AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era – Individual Rights/Personal Freedom and Public Morality/Gay Rights

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

*Gerald Bostock worked for the county government in Clayton County, Georgia as a social worker. Shortly after he joined a gay recreational softball league, he was fired for conduct “unbecoming” a county worker. Bostock then filed a lawsuit against the county claiming that his termination violated the ban on sex discrimination in Title VII. The local district court rejected his claim as did the Court of Appeals for the Eleventh Circuit. Bostock appealed to the Supreme Court of the United States.*

 *The Supreme Court reversed the local federal courts by a 6-3 vote. Justice Neil Gorsuch’s majority opinion held that Bostock was fired because of his sex because he was a woman, he would not have been fired for being sexually attracted to men. All the justices agreed that no one in 1964 thought a ban on sex discrimination was also a ban on discrimination on sexual orientation or gender identity. Why does Gorsuch nevertheless insist that Congress in 1964 banned discrimination on sexual orientation? Why do the dissents disagree? Who has the better of the argument? The judicial opinions in* Bostock *frequently invoke Justice Antonin Scalia? Which opinion best captures Scalia’s jurisprudence? Neither Chief Justice John Roberts nor any of the more liberal justices wrote opinions. Do you believe they agreed with the reasoning of the Gorsuch opinion as well as the result? How might they have reasoned if compelled to write in* Bostock.

Justice [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I576207cbaed911eaa4a6da07b08de5cd&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.Search)&analyticGuid=I576207cbaed911eaa4a6da07b08de5cd) delivered the opinion of the Court.

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

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

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

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The only statutorily protected characteristic at issue in today's cases is “sex”—and that is also the primary term in Title VII whose meaning the parties dispute. . . . The question isn't just what “sex” meant, but what Title VII says about it. Most notably, the statute prohibits employers from taking certain actions “because of ” sex. And, as this Court has previously explained, “the ordinary meaning of ‘because of’ is ‘by reason of’ or ‘on account of.’ ” In the language of law, this means that Title VII's “because of ” test incorporates the “ ‘simple’ ” and “traditional” standard of but-for causation.  That form of causation is established whenever a particular outcome would not have happened “but for” the purported cause. In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.

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. . . . [T]he question becomes: What did “discriminate” mean in 1964? As it turns out, it meant then roughly what it means today: “To make a difference in treatment or favor (of one as compared with others).” To “discriminate against” a person, then, would seem to mean treating that individual worse than others who are similarly situated. In so-called “disparate treatment” cases like today's, this Court has also held that the difference in treatment based on sex must be intentional. So, taken together, an employer who intentionally treats a person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual of another sex—discriminates against that person in violation of Title VII.

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The statute . . . tells us . . . that our focus should be on individuals, not groups: Employers may not “fail or refuse to hire or ... discharge any *individual*, or otherwise ... discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* ... sex.”  The consequences of the law's focus on individuals rather than groups are anything but academic. Suppose an employer fires a woman for refusing his sexual advances. It's no defense for the employer to note that, while he treated that individual woman worse than he would have treated a man, he gives preferential treatment to female employees overall. The employer is liable for treating *this* woman worse in part because of her sex. Nor is it a defense for an employer to say it discriminates against both men and women because of sex. This statute works to protect individuals of both sexes from discrimination, and does so equally. So an employer who fires a woman, Hannah, because she is insufficiently feminine and also fires a man, Bob, for being insufficiently masculine may treat men and women as groups more or less equally. But in *both* cases the employer fires an individual in part because of sex. Instead of avoiding Title VII exposure, this employer doubles it.

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

The statute's message for our cases is equally simple and momentous: An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge. Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.

