DISENTANGLING TEXTUALISM AND ORIGINALISM

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Textualism and originalism are not the same interpretive theory.[1] Textualism commands adherence to the text.[2] Originalism, in contrast, commands adherence to history.[3] It should be self-evident that these are not—put simply—the same thing. While textualism and originalism may in some circumstances be harnessed to work in tandem—or may in some circumstances lead to the same result—they are different inquiries, and command fidelity to different ultimate guiding principles. In situations of conflict, a textualist is ultimately faithful to the text—while an originalist is ultimately faithful to history.[4]

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[*] Professor of Law, Rutgers Law School. This Essay focuses on one aspect of a larger work-in-progress which calls for renewed theorizing to revitalize textualism, *Textualism Revisited*. *See* Katie Eyer, *Textualism Revisited* (work in progress). Note that as a part of that broader project, I also take up the question of whether it is appropriate to treat constitutional and statutory interpretive methodologies as interchangeable, something that, for the purpose of simplicity, I assume here. A video of the Constitution Day lecture that was given sketching the contours of the wider project is available here at The Center for Constitutional Law at Akron. Many thanks to Jessica Clarke, Earl Maltz, Stephen Sachs, Sandra Sperino, and Deborah Widiss for helpful feedback on this project. I am particularly grateful to Larry Solum for his generous feedback and suggestions.

1. It is of course possible to find many works that suggest to the contrary—that suggest that originalism, textualism or both, are necessarily tethered to the "original public meaning of text." My point here is that this represents sloppy and potentially dangerous conceptual reasoning—even if one thinks the *best* version of textualism is one linked to original meaning, or that the *best* version of originalism is one linked to text, each methodology begins with a distinctive guiding star (text for textualism and history for originalism), and conceptual precision is needed to ensure that we honor either of those commitments. *Cf.* Stephen E. Sachs, *Originalism Without Text*, 127 YALE L.J. 156, 157-62 (2017) (making a similar point from the perspective of originalism's primary commitments).

2. *See, e.g.,* ANTONIN SCALIA, A MATTER OF INTERPRETATION 23 (1997).

3. *See, e.g.,* Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1756 (2015).

4. As set out in Part I, *infra*, I do think it is possible for an individual to be both a faithful textualist *and* a faithful originalist, as many scholars and judges identify themselves. However, as set out in this Essay, I think that for these individuals it is *especially* critical to be aware that textualism and originalism are not the same interpretive theory and that even originalist theories that are commonly thought of as being textualist in nature—such as original public meaning—can easily slide into contra-textualist analysis, if an adjudicator is not careful to prioritize their textualist interpretive commitments.

Why should this common-sense observation warrant academic commentary? Because both textualists and originalists—and even those who eschew such methodologies—are surprisingly inclined to conflate the two.[5] This tendency toward conflation has existed since the early days of modern textualism and originalism. But with the rise of the "original public meaning" paradigm, it has become even more common for textualists/originalists[6] to conflate the two.[7] Indeed, it is common (though not universal) today for textualists/originalists to treat textualism and originalism as a single inseparable package (adjudicated under the moniker of "original public meaning"), and to decline to rigorously delineate them in both theorizing and analysis.[8]

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5. This is true in both the statutory interpretation and the constitutional law literature, though it is more common to hear people describe the conflated theory as "textualism" in the statutory interpretation context (while assuming that textualism also entails fidelity to originalist principles), and "originalism" in the constitutional law context (while assuming that originalism also entails fidelity to textualist principles). *See, e.g.,* Lawrence B. Solum, *Disaggregating* Chevron, 82 OHIO ST. L. J. 249, 265 (2021) (describing statutory textualism as definitionally including resort to "the content conveyed by the text to the intended readers . . . *at the time the statute was enacted*"); Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NORTHWESTERN L. REV. 1243, 1245 (2019) (tying originalism in the constitutional law context to "the family of constitutional theories that affirm . . . the meaning of the constitutional text is fixed at the time each provision is drafted.") Note that for the purposes of this short Essay, I do not take up the issue of whether it is appropriate to adopt differing interpretive methodologies for different types of legal texts (constitutional law, statutory law, regulatory law).

6. As described herein, I do not think it is appropriate to conflate textualism and originalism, since they are different—and not always consistent—legal interpretive approaches. Nevertheless, since others do, I think it is useful to have a term to describe the common phenomenon of conflation of the two. Thus, when I use the term "textualism/originalism" or "textualist/originalist," I mean to signify someone who at least some of the time conflates these two interpretive approaches. In contrast, when I use the term "textualism" or "textualist," I mean to describe the interpretive theory in which an adjudicator's ultimate fidelity is to text. And when I use the term "originalism" or "originalist," I mean to describe the interpretive theory in which an adjudicator's ultimate fidelity is to history.

7. *See* sources cited *infra* note 8.

8. *See*, *e.g.*, NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 106 (2019) (stating that textualism and originalism may be "little more than different ways to say the same thing"); *see also, e.g.,* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS xxvii (2012) (characterizing textualists as those who "look for meaning in the governing text [and] ascribe to that text the meaning that it has borne from its inception."); James A. Macleod, *Finding Original Public Meaning*, 56 GEORGIA L. REV. 1, 1 (2021) (stating as an obvious and uncontested proposition that "[t]extualists seek to interpret statutes consistent with their 'original public meaning'"); Ilan Wurman, *What is Originalism? Debunking the Myths*, The Conversation, https://theconversation.com/what-is-originalism-debunking-the-myths-148488 (posing the question "[w]hat's the difference between originalism and textualism?" and answering "[d]espite popular belief, there is no difference between the two"); Brett Kavanaugh Confirmation Hearings, Day 2, Part 2, 1:56, CSPAN, https://www.c-span.org/video/?c4747420/user-clip-kavanaugh-originalism ("Originalism, as I see it, means, in essence constitutional textualism, meaning the original public meaning of the constitutional text.").

Surprisingly, this tendency towards the conflation of textualism and originalism is also common even among those who might seem most inclined to point out this logical fallacy—textualism/originalism's critics.[9] Nor is the conflation of textualism and originalism specific to conservative adherents of textualism/originalism, but rather has seeped into even progressive commentators' understanding of the textualist/originalist project.[10] Thus today, it is rare to see judges or commentators—on either the right or left, inside or outside of the community of committed textualists/originalists—insist on the importance of disaggregating textualism and originalism as interpretive methods.

In this Essay—a part of a longer project on the need for independent theorizing on textualism's future—I argue that disentangling textualism and originalism is critical to both the future vibrancy and the legitimacy of textualism as an interpretive methodology. When conflated with originalism, textualism holds almost endless opportunities for partisan manipulation of precisely the kind that textualism's critics have decried. Moreover, and most troublingly, many types of originalist inquiry can lead judges to results inconsistent with text—and thus textualism. In short, in order for an adjudicator to have genuine fidelity to *any* interpretive theory, it is critical for the adjudicator to know to which theory, in cases of conflict, the adjudicator ultimately subscribes.

The remainder of this Essay proceeds as follows. Part I describes the ways that textualism and originalism can functionally interact: as almost entirely distinctive theories ("acquaintances"), working in tandem ("allies"), or as conflicting methodological approaches ("antagonists"). Part II provides a brief history of the evolution of mainstream originalism from an approach ("original intent") that clearly conflicted with textualism in many instances, to one that on its face need not ("original public meaning"), but that in practice has often been applied in conflict with textualist principles. Part III concludes with a call for those who identify themselves as textualist/originalists to clarify their principle methodological commitments—and for those who have eschewed both to reconsider the potential of a disaggregated textualism.

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9. *See, e.g.,* Cary Franklin, *Living Textualism*, 2020 SUP. CT. REV. 119, 120-21 (2021).

10. *See, e.g.,* James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523, 1526-27 (2011). Jack Balkin's work generally does a good job of disentangling the textualist and originalist aspects of his interpretive methodology, but perhaps because it has been framed as an "originalist" project first, has not necessarily spurred the type of careful disaggregation of textualism and originalism that I argue here is required for true fidelity to text. *See, e.g.,* JACK BALKIN, LIVING ORIGINALISM 39-45 (2011).

