Taking Stock of Bostock

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The Context

On June 15, 2020, writing for a six-justice majority that included Chief Justice Roberts and the four liberal justices — Sotomayor, Kagan, Ginsburg, and Breyer — Justice Neil Gorsuch issued an opinion in which he found that the Civil Rights Act's prohibition of discrimination on the basis of "sex" necessarily barred employers from discriminating against gay or transgender employees.

To call this a momentous decision would undersell it. When the decision was announced on Twitter by reporters live-tweeting the Court session, so many people rushed to download it that the Supreme Court website crashed. For roughly an hour, interested users, commentators, and attorneys could only access the first page.

Even the dissenting justices recognized the magnitude of the moment. Justice Alito's furious dissent, which Justice Thomas joined, cracked 100 pages (including appendices). Justice Kavanaugh, writing separately, closed his dissent with these warm congratulations for the gay and lesbian community (curiously omitting the transgender plaintiff *before the Court*):

Notwithstanding my concern about the Court's transgression of the Constitution's separation of powers, it is appropriate to acknowledge the important victory achieved today by gay and lesbian Americans. Millions of gay and lesbian Americans have worked hard for many decades to achieve equal treatment in fact and in law. They have exhibited extraordinary vision, tenacity, and grit — battling often steep odds in the legislative and judicial arenas, not to mention in their daily lives. They have advanced powerful policy arguments and can take pride in today's result. Under the Constitution's separation of powers, however, I believe that it was Congress's role, not this Court's, to amend Title VII. I therefore must respectfully dissent …

Gorsuch's opinion was clear and compelling, while Kavanaugh's dissent was articulate if ultimately unpersuasive. Alito's dissent, by contrast, was effectively a primal scream riddled with glaring legal and logical flaws. (We'll examine the dissents in detail in Part II).

The right-wing punditocracy divided into similar camps — reflective and fiery — though none sided with Gorsuch outright. David A. French was measured and analytical, focused on process and future possibilities without much comment on the merits. At Cato, Walter Olson was similarly even-handed in his analysis of the opinions, while at *National Review* Ilya Shapiro focused on what the competing opinions said about the Court's approach to statutory interpretation, noting that he'd been convinced by each opinion in turn, as he read them.

In contrast, Matt Walsh did Matt Walsh things, arguing that employers should be free to discriminate on the basis not only of gender identity or sexual orientation, but also on the basis of race, because, well, he's Matt Walsh. Josh Hammer similarly did Josh Hammer things, insisting that conservatives need to push for the appointment of conservative hacks who will reach socially conservative outcomes in every case, no matter what legal basis they would need to conjure. Ben Shapiro pronounced Gorsuch's decision "bad" and "outcome driven" while describing Alito's rebuttal as "devastating."

Aside from Ilya Shapiro, *National Review* was likewise packed with spicy takes about what Gorsuch supposedly got wrong, most of which ignore Gorsuch's actual opinion and the supposedly critical statutory text. So let's dive into the opinions, and then circle back to why the critiques of Gorsuch — primarily *National Review* and Alito's — fail.

The Majority Opinion

Gorsuch's majority opinion is a clear and accessible piece of legal writing. As he notes at the outset, Gorsuch based his ruling on the argument that discrimination on the basis of sexual orientation or gender identity is barred by Title VII of the Civil Rights Act of 1964, which explicitly bars workplace discrimination on the basis of sex. Essentially, discrimination on the basis of sexual orientation or gender identity inherently requires sex-based discrimination; therefore, it is barred by Title VII, whether or not Congress realized that implication when it crafted the law. "The limits of the drafters' imagination," Gorsuch writes, "supply no reason to ignore the law's demands."

After setting out the procedural history of each of the three consolidated cases decided in Bostock — two plaintiffs, Bostock and Zarda, sued after being fired for being gay, while the third, Stephens, was fired after coming out as trans — Gorsuch expands on that theme over the decision's remaining 30 pages.

He starts by setting out the basic rule of statutory interpretation that drives his reasoning, known as textualism: only the words of the statute, as those words were understood at the time the statute was passed — the "ordinary public meaning of its terms at the time" — matter. Not the subjective intent of the legislators who wrote the law, not the imagination of judges, only the words of the statute. So, Gorsuch asks, what did "because of sex" mean in 1964? Relying on the definition proposed by the defendant employers, Gorsuch writes that, in 1964, "sex" meant biological status as male or female. And, relying on past precedents defining the term, "because of" means but-for causation — that is, had the thing in question been different (i.e. here, had the employee's sex been different), then the outcome would have been different.

From here, Gorsuch takes the reader through an important step (one that *National Review's* Michael Brendan Daugherty apparently missed): a "but-for" cause of an effect need not be the ***only*** cause of that effect. A crash involving a driver who runs a red light and crashes into another car whose driver failed to signal a turn has ***two*** but-for causes; the accident would not have happened if the first driver had stopped on red, and it wouldn't have happened if the second driver had signaled their turn. When Congress drafted Title VII, it didn't bar only discrimination based "primarily" or "solely" on sex; rather, it banned ***all*** discrimination based on sex. Thus, Gorsuch concludes, a plaintiff alleging sex discrimination under Title VII need not show that sex was the only basis for the discrimination. If sex plays any role — any role at all — it's covered by federal law.

