Constitutional Law in the time of Pandemic

OLLI at Berkshire Community College

CLASS I:CONSTITUTIONAL INTERPRETATION AND THE ASTOUNDING LGBTQ+ DECISION

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- Welcome to one and all: This is a class in constitutional law and thus, inescapably, a class in how the Supreme Court surfs with and against the waves of our politics. And of course nothing looms larger in our recent politics than the election of Trump.
- I hope to engage you all in a good deal of discussion and will take questions as we move along. This is not a survey, as you know, but something more akin to a sampling--of six issues of concern to us all this fall. For us, as for undergrads, a close reading of the texts, particularly of the assigned Supreme Court opinions, will make for the best discussions. Please feel free to text or email me with ideas, questions and reactions, especially a day or so in advance of the class: I will try to incorporate your commentary in what I say in the Zoom classes.
- I know that the appetite for reading varies from the voracious to the too-little-time-for-that, so I will often put text in front of you in class by using Share the Page on Zoom. Still, I want to say what is obvious: you will learn much, much more about our constitutional system—and the people who write the decisions—if you read the texts with care.

- Bostock Decision

- Bostock v. Clayton County (2020):
- https://www.law.cornell.edu/supremecourt/text/17-1618
- If you have time, read, at the link above, all of Justice Gorsuch's opinion (with the concurrence of Chief Justice Roberts and the liberals).
- Then read the first four of five pages of Justice Alito's dissent (with Justice Thomas)--and, most crucial, the very last page.
- Then read all of Justice Kavanaugh dissent--and do not miss his line, "Seneca Falls was not Stonewall."
- Here is the NYT report on the case for context:
- Gorsuch Leads Way on Landmark LGBT Rights Decision
- If you are interested in an overview of interpretive approaches, this survey from the Congressional Research Service, touches all the bases more or less fairly:
- Modes of Constitutional Interpretation

GORSUCH: Sometimes small gestures can have unexpected consequences. Major initiatives practically guarantee them. In our time, few pieces of federal legislation rank in significance with the **Civil Rights Act of 1964. There, in Title VII, Congress outlawed discrimination in the workplace on the basis of race, color, religion, sex, or national origin.** Today, we must decide **whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.**

Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren't thinking about many of the Act's consequences that have become apparent over the years, including its prohibition against discrimination on the basis of **motherhood** or its ban on the **sexual harassment of male** employees. **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.**

TITLE VII FOCUSES ON INDIVIDUALS AND THE TREATMENT THEY RECEIVE FROM AN EMPLOYER AS INDIVIDUALS... NOT SO MUCH ON THE CLASS OR GROUP THEY BELONG TO: SO AN EMPLOYER MIGHT BE VERY GOOD TO WOMEN, IN GENERAL, BUT THAT EMPLOYER MIGHT NONETHELESS MISTREAT—IN ANY OF A VARIETY OF WAYS – A PARTICULAR WOMAN (AND THE SAME GOES FOR MALES, GAYS, TRANS PEOPLE, ETC.)

THUS GORSUCH:

Suppose an employer fires a woman for **refusing his sexual advances**. It's no defense for the employer to note that, while he treated that individual woman worse than he would have treated a man, he gives preferential treatment to **female employees overall**. The employer is liable for treating *this* woman worse in part because of her sex. Nor is it a defense for an employer to say it discriminates against both men and women because of sex. This statute works to protect individuals of both sexes from discrimination, and does so equally. So an employer who **fires a woman, Hannah, because she is insufficiently feminine** and also **fires a man, Bob, for being insufficiently masculine** may treat men and women as groups more or less equally. But in *both* cases the employer fires an individual in part because of sex. Instead of avoiding Title VII exposure, this employer doubles it....

