



Broadcast Transcript

Broadcast: Has the Supreme Court Lost Its Way? – Part 1

Guest(s): Martin Nussbaum

Air Date: July 1, 2020

[Listen to the broadcast](#)

Roger Marsh: Hi, everyone. This is Roger Marsh for Family Talk. Before we get into today's broadcast, please know that some of the content that we'll be discussing is really intended for more mature audiences. So, if you have little ones listening in right now, we encourage you to use parental discretion. You can either keep them busy with something else or just come back to this presentation at a later time. Thanks so much for joining us, and now here's this edition of Dr. James Dobson's Family Talk.

Dr. Dobson: Well, hello, everyone. I'm James Dobson with Family Talk. I want to discuss something with you today that you may have been reading about in the newspapers or heard about on television or wherever, but none of the articles or reports that I've seen tell the whole story, and you do need to know the whole story. It concerns some egregious decisions that were handed down by the US Supreme Court of the United States that are far reaching in their implications, and it will touch where you live, I guarantee you that. Some would consider those decisions to be disastrous for Christians and Christian organizations. I'm not an attorney, but that's definitely the way I feel and what I've heard. Today, I want you to understand why. Please pay close attention today. There are some programs that make you feel good. There's some programs that offer some advice. There are others that go to the heart of what we believe, and it threatens to undermine our faith. This is one of those programs.

Before we started, we prayed that we would make clear what we're facing today. My guest is Martin Nussbaum. He's a great religious freedom attorney. He's a trial lawyer and an appellate advocate. Martin is also general counsel for our organization, so we work together very closely. We're honored to have him. Martin is the senior partner of Nussbaum Speir Gleason, a boutique law firm that specializes in representing religious institutions around the country. I thank God for qualified people who can help us at a day and time like this, because we're all dragged into the legal arena and the outcome is increasingly dangerous.

Among other achievements, Martin led the litigation team that won religious exemption for over 1,000 Catholic and Protestant ministries and businesses

from the Obama administration's contraceptive and abortifacient mandate under the Affordable Care Act. We were included in that. He and the attorneys for Alliance Defending Freedom fought off the awesome political power and unlimited resources of the federal government and literally saved us from its tyranny. Without these individuals that I just mentioned, JDFI would probably have been forced to pay ruinous fines that would likely have closed our doors. So, I have great reason to appreciate these defenders of the faith.

Martin just gave an overview of the recent Supreme Court decision to our board of directors. We met for our summer board meeting. We were alarmed by what he had to say and what the implications are. That's what we're going to talk about today. So, Martin, it's a pleasure to have you back with us. I appreciate what you do. You are very concerned, too, aren't you, about what came down from the court?

Martin Nussbaum: You bet I am. We are in a cultural hinge moment because of this Bostock decision. It's a very serious decision. It's on par with the severity of the decision in terms of cultural impact with Roe v. Wade and with the Obergefell decision.

Dr. Dobson: Now, that's a big statement.

Martin Nussbaum: Yes.

Dr. Dobson: Those two decisions haunt us today. This is in that category.

Martin Nussbaum: This will haunt us for years to come. It will unleash a huge amount of litigation focused against primarily religious institutions to bring them to heel regarding the sexual revolution we're in the midst of.

Dr. Dobson: Well, describe the case that came before the court, and then we'll get into what the ruling was and what the implication are.

Martin Nussbaum: Jim, there's actually three cases that were joined together at the United States Supreme Court. The first is called Bostock, B-O S-T-O-C-K. Gerald Bostock was a child welfare advocate, worked for the county, joined a gay softball league, and the County came to him and said he was engaged in conduct unbecoming and terminated him. They conceded in the case that they terminated him because of his sexual orientation. The 11th Circuit found ... he sued under Title VII, which prohibits sex discrimination, but not sexual orientation discrimination. The 11th Circuit disagreed with him and found for the employer that Title VII did not prohibit sexual orientation discrimination. The second case is a case brought by Donald Zarda against a airplane flight training company called Altitude Express. He was fired after he came out to his employer. He won at the Second Circuit under Title VII.

The third case, which is probably the most serious here, is a case that was brought by the EEOC on behalf of a employee who was hired as Anthony

Stephens, but by the time of the case had changed his name to Aimee Stephens and had begun the gender transition process. The Sixth Circuit ruled that Title VII prohibition on sex discrimination also includes gender identity. That's the issue that those three cases presented the issue, and the United States Supreme Court in a six three decision ruled that Title VII, passed in 1964, the granddaddy anti-discrimination law of our country, that its prohibition of sex discrimination has all along included sexual orientation and gender identity.

