Civil Rights Actions

Enforcing the Constitution

Fourth Edition

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2020 Supplement

This Supplement contains three substitutions for material in the Fourth Edition of the Casebook:

Page 1: At Chapter 5, Section 1, Page 887, substitute *Bostock v. Clayton County* and its Notes for *Hively v. Ivy Tech Community College of Indiana* and its Notes.

Page 26: At Chapter 5, Section 2, Page 956, substitute a new set of Notes for the Notes on Sexual Assault and Sexual Harassment Under Title IX.

Page 39: At Chapter 5, Section 2, Page 977, substitute new material for the last three paragraphs of Note 5.

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CHAPTER 5

MODERN CIVIL RIGHTS LEGISLATION: SEX DISCRIMINATION

Section 1. Title VII of the Civil Rights Act of 1964

Page 887, replace *Hively* and its notes, pages 887-904, with the following:

Bostock v. Clayton County

Supreme Court of the United States, 2020.
590 U.S. ___, 140 S. Ct. ____.

■ JUSTICE GORSUCH delivered the opinion of the Court.

Sometimes small gestures can have unexpected consequences. Major initiatives practically guarantee them. In our time, few pieces of federal legislation rank in significance with the Civil Rights Act of 1964. There, in Title VII, Congress outlawed discrimination in the workplace on the basis of race, color, religion, sex, or national origin. Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.

Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren't thinking about many of the Act's consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees. But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.

I

Few facts are needed to appreciate the legal question we face. Each of the three cases before us started the same way: An employer fired a long-time employee shortly after the employee revealed that he or she is homosexual or transgender—and allegedly for no reason other than the employee's homosexuality or transgender status.

Gerald Bostock worked for Clayton County, Georgia, as a child welfare advocate. Under his leadership, the county won national awards for its work. After a decade with the

county, Mr. Bostock began participating in a gay recreational softball league. Not long after that, influential members of the community allegedly made disparaging comments about Mr. Bostock's sexual orientation and participation in the league. Soon, he was fired for conduct "unbecoming" a county employee.

Donald Zarda worked as a skydiving instructor at Altitude Express in New York. After several seasons with the company, Mr. Zarda mentioned that he was gay and, days later, was fired.

Aimee Stephens worked at R. G. & G. R. Harris Funeral Homes in Garden City, Michigan. When she got the job, Ms. Stephens presented as a male. But two years into her service with the company, she began treatment for despair and loneliness. Ultimately, clinicians diagnosed her with gender dysphoria and recommended that she begin living as a woman. In her sixth year with the company, Ms. Stephens wrote a letter to her employer explaining that she planned to "live and work full-time as a woman" after she returned from an upcoming vacation. The funeral home fired her before she left, telling her "this is not going to work out."

While these cases began the same way, they ended differently. Each employee brought suit under Title VII alleging unlawful discrimination on the basis of sex. 42 U.S.C. § 2000e–2(a)(1). In Mr. Bostock's case, the Eleventh Circuit held that the law does not prohibit employers from firing employees for being gay and so his suit could be dismissed as a matter of law. Meanwhile, in Mr. Zarda's case, the Second Circuit concluded that sexual orientation discrimination does violate Title VII and allowed his case to proceed. Ms. Stephens's case has a more complex procedural history, but in the end the Sixth Circuit reached a decision along the same lines as the Second Circuit's, holding that Title VII bars employers from firing employees because of their transgender status. During the course of the proceedings in these long-running disputes, both Mr. Zarda and Ms. Stephens have passed away. But their estates continue to press their causes for the benefit of their heirs. And we granted certiorari in these matters to resolve at last the disagreement among the courts of appeals over the scope of Title VII's protections for homosexual and transgender persons.

II

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

With this in mind, our task is clear. We must determine the ordinary public meaning of Title VII's command that it is "unlawful . . . 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." § 2000e–2(a)(1). To do so, we orient ourselves to the time of the statute's adoption, here 1964, and begin by examining the key statutory terms in turn before assessing their impact on the cases at hand and then confirming our work against this Court's precedents.

A

The only statutorily protected characteristic at issue in today's cases is "sex"—and that is also the primary term in Title VII whose meaning the parties dispute. Appealing to roughly contemporaneous dictionaries, the employers say that, as used here, the term "sex" in 1964 referred to "status as either male or female [as] determined by reproductive biology." The employees counter by submitting that, even in 1964, the term bore a broader scope, capturing more than anatomy and reaching at least some norms concerning gender identity and sexual orientation. But because nothing in our approach to these cases turns on the outcome of the parties' debate, and because the employees concede the point for argument's sake, we proceed on the assumption that "sex" signified what the employers suggest, referring only to biological distinctions between male and female.

Still, that's just a starting point. The question isn't just what "sex" meant, but what Title VII says about it. Most notably, the statute prohibits employers from taking certain actions "because of" sex. And, as this Court has previously explained, "the ordinary meaning of 'because of' is 'by reason of' or 'on account of.'" University of Tex. Southwestern Medical Center v. Nassar, 570 U.S. 338, 350 (2013) (citing Gross v. FBL Financial Services, Inc., 557 U.S. 167, 176 (2009); quotation altered). In the language of law, this means that Title VII's "because of " test incorporates the "'simple'" and "traditional" standard of but-for causation. *Nassar*, 570 U.S. at 346, 360. That form of causation is established whenever a particular outcome would not have happened "but for" the purported cause. See *Gross*, 557 U.S. at 176. In other words, a 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.

This can be a sweeping standard. Often, events have multiple but-for causes. So, for example, if a car accident occurred both because the defendant ran a red light and because the plaintiff failed to signal his turn at the intersection, we might call each a but-for cause of the collision. When it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some other factor that contributed to its challenged employment decision. So long as the plaintiff 's sex was one but-for cause of that decision, that is enough to trigger the law. See *Nassar*, 570 U.S. at 350.

No doubt, Congress could have taken a more parsimonious approach. As it has in other statutes, it could have added "solely" to indicate that actions taken "because of" the confluence of multiple factors do not violate the law. Cf. 11 U.S.C. § 525; 16 U.S.C. § 511. Or it could have written "primarily because of" to indicate that the prohibited factor had to

be the main cause of the defendant's challenged employment decision. Cf. 22 U.S.C. § 2688. But none of this is the law we have. If anything, Congress has moved in the opposite direction, supplementing Title VII in 1991 to allow a plaintiff to prevail merely by showing that a protected trait like sex was a "motivating factor" in a defendant's challenged employment practice. Civil Rights Act of 1991, § 107, codified at 42 U.S.C. § 2000e–2(m). Under this more forgiving standard, liability can sometimes follow even if sex wasn't a but-for cause of the employer's challenged decision. Still, because nothing in our analysis depends on the motivating factor test, we focus on the more traditional but-for causation standard that continues to afford a viable, if no longer exclusive, path to relief under Title VII. § 2000e–2(a)(1).

As sweeping as even the but-for causation standard can be, Title VII does not concern itself with everything that happens "because of" sex. The statute imposes liability on employers only when they "fail or refuse to hire," "discharge," "or otherwise . . . discriminate against" someone because of a statutorily protected characteristic like sex. Ibid. The employers acknowledge that they discharged the plaintiffs in today's cases, but assert that the statute's list of verbs is qualified by the last item on it: "otherwise . . . discriminate against." By virtue of the word otherwise, the employers suggest, Title VII concerns itself not with every discharge, only with those discharges that involve discrimination.

Accepting this point, too, for argument's sake, the question becomes: What did "discriminate" mean in 1964? As it turns out, it meant then roughly what it means today: "To make a difference in treatment or favor (of one as compared with others)." Webster's New International Dictionary 745 (2d ed. 1954). To "discriminate against" a person, then, would seem to mean treating that individual worse than others who are similarly situated. See Burlington N. & S. F. R. Co. v. White, 548 U.S. 53, 59 (2006). In so-called "disparate treatment" cases like today's, this Court has also held that the difference in treatment based on sex must be intentional. See, e.g., Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986 (1988). So, taken together, an employer who intentionally treats a person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual of another sex—discriminates against that person in violation of Title VII.

At first glance, another interpretation might seem possible. Discrimination sometimes involves "the act, practice, or an instance of discriminating categorically rather than individually." Webster's New Collegiate Dictionary 326 (1975). On that understanding, the statute would require us to consider the employer's treatment of groups rather than individuals, to see how a policy affects one sex as a whole versus the other as a whole. That idea holds some intuitive appeal too. Maybe the law concerns itself simply with ensuring that employers don't treat women generally less favorably than they do men. So how can we tell which sense, individual or group, "discriminate" carries in Title VII?

The statute answers that question directly. It tells us three times—including immediately after the words "discriminate against"—that our focus should be on individuals, not groups: Employers may not "fail or refuse to hire or . . . discharge any individual, or

otherwise . . . discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* . . . sex." § 2000e–2(a)(1) (emphasis added). And the meaning of "individual" was as uncontroversial in 1964 as it is today: "A particular being as distinguished from a class, species, or collection." Webster's New International Dictionary at 1267. Here, again, Congress could have written the law differently. It might have said that "it shall be an unlawful employment practice to prefer one sex to the other in hiring, firing, or the terms or conditions of employment." It might have said that there should be no "sex discrimination," perhaps implying a focus on differential treatment between the two sexes as groups. More narrowly still, it could have forbidden only "sexist policies" against women as a class. But, once again, that is not the law we have.

The consequences of the law's focus on individuals rather than groups are anything but academic. Suppose an employer fires a woman for refusing his sexual advances. It's no defense for the employer to note that, while he treated that individual woman worse than he would have treated a man, he gives preferential treatment to female employees overall. The employer is liable for treating this woman worse in part because of her sex. Nor is it a defense for an employer to say it discriminates against both men and women because of sex. This statute works to protect individuals of both sexes from discrimination, and does so equally. So an employer who fires a woman, Hannah, because she is insufficiently feminine and also fires a man, Bob, for being insufficiently masculine may treat men and women as groups more or less equally. But in both cases the employer fires an individual in part because of sex. Instead of avoiding Title VII exposure, this employer doubles it.

