

## BOSTOCK WAS BOGUS: TEXTUALISM, PLURALISM, AND TITLE VII

*Mitchell N. Berman\* & Guha Krishnamurthi\*\**

*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 Justice 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 Justice Gorsuch’s effort to establish that result as a matter of “legal” meaning wholly fails because it depends upon a*

---

© 2021 Mitchell N. Berman and Guha Krishnamurthi. Individuals and nonprofit institutions may reproduce and distribute copies of this Article in any format at or below cost, for educational purposes, so long as each copy identifies the authors, provides a citation to the *Notre Dame Law Review*, and includes this provision in the copyright notice.

\* Leon Meltzer Professor of Law, the University of Pennsylvania Carey Law School, and Professor of Philosophy, the University of Pennsylvania. Email: mitchberman@law.upenn.edu.

\*\* Associate Professor of Law, University of Oklahoma College of Law. Email: guha.krishnamurthi@ou.edu. For generous and helpful conversations and comments on prior drafts, we thank Devon Carbado, Cary Coglianese, Beth Colgan, Anuj Desai, Mike Dorf, Ben Eidelson, Erik Encarnacion, Brittany Farr, Jill Fisch, Fanna Gamal, Jonah Gelbach, Mark Greenberg, Tara Grove, Adil Haque, Randy Kelso, Shlomo Klapper, Andy Koppelman, Jamie Macleod, Serena Mayeri, Sandy Mayson, John Mikhail, Lisa Miracchi, Shaun Ossei-Owusu, David Peters, Alex Platt, Richard Re, Charles Rocky Rhodes, Jennifer Rothman, Peter Salib, Amanda Shanor, Seanna Shiffrin, Brian Soucek, Karen Tani, Kevin Tobia, Andrew Verstein, John Worley, Noah Zatz, and participants at faculty workshops at the Penn Carey Law School and the UCLA School of Law.

*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 from Justice Samuel Alito’s principal dissent.*

INTRODUCTION.....	68
I. BOSTOCK IN BRIEF .....	73
A. <i>The Decisions Below</i> .....	74
B. <i>The Supreme Court Resolves</i> .....	76
II. TORTURED TEXTUALISM .....	79
A. <i>Ordinary Meaning</i> .....	80
1. A First Pass .....	81
2. A Disanalogy Noted and Discarded .....	85
3. Litigation.....	86
4. Reception .....	91
B. <i>Counterfactual Confusions</i> .....	98
1. On Motivational and Non-Motivational Causation.....	99
2. On <i>Not</i> Changing “One Thing at a Time” .....	101
3. Why <i>This</i> Way Rather than <i>That</i> Way? .....	103
4. Of Bisexuals and Pansexuals .....	108
5. The Root of the Problem .....	108
6. Possible worlds and the principle of conservation in motivational analysis .....	111
C. <i>And Gender Identity?</i> .....	116
III. OF PURPOSES AND PLURALISM .....	120
CONCLUSION.....	125

## INTRODUCTION

In *Bostock v. Clayton County*,<sup>1</sup> the Supreme Court held that federal antidiscrimination law prohibits employment discrimination on grounds of sexual orientation and gender identity.<sup>2</sup> 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. Justices Clarence Thomas, Samuel Alito, and Brett Kavanaugh dissented in two separate opinions, one calling Justice

1 140 S. Ct. 1731 (2020).

2 *Id.* at 1737.

Gorsuch’s reading of the text “preposterous.”<sup>3</sup> *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.<sup>4</sup>

Most commentators from the legal academy and mainstream media believe the Court reached the right result.<sup>5</sup> 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. Professor Michael Dorf proclaimed Justice Gorsuch’s opinion “[m]agnificent” and wondered why it wasn’t unanimous.<sup>6</sup>

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

4 See, e.g., Tara Leigh Grove, *The Supreme Court, 2019 Term—Comment: Which Textualism?*, 134 HARV. L. REV. 265, 266 (2020); Katie Eyer, *Progressive Textualism and LGBTQ Rights*, SCOTUSBLOG (June 16, 2020, 10:23 AM), <https://www.scotusblog.com/2020/06/symposium-progressive-textualism-and-lgbtq-rights/> [https://perma.cc/68CQ-9U2C]; Anita S. Krishnakumar, *Three Lessons About Textualism from the Title VII Case*, YALE J. REGUL. NOTICE & COMMENT (June 24, 2020), <https://www.yalejreg.com/nc/three-lessons-about-textualism-from-the-title-vii-case-by-anita-s-krishnakumar/> [https://perma.cc/A6NZ-DGCE]; Jonathan Skrmetti, *The Triumph of Textualism: “Only the Written Word Is the Law,”* SCOTUSBLOG (June 15, 2020, 9:04 PM), <https://www.scotusblog.com/2020/06/symposium-the-triumph-of-textualism-only-the-written-word-is-the-law/> [https://perma.cc/PJA5-KVHB].

5 See, e.g., Andrew Koppelman, Essay, *Bostock, LGBT Discrimination, and the Subtractive Moves*, 105 MINN. L. REV. HEADNOTES 1, 1 (2020) (deeming *Bostock* “obviously correct”); 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> [https://perma.cc/FP7Q-UB4K] (“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.”); 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> [https://perma.cc/CRH5-Y6BJ] (“The decision was both symbolic and consequential, and it followed in the tradition of landmark rulings on discrimination.”); Ian Millhiser, *The Supreme Court’s Landmark LGBTQ Rights Decision, Explained In 5 Simple Sentences*, VOX (June 15, 2020), <https://www.vox.com/2020/6/15/21291515/supreme-court-bostock-clayton-county-lgbtq-neil-gorsuch> [https://perma.cc/P46K-2X66] (“*Bostock v. Clayton County* . . . was a test of Justice Neil Gorsuch’s principles. He passed.”); Michael C. 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> [https://perma.cc/CVQ3-MVCF] (“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.”).

6 Dorf, *supra* note 5; see also Michael C. Dorf, *SCOTUS LGBT Discrimination Case Will Test Conservative Commitment to Textualism*, VERDICT (May 1, 2019), <https://verdict.justia.com/2019/05/01/scotus-lgbt-discrimination-case-will-test-conservative-commitment-to-textualism> [https://perma.cc/8K8N-ALJD] (calling the textualist case for the *Bostock* plaintiffs “straightforward,” and predicting that, if the Court’s conservatives “keep faith with

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.”<sup>7</sup> Popular commentators from both sides of the aisle claimed that *Bostock* showed that textualism could be applied neutrally, and at times deliver liberal results.<sup>8</sup>

But if Justice 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 Justice Gorsuch's “halfway textualism,”<sup>9</sup> 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.”<sup>10</sup> The junior Senator from Missouri, a former Roberts clerk, denounced *Bostock* as “represent[ing] the end of the conservative legal

---

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, *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/> [<https://perma.cc/3C49-QZER>]; Cristian Farias, *Is Neil Gorsuch the New Anthony Kennedy?*, GQ (June 15, 2020), <https://www.gq.com/story/neil-gorsuch-scotus-lgbt-decision> [<https://perma.cc/PR5K-GE4F>]; Millhisser, *supra* note 5.

9 Josh Blackman & Randy Barnett, *Justice Gorsuch's Halfway Textualism Surprises and Disappoints in the Title VII Cases*, NAT'L REV. (June 26, 2020) (emphasis omitted), <https://www.nationalreview.com/2020/06/justice-gorsuch-title-vii-cases-half-way-textualism-surprises-disappoints/> [<https://perma.cc/R7ET-AFXR>]

10 Nelson Lund, *Unleashed and Unbound: Living Textualism in Bostock v. Clayton County*, 21 FEDERALIST SOC'Y REV. 158, 167 (2020); see also 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> [<https://perma.cc/DMC8-L9RE>]; 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> [<https://perma.cc/RZA3-ECQ5>]; 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/> [<https://perma.cc/79L4-HMZK>]; Steven D. Smith, *The Mindlessness of Bostock*, LAW & LIBERTY (July 9, 2020), <https://lawliberty.org/bostock-mindlessness/> [<https://perma.cc/YE9X-88KE>].

movement.”<sup>11</sup> “[I]f textualism and originalism gives [sic] you this decision,” he charged, then “those phrases don’t mean much at all.”<sup>12</sup>

The debate over the textualist bona fides of *Bostock* is important and far-reaching.<sup>13</sup> 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.<sup>14</sup> Indeed, commentators are already debating *Bostock*’s implications for challenges to affirmative action university admissions programs under Title VII.<sup>15</sup> Furthermore, particular statutes and disputes aside, there remains the overarching

11 Josh Blackman, *Senator Hawley: Bostock “Represents the End of the Conservative Legal Movement,”* VOLOKH CONSPIRACY (June 16, 2020), <https://reason.com/volokh/2020/06/16/senator-hawley-bostock-represents-the-end-of-the-conservative-legal-movement/> [<https://perma.cc/HJ3T-23XB>].

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

13 See Lund, *supra* note 10, at 160–63 (discussing *Bostock* in terms of its departure from textualist principles properly construed).

14 See, e.g., Guha Krishnamurthi & Charanya Krishnaswami, *Title VII and Caste Discrimination*, 134 HARV. L. REV. F. 456 (2021) (arguing that, in light of *Bostock*, caste discrimination is cognizable under Title VII as race, religion, and national origin discrimination). For other questions in employment discrimination law that *Bostock* might inform, see, e.g., Nimra H. Azmi, *Uncovered: Title VI & Title IX’s Limited Protections for Muslim Students Who Veil*, 43 HARV. J. L. & GENDER 281 (2020); 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).

