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PERSPECTIVE

Bostock opinions rewrite the likely future of the US Supreme Court

By Sanford Jay Rosen

June 15, 2020, was a day for rejoicing by all who favor equal rights for LGBTQ people. The Supreme Court's 6-to-3 decision in consolidated cases reported as *Bostock v. Clayton County, Georgia*, 2020 DJDAR , extended the reach of Title VII of the Civil Rights Act of 1964 to protect LGBTQ workers from employment discrimination nationwide and opened the way for additional strides toward full equality.

I filed an amicus curiae brief in the case on behalf of several leading LGBTQ Bar Associations, the thrust of which was that defendants' customer bias defenses to the plaintiffs' Title VII claims were wholly unavailing. Brief of Amici Curiae National LGBT Bar Association et al. in Support of Employees, *Bostock v. Clayton County, Georgia*, No. 171618 (2019). Before that, the Daily Journal published my opinion piece about likely outcomes in the cases. "New justices and shifting public opinion make Title VII cases hard to predict," May 7, 2019. I made no predictions, other than that there could be a plethora of opinions. Instead I identified the principal uncertainty factors which played out in the decision.

There was no plethora of opinions in *Bostock*, only three — the 33-page majority opinion for the court by Justice Neil Gorsuch, joined without comment by Chief Justice John Roberts, and by Justices Ruth Bader Ginsberg, Stephen Breyer, Elena Kagan and Sonia Sotomayor; a 107- page dissent by Justice Samuel Alito, joined without comment by Justice Clarence Thomas; and a separate 28-page dissent by Justice Brett Kavanaugh. The Kavanaugh dissent rehearsed many of the points as in Justice Alito's dissent but distanced him from the vituperation of that dissent. Justice Kavanaugh included what could be construed as apologies to the LGBTQ community.

The decision and opinions are chuck full of enough material to occupy an entire semester's constitutional law course. The decision and all the opinions turned on how textualism played when the five conservative justices interpreted the words and phrase "because of sex" in Title VII, which prohibits employment discrimination "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." Applying a "plain meaning" dictionary analysis of "because of sex," Justice Gorsuch held that the phrase encompasses sexual orientation and identity.

Both dissents' overarching complaint is that the majority perverted textualism to come to a political result which is an affront to the Constitution's separation of powers and democracy. They assert that the *Bostock* decision expands judicial review to the stretching point, and the court acted as a super legislature arrogating to itself powers reserved by Article I to the Congress.

Subsidiary issues abound, and are addressed, at least by implication, in some or all of the opinions. How should the court apply its prior decisions interpreting "because of sex" to include protection of men, and not just women, from employment discrimination, and of workers from sexual harassment both between persons of different sexes and those of the same sex? Should the legislative history of Title VII be used in interpreting the statute? What bearing on the issue has the several unsuccessful subsequent congressional efforts to amend Title VII to add words such as "sexual orientation?" What bearing on the issues has any interpretations of Title VII or regulations issued by the government agencies charged with enforcing the statute? Does the extraordinary shift in America's attitudes about LGBTQ people and their right to be free from discrimination have any place in interpreting the statute? What impact will the *Bostock* decision have on myriad other issues and cases, including some that are pending?

Lacking the space to address all of these issues, here are some macro observations:

First, the decision is fully precedential. Six justices spoke in one voice. That reminds me of the unanimity of the entire Supreme Court when it issued the *Brown* decisions that racial segregation in public schools violates the 14th and Fifth Amendments.

Second, strikingly, Chief Justice Roberts, who joined the decision, had dissented in *Obergefell v. Hodges*, 576 U.S. 644 (2015), the marriage equality decision. It is also striking and important that both the chief justice and the four liberal justices coalesced into Justice Gorsuch's approach to statutory interpretation and application of "plain meaning" canons of statutory interpretation. Then again, Justice Kagan recently said: "We're all texualists now."

Third, Justices Alito, Thomas and Kavanaugh are right. The court's opinion and decision are an affront to Justice Antonin Scalia's particular legacy of textualism in interpreting the Constitution and federal statutes. Among other things, Scalia's brand of textualism led to reinterpretation of the Second Amendment, after centuries of desuetude, to expand its protections well beyond assuring the viability

of "a well regulated Militia."

