WE'RE ALL ORIGINALISTS NOW . . . OR ARE WE?: *BOSTOCK*'S MISPERCEIVED QUEST TO DISTINGUISH TITLE VII'S MEANING FROM THE PUBLIC'S EXPECTATIONS

*Steven Semeraro**

I. INTRODUCTION

In *Bostock v. Clayton County*,[1] the modern originalist/textualist method[2] of interpreting statutes triumphed.[3] All nine United States Supreme Court Justices endorsed it. Justice Kagan's prophecy—"we're all textualists now"[4]—had come true. Or had it?

Many originalists were not pleased. Some argued that the majority did not apply the method correctly.[5] Others took it harder.[6] Missouri

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* Steven Semeraro is a Professor of Law at the Thomas Jefferson School of Law. His previous work on originalist interpretive methods includes *Interpreting the Constitution's Elegant Specificities*, 65 BUFF. L. REV. 547 (2017) and *Sweet Land of Property: History, Symbols, Rhetoric, and Theory Behind the Ordering of the Rights to Liberty and Property in the Constitutional Lexicon*, 60 S.C. L. REV. 1 (2008). The title of this Article takes off on Paul Brest's famous Article criticizing the search for the original intent of the Constitution's Framers. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 208 (1980).

1. 140 S. Ct. 1731 (2020).

2. Throughout this Article, originalist/originalism and textualist/textualism are used to refer to the modern originalist/textualist method of statutory interpretation. The individual terms are used to improve the flow of the text and no difference in meaning is intended when referring to one rather than the other or both.

3. Although modern originalism/textualism is generally thought to have arisen over the last thirty years, its basic premise was articulated by Oliver Wendall Holmes. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 538 (1947) (quoting Holmes, "I don't care what their intention was. I only want to know what the words mean."); OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 207 (1920) ("We do not inquire what the legislature meant; we ask only what the statute means."). For a discussion of statutory originalism in the LGBT context, see Josh Blackman, *Statutory Originalism*, JOSH BLACKMAN'S BLOG (Feb. 26, 2017), http://joshblackman.com/blog/2017/02/26/statutory-originalism.

4. Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 793, n.10 (2018) (quoting Justice Kagan).

5. *See, e.g.*, Josh Blackman & Randy Barnett, *Justice Gorsuch's Halfway Textualism Surprises and Disappoints in the Title VII Cases*, NAT'L REV. (June 26, 2020, 6:30 AM),

Senator Josh Hawley reacted angrily: "[I]f we've been fighting for originalism and textualism and this is the result . . . we've been fighting for . . . exactly the opposite of what we thought we were fighting for."[7] Nelson Lund declared the case "a demonstrably outlandish judicial performance."[8] Josh Hammer was even more blunt: "*Bostock* . . . lays bare the moral and intellectual bankruptcy of the conservative legal movement,"[9] and he didn't mean in a good way.

What happened? In 1964, all agreed neither Congress nor most of the public would have expected Title VII to prohibit sexual orientation or gender identity discrimination.[10] For a casual originalist, that would seem to end the matter. After all, isn't the whole idea to apply the law the way the public at the time would have understood it, rather than substitute modern values?

Well yes . . . but it's not that simple.[11] As Lawrence Solum, an originalist scholar, has explained, original public meaning is *not* how a

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https://www.nationalreview.com/2020/06/justice-gorsuch-title-vii-cases-half-way-textualism-surprises-disappoints (contending that the Court did not look to the correct original public meaning); Nelson Lund, *Living Textualism in* Bostock v. Clayton County, ORIGINALISM BLOG (July 20, 2020), https://originalismblog.typepad.com; Ed Whelan, *A 'Pirate Ship' Sailing Under a 'Textualist Flag,'* NAT'L REV. (June 15, 2020, 1:01 PM), https://www.nationalreview.com/bench-memos/a-pirate-ship-sailing-under-a-textualist-flag (agreeing with the Alito dissent); Megan M. Arago & David Upham, *The Blindness of Justice Gorsuch's Woke Textualism*, PUB. DISCOURSE (June 22, 2020), https://www.thepublicdiscourse.com/2020/06/65296 (accusing the Court of "historical blindness" and having Congress speak in "tongues" with no one interpreting). Other commentators have criticized the *Bostock* opinion on non-originalist grounds. *See, e.g.*, Steven D. Smith, *The Mindlessness of* Bostock, L. & LIBERTY (July 9, 2020), https://lawliberty.org/bostock-mindlessness (criticizing the originalist/textualist approach on the ground that it "makes the content of our law the product not of mindful decision-making, but of a sort of semantic accident" and creating the possibility of surprise in decision-making that the rule of law is intended to inhibit in the name of following the rule of law); Robert Lowry Clinton, *Textual Literalism and Legal Positivism: On* Bostock *and the Western Legal Tradition*, PUB. DISCOURSE (July 5, 2020), https://www.thepublicdiscourse.com/2020/07/66630 (calling for courts to rely on traditional means of legal interpretation rather than textualism).

6. *See, e.g.*, Josh Blackman, *Senator Hawley:* Bostock *"Represents the End of the Conservative Legal Movement,"* REASON FOUND.: VOLOKH CONSPIRACY (June 16, 2020, 5:39 PM), https://reason.com/2020/06/16/senator-hawley-bostock-represents-the-end-of-the-conservative-legal-movement.

7. *See id.*

8. Lund, *supra* note 5.

9. Jesse Merriam, *Legal Conservatism After* Bostock, L. & LIBERTY (June 29, 2020), https://lawliberty.org/legal-conservatism-after-bostock.

10. *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1737, 1749 (2020); *id.* at 1757, 1767 (Alito, J., dissenting); *id.* at 1828-29 (Kavanaugh, J., dissenting).

11. Modern originalism's focus on the public meaning of the text can be contrasted with earlier versions of originalism that look to the intent of the enacting legislature. In the 1970s and 1980s, Robert Bork and others argued that the original intent of those who drafted the Constitution should constrain courts. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8, 13 (1971) (noting "[t]he words are general but surely that would not permit us to escape the framers' intent if it were clear"); Raoul Berger, *Paul Brest's Brief for an*

majority of the public would have expected a statute to apply.[12] "[D]irect reliance on original expected applications," he wrote, is "completely inconsistent" with the modern originalist/textualist method.[13] Instead, an interpreting court must look to the intersubjectively understood meaning that the text would convey to an objectively reasonable reader at the time the legislature enacted the statute.[14] This reader takes account of the context of the entire statute and the law more broadly,[15] but they must filter out the extratextual gloss that any particular person's individuating values, desires, and prejudices layer on top of the text's intersubjective semantic meaning.[16]

Imperial Judiciary, 40 MD. L. REV. 1, 2, 32 (1981) ("[T]he Court is imposing its own values on the people, often in defiance of the framers' intentions. . . . [T]he Court is not empowered to reverse the unmistakable intention of the Framers."); *see also* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 935-36 (1973); Hans A. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 254-55 (1972); Edwin Meese III, Atty. Gen., Speech Before the American Bar Association (July 9, 1985), *reprinted in* THE FEDERALIST SOC'Y (1986), https://fedsoc.org/commentary/publications/the-great-debate-attorney-general-ed-meese-iiijuly-9-1985. *See generally* Berger, *supra*, at 11 (critiquing the Court's use of the Fourteenth Amendment to effectively amend the Constitution in ways that disregarded the original intent of the founding fathers as well as the Congress ratifying the Fourteenth Amendment).

The idea for semantic originalism may have arisen with Justice Scalia's speech urging originalists to move from the concept of intent to the concept of meaning. *See* Justice Antonin Scalia, Address Before the Attorney General's Conference on Economic Liberties in Washington, D.C. (June 14, 1986), *in* OFFICE OF LEGAL POLICY, ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK 101, 103-04, 106 (1987); s*ee also* Lawrence B. Solum, *Semantic Originalism*, at 14-18 (Ill. Pub. L. & Legal Theory Rsch. Papers Ser. No. 07-24, Nov. 22, 2008); *see generally* Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 599, 607 (2004) (outlining the historical progression of originalism, comparing old and new methods).

The other principal method for interpreting legal texts, living constitutionalism, takes its name from the debate over interpretative methods involving the Constitution. It takes account of the meaning of a law's text and the likely purpose of the legislature that enacted it while also allowing the interpreter to consider social values that have evolved since the time of the enactment, at least when the text is not wholly determinative of the result. Knowledge about the world that did not exist at the time the legislature enacted a law, living constitutionalists believe, can legitimately be applied by an interpreting court without undermining the Rule of Law. Failing to do so would inhibit the court's ability to interpret the law to best fulfill its societal function. *See* Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 248-49, 262-64 (2009). Statutory interpretation can be divided into additional subcategories including textualism, intentionalism, purposivism, pragmatism, and dynamic interpretation.

12. Solum, *supra* note 11, at 20.

13. *Id.*

14. *See infra* Part II.

15. *See infra* Part II.

16. *See infra* Part II. Katie Eyer grappled with this same issue prior to the Court's decision in *Bostock*. Articulating the meaning-application distinction, she argued that taking account of what she called "expected applications originalism" is improper whether focusing on the expectations of the legislators or the general public. Katie R. Eyer, *Statutory Originalism and LGBT Rights*, 54 WAKE FOREST L. REV. 63, 68-69 (2019) (explaining that "[w]hile proponents of 'statutory originalism' in the LGBT rights cases have shifted the focus from Congress's expectations [which the Court had clearly rejected] to those of the general public, they have offered no normative

Originalists justify this strict textualist focus on the ground that *only* the text as understood by an objective reader constitutes *law* with legitimate binding power.[17] American governmental structures empower representatives to enact written statutes that the governed can read and understand.[18] What some people—or even most people—would read *into the text* is *not* the law.[19] As originalist scholar Randy Barnett explains, citizens cannot read minds, and thus they cannot know the subjective expectations others have about how a law should apply in particular cases.[20] Those expectations can evince intersubjective meaning, but they cannot be *law*. Only the objective part—the meaning that all reasonable people would understand from the text—has the authority to legitimately bind us.[21]

Modern originalism/textualism thus rests on dual, potentially conflicting, tenets. An interpreter, originalists believe, must not substitute his own values for those existing at the time a law was enacted. Evolving social movements must seek change through the democratic process for new law to be legitimate. Anti-democratic courts have no authority to update a statute to suit modern values.

At the same time, the interpreter must exclude from the interpretive process the individuating values that particular people at the time of enactment read into the statute. What anyone subjectively anticipated is not legitimate binding law, whether the expectations are those of a legislator, a citizen reading the law as it is being enacted, or an interpreting judge.

Bostock puts this contradiction in sharp relief. The originalist/textualist method commands the interpreter to both (1) set

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argument for why the result ought to differ based on the identity of the group whose subjective expectations are the focus of inquiry"). See *infra* Part III.B.4.b.i for an argument that prevailing views of the public differ from legislative expectations in important, if not determinative, ways. In Eyer's view, the "original public meaning" concept should be rejected, and an interpreting court should refer only to the literal meaning of the terms of the statute both because that is what the Court has done in recent statutory interpretation cases and because doing so leads to the normatively correct result. Eyer, *supra*, at 96-98, 103. That position has been foreclosed by the Court's decision in *Bostock* because the majority did purport to rely on the original public meaning of Title VII. Accommodating text and anticipated applications have thus become critical.

17. *See infra* Part II.B.

18. *See infra* Part II.B.

19. *See infra* Part II.B.

20. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 105 (rev. ed. 2014) (analogizing to contract law in explaining originalism) ("Because people cannot read each other's minds, they must rely on appearances when making their decision of whether to enter or to refrain from entering into a contractual relationship. . . . [W]e are concerned about the intentions of the parties, [but] only those intentions the parties have succeeded in manifesting to each other, and not with any uncommunicated subjective intentions.").

21. *See infra* Part II.B.

aside the 1964 public's extratextual prejudice against gay and transgender individuals; and (2) implement the midcentury understanding prevailing when Congress enacted Title VII, not the values we hold today. The mid-1960s public's expectations about how Title VII would apply to sexual orientation and gender identity discrimination is thus both (1) irrelevant to the original public meaning, and (2) so sacrosanct that an interpreting court must apply it no matter how horribly wrong the prevailing views of that period were.

Rather than grapple with this contradiction, the majority and the dissents privilege one tenet or the other. The widely held belief that Title VII did not protect gay or transgender persons, Justice Gorsuch explained, was merely an extratextual anticipated non-application infected by the prejudices of the time.[22] It was not the statute's original public meaning.[23] A *reasonable* person in 1964—who focused on the semantic meaning of the phrase *discrimination because of sex* in the context of Title VII and the law more broadly, but without the extratextual prejudice—would have recognized that the law covered sexual orientation and gender identity.[24] For the majority, this holding simply distilled the objective component of the law from the text.[25]

Justices Alito and Kavanaugh privileged originalism's other tenet, concluding that the majority substituted modern understandings for those of the generation that enacted the law.[26] To avoid reliance on the judges' own values, the dissenters insisted, an interpreting court must take account of the original prevailing view when Congress enacted the statute.[27]

Despite a great deal of thrust and parry between the Justices, their opinions never engaged the core disagreement over how an interpreting court should distinguish intersubjective original public meaning from individuating subjective expectations about how to apply the statute.[28]

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22. *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1749-51 (2020).

23. *See infra* Part III.A.

24. *See infra* Part III.A.

25. *See Bostock*, 140 S. Ct. at 1738-41.

26. *Id.* at 1756, 1761 (Alito, J., dissenting); *id.* at 1834 (Kavanaugh, J., dissenting).

27. *See infra* III.B.4.

28. The initial reaction from the originalist community has also not focused on the meaning-expectations issue. *See* William Baude, *Conservatives, Don't Give Up on Your Principles or the Supreme Court*, N.Y. TIMES (July 9, 2020), https://www.nytimes.com/2020/07/09/opinion/supreme-court-originalism-conservatism.html (recognizing that *Bostock* "revealed debates among the originalists—for instance, how to balance a conflict between the apparently plain meaning of the text and the expectations of the people who wrote it" but not engaging the issue and recognizing that "many . . . originalists have found Justice Gorsuch's arguments to be a stretch"). Instead, originalists criticized the Court for failing to take account of the correct historical materials. *See* Blackman & Barnett, *supra* note 5 (noting that the

This issue goes to the heart of originalism and demands more attention. Originalist scholars reference the issue,[29] but their theoretical analysis does not resolve concrete cases in which an interpreting court tries to avoid imposing modern values while simultaneously refraining from illegitimately converting then prevailing subjective desires and prejudices into binding law.

Two methods could potentially enable originalism/textualism to resolve this internal conflict. First, Justice Kavanaugh's use of linguistic categories can be read as an attempt to resolve the conflict by using how we talk as a stand-in for objective meaning. This approach fails. Although the existence of linguistic categories is objective, the categories arise subjectively. Allowing the way people talk to blur the meaning of a clear text would undermine both of originalism's tenets by allowing modern judges to (1) change the meaning of objective text, perhaps to conform to their own values, by selecting among linguistic categories; and (2) imbue extratextual subjective beliefs held only by some with the authority to bind future generations.

Second, and more promising, originalist scholars have provided hypotheticals in which an interpreting court could legitimately take account of modern learning.[30] If the original populace made a mistake of objective fact, originalists have acknowledged, a court may correct that mistake when interpreting the text's original meaning.[31] But this window to modern learning is strictly limited. It only applies to factual errors. An interpreter may not consider changes in the policies that people believe best advance societal interests.[32] Since the relevant changes in *Bostock* between 1964 and today relate to our subjective views about homosexuality and gender identity, rather than factual errors, originalists appear to have concluded that the interpretive window to modern learning should have remained closed.[33]

Aspects of language theory show, however, that changes in values—at least in cases like *Bostock*—can be indistinguishable from mistakes of fact.[34] No hard break separates these categories *for us*. Whether a particular issue is designated as one of fact or value is a choice we make. Not all disputes that we call *factual* can be resolved

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then current meaning of *discrimination against* included a component of bias or prejudice); Arago & Upham, *supra* note 5 (explaining that sex discrimination in 1964 did not mean that all traditional sex-based distinctions must be barred).

29. *See infra* Part II.D.
30. *See infra* Part IV.C.
31. *See infra* Part IV.C.
32. *See infra* Part IV.C.
33. *See, e.g.*, Blackman, *supra* note 6; *see also infra* Part IV.
34. *See* Blackman, *supra* note 6.

definitively. Yet, we can agree that certain concepts that we call values are true with an extremely high degree of consensus. Whether an interpreting court should take account of modern learning should turn on the definitiveness of the mistaken nature of the public's original expectations, not whether a mistake is delineated as one of fact or value. To be sure, close cases will pose interpretive challenges over the definitiveness of the *mistake*. But such challenges are nothing new, and *Bostock* is not a close case.

Part II describes the originalist/textualist method, focusing on the distinction between public meaning and anticipated applications. Part III provides a roadmap to the *Bostock* Court's opinions about how to properly apply the originalist/textualist method to the cases before it. For each principal ground on which the dissenters disputed the majority, this Part assesses the Justices' claims through originalism's prism. Part IV considers how the originalist/textualist method can be applied in cases like *Bostock* where an extratextual prevailing prejudice that defined the original understanding of the law has definitively changed. It concludes that for original public meaning to guide the interpreter, judges must strive to make the right decision, not merely to find it.