15 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> [<https://perma.cc/ZPH2-LLA5>]; Cass R. Sunstein, *Gorsuch Paves Way for Attack on Affirmative Action*, BLOOMBERG (June 18, 2020) <https://www.bloomberg.com/opinion/articles/2020-06-17/gorsuch-gay-rights-opinion-targets-affirmative-action> [<https://perma.cc/NP2N-62S2>].

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, 163–164, 185 (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. Petition for Writ of Certiorari at 25, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157 (No. 20-1199), 2021 WL 797848. 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.

need to better understand textualism and its place in the Court's general jurisprudence and interpretive methodology.<sup>16</sup>

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.)<sup>17</sup> 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—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 “discriminat[ion] . . . because of [an] individual's . . . sex”<sup>18</sup> does not cover discrimination taken by reason of a person's sexual orientation as a matter of ordinary meaning or common parlance. 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,<sup>19</sup> namely one that interprets “because of” as incorporating but-for causation.<sup>20</sup> Simply put, Justice 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 Justice 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

---

16 See *supra* note 4 and accompanying text.

17 See *infra* Section II.C.

18 42 U.S.C. § 2000e-2(a)(1) (2018).

19 John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 434–35 (2005).

20 *Bostock*, 140 S. Ct. at 1739.

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.” Second—and of much greater importance to this 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 Justice Alito’s purportedly textualist *Bostock* dissent.

### 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.”<sup>21</sup> The first appellate decision to address whether discrimination on the basis of sexual orientation was barred by Title VII was *Blum v. Gulf Oil Corp.*, in 1979.<sup>22</sup> The Fifth Circuit dismissed the contention in a single sentence.<sup>23</sup> Over the next thirty years, the issue was litigated in eight Circuits and all followed *Blum* in rejecting the claim.<sup>24</sup> Strikingly, every panel appeared to find the question easy:

---

21 42 U.S.C. § 2000e-2(a)(1) (2018) (“It shall be an unlawful employment practice for an employer . . . 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 . . .”).

22 597 F.2d 936, 938 (5th Cir. 1979).

23 *Id.* at 938. *Blum* cited *Smith v. Liberty Mutual Insurance Co.*, 569 F.2d 325 (5th Cir. 1978), for support, 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. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 259 (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, 329–330 (9th Cir. 1979); *Medina v. Income Support Div., N.M.*, 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 Mktg., Inc.*, 667 F.2d

four expended no more than a sentence on the issue, and not one elicited a dissent.<sup>25</sup>

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

### A. *The Decisions Below*

In *Zarda*, filed in 2010, plaintiff David Zarda, a skydiving instructor, alleged that his employer had terminated him for being gay<sup>30</sup> and thus violated Title VII and New York state law.<sup>31</sup> 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.<sup>32</sup> On appeal, a panel of the Second Circuit affirmed.<sup>33</sup> Thereafter, a majority of the Second Circuit sitting en banc reversed

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. *Wrightson*, 99 F.3d 144–45 (Murnaghan, J., dissenting) (agreeing that sexual orientation is not cognizable under Title VII, but contending that same-sex harassment claims are also not cognizable under Title VII); *DeSantis*, 608 F.2d at 333 (Sneed, J., concurring and dissenting) (agreeing that sexual orientation is not cognizable under Title VII, but contending that a disparate impact theory should survive motion to dismiss).

26 *Zarda v. Altitude Express, Inc.*, 855 F.3d 76 (2d Cir. 2017) (per curiam) (affirming district court), *aff’d in part, vacated in part*, 883 F.3d 100 (2d Cir. 2018) (en banc), *aff’d sub nom.* *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

27 *Bostock v. Clayton County*, No. 16-CV-1460, 2017 WL 4456898 (N.D. Ga. July 21, 2017) (adopting magistrate’s report), *aff’d mem. sub nom.* *Bostock v. Clayton Cnty. Bd. of Comm’rs*, 723 F. App’x 964 (11th Cir. 2018) (per curiam), *rev’d sub nom.* *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

28 *Equal Employment Opportunity Comm’n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d 837 (E.D. Mich. 2016), *rev’d*, 884 F.3d 560 (6th Cir. 2018), *aff’d sub nom.* *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

29 *Hively v. Ivy Tech Cmty. Coll.*, No. 14-cv-1791, 2015 WL 926015 (N.D. Ind. 2015), *aff’d*, 830 F.3d 698 (7th Cir. 2016), *rev’d sub nom.* *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017) (en banc).

30 We use the term “gay” to mean one intimately attracted to others of one’s same sex or gender, and regardless of the person’s own sex or gender. That is, a “gay” person may be a man or a woman (socially) or male or female (biologically). We avoid the term “homosexual,” except when quoting or otherwise referring to other work, including judicial opinions.

31 *Zarda*, 883 F.3d at 108–09.

32 *Id.* at 109; *Zarda v. Altitude Express*, 855 F.3d 76, 81 (2d Cir. 2017) (per curiam), *aff’d in part, vacated in part*, 883 F.3d 100 (2d Cir. 2018) (en banc), *aff’d sub nom.* *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

33 *Zarda*, 883 F.3d at 110.

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.<sup>34</sup> In so doing, the majority appealed to the "sex-dependent nature" of sexual orientation discrimination, gender stereotyping, examining employer motivation, and associational discrimination.<sup>35</sup> The majority also reasoned that the but-for causation test showed that sexual orientation discrimination was discrimination "because of . . . sex."<sup>36</sup> Judges Gerard Lynch and Debra Ann 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.<sup>37</sup>

Similarly, *Bostock*, filed in 2013, concerned allegations by plaintiff Gerald Bostock that he had been terminated for being gay.<sup>38</sup> Bostock was a Child Welfare Services Coordinator for Clayton County, Georgia, with a record of strong job performance.<sup>39</sup> He was fired shortly after joining a gay recreational softball league, a job action he alleges was taken because of his sexual orientation.<sup>40</sup> The district court denied his claim for sexual orientation discrimination as not cognizable under Title VII, and also denied his claim for gender stereotyping as factually unsupported.<sup>41</sup> The Eleventh Circuit affirmed.<sup>42</sup>

*Harris Funeral Homes* concerned claims by Aimee Stephens that she had been terminated by her employer for being a transgender woman.<sup>43</sup> 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."<sup>44</sup> Stephens transitioned and planned to show up at work in the employer-mandated attire

34 *Id.* at 131–32.

35 *See id. passim.*

36 *Id.* at 115–19 (alteration in original) (quoting 42 U.S.C. § 2000e–2(a)(1) (2012)). See *infra* Sections I.B and II.B for discussion of but-for reasoning and the choice of comparator.

37 *Zarda*, 883 F.3d at 137–67 (Lynch, J., dissenting); *id.* at 167–69 (Livingston, J., dissenting).

38 *Bostock v. Clayton County*, No. 16-CV-1460, 2017 WL 4456898 (N.D. Ga. July 21, 2017) (adopting magistrate's report from 2016 WL 9753356), *aff'd mem. sub nom.* *Bostock v. Clayton County Bd. of Comm'rs*, 723 F. App'x 964 (11th Cir. 2018) (per curiam), *rev'd sub nom.* *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

39 *Bostock v. Clayton County*, No. 16-CV-001460, 2016 WL 9753356, at \*1 (N.D. Ga. Nov. 3, 2016) (magistrate report).

40 *Id.* at \*1–2.

41 *Bostock*, 2017 WL 4456898, at \*2, \*3.

42 *Bostock*, 723 F. App'x at 964.

43 *Equal Employment Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 566–67 (6th Cir. 2018), *aff'd sub nom.* *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

44 *Id.* at 568–69.

appropriate to her gender, but was fired.<sup>45</sup> The district court granted summary judgment for the employer, reasoning that while Stephens's allegations constituted actionable sex stereotyping, the employer had a defense under the Religious Freedom Restoration Act of 1993 (RFRA).<sup>46</sup> The Sixth Circuit reversed, agreeing that Stephens's allegations constitute actionable sex stereotyping under Title VII but holding RFRA inapplicable.<sup>47</sup>

Finally, in *Hively*, Kimberly Hively, an adjunct professor at Ivy Tech Community College, filed a complaint against Ivy Tech alleging she was passed over for promotion and her contract was nixed on account of her being gay.<sup>48</sup> Citing Seventh Circuit precedent, the district court dismissed the complaint.<sup>49</sup> A panel of the Seventh Circuit affirmed based on the same binding precedent, but noted the many inconsistencies that the precedent produces.<sup>50</sup> The Seventh Circuit took up the case en banc.<sup>51</sup> In an opinion authored by then-Chief Judge Diane Wood, the Seventh Circuit reversed, holding that sexual orientation discrimination was cognizable as sex discrimination under Title VII on theories of sex and gender stereotyping, and associational discrimination.<sup>52</sup> The majority opinion also employed the but-for causation argument that Justice Gorsuch would later embrace, comparing Hively, a gay woman, to a straight man.<sup>53</sup> Then-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.<sup>54</sup>

### B. *The Supreme Court Resolves*

The Supreme Court granted certiorari in three of the cases—*Zarda*, *Bostock*, and *Harris Funeral Homes*—and consolidated them for hearing.<sup>55</sup> In a 6–3 decision, the Court held that discrimination on the

45 *Id.*

46 *Id.* at 570. Stephens moved to intervene in the appeal, which the Sixth Circuit granted. *Id.*

47 *Id.* at 600.

