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## COMMENTS

### WHICH TEXTUALISM?

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#### INTRODUCTION

The academic indictment of textualism was almost in. Although textualism has in recent decades gained considerable prominence within the federal judiciary,<sup>1</sup> legal scholars remain skeptical: critics argue that textualism is insensitive to the actual workings of Congress,<sup>2</sup> overly rigid,<sup>3</sup> or (conversely) overly malleable<sup>4</sup> and thus not much different from its main competitor purposivism.<sup>5</sup> Moreover, some critics charge that textualism is not a neutral method of interpretation at all. Instead,

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<sup>1</sup> Justice Kagan commented several years ago that “w[e] are] all textualists now.” Harvard Law School, *The 2015 Scalia Lecture | A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE at 08:28 (Nov. 25, 2015), <https://youtu.be/dpEtszFToTg> [<https://perma.cc/6HMD-727M>]. Although that may be an exaggeration, Justice Kagan’s comment captures how the rise of modern textualism has impacted the way that judges approach cases. See Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 793 (2018) (underscoring the influence of textualism in the courts); Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 54 (noting that “[t]he Roberts Court is often described as textualist” although questioning whether that characterization is “wholly accurate”).

<sup>2</sup> See Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside — An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 905–06, 968–69 (2013) (urging, based on a survey of 137 congressional staffers responsible for drafting legislation, that “[i]f one were to construct a theory of interpretation based on how members themselves engage in the process of statutory creation, a text-based theory is the last theory one would construct,” *id.* at 969); see also VICTORIA NOURSE, MISREADING LAW, MISREADING DEMOCRACY 7 (2016) (arguing that textualism, along with other prominent interpretive theories, “misunderstand[s] Congress”).

<sup>3</sup> See Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117, 120 (2009) (arguing that textualism becomes “less workable” as an interpretive method over time).

<sup>4</sup> See Abbe R. Gluck, *Justice Scalia’s Unfinished Business in Statutory Interpretation: Where Textualism’s Formalism Gave Up*, 92 NOTRE DAME L. REV. 2053, 2076 (2017); Victoria Nourse, *Textualism 3.0: Statutory Interpretation After Justice Scalia*, 70 ALA. L. REV. 667, 668–69 (2019) (arguing that textualism does not provide objective answers).

<sup>5</sup> See Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1280, 1352 (2020); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 3 (2006); see also Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819, 1821, 1823, 1848–54 (2016) (arguing that textualism, like other theories, has “shed many . . . core commitments” and thus “work[ed] itself impure,” *id.* at 1821).

these commentators insist, textualism is often used as a smokescreen by conservative judges to reach ideologically acceptable outcomes.<sup>6</sup>

Enter *Bostock v. Clayton County*.<sup>7</sup> The case was the culmination of years of litigation asking whether discrimination against a gay, lesbian, or transgender individual qualifies as “discriminat[ion] . . . because of such individual’s . . . sex” under Title VII of the Civil Rights Act of 1964.<sup>8</sup> The text appeared to strongly favor the plaintiffs: terminating a male employee because he is romantically attracted to men, or dismissing an employee after she announces her transition from male to female, seem like instances of discrimination because of “sex.” And to the surprise of many (who doubted that textualism could lead to such a progressive outcome), that is precisely what the Supreme Court held.<sup>9</sup> In an opinion written by self-proclaimed textualist Justice Gorsuch<sup>10</sup> (and joined by fellow conservative Chief Justice Roberts), the Court declared that “to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex. That has always been prohibited by Title VII’s plain terms . . . .”<sup>11</sup>

This result may be reason enough to reexamine some assumptions about textualism. But *Bostock* revealed something more: important tensions *within* textualism. After all, the dissenting opinions purported to

<sup>6</sup> See Neil H. Buchanan & Michael C. Dorf, *A Tale of Two Formalisms: How Law and Economics Mirrors Originalism and Textualism*, 106 CORNELL L. REV. (forthcoming 2020) (manuscript at 37–42) (on file with the Harvard Law School Library) (urging that statutory textualism and constitutional originalism are “a rhetorical smokescreen for extremely Conservative results,” *id.* at 42); William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term — Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 77 (1994) (suggesting that “the new, tougher version of textualism advocated by Justices Scalia and Thomas . . . serves as a cover for the injection of conservative values into statutes”); see also Margaret H. Lemos, *The Politics of Statutory Interpretation*, 89 NOTRE DAME L. REV. 849, 851 (2013) (reviewing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* (2012)) (noting that “textualism is widely regarded as a politically conservative methodology”); Alexander Volokh, *Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else*, 83 N.Y.U. L. REV. 769, 771–75 (2008) (recognizing, but questioning, the “conventional wisdom” that “[t]extualism is a ‘conservative’ method of statutory interpretation,” *id.* at 771).

<sup>7</sup> 140 S. Ct. 1731 (2020).

<sup>8</sup> 42 U.S.C. § 2000e-2(a)(1); see Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253–66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17).

<sup>9</sup> See Robert Barnes, *Neil Gorsuch? The Surprise Behind the Supreme Court’s Surprising LGBTQ Decision*, WASH. POST (June 16, 2020, 8:06 PM), [https://www.washingtonpost.com/politics/courts\\_law/neil-gorsuch-gay-transgender-rights-supreme-court/2020/06/16/112f903c-afe3-11ea-8f56-63f38c990077\\_story.html](https://www.washingtonpost.com/politics/courts_law/neil-gorsuch-gay-transgender-rights-supreme-court/2020/06/16/112f903c-afe3-11ea-8f56-63f38c990077_story.html) [<https://perma.cc/Q6BJ-AEU8>].

<sup>10</sup> See NEIL GORSUCH, *A REPUBLIC, IF YOU CAN KEEP IT* 131–32 (2019) (“[T]extualism offers a known and knowable methodology for judges to determine impartially . . . what the law is.” *Id.* at 132.). Justice Gorsuch was clear about his preference for textualism during his confirmation hearing. See *Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 115th Cong.* 131 (2017) (statement of Judge Neil M. Gorsuch).

<sup>11</sup> 140 S. Ct. at 1743.

rely on textualism, too. The majority opinion applied what this Comment refers to as “formalistic textualism,” an approach that instructs interpreters to carefully parse the statutory language, focusing on semantic context and downplaying policy concerns or the practical (even monumental) consequences of the case. The dissenting opinions offered a more “flexible textualism,” an approach that attends to text but permits interpreters to make sense of that text by considering policy and social context as well as practical consequences. To “ordinary people” in 1964, the dissenters insisted, discrimination on the basis of “sexual orientation” was categorically different from, and not a subset of, discrimination on the basis of “sex.”<sup>12</sup> In sum, *Bostock* was not a case about textualism; it was a case about *textualisms*.

Scholarship on statutory interpretation has largely overlooked the divisions within textualism (perhaps because so many scholars reject textualism at the outset).<sup>13</sup> The academic debate tends to focus on whether an interpreter, particularly a judge, should be a “textualist” or a “purposivist.”<sup>14</sup> The answer, it seems, depends largely on one’s understanding of Article I of the U.S. Constitution and the legislative process.<sup>15</sup> Textualists argue that judges must respect the (often messy) compromises reached through the bicameralism and presentment process of Article I, Section 7 by enforcing a clear text, even if it seems in tension with the apparent intent or purpose underlying the statute.<sup>16</sup> Purposivists contend that,

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<sup>12</sup> *Id.* at 1766, 1772 (Alito, J., dissenting) (“[I]n 1964, ordinary Americans most certainly would not have understood Title VII to ban discrimination because of sexual orientation or gender identity.” *Id.* at 1772.); *id.* at 1828 (Kavanaugh, J., dissenting) (asserting that “common parlance” treated the categories as distinct).

<sup>13</sup> These tensions are, however, suggested by some of the academic criticisms, which have urged that textualism is both too rigid and too malleable. See *supra* notes 3–5 and accompanying text.

<sup>14</sup> See Richard H. Fallon, Jr., *The Statutory Interpretation Muddle*, 114 NW. U. L. REV. 269, 278–79 (2019) (characterizing the statutory interpretation debate as between textualists and purposivists); David S. Louk, *The Audiences of Statutes*, 105 CORNELL L. REV. 137, 148 (2019); Kevin M. Stack, *The Interpretive Dimension of Seminole Rock*, 22 GEO. MASON L. REV. 669, 683 (2015); see also Abbe R. Gluck, *Congress, Statutory Interpretation, and the Failure of Formalism: The CBO Canon and Other Ways that Courts Can Improve on What They Are Already Trying to Do*, 84 U. CHI. L. REV. 177, 191 (2017) (noting this emphasis, but anticipating that statutory interpretive theory is “(finally) entering the post-‘textualism vs purposivism’ era”). To be sure, there are other important methods. See, e.g., WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 26–27, 157–59 (1994); Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 73 (2012). And some statutory theories do not rest on Article I. See ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY* 4–5, 150, 181, 186–87 (2006) (advocating textualism based on concerns about the judiciary’s limited institutional capacities); Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L.J. 979, 1032–34, 1042–43 (2017) (proposing a “‘conversation’ model,” *id.* at 1032, drawing on due process principles of fair notice).

<sup>15</sup> Most theorists focus on statutory interpretation. As I argue in separate work, for other documents (such as presidential directives), theorists must look outside Article I. See Tara Leigh Grove, *Presidential Laws and the Missing Interpretive Theory*, 168 U. PA. L. REV. 877, 880 (2020).

<sup>16</sup> See U.S. CONST. art. I, § 7; *infra* section I.A, pp. 272–274.

given the complexity of the legislative process, Congress cannot be expected to put everything in the text, and thus judges should interpret a statute so as to fulfill its overall aims and goals.<sup>17</sup>

But this focus on textualism versus purposivism papers over crucial differences within each theoretical field. As *Bostock* illustrates, there are competing strands of textualism. So let us suppose that a judge is convinced that the Article I lawmaking process counsels in favor of textualism. What kind of a textualist should she be?<sup>18</sup>

This Comment argues that the answer to that question has less to do with Article I than with Article III — and the deep tension faced by Article III judges in our constitutional scheme. The Constitution creates a federal judiciary that is both shaped by politics and yet designed to be independent of politics. Article II provides that Supreme Court Justices shall be nominated by the President and confirmed by the Senate.<sup>19</sup> This scheme injects politics into the selection of federal judges. At the same time, Article III creates an independent federal judiciary — one whose members enjoy tenure and salary protections.<sup>20</sup> Thus, upon assuming office, judges are supposed to be independent of the very political and ideological forces that gave them their jobs.

*Bostock* underscored this tension. Although the statutory text favored the plaintiffs' Title VII claim, that was likely to be an uncomfortable result for many textualists. Even if textualism *is* (or can be) an ideologically neutral method, it has long been associated with the conservative legal movement.<sup>21</sup> And a number of the self-proclaimed textualists on the judiciary (including President Trump's appointee Justice

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<sup>17</sup> See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 1374 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (advising that a court should “[i]nterpret the words of the statute . . . so as to carry out the purpose as best it can”); see also STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK* 102 (2010) (“A court that looks to purposes is a court that works as a partner with Congress.”); ROBERT A. KATZMANN, *JUDGING STATUTES* 9–10 (2014) (arguing that a purposive approach better “[r]espect[s] Congress’s work product,” *id.* at 10).

<sup>18</sup> Throughout this Comment, I assume that an individual Justice has a good deal of discretion in selecting her preferred interpretive method. See also *infra* note 167. This Comment aims to give would-be textualist judges guidance on which form of textualism to select. But I also assume that some judges may not choose textualism at all.

<sup>19</sup> See U.S. CONST. art. II, § 2, cl. 2.

<sup>20</sup> See *id.* art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”).

<sup>21</sup> See NEAL DEVINS & LAWRENCE BAUM, *THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT* 117 (2019) (describing textualism and originalism as “two linked theories of legal interpretation that have reshaped Supreme Court decision making and strengthened the conservative legal movement”); STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* 145 (2008).

Gorsuch) were selected with the enthusiastic support of social conservatives,<sup>22</sup> many of whom emphatically opposed the plaintiffs' claim.<sup>23</sup> The litigation leading up to *Bostock* also had a partisan valence: although the Obama Administration concluded in 2012 that Title VII's prohibition on sex discrimination "by definition" encompassed the LGBTQ community,<sup>24</sup> the Trump Administration reversed course in 2017, insisting that such an interpretation would lead to "extreme"<sup>25</sup> and "absurd" results.<sup>26</sup>

Interpretive method can, I argue, help a judge navigate this tension. This Comment contends that a federal judge should favor formalistic textualism — a relatively rule-bound method that promises to better constrain judicial discretion and thus a judge's proclivity to rule in favor of the wishes of the political faction that propelled her into power. Formalistic textualism emphasizes semantic context, rather than social or policy context, and downplays the practical consequences of a decision.<sup>27</sup> Notably, the division between formalistic and flexible textualism identified by this Comment also sheds light on some real, but underappreciated, disputes among textualists: formalistic textualism calls upon interpreters to apply only a "closed set" of normative canons<sup>28</sup> and, relatedly, to rule out canons, such as the absurdity doctrine, that flexible textualism permits and that invite considerable judicial discretion.<sup>29</sup> A

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<sup>22</sup> See Jeremy W. Peters, *Conservative Groups Unify to Push Neil Gorsuch's Confirmation*, N.Y. TIMES (Feb. 1, 2017), <https://nyti.ms/2k0dn4m> [<https://perma.cc/V8JS-B4VS>] (describing how conservative organizations, including "evangelical and anti-abortion groups," joined forces to support the nomination of Neil Gorsuch).

<sup>23</sup> See sources cited *infra* note 241 (discussing social conservatives' reactions to *Bostock*).

<sup>24</sup> *Macy v. Holder*, No. 0120120821, 2012 WL 1435995, at \*11 (E.E.O.C. Apr. 20, 2012); see *Baldwin v. Foxx*, No. 0120133080, 2015 WL 4397641, at \*4 (E.E.O.C. July 15, 2015). The Equal Employment Opportunity Commission (EEOC) under the Obama Administration also initiated one of the three cases that the Supreme Court decided in *Bostock*. See Brief for Respondent Aimee Stephens at 11–13, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 140 S. Ct. 1731 (2020) (No. 18-107) (describing how the EEOC brought suit after Aimee Stephens filed her complaint).

<sup>25</sup> Brief for the Federal Respondent Supporting Reversal at 38, *R.G. & G.R. Harris Funeral Homes*, 140 S. Ct. 1731 (No. 18-107) [hereinafter Brief for the Federal Respondent].

<sup>26</sup> Brief for the United States as Amicus Curiae Supporting Affirmance in No. 17-1618 and Reversal in No. 17-1623 at 17, 25, *Bostock*, 140 S. Ct. 1731 (No. 17-1618, No. 17-1623) [hereinafter Brief for the United States].

<sup>27</sup> Although an emphasis on semantic context has been used to distinguish textualism from purposivism, see John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 76 (2006) [hereinafter Manning, *What Divides*], I argue that it is also an important distinction among textualisms.

<sup>28</sup> Compare John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2474 (2003) [hereinafter Manning, *Absurdity*] (advocating a "closed set" of conventions), with Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 160–63 (2010) (critiquing the position that the set should be closed).

<sup>29</sup> Compare Manning, *Absurdity*, *supra* note 28, at 2391 ("If one accepts the textualist critique of strong intentionalism, it is difficult to sustain the absurdity doctrine . . ."), and John C. Nagle,

judge should, in short, aim to insulate herself from external influences, including the pull of partisan politics that urges her to decide a case in a particular way.

Formalistic textualism may at times seem “wooden.”<sup>30</sup> But this approach has powerful normative justifications. First, this method is consistent with, although a refinement of, early textualists’ emphasis on constraining judicial discretion. Justice Scalia worried that a judge applying purposivism might (mis)read a statute so as to “pursue [her] own objectives and desires.”<sup>31</sup> The concern here is not that an Article III judge will aim to fulfill a personal agenda, but instead that she will be influenced by the ideological forces that drive the Article II selection process. That is, she will feel pressure to rule for her “team.” Although no method can fully cabin judicial discretion, formalistic textualism aims to constrain those impulses.<sup>32</sup>

Second, I want to advance a normative goal for textualism that has not previously been emphasized by the discourse on statutory interpretive theory. This Comment asserts that a judge should opt for formalistic textualism to help protect the legitimacy of the judiciary itself. In our polarized political environment, and in the wake of bitter confirmation fights (including over Justice Gorsuch), commentators have raised doubts about the legitimacy of the Supreme Court.<sup>33</sup> Observers worry that, when one ideological faction captures both the Presidency and the Senate — and thus controls the Article II selection process — that faction can “control” the Supreme Court and ensure that its decisions go in only one ideological direction.<sup>34</sup>

Formalistic textualism can, I suggest, help to mitigate this pressure on judicial legitimacy. Given the mix of federal statutes, a Justice using this method should, as she moves from statutes enacted by conservative Congresses to statutes enacted by progressive Congresses, decide cases that accord with both “conservative” and “progressive” preferences. Moreover, this legitimacy-enhancing function should work even if only

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*Textualism’s Exceptions*, ISSUES IN LEGAL SCHOLARSHIP, Nov. 2002, art. 15, at 3 (similarly rejecting the absurdity doctrine as incompatible with textualism), *with* SCALIA & GARNER, *supra* note 6, at 234–39 (endorsing the absurdity doctrine).

