

TEXTUALISM'S DEFINING MOMENT

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Textualism promises simplicity and objectivity: Focus on the text, the whole text, and nothing but the text. But the newest version of textualism is not so simple. Now that textualism is the Supreme Court's dominant interpretive theory, most interpretive disputes implicate textualism, and its inherent complexities have surfaced. This Article is the first to document the major categories of doctrinal and theoretical choices that regularly divide modern textualists and for which their theory currently provides no clear answers. Indeed, as practiced by the Justices, the newest textualism undermines the rule of law that is its theoretical foundation.

As we demonstrate, there are at least twelve categories of analytical choices faced by textualists in the hard cases that dominate the Supreme Court's docket and academic discourse. At present, the new textualist Court is riven with internal divisions and sends less-than-clear messages to the lower courts. And the objective, text-based evidence the Justices claim to apply does not constrain the Court's results. This Article argues that textualists must better define their methodology and should jettison the most activist or idiosyncratic doctrines that have become prominent in Roberts Court jurisprudence. The Article concludes with some best practices that would build on the Court's text-centric focus but render that focus better suited to the Court's proper role as a neutral partner to Congress in elaborating statutory schemes.

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INTRODUCTION

Justice Antonin Scalia’s greatest legacy is his “new textualism,” which inspired a Kuhnian revolution in statutory interpretation.¹ Its basic interpretive principle requires a simple, fact-based linguistic focus: Courts should determine “the meaning that would reasonably have been conveyed to a citizen at the time a law was enacted, as modified by the relationship of the statute to later enactments.”² Crucially, the new textualism rejected the view that interpretation should seek “legislative intent,” often identified via consideration of legislative history.³

For generations before the current dominance of the new textualism, judges typically followed a pragmatic approach that sought to determine the statutory meaning (1) understood by legislators, (2) passing a statute that advances public purposes, (3) as reasonably applied to current

1. See Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 23–25 (Amy Gutmann ed., 1997) [hereinafter *Scalia, A Matter of Interpretation*] (explaining and defending Scalia’s textualist philosophy of interpretation); William N. Eskridge, Jr., *The New Textualism*, 37 *UCLA L. Rev.* 621, 656–60 (1990) (“In each year that Justice Scalia has sat on the Court . . . his theory has exerted greater influence on the Court’s practice.”).

2. Daniel A. Farber & Phillip Frickey, *Legislative Intent and Public Choice*, 74 *Va. L. Rev.* 423, 454 (1988) (internal quotation marks omitted) (quoting Judge Antonin Scalia, *D.C. Cir.*, *Speech on the Use of Legislative History* 15 (1985)); accord *Off. of Legal Pol’y, DOJ*, *Using and Misusing Legislative History: A Re-Evaluation of the Status of Legislative History in Statutory Interpretation* 33–34 (1989) [hereinafter *OLP, Using and Misusing Legislative History*] (arguing that the Article III power to interpret requires the judiciary to interpret laws in their actual, not intended, meaning); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 *Harv. J.L. & Pub. Pol’y* 59, 65–66 (1988) (“We should look at the statutory structure and hear the words as they would sound in the mind of a skilled, objectively reasonable user The meaning of statutes is to be found not in the subjective, multiple mind of Congress but in the understanding of the objectively reasonable person.”); see also John F. Manning & Matthew Stephenson, *Legislation and Regulation: Cases and Materials* 22–23, 55–79, 203–28 (3d ed. 2017) (analyzing the merits of textualism versus purposivism and outlining various canons of construction for textualist statutory interpretation).

3. Cf. John F. Manning, *Second-Generation Textualism*, 98 *Calif. L. Rev.* 1287, 1289–90 (2010) (explaining that “second-generation textualism” does not focus primarily on whether courts should consult legislative history).

circumstances.⁴ This Article refers to this approach as “traditional pragmatism.” In contrast, Scalia’s new textualism offered a seemingly straightforward alternative methodology that determined the meaning (1) understood by the ordinary person, (2) applying standard rules of semantics, definitions, and grammar,⁵ (3) at the time the statute was enacted.⁶ This methodology seemingly could be boiled down to ten words: the text, the whole text, and nothing but the text.

The new textualists also offered sophisticated normative justifications for their methodology. In particular, Scalia claimed that textualism is the only methodology faithful to the rule of law, which requires that legal interpretive rules be stable and that their application be predictable, consistent, objective, and neutral.⁷ Thus, “textualism will provide greater certainty in the law, and hence greater predictability and greater respect for the rule of law.”⁸ Moreover, Scalia maintained, textualism limits judicial discretion and is in fact the only method consistent with Article III’s grant of the “judicial Power,” which contemplates the neutral and objective application of preexisting rules to narrow, fact-based controversies.⁹ A restrained, text-focused judiciary is required by the Constitution’s separation of lawmaking authority (Congress), from law implementation (President) and application (Court), and by the Article I,

4. See, e.g., Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process* 1374–80 (William N. Eskridge, Jr. & Philip P. Frickey eds., Foundation Press 1994) (1958) (describing the pragmatic approach to statutory interpretation).

5. See Manning & Stephenson, *supra* note 2, at 203–08 (detailing the judiciary’s use of ordinary meaning and semantic canons of construction).

6. Condition (3) refers to statutory originalism. In theory, one could be textualist but not originalist, but many modern textualists are also originalists. See Victoria F. Nourse, *Textualism 3.0: Statutory Interpretation After Justice Scalia*, 70 *Ala. L. Rev.* 667, 676 (2019) [hereinafter Nourse, *Textualism 3.0*] (discussing the presence of originalism in textualism and its expansion over time).

7. See Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, at xxvii–xxx (2012) (arguing that textualism is the “most principled” interpretive method); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 *U. Chi. L. Rev.* 1175, 1179, 1183–84 (1989) (“Even where a particular area is quite susceptible of clear and definite rules, we judges cannot create them out of whole cloth, but must find some basis for them in the text that Congress or the Constitution has provided.”); see also OLP, *Using and Misusing Legislative History*, *supra* note 2, at 34–37 (arguing that the rule of law is undermined by laws that lack a stable and ascertainable meaning).

8. Scalia & Garner, *supra* note 7, at xxix.

9. See Scalia, *A Matter of Interpretation*, *supra* note 1, at 16–23; see also OLP, *Using and Misusing Legislative History*, *supra* note 2, at 33 (“[S]tatutes must be interpreted according to actual meaning, rather than intended meaning, . . . [because] the power to interpret the laws is part of the judicial power of Article III and not of the legislative power of Article I.”); John F. Manning, *Justice Scalia and the Idea of Judicial Restraint*, 115 *Mich. L. Rev.* 747, 772 (2017) [hereinafter Manning, *Justice Scalia and Judicial Restraint*] (reviewing Scalia, *A Matter of Interpretation*, *supra* note 1) (explaining the connection between Scalia’s commitment to textualism and his outlook on the “judicial Power” vested in Article III courts). See generally Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 *Geo. Wash. L. Rev.* 1610 (2012) (discussing Scalia’s opposition to judicial use of legislative history in statutory interpretation).

Section 7 process by which statutes are enacted.¹⁰ Statutory text is all that Congress, with the President's approval, may enact, and so textualism is the method most consistent with the democratic premises of constitutional lawmaking.¹¹

Many legal academics are skeptical that the new textualism constrains judges as well as the traditional pragmatic approach does.¹² Specifically, critics have demonstrated, with both qualitative and quantitative analyses of leading cases, that Scalia and like-minded jurists have applied textualism much more flexibly than their theory would predict.¹³ Thus, the new textualism has failed to demonstrate a rule-of-law advantage over other theories or to show that it is required by or even consistent with democratic or constitutional values.¹⁴

Despite these criticisms, the textualist momentum is not slowing, at least not within the judiciary. The Supreme Court is now dominated by devoted textualists: Justices Clarence Thomas, long an enthusiastic booster of the new textualism;¹⁵ Samuel Alito, whose Burkean jurisprudence

10. See John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 *Colum. L. Rev.* 673, 711–19 (1997); see also OLP, *Using and Misusing Legislative History*, *supra* note 2, at 26–33 (arguing that the Constitution assumes a textualist approach to statutory interpretation).

11. Scalia & Garner, *supra* note 7, at 3–4.

12. For a recent review of critiques of textualism, see generally Erik Encarnacion, *Text Is Not Law*, 107 *Iowa L. Rev.* 2027 (2022). On law professors' views about textualism, see generally Eric Martínez & Kevin Tobia, *What Do Law Professors Believe About Law and the Legal Academy?*, 112 *Geo. L.J.* (forthcoming 2023), <https://ssrn.com/abstract=4182521> [<https://perma.cc/66LA-PD7N>] (reporting a survey of over six hundred American law professors, in which many report favorable views toward textualism).

13. See, e.g., 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, 492–93 (2013) (arguing that by consulting dictionaries, Justices confer a deceptive sense of objectivity to their interpretations); Ryan D. Doerfler, *Late-Stage Textualism*, 2021 *Sup. Ct. Rev.* 267, 275–82 (2022) (arguing that modern judges' flexibility in applying textualism facilitated the rise of manipulable canons of construction); Cary Franklin, *Living Textualism*, 2020 *Sup. Ct. Rev.* 119, 169–95 (2021) (showing that both liberal and conservative judges inevitably incorporate extratextual considerations into their textual analysis); Victoria F. Nourse, *Picking and Choosing Text: Lessons for Statutory Interpretation From the Philosophy of Language*, 69 *Fla. L. Rev.* 1409, 1423–30 (2017) (concluding, based on analysis of cases, that textualists, including Scalia, impose meaning by picking and choosing text).

14. William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 *Colum. L. Rev.* 531, 577 (2013) [hereinafter Eskridge, *The New Textualism and Normative Canons*] (reviewing Scalia & Garner, *supra* note 7); William N. Eskridge, Jr. & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 *N.Y.U. L. Rev.* 1718, 1737 (2021); William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 *Mich. L. Rev.* 1509, 1548 (1998) (reviewing Scalia, *A Matter of Interpretation*, *supra* note 1).

15. See H. Brent McKnight, *The Emerging Contours of Justice Thomas's Textualism*, 12 *Regent U. L. Rev.* 365, 365 (2000) (“[Thomas] is leaving his mark on the new textualist movement as he explores the boundaries of sole recourse to the text.”).

has increasingly bent toward textualism;¹⁶ Neil Gorsuch, the boldest heir to Scalia's persistent, uncompromising textualism;¹⁷ Brett Kavanaugh, inspired by Scalia to focus "on the words, context, and appropriate semantic canons of construction";¹⁸ and Amy Coney Barrett, Scalia's former clerk and sympathetic commentator.¹⁹ In addition, Chief Justice John Roberts presents himself as an umpire, applying statutory text according to established rules of interpretation.²⁰ In constitutional cases, there are intense debates between these five or six red-blooded textualist Justices and the three true-blue pragmatic Justices on opposing sides in predictable conservative-liberal splits,²¹ but in statutory cases, it is textualism all the way down. Typically, the pragmatic minority silently joins a textualist majority or dissenting opinion, or they write their own, very similar, text-based opinions.²²

16. See John O. McGinnis, *The Contextual Textualism of Justice Alito*, *Harv. J.L. & Pub. Pol'y Per Curiam*, Spring 2023, no. 14, at 1, 1, <https://journals.law.harvard.edu/jlpp/wp-content/uploads/sites/90/2023/04/McGinnis-John-vFF.pdf> [<https://perma.cc/93EG-DCUL>] ("Alito does have a consistent approach [to statutory interpretation], which would best be described as 'contextual textualism.'").

17. See Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 *Case W. Rsrv. L. Rev.* 905, 906 (2016).

18. Brett M. Kavanaugh, *Keynote Address: Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 *Notre Dame L. Rev.* 1907, 1912 (2017).

19. See, e.g., Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 *B.U. L. Rev.* 109, 120 (2010) [hereinafter Barrett, *Substantive Canons*] (sympathetically examining Scalia's efforts to consider linguistic and substantive canons).

20. See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr., J., D.C. Cir.) ("I will remember that it's my job to call balls and strikes, and not to pitch or bat.").

21. See, e.g., *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2240 (2022) (exemplifying the split between the newest-textualist majority and the three dissenting pragmatists).

22. See, e.g., *Yegiazaryan v. Smagin*, 143 S. Ct. 1900, 1905 (2023) (noting that the pragmatic minority joined Sotomayor's majority opinion, along with Roberts, Kavanaugh, and Barrett, all of whom accepted respondent's contextualist argument); *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1167 (2021) (noting that the pragmatic minority joined Sotomayor's majority opinion); *Lockhart v. United States*, 136 S. Ct. 958, 959 (2016) (Sotomayor, J.) ("Although § 2252 (b)(2)'s list of state predicates is awkwardly phrased (to put it charitably), the provision's text and context together reveal a straightforward reading. A timeworn textual canon is confirmed by the structure and internal logic of the statutory scheme."); *id.* at 969 (Kagan, J., dissenting) ("That ordinary understanding of how English works, in speech and writing alike, should decide this case."). At the time of writing, Justice Ketanji Brown Jackson has authored six majority opinions, all concerning statutory issues. This is too small a sample from which to draw confident conclusions, but there are clearly indications of some form of textualism. In one opinion, Jackson remarks, "Start with the text." *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 143 S. Ct. 927, 937 (2023). Another notes that the interpretive issue "boils down to what Congress intended, as divined from text and context." *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 143 S. Ct. 1444, 1459-60 (2023). Other opinions look to statutory "language" and "plain language," *Santos-Zacaria v. Garland*, 143 S. Ct. 1103, 1116 (2023); "plain text," *Delaware v. Pennsylvania*, 143

Textualism is now clearly ascendant and will remain so for the foreseeable future. At the same time, it is splintering, or at least the veneer of methodological consensus that textualism supposedly represents is eroding. Curiously, the Court's textualists frequently disagree—not merely about *how* to apply text-based interpretive principles to resolve hard cases but also about *what* the relevant rules are. In other words, the newest textualists disagree about the definition of textualism itself.²³

This post-Scalia era is *textualism's defining moment*. Three crucial questions ought to be answered. First, can the newest-textualist majority come together to entrench a rigorous and workable textualism without losing the methodology's simple appeal? Second, can they figure out how to balance historic stability and current predictability, twin rule-of-law goals that are often in conflict? Third, can the newest textualism be applied with the genuine neutrality required by the rule of law without the ideological shade that haunted "Ninoprudence"?²⁴

The most salient intratextualist methodological battle occurred in *Bostock v. Clayton County*, in which the Court interpreted Title VII's bar on job discrimination "because of . . . sex" to protect employees from being fired because of their sexual orientation or gender identity.²⁵ Joined by Roberts and four pragmatic Justices, Gorsuch's opinion for the Court purported to apply "ordinary public meaning."²⁶ In dissent, however, Alito, joined by Thomas, accused the majority opinion of being a "pirate ship" that falsely "sails under a textualist flag"²⁷ and argued that the Court was updating Title VII to suit current LGBT-friendly norms.²⁸ Similarly, Kavanaugh also applied "ordinary public meaning"²⁹ and accused the majority of confusing "ordinary meaning" with "literal meaning" and ignoring how the public would actually interpret Title VII.³⁰

S. Ct. 696, 705 (2023); "ordinary meaning," *id.* at 708; or "common expressions," *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 143 S. Ct. 1689, 1696 (2023).

23. See Tara Leigh Grove, *Which Textualism?*, 134 *Harv. L. Rev.* 265, 269, 279, 281–84 (2020) (arguing that formalists like Gorsuch and contextualists like Kavanaugh reflect different visions for the new textualism); cf. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 *Harv. L. Rev.* 2118, 2121 (2016) [hereinafter Kavanaugh, *Fixing Interpretation*] (calling for clearer "rules of the road" to determine the "best reading" of statutory texts).

24. See Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Progressive Textualism*, 110 *Geo. L.J.* 1437, 1443 (2022) (noting that textualism has been critiqued as an attempt to effectuate a conservative legal agenda).

25. 140 S. Ct. 1731 (2020).

26. See *id.* at 1738 (referring to "ordinary public meaning").

27. *Id.* at 1755 (Alito, J., dissenting).

28. *Id.* at 1755–56.

29. *Id.* at 1825 (Kavanaugh, J., dissenting).

30. *Id.* at 1824.

Bostock is the most jurisprudentially rich disagreement among the textualist majority, but it is far from the only one. In case after case, the Court's textualists have disagreed not just about results but also about what textualism as a method entails. The debates have covered a broad range of interpretive issues, including:

*Historical and common law context in Arizona v. Navajo Nation.*³¹ — In an 1868 treaty establishing the Navajo reservation in the Colorado Basin area, the United States recognized water rights and other rights of the Navajo Nation. Writing for all the Court's textualists except Gorsuch, Kavanaugh rejected the Nation's petition to hold the United States responsible for its water rights, finding that the treaty did not provide an affirmative duty on the part of the United States as trustee.³² Joined by the three pragmatic Justices in dissent, Gorsuch interpreted the treaty in light of its historical circumstances and common law trust doctrine to require the United States to live up to its trustee duties.³³ Concurring in the Court's opinion, Thomas doubted the precedents recognizing such a trustee relationship.³⁴

*Semantic meaning in Sackett v. EPA.*³⁵ — The Clean Water Act (CWA) prohibits discharging pollutants into “navigable waters,” which the Act defines as “waters of the United States.”³⁶ Alito's opinion for the Court (joined by all the new-textualist Justices except Kavanaugh) limited the statute's regulatory ambit to “streams, oceans, rivers, and lakes” and to adjacent wetlands that are “indistinguishable” from those bodies of water due to a continuous surface connection.³⁷ Concurring in the Court's judgment but dissenting from its interpretation of the CWA, Kavanaugh (joined by the three pragmatic Justices) relied on the 1977 CWA Amendments that explicitly codified “adjacent” wetlands within the CWA's ambit,³⁸ an interpretation EPA and Congress have followed for the last generation.³⁹ Concurring in the Court's opinion, Thomas (joined by Gorsuch) would have narrowed the CWA to cover only “navigable waters” as that term was understood in 1789 (and assertedly codified in the Commerce Clause, which is the basis for congressional clean water regulation).⁴⁰

*Statutory precedent in Glacier Northwest, Inc. v. International Brotherhood of Teamsters Local Union No. 174.*⁴¹ — An 8-1 Court ruled

31. 143 S. Ct. 1804 (2023).

32. *Id.* at 1809–10.

33. *Id.* at 1819–22, 1827–28 (Gorsuch, J., dissenting).

34. *Id.* at 1816–18 (Thomas, J., concurring).

35. 143 S. Ct. 1322 (2023).

36. 33 U.S.C. §§ 1311(a), 1362(7), (12)(A) (2018).

37. *Sackett*, 143 S. Ct. at 1336, 1340–41.

38. 33 U.S.C. § 1344(g)(1).

39. *Sackett*, 143 S. Ct. at 1343 (Kavanaugh, J., concurring in the judgment).

40. *Id.* at 1357–58.

41. 143 S. Ct. 1404 (2023).

that the National Labor Relations Act of 1935 (NLRA) did not preempt a state court lawsuit charging that union members destroyed the employer's property in the course of a labor dispute.⁴² Writing for Roberts, Kavanaugh, as well as pragmatist Justices Sonia Sotomayor and Elena Kagan, Barrett's majority opinion applied longstanding precedent requiring the employer to show that the aggrieved conduct did not even "arguably" fall within the NLRA's ambit (a test the employer met).⁴³ Concurring only in the judgment, Thomas (joined by Gorsuch) argued that the longstanding precedent should be overruled because it was "strange[]" in light of the Court's federalism jurisprudence.⁴⁴

Reconciling statutes in *Turkiye Halk Bankasi A.S. v. United States*.⁴⁵ — Federal courts have jurisdiction to hear criminal charges against foreign states and their instrumentalities.⁴⁶ Joined by Roberts, Thomas, Barrett, and the three pragmatists, Kavanaugh's opinion for the Court held that the limitations in the Foreign Sovereign Immunities Act of 1976 (FSIA) did not apply to such criminal prosecutions.⁴⁷ In dissent, Gorsuch (joined by Alito) argued that the FSIA's foreign sovereign immunity defense applied in criminal as well as civil cases.⁴⁸

Choosing among textual canons in *Bittner v. United States*.⁴⁹ — The Bank Secrecy Act requires Americans with certain financial interests in foreign accounts to keep records and file reports.⁵⁰ Section 5321 authorizes the Treasury Secretary to impose a civil penalty of up to \$10,000 for "any violation" of the statutory requirements.⁵¹ Writing for Roberts, Alito, Kavanaugh, and Jackson, Gorsuch employed textual canons in interpreting the penalty to apply to every false report filed and not to every false account contained in the filed reports.⁵² Joined by Thomas, Sotomayor, and Kagan, Barrett's dissenting opinion countered with other textual canons in emphasizing the broad statement of the penalty provision.⁵³

Choosing between statutory provisions in *Biden v. Texas*.⁵⁴ — President Joe Biden revoked his predecessor's policy of returning to Mexico all

42. *Id.* at 1410.

43. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245–46 (1959) (holding that state courts are disabled from adjudicating state-law claims that concern conduct "arguably" protected under the NLRA).

44. *Glacier Nw.*, 143 S. Ct. at 1417 (Thomas, J., concurring in the judgment).

45. 143 S. Ct. 940 (2023).

46. 18 U.S.C. § 3231 (2018).

47. *Turkiye Halk Bankasi*, 143 S. Ct. at 944.

48. *Id.* at 952 (Gorsuch, J., concurring in part and dissenting in part).

49. 143 S. Ct. 713 (2023).

50. 31 U.S.C. § 5314(a) (2018).

51. *Id.* § 5321(a)(5).

52. *Bittner*, 143 S. Ct. at 720.

53. See *id.* at 727–29 (Barrett, J., dissenting).

54. 142 S. Ct. 2528 (2022).

undocumented immigrants coming across the U.S.–Mexico border.⁵⁵ Writing on the merits for Kavanaugh, Barrett, and the pragmatists,⁵⁶ Roberts interpreted the relevant immigration provision to vest enforcement officials with broad discretion.⁵⁷ In contrast, Alito (with Thomas and Gorsuch) read the discretionary text in light of other mandatory provisions and would have ruled that the previous policy was required by law.⁵⁸

*Semantic meaning in Patel v. Garland.*⁵⁹ — An immigrant sought discretionary adjustment of status from the Attorney General, but the administrative law judge found that he was barred for lying on a state driver's license application.⁶⁰ Arguing that the error was an honest mistake, Patel sought judicial review.⁶¹ Writing for all the textualists except Gorsuch, Barrett's opinion applied 8 U.S.C. § 1252(a)(2)(B)(i),⁶² barring judicial review of "any judgment regarding the granting of relief" under the adjustment-of-status provision.⁶³ Joined by the pragmatists, Gorsuch argued that the Court read "regarding the granting of relief" out of the statute.⁶⁴

*The role of the rule of lenity and legislative history in Wooden v. United States.*⁶⁵ — A unanimous Court interpreted the Armed Career Criminal Act to treat sequential storage-unit burglaries in one night as one "occasion" (and not several) for sentence enhancement purposes.⁶⁶ Concurring in most of the majority opinion, Barrett and Thomas objected to its reliance on a statutory amendment and on legislative history.⁶⁷ Concurring in the judgment, Gorsuch rejected the majority's multifactor balancing approach and would have resolved the case with the rule of lenity.⁶⁸ Kavanaugh's concurring opinion argued against the lenity canon because it had rarely made much difference in previous cases and distracted judges from textual analysis.⁶⁹ Like Kavanaugh, Roberts joined the Court's full opinion, and Alito

55. Id. at 2534.

56. Id. at 2548 (Kavanaugh, J., concurring) (noting that Barrett agreed with the majority on the merits, though she dissented on process grounds).

57. Id. at 2541 (majority opinion).

58. Id. at 2555 (Alito, J., dissenting).

59. 142 S. Ct. 1614 (2022).

60. Id. at 1620.

61. Id.

62. 8 U.S.C. § 1252(a)(2)(B)(i) (2018) (limiting review for several proceedings, including discretionary adjustment of status under § 1255).

63. *Patel*, 142 S. Ct. at 1618–28.

64. Id. at 1632 (Gorsuch, J., dissenting) (internal quotation marks omitted) (quoting 8 U.S.C. § 1252(a)(2)(B)(i)).

65. 142 S. Ct. 1063 (2022).

66. Id. at 1067.

67. Id. at 1076–79 (Barrett, J., concurring in part and concurring in the judgment).

68. Id. at 1079–86 (Gorsuch, J., concurring in the judgment).

69. Id. at 1075–76 (Kavanaugh, J., concurring).

(without comment) joined all but the part (II-B) discussing statutory history and purpose.⁷⁰

*Semantic meaning in Van Buren v. United States.*⁷¹ — The Computer Fraud and Abuse Act of 1986 (CFAA) makes it a crime to “access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter.”⁷² Barrett wrote for the Court (including Gorsuch and Kavanaugh) to void the conviction of a police officer accused of using his office computer for private searches that police department policy prohibited him from doing.⁷³ Joined by Roberts and Alito, Thomas dissented in favor of the Government.⁷⁴ The majority and dissent fiercely debated the meaning of “so” and “entitled.” Although disclaiming reliance on the rule of lenity, Barrett closed her opinion with concern for the broad reach of the CFAA if the Government’s approach had prevailed.⁷⁵

*The major questions doctrine in Biden v. Missouri.*⁷⁶ — Interpreting congressional authorization to issue rules regulating the operation of hospitals receiving federal funds, HHS mandated that hospital employees be vaccinated against the COVID-19 virus.⁷⁷ In a per curiam opinion joined by Roberts, Kavanaugh, and the three pragmatists, the Court upheld the mandate.⁷⁸ Thomas’s dissenting opinion (joined by Alito, Gorsuch, and Barrett) invoked the major questions doctrine (MQD) in arguing that a more specific or targeted text was required to authorize an agency to adopt such a far-reaching policy.⁷⁹

*Literalism in Niz-Chavez v. Garland.*⁸⁰ — The 1996 immigration law requires the government to serve a “notice to appear” on individuals it wishes to remove from this country; the notice serves as the termination (the “stop-time”) point for the requirements that the immigrant must meet to seek discretionary relief.⁸¹ The notice must include the

70. Id. at 1065 (case syllabus).

71. 141 S. Ct. 1648 (2021).

72. 18 U.S.C. § 1030(e)(6) (2018).

73. *Van Buren*, 141 S. Ct. at 1652.

74. Id. at 1662–69 (Thomas, J., dissenting).

75. See id. at 1662 (majority opinion) (“On the Government’s reading, . . . the conduct would violate the CFAA only if the employer phrased the policy as an access restriction. An interpretation that stakes so much on a fine distinction controlled by the drafting practices of private parties is hard to sell as the most plausible.”).

76. 142 S. Ct. 647 (2022).

77. Id. at 650.

78. Id.

79. See id. at 655–59 (Thomas, J., dissenting).

80. 141 S. Ct. 1474 (2021).

81. 8 U.S.C. § 1229b(d)(1) (2018) (providing that the stop-time rule is triggered “when the alien is served a notice to appear under section 1229(a)”).

reasons for removal as well as the date, time, and place for a hearing.⁸² Writing for Thomas, Barrett, and the three pragmatists, Gorsuch hyperfocused on the indefinite article “a” and interpreted the provisions to require the government to include all that information in a single notice.⁸³ Joined by Roberts and Alito, Kavanaugh’s dissent argued that the Court’s interpretation was too literal and that the government could satisfy the statute with sequential notices that, together, provided all the required information.⁸⁴

*Choices about contextual evidence in McGirt v. Oklahoma.*⁸⁵ — In nineteenth-century treaties, Congress recognized sovereignty by the Muscogee (Creek) Nation over reservation land in what is now Oklahoma.⁸⁶ A state criminal prosecution of an American Indian defendant would have been invalid if his crime had occurred on the Muscogee Reservation.⁸⁷ Supporting Oklahoma’s position, Roberts, Thomas, Alito, and Kavanaugh focused on nontextual evidence that Congress had implicitly “disestablished” the Muscogee Reservation.⁸⁸ Writing for the Court, Gorsuch found that no statute actually disestablished the reservation.⁸⁹ In *Oklahoma v. Castro-Huerta*, Kavanaugh’s majority ignored *McGirt* and held that Oklahoma could prosecute crimes by non-Indians committed on Indian reservations.⁹⁰ Gorsuch, joined by the pragmatists, dissented.⁹¹

*Semantic meaning in Atlantic Richfield Co. v. Christian.*⁹² — Interpreting the Superfund Act broadly to empower EPA to supersede state law in directing large-scale environmental clean-up operations, Roberts was joined by Alito, Kavanaugh, and the four pragmatists.⁹³ Joined by Thomas, Gorsuch dissented from such a broad understanding of the law—particularly the term “potentially responsible,” which he argued would turn the modest environmental law into a scheme for “paternalist central planning.”⁹⁴

82. Id. § 1229(a)(1) (explaining that “written notice (in this section referred to as a ‘notice to appear’) shall be given . . . to the alien . . . specifying” the time and place of his hearing and other facts required by statute).

83. *Niz-Chavez*, 141 S. Ct. at 1480 (“Admittedly, a lot here turns on a small word.”).

84. Id. at 1491–92 (Kavanaugh, J., dissenting).

85. 140 S. Ct. 2452 (2020).

86. Id. at 2459.

87. Id.

88. Id. at 2482 (Roberts, C.J., dissenting).

89. Id. at 2463 (majority opinion) (noting how Congress has “sought to pressure many tribes to abandon their communal lifestyles and parcel their lands into smaller lots owned by individual tribe members” but never statutorily terminated the Reservation).

90. 142 S. Ct. 2486, 2491 (2022).

91. Id. at 2505–27 (Gorsuch, J., dissenting).

92. 140 S. Ct. 1335 (2020).

93. Id. at 1344.

94. Id. at 1366 (Gorsuch, J., concurring in part and dissenting in part).

Other recent debates have pitted Kavanaugh against Thomas and Alito in *Reed v. Goertz*,⁹⁵ Gorsuch against Barrett in *HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Ass'n*,⁹⁶ Barrett against Gorsuch in *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System*,⁹⁷ and Gorsuch against Kavanaugh (and Roberts, Thomas, and Alito) in *United States v. Davis*.⁹⁸ In yet other recently contested statutory cases, one of the pragmatic Justices has written for one or more textualist Justices, with other textualist Justices in text-based dissent.⁹⁹

These “Text Wars” suggest that the newest textualism is failing to deliver its promised rule-of-law benefits: If all these smart textualist judges, assisted by teams of well-trained law clerks, cannot agree on answers, then textualism does not produce consistent, predictable, and knowable results in hard cases. Although the new textualists do not claim that their method always produces interpretive closure or complete predictability,¹⁰⁰ the recent divisions undermine their claim that textualism

95. 143 S. Ct. 955 (2023). Kavanaugh delivered the opinion of the Court, writing also for Roberts, Barrett, and the three pragmatists. *Id.* at 959–62. Thomas dissented in opposition, *id.* at 962–72 (Thomas, J., dissenting), and Alito wrote a separate dissent joined by Gorsuch, *id.* at 972–77 (Alito, J., dissenting).

