Essay

# *Bostock,* LGBT Discrimination, and the Subtractive Moves

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## INTRODUCTION

In *Bostock v. Clayton County*,[1] the Supreme Court held that Title VII of the Civil Rights Act of 1964 prohibits employment discrimination against lesbian, gay, bisexual, and transgender (LGBT) people. That was obviously correct. It is not possible to discriminate on these bases without treating a person worse because of their sex. So why is it not obvious to everyone?

The case for coverage is simple. What is complicated is the counterarguments, which come forth in baroque profusion. They must be answered. This is, evidently, a neverending task.[2]

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1. 140 S. Ct. 1731 (2020).

2. *See, e.g.*, Brief of Amicus Curiae Stephen Clark et al., Obergefell v. Hodges, 135 S. Ct. 2584 (No. 14-556), 2015 WL 1048436; Brief of Amici Curiae William N. Eskridge Jr., et al., Hollingsworth v. Perry, 570 U.S. 693 (2013) (No. 12-144), 2013 WL 840011; ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 146–76 (1996); ANDREW KOPPELMAN, THE GAY RIGHTS

Some of those counterarguments appeared in two dissenting opinions, by Justice Samuel Alito (joined by Justice Clarence Thomas) and Justice Brett Kavanaugh, and also several opinions by lower court judges. These, without relying on any language in the statute, propose to subtract LGBT people from its coverage. This article catalogues and critiques those counterarguments. I shall call them the *subtractive moves*.

The statute bans discrimination "because of sex," and the Court explained in 1978 that this means "treatment of a person in a manner which, but for the person's sex, would be different . . . ."[3] LGBT discrimination is an instance of such treatment: an employee who dates women is "homosexual" only if that employee is female. Justice Neil Gorsuch, writing for the majority,

QUESTION IN CONTEMPORARY AMERICAN LAW 53–71 (2002); Andrew Koppelman, *Beyond Levels of Scrutiny: Windsor and "Bare Desire to Harm"*, 64 CASE WEST. RES. L. REV. 1045 (2014); Andrew Koppelman, *Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein*, 49 U.C.L.A. L. REV. 519 (2001), *reprinted in* 1 The Dukeminier Awards: Best Sexual Orientation L. Rev. Articles of 2001 49 (2001); Andrew Koppelman, *Discrimination Against Gays is Sex Discrimination and Reply to Richard Wilkins*, *in* MARRIAGE AND SAME-SEX UNIONS: A DEBATE (Lynn D. Wardle et al., eds. 2003); Andrew Koppelman, *The Miscegenation Analogy in Europe, or Lisa Grant meets Adolf Hitler*, *in* LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW (Robert Wintemute & Mads Andenaes, eds., 2001); Andrew Koppelman, *The Miscegenation Precedents*, *in* SAME-SEX MARRIAGE, PRO AND CON: A READER (Andrew Sullivan, ed., 1997); Andrew Koppelman, *Sexual Disorientation*, 100 GEO. L. J. 1083 (2012); Andrew Koppelman, *Same-sex Marriage and Public Policy: The Miscegenation Precedents*, 16 QUINNIPIAC L. REV. 105 (1996); Andrew Koppelman, *Three Arguments for Gay Rights Review of Robert Wintemute, Sexual Orientation and Human Rights*, 95 MICH. L. REV. 1636 (1997); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145 (1988); Andrew Koppelman, *The Supreme Court made the right call on marriage equality — but they did it the wrong way*, SALON (June 29, 2015), https://www.salon.com/2015/06/29/the_supreme_court_made_the_right_call_on_marriage_equality_%E2%80%94_but_they_did_it_the_wrong_way/ [https://perma.cc/957Q-SC27]; Andrew Koppelman & Ilya Somin, *Gender, the gay marriage fight's missing piece*, USA TODAY (Apr. 20, 2015), https://www.usatoday.com/story/opinion/2015/04/19/supreme-court-same-sex-marriage-constitutionality-discrimination-column/70225124/ [https://perma.cc/A5VV-D9EM].

3. City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 711 (1978) (quoting W. David Slawson, *Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1170 (1971)).

thus concluded: "An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids."[4]

Justice Kavanaugh and Justice Alito are (like Justice Gorsuch) adherents of the "New Textualism," the theory that laws should be interpreted only on the basis of a statute's text and not extratextually derived purposes.[5] Their dissents attempt to show that the plain language of the text does not mean what it says.

This Article catalogues and critiques the subtractive moves. Each of these moves reaches outside the statute, placing the language in some larger cultural context in order to defeat the law's literal command. One may focus on (1) the law's prototypical referent, or (2) the categories of objects that it happens to bring to mind, or (3) distinctions that feel familiar but which do not appear in the statute, or (4) formalist exceptions that are unrelated to the law's language, or (5) the general expectations that were part of the law's cultural background. One may also (6) claim that the law, read in its cultural context, simply does not mean what it literally says.

*Bostock* is likely to be the object of sustained criticism. I confidently predict that attacks on it will depend heavily on these subtractive moves. Some of these moves were more fully elaborated in the lower court opinions,[6] and a couple of them were not picked up by the Supreme Court dissenters.

The subtractive strategy is an innovation in statutory interpretation. It seeks to draw upon the cultural context at the time of enactment to avoid unwelcome implications of a statute's plain language—*and* to call what one has done "textualism."

4. *Bostock*, 140 S. Ct. at 1737.

5. *See* William N. Eskridge, Jr., *The New Textualism and Normative Canons,* 113 COLUM. L. REV. 531 (2013).

6. Before *Bostock*, the Courts of Appeals were split on whether LGBT people were protected by the language of the statute. *See* Equal Emp't Opportunity Comm'n v. R.G. &. G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018) (transgender employees protected), *cert. granted*, 139 S.Ct. 1599 (2019); Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018) (en banc) (gay employees protected), *cert. granted*, 139 S.Ct. 1599 (2019); Bostock v. Clayton County, Ga., 723 Fed. App'x. 964 (11th Cir. 2018), *reh'g en banc denied*, 894 F.3d 1335 (11th Cir. 2018) (gay employees not protected), *cert. granted*, 139 S.Ct. 1599 (2019); Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339 (7th Cir. 2017) (en banc) (gay employees protected).

The deployment of the subtractive moves has radical implications. They are offered to limit Title VII, but they can easily be deployed in other contexts. They are particularly potent as tools for restricting the applicability of broad transformative statutes like the Civil Rights Act, because such laws are always inconsistent with the background culture that they aim to change. If that background culture can defeat their operation, then that operation will be narrowly cabined.[7] More generally, they are available to restrict the operation of any statute, so that it has only the effects that were obvious at the time of enactment, rather than the effects dictated by the words of the law.

Each of the moves has intuitive appeal. That is why they can persuade. Each, however, rests on confusion. Each betrays textualism's promise to limit judicial discretion. Background culture always has multiple, contradictory elements. An interpreter who can draw upon that to defeat a statute's plain language can make a law mean anything she wants it to mean.

Part I of this article describes the background of *Bostock*, the new textualist approach to statutory interpretation, and the basic argument why the statute prohibits LGBT discrimination. Part II enumerates and analyzes the subtractive moves. Part III offers some implications of the analysis.

## I. THE LGBT TITLE VII CASES

### A. THE POLITICAL CONTEXT

When *Bostock* was argued, many commentators expected the Court to find a way to confine the statute's reach.[8] These

7. Some of them were in fact deployed for decades to hamstring the Fourteenth Amendment. *See infra* note 179.

8. *See, e.g.*, David S. Cohen, *How the Supreme Court Case on LGBT Rights Could Set Us Back Decades*, ROLLING STONE, (Apr. 23, 2019), https://www .rollingstone.com/politics/politics-news/lgbt-rights-supreme-court-case-826077/ [https://perma.cc/KTT5-823U]; Masha Gessen, *The Dread of Waiting for the Supreme Court to Rule on L.G.B.T. Rights*, NEW YORKER (Apr. 23, 2019), https://www.newyorker.com/news/our-columnists/the-dread-of-waiting-for-the -supreme-court-to-rule-on-lgbt-rights [https://perma.cc/AUY2-RBLZ]; Gloria Gonzalez, *Employers likely to prevail in LGBT cases at Supreme Court with Kennedy retirement*, BUSINESS INSURANCE (June 28, 2018), https://www .businessinsurance.com/article/20180628/news06/912322319/employers-likely-to-prevail-in-lgbt-cases-at-supreme-court-with-kennedy-retireme [https://perma.cc/7N7L-LNXS].

predictions, for the most part, relied on legal realist considerations.[9] "Legal realism" is the theory, well entrenched in the legal academy since the 1920s, that legal doctrine does not determine how judges decide cases; that they are really animated by their personal sense of what is right (what some scholars, too crudely, call their "politics").[10]

Chief Justice Roberts and Justices Thomas and Alito indicated in *Obergefell v. Hodges,*[11] the same-sex marriage case, that they thought the gay rights issue was one the Court should stay out of.[12] The Court since has become more conservative with the retirement of Justice Anthony Kennedy, its strongest defender of gay rights, and the addition of Justices Gorsuch and Kavanaugh. None of the five conservatives had ever voted to support a gay rights claim.[13] Here their conservatism was in deep tension with their distinctive approach to statutory text.

There was also a partisan dimension to the question. The protection of gay people was closely associated with the Democratic Party.[14] The most cynical form of legal realism holds that

9. An exception is Ed Whelan, who however fell prey to the same errors anatomized herein. *See* Ed Whelan, *How the Supreme Court Will Rule in Title VII SOGI Cases*, NAT'L REV. (Apr. 25, 2019), [hereinafter Whelan, *How the Supreme Court Will Rule*], https://www.nationalreview.com/bench-memos/how-the-supreme-court-will-rule-on-title-vii-sogi-cases/ [https://perma.cc/6DYF-WF5E]; *see also* Ed Whelan, *A 'Pirate Ship' Sailing under a 'Textualist Flag,'* NAT'L REV. BENCH MEMOS (June 15, 2020), https://www.nationalreview.com/bench-memos/a-pirate-ship-sailing-under-a-textualist-flag/#:~:text=It%20sails%20under%20a%20textualist,the%20current%20values%20of%20society [https://perma.cc/P77Y-43Q9]; Ed Whelan, *Justice Kavanaugh's Dissent in Title VII Ruling*, NAT'L REV. BENCH MEMOS (June 15, 2020), https://www.nationalreview.com/bench-memos/justice-kavanaughs-dissent-in-title-vii-ruling/ [https://perma.cc/BX4H-2VSC].

10. For a survey, *see* WILLIAM W. FISHER ET AL., AMERICAN LEGAL REALISM (1993).

11. 135 S. Ct. 2584 (2015).

12. *Id.* at 2611 (Roberts, C.J., dissenting).

13. Joan Biskupic, *Two Conservative Justices Joined Decision Expanding LGBTQ Rights*, CNN (June 16, 2020) https://www.cnn.com/2020/06/15/politics/supreme-court-expanding-gay-rights/index.html [https://perma.cc/D3XB-AJPR] (describing Justice Gorsuch as an "unyielding conservative on most disputes" and noting that Justice Roberts has never signed an opinion endorsing gay rights).

14. *LGBTQ Community*, DEMOCRATIC PARTY, (last accessed July 10, 2020) https://democrats.org/who-we-are/who-we-serve/lgbtq-community/ [https://perma.cc/LB3H-937V] (discussing the Democratic party's platform on LGBTQ rights).

judges do not care about principle at all, that they just want victories for their political faction. This case provided the Court with an opportunity to prove the cynics wrong, and to show that it really does take its textualism seriously.

