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Two Types of Empirical Textualism

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I. ORDINARY MEANING IN LEGAL INTERPRETATION

Ordinary meaning plays an increasingly important role in legal interpretation, including the interpretation of contracts, statutes, treaties, and the Constitution.[1] There is significant debate about the meaning of "ordinary meaning," but there is general agreement that it is an *empirical* notion, closely connected to facts about how ordinary people understand language.[2] The ordinary meaning of a legal text is not necessarily what its drafters intended, nor how they expected it would be applied. Nor, for that matter, is it what a judge thinks the text *should* mean. Instead, ordinary meaning is derived from, or perhaps equated with, the general public's understanding of the text.

Underpinning this conception of "empirical textualism" is a set of observations about the relationship between ordinary meaning and ordinary language users. First, interpreting a legal text in line with its ordinary meaning promotes rule of law values like publicity and fair notice. The law should be publicly available to ordinary people, in other words, and it should enable members of the public to rely upon and form reasonable expectations about it. Ordinary meaning analysis is thus often taken to promote

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[1] *See, e.g.*, Lawrence B. Solum, The Constraint Principle: Original Meaning and Constitutional Practice 7–8 (Apr. 3, 2019) (unpublished manuscript); Victoria Nourse, *Textualism 3.0: Statutory Interpretation After Justice Scalia*, 70 ALA. L. REV. 667, 676–80 (2019); Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331; Brian G. Slocum & Jarrod Wong, *The Vienna Convention and the Ordinary Meaning of International Law*, 46 YALE J. INT'L LAW. (forthcoming 2021) (manuscript at 3); BRIAN G. SLOCUM, ORDINARY MEANING: A THEORY OF THE MOST FUNDAMENTAL PRINCIPLE OF LEGAL INTERPRETATION (2016).

[2] *See, e.g.*, Kevin P. Tobia, *Testing Ordinary Meaning*, 134 HARV. L. REV. 726, 731 (2020); *see also* Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J. L. & PUB. POL'Y 65, 66 (2011) ("It cannot be overstressed that the activity of determining semantic meaning at the time of enactment required by the first proposition is *empirical*, not normative." (citing KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT AND JUDICIAL REVIEW 6 (1999))).

democracy; as such, its focus is naturally placed on the understanding of the demos. Similarly, ordinary meaning analysis is taken to prevent judicial overreach. It is the public's common understanding of the text that matters, so the logic runs, not the potentially biased views of unelected judges. More broadly, in centering interpretation on ordinary meaning, empirical textualism promises an alluring objectivity. For that reason, scholars sometimes argue that insofar as textualism and originalism seek to "move beyond the subjective nature of the humanities to the more objective realm of social science," they should rely upon empirical tools to investigate ordinary meaning.[3]

To discover a legal text's ordinary meaning, there are several possible sources of evidence. Empirical textualists frequently rely upon dictionaries.[4] Recently they have also begun to use "legal corpus linguistics" methods, a data-driven approach to textualist interpretation.[5] An ordinary meaning textualist might also look to legislative history—not primarily as evidence of the legislators' intent or expected applications considered in isolation, but rather as probative evidence of what the broader community likely understood the text to mean at the time it was adopted.[6]

There are various limitations, however, in relying exclusively on any of these approaches. For example, interpreters might engage in "dictionary shopping," or cherry picking among competing definitions.[7] In addition, recent empirical evidence suggests that, at least in some hard cases, both dictionaries and legal corpus linguistics methods may reflect a distorted picture of how ordinary people understand language.[8] Finally, legislative history might simply tell us only what legislators intended or expected a law to do, rather than what ordinary people understood the law to mean at the time.

Given these limitations, some commentators have recently suggested that textualists should add an empirical "survey

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[3] James C. Phillips et al., *Corpus Linguistics & Original Public Meaning: A New Tool to Make Originalism More Empirical*, 126 YALE L.J. F. 21, 23 (2016).

[4] *See generally* James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483 (2013).

[5] Scholars have begun taking up this approach. *See, e.g.*, Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788 (2018). Increasingly, judges are themselves conducting legal corpus linguistic analyses. *See* Kevin P. Tobia, *The Corpus and the Courts*, U. CHI. L. REV. ONLINE (2021).

[6] *See, e.g.*, Solum, *supra* note 1, at 3.

[7] Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275, 282 (1998); Brudney & Baum, *supra*, note 4, at 486–87; *see also* John Mikhail, *The 2018 Seegers Lecture: Emoluments and President Trump*, 53 VAL U. L. REV. 631, 640 (2019) (suggesting that government lawyers engaged in this type of cherry-picking in their defense of President Trump in three emoluments lawsuits).

[8] *See* Tobia, *supra* note 5.

method" to their toolbox.[9] This method suggest that in order to determine how ordinary people understand legal language, textualists should ask ordinary people.[10] In particular, these commentators suggest that legal scholars could survey ordinary people about statutory, contractual, or other legal provisions, seeking to understand how that language is in fact understood.

There are obviously many potential complications with this approach. But it is worth noting that this survey method, though less familiar than reliance on dictionaries, corpus linguistics, or legislative history, actually seems to have several comparative advantages over these other methods. For one thing, a well-done survey is a more straightforward reflection of ordinary linguistic understanding than even the most elaborate dictionary definition. Properly framed and executed, moreover, this variant of experimental jurisprudence can reflect the most sophisticated methods in linguistics, psychology, and cognitive science.[11] Furthermore, if ordinary meaning analysis is grounded in concerns about notice, publicity, and democracy, then there is something compelling about directly engaging with the people who are supposedly notified and governed by statutory language: the actual members of the public.

By comparison, the other sources of evidence on which empirical textualism frequently relies seem more indirect and problematic in several respects. For example, as we have indicated, dictionaries are inevitably partial and incomplete reflections of ordinary semantic knowledge. In addition, dictionaries can provide an account of ordinary meaning that is highly contingent, influenced by the specific dictionary author. Legal corpus linguistics is importantly limited by the collection of evidence in the relevant database. For example, only published writing is normally part of the corpus, but that reflects only a tiny fraction of actual language use during a given time period.[12] This limitation seems especially significant in light of

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[9] *See, e.g.*, Shlomo Klapper et al., *Ordinary Meaning from Ordinary People*, U.C. IRVINE L. REV. (forthcoming 2021) (manuscript at 1); *see also* Kevin Tobia, Brian Slocum, and Victoria Nourse, *Statutory Interpretation from the Outside*, 122 COLUM. L. REV. (forthcoming 2022).

[10] *Id.*

[11] *See generally* Kevin Tobia, *Experimental Jurisprudence*, 89 U. CHI. L. REV. (forthcoming 2022) (describing recent work in experimental legal theory).

[12] Indeed, a body of scholarship has begun to consider how both dictionaries and databases may be biased against ordinary language usage by underrepresented populations. *See generally* Anya Bernstein, *Democratizing Interpretation*, 60 WM. & MARY L. REV. 435 (2018); Gelsey G. Beaubrun, Note, *Talking Black: Destigmatizing Black English and Funding Bi-Dialectal Education Programs*, 10 COLUM. J. RACE & L. 196 (2020); Laura Victorelli, Note, *The Right to Be Heard (And Understood): Impartiality and the Effect of Sociolinguistic. Bias in the Courtroom*, 80 U. PITT. L. REV. 709 (2019).

the fact that one of the key objectives of modern linguistic theory is to explain how ordinary language users are capable of parsing a potentially infinite number and variety of sentences, including expressions they have never encountered before.[13]

To make these observations more concrete, consider Title VII's prohibition against firing someone "because of [their] sex."[14] What does that provision convey to most Americans? That turns out to be a complex empirical question, which yields different answers depending on how precisely the question is formulated. But insofar as a legal interpreter is engaging in textualist analysis of this statutory provision, there seems to be something undeniably attractive about privileging public survey responses of ordinary adults over dictionary definitions of its key components ("because of" and "sex") or legal corpus linguistics conclusions about what uses are most frequent in a given database. The former—ordinary understanding—seems much closer to the rule of law values that motivate textualism than either of the latter alternatives; it is not dictionaries or databases that are put on notice, after all, but ordinary people.

