ELECTION LAW — STATUTORY INTERPRETATION — SUPREME COURT OF TEXAS HOLDS THAT LACKING IMMUNITY TO COVID-19 IS NOT A DISABILITY THAT WOULD ALLOW VOTING BY MAIL. — *In re State*, 602 S.W.3d 549 (Tex. 2020).

The clash between textualist Justices in *Bostock v. Clayton County*[1] regarding the scope of Title VII's antidiscrimination protections was a particularly high-profile example of disagreements between textualists about the proper application of the theory to statutory interpretation.[2] However, *Bostock* was not the first case to grapple with competing forms of textualism: divergent theories *within* textualism on determining the meaning of statutory text have been developing for years.[3] Recently, in *In re State*,[4] the Supreme Court of Texas unanimously held that lacking immunity to COVID-19 is not a "disability" that renders voters eligible to vote by mail under section 82.002 of the Texas Election Code.[5] Despite the unanimous judgment, the textualist analyses applied by the various opinions reflect real disagreement about the kind of evidence that is relevant to proper statutory construction. In narrowly construing the statute, the majority applied a flexible textualism that prioritized the policy context of the statute, sacrificing the purported objectivity textualism has long claimed as a primary advantage over alternative theories of interpretation.

As COVID-19 spread across Texas in March 2020, raising questions about elections in July and November, the Texas Democratic Party filed lawsuits in state and federal court to expand access to mail-in ballots.[6] The Democratic Party argued, among other things, that a lack of immunity to COVID-19 qualifies under section 82.002 as a "disability," one of five conditions that make a Texas voter eligible for a mail-in ballot.[7]

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

[2] Tara Leigh Grove, *The Supreme Court, 2019 Term — Comment: Which Textualism?*, 134 HARV. L. REV. 265, 266–67 (2020) (comparing Justice Gorsuch's formalistic, semantic context–focused application of textualism to the dissents' applications of a more flexible, policy context–sensitive textualism).

[3] *See, e.g.*, Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 4–5 (2006) (drawing attention to the distinction between "moderate textualist[s], who merely accord[] textualist and purposivist tools different weight, [and] aggressive textualist[s], who tend[] to try to exclude statutory purposes from [their] inquiry").

[4] 602 S.W.3d 549 (Tex. 2020).

[5] *Id.* at 550 (citing TEX. ELEC. CODE ANN. § 82.002 (West 2020)); *see id.* at 562 (Guzman, J., concurring) (noting that judgment was "unanimous[]").

[6] The Texas Democrats were joined by intervenor-plaintiffs League of Women Voters of Texas, Move Texas Fund, and Workers Defense Action Fund in the state suit, Tex. Democratic Party v. Debeauvoir, No. D-1-GN-20-001610, slip op. at 2 (Tex. Dist. Ct. Apr. 17, 2020), but not in the federal case, Tex. Democratic Party v. Abbott, 461 F. Supp. 3d 406, 426 (W.D. Tex.), *vacated*, 978 F.3d 168 (5th Cir. 2020). Both suits also included individual voters as plaintiffs. *Id.*; *Debeauvoir*, slip op. at 2.

[7] *See* TEX. ELEC. CODE ANN. §§ 82.001–.007. The term "[d]isability" appears in the title of section 82.002 but not in the text of the statute itself. *See id.* § 82.002. The federal court litigation targeted the same election law but on different grounds. *See Abbott*, 461 F. Supp. 3d at 430–33.

In April, the Travis County District Court granted the Texas Democrats a temporary injunction in the state case, barring Travis County from rejecting mail-in ballot applications made because of COVID-19 and enjoining Texas from preventing voters from seeking such ballots.[8] Finding that "[t]he risk of transmission of COVID-19 during in-person voting is high,"[9] the court determined that a lack of immunity to COVID meets section 82.002's definition of disability by creating "a likelihood of injuring [the plaintiffs'] health" when showing up to the polls in person.[10]

Texas immediately appealed and released a letter arguing (1) that the injunction was stayed by virtue of the appeal and (2) that county clerks and third parties who continued to advise voters to apply on the basis of the COVID-disability theory could face criminal sanctions.[11] The Democratic Party responded with an emergency motion in the court of appeals, which reinstated the injunction.[12] Texas then petitioned the Texas Supreme Court for a writ of mandamus to compel the county clerks to stop promoting the COVID-disability theory, and the court agreed to take up the case due to the statewide importance of the matter for the upcoming elections.[13] It stayed the appellate court's order pending its ruling.[14]