## B. THE NEW TEXTUALISM[15]

All the conservatives on the Supreme Court embrace some version of the "new textualist" approach to statutory interpretation that Justice Antonin Scalia espoused.[16] He proposed to derive interpretation of statutes from their words alone, and to ignore unenacted context such as legislative history: "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[17] He argued that a law's words "mean what they conveyed to reasonable people at the time they were written."[18] In determining this meaning, interpreters may consider its context in a sentence, "a

15. I use this label, even though these judges themselves simply call themselves "textualists," because they are distinctive in their focus on text to the exclusion of purpose and legislative history. "[V]irtually all theorists and judges are 'textualists,' in the sense that all consider the text the starting point for statutory interpretation and follow statutory plain meaning if the text is clear." Eskridge, *supra* note 5, at 532. I am not myself a new textualist. *See* Andrew Koppelman, *Passive Aggressive: Scalia and Garner on Interpretation*, 41 BOUNDARY 2: AN INTERNATIONAL JOURNAL OF LITERATURE AND CULTURE 227 (Summer 2014). Here, however, I assume new textualist premises and work through their implications. That was also my strategy in the amicus brief I coauthored in *Bostock*.

16. Anita Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1295–96 (2020) (showing that Justices Thomas and Gorsuch have self-identified as textualists and Justices Alito and Roberts are commonly categorized as textualists); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2118 (2016) ("Statutory interpretation has improved dramatically over the last generation, thanks to the extraordinary influence of Justice Scalia. Statutory text matters much more than it once did. If the text is sufficiently clear, the text usually controls.").

17. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998). On the conservative justices, *see* Victoria Nourse, *Textualism 3.0*, 70 ALA. L. REV. 667 (2019). This essay will engage extensively with the writings of Justice Scalia. I argue that his theory of statutory interpretation entails that Title VII protects LGBT people from discrimination. In keeping with that theory, I eschew any speculation about what he himself would have thought. I focus on his writings, not his unexpressed intentions. *Cf.* Andrew Koppelman, *Why Scalia Should Have Voted to Overturn DOMA*, 108 NW. U. L. REV. COLLOQUY 131 (2013).

18. ANTONIN SCALIA AND BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 16 (2012).

word's historical associations acquired from recurrent patterns of past usage," and the purpose of the text "gathered only from the text itself."[19] They should "reject judicial speculation about both the drafters' extratextually derived purposes and the desirability of the fair reading's anticipated consequences."[20] If the plain language of a law implies a result that its drafters did not imagine, "we are not free to replace it with an unenacted legislative intent."[21] Disregarding the latter "will provide greater certainty in the law, and hence greater predictability and greater respect for the rule of law,"[22] and "will curb – even reverse – the tendency of judges to imbue authoritative texts with their own policy preferences."[23]

The LGBT Title VII cases are a nice test of whether Justice Scalia was right: whether the new textualist method can thus prevent the judges' policy preferences from contaminating their interpretation of statutes.[24] The *Bostock* Court's justification for its method sounds a lot like Justice Scalia. "The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration."[25] "Ours is a society of written laws. Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations."[26] It is of course impossible to know how Justice Scalia would have voted. But, given his methodological commitments, he should have joined the majority.

19. *Id.* at 33.

20. *Id.* at xxvii.

21. Immigration and Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 453 (1987) (Scalia, J., concurring).

22. SCALIA & GARNER, *supra* note 18, at xxix.

23. *Id.* at xxviii.

24. Others noticed this. Gabriel Arana, *Does the Civil Rights Act Protect Gay Employees? The Court Will Decide*, THE AM. PROSPECT (May 22 2019), https://prospect.org/article/does-civil-rights-act-protect-gay-employees-court-will-decide [https://perma.cc/XCT7-VEB5] (quoting Professor William Eskridge); Michael C. Dorf, *SCOTUS LGBT Discrimination Case Will Test Conservative Commitment to Texualism*, VERDICT (May 1 2019), https://verdict.justia.com/2019/05/01/scotus-lgbt-discrimination-case-will-test-conservative-commitment-to-textualism [https://perma.cc/PQL4-9CZK].

25. Bostock v. Clayton County, Ga., 140 S. Ct. 1731, 1749 (2020).

26. *Id.* at 1754.

C. LGBT DISCRIMINATION IS SEX DISCRIMINATION

Title VII of the Civil Rights Act of 1964 provides, in relevant part:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge . . . or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .[27]

What does it mean to discriminate "because of sex"? The statute itself explains: an employer has engaged in "impermissible consideration of . . . sex . . . in employment practices" when "sex . . . was a motivating factor for any employment practice," irrespective of whether the employer was also motivated by "other factors."[28] The question a court should ask, the Supreme Court has explained, is "whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'"[29]

An actor discriminates on the basis of trait T if its decision depends on its determination in specific cases whether T is present. Consequences turn on the presence or absence of T. That is what it means to classify. And if *bad* consequences turn on the presence or absence of T, if you treat someone worse than you would otherwise because they have trait T, then you *discriminate* against them on the basis of T.

The argument for protection of sexual orientation is simple. In order to determine whether someone is "homosexual," an employer must take account of that person's sex. It is not enough to know that A is romantically involved with a woman. The employer must know A's sex. If A is a woman, she is labeled "homosexual" and rejected. If a man, otherwise. Thus the Court's conclusions: "If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female

27. 42 U.S.C. § 2000e-2(a)(1).

28. 42 U.S.C. § 2000e-2(m).

29. City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 711 (1978) (quoting W. David Slawson, *Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1170 (1971)). The sex-based nature of "homosexuality" was particularly manifest in statutes, such as the one invalidated in *Lawrence v. Texas*, 539 U.S. 558 (2003), that criminalized homosexual sex. In any prosecution under the Texas statute, the sex of the defendant was an element of the crime that the prosecutor had to prove. *See* Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, *supra* note 2.

colleague."[30] Similarly, "take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth."[31]

The new textualism is typically contrasted with purposivism, but here it is worth noting that, in this case, the debate between the two approaches to interpretation makes no difference. The case should come out the same way whichever approach one follows. Protection of LGBT people makes sense in terms of the statute's purpose.[32]

At a minimum, the statute must protect people who fail to conform to gender stereotypes. Otherwise a firm could refuse to hire women as attorneys because being an attorney is unfeminine. In a leading case, *Price Waterhouse v. Hopkins*,[33] the plaintiff was denied a partnership because her hard-charging demeanor, which was valued and rewarded in male employees, made her male colleagues uncomfortable because she did not act as a woman should.[34] Her supervisor had told her to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[35] The Supreme Court plurality wrote that "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."[36]

The same logic applies to discrimination against gay people: "when a woman alleges . . . that she has been discriminated against because she is a lesbian, she necessarily alleges that she has been discriminated against because she failed to conform to the employer's image of what women should be—specifically,

30. *Bostock*, 140 S. Ct. at 1741.

31. *Id.*

32. For a fuller exploration of the statute's purpose, *see* William N. Eskridge, *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 YALE L.J. 322 (2017). As I have said, I am not myself a new textualist, and so the observations that follow are, in my view, relevant to the interpretation of the statute.

33. 490 U.S. 228 (1989).

34. *Id.* at 235.

35. *Id.*

36. *Id.* at 250. On this point, there was a majority. The judges split on the question of how a plaintiff proves causation. *See* Eskridge, *supra* note 32, at 373–74.

that women should be sexually attracted to men only."[37] And transgender discrimination: "an employer cannot discriminate on the basis of transgender status without imposing its stereotypical notions of how sexual organs and gender identity ought to align."[38]

As a matter of cultural fact, gender nonconformity is associated with homosexuality, and vice versa. Each is a placeholder for the other:

> Most Americans learn no later than high school that one of the nastier sanctions that one will suffer if one deviates from the behavior traditionally deemed appropriate for one's sex is the imputation of homosexuality. The two stigmas, sex-inappropriateness and homosexuality, are virtually interchangeable, and each is readily used as a metaphor for the other. There is nothing esoteric or sociologically abstract in the claim that the homosexuality taboo enforces traditional sex roles. Everyone knows that it is so. The recognition that in our society homosexuality is generally understood as a metaphor for failure to live up to the norms of one's gender resembles the recognition that segregation stigmatizes blacks, in that both are "matters of common notoriety, matters not so much for judicial notice as for the background knowledge of educated men who live in the world."[39]

The association is close enough that, if homosexuality is deemed to be outside Title VII protection, a sophisticated defendant who has discriminated on the basis of gender nonconformity, such as Price Waterhouse, will always be able to offer a colorable

37. Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1261 (11th Cir. 2017) (Rosenbaum, J., concurring in part and dissenting in part).

38. Equal Empl't Opportunity Comm'n v. R.G. &. G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 576 (6th Cir. 2018).

39. Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, *supra* note 2, at 235 (quoting Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 426 (1960)). For a similar argument, *see* Zarda v. Altitude Express, Inc., 883 F.3d 100, 119–23 (2d Cir. 2018). Judge Lynch cites but misconstrues my argument, which he takes to mean "that the 'deep roots' of hostility to homosexuals are in some way related to the same sorts of beliefs about the proper roles of men and women in family life that underlie at least some employment discrimination against women." *Zarda*, 883 F.3d at 160 (Lynch, J., dissenting). He responds that "legislation is not typically concerned, and Title VII manifestly is not concerned, with defining and eliminating the 'deep roots' of biased attitudes." *Id.* at 161. He is right that "Congress legislates against concrete behavior that represents a perceived social problem," *id.*, but sex discrimination that manifests sexist beliefs is the precise concrete behavior that Title VII prohibits.

defense that it associated such nonconformity with homosexuality.[40] Attempts to distinguish them in litigation make the law incoherent.[41]

## II. THE SUBTRACTIVE MOVES[42]

There is however an alternative way of reading the statute, one that likewise aims to be "faithful to the statutory text, read fairly, as a reasonable person would have understood it when it was adopted."[43] It was offered by Seventh Circuit Judge Diane Sykes, and later embraced by Second Circuit Judge Gerard E. Lynch, Fifth Circuit Judge James C. Ho, and Justices Alito and Kavanaugh. Judge Sykes argued that it is not "even remotely plausible that in 1964, when Title VII was adopted, a reasonable person competent in the English language would have understood that a law banning employment discrimination 'because of sex' also banned discrimination because of sexual orientation[.]"[44] Similarly, 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

40. The plaintiff might in fact not be homosexual, but a defendant's mistake is not actionable so long as the defendant thought it was discriminating on an unprotected ground. I can permissibly fire someone for having the wrong astrological sign even if I am mistaken about the date of their birth.

41. *Zarda*, 883 F.3d at 121–22; Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 350 (7th Cir. 2017) (en banc); Hively v. Ivy Tech Cmty. Coll. of Ind., 830 F.3d 698, 705-06 (7th Cir. 2016); Mary Anne Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995); Zachary A. Kramer, *The Ultimate Gender Stereotype: Equalizing Gender-Conforming and Gender-Nonconforming Homosexuals Under Title VII*, 2004 U. ILL. L. REV. 465 (2004); Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 AM. U. L. REV. 715 (2014). Thus, LGBT people should be protected, not only by Title VII, but also by any statute, federal or state, that prohibits sex discrimination. *See, e.g.*, Nance v. Lima Auto Mall, No. 1-19-54, 2020 WL 3412268 (Ohio. Ct. App. June 22, 2020) (following *Bostock* to hold that state sex discrimination law prohibits sexual orientation discrimination).

