

# ARTICLES

## TEXTUAL GERRYMANDERING: THE ECLIPSE OF REPUBLICAN GOVERNMENT IN AN ERA OF STATUTORY POPULISM

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*We have entered the era dominated by a dogmatic textualism—albeit one that is fracturing, as illustrated by the three warring original public meaning opinions in the blockbuster sexual orientation case, Bostock v. Clayton County. This Article provides conceptual tools that allow lawyers and students to understand the deep analytical problems faced and created by the new textualism advanced by Justice Scalia and his heirs. The key is to think about choice of text—why one piece of text rather than another—and choice of context—what materials are relevant to confirm or clarify textual meaning. Professors Eskridge and Nourse apply these concepts to evaluate the new textualism’s asserted neutrality, predictability, and objectivity in its canonical cases, as well as in Bostock and other recent textual debates.*

*The authors find that textual gerrymandering—suppressing some relevant texts while picking apart others, as well as cherry-picking context—has been pervasive. Texts and contexts are chosen to achieve particular results—without any law-based justification. Further, this Article shows that, by adopting the seemingly benign “we are all textualists now” position, liberals as well as conservatives have avoided the key analytic questions and have contributed to the marginalization of the nation’s premier representative body, namely, Congress. Today, the Supreme Court asks how “ordinary” populist readers interpret language (the consumer economy of statutory interpretation) even as the Court rejects the production economy (the legislative authors’ meaning).*

*Without returning to discredited searches for ephemeral “legislative intent,” we propose a new focus on legislative evidence of meaning. In the spirit of Dean John F. Manning’s suggestion that purposivists have improved their approach by imposing text-based discipline, textualists can improve their approach to choice of text and choice of context by imposing the discipline of what we call “republican evidence”—evidence of how the legislative authors explained the statute to ordinary readers. A republic is defined by law based upon the people’s representatives; hence*

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*the name for our theory: “republican evidence.” This Article concludes by affirming the republican nature of Madisonian constitutional design and situating the Court’s assault on republican evidence as part of a larger crisis posed by populist movements to republican democracies today.*

- INTRODUCTION ..... 1720
  - I. NEW TEXTUALISM’S FOUNDING FATHERS: THE NEW ECONOMY OF INFORMATION AND THE LURE OF GERRYMANDERING ..... 1738
    - A. Church of the Holy Trinity: *Cracking and Packing Text While Stacking and Suppressing (Con)text* ..... 1739
    - B. In re Sinclair: *Suppressing Text* ..... 1741
    - C. Public Citizen: *Ignoring the Whole Text* ..... 1744
    - D. Chisom: *A Representative Textual Gerrymander* .... 1747
    - E. Pride at Work: *Cracking-and-Packing a Constitutional Initiative* ..... 1751
    - F. *The Costs of Gerrymandering*..... 1754
  - II. THE ROBERTS COURT AND THE NEW JUDICIAL ECONOMY OF INFORMATION ..... 1761
    - A. Bond v. United States: *Choosing Text and Context*..... 1763
    - B. King v. Burwell: *Harmonizing v. Dissecting Text* ... 1766
    - C. Bostock v. Clayton County: *Three Different Textualisms* ..... 1768
      - 1. *Justice Gorsuch’s Opinion: Hyper-Textualism and Choice of Text* ..... 1769
      - 2. *Justice Alito’s Dissent: Time-Machine Textualism and Choice of Original Meaning Date* ..... 1772
      - 3. *Justice Kavanaugh’s Dissent: Holistic Textualism and Choice of (Con)text* ..... 1774
  - III. LIBERALS GERRYMANDER, TOO: IT’S THE METHOD, NOT THE JUSTICE ..... 1777
    - A. Muscarello v. United States: *Breyer v. Ginsburg*.... 1777
    - B. Lockhart v. United States: *Sotomayor v. Kagan* .... 1779
    - C. Yates v. United States: *Ginsburg v. Kagan* ..... 1782
    - D. Murphy v. Smith: *Gorsuch v. Sotomayor* ..... 1786
  - IV. CHECKING THE IMPULSE TO GERRYMANDER? THE VALUE OF REPUBLICAN EVIDENCE ..... 1789
    - A. *Finding and Understanding Relevant Text*..... 1795
    - B. *Disconfirming Judicial Assumptions: Curbing Judicial Activism*..... 1798
      - 1. *Yates v. United States: How Broadly Did Congress Define the Problem Addressed in Sarbanes-Oxley?* ..... 1799

2.	Lockhart v. United States: <i>Was Congress Focused on Crimes Against Children?</i> .....	1801
3.	Murphy v. Smith: <i>How Much Was Congress Retreating from the Civil Rights Fee-Shifting Model for Prisoner Civil Rights Lawsuits?</i> .....	1803
C.	<i>Resolving Ambiguity: Consensus Positions and Unanswered Questions</i> .....	1805
1.	Pride at Work: <i>Consensus Positions</i> .....	1806
2.	<i>Bostock v. Clayton County: Resolving Ambiguity</i> .....	1807
CONCLUSION: AGAINST JUDICIAL POPULISM IN STATUTORY INTERPRETATION.....		1810
APPENDIX .....		1814

## INTRODUCTION

The Supreme Court's decision in *Bostock v. Clayton County* catapulted textualism from legal arcana to national news.<sup>1</sup> Justice Gorsuch, writing for a 6–3 Court, ruled that the 1964 Civil Rights Act bars employment discrimination based on sexual orientation and gender identity, astonishing liberals with his method and confounding conservatives with the result. His majority opinion insisted that the “ordinary public meaning” of the text resolved the case.<sup>2</sup> Justices Alito and Kavanaugh argued passionately in dissent that Justice Gorsuch had forsaken textualism.<sup>3</sup> The intense methodological debate among the three originalists befuddled some Court-watchers. Could the textualist methodology yield liberal results? Was original public meaning more dynamic than people thought? Given the sharp, heartfelt disagreement among the Justices, is textualism less objective, determinate, and neutral than advertised?<sup>4</sup>

<sup>1</sup> 140 S. Ct. 1731 (2020); see also George F. Will, Opinion, *The Supreme Court's Decision on LGBTQ Protections Shows the Conflicting Ideas of Textualism*, WASH. POST (June 16, 2020), [https://www.washingtonpost.com/opinions/the-supreme-courts-decision-on-lgbtq-protections-shows-the-conflicting-ideas-of-textualism/2020/06/16/c6979b76-aff8-11ea-8758-bfd1d045525a\\_story.html](https://www.washingtonpost.com/opinions/the-supreme-courts-decision-on-lgbtq-protections-shows-the-conflicting-ideas-of-textualism/2020/06/16/c6979b76-aff8-11ea-8758-bfd1d045525a_story.html).

<sup>2</sup> *Bostock*, 140 S. Ct. at 1738, 1741.

<sup>3</sup> See *id.* at 1755–56 (Alito, J., dissenting) (charging that the “Court’s opinion is like a pirate ship,” sailing “under a textualist flag,” but in reality doing nothing but updating “old statutes so that they better reflect the current values of society”); *id.* at 1836 (Kavanaugh, J., dissenting) (charging the majority with following “a novel form of living literalism to rewrite ordinary meaning and remake American law”).

<sup>4</sup> See William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531 (2013) (reviewing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012)) (predicting that Scalia-style textualism will allow judges to engage in cherry-picking to achieve the outcomes they desire); Victoria F. Nourse, *Textualism 3.0: Statutory Interpretation After Justice Scalia*, 70

As *Bostock* illustrates, textualism is fracturing, dividing itself into camps.<sup>5</sup> It is time to think much harder and deeper about textualism's methodology, its meta-theoretical foundations, and its overall legitimacy within our constitutional democracy. To begin with, and contrary to its presentation by proponents, "orthodox textualism" (now called "original public meaning" by some Justices) is far from a mechanical jurisprudence, where judges applying its method are driven inexorably toward a single answer.<sup>6</sup> As this Article suggests, in any difficult case, the textualist judge starts with two potentially outcome-determinative decisions: a *choice of text*—the scope of text the judge decides to focus on when interpreting a statute—and a *choice of context* surrounding this text. Though both choices involve text, the normative decisions which underlie these choices are not themselves grounded in the text. And the way judges make both of those decisions is changing: Context, for example, once meant judicial consideration of legislative purpose and history, but in federal and many state courts today, choice of context is more likely to canvas the whole act, the whole code, and the larger corpus of statutory law.<sup>7</sup>

Whatever text and context have been selected will be framed by the judge's choice among dozens of canons of statutory construction. It turns out that, once one focuses on these choices—of text and context—one can begin to see the process we dub "gerrymandering." All

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ALA. L. REV. 667 (2019) (arguing that the Court's nominal commitment to textualism will not lead to unified results).

<sup>5</sup> See Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 266 (2020) ("*Bostock* revealed something more: important tensions *within* textualism."). From a linguistic point of view, Justice Gorsuch's "compositional" textualism (focusing on individual words and then assembling them into a plain meaning) in *Bostock* and other cases is a different methodology from Justice Alito's and Kavanaugh's "holistic" textualism (focusing on phrases and sentences) in this and other cases. See William N. Eskridge, Jr., Brian G. Slocum & Stefan Th. Gries, *The Meaning of Sex: Dynamic Words, Novel Applications, and Original Public Meaning*, 119 MICH. L. REV. 1503, 1519–20 (2020). Although he joined Justice Alito's dissent in *Bostock*, Justice Thomas's preferred method is decidedly compositional. See, e.g., *County of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1479–80 (2020) (Thomas, J., dissenting) (focusing on the meaning of the individual word "addition" and then combining it with the meanings of the words "from" and "to"); *Mont v. United States*, 139 S. Ct. 1826, 1832 (2019) (interpreting and then stringing together small portions of the phrase "is imprisoned in connection with a conviction").

<sup>6</sup> Note that we distinguish what we call "orthodox textualism," "high textualism," or "original public meaning" from traditional "plain meaning" textualism. This Article and its critique focus specifically on orthodox textualism.

<sup>7</sup> See, e.g., Victoria F. Nourse, *The Constitution and Legislative History*, 17 U. PA. J. CONST. L. 313 (2014) (documenting the Court's shift and critiquing the constitutional reasoning for that shift); *MCI Tel. Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218, 228–32 (1994) (Scalia, J.) (framing the judicial inquiry into statutory context merely as one that assumes, when faced with equally plausible meanings of the same term, courts' first tool must be context).

interpreters, whether conservative or liberal, textualist or not, make choices about text, and make choices about context. The important question is whether the interpreter sees and defends those choices. When they do not defend them, we call it “gerrymandering”—line drawing that purports to be neutral but risks partisanship—and, as we will see, this is true of both liberal and conservative judges who search vainly for a single “ordinary meaning.”

In this Article, we frame this statutory interpretation debate in terms of production and consumption economies: Should interpreters focus on the readers and consumers of statutes (We the People), or the authors and producers of statutes (Congress)? Or should interpreters consider both, as has been the traditional practice of American judges? On its face, the now-dominant Supreme Court approach elevates the *consumer* perspective and belittles or ignores that of the *producers*. This is an alarming development, for a number of reasons. Anya Bernstein and Glen Staszewski argue that the more dogmatic textualism of the last generation is an example of *judicial populism*; like political populism, dogmatic textualism is anti-pluralist (believing there is one method and one right answer), anti-institutionalist (denigrating legislative and administrative deliberation), and Manichean (pitting virtuous champions of the people against corrupt elites).<sup>8</sup> If their characterization is true, we risk losing our constitutional tradition of representative democracy, whose legitimacy rests upon public and legislative deliberation.<sup>9</sup> Among the *Bostock* Justices, only Justice Alito and Justice Kavanaugh (in separate dissenting opinions) paid any attention to congressional and administrative deliberations, but even they gave it short shrift and ignored the full statutory history of Title VII.<sup>10</sup>

There is a deeper similarity between statutory textualism and political populism: Each lays claim to democratic legitimacy by invoking a search for the “true will” of the people. *Bostock* illumi-

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<sup>8</sup> Anya Bernstein & Glen Staszewski, *Judicial Populism*, 106 MINN. L. REV. 283, 287 (2021); see also William D. Araiza, *Samuel Alito: Populist*, 103 CORNELL L. REV. ONLINE 14 (2017) (discussing the populist attributes of legal writing); Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 661 (2009) (describing the populist features of originalism); Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 8 (2009) (articulating a concern that originalism is used to pander to populism).

<sup>9</sup> See, e.g., JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS: AN ESSAY IN POLITICAL INQUIRY* (1927) (arguing that democracy must be participatory and communal).

<sup>10</sup> See *Bostock v. Clayton County*, 140 S. Ct. 1731, 1767–71 (2020) (Alito, J., dissenting); *id.* at 1829, 1831 (Kavanaugh, J., dissenting). On the relevance of Title VII’s statutory history (the EEOC’s application, Supreme Court precedent, and Congress’s 1972, 1978, and 1991 amendments), see William N. Eskridge, Jr., *Title VII’s Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 YALE L.J. 322 (2017) [hereinafter Eskridge, *Title VII*].

nates this vividly, as the Justices joust for the true “ordinary” or popular meaning, even as they disagree about that very meaning. If textualism’s acolytes cannot decide on the “true” meaning of a text, it is possible—and we think likely—that at least some of their choices reflect more about their judicial perspective than about the will of the people. Because textualists reject institutional reflections of the popular will (namely, legislative expectations, agency practice, and even practical application of statutory schemes), such judges, like populist politicians, risk attributing their own interests or values to the will of the people. Our concern here is not with the populist outcome of particular cases, but with a method that seeks “ordinary” meaning in the eyes of a public as it resides in the imagination of elite judges who themselves disagree, as they did in *Bostock*, about the content of that “true will” of the people.

Accordingly, orthodox textualism and original public meaning pose a triple threat to the rule of law: substituting judicial for legislative evidence, marginalizing public deliberation, and introducing uncertainty and instability into statutory regimes. Our critical stance toward orthodox textualism does not lead us to revive old-fashioned purposivism: We believe that purposivism can suffer from some of the same problems when deployed by willful judges. Rather, it impels us to propose *legislative* or *republican evidence* as relevant and important sources for applying statutes to new factual circumstances, as an antidote to judicial populism’s darker side.

The foregoing is our argument in a nutshell, but we now situate the argument historically. When Judge Frank Easterbrook, Justice Antonin Scalia, and allied thinkers propounded a fresh theory of statutory interpretation in the 1980s, we dubbed it the “new textualism.”<sup>11</sup> They maintained that judges should do nothing more, and nothing less, than apply statutory text.<sup>12</sup> Under this method, interpreters should never revise, narrow, or broaden the ordinary or plain meaning of statutes to fit evidence of “legislative intent,” to carry out the statu-

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<sup>11</sup> See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990) [hereinafter Eskridge, *The New Textualism*].

<sup>12</sup> See, e.g., Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws* (expanding on his own Tanner Lectures), in ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3 (Amy Gutmann ed., 1997) [hereinafter SCALIA, *A MATTER OF INTERPRETATION*]; OFF. OF LEGAL POL’Y, U.S. DEP’T OF JUST., *USING AND MISUSING LEGISLATIVE HISTORY: A RE-EVALUATION OF THE STATUS OF LEGISLATIVE HISTORY IN STATUTORY INTERPRETATION* (1989) [hereinafter OLP, *MISUSING LEGISLATIVE HISTORY*]; Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL’Y 59 (1988); see also JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION: CASES AND MATERIALS* 22–23, 55–79, 203–28 (3d ed. 2017) (providing a synthesis of the new textualism).

tory purpose, or to avoid unreasonable consequences. Judges were admonished against showing any interest in materials about the *production* of the statute by Congress; interpretation should focus only on the reasonable *consumption* of its language by the public, or the so-called “ordinary meaning.” Justice Scalia further argued that the textualist inquiry should probe the ordinary meaning understood by the public when enacted, or the “original public meaning.”<sup>13</sup> Each of *Bostock*’s three opinions claimed to follow these instructions,<sup>14</sup> but arrived at different results.

Title VII of the Civil Rights Act of 1964 tells employers not to “discriminate against any individual . . . because of such individual’s . . . sex.”<sup>15</sup> As Justice Scalia maintained, an approach grounded in the legislative process offers the interpreter several choices, each of which can be manipulated to yield a stingy interpretation (for example, that discrimination because of gender identity or sex of partner is not covered by Title VII) or a broad one (that it is covered).<sup>16</sup> Thus, the interpreter might ask whether Congress specifically intended Title VII to protect transgender persons or “homosexuals,” to which the answer would be “no.” But a “yes” answer would be more likely if the inquiry were whether Congress intended to render illegal any classification entailing “sex.” Or the interpreter could pitch the intent inquiry at an even higher level of generality: What was Congress’s general intent, or purpose? The answer to that question could be understood narrowly (for example, that Congress’s purpose was to integrate women into the workplace) or broadly (that the purpose was to eliminate gender-stereotyping in the workplace). Justice Scalia’s influential critique was that legislative intent and purpose were malleable sources, freeing judges to read their own values into statutes. The “trick” to using legislative materials, one of his colleagues cracked, “is to look over the

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<sup>13</sup> SCALIA & GARNER, *supra* note 4, at 15–16; accord NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 10 (2019); William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 LAW & HIST. REV. 809 (2019).

<sup>14</sup> See *Bostock*, 140 S. Ct. at 1738–39; *id.* at 1767–68 (Alito, J., dissenting); *id.* at 1825–29 (Kavanaugh, J., dissenting).

<sup>15</sup> 42 U.S.C. § 2000e–2(a)(1).

<sup>16</sup> See Scalia, *supra* note 12, at 16–23; *infra* Table 1; see also Frank H. Easterbrook, *The Absence of Method in Statutory Interpretation*, 84 U. CHI. L. REV. 81, 97 (2017) [hereinafter Easterbrook, *Absence of Method*] (arguing that, given judges’ limited resources and tendency to pick which legislative history to use, reliance on legislative history is futile); John F. Manning, *Without the Pretense of Legislative Intent*, 130 HARV. L. REV. 2397 (2017) (providing a history of legislative “intent skepticism”); Ryan D. Doerfler, *High-Stakes Interpretation*, 116 MICH. L. REV. 523, 525 (2018) (criticizing the Supreme Court’s tendency to “treat statutory text as more malleable in big cases” in which “the practical stakes are raised”).



heads of the crowd and pick out your friends.”<sup>17</sup> Table 1 summarizes this critique.

TABLE 1. THE MALLEABILITY OF LEGISLATIVE INTENT/PURPOSE

	Narrow	Broad
<b>Specific Intent</b>	Congress did not intend to protect this class, e.g., “homosexuals.”	Congress did intend to bar this particular classification (“sex”) from job decisions.
<b>General Intent</b>	Congress’s purpose was to open up jobs for women, not to radically change the workplace.	Congress’s purpose was to uproot gender stereotyping that arbitrarily withheld opportunities from workers of all sexes.

The new textualists claimed that focusing on text would avoid purposivism’s elasticity, constrain judges,<sup>18</sup> respect and implement legislative compromises,<sup>19</sup> and lead to predictable outcomes.<sup>20</sup> As *Bostock*’s three different textualist opinions suggest, these claims exaggerate. Some scholars were not surprised to see *Bostock*’s fracture: They had predicted that textualism was not as determinate or objective as its followers alleged.<sup>21</sup> Not only have skeptics questioned

<sup>17</sup> Scalia, *supra* note 12, at 36; see also Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1835, 1853–59 (1998) (arguing that in *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892), for example, “the Court overlooked the surrounding context of the timing of the reports and the critical floor statements by sponsors of the bill” at issue in the case).

<sup>18</sup> See Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RES. L. REV. 905, 910 (2016) (describing the founders as enshrining a judicial power “constrained by its dependence on the adversarial system to identify the issues and arguments for decision” rather than one that accommodates “the outer limits of the judicial imagination”); Eskridge, *The New Textualism*, *supra* note 11, at 648, 674 (summarizing the early new textualists’ arguments about judicial discretion).

<sup>19</sup> John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 74 (2006) (“[T]extualists have contended that the final wording of a statute may reflect an otherwise unrecorded legislative compromise.”); see also Margaret H. Lemos, *The Politics of Statutory Interpretation*, 89 NOTRE DAME L. REV. 849, 884 (2014) (reviewing SCALIA & GARNER, *supra* note 4); Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117, 132–33 (2009).

<sup>20</sup> See Scalia, *supra* note 4, at 16; Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 27 (2006) (describing textualists as having “a strong constitutional argument for cabining judicial leeway and making the interpretive process more transparent and predictable”).

<sup>21</sup> See, e.g., WILLIAM N. ESKRIDGE, JR., *INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION* 3–5 (2016) [hereinafter ESKRIDGE, *INTERPRETING LAW*]; VICTORIA F. NOURSE, *MISREADING LAW, MISREADING DEMOCRACY* 105–06 (2016) [hereinafter NOURSE, *MISREADING LAW*]; ROBERT A. KATZMANN, *JUDGING STATUTES* 43, 48, 52 (2014); RICHARD A. POSNER, *HOW JUDGES THINK* 79–81 (2008); Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 Harv. L. Rev. 1298, 1302–03



the idea of “plain meaning,”<sup>22</sup> they have also argued that textualist opinions manipulate canons<sup>23</sup> and dictionaries<sup>24</sup> to create an arbitrary façade of plain meaning. Such manipulations too often, they urge, allow judges to trump congressional policy with their own frameworks and preferences.<sup>25</sup> *Bostock* not only confirmed the idea that textualism does not lead to one plain meaning but also presented skeptics with a new point of attack. How is it possible to find the “original public meaning” of a statute as applied to a social group (“gay men and lesbians”) or a concept (like “sexual orientation” or “gender identity” discrimination) that did not exist in common parlance or the popular imagination in 1964?<sup>26</sup>

Justice Scalia believed that he would win the fight for textualism because interpreters were lazy: Finding and processing information about a statute’s “intended” meaning can be time-consuming and

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(2018) (finding empirically that even “very text-centric judges” often feel compelled to look to “many different kinds of material . . . to confirm [their] interpretation”).

<sup>22</sup> See NOURSE, *MISREADING LAW*, *supra* note 21, at 40–45 (arguing that there are almost always two meanings of any particular term: the prototypical meaning, which is the best example of the term, and the extensivist or legalist meaning, which includes any logical understanding of the term).

<sup>23</sup> See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 *VAND. L. REV.* 593 (1992) (arguing that shifts in which canons the Court has emphasized over time suggest that Justices employ the canons to achieve their ideological preferences); Lisa Heinzerling, *The Power Canons*, 58 *WM. & MARY L. REV.* 1933 (2017) (arguing that the Court has created new canons which reflect some Justices’ desire to curb the administrative state).

<sup>24</sup> See, e.g., Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 *ARIZ. ST. L.J.* 275 (1998); James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court’s Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 *WM. & MARY L. REV.* 483, 483 (2013) (“We demonstrate how the Court’s patterns of dictionary usage reflect a casual form of opportunistic conduct.”); John Calhoun, Note, *Measuring the Fortress: Explaining Trends in Supreme Court and Circuit Court Dictionary Use*, 124 *YALE L.J.* 484, 513 (2014) (arguing that judges rely on dictionaries to provide a “vener of objectivity” even when their definitions may not provide determinate answers).

<sup>25</sup> See James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 *VAND. L. REV.* 1, 79 (2005) (“[T]he canons are being used by the Rehnquist Court to help produce a judicially desired set of policies, ignoring or sacrificing legislatively expressed preferences in the process.”).

<sup>26</sup> Eskridge et al., *supra* note 5, at 1562–64. Such criticisms of originalist struggles to properly historicize terms and meanings abound. See, e.g., Jonathan Gienapp, *Historicism and Holism: Failures of Originalist Translation*, 84 *FORDHAM L. REV.* 935, 936 (2015) (questioning the “faulty premise that the Founding generation and we today occupy more or less the same linguistic world” and arguing that some originalists incorrectly focus “on individual words and statements when they must first grasp the broader idioms from which those component parts issued”); Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, the Poverty of Public Meaning Originalism*, 48 *SAN DIEGO L. REV.* 575, 583 (2011) (“[T]he now-dominant form of originalism—public meaning or semantic originalism— . . . eschew[s] the value of reconstructing the historical context(s) in which the Constitution was adopted in favor of a primarily linguistic exercise . . .”).

costly.<sup>27</sup> To be sure, jettisoning inquiry into congressional materials can reduce information costs, but *Bostock* shows that inquiry into the historical meaning of words (like “sex,” as it was understood in 1964) poses its own difficulties.<sup>28</sup> Because new textualists such as Justices Gorsuch and Thomas have increasingly focused on small bits of text, such as “sex” in *Bostock*,<sup>29</sup> and have demanded plain meanings from those language morsels, they are pressed to find helpful new context. With legislative materials off-limits, they have turned to other context: related provisions in the United States Code, dictionaries, corpus linguistics, and canons of construction.<sup>30</sup> But these materials, too, can be costly to research and are certainly malleable in the hands of normatively motivated judges deciding cases that present divisive issues.<sup>31</sup>

Textualism’s original defenders claimed they were faithful to democratic values because legislators understand text along the same lines as new textualist judges, but empirical studies have falsified that claim.<sup>32</sup> The new textualist orthodoxy of the *Bostock* era, borrowing

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<sup>27</sup> See Scalia, *supra* note 12, at 36–37 (“When I was head of the Office of Legal Counsel . . . I estimated that 60 percent of the time of the lawyers on my staff was expended finding, and poring over, the incunabula of legislative history.”).

<sup>28</sup> The lengthy appendices and detailed historical analysis included by Justice Alito in his dissenting opinion, see *Bostock v. Clayton County*, 140 S. Ct. 1731, 1784–1822 (2020) (Alito, J., dissenting), illustrate the hard work required to argue for the original public meaning of an older statute—yet his account remained incomplete. For example, his discussion of “gay men and lesbians” was anachronistic: “gay” in 1964 meant “merry,” and the social class recognized in 1964 for men who have sex with men was “homosexuals and other sex perverts,” a far cry from today’s “gay men and lesbians.” Eskridge et al., *supra* note 5, at 1562–63.

<sup>29</sup> This extremely narrow focus is not limited to the *Bostock* decision, but a defining feature of the Court’s method. See *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1480–82 (2021) (focusing on the word “a”); *Van Buren v. United States*, 141 S. Ct. 1648, 1654–56 (2021) (focusing on the word “so”); *Borden v. United States*, 141 S. Ct. 1817, 1824–27 (2021) (plurality opinion) (focusing on the phrase “against the person”).

<sup>30</sup> See, e.g., *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 88–92 (1991) (interpreting “attorney’s fee” by reference to other sections of the U.S. Code); *Carpenter v. United States*, 138 S. Ct. 2206, 2238 n.4 (2018) (Thomas, J., dissenting) (citing corpus linguistics); Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 *YALE L.J.* 788 (2018) (advocating the use of corpus linguistics); see also *ESKRIDGE, INTERPRETING LAW*, *supra* note 21, at 411–16, 425–45 (identifying more than 100 whole act and substantive canons); *Brudney & Baum*, *supra* note 24, at 483 (finding that one-third of the Court’s statutory decisions invoke dictionaries); *Heinzerling*, *supra* note 23 (identifying new substantive canons); Anita S. Krishnakumar, *Statutory History*, 108 *VA. L. REV.* (forthcoming 2022) [hereinafter Krishnakumar, *Statutory History*] (analyzing new textualists’ frequent reliance on statutory history).

<sup>31</sup> See *supra* notes 23–25 and accompanying text.

<sup>32</sup> See Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 *STAN. L. REV.* 901, 949 (2013) (finding that there are judicial canons of which congressional counsels “were unaware and whose underlying presumptions do not seem consistent with the realities of the drafting process”); Victoria F. Nourse & Jane S.

from constitutional originalism, claims to be democracy-enhancing by emphasizing public meaning: how “We the People” would have received the statutory language. What the new textualists say and what they do are two different matters, however. The late Justice Scalia, for example, invoked “ordinary meaning” when defending the legitimacy of his method, but interpretations discussed in his treatise and judicial opinions overwhelmingly turned on legal terms of art, precedents, and judicial canons inaccessible to ordinary folks.<sup>33</sup> To be sure, Justice Scalia punctuated his opinions with homey examples designed to demonstrate his populist bona fides, a practice other Justices have mimicked.<sup>34</sup> But there is no evidence that ordinary citizens read statutory texts the way judges do. When Justices—elite lawyers<sup>35</sup>—debate how “ordinary people” talk, there is a serious risk that their renderings will speak with an upper-class, judicially-inflected accent.<sup>36</sup> When the ordinary people lived fifty or seventy-five years ago, the reconstructive task is even more difficult.

At stake is the constitutional allocation of power in our representative democracy. Traditionally, courts defer to Congress on policy. But if we are right, then textualism is at war with that traditional power division. If you blind yourself to the production economy—to Congress—and impose judge-created canons and judicial precedents on top of judge-inflected ordinary meaning, then you create a system in which the judiciary dominates the legislature.<sup>37</sup> Marginalizing the

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Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575 (2002) (finding that even when lawmakers are aware of judicial rules of construction, they do not consistently apply or consider those rules in their drafting).

<sup>33</sup> See SCALIA & GARNER, *supra* note 4, at 41 (arguing that ordinary meaning is not relevant when a precedent controls); *id.* at 73–77 (arguing that ordinary meaning gives way when text uses a “term of art”); *id.* at 140–45 (revealing that technical grammar canons, like the rule of the last antecedent, determine meaning that is far from ordinary); *id.* at 167–69, 217–20 (discussing non-ordinary meaning determined by judicial whole act and preamble canons); *id.* at 252–55 (discussing non-ordinary meaning determined by judicial whole code canons); *id.* at 261–340 (providing a partial list of judicially created substantive canons that put a thumb on the scale of statutory meaning).

<sup>34</sup> See, e.g., *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 227–28 (1994) (offering a witty analysis by Justice Scalia of the term “modify”); *infra* notes 344–45 and accompanying text (discussing Justices Kagan’s and Sotomayor’s use of homey examples).

<sup>35</sup> See NEAL DEVINS & LAWRENCE BAUM, *THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT* 25 (2019) (examining the elite backgrounds of Supreme Court Justices and the biases, incentives, and blind spots those backgrounds might create).

<sup>36</sup> See Kevin Tobia, Brian G. Slocum & Victoria F. Nourse, *Statutory Interpretation from the Outside*, COLUM. L. REV. (forthcoming 2022) (demonstrating via an empirical study of 4,500 people that “ordinary readers” frequently interpret rules non-literally).

<sup>37</sup> Compare U.S. CONST. art. I (constituting the Congress and granting it lawmaking power), with U.S. CONST. art. III (constituting the federal judiciary and the limits on its jurisdiction). See also Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*,

legislative process invites judges to adopt self-interested interpretations, or interpretations Congress has rejected. Hyper-focusing on text poses costs for republican governance. By ignoring or marginalizing legislative goals and context, the new textualism tends to increase legislative production costs by requiring Congress to draft with utmost precision to correct the Court's off-key interpretations and revise statutes which the Court has misinterpreted.<sup>38</sup> It has already generated costly and repetitive legal challenges to major policies—recall the textual challenges to the Affordable Care Act based on staffer's errors.<sup>39</sup>

At stake, too, is the legitimacy of our rule of law.<sup>40</sup> The new textualists rely on a transactional understanding of Article I, Section 7, which requires bicameral approval and presidential presentment for a bill to become a law.<sup>41</sup> From their perspective, statutes are deals, and strategic dealmakers will naturally manipulate legislative documents, leaving the voted-on text as the only evidence of the deal.<sup>42</sup> But that is a thin understanding of Article I, Section 7, at odds with the republican aspirations of the Founding Era, which emphasized deliberation by elected legislators who were attentive to the public interest as well as to the particular views of the citizenry.<sup>43</sup> Dismissing the republican

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78 GEO. L.J. 281 (1989) (exploring the extent to which legislative supremacy constrains judges, and the ways judges might respond to those constraints); Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109 (2010) (arguing that a court that applies something other than legislative will is not acting as a faithful agent); Manning, *supra* note 19, at 91–99 (arguing that both textualists and purposivists justify their preferences according to their understanding of the relationship between process and legislative supremacy); cf. Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2127–29 (2004) (arguing that “legislative supremacy” does not capture the extent of Congress’s powers under Article I, Section 1, in that Congress actually holds a “legislative monopoly”).

<sup>38</sup> See Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317 (2014).

<sup>39</sup> See Jesse M. Cross, *The Staffer's Error Doctrine*, 56 HARV. J. LEGIS. 83, 117–21 (2019) (analyzing *King v. Burwell*, 576 U.S. 473 (2015), as an example of judicial correction of a staff drafting error made as the ACA barreled toward enactment); Ryan D. Doerfler, *The Scrivener's Error*, 110 NW. U. L. REV. 811, 815 n.20 (2016) (listing cases in which scrivener's errors have resulted in challenges to major pieces of legislation, such as the Federal Advisory Committee Act and the Federal Land Policy and Management Act).

<sup>40</sup> The rule of law requires that the law be objective, predictable, and performable—that citizens know what is expected of them. See generally LON L. FULLER, *THE MORALITY OF LAW* (1964).

<sup>41</sup> U.S. CONST. art. I, § 7.

<sup>42</sup> See OLP, *MISUSING LEGISLATIVE HISTORY*, *supra* note 12, at 64–65; John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 687–88 (1997) (“Actual statutory language is the dearest legislative commodity, and so once legislators become aware that legislative history influences courts, they and their agents (the staff) will try to achieve desired outcomes through the lower-cost mechanism of legislative history.”).

<sup>43</sup> See *Immigr. & Naturalization Serv. v. Chadha*, 462 U.S. 919, 945–51 (1983) (interpreting Article I, Section 7 as a legislative structure that encourages deliberation

deliberations of the production economy and focusing only on the consumer or citizen viewpoint disrespects our constitutional roots and distorts our representative democracy. The new textualism's legitimacy costs are significant even under a liberal, transactional view, because its tools and sources invite judges to read statutes through their own perspectives, and thus lures them from the impartiality demanded by the liberal as well as republican rule of law.<sup>44</sup> This is where the idea of *textual gerrymandering* comes into play.

Orthodox textualist rhetoric obscures the discretionary choices an interpreter must make when resolving a hard case. Just as conflicting state laws once led to the creation of the field of choice of law, we believe that the kind of conflict we see in *Bostock* should invite a similar development in the field of statutory interpretation. The text-attentive judge must engage in a process we call *choice of text*.<sup>45</sup> What statutory text is relevant to the issue raised by the case? By choosing or prioritizing one text over others, the judge makes a choice that must be defended as a matter of law and language. Theorists often forget the essential next step: *choice of context*. Once one has homed in on putatively controlling text(s), one must ask whether there is context that clarifies the meaning of vague or ambiguous text or confirms one's immediate apprehension of a plain meaning. There might be more than one relevant text and a variety of contexts. We contend that the new textualism is most problematic when the choice of text or statutory context is announced by judicial fiat, ignoring obviously relevant text or context and failing to provide a reasonable justification or even acknowledgment of the choices. When applying a method that excludes a great deal of (production) context, new textualist judging often picks and chooses text and (con)text in ways that are hard to defend. Consistent with the emphasis on consumption, our neologism (*con*)text refers to text-based context.

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among lawmakers with different electoral connections). On the importance of the republican tradition of deliberative representation to the Founding Era, see GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1998). See also James H. Hutson, *Country, Court, and Constitution: Antifederalism and the Historians*, 38 WM. & MARY Q. 337, 356-68 (1981) (applying English political norms to frame the American "Country" ideology during the Founding Era as a derivative of classical republicanism). We use 'republicanism' as a broad term, in distinction from direct 'popular' democracy. For the complicated historiography of philosophical 'republicanism,' see Daniel T. Rodgers, *Republicanism: The Career of a Concept*, 79 J. AM. HIST. 11 (1992).

