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Democracy Dies in Darkness

The problem with that big gay rights decision? It's not really about gay rights.

The triumph of 'textualism' led to a civil rights opinion that reads like a logic problem

By **Daniel Hemel**
Daniel Hemel is an assistant professor of law at the University of Chicago.

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"We're all textualists now," Justice Elena Kagan famously said in a 2015 lecture at Harvard Law School honoring her then-Supreme Court colleague Antonin Scalia. Her remark paid tribute to Scalia's success in championing an interpretive approach that focuses on the ordinary meaning of legislative text and that downplays the unexpressed intentions or broader purposes of a statute's drafters.

This week's 6-to-3 decision that federal employment discrimination law protects gay, lesbian and transgender individuals would seem to prove Kagan's point. The battle between Justice Neil M. Gorsuch, who wrote the majority opinion, and three fellow conservatives who dissented is pitched almost entirely on textualist terrain. (Chief Justice John G. Roberts Jr. joined Kagan and three other liberals in the majority.) There are no sweeping arguments in favor of (or opposed to) the rights of gay, lesbian and transgender citizens. Rather, the justices fight fiercely over how the text of the law should be construed, while agreeing unanimously that the text is what trumps.

Certainly, the bottom-line outcome of the decision ought to be celebrated. It

is an enormous victory for equality, and nothing that anyone says about interpretive methodology can or should detract from that fact. But the absence of language invoking conceptions of justice comes with a cost. At a time when no other national institution appears capable of carrying the mantle of moral leadership, the court's clinical approach leaves yet another vacuum.

In truth, there may be no better option for a sharply divided court in a deeply polarized era. With the nation's faith in its leaders fraying, a sermon from the bench may well have fallen flat. The result, though, is a technically adroit opinion that explains why discrimination against gay, lesbian and transgender workers is unlawful — but not why it is wrong. Read closely, it may even fail to leave some LGBTQ people unprotected. And it casts the 1964 Civil Rights Act, arguably the greatest legislative accomplishment of America's greatest social movement, not as a moral triumph but as a logic problem.

In *Bostock v. Clayton County, Ga.*, the text at issue is Title VII of the 1964 act, which prohibits employers from discriminating against any individual "because of such individual's race, color, religion, sex, or national origin." The question in the case is whether an employer who discriminates against

a gay, lesbian or transgender worker is discriminating against that individual "because of such individual's … sex" — or whether a ban on sexual-orientation and gender-identity discrimination in the workplace requires a new statute. Gorsuch, Roberts and the court's liberal bloc found that such discrimination was covered by existing law.

The textualist argument endorsed by Gorsuch is, to its credit, elegant. When an employer fires a man for being gay, the employer is discriminating against the worker because of the man's sex. If the worker were a woman who was sexually attracted to men, the worker would not be fired. The same trait — being sexually attracted to men — is tolerated in a woman but not in a man.

The argument works just as well for transgender people. When an employer fires a woman for being transgender, the employer is discriminating against the woman because of sex. The same trait — identifying as a woman — is tolerated if the worker has two X chromosomes but not if the worker has one X and one Y chromosome.

The dissenters — Justices Samuel Alito, Clarence Thomas and Brett M. Kavanaugh — will have none of it. An employer who discriminates against gay and lesbian individuals is, the dissenters say, discriminating on the basis of sexual orientation, not sex. As Alito notes, an employer could bring about such discrimination by requiring job applicants to check a box if

about such discrimination by requiring job applicants to check a box if they are homosexual and refusing to hire those who do; the employer wouldn't even need to know an applicant's sex. Similarly, they say, anti-transgender discrimination targets people who do not identify with the sex they are assigned at birth; whether that assigned sex was male or female is irrelevant.

Gorsuch's response to that objection dives deep into semantics. One event occurs "because of" another, Gorsuch says, if the second event wouldn't have happened "but for" the occurrence of the first. When a gay man is fired for being gay, both his sex and his sexual orientation are "but-for" causes of his firing; his attraction to men would not be objectionable were he not a man. As long as the man's sex is one but-for cause of his firing, then the man is — according to Gorsuch — fired "because of" his sex.

