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

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

As Bostock illustrates, textualism is fracturing, dividing itself into camps.4 It is time to think much harder and deeper about its methodology, its meta-theoretical foundations, and its overall legitimacy within our constitutional democracy. To begin with, textualism or original public meaning in action is far from a mechanical jurisprudence, where judges applying its method are driven inexorably toward a single answer. As this Article suggests,

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2 Bostock, 140 S. Ct. at 1738-41.
in any difficult case, the textualist judge starts with a *choice of text* and a *choice of context*. Once relevant text has been chosen, textualist theory requires a framework for interpreting it. Context once meant judicial consideration of legislative purpose and history, but in today’s Court choice of context is more likely to consider the whole act, the whole code, and the larger corpus of statutory law. And whatever text and context have been selected will be framed by the judge’s choice among dozens of canons of statutory construction.

In this Article, we theorize this feature of statutory interpretation in terms of production and consumption economies: Should interpreters focus on the readers/consumers of statutes (citizens) or the authors/producers of statutes (Congress)? On its face, the now-dominant Supreme Court approach elevates the *consumer* perspective and obliterates that of the *producers*. In practice, however, the *judicial* perspective controls. That is, strict textualism or originalism amount to judicial aggrandizement under cover of populist rhetoric. We are losing our constitutional tradition of representative democracy, whose legitimacy rests upon public and legislative deliberation. Textualism and original public meaning pose a double threat to the rule of law: its method substitutes judicial for legislative evidence and marginalizes public deliberation. Our critical stance toward strict the strictest version of textualism does not lead us to revive old-fashioned purposivism, but it does impel us to propose ‘legislative’ or ‘republican evidence’ as a necessary complement to ‘public meaning’ as tools of statutory interpretation.

We start with some background. When Frank Easterbrook, Antonin Scalia, and allied thinkers propounded a fresh theory of statutory interpretation in the 1980s, we dubbed it the “new textualism.” They maintained that judges should do nothing more, yet nothing less, than apply statutory text. Interpreters should never revise, narrow, or broaden the ordinary or plain meaning of statutes to fit evidence of ‘legislative intent’, to carry out the statutory purpose, or to avoid unreasonable consequences. Judges were forbidden to show any interest

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in materials about the production of the statute by Congress; interpretation should focus only on the reasonable consumption of its language by the public (so-called ‘ordinary meaning’). Justice Scalia further argued that the textualist inquiry should be the ordinary meaning understood by the public when enacted (its ‘original public meaning’). Each of Bostock’s three opinions claimed to follow these instructions but arrived at different results.

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

Table 1 summarizes this critique.

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<td>Congress didn’t intend to protect this class, e.g., ‘homosexuals’</td>
<td>Congress did intend to bar this particular classification (‘sex’) from job decisions</td>
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The new textualists claimed that focusing on text would avoid purposivism’s elasticity, constrain judges, respect and implement legislative compromises, and lead to predictable outcomes. As Bostock’s three different textualist opinions suggest, these claims exaggerate. Many scholars were not surprised to see Bostock’s fracture. They had predicted that textualism was not as determinate or objective as its followers alleged. Not only have skeptics questioned the idea of ‘plain meaning’, but they have also argued that textualist opinions manipulate canons and dictionaries to create an arbitrary façade of plain meaning. Such manipulations too often, they urge, allow judges to trump congressional policy with their own frameworks and preferences. Bostock not only confirmed the idea that textualism did not lead to one plain meaning but also presented skeptics with a new point of attack. How is it possible to find the ‘original public meaning’ of a concept like ‘sexual orientation’ or ‘gender identity’ that did not exist in 1964?


11 Nourse, Misreading Law, at 40-45 (arguing that there almost always two meanings of any particular term, the best example of the term or prototypical meaning, and any logical or extensivist meaning).


15 For criticisms of originalist efforts in constitutional law, see, e.g., 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).
Justice Scalia believed that he would win the fight for textualism because interpreters were lazy: finding and processing information about a statute’s ‘intended’ meaning can be costly. To be sure, jettisoning inquiry into congressional materials can reduce information costs, but Bostock shows that inquiry into the historical meaning of words (‘sex’, circa 1964) poses its own difficulties (see dissenting Justice Alito’s lengthy appendices). Because new textualists have increasingly focused on small bits of text, such as ‘sex’ in Bostock, and have demanded plain meanings from those language morsels, they are pressed to find helpful new context. With legislative materials off-limits, they have turned to other context: related provisions in the U.S. Code, dictionaries, corpus linguistics, and canons of construction. But these materials, too, can be costly to research and are certainly malleable in the hands of normatively motivated judges deciding cases presenting divisive issues.

Textualism’s defenders have claimed they are faithful to democratic values because legislators understand text along the same lines as new textualist judges—a myth empirically debunked by scholars. The new textualist orthodoxy of the Bostock era, borrowing from constitutional originalism, claims to be democracy-enhancing by emphasizing public meaning: how We the People would have received the statutory language. What the new textualists say and what they do are two different matters, however. The late Justice Scalia, for example, invoked “ordinary meaning” when defending the legitimacy of his method, but interpretations discussed in his treatise and judicial opinions overwhelmingly turned on legal terms of art, precedents, and judicial canons inaccessible to ordinary folks.

To be sure, Scalia punctuated his opinions with homey examples designed to demonstrate his

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16 See Carpenter v. United States, 138 S. Ct. 2206, 2238 n.4 (2018) (Thomas, J., dissenting) (citing corpus linguistics); Eskridge, Interpreting Law, supra note 10, at 411-15, 425-45 (identifying more than 100 whole act and substantive canons); Brudney & Baum, supra note 10 (finding one-third of the Court’s statutory decisions invoke dictionaries); Heinzerling, supra note 12 (identifying new substantive canons); Anita Krishnakumar, Statutory History (Feb. 2021) (draft manuscript) (on file with authors).


18 Scalia & Garner, Reading Law, supra note 7, at 41 (ordinary meaning not “relevant” when a precedent controls), 73-77 (ordinary meaning gives way when text uses a “term of art”), 140-66 (technical grammar canons like the rule of the last antecedent determine meaning that is far from ordinary), 167-95 & 217-20 (nonordinary meaning determined by judicial whole act canons), 252-56 (nonordinary meaning determined by judicial whole code canons), 261-340 (partial list of judicially created substantive canons that put a thumb on the scale of statutory meaning).
populist bona fides, a practice other Justices have mimicked.\textsuperscript{19} But there is no evidence that ordinary citizens read statutory texts the way judges do. When Justices—elite lawyers\textsuperscript{20}—debate how ‘ordinary people’ talk, there is a serious risk that their renderings will speak with an upper-class, judicially-inflected accent.\textsuperscript{21} When the ordinary people lived 50 or 75 years ago, the reconstructive task is even more difficult.

At stake is the constitutional allocation of power in our representative democracy. Traditionally, courts defer to Congress on policy. But if we are right, then textualism is at war with that traditional power division. If you blind yourself to the production economy—to Congress—and impose judge-created canons on top of judge-inflected ordinary meaning, then you create a system in which the judiciary dominates the First Branch, the legislature.\textsuperscript{22} Marginalizing the legislative process invites judges to adopt self-interested interpretations or ones Congress has rejected. Hyperfocusing on text poses costs for republican governance. Ignoring or marginalizing legislative goals and context, the new textualism tends to increase legislative production costs by requiring Congress to draft with utmost precision and correct the Court’s off-key interpretations.\textsuperscript{23} It has already generated costly and repetitive legal challenges to major policies: recall the textual challenges to the Affordable Care Act based on drafting errors.\textsuperscript{24}

At stake, too, is the legitimacy of our rule of law. The new textualists rely on a transactional understanding of Article I, Section 7, which requires bicameral approval and presidential presentment for a bill to become a law; from their perspective, statutes are deals, and strategic dealmakers will naturally manipulate legislative documents, leaving the voted-

\textsuperscript{19} E.g., \textit{MCI v. AT&T}, 512 U.S. 218 (1994) (Scalia, J.) (witty analysis of the term “modify”).
\textsuperscript{20} NEAL DEVINS & LAWRENCE BAUM, THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT (2019).
\textsuperscript{21} Shlomo Klapper, Soren Schmidt & Tor Tarantola, “Ordinary Meaning for Ordinary People” (YLS Spring 2020) (empirical study, finding that new textualist opinions insisting on an unambiguous “ordinary meaning” are inconsistent with “ordinary meaning” understood by “ordinary people”).
\textsuperscript{22} See U.S. Const. Article I (constituting the Congress).
\textsuperscript{24} Jesse Cross, \textit{The Staffer’s Error Doctrine}, 56 HARV. J. LEGIS. 83 (2019) (analyzing \textit{King v. Burwell} as an example of judicial correction of a staff error made as the ACA barreled toward enactment); Ryan David Doerfler, \textit{The Scrivener’s Error}, 110 NW. U. L. REV. 811 (2016).
on text as the only evidence of the deal.\textsuperscript{25} But that is a thin understanding of Article I, Section 7, at odds with the ‘republican’ aspirations of the Founding Era, which emphasized the deliberation by elected legislators attentive to the public interest as well as the particular views of the public.\textsuperscript{26} Dismissing the republican deliberations of the production economy and focusing only on the consumer or citizen viewpoint disrespects our constitutional roots and distorts our representative democracy. The new textualism’s legitimacy costs are enormous even under a liberal, transactional view, because its tools and sources invite judges to read statutes through their own perspectives and thus lures them from the neutrality demanded by the liberal as well as republican rule of law. This is where the idea of “textual gerrymandering” comes into play.

The dramatic rhetoric of the new textualism obscures the discretionary choices an interpreter has to make when resolving a hard case. Just as conflicting state laws once led to the field of \textit{choice of law}, we believe that the kind of conflict we see in \textit{Bostock} should invite a similar development in the field of statutory interpretation. The text-attentive judge has to engage in a process we call \textit{choice of text}.\textsuperscript{27} What statutory text is relevant to the issue raised by the case? By choosing or prioritizing one text over others, the judge is making a choice that must be defended as a matter of law and language. Theorists often forget the essential next step: \textit{choice of context}. Once one has homed in on putatively controlling text(s), one must ask whether there is context that clarifies the meaning of vague or ambiguous text or confirms one’s immediate apprehension of a plain meaning. There might be more than one relevant text and a variety of contexts. We contend that the new textualism is most problematic when the choice of text or statutory context is announced by judicial fiat, ignoring obviously relevant text or context and failing to provide a reasonable justification or even acknowledgment of the choices. When applying a method that excludes a great deal of

\textsuperscript{25} OLP, \textit{Misusing Legislative History}, \textit{supra} note 6; John Manning, \textit{Textualism as a Nondelegation Doctrine}, 97 Colum. L. Rev. 673 (1997).


(production) context, new textualist judging often picks and chooses text and (con)text in ways that are hard to defend. (Consistent with the emphasis on consumption, our neologism (con)text refers to text-based context.)

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

Techniques of political gerrymandering inspire our analysis. When a partisan legislature revises electoral districts, it can minimize the other party’s power by packing opposing voters into just a few districts (creating a few lop-sided districts for them, but many districts leaning its way) and/or by cracking their voting strength so that opposing voters are broken into many districts.28 If a legislature wants to minimize representation of racial minorities, it can stack or enlarge the district through creative mergers of several districts and/or electing representatives at-large.29 And minority voters can be purged from participation altogether, what is called voter suppression.30

Like a legislator who achieves partisan results by manipulating electoral boundaries, an interpreter can sustain a preferred interpretation by manipulating statutory boundaries. Interpretive packing hyperfocuses on only one of several relevant statutory terms or even on only one or a few words; cracking breaks up those items of text, defines each broadly or narrowly according to taste, and then reassembles them into a meaning not apparent from the text as a whole. Interpretive stacking or suppression selectively enlarges or shrinks the (con)textual materials available, respectively. By spreading the (con)textual net widely enough, stacking can narrow or expand the meaning of text that is otherwise clear. Suppression reverses the process.

The new textualism’s premises invite gerrymandering. Statutory text often does not cleanly address fact situations because (1) those facts were not anticipated, usually because the world changed in the years after the statute was passed, (2) legislators ignored the issue, or (3) drafting issues were eclipsed by the need to get legislation passed. Clumsy texts create hard cases, and judges face tough choices in these cases because new textualist theory bars them from admitting they are adjusting text—even to correct obvious drafting or staffer’s errors. New textualist judges tend to deny ambiguity; to admit doubt seems to confess that one is not clever enough to solve the drafting puzzle. Hence, opinions often have a procrustean feature. Because the new textualist is loath to rely on legislative materials, she/they/he relies on interpretive resources that judges create: semantic and holistic canons, statutory precedents, and constitutionally inspired clear statement rules. This Article maintains that, in hard cases, gerrymandering is a pervasive risk, rendering textualism less able to satisfy the rule of law values to which it aspires. And it tends to produce judicial opinions whose cleverness dominates their soundness, as judges engage in word games to the detriment of elaborating on seriously deliberated statutory schemes.

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32 Parker, supra note 25, at 96 (“stacking” minority voters into multi-member or at-large districts with just enough white voters to defeat all minority candidates).


34 See Thomas W. Merril, Textualism and the Future of the Chevron Doctrine, 72 WASH. U. L.Q. 351, 351-52 (1994) (arguing textualism tends to devolve into a cleverness game, where the winner is the judge who can solve the puzzle most elegantly).
In Part I, we illustrate our new analytics by considering textualist classics written in its foundational period; we interrogate both choice of text and choice of (con)text. We find, surprisingly, that key text was omitted or overlooked in four opinions in the new textualist canon: Judge Easterbrook’s opinion in a family farm bankruptcy case, *In re Sinclair*; Justice Kennedy’s concurring opinion in *Public Citizen v. U.S. Department of Justice*, interpreting a federal sunshine law; Justice Scalia’s dissenting opinion in *Chisom v. Roemer*, involving racially-gerrymandered judicial elections; and Justice Markman’s opinion for the Michigan Supreme Court in *National Pride at Work*, involving employment benefits for lesbian and gay households. These interpretations have been criticized as countermajoritarian and ideologically driven, where conservative judges seemed to bend statutes to support the interests of banks over family farms, expand the President’s constitutional prerogatives, tolerate the entrenchment of whites-only judges in Louisiana, and eliminate contract rights owed to lesbian and gay families. The opinions’ authors did not argue in favor of those values and claimed that the text demanded the results. But some texts were chosen rather than others; in each case, text or (con)text was dramatically gerrymandered, without justification. In short, textualism offers judges the power to look out over a crowd of texts and pick their ideological friends. And once textual ambiguities and errors are exposed, these decisions emerge as either nonsensical or usurpative or both.

Part II and the Article’s appendix of recent Supreme Court decisions illustrate the current operation of our theoretical critique—how the move from a production to a consumer economy in statutory interpretation has generated textual gerrymandering as a major phenomenon in statutory cases not governed by precedent. Analyzing important Roberts Court decisions, including *Bostock* and many other decisions in the last three Terms, we argue that gerrymandering remains a characteristic feature of new textualist opinions—

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35 870 F.2d 1340 (7th Cir. 1989).
36 490 U.S. 491 (1989) (Kennedy, J., concurring in the judgment).
38 748 N.W.2d 524 (Mich. 2008).
including those written by so-called liberal as well as conservative Justices. The new textualist emphasis on the ordinary consumer, while ignoring the producers of statutes, creates a *hermeneutical pinch*, where there is less information to resolve difficult cases. Hyperfocusing on tiny bits of text, judges turn to more forms of (con)text to secure interpretive closure. This has generated an expanding cottage industry of allegedly objective sources—dictionaries, corpuses, style books, the U.S. Code, and hundreds of canons—that combine elasticity and opportunities for source-shopping, with normative vacuity. This strange combination of rigid limits (don’t use legislative materials and never admit language provides more than one answer) and interpretive innovation (more aggressive deployment of canons and corpuses) propels new textualists toward gerrymandering. Contrary to the theory’s own aspirations, this methodology drags statutory meaning even further from anything accessible to ordinary citizens, which undermines the approach’s rule of law and democratic justifications. Worse, with judges controlling statutory meaning and legislators marginalized, the new textualism threatens to impose upon statutes the values of judges, undermining textualists’ claims to leave policy to legislators.

