

DISPATCH NO. 26 - UNITED STATES

“THE LANDMARK *BOSTOCK* DECISION: SEXUAL ORIENTATION AND GENDER IDENTITY BIAS IN EMPLOYMENT CONSTITUTE SEX DISCRIMINATION UNDER FEDERAL LAW”

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INTRODUCTION

On June 15, 2020, the Supreme Court of the United States (Supreme Court or SCOTUS) issued a widely anticipated decision holding that the federal statutory ban on sex discrimination in employment includes a prohibition of discrimination based on sexual orientation and gender identity. A landmark case in every sense of the term, *Bostock v. Clayton County* (*Bostock*)¹ is important for a number of reasons. Besides being a significant victory for civil rights advocates, LGBTQIA² people, and their allies, the 6-3 decision was notable for its discussion of an ascendant theory of statutory interpretation, the majority’s well-reasoned analysis of the principles of causation, and the fact that a conservative judicial appointee of President Donald Trump authored the majority opinion. The decision also underscores the value of a carefully constructed LGBTQIA rights litigation strategy that was decades in the making. Perhaps most importantly, *Bostock* lays the groundwork for nationwide protection of sexual minorities from

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1. 140 S. Ct. 1731 (2020).

2. The acronym LGBTQIA refers to people who identify as lesbian, gay, bisexual, transgender, queer or questioning, intersex, and/or asexual. See Michael Gold, *The ABCs of L.G.B.T.Q.I.A.+*, N.Y. Times (June 21, 2018), <https://www.nytimes.com/2018/06/21/style/lgbtq-gender-language.html>.

discrimination in housing, education, health care, and public accommodations, among other areas.³

Despite polls showing that a majority of Americans support civil rights for LGBTQIA people,⁴ reaction to the case, both for and against, has been strong.⁵ Strong partisan response is in part driven by the Trump administration's agenda vis-à-vis the rights of sexual minorities. Indeed, one hallmark of Trumpism has been the continuous attack on civil rights advances for the LGBTQIA community, with a great deal of hostility aimed at transsexuals.⁶ Given the antipathy of the administration towards a vulnerable population, civil rights advocates see *Bostock* as a much needed course correction and cause for celebration.⁷ Cultural conservatives, on the other hand, argue that *Bostock* strikes a blow against religious freedom and constitutes usurpation by the Court of the federal legislative function.⁸ The

3. David Cole & Ria Tabacco Mar, *The court just teed up LGBTQ protections for so much more than employment*, Washington Post (June 18, 2020), https://www.washingtonpost.com/opinions/the-court-just-teed-up-lgbtq-protections-for-so-much-more-than-employment/2020/06/18/725f7832-b0dc-11ea-8f56-63f38c990077_story.html.

4. See Robert P. Jones, et al., *Broad Support for LGBT Rights Across all 50 States: Findings from the 2019 American Values Atlas*, PRRI (April 14, 2020), https://www.prrri.org/wp-content/uploads/2020/04/PRRI_Mar_2020_LGBT-2.pdf. For example, “[c]urrently, 72% of Americans favor laws that would protect LGBT people against discrimination in jobs, public accommodations, and housing.... Only about one in five (21%) Americans oppose these protections.” *Id.* at 27.

5. People who politically identify with the Christian right and conservative cultural values expressed betrayal by the Court. See e.g. Sarah Pulliam Bailey, *Christian conservatives rattled after Supreme Court rules against LGBT discrimination*, Washington Post (June 15, 2020), <https://www.washingtonpost.com/religion/2020/06/15/bostock-court-faith-conservatives-lgbt/>; Jeremy Stahl, *Conservative Activists and Pundits Are Melting Down Over Gorsuch's Embrace of LGBTQ Rights*, Slate (June 15, 2020), <https://slate.com/news-and-politics/2020/06/carrie-severino-meltdown-neil-gorsuch-lgbtq-rights.html>. Those identifying as more politically progressive rejoiced. See e.g. Katie Eyer, *Progressive Textualism and LGBTQ Rights*, SCOTUS Blog (June 16, 2020), <https://www.scotusblog.com/2020/06/symposium-progressive-textualism-and-lgbtq-rights/>; Sarah Rice, *The Strength of the Written Word Fulfills Title VII's Promise*, SCOTUS Blog (June 15, 2010), <https://www.scotusblog.com/2020/06/symposium-the-strength-of-the-written-word-fulfills-title-viis-promise/>.

