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Finding Original Public Meaning

James Macleod

FINDING ORIGINAL PUBLIC MEANING

James A. Macleod[*]

Textualists seek to interpret statutes consistent with their "original public meaning" (OPM). To find it, they ask an avowedly empirical question: how would ordinary readers have understood the statute's terms at the time of their enactment? *But as the Supreme Court's decision in* Bostock v. Clayton County *highlights, merely asking an empirical question doesn't preclude interpretive controversy. In considering how Title VII applies to LGBT people, the* Bostock *majority and dissents vehemently disagreed over the statute's bar on discrimination "because of sex"—each side claiming that OPM clearly supported its interpretation. So who, if anyone, was right? And how can textualists' supposedly commonsense OPM inquiry yield such divergent conclusions?*

This Article introduces a new "applied-meaning-experiment" method to answer those questions and develop the theory of textualism. The method asks ordinary readers to apply the relevant statutory language in context, under experimental conditions that minimize the effect of potential biases or differences between enactment-era and present-day usage. For Bostock, *the applied-meaning-experiment method reveals that the majority was probably right: textualists' "ordinary reader" at the time of Title VII's enactment would most likely have understood it to bar LGBT discrimination. The insights from*

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the applied-meaning-experiment method, however, extend far beyond the controversy in Bostock. *In other contexts where textualists disagree over OPM, the method sheds light on how ordinary readers would have understood statutory terms at the time they were enacted.*

More importantly, the method helps diagnose why textualists disagree about OPM in a given case. Textualists might lack probative evidence of OPM, but they might also implicitly disagree about what they're looking for. Specifically, inquiry into actual reader understanding highlights two choices textualists inevitably make when determining a given term or phrase's OPM: (1) the type of question *whose answer would reveal the reader's relevant "understanding," and (2)* the types of extratextual information *that the reader would treat as relevant to answering it. To the extent that textualists have considered either question, they have done so inconsistently, without realizing what they are doing. By confronting each choice directly, the applied-meaning-experiment method helps to build out the theory of textualism in a way that's needed for textualism to be capable—at least in theory—of delivering on its promise of judicial restraint.*

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I. INTRODUCTION

When textualist judges interpret a statute, they place great weight on the "ordinary," "commonsense," "everyday" meaning of its words at the time they were enacted, i.e., their "original public meaning" (OPM).[1] To find OPM, they ask how ordinary readers

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[1] All judges, not just textualists, consider and defer to ordinary meaning. *See* VALERIE C. BRANNON, CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 21 (2018); WILLIAM N. ESKRIDGE JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 33–55 (Robert C. Clark et al. eds., 2016) [hereinafter ESKRIDGE, INTERPRETING LAW]. But textualists tend to place greater emphasis on it. *See* William N. Eskridge Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1511 (1998) (reviewing ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed., 1997)) (explaining Scalia's premise that "a statutory text's apparent plain meaning must be the alpha and the omega in a judge's interpretation"); John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 74–75 (2006) [hereinafter Manning, *What Divides Textualists from Purposivists?*]. Even staunch textualists recognize exceptions, such as where statutes use technical legal terms of art. *See, e.g.*, Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 792 n.4 (2018). Except as otherwise noted, I set those exceptions aside in this Article.

This Article uses "ordinary meaning" interchangeably with "public meaning" (two terms also used in recent originalist literature concerning the OPM of constitutional provisions—i.e., their "ordinary," "public" meaning at the time they became law). *See* ESKRIDGE, INTERPRETING LAW, *supra*, at 33; Watson v. United States, 552 U.S. 74, 79 (2007); Richard H. Fallon Jr., *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1290 (2015) ("Today . . . mainstream originalists equate the meaning of constitutional provisions with their 'original public meaning.'"); Mark Greenberg, *Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication*, *in* PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 217, 241 (Andrei Marmor & Scott Soames eds., 2011). Extant statutory interpretation scholarship treats "textualism in statutory interpretation as a subspecies of originalism," effectively assuming that statutory textualism and constitutional originalism share the same conception of public meaning and the same view of the relationship between OPM and legal meaning. Hillel Y. Levin, *Justice Gorsuch's Views on Precedent in the Context of Statutory Interpretation*, 70 ALA. L. REV. 687, 688 n.1 (2019); *see also* SCALIA, *supra*, at 38 ("What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text . . . ."); Steven G. Calabresi & Hannah M. Begley, *Originalism and Same-Sex Marriage*, 70 U. MIA. L. REV. 648, 649 (2016) ("[A]ll modern originalists . . . were and are original public meaning textualists . . . ."). This Article therefore draws on both modern originalist and textualist scholarship when addressing OPM and its relation to legal meaning. For my own pushback against the literature's seemingly universal assumption that OPM must or should reference the same type of meaning for purposes of constitutional originalism and statutory textualism, see *infra* notes 302–303.

would have understood the relevant language.[2] Textualists emphasize that this inquiry is factual and empirical, not normative.[3] And they often give it dispositive effect: When ordinary reader understanding accords with only one side's interpretation—

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[2] *See* Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2201 (2017); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150 n.158 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)) ("Under the 'best reading' inquiry, the question is only how the words would be read by an ordinary user of the English language."); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 33 (2012) ("The interpretive approach we endorse is that of the 'fair reading': determining the application of a governing text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued."); William N. Eskridge Jr., *The New Textualism*, 37 UCLA L. REV. 621, 667 (1990) ("[T]he new textualism . . . focus[es] on the plain meaning a statute would have for the ordinary, reasonable reader . . . ."). *But see* Neal Goldfarb, Varieties of Ordinary Meaning: Comments on Kevin P. Tobia, Testing Ordinary Meaning 2–8 (Nov. 12, 2020) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3553016 (distinguishing between ordinary "understanding" and ordinary "usage" and noting judicial emphasis on both). Textualists often add that their hypothesized ordinary reader is a "reasonable" one. For more on what this qualification does and doesn't add, see *infra* notes 32, 302, and Section IV.B.

[3] Kevin P. Tobia, *Testing Ordinary Meaning*, 134 HARV. L. REV. 726, 731 (2020) ("Ordinary meaning inquiries are often understood as *empirical* ones, which aim to discover descriptive facts about meaning. Theories holding that a legal text must be applied consistently with its ordinary meaning do not typically characterize their project as a normative inquiry." (footnote omitted) (citing Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 66 (2011) (citing KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT AND JUDICIAL REVIEW 6 (1999)))); *see* Lee & Mouritsen, *supra* note 1, at 795 ("When we speak of *ordinary* meaning, we are asking an empirical question . . . ."); Barrett, *supra* note 2, at 2204 ("Whether the canons actually capture patterns of ordinary usage is an empirical question."); Anya Bernstein, *Democratizing Interpretation*, 60 WM. & MARY L. REV. 435, 442–51 (2018) (providing examples of cases purporting to rely on empirical evidence of meaning); Brian G. Slocum, *Ordinary Meaning and Empiricism*, 40 STATUTE L. REV. 13, 13 (2019) (noting that advocates of corpus linguistics "have stressed that statutory interpretation is an 'empirical' inquiry"); Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 278 (2017) [hereinafter Solum, *Originalist Methodology*] ("*[I]nterpretation* is a factual inquiry that yields communicative content . . . ."); Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 12 (2015) [hereinafter Solum, *The Fixation Thesis*] ("Interpretation is an empirical inquiry."); Scott Soames, *Originalism and Legitimacy*, 18 GEO. J.L. & PUB. POL'Y 241, 265 (2020) (emphasizing that the goal of interpretation is to discern a fact based on evidence, as is true in "all empirical inquiries"); 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, 21, 24–27 (2016).

as, for textualists, it usually does[4]—that side's interpretation prevails, full stop.[5] As Amy Coney Barrett recently explained, textualists thus act "as agents of the people," faithfully interpreting the words at issue "the way their principal—the people—would understand them."[6]

By marrying this "commonsense,"[7] populist orientation[8] with the promise of a "value-neutral," "objective," "empirical" "science" of interpretation,[9] textualism has had great success appealing to the

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[4] *See* Kavanaugh, *supra* note 2, at 2129, 2144–45, 2150 ("[A] critical difference between textualists and purposivists is that, for a variety of reasons, textualists tend to find language to be clear rather than ambiguous more readily than purposivists do."); Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 VAND. L. REV. EN BANC 315, 320 (2017) ("In my own opinions as a judge, I have never yet had occasion to find a statute ambiguous."); Anita S. Krishnakumar, *Textualism and Statutory Precedents*, 104 VA. L. REV. 157, 164–65 (2018) (describing the "'correct answer' mindset" that characterizes "textualist Justices, particularly in the post-Scalia era" (footnote omitted)).

[5] This is sometimes referred to as the "plain meaning" rule. William Baude & Ryan D. Doerfler, *The (Not So) Plain Meaning Rule*, 84 U. CHI. L. REV. 539, 540–41 (2017). Where the text's OPM is *not* "plain," "unambiguous," "clear," etc., it *under*determines the outcome—i.e., it removes from the set of permissible constructions those that are inconsistent with it, leaving two or more constructions remaining.

[6] Barrett, *supra* note 2, at 2195. Under textualists' conception of this principal-agent relationship, textualists interpret statutes in line with "the *linguistic expectations* of the regulated," *not* the public's *preferences*. *Id.* at 2202 (emphasis added). On potential divergences between ordinary readers' understanding and preferences, see *infra* Section IV.B.

[7] Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610, 1610 (2012).

[8] *See* Anya Bernstein & Glen Staszewski, *Judicial Populism*, 106 MINN. L. REV. (forthcoming 2021) (manuscript at 1), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3694132 (discussing populists' claims that they speak directly on behalf of the people).

[9] *E.g.*, NEIL M. GORSUCH, A REPUBLIC IF YOU CAN KEEP IT 112–13 (2019) (describing originalists' "value-neutral methodology" of deciding based on what "the text tells us"); Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339, 361 (7th Cir. 2017) (en banc) (Sykes, J., dissenting) ("Statutory interpretation is an objective inquiry that looks for the meaning the statutory language conveyed to a reasonable person at the time of enactment."); SCALIA, *supra* note 1, at 3 (discussing "the science of construing legal texts"); Phillips et al., *supra* note 3, at 22; *see also* William N. Eskridge Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 533 (2013) (reviewing SCALIA & GARNER, *supra* note 2) ("[T]he proper textualist approach, [Scalia and Garner] say, 'will curb—even reverse—the tendency of judges to imbue authoritative texts with their own policy preferences' . . . ." (quoting SCALIA & GARNER, *supra* note 2, at xxviii)).

public and the judiciary alike.[10] The risk is that it obscures from the public—and perhaps from the judiciary itself—the unstated assumptions and intuitions that are doing much of the work. In cases of disagreement over OPM, this risk is often realized in the form of accusations of bad faith.[11] With textualism ascendant on the Supreme Court and throughout the judiciary,[12] the stakes of finding OPM[13] have never been higher.[14]

The Court's 2020 decision in *Bostock v. Clayton County*[15] provides a useful illustration. The case concerned whether sexual-orientation and transgender discrimination are prohibited under Title VII of the Civil Rights Act of 1964.[16] Title VII's terms prohibit an employer from discriminating against an employee "*because of*" the employee's "*sex*" (and where the employee's "*sex*" was a "*motivating factor*").[17] The Justices all agreed that the "ordinary public

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[10] *See* John F. Manning, *Justice Scalia and the Idea of Judicial Restraint*, 115 MICH. L. REV. 747, 750, 756 (2017) [hereinafter Manning, *Justice Scalia and the Idea of Judicial Restraint*] (reviewing SCALIA, *supra* note 1); Jonathan T. Molot, *Ambivalence About Formalism*, 93 VA. L. REV. 1, 8–12 (2007) (discussing the popularity of textualism among justices and scholars).

[11] *See, e.g.*, *infra* notes 26–29 and accompanying text.

[12] *See* Scalia & Manning, *supra* note 7, at 1610 ("In recent years, the Supreme Court has placed increasing emphasis on the meaning of the enacted text . . . ."); Victoria Nourse, *Textualism 3.0: Statutory Interpretation After Justice Scalia*, 70 ALA. L. REV. 667, 669 (2019); Harvard Law School, *The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE, at 8:28 (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg&t=9s ("We're all textualists now.").

[13] By "finding OPM," I mean both finding the OPM of this or that in a given case, see *infra* Part III, and more fundamentally, finding which of the many potential kinds of OPM a given textualist is invoking, see *infra* Part IV.

[14] Setting aside the stakes for textualist theory, for political discourse, etc., it's perhaps worth noting that the stakes of ruling in favor of one side or the other in any given case are uniquely high for textualists: Not only do textualists' ordinary meaning determinations resolve the case at bar and other cases concerning the same language in the same statute, but judges often also treat them as dispositive with respect to the meaning of *other* statutes that use the same or similar language, even where those other statutes concern very different areas of law. *See* James A. Macleod, *Ordinary Causation: A Study in Experimental Statutory Interpretation*, 94 IND. L.J. 957, 998–99 (2019) (collecting examples from cases interpreting causal language). Other methods of interpretation rarely generate these sorts of wide-ranging trans-statutory consequences. *Id.*

[15] 140 S. Ct. 1731 (2020).

[16] *Id.* at 1737.

[17] 42 U.S.C. § 2000e-2(a), (m) (emphasis added); *Bostock*, 140 S. Ct. at 1739.

meaning" of the statute's terms was dispositive.[18] To find it, they consulted popular dictionary definitions,[19] examples from everyday linguistic usage,[20] corpus linguistic analysis,[21] and even the imaginary results "[i]f every single living American had been surveyed in 1964" about the meaning of the statute's language.[22]

If the method was familiar, so too was the result: vehement dissensus.[23] Justice Gorsuch, writing for the Court, sided with the employees' interpretation of Title VII, holding that the statutory prohibition clearly encompasses sexual-orientation and transgender discrimination.[24] "[N]o ambiguity exists," Justice Gorsuch emphasized, "about how Title VII's terms apply to the facts before us."[25] In dissent, Justice Alito, joined by Justice Thomas, claimed that "Title VII's plain text" "*indisputably*" favors the employers' contrary interpretation.[26] As to the majority's contentions, "[a] more brazen abuse of our authority to interpret statutes is hard to recall."[27] In a separate dissent, Justice Kavanaugh wrote that "[o]n occasion, it can be difficult for judges to assess ordinary meaning. Not here."[28] The majority, by willfully neglecting the text's obvious ordinary meaning, had "unilaterally rewritten American vocabulary and American Law."[29]

So, which side was right? And why does textualism's supposedly commonsense OPM inquiry—in *Bostock* and the many other cases

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[18] *See, e.g.*, *Bostock*, 140 S. Ct. at 1738 ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms . . . ."); *id.* at 1767 (Alito, J., dissenting) ("The *ordinary meaning* of discrimination because of 'sex' was discrimination because of a person's biological sex, not sexual orientation or gender identity."); *id.* at 1828 (Kavanaugh, J., dissenting) ("Statutory Interpretation 101 instructs courts to follow ordinary meaning . . . .").

[19] *E.g.*, *id.* at 1740 (majority opinion); *id.* at 1756, 1765–66, 1772–73 (Alito, J., dissenting).

[20] *E.g.*, *id.* at 1748 (majority opinion); *id.* at 1828 (Kavanaugh, J., dissenting).

[21] *Id.* at 1769 n.22 (Alito, J., dissenting).

[22] *Id.* at 1755.

[23] *See, e.g.*, BRIAN G. SLOCUM, ORDINARY MEANING 292–98 app. D (2015) (listing Supreme Court cases relying on ordinary meaning but containing dissenting opinions); Krishnakumar, *supra* note 4, at 204.

[24] *Bostock*, 140 S. Ct. at 1737 (majority opinion).

[25] *Id.* at 1749.

[26] *Id.* at 1756, 1778 (Alito, J., dissenting).

[27] *Id.* at 1755.

[28] *Id.* at 1828 (Kavanaugh, J., dissenting).

[29] *Id.* at 1836.

like it—yield such starkly divergent conclusions?[30] This Article introduces a new "applied-meaning-experiment" method to answer those questions and develop the theory of textualism.[31] The keys to the method are as follows: *ask ordinary readers to apply disputed statutory language in context,* under experimental conditions that *minimize potential biases or differences between enactment-era and present-day usage.*[32]

Using *Bostock* as a demonstration, this Article reports a set of experimental survey studies carried out on a nationally representative sample of ordinary Americans prior to the issuance of the Supreme Court's opinion. The studies use the applied-meaning-experiment method to test the OPM of Title VII's disputed language in the contexts of sexual-orientation discrimination, transgender discrimination, and more "traditional" gender discrimination claims.[33] Various aspects of the experimental design

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[30] The question has long beset textualism, with its uniquely strong claims of objectivity and determinacy. *See* Krishnakumar, *supra* note 4, at 204–10 (describing textualists' "'correct answer' mindset"); SCALIA & GARNER, *supra* note 2, at xxvii–xxix, 6 (asserting that "most interpretive questions have a right answer" and that the proper textualist approach "will provide greater certainty in the law, and hence greater predictability"); Eskridge, *supra* note 9, at 532–34; Manning, *Justice Scalia and the Idea of Judicial Restraint*, *supra* note 10, at 750 (describing textualism's "anti-discretion" principle). As Judge Kethledge recently explained,

> [W]e have definitions for every word in the language, and rules of grammar, and, perhaps most important, our own ordinary usage of the language . . . . [T]hese materials limit the judge rather than liberate him. And when used without bias, they allow the judge to identify not merely the plausible interpretations of the text, but the best one. For, in my experience at least, if one works hard enough, all the other interpretations are eventually revealed as imposters.

Kethledge, *supra* note 4, at 319–20.

[31] In this respect, this Article builds on a prior study concerning the ordinary meaning of causal language, albeit language that raised a different set of interpretive issues. *See generally* Macleod, *supra* note 14 (testing the influence of causal necessity and causal sufficiency on lay ascription of causation).

[32] By "biases," I mean the treatment of irrelevant considerations as relevant, or, in other words, the consideration of anything that textualists' "reasonable" reader would not consider. Uncontroversial examples include the reader's own factually mistaken beliefs, as well as the reader's own preferences for a given legal outcome. *See, e.g.*, Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621, 1637–38 [hereinafter Solum, *Triangulating Public Meaning*]; SCALIA & GARNER, *supra* note 2, at 31. Section IV.B discusses at greater length what sorts of considerations textualists appear to deem irrelevant and potentially "biasing."

[33] For details, see *infra* Section III.B.*2*.

helped to root out any post-enactment drift in language or morality that might otherwise lead modern-day interpreters to favor the employees' interpretation for anachronistic or biased reasons.[34] At its core, though, the studies' design was simple. Participants read short vignettes describing an instance of, e.g., workplace sexual-orientation discrimination, after which they were asked, among other things, whether the employer fired the employee "because of" the employee's "sex."[35]

The results favored the *Bostock* majority's interpretation. Most respondents found the statutory language applicable to each type of employment discrimination tested. Most respondents, for example, claimed that an employer who fires an employee because of the employee's sexual orientation thereby fires the employee "because of [the employee's] sex," and that the employee's sex was clearly a "motivating factor" in the employer's decision, even where the employer was equally hostile toward gay men and gay women.[36] And the results were even *more* decisively in favor of finding *transgender* discrimination encompassed by the statute's prohibition—despite respondents' (and the public's) lower support for legal prohibitions of transgender discrimination.[37] These and other findings detailed in Part III have been conceptually replicated in a follow-up study run by separate researchers.[38] In the end, despite the dissenting Justices' emphatic rhetorical embrace of ordinary reader understanding, they (along with other prominent textualist critics of the *Bostock* majority's opinion) appear to have been surprisingly out of step with it.[39]

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[34] *See infra* Section III.B.*4*.

[35] *See infra* Section III.B.*2*; *see also infra* note 196 (comparing this applied-meaning-experiment method to alternative survey-based methods of interpreting legal texts).

[36] *See infra* Section III.B.*2*.a.

[37] *See infra* Section IV.B.*2*.b. Additionally, notwithstanding Title VII's well-established coverage of *Price Waterhouse*-style gender-stereotype discrimination, respondents deemed that type of discrimination no more clearly prohibited by Title VII's ordinary language than sexual-orientation discrimination and indeed *less* clearly prohibited than transgender discrimination. *See infra* Section III.B.*2*.c.

[38] *See* Kevin Tobia & John Mikhail, *Two Types of Empirical Textualism*, 86 BROOK. L. REV. (forthcoming 2021) (manuscript at 15–27), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3729629.

[39] *See infra* Part II (discussing criticism of the *Bostock* majority); Sections III.B.*3*–*4* (summarizing the empirical data and responding to potential objections).

But while these results have important implications for *Bostock*, the method has implications that extend far beyond *Bostock*. First, it can be used elsewhere to answer the central question textualists ask in a given case: which side's interpretation accords with the statutory language's OPM? The method has an especially important role to play where, as in *Bostock*, alternative sources of evidence like dictionaries and legal corpus linguistics prove incapable of addressing, let alone resolving, the OPM issue that the parties actually dispute.[40] But even in cases where those other methods speak to the relevant issue, the applied-meaning-experiment method may provide supplementary—and often far more probative—evidence of OPM.[41]

Second, and more importantly, the method helps reveal why textualists frequently disagree about the OPM of a given statutory word or phrase.[42] Part of the reason, the studies suggest, is that textualists frequently lack probative evidence of a given word or phrase's OPM.[43] But the studies also suggest a complementary explanation for textualist disagreement, which stems not from textualists' incomplete *evidence* but instead from their incomplete *ontology* (i.e., their underspecified account of what they're looking for evidence of in the first place).

More specifically, the applied-meaning-experiment method brings to the surface two important ambiguities in textualists' notion of ordinary reader "understanding," and hence textualists' conception of OPM. The ambiguities' existence helps explain

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[40] Recall that all Justices and parties stipulated to the same definition of "sex." *See infra* note 66. Roughly speaking, then, the disputed question concerned the use of the phrase "Y because of X," as applied where "Y because of *Z*" is undisputed, and "*Z*" is necessarily partially defined by "X." (Here, "Y" is "firing an employee," "*Z*" is "sexual orientation" or "gender identity," and "X" is "sex.") *See* Tobia & Mikhail, *supra* note 38, at 15–27 (testing the same construction for additional values of *Z* and X—e.g., "because of race," in the context of miscegenation). As explained further at *infra* notes 120–125 and accompanying text, neither dictionary definitions nor legal corpus linguistics provides probative evidence as to this central question.

[41] *See infra* Section III.B.*1*.

[42] *See, e.g.*, SLOCUM, *supra* note 23, at 292–98 app. D.

[43] Judges, lacking the sort of evidence that could confirm or disconfirm their initial hunches, exhibit the same "false consensus bias" that the lay respondents in this Article's surveys exhibit. That is, they mistakenly think that their own understanding tracks most other people's, even when it, in fact, does not. *See infra* Section III.B.*3*. For explanations of differences in initial hunches, see Macleod, *supra* note 14, at 1007, and Cass R. Sunstein, *Textualism and the Duck-Rabbit Illusion*, 11 CALIF. L. REV. 463, 463–78 (2020).

textualist disagreement as a practical matter, and the ambiguities' perpetuation threatens textualist claims of in-principle textual determinacy as a matter of theory. Stated in terms of textualists' ordinary reader inquiry, the ambiguities concern: (1) the *type of question* whose answer would reveal the ordinary reader's relevant "understanding," and (2) the *types of extratextual information* that the reader would treat as relevant to answering it. To date, textualists have resolved each of these ambiguities inconsistently, effectively undermining textualism's emphasis on fair notice, reliance interests, and—most central to textualists' self-image—judicial restraint.[44]

Consider the first ambiguity regarding *question-type*. There are two basic approaches textualists take. Each produces a different reading of statutory language. I'll label the approaches "Applied" and "Abstract," respectively. Under an Applied approach, textualists' hypothesized ordinary reader answers a yes-or-no question concerning the application of a word or phrase to a set of facts (e.g., upon learning of an instance of sexual-orientation discrimination, she answers the question, "Did the employer fire the employee 'because of' the employee's 'sex'?"; or, to use Hart's famous example of a statute prohibiting vehicles in a park,[45] upon looking

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[44] *See infra* notes 268–277 and accompanying text; *see also* Manning, *Justice Scalia and the Idea of Judicial Restraint*, *supra* note 10, at 749–50.

