WE'RE NOT ALL TEXTUALISTS NOW

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ABSTRACT

"We're all textualists now," announced Justice Kagan in 2015. In 2022, she rescinded the claim: "It seems I was wrong." We're not all textualists. This Article explores the meaning and impact of these two statements. It argues that the first statement was not mere hyperbole; it expressed that there is a significant sense in which modern American legal interpretive culture is textualist. The shared commitment is not a strict textualism, but a thin one; we all start with the text. The 2022 statement alleges that some "textualists" have begun to flout even the thin shared commitment to text. There is substantial uncertainty about whether our judicial interpretive culture will continue to be textualist.

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INTRODUCTION

In 2015, Justice Kagan announced that "we're all textualists now."[1] Seven years later, she rescinded this claim: "Some years ago, I remarked that '[w]e're all textualists now.' It seems I was wrong."[2]

These two statements highlight a quickly shifting landscape in American statutory interpretation. Part I of this Article describes textualism's rise and in what sense we are "all textualists." It argues that (i) Kagan's claim means "we all *start* with the text" now and that (ii) this claim fairly characterizes modern interpretive practice. Part II explains the more recent accusations of textualism's collapse. The 2022 statement highlights that even the thin commitment to starting with the text has come under question—from "textualists" no less. Kagan's more recent statement questions, with good reason, whether our legal culture will continue to be textualist in even this thin sense.

The Conclusion offers a brief coda about why it matters how courts describe their interpretive philosophy. Statements like "we are all *X*" abound (whether *X* is realism, textualism, or originalism). These claims, when made by judges, are often taken as evidence of widely accepted judicial practice. For theorists who trace law to facts about legal practice or to the consensus of legal officials, claims that "we are all *X*" can become self-fulfilling prophecies. If we are no longer all textualists or all originalists, it is imperative for judges to say so.

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1. Harvard Law School, *The 2015 Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YouTube, at 08:29 (Nov. 25, 2015) [hereinafter Kagan, *2015 Scalia Lecture Series*], https://youtu.be/dpEtszFT0Tg [https://perma.cc/L65V-9AET]. To my knowledge, the earliest appearance of this sentiment is in Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. Rev. 1023 (1998):

> Although the battle over statutory interpretation has been waged with harsh words, the positions of the warring camps are not nearly as far apart as they might seem. Each of the competing methods of statutory interpretation accepts some of the insights of the others. For example, everyone must acknowledge the valuable and very significant achievement of Justice Scalia in recalling the attention of the legal community to the importance of text in statutory interpretation. In a significant sense, we are all textualists now.

Id. at 1057 (footnotes omitted).

2. West Virginia v. EPA, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting) (quoting Kagan, *2015 Scalia Lecture Series*, *supra* note 1).

I.
WE ARE ALL TEXTUALISTS

A. The Claim

Justice Kagan's (2015) "all textualists now" claim has been widely cited—in the legal academy and in the courts. Three recently appointed Supreme Court Justices cited the claim in their scholarship before joining the Court: Gorsuch,[3] Kavanaugh,[4] and Barrett.[5] Other textualists on the Court have also taken note. Justice Thomas joined a concurrence citing the phrase,[6] and Justice Alito referenced the quotation in a speech to the Federalist Society.[7]

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3. Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RES. L. REV. 905, 906 (2016) ("We live in an age when the job of the federal judge is not so much to expound upon the common law as it is to interpret texts . . . . And as Justice Kagan acknowledged in her Scalia Lecture at Harvard Law School last year, 'we're all textualists now.'" (footnote omitted) (quoting Kagan, *2015 Scalia Lecture Series*, *supra* note 1)).

4. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2118 (2016) (book review) ("The text of the law is the law. As Justice Kagan recently stated, 'we're all textualists now.'" (quoting Kagan, *2015 Scalia Lecture Series*, *supra* note 1)); Brett M. Kavanaugh, U.S. Cir. Judge, U.S. Ct. of Appeals for the D.C. Cir., Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions, Keynote Address: Federal Courts, Practice & Procedure Symposium: Justice Scalia and the Federal Courts (Feb. 3, 2017), *in* 92 NOTRE DAME L. REV. 1907, 1910 (2017) ("Justice Scalia brought about a massive and enduring change in statutory interpretation. Text matters. The text of a law is the law. As Justice Kagan recently stated, 'we're all textualists now.'" (quoting Kagan, *2015 Scalia Lecture Series*, *supra* note 1)).

5. Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2195 (2017) ("There is general agreement on the Court that statutory text is both the focal point of and a constraint on statutory interpretation. As Justice Elena Kagan observed when she delivered the Scalia Lecture at Harvard Law School, 'we're all textualists now.'" (quoting Kagan, *2015 Scalia Lecture Series*, *supra* note 1)).

6. In his concurrence, Justice Gorsuch stated:

> [W]e've long since come to realize that the real cure doesn't lie in turning judges into rubber stamps for politicians, but in redirecting the judge's interpretive task back to its roots, away from open-ended policy appeals and speculation about legislative intentions and toward the traditional tools of interpretation judges have employed for centuries to elucidate the law's original public meaning. Today it is even said that we judges are, to one degree or another, "all textualists now."

Kisor v. Wilkie, 139 S. Ct. 2400, 2442 (2019) (Gorsuch, J., concurring).

7. Josh Blackman, *Video and Transcript of Justice Alito's Keynote Address to the Federalist Society*, REASON: THE VOLOKH CONSPIRACY (Nov. 12, 2020, 11:18 PM), https://reason.com/volokh/2020/11/12/video-and-transcript-of-justice-alitos-keynote-address-to-the-federalist-society/ [https://perma.cc/7DNN-PHA7] ("[C]onsider

Kagan's phrase has also appeared in judicial opinions of the lower federal courts in support of the proposition that one should begin *and end* with unambiguous text.[8] Scholars argue that textualism has grown less robustly[9]—or perhaps not at all[10]—in the lower federal courts. At the same time, there are recent high-impact lower court textualist opinions. For example, in 2022, a Florida district court struck down the CDC's mask mandate for travel.[11] The court's opinion was highly textualist, relying heavily on dictionary

these two statements by Justice Kagan, quote, we're all originalist now, and quote, we're all textualist.").

8. *E.g.*, Laidlaw's Harley Davidson Sales, Inc. v. Comm'r, 29 F.4th 1066, 1070 (9th Cir. 2022) ("As Justice Kagan has stated, 'we're all textualists now.'" (quoting Kagan, *2015 Scalia Lecture Series*, *supra* note 1)). When interpreting a statute, "our inquiry begins with the statutory text, and ends there as well if the [statute's] text is unambiguous." United States *ex rel.* Hartpence v. Kinetic Concepts, Inc., 792 F.3d 1121, 1128 (9th Cir. 2015) (en banc) (alteration in original) (quoting BedRoc Ltd. v. United States, 541 U.S. 176, 183 (2004)); Calderon v. Sixt Rent a Car, LLC, 5 F.4th 1204, 1221 (11th Cir. 2021) (Newsom, J., concurring) ("I agree with Justice Kagan that, to one extent or another, 'we're all textualists now.' Because that's so, we shouldn't be atextually interpreting a statute in a manner that, in turn, requires us to atextually interpret contractual provisions." (footnote omitted) (quoting Kagan, *2015 Scalia Lecture Series*, *supra* note 1)); Thompson v. Smith, 805 F. App'x 893, 914 & n.3 (11th Cir. 2020) (Martin, J., dissenting) (referring to Kagan's "we're all textualists now" statement as support for his use of a textualist statutory interpretation (quoting Kagan, *2015 Scalia Lecture Series*, *supra* note 1)).

9. Aaron-Andrew P. Bruhl, *Statutory Interpretation and the Rest of the Iceberg: Divergences Between the Lower Federal Courts and the Supreme Court*, 68 DUKE L.J. 1, 56 (2018).

10. Professor Gluck and Judge Posner surveyed forty-two federal appellate judges and reported:

> *None* of the judges is a "textualist" in the extreme sense of that word, or even in the version of textualism that was practiced by Justice Scalia. Very few judges told us they read the entire statute, or even begin their analysis of statutory cases with the text of the statute. All of the judges use legislative history. Dictionaries are mostly disfavored. Even when asked to provide one word to describe their interpretive approaches, not one judge was willing to self-describe as "textualist" without qualification. Even the text-centric judges described themselves in such terms as "textualist-pragmatist" or "textualist-contextualist." Our findings reveal the academic *cliché de mode*—"we are all textualists now"—to be an overstatement.

Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1310 (2018) (quoting Siegel, *supra* note 1).