6. Among other actions, the Trump administration rescinded federal guidance to schools mandating the protection of transgender students, took steps to bar transgender individuals from military service, and issued a Department of Justice memo noting that the federal government would not consider transgender persons to be protected from workplace discrimination. See Selena Simmons-Duffin, *'Whiplash' of LGBTQ Protections and Rights from Obama to Trump*, NPR (March 2, 2020), <https://www.npr.org/sections/health-shots/2020/03/02/804873211/whiplash-of-lgbtq-protections-and-rights-from-obama-to-trump>. Just days before *Bostock* was decided, the Trump administration issued a rule that eliminated protection for transsexuals from gender identity discrimination by health care providers and health insurers. Margot Sanger-Katz & Noah Weiland, *Trump Administration Erases Transgender Civil Rights Protections in Health Care*, N.Y. Times (June 12, 2020), <https://www.nytimes.com/2020/06/12/us/politics/trump-transgender-rights.html>.

7. See, e.g., Nicole Berner & Monica Jin Joo Wilk, *The moral arc bends toward justice: Toward an intersectional legal analysis of LGBTQ rights*, SCOTUS Blog, (June 16, 2020), <https://www.scotusblog.com/2020/06/symposium-the-moral-arc-bends-toward-justice-toward-an-intersectional-legal-analysis-of-lgbtq-rights/>.

8. See generally, Ryan T. Anderson, *The Supreme Court's Mistaken and Misguided Sex Discrimination Ruling*, Public Discourse (June 16, 2020), <https://www.thepublicdiscourse.com/2020/06/65024/> (suggesting as a legislative correction for *Bostock* that Congress “provide robust religious liberty protections”); Hans A. von Spakovsky & Ryan T.

fears of cultural conservatives, however, were likely assuaged somewhat by a pair of SCOTUS decisions, which were issued just three weeks after *Bostock*.⁹ While those cases may presage limitations on the reach of *Bostock*, and seem to prioritize religious freedom over other fundamental rights, this Dispatch cautions that the human right to be free of workplace discrimination based on sexual orientation and gender identity must be safeguarded as the rule rather than the exception.

LEGAL CONTEXT

In the United States, Title VII of the Civil Rights Act of 1964 (Title VII) is the primary federal statute protecting employees from discrimination in employment.¹⁰ Title VII prohibits employment discrimination because of race, color, religion, sex, and national origin.¹¹ The statute does not expressly list sexual orientation or gender identity as protected statuses. A minority of the country's 50 states explicitly protect sexual minorities from employment discrimination in the workplaces within their jurisdiction.¹²

Yet before *Bostock*, specific protection of employees from discrimination based on sexual orientation and gender identity was far from universal. Efforts to amend Title VII to add the two statuses to the list of protected categories have not yet succeeded in the US Congress.¹³ In short, prior to *Bostock*, protection of LGBTQIA employees from discrimination was lacking in many parts of the country. Indeed, the history of discrimination against LGBTQIA employees in the US is both long and shameful.

Bostock came before the Supreme Court as three consolidated cases. It was clear in the three cases that the aggrieved employees were terminated due to their sexual orientation or gender identity. In the first case, Gerald Bostock worked as a child welfare advocate in Clayton County, Georgia until the county learned that he was participating in a gay recreational softball

Anderson, *Gorsuch Helps Transform the Supreme Court Into the Supreme Legislature on LGBT Rights*, The Heritage Foundation (June 16, 2020), <https://www.heritage.org/courts/commentary/gorsuch-helps-transform-the-supreme-court-the-supreme-legislature-lgbt-rights> (“In an act of judicial activism, a majority of the Supreme Court has simply legislated from the bench and amended the statute itself.”).

