

# Opinion | Another Win for the Kagan Court

*The Editorial Board*

6-7 minutes

---

Congratulations to Chief Justice Elena Kagan on her big win Monday at the Supreme Court on gay and transgender rights in *Bostock v. Clayton County*. Ok, she isn't the Chief, but she might as well be as her redefining of Antonin Scalia's jurisprudence prevailed in a startling 6-3 ruling that included Chief Justice John Roberts and Justice Neil Gorsuch.

Justice Kagan didn't write the majority opinion, but her views are all over Justice Gorsuch's opinion that essentially rewrites Title VII of the 1964 Civil Rights Act. That law bars discrimination in employment on the basis of "race, color, religion, sex, [and] national origin." But in oral argument, Justice Kagan redefined "sex" in Title VII to mean more than the binary choice of a man or woman. Justice Gorsuch bought the argument, and in the process he usurps Congress and distorts the textualist school of jurisprudence that he claims to follow.

\*\*\*

There is no evidence that Congress or the public in 1964

understood gender identity and sexual orientation to be the same as biological sex. Mores have changed for the better, and Congress would have added gender and sexual orientation to the law sooner rather than later. But all 10 appellate courts that considered whether “sex” covered gender identity and sexual orientation before 2017 held that it did not.

The Court has now rewritten the law itself. While Justice Gorsuch concedes that “homosexuality and transgender status are distinct concepts from sex,” he says “discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second.”

But animus toward gays or transgender people isn’t based on their biological sex. People hostile to gays aren’t necessarily sexual chauvinists. Justice Gorsuch cites the High Court’s *Phillips* (1971) ruling that held Title VII protects a woman not hired because she was a mother. But motherhood is inextricably linked to biological sex. Gender and sexual orientation are not.

“When Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule,” Justice Gorsuch writes. But the majority here isn’t merely applying an overly broad or vague law, which Justice Gorsuch has criticized the Court for doing in other cases. The Court is redefining the original meaning of “sex” in the law.

As Justice Samuel Alito explains in a comprehensive dissent joined by Justice Clarence Thomas, “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,'" as Justice Scalia wrote.

Justice Alito adds: "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."

Justice Brett Kavanaugh rebukes the majority in a separate dissent for short-circuiting negotiations in Congress and denying the LGBTQ community a democratic victory: "When this Court usurps the role of Congress, as it does today, the public understandably becomes confused about who the policymakers really are in our system of separated powers, and inevitably becomes cynical about the oft-repeated aspiration that judges base their decisions on law rather than on personal preference."

\*\*\*

All of this matters beyond this ruling because Justice Gorsuch sees himself as an evangelist for textualism and originalism. But he commits the cardinal sin of being a literalist in his interpretation of sex instead of looking at the original public meaning of the law Congress wrote. ("The good textualist is not a literalist," Justice Scalia once wrote.)

If Justice Gorsuch can use textualism to rewrite a statute to comport with changing public mores, then it is meaningless. Textualism becomes merely one more tool of those who believe in a “living Constitution” that means whatever any Justice says it means. Justice Gorsuch has defined his own jurisprudence down.

This judicial law-writing may also have damaging practical consequences. More than 100 federal laws prohibit sex discrimination, and plaintiffs will now use them as a cudgel to let transgender females compete in women’s sports, provide gender neutral restrooms, and force religious institutions to bow to their cultural wishes. Congress could have protected gay rights while working out these accommodations in legislation.

*Bostock* is merely the latest evidence that the Roberts Court, even buttressed by two Trump nominees, is in no consistent way “conservative.” On major cases Justice Kagan swings the biggest constitutional bat.

Main Street: A top prosecutor affirms his virtue as he shrugs off vandalism, leaving the largely black and Latino residents of America’s most vulnerable neighborhoods to pay the price.

Image: NYPD/Getty Images Composite: Mark Kelly

Copyright ©2020 Dow Jones & Company, Inc. All Rights Reserved. 87990cbe856818d5eddac44c7b1cdeb8