II. DISTINGUISHING PUBLIC MEANING FROM EXPECTED APPLICATIONS

Modern originalists/textualists look to a statute's *meaning* at the time a legislature enacts it.[35] But meaning comes in different flavors. A court interpreting a statute must look to the *public* meaning, i.e., a reasonable reader's intersubjective understanding of the relevant clause in the context of the entire statute and American law more generally. The legislature's or citizens' subjective expectations about how the statute would apply, by contrast, are not part of its original public meaning and thus are not binding law.[36]

All nine Justices deciding *Bostock* purported to apply this method.[37] Yet, they interpreted the text in diametrically opposite ways because they took different approaches to distinguish meaning from expectations. This Part reviews the originalist method, focusing on this distinction.

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35. *See infra* Part II.A.

36. Hillel Y. Levin, *Contemporary Meaning and Expectations in Statutory Interpretation*, 2012 U. ILL. L. REV. 1103, 1108-09, 1114-15, 1117 (2012).

37. *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1738-41 (2020); *id.* at 1766-67, 1771-72 (Alito, J., dissenting); *id.* at 1825, 1828, 1833 (Kavanaugh, J., dissenting).

A. Original Public Meaning

Originalism's central claim, Solum explains, is that a legal text describes "rules with content that are fixed by the original public meaning of the text—the conventional semantic meaning of the words and phrases in context."[38] For an originalist, *semantic* meaning refers to a discoverable, fixed, intersubjective understanding that any reasonable contemporary reader who knows the statute's context, and generally understands the American legal system, would have assigned to the text.[39]

Semantic meaning contrasts with the purpose to which the drafters thought the statute would be put—the teleological meaning—or how people reading a law would assume its text would apply to specific cases—the applicative meaning.[40] These types of meaning differ from semantic meaning because they are subject to reasonable disagreement. Legislators may differ about a law's purpose, and reasonable readers will not all agree about how courts should apply the text to particular cases. These differing views—unlike the semantic original public meaning—turn on individualizing subjective values, desires, and prejudices. Only semantic meaning is intersubjective and thus fixed across all reasonable readers. And only it, therefore, constitutes legitimate, binding law.

B. Justifying the Meaning/Expectation Distinction

Modern originalists privilege a text's objective meaning over the subjective expectations that individuals glean from it because originalists

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38. Solum, *supra* note 11, at 2; *see also* Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 303 (2007) ("[W]e have a written Constitution that is also enforceable law. We treat the Constitution as law by viewing its text and the principles that underlie the text . . . . To do this we must ask what the people who drafted the text were trying to achieve in choosing the words they chose, and, where their words presume underlying principles, what principles they sought to endorse.").

39. *See* Lawrence B. Solum, *Constitutional Texting*, 44 SAN DIEGO L. REV. 123, 148-51 (2007) (showing that semantic originalists look for meanings which would have been commonly understood by many at the time of enactment); *see also* Solum, *supra* note 11, at 2 (reiterating that "Semantic Originalism" focuses on content that is "fixed at the time of adoption" and "original public meaning").

40. *See* Solum, *supra* note 11, at 2-3, 64; *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 101, 103-04 (2012) (demonstrating how inferring meanings can contradict the original law makers' intentions); Victoria F. Nourse, *Two Kinds of Plain Meaning*, 76 BROOK. L. REV. 997, 998-99 (2011) (describing Justice Scalia's strong opposition to statutory interpretation elevating congressional purpose or intent over text); Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1078-79 (1992) (distinguishing original public meaning from "asking how the enacting Congress would have decided the question").

believe the nature of our law-making system compels it.[41] Were a single individual—a king or emperor—empowered to dictate law, then that person's subjective view about how it applied would matter to an interpreter.

But our law does not emanate from a single individual. The American legal system employs a particular procedure empowering a legislature to enact a written text.[42] Until a future Congress changes the statutory language on which the legislators agreed, the law's fixed, intersubjective original meaning—how a reasonable person would have understood the text in context—constitutes the only legitimate source of *our law*.

Beyond that lies only what particular individuals thought about a particular law. These subjective beliefs are *not* binding on anyone. Steven G. Calabresi and Saikrishna B. Prakash summed up this position well: "Originalists do not give priority to the plain dictionary meaning of the . . . text because they like grammar more than history. They give priority to it because they believe that it and it alone is law."[43]

From this, originalists draw two justifications for their sharp distinction between intersubjective meaning and subjective expectations. First, it is compelled by the need to ensure that only legitimate *law* binds future conduct.[44] Second, it inhibits modern interpreters from illegitimately imparting their own subjective views into the law.[45] The following Subparts expand on these justifications and reveal their potential conflict.

1. Defining Legitimate Binding Law

Because legitimate binding law flows from a reasonable citizen's understanding of the relevant clause in the context of the rest of the statute and the law in general, the legislator's beliefs about how the

41. Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 551-52 (1994).

42. *See Bostock*, 140 S. Ct. at 1822-24 (Kavanaugh, J., dissenting) (showing how the procedure of enacting or amending laws is meant to be executed); Calabresi & Prakash, *supra* note 41, at 551 & n.33.

43. Calabresi & Prakash, *supra* note 41, at 552. The classic debunking of the notion that the subjective intent of the legislature constituted legitimate binding law is found in an article by Paul Brest. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 221 (1980) ("The act of translation required here [to apply historic values to a present problem] is different in kind, for it involves the counterfactual and imaginary act of projecting the adopters' concepts and attitudes into a future they probably could not have envisioned. When the interpreter engages in this sort of projection, she is in a fantasy world more of her own than of the adopters' making.").

44. *See, e.g.*, BARNETT, *supra* note 20, at 104-07, 109.

45. *See, e.g.*, *id.* at 111.

statute would apply are not binding.[46] Those expectations could be narrower or broader than the semantic meaning conveyed by the text in context, alterations that would be unknown to reasonable readers. Only the text—the part the public can access—is the law.

Originalists believe that the objective text generally provides sufficient content to support a robust enforceable meaning.[47] "As individuals," originalist Keith Whittington explained, those who enact a law are "capable of agreeing to a common text with a commonly understood meaning, and it is this meaning that the originalist hopes to uncover."[48] Justice Scalia put it this way: "We look for a sort of 'objectified intent'—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris* . . . . It is the *law* that governs, not the intent of the lawgiver."[49]

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46. *Id.* at 95 (stating that originalism's sources are "dictionaries, common contemporary meanings, an analysis of how particular words and phrases are used elsewhere in the document or in other foundational documents and cases, and logical inferences from the structure and general purposes of the text"); *id.* at 107 ("[C]ontextual understanding includes how these words are used elsewhere in the document and the general purposes for these clauses that can be ascertained from the document itself.").

47. *See id.* at 95.

48. KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, & JUDICIAL REVIEW 164 (1999); Solum, *supra* note 11, at 2.

49. Antonin Scalia, *Common-Law Courts in a Civil—Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 3, 17 (Amy Gutmann ed., 1997); *see* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) ("[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.").

Potential non-rule-of-law justifications for originalism have been largely disowned by leading advocates of this method. For example, originalism might be thought to foster more clarity and precision than methods that incorporate modern values into the interpretive calculus. But Whittington has explained that this is not so: "[A]n originalist judge is faced with many of the same difficulties and temptations that are faced by non-originalist judges. . . . [Originalism] cannot be expected to free judges from the exercise of contestable interpretive judgment." WHITTINGTON, *supra* note 48, at 4; *see also* John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383, 383, 389-90 (2007). This is true both because meaning is often contested and when clear may still be vague and incapable of providing a definitive answer to a particular question. *See* WHITTINGTON, *supra* note 48, at 9-10.

Similarly, originalism does not necessarily foster judicial restraint. Although original intent scholars made this claim, new originalists generally reject it. *See id.* at 42-43; BARNETT, *supra* note 20, at 270. Whittington explained, "a philosophy of restraint . . . may not be consistent with advocacy of originalism per se." WHITTINGTON, *supra* note 48, at 44. New originalists thus acknowledge that courts must enforce not just the clear meaning of the text but the gaps as well. *Id.* at 40-41, 44 (explaining that originalism cannot be justified on the ground that courts are not adequate to decide policy issues or that originalism is uniquely constraining); BARNETT, *supra* note 20, at 268-69 ("A reliance on judges . . . is unavoidable in a constitutional system in which only courts are available to stand between individual citizens and majority and minority factions operating through representative government.").

Originalists recognize that uncovering the original public meaning of a legal text will not necessarily enable a court to determine precisely how that text will apply to a particular case. A key

"The seeming paradox of determining 'intentions' without relying on evidence of particular subjective intent," Barnett explains, "is routinely resolved by the fact that the English language contains words with generally accepted meanings that are ascertainable independent of any of our subjective opinions about their meaning."[50] As Whittington described it, the role of historical evidence in interpreting a legal text is to show the lawmakers' intent *in doing something*—enacting certain text into law—rather than their intent *to do something*, what they expected that law to do.[51] Calabresi and Prakash put it this way: "[W]hen prior originalist scholarship has looked to history, it has always done so in a manner consistent with the primacy of the law of the text. Originalists do not believe that present-day Americans are bound by historical events or opinions . . . ."[52]

"The interpreter," Whittington explained, "is [thus] not seeking to cross-examine the [lawmakers] about . . . what they think of a given case."[53] Indeed, the lawmakers "themselves could be wrong in their assessment as to the correct application of the rule that they had established . . . . [T]he interpreter [therefore] should not be misled into incorporating expectations . . . into the text."[54] Those who draft a statute necessarily and objectively embed certain meaning into the words they chose, but that meaning "does not depend on whether the [lawmakers] themselves envisioned . . . an application."[55]

2. Reigning in Modern Interpreters

Scalia described what he called a "practical" benefit flowing from the meaning-expectation distinction that rendered it consistent with the fundamental originalist tenet that modern values should not infect the interpretation process.[56] As he saw it, if expectations were not excluded,

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element of semantic originalism is the distinction between *interpretation*, which solely involves uncovering the original public meaning, and *construction*, which involves applying the full array of legal and policy devices to apply a statute in a way that does not conflict with its original public meaning. WHITTINGTON, *supra* note 48, at 7-10; Solum, *supra* note 11, at 19, 63-66, 69.

50. BARNETT, *supra* note 20, at 107.

51. WHITTINGTON, *supra* note 48, at 178; BARNETT, *supra* note 20, at 105 (explaining that the originalists rely on objective public meaning "because this is the meaning to which the parties have committed themselves. This, not any unexpressed intentions, is the meaning they wish to be preserved.").

52. Calabresi & Prakash, *supra* note 41, at 550.

53. WHITTINGTON, *supra* note 48, at 288 n.81.

54. *Id.* at 187.

55. *Id.*

56. Scalia, *supra* note 49, at 17-18.

modern interpreters would be irresistibly tempted to insert their own values into the analysis.[57]

Giving weight to the subjective views of the legislators, for example, would naturally lead interpreters to assume that those who enacted a statute would have wanted it to apply in a way that best served society's interests. And judges would likely conclude that the enactors shared their own subjective views about how to achieve that goal. "[U]nder the guise or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires,"[58] or, perhaps, in the current political climate, interpreting Justices may pursue the objectives and desires of the social groups they were, in a sense, appointed to represent.[59]

As originalists John O. McGinnis and Michael Rappaport have recognized, excluding expectations from the interpretive calculus could have the opposite effect of improperly opening the process to modern values.[60] If the original expectations are walled off, they argue, judges may be tempted to read their own social policy into a vague text.[61] Giving "[e]xpected applications" significant interpretive weight would thus be "especially useful [to] caution modern interpreters against substituting their own preferred glosses on meaning for those that would have been widely held" when a law was enacted.[62] And therein lies the conflict. Expectations are not legitimate binding law, but without them, an interpreting court may be unable to avoid the alluring influence of modern values.

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57. *Id.*

58. *Id.* ("When you are told to decide, not on the basis of what the legislature said, but on the basis of what it *meant*, . . . your best shot at figuring out what the legislature meant is to ask yourself what a wise and intelligent person *should* have meant; and that will surely bring you to the conclusion that the law means what you think it *ought* to mean . . . .").

59. *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1824, 1835-36 (2020) (Kavanaugh, J., dissenting). At least with respect to Kavanaugh, one could read his dissent to suggest no personal desire to exclude homosexual and transgender persons from Title VII's scope, but an understanding that those who supported his nomination wanted him to. *Id.* at 1822, 1835-37 (chastising the Court for usurping the legislative process, but then adding, "Notwithstanding my concern about the Court's transgression of the Constitution's separation of powers, it is appropriate to acknowledge the important victory achieved today by gay and lesbian Americans. . . . They have advanced powerful policy arguments and can take pride in today's result."). As in all matters of this sort, I acknowledge that I may be seeing what I expect to see.

60. *See* John O. McGinnis & Michael Rappaport, *Original Interpretative Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 378-80 (2007).

61. *Id.* at 379.

62. *Id.*

C. Unclear Meaning and Historical Evidence

This potential conflict within originalism has been masked by the process originalists use to flush out meaning, investigating historical evidence. Critically, as Whittington recognized, this inquiry must rely on "intersubjective standards of evaluation."[63] The facts needed to determine original meaning may not be obvious,[64] but they are facts. When all the information is in, an interpreter must settle on the meaning reasonable citizens would have understood, carefully guarding against the influence of the subjective contestable values that any particular individual might have held.

To further this goal of separating the objective wheat of intersubjective meaning from the subjective chaff of individual expectations, originalists initially eschew historical *conduct evidence*—how people acted and what they said—in favor of contemporary dictionary definitions combined with the law's context.[65] Only if the meaning of the text remains vague or ambiguous after this process should a court look to conduct evidence.[66]

If an originalist must move beyond this core evidence, they follow an evidentiary hierarchy designed to ensure that the investigation remains focused on intersubjective facts.[67] First, they look to widely read public statements appearing during the legislative debate that explain the law to those who would be governed by it.[68] Only if meaning remains uncertain should an originalist interpreter consider privately made contemporaneous statements about the meaning of the text.[69] In all cases, though, the originalist must recognize that public and private statements are shaped by the author's subjective values, desires, and

63. WHITTINGTON, *supra* note 48, at 195.

64. Victoria Nourse, *Textualism 3.0: Statutory Interpretation After Justice Scalia*, 70 ALA. L. REV. 667, 669 n.7 (2019) (identifying cases decided in 2018 by a 5–4 vote in which the majority and the dissent both purported to apply textualism).

65. BARNETT, *supra* note 20, at 95.

66. Calabresi & Prakash, *supra* note 41, at 552-53.

67. *Id.*

68. *Id.* at 553. In the area of constitutional interpretation, the Federalist Papers constitute a quintessential example of this sort of evidence. Even here, though, interpreters must exercise care. Although reading a Federalist Paper is evidence of how a reasonable reader would have understood a particular constitutional clause, each essay also embodied the author's subjective belief about how the Constitution would apply. The former is relevant to the originalist interpreter, the extratextual gloss provided by the latter is not.

69. *Id.* In the constitutional context, Madison's notes describing the debates among the Constitution's drafters would constitute this type of historical evidence. Here, the potential to go off the originalist rails is greater still. These types of private statements about the law "might be relevant if, and only if, they reveal something about the original public meaning that the text had to those who" read the relevant clause contemporaneously with its enactment. *Id.*

prejudices, which are not relevant to public meaning.[70] As Solum has explained, if "knowledge of semantic intentions is necessary to glean meaning, then adding more text to the stack of things to be interpreted does not really solve the problem."[71]

An interpreting court should consider conduct, statements, or practices occurring *after the legislature enacted the law* only if the meaning of the text remains uncertain after considering all the then-contemporary evidence.[72] "Such [post-enactment] history is the least reliable source for recovering the original meaning of the law"[73] and thus originalists must exercise utmost care in using it.

In sum, the interpreter properly takes account of historical facts only to the extent that they reveal the intersubjective meaning embodied in the text to a reasonable contemporary reader. What history may reveal about how contemporary values, desires, and prejudices framed any particular person's view of the text should be as irrelevant to the modern interpreter as the interpreters' own subjective values.[74] That distinction is not an easy one to draw. But as Scalia explained, the originalist must draw it.[75] Only the "text" of the statute "is the law," not anyone's subjective beliefs about how it should apply.[76]

D. Using Original Expected Applications to Uncover Original Public Meaning

If public meaning is not clear from dictionary definitions in context, an originalist inquiry into historic evidence brings the

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70. Solum, *supra* note 39, at 149-50.

71. *Id.*

72. Calabresi & Prakash, *supra* note 41, at 553.

73. *Id.*; *see also* Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 398 (2002).

74. *See* Mitchell N. Berman, *Originalism and Its Discontents (Plus a Thought or Two About Abortion)*, 24 CONST. COMMENT. 383, 385-89 (2007) ("[L]eading academic defenders of originalism have been disavowing expectation originalism for years."); *see also* Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the* Hamdan *Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1045 (2007) ("The touchstone must always be the Constitution, not what anyone in particular, including the First Congress, says about the Constitution."); Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269, 1284 (1997) (explaining that "no reputable originalist, with the possible exception of Raoul Berger, takes the view that the Framers' 'assumptions and expectation about the correct application' of their principles is controlling").

