Family Law, Cases and Materials, 7th Edition
(Unabridged and Concise Editions)
August 2020 Update Memorandum

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On page 219 of the Unabridged 7th edition, and on page 174 of the Concise 7th edition, substitute the following case for *Hively v. Ivy Tech Community College of Indiana*:

Bostock v. Clayton County, Georgia

Supreme Court of the United States, 2020
590 U.S. ----, 140 S. Ct. 1731

- JUSTICE GORSUCH delivered the opinion of the Court.

. . . [I]n Title VII [of the 1964 Civil Rights Act], 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.

. . .

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."

. . . 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. . . .

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. . . .

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." [42 U.S.C.] § 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." . . . [B]ecause 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.

. . . 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. . . . Title VII's "because of" test incorporates the "'simple'" and "traditional" standard of but-for causation. [*University of Tex. Southwestern Medical Center* v.] *Nassar*, 570 U. S. [338,] 346, 360 [(2013)]. That form of causation is established whenever a particular outcome would not have happened "but for" the purported cause. 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.

. . . So long as the plaintiff's sex was one but-for cause of that decision, that is enough to trigger the law.

. . .

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. [§ 2000e–2(a)(1).] 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.

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The statute . . . tells us three times—including immediately after the words "discriminate against"—that our focus should be on individuals, not groups[.] . . . 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. . . .

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.

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. . . [I]ntentional 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 [(2d Cir. 2018)] (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. . . . [See *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (*per curiam*); *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702 (1978); *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998).]

. . .

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.

The employers' argument proceeds in two stages. Seeking footing in the statutory text, they begin by advancing a number of reasons why discrimination on the basis of homosexuality or transgender status doesn't involve discrimination because of sex. But each of these arguments turns out only to repackage errors we've already seen and this Court's precedents have already rejected. In the end, the employers are left to retreat beyond the statute's text, where they fault us for ignoring the legislature's purposes in enacting Title VII or certain expectations about its operation. They warn, too, about consequences that might follow a ruling for the employees. But none of these contentions about what the employers think the law was meant to do, or should do, allow us to ignore the law as it is.

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.

. . .

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. . . .

. . . 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. . . . 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.

. . . [S]peculation 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); *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. . . .

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. Imagine that it's a nice day outside and your house is too warm, so you decide to open the window. Both the cool temperature outside and the heat inside are but-for causes of your choice to open the window. That doesn't change just because you also would have opened the window had it been warm outside and cold inside. In either case, no one would deny that the window is open "because of" the outside temperature. Our cases are much the same. So, for example, when it comes to homosexual employees, male sex and attraction to men are but-for factors that can combine to get them fired. The fact that female sex and attraction to women can *also* get an employee fired does no more than show the same outcome can be achieved through the combination of different

factors. In either case, though, sex plays an essential but-for role.

At bottom, the employers' argument unavoidably comes down to a suggestion that sex must be the sole or primary cause of an adverse employment action for Title VII liability to follow. And . . . that suggestion is at odds with everything we know about the statute. Consider an employer eager to revive the workplace gender roles of the 1950s. He enforces a policy that he will hire only men as mechanics and only women as secretaries. When a qualified woman applies for a mechanic position and is denied, the "simple test" immediately spots the discrimination: A qualified man would have been given the job, so sex was a but-for cause of the employer's refusal to hire. But like the employers before us today, this employer would say not so fast. By comparing the woman who applied to be a mechanic to a man who applied to be a mechanic, we've quietly changed two things: the applicant's sex and her trait of failing to conform to 1950s gender roles. The "simple test" thus overlooks that it is really the applicant's bucking of 1950s gender roles, not her sex, doing the work. So we need to hold that second trait constant: Instead of comparing the disappointed female applicant to a man who applied for the same position, the employer would say, we should compare her to a man who applied to be a secretary. And because that jobseeker would be refused too, this must not be sex discrimination.

No one thinks *that*, so the employers must scramble to justify deploying a stricter causation test for use only in cases involving discrimination based on sexual orientation or transgender status. Such a rule would create a curious discontinuity in our case law, to put it mildly. Employer hires based on sexual stereotypes? Simple test. Employer sets pension contributions based on sex? Simple test. Employer fires men who do not behave in a sufficiently masculine way around the office? Simple test. But when that same employer discriminates against women who are attracted to women, or persons identified at birth as women who later identify as men, we suddenly roll out a new and more rigorous standard? Why are *these* reasons for taking sex into account different from all the rest? Title VII's text can offer no answer.

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. "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").

. . .

. . . [T]he employers and dissents . . . 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. . . .

If anything, the employers' . . . framing may only add new problems. The employers assert that "no

one" in 1964 or for some time after would have anticipated today's result. But is that really true? Not long after the law's passage, gay and transgender employees began filing Title VII complaints, so at least *some* people foresaw this potential application. See, *e.g.*, *Smith v. Liberty Mut. Ins. Co.*, 395 F.Supp. 1098, 1099 (ND Ga. 1975) (addressing claim from 1969); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 661 (CA9 1977) (addressing claim from 1974). And less than a decade after Title VII's passage, during debates over the Equal Rights Amendment, others counseled that its language—which was strikingly similar to Title VII's—might also protect homosexuals from discrimination. See, *e.g.*, Note, The Legality of Homosexual Marriage, 82 Yale L. J. 573, 583–584 (1973).

Why isn't that enough to demonstrate that today's result isn't totally unexpected? How many people have to foresee the application for it to qualify as "expected"? Do we look only at the moment the statute was enacted, or do we allow some time for the implications of a new statute to be worked out? Should we consider the expectations of those who had no reason to give a particular application any thought or only those with reason to think about the question? How do we account for those who change their minds over time, after learning new facts or hearing a new argument? How specifically or generally should we frame the "application" at issue? None of these questions have obvious answers, and the employers don't propose any.

One could also reasonably fear that objections about unexpected applications will not be deployed neutrally. Often lurking just behind such objections resides a cynicism that Congress could not *possibly* have meant to protect a disfavored group. . . . [A]pplying protective laws to groups that were politically unpopular at the time of the law's passage—whether prisoners in the 1990s or homosexual and transgender employees in the 1960s—often may be seen as unexpected. But to refuse enforcement just because of that, because the parties before us happened to be unpopular at the time of the law's passage, would not only require us to abandon our role as interpreters of statutes; it would tilt the scales of justice in favor of the strong or popular and neglect the promise that all persons are entitled to the benefit of the law's terms.