9. See *infra* notes 63-69 and accompanying text.

10. 42 U.S.C. §2000e et seq. National prohibitions of age and disability discrimination are provided by the Age Discrimination in Employment Act of 1967, 29 U.S.C §621 et seq., and the Americans with Disabilities Act of 1990, 42 U.S.C. §12101 et seq., respectively.

11. 42 U.S.C. § 2000e-2(a)(1).

12. See generally, Kerith J. Conron & Shoshana K. Goldberg, *LGBT People in the US Not Protected by State Nondiscrimination Statutes*, UCLA School of Law Williams Institute (April 2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-ND-Protections-Update-Apr-2020.pdf>.

13. The most recent attempt to amend the federal Civil Rights Act is the Equality Act, H.R. 5, S. 788, 116th Cong. (2019). The Equality Act would expressly prohibit discrimination on the basis of sexual orientation and gender identity not only in employment, but also in housing, public accommodations, public education, federal funding, credit, and the jury system. While the bill was passed by the US House of Representatives on May 17, 2019, it continues to languish in the US Senate. The text of the bill can be found here: <https://www.congress.gov/bill/116th-congress/house-bill/5/text>.

league. That outside-of-work activity resulted in his discharge from employment.¹⁴ Donald Zarda, a second employee whose case was considered by SCOTUS, was terminated from his job as a skydiving instructor in New York several days after revealing to a skydiving student that he was gay.¹⁵

In the third case, Aimee Stephens, a transgender woman who worked for a funeral home in Michigan and presented as male when hired, was sacked after telling her employer that she planned to start living and working as a woman.¹⁶ All three terminations were separately challenged under Title VII as constituting discrimination based on sex.

Each of the three cases was initially litigated in a different part of the country. In *Bostock*'s case, the Eleventh Circuit Court of Appeals dismissed his suit holding that Title VII does not prohibit discrimination on the basis of sexual orientation.¹⁷ Zarda's suit was permitted to proceed by the Second Circuit Court of Appeals, which found that sexual orientation discrimination is illegal under Title VII.¹⁸ In the case involving Stephens, the Sixth Circuit Court of Appeals ruled that Title VII bars terminations of employment based on gender identity.¹⁹ SCOTUS agreed to hear the consolidated cases to resolve the dispute among the federal Courts of Appeals as to the reach of Title VII's prohibition of discrimination on the basis of sex.²⁰

SUPREME COURT'S MAJORITY DECISION

The question before the Supreme Court was simple: whether Title VII's prohibition of sex discrimination precludes an employer from taking adverse employment actions on the basis of sexual orientation and gender identity. The majority held that it does because when an employer discriminates because someone is gay or trans, "[s]ex plays a necessary and indistinguishable role in the decision...."²¹ In other words, in such cases, the employer acts against the employee "for traits or actions it would not have questioned in members of a different sex."²² How the majority reasoned to that conclusion implicates a great jurisprudential discussion in the US about how judges should engage in statutory interpretation.

14. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737-38 (2020).

15. *Id.* at 1738.

16. *Id.*

17. *Bostock v. Clayton County, Ga.*, 723 Fed. App'x 964 (11th Cir. 2018), *reh'g en banc denied*, 894 F.3d 1335 (11th Cir. 2018), *cert. granted*, 139 S.Ct. 1599 (2019).

18. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc), *cert. granted*, 139 S.Ct. 1599 (2019).

19. *Equal Emp. Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), *cert. granted*, 139 S.Ct. 1599 (2019).

