

Context to Overcome Definition: How the Supreme Court Used Statutory Interpretation to Define “Person” and “Sex”

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I. INTRODUCTION

In both the 2018–2019 and 2019–2020 sessions of the Supreme Court, the Court granted certiorari to decide the meaning of two seemingly straightforward words: “person” and “sex.”¹ In *Return Mail, Inc. v. United States Postal Service*, the Court had to determine if the federal government is considered a “person” for patent infringement purposes in the Leahy-Smith America Invents Act (AIA).² In *Bostock v. Clayton County*, the Court consolidated three appellate court decisions to rule on whether or not sexual orientation and gender identity fall under the protected category of “sex” in Title VII of the Civil Rights Act of 1964.³ The Court was not deciding whether or not to extend protections to certain groups of people; they were deciding whether or not the Acts already did.⁴

Although judges and justices often must utilize statutory interpretation to determine the outcome in cases, the cases above showcase interesting similarities and differences. First, the methodology used by the majority in these cases track along very similar lines. Both cases (1) take a word that is not defined in the text, (2) address a presumption of its meaning, and (3) look at the context of the word to determine whether or not it can overcome that presumption.⁵ But while the methodology used in both cases is close to parallel, the makeup of the Justices in the majority and dissenting opinions flip almost completely. Both cases were heard by the

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1. *Return Mail, Inc. v. U.S. Postal Serv.*, 139 S. Ct. 1853 (2019); *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

2. 139 S. Ct. 1853 (2019).

3. 140 S. Ct. 1731 (2020).

4. *Id.* at 1737.

5. *See Return Mail*, 139 S. Ct. at 1861–63; *see also Bostock*, 140 S. Ct. at 1737–43.

same nine Justices.⁶ In *Return Mail*, Justice Sotomayor wrote for the majority and was joined in her opinion by Chief Justice Roberts and Justices Alito, Thomas, Gorsuch, and Kavanaugh.⁷ Justice Breyer wrote a dissenting opinion and was joined by Justices Ginsburg and Kagan.⁸ In the next session of the Court, Justice Gorsuch wrote for the majority in *Bostock*, with Chief Justice Roberts and Justices Sotomayor, Breyer, Ginsburg, and Kagan joining the opinion.⁹ Justice Alito wrote a dissenting opinion and was joined by Justice Thomas.¹⁰ Justice Kavanaugh wrote a dissenting opinion as well.¹¹

The dissenting opinions in both cases argue that the Court should have looked further outside of the text to come to a different conclusion. Justice Breyer, in *Return Mail*, writes that the majority opinion is incomplete because it does not look at the purpose of the enactment of the AIA.¹² Justice Alito, dissenting in *Bostock*, also argues that the Court should have looked beyond the text of the Civil Rights Act because the word “sex” is ambiguous.¹³ Justice Kavanaugh, also in a dissenting opinion in *Bostock*, argues against the Court’s reliance on literal meaning, rather than ordinary meaning.¹⁴ Both *Bostock* dissenting opinions also look to post-enactment history.¹⁵

Section II of this Comment discusses the history of both the AIA and the Civil Rights Act and how *Return Mail* and *Bostock* came to be heard in the Supreme Court. This Section also does a deep dive of the majority opinions in both cases. Section III provides a foundation of the main methods of statutory interpretation and explores the two leading schools of thought on methodology to use when interpreting statutes. This Section also compares the two cases further, especially bringing to light the key arguments in the dissenting opinions. Finally, Section III questions the strategic importance of ambiguity in statutory interpretation.

II. BACKGROUND

To understand how *Return Mail* and *Bostock* came to be heard before the Supreme Court, it is important to be familiar with not only the

6. See *Return Mail*, 139 S. Ct. at 1855; see also *Bostock*, 140 S. Ct. at 1733.

7. *Return Mail*, 139 S. Ct. at 1855.

8. *Id.* at 1868.

9. *Bostock*, 140 S. Ct. at 1733.

10. *Id.* at 1754.

11. *Id.* at 1822.

12. See *Return Mail*, 139 S. Ct. at 1868–70 (Breyer, J., dissenting).

13. See *Bostock*, 140 S. Ct. at 1756–58 (Alito, J., dissenting).

14. *Id.* at 1824–25 (Kavanaugh, J., dissenting).

15. *Id.* at 1777 (Alito, J., dissenting); *id.* at 1824–25 (Kavanaugh, J., dissenting).

procedural history of the cases, but also the legislative history of each of the relevant Acts.

A. *Return Mail, Inc. v. United States Postal Service*

The Supreme Court granted certiorari and later heard *Return Mail, Inc. v. United States Postal Service* on February 19, 2019.¹⁶ On appeal to the Supreme Court, the two parties argued whether the U.S. Postal Service is considered a “person” to fit within the requirements of the Leahy-Smith America Invents Act (AIA), a patent act the U.S. Postal Service had initially utilized to defend against a copyright infringement claim.¹⁷

1. History of the Leahy-Smith America Invents Act

According to David Kappos, the former Director of the United States Patent and Trademark Office (USPTO), the Leahy-Smith America Invents Act sought to “updat[e] the U.S. patent system back into being the world’s gold standard.”¹⁸ The AIA “[m]ove[d] the U.S. from a ‘first-to-invent’ to a ‘first-inventor-to-file’ system” in order to align the United States with a majority of the industrial world.¹⁹ It was introduced on March 30, 2011 to the House of Representatives.²⁰ The House referred the AIA to the Committee on the Judiciary, including the Subcommittee on Intellectual Property, and the Committee on the Budget.²¹ From there the Act moved quickly through the House, receiving a passing vote less than three months later on June 23, 2011.²² The Senate passed the Act without amendment on September 8, 2011 and it became Public Law on September 16, 2011 when President Obama signed it.²³ The AIA seeks “[t]o amend title 35, United States Code, to provide for patent reform.”²⁴

16. 139 S. Ct. 1853 (2019).

17. *Id.*

18. USPTOvideo, *Fifth Anniversary of the America Invents Act*, YOUTUBE (Sept. 16, 2016), https://www.youtube.com/watch?time_continue=15&v=bRXx6IRsww4&feature=emb_logo [<https://perma.cc/UJ9A-U8WF>].

19. Kenneth E. Levitt, *Patent Reform Becomes Law: The Leahy-Smith America Invents Act*, DORSEY (Sept. 14, 2011), https://www.dorsey.com/newsresources/publications/2011/09/patent-reform-becomes-law-the-leahysmith-america__ [<https://perma.cc/8M83-Y74A>]; see also David Goldman, *Patent Reform Is Finally on Its Way*, CNNMONEY (June 24, 2011, 11:05 AM), https://money.cnn.com/2011/06/24/technology/patent_reform_bill/index.htm [<https://perma.cc/7MMD-B2TJ>].

20. Leahy-Smith America Invents Act, H.R. 1249, 112th Cong. (2011).

21. *Id.*

22. *Id.*

23. *Id.*

24. Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284, 284 (2011).

Despite the short timeline from introduction of the AIA in the House to the signing of the AIA into law, the reform of patent law did not happen immediately.²⁵ This Act represents the first major change passed into “United States patent laws since 1952.”²⁶ That is not to say reform has not been tried before. Two years prior to the passage of the AIA, Senators presented a similar Act, the Patent Reform Act of 2009, in the Senate.²⁷ But after a few months in the Senate, discussions ended and the Act was never introduced in the House of Representatives.²⁸ Passage of the AIA was also a major accomplishment for its co-sponsors, Sen. Patrick Leahy and Rep. Lamar Smith, who were named as two of the four POLITICO policymakers of the year for their efforts.²⁹ The two Congressmen were from different political parties, making the passage of this law a significant bipartisan accomplishment.³⁰

The AIA also focused on making the system more efficient in part by allowing the USPTO Director to set their own fees—a necessary step to advance the United States into the modern patent community.³¹ Additionally, the AIA “created the Patent Trial and Appeal Board” which oversees three types of post-issuance proceedings: inter partes review, post-grant review, and covered-business-method review.³² All three are adversarial proceedings with briefings, hearings, discovery, evidence, and the possibility of an appeal.³³

The AIA addressed a number of issues on the front end of filing for patents, but was it intended to change what “person” could use the reformed systems in the Act after a patent was already granted? *Return Mail, Inc. v. United States Postal Service* brought this very question to the Supreme Court.³⁴

2. Background of the Case

This dispute started over a patent Return Mail, Inc. held for a method

25. Levitt, *supra* note 19.

26. Levitt, *supra* note 19.

27. Patent Reform Act of 2009, S. 515, 111th Cong. (2009).

28. *Id.*

29. Politico Staff, *Jackson, Leahy, Smith, Ryan Named Policymakers of Year*, POLITICO (Nov. 29, 2011, 8:40 PM), <https://www.politico.com/story/2011/11/jackson-leahy-smith-ryan-named-policymakers-of-year-069373> [<https://perma.cc/VX6M-W2W3>].

