HERESIES, HERETICS, AND HERMENEUTICS: THE BATTLE OF TEXTUALISM AGAINST PRAGMATISM—AND ITSELF—ON THE ROBERTS COURT

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INTRODUCTION

The standing of the Supreme Court of the United States (SCOTUS) is more tenuous than it has been at any time, *perhaps* since the infamy of *Dred Scott v. Sanford* almost 150 years ago,[1] and *surely* since the years leading up to the "switch in time that saved nine."[2]

1. Charles M. Ellis, *Roger B. Taney and the Leviathan of Slavery*, ATL. MONTHLY, Feb. 1865 ("Falsifying history; setting above the Constitution the most odious theory of tyranny, long before exploded; scoffing at the rules of justice and sentiments of humanity, he tied in a knot those cords which must end the life of his country or be burst in revolution.");

Indeed, even a sitting justice on our 50th State's Supreme Court recently declared that the opinions of the current SCOTUS are "incredibly dishonest."[3]

What could possibly provoke such a seemingly injudicious remark? Nothing less than a schism that strikes at the heart of the work of the Roberts Court.[4]

That schism arises from several seemingly irresolvable conflicts among the Justices. The conflict focused on in this Article is statutory interpretation. And a retired Justice has recently waded back into that fray with a weighty salvo.

Although he is a retired Justice who does not choose even to sit on Court of Appeals panels,[5] Stephen Breyer is an active warrior in the battle

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The Death of Roger B. Taney, N.Y. TIMES, Oct. 14, 1864, at p. 4 ("The Supreme Court never from its first organization took faith which so much impaired the public action in its impartiality and wisdom. In view of the sides taken by the respective Judges, it was impossible for the body of the people not to believe that the court was influenced by party and sectional feeling."). The standard work on the case is DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1979). For a nuanced and compelling discussion of the contemporary discourse about the case in the local press of representative communities in antebellum United States, *see* ANTHONY V. BAKER, A SEVERE JURISPRUDENCE: THE PRESS, THE SUPREME COURT, AND THE 'MAKING' OF THE CIVIL WAR (forthcoming). Professor Baker was the Author's faculty colleague from 2010 until Professor Baker's retirement in 2023, and he had many discussions with the Author about that important work-in-progress. The *Dred Scott* decision led Senator Charles Sumner to declare in the Senate Chamber during a debate about Congress commissioning a bust to join other judicial statuary in the Capitol, "Let me tell that Senator that the name of Taney is to be hooted down the page of history. Judgement is beginning now; and an emancipated country will fasten upon him the stigma which he deserves." Congressional Globe (23 February 1865) 38th Cong., 2d sess., 1012.

2. *See, e.g.*, Luke G. Cleland, Comment, *John Roberts and Owen Roberts: Echoes of the Switch in Time in the Chief Justice's Jurisprudence*, 54 ST. MARY'S L.J. 851, 856 (2023).

3. Andrew Stanton, *Supreme Court Justices Slammed by Judge: 'Incredibly Dishonest'*, NEWSWEEK (May 14, 2024, 3:21PM), https://www.newsweek.com/hawaii-supreme-court-justice-1900564 [https://perma.cc/X7AV-U5ZX] (quoting Supreme Court of Hawaii Associate Justice Todd Eddins); *see* State v. Wilson, 543 P.3d 440, 453–55 (Haw. 2024) (where Justice Eddins criticizes SCOTUS's approach to interpretation).

4. Michael S. Greve, *Is the Roberts Court Legitimate?*, NAT'L AFFS. (Winter 2020), https://www.nationalaffairs.com/publications/detail/is-the-roberts-court-legitimate [https://perma.cc/E7UZ-BV43].

5. *See* 28 U.S.C. § 294. This statute, titled "Assignment of retired Justices or judges to active duty," provides, "[a]ny retired Chief Justice of the United States or Associate Justice of the Supreme Court may be designated and assigned by the Chief Justice of the United States to perform such judicial duties in any circuit, including those of a circuit justice, as [s/]he is willing to undertake."

See generally William Cracraft, *Ninth Circuit Judges Reflect on the Passing of Retired Associate Judge Sandra Day O'Connor*, U.S. CTS. FOR THE NINTH CIR. (Dec. 6, 2023), https://www.ca9.uscourts.gov/circuit-executive/ninth-circuit-judges-reflect-on-the-passing-of-retired-associate-justice-sandra-day-o-connor/ [https://perma.cc/RL9D-YSZ7]. Justice O'Connor also heard cases on panels in the 2d and 8th Circuits, as well as in various U.S. District Courts. *See* Richard Brust, *A Cowgirl Rides the Circuits*, ABA J. 26, 26 (April 2008). Of the three living former Supremes, *only* Justice David Souter has requested and

over statutory interpretation, which has been strewn across fields of words in recent SCOTUS opinions. In March 2024, his publisher released a kind of last will and testament of Justice Breyer's multi-source hermeneutics, a book he calls, *Reading the Constitution: Why I Chose Pragmatism, Not Textualism*.[6] This work presents as a concise, indeed almost Dale Carnegie-inspired,[7] book, but it means no less than to challenge the bible of textualism, Scalia and Garner's *Reading Law: The Interpretation of Legal Texts,* and the mountain of textualist scripture that came both before—and after—that tome.[8]

As the Author has examined the fierce debates—both implicit and explicit—about statutory interpretation among the Justices of the Roberts

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received Circuit Court assignments. *See, e.g.*, AIG Prop. Cas. Co. v. Cosby, 892 F.3d 25 (1st Cir. 2018). It does not appear Justice Anthony Kennedy (who served on the 9th Circuit for 13 years—1975-1988—before he *began thirty* years of SCOTUS service (1988-2018)) has ever requested or been assigned to Circuit duty. Oddly, even though he is a frail age 87, he attended the recent State of the Union Address in judicial robes with the other Supremes—including Justice Breyer. Justice Breyer may—like Anthony Kennedy—have had enough of judging, since he served as a judge for forty-two years (1st Circuit Judge from 1980-1994 (14 years), then on SCOTUS from 1994-2022 (28 years)). *See generally* Stephen L. Wasby, *Retired Supreme Court Justices in the Courts of Appeals*, 39 J. SUP. CT. HIST. 146 (2014); Jon A. Gryskiewicz, *The Semi-Retirement of Senior Supreme Court Justices: Examining Their Service on the Courts of Appeals*, 11 SETON HALL CIR. REV. 285 (2015). Justice Sandra Day O'Connor, who died 1 December 2023, had been a very active panel member on U.S. 9th Circuit Appeals Court (which embraces her home state of Arizona) from 2006-2013, until illness forced her to retire. *See generally* Stephen L. Wasby, Retired Supreme Court Justices in the Courts of Appeals, 39 J. SUP. CT. HIST. 146 (2014); *see also* Jon A. Gryskiewicz, *The Semi-Retirement of Senior Supreme Court Justices: Examining Their Service on the Courts of Appeals*, 11 SETON HALL CIR. REV. 285 (2015). Justice Sandra Day O'Connor, who died 1 December 2023, had been a very active panel member on U.S. 9th Circuit Appeals Court (which embraces her home state of Arizona) from 2006-2013, see, e.g., *Justice O'Connor Sits with Ninth Circuit Panel*, U.S. CTS. FOR THE NINTH CIR. (Dec. 5, 2013), https://news.arizona.edu/story/o-connor-to-sit-with-ninth-circuit-court-of-appeals-at-ual) [https://perma.cc/Z2YT-D6JA], until illness forced her to retire.

6. STEPHEN G. BREYER, READING THE CONSTITUTION: WHY I CHOSE PRAGMATISM, NOT TEXTUALISM (2024).

7. The reference, of course, is to a celebrated, mid-20th century self-help (or, to use an older phrase, "getting on") classic. *See* DALE CARNEGIE, HOW TO WIN FRIENDS AND INFLUENCE PEOPLE (1936); *Miscellaneous Brief Reviews*, N.Y. TIMES, Feb. 14, 1937, at 104 (providing a review of the first edition, first printing of Mr. Carnegie's book); Dwight Garner, *Classic Advice: Please, Leave Well Enough Alone*, N.Y. TIMES (Oct. 5, 2011) (Books of the Times) https://www.nytimes.com/2011/10/05/books/books-of-the-times-classic-advice-please-leave-well-enough-alone.html?searchResultPosition=1 [https://perma.cc/DF9C-EEGL] ("Dale Carnegie's 'How to Win Friends and Influence People,' which turns 75 this year, has sold more than 30 million copies and continues to be a best seller. The book, a paean to integrity, good humor and warmth in the name of amicable capitalism, is as wholesome as a Norman Rockwell painting."); *see also* WILLIAM HOWARD TAFT, ET AL., ON GETTING ON—A MESSAGE TO THE YOUNG MEN OF AMERICA (Ullery & Co. 1920) (exhorting young men to "get on" and providing examples of how to do it, proceeding from the carpe *diem* approach personified in Lincoln's adage, "I will study and prepare myself, and when my chance comes, I'll be ready.").

8. ANTONIN SCALIA & BRYAN A. GARNER, READING THE LAW: THE INTERPRETATION OF LEGAL TEXTS (2012).

Court, he has been struck by two key observations. First, the debates can take on the doctrinaire intolerance and derisiveness that characterized the fiercest contests of the Reformation in Europe.[9] As Paul Carrington has observed of America's first self-declared disciple of legal hermeneutics, Professor Francis Lieber:

> In identifying principles of interpretation, Lieber drew not only on classical sources, but on Protestant theological works. As a young man in Germany, Lieber had studied the works of, and was influenced by, Protestant theologians who were at pains to convince themselves that divine texts can be correctly interpreted by faithful intelligence, that allowing ordinary believers access to newly printed scriptures would not result in wildly various interpretations destructive of religious faith. Lieber recognized that the discipline theologians had developed to standardize interpretation of the Bible applied as well to the work of courts, especially the courts of a republic enforcing the commands of a self-governing people. If Lutheran ministers preaching false doctrine from the Bible were viewed as faithless heretics, Lieber could disdain self-indulgent judges who disregarded correct meanings as "faithless" usurpers.[10]

The textualist versus pragmatist views continue this tradition. This, however, is no mere battle of plausible positions among Apollonian intellects of genteel jurists in a polite legal debate society. This context raises passions and prejudices as serious as those between the Papacy, Martin Luther, and John Calvin of Reformation Europe. There is a looming sense of cross-accusations of heresy and labeling of opponents as heretics.[11]

Second, this contest transcends mere disagreement on the importance of various tools of the trade. As a fair reading of Justice Breyer's new book makes manifest, this contest strikes at the fundamental nature of often vaguely understood American ideas of judging, of judicial power, and of justice itself.[12] In that sense, the conflict over statutory

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9. *See* William E. Crawford, *Civil Procedure*, 51 LA. L. REV. 245, 264 (1990); Paul Killebrew, Note, *Where Are All the Left-Wing Textualists?*, 82 N.Y.U. L. REV. 1895, 1900–01 (2007); John Tasiolas; *The Legal Relevance of Ethical Objectivity*, 47 AM. J. JURIS. 211, 213–14 (2002).

10. Paul D. Carrington, *William Gardiner Hammond and the Lieber Revival*, 16 CARDOZO L. REV. 2135, 2139 (1995).

11. *See, e.g.*, the discussion of Justice Alito's dissent from Justice Gorsuch's opinion in Bostock v. Clayton Cnty., 140 S.Ct. 1731, 1745–49 (2020).

12. As Professor Eskridge so elegantly put it in his article published during the early days of the Author's law practice career, "[t]he debate about dynamic statutory interpretation challenges us to consider the nature of interpretation itself. What is "interpretation"? What

interpretation has become a most active and divisive forum for a more capacious contest of *legal hermeneutics*—"where jurist and theologian meet the student of the humanities."[13] Francis Lieber, a Prussian immigrant scholar, who injected the contextual consciousness of hermeneutics into American legal discourse with the notion that how we go about interpreting texts is as much as who and what we are about, not just the tools that we use, observed in 1837:

> For it seems evident that mathematics interpretation alone can wholly dispense with and construction of some sort, while, on the other hand, *without good faith* they become *desperate weapons* in the hands of the *disingenuous*.[14]

An examination of the interpretation wars playing out on the Court 190 years after Lieber's work amply confirms the disarming soundness of Lieber's observation. Especially today, two strong impulses compete for dominance in the hermeneutical understanding of law through the process of interpretation:

> [T]he contradictory impulses in Lieber's supposed science of interpretation … [are] exemplified by Lieber's simultaneous commitment to the author's intent as the one true meaning of a text and to the importance of incorporating common sense, good faith, and the public welfare in every interpretation.[15]

The terms of the battle set in the 1830s are just as relevant as America and its courts approach the 2030s.

The thread of the Author's thesis that runs throughout this Article's exploration of the "heresies" and the "heretics" propounding them as "the"

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should it be?" William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609, 612 (1990).

13. GREGORY LEYH, *Introduction*, LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE at xi (1992) (Gregory Leyh, ed., 1992).

14. FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS: OR PRINCIPLES OF INTERPRETATION AND CONSTRUCTION IN LAW AND POLITICS, WITH REMARKS ON PRECEDENTS AND AUTHORITIES, at vii (3d ed. 1880) (Author's Preface to the Second Edition, 1839) (emphasis supplied). For a discussion on the continuing relevance of hermeneutics to understanding American legal phenomena, *see* Francis J. Mootz, III, *The New Legal Hermeneutics*, 47 VAND. L.J. 115, 115–25, 130–42 (1992)*; see also generally* Wolfgang Holdheim, *A Hermeneutic Thinke*r, 16 CARDOZO L. REV. 2153 (1995). For a discussion of Lieber's professional activities after leaving Prussia and becoming professor and savant in America, where he exercised influence on the influential, including Supreme Court Justice and Dane Professor at Harvard, Joseph W. Story; Senator Henry Clay; and Chancellor James Kent. *See* Carrington, *supra* note 10, at, 2137–38; *see generally* Aviam Soifer*, Facts, Things, and the Orphans of Girard College: Francis Lieber, Protopragmatist*, 16 CARDOZO L. REV. 2305 (1995).

15. Mootz, *supra* note 14, at 121, n.19.

way to interpret statutes is that they fundamentally err in trampling upon the central lesson of hermeneutics presented to us over thirty-five years ago by Professor Eskridge:

> The hermeneutical approach suggests that we do not discover the truth of the provision by limiting our vision to the bare text, or to the original legislative expectations, or to current policy. All of these perspectives work together, and each teaches us something.[16]

Given the sheer number of cases decided by the Roberts Court since it took form in 2005, it is impracticable to examine the problem comprehensively in this article. Hence, the author has elected to examine it eclectically.[17]

But in his eclecticism, the Author has chosen three areas that offer not only important domestic and trans-national implications but also a variety of statutory texts from the modern complexity of the Foreign Sovereign Immunities Act; to the unique language of a Reconstruction Civil Rights in 1866 and that chosen for a successor statute in 1964; to the sparest early Republic language of the Judiciary Act of 1789—which reveal the problems with orthodoxies of textualism across the span of three centuries.[18] That is not to say that textualism is without usefulness, nor that it lacks valuable lessons. Textualism has utility and offers very valuable lessons.[19] Well and aptly used as a component of dynamic statutory interpretation, textualism brings integrity and insight. However, when textualism is over-used, misused, or used categorically to the exclusion of other informative sources, it creates serious problems for a Court whose authority derives from reputation more than anything else.[20]

I. A WORD ON THE WARRING SCRIPTURES

Before engaging the fields to which the Justices of the Roberts Court battle over interpretation doctrine, it is helpful to orient ourselves in three significant, contemporary sources of that doctrine. The three sources of interpretation doctrine are books (and scholarly articles) are authored by the late Justice Antonin Scalia, and his co-author Professor Bryan Garner;

16. Eskridge, *supra* note 12, at 613.

17. Although, Professor Eskridge and two co-authors have recently done something very much akin to that in the law review equivalent of a Cecil B. DeMille epic. *See* William N. Eskridge, Jr., Brian G. Slocum, & Kevin Tobia, *Textualism's Defining Moment*, 123 COLUM. L. REV. 1611 (2023).

18. *See* discussion *infra* Sections III.A–C.

19. *See generally* U.S. v. Fausto, 484 U.S. 437 (1989).

20. See Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 752 (1995).

by retired Justice Stephen Breyer; and by Professor William Eskridge, Jr. We examine each below, seriatim.

A. Scalia, Garner, *Reading Law*, and the Textualist Enterprise

A leading commentator has neatly summed up what "textualism" as an approach to statutory interpretation involves:

> One method of statutory interpretation—textualism—elevates the text of the statute as a primary source of statutory meaning. There are varying forms of textualism, some of which eschew the use of legislative history as a valid source for statutory meaning. To determine meaning, a textualist methodology often relies on the dictionary meaning of words, whether the words are terms of art, the grammatical structure of a statute, and how the words fit within the overall context of the statute. Even within textualism there are debates about what meaning should govern when the language of the statute appears to conflict with the accepted public meaning of that language at the time Congress enacted the statute.[21]

In Senate confirmation hearings for federal judges and in commentary (since 2016 in particular), "textualism" has been a talismanic word.[22] But what, exactly, do lawyers, judges, academics, and the better-informed politicians, actually mean by it? Consider:

> This approach to statutory interpretation is often associated with the rejection of legislative history as a relevant guide to statutory interpretation. But the more fundamental innovation of the "new textualism" is this: when faced with clear statutory text, a court must give effect to that text even if the statute's semantic meaning is inconsistent with its perceived purpose. As John Manning—the "new textualism's" most prominent academic theorist—has described the governing rule: "if the text of the statute is

21. Sandra F. Sperino, *The Causation Canon*, 108 IOWA L. REV. 703, 730–31 (2023).

22. *See, e.g.*, Leyh, *supra* note 13, at xi; David Montgomery, *Conquerors of The Courts—Forget Trump's Supreme Court Picks. The Federalist Society's Impact On The Law Goes Much Deeper*, WASHINGTON POST MAG. (Jan. 2, 2019), https://www.washingtonpost.com/news/magazine/wp/2019/01/02/feature/conquerors-of-the-courts/ [https://perma.cc/KG4V-ZJF7]; Fred Barnes, Opinion, *Reshaping the Judiciary*, WASHINGTON EXAMINER (May 31, 2019), https://www.washingtonexaminer.com/opinion/reshaping-the-judiciary [https://perma.cc/U5YC-Y3WE]; Jason Zengerle, *How The Trump Administration Is Remaking The Courts*, THE N.Y. TIMES MAG. (April 22, 2018), https://www.nytimes.com/2018/08/22/magazine/trump-remaking-courts-judiciary.html [https://perma.cc/XC6X-3PBF].

> clear, deviation from the clear import of the text cannot be justified on the ground that it better promotes fidelity to legislative purposes." The Court can go beyond the statutory text to purposive considerations only in the case of "genuine semantic ambiguity."[23]

The doctrine,[24] in fact, has been adopted with a fervor that approaches the religious.[25] And approaching religiosity it does when

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23. Anton Metlinsky, *The Roberts Court and the New Textualism*, 38 CARDOZO L. REV. 671, 672 (2016) (footnotes omitted).

24. *See* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 68 (1994).

25. *See, e.g.*, Willem B. Drees, *Not an Iota, Not a Dot Will Pass from the Law: On Religious and Legal interpretation, in* HOLY WRIT: INTERPRETATION IN LAW AND RELIGION Ch. 4 (Arie-Jan Kwak, ed. 2016). As Tom Levinson has observed of textualism's leading apostle, the late Justice Scalia:

> Justice Scalia's judicial persona resembles that of a fundamentalist because of his attitude toward contemporary culture and his colleagues, his approach toward legal interpretation, and his ambition for the wide scale penetration of his distinctive perspective. Scalia's judicial persona may also be considered "fundamentalist," because of the depth of antagonism and anxiety his views engender in his adversaries.

Justice Scalia's approach to constitutional and statutory interpretation (again, as shorthand, "textualist" for statutory interpretation and "originalist" for constitutional interpretation) stresses fidelity to the plain meaning of a "dead," or unchanging, text. In speeches, Justice Scalia routinely observes that this method was once "constitutional orthodoxy" in the United States. Yet Scalia's judicial persona consists of more than his text-centered interpretative approach. Indeed, he is an outspoken and often confrontational justice, a lightning rod who is at once admired and reviled for his opposition to "modern" forms of interpretation; his fealty to text and tradition; his attacks on extratextual sources for interpretation (for example, legislative history); his distinctive public advocacy of his jurisprudential point of view; his derision of legal culture's prevailing norms; and the embattled, isolated tone that permeates many of his opinions.

Tom Levinson, *Confrontation, Fidelity, Transformation: The Fundamentalist Judicial Persona of Justice Antonin Scalia*, 26 PACE L. REV. 445, 446–47 (2006). Professor Caleb Nelson has described the origin of the textualist term to be one more of critique than of honor, rooted in religious fundamentalism:

> The earliest usage of "textualism" reported by the Oxford English Dictionary comes from 1863, when an author used the term to criticize Puritan theology. *See* Mark Pattison, Learning in the Church of England, in 2 Essays by the Late Mark Pattison 263, 286 (Henry Nettleship ed., Oxford, Clarendon Press 1889) (referring to the "arbitrary textualism of the Puritan divines"), quoted in 17 Oxford English Dictionary 854 (2d ed. 1989). The term retained its dismissive overtones when Justice Robert Jackson introduced it to the United States Reports a century later. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 640 (1952) (Jackson, J., concurring) (asserting that the enumerated powers should have "the scope and elasticity

pronouncements are made such as "only the written word is the law,"[26] which seem one step removed from "I am the Word."[27] Articles are being published by State Supreme Court judges declaring their courts' fealty to the approach and embrace of its scripture as expressed in Justice Scalia's bible of textualism, *Reading Law*.[28] That book does not represent the entire corpus of textualism, but it has, given its pedigree, assumed the role of a scripture for textualism. Following a rollcall of saints in the Acknowledgements and an Epistle from an Apostle (Judge Frank Easterbrook of the U.S. 7th Circuit Court of Appeals), the first fifty pages are the homily to text and the dangers of straying from text.[29] There follows a 450-page dense corpus worthy of Thomist—five "Fundamental Principles" and fifty-two Canons that cover the waterfront of interpretative principles identified and embraced by Justice Scalia and his co-author.[30] But the vigilant eye of Justice Scalia was always scanning the horizon for heresy, so the Canons are followed by what amounts to prophecies of doom for the heretical judge: "**Thirteen Falsities Exposed**" trumpets forth from the book in bold font type.[31] Like any good expositor, Justice Scalia must have the last word, even over himself. The tome wraps up with an extended code, containing an Afterword, Appendices on the "Use of Dictionaries" and a "Glossary of Legal Interpretation," followed by extensive

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> afforded by what seem to be reasonable, practical implications instead of the rigidity dictated by a doctrinaire textualism").

Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 347 n.3 (2005); *see also* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623 (1990). It is its modern adherents who have turned textualist into something approaching a legal confession of faith. *See, e.g.*, Montgomery, *supra* note 22; *see also* Nancy Scherer & Banks Miller, *The Federalist Society's Influence on the Federal Judiciary*, 62 POL. RSCH. Q. 366, 366 (2009).

26. The phrase Justice Gorsuch used in Bostock v. Clayton, 590 U.S. 644, 653 (2020), discussed in *infra Section* III.B.2. Among the commentators who are also troubled by the implications of that phrase, *see, e.g.*, Anuj C. Desai, *Text Is Not Enough*, 93 U. COLO. L. REV. 1, 49 (2021) ("The semantic meaning of the words is certainly not unimportant, but it is a broader understanding of those words—shaped by all the factors that go into the many modalities of interpretation, including prior precedent, other statutes, normative judgments, and historical understandings and assumptions—not their semantic meaning, that determines the outcome.").

27. *See* Note, *Textualism's Mistake*, 135 HARV. L. REV. 890, 897 (2022); John 1:1–1:14 (King James).

28. Jay Mitchell, *Textualism in Alabama*, 74 ALA. L. REV. 1089, 1090 (2023) ("Textualism is alive and well in Alabama. This interpretive doctrine teaches that legal texts have objective meaning and that it is the job of judges to find and apply that meaning. Justice Antonin Scalia and lexicographer Bryan Garner distilled the textualist philosophy and outlined its key operating principles in their seminal treatise *Reading Law*."); SCALIA & GARDNER, *supra* note 8.

29. SCALIA & GARDNER, *supra* note 8, at xix–xxx, 1–46.

30. *Id.* at xi–xvii.

31. Early in Justice Scalia's career, he penned a less scriptural, more satiric look at the interpretative and logical foibles of his fellow lawyers. *See* Antonin Scalia, Essay, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581 (1989).

bibliographies of further reading that had passed muster with the Justice himself.[32] Through this book, then, his bible and *Summa Theologica*, Justice Scalia's greatest legacy was propounded and preserved.[33]

Law schools are being taken to task for not sufficiently teaching students its tenets and techniques.[34] In fact, to the skeptical (or at least, the less doctrinaire), it can seem that this brand of textualism dines from the same buffet as religious fundamentalism.[35] Yet, just like all religious

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32. SCALIA & GARDNER, *supra* note 8, at 411–41, 465–506.

33. There were rival faiths from the start, however. While not wishing to rehearse again all of the battles, suffice it to say that READING LAW drew an early, and indefatigable, critic in the form of a Seventh Circuit judge who was not keen on the Logos—the Hon. Richard Posner, cut not from Thomism but rather from the 19th century laissez faire secularism of Baron Bramwell, who wrote almost as many letters to the *Times of London* as he did judicial opinions. *See, e.g.*, Richard A. Epstein, *Introduction: Baron Bramwell at the End of the Twentieth Century*, 38 AM. J. LEG. HIST. 241 (1994); Richard A. Epstein, *For A Bramwell Revival*, 38 AM. J. LEG. HIST. 246 (1994); *see also* CHARLES FAIRFIELD, SOME ACCOUNT OF GEORGE WILLIAM WILSHERE: BARON BRAMWELL OF HEVER, AND HIS OPINIONS (1898), at preface, 22, 24, 30, 65, 72, 76, 96, 187, 223, 246, 274, 345 (discussing "Lord Bramwell's many letters to the editor of *The Times of London*"). Judge Posner, the most prolific writer of extra-judicial thought ever to sit on a federal court, also wrote his own tracts on judging issues, including interpretation. *See, e.g.*, RICHARD A. POSNER, REFLECTIONS ON JUDGING (2013); RICHARD A. POSNER, HOW JUDGES THINK (2008). His scathing review of READING LAW carries a fresh sting even to this day. *See* Richard A. Posner, *The Incoherence of Antonin Scalia,* THE NEW REPUBLIC (Aug. 24, 2012), https://newrepublic.com/article/106441/scalia-garner-reading-the-law-textual-originalism [https://perma.cc/6E8N-J94S] (asserting, among other things, that the fifty-seven "canons of construction" proclaimed by Scalia and Garner "provide them with all the room needed to generate the outcome that favors Justice Scalia's strongly felt views on such matters as abortion, homosexuality, illegal immigration, states' rights, the death penalty, and guns"). The Justice himself replied only in an interview with Reuters and deigned to have his co-author reply in writing. *See* Debra Cassens Weiss, *Scalia Weighs In on Posner's Controversial Book Review, Calls Posner's Assertion 'a Lie'*, ABA J. (Sept. 18, 2012), https://www.abajournal.com/news/article/scalia_weighs_in_on_a_controversial_book_review [https://perma.cc/YV3N-DQ6H]. Posner's status as a heretic, however, had been confirmed even before his blistering critique on *Reading Law*. *See, e.g.*, Larissa MacFarquhar, *The Bench Burner: How Did A Judge With Such Subversive Ideas Become A Leading Influence On American Legal Opinion?*, NEW YORKER (Dec. 2, 2001), https://www.newyorker.com/magazine/2001/12/10/the-bench-burner [https://perma.cc/3PJN-2K9U]. It is well to point out that Justice Scalia and Judge Posner had been law faculty contemporaries at the University of Chicago before they were called to the bench. *See* CHARLES FAIRFIELD, SOME ACCOUNT OF GEORGE WILLIAM WILSHERE: BARON BRAMWELL OF HEVER, AND HIS OPINIONS (1898), at preface, 22, 24, 30, 65, 72, 76, 96, 187, 223, 246, 274, 345 (discussing "Lord Bramwell's many letters to the editor of *The Times of London*).

