FOREWORD

Testing Textualism's "Ordinary Meaning"

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ABSTRACT

The statutory interpretation literature has taken an empirical turn. One recent line of research surveys the public to test whether textualist opinions reached the "right answer" in specific cases—that is, whether textualist judges correctly identified the "ordinary meaning" of federal statutes. This Foreword uses this literature as a jumping off point to explore the concept of "ordinary meaning." The Foreword challenges two central assumptions underlying this empirical scholarship: first, that "ordinary meaning" should be viewed primarily as an empirical concept, and, second, that textualists themselves view "ordinary meaning" in empirical terms. As the Foreword shows, "ordinary meaning" can be understood as a legal concept, not simply as an empirical fact. Moreover, the Foreword demonstrates that many prominent textualists have long treated "ordinary meaning" as a legal concept—one that must be elucidated through the understanding of a hypothetical reasonable reader (although, as the Foreword discusses, textualists debate how well-informed such a reasonable reader should be). This analysis complicates recent efforts to test empirically whether textualists have reached the "right answer" in specific cases. For many textualists, like many other interpretive theorists, statutory analysis is primarily a normative, not an empirical, enterprise.

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October 2022 Vol. 90 No. 5

Table of Contents

Introduction

Scholarship on statutory interpretation has taken an empirical turn. Much, albeit not all, of this literature seeks to "test" textualism—calling into question the assumptions and practices of the method. Some scholarship examines textualists' assumptions about the legislative process.[1] Other work examines textualists' reliance on dictionaries[2] or corpus linguistic methods.[3] Recently, a third line of

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1 Scholars have interviewed congressional staffers to get a sense of the legislative drafting process. *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901, 906–07, 919, 949–50, 956–60, 968 (2013) (drawing on a survey of 137 congressional staffers responsible for drafting legislation and calling into question textualists' reliance on some canons and textualists' refusal to consider legislative history); Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 Stan. L. Rev. 725, 784–85 (2014) ("[O]ur study calls into question the conclusion that text is always the best evidence of the [legislative bargain]."); Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. Rev. 575, 576–78, 600–05 (2002) (drawing on interviews with sixteen Senate Judiciary Committee staffers). One concern about this work is that the authors were not able to interview members of Congress themselves. *See* John F. Manning, *Inside Congress's Mind*, 115 Colum. L. Rev. 1911, 1936 n.151 (2015).

2 *See, e.g.*, Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 Ariz. St. L.J. 275, 280–81 (1998) (arguing that "textualists are selective and inconsistent in when and how they use dictionary definitions"); James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 Wm. & Mary L. Rev. 483, 488–94 (2013) (concluding, based on an empirical and doctrinal

empirical work has emerged. This work aims to test whether textualists have gotten the "right answer" in specific cases and controversies—that is, whether judges have correctly identified the "ordinary meaning" of a law.[4]

This new line of empirical work surveys "ordinary people" to see if their responses to statutory questions map onto the conclusions of textualist judicial opinions.[5] Some of this scholarship examines admin-

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analysis, that "dictionaries add at most modest value to the interpretive enterprise, and that they are being overused and often abused by the Court"); Kevin P. Tobia, *Testing Ordinary Meaning*, 134 HARV. L. REV. 726, 734 (2020) (using a novel survey method "to test dictionaries and legal corpus linguistics" and finding that "the way people understand ordinary terms and phrases . . . varies systematically from what a dictionary definition or relevant legal corpus linguistics' usage data would indicate about the meaning"); *see also* Gluck & Bressman, *supra* note 1, at 907 (finding that legislative staffers "do not consult dictionaries when drafting").

3 "Corpus linguistics" involves the use of datasets to study linguistic phenomena, including searching databases to determine the frequency with which a word appears alongside other words in a given time period. *See* Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 792, 828–30 (2018) (describing and advocating for the method); *see also* Stefan Th. Gries & Brian G. Slocum, *Ordinary Meaning and Corpus Linguistics*, 2017 BYU L. REV. 1417, 1423–24, 1440–42, 1470–71 (2017) (arguing that interpreters should rely on corpora, but also recognizing the limits of the approach, and suggesting that judges may need to rely on experts). For criticisms of the approach, see Carissa Byrne Hessick, *Corpus Linguistics and the Criminal Law*, 2017 BYU L. REV. 1503, 1505, 1514–15 (2017) (arguing that "corpus linguistics represents a radical break from current interpretive theories" and should "not be adopted as an interpretive theory for criminal laws"); Matthew Jennejohn, Samuel Nelson & D. Carolina Núñez, *Hidden Bias in Empirical Textualism*, 109 GEO. L.J. 767, 770–71 (2021) (arguing that the corpus of Historical American English, "one of the primary corpora that is used in legal interpretation, reflects structural gender bias"); Tobia, *supra* note 2, at 734; *see also* Anya Bernstein, *Democratizing Interpretation*, 60 WM. & MARY L. REV. 435, 444 (2018) (asserting that although corpus linguistics is "certainly interesting, and might be productive, in the legal context[,] empiricism cannot resolve normative questions" about, for example, "the boundaries of the speech community that determines what a word means"); Kevin Tobia & John Mikhail, *Two Types of Empirical Textualism*, 86 BROOK. L. REV. 461, 463 (2021) ("Legal corpus linguistics is importantly limited by the collection of evidence in the relevant database. For example, only published writing is normally part of the corpus, but that reflects only a tiny fraction of actual language use during a given time period."). One possibility is that interpreters can use dictionaries and corpus linguistics as "checks" on one another. *See* Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 285 (2017) (noting that when different "techniques converge on a single hypothesis . . . we would have strong evidence in favor of that meaning").

4 *See infra* notes 6–8 and accompanying text; *see also infra* Part II.

5 To be sure, not all recent survey work has this goal. Kevin Tobia, for example, has used surveys to question the use of dictionaries and corpus linguistics methods. *See* Tobia, *supra* note 2, at 734. In another important paper, Tobia, along with Brian Slocum and Victoria Nourse, find that survey participants understand *rules* differently from other language. *See* Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Statutory Interpretation from the Outside*, 122 COLUM. L. REV. 213, 224–25 (2022). For a general survey of empirical work on not only statutory interpretation but also common law concepts, see Kevin Tobia, *Experimental Jurisprudence*, 89 U. CHI. L. REV. 735 (2022).

istrative and criminal cases,[6] while other work explores the issue raised in *Bostock v. Clayton County*[7]: whether the disparate treatment of a gay, lesbian, or transgender employee qualifies as "discriminat[ion] . . . because of such individual's . . . sex" under Title VII of the Civil Rights Act of 1964.[8]

This Foreword uses this literature as a jumping off point to explore the concept of "ordinary meaning." The Foreword raises questions about two central assumptions underlying much of this scholarship. First, and most fundamentally, scholars assert that "ordinary meaning" is an empirical concept.[9] Second, commentators further claim that textualists treat "ordinary meaning" as an empirical fact—thereby justifying efforts to test textualism.[10]

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6 *See* Shlomo Klapper, Soren Schmidt, & Tor Tarantola, *Ordinary Meaning from Ordinary People*, U.C. IRVINE L. REV. (unpublished manuscript) (on file with author) (using surveys to examine the question in Muscarello v. United States, 524 U.S. 125, 126–27 (1998), which involved whether an individual "'carries a firearm'" when the firearm is in "the locked glove compartment or trunk of a car," and MCI v. AT&T, 512 U.S. 218, 220 (1994), which involved whether the Federal Communications Commission's authority to "'modify'" tariff requirements allowed it to make only modest changes or allowed for broader changes, such as making the tariff filing optional for certain carriers); *infra* Part II.A (discussing the *MCI* case).

7 140 S. Ct. 1731 (2020).

8 42 U.S.C. § 2000e-2(a)(1); *see* James A. Macleod, *Finding Original Public Meaning*, 56 GA. L. REV. 1, 8–10 (2021) (using a new "applied-meaning-experiment" method, which asked participants to "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'" and finding that "[t]he results favored the *Bostock* majority's interpretation," particularly with respect to transgender individuals). Kevin Tobia and John Mikhail also surveyed individuals about the issue in *Bostock* but offer more qualified conclusions. *See* Tobia & Mikhail, *supra* note 3, at 483–85 (finding some support for the *Bostock* majority while noting that the results varied based on the questions asked, and thus "call[ing] into question any uncritical reliance on simple, one-dimensional survey methods to ascertain the meaning of complex legal language").

9 *See* Tobia & Mikhail, *supra* note 3, at 461 ("There is significant debate about the meaning of 'ordinary meaning,' but there is general agreement that it is an *empirical* notion, closely connected to facts about how ordinary people understand language . . . . [O]rdinary meaning is derived from, or perhaps equated with, the general public's understanding of the text."); *infra* notes 10, 85.

10 *See* Macleod, *supra* note 8, at 4–6 (asserting that textualists themselves view the inquiry into "original public meaning" as "factual and empirical, not normative"); Tobia, *supra* note 2, at 801 (asserting that there is "a core assumption of textualist and originalist theories that use dictionaries and legal corpus linguistics: there is an empirical *fact* about ordinary meaning, grounded in what language communicates to ordinary people"); *see also* William N. Eskridge Jr. & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 N.Y.U. L. REV. 1718, 1763 (2021) ("Textualists claim to be empirical, not normative."). Some scholars recognize that the textualist literature is more nuanced. *See* Mitchell N. Berman & Guha Krishnamurthi, Bostock *Was Bogus: Textualism, Pluralism, and Title VII*, 97 NOTRE DAME L. REV. 67, 97 (2021) ("[C]ommitted textualists have often insisted

This Foreword challenges both assumptions. As the Foreword explains, "ordinary meaning" can be understood as a legal concept, serving in part as a legal term of art to distinguish a less technical understanding of statutory terms from a more technical or specialized use.[11] Moreover, many prominent textualists have long treated "ordinary meaning" as a legal concept and have thus urged interpreters to use legal tools, such as the construct of a hypothetical reasonable person, to identify the "ordinary meaning" of statutory terms and phrases.[12] As the Foreword discusses, self-proclaimed textualists disagree about how well-informed this reasonable reader presumptively should be; that is, they disagree about which contextual evidence should factor into the statutory analysis. But all such textualists treat "ordinary meaning" as primarily a legal concept, not simply as an empirical fact.

The Foreword proceeds as follows: Part I explores how "ordinary meaning" can be understood as a legal concept, and how textualists have long viewed "ordinary meaning" in that way, albeit without much theorizing on the topic. Part II examines the recent empirical literature, raising further questions about the capacity of empirical surveys to test the conclusions of textualist judicial opinions. Part III offers some thoughts on the implications of a legalistic conception of "ordinary meaning." The Foreword suggests that, to the extent interpreters treat "ordinary meaning" as a legal concept—as many do—they should grapple with the legal and normative questions surrounding how jurists should identify the "ordinary meaning" of laws.

I. "Ordinary Meaning" as a Legal Concept

Judges often say that they seek the "ordinary meaning" of a federal statute.[13] But what is the ordinary meaning of a law? That turns

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that ordinary meaning is not an entirely empirical inquiry, but rather a partially normalized or idealized one," and thus seek the views of a hypothetical reasonable reader.).