75. Scalia, *supra* note 49, at 17.

76. *Id.* at 22. Some commentators have dismissively labeled statutory interpretation that focuses on the practices at the time of the enactment rather than the meaning of the text itself as "I Have No Idea Originalism." Andrew Koppelman, *Phony Originalism and the Establishment Clause*, 103 NW. U. L. REV. 727, 737 (2009).

meaning-expectations distinction into sharp relief. Historic statements and practices necessarily communicate information about both (1) intersubjective meaning, and (2) the subjective expectations of those making the statements and engaging in the relevant practices. Precisely how expectations fit into the interpretive process is probably the fuzziest aspect of modern originalism/textualism. Scalia recognized that "those two concepts chase one another back and forth to some extent, since the import of language depends upon its context, which includes the occasion for, and hence the evident purpose of, its utterance."[77]

Solum acknowledges that originalists look to expectations as evidence of public meaning.[78] McGinnis and Rappaport go a step further, arguing that original expectations are such "strong evidence" informing "original meaning" that anyone disagreeing must bear the burden of proving otherwise.[79] Jack Balkin swings in the other direction, placing a heavy burden on those who would find meaning in expectations.[80] And Scalia's views oscillate, arguing that excluding expectations entirely is necessary to obtain the theoretical and practical benefits of originalism/textualism,[81] while also concluding that original expectations bind future interpreters.[82]

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77. Antonin Scalia, *Response*, *in* A MATTER OF INTERPRETATION 129, 144 (Amy Gutmann ed., 1997).

78. Solum, *supra* note 11, at 109.

79. McGinnis & Rappaport, *supra* note 60, at 371. McGinnis and Rappaport set up a dichotomy between looking to expected applications to define meaning and "discarding expected applications in favor of abstract principles, as influenced by social movements." *Id.* at 378. This dichotomy appears to leave out the approach defined by Solum, Whittington, and others that expectations are excluded because they are subjective. How could a method resting on the objective meaning of the text rely on subjective and necessarily varying views on how people would anticipate that a statute would apply, even if those expectations were "widely held"? The authors write that "[e]xpected applications are especially useful because they caution modern interpreters against substituting their own preferred glosses on meaning for those that would have been widely held at the Framing." *Id.* at 379. But that approach appears to undermine the originalist's search for intersubjective meaning as the only legitimate law by authorizing interpreters to follow the subjective values, desires, and prejudices that happened to be widely held when a law is enacted. The authors acknowledge that expectations "are not always to be followed," but they essentially flip the burden requiring those who would argue for a meaning inconsistent with widely held expectations to prove that they do not establish objective meaning. *Id.* (explaining "the circumstances must provide strong reasons for believing the applications were mistaken").

80. Balkin, *supra* note 38, at 303 ("[O]riginal expected application . . . helps us understand the original meaning of the text and the general principles that animated the text. But it is important not as binding law but rather as an aid to interpretation, one among many others. It does not control . . . .").

81. Scalia, *supra* note 49, at 17-18.

82. *See id.* at 40, 42; Scalia, *supra* note 77, at 144-45 (explaining that under the Cruel and Unusual Punishment Clause, the founding generation's expectations about what constitutes as cruel punishment controls).

Whittington has gone the furthest in addressing the subtleties of the meaning-expectation distinction. He explained that what lawmakers "thought the terms meant in using them" is highly relevant to an interpreting court, but the legislators' expectations about how the statute would apply are not.[83] Lawmakers could not be wrong about the former, but they could be wrong "in their assessment as to the correct application of the rule that they had established."[84] Whittington adds that "the interpreter should not be misled into incorporating expectations instead of intentions into the text."[85] He appears to mean the objective "intentions" that the legislature expressed to reasonable readers through the words that it chose.

Despite the apparent disparity of views, one generally finds originalists making significant use of expectations only when the text's meaning is vague or ambiguous, such as when courts interpret the Equal Protection Clause.[86] A reasonable reading of the originalist canon reveals that expectations may focus the objective meaning of unclear text, but not blur the meaning of text that is otherwise clear.

Clarity itself, though, may be a contested concept when modern values clash with the way that then-contemporary readers expected a statute to apply. To say that the text unambiguously and clearly comports with modern values in situations where original readers of the statute surely would have thought otherwise puts the originalist/textualist method in a tight spot. The modern interpreter can disclaim, imposing their own values while achieving that exact result. "I'm not letting my own views influence the interpretative process," a modern judge might say, "I am simply refusing to give credence to the subjective views of the people at the time the legislature enacted the statute because the text does not embody those views." That works as a logical matter. But the obvious temptation to substitute one's own views makes this process unacceptable from an originalist perspective. This poses the question whether originalists have merely spoken with insufficient clarity about the meaning-expectation distinction or whether, if pressed, they wouldn't want to be any clearer.[87]

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83. WHITTINGTON, *supra* note 48, at 163, 186-87 (distinguishing intention from expectation explaining "the textual meaning of those terms nonetheless depends on what the founders thought the terms meant in using them," but not how they expected the text to apply).

84. *Id.* at 187.

85. *Id.*

86. *See* McGinnis & Rappaport, *supra* note 60, at 375-76, 378-79.

87. *Cf.* MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 12-13 (1987) (addressing the difficulty of norm legitimation).

III. UNDERSTANDING THE *BOSTOCK* OPINIONS

This Part reviews the *Bostock* Justices' attempts to wiggle from the tight spot between meaning and expectation. All three opinions took as common ground that Title VII's text prohibited discrimination arising from an employee's biological sex,[88] and in 1964 neither Congress nor the public would have expected the statute to prohibit adverse employment decisions arising from an employee's sexual orientation or gender identity.[89]

The differing outcomes turned on how the Justices separated Title VII's meaning from how people anticipated it would apply. The majority walled off, and the dissent relied upon, those original expectations.

Both sides accused the other of making essentially the same error. The majority scolded the dissenters for disregarding the text's semantic meaning in context and improperly exploiting extratextual expectations drawn from then-prevailing pervasive prejudice to create an exception not found in the objective text.[90] The dissent turned the tables, insisting that a reasonable 1964 reader would *not* have understood Title VII to protect homosexual and transgender persons.[91] To be sure, this understanding rested on prejudices that we reject today. But for the dissenters, that was irrelevant. Modern judges may not substitute their own values for those embodied in the law's original public meaning. It was thus the majority that went beyond the text to *legislate* liability for conduct outside the statute's meaning.

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88. *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1750 (2020) (attributing this view to the dissents as well as the majority). Although none of the opinions purport to rely on any change in the meaning of the text between 1964 and today, some commentators have argued that the meaning of "discriminate against" may have incorporated in 1964 a requirement of bias or prejudice that it may not require today. Blackman & Barnett, *supra* note 5.

The cases in *Bostock* were all litigated as intentional discrimination cases, and none of the opinions discussed the possibility of disparate impact challenges. It is interesting to note, however, that women might well have a disparate impact challenge to an employment policy against hiring homosexual individuals because among those individuals who identify as gay, fifty-eight percent are women. *See LGBT Data & Demographics*, UCLA SCH. OF L.: WILLIAMS INST., https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT#density (last visited Feb. 8, 2021).

89. Melissa Legault et al., *Landmark U.S. Supreme Court Ruling Prohibits Sexual Orientation and Gender Identity-Based Discrimination in Employment (US)*, NAT'L L. REV. (June 15, 2020), https://www.natlawreview.com/article/landmark-us-supreme-court-ruling-prohibits-sexual-orientation-and-gender-identity.

90. *See Bostock*, 140 S. Ct. at 1750-51.

91. *Id.* at 1767 (Alito, J., dissenting).

After summarizing the majority opinion, this Part articulates the four principal originalist arguments advanced by the dissenters.[92] For each, it reviews the back and forth between the Justices and assesses how each comports with originalism/textualism.

A. The Opinion of the Court

When interpreting a law, the majority explained, a court must "orient [itself] to the time of the statute's adoption"[93] to uncover the text's public meaning.[94] In 1964, the Court assumed, the public meaning of "sex" constituted biological distinctions between men and women.[95]

Moving to the relevant clause, the Court focused on the public meaning of sex in the context of the statute's language—"discriminate against any individual . . . because of such individual's . . . sex."[96] For guidance, the Court looked to its prior interpretation of the Age Discrimination Act, which Congress enacted three years after Title VII using the same phrasing—"discriminate against any individual . . . because of such individual's age."[97] In an opinion for the Court using the originalist method, Justice Thomas concluded that the statutory clause "because of" when followed by a type of discrimination in the workplace established a but-for causation test.[98]

The *Bostock* Court then explained that, under such a test, if changing the sex of the employee would alter the outcome under the employer's discriminatory plan, then sex is a but-for cause of the

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92. *See infra* Part III.B. In addition to their originalist arguments, the dissenters also raised some non-originalist attacks on the majority opinion. Those parts of the dissent are generally beyond the scope of this Article.

93. *Bostock*, 140 S. Ct. at 1738.

94. *Id.*

95. *Id.* at 1739.

96. *Id.* at 1751; 42 U.S.C. § 2000e–2(a)(1).

97. *Bostock*, 140 S. Ct. at 1739 (citing Gross v. FBL Fin. Serv., Inc., 557 U.S. 167, 176 (2009)); 29 U.S.C. § 623(a)(1).

98. *Bostock*, 140 S. Ct. at 1739. After the *Bostock* decision, Blackman and Barnett questioned whether the but--or standard had been adopted by the Court using originalist methods. Blackman & Barnett, *supra* note 5. But the Court relied on a 2009 opinion by Justice Thomas interpreting the clause "because of age" in a similar mid-1960s civil rights statute using originalist methods. *See Bostock*, 140 S. Ct. at 1739 ("[T]he ordinary meaning of the ADEA's requirement that an employer took adverse action 'because of' age is that age was the 'reason' that the employer decided to act. . . . To establish a disparate-treatment claim under the plain language of the ADEA, therefore, a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision." (citing *Gross*, 557 U.S. at 176)). In 2013, the Court recognized that Congress intended a broader basis for liability under Title VII, explaining that there "it suffices . . . to show that the motive to discriminate was one of the employer's motives, even if the employer also had other, lawful motives that were causative in the employer's decision." Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 343 (2013).

relevant employment decision and the plaintiff would successfully "trigger the law."[99]

If an employer fires a woman for being "insufficiently feminine," but would not fire a man for that reason, the Court recognized, the employer violates Title VII.[100] And this is true even if the same employer would also fire a man for being insufficiently masculine.[101] Although such an employer may treat men and women "more or less equally," the sex of the victim is nonetheless a but-for cause of the adverse action.[102] "[I]n *both* cases the employer fires an individual in part because of sex."[103] The statutory text does not require proximate cause. It is "irrelevant" if factors in addition to "sex contributed to the [adverse] decision."[104] "[I]f changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred."[105]

Given this original public meaning, the Court concluded, Title VII prohibited sexual orientation and gender identity discrimination.[106] "[I]t is impossible," the majority concluded, "to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[107] The two categories, Gorsuch emphasized, "are inextricably bound up with sex."[108] An employer who dismisses a man because he is attracted to another man, but would not dismiss a woman for being attracted to a man, necessarily discriminates on the basis of sex.[109] And firing a male employee because he is attracted to men punishes the man "for traits or actions [the employer] tolerates in . . . female colleague[s]."[110] The traits of same-sex attraction, or dressing in ways stereotypically associated with someone of the opposite biological sex, are similar to the trait of acting insufficiently feminine. And the result should thus be the same. Under the 1964 public meaning

99. *Bostock*, 140 S. Ct. at 1739.
100. *Id.* at 1741.
101. *Id.*
102. *Id.*
103. *Id.* (explaining that "it doesn't matter if the employer treated women as a group the same when compared to men as a group").
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*; *id.* at 1737 (explaining that sex "plays a necessary and undisguisable role in the decision, exactly what Title VII forbids"); *id.* at 1742 (explaining that an employer must "intentionally treat individual employees differently because of their sex" when an adverse employment decision is made because an employee is homosexual or transgender).
108. *Id.*
109. *Id.* at 1740-42.
110. *Id.* at 1741.

of Title VII's text alone, then, sex is a but-for cause of discrimination against a homosexual or transgender person.[111]

The Court acknowledged that in 1964, legislators, and most of their constituents, would *not* have expected Title VII to prohibit discrimination against homosexual or transgender persons.[112] "But the limits of the drafters' imagination," Justice Gorsuch explained, "supply no reason to ignore the law's demands."[113] Legislators, the Court recognized, also "weren't thinking about many of the Act's consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees."[114] Nonetheless, the Court interpreted Title VII to prohibit these forms of discrimination because expectations about how a law would apply to particular cases are "extratextual considerations" that do not alter the statute's original public meaning.[115] That Title VII protects homosexual and transgender persons may have been "unexpected consequences,"[116] but when Congress fundamentally changes the law as it did with Title VII, the Court emphasized, such consequences are "practically guarantee[d]."[117]

B. The Dissents' Four Takes on Why the Court Misapplied the Originalist Method

The dissenting Justices agreed that a court interpreting Title VII should use an originalist/textualist method.[118] But they objected to how

111. *Id.* at 1738-39, 1741-42 (applying the same reasoning to transgender people, Justice Gorsuch wrote: "[T]ake an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision," providing this hypothetical: "The employer hosts an office holiday party and invites employees to bring their spouses. A model employee arrives and introduces a manager to Susan, the employee's wife. Will that employee be fired? If the policy works as the employer intends, the answer depends entirely on whether the model employee is a man or a woman. To be sure, that employer's ultimate goal might be to discriminate on the basis of sexual orientation. But to achieve that purpose the employer must, along the way, intentionally treat an employee worse based in part on that individual's sex.").

112. *Id.* at 1737.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 1737.

118. The dissenters also raised non-originalist arguments. Alito argued that the intent of the legislature did not support the Court's result. *Id.* at 1776-77 (Alito, J., dissenting). This point is

the majority distinguished meaning from expectation.[119] Their objections fall roughly into four categories. The Court, the dissenters argued:

> (1) applied the language literally, ignoring Title VII's context;[120]
> (2) misunderstood the ordinary meaning that *discriminate against an individual because of sex* had in 1964;[121]
> (3) ignored post-enactment historical evidence indicating that Congress did not believe that Title VII covered sexual orientation and gender identity discrimination;[122] and
> (4) failed to recognize a categorical linguistic distinction between the concepts of *discriminating because of sex*, on the one hand, and *because of homosexuality or gender identity*, on the other.[123]

The following Subparts explain each of these arguments and the Court's reply. They then assess the argument through an originalist prism.

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beyond the scope of this Article except to say that subjective-intent-based interpretive arguments raise the same meaning-expectation issue addressed here.

Neither dissenting Justice seemed concerned that Congress would disagree with the Court's result. Of course, if Congress did disagree, it could overturn the Court's decision as it had previously done with respect to multiple court decisions in earlier amendments. Instead, the dissenters expressed concern that the Court's decision would lead to negative consequences that could have been mollified if it had waited for Congress to amend Title VII. These arguments are not originalist because originalism requires interpretation in line with the original public meaning regardless of whether such a result would create ancillary issues requiring resolution. *See supra* Part II.A.

The arguments, in any event, do not stand up to scrutiny. Nothing in the majority's decision would hinder Congress's authority to address uncertainties arising from it, such as whether Title VII would (1) recognize exceptions for religiously motivated discrimination against homosexual or transgender persons, and (2) permit the still common practice of offering separate restroom and locker room accommodations for men and women. *See Bostock*, 140 S. Ct. at 1778-79 (Alito, J., dissenting).

By stepping in, Kavanaugh contended, the Court "cashiers an ongoing legislative process, at a time when a new law to prohibit sexual orientation discrimination was probably close at hand." *Id.* at 1836 (Kavanaugh, J., dissenting). We can only guess at what Kavanaugh means by this because of his choice of words. When used as a verb, *cashier* is generally defined as "to dismiss (someone) from the armed forces in disgrace because of a serious misdemeanor." *Cashier*, LEXICO, https://www.lexico.com/en/definition/cashier (last visited Feb. 8, 2021). Perhaps, he means that the Court's decision undermined the legislative effort to engage with sexual orientation discrimination? Given the current situation in Congress, it seems more likely that the Court's decision will accelerate—not hinder—legislative action to deal with ancillary concerns.

119. *See infra* Part III.B.1–4.
120. *See infra* Part III.B.1.
121. *See infra* Part III.B.2.
122. *See infra* Part III.B.3.
123. *See infra* Part III.B.4.

1. Context in Originalism

Kavanaugh argued that a reasonable reader taking context into account would conclude that sexual orientation and gender identity discrimination are not within the meaning of Title VII's text.[124]

a. The Court's Debate over the Role of Context

Originalism demands a contextual assessment of the statute's language, Kavanaugh correctly argued, because that meaning "is going to be most accessible to the citizenry desirous of following the law *and* to the legislators and their staffs drafting the legal terms of the plans launched by statutes *and* to the administrators and judges implementing the statutory plan."[125] The Court, he contended, wrongly ignored context.[126]

Attempting to show that Title VII in context did not protect homosexual and transgender individuals, Kavanaugh compared *Bostock*'s facts to H.L.A Hart's famous hypothetical involving a statute prohibiting "vehicles in the park."[127] While a baby carriage meets the literal definition of a "vehicle"—a thing used for transporting people or goods on land—the ordinary public meaning in the context of a "no vehicles in the park" statute, Kavanaugh contended, would not cover baby carriages; a reasonable reader of the "no vehicles" statute would understand the text that way.[128]

The same principle, Kavanaugh contended, places sexual orientation and gender identity discrimination outside of Title VII.[129] Just as a reasonable person would understand the limits on the term *vehicle* in the context of a statute prohibiting them in the park, such a reader in 1964 would have understood that prohibiting *sex discrimination* did not also limit adverse employment decisions based on an employee's status as a homosexual or transgender person.[130]

In reply, the Court acknowledged that context matters, citing cases in which it concluded that airplanes were not vehicles and that the term "contracts of employment" included agreements with independent

124. *Bostock*, 140 S. Ct. at 1824-25 (Kavanaugh, J., dissenting).

125. *Id.* at 1828 (quoting WILLIAM N. ESKRIDGE JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 81 (Robert C. Clark et al. eds., 2016)); *see* Scalia, *supra* note 49, at 17-18.