This is critical. Importantly, it's also not contested by either dissent. And it's the reason why Gorsuch and the majority got Bostock right, and their critics got it wrong.

Gorsuch's opinion puts this together with the statute's bar on discrimination: "taken together, an employer [violates Title VII when it] intentionally treats a person worse because of sex — such as by firing the person for actions and attributes it would tolerate in an individual of another sex." And, the statute's command is expressly about discrimination against individuals, not groups; the question is not whether employers treat women as a class better or worse than men as a class, but whether a particular employee was treated worse than they would have been if they were a different sex.

It's important to pause here to discuss another Supreme Court case interpreting Title VII, *Price Waterhouse v. Hopkins*, in which the Supreme Court held that Title VII barred sex stereotyping. Considering the claim of an accountant denied partnership at Price Waterhouse on the basis (she alleged) that she was too "manly" — she had been negatively described in reviews as "macho," "aggressive," "overcompensat[ing] for being a woman," and foul-mouthed, and advised to walk, talk, and dress "more femininely" if she wanted to make partner — the Supreme Court held that Title VII is violated if gender plays any part in the negative employment decision, and that sex stereotyping is sex discrimination for purposes of Title VII.

Also important: *Oncale v. Sundowner Offshore Services*, a unanimous decision written by conservative icon Antonin Scalia. There, a man working on an oil platform was sexually harassed and threatened with rape by other male (and ostensibly straight) members of the platform crew. And, as Scalia acknowledged in *Oncale*, "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII." Yet, because (1) sexual harassment was already squarely held to be actionable under Title VII and (2) the plaintiff showed that the harassment he faced was "because of… sex" in exactly the sense that Gorsuch later applied in *Bostock*, there was no question Title VII applied: "sex discrimination consisting of same-sex sexual harassment is actionable under Title VII."

With all this in mind, Gorsuch drives home the conclusion he started with: discrimination on the basis of sex is an inherent, inescapable component of discrimination on the basis of sexual orientation or gender identity. Gorsuch uses example after example to make his point. An employer with two employees, both of whom are attracted to men, different only in that one is a man and the other a woman. If the employer fires the man because he is attracted to men, then the employer discriminated on the basis of sex: had the employee been a woman, *she* would have kept his job. The same goes for two employees who present as women, only one of whom was assigned female at birth. If the transgender employee is fired, it is on the basis of her sex (as defined for purposes of the opinion); had the employee been assigned female at birth (*exactly* how the *employers* urged the Court to understand the word "sex" in Title VII), she would have been safe. If employee spouses are invited to a work event, and an employee brings their spouse "Susan," whether that employee will be fired by a homophobic employer depends on the employee's sex.

Gorsuch also preemptively addresses some of the arguments of the dissents. "An employer can discriminate against homosexual applicants even if he doesn't know their sex"? So what? An employer who wants to discriminate against both blacks and Catholics could ask applicants to check a box if they were black or Catholic, and write off any candidate who checked the box without knowing which category applied. That the hypothetical employer Alito conjures wants to

discriminate against both gays and lesbians — and therefore doesn't care whether the applicant is a gay man or a lesbian woman — doesn't strip sex out of that discrimination.

"If Congress had wanted to address sexual orientation and transgender status in Title VII, it would have expressly listed them"? That doesn't follow. If Congress passes a broad rule, like "because of sex," without listing exceptions, you can't create an exception by implication. "Sexual harassment," he points out, is "conceptually distinct" from sex discrimination. But it's still covered by Title VII, as the Supreme Court held in *Oncale*. There is no "canon of donut holes."

Gorsuch also takes direct aim at the "original meaning" arguments that will be deployed by both Kavanaugh and Alito. As he points out, neither is truly suggesting any other meaning for the language "discriminate against any individual because of such individual's sex." Rather, they are arguing for a different *result*: that, whatever the words may mean, they cannot encompass discrimination on the basis of sexual orientation or gender identity.

Last, Gorsuch addresses the parade of horribles raised by Alito. Bathroom cases, he says, are not before the court, and in an appropriate case, the court may need to decide whether an employer who has sex-segregated bathrooms and requires transgender employees to use the bathroom of their sex assigned at birth discriminates against them under Title VII. Consistent with his approach elsewhere, Gorsuch takes a judicially modest line: there are any number of questions raised by so-called bathroom cases (could using a particular bathroom be a bona fide occupational qualification? Is forbidding a trans woman from using the women's bathroom sufficiently severe to implicate Title VII?) none of which are present in *Bostock*. While it may have made sense to offer some thoughts on those questions, deferring them to another day — when both parties before the Court address the question as appropriately framed by the context that discrimination because of transgender status *is* discrimination because it unavoidably involves individuals' sex — is a perfectly conventional way to address those concerns.

Gorsuch's opinion is only 32 pages long and mostly in plain English, rather than legalese. As a decision that dramatically changed the legal landscape for some of the country's most vulnerable people, it's not only strong and well-reasoned, but worth reading in full.