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**Josh Hawley**

*Senate Floor Speech on USSC Bostock v. Clayton County*

delivered 16 June 2020



[AUTHENTICITY CERTIFIED: Text version below transcribed directly from audio]

Madam President, I rise today to offer a few thoughts about the [Bostock case](#) handed down by the Supreme Court yesterday. I have it here. Now had the chance to read the case, the decision by the majority of the court, and the two dissenting opinions. And I have to say, I agree with the news reports that have said that this is truly a seismic decision. It is truly a historic decision.

It is truly a historic piece of legislation. This piece of legislation changes the scope of the [1964 Civil Rights Act](#). It changes the meaning of the 1964 Civil Rights Act. It changes the text of the 1964 Civil Rights Act.<sup>1</sup> In fact, you might well argue it is one of the most significant and far-reaching updates to that historic piece of legislation since it was adopted all of those years ago.



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And make no...doubt about it. I mean, make no mistake. This decision, this piece of legislation, will have effects that range from employment law to sports to churches.

There's only one problem with this piece of legislation. It was issued by a court, not by a legislature. It was written by judges, not by the elected representatives of the people. And it did what this Congress has pointedly declined to do for years now, which is to change the text and the meaning and the application and the scope of a historic piece of legislation.<sup>2</sup>

You know, it's significant, I think, Madam President, for another reason, as well. This decision, this Bostock case and the majority who wrote it, it -- it represents the end of something: It represents the end of the conservative legal movement, or the conservative legal project, as we know it. After Bostock, that effort as we know it, as it has existed up to now -- it's over.

And I say this because if [textualism](#) and [originalism](#) give you this decision, if you can invoke textualism and originalism in order to reach a decision, an outcome, that fundamentally changes the scope and meaning and application of statutory law, then textualism and originalism and all of those phrases don't mean much at all.

And if those are the things that we've been fighting for -- it's what I thought we had been fighting for, those of us who call ourselves legal conservatives -- if -- if we've been fighting for originalism and textualism, and this is the result of that, then I have to say it turns out we haven't been fighting for very much. Or maybe we've been fighting for quite a lot, but it's been exactly the opposite of what we thought we were fighting for.

Now, this is a very significant decision and it marks a turning point for every conservative. And it marks a turning point for the legal conservative movement. You know, the legal conservative project has always depended on one group of people in particular in order to carry the weight of the votes to actually support this out in public, to -- to get out there and make it possible electorally. And those are religious conservatives. (And I am one myself.) Evangelicals, conservative Catholics, conservative Jews, they're the ones -- let's be honest -- they're the ones who have been the core of the legal conservative effort.



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And -- And the reason for that dates back decades now, back to the 1970s. The reason for that is these religious conservatives, from different backgrounds -- but what they have consistently sought together was protection for their right to worship, for their right to freely exercise their faith as the First Amendment guarantees, for their right to gather in their communities, for their right to pursue the way of life that their scriptures variously command and that the Constitution absolutely protects.<sup>3</sup> That's what they have asked for; that's what they have sought all these years.

But, as to those religious conservatives -- how do they fare in yesterday's decision? What will this decision mean, this rewrite of [Title VII](#)? What will it mean for churches? What will it mean for religious schools? What will it mean for religious charities?

Well, in the many pages of [its opinion](#), the majority -- 33 pages to be exact -- the majority does finally get around to saying something about religious liberty -- on one page. What does it say? Here's the substance of the court's analysis: "How the[se] doctrines protecting religious liberty interact with Title VII," as reinterpreted now by the court, "are questions for future cases." Let's have that again: "How the[se] doctrines protecting religious liberty interact with Title VII are questions for future cases."<sup>4</sup>

Oh, no doubt they are. Huge questions. And we eagerly await what our "Super-Legislators" across the street in the Supreme Court building, there at 1 First Street -- how they will legislate on this question. What will become of church hiring liberty? What will become of the policies of religious schools? What will become of the fate of religious charities? Who knows? Who's to say? They're questions for "future cases."

Now I will say this in defense of the Court: It is difficult to anticipate in -- in one case all future possible implications. That's why courts are supposed to leave legislating to legislators. That's why Article III does not give the United States Supreme Court or any federal court the power to legislate, but only the judicial power to decide cases and controversies, not to decide policies.



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But I will also say this: that everybody knows, every honest person knows, that the laws in this country today, they're made almost entirely by unelected bureaucrats and courts. They're not made by this body. Why not? Because this body doesn't want to make law. That's why not. Because in order to make law, you have to take a vote. In order to vote, you have to be on the record. And to be on the record is to be held accountable.<sup>5</sup> And that's what this body fears above all else, Madam President. This body is terrified of being held accountable for anything, on any subject.

So can we be so surprised that where the legislature fears to tread, where the Article I body -- this -- this body that is charged with the Constitution for legislating, refuses to do its job, courts rush in -- and bureaucrats, too?<sup>6</sup>

Are they accountable to the people?

No, not at all.

Do we have any recourse?

Not really.

Now what must we do?