Judges and scholars have previously noted a third ambiguity, which constitutes a distinct but less fundamental source of textualist disagreement: judges may implicitly disagree about *how clear* the text must be in order for it to fully determine the outcome of the case without recourse to other sources of evidence. On this topic, see, for example, Kavanaugh, *supra* note 2, at 2136; Richard M. Re, *Clarity Doctrines*, 86 U. CHI. L. REV. 1497, 1499 (2019); and Ward Farnsworth, Dustin F. Guzior & Anup Malani, *Ambiguity About Ambiguity: An Empirical Inquiry into Legal Interpretation* 2 J. LEGAL ANALYSIS 257, 257–60 (2010). This "how-clear-is-'clear'" choice is addressed below in Section III.B.*4*.d. But despite the attention it has received, it is less consequential than the two sets of choices on which this Article focuses. First, the how-clear-is-clear question comes into play only *after* judges resolve these other choices; judges must interpret the statute before they can address whether it satisfies a given clarity threshold. Second, the how-clear-is-clear question apparently arises in a relatively small set of cases. Most cases of textualist disagreement, at least in the Supreme Court, are like *Bostock*: each side claims that its own interpretation is dictated by the clear terms of the text. Inter-textualist disagreements rarely pit one side that claims the support of clear text against another that claims ambiguity. *Cf.* Kavanaugh, *supra* note 2, at 2129 (emphasizing textualists' tendency to find text clear). This is especially so in the current age of waning *Chevron* deference, at least in the Supreme Court. *Id.* at 2151.

[45] *See* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958).

at a baby stroller, she answers the question, "Is that a 'vehicle'?"). An Applied approach thus reveals whether the full extent of the statutory language encompasses the facts at issue. By contrast, an Abstract approach provides the reader only the facts or the statutory language—not both—and asks an open-ended question to see whether the reader spontaneously generates the missing half in her initial response. In other words, an Abstract approach asks the reader to answer a question about *either* (a) how best to describe the *facts* at issue (e.g., upon learning of an instance of sexual-orientation discrimination, answering the question, "Why did the employer fire the employee?"; upon seeing a baby stroller, answering the question, "What is that thing?"), *or* (b) how best to illustrate the statutory *language* (e.g., "What's an example of an employee being fired 'because of' his or her 'sex'?" or, "What's an example of a 'vehicle'?"). By considering only the reader's initial response, an Abstract approach generates a much narrower construction of the statutory language.[46] Textualists cannot avoid choosing between these approaches to ordinary reader "understanding," and hence, to OPM.[47] Their choice—ad hoc, rarely made explicit, and never given explicit justification—is in many cases outcome-determinative.[48]

Now consider the second ambiguity, regarding *extratextual considerations*. Whichever question-type the textualist chooses, she must still make this second set of choices concerning the types of information that her hypothesized reasonable ordinary reader would deem relevant to answering the question. Oftentimes textualists' ordinary reader considers only the surrounding text,

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[46] An Abstract approach is compatible with considering, say, the reader's first five responses, as opposed to only her first response. *See infra* note 257.

[47] *See infra* Part IV.

[48] *See infra* notes 268, 293 (providing examples, in addition to *Bostock*, from Supreme Court caselaw). To be clear, in speaking of "choices" that "determine outcomes," I don't mean that judges first consciously select among imagined question-types or the corresponding conceptions of OPM and then endorse whatever interpretation results. As a matter of psychology, it may well be that OPM claims are mere window dressing. Perhaps judges consciously decide based on their ideological preferences, based on which interpretation just "feels" sensible, or based on some other considerations entirely. My claim instead concerns the choice that an interpreter must *in effect* make whenever attempting to adhere to textualist theory. The same goes for the second ambiguity about to be discussed in the body of the text, concerning the choice of which extratextual information to treat as relevant; the "choice" is often outcome-determinative in theory, even if it never crosses judges' minds during their actual decision-making processes.

along with facts about ordinary linguistic usage.[49] But at other times, textualists imply that the reader treats various types of additional extratextual considerations as relevant. These may include the public's preferences for this or that legal outcome,[50] the public's implicit (non-textualist) theories of interpretation,[51] and the public's expectations regarding this or that application of a statute (perhaps based on partisan media reports, rather than on the precise language of the statute).[52] Textualists cannot avoid choosing which types of extratextual information their hypothesized reader treats as relevant. But so far—as with the choice of question-type—textualists have made this choice in an ad hoc, unprincipled, and inconsistent manner,[53] undermining textualism's core values and even threatening the very coherence of textualism as a theory of interpretation.[54]

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[49] *E.g.*, SCALIA & GARNER, *supra* note 2, at 33 (explaining the utility of context in interpretation); Barrett, *supra* note 2, at 2203 (listing sources for interpretation informed by "ordinary English speakers").

[50] *See infra* notes 292–297 and accompanying text.

[51] Empirical evidence demonstrates that ordinary people are at least somewhat purposivist. *See, e.g.*, Shlomo Klapper, Soren Schmidt & Tor Tarantola, *Ordinary Meaning from Ordinary People*, U.C. IRVINE L. REV. (forthcoming 2021) (manuscript at 7), https://www.readcube.com/articles/10.2139%2Fssrn.3593917; *see also* Noel Struchiner, Ivar R. Hannikainen & Guilherme da F.C.F. de Almeida, *An Experimental Guide to Vehicles in the Park*, 15 JUDGMENT & DECISION MAKING 312, 327 (2020). Ordinary people might also treat various publicly available sources of information (perhaps even legislative history or legislative history as filtered through popular media) as relevant to determining statutory meaning. In short, ordinary people don't systematically ignore information relevant to (individual or group) speakers' intent, as textualists contend judges ought to do when the text is clear on its face. *Cf.* Baude & Doerfler, *supra* note 5, at 546–49.

[52] *See infra* notes 307–308 and accompanying text.

[53] *Infra* notes 293–303 and accompanying text. In a recent Comment on *Bostock*, Tara Leigh Grove compares the majority's "formalistic textualism," which focuses on "semantic context," "downplaying policy concerns," and "practical (even monumental) consequences," with the dissenters' more "flexible textualism," which permits consideration of "policy and social context as well as practical consequences." Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 267 (2020). Grove's distinction seems to track the basic distinction I'm drawing here, at least with respect to certain categories of extratextual considerations. *See infra* Section IV.B.

[54] *See supra* notes 6–10 and accompanying text; *infra* notes 305–306 and accompanying text (discussing the implications of treating as relevant ordinary readers' preferences, implicit theories of interpretation, and popular-media-based or legislative-history-based expectations); *see also infra* notes 307–308 and accompanying text (discussing the possibility, given the public's low opinion of Congress, that textualism—by treating public expectations

This Article's applied-meaning-experiment method helps uncover these ambiguities and demonstrate the outcome-determinative effect of resolving them one way as opposed to another in individual cases. Textualists must now confront these ambiguities and commit to a single, principled conception of OPM—one that resolves each choice in a consistent manner, thereby rendering textualism at least *capable* of justifying its frequent claims of textual determinacy in disputed cases.[55] Toward that end, this Article argues that to preserve textualism's theoretical coherence and honor its normative commitments, textualists would probably need to embrace an approach to ordinary reader "understanding"—and, hence, a conception of OPM—that tracks (1) an Applied question-type, and (2) only a minimal set of extratextual considerations.[56] This Article also suggests that despite textualists' inconsistencies to date, on balance, this approach reflects the conception of OPM that textualist judges and scholars have tended implicitly to favor.[57]

Before proceeding, here are two notes about this Article's scope. First, much of this Article's analysis of textualism applies equally to OPM-based constitutional originalism, the leading version of originalism today. (For example, with respect to their conception of OPM, constitutional originalists must confront the same hidden ambiguities described above.[58]) But this Article leaves those applications and comparisons mostly implicit and focuses almost exclusively on textualist statutory interpretation. Second, this Article does not argue that textualism is or is not normatively desirable, all things considered.[59] To some, using experimental survey studies to interpret statutes may seem like a *reductio ad*

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as relevant and public preferences as irrelevant—could lead to the systematic adoption of the public's most-feared outcomes).

[55] At least, in the many cases where different outcomes would result from different resolutions of the ambiguities concerning question-type or the extratextual considerations.

[56] *See infra* notes 278–290, 304–308 and accompanying text.

[57] *See infra* notes 278–290, 304–308 and accompanying text.

[58] *See supra* note 1 (noting the literature's seemingly unanimous assumption that statutory textualist and constitutional originalist theories must employ the same conception of OPM); *infra* note 303 (arguing, against the conventional wisdom, that there may be principled, warranted divergences between statutory textualists' and constitutional originalists' operative conceptions of OPM).

[59] Doing so would require, among other things, an evaluation of the alternatives to textualism, about which this Article says almost nothing.

absurdum argument against textualism—to others, a roadmap for a more rigorous and accurate textualism. Neither reaction is inconsistent with the main aim of this Article: to clarify and test textualists' claims, thereby rendering textualism—both as a general theory and as applied in concrete cases—more amenable to scrutiny and evaluation. Underlying that aim is the conviction that textualists too often talk past each other and past their critics. Significant progress would be made if textualists were compelled to answer the question at the root of this Article's methodology: What sort of experiment would (even if just in principle) reveal the OPM of a given term or phrase, and what would the results of that experiment need to be in order to demonstrate that the text's OPM is clear?[60] The stakes are too high for interpreters' intuitions about "the people's understanding" to remain vague in theory and untested in practice.

This Article proceeds as follows. Part II provides an overview of the OPM-based arguments in *Bostock*. Section III.A examines the types of evidence on which courts, including the *Bostock* Court, base their OPM claims (specifically: intuition, thought experiments, dictionaries, and corpus linguistics). Section III.B argues that the applied-meaning-experiment method can provide more probative evidence of OPM than these other sources. It then gives a demonstration, reporting four studies testing OPM in the context of *Bostock* and related cases. Finally, it provides a short summary of the studies' design, results, and implications and responds to potential objections. Part IV leverages the experimental framework to highlight two largely overlooked sources of textualist disagreement, both of which relate to ambiguities in textualists' conceptions of OPM. By confronting each ambiguity directly, the applied-meaning-experiment method helps to build out the theory of textualism in a way that's needed for textualism to be both

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[60] This goes for critics of textualism as well, whenever they purport to lay bare a textualist decisionmaker's hypocrisy by demonstrating that the decisionmaker reached the wrong outcome as a matter of textualist interpretation (perhaps due to the alleged hypocritical textualist's ideological motivations). Such accusations imply that the critic has overcome the evidentiary and ontological hurdles discussed in this Article. *See, e.g.*, *infra* notes 252–253 and accompanying text.

coherent and capable, at least in theory, of increasing legal determinacy and decreasing judicial disagreement.[61]

II. "TEXTUALISM'S MOMENT OF TRUTH"

In a staunchly textualist 6–3 decision, the *Bostock* Court held that Title VII prohibits both sexual-orientation and transgender discrimination.[62] Billed by William Eskridge as "[t]extualism's moment of truth,"[63] the decision cut across ideological lines in what some consider a demonstration of textualism's ability to generate

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[61] On the possibility of incoherence, see *supra* note 51 and accompanying text and *infra* notes 302–303 and accompanying text. On the question of normative attractiveness, see, for example, *infra* notes 293–303 and accompanying text.

[62] Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020). The *Bostock* decision concerns a set of three consolidated cases: Zarda v. Altitude Express, Inc., 883 F.3d 100, 107–08 (2d Cir. 2018) (en banc) (describing the gay plaintiff-employee's allegation that he was fired because of his sexual orientation); EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 567–69 (6th Cir. 2018) (recounting the employee's allegation that she was fired because of her being transgender); Bostock v. Clayton Cnty. Bd. of Comm'rs, 723 F. App'x 964, 964–65 (11th Cir. 2018) (per curiam) (relying upon prior precedent holding that sexual-orientation discrimination is not prohibited by Title VII to affirm dismissal of a gay male employee's Title VII claim), *rev'd*, 140 S. Ct. 1731 (2020).

Title VII, passed as part 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 any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's* race, color, religion, *sex*, or national origin . . . ." 42 U.S.C. § 2000e-2(a) (emphasis added). In a 1991 amendment, Congress specified that employers would be liable so long as the employee's sex was "a *motivating factor* . . . even though other factors also motivated" the employer's decision. Civil Rights Act of 1991, Pub. L. No. 102-166, § 107(a), 105 Stat. 1071, 1075 (codified as amended at 42 U.S.C. § 2000e-2(m)); *see also* H.R. REP. NO. 102-40, pt. 1, at 48 (1991) (explaining the Committee's intention to establish "that an employer may be held liable for any discrimination that is actually shown to play a role in a contested employment decision"). In another provision, Congress limited the relief available where the unlawful consideration was merely a "motivating factor" and *not* a but-for cause. § 107(b), 105 Stat. at 1075–76 (codified as amended at 42 U.S.C. § 2000e-5(g)(2)(B)). The *Bostock* Court, like the circuit courts prior to it, treated 1964, not 1991, as the relevant date for all of its OPM analysis. *See Bostock*, 140 S. Ct. at 1739–40.

[63] William N. Eskridge Jr., *Symposium: Textualism's Moment of Truth*, SCOTUSBLOG (Sept. 4, 2019, 2:30 PM), https://www.scotusblog.com/2019/09/symposium-textualisms-moment-of-truth/#more-288953.

principled consensus in the face of ideological differences.[64] But the interplay between the majority and dissenting opinions also demonstrated textualism's surprising tendency to engender emphatic disagreement among its adherents when applied in particular cases.[65]

Before turning to these areas of disagreement in *Bostock*, it's worth noting three broad points on which all of the Justices (along with all of the circuit court judges in the related en banc proceedings) explicitly *agreed*. First, all agreed that the "ordinary public meaning" of the relevant statutory words and phrases has not changed since their enactment in 1964 (or 1991 for the statute's "motivating factor" language).[66] In other words, all agreed that

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[64] *See, e.g.*, Grove, *supra* note 53, at 304–05. Others are more skeptical. *E.g.*, Jeannie Suk Gersen, *Could the Supreme Court's Landmark L.G.B.T.-Rights Decision Help Lead to the Dismantling of Affirmative Action?*, NEW YORKER (June 27, 2020), https://www.newyorker.com/news/our-columnists/could-the-supreme-courts-landmark-lgbt-rights-decision-help-lead-to-the-dismantling-of-affirmative-action; *cf.* Sheryl Gay Stolberg, *Gorsuch Not Easy to Pigeonhole on Gay Rights, Friends Say*, N.Y. TIMES (Feb. 11, 2017), https://www.nytimes.com/2017/02/11/us/politics/gorsuch-gay-rights.html.

[65] *See supra* notes 25–29 and accompanying text.

[66] *See Bostock*, 140 S. Ct. at 1739 ("[W]e proceed on the assumption that 'sex' signified what the employers suggest, referring only to biological distinctions between male and female."); *id.* at 1740, 1750 (explaining that the employers provided no indication "that the meaning of *any* of Title VII's language has changed since 1964" (emphasis added)); *id.* at 1825, 1828, 1833 (Kavanaugh, J., dissenting) ("To a fluent speaker of the English language—*then and now*— . . . discrimination 'because of sex' is not reasonably understood to include discrimination based on sexual orientation . . . .") (alteration in original) (emphasis added) (quoting Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339, 363 (7th Cir. 2017) (en banc) (Sykes, J., dissenting))); *id.* at 1766 (Alito, J., dissenting) ("[D]iscrimination because of 'sex' was understood during the era when Title VII was enacted to refer to men and women. (The same is true of current definitions . . . .)"); Transcript of Oral Argument at 7, 22, 32, 60–61, *Bostock*, 140 S. Ct. 1731 (No. 17-1618) and Zarda v. Altitude Express, Inc., 140 S. Ct. 1731 (2020) (No. 17-1623), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/17-1618_7k47.pdf; Transcript of Oral Argument, at 4–5, 24, 28–30, 46, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, 140 S. Ct. 1731 (2020) (No. 18-107), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-107_6j37.pdf; *accord* Zarda v. Altitude Express, Inc., 883 F.3d 100, 145 (2d Cir. 2018) (en banc) (Lynch, J., dissenting); *id.* at 134 (Jacobs, J., concurring); Wittmer v. Phillips 66 Co., 915 F.3d 328, 334–35 (5th Cir. 2019) (Ho, J., concurring). Judge Posner is the sole arguable exception. *See* Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339, 355 (7th Cir. 2017) (en banc) (Posner, J., concurring) (contending that the modern ordinary understanding of the term "sex" is "broader" than it was in 1964).

Bostock is a case in which the "temporal principle" that "[t]he ordinary meaning that counts is the ordinary public meaning *at the time of enactment* . . . matters little"[67] because no "shifts in linguistic usage" have changed that meaning since the words were enacted.[68] Second, the Justices all agreed that where a statute's OPM is clear, that meaning fully determines the outcome of the case.[69] The rule of law, the Justices emphasized in typical textualist fashion, requires as much.[70] Third, all agreed that "no ambiguity exists about how Title VII's terms apply to the facts before us";[71] the OPM of the statute's terms, in other words, is clear and therefore fully determines the outcome of the interpretive dispute.[72]

Of course, the Justices vehemently *dis*agreed about what the OPM of Title VII's relevant language actually *is*. Starting with the dissenting opinions, which most consistently and emphatically claimed the mantle of OPM, Justice Alito's dissent (joined by Justice Thomas) repeatedly asserts that the result of the ordinary reader test, and hence the OPM of the statute, "could not be clearer": "In 1964, ordinary Americans reading the text of Title VII would not have dreamed that discrimination because of sex meant discrimination because of sexual orientation, much less gender identity."[73] Justice Kavanaugh's dissent, similarly focused on ordinary reader understanding, easily arrives at the same conclusion: "To a fluent speaker of the English language—then and now—. . . discrimination 'because of sex' is not reasonably understood to include discrimination based on sexual orientation . . . . There is no ambiguity or vagueness here."[74]

For an argument that the ordinary meaning of "sex" *has* changed since 1964, and that the Court should *not* have adopted the parties' stipulated enactment-era definition, see William N. Eskridge Jr., Brian G. Slocum & Stefan Th. Gries, *The Meaning of* Sex*: Dynamic Words, Novel Applications, and Original Public Meaning*, 119 MICH. L. REV. 1503 (2021).

[67] *Bostock*, 140 S. Ct. at 1825 (Kavanaugh, J., dissenting) (emphasis added).

[68] *Id.* at 1750 (majority opinion); *see also supra* note 66.

[69] *Bostock*, 140 S. Ct. at 1749 ("[W]hen the meaning of the statute's terms is plain, our job is at an end."); *id.* at 1825 (Kavanaugh, J., dissenting); *id.* at 1774 (Alito, J., dissenting).

[70] *See id.* at 1749 (majority opinion); *id.* at 1825 (Kavanaugh, J., dissenting).

[71] *Id.* at 1749 (majority opinion); *id.* at 1828 (Kavanaugh, J., dissenting).

[72] *Id.* at 1750 (majority opinion).

[73] *Id.* at 1767 (Alito, J., dissenting). The majority's contrary conclusion is therefore "squarely contrary to the statutory text." *Id.* at 1763.

[74] *Id.* at 1833 (Kavanaugh, J., dissenting) (alteration in original) (quoting Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339, 363 (7th Cir. 2017) (en banc) (Sykes, J., dissenting)).

Justice Gorsuch's majority opinion, on the other hand, claims that "the ordinary public meaning of the statute's language" plainly favors the opposite conclusion.[75] But despite that conclusion and the opinion's repeated invocation of the text's OPM, the opinion's "key move," according to Josh Blackman and Randy Barnett (among others), is to "retreat" from OPM when analyzing the statute's crucial causal language.[76] Justice Gorsuch, write Blackman and Barnett, abandoned the ordinary meaning of the term "because of" "in favor of a specialized, technical legal meaning — what lawyers refer to as a *term of art*."[77] Specifically, Justice Gorsuch's opinion emphasizes that "*in the language of law* . . . Title VII's 'because of' test incorporates the . . . standard of *but-for causation*."[78] To his critics, this emphasis on technical legal meaning, rather than ordinary meaning, amounts to "Halfway Textualism,"[79] "Counterfeit Textualism,"[80] or what Justice Alito might label "Pirate Ship Textualism": "The Court's opinion is like a pirate ship. It sails under a textualist flag,"[81] purporting to humbly defer to the people's ordinary understanding while in fact "unilaterally rewrit[ing] American vocabulary and American law."[82] Justice Kavanaugh, content to leave pirates out of this, simply quotes Justice Gorsuch's own words from another case, implying that they speak for themselves: "Contrary to the [Court's] approach today, this Court has repeatedly emphasized that . . . courts heed *how* '*most*

Justice Kavanaugh's dissent, like the other *Bostock* opinions, focuses on sexual-orientation discrimination but explains that the analysis "would apply in much the same way to discrimination on the basis of gender identity." *Id.* at 1823 n.1.

[75] *Id.* at 1741 (majority opinion).

[76] Josh Blackman & Randy Barnett, *Justice Gorsuch's Halfway Textualism Surprises and Disappoints in the Title VII Cases*, NAT'L REV. (June 26, 2020, 6:30 AM), https://www.nationalreview.com/2020/06/justice-gorsuch-title-vii-cases-half-way-textualism-surprises-disappoints/; *see also, e.g.*, Nelson Lund, *Unleashed and Unbound: Living Textualism in* Bostock v. Clayton County, 21 FEDERALIST SOC'Y REV. 158, 160 (2020) (calling this move "crucial[]").

[77] Blackman & Barnett, *supra* note 76.

[78] *Id.* (emphasis added) (quoting *Bostock*, 140 S. Ct. at 1739).

[79] *Id.*

[80] *See* Robert P. George, *Counterfeit Textualism*, NAT'L REV. (Nov. 19, 2019, 5:06 PM), https://www.nationalreview.com/2019/11/counterfeit-textualism/ (criticizing reliance on but-for causation as a basis for interpreting Title VII in the same way that Gorsuch used it to adopt the employees' interpretation in *Bostock*).

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

[82] *Id.* at 1836 (Kavanaugh, J., dissenting).

people' '*would have understood*' the text of a statute when enacted."[83]

Granted, the very cases on which Justice Gorsuch relies claim that the ordinary, everyday meaning of "because of" *just is* what the law refers to as "but-for causation."[84] And Justice Gorsuch purports to see no contradiction, steadfastly maintaining that only his interpretation accords with the text's OPM.[85] Still, critics like Blackman and Barnett are correct that Justice Gorsuch, in emphasizing the but-for standard's legal pedigree, rather than its roots in ordinary language, makes at least a rhetorical "retreat"[86] from ordinary meaning—signaling doubt as to whether the ordinary meaning of "because of" does in fact support the majority's position.[87] Armed with the but-for causation standard, Justice Gorsuch quickly concludes that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[88] After all, Justice Gorsuch claims, in any case of sexual-orientation or transgender discrimination, the employee would not have been fired if, keeping all else constant, the employee had been the opposite biological sex.[89] Whether ultimately grounded in ordinary meaning

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[83] *Id.* at 1828 (Kavanaugh, J., dissenting) (emphasis added) (quoting New Prime Inc. v. Oliveira, 139 S. Ct. 532, 539 (2019)).