Dr. Dobson: That in itself is crazy, because if you go back and read that legislation, it had nothing to do with the issue of changing the meaning of sex.

Martin Nussbaum: Correct. In fact, Justice Alito in his dissent points out that back in 1964 there wasn't even a concept of gender identity. I mean, it couldn't have been in the mind of Congress. In fact, various representatives in Congress have over 45 times, 45 years, they have introduced bills to amend Title VII to include sexual orientation and/or gender identity and they've never passed it. So, there'd be no need for an amendment if Congress believed that was the rule all along, and that has been replicated. They have sometimes passed laws that prohibit discrimination based upon sexual orientation. They know how to do it, but they've never done it for Title VII. But the US Supreme Court now says that doesn't matter. It meant orientation and gender identity all along.

Dr. Dobson: Well, listening to this point might not explain the angst over this issue, because most of us are not transgender. What does that got to do with me? What is the meaning of this ruling?

Martin Nussbaum: Well, secular employers are primarily going to be subject to this law. The primary target for the next wave, and I think the final wave of advancing this agenda, are going to be religious organizations, churches, denominations, and all sorts of ministries, including groups like JDFI. The lawsuits and actions will arise in a huge number of contexts, Jim. Just to give you one example, the day after the Bostock decision was decided, 46 members of the Senate called for a vote on what's called the Equality Act. The Equality Act is very specific. It subordinates religious freedom to the anti-discrimination law of Title VII. It subordinates. It says if those two values come in conflict, religious freedom should lose. That's opposite of what the Religious Freedom Restoration Act said, not passed that many years ago, that was passed by a vote of I think 99 votes in the Senate and signed into law by Bill Clinton. Now, they're calling for that to be flipped the opposite, so that religion loses, but there's going to be a lot of specific implications, too.

Dr. Dobson: Well, obviously that seems to contradict, on the face of it, to the constitutional rights to religious Liberty, to all the freedoms in the Bill Of Rights, and this goes to the core of a constitutional issue. Does it not?

Martin Nussbaum: It is. In fact, I firmly believe that the most distinctive thing about the American experiment in government is the protection of religious freedom. It is our first freedom, and it's fundamental to who we are as human beings, because it

honors our ability to have a conscience. If we can't act consistent with our conscience, we're no more than a porpoise or an ape. I mean, that's what's distinctive about our humanity, and that's what gives us dignity.

Dr. Dobson: And yet in these cases, it comes out second.

Martin Nussbaum: That's what the sexual left is trying to cause to have happen. We're going to see. I mean, the first lawsuits already been filed in the wake of this by a group called Lambda Legal. There's going to be a lot more in a lot of circumstances.

Dr. Dobson: So, this is not the end of the story. This is the beginning. The likelihood, based on how the court came down on this issue, is we're going to lose.

Martin Nussbaum: You know, I'm an advocate, and there are constitutional freedoms left. This was not a constitutional decision. The cultural momentum is against religious freedom in many regards right now. Now, the Supreme Court, by the time this airs will probably have decided three religious freedom cases, so we're going to learn a lot about do they still support that freedom. But meanwhile, this Bostock decision is going to burden colleges and all sorts of institutions in a host of ways.

Dr. Dobson: All right. Let's take examples. You gave this report to our board that I really want to touch on as we go through, because it has so many implications for organizations like ours, for Christian ministries, for churches, for individuals. It is all consuming. It's as broad as all outdoors. Let's talk about some of them. The first you listed was safe environment, private modesty.

Martin Nussbaum: There's all sorts of circumstances where our culture has developed where we want to be with members of the same sex or alone when we're doing certain things, going to the bathroom, taking a shower. That will be challenged under this, to say that that individuals who are transitioning may opt to go into the bathroom that does not align with their biological sex. There will be lawsuits filed, and therefore trans, I have to think of these words, trans women should be allowed to bathroom, or shower, or share a dormitory with a female student, or a woman, or a girl. That will be one implication. We saw regulations about that.

Dr. Dobson: Will that would be forced on the one who doesn't want that exposure?

Martin Nussbaum: If the lawsuits prevail, that will be forced upon them. The logic of Bostock puts strong headwinds in favor of the plaintiff filing those lawsuits, especially against secular organizations, secular colleges.

Dr. Dobson: So, a man taking his shower in the locker room with women who are also in various stages of undress will have to be enforced, allowed.

Martin Nussbaum: That's very possible. Jim, I think the most extreme example here would be safe houses. You have a situation where women who have been physically or

sexually abused and a trans woman, a man who's a biological man who's transitioning, wants to be in the safe house. The safe house is going to be hard put to come up with a legal argument as to why to exclude that individual, and his very presence will be highly traumatic to those women.