20. One additional federal Court of Appeals had ruled that Title VII's sex discrimination prohibition includes sexual orientation discrimination. *Hively v. Ivy Tech Cmty. Coll. Of Ind.*, 853 F.3d 339 (7th Cir. 2017) (en banc). That case was not before the Court.

21. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020).

22. *Id.*

Justice Neil Gorsuch, Donald Trump’s first appointee to the nine member Supreme Court, wrote the majority opinion, joined by Chief Justice John Roberts, and four Justices who are considered the liberal wing of the Court: Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan. To interpret Title VII, Gorsuch employed a method of statutory interpretation known as “textualism.”²³ Textualism, as a mode of interpretation, requires judges to determine the “ordinary public meaning”²⁴ of a statutory provision at the time the statute was adopted. As an interpretive theory, textualism eschews attempts to determine the intent of legislators in enacting the statute. It matters not that legislators at the time a law was passed may not have anticipated a particular outcome. At the same time, judges employing textualism do not attempt to update or add to the legislation. As Gorsuch noted, “Only the written word is the law, and all persons are entitled to its benefits.”²⁵

Turning to the disputed legal term in the case, Gorsuch observed that dictionaries in 1964, the year of Title VII’s passage, defined “sex” as referencing “the biological distinctions between male and female.”²⁶ From there, the majority opinion turned to causation. Title VII prohibits adverse actions “because of sex,” which the Court in prior cases interpreted as encompassing the “but for” causation standard, so common in American law.²⁷ In order to determine whether a factor is a but for cause, one imagines a counterfactual alternative and asks whether the outcome would have been the same. If changing the factor at issue (sex) changes the outcome, the factor is clearly a but for cause. Yet not everything that happens because of sex is actionable under Title VII. Only discrimination – treating someone worse because of sex – is unlawful. Terminating a person’s employment “for actions or attributes [the employer] would tolerate in an individual of another sex”²⁸ is discrimination. Hence, in the three discharge cases before the Court, one must consider whether “changing the employee’s sex would have yielded a different choice by the employer.”²⁹ If so, there is a violation of the statute.

Applying these precepts to discrimination on the basis of sexual orientation, Gorsuch reasoned that if an employer terminates a male

23. Professor Andrew Koppelman describes Justices Neil Gorsuch, Samuel Alito, and Brett Kavanaugh as advocates of “...New Textualism, the theory that laws should be interpreted only on the basis of a statute’s text and not [with respect to] extra[-]textually derived purposes.” Andrew Koppelman, *Bostock, LGBT Discrimination, and the Subtractive Moves*, 105 MINN. L. REV. HEADNOTES 1, 3 (2020), <https://minnesotalawreview.org/article/bostock-lgbt-discrimination-and-the-subtractive-moves/>.

24. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020).

25. *Id.* at 1737.

26. *Id.* at 1739.

27. *Id.*

28. *Id.* at 1740.

29. *Id.* at 1741.

employee for being attracted to men, but would not take the same action against a female employee attracted to men, then that employer discriminates because of sex.³⁰ Similar counterfactual analysis applies in the case of gender identity discrimination. An employer who sacks a transgender person for living and working as a woman yet would not take the same action against a similarly situated cisgender woman, allows sex to play “an impermissible role” in its decision.³¹ The difference between these comparators is the sex assigned to them at birth and recorded on their birth certificates. As Gorsuch puts it, “the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth.”³²

Gorsuch was careful to note that there may be more than one causal factor operating in employment decision-making.³³ But for causation does not require that sex be the sole cause of an adverse employment action in order for the decision to be subject to challenge under Title VII. Analytically, this is an important point because some employers might characterize their motivation for terminating an employee as due only to sexual orientation or gender identity as a standalone factor. Gorsuch exhorts, however, that so long as the employee would have retained their job had they been a different sex, but for causation is satisfied. In such cases, intentional sex discrimination “violates Title VII, even if it is intended only as a means to achieving the employer’s ultimate goal of discriminating against homosexual or transgender employees.”³⁴