[84] *Id.* at 1739 (majority opinion) (first citing Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 350 (2013); then citing Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009); and then citing Burrage v. United States, 571 U.S. 204, 211–12 (2014)); *see also* Macleod, *supra* note 14, at 966–70 (examining causation analyses in these cases, among others).

[85] Indeed, he argues that the dissenters' interpretation "would deny the people the right to continue relying on the original meaning of the law." *Bostock*, 140 S. Ct. at 1738; *see also id.* at 1778 (Alito, J., dissenting) (repeating the majority's claim that the public has a right "to rely on the law as written, without fearing that courts might disregard its plain terms" (quoting *id.* at 1749 (majority opinion))).

[86] Blackman & Barnett, *supra* note 76.

[87] *See, e.g.*, *Bostock*, 140 S. Ct. at 1743 (majority opinion) ("At bottom, these cases involve no more than the straightforward application of *legal terms* with plain and settled meanings." (emphasis added)); *id.* at 1745 (discussing "what kind of cause *the law* is looking for in a Title VII case" (emphasis added)).

[88] *Bostock*, 140 S. Ct. at 1741.

[89] *Id.* By way of illustration, in the sexual-orientation context: if Employee, a male attracted to males, had instead been a *female* attracted to males, Employee would not have been fired. *Id.* Likewise, in the gender-identity context: if Employee, born biologically male but with a female gender identity, were born biologically female, Employee would not have been fired. *Id.*

or technical legal meaning—each of which the majority seems to emphasize at different points—the majority's construal of the statute's causal language makes all the difference.[90]

III. FINDING ORIGINAL PUBLIC MEANING

As happens with surprising frequency in textualist decision-making, the *Bostock* Court ended up at a highly stratified stand-still. But how does this happen when ordinary meaning is supposed to be an objective, empirical, commonsense fact about everyday linguistic usage? Part of the problem, this Part explains, lies in the deficient forms of evidence that judges and scholars have relied on to find ordinary public meaning. Continuing with *Bostock* as an illustrative example, Section III.A shows why the traditional types of evidence on which courts rely (intuition, thought experiments, dictionaries, and corpus linguistics methods) so often fail to move interpreters any closer to consensus than they would be without the evidence—and justifiably so. Section III.B.*1* argues that a new "applied-meaning-experiment" method can provide much more

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To be sure, the "but-for" standard can be deceptively difficult in its application. "Keeping all other things constant" is literally impossible, so long as relational properties count as "things" (by "relational properties," I mean, e.g., the property of having a same-sex partner, or of having a gender identity that doesn't "match" one's biological sex). In other words, in each case, when changing Employee's biological sex for purposes of the counterfactual analysis, one is forced to change at least one other thing. In the sexual-orientation example, one must *also* change *either* Employee's sexual orientation *or* Employee's partner's sex; likewise, in the gender-identity example, one cannot simply change Employee's sex, but must also change *either* Employee's transgender status or Employee's gender. Anuj C. Desai, *Text is Not Enough*, 93 U. COLO. L. REV. (forthcoming 2021) (manuscript at 14–18), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3861914. But neither dissenting opinion in *Bostock* argues that the majority picked the *wrong* additional thing to change for purposes of the but-for analysis (e.g., neither dissent claimed that the majority erred in changing Employee's sexual orientation, rather than Employee's partner's sex, for purposes of applying the but-for test). For an introduction to the cognitive science and experimental philosophy literature concerning which counterfactuals strike ordinary people as more intuitively apt than others for purposes of ascribing causation, see generally Thomas F. Icard, Jonathan F. Kominsky & Joshua Knobe, *Normality and Actual Causal Strength*, 161 COGNITION 80 (2017).

[90] Blackman & Barnett, *supra* note 76 (arguing that Justice Gorsuch's interpretation of the words "because of" "dictated the outcome of Gorsuch's entire textualist analysis"); *see also Bostock*, 140 S. Ct. at 1745 (describing the role of but-for cause in sex discrimination as outcome-determinative in this case); Lund, *supra* note 76, at 160–63 (criticizing Gorsuch's causation analysis).

probative evidence of OPM. To demonstrate, Section III.B.*2* reports a set of experimental survey studies that use the method to answer the disputed question of OPM in *Bostock*. The resulting data, summarized in Section III.B.*3*, undermine the dissenters' claims and demonstrate why the *Bostock* majority's much-criticized "retreat" from ordinary meaning was unnecessary.

A. TRADITIONAL EVIDENCE

One common way for judges to find statutory terms' OPM is through introspection, using their own commonsense intuitions about how ordinary people understand language.[91] Of course, judges cannot simply repeat their brute intuition until their audience shares it.[92] Whether as a pure rhetorical device or as part of a genuine search for evidence, judges often explicitly "test" their intuitions by considering hypothetical or real-world examples (sometimes called "thought experiments" or "intuition pumps"[93]), noting whether it seems intuitive to use the term at issue in these analogous contexts.[94]

The *Bostock* opinions are chock-full of such thought experiments.[95] For example, Justice Gorsuch proposes that we "[i]magine that it's a nice day outside and your house is too warm, so you decide to open the window. Both the cool temperature outside and the heat inside are but-for causes of your choice to open the window."[96] Yet despite their being more than one but-for cause of the window being open, "no one would deny that the window is open '*because of* the outside temperature. Our cases are much the

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[91] *See* LAWRENCE M. SOLAN, THE LANGUAGE OF JUDGES 26 (William M. O'Barr & John M. Conley eds., 1993).

[92] That said, judges sometimes appear to try. *See* Macleod, *supra* note 14, at 969–71 (discussing examples); *Bostock*, 140 S. Ct. at 1758 (Alito, J., dissenting) ("[T]he Court asserts again and again that discrimination because of sexual orientation or gender identity inherently or necessarily entails discrimination because of sex[,] . . . [b]ut repetition of an assertion does not make it so . . . .").

[93] *E.g.*, DANIEL C. DENNETT, INTUITION PUMPS AND OTHER TOOLS FOR THINKING 5 (2013).

[94] *See, e.g.*, Kethledge, *supra* note 4, at 321–22 (explaining that testing ordinary meaning intuitions via thought experiments is an "often colorful and fun part of the job of statutory interpretation").

[95] *See, e.g.*, *Bostock* 140 S. Ct. at 1741–42, 1748 (majority opinion); *id.* at 1760 (Alito, J., dissenting).

[96] *Id.* at 1748 (majority opinion).

same."[97] And for Justice Kavanaugh, it is revealing to imagine how the *Bostock* and *Zarda* plaintiffs would respond if their friends were to ask them why they were fired.[98] In this hypothetical conversation, they would probably "not tell their friends that they were fired because of their *sex*"—an indication that, "[a]s commonly understood, sexual orientation discrimination is . . . not a form of[] sex discrimination."[99] These and the opinions' many other examples are representative of the sorts of thought experiments that permeate textualist judicial decisions.[100]

But one judge's intuitions, even when "tested" via thought experiments, may be unrepresentative of the general public's intuitions. After all, any sample size of one is bound to result in some errors. And judges are keenly aware of the legal and policy implications of one or another interpretation.[101] They may therefore be prone to motivated cognition, systematically favoring those intuitions and thought experiments that support their preferred outcome.[102] For these and other reasons, judges have sought more objective, external evidence of OPM.[103]

With increasing frequency, judges have turned to popular dictionaries.[104] The *Bostock* opinions, for example, quote dozens of dictionary definitions, all concerning perfectly common words like "individual," "discriminate," and "sex."[105] But while dictionaries can prove useful in some cases,[106] they often fail to speak to the context

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[97] *Id.* (emphasis added).

[98] *Id.* at 1828 (Kavanaugh, J., dissenting).

[99] *Id.* at 1828 (emphasis added); *see also id.* at 1745 (majority opinion) (considering the same hypothetical but arguing that it fails to vindicate the employers' interpretation).

[100] *See* Macleod, *supra* note 14, at 985–86 (providing examples).

[101] *See* DENNETT, *supra* note 93, at 13–14 (discussing the pressures a judge faces due to their awareness of the "consequences of a judicial decision").

[102] *See* Macleod, *supra* note 14, at 985.

[103] *See id.* at 986–91.

[104] *See* Jeffrey L. Kirchmeier & Samuel A. Thumma, *Scaling the Lexicon Fortress: The United States Supreme Court's Use of Dictionaries in the Twenty-First Century*, 94 MARQ. L. REV. 77, 79–80 (2010).

[105] *E.g.*, *Bostock*, 140 S. Ct. at 1740 (majority opinion) (using dictionaries to define "discriminate" and "individual"); *id.* at 1756 (Alito, J., dissenting) (citing various dictionary definitions of "sex").

[106] For example, they are useful in cases interpreting technical legal terms of art defined in contemporaneous legal dictionaries. *See, e.g.*, FAA v. Cooper, 566 U.S. 284, 291–92 (2012) (identifying "actual damages" as a legal term of art and defining it by reference to a legal dictionary).

in which a word is used in a given statute or as applied to a given fact pattern.[107] As a result, dictionaries may fail to address, let alone resolve, the relatively nuanced dispute that sent judges to the dictionary in the first place.[108] The *Bostock* majority, for example, appears to consider the dissenters' dictionary definitions to be beside the point, perhaps because the definitions fail to address the competing understandings of the words "because of" that lie at the center of the interpretive dispute.[109] Nor would popular definitions of "because of," "motivating factor," or related terms have proven helpful.[110]

In light of these and other problems with judicial use of dictionaries,[111] some scholars and judges have turned to "corpus linguistics" to ascertain the ordinary public meaning of statutory language.[112] Corpus linguistics analyzes large databases of "naturally occurring" language (books, newspaper articles, etc.)—the sort of raw usage data on which lexicographers rely to craft

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[107] *See* Craig Hoffman, *Parse the Sentence First: Curbing the Urge to Resort to the Dictionary When Interpreting Legal Texts*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 401, 406–07 (2003); A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 71, 73–74 (1994).

[108] *See* Macleod, *supra* note 14, at 987 n.171 (discussing examples).

[109] *See Bostock*, 140 S. Ct. at 1750 (majority opinion) (characterizing the dissenting opinions—including the eight pages of dictionary definitions of "sex" that comprise Appendix A to Justice Alito's dissent—as failing to "offer an alternative account about what [the statute's] terms mean either when viewed individually or in the aggregate").

[110] *See* Macleod, *supra* note 14, at 987 n.171 (illustrating that popular dictionary definitions fail to illuminate whether the phrase "because of" entails but-for causation, let alone how to apply the but-for test in practice); *cf. supra* note 89 (noting complexities concerning the application of the but-for test).

[111] Judges armed with multiple dictionaries and multiple definitions of a given word within each dictionary can choose whichever definition supports their preferred outcome. *See* Lawrence M. Solan & Tammy Gales, *Corpus Linguistics as a Tool in Legal Interpretation*, 2017 BYU L. Rev. 1311, 1334; SLOCUM, *supra* note 23, at 215. The dissenting Justices in *Bostock*, for example, accuse the majority of "scaveng[ing] the world of English usage," finding its preferred acontextual definition of each term, and re-combining those definitions to reach an "exotic meaning" of the text. 140 S. Ct. at 1772 (Alito, J., dissenting) (quoting Chisom v. Roemer, 501 U.S. 380, 410 (1991) (Scalia, J., dissenting)); *see also id.* at 1827 (Kavanaugh, J., dissenting) ("'Legislation cannot sensibly be interpreted by stringing together dictionary synonyms of each word . . . .'" (quoting Zarda v. Altitude Express, Inc., 883 F.3d 100, 144 n.7 (2d Cir. 2018) (Lynch, J., dissenting))).

[112] *See, e.g.*, Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. PA. L. REV. 261, 289–96 (2019); Wilson v. Safelite Grp., Inc., 930 F.3d 429, 440 (6th Cir. 2019) (Thapar, J., concurring); Solum, *Triangulating Public Meaning*, supra note 32, at 1669–71.

dictionary definitions.[113] By searching the raw usage data, one can observe how words and phrases were used in these sources. And by counting how often words or phrases appear to have been used the way one side advocates compared to the way the other side advocates, legal corpus linguistics can often reveal which usage is more frequent and, in that sense, more "ordinary."[114] In *Bostock*, Justice Alito relies on a corpus linguistics analysis conducted by James C. Phillips.[115] (Justice Thomas, who joined Alito's dissent, has also relied on corpus linguistic analyses in his own recent published opinions.[116]) According to Justice Alito, Phillips's study confirms that, "as used in 1964, 'discrimination because of sex' would have been understood to mean [*only*] discrimination against a woman or a man based on 'unfair beliefs or attitudes' *about members of that particular sex*."[117]

Judges and scholars (myself included) have offered various criticisms of legal corpus linguistics,[118] many of which question whether its frequency-of-usage comparisons are as probative of OPM as its proponents claim.[119] But rather than rehearse those

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[113] *See* Solan & Gales, *supra* note 111, at 1337.

[114] *See id.* at 1342–54; Brian G. Slocum & Stefan Th. Gries, *Judging Corpus Linguistics*, 94 S. CAL. L. REV. POSTSCRIPT 13, 30–31 (2020) ("Corpus-linguistic data provide nothing but frequencies . . . .") (citing STEFAN TH. GRIES, QUANTITATIVE CORPUS LINGUISTICS WITH R 141 (2d ed. 2017))). In discussing "*legal* corpus linguistics," I refer specifically to how corpus linguistics has been used in judicial opinions and legal scholarship to date. Corpus linguistics is an entire subfield in linguistics with many methods and projects unrelated to legal interpretation. *See generally* GRIES, *supra*.

[115] *Bostock*, 140 S. Ct. at 1769 n.22 (Alito, J., dissenting) (discussing James C. Phillips, The Overlooked Evidence in the Title VII Cases: The Linguistic (and Therefore Textualist) Principle of Compositionality (May 11, 2020) (unpublished manuscript). https://www.supremecourt.gov/opinions/URLs_Cited/OT2019/17-1618/17-1618-3.pdf).

[116] *E.g.*, Carpenter v. United States, 138 S. Ct. 2206, 2238–39 (2018) (Thomas, J., dissenting) (applying corpus linguistics to determine the original meaning of "search"); Lucia v. SEC, 138 S. Ct. 2044, 2056 (2018) (Thomas, J., concurring) (citing Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 STAN. L. REV. 443, 564 (2018), which used corpus linguistics to derive a definition of "officer" in Article II).

[117] *Bostock*, 140 S. Ct. at 1769 n.22 (emphasis added) (quoting Phillips, *supra* note 115, at 7).

[118] *See, e.g.*, Thomas R. Lee & Stephen C. Mouritsen, *The Corpus and the Critics*, 88 U. CHI. L. REV. 275, 311–41 (2021) (addressing criticism of corpus linguistic analysis in legal interpretation); Macleod, *supra* note 14, at 989–91; Lawrence M. Solan, *Corpus Linguistics as a Method of Legal Interpretation: Some Progress, Some Questions*, 33 INT'L J. FOR SEMIOTICS L. 283, 290-97 (2020).

[119] *See* Macleod, *supra* note 14, at 990 nn.184, 189 (citing examples).

criticisms, let's assume that this sort of relative frequency data is highly probative of OPM. Even then, Phillips's study and Justice Alito's reliance on it highlight a further underappreciated problem with legal corpus linguistics: in some cases, legal corpus linguistic analysis may turn out to be largely irrelevant because the method can't differentiate between the two competing interpretations at issue.

Bostock presents one such case. Specifically, legal corpus linguistics can't determine whether a given instance of the phrase "because of *X*" appearing in the corpus resembles the *Bostock* plaintiffs' interpretation or instead the *Bostock* defendants' interpretation.[120] Without that ability to differentiate, there's no way to count which one appears more frequently, and therefore no way to "confirm" (or disconfirm) Justice Alito's conclusion. Consider an example. Suppose that a book in the corpus mentions that a man was discriminated against "because of his *race*." To determine whether this instance of "because of . . . [trait]" resembles the *Bostock* plaintiffs' or instead the defendants' reading of Title VII, we need to know the following: Was *race* the sole object of the discriminating actor's prejudice, or was, say, *miscegenation* also an object of it? If the former, then this instance of "because of race" resembles the *Bostock* defendants' understanding of "because of sex"; if the latter, then it resembles the plaintiffs' understanding. But to determine whether the direct object of the discriminating agent's prejudice is better construed as "race" or as "miscegenation" requires literary interpretation, or, in any event, not the sort of analysis that corpus linguistics provides.[121] (Phillips, for his part, sidesteps the entire issue by setting aside all instances of the phrase "discriminate against . . . *because of* [some trait]."[122] Instead, he considers only instances of "discriminate against" that *lack* causal

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[120] A different question—one with respect to which corpus linguistics would be much more informative—would have concerned the meaning of "sex," and whether it has changed over time. *See* Eskridge et al., *supra* note 66, at 1515. But I put that analysis aside because every judge to consider the matter has stipulated to its definition (as I do in the experimental survey studies reported below). *See supra* note 66.

[121] *See, e.g.*, Lee & Mouritsen, *supra* note 1, at 844–845 (analyzing whether an "airplane" is a "vehicle" by counting how frequently the terms "airplane" and "vehicle" appear together, i.e., by doing a "collocation" analysis similar to Phillips's, rather than undertaking the relatively simple interpretive investigation into whether those instances of collocation involved assertions that an airplane is a vehicle).

[122] Phillips, *supra* note 115, at 3–5 (emphasis added).

language immediately following them, e.g., "discriminate against women," and "discriminate against Jews,"[123] and concludes that they support the defendants' interpretation.[124]) In short, even assuming that relative frequency data would be probative of OPM, corpus linguistics is in some cases—*Bostock* included—unable to generate the relevant data in the first place.[125]

B. BETTER EVIDENCE

1. The Merits of the Applied-Meaning-Experiment Method. The prior Section surveyed the various types of evidence on which textualists have relied to find OPM. But as Justice Alito emphasizes in Bostock, "what matters in the end is the answer to the question that the evidence is gathered to resolve: *How would the terms of a statute have been understood by ordinary people at the time of enactment?*"[126] A better way to answer that question is by actually asking ordinary people to read the relevant statutory language and apply it in context. To find ordinary public meaning, we can use survey experiments to ask ordinary members of the public questions that reveal their understanding of the terms at issue. Of course, we can't travel back in time to ask people in 1964 or 1991. But according to every Supreme Court Justice and every circuit court judge to have considered the matter, the ordinary meaning of the relevant text has not changed post-enactment.[127] And in any event, even if they're mistaken, various aspects of the experiments' design can root out and minimize the influence of post-enactment linguistic drift.[128]

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[123] *Id.* at 5.

[124] *Id.* at 7.

[125] For another example, see Macleod, *supra* note 14, at 989–90 (noting corpus linguistics' inability to discern whether assertions that *X* was a "cause" exclusively involved but-for causes, or instead also included mere contributing, non-but-for factors).

[126] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1766 (2020) (Alito, J., dissenting) (emphasis added); *see also* Kavanaugh, *supra* note 2, at 2150 n.158 (arguing that judges should interpret statutes in accordance with the "'best reading' inquiry," which asks "only how the words would be read by an ordinary user of the English language").

[127] *See supra* note 66 (quoting the judges, Justices, and parties involved in recent Title VII LGBT discrimination litigation).

[128] To be clear, it's possible that, contrary to some judges' and commentators' assertions, any undetected post-enactment linguistic drift would skew the modern survey's results, if at

Experimental survey studies can overcome the problems that plague other types of OPM evidence. Whereas intuition and thought experiments are based on a sample size of one, survey experiments actually sample the general population, letting idiosyncratic intuitions and biases cancel each other out.[129] Moreover, the influence of widely shared biases—for example, those stemming from readers' moral and legal preferences or factual misunderstandings—can be minimized through various aspects of the experimental design. Ordinary readers can then produce results that reflect textualists' "reasonable" reader understanding.[130] And while dictionary definitions and corpus linguistic analyses may prove unable to speak to the interpretive issue raised in a given case, survey experiments can be designed to test it directly.[131]

Before providing a demonstration, it's worth noting two additional strengths of survey-based experimental interpretation that sometimes masquerade as weaknesses. Richard Fallon gives voice to each when explaining why constitutional originalists rarely

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all, in the *defendants'* favor, not the plaintiffs'—making the survey's results, which favor the plaintiffs, more remarkable. *See* Eskridge et al., *supra* note 66, at 1550–58 (arguing that "sex" had a broader meaning in 1964 than it does today). *But see* Transcript of Oral Argument at 21–22, 30, *Bostock*, 140 S. Ct. 1731 (No. 17-1618) (Alito, J.), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/171618_7k47.pdf (implying that modern definitions of "sex" are more expansive than enactment-era definitions). As for drift in *moral* views, it would likely skew results in the opposite direction (i.e., in the *plaintiffs'* favor) if the experiment were to reflect it. But the experimental design sought to prevent readers' moral views or legal preferences from skewing the results significantly, if at all, and appeared to succeed in this regard. *See infra* Section III.B.*4*; *see also infra* Section IV.B (discussing the treatment of moral views and legal preferences as "biases" for purposes of textualist interpretation).

[129] As for less idiosyncratic biases, surveys can omit information irrelevant to the interpretive issue at hand. And if there are systematic differences in interpretation stemming from interpreters' demographic characteristics or ideological preferences, experiments allow that information to come to light. *Cf.* Christina Mulligan, *Diverse Originalism*, 21 U. PA. J. CONST. L. 379, 412–13 (2018) (discussing potential differences in understandings of the Constitution among different Founding-era demographic groups); Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 841 (2009) (discussing differences in interpretation of video evidence among different demographic groups).

[130] *Cf. infra* Section IV.B.

[131] Of course, experimental survey studies are not without genuine drawbacks. Significantly, linguistic drift may render such studies nonprobative with respect to certain terms and phrases, especially where they are used in statutes enacted long ago. *See* Macleod, *supra* note 14, at 992–93.

speak of OPM in terms of "the answers that most people or a plurality of people would have given to an imagined pollster."[132] First, "[i]t is notorious that the answers that pollsters get frequently depend on how they formulate their questions."[133] Therefore, there is "uncertainty about how exactly to specify the question that a historically nonexistent pollster ought to have asked."[134] This uncertainty as to the relevant question to ask ordinary readers may initially seem like a drawback for surveys. But (to foreshadow Section IV.A) it is a *feature* of survey-based interpretation—not a bug—that in cases of disagreement it forces interpreters to address this uncertainty,[135] rather than simply to incant an underspecified notion of ordinary reader "understanding" and ignore important underlying sources of disagreement over OPM.[136] Moreover, the method allows one to measure the effect of different question types. To the extent that subtle variations generate large shifts in reader response, those shifts may often reflect an inconvenient but important truth for those claiming that the relevant text possesses a single clear, indisputable OPM.

Second, as Fallon notes, originalists emphasize that a law's OPM can diverge from ordinary readers' expectations concerning the law's application.[137] Specifically, this happens where those expectations are premised on bias, factual error, or failure to consider relevant information.[138] If surveys merely poll people for their expected applications without rooting out biases and factual errors that might render those expectations mistaken, those results would indeed be problematic. But survey experiments need not ask respondents to give an opinion about the application of law to fact

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[132] Richard H. Fallon Jr., The Chimerical Concept of Original Public Meaning 35 (unpublished manuscript), https://www.law.nyu.edu/sites/default/files/Fallon%20.pdf.

