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Living Textualism

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In 2020, the Court held in *Bostock v. Clayton County* that discrimination on the basis of sexual orientation and gender identity is discrimination “because of sex” and therefore violates Title VII of the 1964 Civil Rights Act.¹ That landmark holding extended federal antidiscrimination protection to millions of gay and transgender workers.² But that is not the only axis on which *Bostock* was transformative. For the past twenty-five years, the Court has adopted a living constitutionalist approach to gay rights—an approach that takes account of “evolving understanding[s] of the meaning of equality” in interpreting old laws.³ *Bostock* rejects living constitutionalism in favor of textualism—an approach that eschews “evolving understandings” and seeks to enforce a law’s original public meaning: the meaning the “words on the page [would] have conveyed to the reasonable speaker of English in the relevant audience at the time of enactment.”⁴ As a result, *Bostock* engages in a very different sort of analysis from the Court’s other gay rights decisions. It does not rely on the “new insights and societal understandings”⁵ that played a central role in the same-sex marriage decisions. In fact, the Court in *Bostock* blames “societal understandings” over the past half-century for clouding our vision and preventing us from recognizing that, as a matter of ordinary meaning, Title VII’s prohibition on sex discrimination has always barred discrimination against gay and transgender people.

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¹ 140 S.Ct. 1731, 1737 (2020).

² See KERITH J. CONRON & SHOSHANA K. GOLDBERG, LGBT PEOPLE IN THE U.S. NOT PROTECTED BY STATE NON-DISCRIMINATION STATUTES, WILLIAMS INST., UCLA SCHOOL OF LAW, at 1 (Apr. 2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-ND-Protections-Update-Apr-2020.pdf> (reporting, just prior to *Bostock*, that there were 8.1 million LGBT workers in the U.S. over the age of 16, and that nearly half lived in states without statutory protections against anti-LGBT discrimination in the workplace).

³ *Windsor v. United States*, 570 U.S. 744, 769 (2013); see also *Obergefell v. Hodges*, 576 U.S. 644, 664 (2015) (observing that “[t]he nature of injustice is that we may not always see it in our own times” and asserting that the scope of concepts like liberty and equality will evolve “as we learn [their] meaning”); *id.* at 673 (“[T]he Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged.”); *Lawrence v. Texas*, 539 U.S. 558, 579 (2003) (“[T]imes can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”).

⁴ Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 417 (2013).

⁵ *Obergefell*, 576 U.S. at 673.

Commentators have hailed *Bostock* as a “triumph for textualism”⁶; “a new highwater mark for textualism, as *District of Columbia v. Heller* was for originalism”⁷; confirmation of Justice Elena Kagan’s endlessly quoted observation that “[w]e’re all textualists now.”⁸ This assessment stems in part from the fact that all of the opinions in *Bostock*—the majority and the two dissents—embrace textualism. Not too long ago, textualism was an insurgent methodology. It took shape alongside its close cousin, originalism, as part of a campaign by Reagan-era conservatives to develop “antidotes to the ‘judicial activism’ of the Warren and Burger Courts.”⁹ Those early conservative adopters argued that other modes of statutory interpretation (purposivism, pluralism) do not yield determinate answers and thus invite “judges to imbue authoritative texts with their own policy preferences”¹⁰—preferences that inevitably reflect contemporary (elite) social values and not the values of the people who democratically enacted the law.¹¹ Textualism was intended to combat judicial presentism and policymaking by providing judges with a “single truthmaker”¹²: original public meaning. When judges apply this meaning, they are—on the textualist’s view—applying the law as written, the law that satisfied the requirements of bicameralism and presentment,¹³ the law that reflects the will of the people and not the preferences of today’s judiciary.¹⁴

For many, the fact that *Bostock*’s uniquely high-profile application of textualism resulted in a victory for gay and transgender people cemented its triumph. Textualism has long been associated with political conservatism: It is the Federalist Society’s methodology of choice¹⁵; its

⁶ Jonathan Skrmetti, *Symposium: The Triumph of Textualism: “Only the Written Word is the Law”*, SCOTUSBLOG (Jun. 15, 2020, 9:04 PM), <https://www.scotusblog.com/2020/06/symposium-the-triumph-of-textualism-only-the-written-word-is-the-law/>; see also Daniel Hemel, *The Problem With That Big Gay Rights Decision? It’s Not Really About Gay Rights*, WASH. POST (June 17, 2020, 5:00 AM), <https://www.washingtonpost.com/outlook/2020/06/17/problem-with-that-big-gay-rights-decision-its-not-really-about-gay-rights/>; Ezra Ishmael Young, *Bostock is a Textualist Triumph*, JURIST (June 25, 2020, 3:53 PM), <https://www.jurist.org/commentary/2020/06/ezra-young-bostock-textualist-triumph/>.

⁷ Skrmetti, *supra* note 6.

⁸ Justice Elena Kagan, *The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes* at 8:29 (Nov. 17, 2015), <http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation>.

⁹ Margaret H. Lemos, *The Politics of Statutory Interpretation*, 89 NOTRE DAME L. REV. 849, 853 (2013).

¹⁰ ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* xxviii (2012).

¹¹ See, e.g., *Obergefell v. Hodges*, 576 U.S. 644, 718 (2015) (Scalia, J., dissenting) (“[T]o allow the policy question of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine is to violate a principle even more fundamental than no taxation without representation: no social transformation without representation.”); *Lawrence v. Texas*, 539 U.S. 558, 603–04 (2003) (Scalia, J., dissenting) (“It is indeed true that ‘later generations can see that laws once thought necessary and proper in fact serve only to oppress’ . . . But . . . those judgments are to be made by the people, and not imposed by a governing caste that knows best.” (internal citations omitted)); *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (“This Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected, pronouncing that ‘animosity’ toward homosexuality, is evil.”).

¹² William Baude, *Originalism as a Constraint on Judges*, 84 U. CHI. L. REV. 2213, 2227 (2017).

¹³ See *Bostock v. Clayton County*, 140 S.Ct. 1731, 1755 (2020) (Alito, J., concurring) (arguing that only sections of text that have satisfied Article I requirements of “passage in both Houses and presentment to the President” count as law).

¹⁴ See NEIL GORSUCH, *A REPUBLIC, IF YOU CAN KEEP IT* 132 (2019) (“Textualism honors only what’s survived bicameralism and presentment and not what hasn’t. The text of the statute and only the text becomes law. Not a legislator’s unexpressed intentions, not nuggets buried in the legislative history, and certainly not a judge’s policy preferences.”).

¹⁵ Donald B. Ayer, 2019 Higgins Distinguished Visitor Lecture, *The Subversive Side of Textualism and Original Intent* (Mar. 11, 2019), in 24 LEWIS & CLARK L. REV. 1049, 1054 (2020) (attributing the rise of textualism to the

most prominent champions include Justice Antonin Scalia and other famous conservative jurists¹⁶; and, in practice, it tends to produce legal outcomes consistent with conservative policy preferences.¹⁷ For a theory whose claim to fame is its objectivity and political neutrality, these associations are discomfiting. Thus, when Republican Senator Josh Hawley responded to *Bostock* by publicly denouncing textualism for failing to produce reliably conservative results,¹⁸ it was like winning all over again. Proponents of textualism took to the media, declaring that *Bostock* “shore[s] up textualism’s bona fides”¹⁹ and proves “that textualist methodology . . . can yield progressive or conservative results, depending on what the text says.”²⁰ “If what matters most to you are the results in specific cases,” proponents exulted, “you may want non-originalist judges.”²¹ But if you would prefer an objective and politically neutral methodology that enables judges “to transcend our moral disagreements” and simply apply the rule of law, textualism is the approach for you.²²

It is certainly true that textualism can yield progressive or conservative results.²³ *Bostock* demonstrates as much—but not, this Article argues, for the reasons textualism’s proponents

Reagan Administration’s effort to restrain perceived judicial activism and the Federalist Society’s “coordinated support and evangelism” for this project on law school campuses); Senator Ted Cruz, Second Annual Gregory S. Coleman Memorial Lecture (Sept. 14, 2019), in 24 TEX. REV. L. & POL. 283, 286 (2019) (describing textualism and originalism as “the two legal principles . . . at the heart of the founding of The Federalist Society”).

¹⁶ Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 28 (1998) (observing that “textualism is strongly associated with Reagan and Bush judges”); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 828–29 (2006) (“[A]s an empirical matter, the more conservative justices (Justices Antonin Scalia and Clarence Thomas) have embraced ‘plain meaning’ approaches and the more liberal justices have not.”); Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 373 (2005) (observing that “today’s textualists tend to be politically conservative”).

¹⁷ See Neil H. Buchanan & Michael C. Dorf, *A Tale of Two Formalisms: How Law and Economics Mirrors Originalism and Textualism*, 106 CORNELL L. REV. (forthcoming 2020) (manuscript at 37–42) (on file with author) (observing that judges applying textualist and originalist methods of interpretation reach conservative results in the vast majority of cases); Lemos, *supra* note 9, at 901 (“[T]extualism has become a conservative brand. . . . The strength of the brand is reinforced by what we observe in the practice of textualism: we see conservative judges advocating the methodology, and we see those same judges reaching conservative results in most cases.”).

¹⁸ Senator Josh Hawley, *Was It All for This? The Failure of the Conservative Legal Movement*, PUBLIC DISCOURSE (June 16, 2020), <https://www.thepublicdiscourse.com/2020/06/65043/>.

¹⁹ Young, *supra* note 6.

²⁰ Lawrence B. Solum, *Judge Barrett is an Originalist. Should We Be Afraid?*, L.A. TIMES (Oct. 14, 2020, 1:31 PM), <https://www.latimes.com/opinion/story/2020-10-14/amy-coney-barrett-supreme-court-originalism-conservative>; see also Damon Root, *How Gorsuch Took a Page From Scalia in an LGBT Employment Discrimination Case*, REASON (June 15, 2020, 4:15 PM), <https://reason.com/2020/06/15/how-gorsuch-took-a-page-from-scalia-in-an-lgbt-employment-discrimination-case/> (citing *Bostock* as evidence that textualism is objective and politically neutral and allows judges to set aside personal policy preferences and simply apply the rule of law).

²¹ William Baude, *Conservatives, Don’t Give Up on Your Principles or the Supreme Court*, N.Y. TIMES (July 9, 2020), <https://www.nytimes.com/2020/07/09/opinion/supreme-court-originalism-conservatism.html>.

²² *Id.*; see also George F. Will, *The Supreme Court’s LGBTQ Decision Shows the Conflicting Ideas of Textualism*, WASH. POST (June 16, 2020), https://www.washingtonpost.com/opinions/the-supreme-courts-decision-on-lgbtq-protections-shows-the-conflicting-ideas-of-textualism/2020/06/16/c6979b76-aff8-11ea-8758-bfd1d045525a_story.html (asserting that “the unchanged meaning of the 1964 language entails the conclusion that the court’s majority reached,” and gently chiding “Gorsuch’s conservative critics [for] reasoning backward from a policy outcome of which they disapprove, thereby embracing the result-oriented jurisprudence they usually associate with judicial liberalism”).

²³ Lemos, *supra* note 9, at 906–07.

claim. *Bostock* does not demonstrate that textualism is neutral or objective, that textualism enables judges to put aside contemporary social values and simply apply the rule of law, or that textualism provides a means of “transcend[ing] our moral disagreements.” What it demonstrates is that textualism is no more capable of providing a neutral truthmaker or of cabining the influence of evolving social values than any other leading method of statutory interpretation. All three of the opinions in *Bostock* purport to apply Title VII’s original public meaning. But *Bostock* is not a product of 1964. It is a product of 2020. It reflects today’s moral values and partakes in current forms of legal and social contestation—over same-sex marriage, gender identity, and religious liberty—and that is just as true of the dissenting opinions as it is of the majority opinion.

The problem is not that the Justices in *Bostock* were insufficiently disciplined or did not try hard enough to eradicate present-day understandings from their interpretation of the law. The problem is that textualism does not actually provide judges with a means of excising current “value judgments about persons or policies”²⁴ from the interpretation of contested legal texts. This Article examines some of the reasons why, starting with the fact that, as Justice Gorsuch observes, “the cases that land in the Supreme Court are the hardest ones in our legal system.”²⁵ On a granular level, there may be various factors specific to a given case that make statutory interpretation hard. The meaning of a contested text might be particularly ambiguous, or particularly standard-like. However, what is generally true of the cases that reach the Court is that they are strongly contested. They are the site of significant, often sustained, legal conflict, and—especially now that we’re all textualists—they are the subject of multiple, competing textual interpretations. It would be surprising if text alone clearly and unambiguously resolved such cases with any degree of frequency. As Victoria Nourse puts it: “If grammar alone were enough, the case would never have ended up in the Supreme Court.”²⁶

Textualism and originalism—or, at least, the increasingly dominant version of originalism that shares textualism’s focus on original public meaning—start from the opposite premise. Justice Scalia acknowledged that seekers of original public meaning might occasionally disagree with one another, but he argued that “usually . . . [original public meaning] is easy to discern and simple to apply.”²⁷ Justice Gorsuch argues the same: that “texts are not . . . usually indeterminate” and that “[s]tatutory ambiguities are less like dandelions on an unmowed lawn than they are like manufacturing defects in a modern automobile: they happen, but they are pretty rare.”²⁸ The claim is that “statutes do not change,”²⁹ original public meaning is fixed at the moment of enactment, and judges in almost all cases can easily locate and apply that meaning using “preexisting, neutral, and objective interpretive tools.”³⁰ On occasion, textualist judges (and somewhat more frequently, textualist academics) acknowledge it might not actually be as simple as that.³¹ But Justice Gorsuch insists, “at least when we use the value-neutral tools

²⁴ GORSUCH, *supra* note 14, at 130.

²⁵ *Id.* at 112.

²⁶ Victoria Nourse, *Textualism 3.0: Statutory Interpretation After Justice Scalia*, 70 ALA. L. REV. 667, 681 (2019).

²⁷ ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 45 (1997).

²⁸ GORSUCH, *supra* note 14, at 136 (quoting Judge Raymond Kethledge).

²⁹ SCALIA, *supra* note 27, at 40.

³⁰ GORSUCH, *supra* note 14, at 132.

³¹ See, e.g., GORSUCH, *supra* note 14, at 135 (acknowledging the criticism “that textualism does not yield determinate answers . . . and that meaning is always and ultimately controlled by the interpreter, not the text itself,”

of textualism the dispute remains a distinctly legal one carried out in legal terms.”³² That is clearly preferable to living or dynamic approaches that have no fixed rules, that are “fickle”³³ and unpredictable, and that allow judges to pick and choose from among different forms of evidence depending on what they think the law “ought to mean.”³⁴

Textualism and public meaning originalism do not offer more objectivity or determinacy than their more explicitly dynamic counterparts, however. What they offer is the illusion of those characteristics. At the core of the illusion is the premise that original public meaning is something fixed and determinate that judges merely uncover by consulting period sources. In reality, original public meaning is a judicial construct. It is not something judges find, but something they produce—and something they need to produce because, in the kind of conflicts that reach the Court, there generally is not a single truth of the matter from a semantic standpoint. That may be because the meaning of the statutory text is particularly underdetermined, but it is also because the meaning of that text has been put in contest. And, particularly over time, that contest changes the terrain on which we argue about the statute’s meaning and alters the parameters of what counts as a plausible interpretation of the text. The title *Living Textualism* is meant to capture this evolutionary process, and to suggest that, at its core, textualism is no less “living” than any other leading method of statutory interpretation. Indeed, this Article shows that textualism is a form of dynamic statutory interpretation—one that proceeds by making and remaking the original public meaning of contested statutory text over time.³⁵

Of course, this claim runs directly counter to textualist theory. The textualists on the Court insist that, by consulting a dictionary or a corpus linguistics database and examining the text in context, they can easily discern the single, unambiguous meaning of Title VII’s sex

and suggesting “this argument perhaps contains a nugget of truth” before generally rejecting it); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863–64 (1989) (acknowledging that the search for original meaning is “sometimes inconclusive”; asserting “that one cannot realistically expect judges (probably myself included) to apply [originalist methods] without a trace of constitutional perfectionism”; and “fall[ing] back upon G.K. Chesterton’s observation that a thing worth doing is worth doing badly”). For a discussion of textualist scholars’ various concessions and acknowledgements that this methodology does not always deliver on its promises, see Dorf & Buchanan, *supra* note 17, at *34–37; Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819, 1848–54 (2016); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1 *passim* (2006).

³² GORSUCH, *supra* note 14, at 136.

³³ *Id.* at 112.

³⁴ SCALIA, *supra* note 27, at 18; see also Baude, *supra* note 12, at 2229 (“[I]t remains of some importance that originalism operates as an internal constraint. . . . That fact sets originalism aside from what has been called its greatest competitor—constitutional pluralism, most forms of which fail to contain a single ‘truthmaker.’”).

³⁵ My project differs in this way (and others) from Jack Balkin’s “living originalism.” See JACK M. BALKIN, *LIVING ORIGINALISM* (2011). My aim is not to construct a new hybrid theory of textualism or to expand the parameters of textualism to incorporate some of the insights or mechanisms of other, more explicitly dynamic interpretative methodologies. Fidelity to “original semantic meaning,” *id.* at 37, is a key component of Balkin’s theory; that concept is precisely what this Article critiques. What I mean to convey by the term “living textualism” is that textualism is itself a “living” form of interpretation. In this sense, my argument is closer to the one Reva Siegel makes when she frames originalism as a form of living constitutionalism in *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 192 (2008); *id.* at 192 (aiming to “show how *Heller*’s originalism enforces understandings of the Second Amendment that were forged in the late twentieth century through popular constitutionalism”).

provision and then apply that meaning in an entirely text-driven, value-free way. One result of this simultaneous need to rely and deny reliance on extratextual considerations is that much of the work in *Bostock*—and in textualist opinions more generally—takes place at what this Article calls *shadow decision points*: generally unacknowledged, often outcome-determinative choices about how to interpret statutory text that are framed as methodological, but that are typically fueled by substantive extratextual concerns.

Examples of such shadow decision points include, but are not limited to: which bits of statutory text to subject to textualist analysis; whether to consult a dictionary or a corpus linguistics database or both; which dictionary and/or database to use; which definition to select, if, as often occurs, there are several to choose from; how literally to take that definition; whether to deem the text “ambiguous” and what quantum of ambiguity is sufficient to permit the consultation of some wider unspecified set of extratextual sources; how strongly to weigh original expected applications in determining original public meaning; when to deem a statute amended in a relevant way, potentially substantially altering the appropriate date for determining its original meaning; whether to consult and what significance to attach to earlier versions of a statute, including earlier drafts of the bill that ultimately became law or the original version of a statute that has since been amended³⁶; and because textualists acknowledge that “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils,”³⁷ what is the “principal evil” the statute addresses and what sorts of conduct are sufficiently comparable to that evil to also violate the statute.

There is a growing literature showing how textualist and originalist judges’ choices at such points have influenced the outcome of high-stakes cases, and how dependent those choices have been on unacknowledged extratextual considerations.³⁸ Victoria Nourse has an astute article entitled *Picking and Choosing Text*, which demonstrates, by examining a series of textualist decisions, that the choice to focus on “one piece of text over another can amount to assuming that which one is trying to prove” and “can put the thumb on the scales of any interpretation.”³⁹ Justice Kavanaugh has made the same point about the choice of whether to label a text ambiguous—a key and potentially outcome-determinative step in textualist analysis because it determines whether a judge may look to sources beyond the text—such as legislative history—to decipher its meaning. “[D]eterminations of ambiguity dominate statutory interpretation in a way that few people realize,”⁴⁰ Justice Kavanaugh writes, and such determinations “matter[] in a huge

³⁶ See Anita S. Krishnakumar, *Statutory History*, 108 VA. L. REV. (forthcoming 2022) (manuscript at iii, 4) (on file with author) (finding that “the Justices on the Roberts Court exercise significant discretion when drawing inferences from statutory history” and that a substantial majority “of the statutory history inferences the Court employs conflict in some way with the parameters textualists have articulated to distinguish statutory history from traditional legislative history”).

³⁷ *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1997).

³⁸ Some major works questioning the determinacy and objectivity of textualist analysis include WILLIAM N. ESKRIDGE, JR., *INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION* (2016); ROBERT A. KATZMANN, *JUDGING STATUTES* (2014); and VICTORIA F. NOURSE, *MISREADING LAW, MISREADING DEMOCRACY* (2016). All of these authors have numerous other pieces on this subject as well, as do Richard Fallon, Abbe Gluck, Anita Krishnakumar, Kevin Tobia, and others.

³⁹ Victoria Nourse, *Picking and Choosing Text: Lessons for Statutory Interpretation from the Philosophy of Language*, 69 FLA. L. REV. 1409, 1412, 1409 (2017).

⁴⁰ Brett M. Kavanaugh, Keynote Address: Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions, in 92 NOTRE DAME L. REV. 1907, 1913 (2017).

way in many cases of critical importance to the Nation.”⁴¹ But, he contends, “[t]he simple and troubling truth is that there is no definitive guide for determining whether statutory language is clear or ambiguous,”⁴² and “often no good or predictable way” to make this determination.⁴³ Much of the time, “there is no right answer.”⁴⁴ This, he argues, “is a major problem for the Scalia vision of constraining the discretion of judges and for the corresponding Roberts vision of the judge as umpire.”⁴⁵

Textualism has risen to prominence on this vision of judges as umpires—on the claim that it provides a way of keeping values and other extratextual considerations out of judging by enabling judges to enforce the law as written, and nothing more. But textualism does not exclude such considerations from judicial decisionmaking, it simply makes judges’ reliance on those considerations harder to see. This Article shines a light on this dynamic by examining the Justices’ various accounts of original public meaning in *Bostock*, and in antidiscrimination law more generally. It shows: a) how much of the work involved in identifying and applying the original public meaning of a contested law occurs at shadow decision points; b) how infrequently textualist judges acknowledge they are even making choices at these points; and c) how consistently extratextual considerations are smuggled in at these points to enable textualist judges to reach conclusions not clearly required by the text. In sum, this Article shows how judges working at shadow decision points produce the original public meaning textualist methodology purports to discover. Textualism does not eliminate judicial discretion; but it does mask it. That, this Article argues, is primarily what sets textualism apart from other dynamic interpretive approaches: not the degree to which it constrains judicial discretion, but the degree to which it renders the exercise of that discretion visible and thus professionally and democratically accountable.

Part I analyzes the mechanics of the Justices’ textualist analysis in *Bostock*. It shows that they barely acknowledge and do not justify the ostensibly methodological choices they make—and that they make different methodological choices in closely related contexts, sometimes within the same opinion, or in other opinions interpreting the same piece of statutory text. Upon examination, it is apparent that their forays into dictionaries and corpora are not the real drivers of the legal conclusions in *Bostock*. The real drivers lie elsewhere—not in clashes over the finer

⁴¹ *Id.* at 1910; see also Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2140 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)) (“A number of important Supreme Court decisions have implicated the clarity versus ambiguity problem.”).

⁴² Kavanaugh, *supra* note 40, at 1910.

⁴³ Kavanaugh, *supra* note 41, at 2136.

⁴⁴ Kavanaugh, *supra* note 40, at 1910 (“Here’s my biggest problem. . . . [H]ow do courts know when a statute is clear or ambiguous? . . . Judges go back and forth. One judge will say it is clear. Another judge will say, ‘No, it’s ambiguous.’ Neither judge can convince the other. Why not? The answer is that there is no right answer. There are two separate problems here. First, how much clarity is enough? Sixty-fourty? Eighty-twenty? Who knows. Second, let’s imagine we can agree on eighty-twenty. How do we apply that? How do we know whether and when a statute is eighty percent clear?”).

⁴⁵ Kavanaugh, *supra* note 40, at 1913; see also *id.* at 1911 (arguing that the fact that “there is no coherent way to determine whether a statute is clear or ambiguous . . . is a problem for the goal of neutral statutory interpretation”); Kavanaugh, *supra* note 41, at 2138–39 (arguing that “[b]ecause judgments about clarity versus ambiguity turn on little more than a judge’s instincts,” policy preferences inevitably seep in, and that such “preferences can seep into ambiguity determinations in subconscious ways” because “judges don’t make the clarity versus ambiguity determination behind a veil of ignorance” (footnotes omitted)).

points of textualism but in unstated extratextual judgments about the proper scope of Title VII. Those same judgments fuel the Justices' application of (their preferred version of) the statute's original public meaning. Part I ends by showing that applying even the majority's "simple" anticlassificationist understanding of Title VII requires significant extratextual judgment. Part II shows that the same is true of the dissenters' more overtly culturally-attuned antisubordinationist understanding of the law, and that the dissenting Justices apply that understanding in a blatantly inconsistent manner, jettisoning it altogether when it comes to race, despite the fact that Title VII bars race discrimination and sex discrimination in the same sentence using the same words.

Progressives often fault interpretive methodologies that privilege original public meaning for tethering us to old understandings, unsuited to the modern era: the dead hand problem. That criticism is not entirely fair. As this Article shows, textualism does not necessarily bind us to the past. Original public meaning is a moving target; it evolves over time, in part through the very sort of contestation that occurs in *Bostock*. The more substantial problem with textualism, from a democratic perspective, is that it vastly aggrandizes judicial power. It enables judges to rely on normative and other forms of extratextual judgment while denying that they are doing so; it enables them to decide matters of paramount social importance without providing the people and their elected representatives with a complete account of their reasoning. That creates democratic accountability problems, and it also creates rule-of-law problems. It liberates judges from the burden of demonstrating that their conclusions are based in law and it deprives those governed by law of any real sense of the principles guiding judicial interpretation and of the likely implications of legal precedent. *Bostock* exemplifies these problems. The Justices contend they are simply obeying the dictates of a long-ago public. But the real work in their opinions happens in the shadows. That is different from the dead hand problem. It is the Court exerting its own will, making its own inevitably value-laden choices, falsely claiming its hands were tied.