30. *Id.*

31. USPTOvideo, *supra* note 18.

32. *Return Mail, Inc. v. U.S. Postal Serv.*, 139 S. Ct. 1853, 1860 (2019).

33. *Id.* at 1866.

34. *Id.* at 1859.

of sorting undeliverable mail.³⁵ The U.S. Postal Service created a similar process in 2006 which Return Mail claimed infringed its patent.³⁶ The Postal Service and Return Mail then each pursued a different course of action to solve the dispute.³⁷ The Postal Service petitioned the Patent Board for covered-business-method (CBM) review, a post-grant review method provision in the AIA which deals with patents that cover methods or machinery for performing data processing or other operations.³⁸ Meanwhile, Return Mail sued the Postal Service for patent infringement in the Court of Federal Claims.³⁹ Ultimately, the Postal Service won both suits.⁴⁰ The Patent Board determined that the Return Mail product was, in fact, “ineligible to be patented, and . . . the Court of Appeals for the Federal Circuit affirmed. . . .” that the Postal Service could use the Patent Board’s CBM review process because they were a “person” under the Act.⁴¹ However, the Supreme Court granted certiorari and reversed the ruling of the United States Court of Appeals for the Federal Circuit.⁴²

3. The Majority Opinion

The Supreme Court “granted certiorari to determine whether a federal agency is a ‘person’ capable of petitioning for post-issuance review under the AIA.”⁴³ The majority held that the term “person” in the AIA did not include the federal government or its agencies.⁴⁴ The majority’s reasoning rested on a presumption that the meaning of the word “person” excludes sovereigns, and to overcome this exclusion there must be “some affirmative showing of statutory intent to the contrary.”⁴⁵ Ultimately, the majority found no such showing.⁴⁶

As mentioned above, the majority opinion in *Return Mail* tracks along the same broad interpretative methods as *Bostock*. *Return Mail* begins with (1) no set definition for the word “person,” (2) the court addresses the presumption that the word “person” does not include the sovereign, and it

35. *Id.* at 1861.

36. *Id.*

37. *Id.*

38. *Id.* at 1860–61.

39. *Id.* at 1861.

40. *Id.*

41. *Id.*

42. *Id.* at 1859, 1861–62.

43. *Id.* at 1861.

44. *Id.* at 1867.

45. *Id.* at 1861–62 (quoting *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 781 (2000)).

46. *Id.* at 1867.

looks at (3) whether or not context in this instance can overcome the presumption.⁴⁷

The Court in *Return Mail* sought to define the word “person” since it was not defined in the text of the America Invents Act.⁴⁸ However, luckily for the Court, Congress enacted the Dictionary Act in 1871 which helps to “determin[e] the meaning of any Act of Congress.”⁴⁹ The Act was created “to avoid prolixity and tautology in drawing statutes and to prevent doubt and embarrassment in their construction.”⁵⁰ The Dictionary Act does so by defining basic terms that are frequently used in Federal Acts, and providing guidelines for general grammatical rules.⁵¹ Importantly, the Dictionary Act *does* define the word “person.”⁵² The word “person” in “any Act of Congress, unless the context indicates otherwise . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”⁵³ But this does not provide all the information needed to exclude the federal government from the definition. Thus, the opinion quickly dives into presumptions from previous cases to determine the meaning of the word “person” in the AIA.

The Court considered how the prior Courts had determined the interpretation of the word “person” in a number of other cases.⁵⁴ The earliest case the Supreme Court cites to, *United States v. Fox*, concerns a statute using the term “person” to define who can be the recipient of a devise of land.⁵⁵ The Court determined that this statute’s use of the term person “applies to natural persons, and also to artificial persons,—bodies politic, deriving their existence and powers from legislation,—but cannot be so extended as to include within its meaning the Federal government.”⁵⁶ Importantly, the Court determined that “[i]t would require an express definition” to include the federal government.⁵⁷ This case set the foundation for a number of cases to follow when faced with similar statutory interpretation issues.

In two cases from the 1940s, *United States v. Cooper Corporation* and

47. See generally *id.*

48. See Leahy-Smith America Invents Act, Pub. L. No. 112-29, § 2–3(a), 125 Stat. 284, 284–85 (2011).

49. 1 U.S.C.S. § 1.

50. Emily J. Barnet, *Hobby Lobby and the Dictionary Act*, 124 YALE L.J. F.11, 12 (2014) (quoting CONG. GLOBE, 41st Cong., 3d Sess. 1474 (1871) (statement of Rep. Poland)).

51. *Id.* at 11–12; 1 U.S.C.S. § 1.

52. 1 U.S.C.S. § 1.

53. *Id.*

54. See *Return Mail, Inc. v. U.S. Postal Serv.*, 139 S. Ct. 1853, 1862–66 (2019).

55. *Id.* at 1862–63; *United States v. Fox*, 94 U.S. 315, 321 (1876).

56. *Fox*, 94 U.S. at 321.

57. *Id.*

United States v. Mine Workers, the Court explains that it is common usage to presume the term “person” to exclude sovereigns.⁵⁸ However, the cases found “no hard and fast rule of exclusion.”⁵⁹ Rather, *Cooper Corporation* calls for multiple methods of statutory interpretation to be examined to ultimately decide the meaning of a word: “[t]he purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute.”⁶⁰ Because the presumption to exclude sovereigns from the definition of “person” allows other methods to overcome the presumption, the context of the usage of the word “person” must also be examined.⁶¹

The majority again cites to *United States v. Cooper Corporation*, as well as *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, to explain how much context is needed to overcome the Dictionary Act’s definition and the presumption of exclusion.⁶² While there is “no hard and fast rule of exclu[ding]”⁶³ the federal government from being considered a “person,” there also must be “some affirmative showing of statutory intent to the contrary” to allow the federal government to be part of the definition.⁶⁴ To show this “statutory intent,”⁶⁵ the Court looks to how the word “person” is used in the America Invents Act.⁶⁶ The presumption of consistent usage canon directs judges to presume that a word or phrase has “the same meaning throughout a text.”⁶⁷ Generally, Congress’s assigned meaning to a word in one part of a statute will mean that word has the same meaning in another part of the statute.⁶⁸ However, this assumption can be overcome when a word has seemingly distinct meanings in distinct sections of the statute.⁶⁹

The majority holds that the consistent-usage canon does not support

58. *United States v. Cooper Corp.*, 312 U.S. 600, 604–05 (1941); *United States v. United Mine Workers of Am.*, 330 U.S. 258, 275 (1947).

59. *Cooper Corp.*, 312 U.S. at 604–05.

60. *Id.* at 605.

61. *See Return Mail, Inc. v. U.S. Postal Serv.*, 139 S. Ct. 1853, 1862–63.

62. *Cooper Corp.*, 312 U.S. at 604–06 (1941); *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 781 (2000).

63. *Cooper Corp.*, 312 U.S. at 604–05.

64. *Vt. Agency of Nat. Res.*, 529 U.S. at 781.

65. *Id.*

66. *Return Mail*, 139 S. Ct. at 1863.

67. Katharine Clark & Matthew Connolly, *A Guide to Reading, Interpreting, and Applying Statutes*, THE WRITING CTR. AT GEO. L. CTR. 7 (Suraj Kumar & Taylor Beech revs., 2017), <https://www.law.georgetown.edu/wp-content/uploads/2018/12/A-Guide-to-Reading-Interpreting-and-Applying-Statutes-1.pdf> [<https://perma.cc/PJ7A-ENWD>].

68. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 86 (2006) (citing *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005)).

69. *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 319–20 (2014) (quoting *Env’t. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007)).

including the government in the definition of “person.”⁷⁰ They conclude that since there is inconsistent usage of the word “person” in the Act, “the mere existence of some Government-inclusive references cannot make the ‘affirmative showing,’ required to overcome the presumption that Congress did not intend to include the Government” in the definition of the word “person.”⁷¹ The majority wrote that the usage of the word “person” in the statute followed no clear pattern.⁷² In some instances it appears that the word “person” clearly includes the government, but, in other instances, the word clearly does not include the government.⁷³ The majority determined that the first time the word “person” is used inconsistently with previous uses in the AIA, the word in the Act fails the consistent-usage canon necessary to overcome the presumption that the government is excluded from the definition of the word “person.”⁷⁴ After this determination on meaning in the context stage, the Court does not spend time on the other factors laid out in the *Cooper Corporation* case. As such, the majority determined that the inconsistent use of the word in the AIA fails to make an “affirmative showing” that can overcome the presumption that the word “person” does not include the federal government.⁷⁵

B. *Bostock v. Clayton County*

Much like *Return Mail*, the decision in *Bostock* turned on the Court’s interpretation of a statute. The Court granted certiorari in three cases to determine whether the word “sex,” as used in Title VII of the Civil Rights Act of 1964, included protection from discrimination based on sexual orientation and gender identity.⁷⁶

1. History of the Civil Rights Act

Unlike the Leahy-Smith America Invents Act (AIA), the history of the Civil Rights Act of 1964 has been a topic of extensive academic study and scholarship, so this part will be brief. Although the movement toward the Act had been brewing in the country for many years, the

70. See *Return Mail*, 139 S. Ct. at 1863 (suggesting that were the canon to apply without exception, it might weigh strongly in the favor of the Postal Service).

71. *Id.* at 1865 (quoting *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 781 (2000)) (internal citation omitted).

72. *Id.* at 1863.

73. *Id.*

74. *Id.* at 1865.

75. *Id.* (internal citation omitted).

76. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737–38 (2020).

demonstrations of civil rights activists in the early 1960s were a major catalyst for legal change.⁷⁷ On June 11, 1963, President John Kennedy announced that he planned “to propose a comprehensive civil rights bill.”⁷⁸ His bill would address equal access to public accommodation, school desegregation, expand the Civil Rights Commission, and, in Title VII, create a Committee on Equal Employment to oversee “the conduct of federal contractors.”⁷⁹ However, the Committee, and the rest of the bill, focused on public discrimination, not on the acts of private individuals and companies.⁸⁰

On June 19, 1963, the “bill was introduced in both houses of Congress,” but its supporters pushed for it to begin first in the House of Representatives to gain momentum before going to the Senate.⁸¹ The bill made its way through committees and markups throughout the summer and fall but was still pending in the House on November 22, 1963 when President Kennedy was assassinated.⁸² When President Lyndon Johnson took over office, he made it clear he supported the bill and that “the earliest possible passage of the civil rights bill” was the best way to honor President Kennedy’s memory.⁸³

Finally, in February of 1964 the bill was ready to move over to the Senate.⁸⁴ But not before one significant (and especially important to the *Bostock* case) amendment was added. “On February 8, 1964, the Rules Committee Chairman [Howard ‘Judge’ Smith] proposed the addition of the word ‘sex’ to Title VII’s list of impermissible bases for employment decisions.”⁸⁵ Lesser-known history shows that Judge Smith had spent years—33 years in fact—serving in the House, actively working to kill progressive legislation, including civil rights legislation.⁸⁶ If his motives for expanding the reach of this bill seem suspicious to you, you might be right. Alice Paul and the National Women’s Party asked Judge Smith to include “sex” in the bill, which he saw as a way to make the bill look

77. WILLIAM N. ESKRIDGE JR., JAMES J. BRUDNEY, JOSH CHAFETZ, PHILIP P. FRICKEY, & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY 2* (West Academic Publishing, 6th ed. 2020).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 4.

82. *Id.* at 4–7.

83. *Id.* at 7.

84. *Id.* at 10–11.

85. *Id.* at 10.

86. *Id.* at 7.

ridiculous and ultimately fail in the Senate.⁸⁷ In fact, many representatives were playing this game: the bill's passage in the House is credited more toward southern opponents of the bill voting yes, to push an unpassable bill into the Senate to fail.⁸⁸

Unfortunately for the opponents of the bill, their plan to add "sex" to kill the bill in the Senate did not work. The bill spent many months in the Senate, but on June 19, 1964, it received a passing vote.⁸⁹ And it remained vastly the same as the bill that was passed in the House.⁹⁰ Finally, on July 2, 1964, President Johnson signed H.R. 7152 into law and The Civil Rights Act of 1964 was born.⁹¹

2. Background of the Three Cases That Formed the *Bostock* Opinion

The Civil Rights Act has been widely used since its passage in 1964. Title VII alone has provided protection from employment discrimination against individuals "because of such individual's race, color, religion, sex, or national origin."⁹² In *Bostock*, the justices deciding the scope of the word "sex" examined caselaw since Title VII's enactment, which illuminated examples of the Act providing protection from a wide array of sex-based employment discrimination.⁹³ The *Bostock* Court's focus was on whether the word "sex" provides protection for individuals discriminated against because of their sexual orientation or gender identity.⁹⁴

In the first case, *Bostock v. Clayton County Board of Commissioners*, Gerald Bostock was a nationally-recognized child welfare advocate working for Clayton County, Georgia.⁹⁵ Mr. Bostock joined a gay recreational softball league after working for the county for ten years and

87. See *id.* at 10; see also *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1752 (2020) (describing Smith's motivation in making the addition as being "[n]ot necessarily because he was interested in rooting out sex discrimination in all its forms, but because he may have hoped to scuttle the whole Civil Rights Act and thought that adding language covering sex discrimination would serve as a poison pill.").

88. See, e.g., *Bostock*, 140 S. Ct. at 1754 ("Some of those who supported adding language to Title VII to ban sex discrimination may have hoped it would derail the entire Civil Rights Act. Yet, contrary to those intentions, the bill became law."); see also ESKRIDGE, ET. AL., *supra* note 77, at 10. But see Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1320–29 (2012).

89. ESKRIDGE, *supra* note 77, at 16.

90. *Id.* at 17.

91. *Id.* at 18.

92. 42 U.S.C.A. § 2000e-2(a) (West).

93. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1739–41 (2020).

94. *Id.* at 1737–38.

95. *Id.* at 1737.

was quickly “fired for conduct ‘unbecoming’ a county employee.”⁹⁶ He brought suit under Title VII alleging “unlawful discrimination on the basis of sex.”⁹⁷ In the second case, *Zarda v. Altitude Express, Inc.*, Donald Zarda was also fired from his job as a skydiving instructor just days after he mentioned he was gay.⁹⁸ The Eleventh Circuit dismissed the *Bostock* case as a matter of law, holding that Title VII does not prohibit discrimination based on sexual orientation.⁹⁹ However, the Second Circuit ruling in *Zarda* held that discrimination based on sexual orientation “does violate Title VII.”¹⁰⁰

And in the third case, *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.*, Aimee Stephens, a transgender woman, worked for a family-owned and run funeral home, presenting as a man when she first started her job.¹⁰¹ After two years on the job, she began living as a woman in her personal life.¹⁰² In her sixth year working for the funeral home, Ms. Stephens expressed to her employer her plan to come to work as a female and was quickly fired.¹⁰³ The Sixth Circuit held “that Title VII bars employers from firing employees because of their transgender status.”¹⁰⁴

3. The Majority Opinion

Justice Gorsuch surprised many when his name appeared as the author of an opinion holding that Title VII does protect against discrimination based on sexual orientation and gender identity. During oral arguments, Justice Gorsuch, a textualist, seemed to agree that the plain meaning of the text favored a ruling that “sex” includes transgender status.¹⁰⁵ But almost in the same breath, he argued the other side, saying “should [the judge] take into consideration the massive social upheaval that would be entailed in such a decision, and the possibility that—that Congress didn’t think about it?”¹⁰⁶ But his opinion followed a textualist pattern similar to the

96. *Id.* at 1737–38.

