

The Ramifications of the *Bostock* Decision

Kim Colby

The Supreme Court's decision on June 15, 2020, in *Bostock v. Clayton County*¹ signifies a seismic shift in the law that will have ramifications – some predictable but many unforeseen – for years to come. This article will briefly discuss some of the ramifications of the *Bostock* decision; for a more in-depth discussion of the decision, please read the companion article in *The Journal of Christian Legal Thought*.²

The LGBT Movement's 50-Year Effort to Re-define Title VII

Congress enacted Title VII of the Civil Rights Act of 1964 to prohibit discrimination against an individual in employment “because of such individual’s race, color, religion, sex, or national origin.”³ All agree that when Title VII was enacted in 1964, Congress had no intention of prohibiting discrimination on the basis of sexual orientation or gender identity.

Beginning in the 1970s, the LGBT movement worked to persuade Congress to amend Title VII by adding “sexual orientation” and, later, “gender identity,” as protected classes. Such legislation failed to be enacted.

Simultaneously, the LGBT movement pressed federal courts to interpret Title VII to include sexual orientation and gender identity within the already-existing prohibition on sex discrimination. Until April 2017, no court of appeals had agreed to do so.⁴

But the courts' consensus abruptly altered in 2017, when the Seventh Circuit re-defined “sex discrimination” to prohibit employment discrimination based on “sexual orientation” and “gender identity.”⁵ The Second and Sixth Circuits quickly followed in the Seventh Circuit's footsteps. In *Zarda v. Altitude Express*, a skydiving instructor was fired after a customer alleged that he had touched her inappropriately. The employer responded to the instructor's sexual orientation discrimination suit with a motion for summary judgment, relying on longstanding Second Circuit precedent. Eventually, the Second Circuit, sitting *en banc*, ruled that Title VII covered sexual orientation discrimination.⁶ In *EEOC v. Harris Funeral Homes*, a funeral home owner fired an employee who announced that, as part of his transition, he would dress as a woman at work. A Sixth Circuit panel ruled that Title VII prohibited gender identity discrimination in employment.⁷ In *Bostock v. Clayton County, Georgia*, a county employee claimed that his employer's proffered reasons for firing him were pretextual and that he was fired because of his sexual orientation. An Eleventh Circuit panel upheld the trial court's dismissal of his suit based on circuit precedent that held Title VII did not cover sexual orientation discrimination.⁸

The Supreme Court Re-defines Title VII

The Court heard oral argument in the last three cases in October 2019. On June 15, 2020, the Court announced its 6-3 ruling that Title VII prohibits sexual orientation and gender identity discrimination.⁹ Justice Gorsuch characterized his opinion for the Court as a “textualist” reading of Title VII that was based on the “ordinary public meaning” of Title VII in 1964.¹⁰ Yet Justice

Gorsuch also acknowledged that Congress in 1964 would have been surprised by his opinion. As Justice Alito in his dissent observed, “While Americans in 1964 would have been shocked to learn that Congress had enacted a law prohibiting sexual orientation discrimination, they would have been bewildered to hear that this law also forbids discrimination on the basis of ‘transgender status’ or ‘gender identity,’ terms that would have left people at the time scratching their heads.”¹¹

In a masterful dissent, Justice Alito, joined by Justice Thomas, evoked “a pirate ship” image for the majority opinion, as “sail[ing] under a textualist flag, but what it actually represents is a theory of statutory interpretation . . . that courts should ‘update’ old statutes so that they better reflect the current values of society.”¹² Justice Alito detailed the flaws with the Court’s opinion, including the long history of failed efforts to amend Title VII in the courts and Congress. All three dissenters described Justice Gorsuch’s approach as “literalist” rather than “textualist.” Justice Kavanaugh’s dissent focused on the unconstitutional violation of the separation of powers created by the Court’s usurpation of Congress’ legislative function.

The Ramifications of *Bostock*

At oral argument, Justice Gorsuch had foreseen “massive social upheaval” if Title VII were re-interpreted to include sexual orientation and gender identity.¹³ His majority opinion, however, brushed aside the consequences, implying it might be possible to confine its logic to Title VII, while punting the consequences for religious freedom to future cases.¹⁴ Nonetheless, *Bostock*’s ramifications are breathtaking, including:

1. Federal laws that prohibit sex discrimination: Over 160 federal statutes that currently prohibit sex discrimination¹⁵ are now likely to be re-interpreted to include sexual orientation and gender identity discrimination, including Title IX’s broad prohibition on sex discrimination in education.¹⁶

2. State and local laws that prohibit sex discrimination: Before the *Bostock* decision, 23 states had enacted laws prohibiting sexual orientation discrimination in employment, while 20 states prohibited gender identity discrimination. With the *Bostock* decision, federal law prohibits employment discrimination on the basis of sexual orientation in the remaining 27 states, and on the basis of gender identity in the remaining 30 states – without a single vote being cast by those states’ legislators.