The Supreme Court of Texas agreed with the State's interpretation of section 82.002 but declined to issue the writ of mandamus.[15] Writing for the majority, Chief Justice Hecht[16] held that "a voter's lack of immunity to COVID-19, without more, is not a 'disability' as defined by the Election Code," but that a writ of mandamus was not necessary because there was no reason to doubt that the clerks would "comply with the law in good faith."[17] The majority noted that under section 82.002, for something to be a "disability," it must satisfy two necessary statutory criteria: (1) it must be a "sickness or physical condition," and (2) it must "prevent[] the voter from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring the voter's health,"[18] where "'likelihood' means a probability."[19]

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[8] *Debeauvoir*, slip op. at 4–6.

[9] *Id.* at 3.

[10] *Id.* at 4.

[11] Letter from Ken Paxton, Tex. Att'y Gen., to Cnty. Judges & Cnty. Election Offs. 2 (May 1, 2020), https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2020/Press/Mail-in%20Ballot%20Guidance%20Letter_05012020.pdf [https://perma.cc/VQ9Q-5Z42].

[12] State v. Tex. Democratic Party, No. 14-20-00358-CV, 2020 WL 3022949, at *1 (Tex. App. May 14, 2020).

[13] *In re State*, 602 S.W.3d at 557.

[14] *Id.* at 552.

[15] *Id.* at 550.

[16] Justices Green, Guzman, Lehrmann, Devine, Blacklock, and Busby joined the opinion.

[17] *In re State*, 602 S.W.3d at 550.

[18] *Id.* at 557 (quoting TEX. ELEC. CODE ANN. § 82.002(a) (West 2020)).

[19] *Id.* at 560.

Because a lack of immunity to COVID-19 does not meet either condition, the majority held, it is not a "disability" for purposes of section 82.002.[20]

The majority searched for the Texas legislature's "historical and textual intent" through an analysis of section 82.002's meaning as expressed by the definitions of its terms and the statute's relationship to the history of Texas's absentee voting legislative scheme.[21] Tracing this history from its beginning in 1917 to the present, the majority concluded that the Texas legislature's primary intent has been "to limit mail-in voting," and that the statute must be read in that context.[22] Accordingly, although the dictionary definition of "physical condition" can broadly encompass any physical "state of being,"[23] the court rejected that understanding in favor of a more limited reading of "condition" that refers only to the indication of abnormality, "as for example a heart condition,"[24] in part because the court found that a broad definition would render the rest of the statute surplusage.[25] Because most people lack immunity to COVID-19, the court found that a lack of immunity "is not an abnormal or distinguishing condition" and therefore is not a physical condition within the meaning of section 82.002.[26]

The court continued with another historical analysis, noting that while section 82.002 provides two conditions for something to be a disability, those two conditions should be understood in line with previous versions of the statute because "'disability' . . . is the same word the Legislature has used consistently since 1935."[27] Although the term appears only in the heading of section 82.002, and despite section 311.024 of the Texas Government Code's statement that the "heading of a title, subtitle, chapter, subchapter, or section does not limit or expand the meaning of the statute,"[28] the majority ruled that the continuity of usage of the term "disability" should guide the statute's construction.[29] Because ordinarily the term "disability" means "incapacitated by or as if by illness, injury, or wounds," Chief Justice Hecht held lacking immunity to COVID-19 to be further precluded from being a physical condition.[30]

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[20] *Id.*

[21] *Id.* at 559; *see id.* at 559–60.

[22] *Id.* at 559.

[23] *Condition*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/condition [https://perma.cc/74T9-UA87].

[24] *In re State*, 602 S.W.3d at 560.

[25] *Id.* at 559.

[26] *Id.* at 560.

[27] *Id.*

[28] TEX. GOV'T CODE ANN. § 311.024 (Vernon, Westlaw through 2019 Reg. Sess.).

[29] *In re State*, 602 S.W.3d at 560 & n.58.