96. See 141 S. Ct. 2172 (2021). Gorsuch delivered the opinion of the Court, writing also for Roberts, Thomas, Breyer, Alito, and Kavanaugh. See *id.* at 2175–83. Barrett dissented, writing also for Sotomayor and Kagan. See *id.* at 2183–90 (Barrett, J., dissenting).

97. 141 S. Ct. 1951 (2021). Barrett delivered the opinion of the Court, joined by Roberts, Kavanaugh, and the three pragmatists. See *id.* at 1957–63. Gorsuch dissented in part, joined by Thomas and Alito. See *id.* at 1965–70 (Gorsuch, J., concurring in part and dissenting in part).

98. 139 S. Ct. 2319 (2019). Gorsuch delivered the opinion of the Court, joined by Ginsburg, Breyer, Sotomayor, and Kagan. See *id.* at 2323–36. Kavanaugh issued a dissent, joined by Roberts, Thomas, and Alito. See *id.* at 2336–55 (Kavanaugh, J., dissenting).

99. For examples from the 2022 Term, see, e.g., *Axon Enter. v. Fed. Trade Comm'n*, 143 S. Ct. 890, 900–06 (2023) (interpreting the Federal Trade Commission and Securities Exchange Acts, Kagan for a majority including all but Gorsuch, and to some extent Thomas, applied precedent to determine whether the statutory scheme preempts district court jurisdiction to hear constitutional claims); *Wilkins v. United States*, 143 S. Ct. 870, 875–878, 883–886 (2023) (interpreting the Quiet Title Act, Sotomayor, for a majority including Gorsuch, Kavanaugh, and Barrett, relied on a clear statement requirement for finding a provision jurisdictional; Thomas, Roberts, and Alito found the clear statement rule inapplicable in cases against the government); *Delaware v. Pennsylvania*, 143 S. Ct. 696, 711–12 (2023) (interpreting the Federal Dispositions Act, Jackson, for a majority including Roberts and Kavanaugh, relied on legislative history to clarify an undefined term, with Thomas, Alito, Gorsuch, and Barrett declining to join that part of the opinion); *Helix Energy Sols. Grp. v. Hewitt*, 143 S. Ct. 677, 682–83, 692–95 (2023) (interpreting the Fair Labor Standards Act, Kagan for a majority including Roberts, Thomas, and Barrett, parsed the agency regulations, against anti-regulatory doubts raised by Gorsuch, Kavanaugh, and Alito); see also *Arizona v. Navajo Nation*, 143 S. Ct. 1804, 1809–16, 1819–33 (2023) (interpreting a peace treaty, Kavanaugh wrote for a majority, while Gorsuch wrote the dissent joined by Sotomayor, Kagan, and Jackson).

100. Scalia & Garner, *supra* note 7, at 6.

is any *more* objective, yields *more* predictable results, or constrains discretion *better* than pluralist, pragmatic approaches. At the Supreme Court, the newest textualism, as applied in statutory cases, may be less predictable than the traditional approach. Significantly, Sotomayor, Kagan, and Breyer or Jackson were all in the majority for thirteen of these nineteen cases. Roberts and Kavanaugh were in the majority for fifteen cases and Barrett for eleven of the fifteen cases for which she sat. But Thomas, Alito, and Gorsuch were in the majority for only seven cases apiece. Interestingly, Roberts and Kavanaugh voted more often in these cases with Sotomayor and Kagan than with Thomas and Gorsuch.

The recent debates among the newest textualists are important for several reasons, which this Article documents. First is the illusory expectation of text-centric simplicity. As applied, the new textualism is much more complicated than Scalia and his followers have advertised. The Court's recent cases demonstrate that there are many analytical choices necessary to resolve hard statutory cases. Textualist methodology now requires as many as twelve important choices, many of which have subchoices—and even sub-subchoices. These choices create numerous flashpoints in which a judge may, often unconsciously, look out over the crowd and pick out their friends. A challenge for this complex and opaque textualism is to find ways to police its tendency to channel judicial preferences into statutory texts.

Second is the end of judicial consensus about the methodological consequences of the new textualism. There is no doubt that the new textualism announced by Scalia unsettled traditional practices of statutory interpretation. The newest-textualist majority is not inclined to restore the old order, but its Justices also have not replaced it with anything coherent. The Supreme Court's newest-textualist majority is fundamentally divided on important methodological and even jurisprudential issues.¹⁰¹ For almost a generation, textualism spoke with one voice—Scalia's. Post-Nino, there are more voices, and the newest-textualist Justices' sharp debates include such fundamental issues as whether the rule of lenity should have any bite,¹⁰²

101. See Grove, *supra* note 23, at 266–67 (observing that *Bostock* revealed tensions among the textualist Justices); Kevin Tobia & John Mikhail, Two Types of Empirical Textualism, 86 *Brook. L. Rev.* 461, 486 (2020) (distinguishing two types of modern textualism); Anita Krishnakumar, The Multiple Faces of Textualism, *Jotwell* (Jan. 15, 2021), <https://lex.jotwell.com/the-multiple-faces-of-textualism/> [<https://perma.cc/9YJ4-6NLH>] (summarizing Grove's categorization of textualism into formalistic and flexible textualism).

102. See, e.g., *Wooden v. United States*, 142 S. Ct. 1063, 1076, 1085–87 (2022) (Kavanaugh minimizing the rule of lenity, Gorsuch extolling it).

what role semantic canons ought to play in statutory cases,¹⁰³ how attentive the Court should be to statutory precedents and *stare decisis*,¹⁰⁴ what role historical meaning ought to play,¹⁰⁵ whether it's legitimate for the Court to read texts by aggregating the meanings of individual words or by understanding the phrase or clause as a whole,¹⁰⁶ and so forth.

Third is a normative crisis—the Supreme Court's legitimacy meltdown. Many of the current disputes among textualist Justices go to the conceptual underpinnings of textualism and the very definition of the theory. The normative foundation for textualism is the rule of law, including values like (1) stability of legal rules, (2) transparency and predictability of rule application, and (3) neutrality and objectivity for judges predictably applying the stable rules.¹⁰⁷ Given statutory and agency precedents generated by changed circumstances, long-term, historical stability in the law often comes at the cost of shorter-term predictability: Society expects the Court to follow current rules and precedent (predictability today), but the newest textualists are sometimes reluctant to do so when they feel rules and precedents are inconsistent with original meaning (restoring historical stability over time).¹⁰⁸ Conversely, when an originalist Court “discovers” new constitutional baselines (historical stability), their application in statutory cases will generate surprising results, sometimes scrambling textual plain meaning (predictability today).¹⁰⁹

103. See, e.g., *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1175 (2021) (Alito, J., concurring in the judgment) (cautioning against the categorical use of grammar canons even though textualists are known for their frequent citations to such canons).

104. See, e.g., *Ramos v. Louisiana*, 140 S. Ct. 1390, 1404–05, 1425 (2020) (dramatically illustrating differences among Gorsuch's, Thomas's, and Alito's treatment of precedent and their understanding of *stare decisis*).

105. See *Arizona v. Navajo Nation*, 143 S. Ct. 1804, 1816, 1824 (2023) (illustrating the difference between Kavanaugh, who focuses on the text of the treaty, and Gorsuch, who uses historical meaning to inform his reading of the treaty); *Bostock v. Clayton County*, 140 S. Ct. 1731, 1750 (2020) (describing how the law is by nature dependent on context, which requires sensitivity to the likelihood of change).

106. See *Bostock*, 140 S. Ct. at 1739, 1828 (contrasting Gorsuch's focus on the words “because of” and “sex,” with Kavanaugh's focus on the phrase “discrimination because of sex”).

107. See Lon Fuller, *The Morality of Law* 153–55 (1963) (describing the law's neutrality and its accompanying “internal morality”); Friedrich von Hayek, *The Constitution of Liberty* 218 (Ronald Hamowy ed., 2011) (arguing that “law in its ideal form might be described as a ‘once-and-for-all’ command that is directed to unknown people and that is abstracted from all particular circumstances of time and place”).

108. Compare *Sackett v. Env't Prot. Agency*, 143 S. Ct. 1322, 1341–44 (2023) (Alito, J.) (announcing a new rule for wetlands regulation that the majority felt was most consistent with the original statutory meaning and principles of federalism and due process), with *id.* at 1362–63 (Kavanaugh, J., concurring in the judgment) (supporting the approach followed for a generation by EPA and ratified by Congress in the 1977 CWA Amendments).

109. See *id.* at 1356–57 (Thomas, J., concurring) (arguing for an even narrower understanding of “waters” that the federal government can regulate).

A Supreme Court that upends settled legal rules is bound to make many Americans nervous, and it does not help that the Court does so inconsistently. When the Court generates surprising and especially unfair results under the aegis of “we are just applying the law,” the citizenry expects super-rigorous justification, but the textualist majority is divided as to what approach to statutory text justifies their work, especially in controversial cases. The recent cases illustrate how the simple and broad slogan of textualism—give textual words the meaning they “would reasonably have . . . conveyed to a citizen”¹¹⁰—is not specific enough to resolve a wide range of controversies. Today, “textualism” refers, at best, to many different theories that are applied inconsistently among “textualist” Justices and support different answers to many of the cases before the Court.

This Article’s primary aims are exegetical as well as critical: We identify twelve categories of choices in modern textualist interpretation and document that today’s newest textualists frequently make choices that are at odds with established doctrine, clash with the opposite choices made by other committed textualists (and often with their own previously stated textualist commitments), and are hard to justify as matters of either text or public policy. Our analysis is most sharply critical when the newest textualists—ironically, in these cases, speaking in one voice—depart most dramatically from “just following the plain meaning of the text” by applying judicially created, and often upgraded, clear statement rules inspired by novel interpretations of the Constitution.

The Article’s methodology combines qualitative doctrinal analysis with insights from legal theory, philosophy, and linguistics. We analyze dozens of recent cases and elucidate the complex theoretical choices at play. Although we focus on the Supreme Court, we also consider some lower court textualist opinions of significant impact. Our approach complements Professors Anita Krishnakumar’s and Victoria Nourse’s impressive *quantitative* research on interpretive trends at the Supreme Court, which has documented how often individual Justices cite interpretive tools (e.g., substantive canons) or modalities (e.g., arguments about consequences).¹¹¹

110. See *supra* notes 1–3 and accompanying text.

111. See Anita S. Krishnakumar, *Backdoor Purposivism*, 69 *Duke L.J.* 1275, 1298–301 & tbl.2 (2020) (analyzing the use of interpretive tools across 965 opinions in the 2005–2016 Terms); Anita S. Krishnakumar, *The Common Law as Statutory Backdrop*, 136 *Harv. L. Rev.* 608, 626 tbl.2 (2022) [hereinafter Krishnakumar, 2005–2019 Data] (analyzing the use of interpretive tools across 1191 opinions in the 2005–2019 Terms); Anita S. Krishnakumar, *Cracking the Whole Code Rule*, 96 *N.Y.U. L. Rev.* 76, 98 tbl.2 (2021) (analyzing the use of interpretive tools across 1040 opinions in the 2005–2017 Terms); Anita S. Krishnakumar, *Dueling Canons*, 65 *Duke L.J.* 909, 992–95 & tbl.9 (2016) [hereinafter Krishnakumar, *Dueling Canons*] (analyzing the use of interpretive tools across 528 opinions in the 2005–2010 Terms); Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 *U. Chi. L. Rev.* 825, 847–49 & tbl.1 (2017) [hereinafter Krishnakumar, *Reconsidering Substantive Canons*] (analyzing the use of interpretive tools across 584 opinions in the 2005–2011 Terms); Anita

Those important quantitative studies have provided critical insight into modern textualism, and this Article's qualitative approach adds to the account Professors Krishnakumar and Nourse are documenting. First, given the recent addition of several Justices, there is inevitably a small sample size of interpretation cases from the Court's newest members: Gorsuch, Kavanaugh, Barrett, and Jackson. The most recent published quantitative studies do not include opinions from Barrett and Jackson and inevitably include fewer opinions from Gorsuch and Kavanaugh than from Thomas, Alito, and Roberts.¹¹² Second, interpretation is changing quickly. For instance, there have only been a few recent "major questions" cases.¹¹³ But despite this small number, this new canon is an important part of the modern textualist landscape.¹¹⁴ Finally, this Article's qualitative approach emphasizes choices that have not been quantified and may not be easily quantifiable. For example, Choice 2 below examines intensional versus extensional approaches to meaning, and Choice 3 examines compositional versus holistic analysis. No prior quantitative study has documented these trends. Although these choices lurk below the surface, this Article argues that they are critical to understanding modern textualism.

S. Krishnakumar, *Statutory History*, 108 Va. L. Rev. 263, 285–86 tbl.2b (2022) (analyzing the use of interpretive tools across 1119 opinions in the 2005–2018 Terms); Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis*, 62 *Hastings L.J.* 221, 249–51 & tbl.2 (2010) (analyzing the use of interpretive tool across 352 opinions in the 2005–2008 Terms); Victoria Nourse, *The Paradoxes of a Unified Judicial Philosophy: An Empirical Study of the New Supreme Court: 2020–2022*, 38 *Const. Comment* (forthcoming 2023) (manuscript at 4), <https://ssrn.com/abstract=4179654> [<https://perma.cc/KSJ2-VRGZ>] (analyzing the use of interpretive tools across 300 opinions in the 2020–2021 Terms); Anita S. Krishnakumar, *Textualism in Practice* app. tbl.2a (July 29, 2023), <https://ssrn.com/abstract=4441426> [<https://perma.cc/6TJX-TCKK>] (unpublished manuscript) (analyzing the use of interpretive tools across 1254 opinions in the 2005–2020 Terms). To avoid redundant citation, we focus on Krishnakumar, 2005–2019 Data, *supra*, the most recently published study.

For work employing similar quantitative methods, see Frank B. Cross, *The Theory and Practice of Statutory Interpretation* 142–48 (2009) (documenting Justices' use of interpretive tools in the 1994–2002 Terms); James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 *Vand. L. Rev.* 1, 15–29 (2005) (documenting Justices' use of interpretive tools in every workplace law case between 1969 and 2003).

112. The most recent published data on individual Justices' statutory interpretation is Krishnakumar, 2005–2019 Data, *supra* note 111. That dataset includes a rich set of opinions from Thomas (182), Alito (137), Roberts (83), Sotomayor (112), and Kagan (62), but—given the rapidly changing Court—it inevitably includes fewer from Gorsuch (31), Kavanaugh (13), Barrett (0), and Jackson (0). *Id.* at 626.

113. See Kate R. Bowers, *Cong. Rsch. Serv.*, *IF12077, The Major Questions Doctrine* (2022), <https://crsreports.congress.gov/product/pdf/IF/IF12077> [<https://perma.cc/4N8J-2J46>] (listing recent "major questions" cases).

114. Compare *infra* Choice 8, with Krishnakumar, *Reconsidering Substantive Canons*, *supra* note 111, at 850 (emphasizing the infrequent invocation of substantive canons).

This Article also responds to Professor Tara Grove's theory that there are now two textualist camps within the Court.¹¹⁵ The Article contends that there are several broad "modes" of new textualist analysis. Just three include a strict positivist mode that determines statutory meaning by homing in on the conventional social or legal meaning of the most relevant statutory words or phrases; a more methodologically pluralist mode that also considers statutory precedents, agency interpretations, and legislative evidence; and a normativist mode that starts with constitutional or statutory baselines imposing higher burdens of textual or contextual justification on the government. All of the newest-textualist Justices jump from mode to mode—which makes statutory cases more unpredictable today than twenty years ago and may have contributed to the Supreme Court's plunging reputation.¹¹⁶

CHOICE 1: WHICH TEXT

The most basic task for a textualist judge—for any judge—is to choose the relevant legal text(s). Although this choice might seem simple, jurists as brainy as Frank Easterbrook, Nino Scalia, and John Roberts have simply missed highly relevant statutory texts.¹¹⁷ More often, textualist judges have disagreed sharply over which relevant text is most on point or how admittedly relevant texts should be read together.

Consider *King v. Burwell*, in which Roberts and Scalia both started with § 36B(c)(2)(A)(i) of the tax code, which informed modest- and low-income taxpayers how to calculate their tax credits under the Affordable Care Act of 2010 (ACA).¹¹⁸ The provision defines a "coverage month"—the period 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 [§] 1311."¹¹⁹ Section 1321(c) provides that if a state does not establish an exchange under § 1311, the Department of Health and Human Services (HHS) will "establish and operate such Exchange."¹²⁰ Because more than half the states failed to establish "such Exchange[s]," HHS created federal exchanges for those states.¹²¹ Scalia argued that, as a matter of plain meaning, tax credits were allowed only for taxpayers

115. See *supra* note 23 and accompanying text.

116. See Jeffrey M. Jones, Confidence in U.S. Supreme Court Sinks to Historic Low, Gallup (June 23, 2022), <https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx> [<https://perma.cc/E4FM-XFA5>].

117. See Eskridge & Nourse, *supra* note 14, at 1741–44, 1763–66 (analyzing the choice of text by Easterbrook in *In re Sinclair*, 870 F.2d 1340 (7th Cir. 1989), and Roberts and Scalia in *Bond v. United States*, 572 U.S. 844 (2014)).

118. 576 U.S. 473, 486, 498–99 (2015).

119. 26 U.S.C. § 36B(c)(2)(A)(i) (2018) (emphasis added) (referencing 42 U.S.C. § 18051 (2018)).

120. The Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, § 1321(c), 124 Stat. 119, 186 (2010) (codified at 42 U.S.C. § 18041(c)(1)).

121. *King*, 576 U.S. at 513 (Scalia, J., dissenting).

purchasing plans under a state exchange.¹²² Roberts tried to dodge such a catastrophic plain meaning by suggesting that HHS might be understood as establishing “such” exchanges for the states and so the ACA was at least ambiguous.¹²³

Roberts buried his better textual lead. Section 36B(f)(3), added to the ACA through its reconciliation amendment, requires that “[e]ach Exchange . . . under [§] 1311(f)(3) [State Exchanges] or 1321(c) [Federal Exchanges]” reports to HHS “[t]he aggregate amount of any advance payment of such [tax] credit” and “[a]ny information provided to the Exchange, including any change of circumstances, necessary to determine eligibility for, and the amount of, such credit.”¹²⁴ Section 36B(f)(3) assumes the availability of tax credits in states with federally operated exchanges. This provision either is on point for the Roberts–Scalia debate about ambiguity or is key (con)text for the proper interpretation of § 36B(c)(2)(A)(i).¹²⁵

Consider also *Bostock v. Clayton County*, in which Gorsuch’s majority opinion relied on § 703(a)(1) of the Civil Rights Act’s Title VII,¹²⁶ which bars workplace discrimination “because of . . . sex.”¹²⁷ He mentioned but did not rely on § 703(m), added to Title VII by the 1991 Amendments to make illegal any discrimination in which sex “was a motivating factor.”¹²⁸ Because the plaintiff employees would prevail under either text, Gorsuch’s choice of text is defensible—but the dissenters were obliged to respond to both § 703(a)(1) and § 703(m) because they were denying any Title VII coverage. Kavanaugh completely ignored § 703(m),¹²⁹ and so his dissenting opinion made a questionable choice of text.

Another recent dispute over choice of text came in *McGirt v. Oklahoma*,¹³⁰ which concerned whether Congress had disestablished the reservation created by treaties that promised a “permanent home to

122. *Id.* at 499–500.

123. *Id.* at 490 (majority opinion).

124. 26 U.S.C. § 36B(f)(3).

125. Compare *King*, 576 U.S. at 490 (majority opinion) (Roberts, C.J.) (arguing that other provisions render the Act ambiguous by assuming that tax credits are available under federally operated exchanges), with *id.* at 509 (Scalia, J., dissenting) (arguing that the Act clearly denies tax credits under federally operated exchanges).

126. 140 S. Ct. 1731, 1738–39 (2020).

127. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a)(1), 78 Stat. 241, 255 (1964) (codified at 42 U.S.C. § 2000e-2(a)(1) (2018)).

128. Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 107(a), § 2000e-2, 105 Stat. 1071, 1075 (1991) (amending 42 U.S.C. § 2000e-2 (1988)) (codified at 42 U.S.C. § 2000e-2(m)).

129. *Bostock*, 140 S. Ct. at 1823 n.2 (Kavanaugh, J., dissenting) (quoting the “full” statute but omitting § 703(m)); cf. *id.* at 1757 (Alito, J., dissenting) (addressing both §§ 703(a)(1) and 703(m), which was a defensible choice of text).

130. 140 S. Ct. 2452 (2020).

the whole Creek [N]ation of Indians.”¹³¹ Arguing that Congress had disestablished the reservation, Roberts spoke for all the textualist Justices except Gorsuch, whose majority opinion was joined by the then-four pragmatic Justices.¹³² The basic disagreement was that the majority demanded a statute taking back the treaty rights repeatedly conferred on the Creek Nation, while the dissent found disestablishment through a trail of national renegeing and “subsequent demographic history.”¹³³ Hence, the dissenters failed to deliver a textual smoking gun. The same array of Justices, but with Gorsuch in dissent after the death of Justice Ginsburg, encountered the opposite problem in *Oklahoma v. Castro-Huerta*.¹³⁴ Several treaties and statutes were relevant to the defendant’s claim that state criminal law had been preempted by federal Indian law. The majority and dissenting opinions overlapped only occasionally, as each looked at almost two centuries of laws and treaties and picked out their friends.¹³⁵

Turkiye Halk Bankasi A.S. v. United States recently revealed a similar dispute among the newest textualists.¹³⁶ Section 3231 of Title 18 (criminal law) vests federal courts with subject-matter jurisdiction over cases involving “offenses against the laws of the United States,” which on its face would include crimes committed by foreign states and state instrumentalities.¹³⁷ The issue on appeal was whether the Foreign Sovereign Immunities Act of 1976 (FSIA) provided a defense for foreign states to § 3231 prosecutions.¹³⁸ Section 1604 of Title 28 (civil procedure) provides that “a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States,” except as provided in §§ 1605 and 1607 of the FSIA.¹³⁹ Gorsuch relied on that text to conclude that foreign states are immune from criminal as well as civil prosecution

131. Articles of Agreement, Creek Nation-U.S., pmb., Feb. 14, 1833, 7 Stat. 417, 418. Between 1833 and 1881, Congress entered additional treaties guaranteeing this land to the Muscogee (Creek) Nation. See *McGirt*, 140 S. Ct. at 2461.

132. *Id.* at 2482 (Roberts, C.J., dissenting); *id.* at 2458–59 (majority opinion) (Gorsuch, J.).

133. *Id.* at 2486 (Roberts, C.J., dissenting) (internal quotation marks omitted) (quoting *Solem v. Bartlett*, 465 U.S. 463, 471–72 (1984)). Compare *id.* at 2464–65 (majority opinion) (Gorsuch, J.) (demonstrating that Congress never adopted a statute disestablishing the Creek Reservation as it has done for other reservations), with *id.* at 2489–502 (Roberts, C.J., dissenting) (relying on precedents finding disestablishment on the basis of evidence of implied congressional “intent” and then demonstrating that Congress “systematically dismantled” the Creek Nation and approved or acquiesced as Oklahoma exercised jurisdiction over reservation land and its residents).

134. 142 S. Ct. 2486 (2022).

135. Compare *id.* at 2503 (characterizing the dissent’s reliance on certain treaties as “[s]traying further afield” because the treaties had been “supplanted” by a statute), with *id.* at 2525–26 (Gorsuch, J., dissenting) (arguing that the majority failed to adequately address relevant statutes and treaties).

136. 143 S. Ct. 940 (2023).

137. 18 U.S.C. § 3231 (2018).

138. *Turkiye Halk Bankasi*, 143 S. Ct. at 943–44 (2023).

139. 28 U.S.C. § 1604 (2018).

unless the basis for suit fell within one of the FSIA exceptions, such as commercial activity in the United States.¹⁴⁰ But Gorsuch (and Alito, who joined him) were in dissent.¹⁴¹ Kavanaugh's opinion for the Court anchored on § 3231 and on the FSIA's jurisdictional provision, 28 U.S.C. § 1330(a), which applies only to "civil actions" filed against foreign states and their instrumentalities.¹⁴² In our view, Kavanaugh had the better argument regarding the choice of text and ultimate interpretation: The Department of Justice had repeatedly prosecuted foreign states before 1976, and the FSIA's statutory structure and legislative history demonstrated that the 1976 statute addressed foreign sovereign immunity only in civil cases, consistent with Kavanaugh's choice of § 1330(a) and inconsistent with Gorsuch's choice of § 1604.¹⁴³

CHOICE 2: WHICH DATE—INTENSIONAL VS. EXTENSIONAL MEANING

(a) *Current vs. Historical Meaning.* — Once the textualist has chosen a text, they must choose a date from which to view it. Given its fair notice value and the easier evidentiary burden, current meaning would appear the obvious default rule: How would the statutory text and (con)text be understood today?¹⁴⁴ Although textualism and originalism are distinct theories,¹⁴⁵ many textualists are "statutory originalists,"¹⁴⁶ taking the relevant date to be the historical date at which the text became law. In many cases, there is no material difference between current meaning and

140. See *Turkiye Halk Bankasi*, 143 S. Ct. at 952–55 (Gorsuch, J., concurring in part and dissenting in part).

141. *Id.* at 952.

142. *Id.* at 947 (majority opinion).

143. See *id.* at 946–49; Brief for the United States at 37–40, *Turkiye Halk Bankasi*, 143 S. Ct. 940 (No. 21-1450), 2022 WL 17725732.

144. See, e.g., Fred Schauer, *Unoriginal Textualism*, 90 *Geo. Wash. L. Rev.* 825, 838–47 (2022) (describing the theoretical foundation of "intention-independent contemporary meaning").

145. See, e.g., Katie Eyer, *Disentangling Textualism and Originalism*, 13 *ConLawNOW* 115, 115 (2021) [hereinafter Eyer, *Disentangling Textualism*] (arguing that "[t]extualism commands adherence to the text," while "[o]riginalism, in contrast, commands adherence to history"); Ilya Somin, 'Active Liberty' and Judicial Power: What Should Courts Do to Promote Democracy?, 100 *Nw. U. L. Rev.* 1827, 1851 (2006) (explaining that a judge may adopt textualism yet reject originalism, and vice versa, because a textualist follows the text even if doing so contravenes the Framers' expectations, but an originalist may disregard the text if the Framers would have expected a different outcome than that mandated by the text). On originalism in constitutional interpretation, see generally Lawrence Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 *Nw. U. L. Rev.* 1243 (2018).

146. See Katie R. Eyer, *Statutory Originalism and LGBT Rights*, 54 *Wake Forest L. Rev.* 64, 65–66 (2019) [hereinafter Eyer, *Statutory Originalism*] (describing statutory originalism and its entanglement with textualism in the context of the debate over whether Title VII proscribes anti-LGBT discrimination); Nourse, *Textualism 3.0*, *supra* note 6, at 676–77 (identifying statutory originalism as a focus on the meaning of a statute at the time it was passed); see also Scalia & Garner, *supra* note 7, at 41, 83.

historic meaning. *Niz-Chavez*, for instance, grappled with a 1996 statute.¹⁴⁷ There were just a dozen years between statute and decision in *Yates v. United States*.¹⁴⁸ Although *Wooden v. United States* and *Van Buren v. United States* interpreted Reagan-era statutes, the key text in each case (“occasions” in *Wooden* and “so” in *Van Buren*) likely had stable meanings over time.¹⁴⁹

In other cases, the date matters. For instance, *Bostock* required the Roberts Court to interpret unusually dynamic terms (“discriminate” and “sex”) in a statute enacted more than half a century earlier.¹⁵⁰ All nine Justices in *Bostock* signed on to opinions applying “original public meaning”—but neither the Gorsuch majority nor the Kavanaugh dissent reported hard evidence of the meaning § 703 might have had in 1964, and both opinions considered ongoing judicial, administrative, and congressional actions reaching into the new millennium.¹⁵¹ The Alito dissent viewed Title VII through the lens of 1964 America and for that reason looked completely different from the more present-oriented Gorsuch and Kavanaugh opinions.¹⁵²

Although the historical lens was deployed to support a restrictive, antigay construction of Title VII, the same kind of lens usually supports a generous, pro-American-Indian construction of treaties and statutes relating to tribal rights and state responsibilities.¹⁵³ Thus, Alito and Thomas doubled down on history in *Bostock* but joined the Kavanaugh opinion that ignored it in *Navajo Nation*.¹⁵⁴ Conversely, Gorsuch minimized historical context in *Bostock* and *McGirt* but relied on it in *Castro-Huerta* and *Navajo Nation*. Joined by the pragmatists, Gorsuch

147. See *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1478 (2021).

148. 574 U.S. 528 (2014) (interpreting 18 U.S.C. § 1519, which was enacted in 2002).

149. See *Wooden v. United States*, 142 S. Ct. 1063, 1069 (2022) (interpreting the word “occasion” for purposes of the Armed Career Criminal Act, Kagan, writing for the majority, concluded that the ordinary meaning of the word “occasion” does not require occurrence at precisely one moment in time); *Van Buren v. United States*, 141 S. Ct. 1648, 1655 (2021) (holding that the phrase “is not entitled so to obtain” in §1030(a)(2) of the Computer Fraud and Abuse Act refers to information one is not allowed to obtain “by using a computer that [one] is authorized to access”).

150. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1739–40 (2020).

151. Gorsuch and Kavanaugh took more evolutive stances: Gorsuch contemplated how modern ordinary understandings of “sex” implicate sexual orientation, see *id.* at 1739–41, while Kavanaugh focused on the distinctions between “sex” and sexual orientation over a fifty-year period, see *id.* at 1822–37 (Kavanaugh, J., dissenting).

152. Alito argued that ordinary people at the time could not have contemplated that a prohibition on “sex” discrimination included discrimination against “gays and lesbians,” for they were considered mentally ill and abnormal at the time of Title VII’s enactment in 1964. *Id.* at 1766–73 (Alito, J., dissenting).

153. There is not consensus concerning whether “Native American” or “American Indian” is preferred. Because the respondent Navajo Nation uses the term “Indian,” we have used “American Indian” here.

154. *Arizona v. Navajo Nation*, 143 S. Ct. 1804, 1809 (2023).

supported tribal rights and state responsibilities in the three federal Indian law cases and gay rights in *Bostock*.

The tension between textualism and originalism is a recurring issue and contributes to the confusion regarding the choice of date.¹⁵⁵ Originalism aspires to fix statutory meaning upon enactment.¹⁵⁶ Public-meaning textualism, in contrast, allows for the possibility of evolving meaning, because of either new societal facts that change the legal analysis (as we see at work in the Gorsuch opinion in *Bostock*)¹⁵⁷ or new judicial decisions and laws (the Kavanaugh opinion in *Bostock*).¹⁵⁸ Current meaning serves the fair notice feature of the rule of law better, comporting more naturally with textualism. Originalism, in contrast, welcomes—even invites—semantic surprises.¹⁵⁹ It seeks a meaning fixed at the time of a statute’s enactment, a goal that meshes with the stability feature of the rule of law.¹⁶⁰ But, as we shall see, the newest textualists are often poor historians. In cases like *Bostock*, none of the dissenting Justices seemed to realize that the social group benefiting from the Court’s interpretation—gay men, lesbians, and transgender people—did not exist as a social group in 1964, when Title VII was first enacted.¹⁶¹ (Check your 1964 dictionaries; “gay” meant merry, and you will not find “gender identity,” “sexual orientation,” or “transgender.”)