I. TEXTUALISM AND ORIGINALISM AS ACQUAINTANCES, ANTAGONISTS, OR ALLIES

As described above, textualism and originalism are not the same interpretive theory. Textualism holds as its central commitment fidelity to legal text.[11] In contrast, originalism holds as its foundational commitment fidelity to history.[12] This Part takes up the question of how these two distinctive interpretive theories can functionally interact: as almost entirely distinctive methodological approaches ("acquaintances"), as conflicting methodological approaches ("antagonists"), or as complementary approaches to interpretation ("allies"). It suggests that in order for an adjudicator to adhere to *any* of these perspectives on the proper relationship of textualism to originalism faithfully, it will be important for that adjudicator to identify their ultimate interpretive commitment, so that they will be able to identify and appropriately address how to proceed in situations of apparent conflict.

It is useful to begin by exploring what textualism would look like entirely decoupled from originalism (the "acquaintances" approach). Although textualism and originalism are commonly conflated, it is of course possible to have a textualist methodology that is entirely decoupled from originalist commitments. Thus, an interpreter could hold the view that it is important to adhere to textual meaning—whether of a statute, the constitution, or a regulation—but not that it is important to look to history or historical context in so doing. Such an interpretive approach might be deemed a "living" or "dynamic" textualism, i.e., the idea that the content or meaning of the words of a legal text can evolve over time.[13]

Few scholars or adjudicators ascribe to the most radical version of this theory, for good reason. Where the meaning of a law's word or phrase has dramatically changed over time to an entirely new meaning, few would contend that the modern meaning should control. Thus, for example, it would seem absurd to most people to argue that the Constitution's guaranty of protection to the states against "domestic violence" (intended to protect against home-grown uprisings) should be taken today to refer to intimate partner violence, even though "domestic

11. *See supra* note 2.

12. *See supra* note 3.

13. Note that although I borrow his reference to "dynamic" statutory interpretation here, Bill Eskridge's theory of dynamic statutory interpretation is not centered on this type of "dynamic textualism." *See generally* WILLIAM ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994) (developing a broader and distinctive theory of dynamic statutory interpretation).

violence" is today overwhelmingly used in this way.[14] When semantic drift has led to radically different modern meanings of a term used in a legal text, most adjudicators and theorists of all kinds would agree that the historical, not the modern, understanding should be used.

Far more likely to be debated is the question of whether a term which has not radically changed its meaning—but may have changed in some of its more nuanced connotations—ought to be viewed in terms of history, or in terms of what we know now. The word "sex" in anti-discrimination law is an often-debated example of this. Do we care in construing the word "sex" about modern understandings of the term, or how it may have evolved since the time of enactment?[15] Or do we try to restrict ourselves only to those understandings of sex that were extant at the time?[16] While as the *Bostock v. Clayton County* opinion illustrated, the outcome of this debate may not matter for some applications of anti-discrimination law, in other contexts we must ask ourselves whether a "dynamic" or an "original" understanding of the words of a law should be applied.[17]

Either of these alternatives—a "dynamic" or an "original" understanding of sex—are consistent with textualism, though only the latter is consistent with originalism. Thus, it is entirely possible for an adjudicator to have a fidelity to text, but not to any strong version of history or original meaning. Such an adjudicator might believe it is appropriate for the content of complicated words to evolve over time as our understanding does—even if a radically different meaning from a new context (i.e., the "domestic violence" problem) should be rejected. This might be termed the "acquaintances" view of how textualism and originalism ought to interact—as generally distinctive theories and methodological commitments, which need not necessarily run together.

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14. U.S. CONST. art. IV, § 4; *see also* BALKIN, *supra* note 10, at 37 (providing this as an example of why it is important to follow original semantic meaning).

15. *See, e.g.,* Schroer v. Billington, 577 F.Supp.2d 293, 306 (D.D.C. 2008) (describing argument of the plaintiff relying on modern medical understandings of the term "sex" to argue for protection of transgender worker under Title VII, but ultimately ruling for the plaintiff on other grounds).

16. Note that there are, of course, dramatically competing accounts of what "sex" meant, even in 1964—as well as what it means today, and that more may turn on the outcome of those debates than on the historical evolution aspect of this question. *Compare, e.g.,* William Eskridge, Jr., Brian G. Slocum & Stefan Th. Greis, *The Meaning of Sex: Dynamic Words, Novel Applications, and Original Public Meaning*, 119 MICH. L. REV. 1503, 1554-58 (2021); *with* Brief for Petitioners Altitude Express & Ray Maynard at 13, Bostock v. Clayton County, 140 S.Ct. 1731 (2020).

17. *See* Bostock v. Clayton County, 590 U.S. ___, 140 S.Ct. 1731, 1739 (2020) (accepting for the sake of argument the assumption that sex in Title VII should be given its narrowest historical understanding, but concluding that anti-LGBT discrimination was nevertheless "because of . . . sex").

At the other end of the spectrum are those who argue that textualism and originalism should, or necessarily do, work together. This is the dominant view of most textualist/originalists, and likely the reason why it is so common for theorists to decline to disaggregate the two.[18] But this Part will suggest that there are in practice two diametrically different ways that textualism and originalism can functionally interact where they are purported to be working together.[19] First, originalism and textualism can work together as "allies"—used to understand the meaning of a legal text in light of the meaning of the words at the time of enactment. But they can also function as "antagonists," in which "original meaning" methodologies are used to supersede text. Importantly, only the former is consistent with fidelity to text and to textualism.

A few examples may help to illustrate the distinction. One of the most non-controversial examples of textualism and originalism working as "allies"—in tandem not in conflict—is the above example of the Constitution's reference to "domestic violence."[20] Historical context and meaning easily tell us that the when the Founders used this term, they were not referring to intimate partner violence, but instead home-grown American violence.[21] Armed with this historical knowledge, it is then possible to construct a straightforward textual understanding of Article IV, Section 4 as a guaranty by the federal government to come to the aid of the states in case of home-grown violence or insurrection. In this context, history works in tandem with text (as "allies"), rather than conflicting with it.

Another, more nuanced example of textualism and originalism acting as "allies" can be seen in the context of *New Prime Inc. v. Oliveira.*[22] In that case, the question was whether an exemption from the Federal Arbitration Act (FAA) for "contracts of employment" of certain transportation workers should be understood to be limited to contracts between employers and employees—or should also be understood to extend to contracts of independent contractors.[23] While the Court

18. *See* sources cited *supra* note 8.

19. It is important to note that this is not a new observation. Indeed, Ronald Dworkin made a very similar observation in his famous dialogue with Justice Scalia when he observed that Justice Scalia was an inconsistent textualist insofar as he often in practice embraced "expectation-originalism" instead of "semantic-originalism"—and that only the latter was consistent with textualism. *See* Ronald Dworkin, Comment, *in* ANTONIN SCALIA, A MATTER OF INTERPRETATION 119-21 (1997).

20. *See* sources cited *supra* note 14.

21. *Id.*

22. 139 S.Ct. 532 (2019).

23. *Id.* at 536.

observed that "[t]o many lawyerly ears today, the term 'contracts of employment' might call to mind only agreements between employers and employees," it found that at the time of the FAA's enactment, "contracts of employment" was understood differently. Rather, "employment" was generally used as a synonym for "work" and "contracts of employment" was often used to extend to independent contractors.[24] Thus, originalism in *New Prime* suggested a different understanding of the meaning of the term "contracts of employment" than an avowedly non-originalist methodological approach might—but via an approach in which originalism helped to understand text, rather than to undermine it.