In Part III, we suggest a better way to ameliorate the hermeneutical pinch and restore some connection to representative democracy: open up the contextual information economy to *actual* republican and legislative evidence of a text’s meaning. Our government is a republic, not a democracy: representatives filter policy in our constitutional system. If one is to honor that constitutional principle, then one must consider republican meaning, the meaning of representatives, as a check against judicial rewriting of statutes. No judge denies that their role is to defer to the policy choices of the First Branch, but textualism strangely blinds them to evidence of those choices. Considering *republican evidence of meaning* helps the neutral, responsible judge to figure out what text and (con)text are potentially relevant, to confirm or call into question her/their/his understanding of ordinary meaning, and to integrate a mature understanding of the full text and the statutory plan as articulated by legislators to the public. Considering legislative evidence allows judges to consider the perspectives of the actors authoring the statute, much as *The Federalist Papers* help judges understand the Constitution of 1789 from the perspectives of the actors who created and lobbied for its ratification. Textualists already admit the relevance of some legislative
They do not admit wholesale searches for subjective intent or purpose—but our approach depends upon objective evidence, namely, how words were used, how different parts of the statute fit together, the problem the statute was addressing, and the solutions considered. In the spirit of Dean Manning’s suggestion that purposivists have improved their approach by imposing text-based discipline on their examination of legislative expectations, we suggest that textualists (and all judges) can improve their approach by imposing the discipline of republican evidence on their choice of text, choice of (con)text, and inferences that might be drawn from these sources.

Using concrete cases, we consider the risks of populist statutory interpretation untethered to republican government and then offer our path forward.

I. **NEW TEXTUALISM’S FOUNDING FATHERS: THE NEW ECONOMY OF INFORMATION AND THE LURE OF GERRYMANDERING**

This Part examines canonical decisions penned by the Founding Fathers of the new textualism. We start with Justice Scalia’s famous critique of the Court’s 1892 decision in *Holy Trinity Church*. We move on to opinions by another intellectual giant of the movement, Frank Easterbrook of the Seventh Circuit, then to opinions by Anthony Kennedy and Antonin Scalia, before concluding with Steven Markman, a state judge who authored a leading textualist policy statement from the Reagan Justice Department. We focus on two key questions: choice of text and choice of (con)text. Somewhat remarkably, we find that these new textualist canonical analyses overlooked or looked over the most relevant text. Because choices of text and (con)text were left unjustified (and were in truth unjustified), we find considerable textual gerrymandering. However one views the legitimacy of this theory of statutory interpretation, what follows should give textualists grave pause. As we will see, textual analysis was botched—leading textualist judges to ignore obviously relevant textual provisions. If nothing else, these foundational opinions raise serious questions about textual method, not as it has been theorized, but as it has been actually deployed.

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43 See *infra* text accompanying note 233.
A. **Holy Trinity Church: Cracking and Packing Text while Stacking and Suppressing (Con)text**

*Holy Trinity Church v. United States,* 46 anchors the textualist anti-canon. Justice Scalia’s Tanner Lectures took Justice Brewer’s opinion to task for its flawed reasoning.47 Section 1 of an 1885 statute barred employers from prepaying transportation to bring noncitizens to America to perform “labor or service of any kind.”48 The question was whether the statute covered a British rector who contracted to work at the Church of the Holy Trinity in New York. Although conceding that the prepayment of the minister’s transportation may have fallen within the “letter of this section,” Brewer read the statute as a whole to exclude the pastor.49 Scalia critiqued this position, insisting that there was only one meaning to the text “labor or service of any kind,” which had to include the rector, end of story.

Focus on *choice of text* and then choice of *(con)text.* The statute applied to “labor or service of any kind.” Justice Brewer stacked his opinion with *large foundational texts*—Ferdinand and Isabella’s commission to Columbus, the Crown’s charters to the English colonies, early state constitutions, and the Religion Clauses. He concluded from these texts that in a “Christian nation” no one would think that a church could not pay for its minister to travel from abroad.50 This move enlarged the *(con)text,* overshadowing the text that was most on point. Also, Brewer’s stacking was selective, ignoring relevant *(con)text:* Congress had specifically resolved the question in 1891, amending the law to allow churches to import ministers.51 Brewer ignored this deliberative resolution because the law was not retroactive.

Justice Scalia’s critique of *Holy Trinity* also made contestable choices, though different from Justice Brewer’s. The Tanner Lectures packed the entire statute’s meaning into six words: “labor or service of any kind.” Then, these six words were cracked apart, each interpreted broadly, and reassembled into a plain meaning. Whether the preacher performed “labor or service of any kind,” was analyzed as a question about itty bitty bits of text: What is “labor”? “Service”? Surely, Scalia insisted, the pastor was at least engaged in “service” and

46 143 U.S. 457 (1892).
48 Alien Contract Labor Act, ch. 164, § 1, 23 Stat. 332 (1885).
49 Holy Trinity, 143 U.S. at 457-58.
50 Id. at 465-71.
even mental “labor,” and without a doubt “labor or service of any kind.” Scalia also relied on section 5’s exclusion of artists, singers, lecturers, and domestic servants from the prohibitions in the statute, for the exceptions list did not say anything about ministers. But Scalia did not explain why a pastor might not have been considered a “lecturer” in 1885, or at least analogous to the others on the list. Nor did he (or Brewer) explain why section 1 should not have been read in pari materia with section 4. Section 4 barred ship masters from knowingly transporting “mechanics, artisans, and laborers” pursuant to contract labor arrangements like those barred in section 1. Scalia’s bottom line was an interpretation that the statute covered “all” noncitizens brought over for employment, a pretty ambitious reading for a one-page law targeting manual workers in section 4 and exempting a variety of lecturers and other workers of the mind in section 5.

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

B. MATTER OF SINCLAIR: SUPPRESSING TEXT

52 Nor does “of any kind” solve the problem. See BRIAN G. SLOCUM, ORDINARY MEANING: A THEORY OF THE MOST FUNDAMENTAL PRINCIPLE OF LEGAL INTERPRETATION 148-212 (2015) (arguing “any” has no meaning until one identifies the domain of the category to which it is appended). Here the question is what “kind” refers to—manual labor or all labor.
54 U.S. CONST., art. IV, § 2, cl. 3 (fugitive slave clause); Fugitive Slave Act of 1850, ch. 60, § 6, 9 Stat. 462, 463-64 (statutory version).
55 Tammy Gales & Lawrence Solan, Revisiting a Classic Problem in Statutory Interpretation: Is a Minister a Laborer?, 36 GA. ST. U. L. REV. 491 (2020). The Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58, for example, used the term “laborer” to mean both “skilled and unskilled laborers and Chinese employed in mining.”
No one is more important to the conceptual foundations of the new textualism than Frank Easterbrook, but he has stumbled in some of his classic applications. Easterbrook’s most famous statutory opinion is *Marshall v. United States*. Writing for the *en banc* Seventh Circuit, Easterbrook interpreted the Anti-Drug Abuse Act of 1986 to apply a minimum mandatory penalty for LSD sales based on a highly debatable interpretation of the word “mixture.”

Consider Easterbrook’s earlier treatment of Marguerite and Russell Sinclair, owners of a family farm. In April 1985, they filed a petition under Chapter 11 of the Bankruptcy Code. The next year, Congress revised the Bankruptcy Code to add a new Chapter 12, providing a more flexible regime for handling family farms in distress. The Sinclairs asked the bankruptcy court to “convert” their case from Chapter 11 to Chapter 12, as permitted under equity-based criteria found in the newly created section 1112(d)(3) of the Code. The bankruptcy judge declined, and the district court affirmed.

The lower court judges had a good reason to decline the petition. Section 302(c)(1) of the 1986 Act contained a transition rule: “The amendments made by subtitle B of title II [the new Chapter 12] shall not apply with respect to cases commenced under title 11 of the United States Code before the effective date of this Act.” The Sinclairs responded that Congress allowed for conversion to Chapter 12 under equitable circumstances. They relied on the Joint Explanation of the Conferees who presented the Conference Committee Report (i.e., the text of the conference bill) to the House and Senate:

> It is not intended that there be routine conversion of Chapter 11 and 13 cases, pending at the time of enactment, to Chapter 12. Instead, it is expected that

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57 908 F.2d 1312 (7th Cir. 1990) (en banc).
courts will exercise their sound discretion in each case, in allowing conversions only where it is equitable to do so.\textsuperscript{62}

Judge Easterbrook framed the case this way: “The statute says conversion is impossible, the report says that conversion is possible and describes the circumstances under which it should occur.”\textsuperscript{63} He solved the conflict with an early statement of the new textualism: discern the objective meaning of the text and do not guess at the subjective expectations of the legislators voting on the text.\textsuperscript{64} Only the text, and nothing but the text, is law under Article I, and so only the text binds judges. The Sinclairs lost their case and, probably, their farm.

This textualist analysis failed to account for the entire statute; in fact, it missed key text. The conferees’ directions, quoted above, were not explaining section 302 of the bankruptcy bill—the transition rule—as Easterbrook thought. Instead, the conferees were discussing the conversion rule in section 256 of the bill. That provision was inserted in conference, adding section 1112(d)(3) to the Bankruptcy Code: Chapter 11 cases could be converted to Chapter 12 if “equitable,” that is, fair under the circumstances to the various interests, including creditors’ interests. Easterbrook did not mention section 256—the conversion provision—of the 1986 Act. He later told one of us that he was unaware of section 256 and did not explore the relevance of section 1112(d) of the Bankruptcy Code, cited in the district court’s opinion.\textsuperscript{65}

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

\textsuperscript{63} \textit{Sinclair}, 870 F.2d at 1341.
\textsuperscript{64} \textit{Id.} at 1341-44. Legislative history might help a judge figure out the meaning of words and phrases, sort of like a super-dictionary, but nothing more. \textit{Id.} at 1342.
\textsuperscript{65} The Seventh Circuit docket does not have a brief from the Sinclairs. The court issued a show cause order to their counsel, but a week later Easterbrook issued his opinion. On Judge Easterbrook’s tendency to override facts, see Emily Hoerner & Rick Tulsky, \textit{Pattern of Misstated Facts Found in Opinions of Renowned U.S. Judge Easterbrook}, \textit{INJUSTICE WATCH}, April 4, 2017.
the two provisions, without negating either of them, harmonizing the texts. The Sinclairs had requested leave to dismiss their Chapter 11 proceeding, without prejudice to their refiling under Chapter 12. The judges rejected that request because it would have been an end-run around the transition rule, section 302. But the judges were unaware of the clash between sections 256 and 302. Allowing dismissal without prejudice in appropriate cases would have allowed judges to follow both sections 302 and 256. Easterbrook’s approach, in fact, read the transition rule more liberally than the full text demanded—and needlessly negated the conversion provision.

C. PUBLIC CITIZEN: IGNORING THE WHOLE ACT

The practice of ignoring or suppressing text recurs when we apply our analytic questions—choice of text and (con)text—to another new textualist classic, Justice Kennedy’s concurring opinion in Public Citizen v. U.S. Department of Justice. The issue was whether the Federal Advisory Committee Act of 1972 (FACA) required the ABA to follow sunshine requirements when it provided advice to the President regarding potential judicial nominees. Watchdog groups argued that the ABA’s Standing Committee on the Federal Judiciary was an “advisory committee” as defined by section 3(2)(B) of the 1972 Act to “mean[] any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof which is * * * established or utilized by the President.” Because the President often considered its evaluations, he arguably “utilized” the Standing Committee, which was therefore subject to FACA’s sunshine requirements. Writing for a 5-3 Court, Justice Brennan declined to interpret the statute so broadly, relying

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67 Sinclair, 870 F.2d at 1344-45.
68 See 133 Cong. Rec. 3768-69 (1987) (statement of Sen. Grassley) (expressing dismay that judges were ignoring § 256 and not allowing conversions).
70 5 U.S.C. App. § 3(2).
on a rambling legislative history and on the absurdity rule (for which he invoked *Holy Trinity*, the last time it has been cited by a Supreme Court majority opinion).\(^{71}\)

Justice Kennedy made sport of the Court’s invocation of *Holy Trinity* and rejected any suggestion that text must yield to the “spirit of the statute”: “Where it is clear that the unambiguous language of a statute embraces certain conduct, and it would not be patently absurd to apply the statute to such conduct, it does not foster a democratic exegesis for this Court to rummage through unauthoritative materials to consult the spirit of the legislation in order to discover an alternative interpretation of the statute with which the Court is more comfortable.”\(^{72}\) The statute was clear, it applied to the Standing Committee, and as applied, FACA was unconstitutional because it invaded the President’s freedom to consult with outside experts and others when he made judicial appointments. Hence, Kennedy agreed with the Court’s result that the Standing Committee did not have to follow the sunshine requirements of FACA.

Justice Kennedy boiled the case down to one word, “utilized.” Even as a matter of textualist hyperfocus, we do not see this as the only reading of section 3(2)(B). Consistent with the text of both House and Senate bills before they were reconciled in the conference report, might advisory committees be limited to those created or formally recognized by the government? Congress, for example, might “establish” an official advisory committee, whose advice the President might “utilize.” (Hence the statutory language “established or utilized” by the President.) This modest thought experiment suggests that Kennedy did not have a complete understanding of the slice of text he hyperfocused on. Taking a word out of context and blowing it up or shrinking it down is a typical packing-and-cracking gerrymander.

Our thinking about the definition of an advisory committee deepened when we read the *entire* statute. The Court’s opinion had focused all attention on the definitional section 3(2)(B). But section 9(a) provides: “No advisory committee shall be *established* unless such establishment is (1) specifically authorized by statute or by the President; or (2) * * * by the head of an agency” involved as a matter of formal record and in consultation with designated

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\(^{71}\) *Public Citizen*, 491 U.S. at 456-63; *cf.* Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70 (2012) (critiquing the majority opinion for its FACA legislative history) [hereinafter *By the Rules*].

\(^{72}\) 491 U.S. at 473 (Kennedy, J., concurring in the judgment).
What this language demonstrates is that private bodies are not “advisory committees” under the Act. To “establish” a committee under section 9(a), the committee had to be authorized by statute, presidential order, or formal agency action—so not the ABA’s Standing Committee. For those following the statute’s text as it developed, that should not be surprising: neither the House nor the Senate wrote or passed bills that differed on this score: they only covered committees “established” by the government.

Returning to the text provides a solution to the case’s riddle—the meaning of “utilize.” Section 9(b) provides: “Unless otherwise specifically provided by statute or Presidential directive, advisory committees shall be utilized solely for advisory functions.” It was possible, for example, for advisory groups to be created by one governmental entity but used by another. Groups whose advice was “utilized” by the President were advisory committees only if they were “established” by statute, presidential order, or formal agency action. This makes sense of the language in section 3(2)(B), “established or utilized.” Conversely, FACA’s section 14(a) provided that all advisory committees existing on FACA’s effective date should terminate within two years unless they were specifically renewed by presidential order or by appropriate agency action or by statute. FACAs’s text established that the ABA’s judicial evaluation committee was not a federal “advisory committee,” because it was neither established by the government nor subject to a sunset. Kennedy’s adventure into constitutional law was unnecessary if one simply bothered to follow the text.

D. CHISOM: A REPRESENTATIVE TEXTUAL GERRYMANDER

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73 5 U.S.C. App. § 9(a) (emphasis added).
74 Indeed, reports from a “presidential advisory committee” were required to cite the “authority for its creation.” Id. § 6 (c)(1).
75 See Nourse, supra note xx (explaining that the bills passed by both the House and the Senate, prior to conference, required that a committee by “established” by the government). H.R. 4383, 92d Cong., 2d Sess. § 3(2) (1972); S. 3529, 92d Cong., 2d Sess. §§ 3(1), (2) (1972). One of us inferred from this that “utilize” was not meant to change the statute in significant ways. Conference committees are not supposed to make major changes to bills in conference. Adding section 9 into the calculus explains why the addition of the word “utilize” did not in fact make a major change in the bill’s coverage.
76 Id. § 9(b) (emphasis added).
77 Id. § 14(a).
Justice Scalia wrote many new textualist landmarks. Some of these opinions strike us as cogent applications of legal terms of art, while many of his ordinary meaning opinions reveal an unfounded confidence in text-only analysis. Consider questions about choice of text and (con)text as applied to one of Scalia’s most theoretically lucid and colorful opinions—namely, his dissenting opinion in Chisom v. Roemer. As we saw with Justice Kennedy’s opinion in Public Citizen, Justice Scalia deployed one of the classic moves of textual gerrymandering: reducing a statute to a single word.

Chisom’s question was whether section 2 of the Voting Rights Act of 1965, as amended, applied to judicial elections. The original section 2 was simple:

No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.

No one disputed that this 1965 statute applied to judicial elections. But in 1982, Congress amended the statute, in part as a response to Supreme Court decisions. In City of Mobile v. Bolden, the Supreme Court had narrowed section 2, limiting it to intentional discrimination. Bolden left black citizens without redress if legislatures gerrymandered to preserve a segregated status quo but did not overtly admit to racial motivation. That was precisely the problem in Louisiana’s judicial elections. The all-white legislature had diluted black voting strength by combining New Orleans’ black-majority precincts with a larger number of suburban white-majority precincts to elect two (reliably white) justices through

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78 E.g., Moskal v. United States, 498 U.S. 103 (1990) (Scalia, J., dissenting) (demonstrating that “falsely made” was a legal term of art and did not entail the ordinary meaning, i.e., containing inaccurate information); cf. Smith v. United States, 508 U.S. 223 (1993) (Scalia, J., dissenting) (critiquing majority’s view that a drug defendant was “using a firearm” when he traded his gun for drugs).


an at-large electoral process. The Louisiana Supreme Court remained 100% white through the 1980s (in a state whose population was almost one-third black).

