

TEXTUALISM 3.0: STATUTORY INTERPRETATION AFTER JUSTICE SCALIA

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*Victoria Nourse**

Justice Scalia is rightly deserving of praise for his insistence that statutory interpretation return to the text.¹ His most recent heirs on the court, Justice Gorsuch and Justice Kavanaugh, are eager to follow and expand his program. Justice Kavanaugh has even taken this to the Constitution, in his hearings insisting that he is a “constitutional textualist.”² There are now a majority of members of the Court who are primed to read the text, read the text, read the text.³ In more than one case in 2018, the Justices have divided 5–4 on statutory meaning, both sides using the textual method, debating at length the use of verbs and infinitives and gerunds and other grammatical constructions.⁴

There is a problem, however, with declaring victory. Justice Kagan has insisted that “[we are] all textualists now.”⁵ This might seem a signal of peace between liberals and conservatives on the question of text. If the decisions of 2018 are any indication, a unified method has not led to unified results. The truth is that textualism seems a neutral term that in fact is nothing but neutral. It harbors opposites. Hard and dramatic textualists, like Justice Scalia and Justice Gorsuch, insist that every case can be answered with the text. Low-key and pluralistic textualists, like Justice Kagan and Justice Breyer, urge that text

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1. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 33 (2012) (recommending a “fair reading” method that focuses on the “basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued”).

2. *Supreme Court Nominee Brett Kavanaugh Confirmation Hearing, Day 2, Part 2*, at 1:58:47 (C-SPAN television broadcast Sept. 5, 2018), <https://www.c-span.org/video/?449705-10/supreme-court-nominee-brett-kavanaugh-confirmation-hearing-day-2-part-2&playEvent> (claiming “what I have referred to as constitutional textualism”); see also Brett M. Kavanaugh, *Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*, 89 NOTRE DAME L. REV. 1907, 1926 (2014); Kavanaugh, *supra*, at 1908 (“My overriding message will be that one factor matters above all in constitutional interpretation and in understanding the grand sweep of constitutional jurisprudence—and that one factor is the precise wording of the constitutional text.”).

3. I include here not only Justice Gorsuch but also Justice Kavanaugh, Justice Thomas, Justice Alito, and Chief Justice Roberts.

4. See, e.g., cases cited *infra* Part III.

5. Harvard Law School, *The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes*, at 8:29 (Nov. 18, 2015), https://www.youtube.com/watch?time_continue=509&v=dpEtszFT0Tg; see, e.g., *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 62 (2010) (statement of Elena Kagan) (“[W]e apply what [the Founders] say, what they meant to do. So in that sense we are all originalists.”).

is only one part of the calculation, that one can consult other materials, history, practice, and precedent. Textualism does not solve the problem, as we know, of legislative history.⁶ More importantly, it does not solve the deeper problem of textualism's claim to objectivity. If the cases of 2018 are any indication, the number of 5–4 splits in cases involving textual method deployed by both sides is a sure sign that there is no plain meaning to the text, since five members of the Court think it means one thing and four members think it means something entirely different.⁷

In this essay, I address three characteristics of the “new, new, new” textualism or “Textualism 3.0.” Justice Scalia's view has been called the “new textualism”⁸ because textualism was around long before he was on the scene, as anyone familiar with Blackstone knows.⁹ The two “news” I refer to in the first sentence of this paragraph have always been associated with Justice Scalia's textualism, but Scalia's heirs emphasize them even further. The first factor is what I will call “intense decontextualization” (meaning the intensification of text-parsing methodology) accompanied by grammatical analysis.¹⁰ This, as we will see, often leads to one side picking its text and the other side picking a different text. The second factor is an open reference to “original meaning” in statutory construction (a return to the meaning of the text as passed). This leads to increased disruption and the potential to overturn settled precedents. It even suggests that legislative history might actually be of use in discovering meanings that emerged in much earlier times.

In Part I, I argue that textualism's heirs have not solved but embraced the problem of “picking and choosing” text. I use Justice Scalia's important decision in *West Virginia University Hospitals, Inc. v. Casey*¹¹ to explain how this might occur and show that the same quality is on display in three cases involving 5–4 splits on statutory interpretation decided by the Supreme Court in 2018. In Part II, I suggest that the Court is moving in a direction toward originalism in statutory construction, given the kinds of cases already decided and those on

6. VICTORIA NOURSE, *MISREADING LAW, MISREADING DEMOCRACY* (2016) (defending the use of reliable legislative evidence).

7. See, e.g., *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067 (2018); *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833 (2018); *Murphy v. Smith*, 138 S. Ct. 784 (2018); *Artis v. District of Columbia*, 138 S. Ct. 594 (2018).

8. William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1511 (1998) (reviewing ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997)).

9. 1 WILLIAM BLACKSTONE, *COMMENTARIES* *59 (adopting a pluralist method starting with text, stating that meaning is to be gathered from “the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law”).

10. The emphasis on grammar appears in cases with unified results as well. See the dusky gopher frog case, *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 368 (2018) (“Our analysis starts with the phrase ‘critical habitat.’ According to the ordinary understanding of how adjectives work, ‘critical habitat’ must also be ‘habitat.’ Adjectives modify nouns—they pick out a subset of a category that possesses a certain quality.”).

11. 499 U.S. 83 (1991), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 113, 105 Stat. 1071, 1079, *as recognized in* *Landgraf v. USI Film Prods.*, 511 U.S. 244, 251 (1994).

the Term's docket. This strain of textualism is on a theoretical collision course with the legislative history debate and questions of constitutional updating. I will illustrate this with a case on the Federal Arbitration Act as compared to the smoldering debate about whether Title VII covers sexual orientation discrimination. In Part III, I argue that there is another “new”—or at least intensified—feature of the post-Scalia environment, which legitimizes new textualism's already uber-textualist emphasis on particular words by adding grammatical arguments about the importance of verbs and infinitives and gerunds and other grammatical construction. This intensifies the essential methodological flaw of textualism: decontextualization. Although all textualists claim that they look to context, in practice, they may do just the opposite by pulling words out of context. The move toward originalist statutory interpretation makes this salient by asking interpreters to think like a person in 1925 or 1964 or times long past in our collective history. Such imaginary adventures cannot actually take place, other than in the mind of the interpreter, if one refuses to look at the actual record of a statute's birth.