11 *See infra* Part I. To be sure, other commentators have observed that an ordinary meaning of a word is different from a technical meaning. *See, e.g.*, John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum. L. Rev. 1, 107 (2001) (textualists "recognize that statutory terms may have specialized (rather than ordinary) meanings"); Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Ordinary Meaning and Ordinary People*, 171 U. Pa. L. Rev. (forthcoming 2023) (describing the ordinary meaning of a word as "not technical meaning"); *see also* Smith v. United States, 508 U.S. 223, 242, 244–45 (1993) (Scalia, J., dissenting) ("In the search for statutory meaning, we give nontechnical words and phrases their ordinary meaning."). But scholars do not often describe "ordinary meaning" as a legal concept that must be elucidated through legal analysis.

12 *See infra* Part II.

13 *E.g.*, BP P.L.C. v. Mayor and City Council of Baltimore, 141 S. Ct. 1532, 1537 (2021)

out to be a conceptual puzzle. The term "ordinary meaning" does, at first glance, appear to describe an empirical concept. One might assume that the *ordinary* meaning of statutory language is the most common or the most popular usage of that language. On this view, ordinary meaning is an empirical fact.

That is, however, not the only way to understand ordinary meaning. An alternative conception is that "ordinary meaning" is a legal concept, serving in part as a legal term of art that distinguishes a less technical understanding of statutory terms or phrases from a more "technical meaning," one that draws on a particular trade, science, or other specialty. Importantly, prominent textualist jurists and scholars have long treated ordinary meaning as a legal concept. These textualists have thus employed legal constructs (such as the hypothetical reasonable reader) to discern the ordinary meaning of a statutory term or phrase.

A. Ordinary v. Technical Meaning

Years ago, I told my (non-lawyer) mother that I was writing an article about "standing." She paused, stared at me oddly for a while, then said finally, "Okay. And your next paper will be on 'sitting' . . . and then 'walking' . . . ?" Lawyers, of course, know that "standing" has a technical legal meaning, referring to one requirement for launching a suit in federal court.[14] My mom's reply reminded me that "standing" also has a very ordinary meaning—one that made my planned paper topic seem rather odd (and dull!) to a lay audience.

Early jurists and scholars often described "ordinary meaning" as distinct from a more "technical meaning."[15] For example, in his 1839

("When called on to interpret a statute, this Court generally seeks to discern and apply the ordinary meaning of its terms at the time of their adoption."); Artis v. District of Columbia, 138 S. Ct. 594, 603 (2018) ("In determining the meaning of a statutory provision, 'we look first to its language, giving the words used their ordinary meaning.'" (quoting Moskal v. United States, 498 U.S. 103, 108 (1990))).

14 Under current Article III standing doctrine, a private party must demonstrate a concrete injury that was caused by the defendant and that can be redressed by the requested relief. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

15 *See*, *e.g.*, United States v. Stone & Downer Co., 274 U.S. 225, 245–46 (1927) ("If Congress had intended that the words 'clothing wool' should have their commercial designation, it would simply have used the words without qualification or it would have said 'commercially known as.' It would not have used the phrase '*commonly known as*.' The phrase indicates . . . that clothing wool is used in its ordinary or non-expert meaning."); Union Pacific R.R. Co. v. Hall, 91 U.S. 343, 347 (1875) ("The words 'on the boundary of Iowa' are not technical words; and therefore they are to be taken as having been used by Congress in their ordinary signification."); JAMES KENT, COMMENTARIES ON AMERICAN LAW 521 (10th ed. 1826) ("The words of a statute . . . are to be taken in their natural, plain, obvious, and ordinary signification

treatise, Francis Lieber stated: "According to the character of the text before us, we are obliged to take words, either in their common adaptation in daily life, or in the peculiar signification which they have in certain arts [or] sciences."[16] An 1871 treatise likewise stated that "when technical terms are used" in a statute, "they are to be taken in a technical sense . . . . In other cases, words are to be taken in their ordinary sense."[17]

A few cases illustrate this distinction. *Maillard v. Lawrence* (1853)[18] involved whether shawls were "wearing apparel" under the Tariff Act of 1846.[19] If the shawls were "wearing apparel," they would be subject to a higher tariff; otherwise, they would qualify for a lower tariff as products "of which silk shall be a component material, not otherwise provided for."[20] Some evidence suggested that "in a mercantile sense," shawls were not "wearing apparel."[21] But the Court relied on "the ordinary and received acceptation" of the term, concluding that a "shawl" was "a familiar, every day and indispensable part of wearing apparel."[22]

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and import . . . and if technical words are used, they are to be taken in a technical sense."); SIR FORTUNATUS DWARRIS, A GENERAL TREATISE ON STATUTES 179 n.1, 215 (1871) ("[W]hen technical terms are used, they are to be taken in a technical sense . . . . In other cases, words are to be taken in their ordinary sense."); FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS 100 (1839) ("According to the character of the text before us, we are obliged to take words, either in their common adaptation in daily life, or in the peculiar signification which they have in certain arts, sciences, sects, provinces, &c., in short, we have to take words according to what is termed *usus loquendi*."); SIR PETER BENSON MAXWELL, ON THE INTERPRETATION OF STATUTES 2 (1875) ("The first and most important rule of construction is, that it is to be assumed in the first instance, that the words and phrases are used in their technical meaning if they have acquired one, and in their popular meaning if they have not."); J. G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 327 (1891) ("[I]n the absence of anything in the context to the contrary—common or popular words are to be understood in a popular sense . . . and technical words, pertaining to any science, art or trade, in a technical sense."); *infra* notes 16–26 and accompanying text.

16 LIEBER, *supra* note 15, at 100.

17 DWARRIS, *supra* note 15, at 215.

18 57 U.S. (16 How.) 251 (1853).

19 *See id.* at 256–57.

20 Walker Tariff Act of 1846, 1846 Stat. 42, 44–46 (showing that Schedule C imposed a 30% tariff on "clothing ready made, and wearing apparel of every description, of whatever material composed, made up or manufactured wholly or in part by the tailor, sempstress, or manufacturer," among other items, while Schedule D imposed a 25% duty on "manufactures of silk, or of which silk shall be a component material, not otherwise provided for," among other items).

21 *Maillard*, 57 U.S. (16 How.) at 257.

22 *Id.* at 260–61; *see id.* at 261 ("In instances in which words or phrases are novel or obscure, as in terms of art . . . it may be proper to explain or elucidate them by reference to the art or science to which they are appropriate" but, here, the "language [was] familiar to all classes and grades and occupations.").

McCaughn v. Hershey Chocolate Company (1931)[23] involved whether chocolate qualified as "candy" under the Revenue Acts of 1918 and 1921, and thus could be taxed at a higher rate as a "luxury."[24] The Hershey Company argued that chocolate was "food," not "candy," asserting that "candy" had a specialized industry definition limited to "confectionery, made principally of sugar or molasses, with or without the addition of coloring or flavoring matter."[25] The Court acknowledged that "the word 'candy' . . . may be used in this narrower and more restricted sense," but found that, in the context of the Revenue Acts, it was used "in a popular and more general sense" and embraced Hershey chocolate.[26]

Nix v. Hedden (1893)[27] also embodies this distinction, though the case is more nuanced than commentators often presume. *Nix* involved whether "tomatoes" should be classified as "vegetables" under the Tariff Act of 1883, and thus subject to a tariff, or as "fruit" exempt from any payment.[28] At the outset, the Court ruled out one potential technical meaning, finding "no evidence that the words 'fruit' and 'vegetables' have acquired any special meaning in trade or commerce."[29] One might expect that the debate was then between what many take to be the botanical understanding (tomatoes as fruit) and a

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23 283 U.S. 488 (1931).

24 The two revenue statutes were precisely the same, except that candy was subject to a 3% luxury tax under the 1918 Act and a 5% tax under the 1921 Act. *See* Revenue Act of 1918, Pub. L. No. 65-254, § 900, 40 Stat. 1057, 1122 (1919) ("That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased— . . . (9) Candy, 5 per centum."); Revenue Act of 1918, Pub. L. No. 67-98, § 900, 42 Stat. 227, 292 (1921); *see also McCaughn*, 283 U.S. at 489–90.

25 *McCaughn*, 283 U.S. at 490–91 (1931) ("Respondents rest their case mainly upon differences in composition of sweet chocolate from that of confectionery, made principally of sugar or molasses, with or without the addition of coloring or flavoring matter, which, it is urged, is alone described by the word 'candy.' They assert that chocolate is food and candy is not, and hence chocolate cannot be properly described as candy.").

26 *Id.* at 491.

27 149 U.S. 304 (1893).

28 *Id.* at 306 ("The single question in this case is whether tomatoes, considered as provisions, are to be classed as 'vegetables' or as 'fruit,' within the meaning of the Tariff Act of 1883."); *see* An Act to Reduce Internal-Revenue Taxation, and For Other Purposes, Pub. L. No 47-121, 22 Stat. 488, 503–04, 517, 519 (1883) (stating, under Schedule G Provisions, that there would be a tax on "[v]egetables, in their natural state, or in salt or brine, not specially enumerated or provided for in this act, ten per centum ad valorem," while listing, under "Sundries," which were untaxed, "[f]ruits, green, ripe, or dried, not specially enumerated or provided for in this act").

29 *Nix*, 149 U.S. at 306 ("There being no evidence that the words 'fruit' and 'vegetables' have acquired any special meaning in trade or commerce, they must receive their ordinary meaning.").

more ordinary understanding (tomatoes as vegetables).[30] But, interestingly enough, the remainder of the case was a debate over "ordinary meanings." The plaintiffs in *Nix*, who argued that the term "fruit" encompassed tomatoes, disclaimed any reliance on technical meaning.[31] Instead, the plaintiffs emphasized that "the statutory term to be construed is 'fruits'—not tomato," and insisted that the ordinary meaning of "fruit"—an edible plant with seeds—encompassed tomatoes.[32] The government countered that the ordinary meaning of "vegetables" was broad enough to include tomatoes.[33] In this battle over ordinary meanings, the Court sided with the government, stating that although tomatoes are "[b]otanically speaking . . . the fruit of a vine, just as are cucumbers, squashes, beans, and peas . . . in the common language of the people, whether sellers or consumers of provisions, all these are vegetables."[34]

Importantly, in each of these cases, the Court's selection of the ordinary meaning, rather than the technical meaning, did not change the legal nature of the inquiry. The Court had to interpret the terms

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30 That is how the case is often described in law school casebooks. See LISA SCHULTZ BRESSMAN, EDWARD L. RUBIN, & KEVIN M. STACK, THE REGULATORY STATE 163 (3d ed. 2020) ("[I]t would have made all the difference in the *Nix* case had the Court adopted the technical, botanical meaning of tomato as opposed to the ordinary one."); JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION: CASES AND MATERIALS 149 (3d ed. 2017) ("*Nix* illustrates the difficulties that may arise when words and phrases have both ordinary and specialized meanings. . . . A botanist may (correctly) assert that a tomato is a fruit, while a chef might (correctly) assert that it's a vegetable."). Of course, as some casebook authors have recognized, the story is more complicated because botanists may describe a tomato as *both* a fruit *and* a vegetable. *See id.* (noting that "botanists define a vegetable as any edible part of a plant other than the flower").

31 *See* Plaintiff's Brief, at 13–14, 16, Nix v. Hedden, 149 U.S. 304 (1893) (No. 137) ("The meaning of 'fruits' for which we contend is seen to be that given in every dictionary and popular cyclopaedia, and the sense in which it is used in common speech" and insisting "[m]anifestly, the impression [in the lower court decision] that the definitions upon which we relied were botanical, or in any respect technical, was misleading . . . . As the word is not used technically, it must embrace everything in fact 'fruits' . . .").

