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Bostock was Bogus:
Textualism, Pluralism, and Title VII

Mitchell N. Berman* & Guha Krishnamurthi†

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In Bostock v. Clayton County, one of the blockbuster cases from its 2019 Term, the Supreme Court held that federal antidiscrimination law prohibits employment discrimination on grounds of sexual orientation and gender identity. Unsurprisingly, the result won wide acclaim in the mainstream legal and popular media. Results aside, however, the reaction to Justice Neil Gorsuch's majority opinion, which purported to ground the outcome in a textualist approach to statutory interpretation, was more mixed. The great majority of commentators, both liberal and conservative, praised Gorsuch for what they deemed a careful and sophisticated—even “magnificent” and “exemplary”—application of textualist principles, while a handful of critics, all conservative, agreed with the dissenters that textualism could not deliver the outcome that the decision reached.

This Article shows that conservative critics of the majority's reasoning were correct—up to a point. Specifically, it argues that Title VII's ban on discrimination “because of” an employee's “sex” does not cover discrimination because of their sexual orientation as a matter of “plain” or “ordinary” meaning. Further, it demonstrates that Gorsuch's effort to establish that result as a matter of “legal” meaning wholly fails because it depends upon a fatally flawed application of the “but-for” test for causation, one that flouts bedrock principles of counterfactual reasoning. It follows that if a textualist approach to statutory interpretation is correct or warranted, then Bostock was wrongly decided. However, if Bostock was rightly decided, then it must follow that textualism is wrong or misguided. This Article endorses the latter possibility, explaining that the dominant American approach to statutory interpretation is neither textualist nor purposivist but pluralist. It concludes by drawing powerful but previously unnoticed support for pluralism rooted in Justice Samuel Alito's principal dissent.

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INTRODUCTION

In *Bostock v. Clayton County*,¹ the Supreme Court held that federal antidiscrimination law prohibits employment discrimination on grounds of sexual orientation and gender identity.² Writing for a majority that included Chief Justice John Roberts and the four liberals, Justice Neil Gorsuch reasoned that that’s just what Title VII’s “meaning” requires. Justice Samuel Alito, joined by Justice Clarence Thomas, dissented, calling Justice Gorsuch’s reading of the text “preposterous.”³ *Bostock* was a landmark event for lesbian, gay, and transgender people, and a powerful blow for greater social justice. Many pundits and commentators think it just as important for what it reveals about statutory interpretation on the Roberts Court.⁴

Most commentators from the legal academy and mainstream media believe the Court reached the right result.⁵ So if Justice Gorsuch’s textualist approach to statutory interpretation gets you there, well, that’s one big point for textualism—and for Justice Gorsuch too. Blogging about the decision the day after its issuance, Professor Michael Dorf proclaimed Gorsuch’s

¹ 140 S. Ct. 1731 (2020).

² *Id.* at 1737.

³ *Id.* at 1755 (Alito, J., dissenting).

⁴ Jonathan Skrmetti, *The Triumph of Textualism: “Only the Written Word Is the Law,”* SCOTUSBLOG (June 15, 2020), <https://www.scotusblog.com/2020/06/symposium-the-triumph-of-textualism-only-the-written-word-is-the-law/>; Anita S. Krishnakumar, *Three Lessons About Textualism from the Title VII Case*, YALE J. REG. NOTICE & COMMENT (June 24, 2020), <https://www.yalejreg.com/nc/three-lessons-about-textualism-from-the-title-vii-case-by-anita-s-krishnakumar/>; Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 266 (2020); Katie Eyer, *Progressive Textualism and LGBTQ Rights*, SCOTUSBLOG (June 16, 2020), <https://www.scotusblog.com/2020/06/symposium-progressive-textualism-and-lgbtq-rights/>; Judge Thomas B. Griffith, *The Degradation of Civic Charity*, 134 HARV. L. REV. F. 119, 132–33 (2020) (contending that key to the case was a question about “interpretive methodology”).

⁵ See, e.g., Adam Liptak, *Civil Rights Law Protects Gay and Transgender Workers, Supreme Court Rules*, N.Y. TIMES (June 16, 2020), <https://www.nytimes.com/2020/06/15/us/gay-transgender-workers-supreme-court.html> (“The decision was both symbolic and consequential, and it followed in the tradition of landmark rulings on discrimination.”); Tim Fitzsimons, *Supreme Court Sent ‘Clear Message’ With LGBTQ Ruling, Plaintiff Gerald Bostock Says*, NBC (June 16, 2020), <https://www.nbcnews.com/feature/nbc-out/supreme-court-sent-clear-message-lgbtq-ruling-plaintiff-gerald-bostock-n1231190> (“When the history books are written, Gerald Bostock’s name will grace the landmark case that on June 15, 2020, won LGBTQ people nationwide protection from workplace discrimination.”); Ian Millhiser, *The Supreme Court’s Landmark LGBTQ Rights Decision, Explained In 5 Simple Sentences*, VOX (June 15, 2020) (“*Bostock v. Clayton County*, a landmark Supreme Court decision holding that federal law prohibits employment discrimination against LGBTQ workers, was a test of Justice Neil Gorsuch’s principles. He passed.”); Andrew Koppelman, *Bostock, LGBT Discrimination, and the Subtractive Moves*, 105 MINN. L. REV. HEADNOTES 1 (2020) [hereinafter Koppelman, *Subtractive Moves*] (“In *Bostock v. Clayton County*, the Supreme Court held that Title VII of the Civil Rights Act of 1964 prohibits employment discrimination against lesbian, gay, bisexual, and transgender (LGBT) people. That was obviously correct.”); Ilya Somin, *Textualism and Purposivism in Today’s Supreme Court Decision on Discrimination Against Gays, Lesbians, and Transsexuals*, VOLOKH CONSPIRACY (June 15, 2020), <https://reason.com/volokh/2020/06/15/textualism-and-purposivism-in-todays-supreme-court-decision-on-discrimination-against-gays-lesbians-and-transsexuals/> (“Gorsuch is right that ‘discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second.’ The two are, as he puts it, ‘inextricably connected.’”); Michael Dorf, *Does Justice Gorsuch’s Magnificent Opinion in the Title VII Sexual Orientation and Gender Identity Cases Redeem Textualism?*, DORF ON LAW (June 16, 2020), <http://www.dorfonlaw.org/2020/06/does-justice-gorsuchs-magnificent.html> [hereinafter Dorf, *Gorsuch’s Magnificent Opinion*] (“Justice Gorsuch’s opinion for the Supreme Court in *Bostock v. Clayton County* marks a historic victory for LGBT Americans, for civil rights more broadly, and for the rule of law.”).

opinion “[m]agnificent” and wondered why it wasn’t unanimous.⁶ Professor Tara Grove channeled a common reaction when observing, in a Comment on the decision published in the *Harvard Law Review’s* Supreme Court issue, that *Bostock’s* “result may be reason enough to reexamine some assumptions about textualism.”⁷ In the words of prominent conservative attorney George T. Conway, III, *Bostock* “illustrates one of Scalia’s main assertions about textualism: that ‘a textualist reading will sometimes produce ‘conservative’ outcomes, sometimes ‘liberal’ ones.’ It’s a ‘slander,’ he wrote, to call textualism ‘a device calculated to produce socially or politically conservative outcomes.’ . . . Gorsuch’s exemplarily textualist opinion in *Bostock* has proven Scalia’s point for all time.”⁸ A journalist for the left-of-center website *Vox* agreed: “At the very least, *Bostock* suggests that this conservative Supreme Court can follow the clear text of a law, even when that reading points in a liberal direction.”⁹

But if Gorsuch’s opinion won plaudits from many conservatives and liberals alike, at least some conservatives demurred. Professors Josh Blackman and Randy Barnett declared themselves “surprised and disappointed” by Gorsuch’s “halfway textualism,”¹⁰ while Professor Nelson Lund derided the majority opinion as an “analytically untenable” and “outlandish judicial performance,” one whose “application of textualist principles is fatally flawed.”¹¹ The junior Senator from Missouri, a former Roberts clerk, went so far as to denounce *Bostock* as “represent[ing] the end

⁶ Dorf, *Gorsuch’s Magnificent Opinion*, *supra* note 5; see also Michael C. Dorf, *SCOTUS LGBT Discrimination Case Will Test Conservative Commitment to Textualism*, VERDICT (May 1, 2019) (calling the textualist case for the *Bostock* plaintiffs “straightforward,” and predicting that, if the Court’s conservatives “keep faith with their textualist commitment, they will rule in favor of the plaintiffs”). Dorf’s own praise for Justice Gorsuch’s opinion was for its result and craftsmanship, but Dorf further argues that textualism likely did not play a causal role in any Justice’s decision, that a purposivist opinion would have been more persuasive, and that the *Bostock* decision does not ultimately redeem textualism. Dorf, *Gorsuch’s Magnificent Opinion*, *supra* note 5.

⁷ Grove, *supra* note 4, at 266.

⁸ George T. Conway, III, *Why Scalia Should Have Loved the Supreme Court’s Title VII Decision*, WASH. POST (June 16, 2020), <https://www.washingtonpost.com/opinions/2020/06/16/why-scalia-would-have-loved-supreme-courts-title-vii-decision/>.

⁹ Millhiser, *supra* note 5; see also Christian Farias, *Is Neil Gorsuch the New Anthony Kennedy?*, GQ (June 15, 2020), <https://www.gq.com/story/neil-gorsuch-scotus-lgbt-decision> (“The real import of *Bostock*, though, is that Gorsuch — and Roberts, who joined him — can now claim that textualism, as a methodology for interpreting the law, isn’t some results-oriented device conservative legal theorists invented to get what they want in the courts, as liberals have long feared. This new ruling, going against current right-wing orthodoxy as it does, lays those worries to rest.”).

¹⁰ Blackman & Barnett, *supra* note 10.

¹¹ Nelson Lund, *Unleashed and Unbound: Living Textualism in Bostock v. Clayton County*, 21 FEDERALIST SOC’Y REV. 158, 167 (2020). See also, e.g., Steven D. Smith, *The Mindlessness of Bostock*, LAW & LIBERTY (July 9, 2020), <https://lawliberty.org/bostock-mindlessness/>; Howard Kurtz, *Gorsuch Draws Personal Attacks for Breaking Ranks on Gay Rights*, FOX NEWS (June 17, 2020), <https://www.foxnews.com/media/gorsuch-draws-personal-attacks-for-breaking-ranks-on-gay-rights>; Josh Hammer, *Neil Gorsuch Slapped Conservatives by Creating New Gay Rights*, N.Y. POST (June 15, 2020), <https://nypost.com/2020/06/15/neil-gorsuch-slapped-conservatives-by-creating-new-gay-rights>; Ed Whelan, *A ‘Pirate Ship’ Sailing under a ‘Textualist Flag,’* NAT’L REV. (June 15, 2020), <https://www.nationalreview.com/bench-memos/a-pirate-ship-sailing-under-a-textualist-flag/>; Jeremy Stahl, *Conservative Activists and Pundits are Melting Down Over Gorsuch’s Embrace of LGBTQ Rights*, SLATE (June 15, 2020), <https://slate.com/news-and-politics/2020/06/carrie-severino-meltdown-neil-gorsuch-lgbtq-rights.html>; Rena M. Lindevaldsen, *Bostock v. Clayton County: A Pirate Ship Sailing Under A Textualist Flag*, 33 REGENT U. L. REV. 39 (2021).

of the conservative legal movement.”¹² “If textualism and originalism give you this decision,” he charged, then “those phrases don’t mean much at all.”¹³

The debate over the textualist bona fides of *Bostock* is important and far-reaching.¹⁴ To start, many difficult and significant questions remain regarding the scope of Title VII itself, in relation not only to sex discrimination but also to discrimination “because of” race, color, religion, or national origin.¹⁵ Indeed, commentators are already debating *Bostock*’s implications for challenges to affirmative action university admissions programs under Title VII.¹⁶ Furthermore, particular statutes and disputes aside, there remains the overarching need to better understand textualism and its place in the Court’s general jurisprudence and interpretive methodology.¹⁷

We think the textualist critics of the *Bostock* opinion are largely right: textualism and originalism *do* mean something, and they do *not* license the results that Justice Gorsuch reached in *Bostock* regarding sexual orientation discrimination. (We believe that the Court’s holding regarding transgender identity was defensible on textualist premises, and will explain the difference between the cases.¹⁸) But, unlike these critics, we don’t start from the premise that textualism is correct. There are good reasons to conclude that the result in *Bostock* was right—

¹² Josh Blackman, *Senator Hawley: Bostock “Represents the End of the Conservative Legal Movement,”* THE VOLOKH CONSPIRACY (June 16, 2020), <https://reason.com/volokh/2020/06/16/senator-hawley-bostock-represents-the-end-of-the-conservative-legal-movement/>.

¹³ *Id.* True, the speaker was the now-infamous Josh Hawley, reasonably provoking the caution “consider the source.” On the other hand, there is wisdom in the adage about blind squirrels and nuts.

¹⁴ *See* Lund, *supra* note 11, at 160–63 (discussing *Bostock* in terms of its departure from textualist principles properly construed).

¹⁵ *See, e.g.,* Guha Krishnamurthi & Charanya Krishnaswami, *Caste Discrimination and Title VII*, HARV. L. REV. F. (forthcoming 2021) (arguing that, in light of *Bostock*, caste discrimination is cognizable under Title VII as race, religion, and national origin discrimination). There are a number of questions in employment discrimination law about whether discrimination based on some physical characteristic or practice constitutes discrimination on a protected ground. *E.g.,* D. Wendy Greene, *Splitting Hairs: The Eleventh Circuit’s Take on Workplace Bans Against Black Women’s Natural Hair in EEOC v. Catastrophe Management Solutions*, 71 U. MIAMI L. REV. 987 (2017); Nimra H. Azmi, *Uncovered: Title VI & Title IX’s Limited Protections for Muslim Students Who Veil*, 43 HARV. J. L. & GENDER 281 (2020); Kiran Preet Dhillon, *Covering Turbans and Beards: Title VII’s Role in Legitimizing Religious Discrimination Against Sikhs*, 21 S. CAL. INTERDISC. L.J. 215 (2011). *Bostock*’s holdings on the purportedly textual understanding of causation may have impact on these questions.

In a recent case *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, the plaintiff Students for Fair Admissions, Inc. (SFFA) challenged Harvard’s admissions policies as violating Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, and the Equal Protection Clause of the Fourteenth Amendment. After a bench trial, the district court rejected SFFA’s claims and a panel of the First Circuit affirmed. 980 F.3d 157, 164 (1st Cir. 2020).

In its petition for certiorari, SFFA argued that *Grutter v. Bollinger*, 539 U.S. 306 (2003), should be overruled, focusing its challenge on the holding of *Grutter* that student body diversity serves a compelling interest. SFFA did not argue, however, that *Grutter* should be overruled insofar as it held that the Title VI standard tracks the Equal Protection Clause standard, and that under a textualist reading Harvard’s conduct violates Title VI. We find this surprising, for this is clearly the overruling that *Bostock* foreshadows.

¹⁶ Jeannie Suk Gersen, *Could the Supreme Court’s Landmark L.G.B.T.-Rights Decision Help Lead to the Dismantling of Affirmative Action?*, NEW YORKER (June 27, 2020), <https://www.newyorker.com/news/our-columnists/could-the-supreme-courts-landmark-lgbt-rights-decision-help-lead-to-the-dismantling-of-affirmative-action>; Cass R. Sunstein, *Gorsuch Paves Way for Attack on Affirmative Action*, BLOOMBERG (June 18, 2020), <https://www.bloombergquint.com/gadfly/gorsuch-gay-rights-opinion-targets-affirmative-action>; Jason Mazzone, *Bostock: Were the Liberal Justices Namudnoed?*, BALKINIZATION (July 6, 2020), <https://balkin.blogspot.com/2020/07/bostock-were-liberal-justices-namudnoed.html>.

¹⁷ *See supra* note 4 and accompanying text.

¹⁸ *See infra* Part II.C.

legally correct, not (only) morally. If those reasons are persuasive, then so much the worse for textualism.

The Article unfolds over three parts. Part I reviews the facts and opinions in *Bostock*. Part II mounts our critique of Justice Gorsuch’s opinion. That critique has two components. First, we contend that the dissents were correct that the statutory ban on “discrimination . . . because of [an] individual’s sex” does not cover discrimination taken by reason of a person’s sexual orientation as a matter of ordinary meaning or common parlance. This is the standard view in the judicial opinions and the scholarly literature but not, it turns out, the unanimous one. We explain why the orthodox view is correct.

Second, we argue that the statutory phrase also does not cover discrimination by reason of sexual orientation when given the “technical” legal meaning that Justice Gorsuch would assign it,¹⁹ namely one that interprets “because of” as incorporating but-for causation.²⁰ Simply put, Gorsuch reached his conclusion that *Bostock*’s sex was a but-for cause of his firing by operationalizing the but-for test in an illicit manner, one that violates fundamental constraints on counterfactual reasoning. Our demonstration that the *Bostock* result was not truly reachable via Gorsuch’s purportedly textualist route is this Article’s most important and original contribution. If correct, it renders unavailable the happy outcome that many readers of *Bostock* seemed eager to embrace—that you could have ruled for the *Bostock* plaintiffs and be a good textualist too.

Part III briefly explores what follows if our analysis in Part II is correct. One possibility was embraced by the *Bostock* dissents and by other socially conservative commentators: textualism is the correct theory of statutory interpretation, and *Bostock* was wrongly decided. We believe, to the contrary, that the legal result in *Bostock* was likely correct, and that the substantial plausibility of its holding testifies to the falsity of textualism as a theory of statutory interpretation. In presenting this argument, we press two points that are of fundamental importance to debates over contemporary statutory interpretation but are curiously and routinely overlooked in the academic literature that sets forth “textualism” and “purposivism” as the main contending theories of, or approaches to, statutory interpretation. First, the kinds of goals, ends, or intentions that scholars call “legislative purposes” fall into (at least) two quite distinct conceptual categories, what we’ll call “legal intentions” and “policy goals.” Legal intentions and policy goals are very different kinds of purposes with different ends, and the failure to crisply distinguish them consistently breeds confusion. Second—and of much greater importance to this particular interpretive dispute—whether legislative purposes be associated with legal intentions or policy goals or anything else, any classificatory scheme that would oppose purposivism to textualism misleads by ignoring a fundamental asymmetry in interpretive approaches: textualists are overwhelmingly monist in their foundations; non-textualists are not. The more revealing classificatory scheme would contrast textualism not with purposivism, but with pluralism. We close by distilling ironic support for a pluralist approach to statutory interpretation from Alito’s purportedly textualist *Bostock* dissent.

¹⁹ John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 434–35 (2005) (explaining that “textualists seek out technical meaning, including the specialized connotations and practices common to the specialized sub-community of lawyers”).

²⁰ *Bostock*, 140 S. Ct. at 1739.

I. *BOSTOCK* IN BRIEF

Title VII of the Civil Rights Act of 1964 makes it unlawful “for an employer to . . . discriminate against any individual . . . because of such individual’s . . . sex.”²¹ The first case in the Court of Appeals to address whether discrimination on the basis of sexual orientation was barred by Title VII was *Blum v. Gulf Oil*, in 1979.²² The Fifth Circuit dismissed the contention in a single sentence.²³ Over the next 30 years, the issue was litigated in eight Circuits and all followed *Blum* in rejecting the claim.²⁴ Strikingly, the courts that weighed in appeared, without exception, to find the question easy; four expended no more than a sentence on the issue, and not one elicited a dissent.²⁵

Then, shortly after 2010, four cases—*Zarda v. Altitude Express*,²⁶ *Bostock v. Clayton County*,²⁷ *EEOC v. R.G. & G.R. Harris Funeral Homes*,²⁸ and *Hively v. Ivy Tech*²⁹—were filed and would wend through the courts over the next decade. The first three of these lawsuits would become consolidated at the Supreme Court.

²¹ 42 U.S. Code § 2000e. Specifically, Subsection (2)(a) states:

It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

42 U.S. Code § 2000e-2(a).

²² 597 F.2d 936, 938 (5th Cir. 1979).

²³ *Id.* at 938 (“Discharge for homosexuality is not prohibited by Title VII . . .”). *Blum* cited *Smith v. Liberty Mutual Insurance Co.*, 569 F.2d 325 (5th Cir. 1978), which considered the plaintiff’s argument that discrimination on the basis of “sexual preference” violated Title VII, but *Smith* had held only that discrimination based on being an “effeminate” male did not violate Title VII. *Id.* at 326–27.

²⁴ *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir.2000); *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257 (3d Cir.2001); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) (per curiam); *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Fredette v. BVP Mgmt. Assocs.*, 112 F.3d 1503, 1510 (11th Cir. 1997). *Cf.* *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748 (8th Cir.1982) (per curiam) (“transsexual” status). The Sixth Circuit followed suit thereafter. *Kalich v. AT&T Mobility, LLC*, 679 F.3d 464, 471 (6th Cir. 2012).

²⁵ Not on *this* issue. There were dissents on other issues. *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979) (Sneed, J., dissenting) (agreeing that sexual orientation is not cognizable under Title VII, but contending that theory that use of homosexuality as a disqualification for employment may disproportionately impact males should survive motion to dismiss); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996) (Murnaghan, J., dissenting) (aggreging that sexual orientation is not cognizable under Title VII, but contending that same-sex harassment claims are also not cognizable under Title VII).