[133] *Id.*

[134] *Id.*

[135] A similar information-forcing benefit arises with respect to the "how-clear-is-clear" question, though that question is less frequently a source of inter-textualist disagreement. *See supra* note 44; *infra* Section III.B.*4*.d.

[136] *See infra* Section IV.A.

[137] *See* Fallon, *supra* note 132, at 35.

[138] As far as I can tell, this is an exhaustive list of the circumstances under which enactment-era ordinary readers' understanding can fail to track OPM. Originalists cite factual error most often. *See, e.g.*, Lawrence B. Solum, *Surprising Originalism: The Regula Lecture*, 9 CONLAWNOW 235, 253–55 (2018); Steven G. Calabresi & Andrea Matthews, *Originalism and* Loving v. Virginia, 2012 BYU L. REV. 1393, 1398–1400.

(hence this Article's use of the "applied-meaning-experiment" label, rather than, say, "legal-application-experiment").[139] And in any event (to foreshadow Section IV.B), it's a *virtue* of the experimental approach that in cases of disagreement it forces interpreters to be clear about what information or attitudes are irrelevant or biasing, rather than to simply gesture at their imagined reader's "reasonableness" and again avoid important underlying sources of disagreement over OPM.[140] Moreover, this method allows one to measure and adjust for the effect of improper considerations in the event that the experimental design cannot eliminate them.[141]

2. A Demonstration. This Section reports four experimental survey studies that test how ordinary people understand and apply Title VII's operative language in the contexts of sexual-orientation discrimination, transgender discrimination, and more "traditional" gender-based discrimination.[142] (A general overview and summary of the results begins on page 45 below.)

All four surveys were administered online to a combined total of 883 respondents recruited by Lucid Fulcrum Exchange, a company that supplies nationally representative samples that mirror the demographic makeup of the United States.[143] They were

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[139] *See infra* note 196.

[140] *Cf.* Richard H. Fallon Jr., *The Statutory Interpretation Muddle*, 114 NW. U. L. REV. 269, 293–94 (2019).

[141] *See, e.g.*, *infra* Section III.B.*2*.d.

[142] By "traditional gender-based discrimination," I mean discrimination in a setting modeled on the facts of *Price Waterhouse v. Hopkins,* 490 U.S. 228, 235 (1989) (plurality opinion).

[143] *See* LUCID, https://luc.id/ (last visited Nov. 5, 2021); Alexander Coppock & Oliver A. McClellan, *Validating the Demographic, Political, Psychological, and Experimental Results Obtained from a New Source of Online Survey Respondents*, RSCH. & POL., Jan.–Mar. 2019, at 1.

Combining all four vignettes, the demographics were as follows: 49% male, 51% female; ages 18–84 years, with a mean age of 45.5 years and a standard deviation of 16.8 years. For race, 74% of the sample self-identified as White, 12% as Black, 8% as Asian, Native Hawaiian, or Pacific Islander, and 6% as Other. On a separate question, 10% of the sample reported that they are Latino or Hispanic. For education, 2% of the sample had not finished high school, 26% had high school diplomas, 3% had post high school vocational training, 23% had some college experience, 6% had a two-year degree, 29% had a four-year college degree, 9% had master's or professional degrees, and 1% had doctorates or other professional degrees. For political party, 46% indicated that they are anywhere from "Strong Democrat" to "leaning Democrat"; 39% indicated that they are anywhere from "Strong Republican" to "leaning Republican"; and 15% indicated that they lean toward neither political party. Approximately

administered prior to the release of the Supreme Court's decision in *Bostock*, minimizing the possibility that knowledge of the case's outcome could influence the results.[144]

a. Study 1: Sexual-Orientation Discrimination (*Bostock*/*Zarda*)

Materials. At the beginning of the survey, each respondent read the following: "A dictionary defines a person's 'sex' as 'the property of being biologically male or female.' Please assume that definition of the word 'sex' applies throughout the survey." This definition was technically unnecessary insofar as judges (including Supreme Court Justices) have consistently claimed that this definition represents the OPM of the word "sex" *today*, as well as in 1964.[145] Still, I included the definition for two reasons: first, because a few judges and lawyers have merely *stipulated* for purposes of argument that this definition remains accurate without taking a position; and second, because others have occasionally asserted that the term "sex" is more capacious in modern usage than in 1964, stacking modern intuitions in favor of the *Bostock* employees.[146]

After receiving the stipulated definition of "sex," each respondent read the following vignette:[147]

38% reported an annual household income of less than $30,000, and 21% reported over $75,000. For region, all respondents were in the United States, with 20% in the Northeast, 20% Midwest, 38% South, and 22% West. For a breakdown of demographics in each of the four studies individually, see https://osf.io/ce4sk/.

The first three surveys were administered June 25–26, 2019. The fourth survey was administered January 16–19, 2020. Respondents were not permitted to participate in more than one of the surveys.

[144] That said, the results of the first and second studies—concerning sexual-orientation and transgender discrimination, respectively—have been conceptually replicated after the *Bostock* decision came out. *See* Tobia & Mikhail, *supra* note 38, at 12.

[145] *See supra* note 66 and accompanying text; Eskridge et al., *supra* note 66, at 1506–07 ("[T]he *Bostock* Court was unanimous in maintaining that the meanings of all the relevant terms . . . were the same in 2021 as in 1964.").

[146] *E.g.*, Transcript of Oral Argument at 30–31, Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (No. 17-1618) (Alito, J.).

[147] The structure and wording of the vignettes were parallel in all three surveys so that the relevant differences—i.e., sexual-orientation discrimination in Study 1, transgender discrimination in Study 2, and traditional gender stereotype discrimination in Study 3—could be compared in the analysis. Note that the vignette was designed to isolate the relevant legal

> *Gene worked for a website design company that his boss, Bill, owns. Gene is a gay male, but he isn't very open about his sexual orientation, and he doesn't act the way many people associate with being gay. So most people who know Gene (including Bill) simply assume Gene is straight.*
>
> *Bill believes that it is morally wrong to be attracted to the same sex. Bill also believes that, if he were to knowingly employ a male who is attracted to other males, or a female who is attracted to other females, that would make Bill complicit in their immorality.*
>
> *So when Bill recently learned that Gene is gay, Bill fired Gene, despite Gene's excellent work performance.*

Respondents then answered the following five questions, which aimed to measure respondents' interpretation of the statutory language (questions (A) and (B)) along with circuit courts' pattern jury instructions (questions (C), (D), and (E)).[148]

- (A) *Was Gene's sex a motivating factor in Bill's decision to fire Gene?*[149]
- (B) *Was Gene fired because of Gene's sex?*[150]

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issue. A survey that stuck closer to the facts in each case—especially as alleged in pleadings construed in favor of non-moving plaintiffs on appeal—would almost certainly garner more pro-plaintiff responses. But it would do so by including aspects of the case that, while relevant to some arguments made by the litigants, are irrelevant to the textualist plain language claims on which this Article focuses.

[148] The first "motivating factor" question (i.e., the question employing the 1991 statutory causation language) always appeared first; the remaining four questions appeared in random order.

[149] *See* 42 U.S.C. § 2000e-2(m) ("[A]n unlawful employment practice is established when . . . sex . . . was a motivating factor for any employment practice, even though other factors also motivated the practice.").

[150] *See* 42 U.S.C. § 2000e-2(a) ("It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's . . . sex* . . . ." (emphasis added)).

- (C) *Did Gene's sex influence or make a difference in Bill's decision to fire Gene, even if Gene's sex wasn't the only reason Bill fired him?*[151]
- (D) *Did Gene's sex contribute to Bill's decision to fire Gene?*[152]
- (E) *Was Gene's sex a factor that played some part in Bill's decision to fire Gene?*[153]

Each question had four response options: [1] *Clearly YES*; [2] *Probably YES*; [3] *Probably NO*; [4] *Clearly NO*.

After answering question (A), and before answering the remaining four questions, respondents were asked the following question: "***100** other people are taking this survey. Out of the **100**, how many do you predict will agree with you and answer either 'Clearly [YES/NO]' or 'Probably [YES/NO]' (as opposed to 'Clearly [NO/YES]' or 'Probably [NO/YES]').*"[154] This question aimed to measure whether respondents exhibited false consensus bias in their interpretation of the operative statutory language (i.e., whether people overestimated the extent to which others would agree with their interpretation).[155]

Immediately after reading the vignette and answering the questions above, participants were asked, "*Which of the following dictionary definitions of a person's 'sex' comes closer to the definition that you used when answering the previous questions?: (a) 'The property of being biologically male or female'; (b) 'The property of being related in any way to sexual activity'.*" Respondents who

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[151] *See Eleventh Circuit Civil Pattern Jury Instructions*, *in* 4 LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS: CIVIL § 4.5 (2021) (requiring the plaintiff to show that her membership in a protected class "influenced the [employer's] decision," and emphasizing that the plaintiff "does not have to prove that" the plaintiff's membership in a protected class "was the only reason that" the employer made the decision).

[152] *See* COMM. ON PATTERN CIV. JURY INSTRUCTIONS OF THE SEVENTH CIR., FEDERAL CIVIL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT § 3.01, at 59–60 (2017), http://www.ca7.uscourts.gov/pattern-jury-instructions/7th_cir_civil_instructions.pdf (requiring the plaintiff to show that her membership in a protected class "contributed to Defendant's decision" to satisfy the "motivating factor" element).

[153] *See* SAND ET AL., *supra* note 151, ¶ 88.03 ("A 'motivating factor' is a factor that played some part in defendant's employment practice decision.").

[154] Anybody who failed to type a number between 0 and 100 was excluded from the study.

[155] *See* Lawrence Solan, Terri Rosenblatt & Daniel Osherson, *False Consensus Bias in Contract Interpretation*, 108 COLUM. L. REV. 1268, 1268–69 (2008).

selected the latter definition were excluded from the study for having failed to follow the instructions to apply the narrow biological definition of "sex" stipulated at the outset of the survey.[156]

Next, respondents answered three questions that aimed to reveal a benchmark consensus rate for questions with clearly correct answers.[157] Specifically, two questions sought to determine the high benchmark for "yes" responses by asking, "*Was Gene fired because of his sexual orientation (in other words, was he fired because he is gay)?*" and "*Was the fact that Gene is gay a motivating factor in Bill's decision to fire Gene?*" Because the vignette quite directly spoke to this question, "no" responses would seem to be either the product of inattention or of drawing inferences unsupported by the vignette's text. As a low benchmark for "yes" responses, on the other hand, respondents were asked, "*Was Gene fired because of his age?*" Because the vignette said nothing about Gene's age, "yes" responses would seem likewise unwarranted.

Respondents were then asked to indicate their level of agreement or disagreement with the following three statements related to moral and policy attitudes:

- *"It is morally wrong to be gay."*
- *"It is wrong to fire somebody because they are gay."*
- *"It should generally be illegal to fire somebody because they are gay."*

The four possible responses were: [1] *Strongly agree*; [2] *Agree*; [3] *Disagree*; [4] *Strongly disagree*.

Next, respondents were asked to write a brief explanation for why they think Gene's "biological sex" did or did not constitute a

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[156] Near the end of the survey (directly prior to the moral and policy attitude questions), respondents were asked one more comprehension question: "Gene is biologically: (a) male; (b) female." Respondents who answered "female" were excluded from the study for having failed to pay attention to or comprehend the vignette.

[157] Surveys virtually never generate 100% agreement no matter how clear they are; it's therefore common practice to compare the rate of agreement observed with respect to questions of interest *not* to a 100% benchmark but rather to the rate of agreement observed in the same sample with respect to questions that have very clear right answers. *See, e.g.*, Omri Ben-Shahar & Lior Jacob Strahilevitz, *Interpreting Contracts via Surveys and Experiments,* 92 N.Y.U. L. REV. 1753, 1779 (2017); Daniel J. Hemel & Lisa Larrimore Ouellette, *Public Perceptions of Government Speech*, 2017 SUP. CT. REV. 33, 65; Macleod, *supra* note 14, at 1007 n.238.

"motivating factor" in Bill's decision.[158] Finally, respondents answered various demographic questions (gender, political party, etc.).

Results.[159] 223 respondents completed Study 1.

Statutory language. As shown in Figures 1 and 2 below, most respondents found the statutory language applicable to sexual-orientation discrimination as described in the vignette. Specifically, 77% of respondents deemed the "motivating factor" language applicable,[160] while 60% deemed the "because of" language applicable.[161]

Jury instructions. All three "motivating factor" jury instructions elicited responses that fell between the "motivating factor" question (on the high end) and the "because of" question (on the low end). Differences among the three were negligible.[162]

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[158] Six respondents clearly indicated that they had only answered "yes" or "no" to that earlier question by mistake and that they disagreed with their initial answer. These respondents were excluded from the study. The same criterion led to the exclusion of two respondents in Study 2, two respondents in Study 3, and one respondent in Study 4.

[159] Throughout this Section, "significant" refers to statistical significance, which denotes the rejection of the null hypothesis—the possibility of no differences between the various groups—at a probability level indicated by the p-value reported. Thus, p is defined as the probability of finding a difference or relationship between two groups as large as that observed if there were, in fact, no difference or relationship between them. Following convention, this Article labels p values at or below 0.05 as establishing statistical significance. With only two exceptions, however, *see infra* notes 166 and 181, the findings in this Article are associated with p values that are all at or below 0.005. *Cf.* John P.A. Ioannidis, *The Proposal to Lower* P *Value Thresholds to .005*, 319 JAMA 1429, 1429 (2018).

In total, five statistical tests were used: Welch's ANOVA was used to compare responses between more than two different vignettes; a Wilcoxon signed-rank test was used to compare two responses in the same vignette; an independent samples t-test was used to compare responses between two different vignettes; a chi-squared test was used alongside the independent samples t-test in order to analyze responses using a binary (yes-or-no); and linear regression was used to determine whether responses to moral/political questions predicted responses to statutory language questions.

[160] Mean = 1.75. Reported means are the average of all four responses, not just the "Yes" responses. As previously indicated, "Clearly yes" was coded as "1"; "Probably yes" was coded as "2"; "Probably no" was coded as "3"; and "Clearly no" was coded as "4." Therefore, questions that elicited greater "yes" responses will have lower means, and vice versa.

Figure 1, *infra*, shows percentages of respondents selecting each of the four responses.

[161] Mean = 2.17. Figure 2, *infra*, shows percentages of respondents selecting each of the four responses.

[162] Specifically, the Seventh Circuit's "generate or make a difference" instruction, question (D) from the bulleted list above, garnered the greatest "yes" response (70%) (mean = 1.98),

Benchmark questions. Responses to the three high- and low-benchmark questions elicited rational responses that tracked the appropriate answer to each.[163]

False consensus bias. The minority of respondents that gave a "no" answer to the statutory "motivating factor" question drastically overestimated the extent to which others would agree with their interpretation (even predicting that their own interpretation was the majority interpretation), thereby exhibiting false consensus bias.[164]

Demographic association with statutory language. Neither of the two demographic variables tested—respondent gender and political party—showed any significant association with responses to either of the two statutory questions.

Moral/policy view association with statutory language. Responses to the three moral/policy statements showed no significant association with responses to the "because of" question, but two did show significant association with responses to the "motivating factor" question. Specifically, increased agreement with the statement, "It should generally be *illegal* to fire somebody for being gay," was associated with a significant increase in "yes"

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with the Sand et al.'s "a factor that played some part" instruction, question (E), only slightly lower (69%) (mean = 1.95), and the Eleventh Circuit's "contribute to" instruction, question (C), as lowest of the three (67%) (mean = 2.02).

Because the same basic pattern appeared in all four studies, the jury instruction results for Studies 2, 3, and 4 are not reported below. For the same reason, the "benchmark question," "false consensus bias," and "demographic association" results are not reported for Studies 2, 3, and 4. For those results, see https://osf.io/ce4sk/.

[163] When asked whether the employee's "sexual orientation" was a "motivating factor," 96% answered "yes" (mean = 1.2). Likewise, when asked whether the employer fired the employee "because of" the employee's "sexual orientation," 98% answered "yes" (mean = 1.16). Finally, answers to the *low*-benchmark question were indeed far lower: when asked whether the employer fired the employee because of the employee's "age," 15% answered "yes" (mean = 3.5). This relatively high 15% benchmark might be attributable to some combination of inattentiveness and propensity-style reasoning, such as a possible conclusion that a bias-prone employer is likely to engage in more than one form of discrimination.

[164] 81% of those answering "no" estimated that more than half of respondents would agree with them. Actual percentage answering "no" = 23%; mean estimated percentage answering "no" = 64%. *See infra* Figure 3.

Those who answered the statutory language question "yes" were in the majority (actual percentage answering "yes" = 77%), and they accurately estimated that they were in the majority (mean estimated percentage answering "yes" = 80%).

responses to the motivating factor question[165]—as was increased agreement with the statement, "It is morally wrong to be gay."[166]

b. Study 2: Transgender Discrimination (*Harris*)

Materials. Study 2's design was identical to that of Study 1 except that it concerned discrimination on the basis of gender identity rather than sexual orientation. Respondents received the same stipulated definition of "sex" as in Study 1, and as with Study 1, they were excluded from the results if they indicated that they employed a broader alternative definition when answering questions. Respondents read the following vignette:

> *Taylor worked for a website design company that Taylor's boss, Bob, owns. Taylor was born biologically male, and Taylor remains biologically male. But Taylor is transgender: Taylor identifies as a woman, and in public Taylor appears to be a woman. So most people who know Taylor (including Bob) simply assume Taylor is female.*
>
> *Bob believes that it is morally wrong to identify as a member of the opposite sex. Bob also believes that, if Bob were to knowingly employ someone who is biologically male but identifies as a woman, or someone who is biologically female but identifies as a man, that would make Bob complicit in their immorality.*
>
> *So when Bob recently learned that Taylor is transgender, Bob fired Taylor, despite Taylor's excellent work performance.*

Respondents were then asked to answer the same five statutory language and jury instruction language questions from Study 1

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[165] $b = .406$, $SE = .114$, $p < .001$.

[166] $b = .173$, $SE = .076$, $p = .025$. This result, one of the few with a p value between 0.005 and 0.05, is surprising. One explanation for it might be that those who share the protagonist's (i.e., the boss's) moral views more readily imagine that those moral views actually did influence his decision, to the extent the vignette left any doubt as to the boss's reason for firing the employee. An arguably analogous result, with a similarly high p value, arose in Study 3 with respect to the "because of" question (but *not*, as here, with respect to the "motivating factor" question). *See infra* note 181.

(with the names of the characters changed to track the Study 2 vignette). Respondents answered the same agreement-prediction (i.e., consensus bias) question as in Study 1, the same high- and low-benchmark questions, and the same three moral/policy questions (adapted to address gender identity).[167] Finally, respondents were asked to provide a brief written explanation for why Taylor's biological sex does or does not count as a "motivating factor" in Bob's decision to fire Taylor.

Results. 242 respondents completed Study 2. Compared to Study 1, respondents were considerably *more* likely to find the statutory language applicable in Study 2. Respondents' moral and policy views were also considerably *less* sympathetic to Study 2's transgender employee compared to Study 1's homosexual employee. Otherwise, the results of Studies 1 and 2 were similar.

Statutory language. As shown in Figures 1 and 2 below, most respondents found the statutory language applicable to transgender discrimination as described in the vignette. Specifically, 90% of respondents deemed the "motivating factor" language applicable,[168] while 85% deemed the "because of" language applicable.[169]

Moral/policy view association with statutory language. As with Study 1, responses to the three moral/policy statements showed no significant association with responses to the "because of" question. With respect to the "motivating factor" question, also similar to Study 1, increased "yes" responses were significantly associated with an increase in agreement with the statement, "It should generally be *illegal* to fire somebody for being transgender."[170]

Moral/policy view comparison with Study 1. Consistent with nationwide polling data,[171] respondents exhibited greater anti-transgender sentiment in Study 2 than the degree of anti-gay sentiment respondents exhibited in Study 1. Specifically, compared

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[167] Exclusion criteria were the same as in Study 1. *See supra* notes 154, 156, 158 and accompanying text.

[168] Mean = 1.39.

[169] Mean = 1.57.

[170] $b = .279$, $SE = .089$, $p = .002$.

[171] *See, e.g.*, Daniel C. Lewis et al., *Degrees of Acceptance: Variation in Public Attitudes Toward Segments of the LGBT Community*, 70 POL. RSCH. Q. 861, 861 (2017) (analyzing Americans' attitudes toward and level of "support for nondiscrimination protections" for lesbian, gay, bisexual, and transgender people and "find[ing] that public attitudes are significantly more negative toward transgender people and policies pertaining to them than they are toward gay men and lesbians and related policies").

to each analogous question in Study 1, respondents exhibited significantly lower rates of agreement with the statements, "It is wrong to fire somebody because they are transgender"[172] and "It should generally be illegal to fire somebody because they are transgender," compared to each analogous question in Study 1.[173]

c. Study 3: Gender-Stereotype Discrimination (*Price Waterhouse*)

Study 3's design was similar to Studies 1 and 2, but its substance concerned discrimination on the basis of gender stereotypes—a form of discrimination that, unlike sexual-orientation and transgender discrimination, the Supreme Court has long held is covered by Title VII's statutory language.[174] The primary motivation for Study 3 was to determine whether a type of discrimination clearly prohibited under current Title VII caselaw would be considered more clearly encompassed within the plain statutory language.

Materials. As with Studies 1 and 2, respondents were instructed to apply the stipulated definition of "sex" and were excluded if they indicated that they applied a more capacious definition. Study 3 respondents read the following vignette:[175]

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[172] Study 2 mean = 1.66; Study 1 mean = 1.39; t(462) = 3.469, p = 0.001.

[173] Study 2 mean = 1.67; Study 1 mean = 1.41; t(462) = 3.245, p = 0.001. In Study 2, respondents also agreed more with the statement, "It is morally wrong to be transgender," compared to the analogous statement in Study 1; however, the difference was not statistically significant. Study 2 mean = 2.97, Study 1 mean = 3.05; t(462) = 0.801, p = 0.423.

[174] *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (plurality opinion).

[175] Note that whereas the employer-protagonists in Studies 1 and 2 fire the employees out of a sense of moral obligation, the employer-protagonist in Study 3 denies the employee a promotion out of a sense of good business strategy. There were two reasons for this difference: first, a desire to stick closer to the facts of *Price Waterhouse* (and, in Studies 1 and 2, to the facts in those cases, such as the employer's explicitly moral-religious reason for discriminating against transgender people in the *Harris* case); second, a concern that respondents might find it less natural or believable to consider an employer who thinks, in the abstract, that it is morally wrong to fail to fit gender stereotypes (compared to the relative plausibility of imagining an employer who thinks it morally wrong to be gay or transgender). Of course, this difference in employer motivation and action leads to possible alternative explanations of any differences observed in responses to Studies 1 and 2, on the one hand, and Study 3 on the other. Therefore, additional caution is warranted in drawing direct comparisons between the results of Study 3 and the other studies.