32 *Id.* at, at 10–11, 20 ("It must constantly be borne in mind, that *the statutory term to be construed is* 'FRUITS'—not tomato. . . . We believe it impossible to adopt any fair, reasonable, general definition of the word '*fruits*' which, when it comes to be applied, will not include the tomato. . . . In Webster's new 'International,' this is the applicable meaning;— 2. *(Hort.)* The pulpy, edible seed-vessels of certain plants, especially *those grown on branches above ground*, as apples, oranges, grapes, melons, berries, etc.").

33 Brief for the Defendant in Error, at 3, Nix v. Hedden, 149 U.S. 304 (1893) (No. 137) ("The definition of *vegetable* given in the Century Dictionary is adequate and satisfactory, namely: 'A herbaceous plant used wholly *or in part* for culinary purposes, or for feeding cattle, sheep, or other animals, as cabbage, cauliflower, turnips, potatoes, spinach, pease, and beans. The whole plant may be so used, or its tops or leaves, or its roots, tubers, etc., or its fruit or seed.'").

34 *Nix*, 149 U.S. at 307.

"wearing apparel," "candy," "fruit," and "vegetables" in the context of the federal statute at issue. As part of this inquiry, the Court had to address certain legal questions. One set of questions involved the type(s) of evidence relevant to determining the ordinary meaning. In *Nix*, for example, the parties relied on competing dictionary definitions,[35] and the government further emphasized a report from the Tariff Commission describing tomatoes as "vegetables."[36] The Court had to decide, as a matter of law, which sources to consider and how to weigh the evidence before it.

The Court also had to consider the import of the statutory structure. To use *Nix* again as an example, the Tariff Act did tax certain specified fruits, such as dates and plums, while leaving untaxed "fruits . . . not otherwise provided for."[37] The plaintiffs pointed to this structure to argue that the statutory term "fruits" must be very broad.[38] But there were competing structural arguments. The government relied on a provision that was equally broad, taxing "[v]egetables, in their natural state, or in salt or brine, not specially enumerated or provided for in this act."[39] Moreover, as the plaintiffs themselves acknowledged, some dictionary definitions of "fruit" were broad enough to "cover everything," including many plants that are

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35 *See supra* notes 31–33. The Court did not appear to find this dictionary battle to be particularly informative. *See Nix*, 149 U.S. at 306 ("The passages cited from the dictionaries define the word 'fruit' as the seed of plants, or that part of plants which contains the seed, and especially the juicy, pulpy products of certain plants, covering and containing the seed. These definitions have no tendency to show that tomatoes are 'fruit,' as distinguished from 'vegetables,' in common speech, or within the meaning of the Tariff Act.").

36 *See* Brief for the Defendant in Error, at 3–4, Nix v. Hedden, 149 U.S. 304 (1893) (No. 137) (noting that the Tariff Commission in 1882 had published a statement discussing "potatoes, tomatoes, and other green or fresh vegetables" and stating "[w]ith such evidence before them as to the proper classification of tomatoes, we may safely assume that if it had been the intention to admit them free of duty Congress could hardly have expected them to be classified as fruits, but would have exempted them by name").

37 22 Stat. at 504, 517, 519 (taxing "[d]ates, plums, and prunes, one cent per pound" and "[f]ruits, preserved in their own juices, and fruit-juice, twenty per centum ad valorem," while listing, under "Sundries," which were untaxed, "[f]ruits, green, ripe, or dried, not specially enumerated or provided for in this act").

38 *See* Plaintiff's Brief, at 16, Nix v. Hedden, 149 U.S. 304 (1893) (No. 137) ("From all unprovided-for and non-enumerated vegetable products, the act segregates and excepts all classes of specified and unspecified fruits. This exception itself precludes giving the widest meaning which can be embraced within the term 'vegetable' . . . but leaves the most comprehensive sense . . . to be assigned to the word 'fruits' . . . . As the word is not used technically, it must embrace everything in fact 'fruits,' though only dealt in by their several names, as 'mangoes,' 'alligator-pears,' etc., etc. . . . . ").

39 22 Stat. at 503–04 (1883) (stating, under Schedule G Provisions, that there would be a tax on "[v]egetables, in their natural state, or in salt or brine, not specially enumerated or provided for in this act, ten per centum ad valorem").

often described as "vegetables."[40] Yet the Tariff Act clearly differentiated most "fruits" from most "vegetables" in tax treatment—a structure that could suggest the Act did not adopt the most expansive dictionary definition of "fruit."[41]

My goal is not to say whether the Court in *Nix* (or *Maillard* or *McCaughn*) correctly interpreted the relevant statutory language. The important point, for present purposes, is that these questions—e.g., what evidence is relevant to a statutory interpretive inquiry, and what to make of the surrounding statutory structure—are questions of law. To determine the ordinary meaning of a term or phrase in a federal statute, the Court must conduct a legal analysis. Accordingly, there is a strong basis for treating "ordinary meaning" as primarily a legal concept.

To be clear, I do not claim that the search for ordinary meaning (or technical meaning, for that matter) is entirely legal and normative, and not at all empirical. Language of course depends on conventions that one learns in using the language over time. To refer back to my initial example of the distinction between ordinary and technical meaning: It is a convention that speakers of English refer to the upright position as "standing" rather than, say, using something more similar to the French term "debout." It is likewise a convention that lawyers refer to one requirement for getting into court as "standing" rather than calling it, say, "courting" or "complainting." The well-accepted nature of many conventions of language likely explains why we do not see legal disputes over, for example, whether chocolate is a "vegetable" or tomatoes are "candy." But as this section shows, when legal disputes arise, a good deal of the search for "ordinary meaning" will depend on legal considerations.

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40 *See* Plaintiff's Brief at 2, Nix v. Hedden, 149 U.S. 304 (1893) (No. 137) (declining to rely on one dictionary definition, which was listed *first* in that dictionary, because it was so "general" as to "cover[] everything").

41 *Cf.* MANNING & STEPHENSON, *supra* note 30, at 150 (asking students to consider whether, in *Nix*, one might "have reasoned from the structure of the statute that Congress could not have had the botanical definitions in mind, because botanically the category 'fruit' is a subset of the category 'vegetable,' such that the use of the botanical definitions would be inconsistent with the tariff statute's use of 'fruits' and 'vegetables' as separate, presumably exclusive categories?"); Richard M. Re, *Clarity Doctrines*, 86 U. CHI. L. REV. 1497, 1500 (2019) ("[T]he choice to care about clarity or unclarity, as well as how to go about finding it, would still be governable by law.").

B. Textualists' Use of Legal Rules to Select the "Ordinary Meaning"

How have textualists treated the concept of "ordinary meaning"? The literature on textualism does not appear to have theorized much about this concept, but prominent textualists have clearly treated the concept as one having legal content. After all, if one views "ordinary meaning" as a legal concept, one should adopt legal rules to choose *which* ordinary meaning is preferable. Many prominent textualists have adopted such an approach, interpreting statutory language through the lens of a hypothetical reasonable reader.

Justice Scalia, Justice Gorsuch, Judge Easterbrook, and John Manning all focus on "the understanding of the objectively reasonable person."[42] For example, Justice Gorsuch has written that "the task in any case is to interpret and apply the law" from the standpoint of "a

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42 Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988) ("We should look at the statutory structure and hear the words as they would sound in the mind of a skilled, objectively reasonable user of words . . . . The meaning of statutes is to be found not in the subjective, multiple mind of Congress but in the understanding of the objectively reasonable person."); *see* ANTONIN SCALIA, A MATTER OF INTERPRETATION 17 (1997) ("We look for a sort of 'objectified' intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*."); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 15–16 (2012) (advocating a "return to the oldest and most commonsensical interpretive principle: [i]n their full context, words mean what they conveyed to reasonable people at the time they were written—with the understanding that general terms may embrace later technological innovations. . . . The exclusive reliance on text when interpreting text is known as *textualism*."); *infra* notes 43–45 and accompanying text; *see also* Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2200–04 (2017) (noting that textualists such as Justice Scalia and Judge Easterbrook focus on the hypothetical reasonable reader, although also observing that "Scalia was not always clear about whether the prototypical reader is an ordinary member of the public or a lawyer"). This also appears to be the approach of some originalists in constitutional interpretation. *See* Gary Lawson, *No History, No Certainty, No Legitimacy . . . No Problem: Originalism and the Limits of Legal Theory*, 64 FLA. L. REV. 1551, 1554 (2012) (noting that "the form of originalism that is increasingly emerging among sophisticated adherents" is "a form in which meaning is determined by the hypothetical understandings of a fictitious reasonable observer"); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1132 (2003) (describing "*original, objective-public-meaning textualism*" as an effort to determine how the Constitution "would have been understood by a hypothetical, objective, reasonably well-informed reader"); John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 NW. U. L. REV. 1371, 1373 (2019) (noting that original public meaning originalism "posits that the object of interpretation is the text as reasonably understood by a well-informed reader at the time of the provision's enactment," though advocating original methods originalism); *see also* Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 245 (2009) ("[S]everal of the most prominent academic proponents of originalism" look to the understanding of "a *hypothetical*, objective, reasonably well-informed reader.").

reasonable and reasonably well-informed citizen."[43] In their 2012 treatise *Reading Law*, Justice Scalia and Bryan Garner envision a highly sophisticated "reasonable reader":

> 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. The endeavor requires aptitude in language, sound judgment, the suppression of personal preferences regarding the outcome, and, with older texts, historical linguistic research.[44]

John Manning also argues that "textualists interpret statutory language by asking how 'a skilled, objectively reasonable user of words' would have understood the statutory text, as applied to the problem before the judge."[45] As both Manning and Justice Barrett have observed, "the statutory meaning derived by textualists" is thus "a construct."[46] On this view, textualists aim for the reading of a reasonable person or legislator, not the view of any actual person or legislator.

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43 NEIL M. GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 51 (2019) ("[T]he task in any case is to interpret and apply the law as a reasonable and reasonably well-informed citizen might have understood when it engaged in the activity at issue in the case or controversy—not to amend or revise the law in some novel way."); *id.* at 55–56 (arguing that the judge should try to "answer the same narrow question—What might a reasonable person have thought the law was at the time?"); Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RSRV. L. REV. 905, 910 (2016) (emphasizing the vantage point of "a reasonable and reasonably well-informed citizen").

44 SCALIA & GARNER, *supra* note 42, at 33 (stating that the context includes "(1) a word's historical associations acquired from recurrent patterns of past usage, and (2) a word's immediate syntactic setting—that is, the words that surround it in a specific utterance"). The writers also state that such a reasonable reader can consider purpose but only as derived from the text itself. *Id.* (asserting that the reasonable reader should have an "ability to comprehend the *purpose* of the text, which is a vital part of its context. But the purpose is to be gathered only from the text itself, consistently with the other aspects of its context.").