11. Health Freedom Def. Fund, Inc. v. Biden, 599 F. Supp. 3d 1144, 1154, 1178 (M.D. Fla. 2022). *See generally* Stefan Th. Gries, Michael Kranzlein, Nathan Schneider, Brian Slocum & Kevin Tobia, *Unmasking Textualism: Linguistic Misunderstanding in the Transit Mask Order Case and Beyond*, 122 COLUM. L. REV. F. 192 (2022) (explaining the court's textualism and criticizing its use of dictionaries and corpus linguistics).

definitions of the word "sanitation," as well as data about the frequency of word usage, provided by the judge's use of corpus linguistics.[12] The court vacated the mask mandate,[13] and airlines and other transport services quickly dropped masking requirements.[14] Thus, even if textualism is less widespread in the lower courts, it can be impactful.

Textualism has also grown within the academy. The theory increasingly holds a prominent place in legal education.[15] "[O]n a fundamental and intuitive level, New Textualism just seems to make sense—especially to new law students."[16] Moreover, "[a]cademics who write about statutory interpretation . . . agree that attempting to find the best reading of the text of statutes is the dominant method of statutory interpretation today, even if courts and scholars do not always apply the teachings of textualism as strictly as some of its strongest proponents advocate."[17]

There are important scholarly critiques of textualism—too many to detail in this short essay.[18] Yet, perhaps surprisingly, many

12. *Health Freedom Def. Fund, Inc.*, 599 F. Supp. 3d at 1158–61.

13. *Id.* at 1153.

14. *See Factbox: U.S. Airlines Drop Mask Requirements for Passengers, Employees*, REUTERS (Apr. 19, 2022, 11:11 AM), https://www.reuters.com/business/aerospace-defense/us-airlines-drop-mask-requirements-passengers-employees-2022-04-19/ [https://perma.cc/9AG3-YRU7].

15. *See, e.g.*, Barnett J. Harris, *Is Partisan Gerrymandering Unconstitutional? Rethinking* Rucho v. Common Cause, 56 U.S.F. L. REV. 35, 44 (2021) ("'Always start with the text,' my first-year civil procedure teacher told us, 'then move to context.'").

16. Charlie D. Stewart, Comment, *The Rhetorical Canons of Construction: New Textualism's Rhetoric Problem*, 116 MICH. L. REV. 1485, 1491 (2018). On New Textualism, see William N. Eskridge Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990).

17. Mark Seidenfeld, *Textualism's Theoretical Bankruptcy and Its Implication for Statutory Interpretation*, 100 B.U. L. REV. 1817, 1819 (2020).

18. For a recent article that includes references to some of these critiques, see Erik Encarnacion, *Text Is Not Law*, 107 IOWA L. REV. 2027, 2029-30 (2022). Encarnacion cites a critique of textualism's theoretical coherence, *see, e.g.*, Daniel S. Goldberg, *I Do Not Think It Means What You Think It Means: How Kripke and Wittgenstein's Analysis on Rule Following Undermines Justice Scalia's Textualism and Originalism*, 54 CLEV. ST. L. REV. 273, 305 n.178 (2006), a critique of textualism's compatibility with faithful agency, *e.g.*, Melvin Aron Eisenberg, *Strict Textualism*, 29 LOY. L.A. L. REV. 13, 36 (1995), critiques of textualism's theoretical uniqueness and independence from other interpretive theories, *e.g.*, Larry Alexander & Saikrishna Prakash, *"Is That English You're Speaking?" Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967, 974–78 (2004); Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 353 (2005); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 36 (2006); Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1280 (2020), critiques of textualism's relationship to democracy, *e.g.*, AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW 280-82 (Sari Bashi trans., 2007);

law professors report a favorable view towards the theory.[19] In a survey of over five-hundred law professors, participants answered whether they "accept," "lean towards," "lean against," or "reject" different theories of statutory interpretation.[20] Participants could also express views including "insufficient knowledge," "question unclear," or "it depends."[21] Of the participants, 61% accepted or leaned towards textualism, while only 34% rejected or leaned against (5% answered "other").[22] Importantly, many respondents simultaneously endorsed other theories like "purposivism," suggesting that they see "textualism" pluralistically.[23] This view could be consistent with, for example, the idea that text and purpose "are like the two blades of a scissors; neither does the job without the operation of the other."[24]

