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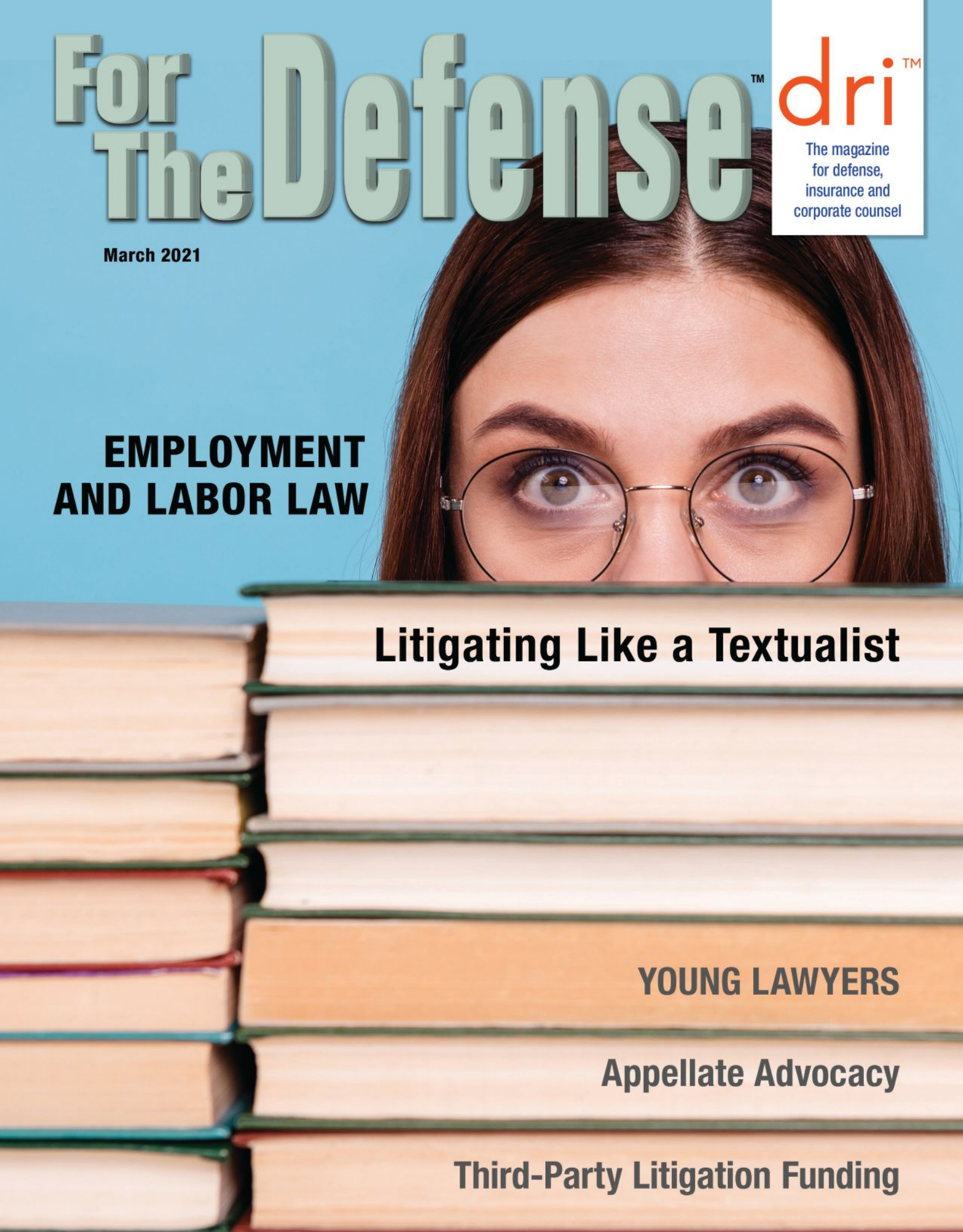

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Litigating Like a Textualist

By Steven B. Katz and Alexandria Gilbert

Over half of the federal bench currently embraces textualism. Use this statutory construction to frame your argument to provide the best defense for your client.