<sup>44</sup> See Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, 50 NOMOS 3, 12 (2011) (remarking that the rule of law requires "impartial" courts).

<sup>45</sup> See Victoria F. Nourse, *Picking and Choosing Text: Lessons for Statutory Interpretation from the Philosophy of Language*, 69 FLA. L. REV. 1409 (2017) [hereinafter Nourse, *Picking and Choosing*].

Accordingly, textualism suffers from similar problems as purposivism. Just as the motivated or unmindful judge can find multiple purposes and set them at various levels of generality, as we demonstrated in Table 1 above, so too the motivated or unmindful judge can pick and choose texts and (con)texts and then read those texts at various levels of generality, as we demonstrate in Table 2 below. From the beginning, new textualists have engaged in what we call *textual gerrymandering*, which has become more pervasive over time, as their method has become more influential. In an era of orthodox textualism, when everyone claims to be a textualist at least some of the time,<sup>46</sup> everyone gerrymanders text and (con)text at least some of the time. This helps explain why the rise of textualism could lead to *Bostock*'s three different textualist opinions. Ironically, we shall maintain that all three opinions were gerrymandered, and that therefore none resolved the legal issue satisfactorily, even under the standards announced by the new textualism.

Techniques of political gerrymandering inspire our analysis and our critical edge. When a partisan legislature revises electoral districts, it can minimize the other party's power by *packing* opposing voters into just a few districts, creating a few lopsided districts for the opposition, but many districts leaning the party's way, or by *cracking* the other party's voting strength so that their voters are broken into many districts where they lack sufficient voting power as a bloc.<sup>47</sup> If a legislature wants to minimize representation of minorities, it can *stack* or enlarge the district through creative mergers of several districts or electing representatives at-large.<sup>48</sup> And minority voters can be purged

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<sup>46</sup> See Harvard Law School, *The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE, at 8:28 (Nov. 25, 2015), <https://www.youtube.com/watch?v=DPEtszFT0Tg> ("I think we're all textualists now, in a way that just was not remotely true when Justice Scalia joined the bench."); see also Diarmuid F. O'Scannlain, "We Are All Textualists Now": *The Legacy of Justice Antonin Scalia*, 91 ST. JOHN'S L. REV. 303, 304 (2017) (celebrating Justice Kagan's quip).

<sup>47</sup> See GARY W. COX & JONATHAN N. KATZ, *ELBRIDGE GERRY'S SALAMANDER: THE ELECTORAL CONSEQUENCES OF THE REAPPORTIONMENT REVOLUTION* 33 (2002); Richard L. Hasen, *Race or Party, Race as Party, or Party All the Time: Three Uneasy Approaches to Conjoined Polarization in Redistricting and Voting Cases*, 59 WM. & MARY L. REV. 1837, 1852–53 (2018) (describing "[p]acking and cracking"); Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 551–52 (2004); Guillermo Owen & Bernard Grofman, *Optimal Partisan Gerrymandering*, 7 POL. GEOGRAPHIC Q. 5, 5–6 (1988); Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 834 (2015); Daniel P. Tokaji, *Vote Dissociation*, 127 YALE L.J.F. 761, 768 (2018).

<sup>48</sup> See Frank R. Parker, *Racial Gerrymandering and Legislative Reapportionment* (describing cracking, packing, and stacking in Mississippi and Alabama congressional redistricting), in *MINORITY VOTE DILUTION* 85, 92–96 (Chandler Davidson ed., 1984); Chandler Davidson & George Korb, *At-Large Elections and Minority-Group*



from participation altogether through what is called voter suppression.<sup>49</sup>

Like a legislator who achieves partisan results by manipulating electoral boundaries, an interpreter can sustain a preferred interpretation by (unconsciously or consciously) manipulating statutory boundaries. Interpretive *packing* hyper-focuses on only one of several relevant statutory terms or even on only one or a few words. Interpretive *cracking* breaks up those items of text, defines each broadly or narrowly according to taste, and then reassembles them into a meaning not apparent from the text as a whole. Interpretive *stacking* or *suppression* selectively enlarges or shrinks the (con)textual materials available, respectively. By spreading the (con)textual net widely enough, stacking can narrow or expand the meaning of text that is otherwise clear. Suppression reverses the process. In all cases of legislative redistricting, lines must always be drawn, just as lines in interpretive efforts must be drawn. *Textual gerrymandering*, as we define it, is the unjustified drawing of lines: the insistence that a word like “a” or “so” resolves a case, even when the textualist Justices themselves disagree about the proper text.<sup>50</sup>

Our concern is not with particular applications; it is that orthodox textualism’s theoretical premises invite gerrymandering. In cases reaching court, statutory text may not cleanly address novel fact situations because (1) those facts were not anticipated, usually because the world changed in the years after the statute was passed; (2) legislators ignored the issue; or (3) drafting issues were eclipsed by the need to get legislation passed. Clumsy texts create hard cases, and judges face tough choices in these cases because the new textualist culture bars them from admitting that they are adjusting, fine-tuning, or even har-

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*Representation: A Re-Examination of Historical and Contemporary Evidence*, 43 J. POL. 982 (1981) (providing empirical evidence linking the creation of at-large systems with racial gerrymandering); D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 681 (2013) (discussing stacking and at-large elections); Franita Tolson, *Benign Partisanship*, 88 NOTRE DAME L. REV. 395, 441 (2012) (discussing at-large voting as disadvantaging minority voters).

<sup>49</sup> See SPENCER OVERTON, *STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION* (2006) (identifying contemporary voter suppression techniques including gerrymandering, underfunded elections infrastructure, ballot inequities, and photo identification requirements); JONATHAN BRATER, KEVIN MORRIS, MYRNA PÉREZ & CHRISTOPHER DELUZIO, BRENNAN CTR. FOR JUST., *PURGES: A GROWING THREAT TO THE RIGHT TO VOTE* (2018), <https://www.brennancenter.org/our-work/research-reports/purges-growing-threat-right-vote> (detailing voter purges as a tactic of voter suppression); see also Rave, *supra* note 48, at 681 (discussing stacking and at-large elections); Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689 (2006) (describing vote denial in the form of voting equipment, felon disenfranchisement, and voter ID requirements); Tolson, *supra* note 48, at 441.

<sup>50</sup> See *supra* notes 29, 45 and accompanying text.



monizing text—even to correct obvious drafting errors.<sup>51</sup> New textualist judges tend to deny ambiguity: To admit doubt seems to confess that one is not clever enough to solve the drafting puzzle or discern the will of the people.<sup>52</sup> Hence, opinions often have a procrustean feature. Because the new textualist is loath to rely on legislative materials, they rely on interpretive resources that judges create—namely, semantic and holistic canons, statutory precedents, and constitutionally inspired clear statement rules. This Article maintains that, in hard cases, gerrymandering is a pervasive risk, rendering textualism less able to satisfy the rule of law values to which it aspires. The result: judicial opinions whose cleverness exceeds their soundness, as judges engage in word games to the detriment of elaborating on seriously deliberated statutory schemes.

We view the populist tendency underwriting the new textualists' interpretive techniques as a form of judicial politics that weaponizes "ordinary" meaning. Today's orthodox textualism insists that it is democratic because it searches for how an ordinary person would read a statute.<sup>53</sup> This is its basic, and purportedly simple, populist methodological premise. By definition, "political populism" invites a search for authentic popular will antagonistic to the dominant political elite or establishment.<sup>54</sup> This form of discourse presupposes that the duly elected representatives have failed the interests of ordinary people in society.<sup>55</sup> When the political demands of the voters go unmet, they open the door for partisan actors who purport to solve them and act in the 'true interest' of the whole population with purportedly simple solutions.<sup>56</sup>

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<sup>51</sup> See Cross, *supra* note 39, at 126–27 (discussing the view held by many that the statutory text at issue in the landmark Affordable Care Act case, *King v. Burwell*, 576 U.S. 473 (2015), resulted from a drafting error); *King*, 576 U.S. at 514 (Scalia, J., dissenting) (accusing the majority of assuming a "free-floating power 'to rescue Congress from its drafting errors'" (quoting *Lamie v. U.S. Tr.*, 540 U.S. 526, 542 (2004))).

<sup>52</sup> See Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 372 (1994) (arguing that textualism tends to devolve into a cleverness game, where the winner is the judge who can solve the puzzle most elegantly).

<sup>53</sup> See *supra* note 32 and accompanying text.

<sup>54</sup> See Kenneth M. Roberts, *Parties, Populism, and Democratic Decay: A Comparative Perspective on Political Polarization in the United States* (naming, for example, President Trump as "a populist 'empty signifier' who is able to weld together, and provide expression for, disparate ideological currents and strands of anti-establishment politics" (citing ERNESTO LACLAU, ON POPULIST REASON (2005))), in *WHEN DEMOCRACY TRUMPS POPULISM: EUROPEAN AND LATIN AMERICAN LESSONS FOR THE UNITED STATES* 132, 147 (Kurt Weyland & Raul L. Madrid eds., 2019).

<sup>55</sup> See *id.* at 148 (discussing populists' incentives to politicize new issue areas in order to win constituencies that feel neglected or unrepresented by the establishment).

<sup>56</sup> See CATHERINE FIESCHI, *POPULOCRACY: THE TYRANNY OF AUTHENTICITY AND THE RISE OF POPULISM* 14 (2019) (stating that a number of approaches toward populism

An imagined unity, however, gives populists the cushion they need to degrade debate by drawing false, authoritative moral lines (“my people are the only good people”), articulating answers to questions that are intentionally limiting (“what do my people want?”), and resisting empirical refutation of such claims (“my people know the truth”).<sup>57</sup> In his classic study, Jan-Werner Müller maintains that populism rejects democratic institutions that attempt to mediate inevitably plural views on difficult, complicated political questions.<sup>58</sup> Populists claim that they, and they alone, can represent the will of the people. But this can be a dangerous deception: Populists often seek to authoritatively assert their own interests and, as history and contemporary events show, populists from Tom Watson to Benito Mussolini to Hugo Chávez to Donald Trump end up pursuing demagogic and authoritarian strategies.<sup>59</sup> If given enough power, they can create a state that excludes those not considered to be part of the proper people. In this way, populism is a form of exclusionary politics. Over time, this serves to obviate the need for republican, meaning representative, institutions. If there is only one common good and only one way to represent the people faithfully, those ideas become the symbolically correct representation of the real people, and rejection of those ideas become morally wrong and impermissible.

There are some parallels between the strategies of the new textualists and political populists.<sup>60</sup> Just as populists believe that they are the true interpreters of a singular and pure popular will, dogmatic textualists believe that they are the true interpreters of law seeking a singular and pure “ordinary” meaning. Just as populists reject pluralist sources of popular will and claim existing democratic institutions have failed, so too do new textualists resist pluralists’ sources of law, rejecting deference to executive meaning or legislative evidence. Just

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describe it as a “corrective” to failed democracy). On simplistic solutions, see BENJAMIN MOFFITT, *THE GLOBAL RISE OF POPULISM: PERFORMANCE, POLITICAL STYLE, AND REPRESENTATION* 9 (2016) (explaining how populists “present their own strong leadership and simple solutions as a method for stemming or avoiding . . . crisis”).

<sup>57</sup> See MOFFITT, *supra* note 56, at 7–10 (discussing, for example, the populist tactic of representing oneself as the champion of “the people” versus “the elite”).

<sup>58</sup> JAN-WERNER MÜLLER, *WHAT IS POPULISM?* 20 (2016); see *id.* at 101 (“When in opposition, populists will necessarily insist that elites are immoral, whereas the people are a moral, homogeneous entity whose will cannot err.”); *id.* at 102 (noting that the populist presents “a symbolic representation of the ‘real people’ from which the correct policy is then deduced,” rendering “the political position of a populist immune to empirical refutation”).

<sup>59</sup> Cf. Roberts, *supra* note 54, at 133 (describing “democratic backsliding” in which elected rulers leverage governmental control to “loosen institutional constraints on executive authority”).

<sup>60</sup> See Bernstein & Staszewski, *supra* note 8, at 309–18 (drawing a similar analogy between textualism and political populism).

as populists in the political sphere are anti-elitist, so too are textualists' acolytes: They openly deride as "insiders" those who revert to the meaning of republican (representative) institutions.<sup>61</sup> Finally, just as populists claim that they embody a single, virtuous people, strict textualists purport to further a pure form of democracy by relying on meaning known to people on the street. Although some claim textualism should be empirical, the process itself—the search for ordinary meaning—is seen at a meta-level as moral and often righteous, even essential to preserve the rule of law and courts. Just look at the rhetoric deployed in the name of "ordinary meaning," which denigrates those who disagree as corrupt anti-rule-of-law judges reading their own policy biases into statutes. There is no more common saying in judicial opinions today than: *You follow policy, I follow the text.*<sup>62</sup>

Our Article proceeds as follows. In Part I, we illustrate our analytical framework by considering new textualist classics written in its foundational period. We interrogate both *choice of text* and *choice of (con)text*. We find, surprisingly, that key text was omitted or overlooked in landmark opinions in the new textualist canon: Judge Easterbrook's opinion in a family farm bankruptcy case, *In re Sinclair*;<sup>63</sup> Justice Kennedy's concurring opinion in *Public Citizen v. U.S. Department of Justice*,<sup>64</sup> interpreting a federal sunshine law; Justice Scalia's dissenting opinion in *Chisom v. Roemer*,<sup>65</sup> involving racially gerrymandered judicial elections; and Justice Markman's opinion for the Michigan Supreme Court in *National Pride at Work, Inc. v. Governor of Michigan*,<sup>66</sup> involving employment contract benefits for lesbian and gay households. These interpretations have been criticized as countermajoritarian and ideologically driven, where con-

<sup>61</sup> See Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193 (2017) [hereinafter Barrett, *Congressional Insiders and Outsiders*] (rejecting views purporting to rely upon those who understand congressional processes).

<sup>62</sup> See, e.g., *Van Buren v. United States*, 141 S. Ct. 1648, 1654 (2021) ("[Petitioners] raise a host of policy arguments . . . But we start where we always do: with the text of the statute."); *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021) ("[N]o amount of policy-talk can overcome a plain statutory command."); *id.* at 1498 (Kavanaugh, J., dissenting) ("As a matter of policy, one may reasonably debate the circumstances . . . [for removing immigrants, but] those policy choices are for the political branches. Our job is to follow the law . . ."); *Bostock v. Clayton County*, 140 S. Ct. 1731, 1824 (2020) (Kavanaugh, J., dissenting) ("[J]udges may not rewrite the law simply because of their own policy views."); *id.* at 1756 (Alito, J., dissenting) ("Many will applaud today's decision because they agree on policy grounds . . . . But the question in these cases is not whether discrimination because of sexual orientation or gender identity should be outlawed. The question is whether Congress did that in 1964. It indisputably did not.").

<sup>63</sup> 870 F.2d 1340 (7th Cir. 1989).

<sup>64</sup> 491 U.S. 440, 467–89 (1989) (Kennedy, J., concurring in the judgment).

<sup>65</sup> 501 U.S. 380, 404–17 (1991) (Scalia, J., dissenting).

<sup>66</sup> 748 N.W.2d 524 (Mich. 2008).

servative judges seemed to bend statutes to support the interests of banks over family farms,<sup>67</sup> expand the President's constitutional prerogatives,<sup>68</sup> tolerate a voting system that entrenched a system of white-only judges in Louisiana,<sup>69</sup> and eliminate contract rights negotiated for and owed to lesbian and gay families.<sup>70</sup> The opinions' authors did not argue in favor of those values, and claimed, rather, that the text demanded their results. But some texts were chosen rather than others, and in each case, text or (con)text was dramatically gerrymandered without justification. In short, textualism offered the judges the power to look out over a crowd of texts and pick their ideological friends.<sup>71</sup> And once obvious textual ambiguities and errors are exposed, these decisions appear lawless.

Part II and the Article's Appendix of recent Supreme Court decisions illustrate the current operation of our theoretical critique—how the move from a production to a consumer economy in statutory interpretation has generated textual gerrymandering as a major phenomenon in statutory cases. Analyzing important Roberts Court decisions, including *Bostock* and many other decisions in the last three Terms, we demonstrate that gerrymandering remains a characteristic feature of new textualist opinions. In other words, we do not think that judicial populism (an attitude that is anti-pluralist, anti-

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<sup>67</sup> See WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 757–58 (2d ed. 1995).

<sup>68</sup> See Bernard W. Bell, *R-E-S-P-E-C-T: Respecting Legislative Judgments in Interpretive Theory*, 78 N.C. L. REV. 1253, 1355 (2000) (critiquing Justice Kennedy's "new textualist approach" in *Public Citizen* for "inappropriately discount[ing] the importance of public justification"); Frank J. Colucci, *When Structure Fails: Justice Kennedy, Liberty, and Trump v. Hawaii*, 70 HASTINGS L.J. 1141, 1155 (2019) (describing Justice Kennedy's *Public Citizen* opinion as "a vehicle for justifying judicial enforcement of separation of powers and judicial policing of Congress" and noting consequent concerns about the President's power to appoint federal judges).

<sup>69</sup> See Jonathan C. Augustine & Ulysses Gene Thibodeaux, *Forty Years Later: Chronicling the Voting Rights Act of 1965 and Its Impact on Louisiana's Judiciary*, 66 LA. L. REV. 453, 454 & n.7 (2006) (arguing that "African-Americans' power to elect judicial representatives of their own choosing . . . came through litigious victories in the courts" like the majority opinion in *Chisom*); Miranda McGowan, *Do as I Do, Not as I Say: An Empirical Investigation of Justice Scalia's Ordinary Meaning Method of Statutory Interpretation*, 78 MISS. L.J. 129, 182 (2008) (pointing out how Justice Scalia's *Chisom* dissent employs the same kind of "common law lawmaking" that he derides by "constru[ing] a statute against the backdrop of lower court glosses").

<sup>70</sup> See Kristofer A. Scarpa, *State Constitutional Law—Marriage—Michigan Marriage Amendment Bars Public Employers from Providing Health Benefits to Same-Sex Partners of Employees*, 40 RUTGERS L.J. 995, 1013 (2009) (arguing that "the text of the Marriage Amendment is not quite as clear and unambiguous as the National Pride majority claims"); Glen Staszewski, *The Bait-and-Switch in Direct Democracy*, 2006 WIS. L. REV. 17, 20 (criticizing the court's opinion in *National Pride* for allowing the amendment's proponents to pull a "bait-and-switch" con on Michiganders).

<sup>71</sup> See *supra* note 17 and accompanying text.

institutional, and Manichean) alone drives textual gerrymandering. Chief Justice Roberts and Justice Breyer, who are personally pluralist, institutionalist, and not prone to good-versus-evil lines, are making choices about text and context right along with strict original public meaning populists, namely Justices Thomas and Gorsuch. They might reach different results, but they do so by gerrymandering the text (and, in the process, sometimes securing the votes of the true believers).

In Part III, we illustrate how these same problems afflict liberal judges: Our critique is not against textualism because it yields results some find “conservative.” It is against the textualist method whether applied by liberal, conservative, or moderate judges. Here is why: The method’s emphasis on the ordinary consumer creates a *hermeneutical pinch*, where there is less information to resolve difficult cases. Hyperfocusing on tiny bits of text, judges turn to more forms of (con)text to secure interpretive closure—closure needed lest they be considered faint-hearted or insufficiently rigorous textualists. This has generated an expanding cottage industry of allegedly objective sources—dictionaries, corpuses, style books, the United States Code, and hundreds of canons—that combine elasticity and opportunities for source-shopping with normative vacuity. This strange combination of rigid limits (refusal to use legislative materials or to admit that language provides more than one answer) and interpretive innovation (more aggressive deployment of canons and corpuses) propels anyone operating within the new textualist method toward textual and (con)textual gerrymandering. Contrary to the theory’s claims, this methodology also drags statutory meaning even further from anything accessible to ordinary citizens, which undermines the approach’s rule of law and democratic justifications. Worse, with judges controlling statutory meaning and legislators marginalized, the new textualism threatens to impose the values of judges upon statutes, undermining textualists’ claims to leave policy to legislators.

In Part IV, we suggest a way to ameliorate the hermeneutical pinch and restore some connection to representative democracy: Open up the information economy to *actual* republican and legislative evidence of a text’s meaning. Our government is a republic, not a democracy; representatives filter policy in our constitutional system. If one is to honor that constitutional principle, then one must consider republican meaning—the meaning of representatives—as a check against judicial rewriting of statutes. No judge denies that their role is to defer to the policy choices of the First Branch, but textualism strangely blinds them to evidence of those choices. Considering *republican evidence of meaning* helps the neutral, responsible judge to

figure out what text and (con)text are potentially relevant, to confirm or call into question their understanding of ordinary meaning, and to integrate a mature understanding of the full text and the statutory plan as articulated by legislators to the public. Considering legislative evidence allows judges to consider the perspectives of the actors who authored the statute, much as *The Federalist Papers* help judges understand the Constitution of 1789 from the perspectives of the actors who created and lobbied for its ratification. Textualists already admit the relevance of some legislative evidence.<sup>72</sup> They do not admit wholesale searches for subjective intent or purpose, but our approach depends upon objective evidence—namely, how words were used, how different parts of the statute fit together, the problem the statute was addressing, and the solutions considered. In the spirit of Dean Manning’s suggestion that purposivists have improved their approach by imposing text-based discipline on their examination of legislative expectations,<sup>73</sup> we suggest that textualists (and all judges) can improve their approach by imposing the discipline of republican evidence on their choice of text, choice of (con)text, and inferences that might be drawn from these sources.

In our conclusion, we explore the dangers of statutory populism. Members of the Supreme Court acting as if they were ordinary people (in a prior original time) invite a strange other-worldly speculation. In the age of orthodox purposivism, judges used to imagine what a legislature would seek to do, called “imaginative reconstruction.” Curiously, statutory populism is no different: Instead of imagining what Congress would do, judges imagine what the “ordinary reader” would do. For some Justices, this permits a properly “populist” result, one that they believe counters the results favored by elites. But our claim is not about results, it is about the dangers of rejecting normal democratic institutions in statutory interpretation. Preferring an imaginary public to the actual results or process reached by public institutions is precisely the dark side of populism.

## I

### NEW TEXTUALISM’S FOUNDING FATHERS: THE NEW ECONOMY OF INFORMATION AND THE LURE OF GERRYMANDERING

This Part examines canonical decisions penned by the Founding Fathers of the new textualism. We start with Justice Antonin Scalia’s famous critique of the Supreme Court’s 1892 decision in *Church of the*

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<sup>72</sup> See *infra* note 397 and accompanying text; Gluck & Posner, *supra* note 21, at 1302–03.

<sup>73</sup> See generally John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113.

*Holy Trinity*. We then move on to opinions by another intellectual giant of the movement, Judge Frank Easterbrook of the Seventh Circuit, then to opinions by Justice Kennedy and Justice Scalia, before concluding with Justice Steven Markman, a state judge who authored a leading textualist policy statement from the Reagan Justice Department.<sup>74</sup> We focus on two key questions: choice of text and choice of (con)text. Remarkably, we find that canonical analyses overlooked the most relevant text. Because choices of text and (con)text were left unjustified (and in our view could not be persuasively justified), we find considerable textual gerrymandering.

Our inquiry should trouble the most avid textualist, as leading exemplars of their method violate its very tenets. At the very least, our findings demonstrate that the new textualism cannot claim the rule of law superiority that is its hallmark, as its method is subject to the same (or worse) selection biases as pragmatic and purposivist methods. Our hypothesis, however, cuts more deeply. Even if more scrupulously deployed, the new textualism or original public meaning sacrifices both republican and democratic legitimacy in statutory interpretation, without any demonstrated advantage. Not least important, textual dogmatism entrenches in statutory cases the bitter polarization that has afflicted the political process. In short, a lot is at stake in our critique.

#### A. Church of the Holy Trinity: *Cracking and Packing Text While Stacking and Suppressing (Con)text*

*Church of the Holy Trinity v. United States*<sup>75</sup> anchors the textualist anti-canon. Justice Scalia's Tanner Lectures took Justice Brewer's opinion to task for its flawed reasoning.<sup>76</sup> Section 1 of an 1885 statute barred employers from prepaying transportation to bring noncitizens to the United States to perform "labor or service of any kind."<sup>77</sup> The question was whether the statute covered a British rector who had contracted to work at the Church of the Holy Trinity in New York City. Although he conceded that the prepayment of the minister's transportation may have fallen within the "letter of this section,"

<sup>74</sup> See OLP, MISUSING LEGISLATIVE HISTORY, *supra* note 12.

<sup>75</sup> 143 U.S. 457 (1892).

<sup>76</sup> Scalia, *supra* note 12, at 18–23; cf. ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 89–102 (2006) (supporting Justice Scalia's skepticism); see also Ronald Dworkin, *Comment* (commenting on the Tanner Lectures and offering thoughts on *Holy Trinity*), in SCALIA, A MATTER OF INTERPRETATION, *supra* note 12, at 115, 115–18; John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2403–04 (2003) (summarizing the Court's holding in *Holy Trinity*).

<sup>77</sup> Alien Contract Labor Act, ch. 164, § 1, 23 Stat. 332, 332 (1885).



Justice Brewer read the statute as a whole to exempt the pastor.<sup>78</sup> Justice Scalia critiqued this position, insisting that there was only one meaning of the text “labor or service of any kind,” which had to include the rector—end of story.<sup>79</sup>

Focus on choice of *text* and then on choice of (*con*)*text*. The statute applied to “labor or service of any kind.”<sup>80</sup> Justice Brewer stacked his opinion with large foundational texts—Ferdinand and Isabella’s commission to Columbus, the Crown’s charters to the English colonies, early state constitutions, and the Religion Clauses.<sup>81</sup> He concluded from these texts that in a “Christian nation” no one would think that a church could not pay for its minister to travel from abroad.<sup>82</sup> This move enlarged the (*con*)*text*, overshadowing the text that was most on point. Also, Justice Brewer’s stacking was selective, ignoring relevant (*con*)*text*: Congress had specifically resolved the question in 1891, amending the law to allow churches to import ministers.<sup>83</sup> Justice Brewer ignored this deliberative resolution because the law was not retroactive.<sup>84</sup>

Justice Scalia’s critique of *Holy Trinity* also made contestable choices, though different from Justice Brewer’s. Justice Scalia’s Tanner Lectures packed the entire statute’s meaning into six words: “labor or service of any kind.”<sup>85</sup> Then, these six words were cracked apart, each interpreted broadly, and reassembled into a plain meaning. Whether the preacher performed “labor or service of any kind” was analyzed as a question about itty bitty bits of text: What is “labor”? “Service”? Surely, Justice Scalia insisted, the pastor was at least engaged in “service” and even mental “labor,” and without a doubt “labor or service *of any kind*.”<sup>86</sup> Justice Scalia also relied on section 5’s exclusion of artists, singers, lecturers, and domestic servants from the prohibitions in the statute, for the exceptions list did not say anything about ministers.<sup>87</sup> But Justice Scalia failed to explain why a pastor might not have been considered a “lecturer” in 1885, or

<sup>78</sup> *Holy Trinity*, 143 U.S. at 458–59, 465.

<sup>79</sup> See Scalia, *supra* note 12, at 19–21.

<sup>80</sup> Alien Contract Labor Act § 1, 23 Stat. at 332.

<sup>81</sup> *Holy Trinity*, 143 U.S. at 465–68.

<sup>82</sup> *Id.* at 471–72.

<sup>83</sup> Act of Mar. 3, 1891, ch. 551, § 5, 26 Stat. 1084, 1085.

<sup>84</sup> See *id.* § 12 (providing that the amendment did not apply to pending actions).

<sup>85</sup> See Scalia, *supra* note 12, at 18–23.

<sup>86</sup> See *id.* at 19–20 (emphasis added). Nor does “of any kind” solve the problem. See BRIAN G. SLOCUM, *ORDINARY MEANING: A THEORY OF THE MOST FUNDAMENTAL PRINCIPLE OF LEGAL INTERPRETATION* 153–56 (2015) (arguing that “any” has no meaning until one identifies the domain of the category to which it is appended). Here, the question is what “kind” refers to—manual labor, or all labor.

<sup>87</sup> See Scalia, *supra* note 12, at 19–20.

at least analogous to the others on the list. Neither he nor Justice Brewer explained why section 1 should not have been read *in pari materia* with section 4. Section 4 barred ship masters from knowingly transporting any “laborer, mechanic, or artisan” pursuant to contract labor arrangements like those barred in section 1.<sup>88</sup> Justice Scalia’s bottom line was an interpretation that the statute covered all noncitizens brought over for employment—surely an ambitious reading for a one-page law targeting manual workers in section 4 and exempting a variety of lecturers and other workers of the mind in section 5.

Although Justice Scalia demanded that judges follow the original public meaning of texts, his Tanner Lectures ignored the public meaning that “labor or service of any kind” might have had in 1885. Such research might start with the Fugitive Slave Clause of the Constitution of 1789: Article IV requires the return to his home state of any “Person held to Service or Labour” (i.e., slavery or servitude) who had escaped to another state.<sup>89</sup> By the post-slavery 1880s, this term (“labor or service” or vice-versa) had acquired a broader meaning, including wage labor or physical toil but not intellectual work.<sup>90</sup> All of this was obvious, accessible (con)text, all ignored by the Scalia critique.

### B. In re Sinclair: *Suppressing Text*

No one is more important to the conceptual foundations of the new textualism than Judge Frank Easterbrook,<sup>91</sup> but his classic applications have sometimes failed to engage deeply with relevant statutory texts. Judge Easterbrook’s most famous statutory opinion is *Marshall v. United States*.<sup>92</sup> Writing for the en banc Seventh Circuit, Judge Easterbrook interpreted the Anti-Drug Abuse Act of 1986<sup>93</sup> to

<sup>88</sup> Alien Contract Labor Act, ch. 164, § 4, 23 Stat. 332, 333 (1885).

<sup>89</sup> U.S. CONST. art. IV, § 2, cl. 3 (Fugitive Slave Clause); Fugitive Slave Act of 1850, ch. 60, § 6, 9 Stat. 462, 463–64 (statutory version).

<sup>90</sup> Tammy Gales & Lawrence M. Solan, *Revisiting a Classic Problem in Statutory Interpretation: Is a Minister a Laborer?*, 36 GA. ST. U. L. REV. 491, 504 (2020) (“[W]hen [people] used the word ‘labor,’ they generally did so to describe manual labor, not something typically performed by clergy. . . . Furthermore[,] . . . the compound phrase ‘labor or service’ was used as an expression to mean the work of slaves—not the tasks of the clergy.”). The Chinese Exclusion Act of 1882, for example, used the term “laborers” to mean both “skilled and unskilled laborers and Chinese employed in mining.” Chinese Exclusion Act of 1882, ch. 126, § 15, 22 Stat. 58, 61.

<sup>91</sup> See generally Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533 (1983) (providing a foundation for textualist approaches to statutory interpretation); Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984).

<sup>92</sup> 908 F.2d 1312 (7th Cir. 1990) (en banc).

<sup>93</sup> 21 U.S.C. § 841(b)(1)(B)(v).

apply a mandatory minimum penalty for LSD sales based on a highly debatable interpretation of the word "mixture."<sup>94</sup>

More conceptually important, but less well known, is Judge Easterbrook's earlier treatment of Marguerite and Russell Sinclair, owners of a family farm. In April 1985, they filed a petition under Chapter 11 of the Bankruptcy Code.<sup>95</sup> The next year, Congress revised the Bankruptcy Code to add a new Chapter 12, providing a more flexible regime for handling family farms in distress.<sup>96</sup> The Sinclairs asked the bankruptcy court to "convert" their case from Chapter 11 to Chapter 12, as permitted under equity-based criteria found in the newly created section 1112(d)(3) of the Code.<sup>97</sup> The bankruptcy judge declined, and the district court affirmed.<sup>98</sup>

The lower court judges had a good reason to decline the petition. Section 302(c)(1) of the 1986 Act contained a transition rule: "The amendments made by subtitle B of title II [the new Chapter 12] shall not apply with respect to cases commenced under title 11 of the United States Code before the effective date of this Act."<sup>99</sup> The Sinclairs responded that Congress allowed for conversion to Chapter 12 under equitable circumstances.<sup>100</sup> They relied on the Joint Explanation of the Conferees who presented the Conference Committee Report (i.e., the text of the conference bill) to the House and Senate: "It is not intended that there be routine conversion of Chapter 11 and 13 cases, pending at the time of enactment, to Chapter 12. Instead, it is expected that courts will exercise their sound discretion in each case, in allowing conversions only where it is equitable to do so."<sup>101</sup>

Judge Easterbrook framed the case this way: "The statute says conversion is impossible, the report says that conversion is possible

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<sup>94</sup> See *Marshall*, 908 F.2d at 1317-18 (holding that blotter paper treated with LSD constitutes a "mixture" under the Anti-Drug Abuse Act, triggering the mandatory minimum). For a sharp critique of this linguistic conclusion, see Lawrence Solan, *When Judges Use the Dictionary*, 68 AM. SPEECH 50, 54 (1993) ("Calling the blotter paper impregnated with LSD a mixture seems odd for the same reason that it seems odd to call a pancake soaked with syrup a *pancake-syrup mixture* . . .").

<sup>95</sup> *In re Sinclair*, No. BK 85-50136 (Bankr. S.D. Ill. Mar. 26, 1987).

<sup>96</sup> Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, § 255, 100 Stat. 3088, 3105-14 (codified as amended at 11 U.S.C. §§ 1201-1208, 1211-1231).

<sup>97</sup> 11 U.S.C. § 1112(d)(3).

<sup>98</sup> *In re Sinclair*, No. BK 85-50136, slip op. at 2 (Bankr. S.D. Ill. Mar. 26, 1987), *aff'd*, Civil No. 87-5196, slip op. at 7 (S.D. Ill. Feb. 26, 1988), *aff'd sub nom. In re Sinclair*, 870 F.2d 1340 (7th Cir. 1989).

<sup>99</sup> Family Farmer Bankruptcy Act § 302(c)(1), 100 Stat. at 3119.

<sup>100</sup> See *Sinclair*, 870 F.2d at 1341.

<sup>101</sup> H.R. REP. NO. 99-958, at 48-49 (1986) (Conf. Rep.), as reprinted in 1986 U.S.C.C.A.N. 5227, 5249-50.

and describes the circumstances under which it should occur.”<sup>102</sup> He solved the conflict with an early statement of the new textualism: discern the objective meaning of the text, and do not guess at the subjective expectations of the legislators voting on the text.<sup>103</sup> Only the text, and nothing but the text, is law under Article I, and so only the text binds judges. The Sinclairs lost their case and, perhaps, their farm.

This textualist analysis missed key text. The conferees’ explanation, quoted above, was not referring to section 302 of the bankruptcy bill—the transition rule—as Easterbrook thought. Instead, the conferees were discussing the conversion rule in section 256 of the bill.<sup>104</sup> That provision was inserted in conference to add new section 1112(d)(3) to the Bankruptcy Code: Chapter 11 cases could be converted to Chapter 12 if “equitable,” that is, fair under the circumstances to the various interests, including creditors’ interests.<sup>105</sup> Judge Easterbrook did not mention section 256—the conversion provision—of the 1986 Act. He later told one of us that he was unaware of section 256 and did not explore the relevance of section 1112(d) of the Bankruptcy Code, even though it was cited in the district court’s opinion.<sup>106</sup>

Judge Easterbrook bungled the *choice of text*. The real conflict in this case was not between statutory text and legislative history but between two statutory provisions. On the one hand, you have the transition rule suggesting that the Sinclairs lose; on the other hand, you have the equitable conversion rule suggesting that the Sinclairs win. How do the different texts relate to one another? Judge Easterbrook told us he would stick with his original answer: The transition rule applies to conversion. Hence, equitable conversion applied only after the 1986 “effective date” of the statute. But there is another

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<sup>102</sup> *Sinclair*, 870 F.2d at 1341.