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

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

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Maybe most intuitively, the employers assert that discrimination on the basis of homosexuality and transgender status aren't referred to as sex discrimination in ordinary conversation. If asked by a friend (rather than a judge) why they were fired, even today's plaintiffs would likely respond that it was because they were gay or transgender, not because of sex. . . . But this submission rests on a mistaken understanding of what kind of cause the law is looking for in a Title VII case. In conversation, a speaker is likely to focus on what seems most relevant or informative to the listener. . . In [*Phillips*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971126991&pubNum=0000780&originatingDoc=I576207cbaed911eaa4a6da07b08de5cd&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.Search)), for example, a woman who was not hired under the employer's policy might have told her friends that her application was rejected because she was a mother, or because she had young children. . . . But the Court did not hesitate to recognize that the employer in [*Phillips*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971126991&pubNum=0000780&originatingDoc=I576207cbaed911eaa4a6da07b08de5cd&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.Search)) discriminated against the plaintiff because of her sex. . . .

Trying another angle, the defendants before us suggest that an employer who discriminates based on homosexuality or transgender status doesn't *intentionally* discriminate based on sex, as a disparate treatment claim requires. . . . But nothing in Title VII turns on the employer's labels or any further intentions (or motivations) for its conduct beyond sex discrimination. In [*Manhart*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1978114221&pubNum=0000780&originatingDoc=I576207cbaed911eaa4a6da07b08de5cd&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.Search)), the employer intentionally required women to make higher pension contributions only to fulfill the further purpose of making things more equitable between men and women as groups. In [*Phillips*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971126991&pubNum=0000780&originatingDoc=I576207cbaed911eaa4a6da07b08de5cd&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.Search)), the employer may have perceived itself as discriminating based on motherhood, not sex, given that its hiring policies as a whole *favored* women. But in both cases, the Court set all this aside as irrelevant. The employers' policies involved intentional discrimination because of sex, and Title VII liability necessarily followed.

. . . Suppose an employer asked homosexual or transgender applicants to tick a box on its application form. The employer then had someone else redact any information that could be used to discern sex. The resulting applications would disclose which individuals are homosexual or transgender without revealing whether they also happen to be men or women. Doesn't that possibility indicate that the employer's discrimination against homosexual or transgender persons cannot be sex discrimination?

No, it doesn't. . . . There is no way for an applicant to decide whether to check the homosexual or transgender box without considering sex. . . .

Next, the employers turn to Title VII's list of protected characteristics—race, color, religion, sex, and national origin. Because homosexuality and transgender status can't be found on that list and because they are conceptually distinct from sex, the employers reason, they are implicitly excluded from Title VII's reach. . . . We agree that homosexuality and transgender status are distinct concepts from sex. But, as we've seen, discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second. . . .

The employers try the same point another way. Since 1964, they observe, Congress has considered several proposals to add sexual orientation to Title VII's list of protected characteristics, but no such amendment has become law. . . .There's no authoritative evidence explaining why later Congresses adopted other laws referencing sexual orientation but didn't amend this one. . . . All we can know for certain is that speculation about why a later Congress declined to adopt new legislation offers a “particularly dangerous” basis on which to rest an interpretation of an existing law a different and earlier Congress did adopt.

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Employer hires based on sexual stereotypes? Simple test. Employer sets pension contributions based on sex? Simple test. Employer fires men who do not behave in a sufficiently masculine way around the office? Simple test. But when that same employer discriminates against women who are attracted to women, or persons identified at birth as women who later identify as men, we suddenly roll out a new and more rigorous standard? Why are *these*reasons for taking sex into account different from all the rest? Title VII's text can offer no answer.

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. . . . This Court has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration. . . . And as we have seen, no ambiguity exists about how Title VII's terms apply to the facts before us. To be sure, the statute's application in these cases reaches “beyond the principal evil” legislators may have intended or expected to address.  But “ ‘the fact that [a statute] has been applied in situations not expressly anticipated by Congress’ ” does not demonstrate ambiguity; instead, it simply “ ‘demonstrates [the] breadth’ ” of a legislative command.

