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Bostock and textualist argumentation

The debate about the meaning of 'discriminate because of sex'

Rights-Thinking: Exploratory Workshop on Current Legal Issues in the U.S.A.
Bachelor's thesis

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28.03.2024

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Abstract page

Bachelor's thesis

Subject: Law
Author: Linda Åkerblad
Title: *Bostock* and textualist argumentation- The debate about the meaning of 'discriminate because of sex'
Supervisor: Samuli Hurri
Number of pages: 25 pages
Date: 28.03.2024

In my thesis I will be exploring the 2020 U.S. Supreme Court case called *Bostock v Clayton County, Georgia* 590 U.S.__(2020) that provided transgender and homosexual employees federal level employment discrimination protections for the first time in U.S. history. The case debated the provision included in Title VII of the Civil Rights act of 1964 that prohibits discrimination "because of sex". The question was whether discrimination based on transgender or homosexual status is discrimination because of sex. The majority decided that it was.
In my paper, I perform an argumentation analysis based mostly on the majority Opinion of the Court and two dissenting opinions given in the decision. I will be researching the textualist approach used both by the Opinion of the Court and the two dissenting opinions presented in the case. I will look at the argumentation used in those documents through the lenses of textualism, use of precedent, overall regarding the application of Title VII and finally ideological perspectives.
My main research result came to be, that different stands of textualism and a difference in understanding the use of textualism dominated the argumentation. The disagreement was about the interpretation of the norms presented in Title VII. The majority used the language of the statute and found it to be unambiguous so that the groups were included in the protections. The dissenting opinions found that legal history, social context and Congressional intent should have been considered and that would have lead to the opposite result, which is that homosexual and transgender discrimination is not under Title VII protections. I also found that the case was assumed to divide the court into conservatives and liberals, but the two conservatives joining the majority was surprising to many.

Key words: textualism, LGBTQ-rights, Title VII, employment protections, U.S.A., Supreme Court, discrimination,

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Abstract page

ON-työ / Tutkielma

Oppiaine: Oikeustiede
Tekijä: Linda Åkerblad
Otsikko: Bostock ja tekstualistinen argumentaatio- väittely sukupuoleen perustuvan syrjinnän merkityksestä
Ohjaaja: Samuli Hurri
Sivumäärä: 25
Päivämäärä: 28.03.2024

Tutkielmani käsittelee Yhdysvaltojen korkeimman oikeuden tapausta *Bostock v. Clayton County, Georgia* 590 U.S.__(2020). *Bostock* käsitteli homoseksuaalien ja transsukupuolisten henkilöiden työsyrjintää. Tapauksessa osapuolet väittelivät työsyrjinnän kiellosta, joka sisältyy liittovaltion tasolla vuonna 1964 säädettyyn kansalaisoikeuksia koskevan lainsäädännön VII:n osaan. Väitellyssä pykälässä kielletään työsyrjintä, joista yksi kielletty peruste on sukupuoleen perustuva syrjintä. Korkein oikeus oli erimielinen siitä, voidaanko homoseksuaalisuuteen tai transsukupuolisuuteen perustuvaa syrjintää pitää sukupuoleen perustuvana syrjintänä. Tuomioistuin päätti 6 puolesta ja 3 vastaan ratkaisussaan, että edellä mainittuihin ominaisuuksiin perustuvaa syrjintää tulee pitää sukupuoleen perustuvana syrjintänä ja laajensi liittovaltion tasoisen syrjintätyösuojelulainsäädännön koskemaan myös transsukupuolisia ja homoseksuaaleja yksilöitä. Ratkaisuun sisältyi yksi oikeuden enemmistön ratkaisu ja kaksi eriävää mielipidettä ratkaisuun.

Tutkielmassani analysoin tapauksessa esitettyä argumentaatiota, joista keskityn pääasiassa näissä kolmessa oikeuden mielipiteessä esitettyihin argumentteihin. Tausta-aineistona käytän lisäksi suullista argumentaatiota, akateemisia artikkeleja ja osapuolien laatimia oikeudenkäyntikirjelmiä. Tarkastelen argumentaatiota tekstualismin, eli mielipiteissä käytetyn laintulkinnallisen tekniikan näkökulmasta. Tekstualismi keskittyy pääasiassa lainsäädännön kirjoitetun kielen tulkintaan. Lisäksi tutkin ennakkotapausten ja oikeuskäytännön käyttöä argumentaation kannalta ja tarkastelen, miten lainsäädäntöä sovellettiin tapaukseen. Lopuksi käsittelen lyhyesti seurauseettistä argumentaatiota, jota käytettiin osassa asiakirjoista. Tutkielmani tutkimusmenetelmä on argumentaatioanalyysi. Sen avulla jäsentelen mielipiteissä käsiteltäviä argumentaatiokeinoja ja argumentteja ja lisäksi tarkastelemaan erilaisten poliittisten ja oikeudellisten ideologioiden vaikutusta ratkaisuun.

Enemmistön mielipide ja eriävät mielipiteet hyödynsivät tekstualismia argumentaatiossaan eri tavoin. He sovelsivat saman tekniikan eri sovellus muotoja ja päätyivät vastakkaisiin lopputuloksiin. Osapuolet argumentoivat lainsäädännön VII:n osan merkitsevän joko syrjintää, joka pohjautuu biologiseen sukupuoleen tai syrjintää, joka on puhtaasti biologiseen sukupuoleen perustuvaa ja sen motivoimaa. Tapauksessa käytetty argumentaatio oli hyvin vastakkaista kaikilla osa-alueilla ja erimielisyys lain kattavuudesta sisälsi monia argumentteja ja kritiikkiä toisia näkökulmia kohtaan.

Asiasanat: Yhdysvallat, Yhdysvaltojen korkein oikeus, työsuojelu, syrjintä, seksuaalivähemmistöt, sukupuolivähemmistöt, Bostock, tekstualismi,

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Abbreviations

Alito J. dissenting	*Bostock v. Clayton County, Georgia*, Justice Alito's dissenting opinion.
Bostock	*Gerald Lynn Bostock v. Clayton County*, Georgia 590 U.S.___(2020).
Bostock	(without inclination) Petitioner Gerald Lynn Bostock, in *Bostock v Clayton County, Georgia.*
Kavanaugh J. dissenting	*Bostock v. Clayton County, Georgia,* Justice Kavanaugh's dissenting opinion.
Opinion of the Court	*Bostock v. Clayton County, Georgia*, opinion of the Court written by Justice Gorsuch
Stephens	Respondent Aimee Stephens in *R.G. & G.R. Harris Funeral Homes, Inc., Petitioner v. Equal Employment Opportunity Commission, et al.*
Title VII	Title VII of the Civil Rights Act of 1964, Volume 42 of the United States Code, starting section 2000e-.
Zarda	Respondents Melissa Zarda, et al. in *Bostock v. Clayton County, Georgia*

1 Introduction

In this paper I will study the 2020 U.S. Supreme Court case *Gerald Lynn Bostock v. Clayton County, Georgia* 590 U.S.___(2020) (later *Bostock*). The judgement included three joined cases for employees Zarda, Bostock and Stephens.[1] *Bostock* was a case about the interpretation of Title VII of the Civil Rights Act of 1964,[2] which states that:

> it shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.[3]

The argumentation primarily focuses on the phrase "because of such individual's sex", most relevantly the meaning of the term 'sex'. The question was whether discrimination because of sexual orientation or gender identity is a form of sex discrimination and thus protected by Title VII employment protections. The employers in the case had quite openly fired the employees because of their homosexual or transgender status, stating that nothing within the law prohibited them from doing so. The U.S. Supreme Court granted certiorari to assess the issue and combined the three employees' cases. What the Court disagreed on were not the facts of the cases, but the interpretation of the norms presented in Title VII.