Dr. Dobson: I hope our listeners understood what you just said. A safe house is where women go when they are trying to recover from sexual abuse, rape, or whatever it is, and it's going to be mandatory, likely, that a man who's transgendered as a woman will be allowed to live, and sleep, and work, and be in that environment with these women who are traumatized already by a relationship with a man. That makes no sense at all.

Martin Nussbaum: It makes no sense. In fact, if one did this before this decision, they could be sued for negligence, right? The trauma caused to those vulnerable women that they're serving. The safe house could be sued for negligence, but that's precisely the implication of this. And moreover, Jim, the court did this with its eyes open. There was an amicus brief filed by the United States Conference of Catholic Bishops, and the Ethics and Religious Liberty Commission of the Southern Baptist Convention jointly filed a brief that has a long section in it on what are the implications of the decision if the court decides as it did. In fact, Justice Alito in part four of his dissent also gives this long litany. The court said, the majority said, "Well, those cases aren't before us today," and that's technically correct. They said, "They'll come up one by one and we'll decide them as they come up." But the implication is very clear, and that's just the beginning of this list.

Dr. Dobson: Let's take that to a college campus, in the dormitories. Suppose I send my son to Liberty University or some conservative Christian university like that and the school typically selects roommates for students for their various facilities. They cannot put two men together or two women together per the law.

Martin Nussbaum: They can do that, but what they can't do or what they will be challenged if they do, do is just say they will always do that. They must be random I guess is going to be the argument.

Dr. Dobson: Imagine arriving in school and find out that you have a guy who's transitioned to a woman getting up and putting on her makeup in the morning and a dress and all the rest of it and living together against your will.

Martin Nussbaum: And may be entirely a biological male being put with your daughter's roommate at college. That's the implication of this. And the court did it with its eyes open.

Dr. Dobson: You know, we're sexual creatures. Everything we do is involved in our sexuality. We know that from 18 months of age. A little boy knows he's a little boy usually, unless somebody told him differently. It's going to be as broad as all human experience. It touches everything.

Martin Nussbaum: Sexuality touches everything. That's exactly right. I'll give you another implication of this decision, Jim. Ministries, like your own, want to hire like-minded people of faith to advance the mission. I mean, the Dr. James Dobson Family Institute is a Christian organization that subscribes to traditional values regarding sexuality, and marriage, and orientation, and all of that. Let's say the best qualified applicant you have who applies for a particular position is transitioning. This law would say that but for, for some kind of constitutional exemption, that you would not be able to exclude that person from your ministry, and now you have someone working for you that is not on board with the mission.

The Cancer Society can insist that its workers don't smoke. Right? They hire like-minded people for their mission, but are churches going to be allowed to hire like-minded people? If they're not, then that transgender employee becomes an employee of the ministry and when he or she hears you talking about the values of the ministry, they're going to say that's sexual harassment, that that kind of language, the language of traditional values around sexuality, constitutes sexual harassment. That was also pointed out in the brief filed by the Catholics and the Baptist in this case.

Dr. Dobson: This goes nose to nose with theological understandings and biblical truth. What about the various dimensions of LGBT? The one that stands out for me is bisexual. That means that you sleep with both sexes. That means promiscuous behavior with both sexes. Do you have obligations to respond to them?

Martin Nussbaum: Interestingly, the Bostock decision does not comment on bisexuality. It comments about sexual orientation and gender identity. So, that's an open issue of whether sex means bisexual. Justice Gorsuch, at the very end of the majority opinion, says, "Well, there are some protections for religious organizations," and he names them. There's a religious exemption from Title VII that's somewhat limited. There's the religious Freedom Restoration Act. There's something called the Ministerial Exception, but what he doesn't say and what the majority doesn't say is those values would trump the Civil Rights Act. It says there are arguments out there that people like me can make. So, we'll be making them, and we'll see where the courts land on those.

Dr. Dobson: All right. Let's go to the next one, unfaithful teammates within the church and within religious schools.

Martin Nussbaum: Yeah. That's what I was alluding to, which is that you want to hire individuals that subscribe to the values of the ministry. While ministries can probably do that for individuals that are classified in the law as ministers, there's a lot of other employees in ministry that may subscribe to opposite values of the ministry if there's not some kind of constitutional protection.

Dr. Dobson: What about sporting events where biological males can compete with women if they have transitioned to the opposite sex?

Martin Nussbaum: Huge problem.

Dr. Dobson: That destroys competition. I mean, it's to the great disadvantage of women who are built different and made different and have different attributes that affect the outcome.

