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IS TITLE VII AN "ANTI-DISCRIMINATION" LAW?

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Title VII of the Civil Rights Act of 1964 is commonly referred to as an "anti-discrimination" statute. At its core, we are told, it prohibits something called "discrimination." But does it? Startlingly, the answer is no—not really. Instead, Title VII prohibits certain *acts* done for certain *reasons*. True, the reasons are precisely what everyone has long understood them to be—"because of . . . race, color, religion, sex, or national origin . . . ."[1] But the law's prohibited acts do not require "discrimination," and in those cases where the term "discrimination" is relevant, "discrimination" does not connote any wrongfulness on the employer's part and therefore does not mean what it might colloquially be thought to mean, i.e. the act of making an *unjust* distinction.[2] In short, Title VII is not an anti-discrimination

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1. 42 U.S.C. § 2000e-2(a)(1).

2. *See discriminate*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/view/Entry/54058?rskey=pTkSKX&result=2#eid (last visited Feb. 6, 2022) ("To treat a person or group in an unjust or prejudicial manner . . . ."); *see also discrimination*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/discrimination#:~:text=Definition%20of%20discrimination-,1%20%3A%20the%20practice%20of%20unfairly%20treating%20a%20person%20or%20group,prohibits%20discrimination%20against%20the%20disabled (last visited Feb. 6, 2022) ("[T]he practice of unfairly treating a person or group of people differently from other people or groups of people."). [https://perma.cc/YW88-JJEC]

statute, at least not as we ordinarily conceive of the concept of discrimination.

Okay, let me step back for a moment. I've overstated things slightly. I am not making a claim about how Title VII operates in the real world. Rather, when I say "Title VII" does not prohibit discrimination in the sense of making unjust distinctions, I mean simply that the ***text*** of Title VII does not require discrimination in that sense. This argument is based solely on the semantic meaning of the fifty words comprising Title VII's principal operative provision, section 703(a)(1).[3] I make no attempt to reconcile this claim with our current understanding of the statute. Nor, quite frankly, do I think I (or, for that matter, anyone else) could.

Indeed, given nearly six decades of Title VII jurisprudence, it might seem that I am a little late to the party, especially since my claim runs against the grain of the dominant view of courts and scholars, including those who surely know more about Title VII than I do. But my only explanation (if not justification) for raising this point at this late date is the Supreme Court's insistence in the blockbuster 2020 gay-rights case *Bostock v. Clayton County* that it was engaged in a textual reading of section 703(a)(1).[4] It was not. All three of the opinions in *Bostock* got the text wrong.[5] But I'm getting a little ahead of myself.

In this brief commentary, my aim is to convince you of three things: (1) in many Title VII cases, the word "discriminate" is irrelevant; (2) when the word "discriminate" does matter, it is

3. 42 U.S.C. § 2000e-2(a)(1). The argument might also be further supported by the broader linguistic context of section 703(a)(1), but I am not endeavoring to make that argument here.

I should also be clear that I am not making a claim about any other "anti-discrimination" statute (e.g., Title VI of the Civil Rights Act, Title IX of the Education Amendments Act of 1972, Americans with Disabilities Act, or 42 U.S.C. § 1981). The semantic structures of those other statutes are different. I do believe the argument would apply, *mutatis mutandis*, to the principal operative provision of the Age Discrimination in Employment Act. That language is almost identical to that found in Section 703(a)(1) of the Civil Rights Act of 1964, with the word "age" replacing "race, color, religion, sex, or national origin." *Compare* 42 U.S.C. § 2000e-2(a)(1), *with* 29 U.S.C. § 623(a)(1). There is, however, one small difference: a comma found in Title VII that is not found in the parallel provision in the ADEA. See 29 U.S.C. § 623(a)(1); Pub. L. No. 90-202, sec. 4(a)(1), 81 Stat. 602, 603 (Dec. 15, 1967) (no comma after the phrase "discharge any individual").

4. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

5. Elsewhere, I explain how Title VII's text cannot resolve the core of the dispute between the majority and the dissents in *Bostock*. *See* Anuj C. Desai, *Text is Not Enough*, 93 U. COLO. L. REV. 1 (2021). That argument is independent of this one and vice versa.

inextricably linked to the longer phrase "discriminate against an individual with respect to his compensation, terms, conditions or privileges of employment"; and (3) to "discriminate against [an] individual" in the context of Title VII simply means to "treat that individual worse than," and does not connote any unjustness in the treatment.

In short, most judges and scholars have misread the grammatical structure of section 703(a)(1) for decades.[6]

* * *

The Court's seminal 2020 Title VII decision, *Bostock v. Clayton County*, provides a perfect example of this misreading.[7] The relevant allegations in the case are pretty straightforward. The plaintiff

> worked for Clayton County, Georgia, as a child welfare advocate . . . . After a decade with the county, Mr. Bostock began participating in a gay recreational softball league. Not

6. Several scholars have argued that Title VII embodies a pure "disparate treatment" principle, such that differential treatment alone, without any need to prove discriminatory intent or motive, would violate the statute. *See* Katie Eyer, *The But-For Theory of Anti-Discrimination Law*, 107 VA. L. REV. 1621, 1625 (2021) (arguing that a "true disparate treatment principle not only resides at the core of antidiscrimination law but also in *its plain textual meaning*"); Tristin K. Green, *The Future of Systemic Disparate Treatment Law*, 32 BERKELEY J. EMP. & LAB. L. 395, 416–17 (2011) (arguing that the Supreme Court's decisions are best understood as not requiring any assessment of the employer's purpose, motive, or state of mind); Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 287–94 (1997) (arguing that in both Title VII and constitutional cases, "a better approach is to concentrate on the factual question of differential treatment"); Amy Wax, *The Discrimination Mind: Define It, Prove It*, 40 CONN. L. REV. 979, 982–93 (2008) (arguing that the basic disparate-treatment principle under Title VII encompasses unconscious-bias claims without any need for wrongful motive on the employer's part); Amy Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1138–39 (1999) (same). Such an approach almost certainly depends on my argument here that the meaning of "discriminate" does not connote any unjustness in treatment.

I should emphasize though that I am not making a normative claim about how particular cases should come out under the proper grammatical reading of section 703(a)(1). I suspect that many Title VII arguments that have relied on the term "discrimination" in its narrower sense of "the act of making an unjust distinction" could instead rely on the phrase "because of" later in the sentence. But if courts insist that "because of" reflects but-for causation—as the Court appears to have held in *Bostock*, *see Bostock*, 140 S.Ct. at 1739—the implications of this textual reading of section 703(a)(1) would likely result in a straightforward "disparate treatment" interpretation. *See generally* Eyer, *supra*.

7. 140 S. Ct. 1731 (2020).

> long after that, influential members of the community allegedly made disparaging comments about Mr. Bostock's sexual orientation and participation in the league. Soon, he was fired for conduct "unbecoming" a county employee.[8]

The Supreme Court held, 6-3, that Title VII prohibits employers from firing an employee for being gay. Justice Gorsuch authored the majority, and Justices Alito and Kavanaugh the two dissents. All three opinions claimed the mantle of Justice Scalia's textualism, yet all three misread the text.

Let's start with a close look at the text of the provision at issue in the case, section 703(a)(1) of the Civil Rights Act of 1964:

> It shall be an unlawful employment practice for an employer-
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ."[9]

Much of the debate in *Bostock* revolved around the word "discriminate." Many of the arguments raised questions along the lines of, did Bostock's employer "discriminate against" him "because of [his] . . . sex"? Yet, when section 703(a)(1) is read carefully, the word "discriminate" and the phrase "discriminate against" are simply irrelevant for a discharge case like Bostock's.