²⁶ *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 107 (2d Cir. 2018) (en banc).

²⁷ *Bostock v. Clayton Cty. Bd. of Commissioners*, 723 F. App’x 964 (11th Cir. 2018) (per curiam).

²⁸ *Equal Employment Opportunity Comm’n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018).

²⁹ *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339 (7th Cir. 2017) (en banc).

A. The Decisions Below

In *Zarda*, filed in 2010, plaintiff David Zarda, a skydiving instructor, alleged that his employer had terminated him for being gay³⁰ and thus violated Title VII and New York state law.³¹ In light of the precedent that Title VII did not prohibit sexual orientation discrimination, Zarda stated his claim in terms of failure to conform to sexual stereotypes,³² which the Supreme Court has recognized under the ambit of Title VII.³³ The district court granted summary judgment against Zarda on the Title VII claim, on factual grounds that did not feature the fact of his sexual orientation.³⁴ On appeal, a panel of the Second Circuit affirmed the district court's decision.³⁵ Thereafter, in an opinion authored by Judge Robert Katzmann, a majority of the Second Circuit sitting en banc reversed the district court's decision, holding that Zarda could raise a claim of sexual orientation discrimination under Title VII as a form of sex discrimination.³⁶ In so doing, the majority appealed to the "sex-dependent nature" of sexual orientation discrimination, gender stereotyping, examining employer motivation, and associational discrimination.³⁷ The majority also reasoned that the but-for causation test showed that sexual orientation discrimination was discrimination "because of . . . sex," using the comparator of a heterosexual woman against David Zarda.³⁸ Judges Gerard Lynch and Debra Livingston each dissented, contending principally that the ordinary meaning of sex discrimination, both in 1964 and in the present day, did not encompass sexual orientation discrimination.³⁹

Similarly, *Bostock*, filed in 2013, concerned allegations by plaintiff Gerald Bostock that he had been terminated on account of being gay.⁴⁰ Bostock was a Child Welfare Services Coordinator for Clayton County, Georgia.⁴¹ Over a decade of work, Bostock had received good performance reviews and even accolades.⁴² At some point, he joined a gay recreational softball

³⁰ We use the term "gay" to mean one intimately attracted to others of one's same sex or gender. *See gay*, Merriam-Webster.com (defining "gay" as "of, relating to, or characterized by sexual or romantic attraction to people of one's same sex"). We avoid using the term "homosexual," except when quoting or otherwise referring to other work, including judicial opinions. GLAAD, *GLAAD Media Reference Guide - Terms To Avoid*, <https://www.glaad.org/reference/offensive> (including "homosexual" among terms to avoid and suggesting "gay" instead). Importantly, our use of "gay" is neutral with respect to the sex or gender of the person to whom it applies; that is, a "gay" person may be a man or a woman (or male or female).

³¹ *Zarda*, 883 F.3d at 108.

³² *Id.* at 109.

³³ In *Price Waterhouse v. Hopkins*, the High Court held that "[a]s for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'" 490 U.S. 228, 251 (1989).

³⁴ *Id.*; *Zarda v. Altitude Express*, 855 F.3d 76, 81 (2d Cir. 2017) (panel op.)

³⁵ *Zarda*, 883 F.3d at 110 (en banc).

³⁶ *Id.* at 131–32.

³⁷ *See generally id.*

³⁸ *Id.* at 116–19. *See infra* Sections I.B and II.B for discussion of but-for reasoning and the choice of comparator.

³⁹ *Id.* at 137–67 (Lynch, J., dissenting); *Id.* at 167–69 (Livingston, J., dissenting).

⁴⁰ *Bostock*, 723 F. App'x 964 (per curiam); *Bostock v. Clayton Cty.*, 2016 WL 9753356, at *1 (N.D. Ga. Nov. 3, 2016) (magistrate report); *Bostock v. Clayton Cty.*, 2017 WL 4456898, at *1 (N.D. Ga. July 21, 2017) (adopting magistrate's report).

⁴¹ *Bostock v. Clayton Cty.*, 2016 WL 9753356, at *1 (N.D. Ga. Nov. 3, 2016) (magistrate report).

⁴² *Id.*

league, which rankled some of his coworkers.⁴³ His program was then audited, he contends pretextually.⁴⁴ Shortly thereafter, he was fired for conduct unbecoming of a County employee, which he alleges was on account of his sexual orientation.⁴⁵ The district court denied his claim for sexual orientation discrimination, citing binding precedent that such claims were not cognizable under Title VII.⁴⁶ The district court also denied his claim for gender stereotyping as factually unsupported.⁴⁷ The Eleventh Circuit affirmed, parroting the same binding precedent, and then denied his request for hearing en banc.⁴⁸

Harris Funeral Homes concerned claims by Aimee Stephens that she had been terminated by her employer for being a transgender woman “who was ‘assigned male at birth.’”⁴⁹ Her employer, a funeral home, “require[d] its public-facing male employees to wear suits and ties and its public-facing female employees to wear skirts and business jackets.”⁵⁰ Prior to a scheduled vacation, Stephens wrote a letter to her employer explaining that she was transitioning and would appear in the appropriate uniform when returning to work.⁵¹ She was promptly fired.⁵² In 2014, Stephens filed a complaint with the EEOC, which in turn filed suit against the funeral home.⁵³ The district court granted summary judgment to the employer funeral home, finding that while Stephens’s allegations did constitute actionable sex stereotyping, the employer was entitled to a defense under the Religious Freedom Restoration Act of 1993 (“RFRA”).⁵⁴ The Sixth Circuit reversed, holding that Stephens’s allegations constitute actionable sex stereotyping under Title VII and that RFRA did not provide the employer funeral home with any defense.⁵⁵

Finally, in *Hively*, the plaintiff Kimberly Hively, a part-time adjunct professor at Ivy Tech Community College, alleged she was passed over for full-time positions and that her part-time contract was nixed, on account of her being gay.⁵⁶ After informing the EEOC, in 2014 Hively filed suit against Ivy Tech in federal district court raising claims under Title VII.⁵⁷ Citing binding Seventh Circuit precedent, the district court dismissed the complaint.⁵⁸ A panel of the Seventh Circuit affirmed based on the same binding precedent, but the opinion went further to observe the many inconsistencies that seem to arise from the precedent.⁵⁹ The Seventh Circuit took up the case en banc.⁶⁰ In an opinion authored by then-Chief Judge Diane Wood, the Seventh Circuit reversed, holding that sexual orientation discrimination was cognizable as sex discrimination

⁴³ *Id.*

⁴⁴ *Id.* at *2.

⁴⁵ *Id.*

⁴⁶ *Bostock v. Clayton Cty.*, 2017 WL 4456898, at *2 (N.D. Ga. July 21, 2017).

⁴⁷ *Id.* at *3.

⁴⁸ *Bostock*, 723 F. App’x 964 (per curiam).

⁴⁹ *Harris Funeral Homes, Inc.*, 884 F.3d at 567.

⁵⁰ *Id.* at 568.

⁵¹ *Id.* at 568–69.

⁵² *Id.* at 569.

⁵³ *Id.*

⁵⁴ *Id.* at 570. In the middle of the case, Stephens moved to intervene in the appeal, expressing concern that the EEOC might not fully represent her interests, which the Sixth Circuit granted. *Id.*

⁵⁵ *Id.* at 600.

⁵⁶ *Hively*, 853 F.3d at 341 (en banc).

⁵⁷ *Hively v. Ivy Tech Cmty. Coll.*, 2015 WL 926015, at *1 (N.D. Ind. Mar. 3, 2015).

⁵⁸ *Id.* at **2–3.

⁵⁹ *Hively v. Ivy Tech Cmty. Coll., S. Bend*, 830 F.3d 698, 718 (7th Cir. 2016) (panel op.).

⁶⁰ *Hively*, 853 F.3d at 341 (en banc).

under Title VII.⁶¹ The Seventh Circuit’s reasoning was based on the theories of the reliance of sexual orientation on the concept of sex, gender stereotyping, and associational discrimination.⁶² The majority opinion also employed the but-for causation argument that Gorsuch would later embrace, comparing Hively, a gay woman, to a straight man.⁶³ Judge Richard Posner concurred, reasoning that the court should “update” Title VII, “taking advantage of what the last half century has taught.”⁶⁴ Judge Diane Sykes dissented, principally observing that judicial updating of the statute is constitutionally inappropriate and that the plain meaning of the statute’s ban on sex discrimination does not encompass sexual orientation discrimination.⁶⁵

B. The Supreme Court Resolves

The Supreme Court granted certiorari in three of the cases—*Zarda v. Altitude Express*, *Bostock v. Clayton County*, and *EEOC v. R.G. & G.R. Harris Funeral Homes*—and consolidated them for hearing.⁶⁶

In a 6-3 decision, the Court held that discrimination on the basis of sexual orientation or transgender status constituted discrimination “because of [an] individual’s . . . sex” and thus violates Title VII. Justice Gorsuch, writing for the majority, contended that this surprising result was required by a textualist reading of the statute. Textualism is the theory that judges must strictly follow the “ordinary public meaning” of the statutory text “at the time of its enactment.”⁶⁷ In Gorsuch’s summary: “only the written word is the law.”⁶⁸ So the statutory language is the place to start.

The question for a textualist is simple: whether “the ordinary public meaning” of the phrase “because of such individual’s sex” encompassed “at the time of its enactment” discrimination on the basis of sexual orientation or gender identity. In answering this question, the key for Gorsuch resided within the phrase “to discriminate against any individual . . . because of such individual’s . . . sex.”⁶⁹ A person is fired “because of” their sex if their sex is what the law calls a “but-for” cause of the discrimination. This, he claimed, arose from “the straight-forward application of legal terms with plain and settled meanings.”⁷⁰ “[A] but-for test,” Gorsuch further

⁶¹ *Id.* at 351–52.

⁶² *See generally id.*

⁶³ *Id.* at 345–46.

⁶⁴ *Id.* at 352, 353, 357 (Posner, J., concurring).

⁶⁵ *Id.* at 360, 363, 363 (Sykes, J., dissenting).

⁶⁶ After the adverse decision in the Seventh Circuit, defendant Ivy Tech announced that it would not petition for certiorari in the Supreme Court and instead defend itself on the merits of the discrimination charge in the lower courts. Cristian Farias, *Losing Employer Won’t Ask Supreme Court to Overturn Landmark Gay Rights Ruling*, HUFFPOST (Apr. 5, 2017), https://www.huffpost.com/entry/supreme-court-gay-rights-ivy-tech_n_58e50f6ae4b0917d34760768.

⁶⁷ *Bostock*, 140 S.Ct. at 1824–25 (Kavanaugh, J., dissenting).

⁶⁸ *Bostock*, 140 S.Ct. at 1737. One of us has previously objected to the facile conflation of text and law that this passage reflects, *see* Mitchell N. Berman, *The Tragedy of Justice Scalia*, 115 MICH. L. REV. 783, 786–88 (2017), but we put that complaint aside for now. For elaboration on the objection see Erik Encarnacion, *Text Is Not Law* (working paper 2021).

⁶⁹ *Id.* at 1753.

⁷⁰ *Bostock*, 140 S. Ct. at 1743.

explained, “directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.”⁷¹

Gorsuch then applied this analysis to Bostock’s case. As mentioned, Gerald Bostock worked as a child welfare advocate for Clayton County, Georgia.⁷² The County allegedly fired him for being gay—that is, “because of” his sexual orientation.⁷³ To determine whether his firing was also “because of his sex,” Gorsuch would change that one thing—Bostock’s sex—while keeping everything else—particularly, his attraction to men—constant.⁷⁴ Because the County didn’t object to women who were attracted to men, “changing the employee’s sex would have yielded a different choice by the employer.”⁷⁵ Voila: Mr. Bostock was fired “because of” his sex, not only because of his sexual orientation.

In stark contrast, Justice Alito’s dissent, also embracing textualism, would have determined that the ordinary public meaning of Title VII did not encompass discrimination on account of sexual orientation.⁷⁶ Justice Alito’s dissent first claimed common parlance on its side. If your friend is fired because she’s a woman, the natural thing to say is that she was fired because of her sex.⁷⁷ But it would be odd to describe somebody who’s been fired because she’s gay or transgender as having been discriminated against “because of their sex.”⁷⁸ “If every single living American had been surveyed in 1964,” he further argued, “it would have been hard to find any who thought that discrimination because of sex meant discrimination because of sexual orientation—not to mention gender identity, a concept that was essentially unknown at the time.”⁷⁹

Obviously, sex, sexual orientation, and gender identity are deeply intertwined concepts. Advocates and social scientists have helped make their complex interrelationships clearer.⁸⁰ But, according to Alito, that’s not the issue for a textualist. “Title VII prohibits discrimination because of *sex itself*,” Alito insisted, “not everything that is related to, based on, or defined with reference to ‘sex.’”⁸¹ To highlight his point, Alito asks the reader to imagine an employer who acts according to a blanket ban on the employment of gay people, and therefore fires or refuses to hire

⁷¹ *Id.* at 1739.

⁷² Bostock, 140 S. Ct. at 1737–38.

⁷³ *Id.* As recounted by the Court, “Bostock began participating in a gay recreational softball league. Not long after that, influential members of the community allegedly made disparaging comments about Mr. Bostock’s sexual orientation and participation in the league. Soon, he was fired for conduct ‘unbecoming’ a county employee.” *Id.*

⁷⁴ *Id.* at 1739, 1741–42.

⁷⁵ *Id.* at 1741.

⁷⁶ Bostock, 140 S. Ct. at 1754–55 (Alito, J., dissenting).

⁷⁷ Bostock, 140 S. Ct. at 1759 (Alito, J., dissenting).

⁷⁸ *Id.*

⁷⁹ *Id.* at 1755.

⁸⁰ See, e.g., Mary Ann Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995); CHARLOTTE WITT, *THE METAPHYSICS OF GENDER* (2011); CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF STATE* (1989); Anne Fausto-Sterling, *Gender/Sex, Sexual Orientation, and Identity Are in the Body: How Did They Get There?*, J. SEX RESEARCH 1 (2019) (providing an extensive review of the scholarship); Mari Mikkola, *Feminist Perspectives on Sex and Gender*, STAN. ENCYCLOPEDIA PHIL. (2017), <https://plato.stanford.edu/entries/feminism-gender/> (same); Raja Halwani, *Sex and Sexuality*, STAN. ENCYCLOPEDIA PHIL. (2018), <https://plato.stanford.edu/entries/sex-sexuality/> (same).

We use “sex” here as understood by the courts to encompass the notion of biological sex, as well as the concept of gender. *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (“Thus, under *Price Waterhouse*, ‘sex’ under Title VII encompasses both sex—that is, the biological differences between men and women—and gender.”).

⁸¹ Bostock, 140 S. Ct. at 1761 (Alito, J., dissenting).

a person whom the employer knows (or believes) to be gay or lesbian, but without any inkling of that person's sex.⁸² If it's hard to see how that could be, you might imagine that the employer requires job applicants to complete an intake form that asks for the applicant's surname, first initial, and sexual orientation (among other info, not relevant), but not the applicant's sex or gender. All persons who check "homosexual" (or "bisexual") are rejected; all who check "heterosexual" are hired, or pass through to the next stage. (This is not science fiction: as Alito observes, it was essentially U.S. military policy for years.⁸³) If the employer's blanket policy were "no women" instead of "no gay people," this would be a textbook case of forbidden discrimination "because of" the claimant's sex. Abstracting from the particular facts presented in any of the consolidated cases, *Bostock* holds broadly that this flat and "even-handed" policy against the employment of gay people is also forbidden discrimination "because of" the sex of any adversely affected actual or would-be employee.

Alito declared this judgment simply "preposterous." Although the majority was trying to "pass off its decision as the inevitable product of" Justice Scalia's textualism, that, he stated, was a ruse. "The Court's opinion is like a pirate ship," he charged. "It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated—the theory that courts should 'update' old statutes so that they better reflect the current values of society."⁸⁴

II. TORTURED TEXTUALISM

Justice Gorsuch's majority opinion starts with a paean to textualist interpretation:

This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives. And we would deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations.⁸⁵

The task at hand then was to interpret the meaning of "because of such individual's . . . sex."⁸⁶ After assuming that "the term 'sex' in 1964 referred to 'status as either male or female [as] determined by reproductive biology,'" Justice Gorsuch explained that "the ordinary meaning of 'because of' is 'by reason of' or 'on account of.'"⁸⁷ So far, so good (for a textualist). Unfortunately, Gorsuch's performance was mostly downhill from there. Section II.A elaborates on the commonsensical view that the phrase "discrimination because of an individual's sex" does not cover discrimination on account of an individual's sexual orientation as a matter of ordinary meaning. Section II.B argues that but-for reasoning does not generate a different conclusion. Section II.C turns from sexual orientation to gender identity, explaining why the ordinary

⁸² *Bostock*, 140 S. Ct. at 1758-59 (Alito, J., dissenting).

⁸³ *Id.*

⁸⁴ *Bostock*, 140 S. Ct. at 1755-56 (Alito, J., dissenting).

⁸⁵ *Id.* at 1738.

⁸⁶ *Id.* (citing 42 U.S. Code § 2000e-2(a)(1)).

⁸⁷ *Id.* at 1739.

meaning of the statutory text does bar employment discrimination against transgender people even though it does not bar employment discrimination against gay people.

A. Ordinary Meaning

Let's start with some basics. As textualists repeatedly insist, textualism is not “literalism,”⁸⁸ where literalism is roughly “dictionary meaning”: the meaning that could be assigned an utterance by piecing together word meanings gleaned from a contemporary dictionary according to rules of syntax. Instead, textualism directs judges to search for, as Gorsuch aptly put it, “the ordinary public meaning” of a statutory utterance at the time of enactment.⁸⁹ And ordinary public meaning is not just any meaning that the words in isolation could carry, but something much like what a hypothetical ordinary and reasonable member of the public, attuned to the relevant context, would understand the statute to communicate or would be warranted in taking it to cover.⁹⁰ In this way, original public meaning—what textualists claim to be seeking—is some function of “common parlance.” How people use words and phrases, and how they understand the use made by others, informs how they will understand the use of words and phrases in a statutory text.⁹¹ In philosophical terms, textualists seek pragmatic content, not bare semantic content.⁹²

This Section examines the ordinary meaning of the statute in four steps. Subsection II.A.1 introduces dictionary definitions and standard hypotheticals to bolster the widespread academic and judicial judgment that the ordinary meaning of the statute disfavored the gay plaintiffs. Subsection II.A.2 then considers the suggestion that such intuitive judgments are unreliable for failing to distinguish original statutory meaning from original expectations regarding the statute's applications. It explains why that distinction, albeit of general importance, finds no foothold here. Subsection II.A.3 derives further support for the tentative conclusion that emerges from the first two subsections in the paucity of textualist arguments in briefs supporting the employees filed at the Supreme Court. In doing so, it also addresses other arguments in the briefs, including those concerning sex-stereotyping. Lastly, because Justice Gorsuch's majority opinion offers so little argument for its supposedly textualist conclusion apart from the but-for analysis that we criticize in depth in Section II.B., subsection II.A.4 jumps straight to the decision's reception. Here we critically engage Andy Koppelman's textualist defense of the decision and the eye-opening work of “empirical textualists” that purports to show that the

⁸⁸ See, e.g., Grove, *supra* note 4, at 279.

⁸⁹ Bostock, 140 S. Ct. at 1738. See also, e.g., ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 33 (2012) (explaining that textualists “determin[e] the application of a governing text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued”).

⁹⁰ Bostock, 140 S. Ct. at 1750; Bostock, 140 S. Ct. at 1755 (Alito, J., dissenting) (“And in any event, our duty is to interpret statutory terms to ‘mean what they conveyed to reasonable people *at the time they were written*.’” (citing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 16 (2012) (emphasis added))); Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 498 (2013) (stating the same and in light of the Gricean theory of meaning); see Manning, *supra* note 89, at 420.

⁹¹ Matters differ a little for specialized legal language, where meaning is set by understandings of specialists not lay people. But that's not relevant here, for “because of an individual's sex” is an ordinary locution.

⁹² Mark D. Greenberg, *Legal Interpretation and Natural Law*, 89 FORDHAM L. REV. 109, 113–14 (2020); see also Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 465 (2013) (discussing “contextual enrichment” in originalism).

linguistic intuitions that we present with some confidence in subsection II.A.1 are not shared by the average speaker of American English.

1. *A first pass*

What should we expect native English speakers to understand the phrase “A did Y because of B’s sex” to mean or encompass? “Sex” has very many meanings; it is a quintessentially polysemous word (much like “law”). The primary definition of “sex,” when used as a characteristic of an individual, is status as either male or female.⁹³ This is just what the employers in these cases put forth, and what all the Justices accepted. Accordingly, we might anticipate that the locution “A did Y because of B’s sex” means A did Y “on account of” B’s being male or on account of B’s being female (or on account of B’s being intersex).⁹⁴ Because B’s being male or B’s being female (or B’s being intersex) is not the same as B’s being gay or being straight or being bisexual, A’s doing Y on account of any of these latter three possible properties of B is not A’s doing Y “because of B’s sex.”

