

Problem #3: Statutory Interpretation

1. In general, there are two approaches to statutory interpretation: purposivism and textualism. What is the difference?

2. *Holy Trinity*
 - a. What were the facts in the case?
 - b. The relevant statute provides as follows: “[I]t shall be unlawful . . . in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States . . . under contract . . . , made previous to the importation or migration of such alien or aliens, foreigner or foreigners, to perform labor or service of any kind in the United States.” What was the legal issue? What phrase within the statute did the Court have to interpret?
 - c. In the Court’s view, if they based their decision by the text alone—without considering the statute’s purpose—what would be the result in the case?
 - d. The most famous language in the case says the following: “It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.” What does this mean?
 - e. What theory of statutory interpretation does the Court use in *Holy Trinity*?
 - f. What is the Court’s holding? Would you have come out the same way? Or do you disagree?
 - g. The Court offers two reasons why the statute doesn’t apply. The first has to do with the problem the legislature meant to address. According to the Court, what was that problem? What evidence does the Court offer to support its view?
 - h. What is legislative history? Should judges use it to determine the meaning of a statute?
 - i. In making this argument, do you think the Court is biased? The Court says it is interpreting the will of Congress, but is Justice Brewer signaling his own views as well (perhaps unintentionally)?
 - j. What argument does the Court make based on the title of the statute? Do you find it persuasive?
 - k. Let’s turn to the second reason offered by the Court. What does he say about the United States? What value does he say is a defining

characteristic of the country? In the Court's view, how is this relevant to the decision?

- l. Do you think every U.S. citizen would agree with Justice Brewer that "this is a Christian nation"?
- m. In offering this second argument, do you think the Court is biased?
- n. The U.S. Constitution is structured so that there is a "separation of powers" in the federal government. The president, congress, and the courts all have different roles. What is the role of the courts? How does it differ from the role of Congress?
- o. After observing that sometimes judges should look to the purpose of the statute, instead of the text, Justice Brewer says that "this is not the substitution of the will of the judge for that of the legislator." Do you agree? Or do you think the judge is acting like a legislator?

3. *Yates*

- a. What were the facts in the case?
- b. The relevant statute provides as follows: "Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States . . . or in relation to or contemplation of any such matter . . . , shall be fined under this title, imprisoned not more than 20 years, or both." What was the legal issue here? What phrase within this statute did the Court have to interpret?
- c. How did the Court come out? Did they think Mr. Yates violated the statute?
- d. In the beginning of the plurality opinion, Justice Ruth Bader Ginsburg ("RBG") says: "A fish is no doubt an object that is tangible; fish can be seen, caught, and handled, and a catch, as this case illustrates, is vulnerable to destruction." What concession is she making?
- e. RBG writes the following: "Whether a statutory term is unambiguous, however, does not turn solely on dictionary definitions of its component words. Rather, "[t]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole." What does this mean?
- f. Is RBG offering a purposivist or a textualist analysis?

- g. Does textualism rely only on dictionaries? Is the gist of this methodology that a judge should figure out the dictionary definition of each individual word in the relevant text?
- h. What argument does RBG make based on the title of the statute?
- i. RBG observes that Congress included two provisions in the same statute—this provision (Section 1519) and Section 1512. What does RBG say about these two provisions? Why does she believe this strengthens her argument?
- j. When interpreting statutes, judges use what are called “interpretive canons,” which essentially are rules of interpretation. What is the surplusage canon? How does RBG use it?
- k. RBG is also influenced by “The words immediately surrounding “tangible object” in [§1519](#),” which are “falsifies, or makes a false entry in any record [or] document.” What conclusion does she draw from these terms?
- l. RBG also uses another canon of construction, which is known as Noscitur a Sociis or “a word is known by the company it keeps.” She makes the following point: “Tangible object” is the last in a list of terms that begins “any record [or] document.” What point is she making?
- m. What is the rule of lenity? Why does RBG invoke it here?
- n. Justice Kagan dissents from the Court’s opinion. What is a dissent?
- o. Is Justice Kagan’s analysis purposivist or textualist?
- p. In Justice Kagan’s view, is this a hard or an easy case? Why?
- q. Who is Dr. Seuss and why does Justice Kagan cite his book, “One Fish, Two Fish, Red Fish, Blue Fish?”
- r. Does Justice Kagan think it makes sense to rely on the title of a statute as a guide to its meaning?
- s. Does Justice Kagan agree that good textualist interpretations consider the context of the relevant language?
- t. Justice Kagan says the phrase “tangible object” is used in a number of other statutes as well. What point is she making in observing this?
- u. Justice Kagan says what she thinks is really motivating the majority. What is her theory about this?
- v. Justice Kagan concludes with a point about separation of powers. What point does she make? Does she think RBG agrees or disagrees with her?
- w. Who do you think has the better of the argument? If you were voting in this case, which side would you be on?