Take a look at the statutory language again and read it one more time carefully. As it applies to a discharge case, the statute reads, with appropriate ellipses, like this: "[i]t shall be an unlawful employment practice for an employer . . . to discharge any individual . . . because of such individual's . . . sex . . . ." The word "discriminate" is simply irrelevant. This reading becomes clear once one notices that the phrase "or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment" is set off by commas, and is thus unnecessary to analyze a discharge case such as Bostock's. In discharge cases then, there

8. *Id.* at 1737–38.
9. 42 U.S.C. § 2000e-2(a)(1).

is no need for a court to determine the meaning of the word "discriminate" at all.

But all three of the Court's opinions seem to think that even a discharge case requires interpreting the word "discriminate." Justice Gorsuch's majority opinion is probably the most equivocal on this, but even he believes the word "discriminate" must be interpreted to decide *Bostock*. When parsing the statutory language, he starts as follows:

> The employers acknowledge that they discharged the plaintiffs in today's cases, but assert that the statute's list of verbs is qualified by the last item on it: "otherwise . . . discriminate against." By virtue of the word *otherwise*, the employers suggest, Title VII concerns itself not with every discharge, only with those discharges that involve discrimination.[10]

Justice Gorsuch then goes on to accept this point "for argument's sake."[11] Similarly, Justice Alito repeatedly refers to "discriminate" as if the word is relevant and necessary to decide the case.[12] And Justice Kavanaugh does the same. When quoting the statute, he uses emphases to read the statute as though it could say "*It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . .*

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

11. *Id.* One does have to wonder though why the answer to an interpretive question should require a court to "accept [a party's claim about a sentence's syntax] for argument's sake."

12. *See*, *e.g.*, *id.* at 1755 (Alito, J., dissenting) ("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" (emphases added).); *id.* at 1756 ("Title VII, as noted, prohibits *discrimination* 'because of . . . sex,' . . . ." (emphasis added)); *id.* at 1757 (framing the question in the case as, "[I]f an employer takes an employment action solely because of the sexual orientation or gender identity of an employee or applicant, has that employer necessarily *discriminated* because of biological sex?" (emphasis added)); *id.* at 1761 ("Title VII prohibits *discrimination* based on five specified grounds, and neither sexual orientation nor gender identity is on the list" (emphasis added)); *see also* Randy Barnett & Josh Blackman, *Justice Gorsuch's Halfway Textualism Surprises and Disappoints in the Title VII Cases*, NAT'L REV. (June 26, 2020), https://www.nationalreview.com/2020/06/justice-gorsuch-title-vii-cases-half-way-textualism-surprises-disappoints/ (prominent textualist scholars asserting that "Title VII of the Civil Rights Act of 1964 made it unlawful for employers to 'discriminate against 'employees 'because of . . . sex,'" and arguing that *Bostock* depends on an interpretation of "discriminate against"). [https://perma.cc/4DVW-XZHZ]

because of such individual's race, color, religion, sex, or national origin."[13]

But these readings of the statute are just flat-out wrong. The word "otherwise" does not mean, as Justice Gorsuch puts it, that "Title VII concerns itself . . . only with those discharges that involve discrimination"; nor are the statute's first three verbs—"to fail . . . to hire," "to . . . refuse to hire," and "to discharge"—"*qualified* by the last item on [the statute's list of verbs]."[14] Rather, the statute's first three verbs are *examples* of the last item on the list. Or, put another way, the first three verbs are *encompassed by* "to discriminate against . . . with respect to his compensation, terms, conditions, or privileges of employment." That's the point of the word "otherwise," which of course means "in a different way."[15]

Importantly, the last item on the list is not just "to discriminate." Instead, it is "to discriminate . . . with respect to . . . compensation, terms, conditions, or privileges of employment." Failing to hire, refusing to hire, and discharging are three ways of "discriminat[ing] . . . with respect to . . . compensation, terms, conditions, or privileges of employment"; and the statute makes clear that the employer may not "discriminate . . . with respect to . . . compensation, terms, conditions, or privileges of employment" in any other way either.