42. I focus here on the counterarguments that have been raised by judges in the Title VII cases. For a survey of other counterarguments, *see* Koppelman, *Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein*, *supra* note 2.

43. Hively, 853 F.3d at 360 (Sykes, J., dissenting).

44. *Id.* at 362. Judge Richard Posner agrees with her, although it is not clear whether he is referring to objective meaning or subjective intention when he writes that his court adopted "a meaning of 'sex discrimination' that the Congress that enacted it would not have accepted." *Id.* at 357 (Posner, J., concurring).

meant discrimination because of sexual orientation—not to mention gender identity, a concept that was essentially unknown at the time."[45] And Justice Kavanaugh: "We cannot close our eyes to the indisputable fact that Congress—for several decades in a large number of statutes—has identified sex discrimination and sexual orientation discrimination as two distinct categories."[46]

This claim has radical implications. In 1964 few thought that sexual harassment, or hostile work environment claims, were barred by the statute. Years passed before courts understood that the plain language entailed these protections.[47] The Court has made clear that the statutory inquiry is not a counterfactual inquiry into what Congress would have thought about an issue it was not presented.[48] "[W]hile it is of course our job to apply faithfully the law Congress has written, it is never our job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced a question that, on everyone's account, it never faced."[49]

So why is any self-professed textualist ever drawn to this claim? It must be acknowledged that the new textualism does not always yield unique answers. Victoria Nourse observes that "the number of 5-4 splits in cases involving textual method deployed by both sides is a sure sign that there is no plain meaning to the text, since five members of the Court think it means one thing and four members think it means something entirely different."[50] But in the cases Nourse cites, the judges have seized on different decontextualized statutory provisions and argued about their linguistic meaning.[51] The judges who resist application of Title VII to LGBT discrimination make no such moves, because *there is no contrary statutory language for them to rely upon.* Instead, they look for ways to nullify or limit the effect of the language that is there. These are the subtractive moves.

There are a number of strategies for justifying the subtraction of LGBT people from the statute's coverage.

45. Bostock v. Clayton County, Ga., 140 S. Ct. 1731, 1755 (2020) (Alito, J., dissenting).

46. *Id.* at 1830 (Kavanaugh, J., dissenting).

47. Zarda v. Altitude Express, Inc., 883 F.3d 100, 114 (2d Cir. 2018); DEBORAH L. RHODE, JUSTICE AND GENDER 231–37 (1989).

48. Henson v. Santander Consumer USA, Inc., 137 S. Ct. 1718 (2017) (Gorsuch, J.).

49. *Id.* at 1725.

50. Nourse, *supra* note 17, at 669.

51. *Id.* at 669 n.7.

A. PROTOTYPES

The first of these strategies is to argue that, as Justice Alito wrote, "the concept of discrimination because of 'sex' is different from discrimination because of 'sexual orientation' or 'gender identity.'"[52] It is a matter of definition: "Determined searching has not found a single dictionary from [1964] that defined 'sex' to mean sexual orientation, gender identity, or 'transgender status.'"[53] Justice Kavanaugh: "Both common parlance and common legal usage treat sex discrimination and sexual orientation discrimination as two distinct categories of discrimination—back in 1964 and still today."[54] The lower court judges: "In common, ordinary usage in 1964—and now, for that matter—the word 'sex' means biologically *male* or *female*; it does not also refer to sexual orientation."[55] "Simply put, discrimination based on sexual orientation is not the same thing as discrimination based on sex."[56] "The two terms are never used interchangeably . . . ."[57] Justice Kavanaugh cited "the widespread understanding that sexual orientation discrimination is distinct from, and not a form of, sex discrimination."[58]

The problem is the ambiguity of what it means to read a text "as a reasonable person would have understood it when it was adopted." Plain meaning can refer to prototypical meaning, the meaning that picks the best example: "bird" prototypically means an animal that can fly. It can mean "the central public meaning of the language used in the statute at the time of its enactment."[59] Thus, sex discrimination would mean discriminating "against women because they are women and against men

52. Bostock v. Clayton County, Ga., 140 S. Ct. 1731, 1755 (2020) (Alito, J., dissenting).

53. *Id.* at 1756 (Alito, J., dissenting).

54. *Id.* at 1828 (Kavanaugh, J., dissenting).

55. Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 362–63 (7th Cir. 2017) (en banc) (Sykes, J., dissenting) (emphasis in original).

56. Zarda v. Altitude Express, Inc., 883 F.3d 100, 148 (2d Cir. 2018) (Lynch, J., dissenting).

57. *Id.* (quoting Hively, 853 F.3d at 363 (Sykes, J., dissenting)). Judge Sykes goes on to claim that "the latter is not subsumed within the former; there is no overlap in meaning." *Id.* As we shall see, this is false.

58. *Bostock*, 140 S. Ct. at 1830 (Kavanaugh, J., dissenting).

59. *Zarda*, 883 F.3d at 144 (Lynch, J., dissenting).

because they are men."[60] The prototypical meaning is the meaning that most commonly occurs, and which normally comes most easily to the mind of a reasonable person.

However, plain meaning can also refer to the definition of a word, which encompasses all its logical extensions. The latter approach is the one used by lawyers. It is the standard approach to Title VII. In *Oncale v. Sundowner Offshore Services, Inc.*,[61] an employer argued that Title VII should not be read "literally" to protect against male-on-male harassment, because "homosexual" assault or boys-on-boys hazing was too far afield Congress's "paradigm case" of a qualified woman not hired "because she is female."[62] The Court, in an opinion by Justice Scalia, unanimously rejected the argument and applied the statutory text.[63]

Victoria Nourse has observed that lawyerly meaning "will, by definition, push the law toward fringe or peripheral meanings, expanding the law beyond its uncontested core."[64] It is the routine stuff of statutory interpretation. John Manning writes that "textualists seek out technical meaning, including the specialized connotations and practices common to the specialized sub-community of lawyers."[65] A rule that statutes must be confined to their prototypical meaning would derange the settled meaning of nearly every statute on the books.

Justice Alito cites a search of "a vast database of documents from that time to determine how the phrase 'discriminate against . . . because of [some trait]' was used."[66] The study con-

60. Hively, 853 F.3d at 341 (Sykes, J., dissenting) (quoting Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984)). *Cf.* Wittmer v. Phillips 66 Co., 915 F.3d 328, 334 (5th Cir. 2019) (Ho, J., concurring) ("Title VII prohibits employers from favoring men over women, or vice versa.").

61. 523 U.S. 75 (1998).

62. Brief for Respondents at 10, 20–21, 37–44, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (No. 96-658), 1997 WL 6344147. Thanks to Bill Eskridge for the reference.

63. *Oncale*, 523 U.S. at 82.

64. VICTORIA NOURSE, MISREADING LAW, MISREADING DEMOCRACY 41 (2016).

65. John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 434–35 (2005).

66. Bostock v. Clayton County, Ga., 140 S. Ct. 1731, 1736 n.22 (2020) (Alito, J., dissenting) (citing James Cleith Phillips, The Overlooked Evidence in the Title VII Cases: The Linguistic (and Therefore Textualist) Principle of Compositionality 3 (May 11, 2020) (unpublished manuscript), https://ssrn.com/abstract=3585940.)

cluded that "discrimination because of sex" would have been understood to mean discrimination against a woman or a man based on "unfair beliefs or attitudes" about members of that particular sex.[67] The study relied on corpus linguistics analysis, which draws upon massive computerized collections of writings from the pertinent period to capture uses of a word or phrase, codes each instance for its meaning and context, and thus aims to ascertain the contemporaneous meaning.[68] The method has been shown to be unreliable even with respect to words in use today.[69] The most common usages tend to cluster around prototypical meaning, rather than the full extension of meaning as understood by native speakers.[70]

Even ordinary language does not confine terms to their prototypical meaning. Words do not work that way. Otherwise you will conclude that ostriches are not birds because they do not fly. Justice Alito and Judges Sykes and Lynch make exactly this mistake when they rely on the fact that the terms "sex" and "sexual orientation" have different meanings, and that the core of Title VII is the refusal to hire women. By the same logic, one could infer that, because the terms "bird" and "ostrich" have different meanings, and the terms are never used interchangeably, it follows that ostriches are not birds.

67. *Id.* The claim is developed and amplified in Josh Blackman & Randy Barnett, *Justice Gorsuch's Halfway Textualism Surprises and Disappoints in the Title VII Cases*, NAT'L REV. (June 26, 2020), https://www.nationalreview.com/2020/06/justice-gorsuch-title-vii-cases-half-way-textualism-surprises-disappoints/ [https://perma.cc/HMW2-VUDG]. For Phillips and Justice Alito, all the work is being done by the idea that Title VII only prohibits stereotypes that are "unfair." Similarly, Blackman and Barnett think that a discrimination plaintiff should have to prove that her mistreatment is "based on bias or prejudice." *Id.* (emphasis omitted). They all think that, in interpreting the statute, judges get to decide, evidently on the basis of nothing but their own gut instincts, which gender stereotypes are fair and which are biased. This is offered as a prescription for judicial restraint.

68. For explications of the method, *see, e.g.*, Stephanie Barclay, Brady Early, & Annika Boone, *Original Meaning and the Establishment Clause: A Corpus Linguistics Analysis*, 61 ARIZ. L. REV. 505 (2019); Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. PA. L. REV. 261 (2019); James C. Phillips, Daniel M. Ortner & Thomas R. Lee, *Corpus Linguistics & Original Public Meaning: A New Tool To Make Originalism More Empirical*, 126 YALE L.J. F. 21 (2016).

69. *See* Kevin Tobia, *Testing Ordinary Meaning: An Experimental Assessment of What Dictionary Definitions and Linguistic Usage Data Tell Legal Interpreters*, 133 HARV. L. REV. (forthcoming 2020).

70. *Id.*

Nonetheless, the mind tends to focus on prototypical meaning, and it takes some effort to look away from it and toward the definition. For this reason, this definitional move will always have its attractions. It is an easy mistake to make.

### B. CATEGORIES OF PEOPLE

A related argument, offered by Judge Lynch, is that protecting gay people would mean improperly extending the statute's protection of women to "an entirely different category of people."[71] Neither Justices Alito nor Kavanaugh embraced this argument, but it is worth discussing, since it has admirers and is likely to be raised in criticism of the decision.[72]

Here, once more, the language of the statute is an obstacle. Title VII does not regulate by categories of people. It bars discrimination on the basis of certain classifications.[73] This subtractive move, which defies the classification-based character of the statute, is available in any novel sex discrimination case: one could make it about "persons sexually harassed at work" or "persons discriminated against based on gender stereotypes."[74] The difference is that these do not have common colloquial terms that refer to them, while "homosexuals" do.[75] But the linguistic happenstance that such a term exists, that there are "*other* social categories,"[76] does not mean that "homosexuals" are excluded from the statute's coverage, or that discrimination against them is not sex discrimination. Justice Gorsuch is referring to this particular kind of confusion when he denies that there is "any such thing as a 'canon of donut holes,' in which Congress's failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception."[77] This is the prototype move again, with the added proviso that a familiar term must define the group whose protection is thus amputated. In fact,

71. Zarda v. Altitude Express, Inc., 883 F.3d 100, 145 (2d Cir. 2018) (Lynch, J., dissenting). *Cf.* Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 366 (7th Cir. 2017) (en banc) (Sykes, J., dissenting) ("sexual-orientation discrimination is a distinct form of discrimination"); Wittmer v. Phillips 66 Co., 915 F.3d 328, 335 (5th Cir. 2019) (Ho, J., concurring) (quoting same).