We believe that is what reflection on our speech practices suggests: in ordinary speech, an employer who discriminates against actual or would-be employees, both male and female, “by reason of” or “on account of” their sexual orientation would not be said or understood to discriminate “by reason of” or “on account of” those individuals’ sex. Judge Sykes put the point concisely in her *Hively* dissent: “discrimination ‘because of sex’ is not reasonably understood to include discrimination based on sexual orientation, a different immutable characteristic. Classifying people by sexual orientation is different than classifying them by sex. The two traits are categorically distinct and widely recognized as such.”⁹⁵ Whether or not she was right on the *legal* question of whether Title VII prohibits discrimination on the basis of sexual orientation, her analysis of the statutory language’s ordinary meaning fully comports with our linguistic intuitions.

This is not a partisan or ideologically freighted reading of the statute. Professor Cass Sunstein elaborates:

[I]magine if an English speaker, now or in 1964, says the following: “I am opposed to discrimination because of sex. I am also opposed to discrimination because of sexual orientation.” Does the speaker not understand the English language? Is she being redundant? (The answer to both questions is “no.”) Or suppose that an English speaker, now or in 1964, says the following: “I am opposed

⁹³ See, e.g., *Sex*, Merriam-Webster.com (providing the definition “the state of being male or female”); *Sex*, CAMBRIDGE ENGLISH DICTIONARY, dictionary.cambridge.org (providing “the state of being either male or female”).

⁹⁴ Although we are sympathetic to this parsing of the phrase, we are also tempted by an alternative offered us by Ben Eidelson. In published writing, Eidelson has proposed a literalist interpretation of these locutions pursuant to which action by A is “because of B’s X” if how A “regards B X-wise” partly explains A’s action. BENJAMIN EIDELSON, *DISCRIMINATION AND DISRESPECT* 16–24 (2015). In private correspondence, he has allowed that this proposal might be equivalent to saying that A does Y because of B’s X whenever A acts on account of any value or quality A assigns B’s X, even when that value or quality is not a standard value that X is. For example, A fires B because of B’s age if A fires B on account of B’s age having the value “42” or the value “older than A”; A fires B because of B’s sex if A fires B on account of B’s sex having the value “female” or the value “the same as the standard value of the sex B seeks in their intimate partners.” We’ll return to this proposal later. See *infra* Part III. We put it aside for now because Eidelson does not contend that his proposal represents a general all-purpose account of the ordinary public meaning of all utterances involving that construction, and all for values of X. In particular, he agrees that A’s firing of B on account of B’s sexual orientation does not count as A’s firing B on account of B’s sex as a matter of common parlance, which is the textualists’ supposed touchstone.

⁹⁵ *Hively*, 853 F.3d at 363 (Sykes, J., dissenting).

to discrimination because of sex. But I am not opposed to discrimination because of sexual orientation.” Is the speaker contradicting himself? Is he making some sort of logical error? Does he not understand the language? (The answer to all three questions is “no.”)⁹⁶

Or consider a gay man worrying about coming out to his parents. He isn’t worried that his parents will disapprove of him “by reason of” or “on account of” his sex. After all, they know his sex. He is worried that they will disapprove of him “by reason of” or “on account of” his sexual orientation. And if they do disapprove of him on that basis, neither he nor an ordinary third party would describe the parents’ attitudes or behaviors toward him as “because of his sex.”

A third case. Suppose the local lesbian motorcycle club advertises for a mechanic. Straight Stan applies for the gig but isn’t hired. Several friends, A, B, and C, are discussing the incident. Here’s their conversation:

A: “I heard they didn’t hire Stan because of his sex.”

B: “I heard they didn’t hire Stan because of his sexual orientation.”

C: “I heard they didn’t hire Stan because of his personality.”

It seems to us that A, B, and C are disagreeing. We think, further, that if D overheard the conversation, D would understand that A and B disagree with each other, and not only with C. If D reports to E that A and B agree that “Stan wasn’t hired because of his sex,” D would not be reporting the conversation faithfully but would instead be misleading E.

All these thought experiments bolster the idea that neither in 1964 nor today does employment discrimination against an individual because they’re gay count as employment discrimination “because of [that] individual’s sex” as a matter of ordinary public meaning of the statutory text.⁹⁷

⁹⁶ Cass R. Sunstein, *Textualism and the Duck-Rabbit Illusion*, 11 CALIF. L. REV. Online 463, 474–75 (2020). One might worry that such a hypothetical proves too much. Tara Grove (in personal correspondence) invites us to consider two related hypotheticals: First, suppose someone says, “I am opposed to discrimination because of sex. I am also opposed to discrimination because of motherhood.” Second, suppose someone says, “I am opposed to discrimination because of sex. But I am *not* opposed to discrimination because of motherhood.” See Bostock, 140 S. Ct. at 1743 (discussing discrimination based on motherhood as in *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971)). Each, at first glance, seems coherent and non-redundant, so do they also reveal that discrimination based on motherhood is not discrimination based on sex?

We think not. For both hypotheticals, if the utterer is using the term “motherhood” to actually mean “parenthood,” then the remark is coherent and non-redundant. But we think that such discrimination, as a matter of motivation, is distinct from discrimination based on sex. That said, it may have disparate impact that is cognizable under Title VII.

Now, let us suppose that the utterer does mean “*motherhood*”—that is, the state of being a parent and a woman. On the first example, we are inclined to say that the utterer is being redundant or is making a mistake. In particular, the “also” in the second sentence strikes us as incorrect. And without that “also,” the utterance may just be emphasizing a particular form of sex discrimination that the utterer finds objectionable—which is completely coherent and non-redundant. On the second example, we think that the utterer is making a mistake, or perhaps is rhetorically suggesting a carve out of cognizable sex discrimination, because discrimination based on the conjunction of being a woman and being a parent is discrimination based on “sex” as a matter of ordinary language.

⁹⁷ We are relying heavily here on dictionary definitions along with our intuitions—and those of other commentators with diverse ideological commitments—about how hypothetical English speakers would use language and would understand the use made by others. This is not the only way, and not always the best way, to ascertain the ordinary meaning that textualist seek. Recently, several scholars have advocated the use of survey

One clarification. To say that speakers would rarely use the locution “A did X because of B’s sex” to refer to action undertaken by A by reason of B’s sexual orientation, and that listeners would rarely understand use of that locution to bear that meaning or extension, is not to deny that there are some contexts in which a speaker might refer to discrimination because of an individual’s sexual orientation as “discrimination because of their sex” or that an ordinary listener would understand that utterance to have that meaning. This follows from the fact that textualists seek, not bare semantic content, but rather pragmatically enriched content.⁹⁸

Here’s an example: Suppose that Employer, who has a strict policy against employing gay people, knows employee Alex only by email. Employer knows that Alex is dating Employer’s neighbor, Blake. When Employer later meets Alex, Employer is surprised to discover that Alex has the same sex (or gender) as Blake. In consequence, Employer fires Alex. If Alex charges Employer with firing them “because of their sex,” the most natural and informative response would be: “no, I’m firing you because of your sexual orientation.” But if that’s the best, most informative answer, it’s not the only one. An affirmative response to Alex wouldn’t be inapt. Surely there’s a sense in which Employer is firing Alex because of Alex’s sex—it’s the discovery of Alex’s sex, given what Employer already knows, that drives Employer’s belief about Alex’s sexual orientation. In this context, it would seem a bit off or infelicitous for Employer to flatly deny to Alex that they’re being fired “because of their sex.”⁹⁹

But this is an unusual context, the proverbial exception that proves the rule. We can see this when we alter the hypo slightly. Now suppose that Employer has personal familiarity with their employee, Alex, knowing Alex’s gender and also that Alex is dating somebody named Blake. Because Employer naturalizes heterosexuality, they assume that Blake has a different gender (and sex) than Alex. When Employer meets Blake, they’re surprised to discover that Blake’s gender is the same as Alex’s. In consequence, Employer fires Alex. In this case, as in the first, Employer is firing Alex because of their sexual orientation. However, in this case, unlike the first, if Alex asks “are you firing me because of my sex?,” the response “no, I’m firing you because of your sexual orientation” would be unequivocal. Revealingly, it would not be entirely inapt for Employer to add “If anything, I’m firing you because of Blake’s sex.” But here, as in the previous types of case canvassed above, it would be entirely unnatural to say that Employer fired Alex because of Alex’s sex.¹⁰⁰ And for textualists, as Scalia has insisted, the statutory text “is to be

instruments to supplant or supplement intuitions and the results of dictionary and corpus linguistics evidence. We engage them in subsection II.A.4, *infra*.

⁹⁸ See *supra* note 92 and accompanying text.

⁹⁹ See *Bostock*, 140 S. Ct. at 1745 (“In conversation, a speaker is likely to focus on what seems most relevant or informative to the listener.”).

¹⁰⁰ Gorsuch invites us to imagine a case like this, but draws a different lesson:

Imagine an employer who has a policy of firing any employee known to be homosexual. The employer hosts an office holiday party and invites employees to bring their spouses. A model employee arrives and introduces a manager to Susan, the employee’s wife. Will that employee be fired? If the policy works as the employer intends, the answer depends entirely on whether the model employee is a man or a woman. To be sure, that employer’s ultimate goal might be to discriminate on the basis of sexual orientation. But to achieve that purpose the employer must, along the way, intentionally treat an employee worse based in part on that individual’s sex.

Bostock, 140 S. Ct. at 1742.

This is not well reasoned. The question, for a textualist, is not whether the employer “intentionally treated the employee worse based in part on that individual’s sex.” That way of putting the issue wrongly conflates questions about intention with questions about motivation. See Kimberly Kessler Ferzan, *Beyond Intention*, 29 CARDOZO L. REV. 1147 (2008). The questions are whether a speaker would describe this type of case as employment action “because

expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it.”¹⁰¹

2. *A disanalogy noted and discarded*

If what we’ve said so far is right, it is nearly all a textualist needs: the legal meaning of the statutory utterance is determined by what reasonable ordinary people would take it to mean; and reasonable ordinary people would not take discrimination on account of a person’s sexual orientation to token or instantiate discrimination “because of [that] individual’s sex.” We say *nearly* all to accommodate the one familiar situation in which (actual or supposed) facts about the circumstances in which ordinary speakers would or would not apply a given locution do not determine the locution’s ordinary meaning: when speakers would mistakenly apply or withhold a term because of erroneous beliefs about aspects of the world that the locution’s meaning makes relevant.¹⁰²

Consider a hypothetical offered by Mark Greenberg and Harry Litman in an important article on the difference between original meaning and original expected applications: a statute that requires quarantining of immigrants with “a communicable disease.”¹⁰³ If the authors and readers would or did apply that language to mandate quarantining persons with psoriasis out of a factually mistaken belief that psoriasis is infectious, that pattern of usage would not reliably evidence the meaning of the phrase “communicable disease.” Similarly, to take a stock constitutional example, if the original public meaning of the Equal Protection Clause had been,

of the employee’s sex,” and whether a listener who heard the event described this way would correctly understand what happened. We think the answers to these questions are “no.” Suppose that there are two model employees, Sally and Ted, and that each introduces their spouse to a manager. Their spouses, respectively, are Susan and Tom. If Sally and Ted are both fired and Sally complains that she was fired “because of her sex,” or that both she and Ted were fired because of their sex, the natural response—a response as likely to be voiced by Ted, the Employer, or an onlooker—is “no, you were fired because of your sexual orientation.”

¹⁰¹ ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 69 (2012). We now encounter what we think is a deep problem for textualism. What a speaker is likely to mean when using a particular locution, and therefore what a reasonable listener would understand the speaker to mean (and would be warranted in understanding the speaker to mean), is context sensitive. *See also, e.g.*, John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 420 (2005) (“[T]extualism does not admit of a simple definition, but in practice is associated with the basic proposition that judges must seek and abide by the public meaning of the enacted text, understood in context (as all texts must be).”). But every context is unique. More pointedly, part of the context for any statutory text includes that it is legislation and not, say, conversation or reporting. It is far from clear how to draw sound inferences about what a given locution means in the context of a particular statutory utterance from what the same locution is used or understood to communicate in other contexts. Some scholars have argued that this problem is fatal to textualism. *See, e.g.*, Mark D. Greenberg, *Legal Interpretation and Natural Law*, 89 FORDHAM L. REV. 109 (2020). While that might be so, because our task here is not to show that textualism is incoherent or untenable, but only that it does not deliver the conclusion that Title VII prohibits employers from discriminating on the basis of sexual orientation, we assume (but only *arguendo*) that the challenge can be met. In the meantime, we agree with the many scholars who have emphasized how far textualists still have to travel in providing an adequate account of the “context” that shapes textualist interpretation. *See, e.g.*, Grove, *supra* note 4, at 280, 295; James Macleod, *Finding Original Public Meaning*, at 47, 56 GA. L. REV. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3729005. *See also infra* Part III.B.

¹⁰² *Accord* James Macleod, *Finding Original Public Meaning*, at 18 & n.32, 56 GA. L. REV. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3729005 (identifying that this may occur due to “expectations [] premised on bias, factual error, or failure to consider relevant information”).

¹⁰³ *See generally* Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569, 585 (1998). *Compare* JACK M. BALKIN, *LIVING ORIGINALISM* 21–34 (2011) (discussing the difference between expected-applications originalism and original meaning—which Balkin labels as “skyscraper originalism” and “framework originalism”).

roughly, states must treat all persons with equal regard and respect, and if people believed that state-enforced racial segregation in schooling complied with that directive, then a textualist court should recognize that the original application expectations departed from the original meaning and privilege the latter over the former.

Gorsuch contends that that's what's going on here: the employers and dissents are appealing not to the original public meaning of the text, but rather to the original public expectations regarding the set of events to which the meaning would apply, and those don't merit respect. "Rather than suggesting that the statutory language bears some other *meaning*," he says,

the employers and dissents merely suggest that, because few in 1964 expected today's *result*, we should not dare to admit that it follows ineluctably from the statutory text. When a new application emerges that is both unexpected and important, they would seemingly have us merely point out the question, refer the subject back to Congress, and decline to enforce the plain terms of the law in the meantime.¹⁰⁴

And this, Gorsuch adds, "is exactly the sort of reasoning this Court has long rejected,"¹⁰⁵ offering *Oncale v. Sundowner Offshore Services, Inc.*,¹⁰⁶ to illustrate. In *Oncale*, the Court held that the statute covered male-on-male sexual harassment despite the fact that this "was assuredly not the principal evil Congress was concerned with when it enacted Title VII."¹⁰⁷ According to Gorsuch, "[u]nder the employer's logic, it would seem this was a mistake."¹⁰⁸

Gorsuch is pressing a false analogy, and Alito is right to object that "*Oncale* is nothing like these cases . . ."¹⁰⁹ Far from maintaining that Title VII "applies only to the 'principal evils' and not lesser evils within the plain scope of its terms," the employers and dissents vigorously contended precisely what Gorsuch says they didn't—namely that the statutory language does bear a different meaning than the plaintiffs allege. Here, Alito explains, "the interpretation that the Court adopts does not fall within the ordinary meaning of the statutory text as it would have been understood in 1964." In contrast, "[t]o decide for the defendants in *Oncale*, it would have been necessary to carve out an exception to the statutory text."¹¹⁰ That's because the plaintiff alleged that the harassment occurred because of his sex (male), and to find that this was not actionable because the alleged perpetrators were also male would add an extratextual requirement and thus contradict the express terms of the text of Title VII.¹¹¹

3. *Litigation*

It is, we think, massively revealing that not even the plaintiffs in these cases seriously argued that statutory ordinary meaning was on their side. In their Supreme Court briefs, Bostock and Zarda advanced many of the arguments found in the lower court opinions—including that sexual orientation discrimination constituted unlawful sex stereotyping, that it constituted associational discrimination, and that it failed the but-for causation test—but they did not even

¹⁰⁴ Bostock, 140 S. Ct. at 1750.

¹⁰⁵ *Id.*

¹⁰⁶ 523 U.S. 75 (1998).

¹⁰⁷ 523 U.S. at 79.

¹⁰⁸ 140 S. Ct. at 1752.

¹⁰⁹ 140 S. Ct. at 1773-74 (Alito, J., dissenting).

¹¹⁰ 140 S. Ct. at 1773-74 (Alito, J., dissenting).

¹¹¹ 523 U.S. at 79.

assert that the plain or ordinary meaning of the statutory text covered discrimination because of an individual's sexual orientation.¹¹²

Indeed, out of the over 65 *amici curiae* briefs filed, only three—the Brief of Professors William Eskridge and Andrew Koppelman, the Historians' Brief, and the Corpus-Linguistics Scholars' Brief—squarely maintain that the ordinary meaning of the statutory term “sex” at the time of enactment was broad enough to encompass sexual orientation.¹¹³ In all three cases, however, the evidence is extremely meager, consisting essentially of tertiary definitions of “sex” in contemporaneous dictionaries that supplement the universal primary definition—the two biological divisions of organisms into either male or female—with references to an organism's “behavior.”¹¹⁴ For example, Eskridge and Koppelman note that one dictionary's third definition of sex was “the whole sphere of behavior related even indirectly to the sexual functions and embracing all affectionate and pleasure-seeking conduct,”¹¹⁵ and the Historians quote another: “the sum of structural and functional differences by which the male and female are distinguished, or the phenomena or behavior dependent on these differences.”¹¹⁶

We're not sure that these definitions reveal very much, for everyone understands that “sex” refers to the property of being male or female and also refers to conduct. When somebody bemoans (or boasts?) that they “haven't had sex in months,” they mean that they haven't engaged in sexual intercourse or related intimate behaviors for a while, not that they've lacked the property of being either male or female. The problem for these amici is that there is a long way to go from acontextual word definitions to a sound conclusion about the ordinary meaning of a concrete utterance that includes the word. And all three briefs stop short of contending that the ordinary or common understanding of the full statutory phrase “to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's sex” would have

¹¹² Brief for Petitioner Gerald Lynn Bostock, *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020) (No. 17-1618); Opening Brief for Respondents Melissa Zarda, et al., *Altitude Express, Inc. v. Zarda, et al.*, 140 S. Ct. 1731 (2020) (No. 17-1623).

¹¹³ Brief of Eskridge and Koppelman as Amici Curiae in Support of Employees at 15–24, *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623, 18-107) [hereinafter Brief of Eskridge and Koppelman]; Brief of Historians as Amici Curiae in Support of Employees at 5–11, *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623, 18-107) [hereinafter Historians' Brief]; Brief of Amici Curiae Corpus-Linguistics Scholars in Support of Employees at 24–26, *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623, 18-107) [hereinafter Corpus-Linguistics Scholars' Brief].

Other briefs make claims that the text and the meaning of the statute unambiguously prohibit sexual orientation discrimination, but their arguments are not based on the ordinary meaning of the statutory text; instead, those briefs appeal to other arguments, such as the but-for analysis and the analogy to anti-miscegenation laws.

¹¹⁴ Brief of Eskridge and Koppelman, *supra* note 113, at 15–24; Historians' Brief, *supra* note 113, at 5–11; Corpus-Linguistics Scholars' Brief, *supra* note 113, at 24–26.

¹¹⁵ Brief of Eskridge and Koppelman, *supra* note 113, at 20–21.

¹¹⁶ Historians' Brief, *supra* note 113, at 6–7. The Historians' Brief contends that the public had a capacious understanding of the term “sex” and that, in light of that capacious understanding, Title VII was understood to prohibit “conformity to sex-role expectations in the workplace.” *Id.* at 5–16. It appears to us that the Historians' Brief is making an argument about the purpose of the statute and that it is not making a textualist argument. Indeed, we are sympathetic to that view of Title VII, but from a pluralist perspective. *See infra* note 247 and accompanying text. However, insofar as the Historians' Brief is advancing a textualist argument, we think it fails on that front. In addition to the fact that differing meanings of “sex” are not instructive for this inquiry, the Historians' Brief does not analyze the proper statutory phrase “because of such individual's . . . sex” and instead focuses on the term “sex discrimination.” *See, e.g., id.* at 12 (discussing the “precise meaning of ‘sex discrimination’”).

The Corpus-Linguistics Scholars' Brief provided some data that the term “sex” encompassed “gender.” The Brief concluded that “sex” covered other aspects of “sexuality,” including sexual orientation, despite “orientation” not appearing in any of their proffered data. Corpus-Linguistics Scholars' Brief, *supra* note 113, at 24–26.

extended to bar discharge of or discrimination against any individual because such individual engaged in “behavior related even indirectly to sexual functions.”¹¹⁷ That’s a good thing because if that were the statute’s ordinary or plain meaning, it would prohibit discharge of a teacher for having sexual relations with a student or the firing of a sales associate for engaging in sexual intercourse on the store floor during business hours.

Having now mentioned the Historians’ Brief, we add a few words about its counterpart, the Philosophers’ Brief,¹¹⁸ not out of any commitment to neutrality among the humanities, but because many readers and workshop attendees have pressed objections to us that either reference that brief or just as well might have.