Fourth, there is a small irony here. Justice Gorsuch occupies the seat vacated by Justice Scalia's death. Justice Scalia wrote the court's 5-to-4 decision unmooring the Second Amendment from the "well regulated Militia" limitation. *District of Columbia v. Heller*, 554 U.S. 570 (2008). Since Justices Alito and Thomas, who served with Justice Scalia, are the only true keepers of Scalia's texualist flame, and Justice Kavanaugh serves as a kind of acolyte, the outcome of future Second Amendment cases is increasingly uncertain. Notably, the same day as the *Bostock* decision, the court denied certiorari in 10 Second Amendment cases, with only Justices Thomas and Kavanaugh dissenting in one of them. *Rogers v. Grewal*, 18-824.

Similarly, we cannot predict how the court will decide the "parade of horribles" cases aired by the *Bostock* dissenters concerning, for example, First Amendment freedom of religion limits on Title VII and other federal and state laws, interpretation of other federal laws that proscribe discrimination "because of sex" but do not specify "because of sexual orientation or gender identity," or constitutional protection of LGBTQ people rights.

Fifth, Justice Kavanaugh complains that until very recently all 30 of the federal court of appeals judges who considered whether Title VII protected LGBTQ people from discrimination in employment emphatically held that it did not. (Yet Second Amendment's desuetude until recently does not trouble him.) Essentially, Justice Kavanaugh accuses the majority of making their decision based "on personal preference." It is more likely that the early 20th century Chicago political humorist and writer, Finley Peter Dunne's observation applies: "No matter whether the Constitution follows the flag or not, the Supreme Court follows the election returns." The polling data are clear that as many as 80% of Americans now believe that LGBTQ people should not be discriminated against in employment and are entitled to the full benefits afforded Americans.

Sixth, many among President Donald Trump's base are astonished by and angry at the *Bostock* decision. They immediately castigated Justice Gorsuch as a traitor to their cause. Similar invective has been directed at Chief Justice Roberts, President George W. Bush's appointee. I have little doubt that President Trump is steaming mad about Justice Gorsuch.

Justice Gorsuch is just the latest in the long line of presidential disappointments in their Supreme Court appointees. Abraham Lincoln appointed Secretary of the Treasury Salmon P. Chase as chief justice at least in part to ensure that the court would uphold Lincoln's legislation to finance the Civil War which Chase had helped draft. Chief Justice Chase then wrote the opinion declaring it unconstitutional. President Theodore Roosevelt exclaimed that he "could carve out of a banana a judge with more backbone than" his appointee, Justice Oliver Wendell Holmes, Jr. who voted against the Roosevelt administration's trust busting position in *United States v. Northern Securities Co.*, 193 U.S. 197 (1904). President Dwight David Eisenhower said his appointment of Chief Justice Earl Warren was "the biggest damn fool mistake I ever made," because of Chief Justice Warren's liberal decisions in *Brown v. Board of Education* and other cases. President Harry Truman was furious at Justice Tom C. Clark, who he had appointed to the court after serving as attorney general, when Justice Clark voted against Truman's 1952 seizure of the steel industry to avert a strike during the Korean War. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). The list is almost endless from the beginning of the Republic up to the present.

After President Trump nominated him to Justice Scalia's seat, Justice Gorsuch said, "Putting on a robe reminds us judges that it's time to lose our egos and open our minds." At his confirmation hearing he testified that judges are not "politicians in robes." "If I thought that were true, I'd hang up the robe."

Perhaps Justice Gorsuch agrees with what Justice Robert Jackson said about the court, "We are not final because we are infallible, but we are infallible only because we are final." Justice Jackson was reminding himself that Supreme Court justices are obligated keep their personal preferences out of their jurisprudence and decisions. Justice Jackson was appointed to the court by President Franklin Delano Roosevelt in mid-1941, after serving him as solicitor general and attorney general. To his credit, Justice Jackson dissented from the court's now discredited decision in *Korematsu v. United States*, 323 U.S. 214 (1944), which upheld the shameful exclusion into detention camps of Japanese Americans from the West Coast pursuant to FDR's Feb. 19, 1942, Executive Order 9066.

I am not a judge. I am just a practicing lawyer, and formerly a teacher of constitutional law. So I give myself leave to end this piece expressing my joy for and with all LGBTQ people and those who love or know them, and my astonishment at the continued speed of this civil rights movement. Several of my closest friends have young adult gay or transgender children. At least one of these parents felt dread awaiting the impending decision. We all can take great comfort in knowing that LGBTQ people have Title VII's protections at their backs and that they should be able to rise and fall on their own merits in work and in life. ■

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