> *Sandy worked for a website design company that Sandy's boss, Brett, owns. Sandy is a male, but—unlike his co-worker, Mark—Sandy doesn't act like a stereotypical, masculine man. In fact, most people who know Sandy (including Brett) consider Sandy much more feminine than a typical male.*
>
> *Brett believes that employees who don't fit traditional gender stereotypes make ineffective leaders. Brett also believes that, if he were to promote to a leadership position a male who seems unusually feminine, or a female who seems unusually masculine, that would make Brett a bad businessman.*
>
> *So when Brett recently considered whether to promote Mark or Sandy to a new leadership position, Brett decided to deny Sandy the promotion and give it to Mark instead, despite Sandy's excellent work performance.*

Respondents were then asked to answer the same questions as in Studies 1 and 2 (with names and attributes changed to fit the vignette).[176]

Results. 214 respondents completed Study 3. The statutory language and jury instruction questions elicited "yes" responses at approximately the same rate as Study 1 (sexual orientation), rather than at the higher rate of "yes" responses observed in Study 2 (transgender).[177] Otherwise, the results of Study 3 were similar to both Studies 1 and 2.

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[176] Exclusion criteria were the same as in Studies 1 and 2. *See supra* notes 154, 156, 158 and accompanying text.

[177] More specifically, pairwise comparisons (Bonferroni-corrected) between responses to the "motivating factor" question for each vignette showed that responses were significantly closer to the "Clearly YES" end of the spectrum in response to the transgender vignette than were responses to the same question in response to the sexual orientation and the gender discrimination vignettes ($p < 0.001$). Pairwise comparison revealed no significant difference in responses to the "motivating factor" question among those who responded to the sexual orientation vignette compared to those who responded to the sex stereotype vignette. The same was true of responses to the "because of" question. While responses were significantly closer to the "Clearly YES" end of the spectrum in response to the transgender vignette ($p < 0.001$), pairwise comparison of the "because of" responses for the sexual orientation and gender stereotype questions showed that those responses were not significantly different. Welch's ANOVA was used to compare responses to the "motivating factor" and "because of" questions across vignettes. Welch's ANOVA was more appropriate than classical ANOVA

Statutory language. As shown in Figures 1 and 2 below, most respondents found the statutory language applicable to the gender stereotype discrimination described in the vignette. 75% of respondents deemed the "motivating factor" language applicable,[178] and 64% deemed the "because of" language applicable.[179]

Moral/policy view association with statutory language. As with Studies 1 and 2, an increase in "yes" responses to the "motivating factor" question was significantly associated with an increase in agreement with the statement, "It should generally be *illegal* to deny somebody a promotion because they fail to conform to gender stereotypes."[180] Unlike in Studies 1 and 2, agreement with that same statement also showed significant association with increased "yes" responses to the "because of" question.[181]

d. Study 4: Testing a Motivated-Blaming Theory (*Bostock/Zarda* with Moral Valence Flipped)

The motivation for Study 4 was to determine the extent to which respondents' ascription of statutory causation in Study 1 (and, by implication, perhaps Studies 2 and 3 as well) might be attributable to their finding the action in question blameworthy, as opposed to simply finding the language applicable.[182] In other words, it sought to test the possible influence of blame-based motivated reasoning on

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because the variances of the three groups were significantly different (Fligner-Killeen test of homogeneity of variances: $\chi^2 = 26.406$, $p < 0.001$) and the size of each group was different (Study 1: $N = 223$, Study 2: $N = 242$, Study 3: $N = 214$).

[178] Mean = 1.85. *See infra* Figure 1.

[179] Mean = 2.16. *See infra* Figure 2.

[180] $b = .376$, $SE = .106$, $p < .001$.

[181] $b = .300$, $SE = .106$, $p = .005$. As noted above, *see supra* note 159, there was also a statistically significant association between "yes" responses to the "because of" question and agreement with the statement, "Employees who don't fit traditional gender stereotypes make ineffective leaders." $b = .200$, $SE = .094$, $p = .034$. Note that this differed somewhat from the analogous prompt for Studies 1 and 2. In those studies, the prompt asked for respondents' degree of agreement with the statement, "It is morally wrong to X," where X was "be gay" (Study 1) or "be transgender" (Study 2). The question was adapted for Study 3 so that it maintained those questions' emphasis on the reason the employer himself articulated for engaging in the adverse employment decision. Whereas that reason was the employer's moral view in Studies 1 and 2, it was his view about effective leadership in Study 3. *See supra* note 175 (explaining the motivation for this difference in Study 3).

[182] *See supra* notes 159, 170, 181 and accompanying text.

respondents' interpretations of the statutory language.[183] Study 4's design was therefore nearly identical to Study 1 but with a twist: The vignette concerned Gene's co-worker, Janet, who decides to *warn* Gene about their boss's views. Rather than ask about the boss (whose actions participants disapproved of in Study 1), Study 4 asked about Janet, whose actions respondents would likely deem non-blameworthy.[184]

Materials. As with Studies 1, 2, and 3, respondents were instructed to apply the stipulated definition of "sex" and were excluded if they indicated that they applied a more capacious definition. Study 4 respondents read the following vignette (Differences from the Study 1 vignette are underlined here for ease of reference, but respondents' version did not contain underlining):

> *Gene worked for a website design company that his boss, Bill, owns. Gene is a gay male, but he isn't very open about his sexual orientation, and he doesn't act the way many people associate with being gay. So most people who know Gene (including Bill) simply assume Gene is straight.*
>
> *Bill believes that it is morally wrong to be attracted to the same sex. Bill also believes that, if he were to knowingly employ a male who is attracted to other males, or a female who is attracted to other females, that would make Bill complicit in their immorality.*
>
> *Gene didn't know about Bill's beliefs, but Gene's co-worker, Janet, did. So when Janet recently learned that Gene is gay, Janet warned Gene to be careful about letting Bill find out.*

Respondents were then asked to answer the same basic questions as in Study 1, except that in Study 4 they were asked about Janet's decision to warn Gene (rather than about Bill's decision to fire Gene).[185]

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[183] For an explanation of blame-based motivated reasoning, see Mark D. Alicke, David Rose & Dori Bloom, *Causation, Norm Violation, and Culpable Control*, 108 J. PHIL. 670, 675 (2011).

[184] *See infra* note 186.

[185] Exclusion criteria were the same as in Studies 1, 2, and 3. *See supra* notes 154, 156, 158 and accompanying text.

Results. 204 respondents completed Study 4. The manipulation of perceived blameworthiness worked in the intended way: In stark contrast to assessments of the *boss*'s actions in Study 1, respondents found *Janet*'s actions in Study 4 to be non-blameworthy and not something the law ought to prohibit.[186] But despite respondents' approval of the protagonist's actions, most respondents still found the statutory language satisfied. 65% of respondents deemed the "motivating factor" language applicable;[187] 58% deemed the "because of" language applicable.[188]

Statutory language comparison to Study 1. The "because of" results show a nearly identical percentage answering "yes" in both surveys.[189] By contrast, while a clear majority continued to answer "yes" in response to Study 4's "motivating factor" question, that majority was twelve percentage points lower in Study 4 compared to Study 1, a statistically significant difference.[190] There are two possible explanations for the downward shift, both of which likely have some merit. The first is the motivated blaming explanation: respondents in Study 4 were less likely to answer "yes" because that response might imply blame, but they didn't find the protagonist blameworthy. The second explanation is that Janet's *motivations* were less clear in Study 4 than the boss's in Study 1 (whereas the

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[186] In Study 4, 7% agreed that "It was wrong for Janet to warn Gene about Bill" (mean = 3.06). In Study 1, 88% agreed that "It is wrong to fire somebody because they are gay" (mean = 1.39). Comparing percentage of "yes" versus "no": $\chi^2(1) = 216.594$, $p < 0.001$. Comparing means: $t(424) = 20.489$, $p < 0.001$.

In Study 4, 12% agreed that "It should be illegal for Janet to warn Gene about Bill" (mean = 3.36). In Study 1, 87% agreed that "It should be illegal to fire somebody because they are gay" (mean = 1.41). Comparing percentage of "yes" versus "no": $\chi^2(1) = 264.766$, $p < 0.001$. Comparing means: $t(424) = 25.313$, $p < 0.001$.

[187] Mean = 2.12. "Clearly yes" = 39%; "Probably yes" = 26%; "Probably no" = 20%; "Clearly no" = 15%.

[188] Mean = 2.30. "Clearly yes" = 35%; "Probably yes" = 23%; "Probably no" = 19%; "Clearly no" = 23%.

[189] The two-percentage-point difference was not statistically significant, nor was the slight difference in means. Study 1 "yes" percentage = 60%; mean = 2.17. Study 4 "yes" percentage = 58%; mean = 2.30. The difference in means owes primarily to a greater proportion of the Study 4 "yes" responses being "probably" as opposed to "clearly" (Study 1 "probably yes" = 13%; Study 4 "probably yes" = 23%).

[190] The twelve-percentage-point difference was statistically significant, as was the difference in means. Study 1 "yes" percentage = 77%; Study 4 "yes" percentage = 65%; $\chi^2(1) = 7.415$, $p = 0.006$. Study 1 mean = 1.75, SD = 1.13; Study 4 mean = 2.12, SD = 1.1; $t(425) = 3.45$, $p = 0.001$.

causal role of Gene's biological sex was no different).[191] The second explanation might help explain why "motivating factor" responses changed while "because of" responses did not.[192] It might also explain why, in response to the "motivating factor" question, respondents were far more likely to choose a "probably" answer (either "probably yes" or "probably no") in Study 4, and far more likely to choose a "clearly" answer in Study 1.[193] Respondents, in short, were less sure of what was going on inside the head of the protagonist in Study 4.

In the end, even if the first, blame-based motivated reasoning explanation accounts for the entirety of the variation in "motivating factor" responses between Study 1 and Study 4,[194] it remains the case that in Study 4—with blame-based reasoning absent—a clear majority of respondents found both the "motivating factor" and "because of" language applicable.[195]

3. Summary of Study Design, Results, and Implications for Bostock. Respondents in each of the three main experiments read a short vignette describing an instance of employment discrimination. Each vignette was modelled on the facts of an actual case but was designed to focus exclusively on the employee attribute that was the direct object of the employer's discriminatory intent. Specifically, the employer disadvantaged the employee due to the employee's sexual orientation (Study 1), gender identity (Study 2), or failure to fulfill "traditional" gender stereotypes (Study 3). The employer in each vignette was an equal-opportunity discriminator as between biological sexes (e.g., someone who has an equal aversion to employing male-to-female transgender employees and female-to-

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[191] In Study 1, the boss is described as clearly motivated by a desire, rooted in his beliefs about morality, not to employ gay people. In Study 4, Janet is not described as being motivated by anything in particular.

[192] *See supra* notes 189–190 and accompanying text.

[193] Specifically, whereas only 21% answered either "*probably* yes" or "*probably* no" in response to Study 1's "motivating factor" question, more than twice as many (46%) answered "*probably* yes" or "*probably* no" in response to Study 4's "motivating factor" question. The change in "probably" responses with respect to the "because of" question was similar in direction but smaller in magnitude (from 30% in Study 1 to 42% in Study 4).

[194] For additional reasons to doubt the magnitude of a motivated blame-based reasoning explanation of the findings in Studies 1–3, see *infra* notes 209–210 and accompanying text.

[195] As for the remaining questions (the jury instruction, high- and low-benchmark, and false consensus bias questions), respondents in Study 4 answered them in a manner similar to how respondents in Studies 1, 2, and 3 answered them. For those results, see https://osf.io/ce4sk/.

male transgender employees). Using a stipulated enactment-era definition of an individual's "*sex*" (namely, "the property of being biologically *male* or *female*"), respondents answered questions about the application of the statutory phrases to the events described in the vignette.[196]

The results were consistent across all three studies. As Figures 1 and 2 illustrate, a clear majority of respondents found that Title VII's plain language encompasses sexual-orientation, transgender, and gender-stereotype based discrimination. They did so most resoundingly with respect to transgender discrimination (where

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[196] To clarify the implications of this approach, it might help to compare it to a different survey-based approach employed in a recent paper by Shlomo Klapper, Soren Schmidt, and Tor Tarantola. *See* Klapper et al., *supra* note 51, at 25–26. The studies in Klapper, Schmidt, and Tarantola's paper directly ask survey participants to draw *legal conclusions*, whereas this Article's studies ask about ordinary *meaning*. *See id.* at 25. Consider, for example, the materials that their subjects responded to in a survey based on *Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560 (2012):

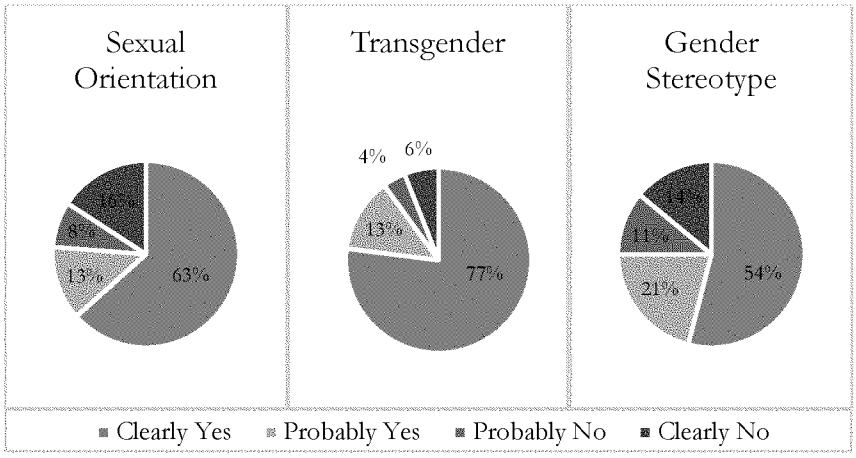
> In some lawsuits, the side that ends up winning can ask the judge to make the losing side compensate them for some of the expenses they had to incur during the lawsuit. According to the law, one of the expenses that is eligible for this kind of compensation request is the services of an "interpreter."
>
> Suppose that in one case, the winning side hired someone to translate written documents as part of the lawsuit. After they won, they asked t[he] judge to make the losing side pay for the services of the translator. The losing side disputed that this counted as an interpreter.
>
> How much do you agree with the following statement:
>
> *The written translator's services are eligible for compensation.*

Klapper et al., *supra* note 51, at 27–28 (emphasis removed). In contrast, this Article's studies, if applied to the issue in *Taniguchi*, would provide participants with something like the following prompt: "Al hired Bert to translate some of Al's documents from one language to another. Bert translated the documents, and Al paid him for his services. By translating the documents, did Bert act as Al's interpreter?"

As the example illustrates, this Article's study, unlike Klapper et al.'s, does not ask participants to perform the more cognitively demanding and bias-prone task of deriving legal conclusions. *See* Lawrence Solum, *Download of the Week: "Ordinary Meaning from Ordinary People" by Klapper, Schmidt, & Tor*, LEGAL THEORY BLOG (June 6, 2020, 9:00 AM), https://lsolum.typepad.com/legaltheory/2020/06/download-of-the-week-ordinary-meaning-from-ordinary-people-by-klapper-schmidt-tor.html ("[Klapper et al.'s] research design conflates the interpretation-construction distinction, assuming that legal effect is meaning. The research subjects are asked only about applications (construction) and not about communicative content (interpretation)."); *cf.* Ward Farnsworth, Dustin Guzior & Anup Malani, *Policy Preferences and Legal Interpretation*, 1 J.L. & CTS. 115, 116 (2013) (adopting a similar approach to Klapper et al. in a survey of law students); Ben-Shahar et al., *supra* note 157, at 1783–84 (adopting a similar approach to Klapper et al. in the context of contract interpretation).

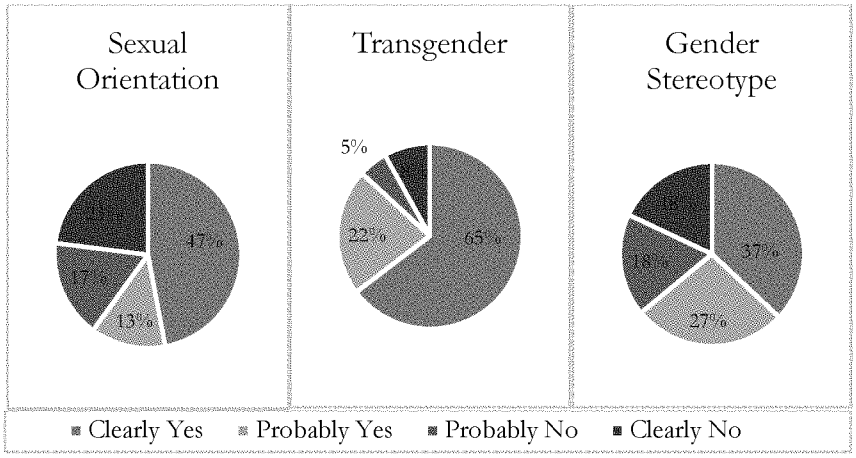
90% of respondents considered the "motivating factor" language satisfied, and 85% considered the "because of" language satisfied). But they also did so with respect to sexual-orientation discrimination (where 77% of respondents considered the "motivating factor" language satisfied, and 60% considered the "because of" language satisfied). And they appeared no more likely to deem the statutory language applicable to more traditional *Price Waterhouse*-style gender stereotype discrimination (indeed, compared to transgender discrimination, respondents were considerably *less* inclined to find *Price Waterhouse*'s discrimination covered by the statute).[197]

FIGURE 1:
"Was [employee's] sex a motivating factor in [employer's] decision to fire [employee]?"



[197] *See supra* note 177 and accompanying text.

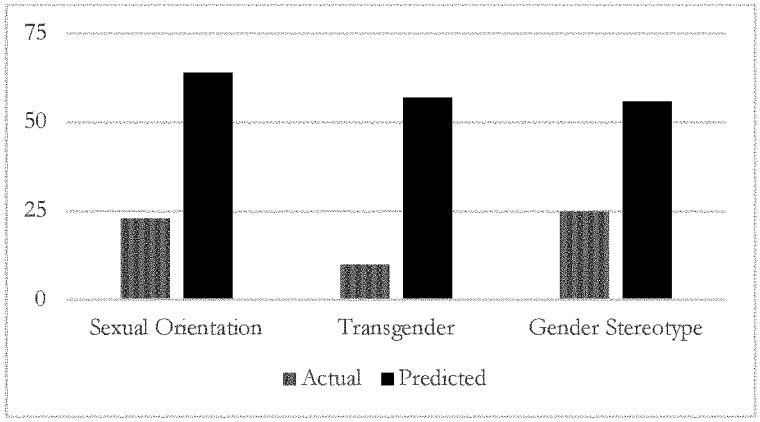
FIGURE 2:
"Was [employee] fired because of [employee's] sex?"



Finally, as Figure 3 illustrates, in all three studies, the respondents in the minority (i.e., those who deemed the statutory language *inapplicable*) exhibited significant false consensus bias, mistakenly believing themselves to be in the majority and predicting on average that anywhere from two to five times more people shared their interpretation than was actually the case.[198]

[198] In Study 1, 81% of those answering "no" estimated that more than half of respondents would agree with them. In Study 2, the figure was 63%, and in Study 3, 69%.

FIGURE 3:
False Consensus Bias
"100 other people are taking this survey. Out of the 100, how many do you predict will agree with you and answer ['NO']?"



The implications for *Bostock* are straightforward. The employees' interpretation better accords with the statutory language's OPM than does the employers' interpretation.[199] Of course, numerous judges and commentators have reached the opposite conclusion. And in doing so, they've been especially emphatic in their embrace of the "ordinary reader" test as the sole determinant of their interpretation.[200] But their confidence may be reminiscent of the false consensus bias exhibited by the survey respondents who adopted the same (minority) interpretation;[201] it belies the actual evidence of ordinary reader understanding. As for Justice Gorsuch's

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[199] And the results may favor the plaintiffs in other civil rights litigation raising similar interpretive questions. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1791–96 app. C (2020) (Alito, J., dissenting) (referencing over 100 federal statutes with similar language); Wittmer v. Phillips 66 Co., 915 F.3d 328, 337–38 (5th Cir. 2019) (Ho, J., concurring) ("[B]ecause federal statutes governing educational institutions employ language indistinguishable from Title VII, this debate also affects virtually every school, college, dormitory, athletic activity, and locker room in America."); Macleod, *supra* note 14, at 959–61 (citing examples of courts importing ordinary meaning determinations from one statute to another, even where the statutes address very different concerns). *But see* Tobia & Mikhail, *supra* note 38, at 17 (finding less plaintiff-friendly results in cases of interracial marriage and pregnancy discrimination, despite those contexts' similar interpretive structure).

[200] *See, e.g.*, *supra* notes 24–29, 77–83 and accompanying text.

[201] *See supra* Figure 3.

majority opinion in *Bostock*, it needn't have made its much-criticized "retreat"[202] away from "ordinary" meaning and toward a "technical" or "literalistic" interpretation of the relevant causal language.[203] What critics deride as an "outlandish judicial performance," "unrestrained in the license it takes" with the text's OPM,[204] turns out to be demonstrably tethered to the text's OPM, even if the *Bostock* majority did not offer a full-throated OPM-based defense.[205]

The best way to further sharpen and test these conclusions is to consider potential objections and explain why they're ultimately unpersuasive.[206]

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[202] Blackman & Barnett, *supra* note 76; *see supra* note 76 and accompanying text.

[203] *See* Blackman & Barnett, *supra* note 76; *Bostock*, 140 S. Ct. at 1824 (Kavanaugh, J., disenting).

[204] Lund, *supra* note 76, at 185.

[205] *See supra* note 78 and accompanying text.

[206] Before moving to more specific objections, here I'll address a broader concern raised in two insightful draft papers that were recently posted online. *See* Mitchell N. Berman & Guha Krishnamurthi, Bostock *Was Bogus: Textualism, Pluralism, and Title VII*, 97 NOTRE DAME L. REV. (forthcoming 2021) [hereinafter B&K], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3777519; Benjamin Eidelson, *Dimensional Disparate Treatment*, 95 S. CAL. L. REV. (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3915787. Both papers emphasize that textualists care about "reasonable" reader understanding, which can differ from the average reader's understanding. B&K at 26–27; Eidelson, *supra*, at 50–52. So far, so good: this Article's studies were designed to prompt responses that reflect the "reasonable" reader's understanding, using criteria for reasonableness that were derived from textualism's commitments and specified in advance of learning the study results. For example, the "reasonable" reader is attentive, hence the use of attention check screening in this Article's experimental materials. *Compare* B&K at 25–26 (arguing that Tobia & Mikhail's study, *supra* note 38, which did not use attention or comprehension checks to screen out any participants, resulted in unreliable responses evincing participants' "carelessness or confusion"), *with supra* notes 154–155, 158–159, 162 and accompanying text (describing this Article's studies' attention and comprehension checks). Additionally, the "reasonable" reader's understanding is not influenced by her own moral views or preferences, hence the inclusion of materials that test whether readers' moral views influenced their interpretations. *See supra* notes 166–167, 170–173, 180–181, Section III.B.*2*.d. Her understanding of the text is not influenced by legislative history, hence the exclusion of any legislative history information. *See* Section III.B.*2*.