In contrast, textualism and originalism can, just as often, act as "antagonists." In such contexts following originalism—or at least certain versions of it—will necessarily entail departures from adherence to text. For example, no one contends that the Eleventh Amendment's text alone can be understood to compel the very broad principles of state sovereign immunity that the modern Supreme Court has adopted.[25] And yet many textualist/originalist judges have nevertheless defended those principles, based on an historical understanding of state sovereign immunity at the time of the founding and the Eleventh Amendment's ratification.[26] While this may be consistent with originalism (although this history too has been extensively debated), it is not consistent with a textualist reading of the Eleventh Amendment.[27] In contexts such as these (where text and history

24. *Id.* at 539-40.

25. Indeed, such an assertion would be laughable, given that the Supreme Court has applied the Eleventh Amendment to many contexts to which it clearly does not apply. *See, e.g.,* sources cited *infra* note 26.

26. *Cf.* U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."); *with* Alden v. Maine, 527 U.S. 706 (1999) (holding that states were immune from suit under the Eleventh Amendment where such suits were brought by citizens of their own states, in state court); Univ. of Alabama v. Garrett, 531 U.S. 356 (2001) (holding that the Eleventh Amendment barred suits against a state by citizens of its own state); Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985) (same).

27. Prominent originalists Will Baude and Stephen Sachs have articulated the view that we ought to disaggregate the textualist components of the Eleventh Amendment and the separate common-law immunity which states possessed at the time of the founding, and argue that in so doing, much (but not all) of modern sovereign immunity can be justified on one or the other grounds, at least when coupled with a narrow reading of Congress's authority to abrogate common-law immunity. *See* William Baude & Stephen E. Sachs, *The Misunderstood Eleventh Amendment*, 169 U. PA. L. REV. 609, 613 (2021). Importantly, however, even Baude and Sachs do not contend that the Supreme Court's interpretive approach is consistent with textualism. *See, e.g., id.* at 611 (noting that the Eleventh Amendment's supporters, including those on the Court have "[read] the Amendment for more than it's worth.") Without offering a view here on the Baude/Sachs theory, I will simply note that it is not the theory on which the Supreme Court itself has justified its modern sovereign immunity

are simply inconsistent), originalism and textualism act as "antagonists" in the sense that one cannot comply with both.

A more subtle, but even more common example of this type of "antagonistic" relationship between textualism and originalism comes from the long tail of "original expected applications" methodologies, even at a time when such methodologies have nominally been mostly discredited. In the following Part, I take up defending the claim that many modern originalist arguments continue to devolve into "original expected applications" approaches, even where framed within the new originalist construct of "original public meaning."[28] In this Part, I will simply observe that such "original expected applications" methodologies—whether framed as "original intent," or as they more commonly are today as "original public meaning"—are almost always inconsistent with a textualist approach.

Why is this? Many of our statutory and constitutional provisions—including many of our most important guarantees of rights—are framed in textually broad terms, at the level of principles[29] not application.[30] A textualist approach to such a provision will ask what the words mean at the level at which they are pitched—that is, as a principle, not an as-applied prescription.[31] Armed with an understanding of this broad-brush

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cases, and that the Court's own reasoning purports to be grounded on history, while clearly being plainly contra-textual.

28. *See infra* Part II.

29. Here, and throughout, I use "principles" in the colloquial sense, and not as a term of art (i.e., not as it is used in the rules/standards/principles literature). Thus, my use of "principles" is intended to connote the legal constraints that text provides, regardless of whether those constraints would be characterized as a principle, rule, or standard in the principles/rules/standard literature. *Cf.* Lawrence B. Solum, *Legal Theory Lexicon: Rules, Standards, and Principles*, LEGAL THEORY BLOG, (Sept. 6, 2009), https://lsolum.typepad.com/legaltheory/2009/09/legal-theory-lexicon-rules-standards-and-principles.html#:~:text=Principles%20provide%20mandatory%20considerations%20for,be%20relevant%20to%20the%20decision (describing the rules/standards/principles literature, and the way in which rules, standards, and principles are used in that literature as terms of art to connote differing levels of precision in the law).

30. *See, e.g.,* U.S. CONST., amend. 14, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"); 42 U.S.C. § 2000e-2(a) ("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; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.")

31. *See, e.g.,* Dworkin, *supra* note 19, at 119 (making this observation); BALKIN, *supra* note 10, at 45-46 (same).

principle, an interpreter following a textualist approach would then be compelled to apply this *principle*—derived from the text—to consider if it included the application at hand.[32] The more broadly worded the provision is, the broader the textual principle that it likely creates, and the more likely it is that it will afford rights to a variety of groups, in a variety of contexts—or in the case of criminal or regulatory law, that it will constrain across a variety of groups or contexts.

But an "original expected applications" approach instead invites us to gerrymander broad text to only extend to those contexts where the adjudicator believes the enactor, or the public, would have expected or intended them.[33] Thus, instead of asking for example what it means at a level of principle to "deny . . . equal protection of the laws"[34] or to take an adverse employment action "because of . . . sex,"[35] an original expected applications approach asks whether a particular application of a rights principle (often one that is maligned or politically unpopular) would have been "expected" at the time.[36]

Similarly, an original expected applications approach can exempt groups and applications from the operation of criminal or regulatory law that are unexpected because they are comparatively favored. Consider, for example, the holding of the Supreme Court in *Church of the Holy Trinity v. United States* that a white rector and pastor from England should be excluded from a criminal law proscription on the importation of aliens because the law was, despite its broad text, intended only to apply to the work of the "manual laborer, as distinguished from that of the professional man."[37] In these contexts, history is not used in service of understanding the meaning of broad textual mandates, but instead as a way of confining them to only preferred applications.[38]

There thus are two very different ways in which textualism and originalism can work together—as "allies," in service of a historically-informed understanding of a statute or constitutional provision's words and terms of art—or as "antagonists" wherein originalism is taken as a

32. *See* sources cited *supra* note 31.

33. As set out in the following Part II, although the preferred originalist terminology has evolved here (from "original intent" to "original public meaning") the threat of deviations from text remains the same.

34. U.S. CONST. amend. 14, § 1.

35. 42 U.S.C. § 2000e-2(a)(1).

36. For an example, see the "original expected applications" arguments made in response to attempts to apply Title VII at the level of textualist principle to the context of anti-LGBT discrimination. *See infra* Part II.

37. Church of the Holy Trinity v. United States, 143 U.S. 457, 463 (1892).

38. *Id.*

justification for overriding text or limiting broad textual principles. Most modern textualist/originalists would likely claim that they follow the former "allied" approach. So why does it remain important to disentangle textualism from originalism?

As set out in Part II, despite protestations to the contrary, examples of the "antagonistic" application of textualism and originalism by textualist/originalists remain common, especially in the real world of originalism in the courts. In particular, it is common for "original public meaning"—which was supposed to supplant discredited "original intent" or "original expected application" approaches—to slide in practice back into functionally indistinguishable approaches (approaches which are, as set out above, methodologically inconsistent with textualism). Crediting the good faith of textualists/originalists (as I largely do), this problem seems to derive precisely from the fuzziness generated by the longstanding conflation of textualism and originalism. It is only with clarity of interpretive commitments—to text above history when they conflict—that it becomes comparatively easier to identify where the line lies between useful historical context and prohibited historical gerrymandering.

The following Part takes up the arc of originalist theorizing with respect to "original expected applications," and argues that although such arguments have lost credence among many mainstream originalist theorists, it is common for originalist analysis to in practice devolve into such approaches, especially where there is an outcome that is surprising or ideologically divergent from the judge's or theorist's own views at stake. Relying on the example of *Bostock v. Clayton County*, it takes up the issue of how "original expected applications" or even "original intent" can be framed as "original public meaning" arguments that are virtually indistinguishable from their discredited predecessors.