126. *Bostock*, 140 S. Ct. at 1825-27 (Kavanaugh, J., dissenting).

127. H.L.A. HART, THE CONCEPT OF LAW 125-26 (1961); *Bostock*, 140 S. Ct. at 1824-26 (Kavanaugh, J., dissenting).

128. *Bostock*, 140 S. Ct. at 1824-26 (Kavanaugh, J., dissenting).

129. *Id.* at 1824-28.

130. *Id.* at 1824-29.

contractors.[131] But Gorsuch distinguished those cases because they involved original meanings that differed from current ones and context helped reveal that distinction. In *Bostock*, the majority pointed out, Kavanaugh failed to show that Title VII's text in 1964 "ordinarily carried some message we have missed."[132]

Instead of using context to inform the objective original public meaning, the Court contended, the dissent "merely suggest[s] that, because few in 1964 expected today's result, we should not dare to admit that it follows ineluctably from the statutory text."[133] That "logic," the Court explained, "impermissibly seeks to displace the plain meaning of the law in favor of something lying beyond it."[134]

b. The Context Argument Through an Originalist Prism

In debating this point, the Justices glossed over the foundation for originalism's distinction between objective meaning and subjective expectations. Essentially talking past each other, Kavanaugh never explained why his contextual argument goes to objective meaning rather than anticipated application. And Gorsuch accused Kavanaugh of improperly considering extratextual expectations without explaining where he crossed the line.[135] Is it that baby carriages should have been prohibited until the legislature amended the law? Or could Hart's example be distinguished from the issue in *Bostock*?

Originalism can distinguish between these situations. A reasonable reader of the no-vehicles statute would have recognized that (1) the ordinance protected certain features embedded in the intersubjective meaning of the phrase *in the park* (i.e., safety, quiet, strolling peacefully), and (2) a baby carriage posed no threat to those features.[136] On the contrary, strolling with babies enhanced the park-like features that a reasonable reader would have understood the statute's text to protect. By prohibiting "vehicles in the park" without exception, the legislature appears to have misspoken.[137] Without baby carriages, a park

131. *Id.* at 1750 (majority opinion).

132. *Id.* Some originalist commentators have argued that the 1964 meaning of "discriminate against" did carry a message that the Court missed. *See infra* Part III.B.2.a.

133. *Bostock*, 140 S. Ct. at 1750.

134. *Id.*

135. *Id.* at 1738, 1749-50.

136. *Cf.* Scalia, *supra* note 49, at 20-21 (explaining that a court may legitimately interpret the statutory term "defendant" to mean "criminal defendant" when the context of the statute provides a clear meaning).

137. Scalia drew a distinction between a "legislature obviously missp[eaking]" that may be corrected by a court interpreting the statute, and a "legislature obviously overlegislat[ing]" that should never be. *Id.* at 21.

would be less park-like, a result clashing with the meaning of a statute objectively intended to preserve park-like features.

The 1964 Congress, by contrast, could not legitimately be accused of misspeaking in the same way. The contextual meaning of *discrimination because of sex* comfortably encompasses sexual orientation and gender identity discrimination in a way that *no vehicles in the park* does not encompass baby carriages. Title VII prohibits workplace discrimination against individuals whose sex has led employers to treat them unfairly.[138] Prohibiting baby carriages conflicts with the contextual meaning of *in the park* by making the environment less park-like. By contrast, barring discrimination against homosexual or transgender individuals fits comfortably with Title VII's contextual meaning to make workplaces more open to historically disadvantaged groups.[139]

Rather than misspeaking, Kavanaugh would have to accuse the 1964 Congress of "overlegislat[ing]," a term Scalia used in cases where the statutory language literally applies to more situations than legislators would have anticipated or wanted.[140] As Scalia has argued, within the originalist/textualist model, an interpreting court should never bail out a legislature that has overlegislated.[141]

2. Motivational Originalism

Alito contended that the phrase *discriminate because of sex* required an employer to adopt a discriminatory project animated solely by an individual employee's biological sex and "not because that person is sexually attracted to members of the same sex or identifies as a member of a particular gender."[142] Essentially, Alito read Title VII to include a proximate cause standard.[143]

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138. Blackman & Barnett, *supra* note 5.

139. *See id.*; *see also* SCALIA & GARNER, *supra* note 40, at 63 (explaining that "[a] textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored").

140. *See Bostock*, 140 S. Ct. at 1825, 1827 (Kavanaugh, J., dissenting) (discussing the importance of judges adhering to the ordinary meaning of a law rather than a hidden, obscure, or overbroad meaning); Scalia, *supra* note 49, at 21 (explaining overlegislation as judges ignoring the text of the statute and focusing on legislative intent when interpreting statutes).

141. *See* Scalia, *supra* note 49, at 20-22; *Bostock*, 140 S. Ct. at 1755-56 (Alito, J., dissenting). To the extent that a reader is sympathetic with Lon Fuller's critique of Hart's use of this example, they might conclude that Hart's hypothetical legislature also over-legislated, and thus only that legislature—within an originalist/textualist model—could create an exception for baby carriages. Of course, that view would further confirm that Kavanaugh's argument is wrong from an originalist perspective. Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 662-64 (1958).

142. *Bostock*, 140 S. Ct. at 1756-57 (Alito, J., dissenting).

143. It is possible that Alito intended this argument in two other ways. First, he may have

a. The Court's Debate over the Role of Motivation

To demonstrate the required sex-based animus, Alito argued, the employer must take adverse action based solely on its knowledge of the biological sex of the employee.[144] An employer that dismisses an employee only after learning additional information does not discriminate because of sex.[145]

Alito dismissed the Court's hypotheticals because the employers took adverse action only after learning "something new, [the employee's] sexual orientation, and it was this new information that motivated [the] discharge. So . . . discrimination because of sexual orientation does not inherently involve discrimination because of sex."[146] He concluded, "[A]ttraction to members of their own sex—in a word, sexual orientation . . . is the employer's real motive."[147]

Post-*Bostock* originalist commentators have generally sided with Alito.[148] In place of his proximate cause standard, however, they contend

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intended to make a non-originalist argument. He clearly raises non-originalist arguments in other parts of his opinion. If that is the case, then his argument is beyond the scope of this Article. Second, he may have intended to use the way people spoke about discrimination in 1964 as a way to uncover the original public meaning of the text. That argument is addressed *infra* Part III.B.4.

144. *See Bostock*, 140 S. Ct. at 1757-58 (Alito, J., dissenting).

145. *Id.* at 1760. Josh Blackman and Randy Barnett, commenting on the *Bostock* case, put a slightly different spin on Alito's argument. In 1964, they argued citing dictionary definitions, "discriminate against" meant that the difference in treatment must be "based on some trait [that is] motivated by prejudice, or biased ideas or attitudes." Blackman & Barnett, *supra* note 5. And Megan Arago and David Upham cited prior laws and treaties prohibiting discrimination against women in other contexts that had *not* been interpreted to prohibit all distinctions based on sex. "[E]mployers make a discrimination when they hire only males as truck drivers," the authors argued, but not by "merely accept[ing] a distinction when they incorporate the prevailing custom of separate restrooms for men and women. . . . Neither the intent nor the letter of the Civil Rights Act, nor the Court's own jurisprudence compels sex blindness." Arago & Upham, *supra* note 5. These alternative appeals to history, though, do not change Alito's basic argument or undermine the majority opinion. To be sure, in 1964 some sex-based distinctions—like sex specific bathrooms—may not have constituted *discrimination* both because they were not animated by bias and because prior anti-discrimination law—such as in the education context—had never been held to prohibit them. But refusing to hire a woman because she is sexually attracted to other women does consist of a bias against women, just as would refusing to hire a woman who acted like a man. Sexual orientation or gender identity discrimination is more akin to refusing to hire women to be truck drivers than to requiring them to use same-biological-sex bathrooms. If there is a meaningful distinction to be made between sexual orientation and gender identity, on the one hand, and job-type, on the other, the originalist commentators haven't articulated it. And the basis for deciding that excluding *those sexually attracted to persons of same biological sex* is not due to a bias or discrimination but excluding those who *act like a member of the opposite biological sex* is a produce of bias, is not readily apparent to say the least.

146. *Bostock*, 140 S. Ct. at 1760 (Alito, J., dissenting).

147. *Id.* at 1763. The discrimination may be related to sex, Alito admitted, but he contended, "Title VII prohibits discrimination because of *sex itself*, not everything that is related to, based on, or defined with reference to, 'sex.'" *Id.* at 1761.

148. *See* Blackman, *supra* note 6.

that in 1964, adverse employment decisions against gay and transgender persons would not have been understood to be *discrimination against* them.[149] Blackman and Barnett point to contemporary dictionary definitions defining *discriminate* to require a distinction resting on an unfair bias, not *any* form of differing treatment.[150] And Arago and Upham cited pre-Title VII law prohibiting sex discrimination that they claim contrasts "mak[ing] a discrimination" with "accept[ing] a distinction."[151]

Although the originalist commentary is not as explicit as it might be, the point seems to be that in 1964, many people—including the medical community—thought that gay people suffered from a mental disorder and conduct associated with homosexuality constituted a felony.[152] Justice Gorsuch acknowledged that refusing to hire homosexual individuals was not the "principal evil" at which Congress aimed Title VII.[153] The commentators—as Justice Alito articulated the point—argued that refusing to hire gay individuals "would not have been evil at all."[154]

Gorsuch replied with a hypothetical response to both Alito's proximate cause argument and the originalist commentators' point about the definition of discriminate.[155] He posited an employer desiring to follow 1950s era stereotypes about the appropriate roles of men and women.[156] Such an employer would be happy to hire women, so long as they applied for secretary jobs. But men, who were never hired as secretaries, received all of the mechanic positions. Men and women are treated equally in that they are both penalized or favored depending on the job they sought. Yet, the employer in the hypothetical would violate Title VII. The employer's need for additional information beyond the sex of the employee—namely the position for which an applicant applied—would not insulate the employer.[157] Nor would the fact that

149. *See* Blackman & Barnett, *supra* note 5.

150. *Id.*

151. Arago & Upham, *supra* note 5 (analogizing to cases holding that affirmative action does not violate Title VII and explaining that prior anti-sex discrimination law "in no way would preclude the virtually universal sex-specific customs as to clothing, modes of address, the meaning of marriage, etc."). Arago and Upham do not cite particular decisions holding that pre-1960s anti-discrimination law protecting women did not protect gay women. Their point seems to be merely that no one thought to apply those pre-1960s laws to protect homosexual persons.

152. Beverley d'Silva, *When Gay Meant Mad*, INDEPENDENT (Aug. 3, 1996, 11:02 PM), https://www.independent.co.uk/arts-entertainment/when-gay-meant-mad-1308085.html.

153. *Bostock*, 140 S. Ct. at 1749.

154. *Id.* at 1774 (Alito, J., dissenting).

155. *Id.* at 1748-49 (majority opinion).

156. *Id.*

157. *Id.*

many people in 1964 would have agreed that women should not be mechanics.

Neither Alito nor the originalist commentators took issue with this hypothetical. Arago and Upham acknowledge that hiring only male truck drivers, for example, would violate Title VII.[158] Yet, Gorsuch argued, when the basis for the discrimination switched from the type of position that the employee sought to the gender to whom the employee is sexually attracted, "or persons identified at birth as women who later identify as men," the dissent—and he could now add the originalist commentators—propose "suddenly roll[ing] out a new and more rigorous standard?"[159]

The prevailing view in 1964 included the notion that certain jobs were inappropriate for women, just as a prevailing view existed that people should not be sexually attracted to their own gender or dress in ways stereotypically associated with the opposite gender.[160] Yet, originalist commentators argue, Title VII somehow applied to the former but not the latter. Neither the dissent nor the commentators convincingly justified this distinction.

Perhaps they would argue that job-type bias differed because it focused on a particularly women-centric bias, i.e., that females should only work in the home or at certain jobs deemed appropriate for them.[161] Presumably, refusing to hire a woman because she is a lesbian does not exhibit a similar inappropriate woman-focused bias, but only a then-appropriate bias against a particular sexual orientation.

In any individual case, though, the bias is related to a particular trait that was unpopular under then-prevailing social norms but *was not mentioned in the text*. Whether that trait is being suited to work only at jobs deemed appropriate for women or being sexually attracted to females, the discrimination is only directed at women and is based on a sense that they are straying beyond situations appropriate for their gender. Whether this straying was toward a job like a truck driver or a

158. Arago & Upham, *supra* note 5.

159. *Bostock*, 140 S. Ct. at 1749.

160. *See* DEBORAH L. RHODE, JUSTICE AND GENDER 231-34 (1989).

161. Blackman & Barnett, *supra* note 5 (referring to Justice Ginsberg's oral argument in a biopic attacking the belief that "all women are preoccupied with home and children" as exemplifying a prejudice that "help keep [a] woman in her place, a place inferior to that occupied by men in our society"); *id.* (arguing "[b]y the 1960s, the phrase *discriminate against because of sex* had formed a single linguistic unit. The whole conveyed more meaning than the sum of its parts. This concept did not merely refer to blindly treating a man differently than a woman. Rather, this standard made *bias or prejudice* an essential element of the casual injury"); Arago & Upham, *supra* note 5 (quoting Ruth Bader Ginsberg in Brief for Appellant at 19 & n.13, Reed v. Reed, 404 U.S. 71 (1971) (No. 430)).

romantic relationship with another woman, the bias motivating the discrimination comes from the same place.

The originalist commentators might respond that these traits differ because the former impacts all women while the latter only impacts lesbians. But Title VII, as the majority explained, has always been understood to reach discrimination that does not apply to all women;[162] a discriminatory plan, for example, limited to women who were pregnant or mothers of young children violates Title VII.[163] Nothing in the text could therefore account for treating *job type* differently from *sexual orientation* or *gender identity* as a basis for the discrimination.[164] All were part of the prevailing view in 1964 and thus the clause *discriminate because of sex* would have to apply to all of them or none. No "canon of donut holes," the majority argued, would justify an implied exception.[165] "Congress's failure to speak directly to a specific case that falls within a more general statutory rule," the Court recognized, has never been held to "create[] a tacit exception."[166]

b. The Motivation Argument Through Originalism's Prism

Both Justice Alito's proximate cause standard—that the dismissal was motivated by animus toward a particular biological sex and required no additional information—and the originalist commentators' point

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162. *Bostock*, 140 S. Ct. at 1745.

163. *Id.*

164. *See id.* at 1748-49. In 1964, Title VII conceivably left room for distinguishing between excluding a woman for being, or acting like, a lesbian, on the one hand, and for defying traditional female stereotypes on the other, because only that latter applied to all women. But subsequent amendments to Title VII make explicit that sex discrimination includes types of discrimination that only affect some women. *See* 42 U.S.C. § 2000e(k) (defining discrimination because of sex to include, *inter alia*, discrimination based on "pregnancy, childbirth, or related medical conditions"); § 2000e–2(k) (recognizing disparate impact cases that do not arise from intentional bias). An originalist must look to the public meaning at the time the legislature adopted relevant amendments to the statute.

Arago and Upham focus on distinctions such as gender specific bathrooms that may respect privacy interests of both sexes. Arago & Upham, *supra* note 5. They conclude that the majority's *Bostock* opinion compels the result that all such distinctions violate Title VII. *Id.* The Court, however, flagged but did not address this issue. *Bostock*, 140 S. Ct. at 1754. Because distinctions like same-sex bathrooms do further shared interests of both sexes in personal privacy, they would not appear to constitute *discrimination against* an employee because of their sex in a way that refusing to hire gay or transgender persons does. Andrew Koppelman, Bostock, *LGBT Discrimination, and the Subtractive Moves*, 105 MINN. L. REV. HEADNOTES 1, 23-24 (2020) ("In sex discrimination law, it must be acknowledged, separate but equal does have a legitimate place.").

165. *Bostock*, 140 S. Ct. at 1747.

166. *Id.* A different justification for concluding that refusing to hire gay or transgender individuals in 1964 was not *discrimination* is that the medical community then considered them to suffer from a mental disorder and statutory law made certain homosexual conduct a felony. *See supra* Part III.B.1.a.

about the then-contemporary definition of *discriminate*, ignore that Congress amended Title VII to permit claims even though (1) the employer required additional information beyond biological sex to implement its discriminatory plan, and (2) in 1964 most people would not have deemed the distinction the employer drew as inappropriate.[167]

Even if Justice Alito and the post-*Bostock* originalist commentators were correct that Title VII's original public meaning somehow distinguished job-type bias from sexual orientation or gender identity bias, they could not get around the text of subsequent amendments rejecting that interpretation, and it is the original meaning of the statute at the time of those amendments that must control.[168]

Early on, the Court recognized that Title VII's text applied to a discriminatory plan that targeted mothers with young children, but not all women.[169] Were Alito's or the commentators' interpretation of Title VII correct, the Court should have held that the employer did not violate the statute. It needed more information than sex alone to implement the discriminatory plan, and in 1964, the notion that mothers of young children should not work was well accepted, yet the Court held that Title VII applied.[170]

The early 1970s Court, of course, could have been wrong. The opinion was a short, per curiam decision without any originalist/textualist analysis.[171] But Congress never questioned the decision, and effectively ratified it by later amending Title VII to clarify that sex discrimination included discrimination based on childbirth.[172]

A few years later in *General Electric v. Gilbert*,[173] the Court employed reasoning similar to Alito's and the commentators'.[174] It held that a health benefits package failing to cover pregnancy did not

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167. *See supra* notes 144-47, 155-61 and accompanying text. The majority essentially made this point explaining that Alito's reasoning, if adopted, would create "a curious discontinuity in [the Court's] case law." *Bostock*, 140 S. Ct. at 1749.

