

THE OVERLOOKED TEXTUAL EVIDENCE
IN THE TITLE VII CASES:
THE LINGUISTIC (AND THEREFORE
TEXTUALIST) PRINCIPLE OF
COMPOSITIONALITY

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The Supreme Court is deciding a trio of cases involving a fascinating statutory interpretation question: whether the plain text of Title VII of the 1964 Civil Rights Act, which prohibits sex discrimination in employment, also prohibits discrimination based on sexual orientation¹ or gender identity.² Since, as Justice Kagan has stated, “we’re all textualists now,”³ the briefing and oral arguments all attempted to offer textualist analyses of the statutory language.

However, all of that briefing and discussion overlooked something—something that brings clarity to the textualist analysis. What has been missed is the linguistic principle of compositionality. That principle is, simply put, the notion that a phrase is often more (or less) than the sum of its parts. Or, as the linguists would put it, compositionality is the notion that “the meaning of a complex expression is a compositional function of the meanings of its [semantic] parts.”⁴ Sometimes what you see is what you get: apple pie is a pie made from apples. But sometimes “the combination of words

¹ See *Bostock v. Clayton Cty., Ga.*, No. 17-1618; *Altitude Express Inc. v. Zarda*, No. 17-1623.

² See *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Emp’t Opportunity Comm’n*, No. 18-107.

³ Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015) <https://www.youtube.com/watch?v=dpEtszFT0Tg>.

⁴ ALAN CRUSE, *MEANING IN LANGUAGE: AN INTRODUCTION TO SEMANTICS AND PRAGMATICS* 29 (3d ed. 2011).

has a meaning of its own that is not a reliable amalgamation of the components at all,” such as *for good* or *at all*.⁵

Related to “compositionality” is the idiom principle: “a language user has available to him or her a large number of semi-preconstructed phrases that constitute single choices [in communication], even though they might appear to be analysable into segments.”⁶ Take, for example, *of course* or *in fact*. Looking up their constituent words separately will not tell you the idiomatic meaning of the combined phrase.

The Supreme Court has for a century recognized this principle in trademark law with the Anti-Dissection Rule.⁷ That rule holds that “a composite mark is tested for its validity and distinctiveness by looking at it as a whole, rather than dissecting it into its component parts.”⁸ Or, as Judge Frank Easterbrook put it more colorfully in a trademark case involving a church’s name:

the World Church produced . . . nothing but a dictionary. It did not offer any evidence about how religious adherents use or understand the phrase *as a unit*. It offered only lexicographers’ definitions of the individual words. That won’t cut the mustard, because dictionaries reveal a range of historical meanings rather than how people use a particular phrase in contemporary culture. (Similarly, looking up the words “cut” and “mustard” would not reveal the meaning of the phrase we just used.)⁹

This same principle (and criticism) applies here.

Parties on both sides refer to *discrimination because of sex*. But that is shorthand for the actual statutory text. Title VII makes it unlawful “to discriminate *against* any individual . . . because of such

⁵ Alison Wray, *Why Are We So Sure We Know What a Word Is?*, in THE OXFORD HANDBOOK OF THE WORD 725, 737 (John R. Taylor ed., 2015).

⁶ John McH. Sinclair, *Collocation: A Progress Report*, in 2 LANGUAGE TOPICS: ESSAYS IN HONOUR OF MICHAEL HALLIDAY 319, 320 (Ross Steele & Terry Threadgold eds., 1987).

⁷ See *Estate of P.D. Beckwith, Inc., v. Comm’r of Patents*, 252 U.S. 538, 545–46 (1920).

⁸ See 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:27 (5th ed.).

⁹ *TE-TA-MA Truth Found.--Family of URI, Inc. v. World Church of Creator*, 297 F.3d 662, 666 (7th Cir. 2002) (emphasis added).

individual's . . . sex.”¹⁰ Everyone seems to drop the word “against” and focus just on “discriminate.” Or if they do take “against” into account, they nonetheless fail to read the whole operative phrase—including “discriminate,” “against,” and the relevant trait (in this case, sex)—as an indivisible whole. The argument for the plaintiffs, in particular, would require us to give “discriminate” and “against” the meaning each of them would have if it existed apart from the rest of the phrase. This “dissection” approach is most obvious in the most precise and careful formulations of the plaintiffs’ central textualist argument.¹¹

But that approach, I will show, violates the linguistic principle of compositionality. So it produces a demonstrably inferior reading of the text on purely linguistic grounds, prior to any appeal to subjective intent, purpose, policy concerns, or other modes of legal argument.