B

From the ordinary public meaning of the statute's language at the time of the law's adoption, a straightforward rule emerges: An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It doesn't matter if other factors besides the plaintiff 's sex contributed to the decision. And it doesn't matter if the employer treated women as a group the same when compared to men as a group. If the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred. Title VII's message is "simple but momentous": An individual employee's sex is "not relevant to the selection, evaluation, or compensation of employees." Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989) (plurality opinion).

The statute's message for our cases is equally simple and momentous: An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it 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. Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.

That distinguishes these cases from countless others where Title VII has nothing to say. Take an employer who fires a female employee for tardiness or incompetence or simply supporting the wrong sports team. Assuming the employer would not have tolerated the same trait in a man, Title VII stands silent. But unlike any of these other traits or actions, homosexuality and transgender status are inextricably bound up with sex. Not because homosexuality or transgender status are related to sex in some vague sense or because discrimination on these bases has some disparate impact on one sex or another, but because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.

Nor does it matter that, when an employer treats one employee worse because of that individual's sex, other factors may contribute to the decision. 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 or transgender, two causal factors may be in play—both the individual's sex and something else (the sex to which the individual is attracted or with which the individual identifies). But Title VII doesn't care. If an employer would not have discharged an employee but for that individual's sex, the statute's causation standard is met, and liability may attach.

Reframing the additional causes in today's cases as additional intentions can do no more to insulate the employers from liability. Intentionally burning down a neighbor's house is arson, even if the perpetrator's ultimate intention (or motivation) is only to improve the view. No less, intentional discrimination based on sex violates Title VII, even if it is intended only as a means to achieving the employer's ultimate goal of discriminating against homosexual or transgender employees. There is simply no escaping the role intent plays here: Just as sex is necessarily a but-for cause when an employer discriminates against homosexual or transgender employees, an employer who discriminates on these grounds inescapably intends to rely on sex in its decisionmaking. 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.

An employer musters no better a defense by responding that it is equally happy to fire male and female employees who are homosexual or transgender. Title VII liability is not limited to employers who, through the sum of all of their employment actions, treat the class of men differently than the class of women. Instead, the law makes each instance of discriminating against an individual employee because of that individual's sex an independent violation of Title VII. So just as an employer who fires both Hannah and Bob for failing to fulfill traditional sex stereotypes doubles rather than eliminates Title VII liability, an employer who fires both Hannah and Bob for being gay or transgender does the same.

At bottom, these cases involve no more than the straightforward application of legal terms with plain and settled meanings. For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex. That has always been prohibited by Title VII's plain terms—and that "should be the end of the analysis." Zarda v. Altitude Express, Inc., 883 F.3d 100, 135 (Cabranes, J., concurring in judgment).

C

If more support for our conclusion were required, there's no need to look far. All that the statute's plain terms suggest, this Court's cases have already confirmed. Consider three of our leading precedents.

In Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (per curiam), a company allegedly refused to hire women with young children, but did hire men with children the same age. Because its discrimination depended not only on the employee's sex as a female but also on the presence of another criterion—namely, being a parent of young children—the company contended it hadn't engaged in discrimination "because of" sex. The company maintained, too, that it hadn't violated the law because, as a whole, it tended to favor hiring women over men. Unsurprisingly by now, these submissions did not sway the Court. That an employer discriminates intentionally against an individual only in part because of sex supplies no defense to Title VII. Nor does the fact an employer may happen to favor women as a class.

In Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702 (1978), an employer required women to make larger pension fund contributions than men. The employer sought to justify its disparate treatment on the ground that women tend to live longer than men, and thus are likely to receive more from the pension fund over time. By everyone's admission, the employer was not guilty of animosity against women or a "purely habitual assumptio[n] about a woman's inability to perform certain kinds of work"; instead, it relied on what appeared to be a statistically accurate statement about life expectancy. Even so,

the Court recognized, a rule that appears evenhanded at the group level can prove discriminatory at the level of individuals. True, women as a class may live longer than men as a class. But "[t]he statute's focus on the individual is unambiguous," and any individual woman might make the larger pension contributions and still die as early as a man. Likewise, the Court dismissed as irrelevant the employer's insistence that its actions were motivated by a wish to achieve classwide equality between the sexes: An employer's intentional discrimination on the basis of sex is no more permissible when it is prompted by some further intention (or motivation), even one as prosaic as seeking to account for actuarial tables. The employer violated Title VII because, when its policy worked exactly as planned, it could not "pass the simple test" asking whether an individual female employee would have been treated the same regardless of her sex.

In Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998), a male plaintiff alleged that he was singled out by his male co-workers for sexual harassment. The Court held it was immaterial that members of the same sex as the victim committed the alleged discrimination. Nor did the Court concern itself with whether men as a group were subject to discrimination or whether something in addition to sex contributed to the discrimination, like the plaintiff 's conduct or personal attributes. "[A]ssuredly," the case didn't involve "the principal evil Congress was concerned with when it enacted Title VII." But, the Court unanimously explained, it is "the provisions of our laws rather than the principal concerns of our legislators by which we are governed." Because the plaintiff alleged that the harassment would not have taken place but for his sex—that is, the plaintiff would not have suffered similar treatment if he were female—a triable Title VII claim existed.

The lessons these cases hold for ours are by now familiar.

First, it's irrelevant what an employer might call its discriminatory practice, how others might label it, or what else might motivate it. . . .

Second, the plaintiff 's sex need not be the sole or primary cause of the employer's adverse action. . . .

Finally, an employer cannot escape liability by demonstrating that it treats males and females comparably as groups. . . .

III

What do the employers have to say in reply? For present purposes, they do not dispute that they fired the plaintiffs for being homosexual or transgender. Sorting out the true reasons for an adverse employment decision is often a hard business, but none of that is at issue here. Rather, the employers submit that even intentional discrimination against employees based on their homosexuality or transgender status supplies no basis for liability under Title VII. . . .

A

Maybe most intuitively, the employers assert that discrimination on the basis of homosexuality and transgender status aren't referred to as sex discrimination in ordinary conversation. If asked by a friend (rather than a judge) why they were fired, even today's plaintiffs would likely respond that it was because they were gay or transgender, not because of sex. According to the employers, that conversational answer, not the statute's strict terms, should guide our thinking and suffice to defeat any suggestion that the employees now before us were fired because of sex.

But this submission rests on a mistaken understanding of what kind of cause the law is looking for in a Title VII case. In conversation, a speaker is likely to focus on what seems most relevant or informative to the listener. So an employee who has just been fired is likely to identify the primary or most direct cause rather than list literally every but-for cause. To do otherwise would be tiring at best. But these conversational conventions do not control Title VII's legal analysis, which asks simply whether sex was a but-for cause. . . . You can call the statute's but-for causation test what you will—expansive, legalistic, the dissents even dismiss it as wooden or literal. But it is the law.

Trying another angle, the defendants before us suggest that an employer who discriminates based on homosexuality or transgender status doesn't intentionally discriminate based on sex, as a disparate treatment claim requires. But, as we've seen, an employer who discriminates against homosexual or transgender employees necessarily and intentionally applies sex-based rules. An employer that announces it will not employ anyone who is homosexual, for example, intends to penalize male employees for being attracted to men and female employees for being attracted to women.

What, then, do the employers mean when they insist intentional discrimination based on homosexuality or transgender status isn't intentional discrimination based on sex? Maybe the employers mean they don't intend to harm one sex or the other as a class. But as should be clear by now, the statute focuses on discrimination against individuals, not groups. Alternatively, the employers may mean that they don't perceive themselves as motivated by a desire to discriminate based on sex. But nothing in Title VII turns on the employer's labels or any further intentions (or motivations) for its conduct beyond sex discrimination. In *Manhart*, the employer intentionally required women to make higher pension contributions only to fulfill the further purpose of making things more equitable between men and women as groups. In *Phillips*, the employer may have perceived itself as discriminating based on motherhood, not sex, given that its hiring policies as a whole favored women. But in both cases, the Court set all this aside as irrelevant. The employers' policies involved intentional discrimination because of sex, and Title VII liability necessarily followed.

Aren't these cases different, the employers ask, given that an employer could refuse to hire a gay or transgender individual without ever learning the applicant's sex? Suppose an employer asked homosexual or transgender applicants to tick a box on its application form. The employer then had someone else redact any information that could be used to discern

sex. The resulting applications would disclose which individuals are homosexual or transgender without revealing whether they also happen to be men or women. Doesn't that possibility indicate that the employer's discrimination against homosexual or transgender persons cannot be sex discrimination?

No, it doesn't. 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.

The same holds here. There is no way for an applicant to decide whether to check the homosexual or transgender box without considering sex. To see why, imagine an applicant doesn't know what the words homosexual or transgender mean. Then try writing out instructions for who should check the box without using the words man, woman, or sex (or some synonym). It can't be done. Likewise, there is no way an employer can discriminate against those who check the homosexual or transgender box without discriminating in part because of an applicant's sex. By discriminating against homosexuals, the employer intentionally penalizes men for being attracted to men and women for being attracted to women. By discriminating against transgender persons, the employer unavoidably discriminates against persons with one sex identified at birth and another today. Any way you slice it, the employer intentionally refuses to hire applicants in part because of the affected individuals' sex, even if it never learns any applicant's sex.

Next, the employers turn to Title VII's list of protected characteristics—race, color, religion, sex, and national origin. Because homosexuality and transgender status can't be found on that list and because they are conceptually distinct from sex, the employers reason, they are implicitly excluded from Title VII's reach. Put another way, if Congress had wanted to address these matters in Title VII, it would have referenced them specifically.

But that much does not follow. We agree that homosexuality and transgender status are distinct concepts from sex. But, as we've seen, discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second. Nor is there any such thing as a "canon of donut holes," in which Congress's failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception. Instead, when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule. And that is exactly how this Court has always approached Title VII. "Sexual harassment" is conceptually distinct from sex discrimination, but it can fall within Title VII's sweep. *Oncale*, 523 U. S. at 79–80. Same with "motherhood discrimination." See *Phillips*, 400 U. S. at 544. Would the employers have us reverse those cases on the theory that Congress could have spoken to those

problems more specifically? Of course not. As enacted, Title VII prohibits all forms of discrimination because of sex, however they may manifest themselves or whatever other labels might attach to them.

The employers try the same point another way. Since 1964, they observe, Congress has considered several proposals to add sexual orientation to Title VII's list of protected characteristics, but no such amendment has become law. Meanwhile, Congress has enacted other statutes addressing other topics that do discuss sexual orientation. This postenactment legislative history, they urge, should tell us something.