97. *Id.* at 1738.

98. *Id.*

99. *Id.* (citing *Bostock v. Clayton Cnty.*, 723 F. App’x. 964, 964–65 (11th Cir. 2018)).

100. *Id.* (citing *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 131–32 (2d Cir. 2018)) (emphasis added).

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* (citing *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 600 (6th Cir. 2018)).

105. Transcript of Oral Argument at 24–25, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 139 S. Ct. 1599 (2019) (No. 18-107).

106. *Id.* at 26–27.

Return Mail case from the 2018–2019 session: (1) begin with an undefined word (“sex”), (2) address the presumption of the ordinary dictionary definition of the word, and (3) turn to the context in which the word “sex” is found to see if the presumption can be overcome.¹⁰⁷

Because the Court was tasked with deciding whether or not the word “sex” in Title VII of the Civil Rights Act includes protections from discrimination because of an individual’s sexual orientation and gender identity, and it is not defined in the Act, they first looked to dictionary definitions of the word.¹⁰⁸ The Court began with a dictionary definition of “sex” that would provide the ordinary public meaning of the word in 1964.¹⁰⁹ Roughly comprehensive dictionaries at the time state that “the term ‘sex’ in 1964 referred to ‘status as either male or female [as] determined by reproductive biology.’”¹¹⁰ Despite employees’ reasoning that the definition has a much broader scope, the Court proceeds in the opinion working under the assumption that the definition is as stated above—it only includes biological differences.¹¹¹ However, once again, a presumption (or “assumption”) can be overcome by context.

Justice Gorsuch goes on to say this dictionary definition is “just a starting point. The question is not just what ‘sex’ meant, but what Title VII says about it.”¹¹² There are three key phrases in the relevant section of Title VII that provide the context the Court uses to overcome the dictionary definition of sex: “because of,” “discriminate against,” and “individual.”¹¹³

Beginning with “because of,” Justice Gorsuch cites to multiple previous Supreme Court decisions.¹¹⁴ This line of reasoning produces a broad but-for test to determine if an action is taken “because of sex.”¹¹⁵ Justice Gorsuch devotes a significant amount of his opinion to this concept, bolstering its credibility through examples.¹¹⁶ Actions by employers do not have to be based solely on their employees’ sex, but if their sex is a factor in the decision, this but-for test has been satisfied.¹¹⁷ He applies this test to one previous Supreme Court case, *Phillips v. Martin*

107. *Bostock*, 140 S. Ct. 1731.

108. *Id.* at 1738–40.

109. *Id.* at 1739.

110. *Id.* (alteration in original).

111. *Id.*

112. *Id.*

113. *Id.* at 1739–41.

114. *Id.* at 1739.

115. *Id.* at 1739–40.

116. *Id.* at 1745–48.

117. *Id.* at 1739.

Marietta Corporation, to show how it plays out.¹¹⁸ In that case, a woman was not hired because of the company's policy not to hire mothers with young children.¹¹⁹ That same policy did not limit the hiring of fathers with young children.¹²⁰ Phillips could explain her not being hired "because she was a mother, or because she had young children," and not necessarily because she was a woman.¹²¹ But sex was a factor and therefore the Court determined it was a violation of Title VII.¹²²

Justice Gorsuch concedes that sexual orientation and gender identity do not fit neatly into the dictionary definition of "sex."¹²³ But he explains that the strict dictionary definition of the word was never the only thing the Act intended to protect, saying:¹²⁴

We agree that homosexuality and transgender status are distinct concepts from sex. But, as we've seen, discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second. Nor is there any such thing as a "canon of donut holes," in which Congress's failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception. Instead, when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule. And that is exactly how this Court has always approached Title VII. "Sexual harassment" is conceptually distinct from sex discrimination, but it can fall within Title VII's sweep. Same with "motherhood discrimination."¹²⁵

Justice Gorsuch will not budge on the test. He writes, "[y]ou can call the statute's but-for causation test what you will—expansive, legalistic, the dissents even dismiss it as wooden or literal. But it is the law."¹²⁶

Of course, Title VII does not limit all actions by employers "because of" sex, just those in which employers "discriminate against" an individual.¹²⁷ The Court first looks to see what the dictionary definition of "discriminate" would have been in 1964.¹²⁸ According to the second edition of Webster's New International Dictionary in 1954, discriminate means: "To make a difference in treatment or favor (of one as compared

118. *Id.* at 1745 (citing *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 543 (1971)).

119. *Id.* at 1743.

120. *Id.*

121. *Id.* at 1745.

122. *Id.*

123. *Id.* at 1746–47.

124. *Id.*

125. *Id.* (internal citations omitted).

126. *Id.* at 1745.

127. *Id.* at 1740 (quoting 42 U.S.C.A. § 2000e-2(a) (West)).

128. *Id.*

with others).”¹²⁹ Combining the meaning of “because of” and “discriminate against” the Court determines that “an employer who intentionally treats 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—discriminates against that person in violation of Title VII.”¹³⁰ But again, the context surrounding the word “sex” does not end there.

The final important word in Title VII is “individual.” The Act protects individuals from discrimination, not groups, and the distinction is critical.¹³¹ Again, Justice Gorsuch provides a very clear and illustrative example:

Suppose an employer fires a woman for refusing his sexual advances. It’s no defense for the employer to note that, while he treated that individual woman worse than he would have treated a man, he gives preferential treatment to female employees overall. The employer is liable for treating *this* woman worse in part because of her sex.¹³²

This important distinction is what truly protects against unequal treatment; otherwise, employers could treat *all* women worse than men and get away with it.

Justice Gorsuch continues the opinion for many more pages after this determination. He gives countless other hypotheticals,¹³³ provides overviews of other Supreme Court decisions which determined the scope of Title VII’s protections,¹³⁴ and explains and rebuts arguments from the employers.¹³⁵ But the dissent is not happy with what they perceive as Justice Gorsuch “legislating” with this decision.¹³⁶

III. ANALYSIS

While the cases cover two very different topics, the methods the Courts follow in each are very similar. Both majority opinions follow a largely textual-based approach, not straying too far from the text of the Acts themselves. However, there are two major differences in these cases:

129. *Id.* (quoting *Discriminate*, WEBSTER’S NEW INTERNATIONAL DICTIONARY (2d ed. 1954)).

130. *Id.*

131. *Id.* at 1740–41.

132. *Id.* at 1741.

133. *Id.* at 1741–43.

134. *Id.* at 1743–44.

135. *Id.* at 1744–45.

136. *Id.* at 1754 (Alito, J., dissenting) (“There is only one word for what the Court has done today: legislation.”); *id.* at 1822 (Kavanaugh, J., dissenting) (“Under the Constitution’s separation of powers, the responsibility to amend Title VII belongs to Congress and the President in the legislative process, not to this Court.”).

the outcomes, and the justices who make up the majority and dissenting sides.

In *Return Mail*, the Court rules that “person” *does not* include the federal government (and therefore the United States Postal Service) mainly because the context of the word in the Act does not give a definite answer that it does.¹³⁷ The majority opinion is written by Justice Sotomayor, with Chief Justice Roberts and Justices Alito, Thomas, Gorsuch, and Kavanaugh joining the opinion.¹³⁸ Justice Breyer wrote a dissenting opinion joined by Justices Ginsburg and Kagan.¹³⁹

In *Bostock*, the Court rules that “because of an individual’s . . . sex” *does* include sexual orientation and gender identity mainly because the context of the word in the Act provides reasons that it could be included.¹⁴⁰ The majority opinion is written by Justice Gorsuch, with Chief Justice Roberts and Justices Sotomayor, Breyer, Ginsburg, and Kagan joining the opinion.¹⁴¹ Justice Alito wrote a dissenting opinion joined by Justice Thomas and Justice Kavanaugh wrote a dissent as well.¹⁴²

To determine how these decisions came out the way they did, it is important to first build a brief foundation of the main methods of statutory interpretation, not just the methods the majorities used in these cases. Then, it is essential to examine the statutory interpretation camps into which most justices fall. Finally, this Comment questions whether these methods and theories hold much weight when highly politicized issues are at stake.