By any measure, the Trump administration had a disproportionate effect on the makeup of the federal judiciary. The impact on the appellate courts is especially noteworthy, given the appointments of three Supreme Court justices (more than any other since the Reagan administration twenty-five years ago) and over fifty circuit court judges (more than any other since the Carter administration over thirty years ago). According to a recent Pew Research Center analysis, one active federal judge in four was appointed by the Trump administration, and another one in four was appointed by a previous Republican administration. **https://www.pewresearch.org**. For litigators, all these numbers should add up to a clear message: Half the federal judiciary today demonstrated a commitment to originalism/textualism before they were appointed to the bench.

During her confirmation, Justice Elena Kagan stated that because "we apply what [the Framers] tried to do… we are all originalists." A decade later, we have seen the plaintiffs' bar adopt originalist/textualist arguments to get stunning rulings out of a politically conservative Supreme Court that one might have thought would be sympathetic to the concerns of defendants. The plaintiffs' bar is adapting to the changing makeup of the federal judiciary and learning to advocate *with* the dominant legal philosophy, rather than *against* it. The defense bar needs to do likewise.

This is not about politics. It is about providing the best defense of our clients. (Only one of us was a member of the Federalist Society. We leave it as an exercise for the reader to decide which one.)

"Originalism" or "Textualism"?

The terms "originalism" and "textualism" are used interchangeably, although some prefer to confine the former to constitutional interpretation and the latter to statutory interpretation. Justice Antonin Scalia, for example, used them interchangeably, but later in life preferred "textualism." We agree. The term "originalism" too often lends itself to the incorrect assumption

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that original *intent* (i.e., the purposes of the legislators who enacted a statute) governs (it does not). But the term "textualism" is accurate and descriptive: the focus is on the *text* of a statute (the words), and not the intentions surrounding the words (neither the subjective intentions of the enactors, or the more objective intentions of the public policy debate out of which a statute arises governs interpretation).

What Is Textualism?

Justice Neil Gorsuch recently put it succinctly: "Rather than beginning with legislative history or making economic hypotheses about social consequences, a Textualist starts with dictionary definitions, rules of grammar, and the historical context in which a law was adopted to see what its language meant to those who adopted the law." Neil M. Gorsuch, *A Republic, If You Can Keep It*, 131–32 (2019).

Textualism boils down to statutes being interpreted (1) strictly according to their words (textualism) and (2) in light of the common meaning of those words when they were enacted (originalism). Late in his life, Justice Scalia systematized textualism into fifty-seven interpretative "canons." *See* A. Scalia & B. Garner, *Reading Law: Interpretation of Legal Texts* (2012). Three stand out as the foundational principles of textualism:

- "The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." *Id*. at 56.
- "Words are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense." *Id*. at 69.
- "Words must be given the meaning they had when the text was adopted." *Id*. at 78.

This framework starkly contrasts with what Justice Oliver Wendell Holmes meant when he said, "A word is not a crystal, transparent and unchanged: it is the skin of a living thought and may vary greatly in color and content according to the circumstances and time in which it is used." *Towne v. Eisner*, 245 U.S. 418, 425 (1918). Textualism does not seek to divine the underlying purposes of a statute and reinterpret old words to remain faithful to that purpose—it merely asks, "what did the statute mean to ordinary people when it was passed" (unless it adopted a technical meaning), and then struggles to apply that meaning to present circumstances.

Textualism Is Now the Dominant Method of Statutory Construction at the Federal Level

The Trump administration has concentrated textualism's influence on decision making on the federal bench. In the 2014 Supreme Court term—Justice Scalia's last full term—34 percent of the Court's decisions cited dictionaries to support textualist reasoning. The following term, during which he participated in a few decisions, the rate dropped to 25 percent, which held steady during the 2016 term (in which Justice Gorsuch did not participate in the majority of decisions). But in Justice Gorsuch's first full term (2017), the rate jumped to 30 percent. After Justice Kavanaugh joined the Court (2018 term), the rate jumped to 44 percent, and stayed steady (43 percent) last year.

Studies of this phenomenon conducted when Justice Scalia was still alive concluded that circuit court decisions are only half as likely to resort to dictionary analysis as Supreme Court decisions. J. Brudney & L. Baum, "Dictionaries 2.0: Exploring the Gap Between the Supreme Court and Courts of Appeals," 125 Yale L.J. F. 104 (2015). Given the rise of dictionary use in Supreme Court decisions, and the Trump administration's disproportionately large impact on the makeup of the circuits, this style of analysis will become increasingly common at the circuit court level.