I) Shadow Decision Points in the Making of Title VII's Original Public Meaning

Commentators have already begun to cast *Bostock* as this generation's equivalent of *Texas v. Johnson*,⁴⁶ the case in which Justice Scalia agreed that the First Amendment protects flag burning: a decision that purportedly cuts against a Justice's policy preferences and therefore proves the objectivity of his interpretive methodology.⁴⁷ Justice Scalia rarely missed an opportunity to emphasize how much he hated the outcome in the flag burning case and how quickly he would throw the flag burner, whom he referred to as a "bearded weirdo," in jail if he were king.⁴⁸ The point he was trying to make (and that many of his fellow textualists have made

⁴⁶ 491 U.S. 397 (1989).

⁴⁷ See, e.g., Akhil Reed Amar, *Justices Shrug Off Politics*, N.Y. TIMES, July 15, 2020, at A23 (citing Justice Gorsuch's decision in *Bostock* as evidence that "there is no aisle on the Supreme Court bench"); Noah Feldman, *The Supreme Court is Still Capable of Shocking the Nation* (July 14, 2020), <https://www.bloombergquint.com/opinion/justices-roberts-gorsuch-show-supreme-court-can-still-surprise> ("Justice Neil Gorsuch revealed himself as so highly principled in his commitment to textualist statutory interpretation that he will carry its logic to conclusions that liberals love. . . . Now liberal academics like me have to admit that he is a serious justice with a serious judicial philosophy that he follows where it logically goes.").

⁴⁸ Erin Fuchs, *Justice Scalia Says He Would Jail This "Bearded Weirdo" If He Were King*, BUS. INSIDER (Mar. 26, 2014, 3:38 PM), <http://www.businessinsider.com/scalia-talks-texas-v-johnson-at-brooklyn-law-2014-3>; see also, e.g., James F. McCarty, *Scalia Says His Beliefs, His Feelings Can Differ: He Tells How He Had to Side with Flag*

subsequently) is that he could not do as he liked because he “ha[d] . . . rules that confine[d]” him: Once he “f[ound] . . . the original meaning” of a legal text, he was “handcuffed” and could not “do all the mean conservative things [he] would like.”⁴⁹ After *Bostock*, some conservative commentators asserted that, once again, “[p]rogressive critics” who portray textualist Justices as “result-oriented reactionaries have egg on their face.”⁵⁰ By siding with the LGBT plaintiffs, Justice Gorsuch demonstrated that he too was handcuffed by the text and would not allow policy preferences to hamper his enforcement of original public meaning.

As a preliminary matter, it is not at all clear that Justice Gorsuch dislikes gay and transgender people and wishes he could do to them what Justice Scalia wanted to do to the flag burner. Approximately ninety percent of Americans believe gay and transgender people should be protected from discrimination in the workplace⁵¹ and there is no reason to believe Justice Gorsuch isn’t among them.⁵² But the more important point is the one Judge Richard Posner made about the discrepancy between Justice Scalia’s “personal and judicial positions” in the flag burning case.⁵³ Judge Posner observed that:

the judicial position may be supporting a more important, though not necessarily less personal, agenda of the Justice. . . . One of the things that is important to Justice Scalia is promoting a textualist approach to the Constitution that would, if adopted, entail the eventual overruling of *Roe v. Wade* and other decisions of which he deeply disapproves. . . . In effect, [by ruling in favor of the flag burner] Justices Scalia . . . trades a minor preference for a major one.⁵⁴

It is not clear that *Bostock* even required such a trade-off. What is clear is that Justice Gorsuch’s ruling enabled him to advance his major preference for textualism. Viewed from that

Burner, PLAIN DEALER, Mar. 20, 2003, at B4; Frank Sikora, *Justice Scalia: Constitution Allows ‘Really Stupid’ Things*, BIRMINGHAM NEWS, Apr. 14, 1999, at 3D; Margaret Talbot, *Supreme Confidence: The Jurisprudence of Justice Antonin Scalia*, NEW YORKER, Mar. 28, 2005, at 40, 43.

⁴⁹ Justice Antonin Scalia, *Constitutional Interpretation the Old Fashioned Way*, Remarks at the Woodrow Wilson International Center for Scholars (Mar. 14, 2005), http://www.cfif.org/htdocs/freedomline/current/guest_commentary/scalia-constitutional-speech.htm; see also, e.g., Steven G. Calabresi & Justin Braga, *The Jurisprudence of Justice Antonin Scalia: A Response to Professor Bruce Allen Murphy and Professor Justin Driver*, 9 N.Y.U. J.L. & LIBERTY 793, 805 (2015); Diarmuid F. O’Sannlain, “We Are All Textualists Now”: *The Legacy of Justice Antonin Scalia*, 91 ST. JOHN’S L. REV. 303, 312–13 (2017); John C. Yoo, *Choosing Justices: A Political Appointments Process and the Wages of Judicial Supremacy*, 98 MICH. L. REV. 1436, 1451 n.25 (2000).

⁵⁰ Ilya Shapiro, *After Bostock, We’re All Textualists Now*, NAT. REV. (June 15, 2020), <https://www.nationalreview.com/2020/06/supreme-court-decision-bostock-v-clayton-county-we-are-all-textualists-now/>.

⁵¹ *Large Majorities, Including Republicans, Oppose Discrimination Against Lesbian, Gay, Bisexual and Transgender People by Employers and Health Care Providers*, Kaiser Fam. Found. (June 24, 2020), <https://www.kff.org/other/press-release/poll-large-majorities-including-republicans-oppose-discrimination-against-lesbian-gay-bisexual-and-transgender-people-by-employers-and-health-care-providers>.

⁵² Richard Primus, *A Weak Assumption in the Discussion of Gorsuch in Bostock*, BALKINIZATION (July 30, 2020), <https://balkin.blogspot.com/2020/07/a-weak-assumption-in-discussion-of.html> (“[H]e followed his principles and not his preferences’ only makes sense here if we think that Gorsuch would prefer a world in which employers were free to discriminate on the basis of sexual orientation and gender identity. . . . I don’t see why I should assume it of Gorsuch.”).

⁵³ Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 50 (2005).

⁵⁴ *Id.* at 50–51.

perspective, it is not clear that the outcome in *Bostock* proves textualism's objectivity and its disregard for extratextual concerns.

This Part shows that *Bostock* proves nothing of the sort. It starts by situating the decision in the context of the Court's other recent gay rights decisions and showing that *Bostock*'s pathbreaking conclusions about Title VII's original public meaning were driven by the same forms of legal contestation and change that have fueled explicitly dynamic forms of doctrinal evolution in the constitutional context. Those extratextual influences become even more apparent in subsequent sections of this Part, which examine how the Justices actually determine Title VII's original public meaning and how the Court applies its understanding of that meaning in *Bostock* and other cases. The idea that textualism enabled the Court to interpret and apply this endlessly contested, highly culturally salient civil rights statute in a completely neutral and objective way, without relying on any extratextual judgments, does not withstand such scrutiny.

A) Textualism as a Form of Dynamic Interpretation

Defenders of the Court's use of textualism in *Bostock* see it differently. Shortly after *Bostock* came down, Tara Grove published an article in the *Harvard Law Review* arguing that the decision vindicates claims of textualism's objectivity and ability to screen out extratextual considerations.⁵⁵ The article argues that, after decades of purposivist precedent denying sex-based Title VII claims by LGBT workers, the Court's embrace of textualism enabled it to look beyond social prejudice and finally apply the statute's true semantic meaning.⁵⁶ The article argues that purposivism's relative porousness to social values means that it may act as an impediment to the realization of civil rights where disfavored groups are concerned—whereas textualism, which puts aside such values, may enable the enforcement of those rights. Indeed, the article suggests that if the Court had embraced textualism fifty years ago, gay and transgender workers might not have had to wait so long to gain protection under Title VII. Although “[i]t is impossible . . . to say for sure how” a textualist court would have ruled fifty years ago if confronted with the claims in *Bostock*, the article asserts, “there is at least some evidence that a textualist approach would have benefitted the plaintiffs.”⁵⁷

In fact, the evidence points strongly in the other direction: The adoption of textualism would have done nothing to alter the fate of gay and transgender workers in the early Title VII cases. One reason it is possible to say this with near certainty is that courts in those cases actually paid a substantial amount of attention to Title VII's text. They observed, with great frequency, that

[i]t is a maxim of statutory construction that, unless otherwise defined, words should be given their ordinary, common meaning. The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are

⁵⁵ Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265 (2020).

⁵⁶ *Id.* at 274–78.

⁵⁷ *Id.* at 278.

men. The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder. . . .⁵⁸

Courts made the same observation in cases with gay plaintiffs, finding that “sexual preference” did not fall within the ordinary meaning of Title VII’s text.⁵⁹ Like today’s textualists, courts in the early cases sometimes quoted the dictionary as part of their analysis of the “ordinary, common meaning”⁶⁰ of sex discrimination.⁶¹ Unlike the Court in *Bostock*, however, courts in the decades after Title VII’s enactment viewed the dictionary definition of “sex” as clearly excluding sexual orientation and gender identity.

It is true that judges in those early cases did not consider themselves textualists. They often professed their readiness to depart from the ordinary meaning of the text if plaintiffs could show that Congress “intended that this 1964 legislation apply to anything other than the traditional concept of sex.”⁶² Such evidence was not forthcoming, however, so courts tended to fall back on the text, concluding “that for the purposes of Title VII the plain meaning must be

⁵⁸ *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (1984); *see also, e.g., id.* at 1087 (“[I]f the term ‘sex’ as it is used in Title VII is to mean more than biological male or biological female, the new definition must come from Congress.”); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (asserting that “for the purposes of Title VII the plain meaning must be ascribed to the term ‘sex,’” and “that the word ‘sex’ in Title VII is to be given its traditional definition, rather than an expansive interpretation”); *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 330 n.3 (9th Cir. 1979) (noting approvingly that, based in part on “the principle that ‘words used in statutes are to be given their ordinary meaning,’ the EEOC has concluded ‘that when Congress used the word sex in Title VII it was referring to a person’s gender’ and not to ‘sexual practices’” (quoting EEOC Dec. No. 76-75, (1976) EMP. PRAC. GUIDE (CCH) ¶ 6495, at 4266)); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977) (rejecting a transgender woman’s Title VII claim after finding “that the term sex should be given the traditional definition based on anatomical characteristics”); *Oiler v. Winn-Dixie La., Inc.*, No. Civ.A. 00-3114, 2002 WL 31098541, at *4 (E.D. La. Sept. 16, 2002) (citing the “maxim of statutory construction that, unless otherwise defined, words should be given their ordinary, common meaning,” and asserting that “discrimination on the basis of sex means discrimination on the basis of the plaintiff’s biological sex” (internal quotation marks omitted)); *Powell v. Read’s, Inc.*, 436 F. Supp. 369, 371 (D. Md. 1977) (granting relief to a transgender woman would be “inconsistent with the plain meaning of the words” of Title VII); *Voyles v. Ralph K. Davies Med. Ctr.*, 402 F. Supp. 456, 457 (N.D. Cal. 1975), *aff’d*, 570 F.2d 354 (9th Cir. 1978) (“[Title VII] speaks of discrimination on the basis of one’s ‘sex.’ No mention is made of change of sex or of sexual preference.”).

⁵⁹ *See, e.g., DeSantis*, 608 F.2d at 329–30 (noting that “Congress has not shown any intent other than to restrict the term ‘sex’ to its traditional meaning,” and declining to “judicially extend[]” that statutory term “to include sexual preference such as homosexuality”) (internal quotation marks omitted); *cf. DeCintio v. Westchester Cnty. Med. Ctr.*, 807 F.2d 304, 306–07 (2d Cir. 1986) (“[T]he other categories afforded protection under Title VII refer to a person’s status as a member of a particular race, color, religion or nationality. ‘Sex,’ when read in this context, logically could only refer to membership in a class delineated by gender, rather than sexual activity. . . .”); *id.* at 306 (declining to expand the definition of sex “to include ‘sexual liaisons’ and ‘sexual attractions’”).

⁶⁰ *Oiler*, 2002 WL 31098541, at *4.

⁶¹ *See, e.g., Holloway*, 566 F.2d at 662 n.4 (quoting the 1970 edition of *Webster’s Seventh New Collegiate Dictionary’s* definition of sex as “either of two divisions of organisms distinguished respectively as male or female,” and citing this definition as evidence that Title VII does not bar discrimination on the basis of “transsexualism”); *cf. In re Estate of Gardiner*, 42 P.3d 120, 135 (Kan. 2002) (quoting the same definition—in a case involving marriage and inheritance—and concluding that “[t]he plain, ordinary meaning” of the word “sex” refers to “a biological man and a biological woman and not persons who are experiencing gender dysphoria”); *id.* (“The word[] ‘sex’ . . . in everyday understanding do[es] not encompass transsexuals.”).

⁶² *Ulane*, 742 F.2d at 1085.

ascribed to the term ‘sex.’”⁶³ In light of courts’ insistence that they were merely enforcing the ordinary meaning of Title VII’s sex provision, it is difficult to see how a more formal embrace of textualism would have altered the outcome of those early cases.⁶⁴ If courts in the 1970s and 1980s had decided to eschew consideration of purpose and intent and focus only on Title VII’s semantic meaning, LGBT plaintiffs would almost always still have lost their claims.

This is because antidiscrimination law is not “autonomous from the beliefs and values” of the society it regulates.⁶⁵ Those beliefs and values will always influence judicial interpretations of the meaning (semantic or otherwise) of Title VII’s ban on sex discrimination. As Justice Alito observes in his dissenting opinion in *Bostock*, gay and transgender people were social pariahs at the time of Title VII’s enactment and for decades thereafter.⁶⁶ They were viewed as mentally diseased and their relationships were criminalized; federal agencies were permitted to fire them; some states barred them from teaching and denied them occupational licenses necessary to work in a range of fields, including law; the military barred them from service; and they were denied entry into the country.⁶⁷ The story with respect to transgender people is similar. In the 1960s, Americans were barely cognizant of that category,⁶⁸ but growing social awareness was not accompanied by acceptance: transgender people were viewed as ill and faced tremendous prejudice, social exclusion, and even violence in the decades after Title VII’s enactment.⁶⁹

⁶³ *Sommers*, 667 F.2d. at 750; see also *Ulane*, 742 F.2d at 1085 (“The dearth of legislative history on [Title VII’s sex provision] strongly reinforces the view that that section means nothing more than its plain language implies.”); *Holloway*, 566 F.2d at 662–63 (discussing the “dearth of legislative history” and concluding that “Congress has not shown any intent other than to restrict the term ‘sex’ to its traditional meaning”); *Grossman v. Bernards Twp. Bd. of Educ.*, No. 74-1904, 1975 WL 302, at *4 (D.N.J. Sept. 10, 1975) (“In the absence of any legislative history indicating a congressional intent to include transsexuals within the language of Title VII the Court is reluctant to ascribe any import to the term ‘sex’ other than its plain meaning.”).

⁶⁴ There were one or two exceptions in these early years in which judges suggested that “transsexuals”—but not gays and lesbians—could state a claim under “the language of the statute itself,” despite the fact “that Congress probably never contemplated that Title VII would apply to transsexuals.” *Holloway*, 566 F.2d at 664 (Goodwin, J., dissenting); see also *Ulane v. E. Airlines, Inc.*, 581 F.Supp. 821, 823 (N.D. Ill. 1983), *overruled by Ulane v. E. Airlines, Inc.*, 742 F.2d 1081 (1984) (“I have no problem with the idea that the statute was not intended . . . to cover the matter of sexual preference. . . . It seems to me an altogether different question as to whether the matter of sexual identity is comprehended by the word, ‘sex.’”); *id.* at 825 (concluding “that working with the word that the Congress gave us to work with,” Title VII covers “transsexuals”). But these rare instances in which judges concluded that the word “sex” applies to transgender people are not evidence that the adoption of textualism would have altered the fortunes even of transgender plaintiffs. All of the other judges that weighed in on the question of whether the ordinary meaning of sex encompasses transgender people answered in the negative. The nearly universal view in this era was that “[a] reading of the statute to cover [a transgender] plaintiff’s grievance would be impermissibly contrived and inconsistent with the plain meaning of the words.” *Powell v. Read’s, Inc.*, 436 F. Supp. 369, 371 (D. Md. 1977).

⁶⁵ Robert Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 7 (2003).

⁶⁶ *Bostock v. Clayton County*, 140 S.Ct. 1731, 1769–71 (2020) (Alito, J., dissenting).

⁶⁷ *Id.*

⁶⁸ *Id.* at 1773 (observing that “transgender” was “a concept that was essentially unknown to the public” at the time Title VII was enacted).

⁶⁹ For more on the emergence of social awareness of transgender identity, see generally JOANNE MEYEROWITZ, *HOW SEX CHANGED: A HISTORY OF TRANSEXUALITY IN THE UNITED STATES* (2004). For more on the violence transgender people faced as they became more visible, listen to: *A History of Violence in the Fight for Trans Rights*, WYNC STUDIOS: THE TAKEAWAY (June 15, 2015), <https://www.wnystudios.org/podcasts/takeaway/segments/struggle-transgender-acceptance>.

It would be an understatement to say that the social status of LGBT people in this period made it difficult for them to win antidiscrimination claims. Courts routinely characterized transgender identity as a “mental disorder,”⁷⁰ insisted that “nature’s choice of his or her . . . sex” (by which courts meant sex assigned at birth) was an individual’s true sex,⁷¹ and expressed skepticism that, even with gender-affirming surgery, “a woman can be so easily created from what remains of a man.”⁷² In 1967, the Court affirmed the deportation of a gay man, holding that he was excludable under the Immigration and Naturalization Act as a person “afflicted with psychopathic personality.”⁷³ Two decades later, the Ninth Circuit upheld the Department of Defense’s refusal to grant security clearances to “known or suspected gay applicants” in a decision that linked homosexuality with necrophilia, pedophilia, voyeurism, and other “deviant conduct.”⁷⁴ In 1986, when a gay man challenged the constitutionality of his arrest under Georgia’s anti-sodomy statute, the Court characterized as “facetious” the notion that the Constitution protects gay people, and condoned the legal enforcement of “majority sentiments about the morality of homosexuality.”⁷⁵

As long as courts viewed gay and transgender people as dangerous and deviant, or sick and sad, no interpretive methodology was going to come to their rescue. Courts were not going to find that their exclusion from the central institutions of American society constituted discrimination—on any ground. So gay and transgender people lost their claims. They lost under the Constitution and under Title VII; they lost whether they framed their claims in terms of sex or in terms of sexual orientation or gender identity; they lost regardless of the interpretive methodology courts applied. Courts held in the early cases that Title VII’s purpose was to protect biological women and men, that Congress did not intend the statute to cover gay and transgender people, and that the statute’s original public meaning did not apply to individuals with “unusual and untraditional”⁷⁶ sexual orientations and gender identities. All of those holdings were informed by prevailing social values, the textualist ones no less than the purposivist and intentionalist ones.

Since that time, however, advocates of LGBT rights have worked to change these values and the law that polices sexual orientation and gender identity. Partially as a result of these efforts, public support for gay people has increased more rapidly than for any other group in

⁷⁰ See, e.g., *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1083 n.3 (1984); cf. *Bostock*, 140 S.Ct. at 1773 (Alito, J., dissenting) (noting that “the great majority of physicians surveyed in 1969 thought that an individual who sought sex reassignment surgery was either ‘severely neurotic’ or ‘psychotic’” (citation omitted)).

⁷¹ *Ulane*, 742 F.2d at 1083 n. 3.

⁷² *Id.*; *id.* at 1087 (expressing skepticism “that post-operative male-to-female transsexuals do in fact qualify as females and are not merely ‘facsimiles’”).

⁷³ *Boutilier v. INS*, 387 U.S. 118, 118 (1967).

⁷⁴ *High Tech Gays v. Def. Indus. Sec. Clearance Off.*, 895 F.2d 563, 567–68 (9th Cir. 1990). The Department of Defense also denied clearance for “misconduct” such as “transsexualism,” which it said “may indicate a mental or personality disorder.” *Id.*; see also *Dronenburg v. Zech*, 741 F.2d 1388, 1398 (D.C. Cir. 1984) (upholding the Navy’s discharge of an accomplished gay linguist on the ground that the Navy’s anti-gay policy advances “crucial[] interest[s] common to all our armed forces,” including upholding “discipline and good order,” preserving morale, and protecting young recruits from “homosexual seduction”).

⁷⁵ *Bowers v. Hardwick*, 478 U.S. 186, 194, 196 (1986).

⁷⁶ *Ulane*, 742 F.2d at 1086.

recent decades.⁷⁷ This tremendous social change has spurred, and been spurred by, legal contestation over LGBT rights.⁷⁸ In recent years, these interrelated social and legal developments have begun to yield new interpretations of antidiscrimination law—most prominently, prior to *Bostock*, in the constitutional context. Over the past generation, the Court has issued a groundbreaking series of decisions—including *Romer v. Evans*, *Lawrence v. Texas*, *Windsor v. United States*, and *Obergefell v. Hodges*—holding that discrimination against gays and lesbians violates due process and equal protection. Those decisions were avowedly living-constitutionalist. Particularly in the later cases, the Court acknowledged the revolution in attitudes toward gay people and embraced the idea “that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged.”⁷⁹

Protections for gay and transgender people under Title VII have evolved in tandem with these new constitutional protections. In 2012, the year the Court decided *Windsor*, the EEOC held that discrimination against transgender people violates Title VII.⁸⁰ In 2015, the year the Court decided *Obergefell*, the EEOC reached the same conclusion with respect to discrimination against gays and lesbians.⁸¹ Courts also began to extend the statute’s protections to LGBT people. Prior to *Romer*, there was virtually no movement on this front, but then—particularly as same-sex couples began to rack up victories in marriage cases—judges began to hold that Title VII bars discrimination against gay and transgender people in the workplace.

The courts that issued those holdings applied a range of interpretive methodologies; textualism was not the dominant approach. Indeed, the three most important decisions extending Title VII’s coverage to gay and transgender workers prior to *Bostock* were written by Judge Robert Katzmann of the Second Circuit, Judge Karen Nelson Moore of the Sixth Circuit, and Judge Diane Wood of the Seventh Circuit,⁸² none of whom are textualists, and at least two of whom are outspoken critics of the methodology.⁸³ These judges accorded great weight to the fact

⁷⁷ ANDREW R. FLORES, NATIONAL TRENDS IN PUBLIC OPINION ON LGBT RIGHTS IN THE UNITED STATES, WILLIAMS INSTIT., UCLA SCHOOL OF LAW 5 (Nov. 2014), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Public-Opinion-LGBT-US-Nov-2014.pdf> (reporting that “[p]ublic support for lesbians and gay men has doubled in the past three decades, more so than for any other group surveyed over the same time period,” and that with respect to transgender people, there was “a 40% increase in support between 2005 and 2011”).

⁷⁸ See Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 945–46 (2011) (describing “law and social change as a dialogical process in which social movement actors seize on judicial decisions and activate legal norms across a variety of institutional settings,” and showing how even litigation loss may “result in productive social movement effects and lead to more effective reform strategies”).

⁷⁹ *Obergefell v. Hodges*, 576 U.S. 644, 673 (2015).

⁸⁰ *Macy v. Holder*, Appeal No. 0120120821, 2012 WL 1435995, at *11 (E.E.O.C. Apr. 20, 2012).

⁸¹ *Baldwin v. Foxx*, Appeal No. 0120133080, 2015 WL 4397641, at *5 (E.E.O.C. July 15, 2015).

⁸² See *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018); *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339 (7th Cir. 2017).

⁸³ Judge Katzmann is one of the nation’s leading proponents of purposivism. His 2014 book, *Judging Statutes*, critiques textualism, argues that courts should interpret statutory text in light of congressional purpose, and strongly advocates the consultation of legislative history. KATZMANN, *supra* note 38. Judge Wood is also a forceful proponent of dynamic forms of interpretation. See, e.g., Diane P. Wood, Madison Lecture, Our 18th Century Constitution in the 21st Century World, in 80 N.Y.U. L. REV. 1079, 1079 (2005) (addressing “the classic question of whether courts should interpret the United States Constitution from an originalist or dynamic approach” and “argu[ing] for the dynamic approach”); cf. Karen Nelson Moore, *The Supreme Court’s Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1109 (1993) (“The rigidity and ultimate futility of the

that, “[s]ince 1964, the legal framework for evaluating Title VII claims has evolved substantially.”⁸⁴ They argued that the appropriate question is “what the correct rule of law is now in light of the Supreme Court’s authoritative interpretations, not what someone thought it meant” in the past.⁸⁵

These judges cited *Price Waterhouse v. Hopkins*⁸⁶ and *Oncale v. Sundowner Offshore Services*⁸⁷ in particular as bases for extending the law’s protections to LGBT people.⁸⁸ *Price Waterhouse* held that Title VII constrains the practice of sex stereotyping, as “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”⁸⁹ *Oncale* held that same-sex sexual harassment is a cognizable form of sex discrimination under Title VII.⁹⁰ The Court acknowledged that “male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII,” but observed that “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils.”⁹¹ Congress likewise did not have LGBT people in mind when it enacted Title VII. But the law now protects workers against a wide range of gender conformity demands. Against this doctrinal backdrop, these judges reasoned, allowing employers to require such conformity with respect to gender identity and sexual orientation creates an unjustified loophole in the law’s coverage.

Indeed, Judge Wood argued, the ongoing exclusion of gays and lesbians from Title VII’s protections appears particularly unwarranted when viewed “against the backdrop of the Supreme Court’s decisions, not only in the field of employment discrimination, but also in the area of broader discrimination on the basis of sexual orientation.”⁹² She argued that the LGBT loophole in contemporary Title VII doctrine ran contrary to the teachings of *Romer*, *Lawrence*, *Windsor*, and *Obergefell*.⁹³ She and Judge Katzmman both observed that continuing to exempt gays and lesbians from Title VII’s coverage after those constitutional decisions generated a “paradoxical legal landscape” in which a person could “be married on Saturday and then fired on Monday for just that act.”⁹⁴ They argued this “bizarre” state of affairs ran contrary to modern precedent.⁹⁵

plain meaning analysis must be recognized. What is plain to one person . . . is not necessarily plain to another. It is misleading to pretend that language is plain.”).