168. *See* 42 U.S.C. § 2000e(k) (defining sex discrimination to include differing treatment based on pregnancy and childbearing).

169. Phillips v. Martin Marietta Corp., 400 U.S. 542, 543-44 (1971) (per curiam) (holding policy against hiring women with pre-school-age children constituted sex discrimination). The Court recognized that refusing to hire the mothers of young children constituted sex discrimination despite evidence that seventy-five to eighty percent of those hired for the position for which the employer had rejected the plaintiff were women. *Id.*

170. *Id.*

171. *Id.*

172. The Pregnancy Discrimination Act of 1978 added this language to Title VII. *See* 42 U.S.C. § 2000e(k); Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 670-71 & nn.1-2 (1983).

173. 429 U.S. 125 (1976).

174. *Id.* at 127-28.

constitute *discrimination because of sex*.[175] Refusing to cover pregnancy, the Court reasoned, "does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities."[176]

Gilbert's reasoning is consistent with the commentators' because in 1964, a distinction based on pregnancy would not have been viewed as *a discrimination* motivated by improper bias. The *Gilbert* Court's reasoning also lines up with Alito's because an employer that plans to discriminate on the basis of pregnancy does not act based on knowledge of the employee's sex alone. A woman beyond childbearing years, for example, would suffer no discrimination. Nor is pregnancy-based discrimination limited to women. A benefits package that provided pregnancy benefits to female employees, but not the female spouses of male employees, would discriminate against men.[177] Before the employer could discriminate against a particular employee it would have to know not just biological sex, but also additional information—whether the employee (or their spouse) was pregnant or at least could be.

Less than two years later, Congress rejected the *Gilbert* Court's reasoning.[178] Importantly, the legislature did not correct a mistake by adding *discrimination based on pregnancy* to Title VII's text. Instead, Congress made clear that the Court had erred in failing to recognize that discrimination based on pregnancy is sex discrimination.[179] And shortly thereafter, the Court confirmed that providing pregnancy benefits to female employees, but denying them to the spouses of all employees, also violated Title VII.[180]

Next, the Court held that harassment constituted discrimination because of sex.[181] Employers, of course, did not reflexively harass every woman they hired. On the contrary, in a typical case, the employer would need additional information before it could implement a

175. *Id.*

176. *Id.* at 134.

177. *See Newport News*, 462 U.S. at 676 (recognizing that a benefit package providing pregnancy benefits to female employees, but not spouses of all employees, discriminated against men, violating Title VII).

178. *Id.* at 670.

179. 42 U.S.C. § 2000e(k) (adopting Pub. L. 95-555, 92 Stat. 2076, adding to the definitional section of the statute that sex discrimination included pregnancy discrimination); *see Newport News*, 462 U.S. at 670, 676 (recognizing that after *Gilbert*, Congress revised the definitional section to make clear that under Title VII pregnancy-based discrimination was discrimination because of sex).

180. *Newport News*, 462 U.S. at 685 (holding that providing pregnancy benefits to women, but not to the spouses of male employees, also constituted sex discrimination).

181. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66 (1986) (holding that sexual harassment constituted sex discrimination and explaining "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment").

harassment plan. Perhaps only women who did not welcome a supervisor's romantic advances would be harassed[182] or those who did not display the stereotypical feminine traits that the employer expected.[183]

A decade later, the Court recognized that male-on-male harassment also constituted discrimination because of sex.[184] Again, the employer would need additional information beyond the sex of the employee. Not all men were harassed, only those that acted in ways that the harassers believed were inappropriate.

Alito does not question the Court's decisions. Instead, he attempts to distinguish them on the ground that in each, the discrimination was based on the employee's biological sex—only a woman can be a mother[185] and maleness is a biological sex even if discrimination against males was not expected to be a basis for Title VII liability.[186] But in each of these cases, the employer required additional information beyond the employee's sex before the employer could implement the discriminatory plan against a particular individual.

And in *Bostock*, the discriminatory plans similarly focused on a particular sex in each individual case.[187] Being sexually attracted to women or dressing in a stereotypically male fashion are only problems if the employee is a woman, just as having young children, finding a heterosexual man's romantic advances unwelcome, and acting in a masculine way are only problems to the employer if the employee is a woman.

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182. *Id.* at 68 (explaining that "[t]he gravamen of [such a] claim is that the alleged sexual advances were 'unwelcome'").

183. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (plurality opinion) (recognizing that "we are beyond the day when an employer could [legitimately] evaluate employees by assuming or insisting that they matched the stereotype associated with their group").

184. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998). Congress's failure to limit the harassment cases despite amending Title VII in other ways is, of course, not determinative of the original meaning of Title VII's text. But Justice Alito does not pursue this argument, accepting the holdings of the Court's harassment cases. *See infra* note 186.

185. Bostock v. Clayton County, 140 S. Ct. 1731, 1775 (2020) (Alito, J., dissenting).

186. *Id.* at 1774 ("But the more important difference between these cases and *Oncale* is that here the interpretation that the Court adopts does not fall within the ordinary meaning of the statutory text as it would have been understood in 1964. To decide for the defendants in *Oncale*, it would have been necessary to carve out an exception to the statutory text. Here, no such surgery is at issue. Even if we totally disregard the societal norms of 1964, the text of Title VII does not support the Court's holding. And the reasoning of *Oncale* does not preclude or counsel against our taking those norms into account. They are relevant, not for the purpose of creating an exception to the terms of the statute, but for the purpose of better appreciating how those terms would have been understood at the time.").

187. *Id.* at 1746 (majority opinion).

3. Post-Enactment Historical Evidence

Both dissenters begin their opinions with, and emphasize repeatedly throughout, that (1) Congress included sexual orientation and gender identity in other anti-discrimination statutes and considered amending Title VII to include sexual orientation discrimination, but had not done so,[188] and (2) every lower court, prior to 2017, had rejected the claim that Title VII applied to discrimination against homosexual persons.[189] These points are powerful rhetorically, but they are not originalism.

a. The Court's Debate of the Post-Enactment Historical Evidence

Congressional action and inaction along with court decisions, the dissenters argued, confirmed that Title VII's meaning could not have included sexual orientation and gender identity discrimination.[190] If it did, why would Congress have singled out these sorts of discrimination in other statutes, and considered amending Title VII to add them, rather than relying on *sex discrimination* to cover it all? Why would no court have recognized for so long that sex discrimination included these other forms?

The majority responded that drawing inferences from subsequent congressional action and lower court decisions is, from an originalist perspective, fraught with difficulty.[191] These sorts of arguments, the majority apparently believed, shirk the Court's responsibility. "When a new application emerges that is both unexpected and important," Gorsuch wrote, the dissenters "would seemingly have us merely point out the question, refer the subject back to Congress, and decline to enforce the plain terms of the law in the meantime."[192] For the majority, that was not a legitimate option.

b. Post-Enactment Historical Evidence Through Originalism's Prism

The dissenters framed their post-enactment evidence in originalist terms, but they obviously intended it to serve a powerful rhetorical purpose as well. In a free-for-all interpretive exercise where anything goes, and the interpreter seeks to balance all the interests raised, the

188. *Id.* at 1755, 1773 (Alito, J., dissenting); *id.* at 1822-24 (Kavanaugh, J., dissenting).
189. *Id.* at 1778 (Alito, J., dissenting); *id.* at 1833-34 (Kavanaugh, J., dissenting).
190. *Id.* at 1754-55 (Alito, J., dissenting); *id.* at 1829 (Kavanaugh, J., dissenting).
191. *Id.* at 1747 (majority opinion).
192. *Id.* at 1750.

rhetorical power of calling a court decision "legislation"[193] and posing the question as "[w]ho decides?"[194] is compelling.

But the dissents did not claim that the Court should interpret statutes in such an open-ended way. They professed to follow the originalist/textualist method. And for an originalist, post-enactment conduct is "the least reliable source for recovering the original meaning of the law."[195] An originalist should not even consider this evidence unless the text is vague or ambiguous and the post-enactment evidence somehow sheds light on how a reasonable reader of the law at the time of its enactment would have understood its text.[196] To open the inquiry into public meaning to the rhetorical force of this post-enactment evidence, as the dissents do, isn't originalism.[197]

This does not mean that the dissents' post-enactment historical evidence has no relevance to original meaning. But that tie needs to be made explicitly by showing how subsequent events relate back to the intersubjectively understood meaning that reasonable readers would understand. The dissenters did try to make that tie, and the next Subpart addresses that effort.

4. Prevailing View, Linguistic Categories & Originalism

The final parry by the dissenting Justices to the majority's holding contended that the post-enactment historical evidence they cited—when considered alongside common parlance—demonstrated that sex discrimination, on the one hand, and sexual orientation or gender identity discrimination on the other, are distinct categories.[198] Alito relied directly on the prevailing view in the mid-1960s.[199] Kavanaugh argued that the way we speak confirms that the two types of discrimination are different.[200] Balls and blocks are both children's toys, but they are in distinct linguistic categories, i.e., toys that roll and toys that stack. When you say one, you don't mean to include the other. And for that reason, Title VII's original public meaning did not include sexual orientation and transgender discrimination.

193. *Id.* at 1754 (Alito, J., dissenting).

194. *Id.* at 1822 (Kavanaugh, J., dissenting).

195. Calabresi & Prakash, *supra* note 41, at 553.

196. *Id.*

197. Tellingly, the post-*Bostock* originalist commentators have not made much of this post-enactment evidence, focusing instead on pre-1964 dictionary definitions, statutes, and treatises. *See* Blackman & Barnett, *supra* note 5; Arago & Upham, *supra* note 5; Whelan, *supra* note 5.

198. *Bostock*, 140 S. Ct. at 1758 (Alito, J., dissenting); *id.* at 1824, 1828 (Kavanaugh, J., dissenting).

199. *Id.* at 1756-57 (Alito, J., dissenting).

200. *Id.* at 1828 (Kavanaugh, J., dissenting).

a. The Court's Debate of the Linguistic Category Argument

This Subpart addresses the back and forth on the prevailing view and linguistic category arguments.

i. Prevailing View

Alito accurately recognized that the search for the original public meaning "calls for an examination of the social context in which a statute was enacted because this may have an important bearing on what its words were understood to mean at the time of enactment."[201] He then tacitly shifted gears, framing the question as what "a group of average Americans" reading Title VII in 1964 would have understood the phrase "discrimination because of sex" to mean.[202] Social context is relevant to intersubjective meaning, but it doesn't equate to what *average* Americans thought. Public meaning looks to a reasonable objective reader, not an average one.

"If every single living American had been surveyed in 1964," Alito predicted, "it would have been hard to find any who thought that discrimination because of sex meant discrimination because of sexual orientation—not to mention gender identity, a concept that was essentially unknown at the time."[203] The survey phrasing compounds the problem. Surveys assess contested, subjective values, not intersubjective meaning.

Recognizing this, the Court rhetorically asked whether Alito's purported survey results were "really true?"[204] Pointing to early complaints in Title VII cases alleging that adverse employment decisions based on sexual orientation violated the statute,[205] the Court

201. *Id.* at 1767 (Alito, J., dissenting). We need to be careful to distinguish this argument from the core originalist position that the text of a statute needs to be interpreted in context. The originalist is referring to the context of the language of the statute as a whole and where it fits within the broader legal system. When Alito refers to "social context," he is looking to something different, namely the prevailing views of the time.

202. *Id.*

203. *Id.* at 1755, 1767 ("In 1964, ordinary Americans reading the text of Title VII would not have dreamed that discrimination because of sex meant discrimination because of sexual orientation, much less gender identity."); *id.* at 1772 (explaining "they would have been bewildered to hear that this law also forbids discrimination on the basis of 'transgender status' or 'gender identity,' terms that would have left people at the time scratching their heads"); *id.* at 1769 ("Discrimination 'because of sex' was not understood as having anything to do with discrimination because of sexual orientation or transgender status. Any such notion would have clashed in spectacular fashion with the societal norms of the day."); *id.* at 1774 ("Whether we like to admit it now or not, in the thinking of Congress and the public at that time, such discrimination would not have been evil at all.").

204. *Id.* at 1750 (majority opinion).

205. *Id.* at 1750-51 (citing Smith v. Liberty Mut. Ins. Co., 395 F. Supp. 1098, 1099 (N.D. Ga.

revealed the limits of the text's intersubjective meaning. Sexual orientation discrimination could not have been excluded by Title VII's original public meaning because all reasonable readers did not agree. The early complaints made that clear.

Alito accused the Court of citing paltry evidence, presumably because there were only a small number of complaints alleging sexual orientation discrimination over the statute's first decade and a half.[206] But that reaction reveals the different ways that the Court and the dissent treated the meaning-expectations distinction. Alito looked to the prevailing view among members of the public—what a survey would reveal.[207] A couple of complaints over a decade could not cast doubt on that.

For the Court, a survey probing differing subjective values could not cast doubt on a public meaning that is, by definition, intersubjective—the same for everyone.[208] Meaning is not a popularity contest. The Court asked, rhetorically, "How many people have to foresee the application for it to qualify as 'expected'?"[209] If legislators and most members of the general public did not think about whether Title VII covered sexual orientation, the Court wondered, why should their expectations override the expectations of "those with reason to think about the question?"[210]

The complaints thus showed that gay and lesbian individuals—who were not steeped in prevalent mid-1960s prejudice against people like them—had concluded early on that Title VII covered sexual orientation discrimination.[211] They demonstrated as much by filing suit. Reasonable people could thus contest whether Title VII prohibited discrimination against gay individuals. And the negative prevailing view was thus part of the statute's non-fixed applicative meaning, not its fixed semantic meaning.

Applying a statute in surprising ways when the beneficiary is a dominant group—as the Court did in *Oncale* for men who were

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1975) (addressing a claim from 1969)); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 661 (9th Cir. 1977) (addressing a claim from 1974); Note, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573, 583-84 (1973).

206. *Bostock*, 140 S. Ct. at 1772 (Alito, J., dissenting) ("The Court makes a tiny effort to suggest that at least some people in 1964 might have seen what Title VII really means. . . . What evidence does it adduce? One complaint filed in 1969, another filed in 1974, and arguments made in the mid-1970s about the meaning of the Equal Rights Amendment. To call this evidence merely feeble would be generous.").

207. *Id.* at 1755.

208. *See id.* at 1750 (majority opinion); s*ee also id.* at 1771-72 (Alito, J., dissenting).

209. *Id.* at 1751 (majority opinion).

210. *Id.*

211. *Id.*

harassed—but refusing to apply it to benefit parties who were unpopular at the time of its enactment, is not recognizing the original public meaning. It's supplanting that meaning to, as the Court put it, "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."[212]

ii. Linguistic Categories

Kavanaugh focused on how people spoke rather than how they thought.[213] With respect to sexual orientation and gender identity, the latter may be subjective and thus inappropriate evidence of original public meaning, but the former, he claimed, is acceptably objective.[214]

Sexual orientation discrimination, Kavanaugh asserted, "has long and widely been understood as distinct from, and not a form of, sex discrimination."[215] "Most everyone familiar with the use of the English language in America," he contended, "understands that the ordinary meaning of sexual orientation discrimination is distinct from the ordinary meaning of sex discrimination."[216] There is a "distinctive nature of anti-gay prejudice," he argued,[217] such that "[t]o a fluent speaker of the English language—then and now . . . discrimination 'because of sex' is not reasonably understood to include discrimination based on sexual orientation, a different immutable characteristic."[218] As a result, "[c]lassifying people by sexual orientation is different than classifying them by sex. The two traits are categorically distinct and widely recognized as such. There is no ambiguity or vagueness here."[219] The *Bostock* plaintiffs were thus—in common parlance—fired "because they were gay, not because they were men."[220]

Kavanaugh then tied the post-enactment evidence—the text of statutes, regulations, and proposed amendments as well as judicial decisions—to original public meaning by arguing they evinced the way that reasonable people communicated about sexual orientation

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212. *Id.* "[T]he same judicial humility that requires us to refrain from adding to statutes," the Court concluded, "requires us to refrain from diminishing them." *Id.* at 1753.

213. *See id.* at 1828, 1833 (Kavanaugh, J., dissenting).

214. *Id.* at 1834.

215. *Id.* at 1835.

216. *Id.*

217. *Id.* (citing Zarda v. Altitude Express, Inc., 883 F.3d 100, 162 (2d Cir. 2018) (Lynch, J., dissenting)).

218. *Id.* at 1833 (quoting Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 363 (7th Cir. 2017) (Sykes, J., dissenting)).

219. *Id.*

220. *Id.* at 1828.

discrimination.[221] The law, he argued, "has always reflected [the] common usage and recognized th[e] distinction between sex discrimination and sexual orientation discrimination."[222] And "[w]e cannot close our eyes to the indisputable fact that Congress—for several decades in a large number of statutes—has identified sex discrimination and sexual orientation discrimination as two distinct categories."[223]

Alito supplied one additional piece of historical evidence supporting the conclusion that sex discrimination is in a different category from sexual orientation discrimination.[224] "[I]n 1964," he observed, citing medical texts and statutes, that "homosexuality was thought to be a mental disorder, and homosexual conduct was regarded as morally culpable and worthy of punishment."[225] All of this evidence, Kavanaugh argued, "overwhelmingly establish[es] that sexual orientation discrimination is distinct from, and not a form of, sex discrimination."[226]

The Court again accused the dissenters of blurring the distinction between meaning and expectations.[227] As Gorsuch explained, "conversational conventions do not control Title VII's legal analysis, which asks simply whether sex was a but-for cause."[228] Comparing the situation to *Phillips*, the Court reasoned that a woman who was not hired because she had kids at home might well say that her "application was rejected because she was a mother, or because she had young children."[229] In *Phillips*, women overwhelmingly held the position for which the plaintiff was rejected.[230] It would thus have been awkward in common parlance to say that the plaintiff "was not hired because she was a woman."[231] Nevertheless, the *Phillips* Court "did not hesitate to

221. *Id.* at 1829-33.