At the same time, a survey method also has some obvious shortcomings. Insofar as textualist interpreters seek to determine the original ordinary meaning (or "original public meaning") of a legal document like the Constitution, for example, the reach of empirical survey methods seems limited. We cannot run controlled experiments on the founding generation. Moreover, contemporary language users may have materially different linguistic intuitions than their historical counterparts, so the former are not necessarily empirically adequate substitutes for the latter. The same logic applies, of course, to old statutes, contracts, and other legal texts. In each case, the value of an empirical survey of ordinary semantic understanding of legal language could be limited.

One response to all of these difficulties is to adopt a form of evidential pluralism.[15] On this view, dictionaries, legal corpus linguistics, legislative histories, and empirical surveys can all provide some evidence of the ordinary meaning of legal texts. No one source is determinative, but each helps us to "triangulat[e]" ordinary meaning.[16] Whenever possible, therefore, one should use all of these sources to help solve the interpretive problem.

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[13] *See* JOHN MIKHAIL, ELEMENTS OF MORAL COGNITION: RAWLS' LINGUISTIC ANALOGY AND THE COGNITIVE SCIENCE OF MORAL AND LEGAL JUDGMENT 16 (2011).

[14] 42 U.S.C. § 2000e-2(a)(1).

[15] *See* Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621, 1621 (2017).

[16] *Id.*

From this ecumenical perspective, survey data constitutes at least one valuable source of textualist evidence, particularly when the relevant legal text was adopted relatively recently. For example, in interpreting the ordinary meaning of a 1964 (or 1991) statute, how ordinary language users understand that text today yields important evidence about how people at the relevant time would have understood it.

With these general reflections on the problems and prospects empirical textualism in mind, this essay now turns to a recent landmark case in which they were implicated: *Bostock v. Clayton County*.[17] The majority opinion by Justice Gorsuch and the dissents by Justice Alito and Kavanaugh all claim to be applying the "ordinary meaning" of Title VII to the main question presented in that case. And across all three opinions, the rationale for this approach suggests a shared commitment to empirical textualism. For example, all three opinions motivate their textualist arguments by appealing to rule of law values, like publicity, notice, and democratic legitimacy. Despite embracing the same interpretive goals and values, their reasoning and legal conclusions diverge dramatically.[18] In the next section, we describe these opinions and explain the different conceptions of ordinary meaning they represent. We then turn in Part III to an experiment that illuminates some key differences between these types of empirical textualism.

II. *BOSTOCK V. CLAYTON COUNTY*

Bostock v. Clayton County is a landmark Supreme Court decision establishing Title VII's protection of gay and transgender persons in employment law. In each of the consolidated cases, an employee was fired for being gay or transgender. Because Title VII prohibits adverse employment actions taken "because of [an] individual's race, color, religion, sex, or national origin"[19] the question presented in *Bostock* was whether these gay and transgender employees were fired "because of . . . [their] sex."[20]

A. Justice Gorsuch's Majority Opinion

Writing for the Court, Justice Gorsuch answered yes. From the outset, his opinion takes aim at the statutory question

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[17] Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020).
[18] *See generally id.*
[19] 42 U.S.C. § 2000e-2(a)(1).
[20] *Bostock*, 140 S. Ct. at 1740.

through the lens of textualism. "When the express terms of a statute give us one answer and extratextual considerations suggest another," Gorsuch explains, "it's no contest. Only the written word is the law, and all persons are entitled to its benefit."[21] The lion's share of his opinion is then devoted to establishing that the express terms of Title VII support the gay and transgender plaintiffs because it is impossible to discriminate based on sexual orientation or gender identity without discriminating based on sex.

Justice Gorsuch begins with a discussion of the "ordinary public meaning" of Title VII at the time of its adoption, focusing on the terms "sex," "because of," and "discriminate."[22] Gorsuch accepts *arguendo* the employers' definition of "sex" as encompassing only the "biological distinction between male and female," and finds that "discriminate" in 1964 means "roughly what it means today."[23]

The crux of Justice Gorsuch's argument concerns the meaning of "because of." He writes:

> [A]s this Court has previously explained, the "ordinary meaning of 'because of' is 'by reason of' or 'on account of.'" In the language of law, this means that Title VII's "because of" test incorporates the "simple" and "traditional" standard of but-for causation. That form of causation is established whenever a particular outcome would not have happened "but for" the purported cause. In other words, a but-for test directs us to change one thing at a time and see if the outcomes changes. If it does, we have found a but-for cause.[24]

To illustrate this step of his analysis, Justice Gorsuch offers the example of a car accident in which one party fails to stop at a red light and another fails to use their turn signal.[25] As he observes, both could be considered but-for causes. For Justice Gorsuch, it follows that Title VII requires only that the plaintiff's "biological sex" be one of many possible but-for causes of the challenged employment action. This finding is reinforced by the fact that Congress could have mandated, but did not, that the prohibited factor be the exclusive or main cause of discrimination by using phrases like "solely" because of or "primarily because of."[26]

Justice Gorsuch contends that the traits that prompted the adverse employment decisions in *Bostock*—sexual orientation and transgender status—are "inextricably bound up in" sex, and that any employer who discriminates on these

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[21] *Id.* at 1737.
[22] *Id.* at 1738–40.
[23] *Id.* at 1739–40.
[24] *Id.* at 1739 (internal citations omitted).
[25] *Id.*
[26] *Id.*

grounds "inescapably intends to rely on sex in [their] decision[-]making."[27] To support this claim, he frames a thought experiment along the lines quoted above, changing "one thing at a time" and asking whether the outcome changes as a result.[28] For example, he considers "an employer who fires a transgender person who was identified as male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth," Justice Gorsuch concludes, "the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee assigned as female at birth."[29]

Justice Gorsuch also imagines a job application in which a box is checked by applicants who identify as gay or transgender. Then he invites us to consider an applicant who does not know the meaning of the words "homosexual" and "transgender" and who tries "writing out instructions for who should check the box without using the words man, woman, or sex (or some synonym)."[30] According to Justice Gorsuch, "[i]t can't be done."[31]

Gorsuch canvasses many other hypotheticals and counterarguments, but in the end his opinion concludes where it began, with a sweeping affirmation of textualism: "Ours is a society of written laws. Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about

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[27] *Id.* at 1742 (emphasis omitted).

[28] *Id.* at 1739. *But see* Mitchell N. Berman & Guha Krishnamurthi, *Bostock was Bogus: Textualism, Pluralism, and Title VII*, NOTRE DAME L. REV. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3777519. Berman and Krishnamurthi argue that Gorsuch's counterfactuals do not, in fact, change just "one thing at a time." When analyzing the case of a gay employee fired because of his sexual orientation, Gorsuch proposes a counterfactual scenario involving a straight female employee (i.e. an employee who is still attracted to men, but with a female sex). However, according to Berman and Krishnamurthi, Gorsuch has changed both the sex *and* the sexual orientation of the employee in that counterfactual. If changing "two things" is permissible, we could equally consider as a counterfactual employee one who is a lesbian woman (i.e., with a different sex and different sexual attractors, but with the same "gay" sexual orientation).