The Supreme Court of the United States decided in a 6-3-opinion that discrimination because of transgender or homosexual status was a subset of sex-discrimination and included in the Title VII protections. The Opinion of the Court stated that "an employer who discriminates against homosexual or transgender employees necessarily and intentionally applies sex-based rules".[4] The Opinion of the Court was written by conservative Justice Gorsuch and a fellow conservative Justice Roberts and the four liberal Justices Ginsburg, Kegan, Sotomayor and Breyer joined the opinion. In addition to the majority Opinion of the Court, there were two dissenting opinions written by Justice Kavanaugh and Justice Alito (with whom Justice Thomas joins). *Bostock* was an important case because "since the mid- 1990s, at least fifteen

[1] *Altitude Express, Inc., et al. v. Zarda et al., Gerald Lynn Bostock v. Clayton County, Georgia* and *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC.*
[2] Volume 42 of the United States Code, starting section 2000e-.
[3] Ibid. Section 2000e-2. [Section 703].
[4] Opinion of the Court, p. 17.

studies found that 15 percent to 43 percent of lesbian, gay, and transgender respondents experienced discrimination in the workplace”.[5] Previous to this decision they enjoyed no federal legal protections from it.

In my paper I will study the argumentation used in the case, mostly in the majority opinion and the two dissenting opinions. I am interested in the way in which the judges and parties read the same norms and precedent and arrived at opposite interpretations. I am searching to see how the interpretive technique called textualism affected the judgement and how the Justices read the same norms and cases through the same interpretative technique and disagreed very strongly on how the end result should look like. This case was a landmark decision, which is why I want to research how this monumental judgment arguments its claims and how this decision was objected.

Let me provide a short synopsis of my paper. In section two I will look at my research materials and the methods I used to analyze them. In section three I will move to study textualism and the role it played in the disagreements. Section four will look into legal practice and precedent and how it was used to validate the opinions. In section five, I will more deeply look into the resulting disagreement about the application of Title VII and how the parties argued their interpretation. Section six starts by briefly presenting ideological differences in the judgment and will continue to handle ideologically colored consequentialist argumentation about possible policy consequences resulting from the judgement. Finally, I will conclude my paper in section seven and summarize what the main differences in argumentation seem to be.

[5] Towers Rise 2021, p. 424.

2 Research materials and methods

My main sources are the Supreme Court's documents on *Gerald Lynn Bostock v. Clayton County, Georgia*. I used the Opinion of the Court, the two dissenting opinions in the case, the oral argumentation[6] and the briefs of the parties. I chose the *Bostock*-case due to the importance of the decision and its implications. I focused on the Opinion of the Court and the two dissenting opinions as my principal source material. The Supreme Court's materials, such as briefs and opinions, gave me a large package of information and arguments.

In addition, I used academic articles relating to the subject to bring different views to my analysis. I chose various academic articles to construe a more coherent interpretation and to give justification to some of my conclusions. I tried to use as many refereed articles as possible and primarily used Hein Online to find all of my articles. However, all of the articles I used are not refereed. All of them are published in law reviews or other legal journals. I tried to include both articles that supported and articles that criticized the *Bostock*-decision. In this paper, they function more as background and supporting materials. I found that the articles continued the discussion that the opinions written and the briefs I read included. The articles I used the most are Grove's *Which textualism?* (2020), Spindelman's *Bostock's paradox* (2021) and Newcombe's *Textualism: Definition, and 20 Reasons Why Textualism Is Preferable to Other Methods of Statutory Interpretation* (2022).

I am researching the argumentation used in the materials and conducting an argumentation analysis on what the parties disagreed on and what the main arguments consisted of. The main focus of the analysis is on the difference in the textualist interpretation of Title VII norms and its meaning, mainly what sex discrimination covers and why. My main research question is what are the questions debated and disagreed on in the Bostock decision and why are those questions disputed. In addition, I focus on how the parties base their argumentation on textualism. I look at the different ways the judges understand the norms in the case. In addition I will try to discover possible underlying ideological and perspective differences behind the parties, most prominently the dissents and the opinion of the Court. All of the argumentation relates to the topic of textualism in one way or another, so I use it to analyse what textualism means to the case and as a basis for my argumentation analysis.

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[6] *Bostock v Clayton County Georgia* (joined oral argumentation with Zarda) and *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC.*

3 Textualism

3.1 Introduction to textualism

Constitution Annotated describes textualism as follows:

> Textualism is a mode of legal interpretation that focuses on the plain meaning of the text of a legal document. Textualism usually emphasizes how the terms in the Constitution would be understood by people at the time they were ratified, as well as the context in which those terms appear. Textualists usually believe there is an objective meaning of the text, and they do not typically inquire into questions regarding the intent of the drafters, adopters, or ratifiers of the Constitution and its amendments when deriving meaning from the text. They are concerned primarily with the plain, or popular, meaning of the text of the Constitution. Nor are textualists concerned with the practical consequences of a decision; rather, they are wary of the Court acting to refine or revise constitutional texts . . . In fact, the Court will often look to the text *first* before consulting other potential sources of meaning to resolve ambiguities in the text or to answer fundamental questions of constitutional law not addressed in the text.[7]

There are multiple different ways to define textualism. The articles I used produced varied definitions and the thought is that increasing political and ideological associations have made it increasingly difficult to give one definite answer to what textualism is. Textualism also includes multiple different 'schools', that use the technique some what differently. I will shortly use Newcombe's article to describe the usual way to apply textualism. She explains that textualist judges emphasize that statutory text should be the foundation to the statutes meaning and that it is argued that "a court's inquiry should begin and end with the statutory text".[8] She presents the idea that the only thing enacted into law is the statutes text, not additional material such as legislative history.[9] Newcombe says that is why textualists are generally opposed to relying on extratextual materials.[10] She states that "textualist analysis focuses on the objective meaning of words contained in the text of the statute" that are supposed to be understood in context such as semantic context or temporal context.[11] The most prominent measure is to interpret the statute as "a reasonable person would have understood the words to mean at the time a statute's enactment".[12] This is called ordinary public meaning in the *Bostock*-opinions. Using this analysis is argued to make the interpretation minimally literalist. Additionally, a