II. THE PERSISTENCE OF "ORIGINAL EXPECTED APPLICATIONS" APPROACHES TO ORIGINALISM

The story of the evolution of originalism as an interpretive theory is a complex one, but for the purposes of this Essay can be told briefly. The earliest versions of modern originalism, articulated by Judge Bork, Chief Justice Rehnquist, Edwin Meese, and others in the 1970s and 1980s, explicitly hewed to an "original intent" approach.[39] Focused on the

39. *See, e.g.,* Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory*, *in* THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL

"original intent" of the framers, this initial version of originalism was predictably "antagonistic" to textualism in many instances, since it called for the primacy of historically-derived intent or expectations about the application of the law, not the meaning of broad textual principles.[40]

But faced with a variety of trenchant critiques, this initial version of originalism as an interpretive methodology evolved.[41] Today, although there remain a diversity of strands of originalist theory, the dominant strain endorses a search for "original public meaning" as the metric of originalism.[42] Moreover, most mainstream versions of "original public meaning" in legal academia explicitly eschew "original expected applications" approaches.[43] Indeed, many academic scholars of original public meaning explicitly stress the importance of text as critical, indeed, central to the originalist enterprise.[44]

Ironically, it may be precisely this academic turn to text in the context of "original public meaning"—and the related repudiation of expected applications—that has solidified the perception that textualism and originalism are interchangeable theories—and thus enhanced the likelihood of uncritical slide in practice from one to the other. Scholars of original public meaning generally conceptualize "original public meaning" as being *inherently* a textualist theory of interpretation.[45] This has led to the wide perception that "original public meaning" is inherently

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INTERPRETATION 6-10 (2011); Keith Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 379-86 (2013).

40. *See* sources cited *supra* note 39.

41. *See, e.g.,* Solum, *supra* note 39, at 6-15 (offering an account of the critiques that spurred an evolution in originalist theorizing, and how such theorizing evolved).

42. *Id.* at 15-16; Whittington, *supra* note 39, at 380.

43. *See, e.g.,* Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 252–54, 254 n.64, 295–97 (2009); Richard H. Fallon, *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1291 (2015); Stephen G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 NORTHWESTERN U. L. REV. 663, 668-671 (2009); Solum, *supra* note 39, at 18–19; Whittington, *supra* note 39, at 382–86. *But see* Jamal Greene, *The Age of Scalia*, 130 HARV. L. REV. 144, 155–56 (2016) (noting that Justice Scalia was inconsistent in his approach and sometimes relied on original expected applications); John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 378–79 (2007) (arguing for a substantial role for original expected applications in originalist interpretation).

44. *See, e.g.,* Randy E. Barnett & Evan Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 25 (2018); Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 4 (2011); Solum, *Originalism Versus Living Constitutionalism*, *supra* note 5, at 1249.

45. *See, e.g.,* Lawrence Solum, *Eyer on the Relationship of Textualism and Originalism*, LEGAL THEORY BLOG, (Apr. 29, 2022), https://lsolum.typepad.com/legaltheory/2022/04/eyer-on-the-relationship-of-textualism-and-originalism.html ("Public Meaning Originalism is a form of textualism.")

textualist in nature, i.e., that it is incapable of being applied in ways that are contrary to text and to textualism.[46]

But this perception—while common—is false. As set out below, "original public meaning" is in practice entirely capable of being applied in ways that are contra-textualist in nature, just like its original intent predecessors. Indeed, "original public meaning" can, in practice, lead to results that are virtually indistinguishable from now discredited (and contra-textualist) theories of original intent. Below, I begin by asking the question of whether "original public meaning," as a concept, is inherently incapable of being applied in ways that are contra-textualist in nature, and demonstrate that it is not. I then turn to a recent example of "original public meaning" being applied in practice in ways that are inconsistent with fidelity to text.

As a concept, the shift from original intent to original public meaning involved two key moves[47]: (1) a change in the actors whose perspective an originalist is endeavoring to uncover (from the Founders to the "original public"); and (2) a change from "intent" to "meaning." Thus, one easy way to assess whether the shift to original public meaning inherently forecloses contra-textualist results is to ask whether either of these shifts inherently and necessarily ensures that antagonistic applications of history to supersede text do not occur in originalist analysis. As set out below, the answer to this question is plainly no: neither of the foundational shifts from original intent to original public meaning foreclose antagonistic applications of history to supersede text.

This is easiest to see in the case of the first of these conceptual shifts—the change in the actor whose perspective an originalist is endeavoring to uncover from the Founders to the original public. While this shift addressed *other* critiques of the originalist enterprise,[48] it plainly did nothing to address the problem of "expected applications" or gerrymandering of text. That is, the "original public," whether real or hypothesized, may—just like the Founders—have contra-textual expectations about where a broad text may apply. Just like the Founders, the real or imagined public may have biases about who *deserves* the

46. *See* source cited *supra* note 45.

47. As I turn to in just a moment, it arguably includes many more moves if one includes all of the academic infrastructure of academic original public meaning theorizing. Because "original public meaning" is a widely used construct, most often applied in practice without resort to that academic infrastructure, I begin here with the basic concept.

48. *See, e.g.,* Solum, *supra* note 39, at 8-9 (describing the array of early critiques of original intent originalism).

benefits of rights or the sanction of criminal or regulatory law that fundamentally affect what applications are anticipated.

Nor does the shift from "intent" to "meaning" necessarily avoid the problem of "expected application" or of originalist approaches that are contrary to text. "Meaning" is itself an exceptionally broad term, which may connote different things to different adjudicators. It *could* prompt an adjudicator to ask a question that is consistent with both textualism and originalism (an allied question), such as "What meaning would the original public have understood the words or phrases of a legal text to have, at the level of generality at which they are pitched?"—and then to neutrally apply the principle thereby derived to the application at hand. But it could just as easily prompt an adjudicator to ask a question which is inconsistent with textualism (an antagonistic question), such as "Would the meaning of the law's text have been understood by the original public to extend to this particular context?" The latter question in practice is both virtually indistinguishable from discredited "original intent" approaches, and highly likely to lead us away from fidelity to textualism.[49]

Again, *Holy Trinity*—long derided by textualists for its open derogation of text—provides an excellent example of this.[50] The Supreme Court in *Holy Trinity* explicitly acknowledged that it was deviating from the broad text of a criminal statute barring the importation of aliens, because the migration of professionals from England was not within what Congress intended.[51] But it would have been just as easy for the Court to have crafted an opinion stating that the "original public meaning" of the law only included the work of the "manual laborer, as distinguished from that of the professional man"—because the public, in light of the historical context, would have understood the statute's terms to be limited to that context (i.e., the statute's "meaning," as understood by the "public" would have been limited to a proscription on the importation of poor laborers lacking in American values—even though its text was facially much broader).[52] Indeed, even modern "corpus linguistics" techniques could

49. For this reason, while I agree with James Macleod that the question that is being asked in the "original public meaning" inquiry is a key, often submerged feature of originalist analysis, I disagree with his suggested approach, which is to adopt an as-applied framing. *See* Macleod, *supra* note 8, at 62-72.

50. 143 U.S. 457 (1892).

51. *Id.* at 458-72.

52. *Id.* at 463. I am unaware of any research that has in fact confirmed that the public, as opposed to Congress, had this belief. The important point here is that if the public did possess such a view—or, as is as often the case, a judge imagined they would based on presumed biases or beliefs of the public—it would be entirely consistent with "original public meaning" to reach an identical contra-textual result to the one that most textualist/originalists have derided.

have been harnessed in service of this outcome, by showing that the words "importation . . . of any alien or aliens" almost exclusively appeared in the context of importation of poor laborers from disfavored countries.[53] In short, it is equally possible to gerrymander text by adverting to the limited imagination or the biases of the public, as it is to abrogate text by adverting to the limited imagination of Congress or the Founders. And the word "meaning" is insufficiently precise to exclude "meanings" that are founded on such biases or lack of imagination.