We cannot fully respond to these thoughtful arguments here, but we offer two brief reactions. First, the property of being *gay* is not obviously held constant in a counterfactual comparison with a *lesbian* woman (or vice-versa); although the term "gay" is used to refer to men and women, it is not clear that the experiences of gay men and lesbian women are perfectly comparable. Second, we read Gorsuch as aiming to counterfactually vary the employee's "sex," to clarify whether sex is a (but-for) cause of the adverse employment action. That a man attracted to men is fired but a women attracted to men would not have been fired suggests that sex was a but-for cause of the firing. On our reading, Gorsuch likely sees the change in sexual orientation as a *consequence* of the counterfactual change to the employee's sex, not as an additional deliberate "change" to the counterfactual. That is, changing sex in the counterfactual has consequences, including that the employee has a different sexual orientation and that the employee is no longer fired.

[29] *Id.* at 1741.

[30] *Id.* at 1746.

[31] *Id.*

intentions or guesswork about expectations."[32] For Gorsuch, the text of Title VII and its ordinary meaning at the time of its adoption are sufficient to decide *Bostock*, despite the fact that few, if any, members of Congress would have expected Title VII to apply to adverse employment actions against gay or transgender employees.

B. Justices Alito and Kavanaugh's Dissenting Opinions

Other self-identified textualists—Justices Alito and Kavanaugh—did not agree with Justice Gorsuch's textualist analysis. In his lengthy dissent, Justice Alito approaches the question presented in *Bostock* through two interrelated lenses: textualism and the separation of powers. On the first point, Alito contends that Gorsuch's opinion for the Court is like a "pirate ship" that "sails under a textualist flag, but . . . actually represents . . . the theory that courts should 'update' old statutes so that they better reflect the current values of society."[33] While he agrees that the Court's examination should begin with the ordinary public meaning of Title VII at the time of its adoption, Alito differs in his assessment of this meaning. He emphasizes the importance of asking "what [these words] conveyed to reasonable people *at the time they were written*."[34] Alito's analysis then turns to how Title VII was perceived in 1964. Had the country been surveyed at that time, he writes, "it would have been hard to find any[one] who thought that discrimination because of sex meant discrimination because of sexual orientation . . . [or] gender identity."[35]

The second main concern of Alito's dissent is reflected in its opening sentence: "There is only one word for what the Court has done today: legislation."[36] Alito rests this argument mainly on the fact that bills to add sexual orientation protection to Title VII were introduced in every Congress beginning in 1975, all of which failed to pass both Houses of Congress.[37] The only activity Congress prohibited in Title VII, he claims, was "discrimination because of sex itself, not everything that is related to, based on, or defined with reference to, 'sex.'"[38] Under the majority's reading, Alito wonders whether it is unlawful for an employer to refuse to hire someone based on a history of "sexual harassment" or "sexual assault or violence," both of which are related to sex.[39]

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[32] *Id.* at 1754.
[33] *Id.* at 1755–56 (Alito, J., dissenting).
[34] *Id.* at 1755 (emphasis in original).
[35] *Id.*
[36] *Id.* at 1754.
[37] *See id.* at 1755, 1777.
[38] *Id.* at 1761 (emphasis omitted).
[39] *Id.*

The difference between sexual orientation and sex is a repeated theme in Alito's dissent: "[T]he concept of discrimination because of 'sex' is different from discrimination because of 'sexual orientation' or 'gender identity.'"[40] The relevant question to ask is whether an employer's action was motivated "entirely by sexual orientation, entirely by sex, or in part by both." [41] According to Alito, firing someone because of sexual orientation simply does not imply firing him or her because of sex.

In his separate dissent, Justice Kavanaugh also highlights separation of powers concerns and treats ordinary meaning as his interpretive touchstone. His approach to the latter issue, though, introduces a new distinction. According to Kavanaugh, "courts must follow ordinary meaning, not literal meaning."[42] Doing this, he contends, involves looking at the "meaning of a *phrase as a whole*, not just the meaning of the words in the phrase."[43] Since discrimination "because of sex" is not normally taken to mean discrimination based on sexual orientation, the two traits are distinct and should be treated as such. There is a fundamental difference, in other words, between "sex discrimination" and "sexual orientation discrimination."[44] Kavanaugh elaborates this point at length:

> Federal law distinguishes the two. State law distinguishes the two. This Court's cases distinguish the two. Statistics on discrimination distinguish the two. History distinguishes the two. Psychology distinguishes the two. Sociology distinguishes the two. Human resources departments all over America distinguish the two. Sports leagues distinguish the two. Political groups distinguish the two. Advocacy groups distinguish two. Common parlance distinguishes the two. Common sense distinguishes the two.[45]

Also appealing to the ordinary meaning of Title VII, Justice Alito reaches the same conclusion:

> 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 and conveying their approval or disapproval. What would these ordinary citizens have taken "discrimination because of sex" to mean? Would they have thought that this language prohibited discrimination because of sexual orientation or gender identity?

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[40] *Id.* at 1755.
[41] *Id.* at 1762.
[42] *Id.* at 1825 (Kavanaugh, J., dissenting).
[43] *Id.* at 1826 (emphasis in original).
[44] *Id.* at 1824.
[45] *Id.* at 1835–36.

> The 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. The ordinary meaning of discrimination because of "sex" was discrimination because of a person's biological sex, not sexual orientation or gender identity.[46]

C. Commonalities and Differences

Before considering how the two types of empirical textualism employed by the majority and dissenting opinions differ, it is worth noting what they have in common. First, all three opinions claim to be applying Title VII's ordinary meaning, rather than what its drafters intended or expected.[47] In addition, all three opinions ground the search for ordinary meaning on familiar rule of law values. For example, Justice Gorsuch emphasizes the importance of democratic legitimacy, separation of powers, and judicial restraint, along with reliance and fair notice, in the following passage:

> This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives. And we would deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations.[48]

Alito and Kavanaugh justify their appeals to ordinary meaning on similar grounds. For example, Alito emphasizes that it is the exclusive role of legislatures "to make new legislation" and insists that judicial interpretation must turn on what the words of the statute convey—not to judges, but to people.[49] Kavanaugh concurs: "Judges adhere to ordinary meaning for two main reasons: rule of law and democratic accountability,"[50] the former of which includes values like "fair notice."[51] Finally, Kavanaugh observes that "[l]ike many cases in this Court, this case boils down to one fundamental question: Who decides?"[52]

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[46] *Id.* at 1767 (Alito, J., dissenting) (emphasis omitted).
[47] *See supra* notes 20–46 and accompanying text.
[48] *Id.* at 1738 (majority opinion).
[49] *Id.* at 1784 (Alito, J., dissenting).
[50] *Id.* at 1825 (Kavanaugh, J., dissenting).
[51] *Id.* at 1828.
[52] *Id.* at 1822.