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[7] Constitution Annotated, 8.2 Textualism and Constitutional interpretation, section 1-2; the technique is not bound up with the interpretation of the Constitution, so it applies similarly when interpreting other laws.
[8] Newcombe 2022, p. 143.
[9] Newcombe 2022, p. 143.
[10] Newcombe 2022, p. 144.
[11] Newcombe 2022, p. 144.
[12] Newcombe 2022. p. 144.

statute should be interpreted as written unless it produces an absurd result.[13] Finally Newcombe concludes that "textualist judges believe that they should still follow the text of a statute, even if they may not personally like the result of a decision they make".[14]

All three of the opinions in *Bostock* represent a form of textualism and all of them argue their side largely relied on textualist grounds. Textualism is important to this case, because all of the parties focus on the statutory language of Title VII and argue about the meaning of the words and phrases it entails. Grove's article[15] demonstrates that there are multiple competing strands of textualism and the majority opinion and the dissenting opinions in *Bostock* represent different strands of the interpretative technique. The article argues that the Opinion of the Court represents a textualist strand she calls "formalistic textualism" [16] and the dissenting opinions reflect what she calls "flexible textualism"[17]. In short, the author presents that "formalistic textualism" focuses on semantic context and carefully goes through the language of the statute, while "flexible textualism" also allows the use of policy and social context and consideration of practical consequences to make sense and interpret the statutory text.[18] The Court's different approaches are also called semantic approach and pragmatics approach by Capparelli in his article.[19] This differentiation is a good background to help understand the underlying reasons for the disagreements.

3.2 Defining Title VII's meaning

The majority opinion of the Court takes the language of the statute, gives definitions of the terms such as *sex, because of sex* and *discriminate against individuals* used both in 1964 and currently. At the same time it takes the established precedent to justify the provided meanings to the phrases and ultimately applies all of it to *Bostock*. Using the definitions of the words and precedent, the majority comes to the textualist conclusion that Title VII's meaning is that "an employer violates Title VII when it intentionally fires an individual employee based in part on sex".[20] The majority rejects the idea that they should take into account extratextual sources for example the intent of the Congress in 1964, conversational meanings, legislative history and consequent failed legislative efforts by the Congress to include sexual orientation

[13] Newcombe 2022, p. 146. see the "absurdity doctrine".
[14] Newcombe 2022, p. 147.
[15] Grove 2020.
[16] Grove 2020, p. 281.
[17] Grove 2020,. p. 286.
[18] Grove 2020, p. 279.
[19] Capparelli 2021, p. 1446.
[20] Opinion of the Court p. 9.

into the statute like the dissents suggest. This is because in their opinion the language of the statute is unambiguous and the language of Title VII is broad so that it is easily applied to the case at bar.[21]

Kavanaugh and Alito criticize the majority opinion's textualism on multiple basis, all more or less stemming from the difference that they apply what Grove called flexible textualism and look at social context and policy when interpreting the statute. They also have a history centred and originalist type of view to their interpretation. Alito's textualist reading argues Title VII means that "if 'sex' in Title VII means biologically male or female, then discrimination because of sex means discrimination because the person in question is biologically male or biologically female".[22] Kavanaugh uses the textualist approach of ordinary meaning and states that the ordinary meaning of "discriminate because of sex" does not encompass discrimination because of sexual orientation for reasons handled in the following sections.[23] Capparelli summarizes Kavanaugh's opinion to be that "while it may be literally true that the phrase could encompass sexual-orientation or gender-identity discrimination, Justice Kavanaugh contended that the majority's reading of the statute did not comport with its *ordinary* meaning".[24]

Remembering the definitions makes it easier to understand, for example, the use of precedent. The majority and the dissents try to prove that their interpretation of the textualist meaning of the statute is correct and that is for example one of the reasons why they use legal practice and precedent differently. Ultimately this is also the base for how they apply Title VII, which I will look into in section five.

3.3 The meaning of 'because of sex'

The definitions that the majority and the dissenting opinions come to are quite different. The majority's definition includes the use of a "but-for-causational test", meaning that 'sex' needs to be only one of the but-for-reason why the discrimination occurs and there may be multiple but-for-reasons that are not all based on sex. A but-for-reason is determined by changing one factor in the case at a time and if the discrimination would not have occurred without that factor, it is a but-for-reason for that action. Basically, the discrimination needs to be only (partly)

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[21] Opinion of the Court. for example p. 24.
[22] Alito J. dissenting p. 5, the phrase starts with if, because the majority agreed to start from the point that sex means biological sex, which Alito is referencing.
[23] Kavanaugh J. dissenting p. 11.
[24] Capparelli 2021, p. 1421.

based on (biological) sex. The Court determined that if you changed the sexes of the employees in *Bostock,* the discrimination would not have occurred, so it is a but-for-reason in the case. I will look into this reasoning more in section five.

The dissents have a different idea of this, because they argue that the discrimination needs to occur because of the fact that a person is biologically of one sex, Alito stating that “Title VII prohibits discrimination because of sex itself, not everything that is related to, based on, or defined with reference to, ‘sex.’“.[25] Kavanaugh has a similar but a slightly differently worded view. He states that as written, Title VII does not prohibit sexual orientation discrimination.[26] He contends that discrimination because of sexual orientation and sex discrimination are distinct categories and thus are not both protected by the clause that prohibits sex discrimination.[27] In the background is the same thought that Title VII only prohibits discrimination because of biological sex. The majority answers this claim originally presented by the employers, by stating that “at bottom, the employers' argument unavoidably comes down to a suggestion that sex must be the sole or primary cause of an adverse employment action for Title VII liability to follow. And, as we've seen, that suggestion is at odds with everything we know about the statute”.[28]

The majority points out that in 1991, when updating the statute, Congress moved “to allow a plaintiff to prevail merely by showing that a protected trait like sex was a ‘motivating factor’ in a defendant's challenged employment practice”.[29] This lowered the threshold for how big of a role sex must play in the employment practice. The majority acknowledged this, but stated that they do not argue based on this, because nothing in their analysis depends on the “motivating factor”-rule and they prefer to stick to the more “traditional” but-for-causation analysis.[30] Alito addresses the motivating factor rule, stating that what motivates the employer's discrimination is gender identity or sexual orientation, not ‘sex’ per se.[31] He also argues that it is possible to have multiple motivating factors, but they all need to be about biological sex.[32] In short, the difference behind their definitions is a disagreement about what ‘because of’ means and whether all of the motivating reasons need to be purely based on biological sex.

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[25] Alito J. dissenting p. 13.
[26] Kavanaugh J. p. 2.
[27] Kavanaugh J. p. 5.
[28] Opinion of the Court p. 22.
[29] Opinion of the Court p. 6.
[30] Opinion of the Court p. 6.
[31] Alito J. dissenting p. 6.
[32] Alito J. dissenting p. 39.