A. *Statutory Interpretation*

Return Mail and *Bostock* both utilize various methods of statutory interpretation in both the majority and dissenting opinions. However, “most of the ‘rules’ of statutory interpretation are judge-made”¹⁴³ and should therefore be examined through an understanding that judges’ personal views play a role in their decision-making. Even so, an understanding of statutory interpretation is critical to understand why decisions are made in many cases.

137. See *Return Mail, Inc. v. U.S. Postal Serv.*, 139 S. Ct. 1853, 1859, 1863–65 (2019).

138. *Id.* at 1855.

139. *Id.*

140. *Bostock*, 140 S. Ct. at 1753–54.

141. *Id.* at 1733.

142. *Id.*

143. Gary E. O’Connor, *Restatement (First) of Statutory Interpretation*, 7 N.Y.U. J. LEGIS. & PUB. POL’Y 333, 336 (2003–04) (footnote omitted).

1. Methods

Four tools of statutory interpretation are especially useful when deciding what a statute means: (1) the plain meaning of the text, (2) prior legal interpretations, (3) the context in which the term is used, and (4) the purpose of the statute.¹⁴⁴ First, using the plain meaning of text can resolve disputes quickly if there is a definitions section in the statute.¹⁴⁵ However, that is not always the case. Second, legal interpretations can be helpful if there are other cases that have already interpreted this same question.¹⁴⁶ Again, this is not always available. Third, courts can interpret the word through context, which includes cross-referencing the word in other sections.¹⁴⁷ This step often includes also looking at prior cases that did not examine the exact question at hand but can assist in answering unknowns. Finally, it is often useful to consider the purpose of the text, i.e. legislative intent, as well as any relevant legislative history.¹⁴⁸

a. Text

Most justices agree that the text is the place to start for any statutory interpretation question. When words or phrases are not defined in the Act's definitions section "[c]ourts generally assume that the words of a statute mean what an 'ordinary' or 'reasonable' person would understand them to mean."¹⁴⁹ This can generally be deduced by looking at dictionary definitions or common law usage of a word.¹⁵⁰

b. Precedent

Next, if there is a case that is on point with a similar issue and facts, courts will often follow the outcome.¹⁵¹ The legal system in the United States follows the concept of *stare decisis*, wherein courts look at rulings in previous cases to follow their precedents.¹⁵² The system also promotes a presumption against changing the common law, which means that those

144. Clark & Connolly, *supra* note 67, at 2–10.

145. See VALERIE C. BRANNON, CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS, 19 (2018) (citing *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000)) (noting that courts look to common meaning *after* they fail to find the term defined within the pertinent statute itself).

146. Clark & Connolly, *supra* note 67 at 5–6.

147. *Id.* at 7–9.

148. *Id.* at 9–10.

149. *Id.* at 3.

150. *Id.* at 3.

151. *Id.* at 5–6.

152. See *id.* at 5–6.

interpreting a statute should do so in a way that does not alter the common law unless there is a clear indication otherwise.¹⁵³

c. Context & Statutory Structure

This step involves digging deeper into the statute itself. To determine the meaning of a word through the context of a statute, courts often use canons of construction, “a set of background norms and conventions that are widely” followed.¹⁵⁴ In fact, this practice has become more common, with over 40% of Supreme Court majority opinions now utilizing canons of construction in their decisions.¹⁵⁵ As utilized in the *Return Mail* case, the consistent usage canon means that judges presume that a word or phrase has “the same meaning throughout a text.”¹⁵⁶ Courts have agreed that interpreting the meaning of a word must be “a holistic endeavor” because often an ambiguous section of the text may be made clear when “the same terminology is used elsewhere” in the Act.¹⁵⁷

d. Purpose & Legislative History

Finally, the purpose of the text is often examined to gain a fuller understanding of the meaning of the text.¹⁵⁸ This includes looking at legislative history and reasoning for enacting a statute because this helps explain what Congress wanted the statute to encompass, even if the definitions are not clear.¹⁵⁹ However, this step is generally taken only when there is so much ambiguity in the text, context, and precedent, that no clear meaning can be interpreted before this point.¹⁶⁰ And some judges and justices believe this step should never be taken in statutory interpretation.¹⁶¹

2. Competing Schools of Thought

While the steps taken by the courts are useful methods of statutory

153. *Id.* at 6.

154. Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 344 (2010).

155. *Id.* at 345.

156. Clark & Connolly, *supra* note 67, at 7.

157. *United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988).

158. Clark & Connolly, *supra* note 67, at 9.

159. *Id.* at 9–10.

160. Brannon, *supra* note 145, at 44 (discussing the Supreme Court’s use of purpose as a last resort “to avoid the type of calamitous result that Congress plainly meant to avoid”) (quoting *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015)).

161. *See infra* Section III.A.2.a.

interpretation, it is important to point out that not all legal scholars believe that statutory interpretation should follow every step. Two major differing theories dominate the field of statutory interpretation—textualism and purposivism—and many judges and justices have fallen into one of these categories throughout the years.¹⁶² Also, as seen in both the *Return Mail* and *Bostock* majority opinions, sometimes statutory interpretation cases do not walk through all the steps outlined above. This can be because not all methods are necessary to making a determination or even because the judge writing the opinion does not believe there is value in a particular method.¹⁶³ Outside influences and politics may also play a role in the esteemed Court’s decisions.

a. Textualism

Justice Scalia was a major proponent of the interpretation method of textualism, which would have the Court “use only the plain meaning of the Constitution’s text.”¹⁶⁴ On today’s court, Justice Gorsuch has taken over as one of the most stringent textualists.¹⁶⁵ Textualists interpret words consistent with how they believe the Framers would have defined them. This methodology includes defining words narrowly or relying heavily on dictionary definitions of the words.¹⁶⁶ Strict textualists like Justice Scalia do not support using legislative history in statutory interpretation for any reason.¹⁶⁷ But context can play a role in statutory interpretation for some textualists, especially as textualism has evolved over time.¹⁶⁸

b. Purposivism

Despite falling under a different school of thought, generally all justices have some characteristics of textualism because they cannot ignore what the text of statutes actually says.¹⁶⁹ Purposivism and textualism have some similar practices but divide on whether

162. Brannon, *supra* note 145, at 10–18.

163. See Brannon, *supra* note 145, at 19.

164. David M. Zlotnick, *Justice Scalia and His Critics: An Exploration of Scalia’s Fidelity to His Constitutional Methodology*, 48 EMORY L.J. 1377, 1382 (1999).

165. Richard Primus, *The Supreme Court Case Testing the Limits of Gorsuch’s Textualism*, POLITICO (Oct. 15, 2019), <https://www.politico.com/magazine/story/2019/10/15/lgbt-discrimination-supreme-court-gorsuch-textualism-229850> [<https://perma.cc/D2SJ-HAN5>].

166. See Zlotnick, *supra* note 164, at 1382–84.

167. Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2150 (2002).

168. *The Rise of Purposivism and Fall of Chevron: Major Statutory Cases in the Supreme Court*, 130 HARV. L. REV. 1227, 1228 (2017) [hereinafter *The Rise of Purposivism*].

169. Primus, *supra* note 165.

interpretation can extend beyond just the text itself.¹⁷⁰ Traditionally, purposivism used Congress' legislative process to discern what Congress was trying to accomplish with the passage of a new act.¹⁷¹ This task, however, is not always easy due to the “limited foresight, legislative time and [scarce] resources” of Congress, so purposivists believe courts must go beyond just what a statute says to figure out its meaning.¹⁷² As the name implies, purposivism is all about figuring out the *purpose* of the act. And in recent years, some believe that the Court has been moving toward this school of interpretation.¹⁷³ However, both *Return Mail* and *Bostock* base their decision on mostly textual arguments.