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

49 *Id.* at 341.

50 *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 718 (7th Cir. 2016), *rev'd sub nom. Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017) (en banc).

51 *Hively*, 853 F.3d at 343.

52 *See id. passim.*

53 *Id.* at 345–46.

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

55 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*

basis of sexual orientation or transgender status constituted discrimination “because of [an] individual’s . . . sex” and thus violates Title VII.<sup>56</sup> Justice Gorsuch, writing for the majority, contended that this surprising result was required by a textualist reading of the statute.<sup>57</sup> Textualism is the theory that judges must strictly follow the “ordinary public meaning” of the statutory text “at the time of [its] enactment.”<sup>58</sup> In Justice Gorsuch’s summary: “Only the written word is the law.”<sup>59</sup>

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 Justice Gorsuch resided within the phrase “to discriminate against any individual . . . because of such individual’s . . . sex.”<sup>60</sup> 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 straightforward application of legal terms with plain and settled meanings.”<sup>61</sup> “[A] but-for test,” Justice Gorsuch further 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.”<sup>62</sup>

Justice Gorsuch then applied this analysis to Bostock’s case. As mentioned, Bostock alleged that his employer fired him because of his sexual orientation.<sup>63</sup> To determine whether his firing was also “because of his sex,” Justice Gorsuch would change that one thing—Bostock’s sex—while keeping everything else—particularly, his attraction to men—constant.<sup>64</sup> Because the employer didn’t object to women who were attracted to men, “changing the employee’s sex would have yielded a different choice by the employer.”<sup>65</sup> Voila: Mr.

*Won’t Ask Supreme Court to Overturn Landmark Gay Rights Ruling*, HUFFPOST (Apr. 5, 2017, 5:53 PM), [https://www.huffpost.com/entry/supreme-court-gay-rights-ivy-tech\\_n\\_58e50f6ae4b0917d34760768](https://www.huffpost.com/entry/supreme-court-gay-rights-ivy-tech_n_58e50f6ae4b0917d34760768) [<https://perma.cc/V689-S5AS>].

<sup>56</sup> *Bostock v. Clayton County*, 140 S. Ct. 1731, 1736–38 (2020) (quoting 42 U.S.C. § 2000e–2(a)(1) (2018)).

<sup>57</sup> *Id.* at 1738.

<sup>58</sup> *Id.* at 1824–25 (Kavanaugh, J., dissenting).

<sup>59</sup> *Id.* at 1737 (majority opinion). 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.

<sup>60</sup> *Bostock*, 140 S. Ct. at 1738, 1753 (quoting 42 U.S.C. § 2000e–2(a)(1) (2018)).

<sup>61</sup> *Id.* at 1743.

<sup>62</sup> *Id.* at 1739.

<sup>63</sup> *Id.* at 1737–38.

<sup>64</sup> *Id.* at 1739, 1741–42.

<sup>65</sup> *Id.* at 1741.

Bostock was fired “because of” his sex, not only because of his sexual orientation.

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.<sup>66</sup> Justice Alito, joined by Justice Thomas, first claimed common parlance on his 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.<sup>67</sup> 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.”<sup>68</sup> “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.”<sup>69</sup>

Obviously, sex, sexual orientation, and gender identity are deeply intertwined concepts. Advocates and social scientists have helped make their complex interrelationships clearer.<sup>70</sup> But, according to Justice Alito, that’s not the issue for a textualist. “Title VII prohibits discrimination because of *sex itself*,” Justice Alito insisted, “not everything that is related to, based on, or defined with reference to, ‘sex.’”<sup>71</sup> To highlight his point, Justice 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 a person whom the employer knows (or believes) to be gay or lesbian, but without any inkling of that person’s sex.<sup>72</sup> 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, but not the applicant’s sex or gender. All persons who check “homosexual” (or “bisexual”) are rejected; all who check

---

66 *Id.* at 1754–55 (Alito, J., dissenting).

67 *Id.* at 1756.

68 *Id.*

69 *Id.* at 1755.

70 See CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF STATE* (1989); CHARLOTTE WITT, *THE METAPHYSICS OF GENDER* (2011); Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 *YALE L.J.* 1 (1995); Anne Fausto-Sterling, *Gender/Sex, Sexual Orientation, and Identity Are in the Body: How Did They Get There?*, 56 *J. SEX RSCH.* 529 (2019) (providing an extensive review of the scholarship).

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).

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

72 *Id.* at 1758–59.

“heterosexual” are hired, or pass through to the next stage. (As Justice Alito observes, this was essentially U.S. military policy for years.)<sup>73</sup> 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.

Justice Alito declared this judgment “preposterous” and derided the majority’s attempt to “pass off its decision as the inevitable product of” Justice Scalia’s textualism as a ruse.<sup>74</sup> “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.”<sup>75</sup> Justice Kavanaugh’s dissent was more polite but to similar effect, deeming the majority’s insistence “that it is not rewriting or updating” the statute “tough to accept.”<sup>76</sup>

## II. TORTURED TEXTUALISM

Justice Gorsuch’s majority opinion starts with a standard textualist premise: “This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment.”<sup>77</sup> The Court’s task, then, was to interpret the meaning of “because of such individual’s . . . sex.”<sup>78</sup> 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.’”<sup>79</sup> So far, so good (for a textualist). Unfortunately, Justice 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—the centerpiece of this Article—argues that but-for reasoning does not generate a different conclusion. Section II.C turns

---

73 *Id.*

74 *Id.* at 1755.

75 *Id.* at 1755–56.

76 *Id.* at 1835 (Kavanaugh, J., dissenting).

77 *Id.* at 1738 (majority opinion).

78 *Id.* (citing 42 U.S.C. § 2000e–2(a)(1) (2018)).

79 *Id.* at 1739 (quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 350 (2013)).

from sexual orientation to gender identity, explaining why the ordinary 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*

As textualists repeatedly insist, textualism is not “literalism,”<sup>80</sup> 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.<sup>81</sup> And ordinary public meaning is not just any meaning that the words in isolation could carry, but rather 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.<sup>82</sup> Original public meaning—what textualists claim to be seeking—is thus close kin to “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.<sup>83</sup> In philosophical terms, textualists seek pragmatic content, not bare semantic content.<sup>84</sup>

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

---

80 This is the central thesis of Kavanaugh’s dissent—that the majority wrongly privileged “literal” over “ordinary” meaning. *Bostock*, 140 S. Ct. at 1823–28 (Kavanaugh, J., dissenting).

81 *Bostock*, 140 S. Ct. at 1738 (majority opinion); see also 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”).

82 See *Bostock*, 140 S. Ct. at 1750; *id.* 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.’” (quoting SCALIA & GARNER, *supra* note 81, at 16)); Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 498 (2013) (similar).

83 Matters differ a little for specialized legal language, where meaning is set by understandings of specialists not laypeople. But “because of an individual’s sex” is an ordinary locution.

84 Mark Greenberg, *Legal Interpretation and Natural Law*, 89 FORDHAM L. REV. 109, 113–14 (2020).

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 Andrew Koppelman's textualist defense of the decision<sup>85</sup> and the eye-opening work of "empirical textualists" that purports to show that the 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. The primary definition of "sex," when used as a characteristic of an individual, is status as either male or female.<sup>86</sup> 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.<sup>87</sup> Because B's being male or B's being female is

---

85 Koppelman had powerfully argued for a broader, pluralist grounding of gay rights in previous work. See, e.g., ANDREW KOPPELMAN, *THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW* 53–71 (2002). Here we are tackling his *textualist* defense of *Bostock*.

86 See, e.g., *Sex*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/sex> [<https://perma.cc/CPS8-E3X3>] (providing the definition "the state of being male or female"); *Sex*, CAMBRIDGE ENGLISH DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/sex> [<https://perma.cc/2BTF-UCU9>] (providing "the state of being either male or female"). We put aside whether this definition requires emendation to accommodate the state of being intersex.

87 Although we are sympathetic to this parsing of the phrase, we are also tempted by some variant of an alternative offered us by Ben Eidelson. In published writing, Eidelson has proposed an 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. See BENJAMIN EIDELSON, *DISCRIMINATION AND DISRESPECT* 16–24 (2015). Put another way, 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

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."<sup>88</sup> 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 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.")<sup>89</sup>

Or suppose the local lesbian motorcycle club advertises for a mechanic. Straight Stan applies for the gig but isn't hired. Several

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." Eidelson develops this idea further in a forthcoming publication, *Dimensional Disparate Treatment*, that seeks to make this case by drawing on the philosophical distinction between "determinates" and "determinables" (e.g., *red* is a determinate of the determinable *colored*). Benjamin Eidelson, *Dimensional Disparate Treatment*, 95 S. CAL. L. REV. (forthcoming 2022) (manuscript at 13–14), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3915787](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3915787). Eidelson's proposal is novel and subtle. Space constraints and publishing deadlines prevent us from addressing it here, but we look forward to doing so on another occasion.

<sup>88</sup> *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 363 (7th Cir. 2017) (en banc) (Sykes, J., dissenting).

<sup>89</sup> Cass R. Sunstein, *Textualism and the Duck-Rabbit Illusion*, 11 CALIF. L. REV. ONLINE 463, 475 (2020).

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.