We urge textualists to avoid anachronistic exercises that generate semantic surprises, perhaps by following a sounder approach that determines original meaning but allows statutory applications to evolve with changing social facts and norms. We discuss this *intensional meaning* approach below.

(b) *Historical Meaning: Which Year?* — If you are going to take an original public meaning approach, you need to know the year of origin—which proved a tricky proposition in *Bostock*.¹⁶² Alito’s dissent picked 1964, which stacked the textualist deck against “homosexuals,” who were

155. See Eyer, *Disentangling Textualism*, supra note 145, at 119.

156. See Eyer, *Statutory Originalism*, supra note 146, at 89–90.

157. 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, 1564–70 (2021) [hereinafter Eskridge et al., *The Meaning of Sex*] (describing how evolving social facts, or “societal dynamism,” explain why Title VII should protect homosexual and transgender employees in 2023 even if it would not have in 1964).

158. See *id.* at 1570–73 (describing “normative dynamism,” which explains how changing norms can change legal meaning).

159. See Lawrence B. Solum, *Surprising Originalism: The Regula Lecture*, 9 *ConLawNOW* 235, 241–45 (2018) (providing examples of how the original meanings of certain constitutional text no longer conform to current understandings).

160. See Lawrence B. Solum, *The Constraint Principle: Original Meaning and Constitutional Practice* 66–67 (Apr. 3, 2019), <https://ssrn.com/abstract=2940215> [<https://perma.cc/9LBR-XMQM>] (unpublished manuscript) (describing the rule of law argument in favor of the originalist “Constraint Principle”).

161. See Eskridge et al., *The Meaning of Sex*, supra note 157, at 1561–64.

162. See Eskridge & Nourse, supra note 14, at 1768–77.

considered presumptive criminals, psychopaths, and even child molesters in American public culture before the 1968 Stonewall protests.¹⁶³ But the defendant in *Bostock* was Clayton County, Georgia, a government employer not covered by Title VII until its 1972 Amendments¹⁶⁴—by which point thousands of gay people had streamed out of their closets, renounced antigay stigmas, and demanded equal treatment. Also, Alito viewed § 703(m) as the key provision in play—but that was not part of Title VII until 1991.¹⁶⁵ So what year is the observation point for “original” public meaning? We don’t see how it’s 1964.

Choosing a year was an even bigger problem for the textualists dissenting in *McGirt* and constituting the majority in *Castro-Huerta*. The *McGirt* dissent and *Castro-Huerta* majority opinion identified neither the actual date that Congress disestablished the Muscogee Reservation (well, sometime between 1890 and 1906¹⁶⁶) nor the date that Congress dislodged the traditional rule against applying state criminal law to crimes committed by Indians on reservations (well, sometime in the second half of the nineteenth century¹⁶⁷). But the case represented an unusual textualist battleground because both sides relied heavily on extratextual evidence rather than focusing closely on statutory language as in other cases. Ultimately, the textualists-minus-Gorsuch could not identify a disestablishing statute or a framework law for crimes on a reservation apart from the General Crimes Act of 1834, which supported Gorsuch’s argument.

McGirt, *Castro-Huerta*, and *Bostock* illustrate how choice of text and choice of date often interact for statutes that have been periodically amended—especially laws affecting marginalized groups—when legislative and public attitudes have shifted over time.

(c) *Extensional vs. Intensional Meaning*. — If the textualist Justice decides to valorize original meaning and determines the proper date for inquiry, they still face a methodological question that divided the *Bostock* Justices: How does the judge analyze the historical materials in light of the chosen theory of meaning? In *Bostock*, Alito sought original meaning through a time machine: How would the 1964 legislator or ordinary citizen have applied just-enacted Title VII to the precise facts of the current case? Linguists call this an *extensional* approach.¹⁶⁸ Thus, Alito viewed the interpretive question as whether people in 1964 would believe that firing a “homosexual” would be “because of sex” and therefore actionable

163. See Eskridge et al., *The Meaning of Sex*, supra note 157, at 1560–70.

164. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended at 42 U.S.C. § 2000e (2018)).

165. Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 107(a), 105 Stat. 1071, 1075 (codified at 42 U.S.C. § 2000e-2(m)).

166. See *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2490–91 (2020) (Roberts, C.J., dissenting).

167. See *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2493 (2022).

168. Eskridge et al., *The Meaning of Sex*, supra note 157, at 1526.

under Title VII. He concluded that the American people would have been “shocked” by such a law¹⁶⁹ and that protecting “homosexuals” from discrimination was the last thing Congress would have adopted that year.¹⁷⁰

For older statutes, the extensional inquiry is exceedingly difficult. “The past is a foreign country: [T]hey do things differently there.”¹⁷¹ Contrary to Alito’s analysis, “gay men and lesbians” were not a social group Americans (including “homosexuals”) would have recognized in 1964. “Gay” meant happy or merry; “sexual orientation” was not a widely understood concept in our 1964 public culture.¹⁷² Alito’s well-researched time machine could not escape serious anachronism—and not just because he and his clerks did not appreciate the historical method.¹⁷³ The Congress enacting and the public receiving Title VII in 1964 would, literally, not have understood the issue posed by Gerald Bostock in 2020. His social group (“gay men and lesbians”) had no name in 1964 because that population did not exist; by 2020, the “homosexuals and other sex perverts”¹⁷⁴ of the 1960s had been overtaken by a new identity that defines a much-expanded and normatively acceptable population today. “Sex” and “gender” are words that operate in such a different social climate today that the “sex discrimination argument for gay rights” was unintelligible in 1964.

For these reasons, the categorical method followed by Gorsuch—what linguists call an *intensional* approach¹⁷⁵—is a better way to explore original public meaning: What was the linguistic concept or principle embedded

169. See *Bostock v. Clayton County*, 140 S. Ct. 1731, 1767–73 (2020) (Alito, J., dissenting); accord *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 158–60 (2d Cir. 2018) (en banc) (Lynch, J., dissenting) (“There is no allegation in this case, nor could there plausibly be, that the defendant discriminated against Zarda because it had something against *men*, and therefore discriminated not only against men, but also against anyone, male or female, who associated with them.”).

170. *Bostock*, 140 S. Ct. at 1767–77 (Alito, J., dissenting); accord *Zarda*, 883 F.3d at 139–40 (Lynch, J., dissenting) (“Discrimination against gay women and men . . . was not on the table for public debate.”).

171. L.P. Hartley, *The Go-Between* 3 (1953).

172. See Eskridge et al., *The Meaning of Sex*, supra note 157, at 1554–58, 1561–64.

173. For criticisms of originalist efforts in constitutional law, see generally Jonathan Gienapp, *Historicism and Holism: Failures of Originalist Translation*, 84 *Fordham L. Rev.* 935 (2015); Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, the Poverty of Public Meaning Originalism*, 48 *San Diego L. Rev.* 575 (2011).

174. Subcomm. on Investigations of the Comm. on Expenditures in the Exec. Dep’ts, *Employment of Homosexuals and Other Sex Perverts in Government*, S. Doc. No. 81-241, at 1 (2d Sess. 1950).

175. See Eskridge et al., *The Meaning of Sex*, supra note 157, at 1526; Stefan Th. Gries, Brian G. Slocum & Kevin Tobia, *Corpus-Linguistic Approaches to Lexical Statutory Meaning: Extensionalist vs. Intensionalist Approaches*, 4 *Applied Corpus Linguistics* (forthcoming 2024) (manuscript at 14–16), <https://ssrn.com/abstract=4568238> [<https://perma.cc/GW5V-A5R7>].

in the statute in 1964.¹⁷⁶ Gorsuch read the original materials to suggest that Americans would have understood the point of Title VII to assure individuals that their “sex” would not be a reason for employers to fire or otherwise discriminate against them. The lower courts that had followed such an intensional approach found elimination of rigid gender roles to be the conceptual object of the statutory scheme.¹⁷⁷ On this intensional approach, what matters is the original concepts, not the original expected applications: Even if no person would have expected in 1964 that Title VII would apply to *Bostock*'s 2020 circumstances, Title VII's original meaning prohibited the discrimination that Bostock faced.

CHOICE 3: COMPOSITIONAL VS. HOLISTIC ANALYSIS

Whether textualist Justices are searching for historical or current meaning (Choice 2), they must decide how to parse the text they have chosen. Here, too, the newest textualists do not speak with one voice, and each Justice waffles from case to case. Gorsuch and Thomas typically approach texts by applying what linguists would term a narrow *compositional* approach: Define each word separately, and then put them together to determine meaning.¹⁷⁸

A compositional linguistic analysis was the basis for Gorsuch's majority opinion in *Niz-Chavez v. Garland*.¹⁷⁹ The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) authorizes the federal government to allow undocumented immigrants to stay in this country if they persuade officials of exceptional circumstances and maintain continuous presence here for at least ten years.¹⁸⁰ The ten-year clock stops when such an immigrant is served with a “notice to appear” for a deportation proceeding; the notice must provide the time and place of the immigrant's hearing, their rights, and other specified information.¹⁸¹ Augusto Niz-Chavez was served with a notice to appear before the ten-year

176. Using similar reasoning, Robert Bork argued that *Brown v. Board of Education* was supported by original understanding:

Since equality and segregation were mutually inconsistent, though the ratifiers did not understand that, both could not be honored. When that is seen, it is obvious the Court must choose equality and prohibit state-imposed segregation. The purpose that brought the fourteenth amendment into being was equality before the law, and equality, not separation, was written into the text.

Had the *Brown* opinion been written that way, its result would have clearly been rooted in the original understanding . . .

Robert Bork, *The Tempting of America* 82 (1989).

177. See *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 120–22 (2d Cir. 2018) (en banc) (Katzmann, C.J.); *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 345 (7th Cir. 2017) (en banc) (Wood, C.J.).

178. Eskridge et al., *The Meaning of Sex*, supra note 157, at 1519.

179. See 141 S. Ct. 1474, 1480–82 (2021).

180. See 8 U.S.C. § 1229b(b)(1) (2018).

181. *Id.* § 1229b(d)(1).

cutoff, but the government failed to provide all the statutory information in that notice—so it supplied the missing information in a second notice.¹⁸² Although Niz-Chavez still had not reached ten years, his counsel maintained that the stop-time was not triggered until a *single* notice included *all* the required information.¹⁸³

Gorsuch agreed, based on a word-by-word parsing of the provision, that “written notice (in this section referred to as a ‘notice to appear’) shall be given” to the immigrant with the required information.¹⁸⁴ Hyperfocusing on the article “a,” which usually means “one,” Gorsuch reasoned that all of the required information must be in a single notice, “and not a mishmash of pieces with some assembly required.”¹⁸⁵ The Government responded that a “written notice” might be a sequence of communications, and its statutory duty is satisfied if the various communications, together, provide the required information.¹⁸⁶ No, replied Gorsuch: “The singular article ‘a’ thus falls outside the defined term (‘notice to appear’) and modifies the entire definition.”¹⁸⁷ Thus, “even if we were to do exactly as the government suggests and substitute ‘written notice’ for ‘notice to appear,’ the law would still stubbornly require ‘a’ written notice containing all the required information.”¹⁸⁸ With tongue firmly in cheek, Gorsuch concluded: “Admittedly, a lot here turns on a small word.”¹⁸⁹

Kavanaugh’s dissenting opinion took a different approach to reading the provision. As a matter of “common sense,” Kavanaugh wrote, the statutory definition of a “notice to appear” that stops the clock only requires that it (1) be “written,” (2) be “given” to the immigrant, and (3) provide all the required information.¹⁹⁰ Reading the clause as a whole, Kavanaugh argued that just as “a job application” can be submitted in installments, so too can “a notice to appear” be a series of documents. Linguists would call his reasoning a *social, holistic, or non-compositional* approach to meaning: How would an ordinary speaker or reader understand the clause as a whole?¹⁹¹ The same division occurred during the previous Term in *Bostock*, in which Gorsuch followed a compositional approach to Title VII, while Kavanaugh and Alito took a social or holistic one.¹⁹² Although Thomas strongly favors the compositional

182. See *Niz-Chavez*, 141 S. Ct. at 1479.

183. *Id.*

184. *Id.* (citing 8 U.S.C. § 1229b(a)(1)).

185. *Id.* at 1480.

186. *Id.* at 1481.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at 1488–93 (Kavanaugh, J., dissenting).

191. Eskridge et al., *The Meaning of Sex*, *supra* note 157, at 1519.

192. Compare *Bostock v. Clayton County*, 140 S. Ct. 1731, 1739 (2020), with *id.* at 1766 (Alito, J., dissenting), and *id.* at 1834 (Kavanaugh, J., dissenting).

approach when he authors opinions, he joined the Alito dissent in *Bostock*.¹⁹³

Even for Thomas and Gorsuch, policy concerns can override the compositional approach. For instance, they do not follow a compositional approach whenever an agency's authority to take some regulatory action involves a "major question" of "vast 'economic and political significance.'"¹⁹⁴ In such cases, the normal compositional reliance on semantic meaning gives way to a wide-ranging, extratextual search for particularly specific indications that Congress intended to grant the agency such power.

Choice 8 discusses the "major questions" doctrine in more detail. For now, consider the Court's per curiam judgment in *NFIB v. OSHA*.¹⁹⁵ OSHA has statutory authority to ensure workplace safety, including the power to issue "emergency temporary standards" upon a showing that "employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards" and that the "emergency standard is necessary to protect employees from such danger."¹⁹⁶ In 2021, OSHA issued emergency standards for large employers to protect their workers against COVID-19, an agent "determined to be toxic," based upon expert findings that vaccination mandates were "necessary to protect employees from such danger" of workplace infection.¹⁹⁷ Thomas and Gorsuch abandoned their usual compositional approach and joined the per curiam opinion that refused to credit the ordinary meaning of the words chosen by Congress and focused on the legislature's larger policy concerns, whereby an "occupational safety" agency ought not be leading a "public health" campaign.¹⁹⁸ (Never mind that Congress named the agency the Occupational Safety and Health Administration.)

CHOICE 4: ORDINARY VS. TERM-OF-ART MEANING

In his treatise with Bryan Garner, the late Justice Scalia admonished judges to give texts their "fair meaning" (the meaning an ordinary English speaker would derive from the text) as the default rule.¹⁹⁹ Following ordinary meaning (rather than specialized meaning) arguably advances

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

194. *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (quoting *Util. Air Regul. Grp. v. Env't Prot. Agency*, 573 U.S. 302, 324 (2014)).

195. *NFIB v. Occupational Safety & Health Admin.*, 142 S. Ct. 661 (2022) (per curiam).

196. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, § 6(c)(1), 84 Stat. 1590, 1596 (codified as amended at 29 U.S.C. § 655(c)(1) (2018)).

197. *Id.*

198. *NFIB*, 142 S. Ct. at 665 ("The Act empowers the Secretary to set *workplace* safety standards, not broad public health measures.").

199. Scalia & Garner, *supra* note 7, at 69; accord Brian G. Slocum, *Ordinary Meaning: A Theory of the Most Fundamental Principle of Legal Interpretation* 2–3 (2015) (discussing the judicial commitment to the ordinary meaning doctrine for legal interpretation).

textualism's claim to simplicity and predictability. Some recent textualists have proposed a further connection between ordinary meaning and democracy. According to Barrett, textualists "view themselves as agents of the people rather than of Congress and as faithful to the law rather than to the lawgiver."²⁰⁰ On this new line of textualist argument, the ordinary meaning rule serves a notice function that helps maintain faithful agency to the people.²⁰¹

Statutes, however, are full of technical legal terms,²⁰² and the rhetorical appeal of "just ordinary meaning, thank you" erodes when you actually examine textualist analyses. Most of the Scalia–Garner "canons," and most of the cases analyzed in their treatise, focus on "term-of-art meaning," namely, the meaning a specialized term would have to an expert community such as lawyers or scientists.²⁰³ And statutes are regularly addressed to such expert audiences.²⁰⁴

Some textualists have addressed the tension between textualism as democratic interpretation and the often-esoteric nature of statutory contexts, although they have suggested different resolutions. Gorsuch concedes that "[s]ometimes Congress's statutes stray a good way from ordinary English" but nevertheless insists that "affected individuals and courts alike are entitled to assume statutory terms bear their ordinary meaning."²⁰⁵ Somewhat differently, Barrett suggests that ordinary meaning ought to be understood as the meaning the "ordinary lawyer" would draw from a statute.²⁰⁶ Because technical meanings are common, ordinary people receive fair notice only by consulting an attorney.

200. Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 *U. Chi. L. Rev.* 2193, 2194–95 (2017) [hereinafter Barrett, *Congressional Insiders and Outsiders*]; accord *District of Columbia v. Heller*, 554 U.S. 570, 576–77 (2008) ("In interpreting this text, we are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" (alteration in original) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931))).

201. On textualism, democracy, and populism, see Anya Bernstein & Glen Staszewski, *Judicial Populism*, 106 *Minn. L. Rev.* 283, 309–18 (2021); Jamal Greene, *Selling Originalism*, 97 *Geo. L.J.* 657, 711–13 (2009); cf. Mitchell N. Berman, *Originalism Is Bunk*, 84 *N.Y.U. L. Rev.* 1, 8 (2009) (expressing concern that originalism is used to pander to populism).

202. See Frederick Schauer, *Is Law a Technical Language?*, 52 *San Diego L. Rev.* 501, 508 (2015).

203. Scalia & Garner, *supra* note 7, at 69–240, 320–26.

204. See Anita S. Krishnakumar, *Meta Rules for Ordinary Meaning*, 134 *Harv. L. Rev. Forum* 167, 170–71 (2021), <https://harvardlawreview.org/wp-content/uploads/2021/01/134Harv.L.-Rev.-F.-167.pdf> [<https://perma.cc/8Y6X-7AQY>] ("[F]or statutes that govern cost-shifting among litigants, jurisdiction or other matters of court procedure, or remedies, the relevant audience or 'ordinary reader' may . . . be judges."); David Louk, *The Audiences of Statutes*, 105 *Cornell L. Rev.* 137, 184–86 (2019) (describing tax law as a statutory field that targets industry professionals as the relevant audience).

205. *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1481–82 (2021).

206. Barrett, *Congressional Insiders and Outsiders*, *supra* note 200, at 2209.

The dialectic relationship between ordinary and technical meaning generates drama when textualists reach Choice 4 and come to different conclusions about which meaning to privilege. As an example, consider *HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Ass'n*.²⁰⁷ When Congress amended the Clean Air Act to add the Renewable Fuel Program (RFP) in 2005, it gave small refineries a temporary exemption from compliance with the program.²⁰⁸ The Environmental Protection Agency (EPA) was vested with authority to grant “extension[s] of the exemption” by reason of “disproportionate economic hardship.”²⁰⁹ The issue in *HollyFrontier* was whether small refineries that once had exemptions and then lost them could apply for extensions.²¹⁰ Barrett, in a dissenting opinion, demonstrated that “extension” was “most naturally read” to extend a temporal deadline without a gap between the expiring deadline and a new starting date.²¹¹ For the natural reading of “extension,” Barrett relied on a suite of dictionaries.²¹²

Although Barrett made a compelling ordinary meaning case,²¹³ Gorsuch’s majority opinion followed Barrett’s own law review article and ruled that a proper textualism did not close the door on EPA’s practice of allowing an equitable exemption even after the small refinery’s exemption had lapsed.²¹⁴ Under federal statutory law, he argued, “extension” is a term of art that can be deployed after an exemption had lapsed.²¹⁵ Although the majority staunchly claimed that it was rendering the term’s “ordinary or natural meaning,”²¹⁶ its cogency rested largely on its citation to sources (like *Black’s Law Dictionary*, cases, and statutes) that rendered term-of-art meanings.²¹⁷ Thus, despite its claims, the Court privileged technical, rather than ordinary, meaning.

Although he was trying to have his cake (populist ordinary meaning) and eat it too (relying on more cogent sources), Gorsuch was right to consider legal meaning because the statutory context will in many cases

207. 141 S. Ct. 2172 (2021).

208. Energy Policy Act of 2005, Pub. L. No. 109-58, § 1501(a), 119 Stat. 594, 1073–74 (codified as amended at 42 U.S.C. § 7545(o)(1)(D), (9) (2018)).

209. 42 U.S.C. § 7545(o)(9)(B)(i).

210. *HollyFrontier*, 141 S. Ct. at 2175.

211. *Id.* at 2184–87 (Barrett, J., dissenting).

212. *Id.* at 2184–85.

213. See *id.*

214. See *id.* at 2177–78 (majority opinion).

215. *Id.* at 2177–79. Gorsuch cited a number of examples to support his reading of “extension,” such as 28 U.S.C. § 2107(c) (2018) and Fed. R. Civ. P. 6(b)(1), as well as statutes providing an “extension” of benefits that previously expired, including the Consolidated Appropriations Act, Pub. L. No. 116-260, § 203, 134 Stat. 1182, 1953 (2021), and Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 2114, 134 Stat. 281, 334 (2020).

216. *HollyFrontier*, 141 S. Ct. at 2176 (internal quotation marks omitted) (quoting *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 476 (1994)).

217. See *id.* at 2178.

support it as the correct meaning. For instance, although the textualists authoring opinions in *Bostock* disagreed sharply about how to read “because of . . . sex,” they all accepted the fact that “because of” entailed but-for causation, as established by statutory precedents and the common law.²¹⁸ When ordinary and term-of-art meanings diverge, as they probably did in *HollyFrontier*, statutory purpose(s) and legislative deliberations will likely indicate the correct meaning. Dogmatic insistence on ordinary meaning is often unwarranted.

The criminal law might be a special case because of the fair notice feature of the rule of law. If the lenity canon is grounded in due process notice,²¹⁹ then judges ought to focus on the ordinary meaning of the particular provision standing alone. But lenity is also grounded in separation of powers,²²⁰ and that suggests the value of legal meaning, given Congress’s professional drafting staff. Consider the application to *Wooden v. United States*, in which Kagan’s majority opinion relied mostly on the ordinary meaning of “occasion” but confirmed that analysis by referring to Congress’s and the Solicitor General’s deployment of the word as a term of art with specific legal meaning.²²¹

CHOICE 5: WHICH LINGUISTIC EVIDENCE AND SOURCES

Once Choices 1–4 have been made, the textualist gets down to the nitty-gritty: What linguistic *evidence* and *sources* should the judge consult to determine the meaning of words or phrases in a statute? Following Scalia, the Justices increasingly engage in thoughtful speculation about the meaning statutory terms and phrases would convey to the ordinary speaker.²²² Kagan’s *Wooden* opinion started its discussion of “occasion” with thought experiments.²²³ If a defendant punched A in the face during a bar-room brawl, and then gut-punched B before kneeling C to the ground, have the defendant’s crimes occurred on three different “occasions”?²²⁴

218. Compare *Bostock v. Clayton County*, 140 S. Ct. 1731, 1739–40 (2020) (majority opinion) (pointing to precedent that establishes but-for causation as the standard for the phrase “because of”), with *id.* at 1775 (Alito, J., dissenting, joined by Thomas, J.) (“The standard of causation in these cases is whether sex is necessarily a ‘motivating factor’ when an employer discriminates on the basis of sexual orientation or gender identity. . . . The Court’s extensive discussion of causation standards is so much smoke.” (quoting 42 U.S.C. § 2000e-2(m) (2018))).

219. See, e.g., Shon Hopwood, *Restoring the Historical Rule of Lenity as a Canon*, 95 N.Y.U. L. Rev. 918, 934 (2020) (discussing how the lenity canon advances due process principles of fair warning).

220. *Id.* at 933.

221. See 142 S. Ct. 1063, 1069–70, 1072–74 (2022).

222. See, e.g., *id.* at 1069 (referring to how “an ordinary person (a reporter; a police officer; yes, even a lawyer) might describe” the defendant’s conduct).

223. *Id.*

224. *Id.* at 1070.

Inspired by Scalia's colorful style, the Justices have made thought experiments and homey examples a staple of textualist debates within the Court, but they have often reasoned in ways that are hard to generalize to the American population. What might be reasonable to judges who graduated from tony colleges and law schools might not reflect the ordinary meaning comprehended by the average American or the typical legislator. Consider Barrett's repeated references to "common sense" (six times!) in reasoning that a "reasonably informed interpreter would expect Congress to legislate on 'important subjects' while delegating away only 'the details.'"²²⁵ What if Congress considers it "important" to vest an agency with updating power so that its statutes can address unforeseen circumstances, such as a once-in-a-century pandemic?

Other textualists have shown skepticism of "common sense" examples. Consider *Dubin v. United States*, a case concerning the meaning of "uses" (with respect to whether a defendant "uses" another person's identity in relation to certain crimes).²²⁶ Sotomayor's 9-0 majority opinion relied on various intuitive hypotheticals about "uses."²²⁷ Gorsuch's concurrence worried that it is possible to "spend a whole day cooking up scenarios—ranging from the mundane to the fanciful—that collapse even your most basic intuitions Try making up some of your own and running them by a friend or family member. You may be surprised at how sharply instincts diverge."²²⁸

Gorsuch's worries about intuitive hypotheticals in *Dubin* apply broadly. The ability to *craft* one intuitive hypothetical (and ignore others) gives textualists enormous flexibility. Moreover, the Justices' views about an example may not be representative, especially insofar as their intuitions may register in an "upper-class, judicially-inflected accent."²²⁹ This possibility puts judicial reliance on the Justices' own intuitions in tension with the Court's "populist"²³⁰ appeals to ordinary people's views of law and language.²³¹ Finally, those with divergent intuitions may not realize it. Law and psychology have demonstrated that people

225. *Biden v. Nebraska*, 143 S. Ct. 2355, 2380–81 (2023) (Barrett, J., concurring) (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825)).

226. See 143 S. Ct. 1557, 1564 (2023).

227. See *id.* at 1563 (considering, as an example, whether a waiter who uses electronic billing (that employs the diner's name) to charge a diner for filet mignon while serving flank steak has "used" the diner's means of identification, triggering a mandatory two-year aggravated identity theft prison sentence).

228. *Id.* at 1575 (Gorsuch, J., concurring).

229. Eskridge & Nourse, *supra* note 14, at 1728.

230. See generally Bernstein & Staszewski, *supra* note 201, at 309–18 (arguing that by claiming to find the "plain meaning" of statutory text, textualist judges engage in judicial populism).

231. See Barrett, *Congressional Insiders and Outsiders*, *supra* note 200, at 2194, 2200–05 ("While textualists have not always made their assumptions clear, they approach language from the perspective of an ordinary English speaker—a congressional outsider.").

often overestimate others' agreement with their own legal interpretation.²³²

But the textualist Court has also relied on a number of other sources to determine ordinary or term-of-art meaning. In hard cases and many easier ones, there are many choices concerning which sources to emphasize and how to apply the sources to the facts of the case.

(a) *Statutory Definitions: Just a Starting Point?* — Start with something (seemingly) simple: Judges should apply statutory definitions of statutory terms. But the newest textualists sometimes pit the statutory definition against the term's ordinary meaning. Consider *Bond v. United States*.²³³ The defendant, Carol Anne Bond, was convicted of violating the Chemical Weapons Convention Implementation Act, which forbids any person to knowingly use “any chemical weapon.”²³⁴ Bond had smeared an arsenic-based compound on the mailbox and door of her neighbor who had a sexual relationship with Bond's husband.²³⁵ “Chemical weapon” is defined as “[a] toxic chemical and its precursors, except where intended for a [permissible] purpose.”²³⁶ In turn, “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.”²³⁷

Bond's use of the arsenic-based compound easily fell within the terms of the statutory definitions. Nevertheless, Roberts, writing for a 6-3 Court, ruled that Bond's conduct did not fall within the statute.²³⁸ The problem with the government's interpretation, he began, was that it was contrary to the law's *ordinary meaning*.²³⁹ Thus, Roberts approached the meaning of “chemical weapon” as though it were left undefined.²⁴⁰ He reasoned

232. Lawrence Solan, Terri Rosenblatt & Daniel Osherson, False Consensus Bias in Contract Interpretation, 108 Colum. L. Rev. 1268, 1268–69 (2008); see also Brandon Waldon, Madigan Brodsky, Megan Ma & Judith Degen, Predicting Consensus in Legal Document Interpretation, 45 Proc. Ann. Conf. Cognitive Sci. Soc'y 1101, 1101 (2023) (conceptually replicating Solan, Rosenblatt & Osherson, *supra*, and finding that a large language model (LLM) does not robustly predict interpreters' consensus). For a summary of recent empirical work related to ordinary meaning, see Kevin Tobia, Experimental Jurisprudence, 89 U. Chi. L. Rev. 735, 783–91 (2022).

233. 572 U.S. 844 (2014).

234. *Id.* at 851–53 (internal quotation marks omitted) (quoting Chemical Weapons Convention Implementation Act of 1998, Pub. L. No. 105-277, div. I, sec. 201(a), 112 Stat. 2681-856, 2681-867 (codified at 18 U.S.C. § 229(a)(1) (2018))).

235. *Id.* at 852.

236. 18 U.S.C. § 229F(1)(A).

237. *Id.* § 229F(8)(A).

238. *Bond*, 572 U.S. at 848.

239. *Id.* at 857 (citing *United States v. Bass*, 404 U.S. 336, 350 (1971)); see also *id.* at 860–62.

240. See *id.* at 861 (explaining that “[i]n settling on a fair reading of a statute, it is not unusual to consider the ordinary meaning of a defined term, particularly when there is dissonance between that ordinary meaning and the reach of the definition”).

that “as 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.’”²⁴¹

Roberts makes a nice point when he says that a chemical used as a weapon cannot always be referred to as a “chemical weapon.”²⁴² A knife that cuts butter is not necessarily a “butter knife.” But the point of a statutory definition is that the legislature has stipulated the meaning of a term (which might well differ from its ordinary meaning). Concurring in the judgment, Scalia (joined by Thomas and Alito) disagreed with the Chief Justice’s marginalization of the statutory definition (which Scalia described as “antitextualism”).²⁴³ Scalia insisted that “the ordinary meaning of the term being defined is irrelevant, because the statute’s own definition—however expansive—is utterly clear.”²⁴⁴ That statutory definition must be followed “even if it varies from that term’s ordinary meaning.”²⁴⁵

Yet Scalia sometimes chose ordinary or term-of-art meaning over statute-defined meaning. For instance, in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,²⁴⁶ the Court interpreted the Endangered Species Act of 1973 (ESA), which makes it unlawful for any person to “take” endangered or threatened species.²⁴⁷ The ESA defines “take” to mean to “harass, harm, pursue,” “wound,” or “kill.”²⁴⁸ The Court had to determine whether “significant habitat modification or degradation where it actually kills or injures wildlife” fell within the terms of the ESA.²⁴⁹ The majority viewed the interpretive dispute as turning on the ordinary meaning of “harm” within the statutory definition of “take.”²⁵⁰ The Court thus looked, in part, to the textualist’s best friend, the dictionary, and, unsurprisingly, found a broad definition: “The dictionary definition of the verb form of ‘harm’ is ‘to cause hurt or damage to: injure.’”²⁵¹

241. *Id.* at 860 (emphasis added).