That is because, as it turns out, the phrase “discriminate against . . . because of [some trait]” was a linguistic unit (a composite) by the time of Title VII’s enactment, which makes the principle of compositionality relevant. And read as a composite, the phrase had more semantic content than one could glean from separately analyzing and then amalgamating its three parts (“discriminate,” “against,” and “sex”). While a “dissection” reading might suggest that Title VII covers *any* adverse treatment that even *advert*s to sex, as plaintiffs suppose, a linguistically superior reading (taking compositionality into account) proves that the operative text refers only to adverse treatment that rests on *prejudice (or bias)—i.e., loose generalizations or other unfair beliefs, attitudes (indifference, discounting of interests, distate, antipathy, etc.)—directed at some or all men, or at some or all women.*

¹⁰ 42 U.S.C. § 2000e-2(a) (emphasis added).

¹¹ The clearest articulation of the plaintiffs’ textualist argument is given by William N. Eskridge and Andrew M. Koppelman in their amicus brief. Professors Eskridge and Koppelman write that “[t]he statute’s logic is that an employer violates the law if it (1) takes negative employment action (2) that is causally linked to (3) the sex of the employee or applicant.” See https://www.supremecourt.gov/DocketPDF/18/18-107/107112/20190703151954986_Amicus_Eskridge%20and%20Koppelman.pdf at 5. The professors produced this three-pronged test by taking each of the three parts of the statutory text one-by-one, determining its most common meaning *when read in isolation*, and then making that sense of the term a new prong of the test. Thus, (1) the statutory term “against” yields the “negative employment action” prong of the professors’ test; (2) “discriminate” yields the “causal[] link[]” prong; and (3) “sex” yields the third prong. As we will see, this dissection approach is misleading. It elides a concept that is essential to the phrase when taken as a whole: *sex-based prejudicial ideas or attitudes* as motivations for the negative employment action.

And this defeats the plaintiffs' textualist argument. Whatever the legal merits of their case overall, their textualist case fails because it violates a basic linguistic principle as applied to linguistic data from the era.

The linguistic point above follow from two textualist sources of evidence: systematic data on linguistic usage around the time of Title VII's passage and contemporaneous dictionaries.

To begin with linguistic usage: The most comprehensive collection of texts of naturally occurring language usage from the 1950s and 1960s is the Corpus of Historical American English (COHA).¹² The largest structured corpus of English in the world, COHA contains approximately 24 million words from each of these two decades, with texts taken from popular magazines, newspapers, non-fiction books, and fiction books. It provides a balanced snapshot of written American English from that time.

And it shows three things. First, COHA shows evidence of the compositional nature of the phrase *discrimination against*. Indeed, *against* is the single word that most often immediately follows the various forms of the word *discriminate*¹³ in American English in the 1950s and 60s. That pairing—*discriminate against*—appears over half the time a word follows *discriminate* during that period, five times more often than the next most frequent word.¹⁴ So it is no accident that *against* follows *discriminate* in Title VII. This suggests that the pair had become a linguist unit of meaning rather than just two words whose meaning could be derived from independently looking at each word.

Second, COHA gives us preliminary evidence of the phrase's meaning. Here we can draw on the principle developed by corpus linguists over a half-century ago—"you shall know a word by the company it keeps"¹⁵—a principle analogous to the legal canon of *noscitur a sociis* ("it is known by its associates"). In linguistics, this

¹² <https://www.english-corpora.org/coha/>.

¹³ I ran a search on the lemma of *discriminate*. The words captured in the search were *discriminate*, *discriminated*, *discriminating*, and *discriminates*.

¹⁴ There were 236 results after I deleted results that were punctuation from the total (total of 32). The word *against* immediately followed the lemma of *discriminate* 125 times, making up 53% of the total.

¹⁵ John Rupert Firth, *A Synopsis of Linguistic Theory, 1930-1955*, in *STUDIES IN LINGUISTIC ANALYSIS* 11 (1957).

principle is operationalized by discovering the words that are located near a target word (what linguists call *collocates*, and what we might informally call word-neighbors). For instance, the word *light* is more likely to occur in American English near words like *bright* or *dim* than the word *perfume*. And a look at the more frequent collocates of *discriminate against* reveals that the term is associated with negative treatment directed at members of a discrete group; among the top five collocates are *negro(es)*, *Jews*, *group(s)*, *women*. (*Because* is the other word in the top five.) This offers preliminary evidence of a semantic focus on bias or prejudice against members of a group.