Nor does the fact that the employer is eager to sack gay or transgender employees of any sex alter the outcome. In other words, being an equal opportunity discriminator willing to discharge gay men and lesbians will not shield an employer. This is because Title VII protects employees as individuals from biased employment decisions. As Gorsuch puts it, “[J]ust as an employer who fires both Hannah and Bob for failing to fulfill traditional sex stereotypes doubles rather than eliminates Title VII liability, an employer who fires both Hannah and Bob for being gay or transgender does the same.”³⁵ In either case, the sex of the employee plays an impermissible and dispositive role in the decision.

Gorsuch addressed and refuted a number of arguments made by employers and raised by Justice Samuel Alito in his dissent. Two merit mention. One objection to the majority opinion was that it will lead to undesirable consequences. Among these were that sex-segregated public toilets, locker rooms, and dress codes will no longer be lawful under Title

30. *Id.*

31. *Id.* at 1741-42.

32. *Id.* at 1741.

33. *Id.* at 1739.

34. *Id.* at 1742.

35. *Id.* at 1742-43.

VII.³⁶ A second objection to the *Bostock* majority is that compliance with Title VII, were it to require refraining from discriminating against gay and transgender employees, would “violate [the] religious convictions” of some employers.³⁷ Gorsuch acknowledged that both sets of concerns might in the future be live matters before the Court. Even so, neither was presently at issue.

Nonetheless, the majority did address the fear that protecting LGBTQIA people from discrimination will impinge upon the rights of religious individuals and institutions. In fact, Gorsuch meaningfully engaged with those concerns, explaining that Title VII contains an express statutory exclusion of religious organizations, which allows them to prefer members of their religion in employment matters. He also noted that Title VII has been interpreted in light of the US Constitution’s First Amendment to include a ministerial exception, which protects religious institutions from employment discrimination suits brought by religious leaders, such as ordained ministers. Finally, he referenced the Religious Freedom Restoration Act of 1993 (RFRA),³⁸ which “prohibits the federal government from substantially burdening a person’s exercise of religion” except when the government shows that the burden “furthers a compelling governmental interest and represents the least restrictive means of furthering that interest.”³⁹ Indeed, he noted that the RFRA might “supersede Title VII’s commands in appropriate cases.”⁴⁰ Alito replied in dissent that he feared protection of religious convictions was narrow and that religious institutions would be forced “to employ individuals whose conduct flouts the tenets of the organization’s faith...”⁴¹

THE DISSENTING OPINIONS

Bostock includes two dissenting opinions: as mentioned above, one authored by Justice Alito, which was joined by Justice Clarence Thomas, and the other written by Justice Brett Kavanaugh, who is Donald Trump’s second judicial appointment on the Court. A main thrust of Alito’s impassioned dissent is that the majority is not properly employing textualism as a theory of statutory interpretation. Using the imagery of a pirate ship, Alito argued that although the majority pretends to sail “under a textualist flag,”⁴² the majority in actuality engages in a different theory of statutory interpretation: updating legislation so that it is in accordance with society’s evolving

36. *Id.* at 1753.

37. *Id.*

38. 42 U.S.C. §2000bb et seq.

39. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (2020) (citing 42 U.S.C. §2000bb-1).

40. *Id.* (citing 42 U.S.C. §2000bb-3).

41. *Id.* at 1781 (Alito, J., dissenting).