<sup>30</sup> *Cf. Bostock*, 140 S. Ct. at 1745 (noting that the dissents “dismiss [the Court’s treatment of Title VII] as wooden or literal”).

<sup>31</sup> ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 17–18 (Amy Gutmann ed., 1997).

<sup>32</sup> Notably, Justice Gorsuch faced pressure before the *Bostock* ruling and has been heavily criticized by social conservatives since the decision. *See infra* pp. 302–03.

<sup>33</sup> *See* Tara Leigh Grove, *The Supreme Court’s Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2240–42 (2019) (reviewing RICHARD H. FALLON, JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* (2018)) (collecting sources and discussing the controversies surrounding certain Supreme Court nominations and the related attacks on the Court’s “legitimacy”); *infra* section III.B, pp. 296–307.

<sup>34</sup> *See infra* section III.B.2, pp. 300–03.

one or a subset of Justices adopts it. Given our country's focus on individual judicial personalities,<sup>35</sup> it was significant in *Bostock* not only that the Court issued a textualist opinion that favored a progressive cause but also that a presumed-conservative Justice was the author.

At the outset, two caveats. First, this Comment draws a sharper distinction between formalistic and flexible textualism than one sees in practice. No self-proclaimed textualist on the Supreme Court appears to clearly prefer one version or the other. Instead, the Justices vacillate between the two strands,<sup>36</sup> perhaps in part because both have long travelled under the larger banner of “textualism.” Second, one could think of textualist practices not as fitting into two clearly defined categories, but as falling along a continuum — tending either toward the more formalistic or the more flexible end of the spectrum. On that view, this Comment offers reasons for textualists to aim for the more formalistic version — and to dispense with as many practices as possible that render textualism more flexible.

The analysis proceeds as follows. Part I offers background on the rise of textualism as a response to strong purposivism. This Part points to the early judicial treatment of Title VII's sex provision as an important illustration of the potential dangers of purposivism. This example, which has unfortunately been largely ignored by textualists, not only provides important background for *Bostock* but also turns on its head the prevailing assumption that purposivism tends toward “progressive” outcomes, while textualism favors “conservative” ones. Part II then turns to *Bostock* and the two strands of textualism that have emerged: a more formalistic and a more flexible version. Part III advocates formalistic textualism in large part as a way to protect judicial legitimacy. But whether or not one accepts that bottom line, interpretive theorists should begin to grapple with the fact that judges apply not simply textualism but *textualisms*.

## I. TEXTUALISM V. PURPOSIVISM

Modern textualism arose in the 1980s as a response to the dominant form of statutory interpretation: purposivism. Textualists claimed to offer an approach that would be more faithful to the words actually used by the legislature and also better constrain the federal judiciary.

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<sup>35</sup> See Richard L. Hasen, *Celebrity Justice: Supreme Court Edition*, 19 GREEN BAG 2D 157, 158 (2016); Suzanna Sherry, *Our Kardashian Court (and How to Fix It)* 2, 4 (Vanderbilt Univ. L. Sch. Legal Stud. Rsch. Paper Series, Paper No. 19-30, 2019) (discussing and criticizing this tendency); see also Chad M. Oldfather, *The Inconspicuous DHS: The Supreme Court, Celebrity Culture, and Justice David H. Souter* 34–35 (Marquette L. Sch. Legal Stud., Paper No. 20-04, 2020) (critiquing the “celebrity culture”).

<sup>36</sup> See *infra* note 167.

As discussed below, the judicial treatment of Title VII's sex provision offers an important illustration of textualists' concerns.

*A. The Textualist Challenge to Strong Purposivism*

Textualists objected primarily to what they called "strong purposivism" — the notion that the "spirit" could prevail over the "letter" of a statute.<sup>37</sup> Under this approach, a court could "alter even the clearest statutory text" when a case would otherwise lead to a result at odds with congressional intent, expectations, or the apparent "policy of the legislation as a whole."<sup>38</sup>

This approach was famously illustrated by *Church of the Holy Trinity v. United States*.<sup>39</sup> The statute at issue — the Alien Contract Labor Act of 1885<sup>40</sup> — prohibited "any person" from entering a "contract or agreement" to bring "any alien or . . . any foreigner . . . into the United States . . . to perform labor or service of any kind."<sup>41</sup> However, the Court held, relying in part on the legislative history, that the statute did not bar "labor or service of any kind"<sup>42</sup> but was meant to limit only "cheap[,] unskilled labor."<sup>43</sup> Accordingly, the law did not prohibit a church from contracting for the services of an English pastor.<sup>44</sup> Although the statutory language was "broad enough to reach" the pastor,<sup>45</sup> the Court was confident that Congress could not have intended such a result: "It is a familiar rule, that a thing may be within the letter of the

<sup>37</sup> See *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 543 (1940) (noting that the Court had often departed from the text "when the plain meaning" would produce "an unreasonable [result] 'plainly at variance with the policy of the legislation as a whole'" (quoting *Ozawa v. United States*, 260 U.S. 178, 194 (1922))).

<sup>38</sup> John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 11 (2001) [hereinafter Manning, *Equity*] (quoting *Am. Trucking Ass'ns*, 310 U.S. at 543) (describing "strong purposivism"). One can of course separate "intent" from "purpose." See Archibald Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 HARV. L. REV. 370, 370-71 (1947) (treating "intent" as a wish for how a law will be applied in a given case, *id.* at 371, and "purpose" as the law's "general aim or policy," *id.* at 370). But in this section, I treat all these concepts — assumptions about congressional intent, purpose, expectations, and policy — as falling under the umbrella of strong purposivism, because that seems to be how early textualists treated them. See Manning, *What Divides*, *supra* note 27, at 86-87, 86 n.59 (asserting that the Legal Process materials of Professors Henry Hart and Albert Sacks, taken by many to be a broadly representative statement of purposivism, "reflect the strong form of atextual, purposive interpretation that has troubled textualists," *id.* at 86 n.59).

<sup>39</sup> 143 U.S. 457 (1892); see, e.g., SCALIA, *supra* note 31, at 18-22 (criticizing *Holy Trinity*).

<sup>40</sup> Ch. 164, 23 Stat. 332 (repealed 1952).

<sup>41</sup> *Id.*

<sup>42</sup> *Holy Trinity*, 143 U.S. at 458.

<sup>43</sup> *Id.* at 465.

<sup>44</sup> See *id.* at 457-58, 472.

<sup>45</sup> *Id.* at 472; see *id.* at 458-59 ("It must be conceded that the [contract here] is within the letter of th[e Act.]" *Id.* at 458.).



statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.”<sup>46</sup>

Beginning in the 1980s, textualists — led by Justice Scalia and Judge Easterbrook — mounted a campaign against this focus on the purpose and spirit, rather than the words, of a statute.<sup>47</sup> Textualists started from the premise that, under Article I, only the text voted upon by the House of Representatives and the Senate and signed by the President (or passed over a presidential veto) constitutes the law.<sup>48</sup> But that was only a starting point;<sup>49</sup> textualists further insisted that it was crucial to adhere to the specific terms of this law. As textualism’s leading academic defender Dean John Manning has emphasized, the bicameralism and presentment process effectively creates a supermajority requirement for every piece of legislation.<sup>50</sup> These procedures thus also grant “political minorities extraordinary power to block legislation or insist upon compromise as the price of assent.”<sup>51</sup> Interpreters respect the (at times messy and unknowable) compromises reached through this process by enforcing the specific provisions of a statute, even when those provisions seem to conflict with some background policy or purpose.

Textualists also objected to strong purposivism as granting far too much discretion to judges. Justice Scalia worried that purposivism would allow judges to read their own preferences into a law:

When you are told to decide, not on the basis of what the legislature said, but on the basis of what it *meant*, and are assured that there is no necessary connection between the two, your best shot at figuring out what the legislature meant is to ask yourself what a wise and intelligent person *should* have meant; and that will surely bring you to the conclusion that the law means what you think it *ought* to mean . . . .<sup>52</sup>

<sup>46</sup> *Id.* at 459; *see id.* at 472 (“It is the duty of the courts, under those circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute.”).

<sup>47</sup> *See* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 685 (1997) [hereinafter Manning, *Nondelegation*] (identifying Justice Scalia and Judge Easterbrook as “the clearest and most influential voices” for modern textualism).

<sup>48</sup> *See* U.S. CONST. art. I, § 7; SCALIA, *supra* note 31, at 25; Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 539 (1983) (“Under article I . . . support is not enough . . . . If the support cannot be transmuted into an enrolled bill, nothing happens.”).

<sup>49</sup> As Dean John Manning has cautioned, this notion — that the text alone is the law — does not tell us how to interpret that law. *See* Manning, *Equity*, *supra* note 38, at 71 (noting that Article I “provides us merely with a rule of recognition”).

<sup>50</sup> *Id.* at 74–75; *see* U.S. CONST. art. I, § 7; *see also* Grove, *supra* note 15, at 891–92 (discussing textualist theory).

<sup>51</sup> Manning, *What Divides*, *supra* note 27, at 77.

<sup>52</sup> SCALIA, *supra* note 31, at 17–18; *see also* Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL’Y 59, 62–63 (1988) (arguing that “[t]he use of original *intent* rather than an objective inquiry into the reasonable import of the language . . . greatly increases the discretion, and therefore the power, of the court,” *id.* at 62).

Textualists raised similar concerns about the use of legislative history. Although textualists objected to reliance on committee reports and floor statements in part on constitutional grounds,<sup>53</sup> a key concern was pragmatic: legislative history was so vast and mixed that a judge could virtually always find something to support a given interpretation. Accordingly, textualists argued that “[j]udicial investigation of legislative history has a tendency to become . . . an exercise in ‘looking over a crowd and picking out your friends.’”<sup>54</sup>

### B. *Strong Purposivism and Title VII*

The judicial treatment of Title VII’s prohibition on sex discrimination illustrates the concerns raised by textualists about strong purposivism. Relying both on assumptions about legislative intent and on selective references to legislative history, federal judges repeatedly narrowed what was, at bottom, a revolutionary statute.

Importantly, although much of this history has been explored by employment discrimination scholars (accounts that I rely on here), it has been largely ignored by textualists.<sup>55</sup> This omission is unfortunate. The story of Title VII offers a considerable counterweight to the assumption that purposivism tends toward “progressive” outcomes, while textualism leads to “conservative” ones. Moreover, this history demonstrates a point that textualists have rarely emphasized: how constraining judicial discretion may be valuable for politically vulnerable communities.<sup>56</sup>

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<sup>53</sup> See *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (“The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators.”); Manning, *Nondelegation*, *supra* note 47, at 719 (arguing that reliance on legislative history as a source of statutory meaning allows Congress to delegate responsibility to its legislative agents, whom it effectively controls, and thus “threat[ens] . . . the constitutional safeguards of bicameralism and presentment”). Notably, some textualists are willing to look at legislative history in certain limited circumstances. See SCALIA & GARNER, *supra* note 29, at 382 (stating that courts may look to legislative history to determine the specialized meaning of a technical term).

<sup>54</sup> *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (Kennedy, J.) (quoting Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983)). In their 2012 treatise, Justice Scalia and Professor Bryan Garner assert that cases of intentional manipulation are “exceptional” (although they still question the utility of legislative history). See SCALIA & GARNER, *supra* note 6, at 378.

<sup>55</sup> Several scholars whose work influences this section expressly disavow any allegiance to textualism. See, e.g., ESKRIDGE, *supra* note 14, at 199–204 (defending a dynamic and critical pragmatic approach); Jessica A. Clarke, *Protected Class Gatekeeping*, 92 N.Y.U. L. REV. 101, 114 n.79 (2017) (favoring dynamic interpretation); Cary Franklin, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 HARV. L. REV. 1307, 1318–19 (2012) (supporting a dynamic interpretation of Title VII).

<sup>56</sup> Justice Gorsuch, however, is one textualist who has suggested this point. See GORSUCH, *supra* note 10, at 131, 144 (asserting that textualism helps ensure that all people, “not just the popular or powerful,” *id.* at 131, get the benefit of a law).

Title VII declares that “[i]t 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.”<sup>57</sup> The statute contains a narrow exception: an employer *may* discriminate on the basis of sex (or religion or national origin but, notably, not race) “*in those certain instances* where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.”<sup>58</sup> The language of Title VII is thus written with considerable breadth. As Professor Mary Anne Case has remarked, “the stricter a constructionist one is, the more seriously one takes statutory language, the more inescapably one is led to a quite radical view of the effect of Title VII.”<sup>59</sup>

Many judges in the 1960s and 1970s, however, did not take the text of Title VII seriously.<sup>60</sup> Courts, for example, rejected sex discrimination claims when women (but not men) were barred from employment for getting married<sup>61</sup> or having young children.<sup>62</sup> The discrimination, the courts asserted, was about marriage or motherhood, not sex.<sup>63</sup> During

<sup>57</sup> 42 U.S.C. § 2000e-2(a)(1).

<sup>58</sup> *Id.* § 2000e-2(e)(1) (emphasis added); see also Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 974–75 (2019) (noting that courts construe the defense narrowly). One example of a “bona fide occupational qualification” arises in the performance context: a theater may hire only women to play female roles. 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, 12 n.23 (1995) [hereinafter Case, *Disaggregating*] (noting, but criticizing, this example).

<sup>59</sup> Case, *Disaggregating*, *supra* note 58, at 48.

<sup>60</sup> The EEOC was also initially reluctant to enforce the prohibition on sex discrimination. See Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 DENV. U. L. REV. 995, 1023–33 (2015).

<sup>61</sup> See *Cooper v. Delta Air Lines, Inc.*, 274 F. Supp. 781, 782 (E.D. La. 1967) (“Congress branded as illegal almost every employment practice which discriminates against an individual because of her race, color, religion, sex, or national origin. But Congress did not outlaw Delta’s discretion to hire only stewardesses who are single and young,” nor did Congress prohibit “the requirements that Delta’s stewardesses must . . . be ‘attractive’, and their ‘family background’ . . . must be ‘good’.”).

<sup>62</sup> *Phillips v. Martin Marietta Corp.*, 411 F.2d 1, 4 (5th Cir. 1969) (finding no “Congressional intent to exclude absolutely any consideration of the differences between the normal relationships of working fathers and working mothers to their pre-school age children[.] . . . [nor a Congressional requirement] that an employer treat the two exactly alike” in its hiring policies). The Supreme Court later vacated the decision (although it left room for the employer to show that hiring only men with young children was a “bona fide occupational qualification”). *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (per curiam); see also Franklin, *supra* note 55, at 1356 (noting that “what the Court gave [in *Phillips*], it then took away”).

<sup>63</sup> See *Cooper*, 274 F. Supp. at 783 (“The discrimination lies in the fact that the plaintiff is married — and the law does not prevent discrimination against married people in favor of the single ones.”); *Phillips*, 411 F.2d at 4 (“The discrimination was based on a two-pronged qualification, i.e., a woman with pre-school age children.”).

this era, courts also dismissed as “ludicrous” claims that Title VII barred sexual harassment.<sup>64</sup>

Courts interpreted Title VII narrowly in large part because of their reading of the statute’s legislative history.<sup>65</sup> The primary purpose of the law, courts declared, was to combat racial discrimination.<sup>66</sup> The “sex amendment” was proposed at the last minute by Virginia Representative Howard Smith, a conservative Southern Democrat whose only goal was to prevent the passage of civil rights legislation.<sup>67</sup> Accordingly, the prohibition on sex discrimination was at best an afterthought and at worst a poison pill.<sup>68</sup> Building on this narrative, courts repeatedly held that Congress could not have intended to do very much at all with the prohibition on sex discrimination.<sup>69</sup>

Scholars have forcefully argued that this narrative is, to put it mildly, incomplete. Representative Smith made the proposal at the urging of women’s rights advocates, and female members of Congress (who also favored the broader civil rights effort) strongly supported the measure.<sup>70</sup>

<sup>64</sup> *E.g.*, *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975); *see also* Franklin, *supra* note 55, at 1310 n.10 (noting the early rejection of sexual harassment claims); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1701 (1998) (stating that courts hearing early Title VII claims “reason[ed] that the women’s adverse treatment occurred because of their refusal to engage in sexual affairs with their supervisors and not ‘because of sex’”).

<sup>65</sup> *See* Robert C. Bird, *More than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137, 137–38, 142–43 (1997).