Martin Nussbaum: Yeah. This decision has the possibility of turning Title IX on its head. Title IX was passed, just as you alluded to, to advance women in sports, to have women get in touch with their bodies and be able to compete against each other. That was one of the primary functions of Title IX. This decision, *Bostock and Harris Funeral Home* was one of the joint cases, was decided under Title VII, the employment statute, but the reasoning of what does the word sex mean, you would think that the same reasoning would apply by that court when it comes to Title IX. The implication is that this *Bostock* case is going to infect, it's going to have a pandemic infection of over 100 federal civil rights laws, which Justice Alito identifies in his dissent, and hundreds of state civil rights laws, and thousands of municipal human rights ordinances. So, it will infect much of the law out there and will have an effect on women's sports. I mean, it is-

Dr. Dobson: This will turn women's sports upside down.

Martin Nussbaum: We've seen that in Connecticut.

Dr. Dobson: The people who win in field and track, or basketball, or anything else, I mean, you can have a seven foot guy who decides he is more of a woman playing basketball with women who average six foot two.

Martin Nussbaum: Exhibit A is Connecticut, where two biological male high school students have been competing in track and field. They now own, I think, 10 or 11 state records, and there's probably 10 or 11 young women who would be state champions but for these two biological males that they've been competing against in Connecticut.

Dr. Dobson: Are women going to hold still for this?

Martin Nussbaum: I don't know. I mean, we're going to see, because it will wreck women's sports to have a handful ... Not many men are going to decide to transition, but those who do that can then own the sports that they want to compete in if they switch over to women's sports. The Olympic Committee, the United States Olympic Committee already has rules that allow transitioning athletes to compete in women's sports. It's always men taking advantage of the rules against women, right? It'll be male athletes, biological male athletes competing against women. State high school athletic associations have rules around this that permit it and so on. We're just going to see more of that.

Dr. Dobson: In professional sports there are other implications. There's a lot of money involved here. Women's tennis, for example. Imagine women now get the same amount of money for Wimbledon as men do.

Martin Nussbaum: And women's soccer, professional sports and the WNBA professional sports. It will affect professional sports. We're going to see dramatic effects in sport.

Dr. Dobson: What about education and the demise of women's colleges?

Martin Nussbaum: Well, we'll see if they stand. Obviously women's college discriminate on the basis of sex, and the key tester is going to be gender transitioning biological males, the so-called trans women, that are going to seek to get into women's colleges. Some of the best schools that I know, charter schools that I know and private schools, separate classes, especially in high school, based upon sex, because boys and girls are distracted from the subject at hand when they're together in the classroom.

Dr. Dobson: Of course they do.

Martin Nussbaum: Some schools have found that both the boys and the girls are better students and flourish better academically when they're separated in high school. That's called into question by this. The revolution will be all across the board.

Dr. Dobson: How about speech codes?

Martin Nussbaum: Well, that's going to come with it. Right? Because we already know, if you look at sexual harassment law, we've all learned that in the workplace certain kinds of language, and certain kinds of humor, and certain kinds of posters or pictures on the wall can be grounds for sexual harassment. If you have a transgender employee, anything that would celebrate or honor traditional values could be viewed by them as harassing. It's not affirming to them. The prime example of that is to change what we've learned of as common English usage with regard to the third person pronoun, because the third person pronoun is sex specific. We're probably going to see codes around that. What's the pronoun of choice? Some colleges are already implementing this. That may be required as a matter of law, going forward.

Dr. Dobson: And all of this has been imposed on the American culture by six justices to the Supreme Court, or by a majority of two, and now everything has to change. Man, there is something about this that's just not right. It inflames me.

Martin Nussbaum: Well, you know, the trend, frankly, was against traditional values on this, and the legislatures were changing a lot of these laws. Many states already had done so. Who knows who's going to win the next election. It's possible it would have been done by an electoral process, which at least would have honored the rule of law, but this corrupts not only traditional values, and moral values, and the

moral grounding of our law, but it also corrupts how we live as a society and how the law works.

Roger Marsh:

Well, this is Roger Marsh, and we hate to interrupt this important discussion, but unfortunately we've run out of time for today's edition of Family Talk. Dr. Dobson's guest has been our ministry's general counsel, Martin Nussbaum. Now, this has been a very timely and necessary conversation about the latest rulings from the Supreme Court. There's still a lot of content to get through that directly applies to our Christian life though, so be sure to join us for the conclusion of this critical interview coming up tomorrow, right here on Dr. James Dobson's Family Talk.

Announcer:

This has been a presentation of the Dr. James Dobson Family Institute.