

Living Textualism (or Torturing Textualism 'til It Cries "Uncle")

So textualism has finally jumped the shark. (For those who do not understand that reference, you obviously missed the episode of *Happy Days* where the Fonz soared over a shark on a surf board; for obvious reasons *Happy Days* was cancelled not long thereafter.) In his recent decision in *Bostock v. Clayton County*, Justice Gorsuch concluded, on purely textualist grounds, that an employer cannot fire an employee simply for being homosexual or transgender. According to Gorsuch, when reading the text of Title VII of the Civil Rights Act of 1964, "the answer is clear." (Really? So why is there a 100+ page dissent?) The text and the text alone precludes such discrimination. While acknowledging that the drafters of Title VII "weren't thinking" about homosexual and transgender individuals, "the limits of the drafters' imagination supply no reason to ignore the law's demands." And what are the law's demands?

Title VII commands that it is "unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." The interpretive question is therefore straightforward: what does it mean to discriminate because of "sex"? Gorsuch's answer is anything but straightforward.

Gorsuch starts by spending a couple of pages dissecting "because of" in the statute, talking about "but for" causes and group versus individual discrimination. As the dissent points out, this is mostly beside the point. These matters are not at issue. Rather, the question from a textualist standpoint is simply this: what does "sex" mean? At first blush, the answer to this seems simple. It means gender. An employer cannot discriminate against someone because she is a woman or because he is a man. Even though the drafters of Title VII probably thought of gender/sex in binary terms in 1964, perhaps the term can be slightly stretched to include transgender individuals since discrimination in that case occurs based upon the person's gender identification, but Gorsuch stretches the term even further. Here is the key leap of logic in Gorsuch's analysis:

An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against the individual based on sex.

Really, this is the legal logic they teach at Harvard Law School?

Here is Gorsuch's logic:

- 1) If employer hires employee A but refuses to hire employee B who is identical in every way to employee A except that A is male and B is female, then Employer has violated Title VII.
- 2) Employer hires A who is male and is attracted to females but refused to hire B a female who is attracted to females. The potential employees are identical in their attraction to females but are not identical in gender. Accordingly, the discrimination is based upon gender.

It's a cute logical argument but it inverts the decision-making process (though it does explain Gorsuch's fixation on but-for causation).

Here is a better way of looking at the situation. Employee A who identifies as male is interviewed for one of two positions. Employee B who identifies as female is also interviewed. Both are “identical” in their qualifications. The employer offers a job to both. As both are being congratulated by their new employer, each reveals that they are in a same-sex relationship. The employer rescinds both offers. Was the decision based upon sex/gender? Of course not. The employer was not interested in the sex/gender of either. The employer was only interested in how each potential employee expressed their sexuality.

Gorsuch argues that homosexuality and transgender status are inextricably bound up with sex. Well of course. There would be no homosexuality or heterosexuality or transgender status if people were sexless. But Gorsuch’s conclusion that to treat homosexuals and transgender individuals differently is to treat them differently because of their sex is logically wrong. Think of it this way. Let’s say an employer has an online interview form with a pre-screening question: do you engage in sexual relations with members of the same gender? The form does not have blanks for name or sex/gender. Anyone who answers yes is denied a job. Such a denial logically can’t be “because of sex.”

Don’t get me wrong. I like the outcome in the case. It is a just decision (though I have my reservations that it is a “correct” one). No one should be denied a job based upon a reason that does not relate to the ability to perform that job, and I can’t think of an instance where being homosexual or transgender would relate to the ability to perform a job. But this doesn’t mean that Title VII prevents this injustice.

Gorsuch’s opinion shows the weakness of textualism and the strength of the living constitutionalist critique of it. Living constitutionalists do not deny the relevance of text; they just dispute the argument that the words of the text are always (or most always) dispositive. Even Justice Scalia faltered in his textualism when faced with the phrase “cruel and unusual punishment.” He concluded that the text needed to be “updated” to preclude barbaric 18th century punishments. Justice Gorsuch could have saved himself from all of the abuse heaped on by Justice Alito. He could have just admitted that he was a faint-hearted textualist or could have simply conceded that the purpose behind Title VII was to prohibit discrimination for traits and actions not relevant to the job and that the text had to be read in that context. Rather than torture textualism, he could have simply admitted that he was a living textualist and not a “pirate flying a textualist flag.”