B. *Comparing the Cases*

As explained previously, these cases are interesting because on the surface they seem to belong in entirely different realms. *Return Mail* involved patent law and produced a decision that affects just the federal government.¹⁷⁴ *Bostock* involved civil rights and its holding affects many, many people—far more than *Return Mail*.¹⁷⁵ But both cases were 6-3 decisions.¹⁷⁶ Both cases were written by a liberal or conservative justice and joined by Chief Justice Roberts and remaining four were opposite political leaning of the writing justice.¹⁷⁷ Both involved statutory interpretation of a word that turned on the context in which it was found.¹⁷⁸ And the dissenting justices in both cases argue that purpose and legislative history should be examined to truly determine the meaning of the words at issue.¹⁷⁹ But the cases diverge on what it takes to get to the step of examining the purpose of a statute and that divergence rests in part on ambiguity.¹⁸⁰

1. *Return Mail* & Statutory Interpretation

In *Return Mail*, the Court rules that “person,” as used in the AIA, does not include the federal government, which in this case means the United

170. *The Rise of Purposivism*, *supra* note 168, at 1229.

171. John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 120–21 (2011).

172. *Id.*

173. *The Rise of Purposivism*, *supra* note 168, at 1248.

174. *See supra* Section II.A.

175. *See supra* Section II.B.

176. *See supra* Section I.

177. *See supra* Section I.

178. *See supra* Section I.

179. *See supra* Section I.

180. *See supra* Section I.

States Postal Service.¹⁸¹ Justice Sotomayor wrote a mostly textual opinion, only really looking at the text and context of the word inside the Act.¹⁸² The plain meaning of the text often gives courts a reason to stop interpretation at this step.¹⁸³ So the Court looked to the Dictionary Act first which defines the word “person” to “include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”¹⁸⁴ Because the federal government is not in the list, neither the majority nor the dissent make much mention of trying to fit it into one of the categories listed.¹⁸⁵ But there are a couple of pieces to the Dictionary Act’s definition that allow for more analysis of its meaning.¹⁸⁶

First, the Act has a caveat that provides for the “context [to] indicate[] otherwise” when utilizing any of the Dictionary Act’s definitions.¹⁸⁷ This inclusion seems like a strategic move on the part of the drafters. It allows for any term defined previously to be redefined in the mind of the interpreter based on where it is used.¹⁸⁸ Additionally, the Dictionary Act uses the word “includes,” which can indicate that this list does not mean other persons are excluded from its definition in the first place.¹⁸⁹ Again, this makes the Dictionary Act less restrictive. Not only have its drafters allowed for context to shift the meaning depending on what the interpreter wants, it does not even provide an all-exclusive definition. The *Return Mail* majority leans on the definition in the Dictionary Act as fairly unwavering,¹⁹⁰ which does not seem to fit with the open-endedness of the Act. Because of this uncertainty, the word “person” cannot be defined simply by stopping at the first step of statutory interpretation and following exactly what the definition says. Therefore, interpretation is required to move beyond reliance on just the plain meaning of the text.

Based on prior cases, the Court explained that it is common usage to presume the term “person” excludes sovereigns.¹⁹¹ But the Court also acknowledges that this “is not a ‘hard and fast rule.’”¹⁹² Prior cases utilize

181. *Return Mail, Inc. v. U.S. Postal Serv.*, 139 S. Ct. 1853, 1867 (2019).

182. *See id.* at 1858–68.

183. *See* BRANNON, *supra* note 145, at 13–16.

184. 1 U.S.C.S. § 1.

185. *See generally, Return Mail*, 139 S. Ct. at 1862.

186. *See* 1 U.S.C.S. § 1.

187. *Id.*

188. Michael J. Gerardi, *The “Person” at Federal Law: A Framework and a RICO Test Suite*, 84 NOTRE DAME L. REV. 2239, 2251–52 (2009).

189. *See id.*

190. *See Return Mail*, 139 S. Ct. at 1862.

191. *Id.* at 1861–62 (quoting *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780 (2000)).

192. *Id.* at 1862 (quoting *United States v. Cooper Corp.*, 312 U.S. 600, 604–05 (1941)).

also “[t]he purpose, the subject matter, the context, the legislative history, [or] the executive interpretation” of the statute to determine whether the presumption can be overcome.¹⁹³ This leads the Court to examine context.¹⁹⁴

The specific use of “person” at argument in this case is in Section 18 of the America Invents Act.¹⁹⁵ The pertinent text reads: “A person may not file a petition for a transitional proceeding with respect to a covered business method patent unless the person or the person’s real party in interest or privy has been sued for infringement of the patent or has been charged with infringement under that patent.”¹⁹⁶ The meaning of “person” is unclear in that section and is also seemingly inconsistent with usage in other sections. Early in the AIA, Section 3 uses “person” in the following way: “a person having ordinary skill in the art to which the claimed invention pertains.”¹⁹⁷ This clearly cannot mean the government, because the government cannot possess a skill in the arts. Yet later in the AIA, the text reads: “A person shall be entitled to a defense”¹⁹⁸ This clearly could include the government as a “person.”

The dissent did not see this inconsistency as a reason to conclude that the word “person,” when used to refer to who may use CBM review process for patent disputes, excludes the federal government.¹⁹⁹ Justice Breyer wrote that the times “person” is used where it is not referring to the government are times when that meaning is “close to logically impossible.”²⁰⁰ This is because in those instances the context surrounding the word “person” is clearly referring to a single person or a human being capable of actions any non-human entity would not be capable of.²⁰¹ Therefore, the use of “person” in relation to the CBM review process *could* logically include the federal government because it is a function the government could physically be capable of.²⁰²

Here is where the schools of thought on statutory interpretation play a big role. For the majority, the presumption of consistent usage canon cuts off the ability to overcome the presumption of excluding sovereigns after

193. *Id.* at 1868 (Breyer, J., dissenting) (quoting *Int’l Primate Prot. League v. Adm’rs of Tulane Educ. Fund*, 500 U.S. 72, 83 (1991)).

194. *Id.* at 1863 (majority opinion).

195. Leahy-Smith America Invents Act, Pub. L. No. 112-29, § 18(a), 125 Stat. 284, 329–31 (2011).

196. *Id.*

197. *Id.* § 3(c).

198. *Id.* § 5(a).

199. *See Return Mail*, 139 S. Ct. at 1868–69 (Breyer, J., dissenting).

200. *Id.* at 1869.

201. *See Leahy-Smith America Invents Act*, § 3(c).

202. *See Return Mail*, 139 S. Ct. at 1869–70.

the first time the word “person” is used inconsistently with previous uses in the AIA because there is no “affirmative showing.”²⁰³ But the dissent, written by purposivist Justice Breyer, emphasizes the purpose and legislative history of the statute to prove that affirmative showing.²⁰⁴

The majority does concede that the federal government has a “longstanding history with the patent system.”²⁰⁵ Yet, they believe that this history is not relevant in determining Congress’ purpose for enacting this new patent statute.²⁰⁶ The majority concludes that the new system of patent review under the AIA is not affected by the history that the federal government has with patents because the AIA system proceedings are very different.²⁰⁷ The old system, *ex parte* reexamination, which is still available to the federal government, allows the Patent Office to decide which patents to reexamine and does so internally without the challenger participating in the process.²⁰⁸ This is very different than the systems under the AIA, which are “adversarial, adjudicatory proceedings between the ‘person’ who petitioned for review and the patent owner”²⁰⁹ The majority believes Congress would not want the federal government to participate in the adversarial patent review process because the possibility of an “awkward situation that might result” when a nongovernmental patent owner has to defend her patent under one federal agency, the Patent Office, against another federal agency, in this case, the U.S. Postal Service.²¹⁰

The dissent’s stance is that Congress clearly intended for the word “person” to include the federal government because of the legislative history and the federal government’s prior patent rights.²¹¹ Before the AIA, the federal government was considered a “person” who could “invoke the administrative review procedures.”²¹² Congress enacted the AIA “to ‘improve the quality of patents’ and ‘make the patent system more efficient,’” not to change the interpretation of the word “person.”²¹³ The dissent explains that the purpose of the AIA “show[s] even more clearly that Congress intended the term ‘person’ to include the Government”

203. *Id.* at 1865 (majority opinion) (quoting *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 781 (2000)).

204. *Id.* at 1870 (Breyer, J., dissenting).

205. *Id.* at 1865 (majority opinion).

206. *Id.* at 1865–66.

207. *Id.*

208. *Id.* at 1865–66, 1865 n.9.

209. *Id.* at 1866.

210. *Id.* at 1867.

211. *Id.* at 1870 (Breyer, J., dissenting).