In 1982, Congress overrode *Bolden* and rewrote section 2 to bar gerrymanders with a demonstrable racial effect. The amended section 2 read as follows:\(^{85}\)

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

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

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

Writing for a 6-3 majority, Justice Stevens ruled that section 2 continued to apply to judicial elections after 1982. Stevens argued that the burden was on the state to demonstrate that Congress meant to narrow section 2 or exclude judicial elections in the 1982 Amendments.\(^{86}\) Because congressional deliberations revealed no evidence that Congress limited the reach of section 2, and every reason to think that Congress was expanding the ambit of the statute, Chisom’s claim prevailed. In the wake of *Chisom*, Louisiana reconfigured its supreme court districts, and in 1994 Bernette Joshua Johnson (the first woman of color) was selected to the court, where she recently retired as chief justice and guardian of what the ABA deemed one of the “cornerstones of representative government.”\(^{87}\)

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\(^{86}\) *Chisom*, 501 U.S. at 396 & n.23 (invoking the “dog doesn’t bark” canon); see Zuni Sch. Dist. No. 89 v. Dep’t of Educ., 550 U.S. 81 (2007).

Justice Scalia’s dissent would have produced a different result—but only because it edited out most of the statutory language and reduced the law to a single word: “representatives.” That word, Scalia claimed, meant that section 2 could not apply to judicial elections. He maintained that no ordinary speaker would have applied the word “representatives” to judges, and as evidence he cherry-picked a 1950 dictionary. The logic: judges were not like members of legislature who act on behalf of their constituents. But the statute focused on “elections” and no one doubted that Louisiana’s judges were “elected,” nor that the dominant dictionary and popular view tied representatives to elections. Scalia riposted: “On that hypothesis, the fan-elected members of the baseball all-star teams are ‘representatives’—hardly a common, if even a permissible usage.” But Google “All-Star Game” and “representative”: it turns out that All-Stars are ordinarily said to “represent” their cities or their teams. In the end, Scalia’s view of “representatives” reflected his personal adherence to a starkly sectarian view of governance, where narrowly political legislators churned out statutes and judges mechanically applied them to new facts. His transactional view of legislators is in stark contrast to that of leading political theorists, who view representatives as acting for and on behalf of the public.

The Scalia interpretation ignored a good bit of relevant (con)text. No one doubted that under the primary statutory text and the Fifteenth Amendment, Chisom could have brought a claim that judicial elections were covered, as long as the claim involved intentional discrimination. And judicial elections were covered under section 5 of the Voting Rights Act, which then required Justice Department pre-clearance of some states’ new voting laws. The 1982 Amendments added a different method to establish a violation via disparate impact,

88 Chisom, 501 U.S. at 404 (Scalia, J., dissenting). Scalia’s approach was in tension with his statement of textualist method, which emphasized context: “first, find the ordinary meaning of the language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies. If not—and especially if a good reason for the ordinary meaning appears plain—we apply that ordinary meaning.”
89 Representative, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/representative (defining “representative” as “of, based on, or constituting a government in which the many are represented by persons chosen from among them usually by election”).
90 Chisom, 501 U.S. at 410 (Scalia, J., dissenting).
91 E.g., Joel Reuter, Which Team Will Have the Most Representatives at 2020 MLB All-Star Game?, BLEACHER REPORT (Mar. 13, 2020), https://bleacherreport.com/articles/2880156-which-team-will-have-the-most-representatives-at-2020-mlb-all-star-game.
93 Bolden, 446 U.S. at 60-61.
but nowhere were judicial elections expressly excluded. As we can see from the Scalia opinion, the aim of textual method in practice was not to harmonize the most text, but to disaggregate it—to reduce it to smaller morsels that could be expanded or narrowed to taste.

One of the great problems with packing a statute into a single word is that the move can lead to further gerrymanders. Justice Scalia was not ready to say that judicial elections were completely excluded from coverage, only that disparate impact claims were excluded. To accomplish that, he had to slice up the statute in an unusual way. He split a single section 2(b), quoted above, into two sections, and then read “and” as “or.” For the Scalia dissent, section 2(b) created two separate voting rights. One right was for individuals to challenge “elections in which members have less opportunity than other members of the electorate to participate in the political process.” The other right was “to elect representatives of their choice.” For Scalia, the right to participate allowed some claims in judicial elections—e.g., shorter polling hours in black voting districts. But the separate right to elect “representatives” did not apply to judicial elections. In fact, if you reread section 2(b), you will see that the statute did not bifurcate these rights. Instead, the right to “participate in the political process” was immediately followed by “and” to elect representatives. This move arbitrarily broke up the statutory protection but was needed so that Scalia could make the case turn on the word “representatives,” even though his real beef was with disparate impact claims.

E. PRIDE AT WORK: CRACKING-AND-PACKING A CONSTITUTIONAL INITIATIVE

Serving in the Reagan Department of Justice, Steve Markman was a Founding Father of the new textualism a decade before he was named to the Michigan Supreme Court. His best-known opinion was National Pride at Work v. Governor of Michigan,95 another example of cracking-and-packing a legal text.96 As in the Kennedy opinion in Public Citizen and Scalia opinion in Chisom, Justice Markman reduced the statute to its individual parts so that it could be reassembled in new, slanted ways.

95 748 N.W.2d 524 (Mich. 2008).
96 Markman was criticized for disrespecting precedent. E.g., Robert Sedler, The Michigan Supreme Court, Stare Decisis, and Overruling the Overrulings, 55 WAYNE L. REV. 1911 (2009).
Kalamazoo, Michigan permitted every municipal employee to include another person in his/her health insurance coverage that came with the employment package. Married employees could include their legal spouses. Nonmarried employees could include "domestic partners," so long as they could certify that the partners were of the same sex, at least 18 years old and mentally competent, shared a common residence, were not domestic partners or married to anyone else and not related by blood, and shared financial arrangements and daily living expenses.

Responding to other states’ early recognition of same sex marriage and civil unions, Michigan voters amended the state constitution in 2004: “To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.” The state attorney general, a resolute new textualist and conservative activist, opined that Kalamazoo could not provide domestic partner benefits to its employees, as its union contract provided. Kalamazoo argued Michigan's marriage amendment did not bar employee benefits. Markman’s opinion for the Court disagreed and voided the contract benefits.

Justice Markham separated each of the words of the Amendment and read each as broadly as possible. Was there (1) an “agreement” (2) that was being “recognized” (3) as a "marriage or similar union"? Disaggregating the sentence into individual words cracked the statute open, allowing Markman to choose the broadest possible meaning of each term. When packed back together, the text appeared to have only one plain meaning—but Markman’s interpretation left out relevant text and (con)text. By 2004, for example, many municipalities had created registries where same-sex couples could file domestic partnership agreements with the government, some triggering public benefits. But not Kalamazoo,

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97 *Pride at Work*, 748 N.W.2d at 531-32 (Kalamazoo's domestic partner benefits).
100 *Pride at Work*, 748 N.W.2d at 533-39.
which only asked employees to identify their domestic partners and to certify the truth of the factual requirements. Upon certification, the partners would be added as health insurance beneficiaries. Hence, there was no “agreement” similar to a marriage contract, a civil union agreement, or even a registered domestic partnership.

Markman focused most of his attention on “marriage or similar union.” The natural reading of that language would target legal statuses amounting to a marriage or something close to it, in light of the preamble’s goal of securing “the benefits of marriage for future generations and children.” As background (con)text, the laws of other states at the time did recognize such a similar legal status, namely, Vermont’s civil unions and California’s statewide domestic partnerships. But Kalamazoo’s domestic partners did not register with the city and enjoyed not a single benefit or duty that family law gave to married spouses. There was no legal status other than an employment contract.

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

Cracking the amendment into itty bits of text, Justice Markman created an implausibly broad construction, rendered the preamble irrelevant, and failed to consider relevant (con)text, namely, state civil union and domestic partnership laws. This should not be a surprise, given what we have already seen: packing the text’s meaning into small pieces

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103 Markman defined “agreement” as any kind of “mutual arrangement,” 748 N.W.2d at 538.
104 *Pride at Work*, 748 N.W.2d at 533-37.
105 JANE AUSTEN, NORTHANGER ABBEY ch. 10 (1817) (an impertinent young man suggests that a woman's acceptance of an invitation to dance was “similar” to her acceptance of an offer to marry).
tends to increase, rather than decrease, discretion. Once the text is pulled from context, each word is set in its own null context, and the interpreter may give it either a broad or a narrow meaning, without regard to the remainder of text.

F. THE COSTS OF GERRYMANDERING

Given the painfully obvious textual mistakes identified above, one might wonder whether we have gerrymandered our own examples, but the authors of these opinions have chosen them to make important theoretical statements, and the leading legislation casebooks have focused attention on them. Textualists rely upon them as sources of methodological guidance. Our appendix demonstrates that the slicing and dicing techniques generating imaginary plain meanings have now become standard practice within the Supreme Court. To the extent textual gerrymandering is occurring, the rule of law takes a hit, because statutory applications become less objective and predictable. If you read the statutes in question, would you have predicted the results in Bostock and the cases analyzed above? Can textualism survive the discovery that, whatever it says in theory, its actual operation picks and chooses text?

Textualists should worry more about textual gerrymandering given what experts teach us about cognitive bias: the less information you use in interpretation, the more likely the interpreter will engage in motivated reasoning. No linguist believes that one can tell the meaning of a sentence by pulling words from it, for words cannot be understood without

106 For an analysis of this move from text to null context, see Nourse, Picking and Choosing, supra note 23, at 1414-23.
108 E.g., United States v. Marshall, 908 F.2d 1312, 1319 (7th Cir. 1990) (en banc) (relying on Sinclair).
Language depends upon condensed, shorthand, expressions that communicate more based on shared but unarticulated assumptions. As the philosopher John Searle has explained: If I order a hamburger, I do not expect that I will receive a hamburger in a lucite cube and I certainly do not have to communicate “no lucite cube” in my order. If, after more than a decade where the Voting Rights Act applied to judicial elections, Congress imposes new anti-discrimination rules onto state elections, a judicial opinion saying that judicial elections are no longer covered is like the waiter who brings the burger in a lucite cube. But the judge is more willful than the waiter, because he/they/she is trumping background context with his/their/her own theory of judging and representation. And the injury is to our democracy and individual voting rights and not just to a disappointed diner.

Judges who prize determinacy often secure it by adding meaning, using implicit, but unacknowledged, quantitative modifiers. In Public Citizen, Justice Kennedy expanded FACA to require that all committees utilized in any way by the President were advisory committees, including family members and political advisers, an absurd result. In Pride at Work, Justice Markman read the statute to include all relationships similar in any way imaginable to marriage (ironically, a unique institution). In Chisom, Justice Scalia modified representatives to mean only political officials. And lest you think that these implicatures are always inexplicit, do not forget Justice Scalia’s opinion in Morrison v. Olson, much

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110 See Victoria F. Nourse, Moderator, Panel on Originalism vs. Living Constitutionalism: History, Theories, Tools and Trends, 2019 Appellate Judges Education Institute Summit (Nov. 15, 2019); Nourse, GULC Whitworth Chair Lecture (2019) (developing the idea that textualism in constitutional law depends upon decontextualization that creates a new null context for isolated terms).


113 487 U.S. 654, 705-06 (1988) (Scalia, J., dissenting); see Nourse, Reclaiming, supra note 105, at 1.
celebrated by textualists, that the President has *all possible* and not just “the” executive power, something that the Constitution does not say.\textsuperscript{114}

Textualists are not alone in failing to address the picking-and-choosing problem. Purposivism has its own gerrymandering problem, given the malleability of statutory purpose, as we demonstrated in Table 1 above\textsuperscript{115} So in *Chisom*, one might describe the purpose broadly, as protecting minority voting rights, or more narrowly as voting rights in elections for representatives. In *Public Citizen*, the statute identified six purposes, any of which could have been read broadly or narrowly.\textsuperscript{116} But the new textualism claims as its comparative advantage that its method uniquely constrains decisionmaking. That claim has never been supported empirically and is inconsistent with evidence from the leading empirical studies of congressional drafting. Table 2 maps this dialectic. One axis is choice of relevant text and (con)text, the other is how broadly to read words and phrases.

**Table 2. How Text and (Con)text Can Be Manipulated**

<table>
<thead>
<tr>
<th>Shrinking (Con)text</th>
<th>Narrow Reading of Words</th>
<th>Broad Reading of Words</th>
</tr>
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<tbody>
<tr>
<td>Ignore and/or Minimize Inconvenient Text</td>
<td><strong>Sinclair</strong> (Easterbrook)</td>
<td><strong>Scalia’s Tanner Lectures</strong> (Anti-<strong>Holy Trinity</strong>)</td>
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<td></td>
<td><strong>Chisom</strong> (Scalia’s dissent)</td>
<td><strong>Public Citizen</strong> (Kennedy’s concurring opinion)</td>
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<td><strong>National Pride at Work</strong> (Markman)</td>
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</tbody>
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<table>
<thead>
<tr>
<th>Enlarging (Con)text</th>
<th>Narrow Reading of Words</th>
<th>Broad Reading of Words</th>
</tr>
</thead>
<tbody>
<tr>
<td>Whole Act or Whole Code or Constitution</td>
<td><strong>Holy Trinity Church</strong> (Brewer)</td>
<td><strong>Chisom</strong> (Stevens)</td>
</tr>
<tr>
<td></td>
<td><strong>Public Citizen</strong> (Brennan)</td>
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\textsuperscript{116} 5 U.S.C. App. § 2(b).
Particularly troubling is new textualism’s scorn for frank normative evaluation, while freeing judges to make normative choices under the veil of word games. In the foregoing cases, judges took an active role in creating and not just discovering text. And the created text coincided with ideological positions associated with those judges. Thus, Judge Easterbrook’s interpretation of the 1986 Bankruptcy Act was consistent with his Chicago School premise that burdening bankers would dry up farmers’ credit, and so such burdens should be minimized. Justice Scalia’s *Chisom* dissent coincided with a rigid understanding of the separation of powers, aggressively differentiationg judges as officers of the law from politician-representatives. Justice Markman’s *Pride at Work* decision echoed the views of those nostalgic for the 1950s marriage regime. If textualism does not produce “one right answer,” then it follows that hard cases are likely to be decided by reading partisan values into gerrymandered texts.\(^\text{117}\) This reverses the critique of purposivism: in practice, the new textualists’ choice of text and choice of (con)text is like selecting the crowd and packing it with your friends.

New textualism’s partisan supporters may believe that ideological tilt is a positive feature, if textualism correlates with dismantling or enfeebling the modern regulatory state. But textualism as a method is not inherently libertarian, unless the partisan judge makes it so. New textualist analysis would have expanded government regulation of religion in the Tanner Lectures, found congressional meddling with presidential advisers in *Public Citizen’s* concurring opinion, terminated contract rights in *Pride at Work*, and denied voting rights in the *Chisom* dissent. Its manipulability makes Procrustes—the ancient bandit and smith who either stretched or amputated people’s legs to fit them into an iron bed—and not Liberty the new textualism’s mythic symbol.

Even if the new textualism’s methodology could be neutrally applied, actually focused on the understanding of ordinary Americans, and constrained judges better than traditional approaches to statutory interpretation, its methodology would be normatively incomplete. The Constitution and the Founding Era established our government as a republic, not as a pure democracy. As Madison expressed it in *Federalist* 10, the goal of a representative, deliberative democracy is “to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of

their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose.”

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

This process has served the country well, and the judiciary has usually been a cooperative partner or a faithful relational agent in that process, carrying out statutory plans by applying them, sometimes rather dynamically, to new circumstances over time. The new textualism’s effort to exclude or marginalize production economy evidence in the name of a consumer economy is, at bottom, a faux-populism—ostensibly democracy-enhancing but in practice judge-empowering. Rhetorically, it builds on cynicism about legislators and is fueled and empowered by congressional gridlock, the very phenomena that Sam Issacharoff warns is creating a “democracy deficit” and enfeebling our national government. That cynicism and democracy deficit have gotten worse in the last two decades—and as one would expect statutory populism has spread throughout the federal and state judiciaries. Today, as we shall see, Justices of all persuasions hew to the rhetoric and embrace the methods of...

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118 FEDERALIST No. 10 (Madison).
120 WILLIAM N. ESKRIDGE JR., DYNAMIC STATUTORY INTERPRETATION (1994) (offering examples of dynamic but text-based statutory interpretation by judges operating as faithful agents of congressional plans); cf. William N. Eskridge Jr., Spinning Legislative Supremacy, 78 GEO. L.J. 319 (1989) (demonstrating that a “faithful agent” for a long-term contract or statute is a judge who acts as a “relational agent” dynamically applying its rules to new circumstances).
the new textualism, with legislative materials ignored or closeted. As the reach of the new textualism has expanded, we have entered the golden age of textual gerrymandering.