I. CHOICE OF TEXT

Many statutory interpretation controversies depend upon which text to choose as the dominant text, although statutory “choice of law” questions (which text to choose) are undertheorized.¹² Consider one of Justice Scalia's most well-known statutory interpretation opinions: *Casey*.¹³ The dispute was over whether West Virginia was subsidizing health care for poor Pennsylvania residents who went to West Virginia hospitals.¹⁴ The case asked whether West Virginia could recoup the full cost of the suit from Pennsylvania under a civil rights statute.¹⁵ Full costs for the suit included expert witness fees for the work of health care-financing experts.¹⁶ The Supreme Court, Justice Scalia writing for the majority, held that expert witness fees were not covered.¹⁷ The statute said “attorney's fee,” not expert witness fee.¹⁸ To support his claim, Justice Scalia marshalled dozens of other attorneys' fees statutes in which Congress did add the precise term “witness fees.”¹⁹ This is sometimes known as the “whole code” method,²⁰ the inference being that if Congress could

12. Victoria F. Nourse, *The Gerrymandered Text: The Rise of Constitutional Textualism* (unpublished manuscript) (on file with author).

13. 499 U.S. 83.

14. *See id.* at 84–86.

15. *Id.*

16. *Id.* at 85.

17. *Id.* at 102.

18. *Id.* at 86–87.

19. *Id.* at 88–91 (collecting statutes).

20. *See* Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 *YALE L. J.* 70, 137 (2012).

write “witness fees” in these other statutes, they could write “witness fees” in the statute invoked by the hospital’s lawyers.

This all sounds perfectly fine if one looks at the text of the statute, but it is not perfectly fine if you look at the history of the statute. Congress went on to override Justice Scalia’s views in part.²¹ But let’s just stick to the text. The text of the statute provides, in certain civil rights cases, for an “attorney’s fee as part of the costs.”²² Now if we take the “ordinary person” view of “cost,” presumably that would mean what West Virginia paid to bring suit. Justice Stevens, in dissent, argued that the term “costs” included witness fees.²³ For him, the plain text meant that West Virginia won, not Pennsylvania. Notice, however, what is going on: the best arguments for the majority tend to focus on negative implications from one piece of the text—“attorney’s fee”—and the best arguments for the opposite view focus on a different text—“costs.”²⁴ Hence, the problem of what I call “picking and choosing” text.

How do we know which text to choose? This sounds as if it is something like a “choice of law” problem, only a “choice of text” problem. There are arguments on both sides. So, for Justice Stevens in dissent, Justice Scalia seems to have cut out words in the statute: namely, “as part of the costs.” If “costs” is logically a larger category than attorneys’ fees, then presumably Stevens—not Scalia—wins on the text. Scalia is not without a rejoinder. He could argue that the term “costs” is a technical term limited to the kind of meaning judges use when they “tax costs.” “Costs” in traditional terms means things like filing fees.²⁵ Before fee-shifting statutes, attorneys were generally not allowed to recover their attorneys’ fees, but they could recover their costs, defined as things like filing fees.²⁶ The only problem with that argument is that attorneys’ fees were never thought of as a part of “taxing costs.”²⁷ If “costs” is a smaller category than attorneys’ fees, the sentence makes no logical sense: a large amount (attorneys’ fees) becomes a “part of” something smaller (traditional taxed costs).

How are we to resolve this problem? Well, one might just look at what Congress was trying to do. It is not hard. There are two easily accessible

21. See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 251 (1994) (explaining that Congress passed one part of the Civil Rights Act of 1991 to include expert fees as a response to *Casey*).

22. 42 U.S.C. § 1988(b) (2012).

23. *Casey*, 499 U.S. at 104 (Stevens, J., dissenting).

24. In fairness, Justice Stevens claimed that his argument worked both with respect to the term “costs” and “attorney’s fees.” See *Id.* The argument based on “attorney’s fee” was based on a prior precedent that included paralegal costs in the attorney’s fee. *Id.* at 104–05.

25. Justice Scalia begins the majority opinion with an ordinary traditional taxing-costs statute: 28 U.S.C. § 1920. See *id.* at 86 (majority opinion) (citing 28 U.S.C. § 1920 (2012)).

26. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 247–62 (1975) (outlining the history of American legal fees and costs), *superseded by statute in part*, Civil Rights Attorney’s Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641, *as recognized in Casey*, 499 U.S. at 97–98.

27. See *id.* at 104 (Stevens, J., dissenting) (“The term ‘costs’ has a different and broader meaning in fee-shifting statutes than it has in the cost statutes that apply to ordinary litigation.”).

committee reports. Congress was trying to reverse common law practice, not embrace it. The Supreme Court had refused, in a decision called *Alyeska Pipeline Service Co. v. Wilderness Society*, to shift fees as a matter of “equity” unless it had a statute to follow.²⁸ Congress complied in a wide variety of cases with a wide variety of statutes, cited by Justice Scalia.²⁹ Attorneys’ fees were viewed as essential to the enforcement of the law under the “private attorney general” theory, meaning that individuals were better and more efficient at seeking recovery for wrongs than was bureaucratic big government enforcement.³⁰ There was no doubt that Congress was trying to change the common law practice—no attorneys’ fees—because Congress was responding to the Court. The report stated: “If private citizens are to be able to assert their civil rights, and if those who violate the Nation’s fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.”³¹