45 John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2458 (2003) (quoting Easterbrook, *supra* note 42, at 65).

46 John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 83 (2006) ("[T]he statutory meaning derived by textualists is a construct. Textualists do not (and, given their assumptions about actual legislative intent, could not) claim that a constitutionally sufficient majority of legislators *actually* subscribed to the meaning that a textualist judge would ascribe to a hypothetical reasonable legislator conversant with the applicable social and linguistic conventions."); *see* Barrett, *supra* note 42, at 2200–04, 2211 (arguing that surveys of congressional staffers do not properly test textualism, because "textualists use the construct of a hypothetical *reader*," not "the construct of a hypothetical *writer* of a statute," and noting that textualists have "identified their construct as a skilled user of language, typically familiar with legal conventions"). In her academic writing, Justice Barrett has suggested that empirical work might inform whether linguistic canons track general patterns of speech. *See id.* at 2203–04 ("[T]he linguistic canons are designed to capture the speech patterns of ordinary English speak-

C. *Debates Over the Hypothetical Reasonable Reader*

There are important debates among textualists about this legal test. Textualists disagree about how "well-informed" this reasonable reader should be—that is, which evidence may be presumptively considered in conducting a statutory analysis. Some textualist opinions apply a more formal textualism, focusing on the surrounding text and structure (semantic context) and declining to consider past public understandings (social context) or the practical consequences of a decision. Other textualist opinions endorse a more flexible textualism that looks beyond semantic context to social and policy context as well as practical consequences.[47] The Court's recent decision in *Bostock v. Clayton County* illustrates this divide.

I explore the divisions within textualism (and the *Bostock* decision) in more detail in separate work.[48] For now, I mention this divide because it is a debate about legal rules—what one might call the proper "law of interpretation."[49] Textualists are engaged in a kind of evidentiary debate, disagreeing about the contextual evidence that may be considered by the hypothetical reasonable reader. As I have argued, the choice between these approaches may be difficult; it depends in part on one's views about the proper judicial role and how much discretion judges should have in statutory interpretation. But whatever one views as the proper approach to textualism—or interpretation more generally—the choice depends on normative values, not empirical calculations.

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ers and, in some cases, of the subclass of lawyers. . . . Whether the canons actually capture patterns of ordinary usage is an empirical question. If they do not track common usage, then the textualist rationale for using them is undermined."). But Justice Barrett clearly understands "ordinary meaning" as a largely legal concept—as illustrated by her recognition that textualists focus on the construct of the hypothetical reasonable reader. *Id.* at 2200–04, 2211. Justice Barrett also identifies an underexamined legal question: whether textualists should "use . . . the perspective of the 'ordinary lawyer' or the ordinary English speaker." *Id.* at 2022, 2209–10; *see also id.* at 2022 ("It is not clear to me that textualists must pick a single perspective applicable across all statutes.").

47 *See* Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 265–71, 279–90 (2020) (describing the divide between "formalistic" and "flexible" textualism).

48 *See id.*; Tara Leigh Grove, *The Misunderstood History of Textualism*, 117 Nw. U. L. REV. (forthcoming 2023).

49 William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1082 (2017); *see* Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898, 1907–18 (2011) (exploring "the legal status of statutory interpretation methodology"); Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation:* Erie *for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 757 (2013) (suggesting that "statutory interpretation methodology is some kind of judge-made law").

1. Formal Textualism's Constrained Reasonable Reader

Bostock involved whether discrimination against a gay, lesbian, or transgender employee qualifies as "discriminat[ion] . . . because of such individual's . . . sex" under Title VII of the Civil Rights Act of 1964.[50] Notably, the majority and dissenting opinions—all of which purported to be textualist—agreed on certain foundational principles. The Justices all concluded that their job was to "determine the ordinary public meaning" at "the time of the statute's adoption."[51] The Justices also agreed that this "ordinary meaning" should be determined from the perspective of the reasonable reader. But the Justices debated the contextual evidence that such a reasonable reader could examine.

Justice Gorsuch wrote the majority opinion, which employed the more formal approach to textualism that focuses on semantic context and downplays other contextual evidence. To identify the law's "ordinary meaning,"[52] the Court carefully parsed the statutory language[53] and found that, "taken together," the phrase "discriminat[ion] . . . because of such individual's . . . sex" prevents an employer from "intentionally treat[ing] a person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual of another sex."[54]

The Court then applied this statutory principle to the disparate treatment of a gay, lesbian, or transgender individual. Justice Gorsuch reasoned that if an employer terminates a male employee "for no rea-

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50 42 U.S.C. § 2000e-2(a)(1).

51 Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1738 (2020) (stating that to "determine the ordinary public meaning of Title VII's command . . . . we orient ourselves to the time of the statute's adoption, here 1964"); *id.* at 1755 (Alito, J., dissenting) ("[O]ur duty is to interpret statutory terms to 'mean what they conveyed to reasonable people *at the time they were written*.'" (quoting SCALIA & GARNER, *supra* note 42, at 16)) (emphasis added by Justice Alito); *id.* at 1828 (Kavanaugh, J., dissenting) ("[T]his 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." (quoting New Prime Inc. v. Oliveira, 139 S. Ct. 532, 538–39 (2019)).

52 *Id.* at 1750 (stating "the law's ordinary meaning at the time of enactment usually governs" and the Court should look to ordinary meaning, not literal meaning).

53 The Court assumed that the term "sex" in 1964 referred to "biological distinctions between male and female." *Id.* at 1739. The Court thereby avoided debates about alternative conceptions of sex and sexuality (and whether those meanings existed in 1964). *Cf.* Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 900, 974–75 (2019) (exploring "what American law would look like if it took nonbinary gender seriously"). The Court then found that "discriminat[ion]" referred to intentional differences in treatment, and that "because of" meant that "sex" had to be a but-for cause of the employer's decision. *Bostock,* 140 S. Ct. at 1739–40.

54 *Bostock*, 140 S. Ct. at 1739–40.

son other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in [a] female colleague."[55] Likewise, if an employer "fires a transgender person who was identified as a male at birth but who now identifies as a female," and yet "retains an otherwise identical employee who was identified as female at birth . . . . the individual employee's sex plays an unmistakable and impermissible role in the discharge decision."[56]

The Court was unmoved by the possibility that its analysis of ordinary meaning might not map onto the way in which people talk in ordinary conversation. In dissent, Justice Kavanaugh argued that, if an employer terminated men who were romantically attracted to men, the employees would say "[i]n common parlance" that they "were fired because they were gay, not because they were men."[57] Justice Gorsuch responded that "these conversational conventions do not control Title VII's legal analysis, which asks simply whether sex was a but-for cause" of the employment decision.[58]

As further evidence of its formalistic approach, the *Bostock* majority clarified that other contextual considerations should *not* be part of the analysis.[59] The Court would not "displace the plain meaning of the law" simply because of the social context of 1964—that many individuals at that time may not have expected Title VII to protect gay, lesbian, or transgender individuals.[60] Nor would the Court entertain "naked policy appeals" claiming that applying the statute's "plain language" could lead to "any number of undesirable policy consequences," such as changes to sex-segregated bathrooms or dress codes.[61] Such an inquiry into practical consequences, the Court admonished, was not appropriate for textualists.[62]

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55 *Id.* at 1741.

56 *Id.* at 1741–42.

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

58 *Id.* at 1745. The dissents did not take issue with the Court's causation analysis. For commentary on that point, see Berman & Krishnamurthi, *supra* note 10; Katie Eyer, *The But-for Theory of Anti-discrimination Law*, 107 VA. L. REV. 1621 (2021); Benjamin Eidelson, *Dimensional Disparate Treatment*, 95 S. CAL. L. REV. (forthcoming 2022).

59 *Id.* at 1750 (rejecting the contention that "because few in 1964 expected today's *result*, we should not dare to admit that it follows ineluctably from the statutory text").

60 *Id.*; *see also* Katie R. Eyer, *Statutory Originalism and LGBT Rights*, 54 WAKE FOREST L. REV. 63, 65–69 (2019) (critically analyzing in the litigation leading up to *Bostock* the focus on "subjective expectations").

61 *Bostock*, 140 S. Ct. at 1753. Justice Gorsuch did hint that the Court might opt to protect religious liberty, in the event of a conflict. *See id.* at 1753–54.

62 *Id.* at 1753–54.

2. *Flexible Textualism's Reasonable Reader*

The dissenting opinions in *Bostock* argued that a good deal more than semantic context should factor into the "ordinary meaning" of Title VII. In the dissenters' view, to determine "what [statutory terms] conveyed to reasonable people at the time they were written," the Court must look at "the social context in which a statute was enacted."[63] In the "social context" of 1964, Justice Alito insisted, "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."[64] Accordingly, "[t]he *ordinary meaning* of discrimination because of 'sex' was discrimination because of a person's biological sex, not sexual orientation or gender identity."[65] Along the same lines, Justice Kavanaugh argued that "ordinary meaning" depended on "common parlance"—that is, "how 'most people' 'would have understood' the text of a statute when enacted."[66] He insisted that "few in 1964 (or today) would describe a firing because of sexual orientation as a firing because of sex."[67] Accordingly, "[t]o a fluent speaker of the English language—then and now— . . . discrimination 'because of sex' is not *reasonably*

63 *Id.* at 1755 (Alito, J., dissenting) ("[O]ur duty is to interpret statutory terms to 'mean what they conveyed to reasonable people *at the time they were written*.'" (quoting SCALIA & GARNER, *supra* note 42, at 16)) (emphasis added by Justice Alito); *id*. at 1767 ("[W]hen textualism is properly understood, it calls for an examination of the social context in which a statute was enacted because this may have an important bearing on what its words were understood to mean at the time of enactment . . . . For this reason, it is imperative to consider how Americans in 1964 would have understood Title VII's prohibition of discrimination because of sex.").

64 *Id.* at 1767 ("Suppose that, while Title VII was under consideration in Congress, a group of average Americans decided to read the text . . . . What would these ordinary citizens have taken "discrimination because of sex" to mean? Would they have thought that this language prohibited discrimination because of sexual orientation or gender identity? . . . The answer could not be clearer. In 1964, ordinary Americans reading the text of Title VII would not have dreamed that discrimination because of sex meant discrimination because of sexual orientation, much less gender identity.").

65 *Id.* ("The possibility that discrimination on either of these grounds might fit within some exotic understanding of sex discrimination would not have crossed their minds.").

66 *Id.* at 1828 (Kavanaugh, J., dissenting) (quoting New Prime Inc. v. Oliveira, 139 S. Ct. 532, 538–39 (2019)).

67 *Id.* ("On occasion, it can be difficult for judges to assess ordinary meaning. Not here. Both common parlance and common legal usage treat sex discrimination and sexual orientation discrimination as two distinct categories of discrimination—back in 1964 and still today. As to common parlance, few in 1964 (or today) would describe a firing because of sexual orientation as a firing because of sex.").

understood to include discrimination based on sexual orientation, a different immutable characteristic."[68]

Both dissenting opinions also urged that the Court should consider the practical consequences of its decision. Justice Kavanaugh was concerned about unfair surprise to employers,[69] while Justice Alito argued that the Court's decision would have "far-reaching consequences," transforming the interpretation of "[o]ver 100 [other] federal statutes" that also "prohibit discrimination because of sex" and "threaten[ing] freedom of religion, freedom of speech, and personal privacy and safety."[70] Justice Alito described "[t]he Court's brusque refusal to consider the consequences of its reasoning" as "irresponsible."[71]

D. Normative Choices

The competing opinions in *Bostock* clearly disagreed on the bottom line: whether Title VII bars the disparate treatment of gay, lesbian, and transgender employees. Nevertheless, the self-proclaimed textualists on the Court all treated "ordinary meaning" as a largely legal inquiry, which depended on the vantage point of the *reasonable* reader.[72] Thus, even the dissenting opinions focused on "what [the statutory terms] conveyed to *reasonable* people at the time they were written"[73] and whether "discrimination 'because of sex' is . . . *reasonably* understood to include discrimination based on sexual orientation."[74] The *Bostock* majority and dissenting opinions reached different conclusions because they were divided over what evidence should factor into the assessment of "ordinary meaning." That is, they

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68 *Id.* at 1833 (emphasis added) (quoting Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 363 (7th Cir. 2017) (Sykes, J., dissenting)).

