
DIMENSIONAL DISPARATE TREATMENT

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ABSTRACT

The Supreme Court's decision in Bostock v. Clayton County was an important victory for gay and transgender workers—but the Court's textual analysis has failed to persuade a number of thoughtful commentators, and it threatens to leave anti-discrimination law in disarray. The root of the problem is that Bostock trumpeted a "simple test" of but-for causation that could not alone explain the correctness of the results that the Court reached. This explanatory gap not only has left Bostock's holding vulnerable to attack, but also has engendered uncertainty about the many disparate-treatment issues for which Bostock now provides the governing precedent. Indeed, because Bostock took it upon itself to interpret Title VII from textualist first principles, its analysis will orient—and perhaps disorient—judicial approaches to all manner of disparate-treatment claims for many years to come.

What disparate-treatment law needs, but the Court has thus far failed to provide, is a coherent, general, and textually grounded account of what it means for a decision to be made "because of" a protected characteristic—one that accords with Bostock's motivating intuitions, but that transcends its overly simplistic account of its own reasoning. Drawing on a venerable body of work in analytic philosophy concerning "determinable" properties and their corresponding "determinates," this Article develops an account that

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meets that need. In brief, this “dimensional” account of disparate treatment recognizes a decision as being made “because of [an] individual’s X” whenever the decision is motivated by a property that characterizes the individual in the dimension of X—regardless of whether a different decision would have been made if the individual had belonged to any other determinate class that is defined along that dimension. After introducing and defending this analysis, the Article traces its implications for a wide range of current controversies—involving bisexuality, pregnancy, race and gender stereotypes, and more. Finally, the Article defends the dimensional account and its implicit application in Bostock on textualist terms. It argues that the account best captures the meaning that an “ordinary reader” would ascribe to Congress’s enactment of Title VII—so long as the reader construes the statute in light of characteristic features of legislative communication, as sophisticated accounts of modern textualism would demand.

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INTRODUCTION

Bostock v. Clayton County delivered a landmark victory to advocates of social equality and workplace fairness.¹ Discrimination against gay and transgender employees, the Supreme Court pronounced, violates the Civil Rights Act of 1964.² Two years later, however, even many who celebrated *Bostock*'s upshot have confessed doubts about the Court's asserted justification for bringing it about: the now-famous claim that firing someone because they are gay or transgender logically entails firing them "because of their sex" as well.³ The first wave of objections to that analysis came from avowed conservatives who, perhaps predictably, condemned it as an abuse of their favored textualist methodology.⁴ But more striking is the second and more recent wave of criticism, in which some of the most thoughtful progressive scholars have now denounced that same analysis as either fallacious or, what is not much better, a façade for value-laden choices that the majority obscured from view.⁵

Although these criticisms are ultimately misplaced (or so I will argue), they underscore the need for something that the Court has indeed failed to provide: a coherent, general account of what it means for an action to be taken "because of" an attribute in the sense relevant to claims of disparate treatment. To be sure, *Bostock* purported to answer just that question by appealing to the familiar idea of "but-for" causation.⁶ And in so doing, it arguably built on other recent decisions construing anti-discrimination

1. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

2. *Id.* at 1754.

3. *Id.* at 1735, 1737, 1754; see 42 U.S.C. § 2000e-2(a)(1). For reasons of clarity and accuracy, I use the singular "they" in this Article. Cf. BRYAN A. GARNER, GARNER'S MODERN ENGLISH USAGE 196 (2016) (noting that "resistance to the singular *they* is fast receding" and that it is "the most convenient solution" to a difficult problem).

4. For criticisms in that vein, see, for example, Josh Blackman & Randy Barnett, *Justice Gorsuch's Halfway Textualism Surprises and Disappoints in the Title VII Cases*, NAT'L REV. (June 26, 2020, 6:30 AM), <https://www.nationalreview.com/2020/06/justice-gorsuch-title-vii-cases-half-way-textualism-surprises-disappoints> [<https://web.archive.org/web/20220412183111/https://www.nationalreview.com/2020/06/justice-gorsuch-title-vii-cases-half-way-textualism-surprises-disappoints>]; Nelson Lund, *Unleashed and Unbound: Living Textualism in Bostock v. Clayton County*, 21 FEDERALIST SOC'Y REV. 158, 160–62 (2020); and Ed Whelan, *A 'Pirate Ship' Sailing Under a 'Textualist Flag'*, NAT'L REV. (June 15, 2020, 1:01 PM), <https://www.nationalreview.com/bench-memos/a-pirate-ship-sailing-under-a-textualist-flag> [<https://web.archive.org/web/20220318235256/https://www.nationalreview.com/bench-memos/a-pirate-ship-sailing-under-a-textualist-flag>].

5. See, e.g., Mitchell N. Berman & Guha Krishnamurthi, *Bostock Was Bogus: Textualism, Pluralism, and Title VII*, 97 NOTRE DAME L. REV. 67, 79–120 (2021); Cary Franklin, *Living Textualism*, 2020 SUP. CT. REV. 119, 129–70; David A. Strauss, *Sexual Orientation and the Dynamics of Discrimination*, 2020 SUP. CT. REV. 203, 203–11; Cass R. Sunstein, *Textualism and the Duck-Rabbit Illusion*, 11 CALIF. L. REV. ONLINE 463, 474–75 (2020).

6. See *Bostock*, 140 S. Ct. at 1739.

requirements in similar terms.⁷ But the critics are right to say that this “simple test”⁸ is not nearly as simple as advertised. As the *Bostock* dissenters were quick to point out, if Gerald Bostock had been a woman rather than a man—but had still been attracted to people of the same sex—he (now she) would still have been fired.⁹ “But for” Bostock’s sex, then, his fate might have been just the same: everything depends on which other traits one chooses to hold constant in the counterfactual comparison. Without principled criteria for making such judgments, *Bostock*’s test is not simple so much as it is vacuous.

But the problem is not just that one Supreme Court opinion—even a salient and consequential one—may be analytically unsatisfying. The more fundamental problem is that *Bostock* at once enshrined a formalistic approach to disparate-treatment law and set up anyone who seeks to implement that approach in a coherent way for failure.¹⁰ Courts and scholars are already seeking to “reorient[.]” this area of law around the “but-for principle” trumpeted in *Bostock*.¹¹ But if that account of “because of” is garbled—or, at the very least, seriously incomplete—it will only sow more confusion and suspicion as it is extended to the host of other issues for which *Bostock* now provides the leading precedent. If the ascendant, textualist vision of disparate-treatment law is instead to guide courts to principled results (and if *Bostock*’s own results are to be satisfactorily defended as such), that vision needs to include more than a pat equation of “because of” with but-for causation. It needs to incorporate a careful and convincing account of the formal relations on which a formalistic doctrine inevitably relies.

This Article undertakes to supply that missing analysis. It develops the account of “because of” that the Court’s approach to disparate-treatment law requires, but that the Court has failed to clearly articulate. And, importantly, it does so within the textualist parameters embraced by a majority of the

7. See *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 350 (2013); see also Katie Eyer, *The But-For Theory of Anti-Discrimination Law*, 107 VA. L. REV. 1621, 1623–25, 1641–44 (2021) (arguing that these cases, together with *Bostock*, stand for a “but-for principle” that is now central to anti-discrimination law). Although *Bostock* certainly pointed to *Gross* and *Nassar* as authority for its “but-for” test, see *Bostock*, 140 S. Ct. at 1739, their common holding—that, in a mixed-motive case, the statutorily prohibited reason must be decisive—does not actually say much of anything about *Bostock*, where the question was whether a particular reason is prohibited at all. See *infra* note 292.

8. *Bostock*, 140 S. Ct. at 1743, 1747–49.

9. See *id.* at 1762–63 (Alito, J., dissenting).

10. For an account of *Bostock* emphasizing and defending its formalistic mode of analysis, see Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 279–82, 290–307 (2020).

11. See, e.g., Eyer, *supra* note 7, at 1621–22.

sitting Justices (and by all of the *Bostock* opinions).¹² The most immediate payoff is to vindicate *Bostock*'s result—and what I will contend is its implicit logic—against the critics who claim that the ruling cannot be defended on its own textualist terms.¹³ If I am right, conscientious textualists ought to accept *Bostock* as rightly decided, and everyone who feels trapped between nagging doubts about the majority's textual argument and anxiety about the consequences of rejecting it can breathe a sigh of relief.¹⁴ At the same time, the account that I develop here clarifies a wide variety of current controversies about the boundaries of anti-discrimination protections and puts a common frame on these diverse disputes, thereby outlining “the contours of a post-*Bostock* Title VII.”¹⁵

Consider a sampling of the questions that are newly arising, or will now be recast, in *Bostock*'s wake. If discrimination against gays and lesbians inherently involves sex discrimination under the “but-for” theory, does discrimination based on pregnancy as well?¹⁶ What about discrimination

12. See Franklin, *supra* note 5, at 120 (noting “that all of the opinions in *Bostock*—the majority and the two dissents—embrace textualism” and situating that fact in the larger context of textualism's ascendancy).

13. See, e.g., Berman & Krishnamurthi, *supra* note 5; Blackman & Barnett, *supra* note 4; Whelan, *supra* note 4.

14. The academic literature on the question addressed in *Bostock* is, of course, extensive. I identify the prior suggestions with the most affinity to mine and contrast those approaches below. See *infra* note 67 and Section III.A. For now, suffice it to say that the commentary favoring *Bostock*'s result on textualist grounds mostly defends and develops (or, for that matter, pioneered) the form of counterfactual argument employed by the *Bostock* majority. See, e.g., William N. Eskridge Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 YALE L.J. 322, 343–46 (2017); Katie R. Eyer, *Statutory Originalism and LGBT Rights*, 54 WAKE FOREST L. REV. 63, 73–80 (2019); Grove, *supra* note 10, at 281–82; Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 208–11 (1994) [hereinafter Koppelman, *Sex Discrimination*]; Andrew Koppelman, *Bostock, LGBT Discrimination, and the Subtractive Moves*, 105 MINN. L. REV. HEADNOTES 1, 8–9 (2020) [hereinafter Koppelman, *Subtractive Moves*]. On the other side of the debate, commentators have criticized *Bostock* (and the commentary preceding it) for either botching the counterfactual analysis or failing to capture the ordinary meaning of the text (or both). See sources cited *supra* note 5. And meanwhile, others have defended the result that *Bostock* reached but do not claim (or, in fact, outright deny) that their arguments show *Bostock* to be sound on textualist premises. See, e.g., Guha Krishnamurthi & Peter Salib, *Bostock and Conceptual Causation*, YALE J. ON REGUL. NOTICE & COMMENT (July 22, 2020), <https://www.yalejreg.com/nc/bostock-and-conceptual-causation-by-guha-krishnamurthi-peter-salib> [https://perma.cc/R6RP-PP7P]; Robin Dembroff, Issa Kohler-Hausmann & Elise Sugarman, *What Taylor Swift and Beyoncé Teach Us About Sex and Causes*, 169 U. PA. L. REV. ONLINE 1 (2020). To my knowledge, no prior commentary develops the analysis of Title VII's “because of” criterion that I advocate here, applies it to *Bostock*, or defends it as an account of the “ordinary meaning” relevant to textualism.

15. Guha Krishnamurthi & Charanya Krishnaswami, *Title VII and Caste Discrimination*, 134 HARV. L. REV. F. 456, 471 n.87 (2021) (“[E]ven under textualist reasoning, it is sufficiently early in the life of *Bostock* that we do not yet know the contours of a post-*Bostock* Title VII.”).

16. See *infra* Section III.C.

against people who are bisexual or pansexual (and whose aggregate set of sexual attractions or practices would thus offend an employer irrespective of the employee's own sex)?¹⁷ Does *Bostock's* protection for transgender individuals—whom the Court understood to be “persons with one sex identified at birth and another today”¹⁸—extend to nonbinary people, who identify neither as men nor as women today?¹⁹ What does *Bostock's* “but-for” analysis mean for the “sex stereotyping” theory articulated in *Price Waterhouse v. Hopkins*,²⁰ which was emphasized by advocates and lower courts but nearly ignored in the Court's opinion?²¹ And what does *Bostock's* analysis mean for protected characteristics unrelated to sex, gender, and sexuality? For example, does discrimination based on cultural practices that have a racial valence constitute discrimination “because of [an] individual's race”?²² Does discrimination based on a person's status within the Indian caste system constitute “national origin” discrimination?²³ And how should a *Bostock*-style textualist evaluate the panoply of discrimination claims based on intersectional identities or the conjunction of a protected trait with an unprotected one (as in so-called “sex-plus” cases)?²⁴

The beginning of wisdom on all of these issues, I will suggest, is conceptual clarification. As is characteristic of anti-discrimination laws, Title VII prohibits certain actions with a certain connection to certain properties of a person; in particular, it prohibits certain adverse employment actions to be taken “because of [an] individual's race, color, religion, sex, or national origin.”²⁵ Both the Court and commentators have generally read that phrase as if each property were merely a shorthand for its range of “standard” values—so that “because of such individual's race,” for example, means “because of such individual's being white, being Black, being Asian,” and so forth. On reflection, however, that is not the only or even the most natural interpretation of these words. Drawing on a rich but untapped body of philosophical work that examines “determinable” properties and their corresponding “determinates,” I will argue that the statute is better read to

17. See *infra* Section III.B. Although some use “bisexual” and “pansexual” interchangeably, others take “pansexual” alone to encompass attraction to individuals who do not identify as either male or female. See generally Christopher K. Belous & Melissa L. Bauman, *What's in a Name? Exploring Pansexuality Online*, 17 J. BISEXUALITY 58 (2017).

18. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1746 (2020).

19. See *infra* Section III.B.

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

21. See *infra* Section III.D.

22. See *infra* Section III.E.

23. See *infra* Section III.C.

24. See *infra* Section III.C.

25. 42 U.S.C. § 2000e-2(a)(1).

prohibit making decisions based on *any* facts about what a person is like *in the named dimensions*. I term this the “dimensional account” of disparate treatment.

On this understanding, the fact of a person’s *being Black* is a prohibited ground of decision-making, but so, too, is the fact of their *being of a different race than their spouse*, or the fact of their *being of the same race as most existing employees*. A decision made on any of these grounds is made on account of the person’s race in the requisite sense: it is made based on a fact about what they are like “race-wise,” or in respect of race. And that, in essence, is why *Bostock* was rightly decided: not because Gerald Bostock would have been treated better if his sex had been *female*, as the Court insisted, but because he would have been treated better if his sex had been *different than the sex of his desired romantic partners*—full stop. In short, disparate-treatment prohibitions make it unlawful to disfavor people because of properties—including relational properties—that they possess partly in virtue of how they stand in the dimensions enumerated in the statute. This account makes sense not only of *Bostock*, but also of the various other controversies noted above. And it puts causal counterfactuals in their place: an evocative tool for describing the role of a given attribute in a decision, but not the fundamental determinant of whether the attribute played a role or did not.

Of course, it is one thing to articulate a theory and another to ground it in positive law. I close that gap in two ways—one less ambitious, and one more so. First, I will contend that the account developed here captures what *Bostock* itself must be taken to have held in order for its own reasoning to make sense. In fact, despite repeatedly touting its “simple test,” the Court retreated at key moments to the intuitions that the dimensional account grounds, formalizes, and develops. So long as *Bostock* is good law, then, that account should be taken as a sympathetic reconstruction of the existing law as well. Second, I will contend that the dimensional account also captures the “ordinary meaning” of Title VII in the legally relevant sense—*notwithstanding the oddity of describing anti-gay practices as “sex discrimination” in everyday speech—and thus that the account would deserve textualists’ allegiance even if it could claim no authority in Bostock* (and, equivalently, that *Bostock* itself was rightly decided insofar as it should be read to incorporate this account).

With this last argument, I intervene not only in the debate over disparate-treatment law but in the cross-cutting debate over textualism as well. *Bostock* has quickly become ground zero for analysis of the textualist approach to statutory interpretation; it has spawned theoretical defenses,

critiques, and even a literature that aims to ascertain the relevant facts about “ordinary meaning” by empirical means.²⁶ And it has already become a principal lens through which students encounter questions of interpretive method.²⁷ I will use the dimensional account to highlight a critical aspect of the methodological debate that, with due respect, all sides have given short shrift. As I will explain, the theoretical premises of modern textualism commit textualists to seeking not the meaning of a free-floating phrase, but rather the meaning of a *legislative* utterance containing that phrase. That difference matters because the hypothetical “ordinary reader” who undertook the latter inquiry would necessarily account for the characteristic modularity and generality of legislative communication. With respect to Title VII, that means they would seek a *general analysis* of “because of such individual’s X,” rather than consulting their own linguistic intuitions about one or another particular case considered in isolation. The dimensional account supplies just such a general analysis; few of *Bostock*’s textualist critics even try to do so. The dimensional account thus not only has a strong claim to be accepted on textualist grounds, but also exemplifies how reading a statute *like a law* may prove essential to faithfully implementing textualists’ methodological commitments.

Although my argument proceeds under textualist premises, I do not mean to imply either that I favor textualism as an original matter or that my analysis should be of interest only to those who do. The question of “[w]hether our system is textualist, intentionalist, purposivist, or something else” is distinct from the question of what it would be best for it to be.²⁸ And within our extant legal system, what a statute means in a textualist’s sense is undoubtedly at least one of the important determinants of its legal effect (whether that represents a salutary feature of our system or not).²⁹ Moreover,

26. See, e.g., Berman & Krishnamurthi, *supra* note 5, at 125 (arguing that those who think “that *Bostock* reached the legally correct result . . . have strong grounds to reject textualism”); Sunstein, *supra* note 5 (using *Bostock* to illustrate the alleged indeterminacy of textualist arguments); Franklin, *supra* note 5 (similar); Grove, *supra* note 10 (using *Bostock* to illustrate different flavors of textualism, and defending the majority’s “formalistic” variant); see also *infra* notes 86, 233, 262–65 and accompanying text (discussing survey research).

27. See, e.g., JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION* 115–39, 146–50, 219–22 (4th ed. 2021); WILLIAM N. ESKRIDGE JR., JAMES J. BRUDNEY & JOSHUA A. CHAFETZ, *CASES AND MATERIALS ON LEGISLATION AND REGULATION* 35–56 (6th ed. Supp. 2021).

28. William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 *HARV. L. REV.* 1079, 1116 (2017); *cf. id.* (making the further claim that this question is itself a legal one).

29. *Cf.* Richard H. Fallon Jr., *The Meaning of Legal “Meaning” and Its Implications for Theories of Legal Interpretation*, 82 *U. CHI. L. REV.* 1235, 1307 (2015) (concluding that there are “multiple linguistically and legally plausible senses of, and thus referents for, claims of legal meaning”); Franklin, *supra* note 5, at 120 (noting how *Bostock* has been taken as “confirmation of Justice Elena Kagan’s endlessly quoted observation that ‘[w]e’re all textualists now’”).

several of the current Justices purport to give this particular consideration special priority.³⁰ So there are powerful reasons for concerning oneself with how a textualist ought to resolve important questions, and even for taking the fruits of that inquiry to bear on the legal soundness of different possible answers, regardless of one's own affinity for textualism and its purported justifications.

The Article unfolds over four parts. In Part I, I briefly explain why analyzing disparate treatment solely in terms of but-for causation, as *Bostock* purported to do, is untenable. In Parts II and III, I develop the interpretation of “because of such individual's X” introduced above and unspool its implications for a range of familiar and novel issues in disparate-treatment law. Finally, in Part IV, I return to *Bostock* and sexual-orientation discrimination in particular in order to develop and rebut the concern that the dimensional account fails to accord with the “ordinary meaning” of the statutory text with respect to that specific form of discrimination.

I. WHY THE “BUT-FOR” THEORY FALLS SHORT

Writing for the majority in *Bostock*, Justice Gorsuch explained the Court's holding in two basic steps.³¹ First, he posited that the phrase “because of,” as used in Title VII, invokes “the ‘simple’ and ‘traditional’ standard of but-for causation.”³² When the statute asks whether a person was fired “because of” their sex, in other words, it is really asking what would have happened in an alternate universe where their sex was different: if the person would *not* have been fired in that counterfactual world, then their firing *was* “because of” their sex in this one. Second, Justice Gorsuch then argued that a person's sex necessarily plays this causal role whenever they

30. See, e.g., *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020) (“When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest.”); *id.* at 1836 (Kavanaugh, J., dissenting) (“The best way for judges to demonstrate that we are deciding cases based on the ordinary meaning of the law is to walk the walk, even in the hard cases when we might prefer a different policy outcome.”).

31. See *id.* at 1739–42 (majority opinion); see also Grove, *supra* note 10, at 281–82 (recounting the same steps and noting that the opinion has “an almost algorithmic feel”).

32. *Bostock*, 140 S. Ct. at 1739. A separate provision of Title VII, added by the Civil Rights Act of 1991, provides that “an unlawful employment practice is established when the complaining party demonstrates that [a protected characteristic] was a motivating factor for any employment practice, even though other factors also motivated the practice.” 42 U.S.C. § 2000e-2(m). Justice Gorsuch set this provision aside as providing Title VII plaintiffs with an alternative, but here unnecessary, path to establishing liability. *Bostock*, 140 S. Ct. at 1740. Because the provision is naturally read to address the weight that a prohibited reason must bear in a decision, rather than (what concerns us here) which reasons are prohibited, I do the same. Cf. *infra* note 292 and accompanying text (addressing the relevance of mixed-motive cases).

are fired on the basis of their sexual orientation or gender identity.³³ After all, if Gerald Bostock had been a woman rather than a man, Bostock's attraction to men would not have gotten him (or her) fired. And likewise for the companion case brought by Aimee Stephens, a transgender woman: if her sex assigned at birth had been female rather than male, her female gender identity would not have gotten her fired either.³⁴

This analysis has been touted as “recenter[ing] disparate treatment law around what should be its core theoretical commitment” by emphasizing a “foundational inquiry”: “[W]ould the outcome have been different ‘but for’ the race, sex or other protected class status of those adversely affected?”³⁵ But far from resolving “the conceptual confusion at the core of disparate treatment doctrine,” this understanding of the central question threatens to compound it.³⁶ First, the unalloyed “but-for” theory lacks the resources to answer its own question in a principled way. And second, it glosses over the distinction between *causes* and *reasons*, thereby cutting loose from the statutory text and embracing untenable results. Both of these problems have been noted by others, so I will move through them briskly here.³⁷ Getting them on the table will position us to work toward an account that solves them in Part II.

A. WHICH COUNTERFACTUAL?

The first and most immediate problem with *Bostock*'s “but-for” argument is now very familiar: How do we specify the relevant counterfactual?³⁸ Yes, Gerald Bostock would have been treated better if he had been a woman *and yet was still attracted to men*.³⁹ But in that counterfactual world, not only is Bostock's sex different, but his sexual orientation is different as well: he (she) is now straight, not gay. Justice Alito thus reasonably objected that the majority's chosen counterfactual comparison (a straight woman vs. a gay man) “loads the dice” in favor of finding disparate treatment.⁴⁰ If we really want to see whether Bostock's *sex*

33. *Bostock*, 140 S. Ct. at 1741–43.

34. *Id.* at 1741–42.

35. Eyer, *supra* note 7, at 1626–27.

36. *Id.* at 1645.