How then could the majority have possibly used “costs” in a technical sense? At the beginning of his opinion, Justice Scalia invoked the traditional “taxing costs” statute, 28 U.S.C. § 1920, to frame the problem in his direction. Even if that statute were relevant, there is every reason to believe that a more specific later-passed statute (42 U.S.C. § 1988) should control more general statutes (28 U.S.C. § 1920).³² We are back at our problem again: there are very persuasive reasons to think that Justice Scalia’s textual argument was wrong. At the very least, assuming one did not look at the legislative evidence, there was substantial reason to think that there were at least two textual interpretations. Since text cannot solve the problem, we have what I call a “choice of text” problem. Textualists have been insistent that the use of legislative history is subject to “picking and choosing” problems. But “picking and choosing” is a problem for the text, as well.³³

There is every reason to believe that this problem is not going away and that it may be intensifying. It was on perfect display in two 2018 cases involving Justice Gorsuch, both 5–4 decisions. Consider Justice Gorsuch’s first major dissent, *Artis v. District of Columbia*.³⁴ The case involved a federal statute of limitations, 28 U.S.C. § 1367(d), that provided as follows: “The period of limitations [for any supplemental state claim] shall be tolled while the claim is pending

28. 421 U.S. at 269–71.

29. See *Casey*, 499 U.S. at 88–89 (collecting statutes).

30. See *id.* at 97–98.

31. *Id.* at 108 (Stevens, J., dissenting) (alteration in original) (emphasis omitted) (quoting S. REP. NO. 94-1011, at 2 (1976)).

32. At a minimum, there are conflicting canons which effectively cancel each other. Later-passed, specific statutes generally control earlier, more general statutes. But there is also a canon against a later statute impliedly repealing an earlier statute. See *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 189–90 (1978).

33. For the linguistic philosophy behind this problem, see Victoria Nourse, *Picking and Choosing Text: Lessons for Statutory Interpretation from the Philosophy of Language*, 69 FLA. L. REV. 1409 (2017).

34. 138 S. Ct. 594, 608 (2018) (Gorsuch, J., dissenting).

and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.”³⁵ Stephanie Artis sued in federal court under a federal statute, Title VII,³⁶ appending state law claims to her federal claim.³⁷ The federal court dismissed the federal claim and dismissed without prejudice the appended state law claims.³⁸ (Federal courts may exercise supplemental jurisdiction over state claims to gain efficiency in litigating state and federal claims with common factual cores.³⁹) When Artis returned to state court with her state claims, the state court dismissed her case because the action was barred by the federal statute of limitations quoted above.⁴⁰

Justice Ginsburg, for the majority in *Artis*, reversed, concluding for the plaintiff that the “shall be tolled” language meant that the clock was stopped on the appended state law claims while Artis was litigating in the federal court.⁴¹ Justice Gorsuch’s dissenting interpretation would have left Artis out of luck, her state law claims barred. In a lengthy dissenting opinion discussing the history of “grace periods” in a “rich common law and state statutory tradition”⁴²—albeit interpreting a federal statute—Gorsuch focused on the words “period of thirty days,” arguing that Artis only had 30 days after the dismissal of the federal claim to file in state court.⁴³ To quote his reasoning:

“[T]he first phrase ‘shall be tolled while the claim is pending and for a period of 30 days’ should be understood to extend a grace period of 30 days after dismissal much as the second phrase ‘tolling period’ is understood to refer the reader to parallel state law grace periods affording short periods for refiling after dismissal.”⁴⁴

As we saw in *Casey*,⁴⁵ and as is frequent when there are 5–4 splits in statutory interpretation cases, when there is more than one text at issue, there are ways of reading that emphasize some text to the exclusion of other text. In *Casey*, Justice Scalia zeroed in on the words “attorney’s fee” and inferred that

35. 28 U.S.C. § 1367(d) (2012) (emphasis added).

36. Civil Rights Act of 1965, Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253–66 (codified as amended at 42 U.S.C. §§ 2000e–2000e-17 (2012)) (barring employment discrimination).

37. *Artis*, 138 S. Ct. at 599–600.

38. *Id.*

39. *Id.* at 598–99.

40. *Id.* at 600.

41. *Id.* at 601–02 (relying upon dictionaries and the Court’s own precedents for the meaning of tolling).

42. *Id.* at 608–09 (Gorsuch, J., dissenting). This dissent was joined by Justices Kennedy, Alito, and Thomas.

43. *Id.* at 608. Justice Gorsuch relied heavily on a canon of interpretation associated with federalism for the context of the statute: “It may only be a small statute we are interpreting, but the result the Court reaches today represents no small intrusion on traditional state functions and no small departure from our foundational principles of federalism.” *Id.*

44. *Id.* at 611 (Gorsuch, J., dissenting) (emphasis omitted).

45. 499 U.S. 83 (1991).

“witness fees” were excluded;⁴⁶ Justice Stevens, by contrast, explained that “costs” meant full costs, including “witness fees.”⁴⁷ In short, the statutory problem raises a question of choice of text. One opinion focuses on one text; the other opinion focuses on another piece of text. The Justices reach opposed conclusions, although it appears that they are using the same textual method. So too in *Artis*.⁴⁸ The majority emphasizes the words “shall be tolled,” which it interprets as stopping the clock;⁴⁹ the Gorsuch dissent emphasizes the words “for a period of 30 days” and “tolling period” to suggest that “tolling” means a 30-day pause.⁵⁰

This is not the only recent case in which we can see textual choice front and center. There was another 5–4 statutory split in 2018 in *Murphy v. Smith*.⁵¹ The question concerned how to pay attorneys who bring lawsuits on behalf of prisoners.⁵² A prisoner was thrown into solitary for a minor offense and fell and hit his head, and as a result, he partially lost his sight.⁵³ It was a rather grisly display of assaultive behavior, so much so that the jury awarded a whopping sum of \$307,733.82 to the injured prisoner.⁵⁴ Meanwhile, attorneys’ fees were assessed at \$108,446.54.⁵⁵ The district court judge made the defendant pay 10% of his judgment to the lawyer.⁵⁶ The rest had to be paid by the state. The state balked and claimed that the statute required that the defendant pay 25% of the attorneys’ fee award.⁵⁷ The state won on appeal.⁵⁸

Here is the statute: “Whenever a monetary judgment is awarded in [a civil-rights action brought by a prisoner], a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney’s fees awarded against the defendant.”⁵⁹ The statute goes on to provide: “If the award of attorney’s fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.”⁶⁰ The latter sentence envisages the typical scenario: “In the vast majority of prisoner-civil-rights cases, the attorney’s fee award exceeds the monetary judgment awarded to the prevailing prisoner-plaintiff. In fiscal year 2012, for instance, the median damages award in a pris-

46. *Id.* at 88.