<sup>66</sup> *See* *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984) (“Congress . . . was primarily concerned with race discrimination. ‘Sex as a basis of discrimination was added as a floor amendment one day before the House approved Title VII . . .’” (footnote omitted) (quoting *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977)); *see also* William N. Eskridge Jr., *Title VII’s Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 YALE L.J. 322, 347 (2017) (“Administrators and judges were slow to apply Title VII’s sex discrimination bar vigorously, in part because they believed the primary statutory mission to be eradication of race-based discrimination and did not think Congress expected them to dislodge traditional gender roles or, perhaps, to do much about workplace sex discrimination at all.”).

<sup>67</sup> *E.g.*, *Willingham v. Macon Tel. Publ’g Co.*, 507 F.2d 1084, 1090 (5th Cir. 1975) (noting that Representative Smith “was accused by some of wishing to sabotage” the Act); *see also* Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1283 (1991) (describing the sex amendment as “a last minute joking ‘us boys’ attempt to defeat Title VII’s prohibition on racial discrimination”).

<sup>68</sup> *See* ALICE KESSLER-HARRIS, *IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA* 239 (2001) (“Popular lore holds that *sex* was added to the title of this bill as something of a joke.”).

<sup>69</sup> *See* Zachary A. Kramer, *Heterosexuality and Title VII*, 103 NW. U. L. REV. 205, 213 (2009) (asserting that this “traditional view” of the legislative history has led courts to interpret the provision “narrowly”). One study, however, finds that courts did not universally use this “stock story” to narrow the law. *See* Rachel Osterman, Comment, *Origins of a Myth: Why Courts, Scholars, and the Public Think Title VII’s Ban on Sex Discrimination Was an Accident*, 20 YALE J.L. & FEMINISM 409, 426–32 (2009).

<sup>70</sup> *See* CYNTHIA HARRISON, *ON ACCOUNT OF SEX* 176–82 (1988) (describing how the National Woman’s Party urged Representative Smith to propose the amendment, *id.* at 177, and how all but one of the twelve female members of the House spoke in favor, *id.* at 178–79);

Professor Cary Franklin recounts that, during the floor debates, some supporters urged that the “core purpose” of the sex amendment was to undermine “traditional sex and family roles.”<sup>71</sup> Yet these statements were ignored by many federal judges. The judicial treatment of Title VII thus underscores one of textualists’ greatest concerns about legislative history: that judges might “look over . . . the crowd and pick out” the parts that support their preferred outcome.<sup>72</sup>

Early sex discrimination claims brought by gay, lesbian, and transgender individuals were dismissed on similar grounds<sup>73</sup> (although in this area it took courts a great deal longer to modify their approach<sup>74</sup>). In a detailed analysis of this early litigation, Professor Jessica Clarke forcefully argues: “[T]he early opinions were not based on the plain meaning of the text.”<sup>75</sup> Instead, “[u]nder the influence of then-prevalent methodologies of statutory interpretation that asked about the spirit rather than the letter of the law,” courts rejected the plaintiffs’ textual arguments and “invent[ed] limiting principles to preserve employer discretion to enforce traditional gender norms.”<sup>76</sup> Clarke further contends

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KESSLER-HARRIS, *supra* note 68, at 239–46; Mary Anne Case, *Reflections on Constitutionalizing Women’s Equality*, 90 CALIF. L. REV. 765, 766–69 (2002) (noting the “odd coalition of racist southern male and moderate northern female and Republican members of Congress,” *id.* at 766–67, responsible for the passage of the sex amendment).

<sup>71</sup> Franklin, *supra* note 55, at 1326. Even Representative Smith’s motives are uncertain. Although he opposed racial civil rights, he was a proponent of some sex equality provisions, such as the Equal Rights Amendment. See HARRISON, *supra* note 70, at 177. Accordingly, he may have believed that, if there were to be a federal prohibition on employment discrimination, it should include “sex.” See *id.*

<sup>72</sup> SCALIA, *supra* note 31, at 36 (invoking the saying by Judge Harold Leventhal).

<sup>73</sup> Franklin, *supra* note 55, at 1310, 1374–76 (noting that “sexual minorities began to make such claims in the 1970s,” *id.* at 1374, and that courts relied on the (lack of) legislative history as well as assumptions about congressional intent in denying the claims, *id.* at 1310).

<sup>74</sup> While courts were more willing to accept some sex discrimination claims by the 1970s (including claims of sexual harassment), see *id.* at 1311 n.16, 1354–58, courts did not begin to recognize claims by transgender individuals until the early 2000s. See Naomi Schoenbaum, *The New Law of Gender Nonconformity*, 105 MINN. L. REV. (forthcoming 2020) (manuscript at 12–20) (on file with the Harvard Law School Library) (describing the history of claims by transgender individuals). And it was not until 2017 that the first court of appeals held that the disparate treatment of a gay or lesbian employee was discrimination because of such individual’s sex. See *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 339 (7th Cir. 2017) (en banc).

<sup>75</sup> Jessica A. Clarke, *How the First Forty Years of Circuit Precedent Got Title VII’s Sex Discrimination Provision Wrong*, 98 TEX. L. REV. ONLINE 83, 89 (2019); see also *id.* at 87; Mary Anne Case, Essay, *Legal Protections for the “Personal Best” of Each Employee: Title VII’s Prohibition on Sex Discrimination, the Legacy of Price Waterhouse v. Hopkins, and the Prospect of ENDA*, 66 STAN. L. REV. 1333, 1342 (2014) [hereinafter Case, *Legal Protections*] (“A hallmark of these [early] decisions is that they claimed to be relying on the statutory text while they blatantly disregarded its actual language.”).

<sup>76</sup> Clarke, *supra* note 75, at 89. Notably, some of the early decisions rejecting claims by gay, lesbian, and transgender plaintiffs did purport to rely on the “plain meaning” of the text. But as Clarke asserts, these decisions also emphasized legislative intent and history, while failing to engage with some textual arguments that were raised by the plaintiffs. See *id.* at 111; *Ulane v. E. Airlines*,

that these precedents had considerable staying power: even after modern textualists began to challenge purposivism, “the old cases continued to exert precedential force for decades.”<sup>77</sup>

It is impossible, of course, to say for sure how this litigation would have proceeded if judges had adopted an alternative interpretive theory. But there is at least some evidence that a textualist approach would have benefited the plaintiffs.<sup>78</sup> For example, in 1977, Judge Goodwin (an appointee of President Nixon) filed a dissenting opinion in a case ruling against a transgender plaintiff, protesting that the court of appeals had transgressed the text of Title VII by rejecting the plaintiff’s claim.<sup>79</sup> Although Judge Goodwin “agree[d] with the majority . . . that Congress probably never contemplated that Title VII would apply to transsexuals,” “[b]y its language, the statute proscribes discrimination among employees because of their sex.”<sup>80</sup> And, here, the plaintiff “allege[d] that she was fired for being (or becoming) female under circumstances that allegedly disturbed her fellow workers and therefore motivated her employer to terminate her employment.”<sup>81</sup>

In subsequent years, according to Professors Clarke and Katie Eyer, modern textualism “gave courts reasons to be skeptical about the legislative intent arguments at the foundations of . . . the old cases, which had strained” to limit Title VII “to avoid its application to contexts that judges thought the 1964 Congress would not have approved of.”<sup>82</sup> And, notably, the first court of appeals decision to hold that gay and lesbian

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Inc., 742 F.2d 1081, 1084–87 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 661–63 (9th Cir. 1977).

<sup>77</sup> Clarke, *supra* note 75, at 89; *see also* Case, *Legal Protections*, *supra* note 75, at 1342 (“Other courts reflexively cited these [earlier] precedents for decades without ever reexamining them.”).

<sup>78</sup> *See* Clarke, *supra* note 75, at 87 (stating that plaintiffs’ textual arguments were accepted by some district court judges and dissenting appellate judges). I do not mean to suggest that a purposive approach *could not* favor plaintiffs in sex discrimination cases. From the outset, courts might have viewed Title VII as aimed at the subordination of one sex in the workplace — and treated discrimination against sexual minorities as bound up with that subordination. *See* Brian Soucek, *Hively’s Self-Induced Blindness*, 127 YALE L.J.F. 115, 121–23, 121 n.36 (2017) (collecting sources urging that “sexual orientation discrimination” is bound up with the “subordination of women,” *id.* at 121); *cf.* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 199 (1994) (arguing that equal protection jurisprudence supports Fourteenth Amendment protections for lesbians and gay men). Many judges, however, did not take that approach.

<sup>79</sup> *See Holloway*, 566 F.2d at 664 (Goodwin, J., dissenting).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> Clarke, *supra* note 75, at 118–19; *see also* Katie R. Eyer, *Statutory Originalism and LGBT Rights*, 54 WAKE FOREST L. REV. 63, 83–86 (2019) (urging that “the rise of textualist modalities of statutory interpretation” has been “critical . . . to the increasing success of LGBT sex discrimination claims,” *id.* at 84). To be sure, another crucial development was the increased acceptance of the LGBTQ community. *See* Clarke, *supra* note 75, at 112; Eyer, *supra*, at 83, 86.

individuals were protected by Title VII was joined in full by one of textualism's leading defenders: Judge Easterbrook.<sup>83</sup>

## II. TEXTUALISM V. TEXTUALISM

Framed as a response to strong purposivism, textualism offered a powerful, and seemingly coherent, vision: no longer should judges pore through legislative history or rely on assumptions about legislative intent and expectations. Courts should focus on the words selected by Congress and the President through the complex Article I lawmaking process. Notably, the rise of textualism seemed to bode well for Title VII sex discrimination claims, including those by sexual minorities; as we have seen, those claims did not fare well under a strong purposivist regime. And in the years leading up to *Bostock*, a few scholars and attorneys predicted that the Supreme Court would issue a textualist opinion holding that the disparate treatment of a gay, lesbian, or transgender employee was discrimination because of such individual's sex.<sup>84</sup>

That prediction, of course, turned out to be correct. But these commentators were perhaps a bit too quick to anticipate an employee victory. Textualism turns out not to be a coherent, unified theory. Instead, as *Bostock* illustrates, there seem to be at least two strands of textualism: (1) a more formalistic version, which instructs interpreters to carefully parse the statutory language, focusing on semantic context, and (2) a more flexible version, which permits interpreters to make sense of the text by considering policy and social context as well as practical consequences. This Part explores these competing textualisms.

### A. *Bostock and the Two Textualisms*

One reason that textualism was susceptible to division is that certain central concepts have been undertheorized. Modern textualists have, for example, long insisted that the method is not literalism.<sup>85</sup> Instead, one can understand language only in context.<sup>86</sup> But what context

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<sup>83</sup> See *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 351 (7th Cir. 2017) (en banc).

<sup>84</sup> See Case, *Legal Protections*, *supra* note 75, at 1342 (predicting in 2014 that the Court would “protect sexual minorities under the text of Title VII”); Emma Green, *The LGBTQ-Rights Movement Is Changing, and So Is the Supreme Court*, THE ATLANTIC (Oct. 8, 2019), <https://www.theatlantic.com/politics/archive/2019/10/supreme-court-lgbtq/599608> [https://perma.cc/CEG4-XUF6] (noting Eyer's prediction); Ezra Ishmael Young, *What the Supreme Court Could Have Heard in R.G. & G.R. Harris Funeral Homes v. EEOC and Aimee Stephens*, 11 CALIF. L. REV. ONLINE 9, 10–11, 10 n.5 (2020) (anticipating that some “conservative justices,” *id.* at 10, such as Justices Gorsuch and Kavanaugh, would rule in favor of the transgender plaintiff).

<sup>85</sup> See, e.g., SCALIA, *supra* note 31, at 24 (“[T]he good textualist is not a literalist . . .”).

<sup>86</sup> See, e.g., *Deal v. United States*, 508 U.S. 129, 132 (1993) (Scalia, J.) (underscoring a “fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used”).

matters? Textualists have variously used terms such as “semantic context,”<sup>87</sup> “social context,”<sup>88</sup> and “full context,”<sup>89</sup> without explaining whether the terms refer to the same or different concepts.

At the outset, I want to point out that these different versions of “context” *could* all refer to the same idea. Semantic context does, after all, encompass cultural cues. Consider the Ku Klux Klan Act,<sup>90</sup> which was first enacted in 1871 and today provides that “the President, by using the militia or the armed forces, or both . . . shall take such measures as he considers necessary to suppress, in a State, any insurrection, *domestic violence*, unlawful combination, or conspiracy” if such conduct “hinders the execution of” state or federal law.<sup>91</sup> What does the statute mean when it says that the President may respond to “any . . . domestic violence” within a state? If we take the statute literally, we might say that the President has the power to address tragic abuses within a family; after all, that is the most common use of the term “domestic violence” today.

Yet I suspect that most interpreters would reject that literal view and conclude that the statute permits the President to respond to a violent uprising. How do we get there? We look in part at clues from the surrounding text — the fact that “domestic violence” appears alongside “any insurrection, . . . unlawful combination, or conspiracy” that “hinders the execution of” state or federal law. And with even a basic familiarity with American history and culture (what one might call “social context”), we know that the term “domestic violence” *can* refer to violent uprisings, such as those perpetrated by the Reconstruction-era Ku Klux Klan.<sup>92</sup>

<sup>87</sup> See, e.g., Manning, *What Divides*, *supra* note 27, at 76 (“Textualists give precedence to semantic context . . .”).

<sup>88</sup> See, e.g., Manning, *Absurdity*, *supra* note 28, at 2392–93, 2457 (“[I]t is now well settled that textual interpretation must account for the text in its social and linguistic context.” *Id.* at 2392.).

<sup>89</sup> See, e.g., SCALIA & GARNER, *supra* note 6, at 15–16, 33 (“In their full context, words mean what they conveyed to reasonable people at the time they were written . . .” *Id.* at 16.).

<sup>90</sup> Ku Klux Klan Act of 1871, ch. 22, § 3, 17 Stat. 13, 14 (codified as amended at 10 U.S.C. § 253). For discussions of this statute, see James Forman, Jr., Essay, *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895, 920–26 (2004); Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600, 655–57 (2009); Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 167 (2004).

<sup>91</sup> 10 U.S.C. § 253(1) (emphasis added).

<sup>92</sup> Cf. U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”). Some readers may view this example as straightforward: “domestic violence” should clearly be read in accordance with its nineteenth-century, not modern, meaning. I agree. But note that this interpretation rests in part on an important assumption: we should read the statute in accordance with the meaning at the time of the original enactment (1871), rather than at the time of any amendment (the most recent were in 2008 and 2016). Moreover, to the extent that this example is straightforward, that is because we almost reflexively incorporate our historical and cultural knowledge that “domestic violence” can refer to a violent uprising. That is the point I aim to make here: semantic context may encompass such historical and cultural cues.



Accordingly, one can reconcile the assorted notions of “context” put forth by textualists — and group them all under the umbrella of semantic context. On that view, a textualist should focus on semantic context, zeroing in on the words approved by Congress and the President, rather than the social or policy context surrounding the enactment.<sup>93</sup> Nevertheless, as noted, textualists have not always been precise in their use of the term “context.” This conceptual uncertainty was on full display in *Bostock*.

I. *Formalistic Textualism and Semantic Context.* — The *Bostock* majority opinion exemplifies formalistic textualism. Justice Gorsuch carefully parsed the words of Title VII, focusing closely on semantic context.<sup>94</sup> Indeed, the opinion has an almost algorithmic feel to it.<sup>95</sup> The Court first assumed that the term “sex” in 1964 referred to “biological distinctions between male and female.”<sup>96</sup> The Court then found that “discriminat[ion]” referred to intentional differences in treatment,<sup>97</sup> and that “because of” meant that “sex” had to be a but-for cause of the

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<sup>93</sup> This understanding of textualism accords with Manning’s argument that the term “semantic context” is discrete from the “policy context” of purposivism. See Manning, *What Divides*, *supra* note 27, at 76 (arguing that textualists prioritize “*semantic context* — evidence that goes to the way a reasonable person would use language under the circumstance,” while purposivists emphasize “*policy context* — evidence that suggests the way a reasonable person would address the mischief being remedied”). Notably, in this formulation, the “reasonable person” is a construct. Textualists do not aim to show that any specific person in an earlier era actually read a statute in a given way. See *id.* at 83 (“[T]he statutory meaning derived by textualists is a construct. . . . Justice Scalia’s ‘reasonable’ legislator purports to capture the understanding of an idealized, rather than an actual, legislator.”).

<sup>94</sup> *Bostock*, 140 S. Ct. at 1738–39 (“[To] determine the ordinary public meaning of Title VII’s command[. . .] we orient ourselves to the time of the statute’s adoption, here 1964, and begin by examining the key statutory terms in turn before assessing their impact on the cases at hand . . .”).