212. *Id.*

213. *Id.* (quoting H.R. REP. NO. 112–98(I), pt. 1, at 48 (2011)).

because its purpose was about improving the patent system's efficiency, not changing who could use it.²¹⁴

Additionally, the dissent explains that the “awkward” situation the majority imagines is nothing new for legal disputes with the federal government.²¹⁵ The majority thinks it would be an awkward situation to let the federal government utilize the administrative processes to challenge the patent in an adversarial way because the dispute would be resolved by another federal agency.²¹⁶ But the converse could also happen if a private citizen used the administrative procedures against the federal government.²¹⁷ So, again, it would be two federal agencies and one private citizen in the dispute. As Justice Breyer puts in his dissenting opinion: “the situation the majority attempts to avoid is already baked into the cake,” meaning it cannot be avoided.²¹⁸

The dissent opined that the methods of statutory interpretation all worked *in favor* of showing the intent to overcome the Dictionary Act's exclusion.²¹⁹ The dissent's analysis considers not only the AIA's use of the word “person,” but also other patent provisions which include the government in the definition of “person.”²²⁰ Their analysis combines multiple steps of statutory interpretation by looking at context in the AIA and other legal interpretation outside of the AIA.²²¹ This leads them to determine “person” would include the federal government.²²² Justice Breyer digs deep into his purposivist beliefs to argue that the majority's ruling is incorrect because it is incomplete.

Before diving into the *Bostock* decision, it is important to reorient which justices were on which side in *Return Mail*. The majority opinion is written by Justice Sotomayor, with Chief Justice Roberts and Justices Alito, Thomas, Gorsuch, and Kavanaugh joining the opinion.²²³ Justice Breyer wrote a dissenting opinion joined by Justices Ginsburg and Kagan.²²⁴

214. *Id.*

215. *Id.* at 1870–71.

216. *Id.* at 1867 (majority opinion).

217. *Id.* at 1870–71 (Breyer, J., dissenting).

218. *Id.* at 1871.

219. *Id.* at 1868.

220. *Id.* at 1868–69.

221. *See id.*

222. *Id.* at 1871–72.

223. *Id.* at 1855 (majority opinion).

224. *Id.*

2. *Bostock* & Statutory Interpretation

Switching gears in *Bostock*, the makeup of the justices was as follows: Justice Gorsuch wrote the majority opinion with Chief Justice Roberts and Justices Sotomayor, Breyer, Ginsburg, and Kagan joining the opinion.²²⁵ Justice Alito wrote a dissenting opinion joined by Justice Thomas, and Justice Kavanaugh wrote a separate dissent as well.²²⁶ Again, the majority opinion is based in textual reasoning, but the justices that favored this in *Return Mail*—Alito, Thomas, and Kavanaugh—have moved to a dissenting opinion, which advocates going beyond the text.

In *Bostock*, the Court ruled that the phrase “because of an individual’s . . . sex” does include sexual orientation and gender identity in Title VII of the Civil Rights Act.²²⁷ Justice Gorsuch walks through a textualist approach to reach this conclusion in his majority opinion.²²⁸ He begins with the word itself, “sex,” and attempts to define it with its ordinary meaning at the time the Civil Rights Act was enacted.²²⁹ His query brings him to a definition that “sex” in 1964 was a “status as either male or female [as] determined by reproductive biology.”²³⁰ However, his analysis explains that this presumed definition of “sex” is incomplete because of the context within which it is written.²³¹ Justice Gorsuch determines the full meaning of “sex” by also defining “because of,” “discriminate against,” and “individual,” so the context in which the word “sex” is found overcomes the presumption of ordinary meaning.²³² Both dissenting opinions emphasize that the majority’s key mistake in this decision is the fact that it was legislating with its ruling.²³³ And both provide some support for their opinions through the definition of “sex.”²³⁴

Justice Kavanaugh, who “sees himself as a textualist”²³⁵ disagrees with the method Justice Gorsuch used for determining the meaning of the

225. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1733 (2020).

226. *Id.*

227. *Id.* at 1737.

228. *See id.* at 1737–41.

229. *Id.* at 1738–39.

230. *Id.* at 1739 (alteration in original).

231. *Id.*

232. *Id.* at 1739–41.

233. *Id.* at 1754 (Alito, J., dissenting) (“There is only one word for what the Court has done today: legislation.”); *id.* at 1822 (Kavanaugh, J., dissenting) (“Under the Constitution’s separation of powers, the responsibility to amend Title VII belongs to Congress and the President in the legislative process, not to this Court.”).

234. *Id.* at 1756–58 (Alito, J., dissenting); *id.* at 1824–26 (Kavanaugh, J., dissenting).

235. Alex Swoyer, *Brett Kavanaugh Best Described as ‘Originalist,’ Say Legal Scholars*, THE WASHINGTON TIMES (Sept. 3, 2018), <https://www.washingtontimes.com/news/2018/sep/3/brett-kavanaugh-best-described-as-originalist-say/> [<https://perma.cc/6E8U-FLRP>].

word “sex.”²³⁶ He has two main issues with Justice Gorsuch’s approach: not using ordinary meaning and not defining a phrase as a whole.²³⁷ To Justice Kavanaugh, Justice Gorsuch is using the literal meaning of “sex” to include “sexual orientation” instead of using the ordinary meaning.²³⁸ Justice Kavanaugh provides a laundry list of cases to support the “foundational interpretive principle that courts adhere to ordinary meaning, not literal meaning, when interpreting statutes.”²³⁹ He goes on to emphasize that following a word’s ordinary meaning is critical to maintain “rule of law and democratic accountability.”²⁴⁰ But in supporting that argument, his reasoning behind the importance of ordinary meaning seems to conflict with the reality of our society today.

A society governed by the rule of law must have laws that are known and understandable to the citizenry. And judicial adherence to ordinary meaning facilitates the democratic accountability of America’s elected representatives for the laws they enact. Citizens and legislators must be able to ascertain the law by reading the words of the statute. Both the rule of law and democratic accountability badly suffer when a court adopts a hidden or obscure interpretation of the law, and not its ordinary meaning.²⁴¹

He supports ordinary meaning so that citizens can understand the law. But this relies on the assumption that all Americans adopt the same ordinary meaning of words and phrases, which is certainly not true. And as a society, our perception of what is “ordinary” continues to evolve.²⁴²

Justice Kavanaugh also emphasizes that “Courts must heed the ordinary meaning of the *phrase as a whole*, not just the meaning of the words in the phrase.”²⁴³ He is critical of Justice Gorsuch defining “sex,” “because of,” “discriminate against,” and “individual” separately and combining their definitions to determine the phrase’s meaning.²⁴⁴ He writes: “Do not simply split statutory phrases into their component words, look up each in a dictionary, and then mechanically put them together again”²⁴⁵ Justice Kavanaugh provides examples to support his

236. *Bostock*, 140 S. Ct. at 1824 (Kavanaugh, J., dissenting).

237. *See id.* at 1824–25.

238. *Id.*

239. *Id.* at 1825.

240. *Id.*

241. *Id.*

242. *See, e.g.*, Chad Day, *Americans Have Shifted Dramatically on What Values Matter Most*, THE WALL ST. J. (Aug. 25, 2020, 9:00 AM), <https://www.wsj.com/articles/americans-have-shifted-dramatically-on-what-values-matter-most-11566738001> [<https://perma.cc/3QDS-U83P>].

243. *Id.* at 1826 (emphasis in original).

244. *Id.* at 1826–27.

245. *Id.* at 1827.

methodology of defining phrases as a whole: the “American flag,” a “cold war,” or a “three-pointer.”²⁴⁶ It is easy to see that those phrases refer to this country’s flag, a brewing conflict, and a basketball score, when their parts could support a less common definition.

But Justice Gorsuch had to define a much more complicated phrase. The words he is defining in the Civil Rights Act are not neatly stacked together in a phrase. The pertinent portion states it is unlawful for an employer to

fail or refuse to hire or to discharge any individual, or otherwise to *discriminate* against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, *because of* such *individual’s* race, color, religion, sex, or national origin²⁴⁷

It would be logically impossible for him to define this phrase without looking at and defining the individual words scattered throughout.