72. *See, e.g.*, Whelan, *How the Supreme Court Will Rule*, *supra* note 9.

73. This is emphasized in Eskridge, *supra* note 32, at 342–43, 346.

74. As the *Zarda* majority observed. *Zarda*, 883 F.3d at 119 n.17.

75. Whether something is perceived as part of a rule or an exception to it is frequently dependent on contingencies of language. Frederick Schauer, *Exceptions*, 58 U. CHI. L. REV. 871 (1991). The confusion here has a similar root.

76. *Zarda*, 883 F.3d at 147 (Lynch, J., dissenting) (emphasis in original).

77. Bostock v. Clayton County, Ga., 140 S. Ct. 1731, 1747 (2020).

even when there is such a familiar term, it is well settled that Title VII nonetheless applies, for example to discrimination against "mothers."[78]

### C. PARALLEL DISCRIMINATIONS

Another formalist response to the sex discrimination argument is that, while an employer might refuse to hire men who date men, there is no sex discrimination if the employer also will refuse to hire women who date women. In such a case, "the grounds for the employer's decision—that individuals should be sexually attracted only to persons of the opposite biological sex or should identify with their biological sex—apply equally to men and women."[79] "An employer who hires only heterosexual employees is neither assuming nor insisting that his female and male employees match a stereotype specific to their sex. He is instead insisting that his employees match the dominant sexual orientation regardless of their sex."[80] This is one justification for the move, which I shall next discuss, of regarding this discrimination as not "invidious": "A refusal to hire gay people cannot serve as a covert means of limiting employment opportunities for men or for women as such . . . ."[81]

Justice Alito made much of this point. He wrote that "it is quite possible for an employer to discriminate on those grounds

78. Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).

79. *Bostock*, 140 S. Ct. at 1764 (Alito, J., dissenting). Alito deploys this argument in an attempt to distinguish the *Hopkins* case, discussed *supra* note 33 and accompanying text. *See also Zarda*, 883 F.3d at 158 (Lynch, J., dissenting) (the employer "is expressing disapproval of the behavior or identity of a class of people that includes both men and women.").

80. Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 370 (7th Cir. 2017) (en banc) (Sykes, J., dissenting) (emphasis in original).

81. *Zarda*, 883 F.3d at 152 (Lynch, J., dissenting). The U.S. Department of Justice relied on the same argument in its amicus brief in *Bostock*. *See* Brief for United States as Amicus Curiae at 17, Bostock v. Clayton County, Ga., 140 S. Ct. 1731, (No. 17-1618) 2019 WL 4014070 (LGBT discrimination "involves less favorable treatment of gay or bisexual employees—men and women alike."); *Id.* at 20 ("[I]f an employer treats gay men and women the same, it has not engaged in sex discrimination."). Another difficulty with this argument is that it was not really relevant in any of the litigated cases, because in none of those cases did the defendant claim that it discriminated equally against lesbians and gay men. *See* Marty Lederman, *Thoughts on the SG's "Lesbian Comparator" Argument in the Pending Title VII Sexual-Orientation Cases*, BALKINIZATION (Sept. 6, 2019), https://balkin.blogspot.com/2019/09/thoughts-on-sgs-lesbian-comparator_6
.html [https://perma.cc/3AW8-MG9G].

without taking the sex of an individual applicant or employee into account. An employer can have a policy that says: 'We do not hire gays, lesbians, or transgender individuals.'"[82] The statute's focus on individuals[83] is not an obstacle to this reasoning: "An employer who discriminates equally on the basis of sexual orientation or gender identity applies the same criterion to every affected *individual* regardless of sex."[84]

He pounced upon an exchange at oral argument with Stanford Professor Pamela Karlan, who represented the plaintiffs. There he posed the same hypothetical, adding that the employer himself never learns the sex of the rejected applicant. Karlan responded: "If there was that case, it might be the rare case in which sexual orientation discrimination is not a subset of sex."[85] Justice Alito cited that "candid answer" in his dissent.[86] Justice Gorsuch's majority opinion responded: "Even in this example, the individual applicant's sex still weighs as a factor in the employer's decision."[87] It may be helpful to expand on Justice Gorsuch's response. Karlan's concession was mistaken.

The logic of Justice Alito's hypothetical was already rejected by the Court in 1964, in *McLaughlin v. Florida*.[88] The Court in that case invalidated a criminal statute prohibiting an unmarried interracial couple from habitually living in and occupying the same room at night.[89] The state tried to defend the law by relying on *Pace v. Alabama*,[90] an 1883 case that held that such laws treat both races equally[91]—just as the employer in the hypothetical proffered by Justice Alito claims that he is treating the sexes equally. The Court rejected the argument, overruled *Pace*, and declared that the law imposed an impermissible racial classification.[92]

Here is Justice Alito's question to Karlan, with some small modifications:

82. *Bostock*, 140 S. Ct. at 1758 (Alito, J., dissenting).

83. *See infra* notes 112–13 and accompanying text.

84. *Bostock*, 140 S. Ct. at 1775 (Alito, J., dissenting) (emphasis in original).

85. Transcript of Oral Argument at 69–70, Bostock v. Clayton County, Ga., 140 S. Ct. 1731 (2020) (Nos. 17–1618, 17–1623).

86. *Bostock*, 140 S. Ct. at 1759 (Alito, J., dissenting).

87. *Id.* at 1746.

88. 379 U.S. 184 (1964).

89. *Id.*

90. 106 U.S. 583 (1883).

91. *Id.*

92. *McLaughlin*, 379 at 195–96.

> Let's imagine that the decisionmaker in a particular case is behind the veil of ignorance and the subordinate who has reviewed the candidates for a position says: I'm going to tell you two things about this candidate. This is the very best candidate for the job, and this candidate is [married to a person of a different race]. And the employer says: Okay, I'm going—I'm not going to hire this person for that reason. Is that discrimination on the basis of [race], where the employer doesn't even know the [race] of the individual involved?[93]

Of course it is. And that is in fact settled law under Title VII.[94] The fact that the hypothetical employer has set up an automatic-discrimination protocol does not change that, any more than if he had simply instructed his manager to discriminate against African-Americans, but not to tell him about it.

Suppose an employer who rejects employees who are in interracial relationships claimed that it was merely discriminating against "miscegenosexuals,"[95] and that the law's protection of African-Americans should not be extended to an entirely different category of people? The only difference between the two responses is that here the neologism is unfamiliar. The flaw in both responses is the same: in any individual case, a person is discriminated against for being the wrong race or sex.[96]

The parallel-discriminations move also proves way too much. Suppose an employer decides to demand equally of men

93. Transcript of Oral Argument, *supra* note 85, at 69.

94. *See* Zarda v. Altitude Express, Inc., 883 F.3d 100, 124–25 (2d Cir. 2018) (citing cases).

95. This wonderfully awful, flagrantly racist neologism was invented, in a satirical spirit, by Samuel Marcosson. *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).

96. For elaboration of this point, *see* Koppelman, *supra* note 39, at 208–14. Judges Sykes and Lynch propose to distinguish race discrimination from sex discrimination, Hively v. Ivy Tech Community College of Indiana, 853 F.3d 339, 367–69 (7th Cir. 2017) (en banc) (Sykes, J., dissenting), *Zarda*, 883 F.3d at 158–62 (Lynch, J., dissenting), but this distinction finds no support in the text of the statute, which treats them the same. Eskridge, *supra* note 32, at 346.

Justice Alito cites the Lynch dissent with approval, and argues that an employer who discriminates against members of interracial couples "is discriminating on a ground that history tells us is a core form of race discrimination," while sexual orientation discrimination "cannot be regarded as a form of sex discrimination on the ground that applies in race cases since discrimination because of sexual orientation is not historically tied to a project that aims to subjugate either men or women." Bostock v. Clayton County, Ga., 140 S. Ct. 1731, 1765 (Alito, J., dissenting). A sex discrimination plaintiff however need not prove that the discrimination is "historically tied to a project that aims to subjugate either men or women," because the statute's language does not include any such requirement.

and women that they comport themselves in a manner consistent with the traditional understanding of their gender. As the Court observes, we might hypothesize "an employer eager to revive the workplace gender roles of the 1950s," who "enforces a policy that he will hire only men as mechanics and only women as secretaries."[97] That of course returns us to the world of *Price Waterhouse*, in which some high-paying jobs are denied to women because performing them competently is unfeminine.

### D. INVIDIOUS

Another subtractive move holds that Title VII "references invidious distinctions: 'To treat a person or group in an unjust or prejudicial manner, esp[ecially] on the grounds of race, gender, sexual orientation, etc.; frequently with against.'"[98] We have already noted Justice Alito's suggestion that the statute only prohibits "discrimination against a woman or a man based on 'unfair beliefs or attitudes' about members of that particular sex."[99]

Judge Lynch observes that some distinctions between the sexes, for example with separate toilets, are generally agreed to be permissible. "The problem sought to be remedied" by the statute "was the pervasive discrimination against women in the employment market."[100] He infers from this that "the law prohibits discriminating against members of one sex or the other in the workplace."[101] This understanding of the statute's ambit then supports the parallel-discriminations move, just discussed.

The argument here relies on the mischief rule, one of the oldest canons of statutory interpretation.[102] It requires the interpreter to read a statute purposively, so that it applies only to the

97. *Bostock*, 140 S. Ct. at 1748. For a response to the sex discrimination argument that falls into this trap, *see* Robert P. George, *Counterfeit Textualism*, NAT'L REV. (Nov. 19, 2019), https://www.nationalreview.com/2019/11/counterfeit-textualism/ [https://perma.cc/EL4K-JR57], critiqued in Andrew Koppelman, *Conservatives Have a New Defense for Anti-Gay Discrimination*, THE AM. PROSPECT (Nov. 25, 2019), https://prospect.org/justice/conservatives-have-a-new-defense-for-anti-gay-discrimination/ [https://perma.cc/6QGS-NQNU].

98. *Zarda*, 883 F.3d at 149 (Lynch, J., dissenting) (quoting Oxford English Dictionary Online, http://www.oed.com (definition 4)).

99. *Bostock*, 140 S. Ct. at 1769 n.22 (Alito, J., dissenting).

100. *Zarda*, 883 F.3d at 143 (Lynch, J., dissenting).

101. *Id.* at 149 (emphasis in original).

102. Heydon's Case, 3 Rep 7a, 76 ER 637 (1584). On the history and uses of the rule, *see generally* Samuel Bray, *The Mischief Rule*, 109 GEO. L. J. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3452037.

defect that the law aims to remedy.[103] It is the most familiar of the subtractive moves, and the most legitimate. One excludes something from coverage by the literal meaning when the thing subtracted is no part of the mischief that concerns the statute. "No vehicles in the park" obviously does not apply to baby carriages.[104]

Subtraction on the basis of the mischief rule, however, is probably barred by the new textualism. Justice Scalia embraces a presumption against ineffectiveness: "A textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored."[105] But a statute's purpose should be "gathered only from the text itself."[106] The mischief rule is thus rejected if the mischief is to be understood with reference to any source outside the statute's terms.[107] Justice Scalia repudiates the idea "that a drafter's 'purposes,' as perceived by the interpreter, are more important than the words that the drafter has used; specif., the idea that a judge-interpreter should seek an answer not in the words of the text but in its social, economic, and political objectives."[108]

103. Bray, *supra* note 102.

104. WILLIAM N. ESKRIDGE, JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 15–16 (2016) [hereinafter ESKRIDGE, INTERPRETING LAW]. The mischief rule can also expand the coverage of a statute, by making it apply to an activity that is not specifically named in the text but which is part of the evil that the statute covers. A "vehicle" is a conveyance moving on land, but if flying hovercraft that floated a foot above the ground started to be used in a way that endangered pedestrians in parks, they would probably be construed to be within the statute. This implication of the mischief rule is not relevant here.