<sup>95</sup> The Court’s analysis has been criticized on this ground. See, e.g., Daniel Hemel, *The Problem with that Big Gay Rights Decision? It’s Not Really About Gay Rights*, WASH. POST (June 17, 2020, 6:00 AM), <https://www.washingtonpost.com/outlook/2020/06/17/problem-with-that-big-gay-rights-decision-its-not-really-about-gay-rights> [<https://perma.cc/6E48-BXJQ>] (praising the outcome but criticizing the opinion as “cast[ing] the 1964 Civil Rights Act . . . not as a moral triumph but as a logic problem”).

<sup>96</sup> 140 S. Ct. at 1739. With this assumption, the Court sidestepped debates about alternative understandings of sex and sexuality (and whether those meanings existed in 1964). Cf. generally Clarke, *supra* note 58 (exploring “what American law would look like if it took nonbinary gender seriously,” *id.* at 900).

<sup>97</sup> 140 S. Ct. at 1740 (“What did ‘discriminate’ mean in 1964? As it turns out, it meant then roughly what it means today: ‘To make a difference in treatment or favor (of one as compared with others).’” (quoting WEBSTER’S NEW INTERNATIONAL DICTIONARY 745 (2d ed. 1954))). Justice Gorsuch also emphasized that Title VII bars discrimination against an individual. Accordingly, it did not matter that an employer might discriminate against both gay men and gay women; in that event, the employer would be discriminating against each individual employee because of the individual’s sex. See *id.* at 1741 (“[I]n both cases the employer fires an individual in part because of sex. Instead of avoiding Title VII exposure, this employer doubles it.”); see also Anthony Michael Kreis, *Dead Hand Vogue*, 54 U. RICH. L. REV. 705, 708–09 (2020) (emphasizing the textual focus on “such individual”).

employer's decision.<sup>98</sup> "[T]aken together, an employer who intentionally treats a person worse because of sex — such as by firing the person for actions or attributes it would tolerate in an individual of another sex — discriminates against that person in violation of Title VII."<sup>99</sup>

The Court then applied that legal test to the cases at hand, declaring that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."<sup>100</sup> Justice Gorsuch reasoned that if an employer fires a "male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in [a] female colleague."<sup>101</sup> Likewise, if an employer "fires a transgender person who was identified as a male at birth but who now identifies as a female," and yet "retains an otherwise identical employee who was identified as female at birth, . . . the individual employee's sex plays an unmistakable and impermissible role in the discharge decision."<sup>102</sup>

Justice Gorsuch was also clear about what was *not* relevant to the Court's analysis. The Court would not entertain "naked policy appeals" asserting that applying the statute's plain language could lead to "any number of undesirable policy consequences," such as changes to sex-segregated bathrooms or dress codes.<sup>103</sup> Justice Gorsuch's opinion emphasized not only that those were matters for another day but also that it would violate the proper judicial role to narrow a statutory text out of concern for possible future consequences:

Gone here is any pretense of statutory interpretation; all that's left is a suggestion we should proceed without the law's guidance to do as we think best. But that's an invitation no court should ever take up. The place to make new legislation, or address unwanted consequences of old legislation, lies in Congress.<sup>104</sup>

2. *Flexible Textualism and Social Context.* — To understand the objections raised by the dissenting opinions in *Bostock*, it is important to recognize the areas of consensus between the Court and the dissents. The Justices all agreed that textualism focuses on meaning at the time

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<sup>98</sup> 140 S. Ct. at 1739; *see also* *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (applying a but-for causation standard to Title VII's sex provision).

<sup>99</sup> 140 S. Ct. at 1740.

<sup>100</sup> *Id.* at 1741; *see also id.* at 1746–47 ("We agree that homosexuality and transgender status are distinct concepts from sex. But . . . discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second.").

<sup>101</sup> *Id.* at 1741.

<sup>102</sup> *Id.* at 1741–42.

<sup>103</sup> *Id.* at 1753. Justice Gorsuch did hint that the Court might opt to protect religious liberty in the event of a conflict. *See id.* at 1753–54 (noting Title VII's exemption for religious organizations, the ministerial exception under the First Amendment, and the Religious Freedom Restoration Act, although also emphasizing that "how these doctrines protecting religious liberty interact with Title VII are questions for future cases").

<sup>104</sup> *Id.* at 1753.

of enactment — in this case, the meaning of “discriminat[ion] . . . because of such individual’s . . . sex” in 1964.<sup>105</sup> The majority also assumed, as the dissenters asserted, that the term “sex” in 1964 “referr[ed] only to biological distinctions between male and female.”<sup>106</sup> And the dissenting opinions acknowledged that terminating a male employee because he is romantically attracted to men, or dismissing an employee after she announces her transition from male to female, *might* as a literal matter be “discriminat[ion] . . . because of such individual’s . . . sex.”<sup>107</sup> Nevertheless, the dissents argued, the majority’s holding was erroneous. The Court went awry in large part because it had an impoverished vision of the relevant context for textualism: the Court “ignor[ed] the social context in which Title VII was enacted.”<sup>108</sup>

In an opinion joined in full by Justice Thomas (who has been described as one of the Court’s “most committed textualists”<sup>109</sup>), Justice Alito urged that a court must examine how the terms of a statute would “have been understood by ordinary people at the time of enactment.”<sup>110</sup> Along similar lines, in a separate dissenting opinion, Justice Kavanaugh

<sup>105</sup> See *Bostock*, 140 S. Ct. at 1738–39; *infra* notes 110–113 and accompanying text; see also Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 367 (2005) (“[T]he typical textualist judge seeks to unearth the statutes’ *original* meanings . . .”).

<sup>106</sup> 140 S. Ct. at 1739; see *id.* at 1756–57 (Alito, J., dissenting); *id.* at 1824–25, 1828, 1834 (Kavanaugh, J., dissenting).

<sup>107</sup> See *id.* at 1824–25 (Kavanaugh, J., dissenting) (assuming that, “[f]or the sake of argument, . . . firing someone because of their sexual orientation may, as a very literal matter, entail making a distinction based on sex,” but insisting that “the ordinary meaning of ‘discriminate because of sex’ — not just the literal meaning — [does not] encompass[] sexual orientation discrimination”); *id.* at 1772 (Alito, J., dissenting) (“Even if discrimination based on sexual orientation or gender identity could be squeezed into some arcane understanding of sex discrimination, the context in which Title VII was enacted would tell us that this is not what the statute’s terms were understood to mean at that time.”). The dissenting opinions did not take issue with the Court’s conclusion that “because of” encompasses a but-for standard of causation.

<sup>108</sup> *Id.* at 1773 (Alito, J., dissenting); see *id.* at 1828 (Kavanaugh, J., dissenting). Some academic commentators have criticized the *Bostock* majority on similar grounds. See, e.g., John O. McGinnis, *Errors of Will and of Judgment*, LAW & LIBERTY (June 25, 2020), <https://lawliberty.org/errors-of-will-and-of-judgment> [<https://perma.cc/WU3J-3E5P>] (arguing that the Court’s analysis was “a conceivable interpretation of the [statutory] words in some world” but “certainly not” the best interpretation given “the world in which Title VII was enacted”); see also 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://perma.cc/3CDJ-Z7VE>] (suggesting that “discriminat[ion] against” in Title VII must involve “bias or prejudice” against women or men, rather than against gay, lesbian, or transgender individuals); Nelson Lund, *Unleashed and Unbound: Living Textualism in Bostock v. Clayton County*, FEDERALIST SOC’Y REV. (forthcoming 2020) (manuscript at 180) (on file with the Harvard Law School Library) (arguing that the Court paid insufficient attention to how “because of sex” would “have been understood in 1964”).

<sup>109</sup> John F. Manning, Festschrift, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1311 (2010).

<sup>110</sup> 140 S. Ct. at 1766 (Alito, J., dissenting) (asserting that interpreters gather evidence, including dictionary definitions, to answer this central question).

argued that “common parlance matters in assessing the ordinary meaning of a statute, because courts heed how ‘most people’ ‘would have understood’ the text of a statute when enacted.”<sup>111</sup>

Justice Alito asserted that a focus on social and cultural context was mandated by textualist theory<sup>112</sup>:

[W]hen textualism is properly understood, it calls for an examination of the *social context* in which a statute was enacted because this may have an important bearing on what its words were understood to mean at the time of enactment . . . . For this reason, it is imperative to consider how Americans in 1964 would have understood Title VII’s prohibition of discrimination because of sex.<sup>113</sup>

Justice Alito insisted that “[t]he answer could not be clearer. In 1964, ordinary Americans reading the text of Title VII would not have dreamed that discrimination because of sex meant discrimination because of sexual orientation, much less gender identity.”<sup>114</sup> After all, many Americans in 1964 viewed “homosexuality . . . [as] a mental disorder, and homosexual conduct . . . as morally culpable and worthy of punishment.”<sup>115</sup> Under these circumstances, “[t]he *ordinary meaning* of discrimination because of ‘sex’ was discrimination because of a person’s biological sex, not sexual orientation or gender identity.”<sup>116</sup>

Justice Alito also chided the Court for its “arrogance” in asserting that Title VII was “unambiguous.”<sup>117</sup> After all, as both dissenting opinions underscored, the Court’s approach went against decades of circuit precedent,<sup>118</sup> ignored the fact that subsequent Congresses had considered adding “sexual orientation” as a separate category to Title VII,<sup>119</sup> and failed to consider that other federal statutes, presidential directives,

<sup>111</sup> *Id.* at 1828 (Kavanaugh, J., dissenting) (quoting *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019)); *see also infra* note 127.

<sup>112</sup> *Id.* at 1766 (Alito, J., dissenting) (“Justice Scalia was perfectly clear on this point. The words of a law, he insisted, ‘mean *what they conveyed to reasonable people at the time.*’” (quoting SCALIA & GARNER, *supra* note 6, at 16 (emphasis added))); *see also id.* at 1766–67 (urging that leading textualists have noted the importance of social and linguistic context).

<sup>113</sup> *Id.* at 1767 (emphasis added).

<sup>114</sup> *Id.* (“The possibility that discrimination on either of these grounds might fit within some exotic understanding of sex discrimination would not have crossed their minds.”).

<sup>115</sup> *Id.* at 1769; *see id.* at 1770–71 (discussing state laws criminalizing sodomy, and federal and state government rules denying employment to people who identified as “homosexuals”).

<sup>116</sup> *Id.* at 1767.

<sup>117</sup> *See id.* at 1757.

<sup>118</sup> *Id.* at 1777–78 (chastising the Court for “disregarding over 50 years of uniform judicial interpretation of Title VII’s plain text,” *id.* at 1778); *id.* at 1833 (Kavanaugh, J., dissenting) (“[I]n the first 10 Courts of Appeals to consider the issue, all 30 federal judges agreed that Title VII does not prohibit sexual orientation discrimination. 30 out of 30 judges.”). Notably, Justice Kavanaugh could assert such “unanimity,” *id.* at 1834, only because he opted not to discuss claims by transgender individuals, *see id.* at 1823 n.1. Such claims were *not* universally rejected, even in the 1970s. *See supra* p. 278 and note 74.

<sup>119</sup> *Bostock*, 140 S. Ct. at 1755 (Alito, J., dissenting) (noting bills to add “sexual orientation” or “gender identity”); *id.* at 1824 (Kavanaugh, J., dissenting).

and state laws since 1964 had barred discrimination on the basis of both “sex” and “sexual orientation” (another indication that the terms were distinct).<sup>120</sup> This evidence, of course, postdates the enactment of Title VII in 1964. So as Justice Gorsuch pointed out, one might expect textualists to dismiss such “postenactment legislative history” as a “‘particularly dangerous’ basis on which to rest an interpretation of an existing law.”<sup>121</sup> But Justice Kavanaugh insisted that this evidence was still “telling” — not because it was “relevant to congressional intent regarding Title VII” but because it “demonstrate[d] the widespread usage of the English language in the United States: Sexual orientation discrimination is distinct from, and not a form of, sex discrimination.”<sup>122</sup>

Finally, Justice Alito was deeply concerned about the “far-reaching consequences” of the Court’s decision.<sup>123</sup> He included a detailed appendix to underscore how *Bostock* could transform the interpretation of “[o]ver 100 other federal statutes” that also “prohibit discrimination because of sex.”<sup>124</sup> And, he argued, the Court’s holding “threaten[s] freedom of religion, freedom of speech, and personal privacy and safety.”<sup>125</sup> Justice Alito attacked the Court’s “brusque refusal to consider the consequences of its reasoning” as “irresponsible.”<sup>126</sup>

### B. Flexible Textualism as Textualism

Some readers might question whether flexible textualism is even “textualism.” After all, the dissenting opinions in *Bostock* often seemed to emphasize *not* the statutory language, but rather how the public would have expected Title VII to apply.<sup>127</sup> As Justice Gorsuch suggested, this focus on “expected public meaning” seems strikingly similar

<sup>120</sup> *Id.* at 1829–32 (Kavanaugh, J., dissenting).

<sup>121</sup> *Id.* at 1747 (majority opinion) (quoting *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990)).

<sup>122</sup> *Id.* at 1830 (Kavanaugh, J., dissenting); *see also id.* at 1777 (Alito, J., dissenting) (“Post-enactment events only clarify what was apparent when Title VII was enacted.”).

<sup>123</sup> *Id.* at 1778 (Alito, J., dissenting).

<sup>124</sup> *Id.*; *see also id.* at 1791–96 app. C (listing the statutes).

<sup>125</sup> *Id.* at 1778; *see also id.* at 1778–83 (discussing, among other things, debates over bathroom usage, athletics, and obligations of religious employers, as well as how the Court’s interpretation of Title VII might play out in equal protection cases).

<sup>126</sup> *Id.* at 1778.

<sup>127</sup> Justice Alito made several statements along these lines. *E.g., id.* at 1767 (“In 1964, ordinary Americans reading the text of Title VII *would not have dreamed* that discrimination because of sex meant discrimination because of sexual orientation, much less gender identity. The possibility that discrimination on either of these grounds might fit within some exotic understanding of sex discrimination *would not have crossed their minds.*” (emphasis added)). Notably, although Justice Kavanaugh’s opinion differed from that of Justice Alito in certain respects (particularly in tone and a lack of emphasis on practical consequences), Justice Kavanaugh also underscored how ordinary people would have expected a prohibition on sex discrimination to apply. *See id.* at 1828 (Kavanaugh, J., dissenting) (asserting that, to determine “ordinary meaning,” the Court should look to “common parlance and common legal usage,” and that “[a]s to common parlance, *few in 1964 (or*

to the strong purposivists' emphasis on congressional intent or expectations; the analysis simply switches from lawmakers to the broader public.<sup>128</sup> I return to this concern in Part III.

But this Comment aims to take seriously the dissenters' assertion that their approach was textualism. It is important to recognize that the dissenting opinions in *Bostock* can be seen as part of an underappreciated, but very real, strand of textualism. This strand is textualist in that it treats text as the focal point of the interpretive inquiry and avoids resort to legislative history.<sup>129</sup> But this version of textualism authorizes interpreters to make sense of the statutory language by looking at social and policy context, normative values, and the practical consequences of a decision. I dub this strand of textualist practice "flexible textualism."<sup>130</sup>

Consider, for example, the absurdity doctrine, which permits a court to reject an interpretation that would lead to "absurd results."<sup>131</sup> As Manning has observed, "[t]he absurdity doctrine . . . rests on a judicial judgment that a particular statutory outcome, although prescribed by the text, would sharply contradict society's 'common sense' of morality, fairness, or some other deeply held value."<sup>132</sup> That is, the absurdity doctrine enables a court to inject policy concerns into the interpretive inquiry — even to the point of overriding a plain text. Although *Holy Trinity* is one of the canonical examples of the absurdity doctrine<sup>133</sup> (the Court held that it would be "absurd" to apply the Alien Contract Labor Act to a pastor<sup>134</sup>), many prominent textualists accept some version of

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*today*) would describe a firing because of sexual orientation as a firing because of sex" (emphasis added)).

<sup>128</sup> See *id.* at 1750 (majority opinion) ("[T]he employers take pains to couch their argument in terms of seeking to honor the statute's 'expected applications' rather than vindicate its 'legislative intent.' But the concepts are closely related."); see also Eyer, *supra* note 82, at 65–69 (critically analyzing the focus on "subjective [public] expectations," *id.* at 68, in the litigation leading to *Bostock*).

<sup>129</sup> Although Justice Alito did briefly discuss legislative history, he did not claim that this discussion was part of his textualist analysis. See 140 S. Ct. at 1776 (Alito, J., dissenting).

<sup>130</sup> For purposes of this Comment, I adopt a capacious definition of textualism, see *supra* note 129; *infra* p. 290, so that I can examine varying practices that currently travel under the banner of textualism. I leave to future work whether any of the practices discussed in this section should not be deemed part of "textualism" (properly defined). I also leave for another day whether, or the extent to which, flexible textualism is distinct from some form(s) of purposivism.