On the surface, then, all three opinions rely on textualism and share important values and methodological commitments. Why then do they reach such different conclusions? We think part of the answer lies in two different types of empirical textualism reflected in these opinions.[53]

The first version, which characterizes Alito's and Kavanaugh's dissents, conceives of ordinary meaning as closely connected to empirical facts about how ordinary people understand statutory language; in effect, it equates ordinary meaning with ordinary understanding.[54] We refer to this as "ordinary criteria" empirical textualism. This version's key empirical move involves simply thinking about how the ordinary public would understand the language of Title VII. Thus, it asks: what would ordinary people in 1964 take discrimination "because of sex" to mean? Would discrimination based on sexual orientation fit within that category? In making this judgment, moreover, this version of empirical textualism presumes that ordinary language users would parse the key phrases of Title VII as unified expressions and use the ordinary meaning of "because of," not any special legal concept, such as the but-for test.

The second version conceptualizes ordinary meaning differently, combining the ordinary understanding of statutory terms with both their previously-established legal meanings and their legal entailments. We refer to this as the "legal criteria" version of empirical textualism, and we suggest it is exemplified by Gorsuch's majority opinion. Gorsuch begins the key part of his analysis in *Bostock* by noting that the Supreme Court has already clarified the ordinary meaning of "because of" in the Title VII context.[55] Citing the controlling precedent of *Univ. of*

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[53] Other scholars have supplied different answers to this question. *See, e.g.*, Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 266 (2020) (proposing a "formalist" and "flexible" textualism); Anuj C. Desai, *Text is Not Enough*, 93 U. COLO. L. REV. (forthcoming 2021) (arguing that analysis of *Bostock* requires multiple interpretive modalities, and that it was not and cannot be resolved with textualism alone); Andrew Koppelman, Bostock*, LGBT Discrimination, and the Subtractive Moves*, 105 MINN. L. REV. HEADNOTES 1, 3 (2020) (arguing that the dissent make "subtractive moves" that reach "outside the statute"). Other scholars have argued that the court should have employed different reasoning from that expressed in any of the opinions. *See, e.g.*, Robin Dembroff et al., *What Taylor Swift and Beyoncé Teach Us About Sex and Causes*, 169 U. PA. L. REV. ONLINE 1, 3 (2020) (arguing that but-for tests are unhelpful in these disputes because discrimination does not occur "because of" specific personal characteristics, but because of social meanings attached to characteristics); William N. Eskridge, Jr. et al., *The Meaning of Sex: Dynamic Words, Novel Applications, and Original Public Meaning*, 119 MICH. L. REV. 1, 48 (2021) (arguing that "sex" had a broader meaning in 1964 than that recognized by any *Bostock* opinion, majority or dissent).

[54] For a useful discussion of the distinctions among ordinary meaning, ordinary understanding, and intent-based interpretation in the context of constitutional originalism, see JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 7–11 (1996).

[55] *Bostock*, 140 S. Ct. at 1739–40.

Tex. Southwestern Medical Center v. Nassar,[56] Gorsuch notes that the previously-established ordinary meaning of "because of" is "by reason of" or "on account of," and the legal criterion for applying this meaning is the but-for test. Importantly, Gorsuch describes this move as involving some kind of legal translation—thus, he says, the but-for test is the ordinary meaning of "because of" in "the language of law."[57] On this view, the key empirical question appears to be, not how ordinary language users would interpret the Title VII language *simpliciter*, but how they would apply *the legally-established criterion* for determining the scope of the ordinary meaning of discrimination "because of sex." In other words, is sex a but-for cause of discrimination based on sexual orientation or transgender status? Gorsuch thinks the answer is yes.[58]

In some cases, the two types of empirical textualism will reach the same outcome. For example, if the ordinary criteria and legal criteria for determining the meaning and application of discrimination "because of sex" were equivalent, one would expect no practical difference between them. Given the divergences in the *Bostock* opinions, one might suspect that the views diverge here. The next Part tests this assumption and confirms the significance of these two variations of empirical textualism.

III. DO THE TWO TYPES OF EMPIRICAL TEXTUALISM DIVERGE?

The previous section suggests that there is a difference between two versions of empirical textualism in *Bostock*. One version focuses mainly on what ordinary people understand Title VII's prohibition on sex discrimination to mean, applying their own criteria. The other version relies not only on the ordinary understanding of "because of sex," but on the ordinary application of the established legal criterion (the but-for test) to interpret and apply the statutory prohibition on discriminating against employees "because of" their sex.[59]

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[56] *Id.* (citing Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 350 (2013)).

[57] *Id.*

[58] *Id.*

[59] Justice Gorsuch's opinion in *Bostock* also appears to rely on a fine-grained legal analysis of intentional action, according to which discriminating against an employee because of their sexual orientation or gender identity necessarily involves discriminating against them because of their sex. Put differently, his opinion appears to rest on a "necessary means" principle, according to which discrimination on the basis of sex is, invariably, a necessary means of discrimination on the basis of sexual orientation or gender identity. *See id.* at 1741 ("[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."); *id.* at 1742 ("[W]hen an employer discriminates against homosexual or transgender employees, [the] employer . . . inescapably

This analysis raises several empirical questions. For instance, does the ordinary understanding of "because of sex" (applying ordinary semantic criteria) diverge from how ordinary people apply the but-for test (the legal criterion)? One way to make progress here is to consider experimental evidence. Indeed, the *Bostock* opinions appear to invite such an approach. For example, Justice Alito suggests that we could easily resolve the main dispute in the case "[i]f every single living American had been surveyed in 1964."[60] Furthermore, Justice Kavanaugh suggests that the ordinary meaning of Title VII when it was enacted does not differ from its ordinary meaning today: "The ordinary meaning that counts is the ordinary public meaning at the time of enactment—although in this case, that temporal principle matters little because the ordinary meaning of 'discriminate because of sex' was the same in 1964 as it is now."[61]

There is already some empirical research that bears directly on these questions. In a seminal study in experimental jurisprudence, James Macleod examined how ordinary people today understand language like "because of," and "results from."[62] Macleod's results indicate that ordinary people do *not* understand this causal language in terms of a straightforward but-for test. At least in certain cases, a majority of participants judge that something is produced "because of" X, even if X is not a necessary (i.e., a but-for) cause of the result.[63] One key takeaway from Macleod's study is that both necessity and sufficiency affect lay judgments, and sufficiency might be even more important.[64]

In an important new project, Macleod assesses ordinary judgments of the key Title VII language as it applies in the circumstances of *Bostock*, and consolidated cases, *Zarda*, and

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intends to rely on sex in its decisionmaking."); *id.* at 1744 ("When an employer fires an employee for being homosexual or transgender, it necessarily and intentionally discriminates against that individual in part because of sex."); *id.* at 1747 ("[D]iscrimination based on homosexuality or transgender status necessarily entails discrimination based on sex."). This principle has strong Kantian or deontological overtones and is widely discussed in the philosophical literature on intentional action. *See* MIKHAIL, *supra* note 13, at 80–81, 303; G.E.M. Anscombe, *War and Murder*, in WAR AND MORALITY 42–53 (Richard Wasserstrom ed., 1970); John Finnis, *Intention in Tort Law*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 229, 229–47 (David G. Owen ed., 1997); *see also* NEIL M. GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 199–210 (2019) ("Of Intentions and Consequences"); NEIL M. GORSUCH, THE FUTURE OF ASSISTED SUICIDE AND EUTHANASIA 53–75 (2006). To keep things simple, we focus here on Gorsuch's use of the but-for test to explicate the "because of" language in Title VII. *Bostock*, 140 S. Ct. at 1739.

[60] *Bostock*, 140 S. Ct. at 1755 (Alito, J., dissenting).

[61] *Id.* at 1825 (Kavanaugh, J., dissenting).