Nancy Staudt, Lee Epstein, Peter Wiedenbeck, René Lindstädt & Ryan J. Vander Wielen, *Judging Statutes: Interpretive Regimes*, 38 LOY. L.A. L. REV. 1909, 1938 (2005), and critiques of textualism's ability to constrain and limit judicial discretion, *see, e.g.*, William N. Eskridge Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1535 (1998) (book review); James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 6 (2005); William N. Eskridge Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 534 (2013) (book review); Anita S. Krishnakumar, *Dueling Canons*, 65 DUKE L.J. 909, 959 (2016). Encarnacion, *supra*, at 2029–30. Another line of criticism argues that textualists do not adequately account for the realities of the legislative process. *See, e.g.*, Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 964–90 (2013); Jarrod Shobe, *Codification and the Hidden Work of Congress*, 67 UCLA L. REV. 640, 694–96 (2020); Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541, 1633–50 (2020). *But see* John Manning, *Inside Congress's Mind*, 115 COLUM. L. REV. 1911, 1934–52 (2015); Barrett, *supra* note 5, at 2207–12 (arguing that these realities are irrelevant, since textualists are "agents of the people," not agents of Congress).

19. Eric Martínez & Kevin Tobia, *What Do Law Professors Believe About Law and the Legal Academy? An Empirical Inquiry* 68–69 (Aug. 5, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4182521 [https://perma.cc/27QM-K3U3].

20. *Id.* at 28, 31, 46.

21. *Id.* at 28.

22. *Id.* at 51–52.

23. The favorable/unfavorable/other ratios for other theories were: Purposivism (77, 14, 9), Pragmatism (73, 19, 7), Intentionalism (54, 33, 13). So while 61% of law professors hold a favorable view towards textualism, it is not the most favorably viewed theory of statutory interpretation. *Id.* at 52.

24. WILLIAM N. ESKRIDGE JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 9 (2016). This view does not imply that purpose trumps text; a statute's ordinary meaning should be "the anchor for statutory interpretation by judges." *Id.* at 40–41. *See also* Eskridge, *Textualism, the Unknown Ideal?*, *supra* note 18, at 1557 ("All major theories of statutory interpretation consider the statutory text primary . . . whether one is a textualist, intentionalist, or pragmatic

But even as some academics still reject textualism and critiques of textualism proliferate, the message that textualism remains relevant is clear. Professor Samuel Issacharoff and former New York University School of Law Dean and Professor Trevor Morrison explain: "We are told that we live in the era of textualism."[25] This certainly seems to be the case at the Supreme Court; as Professor Anita Krishnakumar has documented, the Roberts Court frequently relies on text (among many other interpretive tools).[26] Even the "liberal" Justices, like Justice Sotomayor, author textualist opinions, evaluating the "text" with reliance on linguistic canons of interpretation and dictionary definitions.[27]

In the words of the Sixth Circuit's Judge Thapar: "[S]ome pragmatists and purposivists in the academy lag behind, [but] the bench appears to be slowly but surely moving down the path marked by Justice Scalia: According to no less an authority than Justice Kagan . . . 'we're all textualists now.'"[28]

B. Its Meaning: In What Sense Are We "All Textualists"?

Justice Kagan's phrase has been influential, quoted over one-hundred times in legal scholarship since 2015. But what does it mean to propose that "we are all textualists now"? There are several plausible interpretations.

On a weak interpretation, the claim merely reflects that the required commitments of a card-carrying textualist have become so vague and watered-down that the theory now bears hardly any weight. As Professors Neil Buchanan and Michael Dorf put it:

> To be sure, in 2015, Justice Kagan declared "that we're all textualists now," but she did so in the course of a colloquy at

interpreter of statutes. For any of these, there must be a compelling reason to derogate from the meaning the words would convey to an ordinary speaker or reader.").

25. Samuel Issacharoff & Trevor Morrison, *Constitution by Convention*, 108 CAL. L. REV. 1913, 1913 & n.1 (2020) (citing Kagan, *2015 Scalia Lecture Series*, *supra* note 1).

26. *See* Krishnakumar, *Backdoor Purposivism*, *supra* note 18, at 1296–304. The general appeal to "text" and "meaning" also accompanies an increased reliance on some textualist tools, including linguistic canons. *See id.* The court increasingly relies on dictionaries. John Calhoun, *Measuring the Fortress: Explaining Trends in Supreme Court and Circuit Court Dictionary Use*, 124 YALE L.J. 484, 486 (2014).