242. *See id.*

243. *Id.* at 868 (Scalia, J., concurring in the judgment).

244. *Id.* at 871.

245. *Id.* (emphasis omitted) (internal quotation marks omitted) (quoting *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000)).

246. 515 U.S. 687, 708 (1995).

247. 16 U.S.C. § 1538(a)(1) (2018).

248. *Id.* § 1532(19).

249. *Babbitt*, 515 U.S. at 690 (internal quotation marks omitted) (quoting 50 C.F.R. § 17.3 (1994)).

250. *See id.* at 697 (referring to an “ordinary understanding of the word ‘harm’”).

251. *Id.* at 697 (quoting *Harm*, Webster’s Third New International Dictionary 1034 (1966)). The Court also relied on other interpretive evidence, including the legislative history of the ESA. *See id.* at 704–08.

In dissent, Scalia focused on the statutory term “take” instead of “harm” and relied on that term’s common law meaning.²⁵² Scalia’s common law meaning was narrower than the ordinary meaning of the terms used in the statutory definition.²⁵³ He maintained that the “[t]he tempting fallacy—which the Court commits with abandon—is to assume that *once defined*, ‘take’ loses any significance, and it is only the definition that matters.”²⁵⁴

The contrast between Scalia’s views about statutory definitions in *Bond* and *Babbitt* illustrates the breadth of linguistic choice for textualists. Not only can the textualist choose between ordinary and term-of-art meanings of statutory terms, but in many cases the textualist insists on choosing how much, if at all, to focus on statutory definitions. Definitions ought to control, and they ought to be read in light of congressional purposes and deliberations.

For that reason, Kavanaugh’s interpretation of the Clean Water Act in *Sackett v. EPA* is commendable.²⁵⁵ The CWA as amended defines “navigable waters,” admittedly a legal term of art, to mean “waters of the United States,”²⁵⁶ including “wetlands adjacent” to certain bodies of water.²⁵⁷ As a matter of “ordinary parlance” (the majority’s purported test), “waters” and “adjacent wetlands” are vastly broader terms than the traditional court-understood meaning of “navigable waters.” Alito, for the Court, cited *Bond* for the proposition that the potentially broad statutory definition ought to be narrowed in light of the traditional judicial view.²⁵⁸ This strikes us as contrary to textualism’s focus on the semantic meaning of the statutory text as well as undemocratic.

(b) *Dictionaries & Corpus Linguistics: Definition Shopping*. — Federal judges increasingly rely on dictionary definitions to determine the ordinary meaning of statutory words. In doing so, they exercise considerable discretion because they make multiple choices unconstrained by metarules governing dictionary use.²⁵⁹ Since 2010, Supreme Court opinions have cited dozens of different legal dictionaries (e.g., *Black’s*, *Ballentine’s*, *Bouvier’s*) and ordinary dictionaries (e.g., *Heritage*, *Oxford*, *Funk & Wagnalls*, *Merriam-Webster*), many of which

252. See *id.* at 717 (Scalia, J., dissenting).

253. See *id.* at 718.

254. *Id.* (citation omitted).

255. 143 S. Ct. 1322, 1363–64 (2023) (Kavanaugh, J., concurring in the judgment).

256. 33 U.S.C. § 1362(7) (2018).

257. *Id.* § 1344(g)(1).

258. *Sackett*, 143 S. Ct. at 1337.

259. See, e.g., Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 *Ariz. St. L.J.* 275, 297–300 (1998) (describing the impact of the choice of dictionary in interpretation); Brudney & Baum, *supra* note 13, at 493 (arguing that dictionaries have been “overused and often abused by the Court”).

have multiple editions.²⁶⁰ Once a judge chooses a specific dictionary (and a specific edition of that dictionary), the judge chooses a definition, often among many possibilities (as is the case for common statutory words). In addition to choosing the dictionary (or several), the correct edition, and the definition on point—all offering possibilities for gerrymandering—the court also might edit the chosen definition.²⁶¹

For a recent example, consider the transit mask mandate case.²⁶² Most of this Article's analysis focuses on the Supreme Court, but this district court opinion offers an instructive example. The Supreme Court's open-ended textualism inspires and facilitates flexibility for modern textualists in lower courts. This theoretical flexibility, coupled with district courts' eagerness to issue decisions with nation-wide consequences, has created a perfect storm of textualist unpredictability throughout the judiciary. In the transit mask mandate case, for example, the district court's textualist opinion engaged in egregious dictionary and corpus linguistic shopping. The decision had nationwide impacts, vacating the Biden Administration's mandate to wear masks in some transportation settings in extreme pandemic circumstances. The Eleventh Circuit has since vacated the district court's opinion.²⁶³

In the transit mask mandate case, a Florida district court (the judge a former law clerk to Thomas²⁶⁴) ruled that the Centers for Disease Control and Prevention (CDC) did not have the statutory authority to require mask wearing on mass transit as a pandemic mitigation measure.²⁶⁵ Interpreting the 1944 Public Health Service Act, the court found that the CDC's mask-wearing rule, aimed at preventing the spread of

260. Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Ordinary Meaning and Ordinary People*, 171 U. Pa. L. Rev. 365 app. at 451–55 (2023) [hereinafter Tobia et al., *Ordinary Meaning*] (presenting empirical research showing the variety of dictionaries relied upon by the Supreme Court).

261. See Nourse, *Textualism 3.0*, supra note 6, at 681–82 (comparing adding or subtracting meaning from words to gerrymandering). For a recent, high-impact example, see Stefan Th. Gries, Michael Kranzlein, Nathan Schneider, Brian G. Slocum & Kevin Tobia, *Unmasking Textualism: Linguistic Misunderstanding in the Transit Mask Order Case and Beyond*, 122 Colum. L. Rev. Forum 192, 204–08 (2022), https://columbialawreview.org/wp-content/uploads/2022/12/Gries-Kranzlein-Schneider-Slocum-Tobia-Unmasking_textualism_linguistic_misunderstanding_in_the_transit_mask_order_case_and_beyond.pdf [https://perma.cc/MKW3-3J89] (explaining a Florida district court's gerrymandering of the definition of "sanitation," which supported vacating the Biden mask mandates).

262. *Health Freedom Def. Fund, Inc. v. Biden*, 599 F. Supp. 3d 1144, 1153 (M.D. Fla. 2022) (vacating the mask mandate issued by the CDC), vacated as moot sub nom. *Health Freedom Def. Fund, Inc. v. President of U.S.*, 71 F.4th 888 (11th Cir. 2023).

263. *Health Freedom Def. Fund*, 71 F.4th at 894.

264. Kathryn Kimball Mizelle, U.S. Dist. Ct. Middle Dist. Fla., <https://www.flmd.uscourts.gov/judges/kathryn-kimball-mizelle> [https://perma.cc/WK8F-DAVN] (last visited Aug. 31, 2023).

265. *Health Freedom Def. Fund*, 599 F. Supp. 3d at 1178.

infectious diseases, was not a “sanitation” measure.²⁶⁶ The court relied on *Funk & Wagnalls* (among other dictionaries) to support its view that “sanitation[’s]” ordinary sense could not include a requirement to wear a mask during a pandemic.²⁶⁷ The court reported that “sanitation” admitted of two senses: (1) “devising and applying of measures for preserving and promoting public health” and (2) “the removal or neutralization of elements injurious to health.”²⁶⁸ According to the court, only the former sense would permit a mask-wearing rule. The court conducted a corpus linguistic analysis and found what it was looking for: The second definition is more common and thus the ordinary sense of “sanitation.”²⁶⁹

There are several problems with this use of the dictionary. The court did not comment on the guidance *Funk & Wagnalls* provides about how to read its dictionary: “If a word has two or more meanings, the most common meaning has been given first.”²⁷⁰ Thus, if the court’s question is whether sense (1) or (2) is the more common sense of “sanitation,” the dictionary explains that (1) is more common. This is the definition that would straightforwardly include a pandemic-related mask-wearing regulation.

All this said, it is more plausible that the dictionary lists *one* long definition, not multiple separate definitions, of “sanitation.” The “sanitation” definition in *Funk & Wagnalls* is unnumbered: “The devising and applying of measures for preserving and promoting public health; the removal or neutralization of elements injurious to health; the practical application of sanitary science.”²⁷¹ Compare this to the definition of “sanity” on the same page of *Funk & Wagnalls*: “**1.** The state of being sane; especially soundness of mind; perfect control of one’s sense, reason, and will. See Insanity. **2.** [Archaic.] Physical health.”²⁷² Such bold numbers typically indicate separate senses, while the semicolons separate clauses describing the same sense. The definition of “sanitation” has no such bold numbering to distinguish separate senses. A different version of *Funk & Wagnalls* explains this system: “If the term has two or more different meanings, each definition is set off unmistakably by a bold-faced figure, as **1 . . . 2 . . . 3.**”²⁷³

266. *Id.* at 1163.

267. *Id.* at 1158–59.

268. *Id.* (internal quotation marks omitted) (quoting Sanitation, 2 *Funk & Wagnalls*, *New Standard Dictionary of the English Language* (Isaac K. Funk, Calvin Thomas & Frank H. Vizetelly eds., 1946)).

269. *Health Freedom Def. Fund*, 599 F. Supp. 3d at 1160.

270. 1 *Funk & Wagnalls: New Standard Dictionary of the English Language*, at xiii (Isaac K. Funk, Calvin Thomas & Frank H. Vizetelly eds., 1946).

271. Sanitation, *id.*

272. Sanity, *id.*

273. *Funk & Wagnalls: New Practical Standard Dictionary of the English Language*, at vii (Charles E. Funk ed., 1946).

Thus, the court blatantly gerrymandered what was most likely one long definition, eliminating the last third (about sanitary science) and splitting the first two clauses into separate definitions.²⁷⁴ Then, the court overlooked the dictionary's instructions about which sense is most common, instead conducting its own corpus linguistics analysis, albeit without following the statistical protocols for such analysis. In sum, the court's textualist analysis of "sanitation" turned on a judicially crafted definition (the removal or neutralization of elements injurious to health) that reflected only a third of the actual dictionary definition. And the court's dictionary gerrymandering helped to invalidate an important national policy adopted by democratically accountable officials.

Textualists also rely on dictionaries to launder technical meaning under cover of ordinary meaning. Thus, the Justices rely on (technical) legal dictionaries even when claiming to determine "ordinary meaning."²⁷⁵

One of the many limitations of dictionaries and statutory definitions is that they generally define words and not word clusters (never mind long clauses). This obvious limitation and the new-textualist impulse to turn statutory interpretation into an apparently empirical (rather than normative) enterprise has generated interest in novel sources of linguistic data, particularly corpus linguistics,²⁷⁶ which treats collections of naturally occurring text as data. By searching enormous databases drawing from newspapers, magazines, and novels, judges can use corpus linguistics to see how word clusters and phrases have been used 100 years ago, 50 years ago, or today.

Dozens of lower court decisions have relied on corpus linguistics,²⁷⁷ and it has attracted the attention of the Supreme Court's newest textualists. For example, in his concurring opinion in *Facebook v. Duguid*, Alito proposed that "[t]he strength and validity of an interpretive canon is an empirical question, and perhaps someday it will be possible to evaluate these canons by conducting . . . a corpus linguistics analysis, that is, an analysis of how particular combinations of words are used in a vast

274. *Health Freedom Def. Fund*, 599 F. Supp. 3d at 1158; see also Gries et al., *supra* note 261, at 205–06.

275. See, e.g., *Hall v. United States*, 566 U.S. 506, 511–12 (2012) (citing *Black's Law Dictionary* for the "plain and natural reading" of "incurred by the estate"); *Johnson v. United States*, 544 U.S. 295, 315 (2005) (Kennedy, J., dissenting) (citing *Black's* definition of "discover" as its "ordinary meaning"); *Olympic Airways v. Husain*, 540 U.S. 644, 654–55 (2004) (citing *Black's* definition of "event" as the "ordinary" definition of the term).

276. Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 *Yale L.J.* 788, 795 (2018).

277. See Kevin Tobia, *The Corpus and the Courts*, *U. Chi. L. Rev. Online* (2021), <https://lawreviewblog.uchicago.edu/2021/03/05/tobia-corpus/> [<https://perma.cc/U39E-ANEK>] (finding thirty cases using corpus linguistics ranging across jurisdictions from state appellate courts to federal district and circuit courts).

database of English prose.”²⁷⁸ In a dissenting opinion for another case, Thomas found corpus linguistic research valuable, as it demonstrated that people did not associate “search” with “reasonable expectation of privacy” until the phrase appeared in a 1967 Supreme Court opinion.²⁷⁹ From his originalist perspective, it was telling that the phrase did not appear in corpus searches of the papers of prominent Founders, early congressional documents and debates, collections of early American English texts, or early American newspapers.²⁸⁰

There are many choices facing a textualist inclined to use legal corpus linguistics or another large database: Which databases should the textualist search? What search terms should they use? Which frequencies or patterns of ordinary usage count as evidence of ordinary meaning? There are also complex choices about how to interpret the resulting data; textualists can often support opposing conclusions from the same set of underlying corpus linguistics data.²⁸¹ Finally, there are many choices about how to square legal corpus linguistics with other sources. If corpus linguistics and dictionaries conflict, which should the textualist rely upon? While the difficulty of these questions for nonexperts may counsel against the broad judicial use of corpus linguistics, the methodology does have a role in statutory interpretation. For instance, we agree with Alito’s suggestion that more systematic research, including via corpus linguistics, should be done to test the reliability of canons that purport to show ordinary meaning.²⁸²

(c) *Semantic & Grammar Rules: Canoncopia.* — Dictionaries and definition provisions usually focus on single words, but statutory meaning requires attention to word clusters, phrases, clauses, and sentences.²⁸³ Some repeated contextual patterns are taken to trigger

278. *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1174 (2021) (Alito, J., concurring in the judgment).

279. *Carpenter v. United States*, 138 S. Ct. 2206, 2238–39 (2018) (Thomas, J., dissenting) (finding no uses of the phrase “expectation of privacy” in pre-*Katz* case reporters or early American texts).

280. *Id.*

281. See Kevin Tobia, *Dueling Dictionaries and Clashing Corpora*, 71 *Duke L.J. Online* 146, 158 (2022), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1092&context=dlj_online [<https://perma.cc/G45G-HDGN>] (arguing that legal corpus linguistics is unlikely to provide easy answers in hard cases of interpretation because opposing “moves” of legal corpus linguistic argumentation enable judges and advocates to draw opposing conclusions from the same corpus data).

282. The use of interpretive canons can differ significantly between different legal actors. Cf. 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, 1016 (2013) (demonstrating empirically that congressional staff do not follow the dictionary canon but do follow the negative implication and associated word canons).

283. See William N. Eskridge, Jr., *Interpreting Law: A Primer on How to Read Statutes and the Constitution* 44, 62 (2016) [hereinafter Eskridge, *Interpreting Law*].

regular presumptions about “ordinary meaning.”²⁸⁴ These presumptions are referred to as “textual canons.”²⁸⁵

It is no coincidence that increased judicial citation to textual canons has corresponded with the dramatic ascendancy of textualism.²⁸⁶ As semantic baselines, textual canons fit easily within textualist methodology. They are typically characterized as linguistic rules rather than rules based on legal or normative concerns.²⁸⁷ In turn, textualism is “distinctive because it gives priority to semantic context (evidence about the way a reasonable person uses words) rather than policy context (evidence about the way a reasonable person solves problems).”²⁸⁸ As then-Professor Barrett argued, it follows that “linguistic canons, which pose no challenge to legislative supremacy, are preferable to substantive canons, which do.”²⁸⁹

Identifying the set of possible canons,²⁹⁰ selecting a specific canon,²⁹¹ and applying that canon²⁹² offer numerous opportunities for interpretive choice. As Alito has observed, a textualist ought to be concerned whether

284. See Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Statutory Interpretation From the Outside*, 122 *Colum. L. Rev.* 213, 227–28 (2022) [hereinafter Tobia et al., *Statutory Interpretation From the Outside*].

285. Eskridge, *Interpreting Law*, supra note 283, at 56–84, 102–08 (identifying, explaining, and illustrating the operation of “textual canons”).

286. See Anita S. Krishnakumar & Victoria F. Nourse, *The Canon Wars*, 97 *Tex. L. Rev.* 163, 167 (2018) (concluding “[a]ffection for canons of construction has taken center stage in recent Supreme Court cases”); 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, 73 (2018) (finding in Roberts Court majority opinions, “roughly 67% of statutory issues addressed in all opinions were resolved after considering one or more interpretive canons”).

287. See 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, 1330 (2018) (distinguishing between “‘linguistic’ or ‘textual’ canons, which are presumptions about how language is used,” and “substantive” or “policy” canons, which are normative presumptions).

288. John F. Manning, *What Divides Textualists From Purposivists*, 106 *Colum. L. Rev.* 70, 70 (2006) [hereinafter Manning, *What Divides Textualists*].

289. See Barrett, *Substantive Canons*, supra note 19, at 120.

290. See Scalia & Garner, supra note 7, at xii–xvi (listing fifty-seven canons); see also Eskridge, *The New Textualism and Normative Canons*, supra note 14, at 537 (noting that at least 134 of 187 canons are “substantive”).

291. See Krishnakumar, *Dueling Canons*, supra note 111, at 909 (characterizing textualism’s preferred canons as “susceptible to dueling use” and “judicial manipulation”); Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 *Vand. L. Rev.* 395, 395 (1950) [hereinafter Llewellyn, *Remarks*] (arguing that most interpretive disputes involve conflicting canons).

292. See Tobia et al., *Statutory Interpretation From the Outside*, supra note 284, at 228–30 (explaining that once a judge determines that a canon is triggered, the judge must also apply the canon).

a particular textual canon actually reflects ordinary meaning.²⁹³ Take, for instance, the rule against surplusage. This textual canon, which presumes careful drafting by Congress such that every word must add some meaning to the statute, is often applied by textualists—even though its presumption is likely incorrect.²⁹⁴ It has never been empirically validated, and the leading study found the canon virtually unknown among congressional staff.²⁹⁵

The antisurplusage canon is arbitrarily applied and is sometimes criticized by textualists. For instance, in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, the Court relied on the rule against surplusage in finding that “harm” (one of nine verbs Congress used to define “take”) must be given a broad meaning.²⁹⁶ Scalia’s dissent indicated that such a “proposition is questionable to begin with, especially as applied to long lawyers’ listings such as this.”²⁹⁷ Yet in his 2012 treatise, Scalia conceded that the presumption against surplusage, while “not *invariably* true,” is a valid canon and that criticisms of the canon are “ill-founded.”²⁹⁸ The treatise did not, however, offer guidance to help identify when the presumption is rebutted or even offer reasons why the presumption in general is valid. The canon is thus a paradigmatic example of the undefended interpretive choices inherent in the current practice of textualism. *Sweet Home* also illustrates the disconnect between textual canons (the new-textualist doctrine) and ordinary meaning (the new-textualist metatheory). Many of the textual canons are not reliable indicia of ordinary meaning.

Even if the textual canons could reliably be tied to ordinary meaning, the new textualists’ theory is so muddled that it creates needless discretionary choice. To begin with, it remains unclear what triggers the operation of such canons. In *Yates v. United States*, for example, the plurality opinion cited the *eiusdem generis* and *noscitur a sociis* canons in restricting the meaning of the key statutory phrase “tangible object.”²⁹⁹ In a textualist dissent, Kagan (joined by Scalia, Kennedy, and Thomas) argued that the Court should not have applied the canons because

293. See *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1175 (2021) (Alito, J., concurring in the judgment) (“To the extent that interpretive canons accurately describe how the English language is generally used, they are useful tools. But they are not inflexible rules.”).

294. See Jesse Cross, *When Courts Should Ignore Statutory Text*, 26 *Geo. Mason L. Rev.* 453, 456–57 (2018) [hereinafter Cross, *Statutory Text*] (describing the rule against surplusage as “anchored in an assumption that Congress views the courts as the intended audience for every word of its statutes” and interpreting this assumption as “incorrect”).

295. Gluck & Bressman, *supra* note 282, at 934.

296. 515 U.S. 687, 698 (1995) (arguing that reluctance to treat statutory terms as surplusage supports the reasonableness of the Secretary’s interpretation).

297. *Id.* at 721 (Scalia, J., dissenting).

298. Scalia & Garner, *supra* note 7, at 176–79.

299. 574 U.S. 528, 537, 544–46 (2015) (plurality opinion) (Ginsburg, J.) (rejecting the dictionary definitions of “tangible” and “object” as separate words).

they “resolve ambiguity” rather than help determine the linguistic meaning of a provision.³⁰⁰ This ambiguity-is-required position is not new, but Kavanaugh argues that it undermines the determination of linguistic meaning.³⁰¹

A problem with the ambiguity-is-required trigger is that it creates an incoherent account of textual canons. If a textual canon helps determine the linguistic meaning of a provision, it logically should be applied *before* any determination of ambiguity.³⁰² And a textual canon that restricts the literal meaning of language, as do *eiusdem* and *noscitur*, does not resolve “ambiguity.”³⁰³ The *eiusdem* generis canon does not help a court select between competing lexical meanings (which would make a term ambiguous), but, rather, restricts a catchall to some subset of its literal meaning.³⁰⁴ Indeed, adding a triggering requirement would create an additional discretionary choice (whether “ambiguity” exists) to the existing discretionary choices described below.³⁰⁵

A second way that textual canons create discretionary choices is that applying most such canons requires the interpreter to make a normative evaluation.³⁰⁶ *Noscitur a sociis*, for example, requires the judge to determine the principle of similarity reflected in the companion terms. As an example, consider the application of these canons in *Yates* (whether a fish is a “record, document, or tangible object”). The plurality opined that the common theme linking “record, document, or tangible object” was that they were recordkeeping items that could be shredded.³⁰⁷ Instead

300. *Id.* at 564 (Kagan, J., dissenting).

301. See Kavanaugh, *Fixing Interpretation*, *supra* note 23, at 2140, 2143 (arguing that “the clarity versus ambiguity determination” is “too often a barrier to the ideal that statutory interpretation should be neutral, impartial, and predictable” among different judges). For examples treating ambiguity as a prerequisite to application of textual canons, see *United States v. Stevens*, 559 U.S. 460, 474 (2010) (noting that *noscitur a sociis* requires an ambiguous term, but finding that the term at issue was clear); Gluck & Bressman, *supra* note 282, at 924, 930; Anita S. Krishnakumar, *Longstanding Agency Interpretations*, 83 *Fordham L. Rev.* 1823, 1866 (2015) (noting that language canons should be used only when a clause is ambiguous).

302. As opposed to a substantive canon that resolves ambiguity, such as the rule of lenity.

303. See Tobia et al., *Statutory Interpretation From the Outside*, *supra* note 284, at 238 (explaining that a canon that restricts the literal meaning of language does not help a court select between competing meanings).

304. See *id.*

305. See Brian G. Slocum, *Rethinking the Canon of Constitutional Avoidance*, 23 *U. Pa. J. Const. L.* 593, 616–23 (2021) (arguing that the finding of ambiguity is subjective rather than being based on neutral linguistic principles).

306. See Eskridge, *The New Textualism and Normative Canons*, *supra* note 14, at 675 (noting that Scalia’s textualism required that judges choose from competing evidence and from canons of construction).

307. See *Yates v. United States*, 574 U.S. 528, 536 (2015) (finding that “tangible object” should be “read to cover only objects one can use to record or preserve information, not all objects in the physical world”).

of arguing about the absence of ambiguity, the dissent could have applied *noscitur a sociis* and offered a different but broader theory of similarity: All three items were potential sources of incriminating evidence that could be destroyed.³⁰⁸ If so, how does the textualist adjudicate between the two accounts? And how does the textualist make a “neutral” choice when the method requires them to deny the normativity of their selection?

A third feature of the new textualist toolkit allows for the discretionary choice to pick among applicable canons, thereby allowing a textualist judge to stay within the confines of textualism while pursuing political commitments. That is, in the hard cases, multiple canons might apply—and they will often cut in different directions. The rise of the new textualism has been accompanied by a proliferation of textual as well as substantive canons.³⁰⁹ Some of the canons directly clash with one another.³¹⁰ For example, the Scalia–Garner treatise included among its list of “valid canons” a novel series-qualifier canon, which presumes that “a modifier at the end of the list normally applies to the entire series.”³¹¹ But that new canon typically conflicts with the rule of the last antecedent, which presumes that a modifier generally refers to the nearest reasonable antecedent in the absence of a comma before the modifier.³¹² Unsurprisingly, the Court has recently debated the validity of the two conflicting canons.³¹³

Consider also the rule against surplusage and *noscitur a sociis*. The *noscitur* canon provides that the meaning of words placed together in a statute should be determined in light of the words with which they are associated.³¹⁴ The principle that context is relevant to meaning is such an obvious and broad linguistic proposition (consider context!) that one

308. Arguably, the dissent implicitly applied the canon by limiting “tangible object” to things capable of being “alter[ed], destroy[ed], mutilate[d], conceal[ed], cover[ed] up, falsifie[d],” or subject to a “false entry.” *Id.* at 555–56 (Kagan, J., dissenting).

309. See William N. Eskridge, Jr., James J. Brudney, Josh Chafetz, Philip P. Frickey & Elizabeth Garrett, *Cases and Materials on Legislation and Regulation: Statutes and the Creation of Public Policy* 1151–71 (6th ed. 2020) (identifying at least 161 different interpretive canons); Eskridge, *Interpreting Law*, *supra* note 283, at 407–45 (an even longer list of interpretive canons).

310. Llewellyn, *Remarks*, *supra* note 291, at 395.

311. Scalia & Garner, *supra* note 7, at xiii, 147.

312. See *Lockhart v. United States*, 577 U.S. 347, 363–64 (2016) (Kagan, J., dissenting); Terri LeClercq, *Doctrine of the Last Antecedent: The Mystifying Morass of Ambiguous Modifiers*, 40 *Tex. J. Bus. L.* 199, 204–05 (2004) (describing Jabez Sutherland’s creation of the rule of the last antecedent).

313. Compare *Lockhart*, 577 U.S. at 351–53 (Sotomayor, J.) (applying the rule of the last antecedent and rejecting the “series-qualifier principle”), with *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1169–72 (2021) (Sotomayor, J.) (applying the series-qualifier rule), and *id.* at 1173–75 (Alito, J., concurring) (noting the mutually negating features of the two canons). See also *United States v. Laraneta*, 700 F.3d 983, 989 (7th Cir. 2012) (Posner, J.).

314. See Scalia & Garner, *supra* note 7, at 195.

wonders whether it should qualify as a canon.³¹⁵ The noscitur canon is more contestable (and useful) when it is applied to lists. In such cases, it narrows the meaning of one of the words in the list when that word is potentially broader in meaning than the other words in the list.³¹⁶ Yet narrowing the meaning of one of the words might be in tension with the rule against surplusage, which presumes that every word adds independent meaning to a statute.³¹⁷ In such cases, the court must choose which canon to apply. This was precisely the debate in *Sweet Home*, in which the dissenters invoked noscitur to narrowly interpret the Endangered Species Act's bar to private activity that might "harm" a species and the majority responded that a narrow understanding of "harm" rendered it redundant to the eight other terms in the statutory definition of "take."³¹⁸

The new textualist debates can thus easily explode into a veritable canonicopia, as they did in *Sweet Home*. In a recent exchange, *Bittner v. United States*,³¹⁹ Gorsuch's majority opinion sharply disagreed with Barrett's dissenting opinion about which textual canons to emphasize when interpreting the central provisions of the Bank Secrecy Act of 1970. Section 5314 provides that the Secretary of Treasury shall require certain people to "keep records and file reports" when they "mak[e] a transaction or maintai[n] a relation" with a "foreign financial agency."³²⁰ Section 5321(a)(5) authorizes the Secretary to impose civil penalties for every statutory "violation."³²¹ Invoking *expressio unius*, a canon of negative implication, the majority maintained that because § 5314's mandatory disclosure provision specified only that "reports" (and not "accounts") be disclosed, § 5321's penalty provision applied only to a failure to file annual reports.³²² The dissenters responded that the "reporting" and "recordkeeping" requirements most sensibly applied to each individual account because the terms are defined elsewhere in the statute, implicitly invoking the *in pari materia* canon that "identical words used in different parts of the same statute are generally presumed to have

315. Tobia et al., *Statutory Interpretation From the Outside*, supra note 284, at 242. The basic concept, that context can help select the correct word meaning, is an uncontroversial truism of linguistics. See Nicholas Asher & Alex Lascarides, *Lexical Disambiguation in a Discourse Context*, 12 *J. Semantics* 69, 103 (1995).

316. See Tobia et al., *Statutory Interpretation From the Outside*, supra note 284, at 242.

317. See Cross, *Statutory Text*, supra note 294, at 456–57.

318. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 697–98 (1995); *id.* at 720–21 (Scalia, J., dissenting); see also supra notes 246–254 and accompanying text (discussing the *Sweet Home* case).

319. 143 S. Ct. 713 (2023).

320. 31 U.S.C. § 5314(a) (2018). The Act says that reports must contain information about the identities and addresses of participants in a transaction or relationship and a description of the transaction. *Id.* § 5314(a)(1)–(4).

321. *Id.* § 5321(a)(5)(A).

322. *Bittner*, 143 S. Ct. at 719–20.

the same meaning.”³²³ In turn, the majority buttressed its *expressio* argument with the meaningful variation canon, pointing to congressional action in 1986 that imposed penalties for willful failures to disclose “accounts,” in contrast to its 2004 imposition of penalties for failures to file “reports.”³²⁴

Bittner is an example of canoncopia, or the dueling of linguistic canons, reminiscent of other (in)famous Supreme Court cases like *Sweet Home*. One could conclude that Barrett has the better of the argument, as her view is strongly supported by the statutory text of § 5321(a)(5),³²⁵ the statutory purpose, and the amendment history, which she lucidly analyzed in her dissent. On the other hand, the majority also invoked linguistic canons and supplemented those arguments with a substantive canon, the rule of lenity, which directs that statutory ambiguities be resolved in favor of the defendant.³²⁶ Choice 10 further discusses the discretionary and normative choices inherent in substantive canons.

Are cases like *Bittner* resolvable by selecting the “most natural reading” of the statute, as the dissenters emphasized?³²⁷ A major challenge for such a position is that there are no metacanons that provide priority rules for textual canons.³²⁸ Conflicts among textual canons are thus matters of judicial discretion. In *Sweet Home*, for instance, the Court

323. *Id.* at 727 (Barrett, J., dissenting) (internal quotation marks omitted) (quoting *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005)).