II. THE ROBERTS COURT AND THE NEW JUDICIAL ECONOMY OF INFORMATION

In this Part, we explore how the Roberts Court—including liberal as well as conservative Justices—has shifted the interpretive inquiry away from the authors of statutes, Congress (the ‘production economy’), to the readers of statutes (the ‘consumer economy’). Building on the original impulse to focus on particular words, the Justices now joust about the meaning to the ordinary person of a textual morsel, trading homey examples, even in cases where the methodology yields no interpretive closure even among true textualist believers, like Bostock v. Clayton County. Borrowing original public meaning from constitutional theory, the homey example now looks backward in time: What did “sex” mean to the average American in 1964?

Here, we illustrate the method and madness of high textualism: a faux-populist economy of information where elite judges imagine themselves as ordinary people reading technical statutes as if they lived decades in the past; a disinclination to rely on legislative evidence for anything but confirmation of the judge’s imaginary ordinary meaning; and extensive reliance on dictionaries, corpus searches, grammar-based inferences, and judicially created substantive canons of statutory construction. These trends generate much gerrymandering, as illustrated by the cases examined in this Part and by recent cases digested in this Article’s appendix.

Particularly striking and disturbing has been the Roberts Court’s deployment of canons to supplant actual evidence of meaning from the production economy, particularly


when the statutory authors' views are undisputed.\textsuperscript{124} The foundational cases for the new textualism saw judges cherry-picking texts and (con)text. In the age of high textualism, substantive canons enable judges to create new context. By creating and adjusting substantive canons, judges can engage in “stealth constitutionalism,” bending—or rewriting—pre-selected texts to reflect their preferred constitutional values.\textsuperscript{125} This exacerbates new textualism’s costs to representative democracy as well as the rule of law. As Abbe Gluck and Lisa Schultz Bressman have documented, most of these substantive canons are unknown to the congressional production economy, and some of them operate at odds with Congress’s drafting assumptions.\textsuperscript{126}

\section*{A. Bond and King: Roberts Court Gerrymandering}

Recall that Judge Easterbrook treated \textit{Sinclair} as an easy case because he did not notice a relevant provision. Justice Kennedy in \textit{Public Citizen} and Justice Scalia in \textit{Chisom} made easy cases harder by ignoring relevant statutory text. Cracking-and-packing, accompanied by suppression of text, has become, if anything, more common during the Roberts Court—and it is not limited to the most outspoken textualists. We start with the Chief Justice’s opinion for the Court in \textit{Bond v. United States}.\textsuperscript{127}

In 1998, Congress enacted the Chemical Weapons Convention Implementation Act.\textsuperscript{128} The Act forbids any person knowingly to use (etc.) “any chemical weapon.”\textsuperscript{129} It defines “chemical weapon” as “[a] toxic chemical and its precursors, except where intended for a [permissible] purpose.”\textsuperscript{130} “Toxic chemical” is defined as “any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent

\begin{itemize}
\item \textsuperscript{124} Anita S. Krishnakumar, \textit{Backdoor Purposivism}, 69 DUKE L.J. 1275 (2020) (arguing that the Roberts Court textualists use canons to smuggle in “purpose” through the back door). See also Brudney & Ditslear, \textit{Legislative History}, supra note 14 (documenting the same phenomenon for the Rehnquist Court in labor cases). For a neutral theory of the canons, see Einer Ellehaug, \textit{Statutory Default Rules: How to Interpret Unclear Legislation} (2008).
\item \textsuperscript{125} William N. Eskridge Jr. & Philip P. Frickey, \textit{The Supreme Court, 1993 Term—Foreword: Law as Equilibrium}, 108 HARV. L. REV. 26, 81-87 (1994).
\item \textsuperscript{126} Gluck & Bressman, supra note 17, at 930-40, 954-56 (finding most “textual” canons deployed by Roberts Court are unknown to congressional drafters); \textit{id.} at 940-49, 956-61 (finding a large majority of “substantive” canons deployed by the Roberts Court are unknown to congressional drafters, and some are the opposite of what drafters assume).
\item \textsuperscript{127} 572 U.S. 844 (2014).
\item \textsuperscript{128} Pub. L. No. 105-277, 112 Stat. 2681–856.
\item \textsuperscript{129} 18 U.S.C. § 229(a)(1).
\item \textsuperscript{130} \textit{id.} § 229F(1)(A).
\end{itemize}
harm to humans or animals.”131 Permissible purposes of such chemicals include “[a]ny peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity.”132

Microbiologist Carol Anne Bond stole a quantity of 10–chlorophenoxarsine (an arsenic-based compound). Orally ingesting one-half of a teaspoon of this chemical may be lethal to an adult, while a few ingested crystals could kill a child; a teaspoon may be lethal to the touch.133 Bond also ordered a vial of potassium dichromate on Amazon.com. Even in small quantities, this chemical can cause permanent scarring, organ damage, or death.134 Bond used these toxic chemicals to exact revenge on Myrlinda Haynes, a neighbor who was pregnant with the child of Bond’s husband. Bond went to Haynes’s home on at least 24 occasions and spread the chemicals on her neighbor’s car door, mailbox, and front door knob. Because she detected the chemicals, Haynes suffered only minor injuries, but she complained to local authorities of the ongoing danger to her, her daughter, and her unborn child. The state authorities did nothing, but Bond was prosecuted federally.

Writing for a 6-3 Court, Chief Justice Roberts ruled that Bond’s conduct did not fall within the statute. The problem with the government’s interpretation, he began, was that it would “‘dramatically intrude[ ] upon traditional state criminal jurisdiction,’ and we avoid reading statutes to have such reach in the absence of a clear indication that they do.”135 Rather than asking whether the statute provided such a clear statement, Roberts pivoted toward the statutory audience. “[A]s a matter of natural meaning, an educated user of English would not describe Bond’s crime as involving a ‘chemical weapon.’ Saying that a person ‘used a chemical weapon’ conveys a very different idea than saying the person ‘used a chemical in a way that caused some harm.’”136

Notice that the turn to the hypothetical educated consumer displaced the actual text of the statute. The statute explicitly defines “chemical weapon” and specifies permissible and

131 Id. § 229F(8)(A).
132 Id. § 229F(7).
134 Id.
136 Bond, 572 U.S. at 860-61 (emphasis added).
impermissible uses. “Toxic chemicals” triggering the statute are those that “can cause death, temporary incapacitation or permanent harm to humans or animals.” Roberts read into the text the idea that the toxic chemical had to be used as a weapon of war or terrorism. As Justice Scalia’s outraged dissent (on this issue) observed, Roberts’s opinion, by supplanting the statute’s definition with “natural meaning,” violated one of the most basic rules of statutory interpretation: “When a statute includes an explicit definition, we must follow that definition, even if it varies from that term’s ordinary meaning.” As Richard Re has argued, the Chief Justice’s problem was that he did not want to admit he was carrying out a Holy Trinity move, namely, narrowing the statute.

The majority’s understanding of the “educated user of English” was both ungrounded and implausible. Is it not likely that Myrlinda Haynes and her daughter viewed the two dozen attempts to poison them as “weaponizing” toxic chemicals and as a terror campaign against them? Even if an ordinary citizen could work her way through a chemical weapons statute, would she not pay attention to the statutory definition? The Chief Justice was violating the rules of textualism (definitions trump ordinary meaning), because other normative considerations loomed larger.

Recall that Roberts began his interpretation with a canon disfavoring interpretations that would “dramatically intrude[] upon traditional state criminal jurisdiction.” This put a heavy finger on the scale favoring a narrow interpretation that rendered choice of text less important and the Court’s holding easier to justify. Why was that particular canon preferred? A vast array of federal criminal law overlaps with state criminal law, but has not consistently given rise to application of the federalism canon or to limiting constructions. Why invoke federalism concerns in this case but not in other criminal cases? Importantly, Roberts never explained why this canon was better information than other available (con)text—such as the

139 Bond, 572 U.S. at 867-73 (Scalia, J., dissenting on the statutory issue).
142 Stephen F. Smith, Federalization’s Folly, 56 SAN DIEGO L. REV. 31, 35 (2019); cf. Gonzales v. Raich, 545 U.S. 1 (2005) (upholding Congress’s ability to regulate home-grown marijuana, even though state law traditionally regulated illegal drugs).
international chemical weapons convention requiring that Congress pass the legislation. The convention ratified by the Senate commits the United States to protect an international market for safe and useful chemicals. Article VI of the treaty requires the United States to adopt measures ensuring that toxic chemicals are only “developed, produced, otherwise acquired, retained, transferred, or used within its territory” for “peaceful purposes.”143 Such an effort requires national regulation that, by definition, marginalizes or may even supersede state law. The Chief Justice’s federalism opinion suppressed this competing (con)text without justification or even recognition.

Was Roberts basically rejecting an international law preference for a national regulatory regime, a preference that had been ratified by an overwhelming Senate majority? He was likely trying to avoid the bigger constitutional issue raised by the concurring/dissenting Justices, who would have embraced a game-changing limit on Congress’s power to enforce treaties. They maintained that the Treaty Clause gave Congress no authority to enact a chemical weapons law, in effect overruling Missouri v. Holland.144 Notwithstanding Roberts’s statesmanship, his opinion was a multifaceted textual gerrymander: picking some text (“chemical weapon”) but ignoring other text (the statutory definition), picking one canon among several, and suppressing the international convention. Although we agree with Scalia’s critique in Bond, we think he was the gerrymanderer in his much-discussed face-off with the Chief Justice the following year.

If there were a preview of Bostock’s fracturing textualism, it was the Roberts-Scalia debate in King v. Burwell.145 The Chief Justice purported to find a textual resolution to what was essentially a staffer’s error in the Affordable Care Act of 2010.146 That law sought to encourage citizens to buy health insurance by providing public exchanges on which to buy policies and subsidies to help pay for them. States were required to create Exchanges on which their citizens could purchase insurance—but, if they did not, then the Department of

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144 252 U.S. 416 (1920) (announcing a broad authorization for Congress to pass laws implementing valid treaties). In Bond, Scalia advocated that Holland be overruled. 572 U.S. at 873-82.
146 The dissenters focused on key language describing exchanges created “by” the states; had “by” been changed to “for,” much of the statutory conflict would have largely disappeared.
Health and Human Services (HHS) would create “such Exchange” for the State. Section 36B(c)(2)(A)(i) of the tax code informed taxpayers how to calculate tax credits. That section defines a “coverage month” (when the taxpayer is eligible for subsidies) as one in which the taxpayer is covered by a plan purchased through an “Exchange established by the State under section 1311.”

Nine months after the ACA was adopted, a partisan critic opined that persons who purchased insurance on HHS-established Exchanges were entitled to no tax subsidies: the tax credits were only applicable to taxpayers purchasing insurance on exchanges created “by the states,” a tax provision that critics argued excluded exchanges created by the federal government for the states. Put in other words, if one had changed “by” to “for” in the tax provisions, the case would have disappeared. The Chief Justice rejected this remarkable interpretation by characterizing Exchanges established by HHS to be “such Exchanges” as those established by the States and by reading section 36B(c)(2)(A)(i) in light of the entire statute. To read it any other way would have eliminated the many statutory provisions that viewed HHS as standing in for the states and creating exchanges “for” the states. Put in other words, the Chief harmonized the text, rather than chopping it up into bits and blowing up the statutory plan.

Justice Scalia scolded the Chief Justice for rewriting the statute: “words have no meaning” if the majority can get away with what Scalia considered linguistic homicide. Whereas the Roberts opinion tried to make sense of more rather than less text, the Scalia opinion hyperfocused on four words—“established by the State.” That could only mean that an exchange had to be established “by the state,” not by the federal government “for” the

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147 42 U.S.C. §18031(b)(1) (requiring each State to establish an Exchange); id. §18041(c) (providing if a State does not establish an 18031(b)(1) Exchange, HHS will “establish and operate such Exchange”).
148 26 U.S.C. § 36B(c)(2)(A)(i) (providing for a tax credit “equal to the established premium assistance credit amount,” which is the sum of monthly assistance amounts for “all coverage months of the taxpayer” during the year.”) A “coverage month,” in turn, is one in which the taxpayer is covered by a plan purchased through an “Exchange by the State under section 1311.”
151 King, 576 U.S. at 499-501 (Scalia, J., dissenting).
state. Scalia read “established by the state” in light of a frequently ignored canon that interpreters should “give effect, if possible, to every clause and word of a statute.” As Roberts responded, however, giving Scalia’s effect to those four words would have wreaked havoc on dozens of other words and phrases in the statute and might have nullified thousands of words if his anti-ACA policy had been adopted.

Comparing Bond and King, one sees the emergence of two different, clashing textualisms. One textualism aims to harmonize text, the other to disaggregate it. Moreover, the Justices do not appear to be consistent in these approaches. In Bond, the Chief Justice disaggregated, but he harmonized in King. In Bond, Justice Scalia harmonized, but he disaggregated in King. It would take Justice Scalia’s passing, and two new textualist judges, to reach the textualist fracture in Bostock, but the writing was on the wall long before, that textualism as methodology could lead in opposing directions.

B. Muscarello: Liberals Gerrymander, Too

Although the Roberts Court presides over textualism’s golden age, the Rehnquist Court laid its foundations. Surprisingly, liberal justices were often eager textual brick-layers. Consider the duel between Justices Stephen Breyer and Ruth Bader Ginsburg in Muscarello v. United States.

Three defendants were convicted of drug-related felonies, and their stiff sentences were enhanced by section 924(c)(1) of the Criminal Code, which imposed a five–year mandatory prison term upon a person who “uses or carries a firearm” “during and in relation to” a “drug trafficking crime.” Frank Muscarello had a gun in the locked glove compartment of the truck he used to transport marijuana to his buyers. Muscarello’s case offered the Court an opportunity to decide whether it satisfied section 924(c)(1)’s “carries a firearm.” The Court divided 5-4 on that issue, with Breyer writing for the Court and Ginsburg writing for the dissenters. The authors were the Court’s junior Justices and only Democrats. But their opinions reflected new textualism’s strong influence—homey examples, resort to dictionaries

152 Id. at 502.
and corpuses, and reliance on canons and other judge-made materials to bring closure to open-textured statutory language.

Admitting that “carries a firearm” might have a variety of meanings, such as to bearing arms on one’s person, Breyer opened with a linguistic analysis. “[O]ne can, as a matter of ordinary English, ‘carry firearms’ in a wagon, car, truck, or other vehicle that one accompanies.” For the next four pages, he illustrated that point by references to the King James Version of the Bible, Herman Melville, the Arkansas Gazette, and the New York Times. In contrast, he minimized the ‘bearing arms’ understanding as so rare that it was the Oxford English Dictionary's twenty-sixth definition. Breyer’s chambers applied a home-grown corpus linguistics search, randomly surveying usage from New York Times and Newsweek databases and finding “that many, perhaps more than one-third [of the thousands of hits], are sentences used to convey the meaning at issue here, i.e., the carrying of guns in a car.”

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

As textual analysis, the opinions seemed evenly matched. Their authors chose different kinds of context to reach interpretive closure. Ginsburg concluded her dissent with a canon: the rule of lenity. When in doubt, construe criminal laws narrowly, against the government. Breyer rejected lenity, based on the statute’s purpose to take guns out of the

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155 Id. at 128.
156 Id. at 128-32.
157 Id. at 132.
158 Id. at 129.
159 Id. at 138.
hands of drug dealers. Meanwhile, both opinions missed something big: whether the term “carry” was being used as a term of art given the proliferation of state gun laws. By 1968, states had laws regulating how people could possess and carry guns, and under these state laws, “carries a firearm” typically entailed carriage in a vehicle as well as on the person.

For example, Arizona’s carry-gun law allowed carrying in a vehicle so long as the firearm “is carried within * * * a storage compartment, trunk or glove compartment of a means of transportation.” No state clearly excluded vehicular carrying. In short, Breyer and Ginsburg’s textual analyses sidetracked the inquiry from questions any elected official would ask. Were legislators aware that section 924(c)(1) was using carry as a term of art deployed in state carry gun laws? Were they aware of gun laws that regulate traveling with a gun in your car? In Part III, we provide the answer to those questions.

C. LOCKHART: GRAMMAR-DRIVEN GERRYMANDERING

Roberts Court liberals have continued these textual debates. In Lockhart v. United States, Justices Sotomayor and Kagan battled about hypothesized ordinary meaning and deployed a cartload of canons. Avondale Lockhart possessed child pornography in violation of section 2252(b) of the Criminal Code, which increases penalties for prior offenses. Lockhart had been convicted of sexually abusing his 53-year-old partner. The statute imposed a mandatory minimum prison sentence of ten-to-twenty years if the defendant:

has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography.


163 Klapper et al., supra note 20 (finding 73% of a random sample agreed with Breyer’s understanding of the ordinary meaning in Muscarello).

164 136 S. Ct. 958 (2016).

