CLEARTEXTUALISM AND SEXUALISM

The simplest questions are the hardest to answer. Northrop Frye

The Supreme Court's landmark opinion of Bostock v. Clayton County is now loved and loathed for its broad protection of homosexual employees from employment discrimination. Equally important to the legal scholar is Bostock's approach to statutory interpretation. This article seeks to analyze Bostock's use of textualism through the lens of comparative law. A review of the relevant cases and statutes worldwide suggests that, unlike Bostock, "sex" does not include an individual's sexual orientation.

In *Bostock v. Clayton County*, the Supreme Court concluded that Title VII of the Civil Rights Act of 1964 prohibited employment discrimination against homosexual and transgender employees.[1] *Bostock* is a blockbuster of a case; its ramifications go well beyond the confines of sexual orientation and transgender employment discrimination.[2] *Bostock* stands to completely redefine the Court's usage of textualism.[3] Until now, textualism incorporated the context of a statute to properly understand the statute's command.[4] *Bostock* has effectively supplanted this textualism with a form of hyperliteralism that does not account for the historical and societal

1 Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020).

2 *See* Equal Credit Opportunity (Regulation B); Discrimination on the Bases of Sexual Orientation and Gender Identity, 12 C.F.R. § 1002 (2021); Grimm v. Gloucester Cty. Sch. Bd., 972 F.3d 586 (4th Cir. 2020), *as amended* (Aug. 28, 2020) (holding school district's policy of preventing transgender students from using the bathroom designated for said students' gender identification violated Title IX); Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cty., 968 F.3d 1286 (11th Cir. 2020) (holding school district's policy of preventing transgender students from using the bathroom designated for said students' gender identification violated the Equal Protection Clause and Title IX); Frappied v. Affinity Gaming Black Hawk, LLC, 966 F.3d 1038 (10th Cir. 2020) (holding sex plus age discrimination is prohibited, relying extensively upon *Bostock*); William N. Eskridge Jr. & Christopher R. Riano, *Bostock: A Statutory Super-Precedent for Sex and Gender Minorities*, AM. CONST. SOC'Y (July 1, 2020), https://www.acslaw.org/expertforum/bostock-a-statutory-super-precedent-for-sex-and-gender-minorities/ ("Because the Court's reasoning was sweeping and normatively powerful, *Bostock* will be a foundational decision with broad ramifications for a wide array of Americans. Indeed, we expect it to be a *super precedent*, a judicial landmark debated, celebrated, taught to law students, and interpreted for years to come.") (emphasis in original).

3 For an interesting perspective explaining how *Bostock*'s majority and dissent are a reflection of competing subcategories of textualism, *see* Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265 (2020).

4 *See* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2458 (2003).

context in which a statute was passed.[5] Instead, the static word has become subject to the forces of "living literalism."[6]

Against this backdrop, the broader purpose of this note is to show how comparative law can be an invaluable tool for statutory construction.[7] In particular, this note examines the peculiar nature of *Bostock*'s statutory construction of Title VII through a comparative analysis of sexual orientation discrimination decisions and statutes worldwide. This note attempts to show that the international community's jurisprudence largely would disagree with *Bostock*'s outcome.[8]

I. TEXTUALISM AND COMPARATIVE LAW

Textualism is defined as "[t]he doctrine that the words of a governing text are of paramount concern and that what they fairly convey in their context is what the text means."[9] While Justice Antonin Scalia is widely heralded (or maligned) as the champion of textualism, textualism has been an important school of thought in American jurisprudence for well over 100 years.[10]

Numerous considerations support the textualist approach to statutory interpretation, with many of them showcased in *Bostock*.[11] First, only the

5 *See* Jonathan Skrmetti, *Symposium: The Triumph of Textualism: 'Only the Written Word Is the Law'*, SCOTUSBLOG (Jun. 15, 2020, 9:04 PM), https://www.scotusblog.com/2020/06/symposium-the-triumph-of-textualism-only-the-written-word-is-the-law/. While this proposition seems far from racy at first blush, hyperliteralism in fact distorts the meaning of the text, as will be discussed.

6 *Bostock*, 140 S. Ct. at 1836 (Kavanaugh, J., dissenting).

7 *See* Jens C. Dammann, *The Role of Comparative Law in Statutory and Constitutional Interpretation*, 14 ST. THOMAS L. REV. 513 (2002).

8 This note takes no stance on the policy issues underlying the advantages and disadvantages of having federal legislation that prohibits sexual orientation employment discrimination. Albeit an important issue, this is well beyond the scope of this note. For competing views as to the merit of passing the Equality Act, which would amend the Civil Rights Act of 1964 to explicitly include "sexual orientation" as a protected class, *compare The Equality Act*, HUM. RTS. CAMPAIGN (June 18, 2020), https://www.hrc.org/resources/the-equality-act, *with The Equality Act: How Could Sexual Orientation and Gender Identity (SOGI) Laws Affect You?*, HERITAGE FOUND., https://www.heritage.org/gender/heritage-explains/the-equality-act (last visited Dec. 17, 2020).

9 *Textualism*, BLACK'S LAW DICTIONARY (11th ed. 2019).

10 *See* Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899).

11 Despite the numerous advantages to textualism, critics note multiple drawbacks to textualist statutory construction. First, a judge's overreliance upon the text of a statute may unexpectedly cut against what the majority of Congress actually envisioned when ratifying a statute. Bradford Mank, *Textualism's Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 KY. L.J. 527, 540 (1997). Second, constitutional and statutory language is often broad and ambiguous, suggesting that Congress invited future reinterpretation of these words, as opposed to a reliance upon what words meant once upon a

words of the statute have survived the scrutiny of both Congress and the President; to allow courts to operate beyond the parameters of the statute's text would violate the American legislative system.[12] Second, textualism creates accountability for elected officials. If judges were allowed to look beyond the statute's text for determinative guidance, judges would functionally be the editors of the final draft of legislation when a case reaches their chambers, thereby obfuscating the legislators' connection to a given statute's impact.[13] Third, the true legislative intent of Congress cannot be conclusively determined, even with the most lucid record of a statute's legislative history.[14] Fourth, textualism's simple approach to statutory interpretation cultivates the public's confidence in America's legal system.[15] Fifth, the simplicity of textualism's approach to statutory interpretation helps the public follow the law with greater ease, as the public can rely on the face value of the law when making important personal or

time. *See* Ken Levy, Opinion, *The Problems With Originalism*, N.Y. TIMES (Mar. 22, 2017), https://www.nytimes.com/2017/03/22/opinion/the-problems-with-originalism.html. Third, while textualists emphasize the primacy of the legal text's command over legislative history, they nonetheless selectively rely upon legislative history and extrinsic evidence to reach their conclusions. *See* William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1519–22 (1998) (reviewing ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997)) [hereinafter Eskridge Jr., *Textualism, the Unknown Ideal?*]. However, the drawbacks do not by definition discount the value of textualism; all forms of statutory interpretation have their respective advantages and disadvantages. Furthermore, these critiques do little to take away from textualism's merits. Mank's concern for textualism causing Congress's intentions to be forgotten can easily be solved by Congress writing statutes more clearly (although this solution only solves Mank's concerns regarding statutes that Congress would enact hereon). Levy's criticism is also misguided in that not every statute contains ambiguous phraseology that would theoretically suggest Congress's invitation to interpret the statute according to the contemporary meaning of the terms. As such, this argument fails to support a carte blanche license to use purposivism or the like when interpreting statutes. Finally, Eskridge's point is stickier, and merits more than a passing footnote to deal with. For further discussion on this point, *see* William N. Eskridge, Jr., *Should the Supreme Court Read The Federalist but Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301 (1998); John F. Manning, *Textualism and the Role of The Federalist in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337 (1998).

12 *See* Bostock v. Clayton Cty., 140 S. Ct. 1731, 1738 (2020); The Honorable Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610, 1612 (2012) ("Nothing but the text has received the approval of the majority of the legislature and of the President . . . Nothing but the text reflects the full legislature's purpose. Nothing.").

13 *Bostock*, 140 S. Ct. at 1738; Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1262 (2009).

14 *See* John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 420 (2005) ("Given the undeniable complexity of the legislative process, interpreters simply cannot know if a requisite majority of enactors knew of or assented to the contents of any particular piece of legislative history.").

15 *See Bostock*, 140 S. Ct. at 1836 (Alito, J., dissenting) (noting that "the public understandably becomes confused about who the policymakers really are in our system of separated powers, and inevitably becomes cynical about the oft-repeated aspiration that judges base their decisions on law rather than on personal preference" absent a principled application of textualist statutory interpretation); Eskridge, Jr., *Textualism, the Unknown Ideal?*, *supra* note 11, at 1514.

business decisions.[16] These considerations have brought us to the current state of judicial affairs; as Justice Kagan remarked, "[w]e're all textualists now."[17]

In *Bostock*, a critical component of both the majority and dissent's opinions revolved around the usage of textualism in interpreting statutes. Justice Neil Gorsuch, writing for the majority, wrote that America "is a society of written laws. Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations."[18] Justice Gorsuch's ode to textualism aside, Justice Alito referred to Justice Gorsuch's opinion as "a pirate ship [that] sails under a textualist flag."[19] A comparative international review of the interpretation and ratification of legislation dealing with sexual orientation discrimination will provide us with a greater understanding of how Title VII should be interpreted, and how we should interpret statutes in general.[20]

As previously noted, the hallmark of textualism is that statutory construction is confined to the words of the statute. That is not to say that plain-meaning alone triumphs; words are only understood in their context.[21] *Bostock* illustrates that the ordinary meaning of a statute in conjunction with context may sometimes prove to be elusive.[22] It is in these scenarios that extratextual considerations should be considered—even by the most ardent

16 *See Bostock*, 140 S. Ct. at 1738 (majority opinion); Lawrence B. Solum, *Legal Theory Lexicon 030: Textualism*, LEGAL THEORY LEXICON (Oct. 27, 2019), https://lsolum.typepad.com/legal_theory_lexicon/2004/04/legal_theory_le_3.html.