324. *Id.* at 722 (explaining that in 1970, the BSA penalized willful violations; in 1986, Congress authorized penalties on a per-account basis for certain willful violations; and in 2004, Congress amended the law again to authorize penalties for nonwillful violations but without the 1986 “account” language). Gorsuch found this variation meaningful, namely, certain confirmation that Congress did not expect the new provision to apply to erroneous accounts. See *id.* at 723.

325. Section 5321(a)(5) repeatedly ties statutory “violations” to failure to disclose “accounts.” Section 5321(a)(5)(A) authorizes the Treasury Secretary to impose a civil penalty for a “violation”; § 5321(a)(5)(B) contains an exception, under which no penalty may be imposed if the “violation” is due to reasonable cause; § 5321(a)(5)(C) prescribes a higher maximum penalty if the “violation” was willful; the amount is determined in part by rules in § 5321(a)(5)(D). 31 U.S.C. § 5321(a)(5)(A)–(D). The exception in § 5321(a)(5)(B) uses the term “violation” in an account-specific way because whether reasonable cause exists depends in part on whether the “balance in the account” was properly reported for “such violation.” 31 U.S.C. § 5321(a)(5)(B)(ii). Moreover, § 5321(a)(5)(C)–(D) use the term “violation” in an account-specific way because the maximum penalty amount for a willful violation “involving a failure to report the existence of an account” is in part a function of “the balance in the account at the time of the violation.” 31 U.S.C. § 5321(a)(5)(D)(ii).

326. See *Bittner*, 143 S. Ct. at 724 (discussing how the rule of lenity also weighs against the government).

327. See *id.* at 731 (Barrett, J., dissenting) (“The most natural reading of the BSA and its implementing regulations establishes that a person who fails to report multiple accounts on the prescribed reporting form violates the law multiple times, not just once.”).

328. See Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 *Vand. L. Rev.* 647, 648 (1992) (arguing that there are no metacanons to guide judges regarding when to use canons).

privileged the presumption against surplusage over the noscitur canon,³²⁹ while Scalia in dissent privileged the noscitur canon over the presumption against surplusage.³³⁰ Both opinions offered additional reasons why their favored interpretation was the correct one, but neither could point to any authority providing a hierarchy of canons.

CHOICE 6: BROAD VS. NARROW READING

Whether the textualist follows ordinary or term-of-art meaning, per Choice 4, the semantic meanings of the relevant statutory words and phrases can be framed broadly or narrowly. This is our Choice 6. If “most interpretive questions have a right answer,” as Scalia believed,³³¹ the correct degree of semantic breadth would be an objective matter in most cases. But the things that determine semantic breadth, such as context and interpretive rules, sources, and theories, are subject to judicial choice, and are thus discretionary and contestable.

Semantic breadth can be determined in explicit and transparent ways, such as by adopting a particular theory of semantic meaning. For instance, a court could establish a presumption that the meanings of statutory terms are limited to their prototypes, thereby adopting a systematically narrow view of semantic meaning.³³² Thus, if determining the meaning of “vehicle,” the court might focus on its prototype, thereby certainly including cars and trucks but definitely not a baby stroller and perhaps not a bicycle either.³³³ In some cases, the newest textualists determine semantic breadth by reference to constitutional norms. In *Sackett v. EPA*,³³⁴ for example, Alito defended his narrow interpretation of “waters of the United States” and “adjacent wetlands” by referring to the Due Process

329. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 697–98 (1995) (explaining that the ordinary understanding and the dictionary definition of the word “harm” place a duty on respondents to avoid “habitat alteration”).

330. See *id.* at 721 (Scalia, J., dissenting) (“[T]he Court’s contention that ‘harm’ in the narrow sense adds nothing to the other words underestimates the ingenuity of our own species in a way that Congress did not.”).

331. Scalia & Garner, *supra* note 7, at 6; see also *Smith v. United States*, 508 U.S. 223, 242 (1993) (Scalia, J., dissenting); Manning, *Justice Scalia and Judicial Restraint*, *supra* note 9, at 748 (arguing that much of Scalia’s “theory of adjudication built on what he took to be a constitutionally warranted view of judicial restraint”).

332. See Joel S. Johnson, *Vagueness Avoidance*, 110 Va. L. Rev. (forthcoming 2024) (manuscript at 43–52), <https://ssrn.com/abstract=4309894> [<https://perma.cc/6RJA-2TXY>] (urging judges to interpret word meanings narrowly in order to avoid vagueness concerns).

333. Cf. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1825 (2020) (Kavanaugh, J., dissenting) (“A statutory ban on ‘vehicles in the park’ would literally encompass a baby stroller. But no good judge would interpret the statute that way because the word ‘vehicle,’ in its ordinary meaning, does not encompass baby strollers.”).

334. 143 S. Ct. 1322 (2023).

Clause and Our Federalism.³³⁵ Pitching an even narrower view, concurring Thomas invoked the original meaning of Congress's Commerce Clause authority.³³⁶ Notice, as before, how easily norms and even ideologies sneak into statutory interpretation under the new textualist method.

In other cases, the newest textualists select the semantic breadth of a term indirectly or without a lot of thought. This can be accomplished in a variety of ways, such as by choosing between focusing on a statutory word versus a phrase, exaggerating the semantic determinacy of a term, deciding whether to apply a textual canon, or exercising discretion in choosing a dictionary definition or another source of semantic meaning.

Consider the choice between word and phrasal meaning. Choice 3 addressed compositional versus holistic analysis. Even if a judge selects a compositional approach, there are different ways to view an expression's "composite parts."³³⁷ One way is to define each word individually without the influence of the other words in the provision. Another is to define a phrase as a linguistic unit so that the meanings of the words are interdependent.³³⁸ Often, textualists define words individually (and literally), but they do not invariably do so.

The classic case exemplifying the choice between word and phrasal meaning is *Smith v. United States*,³³⁹ which involved the interpretation of 18 U.S.C. § 924(c)(1)(A). That section provides for enhanced punishment of a defendant who "uses" a firearm "during and in relation to . . . [a] drug trafficking crime."³⁴⁰ In *Smith*, the defendant offered to trade an automatic weapon to an undercover officer for cocaine.³⁴¹ Textualists, including Thomas and Rehnquist, joined the Court's opinion, applying a compositional approach that highlighted the dictionary definition of "use," predictably resulting in a broad interpretation of the statute.³⁴² In one of his most celebrated dissents and an excellent example of

335. *Id.* at 1342 (explaining that a narrow view of "waters" etc. is supported by respect for state primacy in land regulation); *id.* at 1342–43 (arguing that because landowners could face criminal as well as civil liability, due process notice concerns supported a narrower, less vague interpretation).

336. *Id.* at 1345–46 (Thomas, J., concurring).

337. See M. Lynne Murphy & Anu Koskela, *Key Terms in Semantics* 36 (2010) (explaining that the principle of compositionality states that "the meaning of a complex linguistic expression is built up from the meanings of its composite parts in a rule-governed fashion").

338. There are various versions of "compositionality," with some weaker and able to take more context into account. See Zoltán Gendler Szabó & Richmond H. Thomason, *Philosophy of Language* 58 (2019) (describing various forms of compositionality, including "weak compositionality (with context)").

339. 508 U.S. 223, 225 (1993).

340. *Id.* at 227 (internal quotation marks omitted) (quoting 18 U.S.C. § 924(c)(1)(A) (2018)).

341. *Id.* at 226.

342. *Id.* at 236–37.

holistic linguistic analysis, Scalia argued that “use,” when combined with the other statutory term, “a firearm,” has a narrower meaning than “use” by itself.³⁴³ Thus, “[t]o use an instrumentality ordinarily means to use it for its intended purpose.”³⁴⁴ Consequently, “to speak of ‘using a firearm’ is to speak of using it for its distinctive purpose, i.e., as a weapon.”³⁴⁵

The word-versus-phrase debate is viewed as implicating the proper focus of ordinary meaning (as illustrated by the *Smith* opinions), thereby sidelining that the issue systematically represents a choice between a narrower (by focusing on phrases) or broader (by focusing on individual words) meaning. Thus, in *Bostock*, Kavanaugh emphasized that “courts must adhere to the ordinary meaning of phrases, not just the meaning of the words in a phrase.”³⁴⁶ Accordingly, he maintained that the focus should be on the “phrase ‘discriminate because of sex,’” rather than “sex” in isolation, and argued that the Court “dismisses phrasal meaning for purposes of this case.”³⁴⁷ But Kavanaugh did not convincingly establish a narrower meaning for “discriminate because of sex” than for “sex.” The choice was therefore not decisive because, in the Court’s view, Kavanaugh failed to “offer an alternative account about what these terms mean either when viewed individually or in the aggregate.”³⁴⁸ The Court was thus able to acknowledge without consequence that it “must be attuned to the possibility that a statutory phrase ordinarily bears a different meaning than the terms do when viewed individually or literally.”³⁴⁹

More covertly, textualists can exercise interpretive choice about semantic breadth by exaggerating the precision of word meanings. Because the ordinary meaning of a term (in the abstract) often underdetermines the precise meaning necessary to resolve interpretive disputes, judges must “precisify” the relevant statutory term based on nonlinguistic evidence such as context or their preferred result. The exercise gives the judge substantial discretion loosely bounded by ordinary meaning and is at odds with the textualist insistence on a simple, mechanical process for identifying that ordinary meaning.³⁵⁰

343. Id. at 245 (Scalia, J., dissenting).

344. Id. at 242.

345. Id. Scalia argued that, “[w]hen someone asks, ‘Do you use a cane?,’ he is not inquiring whether you have your grandfather’s silver-handled walking stick on display in the hall; he wants to know whether you *walk* with a cane.” Id. The words “as a weapon” are thus “reasonably implicit” from the context of the statute. Id. at 244.

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

347. Id. at 1834.

348. Id. at 1750 (majority opinion).

349. Id.

350. See Amy Coney Barrett, Assorted Canards of Contemporary Legal Analysis: Redux, 70 *Case W. Rsrv. L. Rev.* 855, 856 (2020).

To illustrate, recall *Wooden v. United States*.³⁵¹ At issue was the meaning of “committed on occasions different from one another” under the Armed Career Criminal Act (ACCA).³⁵² The defendant had burglarized ten units in a single storage facility over the course of one evening.³⁵³ The government argued for a “temporal-distinctness test” under which the ten counts of burglary would be considered separate “occasions,” because an occasion “happens at a particular point in time—the moment when [an offense’s] elements are established.”³⁵⁴ Rejecting the government’s “single-minded focus on whether a crime’s elements were established at a discrete moment in time,” the Court appealed to how “an ordinary person (a reporter; a police officer; yes, even a lawyer) might describe Wooden’s ten burglaries.”³⁵⁵ Perhaps realizing that such an inquiry was speculative, Kagan’s majority opinion considered dictionary definitions of “occasion,” indicating a meaning something like “an event, occurrence, happening, or episode.”³⁵⁶ But the definitions were too general to answer the interpretive question (or many future interpretive questions).

Ultimately, Kagan (speaking for everyone but Gorsuch) precisified “occasion,” allegedly in accordance with the term’s ordinary meaning, but without pointing to any external evidence of such meaning.³⁵⁷ Based on the statutory purpose, Kagan ruled that a “range of circumstances” should be relevant in deciding whether offenses were committed on different “occasions,” including proximity in time, intervening events, proximity of location, and the character and relationship of the offenses.³⁵⁸ In an opinion concurring only in the judgment, Gorsuch argued that there was “much uncertainty” in the Court’s “multi-factored’ balancing test,”³⁵⁹ but he did not suggest any way of precisifying the provision through language.

By exaggerating the semantic determinacy of “occasions,” the Court was thus able to covertly decide its scope. The decision whether to apply a textual canon is not covert in the same sense, but it similarly affords textualists discretion to choose between a narrow meaning (by applying the canon) and a broad meaning (often by choosing the literal or dictionary meaning).³⁶⁰ For instance, in *Yates* (is a fish a “tangible object”?) a key interpretive choice was between applying the *eiusdem*

351. 142 S. Ct. 1063 (2022).

352. *Id.* at 1067 (internal quotation marks omitted) (quoting 18 U.S.C. § 924(e)(1) (2018)).

353. *Id.*

354. *Id.* at 1069.

355. *Id.*

356. *Id.* (citing Occasion, American Heritage Dictionary (1981); Occasion, Webster’s Third New International Dictionary (3d ed. 1986)).

357. See *Wooden*, 142 S. Ct. at 1070–71.

358. *Id.*

359. *Id.* at 1079 (Gorsuch, J., concurring in the judgment).

360. See *supra* notes 283–330 and accompanying text (discussing textual canons).

generis (or *noscitur a sociis*) canon versus adopting the broad dictionary definition of “tangible object.”³⁶¹ The choice was between a contextually restricted meaning (“tangible object” means an object used to store information) and a broader, literal meaning (“tangible object” means any object that is tangible).³⁶² Determining which meaning is “correct” is a matter of judgment and thus discretion rather than linguistic science.

A textualist can also covertly choose between broad or narrow meanings via choices about interpretive sources as well as interpretive rules. If they desire a broad meaning, the interpreter can choose a dictionary definition and can pick among many dictionaries and definitions.³⁶³ Conversely, as one of us has empirically demonstrated, an interpreter inclined to interpret narrowly will find frequency-focused corpus searches more fruitful.³⁶⁴

There is a strong correlation between the ascendancy of textualism and judicial citation to dictionaries.³⁶⁵ Sometimes, though, even the most ardent textualists find dictionary definitions to be too broad, thereby demonstrating the discretion inherent in selecting semantic meaning. Consider the Scalia–Garner treatise, which argued that textualism could solve H.L.A. Hart’s famous hypothetical involving a “legal rule [that] forbids you to take a vehicle into the public park.”³⁶⁶ Scalia and Garner purported to seek the general, semantic meaning of “vehicle.” After consulting various dictionary definitions, they found, to their disappointment, that “[a]nything that is ever called a *vehicle* (in the relevant sense) would fall within these definitions.”³⁶⁷ (That might include wheelbarrows, bicycles, and toy cars.) Because the authors felt the dictionaries gave the term too broad a meaning, they created their own “colloquial” definition of “vehicle” as “simply a *sizable* wheeled conveyance (as opposed to one of any size that is motorized).”³⁶⁸ (And although we’re now at Choice 6, don’t forget about Choice 1! If this is a federal “no vehicles” law, 1 U.S.C. § 4 provides a statutory definition of “vehicle.”³⁶⁹)

361. *Yates v. United States*, 574 U.S. 528, 544–46 (2015).

362. *Id.* at 537.

363. See Aprill, *supra* note 259, at 297–300 (describing the tendency of Justices to freely choose from a variety of dictionaries and the impact of the choice of dictionary on interpretation).

364. See Kevin P. Tobia, *Testing Ordinary Meaning*, 134 *Harv. L. Rev.* 726, 783–85 (2020) (presenting evidence of corpus searches favoring narrow interpretations).

365. See John Calhoun, *Note, Measuring the Fortress: Explaining Trends in Supreme Court and Circuit Court Dictionary Use*, 124 *Yale L.J.* 484, 498–501 (2014) (discussing the connection between textualism and the increased judicial reliance on dictionaries over the past few decades).

366. Scalia & Garner, *supra* note 7, at 36–37 (responding to H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *Harv. L. Rev.* 593, 607 (1958)).

367. *Id.*

368. See *id.* at 37–38.

369. Eskridge, *Interpreting Law*, *supra* note 283, at 4; see also Jesse Cross, *The Fair Notice Fiction*, 74 *Ala. L. Rev.* (forthcoming 2023) (manuscript at 30),

The authors' ipse dixit undermined the point of their example, which was to demonstrate that text-based interpretation was uniquely replicable by any interpreter and therefore more objective and predictable than any other method. How many ordinary Americans, or even how many lawyers or judges, would have come up with the exact Scalia–Garner definition or would apply the definition in the same ways as the authors?³⁷⁰ The authors also failed to consider phrasal meaning, which might well indicate that “vehicle” has a different meaning in isolation than it does in the context of “tak[ing] [one] into the public park.”³⁷¹ Thus, a bicycle is a “vehicle” according to the dictionary, but is a bicycle a “vehicle” when it is being ridden in a recreational park subject to a “no vehicles” ordinance? Not clear. Indeed, we think the bicycle issue cannot be answered without knowing the legislative context and purpose of the ordinance.³⁷²

CHOICE 7: WHICH (CON)TEXT

Textualists prioritize semantic meaning (Choices 1–6),³⁷³ but they recognize that interpretation depends on context.³⁷⁴ Drawing inferences from context, however, involves more choices. Which contextual evidence should be considered? Textualists favor related texts, what we call (con)text.³⁷⁵ Fair enough, but sometimes the newest textualists say that broader context might also be relevant. Like with interpretive canons (Choices 5 & 6), however, there are no stable metarules that constrain textualists from subjectively picking and choosing among possible inferences from context.

Consider the surprising debate among textualists as to whether “social context” should be considered as evidence of how an ordinary American would have understood statutory language. In 2004, Thomas was adamant that the Court had “never sanctioned looking to ‘social history’ as a

<https://ssrn.com/abstract=4425730> [<https://perma.cc/YW7Y-MELR>] (noting that the definition of a vehicle would now be determined by referring to the U.S. Code).

370. Keep in mind that slight differences in the definition selected could result in different outcomes in some cases.

371. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *Harv. L. Rev.* 593, 607 (1958) (introducing the vehicle-in-a-park problem as an issue of legal interpretation).

372. Eskridge, *Interpreting Law*, *supra* note 283, at 3–5.

373. Manning, *What Divides Textualists*, *supra* note 288, at 76 (claiming that textualism “gives precedence to semantic context” (emphasis omitted)).

374. See Scalia & Garner, *supra* note 7, at 40 (“The soundest legal view seeks to discern literal meaning in context.”); John F. Manning, *The Absurdity Doctrine*, 116 *Harv. L. Rev.* 2387, 2456 (2003) [hereinafter Manning, *Absurdity Doctrine*] (arguing that textualists are different from “their literalist predecessors in the ‘plain meaning’ school”); Lawrence B. Solum, *Communicative Content and Legal Content*, 89 *Notre Dame L. Rev.* 479, 514 (2013) (noting that textualists rely on arguments that are context specific).

375. Eskridge & Nourse, *supra* note 14, at 1730.

method of statutory interpretation,” nor should it ever do so.³⁷⁶ But in *Bostock*, with the rights of gay and transgender employees on the line, Thomas declined to join Gorsuch’s majority opinion or Kavanaugh’s dissenting opinion. Both opinions pointedly abjured consideration of anti-homosexual social context.³⁷⁷ Instead, Thomas joined Alito’s dissenting opinion, which opined that “when textualism is properly understood, it calls for an examination of the *social context* in which a statute was enacted because this may have an important bearing on what its words were understood to mean at the time of enactment.”³⁷⁸ So one discretionary choice facing the textualist Justice is whether to consider social context.

The incoherence of the newest textualism’s treatment of historical context is on constant display in Indian law cases. In *Navajo Nation*, Kavanaugh’s opinion for the Court stuck to the language of the Treaty of 1868, while Gorsuch explored the rich social and political context of the Treaty.³⁷⁹ But in *McGirt*,³⁸⁰ Kavanaugh joined the Chief Justice’s history-soaked dissenting opinion. This contrasts with Gorsuch’s position, which demanded a statutory text in much the same reasoning that Kavanaugh would deploy in *Navajo Nation*.³⁸¹ Alito and Thomas found extensive social history dispositive in *McGirt* and *Castro-Huerta*,³⁸² but not in *Navajo Nation*. There can be little doubt that text is not dispositive, and often not even relevant, in Indian law cases.³⁸³ Gorsuch

376. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 607 (2004) (Thomas, J., dissenting).

377. See *Bostock v. Clayton County*, 140 S. Ct. 1731, 1736–37 (2020); *id.* at 1824–25 (Kavanaugh, J., dissenting).

378. *Id.* at 1767 (Alito, J., dissenting) (emphasis added); see also *id.* at 1769–72 (examining a variety of sources, including sodomy laws, psychiatry manuals, licensing rules, military exclusions, and other indicia of antihomosexual sentiment); Grove, *supra* note 23, at 286 (explaining that flexible textualism “authorizes interpreters to make sense of the statutory language by looking at social and policy context, normative values, and the practical consequences of a decision”).

379. Compare *Arizona v. Navajo Nation*, 143 S. Ct. 1804, 1810 (2023) (“In light of the treaty’s text and history, we conclude that the treaty does not require the United States to take those affirmative steps.”), with *id.* at 1819, 1824 (Gorsuch, J., dissenting) (“[This treaty provision]—read in conjunction with other provisions in the Treaty, the history surrounding its enactment, and background principles of Indian law—secures for the Navajo some measure of water rights.”).

380. *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).

381. Compare *id.* at 2482–83 (Roberts, C.J., dissenting) (noting facts that have gone “unquestioned for a century” and highlighting the history of the Muscogee (Creek) Nation), with *id.* at 2469 (majority opinion) (highlighting that “there is no need to consult extratextual sources when the meaning of a statute’s term is clear”).

382. *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022).

383. See, e.g., *Haaland v. Brackeen*, 143 S. Ct. 1609, 1628–29 (2023) (Barrett, J.) (discussing specific constitutional text but ultimately resting her opinion on general powers of federal sovereignty); *id.* at 1641 (Gorsuch, J., concurring) (deepening Barrett’s point); *id.* at 1686 (Alito, J., dissenting) (relying on the truistic Tenth Amendment). Only Thomas purported to rely on constitutional text—which he read to wipe out more than a century of

consistently views the legal materials through a lens sympathetic to tribal perspectives, as he admits in *Navajo Nation*,³⁸⁴ while the other conservatives consistently view the materials from the perspective of the reliance interests of white settlers and state governments.

To be sure, the newest textualists are more likely to discuss the many forms of text-based (con)text, but they are inconsistent within cases and across cases—what (con)text is relevant? Does it cut for or against a particular interpretation? How weighty is it in comparison to other sources of meaning? Do norms sneak back in through the (con)textual backdoor? As before, the newest textualists do not have stable metarules to adjudicate these complexities—we offer the diagram below as a friendly way to map and perhaps valorize (con)text. The weightiest (con)text should be that closest to the provision or word at issue. The close (con)text may provide clarity, but if it does not, the textualist might find illuminating the whole act, the whole code, or sometimes even the Constitution’s language.³⁸⁵ Thus, for textualists like Scalia and Thomas, the Kagan dissent in *Yates* was persuasive (more so than the relevant legislative history or even an interpretive canon, *noscitur a sociis*) because it rested upon evidence that “tangible object” was borrowed from the Model Penal Code and was in *pari materia* with other statutes or rules using the same term—most of which had been broadly construed to include animals or other living objects.³⁸⁶

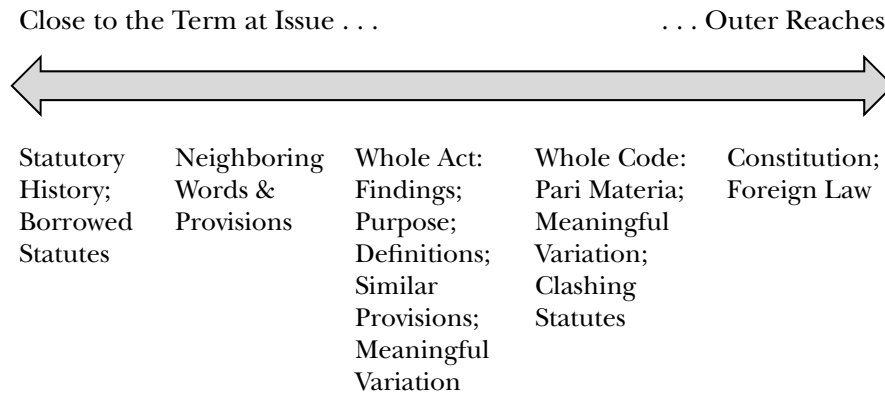
Supreme Court precedent. See *id.* at 1677–78 (Thomas, J., dissenting). He argued that prior precedent cited by the majority “extended the Federal Government’s Indian-related powers beyond the original understanding of the Constitution” but that those questionable precedents could be read much more narrowly, to “at least correspond[] to Founding-era practices.” *Id.*

384. *Navajo Nation*, 143 S. Ct. at 1819–33 (Gorsuch, J., dissenting) (arguing that the treaty provision should be read “in conjunction with other provisions in the Treaty, the history surrounding its enactment, and background principles of Indian law”). This contrasts Gorsuch’s position in *Bostock*. See *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (finding that when the “express terms of a statute give us one answer and extratextual considerations suggest another” the “written word” prevails).

385. The language of the Constitution could have addressed the original meaning of “labor or service” at issue in the famous case *Holy Trinity Church v. United States*, 143 U.S. 457 (1892). See Tammy Gales & Lawrence M. Solan, *Revisiting a Classic Problem in Statutory Interpretation: Is a Minister a Laborer?* 36 Ga. St. U. L. Rev. 491, 504–06 (2020).

386. See *Yates v. United States*, 574 U.S. 528, 556 (2015) (Kagan, J., dissenting).

FIGURE 1. SOURCES OF (CON)TEXT



(a) *Neighboring Words & Provisions*. — As illustrated in *Sweet Home* and *Yates*,³⁸⁷ the noscitur a sociis and ejusdem generis canons give a textualist discretion to consider how the words surrounding the statutory term at issue help to give it meaning.³⁸⁸ In other cases, textualist Justices have similarly disagreed about the relevance of these associated-words canons.³⁸⁹ But the choice about how to consider what we term “(co)text” (all of the language at issue) extends beyond cases where a textual canon is applicable.

Recall the Gun Control Act of 1968, at issue in *Smith v. United States*,³⁹⁰ which (as amended through 1988) imposed a sentence enhancement if a defendant “uses or carries a firearm” in relation to specified crimes.³⁹¹ Textualists were on both sides of cases holding that “uses a firearm” as a word cluster means something different from putting “uses” together with “firearm”³⁹² and that “carries a firearm” means something more than

387. See *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 720–21 (1995) (Scalia, J., dissenting); supra notes 246–254 and accompanying text; see also *Yates*, 574 U.S. at 543; supra notes 299–302 and accompanying text.

388. E.g., *Bittner v. United States*, 143 S. Ct. 713, 719–20 (2023) (“When Congress includes particular language in one section of a statute but omits it from a neighbor, we normally understand that difference in language to convey a difference in meaning (expressio unius est exclusio alterius).”).

389. For example, in *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 224–27 (2008), Thomas, writing for the majority, dismissed ejusdem and noscitur arguments embraced by Kennedy for the dissenters.

390. 508 U.S. 223, 226–27 (1993).

391. 18 U.S.C. § 924(c)(1)(A) (1988), as amended by Pub. L. 101-647, Title XXXV, § 3526(b), 104 Stat. 4921, 4924 (1990).

392. In *Smith*, 508 U.S. at 229, the majority, including Thomas and Rehnquist, applied a broad view of “uses” a firearm. Meanwhile, Scalia’s dissent argued for a narrower meaning of “uses a firearm.” *Id.* at 241–43 (Scalia, J., dissenting); see also supra notes 334–340 and accompanying text (discussing the case).

packing heat on your person.³⁹³ Based on linguistic evidence about how words combine to form larger meanings,³⁹⁴ those textualists considering the ordinary meaning of the statutory phrase (“uses a firearm”) instead of the individual words (“uses” and “firearm”) had a better understanding of how (co)text shapes meaning.³⁹⁵

These cases illustrate the difficulty often involved in figuring out how to characterize the relevant (co)text in a case. Gorsuch’s majority opinion in *Niz-Chavez v. Garland* viewed the text on point as “a ‘notice to appear,’” as opposed to Kavanaugh’s dissenting focus on “notice to appear.”³⁹⁶ The minor difference in focus yielded an intense disagreement as to the correct outcome. Similarly, in *Bostock*, was the correct text at issue “because of sex,” as Gorsuch maintained, or was it “discriminate because of sex,” as Kavanaugh, Alito, and some commentators have argued?³⁹⁷ Usually, the more (co)text considered, the more linguistically accurate the interpretation.

(b) *Whole Act*. — Even when the text on point seems plain, the new textualist will sometimes check that conclusion against the statute as a whole: Is it consistent with other provisions and the statutory structure?³⁹⁸

393. In *Muscarello v. United States*, 524 U.S. 125, 132–36 (1998), the majority, including Thomas, took a broad view of “carries” a firearm. The dissenters, including Scalia, applied a narrower meaning of “carries a firearm.” *Id.* at 140 (Ginsburg, J., dissenting).

394. That is, “using” a “firearm” is different from “using” a “book,” and thus a general dictionary definition of “use” might give the word combination too broad of a meaning.

395. Another way of explaining the issues is that a prototypical “pet fish” (e.g., a guppy) need not be a prototypical pet (e.g., a dog) nor a prototypical fish (e.g., a salmon). See Eskridge, *Interpreting Law*, supra note 283, at 61–63; Andrew C. Connolly, Jerry A. Fodor, Lila R. Gleitman & Henry Gleitman, *Why Stereotypes Don’t Even Make Good Defaults*, 103 *Cognition* 1, 5 (2007) (describing “pet fish” as the “iconic counter example to the claim that prototype concepts can account for the compositionality of concepts”).

396. 141 S. Ct. 1474, 1486 (2021) (Gorsuch, J.); *id.* at 1489–90 (Kavanaugh, J., dissenting).

397. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1740–47 (2020) (Gorsuch, J.); *id.* at 1833–36 (Kavanaugh, J., dissenting).

398. See, e.g., *Sackett v. Env’t Prot. Agency*, 143 S. Ct. 1322, 1336–41 (2023) (Gorsuch, J.) (arguing that the CWA’s statutory scheme compels a narrower interpretation of “adjacent wetlands”); *id.* at 1362–64 (Kavanaugh, J., concurring) (“We must presume that Congress used the term ‘adjacent wetlands’ to convey a different meaning than ‘adjoining wetlands.’”); *Turkiye Halk Bankasi v. United States*, 143 S. Ct. 940, 947–48 (2023) (Kavanaugh, J.) (confirming the FSIA’s limitation to civil actions by considering the civil focus of its provisions); *Bittner v. United States*, 143 S. Ct. 713, 719–21 (2023) (Gorsuch, J.) (considering nearby provisions of the Bank Secrecy Act to argue that the statute only mandates one penalty per deficient report); *id.* at 726–28 (Barrett, J., dissenting) (“[T]he applicable statute and regulations make clear that any failure to report a foreign account is an independent violation, subject to independent penalties.” (internal quotation marks omitted) (quoting *United States v. Boyd*, 991 F.3d 1077, 1089 (9th Cir. 2021) (Ikuta, J., dissenting))); *Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2289–90 (2021) (Alito, J.) (arguing that the structure of 8 § U.S.C. 1231, a provision about detention and removal of immigrants, confirmed the textual reading of the provision); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623–26 (2018) (Gorsuch, J.) (surveying the broader structure of the National

A critical difference between the majority and dissenting opinions in *Bostock* was that the dissenters focused on the *class* of people (e.g., women, men) protected by Title VII's sex discrimination rule, while the majority focused on the *classification* (namely, "sex").³⁹⁹ Defending his distinction, Gorsuch invoked the fact that Title VII's rules barred discrimination against an *individual*, in contrast to the Equal Pay Act's bar to discrimination against women as a *group*.⁴⁰⁰

An important issue is whether the whole act can *create* statutory ambiguity rather than merely *resolve* it. For example, in *King v. Burwell*,⁴⁰¹ Roberts's best arguments for ambiguity were structural ones. Although Scalia was adamant that federal exchanges were not established under § 1311 because of the reference to "an Exchange established by the State,"⁴⁰² Roberts responded that the ACA repeatedly refers to exchanges "established under [§] 1311" for various other purposes; a narrow view of that phrase would have read federal exchanges substantially out of the ACA, which was an implausible reading of the statutory scheme.⁴⁰³

In short, Roberts found statutory ambiguity largely based on the overall statutory scheme rather than the semantic meanings of the individual terms. Doubling down, he then invoked the statutory scheme to disambiguate the provision. "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."⁴⁰⁴ The Chief Justice emphasized that the ACA's interconnected structure would fall apart if some people were not eligible for tax credits: The insurance industry could handle the statute's onerous new coverage rules only by expanding

Labor Relations Act to assess whether employment agreements requiring individual arbitration were enforceable); *Util. Air Regul. Grp. v. Env't Prot. Agency*, 573 U.S. 302, 317–19 (2014) (Scalia, J.) (examining whether EPA's interpretation of certain provisions of the Clean Air Act was inconsistent with the Act's structure).