⁸⁴ *Zarda*, 883 F.3d at 131.

⁸⁵ *Hively*, 853 F.3d at 350; *id.* at 350–51 (“The . . . Court’s decisions, as well as the common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex, persuade us that the time has come to overrule our previous cases that have endeavored to find and observe that line.”).

⁸⁶ 490 U.S. 228 (1989).

⁸⁷ 523 U.S. 75 (1998).

⁸⁸ *See Zarda*, 883 F.3d at 111–23; *R.G. & G.R. Harris Funeral Homes*, 884 F.3d at 571–81; *Hively*, 853 F.3d at 342–47.

⁸⁹ 490 U.S. at 251.

⁹⁰ 523 U.S. at 79.

⁹¹ *Id.*

⁹² *Hively*, 853 F.3d at 349.

⁹³ *Id.*

⁹⁴ *Hively*, 853 F.3d at 342; *see also Zarda*, 883 F.3d at 131 (quoting this passage in *Hively*).

⁹⁵ *Hively*, 853 F.3d at 342; *see also Zarda*, 883 F.3d at 131 (observing that interpreting Title VII in a manner consistent with “the modern constitutional framework” eliminates this paradox).

How, then, are we to understand *Bostock*? The Court in *Bostock* affirmed the outcome of these appellate court decisions but insisted that all of this discussion of the law's development was unnecessary, as gay and transgender workers have been protected under Title VII's sex provision from the start. But if that is so, why did the Court only discover this in 2020, in the wake of the same-sex marriage decisions? Fifty years ago, LGBT plaintiffs lost antidiscrimination cases regardless of the legal provision they invoked, the interpretive method courts applied, or whether they framed their claims in terms of sex or in terms of sexual orientation or gender identity. Today, LGBT plaintiffs are winning cases. But, as before, legal and social conceptions of the licitness of anti-LGBT discrimination—and not anything to do with the interpretive method courts apply—seem to be playing a primary role in the outcomes of these cases. The new understandings that animated the Court's decisions in the marriage cases—and the new understandings those decisions themselves helped to forge—have radically altered the legal terrain on which we fight about LGBT rights.

The Court in *Bostock* makes no mention of the ongoing legal and social revolution of which its decision is a part. But the claim cannot be that it is simply a coincidence that the Justices discovered the gay- and trans-protective nature of Title VII's sex provision in the midst of this revolution. The best textualist claim has to be that this revolution caused the scales to fall from the Justices' eyes—that all of this change swept away the distorting effects of prejudice and enabled them to recognize for the first time the statute's true semantic meaning.⁹⁶ A concession of this sort acknowledges the reality that *Bostock* is part of a broader legal and social revolution while holding onto the idea that the decision itself is textualist.

However, to concede that our understanding of ordinary public meaning is evolutive in this way—that it evolves along with society and may be altered by contestation inside and outside of courts—saps textualism of much of its purported distinctiveness as an interpretive methodology. It belies the central textualist claim that it is possible to identify ordinary public meaning in a manner that is “largely removed from the most salient moral issues of the day.”⁹⁷ It acknowledges that ongoing legal and social conflict will shape, and eternally reshape, judicial perceptions of a statute's semantic meaning. There is already a robust debate among legal scholars about whether textualism retains any analytical distinctiveness in the face of concessions of this general sort.⁹⁸ *Bostock* would seem to provide additional cause for skepticism.

B) Ordinary Public Meaning is Made, Not Found

That is far from the biggest problem *Bostock* poses for textualism, however. A close reading of the decision reveals deeper methodological trouble. The majority and the dissenting opinions in *Bostock* do not simply track evolving understandings of equality. They are actively

⁹⁶ For scholars making versions of this claim, see Jessica Clarke, *How the First Forty Years of Circuit Precedent Got Title VII's Sex Discrimination Provision Wrong*, 98 TEX. L. REV. ONLINE 83, 112–13 (2019); Katie Eyer, *Statutory Originalism and LGBT Rights*, 54 WAKE FOREST L. REV. 63, 83–86 (2019); Grove, *supra* note 55, at 278 n.82.

⁹⁷ Baude, *supra* note 12, at 2226.

⁹⁸ See, e.g., Dorf & Buchanan, *supra* note 17, at *34–37; Kessler & Pozen, *supra* note 31, at 1848–54; Molot, *supra* note 31, *passim*.

engaged in the construction of various original public meanings for Title VII through the choices they make at shadow decision points. The textualist rhetoric of the decision suggests otherwise. The Justices claim they are simply enforcing “legal terms with plain and settled meanings.”⁹⁹ They all agree that a quick consultation of a dictionary or corpus linguistics database is sufficient to yield a determinate answer in this case and that the original public meaning of Title VII’s bar on sex discrimination unambiguously protects (or does not protect) LGBT workers.

As this section shows, however, the original public meaning of Title VII’s sex provision is not something the Justices discover; it is something they produce. As is often the case in the kind of statutory interpretation disputes that arrive at the Court, there are several plausible ways to interpret the statutory language at issue in *Bostock*. Just about the only thing that is unambiguous in this case is that the meaning of Title VII’s sex provision is not unambiguous. That raises questions about how the Justices arrive at the conclusions they do about the statute’s meaning. This section looks beneath the Justices’ textualist rhetoric and examines how their analysis actually works. What it finds is a series of unacknowledged, often outcome-determinative choices unbound by any kind of methodological rule or requirement of consistency. On the surface, the opinions in *Bostock* confidently assert that the phrase “discriminate . . . because of . . . sex” has a determinate meaning that obviously resolves the case. Underneath the surface, the Justices make choices that steer the analysis inexorably toward a particular conclusion.

1) Defining Discrimination

Here is the core of the Court’s textualist analysis in *Bostock*:

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. . . . [A]n 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.¹⁰⁰

The Court makes numerous choices in this passage that it does not acknowledge making, let alone offer any reasons for making. It chooses to rely on a dictionary, rather than one of the new corpus linguistics databases. It chooses to rely on *Webster’s New International Dictionary*. It chooses to analyze the word “discriminate” in isolation from the rest of the statutory text. Most importantly, it selects this particular anticlassificationist definition of “discriminate” from among the several definitions of that word contained in period dictionaries. To discriminate can mean to differentiate. One might discriminate in this sense between different shades of blue. But as Judge Gerald Lynch observed in his dissenting opinion for the Second Circuit in *Zarda* (one of the cases consolidated in *Bostock*), that is not the only meaning of the word. Judge Lynch

⁹⁹ *Bostock v. Clayton County*, 140 S. Ct. 1731, 1743 (2020).

¹⁰⁰ *Id.* at 1740.

acknowledged that “there are recognized English uses of ‘discriminate’ . . . that imply nothing invidious, but merely mean ‘to perceive, observe or note [a] difference.’”¹⁰¹ But, he argued, “in the language of civil rights, a different and stronger meaning applies, that references invidious distinctions: ‘To treat a person or group in an unjust or prejudicial manner, esp[ecially] on the grounds of race, gender, sexual orientation, etc.; frequently with *against*.’”¹⁰²

In his dissenting opinion in *Bostock*, Justice Alito—joined by Justice Thomas—endeavors to prove that Judge Lynch is right by bypassing the dictionary and relying instead on the tools of corpus linguistics. Justice Alito cites a legal corpus linguistics study that “searched a vast database of documents from [the 1950s and 1960s] to determine how the phrase ‘discriminate against . . . because of [some trait]’ was used.”¹⁰³ As Judge Lynch noted, mid-century American writers sometimes used the word “discriminate” to mean differentiate. But, the study concluded, writers in that period used the phrase “discriminate against” differently—to refer not to “*any* adverse treatment that even *adverts* to [the protected trait],” but “only to adverse treatment that rests on *prejudice or bias*.”¹⁰⁴ Thus, Justice Alito and Justice Thomas argue, as a matter of original public meaning, Title VII’s prohibition on discrimination does not bar all forms of differential treatment based on protected traits, but only “discrimination against ‘someone . . . motivated by prejudice, or biased ideas or attitudes . . . directed at people with that trait in particular.’”¹⁰⁵

The choice between these definitions is highly consequential; for some of the Justices in *Bostock*, it may be outcome-determinative. There are various ways one can reach the conclusion that discrimination against LGBT people violates Title VII’s prohibition on sex discrimination. But the particular path Justice Gorsuch chooses is entirely dependent on his conclusion in the passage quoted above: that discrimination means differentiation rather than prejudice and subordination.¹⁰⁶ It is similarly important to Justice Alito and Justice Thomas that Title VII’s bar

¹⁰¹ *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 149 (2d Cir. 2018) (Lynch, J., dissenting) (quoting “*The Oxford English Dictionary Online*, <http://www.oed.com> (search for ‘Discriminate,’ verb, definitions 2a and 2b”). Judge Lynch uses a contemporary dictionary to analyze the ordinary public meaning of “discriminate,” which is not the preferred textualist approach—although in practice, there is considerable variation regarding choice of appropriate dictionary publication date. See James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court’s Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483, 483 (2013) (arguing that the Justices “lack a coherent position on citing to editions from the time of statutory enactment versus the time the instant case was filed”); *id.* at 533–35 (discussing the issue at greater length, with empirical evidence).

¹⁰² *Zarda*, 883 F.3d at 149.

¹⁰³ *Bostock*, 140 S.Ct. at 1769 n.22 (Alito, J., dissenting) (citing James C. Phillips, *The Overlooked Evidence in the Title VII Cases: The Linguistic (and Therefore Textualist) Principle of Compositionality* 3 (May 11, 2020) (second alteration in original)). The cited manuscript—which was available at <https://ssrn.com/abstract=3585940> while *Bostock* was under consideration by the Court, but which was pulled by its author after the decision came down—is on file with this author.

¹⁰⁴ Phillips, *supra* note 103, at 3.

¹⁰⁵ *Bostock*, 140 S.Ct. at 1769 n.22 (citing Phillips, *supra* note 103, at 7).

¹⁰⁶ As an analytical matter, victory for the plaintiffs in *Bostock* did not depend on the Court adopting an anticlassificationist definition of sex discrimination. It is quite plausible to argue that discrimination against gay and transgender people is a form of sex-based subordination and sex-role stereotyping; in fact, Part II argues it is implausible to suggest otherwise. See *infra* text accompanying notes 273–283. But these antisubordinationist and anti-stereotyping arguments necessitate more analytical work than the simple anticlassificationist argument, and conservatives generally reject them. Indeed, the dissenting Justices in *Bostock* treat it as axiomatic that the plaintiffs lose under the antisubordinationist definition. See, e.g., *Bostock*, 140 S. Ct. at 1765 (Alito, J., dissenting)

on sex discrimination *does* entail prejudice and subordination; the claim that the statute bars only “sexist”¹⁰⁷ practices is a central component of their argument that it does not protect gay and transgender people. Thus, it is worth examining the various (unacknowledged and extratextual) choices the Justices make in deciding to define discrimination as they do in *Bostock*.

It is relatively easy to see the choices Justice Gorsuch makes. Dictionaries from the time of Title VII’s enactment contain multiple definitions of the word “discriminate.” In fact, Bill Eskridge notes that “dictionaries of the 1960s, when Title VII was enacted, often gave the prejudice meaning as the first definition of discrimination”¹⁰⁸—which may be why Justice Gorsuch chooses (otherwise seemingly inexplicably) to rely on the one particular dictionary he does, which was published in 1954¹⁰⁹: It leads with an anticlassificationist definition. There are plenty of other dictionaries from this period that do not lead with that definition.¹¹⁰ Consulting the dictionary does not clarify which definition captures Title VII’s original public meaning any more than reading the text of the statute does.

The dissenting Justices’ decisionmaking about the meaning of discrimination is no less reliant on extratextual considerations, but their use of corpus linguistics makes it harder to see. Advocates of this technology—including a substantial and growing number of textualists—portray it as a reliable, objective, and scientific approach to determining original public meaning.¹¹¹ The idea is that by harnessing the power of big data, interpreters can gain insight into how a word or phrase was actually used and would have been understood by people in a particular era.¹¹² Without getting too deep into the weeds, it is worth taking a look at how Justice Alito and Justice Thomas use corpus linguistics in *Bostock*, both because it bears directly on the question of whether textualism is able to resolve the questions at issue in this case and because

([D]iscrimination because of sexual orientation is not historically tied to a project that aims to subjugate either men or women. An employer who discriminates on this ground might be called ‘homophobic’ or ‘transphobic,’ but not sexist.”).

¹⁰⁷ *Bostock*, 140 S.Ct. at 1765 (Alito, J., dissenting).

¹⁰⁸ William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 1101 n.538 (2001).

¹⁰⁹ Justice Gorsuch’s choice of a 1954 dictionary is particularly puzzling in light of the scholarly argument that textualists must “search out dictionaries published . . . a few years *after* the date of the statute” because meanings current at the time of the statute’s enactment will not be captured in dictionaries until a few years later. Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275, 332 (1998) (emphasis added). Justice Gorsuch’s decision to use a dictionary that *predates* Title VII by a decade seems particularly odd given that Americans’ understanding of “discrimination” may have been especially subject to change in that particular ten-year period. Then again, there are few rules governing textualist’s dictionary usage; it is not clear there is an objectively correct way to do this. See Brudney & Baum, *supra* note 101, at 537 (“The Justices’ choices in citing dictionary definitions seem to be largely ad hoc, based on the appeal of particular dictionaries in particular cases.”); Stephen C. Mouritsen, *The Dictionary is Not a Fortress: Definitional Fallacies and a Corpus-Based Approach to Plain Meaning*, 2010 B.Y.U. L. REV. 1915, 1915–46 (2010) (arguing that dictionary usage creates the illusion of objectivity but does not actually provide objective answers, especially in hard cases).

¹¹⁰ For example, the 1963 edition of *Funk & Wagnalls Standard College Dictionary* defines discrimination as “prejudice or partiality in attitudes, actions, etc.: *discrimination* against minorities”—and then, also, as “the power or ability to perceive distinctions or differences; discernment.” FUNK & WAGNALLS STANDARD COLLEGE DICTIONARY 380 (10th ed. 1963).

¹¹¹ See, e.g., Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788 (2018).

¹¹² See Lee J. Strang, *How Big Data Can Increase Originalism’s Methodological Rigor: Using Corpus Linguistics to Reveal Original Language Conventions*, 50 U.C. DAVIS L. REV. 1181 (2017).

corpus linguistics is quickly becoming the gold standard in textualist analysis.¹¹³ This will not be the last time it features in a Supreme Court opinion.

The corpus linguistics study on which Justices Alito and Thomas rely purports to prove that Title VII defines discrimination in an antisubordinationist way. Here is how the study reaches that conclusion. First—using the Corpus of Historical American English (COHA), a database containing approximately 48 million words from the 1950s and 1960s, with texts drawn from popular magazines, newspapers, and fiction and non-fiction books—the study shows that the word that most commonly follows the word “discriminate” is “against.”¹¹⁴ The database generates 236 hits for the word “discriminate” (and various versions of it) in those decades, and the word “against” follows it approximately half of the time, and five times more frequently than any other word.¹¹⁵ On this basis, the study concludes that “discriminate against” is a “linguistic unit” that must be analyzed as a whole,¹¹⁶ and that analyzing the meaning of “discriminate” in isolation, the way Justice Gorsuch does, will not yield accurate results. The study then searches for “collocates”—or words that appear within some (unspecified) number of words of the phrase “discriminate against”—and finds that “among the top five collocates are *negro(es)*, *Jews*, *group(s)*, *women*.”¹¹⁷ The study interprets the frequent proximity of the term “discriminate against” to these group names as “evidence of a semantic focus on bias or prejudice against members of a group.”¹¹⁸

This enterprise is wildly subjective and generates a veritable avalanche of shadow decision points. As a preliminary matter, the conclusion that “discriminate against” is a “linguistic unit,” i.e., that it has a specialized meaning distinct from the word “discriminate,” is highly dubious.¹¹⁹ As the study itself observes, “[p]arties on both sides [in *Bostock*] refer to *discrimination because of sex*. . . . Everyone seems to drop the word ‘against’ and focus just on ‘discriminate.’”¹²⁰ Indeed, they do. That is because everyone has always done this; from the time of Title VII’s enactment through the present day, the terms “discriminate” and “discriminate against” have been used interchangeably. The congresspeople who enacted Title VII used

¹¹³ See Lee & Mouritzen, *supra* note 111, at 796 n.23 (discussing judges’ increasingly frequent use of corpus linguistics); Kevin Tobia, *Testing Ordinary Meaning*, 134 HARV. L. REV. 726, 733 (2020) (observing that “[l]egal corpus linguistics . . . has . . . grown in use and esteem” and that this growth “is likely to continue”); *id.* at 733 n.43 (citing examples of increasing judicial reliance on corpus linguistics in recent years); Amanda Kae Fronk, *Big Lang at BYU*, BYU MAG., Summer 2017, <https://magazine.byu.edu/article/big-lang-at-byu/> (quoting the prominent textualist scholar Lawrence Solum predicting that “corpus linguistics will revolutionize statutory and constitutional interpretation”).

¹¹⁴ Phillips, *supra* note 103, at 4.

¹¹⁵ *Id.* (reporting that the word “against” follows the word “discriminate” five times more often than the next most frequent word).

¹¹⁶ *Id.* at 3.

¹¹⁷ *Id.* at 5.

¹¹⁸ *Id.*

¹¹⁹ The study is not clear about precisely what qualifies “discriminate against” as a “linguistic unit.” It might be the fact that “against” follows “discriminate” half the time; it might be the fact that “against” follows “discriminate” more frequently than any other word; it might be these factors in conjunction, weighted equally, or not. If there was any rule established prior to obtaining the results for identifying a “linguistic unit”—or even any rule established once the results were in—the study does not mention it.

¹²⁰ Phillips, *supra* note 103, at 2–3.

“discriminate” and “discriminate against” interchangeably,¹²¹ as did the EEOC, from the moment it began to interpret the statute.¹²² The *text of Title VII itself* uses those terms interchangeably.¹²³ Textualist Justices have always done so as well. In one of his most famous and important textualist opinions, Justice Scalia repeatedly omitted the word “against” and described Title VII as “prohibit[ing] discrimination on the basis of race or sex.”¹²⁴ Indeed, Justice Scalia explicitly declined to attach any semantic significance to the word “against,” arguing that Title VII (which

¹²¹ It is difficult to capture, in a footnote, the constant interchangeable use of the terms “discriminate” and “discriminate against” over hundreds of pages of the 1964 Civil Rights Act’s legislative history; but I will try, using three illustrations. 1) Opponents of the 1964 Act complained endlessly about the fact that it did not define “discrimination.” They argued that “[t]he language of the bill is so uncertain, indefinite, imprecise, and vague, that it is subject to an almost unlimited variety of interpretations and constructions.” 110 CONG. REC. 5432 (1964) (statement of Sen. Thurmond). While the Senate was debating the bill, opponents took out a full-page advertisement in newspapers across the country that devoted an entire section—entitled “*The Mystery Word: Discrimination*”—to this argument. See 110 CONG. REC. 5931–32 (1964) (reprinting an advertisement by the Coordinating Committee for Fundamental American Freedoms, Inc.). These attacks spurred extensive congressional discussion about the definition of “discrimination,” and never once, over the course of many months of debate, did anyone suggest that the phrase “discriminate against” had any kind of specialized meaning or that it meant anything different from the word “discriminate.” 2) In fact, Senator Hubert Humphrey, the Democratic whip who shepherded the bill through Congress, argued that the bill defined discrimination in the same way as the Hill-Burton Act, the Interstate Commerce Clause, and the Federal Aviation Act—all of which barred “discrimination” but did not include the word “against.” 110 CONG. REC. 5863–64 (1964) (statement of Sen. Humphrey). 3) Even more to the point: some sections of the 1964 Civil Rights Act use the word “discriminate,” and other sections use the phrase “discriminate against”—and no one, including the lawmakers who passed the Act, has ever attached any significance to this fact. Indeed, when those lawmakers discussed Title VII, they regularly omitted the word “against” and described Title VII as barring “*discrimination because of race, [etc.]*.” 110 CONG. REC. 2719 (1964) (statement of Rep. Celler) (emphasis added); see also *id.* (stating that Title VII would make it unlawful “*to discriminate among applicants for employment*” (emphasis added)). There is no evidence that the lawmakers who enacted Title VII understood the phrase “discriminate against” to have any special semantic significance; indeed, the evidence points very strongly in the other direction.

¹²² The EEOC issued its first set of guidelines interpreting Title VII’s sex provision shortly after it went into effect and omitted the word “against” from its discussion of the law. See *EEOC Guidelines on Discrimination Because of Sex*, 30 FED. REG. 14926, 14926 (1965) (characterizing Title VII as prohibiting “discrimination in employment on account of sex”).

¹²³ Section 703(a)(1) of Title VII, the provision at issue in *Bostock*, bars employers from “discriminat[ing] against any individual . . . because of . . . sex.” 42 U.S.C. § 2000e–2(a)(1). Numerous other sections of Title VII also use that language. But some sections—including those that address, *inter alia*, seniority and merit systems, and the law’s application to the federal government—omit the word “against” and simply prohibit “discrimination based on race [etc.]” or “discriminat[ion] because of race [etc.]” 42 U.S.C. § 2000e–2(h); 42 U.S.C. § 2000e–16(a). Textualists have long observed that “[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 622 (1999) (Thomas, J., dissenting; joined by Scalia, J.) (internal quotation marks omitted). If one accepts the claim that “discriminate against” is a “linguistic unit” with a particular meaning, it would appear that Title VII veers from one definition of discrimination to another, from section to section, and that everyone has failed to appreciate the significance of this for over half a century. Indeed, antidiscrimination laws in general appear to use the terms “discriminate” and “discriminate against” interchangeably. See *infra* notes 125–126 and accompanying text. If Congress has been sending a clear signal about which of these laws is to be interpreted in an anticlassificationist way and which in an antisubordinationist way through its decision to include or omit the word “against,” why has nobody noticed this? Why have legislators—or textualist judges—never mentioned it? In reality, there is not some important, yet here-to-fore unnoticed, information about the meaning of discrimination being communicated through this word choice. This argument reveals far more about corpus linguistics, and textualism in general, than it does about the meaning of discrimination.

¹²⁴ *Johnson v. Transp. Agency*, 480 U.S. 616, 675 (1987) (Scalia, J., dissenting); see also, e.g., *id.* at 670.

contains the word “against”) must be interpreted the same way as Title VI (which does not contain the word “against”) because these two sections of the 1964 Act contain “virtually identical categorical language” barring discrimination.¹²⁵ Justice Thomas has also consistently taken this position (until now). He has argued that Title IX of the Education Amendments of 1972 and Title II of the Americans With Disabilities Act define discrimination in the same way as Title VII—despite the fact that the former two statutes do not contain the word “against.”¹²⁶

One might have thought this material—particularly the material from the 1960s—was solid evidence that the phrase “discriminate against” does not have some distinct and specialized significance as a matter of original public meaning. But multiple leading textualists—Randy Barnett, Josh Blackman, Robert George—have weighed in on precisely this point, insisting along with Justice Alito (and Justice Thomas in *Bostock*) that the corpus linguistics evidence is conclusive: the fact that the word “against” follows the word “discriminate” about half the time, and more frequently than any other word, in the small number of results the COHA churns out, proves that “discriminate against” is a “linguistic unit” with a specialized meaning.¹²⁷ Why this very limited data set trumps the countless instances in which “discriminate” and “discriminate against” were used interchangeably in the 1960s is difficult to understand. None of these textualists explain the rule that yields this conclusion, and the study itself does not provide one. But that is of no matter; I have no interest in establishing that “discriminate against” is not a “linguistic unit,” or that whatever rule textualists are using to reach the opposite conclusion is

¹²⁵ *Id.* at 665 n.3; *see also id.* (instructing the reader to “[c]ompare 42 U.S.C. § 2000d (‘No person . . . shall, on the ground of race, color, or national origin, be . . . subjected to discrimination’), with § 2000e–2(a)(1) (no employer shall ‘discriminate against any individual . . . because of such individual’s race, color, religion, sex, or national origin,’))” and observing that these two provisions contain “virtually identical” language regarding discrimination).

¹²⁶ *Olmstead v. L.C. ex. rel. Zimring*, 527 U.S. 581, 616 n.1 (1999) (Thomas, J., dissenting; joined by Chief Justice Rehnquist and Justice Scalia). In another, more recent, case involving the interpretation of a law that prohibits states from imposing a “tax that discriminates against a rail carrier,” Justice Thomas engaged in a lengthy textualist analysis of the meaning of the word “discriminates” and never suggested that the word “against” had any semantic significance or bearing on the law’s meaning. *Ala. Dep’t of Revenue v. CSX Transp., Inc.*, 575 U.S. 21, 32–42 (2015); *CSX Transp., Inc. v. Ala. Dep’t of Revenue*, 562 U.S. 277, 297–306 (2011).