Thought experiments like these 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.<sup>90</sup>

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 pragmatically enriched content not bare semantic content.<sup>91</sup>

Here's an example: suppose that Employer, with 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 most probable and informative answer, it's not the only one. An affirmative response to Alex wouldn't be inapt for 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

---

90 42 U.S.C. § 2000e-2(a)(1) (2018). 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, to ascertain the ordinary meaning that textualists seek. Recently, several scholars have advocated the use of survey instruments to supplant or supplement our preferred sources. We engage them in subsection II.A.4.

91 See *supra* note 84 and accompanying text.

might seem a bit off for Employer to flatly deny to Alex that they're being fired "because of their sex."<sup>92</sup>

But this is an unusual context, the proverbial exception that proves the rule. To see this, alter the hypo slightly. Suppose that Employer has personal familiarity with their employee, Alex, knowing Alex's gender and that Alex is dating somebody named Blake. Naturalizing heterosexuality, Employer assumes that Blake has a different gender (and sex) than Alex. When Employer meets Blake and discovers its mistake, 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?," a negative response would be unequivocal. As in the types of case canvassed above, it would be entirely unnatural to say that Employer fired Alex because of Alex's sex.<sup>93</sup> And for textualists, as Justice Scalia has insisted, the statutory text "'is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it."<sup>94</sup>

92 See *Bostock v. Clayton County*, 140 S. Ct. 1731, 1745 (2020) ("In conversation, a speaker is likely to focus on what seems most relevant or informative to the listener.").

93 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 treat[ed the] employee worse based in part on that individual's sex." *Id.* That formulation wrongly conflates questions about intention with questions about motivation. See Kimberly Kessler Ferzan, *Beyond Intention*, 29 CARDOZO L. REV. 1147, 1152 (2008). The questions are whether a speaker would describe this type of case as employment action "because of the employee's sex," and whether a listener who heard the event described this way would correctly understand what happened. 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 (from Ted, the Employer, or an onlooker) is "no, you were fired because of your sexual orientation."

94 SCALIA & GARNER, *supra* note 81, at 69 (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 451 (Boston, Hilliard, Gray & Co. 1833)). We now encounter 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, e.g., Manning, *supra* note 19, at 420 (making this point). But part of

## 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.<sup>95</sup> A familiar example from constitutional law: if the original public meaning of the Equal Protection Clause had been, roughly, that 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.

Justice 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 this, Justice Gorsuch adds, "is exactly the sort of reasoning this Court has long rejected,"<sup>96</sup> offering *Oncale v. Sundowner Offshore Services, Inc.*,<sup>97</sup> 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

---

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 the ordinary meaning of a locution as used in a statute 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., Greenberg, *supra* note 84, at 118–19 (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 (only *arguendo*) that the challenge can be met. In the meantime, it warrants emphasis just 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 A. Macleod, *Finding Original Public Meaning*, 56 GA. L. REV. (forthcoming 2021) (manuscript at 47), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3729005](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3729005); see also *infra* Section II.B.

<sup>95</sup> See Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569 (1998).

<sup>96</sup> *Bostock*, 140 S. Ct. at 1750.

<sup>97</sup> 523 U.S. 75 (1998).

enacted Title VII.”<sup>98</sup> According to Justice Gorsuch, “[u]nder the employer’s logic, it would seem this was a mistake.”<sup>99</sup>

Justice Gorsuch is pressing a false analogy, and both dissents are right to call him on it.<sup>100</sup> Far from maintaining that Title VII “applies only to the ‘principal evils’ and not lesser evils that fall within the plain scope of its terms,” the employers and dissents vigorously contended precisely what Justice Gorsuch says they didn’t—namely that the statutory language does bear a different meaning than the plaintiffs allege.<sup>101</sup> Here, Justice 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.”<sup>102</sup> In contrast, “[t]o decide for the defendants in *Oncale*, it would have been necessary to carve out an exception to the statutory text.”<sup>103</sup> 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 text’s ordinary meaning.<sup>104</sup>

### 3. Litigation

We find it massively revealing that the plaintiffs in these cases did not seriously claim statutory ordinary meaning on their side. In their Supreme Court briefs, Bostock and Zarda advanced many of the arguments found in the lower court opinions—arguments sounding in sex stereotyping, associational discrimination, and but-for causation—but did not even assert that the ordinary meaning of the statutory text covered discrimination because of an individual’s sexual orientation.<sup>105</sup>

Indeed, out of the over sixty-five 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 phrase at enactment was broad enough to ban discrimination because

98 *Id.* at 79.

99 *Bostock*, 140 S. Ct. at 1752.

100 *Id.* at 1773–74 (Alito, J., dissenting) (“*Oncale* is nothing like these cases . . . .”); *id.* at 1834 (Kavanaugh, J., dissenting) (“[T]he majority opinion makes a fundamental mistake by confusing ordinary meaning with subjective intentions.”).

101 *Id.* at 1774 (Alito, J., dissenting).

102 *Id.*

103 *Id.*

104 *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 79 (1998).

105 Brief for Petitioner, *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (No. 17-1618), 2019 WL 2763119; Opening Brief for Respondents, *Bostock*, 140 S. Ct. 1731 (No. 17-1623), 2019 WL 2745391 (Zarda’s brief).

of sexual orientation.<sup>106</sup> In all three, 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.”<sup>107</sup> For example, Eskridge and Koppelman note that one dictionary’s definition of sex was “the whole sphere of behavior related even indirectly to the sexual functions and embracing all affectionate and pleasure-seeking conduct.”<sup>108</sup>

We’re not sure that these alternate 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, 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 discriminate against any individual . . . because of such individual’s . . . sex”<sup>109</sup> would have extended to bar discrimination against any individual because such individual engaged in “behavior related even indirectly to sexual functions.” That’s a good thing because if that were the statute’s ordinary meaning, it would prohibit discharge of a teacher for having

106 Brief of William N. Eskridge and Andrew M. Koppelman as *Amici Curiae* in Support of Employees at 15–24, *Bostock*, 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623, 18-107), 2019 WL 2915046 [hereinafter Brief of Eskridge and Koppelman]; Brief of Historians as *Amici Curiae* in Support of Employees at 5–11, *Bostock*, 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623, 18-107), 2019 WL 2915044 [hereinafter Historians’ Brief]; Brief for *Amici Curiae* Corpus-Linguistics Scholars Professors Brian Slocum, Stefan Th. Gries, and Lawrence Solan at 24–26, *Bostock*, 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623, 18-107), 2019 WL 3003466 [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.

107 Brief of Eskridge and Koppelman, *supra* note 106, at 15–24 (quoting *Sex*, WEBSTER’S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (2d unabridged ed. 1961)); Historians’ Brief, *supra* note 106, at 5–11 (quoting *Sex*, RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (unabridged ed. 1966)); Corpus-Linguistics Scholars’ Brief, *supra* note 106, at 24–26.

108 Brief of Eskridge and Koppelman, *supra* note 106, at 20–21 (quoting *Sex*, WEBSTER’S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (2d unabridged ed. 1961)).

109 42 U.S.C. § 2000e–2(a)(1) (2018).

sexual relations with a student or 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,<sup>110</sup> not out of any commitment to neutrality among the humanities, but because many workshop attendees have pressed objections to us that reference that brief or might as well have.

The brief's central project 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.<sup>111</sup> 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 "[c]onceptual [c]ausation": "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.<sup>112</sup> 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."

110 Brief of Philosophy Professors as *Amici Curiae* in Support of the Employees, *Bostock*, 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623, 18-107), 2019 WL 2915039 [hereinafter Philosophers' Brief].

111 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, *supra* note 110, at 1. We doubt that the concept of sex is inextricably tied to these other categories even while the converse is undoubtedly true.

112 Guha Krishnamurthi & Peter Salib, *Bostock and Conceptual Causation*, YALE J. REGUL. NOTICE & COMMENT (2020), <https://www.yalejreg.com/nc/bostock-and-conceptual-causation-by-guha-krishnamurthi-peter-salib/> [https://perma.cc/9QVF-ETD9]. Gorsuch flirts with this view. And Koppelman also makes this argument. Koppelman, *supra* note 5, at 1.

In saying that conceptual causation is not 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.<sup>113</sup> 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 stereotyping<sup>114</sup> and that sex or gender stereotyping counts as discrimination because of an individual's sex.

To understand the argument and its flaws, 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 face.<sup>115</sup> 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.<sup>116</sup> 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

113 We bracket Eidelson's work in progress. See *supra* note 87.

114 At least two different ideas are captured by the phrase "sex or gender stereotyping." One involves 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 uncontroversial that the employer discriminates against Betty "because of her sex," for the statute does not prohibit only animus-based discrimination. A second idea involves a shift from statistical generalizations to normative expectations. Imagine now that the moving company is persuaded that 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 only for men. 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 presently in mind.

115 See also *infra* subsection II.B.3 (discussing *Phillips v. Martin Marietta Corp.*).

116 490 U.S. 228, 251 (1989).