17 Harvard Law School, *The 2015 Scalia Lecture | A Dialogue with Justice Kagan on the Reading of Statutes*, YOUTUBE, at 8:27 (Nov. 17, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg&t=17s.

18 *Bostock*, 140 S. Ct. at 1754.

19 *Id.* at 1755.

20 While the focus of this note is not to extol the virtues of comparative law, it bears noting the international trend regarding usage of this legal tool. Courts in the United States neglect to utilize the international wisdom of justices abroad, unlike the rest of the international community. *See, e.g.,* Navtej Singh Johar v. India, W. P. (Crl.) No. 76 (2016) (India) (citing laws and cases from the United States, the Philippines, South Africa, etc. regarding anti-sodomy laws).

21 *See Bostock*, 140 S. Ct. at 1750; *id.* at 1766–67 (Alito, J., dissenting); Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. UNIV. L.Q. 351, 352 (1994); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV J.L. & PUB. POL'Y 61, 64 (1994) ("Because interpretation is a social enterprise, because words have no natural meanings, and because their effect lies in context, we must consult these contexts.").

22 *See* Alan B. Morrison, *LGBT Supreme Court Ruling and the Limits of Textualism*, AM. CONST. SOC'Y (June 23, 2020), https://www.acslaw.org/expertforum/lgbt-supreme-court-ruling-and-the-limits-of-textualism/ ("The most obvious lesson about textualism from *Bostock* is that textualism is not a tool that can be easily applied to produce an agreed upon result.").

believer in textualism—but only as a means to decipher the ordinary meaning of the text.[23]

Understandably, a firm believer in textualism will hesitate, if not scoff, at the prospect of using the international community's jurisprudence to dictate the ordinary meaning of a domestic statute.[24] One of the most obvious issues in performing such a comparative analysis is language barriers.[25] Any earnest attempt to understand foreign law must account for one's lack of proficiency in a given language. Furthermore, the subtleties of a statute are all too easily lost in translation.[26] As such, all of the cases and statutes selected for this note were originally written in English. That is not to say that this is without flaw; certainly, different dialects and cultures may use words differently.[27] For that matter, even within a particular country, different dialects of the same language will not use language uniformly.[28] However, the cases and statutes that follow do not suggest a usage of English different than mainstream American English, thereby justifying our reliance upon these sources.[29]

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23 Obviously, where the interpreter finds the words of the statute to be clear and on point, the interpreter's job starts and finishes with the statute's text. *See* VALERIE C. BRANNON, CONG. RSCH. SERV., STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 1, 17 (Apr. 5, 2018) (citing NLRB v. SW Gen., Inc., 137 S. Ct. 929, 942 (2017)). However, where multiple justices on the same bench cannot reach an agreement as to the ordinary meaning of a statute, even textualism allows for extratextual interpretation. The judicial and legislative wisdom of justices and legislatures abroad provides an additional means with which to interpret the ordinary meaning of a statutes, without relying upon legislative intent.

24 *See* Chisom v. Roemer, 501 U.S. 380, 410 (1991) (Scalia, J., dissenting) ("[O]ur job is not to scavenge the world of English usage . . . ."); Printz v. United States, 521 U.S. 898, 921 n.11 (1997) (Scalia, J.) ("We think such comparative analysis [of the benefits of other countries' federal systems] inappropriate to the task of interpreting a constitution . . . .").

25 *See* Kathryn A. Perales, Note, *It Works Fine in Europe, So Why Not Here? Comparative Law and Constitutional Federalism*, 23 VT. L. REV. 885, 901 (1999).

26 For examples of cases where judges reached erroneous legal conclusions as a result of misinterpreting foreign statutes, *see* Arthur Nussbaum, *The Problem of Proving Foreign Law*, 50 YALE L.J. 1018, 1031 & 1044 n.76 (1941).

27 *See* James Harbeck, *Why Is Canadian English Unique?*, BRIT. BROAD. CO. (Aug. 20, 2015), https://www.bbc.com/culture/article/20150820-why-is-canadian-english-unique (discussing how historical and cultural influences have shaped Canadian English); James Harbeck*, Why Isn't 'American' a Language?*, BRIT. BROAD. CO. (July 15, 2015), https://www.bbc.com/culture/article/20150715-why-isnt-american-a-language (discussing the historical and cultural influences both distinguishing and connecting American and British English).

28 *See* Mark Abadi, *27 Fascinating Maps that Show How Americans Speak English Differently Across the US*, BUS. INSIDER (Jan. 3, 2018, 12:33 PM), https://www.businessinsider.com/american-english-dialects-maps-2018-1.

29 Despite their cultural differences, the United Kingdom and Canada are good comparators for our purposes. *See Which Countries are Most Similar to the United States? 2.0*, OBJECTIVE LISTS (Apr. 3, 2021), https://objectivelists.com/2021/04/03/which-countries-are-most-similar-to-the-united-states/. Thus, these countries' courts' opinions are highly persuasive. Additionally, the majority of the statutes cited in Section IV are from the aforementioned countries or from their former colonies and territories.

II. *BOSTOCK* AND TEXTUALISM

The main debate between Justice Gorsuch and Justices Alito and Kavanaugh revolved upon the proper usage of textualism. While both agreed to the same premises—that context and ordinary meaning trump legislative intent—they nonetheless arrived at conflicting conclusions.

Before we begin our analysis of the majority and dissent in *Bostock*, a brief introduction to the provision at issue in *Bostock* is in order. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination against a number of enumerated categories of individuals.[30] One of the categories enumerated in Title VII is "sex." Title VII provides examples of discrimination "because of . . . sex," such as "pregnancy, childbirth, or related medical conditions."[31] A discriminatory employment action violates Title VII when one of the enumerated categories "was a motivating factor for any employment practice, even though other factors also motivated the practice."[32]

The plaintiffs in *Bostock* conceded, *arguendo*, that "sex" in Title VII only refers to an individual's biological sex, not sexual orientation.[33] The question remained whether discrimination on account of an individual's sexual orientation constitutes a form of sexism. Justice Gorsuch explained that the statute prohibits "discrimination," meaning the treatment of an individual worse than others that are similarly situated.[34] To constitute sexual orientation discrimination, this worse treatment must be "*because of* . . . sex." The phrase "because of" requires the courts to apply a simple but-

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The decisions discussed *infra* that originate from international tribunals (such as the United Nations Human Rights Committee) are less persuasive, but there is still much to glean from those decisions.

30 42 U.S.C. § 2000e-2(a). The statute reads:

> It shall be an unlawful employment practice for an employer—
>
> (1) 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; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

31 *Id.* § 2000e(k).

32 *Id.* § 2000e-2(m). However, Justice Gorsuch held that the more inclusive "motivating factor" test was not needed to find that the defendants discriminated against the plaintiffs because of their sex. Bostock v. Clayton Cty., 140 S. Ct. 1731, 1739–40 (2020). For further analysis of the motivating factor test and how it applies to *Bostock*, *see infra* note 47.

33 *See id.* at 1739; *see also id.* at 1756–58 (Alito, J., dissenting) (vociferously denying any possibility of "sex" including something other than gender).

34 *Id.* at 1740 (majority opinion).

for causation test, which directs a judge "to change one thing at a time and see if the outcome changes."[35] For an employer to violate Title VII, the employer's actions need not be motivated solely, or even primarily, by the adversely affected party's biological sex. As long as an individual's biological sex was a factor underlying the employer's actions, these actions violate Title VII.[36] As such, Justice Gorsuch opined that only a plaintiff's biological sex should be changed to determine if a plaintiff alleging sexual orientation discrimination was treated worse as a result of his or her sex.[37] In sum, the test for purposes of finding sexual orientation employment discrimination is whether the employer intentionally treated an employee or applicant worse than other similarly situated employees and applicants because of the adversely affected party's biological sex, irrespective of the extent to which the employee or applicant's biological sex played a role in the employer's actions.[38]

The main takeaway from *Bostock*'s majority, for our purposes, was its use of the textualist canon to interpret Title VII. Justice Gorsuch stated that his construction of the statute was in accord with how the public in the year 1964 — the year that Congress passed the Civil Rights Act of 1964 — understood the ordinary meaning of Title VII.[39] Despite the unexpectedness and hypothetical repugnancy of the statute's command to the average American in 1964, unambiguous statutory commands must nonetheless be heeded.[40] Therefore, Justice Gorsuch concluded that Title VII clearly protects against sexual orientation employment discrimination.[41]

One of the main themes of Justice Alito's dissent is the importance of the societal context in which a law comes into existence.[42] Like Justice Gorsuch, Justice Alito held that textualism turns to how the ordinary American at the time of the statute's ratification would have understood the statute in question. However, considering the state of affairs in 1964, Justice

35 *Id.* at 1739.

36 *Id.* at 1748.

37 *Id.* at 1747–49.

38 *Id.* at 1740.

39 *Id.* at 1738–41.

40 *See id.* at 1751 (citing *Penn. Dep't of Corr. v. Yeskey*, 524 U.S. 206 (1998) (holding the Americans with Disabilities Act applies to state prisoners)).

41 *See also id.* at 1749 (citing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 101 (2012) (noting that unexpected results of broad statutory commands reflect Congress's intent to provide general coverage, not the ad hoc review on a case-by-case basis).

42 *Id.* at 1771 (Alito, J., dissenting); *see also id.* at 1828 (Kavanaugh, J., dissenting) (quoting New Prime Inc. v. Oliveira, 139 S. Ct. 532, 538–39 (2019) ("Contrary to the majority opinion's approach today, this Court has repeatedly emphasized that common parlance matters in assessing the ordinary meaning of a statute, because courts heed how 'most people' 'would have understood' the text of a statute when enacted.").

