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Gay Rights and Trans Rights Are Indivisible. SCOTUS Just Showed Why.

By ALEXANDER CHEN
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Outside the U.S. Supreme Court on Monday.
Jim Watson/AFP via Getty Images

Since the start of the modern LGBT movement in the 1960s, some members of the community have questioned the degree of common interest between

lesbian, gay, and bisexual people on the one hand and transgender people on the other. Notwithstanding similar experiences of discrimination and a shared history of activism, members of both communities have sometimes viewed one another with mutual suspicion. LGB people, protective of hard-won legal, political, and societal victories, have worried that association with an even more unfamiliar and stigmatized minority group would imperil those advances. Trans people, weary of advocates prioritizing gay rights over trans rights, have worried that LGB people might achieve greater equality and then abandon the field without extending a hand to transgender people. But the Supreme Court's landmark decision on Monday in *Bostock v. Clayton County* provides the strongest possible counterargument that when LGBT people band together to press for rights for the entire community, they can achieve momentous victories that would not have been possible working on their own.

The Supreme Court's decision in *Bostock* focused on the meaning of sex discrimination for the purposes of Title VII of the Civil Rights Act of 1964, which restricts discrimination in the workplace. Writing for a 6–3 majority, Justice Neil Gorsuch ruled that discrimination on the basis of sexual orientation *and* discrimination on the basis of gender identity are forms of sex discrimination. At different intervals, both gay and trans cases have played critical roles in developing the legal reasoning that resulted in Monday's decision.

From the moment of the bill's passage in 1964, LGBT plaintiffs began filing lawsuits against employers, arguing that they are protected by the ban on sex discrimination. In the 1960s and 1970s, those arguments were uniformly rejected by the federal courts, which viewed sexual orientation and gender identity discrimination as distinct concepts from sex discrimination. Many federal judges also viewed LGBT people as sexual deviants undeserving of rights.

The legal landscape shifted, however, with the Supreme Court's 1989 decision in *Price Waterhouse v. Hopkins*. In *Price Waterhouse*, Hopkins was denied a partnership at her accounting firm because she was deemed insufficiently feminine. Price Waterhouse, her employer, argued that it hadn't discriminated against Hopkins because she was a woman, but rather because she was too "aggressive." The Supreme Court rejected this argument. In its plurality opinion, the court explained that sex discrimination encompassed discrimination on the basis of sex stereotypes concerning how men and women ought to behave.

Hopkins opened the door for LGBT plaintiffs to make arguments that sexual orientation and gender identity discrimination are forms of sex discrimination based on sex stereotyping. Federal courts initially proved more receptive to this argument with respect to trans plaintiffs than gay plaintiffs. In a series of cases in the early 2000s, courts recognized that gender identity discrimination is always a form of sex discrimination based on sex stereotyping. This is because, as the 11th U.S. Circuit Court of Appeals

wrote in *Glenn v. Brumby*, “a person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes.”

Over time, courts also began to adopt a simpler explanation for why gender identity discrimination is sex discrimination by itself, without using a sex stereotyping theory. Discrimination based on transgender status, they recognized, is inherently sex-based, because transgender status is defined by a difference between a person’s gender identity and their sex assigned at birth. Both of these characteristics are sex-related. In legal parlance, this theory asserted that anti-LGBT discrimination is sex discrimination *per se*.

Appellate courts then began to realize the same arguments applied to sexual orientation. First, courts began to understand that anti-gay discrimination also stems from sex stereotypes: that men should act masculine by being attracted to women, while women should act feminine by being attracted to men. Second, courts started recognizing that it is also impossible for anti-gay discrimination to not be sex-related. If a woman is fired for marrying a woman, but she would not have been fired had she been a man doing the same thing, she experienced sex discrimination *per se*. By the time the Supreme Court agreed to hear the LGBT Title VII cases, dozens of courts had recognized that anti-transgender discrimination is sex discrimination. A growing number had found that anti-gay discrimination is sex discrimination, too.

But if trans cases led the way in the lower courts, the gay cases arguably clinched the victory before the Supreme Court. Prior to the oral arguments, many legal observers believed that there was a stronger doctrinal foundation for a favorable ruling in the trans case than in the gay cases. At oral argument in October, though, the justices seemed far more concerned with the potential ramifications of a ruling in favor of the transgender plaintiff, Aimee Stephens, than one in favor of the gay plaintiffs, Gerald Bostock and Donald Zarda. Gorsuch, who ended up writing the majority opinion in favor of all three plaintiffs, expressed concern that “massive social upheaval” would result if Stephens won. And Justice Sonia Sotomayor, a liberal, noted the “very powerful” concern that a favorable decision might result in a cisgender woman staying overnight in a woman’s shelter with a transgender woman.