105. SCALIA & GARNER, *supra* note 18, at 63.

106. *Id.* at 33.

107. *Id.* at 433–34. Judge Lynch appears to reject this premise, and embrace a weaker version of textualism, that excludes legislative history but permits reliance on "the broader *political and social* history" of a statute. Zarda v. Altitude Express, Inc., 883 F.3d 100, 144 (2d Cir. 2018) (Lynch, J., dissenting) (emphasis in original).

108. SCALIA & GARNER, *supra* note 18, at 438. One may reasonably wonder whether Scalia and Garner have thought through the implications of this. When contemplating a hypothetical vehicles-in-the-park statute, they propose that the "proper colloquial meaning . . . is simply a *sizable* wheeled conveyance (as opposed to one of any size that is motorized)." *Id.* at 37. Thus, they would exclude bicycles and, presumably, baby carriages. But this restriction relies on commonsense intuitions that come from outside the hypothesized statute, which simply prohibits "vehicles" without further restriction. There are multiple meanings of the word, but the bare text of the statute provides no basis for choosing among them. Their proposed interpretation might defeat the statute's

Justice Alito and Judges Lynch and Ho implicitly rely on the mischief rule to narrow Title VII, because they think that otherwise it would absurdly prohibit separate toilets for men and women.[109] They read the statute, as the rule demands, in light of "the social problem that the statute aimed to correct."[110] They think that this social problem is discrimination, not against individuals, but against an entire sex.[111]

This reading is however contradicted by the text of the statute. Justice Gorsuch observes: "It tells us three times—including immediately after the words 'discriminate against'—that our focus should be on individuals, not groups . . . ."[112] The Second Circuit explained:

> Title VII does not ask whether a particular sex is discriminated against; it asks whether a particular "*individual*" is discriminated against "because of such *individual's* . . . sex." . . . Taking individuals as the unit of analysis, the question is not whether discrimination is borne only by men or only by women or even by both men and women; instead, the question is whether an individual is discriminated against because of his or her sex.[113]

So what about sex-segregated toilets? Justice Alito observes that "many people . . . are reticent about disrobing or using toilet facilities in the presence of individuals whom they regard as members of the opposite sex."[114] Given the Court's decision, "a person who has not undertaken any physical transitioning may claim the right to use the bathroom or locker room assigned to the sex with which the individual identifies at that particular time."[115] Ryan Anderson worries about the fate of gender-specific dress codes and changing facilities: if "changing the plaintiff's sex would change the outcome," Anderson writes, then what happens if "a female lifeguard is fired because she wears a swimsuit

purpose, if for example the law had been enacted in response to incidents in which pedestrians had been injured by bicycles. Eskridge, *supra* note 5, at 560–61.

109. Bostock v. Clayton County, Ga., 140 S. Ct. 1731, 1778–79 (2020) (Alito, J., dissenting); Wittmer v. Phillips 66 Co., 915 F.3d 328, 334 (5th Cir. 2019) (Ho, J., concurring); *Zarda*, 883, F.3d at 150 (Lynch, J., dissenting).

110. *Zarda*, 883 F.3d at 150 (Lynch, J., dissenting).

111. *Id.* at 143.

112. *Bostock*, 140 S. Ct. at 1740.

113. *Zarda*, 883 F.3d at 123 n.23; *see also* Equal Empl't Opportunity Comm'n v. R.G. &. G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 578 (6th Cir. 2018) (quoting same).

114. *Bostock*, 140 S. Ct. at 1778–79 (Alito, J., dissenting).

115. *Id.* at 1779 (Alito, J., dissenting).

bottom but refuses to wear a top," or "a male employee at a fitness center repeatedly goes into the women's locker room and is fired"?[116]

The Court's dismissal of these arguments is entirely appropriate: "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."[117] But these policy worries can be answered.

The appropriate response is not based on any emotional reaction to these hypotheticals, but rather on an interpretation of the text of the statute. Justice Gorsuch writes in *Bostock*: "To 'discriminate against' a person . . . would seem to mean treating that individual worse than others who are similarly situated."[118] The statute does not prohibit classification. It prohibits discrimination.[119]

In sex discrimination law, it must be acknowledged, separate but equal does have a legitimate place.[120] With such arrangements, however, individuals are rarely *disadvantaged* because of their sex (setting aside the important issue of toilet accommodations for transgender workers). And because they are not treated worse than others, they are not discriminated against. The courts will surely hold that sending you to a particular restroom, or making you put a shirt over your breasts, is not treating you worse than others.[121] The plaintiffs in *Bostock*, on the other hand, would have had to change their lives in mighty significant ways in order to avoid displeasing their employers.

The changing-room case has become ubiquitous in discussions of transgender rights, but there has been a remarkable paucity of actual reported cases of men invading women's spaces.[122] There is concededly a man who has repeatedly barged

116. Ryan T. Anderson, *The Supreme Court's Mistaken and Misguided Sex Discrimination Ruling*, PUBLIC DISCOURSE (June 16, 2020), https://www.thepublicdiscourse.com/2020/06/65024/ [https://perma.cc/CN2J-Y3U3].

117. *Bostock*, 140 S. Ct. at 1753.

118. *Id.* at 1740.

119. 42 U.S.C. § 2000e-2(a)(1) ("it shall be unlawful to . . . discriminate against any individual . . . .").

120. Stephen Clark, *Same-Sex But Equal: Reformulating the Miscegenation Analogy*, 34 RUTGERS L. J. 107 (2002).

121. Courts have however sometimes trivialized serious gender-specific burdens, such as a requirement that women wear makeup. *See, e.g.*, Jespersen v. Harrah's Operating Co., 392 F.3d 1076 (9th Cir. 2006) (en banc). Makeup is expensive, and its application is a highly skilled, time-consuming undertaking.

122. *Transgender People and Bathroom Access*, NAT'L CTR. FOR

unannounced into the changing rooms of teenaged beauty contestants and later bragged about it, but I am happy to report that there is only one of him.[123]

Thus, a court can reasonably conclude that toilet classifications are not discriminatory.[124] That is not true of LGBT discrimination, where each victim of discrimination would have been treated better had their sex been different.

The mischief, *as defined by the statute*, is discrimination, not classification. Judge Lynch thinks that a classification is invidious only if it is "a covert means of limiting employment opportunities for men or for women as such . . . ."[125] But in the statute's terms, classification is invidious, is discriminatory, if and only if it harms someone because of their sex.[126] The separate-toilets proviso is thus not an exception to, but a clarification of, the principle that no one is to be discriminated against because of their sex.

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TRANSGENDER EQUALITY (July 10, 2016) https://transequality.org/issues/resources/transgender-people-and-bathroom-access [https://perma.cc/BW73-2FM7] (stating that "law enforcement officials and sexual assault advocates in states and cities that already have trans-inclusive policies . . . have said . . . the claim that these policies cause safety problems is absurd and completely false.").

123. Tessa Stuart, *A Timeline of Donald Trump's Creepiness While He Owned Miss Universe*, ROLLING STONE (Oct. 12, 2016), https://www.rollingstone.com/politics/politics-features/a-timeline-of-donald-trumps-creepiness-while-he-owned-miss-universe-191860/ [https://perma.cc/9J5W-NT79].

124. Again, setting aside the case of transgender workers. The prohibition of sex discrimination means that, whatever toilet arrangements an employer may make, those workers may not be treated worse than others because of their transgender status.

125. Zarda v. Altitude Express, Inc., 883 F.3d 100, 152 (2d Cir. 2018) (Lynch, J., dissenting).

126. Conceivably, "invidious" classification could be understood to exclude discrimination that is well intentioned and not motivated by a desire to harm women, even if it deprives people of significant opportunities. In that case, much of the discrimination that Title VII was understood to prohibit in 1964 would be permitted. Judge Ho thinks that "sex stereotyping is actionable only to the extent it provides favoritism of one sex over the other." Wittmer v. Phillips 66 Co., 915 F.3d 328, 339 (5th Cir. 2019) (Ho, J., concurring). But Justice Bradley was not manifesting favoritism to men, but rather a boneheaded romantic valorization of women, when he wrote that women could legitimately be excluded from the legal profession because the "paramount destiny and mission of woman" was "to fulfil the noble and benign offices of wife and mother." Bradwell v. State, 83 U.S. 130, 141 (1873) (Bradley, J., concurring). The modern Court has made clear that benevolent motive does not make sex discrimination permissible. UAW v. Johnson Controls, Inc., 499 U.S. 187, 200 (1991) (cited in *Zarda*, 883 F.3d at 122).

The new textualism's rejection of the mischief rule is one of its deepest weaknesses. It invites perverse readings of statutes that defeat the purposes for which they were enacted.[127] But that problem is not presented in the Title VII case, where a textualist reading does reach the evil at which the statute is directed. The statute by its terms bars sex discrimination, and LGBT discrimination is sex discrimination.

Judge Lynch thinks that sexual harassment is appropriately prohibited, even if the framers of the statute did not anticipate this, because it "presents a serious obstacle to the full and equal participation of women in the workplace . . . ."[128] "[B]oth the literal language . . . *and* the elimination of the social evil at which it was aimed make clear that the statute must be read to prohibit it."[129] But if the statute is to be read as prohibiting practices that have the purpose or effect of bullying women into subordinate positions, then LGBT discrimination cannot be excepted from the law's scope. As already noted, any time a woman occupies a position of authority, a significant strand of popular culture will use that position in order to impute lesbianism, which it deems intolerable. And if discrimination is permissible whenever the discriminator plausibly recites a purpose of excluding lesbians, then discrimination against women will often be permissible. More generally, any mistreatment on the basis of imputed homosexuality reinforces gender roles and contributes to the subordination of women. Title VII cannot permit it. "[T]his purpose and object of the statute, would be defeated; the absurdity of such a construction is therefore apparent."[130]

### E. ORIGINAL CULTURAL EXPECTATIONS

The deep wellspring of all the subtractive moves discussed thus far is the presumption that if a background belief was entrenched in the culture at the time of a law's enactment, then one can rely on that background belief in order to *subtract* meaning from the plain language of a statute, to limit its extension in order to exclude applications that most people at the time would have rejected.[131] Even a literal application of the statute would

127. *See, e.g.*, King v. Burwell, 135 S. Ct. 2480 (2015) (Scalia, J., dissenting).

128. *Zarda*, 883 F.3d at 159 (Lynch, J., dissenting).

129. *Id.* at 147 (emphasis in original). Once more, it is doubtful that a Scalian textualist can cite "the social evil at which it was aimed."

130. City of Philadelphia v. Ridge Ave. Passenger Ry. Co., 102 Pa. 190, 196 (1883) (quoted with approval in SCALIA & GARNER, *supra* note 18, at 65).