Alito concluded that the average American in 1964 would not have fathomed reading a prohibition against sexual orientation employment discrimination into Title VII.[43] He bolstered his position with a historical account of America's openly negative attitude towards homosexuality during that time period.[44]

Similarly, Justice Kavanaugh considered the *Bostock* majority to have crossed the line between textualism and literalism.[45] Citing cases, Justice Kavanaugh showed that the Court recoils from such an overreading of statutes, as the societal context in which a statute is enacted must be accounted for when interpreting the statute.[46] Additionally, a statute's words are properly understood only when the statute is read as one whole.[47] In

43 "If every single living American had been surveyed in 1964, it would have been hard to find any who thought that discrimination because of sex meant discrimination because of sexual orientation." *Id.* at 1755 (Alito, J., dissenting). This is all the more true regarding a prohibition of discrimination against transgender people, "a concept that was essentially unknown at that time." *Id.*

44 *See id.* at 1769–72. The following are some notable highlights: Homosexuality was classified as a mental disorder in AM. PSYCH. ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 44 (2d ed.). *Id.* at 1769. Furthermore, in all but one state, sodomy was a crime. *Id.* at 1770. Finally, the federal and state governments continued to openly discriminate against homosexuals for decades after Congress passed the Civil Rights Act of 1964. *Id.* at 1770–72.

45 *See id.* at 1836 (Kavanaugh, J., dissenting) ("Instead of a hard-earned victory won through the democratic process, today's victory is brought about by judicial dictate—judges latching on to a novel form of living literalism to rewrite ordinary meaning and remake American law."). A literalist interpretation of a statute is a stretched interpretation of the words that technically accords with the statute's language but fails to capture the true meaning of the words. By contrast, textualism looks to the *ordinary* meaning, "how a reasonable person, conversant with the relevant social and linguistic conventions, would read the text in context." *Id.* at 1825 (quoting Manning, *supra* note 4, at 2392–93).

46 *Id.* at 1826–27; *see also id.* at 1825 (quoting Antonin Scalia, *A Matter of Interpretation* 24 (1997) (explaining that "the good textualist is not a literalist").

47 As Judge Learned Hand eloquently put it, "the meaning of a sentence may be more than that of the separate words, as a melody is more than the notes." Helvering v. Gregory, 69 F.2d 809, 810–11 (2d Cir. 1934), *aff'd*, 293 U.S. 465 (1935).

A word's meaning within a statute is not only understood by looking at the accompanying words within a given phrase or sentence; the statutory scheme sheds light on the meaning of words as well. *See* United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988) ("Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . ."). 42 U.S.C. § 2000(e)-2(m) states that "an unlawful employment practice is established when the complaining party demonstrates that . . . sex . . . was a *motivating factor* for any employment practice, even though other factors also motivated the practice." Congress passed this amendment to Title VII in response to Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), which held that mixed-motive employment actions are sufficient to bring a claim under Title VII. *See* Landgraf v. USI Film Prod., 511 U.S. 244, 251, (1994). *Price Waterhouse* and § 2000e-2(m) significantly lowered the bar for employment discrimination actions. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 349 (2013). In a strikingly dismissive fashion, Justice Gorsuch held that § 2000(e)-2(m) was irrelevant to the Court's considerations. *Bostock*, 140 S. Ct. at 1739–40. Ironically, this more protective statute actually *reinforces* the position of the dissenting opinions. Section 2000e-2(m) is to be superimposed onto § 2000e-2(a) to redefine the causation element for the prohibition against employment discrimination. *Motivation* is a key factor. Query, were the employers motivated to

short, unlike Justice Gorsuch's approach, judges should "not simply split statutory phrases into their component words, look up each in a dictionary, and then mechanically put them together again."[48]

The debate between the majority and the dissenting opinions revolves around two points. First, more broadly, how should judges use the canon of textualism? Does textualism embrace the literal meaning and application of a statute, or must greater emphasis be placed on the societal context in which the statute was passed? Second, more narrowly, does a textualist interpretation of Title VII prohibit sexual orientation employment discrimination? *Bostock*'s divided court warrants an exploration of the international community's approach to textualism, especially regarding sexual orientation discrimination.[49]

III. THE INTERNATIONAL COURTS

A. The United Nations Human Rights Committee

The Vienna Convention on the Law of Treaties (VCLT) is the authoritative "treaty of treaties" that establishes the laws governing all international treaties.[50] Section 3 outlines the rules for interpreting treaties. Section 3, Article 31, ¶ 1 states that "[a] treaty shall be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context in the light of its object and purpose."[51] "Ordinary meaning" is a surprisingly elusive term to define.[52] Whatever "ordinary meaning" is determined to be, this is the foundation for any

discriminate against males or females (or, as the majority would have it, towards both males and females)? The majority's omission proves fatal to its interpretation of "because of" in Title VII. *See Bostock*, 140 S. Ct. at 1757 (Alito, J., dissenting).

48 *Bostock*, 140 S. Ct. at 1827 (Kavanaugh, J., dissenting). *See also* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 67 (1994) ("[T]he choice among meanings must have a footing more solid that a dictionary—which is a museum of words, an historical catalog rather than a means to decode the work of legislatures.").

49 This serves as the easiest vehicle for comparing the jurisprudence of various judicial bodies internationally, as we can literally place the statutes side by side to find commonalities between the statutes.

50 *See generally* Patricia Bauer, *Vienna Convention on the Law of Treaties*, BRITANNICA (Mar. 26, 2018), https://www.britannica.com/topic/Vienna-Convention-on-the-Law-of-Treaties.

51 Vienna Convention on the Law of Treaties art. 31, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

52 *See* RICHARD GARDINER, TREATY INTERPRETATION 184 (2d ed. 2017) (noting that a normative interpretation of treaties in line with the ordinary meaning of the words proves difficult, as "the plain, normal, or ordinary meaning [is] a thing of potential variety rather than objectively ascertainable in most cases"); Anita S. Krishnakumar, *Three Lessons About Textualism from the Title VII Case*, YALE J. REG. (Jun. 24, 2020) https://www.yalejreg.com/nc/three-lessons-about-textualism-from-the-title-vii-case-by-anita-s-krishnakumar/.

interpretation of a treaty covered by the VCLT.[53] Interestingly, the societal context in which a treaty is passed is not of primary importance; only when an ordinary-meaning interpretation leaves the meaning ambiguous or obscure, or where an absurd conclusion would result, is it appropriate to look at the societal context in which the treaty was passed.[54] Notably, this accords with Justice Gorsuch's opinion; absent any ambiguity, the plain meaning of the statute controls, regardless of the societal context in which the statute was originally passed.[55] However, this is arguably inapplicable to domestic statutory interpretation and of necessity when interpreting international treaties. After all, which societal context of the signing parties should control how to interpret the treaty?[56]

In *Toonen v. Australia*,[57] petitioner Nicholas Toonen challenged a number of Tasmanian statutes within the Tasmanian Criminal Code Act that criminalized acts of "gross indecency with another male person,"[58] "sexual intercourse with any person against the order of nature,"[59] and "consensual intercourse with a male "against the order of nature."[60] Mr. Toonen argued

53 *See* Gunnar Beck, *The Court of Justice of the EU and the Vienna Convention on the Law of Treaties*, 35 Y.B. EUR. L. 484, 491 (2016). *But see id.* at 490–91 (quoting Georges Abi-Saab, *The Appellate Body and Treaty Interpretation*, 1 QUEEN MARY STUDS. INT'L L. 97, 99–109) ("[T]he VCLT describes treaty interpretation 'as a holistic, non-hierarchical exercise' which involves the 'summing up of text, context, and purpose,' 'albeit one that starts with the text of the treaty.'").

54 Vienna Convention on the Law of Treaties art. 32, 1155 U.N.T.S. 331.

55 Additionally, one cannot argue that an absurdity doctrine exception, as alluded to in Article 31 of the VCLT, should be relevant to *Bostock*. It is a rarity for the Court to look beyond the unambiguous command of a statute due to an apparently absurd legal outcome. Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002). Perhaps this is the result of the absurdity doctrine's high threshold; the doctrine only applies where "the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application." Sturges v. Crowninshield, 17 U.S. 122, 203 (1819). To call employment discrimination protection a monstrous injustice is a stretch. However, when Title VII was passed, not one country *in the entire world* outlawed sexual orientation employment discrimination. As mentioned above, all but one state criminalized homosexual intercourse. While shocking to the 21st century western ear, perhaps it is absurd to understand that homosexuals were entitled to protection in 1964. *Cf.* Bowers v. Hardwick, 478 U.S. 186, 197 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003) ("To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.") (Berger, C.J., concurring).

56 For example, two of the VCLT's earliest signatories, the Republic of Congo and South Korea, have societies that are literally and figuratively worlds apart. Introducing societal context as a primary means of interpretation would muddle, not elucidate, a treaty's text.

57 U.N. Hum. Rts. Comm., Comm'n No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (Mar. 31, 1994), http://hrlibrary.umn.edu/undocs/html/vws488.htm.

58 Criminal Code Act, 1924, § 123 (Tas.), *repealed by* Criminal Code Amendment Act 1997.

59 *Id.* § 122(a) (repealed 1997).