42. *Id.* at 1755-56.

values.⁴³ Alito accused the majority of achieving what Congress has been unwilling to do. Specifically, Congress has considered amending Title VII to include sexual orientation and gender identity as protected statuses, but has not yet done so.⁴⁴

Turning to his textualist interpretation, Alito counseled that the term “sex” means what it conveyed to reasonable people in 1964, when Congress passed Title VII. Considering the historical and social context, Alito argued that no one in 1964 would have assumed that “sex” included sexual orientation, since homosexuality was considered a mental disorder and illegal at the time.⁴⁵ The same is true, he noted, about gender identity, since the terms “gender identity” and “transgender” were not generally understood or used at the time.⁴⁶ Sex, in 1964, meant being biologically male or female; the term referred to men and women. Therefore, “sex discrimination” referred to actions taken against an employee because they were a biological male or a biological female – a man or a woman. Turning to Title VII’s legislative history, relied on by some jurists when a statutory term is ambiguous, Alito argued that in 1964, not a single member of Congress mentioned that Title VII might be interpreted as protecting against sexual orientation or gender identity discrimination.⁴⁷ Nor for decades, until 2017, did any of the federal Courts of Appeals find sexual orientation encompassed by the term sex.⁴⁸ Similarly, it was not until 2018 that a federal appeals court ruled that gender identity discrimination was unlawful under Title VII.⁴⁹

The second dissent, authored by Justice Kavanaugh, also wears the mantle of textualist analysis. Chiding the majority for applying the literal meaning of the term “to discriminate because of sex,” Kavanaugh argues that the ordinary meaning of terminology should be the textualist’s touchstone.⁵⁰ Kavanaugh notes that in common parlance, in 1964 or today, sexual orientation discrimination is entirely separate and distinct from sex discrimination. Since the literal meaning of “sex discrimination” as articulated by the majority is actually contrary to the ordinary meaning, the former must give way to the latter. Any other outcome usurps Congress’ legislative role.⁵¹ He concludes by noting that the *Bostock* decision is a significant “victory...[for] gay and lesbian Americans,”⁵² but that the wrong branch of government has delivered that win. For Kavanaugh, this is a case of “who decides” whether the statute “should be expanded to prohibit

43. *Id.* at 1756.

44. *Id.* at 1755.

45. *Id.* at 1769-71.

46. *Id.* at 1772-73.

47. *Id.* at 1776-77.

48. *Id.* at 1777.

49. *Id.* at 1777-78.

50. *Id.* at 1825 (Kavanaugh, J., dissenting).

51. *Id.* at 1836.

52. *Id.* at 1837.

employment discrimination because of sexual orientation” and gender identity.⁵³ In short, it is a separation of powers problem. For Kavanaugh, the wrong branch of the federal government has spoken on the matter.

IMPLICATIONS OF THE DECISION

This author has often been critical of US equal employment opportunity law as a transformative force in the American workplace.⁵⁴ Even so, it is easy to view *Bostock* as a significant step forward not only in the sense of national civil rights but also with respect to fundamental human rights. Employment discrimination against LGBTQIA people is a global problem with human rights implications.⁵⁵ *Bostock* represents one analytical approach to gaining protection for sexual minorities. More specifically, it demonstrates how the prohibition of sex discrimination encompasses a ban on discrimination on the basis of sexual orientation and gender identity. For countries without express statutory protections for LGBTQIA people, this may be a path for attaining advances.⁵⁶

Indeed, in the US, *Bostock* is immensely consequential for LGBTQIA employees in the majority of American states because explicit protection from discrimination is nonexistent. Moreover, the reasoning in the majority opinion should ensure an expansion of rights beyond the workplace. Since similar “because of sex” language is used in many statutes prohibiting discrimination in education, housing, public accommodations, credit, and healthcare, American LGBTQIA people should be protected in broad realms of life.⁵⁷ The majority’s consideration and application of the principles of “but for” causation will also be helpful for discrimination claims on other bases, including age and disability, and claims of retaliation. Courts have sometimes misinterpreted causation-in-fact as requiring the aggrieved party to prove that discrimination was the sole cause for an employment decision.⁵⁸ The *Bostock* majority makes clear the error in such thinking.

53. *Id.* at 1822.