¹²⁷ *See* Josh Blackman & Randy Barnett, *Justice Gorsuch’s Halfway Textualism Surprises and Disappoints in the Title VII Cases*, NAT. REV., June 26, 2020, <https://www.nationalreview.com/2020/06/justice-gorsuch-title-vii-cases-half-way-textualism-surprises-disappoints/> (“Professor James Phillips conducted a thorough study of how the phrase ‘discriminate against’ was used in the 1950s and 1960s. That phrase did not merely refer to differential treatment. Rather, ‘discriminate against’ referred to differential treatment ‘based on some trait [that is] motivated by prejudice, or biased ideas or attitudes.’ . . . Had Justice Gorsuch relied on the ordinary meaning of ‘discriminate against’ in 1964, he would have recognized that bias or prejudice had to play some role in the differential treatment.”); Josh Blackman, *Justice Gorsuch’s Textualism Has a Precedent Problem*, THE ATLANTIC, July 24, 2020, <https://www.theatlantic.com/ideas/archive/2020/07/justice-gorsuch-textualism/614461/> (“[T]he phrase ‘discriminate against’ must inform the meaning of ‘because of.’ In the 1960s, that phrase formed a single linguistic unit. . . . [T]he phrase discriminate against because of sex references discrimination based on bias or prejudice about a person’s sex.”); *id.* (“Justice Gorsuch relied on decades of precedents that focused primarily on ‘because of’ and not the entire clause. Doing so eliminated the requirement that some sort of bias or prejudice exists based on a person’s sex. In effect, he severed the statute in half, and concluded that if sex plays any role in the discrimination, the employers’ actions are unlawful.”); Robert George, *Further Thoughts on the Title VII Cases and Textualism*, MIRROR OF JUSTICE (June 16, 2020), <https://mirrorofjustice.blogspot.com/2020/06/further-thoughts-on-the-title-vii-cases-and-textualism.html> (arguing that textualists must analyze “the ordinary meaning of th[e] phrase [‘discrimination against’ individuals ‘because of’ sex] taken as a whole,”; holding out “Professor James Phillips’ recent study relying on linguistic principles and systematic data” as a model for how to do this analysis; and endorsing the study’s conclusions).

wrong. The real problem—and my real focus here—is the enterprise of textualism itself, which enables all of this highly subjective, highly contestable, potentially outcome-determinative decisionmaking to occur, unacknowledged, in the shadows.

That is only the start of it. Even if one accepts that “discriminate against” is a “linguistic unit,” one still has to determine what it means—a process that involves yet another round of shadow decision points. The study on which Justice Alito and Justice Thomas rely treats the fact that the phrase “discriminate against” often appears in close proximity to the names of protected groups as evidence that mid-century Americans understood that phrase in an antisubordinationist way. But that is a highly questionable, if not entirely tautological, approach—not least because some of the results the COHA generates simply reproduce the text of antidiscrimination provisions. Consider this result from a 1956 book by Justice William O. Douglas quoting the Indian Constitution: “‘ARTICLE 15: (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.’”¹²⁸ Another one of the results quotes the EEOC discussing Title VII itself:¹²⁹ Under the study’s methodology, these results count as evidence that Title VII defines discrimination in an antisubordinationist way. Indeed, the study would count all of the following (hypothetical) results as evidence supporting an antisubordinationist interpretation: a) “Women are asking, what does it mean to discriminate against someone because of sex?”; b) “Discrimination against Negroes consists in deviating from a strict colorblind regime.”; c) “Americans understand the phrase ‘discriminate against women’ in an exclusively anticlassificationist way.”¹³⁰

¹²⁸ WILLIAM O. DOUGLAS, *WE THE JUDGES: STUDIES IN AMERICAN AND INDIAN CONSTITUTIONAL LAW FROM MARSHALL TO MUKHERJEA* 301 (1956).

¹²⁹ The passage discusses the EEOC’s initial guidelines for interpreting Title VII, which characterize the law as barring “separate seniority lists that discriminate against either men or women.” *When Is the Difference Unequal?*, TIME, Dec. 10, 1965, at 36. The study counts this usage as antisubordinationist because the term “discriminate against” appears in close proximity to the name of a protected group. But that is the very question we are trying to answer.

These passages reveal an additional set of issues (and shadow decision points) that I will simply note in passing. First, it is surprising that conservative textualists view foreign laws and sources as relevant to determining the semantic meaning of American laws when those laws and sources happen to be included in a corpus linguistics database. Justice Scalia and others have strenuously objected to the consultation of foreign laws and sources in the interpretation of American law, *see, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J. dissenting; joined by Chief Justice Rehnquist and Justice Thomas), and it is difficult to understand why inclusion in a database alters that analysis. Second, and relatedly, some COHA results include quotations from Supreme Court opinions reproduced in popular publications. The study’s author suggests it is inappropriate to consult the corpus of Court opinions to determine a law’s ordinary public meaning unless the law employs a “legal term of art.” James Phillips, *A Response to Ryan Nees on Textualism and Title VII*, ORIGINALISM BLOG (May 17, 2020), <https://originalismblog.typepad.com/the-originalism-blog/2020/05/a-response-to-ryan-nees-on-textualism-and-title-vii-james-phillips.html>. But if passages from Court opinions happen to be included in a corpus linguistics database, they then become relevant to the law’s meaning, even if the law does not contain a “legal term of art.” This is undertheorized (and what counts as a “legal term of art” is yet another shadow decision point). Third, texts in the COHA often contain quotes from other texts produced at earlier time periods (e.g., the section from the Indian Constitution quoted above was written prior to 1950, which the study identifies as the relevant starting point for assessing Title VII’s meaning—but it was picked up because it was quoted in Justice Douglas’s book, which was published after 1950). Again, this is undertheorized (and what time period is relevant for assessing a statute’s original meaning is yet another shadow decision point).

¹³⁰ The study does not rely exclusively on collocata data. It also notes that “the most common form of the binomial prejudice and [WORD] was prejudice and discrimination, appearing twice as often as any other word following the phrase prejudice.” Phillips, *supra* note 103, at 5. The study cites this as “further evidence of a semantic link”

Analyzing the results qualitatively, rather than in this mechanistic way, does not generate any reliable answers either. I found, in my own corpus linguistics experiments on the phrase “discriminate against,” that different interpreters characterize results differently; that it is very often unclear, or at least debatable, how to categorize a particular result; and that this uncertainty is dramatically compounded by the fact that anticlassificationist and antisubordinationist definitions of discrimination were not understood to be in tension with one another in mid-century America, the way they are today.¹³¹ There is no way, when coding these results, to avoid projecting contemporary categorizations of discrimination (anticlassificationism vs. antisubordinationism) back onto writers who came of age in the first half of the twentieth century, before battles over affirmative action and disparate impact drove a hard wedge between these conceptualizations of discrimination.¹³² Proponents of textualism have billed it as a selling point of the methodology that “you don’t need a PhD. in history to discover [ordinary public meaning].”¹³³ But one reason paying attention to history is helpful is that it can reveal problems like the deep anachronism involved in trying to code snippets of text from over half a century ago using contemporary conceptualizations of discrimination.

What this foray into the search for Title VII’s original public meaning ultimately demonstrates is the deep subjectivity of textualism. The objective, data-driven veneer of this methodology disguises a wealth of unacknowledged and potentially outcome-determinative and outcome-driven decisionmaking. Neither the dictionary nor corpus linguistics can resolve deep disputes over what counts as sex discrimination. Courts interpreting Title VII must look beyond the statute’s text in order to determine the kinds of conduct it bars.

Proponents of textualism sometimes respond to criticism of this sort by arguing that the failure of dictionaries and corpus linguistics databases to produce determinate results in hard cases is not a reason to abandon textualism. In fact, they argue, this is textualism functioning as it should, yielding determinate results in cases where such results are available, and proving ambiguity where ambiguity exists. Thus, they argue, “even an avowed ‘anti-textualist’ should be attracted to corpus linguistics . . . for an instrumental or strategic reason”¹³⁴:

between prejudice and discrimination. *Id.* But nobody disputes that discrimination can entail prejudice. Showing that mid-century Americans often associated those two words with one another does not prove that Title VII defines discrimination in an antisubordinationist way. The study also claims that period dictionaries support its interpretation. But textualists have been citing dictionary definitions of the word “discriminate” for decades and this has not resolved the question of Title VII’s meaning. Indeed, textualist judges almost always agree with Justice Gorsuch that the dictionary supports an anticlassificationist reading of the statute. *See infra* notes 335–339 and accompanying text.

¹³¹ See Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1474–75 (2004) (observing that in the 1950s and 1960s, “talk of classification and subordination did not have the same significance it now has” and that “[t]he understanding that anticlassification and antisubordination are competing principles that vindicate different complexes of values and justify different doctrinal regimes is an outgrowth of decades of struggle over *Brown*”).

¹³² *Id.* at 1534–44.

¹³³ Randy E. Barnett, *Another Oblivious Critique of Neil Gorsuch and Originalism*, WASH. POST, Mar. 14, 2017, <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/03/14/another-oblivious-critique-of-neil-gorsuch-and-originalism/>.

¹³⁴ Lee & Mouritsen, *supra* note 111, at 877.

A key move for the anti-textualist is to challenge the purported determinacy of statutory text (or fixation of constitutional language). Corpus analysis can often help in that endeavor. Where the data show that there is no ordinary meaning, or that there is a wide range of ordinary meanings, the interpreter will be free to dismiss the notion of determinacy (or fixation) and turn to other theories or tools of interpretation.¹³⁵

Here is the problem with that argument: It is radiantly clear, to me, that the corpus linguistics data (and the dictionary) strongly support the proposition “that there is no ordinary meaning, or that there is a wide range of ordinary meanings” of Title VII’s prohibition on discrimination—and that, consequently, we should “be free to dismiss the notion of determinacy (or fixation) and turn to other theories or tools of interpretation.” In the past—prior to the rise of textualism—the Court shared this view, treating it as a matter of fact that “the word “discrimination” is inherently . . . [ambiguous],”¹³⁶ and that “[t]he concept of ‘discrimination’ . . . is susceptible of varying interpretations.”¹³⁷ Even today, *outside the context of civil rights*, textualist Justices acknowledge that “the meaning of ‘discriminates’ is ambiguous”¹³⁸; that there is an inherent “ambiguity in the word ‘discriminates’”¹³⁹; and that Court was right to conclude that “the word “discrimination” is inherently [ambiguous]”¹⁴⁰ and “susceptible of varying interpretations.”¹⁴¹

In the domain of civil rights, however, most, if not all, textualists now firmly reject the idea that there is anything ambiguous about the meaning of discrimination. Indeed, the rejection of the idea that there is any ambiguity about the meaning of discrimination is deeply bound up with the development of textualism itself. When Justice Scalia was beginning to develop the new textualism in the late 1980s, he held up Title VII’s bar on sex discrimination as “a model of statutory draftsmanship” and argued that the law defined discrimination with crystalline “clarity”¹⁴² (Justice Scalia argued in that case—which involved affirmative action—that Title VII unambiguously defines discrimination in a thin, anticlassificationist way.¹⁴³) The conservative Justices who embrace textualism in *Bostock* all agree with Justice Scalia’s assessment that the statute’s meaning is unambiguous—though they vehemently disagree about what that meaning is. All of the textualist scholars who have weighed in on *Bostock* (of whom I am aware) have also endorsed the idea that the statute’s meaning is unambiguous, though they too disagree about what that meaning is.¹⁴⁴

¹³⁵ *Id.*

¹³⁶ *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582, 592 (1983) (interpreting Title VI of the 1964 Civil Rights Act).

¹³⁷ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 284 (1978) (Powell, J.).

¹³⁸ *Ala. Dep’t of Revenue v. CSX Transp., Inc.*, 575 U.S. 21, 37 (2015) (Thomas, J., dissenting) (interpreting the Railroad Revitalization and Regulatory Reform Act of 1976, which, *inter alia*, bars states from imposing a “tax that discriminates against a rail carrier”).

¹³⁹ *CSX Transp., Inc. v. Ala. Dep’t of Revenue*, 562 U.S. 277, 303 (2011) (Thomas, J., dissenting).

¹⁴⁰ *Id.* at 298–99 (quoting *Guardians Ass’n*, 463 U.S. at 592).

¹⁴¹ *Id.* at 299 (quoting *Bakke*, 438 U.S. at 284); *see also id.* (discussing the multiple ambiguities in the meaning of the word “discriminates” in the phrase “tax that discriminates against a rail carrier”).

¹⁴² *Johnson v. Transp. Agency*, 480 U.S. 616, 657 (1987) (Scalia, J., dissenting).

¹⁴³ *See infra* notes 196–199 and accompanying text for a discussion of the way textualist judges toggle between different definitions of discrimination in different contexts.

¹⁴⁴ For textualist arguments that Title VII unambiguously protects gay and transgender workers, *see, e.g.*, Eyer, *supra* note 96, at 72–80; Grove, *supra* note 55, at 274–82; Ilya Somin, *Textualism and Purposivism in Today’s Supreme Court Decision on Discrimination Against Gays, Lesbians, and Transsexuals*, VOLOKH CONSPIRACY (June

It is not a coincidence that all, or nearly all, textualists insist that Title VII's meaning is unambiguous.¹⁴⁵ Textualists have a strong incentive to deny ambiguity. If one concedes that there is often a need to look beyond the text and rely on extratextual sources to determine statutory meaning, many of the arguments regarding the special objectivity and value-free nature of textualist methodology lose their force.¹⁴⁶ Thus, the argument that non-textualists ought to embrace corpus linguistics because it can reveal ambiguity and thereby justify reliance on non-textualist methodologies rests on a faulty premise: that determining whether a statute is ambiguous is itself a value-free, text-driven enterprise.¹⁴⁷ In fact, as *Bostock* shows, that determination is itself a major shadow decision point, and one that is deeply reliant on extratextual considerations (including the desire to bolster the practice of textualism itself). In this way, the ambiguity determination is like every other textualist choice the Justices make in *Bostock*. It demonstrates that textualism does not eradicate extratextual considerations, but simply pushes those considerations underground, making it appear that the Justices are having a fight about methodological matters when they are in fact engaged in value-laden arguments about how to implement Title VII's deeply underspecified antidiscrimination guarantee.

One of the most striking aspects of *Bostock* is how little any of the Justices say about any of their ostensibly methodological choices. Justice Gorsuch offers no explanation for eschewing corpus linguistics and relying on the dictionary, for analyzing the word “discriminate” in isolation, or for selecting the thin, anticlassificationist definition of that word. Nor does he explain how he concluded—in the face of enormous disagreement and his own assertion at oral

15, 2020 5:43 PM), <https://reason.com/2020/06/15/textualism-and-purposivism-in-todays-supreme-court-decision-on-discrimination-against-gays-lesbians-and-transsexuals/>. For textualist arguments that Title VII unambiguously does not protect gay and transgender workers, see, e.g., Nelson Lund, *Unleased and Unbound: Living Textualism in Bostock v. Clayton County*, 21 FED. SOC. REV. 158 (2020); Blackman & Barnett, *supra* note 127; Blackman, *supra* note 127; George, *supra* note 127; John O. McGinnis, *Errors of Will and of Judgment*, LAW & LIBERTY (June 25, 2020), <https://lawliberty.org/errors-of-will-and-of-judgment/>; Phillips, *supra* note 103.

¹⁴⁵ See Kavanaugh, *supra* note 41, at 2129 (observing that a “critical difference between textualists and purposivists is that, for a variety of reasons, textualists tend to find language to be clear rather than ambiguous more readily than purposivists”).

¹⁴⁶ Admitting ambiguity may also require a textualist judge to cede some of his or her power, as Justice Scalia observed. See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521 (1989) (“One who finds *more* often (as I do) that the meaning of a statute is apparent from its text . . . thereby finds *less* often that the triggering requirement for *Chevron* deference exists. It is thus relatively rare that *Chevron* will require me to accept an interpretation which, though reasonable, I would not personally adopt.”).

¹⁴⁷ See *supra* notes 40–45 and accompanying text (Justice Kavanaugh disputes this premise). Justice Scalia himself recognized the faultiness of this premise—at least when it came to the “‘rule of lenity,’ which says that any ambiguity in a criminal statute should be resolved in favor of the defendant,” and the “rule which says that ambiguities in treaties and statutes dealing with Indian rights are to be resolved in favor of the Indians.” SCALIA, *supra* note 27, at 27. Justice Scalia rejected these rules because it was “virtually impossible to expect uniformity and objectivity” while according judges so much flexibility. *Id.* at 28. He wrote: “Every statute that comes into litigation is to some degree ‘ambiguous’; how ambiguous does ambiguity have to be before the rule of lenity or the rule in favor of Indians applies?” *Id.*; see also *United States v. Hansen*, 772 F.2d 940, 948 (D.C. Cir. 1985) (Scalia, J.) (“[The rule of lenity] provides little more than atmospherics, since it leaves open the crucial question—almost invariably present—of how much ambiguousness constitutes an ambiguity.”). But presumptions in favor of vulnerable groups are not *sui generis* in requiring judges to make determinations about ambiguity: *textualism itself* requires judges to make such determinations. It is not clear why Justice Scalia found the ambiguity determination to be a major, problematic shadow decision point in one context but not the other.

argument that this “case is really close, really close, on the textual evidence”¹⁴⁸—that, actually, “no ambiguity exists about how Title VII’s terms apply to the facts.”¹⁴⁹ Justice Alito likewise offers no justification for relying on corpus linguistics or for the various highly contestable choices underlying his conclusion that corpus linguistics proves that Title VII bars only discrimination motivated by “prejudice, or biased ideas or attitudes.”¹⁵⁰ Nor does he offer any justification for eschewing corpus linguistics and reverting to the dictionary when it comes to defining the word “sex.”¹⁵¹ Shifting between textualist tools in this manner enables Justice Alito to pick his friends out of the crowd (the corpus linguistics data presented to the Court on the word “sex” suggests its original meaning was broad enough to encompass sexual orientation and gender identity¹⁵²). This kind of cherry-picking of textualist tools and definitions offers significant reason to doubt the objectivity of the textualist enterprise, and the Justices offer no arguments for their methodological choices that would in any way allay those doubts.

The larger point here is that the Justices in *Bostock* are not actually engaged in a value-neutral dispute over textualist methodologies. They do not have—or, at least, chose not to explain or to implement—any sustained commitments to particular means of assessing original public meaning. Textualism offers a variety of tools to pick and choose at key points, and the Justices in *Bostock* take full advantage of that flexibility. But even if the Justices had clear and articulated trans-contextual methodological commitments regarding the practice of textualism, implementing those commitments would not yield determinate answers. The meaning of Title VII’s bar on discrimination is simply underdetermined from a textualist standpoint. Congress did not define the key words of the statute, those words are susceptible of multiple interpretations, and their meaning is constantly being contested. The Justices are thus required to make a series of interpretive choices based on extratextual considerations in order to resolve disputes over its meaning. But something—perhaps textualism itself—appears to preclude them from acknowledging (or perhaps even recognizing) when they are looking outside the text for guidance in making those choices.

The next section shows that the need to look beyond the text does not end once the Justices select their preferred definitions of discrimination. It is also necessary to look beyond the text in order to *apply* those definitions to the facts in *Bostock*. All of the Justices act as though determining the semantic meaning of Title VII’s prohibition on sex discrimination automatically resolves the question of whether that prohibition extends to discrimination on the basis of sexual orientation and gender identity. It does not. Determining the statute’s semantic meaning is only the start of the analysis. Part II examines the extratextual judgments that guide the dissenters’ application of their preferred antisubordinationist understanding of the statute. The next section shows that the majority too engages in extratextual judgments in applying its

¹⁴⁸ Transcript of Oral Argument at 25, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 140 S.Ct. 1731 (2020) (No. 18-107), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-107_c18e.pdf.

¹⁴⁹ *Bostock v. Clayton County*, 140 S. Ct. 1731, 1749 (2020).

¹⁵⁰ *Id.* at 1769 n.22 (Alito, J., dissenting).

¹⁵¹ *Id.* at 1756, 1784–91.

¹⁵² See Brief for Corpus-Linguistics Scholars Professors Brian Slocum, Stefan Th. Gries, and Lawrence Solan as Amici Curiae in Support of Employees, *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (No. 17-1618) (using corpus linguistics to show that the term “sex” was used far more capaciously in the 1960s than it is today, in ways that could have encompassed contemporary conceptions of sexual orientation and gender identity).

preferred anticlassificationist understanding. There is no way to apply even this “simple” definition of discrimination absent the kind of value judgments textualism supposedly excludes.

2) Applying *Bostock*’s “Simple Test” for Discrimination

The Court in *Bostock* asserts, based on its textualist analysis, that Title VII establishes a “simple test” for detecting sex discrimination: “ask[] whether an individual female employee would have been treated the same regardless of her sex”¹⁵³ (or, if the plaintiff is male, whether he would have been treated the same regardless of his sex). If the answer is no, sex discrimination has occurred.

Visit almost any American workplace, however, and you will find employees being subjected to this kind of sex-based differential treatment on a daily basis, with no relief in sight from Title VII. For example, there is a near-universal consensus among courts that sex-differentiated grooming codes and sex-segregated bathrooms do not violate Title VII, even though a woman who is fired for refusing to wear make-up or for entering the men’s bathroom can argue, quite persuasively, that her employer would not have fired a man for engaging in those acts. In these contexts, however, courts do not “buy[] into th[e] [literalist] approach.”¹⁵⁴ They routinely hold that such policies do not discriminate on the basis of sex, but rather require male and female employees alike to comply with basic social norms. In *Willingham v. Macon Telegraph Publishing*, probably the most cited case in this area, the Fifth Circuit explained that when an employer institutes a sex-specific grooming policy, “each sex is treated equally” because “both sexes are being screened with respect to a neutral fact, i.e., grooming in accordance with generally accepted community standards of dress and appearance.”¹⁵⁵ This reasoning has also been used to justify sex-segregated bathrooms—the idea being that “[e]very student can use a restroom associated with their physiology, whether they are boys or girls.”¹⁵⁶ As long as the burdens on the sexes are equal, in the courts’ view, such “generally applicable, gender-specific policies”¹⁵⁷ are not understood to “‘discriminate’ on the basis of sex within the meaning of Title VII.”¹⁵⁸

¹⁵³ *Bostock*, 140 S. Ct. at 1743.

¹⁵⁴ *Cf. id.* at 1824 (Kavanaugh, J., dissenting) (criticizing the Court for “buy[ing] into this approach” in *Bostock*).

¹⁵⁵ 507 F.2d 1084, 1092 (5th Cir. 1975).

¹⁵⁶ *G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 624 (4th Cir. 2020) (Wynn, C.J., concurring) (quoting the school board’s explanation for why its exclusion of a transgender boy from the boys’ bathroom did not discriminate on the basis of sex).

¹⁵⁷ *Schroer v. Billington*, 577 F. Supp. 2d 293, 304 (D.D.C. 2008).

¹⁵⁸ *Viscecchia v. Alrose Allegria LLC*, 117 F. Supp. 3d 243, 253 (E.D.N.Y. 2015) (finding that a policy requiring male but not female employees to have short hair did not discriminate on the basis of sex); *see also* *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104, 1110 (9th Cir. 2006) (“We have long recognized that companies may differentiate between men and women in appearance and grooming policies, and so have other circuits. The material issue under our settled law is . . . whether the policy imposed on the plaintiff creates an ‘unequal burden’ for the plaintiff’s gender.” (citations omitted)); *Harper v. Blockbuster Ent. Corp.*, 139 F.3d 1385, 1389 (11th Cir. 1998) (holding that the permissibility of sex-differentiated grooming codes is so well-established that plaintiffs could not have had an objectively reasonable belief that their employer’s grooming policy discriminated against them on the basis of sex); *Tavora v. New York Mercantile Exch.*, 101 F.3d 907, 908 (2d Cir. 1996) (upholding a policy that barred male but not female employees from having long hair in part because “such employment policies have only a *de minimis* effect”); *Boyce v. Gen. Ry. Signal Co.*, No. 99-CV-6225T, 2004 WL 1574023, at *1 (W.D.N.Y. 2004) (“[A]llegations based upon a male employee’s hair length do not give rise to a sustainable claim under Title VII.”).

Until very recently, courts characterized discrimination against gay and transgender people in this same sex-neutralizing way. They rejected the argument that discrimination against gays and lesbians is sex-based, reasoning that “whether dealing with men or women the employer is using the same criterion: it will not hire or promote a person who prefers sexual partners of the same sex.”¹⁵⁹ Courts adopted a parallel sex-neutralizing characterization of discrimination against transgender people, finding that it was based on employers’ objection to “change in sex,” a form of conduct in which both men and women engage.¹⁶⁰ This was the core of the dissenting Justices’ argument in *Bostock*. Justice Alito asserted that “[i]n cases involving discrimination based on sexual orientation or gender identity, the grounds for the employer’s decision—that individuals should be sexually attracted only to persons of the opposite biological sex or should identify with their biological sex—apply equally to men and women.”¹⁶¹

The Court in *Bostock* decided to stop characterizing discrimination against gay and transgender people in this sex-neutralizing way. It rejected the approach of the grooming cases and likened anti-LGBT discrimination instead to a policy under which “an employer eager to revive the workplace gender roles of the 1950s. . . enforces a policy that he will hire only men as mechanics and only women as secretaries.”¹⁶² The employer could argue that this policy does not discriminate on the basis of sex because it requires men and women alike to conform to traditional gender roles. But, the Court declared: “No one thinks *that*.”¹⁶³

But why do we think what we think about these various examples? How do courts decide which policies to characterize in sex-neutralizing ways and which policies to characterize as sex discrimination? For that matter, why do courts think it is permissible for employers to require female but not male lifeguards to wear bathing suit tops,¹⁶⁴ but not to require female but not male employees to wear uniforms?¹⁶⁵ Why do courts think it is permissible to have a men’s basketball team but not a men’s law firm? Why do courts think it is permissible for employers hiring in male-dominated fields to engage in the targeted recruitment of women, but not of men? The American workplace is replete with sex-based differential treatment and Title VII constrains only

¹⁵⁹ *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 331 (9th Cir. 1979); *id.* (“[T]his policy does not involve different decisional criteria for the sexes”).

¹⁶⁰ *Grossman v. Bernards Twp. Bd. of Educ.*, No. 74-1904, 1975 WL 302, at *4 (D.N.J. Sept. 10, 1975); *id.* (“No facts are alleged to indicate, for example, that plaintiff’s employment was terminated because of any stereotypical concepts about the ability of females to perform certain tasks, nor because of any condition common only to woman.” (internal citation omitted)).

¹⁶¹ *Bostock v. Clayton County*, 140 S.Ct. 1731, 1764 (Alito, J., dissenting).

¹⁶² *Id.* at 1748.

¹⁶³ *Id.* at 1749.