Of course, one rejoinder to all this might be to suggest that "original public meaning" is not a thin concept as I have presented it here, but rather must be understood as incorporating all of the infrastructure of subsidiary rules that academic original public meaning theorists have afforded it—and that so understood, original public meaning *is* truly inconsistent with contra-textualist results. I doubt that this is wholly true—while the academic scaffolding that has been afforded to "original public meaning" seems to me likely to lessen the likelihood that "original public meaning" will slide into antagonistic approaches, it is hard to suggest that it entirely forecloses such approaches, especially given inconsistencies among "original public meaning" theorists.[54] But even more importantly, in the real world we know that most originalist adjudicators apply a thin version of "original public meaning" *without* resort to this academic infrastructure.[55] Thus, as a real-world interpretive theory, it is ordinarily the thin version of "original public meaning" that controls.

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53. *Cf.* Franklin, *supra* note 9, at 141-44 (describing the use of corpus linguistics methodologies in the context of the LGBT Title VII cases to argue that the most common places in which the terminology was used must be the full "ordinary public meaning" of the statutory text).

54. While I could not hope here to address all of the nuanced rules that various theorists have suggested should be attached to public meaning originalism (itself telling as to the likelihood that these rules are known and fully adopted by adjudicators), the core thesis of Public Meaning Originalism, as articulated by one of its leading proponents, is as follows: "the claim that the best understanding of constitutional meaning focuses on the meaning communicated by the constitutional text to the public at the time each constitutional provision was framed and ratified." *See* Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 BOSTON U. L. REV. 1953, 1953 (2021). While this might on its face appear to be textualist in nature, it is important to note that it retains precisely the same flexibility and manipulability that is inherent in a "thin" version of original public meaning. What "meaning" are we asking about? The meaning of the words as they might be understood by the public in establishing principles consistent with the level of generality at which they are pitched? Or the meaning of the text to the public as applied to specific contexts—which might lead to gerrymandering of the text as a result of biases, misconceptions, and many other issues? Only the former question will predictably avoid "antagonistic" applications of originalism vis-à-vis text.

55. *See, e.g., infra* text accompanying notes 82-101; *see also* Solum, *supra* note 5, at 1255 (acknowledging that some uses of originalism by judges "display very little awareness of originalist scholarship," but identifying a handful of sitting judges that display a "sophisticated command of originalist theory.")

Given all this, the dangers of conflating textualism with originalism under the singular rubric of "original public meaning" seem plain. A "thin" version of "original public meaning," which is the version that is most likely to be applied by real-world adjudicators, does nothing to prevent "antagonistic" applications of originalism to supersede text. And yet adjudicators have been told, and may have absorbed, the message that "original public meaning" is an inherently textualist methodology, under which they cannot, as textualists go astray. Especially in the situations where it matters most—where an adjudicator's ideological priors cause them to be disinclined to read the text as reaching a result that they disfavor—we should not be surprised that this often leads to a slide into contra-textualist results. Indeed, without disaggregating textualism and originalism—and recognizing that they need not track in the same direction—such antagonistic results seem virtually assured in cases of ideological divergence.

An excellent real-world example of this can be seen in the recent disputes over the inclusion of LGBT workers within Title VII's protections—an issue that was ultimately resolved by the Supreme Court in the case of *Bostock v. Clayton County*.[56] This is an especially striking example because the textualist principles on which LGBT plaintiffs relied were pioneered by conservative textualist/originalist Justices on the Supreme Court—and thus ought to have presented an easy textualist case for those Justices. Thus, it was Justice Thomas who authored the Supreme Court opinion in *Gross v. FBL Financial* that held that "because of [protected class status]" connotes the principle of "but for causation" as a matter of plain textual meaning.[57] Four years later, all of the Court's conservative textualist/originalists, including Justice Scalia, Justice Alito, and Justice Thomas, also joined the opinion in *UTSMC v. Nassar* extending this textualist interpretation of "because of" as but-for causation to Title VII.[58]

Both *Gross* and *Nassar* were decisions in which the Court's textualist reasoning—reading "because of" as "but for"—benefitted defendants.[59] But as became clear as disputes over LGBT inclusion in Title VII developed, it *also* can lead to pro-plaintiff results.[60] Most saliently to the

56. *See* Bostock v. Clayton County, 140 S.Ct. 1731 (2020).

57. Gross v. FBL Financial, 557 U.S. 167, 177-78 (2009).

58. Univ. of Tenn. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 350-52 (2013). Of course, a number of the Court's current conservative textualist/originalists were not on the Court at the time.

59. *See infra* sources cited notes 57-58.

60. *See* Katie Eyer, *Statutory Originalism and LGBT Rights*, 54 WAKE FOREST L. REV. 63, 72-74 (2019) (pre-*Bostock,* explaining why the textualist principles articulated in *Gross* and *Nassar* compelled the conclusion that LGBT individuals are covered by Title VII); Katie Eyer,

discussion here, the application of the textualist "but for" principle leads inexorably to the conclusion that anti-LGBT discrimination is "because of . . . sex," and thus prohibited by Title VII.[61] Thus, as a six-person majority of the Supreme Court ultimately observed, a man who is fired for being attracted to other men would have experienced a different outcome "but for" his sex (i.e., if he were female).[62] That is, "[i]f the employer fires a male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague."[63] So too an employer who terminates a transgender woman for wearing a dress has acted "but-for" her sex assigned at birth, since the employer would no doubt tolerate dress-wearing by a woman assigned female at birth.[64]

Some commentators and adjudicators—including a number of progressive ones—have argued against this textual conclusion, or have argued that textualism is at least indeterminate in this context.[65] But it is important to note that many of these commentators raise critiques that utterly ignore the fact that *Gross* and *Nassar* had already—before *Bostock*—determined what principle flowed from the ordinary textualist meaning of "because of," and had found that it connoted "but-for" causation.[66] As I discuss more fully elsewhere, if textualism is to have even a modicum of neutrality and ability to restrain, it is critical that textualist judges follow their own self-professed "plain meaning" textualist principles even when they lead to divergent ideological conclusions. Others follow the convention of conflating textualism and

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Understanding the Role of Textualism and Originalism in the LGBT Title VII Cases, AM. CONST. SOC. BLOG, (Apr. 26, 2019), https://www.acslaw.org/expertforum/understanding-the-role-of-textualism-and-originalism-in-the-lgbt-title-vii-cases/ (same); Brief of Statutory Interpretation and Equality Law Scholars as Amici Curiae at 4-7, Bostock v. Clayton County, 140 S.Ct. 1731 (2020) (same); *see also* Katie Eyer, *The But-For Theory of Anti-Discrimination Law*, 107 VA. L. REV. 1621 (2021) (describing additional ways that the "but for" principle may be beneficial for anti-discrimination plaintiffs).

61. *See infra* text accompanying notes 62-64.

62. *Bostock*, 140 U.S. at 1741.

63. *Id.*

64. *Id.*

65. *See infra* text accompanying notes 66-85. Given the hundreds of pages of critiques of the *Bostock* opinion that have been written, I cannot hope to fully respond to them in this short essay. Nevertheless, I address here what appear to be the principal textualist arguments against the outcome.

66. *See, e.g.,* Mitchell N. Berman & Guha Krishnamurthi, Bostock *Was Bogus: Textualism, Pluralism, and Title VII*, 97 NOTRE DAME L. REV. 67, 80-91 (2021); Nelson Lund, *Unleashed and Unbound: Living Textualism in* Bostock v. Clayton County, 21 FED. SOC'Y REV. 158, 180 (2020); Josh Blackman & Randy Barnett, *Justice Gorsuch's Halfway Textualism Surprises and Disappoints in the Title VII Cases*, NAT. REV., (June 26, 2020), https://www.nationalreview.com/2020/06/justice-gorsuch-title-vii-cases-half-way-textualism-surprises-disappoints/.

originalism in their analysis—the very phenomenon being critiqued herein.[67] I take up the problems with conflating textualism and originalism in the context of the LGBT Title VII cases *infra*, but first briefly address what I view as the two most significant—but ultimately unavailing—textualist critiques that have been made with respect to the *Bostock* majority's reasoning.