Justice Alito, in his dissenting opinion, passionately exclaims: “The Court’s argument [that the text is unambiguous] is not only arrogant, it is wrong. It fails on its own terms. ‘Sex,’ ‘sexual orientation,’ and ‘gender identity’ are different concepts, as the Court concedes.”²⁴⁸ He sees the text as ambiguous and does not agree with the majority that “discrimination because of sexual orientation or gender identity inherently or necessarily entails discrimination because of sex.”²⁴⁹ Because he claims “sex” in the Act is ambiguous, Justice Alito focuses on Congress’ intent with the passage of the Civil Rights Act.²⁵⁰ He criticizes the majority for “fl[y]ing a textualist flag,” and determining the word “sex” was unambiguous so the definition could be determined by looking solely at the text.²⁵¹

Instead, Justice Alito looks at the legislative history of the addition of the word “sex” to show that it was clearly pushed in at the last second for women’s rights.²⁵² However, after examining the history of the Civil Rights Act, it seems very suspicious to rely on very isolated parts of legislative process.²⁵³ As with many bills, the process is long and involves many rounds of negotiations and changes to make a bill passable. Justice Alito’s dissent almost seems to call out the justices that generally emphasize the importance of Congressional intent in statutory

246. *Id.* at 1826.

247. 42 U.S.C.A. § 2000e-2(a) (West) (emphasis added).

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

249. *Id.*

250. *Id.* at 1776.

251. *Id.*

252. *Id.*

253. *See supra* Section II.B.1.

interpretation: “For those who regard congressional intent as the touchstone of statutory interpretation, the message of Title VII’s legislative history cannot be missed.”²⁵⁴

Both Justices Alito and Kavanaugh in their respective dissents in *Bostock* look at post-enactment history as well.²⁵⁵ They emphasize the fact that Congress has had ample opportunities to add sexual orientation to Title VII.²⁵⁶ In fact, bills “were before Congress in 1991 when it made major changes in Title VII.”²⁵⁷ But the only reason the dissents in *Bostock* even look at congressional intent is because the dissenters believe that the word “sex” is ambiguous, unlike the majority. So, if all this turns on whether or not a word in a statute is ambiguous, what decides that?

C. *Why Argue Ambiguity?*

The precedential values of these cases are drastically different. In *Return Mail*, the Court narrowed in on deciding if the federal government was a “person” who could use the America Invents Act.²⁵⁸ An attorney for the U.S. Postal Service stated that “since the AIA was enacted, federal agencies have submitted 20 requests for all forms of AIA post-issuance review combined.”²⁵⁹ From September 16, 2012, until February 28, 2019, (the month in which *Return Mail* was argued), there were 9,858 total petitions for post-issuance proceedings.²⁶⁰ Federal agencies account for less than 0.3% of all AIA reviews.²⁶¹ And even further narrowing its potential scope, since *Return Mail* has been decided, the United States Court of Appeals for the Federal Circuit ruled the Federal Reserve Bank is a “person” under the AIA.²⁶²

But *Bostock* is different. The decision provides workplace protection for “1.5 million transgender and 11.5 million lesbian, gay and bisexual people” across the United States.²⁶³ And the case is not simply addressing

254. *Bostock*, 140 S. Ct. at 1777 (Alito, J., dissenting).

255. *Id.*; *id.* at 1824 (Kavanaugh, J., dissenting).

256. *Id.* at 1777 (Alito, J., dissenting); *id.* at 1824 (Kavanaugh, J., dissenting).

257. *Id.* at 1777 (Alito, J., dissenting) (footnote omitted).

258. *See generally* *Return Mail, Inc. v. U.S. Postal Serv.*, 139 S. Ct. 1853 (2019).

259. Transcript of Oral Argument at 61, *Return Mail, Inc. v. U.S. Postal Serv.*, 139 S. Ct. 1853 (2019) (No. 17-1594).

260. Pat. Trial & Appeal Bd., *Trial Statistics IPR, PGR, CBM*, U.S. PAT. & TRADEMARK OFF. 10 (Feb. 2019), https://www.uspto.gov/sites/default/files/documents/trial_statistics_2019_february.pdf [<https://perma.cc/TB3R-AKXJ>].

261. *See supra* notes 259–60 and accompanying text.

262. *Bozeman Fin. LLC v. Fed. Rsrv. Bank of Atlanta*, 955 F.3d 971, 974–75 (Fed. Cir. 2020).

263. David Cole & Ria Tabacco Mar, *The Court Just Teed Up LGBTQ Protections for so Much More than Employment*, THE WASH. POST

isolated discrimination issues seen in the three cases brought before the Court. An estimated “1 in 4 LGBTQ workers reported experiencing discrimination” in their workplace in a 2017 study.²⁶⁴

And while the cases follow similar patterns of analysis, two major differences emerge between them. First, the *Bostock* dissent is made up of Justices Alito and Thomas in one opinion, and Kavanaugh in another.²⁶⁵ And the *Return Mail* dissent is written by Justice Breyer and joined by Justices Ginsburg and Kagan.²⁶⁶ From a political standpoint, the *Bostock* dissenters are conservative justices, and the *Return Mail* dissenters, liberal justices.²⁶⁷ Second, both the majority and dissenting opinions in *Bostock* discuss the concept of ambiguity.²⁶⁸ In *Return Mail*, the word is never mentioned.

The dissenters in *Return Mail* look at the full range of statutory interpretation tools, including purpose and legislative history of the statute.²⁶⁹ This comes as no surprise because the opinion was written by Justice Breyer, a purposivist. The dissenting opinion in *Bostock*, written by Justice Alito and joined by Justice Thomas, also looks to purpose and legislative history but first determines that the word “sex” is ambiguous in order to look at elements outside of the text and context of the statute.²⁷⁰

IV. CONCLUSION

As the makeup of the Court continues to change, so does the ideology of its justices. While some dig firmly into one school of thought on statutory interpretation, many others utilize different methods depending on the case at hand. However, the methods of statutory interpretation, which are meant to create consistency throughout the jurisprudence of the Court, really could allow judges and justices to pick and choose whichever method leans in their favor. In both *Return Mail* and *Bostock*, this choice was apparent in the differences in the majority and dissenting opinions.

(June 18, 2020, 1:05 PM), https://www.washingtonpost.com/opinions/the-court-just-teed-up-lgbtq-protections-for-so-much-more-than-employment/2020/06/18/725f7832-b0dc-11ea-8f56-63f38c990077_story.html [<https://perma.cc/3ZFX-2B3U>].

264. *Id.*

265. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1733 (2020) (majority opinion).

266. *Return Mail, Inc. v. U.S. Postal Serv.*, 139 S. Ct. 1853, 1855 (2019).

267. *See, e.g.*, Nina Totenberg, Emmet Witkovsky-Eldred, Alyson Hurt, *In Supreme Court Term, Liberals Stuck Together While Conservatives Appeared Fractured*, NPR (July 15, 2020, 5:06 AM), <https://www.npr.org/2020/07/15/891185410/in-supreme-court-term-liberals-stuck-together-while-conservatives-appeared-fract> [<https://perma.cc/8NYE-RLT7>].

268. *Bostock*, 140 S. Ct. at 1749–50; *id.* at 1757 (Alito, J., dissenting); *id.* at 1833 (Kavanaugh, J., dissenting).

269. *Return Mail*, 139 S. Ct. at 1870 (Breyer, J., dissenting).

270. *Bostock*, 140 S. Ct. at 1776 (Alito, J., dissenting).

While the majority opinions followed very similar patterns of interpretation, definitions, presumptions, and context to overcome, the dissents diverged because of the makeup of the justices.

In *Return Mail*, the majority did not see the need to examine purpose.²⁷¹ But in *Bostock*, three of the same justices from the majority in *Return Mail* argued that purpose was important because the word “sex” was ambiguous.²⁷² But a judge or justice could argue a statute is ambiguous to them at any time to unlock any method of statutory interpretation they see fit for the case before them. And of course, that is within their discretion. But in a highly politicized environment, that choice becomes ripe for analysis.

271. *Return Mail*, 139 S. Ct. 1853.

272. *Bostock*, 140 S. Ct. at 1756–57 (Alito, J., dissenting); *see id.* at 1833–34 (Kavanaugh, J., dissenting).