34. Nicholas M. Gallagher, *Today's Law-School Graduates Can't Speak the New Supreme Court's Language*, NAT'L REV. (Feb. 20, 2019), https://www.nationalreview.com/2019/02/law-school-graduates-supreme-court-originalism-textualism/ [https://perma.cc/UF2E-H4PG]**.**

35. Levinson, *supra* note 25. Levinson observes that:

> . . . the connection is drawn between legal and religious "fundamentalism" because of the analogous relationship between the legal interpretative method of textualism and the religious

doctrines that at first may have seemed unitary, dissonance has rolled in, and schisms have erupted. For example, textualist argument has seen wins for those who have argued that Title VII of the Civil Rights Act of 1964 proscribes as discrimination "because of . . . sex" those discriminatory actions taken on the basis of an applicant's or employee's sexual orientation.[36] This is a fairly obvious textualist outcome. However, other textualists have denounced this outcome and offered the "original public meaning" gloss on textualism to argue that the average member of the public at the time Title VII was enacted in 1964 would not have understood it to protect sexual orientation.[37]

Some Court observers and commentators have noted two opposing predilections among textualist judges that may begin to explain how two textualist judges, looking at the same statutory language and presumably using the same textualist tools of statutory reading, can come to diametrically opposing conclusions:

> [T]extualist justices' proclivity to overrule may be connected to two related features of modern textualism: (1) the oft-unspoken predicate assumption that there is a singular "correct answer" to every interpretive question; and (2) the political reality that some textualist jurists see themselves as "revolutionaries," whose function is to overthrow the old, corrupt jurisprudential order—including

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> fundamentalist's theology—especially notable in the Protestant fundamentalist context—which is anchored in scriptural literalism.
>
> The relationship appears to have been first sketched by Professor Morton J. Horwitz in his 1989 essay, *The Meaning of the Bork Nomination in American Constitutional History* [50 U. PITT. L. REV. 655 (1989)]. Horwitz writes, "To the extent that Constitution worship is America's secular religion, and all religions have a tendency toward fundamentalism, originalism in constitutional discourse is the equivalent of religious fundamentalism." After positing this textual equivalence, Horwitz extended his analysis, suggesting that constitutional originalists and religious fundamentalists also share an opposition to modern interpretative theories. However, Horwitz hemmed the thread between the two schools of interpretation.

Id. at 445–46 (footnotes omitted).

36. A trend inspired and inaugurated by Mr. Justice Scalia in his groundbreaking opinion in Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79–80 (1998).

37. *See* Anita S. Krishnakumar, *Textualism and Statutory Precedents*, 104 VA. L. REV. 157 (2019); *see also* Wittmer v. Phillips 66 Co., 915 F.3d 328, 334–36, n.1 (5th Cir. 2019) (Ho, J., concurring); Zarda v. Altitude Express, Inc., 883 F.3d 100, 137, 143-56 (2d Cir. 2018) (Lynch, J., dissenting); Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339, 359–63 (7th Cir. 2017) (Sykes, J., dissenting)*; see generally* Katie R. Eyer, *Statutory Originalism and LGBT Rights*, 54 WAKE FOREST L. REV. 63 (2019); William N. Eskridge, Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 YALE L.J. 332, 340–42 (2017).

> outmoded precedents reached through the use of illegitimate, atextual interpretive resources.[38]

For an enterprise that should be liberating from personal predilections, textualism seems to be devolving in the hands of its practitioners.[39] The more labored and the more schismatic in its results, the more problematic this movement will become.

B. The Gentle Sensei: Breyer's *Why I Chose Pragmatism, Not Textualism*

Justice Breyer's book, *Reading the Constitution: Why I Chose Pragmatism, Not Textualism*, is an unusual volume. It is not Thomism; it is much more of a "Sermon On The Mount," in the best sense that pivotal moment holds in Western cultural consciousness.[40] True, it *is* the work of a scholar, but *not* written in a scholarly manner. It will be best understood *by* lawyers, but it is written *for* the everyman. Justice Breyer poses the question, "[W]hy am I writing this book?," and answers it straightforwardly.[41] "The reason," he says, "lies in the growth and popularity among many judges, lawyers, and others in the legal community of an approach to interpretation that is" called "textualism," in which those employing it "may ask only a handful of closely related questions" that "often prioritize the so-called original public meaning of words, which is the meaning that an ordinary speaker of English would attribute to those words at the time they were written."[42] The crux of the problem the retired Justice sees with the approach he sets forth succinctly:

> Of course, a judge must consult the text and understand the text as limiting or helping to explain the scope of the statutory phrase. But I have learned over and over again that *text is but one interpretative tool among many*. And I fear the current enthusiasm for widespread adoption of more purely textual or linguistic approaches to interpretation means that other equally or more important

38. Anita S. Krishnakumar, Academic Highlight: Hyatt *Is Latest Example of Textualist-Originalist Justices' Willingness to Overturn Precedent*, SCOTUSBLOG (May 24, 2019), https://www.scotusblog.com/2019/05/academic-highlight-hyatt-is-latest-example-of-textualist-originalist-justices-willingness-to-overturn-precedent/ [https://perma.cc/XBX8-XN5G].

39. *See* discussion *infra* Sections III.A–C.

40. *Compare* Thomas F. O'Meara, *Thomism*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/Thomism (last visited Aug. 8, 2024). [https://perma.cc/9ESK-5QH3], *with Matthew* 5:7 (King James Version).

41. BREYER, *supra* note 6, at xx.

42. *Id.*

> tools will be set aside. It is as if an artist were to try to paint with only half a palette.[43]

And herein we see the approach emerging—a love of eruditely chosen examples and metaphors and a penchant for stories, the stories of cases he has decided over a staggeringly long judicial career.[44] Justice Breyer states, "I shall mostly describe cases in which I have participated—cases that illustrate why, and how, I have used what one might call "purpose-oriented" or "pragmatic" approaches."[45] In recounting those cases, Justice Breyer "shall explain why, in those cases," he "has rejected the more 'textual-based' approaches that several of [his] colleagues have embraced."[46]

Early and sympathetic reviewers have been less than kind, however. The New York Times reviewer led off by recognizing that Justice Breyer means well, then asked, "[w]hy is his new book . . . so exasperating?" and next wielded the unsparing critic's pen:

> Most of the book is given over to parsing cases in granular detail, explaining exactly how looking beyond the text has historically yielded opinions that are "sound"—a word he calls one of the best compliments that you can give a judge. He front loads his examples with those he describes as "intellectually difficult." Only after wading through "highly technical" cases having to do with things like patent infringement and retirement plans for railroad workers will a reader be prepared, he says, to take on anything as "value-laden" as reproductive rights.
>
> This may have seemed to Breyer like a sound structure for his book, but it turns out to be a rhetorical sinkhole. Subjecting your readers to a forced march through complex arcana, telling them the "repetition" is for their own good, is more likely to exhaust them than prepare them. Despite my (admittedly freakish) tolerance for exegesis, I felt so worn down by the bland recitation of case history that I found myself nearly sapped of the will to go on.[47]

In the end the *New York Times* found the book to be too tepid:

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43. *Id*. (emphasis in original).
44. *See id.* at xxi–xxii.
45. *Id.* at xxi.
46. *Id.*
47. Jennifer Szalai, *The Retired Justice Who Doesn't Understand the Supreme Court*, N.Y. TIMES (Mar. 27, 2024), https://www.nytimes.com/2024/03/27/books/review/stephen-breyer-reading-the-constitution.html.

> Given that Breyer is no longer a sitting judge, one might have thought that this new book would afford him the opportunity to let loose, and in interviews he has suggested he is sounding an alarm. But his voice in the book barely rises above a whisper. Written in Breyer's careful, tentative style, "Reading the Constitution" is well meaning, tedious and exasperating; it is also rather telling, showing how a thoughtful, conscientious jurist can get so wedded to propriety and high-mindedness that he comes across as earnestly naïve.

The *Times* was looking, apparently, for Justice Breyer to become a Lt. Colonel Frank Slade of cinematic fame.[48] Or perhaps the reviewer missed the effortlessly caustic wit of the late Justice Scalia. In any event, Justice Breyer says he is writing especially "to show … why the many promises of textualism and originalism often are not, or cannot be, realized," in hopes "the next generation or two of law students will learn about and understand the more traditional approaches to interpretation."[49] He is a patient, low-key teacher. His tenor and deportment remind one of another gentle law teacher from a generation ago, who also thought stories better than scholastic tomes and confrontational, technical bluster to teach the values he held most dear.[50] And for that, Justice Breyer's book may one day be the most effective surviving tract of the Interpretation Wars.[51]

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48. The character of Slade was one of actor Al Pacino's most vividly visceral creations. In a particularly memorable scene, Col. Slade hostilely shouts at a private school's disciplinary committee, "Out of order? I'll show you 'out of order'! You don't know what 'out of order' is. . . . If I were the man I was five years ago, I'd take *flamethrower* to this place!" *See Scent of a Woman* (1992), AMERICAN RHETORIC: MOVIE SPEECHES, at https://www.americanrhetoric.com/MovieSpeeches/specialengagements/moviespeechscentofawoman.html [https://perma.cc/SVK7-WW89].

49. BREYER, *supra* note 6, at xxvii.

50. *See, e.g.*, Steven Wizner, *A Theology of Justice: Some Reflections On Milner Ball's Non-Religious Practice Of Belief*, 46 GA. L. REV. 945 (2007); Miler S. Ball, *The Failure and Beginnings Again*, 26 CARDOZO L. REV. 2263 (2007). Dean Aviam Soifer words about Professor Ball seem fitting to describe Justice Breyer's approach as well:

> Milner Ball may be the most active, intense, quiet, careful listener in the entire world. In hearing and writing about varied voices and the voiceless, he undoubtedly is foremost within the realm of American law-and far beyond law and the United States as well. Yet Milner is no mere passive, tolerant listener. He hears with his heart. With masterful artistry, he gleans the meanings that others convey, no matter how halting or varied the means used. Then Milner's own eccentric, punctilious, and proper passion creates anew through words and wonder-and the world is better for it.

Aviam Soifer, *Hear Today, God Tomorrow: To Be in but Not of the Law with Moses, and Milner Ball*, 41 GA. L. REV. 917, 917 (2007). His most famous work is MILNER S. BALL, CALLED BY STORIES: BIBLICAL SAGAS AND THEIR CHALLENGE FOR LAW (2000). Professor

For example, a lot of ink has been spilled since 2010 on the question of whether a corporation may be a "proper defendant" in a case brought under the Alien Tort Statute. That statute and that issue are discussed in more detail in Section III.C.[52] For our present purposes, we can see Justice Breyer's pragmatism at work in the way that he used a hypothetical to cut through the hundreds of pages of citations and rhetoric from judicial opinions, party briefs, and amici curiae, not to mention prodigious reams of law review pages.[53] In the first oral argument of the case, Justice Breyer challenged Shell's position that corporate status exempted them somehow from liability for violating international law norms enforced in American courts through subject matter jurisdiction afforded by the Alien Tort Statute:

> Do you think in the 18th century if they'd brought Pirates, Incorporated, and we get all their gold, and Blackbeard gets up and he says, oh, it isn't me; it's the corporation—do you think that they would have then said: Oh, I see, it's a corporation. Good-bye. Go home?[54]

Ball's publisher describes the book in words that resonate with the approach Justice Breyer has taken—albeit, not directly Biblical—in *Why I Chose Pragmatism, Not Textualism*:

> Distinguished legal scholar and Presbyterian minister Milner S. Ball examines great sagas and tales from the Bible for the light they shed on the practice of law and on the meaning of a life lived in the legal profession. Scholars and laypersons alike typically think of the law as a discipline dominated by reason and empirical methods. Ball shows that many of the dilemmas and decisions that legal professionals confront are more usefully approached through an experience of narrative in which we come to know ourselves and our actions through stories.

Called by Stories, DUKE UNIVERSITY PRESS, https://www.dukeupress.edu/called-by-stories [https://perma.cc/5HYA-TQUM] (last visited July 31, 2024).

51. Robert Justin Limpkin, *We Are All Judicial Activists Now*, 77 U. CIN. L. REV. 181, 196 (2008).

52. See *infra* Section III.C.

53. BREYER, *supra* note 6, at 76–79.

54. Lawrence Hurley, *Justice Breyer Takes On Pirates, Inc*., LAWRENCE HURLEY (Feb. 28, 2012), https://lawrencehurley.com/2012/02/28/justice-breyer-takes-on-pirates-inc/ [https://perma.cc/4JRZ-JPR5]. Dean Sullivan dug in: "You could seize the ship with which the piracy was committed, as you could later slave trading ships. But you could not seize another ship, and you could not seize the assets of the corporation." *Id; see also* Garrett Epps, *The Practical Erudition of Stephen Breyer,* WASHINGTON MONTHLY (Jan. 22, 2022), https://washingtonmonthly.com/2022/01/27/the-practical-erudition-of-stephen-breyer%EF%BF%BC/ [https://perma.cc/L3FF-Q24K]. This exchange can be heard in the audio recording of the February 28, 2012 oral argument available at OYEZ. Oral Argument at 26:04–29:37, Kiobel v. Royal Dutch Petroleum Co., 567 U.S. 967 (2012), https://www.oyez.org/cases/2011/10-1491 [https://perma.cc/7UUS-UGU8].

Dean Kathleen Sullivan, Stanford Law School Dean and Shell's counsel at SCOTUS, wouldn't concede the point.[55] But Justice Breyer had won game, set, and match with that single question, regardless of her tendentious reply.

C. Eskridge, *The* Scholar of Interpretation

It is the Author's contention that judges should never put "blinders" on as to any class of information that may illuminate the meaning of a Constitutional provision, a statute, or a regulation. Rather, the question isn't what to look at as much as how to use what you can look at. That is the approach best exemplified in Professor William Eskridge's writings on "dynamic statutory interpretation" through "practical reasoning."[56] As the Author previously described this process in an article examining a vital question of statutory interpretation involving Title VII and the Civil Rights Act of 1991 Amendments:

> A useful vehicle for doing so is the seminal work of Professors Eskridge and Frickey on "practical reasoning" in statutory interpretation.
>
> The practical reasoning model posits that "an interpreter will look at a broad range of evidence" to develop a "preliminary view of the statute," and then test that view against "the multiple criteria of fidelity to the text, historical accuracy, and conformity to contemporary circumstances." This is a fluid process, which Eskridge and Frickey represent with a conical visual metaphor--largest at the most abstract end of the cone, where the inquiry is less focused, using sources such as current policy and statutory evolution, and narrowing through less abstract; more concrete inquiries regarding legislative purpose and specific and general legislative history; and coming to a sharp focus at the level of the statutory text itself. Eskridge and Frickey write that "[i]n formulating and testing her understanding of the statute, the interpreter will move up and down" this hierarchy in "evaluating and comparing the

55. In fact, several Justices queried Dean Sullivan on piracy, and she struggled mightily and obstinately to deflect from the topic. *See Kiobel Oral Argument: Piracy May Spell Trouble for Shell*, DENVER J. INT'L L. & POL'Y (Oct. 12, 2012), https://djilp.org/kiobel-oral-argument-piracy-may-spell-trouble-for-shell/ [https://perma.cc/Y3PB-KKMZ].

56. William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 PA. L. REV. 1479 (1987); William N. Eskridge, Jr., & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990); William N. Eskridge, Jr., & Philip P. Frickey, The *Supreme Court 1993 Term–Forward: Law as Equilibrium,* 108 HARV. L. REV. 26, app. at 97–108 (1994).

> different considerations represented by each source of argumentation."[57]

Professor Eskridge's writings on interpretation are much like Bach's canon of music—always original, brilliant, insightful, and new. His "Publications (Selected)" page at Yale Law School's website but scrapes the surface of the tremendous coverage he has achieved over the last forty years.[58] Several of his articles are cited and quoted throughout this Article.

For present purposes, a good sense of how Eskridge always manages to "peel more layers"[59] of the onion than those around him comes from his relatively modest handbook published as a law teacher's rejoinder to Scalia and Garner's *Reading Law*.

In *Interpreting Law*,[60] Eskridge elaborates upon a hypothetical also posed by Scalia and Garner in *Reading Law*,[61] that supposes Congress "adopts a statute providing that '[n]o vehicles will be allowed in Lafayette Park"[62]—"Does such a statute prohibit bicycles?"[63] Justice Scalia and his co-author "work their way through a variety of dictionary definitions of 'vehicle' and contemplate how that term is used in ordinary parlance" and conclude that "[t]he proper colloquial meaning [of 'vehicle'] in [their] view (not all of them are to be found in dictionaries) is simply a sizeable wheeled conveyance (as opposed to one of any size that is motorized."[64] Thus, "[a]ccording to Justice Scalia and Professor Garner, the scrupulous textualist would have to apply the statutory prohibition to automobiles, golf carts, and mopeds—but can safely assume that the vehicles in the park law cannot apply to 'airplanes, bicycles, roller skates, and toy automobiles.'"[65] Here, Professor Eskridge pauses to ask, "[i]s this a predictable application

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57. Jeffrey A. Van Detta, *"Le Roi Est Mort; Vive Le Roi!": An Essay on The Quiet Demise Of McDonnell Douglas And The Transformation Of Every Title VII Case After Desert Palace, Inc. v. Costa Into A "Mixed-Motives" Case*, 52 DRAKE L. REV. 71, 119–20 (2004) (footnotes omitted).

58. *William Eskridge Jr., Alexander M. Bickel Professor of Public Law*, YALE L. SCH., https://law.yale.edu/william-eskridge-jr [https://perma.cc/GKX3-MQD8] (last visited Sept. 19, 2024).

59. A metaphor that the Author has adopted from Professor Joseph Glannon. *See* JOSEPH GLANNON, THE LAW OF TORTS: EXAMPLES & EXPLANATIONS 493–94 (2nd ed. 2000) ("The more sophisticated the problem, the more clearly the bluebooks [in which law examinations used to be handwritten] break down into categories. I like to think of it in terms of layers of an onion. The mediocre student will only see the outer layer; a better student will peel off another layer of the problem; but the student who has really mastered the analytic technique will keep going, peeling more and more layers, showing that she understands the true elegance of the problem.").

60. WILLIAM N. ESKRIDGE, JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION (2016).

61. SCALIA & GARNER, *supra* note 8, at 37–38.

62. ESKRIDGE, *supra* note 60, at 2–3.

63. *Id.* at 3.

64. *Id.* at 4 (quoting SCALIA AND GARNER, *supra* note 8, at 37–38).

65. *Id.* (quoting SCALIA AND GARNER, *supra* note 8, at 37–38).

of dictionaries, ordinary parlance, and grammar ot this rather simple statutory problem? Does a simple textualist methodology always deliver the predictability its authors promise?"[66] Eskridge, like "[m]any scholars," is "dubious."[67]

To begin with, Eskridge observes that "[o]ne reason the Scalia and Garner exercise may not generate a predictable rule of law is that their analysis does not seem to consider the broader statutory context for" the law in the first place.[68] Eskridge notes, for example, that if the law is federal, "the thorough textualist would be well-advised to consult the Dictionary Act of 1947, which provides a definition that applies everywhere in the US. Code."[69] That definition provides that "vehicle" shall "includ[e] every description of carriage or other artificial contrivance used, or capable of being used, as a means of transportation on land."[70] Noting that "most state codes have almost as capacious a definition of 'vehicle,'" Eskridge asks the (almost rhetorical) questions: "Why is this not relevant context for a textualist approach? If so, does it not suggest the possibility that bicycles are 'vehicles'?"[71]

But that is not all:

> More important, before a textualist analysis settles on the ordinary meaning of "vehicle," it ought to consider the background and purpose of the statue, considerations that typically clarify the issues and often solve the stator puzzle. For example, if Congress adopted [this statute] in order to make Lafayette Park safer for elderly persons and small children—the most likely reason—then Scalia and Garner seem too quick to say that the statute cannot cover bicycles, as a matter of ordinary meaning.[72]

Further, Eskridge reasons, "[i]f I told you that bicyclists and skateboarders had been causing accidents in the park and that the legislature responded with a 'no vehicles' ordinance to reduce accidents, you would assume, as matter of ordinary meaning, that the 'vehicles' covered by the ordinance include bicycles and skateboards."[73] Similarly, "if the relevant congressional committee reports described the Lafayette Park statute as responsive to a series of accidents in which bicyclists and skateboarders had run into children and knocked over elderly visitors, the rule of law is not

66. *Id.*
67. *Id.* at 4.
68. *Id.*
69. *Id.* (citing 1 U.S.C. § 4).
70. *Id.* (citing 1 U.S.C. § 4).
71. *Id.* at 4–5.
72. *Id.* at 5.
73. *Id.*

well-served by an abstract textualist approach that reads bicycles and skateboards out of the statute."[74]

Thus, we are bound to concur with Eskridge that "[a]t least in some circumstances, the predictable rule of law may be undermined, rather than advanced, by a context-denying stance asserting that bicycles are simply not 'vehicles' subject to a law banning vehicles from the park."[75]And just like that, textualism is called to task.[76]

As Eskridge observes, and the following pages will confirm, "[n]ot only are statutes America's main source of law, but they are battlegrounds for our most serious values."[77] Those battles are playing out in the proxy war of textualism versus pragmatism.

II. AN ECLECTIC SELECTION OF BATTLEFIELDS— TEXTUALISM, PRAGMATISM, HERETICS, AND HERESIES

A. Interpreting a Modern Statute of Many Complexities: The Foreign Sovereign Immunities Act

Of the Foreign Services Immunities Act (FSIA), Professors Wright and Miller have written the Act "has generated a significant amount of litigation, as illustrated by the numerous representative cases and law review articles cited in" their authoritative federal practice treatise.[78] Indeed, "[t]he FSIA is a complex statutory scheme that addresses a variety of concerns including subject matter jurisdiction, personal jurisdiction, attachment, service of process and jurisdictional immunity."[79] As another commentator has elaborated, the FSIA's reach for comprehensiveness and authoritativeness has created inevitable interpretative issues of real difficulty:

> Lawsuits against foreign states are now common in American courts but present a unique dilemma. Although these cases can be a vital avenue for vindicating the plaintiffs' rights or enforcing U.S. law, they inherently raise foreign relations risks because of their potential to offend

74. *Id.*

75. *Id.*

76. *Id.* As the late Justice John Paul Stevens wrote in his Foreword to Eskridge's book, "[a] similar hypothetical has been used by other authors writing about statutory" interpretation, "but none as comprehensively or as persuasively as Professor Eskridge." *Id.* at vii.

77. *Id.* at 1.

78. CHARLES A. WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE § 3662 104–40 (5th ed. 2013).

79. Clinton L. Narver, *Putting the "Sovereign" Back in the Foreign Sovereign Immunities Act: The Case for a Time of Filing Test for Agency or Instrumentality Status*, 19 B.U. INT'L L.J. 163, 169–70 (2001).

> the defendant governments. Congress and the Executive Branch attempted to balance these considerations when adopting the Foreign Sovereign Immunities Act (FSIA), which specifies the circumstances under which foreign states may be sued in the United States. Yet splits of authority have developed regarding the proper interpretation of the statute, and the approaches taken by some courts are undermining the balance carefully struck by the political branches.[80]

It is those "splits of authority" and similar uncertainties that have landed FSIA issues before SCOTUS with increasing frequency and have, therefore, made the FSIA a recurring twenty-first century battleground in the contest between textualism and pragmatism. This Article examines two of the recent SCOTUS cases in Section III.A: *Harrison v. Republic of Sudan* and *Opati v. Republic of Sudan.*

1. *Harrison v. Republic of Sudan*

The plaintiffs in *Harrison v. Republic of Sudan*[81] were survivors and family members of crew on the U.S. Navy's guided-missile destroyer, U.S.S. *Cole*, which was attacked by Al Qaeda on October 12, 2000.[82] The eighteen plaintiffs in *Harrison* included "fifteen former sailors who were injured while on the *Cole* and three of their spouses, who, although not on the *Cole* during the attack, allegedly suffered emotional distress upon learning of the incident."[83] The Republic of Sudan was alleged to be liable for these injuries by virtue of its support of Al Qaeda, which perpetrated the *Cole* bombing.[84] Sudan defaulted and made no appearance.[85] Invoking the "state-sponsored terrorism" exception to the FSIA,[86] the *Harrison* plaintiffs won a default judgment of over $300 million against Sudan.[87]

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80. George K. Foster, *When Commercial Meets Sovereign: A New Paradigm for Applying the Foreign Sovereign Immunities Act in Crossover Cases*, 52 HOUS. L. REV. 361, 363 (2014) (footnotes omitted).

81. Harrison v. Republic of Sudan, 882 F. Supp. 2d 23, 28 (D.D.C. 2012).

82. *Id.* at 26; *see, e.g.*, John F. Burns & Steven Lee Myers, *The Warship Explosion: The Overview—Blast Kills Sailors On U.S. Ship In Yemen,* N.Y. TIMES (Oct. 13, 2000), https://www.nytimes.com/2000/10/13/world/the-warship-explosion-the-overview-blast-kills-sailors-on-us-ship-in-yemen.html [https://perma.cc/72GU-2VYU]; Patrick E. Tyler, *A Nation Challenged: Evidence—British Detail bin Laden's Link to U.S. Attacks,* N.Y. TIMES, (Oct. 5, 2001), https://www.nytimes.com/2001/10/05/world/a-nation-challenged-evidence-british-detail-bin-laden-s-link-to-us-attacks.html [https://perma.cc/M5FR-3CSX].