Just as importantly, in the context of the full phrase, the verb "to discriminate" must mean simply "to make a distinction," and thus does not connote anything unjust about that

13. Justice Kavanaugh quotes the statute with emphases as follows:

> *It shall be an unlawful employment practice for an employer*— (1) to fail or refuse to hire or to discharge any individual, or otherwise *to discriminate against any individual* with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's race, color, religion, sex, or national origin*.

Bostock, 140 S. Ct. at 1823 n.2 (Kavanaugh, J., dissenting). The plaintiffs appear to have accepted this framing. *See id.* at 1826 n.3 ("[T]he plaintiffs do not dispute that the ordinary meaning of the statutory phrase 'discriminate' because of sex is the same as the statutory phrase 'to fail or refuse to hire or to discharge any individual' because of sex.").

14. *Bostock*, 140 S. Ct. at 1740 (emphasis added).

15. *Otherwise*, CONCISE OXFORD ENGLISH DICTIONARY 1014 (12th ed. 2011); *see also* Texas Dep't of Housing & Community Affairs v. Inclusive Communities Project, 576 U.S. 519, 535 (2015) (in a case interpreting the Federal Housing Act and, in a passage comparing the FHA to Title VII, citing Webster's Third New International Dictionary in defining "otherwise" as "in a different way or manner").

distinction. This broader reading of the term becomes evident by taking a step back and looking at the sentence as a whole. Let's take one more look. Here it is again:

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

Notice what the comma before the word "because" does: it divides the sentence into *actions* (red text in block quote above) and *reasons* (blue text in block quote above). The portion before the word "because" describes the relevant employment actions, and the portion starting at "because" describes the prohibited reasons. We call the actions "adverse employment actions."[16]

But the statute does not prohibit adverse employment actions themselves. There is nothing unjust or unlawful about taking an adverse employment action. Failing to hire, firing, and "discriminating . . . with respect to . . . compensation, terms, conditions, or privileges of employment" are all lawful actions. Instead, the statute only prohibits such actions if they occur "because of" a prohibited reason. Since everything in the sentence that precedes the word "because" refers solely to employer *actions*, the word "discriminate" plays no role in an analysis of the prohibited *reasons* for taking the action. It is simply part of the way the statute describes the act. Since the employer's reasons for—or state of mind during—the taking of the adverse employment action are irrelevant to the portion of the statute before "because," the justness or unjustness of that action is likewise irrelevant to that portion of the statute—and is thus irrelevant when construing the word "discriminate."

While "discriminate" in section 703(a)(1) does not connote any unjustness towards the individual, the employer's action must nonetheless be adverse to the individual. This is why the statutory text uses the phrase "discriminate *against* [an] individual with respect to his compensation, terms, conditions,

16. *See*, *e.g.*, Clark Cnty. Sch. Dist. v. Breeden, 532 U.S. 268, 269 (2001) (per curiam).

or privileges of employment."[17] The action being challenged under the statute must result in the plaintiff's "compensation, terms, conditions, or privileges of employment" being worse than someone else's. But to constitute discrimination against an individual "with respect to his compensation, terms, conditions, or privileges of employment," the action taken against the individual need only be adverse, not unjust. Put another way, the phrase "to discriminate against [an] individual" means simply "to treat worse than other individuals." It does *not* mean "to treat unjustly when compared with other individuals."