The principal argument that has been offered in the aftermath of *Bostock* as a justification for why the Court got it wrong from a textualist standpoint (or at least arguably so) is that the word "discriminate" connotes something like group-based animus (in this case a desire to harm women or men) and that such animus is lacking where an employer acts based on sexual orientation or gender identity.[68] But as Anuj Desai has shown, this reading of Title VII is not a plausible textualist one, especially in the context of the consolidated cases in *Bostock,* all of which involved

67. For example, Cary Franklin's *Living Textualism* piece, which critiques textualism as manipulable and indeterminant—and specifically argues that a textualist approach to the Title VII LGBT issue suffers from similar defects—conflates originalism and textualism, something that significantly affects aspects of her analysis. *See generally,* Franklin, *supra* note 9, *passim.* Thus, while I agree with a number of Franklin's observations as to the manipulability and problems of "original public meaning" (which she treats as the standard-bearer for textualism throughout her piece), I view those as problems arising from the inappropriate conflation of originalism and textualism, not from textualism properly understood. That being said, I will note that Franklin's methodological choice in this regard is probably reasonable (though not one I would make), in view of the fact that many self-professed textualist/originalists similarly conflate the two methodologies under the rubric of "original public meaning." But to me, the manipulability that Franklin demonstrates is reason to disaggregate textualism and originalism, not to, to use a colloquialism "throw out the baby (textualism) with the bathwater (originalism)." Note that some of Franklin's observations also parallel some of the genuinely textualist issues that I address immediately below, but that I disagree with her conclusions as to whether there is more than one plausible textualist response to those questions.

68. This is the primary argument offered by prominent textualist/originalist scholars Randy Barnett and Josh Blackman. *See, e.g.,* Blackman & Barnett, *supra* note 66; Josh Blackman, *Justice Gorsuch's Legal Philosophy Has a Precedent Problem*, CATO INST., (July 24, 2020), https://www.cato.org/commentary/justice-gorsuchs-legal-philosophy-has-precedent-problem. For the reasons set out herein, I disagree with Barnett and Blackman that this conclusion follows from the presence of the word "discriminate" in Title VII, and I do not believe their argument engages fully with the actual syntactic structure of Title VII's language. Barnett and Blackman also argue or at least imply that the "but-for" principle as a non-textualist one, ignoring the fact that this reading of Title VII was explicitly pioneered by textualist judges *under the banner of textualism* in cases such as *Gross* and *Nassar.* Blackman & Barnett, *supra* note 66; *see also* Lund, *supra* note 66, at 180 (also making this argument). I happen to agree with the textualist ruling in *Gross* and *Nassar*, reading "because of" as connoting the "but for" principle. But regardless, as I discuss in my fuller treatment of this issue in *Textualism Revisited*, if textualism is to have any credibility as a methodology, it must include at a minimum, a commitment to adhering to "plain meaning" textualist readings of the same text across differing contexts. In the interest of space, I do not elaborate on this argument here, but take as a given that textualists of good faith should adopt recent textualist readings of key phrases (especially those articulated by themselves) even where they are applied to new, perhaps ideologically divergent contexts.

terminations.[69] Specifically, the relevant provision of Title VII provides "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*."[70] When the actual statutory text is read, it becomes apparent that the term "discriminate" does not textually modify terminations at all—it is unlawful for an employer to "discharge any individual . . . because of sex," full stop.[71] This alone is sufficient to decide the cases at issue in *Bostock*, which all involved terminations.[72] But as Desai has persuasively argued, the syntactic context of "discriminate" *also* clearly suggests that even in the context of "terms, conditions or privileges of employment," "discriminate" is simply meant to connote other forms of disadvantageous treatment (like termination or non-hiring), not to import a strong intent or malice requirement.[73]

Importantly, this reading of the text of Title VII is not only the most obvious one syntactically, it is also the reading of the text that has been adopted by all of the Court's textualist/originalist Justices, including Justices Scalia, Alito, and Thomas, in cases like *Ricci v. DeStefano*.[74] In *Ricci*, white firefighters argued that the city's action in scrapping the results of a promotion test because of its racial disparate impact was

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69. *See* Anuj C. Desai, *Is Title VII an "Anti-Discrimination" Law?*, 93 COLO. L. REV. (Digital) (Feb. 17, 2022). Note that although I agree with the Supreme Court's conclusion on this issue in *Bostock*, which is that "discriminate" connotes nothing more than adverse differential treatment, I find Desai's analysis of the reasons for this conclusion more compelling, and thus track that analysis more closely here than that actually employed by the Court. For the Court's reasoning, *see Bostock* 140 S.Ct. at 1740:

> What did "discriminate" mean in 1964? As it turns out, it meant then roughly what it means today: To make a difference in treatment or favor (of one as compared to others)." *Webster's New International Dictionary* 745 (2d ed. 1954). To "discriminate against" a person then, would seem to mean treating that individual worse than others who are similarly situated.

Cf. Franklin, *supra* note 9, at 146 (pointing out the subjectivity in the majority's choice of dictionary definition, as well as the substantial subjectivity built into the dissenters' corpus linguistics based understanding of "discriminate against").

70. 42 U.S.C. § 2000e-2(a)(1).

71. *Id.*

72. *See* Bostock v. Clayton County, 140 S.Ct. 1731 (2020).

73. Desai's argument is well worth reading in full, and expresses the textualist argument better than I can here in this brief discussion. For his full discussion, *see* Desai, *supra* note 69.

74. 557 U.S. 557 (2009). Of course, Justices Gorsuch, Kavanaugh, and Barrett were not yet on the Court at this time, and all of them are also self-described textualists.

discrimination because of race within the meaning of Title VII.[75] In opposing this conclusion, the United States as Amicus Curiae specifically argued that "discriminat[ion]" in the context of Title VII connoted an intentionalist paradigm with respect to the harm caused to white workers which could not be met in this type of disparate impact case.[76] And yet the Court rejected the argument that Title VII's requirement of "discrimination" carried any such connotation.[77]

The other principal textualist argument relied on to attempt to dispute the majority outcome in *Bostock* (or at least to suggest that it was not foreordained by textualism) is equally easily shown to be erroneous. Specifically, some judges and commentators have suggested that anti-LGBT discrimination is not "because of" sex, even taking the but-for test on its own terms, since two things (sexual orientation and sex) are altered in the counterfactual when we imagine a lesbian woman, for example, being fired for marrying a woman.[78] But this view represents a simple analytical mistake, as we can see by looking at other forms of relational discrimination.[79] Indeed *every* form of relational discrimination can be repackaged as outside of the "but for" causation test, but only through a sleight of hand that obscures the mechanisms of the underlying relational discrimination.[80]

Consider for example, the historical practice (which persisted for more than a decade following *Brown v. Board of Education*) of only employing Black teachers at Black schools and white teachers at white schools.[81] Most of us can easily see that a qualified Black teacher who is refused employment at a white school because of this policy has been denied employment "because of" or "but for" their individual race. Nevertheless, a state could easily characterize their policy as a ban on "cross-racial placements," and could endeavor to argue that "two things,"

75. *See* Petitioners Brief on the Merits at *43-45, Ricci v. DeStefano, 557 U.S. 557 (2009).

76. *See* Brief for United States as Amicus Curiae at 11, Ricci v. DeStefano, 557 U.S. 557 (2009); *see also Ricci*, 557 U.S. at 579-80 (acknowledging that the United States had made this argument and rejecting it).

77. *Ricci*, 557 U.S. at 579-80.

78. *See, e.g., Bostock*, 140 S.Ct. at 1762 (Alito, J., dissenting); Lund, *supra* note 66, at 180; Berman & Krishnamurthi, *supra* note 66, at 101-13.

79. *See infra* text accompanying notes 74-77; *see also* Brief of Statutory Interpretation Scholars, *supra* note 60, at 7-10 (also making this point).

80. *See* sources cited *infra* note 79.