3.4 Criticism regarding ordinary meaning

Justice Kavanaugh criticizes the majority calling the opinion literalist, stating that "courts must follow ordinary meaning, not literal meaning. And courts must adhere to the ordinary meaning of phrases, not just the meaning of the words in a phrase".[33] Kavanaugh's claim is that the court should have looked at the phrase as a whole to determine its meaning and determine it from the perspective of a 'reasonable person's understanding' of the statutes meaning in 1964.[34] He states that discrimination 'because of sex' is not reasonably understood to include discrimination because of sexual orientation and as I stated before, Kavanaugh's opinion is that the literal meaning may encompass it, but the ordinary meaning does not.[35] This was criticism regarding the ordinary meaning of the phrase and how it was supposed to be determined. The majority opinion did look at the individual words in the phrase, but it did so using definitions given in precedent. The majority also looked at the ordinary public meaning when interpreting the meaning of the statute. It determined that the ordinary public meaning of Title VII in 1964 was discrimination based on a person's biological sex. Then it applied that ordinary understanding and proceeded to determine if transgender and homosexual discrimination was based on a persons biological sex. The majority determined it was and even though that was not necessarily something that the ordinary understanding covered in 1964, it was included in the ordinary public meaning of the statute's definition. The majority also used precedent to show that things that were not within the ordinary understanding of the statute's coverage have been included in Title VII protections by previous precedents.

In his article, Capparelli states that the real dispute is not the difference between literal and ordinary meaning, but whether "it was appropriate to rely on semantics when attempting to find the ordinary meaning of the statute".[36] This means a debate about whether it was appropriate to look at the words to determine the meaning of the phrase. This is based on a debate inside textualism about how ordinary meaning should be found. Capparelli states that the majority used a dictionary and precedent approach and the standard of unambiguity, excluding the consideration of extratextual sources if the language is unambiguous.[37] The basic claim is that the language of the statute was chosen to be broad and is unambiguous and when the language of

[33] Kavanaugh J. dissenting p. 6; also see pages 5-7 and 11.
[34] Kavanaugh J. Dissenting p. 6.
[35] Kavanaugh J. Dissenting p. 21.
[36] Capparelli 2021, p. 1434.
[37] Capparelli 2021, p. 1429-1430.

a statute is unambiguous, it is not necessary or allowed to create unambiguity by using extra-textual sources. Opposed to that, Kavanaugh used what Capparelli calls "best reading" approach, which objects the use of the unambiguity standard.[38] That approach includes looking at "the words themselves", "the context of the whole statute" and "any other applicable semantic canons".[39] Alito argued that the statutory text was not unambiguous and it was arrogant to argue so.[40] I will now turn to what Kavanaugh and Alito thought should additionally have been taken into account when determining the ordinary meaning.

Everyone agreed that the law should be interpreted in accordance with the ordinary public meaning at the time of enactment. The most prominent disagreement is whether the Court should take social context into account when interpreting the ordinary meaning of the statute. Kavanaugh states the following in his dissenting opinion:

> All of the usual indicators of ordinary meaning— common parlance, common usage by Congress, the practice in the Executive Branch, the laws in the States, and the decisions of this Court—overwhelmingly establish that sexual orientation discrimination is distinct from, and not a form of, sex discrimination.[41]

The arguments is that Congress and State legislation uses the terms sex and sexual orientation separately and the Supreme Court has not treated sex discrimination and sexual orientation discrimination as the same thing. They also point that in conversations one uses the terms separately and does not state they were fired because of sex, if they were fired because of their homosexuality. The dissents point to the fact that the terms sexual orientation and gender identity are not on the list of Title VII prohibited grounds and that Congress did not intend to prohibit discrimination based on those qualities in 1964. Alito also tries to show that homosexual and transgender people were treated poorly at the time and discrimination based on those qualities would not have been evil at all in 1964.[42]

The majority opinion states that it is not the concerns of the legislators that govern the interpretation of the statute, but the provisions of those statutes.[43] The majority raises the point that the thought that Congress or the public possibly could not have wanted to protect disfavored

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[38] Capparelli 2021, p. 1430-1431.
[39] Capparelli 2021, p. 1431.
[40] Alito J. dissenting p. 7.
[41] Kavanaugh J. dissenting, p. 21.
[42] Alito J. dissenting, p. 37.
[43] Opinion of the Court, p. 14.

groups, such as homosexuals or transgender individuals, is not a justification to deny the protections that the express provisions of the law would grant them.[44] The opinion of the Court also states that conversational conventions don't matter to the analysis, because sex doesn't need to be the sole but-for cause and listing every but-for-cause in conversations "would be tiring at best".[45] Additionally, "speculation about why a later Congress declined to adopt new legislation offers a 'particularly dangerous' basis on which to rest an interpretation of an existing law a different and earlier Congress did adopt".[46] It is also stated that nothing in the legislative history suggest that Title VII is supposed to be read narrowly.[47]

Using context to determine ordinary meaning is a part of textualist practice as presented in chapter 3.1. However, what is looked at when determining context is disputable. The dissents bring extratextual sources such as legislative intent and post-enactment legislative efforts into their analysis unlike the common usage of textualism would suggest they do. They also in a way ignore the plain text of the statute to do this. The difference comes from the disagreement that the majority argues that the language of the statute is clear and unambiguously covers these applications. On the other hand, the dissents argue that the unambiguity standard is too high or not a good practice and that the meaning of the statute is clear in a way that it only covers discrimination because of biological sex. In the background is also a difference of what and how the opinions use evidence of ordinary meaning. The majority sticks with the Title VII statutory language and its understanding, while the dissents focus on the historical and social aspects in the legislative process and the difference in the use and understanding of the terms sexual orientation and gender identity opposed to the term sex discrimination.

3.5 Additional remarks

The dissenting opinions argue that the majority went beyond what statutory interpretation allows and ended up changing the law, crossing into legislation. This is a question about interpretative boundaries and the power of the court. Justice Alito's dissenting opinion expresses a view that the Opinion of the Court is like a pirate ship, because "it sails under a textualist flag, but what it actually represents is a theory of statutory interpretation, . . . that courts should 'update' old statutes so that they better reflect the current values of society".[48] Alito accuses

[44] Opinion of the Court, p. 27-28.
[45] Opinion of the Court p. 16.
[46] Opinion of the Court, p. 16 and p. 20.
[47] Opinion of the Court p. 29.
[48] Alito J. dissenting, p. 3.

the Court of practicing judicial creativity and updating Title VII to "2020 values".[49] Kavanaugh has a similar view.[50] The majority answers this by stating that what they are doing is purely strict legality because they are sticking to the words of the statute and what they cover. They are blamed for judicial creativity, because they include a new class under the protections, but the majority argues that they are creating nothing outside of the wide statutory text's range and the interpretation is therefore judicially restrained. I believe this is supported by the fact that the two conservative Justices joining the majority are not known for wanting to expand LGBTQ-rights.[51] They can be argued to practice the notion that textualist judges should follow the language of the law even if they personally don't agree with the results.