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

That is exactly the sort of reasoning this Court has long rejected. . . . . If we applied Title VII's plain text only to applications some (yet-to-be-determined) group expected in 1964, we'd have more than a little law to overturn. Start with *Oncale v. Sundowner Offshore Services* (1998). How many people in 1964 could have expected that the law would turn out to protect male employees? Let alone to protect them from harassment by other male employees? As we acknowledged at the time, “male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII.”  Yet the Court did not hesitate to recognize that Title VII's plain terms forbade it. Under the employer's logic, it would seem this was a mistake.

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. . . . Title VII's prohibition of sex discrimination in employment is a major piece of federal civil rights legislation. It is written in starkly broad terms. It has repeatedly produced unexpected applications, at least in the view of those on the receiving end of them. Congress's key drafting choices—to focus on discrimination against individuals and not merely between groups and to hold employers liable whenever sex is a but-for cause of the plaintiff 's injuries—virtually guaranteed that unexpected applications would emerge over time.

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. . . . The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today. Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind. The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual “because of such individual's sex.” As used in Title VII, the term “ ‘discriminate against’ ” refers to “distinctions or differences in treatment that injure protected individuals.”  Firing employees because of a statutorily protected trait surely counts. Whether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases, not these.

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Ours is a society of written laws. Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations. In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee's sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law.

Justice [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=I576207cbaed911eaa4a6da07b08de5cd&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.Search)&analyticGuid=I576207cbaed911eaa4a6da07b08de5cd), with whom Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I576207cbaed911eaa4a6da07b08de5cd&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.Search)&analyticGuid=I576207cbaed911eaa4a6da07b08de5cd) joins, dissenting.

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The Court tries to convince readers that it is merely enforcing the terms of the statute, but that is preposterous. Even as understood today, the concept of discrimination because of “sex” is different from discrimination because of “sexual orientation” or “gender identity.” And in any event, our duty is to interpret statutory terms to “mean what they conveyed to reasonable people *at the time they were written*.” If every single living American had been surveyed in 1964, it would have been hard to find any who thought that discrimination because of sex meant discrimination because of sexual orientation––not to mention gender identity, a concept that was essentially unknown at the time.

The Court attempts to pass off its decision as the inevitable product of the textualist school of statutory interpretation championed by our late colleague Justice Scalia, but no one should be fooled. The Court's opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated––the theory that courts should “update” old statutes so that they better reflect the current values of society.

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. . . . If “sex” in Title VII means biologically male or female, then discrimination because of sex means discrimination because the person in question is biologically male or biologically female, not because that person is sexually attracted to members of the same sex or identifies as a member of a particular gender.

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 The Court's argument is not only arrogant, it is wrong. It fails on its own terms. “Sex,” “sexual orientation,” and “gender identity” are different concepts, as the Court concedes.  And neither “sexual orientation” nor “gender identity” is tied to either of the two biological sexes. Both men and women may be attracted to members of the opposite sex, members of the same sex, or members of both sexes. And individuals who are born with the genes and organs of either biological sex may identify with a different gender.

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

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The Court's remaining argument is based on a hypothetical that the Court finds instructive. In this hypothetical, an employer has two employees who are “attracted to men,” and “*to the employer's mind*” the two employees are “materially identical” except that one is a man and the other is a woman. . . . The problem with this argument is that the Court loads the dice. That is so because in the mind of an employer who does not want to employ individuals who are attracted to members of the same sex, these two employees are not materially identical in every respect but sex. On the contrary, they differ in another way that the employer thinks is quite material. [W]hat we have in the Court's hypothetical case are two employees who differ in *two* ways––sex and sexual orientation––and if the employer fires one and keeps the other, all that can be inferred is that the employer was motivated either entirely by sexual orientation, entirely by sex, or in part by both. . . .