The employer's position also 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. . . .

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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." As used in Title VII, the term "'discriminate against'" refers to "distinctions or differences in treatment that injure protected individuals." *Burlington N. & S.F.R.*, 548 U.S. at 59. Firing employees because of a statutorily protected trait surely counts. 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), 107 Stat. 1488, 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.

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. . . 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.

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- JUSTICE ALITO, with whom Justice THOMAS joins, dissenting.

There is only one word for what the Court has done today: legislation. . . .

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.[4] 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

[4] Section 7(b) of H.R. 5 strikes the term "sex" in 42 U.S.C. § 2000e–2 and inserts: "SEX (INCLUDING SEXUAL ORIENTATION AND GENDER IDENTITY)."

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.

I

A

Title VII, as noted, prohibits discrimination "because of ... sex," § 2000e–2(a)(1), and in 1964, it was as clear as clear could be that this meant discrimination because of the genetic and anatomical characteristics that men and women have at the time of birth. Determined searching has not found a single dictionary from that time that defined "sex" to mean sexual orientation, gender identity, or "transgender status."[6]

. . .

The Court does not dispute that this is what "sex" means in Title VII[.] . . .

If that is so, it should be perfectly clear that Title VII does not reach discrimination because of sexual orientation or gender identity. If "sex" in Title VII means biologically male or female, then discrimination because of sex means discrimination because the person in question is biologically male or biologically female, not because that person is sexually attracted to members of the same sex or identifies as a member of a particular gender.

. . .

Contrary to the Court's contention, discrimination because of sexual orientation or gender identity does not in and of itself entail discrimination because of sex. We can see this because it is quite possible for an employer to discriminate on those grounds without taking the sex of an individual applicant or employee into account. An employer can have a policy that says: "We do not hire gays, lesbians, or transgender individuals." And an employer can implement this policy without paying any attention to or even knowing the biological sex of gay, lesbian, and transgender applicants. . . .

At oral argument, the attorney representing the employees, a prominent professor of constitutional law, was asked if there would be discrimination because of sex if an employer with a blanket policy against hiring gays, lesbians, and transgender individuals implemented that policy without knowing the biological sex of any job applicants. Her candid answer was that this would "not" be sex discrimination.[10] And she was

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[6] The Court does not define what it means by "transgender status," but the American Psychological Association describes "transgender" as "[a]n umbrella term encompassing those whose gender identities or gender roles differ from those typically associated with the sex they were assigned at birth." A Glossary: Defining Transgender Terms, 49 Monitor on Psychology 32 (Sept. 2018), https://www.apa.org/monitor/2018/09/ce-corner-glossary. It defines "gender identity" as "[a]n internal sense of being male, female or something else, which may or may not correspond to an individual's sex assigned at birth or sex characteristics." *Ibid.* Under these definitions, there is no apparent difference between discrimination because of transgender status and discrimination because of gender identity.

[10] See Tr. of Oral Arg. in Nos. 17–1618, 17–1623, pp. 69–70 ("If there was that case, it might be the rare case in which sexual orientation discrimination is not a subset of sex"); see also *id.*, at 69 ("Somebody who comes in and says I'm not going to tell you what my sex is,

right.

The attorney's concession was necessary, but it is fatal to the Court's interpretation, for if an employer discriminates against individual applicants or employees without even knowing whether they are male or female, it is impossible to argue that the employer intentionally discriminated because of sex. An employer cannot intentionally discriminate on the basis of a characteristic of which the employer has no knowledge. And if an employer does not violate Title VII by discriminating on the basis of sexual orientation or gender identity without knowing the sex of the affected individuals, there is no reason why the same employer could not lawfully implement the same policy even if it knows the sex of these individuals. If an employer takes an adverse employment action for a perfectly legitimate reason—for example, because an employee stole company property—that action is not converted into sex discrimination simply because the employer knows the employee's sex. As explained, a disparate treatment case requires proof of intent—*i.e.,* that the employee's sex motivated the firing. In short, what this example shows is that discrimination because of sexual orientation or gender identity does not inherently or necessarily entail discrimination because of sex, and for that reason, the Court's chief argument collapses.

. . .

IV

What the Court has done today—interpreting discrimination because of "sex" to encompass discrimination because of sexual orientation or gender identity—is virtually certain to have far-reaching consequences. Over 100 federal statutes prohibit discrimination because of sex. . . . As to Title VII itself, the Court dismisses questions about "bathrooms, locker rooms, or anything else of the kind." And it declines to say anything about other statutes whose terms mirror Title VII's.

The Court's brusque refusal to consider the consequences of its reasoning is irresponsible. If the Court had allowed the legislative process to take its course, Congress would have had the opportunity to consider competing interests and might have found a way of accommodating at least some of them. In addition, Congress might have crafted special rules for some of the relevant statutes. But by intervening and proclaiming categorically that employment discrimination based on sexual orientation or gender identity is simply a form of discrimination because of sex, the Court has greatly impeded—and perhaps effectively ended—any chance of a bargained legislative resolution. Before issuing today's radical decision, the Court should have given some thought to where its decision would lead.

As the briefing in these cases has warned, the position that the Court now adopts will threaten freedom of religion, freedom of speech, and personal privacy and safety. No one should think that the Court's decision represents an unalloyed victory for individual liberty.

I will briefly note some of the potential consequences of the Court's decision, but I do not claim to provide a comprehensive survey or to suggest how any of these issues should necessarily play out under the Court's reasoning.[43]

"[B]athrooms, locker rooms, [and other things] of [that] kind." The Court may wish to avoid this subject, but it is a matter of concern to many people who are reticent about disrobing or using toilet facilities in the presence of individuals whom they regard as members of the opposite sex. For some, this may simply be a question of modesty, but for others, there is more at stake. For women who have been victimized by sexual assault or abuse, the experience of seeing an unclothed person with the anatomy of a male in a confined and sensitive location such as a bathroom or locker room can cause serious psychological harm.[44]

Under the Court's decision, however, transgender persons will be able to argue that they are entitled to use a bathroom or locker room that is reserved for persons of the sex with which they identify, and while the Court does not define what it means by a transgender person, the term may apply to individuals who are "gender fluid," that is, individuals whose gender identity is mixed or changes over time.[45] Thus, a person

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but, believe me, I was fired for my sexual orientation, that person will lose").

