

The Creation of Positive Rights Leads Ominously to the Creation of Still More

If time allows, you may want to mention the Supreme Court decision in *Bostock v. Clayton County*, which included a case¹ involving Harris Funeral Homes in Michigan. The decision came down on June 15, 2020. In the Harris Funeral Homes case, Anthony Stephens, a male who had worked at the funeral home for almost six years, decided to dress and present as a woman. He worked directly with families at the funeral home but still insisted on acting out his preferred gender identity. Alliance Defending Freedom, who represented the owner of Harris Funeral Homes in the case, explains,

Harris Funeral Homes hired Stephens in 2007 as a funeral director, a position that serves as the face of the funeral home. Stephens agreed to follow the funeral home's policies, including the sex-specific dress code, at the time of hire. And Stephens complied with those policies until nearly six years later, when Stephens gave [owner] Tom [Rost] a letter insisting on a plan to dress as a woman when interacting with the grieving families that the funeral home serves.²

After much prayer, reflection, and anguish, Rost felt he had no other choice but to let Stephens go. Stephens sued, and the case made its way all the way to the Supreme Court. In a 6-to-3 decision, the Court ruled that in prohibiting discrimination based on "sex," the Civil Rights Act of 1964 also prohibits discrimination on the basis of sexual orientation and gender identity. This despite the fact it is beyond dispute that no one had these issues in mind in 1964 when the law was passed. This is a clear example of a government entity (in this case the Supreme

Court), carving out and fashioning positive rights for a select few. Yet the decision clearly tramples on the negative rights of others.

Discuss how.

This also is an unambiguous example of a court acting as a legislature—way outside its area of constitutional responsibility. It is the job of the legislature to pass new laws, not the job of the judiciary. Judges and courts are to interpret laws, not create them.

Point out that prohibiting discrimination on the basis of things like race and sex means prohibiting it on the basis of inherent, innate traits—the color of one's skin and whether one is a biological male or female. But prohibiting it based on sexual orientation and gender identity means outlawing it on the basis of, not what a person *is*, but on what he or she *does*. I mean no disrespect to anyone experiencing same-sex attraction or homosexuality here. I'm just stating facts. While some factors contributing to homosexuality are not chosen, choices are undeniably involved, at least to a significant extent, in every such situation.

Mark it down! At the root of the Court's decision is same-sex marriage, another positive right imposed by the Court on June 26, 2015 in a case known as *Obergefell*. As John Stonestreet says in his *BreakPoint* commentary of June 16, 2020, "Remember when we were also told *Obergefell* would have no bearing on religious freedom or other issues? Certain ideas, when imposed, make other ideas possible, even necessary. Yesterday's decision would have never happened without *Obergefell*."³

Notes: ¹<https://bit.ly/3ea1YZF> ²<https://bit.ly/30QoD9A> ³<https://bit.ly/2UQkLBI>

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