37. See, e.g., Berman & Krishnamurthi, *supra* note 5, at 99–107; see also *infra* note 38.

38. See, e.g., *Bostock*, 140 S. Ct. at 1762–63 (Alito, J., dissenting); *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 366 (7th Cir. 2017) (Sykes, J., dissenting); Berman & Krishnamurthi, *supra* note 5, at 101–03; Brian Soucek, *Hively's Self-Induced Blindness*, 127 YALE L.J.F. 115, 118 (2017).

39. The analysis in this Section applies equally to gender identity. For ease of exposition, however, I limit the discussion here to sexual orientation and return to gender identity below. See *infra* Sections II.A, III.B.

40. *Bostock*, 140 S. Ct. at 1762 (Alito, J., dissenting).

made any difference to his firing, Alito countered, we need to hold everything else, *including his same-sex orientation*, constant—meaning that we should ask what would have happened if Bostock had been, not a man attracted to men, but a woman attracted to women.⁴¹

Assuming that such a woman would also have been fired, specifying the counterfactual Justice Alito’s way yields the result that Bostock’s sex was not a but-for cause of his firing. But this comparison *also* fails to hold constant everything other than Bostock’s sex: it alters not only his sex (from male to female), but also the objects of his attraction (from men to women). Indeed, it is logically impossible to “change one thing at a time”⁴² in this case; one cannot construct a female version of Bostock without also modifying either Bostock’s attraction to men or his homosexuality.⁴³ So the critical issue in *Bostock*, at least under the majority’s “but-for” approach, is how one resolves a mind-bending question: If a given gay man were instead a woman, would that imaginary woman be gay (and hence attracted to women), or would she be straight (and hence attracted to men)? Restated in the favored terms of contemporary metaphysics, the question is which of two different possible worlds (the one with a gay comparator or the one with a straight comparator) is “closer” to our actual world.⁴⁴

Regrettably, the majority opinion offers little to justify its judgment on that pivotal issue. Justice Gorsuch does acknowledge the key objection.⁴⁵ But he quickly dismisses it as resting on a faulty premise: either that Title VII is violated “only when sex is the *sole* or *primary* reason for an [action],” or else that the statute only requires an employer to “treat[] men and women comparably as groups.”⁴⁶ Neither charge sticks. First, the objection accepts that the question is whether sex is a but-for cause; the point is that deciding whether sex is *even* a but-for cause requires deciding whether the proper opposite-sex comparator retains the real Bostock’s attraction to men or, rather, his homosexuality (since, once Bostock is female, those two properties cannot coexist).⁴⁷ Second, the objection also accepts that Title VII

41. See *id.* at 1762–63.

42. *Id.* at 1739 (majority opinion).

43. Here and at a few points below, I use the term “homosexual” because, in the specific context, “gay” is inapt. Given that purpose and context, I trust that my use of the term will not be taken to convey any pejorative attitude.

44. See Berman & Krishnamurthi, *supra* note 5, at 101–03; Julian Jonker, *Beyond the Comparative Test for Discrimination*, 79 ANALYSIS 206, 209 (2019).

45. See *Bostock*, 140 S. Ct. at 1748.

46. *Id.* at 1748–49 (emphasis added).

47. See *id.* at 1762 (Alito, J., dissenting). One might be tempted to think that so long as there is *some* hypothetical comparator who is of the opposite sex and would have been treated differently—as a

protects each *individual* against discrimination on the basis of their sex; the point, again, is that deciding whether the individual has suffered any such discrimination requires a seemingly ungoverned choice about how to imagine their opposite-sex comparator. Justice Gorsuch thus offers no adequate explanation for making the dispositive choice in his counterfactual analysis as he does.⁴⁸

Stepping into that void, Mitchell Berman and Guha Krishnamurthi have recently argued—plausibly, in my view—that when the purpose of a counterfactual comparison is to explain why a person acted as they did, possible worlds are “closer” to ours insofar as they retain more of the facts already known to be among the person’s motivating reasons.⁴⁹ They call this the “Principle of Conservation in Motivational Analysis.”⁵⁰ Applied here, that principle would seem to favor a comparison that holds constant Bostock’s same-sex sexual orientation (which, after all, undisputedly mattered to his employer).⁵¹ And the upshot would be that Justice Alito was right: firing someone for being gay does *not* constitute discrimination on the basis of sex, because the but-for test, rightly applied, is not satisfied.⁵²

For the moment, it does not matter much whether one thinks that the right way to imagine Bostock’s female comparator is Justice Alito’s—or whether one thinks, instead, that the answer is simply indeterminate, a matter for arbitrary choice. Neither view vindicates *Bostock*’s reasoning or result. And even if one were willing to accept that *Bostock* itself might have been wrongly decided, the evident perils of its counterfactual inquiry do not bode well for building a coherent body of disparate-treatment law on the

straight woman would have been here—it follows that Bostock’s sex was a but-for cause of his firing. In the end, I will argue that a thesis in that general neighborhood (though not quite that one) is indeed correct under the special circumstances of this case. *See infra* text accompanying notes 94–98. But it is not true, in general, that one can establish the causal relevance of a fact simply by pointing to *some* counterfactual world in which the fact differed and the result differed too. That world has to be, in the relevant sense, the closest to the real world. *See, e.g.*, Berman & Krishnamurthi, *supra* note 5, at 35–38. And that just brings us back to the question of which of the contending counterfactuals ought to be afforded that privileged status.

48. As I will discuss below, Justice Gorsuch *does* suggest at other points in the opinion that sex and sexual orientation have a special conceptual connection, *see Bostock*, 140 S. Ct. at 1742, 1746; and that connection, suitably described, does ground a viable account of *Bostock*’s justification. *See infra* Part II. But that vital point about sexual orientation does not speak to whether, as Justice Gorsuch repeatedly argued, the employer “fire[d] [the plaintiff] for traits or actions it would not have questioned in members of a different sex.” *Bostock*, 140 S. Ct. at 1737.

49. *See* Berman & Krishnamurthi, *supra* note 5, at 111–13.

50. *Id.*

51. *See id.* at 112–16.

52. *See id.* Berman and Krishnamurthi press this conclusion not to dispute *Bostock*’s bottom-line result, but rather to establish that “if *Bostock* was rightly decided, then it must follow that textualism is wrong or misguided.” *Id.* at 68.

foundation of its “simple test.”

B. REASONS AND CAUSES

This would be bad enough, but the problems with the “but-for” theory run deeper. As it is commonly formulated—and as it was formulated at several points in *Bostock*—the theory asks whether an outcome would have been different if one of a person’s actual attributes had been different.⁵³ But that is not a question that any disparate-treatment prohibition is plausibly read to pose. As *Bostock* itself reiterated, “the ordinary meaning of ‘because of’ ” in this context “is ‘by reason of’ or ‘on account of.’ ”⁵⁴ Disparate-treatment prohibitions thus forbid taking certain actions for certain *reasons* or on certain *grounds*—not the taking of any action that, if taken, would have certain facts among its causes.⁵⁵

A simple example will highlight the intuitive distinction here. Suppose that Sally goes to her school’s chess club meetings because she loves chess. One day the principal learns that a fight broke out at the last chess club meeting, and she decides to interrogate everyone who was there (including Sally). Using “because of” in a bare causal sense, one could say that the principal interrogated Sally because of Sally’s love of chess. And a simple “but-for” test would support that conclusion: but for Sally’s love of chess, she would not have been interrogated. Nonetheless, Sally could not honestly charge that the principal had decided to interrogate her because of—that is, “by reason of” or “on account of”—her love of chess. Such a complaint would clearly misdescribe what had happened. After all, the principal cares

53. See, e.g., *Bostock*, 140 S. Ct. at 1739 (“So long as the [plaintiff’s] sex was one but-for cause of that decision, that is enough to trigger the law.”); *id.* at 1741 (asking “if changing the employee’s sex would have yielded a different choice by the employer”); *id.* at 1742 (similar).

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

55. I focus here on the implausibility of taking disparate-treatment prohibitions to *pose* bare causal questions, but there is also a more fundamental problem with those questions themselves. In short, the question of how to specify the relevant counterfactual is intractable. We just saw a form of this problem in connection with the question of whether to hold constant Gerald Bostock’s sexual orientation, *supra* Section I.A, but that form of the problem is actually somewhat distinctive in that, thanks to the connection between sex and sexual orientation, it arises equally if one asks about the employer’s reasons, rather than the decision’s causes. In most cases, by contrast, one can make a *reasons*-centered counterfactual inquiry manageable by asking what a decisionmaker would have done if they had simply *perceived* a person differently in some respect. See BENJAMIN EIDELSON, *DISCRIMINATION AND DISRESPECT* 19–20 (2015); D. James Greiner & Donald B. Rubin, *Causal Effects of Perceived Immutable Characteristics*, 93 *REV. ECON. & STAT.* 775, 776 (2011). But there is no comparable way to regiment an inquiry about the bare causal significance of a characteristic such as race or sex. See, e.g., Issa Kohler-Hausmann, *Eddie Murphy and the Dangers of Counterfactual Causal Thinking About Detecting Racial Discrimination*, 113 *NW. U. L. REV.* 1163, 1199 (2019) (“It is meaningless to talk about, for example, a white Eddie Murphy, because every aspect of Eddie Murphy’s person from birth onwards was formed by living as a black man in the United States of America.”).

only that Sally was at a gathering that came to blows; she does not care at all about Sally's degree of interest in chess.

The point of the example is simply to foreground the familiar difference between whether an individual's attribute was a *cause* of another person's action and whether, more specifically, it figured in the person's *reasons* for that action. As both linguists and philosophers of action have pointed out, "because of" statements can bear either of these two different meanings in different settings.⁵⁶ In the context of explanations of intentional actions, however, such statements ordinarily bear the narrower, "reasons" interpretation: they usually capture the considerations that motivated an agent to act as they did, not the wider universe of causes that resulted in that event.⁵⁷ That is why "the principal interrogated Sally because of Sally's love of chess" rings false. And by the same token, it is also why the Supreme Court has long held that "[l]iability in a disparate-treatment case 'depends on whether the protected trait . . . actually motivated the employer's decision.'"⁵⁸ Even if *Bostock's* counterfactual analysis succeeded in showing that Gerald Bostock's sex was a cause of his firing, then, it would not necessarily follow that he was fired "because of [his] sex" in the reasons-oriented sense relevant to disparate treatment.⁵⁹ And more generally, insofar as the "but-for" theory "does *not* ask what was in the mind of the discriminator at the time of their actions, but rather simply whether the action would have been different 'but for' the protected class status of those affected,"⁶⁰ it is not a plausible interpretation of a statute that evidently forbids agents to take certain actions for certain reasons.

In the end, in fact, the *Bostock* majority seemed to recognize as much: it layered onto its "but-for" test a requirement that the decisionmaker must

56. See, e.g., Torgrim Solstad, *Some New Observations on 'Because (of),'* in LOGIC, LANGUAGE AND MEANING 436, 436–40 (Maria Aloni, Harald Bastiaanse, Tiki de Jager & Katrin Schulz eds., 2009); George Wilson & Samuel Shpall, *Action*, STAN. ENCYC. PHIL. (Apr. 4, 2012), <http://plato.stanford.edu/entries/action> [<http://perma.cc/4F27-L29P>].

57. See Solstad, *supra* note 56, at 439 (explaining that "[i]n combination with predicates of intentional action . . . *because (of)* phrases are interpreted as reasons or motives"); see also Berman & Krishnamurthi, *supra* note 5, at 99–100 (offering another hypothetical to illustrate this point about language use).

58. *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52 (2003) (citation omitted). I have previously defended a form of this view as part of a conceptual analysis of discrimination (apart from any legal prohibition). See EIDELSON, *supra* note 55, at 19.

59. 42 U.S.C. § 2000e-2(a)(1). The analysis with respect to disparate-impact claims is different. See, e.g., *Smith v. City of Jackson*, 544 U.S. 228, 236 (2005) (plurality opinion) (discussing the distinct textual basis for such claims); see also 42 U.S.C. § 2000e-2(k) (addressing burdens of proof in disparate-impact litigation).

60. Eyer, *supra* note 7, at 1642.

intentionally engage in the relevant differential treatment.⁶¹ As others have noted, the meaning of that requirement is opaque.⁶² What does seem clear, though, is that pairing a bare causal account of disparate treatment with a robust intentionality requirement would cure the causal account's evident overbreadth only indirectly and at significant cost. Consider an employer who perceives a job candidate as weak on the merits but who (unbeknownst to him) only forms that perception because of the cognitive biases activated in him by his impression of the candidate's race.⁶³ Although I will not pursue the issue further here, it is certainly plausible that the employer rejects the candidate "because of his race" in the motivational sense relevant to disparate treatment (even though it is quite implausible that the principal interrogates Sally "because of her love of chess" in that same sense).⁶⁴ In other words, it is far from clear that the employer must have any intentions respecting the characteristic in order for the characteristic to matter in the requisite way.⁶⁵ The "but-for" theory thus lurches too far in one direction—focusing on the generic causal role of a person's attributes, rather than the role they play in the mind of a decisionmaker—and then, if supplemented with an intentionality requirement, corrects for that mistake by lurching too far in the other.

For our purposes, the bottom line is that a satisfactory account of disparate treatment should identify some role that protected characteristics may not lawfully play in someone's decision-making. Any convincing interpretation of the "because of" language in disparate-treatment statutes will need to abide by that constraint. And if *Bostock's* particular holding is to be vindicated, we also need to explain why a person's sex plays that prohibited role in a decision to fire them because of their sexual orientation or gender identity.

61. See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1740–42, 1745–46 (2020).

62. See, e.g., Eyer, *supra* note 7, at 1649 (emphasizing the obscurity of this part of the *Bostock* opinion).

63. For an illuminating discussion of the difficult issues posed by this kind of disparate treatment claim, see Patrick S. Shin, *Liability for Unconscious Discrimination? A Thought Experiment in the Theory of Employment Discrimination Law*, 62 HASTINGS L.J. 67, 68–72 (2010).

64. See *id.* at 81; see also Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323 (1987) (arguing that "requiring proof of conscious or intentional motivation as a prerequisite to constitutional recognition that a decision is race-dependent ignores much of what we understand about how the human mind works").

65. See EIDELSON, *supra* note 55, at 21–22 (suggesting that "one may discriminate on the basis of a trait without really *reasoning* about it at all" in cases in which "certain representational content is essential to accounting for [an] action, but this content is 'processed in a relatively shallow way,' triggering certain affective responses that in turn conduce to a behavioral reaction" (citation omitted)).

II. WHAT DOES “BECAUSE OF SUCH INDIVIDUAL’S . . . ” MEAN?

Despite these shortcomings in *Bostock*’s official account of disparate-treatment law, there is something compelling about the majority’s underlying intuition. It does seem plausible that sexual-orientation discrimination just *is* a kind of sex discrimination, as a matter of the meanings of the relevant words and the relations among the relevant properties.⁶⁶ That intuition has long found expression, in one form or another, in scholarly treatments of sexual-orientation discrimination.⁶⁷ And, to give Justice Gorsuch his due, there are points where that insight does come through in the opinion (albeit entangled with the question-begging argument about what would have happened if Gerald Bostock had been a woman). Faced with the objection that an employer could penalize a gay applicant “without ever learning the applicant’s sex,” for example, Justice Gorsuch responds that “the individual applicant’s sex still *weighs as a factor* in the employer’s decision.”⁶⁸ Likewise, he points out that, if a job application had a “homosexual” or “transgender” checkbox, there would be “no way for an applicant to decide whether to check [that] box without *considering sex*.”⁶⁹ Sexual orientation and gender identity are thus, as Gorsuch observes in passing, “inextricably bound up with sex.”⁷⁰

The idea that looms in the background here holds far more promise than the counterfactual analysis on which the Court mainly relied (and for which *Bostock* has been taken to stand). Suitably developed, that idea can not only explain why *Bostock*’s own results were sound under textualist premises, but also clarify the parameters of disparate-treatment analysis across the board. In this Part, I develop these suggestions into a general account of the

66. As William Eskridge has often put it, “you can’t say *gay* without saying *sex*.” *E.g.*, William N. Eskridge Jr., Brian G. Slocum & Stefan Th. Gries, *The Meaning of Sex: Dynamic Words, Novel Applications, and Original Public Meaning*, 119 MICH. L. REV. 1503, 1549 (2021); William Eskridge, *Symposium: Textualism’s Moment of Truth*, SCOTUSBLOG (Sept. 4, 2019, 2:30 PM), <https://www.scotusblog.com/2019/09/symposium-textualisms-moment-of-truth> [<https://perma.cc/2RKH-FVB9>].

67. For example, a number of scholars have emphasized that “sexual orientation itself is intrinsically *relational*,” Eskridge, *supra* note 14, at 357–58, and explored the implications of that fact for anti-discrimination law. *See id.* at 358 n.133 (collecting sources). Andrew Koppelman’s pathbreaking article casting sexual-orientation discrimination as sex discrimination likewise included an argument that “if prohibited conduct is defined by reference to a characteristic, the prohibition is not neutral with reference to that characteristic.” Koppelman, *Sex Discrimination*, *supra* note 14, at 211. And, as Justice Alito noted in his dissent, similar arguments were advanced by various amici in *Bostock* itself. *See infra* Section III.A.

68. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1746 (2020) (emphasis added).

69. *Id.* (emphasis added).

70. *Id.* at 1742. Even here—where Justice Gorsuch comes closest to transcending his “simple test”—he miscasts his observation as an implication or application of that test instead. *See id.* at 1741–42.

“because of” relation invoked in disparate-treatment prohibitions—one that I will call the “dimensional” account. Throughout this Part and the next one, I bracket the concern that the dimensional account may not line up with everyday ways of describing sexual-orientation discrimination in particular; in Part IV, I will take up separately the question of what difference that granular claim about “ordinary meaning” should make to statutory interpretation (and I will suggest that the answer is none).

A. MOTIVATING THE DIMENSIONAL ACCOUNT

Recall that Title VII prohibits taking certain actions against a person “because of such individual’s race, color, religion, sex, or national origin.”⁷¹ “Because of,” as we have seen, means “by reason of” or “on account of.”⁷² What, then, does it mean to take an action “because of” (or “by reason of”) one of these properties?

In order to articulate and assess the possible answers to this question with precision, we need to avail ourselves of the *determinable-determinate* relationship—a concept with deep roots in analytic philosophy, but none thus far in theoretical accounts of anti-discrimination law.⁷³ Although formal definitions of this relationship are complex, its central features are intuitive.⁷⁴ The classic examples of determinate and determinable properties are *red* and *colored*, respectively.⁷⁵ What stands out about that pairing is that the two properties are not on a metaphysical par: being red (the determinate) is a *way of* being colored (the determinable).⁷⁶ By the same token, any object that has a determinable property must also have *some* property that is a determinate of (and so is said to “fall under”) the determinable. For instance, nothing is simply colored without also being red, blue, or the like. Likewise, nothing is *shaped* (another determinable property) without being shaped in some specific way. And because the possession of a determinable property (such as *colored* or *shaped*) thus depends on the possession of one of its determinates (such as *red* or *square*), there is a sense in which determinable

71. 42 U.S.C. § 2000e-2(a)(1).

72. See *supra* Section I.B.

73. For an introduction to the concept and its intellectual history (which arguably traces as far back as Aristotle), see Jessica Wilson, *Determinables and Determinates*, STAN. ENCYC. PHIL. (Feb. 7, 2017), <https://plato.stanford.edu/entries/determinate-determinables> [https://perma.cc/UP7T-LUNS].

74. Contemporary and illuminating technical discussions include Eric Funkhouser, *The Determinable-Determinate Relation*, 40 NOÛS 548 (2006); and Bo R. Meinertsen, *Mellor’s Question: Are Determinables Properties of Properties or of Particulars?*, 58 AM. PHIL. Q. 291 (2021), as well as the overview offered by Wilson, *supra* note 73.

75. See, e.g., Wilson, *supra* note 73. Both the terminology and the example trace to W.E. Johnson. See W.E. JOHNSON, LOGIC: PART I, at 174 (1921).

76. See Funkhouser, *supra* note 74, at 548–49; Wilson, *supra* note 73.

properties are not themselves fully specified or concrete features of reality. They are more in the nature of *dimensions* that organize the more specific properties (such as *red* or *square*) that any given object might or might not possess.⁷⁷

For our purposes, it is especially important to appreciate the special sense in which being red is a specific way of being colored. It is not just that red objects are a strict subset of colored ones. *Being a red triangle* is more specific in that sense than *being a triangle*, but the two properties are not related in the special way that *being red* and *being colored* are. What makes *being red* a determinate of *being colored* is that it is more specific than being colored *in the very respect of color*. In other words, to be red *is* to be colored—only “not *simpliciter*, but in a certain way.”⁷⁸ A determinate is thus, in John Searle’s evocative phrase, “an area marked off within a determinable without outside help.”⁷⁹ Red triangles, by contrast, are marked off within the larger class of triangles only with “outside help” from color; they are not *triangular* in any specific way that other triangles are not. (*Triangles* and *red triangles* thus stand in what is known as the “genus-species” relationship, a contrast to which I will return.)⁸⁰

Finally, as we turn back to our interpretive question about Title VII, it will help to recognize that expressions capturing determinable properties have certain characteristic linguistic features.⁸¹ For the determinable property of *being colored*, for example, we have an abstract noun, “color,” that plays two interrelated roles. First, we can refer to the determinable itself by this name: we can speak of “color” as such.⁸² Second, we use the same word for determinate properties that fall under this determinable: we call red and blue “colors.”⁸³ We see the same duality with other classic examples of determinable properties, such as temperature, shape, age, and sex.⁸⁴ So, for

77. See Arthur N. Prior, *Determinables, Determinates, and Determinants*, 58 MIND 1, 8–9 (1949). For a recent discussion contrasting this way of conceiving of determinables with another, see Meinertsen, *supra* note 74, at 293. As Meinertsen notes, the substantive overlap in different conceptions “allow[s] for a considerable measure of flexibility when discussing them.” *Id.*

78. Stephen Yablo, *Mental Causation*, 101 PHIL. REV. 245, 260 (1992) (“P determines Q [if and only if] to possess the one is to possess the other, not *simpliciter*, but in a certain way.”).

79. John R. Searle, *On Determinables and Resemblance* (pt. 2), 33 PROC. ARISTOTELIAN SOC’Y, SUPPLEMENTARY VOLUMES 141, 143 (1959).

80. See *infra* Sections III.A, III.C.

81. See Searle, *supra* note 79, at 155.

82. See, e.g., BRIAN K. HEMPHILL, THE ELEMENTS OF CREATIVE AND EXPRESSIVE ARTISTRY 276 (2011) (quoting Claude Monet as saying, “[c]olor is my daylong obsession, joy and torment”).

83. See Searle, *supra* note 79, at 152–55.

84. See *id.* at 152, 155. The same is also true for determinable properties that are captured by less elegant nouns, such as “physical condition” or “degree of sobriety.” *Id.*

example, we can say both that “temperature affects density” and that “seventy degrees is a temperature.” For the moment, the key point is that nouns of this kind allow us to refer to an aspect or dimension of an object without saying anything about what the object is actually like in the named respect. We can refer to an object’s color, as such, rather than to its redness; to its temperature, as such, rather than to its being seventy degrees; and so forth.