In his article, Kalir praises the majority opinion for being "a product of formal logic".[52] He states that the opinion has a "well-reasoned logical structure-complete with sound definitions, logical model, and several hypothetical and actual applications".[53] In my opinion, the logical structure makes the opinion convincing and shows that the interpretation has a basis not only on textualism, but well beyond that interpretive theory. The Opinion of the Court defends its logic well and answers the dissenting opinion's objections logically and convincingly. It demonstrates that at the core of the discrimination is at minimum part of the sex of the employee.[54] Kalir states that it does this using a formal logic model.[55] Kalir argues, and I agree, that the overall logic and justification given in the decision should be more important than a specific interpretive technique and whether it was applied "purely".[56]

In the articles, I found varied opinions of what would be the best way to apply textualism in the future and varied opinions from the past.[57] In his article, Spindelman states that what *Bostock* does, is "illustrate textualism's deep and inescapable methodological indeterminacy".[58] Overall there seems to be a fair bit of dispute about how textualism should be applied and

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[49] Alito J. dissenting p. 14.
[50] Kavanaugh. J. Dissenting for example p. 25.
[51] Kalir 2021, p. 42.
[52] Kalir 2021, p. 43.
[53] Kalir 2021. p. 43.
[54] For example Opinion of the Court p. 9-12, part II section B.
[55] Kalir 2021, p. 45. See pages 45-50 for demonstration of the use of the logic model in *Bostock*.
[56] Kalir 2021, p. 53.
[57] For example Grove thought that formalistic textualism is the best option, while Capparelli presented that the best option would be a sliding scale between semantics and pragmatics, but when it is not useful pragmatics is the only answer. In Vlahoplus's article he states that the same issues have bedevilled textualism since at least the Renaissance.
[58] Spindelman 2021, p. 557.

what one should take into account when applying it. In my understanding, most of the textualist critique about *Bostock* comes from the conservative side. One thing to note is that textualism is most commonly connected with conservative views and viewed as producing conservative results.[59] Usually the liberal side is the one criticising the technique. This time when the technique produced a liberal outcome, the conservatives were not happy.

If we reflect back to the definition given by Constitution Annotated, the dissenting conservative Justices criticise the majority for not using more or less precisely the things that the definition states that textualist usually don't use, which are intent of the drafters and practical consequences[60]. In addition, Constitution Annotated brings forward the idea that the text comes first and the unambiguity left is solved with other material, which is what the majority does and the dissents criticise. The majority is interpreting the statute as written and the criticism they face is largely relied on the fact that behind the written word was a society not supporting LGBTQ-rights. This is not the most common way to criticise textualism. What the justices really ended up doing was using the interpretative techniques "strategically". I could argue that the dissents knew that their preferred ideological view was going to lose based on 'traditional' textualism, so they changed their approach and started to use extratextual sources to justify their predetermined conclusion. What I find interesting, is that they felt enable to criticise the majority for 'using textualism wrong', when they were the ones more broadly changing the basic settings of textualist interpretation.

Some conservatives thought that the majority's use of textualism must have been flawed and that textualism could not justify the conclusion reached by the majority.[61] The thought is that if this result would be possible using textualism, "it must follow that textualism is wrong or misguided".[62] I even found discussion from the conservative side about whether the use of the whole technique of textualism should be abandoned.[63] This shows the ideological nature behind the theory and it's criticism. That is why I find it interesting that the disagreement bases its justifications so much on this interpretative theory that can be used in various ways and has a strong ideological background.

[59] Grove 2020, p. 266 and p. 271.
[60] I will look into practical consequence argumentation in section six.
[61] Berman– Krishnamurthi 2021, p. 67-68.
[62] Berman – Krishnamurthi 2021, p. 68. See also p. 71-72.
[63] Berman – Krishnamurthi 2021 p. 125.

4 Precedent and legal practice

4.1 A brief summary of the precedent cases

In *Phillips v. Martin Marietta Corp*. a company refused to hire women with young children, but did hire men with children the same age. The claim was that the practice was not sex discrimination, because it was based namely on another reason than sex, that was being a mother to a young child. Title VII protections were determined to include discrimination because of motherhood as a form of sex discrimination and it was declared that it is not a good defence that an employer discriminates only in part because of biological sex.

Los Angeles Dept. of Water and Power v. Manhart was about a company that required women to make larger contributions to a pension fund than men due to the overall longer life expectancy of women. It was upheld that a rule that seems equal for men and women as groups can be discriminatory to individuals and Title VII is a protection for individuals.

Oncale v. Sundowner Offshore Services, Inc. determined that Title VII protections include same-sex sexual harassment. It was discussed that the Congress at the time of enactment of Title VII did not necessarily predict such an application, but it is irrelevant whether the protection was the principle evil in Congress's mind at the time, because the language of the law covered the claim.[64]

Price Waterhouse v. Hopkins was a case about discrimination based on sex stereotypes. A woman employee was not made partner at the firm because she was seen not to be feminine enough. The common understanding of this ruling is that it established that sex stereotyping is a form of sex discrimination.[65] Fryer Cohen also states that a two step model for 'mixed motive cases' was established.[66] The steps are 1) "showing that stereotypes (or other form of discrimination) were permitted to enter the decision-making process along with other legitimate factors," and (2) "proof that the stereotypes (or other discriminatory inputs) were relied upon in making the decision".[67] If you look at this through the lens of the but-for-causation standard, the rule seems to be that sex stereotypes need to be one of the but-for-causational reasons in the decision.

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[64] Different sex sexual harassment was established previously in *Meritor Savings Bank, FSB v. Vinson* 477 U.S. 57 (1986).
[65] Cohen 1991, p. 678
[66] Cohen 1991, p. 679.
[67] Cohen 1991, p. 679

4.2 Analysis

The briefs of the parties and the opinions written by the Court all use and lean on precedent as a part of their textualist claims. The majority opinion uses precedent to show that "all that the statute's plain terms suggest, this Court's cases have already confirmed".[68] The majority's argument is that the Supreme Court has already given major rulings expanding the Title VII-statute beyond just discrimination because of biological gender and what the Congress in 1964 might have envisioned. However, the dissenting opinions disagree and argue the contrary. The point that the dissents want to make is that, in their view, no relevant Court, previous to this decision, has interpreted sexual orientation or transgender discrimination as a part of sex discrimination and this should be evidence that it is not. The precedent and legal practice is used as evidence of ordinary meaning. Both parties also use previous cases to quote interpretations about how textualism should be used and what should be taken into account in a textualist reading.

Kavanaugh as well as Alito both lean on decisions given in lower courts to show that the judicial interpretation of the law in Title VII had been uniform for 50 years, Justice Alito stating that in Circuit Courts the rulings about sexual orientation discrimination were uniform until 2017 and rulings handling transgender discrimination were uniform until 2007.[69] These lower court decisions are a way to show ordinary meaning and that the law established in Title VII was interpreted in the same way by judges for years. This is shown as evidence of the common understanding and interpretation of Title VII law.