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[Another] argument fails because it is based on a faulty premise, namely, that Title VII forbids discrimination based on sex stereotypes. It does not. It prohibits discrimination because of “sex,” and the two concepts are not the same. That does not mean, however, that an employee or applicant for employment cannot prevail by showing that a challenged decision was based on a sex stereotype. Such evidence is relevant to prove discrimination because of sex, and it may be convincing where the trait that is inconsistent with the stereotype is one that would be tolerated and perhaps even valued in a person of the opposite sex.

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A second prominent argument made in support of the result that the Court now reaches analogizes discrimination against gays and lesbians to discrimination against a person who is married to or has an intimate relationship with a person of a different race. . . . This argument totally ignores the historically rooted reason why discrimination on the basis of an interracial relationship constitutes race discrimination. . . . [T]his employer is discriminating on a ground that history tells us is a core form of race discrimination. “It would require absolute blindness to the history of racial discrimination in this country not to understand what is at stake in such cases .... A prohibition on ‘race-mixing’ was ... grounded in bigotry against a particular race and was an integral part of preserving the rigid hierarchical distinction that denominated members of the black race as inferior to whites.”

Discrimination because of sexual orientation is different. It cannot be regarded as a form of sex discrimination on the ground that applies in race cases since discrimination 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.

Anyone who examines those definitions [in 1960s dictionaries] can see that the primary definition in every one of them refers to the division of living things into two groups, male and female, based on biology, and most of the definitions further down the list are the same or very similar. . . .

. . . [T]textualists like Justice Scalia do not confine their inquiry to the scrutiny of dictionaries. Justice Scalia was perfectly clear on this point. The words of a law, he insisted, “mean *what they conveyed to reasonable people at the time.*”

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Thus, when textualism is properly understood, it calls for an examination of the social context in which a statute was enacted because this may have an important bearing on what its words were understood to mean at the time of enactment. Textualists do not read statutes as if they were messages picked up by a powerful radio telescope from a distant and utterly unknown civilization. Statutes consist of communications between members of a particular linguistic community, one that existed in a particular place and at a particular time, and these communications must therefore be interpreted as they were understood by that community at that time.

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. . . . In 1964, ordinary Americans reading the text of Title VII would not have dreamed that discrimination because of sex meant discrimination because of sexual orientation, much less gender identity. The *ordinary meaning* of discrimination because of “sex” was discrimination because of a person's biological sex, not sexual orientation or gender identity. The possibility that discrimination on either of these grounds might fit within some exotic understanding of sex discrimination would not have crossed their minds.

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In its then-most recent Diagnostic and Statistical Manual of Mental Disorders (1952) (DSM–I), the American Psychiatric Association (APA) classified same-sex attraction as a “sexual deviation,” a particular type of “sociopathic personality disturbance,”  and the next edition, issued in 1968, similarly classified homosexuality as a “sexual deviatio[n].” It was not until the sixth printing of the DSM–II in 1973 that this was changed.

Society's treatment of homosexuality and homosexual conduct was consistent with this understanding. Sodomy was a crime in every State but Illinois, and in the District of Columbia, a law enacted by Congress made sodomy a felony punishable by imprisonment for up to 10 years and permitted the indefinite civil commitment of “sexual psychopath[s].”

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To its credit, our society has now come to recognize the injustice of past practices, and this recognition provides the impetus to “update” Title VII. But that is not our job. Our duty is to understand what the terms of Title VII were understood to mean when enacted, and in doing so, we must take into account the societal norms of that time. We must therefore ask whether ordinary Americans in 1964 would have thought that discrimination because of “sex” carried some exotic meaning under which private-sector employers would be prohibited from engaging in a practice that represented the official policy of the Federal Government with respect to its own employees. We must ask whether Americans at that time would have thought that Title VII banned discrimination against an employee for engaging in conduct that Congress had made a felony and a ground for civil commitment.