47. *Id.* at 104–109 (Stevens, J., dissenting).

48. *See Artis*, 138 S. Ct. at 603.

49. *Id.*

50. *Id.* at 613 (Gorsuch, J., dissenting).

51. 138 S. Ct. 784 (2018).

52. *Id.* at 786.

53. *Id.* at 791.

54. *Id.*

55. *Id.*

56. *Id.* at 791–92.

57. *Id.* at 792.

58. *Id.*

59. *Id.* (alteration in original) (quoting 42 U.S.C. § 1997e(d)(2) (2012)).

60. *Id.* (quoting 42 U.S.C. § 1997(e)(d)(2)).

oner-civil-rights action litigated to victory . . . was a mere \$4,185.”⁶¹ So, for example, where the prisoner is awarded, let us say \$100, the attorney is awarded \$125, the prisoner would have to pay \$25 (the “excess”) of the attorneys’ fees. *Murphy*, however, involved an atypical case because the judgment was in excess of the attorneys’ fees awarded. The core dispute focused on the first sentence of the statute, which yielded two different interpretations. Justice Gorsuch, for the five-Justice majority, emphasized the words “shall” and “to satisfy” and held that the defendant “shall” pay 25% of the attorneys’ fees.⁶² Justice Sotomayor, in dissent, replied emphasizing that the words “shall be applied” were different from “shall” and that “a portion . . . not to exceed” had been effectively read out of the statute.⁶³

Again, we see the problem of which text to choose. If we focus only on “shall,” then it seems that Congress wanted the defendant to pay 25%—end of case. Shall means shall means shall. But to focus only on “shall” leaves out the rest of the statute and many other words. Why after all, did not Congress simply say “the defendant shall pay 25 percent”? Why did it say that “a portion of the judgment (not to exceed 25 percent) shall be applied”? What happened to “not to exceed”? That would seem to suggest that there was discretion for the judge to assess up to that point. And what about “a portion,” which suggests any portion, something less than 25%, not a mandatory 25%? And then again there is the word “applied,” which modifies “shall,” suggesting that whatever mandate the statute provided was to be applied to satisfy some unidentified portion of an attorneys’ fee award. If one is going to make sense of the most text, one has to consider these terms, not limit the statute to the one word, “shall,” even if we add two more words, “to satisfy.”

All of this suggests that textualism will continue to yield 5–4 decisions in which there is a principal dispute about the choice of text. More importantly, it suggests that *there is no real consensus on the Court about actual textualist methodology*. In *Casey*, do we choose “costs” or “attorneys’ fees,” or should we be required to explain “as part of” as well—more rather than less text? In *Artis*, do we choose “shall be tolled” or “tolling period”? In *Murphy*, do we focus on “shall” alone or “a portion . . . not to exceed” 25%? If this is correct, then it is difficult to say that, in hard cases, textualism yields objective answers. After all, in these cases both opinions are using textualism as a method but coming

61. *Id.* at 793 (Sotomayor, J., dissenting) (citing Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 168 tbl.7 (2015)).

62. *Id.* at 787 (majority opinion) (“First, the word ‘shall’ usually creates a mandate, not a liberty, so the verb phrase ‘shall be applied’ tells us that the district court has some nondiscretionary duty to perform. See *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (“[T]he mandatory ‘shall’ . . . normally creates an obligation impervious to judicial discretion”). Second, immediately following the verb we find an infinitival phrase (‘to satisfy the amount of attorney’s fees awarded’) that specifies the purpose or aim of the verb’s non-discretionary duty. Cf. R. HUDDLESTON & G. PULLUM, *CAMBRIDGE GRAMMAR OF THE ENGLISH LANGUAGE*, ch. 8, §§ 1, 12.2, pp. 669, 729–730 (2002).”)

63. *Id.* at 792–96 (Sotomayor, J., dissenting).

up with diametrically opposed results. And, as we will see later in Part III, this risks something even more methodologically troubling—adding and subtracting text.

II. ORIGINALISM AND ITS UPDATING DISCONTENTS

There has always been an “originalist” aspect of “new textualism,” but this Term’s cases reveal a new emphasis on originalism in statutory interpretation. Justice Gorsuch appears to be leading the way.⁶⁴ Originalism, as we know, is typically associated with constitutional law. There are many forms of originalism in constitutional law, and I will not bother to enumerate them all. “New originalism” has as its nerve center the notion of text since it does not emphasize the Founders’ intent but the “public meaning” of the text.⁶⁵ In statutory interpretation, the question is associated with controversies about “updating.”⁶⁶ The idea is that “original meaning” is the meaning at the time the statute was passed, not today’s meaning. So, if a statute was passed in the 1920s, it holds that meaning, and it holds that meaning even if courts in the meantime have followed a different method and yielded different precedents interpreting the 1920s act to modern circumstances. As in constitutional law, originalism in statutory interpretation has a potential for major disruption of precedent.⁶⁷ Consider, for example, Justice Scalia’s decision on the right to bear arms in *Heller*; whatever you think of the decision, it is a fact that *Heller* overturned a precedent that had stood for over fifty years.⁶⁸

For example, Justice Gorsuch, writing for the majority in a recent tax case, returned the law of money to the 1930s, holding that stock options were not “money remuneration,” against the Trump Administration’s preferred reading. Here is his paean to original statutory interpretation:

Written laws are meant to be understood and lived by. If a fog of uncertainty surrounded them, if their meaning could shift with the latest judicial whim, the point of reducing them to writing would be lost. That is why it’s a “fundamental canon of statutory construction” that words generally

64. *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018) (discussing original statutory meaning).

65. Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 413 (2013).

66. WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 14–16 (1994); William N. Eskridge Jr., *Title VII’s Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 YALE L.J. 322, 325–27 (2017).

67. See generally Anita S. Krishnakumar, *Textualism and Statutory Precedents*, 104 VA. L. REV. 157 (2018) (examining the tendency of textualist judges to be willing to reverse the presumption of strong stare decisis in statutory interpretation cases and cataloguing cases in which judges vote to overturn statutory precedent).

68. *District of Columbia v. Heller*, 554 U.S. 570 (2008) (overruling *United States v. Miller*, 307 U.S. 174 (1939)). *Miller* had stood for nearly seventy years. See Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923, 924 (2009) (discussing the opinions in *Heller* as the “most important and extensive debate on the role of original meaning in constitutional interpretation”); see also Barnett, *supra* note 65, at 420–31.

should be “interpreted as taking their ordinary, contemporary, common meaning . . . at the time Congress enacted the statute.” Congress alone has the institutional competence, democratic legitimacy, and (most importantly) constitutional authority to revise statutes in light of new social problems and preferences. Until it exercises that power, the people may rely on the original meaning of the written law.⁶⁹

This Term, a spate of cases raise questions of textualism and its potential disruptive effect on precedent. Consider a case involving firefighters in California.⁷⁰ They claimed that they were fired unlawfully under the Age Discrimination in Employment Act (ADEA).⁷¹ Their municipal employer said that the ADEA did not apply to small municipalities.⁷² Since the 1980s, courts of appeals had uniformly sided with municipalities concluding that, like private employers, they had to be a certain size—over twenty employees.⁷³ Along, however, came the Ninth Circuit in a decision rejecting that view based on the *text* of the statute, ruling for the firefighters and creating a conflict.⁷⁴ The prior cases were wrong, said the Ninth Circuit, because they did not rely upon a textualist methodology.⁷⁵ The text says that private employers must have twenty employees, but the amendments applying the act to municipalities have no such limitation. If that textual interpretation holds, then all of the other circuits’ positions will be wrong. In an opinion written by Justice Ginsburg, which almost exclusively focused on two words (“and also”), the Court unanimously sided with the firefighters, overturning precedent standing in four circuits dating back to 1986.⁷⁶

This combination of disruption and originalism is set in high relief in a case involving the Federal Arbitration Act (FAA).⁷⁷ The FAA is a perpetual source of angst for those who have decried the courts’ expansion of the act to cover almost any employment or consumer agreement. Because courts have generally given a “liberal” interpretation to the statute,⁷⁸ as Erwin Chemerin-

69. Wis. Cent. Ltd., 138 S. Ct. at 2074 (omission in original) (emphasis added) (citation omitted). *Wisconsin Central* is not the only case involving questions of original meaning this Term. See, e.g., *Jam v. Int’l Fin. Corp.*, 860 F.3d 703 (D.C. Cir. 2017), *cert. granted in part*, 138 S. Ct. 2026 (2018) (mem.) (raising the question of whether the meaning at passage, in 1945, of the International Organizations Immunity Act or the meaning incorporated by reference of later developments in international sovereign immunities law controls).

70. *Mount Lemmon Fire Dist. v. Guido*, 139 S. Ct. 22 (2018).

71. *Id.* at 24.

72. *Id.*

73. *Id.* at 25 (collecting cases).

74. *Guido v. Mount Lemmon Fire Dist.*, 859 F.3d 1168 (9th Cir. 2017), *aff’d*, 139 S. Ct. 22 (2018).

75. *Id.* at 1172–74.

76. See *Guido*, 139 S. Ct. at 25.

77. 9 U.S.C. § 1 (2012).

78. See, e.g., *Oliveira v. New Prime, Inc.*, 857 F.3d 7, 12 (1st Cir. 2017) (noting the “liberal federal policy” on arbitration) (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

sky writes, it amounts to shutting the court house door.⁷⁹ In a famous case called *Circuit City Stores, Inc. v. Adams*,⁸⁰ the Court remitted to arbitration state law antidiscrimination claims by a Circuit City employee—he had to go to arbitration based on the employment agreement signed.⁸¹ The only problem, as most students of the FAA know, is that the courts’ textual analysis was a bit troubling. The court “updated” the statute to conform to modern constitutional law but did so in an inconsistent fashion, reading one clause broadly and the other narrowly.⁸² More importantly, there was very clear legislative evidence that Congress thought the FAA covered large commercial disputes.⁸³

The statute’s original meaning, however, has now come back again in a new case, *New Prime Inc. v. Oliveira*.⁸⁴ The First Circuit used an “original meaning” analysis to resist arbitration of claims involving independent contractors, finding that they were exempt under FAA § 1.⁸⁵ “Because Congress did not provide a definition for the phrase ‘contracts of employment’ in the FAA, we ‘give it its ordinary meaning.’ And we discern the ordinary meaning of the phrase at the time Congress enacted the FAA in 1925.”⁸⁶ Citing dictionaries from the early 1920s, the court found that “[d]ictionaries from the era of the FAA’s enactment confirm that the ordinary meaning of ‘contracts of employment’ in 1925 was agreements to perform work.”⁸⁷ Additionally, the court turned to other sources from the time of the FAA’s enactment.⁸⁸ For example, the court cited an American Law Report from 1926 and a treatise from 1910 which indicated that “contracts of employment” included independent contractors’ agreements to perform work.⁸⁹

79. Erwin Chemerinsky, *Closing the Courthouse Doors*, 90 DENV. U.L. REV. 317, 318–22 (2012).

80. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

81. *Id.* at 119.