<sup>131</sup> See, e.g., *Pub. Citizen v. U.S. Dep't of Just.*, 491 U.S. 440, 453–54 (1989) (relying on *Holy Trinity* to assert that the Court has been "[f]requently" confronted with statutes requiring departure from the text to avoid "absurd results," *id.* at 454 (quoting *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892))); *Sebelius v. Cloer*, 569 U.S. 369, 381 (2013) (explaining that "the sole function of the courts" is to enforce a plain text, "at least where the disposition required by the text is not absurd" (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000))).

<sup>132</sup> Manning, *Absurdity*, *supra* note 28, at 2405–06.

<sup>133</sup> See *id.* at 2403 (describing *Holy Trinity* as "perhaps [the Court's] most influential absurdity decision").

<sup>134</sup> 143 U.S. at 460.

the doctrine.<sup>135</sup> Notably, in *Bostock*, Justice Kavanaugh pointed to the absurdity doctrine to support his argument that the majority opinion was improperly “literal” in its understanding of Title VII.<sup>136</sup>

Many textualists also embrace other normative canons and clear statement rules, such as the constitutional avoidance canon, the rule of lenity, and certain federalism canons (protecting against abrogation of state sovereign immunity or preemption of state law).<sup>137</sup> To the extent that a statute is ambiguous, one can perhaps justify these canons as a way of resolving the ambiguity; textualists, after all, acknowledge that many sources may be relevant to decoding an ambiguous text.<sup>138</sup> But as Judge Barrett has observed, when these devices function in a more “aggressive” fashion — “permitting a court to forgo a statute’s most natural interpretation in favor of a less plausible one” to protect some value external to the legislation — they seem to “pose[] a significant problem . . . for textualists.”<sup>139</sup> Justice Scalia’s early work expresses similar concerns about these “dice-loading” rules: “To the honest textualist, all of these preferential rules and presumptions are a lot of trouble . . . [I]t is virtually impossible to expect uniformity and objectivity [from an interpretive method] when there is added . . . a thumb of indeterminate weight.”<sup>140</sup>

Yet all textualists, including Justice Scalia, have used these canons — at least some of the time.<sup>141</sup> For example, in *Sossamon v.*

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<sup>135</sup> See SCALIA & GARNER, *supra* note 6, at 237 (stating that the “absurdity must consist of a disposition that no reasonable person could intend”); see also Manning, *Absurdity*, *supra* note 28, at 2391 (observing in 2003 that “even the staunchest modern textualists still embrace and apply, even if rarely, at least some version of the absurdity doctrine”).

<sup>136</sup> See *Bostock*, 140 S. Ct. at 1827 & n.4 (Kavanaugh, J., dissenting) (“Another longstanding canon of statutory interpretation — the absurdity canon — similarly reflects the law’s focus on ordinary meaning rather than literal meaning.” *Id.* at 1827 n.4.).

<sup>137</sup> See, e.g., SCALIA & GARNER, *supra* note 6, at 247–339 (endorsing many such canons).

<sup>138</sup> See Barrett, *supra* note 28, at 109–10, 123 (“Some substantive canons express a rule of thumb for choosing between equally plausible interpretations of ambiguous text. The rule of lenity is often described this way . . . .” *Id.* at 109.); see also, e.g., Manning, *What Divides*, *supra* note 27, at 75–76 (noting that “statutory purpose — if derived from sources other than the legislative history — is . . . a relevant ingredient” to interpreting an ambiguous text, *id.* at 76).

<sup>139</sup> Barrett, *supra* note 28, at 109–10. Other scholars, including some other textualists, have acknowledged the tension between textualist principles and the use of normative canons. See John F. Manning, *The Supreme Court, 2013 Term — Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 71–73 (2014) [hereinafter Manning, *Foreword*] (asserting that the Court’s use of practices including “an ever-expanding array of clear statement rules,” *id.* at 72, “recall at least the flavor of *Holy Trinity* — trimming or expanding the conventional meaning of the text in order to serve extratextual values or purposes, at times identified by the Court rather than Congress,” *id.* at 73); see also Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 835 (2017) (noting the “significant theoretical tension between substantive canons and textualism”); Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 565–66 (1992) (arguing that the use of normative canons undermines the philosophy of judicial restraint).

<sup>140</sup> SCALIA, *supra* note 31, at 28.

<sup>141</sup> In a recent empirical study, Professor Anita Krishnakumar finds that textualists do not use normative canons as often as scholars previously assumed. See Krishnakumar, *supra* note 139, at

*Texas*,<sup>142</sup> the Supreme Court applied the clear statement rule that works to protect state sovereign immunity.<sup>143</sup> The statute at issue — the Religious Land Use and Institutionalized Persons Act<sup>144</sup> — conditions the receipt of federal funds on a state’s waiver of immunity from private lawsuits under the Act.<sup>145</sup> The statute provides that a private plaintiff may seek “appropriate relief against a government.”<sup>146</sup> The issue in the case was whether this language (“appropriate relief”) was sufficient to put states on notice that they could be subject to damages claims.<sup>147</sup> In an opinion by Justice Thomas, the Court said no: the text, while apparently sufficient to authorize declaratory and injunctive relief against a state, did not permit money damages.<sup>148</sup> Although damages are another common remedy (indeed, as Justice Sotomayor pointed out in dissent, usually the default remedy<sup>149</sup>), the statute was “not the unequivocal expression of state consent that [the Court’s] precedents require.”<sup>150</sup>

Another development further illustrates the pull of flexible textualism. As noted, under textualist theory, a court is required to stick to the text only if it is unambiguous.<sup>151</sup> One might expect a textualist to focus exclusively on the statutory language in determining whether the law is “ambiguous.” Yet, as Professor Richard Re has forcefully argued, some Justices (including those who are often classified as textualists<sup>152</sup>) have imported normative concerns at the front end — to decide *whether* the law is ambiguous.<sup>153</sup>

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829 (finding, based on a study of 296 statutory interpretation cases from the first six-and-a-half Terms of the Roberts Court, that the Court’s textualist Justices invoked substantive canons in some opinions they authored: “11.0 percent and 11.7 percent for [Justice] Scalia and Justice Clarence Thomas, respectively”).

<sup>142</sup> 563 U.S. 277 (2011).

<sup>143</sup> See *id.* at 285, 290.

<sup>144</sup> Pub. L. No. 106-274, 114 Stat. 803 (2000) (codified at 42 U.S.C. §§ 2000cc to 2000cc-5).

<sup>145</sup> See *Sossamon*, 563 U.S. at 281–82.

<sup>146</sup> 42 U.S.C. § 2000cc-2(a).

<sup>147</sup> See 563 U.S. at 283.

<sup>148</sup> See *id.* at 285, 287, 290 (“[A] waiver of sovereign immunity to other types of relief does not waive immunity to damages.” *Id.* at 285.).

<sup>149</sup> See *id.* at 293 (Sotomayor, J., dissenting); see also *id.* at 299 (“It is not apparent . . . why the phrase ‘appropriate relief’ is too ambiguous to secure a waiver of state sovereign immunity with respect to damages but is clear enough as to injunctive and other forms of equitable relief.”).

<sup>150</sup> *Id.* at 285 (majority opinion).

<sup>151</sup> See sources cited *supra* note 138.

<sup>152</sup> See, e.g., Anita S. Krishnakumar, *Textualism and Statutory Precedents*, 104 VA. L. REV. 157, 163 n.18 (2018) (classifying Justices Scalia and Thomas as “textualists” and Chief Justice Roberts as well as Justices Alito and Kennedy as “textualist-leaning”).

<sup>153</sup> See Richard M. Re, *The New Holy Trinity*, 18 GREEN BAG 2D 407, 407–08, 416–17 (2015). Re at times refers to this development as purposivism, see, e.g., *id.* at 414, but also acknowledges that one could classify the approach as a brand of textualism, see *id.* at 416–17. He goes on to observe that “text continues to play a meaningful role. . . . If a reading has no textual support, then no amount of pragmatism or purpose can carry the day.” *Id.* at 417.



*Bond v. United States*<sup>154</sup> is especially instructive. Carol Anne Bond was criminally prosecuted for using a “chemical weapon” after she attempted to poison her husband’s mistress by spreading two toxic substances on a mailbox.<sup>155</sup> One might not expect these events to result in a federal prosecution, but the relevant statute prohibits “any person” from knowingly “transfer[ing] directly or indirectly . . . any chemical weapon”<sup>156</sup> and defines “chemical weapon” broadly to encompass “any chemical which . . . can cause death, temporary incapacitation or permanent harm to humans or animals.”<sup>157</sup> The poisons used by Bond qualified as “chemical weapons” under that statutory definition.<sup>158</sup>

Nevertheless, in an opinion by Chief Justice Roberts, the Court found that the statute was ambiguous as applied to Bond.<sup>159</sup> To find ambiguity, the Court invoked a few concerns. One was an (apparently new) federalism principle: there are some things the federal government simply should not regulate.<sup>160</sup> But second — and important for evaluating the *Bostock* dissents — the *Bond* Court emphasized how an “ordinary person” would understand the statutory language<sup>161</sup>: “[A]s a matter of natural meaning, an educated user of English would not describe Bond’s crime as involving a ‘chemical weapon,’” and “the chemicals in this case are not of the sort that an ordinary person would associate with instruments of chemical warfare.”<sup>162</sup> The Court was also concerned about “the deeply serious consequences of adopting . . . a boundless reading” of the law.<sup>163</sup> Accordingly, the Court declined the government’s invitation to “brush aside the ordinary meaning and adopt a reading of [the statute] that would sweep in

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<sup>154</sup> 572 U.S. 844 (2014).

<sup>155</sup> See *id.* at 852–53.

<sup>156</sup> 18 U.S.C. § 229(a)(1).

<sup>157</sup> *Id.* § 229F(8)(A); see *id.* § 229F(1)(A).

<sup>158</sup> The Court at one point seemed to acknowledge that. See *Bond*, 572 U.S. at 856–57 (noting the Government’s “simple” argument that the chemicals used by Bond “are ‘toxic chemical[s]’ as defined by the statute” (alteration in original)); see also Manning, *Foreword*, *supra* note 139, at 73 n.414 (noting that the Court did not “deny[] that Bond’s conduct fit within the literal terms of the statutory definition”).

<sup>159</sup> *Bond*, 572 U.S. at 859–60 (“In this case, the ambiguity derives from the improbably broad reach of the key statutory definition given the term — ‘chemical weapon’ — being defined[, as well as] the deeply serious consequences of adopting such a boundless reading.”).

<sup>160</sup> See *id.* at 860 (insisting “in this curious case . . . on a clear indication that Congress meant to reach purely local crimes”). Other discussions of *Bond* have emphasized the Court’s focus on this federalism concern. See, e.g., Manning, *Foreword*, *supra* note 139, at 73 & n.414 (arguing that the Court “clipp[ed] back the express statutory definition” on this basis, *id.* at 73); Re, *supra* note 153, at 409–11.

<sup>161</sup> 572 U.S. at 861 (“In settling on a fair reading of a statute, it is not unusual to consider the ordinary meaning of a defined term, particularly when there is dissonance between that ordinary meaning and the reach of the definition.”).

<sup>162</sup> *Id.* at 860–61.

<sup>163</sup> *Id.* at 860.

everything from the detergent under the kitchen sink to the stain remover in the laundry room.”<sup>164</sup>

The dissenting opinions in *Bostock* are very much in line with these textualist practices. This more flexible strand of textualism treats text as the focal point — and generally as setting the outer boundary of the interpretive inquiry<sup>165</sup> — and does not rely on legislative history. But under this approach, an interpreter may make sense of the statutory language by considering social and policy context (perhaps through the views of “ordinary people”), norms external to the text, and practical consequences. Notably, that is how Justice Alito explained his approach. He insisted that his emphasis on “societal norms” in 1964 was not “an impermissible attempt to displace the statutory language” but instead a way to understand “what the text was understood to mean when adopted.”<sup>166</sup> Accordingly, I believe that a central question post-*Bostock* is not whether to use textualism, but which textualism to use.

### III. A THEORETICAL CASE FOR FORMALISTIC TEXTUALISM

As *Bostock* suggests, there seem to be at least two strands of textualism: a more formalistic and a more flexible variety. Formalistic textualism emphasizes semantic context and downplays normative and consequential concerns, while flexible textualism allows interpreters to make sense of the statutory language with an eye to social context, normative values, and practical consequences. To the extent that a Justice opts for textualism, which version should she favor?<sup>167</sup> This Part argues that a Justice should prefer formalistic textualism — not simply because

<sup>164</sup> *Id.* at 862 (“We are reluctant to ignore the ordinary meaning of ‘chemical weapon’ . . .”). The Court held that the statute did not permit the prosecution against Bond. *See id.* at 866. Justice Scalia (joined by Justices Thomas and Alito) attacked this analysis, asserting that “the statute’s own definition — however expansive — is utterly clear” and chiding the Court for allowing “ordinary meaning” to override a statutory definition. *Id.* at 871–72 (Scalia, J., concurring); *see id.* at 868 (criticizing the Court for its “result-driven antitextualism”). Justice Scalia would have decided the case on constitutional grounds, concluding that the federal government lacked power to prosecute someone in Carol Anne Bond’s position. *Id.* at 867, 873–82.

<sup>165</sup> Flexible textualism seems to permit interpreters to override a plain text only to avoid an “absurd result.” *See supra* pp. 286–87.

<sup>166</sup> *Bostock*, 140 S. Ct. at 1773 (Alito, J., dissenting).

<sup>167</sup> This Comment assumes that individual Justices have considerable discretion to select their preferred interpretive approach. *Cf.* FALLON, *supra* note 33, at 131 (making this assumption about constitutional interpretation). But no self-proclaimed textualist on the Supreme Court has clearly signed on to one version of textualism. For example, Justice Thomas is known for his formalism but authored *Sossamon* and joined Justice Alito’s *Bostock* dissent. *Cf.* Metzger, *supra* note 1, at 62 (noting Justice Thomas’s apparently “uncompromising commitment to formalism, originalism, and textualism”). Chief Justice Roberts authored *Bond* but also joined Justice Gorsuch’s formalistic analysis in *Bostock*. Justice Kagan, a self-proclaimed textualist, *see supra* note 1, joined Justice Gorsuch’s opinion in *Bostock* as well as the more flexible majority opinion in *Bond*.

of assumptions about the Article I lawmaking process, but because it can be a way to protect the Article III judiciary.

A. *Textualism as a Theory of Adjudication*

Much of the debate over statutory interpretation has focused on the Article I legislative process. But this emphasis has obscured an important component of the textualist enterprise: textualism is about not only Congress's handiwork but also the judicial role.<sup>168</sup> Many (albeit not all) textualists put a premium on cabining judicial discretion. These textualists thus implicitly favor formalistic over flexible textualism. But why? I suggest here (and in the next section) that, to justify that preference, textualists should look beyond Article I and consider the proper role of the Article III courts in our constitutional scheme.

1. *Textualism and Interpretive Discretion.* — Decoding a statutory text involves a good deal more than simply staring at words on a page. Modern textualists insist that the method is not literalism.<sup>169</sup> Accordingly, a textualist is unlikely to read “domestic violence” in the Ku Klux Klan Act to encompass tragic abuses within a family. Instead, textualists (of all stripes) construe semantic language with attentiveness to cultural cues, such as the history that tells us “domestic violence” may also refer to a violent uprising.<sup>170</sup> Moreover, most (if not all) textualists presume that Congress is aware of and legislates against the backdrop of certain longstanding conventions, such that they read a federal criminal statute to include a necessity defense, and a statute of limitations to encompass equitable tolling.<sup>171</sup> Jurists and scholars have at times suggested that certain normative canons, such as the rule of lenity or the canon protecting state sovereign immunity, can be understood in the same way: as background conventions against which Congress legislates.<sup>172</sup>

Textualists' acceptance of background principles has the potential to render the method considerably more flexible. After all, what is the stopping point? One might argue that, if textualists are willing to assume that Congress legislates against background conventions such as the necessity defense, why not also assume that Congress legislates with an eye to “societal norms”? Or why not assume that Congress considers

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<sup>168</sup> Cf. Gluck, *supra* note 4, at 2059 (urging that interpretive theory should engage more directly with the “role of the federal judge”).

<sup>169</sup> See, e.g., SCALIA, *supra* note 31, at 24.

<sup>170</sup> See *supra* p. 280.

<sup>171</sup> See *Bond v. United States*, 572 U.S. 844, 871–72 (2014) (Scalia, J., concurring) (noting that the Court reads “even text clear on its face . . . against the backdrop of established interpretive presumptions,” *id.* at 871); Manning, *Absurdity*, *supra* note 28, at 2471.

<sup>172</sup> See SCALIA, *supra* note 31, at 29. Alternatively, some normative canons may be so established as to be part of “our law.” See William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1084, 1095–96 (2017).

how “ordinary people” of the era would understand the impact of language — whether it be “chemical weapon” or “discrimination because of such individual’s sex”? Once one accepts background conventions as an assumption behind the Article I lawmaking process (as, I believe, all textualists do to some degree), that assumption can lead textualism to become quite flexible.