<sup>103</sup> *Id.* at 1341–44. Legislative history might help a judge figure out the meaning of words and phrases, sort of like a super-dictionary, but nothing more. *Id.* at 1342 (“Clarity depends on context, which legislative history may illuminate. The process is objective; the search is not for the contents of the authors’ heads but for the rules of language they used.”).

<sup>104</sup> Family Farmer Bankruptcy Act § 256(4), 100 Stat. at 3114.

<sup>105</sup> 11 U.S.C. § 1112(d)(3).

<sup>106</sup> *In re Sinclair*, Civil No. 87-5196, slip op. at 4 (S.D. Ill. Feb. 26, 1988). The court issued a show cause order to their counsel, requesting a brief, but vacated the order several days later, and Judge Easterbrook issued his opinion within a week. Order to Show Cause, *In re Sinclair*, No. 89–1093 (7th Cir. Mar. 17, 1989); Vacating Order, *In re Sinclair*, No. 89–1093 (7th Cir. Mar. 21, 1989); Order Affirming Judgment, *In re Sinclair*, No. 89–1093 (7th Cir. Mar. 28, 1989). On Judge Easterbrook’s tendency to ignore or override facts found in records on appeal, see Emily Hoerner & Rick Tulsy, *Pattern of Misstated Facts Found in Opinions of Renowned U.S. Judge Easterbrook*, INJUSTICE WATCH (Apr. 4, 2017), <https://www.injusticewatch.org/projects/2017/pattern-of-misstated-facts-found-in-probe-of-renowned-federal-judges-opinions>.

approach that allows a court to reconcile the two provisions, without negating either of them, thus harmonizing the texts.<sup>107</sup> The Sinclairs had requested leave to dismiss their Chapter 11 proceeding, without prejudice to their refile under Chapter 12.<sup>108</sup> The judges rejected that request because it would have been an end-run around the transition rule, section 302.<sup>109</sup> But because the judges did not link the conferees' remarks to the proper statutory text, they were unaware of the clash between sections 256 and 302. Allowing dismissal without prejudice in appropriate cases would have allowed the court to follow both sections 256 and 302. Judge Easterbrook's approach, in fact, read the transition rule more liberally than the full text demanded—and needlessly restricted the conversion provision.<sup>110</sup> This is a very odd “textualism.”

### C. Public Citizen: Ignoring the Whole Text

The practice of ignoring or suppressing text recurs when we apply our analytic questions—choice of text and (con)text—to another new textualist classic, Justice Kennedy's concurring opinion in *Public Citizen v. U.S. Department of Justice*.<sup>111</sup> The issue was whether the Federal Advisory Committee Act of 1972 (FACA)<sup>112</sup> required the American Bar Association (ABA) to follow sunshine requirements<sup>113</sup> when it provided advice to the President regarding potential judicial nominees. Watchdog groups argued that the ABA's Standing Committee on the Federal Judiciary was an “advisory committee” as defined by section 3(2)(B) of the 1972 Act to include “any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . . which is . . . established or utilized by the President.”<sup>114</sup> Because the

<sup>107</sup> See *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (holding that judges must reconcile clashing statutory provisions, if possible); *accord* *Branch v. Smith*, 538 U.S. 254, 266–76 (2003) (plurality opinion) (attempting to reconcile conflicting statutory provisions rather than find an implied repeal).

<sup>108</sup> *Sinclair*, 870 F.2d at 1345.

<sup>109</sup> *Id.* at 1344–45.

<sup>110</sup> See 133 CONG. REC. 3768–69 (1987) (statement of Sen. Chuck Grassley) (expressing dismay that judges were ignoring § 256 and not allowing conversions).

<sup>111</sup> 491 U.S. 440, 467 (1989) (Kennedy, J., concurring in the judgment). Other examples of leading textualist opinions by Justice Kennedy include *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546 (2005); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); and *Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995).

<sup>112</sup> 5 U.S.C. app. § 1.

<sup>113</sup> Sunshine laws impose transparency requirements, such as disclosure mandates and public access rights, on government entities. See *Open-Meeting Law*, BLACK'S LAW DICTIONARY (11th ed. 2019) (identifying the term “sunshine law” as a colloquial equivalent).

<sup>114</sup> 5 U.S.C. app. § 3(2).

President often considered its evaluations, he “utilized” the Standing Committee, making it subject to FACA’s sunshine requirements. Writing for a 5–3 Court, Justice Brennan declined to interpret the statute so broadly, relying on a rambling account of the legislative history and on the absurdity rule, for which he invoked *Holy Trinity*, the last time it has been cited by a Supreme Court majority opinion.<sup>115</sup>

Justice Kennedy made sport of the Court’s invocation of *Holy Trinity* and rejected any suggestion that text must yield to the “spirit” of the statute:

Where it is clear that the unambiguous language of a statute embraces certain conduct, and it would not be patently absurd to apply the statute to such conduct, it does not foster a democratic exegesis for this Court to rummage through unauthoritative materials to consult the spirit of the legislation in order to discover an alternative interpretation of the statute with which the Court is more comfortable.<sup>116</sup>

To Justice Kennedy, FACA clearly applied to the Standing Committee and, as applied, was unconstitutional because it invaded the President’s freedom to consult with outside experts and others when he made judicial appointments. Hence, Justice Kennedy agreed with the Court’s result that the Standing Committee did not have to follow the sunshine requirements of FACA.<sup>117</sup>

Justice Kennedy boiled the case down to one word: “utilized.”<sup>118</sup> This seemed to answer the question, as the President was obviously utilizing (i.e., using) the ABA for advice. But this framing of the case turns out to be wrong. As the Department of Justice argued, advisory committees might be limited to groups created or formally recognized by the federal government; Congress, for example, might “establish” an advisory committee, whose counsel would be “utilized” by the President.<sup>119</sup> Justice Kennedy provided no reason the text could not have been read this way.

At the very least, FACA was ambiguous—but not when you read the *entire* statute, which supported the *Public Citizen* majority. The majority and concurring opinions focused their attention on the section 3(2)(B) definition and ignored a different text, section 9(a): “No

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<sup>115</sup> *Pub. Citizen*, 491 U.S. at 453–54; cf. Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 *YALE L.J.* 70, 93–95 (2012) [hereinafter Nourse, *By the Rules*] (critiquing the majority opinion for its FACA legislative history).

<sup>116</sup> *Pub. Citizen*, 491 U.S. at 473 (Kennedy, J., concurring in the judgment).

<sup>117</sup> *See id.* at 486–69.

<sup>118</sup> *See id.* at 469–82.

<sup>119</sup> *See* Brief for Federal Appellee at 19–28, *Pub. Citizen*, 491 U.S. 440 (No. 88-429, 88-494), 1989 WL 1127662, at \*16–20, \*23–29.

advisory committee shall be *established* unless such establishment is— (1) specifically authorized by statute or by the President; or (2) . . . by the head of an agency” involved as a matter of formal record and in consultation with designated officials.<sup>120</sup> What this language demonstrates is that private bodies are not “advisory committees” under the Act. To “establish” a committee under section 9(a), the committee had to be authorized by statute, presidential order, or formal agency action, thus excluding the ABA’s Standing Committee.<sup>121</sup> For those following the statute’s text as the legislative process evolved, that should not be surprising: Neither the House nor the Senate wrote or passed bills that differed on this score—they covered only committees “established” by the government.<sup>122</sup>

Returning to the text provides a solution to the case’s riddle—the role played by “utilize.” Section 9(b) provides: “Unless otherwise specifically provided by statute or Presidential directive, advisory committees shall be *utilized* solely for advisory functions.”<sup>123</sup> It was possible, for example, for advisory groups to be created by one governmental entity but used by another. Congress could “establish” an official advisory committee, whose advice the President might “utilize.”<sup>124</sup> Groups whose advice was “utilized” by the President were advisory committees only if they were “established” by statute, presidential order, or formal agency action. This makes sense of the language in section 3(2)(B), “established or utilized.”<sup>125</sup> Conversely, section 14(a) provided that all advisory committees existing on FACA’s effective date should terminate within two years *unless* they were specifically renewed by presidential order or by appropriate

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<sup>120</sup> 5 U.S.C. app. § 9(a) (emphasis added).

<sup>121</sup> Indeed, reports from a “Presidential advisory committee” were required to cite the “authority for its creation.” *Id.* § 6(a)–(c).

<sup>122</sup> See Nourse, *By the Rules*, *supra* note 115, at 94; H.R. 4383, 92d Cong. § 3(b) (1972); S. 3529, 92d Cong. § 3(1), (2) (1972). One of us inferred from this that “utilize” was not meant to change the statute in significant ways. Conference committees are not supposed to make major changes to bills in conference. RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 111-157, rule XXII, cl. 9, at 916 (2011) (“The introduction of any language presenting specific additional matter not committed to the conference committee by either House does not constitute a germane modification of the matter in disagreement.”); SENATE MANUAL, S. DOC. NO. 112-1, rule XXVIII, subsec. 2(a), at 52 (2011) (“Conferees shall not insert in their report matter not committed to them by either House, nor shall they strike from the bill matter agreed to by both Houses.”). Adding section 9 into the calculus explains why the addition of the word “utilize” did not in fact make a major change in the bill’s coverage.

<sup>123</sup> 5 U.S.C. app. § 9(b) (emphasis added).

<sup>124</sup> See H.R. REP. NO. 92-1017, at 4 (1972) (discussing how advisory committees may be used by the President); S. REP. NO. 92-1098, at 3–5, 7 (1972) (same).

<sup>125</sup> See *supra* note 114 and accompanying text.



agency action or by statute.<sup>126</sup> FACA's text established that the ABA's judicial evaluation committee was not a federal "advisory committee," because it was neither established by the government nor subject to a sunset provision. Justice Kennedy's adventure into constitutional law thus becomes unnecessary if one simply bothers to read the whole text.

#### D. *Chisom*: A Representative Textual Gerrymander

Justice Scalia wrote many textualist landmarks. Some of these opinions strike us as cogent applications of legal terms of art,<sup>127</sup> while many of his ordinary meaning opinions reveal an unfounded confidence in text-only analysis.<sup>128</sup> Consider questions about *choice of text* and (*con*)*text* as applied to one of Justice Scalia's most theoretically lucid and colorful opinions—namely, his dissenting opinion in *Chisom v. Roemer*.<sup>129</sup> As we saw with Justice Kennedy's opinion in *Public Citizen*, Justice Scalia deployed one of the classic moves of textual gerrymandering: reducing a statute to a single word.

*Chisom*'s question was whether section 2 of the Voting Rights Act of 1965, as amended, applied to judicial elections. The original section 2 was simple: "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color."<sup>130</sup> No one disputed that this 1965 statute applied to judicial elections.<sup>131</sup> But in 1982, Congress amended the statute, in part as a response to

<sup>126</sup> 5 U.S.C. app. § 14(a).

<sup>127</sup> *E.g.*, *Moskal v. United States*, 498 U.S. 103, 119–20 (1990) (Scalia, J., dissenting) (demonstrating that "falsely made" was a legal term of art and did not entail the ordinary meaning, i.e., containing inaccurate information); *cf.* *Smith v. United States*, 508 U.S. 223, 241–42 (1993) (Scalia, J., dissenting) (critiquing the majority's view that a drug defendant was "using a firearm" when he traded his gun for drugs).

<sup>128</sup> *E.g.*, *Green v. Bock Laundry Mach.*, 490 U.S. 504, 527–30 (1989) (Scalia, J., concurring in the judgment) (dismissing legislative debates as "not helpful" and "declin[ing] to join [the majority's] discussion" of those issues at all, even while admitting the relevant text, "if interpreted literally, produces an absurd, and perhaps unconstitutional, result"); *cf.* William N. Eskridge, Jr., *Legislative History Values*, 66 *CHI. KENT L. REV.* 365, 376–78 (1990) (demonstrating that Justice Scalia's revision of the text in *Bock Laundry* rendered the rule incoherent).

<sup>129</sup> 501 U.S. 380, 404–17 (1991) (Scalia, J., dissenting).

<sup>130</sup> Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (codified as amended at 52 U.S.C. § 10301).

<sup>131</sup> See Brief for the United States, *Chisom*, 501 U.S. 380 (Nos. 90-757, 90-1032), 1991 WL 521250, at \*13–14 ("The text of the Voting Rights Act of 1965 therefore clearly applies to the election of state judges . . .").

Supreme Court decisions.<sup>132</sup> In *City of Mobile v. Bolden*, the Supreme Court had narrowed section 2, limiting it to intentional discrimination.<sup>133</sup> *Bolden* left Black citizens without redress if legislatures gerrymandered to preserve a segregated status quo but did not overtly admit to racial motivation. That was precisely the problem in Louisiana's judicial elections. The all-white legislature had diluted Black voting strength by combining New Orleans' Black-majority precincts with a larger number of suburban white-majority precincts to elect two reliably white justices through an at-large electoral process.<sup>134</sup> The Louisiana Supreme Court remained 100% white through the 1980s,<sup>135</sup> in a state whose population was almost one-third Black.<sup>136</sup>

In 1982, Congress overrode *Bolden* and rewrote section 2 to bar electoral gerrymanders with a demonstrable racial effect. The amended section 2 read as follows:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. . . .<sup>137</sup>

Ronald Chisom and other voters of color successfully challenged Louisiana's judicial districting law under the new statute.

<sup>132</sup> Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified as amended at 52 U.S.C. § 10301).

<sup>133</sup> 446 U.S. 55, 69-70 (1980).

<sup>134</sup> See Act of June 23, 1975, No. 51, 1975 La. Acts 282, 283 (codified at LA. STAT. ANN. § 13:101); Augustine & Thibodeaux, *supra* note 69, at 456-60 (analyzing the legislative background for the judicial district gerrymander).

<sup>135</sup> See John B. Wefing, *State Supreme Court Justices: Who Are They?*, 32 NEW ENG. L. REV. 47, 52 n.19 (1997).

<sup>136</sup> Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for the United States, Regions, Divisions, and States* 51 tbl.33 (U.S. Census Bureau, Working Paper No. 56, 2002).

<sup>137</sup> Voting Rights Act Amendments of 1982, § 2, 96 Stat. at 134.

Writing for a 6–3 majority, Justice Stevens ruled that section 2 continued to apply to judicial elections after 1982.<sup>138</sup> Justice Stevens argued that the burden was on the State to demonstrate that Congress meant to narrow section 2 or exclude judicial elections in the 1982 Amendments.<sup>139</sup> Because congressional deliberations revealed no evidence that Congress limited the reach of section 2, and there was every reason to think that Congress was expanding the ambit of the statute, *Chisom*'s claim prevailed.<sup>140</sup> In the wake of *Chisom*, Louisiana reconfigured its supreme court districts, and in 1994 Bernette Joshua Johnson, the first Black woman, was selected to the court, where she recently retired as Chief Justice.<sup>141</sup>

Justice Scalia's dissent would have produced a different result—but only because it edited out most of the statutory language and reduced the law to a single word: “representatives.” That word, Justice Scalia claimed, meant that section 2's disparate impact test could not apply to judicial elections.<sup>142</sup> He maintained that no ordinary speaker would have applied the word “representatives” to judges, and as evidence he cherry-picked a 1950 dictionary.<sup>143</sup> The logic: Judges were not like members of a legislature who act on behalf of their constituents. But the statute focused on “election[s],”<sup>144</sup> and no one doubted that Louisiana's judges were “elected,” nor that the dominant dictionary and popular view tied representatives to elections.<sup>145</sup> Justice Scalia riposted: “On that hypothesis, the fan-elected members of the baseball all-star teams are ‘representatives’—hardly a common, if even a permissible, usage.”<sup>146</sup> But Google “All-Star Game” and “rep-

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<sup>138</sup> *Chisom v. Roemer*, 501 U.S. 380, 403–04 (1991).

<sup>139</sup> *Id.* at 396 & n.23 (invoking the “dog that did not bark” canon); *see also* *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 90–91 (2007) (arguing that, in amending a statute providing for federal school aid, Congress's silence on a well-established calculation method indicated that Congress did not intend to change that method).

<sup>140</sup> *Chisom*, 501 U.S. at 404.

<sup>141</sup> Press Release, La. Sup. Ct., Louisiana Supreme Court Chief Justice Bernette Joshua Johnson Retires (Dec. 30, 2020), [https://www.lasc.org/Press\\_Release?p=2020-41](https://www.lasc.org/Press_Release?p=2020-41).

<sup>142</sup> *Chisom*, 501 U.S. at 405 (Scalia, J., dissenting). Justice Scalia's approach was in tension with his statement of textualist method, which emphasized context: “[F]irst, find the ordinary meaning of the language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies. If not . . . we apply that ordinary meaning.” *Id.* at 404.

<sup>143</sup> *Id.* at 410–11.

<sup>144</sup> Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2, 96 Stat. 131, 134 (codified as amended at 52 U.S.C. § 10301).

<sup>145</sup> *See, e.g., Representative*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/representative> (last visited July 29, 2021) (defining “representative” as “of, based on, or constituting a government in which the many are represented by persons chosen from among them usually by election”).

<sup>146</sup> *Chisom*, 501 U.S. at 410 (Scalia, J., dissenting).

representative.” It turns out that All-Stars are ordinarily said to be “representatives” of their cities or their teams.<sup>147</sup> In the end, Justice Scalia’s view of “representatives” reflected his personal view of governance, where political legislators churned out statutes in an unknowable black box and judges mechanically applied them to new facts. His transactional view of legislators is in stark contrast to that of leading political theorists, who view representatives as acting for and on behalf of the public.<sup>148</sup>

The Scalia interpretation also ignored a good bit of relevant (con)text. No one doubted that under the primary statutory text and the Fifteenth Amendment, *Chisom* could have brought a claim that judicial elections were covered, as long as the claim involved intentional discrimination.<sup>149</sup> And judicial elections were covered under section 5 of the Voting Rights Act, which at that time required Justice Department preclearance of some states’ new voting laws.<sup>150</sup> The 1982 Amendments added a different method to establish a violation via disparate impact, but nowhere were judicial elections expressly excluded. As we can see from the Scalia opinion, the aim of textual method in practice was not to harmonize the most text, but to disaggregate it—to reduce it to smaller morsels that could be expanded or narrowed to taste.

One of the problems with packing a statute into a single word is that the move can lead to further gerrymanders. Justice Scalia was not ready to say that judicial elections were completely excluded from coverage, only that disparate impact claims were excluded. To accomplish that, he had to slice up the statute in an unusual way. He split section 2(b), quoted above, into two segments, and then read “and” as “or.”<sup>151</sup> For the Scalia dissent, section 2(b) created two separate voting rights. One right was for individuals to challenge elections in which “members have less opportunity than other members of the

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<sup>147</sup> See, e.g., Joel Reuter, *Which Team Will Have the Most Representatives at 2020 MLB All-Star Game?*, BLEACHER REP. (Mar. 13, 2020), <https://bleacherreport.com/articles/2880156-which-team-will-have-the-most-representatives-at-2020-mlb-all-star-game>.

<sup>148</sup> See, e.g., HANNAH FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 53–54 (1967) (“We speak of representation . . . where the action is to be ascribed to someone other than the one who acts.”); see also David Plotke, *Representation Is Democracy*, 4 CONSTELLATIONS 19, 24 (1997) (arguing that representation plays a “central positive role in democratic politics”); Michael Saward, *The Representative Claim*, 5 CONTEMP. POL. THEORY 297, 301–02 (2006) (underscoring representation as “claim-making,” in addition to acting on behalf of others).

<sup>149</sup> See *City of Mobile v. Bolden*, 446 U.S. 55, 60–61, 69–70 (1980).

<sup>150</sup> See *Clark v. Roemer*, 500 U.S. 646, 655 (1991) (applying section 5 to Louisiana’s judicial gerrymander).

<sup>151</sup> See *Chisom*, 501 U.S. at 407–08 (Scalia, J., dissenting).

electorate *to participate in the political process.*”<sup>152</sup> The other right was “*to elect representatives of their choice.*”<sup>153</sup> For Justice Scalia, the right to participate allowed some claims in judicial elections—e.g., shorter polling hours in Black voting districts.<sup>154</sup> But the separate right to elect “representatives” did not apply to judicial elections.<sup>155</sup> The statute itself did not, however, bifurcate these rights. Instead, the section 2(b) right to “participate in the political process” was immediately followed by “and” to elect representatives.<sup>156</sup> Justice Scalia’s forced segregation arbitrarily broke up the statutory protection but was needed so that he could make the case turn on the word “representatives,” and his interpretive theory, even though his real beef was with disparate impact claims.

### E. Pride at Work: *Cracking-and-Packing a Constitutional Initiative*

Serving in the Reagan Department of Justice, Steve Markman was a Founding Father of the new textualism a decade before he was named to the Michigan Supreme Court.<sup>157</sup> His best-known opinion was *National Pride at Work v. Governor of Michigan*,<sup>158</sup> another example of cracking-and-packing a legal text.<sup>159</sup> As Justice Kennedy did in *Public Citizen*, Justice Markman broke up the statute into its individual words, read each word as broadly as possible, and then reassembled the words into a very broad prohibition at odds with the legislative and popular plans.<sup>160</sup>

The Markman opinion arose in a challenge to whether Kalamazoo, Michigan could grant health insurance benefits to same-sex partners. Kalamazoo permitted every municipal employee to include another person in their health insurance coverage that came with the employment package.<sup>161</sup> Married employees could include their legal spouses. Nonmarried employees could include “domestic

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<sup>152</sup> *Id.* (quoting 42 U.S.C. § 1973(b)).

<sup>153</sup> *Id.* at 408–10, 417 (quoting 42 U.S.C. § 1973(b)).

<sup>154</sup> *See id.* at 417.

<sup>155</sup> *Id.* at 416–17.

<sup>156</sup> Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified at 52 U.S.C. § 10301(b)).

<sup>157</sup> *See supra* note 74 and accompanying text.

<sup>158</sup> 748 N.W.2d 524 (Mich. 2008).

<sup>159</sup> Justice Markman was criticized for disrespecting precedent. *See, e.g.,* Robert A. Sedler, *The Michigan Supreme Court, Stare Decisis, and Overruling the Overrulings*, 55 WAYNE L. REV. 1911, 1939 (2009) (“[I]n the period from 1999 to 2008, the Michigan Supreme Court overruled thirty-four decisions on ideological grounds. . . . I believe this record of overrulings on ideological grounds by one state court in a limited time frame is truly extraordinary, and likely unmatched by any other state court.”).

<sup>160</sup> *Nat’l Pride at Work*, 748 N.W.2d at 533–39.

<sup>161</sup> *Id.* at 531–32.

partners,” so long as they could certify that the partners were of the same sex; at least eighteen years old and mentally competent; shared a common residence; were not domestic partners or married to anyone else and not related by blood; and shared financial arrangements and daily living expenses.<sup>162</sup> The Michigan Attorney General claimed that the Kalamazoo plan was preempted by a state constitutional provision defining marriage as a “union of one man and one woman.”<sup>163</sup>

In 2004, Michigan voters amended the Michigan constitution as a response to other states’ early recognition of same-sex marriage and civil unions.<sup>164</sup> Aiming to forestall the outcomes of Vermont and California, which bestowed almost all the legal rights and duties of civil marriage upon same-sex couples in statewide civil unions and domestic partnerships (respectively), Michigan voters adopted an amendment which read: “To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.”<sup>165</sup> National Pride at Work and a cohort of various individual plaintiffs brought suit, seeking a declaratory judgment that the amendment did not bar public employers from providing health-insurance benefits to their employees’ qualified same-sex domestic partners.<sup>166</sup> The Attorney General intervened in the suit on behalf of the defendants, arguing that Kalamazoo could not provide partnership benefits to its employees, as its union contract provided.<sup>167</sup> Justice Markman’s opinion for the Court agreed with the Attorney General and voided the contract benefits.<sup>168</sup>

Justice Markman separately analyzed each of the words of the Amendment. Was there (1) an “agreement” (2) that was being “recognized” (3) as a “marriage or similar union”?<sup>169</sup> Disaggregating the sentence into individual words cracked the statute open, allowing

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 532.

<sup>164</sup> MICH. CONST. art. I, § 25.

<sup>165</sup> *Id.* In November 2003, the Massachusetts Supreme Judicial Court recognized same-sex marriages. *E.g.*, *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003). Earlier, California and Vermont had adopted statutes granting almost all the legal rights and benefits of marriage to same-sex partners and persons joined in civil unions. California Domestic Partner Rights and Responsibilities Act of 2003, ch. 421, 2003 Cal. Stat. 3081 (providing comprehensive domestic partnership rights in California); Act of Apr. 26, 2000, No. 91, 2000 Vt. Acts & Resolves 72 (providing comprehensive civil union rights in Vermont).

<sup>166</sup> *Nat’l Pride at Work*, 748 N.W.2d at 529–30.

<sup>167</sup> *Id.* at 530.

<sup>168</sup> *Id.* at 543.

<sup>169</sup> *Id.* at 533–39.



Justice Markman to choose the broadest possible meaning of each term. When packed back together, the text appeared to have only one plain meaning—but Justice Markman’s interpretation left out relevant text and (con)text. By 2004, for example, many municipalities had created registries where same-sex couples could file domestic partnership agreements with the government, some triggering public benefits.<sup>170</sup> California’s domestic partnership law vested registered partners with hundreds of marriage-based legal benefits.<sup>171</sup> But Kalamazoo had nothing like this regime for its employees: The city only asked employees to identify their domestic partners and to certify the truth of the factual requirements.<sup>172</sup> Upon certification, the partners would be added as health insurance beneficiaries.<sup>173</sup> Hence, there was no “agreement” similar to a marriage contract, a civil union agreement, or even a registered domestic partnership.<sup>174</sup>

Justice Markman focused most of his attention on “marriage or similar union.” The natural reading of that language likely would target legal statuses amounting to a marriage or something close to it, in light of the preamble’s goal of securing “the benefits of marriage for our society and future generations of children.”<sup>175</sup> As background (con)text, the laws of other states at the time did recognize such a similar legal status, namely, Vermont’s civil unions and California’s statewide domestic partnerships.<sup>176</sup> But Kalamazoo’s domestic partnership requirements differed. Although the city intended to give the partners of lesbian and gay employees the same contractual benefits as those provided to the spouses (or partners) of straight employees,

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<sup>170</sup> See David L. Chambers, *Tales of Two Cities: AIDS and the Legal Recognition of Domestic Partnerships in San Francisco and New York*, 2 LAW & SEXUALITY 181, 182 (1992).

<sup>171</sup> See *supra* note 162 and accompanying text.

<sup>172</sup> Attorney General’s Brief on Appeal at 5–7, *Nat’l Pride at Work*, 748 N.W.2d 524 (Nos. 133429, 133554) (describing the domestic partnership requirements of Kalamazoo, the University of Michigan, and Michigan State University).

<sup>173</sup> *Nat’l Pride at Work*, 748 N.W.2d at 531.

<sup>174</sup> Justice Markman defined “agreement” as any kind of “mutual arrangement.” *Nat’l Pride at Work*, 748 N.W.2d at 538 (quoting RANDOM HOUSE WEBSTER’S COLLEGE DICTIONARY 28 (1991)).

<sup>175</sup> MICH. CONST. art. I, § 25.

<sup>176</sup> See *supra* note 165 and accompanying text. In 1999, the Vermont Supreme Court directed the state legislature to create a legal form that would afford same-sex couples a status similar to that of married couples. *Baker v. State*, 744 A.2d 864, 867 (Vt. 1999). The next year, the Vermont Legislature enacted a law creating “civil unions,” with all the legal rights and duties of marriage, for same-sex couples. Act of Apr. 26, 2000, No. 91, 2000 Vt. Acts & Resolves 72. California enacted a similar law in 2003. California Domestic Partner Rights and Responsibilities Act of 2003, ch. 421, 2003 Cal. Stat. 3081, 3081–82.

the municipal policy created no legal status other than that of an employment contract.<sup>177</sup>

To include Kalamazoo's contract, Justice Markman split up "similar" and "union." The opinion defined a "union" as "something formed by uniting two or more things; combination," and "similar" meant "having qualities in common."<sup>178</sup> So *anything* that put two or more people together and had "qualities in common" with marriage was covered by the amendment—potentially including grandchildren, best friends, and even casebook co-authors. Or imagine this: A man asks a woman to slow dance with him; she consents because he is an appropriate partner given his age, his unmarried status, and his not being a relative. Is their "agreement" a "similar union" to a marriage? An impertinent young man in Jane Austen's *Northanger Abbey* thought so, but his dancing partner was appalled.<sup>179</sup>

Cracking the amendment into itty bits of text, Justice Markman created an implausibly broad construction, rendered the preamble irrelevant, and failed to consider relevant (con)text—namely, state civil union and domestic partnership laws. This should not be a surprise, given what we have already seen: *Packing the text's meaning into small pieces tends to increase, rather than decrease, discretion.* Once the text is pulled from context, each word is set in its own null context,<sup>180</sup> and the interpreter may give it either a broad or a narrow meaning, without regard to the remainder of text.

### F. *The Costs of Gerrymandering*

Given the textual mistakes identified above, one might wonder whether we have gerrymandered our own examples. But the authors of these opinions are the early new textualist leaders and chose to make important theoretical statements in these cases; indeed, legislation casebooks have focused attention on these very cases as exemplary of the new textualist methodology.<sup>181</sup> Textualists rely upon them

<sup>177</sup> See *Nat'l Pride at Work*, 748 N.W.2d at 531–32.

<sup>178</sup> *Id.* at 533–34 (quoting RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY, *supra* note 174, at 1248, 1456).

<sup>179</sup> JANE AUSTEN, *NORTHANGER ABBEY* 74–75 (Barbara M. Benedict & Deirdre Le Faye eds., Cambridge Univ. Press 2006) (1817) (giving an amusing fictional account of a young man who suggested that a woman's acceptance of an invitation to dance was "similar" to her acceptance of an offer to marry).

<sup>180</sup> For an analysis of this move from text to null context, see Nourse, *Picking and Choosing*, *supra* note 45, at 1414–23 (relying upon PAUL GRICE, *STUDIES IN THE WAY OF WORDS* 23–31 (1989) (highlighting how an interpreter can change the contextual implication of a phrase by isolating it from surrounding text)).

<sup>181</sup> See, e.g., LISA SCHULTZ BRESSMAN, EDWARD L. RUBIN & KEVIN M. STACK, *THE REGULATORY STATE* 147–53, 303–04 (3d ed. 2020) (reviewing *Holy Trinity* with Justice Scalia's critique and *Public Citizen*); WILLIAM N. ESKRIDGE, JR., JAMES J. BRUDNEY, JOSH

as sources of methodological guidance.<sup>182</sup> Our Appendix of recent cases demonstrates that the slicing and dicing techniques generating imaginary plain meanings have now become standard practice within the Supreme Court.<sup>183</sup> To the extent textual gerrymandering is occurring, the rule of law takes a hit because statutory applications become less objective and predictable.<sup>184</sup> If you actually read the statutes in question—they are not very complicated—would you have predicted the results in *Bostock* and the cases analyzed above? The new textualists claim their method is the only one that can be applied objectively to reach consistent results across different interpreters, yet textualists themselves no longer agree upon the proper text and have disagreed in high-profile cases. One might claim that as long as both of the results were “reasonable” in some way, the interpreters’ discretion has been restrained relative to a universe of additional possible interpretations. But can textualism survive the discovery that, despite its theoretical foundations, these divergent interpretations depend upon picking and choosing text? And that their rush to exclude legislative evidence often yields results that are indefensible as a matter of text?

The fact that textualist interpretation allows judges wide discretion to define textual meaning brings to mind a cognitive bias: The less information you use in interpretation, the more likely the interpreter will engage in motivated reasoning.<sup>185</sup> No leading linguist believes that

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CHAFETZ, PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 366, 377–78, 411–18, 476–81, 511–13, 517–25, 528–38, 760–65 (6th ed. 2020) (reviewing *National Pride at Work*, *Holy Trinity* and Justice Scalia’s critique, *Public Citizen*, *Chisom*, *Marshall*, and *Sinclair*); WILLIAM N. ESKRIDGE, JR., ABBE R. GLUCK & VICTORIA F. NOURSE, *STATUTES, REGULATION, AND INTERPRETATION: LEGISLATION AND ADMINISTRATION IN THE REPUBLIC OF STATUTES* 304–12, 386–97, 410–23, 686–98 (2014) (reviewing *Holy Trinity* and Justice Scalia’s critique, *Chisom*, *Marshall*, *Public Citizen*, and *Pride at Work*); JANE C. GINSBURG & DAVID S. LOUK, *LEGAL METHODS: CASE ANALYSIS AND STATUTORY INTERPRETATION* 274–86 (5th ed. 2020) (providing textualist lower court and purposivist Supreme Court opinions in *Holy Trinity* and *Marshall*); Manning & Stephenson, *supra* note 12, at 44–45, 121–36, 246–49, 253–69 (reviewing *Holy Trinity* and Justice Scalia’s critique, *Public Citizen*, *Sinclair*, and *Marshall*); ABNER J. MIKVA, ERIC LANE & MICHAEL J. GERHARDT, *LEGISLATIVE PROCESS* 818–23, 843–54, 908–18 (4th ed. 2015) (reviewing *Holy Trinity*, *Marshall*, and *Chisom*).

<sup>182</sup> See, e.g., *United States v. Marshall*, 908 F.2d 1312, 1319 (7th Cir. 1990) (en banc) (relying on *Sinclair*).

<sup>183</sup> See *infra* Appendix.

<sup>184</sup> See William N. Eskridge, Jr. & John Ferejohn, *Politics, Interpretation, and the Rule of Law* (identifying the elements of a legal system that satisfy “the requirements of the rule of law” as “generality,” “knowability,” and “performability”), in *THE RULE OF LAW: NOMOS XXXVI* 265, 265 (Ian Shapiro ed., 1994).

<sup>185</sup> See Adam M. Samaha, *Looking Over a Crowd—Do More Interpretive Sources Mean More Discretion?*, 92 N.Y.U. L. REV. 554 (2017) (answering the question posed in the title as: not at all, based on empirical evidence).

one can discern the meaning of a sentence by pulling words from it, for words cannot be understood without context.<sup>186</sup> Language depends upon condensed, shorthand expressions that communicate based on shared but unarticulated assumptions. As the philosopher John Searle has explained: If I order a hamburger, I do not expect that I will receive a hamburger in a lucite cube, and I certainly do not have to communicate “no lucite cube” in my order.<sup>187</sup> If, after more than a decade during which the Voting Rights Act applied to judicial elections, Congress imposes new anti-discrimination rules onto state elections, a judicial opinion saying that judicial elections are no longer covered by the Voting Rights Act is like the waiter who brings the burger in a lucite cube.<sup>188</sup> But the judge is more willful than the waiter: She trumps background context with her own theory of judging and representation, and the injury is to our democracy and individual voting rights, not only to a disappointed diner.