The Brief’s central thrust is to reveal the many and deep ways that the concepts of sexual orientation and gender identity appeal to and depend upon the concept of sex. By and large, we believe that the Brief’s conceptual claims are true and persuasively defended.¹¹⁹ The present question is whether the tight conceptual relationship between sexual orientation and sex that the Brief illuminates establishes what matters to a textualist: that employment discrimination against somebody because they’re gay counts as discrimination “because of such individual’s sex” as a matter of the ordinary meaning of the statutory text at time of enactment.

One possible route to an affirmative answer travels via a premise that one of us has elsewhere dubbed “conceptual causation”: “If a putative non-protected basis for discrimination conceptually depends on the protected characteristics of the plaintiff, then the basis for discrimination is ‘because of the relevant protected category’ as a matter of ordinary language.”¹²⁰ But conceptual causation is not a general truth. Suppose A shoots B, a police officer, out of anti-police animus. In this case, competent English speakers would agree that “A shot B because B is a police officer.” Plausibly if roughly, a police officer is a person whose job is to enforce the law, including by investigating crimes and making arrests. But even if the concept of police officer depends upon and incorporates the concept of a person, competent English speakers would firmly deny that “A shot B because B is a person.” Or imagine that C, an avid sports fan, declined free tickets to the Giants–Cardinals match because the teams were playing football, the one sport that C cannot abide. Football is a kind of game. One cannot even grasp the concept football without grasp of the concept game. But it would be absurd to say that C refused the tickets because they were for a game.

¹¹⁷ See also Brief of Eskridge and Koppelman, *supra* note 113, at 23 (arguing similarly that the “[p]ublic meaning is an inquiry into the widely accepted meaning of language, with consideration of how broadly expressed the text might be,” suggesting that the common, everyday meaning of “sex” would not have encompassed “sexual orientation”).

¹¹⁸ Brief of Philosophy Professors as *Amici Curiae* in Support of the Employees, *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623, 18-107).

¹¹⁹ We do have some quibbles though. For instance, the first sentence of the brief’s argument summary declares that “[t]he concept of ‘sex’ is inextricably tied to the categories of same-sex attraction and gender nonconformity.” Philosophers’ Brief, at 1. We doubt that the concept of sex is inextricably tied to these other categories even while the converse is undoubtedly true.

¹²⁰ Guha Krishnamurthi & Peter Salib, *Bostock and Conceptual Causation*, YALE J. REG. NOTICE & COMMENT (2020), <https://www.yalejreg.com/nc/bostock-and-conceptual-causation-by-guha-krishnamurthi-peter-salib/>. Gorsuch flirts with this view. See, e.g., *Bostock*, 140 S. Ct. at 1746 (“There is no way for an applicant to decide whether to check the homosexual or transgender box without considering sex. To see why, imagine an applicant doesn’t know what the words homosexual or transgender mean. Then try writing out instructions for who should check the box without using the words man, woman, or sex (or some synonym). It can’t be done.”).

In saying that conceptual causation is not generally or categorically true, we do not rule out that a more nuanced thesis in the neighborhood might be. But the Philosophers' Brief does not advance a more plausible refinement, and none occurs to us. Instead, many philosophically minded colleagues take the conceptual connection between sex and sexual orientation in a slightly different direction, aiming to establish that employment discrimination against gay people is a form of sex or gender stereotyping¹²¹ and that sex or gender stereotyping counts as discrimination because of an individual's sex.

To understand the argument and its flaws it's helpful to reflect first on a different case. Suppose that Employer fires Fran, a straight ciswoman, for wearing her hair short. In Employer's view, women should wear their hair long. This is surely true: "Fran was fired on account of her failure to conform to gender norms." Is it also true that "Fran was fired because of her sex"?

Distinguish two versions. In Version 1, Employer imposes this gender norm on female but not male employees. Were Fran a cisman, he could wear his hair short or long or not at all. We think that Version 1 is rightly described as discrimination "because of Fran's sex" because it is Fran's being a woman that subjects her to burdensome terms of employment—that she must conform to gender norms regarding hair length—that male employees do not similarly face.¹²² Version 2 is the more relevant and challenging. Here Employer announces and adheres to a sex-neutral policy according to which all employees must abide by gender-appropriate hair-length norms: short for men, long for women. Now was Fran fired "because of her sex"? The seminal case of *Price Waterhouse v. Hopkins* holds that, as a legal matter, she was.¹²³ Textualist defenders of the *Bostock* result say that the same conclusion follows if Fran was fired not because of her hair length but because she is attracted to women, even pursuant to an "evenhanded" sex-neutral policy that requires heterosexuality of male and female employees alike.

Not so fast. First, to accept that *Price Waterhouse* was rightly decided is not to grant that it reflects the ordinary meaning of the statutory text at enactment; we can't simply assume that it was a sound decision *on textualist premises*. To anticipate a point we'll hammer at shortly, it could be that the firing of Fran falls within the ordinary meaning of "sex discrimination," but does not count as discrimination "because of Fran's sex." Second, even if employment discrimination against somebody because of their nonconformity with sex or gender norms regarding hair length (or attire or some other aspect of their behavior) counts as discrimination "because of such individual's sex" as a matter of ordinary meaning, it remains a separate question whether discrimination because the individual is gay does too. Some colleagues deny that this is a separate question, insisting that to discriminate against people because they're gay "just is" to discriminate against them because of their failure to abide by sex- or gender-based norms of sexual attraction: women for men, men for women. But the reduction of anti-gay discrimination

¹²¹ At least two very different ideas are captured by the phrase "sex (or gender) stereotyping." One idea involves simple sex (or gender) statistical generalizations. Take a moving company that declines to hire Betty, a woman, because of a stereotyped belief that men are physically strong and women aren't. We think it largely uncontroversial that the employer discriminates against Betty "because of her sex." A second idea involves a shift from statistical generalizations to normative expectations. Imagine now that the moving company is persuaded that, contrary to prevailing descriptive stereotypes, Betty is plenty strong. They don't hire her not because they think she *can't* do the work but because they believe she *ought* not to, that physical labor is appropriate work for men, not for women. In this latter sense of the term, a practice of sex (or gender) stereotyping is a practice of requiring conformity to sex (or gender) norms. That's the sense we and our interlocutors have in mind for present purposes.

¹²² See also *infra* Subsection II.B.3 (discussing *Phillips*).

¹²³ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

to the enforcement of sex- or gender-based behavioral norms is too facile. That's because it might not represent that way to the employer, and the locution "A does X because of Y" tracks, at least in part, *the actor's view* of Y, not only the philosophically informed view of Y. We can put this in terms that will be familiar to signatories of the Philosophers' Brief: That anti-gay discrimination in employment is a form of sex- or gender-stereotyping does not entail that an employer who fires an employee "because they're gay" would be understood to fire that employee "because they fail to conform to sex- or gender-based norms of conduct" as a matter of ordinary meaning, any more than that Mark Twain "just is" Samuel Clemens entails that someone who believes that Mark Twain wrote *Huckleberry Finn* thereby believes that Samuel Clemens wrote *Huckleberry Finn*.¹²⁴

Happily, the Philosophers' Brief does not truly maintain otherwise. Its central argument is moral, not textual. Although it advances claims about "the most logical and reasonable" reading of the statute,¹²⁵ it is reflection on "the philosophical underpinnings of antidiscrimination law"¹²⁶—not common usage—that underwrites those judgments. Because "what unifies practices deemed discriminatory is that they 'act[] on or reproduce[] an aspect of the category in a way that is morally objectionable,'"¹²⁷ the Brief reasons, it follows that "[t]he real question to ask . . . is whether firing a person for violating a sex-specific stereotype *wrongfully* limits a person's freedom and dignity in the specific capacities and manner that the stereotype demands."¹²⁸ Maybe so. But it's hard to imagine a self-described textualist deeming that "the real question."

If there were any doubt about the non-textualist commitments of the Philosophers' Brief, one striking fact should allay it. After once quoting the statutory language,¹²⁹ the Brief never again returns to the actual text. Instead, it maintains, over again and without exception, that discrimination on the basis of sexual orientation is discrimination "because of sex," not once calling it discrimination "because of *such individual's* sex."¹³⁰ For a textualist, that casual conflation is unacceptable because textual meaning is everything and different texts presumably bear different meanings.¹³¹ (An employer who doesn't hire Casey because Casey is a libertine, or has committed sexual harassment in the past, might thereby discriminate "because of sex" but not "because of Casey's sex.") Now, the signatories of the Philosophers' Brief might respond that the meaning or scope or legal effect of the statute should not depend on the precise verbal formulation chosen—whether the statute, by its terms, prohibits "discrimination because of sex" or "discrimination because of an individual's sex" or "sex discrimination." Very possibly, many signatories and sympathetic others would privilege the principles that underlie the text or show it in its best light over strict adherence to the communicative content that happens to be encoded

¹²⁴ Gottlob Frege, *On Sense and Reference*, in TRANSLATIONS FROM THE PHILOSOPHICAL WRITINGS OF GOTTLLOB FREGE 56 (Max Black & Peter Geach, eds. & trans. 1980).

¹²⁵ Philosophers' Brief, at 3, 12.

¹²⁶ *Id.* at 2.

¹²⁷ *Id.* at 21.

¹²⁸ *Id.* at 23.

¹²⁹ *Id.* at 3.

¹³⁰ *See, e.g., id.* at 19–25.

¹³¹ *See, e.g.,* ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 56 (2012) ("When deciding an issue governed by the text of a legal instrument, the careful lawyer or judge trusts neither memory nor paraphrase but examines the very words of the instrument."); John F. Manning, *Separation of Powers As Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1973 (2011) ("Treating a precise text as a placeholder for a more general background purpose or treating a broadly framed text as the placeholder for a more precise rule negates the lawmaker's ability to determine the appropriate level(s) of generality at which to frame diverse provisions of law.").

in very particular statutory formulations. But we daresay that that’s what makes them philosophers, not textualists (no offense intended, in either direction).

4. Reception

To our surprise, several scholars writing *after* the decision have contended that Gorsuch’s majority opinion correctly captures the plain or ordinary meaning of the statutory text. Some such contentions appear to us as essentially reports of the author’s own linguistic intuitions little supported by explanation or argument.¹³² While these reports are not unworthy of regard, we do not think there is much we can say in response beyond what we have said already. Here we address two sets of scholars who have provided more elaborate defense of the *Bostock* result on textualist grounds: first Andrew Koppelman, and second the “empirical textualism” explored by James Macleod, Kevin Tobia, and John Mikhail.¹³³

Start with Koppelman. While we greatly admire his longstanding campaign to secure legal protection against discrimination for gay and lesbian people, and congratulate him on his victory in *Bostock*, we find his arguments regarding the statute’s ordinary meaning hard to credit. He starts with the now-familiar assertion that “the plain language” of the statutory text prohibits discrimination because of an individual’s sexual orientation,¹³⁴ and that that is just what the text “literally says.”¹³⁵ As we’ve already explained, these contentions are eccentric.¹³⁶ But Koppelman doesn’t stop here. Instead of acknowledging their eccentricity, he treats it as uncontroversial that ordinary meaning was on the plaintiffs’ side and proceeds to investigate the strategies—he calls them “subtractive moves”—employed by those who would “nullify or limit the effect of the language that is there.”¹³⁷ The first common move, he says, and the one he thinks that Alito

¹³² This is true, in our opinion, even of the best of scholars. Michael Dorf, for example, asserts that “the textualist argument for the [*Bostock*] plaintiffs is very strong,” without addressing the plain meaning of “sex” and “sexual orientation.” Dorf, *Gorsuch’s Magnificent Opinion*, *supra* note 5. Although we’re taking issue with Dorf’s assessment of the textualist merits of the majority opinion, we are largely in accord on the other, and perhaps larger, issues the decisions raise. *See supra* note 6. Similarly, Tara Grove states that “[t]he text appeared to strongly favor the plaintiffs: terminating a male employee because he is romantically attracted to men, or dismissing an employee after she announces her transition from male to female, seem like instances of discrimination because of ‘sex.’” Grove, *supra* note 4, at 266. But, again, the statutory language proscribes discrimination “because of such individual’s sex,” not “because of sex,” *see supra* note 130 and accompanying text, and the overwhelming majority of commentators who have weighed in on the topic have reported their judgment that terminating a male employee because he’s attracted to men—i.e., because he’s gay—is *not* an instance of discrimination because of that employee’s sex. As best we can tell, Grove says nothing further to explain why the case seems the way it does to her.

¹³³ In a forthcoming article *The But-For Theory of Anti-Discrimination Law*, VA. L. REV. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3801699, Katie Eyer defends but-for causation as a way of analyzing discrimination claims, stating that it is “important to ensuring that anti-discrimination law can achieve its basic promises.” *Id.* at 1. In her view, embracing textualism is the best way to combat anti-plaintiff structures in discrimination law and thus recognize the varieties of discrimination present in employment. Eyer appeals to the result in *Bostock* as demonstrating this very potential. *Id.* at 6, 20. Though Eyer acknowledges that some progressive critics have challenged the textualist bona fides of the *Bostock* majority opinion, she does not address those criticisms squarely. Rather, her main point is that embracing textualism and the but-for test has more promise in furthering laudable, progressive goals for anti-discrimination law. *Id.* at 48–49.

¹³⁴ Koppelman, *Subtractive Moves*, *supra* note 5, at 3.

¹³⁵ *Id.*

¹³⁶ Although eccentric, they could still be right—about the “literal” meaning of the statute—if something like Eidelson’s analysis of “A does Y because of B’s X” is correct. *See supra* note 94. We are not committed to any particular position regarding the “literal” meaning of the statutory text because the textualist touchstone is common or ordinary meaning, which textualists have long insisted is other than literal meaning.

¹³⁷ *Id.* at 12.

pursued, was to adopt an unduly constrictive theory of plain meaning. In Koppelman’s view, there are two types of “plain meaning” of a text: “prototypical” plain meaning and definitional or extensional plain meaning.¹³⁸ “The prototypical meaning is the meaning that most commonly occurs, and which normally comes most easily to the mind of a reasonable person.”¹³⁹ Definitional meaning is all that falls within the “extensions” of “the definition of a word.”¹⁴⁰ An example: “bird” prototypically means an animal that can fly.¹⁴¹ But definitionally, it includes flightless members of Class Aves, such as ostriches and penguins.¹⁴² Koppelman’s diagnosis: Alito interpreted the statute against the plaintiffs because he ascribed the statute its prototypical plain meaning while Gorsuch properly ascribed it its full extensional meaning.¹⁴³

This diagnosis does not fit the case. To be sure, we could imagine a different case in which Koppelman’s proposed distinction between prototypical and definitional meaning *might* prove illuminating. Imagine a statute that prohibits employment discrimination “because of [an] individual’s age.”¹⁴⁴ If the social phenomenon that occasioned this statutory coverage was always and only discrimination against people who are thought to be too *old*, we might then imagine debates over whether it prohibits discrimination on the basis that an individual is thought too *young* turning on whether one adopts a prototypical or definitional approach to plain meaning. But that is not this case. This statute prohibits discrimination “because of [the] individual’s sex.”¹⁴⁵ Thus, here the question of plain meaning turns on whether an “individual’s sex” means or encompasses an individual’s sexual orientation. But it doesn’t, either as a matter of prototypical meaning or as a matter of the full extension of the term’s dictionary meaning.¹⁴⁶

To better appreciate how Koppelman’s analysis misfires, it might help to have in mind a clear case to which his distinction applies. Drawing from the example with which he illustrates the prototypical/extensional distinction, let us imagine a statute that prohibits employment discrimination against an individual “because of such individual’s ownership of a bird.” Robin is fired for owning a bird, in this case an emu. A practitioner of prototypical plain meaning (if there were such a person) would hold that the statute isn’t violated because an emu isn’t a prototypical bird. A practitioner of definitional plain meaning—and we think that what Koppelman describes as “definitional” plain meaning is what others call “plain meaning,” simpliciter—would hold that

¹³⁸ *Id.* at 13.

¹³⁹ *Id.* at 14.

¹⁴⁰ *Id.* More precisely, Koppelman describes definitional plain meaning as “the definition of a word, which encompasses all its logical extensions.” *Id.* Koppelman has confirmed to us that the qualifier “logical” is better omitted.

¹⁴¹ *Id.* at 13.

¹⁴² *Bird*, Merriam-Webster.com (defining “bird” as “any of a class (Aves) of warm-blooded vertebrates distinguished by having the body more or less completely covered with feathers and the forelimbs modified as wings”).

¹⁴³ Koppelman, *Subtractive Moves*, *supra* note 5, at 15.

¹⁴⁴ The Age Discrimination in Employment Act of 1967 (ADEA) prohibits discrimination of people who are 40 or older “because of such individual’s age.” 29 U.S.C. 621 *et seq.*

¹⁴⁵ 42 U.S. Code § 2000e-2(a).

¹⁴⁶ The dictionary meaning of “sex” is “either of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male especially on the basis of their reproductive organs and structures.” *Sex*, Merriam-Webster.com. The dictionary meaning of “sexual orientation” is “a person’s sexual identity or self-identification as bisexual, straight, gay, pansexual, etc.: the state of being bisexual, straight, gay, pansexual, etc.” *Sexual orientation*, Merriam-Webster.com. The meaning of “sex” here does not mean or encompass “sexual orientation.”

it is violated because, prototypical or not, an emu does fall within the extension of the definition of the word “bird.” Thus, in this case, Robin is fired because they own a bird (to wit, an emu).

Using this example as a model, the prototype/extensional distinction would apply analogously to the dissent’s reasoning in *Bostock* in the following way: if the employer fired a gay male because of his sex (male), but Alito failed to see that firing a gay male because he’s a male is still firing a male because he’s male—due to a belief that a gay male is not a “prototypical” male. But, obviously, that is not what happened. Alito did not fail to see that a gay male is male in the same way that somebody too beholden to prototypical reasoning might fail to see that a flightless bird is a bird. Alito simply observed that if a gay male is fired because he’s gay but not because he’s male then he isn’t fired “by reason of” his sex. In short, it seems to us, Alito and his fellow dissenters did not rely on any esoteric or confused notion of plain or ordinary meaning in concluding that discrimination on account of an individual’s sexual orientation is not discrimination on account of an individual’s sex. They were relying on the statute’s ordinary meaning, full stop. We think that Koppelman, despite his protestations to the contrary, is not.¹⁴⁷

While Koppelman’s arguments and conclusion differ from ours, his basic approach is much the same: heavy reliance on armchair theorizing. But a very different approach might be possible. In two fascinating articles, James Macleod and Kevin Tobia and John Mikhail report survey results showing that slight majorities of ordinary speakers would affirm, in response to short vignettes, that a gay man fired because he’s gay is fired “because of his sex.”¹⁴⁸ These surveys can be read to endorse or assume textualism and to establish, contrary to what the *Bostock* dissents assert and to what we argue here, that the ordinary public meaning of the statutory text does support the plaintiffs—even without recourse to Gorsuch’s but-for analysis.

We think that would be a substantial overreading of the studies because we do not think that textualists would or should take these results at face value. Not to put too fine a point on it, the survey results—the *results*, not the survey instruments or the articles that present the results—are a mess.

First, the results are more equivocal than the articles might be read to suggest. For example, Macleod’s abstract announces flatly that “textualists’ ‘ordinary reader’ at the time of Title VII’s enactment would have understood that it barred LGBT discrimination.”¹⁴⁹ That

¹⁴⁷ We suspect that what Koppelman is really relying on is some combination of but-for reasoning (discussed below) and a conflation of (a) facts that must be known in order for an agent to draw a warranted inference about a fact that is operative in their decision making with (b) the operative fact itself. As he writes: “The argument for protection of sexual orientation is simple. In order to determine whether someone is ‘homosexual,’ an employer must take account of that person’s sex. It is not enough to know that A is romantically involved with a woman. The employer must know A’s sex.” Koppelman, *Subtractive Moves*, *supra* note 5, at 8. That is false. What is true is that, in order to determine whether somebody is homosexual (gay), an employer *who knows only the sex of a person’s romantic interests*, must know the person’s sex in order to draw a conclusion about the person’s sexual orientation. But it is quite easy and common to know whether somebody is gay without knowing their sex. If your friend tells you “my cousin Lee is homosexual,” then you know (or have reason to believe) that Lee is gay without knowing or taking account of Lee’s sex. *Accord* Brief of Ryan T. Anderson as Amicus Curiae In Support of Employers at 6–7, *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020) (Nos. 17-1623 & 18-107).

¹⁴⁸ James Macleod, *Finding Original Public Meaning*, GA. L. REV. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3729005; Kevin Tobia & John Mikhail, *Two Types of Empirical Textualism*, BROOKLYN L. REV. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3729629.