But what? There's no authoritative evidence explaining why later Congresses adopted other laws referencing sexual orientation but didn't amend this one. Maybe some in the later legislatures understood the impact Title VII's broad language already promised for cases like ours and didn't think a revision needed. Maybe others knew about its impact but hoped no one else would notice. Maybe still others, occupied by other concerns, didn't consider the issue at all. All we can know for certain is that speculation about why a later Congress declined to adopt new legislation offers a "particularly dangerous" basis on which to rest an interpretation of an existing law a different and earlier Congress did adopt. Pension Benefit Guaranty Corporation v. LTV Corp., 496 U.S. 633, 650 (1990); see also Sullivan v. Finkelstein, 496 U.S. 617, 632 (1990) (Scalia, J., concurring) ("Arguments based on subsequent legislative history . . . should not be taken seriously, not even in a footnote").

That leaves the employers to seek a different sort of exception. Maybe the traditional and simple but-for causation test should apply in all other Title VII cases, but it just doesn't work when it comes to cases involving homosexual and transgender employees. The test is too blunt to capture the nuances here. The employers illustrate their concern with an example. When we apply the simple test to Mr. Bostock—asking whether Mr. Bostock, a man attracted to other men, would have been fired had he been a woman—we don't just change his sex. Along the way, we change his sexual orientation too (from homosexual to heterosexual). 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. So for Mr. Bostock, the question should be whether he would've been fired if he were a woman attracted to women. And because his employer would have been as quick to fire a lesbian as it was a gay man, the employers conclude, no Title VII violation has occurred.

While the explanation is new, the mistakes are the same. 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. Just cast a glance back to *Manhart*, where it was no defense that the employer sought to equalize pension contributions based on life expectancy. 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.

Still, the employers insist, something seems different here. Unlike certain other employment policies this Court has addressed that harmed only women or only men, the employers' policies in the cases before us have the same adverse consequences for men and women. How could sex be necessary to the result if a member of the opposite sex might face the same outcome from the same policy?

What the employers see as unique isn't even unusual. Often in life and law two but-for factors combine to yield a result that could have also occurred in some other way. . . .

B

Ultimately, the employers are forced to abandon the statutory text and precedent altogether and appeal to assumptions and policy. Most pointedly, they contend that few in 1964 would have expected Title VII to apply to discrimination against homosexual and transgender persons. And whatever the text and our precedent indicate, they say, shouldn't this fact cause us to pause before recognizing liability?

It might be tempting to reject this argument out of hand. This Court has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration. Of course, some Members of this Court have consulted legislative history when interpreting ambiguous statutory language. But that has no bearing here. "Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it." Milner v. Department of Navy, 562 U.S. 562, 574 (2011). And as we have seen, no ambiguity exists about how Title VII's terms apply to the facts before us. To be sure, the statute's application in these cases reaches "beyond the principal evil" legislators may have intended or expected to address. *Oncale*, 523 U.S. at 79. But "'the fact that [a statute] has been applied in situations not expressly anticipated by Congress'" does not demonstrate ambiguity; instead, it simply "'demonstrates [the] breadth' " of a legislative command. Sedima, S.P R.L. v. Imrex Co., 473 U.S. 479, 499 (1985). And "it is ultimately the provisions of" those legislative commands "rather than the principal concerns of our legislators by which we are governed." *Oncale*, 523 U.S. at 79; see also A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 101 (2012) (noting that unexpected applications of broad language reflect only Congress's "presumed point [to] produce general coverage—not to leave room for courts to recognize ad hoc exceptions").

Still, while legislative history can never defeat unambiguous statutory text, historical sources can be useful for a different purpose: Because the law's ordinary meaning at the time of enactment usually governs, we must be sensitive to the possibility a statutory

term that means one thing today or in one context might have meant something else at the time of its adoption or might mean something different in another context. And we must be attuned to the possibility that a statutory phrase ordinarily bears a different meaning than the terms do when viewed individually or literally. To ferret out such shifts in linguistic usage or subtle distinctions between literal and ordinary meaning, this Court has sometimes consulted the understandings of the law's drafters as some (not always conclusive) evidence. For example, in the context of the National Motor Vehicle Theft Act, this Court admitted that the term "vehicle" in 1931 could literally mean "a conveyance working on land, water or air." McBoyle v. United States, 283 U.S. 25, 26 (1931). But given contextual clues and "everyday speech" at the time of the Act's adoption in 1919, this Court concluded that "vehicles" in that statute included only things "moving on land," not airplanes too. . . .

The employers, however, advocate nothing like that here. They do not seek to use historical sources to illustrate that the meaning of any of Title VII's language has changed since 1964 or that the statute's terms, whether viewed individually or as a whole, ordinarily carried some message we have missed. To the contrary, as we have seen, the employers *agree* with our understanding of all the statutory language—"discriminate against any individual . . . because of such individual's . . . sex." Nor do the competing dissents offer an alternative account about what these terms mean either when viewed individually or in the aggregate. Rather than suggesting that the statutory language bears some other *meaning*, the employers and dissents merely suggest that, because few in 1964 expected today's *result*, we should not dare to admit that it follows ineluctably from the statutory text. When a new application emerges that is both unexpected and important, they would seemingly have us merely point out the question, refer the subject back to Congress, and decline to enforce the plain terms of the law in the meantime.

That is exactly the sort of reasoning this Court has long rejected. Admittedly, the employers take pains to couch their argument in terms of seeking to honor the statute's "expected applications" rather than vindicate its "legislative intent." But the concepts are closely related. One could easily contend that legislators only intended expected applications or that a statute's purpose is limited to achieving applications foreseen at the time of enactment. However framed, the employer's logic impermissibly seeks to displace the plain meaning of the law in favor of something lying beyond it. . . .

The employer's position . . . proves too much. If we applied Title VII's plain text only to applications some (yet-to-be-determined) group expected in 1964, we'd have more than a little law to overturn. Start with *Oncale*. How many people in 1964 could have expected that the law would turn out to protect male employees? Let alone to protect them from harassment by other male employees? As we acknowledged at the time, "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII." 523 U.S. at 79. Yet the Court did not hesitate to recognize that Title VII's plain terms forbade it. Under the employer's logic, it would seem this was a mistake.

That's just the beginning of the law we would have to unravel. As one Equal Employment Opportunity Commission (EEOC) Commissioner observed shortly after the law's passage, the words of " 'the sex provision of Title VII [are] difficult to . . . control.' " Franklin, Inventing the "Traditional Concept" of Sex Discrimination, 125 Harv. L. Rev. 1307, 1338 (2012) (quoting Federal Mediation Service To Play Role in Implementing Title VII, [1965–1968 Transfer Binder] CCH Employment Practices ¶ 8046, p. 6074). The "difficult[y]" may owe something to the initial proponent of the sex discrimination rule in Title VII, Representative Howard Smith. On some accounts, the congressman may have wanted (or at least was indifferent to the possibility of) broad language with wide-ranging effect. Not necessarily because he was interested in rooting out sex discrimination in all its forms, but because he may have hoped to scuttle the whole Civil Rights Act and thought that adding language covering sex discrimination would serve as a poison pill. See C. Whalen & B. Whalen, The Longest Debate: A Legislative History of the 1964 Civil Rights Act 115–118 (1985). Certainly nothing in the meager legislative history of this provision suggests it was meant to be read narrowly.

Whatever his reasons, thanks to the broad language Representative Smith introduced, many, maybe most, applications of Title VII's sex provision were "unanticipated" at the time of the law's adoption. In fact, many now-obvious applications met with heated opposition early on . . . .

The weighty implications of the employers' argument from expectations also reveal why they cannot hide behind the no-elephants-in-mouseholes canon. That canon recognizes that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." Whitman v. American Trucking Assns., Inc., 531 U.S. 457, 468 (2001). But it has no relevance here. We can't deny that today's holding—that employers are prohibited from firing employees on the basis of homosexuality or transgender status—is an elephant. But where's the mousehole? Title VII's prohibition of sex discrimination in employment is a major piece of federal civil rights legislation. It is written in starkly broad terms. It has repeatedly produced unexpected applications, at least in the view of those on the receiving end of them. Congress's key drafting choices—to focus on discrimination against individuals and not merely between groups and to hold employers liable whenever sex is a but-for cause of the plaintiff 's injuries—virtually guaranteed that unexpected applications would emerge over time. This elephant has never hidden in a mousehole; it has been standing before us all along.

With that, the employers are left to abandon their concern for expected applications and fall back to the last line of defense for all failing statutory interpretation arguments: naked policy appeals. If we were to apply the statute's plain language, they complain, any number of undesirable policy consequences would follow. Gone here is any pretense of statutory interpretation; all that's left is a suggestion we should proceed without the law's guidance to do as we think best. But that's an invitation no court should ever take up. The place to make new legislation, or address unwanted consequences of old legislation, lies in Congress. When it comes to statutory interpretation, our role is limited to applying the

law's demands as faithfully as we can in the cases that come before us. As judges we possess no special expertise or authority to declare for ourselves what a self-governing people should consider just or wise. And the same judicial humility that requires us to refrain from adding to statutes requires us to refrain from diminishing them.

What are these consequences anyway? The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today. Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind. The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual "because of such individual's sex." . . . Whether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases, not these.

Separately, the employers fear that complying with Title VII's requirement in cases like ours may require some employers to violate their religious convictions. We are also deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society. But worries about how Title VII may intersect with religious liberties are nothing new; they even predate the statute's passage. As a result of its deliberations in adopting the law, Congress included an express statutory exception for religious organizations. § 2000e–1(a). This Court has also recognized that the First Amendment can bar the application of employment discrimination laws "to claims concerning the employment relationship between a religious institution and its ministers." Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 565 U.S. 171, 188 (2012). And Congress has gone a step further yet in the Religious Freedom Restoration Act of 1993 (RFRA), codified at 42 U.S.C. § 2000bb et seq. That statute prohibits the federal government from substantially burdening a person's exercise of religion unless it demonstrates that doing so both furthers a compelling governmental interest and represents the least restrictive means of furthering that interest. § 2000bb–1. Because RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases. See § 2000bb–3.