[62] James A. Macleod, *Ordinary Causation: A Study in Experimental Statutory Interpretation*, 94 IND. L.J. 957, 957 (2019).

[63] *Id.* at 962.

[64] *Id.* at 1000–05.

Harris.[65] Macleod provides participants with a series of questions, including whether a person was fired because of his/her sex.[66] Strikingly, the majority of participants in both cases (gay and transgender) agreed: The firing occurred because of the employee's sex.[67]

The findings we report in this essay build on Macleod's groundbreaking work. Our studies aimed to test some of the key empirical assumptions in *Bostock*.[68] In particular, we investigated a claim about ordinary meaning that seems implicit in Gorsuch's opinion: Do ordinary people understand discrimination because of sexual orientation or gender identity to be discrimination that would not have occurred *but for* the person's sex?[69] Like Macleod, we also examined Kavanaugh and Alito's empirical claims that the ordinary meaning of discrimination "because of sex" does not include discrimination because of sexual orientation. Finally, we examined the empirical basis of a rhetorical strategy used by both Kavanaugh and Alito, which turns on whether ordinary people are less inclined to judge that sexual orientation discrimination is discrimination "because of sex" when they are also given the option to characterize it as discrimination "because of sexual orientation."[70]

Although we focused primarily on the main question presented in *Bostock*, we were also interested in the broader phenomena underlying the ordinary meaning of phrases like "because of sex." As a result, we also considered four cases with a similar structure, such as the question of whether someone was fired "because of" their race when they are fired because they are in an interracial marriage. In what follows, we describe and discuss the results of this experiment.

A. Experimental Design

We begin by noting that the question presented in *Bostock* involves the concept of "partial definition." As the "Philosopher's Brief" submitted in the case put it: "The concept of 'sex' is inextricably tied to the categories of same-sex attraction and gender nonconformity. Both categories are partially defined by sex and cannot logically be applied to any

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[65] James Macleod, *Finding Ordinary Public Meaning*, 56 GA. L. REV. (forthcoming 2021) (manuscript at 1); *see also* Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018); EEOC v. R.G. & G.R. Harris Funeral Homes, 884 F.3d 560 (6th Cir. 2018).

[66] *See* Macleod, *supra* note 65, at 20–23.

[67] *Id.* at 30.

[68] *See generally* Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020).

[69] *See supra* Section II.A.

[70] *See supra* Section II.B.

individual without reference to that individual's sex."[71] In other words, the firings in the case occurred because of some factor (same-sex sexual orientation or transgender status) that is partially defined by the Title VII protected factor (sex).[72] The circumstances in *Bostock* are not the only fact patterns that raise this question. For example, partial definition could also arise with respect to pregnancy or interracial marriage, yielding at least four (nonexhaustive) questions one might ask with respect to Title VII's prohibition on race and sex discrimination:

1. Is discriminating against someone who is gay discriminating "because of sex"?

2. Is discriminating against someone who is transgender discriminating "because of sex"?

3. Is discriminating against someone who is pregnant discriminating "because of sex"?

4. Is discriminating against someone in an interracial marriage discriminating "because of race"?

In each case, the Title VII factor (race or sex) allegedly defines, in part, a second factor (sexual orientation, gender identity, pregnancy, interracial marriage) that is a target of potential litigation. For this reason, we refer to this second factor in what follows as the "target factor" and the Title VII factor as the "statutory factor." We examine how ordinary people's understanding of Title VII's "because of" language applies across all of these four of these cases.

B. Method and Procedure

Our study and analyses were preregistered on Open Science.[73] We recruited 404 participants from Lucid (48.8% female, $M_{age} = 44.2$). Participants were randomly assigned to one of four conditions or "question types" (see below): (i) a But-For condition, (ii) a Statutory Factor condition, (iii) a Target Factor condition, or (iv) a Both Factors condition. Then, participants read four scenarios in a random order.

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[71] Brief of Philosophy Professors as *Amici Curiae* in Support of the Employees at 1, Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020) (No 17-1618) [hereinafter Philosophers' Brief].

[72] *See* 42 U.S.C. § 2000e-2(a)(1).

[73] Kevin Tobia & John Mikhail, *Title VII Ordinary Meaning*, OPEN SCIENCE (Feb. 2, 2021), https://osf.io/df439/ [https://perma.cc/R7YB-ETUY].

> Scenario 1: Mike was an employee at an Italian restaurant. Mike had worked there for ten years. Mike was a gay man, who was married to another man. One day, Mike's boss learned that Mike is gay. Two days later, Mike's boss fired him, saying "I'm sorry Mike, I just don't think having gay employees is good for business."[74]
>
> Scenario 2: Sarah was an employee at a diner. Sarah had worked there for ten years. At birth, Sarah was given the name "Steve," and was assigned a male sex. Today, Sarah identifies as a transgender woman. One day, Sarah's boss learned that Sarah identifies as transgender. Two days later, Sarah's boss fired her, saying "I'm sorry Sarah, I just don't think having transgender employees is good for business."
>
> Scenario 3: Alice was an employee at a coffee shop. Alice had worked there for ten years. Recently Alice and her husband Bob were expecting their first child: Alice was pregnant. One day, Alice's boss learned that Alice is pregnant. Two days later, Alice's boss fired her, saying "I'm sorry Alice, I just don't think having pregnant employees is good for business."
>
> Scenario 4: Peter was an employee at an ice cream shop. Peter had worked there for ten years. Peter was a white man who was married to a Black woman. One day, Peter's boss learned that Peter is married to a Black woman. Two days later, Peter's boss fired him, saying "I'm sorry Peter, I just don't think having interracially married employees is good for business."[75]

We asked four different questions, pertaining to the application of: (i) the But-For test, (ii) the Statutory Factor, (iii) the Target Factor, and (iv) Both Factors together—the statutory

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[74] The introduction to Scenarios 1–3 began: "Please read the scenario and tell us whether you agree ('yes') or disagree ('no') with the following statement. For the purpose of this question, 'sex' should be understood to mean biological sex, per Merriam-Webster's dictionary: 'either of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male especially on the basis of their reproductive organs and structures.'" *Id.* (quoting *Sex*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/sex [https://perma.cc/3S6S-M63K]).

[75] The introduction to Scenario 4 began: "Please read the scenario and tell us whether you agree ('yes') or disagree ('no') with the following statement. For the purpose of this question, 'race' should be understood per Merriam-Webster's dictionary: 'a category of humankind that shares certain distinctive physical traits.'" *Id.* (quoting *Race*, MERRIAM-WEBSTER, https://web.archive.org/web/20191225084838/https:/www.merriam-webster.com/dictionary/race [https://perma.cc/LNY6-HNKG]).

factor and target factor. For example, with respect to Scenario 1 (the case of firing Mike, a gay man), participants received one of four possible questions:

> 1. "But-For" question: Imagine that the above scenario were different in exactly one way: Mike was not a man but was instead a woman named "Michelle," who is married to a man. Imagine that everything else about the scenario was the same. Would Michelle still have been fired?
>
> 2. "Statutory Factor" question: Was Mike fired because of his sex?
>
> 3. "Target Factor" question: Was Mike fired because of his sexual orientation?
>
> 4. "Both Factors" question: Was Mike fired because of
>
> - o his sex
> - o his sexual orientation
> - o both his sex and his sexual orientation
> - o neither

More precisely, participants in the But For condition received this style of question:

> Question: Imagine that the above scenario were different in exactly one way: Mike was not a man but was instead a woman named "Michelle," who is married to a man. Imagine that everything else about the scenario was the same. Would Michelle still have been fired? [Yes or No]
>
> Question: Imagine that the above scenario were different in exactly one way: Sarah was given the name "Sarah" and assigned a female sex at birth. Imagine that everything else about the scenario was the same, including that today Sarah identifies as a woman. Would Sarah still have been fired? [Yes or No]
>
> Question: Imagine that the above scenario were different in exactly one way: Alice was a man named "Arthur", and Arthur is expecting a first child with his pregnant wife named Molly. Imagine that everything else about the scenario was the same. Would Arthur still have been fired? [Yes or No]

> Question: Imagine that the above scenario were different in exactly one way: Peter was not a white man, but was instead a Black man. Imagine that everything else about the scenario was the same, including that Peter is married to a Black woman. Would Peter still have been fired? [Yes or No]

Participants in the Statutory Factor condition received this style of question:

> Statement: Mike was fired because of his sex. [Yes or No]
>
> Statement: Sarah was fired because of her sex. [Yes or No]
>
> Statement: Alice was fired because of her sex. [Yes or No]
>
> Statement: Peter was fired because of his race. [Yes or No]

Participants in the "Target Factor" condition received this style of question:

> Statement: Mike was fired because of his sexual orientation. [Yes or No]
>
> Statement: Sarah was fired because of her gender identity. [Yes or No]
>
> Statement: Alice was fired because of her pregnancy. [Yes or No]
>
> Statement: Peter was fired because of his interracial marriage. [Yes or No]

Finally, participants in the "Both Factors" condition received this style of question and could select only one option:

> Mike was fired because of his sex.
> Mike was fired because of his sexual orientation.
> Mike was fired because of both his sex and his sexual orientation.
> Mike was not fired because of either his sex or his sexual orientation.
>
> Sarah was fired because of her sex.
> Sarah was fired because of her gender identity.
> Sarah was fired because of both her sex and her gender identity.
> Sarah was not fired because of either her sex or her gender identity.

> Alice was fired because of her sex.
> Alice was fired because of her pregnancy.
> Alice was fired because of both her sex and her pregnancy.
> Alice was not fired because of either her sex or her pregnancy.
>
> Peter was fired because of his race.
> Peter was fired because of his interracial marriage.
> Peter was fired because of both his race and his interracial marriage.
> Peter was not fired because of either his race or his interracial marriage.

C. Results

The main results are displayed in Figures 1–4. Figure 1 shows the results for the But For condition. Figure 2 shows the results for the Statutory Factor and Target Factor conditions. Figure 3 shows the results for the Both Factors condition. Figure 4 presents a summary of all the results, with some data transformations for ease of comparison.

As Figure 1 indicates, most participants in the But For condition judged that the person would not have been fired if the Title VII factor (sex, race) had been different. That is, most participants agreed that the Title VII factor was a but-for cause of the discrimination.

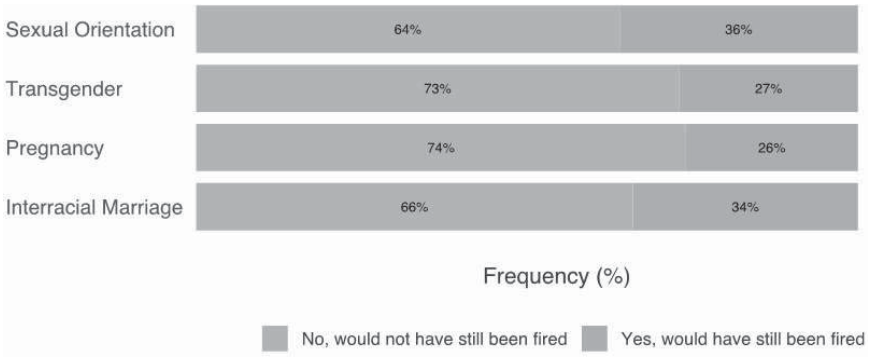


Figure 1. Proportion of respondents in the But For conditions endorsing that the firing would not have occurred if the statutory factor (e.g., sex or race) of the person had differed.

Figure 2a shows that for the Statutory Factor condition, the majority of participants agreed that the gay and transgender firings were "because of" sex. This replicates James Macleod's

important findings.[76] For the pregnancy and marriage cases, the majority said no. Overall, however, participants across all four Statutory Factor groups were somewhat closely divided.

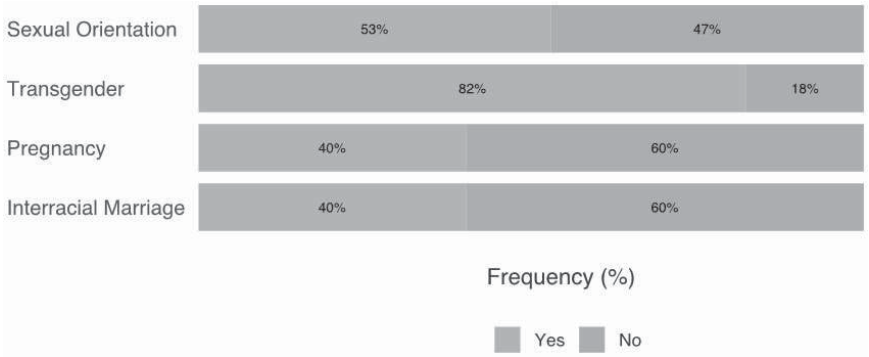


Figure 2a. Proportion of respondents endorsing that the firing was because of the statutory factor ("sex" or "race") in the Statutory Factor condition (i.e., where the only question concerned the Title VII statutory factor).

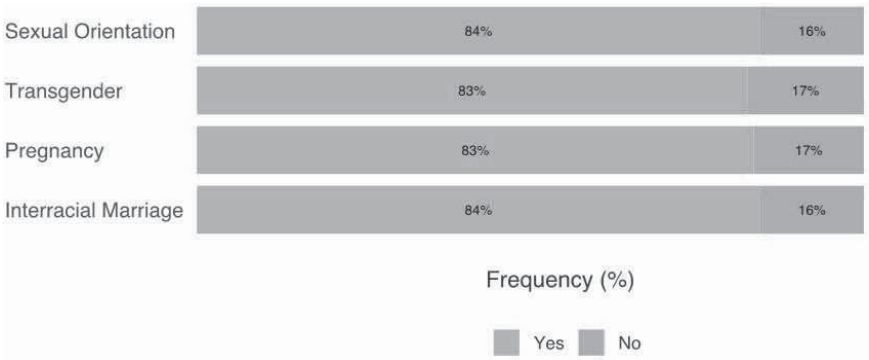


Figure 2b. Proportion of respondents endorsing that the firing was because of the target factor (e.g., "sexual orientation") in the Target Factor condition (i.e., where the only question concerned the target factor).

How did participants respond when both the statutory and target factors were options? Figure 3 shows the results from the Both Factors condition. Here the majority of participants endorsed the target factor response.

[76] *See generally* Macleod, *supra* note 65.