¹⁴⁹ Macleod, *supra* note 102, at 1.

strikes us as a modestly aggressive reading of Macleod's own data.¹⁵⁰ When asked whether discrimination against an employee because he's gay counts as employment discrimination "because of his sex," 47% of his respondents answered "clearly yes," 13% answered "probably yes," 17% selected "probably no," and 23% said "clearly no." This pattern of responses seems to us as supportive of the conclusion that the locution has *no* ordinary meaning than that it bears the ordinary meaning that Gorsuch claimed for it. In Tobia & Mikhail's survey, 53 percent of survey respondents answered that discrimination against an employee because he's gay counts as employment discrimination "because of his sex," while 47 percent said that it does not—a result that, given the margin of error, is a statistical tie.¹⁵¹

Second, disconcertingly large proportions of responses in Tobia & Mikhail's study seem hard to explain on grounds other than carelessness or confusion (or perversity). That study used diverse scenarios and prompts to assess ordinary people's linguistic intuitions on four questions: (1) whether employment discrimination against someone because they're gay is employment discrimination "because of their sex," (2) whether employment discrimination against someone because they're transgender is employment discrimination "because of their sex," (3) whether employment discrimination against someone because they're a mother is employment discrimination "because of their sex," and (4) whether employment discrimination against someone because they're in an interracial marriage is employment discrimination "because of their race."¹⁵² In addition to investigating whether discrimination because of a non-statutory "target" factor (sexual orientation, gender identity, motherhood, interracial marriage) counts as discrimination because of the "statutory" factor (sex, race), the authors also tested whether survey respondents correctly understood that discrimination on the basis of the target factor counts as discrimination "because of" the target factor itself.¹⁵³ Focus on the scenario in which the employer tells the employee, Mike, that he's being fired because "I just don't think that having gay employees is good for business." Some respondents were asked, not whether the employee was fired "because of his sex," but whether he was fired "because of his sexual orientation." Presumably, any competent English speaker who is paying attention should answer *that* question in the affirmative. Yet, for each fact pattern (concerning sexual orientation, gender identity, motherhood, and interracial marriage), a remarkable one out of six respondents denied that firing someone on the basis of X counted as firing them "because of X."¹⁵⁴

Furthermore, the study also asked questions intended to learn something about how respondents would undertake but-for analysis. Here's how the question was formulated for the sexual orientation case: "Imagine that the above scenario were different in exactly one way: Mike was not a man but was instead a woman named 'Michelle,' who is married to a man. Imagine that everything else about the scenario was the same. *Would Michelle still have been fired?*"¹⁵⁵ This question, like the one that asks about the target factor, is close to an intelligence or attention check. Later, we will challenge Gorsuch's claim—a claim that, in our judgment, Tobia and Mikhail accept too uncritically¹⁵⁶--that the appropriate way to run the but-for analysis on a case

¹⁵⁰ See also, e.g., *id.* at 4 (asserting that "[m]ost respondents found the statutory language plainly applicable to each type of employment discrimination tested").

¹⁵¹ Tobia & Mikhail, *supra* note 148, at 17.

¹⁵² *Id.* at 13.

¹⁵³ *Id.* at 14.

¹⁵⁴ *Id.* at 17.

¹⁵⁵ *Id.* at 14.

¹⁵⁶ See *infra* note 181 and accompanying text.

of a gay man like Mike is to use a straight woman like Michelle. We will argue that the counterfactual Michelle must be gay, not straight. But regardless of whether it is useful or revealing to examine how the employer would have treated a straight woman, the question is surely askable, and there is no doubt, based on the scenario and prompt, what the right answer to this question is: “no, straight Michelle would not have been fired.” Yet 36% of the respondents answered that Michelle *would* have been fired.¹⁵⁷ This is a mistake in reasoning, plain and simple. (Roughly similar percentages of respondents—from 26% to 34%—made the same error in the other fact patterns.¹⁵⁸) All these defects combine to paint a picture of survey respondents who are careless and confused.

Third, patterns of responses *across* the scenarios further undermine their reliability. While a slight majority of respondents answered question (1) in the affirmative, larger majorities answered questions (3) and (4) in the *negative*.¹⁵⁹ More respondents appear to believe that firing gay men and lesbian women alike is firing them “because of” their sex than believe that firing mothers but not fathers counts as firing the female parents “because of” their sex or believe that firing somebody for being in an interracial relationship counts as firing them “because of” their race. These are deeply puzzling results because we are aware of no scholar or judge who had anticipated this pattern of outcomes and we cannot think up any explanation that would fully make sense of them.

So what? Maybe nothing if, as the authors of these studies emphasize, the textualist inquiry “is factual and empirical, not normative.”¹⁶⁰ If the touchstone for a textualist is how the statistically average person would have understood the statutory text, then maybe the conclusion is that, because the average person has weird and inexplicable linguistic intuitions, the ordinary meaning of the statutory text is often weird and inexplicable, not something that the average lawyer or judge will have access to just by consulting their own linguistic intuitions. But that would be a disaster for textualism because it would seem to entail that judges would be unable to intelligibly *reason* about ordinary meaning and therefore must defer to whatever conclusions the empiricists deliver. Survey results would dictate legal conclusions in all cases.

In fact, though, committed textualists have often insisted that ordinary meaning is not an entirely empirical inquiry, but rather a partially normalized or idealized one. It “ask[s] how a reasonable person, conversant with the relevant social and linguistic conventions, would read the text in context,”¹⁶¹ and seeks to “hear the words as they would sound in the mind of a skilled, objectively reasonable user of words.”¹⁶² In our view, these surveys powerfully demonstrate that the “ordinary meaning” that textualism seeks cannot be wholly determined by how the statistically average person, warts and all, would understand statutory language, and that the approach does require some nontrivial laundering of brute linguistic intuitions.¹⁶³ What that

¹⁵⁷ Tobia & Mikhail, *supra* note 148, at 16.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 17.

¹⁶⁰ Macleod, *supra* note 148, at 3; *see also* Tobia & Mikhail, *supra* note 148, at 3 & n.2.

¹⁶¹ John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2392-93 (2003).

¹⁶² Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988); *see generally* Richard H. Fallon, Jr., *Three Symmetries Between Textualist and Purposivist Theories of Statutory Interpretation—and the Irreducible Roles of Values and Judgment Within Both*, 99 CORNELL L. REV. 685 (2014).

¹⁶³ *Cf.* Macleod, at 48 n.288 (explaining why textualists “might prefer a more idealized conception” of the hypothetical reader in the statutory context than in the constitutional one). For an incisive commentary on challenges that idealization presents to textualism, *see* Larry Alexander & Saikrishna Prakash, “*Is That English You’re Speaking?*” *Why Intention-Free Interpretation is an Impossibility*, 41 SAN DIEGO L. REV. 967, 982-89 (2004).

laundering involves is a big question that we cannot pursue here. The crucial takeaway is only that, because ordinary meaning cannot be unrefinedly empirical, surveys of the sort conducted by Macleod, Tobia and Mikhail are far less probative to textualists than might initially appear.¹⁶⁴

* * *

By our count, of the 30 judges involved in these four lawsuits, 14 signed opinions that squarely addressed the plain or ordinary meaning of the precise statutory language, and all of them concluded or conceded that it would not have proscribed discrimination because of the affected individual’s sexual orientation.¹⁶⁵ They could be wrong, Sunstein’s examples might misfire, our linguistic intuitions might be off, our doubts about the empirical textualist surveys and their relevance might prove misguided. But if so, those who contend that the plaintiffs had ordinary meaning on their side need a lot more argument to make the case.

B. Counterfactual Confusions

Gorsuch’s opinion did not provide that argument. After asserting that the content of our statutory legal norms is fully determined by the “ordinary public meaning” of the statutory text, and after observing that the ordinary meaning of “because of X” is “by reason of X,” Gorsuch never investigated whether the ordinary public meaning of “by reason of sex” encompassed “by reason of sexual orientation”—whether, that is, ordinary English speakers would hold that somebody who fires lesbians and gay men alike because of their sexual orientation fires them “by reason of [their] sex.” Instead, Gorsuch crucially and subtly changed the topic,¹⁶⁶ replacing an inquiry into ordinary public meaning with one into the “language of law” and the specialized machinery it is said to embrace.

Tara Grove applauds this turn, deeming it exemplary of what she calls “formalistic textualism,” and praising the opinion’s “almost algorithmic feel.”¹⁶⁷ But if truly algorithmic decision making has downsides that commentators are only now understanding,¹⁶⁸ not-algorithmic-reasoning in algorithmic dress can only be worse. This section explains where Gorsuch goes wrong, and why a turn to but-for analysis does not change the straightforward textualist conclusion that discrimination on account of an individual’s sexual orientation is not encompassed within the statutory ban on discrimination “because of such individual’s . . . sex.”

¹⁶⁴ We don’t read these authors to argue otherwise. See, e.g., Macleod, *supra* note 148, at 49 (“Without positing any bad faith, [this Article] demonstrated how textualists’ implicit, case-by-case resolution of those ambiguities currently facilitates a less constrained, less transparent, and less principled interpretive methodology than many textualists appear to realize.”); Kevin Tobia, *Testing Ordinary Meaning*, 134 Harv. L. Rev. 726, 805–06 (2020) (arguing, based on empirical surveys, that different tools to determine ordinary meaning may provide divergent results on legal questions).

¹⁶⁵ Bostock, 140 S. Ct. at 1758–59 (Alito, J., dissenting); *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 363 (7th Cir. 2017) (Sykes, J., dissenting); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 148–49 (2d Cir. 2018) (Lynch, J., dissenting).

¹⁶⁶ See Blackman & Barnett, *supra* note 10 (observing that Gorsuch “pivots” and “abandons . . . ‘ordinary meaning’ in favor of a specialized legal meaning—what lawyers refer to as a *term of art*”).

¹⁶⁷ Grove, *supra* note 4, at 281.

¹⁶⁸ See Deborah Hellman, *Measuring Algorithmic Fairness*, 106 VA. L. REV. 811 (2020); Talia B. Gillis & Jann L. Spiess, *Big Data and Discrimination*, 86 U. CHI. L. REV. 459 (2019); Aziz Z. Huq, *Racial Equity in Algorithmic Criminal Justice*, 68 DUKE L.J. 1043 (2019); Sandra G. Mayson, *Bias in, Bias Out*, 128 YALE L.J. 2218 (2019); Anupam Chander, *The Racist Algorithm?*, 115 MICH. L. REV. 1023 (2017); FRANK PASQUALE, *THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION* (2015).

1. *On motivational and non-motivational causation*

Recall the majority’s observation, quoting precedent, that “the ordinary meaning of ‘because of’ is ‘by reason of’ or ‘on account of.’”¹⁶⁹ That’s not a throwaway; it’s important. The statute proscribes employer conduct based on the reasons that caused or explained the conduct (i.e., based on the employer’s motivation), and not on other non-reason-based causes.

An example spotlights the difference. Suppose Libby intends to dine one evening at Riley’s Restaurant. En route to Riley’s, Libby, a member of the local Libertarian Party, stops at the Party’s office for a short organizational meeting. When arriving at Riley’s, Libby is chagrined to learn that the restaurant’s last table was taken minutes earlier and that it will be accommodating no more diners that evening. Libby’s political affiliation was a but-for cause of Riley’s declining to serve Libby: if Libby hadn’t been a member of the Libertarian Party, they’d have arrived at Riley’s ten minutes earlier,¹⁷⁰ in plenty of time to secure the last table. But Riley’s did not decline to serve Libby “because of” Libby’s political affiliation: that Libby is a Libertarian was unknown to Riley or any of the restaurant’s agents and was no part of their decisional calculus. Were Libby to sue Riley’s, alleging forbidden political-affiliation discrimination, they’d be laughed out of court (two times over). The example generalizes: a fact or event can be a “but-for cause” of some agent’s doing something without it being the case that the agent did that thing “because of” that fact or event. (Here, to repeat, Libby’s Libertarianism might have been a but-for cause of Riley’s not seating them, without it being the case that Riley didn’t seat Libby “because of” Libby’s Libertarianism.) To gloss the statutory phrase “because of” X to mean “by reason of” or “on account of” is to affirm this critical point.¹⁷¹

¹⁶⁹ *Id.* at 1739.

¹⁷⁰ Or so we say. To anticipate some complexities that will require attention later (*see infra* n.168), note that even this judgment depends on contestable assumptions about what Libby would have been like—and therefore what Libby would have been doing at the time in question—had they not been an active Libertarian. Maybe if Libby hadn’t been a Libertarian, they would have become an avid stamp collector and, because the local chapter of the Philatelist Society was meeting at the same time the Libertarians were, would still have arrived at Riley’s when they did—that is, too late to be seated.

¹⁷¹ *See also, e.g.*, *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 560 (2015) (Alito, J., dissenting) (“When English speakers say that someone did something ‘because of’ a factor, what they mean is that the factor was a reason for what was done.”). Admittedly, Alito’s observation appears in a dissent—for himself, Chief Justice Roberts, and Justices Scalia and Thomas. But the majority decision, authored by Justice Kennedy and joined by the four liberals, was decidedly non-textualist. *See Texas Dep’t of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 539 (2015) (“Recognition of disparate-impact claims is consistent with the FHA’s central purpose. The FHA, like Title VII and the ADEA, was enacted to eradicate discriminatory practices within a sector of our Nation’s economy.”); Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1345 & n.253 (2020) (listing *Texas Department of Housing and Community Affairs* as a case that uses legislative history in a way that contradicts the plain meaning of the statute); Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress’s Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 90 (2015) (explaining Justice Kennedy’s purposivist approach in *Texas Department of Housing and Community Affairs* and comparing it to *King v. Burwell*, 135 S. Ct. 2480 (2015)). This is not to claim that “because of” can mean nothing other than “motivated by.” Noah Zatz is surely right that that would be false. *See* Noah D. Zatz, *The Many Meanings of “Because Of”: A Comment on Inclusive Communities Project*, 68 STAN. L. REV. ONLINE 68, 75 (2015). But a textualist doesn’t need such a strong claim. On the central point for a textualist, we think Alito right: the communicative content of “because of” in relevantly similar utterances—say, contexts concerning the wrongfulness or permissibility of acts undertaken by an agent—is most often motivational, and thus the motivational reading is the statute’s “ordinary meaning.” To the extent that Zatz claims otherwise, we disagree. But to the extent he is better read to argue that “because of” must be given a broader meaning in anti-discrimination law in order to make sense of well accepted precedents and to better achieve its purpose and promise, *see id.*; Noah D. Zatz, *Managing the*

Unfortunately, in two quick sentences, the opinion threatens to undermine what it has just accomplished. “In the language of law,” Gorsuch continues, “this means that Title VII’s ‘because of’ test incorporates the “‘simple’” and ‘traditional’ standard of but-for causation. That form of causation is established whenever a particular outcome would not have happened ‘but for’ the purported cause.”¹⁷² It’s a feat to sow so much mischief with such inconspicuous brevity.

In the first sentence, Gorsuch purports to follow precedent on a question that first divided the Court in *Price Waterhouse*: whether a reason that in fact motivated an adverse job action must have been a but for cause of that action when multiple motives were in play. Prior cases such as *Nassar* and *Gross v. FBL Financial Services, Inc.* had interpreted “because of” language in other federal antidiscrimination provisions to require full-blown but-for causation.¹⁷³ And Gorsuch claims to be following suit. But that’s what the Court had held in *Price Waterhouse* when interpreting the same provision at issue in *Bostock*, and Congress had responded by amending the statute. After the Civil Rights Act of 1991, Title VII now provides that “an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.” Whether we construe the 1991 Act as establishing that *Price Waterhouse*’s 1989 interpretation of the Title VII was mistaken or as changing what the pre-1989 law had been, it’s a little audacious to state that *Title VII*’s “because of” language in Title VII today incorporates but-for causation.

But the greater danger lies in the second sentence. Even if the status-based consideration that motivates an adverse job action must fail the ordinary but-for standard, not the “lessened” “motivating factor” standard, in order to be unlawful, it’s still not true that a given outcome counts as occurring “because of” some fact, event, or purported cause “whenever [that] outcome would not have happened ‘but for’” that fact, event or cause. That assertion is incorrect because it ignores the critical point we’ve just hammered: that the statutory language picks out actions that are caused by facts or properties that play the right sort of role in an agent’s motivation (whatever “the right sort of role” might be) and not those caused by the same considerations operating non-motivationally.¹⁷⁴ Libby’s going to the Libertarian meeting was a “purported cause” but for which the outcome in question (Riley’s not seating Libby) “would not have happened,” but Riley didn’t not seat Libby “because of” Libby’s going to that meeting. And once Gorsuch loses sight of this insight, he never regains it. Instead, he operates the but-for machinery without regard for the difference between “by reason of X” and “caused by X.”

2. On not changing “one thing at a time”

Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent, 109 COLUM. L. REV. 1357 (2009), we agree. Again, we take these facts as evidence against textualism, not as evidence against Alito’s view of the statutory text’s ordinary meaning. (We are grateful to Zatz for pressing us on this point.)

¹⁷² *Bostock*, 140 S. Ct. at 1739 (quoting *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 347 (2013)). For a comprehensive argument against the use of but-for causation in motivational analyses, see Andrew Verstein, *The Failure of Mixed-Motives Jurisprudence*, 86 U. CHI. L. REV. 725, 743 (2019). Among other things, Verstein argues that the move to but-for causation does not find grounding in the text of discrimination statutes. *Id.*; see also James Macleod, *Ordinary Causation: A Study in Experimental Statutory Interpretation*, 94 IND. L.J. 957, 957 (2019) (using empirical survey to support the same conclusion regarding the textual support for but-for causation).

¹⁷³ *Nassar*, 570 U.S. at 347 (protected conduct discrimination in Title VII); *Gross*, 557 U.S. 167, 175 (2009) (ADEA).

¹⁷⁴ See also, e.g., *Bostock*, 140 S. Ct. at 1745 (maintaining that “conversational conventions do not control Title VII’s legal analysis, which asks simply whether sex was a but-for cause”).

Putting aside our first objection, and assuming for argument’s sake that but-for reasoning would be appropriate, let us attend carefully to Gorsuch’s application of the but-for test:

[The] but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause. . . . So long as the plaintiff’s sex was one but-for cause of that decision, that is enough to trigger the law. . . . [I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer’s mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee’s sex, and the affected employee’s sex is a but-for cause of his discharge.¹⁷⁵

Thus, under Gorsuch’s application, there are purportedly two relevant facts about Bostock: Bostock is (1) a man and (2) attracted to men.¹⁷⁶ Changing (1), but keeping (2) constant, would result in Bostock being a woman and attracted to men (and thereby heterosexual). Because the employer (presumably) does not discriminate against heterosexual women, Bostock’s sex is a but-for cause of his termination, and thus his termination constitutes discrimination “because of” sex.

The first thing to note is that Gorsuch has not applied the but-for test as he told us he would. There are three relevant facts about Bostock, not two. Bostock is (1) a man, (2) gay, and (3) attracted to men. So, when “changing the employee’s sex,” Gorsuch has not kept everything else the same.¹⁷⁷ If we change (1) from a man to a woman, then we can’t keep *both* (2) and (3) constant: by definition, a gay woman is not attracted to men. So we must keep one and change the other. The hypothetical woman version of Bostock must be either (a) gay and attracted to women or (b) straight and attracted to men. If we apply but-for reasoning to counterfactual (a) rather than counterfactual (b), the conclusion changes: on the supposition that Clayton County would have fired any employee who manifests a same-sex attraction,¹⁷⁸ then Bostock’s sex was *not* a but-for cause of his being fired. Thus Gorsuch’s choice to select the counterfactual (or “comparator”) he did (counterfactual (a)), rather than the counterfactual the employers proposed

¹⁷⁵ Bostock, 140 S. Ct. at 1739–42.

¹⁷⁶ Gorsuch’s opinion shifts between using the concept of sex, and the male/female binary, and gender, utilizing a man/woman binary. For simplicity, in this example, we uniformly use gender and the man/woman binary. In general, we understand sexual orientation as capable of employing both sex and gender. In particular, we think it is plausible that the term “gay” may refer to individuals who are intimately attracted to others based on their same sex or based on their same gender. Moreover, we think that this flexibility in the term is reflected in ordinary usage, as exemplified by the many briefs and judicial opinions in these cases. At times, our discussion of sexual orientation will employ both sex and gender, to track the language of the relevant opinions and to mirror common usage. Importantly, we are not dogmatic about the concepts that should properly inform the term’s usage, but instead we simply want to recognize its capacious meaning in common parlance. On this point, our arguments do not presume any particular formulation of sexual orientation in terms of sex and gender; the arguments should proceed under any plausible permutation of sex or gender.

¹⁷⁷ See *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 366 (7th Cir. 2017) (Sykes, J., dissenting) (“If the aim is to isolate actual discriminatory motive based on the plaintiff’s sex, then we must hold everything constant except the plaintiff’s sex. But my colleagues load the dice by changing two variables—the plaintiff’s sex and sexual orientation—to arrive at the hypothetical comparator.”).

¹⁷⁸ See *infra* 213 and accompanying text.

(counterfactual (b)) was itself a but-for cause of his bottom-line conclusion regarding the scope of the statutory ban.