All of this brings Title VII’s disparate-treatment provision into sharper focus. The statute does not just prohibit treating someone adversely “because of” any garden-variety list of properties; it prohibits, in particular, treating them adversely because of certain determinable properties of theirs (race, sex, and the rest). The fundamental question that a textualist account of disparate-treatment law needs to answer, then, is what it means to take an action “because of” a determinable property of an individual. And, as I will now explain, there are actually two different possible answers to that question. Surfacing and contrasting these distinct possibilities is essential to untangling the conceptual confusions surrounding disparate treatment and resolving them on textualist grounds.

The first of these two views—which I will call the *determinate* account—posits that a decision is made “because of” an individual’s determinable property when it is made *because of some determinate property that falls under that determinable*. Concretely, that is, the account holds that one could expand the relevant phrase in Title VII as follows (without changing the meaning): “because of such individual’s being Black, being white, being Muslim, being Christian, being male, being female, . . .”—and so on, for each race, color, religion, sex, and national origin that a person could have. Each of those determinate properties is a prohibited reason for an employment decision; together, they exhaust the prohibited reasons for employment decisions under the statute.

At first blush it might seem that, whether *Bostock*’s counterfactual analysis was correct or not, the determinate account itself could not possibly be wrong. To fire someone “because of their race,” the thought goes, is to fire them because of, well, *their race*—whatever race it is. Put another way, nobody can be fired “because of their race” without being fired because they are of the race that they are. The force of that intuition explains why the determinate account is tacitly assumed in most discussions of disparate-

treatment law (including all of the *Bostock* opinions).⁸⁵ Yet the determinate account actually fails to capture ordinary language use and common sense. For an initial illustration of the problem, consider the following employment decisions:

- A rejected B's job application because B is not white.
- A rejected B's job application because B's sex is the same as the sex of nearly all of the existing employees in the department to which B applied.
- A rejected B's job application because B's race is different than the race of B's spouse.
- A rejected B's job application because B is older than A.

In each of these cases, I think few would dispute that A rejected B's job application because of B's race, sex, or age (as the case may be). But in all of them, what matters to A about B's race, sex, or age is something other than its having a particular, determinate "value" (such as Black, male, or fifty-eight). In fact, one can readily imagine A making each of these decisions, for the stated reasons, without A's ever ascribing any particular race, sex, or age to B at all. The examples thus suggest that what makes it the case that an action is taken because of some determinable property of B is simply that there is something about what B is like *in that respect* that matters to A; it makes no difference whether the critical feature of B is a determinate property that falls under that determinable or not. Exploiting our earlier observation about nouns that capture determinable properties, we can put the same point as follows: A's decision can evidently be made because of B's race, sex, or age even if the property that matters to A is not itself *a* race, *a* sex, or *an* age.⁸⁶

85. See, e.g., *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1744 (2020); *id.* at 1765, 1769 & n.22 (Alito, J., dissenting); *id.* at 1834 (Kavanaugh, J., dissenting); Berman & Krishnamurthi, *supra* note 5, at 113–15; Eyer, *supra* note 7, at 1646; Koppelman, *Sex Discrimination*, *supra* note 14, at 208.

86. See *supra* note 83 and accompanying text. A recent and interesting survey conducted by Kevin Tobia and John Mikhail might suggest that people's linguistic intuitions with respect to the interracial marriage example are actually more mixed than my discussion here assumes. See Kevin Tobia & John Mikhail, *Two Types of Empirical Textualism*, 86 BROOK. L. REV. 461, 472–83 (2021). They presented respondents with a vignette in which a white man who is married to a Black woman is fired—with the boss explaining, "I just don't think having interracial married employees is good for business." *Id.* at 476. Forty percent of respondents agreed that the employee "was fired because of his race," but the remaining sixty percent did not. *Id.* at 481–83. That result is certainly intriguing, but I do not take it to show much. For one thing, fully a third of respondents concluded that the employee would still have been fired even if he had been a Black man married to a Black woman—which, by hypothesis, is *not* true in the kind of case that we are considering. See *id.* at 479. Indeed, sixteen percent did not even agree to the

The *dimensional* account formalizes and develops that intuition: it holds that a decision is made “because of” an individual’s X if it is made because of *any* property that characterizes the individual *in the dimension of* X. This second account thus subsumes the determinate account but extends, slightly yet critically, beyond it. Resorting again to our analogy of color, consider a relational property such as *being the same color as the sky*, or a disjunctive property such as *being blue or orange*. Neither of these would normally be counted as a determinate of color (or, accordingly, as a color).⁸⁷ But these properties, too, characterize an object *in respect of* color in the sense that I emphasized above.⁸⁸ To put the point intuitively, these are still properties of (or facts about) an object’s color. To put the point more formally, these are properties the possession of which is partly *grounded in* the possession of properties that are determinates of the determinable property of color.⁸⁹ In other words, any particular object that has these properties has them partly *in virtue of* having certain properties (such as *being blue*) that are determinates of color.

The dimensional account thus holds that a decision is made “because of such individual’s X” if it is made by reason of some property of the individual that *either* is a determinate of the determinable property X *or* otherwise bears the dimensional (or “in respect of”) relationship to X that I have just described. We can call those properties “X properties”—that is,

simple statement that the employee was fired “because of his interracial marriage.” *Id.* at 480. Those results suggest that a large share of respondents either did not understand what they were being asked, *see* Berman & Krishnamurthi, *supra* note 5, at 96–97 (raising similar doubts), or, perhaps, did not accept the employer’s quoted statement as a true and complete account of his reasons. Outside the context of a generally applicable anti-discrimination rule, moreover, some might well disagree that the employee was fired “because of his race” because they read the statement with contrastive focus on “his” (that is, as implicitly opposing “his race” to “his wife’s race”). *See generally* Jonathan Schaffer, *Causal Contextualism*, in *CONTRASTIVISM IN PHILOSOPHY* 35, 49 (Martijn Blaauw ed., 2012) (explaining and illustrating the importance of contrastive focus to causal statements).

87. These properties appear to flunk the standard criteria for determinates because they do not have the required logical relationships with other specifiers of color. *See* SIMON KIRCHIN, *THICK EVALUATION* 47–48 (2017) (describing those relationships); Searle, *supra* note 79, at 148 (same). Ordinary color properties logically entail or preclude one another: if an object is uniformly red, for example, it cannot be uniformly blue; and if it is uniformly scarlet, it must be uniformly red. But if an object is uniformly blue, that does not logically entail either that it is or that it is not the same color as the sky (for that depends on the color of the sky); and if an object is *red or blue*, that does not logically entail either that it is or that it is not *red or green* (for that depends on whether it is red).

88. *See supra* notes 77–78 and accompanying text.

89. “Grounding” is a non-causal kind of metaphysical dependence: it captures the sense in which one state of affairs may obtain due to or in virtue of another, without its being an effect of the other in the sense associated with causation. *See, e.g.*, Ricki Bliss & Kelly Trogdon, *Metaphysical Grounding*, *STAN. ENCYC. PHIL.* (Dec. 6, 2021), <https://plato.stanford.edu/entries/grounding> [<http://perma.cc/J6AZ-27RP>]. For a concise and legally oriented explanation, *see* Mitchell N. Berman, *Our Principled Constitution*, 166 U. PA. L. REV. 1325, 1363–64 (2018).

“race properties,” “sex properties,” and so forth—just as we might call the property of *being the same color as the sky* (or *being blue or orange*) a “color property.” “The paint is blue” and “the paint is the same color as the sky” thus both make claims about the paint’s “color properties” (or, for another convenient locution, about what the paint is like “color-wise”).⁹⁰ And likewise, in the suite of discrimination cases that I posited above, A rejected B’s application because of a race property, sex property, or age property of B, as the case may be. The dimensional account holds that each of those decisions was therefore also made because of B’s race, B’s sex, or B’s age, period.⁹¹

As we can see from those same examples, the dimensional account would have us frame counterfactual inquiries about disparate treatment very differently than *Bostock* does.⁹² To be clear, counterfactual dependence is a proxy for, not constitutive of, the thing in which we are interested (the

90. Cf. EIDELSON, *supra* note 55, at 17–22 (positing, in relevant part, that “a difference in how X regards Y P-wise and how X regards or would regard Z P-wise [must] figure[] in the explanation of [X’s] differential treatment [of Y and Z]”).

91. Philosophically scrupulous readers might reasonably hope for a more explicit statement of just what kind of analysis I am advancing here. Is the dimensional account solely an account of language and discourse—and if so, is it an account of the semantics of sentences of the form “A did Y because of B’s X,” or is it rather a pragmatic account of what speakers who utter such sentences typically (or perhaps by “default”) commit themselves to? Cf. Kent Bach, *The Semantics-Pragmatics Distinction: What It Is and Why It Matters*, in PRAGMATIK: IMPLIKATUREN UND SPRECHAKTE 33 (Eckard Rolf ed., 1997) (canvassing candidate understandings of the semantics-pragmatics distinction). Or am I (also?) propounding a metaphysical account of what it really *is* for a determinable property of an object to be a reason for an action—and if so, might that endeavor require us to attend not only to the properties themselves, but also to the concepts or mental representations thereof? While clarity on all of these issues would undoubtedly be a virtue, I cannot run them to ground here, and I will opt for a degree of self-conscious imprecision instead. Because my ultimate thesis concerns how a textualist should interpret a statute, it is ultimately language and its use that matters; nonetheless, I will sometimes speak about reality rather than about language alone. And because it is widely agreed that textualist statutory interpretation is a pragmatic (rather than merely semantic) endeavor, *see infra* Section IV.A, I will not endeavor to resolve whether the intuitions about ordinary language use that drive the dimensional account are best cashed out in semantic or pragmatic terms: it does not really matter here, because statutory interpretation reflects the influence of both kinds of considerations anyway. Cf. Ryan D. Doerfler, *Can a Statute Have More than One Meaning?*, 94 N.Y.U. L. REV. 213, 232 (2019) (“Whether some instance of context-sensitivity falls on the semantic or the pragmatic side of the divide is, for legal purposes, basically irrelevant.”). Having stated this proviso, I will sometimes put the central point loosely (and in the terms most congenial to legal discourse) by saying simply that the account captures the “ordinary meaning” of statements attributing a decision to an attribute of an object. I will also sometimes speak of whether a statement attributing a decision to a person’s attribute is “correct” without meaning to distinguish between truth and appropriateness or felicity.

92. *See, e.g., Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020) (imagining “two individuals [who] are, to the employer’s mind, materially identical in all respects, except that one is a man and the other a woman”); *id.* at 1744 (equating whether mistreatment “would not have taken place but for his sex” with whether “the plaintiff would not have suffered similar treatment if he were female”).

decisionmaker's reasons).⁹³ But insofar as we do use counterfactuals to probe whether some determinable property of a person figured in the reasons for a decision, the dimensional account entails that the relevant question is as follows: Is there any change to what the person is like *in that dimension* that would have mattered to the decisionmaker?

So, for instance, suppose that A rejected B's job application because B's race (white) is different than the race of B's spouse (Black). In that case, it would have made a difference to A if B's race had instead been *the same as the race of B's spouse*.⁹⁴ And according to the dimensional account, that counterfactual difference, described at that level of generality, is enough for us to infer that A's decision was made because of B's race. Notice that, under this analysis, we never reach the question of whether, in the counterfactual world where B is Black, B's spouse should be imagined as white (in order to hold constant the fact that B is in an interracial marriage). For, on this view, the question of what A would have done if B had some other *determinate* property falling under race (such as being Black) is not of singular importance. In other words, there is no need to ask whether A would have acted differently *if B had been Black* here, because we already know that A would have acted differently *if B's race had been the same as B's spouse's race*. Since that latter change would have made a difference to A—and since it is a change to a race property of B—*B's race* made a difference to A.

As will now be obvious, this understanding of Title VII would dissolve the problem about how to specify the counterfactual in *Bostock*. Rather than asking what would have happened if Gerald Bostock's sex had been female (in which case, what do we imagine about his/her sexual orientation?), we would simply ask what would have happened if Gerald Bostock's sex had been *different than the sex of his desired romantic partners*.⁹⁵ Nobody disputes that this change would have mattered to the employer. And it is a change to a sex property of Bostock in the sense defined above.⁹⁶ So, under

93. See *supra* Section I.B.

94. As explained above, what matters is not B's actual race, but how B's race is represented or regarded by A. See *supra* Section I.B. But repeating "had been perceived to be" is cumbersome and distracting, and, having made my official position clear, I will sometimes omit it solely for that reason.

95. The argument here works in the same way whether one understands the relevant characteristic to be sex or gender; the references to "sex" in this sentence could all be replaced with "gender" without altering the analysis. Because Title VII refers to "sex," I treat that as the relevant property here. Interpreting "sex" to refer to gender would have consequences for other issues, however, and I return to those below. See *infra* Sections III.B, III.E.

96. If this statement does not seem self-evident, here are two ways of fleshing it out, corresponding to the two versions of the definition that I gave above. See *supra* notes 88–89 and accompanying text. First, *being different than the sex of Bostock's desired romantic partners* would itself be a property of

the dimensional account, it would follow directly that he was fired because of his sex. And while I have focused on sexual orientation thus far, the analysis in a case of anti-transgender discrimination would be essentially the same.⁹⁷ Assuming the *Bostock* Court's interpretation of "sex" as a matter of "reproductive biology,"⁹⁸ Aimee Stephens would not have been fired if her sex had been *the sex conventionally associated with her gender identity*. True enough, the employer might have required this sex property in male and female employees alike. But from the point of view of the dimensional account, that is no more exonerating than would be requiring the property of *being male*—another sex property—in male and female employees alike. In either event, the decision is based on what the employee is like in the dimension of sex.

B. THE CASE FOR THE DIMENSIONAL ACCOUNT

We have now seen that one can dissolve the counterfactual quandary in *Bostock* (and vindicate the Court's results) by taking a broader view of what it is for a decision to be made "because of" a determinable property of a person in the first place. According to the dimensional account, it is simply for the decision to be made because of *a property that characterizes the individual in that dimension*, whether or not that property constitutes a determinate of the relevant determinable. We have also seen that *Bostock* itself makes some gestures in this direction, potentially lending the account legal weight.⁹⁹ But none of that resolves whether the dimensional account is actually sound as a statutory interpretation by a textualist's lights. Answering that question requires more than a map of the possibility space: it requires probing the ordinary meaning of locutions that cite a determinable property

Bostock's sex. Second, *being of a different sex than the sex of one's desired romantic partners* is a relational property that a person has, if they do, partly *in virtue of* their sex: their sex is one of the relata involved in the relation. For a more detailed explanation of the same issue in another context, see *infra* note 179 and accompanying text.

97. Although "transgender" is often used as an "umbrella term" that extends to nonbinary people, "not all nonbinary people identify as transgender." Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 898 (2019). For the moment, I am using "transgender" to refer to the attribute that *Bostock* directly addressed and that Aimee Stephens, the plaintiff in one of *Bostock's* companion cases, exemplified: either being assigned male sex at birth and identifying as a woman, or vice versa. I address discrimination against nonbinary people (and against the overarching class of people who are not cisgender) below. See *infra* Section III.B.

98. See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1739 (2020). Of course, "sex" need not be understood so narrowly. I explain how the dimensional account illuminates the consequences of a broader understanding of "sex" below. See *infra* Section III.E.

99. See *supra* notes 68–69 and accompanying text. I will also revisit *Bostock's* suggestions in this vein, and the criticism that they have faced, in the course of addressing counterexamples below. See *infra* Section III.A.

of an individual as a reason for a decision. Because *Bostock* did not self-consciously apply the dimensional account, however, it failed to take up that question in a meaningful way.

What does such an inquiry reveal? As I have already begun to suggest, the dimensional account does better than the determinate account at capturing the ordinary import of the relevant class of statements. To be sure, no general analysis can hope to accord with all of our linguistic intuitions about all “because of” statements: statements about reasons and causes, like nearly all others, are sensitive to context in ways that will frustrate any such ambition.¹⁰⁰ And, admittedly, the dimensional account sits uneasily with everyday ways of talking about sexual-orientation discrimination in particular; it is no accident that an anti-gay firing was not included in my bulleted list of motivating examples above.¹⁰¹ So we will have to return to the question of what legal consequence, if any, follows from the account’s seeming departure from everyday speech practices in that specific context.¹⁰² Nonetheless, a broader inquiry into language use suggests that the dimensional account does at least capture the default or “ordinary” meaning of attributing a decision to a person’s determinable property, placing the burden on those who would depart from that interpretation in a particular setting to justify that choice.

We can start by stepping back from employment discrimination, before ultimately working back in that direction. Suppose, for example, that I adopt the following rule for buying new books: I will never buy a book that has the same color cover as any other book that I own by the same author. (Imagine that it is important to me to be able to tell books apart on my bookshelf, and I decide that adjacent books of the same color will make that too difficult.) I own a red-covered book and a blue-covered book by the same novelist. But when a third book by the same author comes out—this one also bearing a blue cover—I apply my standing rule and decline to buy it.

Now ask yourself: Did I reject that new book because of (or by reason of) its color? I think the natural answer is clearly “yes.” And the naturalness of that answer has a natural explanation: to say that I rejected the book “because of its color” is just to say that something about its color prompted me not to buy it. Here, it happens that the motivating reason was not the book’s being any particular color (I have no problem with blue-covered

100. Cf. Schaffer, *supra* note 86, at 36–44 (demonstrating the context-sensitivity of causal claims and investigating whether it is partly semantic or wholly pragmatic). As noted above, I intend to remain mostly agnostic here about whether various phenomena are semantic or pragmatic. See *supra* note 91.

101. See *supra* note 86 and accompanying text.

102. See *infra* Part IV.

books), but rather a relational color property of the book: its being the same color as one or more other books. As the example shows, however, that difference makes no difference to the correctness of describing the decision as being made because of (or by reason of, or on account of) the determinable property at issue.

This example also underscores how the wrong kind of “but-for” analysis could lead us astray. In saying that I passed over the new book “because of its color,” we would not be saying or assuming anything about what color the book *would have been* if it had not been blue, or about whether I would have bought it in that alternate universe. In fact, the statement rings true even if we suppose that the author has published a veritable rainbow of books, all of which I own already. In that case, there may be *no* color that the new book could have been such that I would have bought it. Yet it would still be perfectly natural to say that I rejected the book because of its color. That is because *what mattered to me* was the color; that was my reason for rejecting it.¹⁰³ If we want to capture the point in “but-for” terms, we have to ask the question as follows: Is there any color property of the book such that, but for its having that property, I would have bought it? And as we have already seen, the answer to that question is yes: I would have bought it if only its color had differed from the colors of the author’s other books.

All of this appears to reflect a more general truth: if a person did something because of some property (*F*) of an object that the object has in virtue of what it is like in respect of some determinable property (*G*), then the person did what they did because of that determinable property (*G*) of the object, too. Consider these pairs of sentences, with the first in each case representing a simple stipulation and the second, I suggest, following logically from the first:

- Alex took the course because of the novelty of its approach.
→ Alex took the course because of its approach.
- Betsy admired the painting because of the splendor of its colors.
→ Betsy admired the painting because of its colors.
- Carol chose the bookcase because its height was less than the height of her doorway.
→ Carol chose the bookcase because of its height.

103. Someone might ask: “Why didn’t he buy the new book?” And someone else might answer: “Because of the color of its cover! Can you believe it? What a stupid thing to care about.”

- David hired Emily because her grades were better than the grades of the other candidates.
→ David hired Emily because of her grades.
- Fran bought a house in Cambridge because of its proximity to her office.
→ Fran bought the house because of its location.
- George traded in a card from his hand because its suit did not match the suits of his other cards.
→ George traded in the card because of its suit.
- Henry's lawsuit was dismissed because he is a domiciliary of the same state as the defendant.
→ Henry's lawsuit was dismissed because of his domicile.

In each of these pairs, the first sentence refers to some property that an object has in virtue of what it is like in the dimension mentioned in the second. For example, *having a novel approach* is an “approach property” in the sense defined above.¹⁰⁴ Similarly, *being proximate to Fran's office* is a “location property,” and so forth. And in each of these pairs, the correctness of attributing reason-giving force evidently “transmits” from the more specific “X property” to the corresponding determinable property (X)—so that, if an action is correctly said to have been done because of the former, it is also correctly said to have been done because of the latter. The dimensional account maintains that the same pattern holds true generally. And the wide variety of examples evidencing the pattern suggests that, at least as far as ordinary or default meaning goes, that claim is correct.¹⁰⁵

104. See *supra* note 90 and accompanying text.

105. At a more fundamental level, but more tentatively, I take this analysis to draw support from an analogy to the semantics of statements referencing *events* as opposed to *facts*. As several philosophers have observed, the truth conditions of a sentence attributing causation to an event are inherently more forgiving than those of a sentence attributing causation to a fact. The reason is that “events are particulars, and thus have properties that are not named in the expressions that refer to them, whereas the structure of a fact corresponds to the structure of the proposition expressing it.” Max Kistler, *Analyzing Causation in Light of Intuitions, Causal Statements, and Science*, in CAUSATION IN GRAMMATICAL STRUCTURES 76, 89 (Bridget Copley & Fabienne Martin eds., 2014); see JONATHAN BENNETT, EVENTS AND THEIR NAMES 9 (1988) (“When it comes to naming facts by means of imperfect nominals, *what you see is what you get*.”); ZENO VENDLER, LINGUISTICS IN PHILOSOPHY 125–40 (1967) (similar). If property instances are (or at least are akin to) events, see Jaegwon Kim, *Events as Property Exemplifications*, in ACTION THEORY 310, 310–11 (Myles Brand & Douglas Walton eds., 1976), then it makes sense that a sentence naming a determinable property of an object (say, some book's color) as a reason would resemble a sentence attributing causal responsibility to an event, not a fact. And insofar as such a sentence cites an

We can also readily confirm that—as we have seen in passing already¹⁰⁶—statements about the reasons for adverse employment decisions do not, as a class, reflect any departure from the norm.¹⁰⁷ If Isabelle fired Jason because Jason’s religion was different than his husband’s religion, for example, then it seems entirely correct to say that Isabelle fired Jason *because of his religion*. If Kyle rejected Larry because Larry’s race was different than the race of most of Kyle’s customers, then, likewise, Kyle rejected Larry *because of his race*. The fundamental point is that, in both of these cases, the cited dimension of the employee (religion or race) mattered to the employer’s decision—just as, for instance, Henry’s domicile mattered in the dismissal of his lawsuit, and just as, when it comes to the properties

actual thing in the world (be it an event or a property instance), unnamed features of that named particular—including relational properties that it may have—can render the sentence true. In other words, just like “the performance of the song surprised John” could be made true by an unspecified, relational property of that named event—such as its being a performance of the same song that was performed the day before—so, too, with a sentence such as “John rejected the book because of its color.” Cf. Kistler, *supra*, at 92 (“[T]he truth of an eventive [causal] statement only guarantees the *existence* of properties G, H and a law linking them, without containing explicit information about what they are.”).