Judges who boast about the determinacy of their method often secure it by adding meaning using implicit, but unacknowledged, modifiers.<sup>189</sup> And, often, these modifiers are sufficiently hard-edged and quantitative to appear to resolve the case. In *Public Citizen*, Justice Kennedy expanded FACA to require that *all* committees utilized *in any way* by the President were advisory committees, including family members and political advisers—an absurd result.<sup>190</sup> In *Pride at Work*, Justice Markman read the statute to include *all* relationships similar *in*

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<sup>186</sup> See, e.g., SLOCUM, *supra* note 86, at 106 (“With philosophy of language and linguistics, the typical focus is on sentences as the relevant units of meaning. Part of the problem with the current judicial approach to interpretation, though, is that courts often frame the ordinary meaning inquiry as involving an individual word instead of the relevant sentence.”).

<sup>187</sup> John R. Searle, *Literal Meaning*, 13 ERKENNTNIS 207, 216 (1978). See generally KENT BACH & ROBERT M. HARNISH, *LINGUISTIC COMMUNICATION AND SPEECH ACTS* (1979) (observing that the determination of locutionary meaning involves inferences from contextual information about the speaker’s intentions); GRICE, *supra* note 180, at 1–144; FRANÇOIS RECANATI, *LITERAL MEANING* (2004) (defending semantic contextualism); ROBERT C. STALNAKER, *CONTEXT AND CONTENT: ESSAYS ON INTENTIONALITY IN SPEECH AND THOUGHT* (1999) (offering a subjective conception of context as the common ground of shared presuppositions in a conversation). On applying these ideas, see Nourse, *Picking and Choosing*, *supra* note 45, at 1414–20.

<sup>188</sup> See *supra* Section I.D.

<sup>189</sup> See Nourse, *Picking and Choosing*, *supra* note 45, at 1420–23 (showing how analyzing phrases taken out of context leads judges to imply exclusivity or inclusivity not present when the phrases are considered in context of their full statutes); Victoria Nourse, *Reclaiming the Constitutional Text from Originalism: The Case of Executive Power*, 106 CALIF. L. REV. 1, 24–25 (2018) [hereinafter Nourse, *Reclaiming*] (explaining how Justice Scalia implied the word “all” before “the Executive Power” in Article II of the Constitution in *Morrison v. Olson*, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting)). For a discussion of quantifiers, see SLOCUM, *supra* note 86, at 148–212.

<sup>190</sup> See *supra* Section I.C.

any way imaginable to marriage (ironically, a unique institution).<sup>191</sup> In *Chisom*, Justice Scalia modified representatives to mean *only* political officials.<sup>192</sup> And lest you think that these implicatures are always inexplicit, do not forget Justice Scalia's opinion in *Morrison v. Olson*,<sup>193</sup> much celebrated by textualists, that the President has *all possible* and not just "the" executive power, something the Constitution does not say.<sup>194</sup>

Textualists are not alone in failing to address the picking-and-choosing problem. Purposivism has its own gerrymandering problem, given the malleability of statutory purpose, as we demonstrated in Table 1 above.<sup>195</sup> So in *Chisom*, one might describe the purpose broadly as protecting minority voting rights, or more narrowly as protecting only voting rights in elections for representatives. In *Public Citizen*, the statute identified six purposes, any of which could have been read broadly or narrowly.<sup>196</sup> But the new textualism claims as its comparative advantage that its method uniquely constrains decision-making. That claim has never been supported empirically and is inconsistent with evidence from the leading empirical studies of Supreme Court decisionmaking.<sup>197</sup> Table 2 maps this dialectic. One axis is choice of relevant text and (con)text, the other is how broadly to read words and phrases.

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<sup>191</sup> See *supra* Section I.E.

<sup>192</sup> See *supra* Section I.D.

<sup>193</sup> 487 U.S. at 705–06 (Scalia, J., dissenting); see also Nourse, *Reclaiming*, *supra* note 189, at 1.

<sup>194</sup> See Nourse, *Reclaiming*, *supra* note 189, at 23.

<sup>195</sup> See *supra* Table 1. See generally HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge & Philip P. Frickey eds., 1994) (published version of the 1958 tent. ed.); cf. Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 68 (1994); William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 693 (1987).

<sup>196</sup> 5 U.S.C. app. § 2(b).

<sup>197</sup> See William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008) (analyzing statutory interpretation in Supreme Court cases empirically and concluding that ad hoc judicial decisionmaking occurs in textualist and purposivist decisions alike); Brudney & Ditslear, *supra* note 25, at 79–80, 83 (identifying cases in which same textualist canons are used to reach opposing outcomes).

TABLE 2. HOW TEXT AND (CON)TEXT CAN BE MANIPULATED

	<b>Narrow Reading of Words</b>	<b>Broad Reading of Words</b>
	Limit Words and Phrases to Their Core Meanings	Divvy Up Text, Provide Broad Meaning for Each Word, Then Reassemble
<b>Shrinking (Con)text</b> Ignore and/or Minimize Inconvenient Text	<i>Sinclair</i> (Easterbrook) <i>Chisom</i> (Scalia's dissent)	Scalia's Tanner Lectures (Anti-Holy Trinity) <i>Public Citizen</i> (Kennedy's concurring opinion) <i>National Pride at Work</i> (Markman)
<b>Enlarging (Con)text</b> Whole Act or Whole Code or Constitution	<i>Holy Trinity Church</i> (Brewer) <i>Public Citizen</i> (Brennan)	<i>Chisom</i> (Stevens)

Particularly troubling is new textualism's scorn for frank normative evaluation, while freeing judges to make normative choices under the veil of word games. In the foregoing cases, judges took an active role in *creating, not just discovering, text*. And the created text coincided with ideological positions associated with the judges writing those opinions. Judge Easterbrook's interpretation of the 1986 Bankruptcy Act was consistent with his Chicago School premise that burdening bankers would dry up farmers' credit, and so such burdens should be minimized.<sup>198</sup> Justice Scalia's *Chisom* dissent coincided with a rigid understanding of the separation of powers, aggressively differentiating judges as officers of the law from politician-representatives. Justice Markman's *Pride at Work* decision echoed the views of those nostalgic for the 1950s marriage regime or insistent that same-sex unions ought to be denigrated. If textualism does not produce "one right answer," then it follows that hard cases are likely to be decided by reading partisan values into gerrymandered texts.<sup>199</sup> This reverses the critique of purposivism: In practice, the new textualists' choice of text and choice of (con)text is like looking out over the crowd and picking out their friends.<sup>200</sup>

<sup>198</sup> For a discussion of how neoliberal economic ideals associated with the Chicago School have systematically influenced legal decisionmaking, see Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 *YALE L.J.* 1784, 1799, 1815–18 (2020).

<sup>199</sup> See, e.g., Easterbrook, *Absence of Method*, *supra* note 16, at 95 (demonstrating that judges are not omniscient and apply canons in ways that fit with their partisan understandings when issues present no clear or easy answer).

<sup>200</sup> See *supra* note 17 and accompanying text.



New textualism's partisan supporters may believe that ideological tilt is a positive feature if textualism correlates with dismantling or enfeebling the modern regulatory state or with an anti-statist populism. But textualism as a method is not inherently libertarian, unless the partisan judge makes it so. New textualist analysis would have expanded government regulation of religion in the Tanner Lectures, assumed congressional meddling with presidential nominations in *Public Citizen's* concurring opinion, terminated contract rights in *Pride at Work*, and denied voting rights in the *Chisom* dissent. Nor is textualism as applied by Ivy League and Chicago School jurists populist in a generic sense associated with a pro-agrarian or anti-regulatory stance. If anything, Judge Easterbrook's opinion in *Sinclair* is pro-bank elitist (ask the family farmers, the classic audience for populism but disrespected in the judge's opinion), and Justice Kennedy's separate opinion in *Public Citizen* aggrandizes the President's authority and protects the ABA, a bastion of elite power, against FACA's open-process directives. The method's manipulability makes Procrustes—the ancient bandit and smith who either stretched or amputated people's legs to fit them into an iron bed—the new textualism's mythic symbol.

On the other hand, some of our examples here (and elsewhere in this Article) do echo the ideology or spirit of classic populism—but the echo is to the most questionable features of that political impulse, what Richard Hofstadter called the “paranoid style” in American politics.<sup>201</sup> The paranoid style of many historical claims that sounded in populist rhetoric—from the anti-Catholic paranoia of the early nineteenth century to the racist hysteria of the late nineteenth and early twentieth centuries—rested upon Americans' feeling that they were being dispossessed and their cherished traditions diminished by a conspiracy of government officials and private elites.<sup>202</sup> According to the populists, “[s]elf-government didn't require any special learning, just the native wisdom of the people,” as opposed to “educated sophisticates.”<sup>203</sup> There is a whiff of that style in Justice Markman's fearful resistance to lesbian and gay relationships in *Pride at Work* and in Justice Scalia's textual gymnastics arrayed against racial remediation in *Chisom*. There is even a populist edge to his critique of *Holy Trinity*, where an elite Court protected a tony well-heeled Episcopal church against a statute aiming to discourage a flood of for-

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<sup>201</sup> Richard Hofstadter, *The Paranoid Style in American Politics*, HARPER'S MAG., Nov. 1964.

<sup>202</sup> *Id.* at 79–81.

<sup>203</sup> GEORGE PACKER, LAST BEST HOPE: AMERICA IN CRISIS AND RENEWAL 103 (2021) (discussing Hofstadter's thesis as reflecting anti-intellectualism and anti-elitism).

eign manual workers. Some populist complaints—and some of its suspicion of elite decisions—are well-grounded. If the Justices seek what they consider to be populist results (whether it be for farmers or against elites and minorities), those aims should be transparent, not hidden in an assertedly neutral empirical method. Our critique is not focused on the results of any particular case, but on a *method* that justifies itself at a meta-level as normatively superior because it speaks on behalf of the “ordinary man,” whether that method yields purportedly liberal or conservative, popular or unpopular, results.

The Constitution established our government as a republic of representatives, not as a populist democracy. As Madison expressed it in *Federalist No. 10*, the goal of a representative, deliberative democracy is

to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good, than if pronounced by the people themselves, convened for the purpose.<sup>204</sup>

The legitimacy of a democratic government is complicated and cannot be reduced to a single variable—but leading political theorists maintain that a key building block for legitimate government is the people’s perception that their elected representatives are deliberating with their overall interests in mind and are accountable for the products of their deliberations.<sup>205</sup> No political scientist doubts that, in the United States, voters base their views on low information; they delegate policy choices to elected representatives who, as a relative matter, have greater information about the means by which actual policies can be implemented in a complex legal system.<sup>206</sup>

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<sup>204</sup> THE FEDERALIST NO. 10 (James Madison).

<sup>205</sup> See generally PHILIP PETTIT, ON THE PEOPLE’S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY (2012); DAVID M. ESTLUND, DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK (2008); Margaret Levi & Laura Stoker, *Political Trust and Trustworthiness*, 3 ANN. REV. POL. SCI. 475, 478 (2000); Thomas M. Guterbock & Bruce London, *Race, Political Orientation, and Participation: An Empirical Test of Four Competing Theories*, 48 AM. SOC. REV. 439 (1983); Stephen C. Craig, Richard G. Niemi & Glenn E. Silver, *Political Efficacy and Trust: A Report on the NES Pilot Study Items*, 12 POL. BEHAV. 289 (1990); Donald E. Stokes, *Popular Evaluations of Government: An Empirical Assessment*, in ETHICS AND BIGNESS: SCIENTIFIC, ACADEMIC, RELIGIOUS, POLITICAL, AND MILITARY 61 (Harlan Cleveland & Harold D. Lasswell eds., 1962).

<sup>206</sup> Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 AM. POL. SCI. REV. 63, 66–76 (1994).

This process has served the country well, and the judiciary has usually been a cooperative partner or a faithful relational agent in that process.<sup>207</sup> The new textualism's effort to exclude or marginalize representatives' views in the name of a consumer economy of the "ordinary person" is, at bottom, a faux-populism—ostensibly democracy-enhancing but in practice judge-empowering. Rhetorically, it builds on cynicism about legislators and is fueled and empowered by congressional gridlock, a phenomenon that Samuel Issacharoff warns is creating a "democracy deficit" and enfeebling our national government.<sup>208</sup> Nadia Urbinati has shown that populists claim to represent an immediate "ordinary" popular will, but that these claims are routinely deployed by authoritarian leaders to bypass the republican political process and to advance their own interests.<sup>209</sup> The democracy deficit and suspicion of public officials have gotten worse in the last two decades, at the same time statutory populism and suspicion of any kind of official discretion have come to dominate discourse about courts and judging.<sup>210</sup> Today, as we shall see, Justices of all persuasions hew to the rhetoric and embrace the methods of the new textualism, with legislative materials ignored or closeted. As the reach of the new textualism has expanded, we have entered the golden age of textual gerrymandering in search of "ordinary" meaning.

## II

### THE ROBERTS COURT AND THE NEW JUDICIAL ECONOMY OF INFORMATION

In this Part, supplemented by the Appendix of recent cases, we explore how the Roberts Court—including Justices of liberal as well as conservative persuasion—has shifted the interpretive inquiry away from the authors of statutes, Congress (the "production economy"), to the readers of statutes (the "consumer economy").<sup>211</sup> Building on the

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<sup>207</sup> See WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994) (offering examples of dynamic but text-based statutory interpretation by judges operating as faithful agents of congressional plans); cf. William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319 (1989) (demonstrating that a "faithful agent" for a long-term contract or statute is a judge who acts as a "relational agent" dynamically applying its rules to new circumstances).

<sup>208</sup> Samuel Issacharoff, *Democracy's Deficit*, 85 U. CHI. L. REV. 485, 497–99 (2018).

<sup>209</sup> See Nadia Urbinati, *Liquid Parties, Dense Populism*, 45 PHIL. & SOC. CRITICISM 1069, 1070 (2019) ("[P]opulism's factional nature . . . resonates with . . . the priority given to their 'here' and 'now' majority . . ."). This immediacy helps to explain populism's "impatience" with constitutional rules and the division of powers . . . *Id.*

<sup>210</sup> Issacharoff, *supra* note 208, at 485–88 (surveying causes of populist anti-institutional sensibilities throughout the West).

<sup>211</sup> See *supra* note 37 and accompanying text.

original impulse to focus on particular words, the Justices now joust about the meaning to the ordinary person of a textual morsel, trading homey examples, even in cases where the methodology yields no interpretive closure even among true textualist believers, like *Bostock v. Clayton County*.<sup>212</sup> Borrowing original public meaning from constitutional theory, the homey example now looks backward in time: For example, what did “sex” mean to the average American in 1964?<sup>213</sup>

Here, we illustrate the method and oddity of orthodox textualism. Elite judges try to imagine themselves as ordinary people reading technical statutes as if they lived decades in the past. They refuse to rely on legislative evidence for anything but perfunctory confirmation of the judge’s imaginary ordinary meaning.<sup>214</sup> Meanwhile, the judge’s duty to interpret the law is offloaded onto dictionaries, corpus searches, grammar-based inferences, and judicially created textual canons of statutory construction.<sup>215</sup> Moreover, when dictionaries and the like do not yield interpretive closure, judges deploy judge-made substantive canons to supplant actual evidence of meaning from the production economy, even when the statutory authors’ views are undisputed.<sup>216</sup>

The foundational cases for the new textualism saw judges cherry-picking texts and (con)text. In today’s age of orthodox textualism, substantive canons are being aggressively deployed by judges to *create new context*. By creating and adjusting substantive canons, judges can engage in “stealth constitutionalism,” bending—or rewriting—pre-

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<sup>212</sup> 140 S. Ct. 1731 (2020); see *infra* Section II.C (discussing the various opinions in *Bostock*).

<sup>213</sup> See *supra* notes 28–29 and accompanying text.

<sup>214</sup> On the use of legislative history to confirm “plain” meaning, see, for example, *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1072 (2020) (Breyer, J.); *Milner v. Dep’t of Navy*, 562 U.S. 562, 574 (2011) (Kagan, J.); *Hall v. United States*, 566 U.S. 506, 514 n.3 (2012) (Sotomayor, J.); see also James J. Brudney, *Confirmatory Legislative History*, 76 BROOK. L. REV. 901, 901–02 (2011) (discussing judges’ use of legislative history to confirm their plain meaning analysis).

<sup>215</sup> See *supra* note 30 and accompanying text; ESKRIDGE, *INTERPRETING LAW*, *supra* note 21, at 407–45 (appendix of canon references for the Roberts Court, 2006–15); Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court’s First Era: An Empirical and Doctrinal Analysis*, 62 HASTINGS L.J. 221, 236 (2010); Anita S. Krishnakumar, *Dueling Canons*, 65 DUKE L.J. 909, 914 (2016); Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court’s First Decade*, 117 MICH. L. REV. 71, 74–75 (2018).

<sup>216</sup> See, e.g., Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1350–51 (2020) (arguing that the Roberts Court textualists use canons to smuggle in “purpose” through the back door). For a more democracy-respecting theory of the canons, see generally EINER ELHAUGE, *STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION* (2008).

selected texts to reflect their preferred constitutional values.<sup>217</sup> This exacerbates new textualism's costs to representative democracy as well as to the rule of law. Textualists claim to be empirical, not normative, and yet the choice of canons often depends upon normative commitments that may be entirely at odds with the commitments of the people who voted for the statute in Congress.<sup>218</sup>

### A. *Bond v. United States: Choosing Text and Context*

Recall that Judge Easterbrook treated *Sinclair* as an easy case because he did not notice a relevant textual provision.<sup>219</sup> Justice Kennedy in *Public Citizen* and Justice Scalia in *Chisom* made easy cases harder by ignoring relevant statutory text.<sup>220</sup> Cracking-and-packing, accompanied by suppression of text, has become, if anything, more common during the Roberts Court—and it is not limited to the most dogmatic textualists. We start with the Chief Justice's opinion for the Court in *Bond v. United States*.<sup>221</sup>

In 1998, Congress enacted the Chemical Weapons Convention Implementation Act.<sup>222</sup> The Act forbids any person knowingly to use “any chemical weapon.”<sup>223</sup> It defines “chemical weapon” as “[a] toxic chemical and its precursors, except where intended for a purpose not prohibited under this chapter.”<sup>224</sup> “Toxic chemical” is defined as “any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals.”<sup>225</sup> Permissible purposes of such chemicals include “[a]ny peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity.”<sup>226</sup>

Microbiologist Carol Anne Bond stole a quantity of 10-chloro-10H-phenoxarsine (an arsenic-based compound).<sup>227</sup> Orally ingesting

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<sup>217</sup> William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 81–87 (1994).

<sup>218</sup> See Gluck & Bressman, *supra* note 32, at 930–40, 954–56 (finding most “textual canons” deployed by the Roberts Court are unknown to and unused by congressional drafters); *id.* at 940–49, 956–61 (finding a large majority of “substantive canons” deployed by the Roberts Court are unknown to congressional drafters, and some are the opposite of what drafters assume).

<sup>219</sup> See *supra* note 106 and accompanying text.

<sup>220</sup> See *supra* notes 123–25, 153–56 and accompanying text.

<sup>221</sup> 572 U.S. 844 (2014).

<sup>222</sup> Pub. L. No. 105-277, 112 Stat. 2681, 2681–856 (1998) (codified at 22 U.S.C. §§ 6701–6771).

<sup>223</sup> 18 U.S.C. § 229(a)(1).

<sup>224</sup> *Id.* § 229F(1)(A).

<sup>225</sup> *Id.* § 229F(8)(A).

<sup>226</sup> *Id.* § 229F(7)(A).

<sup>227</sup> *Bond v. United States*, 572 U.S. 844, 852 (2014).

one-half of a teaspoon of this chemical may be lethal to an adult, and “a few ingested crystals could kill a child”; a teaspoon may be “lethal to the touch.”<sup>228</sup> Bond also ordered a vial of potassium dichromate on Amazon.com. Even in small quantities, this chemical can cause permanent scarring, organ damage, or death.<sup>229</sup> Bond used these toxic chemicals to exact revenge on Myrlinda Haynes, a neighbor who was pregnant with the child of Bond’s husband. Bond went to Haynes’s home on at least twenty-four occasions and spread the chemicals on her neighbor’s car door, mailbox, and front doorknob. Because she detected the chemicals, Haynes suffered only minor injuries, but she complained to local authorities of the ongoing danger to her and her family.<sup>230</sup> The state authorities did nothing, but Bond was prosecuted federally.

Writing for a 6–3 Court, Chief Justice Roberts ruled that Bond’s conduct did not fall within the statute. The problem with the government’s interpretation, he began, was that it would “‘dramatically intrude[] upon traditional state criminal jurisdiction,’ and we avoid reading statutes to have such reach in the absence of a clear indication that they do.”<sup>231</sup> Rather than asking whether the statute provided such a clear statement, Chief Justice Roberts pivoted toward the statutory audience. “[A]s a matter of natural meaning, an *educated user of English* would not describe Bond’s crime as involving a ‘chemical weapon.’ Saying that a person ‘used a chemical weapon’ conveys a very different idea than saying the person ‘used a chemical in a way that caused some harm.’”<sup>232</sup> The Chief Justice provided no evidence that his supposition reflected the views of most Americans.

Notice that the turn to the hypothetical educated consumer displaced the actual text of the statute. The statute explicitly *defines* “chemical weapon” and specifies permissible and impermissible uses: “Toxic chemicals” triggering the statute are those that “can cause death, temporary incapacitation or permanent harm to humans or animals.”<sup>233</sup> Chief Justice Roberts read into the text the idea that the toxic chemical had to be used as a weapon of war or terrorism.<sup>234</sup> As

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<sup>228</sup> Brief for United States at 4, *Bond*, 572 U.S. 844 (No. 12-158).

<sup>229</sup> *Id.*

<sup>230</sup> *Bond*, 572 U.S. at 852.

<sup>231</sup> *Id.* at 857 (alteration in original) (quoting *United States v. Bass*, 404 U.S. 336, 350 (1971)); see also *id.* at 848, 856–59.

<sup>232</sup> *Id.* at 860–61 (emphasis added).

<sup>233</sup> 18 U.S.C. § 229F(8)(A).

<sup>234</sup> *Bond*, 572 U.S. at 861; see also Brief for Petitioner at 47–48, *Bond*, 572 U.S. 844 (No. 12-158) (“Congress clearly intended section 229 to reach acts of terrorism, not every malicious use of chemicals.”).



Justice Scalia's separate opinion observed on this issue,<sup>235</sup> Chief Justice Roberts's opinion, by supplanting the statute's definition with "natural meaning," violated one of the most basic rules of statutory interpretation: "When a statute includes an explicit definition, we must follow that definition, *even if it varies from that term's ordinary meaning*."<sup>236</sup> As Richard Re has argued, the Chief Justice's problem was that he did not want to admit he was carrying out a *Holy Trinity* move, namely, narrowing the statute.<sup>237</sup>

Moreover, the majority's understanding of the "educated user of English" was both ungrounded and questionable.<sup>238</sup> Is it not likely that Myrlinda Haynes and her daughter viewed the two dozen attempts to poison them as "weaponizing" toxic chemicals and as a terror campaign against them? Even if an ordinary citizen could work her way through a chemical weapons statute, would she not pay attention to the statutory definition? The Chief Justice violated the textualist rule that definitions trump ordinary meaning, because other normative considerations loomed larger.

Recall that Chief Justice Roberts began his interpretation with a canon disfavoring interpretations that would "dramatically intrude[] upon traditional state criminal jurisdiction."<sup>239</sup> This put a heavy finger on the scale favoring a narrow interpretation that rendered choice of text less important and the Court's holding easier to justify. Why was that particular canon preferred? A vast array of federal criminal law overlaps with state criminal law but has not consistently given rise to application of the federalism canon or to limiting constructions.<sup>240</sup> Why invoke federalism concerns in this case but not in other criminal cases? Importantly, Chief Justice Roberts never explained why this

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<sup>235</sup> *Bond*, 572 U.S. at 867–73 (Scalia, J., concurring) (disagreeing sharply with Chief Justice Roberts's argument on the statutory issue).

<sup>236</sup> *Id.* at 871 (emphasis added) (quoting *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000)); accord *Tanzin v. Tanvir*, 141 S. Ct. 486, 490 (2020); *Gonzales v. Oregon*, 546 U.S. 243 (2006); *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687 (1995).

<sup>237</sup> See Richard M. Re, *The New Holy Trinity*, 18 GREEN BAG 2D 407, 409–11 (2015); cf. Heather K. Gerken, Comment, *Slipping the Bonds of Federalism*, 128 HARV. L. REV. 85, 89–90 (2014) (arguing the statute was "crystalline" but "[t]he Court . . . couldn't bring itself to believe that Congress had, in fact, passed a statute broad enough to reach Bond's conduct"); Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2152 (2015) (arguing that *Bond* is only defensible from a purposivist or avoidance perspective); *Skilling v. United States*, 561 U.S. 358, 403–11 (2010) (openly rewriting a statute to avoid due process notice problems).

<sup>238</sup> See *supra* note 232 and accompanying text.

<sup>239</sup> *Bond*, 572 U.S. at 857 (quoting *United States v. Bass*, 404 U.S. 336, 350 (1971)).

<sup>240</sup> See Stephen F. Smith, *Federalization's Folly*, 56 SAN DIEGO L. REV. 31, 35 (2019); cf. *Gonzales v. Raich*, 545 U.S. 1 (2005) (upholding Congress's ability to regulate home-grown marijuana, even though state law traditionally regulated illegal drugs).

canon provided better information than other available (con)text—such as the international chemical weapons convention requiring that Congress pass the legislation. The convention ratified by the Senate commits the United States to protect an international market for safe and useful chemicals.<sup>241</sup> Article VI of the treaty requires the United States to adopt measures ensuring that toxic chemicals are only “developed, produced, otherwise acquired, retained, transferred, or used within its territory” for “peaceful purposes.”<sup>242</sup> Such an effort requires national regulation that, by definition, marginalizes or may even supersede state law. The Chief Justice’s federalism opinion suppressed this competing (con)text without justification or even recognition.

Was Chief Justice Roberts basically rejecting an international law preference for a national regulatory regime, a preference that had been ratified by an overwhelming Senate majority?<sup>243</sup> In our view, it is more likely that he was trying to avoid the bigger constitutional issue raised by the concurring Justices, who would have embraced a game-changing limit on Congress’s power to enforce treaties. They maintained that the Treaty Clause gave Congress no authority to enact a chemical weapons law, in effect overruling *Missouri v. Holland*.<sup>244</sup> Notwithstanding his statesmanship, Chief Justice Roberts’s opinion was a multifaceted textual gerrymander: picking some text (“chemical weapon”) but ignoring other text (the statutory definition), picking one canon among several, and suppressing the international convention.

### B. *King v. Burwell: Harmonizing v. Dissecting Text*

The Roberts Court’s gerrymandering appeared in full force again the year after *Bond*. If there were a preview of *Bostock*’s fracturing textualism, it was the Roberts-Scalia debate in *King v. Burwell*.<sup>245</sup> The Chief Justice purported to find a textual resolution to what was essen-

<sup>241</sup> Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, *opened for signature* Jan. 13, 1993, 1974 U.N.T.S. 317 [hereinafter Chemical Weapons Convention]. The convention was ratified by the Senate by a 74–26 vote. Convention on Chemical Weapons, Apr. 24, 1997, S. TREATY Doc. No. 103-21.

<sup>242</sup> Chemical Weapons Convention, *supra* note 241, art. VI(2) & art. II(9)(a).

<sup>243</sup> See *Bond*, 572 U.S. at 848.

<sup>244</sup> 252 U.S. 416 (1920) (announcing a broad authorization for Congress to pass laws implementing valid treaties). In *Bond*, Justice Scalia advocated that *Holland* be overruled. *Bond*, 572 U.S. at 873–82 (Scalia, J., concurring in the judgment).

<sup>245</sup> 576 U.S. 473 (2015).

tially a drafting error in the Affordable Care Act of 2010.<sup>246</sup> That law sought to encourage citizens to buy health insurance by providing public exchanges on which to buy policies and subsidies to help pay for them.<sup>247</sup> States were required to create “Exchanges” on which their citizens could purchase insurance—but, if they did not, then the Department of Health and Human Services (HHS) would create “such Exchange” for the State.<sup>248</sup> Section 36B(c)(2)(A)(i) of the tax code informed taxpayers how to calculate tax credits. That section defines a “coverage month”—when the taxpayer is eligible for subsidies—as one in which the taxpayer is covered by a plan purchased through an “Exchange established by the State under section 1311.”<sup>249</sup>

Nine months after the ACA was adopted, an ACA critic opined that persons who purchased insurance on HHS-established Exchanges were entitled to no tax subsidies; the tax credits were only applicable to taxpayers purchasing insurance on exchanges created “by the states,” a tax provision that critics argued excluded exchanges created by the federal government *for* the states.<sup>250</sup> Stated differently, the critic’s challenge would have gone away if one had changed “by” to “for” in the tax provisions. In his majority opinion, the Chief Justice rejected the critic’s tax credit interpretation by characterizing Exchanges established by the federal government as “such Exchanges” as those established by the states and by reading the tax provision, section 36B(c)(2)(A)(i), in light of the entire statute.<sup>251</sup> To read it any other way would have eliminated the many statutory provisions that viewed HHS as standing in for the states and creating exchanges “for” the states.<sup>252</sup> Said differently, the Chief Justice har-

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<sup>246</sup> The dissenters focused on key language describing exchanges created “by” the states. *Id.* at 498–518 (Scalia, J., dissenting).

<sup>247</sup> *Id.* at 479.

<sup>248</sup> 42 U.S.C. § 18031(b)(1) (requiring each State to establish an Exchange); *id.* § 18041(c)(1) (providing if a State does not establish a § 18031(b)(1) Exchange, HHS will “establish and operate such Exchange”).

<sup>249</sup> 26 U.S.C. § 36B(a), (b)(1) (providing for a tax credit “equal to the established premium assistance credit amount,” which is the sum of monthly assistance amounts for “all coverage months of the taxpayer” during the year). A “coverage month,” in turn, is one in which the taxpayer is covered by a plan purchased through an “Exchange established by the State under section 1311.” *Id.* § 36B(c)(2)(A)(i).

<sup>250</sup> See Adam Liptak, *Lawyer Put Health Act in Peril by Pointing Out 4 Little Words*, N.Y. TIMES (Mar. 2, 2015), <https://www.nytimes.com/2015/03/03/us/politics/in-four-word-phrase-challenger-spied-health-care-laws-vulnerability.html>.

<sup>251</sup> *King*, 576 U.S. at 497–98.

<sup>252</sup> *Id.* at 487–92; see also Brief of William N. Eskridge, Jr., John A. Ferejohn, Charles Fried, Lisa Marshall Manheim, and David A. Strauss as Amici Curiae in Support of Respondents at 16–18, *King*, 576 U.S. 473 (No. 14-114) (listing provisions of the Act that would have been so eliminated).

monized the text, rather than chopping it up into bits and blowing up the statutory plan.

Justice Scalia scolded the Chief Justice for rewriting the statute: “Words no longer have meaning” if the majority can get away with what Justice Scalia considered linguistic homicide.<sup>253</sup> Whereas the Roberts opinion tried to make sense of more rather than less text, the Scalia opinion hyper-focused on four words—“established by the State.” That could only mean that an exchange had to be established “by the State,” not by the federal government “for” the State. Justice Scalia read “established by the State” in light of a frequently ignored canon that interpreters should “give effect, if possible, to every clause and word of a statute.”<sup>254</sup> As Chief Justice Roberts responded, however, giving Justice Scalia’s effect to those four words would have wreaked havoc on dozens of other words and phrases in the statute and might have nullified thousands of words if his anti-ACA policy had been adopted.<sup>255</sup>

Comparing *Bond* and *King*, one sees the emergence of two different, clashing textualisms. One textualism aims to harmonize text, the other to disaggregate it. But the Justices do not appear to be consistent in these approaches. In *Bond*, the Chief Justice disaggregated, but in *King*, he harmonized. In *Bond*, Justice Scalia harmonized, but in *King*, he disaggregated. It would take Justice Scalia’s passing, and two new textualist judges, to reach the textualist fracture in *Bostock*, but the eventual bifurcation of textualism, such that it could reasonably produce two or more opposing results, was apparent before then.

### C. *Bostock v. Clayton County: Three Different Textualisms*

*Bostock v. Clayton County*<sup>256</sup> was the statutory interpretation blockbuster of the 2019 Term. Deploying a textualist method to achieve a liberal result, Justice Gorsuch surprised some of his fans. But if there is one thing we have been trying to show, it is that textu-

<sup>253</sup> *King*, 576 U.S. at 499–501 (Scalia, J., dissenting).

<sup>254</sup> *Id.* at 502 (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)).

<sup>255</sup> See Abbe R. Gluck, Comment, *Imperfect Statutes, Imperfect Courts: Understanding Congress’s Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62 (2015) (defending the Roberts approach in *King*).

<sup>256</sup> 140 S. Ct. 1731 (2020). See generally Eskridge et al., *supra* note 5, at 1513 (describing the “great debate” between three textualist opinions); Grove, *supra* note 5, at 266 (describing how “*Bostock* revealed . . . important tensions *within* textualism”); Andrew Koppelman, Essay, *Bostock, LGBT Discrimination, and the Subtractive Moves*, 105 MINN. L. REV. HEADNOTES 1, 6–17 (2020) (describing the new textualism at play in all three *Bostock* opinions); Marc Spindelman, *Bostock’s Paradox: Textualism, Legal Justice, and the Constitution*, 69 BUFF. L. REV. 553, 632 (2021) (arguing that the *Bostock* majority opinion is “part textualist, part anti-textualist”).

alism has no predictable tilt because text and (con)text can be selectively chosen and rearranged; interpreters might have a predictable tilt, but the method does not. Gerrymandering saturates all three of the Court's textual opinions in *Bostock*. What is most striking about the textualist cross-fire is that the Justices gerrymandered *history* as well. If new textualist judges look out over the crowd and pick out their friends, original public meaning judges pack the crowd with their friends and then pick them out.<sup>257</sup>

Title VII bars employers from “discriminat[ing] against any individual . . . because of such individual's . . . sex,”<sup>258</sup> even when sex is one among several “motivating factor[s].”<sup>259</sup> Gerald Bostock worked for Clayton County, Georgia as a child welfare advocate, and his employer fired him upon learning that Bostock played on a gay softball team.<sup>260</sup> Two other plaintiffs, Donald Zarda and Aimee Stephens, were allegedly fired because they were gay and transgender, respectively.<sup>261</sup> The Court found that each plaintiff had been discriminated against “because of such individual's sex.”<sup>262</sup> The Court's opinion and both dissents focused only on text and found unambiguous original meanings. All three opinions made strategic choices about text and (con)text. Each opinion gerrymandered in a distinctive manner. Each blamed the others for false use of textualist or originalist methodology. The hypothesized consumer of statutes—the ordinary reader—was deployed to justify diametrically opposed textual readings and to accuse other Justices of bad faith.

### 1. Justice Gorsuch's Opinion: Hyper-Textualism and Choice of Text

Authoring the opinion for the 6–3 Court, Justice Gorsuch pulled each word out of the statute and matched it with a broad dictionary definition (applicable in 1964 as well as today), then reassembled the words, and concluded that the reassembled text had a meaning that was “plain and settled.”<sup>263</sup> Justice Gorsuch methodically offered definitions of each and every term in the statute, including ones that ordinary persons would consider self-evident, like “otherwise,” and “individual.”<sup>264</sup> Firing Bostock, a man, because he dated men “discriminated” against him “because of” his male “sex.”<sup>265</sup> If he had been

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<sup>257</sup> See *supra* note 17 and accompanying text.

<sup>258</sup> 42 U.S.C. § 2000e-2(a)(1).

<sup>259</sup> *Id.* § 2000e-2(m).

<sup>260</sup> *Bostock*, 140 S. Ct. at 1737–38.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* at 1753.

<sup>263</sup> *Id.* at 1743; see also *id.* at 1739–41 (offering a word-by-word analysis).