We do not think it can be denied that Gorsuch did not do as he described: he did not “change one thing at a time.” Of course, doing so is impossible in this case because the distinct “things” are conceptually interdependent: part or all of what it is to be gay is to be attracted to persons of your same sex (or gender).¹⁷⁹ But to say that it was impossible for Gorsuch to change only one thing is not the same as saying that he did change only one thing. He didn’t. The question thus becomes whether the specification of the counterfactual that Gorsuch selected when operationalizing the but-for test—a woman who dates men and is straight—can be defended against the specification that Clayton County offered—a woman who is gay and dates women.¹⁸⁰

3. *Why this way rather than that way?*

Unfortunately, Gorsuch does not explain or justify his choice of counterfactual in a manner remotely commensurate with its importance.¹⁸¹ Only late in the opinion, after having already run the but-for test on his preferred counterfactual, does he so much as acknowledge that an alternative counterfactual even existed: “If the aim is to isolate whether a plaintiff’s sex caused the dismissal, the employers stress, we must hold sexual orientation constant—meaning we need to change both his sex and the sex to which he is attracted.”¹⁸² Because the choice of counterfactual is the key moment in the but-for analysis, we quote Gorsuch’s response with minimal editing:

The employers might be onto something if Title VII only ensured equal treatment between groups of men and women or if the statute applied only when sex is the sole or primary reason for an employer's challenged adverse employment action. But both of these premises are mistaken. Title VII's plain terms and our precedents don't care if an employer treats men and women comparably as groups; an employer who fires both lesbians and gay men equally doesn't diminish but doubles its liability. . . . Nor does the statute care if other factors besides sex contribute to an employer's discharge decision. Mr. Bostock's employer might

¹⁷⁹ See *supra* note 80 on the sex/gender distinction.

¹⁸⁰ See also Brian Soucek, *Hively's Self-Induced Blindness*, 127 YALE L.J. Forum 115, 118 (2017) (stating, in reference to *Hively*, that “[t]his debate over statutory interpretation has . . . certainly not provided a reason for deciding who Hively’s comparator should be: a man attracted to women (thus maintaining the gender of the worker’s partner) or a gay man (thus holding sexual orientation constant)”).

¹⁸¹ Similar observations apply to Tobia and Mikhail’s intriguing study and to their conclusion that it “confirms that ordinary people largely endorse but-for causation” and see “sex . . . as a but-for cause when someone is fired on account of their sexual orientation.” Tobia & Mikhail, *supra* note 148, at 20. This is misleading. There are (at least) two distinct questions one might ask about deployment of the but-for test in this context: (1) should the but-for test operate upon a counterfactual employee of a different sex who shares the factual employee’s (a) sexual orientation (e.g., gay/straight) or (b) their sexual attraction (e.g., to male/to female), given that it can’t share both? (2) what output does the but-for test deliver when operating upon the correct counterfactual? Their survey question implicitly assumes, with Gorsuch, that the answer to (1) is (b). The survey results then show that most people—albeit far fewer than one would hope for—return the correct answer to (2), given (b): “no.”

But the thorny question, we have been emphasizing, is (1), not (2). No parties to the litigation, and no contributors to the scholarly literature, disagree about the correct answers to (2) for either answer to (1). What (sensible) people do disagree about is (1). And, although the statement we quote from Tobia and Mikhail suggests that ordinary people accept that (b) is the right answer to question (1), the survey results do not show that because that’s not what the question asked for. Moreover, we believe that results of this type of survey are incapable of answering question (1), even were the instrument designed to elicit responses to that question, because the correct answer is determined by theoretical criteria not empirical ones.

¹⁸² 140 S. Ct. at 1747–48.

have decided to fire him only because of the confluence of two factors, his sex and the sex to which he is attracted. But exactly the same might have been said in *Phillips*, where motherhood was the added variable.¹⁸³

Not only does this response to the employers come curiously late in the game, the precise reasons Gorsuch provides for rejecting their preferred counterfactual miss the boat.

Gorsuch's first response undercuts a premise that plays no role in the defense of the proposition that he's challenging. Sure, if it's stipulated or already established that firing gay women under a policy of firing all gay employees is statutorily forbidden discrimination and that firing gay men under a policy of firing all gay employees is also statutorily forbidden discrimination, then doing both things doubles an employer's liability. But whether such firings violate the statute is precisely what's at issue in this case. And the employers are urging that their specification of the counterfactual does a better job of ferreting out what is at issue—whether discrimination against gay men and lesbian women because of the single property the employer attribute to them both (same-sex orientation) is discrimination “because of [their] sex” within the ordinary meaning of the statute. If they're right, then there's no liability in the first place, thus nothing to double. Gorsuch's argument to the contrary puts the cart (what conduct violates the statute) before the horse (which counterfactual should be plugged in to the but-for test that determines what violates the statute).

Gorsuch's second response founders on a plainly confused analogy that plays a disconcertingly prominent role in the majority opinion. In *Phillips v. Martin Marietta Corp.*,¹⁸⁴ the Court held that discrimination against mothers but not fathers is discrimination “on the basis of such individuals' sex.”¹⁸⁵ That ruling, Gorsuch says, is universally recognized as right, by textualists and others. Here and elsewhere in the opinion, Gorsuch argues that *Phillips* and *Bostock* stand or fall together.¹⁸⁶

Once again,¹⁸⁷ Gorsuch is pressing a wholly disanalogous case. *Phillips* involves employment discrimination on a basis—being a mother—that is a true subset of one sex (or gender). It raises the question whether adverse treatment of an individual on account of a property that *only* women possess counts as discrimination “because of” that individual's sex when it is *not* a property that *all* women possess. The Court answered that question in the affirmative. We think that answer probably correct, even as a textualist matter. (And if it wasn't, then so much the worse for textualism.)¹⁸⁸ But the property of being gay (or of being straight) is not similarly a property that only, though not all, women (or men) possess. In philosophical jargon,

¹⁸³ 140 S. Ct. at 1748.

¹⁸⁴ 400 U.S. 542 (1971)

¹⁸⁵ *Id.* at 543,

¹⁸⁶ See also *Bostock*, 140 S. Ct. at 1745 (“In *Phillips*, for example, a woman who was not hired under the employer's policy might have told her friends that her application was rejected because she was a mother, or because she had young children. Given that many women could be hired under the policy, it's unlikely she would say she was not hired because she was a woman. But the Court did not hesitate to recognize that the employer in *Phillips* discriminated against the plaintiff because of her sex. Sex wasn't the only factor, or maybe even the main factor, but it was one but-for cause—and that was enough. You can call the statute's but-for causation test what you will—expansive, legalistic, the dissents even dismiss it as wooden or literal. But it is the law.”).

¹⁸⁷ See *supra* notes 109–111 and accompanying text.

¹⁸⁸ For whatever it's worth, sixty percent of the Tobia and Mikhail survey respondents said that firing somebody because she's a mother is *not* firing her “because of her sex.” Tobia & Mikhail, *supra* note 148, at 17.

the property of being gay is multiply realizable across men and women, as the properties of being a women-who-is-a-parent or of being a woman-who-likes-the-Yankees¹⁸⁹ are not.

Still, that Gorsuch's own response to the employers is obviously unsatisfactory does not establish that his conclusion was mistaken. Can a supporter of his decision do better on his behalf?

One possible approach is to assume that one of these two specifications of the counterfact—that is, one of the two ways to “change two things” when changing only one thing is impossible—is “right” (or “correct” or “preferred”), that the other isn't, and then to show that he, Gorsuch, isolated the right one. But we have not heard a compelling reason why Gorsuch's imagined counterfact would be right and employer's proposed counterfact would be wrong, or even that the former would be “better” or “more accurate.”¹⁹⁰ Roughly speaking, the function of the but-for test is to help us figure out whether a given factor or property had a causal impact. An employer maintains that it fired its employee because of their sexual orientation. In trying to figure out whether the employee's sex was *also* a but-for cause of their being fired, it can't be that counterfactual employees who share the actual employee's sexual orientation are categorically ineligible or disfavored. A clearer case of stacking the deck is hard to imagine. And that Gorsuch was in fact guilty of illicit deck-stacking is made apparent by his stipulation that the two employees he hypothesizes—a gay man who is attracted to men and a straight woman who is also attracted to men—“are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman.” This is screamingly false to the facts as stipulated: *to the employer's mind*, the two employees are *not* materially identical in all respects except that one is a man and the other a woman; they are also non-identical in the respect that one is gay and the other straight. And that latter material non-identity is precisely the one that looms large in the employer's thinking.¹⁹¹

Reassuringly, when we have discussed our concern with colleagues who are more sympathetic to Gorsuch's reasoning than we are, few have urged that Gorsuch picked *the right* counterfact. The best response to our challenge here that we have heard, or can conjure, is only that both specifications of the counterfact are equally eligible, and therefore that Gorsuch was either entitled or required to run the counterfactual as he did. Take these two possibilities

¹⁸⁹ See Bostock, 140 S. Ct. at 1742 (“Consider an employer with a policy of firing any woman he discovers to be a Yankees fan. Carrying out that rule because an employee is a woman *and* a fan of the Yankees is a firing ‘because of sex’ if the employer would have tolerated the same allegiance in a male employee. Likewise here. When an employer fires an employee because she is homosexual . . . , two causal factors may be in play—*both* the individual's sex and something else (the sex to which the individual is attracted . . .). One might have thought that the condition “if the employer would have tolerated the same allegiance in a male employee” would have alerted its author to the disanalogy.

¹⁹⁰ Will Baude mentioned to one of us in passing that the counterfact where only the sex/gender of the discriminated person is changed may be preferable because sex/gender is, in some sense, more “fundamental” than sexual orientation. On this nascent formulation of the argument, we think there are two (correspondingly nascent) responses: (1) It is not obvious that sex/gender are more fundamental, or appreciably more so, in comparison to sexual orientation. Sex/gender are themselves complexes. (2) It is not clear that a property being more fundamental means that it is preferable for change in a counterfactual testing causation. As we discuss below, insofar as we wish the counterfactual world to be as “close” as possible to the actual world, we might prefer that we change some less fundamental property. Until then, the reader might introspect on this question: if you were you, except that you had a different sex, would this counterfactual you retain your actual sexual orientation (e.g., straight, gay) or your actual sexual attractors (e.g., females, women, males, men). We anticipate that intuitions will vary widely, in content and in strength.

¹⁹¹ Bostock, 140 S. Ct. at 1761–62 (Alito, J., dissenting).

separately. The first—that the majority was legally entitled but not required to choose the plaintiffs’ preferred counterfactual over the employers’—maintains that when two formulations of the counterfactual situation lead to different legal results, the analyst has *discretion* over which to choose. But this is implausible. It would entail that one district court could choose one counterfactual, that a second could choose the other, that the different choices would generate different legal conclusions on materially identical facts, and that because neither court would be making a legal error or abusing its discretion, both discordant results must stand. Similarly, it would entail that if some justices prefer one counterfactual and some prefer the other, neither group has access to legal reasons in its favor. The second possibility holds, in effect, that the plaintiff has a legal right to their chosen counterfactual: if the plaintiff can construct any counterfactual that would yield the result that the hypothetical plaintiff, with an altered protected characteristic, would have not suffered an adverse employment result, then the plaintiff has been discriminated against “because of” the protected characteristic. Several commentators have endorsed this latter approach.¹⁹²

We explain in the remainder of this Section why such “counterfactual liberality” is mistaken. Before presenting that argument, however, it’s worth noting one troubling upshot of Gorsuch’s position. Suppose the legislatures in North and South Textalia are both considering whether to ban employment discrimination and, if so, on what bases. Each legislature is considering three options: (1) prohibiting discrimination “because of an individual’s sex or because of their sexual orientation”; (2) prohibiting discrimination “because of an individual’s sex”; or (3) enacting no prohibition. After much debate, North Textalia enacts option (1) and South Textalia enacts option (2). On Gorsuch’s textualist analysis, the law is actually the same in both jurisdictions because discrimination “because of an individual’s sexual orientation” is discrimination “because of an individual’s sex” as a matter of legal meaning. This is so even though the fact that the legislators vigorously debated the choice between (1) and (2) might seem near-conclusive evidence that *they* accorded the phrases different meanings.

4. *Of bisexuals and pansexuals*

There’s an even more troubling implication of Gorsuch’s but-for analysis: its application to bisexuals and pansexuals.¹⁹³ While the precise meanings of these terms are dynamic and contestable,¹⁹⁴ we take a bisexual person to be somebody, whether male or female, who is attracted to cisgender persons of both biological sexes, and a pansexual person to experience romantic or sexual attraction to others regardless of their sex or gender, including trans, nonbinary and gender fluid people. However these terms may be defined, the difficulty is the same: Gorsuch’s reasoning renders employment discrimination against such persons lawful.

Take Dana, a bisexual cisman. Dana dates ciswomen and cismen. Employer fires Dana because Dana is bisexual. Is this a case of discrimination because of Dana’s sex? Well, if Dana were a ciswoman who dates ciswomen and cismen, she’d still be bisexual and still be fired. So,

¹⁹² See, e.g., Koppelman, *Subtractive Moves*, *supra* note 5, at 19; Victoria Schwartz, *Title VII: A Shift from Sex to Relationships*, 35 HARV. J. L. & GENDER 209, 216 (2012) (“Nothing in the language of the statute necessarily distinguishes between these two possible readings of the phrase, and therefore facially both interpretations are plausible.”); cf. Krishnamurthi & Salib, *supra* note 120 (setting forth this construction as a possible reading of *Bostock*).

¹⁹³ We’re grateful to Jonah Gelbach for prodding us to emphasize this implication.

¹⁹⁴ For a nice discussion in the popular media see Zachary Zane, *What’s the Real Difference between Bi- and Pansexual?*, ROLLING STONE, June 29, 2018; see generally Helen Bowes-Catton & Nikki Hayfield, *Bisexuality*, in THE PALGRAVE HANDBOOK OF THE PSYCHOLOGY OF SEXUALITY AND GENDER 42 (C. Richards & M.J. Barker, eds. 2015); NIKKI HAYFIELD, *BISEXUAL AND PANSEXUAL IDENTITIES: EXPLORING AND CHALLENGING INVISIBILITY AND INVALIDATION* (2020).

on Gorsuch’s analysis, Dana’s sex is *not* a but-for cause of his being fired, which is to say that firing Dana was not an adverse employment action “because of such individual’s sex.” As far as we can tell, *Bostock* is unanimously understood as holding that employment discrimination because of an individual’s “sexual orientation” is unlawful. But on Gorsuch’s own pivotal but-for analysis, that cannot be a correct characterization of the opinion’s holding. Homosexuality, heterosexuality, bisexuality and pansexuality are all sexual orientations. Remarkably, though, on a but-for analysis, Title VII prohibits employers from discriminating against a person because they’re gay or straight, but not bi or pan. Is this not the clock’s thirteenth chime?

5. *The root of the problem*

The basic difficulty is well understood: application of the but-for test depends upon a specification of the counterfactual situation, and alternative specifications of that situation are possible. As Professor Michael Moore explains, “[t]here is a great vagueness in counterfactual judgments,” that arises “in specifying the possible world in which we are to test the counterfactual.”¹⁹⁵

Suppose a defendant negligently destroyed a life preserver and a sailor drowns for want of one. When we say ‘But for the defendant’s act of destroying the life preserver’, what world are we imagining? We know we are to eliminate the defendant’s act, but what are we to replace it with? A life preserver that was, alternatively, destroyed by the heavy seas? A defendant who didn’t destroy the life preserver because she had already pushed the victim overboard when no one else was around to throw the life preserver to the victim?¹⁹⁶

The point, in short, is that in order to employ the but-for test, we must choose among alternative specifications of the counterfactual situation. But it does not follow that all alternative specifications are equally eligible, or that one who performs but-for analysis has unfettered discretion regarding how to perform it. Not at all.

To the contrary, as legal scholars of causation have long insisted, the choice of a counterfactual situation is constrained by the theoretical function that but-for reasoning serves. For example, Professor David Robertson, a noted torts scholar, emphasized that the specification of the counterfactual is “the trickiest” part of but-for reasoning.¹⁹⁷

One creates a mental picture of a situation identical to the actual facts of the case in all respects save one . . . It is important to stress that the mental operation performed at this third step must be careful, conservative, and modest; the hypothesis must be counterfactual only to the extent necessary to ask the but-for question.”¹⁹⁸

Similarly, Professor Robert Strassfeld admonished that, “[i]f we hope to use counterfactuals sensibly in the law, we need to clarify our thinking about them.”¹⁹⁹ Unless we are to eliminate

¹⁹⁵ Michael Moore, *Causation in the Law*, STAN. ENCYCLOPEDIA OF PHIL. (2019), <https://plato.stanford.edu/entries/causation-law/>. As Moore explains, the difficulty of speculating about what would have happened in the properly described counterfactual presents a second and distinct challenge.

¹⁹⁶ *Id.*

¹⁹⁷ David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765, 1770 (1997).

¹⁹⁸ *Id.* at 1770–71.

¹⁹⁹ Robert N. Strassfeld, *If...: Counterfactuals in the Law*, 60 GEO. WASH. L. REV. 339, 343–44 (1992).

counterfactual questions from legal analysis, “we should think carefully about when and how to pose them, and how to distinguish good answers from poor ones.”²⁰⁰ Most particularly, it is essential that “we distinguish a valid, or plausible counterfactual, from an invalid, implausible, or downright silly one.”²⁰¹

In his classic 1968 article *A Theory of Conditionals*, the philosopher Robert Stalnaker urged that “among the alternative ways of making the required changes, one must choose one that does the least violence to the correct description and explanation of the actual world.”²⁰² Many contemporary philosophical theories of causation, including Stalnaker’s, use the language of “possible worlds” to articulate the counterfactual conditions.²⁰³ The basic idea is that we can think of all the possible states of affairs—that is, ways the world might have been—as “possible worlds.”²⁰⁴ Using possible world semantics, then, we can describe but-for causation as follows: *A* is a but-for cause of *B*, if in the possible world(s) where *A* doesn’t occur that is *closest* to the actual world, *B* does not occur.²⁰⁵ An advantage of this formulation is that it does not fall victim to the rudimentary instruction to “change only one thing”—which, as we have seen, may be impossible to fulfill. Here, you can change more than one thing, but you must ensure that changes are not superfluous, as superfluous changes will result in a hypothetical world that is not as close to our world as other comparator worlds and thereby distort the analysis.

Of course, this does impose a theoretical obligation to explain how we adjudge what world is *closest*—and more generally what the *closeness* relation is.²⁰⁶ A fulsome explanation of the closeness relation is a matter of great theoretical difficulty and is surely not possible in this Article. But a modest start to wisdom on the topic should recognize that the context of the inquiry will matter.²⁰⁷ If we employ the but-for causation test in the context of asking about whether certain combinations of substances cause certain reactions, we will adjudge closeness with an attention to chemistry; if we employ the but-for causation test in questions about morality, we might adjudge closeness with an attention to morally similar possible worlds; and so on.²⁰⁸

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² ROBERT C. STALNAKER, KNOWLEDGE AND CONDITIONALS 156 (2019).

²⁰³ Peter Menzies, *Counterfactual Theories of Causation*, STAN. ENCYCLOPEDIA PHIL. (2019), <https://plato.stanford.edu/entries/causation-counterfactual/> (discussing use of possible world semantics in contemporary theories of causation); ROBERT C. STALNAKER, KNOWLEDGE AND CONDITIONALS (2019) (using possible-world semantics).

²⁰⁴ Menzies, *supra* note 203; Christopher Menzel, *Possible Worlds*, STAN. ENCYCLOPEDIA PHIL., <https://plato.stanford.edu/entries/possible-worlds/>.

²⁰⁵ See David Lewis, *Counterfactuals and Comparative Possibility*, 2 J. PHIL. LOGIC 418, 420 (1973) (“If we cannot have an antecedent-world [where the counterfactual antecedent is true] that is otherwise just like our world, what can we have? This, perhaps: an antecedent-world that does not differ gratuitously from ours; one that differs only as much as it must to permit the antecedent to hold; one that is closer to our world in similarity, all things considered, than any other antecedent world.”); *see also* Menzies, *supra* note 203.

²⁰⁶ *See generally* JAMES WOODWARD, MAKING THINGS HAPPEN: A THEORY OF CAUSAL EXPLANATION (2003); JUDEA PEARL, CAUSALITY (2000).

²⁰⁷ Menzies, *supra* note 203 (discussing contextualism in the truth or assertibility of causal claims); R. Clarke, J. Shepherd, J. Stigall, R. Repko Waller & C. Zarpentine, *Causation, Norms, and Omissions: A Study of Causal Judgements*, 28 PHILOSOPHICAL PSYCHOLOGY 279 (2015) (observing that people’s causal judgments are context dependent); C. Hitchcock & J. Knobe, *Cause and Norm*, 106 J. PHIL. 587 (2009) (same).

²⁰⁸ Menzies, *supra* note 203 (discussing contextualism and providing an example).

6. Possible Worlds and the Principle of Conservation in Motivational Analysis

To see whether we can progress in putting flesh on the admittedly skeletal constraint of keeping things as close to the actual world as possible, it will be useful to consider a hypothetical variant on the actual case. Suppose that Costock, male, is a fan of the Alabama Crimson Tide. He's fired because the head of the Clayton County Child Welfare Agency is a fervent supporter of the Georgia Bulldogs and feels animosity toward fans of the Bulldogs' more successful rivals. Being a fan of the Tide is not, alas, a protected characteristic. But being male is. So Costock argues that he was fired "because of" his sex, in violation of Title VII. Is this a sound claim?

Intuitively no, and it's not close. Costock was not fired "by reason of" his sex. He was fired by reason of his collegiate football loyalties, misguided or traitorous, as they seemed to his employer. Was Costock's sex a but-for cause of his being fired? Again, intuitively no. But intuitions aside, the task is to change Costock's sex to female, and ask whether this female Costock is fired. Does this female Costock like the Tide? Of course, we would say.