Ultimately, these concerns did not affect the substance of the majority opinion. The court found that anti-LGBT discrimination is sex discrimination because “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.” As the court explained, discriminating against someone for being gay or trans inevitably entails treating that person differently because of their sex. If you fire Mark for bringing his husband to the company Christmas party, and you wouldn’t have fired Susan for bringing that same husband, you are treating Mark differently based on his sex. Similarly, if you fire Louisa for presenting herself as a woman at the company Christmas party because she was assigned male at birth, and you wouldn’t have fired

her for doing so if she had been assigned female at birth, you are treating Louisa differently based on the sex she was assigned at birth.

In other words, Gorsuch chose to adopt the per se discrimination theory rather than the sex stereotyping theory. This may be because the court focused more of its analysis on the sexual orientation cases, where courts have tended to find the per se theory more persuasive as applied to gay plaintiffs. In a gay case, the sex stereotype at issue often *is* the sexual orientation of the plaintiff, whereas in a trans case, courts often focus on the way the plaintiff is dressed or expresses their gender identity, which may seem more like a traditional sex stereotype.

In turn, the per se approach provided an important benefit in the transgender case by obviating the need for the court to discuss the sex stereotyping cases. Those cases were troubling because they often effectively treated trans people like cross-dressers. In early cases like 2000's *Rosa v. Park West Bank & Trust Co.*, for instance, the 1st U.S. Circuit Court of Appeals ruled that it was sex stereotyping for a bank to deny service to a plaintiff who was assigned male at birth but dressed in women's clothing. This framing resulted in the court describing the plaintiff as a cross-dressing man who was being discriminated against for being insufficiently masculine, when in fact she was a transgender woman.

By contrast, under Gorsuch's *per se* analysis, a transgender woman who is fired for acting feminine in the workplace is compared to a cisgender woman, not a cross-dressing man. As Gorsuch wrote, "if the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth." Gorsuch's explanation assumes that transgender women should be treated the same as cisgender *women*, not the same as gender-nonconforming *men*.

Thus, the gay and trans cases helped each other succeed before the Supreme Court. The success of the trans cases in the lower courts using the earlier sex stereotyping theory helped courts initially understand that anti-LGBT discrimination constitutes sex discrimination. And the focus on the gay cases before the Supreme Court likely influenced the court's adoption of the *per se* theory, which in turn validated the gender identity of the transgender plaintiff.

In addition, by analyzing the two sets of cases together, and applying the same legal theory to both, the court was able to let the trans issue recede into the background. This made it easier for the court not to “prejudge” the concerns voiced by the justices at oral argument about what bathrooms, locker rooms, and dress codes transgender employees would use, and avoid inserting any harmful limits on transgender rights into the opinion. The court also reinforced the implicit validation of Aimee Stephens’ female gender identity by using female pronouns to refer to her throughout the opinion. These analytical and linguistic moves allowed the court to legitimate Stephens’ gender identity as a woman, even as the court declined to formally define sex in the opinion.

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The immediate result of *Bostock* is that the millions of LGBT Americans who lived in the nearly 30 states without explicit protections for LGBT people in the workplace became safe, for the first time in their lives, from being fired from their jobs simply for being themselves. But the downstream consequences are more significant even than that, because the logic of the court's decision applies in any instance where the law bars sex discrimination. As Justice Samuel Alito's dissent helpfully pointed out, more than 100 federal statutes bar sex discrimination, including in education, housing, and health care. And that is to say nothing of constitutional protections against sex discrimination. In all of these areas, courts are highly likely to now rule that LGBT people are also protected. Indeed, in many of these contexts, some courts already have.

Monday's historic victory is a testament to the value of minority groups working together to advance one another's rights. The pioneering work of the civil rights and women's rights movements to pass the Civil Rights Act in 1964 and expand its scope paved the way for the LGBT nondiscrimination cases. And for a generation, transgender attorneys working with historically LGB organizations, gay attorneys working with trans organizations, and LGBT attorneys in private practice have all collaborated—together with

courageous plaintiffs, tireless activists, and straight and cisgender allies—to establish the formal equality of LGBT people before the law. That should be a lesson we take into the future as we continue to work to advance the cause of justice. 🏳️‍🌈

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