27. *See, e.g.*, Facebook Inc. v. Duguid, 141 S. Ct. 1163, 1169–71 (2021); Lockhart v. United States, 577 U.S. 347, 351–52 (2016).

28. Amul R. Thapar & Benjamin Beaton, *The Pragmatism of Interpretation: A Review of Richard A. Posner,* The Federal Judiciary, 116 MICH. L. REV. 819, 831 (2018) (book review) (quoting Kagan, *2015 Scalia Lecture Series*, *supra* note 1).

> Harvard Law School named for and in honor of Justice Scalia, and while she was clearly contrasting the newer approach to statutory interpretation with the more broadly policy-based approach that prevailed prior to Scalia's appointment to the Supreme Court, she essentially made the same point that . . . Molot had made nearly a decade earlier—namely, that there no longer is a distinctive textualist position.[29]

A stronger interpretation is that an exacting version of textualism has "won" the debate.[30] That is, perhaps Justice Kagan meant that judges today start *and end* with the text, eschewing all other interpretive criteria (e.g., purpose, legislative intent, consequences) unless the text is ambiguous or otherwise unclear. Consider one recent example of this interpretation: "[W]here a court can discern the ordinary or plain meaning, that is the end of the interpretive analysis. . . . Presumably this is what Justice Elena Kagan means when she says, '[W]e're all textualists now.'"[31]

Between the weak interpretation (the phrase merely indicates that textualism's commitments have grown so thin that any judge could adopt them) and strong interpretation (nearly all judges commit to the idea that clear text constrains interpretation), there are moderate interpretations. One is that judges are all now committed to "*at least start with*" the text.[32] This reading appears with

29. Neil H. Buchanan & Michael C. Dorf, *A Tale of Two Formalisms: How Law and Economics Mirrors Originalism and Textualism*, 106 CORNELL L. REV. 591, 659 (2021) (footnotes omitted) (first quoting Kagan, *2015 Scalia Lecture Series*, *supra* note 1; and then citing Molot, *supra* note 18, at 2, 4).

30. Noah Marks & Jessica Ranucci, *The Implied Assertion Doctrine Applied to Legislative History*, 21 LEWIS & CLARK L. REV. 1135, 1136 (2017) (citing Kagan, *2015 Scalia Lecture Series*, *supra* note 1).

31. Thomas R. Lee & Stephen C. Mouritsen, *The Corpus and the Critics*, 88 U. CHI. L. REV. 275, 282 & n.29 (2021) (quoting Kagan, *2015 Scalia Lecture Series*, *supra* note 1); *see also* Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 877 (2018) (noting a more moderate reading: "'We're all textualists now' in that most all of us at least start with the text" (quoting Kagan, *2015 Scalia Lecture Series*, *supra* note 1)).

32. Lee & Mouritsen, *Judging Ordinary Meaning*, *supra* note 31, at 877 (emphasis added).

some regularity.[33] As Senator Ted Cruz explained, "[e]ven left-leaning judges *start* with the text now."[34]

The context of Justice Kagan's original 2015 statement (in a public discussion with Dean John Manning of the Harvard Law School) further supports a moderate interpretation:

> Justice Scalia has taught everybody how to do statutory interpretation differently, and I really do mean pretty much taught everybody. There's that classic phrase that we're all realists now. Well, I think we're all textualists now in a way that just was not remotely true when Justice Scalia joined the bench.[35]

At this point in the conversation, Dean Manning asks, "even Justice Breyer?" Justice Kagan responds, he "might be a little bit of an outlier, might be a little bit. In certain ways, he too, starts with the text."[36]

This context is telling. Something of significance has changed *in legal practice*. It is not merely that textualist theory has grown so weak as to accommodate (unchanging) interpretive practice. Rather, we are all textualists now, in a way that was not true before: All judges start with (or at some point in interpretation, seriously