60 *Id.* § 122(c) (repealed 1997). Tasmania and Australia debated the implication of Sections 122 and 123 of the Criminal Code Act. Tasmania argued that these provisions offered no definition as to which parties the statute targeted. Rather, the challenged provisions "merely identify acts which are unacceptable to the Tasmanian community." *See* Comm'n No. 488/1992 at 6.13. Because the statute did

that these statutes, discriminating against homosexuals, violated three provisions within the International Covenant on Civil and Political Rights (ICCPR).[61] Among other things, Mr. Toonen alleged that these criminal provisions prevented him from openly expressing his homosexuality, and that his homosexuality ultimately contributed to the wrongful termination of his employment.[62] Australia noted that the ICCPR's broad language—"without distinction of any kind, such as" in Article 2, ¶ 1 and "on any ground such as" in Article 26—exhibited how the enumerated protected categories within the ICCPR were not exhaustive. This potentially allowed the ICCPR to afford protection against sexual orientation discrimination.[63] As such, Mr. Toonen argued that sexual orientation was considered an "other status" for purposes of Article 2, ¶ 1, and Article 26 of the ICCPR.[64] Australia sought the United Nations Human Rights Committee's (UNHRC) guidance as to whether sexual orientation was considered an "other status" under the ICCPR.[65]

In a surprising twist, the UNHRC held that sexual orientation was included within the term "sex," finding Tasmania to have violated Article

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not target a particular class of Tasmanians, the Commission could not find that Tasmania discriminated against Mr. Toonen on account of his sexuality. *Id.* Australia countered that Tasmania's criminalization of acts performed by the specific, distinguishable class of homosexuals is "clearly understood by the community as being directed at male homosexuals as a group." *Id.* Australia's approach is similar to *Bostock*'s opinions, which account (in different ways) for the aspect of societal context in statutory interpretation. *See, e.g., supra* notes 39–48 and accompanying text.

61 The three provisions of the ICCPR are as follows:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

International Covenant on Civil and Political Rights Art. 2.1, opened for signing Dec. 19, 1966, S. Exec. Rep. 102–23, 999 U.N.T.S. 171, 172 (emphasis added).

> No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

Id. Art. 17.1, 999 U.N.T.S. at 177.

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Id. Art. 26, 999 U.N.T.S. at 177 (emphasis added).

62 Comm'n No. 488/1992 at 2.4, 7.9–7.10.

63 *Id.* at 6.9.

64 *Id.* at 7.5. *See also* Wayne Morgan, *Sexuality and Human Rights: The First Communication by an Australian to the Human Rights Committee Under the Optional Protocol to the International Covenant on Civil and Political Rights*, 14 AUSTL. Y.B. INT'L L. 277, 282–83 (1993).

65 Comm'n No. 488/1992 at 6.9.

2, ¶ 1 and Article 17, ¶ 1.[66] Astonishingly, the UNHRC issued its decision without explaining its reasoning.[67] Judge Bertil Wennergren's individual opinion sheds some light on how the majority found that "sex" includes sexual orientation.[68] Judge Wennergren opined that, considering how "the common denominator of 'race, colour, and sex' are biological or genetic factors," sexual orientation discrimination is forbidden per the ICCPR, under the term "sex."[69]

The impact of *Toonen*'s liberal construction of "sex" has influenced international tribunals beyond the UNCHR. In *Sutherland v. United Kingdom*, the European Court of Human Rights (ECtHR) decided on whether disparate ages for consent to heterosexual and homosexual intercourse violated the European Convention on Human Rights (the Convention).[70] *Sutherland*—citing *Toonen* with approval—entertained the protection against sexual orientation discrimination under the term "sex" in Article 14[71] of the Convention.[72] However, *Sutherland* ultimately remained noncommittal towards *Toonen*'s approach, acknowledging the possibility

66 *Id.* at 8.7 ("The Committee confines itself to noting, however, that in its view the reference to 'sex' in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation."). Although sexual orientation discrimination was protected under Art. 26 *obiter dicta*, the UNHRC held that a ruling under Article 26 would be superfluous, considering the commission's finding that Toonen's claim was meritorious under Article 2, ¶ 1 and Article 17. *Id*.

67 *See* Sarah Joseph, *Gay Rights Under the ICCPR – Commentary on Toonen v. Australia*, 13 U. TAS. L. REV. 392, 399 (1994).

68 Judge Wennergren dissented against the majority's logic, holding that Article 2, ¶ 1 was irrelevant to the case, and as such, decided in favor of the petitioner per Article 26. Comm'n No. 488/1992 (Wennergren, J.).

69 *Id. But see* Nsikan Akpan, *There Is No 'Gay Gene.' There Is No 'Straight Gene.' Sexuality Is Just Complex, Study Confirms*, PUB. BROAD. SERV. (Aug. 29, 2019), https://www.pbs.org/newshour/science/there-is-no-gay-gene-there-is-no-straight-gene-sexuality-is-just-complex-study-confirms.

70 Sutherland v. United Kingdom, App. No. 25186/94, ¶ 31 (July 1, 1997), http://hudoc.echr.coe.int/eng?i=001-45912. For more on the ECHR's approach to sexual orientation discrimination, *see infra* notes 89–91 and the accompanying text.

71 Article 14 of the Convention is remarkably similar to Article 26 of the ICCPR, one of the provisions at issue in *Toonen*. *See* Convention for the Protection of Human Rights and Fundamental Freedoms art. 14, Nov. 4, 1950, E.T.S. No. 005 ("The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."). In one of the petitioner's arguments, the United Kingdom violated Articles 8 and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms by specifically denying homosexuals their Article 8 right to privacy free from government intrusion. *See Sutherland*, App. No. 25186/94 at ¶¶ 32, 44.

72 *Sutherland*, App. No. 25186/94 at ¶ 50. *Sutherland*'s openness to *Toonen*'s construction of "sex" offers some support to the thesis of this article; comparative law is applicable to matters of statutory interpretation. However, it bears noting that ECHR is not considered to be a court that is strongly grounded in textualist principles. *See* Beck, *supra* note 53, at 492–93.

for sexual orientation to be included within the "other status" clause of Article 14.[73]

Although *Toonen* and *Bostock* both held that sexual orientation was a protected class under "sex," their approaches were quite different. *Toonen* understood that Tasmania's statutes prohibiting homosexual conduct did not discriminate on the basis of biological sex but rather on the basis of sexual orientation. *Bostock*, on the other hand, understood "sex" in its more conventional sense, namely one's biological sex.[74] This is despite the enumeration of race and color within Title VII, like the ICCPR.[75] Additionally, *Bostock* was forced to find for the plaintiff exclusively under the "sex" class; Title VII lacks any broad catch-all phrases to protect unenumerated classes, unlike the ICCPR. In short, it is highly likely that the *Bostock* Court would disagree with *Toonen*'s reasoning.

Toonen—and Judge Wennergren's opinion in particular—leave much to be desired. Mr. Toonen and Australia argued for the protection against sexual orientation discrimination under the "other status" class. This broad catch-all is further buttressed by additional inclusive language, showing that the enumerated classes within the ICCPR are not exhaustive.[76] It is difficult to understand why the UNHRC ignored the sure-fire approach to finding for the petitioner in favor of its more exotic interpretation.[77] What is more, Judge Wennergren's interpretation is misguided. Even assuming that homosexuality is genetic like race and color, his reading of the ICCPR fails to abide by the VCLT. Textualism, or more precisely, "ordinary meaning," is the first step to interpreting an international treaty.[78] Judge Wennergren neglected to even attempt to use the ordinary meaning of "sex," opting for a novel construction via comparison of enumerated categories within the ICCPR. Furthermore, this comparative derivation—presumably via the canon of *noscitur a socii*—ignores the entirety of Article 2, ¶ 1 and Article

73 *Sutherland*, App. No. 25186/94 at ¶¶ 51, 57. *Sutherland* concluded that the United Kingdom's discrimination against homosexuals vis-à-vis consensual intercourse was in violation of Articles 8 and 14 of the convention. *See id.* at ¶ 67; *see also* Frette v. France, App. No. 36515/97 (Bratza, J., dissenting) (Feb. 26, 2002), http://hudoc.echr.coe.int/eng?i=001-60168 ("As regards the scope of application of Article 14, there is no doubt that sexual orientation is covered by this provision, be it through discrimination on grounds of 'sex' (which is the position of the United 'Nations' Human Rights Committee, particularly in its Toonen v. Australia decision of 4 April 1994) or on grounds of 'other status' (European Commission of Human Rights, Sutherland v. United Kingdom, no. 25186/94, report of the Commission of 1 July 1997, § 51, unreported).").

74 Bostock v. Clayton Cty., 140 S. Ct. 1731, 1739 (2020).

75 42 U.S.C. § 2000e-2(a).

76 *See supra* note 63 and accompanying text.

77 *See* Joseph, *supra* note 67, at 398.

78 *See supra* notes 50–56 and accompanying text.

26.[79] Race and color are not the only categories enumerated in the ICCPR. Classes that are neither biological nor genetic, such as language and religion, are also included.[80] Judge Wennergren had no basis for limiting the scope of his common-denominator inquiry to only the first two enumerated categories in the provisions in question. As such, he improperly used the contextual element alluded to in Article 31, ¶ 1 of the VCLT. Judge Wennergren's interpretation, in sum, falls far short of the VCLT's prescription for proper construction of international treaties and does not assist our review of *Bostock*'s decision.

B. Canada and the European Human Rights Commission

Unlike *Toonen*, other courts worldwide that recognize the protection against sexual orientation discrimination have found this protection under statutes' general terminology. In *Egan v. Canada*, Canada's Supreme Court was presented with the issue of sexual orientation discrimination.[81] The petitioners were a same-sex couple who argued that the Old Age Security Act's limitation of "spouse" to heterosexual couples for purposes of access to social welfare benefits was unconstitutional.[82] Ultimately, *Egan* found for Canada, considering the policy implications for limiting the scope of "spouse" to heterosexual couples.[83]

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79 "A canon of construction holding that the meaning of an unclear word or phrase, esp[ecially] one in a list, should be determined by the words immediately surrounding it." *Noscitur a Sociis*, BLACK'S LAW DICTIONARY (11th ed. 2019).