81. Brown v. Board of Education, 347 U.S. 483 (1954). I follow here the convention of some media sources of capitalizing Black, but not white. For an explanation of the reasons for this convention, *see, e.g.,* COLUMBIA JOURNALISM REV., https://www.cjr.org/analysis/capital-b-black-styleguide.php. For a discussion of the issue of teacher segregation, both past and present, *see* Wendy Parker, *Desegregating Teachers*, 86 WASH U. L. REV. 1 (2008).

not one, are changed when a Black teacher compares themselves to a white teacher in asking whether they would have been hired to work at a white school "but for" their race. As the state might (misleadingly) argue, the white comparator is not only white, but they are also seeking an appropriate "within race" placement, not a prohibited "cross race" placement. But as most of us can easily see, this reasoning is spurious. As to the individual Black applicant, they would have been hired at the white school but-for their race (i.e., if they were white). And the "second" thing that has changed is not a "second" thing at all—it is simply a repackaging of that same "but for discrimination."

As the above example illustrates, most of us can easily spot the logical fallacy in trying to repackage relational discrimination into a distinctive "but for" cause (which then, it is argued, obviates the but-for causal role of protected class status). Specifically, such an approach attempts to obscure the fact that the relational discrimination itself would not have occurred "but for" the employee's protected class status. But the reality is of course, that relational discrimination takes place precisely "because of" or "but for" the individual's protected class status (if the teacher were not Black, she would not have had the proscribed cross-racial relationship to the school). Indeed, repackaging relational discrimination under a label like banned "cross-racial placements" is simply placing a new label on what is, beneath the surface, individual instances of but-for discrimination (each employee would not have the banned relational status, but-for their individual race).

This is equally true in the context of sexual orientation and gender identity discrimination. For example, "sexual orientation" discrimination—terminating a woman because she is attracted to women when one would not terminate a man—is *the same thing* as engaging in discrimination "but for" the woman's sex (since the woman would not have been penalized for being attracted to women were she not a woman). Repackaging this as an independent causal factor which must be separately accounted for is nonsensical—*it is the same causal factor stated differently*. Just as the Black employee was not hired "but for" their race—even though we could repackage it as being because they desired a prohibited "cross-race placement"—the woman here is treated differently "but for" her sex—even though we could repackage it as being because she had prohibited "same-sex" attraction. Either way, at the level of the individual, if protected class status were different, the employer would have responded differently (and more favorably).

The Supreme Court has easily recognized this in the cases in which this issue has arisen historically.[82] For example, in the case of *Dothard v. Rawlinson*, the Court easily concluded that it was facially disparate treatment "because of sex" to refuse employment to a woman who sought work as a prison guard in a men's prison—even though the state's regulation was facially gender-neutral, proscribing cross-sex employment for men and women alike.[83] Given Title VII's focus on whether an *individual* was treated differently "but-for" their sex—which the individual woman at issue in *Dothard* clearly had been—this conclusion seems inescapable.[84]

Thus, textualism—and indeed the very textualist principles developed by the Court's leading textualist/originalist Justices—required the Court in *Bostock* to conclude that anti-LGBT discrimination is "because of" sex and included within Title VII.[85] Moreover, contrary to some of the misleading discourse around this issue, an "allied" approach to textualism and originalism, in which originalism is used to identify the original meaning of a statute's terms, changes nothing about the conclusion that fidelity to text in this circumstance required the application of Title VII to LGBT workers.[86] The term "because of" has not changed in its meaning since the 1960s.[87] And while the content of the term "sex" arguably has evolved in its meaning, even applying the narrowest 1960s-era understanding of sex—as sex assigned at birth—one reaches the same result.[88] Indeed, as elaborated above, even applying the narrowest historical understanding of sex, anti-LGBT discrimination is necessarily "but for" sex, since the employee is treated adversely for traits or actions that would be tolerated in an employee of a different sex.[89]

82. *See infra* text accompanying note 83. Cary Franklin identifies a number of Title VII contexts where the lower courts have found differently. *See* Franklin, *supra* note 9, at 28-32. All of those contexts would be inconsistent with the "but for" principle—which Franklin relies on as a reason for questioning the but-for principle, but which I would rely on as a basis for questioning the legal justification of those practices, except insofar as another textualist justification (such as no change in "terms, conditions, or privileges of employment") exists on the facts.

83. Dothard v. Rawlinson, 433 U.S. 321, 332-34 & n.16 (1977). The Court has also of course rejected this argument in the context of constitutional law, though on different grounds. *See, e.g.,* McLaughlin v. State of Florida, 379 U.S. 184, 191-93 (1964).

84. *Dothard*, 433 U.S. at 332; *see also* 42 U.S.C. § 2000e-2(a)(1) ("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 . . . sex*. . . .").

85. *See supra* text accompanying notes 60-84.

86. *See, e.g.,* Eyer, *Statutory Originalism*, *supra* note 60, at 72-80.

87. *Id.*

88. *Id.*

89. *See supra* text accompanying notes 59-64.

Thus, any textualist—who views their ultimate fidelity as to text, not history—ought to conclude in this circumstance that anti-LGBT discrimination is proscribed.

And yet both on and off the Supreme Court many self-described textualist/originalists argued for a different outcome.[90] While the specifics of their reasoning varied, many included at least some form of arguments that applied "original expected applications" under the rubric of "original public meaning" (or its statutory interpretation analogue, "ordinary public meaning at the time of enactment.")[91] And many further argued for a gerrymandering or abandonment of what conservative textualist/originalists themselves had previously articulated as anti-discrimination law's core textual principles ("because of"="but-for causation").[92] Thus, textualism and originalism were situated as antagonists by many prominent textualist/originalists, despite the widespread application of a modern "original public meaning" approach.[93]

For example, although textualist/originalist Justice Gorsuch authored the majority opinion in *Bostock v. Clayton County*, applying an "allied" approach to textualism and originalism, and ruling in favor of LGBT employees, several of his textualist/originalist colleagues were in dissent.[94] Most notably, Justices Alito and Thomas, who had pioneered the but-for textualist reading of "because of . . . [protected class status]" in earlier cases, argued in this context that following their own textualist principles was inappropriate.[95] Rather, Justice Alito, joined in dissent by

90. *See supra* text accompanying notes 65-84 and *infra* text accompanying notes 94-102.

91. *See infra* text accompanying notes 94-102. As noted, *supra*, some progressive commentators in my view also erroneously took at face value the assertions of the dissenters in *Bostock* that what they were applying was textualism, as opposed to an inappropriately conflated version of textualism and originalism. *See, e.g.,* Franklin, *supra* note 9, at 120; *see also* Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 266-67 (2020) (characterizing the dissenters' approach in *Bostock* as a form of "flexible textualism"). As stated herein, my own view is that once textualism and originalism are appropriately disaggregated, it becomes plain that the arguments that were made by the dissenters in *Bostock* are inconsistent with textualism—although they are consistent with some originalist approaches. That is, in the terminology of this Essay, the dissenters are deploying approaches in *Bostock* in which the version of originalism they are deploying is "antagonistic" to a textualist methodology.

92. *See supra* text accompanying notes 57-59, and *infra* text accompanying notes 94-102.

93. As this illustrates and as described *supra*, "original public meaning" can encompass multiple different approaches, including those that are functionally indistinguishable on this issue from "original intent" approaches. *See supra* text accompanying notes 47-53.

94. *See infra* text accompanying notes 95-99.

95. *See Bostock*, 140 S.Ct. at 1754-84 (Alito, J., joined by Thomas, J., dissenting) (nowhere even acknowledging the textualist but-for principle that they pioneered in *Gross* and *Nassar*, and making arguments inconsistent with that principle and with the statute's text).