69 *Id.* at 1828 (asserting that the Court's "literalist approach . . . disrespects ordinary meaning and deprives the citizenry of fair notice of what the law is"); *id.* at 1824 ("Under this literalist approach, sexual orientation discrimination automatically qualifies as sex discrimination, and Title VII's prohibition against sex discrimination therefore also prohibits sexual orientation discrimination—and actually has done so since 1964, unbeknownst to everyone.").

70 *Id.* at 1778 (Alito, J., dissenting); *id.* at 1778–83 (discussing, among other things, debates over bathroom usage, athletics, religious employers, and how the Court's interpretation of Title VII might impact equal protection cases); *see also id.* at 1791–96 (Appendix C) (listing the statutes).

71 *Id.* at 1778.

72 I discuss below in Section II.B. the possibility that the dissenters' analysis in *Bostock* was based in part on empirical assumptions.

73 *Bostock*, 140 S. Ct. at 1755, 1766 (2020) (Alito, J., dissenting) (emphasis added) (quoting SCALIA & GARNER, *supra* note 42, at 16).

74 *Id.* at 1833 (Kavanaugh, J., dissenting) (emphasis added) (quoting Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 363 (7th Cir. 2017) (Sykes, J., dissenting)).

disagreed over how well-informed the hypothetical reasonable reader should presumptively be.

For those drawn to textualism of some kind,[75] one can certainly debate which approach to textualism is preferable. Some scholars advocate a more flexible version, contending that judges should have the discretion to look beyond semantic context to social context—the original public understandings or expectations[76]—or to the practical consequences of a decision.[77] Advocates of this approach may point to *King v. Burwell*,[78] where the Court interpreted the phrase "an Exchange established by the State" in the Affordable Care Act to encompass a *federal* exchange, and thereby avoided a decision on the availability of tax credits that could have had severe consequences for the health insurance market.[79] As Ryan Doerfler has suggested, it could be seen as irresponsible for a judge to set aside such practical

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75 Here, I focus on debates within textualism, because so much of the recent empirical research has sought to "test" textualism. Many jurists and scholars, of course, reject textualism of any variety. The arguments in this Foreword should still be beneficial to those readers as a more general comment on the (seemingly growing) divide between normative and empirical approaches to the interpretive enterprise.

76 *See, e.g.*, Nelson Lund, *Unleashed and Unbound: Living Textualism in* Bostock v. Clayton County, 21 FEDERALIST SOC'Y REV. 158, 162 (2020) (arguing that the Court paid insufficient attention to how "because of sex" would "have been understood in 1964"); John O. McGinnis, *Errors of Will and of Judgment*, LAW & LIBERTY (June 25, 2020), https://lawliberty.org/errors-of-will-and-of-judgment/ [https://perma.cc/4YBW-3VAX] (arguing that the Court's analysis was "a conceivable interpretation of the [statutory] words in some world" but "certainly not" the best interpretation given "the world in which Title VII was enacted").

77 *See* Ryan D. Doerfler, *High-Stakes Interpretation*, 116 MICH. L. REV. 523, 527–28 (2018) (urging that "it is more difficult to 'know' what statutes mean in high-stakes cases").

78 576 U.S. 473 (2015).

79 *See id.* at 487–98 (noting that "it might seem that a Federal Exchange cannot fulfill this requirement" of being "'established by the State,'" but holding that "when read in context, 'with a view to [its] place in the overall statutory scheme,' the meaning of the phrase 'established by the State' is not so clear") (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)); 42 U.S.C. § 18024(d) (defining "State" in the Affordable Care Act to mean the fifty states and Washington, D.C.); *see also* Doerfler, *supra* note 77, at 562 (noting that the challenge in *King* could have led "a huge number" of individuals to be "exempt from the individual mandate on grounds of financial hardship," which could have kept many healthy people out of the insurance risk pool); Kevin M. Stack, *The Enacted Purposes Canon*, 105 IOWA L. REV. 283, 300–03 (2019). Scholars have recognized that *King v. Burwell* applied a more relaxed version of textualism. *See* Abbe R. Gluck, *Justice Scalia's Unfinished Business in Statutory Interpretation: Where Textualism's Formalism Gave Up*, 92 NOTRE DAME L. REV. 2053, 2075 (2017) (observing that *King* was "a rational, forgiving reading of the statute, but using textualist tools"); Stephanie Hoffer & Christopher J. Walker, *Is the Chief Justice a Tax Lawyer?*, 2015 PEPP. L. REV. 33, 37 (describing the Court's approach in *King* as "contextualism"); Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819, 1853–54 (2016) (noting that *King* was not "a stringent form of textualism"); *see also* Richard M. Re, *The New Holy Trinity*, 18 GREEN BAG 2D 407, 407–09, 416–17 (2015) (describing the approach as "purposivist," although acknowledging that it could be classified as a brand of textu-

considerations and instead to zero in on the semantic context of the law.[80]

In past work, I have advocated the more formal version of textualism, largely on Article III-based grounds.[81] Judges should, I have argued, focus on semantic context and attempt to minimize the influence of (often politically contested and divisive) consequentialist arguments. That is, judges should opt to tie themselves to the mast of the text. Such an approach, I have suggested, could help promote judicial legitimacy—the public reputation of the Supreme Court as a whole.[82] In our politically polarized environment, a Justice is expected to rule in salient cases in accordance with the preferences of the President who nominated her.[83] But with a formal approach to textualism, a Justice may be more difficult to predict in such ideological terms; she may issue some statutory decisions (such as *Bostock*) that please progressive forces, and others that may satisfy more conservative or libertarian voices. Such a politically mixed and surprising jurisprudence in statutory cases could help bolster the Supreme Court's legitimacy. It seems worth noting that public perceptions of the Court improved considerably in the wake of Justice Gorsuch's opinion in *Bostock*.[84]

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alism, because "text continues to play a meaningful role. . . . If a reading has no textual support, then no amount of pragmatism or purpose can carry the day.").

80 *See* Doerfler, *supra* note 77, at 528 (urging that "it is more difficult to 'know' what statutes mean in high-stakes cases"); *id.* at 529–30 (recognizing that judges may need to rely on an "apparent subjective evaluation" about which cases count as "high stakes").

81 Grove, *supra* note 47, at 296–307 (arguing that formalistic textualism can help to promote judicial legitimacy); *see also* Grove, *supra* note 48 (suggesting that the more formal version of textualism has a firm historical basis).

82 *See* RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 21 (2018).

83 *See* NEAL DEVINS & LAWRENCE BAUM, THE COMPANY THEY KEEP 2–3, 121–28, 132–40, 150–57 (2019) (noting that the Justices are often perceived to be on partisan "teams").

84 *See* Sarah Elbeshbishi, *Gallup Poll Finds Highest Supreme Court Approval Rating Since 2009*, USA TODAY (Aug. 5, 2020, 4:12 PM), https://www.usatoday.com/story/news/politics/2020/08/05/gallup-poll-finds-highest-supreme-court-approval-rating-since-2009/3301010001/ [https://perma.cc/4HTA-LBUX] (noting that a Gallup poll in July 2020 "found that 58% of Americans approve of the job being done by the Supreme Court," and noting considerable support among Republicans, Independents, and Democrats). The Court's public approval rating later went down in 2021 in the wake of disputes over a Texas abortion law, and remained low in 2022 after the Court overruled *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). *See* Meghan Roos, *Supreme Court Approval Hits Record Low in Gallup Poll Done After Texas Abortion Law Upheld*, NEWSWEEK (Sept. 24, 2021, 6:41 PM), https://www.newsweek.com/supreme-court-approval-hits-record-low-gallup-poll-done-after-texas-abortion-law-upheld-1632623/ [https://perma.cc/AC37-CND4]; Mohamed Younis, *Democrats' Approval of Supreme Court at Record-Low 13%*, GALLUP (Aug. 2, 2002), https://news.gallup.com/poll/395387/democrats-approval-supreme-court-record-low.aspx [https://perma.cc/L8KW-DWV7] (noting that

My goal is not to resolve this debate here. Instead, I mention these arguments to underscore that these debates over interpretive method—such as what context a hypothetical reasonable reader may consider—depend largely on normative considerations, not an empirical investigation.

II. "ORDINARY MEANING" AS AN EMPIRICAL FACT?

But do we need to make these difficult normative choices? In recent years, some scholars have suggested that "ordinary meaning" is *not* a legal concept, but an empirical fact.[85] On this view, to determine *the* ordinary meaning of a statute, one should identify empirically the use of a term or phrase that is the most common or popular.

To be sure, not all empirical work goes so far as to proclaim that statutory analysis can be entirely data-driven. Some scholars assert that empirical methods, such as corpus linguistics or surveys, provide useful information about possible meanings of statutory terms.[86] These claims accord with the longstanding attitude of many textualists toward dictionaries.[87] Such tools provide some evidence of the *range* of meanings, but a judge should not presume that a dictionary pro-

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"the U.S. Supreme Court's overall job approval rating is 43%, statistically unchanged from last year's 40% reading," but that there were "big swings among partisans, with Republicans' approval rating rising 29 percentage points to 72% and Democrats' falling 23 points to 13%").

85 *See* Lee & Mouritsen, *supra* note 3, at 813–14, 818 (noting that "[l]egal scholarship posits a range of conceptions of ordinary meaning," including "the 'reasonable' or 'imputed' meaning attributed to 'hypothetical, reasonable legislators'" but arguing that "a search for 'objectified intent'" "has nothing to do with actual communicative content" and arguing that, "to the extent our search for ordinary meaning is aimed at protecting" "reliance interests and the avoidance of unfair surprise," "we should seek to assess the public's understanding of the law at the time it was passed" and advocating corpus linguistics in part on this ground); Macleod, *supra* note 8, at 4–6 (asserting that textualists themselves view the inquiry into "original public meaning" as "factual and empirical, not normative"); Lawrence B. Solum, *Disaggregating* Chevron, 82 OHIO ST. L.J. 249, 265 (2021) (suggesting that the communicative content of a statute is an empirical fact); Tobia & Mikhail, *supra* note 3, at 461 ("There is significant debate about the meaning of 'ordinary meaning,' but there is general agreement that it is an *empirical* notion, closely connected to facts about how ordinary people understand language. . . . [O]rdinary meaning is derived from, or perhaps equated with, the general public's understanding of the text.").

86 Tobia & Mikhail, *supra* note 3, at 464, 485 (suggesting some sympathy for "evidential pluralism," the idea that "dictionaries, legal corpus linguistics, legislative histories, and empirical surveys can all provide some evidence of the ordinary meaning of legal texts" and "call[ing] into question any uncritical reliance on simple, one-dimensional survey methods to ascertain the meaning of complex legal language"); *see also* Solum, *supra* note 3, at 285 ("In practice, multiple techniques can all be employed, with each acting as a kind of check on the others. . . . When all these techniques converge on a single hypothesis . . . we would have strong evidence in favor of that meaning. When the techniques do not converge, then we would look for explanations for divergence.").