[30] *Id.* The court dealt much more swiftly with the "likelihood of needing personal assistance or of injuring the voter's health" requirement, TEX. ELEC. CODE ANN. § 82.002 (West 2020), finding simply

Justice Boyd issued an opinion concurring in the judgment. Analyzing the terms "physical condition" and "likelihood" within the context of section 82.002 as it currently exists, Justice Boyd concluded that lacking immunity to COVID-19 is a physical condition because it is "a bodily state that limits, restricts, or reduces [a] person's physical abilities."[31] But he agreed that "'likelihood' refers to a 'probability,' as opposed to a mere 'possibility.'"[32] Thus, Justice Boyd agreed with the majority that lacking immunity is not automatically a "disability," but disagreed with the holding that it can *never* be a disability, because the "likelihood" component of section 82.002 may be satisfied for some voters, since the likelihood of any particular voter contracting COVID-19 at the polls turns on site-specific factors, such as "the adequacy of safety and sanitation measures implemented at and near the polling place."[33]

Justice Bland also concurred in the judgment. In contrast to the majority and Justice Boyd, Justice Bland noted that the nearly hundred-year history of voting by mail in Texas, coupled with subsection 82.002(b)'s inclusion of expected childbirth as a "disability,"[34] shows that the legislature meant for "physical condition" to be construed broadly as "a person's or animal's state of health or physical fitness."[35] Justice Bland also rejected the idea that use of the term "disability" in the heading of section 82.002 could alter the meaning of the statute's text.[36] However, like Justice Boyd, Justice Bland noted that for any particular voter, the court "cannot predict . . . whether the likelihood of contracting COVID-19 is probable," or if contracting the virus would harm the voter's health, given that so many individualized, unknown factors determine both of those probabilities.[37]

In its analysis of the term "physical condition," the *In re State* majority applied a flexible textualism that prioritized the policy context of the statute over the semantic context of the statute's words. This kind of flexible textualism cannot be defended on the same grounds that formalistic textualism often is[38] because identifying a policy context involves the same subjectivity problems that purposivism

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that "'likelihood' means a probability" and that, in general, the chances of catching COVID-19 at a polling place implementing appropriate public health precautions are low. *In re State*, 602 S.W.3d at 560.

[31] *In re State*, 602 S.W.3d at 565 (Boyd, J., concurring in the judgment).

[32] *Id.* at 566 (citing JBS Carriers, Inc. v. Washington, 564 S.W.3d 830, 836 (Tex. 2018)).

[33] *Id.* at 567; *see id.* at 566–67.

[34] *See id.* at 568–70 (Bland, J., concurring in the judgment).

[35] *Id.* at 570 (quoting *Condition*, NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010)).

[36] *Id.* at 570 n.18 (citing TEX. GOV'T CODE ANN. § 311.024 (Vernon, Westlaw through 2019 Reg. Sess.); Abutahoun v. Dow Chem. Co., 463 S.W.3d 42, 47 n.4 (Tex. 2015)).

[37] *Id.* at 571–72. Justice Guzman filed a brief concurrence that emphasized this point. *Id.* at 562–63 (Guzman, J., concurring). Joined by Justices Lehrmann and Busby, she noted that all nine justices agreed COVID-19 did not create universal voting by mail in Texas, whether lacking immunity to the virus is a "physical condition" or not. *Id.*

[38] *See* Grove, *supra* note 2, at 296.

faces.[39] Thus, the high court's narrow reading of "physical condition" opens the court to the charge that it failed to apply the law as written.

While all textualists begin their interpretation with the words of a statute,[40] textualism is not a unified theory: different kinds of textualists appeal to distinct extratextual sources to create clarity when the words are vague or ambiguous.[41] These competing approaches exist along a spectrum ranging from more "formalistic" emphases of the semantic context of a statute's language to more "flexible" prioritizations of the policy context of the statute as a whole.[42] The semantic context of a statute is purely linguistic: it asks how "a skilled, objectively reasonable user of words"[43] would understand the text of a statute based on its grammar, the definitions of the words as they are combined, meanings of terms of art used, and colloquial nuances.[44] The policy context of a statute, by contrast, includes "the mischief the lawmakers sought to address;" the purpose as "reflected in the statute's preamble, title, or overall structure;" and "the policy expressed in similar statutes."[45]

The Texas Supreme Court experienced an "interpretive dissonance"[46] between its first-blush reading of the words "physical condition" and its expectations about what the Texas legislature was likely to have intended, given the history of Texas's elections statutes.[47] The primary definitions offered by *Merriam-Webster* for "physical" and "condition" are quite broad: put together, they would encompass any "state of being"[48] that is "of or relating to the body."[49] Such a reading would certainly cover a lack of immunity to COVID-19 because unlike a mental condition such as fear of catching the virus, lacking immunity is a *bodily* state caused by the lack of particular viral antibodies.[50] As Justice Scalia once noted for a unanimous Supreme Court, the fact that

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[39] *See id.*; *see also* 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: FEDERAL COURTS AND THE LAW 3, 17–18 (Amy Gutmann ed., 1997).

[40] *See* John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 439–40 (2005).