Equally importantly, 24 states previously prohibited sex discrimination in employment, but not sexual orientation and gender identity discrimination.¹⁷ Many state supreme courts now are likely to adopt Justice Gorsuch’s logic and re-interpret their state laws’ prohibition on sex discrimination to include sexual orientation and gender identity. Why does that matter? Because Title VII’s exemption for religious employers’ religious discrimination serves as a defense against federal claims, but not against state claims. While some state laws include religious exemptions, their scope varies. Moreover, state legislators might have provided broader religious exemptions if they had anticipated that they were prohibiting sexual orientation and gender identity discrimination when they prohibited sex discrimination.

3. Equality Act: Despite claims that *Bostock* diminishes momentum for the so-called Equality Act¹⁸, its passage will remain a high priority for the LGBT movement. While *Bostock* eliminates the need for Congress to amend Title VII, other significant areas of federal nondiscrimination law do not prohibit sex discrimination, such as federal public accommodations law in Title II¹⁹ or federal financial assistance law in Title VI.²⁰ The Equality Act vastly expands the definition of “public accommodation,” which is not “limited to a physical facility or place”²¹ but encompasses nearly every business,²² as well as “an *individual* whose operations affect commerce and who is a provider of a good, service, or program.”²³ The Equality Act would render the Religious Freedom Restoration Act toothless.²⁴

4. Title VII exemption for religious employers: Title VII has strong protection for religious employers, but its scope is contested as to the breadth of the definition of “religious employers” who are entitled to claim the exemption.²⁵ And while Title VII defines “religion” broadly,²⁶ many liberal academics claim that a religious employer’s right to hire employees of a particular religion does not protect a religious employer’s standards of conduct for employees. That is, a Baptist college may limit its hiring to Baptists but may not refuse to hire a Baptist who enters a same-sex marriage. Future litigation is likely.²⁷ And, of course, Congress might have provided even broader religious exemptions had it known in 1964 that it was also prohibiting sexual orientation and gender identity discrimination.

5. Ministerial exception: Rooted in both the Free Exercise and the Establishment Clauses, the ministerial exception requires judges to dismiss most cases involving religious congregations’ and religious schools’ employment decisions regarding the persons who lead worship or teach doctrine.²⁸ Even if the case involves race, sex, or other protected classes, the courts must respect religious organizations’ autonomy. The ministerial exception, however, covers only a subset of religious employees.

6. Religious Freedom Restoration Act (RFRA): For six years, Congress has been under intense pressure to eviscerate RFRA’s protections, especially in the nondiscrimination context. The House of Representatives passed the Equality Act in May 2019, with its provision eviscerating RFRA. The misnamed “Do No Harm Act” would also gut RFRA if enacted.²⁹

7. The Free Exercise Clause: After the Court’s 1990 decision in *Employment Division v. Smith*,³⁰ which severely weakened the Free Exercise Clause’s protections, constitutional protection for religious exercise essentially went into hibernation for three decades. Yet in the past three years, the Court has issued three rulings in which the Free Exercise Clause seems to be reawakening.³¹ If the Court fails, however, to overrule *Smith* next term in *Fulton v. City of Philadelphia*,³² religious freedom will continue to have no meaningful federal protection against state and local nondiscrimination laws, or at the federal level should RFRA’s protections be diminished.

Two long-term ramifications: While its potential damage to religious freedom is deeply troubling, the *Bostock* opinion does even worse damage. Most fundamentally, the rule of law, and a self-governing republic, are possible only if words have objective meaning – the ordinary public meaning at the time the law is passed – that judges respect when they interpret and apply

the law. *Bostock* erodes this essential element of the rule of law. The textualist legal movement promised an authentic respect for the rule of law. Such respect allows citizens to reach legislative compromises for pressing problems, but compromise requires citizens' confidence that judges will apply the legislative compromises as they are written.

Finally, even more troubling is *Bostock*'s betrayal of the many law students who daily articulate principled positions during classroom discussions at their schools. At serious personal reputational risk, these students articulate an idea deeply unpopular with their ideologically intolerant professors and classmates³³ – that the People's elected representatives' words have objective meaning that, when enacted into law, judges are duty-bound to honor by their oath to uphold the Constitution. The *Bostock* decision yanked the rug out from under these students. They – and the country – deserved better.