¹⁶⁴ *See Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 150 (2d Cir. 2018) (Lynch, J., dissenting) (assuming widespread judicial agreement with the proposition with “that a pool that required both male and female lifeguards to wear a uniform consisting only of trunks would violate Title VII, while one that prescribed trunks for men and a bathing suit covering the breasts for women would not”).

¹⁶⁵ *Carroll v. Talman Fed. Sav. & Loan Ass’n of Chicago*, 604 F.2d 1028, 1029 (7th Cir. 1979) (finding a Title VII violation because the company “requires all of its female tellers, office and managerial employees to wear a uniform, whereas male employees in the same positions need wear only customary business attire”).

some of it. The text of the statute is of very limited use in helping to make or to explain legal determinations about the licitness of various sex-conscious practices.¹⁶⁶

Against this backdrop, it is possible to see more clearly what *Bostock* did and did not do. *Bostock* rejected courts' long-standing practice of erasing the sex-dependent judgments constitutive of anti-gay and anti-trans discrimination by characterizing such discrimination in sex-neutralizing terms. It did not develop an objective, text-driven way to determine what counts as sex discrimination. The Court declared in *Bostock* that "an employer who intentionally treats a person worse because of sex . . . discriminates against that person in violation of Title VII."¹⁶⁷ But there is no way to implement that rule without looking beyond the text of the statute. As the examples cited above demonstrate, it is impossible to determine when employers are treating an individual of one sex "worse" than an individual of another without considering the social context and making a normatively inflected judgment.

In fact, it is not even possible to determine when employers are treating the sexes *differently* without engaging in such judgment. Consider the case of the would-be FBI agent who flunked out of the FBI Academy after falling one push-up short of the number required of men to progress to the next stage of training.¹⁶⁸ He filed a Title VII claim against the Bureau, correctly claiming that if he were a woman, the number of push-ups he completed would have satisfied the test. But the Fourth Circuit rejected his claim. It held that the Bureau's sex-differentiated standards treat men and women the same because they demand the same level of fitness of both sexes. Indeed, the court suggested that *equalizing* the raw scores required of applicants would *discriminate* against women because it would require them to be considerably more fit than their male counterparts to pass the test.¹⁶⁹ The court explained that "[w]hether physical fitness standards discriminate based on sex . . . depends on whether they require men and women to demonstrate different levels of fitness."¹⁷⁰ This decision was not an outlier: the Fourth Circuit

¹⁶⁶ Richard Primus and Reva Siegel, among others, have made a similar point in the context of race, showing that what counts as an "express racial classification" is, at least in part, a normative question. Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 509 (2003) (arguing that courts "decide whether to apply strict scrutiny based on a normative sense that a statute is constitutionally problematic and then, reasoning backwards, announce that something in the statute constitutes an express classification"); *id.* at 505–06 ("[M]any practices that do involve government actors' identifying people by race are not always subject to strict scrutiny. Examples include the police use of racial descriptions of criminal suspects, the Census Bureau's collection of demographic data, state legislatures' race-based redistricting practices, and social service agencies' race-conscious adoption placements. . . . [N]ot all instances in which the government explicitly considers the race of individuals are 'express racial classifications' for purposes of equal protection doctrine. Some are, and some are not."); Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 59–67 (2013) (comparing and contrasting judicial stances toward race-conscious affirmative action policies with judicial stances toward race-conscious stop-and-frisk policies).

¹⁶⁷ *Bostock*, 140 S. Ct. at 1740.

¹⁶⁸ *Bauer v. Lynch*, 812 F.3d 340 (4th Cir. 2016).

¹⁶⁹ *Id.* at 349 (suggesting "that some differential treatment of men and women based upon inherent physiological differences is not only lawful but also potentially required" under Title VII (quotation marks omitted)); *see also* *Powell v. Reno*, No. 962743, 1997 U.S. Dist. LEXIS 24169, at *10–11 (D.D.C. July 24, 1999) (finding that "physical tests in which women are compared against women and men are compared against men do not discriminate against either sex," and that, in fact, "physical fitness tests that have the same standards for men and women may discriminate against women in violation of Title VII").

¹⁷⁰ *Bauer*, 812 F. 3d at 351.

noted that no court has found sex-differentiated physical fitness standards to be discriminatory under Title VII.¹⁷¹

Our legal system does not generally treat sex-differentiation in sports as violating prohibitions on sex discrimination either. Here too, it is often unclear what counts as treating the sexes the same or differently. Title IX of the 1972 Education Amendments bars discrimination on the basis of sex under any education program or activity that receives federal funds.¹⁷² The law contains several exemptions, but it does not exempt athletics from its antidiscrimination mandate. The regulations implementing Title IX affirm that “[n]o person shall, on the basis of sex, . . . be treated differently from another person or otherwise be discriminated against.”¹⁷³ Then, in the next sentence, those regulations begin to lay out rules for establishing sex-segregated teams.¹⁷⁴ Indeed, the agency that first produced these regulations specifically stated that if a school opens its teams to members of both sexes and girls do not make the teams, sex-segregated teams might be required under the law.¹⁷⁵ That remains true today.¹⁷⁶ There are a million questions (and lawsuits) about what constitutes discrimination on the basis of sex in this context, where the baseline is for making that determination, and how to treat male and female athletes the same, or equally. Even assuming we all accepted Justice Gorsuch’s understanding of sex discrimination, the law’s text—and the “simple test”—wouldn’t get us very far in many of these cases.

Examples of and variations on these problems abound in the employment context. What about the “female lineman” who filed a Title VII claim after complaining about the absence of bathroom facilities and being told she should just urinate outside like all the other (male) linemen do?¹⁷⁷ Or the female firefighter who was required to sleep in the men’s bunk room, which

¹⁷¹ *Id.* at 348. For other decisions upholding sex-differentiated physical fitness standards, see, e.g., *In re Scott*, 172 Vt. 288 (2001) (upholding as non-discriminatory sex-differentiated standards designed “to hold males and females to the same level of fitness based on their aerobic capacity” in Vermont State Police examination); *Hale v. Holder*, EEOC Dec. No. 570-2007-00423X, at *4 (2010) (holding that FBI established sex-differentiated but “equivalent relative fitness standards for males and females and thereby applied nondiscriminatory fitness requirements to its trainees”).

¹⁷² 20 U.S.C. §1681(a) (2000) (“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. . . .”).

¹⁷³ 34 C.F.R. § 106.41(a) (2020).

¹⁷⁴ 34 C.F.R. § 106.41(b) (2020).

¹⁷⁵ See Off. for Civil Rights, U.S. Dep’t of Educ., Letter to Chief State School Officers, Title IX Obligations in Athletics (Nov. 11, 1975), <https://www2.ed.gov/about/offices/list/ocr/docs/holmes.html> (stating that a school would not be in compliance with Title IX if it disbanded “its women’s teams and opened up its men’s teams to women, but only a few women were able to qualify for the men’s teams”).

¹⁷⁶ See 34 C.F.R. § 106.41(c) (2020).

¹⁷⁷ See *DeClue v. Cent. Ill. Light Co.*, 223 F.3d 434, 438 (7th Cir. 2000) (Rovner, C.J., dissenting in part) (“[R]efusal to provide female employees with restrooms can be understood as creating a hostile work environment” under Title VII’s sex provision.); see also *id.* at 439–40 (“Discrimination in the real world many times does not fit neatly into the legal models we have constructed. . . . Because prejudice and ignorance have a way of defying formulaic constructs, the lines with which we attempt to divide the various categories of discrimination cannot be rigid.”).

technically became a unisex bunk room once she was hired?¹⁷⁸ Were these women being treated the same as their male counterparts, or differently?

The point here is that applying the “simple test” for discrimination is nowhere near as simple as the Court in *Bostock* suggests. Even if a judge tried to apply the “simple test” across the board, in an entirely text-driven way, the need to consult extratextual sources and make normative choices would still arise. Textualism can mask those choices. But it is of little help when it comes to actually making choices about what forms of regulation violate the law’s prohibition on discrimination.

3) Context Matters: Textualists’ Disparate Treatment of Sex and Race

The underlying normativity of textualist decisionmaking becomes particularly apparent if we look beyond the interpretation of legal prohibitions on sex discrimination alone and compare it with the interpretation of legal prohibitions on race discrimination. Antidiscrimination doctrine—in both the constitutional and the statutory contexts—only partially constrains sex-based classifications but adopts a considerably stricter stance toward race-based classifications. In fact, sex-based Title VII doctrine has more in common with sex-based equal protection doctrine in this regard than it does with race-based Title VII doctrine—and that is true even (maybe even especially) in textualist jurisprudence. The fact that textualist judges define discrimination differently where sex and race are concerned—even though Title VII does not—is a pretty fair indication that textualist decisionmaking in these contexts is not based on text alone.

In *Bostock*, the Court insists it can determine what counts as sex discrimination without looking beyond Title VII’s text. But in the constitutional context, the Court has long insisted on the need for socially attentive judgments in determining what counts as sex discrimination. *United States v. Virginia*,¹⁷⁹ the leading constitutional sex discrimination decision, holds that the question of whether a sex-based practice is discriminatory depends on whether it perpetuates traditional social hierarchies or reinforces conventional sex-role stereotypes. The Court explains that “[s]ex classifications may be used to compensate women ‘for particular economic disabilities [they have] suffered,’ to ‘promot[e] equal employment opportunity,’ [and] to advance full development of the talent and capacities of our Nation’s people.”¹⁸⁰ But, the Court holds, “such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.”¹⁸¹

All of the Justices, liberal and conservative alike, embrace the idea that sex classifications are sometimes permissible under the Fourteenth Amendment and that determining the constitutionality of such classifications requires an inquiry into their social purposes and effects. For instance, Justice Scalia would have upheld the exclusion of women from the Virginia

¹⁷⁸ See *Epps v. City of Pittsburgh*, 33 F. Supp. 2d 409, 410 (W.D. Pa. 1998). The plaintiff refused to sleep in the station’s bunk room, where the male firefighters typically wore few clothes. She “initially slept on an old couch in the . . . garage . . . behind a fire engine,” but then a captain destroyed it and informed her “she must sleep in the bunk room with the men.” *Id.* at 410–11.

¹⁷⁹ 518 U.S. 515 (1996).

¹⁸⁰ *Id.* at 533 (citations and footnote omitted) (second and third alterations in original).

¹⁸¹ *Id.* at 534.

Military Institute on the ground “[t]hat single gender education at the college level is beneficial to both sexes,” and that the facts “utterly refute the claim that VMI has elected to maintain its all male student body composition for some misogynistic reason.”¹⁸² In *Nguyen v. Immigration and Naturalization Service*, Justice Kennedy upheld a law that made it harder for American fathers to transmit their citizenship to children born overseas than it was for American mothers after finding that the disparate treatment reflected real biological differences and did not reinforce sex stereotypes.¹⁸³ Justice Kennedy explained in *Nguyen* that sex classifications are discriminatory only when they are “marked by misconception and prejudice” or when they “show disrespect for either class.”¹⁸⁴ Conservative Justices have rejected anticlassificationist approaches to sex discrimination since the 1970s, arguing that courts should not “treat gender classification as a talisman . . . without regard to the rights involved or the persons affected.”¹⁸⁵

But this is not how conservative Justices approach the issue of classification in the context of race. At the same time these Justices were developing the argument that courts should not treat sex classification as a talisman of illegality, they were starting to argue the opposite in the context of race, under both Title VII and the Fourteenth Amendment. In 1979, the Court issued a landmark decision, *United Steelworkers of America v. Weber*,¹⁸⁶ upholding an affirmative action program against a race-based Title VII challenge. That decision elicited a forceful dissent from Justice Rehnquist (who three years earlier warned against treating sex classification as a talisman), arguing that racial classification *is* a talisman of illegality. He argued that “[t]he operative sections of Title VII prohibit racial discrimination in employment *simpliciter*,” and that the “normal meaning” of the statute’s bar on discrimination categorically “prohibits a covered employer from considering race when making an employment decision.”¹⁸⁷ In fact, the massive conservative backlash to the Court’s decision in *Weber* helped to fuel the rise of textualism in the 1980s.¹⁸⁸ Justice Scalia had been on the Court for less than a year when he issued one of the boldest dissenting opinions of his career, demanding that *Weber* be overruled.¹⁸⁹ Justice Scalia argued in that opinion that Title VII’s prohibition on discrimination was “a model of statutory draftsmanship” and that it defined discrimination—with crystalline “clarity”—in strict anticlassificationist terms.¹⁹⁰

¹⁸² *Id.* at 580 (Scalia, J., dissenting).

¹⁸³ Tuan Anh Nguyen v. INS, 533 U.S. 53, 68 (2001).

¹⁸⁴ *Id.* at 73.

¹⁸⁵ *Craig v. Boren*, 429 U.S. 190, 220 (1976) (Rehnquist, J., dissenting); *id.* at 219 (arguing against heightened scrutiny of a law enabling women to buy low-alcohol beer at a younger age than men because there is no evidence “males in this age group are in any way peculiarly disadvantaged, subject to systematic discriminatory treatment, or otherwise in need of special solicitude from the courts”).

¹⁸⁶ *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

¹⁸⁷ *Id.* at 220; *id.* at 254 (arguing that “the cold words of the statute itself” bar racial classifications of any kind, including affirmative action).

¹⁸⁸ Philip P. Frickey, John Minor Wisdom Lecture, Wisdom on *Weber*, in 74 TUL. L. REV. 1169, 1184 (2000) (suggesting “the conservative reaction to *Weber*[] has provided much fuel for the remarkable evolution in conservative statutory methodology we have seen since the early 1980s”).

¹⁸⁹ *Johnson v. Transp. Agency*, 480 U.S. 616, 657 (1987) (Scalia, J., dissenting).

¹⁹⁰ *Id.*

Conservative Justices in this period also began to interpret the Fourteenth Amendment's bar on race discrimination in this way, arguing that all race-based classifications should be subject to strict scrutiny and almost always invalidated.¹⁹¹

Justice Scalia argued that "to classify and judge men and women on the basis of . . . the color of their skin. . . is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society."¹⁹² Justice Thomas has suggested that only the need to prevent imminent "anarchy" or "violence" could ever justify race-based state action.¹⁹³ He has explained that "[t]he Constitution abhors classifications based on race . . . because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all."¹⁹⁴ That was also the logic behind Chief Justice John Roberts' plurality opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*: "racial classifications are simply too pernicious to permit"¹⁹⁵ in almost all circumstances, regardless of their social purposes or effects.

What is important for purposes of this Article—and a serious challenge to explain from a textualist perspective—are the substantial continuities between Fourteenth Amendment doctrine and Title VII doctrine when it comes to defining discrimination in the contexts of race and sex. The text of Title VII's prohibition on discrimination is identical with respect to race and sex: It states that employers may not "discriminate against any individual . . . because of such individual's race . . . [or] sex."¹⁹⁶ But as in the equal protection context, courts in Title VII cases have treated race discrimination and sex discrimination differently: they have adopted a more anticlassificationist approach in the context of race and a more antisubordinationist approach in the context of sex.¹⁹⁷ Judge Lynch very matter-of-factly references the differential treatment of race and sex in Title VII jurisprudence in his dissenting opinion in *Zarda*. He observes that in race-based Title VII cases, "courts have taken the view that to distinguish *is*, for the most part, to discriminate."¹⁹⁸ But in sex-based Title VII cases, they have held that "not every distinction between men and women in the workplace constitutes discrimination against one gender or the other."¹⁹⁹

¹⁹¹ Conservative Justices argued then, and argue today, that all racial classifications are subject to strict scrutiny, but, as noted above, the question of what counts as a classification remains a major shadow decision point. *See infra* note 166. The Court has yet to provide an adequate account of what counts as a classification.

¹⁹² *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520–21 (1989).

¹⁹³ *Grutter v. Bollinger*, 539 U.S. 306, 353 (Thomas, J., dissenting).

¹⁹⁴ *Id.*

¹⁹⁵ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 702 (2007).

¹⁹⁶ 42 U.S.C. § 2000e(k) (2012); *see also* *Johnson v. Transp. Agency*, 480 U.S. 616, 665 (1987) (Scalia, J., dissenting) (observing that "the portions of Title VII at issue here [including the statute's core antidiscrimination provision] treat race and sex equivalently").

¹⁹⁷ *See* Reva B. Siegel, *Pregnancy as a Normal Condition of Employment: Comparative and Role-Based Accounts of Discrimination*, 59 WM. & MARY L. REV. 969, 987–990 (2018) (discussing the differing conceptions of discrimination conservatives apply in the contexts of race and sex); *id.* at 988 (noting the frequency with which advocates of anticlassificationism in the race context make "substantive judgments about which kinds of sex distinctions are sex discriminatory"). In fact, it is the conservative textualist judges who toggle most insistently between different definitions of discrimination in the contexts of race and sex. Liberal judges generally apply an antisubordinationist understanding across the board.

¹⁹⁸ *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 149 (2d Cir. 2018) (Lynch, J., dissenting).

¹⁹⁹ *Id.*

The difference in the law’s treatment of race-segregated and sex-segregated bathrooms and locker rooms illustrates this phenomenon in a particularly stark way. Race-segregated facilities are now illegal, of course, while sex-segregated bathrooms and locker rooms remain ubiquitous. Courts offer a variety of reasons for the differential treatment: there are real biological differences between the sexes; “many people . . . are reticent about disrobing or using toilet facilities in the presence of individuals” of the opposite sex; “[f]or women who have been victimized by sexual assault or abuse, the experience of seeing an unclothed [male] person . . . in a confined and sensitive location such as a bathroom or locker room can cause serious psychological harm.”²⁰⁰ But those are all extratextual considerations. Title VII bars discrimination because of race and sex. The idea that segregated bathrooms are stigmatizing and discriminatory in one of those contexts and innocuous or even desirable in the other does not come from the text.²⁰¹ It is a product of evolving social values.²⁰²

4) Textualism’s Democratic Deficit

Robert Post has argued that a necessary consequence of the fact that “constitutional law could not plausibly proceed without incorporating the values and beliefs of nonjudicial actors” is that “constitutional law will be as dynamic and as contested as the cultural values and beliefs that inevitably form part of the substance of constitutional law.”²⁰³ The same is true of Title VII law. Like the equal protection clause, Title VII was enacted prior to the women’s rights and LGBT rights movements. The changes those movements have wrought, and the legal and social conflicts they continue to engender, have powerfully shaped the law’s meaning over the past half-century. Textualist rhetoric might lead one to assume that textualism would act as a drag on this process, eternally confining Title VII to what it meant at the time of its enactment. But the ascendance of textualism has not resulted in a noticeably less dynamic antidiscrimination jurisprudence than the jurisprudence produced by more explicitly dynamic methodologies. Decisions framed in textualist terms have been just as responsive to developments fueled by social mobilizations and legal contestation as decisions adopting other methodological approaches. *Oncale* and *Bostock* are paradigmatic examples: they are both textualist, but also doctrinally innovative, and they both build on, and in turn shape, important ongoing processes of legal and social change.

This dynamism and responsiveness to cultural and doctrinal evolution raises important and difficult questions about textualism that have thus far gone unaddressed by the Court. There

²⁰⁰ *Bostock v. Clayton County*, 140 S.Ct. 1731, 1778–79 (2020) (Alito, J., dissenting).

²⁰¹ Indeed, when it comes to bathrooms, conservative textualist judges, such as Judge William Pryor of the Eleventh Circuit, argue that “context matters.” *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1311 (11th Cir. 2020) (Pryor, J., dissenting); *id.* (“As the late Justice Thurgood Marshall once put it, ‘A sign that says ‘men only’ looks very different on a bathroom door than a courthouse door.’”). Needless to say, this is not the stance conservative textualists take when it comes to affirmative action.

²⁰² If the result of *Bostock* is that Title VII now bars employers from requiring transgender employees—but not cisgender employees—to use bathrooms associated with their birth sex, that will be yet another example of the influence of extratextual considerations on textualist interpretation. That result may reflect the best reading of current legal doctrine, and it may track emerging majoritarian social values, but it does not spring unambiguously from the text of the law.

²⁰³ Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 10 (2003).

is one point in *Bostock* where the Court appears to tee up such questions: It acknowledges toward the end of its opinion that Title VII was not always interpreted as it is now. In the 1960s and 1970s, judges held that “Title VII did not prevent an employer from firing an employee for refusing his sexual advances,” and that the practice of “hiring mothers but not fathers of young children wasn’t discrimination because of sex.”²⁰⁴ Indeed, the Court observes that, “[i]n the years immediately following Title VII’s passage, the EEOC officially opined that listing men’s positions and women’s positions separately in job postings was simply helpful rather than discriminatory.”²⁰⁵ No one thinks any of *this* today, so what changed?

The Court drew these examples from a law review article I wrote on the meaning of Title VII’s sex provision.²⁰⁶ That article quotes an EEOC Commissioner who observed in the mid-1960s that “the sex provision of Title VII is mysterious and difficult to understand and control.”²⁰⁷ The widely acknowledged ambiguity of the sex provision at the time of its enactment meant that legal actors had to consult extratextual sources as guides to its meaning. Women’s rights advocates especially helped to shape popular and judicial conceptions of the provision’s meaning—in some cases inventing new conceptual tools that extended the law’s reach to practices previously viewed as distinct from sex discrimination. By the early 1980s, courts and the EEOC had reversed themselves in all of the instances the Court cites. My article shows that those reversals—of which all the Justices in *Bostock* approve—were driven by social and legal contestation that shaped the statute’s meaning.

The Court, however, makes no mention of that history. It (partially) reproduces the quote from the EEOC Commissioner but omits the part where he says that Title VII’s sex provision is “mysterious and difficult to understand.” The Court instead characterizes him as saying that “the words of ‘the sex provision of Title VII [are] difficult to . . . control’”²⁰⁸—a form of selective editing that obscures the fact that there was explicit discussion of the law’s ambiguity at the time of its enactment. The Court also omits any mention of the legal feminists who exerted such a substantial influence on the law’s development (including those who founded the National Organization for Women in 1966 explicitly in order “to effect ‘a public redefinition of discrimination based on sex’” under Title VII²⁰⁹). The Court instead explains the major interpretive changes that occurred in Title VII jurisprudence in the 1970s and 1980s by claiming that “[o]ver time, the breadth of the statutory language proved too difficult to deny.”²¹⁰

This is textualism at its most aggressive: denying the problem of underdeterminacy and the corresponding need to consult extratextual sources even in the face of deeply ambiguous

²⁰⁴ *Bostock v. Clayton County*, 140 S. Ct. 1731, 1752 (2020).

²⁰⁵ *Id.*

²⁰⁶ *Id.* (citing Cary Franklin, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 HARV. L. REV. 1307, 1338, 1340, 1345 (2012)).

²⁰⁷ Franklin, *supra* note 206, at 1338 & n. 153 (quoting Federal Mediation Service to Play Role in Implementing Title VII, [1965-1968 Transfer Binder] Empl. Prac. Dec. (CCH) P8046, at 6074 (Feb. 7, 1966) (internal quotation marks omitted)).

²⁰⁸ *Bostock*, 140 S.Ct. at 1752 (quoting Franklin, *supra* note 206, at 1338, quoting the Commissioner (internal quotation marks omitted)).

²⁰⁹ See Franklin, *supra* note 206, at 1345 (quoting NAT’L ORG. FOR WOMEN, THE FIRST FIVE YEARS 1966–71, at 16 (1971) (on file with the Schlesinger Library, Radcliffe Institute, Harvard University)); *id.* at 1340–47 (discussing this campaign and the legal results it yielded).

²¹⁰ *Bostock*, 140 S.Ct. at 1752.

statutory text. The Court in *Bostock* claims that all the change that has occurred in Title VII's meaning over the past half-century, and all the change that occurs in *Bostock* itself, is the product of judges' increasing willingness to heed the unambiguous semantic meaning of Title VII's text; there has never been any "construction"²¹¹ involved. The Court insists that the text alone is and always has been capable in this context of resolving our deepest legal and cultural conflicts.²¹²

This approach gives rise to a serious democratic accountability problem. When the Court engages in statutory construction without admitting it, it fails to provide the American people and the coordinate branches of government with a full account of how it is actually constructing the law's meaning: what extratextual sources it is relying on and what rules or principles it is applying to reach the outcomes it does. That is a problem for a host of reasons. For a start, it undermines the democratic dialogue textualism is supposed to enable between the Court and Congress if the Court is not communicating to lawmakers the principles it is actually using to interpret the laws. Interpretive methodology is increasingly at the center of judicial confirmation battles, but elected leaders and the people they represent can hardly object or engage in any real discussion of this topic if judges obscure the methods they actually use. On the most basic level, textualism relieves judges of their obligation to provide a complete and honest accounting of their reasoning and alleviates the need for them to demonstrate that their opinions are based in law—in the way Judge Katzmann, Judge Moore, and Judge Wood do in the cases leading up to *Bostock*.

This lack of reason-giving also gives rise to a significant rule-of-law problem. The Court in *Bostock* declares that after fifty years of applying Title VII one way, the tools of textualism have now revealed that it ought to be applied another way. Justice Alito ends his dissenting opinion with what he considers a parade of horrors: predictions about where the law will go after *Bostock*.²¹³ But it is very hard to predict, based on the majority's opinion, whether he is right or what other implications this decision may have. All the Court tells us in *Bostock* is that the dictionary has revealed that gay and transgender workers are covered by Title VII. It is not at all clear, based on this assertion, what the dictionary will reveal next.

In fact, if one wanted to predict where the Court will next find textualist support for a previously losing argument in the context of antidiscrimination law, the best approach would likely be to identify other social mobilizations and kinds of discrimination claims that have recently gained ground at the Court. That seems one of the clearest lessons of *Bostock*, although it is precisely what the Court seeks to deny. That denial does little work, however. It does not actually insulate the Justices from the moral disagreements of the day or eradicate the influence

²¹¹ See KEITH E. WHITTINGTON, CONSTITUTIONAL: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 7 (1999) (explaining that sometimes, even after all interpretive tools have been applied, "there will remain an impenetrable sphere of meaning that cannot be simply discovered," and asserting that in such cases "[t]he specification of a single governing meaning . . . requires an act of creativity beyond interpretation," which he refers to as "the construction of meaning").