80 *See supra* note 61.

81 Egan v. Canada, [1995] 2 S.C.R. 513 (Can.). The Supreme Court of Canada endorsees the usage of textualism in statutory interpretation where the statute read within the proper context supports only one reading of the statute. *See* Ontario v. Canadian Pac. Ltd., [1995] 2 S.C.R. 1031, 1049–50 (Can.). *Canadian Pac. Ltd.* noted that "words . . . when taken by themselves, can almost always be said to have two meanings . . . a broad one and a restricted one, and the task is to determine what the meaning is in the particular context." *Id.* (citing ELMER A. DRIEDGER, CONSTRUCTION OF STATUTES 39 (2d ed. 1983)). A noteworthy difference between the Canadian model of textualism and that of the late Justice Scalia is that *Canadian Pac. Ltd.* opined that the ordinary meaning of the text reveals what the legislature's *intent* was when passing a given statute. By contrast, Justice Scalia said "I, frankly, don't care what the legislators' purpose is beyond that which is embodied in the duly enacted text." Scalia & Manning, *supra* note 12, at 1612.

All this being said, *Egan* did not outwardly use textualist principles to reach its conclusion. The importance of *Egan* for our purposes is to illustrate how general statutes can cover categories—like sexual orientation—even when they are not explicitly codified, in contrast with Title VII.

82 Old Age Security Act, R.S.C. 1985, c 0-9, sec 2 (Can.), *amended by* Modernization of Benefits and Obligations Act, S.C. 2000, c 12, sec 192 (Can.).

83 The general thrust of *Egan*'s main holding was that the Old Age Security Act's limitation of spousal benefits to heterosexual couples — married or not — was based upon heterosexual couples' unique ability to procreate. *See Egan*, 2 SCR at 534–38 (noting societal values and practical considerations that justified this distinction) Because these concerns were largely inapplicable to homosexual couples, it was constitutional for the Old Age Security Act to define "spouse" as referring exclusively to heterosexual couples. *Id.* at 538–40.

However, before *Egan* decided against the petitioners, it recognized that sexual orientation was indeed protected under the Constitution Act's inclusive language.[84] Despite the breadth of the Constitution Act's open-ended discrimination protection provisions, *Egan* nevertheless recognized that the scope of this protection must be limited.[85] Justice Gérard Vincent La Forest, writing for the plurality, concluded that "sexual orientation . . . is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs, and so falls within the ambit of [Section] 15 protection as being analogous to the enumerated grounds."[86] Phrased differently by the dissent, "[t]he fundamental consideration underlying the analogous grounds analysis is whether the basis of distinction may serve to deny the essential human dignity of the Charter claimant."[87] Of primary import to us is that *Egan* accounted for *all* of the enumerated categories in Section 15(1), to determine how broadly the statute's general language should be applied.[88]

Similarly, in a decision after *Sutherland*, the ECHR concluded in *Salgueiro da Silva Mouta v. Portugal* that protection against sexual orientation discrimination lies under a general provision within Article 14

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84 Section 15(1) of the Constitution Act states: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." Constitution Act, 1982, *being* Schedule B to the Canada Act 1982, c 11 (U.K.), § 15(1) (emphasis added). Notably, this statute contains 5 categories that are biologic or genetic in nature, as opposed to only 4 in Article 26 of the ICCPR. Nonetheless, *Egan* did not follow *Toonen*'s lead.

85 Despite not explicitly saying so, *Egan* seems to have applied the canon of *ejusdem generis*, "[a] canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed." *Ejusdem Generis*, BLACK'S LAW DICTIONARY (11th ed. 2019).

86 *Egan*, 2 SCR at 528. Notably, Justice La Forest acknowledges that "whether or not sexual orientation is based on biological or physiological factors . . . may be a matter of some controversy." *Id*. This stands in contrast to *Toonen*'s position that sexual orientation is determined by "biological or genetic factors." Toonen v. Australia, U.N. Hum. Rts. Comm., Comm'n No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (1994), http://hrlibrary.umn.edu/undocs/html/vws488.htm (Wennergren, J.).

87 *Egan*, 2 S.C.R. at 559 (Cory, J., dissenting). However, this is quickly followed by a purposivist approach to determining whether a given category is analogous to the grounds enumerated in the statute:

> Since one of the *aims* of s. 15(1) is to prevent discrimination against groups which suffer from a social or political disadvantage it follows that it may be helpful to see if there is any indication that the group in question has suffered discrimination arising from stereotyping, historical disadvantage or vulnerability to political and social prejudice.

Id. at 559–60 (Cory, J., dissenting).

88 *But cf.* Dale Gibson, *Analogous Grounds of Discrimination Under the Canadian Charter: Too Much Ado About Next to Nothing*, 29 ALTA L. REV. 772, 773 (1991) (written prior to *Egan*).

of the Convention, not under "sex."[89] *Salgueiro da Silva Mouta* held that a Portuguese court's denial of the applicant's right to custody of his daughter solely on the grounds of his homosexuality violated the Convention's anti-discrimination laws.[90] Article 14's broadness was deemed wide enough to include sexual orientation within the Convention.[91]

While legislation including broad, vague terms might be imprudent for the legislature to pass, that is no fault of the courts. Both *Egan* and *Salgueiro* properly understood that broad statutes and treaties afford the courts the discretion to find for protections against discrimination of unenumerated classes, like sexual orientation discrimination. By contrast, Title VII is a statute composed entirely of enumerated protections. Therefore, like *Bostock*, a court would require finding protection against sexual orientation employment discrimination within one of the enumerated categories, namely "sex."[92]

C. The United Kingdom

While textualism is not the main interpretive method of the courts in the United Kingdom, it is nonetheless relevant (and might become more relevant in the future).[93] In *Macdonald v. Advocate Gen. for Scot.*, a member

89 Textualism is not considered one of the ECHR's primary modes of interpretation. However, textualism is still used within the ECHR's jurisprudence. *See* Maša Marochini, *The Interpretation of the European Convention on Human Rights*, 51 ZBORNIK RADOVA PRAVNOG FAKULTETA U SPLITU 63, 68–69 (2014).

90 *Salgueiro da Silva v. Mouta v. Portugal*, App. No. 33290/96, ¶ 36 (Dec. 21, 1999), http://hudoc.echr.coe.int/eng?i=001-58404.

91 *Id.* at ¶ 28. This opinion stands in contrast to *Sutherland*. Both interpreted Article 14 of the Convention and found for protection against sexual orientation discrimination. However, each court focused on different words within the treaty to control its decision. *Salguiero* focused on the introductory statement to Article 14's enumerated categories, "on any ground such as." *Sutherland*'s focus was on the "other status" clause concluding Article 14. *See* Sutherland v. United Kingdom, App. No. 25186/94, ¶¶ 50–51, 57 (July 1, 1997), http://hudoc.echr.coe.int/eng?i=001-45912. Both the "any ground" and "other status" clauses show the sweepingly broad scope of Article 14. *See* Eur. Ct. Hum. Rts. [Eur. Ct. H.R.], *Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention: Prohibition of Discrimination*, ¶ 89 (Aug. 31, 2021), https://www.echr.coe.int/Documents/Guide_Art_14_Art_1_Protocol_12_ENG.pdf. It is unclear why Article 14 written with two catch-all phrases. *But see id.* at ¶¶ 194–96 (noting the limits to Article 14's "other status" clause).

92 For an illustration of a court noting the broad language of the Convention and the ECHR's holding in *Salgueiro* recognizing the protection against sexual orientation discrimination are both irrelevant to interpreting a statute prohibiting sex-based discrimination but lacking in inclusive language to account for unenumerated classes, *see* Advocate Gen. for Scot. v. Macdonald [2002] SC 1, ¶¶ 7–8 (Lord Kirkwood of Kirkhope), *rev'g* Advocate Gen. for Scot. v. Macdonald [2001] HRLR 5.

93 *See* John James Magyar, The Legacy of Anglo-American Textualism 170, 179–80 (Nov. 6, 2018) (Ph.D. dissertation, University of Cambridge), https://www.repository.cam.ac.uk/bitstream/handle/1810/286338/The_Legacy_of_Anglo-American_Textualism.pdf?isAllowed=y&sequence=1.

of the Royal Air Force disclosed that he was homosexual, resulting in his discharge.[94] Macdonald argued that the Royal Air Force's termination of his employment was discrimination on account of his sex, in violation of the Sex Discrimination Act of 1975 (SDA).[95] The House of Lords held that sexual orientation discrimination is distinct from sex-based discrimination, thereby precluding protection under the SDA.[96]

The SDA's wording is markedly different than that of Title VII. Title VII prohibits discrimination against employees "because of . . . sex."[97] By contrast, the SDA prohibits employment discrimination "on the grounds of her sex,"[98] followed by a later clause protecting male employees from sex-based employment discrimination.[99] This dissection of "sex" into first women, then men, is telling; this further suggests that the SDA's scope of protection is narrow, covering forms of discrimination that would be more prevalent for women than men.[100] As such, it would be difficult to argue that sexual orientation discrimination should be included within the SDA,

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94 Mr. Macdonald's discharge was in light of the Queen's Regulations and Orders for the Royal Air Force, ¶ 1032(1), which stated "[h]omosexuality, whether male or female, is considered incompatible with service in the Armed Forces." Macdonald v. Advocate Gen. for Scot. [2003] UKHL 34, [2003] IRLR 512 at ¶ 43 (Lord Hope of Craighead) (appeal taken from Scot.), http://www.bailii.org/uk/cases/UKHL/2003/34.html In an official leaflet, the Royal Air Force explained the rationale behind this policy: "Homosexuality, whether male or female, is considered incompatible with service in the Armed Forces. This is not only because of the close physical conditions in which personnel often have to live and work, but also because homosexual behaviour can cause offence, polarise relationships, induce ill-discipline and, as a consequence, damage morale and unit effectiveness." AP 3392 vol. 5, no. 107 (Aug. 1995) (quoted in *Macdonald*, UKHL 34, IRLR 512 at ¶ 157(Lord Rodger of Earlsferry). For more background facts, *see id.* at ¶¶ 43–46 (Lord Hope).