But how these doctrines protecting religious liberty interact with Title VII are questions for future cases too. Harris Funeral Homes did unsuccessfully pursue a RFRA-based defense in the proceedings below. In its certiorari petition, however, the company declined to seek review of that adverse decision, and no other religious liberty claim is now before us. So, while other employers in other cases may raise free exercise arguments that merit careful consideration, none of the employers before us today represent in this Court that compliance with Title VII will infringe their own religious liberties in any way.

*

Some of those who supported adding language to Title VII to ban sex discrimination may have hoped it would derail the entire Civil Rights Act. Yet, contrary to those intentions, the bill became law. Since then, Title VII's effects have unfolded with far-reaching consequences, some likely beyond what many in Congress or elsewhere expected.

But none of this helps decide today's cases. Ours is a society of written laws. Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations. In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee's sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law.

The judgments of the Second and Sixth Circuits are affirmed. The judgment of the Eleventh Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

■ JUSTICE ALITO, with whom JUSTICE THOMAS joins, dissenting.

There is only one word for what the Court has done today: legislation. The document that the Court releases is in the form of a judicial opinion interpreting a statute, but that is deceptive.

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on any of five specified grounds: "race, color, religion, sex, [and] national origin." 42 U.S.C. § 2000e–2(a)(1). Neither "sexual orientation" nor "gender identity" appears on that list. For the past 45 years, bills have been introduced in Congress to add "sexual orientation" to the list, and in recent years, bills have included "gender identity" as well. But to date, none has passed both Houses.

Last year, the House of Representatives passed a bill that would amend Title VII by defining sex discrimination to include both "sexual orientation" and "gender identity," H.R. 5, 116th Cong., 1st Sess. (2019), but the bill has stalled in the Senate. An alternative bill, H.R. 5331, 116th Cong., 1st Sess. (2019), would add similar prohibitions but contains provisions to protect religious liberty. This bill remains before a House Subcommittee.

Because no such amendment of Title VII has been enacted in accordance with the requirements in the Constitution (passage in both Houses and presentment to the President, Art. I, § 7, cl. 2), Title VII's prohibition of discrimination because of "sex" still means what it has always meant. But the Court is not deterred by these constitutional niceties. Usurping the constitutional authority of the other branches, the Court has essentially taken H.R. 5's provision on employment discrimination and issued it under the guise of statutory interpretation. A more brazen abuse of our authority to interpret statutes is hard to recall. The Court tries to convince readers that it is merely enforcing the terms of the statute, but that is preposterous. Even as understood today, the concept of discrimination because of "sex"

is different from discrimination because of "sexual orientation" or "gender identity." 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*." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 16 (2012) (emphasis added). If every single living American had been surveyed in 1964, 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.

The Court attempts to pass off its decision as the inevitable product of the textualist school of statutory interpretation championed by our late colleague Justice Scalia, but no one should be fooled. The Court's opinion is like a pirate ship. 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. See A. Scalia, A Matter of Interpretation 22 (1997). If the Court finds it appropriate to adopt this theory, it should own up to what it is doing.

Many will applaud today's decision because they agree on policy grounds with the Court's updating of Title VII. But the question in these cases is not whether discrimination because of sexual orientation or gender identity should be outlawed. The question *is whether Congress did that in 1964*.

It indisputably did not. . . .

■ JUSTICE KAVANAUGH, dissenting.

Like many cases in this Court, this case boils down to one fundamental question: Who decides? Title VII of the Civil Rights Act of 1964 prohibits employment discrimination "because of" an individual's "race, color, religion, sex, or national origin." The question here is whether Title VII should be expanded to prohibit employment discrimination because of sexual orientation. Under the Constitution's separation of powers, the responsibility to amend Title VII belongs to Congress and the President in the legislative process, not to this Court.

The political branches are well aware of this issue. In 2007, the U.S. House of Representatives voted 235 to 184 to prohibit employment discrimination on the basis of sexual orientation. In 2013, the U.S. Senate voted 64 to 32 in favor of a similar ban. In 2019, the House again voted 236 to 173 to outlaw employment discrimination on the basis of sexual orientation. Although both the House and Senate have voted at different times to prohibit sexual orientation discrimination, the two Houses have not yet come together with the President to enact a bill into law.

The policy arguments for amending Title VII are very weighty. The Court has previously stated, and I fully agree, that gay and lesbian Americans "cannot be treated as social outcasts or as inferior in dignity and worth." Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 584 U.S. ___, ___, 138 S.Ct. 1719, 1727 (2018).

But we are judges, not Members of Congress. And in Alexander Hamilton's words, federal judges exercise "neither Force nor Will, but merely judgment." The Federalist No.

78, p. 523 (J. Cooke ed. 1961). Under the Constitution's separation of powers, our role as judges is to interpret and follow the law as written, regardless of whether we like the result. Cf. Texas v. Johnson, 491 U.S. 397, 420–421 (1989) (Kennedy, J., concurring). Our role is not to make or amend the law. As written, Title VII does not prohibit employment discrimination because of sexual orientation. . . .

NOTES ON *BOSTOCK V. CLAYTON COUNTY*

1. THE ORDINARY PUBLIC MEANING OF TITLE VII

Both the majority opinion and dissenting opinions in *Bostock* rely upon the ordinary public meaning of the operative language in Title VII when it was enacted in 1964. Yet they come to diametrically opposed conclusions: the majority in favor of reading "discrimination because of sex" to include discrimination based on sexual orientation or transgender status; the dissents interpreting the prohibition to exclude these forms of discrimination. Both sides argue that the other is essentially engaged in legislation: the majority by contending that a narrow interpretation would require ad hoc policymaking to exclude these forms of discrimination from the statute; the dissents by concluding that the majority has taken on the role reserved for Congress by effectively amending Title VII to cover new grounds of discrimination.

The excerpts from the dissents in *Bostock* have been severely limited in the interest of brevity. The full dissents extend to 82 pages of text (plus a 53-page series of Appendices to Justice Alito's opinion) in the slip opinion format initially released by the Supreme Court.[a] The majority opinion goes into some detail in recounting the arguments of the dissents as framed by the employers in these cases. The opinions on both sides agree on the general approach to statutory interpretation and both appeal to the authority of Justice Scalia on the priority accorded to the text of the statute. One wonders what Scalia would have made of the dispute over the application of the methods he championed.. The notes that follow identify the principal issues raised by the opinions and their implications for future cases.

2. THE MEANING OF "SEX"

The Court begins by refusing to define "sex" "by itself" as used in the statutory text to include sexual orientation and gender identity. Instead, the Court construes the term to refer "only to biological distinctions between male and female." This step anticipates an objection by Justice Alito that "Title VII prohibits discrimination because of *sex itself,* not everything that is related to, based on, or defined with reference to, 'sex.'" (Emphasis in

[a] Justice Alito's dissent did not hold back. In response to the Court's conclusion that the text of Title VII is unambiguous, he responded that the "arrogance of this argument is breathtaking." Later, he said:

> The Court's argument is not only arrogant, it is wrong. It fails on its own terms. . . . "[H]omosexuality and transgender status are distinct concepts from sex" [quoting the Court], and discrimination because of sexual orientation or transgender status does not inherently or necessarily constitute discrimination because of sex. The Court's arguments are squarely contrary to the statutory text.

original.) What the Court subtracts from the definition of "sex," however, it promptly adds back into the essential features of discrimination on the basis of sexual orientation and gender identity. The Court reasons that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." Does this reasoning effectively make discrimination on these grounds a subset of discrimination on the basis of sex? If so, what has become of the Court's limitation of "sex" to "biological distinctions"?

One effect of the narrow definition of "sex" is to align what "sex" means today with what it meant in 1964. It is the ordinary public meaning of the term at the time of enactment that is crucial to the Court's reasoning. A narrow definition of "sex" accomplishes this purpose more readily than a broad definition. And the Court approvingly cites the employers' reliance on contemporaneous dictionaries for the narrow definition it adopts. A broad definition, by contrast, might reflect current views of discrimination against LGBTQ individuals, as reflected, for instance, in intervening decisions in constitutional law, to be discussed in a following note. A narrow definition of "sex" attempts to avoid the charge, levelled by Justice Alito, that the Court is updating the statute to reflect currently prevailing views on acceptable forms of discrimination.

This strategy, however, does call attention to the gap between the Court's textualist and conceptual reasoning and the reasons of policy that support a broad interpretation of Title VII's prohibition against sex discrimination. Even if the Court correctly disclaims any reliance upon policy in broadly interpreting Title VII, it is hard to see how current views of discrimination against LGBTQ individuals are irrelevant to the Court's decision. Perhaps the most that can be said is that the Court's reasoning aligns with, even though it does not explicitly rely upon, current views that condemn this form of discrimination. Of course, that is not to say that such views are uncontroversial. A significant segment of religious opinion, as the dissents emphasize, has expressed strong disagreement. But the Court's approach allows it to avoid the question of how widely accepted those views are.

3. THE MEANING OF "DISCRIMINATION BECAUSE OF"

Another advantage of the Court's narrow interpretation of "sex" is to put it in context with the other crucial terms in Title VII: "discrimination" and "because of." These terms, too, in the Court's view, have changed little in meaning since 1964. According to a dictionary of the mid-twentieth century, "discriminate" meant "[t]o make a difference in treatment or favor (of one as compared to others)." Although it might also have meant to make a difference "categorically rather than individually," that meaning is ruled out by the emphasis in Title VII on discrimination against "any *individual* . . . because of such *individual's* sex." § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (emphasis in opinion). The focus on the individual victim of discrimination eliminates any defense based on how the employer treats other individuals of the same sex.

It follows, for the majority, that an employer who discriminates against both men and women based on their sexual orientation nevertheless violates the statute by discriminating against each individual employee because of sex. The dissenting opinions deny this, based

on the hypothetical question whether an employer could discriminate on the basis of sexual orientation without knowing an individual employee's sex. The attorney for the plaintiffs answered that this was possible. The Court concedes the possibility of such a hypothetical but argues that it would implicitly require the employer to take account of the employee's sex because, by hypothesis, the employer would have treated an employee of the opposite sex differently if the object of sexual attraction were held constant. An employer who discriminates against women who are attracted to women, but not men who are attracted to women, necessarily discriminates on the basis of sex. It does not matter whether the employer is aware of its discrimination or not.