This is not the way we use the words "because of" in ordinary speech. If you asked me why I root for the Cubs, and I said, "Because the Nazis marched into Austria," you'd look at me strangely. But if the Nazis hadn't taken over Austria, my grandmother wouldn't have fled to the United States; my grandfather and grandmother wouldn't have met in Chicago; and — ergo, two generations later — I would not exist. If I didn't exist, I couldn't be a Cubs fan. The Nazis are a but-for cause.

Of course, lawyers have long understood that for the "but-for" principle to

be workable, chains of causation need to be broken off somewhere. We ask not only whether one thing was the but-for cause of another, but whether the causal connections are relevant to reasons the law exists. Gorsuch's opinion gives us no guidance on how to do that chain-breaking. So we are left with a wonderfully clever argument, but one with some odd implications and loopholes.

If an employer fires any worker who is late to a staff meeting, and a man is late one morning because he got caught in a long line at the men's bathroom, would firing the worker constitute sex discrimination? Assume that the women's bathroom that morning was empty. But for the fact that he was a man, the worker wouldn't have been delayed. He was fired because of his sex, under a literal reading of Gorsuch's opinion.

Gorsuch's reduction of sex discrimination to a mechanical comparison between one employee and a hypothetical doppelganger of a different sex creates practical problems, as well. By one estimate, about 1.8 percent of Americans are bisexual. If an employer fires all bisexual workers, and only bisexual workers, is that discrimination because of those workers' sex? A man who is attracted to both men and women would be fired. A woman who is attracted to both men and women would be fired. The same trait — being attracted to both men and women — is treated the same for both men and women. Worryingly, Gorsuch's opinion avoids using the word "bisexual" or any acronym that contains it, suggesting that this group still

"bisexual" or any acronym that contains it, suggesting that this group still may lack robust protection.

The same argument that won the day in *Bostock* was presented to the court five years ago in *Obergefell v. Hodges*, the landmark marriage equality case. Attorneys for plaintiff Jim Obergefell noted that their gay client's marriage to his husband would have been recognized if their client had been a woman — Ohio's refusal to recognize same-sex marriages thus was sex discrimination prohibited by the Constitution's equal-protection clause.

But that wasn't the argument Obergefell's lawyers emphasized, nor was it the argument the court embraced. Instead, Justice Anthony M. Kennedy, writing for a 5-4 majority, seized the opportunity to offer a principled reason discrimination against same-sex couples is wrong: because it "serves to disrespect and subordinate them" simply because of whom they love. Kennedy's soaring rhetoric led to some eye-rolling at the time. But Kennedy wasn't speaking only to the moment; he was speaking for the ages.

Gorsuch is no Anthony M. Kennedy. His opinion doesn't (and doesn't try to) explain why discrimination on the basis of sexual orientation or gender identity is morally objectionable. That's not just because this case involved a statute rather than the Constitution: The Civil Rights Act of 1964 is a statute imbued with moral content. Rather, the turn to textualism reflects a

strategic choice to turn down the temperature of the culture wars.

In a nation torn by partisan and ideological conflict, perhaps that is the best we can hope for. Liberals would not take well to Gorsuch, a Trump appointee, lecturing them on equality and acceptance. (And had one of the court's liberals written such an opinion, Gorsuch might not have joined it.) Those who cling to anti-LGBT views, meanwhile, would not respond well to the court telling them they are bigots.

Alito's dissent blasts Gorsuch for — in Alito's view — misusing textualist tools to make a 1964 law conform to 2020 sensibilities. But aside from a few legal conservatives who are heavily invested in methodological debates, Gorsuch's opinion is unlikely to trigger the backlash that a full-bodied defense of LGBT equality might have elicited.

By framing issues in textual terms, the justices sidestepped a minefield of moral disagreements. Doing so may help to preserve the court's legitimacy across the ideological spectrum. But when the justices abdicate any aspiration to moral leadership, who else will step in? Certainly not this president, and it is hard to see our bickering congressional leaders rising to the task either.

This week's decision is, yes, a triumph for textualism. Yet it's also a triumph for moral minimalism. In light of the current climate, that outcome may

have been inevitable, but it’s also lamentable.