54. See, e.g., Susan Bisom-Rapp, *Sex Harassment Training Must Change: The Case for Legal Incentives for Transformative Education and Prevention*, 71 Stan. L. Rev. Online 62 (2018); Susan Bisom-Rapp, *What We Know about Equal Employment Opportunity Law after Fifty Years of Trying*, in *Game Changers in Labour Law: Shaping the Future of Work*, 100 BULL. COMP. LAB. RELS. 139 (Frank Hendrickx & Valerio De Stefano, eds., 2018); Susan Bisom-Rapp & Malcolm Sargeant, *Lifetime Disadvantage, Discrimination and the Gendered Workforce* (Cambridge University Press 2016).

55. See generally Constance Thomas & Catherine Weber, *Information paper on protection against sexual orientation, gender identity and expression and sexual characteristics (SOGIESC) discrimination*, International Labour Organization (March 2019).

56. See *id.* at 25 (noting that a number of countries gain protection for LGBTQIA persons via the ground of sex and that it may be “the first step” taken before express protections are adopted).

57. See Cole & Mar, *supra* note 3.

58. See Branden Campbell, *Justices’ LGBT Ruling May Mean More Bias Cases Reach Trial*, Law360 (June 19, 2020). In fact, *Bostock*’s discussion of “but for” causation is already having an impact. On July 21, 2020, the 10th Circuit Court of Appeals became the first federal appellate court to hold that older women may bring intersectional “sex-plus-age” claims under Title VII. *Frappied v.*

Finally, the *Bostock* majority provides a strong example of how so-called textualist statutory analysis should be employed. This theory, popularized by the late Justice Antonin Scalia,⁵⁹ has often been associated with conservative legal thinkers.⁶⁰ Justice Gorsuch's majority opinion demonstrates that textualism properly applied does not necessarily produce outcomes ideologically aligned with cultural conservatism.⁶¹ Of course, the *Bostock* dissenters argue that the majority misapplies textualist theory. The dissenters' objections, however, are ably dispatched by the majority opinion. In a recent analysis of the case, Professor Andrew Koppelman concludes that the dissenters betray the theory by "reaching outside the statute, placing the language in some larger cultural context in order to defeat the law's literal command."⁶²

IMPACT OF RELIGIOUS LIBERTY ARGUMENTS

Despite the civil rights gains represented by *Bostock*, two recent SCOTUS decisions involving religious employers provide a preview of how conservative legal advocates will likely attempt to limit *Bostock*'s impact. In the first, the Court expanded the so-called ministerial exception to federal anti-discrimination laws, which shields religious organizations such as churches from employment discrimination suits brought by their ministers. After *Our Lady of Guadalupe School v. Morrissey-Berru*, it is clear that the exception may also bar employment discrimination suits against religious employers brought by employees who are not ordained ministers.⁶³ While the full implications of the case are beyond the scope of this Dispatch, the decision raises the possibility that the expanded ministerial exception may ultimately strip newly-won protections against sexual orientation and gender identity discrimination from some employees of religious institutions. The full breadth of the ministerial exception awaits future adjudication.

Affinity Gaming Black Hawk, LLC, No. 19-1063, 2020 WL 4187420 (10th Cir. July 21, 2020). The court noted that as in *Bostock*, the issue is whether "changing the employee's sex would have yielded a different choice by the employer." *Id.* (citing *Bostock v. Clayton County*, 140 S. Ct. 1731, 1741 (2020)). If so, Title VII's sex discrimination prohibition is violated. More specifically, Title VII is violated if "the employer would not have terminated a male employee with the same 'plus-' characteristic." *Id.* at *4. Thus, for older women, "the relevant comparator [in a sex-plus-age claim] would be an older man." *Id.*

59. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012).

60. See Eyer, *supra* note 5.

61. *Id.*

62. See Koppelman, *supra* note 23, at 3.

63. 140 S. Ct. 2049, No. 19-267 (2020). The decision, issued on July 8, 2020, considered a pair of consolidated cases involving discrimination allegations by two teachers at separate parish schools. Both teachers taught some aspects of religion in their classrooms. One teacher challenged her termination of employment as motivated by age discrimination. The other brought a disability discrimination suit against her employer. The Court found both suits barred by the ministerial exception despite the fact that neither teacher is an ordained minister.