Not so fast, says Costock's attorney, Corsuch. There are many more than two things (that he's male and that he likes the Tide) that are true about actual (hypothetical) Costock. In addition, he was a student in Miss Beverley Johnson's 1995 fourth grade class at Lake Ridge Elementary School, in Riverdale Georgia. "So what?," you ask. So this: although football fandom is not a gendered affair in Georgia, and although a great many Georgian girls and women root for the Tide, it turns out that not a single girl from Costock's fourth-grade class was among them. Surprisingly enough, the distaff portion of that class was comprised entirely of Bulldog fans—an oddity that Miss Johnson and her colleagues remarked on more than once (though only amongst themselves).

Here, then, are the relevant facts about Costock and the world in which he found himself:

- (1) Costock is male.
- (2) Costock is a Tide fan.
- (3) Costock was in Miss Beverley Johnson's 1995 fourth grade class.
- (4) No female students in Miss Johnson's 1995 fourth grade class is or was a Tide fan.

If we run the but-for test on a counterfactual female Costock—that is, if we change fact (1)—we cannot keep the remaining facts constant. What to do? Because this is a case in which we manifestly cannot change only one thing, Corsuch chooses to keep (3) and (4) constant, not (2): the counterfactual female Costock, just like the actual (hypothetical) Costock, was a student in Miss Johnson's class, but unlike Costock she doesn't like the Tide. This hypothetical female Costock is not fired. Therefore, Costock's sex was a but-for cause of his being fired, so he was fired because of his sex.

Silly, right? We hope you share our sense that, whatever might be true of the actual *Costock* case, this way to specify the counterfactual in the hypothetical Costock case is plainly not kosher. It's not that we *can* keep constant that the female Costock likes the Tide, but that we must. We don't think it's up to us to choose whether to keep constant *either* the fact that this Costock likes the Tide *or* the fact that Costock was Miss Johnson's student in 1995 (or that no female who was in Miss Johnson's 1995 class likes the Tide). The logic of but-for inquiry, or the logic and pragmatics of counterfactuals, provides—in this case at least—that there is a right way

to construct the counterfactual antecedent and a wrong way. And Corsuch's way is wrong.²⁰⁹ The challenge is to explain why. Where, exactly, has Corsuch gone wrong?

Put another way, this hypo disproves the Gorsuch-friendly supposition, proposed earlier, that if the plaintiff can construct *any* counterfactual that would yield the result that the hypothetical plaintiff, with an altered protected characteristic, would have not suffered an adverse employment result, then the plaintiff has been discriminated against “because of” the protected characteristic.²¹⁰ Does it also reveal something more affirmative or constructive?

We think that it does. We think that it points toward the following theoretical stricture on the specification of counterfactuals when using but-for analysis to identify explanatory reasons in motivational analyses:

The Principle of Conservation in Motivational Analysis (PCM): When changing one fact requires changing other facts too, the analyst must not change facts that are known, confidently believed, or stipulated to have been among the actor's motivating reasons in favor of facts that are not likely, or less likely, to have been among the actor's motivating reasons.

This is a non-*ad hoc* general constraint on counterfactual reasoning in motivational analyses. In Stalnaker's terms, PCM does “least violence” to the correct description and explanation of the actual motivating reasons of the actor, which is our primary focus in this motivational analysis. In the terminology of possible worlds, PCM sets forth a way to pick out the closest worlds *in the context* of a motivational analysis.

Take Costock. Recall that in determining what the relevant counterfactual world is, we changed Costock's sex from male to female, and thus we were forced to choose among other facts about Costock and his world that could not be kept simultaneously constant. The antecedent of PCM is satisfied, entailing that we must not change facts that are known or stipulated to have been operative in the actor's motivating reasons in favor of facts that are not likely, or less likely, to have been operative in the actor's motivating reasons. Here, we know or stipulate that Costock was fired because of his Tide fandom, and we have no reason to suspect that his employer cared at all about his presence in Miss Beverley Johnson's 1995 fourth grade class. Accordingly, an analyst wielding the but-for test is required to keep (2) constant, which is to say that the counterfactual female Costock who serves as the comparator must be a Tide fan. In that counterfactual world, female Costock is fired. So Costock was not discriminated against because of his sex—just as anybody would intuit.

Now back to *Bostock*.²¹¹ Recall that there were three relevant facts: Bostock is (1) male, (2) gay, and (3) attracted to men. Many readers will have the instinct that Gorsuch's decision to

²⁰⁹ Because we can't change fact (1) while keeping constant all of (2), (3), and (4), the question becomes whether the courts should run the but-for test on a counterfactual that incorporates the set $\{-(1), -(2), (3), (4)\}$, as Corsuch insists, or on a counterfactual comprised either of $\{-(1), (2), (3), -(4)\}$ or of $\{-(1), (2), -(3), (4)\}$, as the employer maintains. The intuition we aim to pump in the text is that, if we are investigating what would have happened had Costock's sex been different, we must *keep (2) constant and relax either (3) or (4)*; we express no view about *which* of (3) or (4) should be relaxed, and are skeptical that the logic of counterfactual analysis furnishes a clear answer.

²¹⁰ See *supra* note 192 and accompanying text.

²¹¹ Of course, the cases differ in this respect: the impossibility of changing “only one thing” is empirically contingent in Costock but conceptual in Bostock. Possibly, that difference might matter to the ordinary meaning inquiry we discuss in Section II.A. Here, however, we are investigating the constraints on but-for reasoning. If PCM explains what is and is not kosher in cases like Costock, those who would hope to escape its strictures in the

change the counterfactual Bostock’s sexual orientation, (2), along with their sex, (1), puts the rabbit in the hat. PCM makes clear why. As we saw before, we cannot just change one fact, so we have a choice between changing one of (2) and (3). But it is stipulated for purposes of this analysis that the adverse job action was “because of” the employee’s sexual orientation. In contrast, it is not stipulated, and is doubtful on its face, that the fact, alone, that an individual is attracted to men is among the employer’s motivating reasons for firing them—that is why the Gorsuchian specification of the counterfactual yields the conclusion that it does. Thus, choosing an alternative world in which Bostock is female, but also straight, violates PCM.

What PCM mandates, of course, is that, when we imagine what Clayton County would have done in the counterfactual world in which Bostock was female not male, the counterfactual Bostock must be gay. That’s because, for purposes of resolving the legal question that these cases present, it is stipulated that Bostock’s sexual orientation was a motivating reason that explained his firing.²¹² At the same time, we have no reason to believe that the bare property of being attracted to men was operative in Clayton County’s motivating reasons. The proper specification of the counterfactual, accordingly, is just as the employer urged: if we change fact (1), we must keep constant fact (2) and change fact (3). We then ask whether Clayton County would have fired this gay female in Bostock’s position. If so, Bostock’s sex was not a but-for cause of his being fired, and he wasn’t fired “because of” his sex.

What would Clayton County have done in this situation? In candor, we don’t know. Perhaps nobody knows for sure. We do not insist that, in the counterfactual scenario, Clayton County *would* have fired Bostock had Bostock been a gay female instead of a gay male, all else equal.²¹³ Anti-gay biases are complex and one cannot simply assume that an employer who discriminates against a gay male because he’s gay would similarly discriminate against a gay female because she’s gay. And if Clayton County would not have fired a gay female in Bostock’s shoes, then it *would* be guilty of discrimination on the basis of sex *in addition to* discrimination on the basis of sexual orientation. But that question is a different one than Gorsuch’s majority opinion considered, for the *Bostock* defendants *conceded* that they’d be guilty of illegal sex discrimination if a factfinder were to find that they discriminated against him because he’s a gay male and would not have treated a lesbian female the same.²¹⁴

Bostock case need to explain why PCM is inapplicable there. Merely citing the difference that we acknowledge doesn’t do the trick. (We thank Katie Eyer for pressing us to clarify this point.)

²¹² Bostock’s case arose on appeal from the grant of the employer’s motion to dismiss, and thus assumed the allegations in the complaint, including the allegation that Bostock was fired due to his sexual orientation. *Bostock v. Clayton Cty. Bd. of Commissioners*, 723 F. App’x 964 (11th Cir. 2018). Indeed, for all the consolidated cases, the Supreme Court assumed that the plaintiffs had been discriminated on the basis of “homosexuality” or “transgender status” in order to resolve the legal question of the scope of Title VII. *Bostock*, 140 S. Ct. at 1737 (“Few facts are needed to appreciate the legal question we face. Each of the three cases before us started the same way: An employer fired a long-time employee shortly after the employee revealed that he or she is homosexual or transgender—and allegedly for no reason other than the employee’s homosexuality or transgender status.”).

²¹³ See *supra* note 195, observing the difficulty in counterfactual reasoning of speculating about what would have happened in the properly described counterfactual.

²¹⁴ Brief for Petitioners Altitude Express, Inc. and Ray Maynard at 33–36, *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020) (Nos. 17-1618 & 17-1623); Brief of Respondent Clayton County, Georgia at 28, *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020) (Nos. 17-1618 & 17-1623). See also Brief for the United States as Amicus Curiae Supporting Affirmance in 17-1618 and Reversal in 17-1623 at 19, *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020) (Nos. 17-1618 & 17-1623).

Yet more importantly, even if there is evidence in the record that might permit a factfinder to conclude that it's more likely than not that *this* employer would not have terminated a lesbian female employee as it terminated a gay male employee, that sort of heavily fact dependent analysis could not possibly support what we have identified above as the broad legal rule that emerges from the decision—namely that a categorical and consistently applied employment ban on gay employees constitutes legally prohibited discrimination because of the affected individuals' sex.²¹⁵ Removing the fact that the person is gay does great and unnecessary violence to our ability to explain what did in fact happen in the real world.

At the risk of beating a dead horse, we offer one final thought experiment.²¹⁶ Lara is a (cisgender) gay woman who smokes. Intuitively, it should be possible (though not necessarily permissible) for her employer to discriminate against Lara on any one of these bases—being gay, being a woman, being a smoker—and not the others. Now imagine that she is fired pursuant to one of the following employer policies, clearly announced and strictly enforced:

Prior to the decision, Marty Lederman explored the argument about the proper comparator in *Bostock* in great detail. Marty Lederman, *Thoughts on the SG's "Lesbian Comparator" Argument in the Pending Title VII Sexual-Orientation Cases*, BALKINIZATION (Sept. 6, 2019), <https://balkin.blogspot.com/2019/09/thoughts-on-sgs-lesbian-comparator-6.html>. We agree with Lederman's observations about these actual cases, but disagree with his contention about the legality, on textualist premises, of a general rule, even-handedly applied that discriminates against all homosexual people.

²¹⁵ See *supra* note 82 and accompanying text. Counsel for the plaintiffs, Professor Pam Karlan appeared to concede this point at oral argument. Transcript of Oral Argument at 69, *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020) (Nos. 17-1618 & 17-1623) ("If there was that case [as Justice Alito described in which an interview only ascertained sexual orientation and not sex], it might be the rare case in which sexual orientation discrimination is not a subset of sex."); *Bostock*, 140 S. Ct. at 1759 (Alito, J., dissenting) (referencing Professor Karlan's response in oral argument).

Gorsuch responds: "Even in this example, the individual applicant's sex still weighs as a factor in the employer's decision. Change the hypothetical ever so slightly and its flaws become apparent. Suppose an employer's application form offered a single box to check if the applicant is either black or Catholic. If the employer refuses to hire anyone who checks that box, would we conclude the employer has complied with Title VII, so long as it studiously avoids learning any particular applicant's race or religion? Of course not: By intentionally setting out a rule that makes hiring turn on race or religion, the employer violates the law, whatever he might know or not know about individual applicants." *Bostock*, 140 S. Ct. at 1746.

This is another inapposite disanalogy. Gorsuch's example seems designed to show that it does not matter whether the employer knows the specific basis on which it is discriminating against a particular applicant, if it can be determined that the employer did discriminate against the particular applicant on a protected ground. So, it doesn't matter that the employer didn't know whether the applicant was Black or Catholic (or both), because the employer intentionally discriminated on the basis of one or more protected grounds (that is, race or religion or both).

But the meaning of this example is different. As Alito observes, the check box for sexual orientation does not reveal the sex of the applicant. *Bostock*, 140 S. Ct. at 1759 (Alito, J., dissenting). Yet, the employer still refuses to hire them. From this, we could infer that the employer does not care about the applicant's sex—that is, male or female. The employer is not refusing to hire them "by reason of" or "on account of"—and thus "because of"—the applicant's sex. Consequently, unlike in Gorsuch's example, we cannot conclude that the employer was discriminating against the applicant on the basis of any protected ground.

²¹⁶ Our earlier thought experiments were designed to reveal something about ordinary meaning. This experiment reveals infirmities with Gorsuch's deployment of but-for reasoning. Because textualists seek pragmatic content not bare semantic content, the very fact that a legislature chooses option A over option B can serve to cancel the implicature that A encompasses B. But if Gorsuch's but-for analysis governs, then a legislature could avoid the expansive interpretation only by explicitly rejecting it, which would be impossible if the legislature doesn't even anticipate that expansive interpretation. So getting the but-for analysis wrong is potentially much more threatening to the legislative supremacy ideal that textualists champion. (We are grateful to Richard Re for inviting this clarification.)

- (1) No smokers. All others welcome.
- (2) No women. All others welcome.
- (3) No homosexuals. All others welcome.
- (4) No women, and no homosexuals. All others welcome.
- (5) No lesbians. All others welcome.

Under our analysis: Employer fires Lara neither by reason of their sex nor by reason of their sexual orientation under policy (1). Employer fires Lara by reason of her sex *and not* by reason of her sexual orientation under policy (2). Employer fires Lara by reason of her sexual orientation *and not* by reason of her sex under policy (3). Employer fires Lara by reason of her sex and by reason of her sexual orientation under policy (4).²¹⁷ And Employer fires Lara by reason of the conjunction of both her sex and her sexual orientation under policy (5).

Our analysis vindicates the intuition that it is possible for the employer to have fired Lara for any of these bases, and conjunctions of these bases, but perhaps not others. But Justice Gorsuch’s analysis cannot. Under his analysis, as under ours, Employer fires Lara neither by reason of her sex nor by reason of her sexual orientation under policy (1). But Employer fires Lara by reason of her sex *and* by reason of her sexual orientation under *all* of the other four policies. There is *no* policy under which Lara is fired by reason of her sex and *not* by reason of her sexual orientation. And there is *no* policy under which Lara is fired by reason of her sexual orientation and not by reason of her sex. This, we contend, simply does not preserve the intuition in our common parlance and understanding of ordinary public meaning that an employer can create a policy that discriminates on the basis of sex but not because of sexual orientation, and vice versa. Consequently, discrimination “because of sexual orientation” is not, as a textual matter, discrimination “because of sex.”

Three decades ago, Robert Strassfeld urged scholars, lawyers, and judges to pay greater attention to the do’s and don’t’s of counterfactual analysis. So long as courts lack “a general understanding of counterfactuals and their place in legal decisionmaking,” he astutely cautioned, their “treatment of legal counterfactuals” is bound to be “ad hoc, localized, and inconsistent.”²¹⁸ Enter Gorsuch’s majority opinion in *Bostock*.

* * *

In his dissent, Justice Kavanaugh criticizes the majority for privileging “literal meaning” over “ordinary meaning.”²¹⁹ Similarly, Professors Josh Blackman and Randy Barnett praise Gorsuch for his “airtight reasoning,” complaining only that it wasn’t truly textualist.²²⁰ But these conservative critics let Gorsuch off the hook too easily. As we have shown, even if the majority’s result as to sexual orientation “fits with” the text in some loose, impressionistic sense, it reflects neither its ordinary meaning nor any technical legal meaning delivered by but-for reasoning.

²¹⁷ One interesting feature of this case is that Lara is fired “by reason” of her sex and “by reason” of her sexual orientation, however but-for causation is not satisfied here, because the reason for her firing is overdetermined.

²¹⁸ Robert N. Strassfeld, *If...: Counterfactuals in the Law*, 60 GEO. WASH. L. REV. 339, 348 (1992).

²¹⁹ *Bostock*, 140 S. Ct. at 1824–25 (Kavanaugh, J., dissenting).

²²⁰ Blackman & Barnett, *supra* note 10.

C. And Gender Identity?

We've argued that employment discrimination on the basis of sexual orientation as such does not constitute illegal sex discrimination if Title VII is subject to bona fide textualist interpretation. We've also said that discrimination on the basis of gender identity, gender expression, or the fact that somebody identifies as transgender is illegal sex discrimination, even for a textualist. In short, we think that, from a textualist point of view, Gorsuch and the majority got things wrong in *Bostock* but right in *Harris Funeral Home*. Because we're defending a position that attracted no textualist Justice in *Bostock*, we close this Part by explaining our view on gender identity, and related matters.

At first blush, the cases do seem on par, legally speaking. As Gorsuch reasoned:

By discriminating against homosexuals, the employer intentionally penalizes men for being attracted to men and women for being attracted to women. By discriminating against transgender persons, the employer unavoidably discriminates against persons with one sex identified at birth and another today. Any way you slice it, the employer intentionally refuses to hire applicants in part because of the affected individuals' sex, even if it never learns any applicant's sex.²²¹

Here, we think, is a particularly forceful way to put Gorsuch's point: When A discriminates against B because they're gay, A is responding to a certain fact about or property of B's sex—namely, that B's sex \neq C's sex (where C stands for an actual or potential romantic partner of B's, and where \neq represents noncongruence, not inequality). When A discriminates against B because they're transgender, A is responding to a different fact about or property of B's sex—namely, that B's sex \neq B's gender. When formulated this way, it might well seem that if the second noncongruence constitutes discrimination because of B's sex then the first noncongruence must too.²²²

To understand why the cases differ, we must first address a more basic question: Does Title VII's prohibition on discrimination because of an individual's "sex" forbid discrimination because of an individual's *sex* or because of an individual's *gender*? A quick answer is that the statutory term "sex" covers *sex*, not *gender*. But that would be too quick, and mistaken. Our current conceptual schema that distinguishes sex (a biological category) from gender (a social category) was not the schema of the authors of Title VII, or its audience. And once we break a single lexical concept represented by a word in the statute ("sex") into two distinct lexical concepts (*sex* and *gender*), it's an open question what sense to make of an earlier invocation of the word in light of our new conceptualization. (After all, even though we call sex "sex" and gender "gender," we could have called them "sex 1" and "sex 2.") Once you look, it's fairly evident that the word is widely used to mean *sex* or *gender*, or both *sex* and *gender* indiscriminately, both in 1964 and today.²²³ We aren't doctrinaire about this conclusion. We are receptive to evidence,

²²¹ *Bostock*, 140 S. Ct. at 1746.

²²² *Bostock*, 140 S. Ct. at 1823 n.1 (Kavanaugh, J., dissenting) ("Although this opinion does not separately analyze discrimination on the basis of gender identity, this opinion's legal analysis of discrimination on the basis of sexual orientation would apply in much the same way to discrimination on the basis of gender identity.").

²²³ See, e.g., Brief of Amici Curiae Corpus-Linguistics Scholars in Support of Employees at 24–26, *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623, 18-107) (providing data that the word "sex" encompassed "gender").

including empirical evidence, to the contrary. But we note that we aren't alone in this interpretation. Courts have interpreted the statute in that commonsensical manner.²²⁴

That observation has relatively straightforward implications for discrimination on account of an individual's being transgender. Transgender status and cisgender status are both properties identifying a particular relationship between one's sex and one's gender. Thus, these concepts are relationships between sex and gender, which are themselves the two children concepts of the parent concept *sex*. It is not surprising that the meaning of "sex" would encompass facts about the relationship between these two children concepts. Again, here we think that as a matter of empirical fact regarding ordinary meaning, the term "sex" does encompass transgender and cisgender status. This could be so on either of two theoretical accounts: (1) because "sex" refers (a) to *sex* (e.g., male or female) and (b) to *gender* (e.g., man or woman) and (c) to the relational property that one's sex has to one's gender (e.g., cis or trans) or (2) because "sex" refers (a) to *sex* and (b) to *gender*, and because *gender* encompasses not man and woman (unmodified), but cisman, ciswoman, transman, and transwoman as four distinct gender values. Either way, an employer who subjects trans people to more burdensome "terms, conditions, or privileges of employment" than it subjects cis people to discriminates "because of such individual's . . . sex" as a matter of ordinary statutory meaning.²²⁵

How, finally, would the but-for test operate? Take an employer who adopts and follows a blanket policy of not employing trans people. Pursuant to this policy, it fires Jack, a transman. Does but-for analysis reveal that it fired Jack "because of [his] sex"? Jack has three relevant properties: his biological sex is female, he identifies as a man, and he is transgender.²²⁶ If we change his biological sex, then we cannot preserve both the other facts; we must imaginatively change at least one. Gorsuch would change, in addition to Jack's sex, the fact that he is transgender. Because the employer does not fire this counterfactual Jack (male, man, cisgender), the but-for test generates the conclusion that Jack was fired because of his sex. Consistent with what we argued in Section II.B., and the principle of conservation of motivational analysis, we, unlike Gorsuch, would change Jack's sex and his gender identity, keeping constant his status as transgender. Because the employer does fire this counterfactual Jack (male, woman, transgender), our deployment of the but-for test yields the conclusion that Jack was not fired because of his sex.