[41] *See* Grove, *supra* note 2, at 274; Molot, *supra* note 3, at 44–48.

[42] Grove, *supra* note 2, at 267.

[43] John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 91 (2006) (quoting Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988)).

[44] *See id.* at 92.

[45] *Id.* at 93.

[46] Richard H. Fallon, Jr., *Three Symmetries Between Textualist and Purposivist Theories of Statutory Interpretation — And the Irreducible Roles of Values and Judgment Within Both*, 99 CORNELL L. REV. 685, 688 (2014).

[47] *See In re State*, 602 S.W.3d at 559.

[48] *Id.* (quoting *Condition*, *supra* note 23).

[49] *Id.* (quoting *Physical*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/physical [https://perma.cc/4AG9-Y5CM]).

[50] *See* Arnaud Fontanet & Simon Cauchemez, Comment, *COVID-19 Herd Immunity: Where Are We?*, 20 NATURE REVS. IMMUNOLOGY 583, 583 (2020).

legislatures cannot always expressly anticipate the consequences of this kind of semantic review "does not demonstrate ambiguity. It demonstrates breadth."[51] However, dissonance is to be expected when what the words of a statute "would seem to require" leads to large real-world changes that may diverge from "what well-written legislation . . . would likely direct," given what a judge knows about the legislature.[52] In *In re State*, the potential breadth of the statute's text likely struck the court as inconsistent with the legislature's history of "deliberately limit[ing] voting by mail."[53]

The *In re State* majority attempted to resolve this dissonance in favor of a more limited reading of "physical condition" by appealing to semantic context, but this analysis was not fully persuasive. Semantic context is not simply revealed by the dictionary definitions of statutory terms in isolation; the words of a statute must be read as they appear together in order for their pragmatic meaning to become clear.[54] As such, the Texas Supreme Court looked at whether a broad reading of "physical condition" would turn the other Election Code categories into surplusage.[55] The court held that since the other eligibility criteria for voting by mail, such as being out of state, being above the age of sixty-five, or being incarcerated, are all states of being that relate to one's body, they would all be "physical conditions" under the broad reading, which would indeed make them surplusage.[56]

As Justice Boyd noted in concurrence, however, this semantic analysis was not conclusive because the existence of a physical condition does not, alone, allow someone to vote by mail under section 82.002.[57] That condition must also be one that "prevents the voter from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring the voter's health."[58] It is this second element that prevents the other sections of the Election Code from becoming redundant in a semantic analysis, because not everyone who is out of state or over sixty-five risks injury or requires personal assistance to get to the polls.[59] Likewise, incarcerated Texans are not prevented

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[51] Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 212 (1998) (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985)).

[52] Fallon, *supra* note 46, at 689; *cf.* Bostock v. Clayton County, 140 S. Ct. 1731, 1757 (2020) (Alito, J., dissenting) ("[T]here is not a shred of evidence that any Member of Congress interpreted the statutory text [to ban sexual orientation discrimination] when Title VII was enacted.").

[53] *In re State*, 602 S.W.3d at 559.

[54] *See* Scalia, *supra* note 39, at 26 ("[I]f someone speaks of using 'tacks, staples, screws, nails, rivets, and other things,' the general term 'other things' surely refers to other fasteners.").

[55] *In re State*, 602 S.W.3d at 559.

[56] *Id.*

[57] *Id.* at 565–66 (Boyd, J., concurring in the judgment).

[58] TEX. ELEC. CODE ANN. § 82.002(a) (West 2020).

[59] As such, they would still require sections 82.001 and 82.003, respectively, to vote by mail. *See id.* §§ 82.001(a), .003.

from arriving at the polls by a risk to their health or need of personal assistance, but rather by a legal restriction on their ability to travel.[60]

Rather than relying solely on this semantic context analysis, however, the Texas Supreme Court looked for the policy context of the statute as revealed by the history of Texas voting law. The legislature has always restricted voting by mail to Texans who fall "in specific, defined categories,"[61] and has never allowed for universal voting by mail, even as it has experimented with expanding and shrinking the categories that allow for absentee voting.[62] In addition, previous, now-repealed versions of the election statute used the narrower phrase "physical disability" instead of "physical condition."[63] Looking at this evidence of policy context, the Texas Supreme Court identified a legislative intent to "limit mail-in voting" that should inform its reading of "physical condition."[64]

A broad reading of "condition" would not only expand voting by mail to nearly all Texas voters during the COVID-19 pandemic but also potentially have other practical ramifications. The court noted, for example, that a broad reading of the phrase could encompass being too tired to drive to the polls, which would be another large expansion of access to voting by mail beyond historical limitations.[65] For this reason, the Texas Supreme Court used its identified policy context to limit the definition of "physical condition" to an "abnormal" or "distinguishing" condition.[66] Because the absence of immunity to COVID-19 is not unusual, the Texas Supreme Court held it does not meet this requirement.