87 *See, e.g.*, Manning, *supra* note 45, at 2456–57 ("Although textualists (like other inter-

vides *the* meaning of a word, as used in the context of a statute. Consider *Nix v. Hedden*. The term "fruit" was quite broad according to some dictionary definitions,[88] but that did not necessarily determine what the term meant in federal tariff legislation.[89]

Some recent scholarship, however, seems to go further and to assert that the "ordinary meaning" of statutory language can be determined via a survey of the broader public. This approach picks up on a comment that Chief Justice Roberts made at a recent oral argument. The Chief Justice suggested that, given that "our objective is to settle upon the most natural meaning of the statutory language to an ordinary speaker of English . . . the most probably useful way of settling all these questions would be to take a poll of 100 ordinary . . . speakers of English and ask them what it means."[90] Recent survey experiments have sought to do something along those lines. One assumption of this approach appears to be that the "ordinary meaning" of a federal statute, as applied to a particular context, is the one favored by a majority (or perhaps a supermajority) of respondents.[91]

This Foreword's primary goal is to challenge this scholarship's assumption that "ordinary meaning" should be understood in empirical terms. As I have shown, ordinary meaning can be understood primarily as a legal concept.[92] On this view, it makes sense for interpreters to use legal tools—such as the hypothetical reasonable reader and evidentiary rules about relevant contextual evidence—to select among

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preters) frequently consult dictionaries as historical records of social meanings that speakers have attached to words, they do not (and could not) stop there.").

88 *See supra* note 40 and accompanying text.

89 *See* Nix v. Hedden, 149 U.S. 304, 306 (1893) ("The passages cited from the dictionaries define the word 'fruit' as the seed of plants, or that part of plants which contains the seed, and especially the juicy, pulpy products of certain plants, covering and containing the seed. These definitions have no tendency to show that tomatoes are 'fruit,' as distinguished from 'vegetables,' in common speech, or within the meaning of the Tariff Act.").

90 Transcript of Oral Argument at 51–52, Facebook, Inc. v. Duguid, 141 S. Ct. 1163 (2021) (No. 19-511) (statement of Chief Justice Roberts) (wondering whether, if "our objective is to settle upon the most natural meaning of the statutory language to an ordinary speaker of English," "the most probably useful way of settling all these questions would be to take a poll of 100 ordinary—ordinary speakers of English and ask them what it means, right? That's—that would be the most useful rule of construction?").

91 To be sure, there are some practical challenges for any survey method. First, are we confident that a given survey reached out to a representative sample of the public? Second, how "common" or "popular" must a use of language be? Do we need a majority or a supermajority of respondents to select a given understanding for it to be the "ordinary meaning"? If a supermajority, how large a supermajority? 60 percent? 90 percent? And there are of course challenges in how a survey is worded and so on. I will presume, for present purposes, that such issues could be worked out.

92 *See supra* Part I.A.

plausible ordinary meanings.[93] That is how prominent textualists have long treated the search for ordinary meaning.

In this Part, I also raise some related theoretical and practical concerns about the survey approach. First, I consider the relevant audience for a particular statute. Some laws may be targeted at a more sophisticated audience, such that the relevant reader of the statute may be particularly well-informed and, thus, not well represented by a survey of the general public. Second, most textualists are interested in the ordinary meaning of a statute at the time it was enacted. This temporal issue may make it challenging to test via a present-day survey whether textualist opinions have gotten the "right answer" to questions about federal statutes from the distant (or even not so distant) past.

A. The Statutory Audience

Scholarship that relies on survey methods appears to assume that the "ordinary meaning" of a statutory provision depends on the views of the general public. But the broader public may not be the target audience for some statutes. Instead, some laws may be aimed at, for example, federal agencies and regulated parties.[94] An "ordinary meaning" to a federal agency or regulated entity may not match that of the general public. This point, I suggest, is another reason to treat ordinary meaning as a legal concept rather than as an empirically testable notion; the hypothetical reasonable reader can be adjusted to comport with the statute at issue.

Consider *MCI v. AT&T*,[95] which involved the authority of the Federal Communications Commission to "modify" certain filing requirements for carriers.[96] The statute provides that "[e]very common carrier . . . shall . . . file with the Commission . . . schedules showing all charges," but also states that "[t]he Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section . . . ."[97] The FCC decided to exempt nondominant carriers, including MCI, from the filing requirement en-

93 *See supra* Part I.B.

94 *See* David S. Louk, *The Audiences of Statutes*, 105 CORNELL L. REV. 137, 141 (2019) ("Not all statutes communicate to their respective audiences in the same manner: some statutes establish specific rules that regulate the conduct of lay audiences like the general public, while other statutes set out broad mandates to specialized government audiences, who implement them through subsequent regulation and enforcement.").

95 MCI Telecomms. Corp. v. Am. Tel. & Tel. Co. 512 U.S. 218 (1994).

96 *Id.* at 220.

97 47 U.S.C. § 203(a), (b)(2).

tirely, leaving AT&T as the sole carrier that was required to file its rates with the FCC.[98]

In an opinion by Justice Scalia, the Court held that the FCC exceeded its statutory authority.[99] The Court found that the statutory term "modify" enabled the agency to make only "modest" changes, not "basic and fundamental changes," such as the elimination of filing requirements for most carriers.[100] In dissent, Justice Stevens insisted that the FCC's "detariffing orders" fell "squarely within its power to 'modify any requirement'" of the statute.[101]

Some recent scholarship sought to test the decision in *MCI* by surveying a "random sample of English-speaking adults in the United States."[102] The survey gave participants some basic background on the law, including that the FCC had the power to "modify any requirement," and asked whether the FCC's decision to "make tariff filing optional for certain nondominant cell phone companies" was "allowed under the law."[103] The scholars found that the responses were split down the middle, with a bare majority (fifty-two percent) agree-

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98 *See MCI*, 512 U.S. at 221–23 (noting the FCC "distinguished between dominant carriers (those with market power) and nondominant carriers—in the long-distance market, this amounted to a distinction between AT&T and everyone else . . . .").

99 *See id.* at 234 (concluding that the FCC introduced "a whole new regime of regulation (or of free-market competition), which may well be a better regime but is not the one that Congress established").

100 *Id.* at 225–30 ("Virtually every dictionary we are aware of says that 'to modify' means to change moderately or in minor fashion. . . . 'Modify,' in our view, connotes moderate change. . . . [T]he Commission's permissive detariffing policy can be justified only if it makes a less than radical or fundamental change in the Act's tariff-filing requirement.").

101 *Id.* at 239–40 (Stevens, J., dissenting) ("In my view, each of the Commission's detariffing orders was squarely within its power to 'modify any requirement' of § 203. Section 203(b)(2) plainly confers at least some discretion to modify the general rule that carriers file tariffs, for it speaks of '*any* requirement.'"); *see id.* at 235 (accusing the Court of applying "a rigid literalism that deprives the FCC of the flexibility Congress meant it to have in order to implement the core policies of the Act in rapidly changing conditions").

102 Klapper, et al., *supra* note 6, at 5, 25–26 (manuscript on file with author) (using a survey to examine *MCI*).

103 *Id.* at 26 ("We posed a slightly modified version of this question to 534 participants: 'The law requires cell phone companies to file a "tariff" with the government. A tariff is simply a document describing the rates, fees, and charges that the company offers for its services. For example, AT&T could file a tariff describing a plan that included unlimited talking, texting, and data for $40 per month. However, in addition to requiring telecommunications tariffs and describing their requirements, the law also authorizes the Federal Communications Commission to "modify any requirement made by or under" that law.' Suppose the Federal Communications Commission decides to make tariff filing optional for certain nondominant cell phone companies—which are all companies but one. How much do you agree with the following statement: '*The Federal Communications Commission's action is allowed under the law*.'").

ing with Justice Stevens's dissenting opinion that the FCC's decision was permissible.[104]

My concern here is not whether the majority or the dissent in *MCI* had the better of the argument. Instead, I want to raise questions about what we can learn from a "random sample" of the public "testing" the *MCI* decision. For present purposes, I put to one side whether fifty-two percent is a substantial enough majority to determine the "right answer" in the case.[105] First, one might wonder whether it makes sense to ask a "random sample" of the general public a legal question, such as whether a federal agency violated a statutory requirement. As Bryan Garner stated in response to Chief Justice Roberts's suggestion that the Court just survey the public, "ordinary speakers or readers" would often "be a little bit befuddled by the legal language. They just would."[106]

Second, the primary audience for these provisions of the Federal Communications Act would seem to be the agency itself and the carriers. Such entities would have some background "understanding . . . of the Commission's efforts to regulate and then deregulate the telecommunications industry"—knowledge that, Justice Scalia suggested, was important to grasp the legal issues in the case.[107] That is, the "ordinary readers" of these provisions may be highly sophisticated and especially well-informed. Thus, a survey of the general public may not tell us much about the relevant "ordinary meaning" of this federal regulatory statute.[108]

This discussion suggests that, in determining "ordinary meaning," judges face another legal question: whether "ordinary meaning" should be determined from the vantage point of a more sophisticated

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104 *Id.*

105 *See supra* note 91.

106 Transcript of Oral Argument at 52, Facebook, Inc. v. Duguid, 141 S. Ct. 1163 (2021) (statement of counsel Bryan Garner) ("Well, Your Honor, the difficulty with having ordinary speakers or readers try to read a—a legislative definition like this is immediately people would be a little bit befuddled by the legal language. They just would.").

107 *MCI*, 512 U.S. at 220.

108 At one point, the authors of the study seem to acknowledge this concern. *See* Klapper, et al., *supra* note 6, at 45 ("Experts in rate regulation would view 'modify' differently than would ordinary people because they know and understand the complexities of the statutory and regulatory schemes governing the telecommunications industry."). Yet in other parts of the analysis, the authors assert that the survey method is a valuable way of answering questions of administrative law, such that both the FCC and litigants might survey the public to determine the meaning of words like "modify." *See id.* at 42 ("In *MCI Telecommunications*, the FCC could have conducted a survey on the ordinary meaning of 'modify' in their authorizing statute before making the decision to largely abolish tariff requirements. And when MCI brought their challenge, they could have used survey evidence to make their case.").

reasonable reader or from that of a less-well-informed reader. That may not be an easy analysis, and it is one that could vary from statute to statute. But, for present purposes, the important point is that the response to that question depends on legal and normative principles, not empirical inquiry.

B. The Temporal Issue

There is another complication. Most textualists aim to discern the ordinary meaning of a statute at the time of enactment.[109] To be sure, there is some debate over this theoretical point. Fred Schauer has recently suggested that textualists should focus on present-day meanings.[110] But most textualists emphasize the original meaning of statutory terms. That raises a challenge for survey methods: how can one determine by surveying the public in 2022 the meaning of a statute enacted in, say, 1871, 1920, or 1964?

Scholars assert that they may still be able to test the results of textualist opinions that interpret statutes from earlier eras if it appears that the meaning of the statutory words has not changed dramatically over time. For example, in his work on Title VII, James Macleod states that the Justices in *Bostock* conceded that the meaning of the relevant terms was the same in 1964 as it is today.[111] Accordingly, he argues, survey methods can determine whether the Court in *Bostock* got the answer "right," when it held that Title VII's prohibition on sex discrimination encompasses the disparate treatment of gay, lesbian, and transgender employees.[112]

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109 *See* Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 367 (2005) ("[T]he typical textualist judge seeks to unearth the statutes' *original* meanings . . . .").