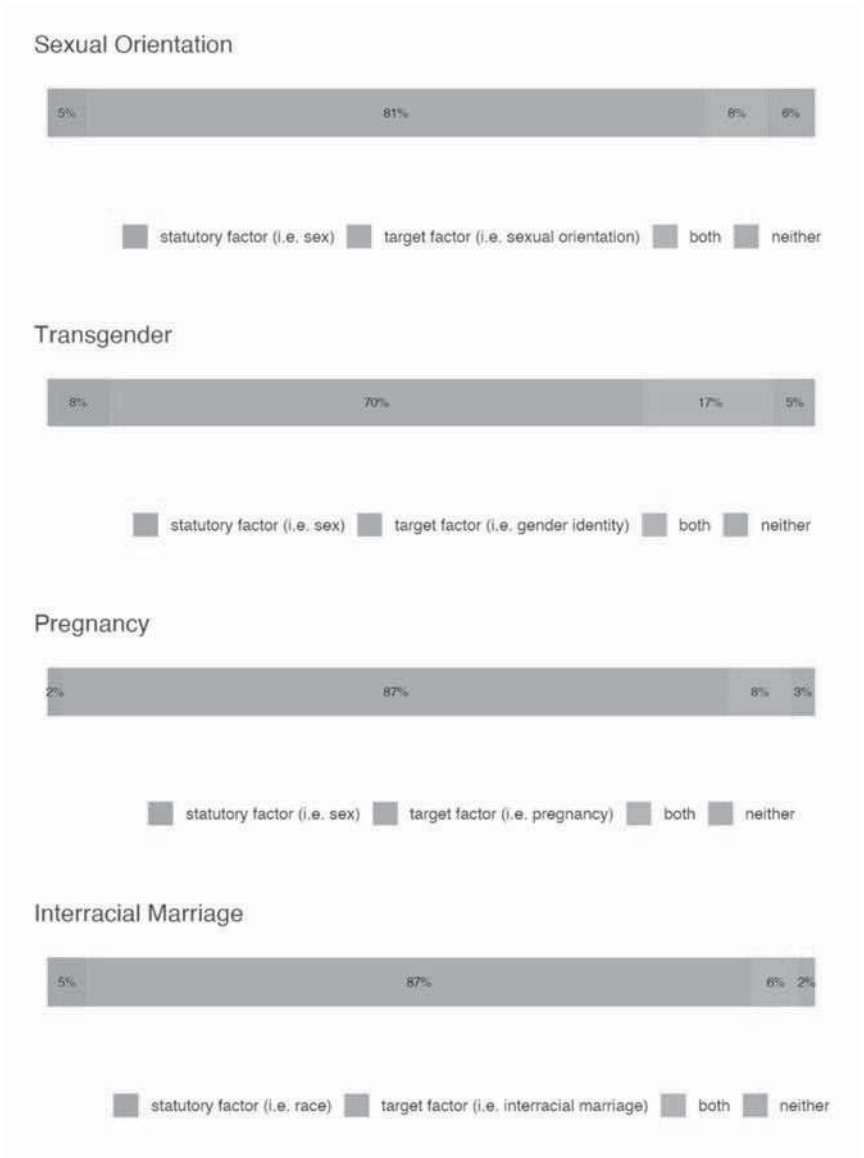


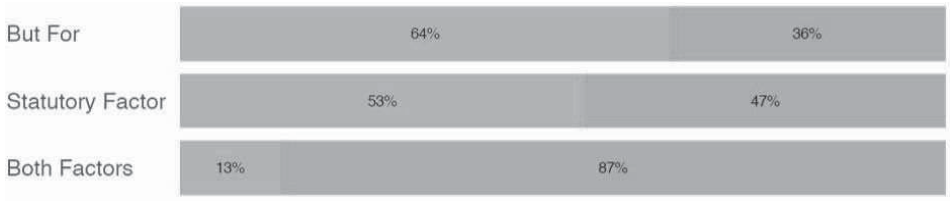
Figure 3. Proportion of respondents in the "Both Factors" condition endorsing that the firing was because of the statutory factor ("sex" or "race"), target factor (e.g., "sexual orientation"), both, or neither.

Finally, Figure 4 presents all results where participants made a judgment about the statutory factor (i.e., sex or race). The results have been transformed for ease of comparison. In Figure 4, the But For results are reverse-coded;[77] the Both Factor "yes"

[77] In our preregistered analysis and this figure, the But For results are reverse-coded. In the other conditions (e.g., Statutory Factor condition), a "yes" response indicates agreement that discrimination occurred because of the factor (i.e., "yes" the

results include participants who chose the statutory factor (e.g., sex) or "both" while the "no" results include participants who chose just the target factor (e.g., sexual orientation) or "neither."

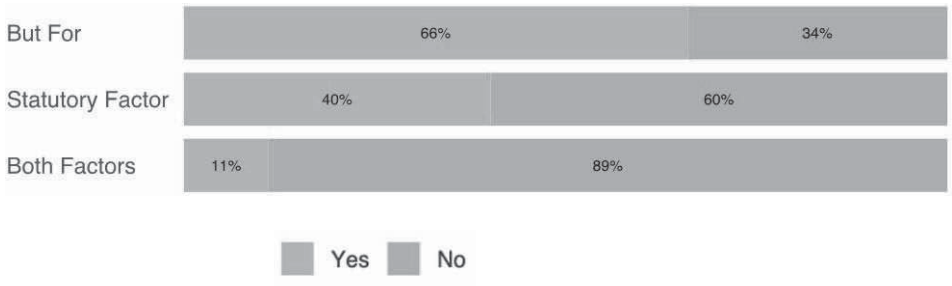
Sexual Orientation



Transgender

Pregnancy

Interracial Marriage



discrimination occurred "because of sex"). In the But For condition, however, an answer of "no" indicates agreement that discrimination occurred because of the factor (i.e., "no" the discrimination would not have occurred but for the factor). In this figure, the reverse-coding is simply a vehicle to improve clarity of presentation.

Figure 4. Proportion of respondents endorsing that the firing was because of the Title VII factor (sex or race), across case and standard type. (But-For is reverse coded; Both Factors "Yes" responses reflect both participants who selected the Title VII factor alone, or "both").

Figure 4 shows how different possible "empirical textualist" tests can lead to very different pictures of the so-called ordinary meaning of the phrase "because of." For example, the but-for test provides the strongest support for the conclusion that sexual orientation discrimination is sex discrimination. A simple survey about the role of the statutory factor (e.g., "sex") provides an intermediate level of support. Finally, providing the second option (e.g., fired because of his sexual orientation) dramatically skews results in the opposite direction.[78]

As expected, participants largely understand the but-for test to indicate that the person would not have been fired but for the Title VII factor (sex or race). The statutory factor condition diverges significantly from this, across most of the cases: Participants were less sure that the person was fired "because of" race or sex. And in the "Both Factors" condition, when the target factor was presented as an option (e.g., sexual orientation or pregnancy), agreement that the person was fired "because of" the Title VII factor dropped dramatically.

D. Discussion

These experimental findings have several important implications. First, they provide an empirical perspective on the debate between the Justices in *Bostock*.[79] Second, they offer insight into the use of survey methods by textualist scholars to uncover ordinary meaning. Finally, they illustrate the key distinction to which we have drawn attention in this essay between two forms of empirical textualism.

First, consider *Bostock*.[80] Our study confirms that ordinary people largely endorse but-for causation of the statutory factor in simple cases involving partial definition of the target factor by the statutory factor. For example, sex is seen as a but-for cause when

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[78] We also conducted a generalized mixed model with a Standard fixed effect and crossed Scenario and participant random effects, with the Title VII factor evaluation as the binary DV. Following our pre-registration plan, we recoded the data so that responses in the Standard condition (1 above) equal "1" if "yes" was selected; in the four-choice condition (3 above), "1" equals answers of a or c; in the but-for, "1" equals answer of "no." There was a significant effect of Standard, $X^2 = 97.6$, $p < .00001$. A full model table is available on Open Science. *See* Tobia & Mikhail, *supra* note 73.