From the ordinary public meaning of the statute's language at the time of the law's adoption, a straightforward rule emerges: An **employer violates Title VII when it intentionally fires an individual employee based in part on sex. It doesn't matter if other factors besides the plaintiff 's sex contributed to the decision**. And it doesn't matter if the employer treated women as a group the same when compared to men as a group. If the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee—put differently, **if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred. Title VII's message is "simple but momentous": An individual employee's sex is "not relevant to the selection, evaluation, or compensation of employees."**

HOW ABOUT REDHEADS? SKINNY PEOPLE? YANKEES OR RED SOX FANS? BOSTON ACCENTS OR PEOPLE FROM LENOX? MUSLIMS OR JEWS OR MORMONS? (AND OF COURSE SEX!) GORSUCH AGAIN:

Nor does it matter that, when an employer treats one employee worse because of that individual's sex, other factors may contribute to the decision. Consider an employer with a policy of firing any woman he discovers to be a **Yankees** fan. Carrying out that rule because an employee **is a woman *and* a fan of the Yankees** is a firing "because of sex" **if the employer would have tolerated the same allegiance in a male employee.** Likewise here. When an employer fires an employee because she is homosexual or transgender, two causal factors may be in play—*both* the individual's sex *and* something else (the sex to which the individual is attracted or with which the individual identifies). But Title VII doesn't care. If an employer would not have discharged an employee but for that individual's sex, the statute's causation standard is met, and liability may attach.

NOW THE EMPLOYER CAN QUIBBLE: "IT WASN'T THE SEX OF THE PERSON THAT MADE ME UPSET...I DIDN'T WANT A TRANS PERSON (OR GAY... ETC.) AT THE FUNERAL PARLOR DOOR OR PARACHUTING FROM MY PLANE OR WORKING FOR THE COUNTY WITH NEEDY FAMILIES..."

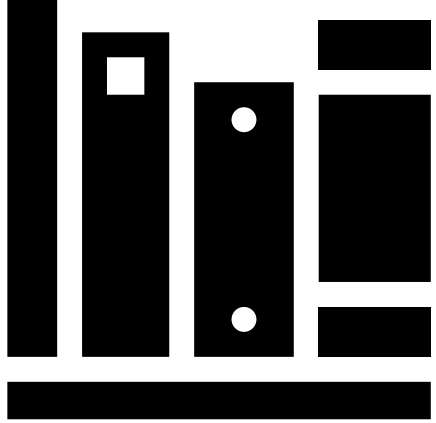
GORSUCH HAS AN ANSWER TO THAT, ANTICIPATING THE DISSENTS:

Maybe most intuitively, the employers assert that discrimination on the basis of homosexuality and transgender status aren't referred to as sex discrimination in **ordinary conversation**. If asked by a friend (rather than a judge) why they were fired, even today's plaintiffs would likely respond that it was because they were gay or transgender, not because of sex. According to the employers, that conversational answer, not the statute's strict terms, should guide our thinking and suffice to defeat any suggestion that the employees now before us were fired because of sex. Cf. *post,* at 3 (Alito, J., dissenting); *post,* at 8–13 (Kavanaugh, J., dissenting).

ELEPHANTS HIDING IN MOUSEHOLES?

- WOULD THE CONGRESS
- OF THE UNITED STATES
- WANT TO HIDE A BIG
- CHANGE IN A
- VERY SMALL WORD?
- (HINT: STARTS WITH
- S. AND ENDS WITH
- X.)

GORSUCH ON THE MOUSEHOLE AND THE ELEPHANT



Justice Scalia made a vivid point in a pollution case back in 2001:"**Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions — it does not, one might say, hide elephants in mouseholes."**

JUSTICE G.:The weighty implications of the employers' argument from expectations also reveal why the cannot hide behind the no-elephants-in-mouseholes canon. That canon recognizes that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Whitman* v. *American Trucking Assns.*, *Inc*., 531 U. S. 457, 468 (2001). But it has no relevance here. We can't deny th
ly broad terms. It has repeatedly produced unexpected applications, at least in the view of those on the receiving end of them. Congress's key drafting choices—to focus on discrimination against individuals a not merely between groups and to hold employers liable whenever sex is a but-for cause of the plaintiff 's injuries—virtually guaranteed that unexpected applications would emerge over time. This

JUSTICE ALITO, with whom JUSTICE THOMAS joins, dissenting.

There is only one word for what the Court has done today: legislation. The document that the Court releases is in the form of a judicial opinion interpreting a statute, but that is deceptive...

The Court tries to convince readers that it is merely enforcing the terms of the statute, but that is preposterous. Even as understood today, the concept of discrimination because of "sex" is different from discrimination because of "sexual orientation" or "gender identity." And in any event, our duty is to interpret statutory terms to "mean what they conveyed to reasonable people *at the time they were written*." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 16 (2012) (emphasis added). If every single living American had been surveyed in 1964, it would have been hard to find any who thought that discrimination because of sex meant discrimination because of sexual orientation—not to mention gender identity, a concept that was essentially unknown at the time.