222. *Id.* at 1835. Even Kavanaugh could not always avoid slipping into the prevailing-view version of public meaning, equating it to "how 'most people' 'would have understood' the text of a statute when enacted." *Id.* at 1828 (quoting New Prime Inc. v. Oliveira, 139 S. Ct. 532, 539 (2019)).

223. *Id.* at 1830.

224. *Id.* at 1769-70 (Alito, J., dissenting).

225. *Id.* (describing homosexuality as "a sexual deviation" that was "a particular type of sociopathic personality disturbance").

226. *Id.* at 1833 (Kavanaugh, J., dissenting).

227. *Id.* at 1749-52 (majority opinion).

228. *Id.* at 1745.

229. *Id.*

230. Phillips v. Martin Marietta Corp., 400 U.S. 542, 543 (1971).

231. *Bostock*, 140 S. Ct. at 1745. The Court's recognizing that Title VII covers discrimination against mothers makes this point even more clearly. The concept of motherhood is distinct from sex. A 1960s employer easily could have said, and everyone would have understood, that it was discriminating against mothers. They could plausibly believe that women can effectively do the job, just not when she is distracted by small children at home. So, just as an employer can say, "I am not discriminating against this man because he is sexually attracted to other men, I am discriminating

recognize that the employer . . . discriminated against the plaintiff because of her sex."[232]

Quoting *Oncale*, which held that harassment of men fell within Title VII's original public meaning, Gorsuch wrote, "To be sure, the statute's application in these cases reaches 'beyond the principal evil' legislators may have intended or expected to address."[233] But only "the provisions of our laws [legitimately bind our actions] rather than the principal concerns of our legislators."[234]

Adopting the dissent's approach to statutory interpretation, the Court appeared to fear, might also create room for interpreters to sneak their own values into the analysis, albeit perhaps unconsciously. "One could also reasonably fear," Gorsuch argued, "that objections about unexpected applications will not be deployed neutrally."[235] After all, the

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against him because he's gay," the employer could have said "I am discriminating against the mother of young children *not* because she is a woman, but because young children will distract her from doing her job." In each case, these are distinct linguistic concepts. Yet, the Court in *Phillips* recognized that Title VII reaches them. *See* Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 354-55 (7th Cir. 2017) (Posner, J., concurring) ("The position of a woman discriminated against on account of being a lesbian is thus analogous to a woman's being discriminated against on account of being a woman. . . . I don't see why firing a lesbian because she is in the subset of women who are lesbian should be thought any less a form of sex discrimination than firing a woman because she's a woman. But it has taken our courts and our society a considerable while to realize that sexual harassment, . . . is a form of sex discrimination. It has taken a little longer for realization to dawn that discrimination based on a woman's failure to fulfill stereotypical gender roles is also a form of sex discrimination. And it has taken still longer, with a substantial volume of cases struggling and failing to maintain a plausible, defensible line between sex discrimination and sexual-orientation discrimination, to realize that homosexuality is nothing worse than failing to fulfill stereotypical gender roles.").

232. *Bostock*, 140 S. Ct. at 1745.

233. *Id.* at 1749 (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998)).

234. *Id.* (quoting *Oncale*, 523 U.S. at 79). When statutes are ambiguous as to their original public meaning, the Court has often looked to outside sources to clarify that ambiguity. However, "the fact that [a statute] has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985) (quoting Haroco, Inc. v. Am. Nat'l Bank & Tr. Co. of Chi., 747 F.2d 384, 398 (7th Cir. 1984)).

235. *Bostock*, 140 S. Ct. at 1751. Although Justice Kavanaugh maintained a consistent position that he personally had no problem with the result in *Bostock*, Justice Alito's opinion was less clear. He posited that a woman who had been traumatized from being attacked by a man would be forced to share a locker room with a biological male. *Id.* at 1778-79 (Alito, J., dissenting). Of course, traumatization could occur in ways that would make same-biological-sex locker rooms equally problematic. Women, sometimes, attack people, too, and some people are attacked by people of different races from their own. One wonders if Justice Alito would like different locker rooms for all these possible groups and subdivisions? He also raised the issue of teachers who might be homosexual or transgender. "A school's standards for its faculty 'communicate a particular way of life to its students,'" he wrote, "and a 'violation by the faculty of those precepts' may undermine the school's 'moral teaching.'" *Id.* at 1781. He then gave an intriguing example that he found problematic: "[I]f a religious school teaches that sex outside marriage . . . [is] immoral, the message may be lost if the school employs a teacher who is in a same-sex relationship . . . ." *Id.* Revealingly,

Court unanimously interpreted Title VII to protect against male-on-male harassment, an unanticipated application that benefited a dominant group, namely men. Yet, the dissenters refused to do the same for homosexual and transgender persons. "Often lurking just behind such objections," the Court recognized, "resides a cynicism that Congress could not *possibly* have meant to protect a disfavored group."[236] This approach is not uncovering the original public meaning. "[T]he same judicial humility that requires us to refrain from adding to statutes," the Court concluded, "requires us to refrain from diminishing them."[237]

b. The Linguistic Categories Argument Through Originalism's Prism

Kavanagh's argument boiled down to this: the prevailing prejudice of the era in which the legislature passed a statute informs its public meaning—even when that prejudice is not reflected in either the literal text or the context of the entire statute—because the prejudice *is* reflected in the objectively defined categories that people use when they talk.

The majority rejected this argument, concluding that the dissents effectively relabeled anticipated applications as original meaning.[238] Neither Kavanaugh nor Gorsuch, however, examined whether linguistic categories can have the intersubjective character that originalism demands of original public meaning and thus legitimate binding law. This Subpart shows that Kavanaugh's position is inconsistent with existing originalist principles. Part IV addresses whether his linguistic categories approach could be incorporated into originalism/textualism to help resolve the conflict between meaning and expectations.

i. Linguistic Categories Are Not Intersubjective

Kavanaugh presumably believes that interpreters can uncover the existence of separate linguistic categories by observing how people talk, a real-world referent on the truth of the existence of those categories. The way fluent speakers of a language organize concepts is thus

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this example suggests that Justice Alito believes either that teachers in heterosexual relationships are capable of abstaining from sex before marriage in a way that those in a same-sex relationship cannot, or he believes that those in same-sex relationships cannot be married.

236. *Id.* at 1751 (majority opinion). Drawing an analogy to the Americans with Disabilities Act ("ADA"), the Court explained that the parties argued that the ADA did not cover disabled prisoners because Congress surely was not thinking of them in enacting the law. Nonetheless, the Court found prisoners were covered by its plain language. *Id.*

237. *Id.* at 1753.

238. *Id.* at 1751.

intersubjectively knowable. A court could then use that information to conclude that the semantic meaning of sex discrimination does not include sexual orientation discrimination.

The way people speak also differs from a lawmaker's views about how a statute would apply. The legislator's anticipated applications are subjective and extratextual. Unless members of the public were mind readers, those governed by the law would have no access to a legislator's individual views. By contrast, everyone who speaks the language knows the linguistic categories. They are commonly understood. Any reasonable reader of the text would understand them.

The problem, though, is that the objective nature of linguistic categories does not read on how we understand the meaning of a clause, the issue that originalism cares about. This is true because the way we speak is not necessarily the way we comprehend the objective meaning of a legal text.

For example, most people in 1789 assumed that a woman could not be President of the United States. But that assumption read solely on the subjective values of the time, not original meaning. To be sure, linguistic patterns likely formed suggesting that a woman could never be the president. People likely used the pronoun "he"—meaning a man—when referring to future presidents. Those patterns could be objectively observed through evidence of how people talked. But this manner of speaking has virtually no bearing on whether the original meaning of the Constitution's text permits either sex to become President. To answer that, originalists look directly to the semantic meaning of the text, and under it, women can be President.[239]

Similarly, what most people in 1964 would have subjectively believed about whether Title VII applied to sexual orientation or gender identity discrimination says everything about the subjective prejudices that much of the population held. From that pervasive prejudice, not surprisingly, patterns of speaking developed. But those patterns were not the meaning of Title VII any more than the way people spoke about women Presidents in the 1790s was not the meaning of the Constitution.

Common parlance, to be sure, may provide insight into public meaning. But that does not transform a text's meaning into how *most people* talk. Meaning for the originalist is what a reasonable reader

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239. *See* John O. McGinnis, *Martha Could Have Succeeded George*, L. & LIBERTY (Nov. 2, 2015), https://lawliberty.org/martha-could-have-succeeded-george; *see also* Robert Natelson, *A Woman as President? The Gender-Neutral Constitution*, WASH. POST (Oct. 28, 2015, 10:56 AM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/10/28/a-woman-as-president-the-gender-neutral-constitution (applying originalist analysis without assessing how most people would have expected the Constitution to be applied).

understands the text to mean. Once one gets into *most people* versus *the others*, the analysis has crossed from intersubjective original public meaning to widely held subjective expectations about how a statute should be applied, that patterns of speaking objectively reflect these expectations and cannot change that distinction.

Kavanaugh insists that the way people talk *is relevant* to a statute's meaning.[240] But the cases he cited do not support the interpretive move he makes. In each case, the Court used the way people talked about a statutory term to confirm the literal meaning from then-contemporary dictionary definitions in the context of the entire statute.[241]

For example, *New Prime Inc. v. Oliveira*, dealt with a 1925 statute using the phrase "contract of employment."[242] To uncover the public meaning, the Court cited the context—the statute referred to "workers" not employees—and contemporary "dictionaries [that] tended to treat 'employment' more or less as a synonym for 'work.'"[243] From this, the Court concluded that the original public meaning of the text included contracts with both employees and independent contractors.[244]

Nothing in the Court's analysis comes close to what Kavanaugh proposes—using common parlance to infer an exclusion from the literal meaning of the text.[245] In sum, common parlance can helpfully reveal meaning when the text is vague or ambiguous. When the text is clear, though, the only purpose served by looking to how people speak would be to reveal something beyond the public meaning—namely, how those speakers expected that the statute would be applied given their own subjective values.

ii. Harassment Is a Distinct Linguistic Category and Sex Discrimination

The harassment cases also compel the rejection of Kavanaugh's linguistic category approach. In the mid-1960s, most people would likely have characterized discriminating because of sex differently from

240. *Bostock*, 140 S. Ct. at 1828 (Kavanaugh, J., dissenting).

241. *Id.* The four cases that Kavanaugh cites all use common parlance to confirm the literal meaning of the text in context, not to create an extratextual exception. *See* New Prime Inc. v. Oliveira, 139 S. Ct. 532, 539-40 (2019) (using common parlance and legal authorities to confirm dictionary definitions); Henson v. Santander Consumer USA Inc., 137 S. Ct. 1718, 1722 (2017) (referring to a conversation between friends only to confirm the literal meaning of the text); Wisc. Cent. Ltd. v. United States, 138 S. Ct. 2067, 2070-71 (2018); FCC v. AT&T Inc., 562 U.S. 397, 403-05 (2011) (confirming dictionary definition of "personal").

242. *New Prime Inc.*, 139 S. Ct. at 539-40 (internal quotation marks omitted).

243. *Id.* at 535, 540-41.

244. *Id.* at 540-41.

245. *Bostock*, 140 S. Ct. at 1825 (Kavanaugh, J., dissenting).

harassing an employee.[246] Only "linguistic happenstance" causes us to have a common colloquial term for homosexual individuals but not for *people harassed at work*.[247] If anything, harassment is more linguistically distinct from sex discrimination and sexual orientation or gender identity discrimination.

The concept of workplace sex discrimination involves treating someone as less capable of doing a job or as inappropriate for the work environment because of their sex. It embodies stereotypes about competence, strength, and workplace atmosphere. Essentially, employers discriminate against women because of sex when they base a negative employment decision on traits widely associated with womanhood rather than a particular woman's ability to do the job. Referring to the Court's 1950s stereotype hypothetical, an employer might explain: "[W]omen can't be mechanics. They aren't strong enough, and they don't like getting their hands dirty."[248]

Harassment, by contrast, involves mistreating someone for reasons going beyond those stereotypes. Unlike discrimination narrowly defined, a woman acting in a stereotypical, woman-like fashion generally does not provide a reason to harass her. While some women might be harassed for stereotypical reasons, harassment is more commonly triggered when a woman acts in ways that the employer finds unwomanly. For example, prime candidates for harassment are female employees who find a supervisor's romantic advances unwelcome or act in a way that the supervisor thinks is inappropriate for her sex. In short, whereas employers tended to discriminate against women for being women, they tended to harass women for acting in ways that the employer thought a woman should not act.

Similarly, prior to the late 1990s, people characterized male-on-male mistreatment as *hazing* or *bullying*, concepts quite distinct from sex discrimination.[249] Statutes and other codes of conduct address hazing and bullying in contexts having no connection to sex discrimination.[250] Harassment and sex discrimination thus had their own

246. Koppelman, *supra* note 164, at 12, 16-17 (explaining that harassment could be in a separate linguistic category from sex discrimination called "persons sexually harassed at work").

247. *Id.* (noting that the existence of a colloquial term for those discriminated against, such as "mothers" did not stop the Court from holding that such discrimination also constituted sex discrimination).

248. *Bostock*, 140 S. Ct. at 1748-49.

249. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998).

250. Claire Wilkinson, *Workplace Hazing Emerges from the Shadows*, BUS. INS. (Sept. 3, 2019), https://www.businessinsurance.com/article/20190903/NEWS06/912330439/Workplacehazing-emerges-from-the-shadows# (discussing potential liability for hazing in the workplace); Lisa Nagele-Piazza, *Workplace Bullying and Harassment: What's the Difference?*, SHRM (Mar. 28,

distinct linguistic categories. Yet, the Court has held unanimously that harassment against men or women is nonetheless sex discrimination.[251]

The dissenting Justices, of course, denied this distinction between harassment and discrimination.[252] They maintained that even male-on-male mistreatment fits within the sex discrimination category.[253] Let's consider that point with some care. Firing someone because they are a woman and firing them because they are gay, the dissent contends, "implicates two distinct societal concerns, reveals two distinct biases, imposes two distinct harms, and falls within two distinct statutory prohibitions."[254] But harassing someone because they are a man who displays traits viewed as unmanly is entirely different. In Kavanaugh's words, whether an employee is male or female, "harassing [them] because of [their] sex is discriminating against the employee because of [their] sex."[255]

Any distinction along these lines is one of degree, not kind.[256] Picking on an effeminate man does not bring to my mind the concept of sex discrimination. At least not before the Supreme Court held that it was.[257] Prior to that, I would likely have used the concepts of hazing or bullying. Yet now, I have no trouble conceptualizing harassment as sex discrimination.

Conversely, it seems obvious to me that an unfavorable employment decision resting on prejudice against a homosexual or transgender person is sex discrimination. At the least, these types of discrimination strike me as more tightly bound up with sex discrimination than male-on-male harassment. The reasons for harassing vary widely from case to case. But an employer discriminates against someone for being sexually attracted to men, or dressing *like a woman*, only if the employee is a man. It's no different than discriminating

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2018), https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/workplace-bullying.aspx (discussing state anti-workplace bullying laws); *Laws, Policies & Regulations*, STOPBULLYING.GOV, https://www.stopbullying.gov/resources/laws (last visited Feb. 8, 2021) (detailing state anti-bullying laws).

251. *Oncale*, 523 U.S. at 75, 79.

252. *Bostock*, 140 S. Ct. at 1834-35 (Kavanaugh, J., dissenting).

253. *Id.* at 1834.

254. *Id.* at 1835.

255. *Id.* at 1834-35.

256. Andrew Koppelman has made the point that any deviation "from the behavior traditionally deemed appropriate for one's sex is the imputation of homosexuality." Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 235 (1994). As a result, if sexual orientation discrimination were not sex discrimination, virtually any sophisticated defendant could escape liability by arguing that it did not discriminate because of a man's or woman's biological sex, but because the employee's actions in the circumstances led the employer to believe that they were gay.

257. *See Bostock*, 140 S. Ct. at 1754.

against a woman for acting too masculine or a man for acting too feminine. Indeed, had the dissent prevailed, one can imagine employers arguing, "I didn't fire her for acting too masculine, I fired her because I thought she was gay."[258]

My opinion, of course, is irrelevant to Title VII's 1964 meaning (or its as amended meaning). But so are Kavanaugh's and Alito's.[259] And it is hard to see how our disagreement rests on anything firmer than subjective disagreement rather than the intersubjective understanding necessary for original public meaning.[260]

IV. ORIGINALISM, *BOSTOCK*, AND THE FACT-VALUE DICHOTOMY

In *Bostock*, all agreed that prejudice that we now recognize as illegitimate produced a prevailing view in 1964 that Title VII's protections did not extend to gay and transgender individuals.[261] But

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258. Koppelman, *supra* note 256, at 235-37.