106. See *supra* notes 85–86 and accompanying text.

107. To be sure, there are some statements that do appear to deviate from the norm. For example, the pattern that I have just documented does not appear to hold for statements that attribute a decision to a relation between two intuitively comparable properties of the *same* object. Suppose, for instance, that Irene dislikes songs that exhibit lyrical dissonance—that is, songs that pair a cheerful melody with dark lyrics, or vice versa. It seems inappropriate to say that Irene disliked a particular lyrically dissonant song “because of its melody” (or, alternatively, “because of its lyrics”), even though the general analysis above would endorse those characterizations. This apparent exception is easy enough to explain on pragmatic grounds: in nearly all conversational contexts, to cite the cheerful melody but not the dark lyrics would violate Gricean maxims of conversation. See generally PAUL GRICE, *STUDIES IN THE WAY OF WORDS* 26–28 (1989) (explaining and cataloging maxims that guide cooperative communication). By way of comparison, consider one of my examples above: “Carol chose the bookcase because of its height.” Although that sentence does not specify that it was the bookcase’s height *relative to the doorway* that mattered to Carol, its utterance need not give rise to any gap between the information actually provided and the information that the audience would take itself to have received. In the lyrical dissonance example, by contrast, the audience would not expect the speaker to name one dimension of an object as a reason while omitting another (nonobvious) dimension of the very same object that conditions the reason-giving force of, and is in all relevant respects symmetrical with, the dimension that the speaker does mention. Because there is no evident reason why the speaker would be arbitrarily selective among features of the object in this way, the audience would normally take the utterance to commit the speaker to the absence of such other dimensions, rendering the utterance not just less than maximally informative, but misleading. See Stephen C. Levinson, *Three Levels of Meaning*, in *GRAMMAR AND MEANING* 90, 97–98 (F.R. Palmer ed., 1995) (positing a heuristic that “[w]hat is simply described is stereotypically and specifically exemplified” and tracing it to the Gricean maxim of quantity). Notably, though, one can readily imagine conversational contexts in which even these seemingly problematic attributions are apt—contexts that arguably resemble those of greatest interest to us here. For example, if a foreign-language radio station had a policy of choosing songs without regard to their lyrics, one might well describe Irene’s violation of that policy by saying that she had “rejected [the lyrically dissonant song] because of its lyrics.” (Thanks to Jonah Mann for suggesting lyrical dissonance as an example.)

listed in the statute, Title VII is naturally read to forbid.¹⁰⁸ Barring some warranted departure from the ordinary meaning of “because of such individual’s X,” then, it would seem to follow that if *Bostock*’s employer can correctly be said to have fired him *because of his attraction to people of his own sex*, then the employer can correctly be said to have fired him *because of his sex*, too.¹⁰⁹

The determinate account of “because of such individual’s X,” by contrast, will struggle with all of these examples. Take Kyle’s rejection of Larry for not matching the race of his customers. Suppose that Larry is Black and most of Kyle’s customers are white. And suppose that Kyle credibly testifies that he rejected Larry solely for failing to match the race of his customers; he did not care about Larry’s race except to that extent.¹¹⁰ Under the determinate account, whether Kyle’s decision was made because of Larry’s race depends solely on whether it would have mattered to Kyle if Larry had a different determinate property falling under the determinable of race—that is, if he had been of some other particular race. Presumably the proper counterfactual here is one in which Kyle takes Larry to be white.¹¹¹ Just as with *Bostock*, however, adjusting Larry’s race in this way amounts to two changes, not one: (1) Larry is now white, and (2) Larry’s race now

108. Although my argument here focuses on the textual merits of the dimensional account, this way of describing its implications also jibes with a certain “anti-classification” vision of how the statute is supposed to work. Insofar as the dimensional account understands the statute to prohibit decisions that put the enumerated determinable properties at issue, that is, it reads the statute as consistent with the idea that “reliance on gender or race in making employment decisions” is “an evil in itself,” *Price Waterhouse v. Hopkins*, 490 U.S. 228, 265 (1989) (O’Connor, J., concurring in the judgment), and with the idea that the named attributes are listed because they have been deemed “not relevant to the selection, evaluation, or compensation of employees,” *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020) (quoting *Price Waterhouse*, 490 U.S. at 239 (plurality opinion)). The account thus accords with others’ observations that “Title VII is not simply *class*-based legislation” but rather “operates as *classification*-based legislation.” Eskridge, *supra* note 14, at 342–43; accord Andrew Koppelman, *Bostock and Textualism: A Response to Berman and Krishnamurthi*, NOTRE DAME L. REV. REFLECTION (forthcoming 2022) (manuscript at 38), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3904246 [<https://perma.cc/Y2M5-4NHS>] (“[T]he text of Title VII, like *McLaughlin v. Florida*, 379 U.S. 184 (1964), takes an anticlassification approach.”).

109. I take up the possibility of departing from the ordinary meaning of “because of such individual’s X” here—and looking instead to whether statements attributing a decision to someone’s *sex* ordinarily encompass a decision based on *sexual orientation*—in Part IV.

110. If it helps, imagine that Kyle operates various businesses in different neighborhoods with different racial compositions, and he has found in each case that customers prefer racial homogeneity with the staff. So Kyle actually would have hired Larry for a different business, in a mostly Black neighborhood—just not for the one to which he applied.

111. This itself may not be trivial. There are many possible racial identities that Larry could have had (or been taken to have), and most of those would still have resulted in his rejection. Notably, the dimensional account obviates this problem of choosing a particular determinate property to serve as the causal contrast.

matches the race of Kyle's customers. But remember that Kyle does not dispute that he cares about (2)—the racial misalignment is his conceded motivation for the decision. He just disputes that he rejected Larry because of his *race*, in the narrow sense of his *being Black*. And if we really want to isolate the effect of Larry's *being Black*—which is what, under the determinate account, needs to have made the difference in order for the decision to have been made “because of Larry's race”—then it seems that we should construct the counterfactual such that, although Larry is now white, Kyle's customers now are not. That is the upshot of Berman and Krishnamurthi's “Principle of Conservation in Motivational Analysis” here.¹¹² And in that event, Kyle would *still* have rejected Larry. So the determinate account yields the result that Larry was not rejected because of his race.

But that is surely wrong—not just as a matter of anti-discrimination law or policy, but as a matter of the plain and ordinary meaning of the relevant phrase. The decision to reject Larry was all about his race. The upshot is that the dimensional account, not the determinate account, better captures the default meaning of statements citing a determinable property of an individual as the reason for a decision, both in the context of discrimination claims and beyond.¹¹³ And *Bostock's* understanding of disparate treatment thus was sound insofar as—despite trumpeting a “but-for” test that presupposed the determinate account—it ultimately appealed to the intuitions that undergird the dimensional account instead.¹¹⁴

112. See *supra* Section I.A.

113. Larry's example should also dispel any worries that, because the relevant phrase refers to “*such individual's X*,” it does not encompass decisions that are based (or equally based) on *someone else's X*. After all, Kyle's decision was clearly based on *Larry's* race, even though it was based on the races of other people as well. More generally, it seems clear that the contrastive focus in “because of such individual's X” ought to be placed not on “such individual's,” but on “X.” That is, the implicit contrast here is between decisions that are based on the individual's *X* and those that are based on the individual's *other properties*—not between decisions that are based on *the individual's X* and those that are based on *someone else's X*. For a related discussion of contrastive focus, see *supra* note 86. (Thanks to Benjamin Sachs for highlighting this issue.)

114. In principle, one could accept much of what I have said here and still object to *Bostock's* particular result by appealing to what philosophers call “hyperintensionality.” See generally Federico L. G. Faroldi, *Co-Hyperintensionality*, 30 *RATIO* 270 (2017) (offering a definition and illustrations). The objector whom I have in mind would concede that disfavoring an employee for *being of the same sex as people to whom they are attracted* constitutes sex discrimination. But, the objector would insist, that is not actually the property that motivates an anti-gay employer to disfavor gay employees: the employer cares instead about the employee's *being attracted to people who are of their own sex* (or, perhaps, about the employee's *being gay*). And while it is tempting to say that these are just different labels for the same property—and, indeed, I will say roughly that in a moment—the objection is not trivial. By way of comparison, consider *being triangular* and *being trilateral*. These two properties are also necessarily

III. THE DIMENSIONAL ACCOUNT IN PRACTICE

Having articulated and preliminarily defended the dimensional account of disparate treatment as a matter of textual interpretation, we can now test-drive it by considering a series of illustrative cases of different types. Of course, I have already highlighted the most immediate concrete consequence of embracing this theory: anti-gay and anti-transgender discrimination are recognized as instances of sex discrimination (at least barring some justification for a property-specific carve-out), as are all other forms of discrimination based on how one's protected characteristics compare with those of others.¹¹⁵ But the account also illuminates a number of other issues, and considering those issues will help us to further refine the account itself as well.

equivalent, in the sense that any object will have one of them in all and only the possible worlds in which it has the other. Yet there is still an intelligible difference between selecting a triangle from an array of shapes *because it has three interior angles* and selecting it from the same array *because it has three sides*. That means that the possible reasons for people's decisions are more fine-grained than is the relation of necessary equivalence; in philosophical jargon, the relevant context is "hyperintensional." In principle, then, one could hold that there is only really sex-based disparate treatment when the employer's motivating reason has the *form* of characterizing a person *in respect of sex* (for example, so-and-so's *being of the same sex as . . .*)—not when that reason has the form of characterizing a person in respect of, say, sexual attraction (*being attracted to . . .*) or socially salient sexual orientation (*being gay*), even if the particular properties at issue are necessarily equivalent.

Although I concede the coherence of the objection, I do not think it should trouble us very much. Even in hyperintensional contexts, some contents *are* equivalent, in the familiar sense that one can be substituted for the other without affecting truth. Cf. Faroldi, *supra*, at 271 (exploring criteria for "hyperintensional equivalence"). For example, selecting a shape *for having three sides* may be distinct from selecting it *for having three interior angles*, but selecting the shape *for having three sides* is surely equivalent to selecting it *for being trilateral*—even though we are using different words to name that same property. Likewise, in the present context, it is at least very intuitive to suppose that *being of the same sex as people to whom one is attracted* and *being attracted to people of one's own sex* are not just intensionally equivalent, but also hyperintensionally equivalent. Although the two descriptions put the relevant words in different orders, they seem to pick out the very same feature of a person. And for that reason, it is difficult to imagine how the mental states of an employer who takes the former property as a reason could differ from the mental states of an employer who is motivated instead by the latter one. Indeed, I imagine that someone who was asked to identify which of these "two" properties motivated their decision would not know what to say; it would be like asking someone who admired the symmetry of a painting whether they liked that the left side mirrored the right or that the right side mirrored the left. The question whether the employer cared about the employee's *being gay* or, rather, about their *being attracted to people of the same sex* seems equally baffling. Finally, even if the relevant distinction could plausibly be drawn here in terms of mental states, the objector would have to show that the ordinary meaning of "because of such individual's X" (let alone the legal effect of a statute using those words) is actually sensitive to such fine-grained distinctions in mental states. Given the seeming impossibility of classifying real-world cases as being of one kind or the other, that seems very unlikely. (I am grateful to Mitch Berman and Deborah Hellman for raising forms of this concern.)

115. See *supra* notes 95–98 and accompanying text.

A. SOME COUNTEREXAMPLES DISTINGUISHED

The test drive starts with a brief obstacle course. In their extended critique of *Bostock*, Berman and Krishnamurthi note that Justice Gorsuch “flirts with” a view that they call “conceptual causation”—the theory that an action is taken “because of” a protected characteristic if the agent’s reason for action “conceptually depends on [that] characteristic[] of the plaintiff.”¹¹⁶ But they contend that this view does not capture a “general truth,” and thus cannot vindicate *Bostock*, in light of the ready availability of counterexamples.¹¹⁷ For example:

Suppose A shoots B, a police officer, out of anti-police animus. In this case, competent English speakers would agree that “A shot B because B is a police officer.” Plausibly if roughly, a police officer is a person whose job is to enforce the law, including by investigating crimes and making arrests. But even if the concept of police officer depends upon and incorporates the concept of a person, competent English speakers would firmly deny that “A shot B because B is a person.”¹¹⁸

Cases of this kind might well doom the “conceptual causation” view that Berman and Krishnamurthi posit—but if so, the same cases nicely highlight the strength of the dimensional account by comparison. Indeed, the dimensional account explains precisely why it seems wrong (as it does) to say that A shot B because B is a person.¹¹⁹

Recall, first, the distinction between the *determinable-determinate* relationship and the *genus-species* relationship.¹²⁰ In the former kind of case, a “determinate” property (such as being red) is itself a *specific way* of having a second, “determinable” property (such as being colored). In the latter kind of case, by contrast, one property (such as being a triangle) is conjoined with another (such as being red) to yield a more specific property that picks out a shared subset of the two (such as being a red triangle). These three properties are traditionally called the “genus,” the “differentia,” and the “species,”

116. Berman & Krishnamurthi, *supra* note 5, at 88 & n.112; see Krishnamurthi & Salib, *supra* note 14; see also *supra* notes 66–70 and accompanying text (discussing the relevant passages in *Bostock*).

117. Berman & Krishnamurthi, *supra* note 5, at 88.

118. *Id.*

119. Berman and Krishnamurthi note that they “do not rule out that a more nuanced thesis in the neighborhood” of what they call “conceptual causation” might be sound; they say only that the briefing and commentary with respect to *Bostock* “does not advance a more plausible refinement, and none occurs to [them].” *Id.* at 89. The dimensional account could be taken as such a refinement. And, as both the text and the footnotes of this Article make clear, it owes much to Berman and Krishnamurthi’s careful work clearing the ground and mapping the space of possibilities.

120. See *supra* text accompanying note 80.

respectively.¹²¹ As I emphasized above, the key for our purposes is that a red triangle is not triangular in a specific way; it is triangular in the very same way (having three interior angles) that any other triangle is triangular. By contrast, a red object is colored in a specific way that differs from the way in which a blue object is colored.

With this distinction in view, we can see that the relationship between *being a person* and *being a police officer* resembles the genus-species relationship, not the determinable-determinate relationship. After all, being a police officer is not a specific way of being a person; it is just being a specific kind of person. In other words, police officers differ from other persons in the dimension of *job*, not in the dimension of *personhood*. Berman and Krishnamurthi's rough definition underscores the point: it has the classic form of a definition identifying a species (police officer) in terms of a genus (person) and differentia (whose job is to enforce the law).¹²² And that explains why targeting someone *for being a police officer* does not amount to targeting them *for their personhood* in any sense. In our terms, the attacker does not act because of any "personhood property" of the officer—that is, any property that specifies or is grounded in *how* the officer is a person. The dimensional account thus singles out a relationship between properties that is more specific, and more apt, than a generic notion of "conceptual dependence."

In the same way, the dimensional account gives substance and hence plausibility to *Bostock's* undeveloped suggestion that sexual orientation is "inextricably bound up with sex."¹²³ Justice Alito had a field day with that notion (and similar arguments advanced by several amici) in his dissent.¹²⁴ As he noted, the Court's suggestion tracked with various briefs contending that sexual orientation is "a sex-based consideration," "a function of sex," or "intrinsically related to sex."¹²⁵ But "Title VII," he pointed out, "prohibits discrimination because of *sex itself*, not everything that is related to, based

121. See, e.g., Searle, *supra* note 79, at 141–43.

122. Although the definition has this form, it is actually problematic as a genus-species definition because the differentia entails the genus (assuming that only persons can have the job of enforcing the law). This does not matter here—the present point is the same if one understands *police officer* as an "undifferentiated specifier" of *person*—but it will matter later on. See *infra* Section III.C.

123. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1742 (2020); see *supra* notes 68–70 and accompanying text.

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

125. *Id.* at 1760–61 (citations omitted). A philosophers' brief likewise contended that "[t]he concept of 'sex' is inextricably tied to the categories of same-sex attraction and gender nonconformity." Brief of Philosophy Professors as Amici Curiae in Support of the Employees at 1, *Bostock*, 140 S. Ct. 1731 (Nos. 17-1618, 17-1623, 18-107).

on, or defined with reference to, ‘sex.’”¹²⁶ After all, plenty of properties are “related to sex”—including, for instance, having “a record of sexual harassment.”¹²⁷ The majority could exclude such cases from its theory of the statute’s coverage, Alito continued, only by “graft[ing] onto Title VII some arbitrary line separating the things that are related closely enough and those that are not.”¹²⁸

As against the hazy formulations that he recited, Justice Alito might have a fair point. But as against the dimensional account, he does not. That account cashes out the intuition driving the majority’s “inextricably bound up” remark and reduces it to a principled analysis that readily distinguishes Alito’s hypotheticals. What matters is not that sex and sexual orientation are somehow related, or even that they are “closely” related, but that being of the same sex as one’s desired sexual partners is a property that characterizes a person *in the dimension of sex*. That is why sexual-orientation discrimination is indeed “discrimination because of *sex itself*” in the sense relevant to disparate treatment. To be sure, it is not discrimination because of a *determinate* of sex—but that is no matter, because the determinate account, as we have seen, fails to capture the ordinary meaning of “because of such individual’s X.”

While we are discussing possible counterexamples, let me take up one other.¹²⁹ Suppose that a student applies to college and, hoping to take advantage of an affirmative action program, he lists his race as Black, even though he actually identifies as (and “is,” in respect of whatever one takes to determine race) white. The college eventually finds out and expels him. Intuitively, he was not expelled because of his race; he was expelled because he lied about it. Yet the dimensional account might seem to commit us to saying that he *was* expelled because of his race, in that the decision was based on a property that is partly grounded in what he is like in that dimension. That would be awkward, at least. But, in fact, the account need not have that consequence at all: *having lied about one’s race* is not necessarily a race property in the sense defined above. According to what is probably the leading understanding of lying, it requires a mismatch between what one says and what one *believes*, not between what one says and what

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

127. *Id.*

128. *Id.*

129. Thanks to Matthew Stephenson for suggesting an example along these lines.

is true.¹³⁰ The property of *having lied about one's race* is thus not even partly grounded in a person's actual race; the two are not logically related. What is true is that, if the college adopts a strict-liability standard—if it expels any student who stated a racial identity that differs from whatever the college, exercising its own judgment, takes to be the student's *actual* race—then the dimensional account commits us to saying that a student who is expelled pursuant to this race-sensitive policy is expelled because of their race. But, to my ear, that characterization falls somewhere between reasonably apt and plainly correct.

B. BISEXUALITY, PANSEXUALITY, AND NONBINARY GENDER IDENTITY

As others have noted, *Bostock's* upshot for bisexual, pansexual, and nonbinary people is unclear.¹³¹ At several points, the majority opinion spoke broadly of discrimination based on “sexual orientation” (and, more ambiguously, of discrimination based on “transgender status”).¹³² The Biden Administration has thus interpreted “*Bostock's* reasoning” as pertaining to “discrimination on the basis of gender identity and sexual orientation” generally.¹³³ Yet, focusing first on sexual orientation, it seems clear that Justice Gorsuch's central “but-for” argument would *not* count discrimination against bisexual or pansexual individuals as “because of such individual's . . . sex.”¹³⁴ In fact, the argument does not reach those cases even if the employees are targeted on account of *the very feature that they share with gay employees*: being attracted to people of the same sex. Take a man who dates both men and women and is fired on the ground that he dates people of the same sex. Was he fired because of his sex? The determinate account must say no: if he were (or were perceived as) a woman, he would still have

130. See, e.g., SEANA VALENTINE SHIFFRIN, *SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW* 12–13 (2014) (including among the “crucial desiderata” for an account of lying that “the proposition . . . that a lie transmits . . . need not be false”); Arnold Isenberg, *Deontology and the Ethics of Lying*, in *AESTHETICS AND THE THEORY OF CRITICISM: SELECTED ESSAYS OF ARNOLD ISENBERG* 245, 248 (William Callaghan ed., 1973) (“A lie is a statement made by one who does not believe it with the intention that someone else shall be led to believe it.”).

131. See, e.g., William N. Eskridge Jr. & Christopher R. Riano, *Bostock: A Statutory Super-Precedent for Sex and Gender Minorities*, AM. CONST. SOC'Y (July 1, 2020), <https://www.acslaw.org/expertforum/bostock-a-statutory-super-precedent-for-sex-and-gender-minorities> [<https://perma.cc/D78M-WPAB>]; Ann C. McGinley, Nicole Buonocore Porter, Danielle Weatherby, Ryan H. Nelson, Pamela Wilkins & Catherine Jean Archibald, *Feminist Perspectives on Bostock v. Clayton County*, 53 CONN. L. REV. ONLINE 1, 10 (2020); Nancy C. Marcus, *Bostock v. Clayton County and the Problem of Bisexual Erasure*, 115 NW. U. L. REV. ONLINE 223, 226–29 (2020).

132. *Bostock*, 140 S. Ct. at 1749. Regarding the terminological relationship between “transgender” and “nonbinary,” see *supra* note 97.

133. Exec. Order No. 13,988, 86 Fed. Reg. 7023 (Jan. 20, 2021).

134. *Bostock*, 140 S. Ct. at 1740; see *supra* notes 31–33 and accompanying text (describing the *Bostock* majority's analysis).

the same disfavored property—dating people of the same sex—and thus he would still be fired.¹³⁵ Berman and Krishnamurthi aptly describe this bizarre and seemingly unintended result as “the clock’s thirteenth chime” for the “but-for” reasoning in *Bostock*.¹³⁶

Under the dimensional account, by contrast, the same question comes out differently. In the case that I just described, what bothers the employer is that the employee is of the same sex as at least some of the people whom the employee dates. In other words, the employer minds that the employee is *not strictly heterosexual*. The employee has that same property whether they are gay, bisexual, or pansexual. And that is straightforwardly a sex property; indeed, it is essentially the same sex property that is at issue in the paradigmatic kind of anti-gay discrimination case that we considered at the outset.¹³⁷ That the dimensional account treats discrimination on the basis of this property the same regardless of who *else* a person dates counts in favor of its plausibility. And the fact that one has to resort to this account in order to reach the results that the Court seems to have thought it had reached further supports reading the account as implicitly endorsed by *Bostock* itself.

It bears noting, however, that even the dimensional account will not classify *all* sexual-orientation discrimination as sex discrimination.¹³⁸ Consider an employer who does not discriminate against gay (or straight) employees, but who nonetheless disfavors bisexual employees, precisely on account of their attraction to both men and women.¹³⁹ It might seem obvious that, if anti-gay discrimination is covered by Title VII, this discrimination must be too. But the dimensional account explains why that is not so: the discrimination in this case need not have anything to do with the employee’s own sex. Whether a person has the property that triggers the adverse treatment here—*being attracted to both men and women*—depends only on

135. See, e.g., McGinley et al., *supra* note 131, at 10.

136. Berman & Krishnamurthi, *supra* note 5, at 108.

137. See *supra* Section II.A.

138. Although I focus on bisexuality and pansexuality here, the analysis that follows applies in exactly the same way to discrimination based on asexuality (that is, the absence of sexual attraction to people of any gender identity). See Marie-Amélie George, *Expanding LGBT*, 73 FLA. L. REV. 243, 295–97 (2021) (explaining definitions of asexuality and reporting that “[a]pproximately 1% of the population is asexual”).