Another way to see why "discriminate against [an] individual" in the statute does not connote any wrongfulness or unjustness is by noting that termination is not always an *unlawful* adverse action. Employers fire people all the time without discriminating against them in the narrower sense of "making an unjust distinction." Termination is, however, ordinarily an example of "discriminating against" that person "with respect to such individual's compensation, terms, conditions, or privileges of employment," at least if we treat the term "discriminate" in that longer phrase as simply "make a distinction" and the phrase "discriminate against" as simply "treat worse than." Compared with someone else who was not fired, the discharged individual was "discriminat[ed] against . . . with respect to such individual's compensation, terms, conditions, or privileges of employment."[18] Thus, Justice Kavanaugh's use of ellipses to read the statute as "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin" doesn't just abridge the sentence; it *changes its meaning* by omitting a necessary prepositional phrase and by giving the impression that "discriminate" means "make an unjust distinction."

17. 42 U.S.C. § 2000e-2(a)(1) (emphasis added). I am indebted to James Cleith Phillips for focusing my attention on the statute's "discriminate *against*" language.

18. One circumstance in which a firing might not literally constitute "discriminat[ion] with respect to . . . compensation, terms, conditions, or privileges of employment," even in the broader "make a distinction" sense, would be an employer with only one employee. Firing that employee would be an adverse employment action but would not literally "discriminate against [that] individual with respect to his compensation, terms, conditions, or privileges of employment" when compared with some other employee. The reason? There are no other employees with whom to compare. The comparator would thus presumably have to be a hypothetical employee who had a different "race, color, sex, religion, or national origin." I am indebted to Caleb Nelson for this point.

In other words, causes of action based on a failure to hire or a discharge do not grammatically need the "otherwise . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment" language. There is thus no need even to consider the meaning of the word "discriminate" in such cases. It is an "unlawful employment practice" to "discharge any individual . . . because of such individual's . . . sex." Period. That's it. Nothing more. No discrimination necessary. On the other hand, for cases *not* involving either a failure to hire or a discharge, one must consider the entire phrase, "discriminate against [an] individual with respect to his compensation, terms, conditions, or privileges of employment," and not just the shorter phrase, "discriminate against [an] individual." Textually, that longer phrase is approximately something like "to treat that individual worse than some other individual with respect to some employment-related term."

Importantly, "to discriminate against [an] individual with respect to his compensation, terms, conditions, or privileges of employment" describes an *act* without in any way describing the reasons or the employer's state of mind. An employer that pays its CEO more than its other employees "discriminate[s] against [each of its other employees] with respect to his compensation . . . ." But of course there is ordinarily nothing unlawful about that because the *reason* the employer is "discriminat[ing] against" each of those other employees "with respect to [their] compensation" is the employees' job responsibilities, not the employees' "race, color, religion, sex, or national origin."

Read in this light, the statute is grammatically clear. There are three *specific* types of actions and one *general* type of action that could constitute an adverse employment action. "[T]o fail . . . to hire," "to . . . refuse to hire," and "to discharge" are the three specific types of actions an employer could take, and the use of the word "otherwise" indicates that those are specific examples of the general type of action, which is to "discriminate . . . with respect to . . . compensation, terms, conditions, or privileges of employment." The three specific types of adverse employment actions are not examples of just "discriminat[ing]," since an action is an adverse employment action only when an employer discriminates "*with respect to . . . compensation, terms, conditions, or privileges of employment*."

Failing to hire and firing are thus examples of "discriminat[ing] . . . with respect to . . . compensation, terms, conditions, or privileges of employment." And so the statute acts as a general prohibition on discriminating with respect to "compensation, terms, conditions, or privileges of employment," but makes explicit that failing to hire or firing someone falls within that general prohibition.

In short, all three of the opinions in *Bostock* misread Title VII's language. The word "discriminate" and phrase "discriminate against" are irrelevant to the application of Title VII's language to discharge cases like Bostock's. Moreover, the word "discriminate" and the phrase "discriminate against any individual" are inextricably tied to the prepositional phrase "with respect to his compensation, terms, conditions, or privileges of employment." They cannot be read without that phrase. In that context, the phrase "discriminate against" simply means "treat worse than," not "treat unjustly when compared with."