Third, that tight link between uses of *discriminate* and the concept of prejudice is confirmed by looking at relevant *binomials*. A binomial is “a coordinated pair of linguistic units of the same word class which show *some* semantic relation.”¹⁶ In the law we often call these legal doublets: for example, *cease and desist* or *aid and abet*.¹⁷ And as it happens, a look at the time of Title VII’s enactment shows a strong binomial relationship between *prejudice* and *discriminate*. In the 1950s and 60s, the most common form of the binomial *prejudice and* [WORD] was *prejudice and discrimination*, appearing twice as often as any other word following the phrase *prejudice and*.¹⁸ The formation of a binomial connecting *prejudice* and *discrimination* is further evidence of a semantic link between the two.

Aside from corpus linguistics data, dictionaries from the time of Title VII’s enactment also confirm that the phrase *discriminate against* naturally refers to mistreatment based on *prejudice directed at* members of a discrete *group*. For instance, Funk & Wagnalls Standard

¹⁶ Joanna Kopaczyk & Hans Sauer, *Defining and Exploring Binomials*, in *BINOMIALS IN THE HISTORY OF ENGLISH: FIXED AND FLEXIBLE* 1, 3 (Joanna Kopaczyk & Hans Sauer eds., 2017).

¹⁷ See BRYAN A. GARNER: *THE REDBOOK: A MANUAL ON LEGAL STYLE* 224-25 (3d ed. 2013).

¹⁸ For example, a 1956 Time Magazine article referred to “prejudice and *discrimination against* a group”—Chicago’s Puerto Rican population. A 1956 letter in the New York Times referenced “prejudice and *discrimination against* colored people.” Another letter published that same year in the New York Times discussed “racial prejudice and discrimination.” A book published in 1957 observed that “[p]rejudice and discrimination toward the Negro vary between section and between social classes.” That same book also pointed out that “[m]embers of minority groups . . . are confronted with prejudice and discrimination.” Finally, a 1960 Harpers Magazine article discussed “the problems arising from matters involving racial, religious, or ethnic prejudice and discrimination.”

College Dictionary (10th ed. 1963) defines *discriminate* as “[t]o act toward someone or something with partiality or prejudice: to *discriminate against* a minority; to discriminate in favor of one’s friends.” Likewise, Webster’s New World Dictionary (1960), defines the relevant sense of *discriminate* as “to make distinctions in treatment; show partiality (*in favor of*) or *prejudice (against)*.” The idea of prejudice or bias against members of a certain group is also present in dictionary definitions emphasizing that discrimination involves action based on someone’s membership in a group “rather than according to actual merit.”¹⁹

Finally, “prejudice,” as dictionaries of the era (and now) show, is a “[p]reconceived opinion not based on reason or actual experience; bias, partiality; (now) spec. unreasoned dislike, hostility, or antagonism towards, or discrimination against, a race, sex, or other class of people.”²⁰ We might summarize these as *unfair beliefs or attitudes* directed at some or all men in particular, or at some or all women in particular—whether the beliefs be outright misconceptions or just unduly rough or weak generalizations; and whether the attitudes be indifference, discounting of interests, distaste, or outright antipathy.

Putting this all together produces a straightforward textualist analysis:

1. Linguistic usage at the time of Title VII’s enactment shows that the statutory language, “discriminate against” someone “because of [some trait],” formed a linguistic unit—a composite that meant

¹⁹ THE RANDOM HOUSE DICTIONARY 411 (1966-73). *See also* WEBSTER’S THIRD INTERNATIONAL DICTIONARY 648 (1961) (“to make a difference in treatment or favor *on a class or categorical basis in disregard of individual merit* ([discriminate] in favor of your friends) (habitually [*discriminate*] *against* a certain nationality).”) (emphasis added).