But there can be reasonable disagreement concerning the criteria for "reasonable reader understanding" that best reflect textualism's commitments. (Indeed, this Article aims to encourage textualists to explicitly confront their implicit disagreements concerning those criteria, and Part IV is dedicated to exploring some of those hidden fault lines.) In that vein, Eidelson makes an interesting suggestion—namely, that textualism's "reasonable member of

4. Objections and Responses.

a. Interpreter Bias

The first objection goes as follows. Perhaps these studies don't actually reveal how people ordinarily understand and use the

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the public," applying the phrase "because of such individual's X" in response to any given set of facts, would take into account the fact that she is interpreting a *law*. Eidelson, *supra*, at 48–53. Why would textualists' reasonable reader consider that relevant? It can't be, for example, that it leads her to adjust her understanding of the text to arrive at what she considers a good legal outcome, or that the legal context leads her to use whatever non-textualist method of interpretation the enactment-era Congress might have expected judges to use. *Cf. infra* notes 229 and 282 and accompanying text. Instead, the fact that it's a *law* is relevant for the reasonable reader because it leads her to ensure that her case-specific judgments conform to an "analysis" of the relevant language capable of being applied consistently across cases. Eidelson, *supra*, at 53–54. Accordingly, textualism's "reasonable" reader will understand the words "because of" in Title VII to possess a consistent meaning across all cases concerning the phrase "because of such individual's X," regardless of whether "X" is "race, color, religion, sex, or national origin." *Id.* at 53–57. But—and here's the concern—the ordinary readers responding to this Article's surveys, unaware of the legal context, might render judgments in individual cases that turn out to be impossible to incorporate into a coherent legal rule applicable across cases. *See id.* at 52–55; B&K at 26 (arguing that the "patterns of responses *across* the scenarios" in Tobia and Mikhail's study "undermine the[] reliability" of Tobia and Mikhail's results).

My response to this concern is simple: there needn't be any contradiction between a generally applicable analysis of "because of" on the one hand and this Article's study results on the other. My response is admittedly incomplete because this Article doesn't supply the generally applicable analysis of "because of" that fits the Article's study results. Still, there are likely many such accounts. Perhaps the best is Eidelson's "dimensional account," which sets forth what amounts to an elegant rule that applies consistently across cases and appears to fit ordinary linguistic and conceptual intuitions—including those reflected in this Article's study results—along with modern judge-made disparate impact caselaw. *See* Eidelson, *supra*, at 19–48. Or perhaps the best such account would be less of an elegant rule and more of a flexible standard, preserving an even greater number of case-specific intuitions by incorporating additional factors that appear to influence lay and legally trained readers' causal judgments. *Cf. infra* note 282 (discussing textualists' preference for rules over standards and suggesting that it is not a necessary outgrowth of textualist theory); Joshua Knobe & Scott Shapiro, *Proximate Cause Explained: An Essay in Experimental Jurisprudence*, 88 U. CHI. L. REV. 165, 181–97, 235–36 (2021) (discussing modern research concerning ordinary people's causal selection judgments and noting the resemblance of those judgments to judge-developed proximate cause doctrine). In any event, there's no reason to presume that people have such incoherent understandings of common causal language that their responses to a given case—under experimental conditions designed to avoid or detect the influence of biases or misunderstandings—should be considered unreasonable even absent evidence of such biases or misunderstandings.

relevant statutory language. Instead, they reveal only that people *dislike* employers who discriminate against LGBT employees and will choose whichever survey response *expresses* that dislike. If those who answered "yes" to the statutory causation questions did so merely to express condemnation of the employer, perhaps the results are not to be trusted as a source of information about plain meaning.

The experimental data undermine this objection in several ways. First, recall the results in Study 4, where respondents were asked about the applicability of the statutory language to an actor whom they considered blameless or even praiseworthy.[207] The bias objection would predict that the results would be reversed, with most respondents deeming the statutory language inapplicable. But that didn't happen; instead, the Study 4 results were similar to the Study 1 results, with a clear majority continuing to deem the statutory language applicable.[208] Second, recall that statutory causation ascription was the highest in response to the transgender discrimination vignette despite respondents'—and the U.S. public's—relatively low assessment of the blameworthiness of employer transgender discrimination compared to sexual-orientation discrimination.[209] Again, the bias objection would predict the opposite. Third, individual respondents showed sensitivity to small variations in questions, suggesting that they were not merely "seeing red" and answering "yes" to express blame.[210] Taken together, these findings show that moral biases, even if present, were far from decisive in determining responses to the statutory language questions.[211]

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[207] *See supra* notes 183–185 and accompanying text.

[208] *See supra* notes 186–190 and accompanying text.

[209] *See supra* notes 168–173 and accompanying text.

[210] For example, the respondents' answers to the statutory causation questions tracked small variations of causal language at issue (e.g., different responses for "because of" and "motivating factor"), *supra* note 162, and variations in the employee attribute at issue (e.g., different responses for "sex" and "sexual orientation"), *supra* note 163.

[211] For an overview of the current debate in experimental philosophy regarding the role of blame in causality ascription, see Justin Sytsma, The Character of Causation: Investigating the Impact of Character, Knowledge, and Desire on Causal Attributions 2–8 (Dec. 28, 2019) (unpublished manuscript), http://philsci-archive.pitt.edu/16739/, and Icard et al., *supra* note 89.

b. Linguistic Drift

The second kind of potential objection is based on the notion of linguistic drift. It concerns the studies' relevance for finding *original* public meaning, as opposed to merely *present-day* public meaning. Perhaps the ordinary meaning of the words in the statute has changed since 1964 (the initial enactment of Title VII)[212] or 1991 (the amendment adding the "motivating factor" language).[213] As a result, one cannot infer, based on ordinary readers' understanding today, what ordinary readers' understanding would have been at the time of enactment. In fact, so the objection goes, responses to the survey would have been different in 1964 and 1991 in the following way: most respondents back then (unlike now) would *not* have found the statutory language applicable to the events described in the experimental vignettes. And that difference is due to post-enactment change(s) in the ordinary meaning of the statute's words.[214]

To evaluate this objection, let's first consider its application to the statute's causal language and then its application to the term "sex." As to causation, I have been unable to find a single judge, lawyer, or commentator who has claimed that the ordinary meaning of the words "because of" or "motivating factor" has changed since 1964 or 1991. Nor have I been able to find research in other disciplines suggesting that such a drift has occurred; to the contrary, a robust literature in experimental philosophy and cognitive science finds remarkable consistency in causal cognition and use of causal language across time and culture.[215] Absent any explanation for or evidence of the posited drift in causal cognition

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[212] 42 U.S.C. § 2000e.

[213] 42 U.S.C. § 2000e-2(m).

[214] On distinct claims about post-enactment drift in values, preferences, biases, and so forth, as opposed to linguistic drift, see *supra* note 32 and *infra* Sections III.B.*4*.a, IV.B.

[215] For accounts of causality ascription as partially norm-dependent, see Icard et al., *supra* note 89, at 80–81, and Jonathan F. Kominsky & Jonathan Phillips, *Immoral Professors and Malfunctioning Tools: Counterfactual Relevance Accounts Explain the Effect of Norm Violations on Causal Selection*, 43 COGNITIVE SCI., 2019, at 32. Note, however, that such accounts do not claim that the concept of causation—or the meaning of causal language—changes as norms change. *Cf.* Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 559–60 (2006); Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067, 2074 (2018) ("While every statute's *meaning* is fixed at the time of enactment, new *applications* may arise in light of changes in the world.").

or language, the core claim on which the objection depends remains foundationless.

Now consider the linguistic drift objection as applied to the meaning of "sex." First, recall that no judge or litigant has claimed that the ordinary meaning of the word "sex" has changed since 1964; indeed, those who have addressed the matter (majority, dissenting, and concurring judges alike) have affirmatively claimed that the ordinary meaning of the word "sex" has *not* changed since 1964 or 1991.[216] Of course, they could all be wrong. But if they *are* all wrong, why assume that the drift has been toward a more, rather than less, capacious understanding of "sex"? In 1964, before terms like "gender" and "sexual orientation" were widely used, the term "sex" would have covered *more* territory, not less.[217] In short, even assuming linguistic drift, it's far from obvious that the drift would lead modern readers to find the statutory language more readily applicable, rather than less.[218]

Second, recall that all of the judges and lawyers in the *Bostock* litigation stipulated that the term's ordinary meaning (in 1964 and today) is captured by the definition, "the property of being 'biologically *male* or *female*.'"[219] That, of course, is the meaning explicitly stipulated in all of the surveys described above.[220] Among other safeguards in survey design, any respondents who indicated that they used a more capacious definition than the one they were instructed to apply were excluded from the results.[221] So even if judges and lawyers on both sides are wrong to claim that the ordinary meaning of "sex" hasn't changed since 1964, and even if the direction of the change would favor the employees' interpretation if left untouched, the surveys' stipulated definition requirement provides further reason to doubt that the hypothesized change in meaning affected the experimental results at all—let

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[216] *See supra* note 66 (collecting sources and noting that Judge Posner is the sole arguable exception).

[217] *See* Eskridge et al., *supra* note 66, at 1558 ("In 1964, gender and sexual orientation were uncommon words, and sex included concepts that today we might refer to as gender and sexual orientation . . . .").

[218] *See id.* at 1560–64.

[219] *See supra* note 66.

[220] *See supra* Section III.B.*2*.

[221] *See supra* note 156 and accompanying text.

alone decisively or in a direction that would hurt, rather than help, the employers.[222]

c. Surrounding Text

Another potential objection might claim that the surveys failed to provide the respondents with enough of the statute's text. Recall that the full statutory provision at issue makes it unlawful for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment," either "because of such individual's . . . sex,"[223] or where such individual's sex was a "motivating factor" in the employer's challenged employment practice.[224] Perhaps the survey should not have simply asked whether the employer *discharged* (or, as the surveys put it, "*fired*") the employee "because of [the employee's] sex." The survey, so one version of the objection goes, should have instead (or in addition) asked whether the firing constituted "*discrimination against*" the employee "because of [the employee's] sex."[225]

Of course, that objection only has teeth if one thinks that the answer would be different and that this difference would reflect a correct reading of the entire statutory provision. In other words, the objection only makes sense if you think that one can "*discharge*" an individual "because of [the employee's] . . . sex" *without* thereby "*discharg[ing]* any individual, *or otherwise* . . . *discriminat[ing]* against any individual with respect to his compensation, terms, conditions, or privileges of employment," on the basis of sex.[226] That strikes me—and seemingly most judges—as a strained reading of the statute. But who's to say? Maybe *that* question should be thrown

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[222] *See supra* note 146. For discussion of a distinct set of claims premised on drift in interpreter values, biases, or background assumptions, see *infra* Section IV.B.

[223] 42 U.S.C. § 2000e-2(a).

[224] 42 U.S.C. § 2000e-2(m).

[225] 42 U.S.C. § 2000e-2(a). And, presumably, should have asked whether the employer "discriminated against" the employee by allowing "sex" to be a "motivating factor" in his decision to fire her. 42 U.S.C. § 2000e-2(m).

[226] 42 U.S.C. § 2000e-2(a) (emphasis added). Or that an employee's race, religion, sex, etc. can be a "motivating factor" in the decision to terminate the employee without the termination constituting "discrimination against" the employee on that basis. 42 U.S.C. § 2000e-2(m).

to the ordinary reader. So maybe, the objection might proceed, the respondents should have been given the full language of the statute (at which point they could interpret "or otherwise discriminate against" as modifying the earlier verb, "discharge," if they saw fit). The survey could then have simply asked whether the statute prohibits what the employer did in the vignette.[227]

The problem with this objection is that it proposes an approach too far afield from textualists' concern with the ordinary, everyday meaning of words and phrases. First, consider the possibility of simply giving respondents the full text of the statutory provision. This complex, legal-sounding format informs the respondent that they are interpreting a *law*.[228] As a result, respondents would likely be influenced (or "biased") by all sorts extratextual beliefs and preferences regarding laws and their interpretation—influences that the textualists' reasonable ordinary reader treats as irrelevant. As explained further in Section IV.B, textualists are apparently not interested in ordinary readers' implicitly non-textualist approaches to legal interpretation.[229] Instead, textualists are interested in the ordinary, everyday, non-"legal" meaning of words and phrases, which they then use to determine the legal effect of those words and

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[227] *See, e.g.*, *supra* note 196 (discussing Klapper et al.'s studies concerning other statutes).

[228] Granted, this may be inevitable with respect to some statutes. Consider, for example, *Smith v. United States*, concerning whether trading a gun for narcotics constituted the "use" of a firearm. 508 U.S. 223, 228–29 (1993). It might be misleading (in a manner favoring the prosecution's interpretation) to present respondents with a vignette in which a protagonist trades a gun for drugs and then simply ask respondents whether he "used" the gun. Instead, one might need to ask whether the protagonist used the gun "during and in relation to any crime of violence or drug trafficking crime." *Id.* at 241 (Scalia, J., dissenting) (quoting 18 U.S.C. § 924(c)(1)). Providing the relevant surrounding text here might unavoidably alert the reader that she is interpreting a law. *See* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 111 (2001) [hereinafter Manning, *Textualism and the Equity of the Statute*] ("Focusing on the contextual gloss put upon 'using a firearm' in the context of committing a crime, the *Smith* dissent arrived at a more plausible conclusion . . . ." (citing *Smith*, 508 U.S. at 241 (Scalia, J., dissenting))); United States v. Alvarez-Sanchez, 511 U.S. 350, 358 (1994) (interpreting the phrase "arrest or other detention"); Deal v. United States, 508 U.S. 129, 131–32 (1993) (interpreting the word "conviction"); *cf.* Manning, *Textualism and the Equity of the Statute*, *supra*, at 111 n.432 (contrasting the meaning of "drew blood" when the phrase "appears in the Criminal Code" from when "it appears in the Health Code").

[229] *Cf.* Struchiner et al., *supra* note 51, at 327 (demonstrating that ordinary people's interpretations of a rule are influenced by considerations of its purpose, even when that purpose is not reflected in the text of the relevant law).

phrases.[230] That's why, when looking for language's OPM, textualists turn to examples from everyday usage, popular dictionaries, and non-legal corpora—rather than, say, popular beliefs about the purpose of the statute.[231]

Finally, even if respondents had not been given the full text of the statutory provisions and had simply been asked, "Did [Employer] *discriminate against* [Employee] because of [Employee's] sex?," instead of "Did [Employer] *fire* [Employee] because of [Employee's] sex?," this framing would still have been problematic. Once again, the proposal makes sense only if the statute's "or otherwise discriminate against" language modifies the earlier term "discharge."[232] Let's assume that it does. Still, the proposal additionally requires that the phrase "'*discriminated against*' because of *X*" adds some requirement over and above merely "'discharged' or 'fired' because of *X*." Justice Kavanaugh implies at one point that he disavows that additional requirement,[233] but Justice Alito appears to endorse it.[234] So let's consider it. What exactly would the phrase "discriminate against" add beyond merely "discharge"? The idea seems to be that it adds an element of *moral judgment*—a declaration that the act or actor was "*biased*," "*prejudice[d]*," "*unfair*," and so on.[235] Admittedly, if

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[230] *See, e.g.*, Solum, *supra* note 196. At least, this is true barring some indication that the terms at issue are terms of art. *See supra* notes 1, 106 and accompanying text. *But see* Eidelson, *supra* note 206, at 48–53.

[231] For a contrary proposal, see Amy Widman, *The Rostrum Principle: Why the Boundaries of the Public Forum Matter to Statutory Interpretation*, 65 FLA. L. REV. 1447, 1463 (2013).

[232] *See supra* note 226 and accompanying text.

[233] *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1826 n.3 (2020) (Kavanaugh, J., dissenting) ("[T]he ordinary meaning of the statutory phrase 'discriminate' because of sex is the same as the statutory phrase 'to fail or refuse to hire or to discharge any individual' because of sex.").

[234] *See, e.g.*, *id.* at 1769 n.22 (Alito, J., dissenting) ("'*[D]iscriminate against*' was 'associated with negative treatment directed at members of a discrete group.' . . . Thus, as used in 1964, '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." (quoting Phillips, *supra* note 115, at 5, 7)). *But see supra* notes 121–125 and accompanying text (arguing that the Phillips study from which Alito derives this conclusion fails to support it).

[235] *Id.* (emphasis added) (quoting Phillips, *supra* note 115, at 7). Judgments of causal selection and causal strength also involve an element of normativity, though not necessarily moral normativity. *See* Icard et al., *supra* note 89, at 88; Knobe & Shapiro, *supra* note 206, at 190–96 (discussing the relationship between causal judgments, norm violations, and blameworthiness).

that's so—i.e., if the statute's use of the term "discrimination" *does* indeed impose a requirement that the act be considered morally wrong as determined by enactment-era popular morality—then the dissenters' interpretation may indeed win the day in *Bostock*[236] (as well as in many anti-discrimination precedents that have come out—mistakenly, on this view—in favor of plaintiffs[237]).

d. How Clear is "Clear"?

A final type of potential objection is narrower: even if the experimental findings show that the employees have the *better* reading as a matter of OPM, the findings don't show that the text's OPM is so clear that the cases can or should be resolved through ordinary public meaning analysis alone.[238] At most, the results show that the text is vague or ambiguous. Granted, all judges who have opined on the matter claim otherwise,[239] and textualists are famously reluctant to conclude that the OPM of statutory language is unclear.[240] But, it can happen.[241] Maybe Title VII's text is sufficiently unclear to make even textualists conclude that it is ambiguous, turning to extratextual considerations (e.g., legislative history, normative values, etc.) to resolve the dispute.[242]

There are two ways textualists might spell out such a claim, but each one commits them to a position that they'd be unwilling to accept. First, the textualist might claim that the experiments reveal insufficient *rates of interpreter agreement* to render the text

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[236] On the other hand, even Justice Alito seemingly claims that the majority's interpretation fails *absent* any such requirement of enactment-era popular immorality: "Even if we totally disregard the societal norms of 1964, the text of Title VII does not support the Court's holding." *Bostock*, 140 S. Ct. at 1774 (Alito, J., dissenting).

[237] *E.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion) (holding that Title VII prohibits discrimination based on gender stereotyping, regardless of how prevalent or accepted gender stereotype-based decision-making was in 1964).

[238] *See supra* notes 5, 44.

[239] *See supra* note 66.

[240] *See supra* note 4.

[241] *See, e.g.*, Kethledge, *supra* note 4, at 320 (admitting that, despite never having found a statutory ambiguity in ten years as a federal judge, "statutory ambiguities . . . *happen*, but they are pretty rare" (emphasis added)).

[242] *See infra* note 278 and accompanying text.

"clear."[243] For example, the claim might be that, whatever the line is for textual "clarity," it must be above the 60% agreement observed with respect to the statute's "because of" language and sexual-orientation discrimination, and perhaps even above the 77% agreement observed with respect to the statute's "motivating factor" language and sexual-orientation discrimination.[244] This strikes me as a more demanding standard than textualists would embrace, even if not impossibly demanding.[245] Still, could textualist judges really demand more than the ***90%*** agreement observed in the transgender context?[246] Put another way, if at the time Title VII was enacted, 90% of ordinary readers would have considered its plain language to prohibit what we now call transgender discrimination, could textualists really maintain that the 10% of ordinary readers who would have disagreed effectively reveal the statute's ordinary meaning to be unclear? If so, plain meaning interpretation would be dead in its tracks. Textualists would not be willing to accept such a demanding standard of ordinary reader consensus.

A second, alternative form of the objection might focus not on the percentage of ordinary readers who agree or disagree, but rather on the *degree of confidence exhibited by interpreters adopting what*

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[243] *See* Mark Tushnet, Bostock *and Originalism*, YALE UNIV. PRESS BLOG (July 15, 2020), http://blog.yalebooks.com/2020/07/15/bostock-and-originalism/ ("One difficulty with original public meaning originalism can be called 'quantitative.' When you try to figure out what a reasonable person would have understood the words to mean, you rapidly find out, almost always, that some reasonable people understood the words to mean one thing while other reasonable people understood them to mean something different.").

[244] *See supra* notes 160–169 and accompanying text.

[245] *See, e.g.*, Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1828 (2020) (Kavanaugh, J., dissenting) ("[C]ourts heed how '*most people*' 'would have understood' the text of a statute when enacted" (emphasis added) (quoting New Prime Inc. v. Oliveira, 139 S. Ct. 532, 539 (2019))); Kavanaugh, *supra* note 2, at 2137 (discussing the difficulty of setting a "clarity threshold" to determine when a statute is unambiguous).

In their recent draft, Berman and Krishnamurthi write that the "because of" results concerning sexual-orientation discrimination "seem[] to us as supportive of the conclusion that the locution has *no* ordinary meaning than that it bears the ordinary meaning that Gorsuch claimed for it." B&K, *supra* note 206, at 25; *see supra* Figure 2. I'm very sympathetic to the claim that this degree of dissensus *should* lead interpreters to resolve the dispute on grounds other than the text's supposed "plain meaning." But to reiterate, I'm skeptical that most textualists would be willing to do so in practice. *Cf.* Kavanaugh, *supra* note 2, at 2129; Kethledge, *supra* note 4, at 320. In any event, Berman and Krishnamurthi argue that as a matter of textualist interpretation, the text here *is* clear, though they contend that its sole "ordinary meaning" is the *Bostock* dissenters' favored meaning. B&K, *supra* note 4, at 3–5.

[246] *See supra* note 168 and accompanying text.

turns out to be the minority interpretation. Recall that in all of the studies reported above, those who deemed the statutory language *inapplicable*, and were therefore in the minority, nonetheless incorrectly believed that *theirs* was the majority interpretation—often believing that more than three times as many people agreed with their interpretation than was actually the case.[247] And in the Title VII LGBT litigation, judges adopting that same minority interpretation have, if anything, been even *more* emphatic in their ordinary meaning claims than the majority judges who, it turns out, actually reflect most ordinary readers' understanding.[248] Perhaps statutory language must be deemed "unclear" whenever interpreters in the minority (whether ordinary readers or judges channeling them) possess such high (albeit mistaken) confidence. Perhaps. But I suspect that this second gloss would prove just as untenable as the first. False consensus bias appears to be ubiquitous among ordinary readers and judges alike.[249] If textualists were this deferential toward interpreters who confidently (but mistakenly) claim that their interpretation tracks ordinary reader understanding, plain meaning interpretation would again be dead in its tracks. Instead, modern Supreme Court decisions are replete with examples of dueling majority and dissenting opinions confidently making conflicting claims about the plain meaning of statutory text.[250] Faced with disagreement over OPM, textualist judges don't (and wouldn't be willing to) retreat to the position that the text must be unclear after all.[251]

IV. TEXTUALISM'S UNASKED QUESTIONS

So when the text's OPM is in fact "clear," why do judges reach such starkly contradictory conclusions about it? The previous Part suggested one explanation: interpreters often *lack probative*

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[247] *See supra* Figure 3.

[248] *See, e.g.*, *supra* notes 73–74 and accompanying text.

[249] *See* Solan et al., *supra* note 155, at 1285–94 (providing experimental evidence of both laypeople and judges exhibiting false consensus bias in contract interpretation); *see also* James A. Macleod, *Reporting Certainty*, 2019 BYU L. REV. 473, 510–11 (discussing lawyers' and judges' "over-confidence in the correctness and obviousness of their assertions").

[250] *See* SLOCUM, *supra* note 23, at 292–97 app. D.

[251] *See id.*; *cf.* Alex Stein, *Law and the Epistemology of Disagreements*, 96 WASH. U. L. REV. 51, 96–97 (2018).

evidence of OPM. They speculate about ordinary reader understanding without ever asking ordinary readers. Lacking evidence that could justifiably move them toward consensus, they become increasingly entrenched in their initial hunches, bolstered by confirmation and false-consensus biases.