259. Kavanaugh's discussion of *Brown v. Board of Education*, 347 U.S. 483 (1954) confirms that linguistic categories do not establish original public meaning. "[T]he question [in *Brown*]," he acknowledges, "was what equal protection meant," i.e., its original public meaning. *Bostock*, 140 S. Ct. at 1835 n.10 (Kavanaugh, J., dissenting). Substantial post-enactment evidence existed of legislators (including Congress) using language conveying the concept that separate facilities could be equal and thus consistent with the equal protection requirement, and courts upheld those laws for decades. *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537, 544 (1896) ("Laws permitting, and even requiring, . . . separation [of the races] . . . have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which have been held to be a valid exercise of the legislative power even by courts of states [such as Massachusetts] where the political rights of the colored race have been longest and most earnestly enforced."). In common parlance, people spoke of differing facilities for different races as sufficiently equal.

Yet, Kavanaugh concluded that the Court correctly held that despite all these statutes and judicial decisions, the original public meaning of the equal protection clause included the concept that "[s]eparate but equal is not equal." *Bostock*, 140 S. Ct. at 1835 n.10 (Kavanaugh, J., dissenting). In assessing *Brown*, Kavanaugh in a properly originalist fashion, looks to the 1860s objective public meaning of "equal protection of the laws" untainted by then prevalent subjective values and prejudices that likely would have led reasonable people at that time to expect that separate but equal facilities could be consistent with the text. In doing so, he properly ignores the wealth of post-enactment evidence indicating that most people in the 1860s likely thought that separate could very well be equal. Yet, when the question is what *discriminate because of sex* means, similar post-enactment evidence, for Kavanaugh, becomes determinative. He never explains how the post-enactment evidence differed in the two cases.

260. One might argue that my views are colored by the time in which I live and do not reflect the way people would have spoken in the early 1960s. But neither of the dissenters claimed that anything had changed between 1964 and now with respect to how we speak or categorize these various types of discrimination. *See Bostock*, 140 S. Ct. at 1758 (Alito, J., dissenting); *id.* at 1828, 1835 n.10 (Kavanaugh, J., dissenting).

261. *See id.* at 1749-51 (majority opinion).

nothing in the text reflected that prejudice. The text excluded many things from the act's scope, but nothing related to these groups.[262]

In 1964 (and certainly when Congress amended Title VII), not everyone felt this prejudice. Millions of gay and transgender individuals, and the people who knew and loved them, surely didn't. Using conventional categorization, this prejudice thus rested on a subjective value, not an objective fact. To rely on such an extratextual subjective expectation about how Title VII should apply would, from an originalist perspective, wrongly elevate anticipated applications to the status of binding law. From an originalist perspective, the *Bostock* majority got it right.

But from an originalist perspective, the Court got it wrong, too. Ignoring the way most people at the time would have understood the text in favor of an interpretation that *just so happened* to line up precisely with the Justices' own modern values is not just bad originalism, but anti-originalism.[263]

The dissenting Justices, though, were also right and wrong. They restrained themselves from imposing their own values only by flouting the centrality of intersubjective semantic meaning and improperly elevating extratextual, contested, subjective prejudices to the status of binding law.

Originalism/textualism produces these conflicting outcomes because it rests on a false dichotomy between facts and values. The method assumes that thought divides into distinct categories: (1) objectively verifiable facts that determine intersubjective semantic meaning, and (2) entirely subjective values that constitute individuating expectations. Objective facts establish the semantic meaning of a statute's text and fix that meaning for future interpreters. Subjective values enhance the understanding of the text for each individual, but that subjective meaning is applicative, not semantic, and is not fixed.

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262. For example, Title VII recognizes exemptions for: (1) employment outside the United States and for religious groups, 42 U.S.C. § 2000e–1(a); (2) where bona fide occupational qualifications require an employee to be of a particular sex or religion, § 2000e–2(e); (3) where national security interests required as such, § 2000e–2(g); and (4) giving preference to Native Americans near reservations, § 2000e–2(i).

263. McGinnis & Rappaport, *supra* note 60, at 381 ("[I]t is a little difficult to see what is left of a recognizable originalism . . . if social movements have such substantial discretion to apply constitutional provisions as they see fit. To put the point differently, why would one adopt a fixed constitution if it can be changed so easily by social movements?").

Yet, we inherently recognize that what we take to be facts are not always provable with certainty by external referents.[264] And what we understand as values are not wholly subjective; often we can determine whether a value is right or wrong with a high degree of consensus. This inherent understanding of the relative objectivity of some values seems to be the point driving the dissenters and the originalist commentators who have objected to the *Bostock* decision. For them, the prejudice of the early 1960s feels as objective to the mid-1960s populace as any other component of the meaning of *discrimination because of sex*. To ignore it as a mere subjective expectation wrongly opens the interpretive window to modern learning.

If fact and value exist on a continuum, we may need to think about originalism in a different way to overcome the conflict that *Bostock* revealed. The following Subparts expand on the fact-value dichotomy and examine two originalist approaches for avoiding the conflict between meaning and expectations by abandoning the false dichotomy.[265]

The first Subpart expands on Kavanaugh's use of linguistic categories as a substitute for direct access to an intersubjective original understanding. If the focus on the way people talk can provide a sufficiently definitive basis for creating binding law, originalism could comfortably find that Title VII did not prohibit sexual orientation or gender identity discrimination despite the subjective nature of the prejudice driving the prevailing view. This approach ultimately fails because the way we talk is not a sufficient ground to bind future generations to what amounts to unwritten law.[266]

The second Subpart draws upon examples that originalist scholars have used to empower an interpreting court to reject beliefs that the public firmly held at the time a law was enacted if those beliefs rested on a mistake of objective fact. These scholars reject the notion that interpreting courts could use changes in values similarly to open the interpretive window. But if the line between facts and values is actually a hazy one, that distinction needs to be reexamined.[267]

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264. *See* Mark Kelman, *The Necessary Myth of Objective Causation Judgments in Liberal Political Theory*, 63 CHI.-KENT L. REV. 579, 620, 628-29, 631, 636 (1987) (arguing that causation decisions cannot be made objectively, and that ultimately subjective judgment is required).

265. *See infra* Part IV.A–C.

266. *See infra* Part IV.B.

267. *See infra* note 307 and accompanying text.

A. Originalism and the Fact-Value Dichotomy

Originalism rests on the belief that the way we think can be broken down into separate realms of (1) intersubjective facts that one can prove true with reference to an objective real world, and (2) individuating values that are entirely subjective with no referent outside the individual who holds them.[268]

Originalism claims to provide a method to interpret meaning without looking to subjective values.[269] Public meaning is a fact. It can be discovered with reference to information that all reasonable people would agree is true based on an objective referent. Lexicographers draft dictionary definitions with reference to how words are used, not by what they think a word should mean.[270] The process is intersubjective and thus the optimal source of evidence about meaning for the originalist.

Expectations about how a statute will apply, by contrast, are subjective beliefs that differ from person to person. Though it is possible that most or even all reasonable people will hold the same value with respect to a particular law, no neutral referent can confirm its validity. Each person must choose to have a value, or not.

A legislature can effectively convert a value into a fact by explicitly recognizing it in a statute's text.[271] Whether contract workers and employees should receive the same level of benefits turns on a subjective value. A statute that requires an employer to provide equal benefits to both groups turns that social value into a legal fact that all reasonable readers will understand, even if they don't agree with it. But if the legislature leaves the text vague, no individual or group of individuals' values can definitively fix the meaning of the vague term. Only the legislature has that power.

A statute that reads, for example, "education systems with single sex schools must have the same financial resources devoted to teacher salaries in male and female schools" converts a value relating salary to instructional quality into a semantic fact. But a statute that reads, "educational systems with single sex schools must appropriate resources in a fair way between male and female schools," does not have a fixed meaning for fluent English speakers that teacher salaries must be the

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268. Whittington, *supra* note 11, at 600-03, 609.

269. Colby & Smith, *supra* note 11, at 294-95.

270. *See* Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 FORDHAM L. REV. 721, 741-42 (2013).

271. *See* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 107-08 (2001) ("If a majority in Congress prefers to pursue precise legislative policies, it can enact detailed and specific statutes, increasing its ability to control discretion in the application of its commands . . . .").

same, even if most people at the time the legislature enacted the statute believed that fairness required an equal distribution of teacher-wage resources. The legislature could have, but did not, choose words to convey a clear message about salaries. Since it did not, no one's subjective beliefs about the appropriate distribution of wage resources can lock in the statute's meaning.

If this fact-value dichotomy is false, and value-free historical facts do not exist—or are insufficiently robust to support coherent meaning—then the semantic meaning in the context that originalists seek becomes allusive. One could not understand the meaning without taking account of the values motivating the use of the language in a particular way. Semantic meaning would lose its contextual grounding and become a matter of convention about how words are used.[272] It could tell us only the meaning of words disassociated from *how the legislature intended them*. That type of meaning could not answer real interpretive questions.[273] It would leave out the critical step—*and here's how members of the public at the time the statute was enacted understood the manner in which those words would be used to respond to the particular problem we now face*.

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272. This limited version of semantic meaning outside the fact-value dichotomy may have been what Whittington had in mind when he referred to "semantic originalism" as an "oxymoron." WHITTINGTON, *supra* note 48, at 287 n.75; *id.* at 185 ("Yet semantics is ultimately of limited use in interpreting specific texts. The role of semantics is to analyze the nature of language in the abstract; however, actual communication occurs not at the level of abstract language but at the level of specific, intended utterances. In the latter case, the question of whether a term is meant to be used in accord with its conventional sense is a specific one and turns on the intentions of the speaker.").

A truly intersubjective semantic meaning would not be enough to meaningfully guide future decisions. *See* Steven Mailloux, *Interpretation*, *in* CRITICAL TERMS FOR LITERARY STUDY 121, 133-34 (Frank Lentricchia & Thomas McLaughlin eds., 2d ed. 1995) ("Interpretive theories are not foundational but rhetorical, establishing no permanent grounding or guiding principles guaranteeing correct interpretation but certainly providing much rhetorical substance for interpretive debate. . . . We are always arguing at particular moments in specific places to certain audiences. Our beliefs and commitments are no less real because they are historical, and the same holds for our interpretations. If no foundationalist theory will resolve disagreements over poems or treaties, we must always argue our cases. In fact, that is all we can ever do."). The interpreter perceives guidance from that meaning only because bound up with it are unperceived value-laden assumptions and suppositions about how meaning applies to particular problems. To say the focus must be on semantic and not applicative meaning is either: (1) to say nothing—because the meaning we find can't answer any real questions—or (2) to read tacitly a possible applicative meaning into the semantic meaning.

If the goal is to identify a fixed core of statutory meaning that would have been understood by the citizens at the time and can guide future interpreters, an explicit focus on value-laden action is more likely to produce an interpretation free of modern values than a pure semantic originalism driven by tacitly assumed hidden values.

273. In Saul Cornell's words, "[t]o analyze Gricean sentence meaning historically one would need to look at how patterns of *usage* correlated with patterns of *intentionality* at a given historical moment." Cornell, *supra* note 270, at 734.

An originalist method would remain possible without a strict fact-value dichotomy. To re-ground semantic meaning, though, the method would have to acknowledge that values are not entirely subjective. They can be uncovered—meaningfully debated leading to a decision about their rightness—just as facts can. Assuming that a coherent, value-free semantic meaning does not exist, an originalist must seek to uncover the value structure from which the law arose by examining the statute's text in light of those values.

Since values are on the table, modern values may threaten to infect the analysis. But if the fact-value dichotomy is false, that risk cannot be completely avoided. And by revealing the necessity of considering both fact and value, we may increase the likelihood that courts will reveal the better angels of their nature as they interpret statutes according to an original public meaning that is not entirely intersubjective.

B. Linguistic Categories as Intersubjective Meaning

Justice Kavanaugh sought to shift the originalist focus away from inherently subjective beliefs people had about sexual orientation to the way people talked about it.[274] Whether he saw it in these terms, his interpretive move can be understood as an effort to enable originalism to come to grips with our inherent understanding that values can be objective. This Subpart flushes out this take on his analysis.

The way people talk is different from the way they think. The early complaints that the majority cited revealed that some people in the mid-1960s believed that *sex discrimination* included *sexual orientation* discrimination.[275] Those conflicting opinions could not be proven definitively right or wrong. Kavanaugh's interpretive move shifts the point of focus away from these contested beliefs about what Title VII meant to our objective understandings of how we talk about those contested beliefs.

Linguistic categories form, Kavanaugh recognized, and any fluent speaker of the language will understand them.[276] It does not matter what particular individuals believe. They understand the categories necessary to communicate and that can be objectively confirmed. Just as a statute's text may convey an intersubjective meaning even though it incorporates values that not everyone agrees with, everyone does not need to agree with our linguistic categories in order to understand them. If people

274. *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1825, 1828 (2020) (Kavanaugh, J., dissenting).

275. *See id.* at 1750-51 (majority opinion).

276. *See id.* at 1833 (Kavanaugh, J., dissenting).

actually employ two distinct categories when talking about sex discrimination and sexual orientation discrimination, Kavanaugh argues, a sufficiently intersubjective meaning of the text of Title VII would justify excluding sexual orientation discrimination.[277] This move would make values more like facts, preserving the originalist justification for establishing binding law despite reliance on a value not directly fixed by the text.

For this distinction to work within the originalist method, the process of forming the linguistic categories would have to be intersubjective, at least to the extent that a lexicographer intersubjectively writes the dictionary. Almost surely, though, linguistic categories cannot meet this standard. To speak a language is to classify. Although the existence of categories is a discoverable fact about how a language is spoken, nothing inherently objective dictates how the categories form. The lines between categories are functional. They facilitate communication, enabling us to understand one another. But they are not dictated by natural qualities of the outside world.

Reasonable people can thus disagree about where the lines between linguistic categories should be drawn. They are thus often, if not always, a product of our values, desires, and prejudices, rather than part of the objective semantic meaning of the words we use. All categories that a language uses to describe reality are thus purposive, what Mark Kelman describes as "creatures of our own interests in naming."[278]

Words like ball or block have real-world referents that enable their meanings to be intersubjective. But categorizing people into different races, for example, does not have a value-free referent. People know the categories, but whether the distinction between them is *true* remains subjective. Is knowing enough when a statute's text includes controversial material? Or does there have to be some level of consensus that the categories reflect the right meaning before we can rely on them to establish binding law?

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277. *Id.* at 1827-30.

278. KELMAN, *supra* note 87, at 64; ROBERTO MANGABEIRA UNGER, KNOWLEDGE & POLITICS 32-33 (1975) ("[A] fact becomes what it is for us because of the way we categorize it."). If things in the world have intelligible essences that individuals may comprehend separate from language, objective agreement may be possible. But the possibility of intelligible essences has been largely rejected in modern philosophy. *See, e.g.*, THOMAS HOBBES, LEVIATHAN 463-65 (J. C. A. Gaskin ed., Oxford Univ. Press 1998) (1651); 2 JOHN STUART MILL, A SYSTEM OF LOGIC: RATIOCINATIVE AND INDUCTIVE 123-27 (9th ed. 1875); 3 DAVID HUME, A TREATISE OF HUMAN NATURE 293-306 (L. A. Selby-Bigge ed., Oxford Univ. Press 1951) (1888). And even if some intelligible essences exist, a theory like originalism that rests on language as a means to avoid the problem of subjective values could not directly access an objective essence.

In *Bostock*, the prejudices against homosexual and transgender persons that dominated the public view in 1964 and long afterward played a central role in creating the separate linguistic concepts that the dissenters describe.[279] Given that we now know that sexual orientation and gender identity are not legitimate bases on which to discriminate in employment,[280] the development of these distinct linguistic categories merely confirms the role of then-dominant prejudices in creating them.

People will talk about something that is abhorred differently than they will talk about something more acceptable, and they may continue to use that distinguishing language even after the once abhorred practice has become more widely accepted.

By 1964, the idea of equality in the workplace between men and women was contested, but not an abhorrent concept. It certainly wasn't always that way. For a half century after the ratification of the Constitution, a woman could not hold a job that required a license or a college degree.[281] In the 1870s, the Supreme Court upheld a state's decision to prohibit women from practicing law.[282] And into the 1960s, many of the nation's leading colleges did not admit females.[283]

Language reflected these practices. People would say *female professor* but not *female pre-school teacher*, for example. But many women surely did not view themselves through the categorical lens that common parlance gave us. Yet, our laws suggested women were a certain way, and our language followed suit.

And even now, though women are on equal footing legally, we often speak of them in ways that recur to the old categories. I know multiple couples whose parents, upon learning that the wife planned to keep her last name, asked whether that was legal. Recently, someone

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279. *Bostock*, 140 S. Ct. at 1755, 1769-71 (Alito, J., dissenting) ("[T]he concept of discrimination because of 'sex' is different from discrimination because of 'sexual orientation' or 'gender identity.'"); *id.* at 1833 (Kavanaugh, J., dissenting) ("[A]ll of the usual indicators of ordinary meaning . . . overwhelmingly establish that sexual orientation discrimination is distinct from, and not a form of, sex discrimination.").

280. *See id.* at 1741 (majority opinion) ("An individual's homosexuality or transgender status is not relevant to employment decisions."); *see also id.* at 1769-71 (Alito, J., dissenting) (agreeing with the majority); *id.* at 1823 (Kavanaugh, J., dissenting) (agreeing with the majority).

281. Marylynn Salmon, *The Legal Status of Women, 1776-1830*, GILDER LEHRMAN, https://ap.gilderlehrman.org/essay/legal-status-women-1776â€"1830 (last visited Feb. 8, 2021).

282. Bradwell v. State, 83 U.S. 130, 137-39 (1872) (holding that no provision of the federal Constitution prohibited a state from refusing to allow women to practice law); *id.* at 141 (Bradley, J., concurring) ("The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.").