Well, now we must wait to see what the Super-Legislators will say about our rights in future cases.<sup>7</sup>

If this case makes anything clear, it is that the bargain that has been offered to religious conservatives for years now is a bad one. It's time to reject it. The bargain has never been necessarily explicitly articulated, but religious conservatives know what it is. The bargain is that you go along with the Party establishment, you support their policies and priorities -- or at least keep your mouth shut about it -- and in return the establishment will put some judges on the bench who supposedly will protect your constitutional rights to freedom of worship, to freedom of exercise. That's been what we've were [sic] told for years now.



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And we were told that we're supposed to shut up while the Party establishment focuses more on cutting taxes and handing out favors for corporations -- multinational corporations who don't share our values, who will not stand up for American principles, who are only too happy to ship American jobs overseas. But we're supposed to say nothing about that. We're supposed to keep our mouths shut because maybe we'll get a judge out of the deal. That was the implicit bargain.

We're supposed to keep our mouths shut while the Party establishment opens borders, while the Party establishment pursues ruinous trade policies.

We're supposed to keep our mouths shut while those at the upper end of the income bracket get all of the attention; while working families and college students and those who don't want to go to college but can't get a good job...they get what? What attention? Workers[?]  
Children[?]

What about parents looking for help with the cost of raising children? Looking for help with the culture in which they have to raise children? Looking for help with the communities, rebuilding the communities in which they must carry out their family life[?]

What about college students trying to find an education that isn't ruinously expensive and then figure out some way to pay back that ruinous debt? What about those who don't have a college degree and don't want one, but [would] like to get a good job? What about them?

No, we're supposed to stay quiet about all of that, and more, because there [might] be pro-Constitution, religious liberty judges. Except for that there aren't. Except for that these judges don't follow the Constitution. Except for these judges invoke "textualism" and "originalism" in order to reach their preferred outcome.

Now, I want to be clear: I am not personally criticizing any justice who joined the majority opinion or wrote it. I -- I believe a hundred percent that the justices -- the justice -- who principally authored this opinion, Justice Gorsuch, and those who joined him are sincere, and



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who were writing to the best of their ability, reasoning to the best of their ability. And -- And the opinion is...whatever else you might say about it, it is not sloppily reasoned. No, I think that they were doing what they thought was best and using all of the skills and -- and gifts that they had.

No, I question how we got here. I question how judges who hold to this philosophy ended up on that bench. I question the bargain that people of faith have been offered and asked to hold to for all of these years.

And the truth is, to those who've said -- who have objected to my own questioning of judicial nominees in this body; to those who said I was wrong to question judges who came before the Judiciary Committee; to those who chided me for asking tough questions, even of nominees by a Republican President; for those who said that I was slowing the process down, and I was out of line; for the supposedly conservative groups who threatened to buy television time in my own state to punish me for asking questions about conservative judges, I just have this to say: This is why I ask questions. This is why I won't stop. And I wish some more people would ask some harder questions.

Because this outcome is not acceptable!

And the bargain which religious conservatives have been offered is not tenable.

So, I would just say it's not time for religious conservatives to shut up. No, we've done that for too long.

No, it's time for religious conservatives to stand up and to speak out.

It's time for religious conservatives to bring forward the best of our ideas on every policy affecting this nation. We should be out in the forefront leading on economics, on trade, on race, on class, on every subject that matters for what our Founders called the "general welfare;" because we have a lot to offer, not just to protect our own rights, but for the good of



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all of our fellow citizens; because as religious believers, we know that serving our fellow citizens -- of whatever their religious faith, whatever their commitments may be -- serving them, aiding them, working for them, is one of the signature ways that we show a *love of neighbor*.

It's time for religious conservatives to do that.

It's time for religious conservatives to take the lead rather than being pushed to the back.

It's time for religious conservatives to stand up and speak out rather than being told to sit down and shut up.

And because I am confident that people of faith, of goodwill, all across this country are ready to do that, and want to do that, and have something to offer this country -- and every person in this country, whatever their background or income or race or religion -- because of that, I'm confident in the future.

But I'm also confident that the old ways will not do.

So, let this be a departure.

Let this be a new beginning.

Let this be the start of something better.

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<sup>1</sup> [Symploce](#) ([anaphora](#) + [epistrophe](#))

<sup>2</sup> [Polysyndeton](#)

<sup>3</sup> One of several notable [anaphoras](#) in this address



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<sup>4</sup> "The Court did not address how religious beliefs potentially impact Title VII's expanded coverage. The Court specifically noted that 'how these doctrines protecting religious liberty interact with Title VII are questions for future cases' because 'none of the employers before us today represent in this Court that compliance with Title VII will infringe their own religious liberties in any way.'" [Sources: [https://www.americanbar.org/groups/labor\\_law/publications/flash\\_archive/issue-june-2020/supreme-court-speaks/](https://www.americanbar.org/groups/labor_law/publications/flash_archive/issue-june-2020/supreme-court-speaks/) and [USSC Opinion \(p.20\) in Bostock v. Clayton County.pdf](#)]

<sup>5</sup> [Anadiplosis](#) [6:40]

<sup>6</sup> Somewhat extended allusion to E.M. Forester's tome [Where Angels Fear to Tread](#) -- itself taken from a line in Alexander Pope's Poem [An Essay on Criticism](#): "For fools rush in where angels fear to tread"

<sup>7</sup> Cascading [hypophora](#)