139. This is not fanciful: “[P]rejudice research shows that heterosexuals hold more prejudice toward bisexual individuals than toward lesbians and gay men,” and bisexual individuals also often face hostility from “other sexual minorities, such as lesbians and gay men, a phenomenon called ‘double discrimination.’” Ethan H. Mereish, Sabra L. Katz-Wise & Julia Woulfe, *Bisexual-Specific Minority Stressors, Psychological Distress, and Suicidality in Bisexual Individuals*, 18 PREVENTION SCI. 716, 717 (2017).

the sexes (or genders) of the people *to whom the employee is attracted*.¹⁴⁰ And although an ideal anti-discrimination regime would certainly prohibit this type of discrimination too, the dimensional account's recognition that the existing statute may not do so is a feature, not a bug, as a matter of textual interpretation. Indeed, the distinction that the account draws here shows that it is not a gimmick or a play on the multiple meanings of "sex," but a principled analysis of what it means for an action to be "because of" one of a person's characteristics. An aversion to a person's dating people of multiple sexes or genders, as such, is not an aversion to any property of *that person's sex*—even though an aversion to a person's dating people *of their own sex* is.¹⁴¹

Finally, the dimensional account suggests that the proper analysis with respect to people with a nonbinary gender identity is similar in some respects and different in others. The key point here is that, according to several historians and linguists, the word "sex" as used in 1964 encompassed the kinds of social identities that we today group under "gender," not merely the physical differences that we today group under "sex."¹⁴² Assuming that is right, it follows that discrimination based on not being cisgender—that is, discrimination that targets *both* transgender men and women *and* nonbinary people—is prohibited by Title VII, because that is discrimination on the basis of a *gender* property. In particular, the critical property here is *not being of the gender conventionally associated with one's sex assigned at birth*, and that is plainly a property that characterizes a person in the dimension of gender. To this extent, the analysis roughly parallels the logic showing that

140. Under an expansive conception of "sex" that encompasses gender roles, it is at least possible in principle that being bisexual or pansexual could qualify as a determinate property of "sex" in its own right. I return to possibilities of that kind below. *See infra* Section III.E.

141. Although this analysis is sound as far as it goes, it does not show that *no* instance of discrimination aimed specifically at bisexual people could constitute sex discrimination under the dimensional account. In principle, an employer could think not that a person should not be attracted to both men and women, but rather that a person who is *attracted to people of the same sex* (a sex property) should not also be *attracted to people of the opposite sex* (another sex property). And the dimensional account might suggest that discrimination on that basis *does* qualify as sex discrimination, even though discrimination against someone for *being attracted to both men and women*, period, does not. (I am grateful to Daphna Renan for highlighting this point.) Although this distinction is theoretically coherent, and perhaps even illuminating, I readily concede that it would be difficult to draw in practice. *Cf. supra* note 114 (discussing the phenomenon of "hyperintensionality" and offering, as an example, the difference between selecting a shape *for being trilateral* and selecting it *for being triangular*). Practically speaking, the more important point about the dimensional account with respect to bisexuality is that (unlike the determinate account) it recognizes discrimination based on same-sex attraction as sex discrimination even when the victim is bisexual or pansexual.

142. *See* Eskridge et al., *supra* note 66, at 1549–70; Brief of Historians as Amici Curiae in Support of the Employees at 11–28, *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623, 18-107).

discrimination against *not-strictly-heterosexual* people is sex discrimination, only substituting cisgenderness for heterosexuality and gender for sex.¹⁴³

The analysis with respect to discrimination against nonbinary people *as such*, however, differs from the analysis with respect to bisexual or pansexual people as such. For if an employer discriminates against nonbinary people as such—demanding simply that all employees identify *either* as a man or as a woman—the employer necessarily discriminates on the basis of gender (even though an employer who discriminates against bisexual employees does not necessarily discriminate on the basis of either gender or sex). The reason is that the very meaning of being “nonbinary” is ordinarily that a person identifies a certain way *in respect of gender*—namely, in some way not subsumed by either the determinate property of *being a man* or the determinate property of *being a woman*.¹⁴⁴ Understood in that way, *being nonbinary* is a gender property just as *not being red or blue* is a color property, and discrimination on that basis is therefore necessarily gender discrimination.¹⁴⁵ So long as “sex” in Title VII can be understood to refer to gender, then, this kind of discrimination seems clearly prohibited. But it is prohibited for very different reasons than is discrimination against people whose sexual attractions do not *align with their sex*—or whose gender identities do not *align with their birth sex*—in the ways that an employer demands.¹⁴⁶

C. “PLUS” CASES, PREGNANCY, AND CASTE

Consider next a relatively simple application of the dimensional account: the so-called “sex-plus” (or, more generally, “trait-plus”) cases. The leading example is *Phillips v. Martin Marietta Corp.*, where an employer told the plaintiff that it would “not accept[] job applications from women

143. Discrimination against the class of people who are “transgender” in the narrow sense—that is, who either were assigned male and identify as women or were assigned female and identify as men—constitutes not only gender discrimination but also sex discrimination, as my earlier discussion of Aimee Stephens’ case reflects. *See supra* note 97 and accompanying text.

144. For an overview of “the diversity of nonbinary gender identities,” see Clarke, *supra* note 97, at 905–10.

145. The best analogy may vary with the different nonbinary gender identities that individuals hold or express. For some who identify with “third genders,” Clarke, *supra* note 97, at 907, for example, the better analogue might not be *not being red or blue*, but rather *being green*; for others, it might be *being purple* (that is, a color in between blue and red); and for still others, it might be *being colorless* (which might or might not qualify as a color property at all). In light of the many evident complexities, I can only skim the surface of these issues here.

146. If “sex” in Title VII does *not* encompass gender, but rather extends only to certain physical differences, then discrimination against nonbinary people does not qualify as sex discrimination under the dimensional account. *Being nonbinary* does not characterize a person in respect of sex at all; it provides no information (not even relational information) about their sex.

with pre-school-age children.”¹⁴⁷ The Court held that such a policy violates Title VII’s ban on discrimination “because of . . . [the applicant’s] sex.”¹⁴⁸ Few would question that holding, and I think any account of disparate-treatment law ought to capture it.¹⁴⁹ And although some lower courts had imposed limits on the doctrine’s scope—holding that only certain “pluses” could qualify¹⁵⁰—*Bostock* appeared to do away with any such limitations. Firing an employee because she is “a woman *and* a fan of the Yankees,” Justice Gorsuch explained, “is a firing ‘because of sex’ if the employer would have tolerated the same allegiance in a male employee.”¹⁵¹

The dimensional account is fully compatible with that view. In a case like *Phillips* (or the Yankees hypothetical), the decision is made on the basis of a property that is equivalent to a conjunction of a sex property and another property. Put in the terms we have been using, the decisive property is a species (such as mothers) that can be defined by a genus (women) and differentia (who are parents). In such cases, it is accurate and usually appropriate to say that the action was taken on the basis of the genus property as well as the species property.¹⁵² The Court’s brief opinion in *Phillips* nicely captures why: the employer there can be understood to have had “one hiring

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

148. *See id.* at 544.

149. As Cary Franklin highlights, however, this interpretation was not considered obvious at Title VII’s inception. *See* Franklin, *supra* note 5, at 173.

150. *See, e.g.,* Willingham v. Macon Tel. Publ’g Co., 507 F.2d 1084, 1092 (5th Cir. 1975) (“[D]istinctions in employment practices between men and women on the basis of something other than immutable or protected characteristics do not inhibit employment *opportunity* in violation of [Title VII].”). For an account of the development of “sex-plus” cases, see Reva B. Siegel, *Introduction: A Short History of Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 1, 13–15 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004).

151. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1742 (2020). For clarity and for consistency with the vocabulary of the cases under discussion, I treat *being a woman* as equivalent to *being female* (and hence as a sex property) in this Section. I will return to the distinction between sex and gender below. *See infra* Section III.E.

152. This way of speaking is only “usually” appropriate because, admittedly, it will often become less apt as the relevant conjunction gets more complex and the motivational role of the protected characteristic is correspondingly diminished. Statements attributing a decision to the genus property without further explanation will also sometimes be inapt because, in the relevant conversational context, they imply a kind of exclusivity. *See supra* note 107 (addressing a similar issue). In my view, *Bostock*’s seemingly categorical approach to “plus” cases is justified nonetheless: To anticipate a point I will develop later with respect to sexual orientation, the scope of “because of such individual’s X” as used in Title VII cannot reasonably track all variations in the appropriateness of using that phrase across conversational contexts, and even a textualist should not ask it to do so. *See infra* Part IV. One might also derive the same conclusion from the “motivating factor” provision added by the Civil Rights Act of 1991. *See* 42 U.S.C. § 2000e-2(m). But, in any event, I will not dwell on this issue because it is neither specific to nor much illuminated by the dimensional account. Unless the determinate account excludes conjunctive cases altogether, it will also diverge from ordinary modes of speech in some conjunctive cases and for essentially the same reason.

policy for women and another for men—each having pre-school-age children.”¹⁵³ In other words, if we flip the genus and differentia—so that we first narrow the class under consideration to parents of young children, rather than to women—we will readily conclude that the employer disfavors some members of that class for being women. And being a woman is, of course, a sex property.¹⁵⁴ So the dimensional account makes short and sensible work of “plus” cases of this kind.

But the dimensional account also captures and explains an important distinction between *bona fide* “plus” cases, such as *Phillips*, and others—a distinction that *Bostock*’s hazier account of its own reasoning obscures. As I will explain in a moment, this point matters for cases involving attributes, such as pregnancy, that are distinct from but conceptually connected to protected characteristics. To frame the key distinction, however, it will help to consider Berman and Krishnamurthi’s example of anti-police animus again.¹⁵⁵ That case poses a puzzle for the “genus-species” account of the “plus” cases that I have just given. For if *being a person* and *being a police officer* stand in the genus-species relationship—just as *being a woman* and *being a mother* do—then accepting the logic of the “plus” cases, as I have just described it, would seem to entail that acting out of anti-police animus actually *does* involve targeting an officer because they are a person. As noted above, however, that result is clearly wrong.¹⁵⁶ So what is going on here?

We can see the source of the problem if we attempt to flip the genus and differentia in the stipulated definition of a police officer, just as *Phillips* did with *being a woman* and *being a parent*. Try it: First, narrow the class under consideration to entities “whose job is to enforce the law.” And then ask whether, within this class, those that are persons are viewed differently by an anti-police assailant than those that are not. The question barely makes sense, because there are no nonpersons “whose job is to enforce the law” in the first place. Insofar as the question does make sense, however, the answer is no: there are no entities with that job that are viewed any differently by the assailant than are the *persons* with that job. And that is why there is no discrimination against persons here. The key feature of this case, then, is that even though *police officer* can theoretically be defined as a species of the genus *person*, that genus property actually contributes nothing to such a definition; the differentia (“whose job is to enforce the law”) already entails

153. *Phillips*, 400 U.S. at 543.

154. *See supra* note 151.

155. *See supra* note 118 and accompanying text.

156. *See supra* note 118 and accompanying text.

the genus property on its own.¹⁵⁷ And the dimensional account nicely explains why this particular logical relationship between the genus and differentia makes the difference that it evidently does: if the genus property is logically superfluous, one can make a decision on the basis of the species property without putting the dimension associated with the genus property (here, personhood) at issue at all.

As I noted a moment ago, the most familiar example of this logical structure for anti-discrimination law is *being pregnant*. Under many traditional definitions of “sex,” being pregnant logically entails being of female sex, just as being a mother does.¹⁵⁸ Nonetheless, being pregnant, unlike being a mother, is not usefully defined as the conjunction of (1) being female, and (2) some other property. Why not? Because we’ve just said that the second conjunct—whatever it is that distinguishes pregnant female people from nonpregnant female people—will itself entail being female, making the first of the two conjuncts superfluous. In John Searle’s terms, being pregnant is thus an “undifferentiated specifier” of being female: it is more specific than being female (hence “specifier”), but it cannot usefully be defined by starting with the genus of female and adding some differentia (hence “undifferentiated”).¹⁵⁹ The same is true of another reproduction-related property that has recently drawn the attention of courts and anti-discrimination theorists: *lactating* or *needing to express milk*.¹⁶⁰ Assuming that, under the stipulated definition of “sex,” only female people can possess

157. Imaginative readers have suggested that both police dogs and robots employed in policing—real or fictional—might complicate this picture. I do not think these are entities “whose job is to enforce the law” in the ordinary sense of a “job,” and for purposes of the illustration I will simply stipulate as much. But note that if one did count, say, K-9 dogs as having the differentia property here, then one *could* say that an anti-police assailant who singles out police officers—that is, who targets *persons* whose job is to enforce the law—attacks those particular targets because they are persons, just as the analysis here predicts. (Thanks to Nathan Raab for highlighting this point.)

158. See Franklin, *supra* note 5, at 177–80 (collecting cases and dictionary definitions noting the semantic connection between sex and pregnancy). On other definitions of “sex” and related terms, of course, this does not follow; transgender men may “conceive, carry a pregnancy, and give birth.” Alexis D. Light, Juno Obedin-Maliver, Jae M. Sevelius & Jennifer L. Kerns, *Transgender Men Who Experienced Pregnancy After Female-to-Male Gender Transitioning*, 124 *OBSTETRICS & GYNECOLOGY* 1120, 1126 (2014).

159. Searle, *supra* note 79, at 145–46. To be clear, the point is not that one cannot differentiate between pregnant and nonpregnant women on the basis of some property; one can certainly do that. The point is that, if one tried to define being pregnant in genus-species terms—as one might define being a mother—the genus property (being female) would add no content to that definition.

160. See L. Camille Hébert, *The Causal Relationship of Sex, Pregnancy, Lactation, and Breastfeeding and the Meaning of “Because of . . . Sex” Under Title VII*, 12 *GEO. J. GENDER & L.* 119, 119–37 (2011) (recounting the split in authority over whether lactation-based employment actions constitute sex discrimination and arguing that they do).

this property, it, too, is an undifferentiated specifier of being female.¹⁶¹

Another example of the same kind is suggested by Guha Krishnamurthi and Charanya Krishnaswami's recent work on caste discrimination.¹⁶² Krishnamurthi and Krishnaswami observe that employment discrimination against members of the Dalit caste is widespread in the United States, and especially in the technology industry, where many individuals of South Asian ancestry work.¹⁶³ They canvass a range of possible theories for holding caste discrimination unlawful under Title VII—including as disparate treatment on the basis of national origin, color, race, or religion.¹⁶⁴ For present purposes, I want to focus on national origin in particular. Let us assume, in keeping with the position of the Equal Employment Opportunity Commission and the existing case law, that disfavoring a person because they have South Asian ancestry constitutes disfavoring them on account of their “national origin.”¹⁶⁵ On plausible assumptions about the nature of the caste system, being a Dalit is an undifferentiated specifier of having South Asian ancestry in the sense that we have just defined. On the one hand, one cannot be a Dalit without having such ancestry. But on the other hand, being a Dalit cannot be defined as the conjunction of such ancestry and any further set of properties *that would not itself entail having such ancestry*. The principal determinants of caste are characteristics of one's South Asian ancestors (such as region and vocation), and one cannot have South Asian ancestors who met the relevant criteria without having South Asian ancestry in the first place.¹⁶⁶ The relationship between caste and national origin thus parallels the relationship between pregnancy (or lactation) and sex.

Should prohibitions on disparate treatment based on “sex” and “national origin” extend to these cases? Taken at face value, *Bostock* might well suggest as much. In the caste case, for example, Krishnamurthi and Krishnaswami contend that “the but-for test can be used to argue that caste discrimination is a form of national-origin discrimination, because it would

161. *See id.* at 119 & n.1 (stressing “the indisputable facts that only women become pregnant, that generally only women who have recently been pregnant and given birth lactate, that only women who are lactating are able to breastfeed, and that only women who are breastfeeding need to pump or manually express milk from their breasts,” but acknowledging that “in very rare circumstances, men have been able to lactate and breastfeed”).

162. Krishnamurthi & Krishnaswami, *supra* note 15.

163. *See id.* at 469–70.

164. *Id.* at 470–79.

165. *See, e.g.,* Koehler v. Infosys Techs. Ltd., 107 F. Supp. 3d 940, 949 (E.D. Wis. 2015); Krishnamurthi & Krishnaswami, *supra* note 15, at 472 & nn.91–92.

166. As Krishnamurthi and Krishnaswami detail, the grounds of caste status are “complex” and “nebulous,” *see* Krishnamurthi & Krishnaswami, *supra* note 15, at 461–62; my formulation is thus meant to be agnostic as to all of the relevant details.

not occur ‘but for’ one’s national origin.”¹⁶⁷ Moreover, they point out, “one cannot understand the employee’s caste identity without appeal to certain features of South Asian culture—thus, caste identity is conceptually dependent on South Asian identity.”¹⁶⁸ Camille Hébert has argued on essentially the same grounds that lactation-related discrimination is proscribed by the “plain language” of bans on sex-based disparate treatment.¹⁶⁹ And liberal Justices have long made the same argument about pregnancy discrimination, both as a matter of statutory interpretation and as a matter of constitutional doctrine. With respect to Title VII, for example, Justice Stevens contended that “[b]y definition, such a [pregnancy-based] rule discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male.”¹⁷⁰ Although a majority of the Court disagreed, perhaps *Bostock*’s “but-for” and “inextricably bound up with” criteria mean that Justice Stevens was right. That would be significant, for (as Cary Franklin observes) “the dominant view among leading textualist judges today seems to be that the ordinary meaning of sex discrimination *does not* encompass pregnancy discrimination.”¹⁷¹ And while Congress has already codified Justice Stevens’s view with respect to Title VII through the Pregnancy Discrimination Act of 1978 (“PDA”),¹⁷² the same question (like the closely related lactation question) still arises under many other federal and state laws.¹⁷³

167. *Id.* at 472.

168. *Id.* at 473.

169. Hébert, *supra* note 160, at 119; *see id.* at 119–20 (emphasizing the “chain of causation from sex to pregnancy to lactation”); *id.* at 144–46 (arguing that “lactation and breastfeeding [should be] considered intrinsic to and therefore inseparable from sex”).

170. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 161–62 (1976) (Stevens, J., dissenting); *accord* *Coleman v. Ct. of Appeals of Md.*, 566 U.S. 30, 54–55 (2012) (Ginsburg, J., dissenting) (endorsing this argument). Justice Brennan likewise argued, in the constitutional context, that “[s]uch dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex, inevitably constitutes sex discrimination.” *Geduldig v. Aiello*, 417 U.S. 484, 501 (1974) (Brennan, J., dissenting).

171. Franklin, *supra* note 5, at 181–82 (citing, among others, *Delva v. Cont’l Grp., Inc.*, 137 So. 3d 371, 376 (Fla. 2014) (Polston, C.J., dissenting); *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1315 (11th Cir. 2020) (Pryor, J., dissenting)).

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

173. As Justice Alito noted in *Bostock*, “[o]ver 100 federal statutes prohibit discrimination because of sex.” *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1778 (2020) (Alito, J., dissenting); *see id.* at 1791–96 (inventorying these statutes). Many of these statutes do not separately address pregnancy discrimination, so the question of whether it constitutes sex discrimination falls to agencies and courts. *See, e.g.*, *Conley v. Nw. Fla. State Coll.*, 145 F. Supp. 3d 1073, 1081 (N.D. Fla. 2015) (addressing the issue under Title IX). The same question about pregnancy also arises under state anti-discrimination

But while caste and reproduction-related discrimination are certainly objectionable, the dimensional account does not vindicate these arguments (or the interpretation of *Bostock* that would favor them). Take pregnancy. If we continue to assume the biological definition of “sex” that underlies the claimed connection between sex and pregnancy,¹⁷⁴ then it follows that being pregnant is not a property that characterizes a person *in that dimension*—as being male, being female, and even being of the same sex as one’s romantic partners all are.¹⁷⁵ In other words, *being pregnant* is not a sex property in the sense defined above.

Why isn’t it? First, *being pregnant* is not a determinate of the determinable property of sex; we know that because pregnant and nonpregnant people need not differ in respect of sex. (Compare red and non-red objects, which must differ in respect of color.) And second, *being pregnant* is not grounded in *being female* in the way that, say, *being of the same sex as one’s spouse* is.¹⁷⁶ To sharpen that contrast, suppose that Jane and Joan are married, and you want to explain in more concrete or fundamental terms *in virtue of what* Jane has the property of *being the same sex as one’s spouse*. You will point to three things: (1) Jane’s being female, (2) Joan’s being female, and (3) Jane’s being married to Joan. Because one of those grounds is Jane’s sex, the property under inspection qualifies as a sex property of Jane. Now try to give the same type of explanation for Jane’s *being pregnant*: In virtue of what more concrete or basic properties does she have that one? The answer will involve various features and states of her body—features and states that, taken together, will *entail* that she is female—but it will not involve her *being female*.¹⁷⁷ The point is even clearer if one asks about a person’s *being nonpregnant*.¹⁷⁸ If *being pregnant* were a sex property, after all, then not having that property would necessarily also characterize a person in the same dimension—just as being red and being

statutes. See, e.g., *Delva*, 137 So. 3d at 375. For a survey of the case law on lactation-related discrimination, see Hébert, *supra* note 160, at 120–36.

174. See, e.g., *Conley*, 145 F. Supp. 3d at 1077 (“The common thread running through these [dictionary] definitions is a focus on reproduction, including the ‘structural’ and ‘functional’ differences between typical male and female bodies.”); *supra* note 158 and accompanying text.

175. I return below to the significance of alternative definitions of “sex” under the dimensional account. See *infra* Section III.E.

176. For a definition of “grounding,” see *supra* note 89.

177. Cf. ÁSTA, CATEGORIES WE LIVE BY: THE CONSTRUCTION OF SEX, GENDER, RACE, AND OTHER SOCIAL CATEGORIES 70–71 (2018) (“It is not your sex assignment that allows you to bear or seed children. . . . What allows one to bear or seed children is rather some other properties that the sex assignment is intended to track.”).

178. The Supreme Court made a form of this point in both of its decisions refusing to recognize pregnancy discrimination as sex discrimination. See *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 135 (1976); *Geduldig v. Aiello*, 417 U.S. 484, 497 n.20 (1974).

non-red both characterize an object in respect of color. But not only is *not being pregnant* not grounded in a person's sex; it does not even entail anything about a person's sex.¹⁷⁹

Now, I hasten to add that the conclusion that being pregnant is not a sex property (given the stipulated, biological definition of sex) does not settle the legality of all policies that distinguish on the basis of pregnancy. Even setting aside the PDA and state analogues, discriminatory practices relating to pregnancy will always have a disparate impact on women and are open to sex-discrimination challenges on that ground.¹⁸⁰ Relatedly, policies that single out pregnancy (as by excluding it from insurance coverage)¹⁸¹ are suspect on the ground that they may be, if not quite pretexts for discrimination against women, motivated by selective disregard for the interests of women as such.¹⁸² That upstream discrimination in the valuation of people's interests is a kind of differential treatment on the basis of sex, even if the pregnancy-related policies that result from it are not.¹⁸³ Moreover, some differential treatment that is prompted by pregnancy is actually (or equally) a kind of anticipatory discrimination on the basis of *motherhood*, which the pregnancy simply reveals to be imminent.¹⁸⁴ If an employer denies

179. To forestall confusion, being of the same sex as one's desired romantic partners *does* entail something about a person's sex: namely, that it is the same as the sex of those other people. Concretely, if one learns that a person has this relational property, one could then triangulate the fact of the matter about their sex from the sexes of certain other people, which one could not do before. Learning that a person is not pregnant, by contrast, opens up no new pathways for deducing their sex.