<sup>264</sup> *Id.* at 1740–41.

<sup>265</sup> *Id.*

a woman who dated men, he would not have been fired. Firing Stephens because her gender identity did not match that assigned to her at birth was sex discrimination for similar reasons. Although Justice Gorsuch insisted that he was applying original public meaning, Justice Alito denounced Justice Gorsuch's opinion as a "pirate ship"—textualism under a false "flag"<sup>266</sup>—and Justice Kavanaugh lamented the majority's "literalist approach."<sup>267</sup> We agree with Justice Kavanaugh that interpreters should "not simply split statutory phrases into their component words, look up each in a dictionary, and then mechanically put them together again."<sup>268</sup> What he is describing is a cracking-and-packing gerrymander.

Ironically, it is unclear how much Justice Gorsuch's cracking-and-packing analysis drove the result. The majority opinion would have been just as persuasive if it had omitted the word-by-word analysis, and started with Justice Gorsuch's homey hypothetical:

So an employer who fires a woman, Hannah, because she is insufficiently feminine and also fires a man, Bob, for being insufficiently masculine may treat men and women as groups more or less equally. But in *both* cases the employer fires an individual in part because of sex. Instead of avoiding Title VII exposure, this employer doubles it.<sup>269</sup>

Justice Gorsuch's hypothetical rests upon a sex-stereotyping theory of discrimination ("insufficiently feminine" or "masculine").<sup>270</sup> This is a social theory of "sex," grounded in the Supreme Court's decision in *Price Waterhouse v. Hopkins*.<sup>271</sup> Justice Alito insisted that it is "sex" discrimination only when employers treat persons assigned female at birth differently from those assigned male at birth,<sup>272</sup> a theory Justice Gorsuch accepted as his working assumption<sup>273</sup>—until he got to Bob and Hannah.<sup>274</sup> Discriminating against effeminate men and masculine women treats men and women the same, so such discrimination does not exactly rely on "sex as biology." Instead, it distinguishes between those individuals because of "sex as gender role," a short analytical

<sup>266</sup> *Id.* at 1755 (Alito, J., dissenting).

<sup>267</sup> *Id.* at 1824–25 (Kavanaugh, J., dissenting).

<sup>268</sup> *Id.* at 1827.

<sup>269</sup> *Id.* at 1741 (majority opinion).

<sup>270</sup> *Id.*

<sup>271</sup> 490 U.S. 228, 241–43, 259, 263 (1989) (holding in the plurality and concurring opinions that discriminating against a female employee because she did not match the employer's stereotype of women was discrimination "because of sex").

<sup>272</sup> See *Bostock*, 140 S. Ct. at 1756–57 (Alito, J., dissenting).

<sup>273</sup> *Id.* at 1739 (majority opinion) (accepting the parties' mutual agreement that "sex" meant "biological distinctions between male and female").

<sup>274</sup> *Id.* at 1741.



step from finding discrimination against them because they do not date or marry different-sex partners.<sup>275</sup>

Ultimately, statutory precedents complemented and then overtook language analysis in Justice Gorsuch's opinion. Its key textualist move was to invoke the Court's decisions holding that an employer violated Title VII if the employee would not have suffered adverse workplace treatment "but for" the employee's sex.<sup>276</sup> Whether "sex" is understood as biology or as gender role, the majority ruled that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."<sup>277</sup> The majority's Bob and Hannah hypothetical implicitly relied on *Hopkins* to support the textual claim. As Professor Koppelman has long argued, penalizing a woman for dating women is discrimination "because of sex" for the same reason penalizing a white man for marrying a Black woman is discrimination "because of race."<sup>278</sup>

Precedent and stare decisis justified the majority opinion better than cut-and-paste textual analysis.<sup>279</sup> Had the Court followed Justice Alito's argument in dissent that discrimination "because of sex" meant nothing more than that women are treated differently than men, *Hopkins* and other statutory precedents would have been subject to challenge. Thirty-five years ago, the Supreme Court held that sexual harassment is a form of sex discrimination.<sup>280</sup> But the 1964 Act does not bar "sexual harassment"; it says only that employers cannot "discriminate . . . because of . . . sex."<sup>281</sup> Might not a strict textualist insist that Congress must pass a statute that uses the specific words "sexual harassment" before courts may consider such claims under Title VII? Likewise, accepting the dissenters' perspective would have

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<sup>275</sup> See Eskridge, *Title VII*, *supra* note 10, at 363–64 (distinguishing between "descriptive" and "prescriptive" sex-based stereotypes).

<sup>276</sup> See *Bostock*, 140 S. Ct. at 1739 (citing *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 350 (2013)); accord Brief of William N. Eskridge, Jr. & Andrew M. Koppelman as Amici Curiae at 5–8, *Bostock*, 140 S. Ct. 1731 (Nos. 17-1623, 18-107) [hereinafter Eskridge-Koppelman Amicus Brief].

<sup>277</sup> *Bostock*, 140 S. Ct. at 1741.

<sup>278</sup> See Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 208–12 (1994) (drawing an analogy between laws discriminating against gay people and anti-miscegenation laws).

<sup>279</sup> *Bostock*, 140 S. Ct. at 1743–44, 1745–46 (citing *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (per curiam), *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978) and *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), as well as sexual harassment precedents).

<sup>280</sup> *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 73 (1986); accord CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 4 (1979).

<sup>281</sup> 42 U.S.C. § 2000e-2(a)(1).

narrowed or overruled *Hopkins*, based on their claim that discrimination because of sex sounded only in biology and not social attitudes.<sup>282</sup>

By the end of Justice Gorsuch's opinion, the textual arguments had been overtaken by normative ones, grounded on the ways that unacceptable "discrimination" may evolve over time. Rejecting the idea that the Court should follow the "expected application[]" of the statute (as no one in 1964 would have protected "homosexual[s]" nor talked about "transgender" persons), Justice Gorsuch warned that "objections about unexpected applications will not be deployed neutrally," presumably because majorities would throw minorities under the bus; if statutory interpretation were reduced to a popularity contest, law's neutrality would take a hit.<sup>283</sup> For example, the Americans with Disabilities Act (ADA) requires accommodation for persons with disabilities by "public entit[ies]," which the Supreme Court has applied to state prisons, even though legislators presumably would neither have supported nor expected such an unpopular application.<sup>284</sup>

## 2. *Justice Alito's Dissent: Time-Machine Textualism and Choice of Original Meaning Date*

Echoing Justice Scalia's indignant style, Justice Alito lambasted the majority opinion as "pirat[ical]," "preposterous," "arrogant," and "stubborn."<sup>285</sup> His dissent took a *time-machine* approach to public meaning. "If every single living American had been surveyed in 1964, 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."<sup>286</sup> This form of argument mobilizes the *Dred Scott* problem, namely, the use of original public meaning by Chief Justice Taney to find that persons of African descent could never be Article III "citizens," because public opinion in 1789 considered even

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<sup>282</sup> See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235, 251, 266 (1989) (plurality and concurring opinions) (holding that a woman allegedly denied a promotion because she was not sufficiently "feminine" had stated a claim under Title VII), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 2, 29, 42 U.S.C.); cf. *Oncale*, 523 U.S. at 81–82 (holding that male-on-male harassment is actionable under Title VII and requiring courts to consider social context when analyzing these claims).

<sup>283</sup> *Bostock*, 140 S. Ct. at 1750–51.

<sup>284</sup> *Id.* at 1750 (citing *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 208 (1998)).

<sup>285</sup> *Id.* at 1755, 1758, 1762 (Alito, J., dissenting).

<sup>286</sup> *Id.* at 1755.

free Black persons unworthy of military service or marriage to white persons.<sup>287</sup>

Another problem with Justice Alito's time machine is that he gerrymandered the date. The 1964 Act did not even apply to a state entity like Clayton County until the 1972 Amendments,<sup>288</sup> when it was hardly unthinkable that "homosexuals" would be protected by a sex discrimination prohibition. The Congress that enacted the 1972 Amendments also passed the Equal Rights Amendment (ERA), which barred state discrimination "on account of sex."<sup>289</sup> In 1970, Paul Freund told Congress that, by analogy to race discrimination law, the ERA would bar states from discriminating against same-sex marriage.<sup>290</sup> This argument did not prevent Congress from passing the ERA, but it was persuasive to many state legislators and voters, who prevented ERA ratification.<sup>291</sup>

Moreover, as part of a comprehensive reform aimed at reversing a series of restrictive Supreme Court decisions, the 1991 Congress added section 703(m), broadening Title VII to include claims where "sex" was a "motivating factor."<sup>292</sup> This expanded the statute in ways that legislators and their allies described as barring "sex stereotyping."<sup>293</sup> In 1991, was it unthinkable that sex stereotyping could be a "motivating factor" when an employer fired a man, but not a woman, who was married to a man? In 1993, the Hawaii Supreme Court ruled that sex discrimination was the primary factor in the state's denying two lesbians a marriage license.<sup>294</sup> As the Seventh

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<sup>287</sup> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407–11 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

<sup>288</sup> Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, 103 (codified as amended at 42 U.S.C. § 2000e(a)).

<sup>289</sup> Equal Rights Amendment to the Federal Constitution, H.R.J. Res. 208, 92d Cong., 86 Stat. 1523 (1972).

<sup>290</sup> See Note, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573, 584 n.49 (1973) ("Indeed, if the law must be as undiscriminating concerning sex as it is toward race, it would follow that laws outlawing wedlock between members of the same sex would be as invalid as laws forbidding miscegenation." (quoting 118 CONG. REC. 9564 (1972) (statement of Sen. Sam Ervin))); see also Eskridge, *Title VII*, *supra* note 10, at 349 (describing Professor Freund's testimony before Congress).

<sup>291</sup> See Eskridge, *Title VII*, *supra* note 10, at 350–52 (describing the key role the Freund argument played in the ERA defeat).

<sup>292</sup> Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075–76 (codified as amended at 42 U.S.C. § 2000e-2(m)).

<sup>293</sup> See Eskridge, *Title VII*, *supra* note 10, at 368–76, 398 (describing how the 1991 Amendments confirmed and expanded *Hopkins*).

<sup>294</sup> *Baehr v. Lewin*, 852 P.2d 44, 60, 64 (Haw. 1993), *abrogated by Obergefell v. Hodges*, 576 U.S. 644 (2015).

Circuit observed, “[i]t would require considerable calisthenics to remove . . . ‘sex’ from ‘sexual orientation.’”<sup>295</sup>

Justice Alito paid no attention to this evidence because he anchored “original public meaning” in 1964, before the statute actually applied to Gerald Bostock and before its relevant text assumed its current form. “Sexual orientation” had nothing to do with “sex,” he insisted, and the majority’s examples were “so much smoke.”<sup>296</sup> Instead, Justice Alito hyper-focused on the keystone of the consumer economy: how ordinary readers would distinguish “sex discrimination” from “sexual orientation discrimination.”<sup>297</sup> But the distinction made no sense in 1964, as “sexual orientation” was not a term people used then.<sup>298</sup> In his appendix of dictionary definitions, Justice Alito did not include “sexual orientation”—because it was not in the popular dictionaries of that era.<sup>299</sup> Justice Alito claimed that the 1964 Congress did not have “gay men and lesbians” in mind for protection under Title VII—and no wonder, as there was no such class of Americans in 1964. If they referred to sexual minorities at all, government documents classified them as “homosexuals and other sex perverts,” and not “gay men and lesbians.”<sup>300</sup> “Gay” meant “merry,” not “homosexual,” and terms like “perversion” and “perverts” populated the dictionaries.<sup>301</sup> Justice Alito’s time machine gerrymander assumed that contemporary words and conceptions of identity could be dropped into 1964, but that assumption turned his time machine into an imaginary encounter with a sad and even paranoid past.

### 3. *Justice Kavanaugh’s Dissent: Holistic Textualism and Choice of (Con)text*

Justice Kavanaugh, an astute commentator on statutory interpretation,<sup>302</sup> rejected Justice Gorsuch’s cracking-and-packing approach: “Legislation cannot sensibly be interpreted by stringing together dic-

<sup>295</sup> *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 350 (7th Cir. 2017) (en banc).

<sup>296</sup> *Bostock v. Clayton County*, 140 S. Ct. 1731, 1775 (2020) (Alito, J., dissenting).

<sup>297</sup> *Id.* at 1767, 1772.

<sup>298</sup> See Eskridge et al., *supra* note 5, at 1554.

<sup>299</sup> See WEBSTER’S NEW INTERNATIONAL DICTIONARY 2291 (2d ed., unabr. 1961) (defining “sexual” but having no entry for “sexual orientation”).

<sup>300</sup> E.g., SUBCOMM. ON INVESTIGATIONS OF THE COMM. ON EXPENDITURES IN THE EXEC. DEP’T, EMPLOYMENT OF HOMOSEXUALS AND OTHER SEX PERVERTS IN GOVERNMENT, S. DOC. NO. 81-241, at 1–3 (2d Sess. 1950); see also WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 67–70, 79 (1999) (describing various federal and state government policies referring to sexual minorities as “homosexuals” or “sex perverts”).

<sup>301</sup> See *supra* note 28 and accompanying text.

<sup>302</sup> See Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)).

tionary synonyms of each word and proclaiming that, if the right example of the meaning of each is selected, the ‘plain meaning’ of the statute leads to a particular result.”<sup>303</sup> For Justice Kavanaugh, “the question in this case boils down to the ordinary meaning of the phrase ‘discriminate because of sex.’ Does the ordinary meaning of that phrase encompass discrimination because of sexual orientation? The answer is plainly no.”<sup>304</sup>

Justice Kavanaugh cited no empirical evidence for this statement, and it remains unclear to us what makes Ivy League-educated judges experts on “ordinary meaning.”<sup>305</sup> Indeed, the country’s leading linguists say that “sexual orientation”—the term he was applying—had no meaning at all to most Americans in 1964.<sup>306</sup> On top of those problems, the learned textualist slighted relevant text. As amended, the statute says an employer cannot “discriminate against any individual . . . because of such individual’s . . . sex,” a rule violated even if sex is just one “*motivating factor*.”<sup>307</sup> The complete text shows why an employer who fires an employee because she is married to someone of a different race or religion has discriminated because of race or religion, for it is undeniable that race or religion is at least one “motivating factor” in the job loss.<sup>308</sup> For the same reason, sex is at least a “motivating factor” if an employer fires an employee because of the sex of their partner or spouse. Brainy textualists like Justice Gorsuch and Judge Easterbrook consider “discrimination because of such individual’s sexual orientation” a subset of “discrimination because of such individual’s sex.” You cannot say “gay” without saying “sex,” but not vice-versa. Justice Kavanaugh had no response to this obvious argument.

Instead, Justice Kavanaugh’s strongest argument was a (con)textual one. He pointed to several federal statutes barring discrimination because of “sex” that were amended to include “sexual orientation” and “gender identity.”<sup>309</sup> He explained: “Congress knows how to prohibit sexual orientation discrimination.”<sup>310</sup> Because one

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<sup>303</sup> *Bostock v. Clayton County*, 140 S. Ct. 1731, 1827 (2020) (Kavanaugh, J., dissenting) (internal quotation marks omitted) (quoting *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 144 n.7 (2d Cir. 2018) (Lynch, J., dissenting)).

<sup>304</sup> *Id.* at 1828.

<sup>305</sup> See *supra* notes 35–36 and accompanying text.

<sup>306</sup> See Eskridge et al., *supra* note 5, at 1554 (detailing how uncommon the term “sexual orientation” was in 1964).

<sup>307</sup> 42 U.S.C. § 2000e-2(a)(1), (m) (emphasis added).

<sup>308</sup> Cf. *City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 704, 711 (1978) (holding that “because of sex” meant “but for the employee’s sex”).

<sup>309</sup> *Bostock*, 140 S. Ct. at 1829–32 (Kavanaugh, J., dissenting).

<sup>310</sup> *Id.* at 1830.

such federal law was passed in 1998, and the remainder after 2007 (more than a generation after Title VII), their relevance for “original public meaning” was wobbly.<sup>311</sup> Congress often adds duplicative terms *ex abundante cautela* (“with an abundance of caution”), and Justice Kavanaugh himself has cautioned against drawing conclusions from terminological variety in the U.S. Code.<sup>312</sup>

Moreover, Justice Kavanaugh’s meaningful variation argument was selective, leaving out (con)text that was more relevant than the (con)text he cited. As the Court has repeatedly said, “negative implications raised by disparate provisions” might, at best, be weighed in those instances in which the relevant statutory provisions were “considered simultaneously when the language raising the implication was inserted,” not decades later.<sup>313</sup> Contemporary statutes, ignored by Justice Kavanaugh, generate different inferences. The Congress that enacted the Civil Rights Act of 1964 was the same Congress that enacted the Equal Pay Act of 1963 (EPA).<sup>314</sup> The EPA prohibited employers from discriminating “on the basis of sex” by paying wages to employees “at a rate less than the rate at which he pays wages to *employees of the opposite sex*” for similar work.<sup>315</sup> The sweeping language of Title VII (discrimination “because of sex,” in all its generality) is in striking contrast to the more particularistic language used in the EPA. At the same time Congress was considering Title VII amendments responding to the Supreme Court’s decisions in *Hopkins* and other cases, it enacted the Americans with Disabilities Act of 1990 (ADA).<sup>316</sup> Section 511(b) excluded “homosexuality and bisexuality” as well as “transvestism” and “transsexualism” from the ADA’s definition of “disability.”<sup>317</sup> The next year, Congress enacted the 1991 Amendments, significantly revising Title VII.<sup>318</sup> Under Justice Kavanaugh’s meaningful variation argument, it is significant that

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<sup>311</sup> *Id.* at 1831 & n.7.

<sup>312</sup> See *Seven-Sky v. Holder*, 661 F.3d 1, 37–38 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (“The lesson from the redundancy in these sections and elsewhere in the Tax Code is not to read provisions out of the statute or contrary to their plain meaning. . . . Rather, we should read the provisions according to their terms, recognizing that Congress often wants to make ‘double sure.’”).

<sup>313</sup> *Lindh v. Murphy*, 521 U.S. 320, 330 (1997); see also *Gomez-Perez v. Potter*, 553 U.S. 474, 486 (2008) (quoting *Lindh*, 521 U.S. at 330).

<sup>314</sup> Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56–57 (1963) (codified as amended at 29 U.S.C. § 206(d)(1)).

<sup>315</sup> 29 U.S.C. § 206(d)(1) (emphasis added); cf. *County of Washington v. Gunther*, 452 U.S. 161, 178–79 (1981) (addressing broader protections in Title VII).

<sup>316</sup> Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101–12213).

<sup>317</sup> *Id.* § 511(a), (b)(1) (codified as amended at 42 U.S.C. § 12211(a), (b)(1)).

<sup>318</sup> Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 2, 29, 42 U.S.C.)

Congress in 1991 failed to revise its definition of “sex” to specifically exclude “homosexuality and bisexuality” or “transvestism” or “transsexualism,” terms that it had just used in the ADA.

### III

#### LIBERALS GERRYMANDER, TOO: IT’S THE METHOD, NOT THE JUSTICE

No one should think that gerrymandering is a phenomenon limited to conservative judges expressing a populist attitude. In this Part, we consider several textual battles between liberal Justices. Although the Roberts Court presides over textualism’s golden age, the Rehnquist Court laid its foundations. Surprisingly, liberal Justices were often eager textual bricklayers. We consider four clashes in which the Justices decided on different texts and (con)texts, choosing text and (con)text without justifying those choices—in short, gerrymandering. In the first four cases, liberal Justices are pitted against each other; in the last, Justice Gorsuch debates Justice Sotomayor.

#### A. *Muscarello v. United States: Breyer v. Ginsburg*

Consider the duel between Justices Stephen Breyer and Ruth Bader Ginsburg in *Muscarello v. United States*.<sup>319</sup> Three defendants were convicted of drug-related felonies, and their stiff sentences were enhanced by section 924(c)(1) of the Criminal Code, which imposed a five-year mandatory prison term upon a person who “‘uses or carries a firearm’ ‘during and in relation to’ a ‘drug trafficking crime.’”<sup>320</sup> Frank Muscarello had a gun in the locked glove compartment of the truck he used to transport marijuana to his buyers.<sup>321</sup> Muscarello’s case offered the Court an opportunity to decide whether it satisfied section 924(c)(1)’s “carries a firearm.” The Court divided 5–4 on that issue, with Justice Breyer writing for the Court and Justice Ginsburg writing for the dissenters. The authors were the Court’s junior Justices, and its only Democratic appointees. But their opinions reflected new textualism’s strong influence, with their homey examples, resort to dictionaries and corpuses, and reliance on canons and other judge-made materials that brought closure to open-textured statutory language.

Admitting that “carries a firearm” might have a variety of meanings, such as to bear arms on one’s person, Justice Breyer opened with

<sup>319</sup> 524 U.S. 125 (1998). For an equally unpersuasive textual analysis of *Muscarello*, based on corpus linguistics, see Lee & Mouritsen, *supra* note 30, at 788, 803–04, 807–10.

<sup>320</sup> *Muscarello*, 524 U.S. at 126–27 (quoting 18 U.S.C. § 924(c)(1)(A)).

<sup>321</sup> *Id.* at 127.



a linguistic analysis. “[O]ne can, as a matter of ordinary English, ‘carry firearms’ in a wagon, car, truck, or other vehicle that one accompanies.”<sup>322</sup> Over the next four pages, he illustrated that point by references to the King James Version of the Bible, Herman Melville, the *Arkansas Gazette*, and *The New York Times*.<sup>323</sup> In contrast, he minimized the “bearing arms” understanding as so rare that it was the *Oxford English Dictionary*’s twenty-sixth definition.<sup>324</sup> Justice Breyer’s chambers applied a home-grown corpus linguistics search, randomly surveying usage from *The New York Times* and *U.S. News* databases and finding “that many, perhaps more than one-third [of the thousands of sentences], are sentences used to convey the meaning at issue here, *i.e.*, the carrying of guns in a car.”<sup>325</sup>

These references aimed to rebut the dissenters’ focus on the putative consumer of criminal law. Justice Ginsburg insisted that the “ordinary” reader would think that “carries a gun” means carrying on the person, or “packing heat.”<sup>326</sup> Responding to Justice Breyer, Justice Ginsburg deployed an equally delightful array of sources, including cognate statutes like section 926A, regulating the “transport” of firearms to states where one was allowed to “carry” them.<sup>327</sup> But Justice Breyer replied with the statute’s definition of “firearm” to include bombs, missiles, and rocket launchers—hardly items that could easily be packed into a person’s jacket or purse.<sup>328</sup> Notice how the textualist debate moved rapidly from ordinary meaning to technical meaning constructed by lawyers.

As textual analysis, the opinions seemed evenly matched. Their authors chose different kinds of context to reach interpretive closure. Justice Ginsburg concluded her dissent with a canon, the rule of lenity: When in doubt, construe criminal laws narrowly, against the government.<sup>329</sup> Justice Breyer rejected lenity, based on the statute’s purpose to take guns out of the hands of drug dealers.<sup>330</sup> Meanwhile, both opinions missed something big: whether the term “carry” was being used as a term of art, given the proliferation of state gun laws. By 1968, states had laws regulating how people could possess and carry

<sup>322</sup> *Id.* at 128.

<sup>323</sup> *Id.* at 128–32.

<sup>324</sup> *Id.* at 130.

<sup>325</sup> *Id.* at 129.

<sup>326</sup> *Id.* at 140 (Ginsburg, J., dissenting).

<sup>327</sup> *Id.* at 147–48; cf. Adrian Vermeule, *Three Strategies of Interpretation*, 42 SAN DIEGO L. REV. 607, 620 (2005) (criticizing both Justices’ “maximizing textualism”).

<sup>328</sup> *Muscarello*, 524 U.S. at 138.

<sup>329</sup> *Id.* at 148–50 (Ginsburg, J., dissenting).

<sup>330</sup> *Id.* at 132, 138–39 (majority opinion).

guns,<sup>331</sup> and under those state laws, “carries a firearm” typically entailed carriage in a vehicle as well as on the person.<sup>332</sup> For example, Arizona’s carry-gun law allowed carrying in a vehicle so long as the firearm “is carried within a means of transportation or within a storage compartment, trunk or glove compartment of a means of transportation.”<sup>333</sup> No state clearly excluded vehicular carrying. In short, Justices Breyer and Ginsburg’s textual analyses sidetracked the inquiry from questions any elected official would ask. Were legislators aware that section 924(c)(1) of the Criminal Code was using “carry” as a term of art deployed in state carry-gun laws? Were they aware of gun laws that regulate traveling with a gun in your car?<sup>334</sup> In Part IV, we provide answers to those questions.

### B. Lockhart v. United States: *Sotomayor v. Kagan*

Roberts Court liberals have continued these textual debates. In *Lockhart v. United States*,<sup>335</sup> Justices Sotomayor and Kagan battled about hypothesized ordinary meaning and deployed various canons, with no clear triumph for either side.<sup>336</sup> Avondale Lockhart possessed child pornography in violation of section 2252 of the Criminal Code, which increases penalties for prior offenses.<sup>337</sup> Lockhart had been convicted of sexually abusing his fifty-three-year-old partner.<sup>338</sup> The statute imposed a mandatory prison sentence of ten to twenty years if the defendant:

[H]as a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of

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<sup>331</sup> See *State Gun Laws*, NAT’L RIFLE ASS’N, <https://www.nraila.org/gun-laws/state-gun-laws> (last visited Nov. 15, 2021) (identifying and summarizing each state’s carry-gun laws).

<sup>332</sup> See Brief for the United States, *Muscarello*, 524 U.S. 125 (No. 96-1654), 1998 WL 84393, at \*34–40; Memorandum from Ben Daus-Haberle to authors (June 19, 2020) (on file with authors).

<sup>333</sup> ARIZ. REV. STAT. ANN. § 13-3102(B)(3)(e) (1997).

<sup>334</sup> See Memorandum from Ben Daus-Haberle to authors, *supra* note 332 (documenting that the application of state carry-gun laws to vehicular carrying would have been hard to miss in 1968).

<sup>335</sup> 577 U.S. 347 (2016).

<sup>336</sup> See Max Alderman & Duncan Pickard, *Justice Scalia’s Heir Apparent?: Judge Gorsuch’s Approach to Textualism and Originalism*, 69 STAN. L. REV. ONLINE 185, 187 (2017) (describing how then-Judge Gorsuch “[o]ok] delight” in the dueling textualist opinions in *Lockhart*); Abbe R. Gluck, *Congress, Statutory Interpretation, and the Failure of Formalism: The CBO Canon and Other Ways That Courts Can Improve on What They Are Already Trying to Do*, 84 U. CHI. L. REV. 177, 193 (2017) (critiquing the *Lockhart* textualist opinions as “serv[ing] neither democracy reasons nor predictability reasons”); Abbe R. Gluck, *Justice Scalia’s Unfinished Business in Statutory Interpretation: Where Textualism’s Formalism Gave Up*, 92 NOTRE DAME L. REV. 2053, 2075–76 (2017) (similar).

<sup>337</sup> 18 U.S.C. § 2252(b).

<sup>338</sup> *Lockhart*, 577 U.S. at 349.

the Uniform Code of Military Justice), or under the laws of any State relating to *aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward*, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography . . . .<sup>339</sup>

The question was whether section 2252(b)'s mandatory minimum kicked in only when the victim in a state conviction was a child, or included Lockhart's conviction of sexual abuse against an adult.<sup>340</sup>

Writing for a 6–2 majority, Justice Sotomayor nodded to the text, but promptly invoked a canon. When the Court “has interpreted statutes that *include* a list of terms or phrases followed by a limiting clause, [it has] typically applied an interpretive strategy called the ‘rule of the last antecedent.’”<sup>341</sup> That rule holds that a modifier applies only to its nearest neighbors, unless it is set off by a comma. Applying this rule to the state crime predicate (“aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or a ward”), she ruled that “a minor or a ward” applies only to the last phrase, “abusive sexual conduct.”<sup>342</sup> Under this interpretation, Lockhart could not escape the mandatory minimum sentence. In dissent, Justice Kagan deployed a different semantic canon: the series qualifier rule.<sup>343</sup> That canon says that the modifier “involving a minor or ward” presumptively applies throughout the list of prior offenses, meaning Lockhart's offense against an adult would not count in penalty calculation.

Both Justices deployed homey examples based on hypothetical ordinary readers. Invoking her favorite sport, Justice Sotomayor wrote:

You tell your scouts to find a defensive catcher, a quick-footed shortstop, or a pitcher from last year's World Champion Kansas City Royals. It would be natural for your scouts to confine their search for a pitcher to last year's championship team, but to look more broadly for catchers and shortstops.<sup>344</sup>

Justice Kagan recast that hypothetical (a “defensive catcher, quick-footed shortstop, or hard-throwing pitcher from the Kansas City Royals”) and offered her own:

Imagine a friend told you that she hoped to meet ‘an actor, director, or producer involved with the new Star Wars movie.’ You would

<sup>339</sup> 18 U.S.C. § 2252(b) (emphasis added).

<sup>340</sup> See *Lockhart*, 577 U.S. at 349.

<sup>341</sup> *Id.* at 351 (emphasis added).

<sup>342</sup> *Id.* at 352 (quoting 18 U.S.C. § 2252(b)).

<sup>343</sup> *Id.* at 363–65 (Kagan, J., dissenting).

<sup>344</sup> *Id.* at 351–52 (majority opinion).

know immediately that she wanted to meet an actor from the Star Wars cast—not an actor in, for example, the latest *Zoolander*.<sup>345</sup>

Again, we see the *Bostock* battle of ordinary meaning foreshadowed, with no apparent way to resolve the contending examples.

Like *Muscarello*'s Clinton-appointed Justices, *Lockhart*'s Obama-appointed Justices had caught the new textualism bug. Justice Scalia was famous for his own homey examples, for hyper-focusing, and for relying on canons to end debate on his terms.<sup>346</sup> Justices Sotomayor and Kagan followed suit. Justice Kagan relied upon the rule of lenity.<sup>347</sup> Justice Sotomayor relied upon the whole text, aiming to harmonize the text. The statute included many cross-references to other crimes applying to adult victims, from obscenity offenses to sex trafficking. From this, Justice Sotomayor argued that there was no reason to limit the state law predicates to child victims.<sup>348</sup> Moreover, section 2252(b) repeated the unusual phrasing of the federal sexual assault law in chapter 109A, which criminalized assault of adults as well as children.<sup>349</sup> Should one committing a sexual assault in Manhattan's federal courthouse receive a different penalty than one committing a similar offense in a state court? This was a telling point, whatever one's methodology.

But if the *Lockhart* Justices followed the virtuous method of their late colleague, Justice Scalia, they also picked up its vices, such as suppressing relevant (con)text. Both opinions neglected the statutory history, meaning how the statute's text was constructed over time. When enacted in 1990, the law's penalty provisions were triggered only by prior crimes committed against children.<sup>350</sup> In 1994, as a technical amendment to an omnibus crime bill, Congress added the federal sexual assault crimes in chapter 109A.<sup>351</sup> The 1994 amendment added no language limiting the offense to child victims, however. Passed as part of a large omnibus appropriations law, the 1996 amendments added the state law predicates at issue in *Lockhart*.<sup>352</sup> This statutory history<sup>353</sup> shows that several different Congresses assembled section

<sup>345</sup> *Id.* at 362, 364 n.1 (Kagan, J., dissenting) (internal quotation marks omitted).

<sup>346</sup> See *supra* note 34 and accompanying text.

<sup>347</sup> *Lockhart*, 577 U.S. at 376–77 (Kagan, J., dissenting).

<sup>348</sup> *Id.* at 358 (majority opinion).

<sup>349</sup> *Id.* at 352–54, 358.

<sup>350</sup> Child Protection Restoration and Penalties Enhancement Act of 1990, Pub. L. No. 101-647, §§ 320–323, 104 Stat. 4816, 4817–19.

<sup>351</sup> Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 160001(d), 108 Stat. 1796, 2037 (codified at 18 U.S.C. § 2252(b)(1)).

<sup>352</sup> Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121(5), 110 Stat. 3009–26, at 3009–30 (codified at 18 U.S.C. §§ 2251(e), 2252(b)(1)–(2)).

<sup>353</sup> Statutory history shows the statutory language as it evolves over time, while legislative history shows the public legislative deliberations accompanying the path a bill

2252(b)'s enhancements; there was no single coherent drafting effort. The statutory history does not tell us whether Congress had decided that the 1996 enhancements applied only to crimes against minors. To answer that question, the Justices would have had to dig into the legislative record, but none did. In Part IV, we provide the answer to that question.

### C. *Yates v. United States: Ginsburg v. Kagan*

*Lockhart* is not the only recent statutory debate within the Supreme Court's liberal wing to depend upon homey examples and multiple canons. In *Yates v. United States*,<sup>354</sup> the skipper of the *Miss Katie* had gotten himself into trouble for overfishing the endangered red grouper. After an inspector caught him red-handed with too many small grouper, Captain Yates allegedly ordered a crew member to throw the undersized fish overboard before he docked for final examination.<sup>355</sup> As a result, federal authorities charged him with obstruction of justice under section 1519 of the Criminal Code:

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or *tangible object* with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States . . . shall be fined under this title, imprisoned not more than 20 years, or both.<sup>356</sup>

If *Yates*'s piscatorial facts were prosaic, the statute addressed something much grander: a nation-gripping fraud that had brought down a multi-billion-dollar corporation. When it came to light that Enron Corporation was charging down bad investments, the Securities and Exchange Commission investigated. Enron's chief accountant ordered the destruction of millions of documents, and a month later the firm collapsed.<sup>357</sup> The accountants' involvement in this project

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takes to becoming a law. See ESKRIDGE, *INTERPRETING LAW*, *supra* note 21, at 204–06; Krishnakumar, *Statutory History*, *supra* note 30 (manuscript at 5) (differentiating between legislative history and statutory history where the latter “focuses on textual comparisons between different versions of a statute”).

<sup>354</sup> 574 U.S. 528 (2015). See generally David S. Louk, *The Audiences of Statutes*, 105 CORNELL L. REV. 137, 200 (2019) (describing *Yates* as an “instant classic of statutory interpretation”); Anton Metlitsky, *The Roberts Court and the New Textualism*, 38 CARDOZO L. REV. 671, 673 (2016) (critiquing *Yates* for “fail[ing] to give effect to the semantic meaning of the relevant statutory text”); Victoria Nourse, *Picking and Choosing*, *supra* note 45, at 1412 (discussing *Yates* to illustrate how “isolationist textualism trades upon enriched meanings that may be contrary to the meaning of the whole text”).

<sup>355</sup> *Yates*, 574 U.S. at 528.

<sup>356</sup> 18 U.S.C. § 1519 (emphasis added).