83. *Harrison*, 882 F. Supp. 2d at 26.

84. *Id.*

85. *Id.* at 28.

86. 28 U.S.C. § 1605A.

87. *Harrison*, 882 F. Supp. 2d at 23, 51.

Judgement enforcement proceedings were then initiated against assets of the Sudanese sovereign in the Southern District of New York, where the financial institutions holding those assets are located.[88] Roused from its default by the imminent execution on these monies, the Sudanese sovereign appeared through its Central Bank in the federal district court and sought to open the default.[89] Sudan collaterally attacked the default judgment on the grounds that personal jurisdiction was not properly established under the FSIA's statute on serving foreign sovereigns.[90] Several federal appellate courts had ruled on whether that service provision, Section 1608(a)(3), permitted service by dropping off a copy of the summons and complaint at that country's embassy in the United States:

> (a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:
>
> ***
>
> (3) . . . by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court *to the head of the ministry of foreign affairs of the foreign state concerned* . . .[91]

In an amicus brief filed when the *Harrison* case reached the U.S. Supreme Court, these cases posed the following fundamental question:

> The question presented is whether service under Section 1608(a)(3) may be accomplished by requesting that the clerk mail the service package to the embassy of the foreign state in the United States, if the papers are directed to the minister of foreign affairs, or whether Section

88. *See, e.g.*, Harrison v. Republic of Sudan, et al., No. 1:13-cv-03127, 2017 WL 5558716 (S.D.N.Y. Jan. 4, 2017); Harrison v. Republic of Sudan, 13-cv-3127, 2017 WL 946422 (S.D.N.Y. Feb. 10, 2017).

89. Harrison v. Republic of Sudan, et al., 309 F. Supp. 3d 46 (S.D.N.Y. 2018).

90. 28 U.S.C. § 1608(a)(3).

91. 28 U.S.C.§ 1608(a)(3) (emphasis supplied). The statute has four methods of service, which are listed in the order in which they are to be attempted when available. The methods listed in Section 1608(a)(1) and (2) were not available with respect to the Republic of Sudan. Thus, plaintiffs used the service methodology permitted under Section 1608(a)(3).

> 1608(a)(3) requires that process be mailed to the ministry of foreign affairs in the country concerned.[92]

Unlike the other federal appellate courts that had confronted this issue,[93] the Second Circuit ruled that Section 1608(a)(3) permitted the district court clerk to mail the process to the ministry of foreign affairs *either* at his or her address in the country concerned, *or* to the ministry *"via" its embassy in the United States*, the latter being the approach used by the *Harrison* plaintiffs.[94] That holding created not only an interpretation issue but also a potential clash with the Vienna Convention on Diplomatic Relations, which, inter alia, declares "inviolable" the premises of foreign embassies in signatory countries.[95] The Court, however, disagreed with the Second Circuit, finding that the "plain language" of Section 1608(a)(3) itself precluded service routed through a foreign state's embassy in the United States.[96]

Wielding its textualist statutory interpretation toolkit, the Court held, 8 to 1, that Section 1608(a)(3) permitted mailing of the process only directly to the foreign minister in his or her home country, *not* to the foreign minister "via" its American embassy.[97] Justice Alito wrote for the other seven Justices, including Justice Sotomayor, who joined his opinion.[98]

Justice Thomas—the Court's chief disciple of textualism after the death of Justice Scalia[99]—dissented.[100] Purportedly applying the same

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92. Brief for the United States as Amicus Curiae at I, Republic of Sudan v. Harrison, 139 S. Ct. 1048 (2019) (No. 16-1094).

93. Kumar v. Republic of Sudan, 880 F.3d 144, 160 (4th Cir. 2008), *cert. denied*, 139 S. Ct. 1445 (2019) (No. 17-1269); Barot v. Embassy of the Republic of Zambia, 785 F.3d 26, 29–30 (D.C. Cir. 2015); Transaero, Inc. v. La Fuerza Aerea Boliviana, 30 F.3d 148, 154 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1150 (1995) (No. 94-1054); Magness v. Russian Fed'n, 247 F.3d 609, 615 (5th Cir. 2001), *cert. denied*, 534 U.S. 892 (2001) (No. 01-139); Alberti v. Empresa Nicaraguense De La Carne, 705 F.2d 250, 253 (7th Cir. 1983); Autotech Techs. LP v. Integral Rsch. & Dev. Corp., 499 F.3d 737, 748–49 (7th Cir. 2007), *cert. denied*, 552 U.S. 1231 (2008) (No. 07-879).

94. Harrison v. Republic of Sudan, 802 F.3d 399 (2d Cir. 2015), *reh'g en banc denied with op.*, 838 F.3d 86 (2d Cir. 2016), *rev'd*, 139 S. Ct. 1048 (2019).

95. Article 22(1) of the Vienna Convention provides: "The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission." Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 500 U.N.T.S. 95.

96. *Harrison*, 139 S. Ct. at 1053.

97. *Id.* at 1051–57.

98. *Id.* at 1051.

99. Journalists of the federal judiciary have taken note:

> Clarence Thomas is the longest-serving justice currently sitting on the Supreme Court. For much of his tenure, court watchers and critics have dismissed his jurisprudence as largely irrelevant, demoting him to the late Justice Antonin Scalia's judicial sidekick. . . . And yet, during his time on the Court, Thomas has written prolifically and introduced ideas that have gradually gained influence among other justices. Of all the

toolkit of textualism that Justice Alito had used,[101] Justice Thomas came to the opposite conclusion—i.e., that the language of Section 1608(a)(3) of the FSIA *permits* service on the state sovereign's foreign minister "via" the sovereign's U.S. embassy.[102]

> Supreme Court justices, Thomas takes an approach to the law that is arguably the purest embodiment of the conservative judicial philosophies known as textualism, which holds that the plain meaning of the text of a law is all that matters in judicial interpretation, and originalism, which holds that the Constitution should be interpreted only as its authors intended.

Emma Green, *The Clarence Thomas Effect: The Notoriously Quiet Supreme Court Justice Has Had A Far-Reaching Influence On The Personnel Of The Trump Administration, Which May Be His Most Lasting Legacy*, THE ATLANTIC (July 10, 2019), https://www.theatlantic.com/politics/archive/2019/07/clarence-thomas-trump/593596/ [https://perma.cc/Y8JT-9SZT] ("Numbers are the first evidence of the sizable Thomas effect. He has had more of his former clerks nominated to federal judgeships under Trump than any other justice, past or present."); *see also* H. Brent McKnight, *The Emerging Contours of Justice Thomas's Textualism*, 12 REGENT U. L. REV. 365, 365–66 (1999-2000).

100. *Harrison*, 139 S. Ct. at 1062–66 (Thomas, J., dissenting).

101. Although there has been speculation that Justice Alito's textualist toolkit may differ from the one Justice Scalia handed off to Justice Thomas. *See, e.g.*, Elliott M. Davis, Note, *The Newer Textualism: Justice Alito's Statutory Interpretation*, 30 HARV. J.L. & PUB. POL'Y 983, 984 (2006); Todd W. Shaw & Steven G. Calabresi, *The Jurisprudence of Justice Samuel Alito,* 87 GEO. WASH. L. REV. 507, 509 (2019).

102. *Harrison*, 139 S. Ct. at 1062 (Thomas J., dissenting). Justice Thomas elaborated:

> The Court holds that service on a foreign state by certified mail under the Foreign Sovereign Immunities Act (FSIA) is defective unless the packet is "addressed and dispatched to the foreign minister at the minister's office in the foreign state." This bright-line rule may be attractive from a policy perspective, but the FSIA neither specifies nor precludes the use of any particular address. Instead, the statute requires only that the packet be sent to a particular person—"the head of the ministry of foreign affairs." 28 U.S.C. § 1608(a)(3).
>
> Given the unique role that embassies play in facilitating communications between states, a foreign state's embassy in Washington, D. C., is, absent an indication to the contrary, a place where a U.S. litigant can serve the state's foreign minister. Because there is no evidence in this case suggesting that Sudan's Embassy declined the service packet addressed to its foreign minister—as it was free to do—I would hold that respondents complied with the FSIA when they addressed and dispatched a service packet to Sudan's Minister of Foreign Affairs at Sudan's Embassy in Washington, D. C. Accordingly, I respectfully dissent.

Id.

a. *Finding Meaning—Or Creating Meaning Out of Whole Cloth? The Peculiar Textualism of Justice Alito in* Harrison

Justice Alito focused on the language from FSIA Section 1608(b)(3)—"that service be sent 'by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned'"—and observed that "[t]he most natural reading of this language is that service must be mailed directly to the foreign minister's office in the foreign state," though, he conceded "[t]his is not, we grant, the only plausible reading of the statutory text," but nonetheless insisted that "it is the most natural one.[103]

Having found that there is more than one plausible meaning of the phrase in question, Justice Alito then identifies what he contends are the key words in the phrase that can demonstrate the "true" meaning of the phrase when they are parsed to a more specific degree.[104] Thus, he pens an exegesis upon the words "addressed" and "dispatched."[105] One who has read either T.S. Eliot or is familiar with the scholarly divines who were among King James's translators of the Holy Bible will immediately recognize the sermonizing technique of the leader of King James's translators, Rev. Lancelot Andrewes, Bishop of Winchester. Conceding that Andrewes's sermons could be "pedantic and verbal," T.S. Eliot nonetheless observed that in "dwelling on a single word, comparing its use in its nearer and in its most remote contexts," Andrewes "takes a word and derives the world from it; squeezing and squeezing the word until it yields a full juice of meaning which we should never have supposed any word to possess."[106] Justice Alito hardly writes with Bishop Andrewes's elegance (or scholarly insight), but he does attempt, from every conceivable angle, to "squeez[e] and squeez[e] the word" at issue.[107]

Starting with "addressed," Justice Alito focuses on the dictionary definition and supplies an avalanche of detailed citations to various dictionaries—even to the "infamous" *Webster's Third New International Dictionary*, which Justice Scalia abhorred, in editions ranging from 1933 to 1971.[108] Through this exercise, Justice Alito believes he establishes that

103. *Id.* at 1055–56 (majority opinion).

104. *Id.* at 1056.

105. *Id.*

106. T.S. ELIOT, FOR LANCELOT ANDREWES: ESSAYS ON STYLE AND ORDER, 15 (1928).

107. *Harrison*, 139 S. Ct. at 1056–57.

108. *Id.* at 1056. At a Congressional memorial service for Justice Scalia, his former law clerk, Joan Larsen (a University of Michigan law professor who was a Michigan Supreme Court Justice at the time of his death and recently became a 6th Circuit Judge), told a wonderful anecdote about having committed a cardinal sin in his Supreme Court chambers—citing the Webster's Third International Dictionary. *Antonin Scalia, Associate Justice of the United States Supreme Court: Memorial Tributes in the Congress of the United States*, 112–13 (remarks of Judge Joan Larsen), U.S. GOV'T PRINTING OFF. (2017), https://www.govinfo.gov/content/pkg/CDOC-114sdoc12/pdf/CDOC-114sdoc12.pdf [https://

"the noun 'address,' in the sense relevant here, means 'the designation of a place (as a residence or place of business) where a person or organization may be found or communicated with.'"[109] Accordingly, from that definition, Justice Alito reasons that "[s]ince a foreign nation's embassy in the United States is neither the residence nor the usual place of business of that nation's foreign minister and is not a place where the minister can customarily be found, the most common understanding of the minister's 'address' is inconsistent with the interpretation of Section 1608(a)(3) adopted by the court below and advanced by respondents."[110] Of course, an obvious flaw of this argument, which Justice Alito gives lip service to "acknowled[ing]," is that "a mailing may be 'addressed' to the intended recipient at a place other than the individual's residence or usual place of business."[111] He even provided several examples of that phenomenon—including, most significantly, the scenario in which "a sender might send a mailing to a third party who is thought to be in a position to ensure that the mailing is ultimately received by the intended recipient."[112] That would seem to describe the relationship between two agencies of any foreign ministry—ambassadors and embassies—to a "T." However, Justice Alito does not even acknowledge that, let alone address it. In a conclusory assertion tantamount to a dismissive wave of a hand, he simply declares, "in the great majority of cases, addressing a mailing to X means placing on the outside of the mailing both X's name and the address of X's residence or customary place of work."[113] "The great majority of cases?" Was there any (or could there ever be) empirical evidence of such a thing—let alone evidence in the record? This is a most unsatisfying way to ignore a rebuttal arrow stuck in the Achilles' heel of an argument.

Instead of dealing with the problematic nature of the "addressed" analysis, Justice Alito quickly moves on to the second pier of his shaky textualist bridge: the meaning of "dispatched."[114] Again, he leads with the dictionary—and again, it is the *Webster's Third* that Justice Scalia loathed—and hones in on a definition that he contends supports the notion that FSIA Section 1608(b)(3) means no embassy-service by the very words that the section uses, which do not include the word "embassy":

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perma.cc/8HH8-RNP6]; *see also Michigan Supreme Court Justice Joan Larsen honoring Justice Antonin Scalia*, C-SPAN (March 1, 2016), https://www.c-span.org/video/?c4583403/michigan-supreme-court-justice-joan-larsen-honoring-justice-antonin-scalia. Like many purists of his generation, Justice Scalia objected to the editorial innovations made in that edition.

109. *Harrison*, 139 S. Ct. at 1056.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

> To "dispatch" a communication means "to send [it] off or away (as to a special destination) with promptness or speed often as a matter of official business." A person who wishes to "dispatch" a letter to X will generally send it directly to X at a place where X is customarily found. The sender will not "dispatch" the letter in a roundabout way, such as by directing it to a third party who, it is hoped, will then send it on to the intended recipient.[115]

Justice Thomas, however, is even more textual-centric than Justice Alito, for in his dissent, Justice Thomas derides this bootstrapping: "The Court focuses on the foreign minister's 'customary office' or 'place of work,' but these terms appear nowhere in § 1608."[116]

Justice Alito's opinion offers two analogies to organizations that are not, frankly, organized the same way that a country's diplomatic service is organized—the Office of the Attorney General and the corporate headquarters of a chain of retail outlets—but he nonetheless implies that they are hog-chokers of a proof[117] by their very recitation.[118]

A U.S. Attorney's Office in one of the ninety-four Judicial Districts of the United States does not sit in an analogous position vis-à-vis the U.S. Attorney General and the U.S. Justice Department as a foreign nation's ambassador sits vis-à-vis his or her country's foreign minister.[119] An even less persuasive analogy is the retail outlet-corporate CEO, considering that no one at a retail store could remotely be viewed as having any duty-based

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115. *Id.* at 1056–57 (citations and parentheticals omitted).

116. *Id.* at 1064 (Thomas, J., dissenting).

117. A wonderful phrase for which the Author is indebted to ALBERT W. ALSCHULER, LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES 194 (2002) ("Firing a demand for hogchoker proof at every belief may leave one without beliefs . . .").

118. *Harrison*, 139 S. Ct. at 1057.

119. Indeed, Justice Thomas took specific issue with this example, reaching a conclusion entirely to the contrary of the one expressed by Justice Alito:

> To the extent the relationship between a U.S. Attorney's office and the Attorney General is analogous, the majority correctly acknowledges that the office would "very probably forward" a letter directed to the attention of the Attorney General. The majority nevertheless believes that it would be improper or unusual to dispatch that letter to a local U.S. Attorney's office. I disagree. It seems entirely likely that a person residing in the District of Idaho would dispatch a letter to the Attorney General through the U.S. Attorney's office serving his District—even if it would be odd for a resident of the District of Columbia to use that Idaho address.

Id. at 1065 n.1 (Thomas, J., dissenting). Of course, both Justices Alito and Thomas are speculating out loud, rather than consulting clear legislative history which demonstrates that Congress was aware of the issue and had no intention of allowing service on the foreign ministers through their American embassies.

or agency relationship with the CEO.[120] But Justice Alito's opinion offers both these examples as if they were so obvious that we would accept them without further persuasion or efforts to justify the analogy.[121]

Justice Alito then invoked the common law of contracts to illustrate his point, speaking of the common law "mailbox" rule (which English law calls "the postal rule") concerning when a mailed acceptance of an offer is considered effective if United States (or Royal) mail is an acceptable means of communicating acceptance.[122] Appealing to this first-year contracts doctrine seems odd in this context. Congress would certainly not have been considering contract law's "mailbox" rule in choosing to stipulate that service must be "dispatched" to the foreign minister of the country being sued. Some might see this as a clever "argument by analogy." However, the analogy is neither persuasive nor helpful—particularly in a Supreme Court opinion where the court is charged with a major interpretative task

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120. *Id.* at 1057 (majority opinion). Justice Thomas called the analogy "inapt" and not an "analog" to "[t]he unique role of an embassy in facilitating communications between sovereign governments." *Id.* at 1065 (Thomas, J., dissenting).

121. *Id.* at 1057 (majority opinion). In his dissent, Justice Thomas explains some of the reasons why these examples are unpersuasive:

> First, the Court offers a series of hypotheticals to suggest that the term "dispatched" not only contemplates a prompt shipment, but also connotes sending the letter directly to a place where the person is likely to be physically located. In my opinion, these hypotheticals are inapt. The unique role of an embassy in facilitating communications between sovereign governments does not have an analog in the hypotheticals offered by the majority. And to the extent the statute emphasizes speed and directness, as the majority suggests, dispatching a letter to a Washington-based embassy with a direct line of communication to the foreign minister—including the ability to communicate electronically—seems at least as efficient as dispatching the letter across the globe to a foreign country, particularly if that country has recently experienced armed conflict or political instability.

Id. at 1065 (Thomas, J., dissenting).

122. *Id.* at 1057 (majority opinion). Justice Alito elaborates:

> As first-year law students learn in their course on contracts, there is a presumption that a mailed acceptance of an offer is deemed operative when "dispatched" if it is "properly addressed." Restatement (Second) of Contracts § 66, p. 161 (1979) (Restatement); Rosenthal v. Walker, 111 U.S. 185, 193 (1884). But no acceptance would be deemed properly addressed and dispatched if it lacked, and thus was not sent to, the offeror's address (or an address that the offeror held out as the place for receipt of an acceptance). *See* Restatement § 66, Comment b.

Id.

involving a statute that deals with matters light-years distant from the bargaining process of contractual formation between private parties.[123]

Urging that the requirement of Section 1608(a)(3) that certified mail with a return receipt be used as the medium of service, Justice Alito's opinion embarks on another shaky avenue of analysis.[124] Just as Justice Alito did in making the conclusory, unsupported assertion that *addressing* "in a great majority of cases" means sending either to the addressee's residence or place of business, he conclusorily asserts here that *requiring a return receipt* is "much less likely" to be done with the expectation that an embassy employee sign for the mailing than with the expectation that a foreign ministry employee will sign for it, because it less likely that the embassy employee "has authority to receive mail on the [foreign] minister's behalf and has been instructed on how that mail is to be handled."[125] No citation to any diplomatic handbook, embassy procedure book, or any other sources—other than the Justice's own sense of things—is provided to support this argument.[126] Yet, while appealing perhaps to the judicial ego, such assertions are simply *ex cathedra* and thus not actually persuasive to the thoughtful reader.

Working to shore up a house of cards, Justice Alito also turns to contextual arguments about the interplay between FSIA Section 1608(a)(3)

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123. Nor is the mailbox rule an inevitable rule, somehow derived from overarching principles informing the common law. Indeed, it is a rule that has been criticized, and by none more eloquently than the great English judge, Baron Bramwell, who observed that "[t]here is no reason in it; it is simply arbitrary":

> Suppose a man has paid his tailor by cheque or banknote, and posts a letter containing a cheque or banknote to his tailor, which never reaches, is the tailor paid? If he is, would he be if he had never been paid before in that way? Suppose a man is in the habit of sending cheques and banknotes to his banker by post, and posts a letter containing cheques and banknotes, which never reaches. Is the banker liable? Would he be if this was the first instance of a remittance of the sort? In the cases I have supposed, the tailor and banker may have recognised this mode of remittance by sending back receipts and putting the money to the credit of the remitter. Are they liable with that? Are they liable without it? The question then is, is posting a letter which is never received a communication to the person addressed, or an equivalent, or something which dispenses with it? It is for those who say it is to make good their contention. I ask why is it? My answer beforehand to any argument that may be urged is, that it is not a communication, and that there is no agreement to take it as an equivalent for or to dispense with a communication. That those who affirm the contrary say the thing which is not.

The Household Fire and Carriage Accident Insurance Company (Limited) v. Grant, 4 Ex D 216, 233–35 (Bramwell, J., dissenting).

124. *Harrison*, 139 S. Ct. at 1057.

125. *Id.* at 1056–57

126. *Id.* at 1057.

with a variety of other FSIA sections, including Sections 1608(b)(3)(B), Section 1608(b)(2), and Section 1608(c).[127] The arguments are in part responsive to the plaintiffs' desperate efforts to save their $300 million default judgment and in other part simply speculation "how Congress would have worded *this* FSIA provision of it had intended *that*" to be the effect of the FSIA provision in question.[128] While there is nothing obviously wrong in what is being said, one has to wonder whether this should be a pier to support the span of the bridge or merely a confirmation that the bridge is already on piers that support its weight.

After all of this, Justice Alito at last faces up to what he has studiously ignored to this point—the effect of the Vienna Convention on Diplomatic Relations,[129] particularly Article 22(1)'s admonition that "[t]he premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.[130]

Rather than acknowledge that the legislative history of FSIA Section 1608(a)(3) clearly and without internal contradiction shows that Congress was aware of this requirement (and the State Department's view that Article 22(1) precluded using a foreign embassy as a medium for serving its government) and intended no infringement of America's obligations under international law, Justice Alito congratulates the textual result he has reached because it avoids more difficult issues with international implications.[131] But of course, it is resolving difficult issues that SCOTUS is supposed to be all about.[132] And by avoiding the opportunity to confirm the Convention's obligations on its parties, the Supreme Court leaves unresolved an important issue squarely raised by this case.

It is also noteworthy that in completely ignoring Congress's on-point and relevant legislative history, Justice Alito instead takes an arguably gratuitous opportunity to aggrandize further deference to the Executive Branch by reiterating that "[i]t is also 'well settled that the Executive Branch's interpretation of a treaty "is entitled to great weight."'[133]

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127. *Id.* at 1058.

128. *See id.* at 1057–60. In Justice Alito's textualist toolkit, this discussion fits the command that "'It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Id.* at 1057 (citation omitted).

129. *Id.* at 1060.

130. *Id.* (quoting Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3237, T.I.A.S. No. 7502.) (italics supplied).

131. *Id.* at 1061 ("By giving § 1608(a)(3) its most natural reading, we avoid the potential international implications of a contrary interpretation.").

132. *See* Aharon Barak, *The Role of a Supreme Court in a Democracy*, 53 HASTINGS L.J. 1205 (2002); *cf.* LISA A. KLOPPENBERG, PLAYING IT SAFE: HOW THE SUPREME COURT SIDESTEPS HARD CASES AND STUNTS THE DEVELOPMENT OF LAW (2002).

133. *Harrison*, 139 S. Ct. at 1060 (citations omitted).

The bottom line for Justice Alito was that "[w]e interpret § 1608(a)(3) as it is most naturally understood: A service packet must be addressed and dispatched to the foreign minister at the minister's office in the foreign state."[134] The Author of this Article does not disagree. However, as discussed in Subsection C.3, the hierarchy of sources was turned on its head by Justice Alito's peculiar way of using textualism, thereby avoiding an important pronouncement on the U.S. obligation under Article 22 of the Vienna Convention while at the same time providing an unconvincing bundle of loosely connected assertions as a "textual analysis."[135] The quality of the Court's jurisprudence can only suffer as a result. Before reaching that discussion, however, we examine in Subsection C.2 the schism that erupted when the Court's textualist nonpareil, Justice Thomas, dissented, finding an entirely different answer in deploying the textualist toolkit.[136]

b. *Justice Thomas: Apostle—Or Apostate? How the Same Words Seem to Have a Different Meaning to Justice Thomas in* Harrison

Justice Thomas dissented because he found the service there to be authorized by the statute and, remarkably, *not* prohibited by the Vienna Convention.[137] Thus, the $300 million default judgment would have stood had his views won the day.

To get to this destination, he had to navigate around the steel-trap word-play reasoning of his brother-in-textualist-arms, Justice Alito. Justice Thomas was all too well aware of that. He acknowledged it early on:

> To serve a foreign state by certified mail under the FSIA, the service packet must be "addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." In many respects, *I approach this statutory text in the same way as the Court. I have no quarrel with the majority's definitions of the relevant statutory terms, and I agree that the FSIA does not deem a foreign state properly served solely because the service method is reasonably calculated to provide actual notice. Nor does the FSIA authorize service on a foreign state by utilizing an agent designated to receive process for the state. At the same time, the FSIA stops short of requiring that the foreign minister personally receive or sign for the service packet: As long as the service packet is "addressed and dispatched ... to" the foreign minister, §*

134. *Id.* at 1062.
135. *Id.* at 1056–57, 1060–62.
136. *Id.* at 1064–66 (Thomas, J., dissenting).
137. *Id.* at 1063, 1066.

> *1608(a)(3), the minister's subordinates may accept the packet and act appropriately on his behalf. In short, I agree with the majority that § 1608(a)(3) requires that the service packet be dispatched to an address for the foreign minister.* The relevant question, in my view, is whether a foreign state's embassy in the United States can serve as a place where the minister of foreign affairs may be reached by mail. Unlike the majority, I conclude that it can.[138]

One is compelled, however, to enquire further beyond Justice Thomas's ratiocination here. Why would Justice Thomas conclude that the foreign embassy should be the mailman for the foreign minister? Justice Thomas opens his dissent with a statement of his views of what an embassy is supposed to do—a view reached without any apparent consultation of the views of any other of the 190 countries who signed the Vienna convention[139]—that shapes his "textualism" when the text does not actually support the result he reaches:

> Given the unique role that embassies play in facilitating communications between states, a foreign state's embassy in Washington, D. C., is, absent an indication to the contrary, a place where a U.S. litigant can serve the state's foreign minister. Because there is no evidence in this case suggesting that Sudan's Embassy declined the service packet addressed to its foreign minister—as it was free to do—I would hold that respondents complied with the FSIA when they addressed and dispatched a service packet to Sudan's Minister of Foreign Affairs at Sudan's Embassy in Washington, D. C.[140]

Justice Thomas's opinion insinuates that the majority has simply picked a policy it prefers—*convenience*—through the adoption of what he calls a "bright-line rule" to prohibit leaving process at foreign embassies.[141]

The balance of Justice Thomas's dissent can basically be broken down into two arguments.[142] First, nothing in FSIA Section 1608(a)(3) actually [a] prohibits service on a foreign embassy or [b] restricts the medium for transmitting process nor the number or identities of persons or entities doing the transferring.[143] Second, he finds that the Vienna Convention actually does not prohibit leaving mail or process on embassy

138. *Id.* at 1062–63 (emphasis supplied).
139. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 500 U.N.T.S. 95.
140. *Harrison*, 139 S. Ct. at 1062.
141. *Id.* at 1062, 1064 (Thomas, J., dissenting).
142. *Id.* at 1062–66.
143. *Id.* at 1062–65.

grounds.[144] Physical intrusions are, he insists, all that are prohibited.[145] As his basis for deriving this distinction, Justice Thomas categorizes some provisions of the Convention as providing "inviolability" while others provide "immunity", and characterizes the problem here as one of immunity, not inviolability, for which the convention does not confer "immunity."[146] In so doing, he cites none of the American cases dealing with serving process at or "via" a foreign embassy; none of the legislative history against it; nor even the State Department's consistent position against it.[147] Nor does he consider what any of the other 190 parties to this fifty-eight-year-old treaty has had to say on the subject.[148]

c. *Textualism in* Harrison*: A Sum That Is Less Than Its Component Parts?*

The *Harrison* opinions—along with those discussed in Section III.B in *Bostock v. Clayton County*—are textbook illustrations of Professor Eskridge's observation that while "[t]extualism is now clearly ascendant and will remain so for the foreseeable future," it is "at the same time, … splintering, or at least the veneer of methodological consensus that textualism supposedly represents is eroding" since "the Court's textualists frequently disagree—not merely about *how* to apply text-based interpretive principles to resolve hard cases but also about *what* the relevant rules are."[149] Indeed, "the newest textualists disagree about the definition of textualism itself."[150]

Furthermore, as practiced by these textualists on the Court, textualism has become like trying to untangle the complex and elusive battles of the various warring camps of Faith during the Reformation.[151]

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144. *Id.* at 1065–66.