Does this conclusion embarrass our analysis? Not at all. First, we are not recommending use of the but-for test to determine whether discrimination on account of a person's being transgender is discrimination "because of that individual's sex" as a textual matter when a direct textual inquiry—an inquiry into how people would use and understand the locution—already establishes that it is. Recall that the use of technical tests or legal devices is not the first recourse for textualists. Second, we have here imagined an employer who fires Jack according to a strict sex- and gender-neutral policy of not employing trans people. But many or most cases have not been like that. Instead, an employer reacts in a one-off fashion to a particular trans person, often firing them post transition. In such cases, counterfactual reasoning will most likely identify that

²²⁴ See, e.g., *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) ("Thus, under *Price Waterhouse*, 'sex' under Title VII encompasses both sex—that is, the biological differences between men and women—and gender.").

²²⁵ The Macleod and Tobia & Mikhail surveys both found more support for the proposition that employment discrimination against transgender people counts as discrimination "because of [the] individual's sex" than that discrimination against gay people does. Macleod, *supra* note 148, at 30; see also Tobia & Mikhail, *supra* note 148, at 19.

²²⁶ We are here assuming that the status of being trans or cis is independent of one's gender. This is option (1) in the paragraph above.

very person, pre-transition, as the most illuminating comparator, not some hypothetical construct possessing some but not all of the actual individual's qualities. Remember that counterfactual reasoning is not a game played according to strict rules but a tool designed to help us better understand what actually happened in the world, which is why we should always select a counterfactual world that does least violence to the actual world. And if the appropriate comparator is the employee pre-transition, then the conclusion follows that their gender was a but-for cause of the termination. And since "sex" encompasses gender, once again the employee was discriminated against "because of [their] sex."

The bottom line, to summarize, is that the analyses of sexual orientation discrimination and discrimination based on transgender status are importantly distinct. Sexual orientation discrimination is not, as a textual matter, discrimination "because of such individual's sex" because: (1) the ordinary meaning of "because of an individual's sex" does not encompass actions taken on account of an individual's sexual orientation; and (2) the but-for test does not generate a different conclusion when operationalized in a theoretically defensible way. In contrast, discrimination based on transgender status will (likely) be, as a textual matter, discrimination "because of such individual's sex" because the ordinary meaning of "sex" *does* encompass transgender status. However, if the ordinary meaning of "sex" were not to encompass transgender status, then a blanket policy of discriminating against transmen and transwomen would *not* be discrimination "because of such individual's sex," at least as a matter of but-for causation. That is because the but-for test, equipped with PCM, will fail to show that the person's sex was a but-for cause of their discrimination.

III. OF PURPOSES AND PLURALISM

What follows? Conservatives say the dissents were right: Title VII does not reach sexual orientation and gender identity.²²⁷ But there's another possibility: the law does reach sexual orientation and gender identity, but the textualist method that all the conservatives purported to apply is the wrong approach to statutory interpretation.

If textualism is wrong, what's right? The standard answer is: "purposivism," an approach that supposedly follows the legislature's broad social purposes rather than the meaning of the words it chose.²²⁸ However that answer is misleading in two fundamental respects.

First, the class of aims or objectives that are grouped as "purposes" is heterogeneous and needs to be subdivided. To be sure, commentators who endorse a simple textualist/purposivist binary often note that different types of things are called legislative purposes.²²⁹ But they too

²²⁷ See, e.g., Lund, *supra* note 11, at 159.

²²⁸ See, e.g., Koppelman, *Subtractive Moves*, *supra* note 5, at 9 ("The new textualism is typically contrasted with purposivism . . ."); Grove, *supra* note 4, at 267 ("The academic debate tends to focus on whether an interpreter, particularly a judge, should be a 'textualist' or a 'purposivist.'"); John F. Manning, *What Divides Textualists and Purposivists*, 106 COLUM. L. REV. 70, 70 (2006); William N. Eskridge, Jr., *The Case of the Speluncean Explorers: Twentieth-Century Statutory Interpretation in A Nutshell*, 61 GEO. WASH. L. REV. 1731, 1744-45 (1993) [hereinafter Eskridge, *Speluncean Explorers*].

²²⁹ John F. Manning, *What Divides Textualists and Purposivists*, 106 COLUM. L. REV. 70, 87 (2006) (distinguishing "Legal Process Purposivism" as a "dominant version" of purposivism, but exploring the different varieties of purposivism no further); Eskridge, *Speluncean Explorers*, *supra* note 228, at 1744-45 (identifying the criticism of purposivism that there are many different kinds that may count as relevant purposes, but failing to further investigate the distinctions); Grove, *supra* note 4, at 272 n.38 (identifying differences in the potential objects of purposivism, but "treat[ing]" them all "under the [same] umbrella" in juxtaposition with textualism).

often dismiss that fact as of little importance, or as marking only differences in degree.²³⁰ We think that attending carefully to the distinguishable types of aims and objects that the words “purpose” and “intent” sometimes reference is closer to the start of wisdom than a detail to be passed over.

Among the more important differences lies between “legal intentions” and “social purposes” (or “policy goals”). A legal intention is the change in the law that the legislature intended to effect by means of enacting a given statutory text—that is, say, the intention to reshape an existing legal duty or create a new legal right or confer a power. A social purpose or policy goal is the change in the world that the legislature intended or hoped to bring about as a consequence of changing the law in the way the legislature intended that it be changed. For example, the “purposes” that animated the Congress that enacted Title VII might have included the legal intention to establish a legal duty of employers not to discriminate on the basis of an individual’s sex and the policy goal of thereby advancing the economic and social equality of women and men. Legal philosophers have marked this distinction time and again.²³¹ The distinction is hugely important because the usual and most powerful arguments against interpreting a statute to effectuate policy goals are weak or even impotent as arguments against interpreting the statute to effectuate the legislature’s legal intention. Thus, to understand the best alternative to textualism our theorists of statutory interpretation must carefully attend to this distinction and its implications.

Second, whether purposes be cashed out in terms of legal intentions, or policy goals, or anything else, virtually nobody is a purposivist in the same single-minded way that defines textualism. Statutory textualism, like standard versions of constitutional originalism, is a monistic thesis. It’s a claim about the sole determinant of legal content, or the sole target of appropriate or legitimate judicial interpretation.²³² So-called purposivists are rarely monistic. They rarely fasten on any one type of legislative purpose as the single target that interpreters should seek. Much more commonly they’re pluralists.²³³ They believe that statutory interpretation—like constitutional interpretation—draws on many factors: original textual

²³⁰ See *supra* note 229; see also WILLIAM N. ESKRIDGE, JR., ABBE R. GLUCK & VICTORIA F. NOURSE, *STATUTES, REGULATION, AND INTERPRETATION* 303 (2014) (failing to distinguish between legislative “intentions” and meanings).

²³¹ See, e.g., Mark Greenberg, *Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication*, in *PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW* 217 (Andrei Marmor & Scott Soames eds., 2011); John Gardner, *Some Types of Law*, in *LAW AS A LEAP OF FAITH: ESSAYS ON LAW IN GENERAL* 51 (2013); Mitchell N. Berman, *The Tragedy of Justice Scalia*, 115 MICH. L. REV. 783, 796–99 (2017).

²³² See, e.g., Grove, *supra* note 4, at 269 (explaining the strong emphasis of formalist textualism on “semantic context”); Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117, 131 (2009) (“The core distinction [between textualism and other interpretive theories] is this: textualists believe that the text of a statute is the law. This belief is the textualists’ prime directive.”); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 22–23 (1997) (stating the position that judges should attend to only what the words in the statutory text mean). What this means is that the communicative content of the text is the law. Mitchell N. Berman, *The Tragedy of Justice Scalia*, 115 MICH. L. REV. 783, 796 (2017).

²³³ See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 57 (1994) (stating that “the Court does not adhere to any single foundation for statutory meaning, but has traditionally followed a multi-factored, pragmatic approach to statutory interpretation that shows certain regularities”); Abbe R. Gluck, *The States As Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1764 (2010) (“There are different stripes of purposivists, but, as relevant to this project, what unites them is this emphasis on pluralistic sources of statutory meaning and interpretive flexibility over formalistic methodological rules.”); Anuj Desai, *Text Is Not Enough*, 93 U. COLO. L. REV. (forthcoming 2021).

meaning, current meaning, legislative intentions and broader purposes, historical practice, avoiding absurd unforeseen results, the polity's current moral commitments if sufficiently deep or widespread, and so forth.²³⁴ Usually, these factors mostly align. When they don't, it's a hard case and no single factor is always decisive.

That approach will seem radical to some. Alito's dissent confirms that it's not. Before *Bostock* was decided, lower courts had already held that Title VII's ban on discrimination "because of [an employee's] race" encompasses employers who fire employees for being in an interracial relationship.²³⁵ The *Bostock* plaintiffs argued that their situation was on par: if discrimination "because of race" covers discrimination against people in opposite-race relationships, then discrimination "because of sex" must cover discrimination against those in same-sex relationships.²³⁶

The analogy is structurally perfect. But Alito's dissent rejected it, chiding plaintiffs for not "taking history into account."²³⁷ The interracial-relationship cases are rightly decided, Alito explained, because the "employer is discriminating on a ground that history tells us is a core form of race discrimination."²³⁸

Alito is right to heed the lessons of history. But he does so in a manner that gives the textualist game away. Title VII's text does not prohibit "core forms of race discrimination."²³⁹ It prohibits discrimination against an individual "because of such individual's race."²⁴⁰ And the version of textualism that would deliver the former meaning from the latter text while earning the Scalia/Alito seal of approval is not easy to conceive. Moreover, one might infer, if discrimination against an individual because they're in a same-sex relationship is not—as a "textual" matter—discrimination "because of such individual's . . . sex," then neither is discrimination against someone because they're in an interracial relationship discrimination "because of such individual's race."²⁴¹

²³⁴ Regarding constitutional interpretation, see Mitchell N. Berman, *Our Principled Constitution*, 166 U. PA. L. REV. 1325 (2018).

²³⁵ See, e.g., *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888 (11th Cir.1986); *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*, 173 F.3d 988, 994 (6th Cir. 1999); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 588 (5th Cir. 1998); *Holcomb v. Iona Coll.*, 521 F.3d 130, 139 (2d Cir. 2008).

²³⁶ Brief for Petitioner Gerald Lynn Bostock at 18–24, *Bostock v. Clayton Cty.*, 140 S. Ct.1731 (2020) (No. 17-1618); Opening Brief for Respondents Melissa Zarda, et al. at 31–36, *Altitude Express, Inc. v. Zarda, et al.*, 140 S. Ct.1731 (2020) (No. 17-1623).

²³⁷ *Bostock*, 140 S. Ct.at 1765 (Alito, J., dissenting).

²³⁸ *Id.* See also William N. Eskridge Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 YALE L.J. 322, 346 (2017) (observing that "the original meaning of Title VII is that antimiscegenation employment policies violate Title VII, even though they do not involve 'differential treatment' for black and white employees (who are treated alike by the employer who does not tolerate interracial intimacy)" and arguing for the analogy to sexual orientation discrimination); Alex Reed, *Associational Discrimination Theory & Sexual Orientation-Based Employment Bias*, 20 U. PA. J. BUS. L. 731, 747 (2018) (arguing against the analogy between sexual orientation discrimination and *Loving*, because "race and sex discrimination are readily distinguishable, particularly in the constitutional context").

²³⁹ 42 U.S. Code § 2000e.

²⁴⁰ *Id.*

²⁴¹ Ilya Somin, *Textualism and Purposivism in Today's Supreme Court Decision on Discrimination Against Gays, Lesbians, and Transsexuals*, VOLOKH CONSPIRACY (June 15, 2020), <https://reason.com/volokh/2020/06/15/textualism-and-purposivism-in-todays-supreme-court-decision-on-discrimination-against-gays-lesbians-and-transsexuals/> ("The problem with [Alito's] argument is that the same

Now, that inference is not ironclad. Insofar as textualism is an empirical project,²⁴² it is not governed by ethical or logical injunctions to treat likes alike. It could be that sexual-orientation discrimination does not run afoul of the original ordinary public meaning of Title VII while interracial-relationship discrimination does. (Or conversely, for that matter.) But if so, Alito or likeminded others need come up with far more argument than his *Bostock* dissent supplies. In the meantime, they'll find little comfort in the Tobia and Mikhail survey results that show 60% of respondents denying that firing somebody for being in an interracial relationship counts as firing them "because of such individual's race."²⁴³

To be sure, as Alito faithfully incants, the duty of a textualist judge "is to interpret statutory terms to 'mean what they conveyed to reasonable people at the time they were written.'"²⁴⁴ But there are reasons to bet that firing somebody because they're in an interracial relationship is, if anything, *less* likely to fall within the *original* ordinary meaning of the statutory text than within the *current* ordinary meaning. For one thing, there is no mention in the legislative history of Title VII that anti-miscegenation discrimination would be a form of discrimination actionable under Title VII, even though that time period was rife with such discrimination. Moreover, after *Loving v. Virginia*,²⁴⁵ such discrimination came to be known by the term "associational discrimination," which indicates that people did not comfortably file it under the heading "racial discrimination," making it especially hard to fathom that they'd describe it as discrimination "because of such individual's race." Finally, early textualist judicial decisions rejected claims that the statute covered associational discrimination.²⁴⁶

Does this mean Alito was wrong about the legal protection afforded interracial relationships? Not at all. He was wrong to think that the correctness of the many judicial

logic would also require us to conclude that discrimination against people in interracial relationships doesn't qualify as race discrimination . . .").

²⁴² See *supra* Part II.A.4.

²⁴³ Tobia & Mikhail, *supra* note 148, at 19.

²⁴⁴ *Id.* at 1755 (Alito, J., dissenting).

We surmise no, for the reasons that follow in the text.

²⁴⁵ 388 U.S. 1 (1967).

²⁴⁶ See, e.g., *Ripp v. Dobbs Houses, Inc.*, 366 F. Supp. 205, 208–09 (N.D. Ala. 1973) (ruling that the ordinary meaning of Title VII does not reach associational claims); *Adams v. Governor's Comm. on Postsecondary Educ.*, No. C80–624A, 1981 WL 27101, at *3, 1981 U.S. Dist. Lexis 15346 at *8–9 (N.D. Ga. Sept.3, 1981) (rejecting an associational discrimination claim by a white man married to a black woman, because "[n]either the language of the statute nor its legislative history supports a cause of action for discrimination against a person because of his relationship to persons of another race").

There are cases that have contrary rulings, but they tend to be predicated on a causal analysis and not the ordinary meaning of the statute. *Whitney v. Greater New York Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363, 1366 (S.D.N.Y. 1975) (finding that plaintiff was "discharged because of her race" because she faced discrimination based on an interracial social relationship); *Holiday v. Belle's Restaurant*, 409 F. Supp. 904, 908–09 (W.D. Pa. 1976) (similar); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 588–89 (5th Cir. 1998) ("It is true that [Title VII's plain language does not address this precise point; but, read as a whole, it does. In essence, the claim . . . is that [plaintiff] was discriminated against, as proscribed by the following language from Title VII, 'because of [her] race' (white), as a result of her relationship with a black person."); *Whitney v. Greater New York Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363, 1366 (S.D.N.Y. 1975) ("Manifestly, if [plaintiff] was discharged because, as alleged, the defendant disapproved of a social relationship between a white woman and a black man, the plaintiff's race was as much a factor in the decision to fire her as that of her friend. Specifying as she does that she was discharged because she, a white woman, associated with a black, her complaint falls within the statutory language that she was 'discharge[d] ... because of [her] race.'"); *Gresham v. Waffle House, Inc.*, 586 F. Supp. 1442, 1445 (N.D. Ga. 1984) (holding that discrimination based on an interracial relationship violates Title VII on a but-for theory); *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986) (same).

decisions holding that Title VII bans employment discrimination against persons in interracial relationships depends upon any fixed meaning (i.e., “communicative content”) the statutory text carried at the time of enactment. However it would also be wrong to think that the propriety of this interpretation of the statute necessarily depends upon the contents of the genuine legal intentions or policy goals of the enacting Congress—for example, that the 88th Congress had the intent or purpose to prohibit employment discrimination “on the basis of an employee’s sexual orientation” or action “that is wrongful in the same way that discrimination because of an individual’s sex is wrongful.” (Introspect: is your judgment that an employer violates Title VII when firing an employee because they’re in an interracial relationship contingent on what a historian of the 1964 Act might disclose?) A pluralist’s analysis is likely to be complicated. But the much-simplified bottom line, in our judgment, is that a national commitment to combatting social practices that are rooted in, and further, white supremacy and racial subordination is properly attributed to or located within Title VII, partly because of the values that animated the enacting Congress and partly because of the values that are embedded in our legal order today. We believe that that’s what history really teaches. And that’s why Title VII prohibits some race-based discrimination that is not, as a textual matter, discrimination “because of the individual’s race.”

The same reasoning, broadly speaking, could have carried the day in *Bostock*. There are strong arguments, paralleling those that have rightly prevailed in the interracial relationship cases, that Title VII is rightly understood to target employment practices that arise from and reinforce sex-based hierarchy, in the same way that Title VII attacks racial subordination.²⁴⁷ Anti-gay and anti-transgender prejudice arise from the same soil as does prototypical sexism and serve the same structures of power and privilege. That’s why Title VII plausibly reaches sexual orientation even though discrimination on that basis is not, textually speaking, discrimination “because of the individual’s sex.”

CONCLUSION

Bostock was a banner decision for gay, lesbian, bisexual, and transgender people.²⁴⁸ It has also been received in academic circles as proof that textualism can lead to progressive results.²⁴⁹ We back legal protection for sexual minorities strenuously, and grant unreservedly that bona fide application of textualism does not guarantee conservative outcomes. But we do not think that *Bostock* is the right vehicle for internalizing these lessons. *Bostock*’s many conservative critics are correct: something has gone awry in *Bostock*, and Gorsuch’s version of textualism, when performed faithfully, doesn’t yield *Bostock*’s more liberal bottom-line result.

More particularly, we have argued (a) that the ordinary meaning of Title VII does not prohibit discrimination because of an individual’s sexual orientation; (b) that Gorsuch’s conclusion that the specialized legal meaning of Title VII does prohibit discrimination because of an individual’s sexual orientation rests on a misapplication of the law’s but-for test; and (c) that correct deployment of but-for analysis reinforces rather than destabilizes the statute’s ordinary meaning, namely that employment discrimination on the basis of an individual’s sexual

²⁴⁷ See Kimberly A. Yuracko, *Trait Discrimination As Sex Discrimination: An Argument Against Neutrality*, 83 TEX. L. REV. 167, 171–72 (2004); Soucek, *supra* note 180, at 124–25.

²⁴⁸ See *supra* note 5 and accompanying text.

²⁴⁹ See *supra* note 4 and accompanying text.

orientation is not proscribed. If we're right about all this, but if you nonetheless believe (d) that this practice does violate Title VII and therefore that *Bostock* reached the legally correct result, then you have strong grounds to reject textualism as a theory of statutory interpretation.

There is an irony to this case. Justice Gorsuch assumed Justice Antonin Scalia's seat, but had clerked for Justice Anthony Kennedy. Because Kennedy, despite his broadly conservative commitments, was a champion for gay and lesbian rights, one might consider *Bostock* as evidence that Gorsuch is following in his mentor's footsteps.²⁵⁰

Yes and no. The difference is that Kennedy was never a single-minded textualist. His approach to law was always resolutely pluralist.²⁵¹ Kennedy was a good justice—flawed to be sure, but better than he is given credit for.²⁵² If Gorsuch is to grow into the best judicial version of himself, it's not enough that he share some of his old boss's decency. He'll have to wean himself from Scalia's blinkered approach to statutory and constitutional interpretation. He'll have to embrace pluralism. He'll have to understand how *Bostock* could be right despite its reasoning.

²⁵⁰ Michael D. Shear, *Gorsuch, Conservative Favorite Appointed by Trump, Leads Way on Landmark Decision*, N.Y. TIMES (June 15, 2020), <https://www.nytimes.com/2020/06/15/us/politics/gorsuch-supreme-court-gay-transgender-rights.html> (“In writing the opinion, Justice Gorsuch assumed the role of his mentor, former Justice Anthony M. Kennedy, for whom he once was a clerk.”); cf. Dorf, *Gorsuch's Magnificent Opinion*, *supra* note 5 (comparing and contrasting Justice Kennedy's and Justice Gorsuch's writing style in landmark gay-rights decisions.). *But see* Farias, *supra* note 9 (“Yet no one should rush to christen Neil Gorsuch as Kennedy's heir. His own concurrence in *Masterpiece Cakeshop* left little doubt that he'd side with a Christian wedding vendor rather than a gay couple claiming discrimination, and who knows where he'd stand on controversies like bathroom discrimination against transgender students, or broader exclusion of transgender athletes.”).

²⁵¹ Mitchell N. Berman & David Peters, *Kennedy's Legacy: A Principled Justice*, 46 HASTINGS CONST. L.Q. 311, 340 (2019) (discussing Justice Kennedy's principled pluralism).

²⁵² *See generally id.*