The majority leans on the Supreme Court's precedent on the interpretation of Title VII and argues that the judgement is in line with the practice that Title VII is, and has been, read broadly to encompass discrimination not purely based on biological sex. It analogizes the existing precedents to *Bostock*. There are three key cases handling Title VII that the majority opinion uses; *Phillips v Martin Marietta Corp*., *Los Angeles Dept. of Water and Power v. Manhart* and *Oncale v. Sundowner Offshore Services, Inc.* From these three precedents, the Opinion of the Court finds three important established ideas, that it applies to *Bostock*; 1) "it's irrelevant what an employer might call its discriminatory practice, how others might label it, or what else might motivate it", 2) "the plaintiff 's sex need not be the sole or primary cause of the

[68] Opinion of the Court p. 12.
[69] Kavanaugh, J. Dissenting p. 4 and p. 21- 22; Alito, J. dissenting p. 44; until 2017 reference is form Alito J. dissenting p. 7 and p. 43-44.

employer's adverse action" and 3) "an employer cannot escape liability by demonstrating that it treats males and females comparably as groups".[70] The majority opinion established that it is not relevant if the employers in *Bostock* call their practice discriminatory because of transgender or homosexual status, because it still "necessarily and intentionally discriminates against that individual in part because of sex".[71] Additionally, it is irrelevant if the employer can name an additional trait besides sex, because sex does not need to be the only reason for the action. Showing this, the majority wants to point that the precedence existing supports the interpretation that discrimination because transgender or homosexual status goes within the scope of Title VII and the precedent stays consistent with this ruling.

Alito addressed these three points in his dissenting opinion.[72] His claim is that all of these points are true, but none of them are relevant to the case, because in his opinion, discrimination because of sexual orientation or gender identity is not discrimination because of sex. He attempts to distinguish the precedent from *Bostock* and show that, in his opinion, it does not provide relevant guidelines for this case. He argues that *Manhart* and *Phillips* are fundamentally cases about discrimination purely based on biological sex.[73] Additionally, he argues that the difference between *Oncale* and *Bostock* is that *Oncale* fits the ordinary public meaning in 1964, while *Bostock* does not.[74] Kavanaugh's dissenting opinion does not speak about these cases directly, but he gives different Supreme Court cases as an example that "the Court never suggested that sexual orientation discrimination is just a form of sex discrimination".[75] The majority of these cases did not handle Title VII. All of this is trying to prove that the majority opinion, in their view, has no significant support in precedent. This mirrors the difference in defining Title VII, that I handled previously.

There is also *Price Waterhouse v. Hopkins,* that the briefs of Bostock, Zarda and Stephens argue established that discrimination based on sex stereotypes is sex discrimination. Transgender or homosexual status is based on the stereotype, that a person should only be attracted to the opposite sex or present as the sex they are born into. The majority opinion does not directly take a stand on the lesson of the case, but it uses sex stereotypes in a couple of their examples[76] and quotes *Price Waterhouse* stating that an individual employee's sex is

[70] Opinion of the Court, p. 14-15.
[71] Opinion of the Court, p. 14.
[72] Alito J. Dissenting p. 36 forward.
[73] Alito J Dissenting, p. 38.
[74] Alito J. Dissenting, p. 37.
[75] Kavanaugh J. Dissenting p. 20.
[76] Opinion of the Court p. 12 and p. 23.

"not relevant to the selection, evaluation, or compensation of employees".[77] Justice Alito disagreed about the lesson *Price Waterhouse* provides in his dissenting opinion, where he asserts that Title VII does not prohibit discrimination based on sex stereotypes.[78] He declares that stereotypes can only be used as evidence of discrimination because of sex. Alito's opinion is that because heterosexuality is something that can be expected from both men and women, thus applies equally to both genders, it is not a sex-specific stereotype and not discrimination (because of sex).[79] Nevertheless, was it not established precedence in *Manhart* that Title VII is a statute about individual protection? In the Brief of petitioner Gerald Lynn Bostock, it is maintained that nowhere does it state "that the stereotype must be sex-specific to men or women as such, rather than sex-based as to the individual employee".[80] One can't easily deny that part of the forementioned stereotype is based on sex. A division between sex-specific and sex-based arguments is also a variation in argumentation seen in the opinions and the briefs. Alito admits that there may be cases where trans or homosexual individuals may have a case based on sex stereotypes, but he firmly denies that it is possible here.[81]

In the background of the use of precedent is the thought that same cases should be treated similarly. For the dissents, this means in line with the lower court judgements and in keeping with the idea that discrimination based on these qualities has not been seen as sex discrimination. For the majority this means correspondingly to the Supreme Court precedent on Title VII. There is also the notion that the society has changed and this is why the cases are treated differently. This is something that the dissents criticise the majority for. The majority does acknowledge that the society has changed, but they base their arguments on the language of Title VII and the previous precedent that is applied similarly in this case. The majority states that the broad language of Title VII often produces new interpretations and authorizes including these groups under the protections and they do not hesitate to acknowledge that.

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[77] Opinion of the Court p. 9.
[78] Alito J. Dissenting p. 18.
[79] Alito J. Dissenting, p. 19; same idea is presented in the Brief of respondent Clayton County, Georgia p. 8.
[80] Brief of petitioner Gerald Lynn Bostock, p. 28.
[81] Alito J. Dissenting p. 19.

5 Application of Title VII

We are left with a different understanding of what the statute means and how the precedent and legal practice affect it. Now I turn to look more closely at how those interpretations were applied to transgender and homosexual discrimination and how the parties supported the fact that discrimination based on these qualities is, or could not be discrimination because of sex.

The majority comes to the conclusion that it is impossible to discriminate because of transgender or homosexual status without at least partly discriminating because of sex, because the discrimination is at its core based on (biological) sex and thus the individuals were fired at least partly based on their sex. The majority uses an example of two employees who have a female partner. When the only difference between the employees is their gender, making the other employee heterosexual and the other homosexual, firing the homosexual employee is based on sex, because the only thing traded is the gender of the employee.[82] The same kind of example is made by the court regarding transgender individuals. If you have two employees identifying as female and the only difference is that the other employee was identified as a male at birth, the discrimination against the latter is based on sex. The majority states that this penalizes LGBTQ-employees for traits employers tolerate in other employees, such as (men's) attraction to women and (a biological woman) presenting as a woman. The majority gives several examples and justifies the reasoning in various ways, but the core point is that ultimately, when discriminating because of homosexual or transgender status, you have to rely on sex-based rules and it is impossible to discriminate on those bases without sex being in some but-for role in the decision. The discrimination would not occur if you changed the sex of the employee in the situations alike the examples presented. The majority opinion ends stating that:

> In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee's sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law.[83]

The dissents point out that the terms sexual orientation or gender identity are not on the list of Title VII's listed qualities. To them, that means that they are not prohibited grounds for discrimination. They state that the discrimination must be based on biological sex and these are

[82] Opinion of the Court p. 9-10.
[83] Opinion of the Court p. 33.

not. 'Sex', 'sexual orientation' and 'gender identity' are distinct concepts. "And neither 'sexual orientation' nor 'gender identity' is tied to either of the two biological sexes", Alito argues.[84] Kavanaugh has a similar point and he states that

> To fire one employee because she is a woman and another employee because he is gay implicates two distinct societal concerns, reveals two distinct biases, imposes two distinct harms, and falls within two distinct statutory prohibitions[85]

The Court answers this claim by stating that "when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule".[86] That means that because "as enacted, Title VII prohibits all forms of discrimination because of sex", discrimination based on the transgender or homosexual status are prohibited because they are forms of discrimination because of sex.[87] To Kavanaugh's point, I would also argue that firing someone because they are a woman and firing someone because of sexual harassment implicates two distinct societal concerns and distinct harms, but either way, both are within the Title VII protections, under the provision of discrimination because of sex.