The second decision, *Little Sisters of the Poor v. Pennsylvania*,⁶⁴ dealt with the validity of a Trump administration rule, which broadly expanded a religious exemption from the Women’s Health Amendment of the Affordable Care Act.⁶⁵ The Act requires that employer-provided health insurance plans include coverage for their female employees’ contraception. Acting at the behest of objecting employers, the Trump administration promulgated a rule exempting *any* employer, not just religious institutions, with religious or moral beliefs in opposition to birth control. The majority opinion, written by Justice Thomas, upheld the rule as consistent with the statute and within the power of an administrative agency to define exemptions to the Act.⁶⁶

Commentators, including this author, reckon that *Little Sisters of the Poor* and *Our Lady of Guadalupe School* evidence by a majority of the Court a regard for religious liberty far in excess of other fundamental rights, including workplace sex equality.⁶⁷ Reading those two decisions along with Gorsuch’s musing in *Bostock* that the RFRA might “supersede Title VII’s commands in appropriate cases”⁶⁸ indicates that *Bostock* may ultimately constrain fewer employers than its dissenters may have initially feared. Ironically, the employees who may most need protection from sexual orientation or gender identity discrimination might be the ones who are unable to access the rights articulated in this landmark decision. Ultimately, this author is hopeful that the Court will embrace an appropriate framework for balancing the fundamental right to be free from sexual orientation and gender identity discrimination with the equally weighty right to religious liberty.⁶⁹ The right of sexual minorities to earn a living free from discrimination must be safeguarded as the rule rather than the exception.

64. 140 S.Ct. 2367, No. 19-431 (2020).

65. 42 U.S.C. §300gg-13(a)(4).

66. See Katherine M. Franke, *Court Allows Employer Exemptions in ACA Birth Control Mandate*, COLUMBIA NEWS (July 8, 2020), <https://news.columbia.edu/news/court-allows-employer-exemptions-aca-birth-control-mandate>.

67. *Id.* (noting with respect to a majority of the SCOTUS justices, “[w]hen they are asked to adjudicate conflicts between religious liberty and other fundamental rights, they have consistently ruled that religious liberty supersedes other rights.”).

68. See *supra* note 37 and accompanying text.

69. Former Commissioner to the Equal Employment Opportunity Commission Chai Feldblum has proposed a compelling theory for analyzing conflicts between the right to be free from discrimination and religious liberty. See Chai R. Feldblum, *Religious Liberty and LGBTQI Rights: Finding the Right Balance*, 41 T. JEFFERSON L. REV. 163 (2019).

CONCLUSION

Bostock represents a watershed moment in the fight for LGBTQIA equality in the US. The battle to secure protection for sexual minorities against workplace discrimination spanned years and involved many committed lawyers and brave litigants.⁷⁰ Few have illusions that the struggle for equal rights has ended. In an American Bar Association webinar on the *Bostock* decision held just days after it was handed down, Shannon Minter, legal director of the National Center for Lesbian Rights, expressed concern about employers raising religious exemptions. Yet he noted that there are strong arguments against too broad an approach to crafting such exceptions to equal employment opportunity law. He promised that advocates would be vigilant.⁷¹ That promise, no doubt, is the proper place to end this Dispatch.

70. See Chai Feldblum, *What Got Us to the Bostock Moment*, Medium (June 28, 2020), <https://medium.com/@chaidfeldblum/what-got-us-to-the-bostock-moment-5d4cb0f7ce54>.

71. *Title VII US Supreme Court Decision: A Discussion and Analysis*, ABA webinar (June 18, 2020), https://www.americanbar.org/groups/crsj/events_cle/program-archive/title-vii-us-supreme-court-decision/ (comments of panelist Shannon Minter).