Traditional defenses of textualism emphasize that it is more objective and restraint-oriented than purposivism,[67] but these rationales do not support the Texas Supreme Court's brand of flexible textualism.[68] Flexible textualism's hunt for a singular policy context[69] departs from formalistic textualism's core commitment to the idea that legislative compromises bring together competing, often incompatible policy goals in a way that does not serve any one, singular policy purpose.[70] Even

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60 And as such, jailed Texans independently require section 82.004 to vote. *See id.* § 82.004(a).

61 *In re State*, 602 S.W.3d at 559.

62 *See id.* at 558–59 (describing the addition of categories, such as incarceration and the removal of a religious belief category).

63 *Id.* at 559.

64 *Id.*

65 *Id.*

66 *Id.* at 560; *see id.* at 559–60 (citing *Condition*, MERRIAM-WEBSTER UNABRIDGED (2020)).

67 *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 16–17 (2012).

68 *See* Entergy Gulf States, Inc. v. Summers, 282 S.W.3d 433, 445 (Tex. 2009) (Hecht, J., concurring) ("Construing statutes is the judiciary's prerogative; enacting them is the Legislature's.").

69 *See* Grove, *supra* note 2, at 293.

70 *See id.* at 267, 293; Manning, *supra* note 43, at 99. This split between formalism and flexibility was exactly the divide in *Bostock* as well. *Compare* Bostock v. Clayton County, 140 S. Ct. 1731, 1754 (2020) (noting that judges cannot favor "guesswork about expectations" of a law's application over its

assuming that a statute could have a primary purpose, textualists traditionally argue that the most reliable evidence of that purpose is the text chosen by the legislature, not speculation on how the legislature *would have* written the text, had it considered the consequence at hand.[71]

Textualists have criticized purposivists' usage of legislative history for allowing judges to cherry-pick congressional reports as if they were "looking over a crowd and picking out [their] friends."[72] Flexible textualism's invocation of statutory history, however, similarly allows for highlighting favored historical trends over others.[73] While the *In re State* majority emphasized the legislature's historical limiting of voting by mail, Justice Bland noted the nearly hundred-year history of voting by mail and the previous expansions of the disability provision.[74] Because prioritizing one policy context over other competing policy objectives is likely to involve injection of the normative preferences that textualism is supposed to mitigate,[75] using policy context to override clear semantic context hinders the ability of legislators to "strike reliable bargains" between those competing policy goals when selecting the actual words of the statute.[76] This concern is why the Supreme Court's formalistic approach in *Bostock* rejected the consideration of purportedly negative or unintended real-world effects that would follow from a straightforward reading of the law as the kind of "naked policy appeal[]" that transforms judges into legislators.[77]

Although the majority and the concurrences in *In re State* all purported to employ textualism to interpret the phrase "physical condition," the majority's flexible, policy-oriented textualism failed to deliver the benefits of objectivity and judicial restraint that have generally been used to justify textualism over purposivism. The contrast between the majority's approach and the analyses of Justices Boyd and Bland is part of a broader contemporary rift between competing forms of textualism[78] and has implications beyond academic debate. Finding a theory of statutory interpretation that both reduces unnecessary subjectivity and cabins judicial discretion may help judges "protect the legitimacy of the judiciary itself" from threats (real and perceived) of politicization of the courts.[79]

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clear text), *with id.* at 1767 (Alito, J., dissenting) ("In 1964, ordinary Americans . . . would not have dreamed that discrimination because of sex meant discrimination because of sexual orientation . . . .").

[71] *See* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 686 (1997).

[72] Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (quoting a conversation between the author and Judge Leventhal).

[73] *Cf.* Grove, *supra* note 2, at 274 (describing textualists' critiques of legislative history).

[74] *Compare In re State*, 602 S.W.3d at 559, *with id.* at 568–70 (Bland, J., concurring in the judgment).

[75] Scalia, *supra* note 39, at 17–18.

[76] Manning, *supra* note 43, at 96.

[77] Bostock v. Clayton County, 140 S. Ct. 1731, 1753 (2020).

[78] *See* Grove, *supra* note 2, at 266–67.

[79] *Cf. id.* at 270 (referencing the federal judiciary).