82. The statute covers any contract for a transaction “involving commerce,” which has been read broadly. *Oliveira*, 857 F.3d at 12 (“[A]n arbitration agreement in ‘a contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.’” (omission in original) (quoting 9 U.S.C. § 2. (2012)). Section 1 of the statute excepts workers in interstate commerce and was read narrowly to mean workers actually engaged in transportation across state lines. *See Oliveira*, 857 F.3d at 18 (explaining that district courts narrowly construe the § 1 exemption).

83. *See* Brief of Historians as Amici Curiae Supporting Respondent at 9–10, *New Prime Inc. v. Oliveira*, 139 S. Ct. 532 (2019) (No. 17-340), https://www.supremecourt.gov/DocketPDF/17/17-340/55373/20180725103012770_17-340_bsac_Historians.pdf (recounting the influence of Herbert Hoover on the § 1 exemption).

84. 139 S. Ct. 532 (2019).

85. *Oliveira*, 857 F.3d. at 22 (“Because the contract is an agreement to perform work of a transportation worker, it is exempt from the FAA.”).

86. *Id.* at 19 (citations omitted) (quoting *United States v. Stefanik*, 674 F.3d 71, 77 (1st Cir. 2012)).

87. *Id.* at 20.

88. *Id.*

89. *Id.* at 20–21 (citing *Teamster as Independent Contractor Under Workmen’s Compensation Acts*, 42 AM. L. REP. 607, 617 (1926), and THEOPHILUS J. MOLL, A TREATISE ON THE LAW OF INDEPENDENT CONTRACTORS & EMPLOYERS’ LIABILITY 47–48 (1910)).

Oliveira helps us to see how original meaning may be on a potential collision course with textualists' refusal to look to legislative history. What better source of meaning in 1925 than Congress's use of the terms which can be found in the legislative history?⁹⁰ The First Circuit did not rely upon Congress's meaning, however. Notable in the First Circuit's opinion was the reliance on dictionaries and nonlegislative materials to establish the statute's meaning in 1925. In *Oliveira*, those Justices who have resisted FAA expansion may well feel it incumbent to reexamine the legislative history. If the "original meaning" of the statute was limited to large commercial contracts and was meant to exclude "any other class of workers" in interstate commerce,⁹¹ as the legislative history shows, it is hardly likely to have covered individual independent contractors in interstate commerce. This, however, will highlight something embarrassing for original statutory interpretation—just how non-original the Court's updating of the FAA has been in cases like *Circuit City*. The statute has been updated in the name of the Constitution: as a general rule, the FAA has expanded to meet the post-New Deal constitutional expansion of the Commerce Clause.⁹² When it was passed, the Commerce Clause would not have permitted application to local contracts, contracts of employment, and certainly not independent contractors.⁹³

This could pose a challenge for the Court in one of the most highly anticipated certiorari petitions of this Term, namely the question whether Title VII's reference to "sex" includes "sexual orientation." According to recent opinions in the Second Circuit, in *Zarda v. Altitude Express, Inc.*, and Seventh Circuit, in *Hively v. Ivy Tech Community College*, Title VII does cover sexual orientation discrimination.⁹⁴ According to the Eleventh Circuit, in *Bostock v. Clayton County*, it does not.⁹⁵ The argument against inclusion of "sexual orientation" is an "original" statutory interpretation argument. The claim is that, in 1964, Congress wrote the term "sex," not "sex-stereotyping" or "sexual orientation."⁹⁶ No one really thought or had much of a conception of sexual orientation at the time. If one is focused on meaning at the time of passage, then the Eleventh Circuit's interpretation is likely to prevail.

Here is the problem: compare the sexual orientation case with the FAA case. If the Court has been willing to update statutes in light of the Commerce Clause, expanding the FAA beyond its original meaning, then why should the

90. See Brief of Historians, *supra* note 83, at 9–10 (recounting the legislative history).

91. 9 U.S.C. § 1 (2012).

92. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115–16 (2001).

93. *Id.* at 124–30 (Stevens, J., dissenting).

94. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018); *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339 (7th Cir. 2017) (en banc).

95. *Bostock v. Clayton Cty. Bd. of Comm'rs*, 723 F. App'x 964 (11th Cir. 2018). For analysis of the issue, see William N. Eskridge Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 YALE L.J. 322 (2017).

96. Eskridge, *supra* note 95, at 325.

court not expand Title VII to comply with existing constitutional law? Is constitutional updating good only for corporations? In a series of cases over the past twenty years, the Court has sought to protect individuals discriminated against because of their sexual orientation as a matter of constitutional law.⁹⁷ Should not Title VII's reference to sex expand consistently with existing constitutional precedent, as has the FAA? At the very least, there is an argument that it should be so construed to avoid constitutional doubt. The point is this: in a world where the Court has not been consistently "originalist," will original statutory meaning prevail if the Court is, at the same time, constitutionally updating?

Original meaning sounds easy, but as these cases illustrate, it may be more difficult in practice than it at first appears, raising serious questions in a world that has not always been consistently textualist, nor consistently devoted to original meaning in statutory interpretation.

III. THE GRAMMARIAN'S TEXT AND ITS DISCONTENTS

We come to the final "new" point of Textualism 3.0. Textualism has with it an internal methodological tension. On the one hand, textualists insist that they look to context to find meaning.⁹⁸ But the actual process of analyzing text amounts to slicing the text into smaller and smaller units. This had been aided recently by notable attempts to focus on grammar. For example, in Justice Alito's concurring opinion in the "fish" case—a notable statutory opinion involving a federal obstruction of justice statute as applied to fish—Justice Alito relied upon the *verbs* in the sentence to convince him that the statute did not apply to covering up undersize fish.⁹⁹ In *Weyerhaeuser Co. v. U.S. Fish & Wildlife Service*, the Chief Justice discussed "nouns" and "verbs."¹⁰⁰ In *Encino Motorcars, LLC v. Navarro*, Justice Thomas spoke of "nouns" and "gerunds" and the "disjunctive."¹⁰¹ Justice Gorsuch, in *Henson v. Santander Consumer USA Inc.*, discussed "past participles" used as adjectives,¹⁰² and discussed verbs and infinitival phrases in *Murphy v. Smith*.¹⁰³

97. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

98. SCALIA & GARNER, *supra* note 1, at 40 ("The soundest legal view seeks to discern literal meaning in context.").

99. *Yates v. United States*, 135 S. Ct. 1074, 1089 (2015) (Alito, J., concurring) ("Three features of 18 U.S.C. § 1519 stand out to me: the statute's list of nouns, its list of verbs, and its title. Although perhaps none of these features by itself would tip the case in favor of Yates, the three combined do so.").