²¹² Justice Gorsuch cites key Title VII precedents in his opinion, and some have argued that his opinion actually relies more heavily on those (non-textualist) precedents than on the original meaning of Title VII's text. See, e.g., Blackman, *supra* note 127. That may be so. But Justice Gorsuch insists it is not. He argues that the outcome in *Bostock* is determined entirely by Title VII's ordinary public meaning circa 1964 and that he is merely "confirming [his] work against th[e] Court's precedents" when he cites them. *Bostock*, 140 S. Ct. at 1739.

²¹³ *Bostock*, 140 S.Ct. at 1778–83.

of fifty years of legal and social contestation on the interpretation of Title VII. It simply makes the outcome in *Bostock*—highly justifiable on other, non-textualist legal grounds—more susceptible to accusations that it came about through judicial fiat.

II) The Inevitability of Extratextual Judgments and the Problem of Judicial Accountability

Part I shows that the Court in *Bostock* made a number of critical choices at shadow decision points guided by unacknowledged extratextual considerations. By denying that it was consulting anything other than the text of Title VII, the Court sought to position itself as a wholly independent and autonomous actor: outside politics, above democratic debate, and impervious to legal and social change. That image of courts has considerable popular appeal, but it is an inadequate and misleading model of how courts operate, and it masks the interactive and iterative process through which legal meaning is made and evolves over time. This model also aggrandizes judicial power in antidemocratic ways, enabling judges to respond selectively to favored social mobilizations while claiming absolute neutrality and to make consequential decisions without giving a complete account of their reasons.

The dissenting Justices—Justice Alito, Justice Thomas, and Justice Kavanaugh—argue that the problem in *Bostock* lies not with textualism itself, but with the way the Court does textualism. They accuse the Court of interpreting Title VII’s antidiscrimination provision in an overly literal way, for results-oriented reasons. The vast majority of Americans today support antidiscrimination protections for gay and transgender workers. The dissenting Justices argue that the right way to create such protections is by persuading lawmakers to take action, not by using the power of judicial review to write such protections into a statute that was enacted a long time ago and that unambiguously lacks such protections. They argue that textualism done right reveals that the ordinary meaning of sex discrimination in 1964 “was as clear as clear could be,”²¹⁴ and that it did not extend to discrimination on the basis of sexual orientation and gender identity. In fact, they argue that the semantic meaning of discrimination “because of sex” has remained constant since the late nineteenth century, when states began to enact early sex-based antidiscrimination provisions,²¹⁵ and that none of the Court’s precedents prior to *Bostock* did anything to alter that meaning. They argue that, even today, “Title VII’s prohibition of discrimination because of ‘sex’ still means what it has always meant,”²¹⁶ and that discrimination against LGBT people simply does not fall within this meaning.

This Part shows that the problem does lie with textualism. The outcome the dissenting Justices reach in *Bostock* may hew more closely to the original expected applications of Title VII’s sex provision, but their conclusions about the statute’s semantic meaning are no more objective or exclusively text-driven than those of the majority. The dissenting Justices make just as many choices at shadow decision points as their colleagues, and they too necessarily rely on extratextual considerations, both in deciding how to define sex discrimination and in deciding how to apply that definition.

²¹⁴ *Id.* at 1756.

²¹⁵ *Id.* at 1768–69.

²¹⁶ *Id.* at 1755.

When it comes to defining discrimination “because of sex,” the dissenting Justices claim that the meaning of that phrase has remained constant since the late nineteenth century—or more boldly still, that that phrase has “always” meant the same thing. Examining these claims, one appreciates why the original public meaning methodology causes historians such deep consternation.²¹⁷ The idea that the meaning of sex discrimination (semantic or otherwise) has remained unchanged throughout American history is wildly inaccurate. Indeed, much of the historical evidence Justice Alito adduces in support of this proposition actually serves to undermine it. This Part examines popular and judicial understandings of sex discrimination over time in various contexts, including marriage, parenthood, pregnancy, and sexual harassment. It shows that what sex discrimination means—not simply in terms of expected applications but also on a definitional level—has changed substantially over the past century as courts have grappled with claims challenging the legality of various sex-respecting practices. The dissenting Justices accept some of this change without acknowledging that it has occurred; some of it they reject. The text of Title VII, even in context, cannot explain why they draw the lines where they do.

This variability substantially undermines the dissenting Justices’ claim that their preferred outcome in *Bostock* reflects a neutral, entirely text-driven interpretation of Title VII. The dissenters contend that only “some exotic understanding of sex discrimination” could lead to the conclusion that discrimination against gay and transgender people falls within the confines of that term.²¹⁸ In fact, this Part shows, the idea that opposition to LGBT people reflects and reinforces traditional sex stereotypes is common knowledge, in all senses of that term. One need not read gender theory to know it. In fact, outside the context of this particular litigation, conservatives, no less than liberals, often insist upon it. As was the case with the majority, it is only extratextual considerations that lead the dissenting Justices to reach the conclusions they do in *Bostock*. But in the dissenting opinions, those extratextual considerations yield an outcome less supported by law.

A) History Will Be Heard²¹⁹

To support his argument that sex discrimination “was a familiar and well-understood concept”²²⁰ at the time of Title VII’s enactment and that its meaning has remained unchanged throughout American history, Justice Alito includes a long historical section in his opinion discussing prohibitions on sex discrimination dating back to the nineteenth century. “Long before Title VII was adopted,” he observes, “many pioneering state and federal laws had used language substantively indistinguishable from Title VII’s critical phrase, ‘discrimination because

²¹⁷ See, e.g., Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, the Poverty of Public Meaning Originalism*, 48 SAN DIEGO L. REV. 575, 584–88 (2011) (enumerating the faults of public meaning originalism from a historian’s standpoint); Jonathan Gienapp, *Constitutional Originalism and History*, PROCESS: A BLOG FOR AMERICAN HISTORY (Mar. 20, 2017), <https://www.processhistory.org/originalism-history/> (arguing that the search for original public meaning “repel[s] historical expertise” and “is an affront to *all* historians”).

²¹⁸ *Bostock*, 140 S.Ct. at 1767 (Alito, J., dissenting).

²¹⁹ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 746 (2007).

²²⁰ *Bostock*, 140 S.Ct. at 1768.

of sex.”²²¹ He notes, for instance, that “the California Constitution of 1879 stipulated that no one, ‘on account of sex, [could] be disqualified from entering upon or pursuing any lawful business, vocation, or profession.’”²²² Wyoming, Montana, Washington, and Utah had similar constitutional provisions, all dating back to the late nineteenth century, the most expansive of which stated that male and female citizens “‘shall equally enjoy all civil, political and religious rights and privileges.’”²²³

Justice Alito’s aim, in citing these early constitutional provisions, is to demonstrate that “discrimination because of sex” has always meant the same thing. But even a brief look at the history of sex-based antidiscrimination law reveals that this is not true. The meaning of this phrase has always been under negotiation and there are numerous historical precedents for the kind of conceptual shift that occurred in *Bostock*.

1) The “Traditional Concept” of Sex Discrimination

The dissenting Justices are right to suggest that the Court’s determination that Title VII protects gay and transgender workers would have surprised mid-century Americans.²²⁴ But that is not the only aspect of *Bostock* that would have generated surprise. Americans half-a-century ago would have been surprised by much of what the Justices say—and perhaps even more by what they take for granted. One aspect of *Bostock* that reflects its contemporary provenance is the absolute certainty with which all of the Justices assume and assert that an employment practice need not affect all women (or all men) in order to qualify as discrimination “because of sex.”²²⁵ The notion that an employment practice can count as sex discrimination if it targets only a subset of one sex was not at all clear at the time of Title VII’s enactment. In fact, many courts in the 1960s rejected that conceptualization as obviously erroneous, holding that—by definition—only practices that divide men and women into two groups perfectly differentiated along biological sex lines qualify as sex discrimination and that discrimination against subsets of men or women obviously rest on factors other than sex.²²⁶

That understanding, which courts in the 1960s and 1970s often referred to as the “traditional concept of sex discrimination,” doomed all sorts of claims that would count as sex discrimination claims under Title VII today, including claims involving marriage, motherhood, pregnancy, and sexual harassment. The next sections of this Article address pregnancy and sexual harassment; this section focuses on marriage and motherhood.

Discrimination against married women and mothers in the workplace was ubiquitous in the nineteenth and early twentieth centuries and remained common at the time of Title VII’s enactment. Some employers fired women when they married, others drew the line at

²²¹ *Id.* Note that Justice Alito here omits the word “against” from his characterization of Title VII’s operative language and suggests that “discriminate against” is not a linguistic unit with a distinct meaning, after all. *See supra* notes 116–125 and accompanying text.

²²² *Id.* (alteration in original).

²²³ *Id.* (quoting “Wyoming’s first Constitution . . . Art. VI, § 1 (1890)”).

²²⁴ *Bostock*, 140 S.Ct. at 1767.

²²⁵ *Id.*

²²⁶ For a more extensive discussion of this history, see Franklin, *supra* note 206.

motherhood, refusing to hire mothers and terminating the employment of women who became mothers. Today, workplace policies explicitly barring the employment of married women or mothers (but not married men and fathers) would generally be understood to violate Title VII. In fact, such policies so obviously violate Title VII, on today's understanding of the law, that contemporary employers rarely implement such policies. But when Title VII was enacted, such policies were common and courts generally upheld them against sex-based Title VII challenges.

Courts in early Title VII cases found that claims challenging discrimination against married women and mothers unambiguously fell outside the ordinary meaning of the law's prohibition on sex discrimination. Those courts observed "that the words of the statute are the best source from which to derive the proper construction,"²²⁷ and that from this textualist perspective, policies that discriminate against subsets of women, based on characteristics not shared by all women, clearly fall outside the law's scope. Courts responded to claims by married women by observing that Title VII bars only five categories of discrimination and that simply "[b]y reading the act it is plain that Congress did not ban discrimination in employment due to one's marital status."²²⁸ On this view, the fact that employers were willing to hire single women proved that their objection was not sex-based, i.e., to women *per se*. It was to the fact that the plaintiffs were married—and, courts held, "the law does not prevent discrimination against married people in favor of single ones."²²⁹

That interpretation seemed plausible in the 1960s because policies barring married women had a long history and had coexisted for many decades with laws barring sex discrimination in employment.²³⁰ It was not until after the rise of the women's movement in the late 1960s and the development of a new conceptual tool that expanded the parameters of what counted as sex discrimination under Title VII that courts finally began to strike down policies barring the employment of married women on the ground that those policies discriminated on the basis of sex. The movement in those years worked to persuade courts—and ordinary Americans—that laws and policies that enforce traditional sex and family roles are not benign reflections of the natural order, but rather, unfair limitations on opportunity. Policies regulating married women and mothers were among the movement's prime targets—and the campaign against those policies helped to spur the development of "sex-plus" doctrine. Under this doctrine, employers may not treat female employees differently than male employees on the basis of sex "plus" some facially neutral characteristic, such as the fact that they are married or have young children.²³¹ This new conceptual tool helped courts to reconceptualize longstanding policies barring the employment of wives and mothers as sex discrimination. In 1971, the Seventh Circuit deployed sex-plus doctrine in *Sprogis v. United Airlines* to invalidate a policy that barred

²²⁷ *Phillips v. Martin Marietta Corp.*, 411 F.2d 1, 3 (5th Cir. 1969) (making this argument about a policy—structurally identical to policies barring the employment of married women—that barred the employment of mothers, but not fathers, with young children).

²²⁸ *Cooper v. Delta Airlines, Inc.*, 274 F.Supp. 781, 783 (E.D.La. 1967).

²²⁹ *Id.*

²³⁰ For more on the history of these laws, see Claudia Goldin, *Marriage Bars: Discrimination Against Married Women Workers, 1920's to 1950's* (Nat'l Bureau of Econ. Rsch., Working Paper No. 2747, 1988), <https://www.nber.org/papers/w2747>.

²³¹ For more on the development of sex-plus doctrine, see Reva B. Siegel, *Introduction: A Short History of Sexual Harassment*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW* 13–17 (Catharine A. MacKinnon and Reva B. Siegel eds., 2004); Franklin, *supra* note 206, at 1374–78.

stewardesses from marrying.²³² That same year, the Supreme Court deployed the same tool in *Phillips v. Martin Marietta* to invalidate a policy barring the employment of mothers, but not fathers, with young children.²³³

Today, this understanding of sex discrimination is firmly rooted in Title VII doctrine. All of the Justices in *Bostock* take it for granted that policies affecting only a subset of women (or men) can qualify as discrimination because of sex—although, it is worth noting that, even today, the parameters of this rule remain unclear. Many courts have held that workplace practices count as sex discrimination only when the plus factor is an immutable characteristic or a fundamental right.²³⁴ On this definition, firing women but not men who have children would count as discrimination because of sex, but firing men but not women who wear skirts would fall outside the parameters of that term.²³⁵

Justice Alito characterizes *Bostock*'s holding that Title VII's ordinary meaning bars discrimination against gay and transgender people as "breathtaking" in its "arrogance," because it suggests that, for half a century, legal actors "did not grasp what discrimination 'because of . . . sex' unambiguously means" and were "not smart enough" to appreciate the "obvious."²³⁶ But Justice Alito's attempt to differentiate *Bostock* from, say, *Martin Marietta* by insisting that the latter case *really was* enforcing the original public meaning of sex discrimination²³⁷ would seem to be equally susceptible to these charges. On his textualist understanding, policies barring the employment of married women and mothers (as well as sexual harassment, including the male-on-male kind) have unambiguously violated prohibitions on sex discrimination not simply since 1964, but presumably since the time such prohibitions became part of American law in the late nineteenth century. The implication of this is that for nearly a century, Americans were simply "not smart enough" to realize it.

The problem here does not lie with our ancestors and their purported lack of intelligence. The problem lies with textualism, and its utterly unrealistic account of how language and law work. Within the field of linguistics, it is uncontroversial that "[j]ust about all words in any language have different meanings now than they did in the past."²³⁸ This is especially true of words such as "discrimination," "sex," and "discrimination because of sex," which have been subject to strong and sustained evolutionary pressure. Prior to the rise of textualism, courts and other legal actors routinely acknowledged that the meaning of those words is ambiguous; that

²³² *Sprogis v. United Airlines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971). Future Supreme Court Justice John Paul Stevens dissented in this case. *See id.* at 1202 (Stevens, J., dissenting). He argued that the marriage bar, as applied to stewardesses, could not logically constitute sex discrimination because United employed only women in this job category—proving that the discrimination was not on the basis of sex, but on the basis of marriage. *Id.* at 1205.

²³³ *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 543 (1971).

²³⁴ *See* Kimberly A. Yuracko, *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*, 83 TEX. L. REV. 167, 204–07 (2004).

²³⁵ *See* Regina E. Gray, *The Rise and Fall of the "Sex-Plus" Discrimination Theory: An Analysis of Fisher v. Vassar College*, 42 HOW. L.J. 71, 84 (1998) ("The requirement that the 'plus' in a 'sex-plus' case consist of an 'immutable characteristic' or a 'fundamental right' was established in cases challenging employers' grooming/dress code regulations").

²³⁶ *Bostock v. Clayton County*, 140 S.Ct. 1731, 1757 (2020) (Alito, J., dissenting).

²³⁷ *Id.* at 1775.

²³⁸ JOHN MCWHORTER, WORDS ON THE MOVE: WHY ENGLISH WON'T—AND CAN'T—SIT STILL (LIKE, LITERALLY) 59 (2016).

ambiguity reflects ongoing contestation over their meaning. For decades, even centuries, social movements have worked tirelessly to alter people's understanding of those words and the phenomena they seek to describe. Textualists and originalists criticize proponents of dynamic statutory interpretation and living constitutionalism for suggesting that the meaning of legal provisions may evolve over time and that judges may properly enforce new meanings. Justice Alito and Justice Thomas accuse the majority in *Bostock* of doing this and excoriate them for it. Justice Scalia reserved some of his harshest criticism for adherents of dynamic interpretive approaches, whom he accused of “deprecating the closed-mindedness of our forebears” and arrogantly assuming their own superiority.²³⁹

But that is an odd criticism for a textualist to make. The basic premise of textualism, as applied in *Bostock*, is that discrimination because of sex has only one meaning, that this meaning has never changed, and that it has always been completely unambiguous. The necessary implication of this premise is that Americans in the past were so blinded by the prejudices of their day that they consistently misinterpreted sex-based antidiscrimination laws to permit conduct that obviously violated them—but that now, textualist judges (who do textualism right) can access the true and eternal meaning of those laws and apply that meaning unencumbered by the kinds of cultural considerations that blinded our forebears. Now, the dissenting Justices contend, they (although not the Justices in the majority) have been able to transcend the situatedness that plagued judges in the past and to apply the ordinary meaning of legal prohibitions on sex discrimination in an entirely text-driven and value-free way.

The remainder of this Part demonstrates that the dissenting Justices have not actually managed this feat—because no judge could. Judges are inescapably part of the culture in which they judge; they are not impervious to social influences, and thus, the law is not either. On this understanding, to say that *Bostock* incorporates “2020 values”²⁴⁰ is not, as Justice Alito imagines, to accuse the majority of arrogance and lawlessness. It is to note something obviously and unavoidably true: the fact that all of us—even judges—are creatures of our time. It is not clear that an interpretive methodology that ignores, or claims to be able to transcend, that fact is a study in humility.

2) The Regulation of Pregnancy

The issue of pregnancy arises only once in *Bostock*, in a footnote.²⁴¹ Justice Alito adverts in that footnote to the fact that Congress amended Title VII in 1978 to define pregnancy discrimination as sex discrimination. He argues that “[t]his definition should inform the meaning of ‘because of sex’ in Title VII more generally” because it shows that the statute, at its most expansive, covers “conditions that are biologically tied to sex”—and, he asserts, sexual orientation and gender identity fall outside even that expansive definition.²⁴² Justice Alito suggests in this footnote that pregnancy discrimination did not fall within the original public meaning of Title VII’s prohibition on sex discrimination, but that its later inclusion in that

²³⁹ *United States v. Virginia*, 518 U.S. 515, 566 (1996) (Scalia, J., dissenting).

²⁴⁰ *Bostock*, 140 S. Ct. at 1761 (Alito, J., dissenting).

²⁴¹ *Id.* at 1761 n.16.

²⁴² *Id.*

prohibition makes sense (in a way that the inclusion of sexual orientation and gender identity would not).

That is one way of understanding the relationship between pregnancy discrimination and sex discrimination, but it is not the only way. Contestation over whether Title VII's prohibition of sex discrimination covered pregnancy discrimination—including as a matter of semantic meaning—began almost immediately after the statute's enactment. Even after Congress amended Title VII to cover pregnancy discrimination, contestation over whether pregnancy discrimination constitutes sex discrimination *as a semantic matter* continued. Indeed, it continues to this day. This section examines this contestation, not in an attempt to resolve the question of whether pregnancy discrimination is sex discrimination, but to demonstrate that the tools of textualism are utterly inadequate to that task. Textualist argument over the question of whether pregnancy discrimination is sex discrimination illustrates in a particularly clear way the role that extratextual values inevitably play in textualist interpretation of Title VII's sex provision. Particularly when juxtaposed with textualist reasoning about whether Title VII covers gay and transgender people, textualist argument over pregnancy discrimination reveals that all of these questions are part of a broader textualist jurisprudence saturated with normative judgments about gender and sexuality.

The basic outline of pregnancy discrimination's fate under Title VII is familiar. In 1976, the Court held in *General Electric v. Gilbert* that Title VII's bar on sex discrimination did not extend to discrimination on the basis of pregnancy.²⁴³ That decision followed *Geduldig v. Aiello*, in which the Court held that a state-run disability insurance program that exempted pregnancy and no other disabilities from coverage did not violate constitutional protections against sex discrimination.²⁴⁴ The core reasoning in the two cases was the same: The challenged conduct “divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.”²⁴⁵ In 1978, however, Congress responded to this ruling by enacting the Pregnancy Discrimination Act. The PDA states that under Title VII “[t]he terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions.”²⁴⁶

²⁴³ *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 136 (1976) (concluding “that an exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all”); *id.* at 140 (“[T]here is no facial gender-based discrimination . . . here.”).

²⁴⁴ *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974) (“Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis. . . .”).

²⁴⁵ *Gilbert*, 429 U.S. at 135 (quoting *Geduldig*, 417 U.S. at 496–97 n.20); *id.* (finding no evidence that “the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class. . . . There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.”) (quoting *Geduldig*, 417 U.S. at 496–97). See also Deborah Dinner, *Strange Bedfellows at Work: Neomaterialism in the Making of Sex Discrimination Law*, 91 WASH. U.L. REV. 453, 484–86 (2014) (showing that the Court in these cases adopted the approach to pregnancy discrimination advocated by business associations and employers and rejected the approach advocated by legal feminists).

²⁴⁶ Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (2018)).

How should we understand this history from a textualist perspective? One possibility is that *Gilbert* got it wrong. The ordinary public meaning of Title VII's sex provision obviously encompasses pregnancy discrimination and the PDA simply clarified what was true all along. On this view, pregnancy discrimination has been illegal since 1964 (or perhaps, in some Western states, since the late nineteenth century). Another possibility is that *Gilbert* got it right and the PDA altered the law's definition of sex discrimination to include pregnancy. On this view, pregnancy discrimination became illegal under Title VII starting in 1978 and did not fall within the ordinary public meaning of sex discrimination circa 1964.

Numerous courts have taken the former position, that the original public meaning of Title VII's sex provision covers pregnancy discrimination. These courts have observed that dictionaries from the time of Title VII's enactment define "sex" as, among other things, "[t]he sum of the structural, functional, and behavioral peculiarities of living beings that subserve reproduction by two interacting parents and distinguish males and females."²⁴⁷ They have explained that "[t]he common thread running through these definitions is a focus on reproduction, including the 'structural' and 'functional' differences between typical male and female bodies."²⁴⁸ On this basis, they have concluded that "by virtue of common usage," prohibitions on sex discrimination unambiguously encompass pregnancy discrimination.²⁴⁹

Evidence strongly suggests that a number of progressive Supreme Court Justices would also have taken this position if asked to assess the question of whether pregnancy discrimination is sex discrimination from a textualist perspective. In fact, Justice John Paul Stevens made something resembling a textualist argument in his dissenting opinion in *Gilbert*. He argued that pregnancy discrimination "[b]y definition . . . 'discriminates' on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male."²⁵⁰ Justice Brennan made a similar argument in his dissenting opinion in *Geduldig*, claiming that pregnancy discrimination applies "one set of rules . . . to females and another to males," and that "[s]uch dissimilar treatment of men and women, on the basis of physical characteristics inextricably

²⁴⁷ *Conley v. N.W. Fla. State Coll.*, 145 F.Supp.3d 1073, 1077 (N.D. Fla. 2015) (quoting WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 795 (1967)); see also *id.* (quoting BLACK'S LAW DICTIONARY 1541 (4th rev. ed. 1968), which "defin[es] 'sex' as '[t]he sum of the peculiarities of structure and function that distinguish a male from a female organism'"); *id.* at 1076 (quoting MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1140 (11th ed. 2003), which defines sex as "'the sum of the structural, functional, and behavioral characteristics of organisms that are involved in productive behavior marked by the union of gametes and that distinguish males and females'"); *id.* at 1076 n.6 (quoting the online version of the COLLINS AMERICAN ENGLISH DICTIONARY (2015), which defines "sex" as "'either of the two divisions, male or female, into which persons, animals, or plants are divided, with reference to their reproductive functions' and 'anything connected with sexual gratification or reproduction'").

²⁴⁸ *Id.* at 1077.

²⁴⁹ *Id.*; see also, e.g., *Glass v. Captain Katanna's, Inc.*, 950 F.Supp.2d 1235, 1245 (M.D. Fla. 2013) (concluding on the basis of various dictionary definitions of the word "sex" that "a plain reading" of the Florida Civil Rights Act's prohibition on sex discrimination leads unambiguously to the conclusion that pregnancy discrimination falls within that prohibition); *id.* (explaining that the semantic meaning "of the phrase . . . 'discriminate against any individual . . . because of such individual's . . . sex' should be understood to ban discrimination against any individual 'because of such individual's' reproductive functions (e.g., pregnancy)"); *Mass. Elec. Co. v. Mass. Comm'n Against Discrimination*, 375 Mass. 160, 167–68 (1978) (holding that "any classification which relies on pregnancy as the determinative criteria is a distinction based on sex" and citing in support of this holding Justice Stevens' assertion in *Gilbert* that pregnancy discrimination is "[b]y definition" sex discrimination (quoting *Gilbert*, 429 U.S. at 167 (Stevens, J., dissenting))).

²⁵⁰ *Gilbert*, 429 U.S. at 167–68 (Stevens, J., dissenting) (emphasis added).

linked to one sex, inevitably constitutes sex discrimination.”²⁵¹ Justice Ginsburg frequently argued that *Gilbert* and *Geduldig* were wrongly decided²⁵² and routinely cited Justice Stevens’ assertion that pregnancy discrimination is “[b]y definition” sex discrimination.²⁵³ She characterized the PDA as ending “any pretense that classification on the basis of pregnancy can be facially nondiscriminatory.”²⁵⁴

The textualist case for interpreting Title VII’s prohibition on sex discrimination to cover pregnancy discrimination seems strong. Yet the dominant view among leading textualist judges today seems to be that the ordinary meaning of sex discrimination *does not* encompass pregnancy discrimination. Judge William Pryor, a prominent conservative proponent of textualism, recently endorsed this view in an opinion dissenting from an Eleventh Circuit decision holding that a policy barring a transgender student from using bathrooms corresponding to his gender identity discriminated on the basis of sex.²⁵⁵ In his opinion, Judge Pryor quoted a number of dictionaries that define sex in the manner we have just seen.²⁵⁶ But Judge Pryor viewed those definitions as evidence that *Gilbert* was rightly decided. Because pregnancy discrimination creates two categories—pregnant people and non-pregnant people—and the non-pregnant category includes members of both sexes, he argued, there is a clear “‘lack of identity’

²⁵¹ *Geduldig v. Aiello*, 417 U.S. 484, 501 (1974) (Brennan, J., dissenting).