145. *Id.* at 1066.

146. *Id.* at 1066. ("Given the VCDR's consistent use of 'inviolability' to protect against physical intrusions and interference, and 'immunity' to protect against judicial authority, Article 22(1)'s protection of the mission premises is best understood as a protection against the former.").

147. *Id.* at 1062–66.

148. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, https://treaties.un.org/doc/Treaties/1964/06/19640624%2002-10%20AM/Ch_III_3p.pdf [https://perma.cc/F7VL-U8HH]. Justice Thomas does, however, cite one case from another Treaty Party – the United Kingdom. Reyes v. Al-Malki, [2017] UKSC 61, from the Supreme Court of the United Kingdom, available at https://www.supremecourt.uk/cases/docs/uksc-2016-0023-judgment.pdf [https://perma.cc/C7FU-NHXJ]. The support, at best however, is tangential.

149. William N. Eskridge, Jr., Brian G. Slocum & Kevin Tobia, *Textualism's Defining Moment*, 123 COLUM. L. REV. 1611, 1616 (2023).

150. *Id.*

151. *See, e.g.*, Christopher Fletcher, *Religious Wars In Early Modern Europe*, THE NEWBERRY (Aug. 31, 2018), https://dcc.newberry.org/?p=14404 [https://perma.cc/C7ME-CXA7]; *see generally* DIARMAID MACCULLOCH, THE REFORMATION: A HISTORY (2005);

The sterile and pedantic opinions in *Harrison* are the antithesis of practical reasoning. In fact, the cabined tools to which Justice Alito and Justice Thomas limited themselves in performing the important work to be done in *Harrison* actually obscure the issues rather than illuminate them. By contrast, each of the U.S. Courts of Appeals that correctly analyzed the service issue and came to the same result as SCOTUS did so using, not the barren textualism of Justices Alito and Thomas, but rather, more common-sense "practical reasoning" approaches that focused on consistent U.S. policy and important segments of the FSIA's legislative history, both of which made clear that the U.S. Congress was well aware of our treaty obligations under the Vienna Convention and had no intention of allowing embassies to become either agents or viaducts for service of process on foreign governments.[152]

1. *Opati v. Republic of Sudan*

The Author originally undertook to examine Justice Gorsuch's own peculiar brand of textualism in a presentation he intended to call "Two Faces Of Textualism: Justice Gorsuch As Savior In *Opati v. Republic of Sudan*, As Slayer In *Comcast Corp. v. Nat'l Ass'n of African American-Owned Media*." That presentation was to be made in Fall 2020 Institute of Continuing Legal Education in Georgia's 27th Annual U.S. Supreme Court Update, where the Author's thesis was to be as follows:

> Justice Gorsuch insists that his textualism is the only true, neutral way of interpreting statutes. But his opinions in two unanimously decided cases use statutory text in critically different ways, to seemingly instrumentalist ends, in interpreting a modern anti-terrorism exception to the Foreign Sovereign Immunities Act versus a key Reconstruction-Era statute, the 1866 Civil Rights Act.

The COVID-19 Pandemic forced the cancellation of that Symposium. However, the Author shall do here and now what he had planned to do there and then.

HAROLD J. BERMAN, II LAW & REVOLUTION: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION (2003).

152. Kumar v. Republic of Sudan, 880 F.3d 144 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 1445 (2019); Barot v. Embassy of the Republic of Zambia, 785 F.3d 26, 29–30 (D.C. Cir. 2015); Transaero, Inc. v. La Fuerza Aerea Boliviana, 30 F.3d 148, 154 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1150 (1995); Magness v. Russian Fed'n, 247 F.3d 609, 611-13 (5th Cir. 2001), *cert. denied*, 534 U.S. 892 (2001); Alberti v. Empresa Nicaraguense De La Carne, 705 F.2d 250, 253 (7th Cir. 1983); Autotech Techs. LP v. Integral Rsch. & Dev. Corp., 499 F.3d 737, 748–49 (7th Cir. 2007), *cert. denied*, 552 U.S. 1231 (2008).

Justice Gorsuch's opinion for the Court in *Opati*[153] is important here not so much for what it says about the FSIA—for it is surely a triumph for victims of terrorism seeking both relief from and retribution against a foreign sovereign. For present purposes, its importance lies in that it shows that the Justices are willing to kowtow to a textualist to secure an outcome. It gives real meaning to a comment that Justice Kagan made during a Harvard Law School lecture in 2015: "We're all textualists now."[154] Conceding this ground has profound implications not just for statutory interpretation but for substantive outcomes. As Professor Eskridge has noted, "[t]ypically, the pragmatic minority silently joins a textualist majority . . . or they write their own, very similar, text-based opinions."[155]

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153. Opati v. Republic of Sudan, 590 U.S. 418 (2020).

154. Benjamin Berger, *Justice Kagan on Textualism's Success*, PROFSBLOG (Dec. 15, 2015, 8:00 AM), https://prawfsblawg.blogs.com/prawfsblawg/2015/12/justice-kagan-on-textualisms-victory.html [https://perma.cc/2Q4N-6N4A]. Professor Berger elaborated insightfully on the full import of Justice Kagan's observation:

> Kagan's lecture reinforces a conventional wisdom on textualism's recent success. Early on (9:10), Kagan beautifully describes the Scalian turn in statutory interpretation while acknowledging its incompleteness. Over time, anti-textualist views have fallen away, so that the center of gravity has moved toward Scalia. Yet Scalia still lies near one end of a spectrum. Both Kagan and Manning adduced evidence of this shift. But the most powerful proof of this claim is the lecture itself. When Kagan, a recent democratic appointee to the Supreme Court, gives a "Scalia Lecture" at Harvard Law School and says (8:25) that "we're all textualists now," she has already gone a long way toward proving that point.
>
> But even Kagan's nuanced lecture, like the conventional wisdom, may give an exaggerated impression of textualism's ascendance. While certain strong versions of purposivism are all but vanquished, the Court's most recent term and even Kagan's own comments suggest that a more moderate, evolved form of purposive reasoning is alive and well.

Id. But Justice Gorsuch's seduction of an entire Court in a serious misreading of the Civil Rights Act of 1866 suggests that the rosy picture painted by Professor Berger in 2015 had become much more dire by 2020.

155. Eskridge et. al., *supra* note 149, at 1615. The Author has previously written on Justice Sotomayor's example in Rubin v. Islamic Republic of Iran. *See* Jeffrey A. Van Detta, *Suing Sponsors of Terrorism in U.S. Courts: In Rubin v. Islamic Republic of Iran and Jesner v. Arab Bank, PLC: SCOTUS Trims to Statutory Boundaries the Recovery in U.S. Courts Against Sponsors of Terrorism and Human-Rights Violations Under FSIA and ATS*, 29 INDIANA INT'L & COMPAR. L. REV. 303 (2019). As the Author observed about Justice Sotomayor's imitative textualism in *Rubin*:

> While Justice Sotomayor's analysis is undoubtedly correct, it adds little to Judge Sykes' more accessible (complete with diagram) opinion for the 7th Circuit; and the orthodoxy of its approach – a bit like a Justice Scalia, except lacking the wit, the humor, and the style that made sober statutory interpretation bearable under his fierce

The Author explores these in more detail in Subsection III.B, where the substantive impact of Justice Gorsuch's textualism is most powerfully revealed—and it just as often makes casualties as it makes clarity.

Opati raised a question of retroactivity—specifically, whether courts could retroactively apply an amendment to the FSIA, by which Congress authorized federal courts to award both compensatory *and punitive* damages against nations found to have aided and abetted terrorism that injured or killed the plaintiff or plaintiffs.[156] The events in question retroactively occurred before the effective date of the amendment that provided for recovery of punitive damages against a foreign sovereign that was (1) listed by the U.S. State Department as a sponsor of terrorism and (2) proven to have sponsored a terrorist act that injured Americans.[157]

> tutelage – reminds one of Judge Posner's critique of the entire textualist exercise as conceived of by the late Justice Scalia:
>
> This austere interpretive method leads to a heavy emphasis on dictionary meanings, in disregard of a wise warning issued by Judge Frank Easterbrook, who though himself a self-declared textualist advises that "the choice among meanings [of words in statutes] must have a footing more solid than a dictionary—which is a museum of words, an historical catalog rather than a means to decode the work of legislatures."

Id. at 328 (citation omitted) (emphasis omitted). Yet, such imitation to curry the votes of textualist colleagues will, over time, inevitably shift the Court's approach towards the extremes of textualism and away from the moderation of more moderate approaches.

156. *See Opati*, 590 U.S. at 427–28.

157. As the D.C. Circuit explained the background of the laws at issue:

> Until 1996 the FSIA provided no relief for victims of a terrorist attack. Courts consistently rebuffed plaintiffs' efforts to fit terrorism-related suits into an existing exception to sovereign immunity. *See, e.g.*, *Saudi Arabia v. Nelson*, 507 U.S. 349, 113 S. Ct. 1471, 123 L. Ed. 2d 47 (1993); *Cicippio v. Islamic Republic of Iran*, 30 F.3d 164 (D.C. Cir. 1994); *Smith v. Socialist People's Libyan Arab Jamahiriya*, 886 F. Supp. 306 (E.D.N.Y. 1995). This changed with the passage of the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214, which added a new exception to the FSIA withdrawing immunity and granting jurisdiction over cases in which
>
> money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

Id. at § 221, 110 Stat. at 1241–43 (codified at 28 U.S.C. § 1605(a)(7) (2006) (repealed)).

Senior Circuit Judge Douglas H. Ginsburg wrote the opinion for a unanimous D.C. Circuit panel.[158] He explained the applicable law as articulated in the Supreme Court's own 1994 precedent *Landgraf v. USI Film Products*.[159] "An analysis of retroactivity entails two steps," Judge Ginsburg wrote.[160] "First, the court must determine 'whether Congress has expressly prescribed the statute's proper reach,'" and "[i]f the Congress has clearly spoken, then 'there is no need to resort to judicial default rules,' and the court must apply the statute as written."[161] However, "[w]hen 'the statute contains no such express command,' the court must then evaluate whether the legislation 'operate[s] retroactively,' as it does if it 'would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.'"[162] "If the statute operates retroactively but lacks a clear statement of congressional intent to give it retroactive effect, then the *Landgraf* presumption controls and the court will not apply the statute to pre-enactment conduct."[163]

On certiorari, Justice Gorsuch rejected Judge Ginsburg's approach entirely. Asserting that the case is one entirely resolved on the face of the statutory amendment itself, Justice Gorsuch propounded a perfectly reasonably sounding textualist explanation, in which he dismissed the relevance of the *Landsgraf* presumption entirely.[164]

This new "terrorism exception" applied only to (1) a suit in which the claimant or the victim was a U.S. national, 28 U.S.C. § 1605(a)(7)(B)(ii), and (2) the defendant state was designated a sponsor of terrorism under State Department regulations at or around the time of the act giving rise the suit, § 1605(a)(7)(A) (referencing 50 U.S.C. App. § 2405(j) and 22 U.S.C. § 2371). The AEDPA also set a filing deadline for suits brought under the new exception at ten years from the date upon which a plaintiff's claim arose. 28 U.S.C. § 1605(f). Owens v. Republic of Sudan, 864 F. 3d 751, 763–64 (D.C. Cir. 2017), *vacated and remanded sub nom.*; *Opati*, 590 U.S. 418.

158. Judge Ginsburg was far from a well-known liberal. In fact, he has impressive conservative credentials. *See, e.g.*, Douglas H. Ginsburg, *Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making*, 33 HARV. J. L. & PUB. POL'Y, 217 (2010). In fact, President Reagan nominated him to the U.S. Supreme Court after the nomination of fellow D.C. Circuit Judge Robert Bork was voted down by the Senate in 1987. *See* Joel Brinkley, *May Face a Fight: Some Democrats Told Reagan of Questions on the Nominee*, N.Y. TIMES, Oct. 30, 1987, at A1; Stuart Taylor Jr., *Youthful Conservative Judge: Douglas Howard Ginsburg*, N.Y. TIMES, Oct. 30, 1987, at D23. Indeed, during the pendency of his nomination, his liberal critics dubbed him "Ginsbork." William Safire, *The End of the Affair*, N.Y. TIMES, Nov. 29, 1987, at E17.

159. *See generally* Landgraf v. USI Film Prods., 511 U.S. 244 (1994).

160. *Owens*, 864 F.3d at 814.

161. *Id.* (quoting *Landgraf*, 511 U.S. at 245 (1994)).

162. Id.

163. *Id.* at 814–15.

164. Opati v. Republic of Sudan, 590 U.S. 418, 427–28 (2020) (citation omitted) ("As we see it, however, there is no need to resolve the parties' debate over interpretive presumptions. Even if we assume (without granting) that Sudan may claim the benefit of *Landgraf*'s presumption of prospectivity, Congress was as clear as it could have been when

Justice Gorsuch's opinion is hard to argue with—at least, once he tosses aside the canon of presuming no retroactivity, which he does when the defendant is a foreign sovereign, rather than a private party.[165] He insists that the canon is inapplicable because the language of the amendment in question is crystal clear. That point might very well be debatable, but two[166] of the three dissenters in *Republic of Austria v. Altman*,[167] the case Justice Gorsuch cited in support of weakening that interpretative canon (at least when foreign sovereigns are involved), were no longer on the court, and the third—Justice Thomas[168]—apparently had no appetite for raising the

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it authorized plaintiffs to seek and win punitive damages for past conduct using § 1065A(c)'s new federal cause of action.").

165. *Id.* at 426. In so doing, Justice Gorsuch explained that:

> Because foreign sovereign immunity is a gesture of grace and comity, . . . it is also something that may be withdrawn retroactively without the same risk to due process and equal protection principles that other forms of backward-looking legislation can pose. Foreign sovereign immunity's "principal purpose," after all, "has never been to permit foreign states . . . to shape their conduct in reliance on the promise of future immunity from suit in United States courts."

Id. (citing and quoting Republic of Austria v. Altmann, 541 U.S. 677, 696 (2004) (holding that held that the FSIA applies to conduct that occurred prior to its enactment – the Nazi looting of art and other private property during the 1930s and 1940s – and before the United States' adoption of the restrictive theory of sovereign immunity). The Altmann ruling, however, drew a sharp dissent from Justice Kennedy, joined by Chief Justice Rehnquist and Justice Thomas. *See Altmann*, 541 U.S. at 715 (Kennedy, J., dissenting) ("To reach its conclusion the Court must weaken the reasoning and diminish the force of the rule against the retroactivity of statutes, a rule of fairness based on respect for expectations; the Court abruptly tells foreign nations this important principle of American law is unavailable to them in our courts; this is so despite the fact that treaties and agreements on the subject of expropriation have been reached against a background of the immunity principles the Court now rejects; as if to mitigate its harsh result, the Court adds that the Executive Branch has inherent power to intervene in cases like this; this, however, is inconsistent with the congressional purpose and design of the FSIA; the suggestion reintroduces, to an even greater degree than before, the same influences the FSIA sought to eliminate from sovereign immunity determinations; the Court's reasoning also implies a problematic answer to a separation-of-powers question that the case does not present and that should be avoided; the ultimate effect of the Court's inviting foreign nations to pressure the Executive is to risk inconsistent results for private citizens who sue, based on changes and nuances in foreign affairs, and to add prospective instability to the most sensitive area of foreign relations.").

166. *See* Linda Greenhouse, *Chief Justice Rehnquist Dies at 80*, N.Y. TIMES, Sept. 4, 2005, at 1; Press Release, U.S. Supreme Court (Jun. 27, 2018), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_06-27-18 [https://perma.cc/P4K5-JJUF] ("Justice Kennedy today advised his colleagues that he is submitting to the President a formal notification of his decision, effective July 31 of this year, to cease active status as an Associate Justice and to assume senior status.").

167. *Altmann*, 541 U.S. 677.

168. This is unlike those issues that he continues to get before the court, by concurring in, or dissenting repeatedly from, denials of certiorari and inviting in those dissents parties to bring challenges to precedents and doctrines for which he has unshakable disapprobation. *See, e.g.*, Dobbs v. Jackson Women's Health Ctr., 597 U.S. 215, 332 (2022) (Thomas, J.,

objection again. The result in that case is thus not surprising, particularly since Sudan initially and intentionally defaulted in the case and because choices made by the Sudanese government do not make it an easy[169] object of judicial empathy. What is of more interest for our purposes, however, is how Justice Gorsuch's brand of textualism picks and chooses among interpretative canons and when to apply them. The canon against retroactivity he chose not to apply when the defendant was a foreign sovereign in *Opati* was applied to protect employers found liable for discrimination in violation of Title VII of the 1964 Civil Rights Act from retroactive application of the Civil Rights Act of 1991's provision for punitive damages when discrimination in reckless disregard of an individual's Title VII rights is proven.[170] And when it came time to deal with causation needed for an individual to prove racial discrimination in contracting in violation of the Civil Rights Act of 1866, Justice Gorsuch did just the opposite with interpretative canons—he reached for one that the

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concurring) (arguing that the Court "should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*" and that "[b]ecause any substantive due process decision is 'demonstrably erroneous,' *Ramos v. Louisiana*, 140 S. Ct. 1390, 1424, 206 L. Ed. 2d 583 (2020) (Thomas, J., concurring in judgment), we have a duty to 'correct the error' established in those precedents."); Berisha v. Lawson, 141 S. Ct. 2424, 2424–25 (2021) (Thomas, J., dissenting) (seeking reassessment and overruling of N.Y. Times v. Sullivan, 376 U.S. 254 (1964)); McKee v. Cosby, 139 S. Ct. 675, 675–82 (2019) (Thomas, J., concurring).

169. *See, e.g.*, Andrew Chung, *U.S. Supreme Court Heaps More Damages On Sudan In Embassy Bombing Cases*, REUTERS (May 19, 2020, 3:58 AM), https://www.reuters.com/article/idUSKBN22U204/ [https://perma.cc/E23P-G5JL]. Another journalist saw how coolly most of the *Opati* court reacted to the notion that there might be any protection for a foreign sovereign under either Due Process clause of the U.S. Constitution:

> [W]hen read in light of justices' questions at oral argument, Monday's decision seems more clearly opposed to constitutional protections for foreign sovereigns. Three out of the eight justices cast doubt on the notion. Justice Alito asked, "In a case involving … a private defendant, rather than a sovereign nation, are there constitutional limits on Congress's ability to make punitive damages retroactive?" Chief Justice Roberts challenged, "If Landgraf . . . is a sort of substantive interpretive canon that is based on constitutional concern, why would it apply at all in a case involving a foreign sovereign?" Justice Kagan expressed disbelief at the notion that a defendant foreign state could challenge retroactive legislation that didn't include punitive damages — even though private parties can do precisely that on constitutional grounds. Justice Breyer was perhaps more open to the idea, quipping, "I guess if corporations are persons, maybe foreign countries are too."

Haley S. Anderson, *The Significance of the Supreme Court's Opati Decision for States and Companies Sued for Terrorism in U.S. Courts*, JUST SECURITY (May 19, 2020), https://www.justsecurity.org/70260/the-significance-of-the-supreme-courts-opati-decision-for-states-and-companies-sued-for-terrorism-in-u-s-courts/ [https://perma.cc/GCS2-5E7C].

170. *Compare* Opati v. Republic of Sudan, 590 U.S. 418, 426 (2020), *with* Bostock v. Clayton, 590 U.S. 644, 653 (2020).

Court had been developing with respect to various discrimination statutes, and he used it to defeat the clear language of an entirely separate law, with entirely different working, enacting nearly a century earlier. This point will be elaborated upon in Section III.B.2. For now, suffice it to say that *Opati* is an example of just how comfortable the Justices have become in allowing a colleague to use textualism in what they see as a helpful context, despite that fact that it can turn around—in the same term—to strike at a law whose broad remedial impact the textualists are committed to stifling—and to do so with the silent acquiescence of Justices who surely should know better.

Before we leave the *Opati* case, however, there is a quiet coda worthy of our attention because of its earth-shaking results. The kinds of concerns that motivated the dissenters from the case (*Altmann*) that Justice Gorsuch relied so heavily upon in discarding a canon of interpretation that he found inconvenient—despite a compelling dissent from Justice Kennedy in that case—apparently resonated more loudly with America's State Department. Three years after *Opati*, "[i]n support of its efforts to normalize relations with Sudan under the civilian-led transitional government—and to achieve a measure of compensation for victims of international terrorism—the United States entered into negotiations with Sudan to resolve pending lawsuits against Sudan for terrorism-related conduct in U.S. courts."[171] As explained by the current Solicitor General of the United States in a brief opposing certiorari in a subsequent case brought against Sudan on terrorism grounds:

> [t]en days after petitioners filed their complaint, the United States and Sudan entered into a Claims Settlement Agreement. In the Agreement, the President espoused and terminated all claims of U.S. nationals against Sudan related to terrorism occurring outside the United States. In exchange, Sudan agreed to provide compensation for plaintiffs in suits relating to terrorist attacks for which federal courts had found Sudan liable, and suits in which Sudan had reached private settlements. Congress then enacted the Sudan Claims Resolution Act, which restored Sudan's immunity from suit and eliminated district court jurisdiction over terrorism-related claims. Sudan Claims Resolution Act (SCRA),. . . The SCRA expressly preserves jurisdiction in U.S. courts over pending litigation against Sudan arising from the September 11, 2001 terrorist attacks within the United States. Because the attack that injured

171. Brief for the U.S. in Opposition at 4, Mark v. Republic of Sudan, 77 F. 4th 892 (D.C. Cir. 2023) (No. 23-708).

> petitioners occurred abroad, the SCRA eliminated the district court's jurisdiction over their suit.[172]

This Executive Agreement and ratifying statute, therefore, effectively settle the claims made against Sudan in the *Opati* case, among many other claims embraced by the Agreement and statute, for a fraction of what was awarded in the original *Opati* default judgment by the D.C District Court.[173]

Justice Gorsuch's hyper-focused approach in *Opati* also therefore demonstrates another problem of textualism that retired Justice Breyer described in his recent book: "The words of the statute themselves [can be] far from clear. That is why this case ended up in the Supreme Court. But the Court's method of clarifying the language—relying upon text and only upon text—draws aside the curtain in the darkened room to reveal nothing beyond the pitch-black night."[174] And here, lurking in that night beyond the curtain of words, is the practical and practical realities of one sovereign

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172. *Id.* at I. As the Solicitor General urged it to do in her brief, the Court denied certiorari. *See* Mark v. Republic of Sudan, 144 S. Ct. 1456 (Mem.) (2024). As the Solicitor General explained this resolution made in the waning days of the Trump Administration:

> In the Claims Settlement Agreement, the United States agreed to accept payment of $335 million as a "full and final settlement * * * through espousal," of all claims of U.S. nationals related to acts of terrorism "occurring outside of the United States of America and prior to" the Agreement's date of execution. That payment provided the funds for distribution to eligible U.S.-national plaintiffs in five identified cases arising from three particular acts of terrorism: the August 7, 1998 bombing of the U.S. embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania (the Embassy Bombings); the October 12, 2000 bombing of the U.S.S. Cole in Yemen (the Cole Bombing); and the January 1, 2008 killing in Sudan of United States Agency for International Development employee John Granville. The agreement also establishes a process to compensate eligible foreign nationals who already had been awarded damages in four identified suits arising from the Embassy Bombings.

Id. at 5–6 (footnotes and citations omitted). *Opati* was one of those four suits. *Id.* at 6 n.2.

173. That court entered damages awards of $10.2 billion, including approximately $4.3 billion in punitive damages, and denied Sudan's motion to vacate the default judgment. *See Opati*, 590 U.S. at 424; *see also* Owens v. Republic of Sudan, 174 F. Supp. 3d 242 (D.D.C. 2016).

174. BREYER, *supra* note 6, at 67.

enforcing penal judgements against the assets of another sovereign[175]—and what kind of real-world fallout that would either promote—or even force.[176]

By hewing to a skewing focus only on narrowly-chosen words, and not on a fuller and more sober examination of context and consequences, Justice Gorsuch's approach strikes one either as politically naïve[177]—or, as is more likely the case, calculated to yield returns on the larger judicial battlegrounds, such as those discussed in the following section.[178]

B. The Reconstruction Era Civil Rights Statute and Its Successor A Century Later

The Supreme Court became dominated by Republican appointees within a few years of when D.C. Circuit Judge Warren Burger succeeded Earl Warren as Chief Justice in 1969.[179] President Richard Nixon's appointments of Justices Blackmun, Powell, and Rehnquist solidified a

175. See Karen J. Tolson, *Punitive Damage Awards in International Arbitration: Does the Safety Valve of Public Policy Render Them Unenforceable in Foreign States?*, 20 LOY. L.A. L. REV. 455 (1987); Law Review Editors, *Extrastate Enforcement of Penal Laws*, 25 U. CHI. L. REV. 187 (1957); *see also* Paul A. Hoversten, *Punishment but Not a Penalty? Punitive Damages Are Impermissible Under Foreign Substantive Law*, 116 MICH. L. REV. 759 (2018). *See generally* The Antelope, 23 U.S. 66, 123 (1825) (holding that a Spanish statute decreeing forfeiture of slaving vessels would not be enforced with respect to a Spanish craft captured off the American coast by a United States revenue-cutter).