The Court attempts to pass off its decision as the inevitable product of the textualist school of statutory interpretation championed by our late colleague Justice Scalia, but no one should be fooled. The Court's opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated—the theory that courts should "update" old statutes so that they better reflect the current values of society. See A. Scalia, A Matter of Interpretation 22

(1997). If the Court finds it appropriate to adopt this theory, it should own up to what it is doing.[5]

Many will applaud today's decision because they agree on policy grounds with the Court's updating of Title VII. But the question in these cases is not whether discrimination because of sexual orientation or gender identity *should be* outlawed. The question is *whether Congress did that in 1964*.

It indisputably did not.

GREAT METAPHOR BUT... DOES HE NOT HAVE A PIRATES HAT AND SHIRT???

Brett Michael Kavanaugh
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Varsity Football 3, 4; J.V. Football 2; Freshman Football 1; Varsity Basketball 3, 4 (Captain); Frosh Basketball (Captain); J.V. Basketball (Captain); Varsity Spring Track 3; Little Moye 3, 4*** Landon Rocks and Bowling Alley Assault — What a Night; Georgetown vs. Louisville — Who Won That Game Anyway?; Extinguisher; Summer of '82 — Total Spins (Rehoboth); [illegible] vs. Red Sox — Who Won, Anyway?; Key Club; Beat [redacted]; Senate Alumnus; Malibu Fan; Triangle; Down Geezer; Easy; S[illegible]

JUSTICE KAVANAUGH DISSENTS:

The policy arguments for amending Title VII are very weighty. The Court has previously stated, and I fully agree, that gay and lesbian Americans "cannot be treated as social outcasts or as inferior in dignity and worth." *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*, 584 U. S. ___, ___ (2018) (slip op., at 9).

But we are judges, not Members of Congress. And in Alexander Hamilton's words, federal judges exercise "neither Force nor Will, but merely judgment." The Federalist No. 78, p. 523 (J. Cooke ed. 1961). Under the Constitution's separation of powers, our role as judges is to interpret and follow the law as written, regardless of whether we like the result. Cf. *Texas* v. *Johnson*, 491 U. S. 397, 420–421 (1989) (Kennedy, J., concurring). Our role is not to make or amend the law. As written, Title VII does not prohibit employment discrimination because of sexual orientation…

The women's rights movement was not (and is not) the gay rights movement, although many people obviously support or participate in both. So to think that sexual orientation discrimination is just a form of sex discrimination is not just a mistake of language and psychology, but also a mistake of history and sociology.

For several decades, Congress has considered numerous bills to prohibit employment discrimination based on sexual orientation. But as noted above, although Congress has come close, it has not yet shouldered a bill over the legislative finish line… To end-run the bedrock separation-of-powers principle that courts may not unilaterally rewrite statutes, the plaintiffs here…have advanced a novel and creative argument. They contend that discrimination "because of sexual orientation" and discrimination "because of sex" are actually not separate categories of discrimination after all…

Consider a simple example of how ordinary meaning differs from literal meaning. A statutory ban on "vehicles in the park" would literally encompass a baby stroller. But no good judge would interpret the statute that way because the word "vehicle," in its ordinary meaning, does not encompass baby strollers…

Consider the employer who has four employees but must fire two of them for financial reasons. Suppose the four employees are a straight man, a straight woman, a gay man, and a lesbian. The employer with animosity against women (animosity based on sex) will fire the two women. The employer with animosity against gays (animosity based on sexual orientation) will fire the gay man and the lesbian. Those are two distinct harms caused by two distinct biases that have two different outcomes. To treat one as a form of the other—as the majority opinion does—misapprehends common language, human psychology, and real life. See *Hively* v. *Ivy Tech Community College of Ind.*, 853 F. 3d 339, 363 (CA7 2017) (Sykes, J., dissenting).

It also rewrites history. Seneca Falls was not Stonewall.

NOW COMES THE HARD PART: WE HAVE THE PRINCIPLE OF NO DISCRIMINATION...
BUT WHAT IS DISCRIMINATION...?