399. See *supra* notes 23–27 and accompanying text.

400. See *Bostock*, 140 S. Ct. at 1738–40.

The statute answers that question directly. It tells us three times—including immediately after the words "discriminate against"—that our focus should be on individuals, not groups: Employers may not "fail or refuse to hire or . . . discharge any *individual*, or otherwise . . . discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* . . . sex."

Id. (quoting 42 U.S.C. § 2000e–2(a)(1) (2018)).

401. 576 U.S. 473, 496–97 (2015) (finding § 36B ambiguous because of several provisions assuming tax credits would be available on both state and federal exchanges).

402. *Id.* at 498 (Scalia, J., dissenting).

403. *Id.* at 489–90 (majority opinion) (Roberts, C.J.).

404. *Id.* at 492 (alteration in original) (internal quotation marks omitted) (quoting *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (Scalia, J.)).

its customer base via the individual mandate (upheld in 2012) and the tax credits for low-income insureds (upheld in *Burwell*).⁴⁰⁵

Joined by Thomas and Alito, Scalia assembled a strong array of structural arguments supporting the view that “state” should be given its literal meaning.⁴⁰⁶ It is apparent to us that Roberts wrote for a 6-3 Court mainly because his interpretation was required by, and not just consistent with, what he called the ACA’s “plan” or “scheme.”⁴⁰⁷ Pragmatic Justices still refer to statutory “purpose” as a key source of meaning—and Jarrod Shobe has demonstrated that this linchpin of pragmatic interpretation ought to be more important for the new textualists because hundreds of federal statutes have purpose provisions in the enacted text.⁴⁰⁸ In *Sweet Home*, for example, Congress announced its purpose to protect ecosystems of endangered species on the face of the statute—and we think Scalia was wrong to ignore that text in his dissent.⁴⁰⁹

(c) *Whole Code*. — Sometimes, the new textualists confirm plain meanings by reference to other statutes. Most whole-code exercises focus either on similar statutes and how they have been interpreted or on statutes that reveal a meaningful variation from the statute in suit. Because the U.S. Code is an ad hoc collection of laws enacted by dozens of different Congresses, we are dubious of the value added by whole code arguments, which also expand the options for textualist (con)text source shopping.⁴¹⁰

The most ambitious whole-code debate in recent years was in *McGirt v. Oklahoma*, where the Court held that Congress had never disestablished the Creek Nation Reservation that now occupies a chunk of Oklahoma.⁴¹¹ The four textualist dissenters relied on a wide array of statutes—ranging from the allotment acts to the 1906 law enabling Oklahoma statehood to laws mentioning the “former” reservation—to argue that the Creek Reservation had at some point between 1890 and 1906 been disestablished.⁴¹² But Gorsuch smacked them all down because no law explicitly disestablished the reservation in terms that Congress has used to disestablish other reservations.⁴¹³ Ironically, the majority consisted of

405. *Id.* at 492–95.

406. *Id.* at 499–518 (Scalia, J., dissenting).

407. *Id.* at 486, 492, 498 (majority opinion).

408. See Jarrod Shobe, Enacted Legislative Findings and Purposes, 86 U. Chi. L. Rev. 669, 675–77 (2019).

409. See *Babbitt v. Sweet Home Chapter of Cmty. For a Great Or.*, 515 U.S. 687, 714–35 (1995) (Scalia, J., dissenting).

410. Eskridge, *Interpreting Law*, *supra* note 283, at 88–94.

411. 140 S. Ct. 2452, 2459 (2020).

412. See *id.* at 2482–504 (Roberts, C.J., dissenting).

413. Compare *id.* at 2489–94, 2498 (“Congress disestablished any reservation possessed by the Creek Nation through a relentless series of statutes leading up to Oklahoma statehood.”), with *id.* at 2462–68 (majority opinion) (Gorsuch, J.) (arguing that the Creek Nation reservation survived allotment because “allowing the transfer of individual plots, whether to Native Americans or others” does not equate to disestablishment).

Gorsuch and four pragmatists insisting on the rule of law for the Muscogee (Creek) Nation pitted against four zealous textualists whose main arguments rested upon legislative intent and white settlers' pragmatic expectations and reliance. Put uncharitably, the textualist dissenters were legitimizing the adverse possession rights of white people who lawlessly took treaty-based rights away from Native people and then relied on their theft, backed up by the authority of the state, for so long that they felt legally entitled.

In sum, (co)text and (con)text present another long and complicated set of textualist choices. First, should a judge look only at text-based context, or should they also consider social context? Second, should the judge prioritize only (co)text or might they consider language outside the provisions at issue (i.e., (con)text) even if it is at the "outer reaches"? Third, once the line is drawn, which types of (con)text count as "close"? Fourth, once the appropriate types of (con)text have been identified, how should the textualist identify the right (con)text—for example, for whole-code arguments, what counts as a "similar" statute? Fifth, once the data are assembled, how should the judge adjudicate among seemingly conflicting (con)texts or between conflicting (co)text and (con)text? This series of complex questions, all within Choice 7, have not yet been answered by the newest textualists in anything close to a unified, consistent, or predictable way.

CHOICE 8: WHAT KINDS OF EXTRINSIC MATERIALS

In addition to the (co)text and (con)text of Choice 7, the Supreme Court has traditionally considered extratextual context (or (extra)text), our Choice 8: internal legislative history, the common law, and agency interpretations. The textualist revolution has generally marginalized such extrinsic materials in Supreme Court opinions; dictionaries, textual canons, and substantive canons have largely supplanted legislative deliberations and purpose, agency views, and (to a lesser extent) the common law (Choice 10 below). As the *McGirt* debate illustrates, discussion of extrinsic materials has hardly disappeared.⁴¹⁴ Indeed, Choice 8 divides the Court's newest textualists: Roberts, Alito, and Kavanaugh are most likely to consider such (extra)text materials, and Thomas, Gorsuch, and Barrett are least likely (except for Gorsuch in Indian law cases). What unites the textualist majority is the view that these materials cannot be authoritative, at least most of the time. At best, the newest textualists consider legislative evidence as confirmatory, the common law as definitional, and agency interpretations as filling in statutory details or gaps. But within that constricted vision, there are many choices such a judge must make.

414. See *supra* notes 85–92.

(a) *Legislative History: Still Relevant.* — Writing also for Alito and Gorsuch, Thomas opined in his concurring opinion in *Digital Realty Trust Inc. v. Somers* that congressional “intent” ought to be irrelevant to proper interpretation and that when the statute has a plain meaning, judges should not even cite committee reports and the like.⁴¹⁵ Alito joined that concurring opinion—yet he and Thomas relied on the 1964 legislative deliberations in their *Bostock* dissent⁴¹⁶ and joined the Chief Justice’s even-more-elaborate discussion of legislative materials in his *McGirt* dissent.⁴¹⁷ In *Wooden*, Thomas, Alito, and Barrett declined to join the Court’s brief consideration of the legislative history of an amendment to the ACCA,⁴¹⁸ and Gorsuch concurred only in the judgment.⁴¹⁹ But Roberts and Kavanaugh joined the majority opinion without cavil over its reliance on legislative history.⁴²⁰

So the textualist consensus might be that legislative materials may be mentioned only to confirm text-based plain meaning—except when those materials are just too persuasive not to cite in support of strong-arming an ambiguous statute into one having a plain meaning.⁴²¹ Scalia partly relied on the congressional sponsors’ explanations to establish his view of the statutory structure in *Sweet Home*,⁴²² and he and Thomas joined Sandra Day O’Connor’s lavish deployment of committee hearings, rejected proposals, and committee reports in *FDA v. Brown & Williamson Tobacco Corp.*, which held that the FDA’s authority to regulate “drugs” plainly did not extend to addictive nicotine.⁴²³ The discussion of internal legislative materials in *Brown & Williamson* was the most detailed and extensive invocation of legislative history in a Supreme Court majority opinion during the last generation—yet the new textualists joined every sentence and every footnote.⁴²⁴

415. 138 S. Ct. 767, 783–84 (2018).

416. See *Bostock v. Clayton County*, 140 S. Ct. 1731, 1755–84 (2020) (Alito, J., dissenting).

417. *McGirt*, 140 S. Ct. at 2489–94 (Roberts, C.J., dissenting).

418. *Wooden v. United States*, 142 S. Ct. 1063, 1078 (2022) (Barrett, J., concurring in part and concurring in the judgment, joined by Thomas, J.); *id.* at 1065 (case syllabus) (noting that Justice Alito did not join the majority’s discussion of legislative history).

419. *Id.* at 1079 (Gorsuch, J., concurring in the judgment).

420. *Id.* at 1067–74 (majority opinion).

421. See James J. Brudney, *Confirmatory Legislative History*, 76 *Brook. L. Rev.* 901, 901–02 (2010).

422. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 727–28 (1995) (Scalia, J., dissenting).

423. See *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 131–59 (2000).

424. See *id.* at 143–59. The Court’s opinion not only rested decisively on its findings that Congress had relied on the FDA’s constant assurance that it had no regulatory authority over tobacco products but also included references to hearings, floor debates, and committee reports for the 1938 law regulating food and drugs, the 1965 law creating disclosure rules for cigarettes, and laws enacted in 1969, 1976, 1983, 1984, and 1986, elaborating on a regulatory regime for tobacco products. And, for good measure, the Court

Legislative evidence was recently decisive in *Delaware v. Pennsylvania*.⁴²⁵ The Federal Disposition Act (“the Act”) requires that unclaimed money orders and similar instruments “other than a third party bank check” should escheat (revert) to the state where they were purchased.⁴²⁶ Delaware invoked the Supreme Court’s original jurisdiction to determine whether the Act applied to “[t]eller’s [c]hecks” and “[a]gent’s [c]hecks,” prepaid financial instruments used to transfer funds to a named payee.⁴²⁷ (MoneyGram, the payer, followed the common law rule, which escheated such property to the state of incorporation, namely, Delaware.)⁴²⁸ The issues were whether the disputed MoneyGram instruments were “similar” to money orders and, if so, whether they were “third party bank checks” nonetheless exempted from the Act’s coverage.⁴²⁹ In a masterful exegesis of the statutory and financial issues that had stumped the Special Master, Justice Ketanji Brown Jackson’s opinion for a unanimous Court found the teller’s and agent’s checks similar to money orders: All three are prepaid instruments for advancing funds to a named payee; subjecting them to the Act’s rule would be consistent with the core statutory purpose.⁴³⁰

The harder issue was whether such checks were exempted as “third party bank checks,” a term that the Act did not define and that had no accepted commercial meaning. Although teller’s and agent’s checks could, literally, be considered bank checks payable to third parties, a unanimous Court rejected a broad reading of the parenthetical.⁴³¹ The strongest argument, however, was joined by only a bare majority of the Court (Roberts, Sotomayor, Kagan, Kavanaugh, and Jackson): The legislative materials established that the addition of this parenthetical was a “technical” insertion added at the request of the Treasury Department to underline the statutory focus on money orders and similar instruments and was not intended to create a broad exemption that would apply to a wide range of known financial instruments such as teller’s checks.⁴³²

Even more dramatic was the new textualist performance in *McGirt*. All except Gorsuch signed on to the Roberts dissent, which began with the announcement that the *only* relevant inquiry was whether disestablishment of a treaty-guaranteed reservation was Congress’s “intent” or “purpose” and text was nothing more than “evidence” of legislative intent and

relied on Congress’s rejection of a 1929 proposal to regulate such products. *Id.* Scalia and Thomas joined every bit of this unprecedented level of congressional analysis.

425. 143 S. Ct. 696 (2023).

426. 12 U.S.C. § 2503 (2018).

427. *Delaware v. Pennsylvania*, 143 S. Ct. at 704.

428. *Id.*

429. *Id.* at 704–05.

430. See *id.* at 705–07.

431. *Id.* at 709–11.

432. *Id.* at 711–12 (encompassing Part IV.B of the Court’s opinion, joined only by Roberts, C.J., and Sotomayor, Kagan & Kavanaugh, JJ.).

purpose.⁴³³ The dissenters relied on congressional committee reports, hearings, and documents to claim that federal legislators, state officials, and even tribal representatives believed the reservation had been terminated.⁴³⁴ *Castro-Huerta*, decided the next Term, was the occasion for an even bigger surprise, as Gorsuch, dissenting, relied on the legislative history of the General Crimes Act of 1834 to argue that the vague statute's plain meaning had generated the interpretation of the Act that dominated two centuries of legal authorities.⁴³⁵ And in *Navajo Nation*, Gorsuch relied on the negotiating history of the 1868 treaty establishing the Navajo reservation and, by his view, vesting the United States with fiduciary responsibilities that it has woefully neglected.⁴³⁶

Legislative history may represent a growing disconnect between textualist theory and practice. Textualists consult legislative history, but one of textualism's core tenets is intent skepticism and a correlative general rejection of legislative history.⁴³⁷ Consider Barrett's textualist theory of legislative history. Under that view, textualists can consult legislative history "to shed light on how ordinary speakers use words in a particular context"⁴³⁸ but *not* to establish that "Congress used language in something other than its natural sense."⁴³⁹ But the distinction between ordinary usage in a "particular context" (okay) and usage "other than its natural sense" (not okay) is often a matter of judgment and thus discretionary. And the latter might reveal that Congress intended some legal or technical meaning, which might better fit the statutory scheme.

(b) *Common Law: Dynamic?*—The common law, unwritten legal rules developed from precedent, would seem like an unappealing source of evidence for textualists who invoke hard objective evidence of ordinary meaning.⁴⁴⁰ For one thing, the ordinary American is probably not aware of the common law meaning of statutory terms. For another thing, the common law is created and amended over time by judges, not by

433. See *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2485 (2020) (Roberts, C.J., dissenting, joined by Thomas, Alito & Kavanaugh, JJ.).

434. *Id.* at 2494–97.

435. See *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2505, 2507–09 (2022) (Gorsuch, J., dissenting).

436. *Arizona v. Navajo Nation*, 143 S. Ct. 1804, 1821–22 (2023) (Gorsuch, J., dissenting).

437. See Barrett, *Congressional Insiders and Outsiders*, *supra* note 200, at 2205 ("Textualists have long objected to the use of legislative history on the ground that it is designed to uncover a nonexistent, and in any event irrelevant, legislative intent."); John F. Manning, *Inside Congress's Mind*, 115 *Colum. L. Rev.* 1911, 1912 (2015) ("[O]ne typically associates 'intent skepticism' with the new textualism . . .").

438. Barrett, *Congressional Insiders and Outsiders*, *supra* note 200, at 2207.

439. *Id.* at 2194.

440. But see William Baude & Stephen Sachs, *The Law of Interpretation*, 130 *Harv. L. Rev.* 1079, 1098 (2017) ("In a common law system like ours, the rules of interpretation can also bubble up from below."); Krishnakumar, 2005–2019 *Data*, *supra* note 111, at 610 (uncovering the largely unnoticed frequency with which the Court has historically relied on the common law to guide textualist statutory interpretation).

legislators. At what point does piling one judge-created source of meaning after another destroy the new textualist claim that its method is the only one that constrains judges? How does a method dominated by the products of judicial lawmaking subserve the separation of powers or Congress's lawmaking supremacy?

There are further, deeper difficulties. The newest textualists claim to be statutory originalists,⁴⁴¹ seeking to fix the statute's permanent meaning to the time of enactment. The common law, however, is not originalist in nature. The common law *evolves*.⁴⁴² For today's statutory originalists, there is some tension between fidelity to a statute's *historical* meaning and appeal to the common law (that is, the common law as it has been articulated at any and all times—including since the statute's date of enactment). Indeed, "Common Law Constitutionalism," which emphasizes the evolving, living, and dynamic nature of the common law, is a competitor of originalism.⁴⁴³ Moreover, "finding" the common law is a famously tricky activity—and an unpredictable one. For textualists who appeal to simplicity and predictability, infusing interpretation with the common law is not without rule-of-law costs.

Nevertheless, the common law may fill in some of the gaps left by the newest textualists' reluctance to rely on legislative history, statutory precedents, and agency views. Anita Krishnakumar reports that between 2005 and 2019, the uber-textualist Court has frequently turned to the common law in statutory cases.⁴⁴⁴ Specifically, Professor Krishnakumar finds that common law is evoked for (1) "derogation-resembling" arguments (e.g., a judicial finding that the statute did not displace the common law); (2) expected-meaning arguments (e.g., assuming that legislators and lawyers would "expect" statutes to reflect common law baselines); (3) arguments that certain legal principles are "well-settled" or that "general principles" support a particular interpretation; (4) other "miscellaneous" arguments that support a certain statutory reading;

441. Nourse, *Textualism 3.0*, *supra* note 6, at 676–80.

442. Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* 36 (1960) (highlighting the ever-adapting nature of common law doctrine); Julius Stone, *Precedent and Law: Dynamics of Common Law Growth* 6–7 (1985) (noting that constitutional review, just like common law review, is part of the "dynamic process of legal evolution"); David A. Strauss, *Common Law Constitutional Interpretation*, 63 *U. Chi. L. Rev.* 877, 879 (1996) [hereinafter Strauss, *Common Law Constitutional Interpretation*] (defining the common law tradition as one in which understandings of law evolve over time). For an example of how the common law's evolution played out in a ridiculous originalist debate between Justices William Brennan and William Rehnquist, see *Smith v. Wade*, 461 U.S. 30 (1983). As O'Connor opined in a dissenting opinion, the evolving common law rules should be applied with an eye on the statutory purposes. *Id.* at 92–94 (O'Connor, J., dissenting).

443. Strauss, *Common Law Constitutional Interpretation*, *supra* note 442, at 879; see also David A. Strauss, *The Living Constitution* 35–46 (2010) (arguing that constitutional interpretation is best understood as a common law approach).

444. See Krishnakumar, *2005–2019 Data*, *supra* note 111, at 620–55.

and (5) “no reason” arguments that provided no justification for invoking the common law.⁴⁴⁵

Here, again, textualists have choices to make. Which of these five common law arguments (or others) are permissible in textualist interpretation? What is the method to find the “common law”? How should conflicting evidence be reconciled? And here, again, the newest textualists do not always agree. For example, they splintered in *Atlantic Sounding Co. v. Townsend*.⁴⁴⁶ Writing for himself and four pragmatic Justices, textualist Justice Thomas ruled that the Jones Act did not supplant admiralty law’s remedy of punitive damages for a seaman’s maintenance-and-cure claim.⁴⁴⁷ The Court’s remaining textualists—Roberts, Scalia, Kennedy, and Alito—dissented. They accused Thomas (who finds dynamic interpretation anathema⁴⁴⁸) of imposing a dynamic reading of the common law that was inconsistent with the Jones Act’s remedial scheme, in which Congress rejected punitive damages for seamen’s maintenance-and-cure claims.⁴⁴⁹

In *Navajo Nation*, a key disagreement between the Gorsuch dissent and Kavanaugh’s majority opinion lay in Gorsuch’s aggressive deployment of the common law of fiduciary responsibility. The United States conceded that it was the trustee of the tribe’s water rights and other rights, and Gorsuch accordingly found that it had violated the good faith and fiduciary responsibilities implicit in the terms of the 1868 treaty.⁴⁵⁰ In contrast, Kavanaugh believed the common law of trusts did not impose what he considered affirmative obligations on the United States to take away water rights from the states and bestow them on the Navajo Nation.⁴⁵¹

(c) *Agency Interpretations: Closeted Influence*. — A significant policy choice for textualists concerns whether judges should defer to agency statutory interpretations. Textualist judges traditionally seek the “best reading” of a statute,⁴⁵² but the possibility of deferring to an agency

445. *Id.* at 640.

446. 557 U.S. 404 (2009). For a more detailed discussion of how the new textualists differed in their approach to common law in *Atlantic Sounding Co.*, see Krishnakumar, 2005–2019 Data, *supra* note 111, at 647–48.

447. *Atl. Sounding Co.*, 557 U.S. at 424.

448. Book Note, Justice Thomas’s Inconsistent Originalism, 121 *Harv. L. Rev.* 1431, 1434–36 (2008) (reviewing Clarence Thomas, *My Grandfather’s Son: A Memoir* (2007)) (discussing Thomas’s ostensible commitment to originalism but his failure to apply a consistent methodology).

449. *Atl. Sounding Co.*, 557 U.S. at 429–32 (Alito, J., dissenting).

450. *Arizona v. Navajo Nation*, 143 S. Ct. 1804, 1829 (Gorsuch, J., dissenting) (“Not even the federal government seriously disputes that it acts ‘as a fiduciary’ of the Tribes with respect to tribal waters it manages. . . . [T]he United States freely admits that it holds certain water rights for the Tribe ‘in trust’ [and] . . . [t]hose observations suffice to resolve today’s dispute.”).

451. *Id.* at 1813 (majority opinion).

452. See, e.g., Kavanaugh, *Fixing Interpretation*, *supra* note 23, at 2121 (explaining that the primary function of courts is to determine the “best reading” of a statute).

interpretation requires redefining the interpretive inquiry. The (in)famous *Chevron* doctrine asks instead whether the statute provides a clear directive (“Step One”) and, if not, whether the agency’s interpretation is reasonable (“Step Two”).⁴⁵³ The discretion inherent in the traditional inquiry, finding the statute’s “best reading,” is thus transferred to two separate, discretionary inquiries: determining “ambiguity” and “reasonableness.” More troubling for textualists is *Chevron*’s acknowledgment that statutory interpretation is, at least partly, a policy determination.⁴⁵⁴ The “ambiguity” determination mediates between Step Two nonlinguistic “construction,” or policymaking, and Step One linguistic “interpretation.”⁴⁵⁵

Scalia was initially the Court’s biggest fan of *Chevron*, based on the institutional view that judges should leave policy balancing to agencies when statutory text is genuinely ambiguous,⁴⁵⁶ and he interpreted the doctrine broadly as creating an “across-the-board presumption that, in the case of ambiguity, agency discretion is meant.”⁴⁵⁷ He also authored *Auer v. Robbins*, which held that courts ought to defer to agency interpretations of their own regulations unless clearly unreasonable.⁴⁵⁸ During the Obama Administration, however, Scalia soured on *Auer* and was no longer a big cheerleader for *Chevron*.⁴⁵⁹ Likewise, Thomas was for most of his tenure on the *Chevron* bandwagon,⁴⁶⁰ but post-Obama, he

453. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). For a comprehensive study into the Supreme Court’s application of the *Chevron* doctrine, see generally 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).

454. See *Chevron*, 467 U.S. at 843 (“The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.” (internal quotation marks omitted) (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974))).

455. See Lawrence B. Solum & Cass R. Sunstein, *Chevron as Construction*, 105 *Cornell L. Rev.* 1465, 1475 (2020) (arguing that “Step One losses, for agencies, typically involve interpretation rather than construction”).

456. *Immigr. & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 454 (1987) (Scalia, J., concurring) (“This Court has consistently interpreted *Chevron*—which has been an extremely important and frequently cited opinion . . . —as holding that courts must give effect to a reasonable agency interpretation of a statute . . .”).

457. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 *Duke L.J.* 511, 516.

458. 519 U.S. 452, 459 (1997).

459. See Adrian Vermeule, Professor of Const. L., Harvard L. Sch., Lecture Delivered at Harvard Law School: *The Original Scalia* (Oct. 19, 2022), in *Harv. J.L. & Pub. Pol’y Per Curiam*, Winter 2023, no. 2, at 2, 12–13, <https://journals.law.harvard.edu/jlpp/wp-content/uploads/sites/90/2023/01/Vermeule-The-Original-Scalia-vF.pdf> [<https://perma.cc/N34V-9H45>].

460. See, e.g., *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980–85 (2005) (Thomas, J.) (explaining that agency construction is almost always entitled to *Chevron* deference, unless it undermines an entirely unambiguous statute).

has asserted that *Chevron* amounts to abdication of judicial power in violation of Article III.⁴⁶¹

On the current Court, *Chevron* is virtually uncitable, and the Court may soon overrule or narrow *Chevron*.⁴⁶² But because statutory interpretations by the Solicitor General or an agency are before the Court in the large majority of its statutory cases, the textualist is endemically confronted with a *Skidmore* choice: How much weight, if any, to give the agency's interpretation?⁴⁶³ As reflected in *Biden v. Texas*, in which three of the six newest textualists gave President Biden a pass on the merits,⁴⁶⁴ any case involving foreign affairs, the armed forces, or immigration law generates a give-the-executive-the-benefit-of-the-doubt impulse among some of the textualist Justices.⁴⁶⁵ In domestic regulatory cases, some of the newest textualists quietly go along with agency views, especially if they have generated private or public reliance⁴⁶⁶ or coincide with the Justices' ideological or policy preferences.⁴⁶⁷

461. E.g., *Baldwin v. United States*, 140 S. Ct. 690, 690–95 (2020) (Thomas, J., dissenting from the denial of certiorari).

462. See Amy Howe, *Supreme Court Will Consider Major Case on Power of Federal Regulatory Agencies*, SCOTUSBlog (May 1, 2023), <https://www.scotusblog.com/2023/05/supreme-court-will-consider-major-case-on-power-of-federal-regulatory-agencies> [<https://perma.cc/6LW4-CDNS>]; see also *Buffington v. McDonough*, 143 S. Ct. 14, 18–19, 22 (2022) (Gorsuch, J., dissenting from the denial of certiorari) (providing a detailed critique of *Chevron* and demanding that it be expunged).

463. Cf. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (holding that judges ought to at least give executive branch interpretations their due in light of factual and legal cogency).

464. 142 S. Ct. 2528, 2534, 2548, 2560 (2022).

465. See, e.g., *Turkiye Halk Bankasi A.S. v. United States*, 143 S. Ct. 940, 948 (2023) (Kavanaugh, J.) (accepting the executive branch's view of the FSIA); *Fed. Bureau of Investigation v. Fazaga*, 142 S. Ct. 1051, 1059–60 (2022) (Alito, J.) (holding that the Foreign Intelligence Surveillance Act does not displace the state secrets privilege); *Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1057, 1059–62 (2019) (Alito, J.) (following the State Department's interpretation of the Foreign Sovereign Immunities Act, while Thomas dissented on text-based grounds); *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 771–72 (2019) (Roberts, C.J.) (following the State Department's view of immunity for international organizations); *Trump v. Hawaii*, 138 S. Ct. 2392, 2408–10, 2415 (2018) (Roberts, C.J.) (allowing President Trump broad discretion to exclude immigrants from countries with Muslim-majority populations); *Water Splash, Inc. v. Menon*, 137 S. Ct. 1504, 1510 & n.3 (2017) (Alito, J.) (following a DOJ amicus brief to interpret the Hague Service Convention).

466. See, e.g., *Lorenzo v. Sec. & Exch. Comm'n*, 139 S. Ct. 1094, 1099–102 (2019) (Breyer, J.) (adopting a longstanding SEC interpretation of 17 C.F.R. § 240.10b-5 (2022); Securities Exchange Act § 10(b), 15 U.S.C. § 78j (2018); and Securities Act of 1933 § 17(a)(1), 15 U.S.C. § 77q(a)(1)). Roberts and Alito joined Breyer's opinion; Gorsuch joined Thomas's textualist dissent. *Id.* at 1107–10 (Thomas, J., dissenting).

467. See, e.g., *United States v. Tsarnaev*, 142 S. Ct. 1024, 1037 (2022) (writing for all six textualists, Thomas adopted the DOJ's interpretation of the Federal Death Penalty Act; the Court's three pragmatists dissented); accord Matt Ford, *The Supreme Court Shows No Signs of Slaking Its Thirst for Capital Punishment*, *New Republic* (Oct. 12, 2022), <https://newrepublic.com/article/168105/death-penalty-supreme-court>

Recently, the Major Questions Doctrine (MQD) has become a prominent textualist-favored, policy-based exception to *Chevron* and has added layers of interpretive discretion for textualists (e.g., whether an interpretive question is “major”). The MQD started out as a loophole in the *Chevron* doctrine, but it has proven to be much more dynamic and text-bending than the common law. Soon after the *Chevron* decision, then-Judge Breyer argued that the doctrine should be inapplicable in “major” cases.⁴⁶⁸ In *Brown & Williamson*, arguably the first MQD case, a 5-4 Court showed no deference to the FDA’s regulation of tobacco products as “drugs.”⁴⁶⁹ O’Connor, joined by the textualists then on the Court, reasoned that *Chevron* rests on the assumption that “a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.”⁴⁷⁰ Similarly, in *King v. Burwell*, the Court indicated that *Chevron* deference does not apply to “a question of deep ‘economic and political significance’ that is central to [a] statutory scheme.”⁴⁷¹

Today, there is a consensus among the Court’s textualists not only that the MQD can trump *Chevron* deference but also that it acts as a canon of antideference.⁴⁷² Gorsuch has made it his mission to revive the nondelegation doctrine and limit Congress’s capacity to delegate lawmaking to agencies or the President (except in foreign affairs, etc.). This steroidal version of the MQD is a “super-strong” clear statement rule: If Congress wants to delegate lawmaking authority, the Court will interpret that delegation stingily and will not allow an agency to intervene majorly in the market economy without very specific authorization. How specific? It’s hard to say, but in such cases, the traditional textualist conception of a semantically based “best reading” of a statute is undoubtedly changed in some (indeterminate) way.

term [<https://perma.cc/2J4Q-NWFK>] (detailing how textualist Justices have “consistently voted against death row inmates seeking relief in multiple ways, even in extreme and dubious circumstances”).

468. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 *Admin. L. Rev.* 363, 370, 377, 394 (1986); see also William Eskridge, Jr. & Philip Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 *Vand. L. Rev.* 593, 606–07 (1992) [hereinafter Eskridge & Frickey, *Quasi-Constitutional Law*] (noting that after the “nondelegation doctrine” became disfavored as a form of constitutional interpretation, proponents of the doctrine continued to wield it as a form of statutory interpretation).