176. An insightful student commentator foresaw this over twenty years ago. *See* Daveed Gartenstein-Ross, Note, *Resolving Outstanding Judgments Under the Terrorism Exception to the Foreign Sovereign Immunities Act*, 77 N.Y.U. L. REV. 496, 496 (2002) (arguing that "the best method for resolving outstanding judgments [against foreign sovereigns rendered under the "terrorism exception" to sovereign immunity] is to terminate them and resubmit the claims to ad hoc international tribunals," and noting that "[a]lthough successful plaintiffs whose judgments [would thereby be] abrogated [could] bring takings claims against the government, . . . those claims should be surmountable through a sensible application of takings jurisprudence."); *see also* Troy C. Homesley III, *"Towards a Strategy of Peace": Protecting the Iran Nuclear Accord Despite $46 Billion in State-Sponsored Terror Judgments*, 95 N.C. L. REV. 795, 803 (2017).

177. Of the son of a politically savvy and contentious Washington political insider, Anne Gorsuch Burford, it simply is not tenable to believe. In fact, Justice Gorsuch was a mere 15 years of age when he reproached his mother for resigning as the Director of the Environmental Protection Agency during President Reagan's first term. "'You should never have resigned,' he told his mother . . . 'You didn't do anything wrong. You only did what the president ordered. Why are you quitting? You raised me not to be a quitter. Why are you a quitter?'" Adam Liptak, Peter Baker, Nicholas Fandos & Julie Turkewitz, *For Court Pick, Painful Lesson From Boyhood: Mother and Congress Faced Off in the '80s*, N.Y. TIMES, Feb. 5, 2017 at 1. *See generally* ANNE BURFORD & JOHN GREENYA, ARE YOU TOUGH ENOUGH? AN INSIDER'S VIEW OF WASHINGTON POWER POLITICS (1986).

178. *See, e.g.*, Elizabeth Slattery, *Narrow Unanimity, Strange Bedfellows, and a Transitional Term*, 48 PREVIEW U.S. SUP. CT. CASES 6, 8 (2021) (noting the ways in which the voting patterns of the Justices after the arrival of Neil Gorsuch raise the question, "Is this evidence of strategic voting or calling balls and strikes?").

179. EARL M. MALTZ, THE CHIEF JUSTICESHIP OF WARREN BURGER, 1969-1986 xi–xii (Herbert A. Johnson ed., 2000).

rightward drift, particularly in matters of statutory interpretation.[180] During this time, the federal employment discrimination laws became increasingly narrowed and technocratic under the precedents being set by the Burger, Rehnquist, and Roberts courts.[181] What had been understood in the Warren Court as laws of broad remediation became the objects of constant pruning and retrenchment in the hands of increasingly conservative—and unsympathetic—majorities on the Court.

Among the statutes that have borne the brunt of this retrenchment are the nation's oldest anti-discrimination law, the Civil Rights Act of 1866, and the nation's landmark antidiscrimination law—championed by President Lyndon Johnson as successor to the slain and sympathetic John F. Kennedy—the Civil Rights Act of 1964.

In this subsection, we will examine two landmark cases that were heavily impacted by the Supreme Court's textualism, although in very different ways: the *Comcast* case,[182] involving a devastating misinterpretation of the Civil Rights Act of 1866, and the *Bostock* case, involving a misuse of textualism to get the right result under Title VII of the Civil Rights Act of 1964, which would have come naturally from pragmatism.

1. Textualists Inventing a New Interpretative Canon to Cast Aside Plain Language: The Co-Opting of the Court to Cripple the Efficacy of the Civil Rights Act of 1866

Like the Alien Tort Statute of 1789, the Civil Rights Act of 1866 spent most of its first hundred years moribund.[183] It took a Warren Court

180. *Id.* at xii.

181. *See generally id.*

182. Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 589 U.S. 327 (2020).

183. Some commentators have opined that "section 1981 was inevitably drawn into the controversies–to this day not fully resolved–over the meaning of the [Fourteenth Amendment's] Equal Protection Clause." George Rutherglen, *The Improbable History of Section 1981: Clio Still Bemused and Confused*, 2003 SUP. CT. REV. 303, 305 (2003) (alteration in original). "For this reason," Professor Rutherglen has observed, "[S]ection 1981 was soon completely overshadowed by the Fourteenth Amendment and fell into a long period of disuse in which it had virtually no independent significance." *Id.* The statute, these commentators argue, was engulfed in the larger "debates over the Fourteenth Amendment and, in particular, over the deep and enduring question of what constitutes equality under the Equal Protection Clause." *Id.* Those debates centered on "[q]uestions about the coverage of the clause–why it was limited to state action– [which] were merged with questions about the kind of equality that it protected–whether it was civil, political, or social." *Id.* (alteration in original). In addition, after vigorous enforcement efforts of the Reconstruction Amendments and statutes during the first Grant Administration, the momentum slowed during the second Grant Administration and fell off a figurative cliff with the end of Reconstruction and the compromise Presidential election of 1876. *See, e.g.*, Robert J. Kaczorowski, *Federal Enforcement of Civil Rights During the First Reconstruction*, 23 FORDHAM URB. L.J. 155 (1995); Robert J. Kaczorowski, *The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of Runyon v. McCrary*. 98 YALE L.J. 565 (1988); ROBERT J.

decision and a Burger Court decision to free the statute from the debates over the meaning and scope of equality under the Fourteenth Amendment[184] by clarifying that the Civil Rights Act of 1866 drew its authority from the Thirteenth Amendment and thus applied directly to private action, not just state action.[185]

And like Title VII, the Civil Rights Act of 1866 has had to contend with judicial attempts to make it something less than its clear language intended—as if some judges could not or would not believe that Congress intended it to operate with the scope and breadth of words aptly chosen by Congress to express these statutes.[186] Those words were:

KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866-1876 (Paul A. Cimbala ed., 2005).

184. Cases that treated Section 1981 as applying only to actions taken under the color of law include Hurd v. Hodge, 334 U.S. 24 (1948); Hodges v. United States, 203 U.S. 1 (1906); and Virginia v. Rives, 100 U.S. 313 (1879). A few lower courts saw the issue differently. *See* United States v. Morris, 125 F. 322 (E.D. Ark. 1903). But that did not free Section 1981 from the mischaracterization that, among other factors, shunted it onto a legal siding for nearly a century. Indeed, as late as August 1968, at least one southern federal court declared that no Section 1981 claim lay where the discriminatory sections complained of were the decisions of private, not governmental, entities. *See* Colbert v. H-K Corp., 295 F. Supp. 1091 (N.D. Ga. 1968), *vacated on other grounds*, 444 F.2d 1381 (5th Cir. 1971).

185. *See* Runyon v. McCrary, 427 U.S. 160, 174 (1976) (where the Burger Court ruled 7-2 that Section 1981 applies to private, racially discriminatory conduct); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 420 (1968) (interpreting Section 1981's companion statute, 42 U.S.C. §1982); E. Richard Larsen, *The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment*, 7 HARV. C.R.-C.L. L. REV. 56, 59 (1972); Samuel Estreicher, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments,* 74 COLUM. L. REV. 449, 477–85 (1974). As a result of the Mayer case, "Section 1981 … received universal recognition in the courts of appeals as a remedy for private racial discrimination." *Id.* at 479. Some lower federal district courts then sought to stem the spread of Section 1981 claims by–absurdly in this author's view–buying the argument that Title VII of the Civil Rights Act of 1964 'impliedly' repealed Section 1981–but wiser heads in other federal district courts and the federal courts of appeals prevailed. *Compare, e.g., Colbert*, 295 F. Supp. 1091 (N.D. Ga. 1968), *vacated on other grounds*, 444 F.2d 1381 (5th Cir. 1971), *with* Thomas v. Ford Motor Co., 396 F. Supp. 52, 60 & nn. 20–23 (E.D. Mich. 1973), *aff'd*, 516 F.2d 902 (6th Cir. 1975), in which the latter case observed:

> Although a few courts have expressed the opinion that 42 U.S.C. § 1981 is also limited to acts engaged in under color of state law, that position is no longer tenable in view of Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). The applicability of Section 1981 to private acts of discrimination has been explicitly recognized since that case in at least five of the circuits. A similar fate has befallen the argument that Title VII of the 1964 Civil Rights Act was intended to 'preempt' Section 1981 as the exclusive remedy for discriminatory conduct.

Thomas, 396 F. Supp. at 60 nn. 20–23 (E.D. Mich. 1973).

186. This is a point the Author has made extensively about Section 703(m) of the 1991 amendments to Title VII. *See* Jeffrey A. Van Detta, *"Le Roi est Mort; Vive le Roi!": An Essay On The Quiet Demise Of McDonnell Douglas and the Transformation of Every Title VII Case After Desert Palace, Inc. v. Costa Into A "Mixed-Motives" Case*, 52 DRAKE L.

> All persons within the jurisdiction of the United States *shall have the same right* in every State and Territory *to make and enforce contracts*, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property *as is enjoyed by white citizens*, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.[187]

But in two Supreme Court cases written by judges espousing textualism either implicitly or explicitly, Section 1981 has been badly damaged. Thus, an Act whose text commands a broad and unfettered reading has been judicially butchered by textualists who claim, unconvincingly, that their only objective was to be true to the language.

a. Pointillist Textualism: Justice Kennedy in Patterson v. McLean Credit Union

The first textualist to lay hostile hands to Section 1981 was none other than Justice Anthony Kennedy, whose judicial style was like that of a chameleon over the long arc of his thirty years on the Court. In *Patterson*, he wrote as a recently confirmed Reagan-nominated substitute for the preferred (but too arrogant) Robert Bork;[188] years later, he selectively

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REV. 71, 119 (2003); Jeffrey A. Van Detta, *"Le Roi Est Mort" Redux: Section 703(m), Costa, McDonnell Douglas, and the Title VII Revolution: A Reply*, 52 DRAKE L. REV. 427, 444–45 (2004); Jeffrey A. Van Detta, *Requiem For A Heavyweight: Costa As Countermonument To McDonnell Douglas—A Countermemory Reply To Instrumentalism,* 67 ALB. L. REV. 965, 976 (2004); Jeffrey A. Van Detta, *The Strange Career of Title VII § 703(m): An Unfulfilled Promise of the Civil Rights Act of 1991*, 89 ST. JOHN'S L. REV. 883, 888 (2015).

187. This was the longstanding text of the statute as codified, until the Supreme Court's 1989 *Patterson* decision was reversed by Congress in the Civil Rights Act of 1991. Patterson v. McClean Credit Union, 491 U.S. 164, 176 (1989) (quoting 42 U.S.C.A. § 1981(a)) (emphases added).

188. *See, e.g.*, Paul Marcotte, *Bork to Ginsburg to Kennedy*, 75 A.B.A. J. 15 (1988); Sue Golden, *Justice Anthony M. Kennedy: A Trojan Horse Conservative*, 1 MD. J. CONTEMP. LEGAL ISSUES 229 (1990); Benjamin Pomerance, *What Might Have Been: 25 Years of Robert Bork on the United States Supreme Court*, 1 BELMONT L. REV. 221 (2014); *see also* AARON WILDAVSKY, CULTURAL ANALYSIS: VOLUME 1, POLITICS, PUBLIC LAW, AND ADMINISTRATION 183–202 (Brenton Swedlow et al. eds., 2017 ed. 2005). Indeed, during his early years on the Court, some commentators called Justice Kennedy "a Trojan Horse Conservative," in the sense that he was promised as another Judge Lewis Powell, but was proving to be far closer to the legal views of Judge Robert Bork.

abandoned textualism and originalism to reach results[189] that would have stunned the President who nominated him.[190]

But he was not the Justice Kennedy of *Obergefell* who took up pen in writing out much of the remedial impact of Section 1981 in *Patterson*. He was a textualist, committed to protecting the supposed purity of Anglophone understanding of the word *make*:

> By its plain terms, the relevant provision in § 1981 protects two rights: "the same right . . . to make . . . contracts" and "the same right . . . to . . . enforce contracts." The first of these protections extends only to the formation of a contract, but not to problems that may arise later from the conditions of continuing employment. The statute prohibits when based on race, the refusal to enter into a contract with someone, as well as the offer to make a contract only on discriminatory terms. But the right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established, including breach of the terms of the contract or imposition of discriminatory working conditions. Such postformation conduct implicates the performance of established contract obligations and the conditions of continuing employment, matters more naturally governed by state contract law and Title VII.[191]

Justice Kennedy thereby dealt a swift blow to the efficacy of the statute in a wide swath of discriminatory actions that did not fall within his narrow

189. *Compare Patterson*, 491 U.S. 164, *with* Planned Parenthood v. Casey, 505 U.S. 833 (1992), Romer v. Evans, 517 U.S. 620 (1996), Lawrence v. Texas, 539 U.S. 558 (2003), United States v. Windsor, 570 U.S. 744 (2013), *and* Obergefell v. Hodges, 576 U.S. 644 (2018).

190. See President Reagan's Radio Address on Anthony Kennedy, Central America on November 14, 1987, REAGAN LIBRARY, at https://www.youtube.com/watch?v=WLFEHdXG85g [https://perma.cc/9TWP-P2QS]; Ilya Shaprio, Commentary, *Insult After Injury: The Nomination Of Anthony Kennedy—The Problem With Kennedy Is That Even If He Had A Coherent View Of The Constitution, His Jurisprudence Was Often Inscrutable*, CATO INST., Nov. 1, 2020, at https://www.cato.org/commentary/insult-after-injury-nomination-anthony-kennedy [https://perma.cc/C3K5-SWWR] ("Decisions that come from such special access to legal truth undermine the rule of law, which values predictability and transparency. Regardless of how convincing anyone's explanation of his methods may be, if the perception is that he decided cases like a magic eight-ball, whether based on a unique legal theory or personal predilections, that doesn't instill faith in the system."). For a comprehensive examination of Justice Kennedy's judging, *see generally* THE RHETORIC OF JUDGING WELL: THE CONFLICTED LEGACY OF JUSTICE ANTHONY M. KENNEDY, at 1–2, 205–06, 247–60 (David A. Frank and Francis J. Mootz III eds., 2023).

191. *Patterson*, 491 U.S. at 176–77.

conception of "making" a contract,[192] which was itself an anachronistic misunderstanding that applied Williston's early 20th century systematized formalism in contract formation to the minds of lawyers educated (mostly by law office study) in the early 1800s—i.e., the legislators in the Congress that enacted the Civil Rights Act of 1866.[193]

The only nuance that Justice Kennedy could see proved to be more nuisance than nuance. He demanded a fact-specific inquiry in each case going forward, necessitated only by his peculiarly cabined textualism. In addressing a failure to promote claim under Section 1981, Justice Kennedy rejected the federal appellate court's view that "'[c]laims of racially discriminatory . . . promotion go to the very existence and nature of the employment contract and thus fall easily within § 1981's protection.'"[194] Rather, Justice Kennedy insisted, "the question whether a promotion claim is actionable under § 1981 depends upon whether the nature of the change in position was such that it involved the opportunity to enter into a new

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192. *See, e.g.*, *Patterson* 491 U.S. at 179, where Justice Kennedy exposited just how broadly his narrow interpretation of Section 1981 swept:

> Rather, the conduct which petitioner labels as actionable racial harassment is postformation conduct by the employer relating to the terms and conditions of continuing employment. This is apparent from petitioner's own proposed jury instruction on her § 1981 racial harassment claim:
>
> ". . . The plaintiff has also brought an action for harassment in employment against the defendant, under the same statute, 42 USC § 1981. An employer is guilty of racial discrimination in employment where it has either created or condoned a substantially discriminatory *work environment*. An employee has a right to work in an *environment* free from racial prejudice. If the plaintiff has proven by a preponderance of the evidence that she was subjected to racial harassment by her manager while employed at the defendant, or that she was subjected to a *work environment* not free from racial prejudice which was either created or condoned by the defendant, then it would be your duty to find for plaintiff on this issue." 1 Record, Doc. No. 18, p. 4 (emphasis added).
>
> Without passing on the contents of this instruction, it is plain to us that what petitioner is attacking are the conditions of her employment. This type of conduct, reprehensible though it be if true, is not actionable under § 1981, which covers only conduct at the initial formation of the contract and conduct which impairs the right to enforce contract obligations through legal process.

Id.

193. *See* GRANT GILMORE, THE DEATH OF CONTRACT 14 (1974) (arguing that Williston "pieced together" a 20th century understanding of contract law "in meticulous, although not always accurate, scholarly detail"); *see generally* Mark L. Movsesian, *Rediscovering Williston*, 62 WASH. & LEE L. REV. 207 (2005).

194. *Patterson*, 491 U.S. at 185.

contract with the employer."[195] Only if the promotion involved the opportunity to enter into a new contract is "the employer's refusal to enter the new contract is actionable under § 1981."[196] Justice Kennedy instructed that federal courts "should give a fair and natural reading to the statutory phrase 'same right . . . to make . . . contracts,' and should not strain in an undue manner the language of § 1981."[197] This was not lightly to be found. In declaring "[o]nly where the promotion rises to the level of an opportunity for a new and distinct relation between the employee and the employer is such a claim actionable under § 1981," Justice Kennedy gave as the sole example a change of huge magnitude: that of the opportunity of a law firm associate to be elected as an equity partner in a general partnership.[198]

The result on pending Section 1981 cases was devastating, as the Author can attest from his own law practice experience in a case that played out before, during, and after the immediate wake of *Patterson*.[199]For one of the last times in our history of still-active memory, Congress responded swiftly with remedial legislation to overrule *Patterson*, and that legislation was signed into law by a Republican President. The Civil Rights Act of 1991 made important amendments to a number of federal laws, including Title VII and Section 1981.[200] The Amendment to Section 1981 was adopted to overrule *Patterson* and provided a statutory definition of the phrase, "make and enforce contracts" that now explicitly "includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."[201]

Thus, Congress abrogated Justice Kennedy's textualist assault on Section 1981. But twenty-nine years later, a new textualist assault was launched by a textualist who had clerked for Justice Kennedy in 1993–

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* at 185–86 (citing Hishon v. King & Spalding, 467 U.S. 69 (1984) (construing Title VII of the Civil Right Act of 1964)).

199. *See* Walker v. Frito-Lay, Inc., No. 89-522-CIV-ORL-19, 1990 WL 193653 (M.D. Fla. Sept. 21, 1990) (holding after full trial with advisory jury under Fed. R. Civ. P. 39 that *Patterson* required dismissal as a matter of law plaintiff's Section 1981 claim for racially discriminatory discharge for unequally enforced work-rule violation by snack food company), *aff'd mem.*, 952 F.2d 411 (11th Cir. 1992).

200. Section 3, "Purposes," includes as a purpose "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." Equal Employment Opportunity Commission, Civil Rights Act of 1991 (Original Text) https://www.eeoc.gov/civil-rights-act-1991-original-text [https://perma.cc/4QMY-94ET]; Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 101, 102, 105 Stat. 1071, 1072 (1991) (amending 42 U.S.C. § 2000e and 42 U.S.C. § 1981).

201. Civil Rights Act of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1071, 1071-72 (amending 42 U.S.C. § 1981).

94[202]: Justice Gorsuch, in the case discussed in the next subsection. This time, however, there was no split of ideologies evident on the Court, as there had been in *Patterson*. Nor was there any dissention about whether a textualist opinion would rule the day. This time, Justice Gorsuch's textualism carried the whole court in an *atextual* reading of the nation's oldest civil rights statute.

b. Textualism's Whole-Cloth Invention: The "Causation" Canon

As restored by Congress in 1991, Section 1981 continued to grow in importance as part of a national commitment to eradicate race-based prejudice from the Nation's economic life. The Civil Rights Act of 1866 became important for enforcing a wide range of contract-based rights—for franchisees;[203] for the growing number of workers classified as independent contractors;[204] for the growing number of workers classified as independent contractors (who are not classified as employees within the protection of Title VII);[205] for home buyers for home buyers and apartment renters;[206] and for others who seek to engage in a variety of economic arrangements vital to the American economy. [207] Indeed, the problems that Section 1981 was enacted to eradicate persist to this day.[208]

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202. Adam Liptak & Nicholas Fandos, *Lucky Break Led Gorsuch to Long Bond*, N.Y. TIMES, Mar. 3, 2017, at A1.

203. Charles K. Grant, *Lessons from a Florida Franchise Race Discrimination Case*, BAKER DONELSON (May 18, 2009) ("There appears to be a sharp increase in lawsuits filed against franchisors alleging race discrimination under Section 1981 . . . This is a Reconstruction-era statute providing all people, including recently freed slaves, with the same right as white people to make and enforce contracts."), https://www.bakerdonelson.com/Lessons-from-a-Florida-Franchise-Race-Discrimination-Case-05-18-20091 [https://perma.cc/77J8-QT6E]; *see, e.g.,* Howard v. BP Oil Co., 32 F.3d 520 (11th Cir. 1994); Elbanna v. Captain D's, LLC, No. 3:07-cv-926-J-32MCR, 2009 WL 435051 (M.D. Fla. Feb. 17, 2009*);* Int'l House of Pancakes, Inc. v. Albarghouthi, No. 04-cv02264-MSK-MEH, 2007 WL 2669117 (D. Colo. Sep. 6, 2007); Elkhatib v. Dunkin' Donuts, Inc., 493 F.3d 827 (7th Cir. 2007); Harper v. BP Exploration & Oil, Inc., 134 F.3d 371 (6th Cir. 1998); Pointer v. Bldg. Stars Advantage, 115 F. App'x 321 (8th Cir. 2004); Home Repair, Inc. v. Paul W. Davis Sys., Inc., No. 98 C 4074, 1998 WL 721099 (N.D. Ill. Oct. 9, 1998) (motion to dismiss); Home Repair, Inc. v. Paul W. Davis Sys., Inc., No. 98 C 4074, 2000 WL 126905 (N.D. Ill. Feb. 1, 2000) (motion for summary judgment); Smith v. Molly Maid, Inc., 415 F. Supp. 2d 905 (N.D. Ill. 2006).

204. *See, e.g.*, Brown v. J. Kaz, Inc., 581 F.3d 175, 181 (3d Cir. 2009); *see also* Danielle Tarantolo, *From Employment to Contract: Section 1981 and Antidiscrimination Law for the Independent Contractor Workforce*, 116 YALE L.J. 170 (2006).

205. *See* Minna J. Kotkin, *Uberizing Discrimination: Equal Employment and Gig Workers*, 87 TENN. L. REV. 73, 105–10 (2019).

206. *See* Robert G. Schwemm, *Why Do Landlords Still Discriminate (and What Can Be Done About It)?*, 40 J. MARSHALL L. REV. 455, 456 (2007).

207. *See* Carmen D. Caruso*, Section 1981 Litigation: Making Free Markets Free*, CIVIL RIGHTS LITIGATION (2013), https://cdcaruso.com/wp-content/uploads/2017/02/section-1981-litigation-making-free-markets-free.pdf [https://perma.cc/9ZBQ-4R4J]; *see, e.g.*, White Glove Staffing, Inc. v. Methodist Hosps. of Dallas, 947 F.3d 301, 304-08 (5th Cir. 2020) (holding that "[t]emporary staffing company had statutory standing to bring § 1981 racial

However, at the same time, there has been a steady retrenchment in the Supreme Court's view of another element of discrimination claims—causation, or more, particularly, what it takes to show that the defendant's intentional discrimination caused a remediable injury to the plaintiff. In a series of cases involving statutes that create causes of action for discrimination "because of" a protected characteristic, SCOTUS majorities ruled that a plaintiff had not created a triable claim merely by showing that the defendant's discriminatory intent had played "a" role in the adverse action or decision. Rather, these decisions insist the cause-in-fact standard of causation in negligence claims must govern.[209] This is a dubious proposition at best. But as a noted scholar of employment discrimination law has revealed, the notion has taken on a life of its own—a golem vivified as a "canon" of interpretation.[210]

That golem reached its apotheosis when SCOTUS joined an opinion by Justice Gorsuch that unanimously declared that it applied to a statute that does not contain the words "because of," but rather, whose explicit language does not admit of such treatment at all. A greater perversity in the use of textualism is scarcely imaginable.

In *Comcast, Inc. v. National Association of African American-Owned Media*,[211] an African American-owned operator of television networks pursued a carriage contract from Comcast Corporation, the largest cable television-distribution company in the United States.[212] After years of

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discrimination claim, asserting that employer impinged on its right to contract because it terminated contract negotiations after staffing company sent African-American employee to work for employer; staffing company's claim fell within the zone of interests protected by § 1981, as it was consistent with the purpose of § 1981 to protect equal rights to make contracts without regard to race, and staffing company's alleged harm of the termination of its prospective contract was sufficiently closely connected to the alleged discrimination prohibited by § 1981"); Strata Solar, LLC v. Fall Line Constr., LLC Arch Ins. Co., 683 F.Supp.3d 503 (E.D. Va. 2023) (noting "the apparent appeal of adopting what may be an emerging trend toward recognizing that Avenue B standing falls within § 1981's 'zone of interests,' with the statute aimed at both preventing all race-based discrimination that materially harms a contracting 'person' (corporate or individual) and providing an adequate deterrent against the same").

208. *See, e.g.*, Debra Kamin, *She Made an Offer on a Condo. Then the Seller Learned She Was Black.*, N.Y. TIMES (May 31, 2024), https://www.nytimes.com/2024/05/31/real estate/race-home-buying-raven-baxter.html.

209. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 346-47 (2013) (retaliation claim under Title VII of the Civil Rights Act of 1964); Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176–77 (2009) (Age Discrimination in Employment Act of 1967).

210. *See generally* Sperino, *supra* note 21.

211. Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 589 U.S. 327 (2020). For an interesting discussion of *Comcast* in light of *Patterson*, see Tessa Martin, *Casting A Short Net: The Supreme Court's Damaging Interpretation of § 1981 in* Patterson v. Mclean Credit Union *and* Comcast Corp. v. National Association of African American Owned Media and Entertainment Studios Network, 14 J. MARSHALL L.J. 34 (2020).

212. *Compare* Nat'l Ass'n of Afr. Am.-Owned Media v. Comcast Corp., 743 F. App'x 106 (9th Cir. 2018), *vacated and remanded*, 589 U.S. 327 (2020) (Justice Gorsuch's opinion did not tarry long with the facts), *with Comcast Corp*., 589 U.S. at 330.

bait-and-switch negotiations, the plaintiff sued Comcast because, the plaintiff alleged, they had experienced disparate treatment due to race and was thus denied the same right to contract as a white-owned company, which violates Section 981.[213] The plaintiff offered examples that would, in their totality, allow a reasonable jury to draw an inference that the race of the plaintiff's owners had been considered negatively in Comcast's decision.[214]

The Ninth Circuit precedent actually looked squarely at the language of Section 1981 and saw that it admitted of only one rational interpretation. "Section 1981 guarantees 'the same right' to contract 'as is enjoyed by white citizens,'" the Ninth Circuit panel observed in the *Charter Communications* case.[215] "This is distinctive language, quite different from the language of the ADEA and Title VII's retaliation provision, both of which use the word 'because' and therefore explicitly suggest but-for causation."[216] Quite correctly, the Ninth Circuit panel rejected the contention "that the most natural understanding of the 'same right' language is also but-for causation."[217] Without ratiocination, sophistry, or intellectual deception, the *Charter Communications* court gave voice to no more than that which the natural reading of Congress's unequivocal language commands, declaring that "[i]f race plays any role in a challenged decision by a defendant, the plain terms of the statutory text suggest the

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213. See Nat'l Ass'n of Afr. Am.-Owned Media, 743 F. App'x at 106.