One point that the dissenting opinions disagree on is the point of comparison. They state that in the majority's examples, the majority is not only changing the sex of the individual but the sexual orientation or gender identity of the comparison. Alito and Kavanaugh state that the appropriate comparison is between a man who is attracted to men and a woman who is attracted to women as well as a transgender woman and a transgender man.[88] They state that because between those groups the only thing in common is sexual orientation or gender identity, and because those groups are treated equally, that is proof that gender plays no role in the action and sexual orientation or gender identity is the decisive trait. However, the court answers this by stating that it is not the right comparison and that showing this, the employee only doubles their discrimination.[89]

The dissents argue that it is possible to discriminate because of transgender or homosexual status without relying on sex. Garden summarized Alito's point like so:

[84] Alito J. dissenting. p. 7.
[85] Kavanaugh. J. dissenting p. 12.
[86] Opinion of the Court p. 19.
[87] Opinion of the Court p. 19.
[88] Alito J. dissenting p. 17 ; Kavanaugh J. dissenting p. 12.
[89] Opinion of the Court. p. 12.

> Discrimination based on sexual orientation or gender identity is different than discrimination based on sex, in part because an employer could discriminate without knowing an applicant's sex, if they knew that they identified as LGBT.[90]

Alito uses an example that checking a box indicating a person is homosexual or transgender is possible without knowing the gender of the applicant and that is an example that discrimination independently based of those traits is possible without knowing the biological sex of the person.[91] The majority answers this in their opinion showing the flaws of this approach by, for example, stating that you can't explain the terms 'sexual orientation' or 'gender identity' to someone who does not know what the terms mean without using the word 'sex'. They also compared it with similar situations regarding religious protections in Title VII.[92] The majority opinion used race in the same example as comparison,[93] but the at least Alito argued that it is not comparable,[94] because the race-question has such a strong historical background in the U.S.A.

Overall, there is a difference in argumentation that can be traced to the difference that the majority looks at the language of the statute and what it entails, while the dissents focus more on the fact that, in their view, sex discrimination and discrimination because of gender identity or sexual orientation are distinct concepts. For example a lot of Kavanaugh's argumentation focuses on the fact that most courts, legislators and state actors have not previously seen sexual identity discrimination as a part of sex discrimination. What the majority is doing, is focusing more on what is discrimination because of sex and basing their arguments on the fact that these forms of discrimination are based on sex. They acknowledge that biological gender, sexual orientation and gender identity are distinct categories,[95] but they focus on the language of the statute and the understanding that the discrimination needs to be based on sex. This difference in argumentation can easily be seen to be a continuum of the different definitions given to Title VII. The majority argues that the discrimination needs to be based on sex and tries to prove that it is. The dissents argue that the discrimination needs to be purely based on biological sex and thus argue that the concepts in this case are distinct and not because of purely biological sex.

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[90] Garden 2020, p. 123.
[91] Alito J. dissenting, p. 10.
[92] Opinion of the Court p. 18.
[93] Opinion of the Court p. 18.
[94] Alito J. dissenting p. 10, 20-21.
[95] Opinion of the Court p. 19.

6 Ideological aspects

6.1 Ideological background generally

A battle between conservative and liberal ideologies was one factor in this case. The decision has been praised by many to be "particularly remarkable because the majority was ideologically diverse: two conservative justices joined with the Court's liberal bloc".[96] However, many (conservatives) found it surprising and some disappointing that the two conservatives sided with the liberals in supporting LGBTQ-rights.[97] The case was deemed to be conservatives opposed to liberals even outside of any legal justifications. This case managed to break up that distinction by using sound logic and the language of the law. The use of the conservatively connected textualism to produce a more liberal outcome ensued but was highly debated. A win for the LGBTQ-community followed, but the conservative justices ended up facing criticism by their own block. For example Colby stated the following:

> the most troubling is that the conservative justices, in joining the Bostock majority, failed a generation of law students and young lawyers by abandoning the principles of judicial restraint that they had previously publicly championed.[98]

In addition, one thing that affected the argumentation in the background was homophobia and transphobia. Most prominently the Brief of petitioner R.G. & G.R. Harris Funeral Homes ended in a very transphobic note by going the furthest with unwarranted and unrelated notes to the case, when it presents statistics that sex-reassignment surgeries have negative results and stating that:

> The science regarding gender identity is far from settled, and there are deep disagreements over whether otherwise healthy bodies should be physically modified to align with the mind, . . . , The opposite approach—aligning one's mind with the body—has traditionally been the preferred method for treating other dysphorias.[99]

Most prominently Alito borrowed most of the consequentialist arguments from this brief. The arguments can be seen as unwarranted and not related to the case. All of this is to show that the issue goes deeper that just the textualist interpretation of a law. In the background is the all too common negative ideas about the LGBTQ-community that are present in the U.S. society, firmly related to the religious and in big part also conservative ideologies. The following

[96] Akers 2021, p. 116.
[97] Colby 2020, p. 54 and p. 56.
[98] Colby 2020, p. 54.
[99] Brief of petitioner R.G. & G.R. Harris Funeral Homes, Inc, p. 54, also the statistics are found in this page.

sections will handle argumentation that can be seen to be ideologically and politically colored in the background and a lot of them represent an apprehensive view of transgender people.

6.2 Policy Consequences

In his dissenting opinion, Alito brings forward possible consequences that the ruling might have. These are mostly taken from the briefs representing the employers and their amicus curiae. He criticises the Court for not providing an answer to these questions. This form of argumentation presents a mild form of argumentation called consequentialist argumentation, which argues based on consequences. Harvard Law Review's article defines that "rule consequentialism, evaluates legal rules solely based on their consequences. Legal rules, on this view, may (or must) go into effect if and only if justified by their consequences".[100] This is something that the definitions on textualism argued that textualism does not concern itself with.

While the Court expanded employment protections to include LGBTQ-individuals, the majority opinion ended in an open statement about religious exemptions to the protections. The Court states that there might be avenues in which religious exemptions might effect the established LGBTQ-protections and vaguely contended about the importance of religious freedom. The majority of the Court refused to take a stand on these issues, because there was no religious claims presented in *Bostock*. The briefs and Alito argued that religious freedom is in conflict with this decision and religious freedom should be considered in this case. Religious exemptions might pose the biggest risk for the legal protections established in *Bostock,* because there exists multiple possible ways organisations might appeal to their religious freedoms and overtake the LGBTQ-protections. This is an issue left unresolved and it has produced varied conclusions in lower courts.