469. *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (“[W]e are obliged to defer not to the agency’s expansive construction of the statute, but to Congress’ consistent judgment to deny the FDA this power.”).

470. *Id.* at 159 (citation omitted).

471. 576 U.S. 473, 486 (2015) (quoting *Util. Air Regul. Grp. v. Env’t Prot. Agency*, 573 U.S. 302, 324 (2014)).

472. See Mila Sohoni, *The Major Questions Quartet*, 136 *Harv. L. Rev.* 262, 293 (2022) (“The new major questions doctrine enables the Court to effectively resurrect the nondelegation doctrine without *saying* it is resurrecting the nondelegation doctrine.”).

The MQD has had a decisive role in multiple recent cases. In *Alabama Ass'n of Realtors v. HHS*, the 6-3 Court vetoed a nationwide moratorium on evictions issued by the CDC.⁴⁷³ Because the CDC's moratorium was an issue of "vast 'economic and political significance'" and represented "a breathtaking amount of authority,"⁴⁷⁴ the per curiam opinion, joined only by the Court's newest textualists, was unpersuaded by the broad statutory language authorizing the CDC to "make and enforce such regulations as in [its] judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases," such as COVID-19.⁴⁷⁵ The statute was "a wafer-thin reed on which to rest such sweeping power" and was thus insufficiently clear.⁴⁷⁶

The same 6-3 Court also invoked the MQD to antidefer to OSHA's employer mask mandate a year later, in *NFIB v. OSHA*.⁴⁷⁷ In a concurring opinion, Gorsuch explicitly tied the major questions canon to nondelegation concerns.⁴⁷⁸ The canon guards against the possibility that an "agency may seek to exploit some gap, ambiguity, or doubtful expression in Congress's statutes to assume responsibilities far beyond its initial assignment."⁴⁷⁹ In *West Virginia v. EPA*, Roberts wrote for the same 6-3 majority to apply the antideference MQD and therefore require a clearer statement from Congress before EPA could issue power plant rules that would reallocate energy production over time.⁴⁸⁰ In *Biden v. Nebraska*, the 6-3 majority invalidated the Biden Administration's student loan forgiveness program with reasoning similar to that of the earlier major questions decisions but grounded more in textualist semantics and likely congressional expectations rather than quasi-constitutional law.⁴⁸¹

This super-strong version of MQD is, in our view, at odds with textualism—and arguably the rule of law—because it rejects the primacy of semantic meaning in favor of a normatively inspired, narrow gloss on broad statutory text. It is also at odds with separation of powers because it burdens Congress's limited agenda.⁴⁸² Further, as a discretion-conferring

473. 141 S. Ct. 2485, 2490 (2021).

474. *Id.* at 2489.

475. Public Health Service Act, ch. 373, § 361(a), 58 Stat. 682, 703 (1944) (codified as amended at 42 U.S.C. § 264(a) (2018)).

476. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489.

477. 142 S. Ct. 661, 662–63 (2022) (per curiam).

478. *Id.* at 668 (Gorsuch, J., concurring, joined by Thomas & Alito, JJ.).

479. *Id.* at 669.

480. See 142 S. Ct. 2587, 2614 (2022).

481. See 143 S. Ct. 2355, 2375 (2023) (deciding that there was insufficient congressional authorization for the Secretary of Education to forgive a large volume of student loans in the wake of the COVID-19 pandemic); cf. *id.* at 2378–81 (Barrett, J., concurring) ("[T]he major questions doctrine plays a role, because it helps explain the court's conclusion that the agency overreached.").

482. See Chad Squitieri, *Who Determines Majoriness?*, 44 *Harv. J.L. & Pub. Pol'y* 463, 465 (2021) (arguing that the major questions doctrine is incompatible with the textualist

doctrine, the MQD is in tension with textualism in other ways. For instance, it runs counter to the textualist preference for brightline rules.⁴⁸³

It shouldn't be surprising that some textualists are responding to critics' objections by framing the MQD as a linguistic principle rather than a normative one. Barrett's preappointment law review scholarship was skeptical of textualists' use of substantive canons but supported a nondelegation canon.⁴⁸⁴ In an obvious effort to becloud the Court's apparent activism, Barrett recently argued in *Biden v. Nebraska* that the MQD is *not* a clear statement requirement or substantive canon. Instead, it merely represents a "common sense" limitation on literal meaning that reflects how a "reasonably informed interpreter" understands how Congress delegates authority.⁴⁸⁵

The linguistic legitimization of the MQD is far from complete, and Barrett's arguments raise a lot of questions. Most crucially, they rest on an unproven empirical claim about "common sense" and the ordinary reader. Do ordinary people understand (ordinary, legal, or congressional) delegations of authority to be limited in scope when applied to issues of "major" significance? For example, parents direct a babysitter to take care of the children. While that directive does not authorize the sitter to fly the kids to visit their grandparents, it surely allows the sitter to deal with immediate medical emergencies.⁴⁸⁶ Until empirical evidence is offered, it is natural to ask whether the "reasonably informed interpreter" is merely a mirror of the judge's own policy preferences.

There is great flexibility in textualists' appeal to "common sense" and concerning their identification of a "major question." Textualists have not identified criteria that would make either inquiry substantially more objective or predictable. For example, in *Biden v. Missouri*, the third COVID-19 regulatory case, Roberts, Kavanaugh, and the three pragmatic Justices joined a per curiam opinion upholding HHS's safety mandates for hospital workers; the other four textualists dissented, based upon the MQD.⁴⁸⁷ So, in cases where the Court is responding to an agency interpretation of a federal statute, some textualists might now appeal to (extra)textual sources that bear on the "majorness" of the underlying issue. This analysis could include various factors, like whether the agency

perspective that members of Congress differ in their understandings of what is politically major).

483. See Scalia, *A Matter of Interpretation*, supra note 1, at 25 (arguing that textualism is intentionally formalistic to constrain judges from overstepping their authority).

484. See Barrett, *Congressional Insiders and Outsiders*, supra note 200, at 2205; Barrett, *Substantive Canons*, supra note 19, at 116 (relying on Eskridge & Frickey, supra note 468, at 606–07).

485. *Biden v. Nebraska*, 143 S. Ct. at 2378, 2380–81 (Barrett, J., concurring) (citing *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 6 (1825)).

486. *Id.* at 2378–81.

487. See 142 S. Ct. 647, 659–60 (2022).

was making a “major” intervention into the economy, what reliance interests are implicated, and how targeted the judge finds the authorizing statute. These inquiries are chock-full of discretion and the potential for biased judgments.

CHOICE 9: WHICH PRECEDENT(S)

Given our legal tradition, you cannot have a theory of statutory interpretation without a theory of statutory precedents.⁴⁸⁸ Indeed, most of the Court’s statutory interpretation cases come encumbered with precedents. An initial choice facing the textualist Justice (though one we consider contrary to the rule of law) is whether to ignore or minimize relevant precedents, perhaps because their reasoning was not text based or otherwise clashed with the newest textualists’ strict view of separation of powers.⁴⁸⁹ In *Bostock*, for example, Title VII precedents relating to gender stereotyping and sexual harassment were relevant to whether job discrimination against LGBT employees was discrimination “because of sex.” Justice Gorsuch’s majority opinion rested upon the statutory language and structure and failed to cite on-point precedent (*Price Waterhouse v. Hopkins*⁴⁹⁰) for its striking statement that hypothetical employees Bob and Hannah, fired because they did not match assumed gender roles, would have a valid Title VII claim.⁴⁹¹ Like the Gorsuch majority, the Kavanaugh dissent ended with illustrative discussion of some Title VII precedents but ignored *Hopkins*.⁴⁹² The Alito dissent, alone, treated *Hopkins* as a relevant precedent and distinguished it.⁴⁹³

The debate in *Bostock* tracks the different approaches to precedent largely followed by the newest-textualist Justices in constitutional cases, notably *Ramos v. Louisiana*.⁴⁹⁴ Roberts, Alito, Kavanaugh, and Barrett are attentive to precedents and reluctant to overrule ones they

488. See Eskridge, *Interpreting Law*, supra note 283, at 139–90.

489. See, e.g., *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562, 1576–77 (2022) (Kavanaugh, J., concurring, joined by Gorsuch, J.) (“I would reorient the inquiry to focus on a background interpretive principle rooted in the Constitution’s separation of powers. Congress, not this Court, creates new causes of action.”); see also Anita S. Krishnakumar, *Textualism and Statutory Precedents*, 104 Va. L. Rev. 157, 165–83 (2018) (describing examples that show a shift away from a heightened presumption of correctness for statutory precedent).

490. 490 U.S. 228, 250 (1989) (holding that denial of partnership based on employee’s not conforming to gender stereotypes is actionable sex discrimination under Title VII).

491. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1741 (2020). Gorsuch later referenced *Hopkins*, but for a routine point of law. *Id.*

492. See *id.* at 1832–37 (Kavanaugh, J., dissenting).

493. See *id.* at 1763–64 (Alito, J., dissenting).

494. See 140 S. Ct. 1390, 1402–05 (2020) (Gorsuch, J.); *id.* at 1409 (Sotomayor, J., concurring in part); *id.* at 1411–16 (Kavanaugh, J., concurring in part); *id.* at 1421–22 (Thomas, J., concurring in the judgment); *id.* at 1425 (Alito, J., dissenting) (illustrating the various approaches of precedent applied by the several Justices).

disagree with, though they may construe such precedents narrowly.⁴⁹⁵ Gorsuch is more willing to overrule, ignore, or recharacterize precedents inconsistent with constitutional or statutory text.⁴⁹⁶ Thomas is willing to overrule any precedent not consistent with his reading of statutory and constitutional language.⁴⁹⁷ For example, in *Glacier Northwest, Inc. v. International Brotherhood of Teamsters Local Union No. 174*, Barrett's opinion for the Court (joined by Roberts, Sotomayor, Kagan, and Kavanaugh) applied longstanding Supreme Court precedent requiring the union to show that the aggrieved conduct "arguably" fell within the NLRA's ambit (a test the union did not meet).⁴⁹⁸ Concurring only in the judgment, Thomas (joined by Gorsuch) would have overruled the preemption approach followed in dozens of Supreme Court cases and hundreds of decisions by the courts of appeals.⁴⁹⁹ In contrast, Alito wrote a narrow concurring opinion, carefully following a precedent he believed most on point.⁵⁰⁰ The Thomas position strikes us as inconsistent with the rule of law; it would foment uncertainty by undermining longstanding precedent. The Roberts–Alito–Kavanaugh–Barrett position is, in our view, most consistent with the predictability, objectivity, and notice features of the rule of law.

Regardless of their individual views about stare decisis, all the newest-textualist Justices tend to brigade their semantic analyses with supportive precedents, which often involves choosing favorable decisions and distinguishing or ignoring the rest. The lack of a governing framework facilitates debates as to which precedents are most on point, how broadly

495. See, e.g., *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562, 1573–75 (2022) (Roberts, C.J.) (holding that precedent allowing a contract analogy should only be applied to limit available remedies, not to expand them); *Ramos*, 140 S. Ct. at 1432–40 (Alito, J., dissenting, joined by Roberts, C.J. & Kagan, J.) ("There are circumstances when past decisions must be overturned, but we begin with the presumption that we will follow precedent, and therefore when the Court decides to overrule, it has an obligation to provide an explanation for its decision."); *id.* at 1419–20 (Kavanaugh, J., concurring in part) ("Why stick by an erroneous precedent that is egregiously wrong as a matter of constitutional law . . . ?"); Amy Coney Barrett, *Originalism and Stare Decisis*, 92 *Notre Dame L. Rev.* 1921, 1941–43 (2017) (arguing that the Supreme Court considers stability of the law in determining how broadly or narrowly to construe precedent).

496. See, e.g., *Ramos*, 140 S. Ct. at 1402–05 (Gorsuch, J.) (arguing that a precedent is not entitled to stare decisis because it is either nonbinding or was based in one Justice's now-discredited constitutional theory).

497. See *id.* at 1421–22 (Thomas, J., concurring in the judgment) (arguing that "demonstrably erroneous decisions," namely "decisions outside the realm of permissible interpretation," are not entitled to stare decisis (internal quotation marks omitted) (quoting *Gamble v. United States*, 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring))).

498. 143 S. Ct. 1404, 1411–14 (2023) (applying the NLRA preemption doctrine developed in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245–46 (1959)).

499. See *id.* at 1417 (Thomas, J., concurring in the judgment, joined by Gorsuch, J.).

500. *Id.* at 1418 (Alito, J., concurring in the judgment, joined by Thomas & Gorsuch, JJ.) (arguing that the Supreme Court's precedents well establish that striking workers may be liable for damage to property, so a *Garmon* preemption analysis is not necessary).

to read relevant precedents, and how to reconcile conflicting lines of cases.⁵⁰¹ In *Oklahoma v. Castro-Huerta*, for example, many precedents were potentially relevant to the issue of whether the state could prosecute non-Indians for crimes committed on Native reservations.⁵⁰² Gorsuch anchored his dissent upon Chief Justice John Marshall's famous opinion in *Worcester v. Georgia*,⁵⁰³ which held that only the federal government or the sovereign tribes could prosecute crimes committed on tribal reservations.⁵⁰⁴ Lest non-Indians be subject to prosecution in tribal courts, Congress adopted the General Crimes Act of 1834 to provide for federal prosecution of such crimes.⁵⁰⁵ Writing for the Court, Kavanaugh responded that *Worcester* had been superseded by subsequent precedents that established a new baseline: States have plenary authority over all land and people within their borders except where limited by the Supremacy Clause.⁵⁰⁶ Gorsuch replied with precedents applying the rule that tribes retain quasi-sovereign status subject to congressional regulation, such as the General Crimes Act.⁵⁰⁷

Another recent case involving textualist disputes about applicable precedent is *Goldman Sachs Group v. Arkansas Teacher Retirement System*, which involved a securities fraud class action.⁵⁰⁸ The Court had previously held that plaintiffs could establish the element of reliance based on a rebuttable presumption that they relied on the misrepresentation if it was reflected in the time-of-purchase market price.⁵⁰⁹ To rebut the presumption, the defendant would have to “show that the misrepresentation *in fact* did not lead to a distortion of price.”⁵¹⁰ The issue in *Goldman Sachs* was whether defendants bore the burden of persuasion

501. Compare *Edwards v. Vannoy*, 141 S. Ct. 1547, 1553–60 (2021) (Kavanaugh, J.) (interpreting statutory habeas precedents for the Court), with *id.* at 1562–66 (Thomas, J. concurring, joined by Gorsuch, J.) (arguing that the Court's habeas precedents were preempted by statute), and *id.* at 1566–73 (Gorsuch, J., concurring, joined by Thomas, J.) (reading the precedents more narrowly).

502. 142 S. Ct. 2486, 2493–94 (2022) (providing several examples of precedent addressing the issue of state sovereignty over Indian reservations).

503. See *id.* at 2505–07 (Gorsuch, J., dissenting).

504. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832).

505. *Castro-Huerta*, 142 S. Ct. at 2507 (discussing the enactment of the General Crimes Act of 1834 and noting that the Act remains in force today); see also 18 U.S.C. § 1152 (2018).

506. *Castro-Huerta*, 142 S. Ct. at 2493–94 (invoking *Organized Vill. of Kake v. Egan*, 369 U.S. 60, 72 (1962), and seven other precedents).

507. *Id.* at 2513–18 (Gorsuch, J., dissenting).

508. 141 S. Ct. 1951, 1957 (2021).

509. See, e.g., *Erica P. John Fund v. Halliburton Co.*, 563 U.S. 804, 813 (2011) (upholding and following the presumption that an investor relies on a misrepresentation so long as it was reflected in the market price at the time of his transaction); *Basic Inc. v. Levinson*, 485 U.S. 224, 245–47 (1988) (adopting such rebuttable presumption because it is consistent with the policy of the Securities Exchange Act of 1934 and is supported by common sense and empirical studies).

510. *Basic*, 485 U.S. at 248 (emphasis added); see also *Erica P. John Fund*, 563 U.S. at 813 (applying the holding of *Basic*, 485 U.S. at 248).

on such a “showing” or just the burden of production.⁵¹¹ Barrett’s majority opinion ruled that defendants bore the burden of persuasion.⁵¹² Dissenting in part, Gorsuch, Thomas, and Alito argued that the precedents did not foreclose what they considered the better legal baseline: that the party required to establish a fact (reliance) bore the ultimate burden of persuasion.⁵¹³ Barrett responded that, as a practical matter, the dissenters’ rule would negate the point of those precedents, which was to force information from the parties best able to provide it.⁵¹⁴ In our view, her opinion is a model for neutral application of precedent.

CHOICE 10: SUBSTANTIVE CANONS

Textualist theory privileges linguistic canons but broadly questions the legitimacy of substantive canons. Barrett, for instance, argues that “substantive canons are designed not to interpret text but rather to advance substantive policies”⁵¹⁵ and are thus “at apparent odds with the central premise from which textualism proceeds.”⁵¹⁶ Similarly, in his Tanner Lectures, Scalia complained that textualists should not bother with substantive, “dice-loading” canons because they might lead a judge away from ordinary meaning and, hence, away from the neutrality and objectivity required by the rule of law.⁵¹⁷ He made an exception for the rule of lenity because it was objectively ratified by longstanding tradition.⁵¹⁸ Some nontextualist scholars have even argued that textualism cannot accommodate any substantive canons.⁵¹⁹ Textualist practice, though, is much more equivocal and accepting of substantive canons, even expressing enthusiasm for the new MQD (discussed in Choice 8).⁵²⁰ In Indian law cases, the ongoing disagreement between Gorsuch and the other textualists is the former’s embrace of the longstanding “Indian

511. *Goldman Sachs*, 141 S. Ct. at 1961–62.

512. *Id.* at 1963.

513. *Id.* at 1966–69 (Gorsuch, J., concurring in part and dissenting in part, joined by Thomas & Alito, JJ.).

514. See *id.* at 1962–63 (majority opinion).

515. Barrett, *Congressional Insiders and Outsiders*, *supra* note 200, at 2203.

516. Barrett, *Substantive Canons*, *supra* note 19, at 110.

517. Scalia, *A Matter of Interpretation*, *supra* note 1, at 27–29.

518. *Id.* at 29 (“The rule of lenity is almost as old as the common law itself, so I suppose that is validated by sheer antiquity.” (footnote omitted)).

519. See Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 *Harv. L. Rev.* (forthcoming 2023) (manuscript at 73–74), <https://ssrn.com/abstract=4330403> [<https://perma.cc/N2G5-AUX2>] (arguing that any efforts directed at reconciling substantive canons with textualism fail because they either commit textualists to jurisprudential positions they ordinarily denounce or imply such a narrow scope for substantive canons that nothing resembling their current use would survive).

520. See *supra* notes 465–478 and accompanying text.

canon,” which the Court deployed for decades to read treaties and statutes from the perspective of Native peoples and tribes.⁵²¹

In practice, Scalia authored or signed onto hundreds of opinions relying on dozens of substantive canons, and his 2012 treatise endorsed several substantive canons.⁵²² Many of the dice-loading canons Scalia supported were clear statement rules, which, according to Barrett, “permit[] a court to *forgo* a statute’s most natural interpretation in favor of a less plausible one more protective of a particular value.”⁵²³ Such substantive canons arguably enforced constitutional norms that Scalia believed were “underenforced.”⁵²⁴

In 2010, then-Professor Barrett agreed with the underenforced-constitutional-norms justification as a way to reconcile textualism with clear statement rules like the rule of lenity, avoidance of unconstitutional interpretations, the rule against retroactivity, and the federalism-based, “super-strong” clear statement rules.⁵²⁵ The Constitution is the ultimate rule of law, as the Supremacy Clause says,⁵²⁶ and so canons that gently implement constitutional norms might be admissible. Barrett went well beyond the underenforced-constitutional-norms justification, however, when she defended aggressive application of such canons even when they may “overenforce” constitutional norms.⁵²⁷ Her justification was that Congress frequently responds to aggressive Supreme Court statutory interpretations, so departing from ordinary meaning requires Congress to deliberate more carefully on sensitive constitutional issues.⁵²⁸ Unfortunately, in 2010, when she published her article, Congress had been gridlocked for a dozen years and was able to enact only a handful of overrides each session; today, there is virtually no chance of congressional overrides for any controversial issue, and the Court has the final word more than ever before.⁵²⁹

521. See *Arizona v. Navajo Nation*, 143 S. Ct. 1804, 1826 (2023) (Gorsuch, J., dissenting).

522. See Eskridge, *Interpreting Law*, *supra* note 283, at 425–45 (appendix listing hundreds of Supreme Court opinions following dozens of substantive canons, almost all joined by Scalia); Scalia & Garner, *supra* note 7, at xv–xvi (identifying twenty substantive canons split into four categories: expected meaning, government-structuring, private right, and stabilizing canons).

523. Barrett, *Substantive Canons*, *supra* note 19, at 109–10 (emphasis added).

524. Eskridge & Frickey, *Quasi-Constitutional Law*, *supra* note 468, at 630–31.

525. Barrett, *Substantive Canons*, *supra* note 19, at 168–77; accord John F. Manning, *Legal Realism & the Canons’ Revival*, 5 *Green Bag 2d* 283, 292 n.42 (2002) (noting that textualists often support canons that reflect constitutionally derived values).

526. See U.S. Const. art. VI, cl. 2.

527. See Barrett, *Substantive Canons*, *supra* note 19, at 172–77.

528. *Id.* at 175.

529. See Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 *Tex. L. Rev.* 1317, 1331–44 (2014).

The underenforced-constitutional-norms justification faces several dilemmas from a rule-of-law perspective. First, many strong clear statement rules—and especially the super-strong ones—lead the textualist away from ordinary meaning.⁵³⁰ Statutes no longer mean what they seem to say, and We the People must await the Court's selection and application of its favored canons before We can be sure. The first problem is compounded by a second one: The norms justification introduces more choices—and therefore discretion—into cases where a constitutionally inspired canon might apply. Should the judge apply the canon? How specific does that statutory language have to be? (Once launched by the Court, the constitutionally inspired canons have evolved—typically from presumptions to clear statement rules to super-strong clear statement rules.) Should there be an exception to the canon?

The new textualists realize they are under assault for judicial activism and may be refining their justifications for the MQD. In *Biden v. Nebraska*, Barrett abandoned her earlier position that the Court should “overenforce” norms through substantive clear statement rules and took the position that the major questions idea was nothing more than a textual canon. That is, the MQD was normal, ordinary-meaning interpretation.⁵³¹ Barrett attempted to support this argument with a familiar, common sense example from ordinary life: Imagine that a parent hires a babysitter to watch the children overnight on the weekend, and the parent hands the babysitter a credit card and instructs the babysitter to use it to make sure the kids have fun. We all understand, says Barrett, that the parents' instruction permits the babysitter to take the children to a movie theater, but it does not permit the babysitter to take the children to an amusement park and stay in a hotel overnight.⁵³² Similarly, proposes Barrett, the meaning of authorizations from Congress to agencies are limited in scope.

This claim further muddies what the Court considers to be a “major question” and rests upon dubious logic about context and delegated authority. Barrett calls for attention to context, but her reasoning ignores the COVID context of the recent MQD cases. What if the children all became sick and the parents were unreachable? Would the sitter not have an implicit authorization to take the kids to the hospital and seek medical assistance? More broadly, are the ordinary linguistics of babysitter delegation the same as the ordinary linguistics of agency delegation?

530. But see Brian G. Slocum & Kevin Tobia, *The Linguistic and Substantive Canons*, 137 *Harv. L. Rev. Forum* (forthcoming 2023) (manuscript at 23–30), <https://ssrn.com/abstract=4186956> [<https://perma.cc/4EXD-JWUJ>] (arguing that some substantive canons, like the presumption against retroactivity, have a linguistic basis); Ian Wurman, *Importance and Interpretive Questions*, 109 *Va. L. Rev.* (forthcoming 2023) (manuscript at 35–47), <https://ssrn.com/abstract=4381708> [<https://perma.cc/5PKJ-NZP7>] (arguing that the major questions doctrine is a linguistic canon).

531. *Biden v. Nebraska*, 143 S. Ct. 2355, 2378–81 (2023) (Barrett, J., concurring).

532. *Id.* at 2378–80.

A final problem is empirical. Even taking Barrett's analogy between babysitting and lawmaking at face value, ordinary Americans do not find the babysitter example to be common sense! An empirical study presented people with the babysitter example and asked whether the babysitter followed or broke the rule. The study found that the vast majority (92%) disagreed with Barrett: The amusement park trip did not violate the instructions.⁵³³

For another example of the malleability of the substantive canons, the Roberts Court requires a strong clear statement from Congress before it will consider a statutory lawsuit prerequisite "jurisdictional."⁵³⁴ In *Wilkins v. United States*, the Court applied the rule over the dissent of Thomas (joined by Roberts and Alito), who argued for an exception to the clear statement rule when the defending party is the federal government.⁵³⁵ The textualist dissenters maintained that any waiver of immunity by the United States should be strictly construed and any preconditions for suit against the sovereign should usually be considered jurisdictional.⁵³⁶ This turns the jurisdiction clear statement rule on its head.

Finally, commenters have worried that such "power canons" would become a form of "stealth constitutionalism."⁵³⁷ How do you say, exactly, whether a constitutional rule is "underenforced" to start with, and at what point does it become overenforced through these clear statement rules? There is no objective metric for such judgments.

John Manning objects to the "aggressive construction" of clear statement rules because they "impose a clarity tax on Congress by insisting that Congress legislate exceptionally clearly when it wishes to achieve a statutory outcome that threatens to intrude upon some *judicially identified* constitutional value."⁵³⁸ Is the post-*West Virginia v. EPA* Court even listening to these rule-of-law concerns—or will it be emboldened by a lack of immediate punishment to engage in ever more activist sabotage of the regulatory state, the rights of marginalized populations, and the liberty protections for criminal defendants?

533. See Kevin Tobia, Daniel Walters & Brian G. Slocum, Major Questions, Common Sense? 97 S. Cal. L. Rev. (forthcoming 2023) (manuscript at 41–43), <https://ssrn.com/abstract=4520697> [<https://perma.cc/WSU4-83A5>].

534. E.g., *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 143 S. Ct. 927, 936 (2023) (summarizing and explaining several Roberts Court precedents imposing a clear statement rule for considering a mandatory statutory requirement to be jurisdictional). Clear statement rules require that Congress legislate clearly when legislation would impose on certain values (e.g., federalism, non-retroactivity). John F. Manning, Clear Statement Rules and the Constitution, 110 Colum. L. Rev. 399, 401 (2010) [hereinafter Manning, Clear Statement Rules]; see also Barrett, Substantive Canons, supra note 19, at 118; Eskridge & Frickey, Quasi-Constitutional Law, supra note 468, at 597.

535. 143 S. Ct. 870, 876 & n.3 (2023).

536. *Id.* at 881 (Thomas, J., dissenting).

537. See William N. Eskridge, Jr. & Philip P. Frickey, Foreword: Law as Equilibrium, 108 Harv. L. Rev. 26, 81–87 (1994).

538. Manning, Clear Statement Rules, supra note 534, at 399, 419 (emphasis added).

As to the last point, the long-established rule of lenity—a canon championed by Ruth Bader Ginsburg and Antonin Scalia, the oldest substantive canon of all, and a nondelegation canon on top of all that—is under siege in the Roberts Court. To be sure, the pre-2017 Court applied the rule of lenity mainly to protect corrupt white-collar politicians and businessmen⁵³⁹ while usually giving the cold shoulder to blue-collar defendants.⁵⁴⁰ Ironically, the post-Scalia Court recently overturned criminal convictions of several blue-collar defendants—but without relying on the rule of lenity. One reversal came in *Van Buren v. United States*, in which Barrett narrowly interpreted a broad computer-crime law to absolve a police officer tapping into police databases for a personal business.⁵⁴¹ Her opinion for the Court placed great weight on the word “so” (confirmed by an analysis of the statutory structure) but explicitly abjured reliance on lenity—only to conclude with a warning that the government’s broader interpretation would “criminalize[] every violation of a computer-use policy, [making] millions of otherwise law-abiding citizens . . . criminals.”⁵⁴²

Likewise, in *Wooden v. United States*, Kagan’s opinion for the Court reversed the defendant’s sentence enhancement because the Government’s reading of “occasion” was semantically implausible.⁵⁴³ Concurring only in the judgment, Gorsuch would simply have invoked the rule of lenity⁵⁴⁴—but Kavanaugh’s concurring opinion responded with a plea that the Court retire the venerable canon. He argued that “the rule of lenity has appropriately played only a very limited role in this Court’s criminal case law.”⁵⁴⁵ The reason for its limited role, according to Kavanaugh, is that the traditional textualist sources and canons almost always reach the right answer (in Kavanaugh’s terms, the “best reading”), as Kagan did in this case.⁵⁴⁶ To satisfy “fair notice” in criminal cases, Kavanaugh suggested that a newer (substantive) canon could do the job just as well—namely, the presumption that the government must prove *mens rea* in criminal prosecutions.⁵⁴⁷

539. See, e.g., *Marinello v. United States*, 138 S. Ct. 1101, 1106–08 (2018) (using the rule of lenity in favor of company owner convicted of obstructing the administration of tax laws); *McDonnell v. United States*, 579 U.S. 550, 576–77 (2016) (applying the rule of lenity to overturn former GOP Governor’s conviction in major corruption case); *Skilling v. United States*, 561 U.S. 358, 410–11 (2010) (applying the rule of lenity in favor of Enron CEO after he was convicted of honest-services wire fraud).

540. See, e.g., *Muscarello v. United States*, 524 U.S. 125, 138 (1998) (refusing to invoke the rule of lenity, despite objections from Ginsburg and Scalia, in matter involving the sentence enhancement of a street-level drug dealer for “carrying” a firearm in his car).

541. 141 S. Ct. 1648, 1652 (2021).

542. *Id.* at 1661.

543. 142 S. Ct. 1063, 1069–71 (2022).

544. See *id.* at 1081 (Gorsuch, J., concurring in the judgment).

545. *Id.* at 1075 (Kavanaugh, J., concurring).

546. *Id.*

547. *Id.* at 1076.

Wooden and *Van Buren* leave fair notice and the rule of law in a state of uncertainty in criminal cases. Is the rule of lenity now irrelevant in such cases? Is the mens rea canon relevant? It's unclear. Maybe Kavanaugh is right that a purely textualist Court should just provide its "best reading" of the statute and let the cards fall where they may.⁵⁴⁸ But the Roberts Court does not have a coherent, unified, predictable theory of "best reading." For example, why should *Van Buren* and *Wooden* not get the benefit of the rule of lenity, which is the oldest of the nondelegation canons,⁵⁴⁹ when the MQD—also linked to nondelegation—disrupted "best reading" analyses in high-stakes cases involving human life (the *COVID-19 Cases*) and global warming (*West Virginia v. EPA*)?

