Phil 324: Law and Morality

Module 9 Reading Guide

# *Bostock v. Clayton County* (2020)

## Opinion of the Court (Justice Gorsuch)

1. The majority opinion starts on p. 5 of the pdf (*not* the page number that appears in the margin of the actual page).

### Introduction

1. **What does Title VII prohibit?**
2. What is the question the Court decides today? And what is the Court’s answer?
3. Note the way Gorsuch alludes to something like the distinction between what the law makers intended to mean and what they expected (or, in Gorsuch’s words, “anticipated”) to mean, which came up in our discussion of Scalia and Dworkin.

### Part I

1. This part introduces the three consolidated cases. *Bostock v. Clayton County* and *Altitude Express v. Zarda* are both cases in which the employee was fired for being gay. In *Harris* *Funeral Homes v. EEOC*, the employee was fired for being transgender. All of these cases were in litigation for quite a long time. For example, Aimee Stephens, the plaintiff in the *Harris Funeral Homes* case, was fired back in 2013, and she passed away a month before the Supreme Court handed down this decision.

### Part II-Introduction

1. Note the way Gorsuch clarifies his blend of originalism and textualism: the meaning of the statute should be “the ordinary public meaning of [the statute’s] terms at the time of its enactment.” It’s not clear that Scalia would be on board with this, though—think about why not.

### Part II-A

1. What does Gorsuch assume the meaning of the term “sex” is?
2. How does Gorsuch interpret the phrase “because of”?
3. Note Gorsuch’s discussion of the “motivating factor” test. In what sense is the motivating factor test “more forgiving” than the but-for test?
4. How does Gorsuch interpret “discriminate against”?
5. **So, altogether, what is Gorsuch’s interpretation of “discriminate against an employee because of their sex”?**
6. Skim the discussion of the individual-based interpretation vs. the group-based interpretation of Title VII (think about what MacKinnon would say about that), but pay attention to Gorsuch’s battle in the last paragraph: sex discrimination is still sex discrimination even if it discriminates against women and men “equally.”

### Part II-B

1. **What test can be used to determine if there has been an act of sex discrimination in violation of Title VII?**
2. How does Gorsuch argue for the claim that “it is impossible to discriminate against a person” based on their sexual orientation or gender identity “without discriminating against that individual based on sex”?
3. **In terms of what does Gorsuch analyze “being homosexual” and “being transgender”?**
4. How does an employer necessarily intentionally discriminate on the basis of sex even if the employer may have the intention to discriminate only on the basis of sexual orientation or gender identity?
5. Next, Gorsuch reiterates his earlier point about why it is still sex discrimination even if the employer discriminates against both women and men.

### Part II-C

1. Skip this part, where Gorsuch handles precedents.

### Part III-A

1. In this part, Gorsuch responds to several objections. Most of them are really just repetitions of his earlier points. Let’s focus on the following three, and you can skim or skip the rest.
2. First, how does Gorsuch respond to the objection that an employer can discriminate on the basis of sexual orientation or gender identity *without knowing* the individual’s sex?
3. **Second, what is Gorsuch’s response to the objection that neither sexual orientation nor gender identity is explicitly included as a protected category in the *text* of Title VII?**
4. **Third, what is Gorsuch’s response to the objection that, in constructing the relevant hypothetical, we should hold fixed the sexual orientation of the individual?**

### Part III-B

1. What is Gorsuch’s response to the objection that the Congress that enacted Title VII did not expect it to cover sexual orientation or gender identity discrimination?
2. What is Gorsuch’s response to the worry that Congress would not hide an elephant in a mousehole?
3. What is Gorsuch’s response to the argument from policy?
4. Note that Gorsuch says the Court’s decision today does not reach the legality of sex-segregated bathrooms, locker rooms, or dress codes. This is particularly interesting given the justices actually spent a substantial proportion of the oral arguments on the cases’ implications for bathrooms. (We will come back to bathrooms in the last module of the course.)
5. Gorsuch then says the Court’s decision today also does not address potential conflicts with religious liberty, but he highlights ways in which religious liberty may override Title VII claims. (Think about the implications of this discussion with the hindsight of Gorsuch’s recent majority opinion in *303 Creative v. Elenis*.)

## Justice Alito’s Dissent

1. Skim the introduction, but notice three things: (1) Justice Alito (correctly) observes that neither sexual orientation nor gender identity appears in the text of Title VII, (2) he compares the majority to “a pirate ship . . . sail[ing] under a textualist flag” (!!), and (3) he seems to urge us to distinguish what the law is and what the law ought to be.

## Part I-A

1. Skip pp. 41–46 of the pdf (pp. 4–9 of the Alito dissent).
2. **What is Alito’s objection to Gorsuch’s argument based on the application form example?**
3. **What is Alito’s objection to Gorsuch’s argument based on the model employee example?**
4. Skip pp. 49–50 of the pdf (pp. 12–13 of the Alito dissent).
5. **What is Alito’s objection to the Court’s “remaining argument”?**

## Part I-B

1. Skip Part I-B-1 (pp. 55–56, or pp. 18–19 of the Alito dissent).
2. **Focus on Part I-B-2 (pp. 57–58, or pp. 20–21 of the Alito dissent). What is Alito’s response to the argument from interracial marriage?**
3. Skip Part I-B-3 (pp. 58–56 of the pdf, or pp. 21–19 of the Alito dissent).

## Part II

1. Please read *only* the first two paragraphs of Part II-A. Note how the issue seems to end up turning on who is the faithful heir to Justice Scalia.
2. **Jump to p. 62 of the pdf (p. 25 of the Alito dissent), just under the heading of “B.” What does Alito take the ordinary meaning of “discrimination because of sex” to be?**
3. Skip the rest of the main text of Justice Alito’s dissent, but please go to p. 92 of the pdf (or p. 55 of the dissent). I’m going to ask you to scroll down (*but don’t read or even really skim!!*) the Appendices. (Side note: the Appendices made the opinion file so big that it broke the Supreme Court’s website the day the decision was announced.)

Appendix A contains dictionary entries around the time of Title VII’s enactment, which are supposed to demonstrate that “sex” was understood back then as a biological term.

Appendix B includes current dictionary entries supposedly proving that the same meaning of “sex” still obtains nowadays.

Appendix C is a parade of horribles—all the statutes that Justice Alito worries the Court’s holding may have implications for.

Appendix D includes photocopies of a form used by the U.S. military at the time of Title VII’s enactment, which explicitly asked if the applicant was “homosexual”—a positive answer would make them ineligible for military service. One of Justice Alito’s examples is based on this question.

## Justice Kavanaugh’s Dissent

1. Please jump directly to the last two paragraphs of Justice Kavanaugh’s dissent (p. 171–72 of the pdf, or pp. 27–28 of the dissent).
2. After chastising the majority’s decision as “judicial dictate,” Kavanaugh goes on to congratulate lesbian and gay people. Compare these passages with Chief Justice Roberts’ dissent in *Obergefell v. Hodges* (2015), the landmark case extending the right to marry to same-sex couples (interestingly, Roberts joins the majority opinion in *Bostock*). Here is what Roberts wrote in *Obergefell*:

“If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today’s decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it.

“I respectfully dissent.”

What do you think might have changed Roberts’ mind?