Pearce v. Governing Body of Mayfield [2003] UKHL 34, IRLR 512 (appeal taken from Eng. And Wales), http://www.bailii.org/uk/cases/UKHL/2003/34.html, having facts very similar to that of *Macdonald*, was consolidated with *Macdonald* before the House of Lords.

95 *Macdonald*, UKHL 34, IRLR 512 at ¶ 47 (Lord Hope).

96 *See, e.g., id.* at ¶ 7 (Lord Nicholls of Birkenhead).

97 § 2000e-2(a).

98 Sex Discrimination Act 1975, c. 65, § 1(1)(a) (U.K.), https://www.legislation.gov.uk/ukpga/1975/65/section/1/1991-02-01, *repealed by* Equality Act 2010, c. 15 (U.K.), https://www.legislation.gov.uk/ukpga/2010/15/introduction/enacted ("A person discriminates against a woman in any circumstances relevant for the purposes of any provision of this Act if—(a) on the grounds of her sex he treats her less favourably than he treats or would treat a man . . . .") (emphasis added).

99 For the corollary protection against sexual discrimination of men, *see id.* § 2(1), *repealed by* Equality Act 2010, c. 15 (U.K.), https://www.legislation.gov.uk/ukpga/2010/15/introduction/enacted ("Section 1, and the provisions of Parts II and III relating to sex discrimination against women, are to be read as applying equally to the treatment of men, and for that purpose shall have effect with such modifications as are requisite.").

100 *Accord Macdonald*, [2003] UKHL 34, IRLR 512 at ¶ 148 (Lord Rodger) ("[A]s is suggested by the form of section 1(1)(a), the opening provision of the Act, Parliament's main concern was to put an end to certain areas of discrimination against women on the ground that they were women rather than men."). Parenthetically, it is worth noting Lord Rodger of Earlsferry's seeming reluctance to rely upon the legislature's purpose in passing the SDA, implying his usage of a textualist approach to interpreting the SDA. *See id.*

assuming that criminal law is a valid barometer of a society's moors.[101] While male homosexual activity was criminalized for centuries—even meriting capital punishment—female homosexuality has never been criminalized in the United Kingdom.[102]

Additionally, the way in which sex-based discrimination is conveyed within the SDA—discrimination against an employee because of "her sex," using a gender-specific pronoun—evidences a narrow construction of "sex" that refers exclusively to one's biological sex.[103] Lord William Prosser in his dissenting opinion on the Employment Appeal Tribunal subscribed to this approach,[104] but Lords Archibald Kirkwood and Phillip Caplan did not rely upon this inference, despite concluding that "sex" refers only to one's biological sex.[105] *Bostcock*'s plaintiffs conceded that the term "sex" in Title VII refers only to one's biological sex, despite the majority's willingness to entertain a broader construction of "sex."[106] Using Lord Prosser's interpretation of the SDA, one could argue that Title VII's omission of gender-specific pronouns affords the possibility of a broader interpretation of "sex" that would include sexual orientation. Nonetheless, as previously mentioned, this point was moot in *Bostock*.

A final critical difference between the SDA and Title VII is that the SDA provides guidance for how to compare a plaintiff against another individual to determine if there was in fact discrimination. § 5(3) of the SDA states: "A comparison of the cases of persons of different sex . . . under section 1(1) . . . must be such that the relevant circumstances in the one case are the same, or not materially different, in the other." No comparable guidance exists within Title VII itself.[107] This proves critical in *Macdonald*'s reasoning, as we shall discuss.

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101 For an in-depth discussion of the relationship between society's morals and crime, *see* James Edwards, *Theories of Criminal Law*, STAN. ENCYCLOPEDIA PHIL. (Aug. 6, 2018) https://plato.stanford.edu/entries/criminal-law/.

102 *See* Florence Sutcliffe-Braithwaite, *The 1967 Sexual Offences Act: A Landmark Moment in the History of British Homosexuality*, HIST. EXTRA (July 14, 2018, 12:00 PM), https://www.historyextra.com/period/modern/the-1967-sexual-offences-act-a-landmark-moment-in-the-history-of-british-homosexuality/.

103 Sex Discrimination Act, § 1(1)(a).

104 Advocate Gen. for Scot. v. Macdonald [2001] IRLR 431, ¶¶ 26–27.

105 *Id.* at ¶ 5 (Lord Kirkwood of Kirkhope); ¶ 3 (Lord Caplan). Once the appeal reached the House of Lords, the point was already conceded that "sex" refers to gender. *See Macdonald*, UKHL 34, IRLR 512 at ¶ 59 (Lord Hope).

106 *See supra* note 33 and accompanying text.

107 *See* Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 743–44 (2011). However, the word "discriminate" in Title VII can be unpackaged as requiring a comparative analysis of whether the employee was wrongfully discriminated against. *See* Bostock v. Clayton Cty., 140 S. Ct. 1731, 1740 (2020) ("To 'discriminate against' a person, then, would seem to mean treating that individual worse than others who are similarly situated.").

In a unanimous decision, the *Macdonald* Court held that sexual orientation discrimination was not a form of gender discrimination under the SDA.[108] Both *Macdonald and Bostock* used a "but-for" causation test, yet the two Courts reached opposing conclusions.[109] *Bostock* held that the "but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause."[110] Because the biological sex of the petitioner is the only thing that should be changed, *Bostock* reasoned that the proper comparator is a heterosexual individual of the opposite gender.[111]

Macdonald, on the other hand, argued against the usage of the but-for test as it was used in *Bostock*. Lord Rodger of Earlsferry cautioned against oversimplifying the but-for test; the test must account for the nuances of the employee's particular situation.[112] As such, merely switching the biological sex of the party filing suit under the SDA is sometimes insufficient, like in *Macdonald*, as changing the petitioner's biological sex would also change the individual's sexual orientation.[113] Lord Hope of Craigshead agreed with this, as any "critical circumstance" within the adverse employment action must be accounted for in the comparison.[114] While this results in the "equal misery rule"—both gays and lesbians will end up being the targets of discrimination—this is nonetheless the appropriate application of the SDA.[115] In sum, sex-based discrimination on account of sexual orientation discrimination can only be proven via a comparison with a homosexual individual of the opposite sex.[116]

Beyond the Courts' divergent approaches to using the but-for test, there is also a more general dispute regarding what constitutes sex-based discrimination. *Bostock* explained that discrimination against both gays and

108 *Macdonald*, UKHL 34, IRLR 512.

109 *Id.* at ¶ 154; *Bostock*, 140 S. Ct. at 1739.

110 *Bostock,* 140 S. Ct. at 1739; *see supra* notes 35–38 and accompanying text.

111 *See Bostock,* 140 S. Ct. at 1741.

112 One could argue that "cases of direct discrimination under section 1(1)(a) can be considered by asking the simple question: would the complainant have received the same treatment from the defendant but for his or her sex?" *See* James v. Eastleigh Borough Council [1990] 2 AC 751, 774B–C (Lord Goff of Chieveley). Lord Rodger of Earlsferry argued that this test oversimplifies the SDA, as the circumstances of the individuals being compared cannot differ materially, in line with § 5(3) of the SDA. *See Macdonald* [2003] UKHL 34, IRLR 512 at ¶¶ 154–56 (Lord Rodger).

113 *MacDonald* [2003] UKHL 34, IRLR 512 at ¶ 158 (Lord Rodger).

114 *Id.* at ¶ 65 (Lord Hope).

115 *Id.* at ¶ 66.

116 *Id.* at ¶ 9 (Lord Nicholls), ¶¶ 63–66 (Lord Hope), ¶ 109 (Lord Hobhouse of Woodborough), ¶ 158 (Lord Rodger).

lesbians *doubles*, not negates, the presence of sex-based discrimination.[117] By contrast, *Macdonald* held that this equal discrimination *reinforces* the understanding that the employees' biological sex was not a motivating factor behind the adverse employment decision.[118] Even assuming that policies against homosexuality could be broken down into an individual of one sex having a same-sex attraction or relationship, policies that treat all homosexuals the same cannot be considered discriminatory on the basis of gender.[119] Intuitively, *Macdonald*'s approach seems correct; discrimination against both sexes is, *by definition*, discrimination against neither sex.

One final point of comparison is regarding the analogy between miscegenation and sexual orientation protections.[120] *Loving v. Virginia* established that anti-miscegenation laws were unconstitutional.[121] The appellate courts extended this idea to Title VII, prohibiting discrimination

117 *Id.* at 1745, 1747 ("An employer that announces it will not employ anyone who is homosexual, for example, intends to penalize male employees for being attracted to men and female employees for being attracted to women . . . Title VII's plain terms and our precedents don't care if an employer treats men and women comparably as groups; an employer who fires both lesbians and gay men equally doesn't diminish but doubles its liability."). While *Bostock* claims that City of L.A., Dep't of Water and Power v. Manhart, 435 U.S. 702 (1978), supports this conclusion that equal gender-discrimination doesn't negate the discrimination, this argument is specious. *See generally Bostock*, 140 S. Ct. at 1744. *Manhart* held that women having a longer life expectancy than men does not justify an employer requiring female employees to make larger contributions to the company's pension plan. *See Manhart*, 435 U.S. at 708–13. Unlike *Bostock*'s interpretation of *Manhart*, the analysis cannot stop there: *why* did *Manhart* hold this disparate treatment violated Title VII? Because gender stereotypes invariably discriminate against individuals who deviate from said stereotypes. *See id.* at 707–08. However, absent discriminatory treatment of individuals based upon their gender, policies that advance "evenhandedness between men and women," as *Bostock* put it, through disparate treatment of different genders would survive a Title VII challenge. *A fortiori*, where both genders are treated *exactly the same*, such evenhandedness clearly prevents a Title VII challenge against the employer.