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While Americans in 1964 would have been shocked to learn that Congress had enacted a law prohibiting sexual orientation discrimination, they would have been bewildered to hear that this law also forbids discrimination on the basis of “transgender status” or “gender identity,” terms that would have left people at the time scratching their heads. The term “transgender” is said to have been coined “ ‘in the early 1970s,’ ” and the term “gender identity,” now understood to mean “[a]n internal sense of being male, female or something else,” apparently first appeared in an academic article in 1964. Certainly, neither term was in common parlance; indeed, dictionaries of the time still primarily defined the word “gender” by reference to grammatical classifications.

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It 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.

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The Court's unanimous decision in *Oncale v. Sundowner Offshore Services* (1998) was thoroughly unremarkable. The Court held that a male employee who alleged that he had been sexually harassed at work by other men stated a claim under Title VII. Although the impetus for Title VII's prohibition of sex discrimination was to protect women, anybody reading its terms would immediately appreciate that it applies equally to both sexes, and by the time [*Oncale*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1998062031&pubNum=0000780&originatingDoc=I576207cbaed911eaa4a6da07b08de5cd&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.Search)) reached the Court, our precedent already established that sexual harassment may constitute sex discrimination within the meaning of Title VII. . . . .

Properly understood, [*Oncale*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1998062031&pubNum=0000780&originatingDoc=I576207cbaed911eaa4a6da07b08de5cd&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.Search)) does not provide the slightest support for what the Court has done today. For one thing, it would be a wild understatement to say that discrimination because of sexual orientation and transgender status was not the “principal evil” on Congress's mind in 1964. Whether we like to admit it now or not, in the thinking of Congress and the public at that time, such discrimination would not have been evil at all.

But the more important difference between these cases and [*Oncale*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1998062031&pubNum=0000780&originatingDoc=I576207cbaed911eaa4a6da07b08de5cd&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.Search)) is that here the interpretation that the Court adopts does not fall within the ordinary meaning of the statutory text as it would have been understood in 1964. To decide for the defendants in [*Oncale*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1998062031&pubNum=0000780&originatingDoc=I576207cbaed911eaa4a6da07b08de5cd&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.Search)), it would have been necessary to carve out an exception to the statutory text. Here, no such surgery is at issue. Even if we totally disregard the societal norms of 1964, the text of Title VII does not support the Court's holding. And the reasoning of [*Oncale*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1998062031&pubNum=0000780&originatingDoc=I576207cbaed911eaa4a6da07b08de5cd&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.Search)) does not preclude or counsel against our taking those norms into account. They are relevant, not for the purpose of creating an exception to the terms of the statute, but for the purpose of better appreciating how those terms would have been understood at the time.

The Court argues that two other decisions––*Phillips v. Martin Marietta Corp.* (1971), and *Los Angeles Dept. of Water and Power v. Manhart* (1978)––buttress its decision, but those cases merely held that Title VII prohibits employer conduct that plainly constitutes discrimination because of biological sex. In [*Philips*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971126991&originatingDoc=I576207cbaed911eaa4a6da07b08de5cd&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.Search)), the employer treated women with young children less favorably than men with young children. In [*Manhart*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1978114221&pubNum=0000780&originatingDoc=I576207cbaed911eaa4a6da07b08de5cd&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.Search)), the employer required women to make larger pension contributions than men. It is hard to see how these holdings assist the Court.

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[T]he legislative history of Title VII's prohibition of sex discrimination is brief, but it is nevertheless revealing. The prohibition of sex discrimination was “added to Title VII at the last minute on the floor of the House of Representatives,”  by Representative Howard Smith, the Chairman of the Rules Committee. Representative Smith had been an ardent opponent of the civil rights bill, and it has been suggested that he added the prohibition against discrimination on the basis of “sex” as a poison pill. On this theory, Representative Smith thought that prohibiting employment discrimination against women would be unacceptable to Members who might have otherwise voted in favor of the bill and that the addition of this prohibition might bring about the bill's defeat. But if Representative Smith had been looking for a poison pill, prohibiting discrimination on the basis of sexual orientation or gender identity would have been far more potent. However, neither Representative Smith nor any other Member said one word about the possibility that the prohibition of sex discrimination might have that meaning. Instead, all the debate concerned discrimination on the basis of biological sex.