Justice Kagan's 2010 judgment about constitutional interpretation is now true of statutory interpretation: we *are* all textualists now.

Plaintiffs Are Discovering Textualism

Here, "we" includes the plaintiffs' bar, which has racked up some impressive wins in the Supreme Court during the past two terms.

A striking example of plaintiffs using textualism to achieve their objectives is *New Prime, Inc. v. Olveira*, 139 S.Ct. 532 (2019), in which Justice Gorsuch, writing for a unanimous Court, held that the Federal Arbitration Act does not cover certain transportation workers—regardless of whether the worker is an employee, an independent contractor, or something else.

The Federal Arbitration Act (FAA) generally favors arbitration of disputes and provides that arbitration agreements should be enforced. Section 2 of the FAA broadly extends the generous enforcement of arbitration agreements to any "contract evidencing a transaction involving commerce." But there are exceptions. Section 1 exempts "contracts of employment of seamen, railroad workers, or any class of workers engaged in foreign or interstate commerce." To keep Section 1 from erasing Section 2, the Supreme Court held in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), that "any class of workers engaged in foreign or interstate commerce" refers to "transportation workers"—those "actually engaged in the movement of goods in interstate commerce." *Id*. at 111.

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In *New Prime*, the Supreme Court turned to the meaning of "contracts of employment." Before *New Prime*, most courts looked at the FAA's Section 1 language through 21st century eyes: A "con-

tract of employment" meant a contract that created an employer-employee relationship. If a transportation worker was truly an independent contractor, then the contract could not be one "of employment." If he or she was truly an "employee," then it was. But the Court held that "contract of employment" must be interpreted instead through "1920's eyes." The Court's analysis was largely devoted to examining what the word "employment" meant when the FAA was enacted in 1925. The Court concluded that the meaning of "employment" was "broader than may be often found in dictionaries today." In 1925, "employ" "usually meant nothing more than an agreement to perform work." 139 S.Ct. at 539.

Justice Gorsuch defended the style of interpretation used in *New Prime* by writing,

> [I]t's a "fundamental canon of statutory construction" that words generally should be "interpreted as taking their ordinary… meaning… at the time Congress enacted the statute."… After all, if judges could freely invest old statutory terms with new meanings, we would risk amending legislation outside the "single, finely wrought and exhaustively considered, procedure" the Constitution commands.

Id. at 535.

Thus, the Court held, even if the plaintiff, an interstate trucker, were an independent contractor, his contract fell within the Section 1 exemption, and *New Prime* could not compel him to arbitrate his wage and hour class action.

The plaintiffs' bar secured an even more spectacular textualist victory in *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020), in which a narrow majority held that Title VII protected gay and transgender persons against employment discrimination. *Bostock* had the hallmarks of a classic 5–4 "culture war" case. Given the composition of the Court, one would have expected that the plaintiffs did not stand a chance at securing a fifth vote. But they did, gathering support from two conservatives: Chief Justice Roberts and Justice Gorsuch—who wrote the majority opinion in *Bostock*. The split between the majority and Justices Alito's and Kavanaugh's dissents illustrate the artistry of textualist argument.

Bostock involved close analysis of the Title VII language making it unlawful for an employer to "discriminate against any individual… because of such individual's… sex…." Three cases were before the Court, two of which involved gay employees fired for their sexual orientation and one of which involved an employee fired for her transgender status. All three Justices' opinions lean heavily on textualist principles, yet they reach different conclusions. Interestingly, one major reason for this splintering is that the majority analyzed contemporaneous definitions of "discriminate" and "individual" (and the common law definition of "because of"), while Justice Alito, joined by Justice Thomas, largely zeroed in on the definition of "sex." Another is that the majority adheres to what it frames as straightforward textualism, but Justices Alito and Kavanaugh reframe as overly literal analysis.

The majority opinion does not feature a primary source analysis of "sex." Instead, it accepts the employer's definition and indicates the meaning of "sex" is unnecessary to answering the question before it:

> Appealing to roughly contemporaneous dictionaries, the employers say that, as used here, the term "sex" in 1964 referred to "status as either male or female [as] determined by reproductive biology." The employees counter by submitting that, even in 1964, the term bore a broader scope, capturing more than anatomy and reaching at least some norms concerning gender identity and sexual orientation. But because nothing in our approach to these cases turns on the outcome of the parties' debate, and because the employees concede the point for argument's sake, we proceed on the assumption that "sex" signified what the employers suggest, referring only to biological distinctions between male and female.
>
> Still, that's just a starting point. The question isn't just what "sex" meant, but what Title VII says about it. Most notably, the statute prohibits employers from taking certain actions "because of" sex.