110 Schauer focuses on constitutional interpretation but also advocates an "unoriginal" textualist approach to statutory interpretation. Frederick Schauer, *Unoriginal Textualism*, 90 GEO.WASH. L. REV. 825, 828–29 (2022) ("[T]extualism might be understood as committed to interpretation on the basis of what the relevant statutory language means *now*, not to what that language meant at some point in the past, and not to what the drafters of that language intended.") (citations omitted); *id* at 829 n.11. This approach finds some support in the work of Philip Bobbitt, who suggested that a textualist interpretation of the Constitution would draw on the "present sense of the words." PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 7, 26–32 (1982) (defining "*textual argument*" as "argument . . . drawn from a consideration of the present sense of the words of the provision" and associating that approach with Justice Black).

111 Macleod, *supra* note 8, at 18–19, 28 (asserting that "all of the Justices (along with all of the circuit court judges in the related en banc proceedings) explicitly *agreed*[] . . . that the 'ordinary public meaning' of the relevant statutory words and phrases has not changed since their enactment").

112 *See id.* at 28.

But this assertion seems to overlook the nature of the Justices' search for "ordinary meaning." The majority opinion in *Bostock* treated "ordinary meaning" as a legal concept, concluding that the phrase "discriminat[ion] . . . because of such individual's . . . sex" prevents an employer from "intentionally treat[ing] a person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual of another sex."[113] That general principle was the meaning that the Court said had gone unchanged since 1964. But the Court did not claim that a majority of individuals in 1964 (or any other time) would necessarily apply the statutory language to the disparate treatment of a gay, lesbian, or transgender employee. In fact, the Court found such an inquiry to be irrelevant.[114] In the Court's view, a *reasonable* statutory reader would conclude that terminating a male employee who is romantically attracted to men, or dismissing a female employee after she announces her transition from male to female, is discrimination because of such individual's sex. And that reasonable interpretation, in the view of the *Bostock* majority, was the "ordinary meaning" that mattered.

The dissenting opinions in *Bostock*, at first glance, seem more susceptible to empirical evaluation. Most notably, Justice Kavanaugh stated that "few in 1964 (or today) would describe a firing because of sexual orientation as a firing because of sex."[115] Perhaps the assertion about people today could be tested via a survey of the public.

But that was not the focus of either Justice Kavanaugh's or Justice Alito's dissent. As discussed, the dissenters emphasized how "reasonable people" in 1964 would have interpreted Title VII.[116] The dissenting opinions did at times conflate "reasonable people" with the dissenters' assumptions about actual people. But the focus was still the social context of 1964—whether the public *at that time* would have understood or expected Title VII to protect gay, lesbian, or transgender individuals.[117] The dissenting opinions insisted that the answer

113 Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1739–40 (2020).

114 *See id.* at 1750 (rejecting the contention that "because few in 1964 expected today's result, we should not dare to admit that it follows ineluctably from the statutory text") (emphasis omitted).

115 *Id.* at 1828 (Kavanaugh, J., dissenting); *see also id.* at 1755 (Alito, J., dissenting) (asserting that "[e]ven as understood today, the concept of discrimination because of 'sex' is different from discrimination because of 'sexual orientation' or 'gender identity,'" but adding that "in any event, our duty is to interpret statutory terms to 'mean what they conveyed to reasonable people *at the time they were written*'" (quoting SCALIA & GARNER, *supra* note 42, at 16)) (emphasis added by Justice Alito).

116 *Id.* at 1755 (Alito, J., dissenting); *supra* Part I.C.2.

117 *Bostock*, 140 S. Ct. at 1755 (Alito, J., dissenting); *id.* at 1828 (Kavanaugh, J., dissenting)

was "no." Indeed, Justice Alito was confident as to how the results of a 1964 survey would have come out: "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—not to mention gender identity, a concept that was essentially unknown at the time."[118] It would certainly be interesting to test Justice Alito's assertion. But it is not possible to test via a survey to twenty-first-century Americans what the public in 1964 might have understood or expected.

One can extend the examples beyond *Bostock*. Today, most of us would take for granted that firing a woman because she gets married, or has young children, or rebuffs her supervisor's sexual advances, qualifies as "discrimination . . . because of such individual's . . . sex."[119] Indeed, I suspect that many judges and lawyers would view these as textbook examples of sex discrimination.

These assumptions, however, would not have been widespread in 1964. In the 1960s, some officials assumed that employers *could* reject female workers who got married or had young children; such actions were found to be distinctions on the basis of marriage or parenthood, not "sex"; moreover, they were viewed as reasonable employment decisions, because—under the thinking of the time—women who had such familial obligations would not be able to do the job.[120] Likewise,

("[T]his 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." (quoting New Prime Inc. v. Oliveira, 139 S. Ct. 532, 539 (2019))); *see also* 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, 1532 (2021) (noting that "the interpretive question posed by the dissenting opinions in *Bostock*" was "[h]ow would the terms of a statute have been understood and applied by ordinary people at the time of enactment?," which was "an empirical-public-meaning approach . . . that sought to determine the extensional meaning of Title VII as it existed in 1964").

118 *Bostock*, 140 S. Ct. at 1755 (Alito, J., dissenting).

119 42 U.S.C. § 2000e-2(a)(1).

120 *See* Cooper v. Delta Air Lines, Inc., 274 F. Supp. 781, 782–83 (E.D. La. 1967) (holding there was no Title VII violation when the airline had a policy of firing female flight attendants upon marriage, and stating "[t]he discrimination lies in the fact that the plaintiff is married—and the law does not prevent discrimination against married people in favor of the single ones"); Phillips v. Martin Marietta Corp., 411 F.2d 1, 4 (5th Cir. 1969) (finding no "Congressional intent to exclude absolutely any consideration of the differences between the normal relationships of working fathers and working mothers to their pre-school age children" nor a requirement that "an employer treat the two exactly alike" in its hiring policies); *see also* Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 DENV. L. REV. 995, 1026 (2014) (discussing how the EEOC initially approved the airlines' practice of firing female flight attendants upon marriage). The Supreme Court vacated the *Phillips* decision, though it left room for the employer to show that hiring only men with young children was a "bona fide occupational qualification." Phillips v. Martin Mari-

almost no one in 1964 would have seen sexual harassment as sex discrimination.[121] Accordingly, even as to issues that today seem obvious, a 1964-era survey would likely provide a much more sobering response.

This temporal complication is another reason to treat "ordinary meaning" as a legal concept, rather than simply as an empirical fact. One can certainly debate on normative grounds what contextual evidence should be relevant to evaluating a statute such as Title VII. Scholars (myself included) have argued that social context—original understandings or expectations—should not factor into the statutory analysis.[122] Other scholars insist that such historical information is vital to understanding a statute.[123] But the debate is a normative one and cannot be settled by an empirical investigation.

III. Implications for Interpretive Debates

This Foreword seeks primarily to question the assumption that "ordinary meaning" is an empirical concept. The Foreword argues that ordinary meaning can be understood as a legal concept and, moreover, that is how textualists have long treated the search for ordinary meaning. To the extent that ordinary meaning is a legal concept, it is not easily susceptible to an empirical evaluation.

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etta Corp., 400 U.S. 542, 543–44 (1971); *see also* Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 Harv. L. Rev. 1307, 1356 (2012) ("'what the Court gave [in *Phillips*], it then took away" because "'family obligations, if demonstrably more relevant to job performance for a woman than for a man,' could justify" a bona fide occupational qualification).

121 *See* Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 161–64 (D. Ariz. 1975); Franklin, *supra* note 120, at 1309–10 (noting the early rejection of sexual harassment claims); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 Yale L.J. 1683, 1701 (1998) (stating that early courts "reason[ed] that the women's adverse treatment occurred because of their refusal to engage in sexual affairs with their supervisors and not 'because of sex'"). The view that sexual advances in the workplace were problematic, much less unlawful discrimination, did not begin to be accepted until the 1970s. *See id.* at 1696–1705 (detailing this history, and noting that a 1977 court of appeals decision "ushered in the new legal paradigm"); *see also* Anita Bernstein, *Law, Culture, and Harassment*, 142 U. Pa. L. Rev. 1227, 1240 (1994) ("Sexual harassment claims [under Title VII involving a hostile work environment] began to be brought in the late 1970s, with the first successes occurring in 1980 and 1981."); Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 Stan. L. Rev. 691, 706–07 (1997) (noting that plaintiffs had some success with *quid pro quo* harassment claims beginning in the late 1970s).

122 *See* Grove, *supra* note 47, at 290–307 (advocating formalistic textualism); Eyer, *supra* note 60, at 65–69 (emphasizing that "politically unpopular applications of the law will rarely be within the original expectations of the public"); Andrew Koppelman, Bostock, *LGBT Discrimination, and the Subtraction Moves*, 105 Minn. L. Rev. Headnotes 1, 26 (2020) (urging that a focus on "original cultural expectations" tends to "defeat" "statutes that aim at broad social transformation").

123 *See supra* note 42.

Nevertheless, this notion that ordinary meaning is a legal concept also raises some important questions. I have already touched on one set of issues. If ordinary meaning is a legal concept, then one should use legal tools to discern that ordinary meaning. But as discussed, there are some serious—and, until recently, rarely examined—disputes among textualists about those legal tools. Although prominent textualists agree that one should look to the perspective of a hypothetical reasonable person, they disagree about how well-informed that reasonable person should be. The debate is largely an evidentiary one, with some textualists favoring a more formal approach that focuses on semantic context and others advocating a more flexible version of textualism that looks beyond semantic context to social context and practical consequences. Going forward, textualists should aim to justify their preferred approach on normative grounds.

There is a related issue. If "ordinary meaning" is a legal concept, rather than an empirical claim about common or popular speech, one might wonder about the prevalent use of what William Eskridge and Victoria Nourse have dubbed "homey examples" in statutory analysis.[124] Justice Scalia famously used one such "homey example" in his dissent in *Smith v. United States*.[125] The case involved whether John Smith had "'use[d]' . . . a firearm 'during and in relation to . . . [a] drug trafficking crime'"[126]—and thus was eligible for a sentencing enhancement—after he offered to trade an automatic MAC–10 for two ounces of cocaine.[127] In an opinion by Justice O'Connor, the Court relied on the "ordinary or natural meaning" of the term "use" to find a statutory violation.[128] Dissenting, Justice Scalia insisted that the Court had botched the ordinary meaning analysis:[129]

> To use an instrumentality ordinarily means to use it for its intended purpose. When someone asks, "Do you use a cane?," he is not inquiring whether you have your grandfa-

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124 Eskridge & Nourse, *supra* note 10, at 1728, 1781–82.

125 508 U.S. 223 (1993).

126 *Id.* at 225–27 (third and fourth alterations in original); *see* 18 U.S.C. § 924(c)(1).

127 *Smith*, 508 U.S. at 225–26. Smith made the offer to an undercover police officer. *See id.*

128 *Id.* at 225, 228–29, 241 ("When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning. . . . Surely petitioner's treatment of his MAC–10 can be described as 'use' within the everyday meaning of that term.") (citations omitted); *see also id.* at 239–40 (concluding that the rule of lenity did not apply because the statute was not ambiguous).