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What the Court has done today––interpreting discrimination because of “sex” to encompass discrimination because of sexual orientation or gender identity––is virtually certain to have far-reaching consequences. Over 100 federal statutes prohibit discrimination because of sex. The briefs in these cases have called to our attention the potential effects that the Court's reasoning may have under some of these laws, but the Court waves those considerations aside. As to Title VII itself, the Court dismisses questions about “bathrooms, locker rooms, or anything else of the kind.”  And it declines to say anything about other statutes whose terms mirror Title VII's.

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

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*Women's sports*. Another issue that may come up under both Title VII and Title IX is the right of a transgender individual to participate on a sports team or in an athletic competition previously reserved for members of one biological sex. . . . The effect of the Court's reasoning may be to force young women to compete against students who have a very significant biological advantage, including students who have the size and strength of a male but identify as female and students who are taking male hormones in order to [transition](https://1.next.westlaw.com/Link/Document/FullText?entityType=disease&entityId=I777c6aba995711de9b8c850332338889&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) from female to male. . . .

*Housing*. The Court's decision may lead to Title IX cases against any college that resists assigning students of the opposite biological sex as roommates. . . .

*Employment by religious organizations*. Briefs filed by a wide range of religious groups––Christian, Jewish, and Muslim––express deep concern that the position now adopted by the Court “will trigger open conflict with faith based employment practices of numerous churches, synagogues, mosques, and other religious institutions.” . . .

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[*Healthcare*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2050166488&pubNum=0004031&originatingDoc=I576207cbaed911eaa4a6da07b08de5cd&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.Search)). Healthcare benefits may emerge as an intense battleground under the Court's holding. Transgender employees have brought suit under Title VII to challenge employer-provided health insurance plans that do not cover costly sex reassignment surgery. . . .

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*Freedom of speech*. . . . . After today's decision, plaintiffs may claim that the failure to use their preferred pronoun violates one of the federal laws prohibiting sex discrimination.

The Court's decision may also pressure employers to suppress any statements by employees expressing disapproval of same-sex relationships and sex reassignment procedures. Employers are already imposing such restrictions voluntarily, and after today's decisions employers will fear that allowing employees to express their religious views on these subjects may give rise to Title VII harassment claims.

*Constitutional claims*. Finally, despite the important differences between the Fourteenth Amendment and Title VII, the Court's decision may exert a gravitational pull in constitutional cases. Under our precedents, the Equal Protection Clause prohibits sex-based discrimination unless a “heightened” standard of review is met.  By equating discrimination because of sexual orientation or gender identity with discrimination because of sex, the Court's decision will be cited as a ground for subjecting all three forms of discrimination to the same exacting standard of review.

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[​](https://1.next.westlaw.com/Link/Document/Blob/I62575630af6511eab7a68702b83ea9d4.png?originationContext=document&transitionType=DocumentImage&uniqueId=14b5bdff-3500-49f9-ab1b-7def7bf3624c&contextData=(sc.History*oc.Search))

Justice [KAVANAUGH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0364335801&originatingDoc=I576207cbaed911eaa4a6da07b08de5cd&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.Search)&analyticGuid=I576207cbaed911eaa4a6da07b08de5cd), dissenting.

Like many cases in this Court, this case boils down to one fundamental question: Who decides? . . . . Under the Constitution's separation of powers, the responsibility to amend Title VII belongs to Congress and the President in the legislative process, not to this Court.

. . . . The policy arguments for amending Title VII are very weighty. The Court has previously stated, and I fully agree, that gay and lesbian Americans “cannot be treated as social outcasts or as inferior in dignity and worth.”