165 18 U.S.C. § 2252(b) (emphasis added).
The question was whether section 2252(b)'s mandatory minimum kicked in only when the victim was a child or included Lockhart’s offense against an adult.\textsuperscript{166}

Writing for a 6-2 majority, Justice Sotomayor nodded to the text, but promptly invoked a canon. When the Court “has interpreted statutes that \textit{include} a list of terms or phrases followed by a limiting clause, we have typically applied an interpretive strategy called the ‘rule of the last antecedent.’”\textsuperscript{167} That rule holds that a modifier applies only to its nearest neighbors, unless it is set off by a comma. Applying this rule to the state crime predicate (“aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or a ward”), she ruled that “a minor or a ward” only applies to the last phrase, “abusive sexual conduct involving a minor or child.” Lockhart could not escape the mandatory minimum. In dissent, Justice Kagan deployed a different semantic canon: the series qualifier rule.\textsuperscript{168} That canon says that the modifier “involving a minor or ward” presumptively applies throughout the list of prior offenses. Lockhart’s offense against an adult did not count.

Both Justices deployed homey examples based on hypothetical ordinary readers. Invoking her favorite sport, Sotomayor wrote: “You tell your scouts to find a defensive catcher, a quick-footed shortstop, or a pitcher from last year’s World Champion Kansas City Royals. It would be natural for your scouts to confine their search for a pitcher to last year’s championship team, but to look more broadly for catchers and shortstops.”\textsuperscript{169} Kagan recast that hypothetical (a “defensive catcher, quick-footed shortstop, or hard-throwing pitcher from the Kansas City Royals”) and offered her own: “Imagine a friend told you that she hoped to meet ‘an actor, director, or producer involved with the new \textit{Star Wars} movie.’ You would know immediately that she wanted to meet an actor from the \textit{Star Wars} cast—not an actor in, for example, the latest \textit{Zoolander}.”\textsuperscript{170} Again, we see the \textit{Bostock} battle of ordinary meaning foreshadowed, with no apparent way to resolve the contending examples.

Like \textit{Muscarello}’s Clinton-appointed Justices, \textit{Lockhart}’s Obama-appointed Justices had caught the new textualism bug. Justice Scalia was famous for his own homey examples, for hyperfocusing, and for relying on canons to end debate on his terms. Sotomayor and

\begin{itemize}
\item \textsuperscript{166} \textit{Lockhart}, 136 S. Ct. at 961-62.
\item \textsuperscript{167} Id. at 962-63.
\item \textsuperscript{168} Id. at 970-71 (Kagan, J., dissenting).
\item \textsuperscript{169} Id. at 963 (majority opinion).
\item \textsuperscript{170} Id. at 969 (Kagan, J., dissenting).
\end{itemize}
Kagan followed suit. Kagan relied upon the rule of lenity. Sotomayor relied upon the whole text, aiming to harmonize the text. The statute included many cross-references to other crimes applying to adult victims, from obscenity offenses to sex trafficking. From this, Sotomayor argued that there was no reason to limit the state law predicates to child victims.

Moreover, section 2252(b) repeated the unusual phrasing of federal sexual assault law in chapter 109A, which criminalized assault of adults as well as children. Should one committing a sexual assault in Manhattan’s federal courthouse receive a different penalty than one committing a similar offense in a state court? This was a telling point, whatever one’s methodology.

But if the Lockhart Justices followed the virtuous method of their late colleague, Justice Scalia, they also picked up its vices, such as suppressing relevant (con)text. Both opinions neglected the statutory history, meaning how the statute’s text was constructed over time. When enacted in 1990, the law’s penalty provisions were triggered only by prior crimes committed against children. In 1994, as a technical amendment to an omnibus crime bill, Congress added the federal sexual assault crimes in chapter 109A. The 1994 amendment added no language limiting the offense to child victims, however. Passed as part of a large omnibus appropriations law, the 1996 amendments added the state law predicates at issue in Lockhart. The statutory history shows that several different Congresses assembled 2252(b)’s enhancements; there was no single coherent drafting effort. The statutory history does not tell us whether Congress had decided that the 1996 enhancements just applied to crimes against minors. To answer that question, the Justices would have had to dig into the legislative record, but none did. In Part III, we provide the answer to that question.

D. YATES: FISHY GERRYMANDERING

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171 Id. at 964-66 (majority opinion).
175 Statutory history shows the statutory language as it evolves over time, while legislative history shows the public legislative deliberations accompanying the path a bill takes to becoming a law. ESKRIDGE, INTERPRETING LAW, supra note 10, at 204-06; Anita S. Krishnakumar, Statutory History, VA. L. REV. (forthcoming 2021).
Lockhart is not the only recent statutory debate within the Supreme Court’s liberal wing depending upon the homey example and multiple canons. In Yates v. United States,\textsuperscript{176} the skipper of the Ms. Katie had gotten himself into trouble for over-fishing the endangered red grouper. After an inspector caught him red-handed with too many small grouper, Captain Yates allegedly switched out some under-seized grouper with larger fish before he docked for final examination. As a result, federal authorities charged him with obstruction of justice under section 1519 of the Criminal Code:

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States *** shall be fined under this title, imprisoned not more than 20 years, or both.\textsuperscript{177}

If Yates’ piscatorial facts were prosaic, the statute addressed something much grander: a nation-gripping fraud that had brought down a $100 billion corporation. When Enron Corporation disclosed to investors that it was charging down bad investments, the SEC investigated. Enron’s chief accountant ordered the destruction of millions of documents, and a month later the firm collapsed. The accountants’ involvement in this project caused a sensation, worrying markets about the basic soundness of major accounting firms’ practices. Major legislation known as the Sarbanes-Oxley Act of 2002, or SOX, followed.

Justice Ginsburg’s plurality opinion setting aside Captain Yates’s conviction was super-textual. She almost entirely ignored legislative history, picking and choosing various pieces of (con)text. For example, she began with section 1519’s caption, the statute’s title, and surrounding U.S. Code provisions—all of which described the law’s focus as documents and records, full stop.\textsuperscript{178} Those elements of (con)text were emphasized as key evidence despite the fact that Congress itself has warned that titles, captions, and placement are unreliable interpretive devices for interpreting the Criminal Code in particular.\textsuperscript{179} The plurality then hyperfocused on three words in the statute—“record, document or tangible object”—which

\begin{thebibliography}{9}
\bibitem{176} 574 U.S. 528 (2015).
\bibitem{177} 18 U.S.C. § 1519 (emphasis added).
\bibitem{178} Yates, 574 U.S. at 539-40.
\end{thebibliography}
they interpreted through the lens of the linguistic canon *noscitur a sociis* (“words are known by their associates”).

Because “tangible object” was associated with record and document, that broader term should be limited to “the subset of tangible objects involving records and documents, *i.e.*, objects used to record or preserve information.”

Ginsburg confirmed this reading by matching it to the verbs in the statute: “alters, destroys, mutilates, cancels, covers up, falsifies, or makes a false entry,” arguing that the last two verbs are typically associated with things like records, logbooks or hard drives.

In dissent, Justice Kagan admonished the plurality for its (con)textual gerrymander: titles and captions are not supposed to narrow the statutory text, which was as broad as Congress could have written it.

Kagan then engaged in her own textual gerrymander—cracking the text, reducing it to two words, and reading those two words broadly. She deployed the statute’s reference to “any,” the use of a similar term (“tangible thing”) in the now-controversial Model Penal Code, and the accepted interpretation of “tangible object” in other federal rules and laws, including obstruction of justice statutes. There was only one “ordinary meaning” of “tangible object,” namely, “a discrete thing that possesses physical form.” According to no less an authority than Dr. Seuss, “a fish is, of course, a discrete thing that possesses physical form.”

*Yates’* central debate was whether the statute should be read as a specialized obstruction statute, relating to financial records, or a general obstruction statute, relating to anything that might be covered up. Ginsburg wanted to make “record, document, and tangible object” the lodestar; Kagan wanted to emphasize the breadth of “tangible object.”

Kagan cracked the text into smaller pieces and gave them a broad reading; Ginsburg considered the words in a larger whole act context. But the canons did not determine the choice either justice was making; the canons followed the choice of text. *Noscitur a sociis* and *ejusdem generis* both call for generalizations based on common traits. Ginsburg offered one generalization (a narrow one about document-like things preserving information); Kagan had

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180 *Yates*, 547 U.S. at 543-44.
181 *Id.* at 544.
182 *Id.* at 544-45.
183 *Id.* at 553 (Kagan, J., dissenting).
184 *Id.* at 556-57. The Model Penal Code has never been a “model” for the federal Criminal Code in Title 18.
185 *Id.* at 553, citing DR. SEUSS, ONE FISH TWO FISH RED FISH BLUE FISH (1960).
a different one (a broad one about anything providing information). It is no coincidence that these generalizations followed their views about the proper textual meaning of the statute. Unlike Lockhart’s cancelling canons, in Yates a single canon yielded cancelling interpretations.

Yates shows how the linguistic canons may do less to reveal genuine meaning than to provide ammunition for a judge to create a supposed plain meaning. As Judge Easterbrook has explained, “every canon implicitly begins or ends with the statement ‘unless the context indicates otherwise,’ which potentially leaves so much room for maneuver that the canon isn’t doing much work. Indeed, a reference to ‘the context’ does not even pin down what context.”186 Indeed, “what context” is precisely our question. Why limit one’s view to judge-made canons as a form of context? Why not look at the actual legislative context—Congress’s official reports? Both Justices selected other context that was less relevant (the Model Penal Code, the title). Justice Ginsburg contextualized the case by describing the massive Enron fraud prompting the law’s enactment but only cited a bit of the legislative evidence, while Justice Kagan invoked a Senate committee report as “extra icing on a cake already well-frosted.”187 Both Justices relied on a Senate committee report that discussed a bill that came before the SOX legislation.188 That report focused on financial fraud; it did not contemplate a general “obstruction of justice” reform, although it mentioned “evidence” in discussing the obstruction provisions.189 As we will see in Part III, in their hyperfocus on what they considered textualist smoking guns, both opinions ignored more probative legislative evidence: the Senate floor debate adding section 1519 to SOX, and the conference report, the legislative process’s final stage, where precise text is finalized, and then debated again.190

186 Easterbrook, Absence of Method, supra note 8, at 83.
187 Yates, 574 U.S. at 536 (plurality opinion); Id. at 557-58 (Kagan, J., dissenting).
188 The SOX bill came to the Senate with no provisions on obstruction of justice. Senator Leahy added them to SOX on the Senate floor as part of a larger amendment. 148 Cong. Rec. 6436 (2002) (introduction); id. at 6551 (passage). That amendment originated in S. 2010. S. Rep. No. 107-146 (2002) (report accompanying S. 2010). The new § 1519, which was part of S. 2010, was nearly identical to the provision ultimately passed as part of the Conference Report.
189 The report never uses the term “general obstruction of justice” statute; it focuses on financial fraud and various penalties and reporting requirements involving financial fraud. See S. Rep. No. 107-146, at 2, 27 (2002). But the report does refer to “acts to destroy or fabricate physical evidence,” id. at 14, and mentions difficulties courts had created by narrow constructions of § 1512, the general evidence tampering statute. Id. at 6-7, 12.
Justice Kagan was right to ask whether Congress meant to enact a general obstruction statute. General obstruction statutes, common in state law, use terminology like “tangible object” to cover everything from dead bodies to murder weapons. This issue is complicated by the fact that there is a general evidence tampering statute, section 1512, that pre-existed SOX. That creates a puzzle: Why did Congress not just fix the old-general-evidence-tampering section 1512, rather than add a new-document-obstruction section 1519? Surely, a reasonable interpreter would want to know the answer to these questions. Without an answer to these questions, one is left worrying that the opinions reflected different normative impulses or sub silentio constitutional principles. Justice Ginsburg, for example, read both the statutory text and the committee report through the constitutional lens of lenity, a concern she had displayed in prior decisions such as Muscarello.

E. MURPHY v. SMITH: DISCREETLY REVISIGN TEXT

The issue in Murphy v. Smith191 was how to pay prisoners’ attorneys who bring successful lawsuits. Charles Murphy lost his sight as a result of prison officials’ race-bashing abuse and physical assaults. The jury awarded him $307,733.82, a rare sum in prisoner cases, and the district court assessed fees of $108,446.54 to be paid to prevailing counsel, with 10% of Murphy’s award applied to the fees and the remainder to be paid by the state.192 On appeal, the state successfully objected that Murphy should fork over 25% of his award to pay most of the counsel fees.193

The Civil Rights Attorneys Fees Act of 1978 requires states to pay counsel fees for prisoners (and other plaintiffs) successfully suing the state for civil rights violations.194 The Prison Litigation Reform Act of 1995 imposed a number of new rules on the award of counsel fees for successful prisoner suits.195 Section 803 established the rule at issue in Murphy:

Whenever a monetary judgment is awarded in [a section 1983 civil rights action brought by a prisoner], a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded

192 Id. at 791.
193 Id. at 792.
against the defendant. If the award of attorney’s fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.  

The trial judge assumed he had discretion under the first sentence to order Murphy to pay less than 25 percent. After all, the statute says “not to exceed 25 percent.” Writing for the 5-4 Court, Justice Gorsuch disagreed.

The Gorsuch opinion cracked the first sentence into particular words that could be edited and reassembled; he then sealed his gerrymander by packing everything into one word, “satisfy.” Thus, Gorsuch started with the mandatory (“shall”) nature of the statute, which he read to bar district court discretion, and then concluded with “to satisfy,” which he read as “pay off completely.” After he was done, Gorsuch had effectively revised the first sentence to require that “25% of the judgment shall be applied to satisfy the amount of attorney’s fees.” “[A] portion . . . not to exceed” had literally been struck from the statute.

The suppressed text, the dissenters argued, vested the district court with discretion to apportion less than 25% of the judgment to pay counsel fees. At oral argument, the majority Justices were fixated on the idea that “satisfy” can only mean pay the entire fees award. That focus edited out the word “applied.” Everyone recognized that even 25% of the usually meagre prisoner judgments would usually not fully pay an award of counsel fees. Even under the state’s theory, Murphy’s payment of $76,933.46 (25% of the judgment) would not “satisfy” the fee award, but it could be “applied to satisfy” the award, with the state kicking in the rest. The same could be said of the $30,773 (10% of the judgment) that the district court said should be “applied to satisfy” the fee award.

In Murphy, Justices’ different choices of text were driven by two different models of attorney compensation. The majority Justices viewed the statute as instantiating a private law model of standard tort suits. Successful counsel was assured of at least 25 percent of the judgment, a low but not unusual contingency fee, and the law allowed counsel to negotiate a higher percentage to take the case. The dissenting Justices saw a public law baseline: civil rights statutes like section 1988 follow a private attorney general approach, prizing

197 Murphy, 138 S. Ct. at 792-96 (Sotomayor, J., dissenting).
generosity in cases where the litigant has ferreted out public abuse. Gorsuch’s opinion essentially privatized a claim for relief and fee structure. To do so, he had to edit the text quite a bit. Did his editing needlessly undermine Congress’s statutory scheme? We will try to answer that question in Part III.

F. BOSTOCK: THREE WAYS TO GERRYMANDER ORIGINAL PUBLIC MEANING

Bostock v. Clayton County was the statutory interpretation blockbuster of the 2019 Term. Deploying textualist method to achieve a liberal result, Justice Gorsuch surprised some of his fans. But if there is one thing we have been trying to show, it is that textualism has no predictable tilt because text and (con)text can be selectively chosen and rearranged; interpreters might have a predictable tilt, but the method does not. Gerrymandering saturates all three of the Court’s textual opinions. What is most striking about Bostock is that the originalist Justices gerrymandered history as well. If new textualist judges look out over the crowd and pick out their friends, original public meaning judges pack the crowd with their friends and then pick them out.

Title VII bars employers from “discriminat[ing] against any individual because of such individual’s * * * sex,” even when sex is one among several “motivating factors.” Gerald Bostock worked for Clayton County, Georgia as a child welfare advocate. His employer fired him upon learning that Bostock played on a gay softball team. Two other plaintiffs (Donald Zarda and Aimee Stephens) were allegedly fired because they were gay and transgender, respectively. The Court found that each plaintiff had been discriminated against “because of such individual’s sex.” The Court’s opinion and both dissents focused only on text and found unambiguous original meanings. And all three opinions made strategic choices about text and (con)text. Each opinion gerrymandered in a distinctive manner. Each blamed the others for false use of textualist or originalist methodology. The hypothesized consumer of

199 Id. at 27-28 (exchanges between Justice Breyer and plaintiff’s counsel).
200 140 S. Ct. 1731 (2020).
statutes—the ordinary reader—was deployed to justify diametrically opposed textual readings and to accuse other Justices of bad faith.

1. Gorsuch’s Opinion: Hypertextualism and Choice of Text

Authoring the opinion for the 6-3 Court, Justice Gorsuch pulled each word out of the statute and matched it with a broad dictionary definition (applicable in 1964 as well as today), then reassembled the words, and concluded that the reassembled text had a meaning that was “plain and settled.”