The standard analysis of the phrase "because of" in Title VII reinforces this conclusion. All the statute requires is that sex be a "but-for cause" of the decision adverse to the employee. It need not be the only "but-for cause," and in cases of sex discrimination, it need only be "a motivating factor" in the decision adverse to the employee. § 703(m), 42 U.S.C. § 2000e-2(m). It does not matter if other factors come into play, as they frequently do. As the Court notes, in an early Title VII case, an employer discharged a new mother on grounds both of sex and parenthood. Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971). That was still sex discrimination even though the employer relied on the additional factor of parenthood in its decision. As the Court framed the argument in *Bostock*:

> Just as sex is necessarily a but-for *cause* when an employer discriminates against homosexual or transgender employees, an employer who discriminates on these grounds inescapably *intends* to rely on sex in its decisionmaking.

Just as it does not matter how the employer treats other employees of the same sex, it does not matter if the employer also relies on other factors in making its decision.

So, too, it does not matter that in ordinary conversation, a speaker would identify the discrimination at issue as based on sexual orientation or gender identity rather than sex. Justice Kavanaugh, in his dissent, contrasts this approach, which he identifies with "ordinary meaning," with the majority's approach, which he characterizes as "literalist." It is the former, in his view, that more likely reflects the understanding of Congress when it enacted Title VII in 1964.[b] The problem with this argument, as the Court points out, is that conversational conventions are fluid, resistant to convincing demonstration, and subject to the pressures of litigation. In *Phillips v. Martin Marietta,* for instance, the parties might have correctly stated that though the plaintiff was a victim of discrimination because she was a mother, she was also, inevitably, a victim of discrimination because of her sex.

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[b] He concluded:

> In sum, all of the usual indicators of ordinary meaning—common parlance, common usage by Congress, the practice in the Executive Branch, the laws in the States, and the decisions of this Court—overwhelmingly establish that sexual orientation discrimination is distinct from, and not a form of, sex discrimination. The usage has been consistent across decades, in both the federal and state contexts.

4. THE UNEXPECTED CONSEQUENCES OF TITLE VII

The interpretation of Title VII according to conversational conventions fits with another argument vigorously advocated by the dissenting opinions: that coverage of discrimination based on sexual orientation and transgender status would have come as a complete surprise to the members of Congress who enacted Title VII. This objection takes on added force for Justice Alito because of the ambiguous origins of the prohibition against sex discrimination in Title VII. The amendment adding sex to Title VII was introduced by Representative Howard Smith of Virginia, an opponent of the entire civil rights bill. Whether his sole purpose was to subvert the entire bill or whether other legislators had other purposes in mind has been much debated. As Justice Alito pointed out, however:

> [I]f Representative Smith had been looking for a poison pill, prohibiting discrimination on the basis of sexual orientation or gender identity would have been far more potent. However, neither Representative Smith nor any other Member said one word about the possibility that the prohibition of sex discrimination might have that meaning.

To this argument, the majority responds by pointing out the many surprising consequences of the enactment of the prohibition against sex discrimination in Title VII. As it notes, it was interpreted to prohibit discrimination against women based on parenthood, to prohibit discrimination against women in pension plans because of their longer life expectancy, and to prohibit sexual harassment, including sexual harassment of men by men. None of these consequences was foreseen when Title VII was enacted.

5. THE SIGNIFICANCE OF FAILED ATTEMPTS TO AMEND TITLE VII

Bills regularly have been proposed in Congress to amend Title VII to prohibit discrimination on the basis of sexual orientation and gender identity, but none have been enacted. Both Justice Alito and Justice Kavanaugh emphasize the failure of such legislation and go on to argue that the majority has usurped the legislative process. As a matter of statutory interpretation, should the failure of Congress to amend Title VII affect the interpretation of what Congress did in enacting Title VII? And as a practical matter, in an era of pervasive legislative stalemate, how informative is it that Congress did not act?

The Court relies on the canon of construction that post-enactment legislative history should generally be ignored. The Court quotes Justice Scalia for the proposition that "[a]rguments based on subsequent legislative history . . . should not be taken seriously, not even in a footnote." The reasons have to do with the many explanations for congressional inaction: subsequent Congresses might have thought an amendment was unnecessary because Title VII already reached this form of discrimination; or they might have thought that other issues on the legislative agenda were more pressing; or they might not have known or cared about what the enacting Congress did; or they might have disagreed among themselves about what to do about the original legislation. It is a truism of federal statutory interpretation that the sheer difficulty of gaining passage of legislation explains most failures of amending legislation. It must gain approval by the House of Representatives and

by the Senate, and then get the signature of the President or the override of a presidential veto by a two-thirds majority.

Still, it is difficult to conclude that the failure of amending legislation is irrelevant. It shows, at a minimum, that Congress is capable of addressing the issue. It also supports the inference that members of Congress supporting the legislation either believed that Title VII did not extend to discrimination on the basis of sexual orientation or gender identity or that the courts would not interpret it to do so. On the other hand, it is also difficult to identify the weight that such a failure should have. Was the Court right to ignore the failure of amending legislation?

6. THE INFLUENCE OF CONSTITUTIONAL DECISIONS

In a series of decisions, the Supreme Court has gradually extended the constitutional rights of gay and lesbian individuals. It began inauspiciously by upholding criminal prohibitions of gay and lesbian sex in Bowers v. Hardwick, 478 U.S. 186 (1986), but then overruled that decision in Lawrence v. Texas, 539 U.S. 558 (2003). This trend in favor of gay and lesbian rights culminated in decisions forcing the federal government and the states to recognize gay marriage. In United States v. Windsor, 570 U.S. 744 (2013), the Court invalidated a federal statute that discriminated against same-sex couples who were married under state law. The Court held unconstitutional a section of the Defense of Marriage Act (DOMA) that required the federal government to ignore such marriages, even when valid under state law. It reasoned that marriage was primarily a concern of the states and that the only reason DOMA refused to recognize same-sex marriages was hostility to gays and lesbians. The Court concluded its discussion in the following sweeping terms:

> The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State. DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment. This opinion and its holding are confined to those lawful marriages.

This reasoning led the Supreme Court two years later to hold that same-sex couples had a right to marry under the Due Process and Equal Protection Clauses. Obergefell v. Hodges, 576 U.S. ___135 S.Ct. 2584 (2015). Because the decision emphasized that "the right to marry is a fundamental right inherent in the liberty of the person," it had no

immediate implications for discrimination on the basis of sexual orientation in other spheres, such as employment.

These decisions nevertheless altered the legal landscape in which *Bostock* was decided. They also correlate with the discrepancy, noted by the dissenting opinions, that all the circuit court decisions before 2017 held that Title VII did not cover discrimination on the basis of sexual orientation or transgender status. Only after recognition of the constitutional right to marry did these decisions find coverage of such discrimination under Title VII.

Justice Alito adopts a particularly pointed form of this argument in assessing the legal treatment of sexual orientation and transgender status in 1964. At the time, gay and lesbian sex was generally illegal and transgender status was largely unknown. He observes "that in 1964 homosexuality was thought to be a mental disorder, and homosexual conduct was regarded as morally culpable and worthy of punishment"; and the terms "'transgender status' or 'gender identity' . . . would have left people at the time scratching their heads." He is, of course, factually correct in making these observations, but arguably tone deaf to the implications of these facts. It is this history of discrimination, and the failure to recognize it for what it was, that give some urgency to the need to reevaluate the meaning of sex discrimination under Title VII.

For that matter, it is difficult to reconcile the Supreme Court's constitutional decisions on gay and lesbian rights with any originalist approach to interpretation of the Constitution itself. Acknowledging the influence of constitutional law on interpretation of Title VII reopens the question whether the statute should be given a static interpretation tied to the meaning of its language upon enactment or whether it should receive a dynamic interpretation that reflects changing views of sexual orientation and transgender status. A dynamic approach supports the same result as the majority opinion but cannot easily be reconciled with its textualist reasoning. Can the two nevertheless coexist in some way? How would an opinion in a later case that takes a dynamic approach treat the textualist approach in *Bostock*?

7. IMPLICATIONS FOR OTHER STATUTES AND OTHER ISSUES

The Court in *Bostock* did not address the potential impact of its decision in other contexts. It reserved several specific questions: what "because of sex" means under other statutes; how Title VII applies to questions of access to bathrooms or locker rooms; and whether religious institutions or religious believers have to accommodate individuals based on sexual orientation and transgender status. Justice Alito's dissent isolated numerous other situations where the issue will arise,[c] and included an extensive statutory Appendix listing over 100 federal statutes that prohibit discrimination because of sex.

The most obviously analogous statute is Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), which prohibits discrimination on the basis of sex in federally

[c] Among them were transgender participation in women's sports, housing in student dormitories, and healthcare benefits.

funded education programs. Title IX is the subject of the next section of this chapter. As discussed more fully there litigation has already commenced over the access of students to bathrooms and locker rooms, mainly in the context of primary and secondary schools.

Under Title VII, issues of access to bathrooms and locker rooms would be approached initially under the exception for sex discrimination based on a "bona fide occupational qualification." § 703(e)(1), 42 U.S.C. § 2000e-2(e)(1). Although access to these facilities does not exactly reflect a "qualification" for employment, rather than a condition of employment, an employer could make an employee's agreement to restricted access a qualification for the job. In any event, sex-based classifications on issues such as sex-based standards of appearance have been upheld under Title VII without directly falling under the BFOQ. E.g., Jesperson v. Harrah's Operating Co., Inc., 444 F.3d 1104 (9th Cir. 2006) (en banc). Access to bathrooms and locker rooms could be treated similarly, although exactly what restrictions on access could be applied to LGBTQ employees—or for that matter, sex-based standards of appearance—raise difficult questions.

Religious institutions also receive special treatment under Title VII, not only in the BFOQ provision but with additional blanket exemptions for religious institutions and religious schools. §§ 702(a), 703(a)(2), 42 U.S.C. §§ 2000e-1(a), -2(a)(2). All of these exemptions allow only discrimination based on religion, but a constitutionally based exception gives religious institutions the absolute right to decide who can take on a ministerial role in their faith. Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 565 U.S. 171 (2012). If applicable to a particular position, this constitutional exception would allow religious institutions to exclude individuals based on sexual orientation or gender identity.