180. See, e.g., *Nashville Gas Co. v. Satty*, 434 U.S. 136, 139–42 (1977) (recognizing a sex-based disparate impact claim based on an employer's policy toward pregnant employees); see also EIDELSON, *supra* note 55, at 49 (offering pregnancy discrimination as an example supporting the normative logic of disparate-impact liability). Although the issue deserves far more attention than I can give it here, the dimensional account might also entail that some forms of sexual harassment are actionable only under a disparate-impact theory—that is, as practices that, however motivated, are disproportionately disadvantageous to people of one sex or gender for reasons traceable to their sex or gender. For a recent discussion of how sexual harassment might be framed in disparate-impact terms, see L. Camille Hébert, *How Sexual Harassment Failed Its Feminist Roots*, 22 *GEO. J. GENDER & L.* 57, 117–19 (2021).

181. For an example of such a policy, see *Gilbert*, 429 U.S. at 129.

182. Cf. *Coleman v. Ct. of Appeals of Md.*, 566 U.S. 30, 55 (2012) (Ginsburg, J., dissenting) (noting that some disability-insurance programs excluded pregnancy but covered “virtually any conceivable [other] disability,” including “disabilities caused by ailments and procedures that affected men alone”).

183. I have elsewhere analyzed discrimination of this kind under the rubric of “second-order discrimination”—that is, discrimination on one basis in the formulation of rules that themselves discriminate on another. See EIDELSON, *supra* note 55, at 40–44. Such discrimination often undergirds what Sophia Moreau describes as “structural accommodations” for members of privileged groups. See *generally* SOPHIA MOREAU, *FACES OF INEQUALITY: A THEORY OF WRONGFUL DISCRIMINATION* 42–75 (2020).

184. See *Coleman*, 566 U.S. at 56–57 (Ginsburg, J., dissenting) (discussing evidence to this effect). Regarding discrimination against mothers, see *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 543–44 (1971); and *Franklin*, *supra* note 5, at 173–75. And for other examples of discrimination on the basis of one property that is perceived by way of another property, see EIDELSON, *supra* note 55, at 20–21.

a pregnant woman a promotion because of assumptions about her future caregiving responsibilities, when the employer would treat an expectant father differently, the preemptive quality of that motherhood discrimination does not make it any less sex-based.¹⁸⁵

In noting these alternative possibilities, however, I do not mean to hedge or undercut the core point: the dimensional account does not vindicate the familiar suggestions that disparate treatment on the basis of pregnancy (or other comparable properties) simply is, by its nature, disparate treatment on the basis of sex as well.¹⁸⁶ As we have seen, *being pregnant* is not itself a sex property. And we cannot simply recast the employer's disfavored class as *pregnant women*, because the more specific property that we know *does* contribute to explaining the decision—*being pregnant*—entails *being a woman* on its own already. This is why a manager who rejects a pregnant woman in favor of a nonpregnant woman might justifiably be puzzled by the charge that he had rejected the pregnant candidate on account of her sex. And it is also why a manager who denies a fellow Indian immigrant a promotion because the latter is a Dalit would be perplexed by the accusation that she had disfavored the candidate by reason of his national origin. Absent additional facts, those cases are on all fours with the anti-police animus hypothetical. And, importantly, we have now explained their defects in terms that leave our conclusions about anti-gay and anti-transgender discrimination, as well as the “plus” cases in which a protected characteristic plays a necessary logical role, unscathed.¹⁸⁷

D. STEREOTYPES

The dimensional account also grounds and explains the “sex stereotyping” doctrine of *Price Waterhouse v. Hopkins*.¹⁸⁸ *Price Waterhouse* inaugurated a now-familiar class of “stereotyping” claims by holding that, “[i]n the specific context of sex stereotyping, an employer who acts on the

185. Thanks to Catherine Willett for emphasizing this point.

186. Our analysis thus far also leaves open one other possibility: that pregnancy discrimination *does* inherently constitute discrimination in the dimension of sex but, ironically, only because “sex” should *not* be understood in the biological sense that undergirds the tight logical connection to pregnancy. I will return to the wide-ranging consequences of an alternative, gender-based definition of “sex” below. *See infra* Section III.E.

187. In tracing the history of sex discrimination law, Reva Siegel notes that the Supreme Court's “formalistic” approach to the pregnancy question “gave stature” to defendants' arguments for resisting sex-plus claims in the lower courts—because it signaled that discrimination against a mere *subset* of women was not covered by the statute. *See Siegel, supra* note 150, at 13. I do not doubt that historical claim, but the preceding argument demonstrates that the courts that drew this inference erred even on “formalistic” terms.

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

basis of a belief that a woman . . . must not be [aggressive] has acted on the basis of gender.”¹⁸⁹ As Katie Eyer notes, however, that doctrine has “long been dogged by critiques that it lacks any clear textual foundation.”¹⁹⁰ Our discussion thus far positions us to distinguish two different conceptions of why *Price Waterhouse* might be textually grounded after all.

The first possibility is that *Price Waterhouse* was essentially a “sex-plus” case that did not announce itself as such. As a logical matter, after all, discrimination against *women who are aggressive* is no different in kind than discrimination against *women who are parents*; both involve a conjunction of a sex property and another. And, indeed, *Bostock* seemed to take this view of *Price Waterhouse*: the majority identified “hir[ing] based on sexual stereotypes” as one example of the wide range of cases controlled by the “[s]imple test” of but-for causation.¹⁹¹ The idea here seems to be that, if one holds constant aggressiveness and toggles sex, one will find that male and female people are treated differently.¹⁹² That understanding of the situation makes sense as far as it goes. But it makes it difficult to explain why the *Price Waterhouse* Court did not put the point in these terms (despite the on-point precedent in *Phillips*) and, relatedly, why *Price Waterhouse* did not effectively do away with the lower courts’ limits on the “pluses” that are eligible to figure in “sex-plus” cases (as *Bostock* has only now seemed to do).¹⁹³

The dimensional account suggests a second, subtly different understanding of *Price Waterhouse*: perhaps Ann Hopkins was denied a promotion because of a simple sex property, namely, *acting inappropriately for one’s sex*. In other words, one could say that she was denied the promotion because her sex was *not the sex for which her behavior is considered appropriate*. This analysis differs from the “sex-plus” analysis in that the property that grounds the claim of discrimination is not a conjunction of a sex property and some other, independent property.¹⁹⁴ Nor is that pivotal

189. *Id.* at 250 (plurality opinion); *see id.* at 272–73 (O’Connor, J., concurring in the judgment). The Court’s holding extended equally to a belief that women “cannot” be aggressive, but that portion of the analysis is unremarkable; such discrimination is akin to any other discrimination based on a generalization about the characteristics of a protected class.

190. Eyer, *supra* note 7, at 1665–66.

191. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1749 (2020).

192. *See supra* Section III.C; *see also* Eyer, *supra* note 7, at 1665–70 (arguing that *Bostock* subsumes sex-stereotyping cases into the “but-for” theory).

193. *See supra* note 150 and accompanying text.

194. To cement this distinction, note that, in *Phillips* (unlike here), it is impossible to recast the employer’s decision as based on a sex property alone. If we tried to do so, we might say that *Phillips* was rejected because her sex was *not the sex that (in the employer’s view) a parent seeking employment should*

property a determinate of sex: after all, *the sex for which one's behavior is considered inappropriate* is not a sex, just as *the color of the sky* is not a color.¹⁹⁵ Yet the property that grounds the discrimination claim—the property of defying sex-differentiated behavioral norms—does characterize Hopkins in the *dimension* of sex, because it is a property she has partly in virtue of her sex. (One could not explain *why* Hopkins has that property without pointing to (1) her sex, and (2) a set of sex-differentiated conventions.)¹⁹⁶ And, according to the dimensional account, that alone means that Hopkins was denied the promotion “because of [her] sex.”¹⁹⁷

Understood in this way, *Price Waterhouse* actually anticipated the move from the determinate to the dimensional account (even if it did not defend that move on textual grounds). It did so by recognizing that a decision qualifies as “because of [an] individual's sex” when it is based on how the individual's sex *compares to something else*—namely, the sex that would be required under the operative sex-differentiated code of behavior—and not merely when the decision is based on a determinate property that falls under the determinable property of sex.¹⁹⁸ This dimensional spin on *Price Waterhouse's* logic makes intuitive sense and explains its seeming distinctness from the larger universe of sex-plus cases. And, notably, this analysis vindicates suggestions that *Bostock's* results flow logically from *Price Waterhouse*, at least insofar as an employee's being gay or being transgender matters to an employer because it entails nonconformity with conventional sex roles.¹⁹⁹

E. “SIMPLE” CASES REFRAMED

Let me conclude this survey of the dimensional account's implications on a different note. My discussion has focused on a question that arises in

be. But that property is actually shared by *all* women. It only matters to the employer in Phillips's case because she *also* has the independent property of *being a parent seeking employment*. The property of *not being of the sex appropriate to one's behavior*, by contrast, might well matter to an employer even when it is conjoined with no other properties of the employee.

195. See *supra* note 87 and accompanying text.

196. Cf. *supra* notes 176–79 and accompanying text (offering parallel analyses with respect to sexual orientation and pregnancy).

197. See *supra* notes 88–89 and accompanying text.

198. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (“[I]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.” (citation omitted)).

199. See, e.g., *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 346 (7th Cir. 2017); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 119–22 (2d Cir. 2018); Eskridge, *supra* note 14, at 370–73, 378–79, 381; Koppelman, *Subtractive Moves*, *supra* note 14, at 9–11; Strauss, *supra* note 5, at 216–22; see also MANNING & STEPHENSON, *supra* note 27, at 135–39 (summarizing the debate over this argument).

“hard” cases: When are decisions that are *not* simply based on a determinate property—for example, not simply based on a person’s being Black or being female—nonetheless made on the basis of the corresponding determinable property (such as the person’s race or sex)? But at least as important for disparate-treatment law is how one understands the relevant set of *determinate* properties—the properties at issue in what I have so far treated as simple, pedestrian cases. (In other words, what are the specific ways of being in respect of “race” or “sex” anyway?) And while the dimensional account as such has nothing to say about that—as defined, it operates at a higher level of abstraction²⁰⁰—the conceptual resources that we now have at our disposal do offer insight here. Having excavated those resources, it would be a shame not to use them. So I will say a few words about how to understand the relevant determinate properties in disparate-treatment cases, with the caveats that this discussion can only be suggestive and that, strictly speaking, it digresses from my textual defense and explication of the dimensional account as such.

We can bring out the central point by considering *Price Waterhouse* again. I suggested a moment ago that the property that was held against Ann Hopkins could be understood either as a conjunction of a sex property and another property (that is, in “sex-plus” terms), or, alternatively, as a non-conjunctive sex property that simply relates Hopkins’s sex to the sex conventionally associated with her behavior.²⁰¹ But there is actually a third way of understanding the same case. As I noted earlier, a number of historians and linguists have concluded that “sex,” as used in Title VII, should be understood to encompass what we today would call “gender.”²⁰² And if that is correct, it is tempting to say that *being an aggressive woman*—or, perhaps better, *being unladylike*—is itself a *determinate* property that falls under the very determinable property (gender) ruled off-limits by the statute. In other words, one could say that the property that was ascribed to and held against Hopkins was itself a *specific way of being gendered*—much as being red is a specific way of being colored.²⁰³ On this analysis, *Price Waterhouse* actually turns out to have the logical form of a “simple” case—one covered by the dimensional and determinate accounts alike—once one embraces a more sophisticated account of the determinable property that Title VII protects in the first place.

To flesh out this idea in more general terms and explore its

200. See *supra* notes 88–90 and accompanying text.

201. See *supra* Section III.D.

202. See *supra* note 142 and accompanying text.

203. See *supra* Section II.A.

ramifications, I need to say a bit more about the nature of the determination relation. Determinate properties, as we have seen, are specific ways of being *in respect of* the corresponding determinables.²⁰⁴ I have described the determinable property, in turn, as a “dimension” of an object; objects that possess different determinates of the determinable property differ in that dimension. But that is only part of the story, because there are also underlying dimensions—what Eric Funkhouser has termed “determination dimensions”—that capture the specific respects in which any two determinates of a given determinable can differ from one another.²⁰⁵ In the case of color, for example, the standard view is that there are three such dimensions: hue, saturation, and brightness.²⁰⁶ As Funkhouser explains, “[c]olors differ to the extent, and only to the extent, that they differ in” these three respects, and thus “these are the three variables along which colors can be determined.”²⁰⁷ More generally, we “discover the determination dimensions of a given determinable, X,” by investigating “the ways in which determinates under the determinable X can differ from one another with regard to their X-ness.”²⁰⁸ Some determinables (such as color) have multiple determination dimensions, and thus are “complex,” while other determinables (such as mass) have only one, and thus are “simple.”²⁰⁹

I have also postponed until now the related fact that the determinate-determinable relationship is hierarchical and relative.²¹⁰ Sticking with the canonical example, being red is a *determinate* of being colored, but it is a *determinable* relative to being scarlet. Scarlet is a determinate of red because scarlet objects are red *in a specific way*, much as they are colored in a specific way. And while objects cannot have competing “same-level” determinate properties of the same determinable—for instance, they cannot be uniformly red and uniformly blue at the same time—they can and do possess “different-level” determinates of the same determinable, such as being red and being scarlet.²¹¹ We can thus imagine all of the determinates that fall under a given “top-level” determinable as marking out different areas in a multi-dimensional “property space” defined by the determination dimensions of that determinable.²¹² For the top-level determinable of *being colored*, for

204. See *supra* Section II.A.

205. Funkhouser, *supra* note 74, at 552.

206. See, e.g., *id.* at 551; JOHNSON, *supra* note 75, at 183.

207. Funkhouser, *supra* note 74, at 551.

208. *Id.* (formatting omitted).

209. *Id.* at 553.

210. See, e.g., Searle, *supra* note 79, at 144–45, 149–50; Wilson, *supra* note 73.

211. See Searle, *supra* note 79, at 149.

212. See Funkhouser, *supra* note 74, at 554–55.

example, any point in the relevant space is a unique, maximally specific color (an “absolute determinate” of color).²¹³ And, in that same model, scarlet simply constitutes a zone within the larger region that defines red, with each of these regions being marked out along one or more of the determination dimensions of color itself.

The first key move in the possible reframing of *Price Waterhouse* above, then, is the proposed specification of the determination dimensions of “sex.” The analysis posits that those dimensions include not only the biological features that constitute maleness and femaleness, but also the social features that make for masculinity and femininity. That specification makes Hopkins a victim of “sex” (meaning gender) discrimination insofar as she was treated adversely because of what she was like in respect of those same, gender-determining properties.²¹⁴ And one does not have to be steeped in feminist theory to feel the force of analyzing the situation in this way.²¹⁵ Just as scarlet objects are not merely an arbitrary subset of red objects, but ones with a specific kind of redness, “ladies” are not merely an arbitrary subset of women, but ones who instantiate *womanhood* or *femininity*—and hence also “sex” (meaning gender)—in a specific way.²¹⁶ Just as a preference for or against scarlet objects is a color preference, then, it seems to follow that a preference for or against “ladies” is a straightforward gender

213. See Meinertsen, *supra* note 74, at 297.

214. Cf. Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 2 (1995) (arguing that “almost every claim with regard to sexual identity or sex discrimination can be shown to be grounded in normative gender rules and roles”); Dembroff et al., *supra* note 14, at 6–7 (similar).

215. For some leading articulations of the relationship between sex and gender in the context of anti-discrimination law, see Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 18–36 (1995); Franke, *supra* note 214; and Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1774–89 (1998).

216. Whether this possible view is actually correct will depend on an account of the determination dimensions of gender in general, or at least of the property of *being a woman* in particular (insofar as a property such as *being a lady* is claimed to constitute a specific way of *being a woman*). Those are, of course, enormously complex issues. See, e.g., Katharine Jenkins, *Amelioration and Inclusion: Gender Identity and the Concept of Woman*, 126 ETHICS 394 (2016) (offering one complex account of the concept of *woman*). Moreover, a satisfactory account will probably need to go beyond identifying the determination *dimensions* as such (that is, beyond simply listing properties analogous to hue, saturation, and brightness); it may need to address the “geometry” of the relevant spaces, some of which will be far more complex than the color space. Cf. PETER GÄRDENFORS, *CONCEPTUAL SPACES: THE GEOMETRY OF THOUGHT* 102–04 (2000) (noting “the differences between single-domain properties and multi-domain concepts” and offering “apple” as an example of a concept that is “represented in several domains,” each with its own geometrical structure and “salience,” which explains the difficulty of being “precise about the topological structure of ‘fruit space’”); *id.* at 105 (proposing that “[a] natural concept [be] represented as a set of regions in a number of domains together with an assignment of salience weights to the domains and information about how the regions in different domains are correlated”).

preference. To borrow Searle's imagery again, that kind of disparate treatment is based on a property that is more specific than being a woman but that is nonetheless "marked off within [gender] *without outside help*."²¹⁷

But there is also a second and related move here that needs to be made explicit: the analysis relies on a *fine-grained* conception of the determinable property at issue (here, gender).²¹⁸ It supposes not only that women who qualify as ladies differ from other women in respect of the determination dimensions of gender—in their *gendering*, as we might say, or in *how they are gendered*—but also that they differ from other women in their *gender*, period, in the sense that matters to Title VII. That is not a trivial inference. Some properties, to be sure, are fine-grained in this way: any difference in hue, saturation, or brightness arguably makes for a difference in color as well.²¹⁹ But, for a contrasting example, consider grades. The determination dimension for *grade* might be the quality of the work, but—as students and graders know all too well—not every difference in that dimension is large enough to yield a difference in grade. So not all differences in a property that is a determination dimension of another property make for differences in that second property; that depends on just how the second property is determined and the range of values that it admits. In fact, even "color" appears to be ambiguous on this point: the word can be used in a sense that allows only for relatively coarse-grained values—the kinds of "colors" one could imagine finding in a crayon box—or in a sense that makes every conceivable microshade its own "color."²²⁰

A key issue for making sense of disparate treatment on textualist terms, then, is how fine-grained one should understand each of the textually enumerated properties to be. Those who favor broader anti-discrimination protections will generally favor conceiving of these properties in more fine-grained terms, since this necessarily yields more cognizable instances of discrimination. And those who favor narrower protections will prefer the opposite.

We can illustrate the difference here—as well as the intuitive appeal of a fine-grained conception in at least some contexts—with *Oncale v. Sundowner Offshore Services, Inc.*, another of the Court's well-known sex

217. Searle, *supra* note 79, at 143 (emphasis added); *see supra* note 79 and accompanying text.

218. *Cf.* Funkhouser, *supra* note 74, at 561 (noting that some determination dimensions "make[] more subtle distinctions" than others).

219. *Cf.* Meinertsen, *supra* note 74, at 297 (noting that "the term 'a color,' as used in ordinary language, is ambiguous" on this point).

220. *See id.*

discrimination cases.²²¹ Joseph Oncale worked as part of an all-male crew on an oil platform; he was subjected to severe sexual harassment and abuse by several of the other crew members, and the Court held that the same-sex character of the harassment did not preclude a claim of sex discrimination.²²² For our purposes, the interesting question is how Oncale's case should then have been resolved on the merits. Suppose, plausibly, that Oncale was singled out for harassment because of his perceived effeminacy or femininity.²²³ But suppose also that he was not singled out because of any *mismatch* between that gender expression and his male sex, but rather simply because of the gender expression itself. In other words, suppose that the crewmates would have harassed *whomever* was the most effeminate or feminine member of the crew (perhaps so long as some absolute threshold was crossed), regardless of that person's sex. Was Oncale then harassed because of *his gender*, or was he not?

The answer depends on how fine-grained we take the determinable property of gender to be. If only *being a man*, *being a woman*, and perhaps *being nonbinary* are counted as determinates falling under this determinable, then it follows that Oncale was *not* harassed because of his gender. After all, he was not harassed for being a man; and even applying the dimensional account, he also was not harassed for any other property that characterizes him in respect of gender in this coarse-grained sense (such as being of a different gender than anyone else). The same point is reflected in the fact that a hypothetical woman who found herself in Oncale's place—stuck on the same oil platform with the same sexually vicious crewmates—would *also* have suffered sexual harassment.²²⁴ Yet finding no gender discrimination here seems obtuse: Oncale was targeted for his perceived femininity—a property that takes its entire meaning from, and appears to characterize Oncale solely in respect of, gender. Moreover, the anomaly here is not idiosyncratic; the same problem will arise in all cases of what Mary Anne Case has called “discrimination against the feminine,” a common form of discrimination that affects women and effeminate or gay men alike.²²⁵ For present purposes, my point is that one can recognize this recurring form of disparate treatment as discrimination “because of [an] individual's sex” if, but only if, one understands the statute's reference to “[an] individual's sex”

221. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998).

222. *Id.* at 77, 82.

223. *See id.* at 77.

224. *Cf.* Dillon v. Frank, No. 90-2290, 1992 U.S. App. LEXIS 766, at *27 (6th Cir. Jan. 15, 1992) (rejecting a male plaintiff's claim because he could not show “that a woman known to engage in the disfavored sexual practices would have escaped abuse”).

225. Case, *supra* note 215, at 58–60; *see* Schultz, *supra* note 215, at 1776 (similar).

both to refer to gender (rather than to physical differences) and to cognize granular differences in the way that a particular person is gendered—in other words, if one reads the statute to treat each way of being gendered as, in effect, a gender (and hence also a “sex”).²²⁶ So a vital, neglected, and potentially difficult question for a textualist account of disparate-treatment law is whether each of the relevant determinable properties is to be understood in a coarse-grained or a spectral sense.

That brings me to the last point, which is simply to note that the same analysis that we have just developed readily generalizes to other protected characteristics.²²⁷ As to each, the central questions will be the same: First, how should one understand the determination dimensions of the relevant top-level determinable property? And second, how granular should one understand that property to be? If a Black person is fired under a “no dreadlocks” or “no cornrows” policy, for example, one should ask not whether they would have had the same hairstyle but for their being Black (who knows?), but rather whether this aspect of hairstyle makes them *Black in a specific way*, or more generally, *raced in a specific way*, using the statutorily relevant sense of “race.”²²⁸ That is why, as Angela Onwuachi-Willig and Mario Barnes have argued, such a hairstyle policy may constitute race-based disparate treatment even if it discriminates not against “all Blacks, but [against] the *kind* of Black who is [deemed] too ‘ethnic.’”²²⁹ The latter property may itself be cognizable as a racial category, just as scarlet (and not only red) is a color.

The broader lesson here is that once we recognize the properties listed in Title VII as determinable properties that identify dimensions of difference, disparate treatment is potentially eligible to qualify as “because of” a

226. I do not purport to resolve here whether that reading is textually plausible; I mean only to outline the propositions that one would need to endorse in order to favor it.