214. *Id.* at 107. Specifically, as the Ninth Circuit recounted:

> Here, Plaintiffs' SAC includes sufficient allegations from which we can plausibly infer that Entertainment Studios experienced disparate treatment due to race and was thus denied the same right to contract as a white-owned company, which violates § 1981. *See* 42 U.S.C. § 1981(a) ("All persons . . . shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens. . . ."). These allegations include: Comcast's expressions of interest followed by repeated refusals to contract; Comcast's practice of suggesting various methods of securing support for carriage only to reverse its position once Entertainment Studios had taken those steps; the fact that Comcast carried every network of the approximately 500 that were also carried by its main competitors (Verizon FIOS, AT & T U-verse, and DirecTV), *except* Entertainment Studios' channels; and, most importantly, Comcast's decisions to offer carriage contracts to "lesser-known, white-owned" networks (including Inspirational Network, Fit TV, Outdoor Channel, Current TV, and Baby First Americas) at the same time it informed Entertainment Studios that it had no bandwidth or carriage capacity.

Id.

215. Nat'l Ass'n of Afr. Am.-Owned Media v. Charter Commc'ns, Inc., 915 F.3d 617 (9th Cir. 2019), *cert. granted, judgment vacated*, 140 S. Ct. 2561 (2020), *vacated and remanded*, 804 F. App'x 710 (9th Cir. 2020), *abrogated by* Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 589 U.S. 327 (2020).

216. *Id.* at 625.

217. *Id.*

plaintiff has made out a prima facie case that section 1981 was violated because the plaintiff has not enjoyed 'the same right' as other similarly situated persons."[218]

When SCOTUS took certiorari of the parallel *Comcast* case, the Author was certain that SCOTUS would resoundingly confirm this textbook exercise in textualism. After all, were they all not "textualists now"? But the Author was wrong.

Justice Gorsuch cast aside all notions of actually dealing with the implications of the text and headed straight for what has become a new tool of textualism: a canon of interpretation that presumes all civil wrongs should be treated as if they were common-law torts and that there is a (virtually undebatable) presumption that all civil wrongs require but-for causation.[219] The very first lines of the opinion distort the usual textualist inquiry—the actual and apt language used by Congress—the way that a clear image is distorted in a funhouse mirror:

> Few legal principles are better established than the rule requiring a plaintiff to establish causation. In the law of torts, this usually means a plaintiff must first plead and then prove that its injury would not have occurred "but for" the defendant's unlawful conduct. The plaintiffs before us suggest that 42 U.S.C. § 1981 departs from this traditional arrangement. But looking to this particular statute's text and history, we see no evidence of an exception.[220]

From there, the opinion is a self-fulfilling prophecy. The actual language of the statue is suffocated under the weight of an interpretative canon. But we won't find this one, even in the Scalia and Garner book. That is because it has been constructed out of whole cloth.

The fallacy of this "Causation Canon" and its baleful effects on perfectly clear statutory text have been thoroughly exposed by one of our leading employment law scholars, Professor Sandra Sperino.[221] Professor Sperino has explained that "[i]n the past decade, the Supreme Court created a new canon of construction--the causation canon," which holds that "[i]f a statute uses causal language, the Court will assume that the plaintiff is required to establish 'but-for' cause."[222] Despite Justice Gorsuch's claims

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218. The Ninth Circuit panel cited two cases that had treated this interpretative issue and reached the same conclusion. *See* Brown v. J. Kaz, Inc., 581 F.3d 175, 182 n. 5 (3d Cir. 2009); St. Ange v. ASML, Inc., No. 3:10-cv-00079-WWE, 2015 WL 7069649, at *2 (D. Conn. Nov. 13, 2015) ("Where race discrimination is a motivating factor in an adverse employment decision, the subject of the discrimination has not enjoyed the same right to the full and equal benefit of the law.").

219. *See* Comcast Corporation, 589 U.S. at 331–36.

220. *Id.* at 329–30.

221. *See generally* Sperino, *supra* note 21.

222. *Id.* at 705–06 (footnotes omitted).

for the canon's historicity, "[p]rior to 2013, no Supreme Court case invoked this canon,"[223] and even though "[i]n 2013, the Supreme Court articulated the causation canon . . . it was difficult to recognize it at the time."[224] Indeed, "[i]t was not until 2020 that the canon fully emerged"[225] when Justice Gorsuch invoked it to effectively write into the Civil Rights Act of 1866 causation language that is not there—nor, historically speaking, could be there, since the but-for concept developed later."[226] Indeed, "[o]ne striking feature of the causation canon is that it does not accurately capture tort causation," in which "factual cause is not described through one test."[227]

Professor Sperino rightly sees that "serious questions about the legitimacy of the causation canon as a statutory interpretation device" are thus raised. To begin with, the purported "canon is in tension with statutory interpretation methodology, especially textualism":

> One of the central precepts of textualism is words matter. To date, the Court has applied the causation canon to different words, and even to statutes that do not explicitly use causal language. Strangely, if the federal courts adopted the actual common law with its bundle of standards, this would also be in tension with an idea implied within textualism: that the courts should select one meaning for words within a statute.

Professor Sperino also points out the sui generis nature of the causation canon and raises, thereby, a suspicion of spuriousness about the canon's pedigree:

> The causation canon also points to a gap in the statutory interpretation literature. There is no agreement about where the common law fits within the taxonomy of statutory interpretation. And there has been no systematic attention paid to how the Supreme Court is importing the common law into statutes through canons and how much power federal courts have when doing so.

Professor Sperino rightly shows no mercy to this "legal Lohengrin" (to borrow a phrase of Judge Henry Friendly's),[228] which she perceptively sees a kind of interpretative *deus ex machina*.

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223. *Id.* at 706.
224. *Id.* at 719.
225. *Id.*
226. *See id*. at 725–26.
227. *Id.* at 706.
228. ITT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975) (describing the Alien Tort Statute) ("This old but little used section is a kind of legal Lohengrin; although it has

> If a canon, like the causation canon, does not interpret a statute and does not reflect the common law, it appears the Supreme Court is creating a federal common law. That the Supreme Court is trying to do so through the guise of a statutory interpretation canon merits further attention.[229]

The Causation Canon's perniciousness can be seen in the way it has encouraged federal appellate courts to ignore even Congress's intentional changes in statutory language and instead insist that but-for causation rules the day in their face. For example, the U.S. Eleventh Circuit Court of Appeals recently cited and quoted *Comcast* in ruling, "as a matter of first impression," that Congress's decision in 2008 to change the operative language of the Americans with Disabilities Act from "because of disability" to "on the basis of disability" did not shake the death grip of the Causation Canon.[230] "The Supreme Court has instructed," wrote the Eleventh Circuit, "that 't]his ancient and simple 'but for' common law causation test . . . supplies the 'default' or 'background' rule against which Congress is normally presumed to have legislated," including for 'federal antidiscrimination laws'" and "the particular phrase '*on the basis of*' is 'strongly suggestive of a but-for causation standard.'"[231] Thus, the textualist Causation Canon allowed the Eleventh Circuit to "hold that the switch from 'because of' to 'on the basis of' in the 2008 amendment to the ADA did not change or affect its but-for causation standard."[232]

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been with us since the first Judiciary Act [of 1789]), no one seems to know whence it came."). An opera commentator provides useful context to understanding the significance of Judge Friendly's and this Author's invocation of Lohengrin:

> A nameless knight (Lohengrin, we learn three hours later) heeds Elsa's prayer, and comes to defend her from this charge. In his turn, he, too, demands absolute faith, and her hand in marriage. Never, the knight commands, shall Elsa ask him whence he came, his name, or his origin; he must remain a mystery. (It is a very Protestant idea: justification by faith. Wagner, of course, was raised as a Lutheran.)

Nicholas Fuller, *Lohengrin*, THE OPERA SCRIBE (Mar. 19, 2024), https://operascribe.com/2024/03/19/282-lohengrin-wagner/ [https://perma.cc/2GHQ-HXJQ]**.**

229. *Id.* at 729.

230. Akridge v. Alfa Ins. Companies, 93 F.4th 1181, 1192 (11th Cir. 2024).

231. *Id.* at 1192.

232. *Id.* at 1192. Other Circuits similarly ignore Congress's explicit change in operative language. *E.g.*, Natofsky v. City of New York, 921 F.3d 337, 349 (2d Cir. 2019) ("We find no reason to hold that there is any meaningful difference between 'on the basis of,' 'because of,' or 'based on,' which would require courts to use a causation standard other than 'but-for.'"); Gentry v. E. W. Partners Club Mgmt. Co., 816 F.3d 228, 235–36 (4th Cir. 2016) ("We see no 'meaningful textual difference' between ['on the basis of '] and the terms 'because of,' 'by reason of,' or 'based on.'") (alteration in original); Murray v. Mayo Clinic, 934 F.3d 1101, 1106 & n.6 (9th Cir. 2019) ("We find no meaningful textual difference in the two phrases with respect to causation."); Lewis v. Humboldt Acquisition Corp., 681 F.3d

Interpretative canons can indeed quickly become, to coin a metaphor, "the loose can[ons] on the deck" of textualism that wreck the legitimacy of textualism as a tool. Professor Sperino aptly describes the heresies the newly minted causation canon in particular is working:

> What is especially troublesome about the causation canon is the lengths the Supreme Court goes to hide its non-existent pedigree. Even a cursory review of Supreme Court cases from the past forty years reveals that the causation canon did not exist until recently. Nonetheless, the Court in *Comcast* described its new canon as "ancient" and "'textbook tort law"' when it is neither of those things.
>
> The causation canon does not reflect the conventional meaning of factual cause within tort law. Tort law recognizes some circumstances in which the plaintiff is required to prove "but-for" cause and several instances in which either the plaintiff is not required to fully prove the causal standard and/or the standard is not "but-for" cause. Tort law retains flexibility to align the factual cause standard given the facts of the case and the demands of broader issues, like fairness.
>
> More importantly, the causation canon raises significant questions about what conventional meaning Congress is trying to convey in statutes. Many statutes do not use tort-like causal language, such as "but-for" cause, factual cause, or even cause. Instead, statutes often use words such as "because of" or "results in." If Congress intended to invoke tort causation, it could use more specific words from tort law. It would be quite easy for Congress to include statutory language indicating that the plaintiff is required to establish "but-for" cause.[233]

The damage that the Court—and Justice Gorsuch specifically in *Comcast*—has done with the cavalier (or carefully calculated?) invocation of a language-vaporizing tool such as the Causation Canon is doing to the Court's reputation is extensive. As Professor Sperino has admonished, "[t]he fact that the causation canon is not long-lived and does not represent conventional meaning makes the causation canon highly susceptible to the charge that the Supreme Court is hiding the preferences it is enacting by

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312, 315, 321 (6th Cir. 2012) (en banc) (recognizing the 2008 amendments to the ADA and holding that the ADA requires but-for cause).

233. Sperino, *supra* note 21, at 738–39.

disguising them as a canon."[234] To this Author's ears, *Comcast* not merely suggests, but practically shouts, the irrefutable confirmation of that charge. The charge takes on added potency when one considers that "[t]he timing of the factual cause canon is especially curious" because it "emerged when most statutes are no longer perceived as being extensions of the common law." [235] It seems nothing less than the equivalent of an Arian heresy,[236] a raiment for a false theology of judicial deference when, in fact, in the hands of heretics it is nothing less than "an exercise in judicial power, elevating judge-made law over statutory text."[237] "That avowed textualists are making this move" portends a schism more severe than the one suggested by the dueling opinions of Justices Alito and Thomas in *Harrison*, because "this new canon is in tension with textualist claims about statutory interpretation and with claims about substantive canons, specifically."[238] The *Bostock* case saw just such a schism erupt to tear the textualist fabric, as discussed in Section III.B.2.

2. Textualists, Schism, and the Manipulation of Original Public Meaning, When Pragmatism Would Readily Have Solved the Problem: *Bostock v. Clayton County*

In *Bostock v. Clayton County*,[239] the House of Textualism came tumbling down in spectacular fashion—as when "Samson took hold of the two middle pillars upon which the house stood, and on which it was borne up, of the one with his right hand, and of the other with his left . . . [a]nd . . . bowed himself with all his might; and the house fell."[240] The rubble revealed a most serious schism between the textualism of Justice Gorsuch, who wrote the majority opinion, versus Justice Alito, who dissented. And that schism itself reveals a serious failing of the Textualist Enterprise. Textualism as such is touted as revealing "the" answer to a statutory

234. *Id.* at 739.

235. *Id.*

236. *See* DIARMAID MACCULLOCH, THE REFORMATION: A HISTORY 244–46 (2005). The Arrian Heresy was the most serious of them all—in a region where Christ was Redeemer and His Divinity central to that theme, Arrius and his followers maintained that "Jesus was not God at all, but a human prophet of God, and the whole doctrine of the Trinity was an unbiblical sham, thought up in the years of the Church's decay." *Id.* at 187. It enjoyed a revival during the Reformation and provoked a vigorous repression. *Id.* at 244–46; *see generally* ROMAN HERESY AND BARBARIAN CREED (Guido M. Berndt & Roland Steinacher eds., 2014). Indeed, Arianism has been called "the archetypal" heresy. MAURICE WILES, ARCHETYPAL HERESY: ARIANISM THROUGH THE AGES 5 (Oxford 2001); D.H. Williams, *Archetypal heresy: Arianism through the centuries,* 83 ANGLICAN THEOLOGICAL REV. 487 (1999) (comparing Arianism in Christianity's history to "a dormant volcano that suddenly erupts then returns to a state of uncertain quiescence").

237. Sperino, *supra* note 21, at 743–44.

238. *Id.*

239. Bostock v. Clayton, 590 U.S. 644 (2020).

240. *Judges* 16:29-30 (King James Version).

interpretation problem. Yet in *Bostock*, textualism was claimed by various of the textualist Justices to support results both directly contradictory to one another and beyond logical harmonization.

The issue that came to the Court in *Bostock* was whether the word "sex" in the familiar Title VII litany of protected classes in Section 703(a)—"race, color, religion, sex, or national origin"[241]—embraced persons discriminated against *because of* their sexual orientation.

A curious phrase opens Justice Gorsuch's opinion for the Court—"[s]ometimes small gestures can have unexpected consequences."[242] In that phrase is the key to the underpinning of his textualist opinion: he is going to read the words against the statutory grain, but he will not explicitly say so. Instead, Justice Gorsuch professed to be committing the Court to a purely textualist analysis.[243] After traveling byways and highways that are

241. 42 U.S.C. § 2000e-2(a)(1), (2).

242. *Bostock*, 590 U.S. at 649. Justice Gorsuch elaborates on that theme:

> Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren't thinking about many of the Act's consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees. But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.

Id. at 653. But the case law pointed the other way—that is to say, that at the time of Title VII's enactment, courts did not understand the term "sex" to include sexual orientation. *See* Irving Kovarsky, *Fair Employment for the Homosexual*, 1971 WASH. U. L. Q. 527, 560 (1971); James C. Oldam, *Questions of Exclusion and Exceptions Under Title VII-Sex Plus and the BFOQ*, 23 HAST. L.J. 55, 67 (1971); *see, e.g.*, Holloway v. Arthur Andersen & Co., 566 F.2d 659 (9th Cir. 1977); Smith v. Liberty Mut. Ins. Co., 569 F.2d 325, 326–27 (5th Cir. 1978); DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979).

243. Justice Gorsuch structures this commitment in a "on the one hand/on the other hand" juxtaposition. First, he endorses the view of textual restraint—

> This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives. And we would deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations

—but he then opens the door to textual expansion:

reminiscent of Justice Alito's opinion in *Harrison*,[244] Justice Gorsuch proclaims that he has used text and nothing but the text to reach the ruling:

> Ours is a society of written laws. Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations. In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee's sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law.[245]

While rhetorically brilliant, textualism this is not.

Indeed, as recognized over fifty years ago by commentators seeking the kind of coverage Justice Gorsuch found in the term "sex":

> [g]iven the peculiar history of the term "sex" in Title VII one would be overextending the law to justify the broad application of this term on any basis other than the general mandate of Congress to remove artificial, arbitrary, and unnecessary barriers to employment when the barriers

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> With this in mind, our task is clear. We must determine the ordinary public meaning of Title VII's command that it is "unlawful ... for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." § 2000e–2(a)(1). To do so, we orient ourselves to the time of the statute's adoption, here 1964, and begin by examining the key statutory terms in turn before assessing their impact on the cases at hand and then confirming our work against this Court's precedents.

Bostock, 590 U.S. at 564–65. That invitation becomes clearer when he justifies ignoring and treating as irrelevant the perspectives of those in Congress who enacted the legislation:

> Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren't thinking about many of the Act's consequences that have become apparent over the years . . . When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.

Id. at 653.

244. *See generally* Republic of Sudan v. Harrison, 587 U.S. 1 (2019).

245. *Bostock*, 590 U.S. at 683.

> operate invidiously to discriminate on the basis of the impermissible classification.[246]

Concomitantly, given a marked judicial reluctance at the time to give the term "sex" such a capacious interpretation,[247] it is no surprise to the fact that legislation was introduced into Congress repeatedly beginning in the 1970s to extend Title VII's protections to sexual orientation.[248]

Dynamic statutory interpretation, on the other hand, would have made the point clear: we can view the language of the statute in light of its purposes and with the recognition that Congress can hardly be presumed to have sealed it forever upon enactment in 1964. The process of reckoning with our Nation's history of discrimination in the areas Title VII sought to address is a dynamic and ongoing one—and one that has no end in sight. Thus, it makes perfect sense that our understanding of the problems of inequality will necessitate a revision of our understanding of basic concepts of discrimination in pursuit of a worthy goal of having individuals viewed and assessed on merits relevant to essential job functions, rather than on subjective, harmful, and, ultimately, inefficient considerations.

Justice Alito's dissent erupts with the fiery indignation that the other side of the textual schism can be expected to invoke. Declaring the Gorsuch opinion "legislation," he invokes their textualist Deity and The Book he and his apostle gave to his disciples in a passage that will be quoted for years to come:

> The Court attempts to pass off its decision as the inevitable product of the textualist school of statutory interpretation championed by our late colleague Justice Scalia, but no one should be fooled. 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"

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246. Juan R. Rivera & Richard J. Galvan, *Homosexuals and Title VII*, 3 TEX. S.U. L. REV. 126, 134 (1973).

247. *See, e.g.*, Smith v. Liberty Mut. Ins. Co., 395 F. Supp. 1098, 1101 (N.D. Ga.1975) (holding that the Title VII did not currently encompass discrimination against homosexuals and declining to extend the scope of the Act: "Whether or not the Congress should, by law, forbid discrimination based upon 'affectional or sexual preference' of an applicant, it is clear that Congress has not done so. The Civil Rights Act is not just the 'starting point' for this Court's extension of limitations upon employers; it is both the starting point and the ending point."), *aff'd*, 569 F.2d 325, 327 & n.1 (5th Cir. 1978).

248. *See, e.g.*, *Holloway*, 566 F.2d 659 at 663 & n.6 (citing HR 5452, 94th Cong., 1st Sess. (1975); HR 166, 94th Cong., 1st Sess. (1975) and HR 2667, 94th Cong., 1st Sess. (1975). Seven have been presented to the 95th Congress: HR 451, 95th Cong., 1st Sess. (1977); HR 2998, 95th Cong., 1st Sess. (1977); HR 4794, 95th Cong., 1st Sess. (1977); HR 5239, 95th Cong., 1st Sess. (1977); HR 7775, 95th Cong., 1st Sess. (1977); HR 8268, 95th Cong., 1st Sess. (1977) and HR 8269, 95th Cong., 1st Sess. (1977)).

> old statutes so that they better reflect the current values of society.[249]

"Many will applaud today's decision because they agree on policy grounds with the Court's updating of Title VII," Justice Alito wrote.[250] "But the question in these cases is not whether discrimination because of sexual orientation or gender identity should be outlawed," but rather "whether Congress did that in 1964."[251] And Justice Alito spills much ink to demonstrate that it did not.[252]

A third textualist—Justice Kavanaugh—chose a longer strand of words from the statute on which to focus and ended up on Justice Alito's side of the ledger rather than Justice Gorsuch's.[253] This further fracturing among three leading textualists exemplifies the question asked by Professor Tara Leigh Grove, "which" or "whose" textualism?[254]

The Author agrees that Title VII and similar anti-discrimination laws not only should—but also *must*—be extended to protect against discrimination on the basis of sexual orientation, sexual preferences, and other characteristics of human existence and identity[255] that were not yet in the general public consciousness when the Congress enacted Title VII on the Author's second birthday.[256] The Author's point in including *Bostock* in this article is to show the unraveling of textualism as the Roberts Court's

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249. *Bostock*, 590 U.S. at 683, 685 (Alito, J., dissenting).

250. *Id.* at 685.

251. *Id.*

252. *See id.* at 683–721. Justice Alito explains:

> Because the opinion of the Court flies a textualist flag, I have taken pains to show that it cannot be defended on textualist grounds. But even if the Court's textualist argument were stronger, that would not explain today's decision. Many Justices of this Court, both past and present, have not espoused or practiced a method of statutory interpretation that is limited to the analysis of statutory text. Instead, when there is ambiguity in the terms of a statute, they have found it appropriate to look to other evidence of "congressional intent," including legislative history.
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> So, why in these cases are congressional intent and the legislative history of Title VII totally ignored? Any assessment of congressional intent or legislative history seriously undermines the Court's interpretation.

Id. at 720–21.

253. *Id.* at 784 (Kavanaugh, J., dissenting).

254. *See* Tara Leigh Grove, *Which Textualism?,* 134 HARV. L. REV. 265, 266 (2020).

255. *See* Jeffrey A. Van Detta, *Sexual Orientation, Human Rights, and Corporate Sponsorship of the Sochi Olympic Games: Rethinking the Voluntary Approach to Corporate Social Responsibility*, 30 UTRECHT J. INT'L & EUR. L. 99, 101 (2014).

256. *See* Jeffrey A. Van Detta, *The Strange Career of Title VII § 703(m): An Unfulfilled Promise of the Civil Rights Act of 1991*, 89 ST. JOHN'S L. REV. 883, 883 (2015).

dominant tool of statutory interpretation—textualists at war with one another, when textualism was touted to offer "the way."

The Court would have been better off having Justice Ginsburg or Justice Breyer write an opinion embracing the approach[257] Justice Gorsuch's once-textualist mentor, Justice Kennedy, took in the *Obergefell*[258] case—conceptual, soaring rhetoric rather than twisting textualism.

Justice Gorsuch's textualism in *Bostock* is thus far not proving persuasive to state high courts. The state supreme courts, which have interpreted the term "sex" within their own states' statutes after *Bostock*, have rejected Justice Gorsuch's view and agreed with Justice Alito's view.[259] Further, while in sympathy with the outcome reached by Justice Gorsuch, some commentators have found *his textualism* to be either heretical or unpersuasive in terms of the textualist idiom.[260] Indeed, Elena

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257. Carlos A. Ball, *The Judicial Activism of Justice Anthony Kennedy*, 72 AM. U. L. REV. 1501, 1587–88 (2023).

258. Take, for example, the most memorably soaring passage from Justice Kennedy's opinion:

> No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.

Obergefell v. Hodges, 576 U.S. 644, 681 (2015).

259. *See, e.g.*, Vroegh v. Iowa Dep't of Corr., 972 N.W.2d 686, 700–02 (Iowa 2022); Doe v. Cath. Relief Servs., 300 A.3d 116, 124–31 (Md. 2023).

260. *See, e.g.*, Elena Schiefele, *When Statutory Interpretation Becomes Precedent: Why Individual Rights Advocates Shouldn't Be So Quick to Praise Bostock*, 78 WASH. & LEE L. Rev. 1105, 1155 (2021); Mitchell N. Berman & Guha Krishnamurthi, *Bostock Was Bogus: Textualism, Pluralism, and Title VII*, 97 NOTRE DAME L. REV. 67, 125–26 (2021); *see* Grove, *supra* note 254, at 266–67, 269, 279; *see also* Eskridge et al., *supra* note 149, at 1616, 1624, 1628, 1631–32. Professor Eskridge and his co-authors make the fascinating observation that:

> the newest textualists are often poor historians. In cases like Bostock, none of the dissenting Justices seemed to realize that the social group benefiting from the Court's interpretation—gay men, lesbians, and transgender people—did not exist as a social group in 1964, when Title VII was first enacted. (Check your 1964 dictionaries; "gay" meant merry, and you will not find "gender identity," "sexual orientation," or "transgender.")

Id. at 1632.

Schiefele has been soberly not sanguine about *Bostock*, pointing out that "[t]he interpretive analysis exemplified in Justice Gorsuch's statutory interpretation opinions demonstrates a progression toward an increasingly literal methodology that rejects much of the context that new textualists routinely consider."[261]

Under the dynamic statutory interpretation approach, by contrast, finding coverage in that more capacious principle is not only proper but imperative.[262] Such a finding will not come at the price of buying into a textualist approach that will be filled with unintended consequences. In fact, the Court demonstrated that on June 14, 2024, when it abrogated a regulation of the Bureau of Alcohol, Tobacco, and Firearms that classified the infamous "bump stock"—a device that enabled one of the nation's worst mass shootings (1000 rounds fired, killing 64 and wounding over 400) by a lone gunman in Las Vegas seven years ago[263]—as a "machine gun," a term of art used in a federal statute. Justice Alito, sounding as if he were a cleric at an auto-da-fé, appeared to declare that irrelevance of Congressional purpose—just as Justice Gorsuch had insisted upon in *Bostock*—is the price the nation had to pay for the fidelity of textualism:

> I join the opinion of the Court because there is simply no other way to read the statutory language. There can be little doubt that the Congress that enacted [the statute] would not have seen any material difference between a machinegun and a semiautomatic rifle equipped with a bump stock. But the statutory text is clear, and we must follow it. The horrible shooting spree in Las Vegas in 2017 did not

261. Schiefele, *supra* note 260, at 1155–56. That author elaborates on the observation by noting that there will be detractors and exactors in response to the Gorsuch brand of textualism:

> Justice Gorsuch's appointment to the Supreme Court provides the forum from which he can advocate for muscular textualism. It is probable that his theories, like Justice Scalia's, will gain traction. In some cases, this interpretation will broaden a statute's reach, as it did in *Bostock*, allowing the statute to provide relief to a greater number of plaintiffs. In others, muscular textualism will severely restrict the statute's remedial scope. Scholars and judges who worry about unconstrained judicial discretion will applaud muscular textualism's formulaic qualities. Others will condemn its frequently narrow interpretations.