But we are judges, not Members of Congress. And in Alexander Hamilton's words, federal judges exercise “neither Force nor Will, but merely judgment.” Under the Constitution's separation of powers, our role as judges is to interpret and follow the law as written, regardless of whether we like the result. Our role is not to make or amend the law. As written, Title VII does not prohibit employment discrimination because of sexual orientation.

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For the sake of argument, I will assume that firing someone because of their sexual orientation may, as a very literal matter, entail making a distinction based on sex. But to prevail in this case with their literalist approach, the plaintiffs must *also* establish one of two other points. The plaintiffs must establish that courts, when interpreting a statute, adhere to literal meaning rather than ordinary meaning. Or alternatively, the plaintiffs must establish that the ordinary meaning of “discriminate because of sex”—not just the literal meaning—encompasses sexual orientation discrimination. The plaintiffs fall short on both counts.

*First*, courts must follow ordinary meaning, not literal meaning. And courts must adhere to the ordinary meaning of phrases, not just the meaning of the words in a phrase.

There is no serious debate about the foundational interpretive principle that courts adhere to ordinary meaning, not literal meaning, when interpreting statutes. As Justice Scalia explained, “the good textualist is not a literalist.” Or as Professor Eskridge stated: The “prime directive in statutory interpretation is to apply the meaning that a reasonable reader would derive from the text of the law,” so that “for hard cases as well as easy ones, the *ordinary meaning* (or the ‘everyday meaning’ or the ‘commonsense’ reading) of the relevant statutory text is the anchor for statutory interpretation.” . . .

Judges adhere to ordinary meaning for two main reasons: rule of law and democratic accountability. A society governed by the rule of law must have laws that are known and understandable to the citizenry. And judicial adherence to ordinary meaning facilitates the democratic accountability of America's elected representatives for the laws they enact. Citizens and legislators must be able to ascertain the law by reading the words of the statute. Both the rule of law and democratic accountability badly suffer when a court adopts a hidden or obscure interpretation of the law, and not its ordinary meaning.

Consider a simple example of how ordinary meaning differs from literal meaning. A statutory ban on “vehicles in the park” would literally encompass a baby stroller. But no good judge would interpret the statute that way because the word “vehicle,” in its ordinary meaning, does not encompass baby strollers.

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Next is a critical point of emphasis in this case. The difference between literal and ordinary meaning becomes especially important when—as in this case—judges consider *phrases* in statutes. . . . Courts must heed the ordinary meaning of the *phrase* *as a whole*, not just the meaning of the words in the phrase. That is because a phrase may have a more precise or confined meaning than the literal meaning of the individual words in the phrase. Examples abound. An “American flag” could literally encompass a flag made in America, but in common parlance it denotes the Stars and Stripes. . . .

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If the usual evidence indicates that a statutory phrase bears an ordinary meaning different from the literal strung-together definitions of the individual words in the phrase, we may not ignore or gloss over that discrepancy. “Legislation cannot sensibly be interpreted by stringing together dictionary synonyms of each word and proclaiming that, if the right example of the meaning of each is selected, the ‘plain meaning’ of the statute leads to a particular result. No theory of interpretation, including textualism itself, is premised on such an approach.”

. . . .

A literalist approach to interpreting phrases disrespects ordinary meaning and deprives the citizenry of fair notice of what the law is. It destabilizes the rule of law and thwarts democratic accountability. For phrases as well as terms, the “linchpin of statutory interpretation is *ordinary meaning*, for that is going to be most accessible to the citizenry desirous of following the law *and* to the legislators and their staffs drafting the legal terms of the plans launched by statutes *and* to the administrators and judges implementing the statutory plan.”

. . . .

. . . [I]n light of the bedrock principle that we must adhere to the ordinary meaning of a phrase, the question in this case boils down to the ordinary meaning of the phrase “discriminate because of sex.” Does the ordinary meaning of that phrase encompass discrimination because of sexual orientation? The answer is plainly no.

