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New justices and shifting public opinion make Title VII cases hard to predict

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James Obergefell, center, plaintiff in the same-sex marriage case *Obergefell v. Hodges*, following the ruling, in Washington, June 26, 2015. Since that ruling, the Supreme Court has two new justices. Inset: Justice Gorsuch, left and Justice Kavanaugh.

The U.S. Supreme Court will hear three cases in its October 2019 Term concerning whether LGBTQ people are protected from employment discrimination by Title VII of the Civil Rights Act of 1964. Two of the cases — *Altitude Express Inc. v. Zarda*, 883 F.3d 100 (2d Cir. 2018) (en banc), USSC No. 17-1623, and *Bostock v. Clayton County, Georgia*, 723 Fed. App'x 964 (11th Cir. 2018), USSC No. 17-1618, present the question as phrased in Zarda, "Whether the prohibition in Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-2(a) (l), against employment discrimination 'because of ... sex' encompasses discrimination based on an individual's sexual orientation." The 2nd U.S. Circuit Court of Appeals held it does and the 11th Circuit that it does not.

In the third case, *R.G. & G.R. Harris Funeral Homes v. EEOC*, 884 F.3d 560 (6th Cir. 2018), USSC No. 18-107, the 6th Circuit held that Title VII protects transgender people from employment discrimination. The question before the Supreme Court is: "Whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)."

The 7th Circuit's *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017) (en banc) decision generally is in accord with the 2nd and 6th Circuits. A panel of the 1st Circuit leaned the same way in *Franchina v. City of Providence*, 881 F.3d 32 (1st Cir. 2018), but did not reach the merits. The 5th Circuit leaned the other way in *Wittmer v. Phillips 66 Co.*, 915 F.3d 328 (5th Cir. 2019).

I had hoped to prognosticate about likely outcomes in the three cases before the Supreme Court, but cannot. There are too many variables and complex questions. Instead, I hope to provide some context by discussing broad themes that may play out in what could be a plethora of opinions.

The five mostly young members of newly convened conservative majority of the Supreme Court may use these cases to lay out their positions in several critical areas of jurisprudence: LGBTQ rights and canons of statutory interpretation, including whether courts should defer to federal agencies' interpretation of the statutes they enforce. The decisions thus could be lenses through which we can see decades into the future outlines of the Supreme Court's likely direction on LGBTQ rights and statutory interpretation.

These are the first Supreme Court cases to address LGBTQ rights since Justice Anthony Kennedy's 5-to-4 decision in *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015), that LGBTQ people have a federal constitutional right to marry. With Justice Kennedy's retirement, the Supreme Court's direction on LGBTQ issues is unknown. Will some or all of the conservative majority stay Justice Kennedy's course, and apply his jurisprudence of expanding human rights and human dignity to protect LGBTQ people? Will they respect his same sex marriage decision? Will Chief Justice John Roberts, who dissented in *Obergefell*, play an institutional long game and accept the scant four-year-old precedent? Does it qualify for "super *stare decisis*" status — that is, the essentially inviolate status that former 4th Circuit Judge J. Michael Luttig attributed to decisions like *Roe v. Wade*, 410 U.S. 113 (1973), a concept that Justice Roberts may implicitly have endorsed during his confirmation hearings? What about Justices Neil Gorsuch and Brett Kavanagh, neither of whom was on the court at the time *Obergefell* was decided?

Unquestionably, protection of LGBTQ people was not on Congress' screen when it enacted Title VII 55 years ago. To the contrary, in 1964 gay sex was criminalized across the country and LGBTQ people were mostly closeted, wary, feared and despised throughout the country. Just comparing polling numbers, there is a world of difference between then and now. In 1977, the first year Gallup polled Americans about their opinions on the legality of homosexuality, only 43 percent of respondents agreed that homosexual relations between consenting adults should be legal. In 2018, the figure was 75 percent. *See* https://news.gallup.com/ poll/1651/gay-lesbian-rights.aspx.

When the Supreme Court decides the three cases before it, we should learn whether some or all of the conservative majority will cleave to Justice Antonin Scalia's canons of "originalism," applying the plain language of statutes and eschewing any consideration of legislative history. The Supreme Court may have

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to decide if it agrees with Judge Richard Posner who stated in his concurring opinion in the Hively case, that "Title VII of the Civil Rights Act of 1964, now more than half a century old, invites an interpretation that will update it to the present, a present that differs markedly from the era in which the Act was enacted." 853 F.3d at 352.

Several Supreme Court decisions light a path for a majority to do just that. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), held that Title VII's prohibition of sex discrimination proscribes workplace sexual harassment, extending the Title VII beyond what many lawmakers who passed the law may have had in mind. *Price Waterhouse* and *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), went further. *Price Waterhouse*, which is included as the touchstone in question to be decided in *Harris*, held that gender stereotyping violates Title VII; *Oncale* decided that sexual harassment by someone of the same sex as the victim violates Title VII.

In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Supreme Court unanimously read disparate impact liability into Title VII, in part due to its giving great deference to guidelines issued by the Equal Employment Opportunity Commission, which is charged with enforcing Title VII. By contrast, Justices Gorsuch and Kavanagh disdain the doctrine of judicial deference to agency interpretation of the statutes they enforce. *See, e.g., Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring) ("*Chevron* [*U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)] seems no less than a judge-made doctrine for the abdication of judicial duty."); Brett M. Kavanagh, "Fixing Statutory Interpretation," 129 Harv.L. Rev. 2118, 2154 (2016) (describing "certain applications of *Chevron*" as "antithetical to the neutral, impartial rule of law").

Application and survivability of the doctrine of giving great deference to the enforcing agency's statutory interpretation is muddied here. During President Barack Obama's administration, the EEOC had been increasingly active in applying Title VII to protect LGBTQ people, and it is the plaintiff and respondent in the R.G. & G.R. Funeral Homes case. The Trump Department of Justice, by contrast, has been backing opponents of including LGBTQ people in Title VII's embrace. It is an open question whether these cases will provide members of the conservative majority with a platform for relegating the "great deference" doctrine to the trash can of history.

Presently, 22 of the 50 states, along with the District of Columbia, the Commonwealth of Puerto Rico, and the Territory of Guam, encompassing 50 percent or more of the nation's population, have laws protecting LBGTQ people from employment discrimination. This patchwork of state anti-discrimination legislation will not alleviate mounting pressures for federal action — it may do the opposite.

Long before the European Union or NAFTA, the Constitution overtook the Articles of Confederation and recreated the United States as a free trade common market. The leaders of many and perhaps most American Fortune 500 companies, all which do business and even have employees throughout the United States, are on record that they abhor discrimination against LBGTQ people.

According to recent polls, most Americans favor full equality for LBGTQ people and believe they are or should be protected from employment discrimination. Support for LGBTQ rights is especially strong among young people throughout the country. States that condone such discrimination increasingly are shunned and boycotted by major companies, not for profits, sports franchises, and even other states. Companies that do substantial visible business or have facilities and employees in states that condone discrimination, increasingly suffer damage to their brands and risk being targeted by consumer boycotts.

It is beyond my powers of prediction to know how these facts and themes will play among the conservative Supreme Court majority in these cases. Title VII's 55-year-old text may or may not be flexible enough to include protection against anti-LGBTQ discrimination. But the tide of history and changing demographics suggest that LGBTQ equality ultimately will prevail, whether or not the Supreme Court decides that Title VII applies. In this environment, support for a uniform federal standard could emerge from unexpected corners of the political and legal spectrum; and such a national standard or practice could emerge reasonably soon even if the Supreme Court trammels Title VII.

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