Symposium: Progressive textualism and LGBTQ rights

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By Katie Eyer
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Katie Eyer is a professor of law at Rutgers Law School. She co-authored an amicus brief on behalf of scholars of statutory interpretation and equality law arguing that textualism required a finding in favor of LGBTQ employees.

Title VII has prohibited discrimination "because of … sex" since 1964—and yet many lower courts have long held that employers are free to discriminate against LGBTQ employees. Yesterday, the Supreme Court held that anti-LGBTQ discrimination is indeed "because of sex" under Title VII in the consolidated cases of *Bostock v. Clayton County*, *Altitude Express v. Zarda* and *R.G. & G.R. Harris Funeral Homes v. EEOC*. This ruling—which has enormous implications for equality for LGBTQ workers—also makes clear why progressive textualism, i.e., progressive arguments for the centrality of legal text, is important for the future of equality change.

Before addressing the wider implications of the *Bostock* decision, it is important to observe how enormously significant the decision is for LGBTQ employees, who remain without explicit protections against discrimination in many states. For many employees, especially in the transgender community, this has meant that employment discrimination continues to be a lived reality, deeply disrupting personal and professional lives. As the many who have lost their jobs in the recent COVID crisis can attest, it is no small thing to be deprived of your source of income, and thus the ability to support yourself and your family. For many LGBTQ workers, this has continued to be a real risk of their working lives, and too often a lived reality.

In a 6-3 opinion by Justice Neil Gorsuch, *Bostock* makes clear that LGBTQ workers are indeed already entitled to federal employment discrimination protections, despite the long history of discrimination against them (and some lower court judges' conclusion that such discrimination is lawful). Title VII prohibits employers from "fail[ing] or refus[ing] to hire or … discharg[ing] any individual … because of such individual's … sex." As the majority opinion

recognizes, this language required an outcome in favor of LGBTQ rights. Because it is impossible to discriminate against an LGBTQ employee without such discrimination also being "because of … sex," anti-LGBTQ discrimination is prohibited.

As the majority opinion further elaborates, the reasoning behind this conclusion is straightforward. The Supreme Court has already held, as a matter of textualism, that "because of" connotes but-for causation—meaning that an employer has acted "because of" sex whenever that action would not have occurred "but for" the employee's sex. And in each and every case of anti-LGBTQ discrimination, the employee's sex is a but-for cause of the adverse action taken against them. Thus, Susan, a lesbian, would not have been fired for her attraction to women if she were Mark, a cisgender man. Similarly, John, a transgender man who is fired for claiming a male identity and having a male appearance, would not have been fired if he, like Mark, had been assigned the male sex at birth.

Gorsuch's opinion for the majority embraces this straightforward textualist logic, and rejects the numerous contra-textual arguments that were offered by the employers and the government in *Bostock*. As Gorsuch writes:

> Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. … But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.

This reasoning, written by a conservative justice in service of an opinion recognizing historic equality rights, is important to note. Although textualism has often been viewed as a tool of conservative legal advocacy, it need not and ought not be viewed that way. As organizations like the Constitutional Accountability Center and other scholars and activists have recognized, textualism is not an inherently ideological methodology, only serving conservative aims. Rather, there are many reasons for progressives, like conservatives, to celebrate a methodology that places limits on the ability of biases and individual beliefs to infect judicial decision-making. Indeed, as the *Bostock* opinion notes, textualism properly understood can serve as a bulwark against the exclusion of politically unpopular groups from the law's protections.

Thus, for example, as Gorsuch's opinion observes, the public (and Congress) in 1964 surely would not have believed that LGBTQ people—who were at that time a highly stigmatized minority—were covered by Title VII. But as the opinion further notes, this is irrelevant if LGBTQ people are included within Title VII's broad textual protections (although it would not be irrelevant under an approach that prioritized congressional intent). So too, past textualist opinions by the late Justice Antonin Scalia and others have rejected the exclusion of stigmatized groups like prisoners from the protections of expansive rights laws—even though a more purposivist approach might lead to a contrary result. Thus, although text may

constrain legal outcomes in ways that progressives disagree with, so too it can at times ensure that, as the *Bostock* majority puts it, "all persons are entitled to the benefit of the law's terms."