²⁰ Oxford English Dictionary Online, *prejudice*. *See also* WEBSTER’S THIRD INTERNATIONAL DICTIONARY 1788 (1961) (“[A]n irrational attitude of hostility directed against an individual, a group, a race, or their supposed characteristics.”); THE RANDOM HOUSE DICTIONARY 1135 (1966-73) (“[A]n unfavorable opinion or feeling formed beforehand without knowledge, thought, or reason. ... [U]nreasonable feelings, opinions, or attitudes, esp. of a hostile nature, directed against a racial, religious, or national group.”); FUNK & WAGNALLS STANDARD COLLEGE DICTIONARY 1063 (10th ed. 1963) (“A judgment or opinion formed beforehand or without thoughtful examination of the pertinent facts, issues, or arguments; especially, an unfavorable, irrational opinion. ... Hatred of or dislike for a particular group, race, religion, etc.”); OXFORD ENGLISH DICTIONARY 1274 (1961) (“Preconceived opinion; bias or leaning favourable or unfavourable.”).

something more specific than one could glean from reading each of the three components in isolation and then simply combining the resulting meanings.

2. Multiple textualist forms of evidence—contemporary collocates of “discriminate against” (drawn from a corpus linguistic databases for the 1950s and 1960s); the solidifying of the binomial *prejudice and discrimination* during that time period; contemporary definitions; and dictionaries’ sample sentences involving “discriminate against” (drawn from dictionaries of the era)—all show that discrimination against someone based on some trait must be motivated by prejudice, or *biased ideas or attitudes (including unduly rough or weak generalizations as well as falsehoods; and indifference, discounting of interests, and distaste as well as hostility) directed at people with that trait in particular.*

Conclusion: As a matter of linguistically sound textual interpretation, sex discrimination under Title VII will always rest on unfair beliefs or attitudes about women in particular, or about men in particular. In a word, on *sexism*.

As it happens, this textualist conclusion fits well with the Court’s precedent. In every case in which the Court has found sex discrimination, the actors in question were making a decision based on some unduly rough (or worse) generalization about, or unfair attitude focused on, men in particular, or women in particular—as the Court itself repeatedly emphasized.²¹

²¹ See *Craig v. Borden*, 429 U.S. 190, 201-202 (1976) (law that used “maleness” as “a proxy for drinking and driving” was based on “archaic and overbroad generalizations”); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (law based on the idea that men are the breadwinners); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (same); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (employment action based on the expectation that women should be meek). Even *City of Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702 (1978), comes under this textualist understanding of Title VII. There an employer required women to make larger contributions to a company’s pension plan because women statistically lived longer than men. And the Court struck down the company’s requirement as violating Title VII. One could try to argue that the company’s policy had nothing to do with prejudice against women—just cold, hard statistics. But it *did* involve what the Court regarded as an *unduly (unfairly) rough and ready generalization* about women as a class. See *id.* at 708 (“Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply . .

One legal scholar who not only arrived at the same conclusion but also applied it to these cases is Princeton’s McCormick Professor of Jurisprudence, Robert P. George. In his textualist analysis of the pending Title VII cases, he wrote that the statute requires courts to attend to “the employer’s reasons for action, or motivation”—here, to the presence or absence of *sexist prejudice or bias*.²² He continued:

[M]otivations are decisive because the text of Title VII plainly picks out certain employers by their practical reasoning (those who “discriminate against” people “because of” a trait). Thus, race-based discrimination under the law will reflect *reasoning or motivations involving some generalization or other belief or attitude about people of a particular race*. Even supposedly “race-neutral” anti-miscegenation policies were motivated by certain beliefs — reprehensible beliefs — about African Americans’ “proper place” in society.

Likewise, *the reasoning or motivations of someone discriminating by sex will include some generalization or other belief or attitude specifically about women, or (less often) men*. That explains why the Title VII plaintiffs, in their briefs and oral arguments, ultimately had to fall back on a major non-textual (and manifestly implausible) premise: that opposition to homosexual conduct is necessarily patriarchal or misogynistic. The truth, of course, is that no sexism need figure in the reasoning or motivations of an employer opposed to, say, hiring those engaging in same-sex sexual relations (as confirmed by myriad intellectual traditions, historically and today, that oppose homosexual conduct for everyone, on moral grounds that give no special exceptions or advantages to men). And so the American public has not, after all, been missing the plain import of Title VII for over half a century.²³

. because there is no assurance that any individual woman . . . will actually fit the generalization.”).

²² <https://www.nationalreview.com/2019/11/counterfeit-textualism/>.

²³ *Id.*

George is correct. For again, the plaintiffs' argument requires a literalistic "dissection" reading of the text, flouting the well-established linguistic principle of compositionality.