Id.

262. *See* Jonah B. Gelbach, *The Dynamic Dilemma: Dynamics and Disuniformity in Statutory Interpretation, in* RESEARCH HANDBOOK ON LAW AND TIME 37 (F. Fagan & S. Levmore eds., 2024); William N. Eskridge Jr., Brian G. Slocum & Stefan Th. Gries, *The Meaning of Sex: Dynamic Words, Novel Applications, and Original Public Meaning*, 119 MICH. L. REV. 1503, 1564 (2021).

263. Garland v. Cargill, 602 U.S. 406 (2024).

> change the statutory text or its meaning. That event demonstrated that a semiautomatic rifle with a bump stock can have the same lethal effect as a machinegun, and it thus strengthened the case for amending [the statue]. But an event that highlights the need to amend a law does not itself change the law's meaning. There is a simple remedy for the disparate treatment of bump stocks and machineguns. Congress can amend the law—and perhaps would have done so already if ATF had stuck with its earlier interpretation. Now that the situation is clear, Congress can act.[264]

To this summa cum laude assertion of textualism, over which the textualists' favored Second Amendment jurisprudence[265] casts a very long shadow, the pages of the Supreme Court Reporter offer but a single ringing rejoinder to such a straightjacketed approach, a rejoinder from the Court's greatest pragmatist of modern times, Justice Robert H. Jackson: *"There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."*[266]

In sum, *Bostock* revealed that today's unbridled, multifarious textualism—as Justice Sandra Day O'Connor once wrote of the trimester framework of *Roe v. Wade*—"is clearly on a collision course with itself."[267]

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264. *Id.* at 429 (Alito, J., concurring) (emphases added).

265. *See* Posner, *supra* note 33; *see also* Eugene Volokh, *Textualism and District of Columbia v. Heller*, 37 HARV. J. L. & PUB. POL'Y 729, 729 (2014). The great irony is that in *Heller*, the textualist Scalia dismissed the importance of the Second Amendment's preamble as a limitation on the right to bear arms—just as Georgia Supreme Court Justice Joseph Henry Lumpkin did in his antebellum opinion insisting that the Second Amendment applies directly—and without qualification—to the States. *See* Nunn v. State, 1 Ga. 243 (1846); *see also* Noah Shusterman, *Why Heller Is Such Bad History,* DUKE CTR. FOR FIREARMS L., (Oct. 20, 2020), https://firearmslaw.duke.edu/2020/10/why-heller-is-such-bad-history [https://perma.cc/BZS6-HSTQ] ("*Heller* is not bad history because it rules that individuals had the right to bear arms outside of participation in the militia. It is bad history because it viewed the individual right to bear arms as *why* the amendment was written in the first place; it is bad history in its claim that the Second Amendment protected "*only* individuals' liberty to keep and carry arms." [emphasis added]. With this approach, Scalia shifted the decision from a questionable but defensible answer to the question the court had been asked, to a mischaracterization of the nature of the amendment itself. That mischaracterization, rather than the decision itself, is what makes Heller such bad history.").

266. Terminiello v. City of Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) (emphasis added).

267. City of Akron v. Akron Center for Reprod. Health, Inc., 462 U.S. 416, 458 (1983) (O'Connor, J., dissenting). Justice Alito himself clearly had a sense that a serious schism had erupted in the Textualist Enterprise:

> The updating desire to which the Court succumbs no doubt arises from humane and generous impulses. Today, many Americans know individuals who are gay, lesbian, or transgender and want them to be

C. The Alien Tort Statute—A Section of the 1789 Judiciary Act That "Can Probably Be Adequately Understood Only in the Context of the Premises and Assumptions of a Legal Culture That No Longer Exists"

The Alien Tort Statue (ATS) is the oldest—and the most sparse and vague—legal text in reference to which we will discuss textualism, textualists, pragmatism, pragmatists (and heresies and heretics) in statutory interpretation. Here, however, is where textualism can contribute some much-needed discipline to otherwise virtually limitless judicial legislating.[268] The textualist focus on actual statutory language is a worthy antidote to the meanderings of judges who would see the United States federal courts use a subject matter jurisdictional statute to create elaborate structures of rules purporting to dictate standards of international conduct by a wide array of actors on the world stage.

> treated with the dignity, consideration, and fairness that everyone deserves. But the authority of this Court is limited to saying what the law *is*.
>
> The Court itself recognizes this:
>
> "The place to make new legislation . . . lies in Congress. When it comes to statutory interpretation, our role is limited to applying the law's demands as faithfully as we can in the cases that come before us." *Ante*, at 1753.
>
> It is easy to utter such words. If only the Court would live by them.

Bostock v. Clayton, 590 U.S. 644, 734 (Alito, J., dissenting). Not surprisingly, some commentators feel unease about the security of the holding in *Bostock*, and urge a major update statute to protect the judicial gains by statute. *See* Alex Reed, *The Title VII Amendments Act: A Proposal*, 59 AM. BUS. L.J. 339, 340 (2022)(noting that "*Bostock*, therefore, raises more questions than it answers. For instance, are transgender workers entitled to use sex -segregated restrooms and locker rooms consistent with their gender identity? Is discrimination against bisexual and intersex persons a form of sex discrimination so as to be actionable under Title VII? Might the Religious Freedom Restoration Act (RFRA) afford employers a viable defense to claims of LGBTQ discrimination? Answers to these and numerous other questions will require years, if not decades, of litigation to resolve, leaving LGBTQ workers and the nation's employers with no clear guidance in the interim."); Regina L. Hillman, *The Battle over Bostock: Dueling Presidential Administrations & the Need for Consistent and Reliable LGBT Rights*, 32 AM. U. J. GENDER, SOC. POL'Y & L. 1, 7 (2023).

268. The author has previously examined this problem. *See* Jeffrey A. Van Detta, *Suing Sponsors of Terrorism in U.S. Courts: In Rubin v. Islamic Republic of Iran and Jesner v. Arab Bank, PLC: SCOTUS Trims to Statutory Boundaries the Recovery in U.S. Courts Against Sponsors of Terrorism and Human-Rights Violations Under FSIA and ATS*, 29 IND. INT'L & COMPAR. L. REV. 303, 332–59 (2019); Jeffrey A. Van Detta, *Some Legal Considerations For EU-Based MNEs Contemplating High-Risk Foreign Direct Investments in the Energy Sector After Kiobel v. Royal Dutch Petroleum and Chevron Corporation v. Naranjo*, 9 S.C. J. INT'L L. & BUS. 161, 201–03 (2013).

The Alien Tort Statute is more properly known merely as forty-seven words in the midst of Section 9 of the Judiciary Act of 1789, by which Congress exercised the power that Article III of the U.S. Constitution vested in it to create a lower federal court system. To appreciate just how unlikely it was ever meant to be what judicial activists and human rights lawyers have tried to make of it since Judge Kaufman's opinion in *Filartiga*, one must see the fullness of its original context:

> SEC. 9. And be it further enacted, That the district courts shall have, exclusively of the courts of the several States, cognizance of all crimes and offences that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas; where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted; and shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it; and shall also have exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States. *And shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.* And shall also have cognizance, concurrent as last mentioned, of all suits at common law where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars. And shall also have jurisdiction exclusively of the courts of the several States, of all suits against consuls or vice-consuls, except for offences above the description aforesaid. And the trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury.[269]

269. *The Judiciary Act; September 24, 1789, An Act to Establish the Judicial Courts of the United States, 1 Stat. 73*, THE AVALON PROJECT: DOCUMENTS IN LEGAL HIST. & DIPL.,

Other judges read more into the forty-seven words of the ATS and found more—even if limited—substance. As the Author has observed previously, [270] the Alien Tort Statute functions like a "judicial Rorschach test."[271] Thus, Justice Souter rescued the statute from textual oblivion with an excessive dose of activism;[272] Chief Justice Roberts put up a fence to keep the ATS from making U.S. federal courts the world's tribunal for international law violations that do not "touch and concern" the territory of the United States.[273] Justice Kennedy further extended that notion to keeping non-U.S. corporations out of federal courtrooms for human rights violations that do not touch and concern the United States;[274] and, as discussed below, Justice Thomas contracted that circumference even further by disallowing the feint of claiming that "decisions made in the U.S." provided the hook for ATS jurisdiction of foreign actions occurring in foreign countries.[275]

1. Domestic Corporate Liability Under the Alien Tort Statute—"The" Unanswered Question, or a Moot Point That Textualism Should Preclude From Ever Even Being Reached?

The unanswered question, however, remains the first question that reached the Supreme Court after *Sosa*[276]—the question originally teed by a very aggressive opinion by Circuit Judge Jose Cabranes in his *Kiobel* opinion,[277] and the question on which the U.S. Supreme Court originally

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YALE L. SCH. LILLIAN GOLDMAN L. LIBR., https://avalon.law.yale.edu/18th_century/judiciary_act.asp [https://perma.cc/7UKN-TL5C] (last visited Sept. 20, 2024); Establishment of the Judicial Courts of the United States, ch. 20, 1 Stat. 73 (1789).

270. Van Detta, *supra* note 155.

271. *Id.* at 304.

272. Sosa v. Alvarez-Machain, 542 U.S. 692 (2004). "After Sosa, the door to actionable claims under the ATS was kept ajar. subject to' vigilant doorkeeping' by the federal courts." Keith A. Petty, *Who Watches the Watchmen: Vigilant Doorkeeping, the Alien Tort Statute, and Possible Reform*, 31 LOY. L.A. INT'L & COMP. L. REV. 183, 189 (2009) (quoting Sosa, 542 U.S. at 729). "[A]according to the Court [in *Sosa*], the ATS was purely jurisdictional, but allowed the courts to entertain causes of action under federal common law." *Id.* at 188. As to what causes of action the courts could entertain under federal common law, "The Sosa Court provided some guidance by stating, '[W]e think courts should require any claim based on the present-day lawof nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized. The eighteenth century paradigms recognized by the Court include norms against the 'violation of safe conducts, infringement of the rights of ambassadors, and piracy.'" *Id.* at 188–89.

273. *See* Jesner v. Arab Bank, PLC, 584 U.S. 241 (2018).

274. *Id.*

275. Nestlé USA, Inc. v. Doe, 593 U.S. 628 (2021).

276. *See supra* text accompanying note 268.

277. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 148–49 (2d Cir. 2010) ("No corporation has ever been subject to *any* form of liability (whether civil, criminal, or otherwise) under the customary international law of human rights. Rather, sources of customary international law have, on several occasions, explicitly rejected the idea of

granted certiorari in *Kiobel* but later changed its mind and decided the case on the canonic presumption against extraterritoriality:

> Whether corporations are immune from tort liability for violations of the law of nations such as torture, extrajudicial executions or genocide, as the court of appeals decisions provides, or if corporations may be sued in the same manner as any other private party defendant under the ATS for such egregious violations, as the Eleventh Circuit has explicitly held.[278]

By limiting the Court's holding to the scenario of a foreign corporate defendant, *Jensen v. Arab Bank PLC* ensured that there would need to be at least one more major decision concerning the scope of the Alien Tort Statute.[279] The major remaining question is whether corporation or Multi-National Enterprise (MNE) *incorporated or headquartered in the United States* is a proper defendant in an ATS action.[280]

Then, the Ninth Circuit's opinion in *Doe v. Nestlé*, *S.A*. appeared to tee up the unanswered question[281]—but only by reason of a bold dissent by Circuit Judge Mark J. Bennett from a denial of rehearing en banc. At first blush, *Nestlé* appeared to be just another in a string of federal court cases issued shortly after *Jesner* to conclude that the concerns and reasoning of *Jesner* applied solely to foreign corporate defendants under the ATS and not to U.S. corporations, which, in the view of these courts, remain viable

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corporate liability. Thus, corporate liability has not attained a discernable, much less universal, acceptance among nations of the world in their relations *inter se*, and it cannot not, as a result, form the basis of a suit under the ATS.") (emphasis added), *aff'd on other grounds*, 569 U.S. 108 (2013).

278. Petition for Writ of Certiorari, Kiobel v. Royal Dutch Petroleum Co., No. 10-1491, 2011 WL 2326721, at ii (June 6, 2011). At that time, the U.S. Eleventh Circuit was firmly in conflict with the Second Circuit on the question of corporate liability under the ATS. *See* Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1263 (11th Cir. 2009); Romero v. Drummond Co., 552 F.3d 1303, 1315 (11th Cir. 2008); Aldana v. Del Monte Fresh Produce, N.A., 416 F.3d 1242, 1253 (11th Cir. 2005). Other Circuits reached the same conclusion as the Eleventh, deepening the divide. Yet, SCOTUS did not reach the corporate liability issue in *Kiobel*. *See* Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013, 1017 (7th Cir. 2011); Doe v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011), *vacated mem. on other grounds*, 527 Fed.Appx. 7 (D.C. Cir. 2013).

279. 28 U.S.C. § 1350.

280. Commentary weighing in on this issue after Jesner includes Doori C. Song, *U.S. Corporate Liability Under the Alien Tort Statute After Jesner v. Arab Bank, PLC*, 21 OR. REV. INT'L L. 1, 2 (2020); Tyler Becker, Note, *The Liability of Corporate Directors, Officers, and Employees under the Alien Tort Statute After Jesner v. Arab Bank, PLC*, 120 COLUM. L. REV. 91, 92 (2020); Rachel Chambers, *Parent Company Direct Liability for Overseas Human Rights Violations: Lessons from the U.K. Supreme Court*, 42 U. PA. J. INT'L L. 519, 522 (2021).

281. *See generally* Doe v. Nestlé, 906 F.3d 1120 (9th Cir. 2018).

defendants in ATS suits that otherwise meet the array of prerequisites established by SCOTUS from *Sosa* to *Jesner*.[282]

At that point, a petition for rehearing and suggestion for rehearing en banc had been filed in the case.[283] Although denying rehearing, the Ninth Circuit issued an amended opinion on July 5, 2019.[284] The amended opinion did not change the earlier opinion's discussion of the effect of *Jesner*; the amended opinion substituted a new discussion of Article III standing, which appeared to be the key to a decision both to deny rehearing and, after a poll of the active judges on the Circuit, to reject the suggestion of rehearing en banc.[285]

Yet, far more significant is the long and stinging dissent to the denial of rehearing by Ninth Circuit Judge Mark J. Bennett,[286] with whom

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282. After a very extensive discussion of the plurality and concurring opinions in *Jesner* and of the cases that preceded *Jesner*, the district court [in *Estate of Alvarez v. Johns Hopkins University*] concluded "[t]o the extent that *Jesner* provides guidance on how to assess whether ATS liability is available against domestic corporations, such guidance does not lead to the conclusion that domestic corporate liability is categorically foreclosed under the ATS." Judge Chuang then set forth a succinct, but compelling, analysis that even under the twin-aims of *Kiobel* and *Jesner*, permitting ATS suits against domestic corporations is the only plausible reading of the statute:

> [T]he Court finds that the need for judicial caution is markedly reduced. Unlike a suit against a foreign corporation as in *Jesner*, which can cause, and has caused in other cases, diplomatic tension or objections from foreign governments that a suit is an "affront" to their sovereignty, suits against U.S. corporations likely will not generate such complaints. Moreover, allowing domestic corporate liability would further the purposes of the ATS, by affording a remedy in U.S. courts to foreign nationals for violations of international law by a U.S. corporation. Permitting such suits to go forward would thus "promote harmony" rather than "provoke foreign nations." Thus, the analysis in *Jesner* underlying the barring of ATS suits against foreign corporations does not lead to the same result for ATS suits against domestic corporations.

Elsewhere in the 4th Circuit, District Judge Leonie Brinkema reached a similar conclusion in the recent case of *Al Shimari v. CACI Premier Tech., Inc*. Meanwhile, a 9th Circuit panel has also embraced a similar reading of *Jesner* on the issue of domestic corporate liability in the latest opinion to issue in the long-running ATS suit (filed fifteen years ago) over allegations that Nestle and other companies, including Cargill, aided and abetted the use of child slavery to harvest cocoa in the Ivory Coast. Once the pending petition for rehearing and suggestion for rehearing en banc are resolved in *Doe v. Nestle*, the defendants may very well again, as they have previously done, file a petition for writ of certiorari to the U.S. Supreme Court. *See* note 265 and accompanying text (footnotes omitted) (quoting *Est. of Alvarez v. Johns Hopkins Univ.*, 373 F. Supp. 3d 639, 647-49 (D. Md. 2019)).

283. *Id.*

284. *See generally* Doe v. Nestlé, S.A., 929 F.3d 623 (9th Cir. 2019).

285. *Id.* at 626.

286. Judge Bennett is a relatively new member of the Ninth Circuit who was confirmed by the U.S. Senate on July 10, 2018, by a 72-27 vote, with all 27 "nays" coming from Republican Senators who cited Bennett's less expansive views on the reach of the Second

Judges Bybee, Callahan, Bea, Ikuta, and Ryan Nelson concurred. This powerful and populous dissent made it clear that this case could be catapulted to a priority position for SCOTUS to pluck from the certiorari docket.

Judge Bennett's dissent invited the Court not only to rule—*flatly*—that there is no corporate liability whatsoever under the ATS but also to tighten up loose ends left by *Kiobel* in the nature of the "touch and concern the territory of the United States" test enunciated by Chief Justice Roberts's 2013 opinion for the Court in *Kiobel*.[287] One can hear echoes of both Justice Gorsuch and Justice Alito in Judge Bennett's opening paragraph:

> The Supreme Court has told us that the Alien Tort Statute ("ATS") must be narrowly construed and sparingly applied, in line with its original purpose: "to help the United States avoid diplomatic friction" by providing "a forum for adjudicating that 'narrow set of violations of the law of nations' that, if left unaddressed, 'threaten[ed] serious consequences' for the United States." . . . The Court has given us a roadmap to determine whether artificial entities like corporations can be liable for ATS violations. And the Court has made it equally clear that the ATS reaches only domestic conduct—where a claim "seek[s] relief for violations of the law of nations occurring outside the United States," the claim is "barred." Violations of the law of nations—like genocide, slavery, and piracy—are horrific. But in its zeal to sanction alleged violators, the panel majority has ignored the Court's ATS roadmap. First, the panel majority has failed to properly analyze under Jesner whether a claim against these corporate defendants may proceed. And second, the panel majority has compounded that error by allowing this case to move forward notwithstanding that Defendants' alleged actionable conduct took place almost entirely abroad, turning the presumption against extraterritoriality on its head.[288]

Amendment expressed as Hawaii's Attorney General as the reason for their opposition. Alex Swoyer, *27 Republicans vote against Donald Trump's judge for the 9th Circuit*, WASH. TIMES (July 10, 2018), https://www.washingtontimes.com/news/2018/jul/10/27-republicans-vote-against-trumps-judge-9th-circu/ [https://perma.cc/V79Y-2WEH].

287. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 124 (2d Cir. 2010); see Jeffrey A. Van Detta, *Some Legal Considerations For EU-Based MNEs Contemplating High-Risk Foreign Direct Investments in the Energy Sector After Kiobel v. Royal Dutch Petroleum and Chevron Corporation v. Naranjo*, 9 S.C. J. INT'L L. & BUS. 161, 201–03 (2013).

288. *Nestlé, S.A.*, 929 F.3d at 626–27 (Bennett, J., dissenting) (citations omitted).

Judge Bennett elaborated upon the foregoing opening salvo in a two-prong attack that invoked his (and his dissenting colleagues') views of the holdings of both *Kiobel* and *Jesner*:

> *Jesner* changed the standard by which we evaluate whether a class of defendants is amenable to suit under the ATS. Corporations are no longer viable ATS defendants under either step one or step two of the two-step approach the Court announced in *Sosa*, as applied in *Jesner*. The panel majority, however, fails to apply *Jesner*'s controlling analysis and applies an incorrect theory of ATS corporate liability even as the Supreme Court suggests that we reach the opposite conclusion.
>
> The panel majority also all but ignores the Court's instruction that an ATS claim must "touch and concern the territory of the United States ... with sufficient force to displace the presumption against extraterritorial application" of the ATS. Plaintiffs' allegations—based almost entirely on violations of the law of nations that allegedly occurred in Africa—are wholly insufficient to state a claim.
>
> The Supreme Court has instructed that we must "exercise 'great caution' before recognizing new forms of liability under the ATS." … We should have heeded this instruction and taken this case en banc to hold that these corporations may not be sued under the ATS and to make clear that the presumption against extraterritoriality still applies in the Ninth Circuit.[289]

First, as to Judge Bennett's contention that *Jesner* commands the end of corporate defendant ATS lawsuits that began with *Doe v. Unocal*,[290] he concedes, of course, that this is an ineluctable *inference*, rather than a direct quotation, from *Jesner*'s holding. He also concedes that the Court, while setting up that inference, left it to the lower courts to draw:

> [T]he Jesner Court explained that its "general reluctance to extend judicially created private rights of action ... extends to the question whether the courts should exercise the

289. *Id.* at 627 (citations omitted).

290. Theresa Adamski, *The Alien Tort Claims Act and Corporate Liability: A Threat to the United States' International Relations*, 34 FORDHAM INT'L L.J. 1501, 1517 (2003) ("In 1996, *Doe v. Unocal Corporation*, the first ATCA case against a multinational corporation for alleged human rights violations, was filed in the Ninth Circuit.").

> judicial authority to mandate a rule that imposes liability upon artificial entities like corporations." . . . Justice Kennedy's opinion for the Court answered that question in the negative for foreign corporations, and in the process invited the lower courts to consider whether the question should be answered similarly as to domestic corporations.[291]

More significantly, Judge Bennett—and the good number of his 9th Circuit colleagues who joined his dissent—counted five votes scattered among three separate opinions (plurality by Kennedy, concurrences by Alito and Gorsuch) that, he argued, taken in toto, preclude any corporate liability whatsoever—domestic or foreign—under the ATS.[292] Judge Bennett then returned to the argument first—and most powerfully—advanced by Second Circuit Judge Jose Cabranes[293] that international law does not recognize corporate liability for violation of customary international law (and most treaty-based international law).[294] Further, Judge Bennett expounds in answering with a definitive *no* and *yes* to the compound question of "whether allowing [a] case to proceed under the ATS is a proper exercise of judicial discretion, or instead whether caution requires the political branches to grant specific authority before corporate liability can be imposed."[295]

Judge Bennett and his dissenting colleagues did not stop there, however. They proceed to challenge the way that the majority applies the *Kiobel* "touch-and-concern-the-territory-of-the-United States" test for reining in the application of the ATS to extraterritorial conduct.[296] In summarizing the (lack of meaningful) contacts with the United States, the dissenters note that "[t]he majority opinion identifies three examples of conduct that, in its view, are sufficiently forceful to displace the presumption against extraterritoriality." These include "allegations that (1) "[D]efendants funded child slavery practices in the Ivory Coast" in the form of "personal spending money to maintain the farmers' and/or the cooperatives' loyalty as an exclusive supplier," which the panel majority characterizes as "kickbacks"; (2) Defendants' employees "inspect

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291. *Nestlé, S.A.*, 929 F.3d at 629 (Bennett, J., dissenting) (citations omitted) (discussing the three opinions and concluding that, "[i]n short, five justices signaled in *Jesner* that they would hold that corporations are not subject to the ATS").

292. *Id.* at 630. The author of this paper does not find Judge Bennett's reasoning here particularly persuasive as to whether *Jesner* speaks meaningfully to domestic corporate liability under the ATS, but since all he was trying to support with this reasoning is his argument that the 9th Circuit should have re-heard the case in banc, perhaps it suffices to justify that more modest ambition.

293. *E.g.* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 148–49 (2d Cir. 2010).

294. *Nestlé, S.A.*, 929 F.3d at 630–32 (Bennett, J., dissenting).

295. *Id.* at 632–33.

296. *Id.* at 633–34.

operations in the Ivory Coast"; and (3) Defendants made "financing decisions" in the United States." However, the dissent makes quick work of this trio, pronouncing that "the first two sets of allegations (provision of spending money and inspections) relate solely to foreign conduct" while "[t]he third, which involves domestic corporate decision-making, cannot sustain an ATS claim, even if we assume aiding and abetting liability under the ATS.[297]

In this forthright salvo, Judge Bennett fired a shot across the Ninth Circuit majority's bow because the majority had, in his view, rather dramatically misapplied, or even outright ignored, the Court's standard for "touch and concern" that *Kiobel* set down. He focused further fire on the third allegation about financing decisions made in the U.S., highlighting a circuit split that seemed a casting of bait to hook a possible certiorari grant to refine the *Kiobel* test as well as to kill all corporate liability under the ATS.[298]

In short, the six-judge dissent in *Nestlé* teed up two perfect opportunities for SCOTUS to further trim the ATS to statutory boundaries: by declaring all corporations immune from suit and by tightening up the scope of extraterritoriality through the clarification that merely making financial decisions in the U.S. does not make a case, otherwise built predominantly upon events transpiring in foreign lands, somehow "touch and concern" American territory. Indeed, *Nestlé* presented a golden opportunity for the Supreme Court to resolve corporate liability in toto and also to tighten up *Kiobel*'s territorial rule. Moreover, since *Jesner* was decided, there had been a major change in Court personnel—Justice Kavanaugh has been confirmed and seated to replace the retired Justice Kennedy. Justice Kennedy, the author of the plurality opinion in *Jesner*, appeared to be conflicted about whether domestic corporate liability was precluded under the ATS, as opposed to foreign corporate liability. Justice Kavanaugh, however, had no such qualms.[299]

At the time of Judge Bennett's dissent, it appeared questions of whether and to what degree the Court would take the opportunity likely to be presented in *Doe v. Nestlé* would come down once again to a fifth

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297. *Id.* at 634 (citation omitted).

298. *Id.* at 635–36 (noting that the majority's "holding here also conflicts with two other circuits that have considered the question," specifically the Eleventh and the Fifth) (citing Doe v. Drummond Co., 782 F.3d 576 (11th Cir. 2015); Adhikari v. Kellogg Brown & Root, Inc., 845 F.3d 184, 197 (5th Cir. 2017)).

299. Indeed, we knew more about his views on the Alien Tort Statue than we did even of some of the Justices who have been on the court for longer than he has. That is because he penned a strong and lengthy dissent to another corporate ATS case, Doe v. VIII Exxon Mobil Corp., which preceded – and predicted – both the SCOTUS decisions on the limits of extraterritoriality in *Kiobel* and foreign corporate liability in *Jesner*, and in which then-Judge Kavanaugh expressed complete and strong agreement with Judge Cabranes in the 2010 *Kiobel* opinion declaring the ATS permits no corporate liability. 654 F.3d 11, 72–73, 74–81 (extraterritoriality), 81–85 (corporations are not proper defendants because "customary international law does not extend liability to corporations").