Notably, some prominent textualists have sought to avoid this result — and have suggested rules to control the textualist inquiry. Judge Barrett has argued, for example, that a normative canon should be used in an “aggressive” fashion only if it has clear constitutional underpinnings.<sup>173</sup> Manning has raised questions about many prominent clear statement rules,<sup>174</sup> affirmatively called upon textualists to abandon the absurdity doctrine,<sup>175</sup> and suggested that interpreters should apply only a “closed set” of normative canons.<sup>176</sup> That is, these textualists have called for a move toward a more formalistic textualism.

But these textualists have not clearly articulated *why* there should be rules to cabin the textualist inquiry. To the extent that Congress legislates against a set of background conventions,<sup>177</sup> it is not evident that it should be only a “closed set.” Nor is it clear why interpreters should exclude certain canons, such as the absurdity doctrine. As Justice Kavanaugh noted in *Bostock*, and as Manning concedes, the absurdity doctrine is “longstanding”<sup>178</sup> and could perhaps be “validated by sheer antiquity.”<sup>179</sup> Manning’s response is instructive: the absurdity doctrine,

<sup>173</sup> See Barrett, *supra* note 28, at 167–77. Judge Barrett acknowledges that, under this approach, the precise lines that interpreters draw will depend on contestable assumptions about constitutional meaning. See *id.* at 181.

<sup>174</sup> See John F. Manning, Essay, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 403–06 (2010) [hereinafter Manning, *Clear Statement*].

<sup>175</sup> Manning, *Absurdity*, *supra* note 28, at 2391 (“If one accepts the textualist critique of strong intentionalism, it is difficult to sustain the absurdity doctrine . . .”); see also Nagle, *supra* note 29, at 3 (urging textualists to abandon both the absurdity and the scrivener’s error doctrines).

<sup>176</sup> See Manning, *Absurdity*, *supra* note 28, at 2474–76. Although Manning initially argued that the “closed set” should include all existing conventions, he has since suggested that certain canons, such as those protecting federalism, should be discarded as lacking an adequate constitutional foundation. See Manning, *Clear Statement*, *supra* note 174, at 403–06.

<sup>177</sup> Some scholars have questioned this textualist assumption on empirical grounds. See Gluck & Bressman, *supra* note 2, at 949–50, 956–60 (drawing on a survey of 137 congressional staffers responsible for drafting legislation and finding that these staffers were aware of and relied on some canons but were unaware of or rejected others); Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 576–79, 600–05 (2002) (drawing on interviews with sixteen Senate Judiciary Committee staffers and finding variation in use or awareness of canons). But as other scholars have noted, these studies are limited by the fact that the authors talked to staffers, rather than to members of Congress. See John F. Manning, Essay, *Inside Congress’s Mind*, 115 COLUM. L. REV. 1911, 1936 n.151 (2015).

<sup>178</sup> *Bostock*, 140 S. Ct. at 1827 n.4 (Kavanaugh, J., dissenting); see Manning, *Absurdity*, *supra* note 28, at 2388.

<sup>179</sup> Cf. SCALIA, *supra* note 31, at 29 (suggesting this justification for the rule of lenity).

he argues, is far more “open-ended” than other background conventions.<sup>180</sup> Thus, the doctrine not only provides lawmakers with an insufficient baseline against which to legislate but also “invites the court to make adjustments based on social values whose content and method of derivation are both unspecified ex ante.”<sup>181</sup> That is, the absurdity doctrine should be discarded in part to constrain judicial power.

This observation brings us back to an important aspect of the origins of textualism. For many early textualists, the goal was not only to preserve legislative supremacy but also to constrain judicial discretion.<sup>182</sup> Justice Scalia worried, for example, that judges might use the open-ended nature of strong purposivism to read their personal preferences into the law. Likewise, textualists were concerned about judges cherry-picking from legislative history. Accordingly, textualism turns out to be as much a theory of *adjudication* as it is a theory of interpretation.<sup>183</sup>

2. *An Illustration: Flexible Textualism in Bostock.* — This concern about judicial discretion suggests an important objection to the *Bostock* dissenting opinions, which emphasized what “ordinary people” would have believed in 1964, or what would have been in “common parlance” at that time and thereafter. This focus on public expectations seems reminiscent of strong purposivism<sup>184</sup> and carries an analogous risk of

<sup>180</sup> Manning, *Absurdity*, *supra* note 28, at 2472; *see id.* at 2473.

<sup>181</sup> *Id.* at 2471.

<sup>182</sup> *See supra* section I.A, pp. 272–74; *see also* John F. Manning, *Justice Scalia and the Idea of Judicial Restraint*, 115 MICH. L. REV. 747, 749–50, 770, 781 (2017) (reviewing SCALIA, *supra* note 31) [hereinafter Manning, *Judicial Restraint*] (arguing that Justice Scalia’s preference for textualism was driven by an “anti-discretion principle,” *id.* at 749); Nelson, *supra* note 105, at 403 (asserting that textualists are less “receptive to a background presumption of judicial discretion” than are other interpreters).

<sup>183</sup> *Cf.* Manning, *Judicial Restraint*, *supra* note 182, at 748 (“Every theory of interpretation entails a theory of lawmaking and of adjudication.”).

<sup>184</sup> *See supra* note 127 and accompanying text (noting that this criticism applies to the dissenting opinions of both Justice Alito and Justice Kavanaugh). Indeed, Justice Alito’s thought experiment about “ordinary Americans” is strikingly similar to rhetoric in *Holy Trinity*:

<i>Holy Trinity</i>	Justice Alito’s dissent in <i>Bostock</i>
Suppose in the Congress that passed this act some member had offered a bill which in terms declared that, if any Roman Catholic church in this country should contract with Cardinal Manning to come to this country . . . such contract should be adjudged unlawful and void, and the church making it be subject to prosecution and punishment, can it be believed that it would have received a minute of approving thought or a single vote?	Suppose that, while Title VII was under consideration in Congress, a group of average Americans decided to read the text of the bill with the aim of writing or calling their representatives in Congress . . . . What would these ordinary citizens have taken “discrimination because of sex” to mean? . . . The answer could not be clearer. In 1964, ordinary Americans . . . would not have dreamed that discrimination because of sex meant discrimination because of sexual orientation, much less gender identity.
Church of the Holy Trinity v. United States, 143 U.S. 457, 472 (1892).	<i>Bostock</i> , 140 S. Ct. at 1767 (Alito, J., dissenting).

Justice Alito, however, not only asserted that his approach was textualist but also accused the Court of falsely “sail[ing] under a textualist flag.” 140 S. Ct. at 1755–56 (Alito, J., dissenting).

interpretive leeway. In criticizing strong purposivism, Judge Easterbrook argues that “[t]he use of original *intent* rather than an objective inquiry into the reasonable import of the language . . . greatly increases the discretion, and therefore the power, of the court”<sup>185</sup> — in part because a court has “endless flexibility” in determining *whose* intent matters.<sup>186</sup>

Likewise, one might ask: Who are the relevant “ordinary people”? At times, Justices Alito and Kavanaugh appear to refer to members of the public, the federal judges who initially interpreted Title VII, the executive officials who enforced it, or legislative and executive officials who acted well after 1964.<sup>187</sup> The implication is that these “ordinary people” almost universally rejected the majority’s conclusion that the disparate treatment of a gay, lesbian, or transgender employee is discrimination because of such individual’s sex. To underscore the point, Justice Alito declared: “If every single living American had been surveyed in 1964, it would have been hard to find any who thought that discrimination because of sex meant discrimination because of sexual orientation — not to mention gender identity, a concept that was essentially unknown at the time.”<sup>188</sup>

But as we have seen, and as Justice Gorsuch pointed out, “[n]ot long after the law’s passage, gay and transgender employees began filing Title VII complaints, so at least *some* people foresaw this potential application.”<sup>189</sup> The dissenting opinions do not explain why these voices do not count as “ordinary people” whose efforts were part of “common parlance.”<sup>190</sup> And as Justice Gorsuch suggested (in a passage of the opinion that was in no way algorithmic), there are reasons to worry about giving judges a license to determine which past voices were sufficiently “ordinary” or “common.” Such an approach may tend to harm politically unpopular groups:

Often lurking just behind such objections resides a cynicism that Congress could not *possibly* have meant to protect a disfavored group . . . . But to refuse enforcement just because of that . . . would not only require [judges] to abandon [their] role as interpreters of statutes . . . [but also] neglect the promise that all persons are entitled to the benefit of the law’s terms.<sup>191</sup>

<sup>185</sup> Easterbrook, *supra* note 52, at 62.

<sup>186</sup> *Id.* at 63.

<sup>187</sup> *See supra* pp. 284–85.

<sup>188</sup> *Bostock*, 140 S. Ct. at 1755 (Alito, J., dissenting).

<sup>189</sup> *Id.* at 1750–51 (majority opinion).

<sup>190</sup> Justice Alito stated only that the Court’s evidence was “feeble” at best. *Id.* at 1772 (Alito, J., dissenting) (suggesting that the Court should have put forth more examples); *see also id.* at 1828 (Kavanaugh, J., dissenting).

<sup>191</sup> *Id.* at 1751 (majority opinion); *see also* Eyer, *supra* note 82, at 65–69 (emphasizing that “politically unpopular applications of the law will rarely be within the original expectations of the public,” *id.* at 69); Andrew Koppelman, Essay, *Bostock, LGBT Discrimination, and the Subtractive*

The subjectivity of the dissenters' analysis in *Bostock* becomes even more perplexing when we see what they *did* consider to be covered by Title VII. Both dissenting opinions asserted that “the ordinary meaning of the law demonstrates that harassing an employee because of her sex is discriminating against the employee because of her sex.”<sup>192</sup> But it is doubtful that many “ordinary people” in 1964 would have deemed a prohibition on sex discrimination to bar sexual harassment. The concept that sexual advances in the workplace were problematic — much less discrimination — did not begin to get off the ground until the 1970s.<sup>193</sup> And even then, some federal courts dismissed the idea as “ludicrous.”<sup>194</sup> To borrow from Justice Alito's *Bostock* dissent: “Whether we like to admit it now or not, in the thinking of Congress and [much of] the public [in 1964], such [sexual advances] would not have been evil at all.”<sup>195</sup>

Once a judge emphasizes social and policy context, the door is opened for considerable interpretive leeway. Accordingly, one worry with flexible textualism parallels Justice Scalia's concerns about strong purposivism: in determining what “ordinary people” would have understood a text to mean, you might be inclined “to ask yourself what a wise and intelligent person *should* have meant; and that will surely bring you to the conclusion that the law means what you think it *ought* to mean.”<sup>196</sup>

3. *A Puzzle: Should Textualism Constrain Discretion?* — Textualism began in part as a theory of adjudication. For many textualists (including Justice Scalia and Judge Easterbrook), one goal of the interpretive method was to constrain judicial discretion. For these textualists, flexible textualism should be deeply problematic.

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*Moves*, 105 MINN. L. REV. HEADNOTES 1, 26 (2020) (urging that a focus on “original cultural expectations” tends to “defeat” “statutes that aim at broad social transformation”).

<sup>192</sup> 140 S. Ct. at 1835 (Kavanaugh, J., dissenting); *accord id.* at 1774 (Alito, J., dissenting) (describing same-sex sexual harassment as perhaps not the principal evil of Title VII, but as a “lesser evil[] that fall[s] within the *plain scope of its terms*” and “fall[s] within the ordinary meaning of the statutory text as it would have been understood in 1964” (emphasis added)).

<sup>193</sup> See Schultz, *supra* note 64, at 1696–1705 (detailing this history, and noting that a 1977 court of appeals decision “ushered in the new legal paradigm,” *id.* at 1704); see also Anita Bernstein, *Law, Culture, and Harassment*, 142 U. PA. L. REV. 1227, 1240 (1994) (“Sexual harassment claims [under Title VII based on a hostile work environment theory] began to be brought in the late 1970s, with the first successes occurring in 1980 and 1981 . . . .”); Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 706–07 (1997) (noting that plaintiffs had some success with quid pro quo harassment claims beginning in the late 1970s).

<sup>194</sup> *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975); see sources cited *supra* note 64.

<sup>195</sup> Cf. *Bostock*, 140 S. Ct. at 1774 (Alito, J., dissenting).

<sup>196</sup> SCALIA, *supra* note 31, at 18.

But these assumptions about the judicial role are contestable. Not all textualists may be eager to rein in federal judges. In fact, some scholars have recently called for a more flexible textualism. Professor Ryan Doerfler argues that textualists are justified in finding statutory ambiguity in what he calls “high-stakes cases.”<sup>197</sup> Professor Samuel Bray contends that textualists should embrace the “mischief rule.”<sup>198</sup> Under this rule, an interpreter may consider the problem (“mischief”) that a statute was enacted to address, even in determining whether statutory language is ambiguous.<sup>199</sup> The mischief rule, Bray argues, supports the Court’s narrow reading of “chemical weapon” in *Bond*<sup>200</sup> and helps to justify the logic behind the dissenting opinions in *Bostock* — apparently because the protection of sexual minorities was well outside any “mischief” that anyone might have perceived in 1964.<sup>201</sup> Although Bray acknowledges that the mischief rule often expands judicial discretion, he does not view that as a problematic feature.<sup>202</sup>

So what could justify a preference for a more formalistic textualism? I sketch out below an argument that takes us beyond the Article I legislative process and toward a focus on the Article III courts’ broader role in our constitutional scheme.

### B. Formalistic Textualism and Supreme Court Legitimacy

The Constitution establishes a federal judiciary that is both infused with politics and independent of politics. The Article II appointments process injects politics into the selection of judges,<sup>203</sup> and Presidents and Senators have long battled over nominees to the Supreme Court.<sup>204</sup>

<sup>197</sup> See Ryan D. Doerfler, *High-Stakes Interpretation*, 116 MICH. L. REV. 523, 527–28 (2018) (arguing that “it is more difficult to ‘know’ what statutes mean in high-stakes cases,” *id.* at 528) [hereinafter Doerfler, *High-Stakes*]; *id.* at 529–30 (recognizing that this approach will depend on an “apparent subjective evaluation,” *id.* at 530, about which cases count as “high stakes,” *id.* at 520); see also Ryan D. Doerfler, *The Scrivener’s Error*, 110 NW. U. L. REV. 811, 816, 828–30, 857 (2016) (urging textualists to relax the scrivener’s error doctrine, so that judges can more easily fix apparent drafting errors by Congress).

<sup>198</sup> See Samuel L. Bray, *The Mischief Rule*, 109 GEO. L.J. (forthcoming 2021) (manuscript at 48) (on file with the Harvard Law School Library).

<sup>199</sup> *Id.* at 4–5, 48.

<sup>200</sup> *Id.* at 33–34.

<sup>201</sup> See *id.* at 6–7, 7 n.27, 26. Professor Andrew Koppelman, by contrast, argues that proper application of a “mischief rule” should have led the Court to rule for the plaintiff employees in *Bostock*. See Koppelman, *supra* note 191, at 24–25 (“The mischief, as defined by the statute, is discrimination . . . . [A] textualist reading does reach the evil at which the statute is directed.”).

<sup>202</sup> See Bray, *supra* note 198, at 8, 23, 36, 43 (“[A] text read in light of the mischief will tend to have a fuzzier boundary.” *Id.* at 23.).

<sup>203</sup> See U.S. CONST. art. II, § 2, cl. 2.

<sup>204</sup> For a small sample of the literature on the Supreme Court confirmation process, see STEPHEN L. CARTER, *THE CONFIRMATION MESS* 11–13 (1994); CARL HULSE, *CONFIRMATION BIAS: INSIDE WASHINGTON’S WAR OVER THE SUPREME COURT, FROM*



Article III then grants those judges tenure and salary protections,<sup>205</sup> thereby suggesting that, upon assuming office, federal judges should be independent of the very forces that gave them their jobs.

The Supreme Court has long struggled with these competing pressures. But the tension between Article II and Article III is likely to be particularly pronounced during eras such as our current political moment, when there are deep partisan divides in the political branches and the broader public.<sup>206</sup> Indeed, the Court has recently become a focal point for partisan battles.<sup>207</sup> After Justice Scalia passed away in 2016, President Obama nominated Judge Garland but was met with extreme resistance from the Republican-controlled Senate, which refused even to hold hearings on the nominee.<sup>208</sup> When President Trump later filled the seat with Justice Gorsuch, some critics argued that the seat was “stolen.”<sup>209</sup> The 2018 confirmation process for Justice Kavanaugh was also deeply divisive.<sup>210</sup>

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SCALIA'S DEATH TO JUSTICE KAVANAUGH 17–18 (2019); LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT* 77–79 (1985).

<sup>205</sup> See U.S. CONST. art. III, § 1.