The opinion offered definitions of terms one would have considered self-evident, like “otherwise,” and “individual.” Firing a man (Bostock) because he dated men “discriminated” against him “because of” his male “sex.” If he had been a woman who dated men, he would not have been fired. Firing Stephens because her gender identity did not match that of her birth was sex discrimination for similar reasons. Although Justice Gorsuch insisted that he was applying original public meaning, Justice Alito denounced Gorsuch’s opinion as a “pirate” ship—textualism under a “false flag”—and Justice Kavanaugh lamented the majority opinion’s “literalist approach.” We agree with Kavanaugh that interpreters should “not simply split statutory phrases into their component words, look up each in a dictionary, and then mechanically put them together again.”

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

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

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203 Bostock, 140 S. Ct. at 1739-41(word-by-word analysis); Id. at 1743 (quotation).
204 Id. at 1740-41.
205 Id. at 1755 (Alito, J., dissenting).
206 Id. at 1824-25 (Kavanaugh, J., dissenting).
207 Id. at 1827.
208 Id. at 1741 (majority opinion).
Gorsuch’s hypothetical rests upon a sex-stereotyping theory of discrimination (“insufficiently feminine” or “masculine”). This is a social theory of ‘sex’, different from the dissent’s biology-based theory. Justice Alito insisted that it is ‘sex’ discrimination only when employers treat biological women differently from biological men,209 a theory Gorsuch accepted as his working assumption210—until he got to Bob and Hannah.211 Discriminating against effeminate men and masculine women treats men and women the same, so it’s not exactly ‘sex as biology’. Instead, it is discriminating against those individuals because of ‘sex as gender role’, a short analytical step from finding discrimination against them because they do not date or marry different-sex partners.212

Ultimately, statutory precedents overtook language analysis in Gorsuch’s opinion. Its key move was to invoke the Court’s decisions holding that an employer violated Title VII if the employee would not have suffered adverse workplace treatment “but for” the employee’s sex.213 Whether ‘sex’ is understood as biology or as gender role, the majority ruled that “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”214 As Andy Koppelman has long argued, penalizing a woman for dating women is discrimination “because of sex” for the same reason penalizing a white man for marrying a black woman is discrimination “because of race.”215

Precedent and stare decisis justified the majority opinion better than cut-and-paste textual analysis.216 Had the Court followed Justice Alito’s dissent that discrimination “because of sex” meant nothing more than that women are treated differently than men,

209 Id. at 1756-57 (Alito, J., dissenting).
210 Id. at ____ (defining sex to mean biological sex)
211 Id. at 1739 (majority opinion).
212 William N. Eskridge Jr., Title VII’s Statutory History and the Sex Discrimination Argument for LGBTQ Workplace Protections, 127 YALE L. J. 322, 363-64 (2017) [hereinafter Eskridge, Title VII]
214 Bostock, 140 S.C. at 1739.
several important statutory precedents would have been subject to challenge. Thirty-five years ago, the Supreme Court held that sexual harassment is a form of sex discrimination. But the 1964 Act does not bar “sexual harassment”; it only says employers cannot “discriminate because of sex.” Might not a strict textualist insist that Congress must pass a statute that uses the specific words “sexual harassment” before courts may consider such claims under Title VII? Likewise, the Court in 1989 held that an employer violated Title VII when it denied job opportunities to a woman perceived to be too masculine. That precedent would have been implicitly overruled if Alito’s opinion had spoken for the majority.

By the end of Gorsuch’s opinion, the textual arguments had been overtaken by normative ones conceding how discrimination evolves over time. Rejecting the idea that the Court should follow the “expected application” of the statute (no one in 1964 would have protected “homosexuals” nor talked about “transgender” persons), Gorsuch warned that “objections about unexpected applications will not be deployed neutrally,” presumably because majorities would throw minorities under the bus, and statutory interpretation reduced to a popularity contest. For example, the Americans with Disabilities Act (ADA) required accommodation for persons with disabilities by “public entities,” which the Supreme Court applied to state prisons, even though legislators would neither have supported or expected such an unpopular application. Gorsuch seemed to suggest that courts should give more, rather than less, deference to broad statutory language in cases where majorities decide to protect minorities. Thus, he distanced his original meaning approach from what the Eskridge-Koppelman brief in Bostock dubbed the “Dred Scott problem,” after that precedent’s holding that the original public meaning of the Constitution demanded required a holding that free persons of African descent could not be “citizens” because of their degraded status in 1789.

2. Alito’s Dissent: Time Machine Textualism and Choice of Original Meaning Date

219 Bostock, 140 S. Ct. at 1751.
220 Id. (discussing Pennsylvania Dept. of Corrections v. Yeskey, 524 U. S. 206, 208 (1998)).
221 Eskridge-Koppelman Amicus Brief, supra note 200, at 15-20.
Mimicking Justice Scalia’s indignant style, Justice Alito lambasted the majority opinion as “pirat[ical],” “preposterous,” “arrogant,” and “stubborn.”

His dissent took a *time machine* approach to public meaning. “If every single living American had been surveyed in 1964, it would have been hard to find any who thought that discrimination because of sex meant discrimination because of sexual orientation—not to mention gender identity, a concept that was essentially unknown at the time.”

One problem with Alito’s time machine is that he gerrymandered the date. The 1964 Act did not even apply to a state entity like Clayton County until the 1972 Amendments, when it was hardly unthinkable that “homosexuals” would be protected by a sex discrimination prohibition. The Congress enacting the 1972 Amendments also passed the Equal Rights Amendment (ERA), which barred state discrimination “on account of sex.”

In 1970, Professor Paul Freund told Congress that, by analogy to race discrimination law, the ERA would bar states from discriminating against same-sex marriage. This argument did not prevent Congress from passing the ERA, but it was persuasive to many state legislators and voters, who prevented ERA ratification.

Moreover, as part of a comprehensive reform aimed at reversing a series of restrictive Supreme Court decisions, the 1991 Congress added section 703(m), broadening Title VII to include claims where “sex” was a “motivating factor.” This expanded the statute in ways that Congress described as barring “sex-stereotyping.” In 1991, was it unthinkable that sex-stereotyping could be “a motivating factor” when an employer fired a man, but not a woman, who was married to a man? In 1993, the Hawaii Supreme Court ruled that sex discrimination was the primary factor in the state’s denying two lesbians a marriage license. As the Seventh Circuit observed, “[i]t would require considerable calisthenics to remove ‘sex’ from ‘sexual orientation.’”

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222 *Bostock*, 140 S. Ct. at 1755, 1758, 1762 (Alito, J., dissenting).
223 *Id.* at 1767.
225 Note, *The Legality of Homosexual Marriage*, 82 *Yale L.J.* 573 (1973); see *Eskridge, Title VII*, supra note 199 (describing the key role the Freund argument played in the ERA defeat).
228 *Hively v. Ivy Tech Community College*, 853 F. 3d 339, 350 (7th Cir. en banc 2017).
Justice Alito paid no attention to this evidence, preferring to look for “original public meaning” in 1964, before the statute was amended. “Sexual orientation” had nothing to do with “sex” he insisted, and the majority’s examples were “so much smoke.” Instead, Alito hyperfocused on the keystone of the consumer economy: how ordinary readers would distinguish “sex discrimination” from “sexual orientation discrimination.” But the distinction made no sense in 1964, as “sexual orientation” was not a term people used then. In his appendix of dictionary definitions, Alito did not include “sexual orientation”—because it wasn’t in the dictionaries of that era. Alito claimed that the 1964 Congress did not have “gay men and lesbians” in mind for protection under Title VII—and no wonder, as there was no such class of Americans in 1964. If they referred to sexual minorities at all, government documents classified them as “homosexuals and other sex perverts,” and not “gay men and lesbians.” “Gay” meant “merry,” not “homosexual.” Terms like “perversion” and “perverts” populated the dictionaries. Alito’s temporal gerrymander pretended that contemporary words and conceptions of identity could be dropped into 1964. His time machine gerrymander was a classic example of anachronism.

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

Justice Kavanaugh, an astute commentator on statutory interpretation, rejected Gorsuch’s cracking-and-packing approach: “Legislation cannot sensibly be interpreted by stringing together dictionary synonyms of each word and proclaiming that, if the right example of the meaning of each is selected, the ‘plain meaning’ of the statute leads to a particular result.” For Kavanaugh, “the question in this case boils down to the ordinary meaning of the phrase ‘discriminate because of sex.’ Does the ordinary meaning of that phrase encompass discrimination because of sexual orientation? The answer is plainly no.”

229 Bostock, 140 S. Ct. at 1775 (Alito, J., dissenting).
233 Bostock, 140 S. Ct. at 1827 (Kavanaugh, J., dissenting).
234 Id. at 1828.
Kavanaugh cited no empirical evidence for this statement, and it remains unclear to us what makes Ivy League-educated judges experts on ‘ordinary meaning’. Indeed, the country’s leading linguists say that ‘sexual orientation’—the term he was applying—had no meaning at all to most Americans in 1964. On top of those problems, the learned textualist slighted relevant text. As amended, the statute says an employer cannot “discriminate against an individual because of such individual’s sex,” a rule violated even if sex is just one “motivating factor.” The complete text shows why an employer who fires an employee because she is married to someone of a different race or religion has discriminated because of race or religion, for it is undeniable that race or religion is at least one “motivating factor” in the job loss. For the same reason, sex is at least a “motivating factor” if an employer fires an employee because of the sex of his/her/their partner or spouse. Brainy textualists like Neil Gorsuch and Frank Easterbrook consider “discrimination because of such individual’s sexual orientation” a subset of “discrimination because of such individual’s sex.” You can’t say “gay” without saying “sex,” but not vice-versa. Kavanaugh had no response to this obvious argument.

Instead, Kavanaugh’s strongest argument was a (con)textual one. He pointed to several federal statutes barring discrimination because of “sex” that were amended to include “sexual orientation” and “gender identity.” He explained: “Congress knows how to prohibit sexual orientation discrimination.” Because one such federal law was passed in 1998, and the remainder after 2008 (more than a generation after Title VII), their relevance for “original public meaning” was wobbly. Congress often adds duplicative terms ex abundante cautela (“with an abundance of caution”), and Kavanaugh himself has cautioned against drawing conclusions from terminological variety in the U.S. Code.

Moreover, Kavanaugh’s meaningful variation argument was selective, leaving out (con)text that was more relevant than the (con)text he cited. As the Court has repeatedly said, “negative implications raised by disparate provisions” might, at best, be weighed in those instances in which the relevant statutory provisions were “considered simultaneously

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235 Title VII, § 703(a)(1), (m) (codified at 42 U.S.C. 2000e-2(a)(1), (m)) (emphasis added).
236 Manhart, 435 U.S. at 711 (holding that “because of sex” meant “but for the employee’s sex”).
237 Bostock, 140 S. Ct. at 1830 (Kavanaugh, J., dissenting).
238 Seven-Sky v. Holder, 661 F.3d 1, 38 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).
when the language raising the implication was inserted,” not decades later.\footnote{Lindh v. Murphy, 521 U.S. 320, 330 (1997), followed in Gomez-Perez v. Potter, 553 U.S. 474, 486 (2008).} Contemporary statutes, ignored by Kavanaugh, generate different inferences. The Congress that enacted the Civil Rights Act of 1964 was the same Congress that enacted the Equal Pay Act of 1963 (EPA).\footnote{Pub. L. No. 88-38, 77 Stat. 56 (1963).} The EPA prohibited employers from discriminating “on the basis of sex” by paying wages to employees “at a rate less than the rate at which he pays wages to employees of the opposite sex” for similar work.\footnote{Id. §3 (codified at 29 U.S.C. §206(d)(1) (emphasis added)); cf. County of Washington v. Gunther, 452 U.S. 161, 178 (1981) (broader protections in Title VII).} The sweeping language of Title VII in 1991 (discrimination based at least in part on sex) is in striking contrast to the EPA. At the same time Congress was considering amendments to Title VII, it enacted the Americans with Disabilities Act of 1990 (ADA).\footnote{Pub. L. No. 101-336, 104 Stat. 376 (1990).} Section 511(b) excluded “homosexuality and bisexuality” as well as “transvestism, transsexualism” from the ADA’s definition of “disability.”\footnote{42 U.S.C. § 12211(a), (b)(1).} The next year, Congress enacted the 1991 Amendments, significantly revising Title VII. Under Kavanaugh’s meaningful variation argument, it is significant that Congress in 1991 failed to revise its definition of “sex” to specifically exclude “homosexuality and bisexuality” or “transvestism” or “transsexualism,” terms that it had just used in the ADA.

Notice what we have demonstrated in this part. Our earlier claim that judges applying the new textualist method – whether they be liberals or conservatives – will strain to answer interpretive questions based on text and nothing but the text. By abjuring resort to legislative materials, the opinions analyzed here gerrymandered the hell out of the statutory texts they were interpreting. As Table 3 summarizes, these case examples illustrate the malleability of textualist sources. (Examples from the last three terms of the Supreme Court are collected and briefly analyzed in the appendix.) Contrary to its proponents’ much-publicized claims, the new textualist method is not one bit more constraining than traditional methodology, and in our view it is less constraining. This should be alarming to any judge dedicated to the rule of law in our constitutional democracy. We now turn to evidence-based suggestions that can ameliorate this problem.

### Table 3. How Text and (Con)text Can Be Manipulated

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<thead>
<tr>
<th>Shrinking Text or (Con)text</th>
<th>Narrow Reading of Words</th>
<th>Broad Reading of Words</th>
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<tbody>
<tr>
<td>Ignore, Edit, or Minimize Inconvenient Text</td>
<td>Holistic view + Core Meaning</td>
<td>Divvy up Text + Reassemble</td>
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<tr>
<td>Sinclair (Easterbrook)</td>
<td>Scalia’s Tanner Lectures (Anti-Holy Trinity)</td>
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<tr>
<td>Public Citizen (Brennan)</td>
<td>Public Citizen (Kennedy’s concurrence)</td>
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<tr>
<td>Muscarello (Ginsburg’s dissent)</td>
<td>Muscarello (Breyer)</td>
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<td>Bostock (Alito’s dissent)</td>
<td>Bostock (Gorsuch)</td>
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<td>Bond (Roberts)</td>
<td>Bond (Scalia’s concurrence)</td>
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<td>Chisom (Scalia’s dissent)</td>
<td>Pride at Work (Markman)</td>
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<td>Lockhart (Kagan’s dissent)</td>
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<table>
<thead>
<tr>
<th>Enlarging Text or (Con)text</th>
<th>Narrow Reading of Words</th>
<th>Broad Reading of Words</th>
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<tbody>
<tr>
<td>Comparison Shop in the Whole Act or Whole Code</td>
<td>Holy Trinity Church (Brewer)</td>
<td>Murphy (Gorsuch)</td>
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<td>Yates (Ginsburg’s plurality)</td>
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<td>Bostock (Kavanaugh’s dissent)</td>
<td>Lockhart (Sotomayor)</td>
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### III. Checking the Impulse to Gerrymander? The Value of Republican Evidence

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

Our project is critical but not nostalgic. We advocate no return to New Deal purposivism, nor do we abandon the methodological advances we owe to Easterbrook’s and Scalia’s close focus on text and their healthy skepticism about the value of legislative history as evidence of a subjective “legislative intent.” At its worst, however, the new textualism risks turning statutory interpretation into a shell game, where clever but shallow manipulation of dictionaries (and now corpuses), canons, and Control-F searches of the U.S. Code dominate efforts to understand the problem prompting the statute, the drafting history of the act, and ironically the very thing textualists care most about: relevant text.

Our thesis is that in hard cases, evidence from the production economy of statutes has powerful value for textualist as well as pluralist judges—these materials can serve as a partial check against judicial bias and gerrymandering. “Legislative evidence” is not legislative history. It is a term first used by textualists in describing the role that legislative materials might play: not as authoritative, but in cases of doubt, as evidentiary. Nor, as we explain later, is it some kind of elite knowledge of insiders; it is the public, non-subjective, record of republican deliberation. Hence, we call it “republican evidence.” Accordingly, it must be evaluated as evidence. Not all legislative materials are of the same caliber or relevance or probative effect, and in some cases, they do nothing to resolve the matter. Conventional theories of legislative history have invited all sorts of deviations from a proper understanding of legislative evidence. Our theory of republican evidence creates no roving commission searching for something in an individual legislator’s mind or vague statements of purpose; it follows the making of text. In hard cases, where the text supports serious claims for two ‘ordinary meanings’, courts should check those meanings against evidence in the production economy. In fact, the refusal to look at such texts, when ordinary meaning is inconclusive or

244 Victoria F. Nourse, Elementary Statutory Interpretation: Rethinking Legislative Intent and History, 55 B.C. L. REV. 1613 (2014) (rejecting the relevance of “mental intent”).
245 OLP, MISUSING LEGISLATIVE HISTORY, supra note 6, at 74-77 (endorsing a limited utility of legislative materials as “evidence” of “actual [textual] meaning”).
open to reasonable debate, means that statutory interpretation has given up all pretense to respecting the republic.