118 For a sampling of this concept that is found throughout the opinion, *see Macdonald* UKHL 34 at ¶¶ 6 (Lord Nicholls) ("[I]t was a policy which discriminated between people solely on the ground of their sexual orientation, not on the ground of their sex. The policy was gender neutral, applicable alike to men and women and, moreover, applied alike to men and women."); *id.* at 62 (Lord Hope) ("The fact that the policy applied to all service personnel irrespective of their gender, with the result that homosexual men and women were treated equally, removes from the case another possible ground on which it might have been said that there was unlawful discrimination on the ground of the person's sex."); *id.* at 114 (Lord Scott of Foscotte) ("A homosexual is a person who is sexually attracted to those of the same sex as himself or herself. In statement 1 the reason for the dismissal is the employee's homosexuality. The reason would apply indiscriminately to men or to women. It is a gender neutral reason. To treat the homosexuality reason as being gender specific is to treat it as something that it is not. The 1975 Act bars gender specific discrimination: discrimination on the ground of sex. It does not address discrimination on the gender neutral ground of sexual orientation.").

119 For a detailed illustration of this, *see id.* at ¶¶ 164–73 (Lord Rodger).

120 This argument was not addressed in the majority's opinion, but Justice Alito nonetheless explained the problems with this analogy "for the sake of completeness." *Bostock*, 140 S. Ct. at 1764 (Alito, J., dissenting).

121 Loving v. Virginia, 388 U.S. 1 (1967).

against an employee because of his or her partner's race.[122] One could argue that, just as Title VII protects a Caucasian individual's relationship with someone who is African American, so too Title VII protects someone in a relationship with an individual of a particular sex.[123] Justice Alito argued that one cannot compare miscegenation discrimination to sexual orientation; while anti-miscegenation laws were a "core form" of racial discrimination that anti-discrimination laws were meant to combat, discrimination of homosexuals is not tied historically to any subjugation of either men or women.[124]

Macdonald was divided on how to distinguish racial discrimination laws (including anti-miscegenation laws) from sexual orientation discrimination.[125] As opposed to turning to historical context,[126] Lord Nicholls of Birkenhead took the more intuitive approach and looked to the statutes' words for guidance.[127] The Race Relations Act's language of "on racial grounds"[128]—"grounds" being in the plural tense—was held to have a broader scope of protection than the SDA's "on the ground of her sex."[129] Unlike the Race Relations Act and the SDA, Title VII includes sex and race protections in the same statute. As such, Lord Nicholls's approach would support *Bostock*'s petitioners' argument that anti-miscegenation discrimination protections support Title VII's protection against sexual orientation discrimination under "sex."

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122 *See* Holcomb v. Iona Coll., 521 F.3d 130 (2d Cir. 2008); Parr v. Woodmen of World Life Ins. Co., 791 F.2d 888 (11th Cir. 1988).

123 *See* Hively v. Ivy Tech Cmty. Coll. Of Ind., 853 F.3d 339, 347–49 (7th Cir. 2017).

124 *Bostock*, 140 S. Ct. at 1765 (quoting Altitude Express Inc. v. Zarda, 883 F.3d 100, 158–59 (2d Cir. 2017) (Lynch, J., dissenting); Wittmer v. Phillips 66 Co., 915 F.3d 328, 338 (5th Cir. 2019) (Ho, J., concurring)).

125 *See* Race Relations Act 1976, c. 74 (U.K.), https://www.legislation.gov.uk/ukpga/1976/74/enacted.

126 Interestingly, miscegenation was never prohibited in the United Kingdom, although miscegenetic couples were victims of racial discrimination. *See* Aamna Mohdin, *Meghan Markle's Mixed-Race Marriage Isn't Unusual in the UK*, QUARTZ (May 16, 2018) https://qz.com/1279306/royal-wedding-2018-meghan-markles-mixed-race-marriage-isnt-unusual-in-the-uk/ ("[T]he British reluctance to introduce anti-miscegenation laws stemmed from concern over its possibly damaging effect on colonial relations rather than egalitarianism . . . ."). Chamion Caballero, *Interraciality in Early Twentieth Century Briatin: Challenging Traditional Conceptualisations Through Accounts of 'Ordinariness'*, MULTIDISCIPLINARY DIGIT. PUBL'G INST. (Apr. 17, 2019), https://www.mdpi.com/2313-5778/3/2/21.

127 *See* Macdonald v. Advocate Gen. for Scot. [2003] UKHL 34, [2003] IRLR 512 ¶¶ 10–13 (Lord Nicholls), ¶ (appeal taken from Scot.), http://www.bailii.org/uk/cases/UKHL/2003/34.html.

128 Race Relations Act 1976 at § 1(1)(a).

129 Sex Discrimination Act 1975, c. 65 (U.K.), https://www.legislation.gov.uk/ukpga/1975/65/section/1/1991-02-01, *repealed by* Equality Act 2010, c. 15 (U.K.), https://www.legislation.gov.uk/ukpga/2010/15/introduction/enacted.

While Lord Hope of Craighead entertained Lord Nicholls's approach, he ultimately opted for what he thought was "[t]he better answer."[130] Although the textual nuances must be accounted for, Lord Hope held that there was no hard and fast rule as to when parties associated with the discriminated employee must be considered.[131] This fact-sensitive flexibility would certainly accord with Justice Alito's appeal to historical context in interpreting Title VII.

Lord Rodger of Earlsferry explicitly dealt with the comparison to *Loving*, noting that the purpose of anti-miscegenation laws that prohibited interracial marriage of both African American male and female permutations was to subjugate African Americans.[132] Regarding discrimination against an individual for his or her sexual orientation, this discrimination is not to treat one sex more favorably than another (as anti-homosexual policies apply with equal force against males and females).[133] This fits perfectly with Justice Alito's position in *Bostock*.

IV. THE INTERNATIONAL LEGISLATURES

A good portion of *Bostock* revolves around the glaring omission of the term "sexual orientation" from Title VII. Justice Kavanaugh noted that *every* federal statute that protects against sexual orientation discrimination explicitly codifies this category.[134] Additionally, almost every state that prohibits sexual orientation discrimination explicitly codifies this separately from sex-based discrimination, evidencing the ordinary meaning of "sex" as being a narrow one.[135] More specifically, Justice Alito noted that congressmen have attempted more than a dozen times to amend Title VII to include sexual orientation as a protected class, indicating their understanding that "sex" does not include sexual orientation.[136]

These points did not phase Justice Gorsuch, who explained there was no judicial "canon of donut holes;" although Congress could have explicitly codified the sexual orientation class, the breadth of the term "sex" obviated

130 *Macdonald*, [2003] UKHL 34, IRLR 512 at ¶ 82 (Lord Hope).

131 *Id.*

132 *Id.* at ¶ 174 (Lord Rodger).

133 *Id.*

134 Bostock v. Clayton Cty., 140 S. Ct. 1731, 1829 (2020) (Kavanaugh, J., dissenting) (noting that Congress never defined "sex" to include sexual orientation in *any* federal statute).

135 *Id.* at 1831–32.

136 *Id.* at 1755 (Alito, J., dissenting). *But see id.* at 1747 (majority opinion) (noting that "speculation about why a later Congress declined to adopt new legislation offers a 'particularly dangerous' basis on which to rest an interpretation of an existing law a different and earlier Congress did adopt" (quoting Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990)).

the need to do so.[137] Furthermore, Congress's attempts and failure to amend Title VII to explicitly codify the sexual orientation class is not indicative of sexual orientation discrimination falling beyond the scope of Title VII, as any number of reasons could explain why Congress did not ratify such an amendment to Title VII.[138] Furthermore, the "no-elephants-in-mouseholes canon" did not apply, as Title VII is a major piece of federal legislation written with broad terminology, such as the word "sex."[139]

The dissent's argument is compelling; one would think that Congress says what it means to say.[140] This is especially true for textualists, as statutes' words are the sole means with which Congress communicates how it wants judgments to be made.[141] This concept is evidenced from Title VII's text. Title VII separately prohibits discrimination because of "race" and "color."[142] This suggests that Congress, at the expense of possible redundancy, would clearly state those classes that it wishes to protect.[143] Logically, sexual orientation should be no different.

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137 *Id.* at 1747.

138 For example, some legislators might have considered the legislation unnecessary, as "sex" already included sexual orientation. Other legislators, knowing that Title VII's broad language included sexual orientation, might have wanted to conceal this point to the extent possible. Finally, legislators might have been too busy to properly consider whether the amendment should be made. *Id.* at 1753. The first possibility seems farfetched, as what would an unbiased legislator stand to lose by voting in favor of the amendment? Additionally, the third explanation seems patently absurd. We would like to think that Congress carefully considers matters, especially proposed legislative amendments that have been suggested over a dozen times in less than 60 years. Only the second, if any, of these possibilities should be seriously considered.

139 *Id.*

140 While this is not always the case, it certainly raises a question that should give the courts pause. *See* LARRY M. EIG, CONG. RSCH. SERV., STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 1, 17 (Sep. 24, 2014).

141 *See* John F. Manning, *Without the Pretense of Legislative Intent*, 130 HARV. L. REV. 2397, 2427 (2017) (noting that failure to abide by even awkward statutes could result in judges overlooking Congress's particular command resulting from legislative compromise).

142 42 U.S.C. § 2000e-2(a).