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, the firing of Fran could fall within the ordinary meaning of "sex discrimination," but 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 to the enforcement of sex- or gender-based behavioral norms is too facile for 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. An analogy that signatories of the philosophers' brief might appreciate: 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*.<sup>117</sup>

Happily, the philosophers' brief does not truly maintain otherwise. Its central argument is moral, not textual. Although it advances claims about "[t]he most logical and reasonable" reading of the statute,<sup>118</sup> it is a reflection on "[t]he philosophical underpinnings of antidiscrimination laws"<sup>119</sup>—not common usage—that underwrites those judgments. Because "what unifies practices deemed discriminatory is that they 'act[] on or reproduce[] an aspect of the

---

117 Gottlob Frege, *On Sense and Reference*, 100 ZEITSCHRIFT FÜR PHILOSOPHIE UND PHILOSOPHISCHE KRITIK 25 (1892), *reprinted in* TRANSLATIONS FROM THE PHILOSOPHICAL WRITINGS OF GOTTLIB FREGE 56 (Peter Geach & Max Black eds., 2d ed. 1960).

118 Philosophers' Brief, *supra* note 110, at 3, 12.

119 *Id.* at 2.

category in a way that is morally objectionable,”<sup>120</sup> 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.”<sup>121</sup> Maybe so. But no genuine textualist would deem 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,<sup>122</sup> the brief never returns to the actual text. Instead, it maintains, repeatedly 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.”<sup>123</sup> For a textualist, that casual conflation is unacceptable because textual meaning is everything and different texts presumably bear different meanings.<sup>124</sup> (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 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 Justice 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

---

120 *Id.* at 21 (alterations in original) (quoting Issa Kohler-Hausmann, *Eddie Murphy and the Dangers of Counterfactual Causal Thinking About Detecting Racial Discrimination*, 113 NW. U. L. REV. 1163, 1172 (2019)).

121 *Id.* at 23.

122 *Id.* at 3.

123 *See, e.g., id.* at 19–25.

124 *See, e.g.,* SCALIA & GARNER, *supra* note 81, at 56; John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1973 (2011).

linguistic intuitions little supported by explanation or argument.<sup>125</sup> While these reports are not unworthy of regard, we think there is little 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 Professors James Macleod, Kevin Tobia, and John Mikhail.

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 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,<sup>126</sup> and that that is just what the text “literally says.”<sup>127</sup> As we’ve already explained, these contentions are eccentric.<sup>128</sup> 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.”<sup>129</sup> The first common move, he says, and the one he thinks that Justice Alito 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.<sup>130</sup> “The

---

125 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, *supra* note 5. (Although we take issue with Dorf’s assessment of the textualist merits of the majority opinion, we are in accord on 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 . . . seem[s] like [an] instance[] 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 123 and accompanying text. The overwhelming majority of commentators have judged that terminating a male employee because he’s attracted to men—i.e., because he’s gay—is *not* discrimination “because of” that employee’s sex. As best we can tell, Grove does not explain why the case seems the way it does to her.

126 Koppelman, *supra* note 5, at 3.

127 *Id.*

128 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 87. We’re not committed to any position regarding the text’s “literal” meaning because the textualist touchstone is ordinary meaning, which textualists have long insisted is other than literal meaning.

129 Koppelman, *supra* note 5, at 12.

130 *Id.* at 13.

prototypical meaning is the meaning that most commonly occurs, and which normally comes most easily to the mind of a reasonable person.”<sup>131</sup> Definitional meaning is all that falls within the “extensions” of “the definition of a word.”<sup>132</sup> An example: “‘bird’ prototypically means an animal that can fly.”<sup>133</sup> But definitionally, it includes flightless members of Class Aves, such as ostriches and penguins.<sup>134</sup> Koppelman’s diagnosis: Justice Alito interpreted the statute against the plaintiffs because he ascribed the statute its prototypical plain meaning while Justice Gorsuch properly ascribed it its full extensional meaning.<sup>135</sup>

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.”<sup>136</sup> If the social phenomenon that pushed the legislature to pass this statute 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.”<sup>137</sup> 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.<sup>138</sup> Koppelman agrees with Justice Gorsuch that

131 *Id.* at 14.

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

133 *Id.* at 13.

134 *Bird*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/bird> [<https://perma.cc/M88A-HQ4U>] (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”).

135 Koppelman, *supra* note 5, at 15.

136 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. §§ 621–34 (2018).

137 42 U.S.C. § 2000e–2(a)(1) (2018).

138 For dictionary definitions of “sex,” see *supra* note 86. 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, <https://www.merriam-webster.com/dictionary/sexual%20orientation> [<https://perma.cc/9JE4-D2DZ>].

this dispute mirrors the issue in *Oncale*. But, as already explained, it doesn't.<sup>139</sup>

In short, it seems to us, Justice Alito and his fellow dissenters did not rely on any esoteric or confused notion of plain or ordinary meaning. They were relying on the statute's ordinary meaning, full stop. They 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. We think that Koppelman, despite his protestations to the contrary, is not relying on ordinary meaning. We suspect that he's really relying on some combination of but-for reasoning (discussed below) and a conflation of (a) facts that must be known for an agent to draw a warranted inference about a fact that is operative in their decision making with (b) the operative fact itself. In particular, he states, "[i]n order to determine whether someone is 'homosexual,' an employer must take account of that person's sex."<sup>140</sup> 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. But it is quite easy 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.<sup>141</sup>

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."<sup>142</sup> 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 Justice 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.

First, the results are more equivocal than the articles might be read to suggest. For example, Macleod's abstract announces flatly that

139 See *supra* subsection II.A.2.

140 Koppelman, *supra* note 5, at 8.

141 See Brief of Ryan T. Anderson as Amicus Curiae in Support of Employers at 6–7, *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (Nos. 17-1623, 18-107), 2019 WL 4014071.

142 Macleod, *supra* note 94; Kevin Tobia & John Mikhail, *Two Types of Empirical Textualism*, 87 BROOK. L. REV. (forthcoming 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3729629](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3729629) [<https://perma.cc/4DZ3-UR4F>].

“textualists’ ‘ordinary reader’ at the time of Title VII’s enactment would have understood that it barred LGBT discrimination.”<sup>143</sup> That strikes us as a modestly aggressive reading of Macleod’s own data.<sup>144</sup> When asked whether employment 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 as supportive of the conclusion that the locution has *no* ordinary meaning than that it bears the ordinary meaning that Justice Gorsuch claimed for it. In Tobia & Mikhail’s survey, 53% of survey respondents answered that discrimination against an employee because he’s gay counts as employment discrimination “because of his sex,” while 47% said that it does not—a result that, given the margin of error, is a statistical tie.<sup>145</sup>

Second, disconcertingly large proportions of responses in Tobia & Mikhail’s study are hard to explain on grounds other than carelessness, 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 pregnant 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.”<sup>146</sup> In addition to investigating whether discrimination because of a non-statutory “target” factor (sexual orientation, gender identity, pregnancy, 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.<sup>147</sup> Focus on the scenario in which the employer tells 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 Mike was fired “because of his sex,” but whether he was fired “because of his sexual orientation.” Presumably, any

143 Macleod, *supra* note 94 (manuscript at 1).

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

145 Tobia & Mikhail, *supra* note 142 (manuscript at 17).

146 *Id.* at (manuscript at 12–13).

147 *Id.* (manuscript at 14).

competent English speaker who is paying attention should answer *that* question in the affirmative. Yet, for each fact pattern (concerning sexual orientation, gender identity, pregnancy, and interracial marriage), a remarkable one of six respondents denied that firing someone on the basis of X counted as firing them “because of X.”<sup>148</sup>

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?*”<sup>149</sup> This question, like the one about the target factor, is essentially an intelligence or attention check. Later, we will challenge Justice Gorsuch’s claim—a claim that, in our judgment, Tobia and Mikhail accept too uncritically<sup>150</sup>—that the appropriate way to run the but-for analysis on a case 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 is: “No, straight Michelle would not have been fired.” Yet 36% of the respondents answered that Michelle *would* have been fired.<sup>151</sup> 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.)<sup>152</sup> Combined, these defects 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*.<sup>153</sup> More respondents answered that firing gay men and lesbian women alike is firing them “because of” their sex than that firing pregnant women counts as firing them “because of” their sex or that firing somebody for being in an interracial relationship counts as firing them “because of” their race. These are puzzling results because we are aware of no scholar or judge

---

148 *Id.* (manuscript at 17).

149 *Id.* (manuscript at 14).

150 *See infra* note 181 and accompanying text.

151 Tobia & Mikhail, *supra* note 142 (manuscript at 16).

152 *Id.*

153 *Id.* (manuscript at 17).

who had anticipated this pattern of outcomes and we are not persuaded by any explanation that would fully make sense of them.<sup>154</sup>

So what? Maybe nothing if, as the authors of these studies emphasize, the textualist inquiry “is factual and empirical, not normative.”<sup>155</sup> 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,”<sup>156</sup> and seeks to “hear the words as they would sound in the mind of a skilled, *objectively reasonable* user of words.”<sup>157</sup> 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.<sup>158</sup> What that 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

154 In correspondence, Macleod proposed to explain the pattern on the basis that there is less difference between (a) the durability of a gay person’s biological sex, and (b) the durability of their sexual orientation than there is between either (c) the durability of a person’s race, and (d) the durability of their attraction to or preference for a different-race partner, or (e) the durability of a person’s being female, and (f) the durability of her being pregnant. Email from James Macleod, Assistant Professor of L., Brooklyn L. Sch., to authors (June 30, 2021 11:32 AM) (on file with authors).

155 Macleod, *supra* note 94 (manuscript at 1); *see also* Tobia & Mikhail, *supra* note 142 (manuscript at 3 & n.2).

156 John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2392–93 (2003) (emphasis added).

157 Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL’Y 59, 65 (1988) (emphasis added).