²⁵² See, e.g., *Coleman v. Court of Appeals of Md.*, 556 U.S. 30, 56–57 (2012) (Ginsburg, J., dissenting) (“Because pregnancy discrimination is inevitably sex discrimination, and because discrimination against women is tightly interwoven with society’s beliefs about pregnancy and motherhood, I would hold that *Aiello* was egregiously wrong to declare that discrimination on the basis of pregnancy is not discrimination on the basis of sex.”); *AT & T Corp. v. Hulteen*, 556 U.S. 701, 728 (2009) (Ginsburg, J., dissenting) (“I would . . . explicitly overrule *Gilbert* so that the decision can generate no more mischief.”).

²⁵³ *Coleman*, 556 U.S. at 55 (alteration in original) (quoting *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 161–62 (1976) (Stevens, J., dissenting)); cf. *id.* (arguing that, “[a]s an abstract statement,” it is ‘simply false’ that ‘a classification based on pregnancy is gender neutral’” (quoting *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 327 (1993) (Stevens, J., dissenting) (alteration in original))). Note that when Justice Ginsburg quoted Justice Stevens, she was in a sense quoting herself, because she had pressed this argument in a series of Supreme Court briefs in the 1970s. For more on these briefs, see Reva B. Siegel, *The Pregnant Citizen, from Suffrage to the Present*, 108 GEO. L.J. (19TH AMEND. ED.) 167, 197 (2020).

²⁵⁴ *Hulteen*, 556 U.S. at 721 (internal quotation marks omitted).

²⁵⁵ *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1315 (11th Cir. 2020) (Pryor, J., dissenting).

²⁵⁶ *Id.* at 1320 (“See, e.g., *Sex*, *The American Heritage Dictionary of the English Language* (1979) (‘The property or quality by which organisms are classified according to their reproductive functions.’); *Sex*, *The Random House College Dictionary* (1980) (‘either the male or female division of a species, esp. as differentiated with reference to the reproductive functions’); see also Am. Psychiatric Ass’n, *Diagnostic and Statistical Manual of Mental Disorders* 451 (5th ed. 2013) (“This chapter employs constructs and terms as they are widely used by clinicians from various disciplines with specialization in this area. In this chapter, *sex* and *sexual* refer to the biological indicators of male and female (understood in the context of reproductive capacity) . . .”).

between pregnancy and sex.”²⁵⁷ On his account, “sex,” by definition, “refers ‘only to biological distinctions between male and female,’”²⁵⁸ and pregnancy is not such a distinction.²⁵⁹

Ricky Polston, then-Chief Justice of the Florida Supreme Court, reached the same conclusion in a recent opinion dissenting from his court’s holding that pregnancy discrimination constitutes sex discrimination under the Florida Civil Rights Act.²⁶⁰ Justice Polston is also a prominent conservative proponent of textualism, and he too argues that the Court in the 1970s got it right with respect to pregnancy discrimination.²⁶¹ He cites a number of dictionaries defining sex in the familiar way and concludes that “pursuant to [its] plain meaning,” the Florida Civil Rights Act’s “prohibition of sex discrimination does not encompass discrimination on the basis of pregnancy.”²⁶²

The most prominent textualist of all, Justice Scalia, would almost certainly have taken this position as well. In a 1993 opinion holding that the harassment of “women seeking abortions” does not constitute discrimination “against women as a class” under § 1985(3), Justice Scalia endorsed the Court’s reasoning in *Geduldig*, explaining that pregnancy discrimination, which targets only a subset of women on the basis of their reproductive choices, does not constitute discrimination on the basis of sex.²⁶³ Justice Thomas joined that opinion. He also joined a more recent opinion by Justice Scalia endorsing *Geduldig*’s reasoning (in a sex-based Title VII case, no less).²⁶⁴ Justice Scalia, Justice Thomas, and Justice Alito also joined the majority in *AT & T v. Hulteen*, in which the Court concluded, among other things, that pregnancy discrimination prior to the PDA did not violate Title VII’s prohibition on sex discrimination.²⁶⁵ It would be difficult to square that conclusion with a textualist interpretation finding that Title VII unambiguously barred pregnancy discrimination starting in 1964.

What are we to make of this ongoing conflict within textualism over whether legal provisions barring discrimination because of sex encompass pregnancy discrimination? Textualists’ standard response when confronted with conflicts of this sort is to accuse critics of attacking a straw man. Of course textualism will not produce uniform results in every case, they

²⁵⁷ *Id.* at 1315 (quoting *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974)). Judge Pryor argues that pregnancy thus provides an “instructive” analogue for cases in which plaintiffs argue that discrimination against transgender students in the context of bathrooms constitutes sex discrimination. *Id.* (“The bathroom policy creates two groups—students who can use the boys’ bathroom and students who can use the girls’ bathroom. Both groups contain transgender students and non-transgender students, so a ‘lack of identity’ exists between the policy and transgender status. *Geduldig*, 417 U.S. at 496 n.20.”)).

²⁵⁸ *Id.* at 1311 (quoting *Bostock v. Clayton County*, 140 S. Ct. 1731, 1739 (2020)).

²⁵⁹ *Id.* at 1320 (arguing that “[a]s used in Title IX and its implementing regulations, ‘sex’ unambiguously is a classification on the basis of reproductive function,” and that pregnancy, sexual orientation, and gender identity unambiguously falls outside that definition).

²⁶⁰ *Delva v. Cont’l Grp., Inc.*, 137 So. 3d 371, 376 (Fla. 2014).

²⁶¹ *Id.* (noting that at the time *Gilbert* was decided, Title VII “included language very similar to Florida’s current statute”).

²⁶² *Id.*

²⁶³ *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 269 (1993).

²⁶⁴ *Young v. United Parcel Serv., Inc.*, 575 U.S. 206 (2015).

²⁶⁵ *AT & T Corp. v. Hulteen*, 556 U.S. 701, 705 (2009) (“In the 1960s and early to mid-1970s, . . . [the] differential treatment of pregnancy leave . . . was lawful); *id.* at 710 (“As a matter of law, at that time, an exclusion of pregnancy from a disability-benefits plan providing general coverage [was] not a gender-based discrimination at all.” (internal quotation mark omitted) (alteration in original))).

argue; no theory could.²⁶⁶ Textualism does not eliminate the need for judgment, so we should expect “the occasional disagreement” among its practitioners, especially in the kind of “cases that land in the Supreme Court . . . the hardest ones in our legal system.”²⁶⁷ The superiority of textualism, relative to other methods of statutory interpretation, is not that it relieves judges of the difficult work of judging. It is that, although textualist judges “may sometimes disagree on outcomes, they are at least constrained by the same value-neutral methodology and the same closed record of historical evidence.”²⁶⁸

But that defense is its own kind of straw man argument. The point of examining the ongoing conflict over whether the ordinary public meaning of sex discrimination encompasses pregnancy discrimination is not to suggest that the fact that judges reach different outcomes undermines the legitimacy of textualism. The point is to show that this conflict and these different outcomes are not fueled by value-free disagreements about the finer points of textualist interpretation. The fight over whether pregnancy discrimination is sex discrimination is not a fight over whether to rely on a dictionary or a corpus linguistics database, how to apply one of Justice Scalia’s fifty-seven canons of textualist interpretation, or any other value-neutral methodological rule. No judge in any of these cases even purports to be engaged in this sort of argument or tries to adduce this sort of methodological justification for his conclusions.

That is because the question of whether pregnancy discrimination is sex discrimination is part of a longstanding, transcontextual, and pitched ideological battle over the application of antidiscrimination law in contexts involving women’s sex and family roles that encompasses conflict over abortion, birth control, family leave, pregnancy disability leave, and sexual orientation and gender identity. Every one of the textualist judges cited above who purports to reject on semantic grounds the idea that pregnancy discrimination falls within the ordinary public meaning of sex discrimination is a committed conservative, a frequent attendee at Federalist Society events, and a staunch opponent of expansive conceptions of women’s rights in all of the contexts listed above. I have no doubt that if the late Justice Ginsburg, a fierce advocate of women’s rights, had been required to write a textualist opinion on whether pregnancy discrimination is sex discrimination, she would have reached a different conclusion from these conservative judges. It strains credulity beyond the breaking point to suggest that what is driving this disagreement over the ordinary meaning of sex discrimination with respect to pregnancy is an unarticulated, value-neutral, outcome-determinative disagreement about how to apply a particular textualist rule.

Proponents of textualism often respond to this sort of critique by contending that it is not the fault of the methodology if judges allow themselves to be influenced by extratextual considerations; few if any interpretive methodologies can “constrain the wayward judge” who refuses to put such considerations aside when interpreting the law.²⁶⁹ Here too, however, the

²⁶⁶ See Judge Amy Coney Barrett, 2019 Sumner Canary Lecture: Assorted Canards of Contemporary Legal Analysis: Redux, in 70 CASE W. RES. L. REV. 855, 859 (2020) (“Those who take an oversimplified view of textualism imagine that it works like Google Translate: a judge punches in words, and—voilà!—out pops the result. If that were how interpretation worked, one could expect every textualist judge to interpret text in exactly the same way.”).

²⁶⁷ GORSUCH, *supra* note 14, at 112.

²⁶⁸ *Id.*

²⁶⁹ Baude, *supra* note 12, at 2223.

fault does not lie with errant humanity. The fault lies with textualism, which does not actually provide judges with a means of putting aside social values and substantive jurisprudential commitments, particularly in the hard cases that arrive at the Court. What generally makes a case hard, in the context of antidiscrimination law, is that it involves a matter over which Americans are deeply divided. The spare and Rorschach-like text of our landmark antidiscrimination laws cannot itself resolve such conflict. Determining what such laws mean requires more and different kinds of knowledge than textualism can provide.

B) Sailing Under a Textualist Flag

The dissenting Justices in *Bostock* vehemently reject that contention. They argue that textualism easily resolves the question of whether Title VII prohibits discrimination against gay and transgender workers, relieving judges of the need to consult extratextual sources. As with pregnancy discrimination, however, any guidance provided by the text of Title VII stops well short of resolving the question of whether discrimination on the basis of sexual orientation and gender identity is sex discrimination. The dissenting Justices' determination that Title VII does not bar anti-LGBT discrimination is based just as much on "2020 values,"²⁷⁰ and is just as responsive to current contestation over LGBT rights, as the Court's determination to the contrary. In fact, this section shows, the dissenting opinions in *Bostock* find more support in social values than they do in law.

1) The Strange Career of the Sex Discrimination Argument

Twice in his dissenting opinion in *Bostock*, Justice Alito alleges that the Court's holding that Title VII's prohibition on sex discrimination extends to gay and transgender people reflects an "exotic understanding of sex discrimination."²⁷¹ The implication is that although this understanding might hold sway among queer theorists and graduate students at Ivy League universities today, it is not an idea to which regular Americans would have subscribed fifty years ago. When Americans in the 1960s heard the term sex discrimination, they thought of employers who paid women less than men or refused to hire them at all: discrimination against people because of their sex, not because of their sexual orientation or gender identity.²⁷²

By this point, the various arguments in support of the idea that anti-LGBT discrimination is sex discrimination are familiar. There's the formalistic argument the Court endorses in *Bostock*: refusing to hire women, but not men, who date women treats employees differently on the basis of sex. There's the anti-stereotyping argument, which suggests that gay and transgender workers face discrimination in part because they fail to conform to sex stereotypes about who men and women should date and how they should express their gender identity. There's a related antistatist argument, which focuses on the fact that sex-based social hierarchy depends

²⁷⁰ *Bostock v. Clayton County*, 140 S.Ct. 1731, 1761 (2020) (Alito, J., dissenting).

²⁷¹ *Id.* at 1767.

²⁷² *Id.* at 1769 (arguing that "the concept of discrimination 'because of,' 'on account of,' or 'on the basis of' sex was well understood" in 1964, and that "[i]t was part of the campaign for equality that had been waged by women's rights advocates for more than a century, and what it meant was equal treatment for men and women").

on sex-differentiated sex and family roles for men and women, and gay and transgender people are perceived as threats to this traditional sex-role system. None of these arguments strikes me as particularly exotic. But that is the label the dissenting Justices assign them. So perhaps it would be useful to start with something humbler.

When I was a child, girls and boys did not play together on the playground. The boys played kickball, and I am not sure what the girls played because I too played kickball. The other kids generally tolerated this, but sometimes they called me a lesbian. It would be years before any of us, or most of us anyway, would learn the definition of that term the Court employs in *Bostock*. We understood the word “lesbian” to mean “a boyish girl,” a girl who fails to do what girls are expected to do. We were not unique in this understanding. Sociologists have documented American schoolchildren’s widespread understanding of homosexuality as a form of sex-role transgression. One sociologist, who spent two years embedded in an American high school, reported that in the students’ eyes, being “a fag has as much to do with failing at the masculine tasks of competence, heterosexual prowess, and strength or in any way revealing weakness or femininity as it does with a sexual identity.”²⁷³ She concluded that although homophobia certainly played a role in the constant anti-gay discourse at this school, the kids themselves understood that discourse as part of a larger project of enforcing normative conceptions of masculinity. Indeed, a substantial number of them insisted that their use of anti-gay slurs had “nothing to do with sexual preference at all.”²⁷⁴ It was about policing “any sort of behavior defined as unmasculine.”²⁷⁵

In addition to being common knowledge, the idea that discrimination against gay people is, in part, a response to perceived sex-role transgressions is old knowledge. In the nineteenth century, the term “[s]exual inversion referred to a broad range of gender deviant behavior, of which homosexual desire was only a logical but indistinct aspect.”²⁷⁶ Later conceptions of “‘homosexuality’ focused on the narrower issue of sexual object choice,”²⁷⁷ but the idea that homosexuality was a form of gender deviant behavior lived on. It is why gay men were, and sometimes still are, called sissies, fairies, pansies, and nancy boys. It is why, even today, discrimination against gay men in the workplace so often involves gendered insults, women’s clothing and accessories, and the color pink. Sometimes workplace harassers just come right out and call the gay employee a woman.²⁷⁸

²⁷³ C.J. PASCOE, DUDE, YOU’RE A FAG: MASCULINITY AND SEXUALITY IN HIGH SCHOOL 53–54 (2011).

²⁷⁴ *Id.* at 57.

²⁷⁵ *Id.*

²⁷⁶ George Chauncey, Jr., *From Sexual Inversion to Homosexuality: Medicine and the Changing Conceptualization of Female Deviance*, 58–59 SALMAGUNDI 114, 116 (1982–83).

²⁷⁷ *Id.*

²⁷⁸ See, e.g., *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 287 (3d Cir. 2009) (noting that gay employee was called “Princess” and “Rosebud,” and that “a pink, light-up, feather tiara” was left at his desk); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1064 (9th Cir. 2002) (noting that gay plaintiff’s co-workers “call[ed] him ‘sweetheart’ and ‘muñeca’ (Spanish for ‘doll’)” and “that his coworkers would ‘touch [his] body like they would to a woman.’” (alteration in original)); *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1084 (7th Cir. 2000) (reporting that the gay plaintiff was called a “bitch,” which, according to another utility worker . . . meant . . . a ‘woman,’ . . . that his co-workers perceived him to be too feminine to work at Ford,” and that he was assigned to “window-washing . . . which is a function ‘traditionally reserved for women’”); see also *Eginton v. Fla. State Univ.*, 111 F. Supp. 3d 1263, 1267 (M.D. Fla. 2015) (describing harassment of a lesbian employee who was called a “dyke” and “completely unfeminine”).

These insults are all perfectly culturally legible and have been for many decades. They do not rest on “some exotic understanding of sex.” They rest on the pervasive and long-standing perception that LGBT people violate normative conceptions of how men and women should be. If anything, the charge of exoticism would seem to apply more readily to the dissenting Justices’ more contemporary notion that sexual orientation and gender identity are completely distinct from sex. If you asked regular Americans in the 1960s whether identifying as a man and being sexually attracted to women are a core part of what it means to be a man, would they all have responded with a resounding no?

In fact, outside the legal context in which *Bostock* is set, it has often been social conservatives and opponents of LGBT rights who have advanced the argument that prohibitions on sex discrimination cover LGBT people. In the 1970s, one of the central arguments against the Equal Rights Amendment—which prohibits the government from denying or abridging “[e]quality of rights under the law . . . on account of sex”²⁷⁹—was that it would outlaw discrimination on the basis of sexual orientation. Phyllis Schlafly, leader of the prominent and successful campaign to defeat the ERA, argued throughout the 1970s that “[i]t is precisely ‘on account of sex’ that a state now denies a marriage license to a man and a man, or to a woman and a woman.”²⁸⁰ She claimed that if the ERA became law, “[a] homosexual who wants to be a teacher could argue persuasively that to deny him a school job would be discrimination ‘on account of sex.’”²⁸¹

The Catholic Church today continues to frame its opposition to expansions of LGBT rights in terms of sex. The Church’s central justification for opposing same-sex marriage is that such partnerships violate principles of gender complementarity: the idea that men and women are fundamentally different, biologically and psychologically, and that “[a] mother and father each bring something unique and irreplaceable to child-rearing that the other cannot.”²⁸² The Church opposes the expansion of transgender rights for the same reason, arguing that “Pope Francis has rightly rejected an ideology of gender that denies the difference and reciprocity in nature of a man and a woman,” and noting that “Pope Benedict XVI criticized gender ideology in similar terms.”²⁸³ The Church argues against legal recognition of transgender kids’ rights in bathroom cases on the ground that “being created by God as male and female pertains to the essence of the human creature” and that “[t]his duality is an essential aspect of what being human is all

²⁷⁹ H.R.J. Res. 208, 92d Cong., 2d Sess. (1972); S.J. Res. 8, 92d Cong., 1st Sess. (1971).

²⁸⁰ PHYLLIS SCHLAFLY, *THE POWER OF THE POSITIVE WOMAN* 90 (1977).

²⁸¹ *Id.* For more on ERA opponents’ use of the argument that prohibitions on sex discrimination bar discrimination on the basis of sexual orientation, see Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817, 846–48 (2014); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323, 1389–1402 (2006).

²⁸² Brief Amicus Curiae of United States Conference of Catholic Bishops in Support of Respondents, *Obergefell v. Hodges*, 2015 WL 1519042, Nos. 14-556, 14-562, 14-571, 14-574 (Apr. 2, 2015), at *7–8; *id.* at *7 (quoting Pope Francis, Address to Participants in the International Colloquium on the Complementarity Between Man and Woman (Nov. 17, 2014), http://www.vatican.va/content/francesco/en/speeches/2014/november/documents/papa-francesco_20141117_congregazione-dottrina-fede.html (“Children have a right to grow up in a family with a father and a mother capable of creating a suitable environment for the child’s growth and emotional development.”)).

²⁸³ Brief of Major Religious Organizations as Amici Curiae Supporting Petitioner, *Gloucester County Sch. Bd. v. G.G.*, 2017 WL 192761, No. 16-273 (Jan. 10, 2017), at *8; *id.* at *6–7 (discussing the centrality of these ideas about gender in Catholic doctrine).

about.”²⁸⁴ The Church insists in all these cases—the marriage cases and the bathroom cases—that its opposition to LGBT rights does not stem from any animus against LGBT people, but entirely from its fundamental commitment to traditional ideas about the nature of men and women.

Justice Alito portrays this kind of thinking as “exotic,” but it isn’t. It is common, it is deeply-rooted in American culture, and it cuts across political and social divisions. Thus, Justice Alito and the other dissenters in *Bostock* get it precisely backwards. What it means to discriminate because of sex has changed significantly over time. What has remained constant across the decades is the understanding that gay and transgender people violate conventional gender norms.

2) How Precedent is Folded Into Original Public Meaning

The idea that discrimination against gay and transgender people is a form of sex discrimination has deep roots in American history and culture. Even small children understand it, and it cuts across political and ideological lines. So what is the argument against it? The core of the dissenting Justices’ argument in *Bostock* is that Americans in the early 1960s did not understand Title VII’s bar on sex discrimination to extend to anti-LGBT discrimination, either as a matter of expected application or as a matter of semantic meaning—that, in fact, “any such notion would have clashed in spectacular fashion with the societal norms of the day.”²⁸⁵ Discrimination against gays and lesbians was widespread and accepted in the 1960s, and Americans were not even familiar with the category “transgender.” “While it is likely true that there have always been individuals who experience what is now termed ‘gender dysphoria,’” Justice Alito writes in *Bostock*, “the current understanding of the concept postdates the enactment of Title VII.”²⁸⁶ He argues that “[i]t defies belief to suggest that the public meaning of discrimination because of sex in 1964 encompassed discrimination on the basis of a concept that was essentially unknown to the public at that time.”²⁸⁷

This core claim runs into trouble, however, when juxtaposed with the dissenting Justices’ insistence that sexual harassment (including same-sex sexual harassment) unambiguously falls within the original public meaning of Title VII’s prohibition on sex discrimination.²⁸⁸ Like discrimination against gays and lesbians, sexual harassment was pervasive at the time of Title VII’s enactment. Like the category “transgender,” the category “sexual harassment” had not yet come into being.²⁸⁹ While there have always been individuals who experienced what is now

²⁸⁴ *Id.* at *9 (internal quotation marks omitted).

²⁸⁵ *Bostock v. Clayton County*, 140 S.Ct. 1731, 1769 (2020) (Alito, J., dissenting).

²⁸⁶ *Id.* at 1773.

²⁸⁷ *Id.*

²⁸⁸ *Id.* at 1773–74; *id.* at 1834–35 (Kavanaugh, J., dissenting).

²⁸⁹ The “terminology [of sexual harassment] made its public debut in 1975,” in testimony before the New York City Commission on Human Rights by Lin Farley, who developed the term while teaching at Cornell University. See Kyle Swenson, *Who Came Up with the Term ‘Sexual Harassment’?*, WASH. POST (Nov. 22, 2017), http://www.washingtonpost.com/news/morning-mix/wp/2017/11/22/who-came-up-with-the-term-sexual-harassment/?noredirect=on&utm_term=.3b14f3d8bbcf; see also Enid Nemy, *Women Begin to Speak Out Against Sexual Harassment at Work*, N.Y. TIMES, Aug. 19, 1975, at 38 (“Although the issue of sexual harassment is still a

termed “sexual harassment,” the current understanding of that concept postdates the enactment of Title VII. Prior to the late 1970s, many women and some men were subjected to unwanted sexual advances, touching, teasing, demeaning comments, bullying, roughhousing, and rape in the workplace. The very substantial contribution of thinkers and advocates such as Lin Farley and Catharine MacKinnon was to reconceptualize (a still evolving set of) those behaviors as “sexual harassment” and to argue that this practice is a form of sex discrimination.²⁹⁰

Courts initially rejected the argument that sexual harassment is sex discrimination.²⁹¹ They held that “loss of employment as the result of rejection of sexual advances is not the same thing as discrimination based on sex.”²⁹² They held that harassing behavior is “nothing more than a personal proclivity, peculiarity or mannerism,” and that an employer who engages in such behavior is simply “satisfying a personal urge.”²⁹³ They held that Title VII does not “provide a federal tort remedy for what amounts to a physical attack motivated by sexual desire on the part of a supervisor and which happened to occur in a corporate corridor.”²⁹⁴ But by the 1980s, feminists’ reconceptualization of the conduct at issue in those cases had begun to take root. Practices that had long been understood to fall outside the scope of Title VII came to be seen—by Americans generally and by courts interpreting Title VII—as discrimination “because of sex.”²⁹⁵

This process repeated itself a decade later in the context of male-on-male harassment. Even some courts that had come to accept sexual harassment as a form of sex discrimination when perpetrated by men against women continued to hold well into the 1990s that the harassment of men by other men did not—and by definition could not—constitute discrimination because of sex. In 1994, the Fifth Circuit held that, by definition, “[h]arassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones” because “Title VII addresses gender discrimination.”²⁹⁶

comparatively new one, it is being treated with increasing seriousness by government agencies.”). Catharine MacKinnon’s classic 1979 book on sexual harassment played a major role in popularizing the term and developing the legal theory that conceptualized this kind of harassment as sex discrimination. *See* CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979).

²⁹⁰ For more on the development and early history of the concept of “sexual harassment,” see Siegel, *supra* note 231, at 8–26; *see also* Sheelah Kolhatkar, *How Two Legal Cases Established Sexual Harassment as a Civil Rights Violation*, BLOOMBERG (Dec. 4, 2014), <https://www.bloomberg.com/news/articles/2014-12-04/sexual-harassment-naming-it-paved-the-way-to-legal-victories> (quoting Catharine MacKinnon’s observation that “[s]exual harassment law is the first law written by women about our own condition”).

²⁹¹ Siegel, *supra* note 231, at 11 (observing that, when women first began to challenge this conduct under Title VII, “the central ground on which courts resisted the claim was simply that sexual harassment was not discrimination ‘on the basis of sex’”).

²⁹² *Seritis v. Lane*, 30 Fair Empl. Prac. Cas. (BNA) 423 (Cal. Super. Ct. 1980).

²⁹³ *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975).

²⁹⁴ *Tomkins v. Pub. Serv. Elec. & Gas Co.*, 422 F.Supp. 553, 556 (D.N.J. 1976); *id.* at 557 (“The abuse of authority by supervisors of either sex for personal purposes is an unhappy and recurrent feature of our social experience. . . . It is not, however, sex discrimination within the meaning of Title VII even when the purpose is sexual.”).

²⁹⁵ In 1986, the Supreme Court held for the first time that “sexual harassment” is a cognizable form of sex discrimination under Title VII. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65–67 (1986). The Court reaffirmed and expanded on that holding seven years later in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993)—and it is now an established part of Title VII law.