[43] Contrary to the implication in the Court's opinion, I do not label these potential consequences "undesirable." I mention them only as possible implications of the Court's reasoning.

[44] Brief for Defend My Privacy et al. as *Amici Curiae* 7–10.

[45] See 1 Sadock, Comprehensive Textbook of Psychiatry, at 2063 (explaining that "gender is now often regarded as more *fluid*" and "[t]hus, gender identity may be described as masculine, feminine, or somewhere in between").

who has not undertaken any physical transitioning may claim the right to use the bathroom or locker room assigned to the sex with which the individual identifies at that particular time. The Court provides no clue why a transgender person's claim to such bathroom or locker room access might not succeed.

A similar issue has arisen under Title IX, which prohibits sex discrimination by any elementary or secondary school and any college or university that receives federal financial assistance.[46] In 2016, a Department of Justice advisory warned that barring a student from a bathroom assigned to individuals of the gender with which the student identifies constitutes unlawful sex discrimination,[47] and some lower court decisions have agreed. See *Whitaker v. Kenosha Unified School Dist. No. 1 Bd. of Ed.*, 858 F.3d 1034, 1049 (CA7 2017); *G. G. v. Gloucester Cty. School Bd.*, 822 F.3d 709, 715 (CA4 2016), vacated and remanded, 580 U.S. ——, 137 S.Ct. 1239 (2017); *Adams v. School Bd. of St. Johns Cty.*, 318 F.Supp.3d 1293, 1325 (MD Fla. 2018); cf. *Doe* v. *Boyertown Area School Dist.*, 897 F.3d 518, 533 (CA3 2018), cert. denied, 587 U.S. ——, 139 S.Ct. 2636 (2019).

. . .

Constitutional claims. Finally, despite the important differences between the Fourteenth Amendment and Title VII, the Court's decision may exert a gravitational pull in constitutional cases. Under our precedents, the Equal Protection Clause prohibits sex-based discrimination unless a "heightened" standard of review is met. *Sessions* v. *Morales-Santana*, 582 U.S. ——, ——, 137 S.Ct. 1678, 1689 (2017); *United States v. Virginia*, 518 U.S. 515, 532–534 (1996). By equating discrimination because of sexual orientation or gender identity with discrimination because of sex, the Court's decision will be cited as a ground for subjecting all three forms of discrimination to the same exacting standard of review.

Under this logic, today's decision may have effects that extend well beyond the domain of federal antidiscrimination statutes. This potential is illustrated by pending and recent lower court cases in which transgender individuals have challenged a variety of federal, state, and local laws and policies on constitutional grounds. See, *e.g.*, Complaint in *Hecox* [*v. Little*], No. 1: 20–CV–00184 [(D. Idaho, Apr. 15, 2020)] (state law prohibiting transgender students from competing in school sports in accordance with their gender identity); Second Amended Complaint in *Karnoski* v. *Trump*, No. 2:17–cv–01297 (WD Wash., July 31, 2019) (military's ban on transgender members); *Kadel v. Folwell*, —— F. Supp. 3d ——, —— – ——, 2020 WL 1169271, *10–*11 (MDNC, Mar. 11, 2020) (state health plan's exclusion of coverage for sex reassignment procedures); Complaint in *Gore* v. *Lee*, No. 3:19–cv–00328 (MD Tenn., Mar. 3, 2020) (change of gender on birth certificates); Brief for Appellee in *Grimm* v. *Gloucester Cty. School Bd.*, No. 19–1952 (CA4, Nov. 18, 2019) (transgender student forced to use gender neutral bathrooms at school); Complaint in *Corbitt* v. *Taylor*, No. 2:18–cv–00091 (MD Ala., July 25, 2018) (change of gender on driver's licenses); *Whitaker*, 858 F.3d at 1054 (school policy requiring students to use the bathroom that corresponds to the sex on birth certificate); *Keohane v. Florida Dept. of Corrections Secretary*, 952 F.3d 1257, 1262–1265 (CA11 2020) (transgender prisoner denied hormone therapy and ability to dress and groom as a female); *Edmo v. Corizon, Inc.*, 935 F.3d 757, 767 (CA9 2019) (transgender prisoner requested sex reassignment surgery); cf. *Glenn v. Brumby*, 663 F.3d 1312, 1320 (CA11 2011) (transgender individual fired for gender non-conformity).

Although the Court does not want to think about the consequences of its decision, we will not be able to avoid those issues for long. The entire Federal Judiciary will be mired for years in disputes about the reach of the Court's reasoning.

* * *

The updating desire to which the Court succumbs no doubt arises from humane and generous impulses. Today, many Americans know individuals who are gay, lesbian, or transgender and want them to be treated with the dignity, consideration, and fairness that everyone deserves. But the authority of this Court is limited to saying what the law *is*.

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[46] Title IX makes it unlawful to discriminate on the basis of sex in education: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

[47] See Dept. of Justice & Dept. of Education, Dear Colleague Letter on Transgender Students, May 13, 2016 (Dear Colleague Letter), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf.

The Court itself recognizes this:

> "The place to make new 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." *Ante*, at ——.

It is easy to utter such words. If only the Court would live by them.

I respectfully dissent.

▪ 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. . . .

The policy arguments for amending Title VII are very weighty. . . .

But we are judges, not Members of Congress. . . . Our role is not to make or amend the law. As written, Title VII does not prohibit employment discrimination because of sexual orientation.[1]

. . .

II

. . .

. . . [T]his case involves sexual orientation discrimination, which has long and widely been understood as distinct from, and not a form of, sex discrimination. Until now, federal law has always reflected that common usage and recognized that distinction between sex discrimination and sexual orientation discrimination. To fire one employee because she is a woman and another employee because he is gay implicates two distinct societal concerns, reveals two distinct biases, imposes two distinct harms, and falls within two distinct statutory prohibitions.