158 *Cf.* Macleod, *supra* note 94 (manuscript at 48 n.288) (explaining why textualists “might prefer a more idealized conception” of the hypothetical reader in the statutory than the constitutional context).

and Mikhail are far less probative to textualists than might initially appear.<sup>159</sup>

\* \* \*

By our count, of the thirty judges involved in these four lawsuits, fourteen 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.<sup>160</sup> 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*

Justice 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," Justice 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, Justice Gorsuch crucially and subtly changed the topic,<sup>161</sup> 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."<sup>162</sup> But if truly algorithmic decisionmaking has

<sup>159</sup> We don't read these authors to argue otherwise. See Macleod, *supra* note 94 (manuscript at 49); Kevin P. Tobia, *Testing Ordinary Meaning*, 134 HARV. L. REV. 726, 805–06 (2020).

<sup>160</sup> *Bostock v. Clayton County*, 140 S. Ct. 1731, 1758–59 (2020) (Alito, J., dissenting); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 148–49 (2d Cir. 2018) (en banc) (Lynch, J., dissenting); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 363 (7th Cir. 2017) (en banc) (Sykes, J., dissenting). Kavanaugh's contention that "[a]ll 30 judges" reached judgments "based on the text of the statute," 140 S. Ct. at 1824 (Kavanaugh, J., dissenting), misleads if it does not overstate.

<sup>161</sup> See Blackman & Barnett, *supra* note 9 (observing that Gorsuch "pivots" and "abandons . . . 'ordinary meaning' in favor of a specialized, technical legal meaning—what lawyers refer to as a *term of art*").

<sup>162</sup> Grove, *supra* note 4, at 281.

downsides,<sup>163</sup> not-algorithmic-reasoning in algorithmic dress can only be worse. This section explains where Justice 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."

## 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.'"<sup>164</sup> 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,<sup>165</sup> 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's or any of its agents and was no part of its decisional calculus. Were Libby to sue Riley's, alleging forbidden political-affiliation discrimination, they'd be laughed out of court (twice 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

163 See, e.g., Deborah Hellman, *Measuring Algorithmic Fairness*, 106 VA. L. REV. 811 (2020); Sandra G. Mayson, *Bias in, Bias Out*, 128 YALE L.J. 2218 (2019).

164 *Bostock*, 140 S. Ct. at 1739 (majority opinion) (quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 350 (2013)).

165 Or so we say. To anticipate a complexity that will require attention later, see *infra* note 197 and accompanying text, 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 not a Libertarian, Libby would have become a stamp collector and, because the local chapter of the Philatelist Society was meeting when the Libertarians were, would still have arrived at Riley's too late to be seated.

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.<sup>166</sup>

Unfortunately, in two quick sentences, the opinion threatens to undermine what it has just accomplished. “In the language of law,” Justice 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.”<sup>167</sup> It’s a feat to sow so much mischief with such inconspicuous brevity.

In the first sentence, Justice Gorsuch purports to follow precedent on a question that first divided the Court in *Price Waterhouse*: whether a reason that motivated an adverse job action must have been a but-for cause of that action when multiple motives were operative.<sup>168</sup> Prior cases had interpreted “because of” language in other federal antidiscrimination provisions to require full-blown but-for causation,<sup>169</sup>

166 See also, e.g., *Texas Dep’t of Hous. and Cmty. Affs. v. Inclusive Cmty. 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, Justice Alito’s observation appears in a dissent, one joined by Justices Roberts, Scalia and Thomas. But the majority decision, authored by Justice Kennedy and joined by the four liberals, was decidedly non-textualist. See *id.* at 539 (majority opinion).

This is not to claim that “‘because of’ can mean nothing other than ‘motivated by.’” Noah Zatz rightly argues against that claim. 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 Justice 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, making the motivational reading the statute’s “ordinary meaning.” To the extent that Zatz maintains otherwise, we disagree. But to the extent he is arguing that “because of” must be given a broader meaning in anti-discrimination law to make sense of well-accepted precedents and to better achieve its purpose and promise, see *id.*; Noah D. Zatz, *Managing the 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 Justice Alito’s view of the statutory text’s ordinary meaning. (We thank Zatz for pressing us on this point.)

167 *Bostock v. Clayton County*, 140 S. Ct. 1731, 1739 (2020) (citation omitted) (quoting *Nassar*, 570 U.S. at 347). For arguments against the use of but-for causation in motivational analyses, see James A. Macleod, *Ordinary Causation: A Study in Experimental Statutory Interpretation*, 94 IND. L.J. 957, 957 (2019); Andrew Verstein, *The Failure of Mixed-Motives Jurisprudence*, 86 U. CHI. L. REV. 725, 743 (2019).

168 *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241–42 (1989); *id.* at 260 (White, J., concurring in the judgment); *id.* at 262–63 (O’Connor, J., concurring in the judgment); *id.* at 281–82 (Kennedy, J., dissenting).

169 *Nassar*, 570 U.S. at 347 (protected conduct discrimination in Title VII); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175–180 (2009) (ADEA).

and Justice 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*,<sup>170</sup> and Congress had responded by amending the statute in the Civil Rights Act of 1991.<sup>171</sup> 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."<sup>172</sup> 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, 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'"<sup>173</sup> that fact, event or cause. That assertion 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 role in an agent's motivation (whatever "the right role" might be) and not those caused by the same considerations operating non-motivationally. 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 Justice 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."<sup>174</sup>

## 2. On *Not* Changing "One Thing at a Time"

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

170 *Price Waterhouse*, 490 U.S. at 240–42 (1989).

171 Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 2, 107(a), 105 Stat. 1071, 1071, 1075 (1991) (codified as amended at 42 U.S.C. § 2000e–2(m)).

172 42 U.S.C. § 2000e–2(m) (2018).

173 *Bostock v. Clayton County*, 140 S. Ct. 1731, 1739 (2020).

174 *See also 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").

[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.<sup>175</sup>

Thus, under Justice Gorsuch's application, there are purportedly two relevant facts about Bostock: Bostock is (1) a man and (2) attracted to men.<sup>176</sup> 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 Justice 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," Justice Gorsuch has not kept everything else the same.<sup>177</sup> 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

---

<sup>175</sup> *Bostock*, 140 S. Ct. at 1739–41.

<sup>176</sup> Gorsuch's opinion shifts between the concept of sex (male/female) and gender (man/woman). For simplicity, in this example, we uniformly use gender and the man/woman binary. 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 aim only to recognize its capacious meaning in common parlance.

<sup>177</sup> See *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 366 (7th Cir. 2017) (en banc) (Sykes, J., dissenting) (making this point).

would have fired any employee who manifests a same-sex attraction,<sup>178</sup> then Bostock's sex was *not* a but-for cause of his being fired. Thus Justice Gorsuch's choice to select the counterfact (or "comparator") he did (counterfact (a)), rather than the counterfact the employers proposed (counterfact (b)) was itself a but-for cause of his bottom-line conclusion regarding the scope of the statutory ban.

It cannot be denied that Justice 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).<sup>179</sup> But to say that it was impossible for Justice Gorsuch to change only one thing is not to say that he did change only one thing. He didn't. The question thus becomes whether the specification of the counterfact that Justice 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.<sup>180</sup>

### 3. Why *This Way* Rather than *That Way*?

Unfortunately, Justice Gorsuch does not explain or justify his choice of counterfact in a manner remotely commensurate with its importance.<sup>181</sup> Only late in the opinion, after having already run the

178 See *infra* note 215 and accompanying text.

179 See *supra* note 70, on the sex/gender distinction.

180 See also Brian Soucek, Hively's *Self-Induced Blindness*, 127 YALE L.J. F. 115, 118 (2017) (making this point pre-*Bostock*).

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 142 (manuscript 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 (a) the factual employee's 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 counterfact? 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

but-for test on his preferred counterfact, does he so much as acknowledge that an alternative counterfact 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.”<sup>182</sup> Because the choice of counterfact is the key moment in but-for analysis, we quote Justice 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 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.<sup>183</sup>

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

Justice Gorsuch’s first response undercuts a premise that plays no role in the defense of the proposition 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. The employers are urging that their specification of the counterfact 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.<sup>184</sup> If they’re right, then there’s no liability in the first place, thus nothing to double. Justice Gorsuch’s argument to the contrary puts the cart (what conduct violates the statute) before the horse (which counterfact should be plugged into the but-for test that determines what violates the statute).

---

designed to elicit responses to that question, because the correct answer is determined by theoretical criteria not empirical ones.

182 *Bostock v. Clayton County*, 140 S. Ct. 1731, 1747–48 (2020).

183 *Id.* at 1748.

184 42 U.S.C. § 2000e–2(a)(1) (2018)

Justice 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.*,<sup>185</sup> the Court held that discrimination against mothers but not fathers is discrimination "because of such individual[s'] . . . sex."<sup>186</sup> That ruling, Justice Gorsuch says, is universally recognized as right, by textualists and others. Here and elsewhere in the opinion, Justice Gorsuch argues that *Phillips* and *Bostock* stand or fall together.<sup>187</sup>

Once again,<sup>188</sup> Justice 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 it does. We think that answer probably correct, even as a textualist matter. (And if it wasn't, then so much the worse for textualism.)<sup>189</sup> 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, 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-Yankees<sup>190</sup> are not.

Still, that Justice Gorsuch's own response to the employers is obviously unsatisfactory does not establish that his conclusion was mistaken. Can a supporter of his opinion 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

185 400 U.S. 542 (1971).