Bostock, at 140 S. Ct. at 1739.

This choice is interesting given that the first argument the *Bostock* petitioners made in their opening brief was centered on the place of "sex" in the definition of "homosexual":

> Sexual orientation discrimination constitutes sex discrimination under the plain language of Title VII because one simply cannot consider an individual's sexual orientation without first considering his sex. A "homosexual" person is one "[h]aving a sexual propensity for one's own sex," Homosexual, Oxford Dictionary of Current English (5th ed. 1964) (emphasis supplied), or "of, relating to, or characterized by a tendency to direct sexual desire toward another of the same sex," Homosexual, Webster's New International Dictionary (3d ed. 1961) (emphasis supplied). Because a person's sex is a necessary element of his sexual orientation, it follows without question that one cannot define a person's sexual orientation without first taking his sex into account… But the prohibition of discrimination "because of sex" in Title VII forbids employers from relying on sex-based considerations in making employment decisions… Accordingly, Title VII prohibits sexual orientation discrimination because it necessarily rests on a sex-based consideration.

Bostock v. Clayton County, Georgia, 2019 WL 2763119 (U.S.), 13–14 (U.S., 2019).

Looking at the opening briefs from the other two cases, one plaintiff simply adopted the employer's definition of "sex," while the other addressed no such definition. Yet, the meaning of the words "homosexuality" and "sex" did not factor into the majority opinion, while the meaning of the word "sex" dominated much of Justice Alito's dissent.

Justice Alito did not mince words:

> The Court's opinion is like a pirate ship. It sails under a Textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated––the theory that courts should 'update' old statutes so that they better reflect the current values of society….
>
> To be fair, the Court does not claim that Title VII prohibits discrimination because of everything that is related to sex. The Court draws a distinction between things that are "inextricably" related and those that are related in

"some vague sense." *Ante*, at 1741–1742. Apparently, the Court would graft onto Title VII some arbitrary line separating the things that are related closely enough and those that are not. And it would do this in the name of high Textualism.

Id. at 1755–56, 1761.

Interestingly, both sides claim to be the spiritual successor to Justice Scalia's interpretive style. Both the Majority and Justice Alito cite Justice Scalia's *Reading Law*. *Id*. at 1750, 1755, 1766. Justice Kavanaugh cites Justice Scalia's *A Matter of Interpretation* (1997). *Id*. at 1828. But ultimately, they chose different focal points. As Justice Alito points out, the majority "concedes" that "homosexuality and transgender status are distinct concepts from sex." *Id*. at 1746–47, 1758. Yet, the majority also had little difficulty concluding "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Id*. at 1741. Justice Alito, however, found it exceedingly important to reiterate the literal definition of "sex." After citing half a dozen dictionaries to make his point that "sex" does not literally mean "sexual orientation" or "gender identity," he then added seven pages of appendices to reproduce the definitions he cited. *Id*. at 1765–66, 1784–1791.

Justice Alito also makes the point that, in the tradition of Justice Scalia's textualism, the Court should look beyond dictionaries because the "words of a law, [Justice Scalia] insisted, 'mean what they conveyed to reasonable people at the time.'" *Id*. at 1766. Ultimately Justice Alito asserts that textualism is not merely literal:

> Thus, when Textualism is properly understood, it calls for an examination of the social context in which a statute was enacted because this may have an important bearing on what its words were understood to mean at the time of enactment. Textualists do not read statutes as if they were messages picked up by a powerful radio telescope from a distant and utterly unknown civilization. Statutes consist of communications between members of a particular linguistic community, one that existed in a particular place and at a particular time, and these communications must therefore be interpreted as they were understood by that community at that time.… For this reason, it is imperative to consider how Americans in 1964 would have understood Title VII's prohibition of discrimination because of sex.

Id. at 1767.

