THE CASE FOR INCLUSION

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Another Victory in the L.G.B.T.Q.-Rights Movement

BY BOWDITCH & DEWEY • JUNE 26, 2020

The "single biggest victory in the history of the L.G.B.T.Q.-rights movement" is what one combatant called the Supreme Court's decisions by 6 to 3 majorities in three cases decided on Monday, June 15, 2020. The decision, the first written by Associate Justice Neil Gorsuch since he joined the Court, found it an easy job to interpret the meaning of the Civil Rights Act of 1964's prohibition on job discrimination based on sex. The first two paragraphs of the opinion eloquently make his point:

> 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.
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> 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.

This decision, with its clarity and sweeping language may have impact on many other government policies, among other things, President Trump's campaign to eliminate transgender rights in health care, the military, housing, and education. Scholars think that these policies cannot be maintained after these decisions.

Conservative Christian groups are concerned that this ruling would affect their current practice, based on their interpretation of the basic tenets of Christianity, of not hiring or, upon discovery, terminating L.G.B.T. workers. On the other hand, Americans United for Separation of Church and State said that they and their allies "must come together to make clear the religious freedom is a shield that protects, not a sword that licenses discrimination."

The dissents were vigorous. This is from Associate Justice Samuel Alito:

> 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*.
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> It indisputably did not.

Later in the opinion he says that the "arrogance of this argument is simply breathtaking." In an appendix to his opinion, he listed over 100 federal statutes that prohibit discrimination because of sex. There may be fighting in the courts about it, but this decision is likely to have far reaching consequences for L.G.B.T.Q. people.