¹ *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731 (2020), which is also the Court's opinion in *Altitude Express v. Zarda*, No. 17-1623, and *R.G. & G.R. Harris Funeral Homes v. EEOC*, No. 18-107.

² The Fall 2020 edition of *The Journal of Christian Legal Thought* will be on the CLS website at <https://www.christianlegalsociety.org/resources/publications/journal-christian-legal-thought>.

³ 42 U.S.C. § 2000e-2(a)(1).

⁴ *Bostock*, 140 S. Ct. at 1777 (Alito, J., dissenting) (listing cases).

⁵ *Hively v. Ivy Tech Comm. College of Ind.*, 853 F.3d 339 (2017) (*en banc*).

⁶ 883 F.3d 100 (2d Cir. 2018) (*en banc*).

⁷ 884 F.3d 560 (6th Cir. 2018).

⁸ 723 Fed. Appx. 964 (11th Cir. 2018) (*per curiam*).

⁹ *Bostock*, 140 S. Ct. 1731.

¹⁰ *Id.* at 1738.

¹¹ *Id.* at 1772 (Alito, J., dissenting).

¹² *Id.* at 1755-56 (Alito, J., dissenting).

¹³ *Harris Funeral Homes v. EEOC*, No. 18-107, oral arg. trans. at 25,

https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-107_c18e.pdf.

¹⁴ *Bostock*, 140 S. Ct. at 1753-54.

¹⁵ 140 S. Ct. at 1791-96 (Alito, J. dissenting) (App. C) (listing 160 statutes).

¹⁶ *See, e.g., Whitaker v. Kenosha School District*, 858 F.3d 1054 (7th Cir. 2017) (Title IX prohibition on sex discrimination includes prohibition on gender identity, allowing transgender student to sue a school district for access to bathrooms and locker rooms of the student's choice).

¹⁷ Three states do not have nondiscrimination laws regarding employment.

¹⁸ H.R. 5, 116th Cong., at <https://www.congress.gov/116/bills/hr5/BILLS-116hr5rfs.pdf>; S. 788, 116th Cong., at <https://www.congress.gov/116/bills/s788/BILLS-116s788is.pdf> (46 co-sponsors).

¹⁹ 42 U.S.C. § 2000a.

²⁰ 42 U.S.C. § 2000d.

²¹ H.R. 5, § 3(c).

²² *Id.*, § 3(a)(2)(c) (the definition includes in part “any establishment that provides a good, service, or program, including a store, shopping center, online retailer or service provider, salon, bank, gas station, food bank, service or care center, shelter, travel agency, or funeral parlor, or establishment that provides health care, accounting, or legal services”).

²³ *Id.*, § 3(c).

²⁴ *Id.*, § 9.

²⁵ *E.g., Spencer v. World Vision*, 633 F.3d 723 (9th Cir. 2011).

²⁶ 42 U.S.C. § 2000e(j) (“The term ‘religion’ includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.”).

²⁷ See Carl H. Esbeck, *Federal Contractors, Title VII, and LGBT Employment Decisions: Can Religious Organizations Continue to Staff on a Religious Basis?*, OXFORD JOURNAL OF LAW AND RELIGION, Volume 4, Issue 3, October 2015, Pages 368–397 (2015), at <https://academic.oup.com/ojlr/article-abstract/4/3/368/1557522>.

²⁸ *Our Lady of Guadalupe v. Morrissey-Berru*, 140 S. Ct. 2049 (July 8, 2020).

²⁹ H.R. 1450, 116th Cong., at <https://www.congress.gov/116/bills/hr1450/BILLS-116hr1450ih.pdf>; S. 593, 116th Cong., at <https://www.congress.gov/116/bills/s593/BILLS-116s593is.pdf>.

³⁰ 494 U.S. 872 (1990).

³¹ *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018); *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012 (2017).

³² *Fulton v. Philadelphia*, 922 F.3d 140 (3d Cir. 2019), *pet. filed*, No. 19-123 (July 22, 2019).

³³ Aaron Haviland, *I Thought I Could Be a Christian and Constitutionalist at Yale Law School. I Was Wrong*, The Federalist (Mar. 4, 2019), <https://thefederalist.com/2019/03/04/thought-christian-constitutionalist-yale-law-school-wrong/#.XH1dR1LD2LU.twitter>.