283. Scott Jaschik, '*Keep the Damned Women Out*,' INSIDE HIGHER ED (Sept. 30, 2016), https://www.insidehighered.com/news/2016/09/30/author-discusses-new-history-struggle-elite-universities-admit-women.

told me that they had a "male nurse" when they were in the hospital.[284] When a woman achieves a certain goal, we still sometimes reflexively speak of it as if her biological sex were somehow noteworthy. There remains a sense in the way we talk that still reflects that women are categorically different from men in their ability to hold public office, for example, even though we know that they are not.

Homosexual and transgender persons experienced a similar trajectory. In 1964, few would have imagined a law protecting members of these groups in the workplace, just as 150 years before, few would have imagined such a law for women. But many homosexual and transgender persons, and those who knew and loved them, likely had entirely different views about whether the text of Title VII applied to protect them from workplace discrimination.

As of 2021, homosexual and transgender persons have made substantial gains just as cis women did before them.[285] But as with women, the way we talk changes more slowly than the way we think. It is common for people who are part of once disfavored groups to say that even though they now have equal rights, they long for the day when their status is accepted to the extent that no one thinks about it. Values change slowly; linguistic categories change slower still. Neither can be used to convert a vague statutory text into legitimate binding law consistent with the principles that justify the originalist/textualist method.

A legislature has the authority to make a contested value fixed binding law even if not everyone agrees with that decision. But a court does *not* have the authority to turn linguistic patterns that originally flowed from anachronistic laws into continuing sources of binding law.

C. Treating Values More Like Facts

Originalists acknowledge that an interpretive court may correct mistakes of objective fact without undermining the originalist/textualist method.[286] Where only values change, however, these originalists insist that the interpreting court must retain the original meaning even if modern values are undeniably different.[287] The interpretive window may open to correct factual mistakes, but not to implement evolving values.

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284. *See, e.g.*, Niall O'Donnell, *What's the Word for a Male Nurse?*, ENGLISH-LANGUAGE THOUGHTS (Nov. 9, 2017), https://englishlanguagethoughts.com/2017/11/09/whats-the-word-for-a-male-nurse.

285. *Bostock*, 140 S. Ct. at 1737.

286. *See* Berman, *supra* note 74, at 385.

287. *See* Colby & Smith, *supra* note 11, at 248-49, 264; *see also* McGinnis & Rappaport, *supra* note 49, at 389-90.

To illustrate, Solum posits hypothetical punishment X that was not thought to be cruel when the Eighth Amendment was ratified.[288] At that time, people mistakenly believed that punishment X was painless.[289] At a later time, we learned that punishment X inflicts "horrendous pain."[290] Solum contends that in this situation "the applicative meaning of cruel could change while the linguistic meaning remained the same."[291]

But the result would be different if a value had changed rather than a fact. Now, assume that punishment X was indeed painless for the recipient, but the manner in which the punishment was inflicted brought great shame on the victim's family. When the clause was enacted, the prevailing view found such shaming appropriate. But modern values recognize that shaming a criminal's family for the criminal's acts inappropriately punishes innocent people.[292] Because this hypothetical reflects a change in values about correct policy, rather than an objective fact, an interpreting court could *not* hold consistently with the originalist method that punishment X is cruel.

McGinnis and Rappaport offer a similar example.[293] They posit a hypothetical in which miners discover mineral deposits that, during the founding era, everyone believed to be gold.[294] Pursuant to the Constitution, a state makes coins from this mineral.[295] Later scientific learning reveals that these deposits looked like gold, but had certain qualities making them less valuable. The authors recognize that originalism would permit an interpreting court in a case challenging the use of this mineral for coins to recognize that the substance was not in fact gold, even though a reasonable reader of the Constitution during the founding era would have thought that it was.[296]

The authors stress, however, that the result would be different if values about appropriate coinage policy had changed.[297] In the false-gold hypothetical, they point out, an interpreter would recognize "as a factual matter" that people who thought the mineral was gold must have "been mistaken."[298] McGinnis and Rappaport contrast this sort of mistake with

288. Solum, *supra* note 11, at 65-66, 85.
289. *Id.* at 65-66.
290. *Id.* at 66.
291. *Id.*
292. *See* Robinson v. California, 370 U.S. 660, 666 (1962) (punishing an individual for a status over which the individual has no control would violate the Eighth and Fourteenth Amendments).
293. McGinnis & Rappaport, *supra* note 60, at 380.
294. *Id.*
295. *Id.*
296. *Id.*
297. *Id.*
298. *Id.*

"a legal provision purport[ing] to incorporate moral or policy beliefs."[299] These types of beliefs are not factual, and thus if understandings about how they should apply change from the time that they are adopted to the time they are interpreted, "it is more likely that later interpreters are mistaken about the content of the provision that was adopted than that interpreters at the time were mistaken about the meaning of the provisions they wrote."[300]

To illustrate this distinction, assume that at some point after the founding era, the public came to believe that because gold and silver were used to make jewelry, they should *not* be used for coinage. The new prevailing view held that equally valuable elements with more industrial uses were more appropriate for financial exchanges than gold or silver. Because this change is one of policy and the values that underlie it, rather than fact, a court could not interpret the constitutional language to permit the use of other equally valuable minerals for coinage.[301]

Putting these examples in the context of Title VII, a reasonable reader would have understood the text to prohibit all sex-based *discrimination*. But adverse workplace decisions against homosexual and transgender persons, under the then-prevailing view, were not *discrimination*. Just as the public believed punishment X was painless and the false-gold deposits were actually gold, in 1964 the public believed that homosexual and transgender individuals were, in a sense, unqualified. According to medical literature, they suffered from a mental disorder and practices commonly associated with them were often punishable as felonies.[302] Just as a physically disabled woman, or one actively engaged in criminal activity, would be unqualified to perform certain jobs, homosexual and transgender persons, under the 1964 prevailing view, were unqualified.

Just as we learned that punishment X caused horrendous pain and false gold was not gold, we now know that homosexual and transgender people do not suffer from a mental disorder, nor do they regularly

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299. *Id.*

300. *Id.*

301. Scalia made this point explicitly, arguing that the Eighth Amendment does not abstract "a moral principle of 'cruelty' that philosophers can play with in the future, but rather the existing society's assessment of what is cruel." Balkin, *supra* note 38, at 295-96. Originalists often insist that meaning includes the particular conceptions people had at the time of enactment. *See id.*; McGinnis & Rappaport, *supra* note 60, at 378-79; Solum, *supra* note 11, at 20; WHITTINGTON, *supra* note 48, at 184-85.

302. Sarah Carr & Helen Spandler, *Hidden from History? A Brief Modern History of the Psychiatric "Treatment" of Lesbian and Bisexual Women in England*, LANCET (Feb. 11, 2019), https://www.thelancet.com/action/showPdf?pii=S2215-0366%2819%2930059-8.

commit crimes. An individual's status as a member of these groups does not disqualify them from any employment opportunity. Adverse workplace decisions based on sexual orientation or gender identity thus *do* constitute discrimination, and that discrimination turns on the sex of the individual. Identifying as a man and being sexually attracted to women is only a problem for female employees.

If our modern understanding of sexual orientation and gender identity evolved in a way that was similar to a society's learning that a particular punishment once thought to be painless is actually horrendously painful—or that a substance once thought to be gold was not—originalism would permit an interpreter to take account of the change. But if our modern understanding of sexual orientation and gender identity arose from a change in values, then, according to the originalist scholars, an interpreting court must keep the interpretive window closed.

Given that the consensus among initially commentating originalists seems to be that the *Bostock* majority was wrong, they presumably see the change as one of value, not objective fact.[303] But fact-value dichotomy is not robust enough to support that position.

All punishment incorporates some type of pain, physical or mental. And all metals have some level of value. Whether a punishment falls into the category of *acceptable punishments*, or false gold has *in*sufficient value to be used as coinage, are not value-free decisions. What we mean by *an acceptable level of pain* or *a sufficient monetary value* is thus not separable from the values we hold. The two are bound up together. We simply cannot know as a matter of indisputable, intersubjective, historical fact the level of pain equating to cruelty or the value metal must have to be acceptable for coinage (or to constitute gold given a similar appearance).

Critically, though, we can know more about shared values than the traditional fact-value dichotomy suggests. Solum, McGinnis, and Rappaport tacitly recognize this in their hypotheticals.[304] Despite the value-laden nature of the questions, we are not hopelessly ignorant about how much pain constitutes an unconstitutionally cruel punishment or how much value is sufficient for a metal to be used for coinage. Although some sadists might not agree that horrendous pain would be unconstitutionally cruel, Solum concludes—and I agree—that American society would share the value that any punishment falling into the

303. *See* Blackman, *supra* note 6.
304. *See supra* notes 288-300 and accompanying text.

category we have named *horrendous* would be unconstitutional.[305] Similarly, a broad consensus may be available to conclude that a mineral that looked like gold but had substantially less value, did not constitute *gold* for coinage purposes.

To frame these issues in a way that produced an objective answer with a definitive real-world referent, one would need to artificially narrow the question to the point that it does not include the information we need to interpret the law.[306] For example, one might argue that we can know objectively that a mineral is not gold because we could test it and determine its atomic weight. The answer to that question may be objective, albeit based on a fact unknown to the framers of the Constitution. But it does not capture the full range of information needed to determine whether the mineral should be used for money in the sense that the word "gold" was objectively intended by the framers. We need to consider contested matters—whether we call them facts or values—but we can nonetheless be quite confident in the result.

The label assigned to a change in prevailing views—mistake of fact or evolving value—is thus itself a subjective decision. The proper question is *whether the change is sufficiently definitive that interpreting courts can recognize and adopt it with the sort of intersubjective quality that we normally associate with semantic meaning*.[307] To be sure, in some cases where societal values change, the definitiveness standard would not be met. In such cases, original values—not modern ones—should guide interpretation. But when values do evolve in a definitive way, an interpreting court should recognize it without the distorting lens of an artificial fact-value label. Adopting the label is really making the definitiveness decision without admitting it.

An alternative way to think about this issue can be derived from what Lawrence Lessig called two-step originalism.[308] He pointed out that a law's meaning is necessarily bound up with a set of presuppositions.[309] Within the philosophy of language, Gerald Graff makes a similar point.[310] He explained that *knowing* a language means

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305. *See* Solum, *supra* note 11, at 65-66.

306. ESKRIDGE, *supra* note 125, at 83 ("Text-based interpretation is not a mechanical exercise that avoids value judgments.").

307. Koppelman, *supra* note 164, at 35-36 ("Sometimes prejudices are so deeply entrenched that an entire society is mistaken about what its law actually is.").

308. Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1183 (1993); LAWRENCE LESSIG, FIDELITY & CONSTRAINT: HOW THE SUPREME COURT HAS READ THE AMERICAN CONSTITUTION 63-64 (2019).

309. *Id.* at 1211-14.

310. *See* Gerald Graff, *Determinacy/Indeterminacy*, *in* CRITICAL TERMS FOR LITERARY STUDY 163, 164-67 (Frank Lentricchia & Thomas McLaughlin eds., 2d ed. 1995).

more than learning the semantic meaning of words and the structure of sentences: "[A] set of codes" exists separately from the words that enable speakers to make "inferences about . . . situations or contexts in which particular words and sentences tend to be used."[311] No one actually sits around and watches grass grow. But we understand what it means when someone says it. It is never really Christmas in July, but we have sufficient coding to make sense of what a speaker means when they use the phrase.

If we did not have these codes: "We would have no way of inferring any intention and thus no way of deciding what any utterance meant. Without the codes that enable us to determine the context, 'the words on the page' of a text would tell us nothing."[312] We possess the codes, in a sense, "unconsciously" and thus perceive that the words tell us more than they actually do.[313]

Recognizing the centrality of Graff's unconsciously internalized codes and Lessig's presuppositions does *not* undermine originalism/textualism. The method takes account of context, which can incorporate the codes and suppositions. The key point is that facts and values overlap. Context lying beneath the text is nonetheless broadly and intersubjectively held by reasonable readers. That was Kavanaugh's point about linguistic categories.

If we are going to recognize the intersubjectivity of context—and the codes and presuppositions that underlie it—we must also recognize that codes/suppositions can change intersubjectively between the enactment of a statute and when a court interprets it. We cannot dismiss these changes as mere policy disputes over subjective values. The correct question should be what the text *would have meant* to the contemporary readers if they had had access to the modern codes and presuppositions.

For example, the Eighth Amendment requires that fines, but not prison sentences, be proportionate.[314] The text could not be clearer, and contemporary readers would likely have understood it that way. But in the late eighteenth century, the penitentiary system did not exist.[315] The founding generation likely presupposed that the relevant penal options were fines and the death penalty. They did not have the linguistic codes we have today that compel us to consider whether a length of time in prison is appropriate for particular sets of crimes. That concept comes

311. *Id.* at 166.
312. *Id.*
313. *See id.* at 164-67.
314. U.S. CONST. amend. VIII.
315. *See* Lessig, *supra* note 308, at 1204.

into our minds without conscious effort because we are coded that way. The founding generation was not. For them, only fines could meaningfully be proportioned.[316]

But if in 1792 prison sentences were the standard form of punishment for serious crime, as they are now, a law requiring proportional fines would have required the same for prison sentences. If fines that do not deny an offender's liberty must meet this standard, then surely a denial of liberty would as well.

Unless an interpreter engages this second step in determining the original meaning, they are virtually certain to arrive at a meaning that reasonable contemporary readers would not have understood had they had modern codes and presuppositions.[317]

A similar analysis can be applied to Title VII. In 1964, homosexuality was believed to be a mental disorder and acts associated with it were crimes.[318] The codes and presuppositions prevailing in 1964 would lead a reasonable reader to understand that the phrase *discrimination because of sex* excluded adverse employment decisions based on sexual orientation. Not because they weren't sufficiently intertwined with sex, but because they weren't discrimination. In context, it would have been obvious that Congress would *not* prohibit an employer from refusing to hire someone with a mental disorder who was probably regularly committing a felony. Despite the vagueness of the concept of sex discrimination, in 1964 it would have made no sense to anticipate that Title VII would protect homosexual and transgender individuals from adverse workplace decisions based on their status as members of these groups.

When viewed in this light, the majority's decision in *Bostock* poses virtually no threat to the originalist tenet that changing values should not change meaning. Our society generally understands, in a way that the 1964 society could not, that homosexuality and transgenderism are part of the human condition. The Constitution prohibits criminalizing private conduct associated with homosexual people[319] and guarantees a right for

316. *See id.* at 1186.

317. *Id.* at 1264 ("For reasons tied to how meaning changes across contexts, one-step originalism as a practice must systematically defeat any ideal of fidelity. Blind to the effect of context on meaning, originalism allows context to change constitutional meaning."). But some originalist Justices have argued that prison sentences need not be proportionate because the text of the Constitution does not require it. *See* Harmelin v. Michigan, 501 U.S. 957, 965-67, 975 (1991) (applying originalist reasoning to conclude that the Constitution does not require proportionality in prison sentences); *accord* Ewing v. California, 538 U.S. 11, 31 (2003) (Scalia, J., concurring); *id.* at 32 (Thomas, J., concurring).

318. *See* d'Silva, *supra* note 152.

319. *See* Lawrence v. Texas, 539 U.S. 558, 562, 575, 578 (2003).

these people to marry someone of the same sex.[320] The medical community now recognizes that neither homosexuality nor transgenderism are disorders.[321] All nine Justices appeared to concur that employers have no legitimate basis to discriminate generally against gay or transgender persons.[322] And members of both groups have definitively demonstrated that they are productive members of society in every conceivable way.

Viewed in this light, clinging to the values that most members of the 1964 public held equates to continuing to treat false gold as if it were real. The originalist tenet that judges must not substitute modern values for original understanding rests on the notion that the changing whims of evolving social movements should gain legal status only through the democratic, as opposed to the judicial, process. But when values have changed as definitively as any mistaken fact, that justification for keeping the interpretive window closed evaporates.[323] The danger is no longer that an anti-democratic court system will illegitimately impose contested values, but that a dysfunctional or distracted legislature will ignore the call of truth. Originalist scholars acknowledge that a court may change a law's meaning because the original understanding was infected with a mistake of objective fact.[324] Values can change no less definitively. Refusing to recognize that would wrongly allow extratextual assumptions—and ones we know to be definitively wrong at that—to bind future generations.

V. CONCLUSION

Two principal tenets of originalism/textualism—that modern values may not supplant original meaning and that meaning is limited to the intersubjective original understanding of the text—appear to conflict. The scholarly originalist community's initial reaction to *Bostock* suggests that the fear of modern values gaining hold through anti-democratic means is the more important tenet. But given the dramatic and definitive change in the prevailing views on homosexuality

320. *See* Obergefell v. Hodges, 135 U.S. 2584, 2601-02 (2015).

321. *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1769 (2020) (Alito, J., dissenting) (citing medical literature indicating that in 1973 the medical community understood that homosexuality was not a mental disorder).

322. *See* note 280 and accompanying text.

323. *See id.* at 1836-37 (Kavanaugh, J., dissenting).

324. *See* Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 357 (7th Cir. 2017) (Posner, J., concurring) (explaining that what Title VII's drafters and the 1964 public "understandably didn't understand was how attitudes toward homosexual individuals would change in the following half century. . . . *We* understand the words of Title VII differently not because we're smarter . . . but because we live in a different era, a different culture.").

and gender identity between 1964 and today, the real threat appears to be that unwritten prejudices of the past would be permitted to override intersubjective meaning and illegitimately bind future generations.

Originalism must accept that values can be mistaken in the same way as facts. The interpretive window should open to correct mistaken values when they have changed in a way that is as definitive as what we normally think of as a mistake of objective fact.