131. I note in passing that this move is not mentioned in the catalogue of

then be rejected if that application was not part of its meaning "as a reasonable person would have understood it at the time of enactment,"[132] filtered through whatever blind spots were then commonly shared by (otherwise) reasonable people. By this reasoning, the Supreme Court was wrong to say that the statute "strike[s] at the entire spectrum of disparate treatment . . . ."[133] There are gaps in the spectrum, blown open by the background culture at the time of enactment.

When it is applied to statutes that aim at broad social transformation, the original cultural expectations move has a conservative bias. Its tendency is to defeat the very laws it purports to interpret.[134] Normally, statutes are read to give full effect to their purpose.[135] But laws that aim to counteract prejudice, by their nature, press against the background culture. Given the tendency of some groups to violently dominate others, patterns of exclusion with deep cultural roots exist in many parts of the world.[136] If that culture is taken to be a check on their meaning, then what was enacted as a broad principle will be pruned down to include only its paradigmatic cases, tightly encased by the prejudices of the surrounding culture at the time of enactment.[137]

canons of interpretation in SCALIA & GARNER, *supra* note 18. The understanding of sex discrimination that prevailed in 1964 was less narrow than the dissenters assume. Cary C. Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307 (2012). The applicability of a sex discrimination prohibition to LGBT discrimination was very much debated in 1972, when Title VII was extensively amended. Eskridge, *supra* note 32, at 347–53.

132. Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 360 (7th Cir. 2017) (en banc) (Sykes, J., dissenting).

133. City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978).

134. That tendency has also been noted in some of the court's other techniques of statutory interpretation. *See* Simon Lazarus, *Stripping the Gears of National Government: Justice Stevens's Stand Against Judicial Subversion of Progressive Laws and Lawmaking*, 106 NW. U. L. REV. 769 (2012).

135. SCALIA & GARNER, *supra* note 18, at 63 ("A textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored.").

136. *See* TARUNAIBH KHAITAN, A THEORY OF DISCRIMINATION LAW (2015).

137. This tendency was naively displayed in some of the early same-sex marriage cases, in which litigants and courts invoked crude sex stereotypes to rebut the claim that discrimination against same-sex couples was sex discrimination. *See* Deborah A. Widiss et al., *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461 (2007).

This move is a mutated variant of the old, similarly conservative canon that "statutes in derogation of the common law shall be narrowly construed."[138] It contemplates statutes with the same skeptical conservatism, the same powerful presumption in favor of the status quo, as the subtractive moves we have been considering here. This canon has been expressly abrogated by statute in many states.[139] Justice Scalia thought it was a "sheer judicial power grab,"[140] "a relic of the courts' historical hostility to the emergence of statutory law."[141]

The original cultural expectations move is also, specifically, one of the original targets of Justice Scalia's ire. The "prototypical case"[142] of the kind of judicial discretion he sought to eradicate was *Church of Holy Trinity v. United States*,[143] in which the Supreme Court carved out an exception to a statute making it illegal for anyone to "in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, in the United States . . . under contract or agreement . . . to perform labor or service of any kind . . . ."[144] A church hired a minister from England to travel to New York and serve as the church's rector and pastor.[145] The Court said: "It must be conceded that the act of the corporation is within the letter of this section, for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other."[146] But, it held, "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."[147]

Justice Scalia observed that the Court relied on "various extratextual indications"[148] to conclude that the law only applied to manual labor, including "a lengthy description of how and why

138. *See e.g.*, United States v. Texas, 507 U.S. 529, 534 (1993) (invoking this canon in statutory interpretation analysis).

139. Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 399 (2010).

140. ANTONIN SCALIA, A MATTER OF INTERPRETATION 29 (1997).

141. SCALIA & GARNER, *supra* note 18, at 318.

142. SCALIA, *supra* note 140, at 18.

143. 143 U.S. 457 (1892).

144. *Id.* at 458.

145. *Id.*

146. *Id.* at 457–58.

147. *Id.* at 459.

148. SCALIA, *supra* note 140, at 19.

we are a religious people."[149] He thought, on the contrary, that cultural facts, such as the religiosity of America, cannot override statutory language.[150] "The text of the statute contains no ambiguity at all: 'labor or service of any kind' unambiguously includes not just labor but service of any kind."[151] *Holy Trinity* "is nothing but an invitation to judicial lawmaking."[152] It reflects the "philosophy that it is the function of the courts to improve faulty legislation."[153]

More generally, Justice Scalia anticipated and rejected the original cultural expectations move: "some think that when courts confront generally worded provisions, they should infer exceptions for situations that the drafters never contemplated and did not intend their general language to resolve."[154] That is precisely what was proposed in the Title VII cases. "Traditional principles of interpretation reject this distinction because the presumed point of using general words is to produce general coverage—not to leave room for courts to recognize ad hoc exceptions."[155]

Justice Alito lays out the original cultural expectations move in stark terms when he invites us to "imagine this scene. Suppose that, while Title VII was under consideration in Congress, a group of average Americans decided to read the text of the bill . . . ." He concludes that they "would not have dreamed that discrimination because of sex meant discrimination because of sexual orientation, much less gender identity." Justice Alito takes as a source of law, not only the legislative history and publicly understood purposes of the Act, but the entire background culture at the time the law was enacted. The modern reader must imagine and reconstruct that background culture.

What he proposes, predicting how someone would have reacted to an unforeseen circumstance, is essentially the technique of Method Acting, pioneered by Constantin Stanislavski. Stanislavski argued that actors must, in order to perform well, construct "an inner chain of circumstances which we ourselves have imagined in order to illustrate our parts."[156]

149. *Id.* at 19–20.
150. SCALIA & GARNER, *supra* note 18, at 222–23.
151. *Id.*
152. SCALIA, *supra* note 140, at 21.
153. SCALIA & GARNER, *supra* note 18, at 332.
154. *Id.* at 101.
155. *Id.*
156. CONSTANTIN STANISLAVSKI, AN ACTOR PREPARES 60 (1936).

Justice Alito evidently imagines the thinking of a member of Congress the way an actor imagines Othello or Lear. What would they do in these circumstances? But of course acting is a creative enterprise. There are lots of valid ways to imagine those characters, consistent with the text. Many of them would have surprised Shakespeare. Stanislavski's claim is that, in order for an actor to do his job well, he must rely on (in the words of Justice Gorsuch in *Bostock*) "extratextual sources and our own imaginations . . . ."[157]

The trouble is that counterfactual questions are unanswerable. If Congress knew everything we now know about LGBT discrimination, what would it say? David Hackett Fischer writes: "No amount of empirical research will ever suffice to prove that Timothy Pickering, had he by some horrible twist of fate been elevated to the presidential chair, would or would not have done precisely what Jefferson did. His perverse opinions on Louisiana are well known, but the opinions which he might have held in different circumstances are utterly unknowable, and irrelevant to a proper historical inquiry."[158]

In 1964, overwhelming majorities of Americans disapproved of homosexual sex. They probably disapproved of transgender people too. But the argument proves too much. Americans had other attitudes that, if one applies Justice Alito's method, produce awkward results for him. In 1958, for example, 4% of Americans approved of interracial marriage.[159] That number had risen to 20% in 1968, but 73% still disapproved.[160] In 1965, 48% of Americans approved of laws criminalizing interracial marriage.[161] 46% were opposed.[162] There's plenty of reason to think that most Americans in 1964 would have been surprised to learn that the statute would protect employees who are in interracial relationships. Justice Alito's argument, taken to its logical con-

157. Bostock v. Clayton County, Ga., 140 S. Ct. 1731, 1738 (2020).

158. DAVID HACKETT FISCHER, HISTORIANS' FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT 18 (1970).

159. *In U.S., 87% Approve of Black-White Marriage, vs. 4% in 1958*, GALLUP (July 25, 2013), https://news.gallup.com/poll/163697/approve-marriage-blacks-whites.aspx [https://perma.cc/VC8S-U9MM].

160. *Id.*

161. *Gallup Vault: Americans Slow to Back Interracial Marriage*, GALLUP (June 21, 2017), https://news.gallup.com/vault/212717/gallup-vault-americans-slow-back-interracial-marriage.aspx [https://perma.cc/Z66W-KSDE].

162. *Id.*

clusion, prevents law from ever doing more than ratifying existing prejudices.

Stanislavski's central claim is that acting demands creativity. In a play's text, you may just find a direction that someone exits the stage. "But one cannot appear out of the air, or disappear into it. We never believe in any action taken 'in general' . . . ."[163] The actor's job is to "embroider facts with details drawn from our own imaginations."[164] But of course this method will yield different results with different actors, who need to know how to work with their own idiosyncrasies. "When you know the inclinations of your own nature it is not difficult to adapt them to imaginary circumstances."[165] This is a swell way of thinking about theatre. That's why Stanislavskian methods continue to be taught in acting classes.

In statutory interpretation it will not do. It is particularly problematic as an approach to a broadly transformative statute like the Civil Rights Act, whose terms, Justice Gorsuch observed, "virtually guaranteed that unexpected applications would emerge over time."[166] One question a good actor will ask about his character is whether this person is capable of growth and change. Hamlet is; Polonius isn't. Justice Alito's argument presumes that when Congress spoke, it was more like Polonius—and this while interpreting a statute that, more than almost any other legislation in American history, displays a willingness and ability to grow and change.

## F. ELEPHANTS

The LGBT sex discrimination claim is concededly surprising to many. Judge Ho suggested that its surprising character implicates the rule that Congress "does not alter the fundamental details of a regulatory scheme in vague or ancillary provisions—it does not, one might say, hide elephants in mouseholes."[167] Professor Eskridge and I addressed this in our amicus brief: "in these cases, it is the principle against sex discrimination that is the elephant. The statute attacks an injustice that is present in

163. STANISLAVSKI, *supra note* 156, at 52.

164. *Id.* at 53.

165. *Id.* at 65.

166. Bostock v. Clayton County, Ga., 140 S. Ct. 1731, 1753 (2020).

167. Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 468 (2001); Wittmer v. Phillips 66 Co., 915 F.3d 328, 336 (5th Cir. 2019) (Ho, J., concurring) (quoting same). *See* ESKRIDGE, INTERPRETING LAW, *supra* note 104, at 337–40 (discussing the canon).

virtually every known civilization. What would be surprising would be if that broad project did not have surprising implications . . . ."[168] Justice Gorsuch wrote that the statute's terms "virtually guaranteed that unexpected applications would emerge over time. This elephant has never hidden in a mousehole; it has been standing before us all along."[169]

Let's anatomize the elephant in the room. It has nothing to do with the text of the statute. It consists of "the societal norms of the day,"[170] the fact that "in 1964 homosexuality was thought to be a mental disorder, and homosexual conduct was regarded as morally culpable and worthy of punishment."[171]

The exclusion of a class of persons from otherwise express protection, on the basis of conspicuous prejudice against them at the time of enactment, does not have an admirable history. Its *locus classicus* is *Dred Scott v. Sandford*,[172] the notorious 1857 decision that held that African-Americans could not be citizens of the United States.[173] The Court confronted, among other issues, the embarrassment that the Declaration of Independence had declared "that all men are created equal."[174] The words, the Court admitted, "would seem to embrace the whole human family . . . ."[175] But, the Court explained, "it is too clear for dispute, that the enslaved African race were not intended to be included . . . ."[176] The framers "perfectly understood the meaning of the language they used, and how it would be understood by others; and they knew that it would not in any part of the civilized world be supposed to embrace the negro race . . . ."[177] The public meaning was clear. "They spoke and acted according to the then established doctrines and principles, and in the ordinary language of the day, and no one misunderstood them."[178]

168. Brief of William N. Eskridge Jr. and Andrew M. Koppelman as Amici Curiae in Support of Employees at 17, Bostock v. Clayton County, Georgia, 140 S. Ct. 1731, (2020) (No. 17-1618), 2019 WL 2915046. The "elephant" canon is also a way of addressing linguistic ambiguity, which is not present here.