Justice Thomas, argued that a proper analysis must ask "[h]ow would the terms of a statute have been understood by ordinary people at the time of enactment" (ignoring that they themselves had already answered this question in prior cases)—and more specifically "[w]ould [the original public] have thought that this language prohibited discrimination because of sexual orientation or gender identity?"[96]

Observe the easy slide here from what could be an "allied" approach to textualism and originalism—the question of, at a big picture level how the words "because of . . . sex" would have been understood by ordinary people at the time—to an "antagonistic" one, in which the expectations of the original public about a particular application are deemed controlling. The former question had already been answered by Justices Alito and Thomas in prior cases like *Gross* and *Nassar* ("because of sex" means "but-for sex")—in a way that compelled the conclusion that LGBT employees were covered in *Bostock*.[97] But of course, as Justice Alito and Thomas pointed out, asking the second, very different question, most likely leads to a different conclusion.[98] Because, as Justices Alito and Thomas note, there was widespread discrimination and bias against the LGBT community in 1964, it seems unlikely that the original public would have expected Title VII's principles—however textually broad and capacious—to confer rights on the LGBT community.[99] But this is of course not a question of what Title VII's text meant at the time—it is a question of how the original public's biases would have influenced their perception of the specific applications to which those broad principles should extend.

Similarly, before *Bostock* textualist/originalist lower court judges often raised arguments against LGBT Title VII inclusion on the basis of antagonistic applications of originalism and textualism under the rubric of "original public meaning" (though typically purporting to apply an "allied" textualist/originalist approach).[100] For example, Judge Ho in the pre-*Bostock* case of *Wittmer v. Phillips 66 Company* argued in concurrence to his own majority opinion that a textualist/originalist ought to conclude that LGBT employees are not covered by Title VII because the statute's broad language—"because of sex"—would not have been understood at the time to extend to the context of LGBT employees.[101]

96. *Id.* at 1766, 1767.
97. *See supra* text accompanying notes 56-64.
98. *See infra* text accompanying note 99.
99. *Bostock,* 140 S.Ct. at 1769-73.
100. *See infra* text accompanying notes 101-06.
101. *See Wittmer v. Phillips 66 Co.*, 915 F.3d 328, 334-35 (5th Cir. 2019) (Ho, J., concurring).

Similarly, Judge Sykes, while arguing in dissent for fidelity to the text of Title VII in *Hively v. Ivy Tech Community College*, nevertheless pitched her analysis of its "original public meaning" not at what Title VII's broad words meant in principle at the time, but rather at whether the application of those principles to sexual orientation discrimination specifically would have been anticipated.[102]

What is perhaps most striking about these many instances of textualist/originalists judges applying an antagonistic approach to textualism and originalism in the context of the LGBT Title VII cases is that many appeared not to recognize that it was even possible for an "original public meaning" approach to be contrary to textualism, much less that they themselves were applying it in this way.[103] But as described above, "original public meaning" as an approach can easily be applied in a manner that is both inconsistent with textualism and functionally indistinguishable from discredited theories of original intent—asking not what the textual principles are that a broadly worded statute or constitution adopts, but rather whether a particular less-favored application was desired or anticipated. Without disaggregating textualism and originalism, it may become impossible for even a judge who is committed in theory to textualism to see where originalism and textualism have become antagonists and thus to consistently honor text.

III. CONCLUSION

The above sections have argued that textualism and originalism are not the same interpretive theory—and indeed in practice can conflict. But if this is true, what are we to take from this? This Part argues in conclusion that this common-sense insight has important implications, both for those who subscribe to textualism as a legal methodology, and for those who currently do not.

For those who subscribe to textualism (or to textualism/originalism) as a methodology, recognizing the distinctiveness and potential for conflict between textualism and originalism as legal methodologies is key to honoring any genuine commitment to text. Adjudicators and others who consider themselves to be both textualists and originalists must not simply assume that the two are compatible and can be conflated, but rather must take seriously the project of ensuring fidelity to both text and to history are honored through only "allied" approaches. Where historical

102. *See* Hively v. Ivy Tech Comm. Coll., 853 F.3d 339, 359-63 (7th Cir. 2017) (Sykes, J., dissenting).

103. *See supra* text accompanying notes 91-102.

approaches are situated "antagonistically" to textual ones, a textualist's ultimate fidelity ought to be to the law's text.

Moreover, it is critical for those who consider themselves textualists, or both textualists and originalists, to remember that "original public meaning" is essentially an empty vehicle. While original public meaning can be used as a basis for semantic arguments that are entirely consistent with textualism ("allied" approaches), without a fundamental, clear and unwavering commitment to *text* as the ultimate guiding lodestar, it can also be used as a basis for arguments that are fundamentally inconsistent with textualism ("antagonistic" approaches). Indeed, original public meaning is such a capacious concept that it can allow approaches that are for most purposes (except the identity of the actor whose intentions are being divined) essentially indistinguishable from long-rejected "original intent" forms of originalist theory. Thus, the fact that originalist reasoning comes in "original public meaning" garb says little about whether its arguments are made in service of—or in contravention of—interpreting text.

Finally, it is important for textualists to understand that uncritical uses of originalism may not only challenge their fidelity to text, but the very legitimacy of the textualist enterprise. The central claim of many textualist scholars and judges has been that textualism offers the promise of the rule of law through its ability to constrain judges.[104] The central claim of many of textualism's critics has been that this promise is false, and that textualism is inherently non-constraining, manipulable, and politicized.[105] Conflating textualism and originalism—and in so doing permitting "antagonistic" applications of history to supersede text—fundamentally undermines the core promise of textualism to afford equal access to the law's protections as written to all.

The above are the implications for those who ascribe to textualism—but what about for those who do not? For critics, or for those who are simply uncommitted to any legal methodology, what are the implications of the account provided herein? One argument might be that this account should be seen as a further reason to critique textualism—as inconsistent, partisan, and manipulable.[106] Perhaps, on this account, textualism should be seen as irredeemably tainted by its longstanding association with

104. *See, e.g.,* SCALIA, *supra* note 1, at 25 ("Long live formalism. It is what makes a government a government of laws and not of men.")

105. *See, e.g.,* ESKRIDGE, *supra* note 13, at 38, 41, 47.

106. *Cf.* Franklin, *supra* note 9, at 123-24 (making this argument about textualism as "original public meaning").

originalism, and the ability for modern theories of originalism to be applied antagonistically in derogation of text.

But this ignores the many virtues that a textualism disentangled from antagonistic originalism could have. While a full account of these virtues is the work of a longer project—and beyond the scope of this Essay—it may suffice here to observe that a true textualism, in which ultimate fidelity is to text, may be a critical bulwark against inequality in the application of the law.[107] The *Bostock* opinion—declining to gerrymander LGBT workers out of the broad textual protections of Title VII—provides one important example of this.[108] Justice Thomas's textualist critiques of qualified immunity provide another.[109] In short, if we wish to ensure that all have equal access to the law's protections—and bear equally the law's burdens—we could do worse that a theory that takes the language of the law as it finds it, with equal application of its broad terms.

In short, the time may have come for all of us, both adherents and non-adherents alike, to view textualism with fresh eyes, disentangled from its longstanding conflation with originalism. For whether one views oneself as a textualist, an originalist, both, or neither, there is much to be gained from understanding the difference between textualism and originalism, and to ensuring in application that methodological commitments are honored.

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107. For a very brief treatment of this issue, *see* Katie Eyer, *Progressive Textualism in Statutory Interpretation*, in Laying Claim to the Constitution, CONST'L ACCOUNTABILITY CTR. (2021 ed.), https://www.theusconstitution.org/wp-content/uploads/2021/09/The-2021-Edition-of-Laying-Claim-to-the-Constitution.pdf.

108. *See Bostock*, 140 S.Ct. at 1751 ("As *Yeskey* and today's cases exemplify, applying protective laws to groups that were politically unpopular at the time of the law's passage—whether prisoners in the 1990s or homosexual and transgender employees in the 1960s—often may be seen as unexpected. But to refuse enforcement just because of that, because the parties before us happened to be unpopular at the time of the law's passage, would not only require us to abandon our role as interpreters of statutes; it would tilt the scales of justice in favor of the strong or popular and neglect the promise that all persons are entitled to the benefit of the law's terms.").

109. *See, e.g.,* Baxter v. Bracey, 140 S.Ct. 1862 (2020) (Thomas, J. dissenting from denial of certiorari).