This Part offers a second, complimentary explanation: interpreters often implicitly invoke *different conceptions of OPM*—that is, they make different assumptions about what exactly they're looking for evidence *of* in the first place. While textualists agree that the text's OPM is determined by enactment-era reasonable reader understanding, they often implicitly disagree—with each other, and with themselves from case to case—about the sense of reader "understanding" at issue.[252] The applied-meaning-experiment method brings these implicit disagreements to light. Textualists' divergent conceptions of readers' relevant "understanding," and hence, of OPM, correspond to textualists' divergent answers to the following two questions, posed here in the terms of the applied-meaning-experiment method: (1) *What type of question* would reveal readers' relevant "understanding"? (2) *What types of extratextual information* would textualists' "reasonable" reader treat as relevant to answering it?[253]

Confronting each of these questions illuminates often overlooked but highly consequential ambiguities at the heart of textualist theory. The resolution of each ambiguity determines outcomes of many cases, and textualists' failure to explicitly address either ambiguity helps explain the stubborn persistence of inter-textualist disagreement. Without principled resolution, each ambiguity threatens to undermine textualism as a theory of interpretation, rendering it normatively unattractive at best and theoretically incoherent at worst. In what follows, I outline each ambiguity in more detail and provide examples of the way its resolution affects case outcomes. I then suggest how textualists ought to resolve each ambiguity if they are to preserve textualism's theoretical coherence and honor its stated normative commitments.

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[252] *See infra* notes 261–262 and accompanying text.

[253] A third question—how clear is "clear"—comes into play only after these two questions have been answered. *See supra* note 44; Section III.B.*4*.d.

A. WHAT TYPE OF QUESTION REVEALS RELEVANT "UNDERSTANDING"?

The first ambiguity concerns the type of question one imagines textualists' ordinary reader answering to reveal her "understanding" of the statutory language. There are two broad possibilities. First, she could be answering a yes-or-no question of the form, "Is *X* a *Y*?" If and only if the answer is "yes," then the statute's explicit mention of *Y* encompasses *X*. Drawing on Hart's famous "no vehicles in the park" hypothetical, this first approach is akin to pointing at, say, a baby stroller, and asking the ordinary reader, "Is that a vehicle?"[254] This was the approach utilized in the experimental survey studies reported in Section III.B, where respondents were shown an instance of, e.g., sexual-orientation discrimination, and were then asked whether the event described was also an instance of sex discrimination. I'll call this the "*Applied*" approach to ordinary public meaning.[255] It elucidates the extension and boundaries of a statutory term's application, situating the interpretive query in the basic factual context that gave rise to the interpretive dispute. In *Bostock*, the majority at times appears to favor an Applied approach to determining the text's ordinary public meaning.[256]

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[254] *See* Hart, *supra* note 45, at 607 (presenting the no-vehicles hypothetical). *But see* Goldfarb, *supra* note 2, at 9–12 (drawing on the no-vehicles example to illustrate "category membership" determinations and arguing that they arrive at conclusions that differ from "Ordinary/Typical Understanding": "[F]or purposes of Ordinary/Typical Understanding, the interpretive context does not encompass the specific interpretive question that is to be decided. Situations in which the discussion focuses on the meaning of a word or the scope of a category are out of the ordinary . . . .").

[255] For those familiar with the interpretation-construction distinction, it may be worth noting that the choice of an Applied approach (or any alternative to it) occurs prior to the "construction" stage. This is true even on a relatively expansive construal of "construction," such as Larry Solum's. *See* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 103, 105 n.21 (2010) [hereinafter Solum, *The Interpretation-Construction Distinction*] (explaining that, on Solum's stipulated definition of "construction" as the act of "giving legal effect to an authoritative text," construction occurs in all cases, even where it "does no work in determining legal content").

[256] *See, e.g.*, Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1748 (2020) (using an example from everyday life to illustrate that "[o]ften in life and law" there are multiple "but-for factors" that bring about some event and framing the relevant question as whether, in ordinary usage, one would "*deny* that" an event occurred "because of" each of those factors (emphasis added)).

In contrast, "*Abstract*" approaches provide the reader *only* the facts *or* the statutory language—not both. An Abstract approach then asks the reader a more open-ended question to see whether her initial response contains the missing statutory language or the missing facts, as the case may be. Abstract approaches, by cutting off the ordinary reader's answer after that initial response, produce a much narrower interpretation of statutory language.

Consider each of the two types of Abstract approach—"facts-only" and "statute-only"—in turn. A *facts-only* Abstract approach asks a question of the form, "What is a *Y*?" Then, unless people's first answer is "*X*," *X* would not count as a *Y*.[257] So, using the "no vehicles in the park" example, the question might be, while pointing at a picture of a baby stroller, "What is *that*?" If people's initial response is anything other than "a *vehicle*," then a baby stroller doesn't count as a vehicle under the statute. In *Bostock*, a facts-only Abstract approach would ask, e.g., "Why did [employer] fire [employee]?" If respondents' initial answer is "because of [employee's] *sexual orientation*"—or, indeed, anything other than "because of [employee's] *sex*"—then the employee's "sex" doesn't count as a cause of the firing for purposes of the statute.[258] In effect, a facts-only Abstract approach asks what word or phrase people would most naturally use to describe the fact pattern at issue in the

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[257] I mention a first-answer cutoff for simplicity. One could expand this to, say, their first five answers (or, for that matter, the answers they give until the point where they pause for a long time, indicating difficulty coming up with further answers). The key is just that the Abstract approach uses a cutoff. Without one, the results of the Abstract approach would produce the same set of applications as the Applied approach (at least in theory). Respondents in an Abstract approach would eventually name everything that they would have answered "yes" to in an Applied approach.

[258] Abstract approaches run into problems related to the need to specify the "level" of category with which the ordinary reader should respond. *See* JOHN R. TAYLOR, LINGUISTIC CATEGORIZATION 48–53 (3d ed. 2003). For example, consider a facts-only Abstract approach with respect to a ban on vehicles. When shown a photo of a truck and asked, "What is *that*?," one might respond, "a vehicle," but one might alternatively respond, "a truck." So, to truly operationalize such an approach, one would likely need to give the respondent options, each at the same "level" of categorization, from which the ordinary reader could choose. This might not seem troublesome because we all know that trucks are vehicles, so we could just be sure not to list "truck" as one of the options competing with "vehicle." But now turn back to the prohibition on "sex discrimination": would "sex discrimination" be listed alongside (i.e., on the same "level" as) "sexual-orientation discrimination," or would "sex discrimination" instead be treated as an umbrella term (like "vehicle"), with "sexual-orientation discrimination" a subcategory (like "truck")? Making such decisions would in many cases beg the question.

case.[259] In *Bostock*, the majority readily concedes (as the experimental data indicate[260]) that a facts-only Abstract approach would favor the employers' interpretation: "If asked by a friend . . . why they were fired," Justice Gorsuch writes, "even today's plaintiffs would likely respond that it was because they were gay or transgender, not because of sex."[261] But whereas Justice Kavanaugh's dissenting opinion appears to favor this facts-only Abstract approach, the majority considers it inapposite.[262]

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[259] After conceptually replicating the results of Section III.B's Applied approach, Tobia & Mikhail, *supra* note 38, at 15, go on to investigate another variation on an Applied approach—one that generates something closer to the answer a facts-only Abstract approach would generate. Specifically, Tobia & Mikhail ask their respondents to select one among the following four descriptions: (A) "[Employee] was fired because of his sex."; (B) "[Employee] was fired because of his sexual orientation."; (C) "[Employee] was fired because of *both* his sex *and* his sexual orientation."; (D) "[Employee] was not fired because of either his sex or his sexual orientation." *Id.* (emphasis added). Most respondents chose (B), *not* (C). *Id.* at 18. That is, only very few people chose to describe the firing as resulting from *both* sex *and* sexual orientation. *Id.* Mikhail and Tobia speculate that this "Both Factors" finding "is capturing something about what makes for a good—or bad—explanation in this context, in addition to something about meaning." *Id.* at 21 n.64 (citing H. Paul Grice, *Logic and Conversation*, *in* 3 SYNTAX AND SEMANTICS 41 (Peter Cole & Jerry L. Morgan eds., 1975)). The facts-only Abstract approach seems to aim at precisely the same thing—namely, finding the most apt explanation. And in any controversial case, the statutory term at issue does not figure in the single most apt explanation of the facts. For example, in *Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560 (2012), if given the choice to describe the translator as "*both* an 'interpreter' *and* a 'translator,'" most people would instead choose merely "translator" (i.e., they'd choose the single most apt description—the same term they'd use when responding to a facts-only Abstract question). *See supra* note 196. Similarly, in *Smith v. United States*, 508 U.S. 223 (1993), if given the choice to describe the trading of guns for narcotics as "*both* 'using' the gun *and* 'trading the gun for narcotics,'" most people would instead choose merely "trading the gun for narcotics" (again, the most apt description, i.e., the one they'd provide in response to a facts-only Abstract question). *See supra* note 228.

[260] *See supra* note 163; *see also* Tobia & Mikhail, *supra* note 38, at 18 fig.3.

[261] *Bostock*, 140 S. Ct. at 1745.

[262] *Compare id.* ("[A]n employee who has just been fired is likely to identify the primary or most direct cause rather than list literally every but-for cause. To do otherwise would be tiring at best. But these conversational conventions do not control Title VII's legal analysis, which asks simply whether sex was a but-for cause."), *with id.* at 1828 (Kavanaugh, J., dissenting) (emphasizing the alleged importance of the majority's concession regarding the employee's hypothetical conversational response to his or her friends), *and* Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339, 367, 370 (7th Cir. 2017) (en banc) (Sykes, J., dissenting) (insisting that there is only one "*real* motivation for Ivy Tech's decision," and that the statute's failure to invoke its single-most-apt description—"sexual orientation"—dooms plaintiff's case).

A *statute-only* Abstract approach, in contrast, would move much further from the factual context at issue. When interpreting a statutory prohibition on vehicles in the park, it would ask, e.g., "What is an example of a *vehicle*?"[263] When interpreting Title VII's sex discrimination provision, it would ask, "What is an example of a person being fired because of their *sex*?" Unless the respondent's initial response is, e.g., "a *baby stroller*," or, "a person getting fired for being gay or lesbian," those answers would not be treated as falling under the ambit of the respective statutes. In effect, the statute-only Abstract approach asks for only the prototypical examples of the thing mentioned in the statute.[264] In *Bostock*, Justice Alito's dissenting opinion leans heavily on a statute-only Abstract approach to ordinary public meaning.[265] He emphasizes, for example, that what we now call transgender discrimination would not "have crossed [the ordinary reader's] mind" upon reading the words in the statute[266] without considering what that enactment-era reader *would* have called it in the event that it *had*

As another example of Justice Kavanaugh arguably favoring an Abstract approach in *Bostock*, consider his discussion of the "baby stroller" vehicles-in-the-park example mentioned above to demonstrate "how ordinary meaning differs from literal meaning. A statutory ban on 'vehicles in the park' would literally encompass a baby stroller. But no good judge would interpret the statute that way because the word 'vehicle,' in its ordinary meaning, does not encompass baby strollers." *Bostock*, 140 S. Ct. at 1825 (Kavanaugh, J., dissenting). Justice Kavanaugh's argument here is ambiguous as between an Applied approach and an Abstract approach, but his argument is more obviously true if one assumes an Abstract approach. (That said, Kavanaugh appears to be correct that "'vehicle,' in its ordinary meaning, does not encompass baby strollers" even if one adopts an Applied approach to ordinary meaning. *Id.*; *see* Tobia, *supra* note 3, at 763–64 (demonstrating empirically that most people deny that a baby stroller is a "vehicle").

[263] *See Bostock*, 140 S. Ct. at 1826 (Kavanaugh, J., dissenting) ("[I]n everyday speech 'vehicle' calls up the picture of a thing moving on land." (quoting McBoyle v. United States, 283 U.S. 25, 26 (1931))); *McBoyle*, 283 U.S. at 27 (stating that because the term "vehicle . . . evoke[s] in the common mind *only* the picture of vehicles moving on land," the definition should not be construed broadly to include other things like an "aircraft" (emphasis added)).

[264] Previous scholarship in law and linguistics has focused on similar prototype-based approaches to statutory interpretation. *See, e.g.*, LAWRENCE SOLAN, THE LANGUAGE OF STATUTES: LAWS AND THEIR INTERPRETATION 64–69 (2010) (discussing prototype-based approaches to ordinary meaning interpretation); Hart, *supra* note 45, at 607 (discussing the vehicles-in-the-park example and both the "core of settled meaning" and "penumbra of debatable cases" that arise from general rules).

[265] *Bostock*, 140 S. Ct. at 1767 (Alito, J., dissenting) ("In 1964, ordinary Americans reading the text of Title VII would not have dreamed that discrimination because of sex meant discrimination because of sexual orientation, much less gender identity.").

[266] *Id.*

crossed her mind (i.e., without considering a facts-only Abstract approach).[267]

Applied and Abstract approaches are each compatible with the ambiguous notion of ordinary reader "understanding" (as well as other popular, similarly ambiguous locutions).[268] Yet they often provide very different answers to the question of OPM in a given case.[269] There is little pattern or consistency in judges' adoption of

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[267] *Cf.* Eskridge et al., *supra* note 66, at 1550–58 (arguing that "sex" had a broader meaning in 1964 than it does today).

[268] These other ambiguous locutions include, for example, instances in which judges write that an ordinary person "would not say that" *X*, without specifying the context imagined (e.g., whether the person is considering the applicability of *X* to the situation at hand [an Applied approach], or instead whether the person is offering her first-most-apt description of the situation [a facts-only Abstract approach]). *See, e.g.*, *Bostock*, 140 S. Ct. at 1828 (Kavanaugh, J., dissenting) ("[F]ew in 1964 (or today) *would describe* a firing because of sexual orientation as a firing because of sex." (emphasis added)); Milner v. Dep't of Navy, 562 U.S. 562, 577–78 (2011) ("We *would not say*, in ordinary parlance, that a 'personnel file' is any file an employee uses, or that a 'personnel department' is any department in which an employee serves. No more *would we say* that a 'personnel rule or practice' is any rule or practice that assists an employee in doing her job." (emphasis added)); *Bostock*, 140 S. Ct. at 1826 (Kavanaugh, J., dissenting) (citing *Milner*, 562 U.S. at 578, as an example of "[t]he Court rebuff[ing] a literal reading of 'personnel rules'"); Abramski v. United States, 573 U.S. 169, 196 (2014) (Scalia, J., dissenting) (arguing that a statute applicable to purchasers may not apply to the facts at hand, concerning an agent who purchases on behalf of a principal: "[I]f I give my son $10 and tell him to pick up milk and eggs at the store, no English speaker *would say that* the store 'sells' the milk and eggs to me." (emphasis added)); Roberts v. Sea-Land Servs., Inc., 566 U.S. 93, 102 n.5 (2012) ("A person who slipped and fell on a negligently maintained sidewalk *would not say* that she had been 'awarded money damages' if the business responsible for the sidewalk voluntarily paid her hospital bills." (emphasis added)); Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 185 (2005) (Thomas, J., dissenting) ("[S]uppose a sexist air traffic controller withheld landing permission for a plane because the pilot was a woman. While the sex discrimination against the female pilot no doubt adversely impacted male passengers aboard that plane, *one would never say* that they were discriminated against 'on the basis of sex' by the controller's action." (emphasis added)).

[269] *See, e.g.*, Voisine v. United States, 136 S. Ct. 2272, 2278–80 (2016) (interpreting the meaning of "use of force" in the context of merely reckless behavior). In *Voisine*, Justice Kagan used an Applied approach and found the statute applicable:

> [S]uppose a person throws a plate in anger against the wall near where his wife is standing. *That hurl counts as a 'use' of force* even if the husband did not know for certain (or have as an object), but only recognized a substantial risk, that a shard from the plate would ricochet and injure his wife.

Id. at 2279 (emphasis added); *see also id.* (providing additional illustrations). In dissent, Justice Thomas appeared to favor a statute-only Abstract approach, and therefore found the statute *in*applicable: "When a person talks about 'using force' against another, one thinks of

a given approach from one case to another.[270] Nor do judges articulate any express justification for adopting whichever approach they use in a given case.

Unfortunately, scholars likewise appear not to have attempted to resolve this ambiguity regarding relevant reader "understanding."[271] John Manning, the foremost academic proponent of textualism—and the most frequently quoted textualist scholar in *Bostock*[272]—seems at times to assume the propriety of an

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intentional acts—punching, kicking, shoving, or using a weapon." *Id.* at 2284 (Thomas, J., dissenting); *see also id.* at 2284–85 (providing illustrations reflecting a facts-only Abstract approach).

[270] Justice Scalia, for example, adopted different types of approaches from case to case without providing any explicit justification, seemingly without any principled or predictable pattern. *Compare, e.g.*, Loughrin v. United States, 573 U.S. 351, 367–69 (2014) (Scalia, J., concurring) (adopting an Applied approach, providing numerous hypothetical fact patterns and asking, for each, whether an ordinary speaker would or would not *agree* that the statutory language applied), *with, e.g.*, Johnson v. United States, 529 U.S. 694, 718–19 (2000) (Scalia, J., dissenting) (impliedly endorsing a facts-only Abstract approach: "[T]he acid test of whether a word can reasonably bear a particular meaning is whether you could use the word in that sense at a cocktail party without having people look at you funny.").

That said, in any given case it's possible that a judge employs one approach merely as a means of obtaining *evidence* of the outcome of the *other* approach, the latter being the one corresponding to the judge's conception of OPM. This possibility makes it doubly challenging to discern judges' implicit conceptions of OPM. *See infra* Section IV.B (noting a similar difficulty when interpreting judges' statements implicating extratextual considerations).

[271] Consider, for example, scholars' responses to Judge Easterbrook's opinion in United States v. Marshall, 908 F.2d 1312, 1317 (7th Cir. 1990) (interpreting the reach of a statute concerning a "mixture or substance containing a detectable amount" of LSD and reasoning that "[o]rdinary parlance calls the paper containing tiny crystals of LSD a mixture"), *aff'd sub nom.* Chapman v. United States, 500 U.S. 453 (1991). *Compare, e.g.*, RICHARD L. HASEN, THE JUSTICE OF CONTRADICTIONS: ANTONIN SCALIA AND THE POLITICS OF DISRUPTION 28 (2018) (criticizing Judge Easterbrook's opinion by asking, rhetorically, "What ordinary speaker of English would refer to LSD-laced blotter paper as a 'mixture' of drug and paper?"), *and* Ian Samuel, *Textualism for Realists*, 117 MICH. L. REV. 1085, 1094 (2019) (reviewing HASEN, *supra*) ("That response, which I think is absolutely correct, *sounds in textualism*."), *with* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2432, 2452–53 n.244 (2003) [hereinafter Manning, *The Absurdity Doctrine*] (noting, with seeming approval, the Court's opinion affirming Judge Easterbrook's decision on textualist grounds). Of course, Judge Easterbrook *may* have been considering *either* an Applied or an Abstract approach, as may Hasen, Samuel, and Manning. But much of the rhetorical force of the dueling positions comes from assuming the propriety of an Applied approach in Easterbrook and Manning's case and assuming the propriety of an Abstract approach in Hasen and Samuel's case.

[272] *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1766–67 (2020) (Alito, J., dissenting) (first citing John Manning, *Textualism and the Equity of the Statute*, *supra* note 228; then citing

Applied approach. So, for example, he approvingly quotes Judge Easterbrook's claim that "[w]hen most of the relevant community would agree on the meaning of a text *as applied to a particular fact situation*, that text is considered *clear in context*."[273] Further emphasizing the importance of interpreting words "in context," Manning explains that textualists ask how readers "would have understood the statutory text, *as applied to the problem before the judge*,"[274] i.e., while "*thinking about the same problem*" the judge faces.[275]

On the other hand, recent scholarship advocating the use of corpus linguistics in statutory interpretation has tended to favor a statute-only Abstract approach, which would ask about the sense or application of the statute's term that is "likely to be the one that first comes to mind when [readers] think of [the statute's] term."[276] These scholars, citing "the rationales that drive us to consider ordinary meaning," suggest that "[a] concern for fair notice and protection of reliance interests may well direct us to stop at th[is] top-of-mind sense of a statutory term" because "the first [sense] that comes to mind . . . may be the sense that the public will have in mind upon reading the terms of a statute."[277]

In the end, while caselaw and scholarship are all over the map, textualism's underlying rationales probably favor an Applied

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John Manning, *What Divides Textualists from Purposivists?*, *supra* note 1; and then citing Manning, *The Absurdity Doctrine*, *supra* note 271); *id.* at 1825 (Kavanaugh, J., dissenting) (citing Manning, *The Absurdity Doctrine*, *supra* note 271).

[273] Manning, *Textualism and the Equity of the Statute*, *supra* note 228, at 17 & n.66 (emphasis added).

[274] Manning, *The Absurdity Doctrine*, *supra* note 271, at 2458 (emphasis added) (citing Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988)); *see* John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 445 n.84 (2005) [hereinafter Manning, *Textualism and Legislative Intent*].

[275] Manning, *Textualism and Legislative Intent*, *supra* note 274, at 420–21 (emphasis added) (quoting Easterbrook, *supra* note 274, at 61).

[276] Lee & Mouritsen, *supra* note 1, at 874 (contrasting this approach with a "broader, 'reflective' sense" that would reflect the fact that, "[i]f pressed, some people might concede that the term encompasses" something else). *But see* Slocum & Gries, *supra* note 114, at 22, 25 ("Corpus-linguistic data provide nothing but frequencies," and "frequency has been shown to be not as good a measure of 'commonness' and 'ease of accessibility in a speaker's mind' as Lee and Mouritsen presuppose.").

[277] Lee & Mouritsen, *supra* note 1, at 874.

approach to ordinary reader understanding.[278] Consider the values of "fair notice" and "protection of reliance interests"—both of which the *Bostock* majority and dissents emphasize as reasons to focus on ordinary meaning.[279] As noted in the previous paragraph, some take these values to favor a statute-only Abstract approach, on the ground that such an approach produces a narrow, "top-of-mind" reading of statutes.[280] Granted, that reasoning might be compelling in the criminal context where narrower readings systematically favor defendants (though I doubt it's compelling even there[281]). Still, in non-criminal contexts like Title VII, fair notice and reliance interests don't favor a narrower or broader construal of a statute per se; the employee and employer have roughly equal need for notice of their rights and responsibilities.

Instead, what seems to matter for purposes of notice and reliance is what would happen in the following sort of situation: An ordinary person (whether employer or employee) is contemplating some course of action (e.g., firing someone) or event (e.g., getting fired)

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[278] To be sure, textualists *could* simply say that whenever Applied and Abstract approaches reach different outcomes, the text's OPM is thereby rendered "unclear," making recourse to extratextual considerations necessary (i.e., putting interpreters in the "construction zone" rather than the realm of "interpretation"). *See* Solum, *The Interpretation-Construction Distinction*, *supra* note 255, at 100, 108. They would be unwilling to do so, however, because this would render the text at issue in most disputed cases unclear. *See infra* Section IV.B.

[279] *See, e.g.*, Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1738 (2020) ("If judges could . . . remodel . . . statutory terms inspired only by extratextual sources and our own imaginations, we would . . . deny the people the right to continue relying on the original meaning of the law they have counted on . . . ."); *id.* at 1828 (Kavanaugh, J., dissenting) ("A literalist approach to interpreting phrases . . . deprives the citizenry of fair notice of what the law is."); Lee & Mouritsen, *supra* note 1, at 874.

[280] Lee & Mouritsen, *supra* note 1, at 874.