. . .

As a result, many Americans will not buy the novel interpretation unearthed and advanced by the Court today. . . .

I have the greatest, and unyielding, respect for my colleagues and for their good faith. But when this Court usurps the role of Congress, as it does today, the public understandably becomes confused about who the policymakers really are in our system of separated powers, and inevitably becomes cynical about the oft-repeated aspiration that judges base their decisions on law rather than on personal preference. The best way for judges to demonstrate that we are deciding cases based on the ordinary meaning of the law is to walk the walk, even in the hard cases when we might prefer a different policy outcome.

* * *

. . .

Notwithstanding my concern about the Court's transgression of the Constitution's separation of powers, it is appropriate to acknowledge the important victory achieved today by gay and lesbian Americans. Millions of gay and lesbian Americans have worked hard for many decades to achieve equal treatment in fact and in law. They have exhibited extraordinary vision, tenacity, and grit—battling often steep odds in the legislative and judicial arenas, not to mention in their daily lives. They have advanced powerful policy arguments and can take pride in today's result. Under the Constitution's separation of powers, however, I believe that it was Congress's role, not this Court's, to amend Title VII. I therefore must respectfully dissent from the Court's judgment.

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[1] Although this opinion does not separately analyze discrimination on the basis of gender identity, this opinion's legal analysis of discrimination on the basis of sexual orientation would apply in much the same way to discrimination on the basis of gender identity.

Note

How does *Bostock* and the controversy it involves relate to family law and family welfare? Concretely, is *Bostock* practically conceivable without the Supreme Court's decisions leading up to and culminating in *Obergefell v. Hodges*? How do the opinions in *Bostock* differentially make work and life opportunities available to different workers, households, and families?

On page 283 of the Unabridged 7th edition, and on page 223 of the Concise 7th edition, after *Whole Woman's Health* replace the notes after the case with the following note:

Note

In *June Medical Services L.L.C. v. Russo*, 591 U.S. ----, 140 S. Ct. 2103 (2020), the Supreme Court returned to the meaning and scope of constitutional abortion rights. While many commentators predicted that *June Medical* would deal a major set-back to abortion rights, the Court instead actually struck down the state abortion restriction involved in the case. A plurality opinion, written by Justice Stephen Breyer and joined by Justices Ginsburg, Sotomayor, and Kagan, made clear that the broad rule announced in *Whole Woman's Health* remains good law. In a separate opinion concurring in the judgment, Chief Justice John G. Roberts, Jr., agrees with the majority's conclusion about the similarities between the laws at issue in *June Medical* and in *Whole Woman's Health*, and on their constitutionality. The Chief Justice's opinion, however, rejects some of the broader prospects found in the Court's *Whole Woman's Health* opinion. His concurrence makes clear that *Whole Woman's Health*, in his view, should not be understood to constitute an expansion on the Supreme Court's earlier decision in *Planned Parenthood of Southeastern Pa. v. Casey*. As to the central question of the scope of constitutionally protected abortion rights, the Chief Justice's concurrence indicates that considerations of stare decisis and respect for the rule of law ground his decision in the case, which applies the *Casey* framework with its "undue burden" test. Dissents in the case not only would have upheld the law at issue in *June Medical*, but call the Supreme Court's constitutional jurisprudence differentially into doubt.

As you read the excerpts from Justice Breyer's plurality opinion, from Chief Justice Roberts's concurrence, and from dissents filed by Justice Clarence Thomas, Justice Samuel Alito, and Justice Brett Kavanaugh, ask yourself what you can tell about where the Supreme Court might go next in its abortion rights jurisprudence. Does *June Medical*, specifically Chief Justice Roberts's opinion, suggest a simple return to *Planned Parenthood v. Casey*? Does that mean a return to that decision as the co-authors of that opinion might have understood it, including as a decision that was in part designed to settle the ongoing questions about *Roe* and the contentious nature of legal fights about abortion rights as against religious and/or traditional moral pro-life interests? Or does Chief Justice Roberts's opinion look forward to a cut-back on *Whole Woman's Health* and a return to *Casey* that are more incrementalist, a means by which to slow down and get the sequencing and timing of reconsidering the Court's abortion jurisprudence just right? In different terms, how does the Chief Justice's concurrence position itself in relation to the clashes of values that the Court's abortion rights jurisprudence reflects? Do you find any clear indications in the text of the Chief Justice's concurrence as reproduced below?

June Medical Services L.L.C. v. Russo

Supreme Court of the United States, 2020
591 U.S. ----, 140 S. Ct. 2103 (June 29, 2020)

- JUSTICE BREYER announced the judgment of the Court and delivered an opinion, in which JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join.

In *Whole Woman's Health* v. *Hellerstedt*, 579 U. S. ——, 136 S.Ct. 2292 (2016), we held that "'[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right'" and are therefore "constitutionally invalid." *Id.,* at ——, 136 S.Ct., at 2300 (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 878 (1992) (plurality opinion); alteration in original). We explained that this standard requires courts independently to review the legislative findings upon which an abortion-related statute rests and to weigh the law's "asserted benefits against the burdens" it imposes on abortion access. 579 U. S., at ——, 136 S.Ct.,

at 2310 (citing *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007)).

The Texas statute at issue in *Whole Woman's Health* required abortion providers to hold "'active admitting privileges at a hospital'" within 30 miles of the place where they perform abortions. 579 U. S., at ——, 136 S.Ct., at 2300 (quoting Tex. Health & Safety Ann. Code § 171.0031(a) (West Cum. Supp. 2015)). Reviewing the record for ourselves, we found ample evidence to support the District Court's finding that the statute did not further the State's asserted interest in protecting women's health. The evidence showed, moreover, that conditions on admitting privileges that served no "relevant credentialing function," 579 U. S., at ——, 136 S.Ct., at 2313, "help[ed] to explain" the closure of half of Texas' abortion clinics, *id.,* at ——, 136 S.Ct., at 2312. Those closures placed a substantial obstacle in the path of Texas women seeking an abortion. *Ibid.* And that obstacle, "when viewed in light of the virtual absence of any health benefit," imposed an "undue burden" on abortion access in violation of the Federal Constitution. *Id.,* at ——, 136 S.Ct., at 2313; see *Casey*, 505 U.S. at 878 (plurality opinion).