He also asserts that pure literal textualism is inappropriate here because the "battle of labels" the different factions of the Court are competing in—that is, whether employers discriminated based on "sex" or "sexual orientation" and "gender identity"—demonstrates that the statutory text is not unambiguous, and the Court should therefore look beyond pure textualism to the legislative history of Title VII, which would warrant a narrower interpretation of "sex." *Id*. at 1762. This position then allowed Justice Alito to explore the social context of the 1960s and non-textualist arguments that supported his position.

> In Justice Kavanaugh's dissent, he similarly asserted that Textualism is not literal: "No 'mainstream judge is interested solely in the literal definitions of a statute's words'… The ordinary meaning that counts is the ordinary public meaning at the time of enactment." *Id*. at 1825 (internal citation omitted). He further states: "Courts must heed the ordinary meaning of the phrase as a whole, not just the meaning of the words in the phrase." *Id*. at 1826. According to Justice Kavanaugh, "this Court's precedents and longstanding principles of statutory interpretation teach a clear lesson: Do not simply split statutory phrases into their component words, look up each in a dictionary, and then mechanically put them together again, as the majority opinion today mistakenly does." *See ante*, at 1756–1759. To reiterate Justice Scalia's caution, that approach misses the forest for the trees; "[a] literalist approach to interpreting phrases disrespects ordinary meaning and deprives the citizenry of fair notice of what the law is."

Id. at 1827–28.

And so, as he cautions against "literalism," Justice Kavanaugh reaches the same conclusion as Justice Alito, though apparently without needing to examine the definitions underlying the statutory text. Justice Kavanaugh stood alone in taking this approach—all of his colleagues, regardless of their conclusions, engaged directly with the text.

How to Research Like a Textualist

So how do they do it? Let's go back to Justice Gorsuch's practical explanation of textualism: "Rather than beginning with legislative history or making economic hypotheses about social consequences, a textualist starts with dictionary definitions, rules of grammar, and the historical context in which a law was adopted to see what its language meant to those who adopted the law." This calls for a set of researching skills you likely didn't learn in law school.

Having identified the critical textual language on which you intend to base your argument, you need to marshal convincing proof that the ordinary, contemporaneous meaning of the language supports the result you advocate.

Having identified the critical textual language on which you intend to base your argument, you need to marshal convincing proof that the ordinary, contemporaneous meaning of the language supports the result you advocate. You have two sources that you can turn to: dictionaries and contemporary literature.

Dictionaries are the preferred source for textualists. Last term, the Supreme Court cited nineteen dictionary sources, some published as early as the 1700s. The most-cited source was *Black's Law Dictionary* (cited in twelve cases), followed by the *American Heritage Dictionary* (eight cases), *Webster's New International Dictionary* (four cases), and *Webster's Third New International Dictionary* (four cases).

One of the best online resources for finding different editions of major dictionaries is Internet Archive: **http://www.archive.org**. Creating a free account grants access to invaluable sources, including the *Webster's* dictionaries so often cited by courts. Another helpful free resource, particularly for 18th and 19th century legal dictionaries, is Hathi Trust Digital Library: **http://www.hathitrust.org**. Depending on the legal research services you use, you can also turn to paid platforms such as HeinOnline (featuring several law dictionaries), Lexis Advance (for *Ballentine's Law Dictionary*), and Westlaw (for *Black's Law Dictionary*).

A supplement to dictionary meaning gaining ground in textualist circles is corpus linguistics, which "draws on the common knowledge of the lay person by showing us the ordinary uses of words in our common language."

Other important resources that many overlook these days: public and university libraries. As many older editions are only available as physical copies (and therefore may not be accessible for the next few months due to COVID-19), this route is often your best bet for finding the most contemporaneous version of a popular dictionary.

It is worth identifying your access points to at least several editions of each major dictionary. Generally, the edition closest to the drafting of the law most clearly demonstrates that a definition was contemporaneous. However, courts may cite to different editions of the same dictionary within the same opinion to illustrate consistency across far apart publication dates. If you seek to emphasize that a certain definition is long standing, you could opt to include an earlier edition. *See, e.g.*, *Peter v. Nantkwest, Inc.*, 140 S.Ct. 365, 372 (2019) (citing the 10th Edition of *Black's Law Dictionary*, followed by the 1891 edition to show that a "term has long referred to" its current definition). On the flipside, when asserting that a term does *not* have a long-settled definition, a party may identify when the term was introduced. *See, e.g.*, *Liu v. Securities and Exchange Commission*, 140 S.Ct. 1936 (2020) (Thomas, J., dissenting) (citing particular editions of *Black's Law Dictionary* and *Merriam-Webster's Dictionary of Law* to show that "[l]eading legal dictionaries did not define ['disgorgement'] until the turn of the 20th century").