<sup>357</sup> Jeff Leeds, *Andersen Auditor Details Shredding of Enron Papers*, L.A. TIMES (May 14, 2002), <https://www.latimes.com/archives/la-xpm-2002-may-14-fi-andersen14-story.html>.

caused a sensation, worrying markets about the basic soundness of major accounting firms' practices, and major legislation known as the Sarbanes-Oxley Act of 2002, or SOX, followed.<sup>358</sup>

Justice Ginsburg's plurality opinion setting aside Captain Yates's conviction was quite textual. She almost entirely ignored legislative history, picking and choosing various pieces of (con)text. For example, she began with section 1519's caption, the statute's title, and surrounding U.S. Code provisions—all of which described the law's focus as documents and records, full stop.<sup>359</sup> Those elements of (con)text were emphasized as key evidence despite the fact that Congress itself has warned that titles, captions, and placement are unreliable interpretive devices for interpreting the Criminal Code in particular.<sup>360</sup> The plurality then hyper-focused on three words in the statute—"record, document or tangible object"—which they interpreted through the lens of the linguistic canon *noscitur a sociis*, namely, "words are known by their associates."<sup>361</sup> Because "tangible object" was associated with record and document, that broader term should be limited to "the subset of tangible objects involving records and documents, i.e., objects used to record or preserve information."<sup>362</sup> Justice Ginsburg confirmed this reading by matching it to the verbs in the statute—"alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry"—arguing that the last two verbs are typically associated with things like records, logbooks or hard drives.<sup>363</sup>

In dissent, Justice Kagan admonished the plurality for its (con)textual gerrymander: Titles and captions are not supposed to narrow the statutory text, which was as broad as Congress could have written it.<sup>364</sup> Justice Kagan then engaged in her own textual gerrymander, cracking the text, reducing it to two words, and reading those two words broadly. She deployed the statute's reference to "any," the use of a similar term—"thing"—in the now-controversial Model Penal Code, and the accepted interpretation of "tangible object" in other

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<sup>358</sup> See *Yates*, 574 U.S. at 535–36 (plurality opinion).

<sup>359</sup> *Id.* at 539–40.

<sup>360</sup> See Tobias A. Dorsey, *Some Reflections on Yates and the Statutes We Threw Away*, 18 GREEN BAG 2D 377, 379–81, 386–89 (2015) (discussing Congress's instructions against relying on chapter, title, and heading for purposes of interpretation, and *Yates*'s disregard of those instructions); Daniel B. Listwa, Comment, *Uncovering the Codifier's Canon: How Codification Informs Interpretation*, 127 YALE L.J. 464, 473–74, 486–88 (2017) (similar).

<sup>361</sup> *Yates*, 574 U.S. at 543–44 (plurality opinion).

<sup>362</sup> *Id.* at 544 (emphasis omitted).

<sup>363</sup> *Id.* at 544–45 (emphasis omitted) (quoting 18 U.S.C. § 1519).

<sup>364</sup> See *id.* at 553 (Kagan, J., dissenting) (interpreting "tangible object" to mean "any object capable of being touched").

federal rules and laws, including obstruction of justice statutes.<sup>365</sup> There was only one “ordinary meaning” of “tangible object,” namely, “a discrete thing that possesses physical form.”<sup>366</sup> According to no less an authority than Dr. Seuss, “a fish is, of course, a discrete thing that possesses physical form.”<sup>367</sup>

*Yates*’s central debate was whether the statute should be read as a specialized obstruction statute, relating to financial records, or a general obstruction statute, relating to anything that might be covered up. Justice Ginsburg wanted to make “record, document, and tangible object” the lodestar; Justice Kagan wanted to emphasize the breadth of “tangible object.” Justice Kagan cracked the text into smaller pieces and gave them a broad reading; Justice Ginsburg considered the words in a larger whole act context. But the canons did not determine the choice either Justice was making; the canons followed the choice of text. *Noscitur a sociis* and *ejusdem generis* both call for generalizations based on common traits. Justice Ginsburg offered one generalization, a narrow one about document-like things preserving information; Justice Kagan had a different one, a broad one about anything providing information. It is no coincidence that these generalizations followed their views about the proper textual meaning of the statute. Unlike *Lockhart*’s canceling canons, in *Yates*, a single canon yielded canceling interpretations.

*Yates* shows how the linguistic canons may do less to reveal genuine meaning than to provide ammunition for a judge to create a supposed plain meaning. As Judge Easterbrook has explained, “every canon implicitly begins or ends with the statement ‘unless the context indicates otherwise,’ which potentially leaves so much room for maneuver that the canon isn’t doing much work. Indeed, a reference to ‘the context’ does not even pin down *what* context.”<sup>368</sup> Indeed, “what context” is precisely our question. Why limit one’s view to judge-made canons as a form of context? Why not look at the actual legislative context—Congress’s official reports? Instead, both Justices

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<sup>365</sup> *Id.* at 555–57. The Model Penal Code has never been a “model” for the federal Criminal Code in Title 18. See Gerard E. Lynch, *Towards a Model Penal Code, Second (Federal?): The Challenge of the Special Part*, 2 BUFF. CRIM. L. REV. 297, 299–300, 299 nn. 6–11, 348 (1998) (citing federal criminal statutes “undreamed of by the drafters of the Model Penal Code”); *Yates*, 574 U.S. at 546–47 (plurality opinion) (discussing the differences between the Model Penal Code’s provision prohibiting tampering with physical evidence and 18 U.S.C. § 1519); see also Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326–27 (2007) (describing Congress’s failure to reform the federal Criminal Code following the Model Penal Code).

<sup>366</sup> *Yates*, 574 U.S. at 553 (Kagan, J., dissenting) (internal quotation marks omitted).

<sup>367</sup> *Id.* at 553 (citing DR. SEUSS, *ONE FISH TWO FISH RED FISH BLUE FISH* (1960)).

<sup>368</sup> Easterbrook, *Absence of Method*, *supra* note 16, at 83.



selected other context that was less relevant, like the Model Penal Code or the title. Justice Ginsburg contextualized the case by describing the massive Enron fraud prompting the law's enactment, but only cited a bit of the legislative evidence, while Justice Kagan invoked a Senate committee report as “extra icing on a cake already frosted.”<sup>369</sup> Both Justices relied on a Senate committee report that discussed a bill that came before the SOX legislation.<sup>370</sup> That report focused on financial fraud; it did not contemplate a general “obstruction of justice” reform, although it mentioned “evidence” in discussing the obstruction provisions.<sup>371</sup> As we will see in Part IV, in their hyper-focus on what they considered textualist smoking guns, both opinions ignored more probative legislative evidence: the Senate floor debate adding section 1519 to SOX, and the conference report—the legislative process's final stage, where precise text is finalized and then debated again.<sup>372</sup>

Justice Kagan was right to ask whether Congress meant to enact a general obstruction statute. General obstruction statutes, common in state law, use terminology like “thing” or “tangible object” to cover everything from dead bodies to murder weapons.<sup>373</sup> This issue is complicated by the fact that there is a general evidence tampering statute, section 1512, that pre-existed SOX.<sup>374</sup> That creates a puzzle: Why did Congress not just fix the old general-evidence-tampering section 1512, rather than add a new obstruction section 1519? Surely, a reasonable interpreter would want to know the answer to these questions.

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<sup>369</sup> *Yates*, 574 U.S. at 536 (plurality opinion); *id.* at 557–58 (Kagan, J., dissenting).

<sup>370</sup> The SOX bill came to the Senate with no provisions on obstruction of justice. Senator Leahy added them to SOX on the Senate floor as part of a larger amendment. *See* 148 CONG. REC. 6436–37 (2002) (recording the introduction of the Leahy Amendment); *id.* at 6551 (enacted). That amendment originated in S. 2010, 107th Cong. (2002). *See also* S. REP. NO. 107-146 (2002) (accompanying the Leahy Amendment). The new section 1519, which was part of S. 2010, was nearly identical to the provision ultimately passed as part of the Conference Report. *See id.*; *infra* note 372.

<sup>371</sup> The Senate Report never uses the term “general obstruction of justice” statute; it focuses on financial fraud and various penalties and reporting requirements involving financial fraud. *See* S. REP. NO. 107-146, at 2, 27 (2002). But the report does refer to “acts to destroy or fabricate physical evidence,” *id.* at 14, and mentions difficulties courts had created by narrow constructions of section 1512, the general evidence tampering statute. *Id.* at 6–7, 12.

<sup>372</sup> *See* H.R. REP. NO. 107-610 (2002) (Conf. Rep.).

<sup>373</sup> *See, e.g.*, TEX. PENAL CODE ANN. § 37.09(a)(1) (West 2021) (stating a person commits an offense if, knowingly during an investigation, he “alters, destroys, or conceals any record, document, or thing with intent to impair its verity, legibility, or availability as evidence in the investigation or official proceeding”); OHIO REV. CODE ANN. § 2921.12(A)(1) (West 2021) (prohibiting, for example, “[a]lter[ing], destroy[ing], conceal[ing], or remov[ing] any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation”).

<sup>374</sup> 18 U.S.C. § 1512.

Without an answer to these questions, one is left worrying that the opinions reflected different normative impulses or *sub silentio* constitutional principles. Justice Ginsburg, for example, read both the statutory text and the committee report through the constitutional lens of lenity, a concern she had displayed in prior decisions such as *Muscarello*.<sup>375</sup>

#### D. Murphy v. Smith: *Gorsuch v. Sotomayor*

The issue in *Murphy v. Smith* was how to pay prisoners' attorneys who bring successful lawsuits. Charles Murphy lost his sight as a result of prison officials' racist abuse and physical assaults.<sup>376</sup> The jury awarded him \$307,733.82, a rare sum in prisoner cases, and the District Court assessed fees of \$108,446.54 to be paid to prevailing counsel, with ten percent of Murphy's award applied to the fees and the remainder to be paid by the state.<sup>377</sup> On appeal, the state successfully objected that Murphy should fork over twenty-five percent of his award to pay most of the counsel fees.<sup>378</sup>

The Civil Rights Attorney's Fees Act of 1978 requires States to pay counsel fees for plaintiffs, often prisoners, who successfully sue the State for civil rights violations.<sup>379</sup> The Prison Litigation Reform Act of 1995 imposed a number of new rules on the award of counsel fees for successful prisoner suits.<sup>380</sup> Section 803 established the rule at issue in *Murphy*:

Whenever a monetary judgment is awarded in [a section 1983 civil rights action brought by a prisoner], a portion of the judgment (*not to exceed 25 percent*) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.<sup>381</sup>

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<sup>375</sup> See *Muscarello v. United States*, 524 U.S. 125, 140 (1998) (Ginsburg, J., dissenting) (stating the court should have continued to adhere to the principle of lenity as it has long followed by confining "carries a firearm" to mean bearing a firearm in a manner as to be ready for use as a weapon).

<sup>376</sup> *Murphy v. Smith*, 138 S. Ct. 784 (2018); *id.* at 791 (Sotomayor, J., dissenting) (describing the facts of *Murphy*); see also Nourse, *supra* note 4, at 675 (arguing that *Murphy* presents a "problem of which text to choose").

<sup>377</sup> *Murphy*, 138 S. Ct. at 791. The jury itself awarded Mr. Murphy \$409,750, which the District Court reduced to \$307,733.82. *Id.*

<sup>378</sup> *Id.* at 792.

<sup>379</sup> 42 U.S.C. § 1988(b).

<sup>380</sup> Pub. L. No. 104-134, § 803(d), 110 Stat. 1321-66, 1321-71 to -72 (1995) (codified at 42 U.S.C. § 1997e(d)(1)(A)-(B)) (limiting attorney's fees).

<sup>381</sup> 42 U.S.C. § 1997e(d)(2) (emphasis added).

The trial judge assumed he had discretion under the first sentence to order Murphy to pay less than twenty-five percent: After all, the statute says, “not to exceed 25 percent.”<sup>382</sup>

Writing for the 5–4 Court, Justice Gorsuch disagreed. Justice Gorsuch’s opinion cracked the first sentence into particular words that could be edited and reassembled; he then sealed his gerrymander by packing everything into one word, “satisfy.” Thus, Justice Gorsuch started with the mandatory (“shall”) nature of the statute, which he read to bar district court discretion, and then concluded with “to satisfy,” which he read as “to discharge the obligation in full.”<sup>383</sup> After he was done, Justice Gorsuch had effectively revised the first sentence to mean “25% of the judgment shall be applied to satisfy the amount of attorney’s fees.” “[A] portion . . . not to exceed” had literally been struck from the statute.

The suppressed text, as Justice Sotomayor argued for the dissenters, vested the district court with discretion to apportion less than twenty-five percent of the judgment to pay counsel fees.<sup>384</sup> At oral argument, the majority Justices were fixated on the idea that “satisfy” could only mean pay the entire fees award.<sup>385</sup> That focus edited out the word “applied.” Everyone recognized that even twenty-five percent of usually meager prisoner judgments would usually not fully pay an award of counsel fees. Even under the State’s theory, Murphy’s payment of \$76,933.46 (twenty-five percent of the judgment) would not “satisfy” the fee award, but it could be “applied to satisfy” the award, with the State kicking in the rest. The same could be said of the \$30,773 (ten percent of the judgment) that the district court said should be “applied to satisfy” the fee award.

In *Murphy*, the Justices’ different *choices of text* were driven by two different models of attorney compensation. The majority Justices viewed the statute as instantiating a private law model of standard tort suits. Successful counsel was assured at least twenty-five percent of the judgment, a low but not unusual contingency fee, and the law allowed counsel to negotiate a higher percentage to take the case.<sup>386</sup> The dissenting Justices saw a public law baseline: Civil rights statutes like section 1988 follow a private attorney general approach, prizing

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<sup>382</sup> *Murphy*, 138 S. Ct. at 787.

<sup>383</sup> *Id.* at 787–88.

<sup>384</sup> *Id.* at 795 (Sotomayor, J., dissenting) (“The rest of the statutory text confirms that district courts have discretion to choose the amount of the judgment that must be applied toward the attorney’s fee award.”).

<sup>385</sup> See Transcript of Oral Argument at 5–7, 10–12, 29–31, 35–36, 49, 51–53, *Murphy*, 138 S. Ct. 784 (No. 16-1067).

<sup>386</sup> See *id.* at 22–23 (detailing an exchange between Chief Justice Roberts and plaintiff’s counsel).

generosity in cases in which the litigant has ferreted out public abuse.<sup>387</sup> Justice Gorsuch's opinion essentially privatized a claim for relief and fee structure. To do so, he had to edit the text quite a bit. Did his editing needlessly undermine *Congress's* statutory scheme? We will try to answer that question in Part IV.

Notice what we have demonstrated in this Part. Our earlier claim was that Roberts Court Justices will strain to answer interpretive questions based on text and nothing but the text. That might be a predictable claim from those who have criticized textualism in the past. But in this Part, we apply the same critique to liberal Justices. And we show, unexpectedly for many gentle readers, that liberal Justices helped lay the groundwork for this new orthodoxy. As Table 3 summarizes, these cases illustrate judges failing to grapple openly with their choices of text or choices of context.<sup>388</sup> Contrary to its proponents' much-publicized claims, the new textualist method is not more constraining than traditional methodology. In our view, it is less constraining. This should be alarming to any judge dedicated to the rule of law in our constitutional democracy. And it calls into question the seeming banality of Justice Kagan's famous statement that "we are all textualists now."<sup>389</sup> There is a dark side to this statement, as these cases show, if by textualism one means picking and choosing text. One of the essential strategies of dangerous populist political leaders—from Hugo Chávez to Huey Long—is to offer highly simplistic solutions to difficult problems.<sup>390</sup> As we have seen, there is nothing particularly simple about textualism in difficult cases. As students of political populism know, it is a "permanent shadow of representative politics."<sup>391</sup> None of the liberal Justices would say they are against representation. The danger is that they have adopted a theory at war with that principle, one which allows judges to insist that "only they themselves are the legitimate representatives"<sup>392</sup> of an imagined "ordinary" people.

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<sup>387</sup> *Id.* at 27–28 (detailing an exchange between Justice Breyer and plaintiff's counsel).

<sup>388</sup> Examples from the last several terms of the Supreme Court are collected and briefly analyzed in the Appendix.

<sup>389</sup> See *supra* note 46 and accompanying text.

<sup>390</sup> See MOFFITT, *supra* note 56, at 9 (arguing that populists perform "crisis" to "radically simplify the political terrain, and to present their own strong leadership and simple solutions as a method for stemming or avoiding the crisis").

<sup>391</sup> MÜLLER, *supra* note 58, at 101 ("Populism is neither the authentic part of modern democratic politics nor a kind of pathology caused by irrational citizens. It is the permanent shadow of representative politics.").

<sup>392</sup> *Id.* ("Populists are not against the principle of political representation; they just insist that only they themselves are legitimate representatives.").

TABLE 3. HOW TEXT AND (CON)TEXT CAN BE READ BROADLY OR NARROWLY

	Narrow Reading of Words	Broad Reading of Words
	Holistic View + Core Meaning	Divvy Up Text + Reassemble
<b>Shrinking Text or (Con)text</b> Ignore, Edit, or Minimize Inconvenient Text	<i>Sinclair</i> (Easterbrook)	Scalia’s Tanner Lectures (Anti-Holy Trinity)
	<i>Public Citizen</i> (Brennan)	<i>Public Citizen</i> (Kennedy’s concurrence)
	<i>Muscarello</i> (Ginsburg’s dissent)	<i>Muscarello</i> (Breyer)
	<i>Bostock</i> (Alito’s dissent)	<i>Bostock</i> (Gorsuch)
	<i>Bond</i> (Roberts)	<i>Bond</i> (Scalia’s concurrence)
	<i>Chisom</i> (Scalia’s dissent)	<i>Pride at Work</i> (Markman)
	<i>Lockhart</i> (Kagan’s dissent)	
<b>Enlarging Text or (Con)text</b> Comparison Shop in the Whole Act or Whole Code	<i>Holy Trinity Church</i> (Brewer)	<i>Murphy</i> (Gorsuch)
	<i>Yates</i> (Ginsburg’s plurality)	<i>Yates</i> (Kagan’s dissent)
	<i>Bostock</i> (Kavanaugh’s dissent)	<i>Lockhart</i> (Sotomayor)

IV

CHECKING THE IMPULSE TO GERRYMANDER? THE VALUE OF REPUBLICAN EVIDENCE

The new textualism has proven to be a methodology at odds with its own aspirations for predictability, neutrality, and the rule of law. As in *Bostock*, new textualist judges cherry-pick text and (con)text and read current terms and social identities back into history, while bitterly accusing other judges of legislating from the bench. There is something deeply disturbing about this: Interpretation should be more than word play in the name of a hypothetical ordinary reader in an imaginary populist information economy grounded in a past that judges view through their own presentist lenses. In our view, the new economy of statutory interpretation denigrates what ought to be central: the production of statutes by elected and accountable representatives. In hard cases, the new economy entrenches a judicial monopoly on the sources of meaning, namely, precedents and canons. Congress, and the idea of a republican government, have been eclipsed by dictionary- and canon-wielding judges. The fact is, we have a republican government, one which filters democracy through representation. To honor that government, we propose that statutory interpreters consider *republican evidence* of meaning in hard cases. As

we will show in this Part, the results of this effort are not always what we would prefer or even expect.

Our project is critical but not nostalgic. We do not advocate for a return to New Deal purposivism, nor do we abandon the methodological advances we owe to Judge Easterbrook's and Justice Scalia's close focus on text and their healthy skepticism about the value of legislative history as evidence of a subjective "legislative intent."<sup>393</sup> At its worst, however, the new textualism risks turning statutory interpretation into a shell game, where clever but shallow manipulation of dictionaries (and now corpuses), canons, and Control-F searches of the U.S. Code dominate efforts to understand the problem prompting the statute, the drafting history of the act, and—ironically—the very thing textualists care most about: relevant text.

Our thesis is that in hard cases, *evidence from the production economy of statutes has powerful value for textualist as well as pluralist judges, for it can serve as a partial check against judicial bias and gerrymandering*. "Legislative evidence" is not legislative history. It is a term first used by textualists in describing the role that legislative materials might play—not as authoritative, but, in cases of doubt, as evidentiary.<sup>394</sup> Nor, as we explain later, is it mere elite knowledge of insiders;<sup>395</sup> it is the public, non-subjective, record of republican deliberation. Moreover, such evidence is *probative* in a very specific way: It elevates the views of deliberative bodies whose role in our republican system refine and shape the policy demands generated by popular majorities. Hence, we call it *republican evidence*. Accordingly, it must be evaluated as evidence. Not all legislative materials are of the same caliber or relevance or probative effect, and in some cases, they do nothing to resolve the matter. Conventional theories of legislative history have invited all sorts of deviations from a proper understanding of legislative evidence. Our theory of republican evidence creates no roving commission searching for something in an individual legislator's mind or vague statements of purpose; it follows the making of *text*. In hard cases, where the text supports serious claims for two "ordinary meanings," courts should check those meanings against evidence in the production economy. In fact, the refusal to look at such texts, when ordinary meaning is inconclusive or open to reasonable

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<sup>393</sup> See Victoria F. Nourse, *Elementary Statutory Interpretation: Rethinking Legislative Intent and History*, 55 B.C. L. REV. 1613 (2014) (rejecting the relevance of "mental intent").

<sup>394</sup> See OLP, *MISUSING LEGISLATIVE HISTORY*, *supra* note 12, at 74–77 (endorsing a limited utility of legislative materials as "evidence" of "actual [textual] meaning").

<sup>395</sup> See Barrett, *Congressional Insiders and Outsiders*, *supra* note 61 (rejecting views purporting to rely upon those who understand congressional processes).

debate, means that statutory interpretation has given up all pretense to respecting the republic.

Republican evidence from the deliberative production economy serves three values. First, republican evidence has a potential *rule of law value* that can aid interpreters in finding and considering *all the relevant text*. As in *Muscarello*, legislative evidence can help us see when Congress uses legal terms of art, a common practice.<sup>396</sup> Surely, as Justice Scalia conceded, legislative evidence is admissible to show legislative usage or “that a word could bear a particular meaning.”<sup>397</sup> Our student Dan Listwa searched 1880s legislative discussions to determine how members of Congress used the *Holy Trinity* statute’s phrase “labor or service” and found it was limited to wage labor.<sup>398</sup> Our own examination of the legislative record of the 1885 Act found that both sides of the debate used the term “labor” (or “labor or service”) to refer to skilled as well as unskilled manual work, not what Justice Brewer referred to as “toil . . . of the brain.”<sup>399</sup>

In addition to word meaning, legislative evidence can be an invaluable resource for locating relevant text and explaining how different provisions in a statute relate to one another. We saw this on dramatic display in the *Sinclair* bankruptcy case, where legislative evidence pointed the interpreter to a conflicting provision,<sup>400</sup> and in *Public Citizen*, where legislative evidence motivated us to consider the statutory structure and led us to the conclusion that FACA only regulated advisory committees established by a federal official or institution.<sup>401</sup> But it is also true of *Holy Trinity*. Neither Justice Brewer nor Justice Scalia appreciated the significance of section 4 of the contract labor law, which barred the master of a ship from knowingly transporting any immigrant who was a “laborer, mechanic, or artisan” under contract to do “labor or service” in the United States.<sup>402</sup> We read the

<sup>396</sup> See *supra* notes 331–34 and accompanying text.

<sup>397</sup> Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610, 1616 (2012); accord *In re Sinclair*, 870 F.2d 1340, 1343 (7th Cir. 1989); Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621, 1656.

<sup>398</sup> Dan Listwa, *The Congressional Record as a Dictionary: The Case of Labor or Service* (2018) (unpublished Yale Law School seminar paper) (on file with authors); see also Gales & Solan, *supra* note 90.

<sup>399</sup> *Church of the Holy Trinity v. United States*, 143 U.S. 457, 463 (1892); e.g., 16 CONG. REC. 1779–95 (1885) (showcasing numerous Senators using the terms “labor or service” or “labor” in connection with the alien contract labor bill); see also NOURSE, MISREADING LAW, *supra* note 21, at 77–78.

<sup>400</sup> See *supra* notes 106–10 and accompanying text.

<sup>401</sup> See *supra* notes 119–23 and accompanying text.

<sup>402</sup> Alien Contract Labor Act, ch. 164, § 4, 23 Stat. 332, 332–33 (1885); see also *supra* note 88 and accompanying text.



statute and caught the section 4 point but did not know what to make of it: Was section 4 *in pari materia* with section 1, and therefore supporting Justice Brewer's opinion? Or was it an example of meaningful variation, and thus supporting Justice Scalia's critique? Legislative evidence gave us a clear, objective, and verifiable answer: The sponsor and supportive legislators assured their colleagues and the public that section 4 was "aimed . . . against the man who knowingly brings an immigrant from foreign shores to our own, who comes here under and by virtue of a contract such as is prohibited by [section 1 of] the bill."<sup>403</sup>

Second, republican evidence checks interpretive bias by providing judges with information that might *disconfirm* their assumptions and reject some problems as *outside* the statute's anticipated application.<sup>404</sup> We all suffer from cognitive biases. Because of their elite backgrounds and lived experiences, judges arguably suffer from more of these biases, making it harder to consistently categorize the full scope of everyday problems.<sup>405</sup> For generations, theorists have maintained that legislative materials are valuable not as evidence of legislators' specific intent on an interpretive issue, but instead as evidence of how the statute sought to ameliorate a real-world mischief or problem.<sup>406</sup> We use the word "problem" as opposed to "purpose" because the latter term suggests a vague mental state and our focus is on concrete facts about the world. From *Chisom* to *Muscarello* to *Yates* to *Lockhart*, the best way to figure out the problem—or "mischief," to use an old term—Congress was addressing and the level of generality with which it was addressing it, is to examine the public debate. At worst, examining those materials involves effort and research that merely confirm the obvious, but at best, those materials can lead the judge to see the statute from the perspective of those who produced it. As we saw for *Holy Trinity*, Justice Scalia's modern per-

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<sup>403</sup> 16 CONG. REC. 1630 (1885) (statement of Sen. Henry W. Blair, sponsor); *accord id.* at 1629 (statement of Sen. John R. McPherson); *id.* at 1785 (statement of Sen. Henry W. Blair); *id.* at 1779 (statement of Sen. John Franklin Miller). Professor Vermeule's contrary reading, emphasizing the breadth of section 1, ignored this evidence, and relied on the statements of an opponent of the legislation. See NOURSE, MISREADING LAW, *supra* note 21, at 76–78.

<sup>404</sup> See ESKRIDGE, INTERPRETING LAW, *supra* note 21.

<sup>405</sup> See *supra* notes 35–36 and accompanying text.

<sup>406</sup> See, e.g., HART & SACKS, *supra* note 195; Samuel L. Bray, *The Mischief Rule*, 109 GEO. L.J. 967 (2021); Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 643 (1949) ("I must confess that as I grow older I become more and more perplexed at men's refusal to apply their common sense to problems of law and government."); see also Gluck & Posner, *supra* note 21, at 1303 (noting that even "very text-centric judges" voice support for "a cabined approach that seeks to implement what Congress was trying to do, using all available tools to confirm the judge's interpretation").

spective was wrong: Legislative deliberations were better evidence of original public meaning, because the words used in the legislative process were not only contemporary with the statute's enactment, but they were used in the normative context of the statute itself. "Labor or service" were normative words, embodying a policy choice made by Congress addressing a particular problem, easily misunderstood by modern readers ignorant of the legislative context.<sup>407</sup>

Shifting the interpretive focus from purposes to problems does not magically vitiate the generality critique: It is possible to describe problems (such as the danger of guns during crimes) as well as words and phrases (such as "carries a firearm") at various levels of generality. Textualism aggravates the generality problem and the judicial discretion problem by ignoring both issues. In our view, the best way to ameliorate the level-of-generality issue in practice is to look to *concrete evidence* about Congress's republican deliberations, including the level of generality at which legislators described the problem they were trying to solve. Legislative evidence demonstrates that the Alien Contract Labor Act was a specific response to employers financing a flood of foreign workers; Congress considered that a problem because "bought" foreign workers were driving down wage rates for "free" American workers.<sup>408</sup> Notice how the legislative focus on the "bought" (as opposed to "free") workers linked the statutory language in the 1885 Act ("labor or service") with the language of the Fugitive Slave Clause ("Service or Labor").<sup>409</sup> There was no evidence that ministers or so-called brain-toilers were being imported *en masse* to the United States.

Third, republican evidence often has value for any neutral judge wishing to be true to the idea that the Congress and its elected representatives, not the appointed Court, makes and changes the law, as well as takes the lead in declaring national policies. If populism is, as Professor Issacharoff argues, all popular and no republican,<sup>410</sup> then courts employing such a method are undermining the elected body representing the multifarious views of *those very people*. The Constitution grants Congress the legislative power not because its members are individually wise, but because collectively they are accountable to We the People, and deliberate in the interest of the

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<sup>407</sup> See *supra* notes 89–90, 398–99 and accompanying text.

<sup>408</sup> H.R. REP. NO. 48-444 (1884), as reprinted in 15 CONG. REC. 6059 (1884); see also Carol Chomsky, *Unlocking the Mysteries of Holy Trinity: Spirit, Letter, and History in Statutory Interpretation*, 100 COLUM. L. REV. 901, 923–38 (2000) (providing a comprehensive account of the legislative evidence on the statutory problem).

<sup>409</sup> See *supra* note 89 and accompanying text.

<sup>410</sup> See Issacharoff, *supra* note 208, at 486.

polity by considering a wide variety of perspectives.<sup>411</sup> Conservatives are fond of insisting that we have a republic,<sup>412</sup> rather than a democracy, because we have representatives who filter popular views. Surely, an interpreter faced with two plausible ordinary meanings would want to know how legislators—our elected representatives, accountable for the statutory policy—understood those meanings. No disinterested judge ought to apply a statute in ways that Congress has rejected, or in ways that intrude upon the legislative authority. Nor should judges want to apply a statute to aggrandize their own authority. For example, the rule of lenity tells us that courts should not create common law crimes through dynamic interpretations of open-textured criminal laws.<sup>413</sup> Republican evidence in criminal prosecutions such as *Muscarello*, *Yates*, *Bond*, and *Lockhart* may help the cautious judge be more certain that an expansive reading of the Criminal Code does not reach beyond the conduct legislators, after investigation and deliberation, considered culpable.

Legislative materials can be valuable evidence of *consensus positions* undergirding statutory responses to social and economic problems. Judicial respect for legislatively settled issues is essential to maintaining the separation of powers, including judicial deference to the supremacy of Congress as the democratically legitimate driver of the republic. After the circuit court ruled in 1890 that Holy Trinity Church had violated the 1885 Act, surprised legislators immediately amended the statute to exempt “ministers of any religious denomination.”<sup>414</sup> The legislative debates revealed a consensus that statutory law should reflect the norm that “this is a free country, free in religion as in everything else.”<sup>415</sup> Although the 1891 Amendment did not apply to pending cases (i.e., *Holy Trinity*),<sup>416</sup> the legislative evidence supports the Supreme Court’s view that penalizing a church’s choice of minister was not appropriate under the 1885 language. Today, we

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<sup>411</sup> THE FEDERALIST NO. 10 (James Madison); ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 17 (2d ed. 1986) (“[N]o democracy operates by taking continuous nose counts on the broad range of daily governmental activities. Representative democracies—that is to say, all working democracies—function by electing . . . [representatives] for certain periods . . . and then passing judgment periodically on their conduct.”).

<sup>412</sup> See, e.g., RANDY E. BARNETT, *OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE* (2016).

<sup>413</sup> See Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 347.

<sup>414</sup> Act of Mar. 3, 1891, ch. 551, § 5, 26 Stat. 1084, 1085; see also 21 CONG. REC. 9439 (1890).

<sup>415</sup> 21 CONG. REC. 10,466–67 (1890) (containing a colloquy justifying a broad exemption for any faith tradition).

<sup>416</sup> See *supra* note 84 and accompanying text.

should be reluctant to interpret a generally worded criminal law to deny a church the freedom to choose its ministers,<sup>417</sup> and the legislative evidence in *Holy Trinity* demonstrates that this longstanding norm was appreciated by Congress before it was apprehended by the Supreme Court. In our republic of statutes, judges can learn something about norms from legislative deliberations.<sup>418</sup>

Using decisions we analyzed in Parts I and II, we show how republican evidence might help the politically neutral textualist resolve issues that the text, standing alone, did not. Specifically, the evidence decisively refutes the views advanced by dissenters in *King* and *Muscarello*, suggests more persuasive reasoning for majority opinions in *Yates*, *Murphy*, and *Bostock*, and supports different text-based results in cases like *Sinclair*, *Bond*, *Lockhart*, and *Pride at Work*. Our detective work led us in surprising directions—often upending our own biases and disfavoring positions taken by our favorite Justices. For example, in *Muscarello*, the legislative evidence shows that Congress wanted judges to enforce what we consider a harsh minimum mandatory penalty. For years, we taught *Bond* as a case neatly wedding federalism and the rule of lenity—but the legislative and treaty materials drove us into Justice Scalia’s camp on the statutory issue. In *Lockhart*, we originally leaned toward Justice Sotomayor’s view, but republican evidence taught us that the statutory focus was child sex abuse. Justice Kagan’s witty arguments persuaded us in *Yates*, until we looked at the actual record which focused on “shredding.” Legislative evidence flipped us from Justice Sotomayor’s dissent to favor Justice Gorsuch’s ruling in *Murphy*. Additional examples can be found in our Appendix of recent Roberts Court decisions.

### A. *Finding and Understanding Relevant Text*

Republican evidence can help the interpreter locate relevant text and (con)text and resist the tendency to cherry-pick. When a first look at the application of a text seems irrational or unthinkable, interpreters should, as Justice Scalia once suggested, check their intuition against legislative materials.<sup>419</sup> In *Public Citizen*, a broad reading of

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<sup>417</sup> Cf. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 184, 202 (2012) (holding that the Free Exercise Clause bars statutory interference with a church’s selection of ministerial officials).

<sup>418</sup> See WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 7, 12 (2010) (arguing that legislative and administrative deliberations over time can create entrenched institutional norms).

<sup>419</sup> *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring in the judgment) (“I think it entirely appropriate to consult all public materials, including the

“utilized” gave the FACA a constitutionally questionable breadth. The Justices should have taken a harder look in light of republican evidence revealing that the broadening term—utilize—was not found in either the House or Senate bills and was added in conference.<sup>420</sup> That led us to a more careful review of the statutory scheme, including FACA’s rules for creating and terminating advisory committees.<sup>421</sup> Thanks to legislative materials, a hard case became quite easy, as a textual matter.

*Sinclair* is the flip side of *Public Citizen*: an easy case that is made hard once republican evidence reveals that the conflict was *not* between the statute and its legislative history, but between two statutory provisions—the conversion provision favoring the farmers and the nonretroactivity provision favoring the creditor. The statutory conflict could have been avoided by allowing the Sinclairs to dismiss their Chapter 11 claim and refile under Chapter 12.<sup>422</sup> An approach that reconciles more rather than less text ought to be preferred by textualists. This precept also justifies Chief Justice Roberts’s majority opinion in *King*, though not his opinion in *Bond*, where Justice Scalia had the better arguments.

*Muscarello* was a hard case because “carries a firearm” is susceptible to both broad and narrow readings, and in such cases we usually follow the rule of lenity. Our inclination was unsettled when we learned that most state “carry-gun” laws apply to “carrying” firearms in vehicles, but we still wondered: Did Members of Congress consider these laws? Was it fair to view them as prominent features of the legal landscape? Decisive for us was the statutory history of section 924(c). Almost all of the Supreme Court’s debate about words in the Bible and popular culture was irrelevant in light of the actual evidence showing that members were using “carries a firearm” as a phrase with legally established meaning, which is entirely plausible given the importance of gun laws in the states.<sup>423</sup>

The House and Senate enacted the Gun Control Act of 1968<sup>424</sup> against the background of state carry-gun laws. When the House added “unlawfully carries a firearm” as a sentencing enhancement,

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background of Rule 609(a)(1) and the legislative history of its adoption, to verify that what seems to us an unthinkable disposition.”).

<sup>420</sup> See *Pub. Citizen v. U.S. Dep’t of Just.*, 491 U.S. 440, 459–62 (1989). That “utilize” was added in conference supports the inference that it did not really “change” the underlying bill, as major changes at that stage are disfavored and against congressional rules. Nourse, *By the Rules*, *supra* note 115, at 93–97.

<sup>421</sup> See *supra* notes 119–23 and accompanying text.