In this case, we consider the constitutionality of a Louisiana statute, Act 620, that is almost word-for-word identical to Texas' admitting-privileges law. See La. Rev. Stat. Ann. § 40:1061.10(A)(2)(a) (West 2020). As in *Whole Woman's Health,* the District Court found that the statute offers no significant health benefit. It found that conditions on admitting privileges common to hospitals throughout the State have made and will continue to make it impossible for abortion providers to obtain conforming privileges for reasons that have nothing to do with the State's asserted interests in promoting women's health and safety. And it found that this inability places a substantial obstacle in the path of women seeking an abortion. As in *Whole Woman's Health*, the substantial obstacle the Act imposes, and the absence of any health-related benefit, led the District Court to conclude that the law imposes an undue burden and is therefore unconstitutional. See U. S. Const., Amdt. 14, § 1.

The Court of Appeals agreed with the District Court's interpretation of the standards we have said apply to regulations on abortion. It thought, however, that the District Court was mistaken on the facts. We disagree. We have examined the extensive record carefully and conclude that it supports the District Court's findings of fact. Those findings mirror those made in *Whole Woman's Health* in every relevant respect and require the same result. We consequently hold that the Louisiana statute is unconstitutional.

. . .

Reversed.

▪ CHIEF JUSTICE ROBERTS, concurring in the judgment.

In July 2013, Texas enacted a law requiring a physician performing an abortion to have "active admitting privileges at a hospital ... located not further than 30 miles from the location at which the abortion is performed." Tex. Health & Safety Code Ann. § 171.0031(a)(1)(A) (West Cum. Supp. 2019). The law caused the number of facilities providing abortions to drop in half. In *Whole Woman's Health* v. *Hellerstedt*, 579 U.S. ——, 136 S.Ct. 2292 (2016), the Court concluded that Texas's admitting privileges requirement "places a substantial obstacle in the path of women seeking a previability abortion" and therefore violated the Due Process Clause of the Fourteenth Amendment. *Id.,* at ——, 136 S.Ct. (slip op., at 2) (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 878 (1992) (plurality opinion)).

I joined the dissent in *Whole Woman's Health* and continue to believe that the case was wrongly decided. The question today however is not whether *Whole Woman's Health* was right or wrong, but whether to adhere to it in deciding the present case. See *Moore* v. *Texas*, 586 U. S. ——, ——, 139 S.Ct. 666, 203 (2019) (ROBERTS, C. J., concurring) (slip op., at 1).

Today's case is a challenge from several abortion clinics and providers to a Louisiana law nearly identical to the Texas law struck down four years ago in *Whole Woman's Health*. Just like the Texas law, the Louisiana law requires physicians performing abortions to have "active admitting privileges at a hospital ... located not further than thirty miles from the location at which the abortion is performed." La. Rev. Stat. Ann. § 40:1061.10(A)(2)(a) (West Cum. Supp. 2020). Following a six-day bench trial, the District Court found that Louisiana's law would "result in a drastic reduction in the number and geographic distribution of abortion providers." *June Medical Services LLC v. Kliebert*, 250 F.Supp.3d 27, 87 (MD La. 2017). The law

would reduce the number of clinics from three to "one, or at most two," and the number of physicians providing abortions from five to "one, or at most two," and "therefore cripple women's ability to have an abortion in Louisiana." *Id.,* at 87–88.

The legal doctrine of *stare decisis* requires us, absent special circumstances, to treat like cases alike. The Louisiana law imposes a burden on access to abortion just as severe as that imposed by the Texas law, for the same reasons. Therefore Louisiana's law cannot stand under our precedents.

I

Stare decisis ("to stand by things decided") is the legal term for fidelity to precedent. Black's Law Dictionary 1696 (11th ed. 2019). It has long been "an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion." 1 W. Blackstone, Commentaries on the Laws of England 69 (1765). This principle is grounded in a basic humility that recognizes today's legal issues are often not so different from the questions of yesterday and that we are not the first ones to try to answer them. Because the "private stock of reason ... in each man is small, ... individuals would do better to avail themselves of the general bank and capital of nations and of ages." 3 E. Burke, Reflections on the Revolution in France 110 (1790).

Adherence to precedent is necessary to "avoid an arbitrary discretion in the courts." The Federalist No. 78, p. 529 (J. Cooke ed. 1961) (A. Hamilton). The constraint of precedent distinguishes the judicial "method and philosophy from those of the political and legislative process." Jackson, Decisional Law and Stare Decisis, 30 A. B. A. J. 334 (1944).

The doctrine also brings pragmatic benefits. Respect for precedent "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). It is the "means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion." *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986). In that way, "*stare decisis* is an old friend of the common lawyer." [*Barrows v.*] *Jackson*, [346 U.S. 249,] 334 [(1953)].

Stare decisis is not an "inexorable command." *Ramos* v. *Louisiana*, 590 U. S. ——, ——, 140 S.Ct. 1390 (2020) (slip op., at 20) (internal quotation marks omitted). But for precedent to mean anything, the doctrine must give way only to a rationale that goes beyond whether the case was decided correctly. The Court accordingly considers additional factors before overruling a precedent, such as its adminstrability, its fit with subsequent factual and legal developments, and the reliance interests that the precedent has engendered. See *Janus* v. *State, County, and Municipal Employees,* 585 U. S. ——, —— – ——, 138 S.Ct. 2448 (2018) (slip op., at 34–35).

Stare decisis principles also determine how we handle a decision that itself departed from the cases that came before it. In those instances, "[r]emaining true to an 'intrinsically sounder' doctrine established in prior cases better serves the values of *stare decisis* than would following" the recent departure. *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 231 (1995) (plurality opinion). *Stare decisis* is pragmatic and contextual, not "a mechanical formula of adherence to the latest decision." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940).