[79] *See generally* Part II.

[80] Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020).

someone is fired on account of their sexual orientation. On the other hand, our study provides additional evidence that how ordinary people understand Title VII's "because of" language is not simply the result of the but-for test employed by the Court in *Bostock*.[81] Specifically, the Statutory Factor condition results differed from those of the But For condition. This conclusion reinforces previous work by James Macleod, who showed that there appears to be a significant divergence between but-for causation and the ordinary concept of causation.[82] In the terminology of our "ordinary criteria" and "legal criteria" distinction, our findings lend further support to the conclusion that Gorsuch's "legal criteria" version of empirical textualism diverges to some extent from an "ordinary criteria" version.[83] Although both sets of criteria support the *Bostock* employee-plaintiffs (both are endorsed at a rate of over 50%), the ordinary application of the but-for test offers the employee-plaintiffs much stronger support than the ordinary semantic criteria embedded in the common linguistic meaning of "because of."

At the same time, our results call into question some of the empirical assumptions underlying the Alito and Kavanaugh dissents in *Bostock*.[84] In particular, our findings suggest that these Justices were incorrect to assume that the ordinary meaning of Title VII cuts clearly against the *Bostock* plaintiffs. In the "Statutory Factor" condition there was substantial disagreement in the gay employee case; furthermore, most of our participants said the transgender employee *was* fired "because of" their sex. Together with Macleod's results, these findings cast doubt on a key premise of the Alito and Kavanaugh dissents, both of which hold that the original ordinary meaning of Title VII's statutory language obviously excludes protection of gay and transgender employees (on the basis of the further assumption, made explicit by Kavanaugh, that the ordinary meaning today is the same as the ordinary meaning in 1964).[85] Insofar as Alito and Kavanaugh intended to rely upon "ordinary criteria" empirical textualism, their analyses appear to have missed the mark.

The final illustration in our study, the "Both Factors" condition, provides further insight into the Alito and Kavanaugh dissents. Both Justices focused on the distinction between sex and sexual orientation and insisted that sexual orientation was

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[81] *Id.* at 1739.
[82] *See* Macleod, *supra* note 62, at 962.
[83] *See* discussion *supra* Section II.A.
[84] *See* discussion *supra* Section II.B.
[85] *See* discussion *supra* Section II.B.

the real reason why the plaintiff-employees in *Bostock* and *Zarda* were fired.[86] Our findings reveal why there is something rhetorically appealing, but nonetheless slippery, about that argument. When our subjects were informed that someone was fired because of their sexual orientation and were then confronted with a variety of choices characterizing that employment action as one in which these employees were fired because of their sexual orientation, their sex, both, or neither, most people said just sexual orientation. This pattern reflects the salience of sexual orientation in a manner superficially in line with Justice Alito's and Kavanaugh's emphasis on this operative factor.[87] The legal test for a Title VII violation, however, requires merely that sex be "one but-for cause," not necessarily "the only factor, or . . . even the main factor," in an adverse employment action, as Justice Gorsuch underscores in his majority opinion.[88]

This brings us to the second set of implications concerning the relation between survey methods and ordinary meaning. Insofar as empirical textualists wish to use surveys to uncover how ordinary people understand legal language, our study suggests that this strategy may be more complicated than it seems. For example, consider again the contrast between our "Statutory Factor" and "Both Factors" conditions. The simple addition of an extra choice dramatically alters people's responses in these cases. Whether this shift is more a matter of pragmatics (e.g., whether it would be appropriate to say "both" where one factor partially defines the other) than semantics is not fully clear, but the variation nonetheless calls into question any uncritical reliance on simple, one-dimensional survey methods to ascertain the meaning of complex legal language.

As with other sources of evidence (e.g., dictionary use, legal corpus linguistics, legislative history), the use of surveys in empirical textualism thus calls for a more robust and self-conscious methodology: How should the survey question be formed, and what options should be given? Without principled answers to these questions, many of the same concerns that have been raised about dictionaries, legal corpus linguistics, and legislative histories (e.g., cherry-picking) may arise for survey methods.

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[86] *See* discussion *supra* Section II.B.

[87] *See* discussion *supra* Section II.B.

[88] Bostock v. Clayton Cty., 140 S. Ct. 1731, 1745 (2020). Although further empirical work is required to fully understand this phenomenon, our suspicion is that the "Both Factors Choices" scenario, in this context, is capturing something about what makes for a good—or bad—explanation in this context, in addition to something about meaning. *See generally* H. Paul Grice, *Logic and Conversation*, in 3 SYNTAX AND SEMANTICS 41 (Peter Cole & Jerry L. Morgan eds., 1975).

Finally, our studies shed light on the distinction between two types of empirical textualism. One version ("ordinary criteria") focuses on the empirical question of how ordinary people would understand the language of a legal text (e.g., is sexual orientation discrimination ordinarily understood as discrimination "because of sex" in Title VII). The other version ("legal criteria") focuses on the empirical question of how ordinary people would apply the relevant legal test or criteria (e.g., the but-for test to determine causation). Our findings clarify that these two versions are not necessarily equivalent.

CONCLUSION

Empirical methods seem to promise the objectivity sought by empirical textualism. There are many ways, however, to consult a dictionary, search a corpus, or prepare an experimental survey study. In practice, empirical studies require a number of choices. The experiment presented here can be seen as a case study in this complexity; different experimental approaches can suggest different conclusions about "ordinary meaning."

Nevertheless, empirical methods offer useful new ways for empirical textualism to make progress as a theory. For example, this essay proposes a distinction between an empirical textualism that looks to ordinary people's application of ordinary semantic criteria and one that looks to ordinary people's application of legal criteria. In the context of *Bostock*, this distinction separates how ordinary people would evaluate the statutory language of Title VII from how they would apply the but-for test in a given case.

Our experiment suggests that both types of empirical textualism favor the gay and transgender plaintiffs in *Bostock*. Our study, however, also shows that these empirical methods could support divergent results in certain circumstances. The key question for empirical textualism is: Which is the right specification of the theory and method in a given case? This may soon become an important question again in the Title VII context or other statutory schemes using the key "because of" language.[89] If its advocates

[89] On affirmative action, see, for example, Jeannie Suk Gersen, *Could the Supreme Court's Landmark L.G.B.T.-Rights Decision Help Lead to the Dismantling of Affirmative Action?*, NEW YORKER (June 27, 2020), https://www.newyorker.com/news/our-columnists/could-the-supreme-courts-landmark-lgbt-rights-decision-help-lead-to-the-dismantling-of-affirmative-action [https://perma.cc/R6TJ-NSXG]; Nelson Lund, *Unleashed and Unbound: Living Textualism in* Bostock v. Clayton County, 21 FEDERALIST SOC'Y REV. 158, 163 (2020); Cass R. Sunstein, Opinion, *Gorsuch Paves Way for Attack on Affirmative Action*, BLOOMBERG QUINT (June 18, 2020, 6:01 AM), https://www.bloombergquint.com/gadfly/gorsuch-gay-rights-opinion-targets-affirmative-action [https://perma.cc/Y8FD-8FWU]. On the Fair Housing Act see, Rigel C. Oliveri, *Sexual Orientation and Gender Identity Discrimination Under the Fair Housing Act After* Bostock v. Clayton County, 69 KAN. L. REV. 409, 409 (2021).

cannot provide compelling answers, this fact would seem to undercut much of the supposed objectivity and transparency of empirical textualism.