Although Barrett declined to invoke the rule of lenity or constitutional avoidance in *Van Buren*, which involved a serious criminal prosecution of a police officer who used his work computer in ways that millions of Americans (including not a few law professors) do, she joined Alito's opinion for the Court in *Sackett v. EPA*.⁵⁵⁰ To support his narrow view of "waters of the United States" and "adjacent wetlands," Alito invoked both constitutional avoidance and lenity against vague rules—in a civil case.⁵⁵¹ Dozens of federal statutes impose civil penalties, with the possibility of criminal liability for intentional violations. In a Court where the rule of lenity and due process concerns about vagueness are not openly invoked to protect ordinary criminal defendants like *Van Buren* and *Wooden*, might these same concerns now be invoked by civil plaintiffs like the *Sacketts* when the green police limit their plans for land development?

In short, substantive canons make a big difference in the Roberts Court—especially in its uber-textualist phase, in which legislative materials are suspect, agency views often don't carry much weight, and even the Court's own precedents are ignored, marginalized, or overruled.⁵⁵² There are dozens of such canons the Court can use to load the dice, their application is often discretionary and contestable, and the Court's

548. Kavanaugh, *Fixing Interpretation*, supra note 23, at 2121.

549. See *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019) ("[The rule of lenity] is 'perhaps not much less old than' the task of statutory 'construction itself.'" (quoting *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.))).

550. 143 S. Ct. 1322, 1328 (2023).

551. *Id.* at 1335–36, 1342.

552. But see Krishnakumar, *Reconsidering Substantive Canons*, supra note 111, at 847–64 (presenting quantitative data from Roberts Court statutory cases and concluding that the substantive canons are "infrequently invoked"). Professor Krishnakumar's quantitative data is illuminating. It shows that Justices invoke substantive canons in statutory cases on a spectrum—anywhere from 7.7% (Kavanaugh) to 22.6% (Gorsuch), and 15% overall in all opinions. Krishnakumar, *2005–2019 Data*, supra note 111, at 625–26. Though a 15% rate of citation to substantive canons is lower than the conventional wisdom, it is also not an insubstantial amount.

textualists do not agree about which ones to privilege or privilege first.⁵⁵³ Hence, rare is the hard case in which the Justices do not have the option of picking or ignoring or even making up a substantive canon or other new “doctrine.”⁵⁵⁴

CHOICE 11: CONFLICTING PROVISIONS OR STATUTES

Just as there may be clashing precedents in Choice 9 or conflicting canons in Choice 10, there might be statutes or provisions that seem to be inconsistent. As there are usually no linguistic principles on which to rely, how do the newest textualists make these choices? Choice 11, resolving conflicts between statutory provisions, often requires extratextual judgment and thereby offers more room for judicial discretion and popular confusion about what the law requires.

A conflict between two sub-sub-subsections was at the center of one of the Biden Administration’s few big wins, *Biden v. Texas*.⁵⁵⁵ Section 1225(b)(2)(C) of the Immigration and Nationality Act provides that “[i]n the case of an alien . . . who is arriving on land . . . from a foreign territory contiguous to the United States, the [Secretary of Homeland Security] may return the alien to that territory pending a proceeding under [§] 1229a.”⁵⁵⁶ Reversing a policy of returning to Mexico all undocumented immigrants (including asylum seekers) crossing the Mexican border, the Biden Administration invoked the discretionary language (“may”) of § 1225(b)(2)(C) to release many of those immigrants into the country, pending resolution of their petitions.⁵⁵⁷ Writing for Kavanaugh and Barrett as well as the three pragmatic Justices, Roberts upheld the presidential policy.

Alito’s dissent focused on a different provision, § 1225(b)(2)(A), which provides that “if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding

553. Compare *Davis*, 139 S. Ct. at 2333 (Gorsuch, J.) (appealing to lenity before avoidance), with *id.* at 2351–52 (Kavanaugh, J., dissenting) (proposing that lenity should be a last resort).

554. Major questions was not even a fully defined “doctrine” until Gorsuch announced it in *NFIB v. OSHA*. See 142 S. Ct. 661, 667–70 (2022) (Gorsuch, J., concurring).

555. 142 S. Ct. 2528 (2022).

556. 8 U.S.C. § 1225(b)(2)(C) (2018). Though the statute makes the Attorney General responsible for returning the noncitizen to the contiguous territory, in practice, this duty falls to the Secretary of Homeland Security.

557. Brief for the Petitioners at 19–20, *Biden v. Texas*, 142 S. Ct. 2528 (No. 21-954), 2022 WL 815341; see also *Opati v. Republic of Sudan*, 140 S. Ct. 1601, 1609 (2020) (“[T]he word ‘may’ clearly connotes discretion.” (internal quotation marks omitted) (quoting *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1931 (2016))); *Jama v. Immigr. & Customs Enft*, 543 U.S. 335, 346 (2005) (“The word ‘may’ customarily connotes discretion.”).

under section 1229a.⁵⁵⁸ Because § 1225(b)(2)(A) makes detention mandatory, Alito, Thomas, and Gorsuch argued that the otherwise discretionary return authority in § 1225(b)(2)(C) becomes mandatory if the Secretary chooses not to detain or parole (the third option) undocumented immigrants.⁵⁵⁹ The dissenters arguably have the better textual argument, yet *Biden v. Texas* divided the Court's textualists 3-3—pitting their preference for following the plain meaning of the immigration law (Alito) against their reading of Article II of the Constitution to vest foreign policy and diplomacy largely with the President (Roberts).⁵⁶⁰ Resolving this sort of conflict is a matter of policy, not linguistics, and it illustrates the policy-based discretion inherent in textualism.

The same discretionary choice is also present when there is a conflict between statutes. For instance, Gorsuch indicated in *Bostock* that a conflict between Title VII's antidiscrimination provisions and the Religious Freedom Restoration Act of 1993 (RFRA) should be resolved in favor of RFRA because it "operates as a kind of super statute, displacing the normal operation of other federal laws."⁵⁶¹ But how is it determined that RFRA is more of a super-statute than Title VII? Super-statutes have been described as "landmark laws that successfully displace common law norms and entrench new transformational legal rules."⁵⁶² Certainly, Title VII has as much of a claim to super-statute status as RFRA, and Title VII already contains detailed religious allowances.⁵⁶³ Yet the Court asserted that RFRA trumps Title VII without any analysis or acknowledgment of its policy decision.

The recent case *Turkiye Halk Bankasi* involved a similar phenomenon: How does the general criminal law jurisdiction provision interact with the Foreign Sovereign Immunities Act? Does the sovereign immunity defense afforded by the latter statute seep over into the earlier, general one? Kavanaugh's opinion for the Court made a persuasive case for maintaining a formal separation between the two statutory regimes—but Gorsuch's opinion highlighted the fact that as statutes proliferate,

558. 8 U.S.C. § 1225(b)(2)(A); see also *Biden v. Texas*, 142 S. Ct. at 2549–50 (Alito, J., dissenting).

559. *Biden v. Texas*, 142 S. Ct. at 2549–50.

560. *Id.* at 2543 (majority opinion) (noting that Texas's position interferes with the President's management of our frayed relations with Mexico).

561. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (2020).

562. Eskridge et al., *The Meaning of Sex*, supra note 157, at 1507 n.14; see also William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 *Duke L.J.* 1215, 1230–46 (2001) (providing examples of super-statutes including the Sherman Antitrust Act of 1890, the Civil Rights Act of 1964, and the Endangered Species Act of 1973).

563. See 42 U.S.C. § 2000e-1 (2018) (allowing religious organizations to discriminate because of religion); *id.* § 2000e-2(e) (allowing religion-based discrimination by colleges and universities substantially controlled by a religious organization).

they will inevitably come into conflict in ways not anticipated by their drafters.⁵⁶⁴

CHOICE 12: TEXTUALIST ESCAPE HATCHES

A textualist judge is not often obligated to select an interpretation deeply objectionable to their politics, faith tradition, or moral intuitions. Textualists privilege semantic meaning, but within the parameters of the newest textualism, judges have plenty of room to find the semantic meaning they like the most.⁵⁶⁵ A judge has discretion to choose the statutory term or precedent they consider most on point,⁵⁶⁶ which contextual and (con)textual evidence that will be considered,⁵⁶⁷ whether the term will be given a narrow or broad meaning,⁵⁶⁸ and whether and how to apply both linguistic and substantive canons.⁵⁶⁹ With all of these discretionary interpretive choices, a textualist judge can typically construct a “best reading” of the statute that is consistent with the judge’s view of desirable or acceptable policy outcomes.⁵⁷⁰

In those situations when an unacceptable public meaning of the text is hard to avoid, the new textualist judge has a choice to apply the absurdity doctrine and revise the language of the statute.⁵⁷¹ Manning indicates that “even the staunchest modern textualists still embrace and apply, even if rarely, at least some version of the absurdity doctrine.”⁵⁷² To be sure, the newest textualists are reluctant to concede that applying the absurdity doctrine necessarily rejects the text’s public meaning. Scalia and Gorsuch give the absurdity doctrine an objective gloss—via what a “reasonable person” would believe to be the “correct” or “fair” meaning of the text—that positions it as just one aspect of the public meaning of a text, rather than a doctrine for deviating from that meaning.⁵⁷³ But this inquiry—

564. Compare *Turkiye Halk Bankasi A.S. v. United States*, 143 S. Ct. 940, 946–49 (2023) (Kavanaugh, J.), with *id.* at 953 (Gorsuch, J., concurring in part and dissenting in part) (arguing that any exception must stand on the text alone, not inferred congressional intention).

565. See, e.g., Tobia et al., *Ordinary Meaning*, *supra* note 260, at 417–20 (arguing that courts often find legal rather than ordinary meaning—giving judges discretion to choose between the two).

566. See *supra* Choice 1.

567. See *supra* Choice 5.

568. See *supra* Choice 6.

569. See *supra* Choice 5, Choice 10.

570. See Kavanaugh, *Fixing Interpretation*, *supra* note 23, at 2121 (referring to the judge’s obligation to determine the “best reading” of a statute).

571. See Manning, *Absurdity Doctrine*, *supra* note 374, at 2388 (“From the earliest days of the Republic, the Supreme Court has subscribed to the idea that judges may deviate from even the clearest statutory text when a given application would otherwise produce ‘absurd’ results.”).

572. *Id.* at 2391.

573. E.g., *Yellen v. Confederated Tribes of the Chehalis Rsr.*, 141 S. Ct. 2434, 2460 n.3 (2021) (Gorsuch, J., dissenting) (indicating that “[a]nything more would threaten the

asking what a “reasonable person” would believe is “correct” or “fair”— does not involve an objective standard external to the judge.⁵⁷⁴ Scalia and Gorsuch’s “reasonable person,” like Barrett’s “reasonably informed interpreter” for purposes of the MQD,⁵⁷⁵ is a normative construct that is subject to the perspectives of the Justices.

Thus, one textualist’s plain meaning can be another’s absurdity. For example, in *Brown v. Plata*, Justice Anthony Kennedy’s uber-textualist opinion for the Court upheld a lower court prison injunction that required the release of prisoners if the authorities could not satisfy minimal Eighth Amendment standards for overcrowding and medical care.⁵⁷⁶ Kennedy found the lower court’s findings of fact closely tailored to the requirements of the Prison Litigation Reform Act of 1995 (PLRA).⁵⁷⁷ In a furious dissent, Scalia (joined by Thomas) denounced the Court’s opinion as a “judicial travesty” that violated “common sense.”⁵⁷⁸ In his pastiche of the absurdity rule, Scalia opined that, “before allowing the decree of a federal district court to release 46,000 convicted felons, this Court [sh]ould *bend every effort* to read the law in such a way as to *avoid that outrageous result*.”⁵⁷⁹

Of course, no prisoners had been released, nor were they released after the decree was affirmed. Moreover, in detailed testimony and findings of fact, the record revealed that one prisoner was dying every week because of systemwide noncompliance with agreed-upon consent decrees.⁵⁸⁰ From the perspective of human beings whose health and lives were in peril, in serious violation of the Eighth Amendment as construed by the Court, was the judicial insistence on minimal standards a “travesty”? Or did the interpretation merely adhere to ordinary meaning? As before, the methodological debate was peripheral to the policy issue that really

separation of powers, undermine fair notice, and risk upsetting hard-earned legislative compromises”); see also Manning, Absurdity Doctrine, *supra* note 374, at 2392–93 (explaining that strict textualists ask how a reasonable person, familiar with social and linguistic conventions, would interpret the text); *id.* at 2419–20 (providing examples of Scalia endorsing “some form” of the absurdity doctrine).

574. It may be that ordinary people interpret statutes to avoid absurd results. See Tobia et al., Statutory Interpretation From the Outside, *supra* note 284, at 284 n.290 (citing evidence that ordinary people rely on purpose (limited by semantic meaning)). The new textualists have not made that claim.

575. See *Biden v. Nebraska*, 143 S. Ct. 2355, 2380–81 (2023) (Barrett, J., concurring) (invoking the expectations of a “reasonably informed interpreter” to help construe a statute).

576. See 563 U.S. 493, 502 (2011).

577. See *id.* at 524–45 (concluding that overcrowding was the “primary cause” of the violation, consistent with the text of the PLRA). Alito and Roberts dissented based upon a close analysis of the record, which they found inconsistent with the PLRA requirements. *Id.* at 564–81 (Alito, J., dissenting).

578. *Id.* at 550 (Scalia, J., dissenting).

579. *Id.* (emphasis added).

580. *Id.* at 507–08 (majority opinion).

divided the Justices: Does the Eighth Amendment protect incarcerated individuals against confinement that puts their lives at great risk?

The newest textualists ought to be ambivalent about the absurdity escape hatch. An interpretive device like the absurdity doctrine is occasionally necessary to mitigate the harsh results of public meaning, and it might be a device for avoiding constitutional boundaries. On the other hand, even beyond its subjectivity, the doctrine is inconsistent with an essential assumption of the new textualism, which is that Congress drafts carefully and should be accountable for the text it adopts under Article I, Section 7. This assumption is at the heart of the new textualist version of the separation of powers. As Manning has observed, “By giving judges broad authority to displace legislative outcomes based on an unstructured identification of background social values, the absurdity doctrine permits judges to make an end run around the constitutional norms that establish those boundaries.”⁵⁸¹

Furthermore, if the absurdity doctrine is accepted, it is difficult to argue against other mitigating doctrines. Why should public meaning not also yield to “unreasonable” outcomes, or even nonoptimal outcomes?⁵⁸² Recall *King v. Burwell*.⁵⁸³ The Court held that the Affordable Care Act (ACA) provided for tax credits to customers of federal insurance exchanges, despite key provisions referencing only state exchanges.⁵⁸⁴ The Court reasoned that a literal interpretation would “make little sense” and would undermine the entire ACA but did not invoke the absurdity doctrine.⁵⁸⁵ In turn, Scalia found the meaning of the ACA to be rational and free of ambiguity or absurdity despite the powerfully supported claim that the supposedly unambiguous plain meaning would set the ACA to self-destruct.⁵⁸⁶ Would a “reasonable person” find a suicidal interpretation of the ACA to be absurd?

In sum, even after working through the eleven foregoing choices, textualists might still jump ship. This choice has focused on the escape hatch of “absurdity,” but there are other potential escape hatches. Thus, a textualist alarmed by the apparent plain meaning of a statute can also escape through appeal to constitutional avoidance,⁵⁸⁷ bad consequences

581. Manning, Absurdity Doctrine, *supra* note 374, at 2393.

582. See William N. Eskridge, Jr., *Dynamic Statutory Interpretation* 45–46 (1994) (“[T]here is no logical reason not to sacrifice plain meaning when it directs an ‘unreasonable’ result that was probably unintended by Congress.”).

583. 576 U.S. 473 (2015).

584. See *id.* at 498.

585. *Id.* at 491 (arguing that since the ACA requires all exchanges to submit reports on their health plans, including information that is necessary to determine whether taxpayers have received excess advanced payments, the ACA intended to make tax credits available on federal exchanges).

586. See *id.* at 500 (Scalia, J., dissenting) (arguing that the Court’s interpretation meant that “[w]ords no longer have meaning”).

587. See *supra* notes 542–545 and accompanying text.

and “disruption” of established reliance interests,⁵⁸⁸ or lack of jurisdiction and other passive virtues.⁵⁸⁹

CONCLUSION

Textualism, once a seemingly simple, unified, straightforward theory, is now complex and multivocal, even convoluted. The Court’s fractures and each Justice’s individual inconsistencies reveal that the newest textualists, though a solid majority, have, to paraphrase Kavanaugh, not agreed on the rules of the road.⁵⁹⁰ The recent “Text War” cases demonstrate that the Court’s broad, unfocused commitment to textualism does not guarantee predictable, transparent, neutral interpretations of federal statutes. The Justices have thus far offered the public no instruction manual for textualism with metarules that could address the numerous interpretive inconsistencies revealed in every recent Term of the Court. It is not clear where the newest-textualist Justices will take the Court methodologically or how they will get there.

How many “textualisms” are there? Back-of-the-envelope calculations suggest *a lot*. There are twelve major choices; supposing that these choices are independent, with two options for each choice, that would suggest over 4,000 versions of textualism! The number could be even larger. Most of the twelve choices involve sub-choices (and some sub-sub-choices), and all the choices have more than two possible answers. Moreover, the order of operations among the twelve choices could matter, leading to even more possibilities.⁵⁹¹

This rough calculation, though staggering, overestimates the practical or likely possibilities. Perhaps there are some *broader textualist* orientations, which imply a set of crosscutting answers to the choices (i.e., the choices are not independent). For example, “Textualism A” answers all twelve choices in one way (or with one or two variations), while “Textualism B” answers all twelve choices in a different way (or with one or two variations)—and all the Justices are either type A or type B textualists. If so, there is still a predictability problem, but it is less extreme than we have made it out to be.

588. See *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2502 (2020) (Roberts, C.J., dissenting) (objecting to the “potential for cost and conflict” and the “disruption inflicted” by the Court’s uber-textualist decision).

589. See, e.g., *id.* at 2502–04 (Thomas, J., dissenting) (arguing that the Court had no jurisdiction to review the appeal).

590. Kavanaugh, *Fixing Interpretation*, *supra* note 23, at 2121.

591. Some choices naturally arise before others: Choice of text (Choice 1) occurs before any whole act or whole-code analysis (Choice 7). But other choices could be made in different orders, leading to different outcomes. For example, should textualists first consider agency interpretations (Choice 7) or substantive canons (Choice 10)? See Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 *Yale L.J.* 64, 70–74 (2008) (discussing the conflict between substantive canons and judicial deference to agency interpretations). Thanks to Kart Kandula for suggesting this point.

This is doubtful. Consider, as an example, one of the more influential recent proposals about textualist types. Tara Grove has developed a broad distinction between “formalistic” and “flexible” textualisms.⁵⁹² Identification as a formalistic or flexible textualist might imply an answer to one aspect of Choice 7 (a formalist favoring text-based context over social context), but our survey reveals that Gorsuch—a formalist by Professor Grove’s typology—is super-flexible and contextual in Indian law cases, while the flexible Roberts and Kavanaugh are quite the formalists in such cases. Nor does the Grove typology fully answer Choice 7: For example, does a formalistic textualist employ the whole act or whole code rules? Both? Nor does the answer entail how one should answer Choices 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, or 12. Of course, other textualists might propose more highly specified, crosscutting types, which imply answers to all the Choices. This Article invites exactly this kind of elaboration: If textualism claims to be more objective and predictable than its competitors, its proponents and practitioners must elaborate on what their theory *is*. But textualists have not yet offered theories of language and interpretation that would create coherent crosscutting methodologies.

As it stands, the Court’s textualist hodgepodge facilitates politically oriented judging. In constitutional cases, the six Justices appointed by Republican presidents almost always vote consistently with the 2016 GOP platform,⁵⁹³ often with insufficient evidence that their activism is required by either constitutional text or original meaning and sometimes with error-filled law office history. In statutory cases, usually involving issues not addressed in the GOP platform, none of the Justices follow an entirely consistent textualist methodology.

In our view, current methodological divisions are more deeply driven by a variety of conservative political ideologies. Alito is basically a Burkean conservative, which reflects his comfort with tradition-based arguments and his particular interest in religious freedom.⁵⁹⁴ Roberts and Kavanaugh are legal process conservatives, attentive to precedent, neutral principles,

592. See Grove, *supra* note 23, at 267.

593. The most recent Republican Party Platform, created in 2016, explicitly supported the integrity of “free markets” against the “nanny state”; individual workers against unions and compulsory dues; natural law and “family values” against gay marriage; white people against racial quotas and preferences; “human life” against *Roe v. Wade*; a revival of the nondelegation doctrine against judicial deference to agency interpretations; religious liberty against the siege from antidiscrimination laws; a broad Second Amendment right to own and carry guns against state regulation; and polluters against EPA’s “radical environmentalists.” See 2016 Republican Party Platform, Am. Presidency Proj. (July 18, 2016), <https://www.presidency.ucsb.edu/documents/2016-republican-party-platform> [<https://perma.cc/4R32-4LW6>]. The Roberts Court has faithfully implemented all these partisan stances by creating a new constitutional regime, often overruling or marginalizing constitutional precedents.

594. Burke maintained that religion, including religious diversity, was the foundation for civil society. See Edmund Burke, *Reflections on the Revolution in France* 90 (L.G. Mitchell ed., Oxford Univ. Press 2009) (1790).

passive virtues, and institutional guardrails. Thomas and Gorsuch are the most strongly Hayekian among the Justices: They valorize the spontaneous generation of unregulated private choices and free markets and seem hostile to centralized, liberty-restricting administration.⁵⁹⁵ To make matters more complicated, each jurist has soft spots where they behave differently than expected. Thus, uber-formalist Gorsuch (whose Tenth Circuit experience rendered him especially knowledgeable) becomes a context-sensitive minority rights advocate in Indian law cases. Roberts and Kavanaugh (top executive department officials before their judicial appointments) defer to the White House on matters of national security, foreign affairs, and immigration.

These developments—textualism’s increasing complexity and the Justices’ tendency to trump precedent (and often statutory text) in favor of political philosophies—are especially worrying alongside another closely related trend: bolder activism. The majority are trying to accomplish more with an undertheorized methodology. For instance, their proliferation of super-strong clear statement rules that override ordinary meaning suggests that the newest-textualist majority are using statutory interpretation to engage in a stealth constitutionalism that corrodes policy choices made by elected legislators and presidents. These patterns—obscurity and inconsistency, political ideology, and activism—are deeply troubling for the Court, country, and rule of law.

Is the newest-textualist Court locked into the unfortunate trajectory outlined above? The media and partisan observers assume that it is.⁵⁹⁶ As academics supporting the rule of law and hoping that the Court can pull out of its legitimacy nosedive, we hold out some optimism. We think all six newest textualists support the rule of law, and most of them agree with Roberts that the Court’s plunging legitimacy is a matter of concern. And they ought to be open to Kavanaugh’s call for clearer “rules of the road.”⁵⁹⁷

Of course, textualist rules of the road must necessarily be sophisticated. The theory cannot simultaneously be simple and intuitive yet also significantly constrain judges in cases involving complex statutes and difficult interpretive questions. Careful, text-centric interpretation is unavoidably complex. Consider some of the choices described in the

595. See F.A. Hayek, *Law, Legislation, and Liberty*, in 19 *The Collected Works of F.A. Hayek* 1, 15–21 (Jeremy Shearmur ed., 2021). For an argument that the Roberts Court GOP majority is generally united behind a Hayekian assault on the administrative state, see Gillian E. Metzger, *The Supreme Court 2016 Term: Foreword, 1930s Redux: The Administrative State Under Siege*, 131 *Harv. L. Rev.* 1, 2–7 (2017).

596. See, e.g., Ben Olinsky & Grace Oyenubi, *The Supreme Court’s Extreme Majority Risks Turning Back the Clock on Decades of Progress and Undermining Our Democracy*, *Ctr. for Am. Progress* (June 13, 2022), <https://www.americanprogress.org/article/the-supreme-courts-extreme-majority-risks-turning-back-the-clock-on-decades-of-progress/> [<https://perma.cc/72W5-SLR5>] (“*Dobbs* offers a stark preview of the plans the court’s radical majority has for the future.”).

597. Kavanaugh, *Fixing Interpretation*, *supra* note 23, at 2121.

Article: (1) which is the relevant text;⁵⁹⁸ (2) whether to apply a presumption of ordinary meaning or one of term-of-art meaning;⁵⁹⁹ (3) what linguistic evidence should be considered (e.g., semantic and grammar canons);⁶⁰⁰ (4) whether terms should be given broad or narrow meanings;⁶⁰¹ and (5) what (co)text, (con)text, and (extra)text should be considered.⁶⁰² These choices and others must be made in text-centric interpretation, even if implicitly. By failing to resolve such issues, textualists foster judicial discretion and interpretive splits (evident in recent Court decisions), thereby undermining the very rule-of-law values textualism promotes.

In a Court split between Democrat-appointed pragmatists and Republican-appointed textualists, the balance of power rests with Roberts, Kavanaugh, and Barrett—precisely those jurists who, in our opinion, would be most amenable to rules of the road that would offer the newest textualism improved rigor but would also iron out some of its least-defensible features. In that spirit, we offer some rules of the road that would, we maintain, make the Court's textualism better conform to its rule-of-law aspirations.

1. *Study the Whole Act Sympathetically.* — Federal statutes usually define their terms, explicitly set forth findings and purposes, and have a logical structure. A textualism faithful to statutory details and structure is good for the rule of law, democracy, and the country. We consider Kavanaugh's majority opinion in *Turkiye Halk Bankasi*, Roberts's majority opinion in *King v. Burwell*, O'Connor's opinion in *Brown & Williamson*, and both Justice John Paul Stevens's majority and Scalia's dissenting opinions in *Sweet Home*, to be splendid examples of deep judicial understanding of statutory schemes.

2. *Textualism, Not Originalism—and Intensional Originalism if You Must.* — Judges are not competent time travelers and should be more cautious and less dogmatic when they rely on historical reconstruction to resolve present-day issues. As Scalia was wont to do, consider historical meaning but do not stop with that. If judges do seek to determine original meaning, it should be intensional (the Gorsuch approach in *Bostock*), not extensional (the Alito approach in *Bostock*).

3. *Neither Myopic Compositional Linguistics Nor Speculative Holism.* — The cut-and-paste methodology associated with Thomas and Gorsuch does not always track the way ordinary people or legislators understand language. And a myopic focus on the semantic meanings of individual words can distort the meanings of the phrases and sentences that constitute the text. Roberts, in cases like *Bond*, and Kavanaugh, in cases

598. See *supra* Choice 1.

599. See *supra* Choice 4.

600. See *supra* Choice 5.

601. See *supra* Choice 6.

602. See *supra* Choice 7.

like *Niz-Chavez*, approach language in a more realistic manner, and we recommend their approach for the future. At the same time, we caution against *speculative* holism, which privileges judicial abstraction about what the statutory language is “really” about at the expense of the statute’s actual language. Both myopic compositional linguistics and speculative holism run the risk of empowering judges to inject policy preferences into interpretation.

4. *Public > Ordinary Meaning*. — We understand the impulse for the Court to say it is only implementing “ordinary meaning.” But the best opinions, such as Barrett’s majority opinion in *HollyFrontier* and her *Bittner* dissent, consider legal and technical as well as ordinary meanings. Why not stick with “public meaning,” which includes consideration of how regular people understand language, including technical language?

5. *Do Not Be Quick to Insist on a Plain Meaning*. — Kavanaugh aptly criticizes the Court for obsessing about whether a provision is ambiguous. In most of the hard cases discussed in this Article—especially *Bostock* and *Castro-Huerta*—the statutory texts can easily be read more than one way. Kavanaugh argues that judges should focus more on the “best reading” of the text, and not on whether it is completely clear or ambiguous.⁶⁰³ His *Niz-Chavez* and *Bostock* dissents are good examples, as is his majority opinion in *Turkiye Halk Bankasi*.

6. *Make Good on Textual (Con)text*. — We have learned valuable lessons from the new textualism’s appeal to (con)text along the lines of our diagram in Choice 7; *King v. Burwell* is once more a good model, as is *Turkiye Halk Bankasi*. Whole-code analysis should be deployed cautiously and not dogmatically, but Alito and Kavanaugh responsibly deployed that mode of argument in *Bostock*.

7. *Follow Statutory Precedent*. — You cannot have a theory of statutory interpretation without a theory of precedent. The least persuasive theory of precedent is that of Thomas, as it would dramatically unsettle the rule of law and disrupt private, societal, and public reliance on Supreme Court statutory precedents, and often longstanding agency precedents as well. A better theory is that articulated by Kavanaugh in *Ramos*. Barrett’s opinion in *Goldman* is a splendid exemplar of careful application of precedent.

8. *Consider Relevant Legislative Evidence*. — Reading statutes consistent with Article I’s vesting primacy in Congress requires attention to relevant legislative evidence. To help resolve choice of text, choice of (con)text, broad-versus-narrow interpretation, and the meaning of words, phrases, and clauses, judges should consult the use of language in legislative materials, as well as evidence of Congress’s plan or purpose (often found in the statutory text). O’Connor’s opinion in *Brown & Williamson* is the best example of careful consideration of legislative evidence. More recent (and shorter) exemplars include Kavanaugh’s balanced approach in

603. Kavanaugh, *Fixing Interpretation*, *supra* note 23, at 2121.

Sackett v. EPA, Jackson's thoughtful exegesis in *Delaware v. Pennsylvania*, Gorsuch's dissent in *Castro-Huerta*, and Roberts's dissent in *McGirt*. Reading what the statutory authors have to say about their work also enjoys a hermeneutical virtue.

9. *Agency Views About Statutory Purposes and Reliance Interests Are Worth Considering.* — The whole *Chevron* debate has been overstated. As the Court opined in *Skidmore*, the Justices are responsible for statutory interpretation, but agencies can help them understand how statutory words are used, how the statutory scheme is working, and what consequences different interpretations might have in practice.⁶⁰⁴ From a sensible textual perspective, Roberts and Kavanaugh were probably right to go along with the Biden Administration's approach to asylum seekers (*Biden v. Texas*) and hospital workers (*Biden v. Missouri*). Kavanaugh's concurring opinion in *Sackett v. EPA* reflects the importance of public and private reliance on longstanding agency interpretations that were ratified by Congress.

10. *Substantive Canons Should Be Used Sparingly.* — Textualists should focus on the time-tested canons like lenity, avoidance, and federalism, but should tone down super-strong clear statement rules such as the MQD. The Court's decision in *NFIB v. OSHA* is antitextual and unwise, as is its less egregious decision in *Sackett v. EPA*. The Justices should be wary of the charge of stealth constitutionalism, as it violates the transparency feature of the rule of law, not to mention the proper separation of powers, when the Court "overenforces" even its aggressive reading of the Constitution.

Of course, the newest textualists on the Court might develop different answers to the questions raised by our Twelve Choices. To develop, publicize, and consistently adhere to a more sophisticated textualist methodology would be a welcome improvement from the perspective of the rule of law.

604. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (explaining that the weight given to the agency's interpretation will depend on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control").