Justice—Chief Justice John Roberts. Would he be ready to have the court administer a coup-de-grâce to the ailing ATS corporate-suit era? Or would he hold back, and find some middle ground for allowing at least some ATS suits to proceed against domestic corporate defendants? As the Author observed in an earlier work, "*Yet, we must not forget that its Chief Justice's incrementalism has defined the Roberts Court. How many more increments are needed to "tame" the ATS—or to inspire Congress to legislate it back to life—may be known only to the Chief Justice himself*."[300]

Judge Bennett's dissent worked—up to a point. The Court *did* take certiorari of *Nestlé*.[301] And one shot among the many that Judge Bennett's dissent took at the Alien Tort Statute landed true with a majority of the Justices. However, Justice Thomas wrote a fairly narrowly crafted opinion that stopped short of finding corporate liability untenable under the ATS.[302] Instead, he focused on whether the plaintiffs were really "here seek[ing] a judicially created cause of action to recover damages from American corporations that allegedly aided and abetted slavery abroad" although their "injuries occurred entirely overseas, . . . because the defendant corporations allegedly made 'major operational decisions' in the United States."[303] Justice Thomas wrote for an eight-Justice majority of the Court in rejecting the "major operational decisions" view. "Nearly all the conduct that they say aided and abetted forced labor—providing training, fertilizer, tools, and cash to overseas farms—occurred in Ivory Coast" and "allegations of general corporate activity—like decisionmaking [in the United States]—cannot alone establish domestic application of the ATS."[304] Thus, the Thomas opinion reduced the case to a routine application of the presumption against extraterritoriality of the kind the Court had already employed to trim the Alien Tort Statute in *Kiobel*.[305]

Significantly, however, it is clear that there is a majority of the Justices—avowed textualists and otherwise—who would hold that

300. Jeffrey A. Van Detta, *Suing Sponsors of Terrorism in U.S. Cts.:* Rubin v. Islamic Republic of Iran *and* Jesner v. Arab Bank, PLC: *SCOTUS Trims To Statutory Boundaries The Recovery In U.S. Courts Against Sponsors of Terrorism and Hum.-Rts Violations Under FSIA and ATS*, 29 IND. INT'L & COMPAR. L. REV. 303, 368 (2019) (emphasis added) (footnote omitted).

301. Nestlé USA, Inc. v. Doe, 593 U.S. 628, 628 (2020).

302. *Id.*

303. *Id.* at 630.

304. *Id.* at 634.

305. *Id.* ("Because making 'operational decisions' is an activity common to most corporations, generic allegations of this sort do not draw a sufficient connection between the cause of action respondents seek—aiding and abetting forced labor overseas—and domestic conduct. '[T]he presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case.'") (original emphasis).

corporations are proper parties under the Alien Tort Statute. Justice Alito, in dissent,[306] counted the votes:

> The primary question presented in the two certiorari petitions filed in these cases is whether domestic corporations are immune from liability under the Alien Tort Statute . . . I would decide that question, and for the reasons explained in Part I of Justice Gorsuch's opinion, which I join, I would hold that if a particular claim may be brought under the ATS against a natural person who is a United States citizen, a similar claim may be brought against a domestic corporation. See also ante, at 1945 - 1946, n. 4 (Sotomayor, J., joined by Breyer and Kagan, JJ., concurring in part and concurring in judgment). Corporate status does not justify special immunity.[307]

In fact, when one looks at the concurring opinions, one sees that other textualist judges do not see matters Judge Bennett's way when it comes to the unanswered question of corporate liability. In fact, it seems as if Justice Thomas crafted the Court's opinion narrowly because there is

306. Justice Alito did not dissent because he thought the *Nestlé* plaintiffs had stated a claim under the Alien Tort Statute. He dissented because instead of deciding the issue of whether domestic corporations could be sued, "[t]he Court instead disposes of these cases by holding that respondents' complaint seeks extraterritorial application of the ATS, but in my view, we should not decide that question at this juncture" because it "is tied to the question whether the plaintiffs should be allowed to amend their complaint, and in order to reach the question of extraterritoriality, the Court must assume the answers to a host of important questions," the nature of which "begins to take on the flavor of an advisory opinion when it is necessary to make so many important assumptions in order to reach the question that is actually resolved." *Id.* at 657–58 (Alito, J., dissenting). At least five such assumptions were enumerated by Justice Alito: "(1) that, contrary to the arguments set out in Part III of Justice Thomas's opinion and Part II of Justice Gorsuch's opinion, it is proper for us to recognize new claims that may be asserted under the ATS; (2) that the conduct petitioners are alleged to have aided and abetted provides the basis for such a claim; (3) that there is a 'specific, universal, and obligatory' international law norm, that imposes liability for what our legal system terms aiding and abetting; (4) that, if there is such a norm, we should choose to recognize an ATS aiding-and-abetting claim; and (5) that respondents' complaint adequately alleges all the elements of such a claim, including the requisite *mens rea*." *Id.* at 657 (citations omitted).

307. *Id.* Justice Breyer retired in 2022 and was replaced by Justice Ketanji Brown Jackson. Justice Jackson's views on the Alien Tort Statute are not yet known, *see* Tyler R. Giannini, *Living with Hist.: Will the Alien Tort Statute Become a Badge of Shame or Badge of Honor*, 132 YALE L.J. F. 814, 837 (2022) (noting that "[w]hile Justice Breyer has since been replaced by Justice Jackson, whose position on ATS corporate liability is unknown, she will likely prove to be ideologically closer on the issue to Justices Kagan and Sotomayor than the Justices who have rejected corporate liability"), although she invoked the statute in a controversial brief to which she subscribed as a federal public defender. *See, e.g.*, Daniel Dale, *Fact Check: Ketanji Brown Jackson's 2005 'War Crimes' Allegation Was About Torture*, CNN (Mar. 23, 2022, 8:04 AM), https://www.cnn.com/2022/03/23/politics/ketanji-brown-jackson-hearings-fact-check/index.html [https://perma.cc/7UV4-PPL8].

insufficient support among the textualist justices to deliver a coup-de-grâce to corporate liability generally. Indeed, quite the opposite appears—the textualists see no exclusion of corporations in the language of the statute and see nothing compelling in American legal history to presume it.[308] Accordingly, corporate liability is likely to survive if and when raised in a subsequent case.[309]

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308. Justice Gorsuch's concurrence elaborated on this point. *Nestlé USA, Inc.*, 593 U.S. at 640–46 (2020) (Gorsuch, J., concurring). "Generally, . . . the law places corporations and individuals on equal footing when it comes to assigning rights and duties. Even before the ATS's adoption, Blackstone explained that, '[a]fter a corporation is so formed and named, it acquires many powers, rights, capacities, and incapacities,' including '[t]o sue or be sued, implead or be impleaded, grant or receive, by its corporate name, and do all other acts as natural persons may.'" *Id.* at 640. "If more evidence were necessary to prove the point, plenty would seem available," Justice Gorsuch observed, for "[c]ase after case makes plain that, '[a]t a very early period, it was decided in Great Britain, as well as in the United States, that actions might be maintained against corporations for torts . . . of nearly every variety.' *Id.* (quoting Philadelphia, W., & B.R. Co. v. Quigley, 62 U.S. 202, 21 How. 202, (1859), and citing Chestnut Hill & Spring House Turnpike Co. v. Rutter, 4 Serg. & Rawle 6, 17 (Pa. 1818) ("[F]rom the earliest times to the present, corporations have been held liable for torts"); United States v. Amedy, 24 U.S. 392, 11 Wheat. 392, 412, (1826) (Story, J.) ("Another question, not raised in the Court below, has been argued here, and upon which, as it is vital to the prosecution, we feel ourselves called upon to express an opinion. It is, that a corporation is not a person within the meaning of the act of Congress [Crimes Act of the 26th of March, 1804, c. 393. [xl.] s. 2. . . . making it a crime to "destroy[y] a vessel with intent to prejudice the underwriters." Act of March 26, 1804, ch. 40, 2 Stat. 290]. If there had been any settled course of decisions on this subject, in criminal cases, we should certainly, in a prosecution of this nature, yield to such a construction of the act. But there is no such course of decisions. The mischief intended to be reached by the statute is the same, whether it respects private or corporate persons. That corporations are, in law, for civil purposes, deemed persons, is unquestionable") (emphasis omitted). Justice Gorsuch then looked at corporations as actors within the historical context of the Alien Tort Statute:

> More evidence yet lies in the circumstances surrounding the ATS's adoption. It seems Congress enacted the statute as part of a comprehensive effort to ensure judicial recourse for tortious conduct that otherwise could have provided foreign nations "with just cause for reprisals or war." In particular, Congress may have had an eye on three specific problems: violations of safe conduct, interference with ambassadors, and piracy. On the view of many, Blackstone included, these three offenses entailed not just injuries to the affected individuals but to their nation-states. So, if Americans engaged in them, and if American courts provided foreigners no recourse of any kind, European powers would have had just cause to bully the new Nation. In that context, distinguishing between individuals and corporations would seem to make little sense. If early Americans assaulted or abducted the French Ambassador, what difference would it have made if the culprits acted individually or corporately? Either way, this Nation's failure to "oblige the guilty to repair the damage" would have provided just cause for reprisals or worse.

Nestlé USA Inc., 593 U.S. at 640–42 (citations omitted).

309. *See* Clara Petch, *What Remains of the Alien Tort Statute after* Nestlé USA, Inc. v. Doe*?*, 42 NW. J. INT'L L. & BUS. 397, 412–14 (2022) (observing that "*Nestlé* presented

That, however, is not the end of the rendezvous between textualism and the Alien Tort Statute. Indeed, if the warring textualists from *Harrison* and *Bostock* get their acts together, they could achieve a ruling where textualism truly does have something to add and errors to correct.

2. The Opinion That Never Was but Could and Should Be: A Textualist Overruling of *Sosa*, and the Return of the Alien Tort Statute to the Source of Subject Matter Jurisdiction, Not Substantive Law, That the Text and Context of the 1789 Judiciary Act Clearly Established

Ten years ago, an author in the inaugural issue of the *Belmont Law Review* posed a profound hypothetical that is of interest to us at this juncture: *What if Judge Robert Bork had been confirmed to the Supreme Court in 1986?*[310] While that author discussed a number of very high-profile issues that came before SCOTUS in the years following 1986, we are concerned with an issue the author did not discuss: whether the Alien Tort Statute recognizes any power in the federal courts to create new causes of actions against any person or entity—corporate or otherwise—beyond the three torts that the First Congress understood violated the law of nations (piracy, assaults on ambassadors, and violation of safe conducts)? While the author of the 2014 article did not take up that specific issue, it is *not* one that requires *any* speculation on our part. A Justice Bork would have already thoroughly analyzed the scope and meaning of the Alien Tort Statute as a Judge on the District of Columbia Court of Appeals in *Tel–Oren v. Libyan Arab*.[311]

And Judge Bork's views have a renewed potency and relevance in an age where textualism could be put to a constructive use in the Alien Tort Statute arena, unlike its misuse in federal discrimination law statutes. That door has been opened in *Nestlé*. In Part III of his opinion in *Nestlé*, Justice Thomas set out a call for completing the trimming of the Alien Tort Statute to its historic dimensions, before the extravagances of the *Filartiga* line of cases started by Judge Irving Kaufman.[312] Only Justices Gorsuch and

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sufficient consensus to suggest that domestic corporations can be named defendants in ATS suits" but an "area of interest regarding domestic corporate liability under the ATS may be whether plaintiffs can sue domestic parent corporations with foreign subsidiaries engaging in international law violations," which involves a "corporate relationship [that] is arguably more significant than that in Nestlé, where the domestic corporation had influence over but did not control the farms in Ivory Coast.").

310. Pomerance, *supra* note 188.

311. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 813 (D.C. Cir. 1984) (Bork, J., concurring); *see also* Doe v. Nestlé, S.A., 929 F.3d 623, 637 (9th Cir. 2019) (identifying the Alien Tort Statute as 28 U.S.C. § 1350).

312. *Tel-Oren*, 726 F.2d at 813 (Bork, J., concurring); *see Nestlé, S.A.*, 929 F.3d at 637 (identifying the Alien Tort Statute as 28 U.S.C. § 1350).

Kavanagh joined that portion of the opinion.[313] But in a subsequent case, there will be enough votes to overrule *Sosa*, which, better informed opinion thinks, is imperative.[314]

The next Alien Tort Statute case that comes to SCOTUS, therefore, presents the textualist Justices the opportunity to harmonize their textualism and put it to highly effective use in overruling a precedent that was "egregiously wrong"[315] from the time it was decided. Specifically, they should overrule that crucial portion of *Sosa v. Alvarez-Machain,*[316] in which Justice Souter held for the majority that "the door is still ajar subject to

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313. *Nestlé USA Inc*., 593 U.S. at 630. Justice Gorsuch further elaborated on the reasons for overruling *Sosa* in a separate concurrence. *Id.* at 642–43 (Gorsuch, J., discussing *Sosa*).

314. The standard for overruling a precedent set within recent memory by SCOTUS. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022). The author does not cite *Dobbs* because of any agreement with the majority's holding. In fact, the author flatly disagrees with the position espoused by Justice Alito, as he has been on record for doing so over the last 38 years. *See, e.g.*, Jeffrey A. Van Detta, *Compelling Governmental Interest Jurisprudence of the Burger Court: A New Perspective On* Roe v. Wade, 50 ALB. L. REV. 675, 675–76 (1986) (correctly, six years in advance, the U.S. Supreme Court's ruling in Planned Parenthood v. Casey, 505 U.S. 833 (1992), which *Dobbs* purported to overrule); *see also* Jeffrey A. Van Detta, *Constitutionalizing* Roe, Casey, *and Carhart: A Due-Process Anti-Discrimination Principle To Give Constitutional Content To The "Undue Burden" Standard Of Review Applied To Abortion Control Legislation*, 10 SO. CAL. REV. L. & WOMEN'S STUD. 211, 215-16 (2001). Rather, the author cites *Dobbs* simply for the multi-factored test the Court has developed in considering whether to overrule a previous precedent. *See Dobbs* at 267. Our cases have attempted to provide a framework for deciding when a precedent should be overruled, and they have identified factors that should be considered in making such a decision," including "the nature of their error, the quality of their reasoning, the "workability" of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance". *Accord* Janus v. State, Cnty., and Mun. Emps., 138 S. Ct. 2448, 2478–79, (2018); *see also* Ramos v. Louisiana, 140 S. Ct. 1390, 1414–16 (2020) (Kavanaugh, J., concurring in part); Patterson v. McLean Credit Union, 491 U.S. 164, 171–75 (1989) (declining to overrule holding of Runyon v. McCrary, 427 U.S. 160 (1976) that 42 U.S.C. § 1981 bars racially discriminatory conduct in contracting by private parties, but noting that a "traditional justification for overruling a prior case is that a precedent may be a positive detriment to coherence and consistency in the law, either because of inherent confusion created by an unworkable decision, or because the decision poses a direct obstacle to the realization of important objectives embodied in other laws").

315. *See, e.g.*, *An Objection to* Sosa - *and to the New Federal Common Law*, 119 HARV. L. REV. 2077, 2093–94, 2098 (2006) ("If the ATS, as *Sosa* held, *Sosa* held, was only jurisdictional and if, as *Erie* held, the Rules of Decision Act dictated that state substantive rules control in the absence of federal enacted law, then Congress did not intend to enable a federal common law of CIL," and therefore "the federal common law created in *Sosa* cannot be justified as either congressionally authorized or falling within a constitutional enclave"); Petty, *supra* note 272; *see also Tel-Oren*, 726 F.2d at 799 (Bork, J., concurring); *see generally* Anthony J. Bellia, *Justice Scalia, Implied Rights of Action, and Historical Practice*, 92 NOTRE DAME L. REV. 2077 (2017); Anthony J. Bellia Jr. & Bradford R. Clark, *The Original Source of the Cause of Action in Federal Courts: The Example of the Alien Tort Statute*, 101 VA. L. REV. 609 (2015), *and* Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777 (2004).

316. Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004).

vigilant doorkeeping, and thus open to a narrow class of international norms today."[317] They should adopt instead the good sense, which Justice Souter's majority rejected, that would "close the door to further independent judicial recognition of actionable international norms."[318]

And Judge Bork provided the blueprint for a correct ruling by the Court.

Judge Bork made the classic *enlightened* textual case—textualism applied within a dynamic statutory interpretative context—for reading the Alien Tort Statute consonant with its forty-seven-words, within its context in the Judiciary Act of 1789, within separation of powers concepts and within the political and legal realities of its time:

> The question in this case is whether appellants have a cause of action in courts of the United States for injuries they suffered in Israel. Judge Edwards contends, and the Second Circuit in *Filartiga* assumed, that Congress' grant of jurisdiction also created a cause of action. That seems to me fundamentally wrong and certain to produce pernicious results. For reasons I will develop, it is essential that there be an explicit grant of a cause of action before a private plaintiff be allowed to enforce principles of international law in a federal tribunal. . . . [N]o body of law expressly grants appellants a cause of action; the relevant inquiry, therefore, is whether a cause of action is to be inferred. That inquiry is guided by general principles that apply whenever a court of the United States is asked to act in a field in which its judgment would necessarily affect the foreign policy interests of the nation.[319]

Judge Bork's textualism did not eclipse his ability to see the problem from the wider perspective of dynamic statutory interpretation. What his textualism demonstrated, however, is that going beyond the language of the Alien Tort Statute itself and its context within the Judiciary Act of 1789 leads to the same destination. "Historical research has not as yet disclosed what Section 1350 was intended to accomplish," a fact which "poses a special problem for courts."[320] "A statute whose original meaning is hidden from us and yet which, if its words are read incautiously with modern assumptions in mind, is capable of plunging our nation into foreign conflicts, ought to be approached by the judiciary with great

317. For an informative discussion of the many practical problems that arise from this invention of Justice Souter's, *see* Petty, *supra* note 272.

318. *Sosa*, 542 U.S. at 729.

319. *See Tel-Oren*, 726 F.2d at 801 (Bork, J., concurring) (emphasis supplied) (citing Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir.1980)).

320. *Id.* at 812.

circumspection," Judge Bork cautioned.[321] For example, "[i]t will not do simply to assert that the statutory phrase, the "law of nations," whatever it may have meant in 1789, must be read today as incorporating all the modern rules of international law and giving aliens private causes of action for violations of those rules."[322] To the obvious question, "Why will it not do," Judge Bork was ready with a definitive reply that "[i]t will not do because the result is contrary not only to what we know of the framers' general purposes in this area but contrary as well to the appropriate, indeed the constitutional, role of courts with respect to foreign affairs."[323]

The quest for meaning of the ATS could be brought to a swift conclusion after forty-five years of confusion. As Judge Bork trenchantly observed, "Section 1350 can probably be adequately *understood only in the context of the premises and assumptions of a legal culture that no longer exists*."[324] Judge Bork was willing to be proven wrong: as he wrote in 1986, "[p]erhaps historical research that is beyond the capacities of appellate judges will lift the darkness that now envelops this topic, but that has not yet occurred, and we should not attempt to anticipate what may or may not become visible."[325] In the thirty-eight years that have elapsed, we know no more now about the history of the ATS—whether from the labors of judges or the research of scholars—than we did then.[326] What we do know today leads—from the perspective of an enlightened textualist analysis—is what Judge Bork understood then.[327] "What little relevant historical background is now available to us indicates that those who drafted the Constitution and the Judiciary Act of 1789 wanted to open federal courts to aliens for the purpose of avoiding, not provoking, conflicts with other nations."[328] Indeed, "a broad reading of section 1350 runs directly contrary to that desire."[329] Furthermore, "[i]t is also relevant to a construction of this provision that until quite recently nobody understood it to empower courts to entertain cases like this one or like *Filartiga*."[330]

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321. *Id.*

322. *Id.*

323. *Id.* at 812.

324. *Id.* at 815.

325. *Id.*

326. In fact, what we know now resoundingly confirms what Judge Bork taught us then. *See generally* Thomas Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830 (2006); Daniel Hulsebosch, Magna Carta *for the World: The Merchant's Chapter and Foreign Capital in the Early American Republic*, 94 N.C. L. REV. 1599 (2016).

327. *See* Lee, *supra* note 326.

328. *Tel-Oren*, 726 F.2d at 812–13 (Bork, J., concurring).

329. *Id.*

330. *Id.* Judge Bork further elaborated the textualist perspective:

> Though it is not necessary to the decision of this case, it may be well to suggest what section 1350 may have been enacted to accomplish, if only to meet the charge that my interpretation is not plausible because it would drain the statute of meaning. The phrase "law of nations" has meant various things over time. It is important to remember that in 1789

Thus, Judge Bork concluded that "the statute probably was intended to cover only a very limited set of tort actions by aliens, none of which is capable of adversely affecting foreign policy."[331] Furthermore, "[s]ince international law does not, nor is it likely to, recognize the capacity of private plaintiffs to litigate its rules in municipal courts, as a practical matter only an act of Congress or a treaty negotiated by the President and ratified by the Senate could create a cause of action that would direct courts to entertain cases like this one."[332] As a veteran of the political world in Washington, Judge Bork didn't think that was a very likely expectation: "Should such an improbable statute or treaty come into existence," wrote Judge Bork, "it will be time to ask whether the constitutional core of the political question doctrine precludes jurisdiction."[333]

> there was no concept of international human rights; neither was there, under the traditional version of customary international law, any recognition of a right of private parties to recover . . . . Clearly, cases like this and *Filartiga* were beyond the framers' contemplation. That problem is not avoided by observing that the law of nations evolves. It is one thing for a case like *The Paquete Haban*a to find that a rule has evolved so that the United States may not seize coastal fishing boats of a nation with which we are at war. It is another thing entirely, a difference in degree so enormous as to be a difference in kind, to find that a rule has evolved against torture by government so that our courts must sit in judgment of the conduct of foreign officials in their own countries with respect to their own citizens. The latter assertion raises prospects of judicial interference with foreign affairs that the former does not. A different question might be presented if section 1350 had been adopted by a modern Congress that made clear its desire that federal courts police the behavior of foreign individuals and governments. But section 1350 does not embody a legislative judgment that is either current or clear and the statute must be read with that in mind.

Id. at 813 (citations omitted) (emphasis added). One does not have to share Judge Bork's social philosophies or political conservatism (*see generally*, ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE (Harper Collins 1996)) to see that no theory of rational statutory interpretation supports the federal courts' reanimation of the ATS from 1980 onwards. *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 268–72 (West Group 2011) (explaining the "Extraterritoriality Canon" of statutory interpretation, and quoting Justice Robert H. Jackson's admonition that "if any construction otherwise be possible, an Act will not be construed as applying to foreigners in respect to acts done by them outside the dominions of the sovereign power enacting.") (quoting Lauritzen v. Larsen, 345 U.S. 571, 578 (1953)). Or, as it was reportedly put by a very pragmatic jurist and a committed internationalist, Chief Judge Charles Evans Hughes, "[i]t is well to be liberal, but not messy." FRED W. FRIENDLY, MINNESOTA RAG: THE DRAMATIC STORY OF THE LANDMARK SUPREME COURT CASE THAT GAVE NEW MEANING TO FREEDOM OF THE PRESS 105 (Random House, Inc.1981) (discussing the judicial philosophy of Chief Justice Hughes).

331. *Tel-Oren,* 726 F.2d at 822 (Bork, J., concurring).

332. *Id.*

333. *Id.*

A harmonized textualist majority could do a great favor to the bench and bar if it simply said: "The issue of corporate liability under the ATS is largely moot, because we overrule the 'vigilant doorkeeping' invitation in *Sosa* on the grounds exposited by Judge Bork in his *Tel-Oren* concurrence. To the extent that a corporation can violate the law of nations (or a specific treaty to which the U.S. is party) in matters involving piracy, ambassadors, and safe conduct, nothing in the text or history of the ATS precludes a corporation from liability for these three ancient torts in violation of the law of nations or a treaty of the United States."

CONCLUSION: "DANGEROUS WEAPONS IN THE HANDS OF THE DISINGENUOUS"?

The exploration of the cases and arguments made in this Article confirms a vital observation made by the leading scholar of statutory interpretation in our time:

> These "Text Wars" suggest that the newest textualism is failing to deliver its promised rule-of-law benefits: If all these smart textualist judges, assisted by teams of well-trained law clerks, cannot agree on answers, then textualism does not produce consistent, predictable, and knowable results in hard cases. Although the new textualists do not claim that their method always produces interpretive closure or complete predictability, the recent divisions undermine their claim that textualism is any *more* objective, yields *more* predictable results, or constrains discretion *better* than pluralist, pragmatic approaches.[334]

That the Court can indulge in such Reformation schisms as fundamental as the proper way to interpret statutes suggests not only usurpation of authority but also abuse of it as well. The Author is compelled to agree with the following observations by Professor Lemley:

> The past few years have marked the emergence of the imperial Supreme Court. Armed with a new, nearly bulletproof majority, conservative Justices on the Court have embarked on a radical restructuring of American law across a range of fields and disciplines. . . . [T]he Court's recent opinions point in radically different directions. [Those opinions] have done so using a variety of (often contradictory) interpretative methodologies. The common

334. William N. Eskridge, Jr., Brian G. Slocum, & Kevin Tobia, *Textualism's Defining Moment*, 123 COLUM. L. REV. 1611, 1622–23 (2023).

> denominator across multiple opinions in the last two years is that they concentrate power in one place: the Supreme Court.
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> . . . [T]he Court has begun to implement the policy preferences of its conservative majority in a new and troubling way: by simultaneously stripping power from every political entity *except* the Supreme Court itself. The Court of late gets its way, not by giving power to an entity whose political predilections are aligned with the Justices' own, but by undercutting the ability of any entity to do something the Justices don't like. We are in the era of the imperial Supreme Court.[335]

Harrison shows pedantic uses of textualism; *Comcast* and *Bostock* show misuse of textualism, isolated from dynamic statutory interpretation, leading to unpredictable results because they are severed from the actual statutory language; and the Alien Tort Statute, interpreted by a sophisticated textualist such as the late Judge Robert Bork, shows where focus on text and context lead to a result that—although unpopular in many quarters—would restore a statute its proper jurisdictional sphere rather than a futile engine for judicial activism.

The Supreme Court should attend to get its interpretative house in order. The 1830s admonition of Francis Lieber about "desperate weapons in the hands of the disingenuous"[336] continues to ring in our ears. Having the right tools, but using them selectively, disingenuously, or incorrectly, is nothing short of an unfolding legal tragedy—for as Scripture long ago admonished, "in the days when the judges ruled, a great famine came upon the land."[337]

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335. Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 97–98 (2022).

336. FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS: OR PRINCIPLES OF INTERPRETATION AND CONSTRUCTION IN LAW AND POLITICS, WITH REMARKS ON PRECEDENTS AND AUTHORITIES, at vii (3d ed. 1880).

337. Alex Kozinski, *The Case Of The Speluncean Explorers: Revisited*, 112 HARV. L. REV. 1876, 1876 (1999) (quoting *Ruth* 1:1 (version unspecified)).