In the background of all these issues is the question how *Bostock* would influence interpretation of the constitutional prohibition against sex discrimination, which allows the government to make sex-based classifications only if they have an "exceedingly persuasive" justification. United States v. Virginia, 518 U.S. 515, 531 (1996). Would classifications on the basis of sexual orientation and sexual identity trigger this heightened standard of review? Recall that the constitutional provisions in question, the Equal Protection Clause of the Fourteenth Amendment and the Due Process Clause of the Fifth Amendment, do not literally refer to discrimination on the basis of sex. Only the Nineteenth Amendment concerning the right to vote does so. It follows that the textualist reasoning in *Bostock* does not directly apply to this constitutional issue. Would it nevertheless support the extension of this heightened standard of review to rights beyond those recognized in the existing constitutional decisions? All of these issues remain open for the future.

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SECTION 2: TITLE IX OF THE EDUCATION AMENDMENTS OF 1972

Page 956, Omit the Notes on Sexual Assault and Sexual Harassment Under Title IX, pages 956-70, and substitute:

1. INTRODUCTION

In the aftermath of several highly publicized accounts of sexual assault involving college and university students, the Department of Education issued a "Dear Colleague Letter" in 2011. The letter served as policy guidance for compliance with Title IX by educational institutions. The letter did not constitute a regulation subject to notice and comment procedures under the Administrative Procedure Act. Just as this Dear Colleague Letter was easily promulgated under the Obama Administration, it was just as easily rescinded by the Trump Administration, which issued a "Q&A on Campus Sexual Misconduct" and initiated the process of changing the regulations under Title IX. These regulatory actions by both the Obama and the Trump Administrations have proved to be controversial, as have the reactions of colleges and universities in establishing their own policies to deal with sexual assault. The law on this issue is in flux.

Earlier this year, the Trump Administration issued regulations under Title IX on sexual assault and sexual harassment. 34 C.F.R. part 106. These regulations take positions similar to those in the Trump Q&A. They differ in one crucial respect, however, because they do not simply offer guidance on the Department of Education's enforcement policies. Instead, they attempt to exercise rulemaking authority granted by Congress, which would be entitled to great judicial deference as an authoritative interpretation of Title XI. Under Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), if the courts find that these regulations are authorized by Congress and they have a reasonable basis in the text of Title IX, they have the force of law. As presently formulated, the new regulations are very likely to be upheld. They do have more detail than the prior guidance, as a codification of the law naturally would, and so that they go beyond the suggestions in the Trump Q&A to take definitive positions. These notes identify the provisions in the new regulations that most directly address the concerns raised earlier, with extensive quotations from the regulations as needed.

2. SCOPE

The Obama Dear Colleague Letter applied very broadly in these terms:

> Title IX protects students from sexual harassment in a school's education programs and activities. This means that Title IX protects students in connection with all the academic, educational, extracurricular, athletic, and other programs of the school, whether those programs take place in a school's facilities, on a school bus, at a class or training program sponsored by the school at another location, or elsewhere. For example, Title IX protects a student who is sexually assaulted by a fellow student during a school-sponsored field trip. . .

> Schools may have an obligation to respond to student-on-student sexual harassment that initially occurred off school grounds, outside a school's education program or activity. If a student files a complaint with the school, regardless of where the conduct occurred, the school must process the complaint in accordance with its established procedures. Because students often experience the continuing effects of off-campus sexual harassment in the educational setting, schools should consider the effects of the off-campus conduct when evaluating whether there is a hostile environment on campus.

The Trump Q&A narrowed the scope of covered conduct by excluding assault and harassment that occurs off school grounds. A footnote emphasized that "[a] university does not have a duty under Title IX to address an incident of alleged harassment where the incident occurs off-campus and does not involve a program or activity of the recipient." In stark contrast with the broad terms used by the Obama Dear Colleague Letter, the regulations simply provide that the school "must investigate the allegations in a formal complaint." § 106.45(D)(b)(3)(i). The regulations further narrow the scope of covered conduct by specifying that grievance procedures "apply only to sex discrimination occurring against a person in the United States." § 106.8(d). While this provision seems to allow a school, at its own discretion, to adopt Title IX grievance procedures that cover harassment that occurs outside of the United States, the regulations also state that a school "*must dismiss* [a] formal complaint . . . for the purposes of sexual harassment under title IX," where "the conduct alleged in the formal complaint . . . did not occur against a person in the United States." § 106.45(D)(b)(3)(i) (emphasis added). Does it make sense to exclude from coverage assault or harassment of a student on a school-sponsored program overseas?

Both the Obama and the Trump guidance address only student-on-student sexual violence and harassment, but the duties of universities extend further, to actions taken by employees and by independent contractors on campus. The broad coverage of Title IX has led some universities to consolidate all of their policies on sexual violence and harassment in a single document. To the extent that they involve employees, these policies might go beyond the scope of Title IX but they fall well within the scope of Title VII.

The very wide scope of the university policies makes it almost inevitable that they will be enforced selectively. See Keri Smith, Title IX and Sexual Violence on College Campuses: The Need for Uniform on-Campus Reporting, Investigation, and Disciplinary Procedures, 35 St. Louis U. Pub. L. Rev. 157 (2015) (arguing Title IX gives universities "too much breathing room in determining how they handle claims of sexual violence"). No university can expect to thoroughly police all the sexual encounters of their constituents to determine whether they were consensual. Moreover, a systematic problem noted in the Obama Dear Colleague Letter arises from the reluctance of victims to make their complaints public. If they insist on confidentiality, they effectively preclude the most serious forms of discipline for sexual assault. In the language of the criminal law, they have "refused to press charges." But even if they do press charges, that only starts the investigative process, which frequently must go into disputed facts. How are universities to decide which cases deserve intensive examination? Should they rely mainly upon the seriousness of the

alleged assault or on the quality of the supporting evidence? Should the publicity that the allegations receive, for instance, because they involve a well-known athlete, play a role? Does the inevitable process of filtering cases make enforcement ineffective or simply make it workable?

The changes made by the Trump Administration do not make these issues go away. The scope of the prohibitions under Title IX might be narrowed, but the actions of the Trump Administration do not require universities to undo their own broader policies and rules. A narrow interpretation at the federal level does not necessarily preempt a broad interpretation at the university level. Universities can probably achieve compliance with Title IX more easily by over-enforcement rather than by risking under-enforcement. In any event, they have little incentive to change policies that might have taken years to develop and implement and which might be satisfactory to all affected constituencies—those aligned with the complainant as well as those aligned with the accused. Or perhaps policies that are only tolerable. See Brian A. Pappas, Dear Colleague: Title IX Coordinators and Inconsistent Compliance with the Laws Governing Campus Sexual Misconduct, 52 Tulsa L. Rev. 121 (2016) (finding university compliance with Title IX to be "highly inconsistent and largely ineffective" and "motivated more by symbolic enforcement than true dedication to ensure a hostility-free campus").

3. THE DEFINITION OF CONSENT

The Obama Dear Colleague Letter contained the following definition of "consent":

> Sexual violence, as that term is used in this letter, refers to physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent due to the victim's use of drugs or alcohol. An individual also may be unable to give consent due to an intellectual or other disability. A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, and sexual coercion. All such acts of sexual violence are forms of sexual harassment covered under Title IX.

No corresponding definition appears in the Trump Q&A.

Two basic questions arise from the definition of consent in the Obama Dear Colleague Letter. First, how is it related to the element of sexual harassment that requires the action in question simply to be "unwelcome"? And second, why does intoxication of the victim invalidate consent when intoxication of the accused does not alleviate guilt? Systematic answers to these questions have been controversial. It might be that the answers depend on the facts of each case. If so, how should these issues affect the approach of investigators? Do they just constitute added difficulties that they must resolve?

Consistent with the Trump Q&A which did not define consent, the regulations disclaim any attempt to "require recipients to adopt a particular definition of consent with respect to sexual assault, as referenced in this section." § 106.8(a).

The relevance of consent derives from the common law of battery, which makes it an intentional tort to touch someone in a harmful or offensive way without their apparent consent. The law of sexual harassment goes considerably further in making unwelcome touching or speech actionable, provided that it satisfies the further requirement of being "severe or pervasive." Thus, unwelcome sexual advances can still amount to sexual harassment even if the victim eventually submits and consents to the advances.

Combining lack of consent with unwelcomeness creates the risk that the former will be diluted compared to the latter. This risk could materialize in several ways. The hearing officers might implicitly combine the two elements into a watered-down inquiry into lack of consent when the accused is charged with sexual assault, justifying a more severe penalty than when the accused is charged only with sexual harassment, for which proof of unwelcomeness alone is needed. Unwelcomeness could also be used as evidence of lack of consent or simply confused with it in determining whether the sexual assault occurred. Confusion over these two different elements works mainly to the disadvantage of the accused, by making it easier to find sexual assault and impose a greater penalty. Is there any way to clarify the definition and appropriate role of these elements? Could the proceedings be bifurcated into questions first of sexual assault and then other forms of harassment? Or should these questions go only to the punishment imposed on the accused? See Charles M. Sevilla, Campus Sexual Assault Allegations, Adjudications, and Title IX, Champion 16 (2015) (vagueness of the consent standard could cause problems).

Lack of consent also becomes easier to prove because lack of capacity due to alcohol or drugs vitiates apparent consent by the victim of sexual assault. This point becomes all the more significant since many instances of sexual assault are accompanied by the inebriation of one or both of the students involved. Understandably, intoxication of the accused provides no defense to a charge of sexual assault, just as it generally does not relieve defendants from criminal liability. Certainly, universities do not want to encourage students to drink heavily, which is already a problem on college campuses. But if voluntary intoxication cuts against the accused, should it also affect the responsibility of the complaining student? Perhaps in some cases the accused plied the complainant with alcohol or drugs or simply took advantage of the resulting impairment to engage in sexual assault. But if the incident resulted from voluntary intoxication of both participants, it may seem difficult that drunkenness should impose responsibility on only one party. See Lori E. Shaw, Title IX, Sexual Assault, and the Issue of Effective Consent: Blurred Lines-When Should "Yes" Mean "No"?, 91 Ind. L.J. 1363 (2016) (questioning the assumption that intoxication always invalidates consent).