4. *Bostock* Majority Opinion

- a. In this case, three plaintiffs sued their employers, saying they were dismissed improperly. Is there any dispute about why they were dismissed?
- b. The relevant statute, Title VII of the Civil Rights Act of 1964, makes it “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 origin.” What is the issue in the case? What language is the court interpreting?
- c. Justice Gorsuch wrote for the majority. How did they decide the issue?
- d. Justice Gorsuch begins by saying the following: “Sometimes small gestures can have unexpected consequences. Major initiatives practically guarantee them.” What does he mean?
- e. Does Justice Gorsuch think that a legislature can pass a statute that provides for a result they didn’t intend or expect?
- f. Does the statute specifically say that it applies to discrimination “because of sexual orientation”?
- g. True or false: Justice Gorsuch says that discrimination because of sexual orientation inherently involves discrimination because of sex.
- h. Is Justice Gorsuch saying that “sex” and “sexual orientation” have the same meaning?
- i. How is Justice Gorsuch interpreting the term “because of”? Does he think this phrase means “the only cause” of the relevant outcome? Or “the main cause”? Or “one of many causes”?
- j. Assume that Ed and Ellen are both employees. Ed is a gay man and Ellen is a heterosexual woman. Assume that the company fires Ed because he is gay. Justice Gorsuch argues that this dismissal is “because of sex.” Why? (Hint: Justice Gorsuch notes that Ed and Ellen are both attracted to men.)
- k. About the situation in “j,” Justice Gorsuch writes: “The employer intentionally singles out an employee to fire based in part on the employee’s sex, and the affected employee’s sex is a but-for cause of his discharge.” What does he mean?
- l. Do you think Justice Gorsuch’s interpretation of “because of sex” is an obvious reading of the phrase? Or do you think it’s a strained reading?
- m. Is Justice Gorsuch offering a purposivist or textualist interpretation?

5. *Bostock* Dissents

- a. Does Justice Alito think Justice Gorsuch is applying a textualist interpretation? What metaphor does he use to describe the majority's approach? (Hint: it's a type of ship.)
- b. Justice Alito argues that an employer could discriminate based on sexual orientation without even knowing a potential employee's sex. What point is he trying to make in saying this? Do you find this argument persuasive?
- c. Justice Kavanaugh offers his own dissent. Like Alito, Kavanaugh rejects the idea that discrimination based on sexual orientation inherently involves discrimination based on sex. Like Alito, he makes the point by offering an example in which an employer has four employees: a straight man, a straight woman, a gay man, and a lesbian.
 - i. According to Kavanaugh, if the employer is biased against women, which employees would he fire?
 - ii. What if instead the employer is biased against gay and lesbian employees? Would the employer fire the same people?
 - iii. How effective do you think this argument is as a critique of the majority's reasoning?
- d. Kavanaugh mentions that a number of federal and state statutes include both sex and sexual orientation in listing impermissible discrimination. Why is this relevant? (Hint: what is the canon on surplusage, which we discussed above in *Yates*?)
- e. Alito and Kavanaugh both mention that Congress has periodically considered amending Title VII to cover sexual orientation, but these amendments have not passed. Why do they think this is relevant?
- f. Kavanaugh distinguishes between "literal" meaning and "ordinary" meaning. What is the difference? (Hint: He illustrates the difference with an example involving vehicles in the park.)
- g. When someone uses the phrase, "American flag," are they referring to any flag made in the United States? Or to the flag of the United States of America, which is red, white, and blue and has 50 stars and 13 stripes? Which is the literal meaning? Which is the ordinary meaning?
- h. In explaining why courts should look to ordinary—not literal—meaning, Kavanaugh writes: "A literalist approach to interpreting phrases disrespects ordinary meaning and deprives the citizenry of fair notice of what the law is. It destabilizes the rule of law and thwarts democratic accountability." There are two different reasons here. What are they? Do you agree?
- i. True or false: Gorsuch, Alito, and Kavanaugh all agree that Congress did not intend for Title VII to reach discrimination based on sexual orientation.

- j. True or false: Kavanaugh and Alito are offering a purposivist interpretation, arguing that the Court should focus on what Congress *intended*, not what Congress *actually said*.
- k. Kavanaugh says that “the majority opinion makes a fundamental mistake by confusing ordinary meaning with subjective intentions.” What does he mean?
- l. True or false: Gorsuch, on one hand, and Alito and Kavanaugh, on the other, using different approaches to textualism.
- m. According to Alito and Kavanaugh, which part of the federal government is supposed to decide whether Title VII should cover sexual orientation? Why?
- n. Is the argument in “m” about Federalism? Or Separation of Powers?
- o. If you were on the Court, how would you vote in this case? To be clear, I am not asking about the policy issue of whether discrimination based on sexual orientation should be illegal. Rather, the question is one of statutory interpretation. In arguing what the statute *does say*—not what you think it *should say*—which side makes the stronger argument?