II

A

Both Louisiana and the providers agree that the undue burden standard announced in *Casey* provides the appropriate framework to analyze Louisiana's law. Brief for Petitioners in No. 18–1323, pp. 45–47; Brief for Respondent in No. 18–1323, pp. 60–62. Neither party has asked us to reassess the constitutional validity of that standard.

Casey reaffirmed "the most central principle of *Roe* v. *Wade*," "a woman's right to terminate her pregnancy before viability." *Casey*, 505 U.S. at 871 (plurality opinion).[1] At the same time, it recognized that

[1] Although parts of *Casey*'s joint opinion were a plurality not joined by a majority of the Court, the joint opinion is nonetheless

the State has "important and legitimate interests in ... protecting the health of the pregnant woman and in protecting the potentiality of human life." *Id.,* at 875–876 (internal quotation marks and brackets omitted).

To serve the former interest, the State may, "[a]s with any medical procedure," enact "regulations to further the health or safety of a woman seeking an abortion." *Id.,* at 878. To serve the latter interest, the State may, among other things, "enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term." *Id.,* at 872. The State's freedom to enact such rules is "consistent with *Roe*'s central premises, and indeed the inevitable consequence of our holding that the State has an interest in protecting the life of the unborn." *Id.,* at 873.

Under *Casey*, the State may not impose an undue burden on the woman's ability to obtain an abortion. "A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.,* at 877. Laws that do not pose a substantial obstacle to abortion access are permissible, so long as they are "reasonably related" to a legitimate state interest. *Id.,* at 878.

After faithfully reciting this standard, the Court in *Whole Woman's Health* added the following observation: "The rule announced in *Casey* ... requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer." 579 U. S., at ——— – ———, 136 S.Ct. (slip op., at 19–20). The plurality repeats today that the undue burden standard requires courts "to weigh the law's asserted benefits against the burdens it imposes on abortion access." *Ante,* at ——— (internal quotation marks omitted).

Read in isolation from *Casey*, such an inquiry could invite a grand "balancing test in which unweighted factors mysteriously are weighed." *Marrs v. Motorola, Inc.*, 577 F.3d 783, 788 (CA7 2009). Under such tests, "equality of treatment is ... impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated; judicial courage is impaired." Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1182 (1989).

In this context, courts applying a balancing test would be asked in essence to weigh the State's interests in "protecting the potentiality of human life" and the health of the woman, on the one hand, against the woman's liberty interest in defining her "own concept of existence, of meaning, of the universe, and of the mystery of human life" on the other. *Casey*, 505 U.S. at 851 (opinion of the Court); *id.,* at 871 (plurality opinion) (internal quotation marks omitted). There is no plausible sense in which anyone, let alone this Court, could objectively assign weight to such imponderable values and no meaningful way to compare them if there were. Attempting to do so would be like "judging whether a particular line is longer than a particular rock is heavy," *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in judgment). Pretending that we could pull that off would require us to act as legislators, not judges, and would result in nothing other than an "unanalyzed exercise of judicial will" in the guise of a "neutral utilitarian calculus." *New Jersey v. T. L. O.*, 469 U.S. 325, 369 (1985) (Brennan, J., concurring in part and dissenting in part).

Nothing about *Casey* suggested that a weighing of costs and benefits of an abortion regulation was a job for the courts. On the contrary, we have explained that the "traditional rule" that "state and federal legislatures [have] wide discretion to pass legislation in areas where there is medical and scientific uncertainty" is "consistent with *Casey*." *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007). *Casey* instead focuses on the existence of a substantial obstacle, the sort of inquiry familiar to judges across a variety of contexts. See, *e.g., Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (asking whether the government "substantially burdens a person's exercise of religion" under the Religious Freedom Restoration Act); *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 748 (2011) (asking whether a law "imposes a substantial burden on the speech of privately financed candidates and independent expenditure groups"); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516, 521 (1999) (asking, in the context of the Americans with Disabilities Act, whether an individual's impairment "substantially limits one or more major life activities" (internal quotation marks omitted)).

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considered the holding of the Court under *Marks v. United States*, 430 U.S. 188, 193 (1977), as the narrowest position supporting the judgment.

. . .

We should respect the statement in *Whole Woman's Health* that it was applying the undue burden standard of *Casey*. The opinion in *Whole Woman's Health* began by saying, "We must here decide whether two provisions of [the Texas law] violate the Federal Constitution as interpreted in *Casey*." 579 U. S., at ——, 136 S.Ct. (slip op., at 1). Nothing more. The Court explicitly stated that it was applying "the standard, as described in *Casey*," and reversed the Court of Appeals for applying an approach that did "not match the standard that this Court laid out in *Casey*." *Id.,* at ——, ——, 136 S.Ct. (slip op., at 19, 20).

Here the plurality expressly acknowledges that we are not considering how to analyze an abortion regulation that does not present a substantial obstacle. "That," the plurality explains, "is not this case." *Ante*, at ——. In this case, *Casey*'s requirement of finding a substantial obstacle before invalidating an abortion regulation is therefore a sufficient basis for the decision, as it was in *Whole Woman's Health*. In neither case, nor in *Casey* itself, was there call for consideration of a regulation's benefits, and nothing in *Casey* commands such consideration. Under principles of *stare decisis*, I agree with the plurality that the determination in *Whole Woman's Health* that Texas's law imposed a substantial obstacle requires the same determination about Louisiana's law. Under those same principles, I would adhere to the holding of *Casey*, requiring a substantial obstacle before striking down an abortion regulation.

B

Whole Woman's Health held that Texas's admitting privileges requirement placed "a substantial obstacle in the path of women seeking a previability abortion," independent of its discussion of benefits. 579 U. S., at ——, 136 S.Ct. (slip op., at 2) (citing *Casey*, 505 U.S. at 878 (plurality opinion)).[3] Because Louisiana's admitting privileges requirement would restrict women's access to abortion to the same degree as Texas's law, it also cannot stand under our precedent.[4]

To begin, the two laws are nearly identical. Prior to enactment of the Texas law, abortion providers were required either to possess local hospital admitting privileges or to have a transfer agreement with a physician who had such privileges. Tex. Admin. Code, tit. 25, § 139.56(a) (2009). The new law, adopted in 2013, eliminated the option of having a transfer agreement. Providers were required to "[h]ave active admitting privileges at a hospital ... located not further than 30 miles from the location at which the abortion is performed." Tex. Health & Safety Code Ann. § 171.0031(a)(1)(A).