One of the biggest and, to this case, irrelevant worries Alito and the briefs presented is the issue of bathrooms, locker rooms and such. Alito argues that "it is a matter of concern to many people who are reticent about disrobing or using toilet facilities in the presence of individuals whom they regard as members of the opposite sex".[101] He brings up that this can be an issue of modesty or for example issue for women who have been victim to sexual assault or abuse.[102] This is not a new issue in the United States. Sixteen States have considered adoption

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[100] Harvard law Review 2017, p. 1438.
[101] Alito J. dissenting p. 45.
[102] Alito J. dissenting p. 45.

legislation that prevents trans individuals from using bathrooms, locker rooms and other sex-segregated facilities that is not in accordance their biological sex.[103] These have not had effective outcomes.[104] The argument is that under the decision in *Bostock,* transgender and gender fluid persons might feel that they are now entitled by the law to use the facilities that coincide with their gender identity. Alito sees this as a bad thing and especially as a problem in schools. This is also a notion debated in the briefs and largely dominating the oral argumentation in *R.G. & G. R. Harris Funeral Homes Inc v. EEOC,* especially in the questions presented to the employee's presentative.

An other issue Alito brings forward is women's sports.[105] He states that under Title VII and Title IX might arise "the right of a transgender individual to participate on a sports team or in an athletic competition previously reserved for members of one biological sex".[106] The claim is that the transgender individuals have a "very significant biological advantage"[107] and that is unfair to the competition and harmful for sports. This again is not a new issue and there also has been attempted State legislation regarding this topic.[108] Alito brings forward the issue of housing, most prominently colleges that don't want to assign roommates that are of different biological sex.[109] Alito also raises concerns about the effects to healthcare relating to sex-reassignment surgeries and their coverage under employer-provided health insurance. He also feels this decision will restrict freedom of speech, because failing to use the person's preferred personal pronouns may in his opinion be claimed to breach federal laws prohibiting sex discrimination.[110] It may also "pressure employers to suppress any statement by employees expressing disapproval of same-sex relationships and sex reassignment procedures".[111] Alito's last claim is that there will be a gravitational pull in constitutional cases after *Bostock* and "the entire Federal Judiciary will be mired for years in disputes about the reach of the Court's reasoning".[112]

In the Opinion of the Court, the majority dismisses all of these "naked policy appeals" stating that when asked to consider them, the suggestion is that they abandon the law's guidance and

[103] Gilroy et al. 2021, p. 465.
[104] Gilroy et al. 2021, p. 465-467.
[105] Alito J. dissenting p. 47.
[106] Alito J. dissenting p. 47.
[107] Alito J. dissenting p. 47.
[108] Gilroy et al. 2021 p. 467-468.
[109] Alito J. dissenting p. 48.
[110] Alito J. dissenting p. 51-52.
[111] Alito J. dissenting p. 52.
[112] Alito J. Dissenting p. 52-53.

do what they think is best.[113] The court feels that considering these possible consequences would end up ignoring the clear language of the statute in favour of an ideological concern. They point out that the place to solve these issues is in the Congress by means of legislation. The Court points out that none of the issues are at hand in *Bostock* which is why they will not address them.[114] The majority also states that they do not even claim to address the issues of bathrooms, dressing rooms and such under Title VII.[115] In Spindelman's article he argues that at the background of the refusal to address these is Gorsuch's "lingering anxieties" about what the judgement will do.[116] Even though Gorsuch wrote the majority opinion, he has "voiced reservations" about the "massive social upheaval" that this decision might bring forward and that is why he is argued to strategically leave more "culturally charged legal conclusions" to be determined later.[117]

These are all claims based on hypotheticals about future situations and are located on the conservative and religious side of ideologies. The consequentialist claims are at their core not so well masked transphobia. They have nothing to do with the case and that is why the majority found them unconvincing and Kavanaugh did not mention them in his dissent. For example, regarding Alito's concerns on sexual assault victims, in 2018 more than 300 sexual assault and domestic violence victims signed a statement where they supported trans persons' right to use the facilities and said that it is not an issue to them.[118] However, these topics are highly debated concerns in the U.S. society and are based on the conservative ideologies that include transphobia and homophobia.

There was also a rule-of-law aspect to this decision. The majority's opinion included "the rule- of-law ideal of legal justice", "a distinctive way of discussing formal equality in the rule-of-law setting- broadly and procedurally requires, to use *Bostock's* language, that 'all [similarly situated] persons' are to be treated alike in the eyes of the law, 'entitled to' all the same 'benefit[s] of the law's terms' as everybody else".[119] Kavanaugh had his own rule-of-law arguments, but he focused on the separation of powers and democratic accountability concerns.[120]

[113] Opinion of the Court p. 31.
[114] Opinion Of the Court p. 31.
[115] Opinion of The Court p. 31.
[116] Spindelman 2021, p. 558.
[117] Spindelman 2021, p. 558-559.
[118] Gilroy et al. 2021 p. 468.
[119] Spindelman 2021, p. 591-592.
[120] Spindelman 2021, p. 590-591.

7 Conclusion

To conclude, a lot of the argumentation bases itself on the different strands of textualism and a different view on what is the correct way to use it. The argumentation focused on how textualism should be applied to interpret Title VII, what precedent means to the case and how sex discrimination must be interpreted. In the background of this separation can be seen debates between judicial creativity and judicial restraint, strict legality and societal consequences, same cases similarly versus changes of society thinking and history opposed to means-end scrutiny. The most expected difference was between liberal versus conservative ideologies. However, the decision was significant because it managed to mix up the expected setting of liberals opposed to conservatives by getting two conservatives to back up and even write the opinion. The ideological aspects of transphobia and homophobia were also present and effected the textualist outcomes. This case showed the uncertain nature of textualism and managed to use the more conservative technique to produce a liberal outcome.

There still remain other major obstacles to victims of employment discrimination. In her article, Wyman presents that employment discrimination cases have had "abysmal success rates" in the past and it is possible that victims will struggle to get their Title VII discrimination cases to court.[121] However, Wyman states that *Bostock* might also change this for the better. Additionally, Justice Gorsuch used narrow language, referring only to transgender and homosexual persons when writing his majority opinion, that can lead to some problematics in the future.[122] Religious exceptions might also limit the effects of the established protections.

All in all, this case was a monumental win for the LGBTQ-community that even Justice Kavanaugh congratulated them on in his dissent. It was highly debated, but ended up granting important employment protections to vulnerable groups that statistically had endured a fair share of workplace discrimination. Overall, the majority delivered a powerful message in their opinion and justified it well. Before the decision, the employers felt free to openly discriminate based on these grounds and thought that nothing would come of their actions. This is why, what the Court did in *Bostock* is extremely important. The decision shows employers that the law does not allow this kind of discriminatory behaviour and that all individuals truly are equally protected by the law. The majority's opinion has been praised by liberals and

[121] Wyman 2020-2021, p. 63.
[122] See for example Blazucki, The Equal Rights Amendment & the Equality Act.

(some) conservatives and has had important consequences for the usage of employment protection laws and in part other legal protections. The protections have had affects on the use of multiple related laws that prohibit sex discrimination. This was truly a landmark decision that produced a surprising but exceedingly important conclusion. The use of conservative driven textualism and the fact that the opinion was diverse over ideological lines ultimately gives the decision more credibility. At the end of the day it was a well justified opinion that hopefully will not be overturned any time soon and will produce effective results in preventing LGBTQ-workplace discrimination.