129 *Id.* at 242, 244–45 (Scalia, J., dissenting) ("In the search for statutory meaning, we give nontechnical words and phrases their ordinary meaning. . . . We are dealing here not with a technical word or an 'artfully defined' legal term . . . but with common words that are, as I have suggested, inordinately sensitive to context.") (citations omitted).

> ther's silver-handled walking stick on display in the hall; he wants to know whether you *walk* with a cane. Similarly, to speak of "using a firearm" is to speak of using it for its distinctive purpose, *i.e.*, as a weapon.[130]

The example is vivid. But is it relevant? Justice Scalia may have been absolutely right about how one speaks of using a cane. But that does not necessarily tell us what "use a firearm" means in a federal statute addressing sentencing enhancements. Nor did Justice Scalia need to rely on this homey example to justify his reading of the statute. Instead, one can look to the surrounding statutory text and structure (that is, the semantic context). Under the statute, "the sentence to be imposed on the defendant" "var[ied] with the nature of the firearm."[131] The more deadly the firearm at issue, the higher the sentence. Thus, the "use" of a short-barreled rifle came with a minimum ten-year prison term, while the "use" of a machine gun triggered a thirty-year prison term.[132] As Michael Geis has argued, this "linguistic context . . . provides strong support for the view" that Congress was focused on not just *any* use of a firearm, but rather on the "use [of] a firearm as a weapon."[133]

As Eskridge and Nourse observe, Justice Scalia was hardly alone; many interpreters use these homey examples.[134] But to the extent that ordinary meaning is a legal concept, judges should at least exercise caution in relying on examples from ordinary conversation to resolve the underlying legal questions.[135] Indeed, in *Bostock*, Justice Gorsuch criticized such a move in one of the dissents. As noted, Justice Kava-

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130 *Id.* at 242 (Scalia, J., dissenting).

131 Michael L. Geis, *The Meaning of* Meaning *in the Law*, 73 WASH. U. L.Q. 1125, 1138 (1995) ("[T]he language of section 924(c)(1) provides that the sentence to be imposed on the defendant must vary with the nature of the firearm. . . . The nature of the sentence to be imposed seems to be a function of the deadliness of the firearm ('semiautomatic assault weapon' versus 'machine gun') and its efficacy in criminal activities (use of silencers can reduce the chance of being observed engaging in the crime).").

132 *See* 18 U.S.C. § 924(c)(1)(B) ("If the firearm possessed by a person convicted of a violation of this subsection—(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or (ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.").

133 Geis, *supra* note 131, at 1137.

134 Eskridge & Nourse, *supra* note 10, at 1728, 1777, 1780–82 (observing that "Justice Scalia was famous for his own homey examples" but that other members of the Court—including Justices Breyer, Ginsberg, Sotomayor, and Kagan—have used homey examples based on "hypothetical ordinary readers").

135 *See* Mark Greenberg, *Legal Interpretation and Natural Law*, 89 FORDHAM L. REV. 109, 122–23 (2020) ("The assumption that legal interpretation should be modeled on the interpreta-

naugh insisted that a male employee who was terminated for being romantically attracted to men would say "[i]n common parlance" that he "[was] fired because [he was] gay," not because he was a man.[136] Justice Gorsuch countered that "these conversational conventions do not control Title VII's legal analysis."[137]

At a deeper level, some readers might wonder about the implications of this Foreword's argument for notions of "fair notice." Some scholars have suggested that treating "ordinary meaning" as an empirical concept helps promote the value of fair notice and, more generally, the democratic legitimacy of an interpretive method.[138] If judicial opinions map onto the way "ordinary people" expect the law to apply, the law provides "fair notice." As Kevin Tobia and John Mikhail suggest, "[t]he law should be publicly available to ordinary people" and "enable members of the public to rely upon and form reasonable expectations about it."[139] Conversely, if interpreters treat ordinary meaning as primarily a legal concept—and if interpreters thereby reach conclusions that differ from how the general public would ex-

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tion of ordinary conversation is problematic. Lawmaking has very different goals, presuppositions, and circumstances from ordinary conversation.").

136 Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1828 (2020) (Kavanaugh, J., dissenting) ("As to common parlance, few in 1964 (or today) would describe a firing because of sexual orientation as a firing because of sex. . . . In common parlance, Bostock and Zarda were fired because they were gay, not because they were men.").

137 *Id.* at 1745.

138 *See* Tobia & Mikhail, *supra* note 3, at 461–62, 470 ("Underpinning this conception of 'empirical textualism' is a set of observations about the relationship between ordinary meaning and ordinary language users. . . . [I]nterpreting a legal text in line with its ordinary meaning promotes rule of law values like publicity and fair notice. The law should be publicly available to ordinary people, in other words, and it should enable members of the public to rely upon and form reasonable expectations about it. Ordinary meaning analysis is thus often taken to promote democracy; as such, its focus is naturally placed on the understanding of the demos."); *see also* Klapper, et al., *supra* note 6, at 49 (arguing that textualist opinions do not map on to survey results and asserting that "[w]hen using the modern ordinary-meaning toolkit, courts are in fact *not* implementing the law in ways that are predictable to ordinary people. This erodes legitimacy and undermines the principle of fair notice."); Macleod, *supra* note 8, at 69–72 ("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 . . . or without a particular law they are consulting* . . . . 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 . . . ."); Tobia, Slocum, & Nourse, *supra* note 5, at 282 ("Many textualists articulate normative justifications for the ordinary meaning doctrine—such as fair notice, reliance, and democratic values—that are tied to facts about how ordinary people actually understand language.").

139 Tobia & Mikhail, *supra* note 3, at 461.

pect a statute to apply—that could undermine the value of "fair notice."[140]

A full exploration of the concept of "fair notice" is beyond the scope of this Foreword. But I sketch out here a few points that warrant further analysis. First, "fair notice" is itself a legal concept. Our legal system does not equate "fair notice" with *actual* notice. After all, "ignorance of the law" is generally not a defense to a legal violation.[141] Accordingly, it may be that fair notice is provided when judges interpret the law in accordance with how a *reasonable* reader would have understood the statutory text. Indeed, this legalistic vision of fair notice is suggested by Tobia and Mikhail's argument that "[t]he law . . . should enable members of the public to rely upon and form *reasonable* expectations about it."[142] Interestingly, a recent empirical study by Kevin Tobia, Brian Slocum, and Victoria Nourse suggests that a legalistic approach may *better* accord with public expectations; according to the authors, members of the public understand that the law is a special language and are inclined to defer to legal experts on statutory interpretive questions.[143]

Moreover, to build on earlier points, "fair notice"—that is, what notice is due—may depend on the statutory context and the statutory audience. What qualifies as "fair notice" in the context of a statute regulating agency action, as in *MCI*, may differ dramatically from "fair

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140 *Cf.* Eskridge & Nourse, *supra* note 10, at 1727–28 (arguing that "[t]he new textualist orthodoxy . . . claims to be democracy-enhancing by emphasizing public meaning: how 'We the People' would have received the statutory language" and that "[t]he late Justice Scalia, for example, invoked 'ordinary meaning' when defending the legitimacy of his method, but interpretations discussed in his treatise and judicial opinions overwhelmingly turned on legal terms of art, precedents, and judicial canons inaccessible to ordinary folks," and insisting that "there is no evidence that ordinary citizens read statutory texts the way judges do"). Interestingly, textualists have rarely focused on "fair notice" as a justification for the method (although one thoughtful student note endeavored to do so). *See* Note, *Textualism as Fair Notice*, 123 HARV. L. REV. 542, 542–43, 557–58 (2009). That may be because, as Caleb Nelson has pointed out, all interpretive methods aim to provide "fair notice." *See* Nelson, *supra* note 109, at 352–53 (observing that textualism is often associated with an effort to "enforc[e] the 'reader's understanding'" of a statute and thereby to serve goals of fair notice but also asserting that "[t]extualists and intentionalists alike give every indication of caring . . . about the need for readers to have fair notice").

141 *See* Cheek v. United States, 498 U.S. 192, 199 (1991) ("The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system.").

142 Tobia & Mikhail, *supra* note 3, at 461 (emphasis added).

143 *See* Tobia, Slocum & Nourse, *supra* note 11, at 7 (asserting that "ordinary people understand legal texts to contain terms with technical meanings and intuitively defer to experts for the meanings of those terms"). The authors assert that is true, even when statutory language contains terms used in ordinary conversation, such as "intent" or "because of." *Id.*

notice" in the criminal realm, as in *Smith*. Judges may need to use legal tests that are calibrated to the specific context—either a particularly sophisticated hypothetical reasonable reader, or one with less presumed background knowledge—to get closer to "fair notice."

Finally, a legalistic understanding of "fair notice"—one that can be satisfied if judges look to the perspective of a hypothetical reasonable reader—seems to be the only one that would enable reform legislation.[144] Any major reform, such as the Civil Rights Act of 1964, will come with surprises. As discussed, some employers in the 1960s and 1970s would have been shocked to learn that—simply because Congress had enacted an employment discrimination law—they could no longer terminate a woman who got married or had young children or refused her supervisor's sexual advances. And yet when Congress enacts a revolutionary law such as Title VII, one might quite reasonably assume that employers are on "*fair* notice" that there will be big changes to the employment sector, even if they are surprised by the particulars.[145]

This Foreword does not seek to resolve these questions surrounding "ordinary meaning." My hope is to raise issues that textualists and other interpreters should address going forward, to the extent that they assume—as many do—that "ordinary meaning" is a legal concept. In my view, the recent empirical literature on "ordinary meaning" has considerable value by helping to bring some of these considerations to the surface. If "ordinary meaning" is a legal concept rather than simply an empirical fact, textualists should more carefully define the legal tools and normative values that get us there.

Conclusion

The term "ordinary meaning" seems, at first glance, to refer to an empirical concept: the most common or popular use of a word or phrase. But as this Foreword shows, "ordinary meaning" can be un-

144 Scholars have raised related concerns about an approach to textualism that would give substantial weight to past public expectations or understandings. *See* Koppelman, *supra* note 122, at 26 ("When it is applied to statutes that aim at broad social transformation, the original cultural expectations move has a conservative bias. Its tendency is to defeat the very laws it purports to interpret . . . laws that aim to counteract prejudice, by their nature, press against the background culture."); *see also* Eyer, *supra* note 60, at 65–69 (emphasizing that "politically unpopular applications of the law will rarely be within the original expectations of the public").

145 *Cf.* Felipe Jiménez, *Some Doubts About Folk Jurisprudence: The Case of Proximate Cause*, U. Chi. L. Rev. Online (Aug. 23, 2021), https://lawreviewblog.uchicago.edu/2021/08/23/jimenez-jurisprudence/ [https://perma.cc/2URX-PRLG] ("[W]hether the values of the rule of law and democracy are best served in a regime under which lay conceptions are perfectly reflected in law, and legal concepts just reflect ordinary concepts, is an open question.").

derstood as a legal concept and, moreover, that is how prominent textualists have long treated ordinary meaning. Thus, textualists use legal tools, such as the construct of the hypothetical reasonable reader, to select among plausible ordinary meanings. This analysis complicates recent efforts to test empirically whether textualists have reached the "right answer" in specific cases and controversies. For many textualists, like many other interpretive theorists, statutory analysis is primarily a normative, not an empirical, enterprise.