Likewise, Louisiana law previously required abortion providers to have either admitting privileges or a transfer agreement. La. Admin. Code, tit. 48, pt. I, § 4407(A)(3) (2003), 29 La. Reg. 706–707 (2003). In 2014, Louisiana removed the option of having a transfer agreement. Just like Texas, Louisiana now requires abortion providers to "[h]ave active admitting privileges at a hospital ... located not further than thirty miles from the location at which the abortion is performed." La. Rev. Stat. § 40:1061.10(A)(2)(a).

Crucially, the District Court findings indicate that Louisiana's law would restrict access to abortion in just the same way as Texas's law, to the same degree or worse. In Texas, "as of the time the admitting-privileges requirement began to be enforced, the number of facilities providing abortions dropped in half, from about 40 to about 20." *Whole Woman's Health*, 579 U. S., at ——, 136 S.Ct. (slip op., at 24). Eight abortion clinics closed in the months prior to the law's effective date. *Ibid.* Another 11 clinics closed on the day the law took effect. *Ibid.*

Similarly, the District Court found that the Louisiana law would "result in a drastic reduction in the number and geographic distribution of abortion providers." 250 F.Supp.3d at 87. At the time of the District Court's decision, there were three clinics and five physicians performing abortions in Louisiana. *Id.,* at 40, 41. The District Court found that the new law would reduce "the number of clinics to one, or at most two,"

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[3] Justice GORSUCH considers this is a "nonexistent ruling" nowhere to be found in *Whole Woman's Health*. I disagree. *Whole Woman's Health* first surveyed the benefits of Texas's admitting privileges requirement. The Court then transitioned to examining the law's burdens: "*At the same time*, the record evidence indicates that the admitting-privileges requirement places a substantial obstacle in the path of a woman's choice." And the Court made clear that a law which has the purpose or effect of placing "a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability" imposes an "undue burden" and therefore violates the Constitution. Thus the discussion of benefits in *Whole Woman's Health* was not necessary to its holding.

[4] For the reasons the plurality explains, I agree that the abortion providers in this case have standing to assert the constitutional rights of their patients.

and the number of physicians in Louisiana to "one, or at most two," as well. *Id.,* at 87. Even in the best case, "the demand for services would vastly exceed the supply." *Ibid.*

Whole Woman's Health found that the closures of the abortion clinics led to "fewer doctors, longer waiting times, and increased crowding." 579 U. S., at ——, 136 S.Ct. (slip op., at 26). The Court also found that "the number of women of reproductive age living in a county more than 150 miles from a provider increased from approximately 86,000 to 400,000 and the number of women living in a county more than 200 miles from a provider from approximately 10,000 to 290,000." *Ibid.* (internal quotation marks and alterations omitted).

The District Court here likewise found that the Louisiana law would result in "longer waiting times for appointments, increased crowding and increased associated health risk." 250 F.Supp.3d at 81. The court found that Louisiana women already "have difficulty affording or arranging for transportation and childcare on the days of their clinic visits" and that "[i]ncreased travel distance" would exacerbate this difficulty. *Id.,* at 83. The law would prove "particularly burdensome for women living in northern Louisiana ... who once could access a clinic in their own area [and] will now have to travel approximately 320 miles to New Orleans." *Ibid.*

In Texas, "common prerequisites to obtaining admitting privileges that [had] nothing to do with ability to perform medical procedures," including "clinical data requirements, residency requirements, and other discretionary factors," made it difficult for well-credentialed abortion physicians to obtain such privileges. *Whole Woman's Health*, 579 U. S., at ——, 136 S.Ct. (slip op., at 25). In particular, the Court found that "hospitals often condition[ed] admitting privileges on reaching a certain number of admissions per year." *Id.,* at ——, 136 S.Ct. (slip op., at 24) (internal quotation marks omitted). But because complications requiring hospitalization are relatively rare, abortion providers were "unlikely to have any patients to admit" and thus were "unable to maintain admitting privileges or obtain those privileges for the future." *Id.,* at ——, 136 S.Ct. (slip op., at 25).

So too here. "While a physician's competency is a factor in assessing an applicant for admitting privileges" in Louisiana, "it is only one factor that hospitals consider in whether to grant privileges." 250 F.Supp.3d at 46. Louisiana hospitals "may deny privileges or decline to consider an application for privileges for myriad reasons unrelated to competency," including "the physician's expected usage of the hospital and intent to admit and treat patients there, the number of patients the physician has treated in the hospital in the recent past, the needs of the hospital, the mission of the hospital, or the business model of the hospital." *Ibid.*

And the District Court found that, as in Texas, Louisiana "hospitals often grant admitting privileges to a physician because the physician plans to provide services in the hospital" and that "[i]n general, hospital admitting privileges are not provided to physicians who never intend to provide services in a hospital." *Id.,* at 49. But "[b]ecause, by all accounts, abortion complications are rare, an abortion provider is unlikely to have a consistent need to admit patients." *Id.,* at 50 (citations omitted).[6]

Importantly, the District Court found that "since the passage of [the Louisiana law], all five remaining doctors have attempted *in good faith* to comply" with the law by applying for admitting privileges, yet have had very little success. *Id.*, at 78 (emphasis added). This finding was necessary to ensure that the physicians' inability to obtain admitting privileges was attributable to the new law rather than a halfhearted attempt to obtain privileges. Only then could the District Court accurately identify the Louisiana law's burden on abortion access.

The question is not whether we would reach the same findings from the same record. These District Court findings "entail[ed] primarily ... factual work" and therefore are "review[ed] only for clear error." *U. S. Bank N. A.* v. *Village at Lakeridge*, *LLC*, 583 U. S. ——, ——, ——, 138 S.Ct. 960 (2018) (slip op., at 6, 9). Clear error review follows from a candid appraisal of the comparative advantages of trial courts and appellate courts. "While we review transcripts for a living, they listen to witnesses for a living. While we largely read briefs for a living, they largely assess the credibility of parties and witnesses for a living." *Taglieri v. Monasky*, 907 F.3d 404, 408 (CA6 2018) (en banc).