<sup>422</sup> See *supra* notes 106–10 and accompanying text.

<sup>423</sup> See *supra* notes 329–32 and accompanying text.

<sup>424</sup> Pub. L. No. 90-618, 82 Stat. 1213 (1968) (codified at 18 U.S.C. §§ 921–928).

most states had laws regulating “carrying firearms,” and some states explicitly regulated carrying guns in vehicles.<sup>425</sup> For example, Massachusetts prohibited carrying firearms in vehicles unless “under the direct control” of the carrier, as in a glove compartment—which was Muscarello’s enhancement.<sup>426</sup> Hawaii, Michigan, Pennsylvania, and other states prohibited gun-carrying within any vehicle.<sup>427</sup> General carry-gun prohibitions had been interpreted to apply to carrying guns in automobiles.<sup>428</sup> During Senate deliberations, Senator Strom Thurmond introduced into the *Congressional Record* a list of state carry-gun laws, and senators were informed that without the “unlawfully” language, the proposed legislation might penalize law-abiding citizens for carrying weapons “in their automobiles.”<sup>429</sup> Both supporters<sup>430</sup> and opponents<sup>431</sup> of the gun control bill discussed state carry-gun laws.

In 1968, Congress was using “unlawfully carries a firearm” as a term of art based on state law. As a matter of public meaning in 1968 or 1984 (when section 924(c) was expanded to drop the “unlawfully” modifier),<sup>432</sup> “carrying a firearm” typically included carriage within a vehicle. A similar consensus was reflected in legislative deliberations

<sup>425</sup> See *supra* notes 329–33 and accompanying text.

<sup>426</sup> MASS. GEN. LAWS ANN. ch. 140, § 131C (West 1958), amended by Act of Feb. 16, 1965, ch. 44, 1965 Mass. Acts 18; see also Act of May 11, 1959, ch. 296, § 6, 1959 Mass. Acts 207 (codified at MASS. GEN. LAWS ANN. ch. 140, § 131 (West Supp. 1972)) (earlier regulation touching on carrying a gun in an automobile); Act effective Sept. 9, 1953, ch. 36, § 12025, 1953 Cal. Stat. 653, 654–55 (prohibiting unlicensed carrying of firearms in any vehicle in California).

<sup>427</sup> HAW. REV. STAT. § 727-25 (1968); see also MICH. COMP. LAWS ANN. § 750.227 (West 1968) (making it a felony for individuals to carry any pistol “in any vehicle operated or occupied” by them); 18 PA. STAT. AND CONS. STAT. ANN. § 4416 (West 1963), amended by Act of July 30, 1968, 1968 Pa. Laws 690, sec. 1, § 4416(a).

<sup>428</sup> See, e.g., *Stephens v. City of Fort Smith*, 300 S.W.2d 14, 15 (1957) (holding that storing a pistol in the glove compartment of a car constituted “carrying a pistol in ‘any manner’” (quoting Ark. Acts § 41-4501 (1985))).

<sup>429</sup> 114 CONG. REC. 27,412–19 (1968) (statement of Sen. Strom Thurmond, an opponent). Because state courts had applied carry-gun laws to vehicles, Senator Cooper, a supporter, worried that the Senate bill would “deprive law abiding citizens of the right to . . . carry these weapons in their automobiles as many people do today.” 114 CONG. REC. 27,419 (1968).

<sup>430</sup> See 114 CONG. REC. 22,267–68 (1968) (statement of Rep. Benjamin B. Blackburn) (discussing gun control provisions in Georgia); *id.* at 22,241–42 (statement of Rep. Catherine D. May) (discussing state-level enforcement in Washington).

<sup>431</sup> Opponents worried that the federal legislation would go beyond the regulations in their own state carry-gun laws, which specifically allowed carrying guns in certain vehicles or (for one state) in a “saddlebag” when traveling. 114 CONG. REC. 26,827 (1968) (statement of Sen. Joseph Tydings) (referencing a Texas law); see *id.* at 27,125 (statement of Sen. Ernest Gruening) (referencing an Alaska law requiring some individuals to carry guns in planes).

<sup>432</sup> See S. REP. NO. 98-225, at 314 n.819 (1984), as reprinted in 1984 U.S.C.C.A.N. 3182, 3492.

surrounding section 926A, added in 1986 and invoked by the *Muscarello* dissenters.<sup>433</sup> Legislative evidence establishes that the 1986 law strongly supported the majority's argument. The sponsor explained that "a hunter from South Carolina has no way of getting through the State of New York to go moose hunting in Maine," because New York's carry-gun law did not permit carrying such weapons in vehicles.<sup>434</sup> The proposed legislation would allow "transport" of a gun through New York to another state where the owner could lawfully "carry" the gun.<sup>435</sup> Contrary to the dissenting opinion, the 1986 law confirms that "carries a firearm" applied to carrying a gun in your car.

As a matter of law, Justice Breyer reached the right answer. For a judge worried about expanding the reach of the criminal law, or aggrandizing judicial authority to create crimes, the republican evidence provides reassurance. Our qualms about harsh punishment were satisfied by targeted legislative deliberation—as legislators we might have voted the other way, but as judges we would follow the congressional consensus. A great lesson of this case is that Congress legislates, often carefully, based on law, particularly state law. This should not be surprising given the republican nature of representation: Representatives are elected by voters from their states and localities. Judges who care about federalism should take an important lesson from this case—but it is a lesson easily missed by judges who close their eyes to republican evidence.

### *B. Disconfirming Judicial Assumptions: Curbing Judicial Activism*

Today, legislative materials are usually invoked to "confirm" ordinary meaning,<sup>436</sup> but we think republican evidence should also be used to *disconfirm interpreters' assumptions or tentative conclusions*. The new textualism pressures judges to find a plain meaning, but a clear-eyed view of the text often does not cooperate. Textualists ought to test their assumptions against republican evidence. In the following cases, the evidence negated some judicial claims about Congress's plans and converted hard cases into easier ones.

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<sup>433</sup> Act of July 8, 1986, Pub. L. No. 99-360, § 1(a), 100 Stat. 766 (codified at 18 U.S.C. § 926A); *Muscarello v. United States*, 524 U.S. 125, 146-48 (1998) (Ginsburg, J., dissenting).

<sup>434</sup> 132 CONG. REC. 9603 (1986) (statement of Sen. James A. McClure, Senate sponsor).

<sup>435</sup> *Id.* at 15,227-28 (statement of Rep. Bill McCollum, House sponsor).

<sup>436</sup> Brudney, *supra* note 214, at 901.



I. *Yates v. United States: How Broadly Did Congress Define the Problem Addressed in Sarbanes-Oxley?*

*Yates*, the fish case, presented us with a mystery: Was section 1519<sup>437</sup> (added by SOX) a new general obstruction statute, or just a specialized statute focusing on document destruction? In 2002, the Criminal Code had an existing general evidence tampering statute, section 1512.<sup>438</sup> Why did Congress not amend section 1512, rather than create a new section 1519 (and section 1520,<sup>439</sup> requiring preservation of records)? Looking at the legislative debate helps us see the problem Congress addressed: financial fraud, markets crashing, and high-flying corporate executives destroying citizens' pensions. Congress was aware of the old section 1512 and chose to treat it differently. This *disconfirms* the dissenters' view that the purpose of the statute was to create a general obstruction measure.

When the Oxley bill came to the Senate, it had no obstruction of justice provisions.<sup>440</sup> Senator Leahy, a former prosecutor and sponsor of the bill, added the obstruction provision that would become section 1519 as a floor amendment.<sup>441</sup> During conference, the House receded to the Senate provisions.<sup>442</sup> During the Senate's debate on the conference report, Senator Leahy explained:

[W]e include new *anti-shredding crimes* and the requirement that corporate audit documents be preserved for 5 years with a 10 year maximum penalty for willful violations. . . . As the *Andersen* case showed, instead of just incorporating the loopholes from existing crimes and raising the penalties, we need tough *new* provisions that will make sure key *documents* do not get *shredded* in the first place.<sup>443</sup>

The Senate debate was focused on documents and records, not fish and assorted things:

Section 802 creates two *new* felonies [sections 1519 and 1520] to clarify and close loopholes in the existing criminal laws relating to the destruction or fabrication of evidence and the preservation of

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<sup>437</sup> 18 U.S.C. § 1519.

<sup>438</sup> *Id.* § 1512.

<sup>439</sup> *Id.* § 1520.

<sup>440</sup> See Brief for the Honorable Michael Oxley as Amicus Curiae in Support of Petitioner at 6, *Yates v. United States*, 574 U.S. 528 (2015) (No. 13-7451) [hereinafter Oxley Amicus Brief].

<sup>441</sup> 148 CONG. REC. 12,315–17 (2002); *id.* at 12,490, 12,505.

<sup>442</sup> H.R. REP. NO. 107-610, at 1 (2002) (Conf. Rep.).

<sup>443</sup> 148 CONG. REC. 14,447 (2002) (statement of Sen. Patrick Leahy) (alteration in original) (emphasis added) (referencing then-pending *Arthur Andersen LLP v. United States*, 544 U.S. 696, 706, 708 (2005) (overturning conviction of an accounting firm for obstruction of justice due to lack of scienter)).

financial and audit records. [Specifically], it creates a new general anti *shredding* provision, 18 U.S.C. § 1519, with a 10-year maximum prison sentence.<sup>444</sup>

The Department of Justice had been pushing Congress to amend the general obstruction statute, section 1512, which started as a statute focusing on evidence tampering.<sup>445</sup> Congress rejected that approach, preferring to create subject-matter fraud and obstruction statutes with a narrower reach, such as obstruction in health care fraud or, in this case, financial fraud.<sup>446</sup> Enron highlighted the need for some fixes: One of the problems in prosecuting the Enron accountants was that section 1512 seemed to require a third party to dispose of the evidence.<sup>447</sup> Senator Leahy's bill never amended section 1512—it added new provisions, sections 1519 and 1520. Neither Senator Leahy nor the bill's bipartisan supporters (it passed 96–3) mentioned the existing general evidence-tampering statute—until the end of the Senate debate, when Senator Lott offered an amendment (probably on behalf of the Justice Department) that updated the old evidence-tampering statute, section 1512.<sup>448</sup>

Given this sequence of events, Justice Kagan was wrong to say that section 1519 was a general obstruction statute: As the drafting and debating history of SOX demonstrates, there was congressional consensus that it was not. Even if one does not want to import this evidence into an opinion, as Justice Ginsburg did when she derived her caption, title, and other textual arguments from former Representative Oxley's amicus brief in *Yates*,<sup>449</sup> at the very least it *disconfirms* Justice Kagan's assumptions. Her effort to “clean up” the otherwise messy law of obstructing justice is attractive—but that was not what Congress was doing in 2002.

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<sup>444</sup> *Id.* at 14,448 (alteration in original) (emphasis added). The conference report's explanation speaks not of a “general spoliation statute” as Justice Ginsburg wrote, *Yates*, 574 U.S. at 546 (plurality opinion), but of a “general anti shredding” provision, 148 CONG. REC. 14,448 (2002) (reprinting and discussing the conference report).

<sup>445</sup> See Oxley Amicus Brief, *supra* note 440, at 3, 7–8 (showing that “frustration” with the limitations placed on prosecutors in prosecuting the Enron case motivated proposals to amend section 1512).

<sup>446</sup> *Id.* at 18–19, 23–24.

<sup>447</sup> See *id.* at 3 (discussing how section 1512 only made it a crime to persuade another person to destroy evidence, not to destroy evidence oneself).

<sup>448</sup> 148 CONG. REC. 12,509, 12,512 (2002) (statement of Sen. Trent Lott) (“[T]his section would allow the Government to charge obstruction against individuals who acted alone, even if the tampering took place prior to the issuance of a grand jury subpoena.”).

<sup>449</sup> See *Yates v. United States*, 574 U.S. 528, 539–41 (2015) (plurality opinion); Oxley Amicus Brief, *supra* note 440, at 7, 9, 10–11, 16 (arguing that the caption, title, and placement points all support reading “tangible object” to refer primarily to documents and records).

## 2. *Lockhart v. United States: Was Congress Focused on Crimes Against Children?*

After all the canons had been fired—last antecedent, series modifier, whole act, whole code—*Lockhart* seems a tie. Although it is doubtful any ordinary citizen would have tried to untangle the statute, there were two plausible legal meanings. Assuming that Congress had created a coherent scheme, the majority read the state law predicates to echo the federal predicates.<sup>450</sup> But the statutory record belies that assumption and disconfirms the notion that focusing on child crimes was a mere accident. The dissenters' narrower meaning emerges as the more plausible one, whose cogency should have been sealed by the rule of lenity.

Between 1978 and 1996, section 2252's enhancements were only triggered by prior convictions under federal law, assembled from a variety of unrelated pieces of legislation.<sup>451</sup> State law crimes were first added by a child pornography bill introduced by Senator Hatch, the Chair of the Senate Judiciary Committee during the 104th Congress.<sup>452</sup> The Hatch bill was a rider to an appropriations bill, emerging only in conference, a process ripe with risks for bad drafting.<sup>453</sup> The history of the Hatch bill disconfirms assumptions, made by the majority opinion, that Congress was aiming for penalty coherence; the statutory scheme was instead assembled piecemeal.

The Hatch bill expanded regulation of child pornography to computer-morphed child pornography, and much of the debate in the Senate Judiciary Committee was about whether this violated the First Amendment.<sup>454</sup> As background, it is important to note that while Congress generally cannot regulate adult pornography other than obscenity, it can regulate child pornography but only if its laws meet certain standards, including a showing of harm to children.<sup>455</sup> Senators concerned about First Amendment implications warned that some

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<sup>450</sup> See *supra* notes 348–49 and accompanying text.

<sup>451</sup> Brief for Petitioner at 25, *Lockhart v. United States*, 577 U.S. 347 (2016) (No. 14-8358).

<sup>452</sup> Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, §§ 121(4)–(5), 110 Stat. 3009–26, at 3009–30 (codified at 18 U.S.C. §§ 2251(d), 2252(b)).

<sup>453</sup> See H.R. REP. NO. 104-863, at 802 (1996) (Conf. Rep.) (noting that the conference bill “includes new language, not included in the House or Senate-reported bills, to address the growing problem of child pornographic materials produced using new computer imaging and ‘morphing’ technologies”). Conference reports occur at the end of a long process and there may be a rush to finish; they also present opportunities for drafters to win points lost elsewhere. See Nourse, *By the Rules*, *supra* note 115, at 98.

<sup>454</sup> See S. REP. NO. 104-358, at 18–37 (1995).

<sup>455</sup> See, e.g., *New York v. Ferber*, 458 U.S. 747, 755–56, 758 (1982) (upholding New York's regulation of child pornography that was not “obscene” under the Court's precedents, based, in part, on the notion that the “use of children as subjects of

morphed porn did not involve an actual child, so the harm was not as great as that which had been one of the “compelling reasons” for the Supreme Court to support earlier child pornography legislation.<sup>456</sup> Senator Hatch replied that there was harm to children because pedophiles would view child pornography and then commit sex crimes<sup>457</sup>: “[C]hild pornography aggravates *child* sexual molestation.”<sup>458</sup>

Thus, the original committee report described the penalty provision as limited to offenses against *children*: “[A]ny State *child* abuse law or law relating to the production, receipt or distribution of *child* pornography.”<sup>459</sup> More importantly, the *conferees* adopted that meaning—focusing on *children*—by explaining that the bill “would increase the penalties for *child* sexual exploitation, *child* sexual abuse and *child* pornography offenses”<sup>460</sup> and including a ten-year enhancement if the defendant had a prior conviction “under the laws of any State relating to the sexual exploitation of *children*.”<sup>461</sup> In neither the committee report nor the conference report’s joint explanation did anyone pay attention to how these new offenses related to the list of adult offenses covered in then-existing section 2252(b). At the same time, this evidence shows that the drafters<sup>462</sup> and the conferees<sup>463</sup> were very much focused on children and offenses against children and that there was a reason for that focus: the debate about the law’s constitutionality. A measure regulating child pornography was less encumbered by constitutional difficulties than one involving just adults.

None of this evidence played a significant role in *Lockhart*’s majority or dissenting opinions. Legislators were paying attention to crimes against children, and not to how the penalties matched up in section 2252. At the very least, this *disconfirms* the majority’s notion of penalty coherence and responds to its lament that no one could

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pornographic materials is harmful to the physiological, emotional, and mental health of the child”).

<sup>456</sup> S. REP. NO. 104-358, at 28–30, 36–38 (1995).

<sup>457</sup> *Id.* at 17, 19.

<sup>458</sup> 142 CONG. REC. 26,638 (1996) (statement of Sen. Orrin Hatch) (emphasis added).

<sup>459</sup> S. REP. NO. 104-358, at 9–10 (emphasis added).

<sup>460</sup> H.R. REP. NO. 104-863, at 802–03 (1996) (Conf. Rep.) (emphasis added).

<sup>461</sup> *Id.* at 32 (emphasis added); 142 CONG. REC. 26,638–39 (1996) (printing a section-by-section analysis of the Child Pornography Prevention Act).

<sup>462</sup> The Justice Department read the 1996 amendment in precisely this way. See *Lockhart v. United States*, 577 U.S. 347, 368–71 (2016) (Kagan, J., dissenting) (noting the Justice Department’s interpretation in a formal bill comment).

<sup>463</sup> Justice Kagan invoked only the Senate committee report, see *id.* at 369–70 (quoting S. REP. NO. 104-358, at 9 (1996)), but the conference report is better evidence because it was the text of the law actually enacted.

come up with a reason why crimes against minors were the focus of all three sentence enhancements added in 1996. There were good reasons that Congress focused on abuse of children: Legislators considered previous sexual exploitation of children particularly reprehensible (and hence deserving of longer sentences) and were aware that the Supreme Court gave them greater authority to regulate child, but not adult, pornography. Even if one did not think that this evidence established the provision's meaning beyond all argument, it should at least have tilted the balance toward the rule of lenity, which encourages Congress to clarify the criminal law's reach.

### 3. *Murphy v. Smith: How Much Was Congress Retreating from the Civil Rights Fee-Shifting Model for Prisoner Civil Rights Lawsuits?*

In *Murphy*, the critical consideration for reading that oddly drafted statute was whether Congress was substantially abandoning, for prisoner lawsuits, the liberal fee-shifting civil rights approach of the 1978 statute in favor of something closer to the American Rule, under which each party bears its own fees.<sup>464</sup> Because we believe civil rights lawsuits can deter egregious public conduct and therefore should be encouraged through fee-shifting, we were with Justice Sotomayor—until we read the legislative evidence. It suggests that Congress was indeed demoting prisoners from favored civil rights litigation status to a litigation status only a little better than a normal tort plaintiff. The enacting coalition specifically pitched the legislation to colleagues and the public as treating counsel fees in prisoner cases more like American Rule contingency fees, consistent with Justice Gorsuch's majority opinion.<sup>465</sup>

The proposed Prison Litigation Reform Act (PLRA)<sup>466</sup> was originally introduced in connection with the GOP's Contract with America.<sup>467</sup> The initial 1995 bill contained the following counsel fee provision:

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<sup>464</sup> See *supra* notes 386–87 and accompanying text.

<sup>465</sup> See Brief for Respondents at 21–25, *Murphy v. Smith*, 138 S. Ct. 784 (2018) (No. 16-1067) (reviewing statements by congressional sponsors that the legislation was intended to align prisoners' incentives with non-incarcerated individuals).

<sup>466</sup> S. 1279, 104th Cong. § 7(d)(2) (1995). There was an earlier version of the Prison Litigation Reform Act, but it lacked the distinctive attorney's fee-shifting provisions relevant to this statutory scheme. See S. 866, 104th Cong. (1995).

<sup>467</sup> See NEWT GINGRICH, DICK ARMEY & HOUSE REPUBLICANS, CONTRACT WITH AMERICA 53 (Ed Gillespie & Bob Schellhas eds., 1994) (discussing reforms applicable to prison lawsuits in the PLRA's predecessor bill, the Taking Back Our Streets Act, H.R. 3, 104th Cong. (1995)).

Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. *If the award of attorney's fees is greater than 25 percent of the judgment, the excess shall be paid by the defendant.*<sup>468</sup>

The first sentence is identical to the first sentence of section 803 as enacted<sup>469</sup> and, read in conjunction with the second sentence, it shows that the sponsors were treating the prisoner plaintiff like a contingency fee plaintiff, up to twenty-five percent of the judgment (which would usually be a modest figure). After twenty-five percent, the prisoner plaintiff was being treated like a civil rights plaintiff, and the state defendant had to pay. The analogy to contingency fees was repeatedly suggested by the PLRA's sponsors. They reasoned that prisoners with modest claims would be deterred from filing marginal lawsuits if they were to face the same considerations other citizens face when deciding whether to file suit: "Is the lawsuit worth the price?"<sup>470</sup> Performing this familiar calculus would likely make prisoners with marginal and even valid claims think twice about filing a lawsuit, and naturally lawyers performing the same calculus would think more than twice before taking even a valid claim to court. Later that year, the PLRA, including this language, was attached to an omnibus appropriations measure.<sup>471</sup>

When the omnibus bill emerged from conference, the second sentence of the PLRA fee-shifting provisions had been changed to cap counsel fees paid by the state at 150% of the judgment.<sup>472</sup> Although Senator Hatch reported that the conference report achieved the same goal as the earlier bill,<sup>473</sup> the revised PLRA actually discouraged more prisoner civil rights lawsuits—both frivolous and meritorious—by setting a 150% cap on counsel fees. Congress was on notice that the overwhelming majority of prisoner awards were very low. The imposition of a cap further weakened the analogy between prisoner civil rights cases and regular civil rights cases and strengthened the analogy

<sup>468</sup> S. 1279 § 7(d)(2).

<sup>469</sup> See Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 803(d), 110 Stat. 1321, 1321-72 (1996) (codified at 42 U.S.C. § 1997e(d)(2)). Though the Act's official title is "The Prison Litigation Reform Act of 1995," it was not enacted until April 26, 1996.

<sup>470</sup> 141 CONG. REC. 14,572 (1995) (statement of Sen. Jon Kyl); *accord id.* at 26,548 (statement of Sen. Robert Dole).

<sup>471</sup> H.R. 2076, 104th Cong. §§ 801-802 (1995).

<sup>472</sup> H.R. REP. NO. 104-378, at 71 (1995) (Conf. Rep.); see also H.R. Res. 289, 104th Cong. (1995) (resolution ordering appropriations); BERNARD D. REAMS, JR. & WILLIAM H. MANZ, A LEGISLATIVE HISTORY OF THE PRISON LITIGATION REFORM ACT OF 1996 (1997) (outlining reports pertaining to the PLRA).

<sup>473</sup> See 141 CONG. REC. 35,797 (1995) (statement of Sen. Orrin Hatch).

with normal tort contingency fee cases. As Congress was undoubtedly also aware, tort clients with high likelihoods of success will attract no lawyers if the likely awards are small. For regular civil rights cases, that drawback is ameliorated by the adjusted count-the-hours approach for computing counsel compensation. The PLRA was passed by Congress and signed by President Clinton on April 26, 1996.<sup>474</sup>

Justice Gorsuch ignored this evidence in his opinion for the Court, which was a weak defense of the holding because it gerrymandered words out of the statute. In our view, he would have written a stronger *textualist* opinion if he had pointed to the drafting history, which helps explain how Congress was adopting the contingency fee model and why section 803 looks so clumsy. The republican evidence ought to be persuasive to anyone who cares about interpreting statutes with attention to *Congress's* plan and not just one's normative views about whether prisoner civil rights lawsuits should be encouraged by liberal fee-shifting.

### C. *Resolving Ambiguity: Consensus Positions and Unanswered Questions*

Republican evidence may be useful not only to find text, determine relevant usage, and disconfirm judicial assumptions, but also to illuminate widely held consensus positions. This is the use Justice Scalia made of *The Federalist Papers*: He cited them to understand the evolving public consensus surrounding the Constitution's ratification.<sup>475</sup> As empirical work has shown, Congress itself views legislative evidence reflecting bipartisan positions as most reliable.<sup>476</sup> More importantly, *consensus positions* on a core problem are, by definition, outside the cherry-picking critique associated with conventional legislative history. Even if one worries that it is difficult to find a consensus, concretely defining the legislative problem (the "mischief") can *disconfirm* some views and show how some supposed "ordinary meanings" reflected outlier positions. When reviewing the evidence,

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<sup>474</sup> Prison Litigation Reform Act §§ 801–802, 110 Stat. at 1321–66 to –70 (1996) (codified as amended at 18 U.S.C. § 3626).

<sup>475</sup> See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 568 (2004) (Scalia, J., dissenting) (citing THE FEDERALIST No. 45 (James Madison)) (arguing that the executive's lack of indefinite wartime detention authority is consistent with the views of the founders); *Printz v. United States*, 521 U.S. 898, 919–21 (1997) (citing THE FEDERALIST No. 15 (Alexander Hamilton) and THE FEDERALIST No. 39 (James Madison)) (arguing that state sovereignty reflects the views of the founders).

<sup>476</sup> See Gluck & Bressman, *supra* note 32, at 977–78 (finding via surveys that congressional staffers viewed committee and conference reports as the most reliable legislative evidence).



one does not aim for a comprehensive story about a statute, but instead focuses insistently on how the text related to the problem Congress was trying to solve.

### 1. Pride at Work: *Consensus Positions*

Justice Markman, in *National Pride at Work*, concluded that employment benefits for domestic partners amounted to state recognition of an “agreement” that was a “marriage or similar union.”<sup>477</sup> He twisted the text into an unrecognizable shape. But if there is doubt, it should have been resolved by the public debate on the problem the voters saw the amendment solving. The amendment’s advocates advertised the core problem as marriage and civil unions and repeatedly conceded that the amendment would not affect domestic partnership registries, much less contract benefits.<sup>478</sup> We recognize that the constitutional amendment here reflected direct democracy at work, and public debates may raise different issues from evidence of representative debate, but in this case consensus was strong, applying not only to public knowledge but also to representations made to government officials by gay marriage opponents.

Citizens for the Protection of Marriage (CPM), the amendment’s sponsoring organization, maintained that the amendment would strengthen the state’s statutory prohibition of same-sex marriage and would head off civil unions, a well-recognized “marriage-lite” institution granting all or almost all the legal benefits of marriage—such as spousal immunities, inheritance rights, and so forth—to same-sex couples.<sup>479</sup> CPM’s spokespersons represented that protecting marriage had nothing to do with domestic partnerships or contract rights. At a hearing before the board that had to approve the amendment for the ballot, CPM’s counsel stated that there “would certainly be nothing to preclude [a] public employer from extending [health-care] benefits, if they so chose, as a matter of contract between employer and employee, to say domestic dependent benefits . . . [to any] person, . . . as a matter of contract.”<sup>480</sup> CPM’s official campaign brochure said

<sup>477</sup> See *supra* notes 165–69 and accompanying text.

<sup>478</sup> *Nat’l Pride at Work, Inc. v. Governor of Mich.*, 748 N.W.2d 524, 546–47 (Mich. 2008) (Kelly, J., dissenting).

<sup>479</sup> See *id.* at 547 (describing CPM’s emphasis that the amendment was about “defining marriage as the union of one man and one woman”); Glen Staszewski, *The Bait-and-Switch in Direct Democracy*, 2006 WIS. L. REV. 17, 22 (citing Dawson Bell, *Proposal 2: Gay Marriage Ban Easily Wins in State, Elsewhere*, DETROIT FREE PRESS, Nov. 3, 2004, at 9A (noting that the amendment excludes civil unions from its definition of marriage)).

<sup>480</sup> *Nat’l Pride at Work*, 748 N.W.2d at 546–47 (Kelly, J., dissenting); see also Staszewski, *supra* note 70, at 25–26 (outlining the dispute over the amendment’s statement of purpose).

that “Proposal 2 is [o]nly about marriage,” namely, “a union between husband and wife. Proposal 2 will keep it that way. *This is not about rights or benefits* or how people choose to live their life.”<sup>481</sup> Its premier television commercial had the same message. CPM’s communications director and the two primary drafters disclaimed the measure’s potential effect on domestic partnership benefits, dismissing the opposition’s warnings as a “scare tactic” or “diversion from the real issue,” to preserve marriage.<sup>482</sup> This was not an unusual position. Supporters of the Federal Marriage Amendment, which came to a vote in Congress the same year as the Michigan amendment, explicitly disclaimed any intent to preempt domestic partnership benefits.<sup>483</sup> Even after the Michigan Attorney General sued to cancel benefits, the Catholic Church, the Church of Jesus Christ, and the National Association of Evangelicals—all opponents of same-sex marriage and civil unions for faith-based reasons—declined to support the anti-health-benefits position.<sup>484</sup>

The record shows that everyone, including critics, agreed that the core problem was marriage and civil unions, not contracts. While marriage equality supporters opposing the marriage amendment claimed that it swept too far, even their most exaggerated claims did not reach private contracting.<sup>485</sup> At a minimum, this evidence disconfirms the claimed democratic or even populist pedigree of Justice Markman’s interpretation: He was imposing his own meaning on that ratified by the voters in 2004. His opinion reflected the worst features of “judicial” populism—claiming to find the “ordinary meaning” of a statute no ordinary reader would adopt, imagining a public in the image of the judiciary.

## 2. *Bostock v. Clayton County: Resolving Ambiguity*

Hard cases arise because of ambiguity and the generality problem; text and purpose can both be stated at narrow or general

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<sup>481</sup> *Nat’l Pride at Work*, 748 N.W.2d at 547 (emphasis added).

<sup>482</sup> Staszewski, *supra* note 70, at 24 & n.28 (collecting CPM primary sources).

<sup>483</sup> See, e.g., Robert Bork, *Stop Courts from Imposing Gay Marriage*, WALL ST. J., Aug. 7, 2001, at A14 (endorsing the Federal Marriage Amendment but conceding that “[t]o try to prevent legislatures from enacting permission for civil unions by constitutional amendment would be to reach too far”); accord WILLIAM N. ESKRIDGE, JR. & CHRISTOPHER R. RIANO, *MARRIAGE EQUALITY: FROM OUTLAWS TO IN-LAWS* 259–63 (2020).

<sup>484</sup> The only amicus briefs filed in support of the Attorney General were perfunctory filings by outliers. E.g., Brief of Amicus Curiae Michigan Family Forum in Support of Intervening Defendant, *Nat’l Pride at Work*, 748 N.W.2d 524 (No. 133554).

<sup>485</sup> In any event, representations by opponents of laws or amendments cannot be used to establish the core meaning of a provision, especially when those representations are refuted by the proposal’s supporters. See Nourse, *By the Rules*, *supra* note 115, at 118–28.

levels, and there may be an element of choice among alternatives in both cases. A central problem with the new textualism—which refuses to look at evidence from statutory production—is that it motivates judges to find one “plain meaning” that closes off further kinds of inquiry. The pressure to locate a plain meaning yields spectacles where opposing camps both implausibly claim the mantle of unambiguous meaning—precisely what occurred in *Bostock*.<sup>486</sup> Reluctance to admit ambiguity and nuance is one of the worst effects of the consumption economy created by the new textualism. It assures gerrymandering.

In our view, there are two plausible interpretations in the *Bostock* case. On the one hand, discrimination “because of sex” might be read to protect women or men (based on sex-as-biology-assigned-at-birth) against workplace exclusion. Or it might be read to bar employers from considering an employee’s sex in any way or from imposing sex- or gender-stereotypes on employees.<sup>487</sup> The second interpretation, but not the first, would have provided *Bostock* with a claim for relief. Republican evidence makes clear that, by 1991, a legislative consensus had assimilated the Equal Employment Opportunity Commission’s and Court’s interpretation protecting men and women from discrimination because of sex stereotyping.<sup>488</sup> Even “original public meaning” inquiries must take account of the formal evolution of a statute—not just its interpretation by federal administrators and employers on the ground, but also binding statutory precedents and amendments adding relevant text of the law.

This resulting consensus reflected an ongoing conversation among legislators, administrators, and judges. In 1971, the Supreme Court held in *Phillips v. Martin Marietta Corporation*<sup>489</sup> that an employer could not discriminate against women with small children, notwithstanding the employer’s showing that most of its hires were women; the employer’s claim was rejected because it was making hiring decisions based on “stereotyped characterizations of the sexes.”<sup>490</sup> Congress was surely aware of this authoritative interpreta-

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<sup>486</sup> See Eskridge-Koppelman Amicus Brief, *supra* note 276, at 2–4.

<sup>487</sup> See WILLIAM N. ESKRIDGE, JR., NAN D. HUNTER & COURTNEY G. JOSLIN, *SEXUALITY, GENDER, AND THE LAW* 601–750 (4th ed. 2018) (summarizing and excerpting the cases expansively applying Title VII to a wide range of sex-stereotyping claims).

<sup>488</sup> On the breadth of Title VII in the 1964 debates, see Cary Franklin, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 HARV. L. REV. 1307, 1320–29 (2012). For broadening over time, see Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 DENV. L. REV. 995, 1108–09 (2015).

<sup>489</sup> 400 U.S. 542, 544 (1971) (per curiam).

<sup>490</sup> *Id.* at 545 (Marshall, J., concurring).

tion when it expanded Title VII in the 1972 amendments.<sup>491</sup> In 1978, Congress applied the *Phillips* sex-stereotyping theory to override the Court when it refused to accommodate a subgroup of women discriminated against because they were pregnant.<sup>492</sup> Under Title VII as amended, pregnant workers must be “treated the same [as other employees] . . . [on the basis of] their ability or inability to work.”<sup>493</sup> In *Price Waterhouse v. Hopkins*,<sup>494</sup> the Court held that a woman allegedly denied promotion because she was not sufficiently “feminine” stated a claim under Title VII: “[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the *stereotype* associated with their group.”<sup>495</sup>

When it enacted a comprehensive 1991 liberalization of Title VII, Congress overrode part of *Hopkins*, broadening the statute to include claims motivated in part on the basis of sex, but acquiesced in the Court’s holding that sex stereotyping violated Title VII.<sup>496</sup> There was a substantial political consensus, including support from big business, that the sex stereotyping Ann Hopkins suffered was “very impermissible” under Title VII.<sup>497</sup> After 1991, the Supreme Court used the sex-stereotyping idea to apply the statute to situations that were not contemplated in 1964—including homosexual hazing of new men on the job.<sup>498</sup>

On this public record, it would be unreasonable to think that Title VII only applied narrowly when women as a class were treated differently from men as a class. Instead, judges, administrators, and legislators had come to see the core problem as “sex stereotyping,” and the

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<sup>491</sup> Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. §§ 2000e–2000e-13).

<sup>492</sup> See Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e) (overriding *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976)).

<sup>493</sup> 42 U.S.C. § 2000e(k); see also S. REP. NO. 95-331, at 3 (1977); H.R. REP. NO. 95-948, at 4 (1978).

<sup>494</sup> 490 U.S. 228 (1989).

<sup>495</sup> *Id.* at 251 (plurality opinion) (emphasis added); see also *id.* at 266 (O’Connor, J., concurring in the judgment) (agreeing with the plurality that Hopkins had made out a proper claim of sex discrimination).

<sup>496</sup> Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075–76 (codified at 42 U.S.C. § 2000e-2(m)).

<sup>497</sup> Eskridge, *Title VII*, *supra* note 10, at 374–76 (quoting hearing testimony from the National Retail Federation). Both proponents and opponents of the 1991 Civil Rights Act were aware of the *Hopkins* case’s focus on sex stereotyping. See, e.g., 136 CONG. REC. 16,706 (1990) (statement of Sen. Ted Kennedy, the bill’s sponsor); S. REP. NO. 101-315, at 99 (1990) (statements of Sens. Orrin Hatch, Strom Thurmond & Dan Coats) (agreeing that *Hopkins* was a sex-stereotyping precedent); H.R. REP. NO. 101-644, at 29 (1990) (describing the firm’s refusal to promote Hopkins based on a “sex stereotypical” judgment).