There are important stakes to progressives' willingness (or unwillingness) to fully embrace textualism as an interpretative approach. As the dissents in *Bostock* make clear, control over the very meaning of textualism is a part of those stakes. Both textualism and originalism can be infinitely malleable when only one side of the argument claims the authority to define their contours. This is most strikingly evident in Justice Brett Kavanaugh's dissent, which ignores the Supreme Court's own pronouncements (made by the conservative wing of the court) that the "ordinary meaning" of "because of" in Title VII is and was but-for causation—pronouncements that all but compelled the outcome for the employees here. Instead, Kavanaugh suggests that the court should look to the public and Congress' beliefs about expected applications as the barometer of ordinary meaning—an approach that bears an uncanny resemblance to long-discredited uses of congressional expectations to contravene text. But his dissent nevertheless unfailingly claims the mantle of "real" textualism. Without the counterweight of progressive textualist arguments, it seems possible, indeed likely, that a nominally textualist argument like Kavanaugh's would have carried the day—despite the fact that that his arguments contradicted prior conservative textualist precedents.

But as *Bostock* demonstrates, progressives have the ability and the opportunity to reclaim the other side of the debate. As Justice Elena Kagan famously put it in describing Scalia's influence, "[w]e're all textualists now." That pronouncement ought not signal a defeat for progressive approaches to statutory interpretation. Rather, the rise of textualism offers powerful opportunities for progressive lawyers, scholars and judges to think about the relationship of text to law and the ways that text safeguards the most vulnerable among us.

And those opportunities will be needed in the years ahead. As the racial-justice context vividly illustrates, winning formal legal protections—in *Bostock* or indeed in any context—is no guarantee of equality on the ground. The victory of LGBTQ rights in *Bostock*—a very important step forward—will not translate seamlessly into lived equality for LGBTQ individuals, or for anyone else. Although there will be many fronts in the continuing equality struggles—for LGBTQ workers, for black and brown victims of police violence, for disabled students denied educational equality, for women subjected to harassment and violence—the law will surely continue to be one. And in those legal struggles, textualism will afford an important tool.

For a vivid reminder of the importance of textualism as a tool, one need look no further than Justice Clarence Thomas' dissent from denial of certiorari in *Baxter v. Bracey*, the same day that *Bostock* was decided. Even as Black Lives Matters protests continue to grow around the country, Thomas, no wild-eyed liberal, calls in *Baxter* for the limitation of qualified immunity "[b]ecause [it] … appears to stray from the statutory text" of 42 U.S.C. § 1983. The abolition or limitation of qualified immunity, a doctrine that continues to allow many cases of police

brutality against black and brown citizens, some of them also LGBTQ, to be dismissed on technical grounds, is surely an important, though radically incomplete, step toward lived equality.

So too, as scholars like Sandra Sperino have shown, many of the doctrines that allow judges to regularly dismiss the statutory discrimination claims of all groups—black and brown workers, religious minorities, women, people with disabilities, LGBTQ employees—are completely untethered from the statutory text. For that reason, some conservative judges (including then-Judge Gorsuch), have argued for at least some such doctrines' abandonment. There are thus reasons to believe that if we want employees of any kind to have access to meaningful discrimination claims, progressive textualism will be important.

The law in the courts is of course only one tool of equality change. Protest, social change, legislative and administrative reform are all no doubt at least as useful for securing the lived reality of equality. But for that part of the work of equality change that will continue to take place within the courts, *Bostock* serves as a crucial reminder: Progressive textualism is important.

Posted in Symposium on the court's ruling in Bostock v. Clayton County and Harris Funeral Homes v. EEOC

Cases: Bostock v. Clayton County, Georgia, Altitude Express Inc. v. Zarda, R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission

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