Most of the accused students in sexual assault cases (but not all) are male and most of the complainants (again not all) are female. By making lack of consent easier to prove, does the Obama Dear Colleague letter generate its own form of discrimination on the basis of sex, at least in its adverse impact on male students? Implicit charges of sex discrimination in enforcement permeate the criticism of Title IX as a vehicle for prohibiting sexual assault. Should this concern be explicitly addressed in the guidance offered by the

Department of Education? Or is it an inevitable consequence of enforcing any neutral prohibition against discrimination? Most claims of sex discrimination, after all, are made by women, and most frequently, against men.

4. ADMINISTRATIVE STRUCTURE

The Obama Dear Colleague Letter relied on earlier guidance, from 2001, to outline the basic procedures "for prompt and equitable resolution of sexual harassment complaints." The Trump Q&A endorses the same basic procedures, apparently because they predated the Obama Administration, and framed them in the following terms:

> A school must adopt and publish grievance procedures that provide for a prompt and equitable resolution of complaints of sex discrimination, including sexual misconduct. OCR has identified a number of elements in evaluating whether a school's grievance procedures are prompt and equitable, including whether the school (i) provides notice of the school's grievance procedures, including how to file a complaint, to students, parents of elementary and secondary school students, and employees; (ii) applies the grievance procedures to complaints filed by students or on their behalf alleging sexual misconduct carried out by employees, other students, or third parties; (iii) ensures an adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence; (iv) designates and follows a reasonably prompt time frame for major stages of the complaint process; (v) notifies the parties of the outcome of the complaint; and (vi) provides assurance that the school will take steps to prevent recurrence of sexual misconduct and to remedy its discriminatory effects, as appropriate.

At this point, however, the Obama Dear Colleague Letter went on to discuss the possibility of filing a criminal complaint, in a passage with no analogue in the Trump Q&A:

> A school should notify a complainant of the right to file a criminal complaint and should not dissuade a victim from doing so either during or after the school's internal Title IX investigation. For instance, if a complainant wants to file a police report, the school should not tell the complainant that it is working toward a solution and instruct, or ask, the complainant to wait to file the report. Schools should not wait for the conclusion of a criminal investigation or criminal proceeding to begin their own Title IX investigation and, if needed, must take immediate steps to protect the student in the educational setting. For example, a school should not delay conducting its own investigation or taking steps to protect the complainant because it wants to see whether the alleged perpetrator will be found guilty of a crime. . . .

In language and structure similar to the Trump Q&A, the regulations require schools to "adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging" conduct covered under Title IX.

§ 106.8(c). Schools "must provide to persons entitled to a notification" under Title IX notice of the school's "grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a complaint of sexual harassment, and how the [school] will respond." Id. In contrast with the Obama Dear Colleague Letter, both the Trump Q&A and the regulations do not mention the possibility of filing a criminal complaint.

These provisions, although framed in very general terms, reflect two different objectives. One is therapeutic, aimed at protecting the victim and assisting in recovery. See Katharine Silbaugh, Reactive to Proactive: Title IX's Unrealized Capacity to Prevent Campus Sexual Assault, 95 B.U. L. Rev. 1049 (2015). The other is prosecutorial, aimed at identifying the accused and imposing a suitable sanction for wrongdoing. Schools must have both components in their programs to achieve compliance with Title IX. They can, however, work at odds with one another, as the reference to concurrent criminal proceedings reveals. Criminal prosecution can delay the university's complaint process, but not too long. And the delay cannot jeopardize continuing efforts to protect the complainant.

The therapeutic approach actually envisions a much wider reach than dictated by Title IX. Students might need advice, counseling, and other forms of assistance even if the incident that led them to complain was not actionable. A student's social and romantic life can add to the stress and challenges of college even in the absence of sexual assault or harassment. The educational and counseling functions of compliance programs blend into other efforts to help students adjust to college life. The regulations identify these steps as "supportive measures," which "may include counseling, extension of deadlines or other course-related adjustments, modification of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and similar measures." § 106.30. These measure "are designed to restore or preservice equal access to the recipient's education program or activity without unreasonably burdening the other party, including measure designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment." Id.

The difficulties arise when solicitude for the complainant compromises the rights of the accused. The interim measures necessary to protect the complainant might require the accused to be transferred to a different classroom or dormitory. Yet that step precedes any finding of guilt, or even a thorough investigation. Likewise, prohibiting contact between the parties might impair the effort of the accused to develop favorable evidence. Relying on intermediaries to develop evidence, such as lawyers, likewise might be prohibited because of its disturbing effects on the complainant, who can in any event simply refuse all such contact. The regulations indirectly address this issue by requiring an institution to "treat complainants and respondents equitably by offering supportive measures" and "by following a grievance process that complies [with the regulations] before the imposition of any disciplinary sanctions or other actions thar are not supportive measures." § 106.44(a).

The prosecutorial approach does not guarantee to the accused full discovery, but it presupposes the need for some form of adversary proceeding and accompanying procedural rights. Yet the overall perspective from a therapeutic approach—emphasizing assistance to the complainant—differs from the punishment and deterrence goals of the prosecutorial approach. As in a criminal case, when an individual faces the power of an institution to impose sanctions, the argument for enhanced procedural rights grows stronger than when only the well-being of the complainant is at stake. The implications of these different approaches are discussed in detail in the Notes that follow.

5. ADVERSARY PROCEDURES

The Obama Dear Colleague Letter, the Trump Q&A, and the regulations agree that the complaining student and the accused student must have the same opportunity to be heard and to present evidence at each stage of the proceeding. But where the Obama guidance emphasizes the rights of the complainant, the Trump guidance emphasizes the rights of the accused. Here is what the Obama Dear Colleague Letter said:

> Throughout a school's Title IX investigation, including at any hearing, the parties must have an equal opportunity to present relevant witnesses and other evidence. The complainant and the alleged perpetrator must be afforded similar and timely access to any information that will be used at the hearing. For example, a school should not conduct a pre-hearing meeting during which only the alleged perpetrator is present and given an opportunity to present his or her side of the story, unless a similar meeting takes place with the complainant; a hearing officer or disciplinary board should not allow only the alleged perpetrator to present character witnesses at a hearing; and a school should not allow the alleged perpetrator to review the complainant's statement without also allowing the complainant to review the alleged perpetrator's statement.

The Trump Q&A stressed that the school has the burden to establish procedures that are fair to the accused student. The regulations take a similar approach and elaborate and emphasize these points even further. Grievance procedures must "include the presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process." § 106.45(D)(b)(1)(iv). During investigation of a complaint and the grievance process, schools must "[e]nsure that the burden of proof rest on the [school] and not on the parties." § 106.56(D)(b)(5).

The regulations further elaborate that the schools must:

> (ii) Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence;
>
> (iii) Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;

(iv) Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding; however, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties;

(v) Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate;

(vi) Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation. Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report. The recipient must make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination.

§ 106.56(D)(b)(5). Further:

Upon receipt of a formal complaint, a recipient must provide the following written notice to the parties who are known: . . . (B) Notice of the allegations of sexual harassment potentially constituting sexual harassment as defined in § 106.30, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved in the incident, if known, the conduct allegedly constituting sexual harassment under § 106.30, and the date and location of the alleged incident, if known. The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process. The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section, and may inspect and review evidence under paragraph (b)(5)(vi) of this section.

§ 106.45(D)(b)(2)(i).

Much of the criticism of the Obama Dear Colleague Letter asserted that it encouraged schools to deny due process to the accused, and in effect, deny the presumption of innocence and presume that the accused was guilty. See Open Letter from Members of the Penn Law School Faculty, http://online.wsj.com/public/resources/documents/20150218_upenn.pdf; Law Professor's Open Letter Regarding Campus Free Speech and Sexual Assault, https://www.lankford.senate.gov/imo/media/doc/Law-Professor-Open-Letter-May-16-016.pdf. A few cases have upheld such claims against public universities, but on fact-specific grounds. For instance, in Doe v. Alger, 2016 WL 7429458 (W.D. Va. 2016), a federal court granted summary judgment to an accused student who was denied access to evidence, prevented from responding to adverse evidence, and given no reason for enhanced sanctions imposed by an appeal board. Each one of the defects in this proceeding could have been avoided by the sensible exercise of discretion by the university's hearing officers. For instance, it is an accepted principle of criminal procedure that the prosecution must turn over all evidence favorable to the defendant, and in civil procedure, broad discovery assures both parties access to all evidence relevant to any claim or defense. More generally, the Due Process Clause requires notice and opportunity to be heard in all proceedings that can result in the denial of liberty or property. Nothing in the Obama Dear Colleague Letter requires the denial of procedural fairness, but of course this does not mean that procedural fairness will be provided in every case. The regulations explicitly state: "Nothing in this part requires a [school] to: . . . (2) Deprive a person of any rights that would otherwise be protected from government action under the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution." § 106.6(d).

Some might object to the analogy to constitutionally required procedures on the ground that the Constitution applies of its own force only to public universities. Private universities do not engage in "state action" that triggers constitutional protection. Yet in the Title IX context, universities operate under the compulsion of federal guidelines that threaten the loss of federal support. That itself is government action that brings the protection of the Fifth Amendment into play. For elaboration of this point, see Jed Rubenfeld, Privatization and State Action: Do Campus Sexual Assault Hearings Violate Due Process, 96 Tex. L. Rev. 15 (2017).

Isolated instances of denying due process could be the product of a mindset that gives priority to protecting the complainant rather than respecting the rights of the accused and the presumption of innocence. The Obama Dear Colleague Letter equivocates on this issue, as exemplified by the following provision: "Public and state-supported schools must provide due process to the alleged perpetrator. However, schools should ensure that steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant." The principle of equal access to evidence is also qualified in other respects. Federal law does not allow a complainant access to the accused student's disciplinary records, even if they are used to determine the sanction

imposed. Likewise, the accused "should not be given access to communications between the complainant and a counselor or information regarding the complainant's sexual history." Presumably, the parties could introduce evidence of their prior relationship, if any, as it might be relevant to issues of lack of consent or unwelcomeness. The existence of a prior relationship, however, does not constitute a defense in and of itself.