100. *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 368 (2018) ("Adjectives modify nouns—they pick out a subset of a category that possesses a certain quality.").

101. *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1141 (2018) ("The exemption uses the word 'or' to connect all of its nouns and gerunds, and 'or' is 'almost always disjunctive.'" (quoting *United States v. Woods*, 571 U.S. 31, 45 (2013))).

102. 137 S. Ct. 1718, 1722 (2017).

103. 138 S. Ct. 784, 787 (2018).

The reign of grammar suggests a neutral technology. There are “rules”! The problem is that rules help in easy cases, but leave one asking for more in hard cases. If grammar alone were enough, the case would never have ended up in the Supreme Court. There are two theoretical problems with this new focus on a neutral technology. First, grammar does not save the practice of textualism from decontextualizing text, even if textualists insist that they focus on context. Put differently, grammar does nothing to prevent textualists from doing what they say they do not do—reducing the statute’s meaning to a particular word or two. In fact, it may exacerbate that tendency. Second, grammar does not prevent the interpreter from what I call “gerrymandering” the text, which is to say that it may also increase the tendency of interpreters, once a word or two is isolated, to add and subtract meaning.¹⁰⁴

To see the first problem, return to Justice Gorsuch’s *Artis* dissent, the statute-of-limitations case.¹⁰⁵ Focusing on a term like “tolling period”—to mean grace period—has the tendency to put the rest of the statute out of the interpreter’s vision. Pulling the term out of the sentence and out of the statute is not the way traditional statutory interpretation works. Linguists focus on sentence meaning, not word meaning.¹⁰⁶ More importantly, the traditional view is that the whole statute counts, not a particular word pulled out of the statute.¹⁰⁷ This makes sense. Imagine a statute that provided for taxing A and the Court thinks A is money. But it turns out that, in a section three pages later, the statute defines A as “not money.” The “whole text” rule is ancient. Traditional statutory interpretation toggles between specific words and whole texts, trying to make sense of the most text; the new, new, new textualism can result in an interpretation that focuses on the least text.

If the best interpretation were the one that explained the “most” text, then new, new, new textualism may well yield results its protagonists do not favor. Remember *West Virginia University Hospitals, Inc. v. Casey*,¹⁰⁸ the attorney’s fee case. If one were a “whole textualist,” one would demand that the analysis not depend upon the term “attorney’s fees,” but upon all the words in the statute, including “costs” and the ordinary meaning of “costs.” At the very least, the opinion would have been more straightforward if it had warned that there were two meanings to *cost*—one to the ordinary person and the other to common law lawyers. Similarly, in the *Artis* case, one would ask of the dissent that it answer more directly the question of the meaning of “shall be tolled” earlier in the sentence. Justice Gorsuch argued that “tolling period” meant

104. See Nourse, *supra* note 12.

105. See *Artis v. District of Columbia*, 138 S. Ct. 594, 609–17 (2018) (Gorsuch, J., dissenting).

106. BRIAN G. SLOCUM, ORDINARY MEANING: A THEORY OF THE MOST FUNDAMENTAL PRINCIPLE OF LEGAL INTERPRETATION (2015).

107. SCALIA & GARNER, *supra* note 1, at 167–69.

108. *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83 (1991).

“grace period” and “grace period” must then be engrafted onto “tolled.”¹⁰⁹ But, given the very history recounted by the dissent, there is good reason to think that these are terms of art that may mean entirely different things. The surplusage rule tells us that each term is to be given significance.¹¹⁰ Finally, we can see the same effect in *Murphy v. Smith*, where the statute’s “a portion . . . (not to exceed 25 percent)”¹¹¹ is reduced to “shall be 25%.”¹¹²

Second, even if one were to return to a “whole text” or “more text than less” rule, grammar would not solve the second problem with what I have called “gerrymandered” text. To gerrymander is to change the outcome of an election by drawing political boundaries in particular ways. So, one can change an election by drawing boundaries in such a way as to yield a result—Republicans or Democrats or the Green Party wins. Gerrymandering text is also possible, and it occurs by virtue of a process of decontextualization, noted earlier. A word is pulled out of a statute. Once it is pulled out, it is in a new “null” context, apart from the statute.¹¹³ At this point, the interpreter may add meaning to the targeted text, in part because it is in the interest of interpreters to find meaning and in part because it economizes on mental effort. The clearest example of this is Justice Scalia’s celebrated dissent in *Morrison v. Olson*.¹¹⁴ In that case, he pulled the word “executive” out of the Constitution and then added the word “all.” Of course, the word “all” does not exist in the Constitution. The method here involves choosing a particular text, then adding small but important additions, once the word is decontextualized. This adds the interpreter’s own meaning, typically as in this case, a meaning that appears to lead to deductive results. “All” executive power includes power to fire a special prosecutor, the issue in *Morrison*.¹¹⁵ Note as well that it subtracts other potentially relevant text, such as the Necessary and Proper Clause or any other amendment that may be relevant to the inquiry.¹¹⁶

As Justice Gorsuch has made clear, no judge should add his own meaning to the text. But query whether it is ever possible to interpret text in a hard case without, in effect, adding or subtracting meaning. This is particularly true when one is engaged in decontextualizing (pulling words out of the statutory context). If I say the word “fifth,” it could mean the Fifth Amendment to the Constitution or a fifth of Scotch depending on the context—a law school classroom or a liquor store. If you take the word “fifth” out of context and

109. *Artis*, 138 S. Ct. at 609–617 (2018) (Gorsuch, J., dissenting).