143 Title VII explicitly protects against employment discrimination both because of one's race and one's color, leading the courts to conclude that color discrimination is separate from racial discrimination under Title VII. *See, e.g.,* Walker v. Sec'y of Treasury, I.R.S., 713 F. Supp. 403, 405–07 (N.D. Ga. 1989); *see also* Saint Francis Coll. v. Al–Khazraji, 784 F.2d 505, 515 (3d Cir. 1986), *affd.* 481 U.S. 604 (1987) (same but regarding 42 U.S.C. § 1981). However, color discrimination alone is insufficient to merit Title VII's protection; racial history within the context of America's or a foreign country's national history is also a necessary factor. *See* Ali v. Nat'l Bank of Pak., 508 F. Supp. 611, 613 (S.D.N.Y. 1981) ("[T]he presumption of a protected class status on the basis of color is bound up with an entire national racial history."); *cited with approval by* Kellum v. Cent. Freight Lines Inc., No. CV 01-776 LCS/JHG, 2002 WL 35649939, at *5 (D.N.M. June 21, 2002). Per *Bostock*'s breakdown of sexual orientation as being a form of sex-based discrimination, color-based discrimination amounts to discrimination against a person (i) of a particular race (ii) due to his color. In other words, race is a but-for factor in the adverse employment action. Nevertheless, "color" and "race" are separately enumerated in Title VII. *But see* Felix v. Marquez, No. 78-2314, 1980 WL 242, at *1 (D.D.C. Sept. 11, 1980) ("Color may be a rare

The international community's legislation further suggests that protection against sexual orientation employment discrimination must be explicitly codified in addition to sex, if discrimination protections are to be afforded. A survey of English-speaking countries—whose laws are of greatest relevance for our purposes—is quite telling. South Africa,[144] New Zealand,[145] Canada,[146] Australia,[147] the United Kingdom,[148] the Republic of

claim, because color is usually mixed with or subordinated to claims of race discrimination, but considering the mixture of races and ancestral national origins in Puerto Rico, color may be the most practical claim to present.").

144 S. AFR. CONST., 1996, § 9 ("(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including . . . gender, sex [and] sexual orientation . . . (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3)."); Employment Equity Act 55 of 1998, ch. 2 § 6(1) ("No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including . . . gender, sex, [and] sexual orientation . . . .").

145 Human Rights Act 1993, s 21(1)(a), (m) (N.Z.) ("For the purposes of this Act, the *prohibited grounds of discrimination* are . . . sex, which includes pregnancy and childbirth: . . . sexual orientation, which means a heterosexual, homosexual, lesbian, or bisexual orientation.") It is noteworthy that sex and sexual orientation are the first and last enumerated categories respectively. If sexual orientation were considered a derivative of gender discrimination, one would expect the two to be listed closer together. *See id.* at (c) ("religious belief:"), (d) ("ethical belief, which means the lack of a religious belief, whether in respect of a particular religion or religions or all religions:"); *id.* at (e) ("colour:"), (f) ("race:"), (g) ("ethnic or national origins, which includes nationality or citizenship:").

146 Canadian Human Rights Act, R.S.C., 1985, c. H-6 § 3(1) ("For all purposes of this Act, the prohibited grounds of discrimination are . . . sex, sexual orientation . . . .").

147 *Sex Discrimination Act 1984* (Cth) s 14(1) (Austl.) ("It is unlawful for an employer to discriminate against a person on the ground of the person's sex, sexual orientation, gender identity, intersex status . . . ."); Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth) 26 (Austl.) ("Currently there is limited protection in federal law from discrimination on the basis of sexual orientation and gender identity.") (explaining impetus for amending Sex Discrimination Act of 1984 to include protection against sexual orientation discrimination).

148 Equality Act 2010, c. 15 (UK), https://www.legislation.gov.uk/ukpga/2010/15/introduction/enacted ("The following characteristics are protected characteristics . . . gender reassignment; . . . pregnancy and maternity; . . . sex; sexual orientation.").

Ireland,[149] Jersey,[150] the Isle of Man,[151] Gibraltar,[152] Bermuda,[153] Montserrat,[154] St. Lucia,[155] the Turks and Caicos Islands,[156] and Malta[157] all explicitly prohibit sexual orientation discrimination in their respective constitutions, statutes, and regulations. This international consensus strongly supports the conclusion that Title VII's omission of "sexual orientation" is determinative.

CONCLUSION

As evidenced, the compared courts' holdings are either flawed, irrelevant, or detract from *Bostock*'s broad interpretation of "sex." The international legislatures' unanimity in enumerating "sexual orientation"

149 Employment Equality Act 1998 (Act No. 21/1998) § 6(2) (Ir.), http://www.irishstatutebook.ie/eli/1998/act/21/enacted/en/print ("As between any 2 persons, the discriminatory grounds (and the descriptions of those grounds for the purposes of this Act) are—(a) that one is a woman and the other is a man (in this Act referred to as "the gender ground") . . . (d) that they are of different sexual orientation (in this Act referred to as "the sexual orientation ground").").

150 Discrimination Law 2013, Sched. 1, §§ 3(1), 4(1), (Jersey), https://www.jerseylaw.je/laws/unofficialconsolidated/Pages/15.260.aspx#_ednref40 ("Sex is a protected characteristic . . . Sexual orientation is a protected characteristic.").

151 Employment Act 2017, pt. 2 div. 1, § 5 (Isle of Man), https://www.legislation.gov.im/cms/images/LEGISLATION/PRINCIPAL/2017/2017-0005/EqualityAct2017_2.pdf ("The following characteristics are protected characteristics . . . (h) sex; (i) sexual orientation.").

152 Equal Opportunities Act 2006, § 3(1), (Gib.), https://www.gibraltarlaws.gov.gi/legislations/equal-opportunities-act-2006-369 ("In this Act, except where otherwise provided, "equal opportunities ground" means the grounds of . . . (f) sex (including marital or family status); (g) sexual orientation; . . . .").

153 Human Rights Act 1981, § 2(a)(ii), (Ber.), http://www.bermudalaws.bm/laws/consolidated%20laws/human%20rights%20act%201981.pdf ("For the purposes of this Act a person shall be deemed to discriminate against another person— if he . . . deliberately treats him differently to other persons because . . . of his sex or sexual orientation; . . . .").

154 The Montserrat Constitution Order 2010, No. 2474 (Montserrat), http://www.caribbeanelections.com/eDocs/legislation/ms/ms_constitution_order_2010.pdf ("Whereas every person in Montserrat is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, without distinction of any kind, such as sex, sexual orientation . . . .").

155 Labour Code 2006, § 131(1)(a) (St. Lucia), http://www.govt.lc/media.govt.lc/www/resources/legislation/SaintLuciaLabourCode2006.pdf ("An employer shall not dismiss an employee or institute disciplinary action based on —(a) an employee's . . . sex . . . sexual orientation . . . ."). *See supra* note 147.

156 Turks and Caicos Islands Constitution Order 2011, § 16(3) (Turks & Caicos Is.), https://www.legislation.gov.uk/uksi/2011/1681/pdfs/uksi_20111681_en.pdf ("'discriminatory' means affording different treatment to different persons attributable wholly or mainly to their respective descriptions such as by . . . sex, sexual orientation . . . .").

157 Equal Treatment in Employment Regulations, S.L.452.95 § 3(1) (2004), (Malta), https://www.legislationline.org/download/id/5659/file/Malta_regulations_equal_treatment_employment_2004_am2014_en.pdf ("It shall be unlawful for a person to subject another person to discriminatory treatment, whether directly or indirectly, on the grounds of a . . . sex, including discriminatory treatment related to gender reassignment and to pregnancy or maternity leave [and] sexual orientation . . . .").

separately from "sex" further emphasizes *Bostock*'s error. Considering the weakness of *Bostock*'s holding, it is no surprise that President Joe Biden announced that it is a top priority for his administration to pass the Equality Act, which would explicitly include sexual orientation as a protected characteristic.[158] Last year's confirmation of Justice Amy Coney Barrett is sure to further the sense of urgency among LGBTQ supporters for the codification of *Bostock*'s discrimination protections.[159]

On a broader scale, *Bostock*'s "textualism" stands to threaten authentic textualism's existence.[160] *Bostock*'s bottom line is that words can be understood without turning to society's understanding of a statute, a new perspective on the meaning of textualism. This changing of the textualist guard is sure to have major ramifications for generations to come.

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158 *See The Biden Plan to Advance LGBTQ+ Equality in America and Around the World*, JOE BIDEN FOR PRESIDENT: OFF. CAMPAIGN WEBSITE, https://joebiden.com/lgbtq-policy/ (pledging to reaffirm Title VII's protection against sexual orientation discrimination by passing the Equality Act) (last visited Dec. 17, 2020). To date, the Senate has yet to pass the Equality Act. *See* Mike DeBonis, *The Push for LGBTQ Civil Rights Stalls in the Senate As Advocates Search for Republican Support*, WASH. POST (June 20, 2021, 6:00 AM) https://www.washingtonpost.com/politics/senate-lgbtq-equality-act/2021/06/19/887a4134-d038-11eb-a7f1-52b8870bef7c_story.html.

159 *See* Angela D. Giampolo, *Justice Amy Coney Barrett: A Threat to LGBTQ and Minority Civil Rights*, LAW.COM (Nov. 13, 2020, 11:03 AM), https://www.law.com/thelegalintelligencer/2020/11/13/justice-amy-coney-barrett-a-threat-to-lgbtq-and-minority-civil-rights/?slreturn=20201117121221.

160 *See* Editorial, *The Supreme Court's Textualism Test*, WALL ST. J. (Nov. 21, 2019, 7:21 PM), https://www.wsj.com/articles/the-supreme-courts-textualism-test-11574382080.

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