6. RIGHT TO COUNSEL

The Obama Dear Colleague Letter recognized the right of both parties to be represented by counsel, but it hedged on the role that counsel can play:

> While OCR does not require schools to permit parties to have lawyers at any stage of the proceedings, if a school chooses to allow the parties to have their lawyers participate in the proceedings, it must do so equally for both parties. Additionally, any school-imposed restrictions on the ability of lawyers to speak or otherwise participate in the proceedings should apply equally**.** OCR strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing. Allowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment.

While the Obama Dear Colleague Letter sought to minimize the role that counsel can play, the Trump Q&A and the regulations emphasize both parties' right to "the advisor of their choice." Schools must:

> (iv) Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding; however, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties.

§ 106.56(D)(b)(5). The regulations further elaborate on the role each party's advisor can play at postsecondary institutions:

> The recipient's grievance process must provide for a live hearing. At the live hearing, the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings.

§ 106.56(D)(b)(6)(i).

In a civil action for sexual harassment, both parties would have attorneys who fully participate in the proceedings: protecting the plaintiff's reputation and making the best case for recovery; or putting forward the best case for exonerating the defendant. The procedures contemplated by the Obama Dear Colleague Letter allows attorneys to perform the same functions, but at one remove. On the complainant's side, the university investigators and representatives do most of the work, subject to the discretion of the hearing officers. On the accused student's side, the attorney can play a role in the investigation, but not necessarily in the disciplinary proceeding. The new regulations, however, give attorneys a larger role in the hearing, stating that the university "must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party." § 106.56(D)(b)(6)(i).

Many universities currently limit the role that counsel, or other representatives, can play. Harvard limits advisors to "general advice" and provides that "[d]uring interviews, personal advisors may not speak for their advisees, although they may ask to suspend the interviews briefly if they feel their advises would benefit from a short break." Procedures for Handling Complaints Involving Students Pursuant to the Sexual and Gender-Based Harassment Policy (Harvard Procedures) III.F. Advisors presumably can also submit written responses to the draft report of an Investigation Team. Id. III.I. The University of Virginia has similar restrictions on personal advisors. University of Virginia Procedures for Reports Against Students (Virginia Procedures) VI.A.1.f. Stanford goes even further in restricting the role of an advisor:

> The Support Person serves as an advisor to the party. While an advisor may offer guidance to a party, each party is expected to submit their own work, which should be signed by the party attesting it is their work. Stanford students are expected to speak for themselves, and express themselves, including in writing, on all matters relating to University concerns, including Title IX-related matters and Prohibited Conduct.

Stanford Student Title IX Process VII.A. Is it too much to expect of college students, especially undergraduates, that they should defend their reputation and careers without professional help? In a life crisis of this magnitude would most people want a lawyer at their side with the full right to participate in proceedings. Can these university limits on representation survive under the new regulations?

The departure from full adversary proceedings might work well enough, but only if the parties can actually afford counsel and retain attorneys familiar with the university procedures. In the absence of professional assistance, both parties depend entirely upon university officials, and perhaps faculty and students. Although the Obama Dear Colleague Letter required that "any real or perceived conflicts of interest between the fact-finder or decision-maker and the parties should be disclosed," can the affiliation of the decision-makers with the university be entirely discounted? The university, after all, is caught between the parties and might be sued by either one. Would that lead university officials to

take the course in a particular case that minimized the university's exposure to liability? Or is this no different from the presence of government prosecutors and government judges in any case brought against private individuals? Can anything be done about such a conflict of interest that is so pervasive but is so much in the background?

The Department of Education has been criticized for exerting "improper pressure upon universities to adopt procedures that do not afford fundamental fairness." Robin Wilson, Should Colleges Be Judging Rape? The Chronicle of Higher Education, April 12, 2015, available at http://chronicle.com/article/Should-Colleges-Be-Judging/229263/. On the other hand, it has been argued, sexual misconduct proceedings can be seen as non-adversarial disciplinary procedures properly handled by school administrators. Because it is an opportunity for schools to teach fundamental social skills and enforce social norms, the argument continues, it is appropriate that the proceeding deviates from criminal procedure. Djuna Perkins, Behind the Headlines: An Insider's Guide to Title IX and the Student Discipline Process for Campus Sexual Assaults, Boston B.J. 19 (2015)

For the argument that the Title IX adversarial process is fundamentally unfair to the accused and prone to false convictions, see Stephen Henrick, A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses, 40 N. Ky. L. Rev. 49 (2013); Audrey Wolfson Latourette, Title IX Office of Civil Rights Directives: An Assault Against Due Process and First Amendment Rights, 23 J.L. Bus. & Eth. 1 (2017). For the argument that Title IX does not provide meaningful relief to sexual harassment plaintiffs, see Meghan E. Cherner-Ranft, The Empty Promise of Title IX: Why Girls Need Courts to Reconsider Liability Standards and Preemption in School Sexual Harassment Cases, 97 Nw. U. L. Rev. 1891 (2003); Misa Scharfen, Peer Sexual Harassment in School: Why Title IX Doctrine Leaves Children Unprotected, 24 S. Cal. Rev. L. & Soc. Just. 81 (2014).

7. PROOF BY A PREPONDERANCE OF THE EVIDENCE

The Obama Dear Colleague Letter requires schools to use the ordinary civil standard of proof by a preponderance of the evidence. Critics insist on a higher degree of proof, usually by "clear and convincing evidence," as a step toward the criminal standard of proof "beyond a reasonable doubt." They rely directly upon the analogy between disciplinary proceedings for sexual assault and criminal proceedings. As the Obama Dear Colleague Letter correctly notes, however, the standard of proof by a preponderance of the evidence applies generally in civil litigation, including in proceedings to enforce Title IX itself. The critics respond by arguing that the sanctions in serious cases of sexual assault more closely resemble criminal punishment in the form of expulsion from school and harm to reputation.

Departing from the previous administration, the Trump Q&A and the regulations give schools the discretion to choose their burden of proof so long as it is consistent with the university's other sexual harassment complaint procedures. Grievance procedures must:

> State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment.

§ 106.56(D)(b)(1)(vii).

To decide between these standards of proof, it is first necessary to articulate exactly what "a preponderance of the evidence" means. Critics often define it as a bare mathematical difference in probability: just slightly more than exactly even odds. Juries in federal civil cases, however, are not instructed in these terms. The standard in that context is typically described as "such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true." 3 Kevin F. O'Malley, Federal Jury Practice and Instructions § 104.02 (6th ed. 2011). If this standard actually operated in practice to require no more than a minuscule increase above even odds, the extensive litigation over who has the burden of proof in civil litigation would make little sense. In civil rights cases, allocation of this burden of proof often turns out to be dispositive. Why should it have less significance in Title IX hearings?

One answer might be the lack of legal training of university hearing officers, but that neglects the application of the same standard by civil juries. See Sara F. Dudley, Paved with Good Intentions: Title IX Campus Sexual Assault Proceedings and the Creation of Admissible Victim Statements, 46 Golden Gate U. L. Rev. 117 (2016) (arguing university officials should receive trauma-informed interview training to ensure evidentiary reliability). Another answer might be that it amplifies the other imbalances in Title IX hearings that might work generally to the disadvantage of the accused. A response to both of these concerns, implemented by Stanford University, is to require unanimity among a hearing panel with three members. Stanford Process Rights of the Parties XII.C. That procedure both complies with the Obama Dear Colleague Letter and minimizes the risk of unfairness to the accused. Yet by the same token, it also makes it more difficult to rule in favor of the complainant. The University of Virginia simply retains the standard of proof by a preponderance of the evidence:

> The investigation is a neutral fact-gathering process. The Respondent is presumed to be not responsible; this presumption may be overcome only where the Investigator and/or Review Panel conclude that there is sufficient evidence, by a Preponderance of the Evidence, to support a finding that the Respondent violated the Title IX Policy.

Virginia Procedures VI.A.1.c.

Does the dispute over the burden of proof come down to striking the right balance between avoiding errors inevitable in any adjudicatory process—resulting either in letting

guilty defendants go free or in punishing defendants who are innocent? Would use of the standard of "clear and convincing evidence" strike a better balance than "preponderance of the evidence" coupled with an unanimity requirement? Historically, civil juries operated in just this way: they could reach a verdict against the defendant only by deciding unanimously that the preponderance of the evidence favored that conclusion.

Page 977, omit the first two paragraphs at the top of the page and the first sentence of the third paragraph and substitute the following:

The Fourth Circuit's decision in *Grimm* was vacated and remanded by the Supreme Court for reconsideration in light of new guidance issued by the Department of Education and the Department of Justice. Gloucester County School Bd. v. G.G. ex rel. Grimm, ___ U.S. ___, 137 S.Ct. 1239 (2017). Hence the opinions excerpted above stand more for an illustrative exposition of the issues than an authoritative resolution of them. The guidance referenced by the Supreme Court was from the Trump Administration and it simply retracted the letters issued by the Obama Administration. Letter of February 22, 2017 from the Acting Assistant Secretary for Civil Rights in the Department of Education and the Acting Assistant Attorney General for Civil Rights in the Department of Justice, https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf.

This change in regulatory posture did not have much effect on the ultimate outcome of this case. On remand from the Supreme Court and the Fourth Circuit, the district court entered summary judgment for the plaintiff, Grimm, declaring that the school board had violated both the Equal Protection Clause and Title IX. The violation consisted of the school board's failure to treat him as a male, as he was designated on his updated birth certificate. The court also enjoined the school board to update school records to reflect this designation and granted Grimm nominal damages, costs, and attorney's fees. Grimm v. Gloucester Country School Board, 400 F.Supp.3d 444 (E.D. Va. 2019).

The subsequent decision under Title VII in Bostock v. Clayton County, 589 U.S. ___, 140 S. Ct. ___ (2020) has no direct effect on the interpretation of Title IX. *Bostock* held that discrimination on the basis of sexual orientation and transgender status violated the prohibition against sex discrimination in Title VII, but did not address the meaning of "sex discrimination" under any other statute or issues of bathroom or locker room access. Nevertheless, the protection of transgender rights in *Bostock* does lend support to the outcome of the litigation in *Grimm*.

Does the debate between the majority and Judge Niemeyer in the 2016 Fourth Circuit decision substitute for the public comment that would have accompanied an explicit amendment to the Title IX regulations or to Title IX itself? [Here continue with the remainder of the third paragraph on page 977.]