Republican evidence from the deliberative production economy serves these values:

**First**, republican evidence has a potential *rule of law value* that can aid interpreters in finding and considering *all the relevant text*. As in *Muscarello*, legislative evidence can help us see when Congress uses legal terms of art, a common practice. Surely, as Scalia conceded, legislative evidence is admissible to show legislative usage or “that a word could bear a particular meaning.”

Our student Dan Listwa searched 1880s legislative discussions to determine how members of Congress used the *Holy Trinity* statute’s phrase “labor or service” and found it limited to wage labor. Our own examination of the legislative record of the 1885 Act found that both sides of the debate used the term labor (or labor or service) to refer to skilled as well as unskilled manual work, not what Brewer referred to as “toil of the brain.”

In addition to word meaning, legislative evidence can be an invaluable resource for locating relevant text and explaining how different provisions in a statute relate to one another. We saw this on dramatic display in the *Sinclair* bankruptcy case, where legislative evidence pointed the interpreter to a conflicting provision, and in *Public Citizen*, where legislative evidence motivated us to consider the statutory structure and led us to the conclusion that FACA only regulated advisory committees established by a federal official or institution. But it is also true of *Holy Trinity*. Neither Brewer nor Scalia appreciated the significance of section 4 of the contract labor law, which barred the master of a ship from knowingly transporting any immigrant who was a “laborer, mechanic, or artisan” under contract to do “labor or service” in the United States. We read the statute and caught the section 4 point but did not know what to make of it: Was section 4 in *pari materia* with section

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249 See, e.g., 16 CONG. REC. 1779-87 (1885) (numerous Senators using the terms “labor or service” or “labor” in connection with the alien contract labor bill). *See also Nourse, Misreading Law*, ch. 3.

1, and therefore supporting the Brewer opinion? Or was it an example of meaningful variation, and thus supporting Scalia’s critique? Legislative evidence gave us a clear, objective, and verifiable answer; the sponsor and supportive legislators assured their colleagues and the public that section 4 was “aimed against the man who knowingly brings an immigrant from foreign shores to our own, who comes here under and by virtue of a contract such as is prohibited by [section 1 of] the bill.”

**Second**, republican evidence checks interpretive bias by providing judges with information that might disconfirm their assumptions and reject some problems as outside the statute’s anticipated application. We all suffer from cognitive biases. For generations, theorists have maintained that legislative materials are valuable not as evidence of legislators’ specific intent on an interpretive issue, but instead as evidence of how the statute sought to ameliorate a real-world mischief or problem. We use the word ‘problem’ as opposed to ‘purpose’ because the latter term suggests a vague mental state and our focus is on concrete facts about the world. From *Chisom* to *Muscarello* to *Yates* to *Lockhart*, the best way to figure out the problem (or “mischief,” to use an old term) Congress was addressing and the level of generality with which it was addressing it, is to examine the public debate. At worst, examining those materials involves effort and research that merely confirm the obvious—but at best, those materials can lead the judge to see the statute from the perspective of those who produced it. As we saw for *Holy Trinity*, Scalia’s modern perspective was wrong: legislative deliberations were better evidence of original meaning, because the words used in the legislative process were not only contemporary with the statute’s enactment, but they were used in the context of the statute itself.

Shifting the interpretive focus from purposes to problems does not magically vitiate the generality critique: it is possible to describe problems (such as the danger of guns during crimes) as well as words and phrases (such as “carries a firearm”) at various levels of generality. Textualism aggravates the generality problem and the judicial discretion problem.

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251 16 Cong. Rec. 1630 (1885) (Sen. Blair, sponsor); accord, *id.* at 1629 (Sen. McPherson), 1785 (Sen. Blair), 1779 (Sen. Miller). Professor Vermuele’s contrary reading, emphasizing the breadth of section 1, ignored this evidence, and relied on the statements of an opponent of the legislation. See NOURSE, MISREADING LAW, *supra* note ____, at ____.

252 ESKRIDGE, INTERPRETING LAW, *supra* note 10, at 3-5.

by ignoring both. In our view, the best way to ameliorate the level-of-generality issue in practice is to look at concrete evidence about Congress’s republican deliberations, including the level of generality at which legislators described the problem they were trying to solve. Legislative evidence demonstrates that the Alien Contract Labor Act was a specific response to employers financing a flood of foreign workers; Congress considered that a problem because “bought” foreign workers were driving down wage rates for “free” American workers. Notice how the legislative focus on the “bought” (as opposed to “free”) workers linked the statutory language in the 1885 Act (“labor or service”) with the language of the Fugitive Slave Clause (“Service or Labor”). There was no evidence that ministers or so-called brain-toilers were being imported en masse to the United States.

Third, republican evidence often has value for any neutral judge wishing to be true to the idea that the Congress and its elected representatives, not the appointed Court, is lawmaker. The Constitution grants Congress the legislative power not because its members are individually wise, but because collectively they are accountable to We the People, and reflect a wide variety of perspectives. Conservatives are fond of insisting that we have a republic rather than a democracy, because we have representatives who filter popular views. Surely, an interpreter faced with two plausible ordinary meanings would want to know how the legislature—our elected representatives, accountable for the statutory policy—understood those meanings. No disinterested judge wants to apply a statute in ways that Congress has rejected, or in ways that intrude upon the legislative authority. Nor should judges want to apply a statute to aggrandize their own authority. For example, the rule of lenity tells us that courts should not create common law crimes through dynamic interpretations of open-textured criminal laws. Republican evidence in criminal prosecutions such as Muscarello, Yates, Bond, and Lockhart may help the cautious judge be more certain that a liberal reading of the criminal code does not reach beyond conduct the legislature has labeled culpable.

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254 15 CONG. REC. 6059 (1884) (reprinting committee report); Carol Chomsky, Unlocking the Mysteries of Holy Trinity, 100 COLUM. L. REV. 901, 923-35 (2000) (providing comprehensive account of the legislative evidence on the statutory problem).


Legislative materials can be valuable evidence of *consensus positions* undergirding statutory responses to social and economic problems. Judicial respect for legislatively settled issues is essential to maintaining the separation of powers, including judicial deference to the supremacy of Congress as the democratically legitimate driver of the republic. After the circuit court ruled in 1890 that Holy Trinity Church had violated the 1885 Act, surprised legislators immediately amended the statute to exempt “ministers of any religious denomination.”\(^{257}\) The legislative debates revealed a consensus that statutory law should reflect the norm that “this is a free country, free in religion as in everything else.”\(^{258}\) Although the 1891 amendment did not apply to pending cases (i.e., *Holy Trinity*), the legislative evidence supports the Supreme Court’s view that the penalizing a church’s choice of minister was not appropriate under the 1885 language.\(^{259}\)

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

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\(^{258}\) 21 CONG. REC. 10,466-67 (1890) (colloquy justifying a broad exemption for any faith tradition).

A. FINDING AND UNDERSTANDING RELEVANT TEXT

Republican evidence can help the interpreter locate relevant text and (con)text and resist the tendency to cherry-pick. When a first look at the application of a text seems irrational or unthinkable, interpreters should, as Justice Scalia once suggested, check their intuition against legislative materials. In Public Citizen, a broad reading of “utilized” gave the FACA a constitutionally questionable breadth. Justices should have taken a harder look in light of republican evidence revealing that the broadening term was not found in either the House or Senate bills and was added in conference. That led us to a more careful review of the statutory scheme, including FACA’s rules for creating and terminating advisory committees. Thanks to legislative materials, a hard case became quite easy, as a textual matter.

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

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

\[261\] Public Citizen, 491 U.S. at 459-61. That “utilize” was added in conference supports the inference that it did not really “change” the underlying bill, as major changes at that stage are disfavored and against congressional rules. See Nourse, By the Rules, supra note 67, at 93-97.
were using “carries a firearm” as a phrase with legally established meaning, which is entirely plausible given the importance of gun laws in the states.

The House and Senate enacted the Gun Control Act of 1968 against the background of state carry-gun laws. When the House added “unlawfully carries a firearm,” most states had laws regulating “carrying firearms,” and some states explicitly regulated carrying guns in vehicles. For example, Massachusetts prohibited carrying firearms in vehicles unless “under the direct control” of the carrier, as in a glove compartment (Muscarello’s enhancement). Hawaii, Michigan, Pennsylvania, and other states prohibited gun-carrying “within any vehicle.” General carry-gun prohibitions were interpreted to apply to carrying guns in automobiles. During Senate deliberations, Strom Thurmond introduced into the Congressional Record a list of state carry-gun laws, and senators were informed that without the “unlawfully” language the proposed legislation might penalize law-abiding citizens for carrying weapons “in a vehicle.” Both supporters and opponents of the gun control bill discussed state carry-gun laws.

In 1968, Congress was using “unlawfully carries a firearm” as a term of art based on state law. As a matter of public meaning in 1968 or 1984 (when section 924(c) was expanded to drop the “unlawfully” modifier), “carrying a firearm” included carriage within a vehicle. A similar consensus was reflected in legislative deliberations surrounding section 926A, added in 1986 and invoked by the Muscarello dissenters. Legislative evidence establishes that the 1986 law strongly supported the majority. The sponsor explained that “a hunter from South Carolina has no way of getting through the State of New York to go moose-hunting in

262 MASS. GEN. LAWS ch. 140, § 131C (1968); see also id. § 131 (earlier regulation touching on carrying a gun in an automobile); 1952-1953 CAL. LEGIS. SERV. 654-55 (similar).
263 HAW. REV. STAT. § 134-51 (West 1968); accord MICH. STAT. § 750.227 (West 1968); 18 PA. STAT. & CONS. STAT. § 6106 (West 1968).
264 Stephens v. City of Fort Smith, 227 Ark. 609, 612 (1957) (pistol in glove compartment of a car was “carrying a pistol in ‘any manner’”).
265 CONG. REC. S27412-14 (daily ed. Sept. 18, 1968) (statement of Sen. Thurmond, an opponent). Because state courts had applied carry-gun laws to vehicles, Senator Cooper (a supporter) worried that the Senate bill would “deprive law abiding citizens of the right to * * * carry these weapons in their automobiles as many people do today.” CONG. REC. S27419 (Sept. 18, 1968).
267 Opponents worried that the federal legislation would go beyond the regulations in their own state gun-carry laws, which specifically allowed carrying guns in certain vehicles or (for one state) in a “saddlebag.” CONG. REC. S27125 (daily ed. Sept. 17, 1968) (Alaska law); id. at 26827 (Texas law).
Maine,” because New York’s carry-gun law did not permit carrying such weapons in vehicles. The proposed legislation would allow “transport” of a gun through New York to another state where the owner could lawfully “carry” the gun. Contrary to the dissenting opinion, the 1986 law confirms that “carries a firearm” applied to carrying a gun in your car.

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

B. DISCONFIRMING JUDICIAL ASSUMPTIONS: CURBING JUDICIAL ACTIVISM

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

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

Yates, the fish case, presented us with a mystery: Was SOX’s section 1519 a new general obstruction statute or just a specialized statute focusing on document destruction? In 2002, the Criminal Code had an existing general evidence tampering statute, section 1512. Why did Congress not amend section 1512, rather than create a new section 1519 (and 1520, requiring preservation of records)? Looking at the legislative debate helps us see the problem.

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Congress addressed: financial fraud, markets crashing, and high-flying corporate executives destroying citizens’ pensions. Congress was aware of the old section 1512 and chose to treat it differently. This disconfirms the dissenters’ view that the purpose of the statute was to create a general obstruction measure.

When the Oxley bill came to the Senate, it had no obstruction of justice provisions.\textsuperscript{270} A former prosecutor and sponsor of the bill, Senator Leahy added the obstruction provision that would become section 1519 as a floor amendment.\textsuperscript{271} During conference, the House receded to the Senate provisions.\textsuperscript{272} During the Senate’s debate on the conference report, Senator Leahy explained: “We include new anti-shredding crimes and the requirement that corporate audit documents be preserved for 5 years with a 10 year maximum penalty for willful violations. * * * As the Andersen case showed,\textsuperscript{273} instead of just incorporating the loopholes from existing crimes and raising the penalties, we need tough new provisions that will make sure key documents do not get shredded in the first place.”\textsuperscript{274} The Senate debate was focused on documents and records, not fish and assorted things: “Section 802 creates two new felonies [sections 1519 and 1520] to clarify and close loopholes in the existing criminal laws relating to the destruction or fabrication of evidence and the preservation of financial and audit records. [Specifically], it creates a new general anti shredding provision, 18 U.S.C. § 1519, with a 10-year maximum prison sentence.”\textsuperscript{275}

For years, the Department of Justice had been pushing Congress to expand the general obstruction statute, section 1512, which started as a statute focusing on evidence tampering. Congress rejected that approach, preferring to create subject matter fraud and obstruction statutes with a narrower reach, such as obstruction in health care fraud or, in this case, financial fraud.\textsuperscript{276} Enron highlighted the need for some fixes: one of the problems in prosecuting the Enron accountants was that section 1512 seemed to require “someone else”

\textsuperscript{271} 148 CONG. REC. 12,315-17 (July 9, 2002); id. at 12,490-518 (July 10, 2002).
\textsuperscript{276} Oxley Amicus, supra note 253, at 18-19.
—a third party—to dispose of the evidence. Leahy’s bill never amended section 1512—it added new provisions 1519 and 1520. Neither Leahy nor the bill’s bipartisan supporters (it passed 96-3) mentioned the existing general evidence-tampering statute—until the end of the Senate debate, when Senator Lott offered an amendment (presumably on behalf of the Justice Department) that updated the old evidence-tampering statute, section 1512.277

Given this sequence of events, Justice Kagan was wrong to say that section 1519 was a general obstruction statute; there was congressional agreement that it was not. Even if one does not want to import this evidence into an opinion, as Justice Ginsburg did when she derived her caption, title, and other textual arguments from the Oxley amicus brief,278 at the very least it disconfirms Kagan’s assumptions. Her effort to “clean up” the otherwise messy law of obstructing justice is attractive—but that was not what the congressional process was doing in 2002.

2. Lockhart v. United States: Was Congress Focused on Crimes against Children?

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

Between 1978 and 1996, section 2252’s enhancements were only triggered by prior convictions under federal law, assembled from a variety of unrelated pieces of legislation.279 State law crimes were first added by a child pornography bill introduced by Senator Hatch, the Chair of the Senate Judiciary Committee during the 104th Congress (1995-96). The Hatch bill was a rider to an appropriations bill, emerging only in conference, a process ripe

278 Oxley Amicus, supra note 253, at 7, 9, 10-11, 16 (making the caption, title, and placement points as a primary reason to read “tangible object” like documents and records).
with risks for bad drafting. The history of the Hatch bill disconfirms assumptions, made by the majority opinion, that Congress was aiming for penalty coherence; the statutory scheme was assembled piecemeal.

The Hatch bill expanded regulation of “kiddie-porn” to computer-morphed child pornography, and much of the debate in the Senate Judiciary Committee was about whether this violated the First Amendment. Senators concerned about First Amendment implications warned that morphed porn did not involve an actual child, so that the harm was not as great as that which had prompted the Supreme Court to find a “compelling reason” to support earlier child pornography legislation. Hatch replied that there was harm to children because pedophiles would view child pornography and then commit sex crimes: “child pornography aggravates child sexual molestation.”

Thus, the original committee report described the penalty provision as limited to offenses against children: “any State child abuse law or law relating to the production, receipt or distribution of child pornography.” More importantly, the conferees adopted that meaning—focusing on children—explaining that the bill “would increase the penalties for sexual abuse of children,” including a ten-year enhancement if the defendant had a prior conviction “under any state law relating to the sexual exploitation of children.” In neither the committee report nor the conference report’s joint explanation did anyone pay attention to how these new offenses related to the list of adult offenses covered in then-existing section 2252(b). At the same time, this evidence shows that the drafters and the conferees were very much focused on children and offenses against children, and that there was a reason for

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280 Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121(4-5), 110 Stat. 3009, 3009-30 to 3009-31; see H.R. Rep. No. 104-863, at 802 (1996) (conference bill “includes new language, not included in the House or Senate-reported bills, to address the growing problem of child pornographic materials produced using new computer imaging and ‘morphing’ technologies”). Typically, when new provisions are passed in this fashion it is because they are too controversial to pass as a stand-alone provision.
285 The Justice Department read the 1996 amendment in precisely this way. See Lockhart, 136 S. Ct. at 973-74 (Kagan, J., dissenting).
that focus: the debate about the law’s constitutionality. A measure regulating child pornography was less encumbered by constitutional difficulties than one involving just adults.

None of this evidence played a significant role in Lockhart’s majority or dissenting opinions. Legislators were paying attention to crimes against children, but they were not paying attention to how the penalties matched up in section 2252. At the very least, this disconfirms the notion adopted by the majority of penalty coherence and responds to its lament that no one could not come up with a reason why child penalties might control. There was a reason that Congress focused on abuse of children: constitutional limitations allowing the regulation of child, but not adult, pornography. Even if one did not think that this established the provision’s meaning, it should at least have tilted the balance toward the rule of lenity, which encourages Congress to clarify the criminal law’s reach.