169. *Bostock*, 140 S. Ct. at 1753.

170. *Id.* at 1769 (Alito, J., dissenting).

171. *Id.* (Alito, J., dissenting).

172. 60 U.S. 393 (1857).

173. *Id.*

174. *Id.* at 410.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* Christopher Eisgruber observes that the Court's interpretation of the Constitution was premised "on the assumption that the Framers could not

Judge Ho is making exactly the same argument. The words of Title VII would seem to embrace antigay discrimination. But it is too clear for dispute that gay people were not intended to be included. And so forth.

Or consider the interpretation of the Fourteenth Amendment, which (among other things) overrode *Dred Scott*. There were well-settled prejudices at the time of enactment with respect to segregated schools, voting, and interracial marriage, and many of the framers did not expect the law to apply to them. A societal-norms override would have been bad news for protection in these cases.[179] It would, as Justice Gorsuch put it, "tilt the scales of justice in favor of the strong or popular."[180]

The pertinent canon is rather this: "Without some indication to the contrary, general words (like all words, general or not) are to be accorded their full and fair scope. They are not to be arbitrarily limited."[181] The elephant rule is not a license for courts to refuse to enforce clearly worded laws when the implications are so surprising that the courts would like the legislature to reconsider the question.

### G. ORDINARY MEANING, NOT LITERAL MEANING

A cleverer argument was made by Justice Kavanaugh, who pointed out that courts, applying statutes, generally follow a law's ordinary meaning rather than its literal meaning.[182] He relied primarily on two authorities:

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have intended the Constitution to incorporate a standard of conduct higher than the one they met." Christopher L. Eisgruber, *Dred Again: Originalism's Forgotten Past*, 10 CONST. COMM. 37, 47 (1993). Chief Justice Taney relied on historic military and marriage exclusions to demonstrate the original understanding. *Dred Scott*, 60 U.S. at 413–16; *cf.* Bostock v. Clayton County, Ga., 140 S. Ct. 1731, 1769 (2020) (Alito, J., dissenting)*;* Zarda v. Altitude Express, Inc., 883 F.3d 100, 137–52 (2d Cir. 2018) (Lynch, J, dissenting) (both citing anti-homosexual prejudice in 1964).

179. And it was. *See, e.g.*, Slaughter-House Cases, 83 U.S. 36, 78 (1873) (interpretation of Fourteenth Amendment rejected because it "radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people."); Plessy v. Ferguson, 163 U.S. 537, 544 (1896) (interpretation of Fourteenth Amendment rejected because "in the nature of things, it could not have been intended to abolish distinctions based upon color . . . .").

180. *Bostock*, 140 S. Ct. at 1751.

181. SCALIA & GARNER, *supra* note 18, at 101.

182. Similarly, Justice Alito: "The *ordinary meaning* of discrimination because of 'sex' was discrimination because of a person's biological sex, not sexual

> There is no serious debate about the foundational interpretive principle that courts adhere to ordinary meaning, not literal meaning, when interpreting statutes. As Justice Scalia explained, "the good textualist is not a literalist." A. Scalia, *A Matter of Interpretation* 24 (1997). Or as Professor Eskridge stated: The "prime directive in statutory interpretation is to apply the meaning that a reasonable reader would derive from the text of the law," so that "for hard cases as well as easy ones, the *ordinary meaning* (or the 'everyday meaning' or the 'commonsense' reading) of the relevant statutory text is the anchor for statutory interpretation." W. Eskridge, *Interpreting Law* 33, 34–35 (2016) (footnote omitted).[183]

Justice Scalia, as we have already noted, was the leading proponent of the new textualism. Professor Eskridge, who teaches at Yale Law School, is one of the nation's leading authorities on statutory interpretation.

Justice Kavanaugh offered a number of illustrations. In earlier decisions, the Court refused a reading of "mineral deposits" that included water, even though water is literally a mineral.[184] It declined to hold that "personnel rules" encompass any rules that personnel must follow.[185] Beans are not "seeds."[186] An aircraft is not a "vehicle."[187] Buying drugs is not "facilitating" drug distribution.[188] Ordinary meaning sometimes precludes the literal application of a statute's terms.[189]

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orientation or gender identity." *Bostock*, 140 S. Ct. at 1767 (Alito, J., dissenting) (emphasis in original).

183. *Bostock*, 140 S. Ct. at 1825 (Kavanaugh, J., dissenting) (emphasis in original).

184. *Id.* at 1826 (Kavanaugh, J., dissenting).

185. *Id.* (Kavanaugh, J., dissenting).

186. *Id.* at 1825 (Kavanaugh, J., dissenting).

187. *Id.* (Kavanaugh, J., dissenting).

188. *Id.* at 1826 (Kavanaugh, J., dissenting).

189. *Id.* (Kavanaugh, J., dissenting). This was a move that was not made by any of the judges below. Some of them asserted that discrimination against LGBT people was not prohibited by the literal meaning of the statute. *See* Zarda v. Altitude Express, Inc., 883 F.3d 100, 137, 149 (2d Cir. 2018) (Lynch, J., dissenting), *but see id.*, 144 n.7 (distinguishing "fair meaning" from "hyperliteral meaning"); Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 352 (7th Cir. 2017) (en banc) (Posner, J., concurring) ("[W]here words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them.") (quoting WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *59–60 (1765)); *Id.* at 355 (Posner, J., concurring) (endorsing coverage as "a sensible deviation from the literal or original meaning of the statutory language."). Some of Justice Kavanaugh's examples address an entirely different issue, the distinction between ordinary colloquial meaning and scientific or technical meaning: colloquially, tomatoes are not fruit and

On the other hand, Professor Eskridge, whom Justice Kavanaugh cited six times, disagreed with him about the application of the ordinary meaning rule in *Bostock*. He had coauthored an amicus brief on the other side.[190] Professor Eskridge is not a new textualist, and it is not clear that the distinction between literal and ordinary meaning can be maintained within the mental world of the new textualism.[191] Summarizing the ordinary meaning rule, Professor Eskridge writes:

> [T]ext-based interpretation is not a mechanical exercise that avoids value judgments. Just as ordinary conversations have a point that affects the way the interlocutors understand one another, so statutes have a purpose that ought to affect the way judges understand the legislated text.[192]

The central claim of the new textualism is that extratextually derived purposes should not be a source of statutory interpretation.[193] Moreover, a turn to purposivism would not help Justice Kavanaugh. As already noted, the protection of LGBT people furthers the purposes of the statute.[194]

As the majority observed, Justice Kavanaugh did not "offer an alternative account about what these terms mean either when viewed individually or in the aggregate."[195] In the earlier cases, such an account had been offered. In context, the ordinary meaning of "vehicle" is a conveyance moving on land.[196] "Contracts of employment" encompass contracts with independent contractors.[197] But Justice Kavanaugh did not suggest an ordinary meaning for the law's words. He said, in effect, that whatever the words mean, they cannot mean that.[198] His position

beans are not seeds. The issue in *Bostock*, however, is not one of linguistic ambiguity. Thanks to Brian Slocum for clarification of this point.

190. I was the other coauthor. *See* Brief of William N. Eskridge Jr. and Andrew M. Koppelman, *supra* note 168. Justice Kavanaugh did not cite it, but Justice Alito did. *See Bostock*, 140 S. Ct. at 1760 n.11 (Alito, J., dissenting).

191. *See supra* note 108.

192. Eskridge, *supra* note 104, at 83.

193. *See* SCALIA & GARNER, *supra* note 18, at xxvii.

194. *See supra* Part I.C.

195. *Bostock*, 140 S. Ct. at 1750.

196. *Id.*

197. *Id.*

198. His reading is thus analogous to what I have called "I Have No Idea Originalism." Andrew Koppelman, *Phony Originalism and the Establishment Clause*, 103 NW. U. L. REV. 727, 737–38 (2009) [hereinafter Koppelman, *Phony Originalism*] (discussing Justice Scalia's purportedly originalist reading of the Establishment Clause).

thus collapses back into original cultural expectations, as Justice Gorsuch's opinion for the Court observes:

> Rather than suggesting that the statutory language bears some other *meaning*, the employers and dissents merely suggest that, because few in 1964 expected today's *result*, we should not dare to admit that it follows ineluctably from the statutory text. When a new application emerges that is both unexpected and important, they would seemingly have us merely point out the question, refer the subject back to Congress, and decline to enforce the plain terms of the law in the meantime.[199]

## H. UPDATING STATUTES?

The dissenters thought that the Court's decision illegitimately reflected changing social mores. Justice Alito wrote that "what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated—the theory that courts should 'update' old statutes so that they better reflect the current values of society."[200] Justice Kavanaugh observes:

> [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 . . . . Those 30 judges realized a seemingly obvious point: Title VII is not a general grant of authority for judges to fashion an evolving common law of equal treatment in the workplace.[201]

Changing social mores matter, but in a different way than the dissenters appreciate. Sometimes prejudices are so deeply entrenched that an entire society is mistaken about what its law actually is.[202] Thus the 30 judges. When *Plessy v. Ferguson*[203] upheld racial segregation in 1896, the decision was so uncontroversial that the newspapers barely took any notice.[204] Those

199. *Bostock*, 140 S. Ct. at 1750 (emphasis in original).

200. *Id.* at 1755–56 (Alito, J., dissenting).

201. *Id.* at 1833–34 (Kavanaugh, J., dissenting). Judge Posner made similar claims, but unlike the other judges, he did not make any of the subtractive moves in support of it. He merely asserted without argument that the court was judicially amending the statute. Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 352–57 (7th Cir. 2017) (en banc) (Posner, J., concurring).

202. *See* William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1473 (2019). *Cf. Bostock*, 140 S. Ct. at 1751 ("One could also reasonably fear that objections about unexpected applications will not be deployed neutrally. Often lurking just behind such objections resides a cynicism that Congress could not *possibly* have meant to protect a disfavored group.") (emphasis in original).

203. 163 U.S. 537 (1896).

204. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 23 (2004).

prejudices must be overcome before we can think clearly. One variety of popular YouTube video shows an infant getting its first glasses. The baby is confused at first, then abruptly smiles at the realization that it can see for the first time what was there all along.[205]

## III. IMPLICATIONS

### A. A CONSTITUTIONAL PARALLEL

Students of originalist constitutional theory will recognize the original cultural expectations move immediately. It is simply another label for "original expected applications originalism"—the notion that the Constitution means what the framers expected it to mean. Early originalist theorists were drawn to this approach.[206] It was soon abandoned, most conspicuously by Justice Scalia.[207] The most fundamental objection it faced was that intentions are not law. "Statutes should be interpreted," Justice Scalia declared, "not on the basis of the unpromulgated intentions of those who enacted them . . . but rather on the basis of

205. *See, e.g.*, Poke My Heart, *Baby Wears Glasses for the First Time*, YOUTUBE (Nov. 11, 2017), https://www.youtube.com/watch?v=SdISEYcegww. Justice Kavanaugh observes:

> Over the last several decades, the Court has also decided many cases involving sexual orientation. But in those cases, the Court never suggested that sexual orientation discrimination is just a form of sex discrimination. All of the Court's cases from *Bowers* to *Romer* to *Lawrence* to *Windsor* to *Obergefell* would have been far easier to analyze and decide if sexual orientation discrimination were just a form of sex discrimination and therefore received the same heightened scrutiny as sex discrimination under the Equal Protection Clause. *See Bowers* v. *Hardwick*, 478 U.S. 186 (1986); *Romer* v. *Evans*, 517 U.S. 620 (1996); *Lawrence* v. *Texas*, 539 U.S. 558 (2003); *United States* v. *Windsor*, 570 U.S. 744 (2013); *Obergefell* v. *Hodges*, 576 U.S. 644 (2015).