Some tips for finding different editions of some of the Court's most cited dictionaries:

- *American Heritage Dictionary*—A more "modern" dictionary, the AHD first appeared in 1969 and used corpus linguistics in its compilation. Archive.org has several editions of AHD, including the original. Current AHD definitions are available for free online at **https://ahdictionary.com**.
- *Black's Law Dictionary*—A go-to for legal citations, *BLD* is available via subscription. It is especially useful, as some definitions include quotations from treatises or Restatements. The Court may cite these excerpts along with the definition itself. *See, e.g.*, *June Medical Services L. L. C. v. Russo*, 140 S.Ct. 2103, 2159-60 (2020) (Roberts, C.J., concurring) (quoting *Black's Law Dictionary* for both the definition of "good faith" and a treatise discussing the term). The original 1891 *BLD* is available online for free, as is the 1910 2nd Edition. The current 11th Edition is available via Westlaw.
- *Oxford English Dictionary*—A widely relied upon and prestigious publication, the OED is available online at **https://www.oed.com**. Access requires a subscription (currently $90/year), but you can likely also access OED for free through a local library.
- *Random House Dictionary of the English Language*—Justice Alito appears to have a special fondness for this one, which he cites nearly every time he deploys definitions. His colleagues do not use this dictionary. Yet, it is worth taking note—judges return to the same sources. By identifying such patterns, you can use the sources your judge trusts. This dictionary is less commonly available than the others, but Internet Archive has editions readily available by search, and you can likely find it at a local library.
- *Webster's New International Dictionary*—The First Edition of *Webster's New International Dictionary* was kept current from 1909 to 1934; the Second Edition, from 1934 to 1961. Look here for statutes including the Fair Labor Standards Act (FLSA), FAA, and Securities Exchange Acts. Internet Archive has editions readily available by search, including the 1923 reprinting of the First Edition where one could find, for example, a contemporaneous definition of "employment" when analyzing the FAA.
- *Webster's Third New International Dictionary*—"*Webster's Third*" is a go-to for post-1961 statutes, from the Civil Rights Act to Clean Water Act to Affordable Care Act. Internet Archive has some editions readily available by search, including the 1966 version relied upon in *Bostock*'s Title VII analysis. Current Webster's definitions are available for free at **https://www.merriam-webster.com**.

As a quick exercise, we can tackle the same issue as the unanimous Court in *New Prime* to determine whether a "contract of employment" applied to anyone doing work or just "employees" as we presently conceive of them. Congress enacted the FAA in 1925; Internet Archive can quickly get you to the 1923 reprinting of *Webster's New International*. From there, flip to "employment." The first definition: "Act of employing, or state of being employed." We could next establish what "being employed" means, by popping up to "employ." (But first, take a moment to look at the synonyms of the time. The first one? Simply "work.")

The first definition of "employ": "To imply; inclose; infold; involve." Not relevant, and it's marked "obsolete." Next: "To make use of." Again, not relevant. Next up: "To occupy; busy." Still not what we want. Then, number four: "To make use of the services of; to have or keep at work; to give employment to… as, to employ a hundred

workmen… to be at work." So, what did the *New Prime* court do? Cited the same edition of *Webster's*—with an emphasis on the first given synonym. *New Prime*, 139 S.Ct. at 540 (citing the First Edition of *Webster's New International Dictionary* as listing "work" as a synonym for "employment"). An extra lesson: Don't overthink this process. The point is to harness plain language and ordinary meaning—not convoluted legal fictions—to prove that you are the party correctly applying the law.

A supplement to dictionary meaning gaining ground in textualist circles is corpus linguistics, which "draws on the common knowledge of the lay person by showing us the ordinary uses of words in our common language." *Wilson v. Safelite Group, Inc.*, 930 F.3d 429, 439–40 (6th Cir. 2019) (Thapar, J., concurring). The gist of the method is to apply statistical methods to collections of contemporary writing exemplars as a "cross-check" to dictionary meanings. Judge Amul Thapar of the 6th Circuit has been an especially vocal proponent of corpus linguistic methods "in those difficult cases where statutes split and dictionaries diverge." One of the best sources of contemporary non-dictionary exemplars is Brigham Young University's Corpus of Historical American English: **http://www.english-corpora.org**.