1. BATHROOM and LOCKER ROOM SHARING AND PRIVACY CONCERNS (e.g., JK Rowling's fear...)

2. GIRLS'S AND WOMEN'S ATHLETICS and COMPETITION (e.g., Caster Semenya)

3. DO STRENGTH TESTS SURVIVE CHALLENGE (e.g., Navy Seals or West Point)

4. ARE ALL DRESS CODES OUT THE WINDOW (e.g., toplessness in NY and other liberal states).

4. BUT NOTA BENE: Real problem with religious exclusions=1st Amendment protects 'free exercise' of convictions AND 'ministerial exceptions'… of employers...
5. HOBBY LOBBY allowed medical coverage exceptions 'on the basis of the boss's conscience'. IS THAT REALLY FAIR? THE EMPLOYER DOESN'T PAY BUT THE EMPLOYEE HAS TO SCRAMBLE FOR, E.G., BIRTH CONTROL OR AN ABORTION (or wedding cake!).

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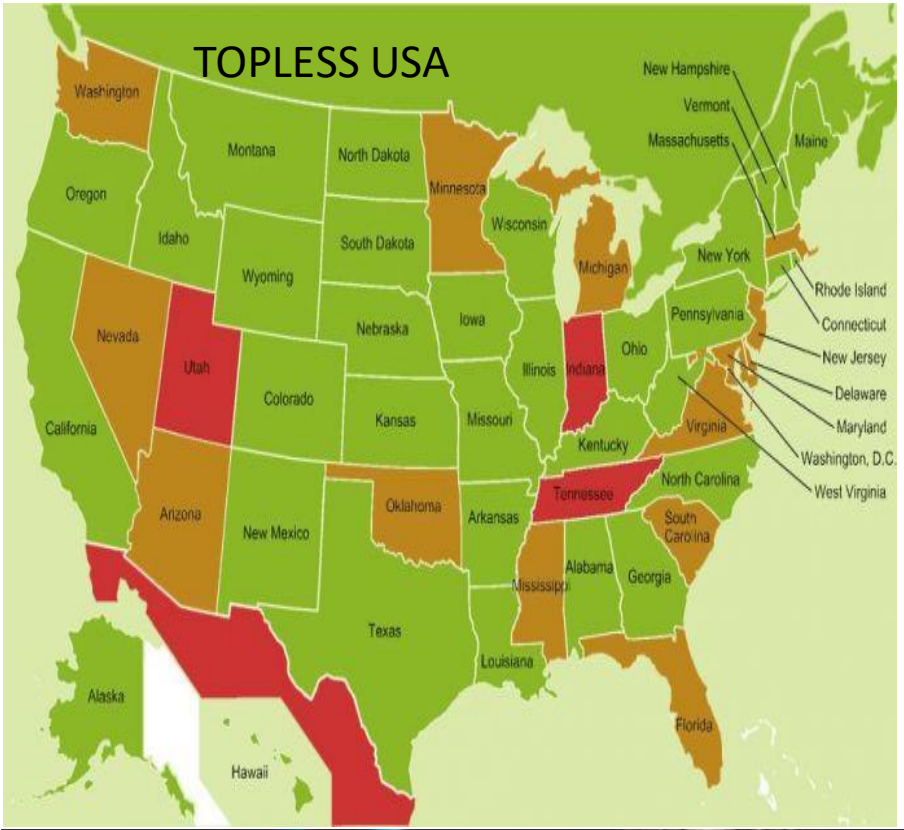
The green colored states are those where top freedom is in effect.
The orange colored ones have ambiguous state laws on the matter.
The red colored ones are the ones where the mere showing of the female breast in public is illegal according to state law.

In the USA, though the majority of states are top-free, some cities in those states have passed (unconstitutional) ordinances that annul the state's top free statute.
In Canada, the law on public decency is found in Sections 173 and 174 of the Criminal Code. However, what constitutes an indecent act is not defined, and is open to interpretation by the courts. Top freedom is allowed in Ontario, Sasketchawen and British Columbia following specific court cases on the matter but the case for topless equality has not been heard by the Canadian Supreme Court yet.
The following cities are officially topless "tested":
Asheville, NC, Portland, OR; Santa Fe, NM; S. Beach, Miami, FL; Washington, DC;
Austin, TX; Boulder, CO; Columbus, OH; Honolulu, HI; Keene, NH; Key West (once a year);
Madison, WI; New Orleans (for Mardi Gras); NYC...




LITTLE SISTERS OF THE POOR
HOME FOR THE AGED
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BANNED!