<sup>498</sup> *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998) (Scalia, J.).

statute had been read broadly over time by different institutions and by conservative as well as liberal interpreters. Justice Gorsuch relied on precedent to support that view, but he would have written a stronger opinion if he had considered republican evidence, including Congress's reaction to Supreme Court readings. When the Court chose to read the statute narrowly, Congress rebuked the Court and, in the comprehensive 1991 reform, insisted that it be read *broadly*. Based on the republican evidence, the level of generality question has a democracy-respecting answer.

#### CONCLUSION: AGAINST JUDICIAL POPULISM IN STATUTORY INTERPRETATION

We conclude by considering the theoretical lessons this examination of concrete cases shows for the rise of statutory populism. Orthodox textualism represents the golden age of original public meaning, which is now eclipsing republican evidence or driving it into judicial closets in statutory interpretation cases. Much is at stake in the move to a statutory populism purportedly grounded in the illusory, even constructed, *common person's* interpretation. On the surface, textualism and its populist audience seem banal. The warning signal that something is deeply wrong with this picture is false humility. No one thinks doctors should impose the medical views of the "ordinary person" simply because medical treatment applies to the ordinary person. Ordinary people do not perform surgery or read statutes. Members of the Supreme Court acting "as if" they were ordinary people (in a prior original time) invites a strange otherworldly speculation by some of the world's most extraordinary lawyers acting as if they knew nothing about the law. Even if this knowledge-alienation were possible—even if some of the most learned lawyers in our society could lose their learning—we doubt that it would be advisable.

First, populist embrace of ordinary meaning is inconsistent with textualism's internal claims. Populism purports to find a single popular will or meaning even though the populace is made up of a massive number of people. Textualism launched itself by contending it was impossible to know what groups do; Congress was a "they," not an "it," and for that reason should be ignored.<sup>499</sup> And, yet, textualists assume that the group known as the "people" or the "public" can be

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<sup>499</sup> See Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. OF L. & ECON. 239, 239–56 (1992); see also NOURSE, MISREADING LAW, *supra* note 21, at 16 (discussing how textualism emerges from skepticism about groups).

known, and that it is an “it” not a “they.” This makes little sense in terms of numbers: Surely it is easier to discern the official views of 535 representatives speaking collectively to the precise issue or the general plan than it would be to discern and document the views of millions of people who never read nor thought about the statute, and most of whom were uninterested in its text, structure, or plan. As we have said elsewhere, this essentially skeptical “group agency” critique would mean that the decisions of the judiciary, corporations, and churches should all be discounted because these institutions are made up of many people. Skepticism about group agency is corrosive of all institutions, including the institutions created in our Constitution for self-governance.<sup>500</sup>

Second, an elite federal judge’s image of We the People is likely to be self-reflexive and indifferent, or even hostile, to the most vulnerable members of society. As we said earlier, the textual meanings favored by the Supreme Court are likely to have an upper-class accent.<sup>501</sup> Populist movements around the world divide rather than unify.<sup>502</sup> Why? Because the idea of “the people” is gerrymandered to reflect a certain part of the population, which is less than the whole. Populism has the tendency to favor some rather than others, demonizing those it considers elites or outsiders. As Nadia Urbinati frames this issue, “populists [the world over] in power claim to be a *simple and objective representation of the people’s needs here and now.*”<sup>503</sup> Such movements are, in other words, premised on arriving at “audience democracy” by obliterating deliberative checks on the people’s immediate whims.<sup>504</sup> In statutory interpretation, the fear is that the law will imagine the “ordinary meaning” of words in the vision of some rather than all. As even Justice Gorsuch has warned, “judges are, by and large, drawn from the majority or more powerful groups in society,” so it should come as little surprise that if judges are biased, that “bias will often harm minorities and disfavored groups.”<sup>505</sup>

Third, if one digs just a bit further, one sees something much bigger, and deeply concerning, afoot. It is no coincidence that the rise of the new textualism and original public meaning, with its populist appeal to ordinary meaning and its contempt for legislative delibera-

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<sup>500</sup> See CHRISTIAN LIST & PHILIP PETTIT, GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS 4–5 (2011) (rebutting the critique of groups as merely the sum of individual preferences).

<sup>501</sup> See *supra* notes 35–36 and accompanying text.

<sup>502</sup> See *supra* notes 208–10 and accompanying text.

<sup>503</sup> Urbinati, *supra* note 209, at 1078 (emphasis added).

<sup>504</sup> See *id.* at 1071 (defining audience democracy).

<sup>505</sup> GORSUCH, *supra* note 13, at 139.

tions, has come at the same time this country and others face erosion of public trust in the institutions of governance—including political parties as well as legislatures.<sup>506</sup> Like the pretend-populism of Putin, Erodgan, Trump, and others, the pretend-populism of ordinary meaning lays exclusive claim to delivering a legitimate rule of law while dismantling the institutional foundations for it. This is why we have deployed the provocative title “textual gerrymandering.” Just as electoral gerrymandering manipulates the democratic process for short-term political gain but results in long-term institutional decay, textual gerrymandering manipulates the interpretive process for short-term political gain but results in long-term institutional decay. Textualism purports to serve democracy, but its operation undermines the republic.

Our Constitution creates institutions foundational for the republic’s flourishing. Its wise structure starts with Congress (Article I) and ends with the rule of law grounded upon the work of Congress (Article VI’s supremacy for statutes and treaties, but silence as to executive orders and judicial precedents). Congress is structured to combine electoral accountability with deliberative process; this is the essence of republican government, and our current governance crisis owes much to the paralysis of the congressional process. When Congress does successfully enact statutes, they must last for a long time—and that requires a judiciary committed to a partnership that advances legislative projects by applying them to inevitably changed circumstances, including not just presidential usurpation, but also corporate evasion, new social groups, and technological revolution. A jurisprudence of hypertextual cutting-and-pasting, clever word games, and a labyrinth of canons is not a serious effort by judges to contribute to governance or even the rule of law. As we have argued, when judges and Justices—conservative or liberal—employ this method, it degrades the role of deliberation and debate at a time when this mediating or republican role for the legislative branch is increasingly under pressure from all sides.

If we are right, judicial populism in statutory interpretation poses serious risks to the institutional foundations of the republic. Textualists believe that they are championing the ordinary person. Like other populists, they applaud disruption of the given order. Implicitly, they imagine Congress, and even anyone who knows anything about

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<sup>506</sup> See Samuel Issacharoff, *The Corruption of Popular Sovereignty*, 18 INT’L J. CONST. L. 1109, 1113–14 (2020) (arguing that populism in the United States and other countries places immediate political gratification ahead of long-term investment in stable and productive institutions).



Congress, as a suspect “insider.”<sup>507</sup> That approach, in our view, cannot be squared with the traditional view of statutory interpretation in which judges defer to the policy views of a republican government. It is a recipe ripe for judicial aggrandizement. Like the populist senators who disputed lawfully chosen electors in January 2021,<sup>508</sup> judges who appeal to partisan sentiment and denigrate the republican, deliberative process are undermining representative democracy.

The *Bostock* debate both exemplifies orthodox textualism and unsettles it: How can textualism anchor the rule of law if there are three answers to a textualist question? This should invite textualists, and their critics, to more deeply understand textualism’s practice and theory. There are large stakes here. If we are right, the new textualism, embraced by both liberals and conservatives, risks not only lawless gerrymandering, but also alienating interpretation from democratic legitimacy. Choices about text and (con)text are being made that remain unjustified by the rule of law, democratic values, or good governance. As long as the new textualism, or the new original public meaning, presents itself as a game of clever dictionary-shopping and text-chopping, to the exclusion of other, more relevant evidence of actual meaning, it risks becoming a pointless and destructive word game. It is time for both liberal and conservative Justices to attend to these problems. Once upon a time, Dean John Manning argued that textualism had improved purposivism by narrowing the ability of judges to depart from the text.<sup>509</sup> Our project has flipped his idea: We believe that textualism, in hard cases, would be improved by checking one’s assumptions about ordinary meaning against actual republican evidence.

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<sup>507</sup> See, e.g., Barrett, *Congressional Insiders and Outsiders*, *supra* note 61, at 199–211 (criticizing theories based on congressional “insiders”).

<sup>508</sup> See Barbara Sprunt, *Here Are the Republicans Who Objected to the Electoral College Count*, NPR (Jan. 7, 2021, 4:26 PM), <https://www.npr.org/sections/insurrection-at-the-capitol/2021/01/07/954380156/here-are-the-republicans-who-objected-to-the-electoral-college-count>.

<sup>509</sup> See Manning, *The New Purposivism*, *supra* note 73, at 119.

## APPENDIX

Many of the Supreme Court's decisions each Term involve interpretation of the Constitution or federal common law.<sup>510</sup> Among the statutory interpretation opinions, some are resolved by application of the Court's statutory precedents.<sup>511</sup> However, each Term, there are a fair number of statutory cases not governed by precedent or some constitutional cases that depend upon reading statutes. What follows are recent cases with notable textual gerrymanders, usually in majority opinions.<sup>512</sup>

***Brnovich v. Democratic National Committee***, 141 S. Ct. 2321 (2021). Section 2 of the Voting Rights Act (VRA) prohibits any “voting qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.” 52 U.S.C. § 10301(a). The VRA is violated when “it is shown that the political processes leading to nomination or election . . . are not equally open to participation by members of a class of citizens . . . *in that* its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” *Id.* § 10301(b) (emphasis added). Arizona invalidated votes cast outside a voter's registered precinct and made it a felony for a third party to collect and deliver another person's early mail-in ballot; both rules had a disparate impact on minority voters. Justice Alito's majority opinion used dictionaries to select definitions of “open” and “opportunity” and homed in on the phrase “in that” to equate the concepts of equal openness and equal opportunity. Justice Kagan's dissent emphasized the broad language of section 2(a) and used a different dictionary from the majority to define “abridgement” and “opportunity.” *Gerrymanders*: Justice Alito focused on terms like “open” and “opportunity” while ignoring terms like “abridgement” and “results in” (packing), defined each term separately using dic-

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<sup>510</sup> *E.g.*, *United States v. Cooley*, 141 S. Ct. 1638 (2021).

<sup>511</sup> *E.g.*, *Pakdel v. City & County of San Francisco*, 141 S. Ct. 2226 (2021) (per curiam); *Goldman Sachs Grp., Inc. v. Ark. Tchrs. Ret. Sys.*, 141 S. Ct. 1512 (2021); *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894 (2019).

<sup>512</sup> For statutory opinions that we consider model sources of reasoning from text, (con)text, and republican legislative evidence, see, for example, *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308 (2020) (Justice Sotomayor interpreting the Affordable Care Act); *County of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462 (2020) (Breyer, Clean Water Act); *Sturgeon v. Frost*, 139 S. Ct. 1066 (2019) (Kagan, Alaska Lands Act); *Washington State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1016 (2019) (Gorsuch concurrence, Treaty with Yakima Nation); *Rimini St., Inc. v. Oracle USA*, 139 S. Ct. 873 (2019) (Kavanaugh, Copyright Act); *Lamar, Archer & Cofrin v. Appling*, 138 S. Ct. 1752 (2018) (Sotomayor, Bankruptcy Reform Act).

tionary definitions (cracking), and used the term “totality of the circumstances” as an invitation to include considerations without a basis in the text or legislative history (stacking).

**Johnson v. Guzman Chavez**, 141 S. Ct. 2271 (2021). The Immigration and Nationality Act (INA) provides procedures governing when detained individuals may seek individualized bond hearings while they pursue withholding of removal from the country. Respondents were detained noncitizens who had previously been removed from the United States, returned without authorization, and sought withholding of removal for fear of persecution if returned to their home countries. They subsequently requested bond hearings, which the government denied, arguing that the section of the INA governing the post-removal “removal period”—which does *not* provide for bond hearings—applied to the situation, rather than the section governing the pre-removal period, which *does* provide for bond hearings. See 8 U.S.C. § 1226 (pending removal); § 1331 (post-removal). Justice Alito’s majority opinion ruled that the “withholding” of removal presumes a prior, final removal order. Justice Breyer’s dissent argued that the pending withholding proceedings meant the “removal period” had not yet begun. *Gerrymanders (majority and dissent)*: Justice Alito read an exceptions clause narrowly by applying it only to a portion of the provision (cracking); Justice Breyer read the clause broadly but ignored the structure of the statute and the clause’s relationship to the rest of the provision (suppression). Justice Breyer also failed to distinguish linguistically between removal “to” another country (subject to withholding) and removal “from” the United States (not subject to withholding).

**Borden v. United States**, 141 S. Ct. 1817 (2021). The Armed Career Criminal Act (ACCA) creates a mandatory minimum sentence of fifteen years for anyone who is found guilty of illegally possessing a firearm and has at least three prior convictions for a “violent felony.” 18 U.S.C. § 924(e). A “violent felony” is one that “has as an element the use, attempted use, or threatened use of physical force against the person of another.” *Id.* § (e)(2)(B)(i). Did an offense requiring only a reckless mental state qualify as a “violent felony”? A majority concluded that it does not. Justice Kagan’s plurality opinion boiled the issue down to the meaning of “against” to connote a knowing or purposeful mental state. Justice Kavanaugh’s dissenting opinion argued that the phrase “against the person of another” is a term of art used to distinguish between crimes against persons and those against property. *Gerrymanders (plurality and dissent)*: Justice Kagan packed the text by narrowing in on the word “against.” Justice Kavanaugh stacked the (con)text, pointing to state and Model Penal Code provi-

sions defining offenses against the person and reading that phraseology back into the text.

***Fulton v. City of Philadelphia***, 141 S. Ct. 1868 (2021). Under the Court's precedents, "laws incidentally burdening religion are . . . not subject to strict scrutiny under the Free Exercise Clause so long as they are both neutral and generally applicable." *Id.* at 1876. Applying a general anti-discrimination city ordinance, Philadelphia discontinued a foster care contract with Catholic Social Services (CSS) until the agency agreed to certify same-sex couples as foster parents, in violation of the agency's religious beliefs about marriage. Chief Justice Roberts's majority opinion held that the municipal contract's anti-discrimination provision was not a "generally applicable" law and so heightened scrutiny applied. It also held that Philadelphia's anti-discrimination ordinance did not apply because foster care was not a public accommodation. Arguing for overruling free exercise constitutional precedents, Justice Gorsuch's concurring opinion rejected the majority's interpretation of the anti-discrimination ordinance and the anti-discrimination contract provisions. *Gerrymanders*: As the concurring Justices maintained, Chief Justice Roberts stacked his reading of the municipal contracting rules. He also narrowed the city's broad definition of "public accommodations" (cracking-and-packing).

***HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Association***, 141 S. Ct. 2172 (2021). To provide allowances for small refineries in the renewable fuel program, Congress provided that "[a] small refinery may at any time petition" for an exemption "for the reason of disproportionate economic hardship." 42 U.S.C. § 7545(o)(9)(B)(i). Petitioner refineries received an exemption, but after it lapsed, they reapplied for the exemption. Justice Gorsuch's majority opinion held that an exemption did not need to be continuous to be extended, placing an emphasis on the phrase "at any time." Justice Barrett's dissent contended that in accordance with plain meaning, ordinary usage, and statutory structure, an extension can only be given to an exemption that is presently occurring. *Gerrymanders (majority and dissent)*: Justice Gorsuch applied a broad meaning to "extension" and "at any time" (cracking-and-packing). Justice Barrett supported her definition of "extension" by picking selected definitions from dictionaries.

***Van Buren v. United States***, 141 S. Ct. 1648 (2021). The Computer Fraud and Abuse Act (CFAA) prohibits "obtain[ing] or alter[ing] information in [a] computer that the accesser is not entitled so to obtain or alter." 18 U.S.C. § 1030(e)(6). Van Buren, a police officer, was convicted under the CFAA after he violated department policy by running a license-plate search in exchange for money. Justice

Barrett's majority opinion interpreted the CFAA to cover only information that is off-limits to the individual. Since the officer had access to the license-plate database, the statute did not cover him. Justice Thomas's dissent argued that the provision extended to information accessed for a prohibited purpose, emphasizing that the officer was not entitled to use the database for personal gain. *Gerrymanders (majority and dissent)*: Justice Barrett looked to dictionaries and other federal statutes' use of "so" (stacking) and split the word "entitled" from the subsequent phrase "so to obtain" (cracking). Justice Barrett also hyperfocused on the meaning of "so," while Justice Thomas did the same with "entitled" (packing).

*Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021). Under federal immigration law, nonpermanent residents placed in removal proceedings are eligible for discretionary relief if they can establish their continuous presence in the United States for at least ten years. Section 1229b(d)(1) of the U.S.C. (codifying the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)) states that this relief "shall be deemed to end" when the immigrant is served a "notice to appear" (NTA) in a removal proceeding initiated under section 1229a. Can the government stop the time by providing the immigrant with the statutory information in two separate notices? Justice Gorsuch's majority opinion held that "a" NTA under the IIRIRA is a single document and must contain *all* of the requisite details to confer jurisdiction to an immigration court. Justice Kavanaugh's dissent argued that the "a" should be viewed inside the defined term, highlighting other examples in which an article can be used to modify a term that contains multiple installments. *Gerrymander*: Justice Gorsuch drilled down on the use of quotation marks around "notice to appear" rather than "a notice to appear" to distinguish the customary and dictionary use of articles that allow for serial installments and those like "a" that normally precede countable nouns (cracking-and-packing). He further compared the use of "a" with other statutory references to "the" NTA to suggest that Congress was talking about a discrete document (stacking).

*Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020). The Affordable Care Act (ACA) states that group health plans must provide women with "preventive care and screenings . . . as provided for in comprehensive guidelines supported by" the Health Resources and Services Administration (HRSA). 42 U.S.C. § 300gg-13(a)(4). HRSA initially mandated employee access to contraception, but later interpreted the Religious Freedom Restoration Act to require an exemption for any employer with a religious objection. Justice Thomas's majority

opinion read “as provided for” to vest HSRA with broad discretion over coverage issues, including exemptions. Justice Ginsburg’s dissent homed in on the mandate applicable to all preventive-care services listed in section 300gg-13(a), namely, that group plans “shall, at a minimum, provide coverage.” *Gerrymander*: Justice Thomas read the general section 13(a) mandate out of the statute (suppression) and created a confused reading of section 13(a) (stacking and cracking). Even the government conceded it had no discretion for section 13(a)(4) coverage of children’s benefits.

***United States Forest Service v. Cowpasture River Preservation Association***, 140 S. Ct. 1837 (2020). The National Park Service Organic Act says that lands in the National Park System include “any area of land” that is “administered” by the Park Service. 54 U.S.C. § 100501. Another statute bars pipelines traversing “lands in the National Park System.” 30 U.S.C. § 181. Justice Thomas’s majority opinion ruled that “lands in the National Park System” do not include the Appalachian Trail, even though it is administered by the Park Service, based upon comparison of the Trails Act with other statutory schemes and federalism and nondelegation canons. Justice Sotomayor dissented. *Gerrymanders*: Justice Thomas avoided the explicit terms of the statute by stacking the deck with canons and other laws.

***Nasrallah v. Barr***, 140 S. Ct. 1683 (2020). The Convention Against Torture (CAT) allows noncitizens to challenge deportation by demonstrating they would likely be tortured in their home jurisdictions. Justice Kavanaugh’s majority opinion ruled that federal courts of appeal have jurisdiction to review a noncitizen’s factual challenge to a CAT order. Justice Thomas’s dissent argued that other provisions in the statute limit the reviewability of CAT claims to legal and constitutional questions. *Gerrymanders (majority and dissent)*: Justice Kavanaugh relied on other statutes (stacking), while Justice Thomas claimed whole act consistency (suppression).

***County of Maui v. Hawaii Wildlife Fund***, 140 S. Ct. 1462 (2020). The Clean Water Act forbids “any addition” of a pollutant from “any point source” to “navigable waters” without an appropriate permit. Justice Breyer’s majority opinion ruled that pumping millions of gallons of treated water each day into wells that emptied into groundwater conveying contaminants into the ocean was a regulable “addition” of a “pollutant” to “navigable waters” (e.g., the ocean). Justice Thomas’s dissent argued that no permit was needed because pollutants were “added” from the point source to the groundwater, and then from the groundwater to the ocean. *Gerrymander (dissent)*: Justice Thomas argued for a very narrow rule by hyper-focusing on

“addition” and “to” and importing libertarian content into those words (packing and cracking).

***Barton v. Barr***, 140 S. Ct. 1442 (2020). Under federal immigration law, the government may remove a lawful permanent resident who commits a serious crime. Green card holders may apply for cancellation of removal in order to stay in the country if they meet certain criteria, including seven years of continuous residence. Under the “stop-time rule,” cancellation of removal is precluded if, during the initial seven years of residency, a lawful permanent resident commits an offense that renders them “inadmissible” under 8 U.S.C. § 1181(a)(2) or “removable” under § 1227(a)(2), (a)(4). Can a green card holder be precluded from cancellation of removal by offenses different from those crimes that triggered the removal in the first place? Justice Kavanaugh’s majority opinion held that Barton was precluded from cancellation of removal by a crime that rendered him “inadmissible” but was not an offense in the “removable” category. Justice Sotomayor’s dissent argued that a lawful permanent resident should only be precluded from cancellation of removal by an offense that renders them “removable.” *Gerrymander*: Justice Kavanaugh conflated the terms of art “inadmissible” and “removable,” thereby rendering the “removable” provision surplusage, and ignored the broader statutory scheme that reinforces the distinction between them (suppression).

***Department of Commerce v. New York***, 139 S. Ct. 2551 (2019). The Administrative Procedure Act, 5 U.S.C. § 706(2)(A), authorizes courts to set aside agency decisions that are “arbitrary and capricious.” The Secretary of Commerce inserted a question for the decennial Census asking respondents to say whether they are citizens. Speaking for distinct 5–4 coalitions in different parts of the opinion, Chief Justice Roberts’s opinion reasoned that the decision was not “arbitrary and capricious” (joined by conservatives) but was invalid because it was “pretextual” (joined by liberals). Justice Thomas’s dissent argued that nonarbitrary decisions must be upheld, as the APA does not impose a “pretext” test. Justice Breyer’s dissent argued that the citizenship question was arbitrary. *Gerrymanders*: In textual suppressions, Chief Justice Roberts added a nontextual test for “pretext” (alarming Justice Thomas) and ignored statutory rules demanding streamlined questionnaires (alarming Justice Breyer).

***Rehaif v. United States***, 139 S. Ct. 2191 (2019). Under the Gun Control Act, must the government, to successfully prosecute an undocumented immigrant in possession of a firearm under 18 U.S.C. § 924(a)(2) and § 922(g), prove the defendant had *actual knowledge* of both his unlawful alien status and his possession of a firearm? Abro-



gating decisions in every court of appeals, Justice Breyer's majority opinion held that, in adding "knowingly" to section 924(a)(2), Congress meant to add a scienter requirement to both parts of section 922(g). Justice Alito's dissent argued that "knowingly" should only apply to impute scienter to gun possession and not to immigration status. If one reads section 924(a)(2) to demand that the government show actual knowledge of all non-jurisdictional elements of crimes defined in section 922(g), this presumption must apply not merely to undocumented immigrants, *see* § 922(g)(5), but also to persons barred from owning guns because of mental illness under section 922(g)(4) and to persons whose prior crimes were "domestic abuse," *see* § 922(g)(9). *Gerrymanders*: Justice Breyer selectively applied the scienter requirement to only two of the section 922(g) categories (cracking-and-packing) and was strong-arming the text via the lenity canon presuming a scienter requirement for criminal laws.

***Food Marketing Institute v. Argus Leader Media***, 139 S. Ct. 2356 (2019). The fourth exemption to the Freedom of Information Act (FOIA) regime shields from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). Justice Gorsuch's majority opinion ruled that business information was "confidential" if the business treated it as secret, while Justice Breyer's partial dissent would have understood "confidential" as also entailing harm if information were released. *Gerrymanders*: Justice Gorsuch gerrymandered dictionaries and comparable statutes to transform an ambiguity into plain meaning (stacking).

***Return Mail, Inc. v. United States Postal Service***, 139 S. Ct. 1853 (2019). The America Invents Act (AIA) created three new avenues through which "persons" can challenge the validity of another party's patent after it is issued. Is the Postal Service a "person" that can avail itself of these novel procedures? Invoking the canon presuming sovereign immunity from suit, Justice Sotomayor's majority opinion held that the canon also applied when the government claimed to be a "person" bringing suit. Justice Breyer's dissent relied on legislative history, statutory purpose, and the many places where "person" in the AIA includes the government. *Gerrymanders*: Justice Sotomayor adapted the sovereign immunity canon to explain away instances where "person" includes the government (suppression).

***Mont v. United States***, 139 S. Ct. 1826 (2019). A term of supervised release is tolled when an offender "is imprisoned in connection with a conviction." 18 U.S.C. § 3624(e). The issue was whether pretrial detention later credited as time served for a new offense had this tolling effect. Justice Thomas's majority opinion hyper-focused on

“imprisoned” and “in connection,” read them broadly, and found a tolling effect that added three and a half more years to Mont’s time in prison. Relying on the natural meaning of the whole sentence, the present tense of the verb, the statutory scheme and goal, and the whole code, Justice Sotomayor’s dissent would have limited the tolling to imprisonment after the conviction. *Gerrymander*: Justice Thomas’s opinion was a classic cracking-and-packing gerrymander.

***Home Depot U.S.A., Inc. v. Jackson***, 139 S. Ct. 1743 (2019). The Class Action Fairness Act allows liberalized removal of state class actions to federal court by “any defendant.” 28 U.S.C. § 1453(b). The issue was whether a third-party defendant (brought into the case by a defendant) could take advantage of that authorization. Distinguishing between “defendants” and “third-party defendants,” *à la* the Federal Rules of Civil Procedure, Justice Thomas’s majority opinion said no. Relying on the broad text and the statutory plan, Justice Alito’s dissent would have allowed it. *Gerrymanders*: Justice Thomas slighted the possibility that “third-party defendants” might be a subset of “defendants” (cracking-and-packing) and the effect of his reading on the statutory scheme as a whole (suppression).

***Lamps Plus, Inc. v. Varela***, 139 S. Ct. 1407 (2019). The lower court had referred a dispute to class arbitration, and the defendant claimed that the contract was ambiguous as to the availability of class arbitration under the Federal Arbitration Act (FAA). Chief Justice Roberts’s majority opinion supported the defendant’s refusal to engage in class arbitration. Justice Kagan’s dissent argued that the FAA required the terms of arbitration to follow state contract law, which interpreted ambiguous contracts against the drafter (the defendant company). *Gerrymander*: Chief Justice Roberts read precedents broadly and substantially ignored the FAA’s text (suppression).

***Lorenzo v. SEC***, 139 S. Ct. 1094 (2019). The SEC’s Rule 10b-5(b) makes it illegal to “make any untrue statement of a material fact” in connection with the sale of a security. Defendant disseminated statements to investors he knew to be untrue but was not the “maker.” The issue was whether he could be sanctioned under Rule 10b-5(a) and (c), as well as under section 17(a)(1) of the Securities Act, for employing a “device, scheme, or artifice to defraud.” Relying on the statutory text (and a bevy of dictionaries), precedent, and purpose, Justice Breyer’s majority opinion held the defendant culpable. Justice Thomas’s dissent argued that Rule 10b-5(b) was the controlling provision, and the other provisions should not be read to overlap. *Gerrymander (dissent)*: Justice Thomas used canons to avoid engagement with the statute’s anti-fraud scheme and the Court’s precedents, suppressing statutory text.

***Republic of Sudan v. Harrison***, 139 S. Ct. 1048 (2019). Under the Foreign Sovereign Immunities Act (FSIA), a foreign state may be served by means of a mailing that is “addressed and dispatched . . . to the head of the ministry of foreign affairs of the foreign state concerned.” 28 U.S.C. § 1608(a)(3). Justice Alito’s majority opinion held that service must be mailed to the minister’s address in the foreign country; service to the country’s American embassy is not sufficient. Justice Thomas’s dissent relied on the textual focus on serving the “foreign minister,” not on a particular “address.” *Gerrymanders (majority and dissent)*: Justice Alito conceded that his reading was not the only natural one, but Justice Thomas demonstrated that it was substantially less “natural” than his (stacking and cracking). Justice Thomas’s narrow stacking-and-cracking, however, slighted all the other relevant sources of law (suppression).

***Washington State Department of Licensing v. Cougar Den, Inc.***, 139 S. Ct. 1000 (2019). An 1855 Treaty with the Yakama Tribe assured its members “the right, in common with citizens of the United States, to travel upon all public highways.” The State of Washington taxed the transport of fuel by public highway to the Yakama Reservation, and the Tribe objected. Justice Breyer’s plurality and Justice Gorsuch’s concurring opinions ruled that the treaty preempted state law. Both Chief Justice Roberts’s and Justice Kavanaugh’s dissents argued that the treaty did not entitle the Tribe to special exemption from nondiscriminatory taxes. *Gerrymander*: Justice Breyer’s plurality opinion and Justice Gorsuch’s concurring opinion read “in common with” out of the treaty (suppression).

***BNSF Railway Co. v. Loos***, 139 S. Ct. 893 (2019). The Railroad Retirement Tax Act (RRTA) taxes an employee’s “compensation,” defined as “money remuneration . . . for services rendered as an employee to one or more employers.” 26 U.S.C. § 3231(e)(1). The issue was whether lost wages awarded to an employee because of an injury attributable to the employer’s negligence was “compensation.” Justice Ginsburg’s majority agreed with the IRS that it was, based on tax policy and analogous cases under other tax laws. Justice Gorsuch’s dissent relied on the definition and the RRTA’s statutory history. *Gerrymander*: Justice Ginsburg read “services rendered” out of the definition (suppression).

***Jam v. International Finance Co.***, 139 S. Ct. 759 (2019). The International Organizations Immunities Act of 1945 (IOIA) grants international organizations such as the World Bank and the World Health Organization the “same immunity from suit . . . as is enjoyed by foreign governments.” 22 U.S.C. § 288a(b). Did the Act grant international organizations the virtually absolute immunity that the

United States recognized for foreign states in 1945, or the restricted immunity adopted by the later-enacted Foreign Sovereign Immunities Act of 1976 (FSIA)? Chief Justice Roberts's majority opinion adopted the limited immunity view, based on the present tense ("as is") and the reference canon. Justice Breyer's dissent justified the absolute immunity view based on text, background, and purpose. *Gerrymanders (majority and dissent)*: Chief Justice Roberts molded the text by using the reference canon, ignoring relevant legislative evidence. Both opinions engaged in suppression, understating the importance of the FSIA.

***WesternGeco LLC v. ION Geophysical Corp.***, 138 S. Ct. 2129 (2018). The Patent Act creates liability for patent infringement if a company ships components of a patented invention overseas to be assembled there. 35 U.S.C. § 271(f)(2). Patent owners who prove infringement under this provision are entitled to damages. *Id.* § 284. Can a patent owner recover for lost foreign profits? Finding that the presumption against extraterritoriality did not govern, Justice Thomas's majority opinion ruled that patent owners could recover for lost foreign profits. Justice Gorsuch's dissent found the canon irrelevant and argued from the whole act that foreign profits were not recoverable. *Gerrymanders*: Justice Thomas's opinion suppressed statutory text and whole act (con)text.

***Wisconsin Central Ltd. v. United States***, 138 S. Ct. 2067 (2018). The Railroad Retirement Tax Act taxes employee "compensation," which is confined to only "any form of money remuneration." 26 U.S.C. § 3231(e)(1). Did employee stock options, easily convertible into cash, count as taxable "compensation"? Justice Gorsuch's majority opinion argued plain meaning that stock was not compensation, while Justice Breyer's dissent found the definition ambiguous and the statutory history and purpose dispositive. *Gerrymanders*: Justice Gorsuch picked narrow definitions from dictionaries and slighted the statutory amendment that excluded some stock options from "compensation" (suppression), while giving excessive weight to different words used in the Federal Insurance Contribution Act (FICA) (stacking).

***Husted v. A. Philip Randolph Inst.***, 138 S. Ct. 1833 (2018). The National Voter Registration Act (NVRA) requires states to make a "reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of . . . a change in the residence of the registrant." 52 U.S.C. § 20507(a)(4). In Ohio, a failure to vote in a single federal election began a process that might result in removal. The issue was whether that process violated the NVRA's general rule prohibiting states from removing registrants "by reason

of the person's failure to vote." § 20507(b)(2). Justice Alito's majority opinion found no violation; subsection (b)(2) applied when the *sole* reason for removal was a failure to vote, and Ohio gave registrants opportunities to remain on the voter rolls. Justice Breyer's dissent argued that failure to vote cannot trigger a process like Ohio's and that its process was not a "reasonable" way to monitor a change in residence. *Gerrymanders (majority and dissent)*: In dueling suppressions, Justice Alito neglected the relationship among subsections (a)–(d), and Justice Breyer undervalued the Help America Vote Act of 2002.

***Epic Sys. Corp. v. Lewis***, 138 S. Ct. 1612 (2018). The National Labor Relations Act (NLRA) and its forerunner, the Norris-LaGuardia Act (NLGA), guarantee to workers the rights to organize unions, to bargain collectively, and "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Justice Gorsuch's majority opinion held that this language did not override the Federal Arbitration Act's (FAA) allowance of employers to demand workers waive statutory rights to court enforcement of FLSA violations. Justice Ginsburg's dissent argued that later statutes protected employees. *Gerrymanders*: Justice Gorsuch ignored the repeal clause of the NLGA (suppression), narrowly interpreted employee protections (cracking-and-packing), and trumped labor laws with the FAA (stacking). An earlier gerrymander was the Court's interpretation of the FAA to cover employment contracts, contrary to its text, purpose, and legislative history. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 124–40 (2001) (Stevens, J., dissenting).

***Encino Motorcars, LLC v. Navarro***, 138 S. Ct. 1134 (2018). The Fair Labor Standards Act (FLSA) exempts from its overtime-pay rules "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles" at a dealership. 29 U.S.C. § 213(b)(10)(A). Did this exemption include "service advisors," namely, car dealership employees who consult with customers about their auto-servicing needs? Chopping up the statutory definition into tidbits defined as broadly as possible, Justice Thomas's majority opinion found that it did, while Justice Ginsburg's dissent argued to the contrary based on a reading of the definition as a whole phrase and illuminated by concrete legislative evidence. *Gerrymanders*: Justice Thomas ignored the fact that the exemption only applied to three kinds of employees ("salesman, partsman, or mechanic") and chose the broadest dictionary definition of "servicing," detaching it from the phrase "servicing a vehicle."

***Artis v. District of Columbia***, 138 S. Ct. 594 (2018). If a federal district court dismisses federal and “supplemental” state claims under 18 U.S.C. § 1367, then subsection (d) allows a plaintiff to refile state claims in state court within a time limit: “The period of limitations shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless state law provides for a longer tolling period.” Justice Ginsburg’s majority opinion held that “shall be tolled” meant the clock was stopped on the limitations period to file the state claims. Justice Gorsuch’s dissent argued that “shall be tolled” merely assured Artis of a thirty-day grace period after the dismissal of the federal claim to file in state court. *Gerrymanders (majority and dissent)*: Each opinion pretended there was a plain meaning for a badly drafted provision that slipped through Congress without careful attention. Justice Gorsuch imported state grace period laws (stacking). Justice Ginsburg read the entire provision through one word, “tolling” (cracking-and-packing).