<sup>206</sup> See *infra* section III.B.2, pp. 300–03 (discussing how Presidents of both parties have, since the 1980s, increasingly aimed to use the appointment process to control Supreme Court decisions, and how the Justices' polarized social environments reinforce these pressures); see also Christopher Jon Sprigman, *Congress's Article III Power and the Process of Constitutional Change*, 95 N.Y.U. L. REV. (forthcoming 2020) (manuscript at 4) (on file with the Harvard Law School Library) (underscoring “the powerful temptation” of “America’s political parties in our age of extreme political polarization . . . to stack the federal courts with partisans”). For literature discussing the increased polarization since the 1980s, see SEAN M. THERIAULT, *PARTY POLARIZATION IN CONGRESS* 13–42 (2008); and ALAN I. ABRAMOWITZ, *THE DISAPPEARING CENTER* 2, 5 (2010). Political scientists debate the extent to which the public is polarized. Compare MORRIS P. FIORINA, SAMUEL J. ABRAMS & JEREMY C. POPE, *CULTURE WAR?: THE MYTH OF A POLARIZED AMERICA*, at xiii, 19 (2d ed. 2006) (asserting that ordinary Americans “instinctively seek the center,” *id.* at xiii), with Alan I. Abramowitz & Kyle L. Saunders, *Is Polarization a Myth?*, 70 J. POL. 542, 543 (2008) (arguing that “there are large differences in outlook” between the parties, especially among the “most interested, informed, and active members of the public”).

<sup>207</sup> See Grove, *supra* note 33, at 2242, 2272–73.

<sup>208</sup> Jon Schuppe, *Merrick Garland Now Holds the Record for Longest Supreme Court Wait*, NBC NEWS (July 20, 2016, 10:14 AM), <https://www.nbcnews.com/news/us-news/merrick-garland-now-holds-record-longest-supreme-court-wait-n612541> [<https://perma.cc/7TUY-UQCU>].

<sup>209</sup> E.g., Editorial Board, *Opinion, The Stolen Supreme Court Seat*, N.Y. TIMES (Dec. 24, 2016), <https://www.nytimes.com/2016/12/24/opinion/sunday/the-stolen-supreme-court-seat.html> [<https://perma.cc/Q96Q-AE48>]; see Grove, *supra* note 33, at 2242 (discussing the controversy surrounding Justice Gorsuch’s nomination).

<sup>210</sup> See Grove, *supra* note 33, at 2242 (discussing the fights over Justice Kavanaugh’s nomination). Just before this Comment went to press, Justice Ginsburg passed away. Commentators soon forecast another brutal confirmation battle. See, e.g., Robert Barnes, *Ginsburg’s Death Sets Off Political Battle Over Her Replacement, Supreme Court’s Future*, WASH. POST (Sept. 18, 2020, 10:39 PM), [https://www.washingtonpost.com/politics/courts\\_law/ruth-bader-ginsburg-supreme-court-next/2020/09/18/d5251c72-fao8-11ea-be57-d0bb9bc632d\\_story.html](https://www.washingtonpost.com/politics/courts_law/ruth-bader-ginsburg-supreme-court-next/2020/09/18/d5251c72-fao8-11ea-be57-d0bb9bc632d_story.html) [<https://perma.cc/234G-V37L>]. President Trump nominated Judge Barrett to fill the vacancy. See Peter Baker & Nicholas Fandos, *Trump Announces Barrett as Supreme Court Nominee, Describing Her as Heir to Scalia*, N.Y. TIMES (Sept. 26, 2020), <https://nyti.ms/2S2awII> [<https://perma.cc/M5UQ-J677>].

Critics have suggested that these judicial confirmation battles implicate not only the President and the Senate but also the Supreme Court itself.<sup>211</sup> Republican lawmakers, the argument goes, used underhanded tactics to gain control of the Article II selection process — in an effort to secure a conservative majority on the Court and thereby control the future direction of its decisions.<sup>212</sup> That is, the goal was to ensure (to the extent possible) that the Justices would no longer display the political independence contemplated by Article III but would instead rule for their ideological “team,” at least in high-profile cases. These efforts to control the Article II selection process, commentators warn, threaten to undermine the perceived independence — and, relatedly, the public reputation (“sociological legitimacy”) — of the Supreme Court.<sup>213</sup>

In past work, I have argued that, in these politically charged moments, one or more Justices may feel pressure to moderate their jurisprudence (and perhaps even vote in ways that they deem legally erroneous) in order to preserve the Supreme Court’s public image.<sup>214</sup> But in that event, a Justice may sacrifice the legal legitimacy of her decisions in order to protect the sociological legitimacy of the Court as a whole. That, I have suggested, is a serious dilemma.<sup>215</sup>

But there may be another way to protect Supreme Court legitimacy. This Comment suggests that interpretive method may help a Justice navigate the tension between Article II and Article III. A Justice, I argue, could precommit to formalistic textualism — a relatively rule-

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<sup>211</sup> See Grove, *supra* note 33, at 2242–43, 2272–73. In past work, I have noted that these tactics can be seen as “constitutional hardball.” *Id.* at 2243. For explorations of the concept of constitutional hardball, see Joseph Fishkin & David E. Pozen, Essay, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 920 (2018); and Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 523 (2004).

<sup>212</sup> See Grove, *supra* note 33, at 2242 (describing this claim).

<sup>213</sup> See Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 150–51, 151 n.4, 153–66 (2019); Grove, *supra* note 33, at 2240–44 (discussing these attacks); see also FALLON, *supra* note 33, at 21 (distinguishing sociological, moral, and legal legitimacy); Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CALIF. L. REV. 1473, 1473–74 (2007) (discussing a potentially “serious tension,” *id.* at 1474, between “the social legitimacy of the law as a public institution” and “the legal legitimacy of the law as a principled unfolding of professional reason,” *id.* at 1473).

<sup>214</sup> See Grove, *supra* note 33, at 2245.

<sup>215</sup> *Id.* at 2245, 2254–72. Some commentators assert that, to protect the Court’s external reputation, Chief Justice Roberts switched his vote in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), and opted to uphold the Affordable Care Act’s individual mandate under the federal taxing power. See *id.* at 575 (opinion of Roberts, C.J.); Grove, *supra* note 33, at 2243, 2254–55; see also JOAN BISKUPIC, THE CHIEF 221–22, 233–48 (2019) (detailing the Chief Justice’s vote change in the case); Charles L. Barzun, *Impeaching Precedent*, 80 U. CHI. L. REV. 1625, 1626–27 (2013) (noting that opponents of *NFIB* have questioned its precedential value to the extent that the Chief Justice “switched his vote . . . largely for political or institutional reasons”).

bound method that will better constrain her discretion and thus her proclivity to rule in favor of the political forces that propelled her to the Court. As discussed below, *Bostock* offers an illustration.

I. *The Risks to the Supreme Court's Sociological Legitimacy.* — As I explore in separate work,<sup>216</sup> the Supreme Court can function effectively only if it has external support — that is, sociological legitimacy.<sup>217</sup> Political scientists explain that, because the Court has no army, it must rely on others to obey its decrees.<sup>218</sup> External actors are more likely to heed the Court's decisions if they view the Court as “legitimate” — that is, as an institution that does and should have the power to determine legal rights and obligations.<sup>219</sup>

Political scientists debate the source and nature of the Supreme Court's sociological legitimacy. Many scholars contend that the Court enjoys broad “diffuse support,” such that the public views the Court as performing a different function from the political branches and treats its decisions as reasonable and authoritative, regardless of the outcome of a specific case.<sup>220</sup> Others respond that the Court can count on only “specific support,” with members of the public inclined to support the institution if they agree with the results in high-profile cases.<sup>221</sup>

But these legitimacy scholars do agree on one thing: public respect for the Supreme Court is contingent, at least in the long run. Thus, even diffuse support scholars acknowledge that if the Court's decisions appeared to run in only one ideological direction — that is, if it repeatedly issued “conservative” (or “progressive”) decisions in salient cases — its

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<sup>216</sup> See Grove, *supra* note 33, at 2250–54 (discussing the political science literature on sociological legitimacy); see also Tara Leigh Grove, *Sacrificing Legitimacy in a Hierarchical Judiciary*, 121 COLUM. L. REV. (forthcoming 2021) (manuscript at 6–8) (on file with the Harvard Law School Library) (underscoring that the political science literature on sociological legitimacy focuses on the Supreme Court and suggesting that scholars should begin to consider the public reputation of lower federal courts as well).

<sup>217</sup> See, e.g., Brandon L. Bartels & Christopher D. Johnston, *On the Ideological Foundations of Supreme Court Legitimacy in the American Public*, 57 AM. J. POL. SCI. 184, 184 (2013).

<sup>218</sup> See, e.g., Mark D. Ramirez, *Procedural Perceptions and Support for the U.S. Supreme Court*, 29 POL. PSYCH. 675, 675 (2008).

<sup>219</sup> See Bartels & Johnston, *supra* note 217, at 184; cf. JAMES L. GIBSON & GREGORY A. CALDEIRA, *CITIZENS, COURTS, AND CONFIRMATIONS* 38–41 (2009).

<sup>220</sup> See GIBSON & CALDEIRA, *supra* note 219, at 42, 61–62 (“Although the American people are severely divided on many important issues of public policy, when it comes to the institution itself, support for the Court has little if anything to do with ideology and partisanship. Liberals trust the Court at roughly the same level as conservatives; Democrats and Republicans hold the Supreme Court in similar regard.” *Id.* at 61.); cf. James L. Gibson & Michael J. Nelson, *Change in Institutional Support for the U.S. Supreme Court: Is the Court's Legitimacy Imperiled by the Decisions It Makes?*, 80 PUB. OP. Q. 622, 623–24 (2016).

<sup>221</sup> See Bartels & Johnston, *supra* note 217, at 185–86 (arguing that “individuals grant or deny the Court legitimacy based on the ideological tenor of the Court's policymaking,” *id.* at 185); see also Dino P. Christenson & David M. Glick, *Chief Justice Roberts's Health Care Decision Disrobed: The Microfoundations of the Supreme Court's Legitimacy*, 59 AM. J. POL. SCI. 403, 415–16 (2015).

overall public reputation would eventually decline.<sup>222</sup> The Court, it seems, might no longer be trusted to exercise the political independence contemplated by Article III.

This research has an important lesson: the Supreme Court's sociological legitimacy could suffer if one ideological faction captured the Article II selection process and in so doing seemed to control the future direction of the Court's decisions. Justice Kagan powerfully articulated this concern in an October 2018 speech, which she delivered near the end of the confirmation battle over Justice Kavanaugh.<sup>223</sup> As Justice Kagan recognized, "part of the court's legitimacy depends on people not seeing the court in the way that people see the rest of the governing structures of this country."<sup>224</sup> And, the Justice suggested, one important sign of the Court's distinct role is the presence of a "swing Justice" — someone whose votes are hard to predict by looking at the political party of the nominating President<sup>225</sup>:

In the last, really 30 years, starting with Justice O'Connor and continuing with Justice Kennedy, there has been a person who found the center or people couldn't predict in that sort of way. That enabled the court to look as though it was not owned by one side or another and was indeed impartial and neutral and fair.<sup>226</sup>

Justice Kagan wondered whether the Court could continue to be seen as legitimate in this "really divided time," absent such a swing Justice.<sup>227</sup>

2. *The Pressures of Politics.* — The risks to the Supreme Court's external reputation seem to have grown over the past few decades. Since the 1980s, Presidents and Senators have increasingly aimed to use the Article II selection process to control the future direction of the Court's

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<sup>222</sup> See GIBSON & CALDEIRA, *supra* note 219, at 43–44 (stating that "over the long haul, the repeated failure of an institution to meet policy expectations can weaken and even destroy that institution's legitimacy in the eyes of disaffected groups," *id.* at 43, and adding that "[f]rom this perspective, Court support can change fairly quickly over time," *id.* at 44); James L. Gibson & Michael J. Nelson, *The Legitimacy of the U.S. Supreme Court: Conventional Wisdoms and Recent Challenges Thereto*, 10 ANN. REV. L. & SOC. SCI. 201, 206–07 (2014) (noting this risk to "diffuse support").

<sup>223</sup> Sophie Tatum, *Justice Kagan Worries About the "Legitimacy" of a Politically Divided Supreme Court*, CNN (Oct. 5, 2018, 10:06 PM), <https://www.cnn.com/2018/10/05/politics/supreme-court-elena-kagan-legitimacy/index.html> [https://perma.cc/2K5S-TAKX].

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* ("Supreme Court Justice Elena Kagan expressed concern . . . over the court's lack of a swing vote with Justice Anthony Kennedy's departure from the bench. Speaking at a Princeton University conference, Kagan warned that a politically divided court could jeopardize its legitimacy.").

<sup>226</sup> *Id.*

<sup>227</sup> Daniel Politi, *Justice Kagan Fears Supreme Court Could Lose Legitimacy Without a Swing Justice*, SLATE (Oct. 6, 2018, 11:08 AM), <https://slate.com/news-and-politics/2018/10/justice-elena-kagan-fears-supreme-court-could-lose-legitimacy-without-a-swing-justice.html> [https://perma.cc/MM8U-7QJ8].

decisions.<sup>228</sup> Republican Presidents aim to nominate movement conservatives, while Democratic Presidents seek out reliable progressives. That is, Presidents of both parties are determined not to appoint anyone to the Court who might turn out to be a “swing Justice.”<sup>229</sup>

The Justices face continuing pressure to rule for their “team” in salient cases even after they take the bench.<sup>230</sup> Professors Neal Devins and Lawrence Baum have shown that members of the Supreme Court tend to be surrounded by those who share their ideological commitments; that is, conservative Justices travel in conservative elite circles, while progressive Justices make speeches to and socialize with progressive elites.<sup>231</sup> This trend “reinforces the appointment process in hardening ideological positions,” such that “the days when some Republican appointees drifted toward more liberal positions are behind us.”<sup>232</sup> Devins and Baum make the following prediction specifically about Justice

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<sup>228</sup> See DEVINS & BAUM, *supra* note 21, at 2–3, 121–30; Lawrence B. Solum, *Judicial Selection: Ideology Versus Character*, 26 CARDOZO L. REV. 659, 660–62 (2005) (noting that ideological factors were always relevant to judicial appointments and have only become more so over time, and expressing concern about this “emerging practice that explicitly acknowledges ideological appointments as a legitimate basis for changing the law without amending the Constitution or enacting new statutes,” *id.* at 661); see also KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY* 89 (2009) (noting the Reagan Administration’s emphasis on “judicial ideology” across many issue areas). Political actors have also increasingly focused on ideology in lower court appointments. See NANCY SCHERER, *SCORING POINTS* 3–4, 161 (2005); see also Grove, *supra* note 216, at 3–4 (exploring the implications for lower court legitimacy); cf. Bert I. Huang, *Judicial Credibility*, 61 WM. & MARY L. REV. 1053, 1055, 1060 (2020) (examining whether the party of the nominating President affects the willingness of members of the public to view a lower court judge’s decisions as legally correct).

<sup>229</sup> See DEVINS & BAUM, *supra* note 21, at 2–3, 121–30; see also JAN CRAWFORD GREENBURG, *SUPREME CONFLICT* 265 (2007) (stating that President George W. Bush ultimately withdrew the nomination of Harriet Miers so as “not to repeat his father’s mistake with Souter”); JEFFREY TOOBIN, *THE NINE* 266–70 (2007) (describing how White House insiders in the early 2000s aimed for “no more Souters and no more Kennedys” and rejected Alberto Gonzales because he was viewed as “not a movement conservative,” *id.* at 268, and “unreliable on abortion,” *id.* at 270). An exception to this trend might be the nomination of Judge Garland, selected by President Obama to replace Justice Scalia in part because of his “centrist reputation.” Jordan Fabian, *Why Obama Picked Merrick Garland*, *THE HILL* (Mar. 17, 2016, 5:40 AM), <https://thehill.com/homenews/administration/273346-why-obama-picked-merrick-garland> [<https://perma.cc/AW4J-VWVG>]. But President Obama might have selected a different nominee if Democrats had controlled the Senate at the time.

<sup>230</sup> Cf. DEVINS & BAUM, *supra* note 21, at 138 (“Democratic Justices undoubtedly see themselves as members of a different team than their Republican counterparts.”). To be sure, scholars have long asserted that the Justices’ ideological leanings affect their votes. See generally Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257 (2005) (offering an overview of the debate over whether the Justices are more motivated by law or politics). The concern articulated here is that these tendencies may be more pronounced today.

<sup>231</sup> See DEVINS & BAUM, *supra* note 21, at 132–40, 150–57 (describing how, for example, Republican appointees can be found at Federalist Society events, while Democratic appointees appear at American Constitution Society events); *id.* at 3 (urging that the Justices’ decisions are heavily influenced by the “political, social, and professional elites” that surround them).

<sup>232</sup> *Id.* at 151 (“In this new world, the ideological content of Justices’ votes and opinions is less susceptible to change than it was in the preceding period.”).

