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Dueling Textualisms or Multimodal Analysis? Using *Bostock* to Show Why No One Is Really a Textualist

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Date : November 30, 2022

Anuj C. Desai, *Text Is Not Enough*, 93 **U. Colo. L. Rev.** 1 (2022).

In *Text Is Not Enough*, Anuj Desai analyzes the Supreme Court's 2020 decision in *Bostock v. Clayton County*, which held that it is unlawful for employers to fire individuals merely because they are gay or transgender, to raise several points about the Court's favorite interpretative tool, textualism. Professor Desai shows that—contrary to the "conventional wisdom" that the *Bostock* majority and dissenting opinions showcase "dueling examples of textualism"—textual analysis is insufficient to decide the question whether the term "sex" includes sexual orientation for purposes of Title VII. (P. 1.) Accordingly, "in difficult, contested cases, statutory interpretation is unavoidably a multimodal enterprise that involves consideration of, at least, text, semantic context, statutory purpose, history (statutory, legislative, social, and political), social context, precedent, moral judgment, and consequentialist reasoning." (P. 3.)

Bostock comprises three consolidated cases, only two of which Professor Desai examines: *Bostock* itself, where the county employer discharged Gerald Lynn Bostock, a Child Welfare Services Coordinator, when his co-workers discovered that he played for a gay recreational softball league; and Altitude Express v. Zarda, where a skydiving company fired one of its instructors when a customer complained that he was gay.[1] Both cases raise the legal question of whether employment discrimination because of sexual orientation constitutes discrimination "because of…sex" within the meaning of Section 703(a)(1) of Title VII.[2] Justice Gorsuch's majority opinion says yes; Justice Alito's and Justice Kavanaugh's dissenting opinions say no. All three Justices claim that the text answers the question to support their distinct conclusions.

Professor Desai sets up his argument in Part I. Part I.A. faithfully characterizes the textualist arguments of the majority and dissenting opinions. Part I.B. reviews the basic tenets of textualism: (1) judges must glean the "ordinary public meaning" of statutory text to determine the text's communicative content from the reader's vantage point; (2) textualism employs deductive reasoning—once judges determine the text's objective, semantic meaning, they must apply that meaning to the facts. Accordingly, the deductive legal reasoning used in textualism is fundamentally distinct from the inductive legal reasoning of the common law, which compares the facts of a current case to those of previous cases to determine the outcome.

Professor Desai makes his crucial point in Part II: "*Bostock* shows that, notwithstanding the textualist rhetoric that pervades the case, cases involving statutory interpretation that reach the Supreme Court will inevitably require multiple modes of analysis." (P. 13.) To support that conclusion, Part II.A shows how Title VII's text cannot resolve the disagreement between the majority and dissenting opinions. Both sides use a comparator. Justice Gorsuch uses a straight-woman comparator: If Bostock were a straight woman, he would not have been fired. Therefore, Bostock was fired because of his sex. Justice Alito uses a gay-woman comparator to draw the opposite conclusion: If Bostock were a lesbian, he would have been fired. Therefore, Bostock was *not* fired because of his sex. Desai explains why neither comparator "depend[s] on the semantic meaning of Title VII's language" (P. 18.):

> Neither opinion appeals to the definition of any word or set of words to defend its comparator against the competing comparator. Both make a claim about the semantic meaning of the words; both depend on a claim that "because of" embodies but-for causation. Yet, to go from one argument to the other requires almost a gestalt shift in thinking. Nothing in the structure of the sentence or the definition of "sex" or "because of" or

> "discriminate" or even "individual" helps us choose which of the two comparators (straight woman v. gay woman) to select. In other words, even the comparator argument, the one that everyone seems to agree is a "textualist" argument, cannot be resolved with text.

Because the text cannot tell us which comparator is superior, judges must interpret the text using context. As Desai explains (II.B.), the majority and the dissents agree that they need not limit their interpretive analyses to linguistic context, but may instead review the social context, "ranging from statutory purpose to the broad *moral*, *political*, *or social assumptions* that drafters and readers would have shared at the time of the statute's passage." (P. 22.) For Alito, this means the societal norms in 1964, at which time it would have been "unimaginable" for anyone to think that Title VII protected gay individuals from discharge. Desai criticizes this view, not for going back in time but for

> conflat[ing] the distinction between linguistic drift and drift in readers' moral, political, or social assumptions about what the statutory language could possibly mean. His claim about 1964 seems stronger because of the *unexpected real-world consequences* of the plaintiffs' comparator argument. The semantic meaning of the words has not relevantly changed since 1964, but social understandings of the world have. (P. 26.)

Desai spends the remainder of Part II explaining how "choos[ing] between the two comparator arguments…*requires* deciding about the appropriateness of particular analogies, the bread and butter of the common law." There is no way to be a textualist in a case like *Bostock*, Desai claims, because in difficult cases judges must resort to common-law, analogical reasoning to illuminate meaning. He adds that the sex-stereotyping argument (II.C)—that the county fired Bostock because he failed to conform to gender norms—is logically equivalent to the comparator argument but grounded in precedent,[3] not text. He also adds that the associational argument (II.D)—discriminating against Bostock for being gay is no different than discriminating against the Lovings for being in an interracial relationship[4]—is itself another comparator argument. While we have a word for people involved in same-sex relationships (e.g., gay, lesbian, homosexual) we have no equivalent word for people involved in interracial relationships (*e.g.*, heteroracial?). Similarly, we have a not-so-nice word for interracial relationships (miscegenation) but no such equivalent word (miscegenosexual[5]) for same-sex relationships. These linguistic gaps mask the true force of the associational argument—that it is not truly textual but analogical.[6]

This leaves us with a completely new narrative. While Justice Scalia convinced even Justice Elena Kagan that "we're all textualists now," that narrative is misleading. Sure, we always start with the text in statutory-interpretation cases. But language is nuanced, and judges are not trained linguists. Accordingly, judicial temperament and values will always inform judicial disagreements over text. Professor Desai gives us pause to rethink the textualist paradigm and the force of its rhetoric—the claim that it is apolitical—by showing us just how political textualism really is. *Bostock* is a perfect vehicle for revealing the political side of textual interpretation.

1. Professor Desai does not analyze the third case, which held that an employer violates Title VII's prohibition against sex discrimination when it discharges employees because they are transgender. *See* *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, *rev'd*, 884 F.3d 560 (6th Cir. 2018), *affirmed sub nom*. 140 S. Ct. 1731 (2020). As Professor Desai acknowledges, the analysis of transgender discrimination "arguably play[s] out differently" than that of sexual-orientation discrimination. (P. 4 n.7.)
2. 42 U.S.C. § 2000e-2.
3. *See* Price Waterhouse v. Hopkins.
4. *See* Loving v. Virginia (striking down as unconstitutional violations of due process and equal protection state anti-miscegenation law banning interracial marriage).
5. *See* Samuel A. Marcosson, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII,* 81 **Geo. L.J.** 1, 6 (1992) (coining term miscegenosexual); *see also* Andrew Koppelman, *Bostock, LGBT Discrimination, and the Subtractive Move,* 105 **Minn. L. Rev.** Headnotes 1 (2020).

6. Part III extends this analysis using analogies from sexual harassment law and grounded in Oncale v. Sundowner Offshore Servs.

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