227. As I noted earlier, it is at least possible in principle that pregnancy discrimination could also be counted as sex discrimination under the gender-based definition of “sex.” See *supra* note 186. Substantiating that claim would require showing that *being pregnant* is itself a specific way of being in respect of gender. And that, in turn, would take more than simply showing that social attitudes toward pregnancy shape the gender-specific expectations of *women*, or even that there are gender-specific expectations of women, *qua* women, that apply only when they are pregnant. I think the question of whether pregnancy is a determinate of gender is difficult, perhaps requiring a sophisticated metaphysics of gender, and I do not purport to resolve it. See *supra* note 216 (noting the complexity of these issues).

228. The question of what constitutes the statutorily relevant sense of “race” is large and difficult, and, as with gender, I make no pretense of answering it here. See generally Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind,”* 44 STAN. L. REV. 1 (1991) (distinguishing different conceptions of “race” that are invoked in legal analysis).

229. Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being “Regarded as” Black, and Why Title VII Should Apply Even if Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283, 1318 (emphasis added); see also Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 890–96 (2001) (similar).

protected determinable property even if there is no *standard name* for the determinate property at issue—just as a choice could be made “because of an object’s color” even if there is no English word for that unique combination of hue, saturation, and brightness. Whether this potential is realized depends, again, on how fine-grained one understands the relevant properties to be—a question that, to my knowledge, textualists have not even begun to consider. In any case, the analysis we have developed is thus compatible with both more and less radical understandings of the reach of disparate-treatment law: it recasts those disagreements as rooted in competing views of the natures of the relevant determinable properties—the referents of “race,” “sex,” and the like—themselves.²³⁰

IV. READING TITLE VII LIKE A LAW

The dimensional account offers a coherent and plausible analysis of what it is for an action to be “because of such individual’s X” in the sense relevant to disparate treatment. Its plausibility comes mainly from the fact

230. The dimensional account is also compatible with different views of the legality of affirmative action, although for reasons more external than internal to the account itself. To be sure, the account does commit one to the proposition that, when a person is denied a job or promotion due to concerns about how their selection would affect the racial or gender composition of a larger class, they are rejected “because of” their race or gender in the ordinary sense. *See supra* notes 85–86 and accompanying text. But the precedents approving affirmative action plans have never really denied that proposition. Rather, the Court’s

decisive rejection [in *United Steelworkers v. Weber*, 443 U.S. 193 (1979)] of the argument that the “plain language” of the statute prohibits affirmative action rested on (1) legislative history indicating Congress’ clear intention that employers play a major role in eliminating the vestiges of discrimination, and (2) the language and legislative history of § 703(j) of [Title VII], which reflect a strong desire to preserve managerial prerogatives so that they might be utilized for this purpose.

Johnson v. Transp. Agency, 480 U.S. 616, 629 n.7 (1987) (citation omitted); *see Weber*, 443 U.S. at 201–07. In reaffirming *Weber* eight years later, the Court further emphasized that “Congress has not amended the statute to reject our construction, nor have any such amendments even been proposed”—even though *Weber* “was a widely publicized decision that addressed a prominent issue of public debate,” and even though Congress had a “radically different . . . reaction[.]” to some of the Court’s other “interpretations of the same statute.” *Johnson*, 480 U.S. at 629 n.7. On that ground alone, the Court suggested, “we . . . may assume that our interpretation was correct.” *Id.*; *cf. Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015) (explaining that *stare decisis* has “enhanced force” in the statutory context “regardless whether our decision focused only on statutory text or also relied . . . on the policies and purposes animating the law,” because “[a]ll our interpretive decisions, in whatever way reasoned, effectively become part of the statutory scheme, subject (just like the rest) to congressional change”). Insofar as the dimensional account assumes textualism, it (like *Bostock*) presumably rules out *Weber*’s bare appeal to the “spirit” of Title VII as manifest in its legislative history. *Weber*, 443 U.S. at 201 (quoting *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892)). But the account says nothing about the force of these various arguments based on *stare decisis*, ratification, or the inferences to be drawn from section 703(j)—or, for that matter, any other arguments that might be adduced in support of reading the operative provision as globally modified by a distinction between decisions that are made pursuant to affirmative action programs and those that are not.

that it accords with how we ordinarily use language attributing reason-giving force to a determinable property of an object, whether in the context of discrimination claims or beyond. But there is a significant challenge on that front that I have postponed until now: just like *Bostock*'s official analysis, the dimensional account seems to break with everyday language use when it comes to whether a person who is fired for being gay is fired "because of their sex."²³¹ Insofar as the account is supposed to operate within a textualist framework, then, any effort to apply it to sexual-orientation discrimination appears vulnerable to an objection much like the one Justice Kavanaugh leveled against the *Bostock* majority. Kavanaugh was willing to assume that "firing someone because of their sexual orientation may, as a very literal matter, entail making a distinction based on sex," but he countered that what matters, for legal purposes, is whether "the ordinary meaning of 'discriminate because of sex'—not just the literal meaning—encompasses sexual orientation discrimination."²³² If the ordinary meaning of the relevant language does not extend to anti-gay discrimination—and Kavanaugh's sense that it does not is hardly idiosyncratic—then so much the worse for the dimensional account, too, at least as applied to the question in *Bostock*.²³³

231. I focus on sexual orientation (not gender identity) in this Part because the disconnect between the account's prescriptions and everyday speech seems starker with respect to sexual orientation. See, e.g., Tobia & Mikhail, *supra* note 86, at 479 (reporting that a large majority of respondents agreed that an employee fired for being transgender was fired "because of her sex"). Nonetheless, the argument of this Part would apply in exactly the same way to gender identity.

232. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1824–25 (Kavanaugh, J., dissenting).

233. Recent survey evidence suggests that many people's linguistic intuitions about sexual-orientation discrimination may not be as hostile to *Bostock*'s result as I and others have assumed. James Macleod presented survey respondents with a vignette in which an employee, Gene, is fired for being gay and asked them (among other things), "Was Gene fired because of Gene's sex?" James A. Macleod, *Finding Original Public Meaning*, 56 GA. L. REV. 1, 33 (2021). Forty-seven percent of respondents answered "clearly yes" and another thirteen percent said "probably yes." *Id.* at 48; see also Tobia & Mikhail, *supra* note 86, at 479–80 (similar). If those results are to be trusted, so much the better for the dimensional account. I doubt, though, that they would (or perhaps should) satisfy Justice Kavanaugh or the many *Bostock* skeptics. For one thing, Macleod's survey prompt explained the employer's motivations as follows: "Bill believes that it is morally wrong to be attracted to the same sex. Bill also believes that, if he were to knowingly employ a male who is attracted to other males, or a female who is attracted to other females, that would make Bill complicit in their immorality." Macleod, *supra*, at 33 (emphasis added). Spelling out the meaning of being "attracted to the same sex" here is understandable, but it certainly primes one to say or think that Gene was fired for being in one of the employer's two disfavored categories: "a male who is attracted to other males." And once that middle step is in place, it is much more natural to say that he was also fired "because of his sex." In the real world, by contrast, it may well be that people would not ordinarily affirm that an anti-gay firing was "because of the employee's sex" precisely because they would not ordinarily decompose homosexuality into a disjunction of two partly sex-based conjunctions. (If Cass Sunstein is right to analogize the textual question in *Bostock* to the duck-rabbit illusion, see Sunstein, *supra* note 5, at 474–76, perhaps Macleod's prompt is like asking people what they see after mentioning a duck, see *id.* at 467–68.) A similar concern applies to a study by

My response to this challenge is two-fold. The first and simpler answer is forward-looking and geared specifically to making sense of anti-discrimination law. In short, Justice Kavanaugh was in dissent in *Bostock*, and he was in dissent precisely because the majority did not accept his granular approach to assessing “ordinary meaning” under Title VII.²³⁴ The majority instead took the statute to establish a general legal criterion (the “but-for” test) and then applied it to the case at hand.²³⁵ Now, importantly, that legal test could not actually do the work that the majority asked of it; that is why, despite touting his “simple test,” Justice Gorsuch was ultimately forced to claim that sex and sexual orientation are “inextricably bound up” with one another instead.²³⁶ And that fallback argument is essentially the notion that the dimensional account grounds and develops—thereby revealing the conception of disparate treatment that actually does the analytic work in *Bostock*. In so doing, the account obviates the powerful objections to *Bostock*’s “but-for” analysis and clarifies “the contours of a post-*Bostock* Title VII.”²³⁷ Success on these scores does not require also vindicating the majority’s overall approach to statutory interpretation. Put another way, one could think that *Bostock* was wrong for the reasons given by Justice Kavanaugh (albeit not for the reasons given by Justice Alito),²³⁸ and yet that the dimensional account best captures the now-reigning theory of disparate treatment and, indeed, the theory of disparate treatment that ought to be accepted by any textualist as willing as the *Bostock* Court was to run roughshod over particular linguistic intuitions about specific fact patterns.

But the balance of this final Part of the Article offers a second response, one that requires more argument—perhaps more than I can fully develop here—but is ultimately more satisfying. Assuming textualist premises, the Court was *right* to accept and apply the dimensional account in *Bostock* (or would have been right to do so explicitly) even if that account does *not* accord with the informal, ordinary understanding of “because of such

Kevin Tobia and John Mikhail that asked about a firing of a “gay man” without stipulating that a lesbian woman would have been treated the same. See Tobia & Mikhail, *supra* note 86, at 475–79; see also *supra* note 86 (noting other concerns about comprehension among Tobia and Mikhail’s respondents). In any event, I proceed here on the premise that *Bostock*’s result does not align very well with everyday language use (which, given the breakdown of responses, the various surveys could also be taken to support).

234. See *Bostock*, 140 S. Ct. at 1745.

235. See *id.*; see also *infra* notes 289–92 and accompanying text (discussing this aspect of the majority’s approach).

236. See *supra* notes 68–70, 123–28 and accompanying text.

237. Krishnamurthi & Krishnaswami, *supra* note 15, at 471 n.87.

238. See *supra* Section I.A (discussing Justice Alito’s argument with respect to the “but-for” analysis); *supra* notes 123–28 and accompanying text (discussing Justice Alito’s argument with respect to the notion that sex and sexual orientation are “inextricably bound up”).

individual's sex" with respect to sexual orientation. The reason is that the object of textualist inquiry—the reasonably imputed communicative content of the statutory text—does not build in every context-specific wrinkle in everyday language use. Why not? Because an ordinary reader would read Title VII like the kind of text that it is—a piece of legislation, not a transcript of a conversation between friends about a particular incident. Understanding that the ordinary purpose of legislative communication is to subject a class of conduct to general norms, the reader would seek an *interpretation* or *analysis* of “because of such individual's X”; they would not understand the intended meaning of that phrase to align with their own linguistic intuitions about each conceivable scenario or individual characteristic considered in isolation from all others. And once the ordinary reader is in the market for a genuine analysis of this general phrase, they will find that the dimensional account is—for all of the reasons given earlier—the best alternative on offer.

A. TEXTUALISM AND COMMUNICATIVE CONTENT

In order to get this argument off the ground, we need some account of what “textualism” actually holds. Although there is no one official definition,²³⁹ there is indeed a leading modern account of the central idea, and it goes essentially as follows:

The contribution that the enactment of a statute makes to the law is determined by what a *reasonable member of the public* would understand the *communicative content* of the statute to be.

Both of the italicized notions in this claim are important, so I will say a few words about each.²⁴⁰

The first, *communicative content*, is not a specifically legal notion; it is a central concept in the modern understanding of language generally. Broadly speaking, the communicative content of an utterance is what the

239. See, e.g., John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 420 (2005) (“[T]extualism does not admit of a simple definition”); see also Fallon, *supra* note 29, at 1280 (“Neither textualists, nor legislative intentionalists, nor purposivists consistently embrace the same sense of or referent for claims of legal meaning.”).

240. The formulation above is not lifted verbatim from any textualist judge or scholar, but as the ensuing discussion will show, it captures the substance of the various formulations that many have employed. See *infra* notes 243–48 and accompanying text. For philosophical accounts of textualism along essentially the same lines as mine, see ANDREI MARMOR, *THE LANGUAGE OF LAW* 116–17 (2014); Mark Greenberg, *Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication*, in PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 217, 231 (Andrei Marmor & Scott Soames eds., 2011); Gideon Rosen, *Deferentialism and Adjudication*, in THE NATURE OF LEGAL INTERPRETATION 241 (Brian G. Slocum ed., 2017); and Scott Soames, *Deferentialism: A Post-Originalist Theory of Legal Interpretation*, 82 FORDHAM L. REV. 597, 597–98 (2013).

speaker intends the audience to recognize the speaker as intending to convey or commit himself to via the utterance.²⁴¹ For example, the communicative content of a prohibitory law (such as the disparate-treatment provision of Title VII) is that certain actions are prohibited. Which actions in particular? Whichever ones the legislature intended the public to recognize it as intending, by enacting the law, to designate as prohibited. A theory of statutory interpretation that tied a statute's legal effect to its communicative content would thus be straightforwardly "intentionalist," not textualist.²⁴²

Which is why the second idea—that of the *reasonable member of the public*—lies at the heart of textualism. As John Manning has explained, modern textualists do "seek the legislature's intended meaning in some sense," but they "focus on 'objectified intent'—the import that a reasonable person conversant with applicable social and linguistic conventions would attach to the enacted words,"²⁴³ or otherwise said, "the way a reasonable person conversant with applicable conventions would read the enacted words in context."²⁴⁴ Textualists thus posit a hypothetical reader who is trying to discern the actual communicative content of the statute, and they then peg the statute's legal effect to the answer that this hypothetical "ordinary" reader would come up with.²⁴⁵ The main point of this perspective-taking exercise is that the hypothetical reader can be constructed as *lacking* certain information that the actual interpreter possesses but which, according to textualists, should not bear on the statute's legal effect. In particular, the approach is meant to exclude resort to legislative history or "the judge's commonsense

241. This notion of communicative content traces to Paul Grice. See PAUL GRICE, *STUDIES IN THE WAY OF WORDS* 220–23 (1989); Greenberg, *supra* note 240, at 230–31. Notwithstanding this definition, some use "communicative content" in an "objective" sense, such that the communicative content of an utterance is *not* determined by the speaker's communicative intention. See Greenberg, *supra* note 240, at 231 (distinguishing between "the neo-Gricean notion" of communicative content and "an objective notion" of communicative content); Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 488 (2013) (using "communicative content" in the latter way).

242. See, e.g., Manning, *supra* note 239, at 428 ("[C]lassical intentionalists emphasize that meaning depends on what the speaker *actually* intends to convey."); see also MARMOR, *supra* note 240, at 116–17 (similar). Regarding the competing, "objective" usage of "communicative content," see *supra* note 241.

243. Manning, *supra* note 239, at 423–24.

244. *Id.* at 438; see Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 17 (Amy Gutmann ed., 1997); MARMOR, *supra* note 240, at 116–17; Rosen, *supra* note 240, at 251.

245. See Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 348 (2005) ("[J]udges whom we think of as textualists construct their sense of objective meaning from what the evidence that they are willing to consider tells them about the subjective intent of the enacting legislature."); Rosen, *supra* note 240, at 251.

understanding of what policy outcomes legislators would likely prefer.”²⁴⁶ The *reasonable member of the public* is thus stipulated to be “a skilled, objectively reasonable user of words” who is well-acquainted with “shared background conventions for understanding how particular words are used in particular contexts,”²⁴⁷ but who simply knows nothing of “the drafters’ extratextually derived purposes [or] the desirability of the fair reading’s anticipated consequences.”²⁴⁸

One further clarification is important. As philosophers of law and language have often observed, what a legislature is reasonably thought to have intended to communicate through the enacted text can differ from what change it sought (or even is reasonably thought to have sought) to make to the law.²⁴⁹ Aims or intentions of the latter kind are sometimes termed “legal intentions,” in contrast to the “communicative intentions” that determine communicative content.²⁵⁰ Mark Greenberg offers a nice illustration of the difference: a statute providing that, for purposes of diversity jurisdiction, a noncitizen who is a lawful permanent resident “shall be deemed a citizen of the State in which such alien is domiciled.”²⁵¹ Congress apparently sought by this amendment to change the law in only one way: to close a perceived loophole that permitted diversity suits between two people permanently residing in the same state, if one of them was not a U.S. citizen. Nonetheless, if we ask what Congress intended to *communicate* (or is reasonably taken to have intended to communicate), the answer is simple: that a lawful

246. MANNING & STEPHENSON, *supra* note 27, at 99.

247. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2457–58 (2003) (first quoting Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL’Y 59, 65 (1988)).

248. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS*, at xxvii (2012). The lack of prior knowledge about Congress’s policy preferences arguably makes the hypothetical reader far from “ordinary,” but this is nonetheless a core commitment of textualism.

249. See, e.g., Mitchell N. Berman, *The Tragedy of Justice Scalia*, 115 MICH. L. REV. 783, 796–99 (2017).

250. See, e.g., Greenberg, *supra* note 240, at 242. By “legal intentions” here, I mean intentions to alter legal rights and obligations in particular ways. Such intentions might be distinguished from what Joseph Raz describes as the “minimal” intention inherent in legislating: “an intention that the text of the Bill on which [one] is voting will—when understood as such texts, when promulgated in the circumstances in which this one is promulgated, are understood in the legal culture of this country—be law.” JOSEPH RAZ, *BETWEEN AUTHORITY AND INTERPRETATION* 284 (2009). At that high level, the legislature’s intended change to the law and the reasonably imputed communicative content of its utterance may converge. Cf. Manning, *supra* note 247, at 2457–58 & n.258 (suggesting that “the textualist approach” embraces Raz’s notion that “we can at least charge each legislator with the intent ‘to say what one would be normally understood as saying, given the circumstances in which one said it’ ” (citation omitted)).

251. Greenberg, *supra* note 240, at 242–43 (discussing *Saadeh v. Farouki*, 107 F.3d 52 (D.C. Cir. 1997), and 28 U.S.C. § 1332(a)).

permanent resident should be treated, for purposes of diversity jurisdiction, as a citizen of the state in which they reside. And if that communicative content determines the statute's contribution to the law, it follows that the amendment not only closed the loophole, but also *expanded* diversity jurisdiction—by newly extending it to suits between a lawful permanent resident of a state (who is now treated as a citizen) and a nonresident foreign citizen—even though Congress never intended that further change. A hallmark of textualism, as I understand it, is that it would give effect to this unintended side effect of the amendment—indeed, that it would view the question as a very easy one, given the clarity of the text. That is because Congress's legal intentions do not matter; it is the reasonably imputed communicative content that does.

B. THE “ORDINARY MEANING” OF LEGISLATION

Most of the commentary on *Bostock* frames the relevant question of “ordinary meaning” as Justice Kavanaugh does: In everyday contexts, what do speakers typically mean by (or audiences understand by) a statement that some action was taken “because of [someone's] sex?” For example, if someone is fired for being gay, and the question is then put whether they were fired “because of their sex,” would a typical English-speaker answer “yes” or “no”? Many, including Kavanaugh, have argued powerfully that the answer to that question is “no.”²⁵² On the other hand, recent empirical work takes up the same question and argues that the answer may be less clear-cut: asked whether the character in such a vignette was fired “because of his sex,” many say “no,” but a slight majority say “yes.”²⁵³

But while all of this certainly speaks to “ordinary meaning” in a colloquial sense of that phrase, it does not speak directly to the question that textualism asks. Recall that textualism gives legal weight to “ordinary meaning” only in a specific sense: it asks what a reasonable member of the public would take Congress to have intended to communicate through its utterance.²⁵⁴ At least in the first instance, then, the utterance for which the hypothetical reader seeks to reconstruct the communicative content is *Congress's enactment of a statute*; it is not any particular person's assertion

252. See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1828 (2020) (Kavanaugh, J., dissenting); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 149–50 (2d Cir. 2018) (Lynch, J. dissenting); *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 363 (7th Cir. 2017) (Sykes, J., dissenting); Berman & Krishnamurthi, *supra* note 5, at 81–83.

253. See Macleod, *supra* note 233; Tobia & Mikhail, *supra* note 86. As earlier noted, I am reluctant to draw too much from these studies even with respect to the bottom-line questions that they ask. See *supra* note 233.

254. See *supra* Section IV.A.

that any particular act falls under any particular description. Of course, the two inquiries are related: a reasonable member of the public will begin from the assumption that Congress uses words and phrases in the same way that others do. So, for example, Congress presumably meant by “vehicle” or “vegetable” what “everyday speech” or “the common language of the people” would suggest.²⁵⁵ But our hypothetical reader knows that, at the end of the day, they are interpreting a piece of legislation, not an ordinary conversational contribution.²⁵⁶ And there is nothing nontextualist about expecting the reader to account for that distinctive conversational context insofar as it bears on the probable communicative content of the utterance actually at issue.

Indeed, the theoretical premises of textualism require the hypothetical reader to do exactly that. As Manning explains, “modern textualism . . . account[s] for the contextual nuances of language, especially the particular nuances and conventions that the subcommunity of legal speakers has developed to facilitate effective legal communication.”²⁵⁷ That is why the modern textualist bible is called *Reading Law*, not *Reading in General*.²⁵⁸ In fact, many of the questions that textualists ask cannot even be formulated without accounting for the fact that a legal enactment, in particular, is at issue. According to Justice Scalia, for example, textualists aim to discern what “a reasonable person would gather from the text of the law, *placed alongside the remainder of the corpus juris*,” as only a legal text could be.²⁵⁹ Manning offers another instructive example: if a statute using the phrase “drew blood” is enacted as part of a criminal code, he suggests, that fact favors taking the term to refer to “a violent act,” not a medical procedure.²⁶⁰

255. See *Nix v. Hedden*, 149 U.S. 304, 306–07 (1893); *McBoyle v. United States*, 283 U.S. 25, 26 (1931); see also *Bostock*, 140 S. Ct. at 1825–26 (Kavanaugh, J., dissenting) (offering these examples).

256. See Fallon, *supra* note 29, at 1273 (“If meaning depends on context, the context for legal interpretation can be, and often is, importantly different from that of conversational interpretation.”).

257. Manning, *supra* note 247, at 2458; see also Manning, *supra* note 239, at 434 (“[M]odern textualists are not literalists; they do not look exclusively for the ‘ordinary meaning’ of words and phrases. Rather, they emphasize the relevant linguistic community’s (or sub-community’s) shared understandings and practices.”). If textualists truly aim to account for the communicative conventions among legal speakers, shouldn’t textualism actually be taken to recommend a broadly purposivist approach to legislative utterances—such as Title VII—that predate the rise of modern textualism? Perhaps. Cf. Caleb Nelson, *A Response to Professor Manning*, 91 VA. L. REV. 451, 455–56 (2005) (posing a form of this question). In practice, however, textualists interpret all statutes *as if* they were enacted against a backdrop of textualist interpretive conventions, and I proceed on that same premise here. Cf. Manning, *supra* note 239, at 435 n.53 (suggesting that “textualists appropriately rejected purposivism on normative grounds, even if purposivism did constitute a previously established mode of interpretation”).

258. SCALIA & GARNER, *supra* note 248.

259. Scalia, *supra* note 244, at 17 (emphasis added).

260. Manning, *supra* note 247, at 2461.

There is nothing nontextualist about that inference; it seeks the reasonably imputed communicative content of Congress's utterance, and it does not resort to any of the information that textualism rules out-of-bounds. But this kind of contextual inference will never get off the ground if the hypothetical reader merely asks how a given phrase is commonly used and leaves it at that. Just as "[w]e must never forget that it is a *constitution* we are expounding,"²⁶¹ then, we need to remember that it is a *statute* we are interpreting when we aim to discern the meaning of a statutory text.