Gorsuch in their 2019 work: “With the careful vetting that now characterizes the appointment of Justices and with the Court’s new social environment, it would be very surprising if Gorsuch deviated from the ideological path that he has taken thus far in his career.”<sup>233</sup>

This political background set the stage for *Bostock*. During the litigation, the Trump Administration did not mince words about its preferences. While the Obama Administration had announced that Title VII’s sex provision “by definition” covered the LGBTQ community (and initiated some of the litigation before the Court in *Bostock*),<sup>234</sup> the Trump Justice Department came out strongly on the other side. The federal government insisted that a victory for the plaintiffs could lead to “extreme”<sup>235</sup> or “absurd”<sup>236</sup> results, “transform[ing] Title VII into a blanket prohibition on all sex-specific workplace practices” that “would bear no resemblance to how [the statute] has been understood by Congress or the public from 1964 to the present.”<sup>237</sup> Moreover, during the oral argument, Solicitor General Noel Francisco characterized the litigation as pitting LGBTQ equality against the religious liberty of employers and admonished that a ruling for the plaintiffs would give “a complete victory to one side of the fight.”<sup>238</sup>

The pressure on the Justices to rule for the “correct” ideological “side” continued in the ensuing months. Notably, during the *Bostock* argument, Justice Gorsuch signaled his sympathy for the plaintiffs’ textual claim, wondering “in what linguistic formulation . . . would one say that sex, biological gender, has nothing to do with what happened in this case?”<sup>239</sup> Due in part to such questions — as well as leaks from the Court — rumors began to circulate in late 2019 that Justice Gorsuch might vote in favor of the *Bostock* plaintiffs.<sup>240</sup> Some conservative

<sup>233</sup> *Id.* at 157.

<sup>234</sup> See *supra* note 24.

<sup>235</sup> Brief for the Federal Respondent, *supra* note 25, at 38.

<sup>236</sup> Brief for the United States, *supra* note 26, at 17, 25.

<sup>237</sup> Brief for the Federal Respondent, *supra* note 25, at 16; see *id.* at 38 (expressing concern about “workplace dress codes,” “sex-specific restrooms,” and “different male and female fitness standards”).

<sup>238</sup> Transcript of Oral Argument at 56, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 140 S. Ct. 1731 (2020) (No. 18-107), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2019/18-107\\_6j37.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-107_6j37.pdf) [<https://perma.cc/MQC4-SF7B>].

<sup>239</sup> Transcript of Oral Argument at 46, *Bostock*, 140 S. Ct. 1731 (Nos. 17-1618, 17-1623), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2019/17-1618\\_2a34.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/17-1618_2a34.pdf) [<https://perma.cc/EHP5-B5WE>].

<sup>240</sup> See Joan Biskupic, *Anger, Leaks and Tensions at the Supreme Court During the LGBTQ Rights Case*, CNN (July 28, 2020, 2:15 PM), <https://www.cnn.com/2020/07/28/politics/neil-gorsuch-supreme-court-lgbtq-civil-rights-act-alito/index.html> [<https://perma.cc/5JXC-7TV2>] (suggesting that the leaks were designed to “jab the conservatives, perhaps even pressure them to change”).

commentators declared that such a result would be unacceptable or even an “unprecedented betrayal.”<sup>241</sup>

In this environment, many observers predicted that the Republican-appointed jurists would reject the claim that the disparate treatment of gay, lesbian, and transgender individuals qualifies as “discriminat[ion] . . . because of such individual’s . . . sex.”<sup>242</sup> That is, despite the strength of the plaintiffs’ textual arguments — and the apparent commitment of several members of the Court to textualism — the Justices would vote according to the political party of the President who appointed them, and the plaintiffs would lose by a 5–4 margin. The assumption, in short, was that the Article II selection process would drive the outcome of this litigation.

3. *Interpretive Method as a Response to Political Pressure.* — This Comment argues that formalistic textualism offers a way to navigate these external pressures — and, relatedly, the structural tension between Article II and Article III. Formalistic textualism urges the judge to zero in on the statutory language, focusing on semantic context and downplaying policy concerns and practical consequences — the very concerns and consequences that tend to be of most interest to external observers.

Notably, the goal of this Comment is to offer a theoretical foundation for formalistic textualism. To navigate the tension between Article II and Article III, judges should attempt to tie themselves to the mast through their interpretive method. Although I cannot within the space permitted by this Comment describe in detail all features of formalistic textualism,<sup>243</sup> the analysis here does provide a basis for evaluating some

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<sup>241</sup> Barnes, *supra* note 9 (noting the comment on social media); *see also, e.g.*, Editorial Board, Opinion, *The Supreme Court’s Textualism Test*, WALL ST. J. (Nov. 21, 2019, 7:21 PM), <https://www.wsj.com/articles/the-supreme-courts-textualism-test-11574382080> [<https://perma.cc/743M-6PVY>] (urging that a ruling for the plaintiffs would be a “misuse[] of textualism”). Many social conservatives have echoed these views since the Court announced the decision. *See* Sarah Pulliam Bailey, *Christian Conservatives Rattled After Supreme Court Rules Against LGBT Discrimination*, WASH. POST (June 15, 2020, 5:41 PM), <https://www.washingtonpost.com/religion/2020/06/15/bostock-court-faith-conservatives-lgbt> [<https://perma.cc/N7LF-UNAY>]. Indeed, some reacted to the decision by declaring that textualism should be abandoned. *See, e.g.*, Josh Hawley, *Was It All for This? The Failure of the Conservative Legal Movement*, PUB. DISCOURSE (June 16, 2020), <https://www.thepublicdiscourse.com/2020/06/16/5043> [<https://perma.cc/7KW4-8TUX>] (piece by a U.S. Senator).

<sup>242</sup> 42 U.S.C. § 2000e-2(a)(1); *see* Koppelman, *supra* note 191, at 4–5, 4 n.8 (collecting sources). To be sure, a few employment discrimination specialists had a different view. *See supra* note 84 and accompanying text.

<sup>243</sup> There are important questions about, for example, the relationship between formalistic textualism and precedent. *See also supra* section III.A.1, pp. 291–93 (noting questions about normative canons). More generally, there may be a need for “meta-rules” to govern formalistic textualism. *Cf.* Anita S. Krishnakumar, *Meta-rules for Ordinary Meaning*, 134 HARV. L. REV. F. (forthcoming 2020) (manuscript at 11–18) (on file with the Harvard Law School Library) (suggesting that either Congress or courts could identify meta-rules to handle conflicting evidence about ordinary meaning from sources such as dictionaries, corpus linguistics, or surveys of judges or laypeople).

existing disputes among textualists. This analysis gives federal judges good reason to discard canons (such as the absurdity doctrine) that grant judges broad discretion to deviate from the statutory language, and to aim for a closed set of canons.<sup>244</sup> This approach also counsels against recent calls for a more flexible textualism, such as efforts to resurrect the mischief rule or to give judges greater leeway to find statutory ambiguity.<sup>245</sup> Formalistic textualism calls upon judges to limit their own discretion to rule consistently for their perceived “team” in statutory cases.

To be sure, no interpretive method can fully cabin judicial discretion. But there is a strong sense among legal scholars and political scientists that more rule-like methods tend to provide greater constraint than standards.<sup>246</sup> And many legal scholars — textualists and nontextualists alike — have argued that certain practices, such as the use of normative canons or the mischief rule, tend to expand interpretive discretion.<sup>247</sup> Accordingly, it seems reasonable to assume that a version of textualism that minimizes or rejects such practices should constrain judicial discretion to a greater extent than a more flexible strand that accepts them.

Such constraint seems likely to benefit the Supreme Court’s public reputation in a few respects. First, as *Bostock* illustrates, a Justice may vote contrary to her (assumed) ideological priors.<sup>248</sup> That is, the Justice may vote against the views of the political forces that put her on the bench. Such a vote — particularly in a high-profile case that garners considerable media attention — pushes against any assumption that political actors may use the Article II selection process to control the future decisions of the Court.

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<sup>244</sup> See *supra* section III.A.1, pp. 291–93. A detailed list of which normative canons should be retained (or discarded) is beyond the scope of this Comment. But I plan to explore that in future work.

<sup>245</sup> See *supra* section III.A.3, pp. 295–96.

<sup>246</sup> Scholars agree, for example, that lower courts have far more discretion in applying legal doctrines that take the form of standards, rather than rules. See VERMEULE, *supra* note 14, at 68; Scott Baker & Pauline T. Kim, *A Dynamic Model of Doctrinal Choice*, 4 J. LEGAL ANALYSIS 329, 333, 336–37 (2012) (“[T]he more rule-like the doctrine, the more likely it is that the lower courts will follow the directive.” *Id.* at 336.).

<sup>247</sup> See, e.g., William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1542–43, 1545–46 (1998) (reviewing SCALIA, *supra* note 31) (arguing that the normative canons threaten to render textualism “potentially destabilizing,” *id.* at 1543, and “unpredictable,” *id.* at 1546, especially “if judges succumb to the temptation of creating new canons or adjusting old ones to their changing tastes,” *id.* at 1543); *supra* section II.B, pp. 285–290; *supra* section III.A, pp. 291–96.

<sup>248</sup> I make no assumptions about the *actual* views of any of the Justices in *Bostock* (or any other case). What matters, for my purposes, is that many observers predicted that the Justices in *Bostock* would vote according to the political party of the nominating President. See *supra* note 242 and accompanying text.



Second, given the mix of federal statutes (passed by Democratic- and Republican-controlled Congresses), and the mix of baseline requirements and exceptions within each statute, formalistic textualism should help ensure that a Justice does not vote in a single ideological direction. That is, this method has the potential to transform even the most apparently “reliable” progressive or conservative member of the Court into a “swing Justice” in statutory cases.

Consider *King v. Burwell*,<sup>249</sup> which involved a provision of the Patient Protection and Affordable Care Act<sup>250</sup> (ACA). The ACA required each state to establish an exchange where individuals could purchase health insurance<sup>251</sup> but provided that, if a state opted not to do so, the federal government would establish the exchange.<sup>252</sup> The question in the case was whether individuals who purchased a health insurance plan via a federally created exchange would qualify for certain tax credits.<sup>253</sup> The statute provided that such credits were available if an individual purchased insurance “through an Exchange *established by the State*.”<sup>254</sup>

In an opinion by Chief Justice Roberts, the Court noted that “an Exchange established by the State” would seem to foreclose a federal exchange.<sup>255</sup> But the Court held that, in light of the plan of the ACA as a whole — and given the monumental consequences that would follow from a denial of tax credits — the language was ambiguous.<sup>256</sup> The Court ultimately held that the ACA permitted an individual to receive tax credits, whether she purchased insurance through a state or a federal exchange.<sup>257</sup>

<sup>249</sup> 135 S. Ct. 2480 (2015).

<sup>250</sup> Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.).

<sup>251</sup> 42 U.S.C. § 18031(b)(1).

<sup>252</sup> *Id.* § 18041(c)(1).

<sup>253</sup> 135 S. Ct. at 2487.

<sup>254</sup> 26 U.S.C. § 36B(b)(2)(A) (emphasis added).

<sup>255</sup> 135 S. Ct. at 2490 (“[I]t might seem that a Federal Exchange cannot fulfill this requirement” of being “established by the State,” especially given that “the Act defines ‘State’ to mean ‘each of the 50 States and the District of Columbia’ — a definition that does not include the Federal Government.” (quoting 42 U.S.C. § 18024(d))).

<sup>256</sup> *See id.* at 2490–96 (“[W]hen read in context, ‘with a view to [its] place in the overall statutory scheme,’ the meaning of the phrase ‘established by the State’ is not so clear.” *Id.* at 2490 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000))); *see also* Doerfler, *High-Stakes*, *supra* note 197, at 562 (noting that the challenge could have led “a huge number” of individuals to be “exempt from the individual mandate on grounds of financial hardship,” which in turn could have kept many healthy people out of the insurance risk pool); Kevin M. Stack, *The Enacted Purposes Canon*, 105 IOWA L. REV. 283, 300–03 (2019).

<sup>257</sup> *See* 135 S. Ct. at 2492–93 (“[T]he statutory scheme compels us to reject petitioners’ interpretation because it would destabilize the individual insurance market in any State with a Federal Exchange . . .”).

*King v. Burwell* has many of the hallmarks of flexible textualism.<sup>258</sup> The Court was presented with a text that, by the Court's own admission, seemed clear. But due in large part to concerns about practical consequences, the Court found the statutory language ambiguous. A full exploration of *King* is beyond the scope of this Comment. For now, I assume that formalistic textualism would lead a Justice to side with Justice Scalia's dissent, which found that the statutory text clearly foreclosed tax credits on a federal exchange.<sup>259</sup> On that assumption, *King* along with *Bostock* illustrates how formalistic textualism can lead a Justice to outcomes favored by either conservatives or progressives in high-profile cases.<sup>260</sup>

The constraint offered by formalistic textualism seems most pressing in high-profile cases. As Doerfler and Re have separately observed, the Justices are most tempted to depart from the statutory text in cases such as *Bond*, *King*, and (I will add) *Bostock*, where the political and practical stakes are seen as "far-reaching."<sup>261</sup> In these cases, a Justice is well advised to zero in on semantic context, downplaying arguments about societal norms, external values, or practical consequences — even when those arguments are put forth by the very political forces that helped put the Justice on the bench.

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<sup>258</sup> Re suggests that the Court's reasoning in *King* was purposivist. See Re, *supra* note 153, at 413–15 (asserting that the case should have been "easy" under a textualist approach, *id.* at 413); see also Stephanie Hoffer & Christopher J. Walker, *Is the Chief Justice a Tax Lawyer?*, 43 PEPP. L. REV. 33, 37 (2015) (describing the Court's approach in *King* as "contextualism"). But as Professors Abbe Gluck, Jeremy Kessler, and David Pozen have observed, the Court's analysis was "textualist" in several respects. See Abbe R. Gluck, *The Supreme Court, 2014 Term — Comment: Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 88 (2015) ("The choice of the word 'plan' instead of 'purpose' seems intentional: the Court is conveying something more linked to text . . ."); Gluck, *supra* note 4, at 2074–75 (asserting that *King* was "a rational, forgiving reading of the statute, but using textualist tools," *id.* at 2075); Kessler & Pozen, *supra* note 5, at 1853–54 (stating that *King* "sound[ed] like a stringent form of textualism," *id.* at 1853, while "integrat[ing] purposive considerations" into a finding of ambiguity, *id.* at 1854).

<sup>259</sup> See 135 S. Ct. at 2406–07, 2502 (Scalia, J., dissenting) ("It is hard to come up with a clearer way to limit tax credits to state Exchanges than to use the words 'established by the State.'" *Id.* at 2497 (quoting 26 U.S.C. § 36B(b)(2)(A)).

<sup>260</sup> *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), also from this Term, offers another illustration. In an opinion by Justice Gorsuch, the Court relied on the text of the Major Crimes Act to hold that a considerable portion of Oklahoma is "Indian country" for purposes of that federal criminal statute, *id.* at 2459 — notwithstanding the State's concerns about the "potentially transform[ative] effects" of such a holding, *id.* at 2478 (quoting Brief for Respondent at 43, *McGirt*, 140 S. Ct. 2452 (No. 18-9526)). See also *id.* at 2468–69, 2478–79, 2481–82 (asserting that "dire warnings" about practical consequences are "not a license for us to disregard the law," *id.* at 2481); Jack Healy & Adam Liptak, *Landmark Supreme Court Ruling Affirms Native American Rights in Oklahoma*, N.Y. TIMES (July 11, 2020), <https://nyti.ms/2BMFYWS> [<https://perma.cc/PQG9-FKGX>] (stating that Justice Gorsuch "broke[]" with his fellow conservatives" and "joined the court's more liberal members to form the majority" in the case).

<sup>261</sup> *Bostock*, 140 S. Ct. at 1778 (Alito, J., dissenting) (urging that *Bostock* "is virtually certain to have far-reaching consequences"); see Doerfler, *High-Stakes*, *supra* note 197, at 527–30; Re, *supra* note 153, at 421 (arguing that the Court is inclined to find ambiguity "when a statute's central objective is at risk or an otherwise plausible reading leads to alarming results").

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Properly applied, formalistic textualism has the potential to turn even a bright-line-rule-centered jurist into a “swing Justice.” The votes of such a Justice would be hard to predict, at least in salient statutory interpretation cases. I argue that this is a feature of the interpretive method when viewed against the backdrop of preserving judicial legitimacy.

#### CONCLUSION

Scholars have long engaged with the battle between textualism and purposivism. Although this debate is important, it has overshadowed another important division: that between formalistic and flexible textualism. This Comment calls upon would-be textualist judges to opt for a more formalistic approach, in large part as a way to protect judicial legitimacy. But whether or not one agrees with that bottom line, scholars should begin to explore the fact that judges apply not simply textualism but textualisms.