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As to common parlance, few in 1964 (or today) would describe a firing because of sexual orientation as a firing because of sex. As commonly understood, sexual orientation discrimination is distinct from, and not a form of, sex discrimination. . . . In common parlance, Bostock and Zarda were fired because they were gay, not because they were men.

Contrary to the majority opinion's approach today, this Court has repeatedly emphasized that common parlance matters in assessing the ordinary meaning of a statute, because courts heed how “most people” “would have understood” the text of a statute when enacted.

Consider the employer who has four employees but must fire two of them for financial reasons. Suppose the four employees are a straight man, a straight woman, a gay man, and a lesbian. The employer with animosity against women (animosity based on sex) will fire the two women. The employer with animosity against gays (animosity based on sexual orientation) will fire the gay man and the lesbian. Those are two distinct harms caused by two distinct biases that have two different outcomes. . . .

It also rewrites history. Seneca Falls was not Stonewall. The women's rights movement was not (and is not) the gay rights movement, although many people obviously support or participate in both. So to think that sexual orientation discrimination is just a form of sex discrimination is not just a mistake of language and psychology, but also a mistake of history and sociology.

. . . .

Many federal statutes prohibit sex discrimination, and many federal statutes also prohibit sexual orientation discrimination. But those sexual orientation statutes expressly prohibit sexual orientation discrimination in addition to expressly prohibiting sex discrimination. *Every single one.* To this day, Congress has never defined sex discrimination to encompass sexual orientation discrimination. Instead, when Congress wants to prohibit sexual orientation discrimination in addition to sex discrimination, Congress explicitly refers to sexual orientation discrimination.[5](https://1.next.westlaw.com/Document/I576207cbaed911eaa4a6da07b08de5cd/View/FullText.html?listSource=Foldering&originationContext=clientid&transitionType=MyResearchHistoryItem&contextData=%28oc.Search%29&VR=3.0&RS=cblt1.0#co_footnote_B00682051255377)

. . . .

Where possible, we also strive to interpret statutes so as not to create undue surplusage. It is not uncommon to find some scattered redundancies in statutes. But reading sex discrimination to encompass sexual orientation discrimination would cast aside as surplusage the numerous references to sexual orientation discrimination sprinkled throughout the U.S. Code in laws enacted over the last 25 years.

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And it is the common understanding in this Court as well. Since 1971, the Court has employed rigorous or heightened constitutional scrutiny of laws that classify on the basis of sex. Over the last several decades, the Court has also decided many cases involving sexual orientation. But in those cases, the Court never suggested that sexual orientation discrimination is just a form of sex discrimination. . . . Did the Court in all of those sexual orientation cases just miss that obvious answer—and overlook the fact that sexual orientation discrimination is actually a form of sex discrimination? That seems implausible. Nineteen Justices have participated in those cases. Not a single Justice stated or even hinted that sexual orientation discrimination was just a form of sex discrimination and therefore entitled to the same heightened scrutiny under the Equal Protection Clause. . . .

. . . .

. . . . [T]he majority opinion makes a fundamental mistake by confusing ordinary meaning with subjective intentions. . . . In the early years after Title VII was enacted, some may have wondered whether Title VII's prohibition on sex discrimination protected male employees. After all, covering male employees may not have been the intent of some who voted for the statute. Nonetheless, discrimination on the basis of sex against women and discrimination on the basis of sex against men are both understood as discrimination because of sex (back in 1964 and now) and are therefore encompassed within Title VII. So too, regardless of what the intentions of the drafters might have been, the ordinary meaning of the law demonstrates that harassing an employee because of her sex is discriminating against the employee because of her sex with respect to the “terms, conditions, or privileges of employment,” as this Court rightly concluded.

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

. . . .

Instead of a hard-earned victory won through the democratic process, today's victory is brought about by judicial dictate—judges latching on to a novel form of living literalism to rewrite ordinary meaning and remake American law. Under the Constitution and laws of the United States, this Court is the wrong body to change American law in that way. The Court's ruling “comes at a great cost to representative self-government.” . . .

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