186 See *id.* at 543 n.\*, 544 (quoting Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 75 Stat. 241, 255 (1964) (codified as amended at 42 U.S.C. § 2000e-2(a)(1) (2018))).

187 See also *Bostock*, 140 S. Ct. at 1745.

188 See *supra* notes 100–104 and accompanying text.

189 For whatever it's worth, sixty percent of the Tobia and Mikhail survey respondents said that firing somebody because she's pregnant is *not* firing her "because of her sex." Tobia & Mikhail, *supra* note 142 (manuscript at 15, 17).

190 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.

show that Justice Gorsuch isolated the right one. But we have not heard a compelling reason why Justice Gorsuch's imagined counterfactual would be right and employer's proposed counterfactual would be wrong, or even that the former would be "better" or "more accurate."<sup>191</sup> Roughly speaking, the function of the but-for test is to help identify 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 Justice 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."<sup>192</sup> 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, by hypothesis, motivated the employer.<sup>193</sup>

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

---

191 Will Baude mentioned in passing during a conversation at a conference that the counterfactual 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's being more fundamental means that it is more eligible to be changed 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 puzzle: 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 (among those who find the question sufficiently intelligible to entertain) will vary widely, in content and in strength.

192 *Bostock*, 140 S. Ct. at 1741.

193 *Id.* at 1761–62 (Alito, J., dissenting).

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. 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.<sup>194</sup>

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 Justice 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 Justice 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.

---

194 See, e.g., Koppelman, *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.”).

#### 4. Of Bisexuals and Pansexuals

There's an even more troubling implication of Justice Gorsuch's but-for analysis: its application to bisexuals and pansexuals.<sup>195</sup> While the precise meanings of these terms are dynamic and contestable,<sup>196</sup> we take a bisexual person to be somebody 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: Justice 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, on Justice 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 universally understood as holding that employment discrimination because of an individual's "sexual orientation" is unlawful. But on Justice Gorsuch's own pivotal but-for analysis, that's an incorrect 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: but-for reasoning 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."<sup>197</sup> For example, if the defendant had

---

195 We're grateful to Jonah Gelbach for prodding us to emphasize this implication.

196 See NIKKI HAYFIELD, *BISEXUAL AND PANSEXUAL IDENTITIES: EXPLORING AND CHALLENGING INVISIBILITY AND INVALIDATION* (2021); Helen Bowes-Catton & Nikki Hayfield, *Bisexuality*, in *THE PALGRAVE HANDBOOK OF THE PSYCHOLOGY OF SEXUALITY AND GENDER* 42 (Christina Richards & Meg John Barker eds. 2015).

197 Michael Moore, *Causation in the Law*, *STAN. ENCYCLOPEDIA OF PHIL.* (2019) (first citing Robert H. Cole, *Windfall and Probability: A Study of "Cause" in Negligence Law: Part I: Uses of Causal Language*, 52 CALIF. L. REV. 459 (1964); then citing Robert H. Cole, *Windfall*

not supplied a defective piece of safety equipment, would they have supplied a non-defective piece or none at all? The but-for test tells us “to eliminate the defendant’s act,” but not “what are we to replace it with.”<sup>198</sup> Therefore, in order to employ the 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.

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. As Professor David Robertson emphasized, the specification of the counterfactual is “the trickiest” part of but-for reasoning.<sup>199</sup>

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.<sup>200</sup>

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.”<sup>201</sup> Unless we are to eliminate 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.”<sup>202</sup> Most particularly, it is essential that “we distinguish a valid, or plausible counterfactual, from an invalid, implausible, or downright silly one.”<sup>203</sup>

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.”<sup>204</sup> Many

*and Probability: A Study of “Cause” in Negligence Law: Part II: Factual Uncertainty and Competitive Fairness*, 52 CALIF. L. REV. 764 (1964); and then citing DAVID LEWIS, COUNTERFACTUALS (1973)), <https://plato.stanford.edu/entries/causation-law/> [<https://perma.cc/G9SJ-9PNM>]. As Moore explains, the difficulty of speculating about what would have happened in the properly described counterfactual presents a second and distinct challenge.

198 *Id.*; see *supra* note 165.

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

200 *Id.* at 1770.

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

202 *Id.* at 344.

203 *Id.*

204 ROBERT C. STALNAKER, *A Theory of Conditionals*, in KNOWLEDGE AND CONDITIONALS: ESSAYS ON THE STRUCTURE OF INQUIRY 156 (2019).

contemporary philosophical theories of causation, including Stalnaker's, use the language of "possible worlds" to articulate the counterfactual conditions.<sup>205</sup> 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."<sup>206</sup> 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.<sup>207</sup> 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, might 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.<sup>208</sup> 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.<sup>209</sup> 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

205 *Id.* (discussing use of possible world semantics in contemporary theories of causation); Peter Menzies & Helen Beebe, *Counterfactual Theories of Causation*, STAN. ENCYCLOPEDIA PHIL. (2019), <https://plato.stanford.edu/entries/causation-counterfactual/> [<https://perma.cc/D5CB-TCW9>] (same).

206 Christopher Menzel, *Possible Worlds*, STAN. ENCYCLOPEDIA PHIL. (2016), <https://plato.stanford.edu/entries/possible-worlds/> [<https://perma.cc/Q49G-T6DT>]; Menzies & Beebe, *supra* note 205.

207 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," we can at least have "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 & Beebe, *supra* note 205.

208 See JUDEA PEARL, CAUSALITY: MODELS, REASONING, AND INFERENCE (2000); JAMES WOODWARD, MAKING THINGS HAPPEN: A THEORY OF CAUSAL EXPLANATION (Paul Humphreys ed., 2003).

209 Menzies & Beebe, *supra* note 205 (discussing contextualism in the truth or assertibility of causal claims); Randolph Clarke, Joshua Shepherd, John Stigall, Robyn Repko Waller & Chris Zarpentine, *Causation, Norms, and Omissions: A Study of Causal Judgements*, 28 PHIL. PSYCH. 279 (2015) (observing that people's causal judgments are context dependent); Christopher Hitchcock & Joshua Knobe, *Cause and Norm*, 106 J. PHIL. 587 (2009) (same).

causation test in questions about morality, we might adjudge closeness with an attention to morally similar possible worlds; and so on.<sup>210</sup>

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

To see whether we can put some 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 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.

---

<sup>210</sup> Menzies & Beebee, *supra* note 205 (discussing contextualism and providing an example).

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 *Bostock* 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.<sup>211</sup> The challenge is to explain why. Where, exactly, has Corsuch gone wrong?

Put another way, this hypo disproves the Justice 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.<sup>212</sup> 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:

---

211 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 counterfact that incorporates the set  $\{-(1), -(2), (3), (4)\}$ , as Corsuch insists, or on a counterfact 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.

212 See *supra* note 194 and accompanying text.

*The Principle of Conservation in Motivational Analysis* (PCM): In performing counterfactual analysis, 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*.<sup>213</sup> Recall the three relevant facts: Bostock is (1) male, (2) gay, and (3) attracted to men. Many readers will have the instinct that Justice Gorsuch's decision to 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, we cannot change just (1), and must choose between changing either (2) or (3). But it is stipulated for purposes of this analysis that the adverse job action was "because of" the employee's sexual orientation. In

---

213 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 *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.)

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.<sup>214</sup> 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 counterfact, 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 does. 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.<sup>215</sup> Anti-gay biases are complex and one cannot 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.<sup>216</sup> But that question is a different one than Justice Gorsuch's majority opinion considered, for the *Bostock* defendants *conceded* that they'd be guilty of

---

214 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 Cnty. Bd. of Comm'rs*, 723 F. App'x 964 (11th Cir. 2018) (per curiam). In each of the consolidated cases, the Supreme Court assumed that the plaintiffs had been discriminated against on the basis of "homosexuality" or "transgender status" in order to resolve the legal question of the scope of Title VII. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020).

215 See *supra* note 197, observing the difficulty in counterfactual reasoning of speculating about what would have happened in the properly described counterfactual.

216 See 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](https://balkin.blogspot.com/2019/09/thoughts-on-sgs-lesbian-comparator_6.html) [<https://perma.cc/8DD6-ML8L>].

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.<sup>217</sup>

Yet more importantly, even if record evidence might permit a factfinder to conclude that, more likely than not, *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 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.<sup>218</sup> 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.<sup>219</sup>

217 Brief for Petitioners Altitude Express, Inc. and Ray Maynard at 33–36, *Bostock*, 140 S. Ct. 1731 (2020) (No. 17-1623), 2019 WL 3958415; Brief for Respondent at 28, *Bostock*, 140 S. Ct. 1731 (2020) (No. 17-1618), 2019 WL 3942896.

218 See *supra* note 72 and accompanying text. Counsel for the plaintiffs, Professor Pamela Karlan appeared to concede this point at oral argument. Transcript of Oral Argument at 69, *Bostock*, 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 glaring disanalogy. In Gorsuch’s hypo, the employer’s policy ensures that anybody with either of two protected traits—being Black or being Catholic—is not hired, although the unusual structure prevents the employer from knowing, in an individual case, which protected trait does the dirty work. In Justice Alito’s example, nobody is discriminated against for the bare possession of a protected trait. In general, the difference between a disjunction (the way that race and religion operate in Gorsuch’s example) and a compound (the way that sex operates in Justice Alito’s) is not, as Gorsuch wishes, “ever so slight[.]”