²⁹⁶ *Garcia v. ELF Atochem N. Am.*, 28 F.3d 446, 451–52 (5th Cir. 1994) (quoting *Giddens v. Shell Oil Co.*, 12 F.3d 208 (5th Cir. 1993)) (alteration in original). For other decisions concluding that same-sex sexual harassment is not

When an oil rig worker named Joseph Oncale filed a Title VII lawsuit alleging he had been sexually harassed by male co-workers, his employer's (intelligent and accomplished) lawyers made the same argument.²⁹⁷ They argued that accepting Oncale's claim "would write the 'because of sex' language out of the statute" because "all same-gender sexual harassment has only sexual content, and nothing to suggest discrimination because of gender."²⁹⁸ But by 1998, that argument no longer prevailed; the Court held in *Oncale* that Title VII's prohibition on sex discrimination extends to male-on-male sexual harassment as well.²⁹⁹

The dissenting Justices in *Bostock* embrace *Oncale* and endorse the idea that Title VII has prohibited sexual harassment—including the male-on-male sort—since 1964.³⁰⁰ (Indeed, Justice Alito and Justice Thomas suggest such conduct has been prohibited in some Western states since the late nineteenth century.) But, as noted above, sexual harassment and anti-LGBT discrimination are quite similar with respect to characteristics the dissenters identify as important to determining whether a practice falls within Title VII's original public meaning. Neither sexual harassment nor anti-LGBT discrimination was understood to violate Title VII in 1964—in part because the concept of "sexual harassment," like the concept of "transgender," had yet to enter public consciousness. Like anti-LGBT discrimination, sexual harassment came to be defined as sex discrimination only after decades of sustained legal and social contestation and substantial doctrinal evolution in constitutional and statutory sex discrimination law. The dissenting Justices do not provide any justification for treating these practices differently, other than falling back on the tautological and presentist claim that sexual harassment just obviously is discrimination because of sex and anti-LGBT discrimination is not.

The dissenting Justices' embrace of other Title VII precedents, such as *Manhart* and *Price Waterhouse*, causes similar problems.³⁰¹ As Judge Wood and Judge Katzmann observed in the federal appeals court cases that preceded *Bostock*, once one accepts *Manhart*, *Price Waterhouse*, and *Oncale*, there is not a strong basis in law for excluding gay and transgender workers from Title VII's protections.³⁰² *Manhart* states "that employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females."³⁰³

discrimination because of sex under Title VII, see, e.g., *Ashworth v. Roundup Co.*, 897 F. Supp. 489, 493–94 (W.D. Wash. 1995); *Myers v. City of El Paso*, 874 F.Supp. 1546, 1548 (W.D. Tex. 1995); *Oncale v. Sundowner Offshore Services, Inc.*, Civ. A. No. 94-1483, 1995 WL 133349, at *1–2 (E.D. La. Mar. 24, 1995); *Fleenor v. Hewitt Soap Co.*, No. C-3-94-182, 1995 WL 386793, at *2–3 (S.D. Ohio Dec. 21, 1994); *Hopkins v. Balt. Gas & Elec.*, 871 F. Supp. 822, 834 (D. Md. 1994); *Vandeventer v. Wabash Nat'l Corp.*, 867 F. Supp. 790, 796 (N.D. Ind. 1994).

²⁹⁷ Sundowner's lawyers were serious people: Harry M. Reasoner, managing partner at Vinson & Elkins and one of Texas's most celebrated attorneys, and Samuel Issacharoff, a prominent constitutional law professor then at the University of Texas. See Brief for Respondents, *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1997) (No. 96-568), 1997 WL 634147.

²⁹⁸ *Id.* at *16, *23. They also argued, with some foresight, that recognizing male-on-male harassment claims under Title VII would effectively extend the law's protection to gays and lesbians because such "claims invariably devolve into allegations of conduct that conflates gender with sexual orientation." *Id.* at *7; *id.* at *43 (arguing that courts "meld gender discrimination and discrimination because of sexual orientation when they conclude that gender stereotyping in the context of same-gender harassment amounts to discriminatory sexual harassment in violation of Title VII").

²⁹⁹ *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 78–80 (1997).

³⁰⁰ *Bostock v. Clayton County*, 140 S.Ct. 1731, 1774 (2020) (Alito, J., dissenting).

³⁰¹ *Id.* at 1774–75.

³⁰² See *supra* text accompanying notes 86–92.

³⁰³ *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 (1978).

Price Waterhouse declares that “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group,”³⁰⁴ and that Title VII “strike[s] at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”³⁰⁵ For years, courts tied themselves in knots trying to explain why traditional gendered expectations that women will date men and that people labeled female at birth will assume a female gender identity were not rooted in sex stereotypes but instead reflected a distaste for gay and transgender people.³⁰⁶ As if those things could be teased apart. As if being a lesbian or a transgender man is not in fact “the ultimate case of failure to conform to the female stereotype (at least as understood in a place such as modern America, which views heterosexuality [and cisgenderedness] as the norm . . .).”³⁰⁷ Once one accepts all the precedents that have extended Title VII’s reach over the past fifty years, it becomes very difficult to justify drawing the line where the dissenting Justices do in *Bostock* on anything other than normative grounds.

The more consistent approach, for the *Bostock* dissenters, would have been to call for the overruling of these precedents: to argue that the Court got it wrong and that sexual harassment, for example, does not fall within the original public meaning of sex discrimination. Josh Blackman, a prominent textualist scholar, has suggested that this is precisely what the Justices in *Bostock* should have done, because by accepting “precedents [that] were inconsistent with textualism,” they “undermined textualism’s justification.”³⁰⁸ Blackman asserts: “One can’t profess to follow the original meaning of a text while in fact following precedents that ignored that meaning.”³⁰⁹

That may be true. But as a practical matter, the Justices could not seriously have pursued this more consistent interpretive approach. The problem is not only that it would mean calling for the overruling of decades of precedent, which some textualists may be hesitant to do (another shadow decision point).³¹⁰ The more substantial problem is that for the lawyers and other twenty-

³⁰⁴ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

³⁰⁵ *Id.* (quoting *Manhart*, 435 U.S. at 707 n.13).

³⁰⁶ See *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 121–22 (2d Cir. 2018) (observing that courts “have long labored to distinguish between gender stereotypes that support an inference of impermissible sex discrimination and those that are indicative of sexual orientation discrimination,” and that “many courts have found these distinctions unworkable, admitting that the doctrine is illogical, and produces untenable results” (internal citation and quotation marks omitted)); *id.* at 122 (“In the face of this pervasive confusion, we are persuaded that the line between sex discrimination and sexual orientation discrimination is difficult to draw because that line does not exist save as a lingering and faulty judicial construct.” (internal quotation marks omitted)); *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 342 (7th Cir. 2017) (discussing “how difficult it is to extricate the gender nonconformity claims from the sexual orientation claims” and asserting that “[t]hat effort . . . has led to a confused hodge-podge of cases” (internal quotation marks omitted)).

³⁰⁷ *Hively*, 853 F.3d at 346; *id.* at 342 (“[A]ll gay, lesbian and bisexual persons fail to comply with the *sine qua non* of gender stereotypes—that all men should form intimate relationships only with women, and all women should form intimate relationships only with men.”).

³⁰⁸ Blackman, *supra* note 127. Blackman aims his criticism at Justice Gorsuch, but it applies equally to the dissenting Justices, who accepted the same precedents.

³⁰⁹ *Id.*

³¹⁰ The question of whether or not to follow precedent when it conflicts with original public meaning is another major shadow decision point. Some textualists take a hard line, arguing that original public meaning always trumps precedent, regardless of how deeply that precedent has been woven into the fabric of the Court’s jurisprudence and the reality of American life. See, e.g., Randy E. Barnett, Response, *It’s a Bird, It’s a Plane, No, It’s Super*

first century Americans across the political spectrum who will read their opinions, the truth of the proposition that sexual harassment is sex discrimination is so obvious that to deny it would call into question the credibility of everything else the Justices argue. Arguing that sexual harassment is not sex discrimination today would be outlandish. As Justice Gorsuch observes in a parallel context in *Bostock*: “nobody believes *that*.”

The incorporation of legal precedent into mainstream legal understandings is one important way in which original public meaning evolves. The American people, and the courts, have had many “new insights” with respect to gender and sexuality since the time of Title VII’s enactment, and some of these insights have become so deeply embedded in legal doctrine and legal culture that it would now be “off-the-wall” to argue for their rejection. In this way, sexual harassment is like school segregation. When courts first began to hold such segregation illegal, supporters of the old regime made (quite plausible) textualist and originalist arguments against those rulings.³¹¹ But it would be surprising, even shocking, for a textualist or originalist to argue that school segregation is consistent with the original public meaning of the Fourteenth Amendment today. The idea that this practice violates the law has become so ingrained in twenty-first century legal culture that nobody makes—or even wants to make—arguments to the contrary. In fact, the idea that this practice is illegal is such a fixture of the contemporary legal landscape that it may be difficult, or even impossible, for people to believe, or to accept, that it was once licit under the ordinary public meaning of our laws. It is quite possible, perhaps even likely, that this is what the future holds for *Bostock*: If textualism remains a dominant interpretive approach fifty years from now, the consensus among its practitioners will be that the Court got it right in this case.

The linguist John McWhorter has written: They tell you “that a language is something that *is*, when it is actually something always *becoming*. They tell you a word is a thing, when it’s actually something going on.”³¹² McWhorter was not talking about textualism, but these lines capture the dynamic this Article describes. Textualism portrays original public meaning as something frozen in time, preserved in period dictionaries or corpora. But it is actually something forged, over time, through legal and social contestation. We shape and reshape the original public meaning of legal provisions as we argue about what those provisions mean. The problem with textualism is not that it tethers us to old meanings, but that it enables courts to

Precedent: A Response to Farber and Gerhardt, 90 MINN. L. REV. 1232 (2006) (rejecting stare decisis when it would require infidelity to original public meaning); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL’Y 23, 25–28 (1994) (arguing that it is unconstitutional to adhere to precedent that conflicts with the Constitution’s text). Justice Scalia, on the other hand, referred to himself (at least early in career) as a “faint-hearted originalist” due to his willingness to uphold some precedents that depart from the original public meaning of constitutional text. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989). Some speculate that Justice Barrett may share this “moderate” stance toward precedent and praise this approach. See, e.g., Solum, *supra* note 20. Blackman suggests that the faint-hearted “approach has the virtue of humility, even if it [sometimes] reaches the ‘wrong’ result, at least by a textualist standard.” Blackman, *supra* note 127. But it is not clear that a textualist judge who picks and chooses when to abide by a text’s original public meaning and when to depart from it demonstrates “humility.” That approach could be characterized as a rather bold judicial assertion that original public meaning is law, except when I decide it is not.

³¹¹ See Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881 (1995) (discussing the history on which originalist arguments against *Brown* were based); Siegel, *supra* note 166, at 28 n.39 (citing examples of those arguments).

³¹² MCWHORTER, *supra* note 238, at 3.

respond to legal and social change selectively and from a normative perspective while denying that that's what they're doing. It enables judges to decide the most significant questions in our legal system—including questions about who counts as a full and equal member of the American polity—without showing their work. So much of the decisionmaking in a textualist opinion happens in the shadows, out of view of the people and the elected branches. That is the opposite of judicial humility and deference: it is an assertion of judicial power.

Conclusion

In his book, *A Republic, If You Can Keep It*, Justice Gorsuch contends that one of the advantages of textualism is that it enables judges to tell litigants: “I didn’t rule against you because I disagree with your values and goals, but because the law required me to.”³¹³ For this reason, Justice Gorsuch argues that textualism is better than other interpretive methodologies at protecting the rights of “minorities and disfavored groups”³¹⁴: “Judges are more likely to fulfill their assigned mission of protecting disfavored persons from intemperate majorities when they can . . . say . . . the law required” them to reach the outcome they did.³¹⁵

Of course, textualist judges can and do make this assertion in every case—those that extend legal protections to minorities as well as those that dismantle such protections. The latter sort of decision can also be unpopular, and the argument that “the law required me to” can be deployed as a shield against criticism of that sort of decision too. Indeed, the ability to say “the law required me to” would seem to embolden textualist judges to make countermajoritarian decisions of all kinds. Justice Gorsuch foregrounds cases in which textualist judges use original public meaning to thwart the oppression of minorities, but that is only one kind of judicial countermajoritarianism. The claim that “the law required me to” helps to justify and defend all decisions that thwart the will of majorities and the work of the elected branches.

It is not difficult to understand the appeal of the claim that “the law required me to.” That claim taps into a persistent and widespread desire to view judges as umpires, calling balls and strikes, applying the law, not making it. Textualism has risen to great prominence promising to operationalize that vision of judging, in which law is fully and comfortably separate from politics—and even from judges’ own substantive constitutional and jurisprudential views. But, in reality, “we are long past the day when we can plausibly imagine judicial work as merely ministerial and mechanical, . . . [b]ecause everyone knows that judges have discretion in their interpretation of the law.”³¹⁶ The adjudication of disputes over contested legal texts is not, and cannot be, insulated from extratextual considerations. As Justice Kavanaugh observes, judges do not interpret legal texts behind a veil of ignorance.³¹⁷ When they interpret words like “commerce” and “discrimination,” when they decide what to make of the Second Amendment’s

³¹³ GORSUCH, *supra* note 14, at 134.

³¹⁴ *Id.* at 139.

³¹⁵ *Id.* at 134.

³¹⁶ Robert Post, *Theorizing Disagreement: Reconceiving the Relationship Between Law and Politics*, 98 CAL. L. REV. 1319, 1331 (2010).

³¹⁷ Kavanaugh, *supra* note 41, at 2139; *see also supra* note 45.

invocation of militias,³¹⁸ they do so in the full knowledge of the consequences of their decisions, and their interpretations reflect their understanding of those consequences. Textualism does not enable judges to put such considerations aside; it disguises those considerations under a veneer of scientism and filters them through shadow decision points. This enables judges to act on substantive values and commitments without acknowledging that they are doing so or taking responsibility for the consequences of their decisions. When textualist judges insist that disputed bits of text compel them to reach the results they do, that is not, as Justice Gorsuch suggests, an expression of judicial humility. It is an assertion of judicial authority without accountability.

There is no better place to witness this dynamic playing out right now than in the context of affirmative action—a subject that arose frequently in the aftermath of *Bostock* and that provides an apt setting for some closing reflections on the themes of this Article. Numerous commentators have declared that *Bostock* “spells the end of affirmative action.”³¹⁹ The majority in *Bostock* defined discrimination in a thin, anticlassificationist way, suggesting that any time an employer treats one employee worse than another on the basis of a protected trait, that differential treatment violates Title VII, regardless of its purposes or effects. Opponents of affirmative action have long embraced this anticlassificationist account of discrimination in the context of race, arguing that Title VII mandates race blindness and that any racial preference is suspect regardless of the motivation underlying it. Conservative textualists have already begun to argue that “logic, consistency, [and] fidelity to the rule of law” require the Court, post-*Bostock*, to declare affirmative action illegal.³²⁰ And they have already begun to construct a narrative portraying the invalidation of affirmative action as a neutral, value-free choice—one that is unambiguously mandated by Title VII’s text and impervious to charges that it is part of a conservative political agenda, given that it rests on a definition of discrimination taken directly from *Bostock*.³²¹

The problem with this argument is that any decision interpreting Title VII to bar affirmative action would almost certainly require the assent of some or all of the dissenting

³¹⁸ See Siegel, *supra* note 35, at 197–201, 239–40 (discussing the *Heller* Court’s characterization of the Second Amendment’s first clause, which discusses the necessity of “a well regulated Militia,” as “prefatory,” and its second clause, which discusses the right of the people to keep and bear Arms, as “operative”: a textbook instance of shadow decisionmaking that has a substantial impact on the case’s resolution but that isn’t clearly compelled by the text itself or unambiguously part of the Amendment’s original public meaning).

³¹⁹ Cass R. Sunstein, *Gorsuch Paves Way for Attack on Affirmative Action*, BLOOMBERG (June 17, 2020, 10:00 AM), <https://www.bloomberg.com/opinion/articles/2020-06-17/gorsuch-gay-rights-opinion-targets-affirmative-action>; see also Jeannie Suk Gersen, *Could the Supreme Court’s Landmark L.G.B.T.-Rights Decision Help Lead to the Dismantling of Affirmative Action?*, NEW YORKER (June 27, 2020), <https://www.newyorker.com/news/our-columnists/could-the-supreme-courts-landmark-lgbt-rights-decision-help-lead-to-the-dismantling-of-affirmative-action> (arguing that “there is reason to think that *Bostock*’s formalist articulations on discrimination will bolster a conservative decision to dismantle race-conscious admissions policies”); Jason Mazzone, *Bostock: Were the liberal justices namudnoed?*, BALKINIZATION (July 6, 2020), <https://balkin.blogspot.com/2020/07/bostock-were-liberal-justices-namudnoed.html> (asserting that “[i]n *Bostock*, the absolutist language in Gorsuch’s opinion . . . about Title VII is readymade for a future ruling that Title VII prohibits . . . affirmative action”).

³²⁰ Nelson Lund, *Unleashed and Unbound: Living Textualism in Bostock v. Clayton County*, 21 FED. SOC’Y REV. 158, 167 (2020).

³²¹ See, e.g., *id.* (“Although *Bostock*’s particular application of textualist principles is fatally flawed, those principles can and should be faithfully applied in other cases. Title VII’s anti-discrimination language does not apply . . . to discrimination on the basis of sexual orientation. . . . But [its] application . . . to preferences based on race or sex is indisputably clear.”).

Justices in *Bostock*. Those Justices vehemently reject the Court’s anticlassificationist interpretation of Title VII in *Bostock*, portraying it as overly “literal,” “legalistic,” and “wooden.”³²² Justice Alito and Justice Thomas insist, on the basis of purportedly unambiguous corpus linguistics evidence, that Title VII prohibits only practices “motivated by prejudice, or biased ideas or attitudes.”³²³ They argue that to determine whether a practice “discriminates” in the eyes of the law, it is necessary to attend to its social history, to assess whether it is “historically tied to a project that aims to subjugate” on the basis of a protected trait.³²⁴

This is the basis on which the dissenting Justices reject the *Bostock* plaintiffs’ attempts to analogize anti-LGBT discrimination to anti-miscegenation laws. Advocates of LGBT rights have long argued that, if it is illegal for the state/an employer to police the race of one’s romantic partner, it should also be illegal for the state/an employer to police the sex of one’s romantic partner. But the dissenters in *Bostock* reject that reasoning as overly formalistic, arguing that it “totally ignores the historically rooted reason why discrimination on the basis of an interracial relationship constitutes race discrimination.”³²⁵ Bars on interracial marriage violate the law because “history tells us” they are “a core form of race discrimination.”³²⁶ The dissenters argue that anti-LGBT discrimination does not have the same historical and sociological relationship to sex discrimination. Discrimination against gay and transgender people may treat men and women differently as a formal matter,³²⁷ but, the dissenters argue, it is not “sexist.”³²⁸ It is not the kind of practice that contravenes “the campaign for equality . . . waged by women’s rights advocates for more than a century.”³²⁹

Conservative textualist federal appeals court judges have also embraced this socially-attentive, antisubordinationist approach to Title VII in LGBT rights cases. They too have advocated taking history and context into account in antidiscrimination law, and explicitly condemned the kind of formalism that sometimes prevails in this area of law. Judge James Ho, a staunchly conservative textualist on the 5th Circuit, railed against “the blindness theory of Title VII”³³⁰ in a decision just prior to *Bostock* in which he rejected a sex-based claim by a transgender plaintiff. He argued that Title VII does not categorically bar all classifications on the basis of protected traits, but only those that constitute “invidious . . . discrimination.”³³¹ Judge William Pryor echoed this condemnation of anticlassificationism in his own recent textualist

³²² *Bostock v. Clayton County*, 140 S.Ct. 1731, 1745 (2020) (Justice Gorsuch’s characterization of the dissenting Justices’ critique).

³²³ *Id.* at 1769 n. 22 (Alito, J., dissenting).

³²⁴ *Id.* at 1765.

³²⁵ *Id.*

³²⁶ *Id.*; *see also id.* (explaining that anti-miscegenation laws were “grounded in bigotry against a particular race and w[ere] an integral part of preserving the rigid hierarchical distinction that denominated members of the black race as inferior to whites”).

³²⁷ *Id.* at 1824 (Kavanaugh, J., dissenting).

³²⁸ *Id.* at 1765 (Alito, J., dissenting).

³²⁹ *Id.* at 1769; *see also id.* at 1828 (Kavanaugh, J., dissenting) (asserting that “Seneca Falls was not Stonewall,” and that such historical and sociological evidence is relevant to the question of whether anti-LGBT discrimination qualifies as discrimination because of sex).

³³⁰ *Wittmer v. Phillips 66 Co.*, 915 F.3d 328, 337 (5th Cir. 2019) (Ho, J., concurring); *id.* at 334 (“The blindness theory . . . would hold that Title VII prohibits both transgender and sexual orientation discrimination. Because under that theory . . . [a]ll that matters is that company policy treats people differently based on their sex”).

³³¹ *Id.* at 340 (internal quotation marks omitted).

opinion rejecting a sex-based claim by a transgender student. Judge Pryor argued that “context matters” in antidiscrimination law—a proposition for which he cited the great antistatist Justice, Thurgood Marshall.³³² Judge Pryor is not an outlier. Much conservative textualist commentary in recent sex-based LGBT rights decisions echoes antistatist arguments generally associated with Justice Marshall and other progressive Justices. These Justices have always argued that context matters—particularly in affirmative action cases, where they have observed that “[a]ctions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its after effects have been extirpated.”³³³

One would think, based on conservative textualists’ rejection of antistatistism and embrace of antistatistism in these recent LGBT rights cases, that affirmative action’s future under Title VII would be fairly secure. But the commentators who predicted in the wake of *Bostock* that affirmative action was “doomed”³³⁴ may very well be right. Because, in reality, and contrary to what the Justices suggest in *Bostock*, the meaning of Title VII’s prohibition of discrimination is underdetermined; it admits of multiple interpretations. There is very little to prevent a textualist judge from picking and choosing from among the different definitions of discrimination to reach results that best accord with his or her extratextual commitments in different legal contexts.

Indeed, *textualist judges already toggle between different definitions of discrimination in different Title VII contexts*. In *Bostock*, Justice Thomas endorses corpus linguistics evidence purporting to show that Title VII’s original public meaning does not bar all discrimination, but only discrimination motivated by prejudice or bias. But in *Olmstead v. Zimring*, a case involving disability discrimination, Justice Thomas adopted Justice Gorsuch’s approach in *Bostock*: He turned to the dictionary and concluded that the word “discriminate” “means to ‘distinguish,’ to ‘differentiate,’ or to make a ‘distinction . . .’” between individuals on the basis of a protected trait.³³⁵ Justice Thomas explicitly stated in *Olmstead* that this thin, antistatist definition of discrimination is the one that captures Title VII’s original public meaning,³³⁶ and he cited constitutional decisions prohibiting race-based affirmative action as evidence that the word discrimination always carries this same formalistic meaning.³³⁷ Justice Thomas made the same

³³² See *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1311 (11th Cir. 2020) (Pryor, J., dissenting).

³³³ *Gratz v. Bollinger*, 539 U.S. 244, 301 (2003) (Ginsburg, J., dissenting); see also *id.* at 301–02 (“[A] classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination.” (internal quotation marks omitted)); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 245 (1995) (Stevens, J., dissenting) (criticizing rulings invalidating affirmative action on equality grounds for “disregard[ing] the difference between a ‘No Trespassing’ sign and a welcome mat”).

³³⁴ Sunstein, *supra* note 319.

³³⁵ *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 616 (1999) (Thomas, J., dissenting) (quoting RANDOM HOUSE DICTIONARY 564 (2d ed. 1987)); see also *id.* (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 648 (1981), which defines “‘discrimination’ as ‘the making or perceiving of a distinction or difference’ or as ‘the act, practice, or an instance of discriminating categorically rather than individually’”).

³³⁶ *Id.* at 616–17.

³³⁷ *Id.* at 620 (“This same understanding of discrimination also informs this Court’s constitutional interpretation of the term.”); *id.* (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 223–224 (1995) and *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–494 (1989) (plurality opinion)).

argument a few years after *Olmstead* in age discrimination case called *General Dynamics Land Systems, Inc. v. Cline*, in which he excoriated his colleagues for attending to “social history” in interpreting antidiscrimination laws³³⁸ and once again characterized Title VII as adopting a strictly anticlassificationist definition of discrimination.³³⁹

One response to these shifting and context-dependent interpretations of Title VII’s original public meaning might be to say it’s just bad textualism. But there is a reason judges keep failing at this, which is that textualism does not actually enable them to do what it promises. It does not actually provide a means of cabining all knowledge of history and social values and resolving highly contested issues in a neutral and value-free way. There are too many shadow decision points; the meaning of words is too varied and dynamic; and the kinds of cases that reach the Court are too contested for the search for original public meaning to yield determinate answers. What textualism provides instead is a string of superficially appealing assertions that its practitioners cannot hear or will not attend to democratic debate over the issues of the day. Textualism promises that arguments involving matters of deep moral and political significance to the American people can be transformed into, and resolved through, value-free arguments over technical methodological questions. But that is not possible, and pretending otherwise is not democracy-enhancing. In fact, it is the big lie, in the judicial realm for the coming generation: that judicial elites, trained in the practice of textualism and originalism, can unlock the one true and eternal meaning of our deepest legal commitments, unburdened by history, politics, social change, and the substantive constitutional visions that so profoundly influence how we all understand those commitments.

³³⁸ *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 606–13 (2004) (Thomas, J., dissenting).

³³⁹ *Id.* at 608–12; *id.* at 608 (observing that “[t]here is little doubt that the motivation behind the enactment of the Civil Rights Act of 1964 was to prevent invidious discrimination against racial minorities, especially blacks,” but arguing that it does not matter which social group Congress intended to protect because, as a semantic matter, Title VII bars all differential treatment on the basis of race).