All of this casts doubt on both the thought experiments and the survey experiments mentioned above. Consider the surveys: because they ask respondents to apply isolated phrases (such as "because of his sex") to real-world vignettes, they remove law from the picture altogether. In fact, James Macleod argues that such surveys should *not* present respondents with full statutory texts precisely because the "complex, legal-sounding format informs the respondent that they are interpreting a *law*," and this in turn will lead them to "be influenced (or 'biased') by all sorts [of] extratextual beliefs and preferences regarding laws and their interpretation."²⁶² He is surely right that such a survey would yield biased results in the following sense: many respondents would end up opining on whether they think that some action is or ought to be illegal, rather than on the communicative content of the statute.²⁶³ But, with due respect for Macleod's fascinating work, that is just a reason for pessimism about the project of deriving textualist interpretations from survey results. In many cases, it may well be infeasible to get unbiased results from surveys that ask the question that textualists actually seek to answer. If so, textualists should still look for their keys where they dropped them, not under the empirical streetlamp.²⁶⁴ And, to be clear, nonempirical thought experiments about "everyday speech" are no better: they, too, can answer the ultimate interpretive question only if one has already concluded that the special conversational context of legislation makes no difference to the relevant aspect of the statute's communicative content. That might be a reasonable assumption with respect to "vehicle," "vegetable," or "washing

261. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

262. Macleod, *supra* note 233, at 56.

263. *See id.* at 44 n.190. In other words, respondents would end up reporting their views on a matter of "construction" rather than "interpretation." *See Solum, supra* note 241, at 483–84 (explaining this distinction); *cf. Frederick Schauer, Is Law a Technical Language?*, 52 *SAN DIEGO L. REV.* 501, 503 (2015) ("[T]o the extent that legal language is itself a technical language, legal ideals and aims come in at the interpretation stage and not just at the later point of construction.").

264. Indeed, new research may confirm that "[o]rdinary people carefully consider the (legal) genre in which a term appears and do not understand laws to communicate largely ordinary meanings." Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Ordinary Meaning and Ordinary People*, 171 *U. PA. L. REV.* (forthcoming 2023) (manuscript at 8), <https://ssrn.com/abstract=4034992> [<https://perma.cc/P453-8BX6>].

machine” (another of Justice Kavanaugh’s examples).²⁶⁵ But, as I’ll now explain, when it comes to the use of “because of such individual’s . . . sex” in Title VII, it is not.

C. THE MODULARITY AND GENERALITY OF TITLE VII

Just what do inquiries into “everyday speech” miss about the reasonably imputed communicative content of Title VII’s disparate-treatment provision? In short, they cut out the natural tendency to read legal language in modular, even analytical, terms. They do that by asking how a single incident would or would not be described, rather than how a wide-ranging ban on a heterogeneous class of conduct, read as a whole, would most naturally be understood.

The critical point here actually builds on a central theme of Justice Kavanaugh’s *Bostock* dissent. As Kavanaugh emphasized, “[t]he full body of a text contains implications that can alter the literal meaning of individual words.”²⁶⁶ That is why he thought the majority went wrong: it interpreted “because of” and “sex” separately, and then just strung together the definitions that resulted. But Justice Kavanaugh failed to take his own insight far enough. The “full body of [the] text” here is not “discriminate because of sex,” as he suggested,²⁶⁷ or even “discriminate because of such individual’s sex”; those words do not appear in an unbroken string anywhere in the provision.²⁶⁸ Rather, the relevant text extends as least to this full sentence:

It shall be an unlawful employment practice for an employer—

to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.²⁶⁹

If we set aside both legislative history and any preconceptions about Congress’s policy objectives, what would Congress reasonably be taken to have communicated by this? At the most general level, the answer seems clear: certain actions toward a person are prohibited if they bear a certain

265. See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1826 (2020) (Kavanaugh, J., dissenting) (“A ‘washing machine’ could literally refer to any machine used for washing any item, but in everyday speech it means a machine for washing clothes.”).

266. *Id.* at 1827 (citation omitted).

267. *Id.* at 1826 & n.3.

268. Cf. Victoria Nourse, *Picking and Choosing Text: Lessons for Statutory Interpretation from the Philosophy of Language*, 69 FLA. L. REV. 1409, 1412 (2017) (arguing that “the very act of textual isolation leads to unstated implications” and that “these implications can be quite false based on an examination of the whole text”).

269. 42 U.S.C. § 2000e-2(a) (numbering omitted).

connection to certain attributes of that person.²⁷⁰ Any well-trained reader of statutes would discern that much without any real difficulty. Thanks to the two embedded lists, the reader would note, the action and the attribute can each be any of several alternatives; for any pairing of the two, what is prohibited is doing the action with the specified relation to the individual's attribute. Once the reader nailed down the meanings of the various listed actions and characteristics, then, they would need just one more thing: an interpretation of "because of such individual's X." In short, they would naturally treat that phrase as its own module or unit of statutory content, with a unitary meaning that does not depend on the particular characteristic (or, for that matter, employment action) that is at issue in a given case. And, for all of the reasons given above, they ought to accept the dimensional account, not the determinate account, as capturing the standard meaning of that phrase.²⁷¹

We can sharpen this point by considering the same issue in the context of the Equality Act 2010—the principal anti-discrimination statute in the United Kingdom—rather than Title VII. Unlike Title VII, the Equality Act specifies the "prohibited conduct" of discrimination in one chapter and lists the "protected characteristics" in another. Disparate treatment is thus defined as follows: "A person (A) discriminates against another (B) if, *because of a protected characteristic*, A treats B less favourably than A treats or would treat others."²⁷² The statute elsewhere provides a list of the "protected characteristics," which include (among others) "race," "sex," "age," and "disability."²⁷³ Under this statute, it seems very clear that the meaning of "because of a protected characteristic" should be articulable in general terms; it should not depend on *which* protected characteristic is at issue in a given case. For example, an action based on how a person's protected characteristic compares to the same characteristic of their spouse (or the business's customers, or anybody else) could not be an action "because of a protected characteristic" for some protected characteristics but not others. Such an

270. And, in fact, that is the basic schema of an anti-discrimination law in general, setting aside more complex variants and extensions. *See, e.g.*, TARUNABH KHAITAN, A THEORY OF DISCRIMINATION LAW 29 (2015) (offering a general analysis of the form of anti-discrimination laws across jurisdictions).

271. *See supra* Part II.

272. Equality Act 2010, c.15 § 13(1) (U.K.) (emphasis added).

273. *Id.* § 4. The list includes "sexual orientation" as well. Nonetheless, the question of whether discrimination against people *in same-sex relationships* constitutes sex discrimination remains potentially important in the U.K., because not all agree that such discrimination is on the basis of "sexual orientation" within the meaning of the statute. *See* Daniel J. Hill, *Is Sexual-Orientation Discrimination a Form of Sex Discrimination?*, 41 LIVERPOOL L. REV. 357 (2020). So, while I am using the Equality Act here to illustrate a point about Title VII, the dimensional account and its application to sex properties may have a significant upshot for U.K. law as well.

interpretation would flout the evident modularity of the statute's text and thus fail to capture the content that the legislature presumably intended to communicate.²⁷⁴ But if that is right, the answer under Title VII should be no different. How could it matter that Title VII lists the protected characteristics at the end of the same sentence in which the "because of" phrase appears, rather than relegating them to a separate enumeration? Those different drafting strategies reflect, at most, different aesthetic judgments; they do not suggest different communicative intentions. At least when a statute is at issue, in other words, we presume a sentence such as Title VII's disparate-treatment provision to have the kind of modular structure that the Equality Act wears even more prominently on its sleeve.²⁷⁵

This presumption about legislative communication is well-grounded in doctrine and theory alike.²⁷⁶ As for doctrine, the leading case is *Clark v. Martinez*.²⁷⁷ The case involved an immigration-detention statute that listed off three categories of people who "may be detained" beyond a certain period.²⁷⁸ The Court had previously held that this seemingly unlimited detention authority would pose a "serious constitutional threat" with respect to one of the three categories, and it had therefore read an implicit time limit

274. To be clear, I am not denying that a participant in a conversation might properly draw different inferences from a statement that someone was fired "because of their X" depending on the protected characteristic (X) involved. Pragmatic considerations might well justify their doing so. Cf. *supra* notes 100, 107 and accompanying text (noting context-sensitivity, giving an example of a context that departs from the norm, and identifying a particularized conversational implicature that explains that departure). My point is rather that, even *granting* that kind of characteristic-specific variation in ordinary conversational contexts, the legislature's utterance in the Equality Act has no room for it.

275. Although I emphasize the legal context here, it may well be that at least part of the force of the point derives from phenomena of wider scope. For instance, the apparent problem with reading the statute to exclude differential treatment based on how a person's sex relates to their spouse's sex, but not how their race relates to their spouse's race, bears a notable resemblance to the recognized "impossibility of crossed interpretations" in semantics generally. See, e.g., Alex Lascarides, Ann Copestake & Ted Briscoe, *Ambiguity and Coherence*, 13 J. SEMANTICS 41, 42 (1996) (offering the example of "John and Bill each have a file," which "cannot have readings where John has a tool designed for shaping and Bill has a folder of documents").

276. Jonathan Siegel calls a similar norm the "unitary principle," see Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339, 340 (2005), and Saikrishna Prakash refers to that same notion as the "presumption of intrasentence uniformity," see Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 ARK. L. REV. 1149, 1150 (2003). As just noted, all of these may be legal labels for more general linguistic phenomena. Perhaps the point could be restated, in those generic terms, as follows: Congress can be presumed not to deploy the "punning" effect known as *zeugma* (as in, "[s]ome dam busters blew up banks and so did some bank robbers") and, like other competent speakers, it does not express itself in ways that only "crossed interpretations" could accurately capture. See Lascarides et al., *supra* note 275, at 43.

277. *Clark v. Martinez*, 543 U.S. 371 (2005). For detailed discussion of *Clark*, its forerunners, and its merits, see Siegel, *supra* note 276.

278. 8 U.S.C. § 1231(a)(6); see *Clark*, 543 U.S. at 377.

into the statute in cases involving that category.²⁷⁹ But having done so, Justice Scalia explained in *Clark*, the Court had to apply the same time limit to the other two categories as well. That followed from the simple fact that “[t]he operative language . . . applie[d] without differentiation to all three categories.”²⁸⁰ “[T]he statute can be construed ‘literally’ to authorize indefinite detention,” he reasoned, “or (as the Court ultimately held [in the prior case]) it can be read to ‘suggest less than unlimited discretion’ to detain.”²⁸¹ But it could not “be interpreted to do both at the same time.”²⁸² Whatever content might properly be imputed to a given linguistic unit in a statute, in other words, Congress is at least presumed to have intended the relationships of logical independence that the text suggests.

Doctrine aside, this presumption of modularity makes a good deal of sense. Justice Alito is surely correct that textualists should not read statutes “as if they were messages picked up by a powerful radio telescope from a distant and utterly unknown civilization.”²⁸³ But statutes are, indeed, one-way messages to a vast audience that will be required to interpret them without the usual opportunities for further conversational clarification; as Lawrence Solum puts it, they must be adapted for successful communication under circumstances that are “information poor.”²⁸⁴ They are also ordinarily crafted with at least attempted precision: so, compared to an ordinary conversational contribution, the audience should be much slower to infer that the speaker intended something other than the surface grammar of their utterance would suggest.²⁸⁵ And, of course, statutes are supposed to govern wide swathes of conduct by imposing consistent, general criteria—standards that, ideally, can be understood by regulated parties and further elucidated by courts in an incremental but coherent fashion.²⁸⁶ For all of these reasons, if a statute appears to require one item from column A and one from column B—or to supply a uniform rule that applies to circumstances X, Y, and Z, or the like—it makes sense to presume that Congress actually intended to

279. *Clark*, 543 U.S. at 377 (quoting *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001)).

280. *Id.* at 378.

281. *Id.* (brackets omitted) (quoting *Zadvydas*, 533 U.S. at 697–98).

282. *Id.*

283. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1767 (2020) (Alito, J., dissenting).

284. Solum, *supra* note 241, at 492–93, 496–502; see Fallon, *supra* note 29, at 1273–74 (similar).

285. *Cf.* Rosen, *supra* note 240, at 252–53 (“[W]hen a speech act is designed to establish a rule that people must comply with on pain of penalties, drafters are under considerable pressure to say exactly what they mean. Moreover a rational interpreter whose job it is to identify what was said will know this and will thus feel pressure to minimize the gap between the literal meaning of the words and what he takes the utterance to say or stipulate . . .”).

286. *Cf.* Nelson, *supra* note 245, at 400 (noting that textualists “assume[] that Congress generally means its statutory directives to be just as rule-like as they seem on the surface”); *id.* at 398–403 (discussing textualists’ general tendency to prefer rules over standards).

communicate exactly that.

The upshot is that the dimensional account and its application in *Bostock* are much more plausible on textualist grounds than the conventional wisdom—or, frankly, than simply ranking the persuasiveness of the contending *Bostock* opinions—might suggest. The pivotal question is not whether people would affirm that a particular action based on sexual orientation was “because of such individual’s sex” in everyday conversation, but whether the dimensional account best captures the connection between actions and attributes that Congress would reasonably be taken to have conveyed in Title VII (given that any such account would be expected to apply to disparate treatment across the board). As I argued in Part II, the dimensional account does capture the ordinary meaning of “because of such individual’s X” at that level of generality better than the determinate account. And given that much, *Bostock* actually seems a fairly easy case for a textualist. Remember that the textualist’s hypothetical reader has to approach the *Bostock* question as if the enacting Congress might well have been unbothered (or, indeed, pleased) by *Bostock*’s bottom-line result.²⁸⁷ What matters is whether sexual-orientation discrimination falls under the criterion that, in view of the overall sentence that Congress uttered, it probably intended the reader to understand it as setting out. And the answer to that question seems clear enough: decisions based on how a person compares to others in the dimension of X are within the ordinary meaning of “because of such individual’s X,” and nothing suggests that the communicative content of Congress’s utterance in Title VII incorporated any special escape valve that would exclude certain among them.²⁸⁸

287. See *supra* Section IV.A. Even Justice Alito’s dissent did not clearly dispute that premise. See *Bostock*, 140 S. Ct. at 1773 (Alito, J., dissenting); cf. Grove, *supra* note 10, at 282–84 (analyzing Justice Alito’s appeal to “social context”).

288. The point about *modularity* that I have stressed here may generalize to a more fundamental point about *analyzability*. Even if Title VII were a single-subject ban on disparate treatment “because of such individual’s sex,” that is, one might argue that Congress is best understood to have conveyed *some* general criterion, of the genre exemplified by the dimensional account, and that context-specific variations in everyday language use thus are not relevant unless they can be built up into aspects of such a suitably general analysis of the relevant text. Cf. Nelson, *supra* note 245, at 413 (“To decide how [a] law [regulating ‘ovens’] applies to newfangled appliances, textualists will not ask, on a case-by-case basis, whether the enacting legislature would have wanted to cover those appliances if it had known about them. Instead, textualists will emphasize the need to identify an appropriate verbal formula to determine the coverage of the word ‘ovens,’ and they will take the statute to cover a particular appliance only if the appliance fits within that formula.”). And there is reason to doubt that the conversational dynamics that disincline us to describe sexual-orientation discrimination as “because of such individual’s sex” could properly figure in a suitably general analysis of that kind. After all, those dynamics do not appear to reflect some general deficit in our analysis of when an action is taken on account of an attribute; rather, they reflect the distinctive social significance of whether an action was motivated in this particular way.

Let me pause here to contrast the interpretive argument that I have just made with the one advanced by the *Bostock* majority. As several commentators have observed, Justice Gorsuch appears to suggest that “because of” should be understood as a term of art—a way of referring, “[i]n the language of law,” to the “but-for test.”²⁸⁹ If that suggestion were correct, it would nicely explain why everyday speech patterns can be dismissed as evidence of the statute’s meaning (although, as explained earlier, it would not explain why *Bostock*’s “but-for” analysis is actually correct).²⁹⁰ But, in fact, the majority’s argument for construing “because of” as simply legal jargon for but-for causation is weak: that interpretation is conspicuously ill-suited to a provision that reads as a prohibition on acting for certain reasons,²⁹¹ and the prior cases on which the majority appeared to rest are readily distinguishable.²⁹² Nonetheless, my alternative argument suggests that here, too, *Bostock*’s analysis may not have done justice to the force of its author’s intuitions. For, assuming textualist premises, there is something importantly right about the majority’s “almost algorithmic”²⁹³ approach to the interpretive question here (even if, as I’ve suggested, the algorithm itself was wrong).

What justifies that step-wise approach is not that “because of” bears some special, term-of-art meaning within some particular community (as, for

When it comes to these particular actions, in other words, it would often be misleading to apply the description of “because of such individual’s sex”: the motivation is relevantly different, for many purposes, than the one that this description most commonly suggests. Cf. *supra* note 107 (identifying a potentially similar pragmatic implicature). Such a pragmatic consideration, triggered only in a relatively narrow context, might not have any bearing on the communicative content reasonably imputed to a legislative utterance establishing a general criterion of legality. But while I am tempted by this line of thought, I will not pursue it further here.

289. *Bostock*, 140 S. Ct. at 1739; see MANNING & STEPHENSON, *supra* note 27, at 221 (reading *Bostock* as turning on the majority’s treatment of “because of” as bearing a “technical legal meaning”); Berman & Krishnamurthi, *supra* note 5, at 72 (similar); Tobia et al., *supra* note 264, at 57–58 (similar).

290. See *supra* Section I.A.

291. See *supra* Section I.B.

292. Both of the cited cases concerned the special problem posed by so-called “mixed motive” cases. See *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175–76 (2009); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 352 (2013). In such cases, an employer has multiple reasons for taking an action against an employee, and the question arises what weight a forbidden reason must have borne in order to trigger liability (or, alternatively, to shift a burden to the defendant). A “but-for” test captures one answer to that question: the forbidden reason must have been decisive. And the cited cases did adopt that answer on the basis of the statutes’ “because of” language. But these cases did not reach that result by elevating a technical, “but-for” definition of “because of” above the ordinary meaning; to the contrary, they held that the “but-for” answer to the mixed-motive question flowed in part from the ordinary meaning that “because of” has with respect to that issue. See, e.g., *Gross*, 557 U.S. at 176. Fairly read, then, these cases cast little light on whether an action taken for a given reason can qualify as “because of such individual’s sex” even if, in ordinary speech, few would take that phrase to cover an action based on that reason.

293. *Grove*, *supra* note 10, at 281–82.

example, “working conditions” might in the “language of industrial relations”).²⁹⁴ It is rather that *all* of the linguistic units that compose a statute necessarily take on some resemblance to a term of art: Their meanings, whatever they might be, do not vary freely across the factual contexts covered by the statute to track how one might ordinarily speak of that particular situation alone. Instead, each apparent module or linguistic unit is taken to have, across the board, the meaning that it most plausibly has in general. And given that built-in rigidity, it should come as no surprise that there will be cases in which the proper analysis of the statute yields results that do not correspond to apt descriptions of the particular events at issue in ordinary utterances whose terms are not so constrained. *Bostock* thus exemplifies how, as Fred Schauer has observed, legal language—“all of it, and not just the epiphenomenal corner we designate as *terms of art*”—may constitute “a specialized language demanding interpretation in light of the particular goals of a legal system.”²⁹⁵ Insofar as modern textualism aspires to take context and interpretive conventions seriously, then, Justice Gorsuch was right to recognize that a reasonable reading of legal language will sometimes yield “legalistic” results.²⁹⁶

Of course, none of this is to say that Congress would have *wanted* to prohibit sexual-orientation or gender-identity discrimination in 1964.²⁹⁷ If it did prohibit such discrimination (as I think textualists should conclude), that was surely an accident—an unintended consequence of Congress’s saying what it said, just as expanding diversity jurisdiction was in our earlier example.²⁹⁸ But even if committed textualists could take notice of this reality (which it seems clear that they may not),²⁹⁹ it would not be a reason to think that Congress must somehow have disavowed *Bostock*’s results, *sub silentio*, in Title VII. Indeed, given how far the possibility of prohibiting sexual-orientation discrimination would have been from most legislators’ minds in 1964, one would not expect a concern to *avoid* that result to have played any significant role in Congress’s determination of what it would say on the topic of employment discrimination.³⁰⁰ And that, in short, is how the homophobic

294. *Corning Glass Works v. Brennan*, 417 U.S. 188, 201–02 (1974).

295. Schauer, *supra* note 263, at 502.

296. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1745 (2020).

297. *Cf.* Strauss, *supra* note 5, at 205 (“It is hard to believe that any reasonable observer at the time would have thought that the enactment of Title VII immediately outlawed discrimination against gay people and lesbians.”).

298. *See supra* note 251 and accompanying text.

299. *See supra* notes 246–48 and accompanying text.

300. Given the interpretive conventions of the time, moreover, Congress might not have worried overly much about the reasonably imputed communicative content of its utterance, in the textualist’s

legislators of the 1960s ended up delivering an unintended prohibition on anti-gay discrimination that the more enlightened legislators of recent decades could not manage to adopt with eyes wide open.³⁰¹

CONCLUSION

Bostock will orient disparate-treatment law for years to come, so it matters a great deal how courts and commentators come to understand the course that it set. Too bad, then, that the Court's central argument was—in Justice Alito's apt phrase—“so much smoke.”³⁰² Yet clearing the haze reveals that *Bostock* is consistent with, and indeed suggestive of, a coherent, general account of disparate treatment—the one that I have termed the “dimensional account”—that holds far more appeal than Justice Gorsuch's vaunted “simple test” of but-for causation. Although the majority may have lacked the vocabulary to articulate this alternative vision, the account grounds *Bostock*'s results in a principled distinction between different kinds of properties and, I've argued, in the statutory text as well. As courts, litigants, and academics grapple with the bounds of disparate treatment in a post-*Bostock* world, they would do well to set aside counterfactual gymnastics and to ask, instead, whether the reason for the adverse treatment was what the plaintiff is like in one of the *dimensions* that an anti-discrimination statute rules out-of-bounds.

sense, anyway. (This is one manifestation of the more general puzzle, noted above, about why textualism does not recommend reading “pre-textualist” statutes in nontextualist terms. See *supra* note 257.)

301. Justice Kavanaugh also made a distinct argument based on the fact that later-enacted statutes and regulations have often prohibited (or referred to) discrimination based on “sexual orientation” in addition to discrimination based on “sex” or “gender.” See *Bostock*, 140 S. Ct. at 1829–32 (Kavanaugh, J., dissenting). But that discrepancy is readily explained in the terms just described: unlike the 1964 Congress, the later lawmakers actually *intended* to prohibit sexual-orientation discrimination, and they presumably (and sensibly) thought that naming “sexual orientation” was the best way to make that legal intention clear. If that is why they proceeded as they did, it supports no inference about their views as to the communicative content that a reader who is oblivious to a lawmaker's legal intentions would most reasonably impute to a statute or regulation that names “sex” but not “sexual orientation,” let alone a statute or regulation that predated the contrary practice that these later lawmakers established.

302. *Id.* at 1775 (Alito, J., dissenting).