219 While PCM must be respected when the conditions for its application obtain, those conditions obtain only rarely. PCM applies whenever two conditions hold: (1) in conducting a counterfactual analysis, the analyst must change a property or fact F which requires the analyst to make other changes, say, either to F<sub>1</sub> or to F<sub>2</sub>; and (2) the actor acted

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."<sup>220</sup> Enter Justice Gorsuch's majority opinion in *Bostock*.

\* \* \*

In his dissent, Justice Kavanaugh criticizes the majority for privileging "literal meaning" over "ordinary meaning."<sup>221</sup> Similarly, Professors Josh Blackman and Randy Barnett praise Justice Gorsuch for his "airtight reasoning," complaining only that it wasn't truly textualist.<sup>222</sup> But these conservative critics let Justice 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.

### 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, Justice 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 Justice 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

---

"because of" F<sub>1</sub>. PCM says that in those limited cases, the analyst cannot leverage the necessity captured in (1) to change F<sub>1</sub>, but must instead let F<sub>2</sub> vary in conjunction with F.

<sup>220</sup> Strassfeld, *supra* note 201, at 348.

<sup>221</sup> *Bostock*, 140 S. Ct. at 1824–25 (Kavanaugh, J., dissenting).

<sup>222</sup> Blackman & Barnett, *supra* note 9.

to hire applicants in part because of the affected individuals' sex, even if it never learns any applicant's sex.<sup>223</sup>

Here, we think, is a particularly forceful way to put Justice 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.<sup>224</sup>

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.<sup>225</sup> We aren't doctrinaire about this conclusion. We are receptive to evidence, 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.<sup>226</sup>

---

223 *Bostock*, 140 S. Ct. at 1746 (majority opinion).

224 *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.")

225 See, e.g., Corpus-Linguistics Scholars Brief, *supra* note 106, at 15, 24–26 (providing data that the word "sex" encompassed "gender").

226 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.")

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.<sup>227</sup>

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.<sup>228</sup> If we change his biological sex, then we cannot preserve both the other facts; we must imaginatively change at least one. Justice 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 Justice 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,

---

227 Macleod, *supra* note 94 (manuscript at 34) (alteration in original) (quoting 42 U.S.C. § 2000e-2(a)(1) (2018)). 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. *Id.* (manuscript at 30, 34); *see also* Tobia & Mikhail, *supra* note 142 (manuscript at 19).

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

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 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.<sup>229</sup> 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.<sup>230</sup> 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.<sup>231</sup> But they too often dismiss that fact as of little importance, or as marking only differences in degree.<sup>232</sup> 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

<sup>229</sup> See, e.g., Lund, *supra* note 10, at 159.

<sup>230</sup> See, e.g., 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); 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.'" (first citing Richard H. Fallon, Jr., *The Statutory Interpretation Muddle*, 114 NW. U. L. REV. 269, 278–79 (2019); then citing David S. Louk, *The Audiences of Statutes*, 105 CORNELL L. REV. 137, 148 (2019); and then citing Kevin M. Stack, *The Interpretive Dimension of Seminole Rock*, 22 GEO. MASON L. REV. 669, 683 (2015)); Koppelman, *supra* note 5, at 9 ("The new textualism is typically contrasted with purposivism . . .").

<sup>231</sup> John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 85–87, 91 (2006) (distinguishing "Legal Process purposivism" as a "dominant version" of purposivism, but exploring the different varieties of purposivism no further); Eskridge, *supra* note 230, 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).

<sup>232</sup> See *supra* note 231; see also WILLIAM N. ESKRIDGE JR., ABBE R. GLUCK & VICTORIA F. NOURSE, *STATUTES, REGULATION, AND INTERPRETATION: LEGISLATION AND ADMINISTRATION IN THE REPUBLIC OF STATUTES* 303 (2014) (failing to distinguish between legislative "intent[ions]" and meanings).

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.<sup>233</sup> 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.<sup>234</sup> 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.<sup>235</sup> They believe that statutory interpretation—like constitutional interpretation—draws on many factors: original textual

233 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, 241 (Andrei Marmor & Scott Soames eds., 2011); John Gardner, *Legal Positivism: 5½ Myths*, in LAW AS A LEAP OF FAITH: ESSAYS ON LAW IN GENERAL 51 (2012); Berman, *supra* note 59, at 796–99.

234 See, e.g., 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); Grove, *supra* note 4, at 269 (explaining the strong emphasis of formalist textualism on “semantic context”).

235 See, e.g., Anuj C. Desai, *Text Is Not Enough*, 93 U. COLO. L. REV. (forthcoming 2021) (manuscript at 3); William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 2019 Term—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.” (citing WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 125 (1994))).

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.<sup>236</sup> 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. Justice 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.<sup>237</sup> 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.<sup>238</sup>

The analogy is structurally perfect. But Justice Alito's dissent rejected it, chiding plaintiffs for not "taking history into account."<sup>239</sup> The interracial-relationship cases are rightly decided, Justice Alito explained, because the "employer is discriminating on a ground that history tells us is a core form of race discrimination."<sup>240</sup>

Justice 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."<sup>241</sup> It prohibits discrimination against an individual "because of such individual's race."<sup>242</sup> 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

236 Regarding constitutional interpretation, see Mitchell N. Berman, *Our Principled Constitution*, 166 U. PA. L. REV. 1325, 1342 (2018).

237 See, e.g., *Holcomb v. Iona Coll.*, 521 F.3d 130, 139 (2d Cir. 2008) (quoting 42 U.S.C. § 2000e-2(a)(1)); *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*, 173 F.3d 988, 993-4 (6th Cir. 1999) (quoting 42 U.S.C. § 2000e-2(a)(1)); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 588-9 (5th Cir. 1998) (quoting 42 U.S.C. § 2000e-2(a)(1)); .

238 Brief in Opposition, *supra* note 105, at 31-36 (*Zarda*); see Brief for Petitioner, *supra* note 105, at 18-24 (*Bostock*).

239 *Bostock v. Clayton County*, 140 S. Ct. 1731, 1765 (2020) (Alito, J., dissenting).

240 *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).

241 42 U.S.C. § 2000e-2 (2018).

242 *Id.*

such individual's . . . sex," then neither is discrimination against someone because they're in an interracial relationship discrimination "because of such individual's race."<sup>243</sup>

Now, that inference is not ironclad. Insofar as textualism is an empirical project,<sup>244</sup> 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, Justice Alito or likeminded others need to 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."<sup>245</sup>

To be sure, as Justice 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.'"<sup>246</sup> 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*,<sup>247</sup> 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 improbable 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.<sup>248</sup>

243 Ilya Somin, *Textualism and Purposivism in Today's Supreme Court Decision on Discrimination Against Gays, Lesbians, and Transsexuals*, VOLOKH CONSPIRACY (June 15, 2020) (quoting 42 U.S.C. § 2000e-2 (2018)), <https://reason.com/volokh/2020/06/15/textualism-and-purposivism-in-todays-supreme-court-decision-on-discrimination-against-gays-lesbians-and-transsexuals/> [<https://perma.cc/53LH-8XP6>].

244 See *supra* subsection II.A.4.

245 Tobia & Mikhail, *supra* note 142 (manuscript at 6, 19) (quoting 42 U.S.C. § 2000e-2 (2018)).

246 *Bostock v. Clayton County*, 140 S. Ct. 1731, 1755 (2020) (Alito, J., dissenting) (emphasis omitted) (quoting SCALIA & GARNER, *supra* note 81, at 16).

247 388 U.S. 1 (1967).

248 See, e.g., *Adams v. Governor's Comm. on Postsecondary Educ.*, No. C80-624A, 1981 WL 27101, at \*3 (N.D. Ga. Sept. 3, 1981) (rejecting an associational discrimination claim, because "[n]either the language of the statute nor its legislative history supports a cause of

Does this mean Justice 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 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 88<sup>th</sup> Congress had the intent or purpose to prohibit employment discrimination “on the basis of an employee’s involvement in an interracial relationship” or action “that is wrongful in the same way that discrimination because of an individual’s race 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.<sup>249</sup> Anti-gay and anti-transgender prejudice arise from the same soil as does prototypical sexism and serve the same

---

action for discrimination against a person because of his relationship to persons of another race”); *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).

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. *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 588–89 (5th Cir. 1998); *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986); *Gresham v. Waffle House, Inc.*, 586 F. Supp. 1442, 1445 (N.D. Ga. 1984); *Holiday v. Belle’s Rest.*, 409 F. Supp. 904, 908–09 (W.D. Pa. 1976); *Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363, 1366 (S.D.N.Y. 1975).

<sup>249</sup> See Soucek, *supra* note 180, at 124–25; Kimberly A. Yuracko, *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*, 83 TEX. L. REV. 167, 171–72 (2004).

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. It has also been received in academic circles as proof that textualism can lead to progressive results. 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 Justice 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 Justice 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 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 Justice Gorsuch is following in his mentor's footsteps.<sup>250</sup>

Yes and no. The difference is that Kennedy was never a single-minded textualist. His approach to law was always resolutely

---

<sup>250</sup> 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> [https://perma.cc/7RNK-5FHZ] ("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, *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 8 ("Yet no one should rush to christen Neil Gorsuch as Kennedy's heir.").

pluralist.<sup>251</sup> Kennedy was a good justice—flawed to be sure, but better than he is given credit for. If Justice 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.

---

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).