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[6] . . . Appreciating that others may in good faith disagree, however, I cannot view the record here as in any pertinent respect sufficiently different from that in *Whole Woman's Health* to warrant a different outcome.

We accordingly will not disturb the factual conclusions of the trial court unless we are "left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). In my view, the District Court's work reveals no such clear error, for the reasons the plurality explains. *Ante,* at ——— – ———. The District Court findings therefore bind us in this case.

* * *

Stare decisis instructs us to treat like cases alike. The result in this case is controlled by our decision four years ago invalidating a nearly identical Texas law. The Louisiana law burdens women seeking previability abortions to the same extent as the Texas law, according to factual findings that are not clearly erroneous. For that reason, I concur in the judgment of the Court that the Louisiana law is unconstitutional.

▪ JUSTICE THOMAS, dissenting.

. . .

II

. . .

. . . The Constitution does not constrain the States' ability to regulate or even prohibit abortion. This Court created the right to abortion based on an amorphous, unwritten right to privacy, which it grounded in the "legal fiction" of substantive due process, *McDonald v. Chicago*, 561 U.S. 742, 811 (2010) (THOMAS, J., concurring in part and concurring in judgment). As the origins of this jurisprudence readily demonstrate, the putative right to abortion is a creation that should be undone.

. . .

B

Roe is grievously wrong for many reasons, but the most fundamental is that its core holding—that the Constitution protects a woman's right to abort her unborn child—finds no support in the text of the Fourteenth Amendment. . . .

More specifically, the idea that the Framers of the Fourteenth Amendment understood the Due Process Clause to protect a right to abortion is farcical. In 1868, when the Fourteenth Amendment was ratified, a majority of the States and numerous Territories had laws on the books that limited (and in many cases nearly prohibited) abortion. See [*Roe v. Wade,* 410 U.S. 113,] 175, n. 1 [(1973) (Rehnquist, J., dissenting)]. It would no doubt shock the public at that time to learn that one of the new constitutional Amendments contained hidden within the interstices of its text a right to abortion. The fact that it took this Court over a century to find that right all but proves that it was more than hidden—it simply was not (and is not) there.

C

Despite the readily apparent illegitimacy of *Roe*, "the Court has doggedly adhered to [its core holding] again and again, often to disastrous ends." *Gamble* v. *United States*, 587 U. S. ——, ——, 139 S.Ct. 1960 (2019) (THOMAS, J., concurring) (slip op., at 16). In doing so, the Court has repeatedly invoked *stare decisis*. See, *e.g., Casey*, 505 U.S. at 854–869. And today, a majority of the Court insists that this doctrine compels its result. See *ante*, at —— (plurality opinion); *ante,* at ——, —— (opinion of ROBERTS, C. J.).

. . .

THE CHIEF JUSTICE advocates for a Burkean approach to the law that favors adherence to "'the general bank and capital of nations and of ages.'" *Ante*, at —— (quoting 3 E. Burke, Reflections on the Revolution in France 110 (1790)). But such adherence to precedent was conspicuously absent when the Court broke new ground with its decision[] in . . . *Roe*. And no one could seriously claim that [that]

revolutionary decision[]—or *Whole Woman's Health*, decided just four Terms ago—are part of the "*inheritance from our forefathers*," fidelity to which demonstrates "reverence to antiquity." E. Burke, Reflections on the Revolution in France 27–28 (J. Pocock ed. 1987).

More importantly, we exceed our constitutional authority whenever we "appl[y] demonstrably erroneous precedent instead of the relevant law's text." *Gamble*, *supra,* at ——, 139 S.Ct., at (THOMAS, J., concurring) (slip op., at 2). Because we can reconcile neither *Roe* nor its progeny with the text of our Constitution, those decisions should be overruled.

- JUSTICE ALITO, with whom JUSTICE GORSUCH joins, with whom JUSTICE THOMAS joins . . . , and with whom JUSTICE KAVANAUGH joins as to Part[] I . . . , dissenting.

The majority bills today's decision as a facsimile of *Whole Woman's Health* v. *Hellerstedt*, 579 U. S. ––, ——, 136 S.Ct. 2292 (2016), and it's true they have something in common. In both, the abortion right recognized in this Court's decisions is used like a bulldozer to flatten legal rules that stand in the way.

. . .

I

Under our precedent, the critical question in this case is whether the challenged Louisiana law places a "substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Casey*, 505 U.S. at 877 (plurality opinion). If a law like that at issue here does not have that effect, it is constitutional. *Id*., at 884 (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

Casey also rules out the balancing test adopted in *Whole Woman's Health*. *Whole Woman's Health* simply misinterpreted *Casey,* and I agree that *Whole Woman's Health* should be overruled insofar as it changed the *Casey* test. Unless *Casey* is reexamined—and Louisiana has not asked us to do that—the test it adopted should remain the governing standard.

. . .

- JUSTICE KAVANAUGH, dissenting.

. . .

Today, five Members of the Court reject the *Whole Woman's Health* cost-benefit standard. *Ante*, at —— – —— (ROBERTS, C. J., concurring in judgment); *ante*, at —— – —— (THOMAS, J., dissenting); *ante*, at —— (ALITO, J., joined by THOMAS, GORSUCH, and KAVANAUGH, JJ., dissenting); *ante*, at —— – —— (GORSUCH, J., dissenting). A different five Members of the Court conclude that Louisiana's admitting-privileges law is unconstitutional because it "would restrict women's access to abortion to the same degree as" the Texas law in *Whole Woman's Health*. *Ante*, at —— (opinion of ROBERTS, C. J.); see also *ante*, at —— – – —— (opinion of BREYER, J., joined by GINSBURG, SOTOMAYOR, and KAGAN, JJ.).

I agree with the first of those two conclusions. But I respectfully dissent from the second because, in my view, additional factfinding is necessary to properly evaluate Louisiana's law. . . . In short, I agree with Justice ALITO that the Court should remand the case for a new trial and additional factfinding under the appropriate legal standards.