[281] The more principled approach, in terms of fair notice and lenity, is to employ an Applied approach but require greater clarity for criminal statutes than others. In any event, as a matter of black-letter law, the rule of lenity applies only *after* one has determined that two or more interpretations are in equipoise (at which point the tie favors the defendant). *See* 73 AM. JUR. 2D *Statutes* § 188 (2021) ("[T]he view has been followed that the rule of lenity is a tie-breaking principle of relevance when two reasonable interpretations of the same provision stand in relative equipoise."). To make that equipoise determination, one must *first* decide how to weigh the answer an Applied approach provides relative to the answer an Abstract approach provides. To state the point more generally using the interpretation-construction distinction: to determine what *constructions* are permissible, one must first determine the set of *interpretations* that capture the text's OPM. *See* Solum, *The Interpretation-Construction Distinction*, *supra* note 255, at 106–07. It's at that first, interpretation, stage that the choice between Applied and Abstract approaches is typically decisive.

and consults the statutory provision at issue. The question is: would they understand that statutory provision to reach the course of action or event contemplated? An Applied approach tracks that ordinary reader's answer. An Abstract approach, on the other hand, will construe the statute much more narrowly than anticipated. The ideal of "fair notice"—already tenuously connected to the modern world of voluminous, often technical, law—becomes especially strange if it is conceptualized as notice *to someone without any particular course of action or event in mind* (as a statute-only Abstract approach would have it), *or without a particular law they are consulting* (as a facts-only Abstract approach would have it).[282] And indeed, the very notion of "reliance interests" implies agents who have considered the relevant law and its application to a contemplated course of action or event—i.e., the sorts of ordinary readers whose understanding the Applied approach tracks.

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[282] *Cf. Bostock*, 140 S. Ct. at 1828 (Kavanaugh, J., dissenting) ("[T]he 'linchpin of statutory interpretation is *ordinary meaning*, for that is going to be most accessible to *the citizenry desirous of following the law* . . . .'" (second emphasis added) (first quoting ESKRIDGE, INTERPRETING LAW, *supra* note 1, at 81; and then citing SCALIA, *supra* note 1, at 17)).

Two clarifications. First, this is not to say that it is natural, in ordinary cognition, to make the sorts of binary yes-or-no judgments that the law requires, especially in cases dealing with in-or-out categorization judgments. *See* Brian G. Slocum, *Replacing the Flawed* Chevron *Standard*, 60 WM. & MARY L. REV. 195, 238–39 (2018) (explaining that a binary approach conflicts with the natural tendency to categorize as "a matter of degree"). Second, if textualism is in fact (as opposed to in its own professed impetuses) driven primarily by a preference for rules over standards, as Caleb Nelson has suggested, then textualists may prefer an Abstract approach insofar as it allows them to pick where to draw the cutoff line so as to create bright-line rules. *See* Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 350 (2005) ("[J]udges whom we think of as textualists have explicitly noted their relative affinity for rules."). *Compare, e.g.*, County of Maui v. Haw. Wildlife Fund, 140 S. Ct. 1462, 1482–83 (2020) (Alito, J., dissenting) (faulting the majority for failing to craft a bright-line rule), *and id.* at 1481 (Thomas, J., dissenting) ("As the Court acknowledges, its opinion gives almost no guidance, save for a list of seven factors."), *and Bostock*, 140 S. Ct. at 1761 (Alito, J., dissenting) (faulting the majority for "graft[ing] onto Title VII some arbitrary line separating the things that are related closely enough [to 'sex'] and those that are not," rather than providing a bright line rule), *with, e.g.*, *Maui*, 140 S. Ct. at 1478 (Kavanaugh, J., concurring) (declining to join Justices Thomas and Alito in dissent because "the statute does not establish a bright-line test," or, in other words, because "[t]he source of the vagueness is Congress' statutory text"). *But see, e.g.*, Manning, *Textualism and Legislative Intent*, *supra* note 274, at 424 (noting textualists' emphasis on respecting the deal legislators struck, implicitly including their use of broad or vague terms); Manning, *The Absurdity Doctrine*, *supra* note 271, at 2411–12 ("[T]extualists argue that if a judge curtails or extends the clear terms of a statutory text, he or she risks disturbing a carefully wrought (and perhaps unrecorded) legislative deal.").

Now, even if an Applied approach is better on fair notice and reliance grounds, textualists might still worry that an Applied approach sacrifices a different virtue of OPM-based textualism emphasized in the *Bostock* dissents—namely, that textualism "facilitates the *democratic accountability* of America's elected representatives for the laws they enact."[283] When citizens can "ascertain the law by reading the words of the statute," so this theory goes, they can better hold legislators accountable for the laws they pass.[284] Let's assume, as we did with the "fair notice" rationale, that this "democratic accountability" rationale bears some resemblance to how the world works.[285] Does textualism's democratic accountability rationale favor a statute-only Abstract approach to interpretation—an interpretation that limits statutes to the "top-of-mind" applications citizens imagine upon reading the words in the statute—rather than an Applied approach that construes statutes more broadly?

Textualists' "democratic accountability" rationale likely favors neither approach over the other. The issue turns on how much imagination one assumes citizens (and, as a result, legislators) possess or should possess. So, for example, in *Bostock* Justice Alito "imagine[s] this scene[:] . . . a group of average Americans" in 1964 "decide[s] to read the text of [Title VII] with the aim of writing or calling their representatives in Congress and conveying their approval or disapproval."[286] Justice Alito claims that they "would not have dreamed" that its text applied to, say, discrimination against transgender people.[287] If true, this might indeed be troubling for purposes of democratic accountability. But once one dispenses with anachronistic labels like "transgender," I'm not so sure it's true. In the terms that they might have used at the time, the citizens' hypothetical might have been: "What if someone born male begins dressing and acting like a female and gets fired as a result? Does the statute prohibit *that*?" Is that such an unimaginable potential application for these concerned citizens to have dreamed up? (Think of the dystopian expectations suggested

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[283] *Bostock*, 140 S. Ct. at 1825 (Kavanaugh, J., dissenting) (emphasis added).

[284] *Id.*; *see* Macleod, *supra* note 14, at 980.

[285] *But see, e.g.*, CHRISTOPHER H. ACHEN & LARRY M. BARTELS, DEMOCRACY FOR REALISTS: WHY ELECTIONS DO NOT PRODUCE RESPONSIVE GOVERNMENT (Tali Mendelberg ed., 2016).

[286] 140 S. Ct. at 1767 (Alito, J., dissenting).

[287] *Id.*

by Phyllis Schlafly with respect to the Equal Rights Amendment[288] or fears of "death panels" under the Affordable Care Act.[289] Concerned citizens are creative.[290])

In any event, if Alito's hypothetical citizens *had* considered the matter, the data reported in Section II.B indicate that they *would* have thought the statute's plain language prohibited the employer's action—at least, if these concerned citizens had disregarded their own preferences and any other irrelevant extratextual beliefs or attitudes.

B. WHAT TYPES OF EXTRATEXTUAL INFORMATION ARE RELEVANT?

That last proviso raises the second ambiguity in textualists' notion of ordinary reader understanding, which concerns the types of extratextual information the ordinary reader treats as relevant to her interpretive task. Note that what fundamentally matters here isn't so much whether one imagines that textualists' "ordinary reader" is especially *well-informed* (or in any event has firm beliefs, whether true or false) about drafting history, public opinion, public expectations, or other matters outside the statute's text. Instead, for present purposes what matters is whether those sorts of considerations affect her understanding of the statute's language. The question, in other words, concerns what extratextual factors she treats as *relevant* to interpreting statutes, regardless of how informed or uninformed one imagines her to be.

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[288] *See* MARJORIE J. SPRUILL, DIVIDED WE STAND: THE BATTLE OVER WOMEN'S RIGHTS AND FAMILY VALUES THAT POLARIZED AMERICAN POLITICS 102–104 (2017) (discussing how Schlafly and others exploited the public's fears to campaign against the Equal Rights Amendment).

[289] *See* Brendan Nyhan, *Why the "Death Panel" Myth Wouldn't Die: Misinformation in the Health Care Reform Debate*, 8 FORUM, no. 1, 2010, at 1. On the possibility of systematically undesirable interpretations, generated by the combination of (a) ordinary folks' expectations and (b) ordinary folks' negative attitudes toward Congress and/or opposition to particular legislation, see *infra* note 308 and accompanying text.

[290] Note also that the "democratic accountability" rationale can't require that Congress consider and articulate all intended applications in the text of statutes that would otherwise be more vaguely worded. Such a requirement would go against textualists' firm emphasis on honoring the deal Congress strikes as evidenced by the text it enacts, including when it adopts broad or vague language. *See* Manning, *Textualism and Legislative Intent*, *supra* note 274, at 424.

Myriad sub-questions about particular types of information, beliefs, and preferences quickly arise. Table 1 provides some examples. The point isn't to answer each of the questions raised, but rather to appreciate how much room there is for divergent answers to lead to divergent interpretations of a text's OPM.

TABLE 1: *Does textualism's "ordinary reader" consider . . .*

. . . consequences of each possible interpretation?	If so, then how extensive is her prediction of the legal consequences? Does she consider the ramifications for the development of entire bodies of law? Only for the parties in the case at hand? And how accurate must her prediction be? Can she be influenced by popular misunderstandings?[291]
. . . the public's **preferences**?[292]	If so, can these preferences stem from factually incorrect beliefs?
. . . the public's **application expectations**?	If so, can these expectations stem from factually incorrect beliefs? From the public's wishful, pessimistic, or otherwise biased thinking? From their cynical view of Congress's expectations, preferences, intent, or purposes? From predictions of how judges would interpret the language?
. . . the intent or purpose of the language's enactment?	If so, what sort of extratextual evidence of intent or purpose might she consider? Must it be accurate? Widely-accessible? Actually widely accessed? Widely understood? Can it include legislative history?

[291] Textualists appear for the most part to posit an ordinary reader who is not influenced by her own false beliefs. *Cf.* Solum, *Triangulating Public Meaning*, *supra* note 32, at 1637–38 (explaining that "original expected applications" can be "*evidence* of original public meaning" but can be "incorrect" when, for example, "the expectation was based on a false belief about the facts"). But it's unclear whether the ordinary reader can be influenced by her knowledge of *the public*'s widely shared false beliefs.

[292] Textualists' ordinary reader disregards her "personal preferences regarding the outcome" of the interpretive dispute. SCALIA & GARNER, *supra* note 2, at 33. But again, it's unclear whether the ordinary reader can be influenced by her knowledge of *the public*'s widely shared preferences.

The *Bostock* opinions display the sorts of confusion that this second ambiguity fosters. Justice Gorsuch's majority opinion purports to foreswear reliance on extratextual information altogether.[293] Justice Alito's dissenting opinion likewise implies that nothing outside the text is needed to reach the correct interpretation.[294] Still, Justice Alito goes on to emphasize that textualists ought to consider far more by way of extratextual information than does Justice Gorsuch.[295] Alito focuses on the importance of "societal norms," such as society's views about the (im)morality of gay or transgender people.[296] But it's unclear *why* such attitudes would, on Alito's view, appropriately affect reasonable ordinary readers' understanding of the text. (Is it because they would have shed light on congressional intent, purpose, or expectations? On public expectations? Public preferences?[297]) That said, even if Justice Alito doesn't explain exactly why these norms are relevant, his explicit mention of extratextual influences is at least more informative than judges' typical practice of leaving the entire topic implicitly to their audience's imagination.

Unfortunately, textualist scholarship provides surprisingly little guidance here, too. John Manning's work, as both dissenting opinions emphasize, notes the relevance of "context" for properly understanding statutory language.[298] But the types of relevant

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[293] *E.g.*, Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020) ("When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law . . . .").

[294] *E.g.*, *id.* at 1774 (Alito, J., dissenting) ("Even if we totally disregard the societal norms of 1964, the text of Title VII does not support the Court's holding.").

[295] *See, e.g.*, *id.* at 1767 ("[W]hen textualism is properly understood, it calls for an examination of the social context in which a statute was enacted . . . .").

[296] *Id.* at 1769.

[297] Moreover, when judges appear to describe completely unidealized, actual people who had opinions about the statute at the time of its enactment, it's often unclear whether judges are doing so because such people's actually-held, unidealized views reflect (the judge's conception of) OPM, or merely because people's actually-held, unidealized views provide *evidence* of how a *reasonable* reader *would have* understood the text (e.g., without believing falsehoods, without being swayed by media portrayals of statutory purpose, etc.)—the *latter* reflecting the judge's conception of OPM. This makes it doubly difficult to discern judges' conceptions of OPM with respect to the extratextual information issue.

[298] *See Bostock*, 140 S. Ct. at 1766–67 (Alito, J., dissenting) ("[S]tatutes convey meaning only because members of a relevant linguistic community apply shared background

"context" are tricky to pin down. Justice Alito quotes at length from Manning's article, *What Divides Textualists from Purposivists?*, emphasizing that, as Manning writes, "[o]ne can make sense of others' communications only by placing them in their *appropriate social* and linguistic *context*."[299] But as Manning makes clear in the same article, where the text is clear as a matter of "semantic usage," "contextual evidence that relates to questions of *policy*," such as "*public knowledge of the mischief the lawmakers sought to address*" is irrelevant.[300] What, then, counts as "appropriate social context" according to textualists? It remains unclear.[301]

Nor have OPM-based constitutional originalists offered much guidance; even the most careful accounts of OPM contain only vague assertions about proper and improper extratextual considerations

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conventions for understanding how particular words are used in particular contexts." (alteration in original) (quoting Manning, *The Absurdity Doctrine*, *supra* note 271, at 2457)); *id.* at 1825 (Kavanaugh, J., dissenting) ("[S]tatutory interpretation asks 'how a reasonable person, conversant with the relevant social and linguistic conventions, would read the text in context.'" (quoting Manning, *The Absurdity Doctrine*, *supra* note 271, at 2392–93)).

[299] *Id.* at 1766 (Alito, J., dissenting) (emphasis added) (quoting Manning, *What Divides Textualists from Purposivists?*, *supra* note 1, at 79–80).

[300] Manning, *What Divides Textualists from Purposivists?*, *supra* note 1, at 92–93 (emphasis added); *see also* Manning, *Textualism and Legislative Intent*, *supra* note 274, at 424–25 ("[Textualists] subscribe to the general principle that texts should be taken at face value . . . even if the legislation will then have an awkward relationship to the apparent background intention or purpose that produced it.").

[301] Consider the following candidate for a piece of "appropriate," i.e., relevant, "social context," taken from Alito's *Bostock* dissent: "[D]iscrimination because of sexual orientation is not historically tied to a project that aims to subjugate either men or women," and is therefore not "sexist." 140 S. Ct. at 1765. Assuming that's true, why is it relevant? Because it bears on "public knowledge of the mischief [Congress] sought to address," i.e., sexism (in which case Manning would not deem it relevant), or instead because it is "contextual evidence of semantic usage" that shows what the words "sex" and "discrimination" meant when they appeared together in the statute (in which case he would deem it relevant)? *See* Manning, *What Divides Textualists from Purposivists?*, *supra* note 1, at 93. These sorts of distinctions—between evidence of "semantic meaning" (good) and evidence of anything else (bad)—are often extremely difficult to draw in any principled manner. Nor is the more generally worded distinction between relevant and irrelevant extratextual "context" a subject that has received sustained attention in Manning's or in other textualists' work. *See, e.g.*, Manning, *What Divides Textualists from Purposivists?*, *supra* note 1, at 110 (explaining that "[t]extualists of course believe that language has meaning only in context," and that "[t]his recognition requires them routinely to consult extratextual sources," but noting, with respect to those extratextual sources, that only "*in cases of ambiguity*, [are] textualists . . . even willing to treat indicia of purpose as legitimate parts of the relevant context" (emphasis added)).

for purposes of determining ordinary reader understanding.[302] And even if constitutional originalists were to flesh out a more robust account, there are a number of reasons why statutory textualists might decide to adopt a divergent conception.[303]

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[302] Originalist theorists like Larry Solum, for example, have given careful accounts of "public meaning." *E.g.*, Solum, *Originalist Methodology*, *supra* note 3, at 275–76; Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 497–98 (2013). But the resulting conceptions of it are, as Richard Fallon has noted, "strikingly open-ended." Fallon, *supra* note 1, at 1267. This is understandable given their focus on offering an account of "public meaning" that distinguishes it from other types of meaning addressed in theoretical linguistics and the philosophy of language. Still, the result is that many more specific, and outcome-determinative, questions concerning the potential relevance of various types of extratextual information remain unanswered. *See id.*; SLOCUM, *supra* note 23, at 5–10, 21–26 (discussing accounts of meaning developed by Scott Soames, Lawrence Solum, and Andrei Marmor); *see also* Andrei Marmor, *Introduction* to PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 8 (Andrei Marmor & Scott Soames eds., 2011) (discussing various factors involved in understanding "the ordinary meaning of the language in its textual context"). So, for example, Larry Solum explains that the "context of constitutional communication" is relevant to finding the OPM of the Constitution's text. Solum, *The Fixation Thesis*, *supra* note 3, at 28–29. That "context" is comprised of "publicly available" information, likely including "facts about the American Revolution, experience under the Articles of Confederation, and the general shape of the common law legal regime in effect throughout the United States." *Id.* But it isn't possible to infer from this cursory non-exhaustive list what an analogous full list of relevant contextual considerations would look like for a statute such as the Civil Rights Act of 1964.

[303] While some OPM constitutional originalists explicitly posit a hypothetical reader who, they emphasize, is "objective" and fully informed as to all publicly available ratification-era information, others appear to favor a somewhat less idealized hypothetical reader. *See* Mulligan, *supra* note 129, at 406 (describing "reasonable person" standards for constitutional interpretation); *see also* Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 724 (2011) (describing the evolution of originalists' ideal reader). But there are three interconnected reasons why originalists may be attracted to a less-idealized ordinary reader conception of OPM, while textualists might prefer a more idealized conception. First, for constitutional originalists, the decision to opt for a less idealized ordinary reader may often be premised on the *normative significance of constitutional ratification*—a consideration absent in statutory interpretation. In other words, originalists might have special reasons to care what ratifiers actually happened to think (even if it was in some sense uninformed or biased). *See* Solum, *Originalist Methodology*, *supra* note 3, at 275 (discussing the Constitution's "complex process of authorship intended to make the communicative content of the constitutional text accessible to the public at the time the text went through the ratification process"). Second, a less idealized conception of the ordinary reader might also be less fraught in the constitutional context because the *text is relatively short and the attention paid to it relatively great*, compared to modern statutes, perhaps decreasing the degree of ignorance among its enactment-era lay readers. Third, the *infrequency of constitutional ratification* may make enactment-era laypeople's implicit methods of constitutional

In the end, most textualist scholarship and judicial rhetoric suggests that the ordinary reader test resembles Justice Gorsuch's low-extratextual-information approach.[304] After all, the alternative approach threatens to render textualism incoherent by turning the "ordinary reader" test (and, therefore, "public meaning"-based interpretation) into merely an alternative entry point for the same sorts of considerations that characterize non-textualist methods of interpretation (e.g., considerations of the legislature's or public's preferences, expectations, purposes, intent, and so forth). Textualists emphasize that such considerations render otherwise clear text amenable to an unacceptably diverse set of contradictory interpretations, making easy cases hard.[305] They portray the ordinary reader test as a means of avoiding extratextual considerations like statutory purpose, instead focusing on a commonsense understanding of language;[306] the surrounding *text*—not, e.g., popular beliefs about congressional intent or statutory purpose—provides the relevant context. (Moreover, imagine the alternative for a moment in light of the fact that popular beliefs about the content of new legislation are often premised on fear and

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interpretation more palatable as a relevant consideration, whereas pegging statutory interpretation to laypeople's implicit interpretive methods at the time of statutes' passage might result in an extreme patchwork of interpretive approaches across many different statutes enacted at different times.

The upshot is that even if constitutional originalists were to provide a comprehensive list of relevant extratextual considerations (i.e., the list discussed at the end of the previous footnote), it's not obvious that it would be instructive for purposes of statutory interpretation. *But see supra* note 1 (noting textualists' and originalists' seemingly universal assumption that "public meaning" refers to the same type of meaning in both statutory and constitutional interpretation).

[304] *See* John F. Manning, *Competing Presumptions About Statutory Coherence*, 74 FORDHAM L. REV. 2009, 2010 (2006) (discussing Justice Scalia's view that "judges should hew closely to the semantic import of what Congress as a whole has been able to agree upon").

[305] *E.g.*, SCALIA & GARNER, *supra* note 2, at xxvii–iii (noting "uncertainty and confusion" resulting from a lack of clear "interpretive conventions"); Manning, *Justice Scalia and the Idea of Judicial Restraint*, supra note 10, at 750 (explaining how a "text-based approach" limits judges' individual discretion); Grove, *supra* note 53, at 270 (explaining how textualism can constrain judges).

[306] *E.g.*, Barrett, *supra* note 2, at 2203 (characterizing textualists' use of dictionary definitions as aiming to ascertain the "meaning attributed to words by ordinary English speakers").

cynicism about Congress.[307] An "ordinary reader" test that privileges ordinary people's cynical assumptions about congressional intent could result in the systematic adoption of the public's most-feared, least-favored outcomes—effectively treating statutes as the product of "[*un*]reasonable persons pursuing [*un*]reasonable purposes [*un*]reasonably."[308])

Still, many scholars discussing OPM do posit a reasonable ordinary reader influenced by at least *some* extratextual considerations.[309] The problem remains: which ones? Without more clarity, this second ambiguity in textualists' conception of OPM will continue to undermine claims of empirical determinacy in cases where textualists assert that the text is clear. In other words, dissensus might continue, even if all of the empirical facts are known, because textualists might disagree about which facts are relevant to determining a text's OPM.[310]

V. CONCLUSION

The *Bostock* litigation illustrates the sort of interpretive conflict that increasingly typifies our textualist era. The ordinary meaning of a few common words becomes the fulcrum of largescale social and political division. Judges, conscious of their limited mandate, consider "how the ordinary user of the English language might understand that statutory language"[311] and give the resulting "commonsense" understanding dispositive effect,[312] thereby purportedly acting as "agents of the people."[313]

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[307] *See, e.g.*, *Congress and the Public*, GALLUP, https://news.gallup.com/poll/1600/Congress-Public.aspx (last visited Nov. 6, 2021) (noting that, as of September 2021, 69% of respondents polled disapproved of the way Congress is handling its job, and 62% had very little or no confidence in Congress); Nyhan, *supra* note 289, at 1 (providing examples of misinformation playing on public fears regarding health care reform).

[308] *Cf.* HENRY M. HART JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1378 (William N. Eskridge Jr. & Philip P. Frickey eds., 1995) (contending that statutes should be construed as if drafted by "reasonable persons pursuing reasonable purposes reasonably").

[309] *See, e.g.*, Manning, *What Divides Textualists from Purposivists?*, *supra* note 1, at 110.

[310] *Cf.* Grove, *supra* note 53, at 281–85 (describing how the majority and dissenting Justices' relied on different considerations to interpret Title VII in *Bostock*).

[311] Kavanaugh, *supra* note 2, at 2150 n.158.

[312] Scalia & Manning, *supra* note 7, at 1610.

[313] Barrett, *supra* note 2, at 2195.

By actually obtaining evidence of ordinary readers' understanding, this Article followed the logic and rhetoric of textualist judges and scholars where it led. In *Bostock*, it led to evidence supporting the employees' enactment-era OPM claims and undermining the employers' contrary claims. In the process, the Article's experimental approach brought to light two important ambiguities in judges' and scholars' conceptions of OPM. Without positing any bad faith, it demonstrated how textualists' implicit, case-by-case resolution of those ambiguities currently facilitates a less constrained, less transparent, and less principled interpretive methodology than many textualists appear to realize. Finally, this Article suggested how textualists ought to resolve each ambiguity if they want to preserve textualism's coherence and honor its normative commitments.