Corpus linguistics and dictionary definitions are hardly in opposition. *Webster's Third* was a trailblazing publication in 1961, as it took a descriptivist (i.e., how people actually use words) rather than prescriptive (how people "should" use words) approach to compiling definitions—which is precisely the point of corpus linguistics. D. Snyder, "A Corpus-based Approach to Determining Standard American English," *BYU ScholarsArchive* (2007), at 26, **https://scholarsarchive.byu.edu/etd/1269**.)

How to Argue Like a Textualist

In a certain sense, litigating like a textualist is straightforward: aim at the ordinary, contemporaneous meaning of statutory language and argue from dictionaries of the time. But there is an art to deciding which language is critical to your case—and when to deploy textualist arguments at all.

An important lesson from *Bostock* is that the savvy litigator must be careful when predicting which language a court will most closely analyze. In *Bostock*, the majority did not focus on "sex," but instead included definitions for other portions of the law. Justice Alito's lengthy dissent did the opposite; he defines "sex" as the dispositive language and wryly notes that the conclusion drawn from doing so (i.e., that "sex" does not extend as far as the Court held) "no doubt explains why neither this Court nor any of the lower courts have tried to make much of the dictionary definitions of sex just discussed." *Id.* at 1766.

Another example of this lesson is found in *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S.Ct. 1462 (2020), in which Justice Thomas's dissent asserts that the Court focused on the wrong language. There, the statute defined the term "discharge" as "any addition of any pollutant to navigable waters from any point source." Justice Thomas contended that "[i]n interpreting the statutory definition of 'discharge,' the Court focuses on the word 'from,' but the most helpful word is 'addition,'" and he then explored multiple definitions of "addition." *Maui*, 140 S.Ct. at 1479. (Justice Thomas further argues that the Court erred by going beyond the statutory text.)

These cases demonstrate that it is not enough simply to point to the text; instead, orienting the court to the proper portion of the text or a specific definition can make a huge difference to the outcome. A court may cite generally to a filed brief, including an amicus brief, that has done the heavy lifting on textualist analysis. *See, e.g.*, *Espinoza v. Montana Dep't of Revenue*, 140 S.Ct. 2246, 2270 (2020) (citing the Independence Institute's amicus brief as "collecting several similar definitions" to supplement the single definition directly cited). The Court could also go off on its own tangent.

We noted above that lower courts tend to turn to textualist analysis less frequently than the Supreme Court. In part that reflects the disproportionate effect of the Trump administration on the Court; but it also reflects the relationship between textualism and stare decisis. Lower courts are bound by precedents, even if those precedents do not follow textualist methods.

Out of respect for stare decisis, Justice Scalia maintained that it "is not a part of textualism. It is an exception to textualism…." *Reading Law*, at 413–14. Recently, Justices Thomas and Gorsuch articulated a textualist framework in *Garza v. Idaho*, 139 S.Ct. 738 (2019): if there is "little available evidence suggest[ing] that" precedent is "correct as an original matter, the Court should tread carefully before extending our precedents in this area." *Id.* at 756 (Thomas, J., dissenting). The Supreme Court has traditionally admonished lower courts to follow controlling precedent, even if such precedent "appears to rest on reasons rejected in some other line of decisions." *Rodriguez de Quijas v. Shearson/American Express Inc.*, 490 U.S. 477, 484 (1989). Only the Supreme Court has "the prerogative of overruling its own decisions." *Id.* The same is true of binding circuit court authority.

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The savvy litigator should also be careful to deploy textualist arguments only when they will be effective. Even textualist lower court judges will be receptive to textualist arguments *only* when there is no binding precedent to settle the question.

Conclusion

When Justice Scalia brought textualism—then under the guise of originalism—to the Supreme Court in 1986, it was an arcane (and controversial) practice. It has since become the dominant interpretive method of the Court and, increasingly, of the lower courts. An unexpected consequence of this shift is how the plaintiffs' bar has prevailed before "conservative" jurists by embracing textualism. When appropriate, the defense bar needs to adopt it, too. FD