110. SCALIA & GARNER, *supra* note 1, at 167–69.

111. 42 U.S.C. § 1997e(d) (2012).

112. *See* *Murphy v. Smith*, 138 S. Ct. 784 (2018).

113. Linguists call this “entextualization.” ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO “THINK LIKE A LAWYER”* 45 (2007).

114. *Morrison v. Olson*, 487 U.S. 654, 697–734 (1988) (Scalia, J., dissenting).

115. *Id.* at 659–60 (majority opinion).

116. *Id.* at 697–734 (Scalia, J., dissenting).

zero in on it, you are taking it out of that context, and robbing it of contextual clues. This is why all interpreters, including textualists and their critics, insist that context is crucial. This is also why the law tells us both to give words independent meanings and to consider the “whole” text, demanding that the interpreter toggle back and forth between the part and the whole.

Now let us return to our examples and see how interpreters add (or subtract) from the text. Consider *West Virginia University Hospitals, Inc. v. Casey*.¹¹⁷ If one were to diagram Justice Scalia’s and Justice Stevens’s interpretation of 42 U.S.C. § 1988, it might read something as below. I offer what I believe are the most parsimonious interpretations. Additions to text are marked by the symbol ^ ____ ^.

- ❖ The Text: “attorney’s fee as part of the costs”
- ❖ Scalia, J.: “attorney’s fee as part of the ^taxed^ costs
- ❖ Stevens, J.: “attorney’s fee as part of the ^full^ costs

These additions lead to obvious, apparently deductive results, one in favor of the majority opinion, one in favor of the dissent. Notice that both interpretations “add” meaning. The statute is silent, and these interpretations are “read in.” Notice also that I am emphasizing that both interpreters added meaning. They are forced to add meaning because the statute is silent on witness fees; an absence of evidence leads interpreters to interpolate their views of the statute’s meaning.

Consider *Murphy v. Smith*,¹¹⁸ where we see again the subtraction as well of the addition of text. The relevant text of the statute provided: “Whenever a monetary judgment is awarded in [a civil-rights action brought by a prisoner], a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney’s fees awarded against the defendant.”¹¹⁹ Focusing on the key text yields the following:

- ❖ Text: “a portion of the judgment (not to exceed 25 percent).”
- ❖ Majority: “~~a portion~~ ^25 percent^ of the judgment (~~not to exceed 25 percent~~).”
- ❖ Dissent: “a ^any^ portion of the judgment (not to exceed 25 percent).”

Again, both interpreters have added and subtracted text. The dissent effectively intensifies the meaning of “portion”; the majority eliminates portion and requires 25%.

The same occurs, albeit in a more complex fashion, in *Artis*, the statute of limitations case. The relevant text provides: “[t]he period of limitations . . . shall be tolled while the claim is pending and for a period of 30 days after it is

117. *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83 (1991).

118. 138 S. Ct. 784 (quoting 42 U.S.C. § 1997e(d) (2012)).

119. 42 U.S.C. § 1997e(d)(2).

dismissed unless State law provides for a longer tolling period.”¹²⁰ The real question in *Artis* is whether the state clock is restarted upon federal dismissal or whether the complainant has only a grace period (30 days).

- ❖ Majority: “the ^{^State^} period of limitations shall be ~~tolled~~ ^{^stopped^} while the ^{^federal^} claim is pending. ^{^The State clock restarts upon federal dismissal^} and for a ^{^grace^} period of 30 days after it is dismissed unless State law provides for a longer ~~tolling~~ ^{^grace^} period.
- ❖ Dissent: “the ^{^State^} period of limitations shall be ~~tolled~~ ^{^stopped^} while the ^{^federal^} claim is pending. ^{^The State clock does not restart upon federal dismissal but only for^} a ^{^grace^} period of 30 days after it is dismissed unless State law provides for a longer ~~tolling~~ ^{^grace^} period.

Again, one can see adding and subtracting to the text. One can also see there is a significant area of agreement between the majority’s and dissent’s various additions and subtractions. What was different was simply not stated explicitly in the statute: whether the state clock restarted upon federal dismissal. Notice also that all of this addition and subtraction suggests that the words alone are not doing the work. Presumably, even if it is not expressed as such, judges should care about the ends sought by the law, even if those ends are gleaned from the text. After all, should we not care whether a state litigant is punished because of the time it takes for a federal judge to dismiss a claim? Or perhaps we should worry, as did the dissenters, that federal courts are determining the length of state statutes of limitation, undermining federalism principles. These questions simply cannot be answered by looking at the text.

If I am right about gerrymandering—that textualism is an inevitable exercise in adding and subtracting text, focusing on some terms and omitting others—then the actual practice of textualism is at war with its avowed method. Textualists do not believe that they are adding and subtracting text; they believe that the text alone counts. In fact, I believe this is inevitable, whether one is a textualist or not. Interpolation—the addition of context—is natural. It is part of what we mean by “interpretation.” Textualists concede the importance of context.¹²¹ They must. But the actual method—what they do—is rife with taking things out of context. The very act of zeroing in on words for intense examination is an act of decontextualization. It creates a new null context for the word. In this new null context, the interpreter is free to add or subtract meaning.

CONCLUSION

In the coming months, we will be treated to any number of Supreme Court statutory opinions which will help us to understand Textualism 3.0. I

120. *Artis v. District of Columbia*, 138 S. Ct. 594, 599 (2018) (quoting 28 U.S.C. § 1367(d) (2012)).

121. See SCALIA & GARNER, *supra* note 1, at 40.

hope this Essay is a beginning in tracing the developments I have identified: (1) picking and choosing text, (2) a return to original meaning, and (3) the rise of grammatical rules of inference. What we can be sure of, however, now that there are five Justices who reject the notions of a broad purposivism, is that textualism will be front and center in an increasing number of statutory—and constitutional—opinions. For textualists, they will see themselves entering a new golden age. For their critics, it is time to consider whether the gold is fool's gold.