Indeed. The argument was in fact offered in a number of those cases. The Court ignored it. *See, e.g.*, Brief of Amicus Curiae Constitutional Law Professors Bruce A. Ackerman et al., Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 136139; Brief of Amici Curiae William N. Eskridge Jr., et al., Hollingsworth v. Perry, 570 U.S. 693, (2013) (No. 12-144), 2013 WL 840011; Brief of Amicus Curiae Stephen Clark et al., Obergefell v. Hodges, 576 U.S. 644 (2015) (No. 14-556), 2015 WL 1048436.

206. Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 728 (2011).

207. The intellectual shift is chronicled in Colby, *supra* note 206. For critique of original expected applications originalism, *see* JACK BALKIN, LIVING ORIGINALISM 6–12 (2011).

what is the most probable meaning of the *words* of the enactment, in the context of the whole body of public law with which they must be reconciled."[208]

Some originalists have observed that, although original expected applications cannot be dispositive, they are relevant *evidence* of original public meaning.[209] But even granting that claim, those applications are merely evidence, useful when the text is ambiguous. In constitutional interpretation, of course, ambiguity is ubiquitous, particularly with respect to some of the most contested provisions, the Commerce Clause and the Fourteenth Amendment. Those texts state general principles, not rules. As Justice Scalia observed, constitutions are not statutes, and "the context of the Constitution tells us not to expect nitpicking detail."[210] Even when interpreting those provisions, one must move past original expected applications in order to avoid embarrassing implications, such as overruling *Brown v. Board of Education*.[211]

208. Antonin Scalia, Address Before the Attorney General's Conference on Economic Liberties in Washington, D.C. (June 14, 1986), *in* OFFICE OF LEGAL POLICY, U.S. DEPT. OF JUSTICE, ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK 101, 103 (1987). In practice, Justice Scalia sometimes relied on original expected applications in ways that were unfaithful to his theory. *See* Colby, *supra* note 207, at 773 n.340. Sometimes he cited original expectations and did not even engage the text or attempt to state the principle for which the disputed constitutional provision stands. Koppelman, *Phony Originalism*, *supra* note 198. In his confirmation hearings, Chief Justice Roberts expressly rejected this approach:

> There are some who may think they're being originalists who will tell you, well, the problem they were getting at were the rights of the newly freed slaves, and so that's all that the Equal Protection Clause applies to. But, in fact, they didn't write the Equal Protection Clause in such narrow terms. They wrote more generally. That may have been a particular problem motivating them, but they chose to use broader terms, and we should take them at their word, so that it is perfectly appropriate to apply the Equal Protection Clause to issues of gender and other types of discrimination beyond the racial discrimination that was obviously the driving force behind it.

Simon Lazarus, *Federalism R.I.P.?: Did The Roberts Hearings Junk The Rehnquist Court's Federalism Revolution?*, 56 DEPAUL L. REV. 1, 18 (2006) (quoting Chief Justice Roberts).

209. John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENTARY 371, 378–81 (2007).

210. SCALIA, *supra* note 140, at 37.

211. 347 U.S. 483 (1954). *See* Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881 (1995).

Title VII, on the other hand, states a rule. The subtractive move aims to authorize a departure from the rule stated in the text, on the basis of considerations that appear nowhere in the text. Justice Scalia warned against adopting "an interpretation that the language will not bear."[212] Original expected applications cannot displace a rule stated in the text.

B. GUTS

For some judges, the sex discrimination argument just feels intuitively wrong. But that intuition cannot defeat a statute's language. Long ago, Connecticut Supreme Court Justice David M. Borden told me in conversation how he thought about such intuitions.[213] When I hear a case, he said, I often have a gut feeling about how it ought to come out. And I generally try to bring my head into line with my gut. Often I'm able to do it. But if I cannot line them up, he explained, my obligation as a judge is to be ruled by my head, not my gut.

The subtractive moves put the gut in charge. Judges can cite elements of the culture that resisted the social change a law undertook to bring about, in order to disregard the law's plain command. But they do not have to do that: they can stick to the language if they find its entailments congenial. A license to draw statutory meaning from the background culture at the time of enactment, multivocal and contestable as culture always is, allows the interpreter to find justification for pretty much whatever she feels like doing with a statute.

Justice Scalia objected to reliance on legislative history, because the proliferation of possible sources of law placed the interpreter in a position much like "entering a crowded cocktail party and looking over the heads of the guests for one's friends."[214] If one can go beyond the legislative record to the entire background culture outside the legislature, the crowd becomes mighty thick. Sooner or later you will find a friendly face. Unlike the theories of statutory interpretation that rely on legislative history, which do so in a structured and constraining way,[215] the subtractive moves are available on an absolutely ad hoc basis. The background culture "can be either hewed to as

212. SCALIA, *supra* note 140, at 37.

213. I got to know him when I was a law clerk for Chief Justice Ellen A. Peters in 1991-92. He died in 2016.

214. SCALIA & GARNER, *supra* note 18, at 377.

215. NOURSE, *supra* note 64; Eskridge, *supra* note 5.

determinative or disregarded as inconsequential – as the court desires."[216] Judicial discretion is at its maximum.

### C. BACK TO REALISM

The Court could not deny the LGBT sex discrimination claim without betraying its commitment to the new textualism. This result is ideologically unwelcome to some. If one is to be a legal realist, however, one should consider the realist considerations on the other side.

The stakes are lower than in many Supreme Court cases. *Bostock* only accelerated the inevitable. As Justice Kavanaugh pointed out, "a new law to prohibit sexual orientation discrimination was probably close at hand."[217] The Equality Act passed the House of Representatives in 2019.[218] That is as far as it will get this year, because the Republicans control the Senate and the Presidency. But political fortunes shift and that will not always be the case. It has already attracted Republican votes.[219] Majorities in every state, 69% of Americans overall, think LGBT people should be protected from discrimination in jobs, public accommodations, and housing.[220] Specific protection from LGBT employment discrimination, which is what Title VII offers, is supported by 92%.[221]

Another realist consideration is the question of religious dissent from antidiscrimination laws—the problem that the Court

216. SCALIA & GARNER, *supra* note 18, at 377–78 (referring to the use of legislative history).

217. Bostock v. Clayton County, Ga., 140 S. Ct. 1731, 1836 (2020) (Kavanaugh, J., dissenting).

218. Catie Edmondson, *House Equality Act Extends Civil Rights Protections to Gay and Transgender People*, N.Y. TIMES (May 17, 2019), https://www.nytimes.com/2019/05/17/us/politics/equality-act.html [https://perma.cc/B89W-C3MZ].

219. Chris Cioffi, *These 8 Republicans voted for the Equality Act*, ROLL CALL (May 17, 2019), https://www.rollcall.com/news/congress/these-8-republicans-voted-for-the-equality-act [https://perma.cc/KZ8J-P5GS].

220. Daniel Greenberg et al., *Americans Show Broad Support for LGBT Nondiscrimination Protections*, PRRI (Mar. 12, 2019), https://www.prri.org/research/americans-support-protections-lgbt-people/ [https://perma.cc/2JBY-UQGR].

221. *U.S. Voters Still Say 2-1 Trump Committed Crime, Quinnipiac University National Poll Finds; But Voters Oppose Impeachment 2-1*, QUINNIPIAC UNIV. POLL (May 2, 2019), https://poll.qu.edu/national/release-detail?ReleaseID=2618 [https://perma.cc/8CMU-SFU8].

confronted, but did not resolve, in *Masterpiece Cakeshop v. Colorado.*[222] That question is obviously irrelevant to textualist interpretation, but it still may weigh on the minds of the Justices; all three mentioned it and Justice Alito discussed it at some length. The constitutional arguments offered in that case do not work,[223] but the Court nonetheless may feel impelled to become involved. In addressing this problem, Title VII already offers a model, one that will become more salient now that it is clear that the statute covers LGBT discrimination. It permits religious associations, corporations, educational institutions, and societies to discriminate based on religion in a range of ways that other entities may not.[224] The statute permits religious organizations to hire individuals "of a particular religion," and it defines religion to include "all aspects of religious observance and practice, as well as belief."[225] Strict textualism here will help religious dissenters: "all" means "all." Employers may also discriminate based on sex if that discrimination relates to a bona fide occupational qualification that is reasonably necessary to the normal operation of their businesses.[226] The Religious Freedom Restoration Act (RFRA)[227] exempts the exercise of religion from the normal operation of federal laws unless the burden is the least restrictive means of advancing a compelling governmental interest.[228] Justice Alito is correct that "the scope of these provisions is disputed, and as interpreted by some lower courts, they provide only narrow protection,"[229] but this is a matter within the Court's control. The Equality Act, on the other hand, includes no religious accommodations and specifically excludes exemptions based on RFRA.[230]

222. 138 S. Ct. 1719 (2018).

223. ANDREW KOPPELMAN, GAY RIGHTS VS. RELIGIOUS LIBERTY? THE UNNECESSARY CONFLICT 66–82 (2020).

224. 42 U.S.C. § 2000e-1(a); 42 U.S.C. §2000e-2(e)(2).

225. 42 U.S.C. §§ 2000e(j), 2000e-1(a).

226. 42 U.S.C. § 2000e-2(e)(1).

227. 42 U. S.C. § 2000bb.

228. *Id.*

229. Bostock v. Clayton County, Ga., 140 S. Ct. 1731, 1781 (2020) (Alito, J., dissenting).

230. Justice Alito however thinks that, had *Bostock* come out the other way, "Congress would have had the opportunity to consider competing interests and might have found a way of accommodating at least some of them." *Bostock*, 140 S. Ct. at 1778 (Alito, J., dissenting). Of course, nothing in *Bostock* denies Congress that opportunity.

Chief Justice Roberts clearly is concerned about the Court appearing to be a partisan tool. He is so worried about the notion of Democratic judges and Republican judges that he was willing to get into a public argument with President Trump about it.[231] *Bostock* helps the Court with that problem. It confounds narratives on right and left about the partisanship of the Court.[232] It bolsters confidence in the Court, and thus, in a small way, lowers the level of polarization and distrust that is destroying American politics.

## CONCLUSION

Title VII prohibits sex discrimination. Discrimination against LGBT people is sex discrimination. A remarkable number of strategies have been devised to evade this conclusion, to subtract LGBT people from the coverage of the statute. None of them work.

231. JOAN BISKUPIC, THE CHIEF: THE LIFE AND TURBULENT TIMES OF CHIEF JUSTICE JOHN ROBERTS 348–49 (2019).

232. Some commentators on the right felt betrayed by the decision, as though Justice Gorsuch had reneged on a political deal.