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

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

The proposed PLRA was originally introduced in connection with the GOP’s Contract for America. The initial 1995 bill contained the following counsel fee provision:

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286 Justice Kagan invoked only the Senate committee report, but the conference report is better evidence because it was the text of the law actually enacted.

Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney’s fees awarded against the defendant. If the award of attorney’s fees is greater than 25 percent of the judgment, the excess shall be paid by the defendant.288

The first sentence is identical to the first sentence of section 803 as enacted, and read in conjunction with the second sentence, it shows that the sponsors were treating the prisoner plaintiff like a contingency fee plaintiff, up to 25 percent. After 25 percent, the prisoner plaintiff was being treated like a civil rights plaintiff, and the state defendant had to pay. The analogy to contingency fees was repeatedly suggested by the PLRA’s sponsors. They reasoned that prisoners with modest claims would be deterred from filing marginal lawsuits if they were to face the same considerations other citizens face when deciding whether to file suit: “Is the lawsuit worth the price?”289 Performing this familiar calculus would likely make prisoners with marginal and even valid claims think twice about filing a lawsuit, and naturally lawyers performing the same calculus would think more than twice before taking even a valid claim to court. Later that year, the PLRA, including this language, was attached to an omnibus appropriations measure.290

When the omnibus bill emerged from conference, the second sentence of the PLRA fee-shifting provisions had been changed to cap counsel fees paid by the state at 150 percent of the judgment.291 Although Senator Hatch reported that the conference report achieved the same goal as the earlier bill,292 the revised PLRA actually discouraged more prisoner civil rights lawsuits—both frivolous and meritorious—by setting a 150 percent cap on counsel fees. Congress was on notice that the overwhelming majority of prisoner awards were very low. The imposition of a cap further weakened the analogy between prisoner civil rights cases and regular civil rights cases and strengthened the analogy with normal tort contingency fee cases. (Tort clients with high likelihoods of success will attract no lawyers if the likely awards

are small. For regular civil rights cases, that drawback is ameliorated by the adjusted count-the-hours approach for computing counsel compensation.) Although the 1995 omnibus bill was successfully vetoed, the PLRA as revised was included in a new omnibus bill (H.R. 3019) passed by Congress and signed by President Clinton on April 26, 1996.

Gorsuch ignored this evidence in his opinion for the Court, which was a weak defense of the holding because it gerrymandered words out of the statute. In our view, he would have written a stronger *textualist* opinion if he had pointed to the drafting history, which helps explain how the Congress was adopting the contingency fee model and why section 803 looks so clumsy. The republican evidence ought to be persuasive to anyone who cares about interpreting statutes with attention to Congress’s plan and not just judicial preferences.

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

Republican evidence may be useful not only to find text, determine relevant usage, and disconfirm judicial assumptions, but also to illuminate widely-held consensus positions. This is the use Justice Scalia made of *The Federalist Papers*: he cited them to understand the evolving public consensus surrounding the Constitution’s ratification. As empirical work has shown, Congress itself views as most reliable the types of legislative evidence that reflect bipartisan positions. More importantly, *consensus positions* on a core problem are by definition outside the cherry-picking critique associated with conventional legislative history. Even if one worries that it is difficult to find a consensus, concretely defining the legislative problem (the “mischief”) can disconfirm some views and show how some supposed “ordinary meanings” reflected outlier positions. When reviewing the evidence, one does not aim for a comprehensive story about a statute, but instead focuses insistently on how the text related to the problem Congress was trying to solve.

1. Pride at Work: *Consensus Positions*

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293 Id. at H15166-67 (daily ed. Dec. 19, 1995).
295 Gluck & Bressman, supra note 17, at 977-78.
Justice Markman, in *Pride at Work*, concluded that employment benefits for domestic partners amounted to state recognition of an “agreement” that was a “marriage or similar union.” He twisted the text into an unrecognizable shape. But if there is doubt, it should have been resolved by the public debate on the problem the voters saw the amendment solving. The amendment’s advocates advertised the core problem as marriage and civil unions and repeatedly conceded that the amendment would not affect domestic partnership registries, much less contract benefits. We recognize that the constitutional amendment here reflected direct democracy at work, and public debates may raise different issues from evidence of representative debate, but in this case, consensus was strong, applying not only to public knowledge but also to representations made to government officials by gay marriage opponents.

Citizens for the Protection of Marriage (CPM), the amendment’s sponsoring organization, maintained that the amendment would strengthen the state’s statutory prohibition of same-sex marriage and would head off civil unions, a well-recognized “marriage-lite” institution granting all or almost all the legal benefits of marriage (such as spousal immunities, inheritance rights, and so forth) to same-sex couples.296 Spokespersons represented that protecting marriage had nothing to do with domestic partnerships or contract rights. At a hearing before the board that had to approve the amendment for the ballot, CPM’s counsel stated that there “would certainly be nothing to preclude [a] public employer from extending [health-care] benefits, if they so chose, as a matter of contract between employer and employee, to say domestic dependent benefits [to any] person, *** as a matter of contract.”297 CPM’s official campaign brochure said that “Proposal 2 is only about marriage,” namely, “a union between husband and wife. Proposal 2 will keep it that way. *This is not about rights or benefits* or how people choose to live their lives.”298 Its premier television commercial had the same message. CPM’s communications director and the two primary drafters disclaimed the measure’s potential effect on domestic partnership benefits, dismissing the opposition’s warnings as a “scare tactic” or “diversion from the real issue,” to

296 *Pride at Work*, 748 N.W. 2d at (Kelly, J., dissenting); Dawson Bell, *Proposal 2: Gay Marriage Ban Easily Wins in State, Elsewhere*, DETROIT FREE PRESS, Nov. 3, 2004, at 9A.
298 Staszewski, *supra* note 38, at 23 (quoting CPM, emphasis added).
preserve marriage. This was not an unusual position. Supporters of the Federal Marriage Amendment, which came to a vote in Congress the same year as the Michigan amendment, explicitly disclaimed any intent to preempt domestic partnership benefits. Even after the Michigan Attorney General sued to cancel benefits, the Catholic Church, the Church of Jesus Christ, and the National Association of Evangelicals (all opponents of same-sex marriage and civil unions for faith-based reasons) declined to support that position.

The record shows that everyone, including critics, agreed that the core problem was marriage and civil unions, and no one could say that contract benefits were at the core of the statute’s meaning. As Markman observed, marriage equality supporters opposing the marriage amendment claimed that it swept too far, but even their most exaggerated claims did not reach private contracting. And, in any event, representations by opponents of laws or amendments cannot be used to establish the core meaning of a provision, especially when those representations are refuted by the proposal’s supporters. At a minimum, this evidence disconfirms the claimed democratic pedigree of Markman’s plain meaning: he was imposing his own meaning on that ratified by the voters in 2004.

2. Bostock v. Clayton County: Resolving Ambiguity

Hard cases arise because of ambiguity and the generality problem: text and purpose can both be stated at narrow or general levels, and there may be an element of choice among alternatives in both cases. A central problem with the new textualism—which refuses to look at evidence from statutory production—is that it presses judges to find one ‘plain meaning’ that closes off further kinds of inquiry. The pressure to locate a plain meaning yields spectacles where opposing camps both claim the mantle of unambiguous meaning—precisely what occurred in Bostock. Reluctance to admit ambiguity and nuance is one of the worst

299 Id. at 24 & n.28 (collecting CPM primary sources).
301 The only amicus briefs filed in support of the attorney general were perfunctory filings by outliers, e.g., Brief of Amicus Curiae Michigan Family Forum, National Pride at Work v. Governor of Michigan, 748 N.W.2d 524 (Mich. 2008) (Nos. 133554), 2007 WL 3168658.
302 Nourse, By the Rules, supra note 67, at 118-28.
303 One of us co-authored a brief making arguments the Court accepted. Eskridge-Koppelman Amicus Brief, supra note 200. Here, we appear as scholars, not litigators.
effects of the consumption economy created by the new textualism. It assures gerrymandering. It exposes fractures within even strict textualism.

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

This resulting consensus reflected an ongoing conversation among legislators, administrators, and judges. In 1971, the Supreme Court held in Phillips v. Martin Marietta Corporation that an employer could not discriminate against women with small children, notwithstanding the employer’s showing that most of its hires were women; the employer’s claim was rejected because it was making hiring decisions based on “stereotyped characterizations of the sexes.” Congress was aware of this authoritative interpretation when it expanded Title VII in the 1972 amendments. In 1978, the Congress applied the Phillips sex-stereotyping theory to override the Court when it refused to accommodate a subgroup of women discriminated against because they were pregnant. Under Title VII as amended, “pregnant workers” must be “treated the same as other employees on the basis of their ability or inability to work.” In Price Waterhouse v. Hopkins, the Court held that a

305 On the breadth of Title VII in the 1964 debates, see Cary Franklin, Inventing the “Traditional Concept” of Sex Discrimination, 125 Harv. L. Rev. 1307, 1320-29 (2012). For broadening over time, see Vicki Schultz, Taking Sex Discrimination Seriously, 91 Denver L. Rev. 995, 1108-09 (2015).
306 400 U.S. 542 (1975) (per curiam).
307 Id. at 544-45 (Marshall, J., concurring).
woman allegedly denied promotion because she was not sufficiently “feminine” stated a claim under Title VII: “[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”

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

On this public record, it would be unreasonable to think that Title VII only applied narrowly when women as a class were treated differently from men as a class. Instead, judges, administrators, and legislators had come to see the core problem as ‘sex stereotyping’, and the statute had been read broadly over time by different institutions and by conservative as well as liberal interpreters. Justice Gorsuch relied on precedent to support that view—but he would have written a stronger opinion if he had considered republican evidence, including Congress’s reaction to Supreme Court readings. When the Court chose to read the statute narrowly, Congress rebuked the Court and, in the comprehensive 1991 reform, insisted that it be read broadly. Based on the republican evidence, the level of generality question has a democracy-respecting answer.

CONCLUSION: AGAINST STATUTORY POPULISM

We find ourselves in the golden age of original public meaning and the twilight of republican government’s role in statutory interpretation. Much is at stake in the move to a statutory populism purportedly grounded in the common man’s interpretation. On the

310 Id. at 251 (plurality opinion) (Brennan, J.); see id. at 266 (O’Connor, J., concurring in the judgment but agreeing with the plurality that Hopkins had made out a proper claim of sex discrimination).
311 Eskridge, Title VII, supra note 199, at 374-76 (quoting hearing testimony from the National Retail Federation). Both proponents and opponents of the 1991 Civil Rights Act were aware of the Hopkins case’s focus on sex-stereotyping. E.g., 136 Cong. Rec. S16,706 (July 10, 1990) (statement of Sen. Kennedy, the bill’s sponsor); Sen. Rep. 101-315 (June 8, 1990) (dissenting views of Sen. Hatch, agreeing that Hopkins was a sex-stereotyping precedent); see H.R. Rep. 101-644 (July 30, 1990) (describing the firm’s refusal to promote Hopkins based on a “sex stereotypical” judgment).
surface, textualism and its populist audience seem banal. The warning signal that something is deeply wrong with this picture is false humility. No one thinks doctors should impose the medical views of the “ordinary person” simply because medical treatment applies to the ordinary person. Ordinary people do not perform surgery or read statutes. Members of the Supreme Court acting “as if” they were ordinary people (in a prior original time) invites a strange other-worldly speculation by some of the world’s most extraordinary lawyers acting as if they knew nothing about the law. Even if this knowledge-alienation were possible—even if some of the most learned lawyers in our society could lose their learning—we doubt that it would be advisable.

First, populist embrace of ordinary meaning is inconsistent with textualism’s internal claims. Populism purports to find a single popular will or meaning even though the populace is made up of a massive number of people. Textualism launched itself by contending it was impossible to know what groups do; Congress was a “they,” not an “it,” and for that reason should be ignored. And, yet, textualists assume that the group known as the “people” can be known, it is an “it” not a “they.” This makes little sense in terms of numbers: surely it is easier to discern and document the meaning reflecting the views of 535 representatives speaking to the precise issue or the general plan, and doing so on the public record, than it would be to discern and document the views of more than 300 million people who never read or thought about the statute and most of whom were uninterested in its text, structure, plan, and so forth. As we have said elsewhere, this essentially skeptical “group agency” critique would mean that the decisions of the judiciary, corporations, and churches, should all be discounted because these institutions are made up of many people. Skepticism about group agency is corrosive of all institutions, including the institutions created in our constitution for self-governance.314

313 Kenneth Shepsle, Congress is a They Not an It: Legislative Intent as an Oxymoron, 12 Int’l Rev. of L. & Econ. 239 (1992); see Nourse, Misreading Law, at 33-34 (discussing how textualism emerges from skepticism about groups).

Second, an elite federal judge’s image of the We the People is likely to be self-reflexive and hostile to the most vulnerable members of society. As we said earlier, the textualism meanings favored by the Supreme Court are likely to have an upper-class accent. Populist movements around the world divide rather than unify. Why? Because the idea of the people is jiggered to reflect a certain part of the “people,” which is less than the whole. Populism has the tendency to favor some rather than others, demonizing those it considers ‘elites’ or ‘outsiders’. In statutory interpretation, the fear is that the law will imagine the ‘ordinary meaning’ of words in the vision of some rather than all. As even Justice Gorsuch has warned, “judges are, by and large, drawn from the majority or more powerful groups in society.” It should come as little surprise, he notes, that if judges are biased, that “bias will often harm minorities and disfavored groups.”

Third, if one digs just a bit further, one sees something much bigger, and deeply concerning, afoot. It is no coincidence that the rise of the new textualism and original public meaning, with its populist appeal to ordinary meaning and its contempt for legislative deliberations, has come at the same time this country and others face erosion of public trust in the institutions of governance—including political parties as well as legislatures. Like the pretend-populism of Putin, Erdogan, Trump, and others, the pretend-populism of ordinary meaning lays exclusive claim to delivering a legitimate rule of law while dismantling the institutional foundations for it. This is why we have deployed the provocative title “textual gerrymandering.” Just as electoral gerrymandering manipulates the democratic process for short-term political gain but results in long-term institutional decay, so textual gerrymandering manipulates the interpretive process for short-term political gain but results in long-term institutional decay. Textualism purports to serve democracy, but its operation undermines the republic.

Our Constitution creates institutions foundational for the republic’s flourishing. Its wise structure starts with Congress (Article I) and ends with the rule of law grounded upon the work of Congress (Article VI’s supremacy for statutes and treaties, but silent as to

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executive orders and judicial precedents). Congress is structured with an aspiration to combine electoral accountability with deliberative process; this is the essence of republican government, and our current governance crisis owes much to the paralysis of the congressional process. When Congress does successfully enact statutes, they must last for a long time—and that requires a judiciary committed to a partnership that advances legislative projects by applying them to inevitably changed circumstances, including not just presidential usurpation, but also corporate evasion, new social groups, and technological revolution. A jurisprudence of hypertextual cutting-and-pasting, clever word games, and a labyrinth of canons is not a serious effort by judges to contribute to governance or even the rule of law.

If we are right, judicial populism in statutory interpretation poses serious risks to the institutional foundations of the republic. Textualists believe that they are championing the ordinary person. Like other populists, they applaud disruption of the given order. Implicitly, they imagine Congress, and even anyone who knows anything about Congress, as a hostile insider. That approach, in our view, cannot be squared with the traditional view of statutory interpretation in which judges defer to the policy views of a republican government. It is a recipe ripe for judicial aggrandizement. Like the populist senators who disputed lawfully chosen electors in January 2021, judges who appeal to partisan sentiment and denigrate a republican, deliberative process are undermining representative democracy.

The Bostock debate both exemplifies high textualism and unsettles it: How can textualism anchor the rule of law if there are three answers to a textualist question? This should invite textualists, and their critics, to more deeply understand textualism’s practice and theory. There are large stakes here. If we are right, the new textualism, embraced by both liberals and conservatives, risks not only lawless gerrymandering, but also alienating interpretation from democratic legitimacy. Choices about text and (con)text are being made that remain unjustified by the rule of law, democratic values, or good governance. As long as the new textualism, or the new original public meaning, presents itself as a game of clever dictionary-shopping and text-chopping, to the exclusion of other more relevant evidence of actual meaning, it risks becoming a pointless and destructive word game. It is time for both

317 See Barrett, Congressional Insiders and Outsiders, supra note 232, at 2199-2211 (criticizing theories based on congressional “insiders”).
liberal and conservative Justices to attend to these problems. Once upon a time, Dean John Manning argued that textualism had improved purposivism by narrowing the ability of judges to depart from the text.\textsuperscript{318} Our project has flipped his idea: we believe that textualism, in hard cases, would be improved by checking one’s assumptions about ordinary meaning against actual republican evidence.