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33. Taylor J. Smith, Comment, *Linguistic Estoppel: A Custodial Interrogation Subject's Reliance on Traditional Language Customs When Facing Unknown Expectations for Legally Efficacious Speech*, 46 BYU L. REV. 1675, 1690–91 (2021) ("While judges vary in the extent to which they will look beyond the text and into underlying context such as legislative intent, Justice Kagan on the Supreme Court made it clear that judges all start with the text when she said, 'We're all textualists now.'" (citing Lee & Mouritsen, *Judging Ordinary Meaning*, *supra* note 31, at 793 nn.10–11)); Chase Wathen, Note, *Textualism Today: Scalia's Legacy and His Lasting Philosophy*, 76 U. MIAMI L. REV. 864, 866–67 (2022) ("Elena Kagan recently said, 'I think we're all textualists now . . . .' Today, virtually all judges, regardless of their own approach to statutory interpretation, at least start with the text, even if they do not end with it." (quoting Kagan, *2015 Scalia Lecture Series*, *supra* note 1)); Devin Thomas Slaugenhaupt, Note, *Resolving Division Among the U.S. Courts of Appeals: What Constitutes a Physical Restraint?*, 82 U. PITT. L. REV. 489, 519 (2020) ("Textualism has become the starting point of judicial interpretation of statutes, and Justice Kagan even stated in 2015 that 'we're all textualists now.' Additionally, no matter which interpretative philosophy a Justice subscribes to, statutory interpretation always begins with the primary language of the text." (footnote omitted) (quoting Kagan, *2015 Scalia Lecture Series*, *supra* note 1)); Orion de Nevers, Note, "*No Voting About Us Without Us": The Iowa Caucuses and the Americans with Disabilities Act*, 26 TEX. J. C.L. & C.R. 75, 85 n.81 (2020) (explaining that an analysis of a statute "begins with the text" (citing Kagan, *2015 Scalia Lecture Series*, *supra* note 1)).

34. Senator Ted Cruz, Second Annual Texas Chapters Conference Keynote Address (Sept. 17, 2016), *in* 21 TEX. REV. L. & POL. 283, 284 (2017) (emphasis added) (citing Kagan, *2015 Scalia Lecture Series*, *supra* note 1).

35. Kagan, *2015 Scalia Lecture Series*, *supra* note 1, at 08:12–08:39.

36. *Id.* at 08:39–08:50.

consider) the text. Yet, the universal textualism is not one that requires starting *and ending* with the text, as Scalia might have it. It means *starting with* the text—like even Justice Breyer might.

Justice Kagan's subsequent remarks further support such a moderate interpretation:

> [T]he center of gravity has moved towards the kinds of things that [Justice Scalia] has preached for quite some time, even at the same time as [Scalia] is still a little bit on the edge of a spectrum. But his focus on statutory text, on the idea that, yes, Congress has written something and your job truly is to read and interpret it, and that means staring at the words on the page. And it's actually remarkable to me how different that is than what used to be.[37]

Justice Kagan's post-2015 comments also favor this interpretation. In her 2016 Memoriam to Justice Antonin Scalia, she reflected on Scalia and textualism:

> [Scalia's] articulation of textualist and originalist principles, communicated in that distinctive splendid prose, transformed our legal culture: It changed the way almost all judges (and so almost all lawyers) think and talk about the law—even if they part ways, at one or another point, from his interpretive theories. Does anyone now decline to focus first, in reading a statute, on its text in context? . . . If the answer is no (and the answer is no), Justice Scalia deserves much of the credit.[38]

These remarks do not square with the weakest interpretation, which posits that "we are all textualists" only because "textualism" has become meaningless. Justices do not do precisely what they have always done, blanketed in the ever-permissive language of textualism. They think, talk, analyze, and write differently today.

But Kagan's comments *do* square with the strongest interpretation, which posits that all judges today start *and end* with text (eschewing other interpretive criteria). Some judges "part ways" with Scalia's version of textualism.[39] Scalia is on the edge of a spectrum in terms of the weight given to text—and, while we are all textualists, says Justice Kagan, we are not all on that edge.

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37. *Id.* at 09:05–09:47.

38. Cass R. Sunstein, John G. Roberts Jr., John F. Manning, Elena Kagan, Ruth Bader Ginsburg, Martha Minow & Rachel E. Barkow, In Memoriam, *In Memoriam: Justice Antonin Scalia*, 130 HARV. L. REV. 1, 9 (2016) (Justice Kagan's tribute).

39. *Id.*

II.
WE ARE NOT ALL TEXTUALISTS

A. The Claim

"Some years ago, I remarked that '[w]e're all textualists now.' It seems I was wrong."[40] Justice Kagan's newest claim about textualism has already made waves.[41] Does this statement contradict her 2015 statement,[42] or are the two somehow consistent? Does it signal a disavowal of textualism, and if so, has it come too late?[43] In just a few months, the statement has already spurred new debates surrounding textualism and legal interpretation.

B. Its Meaning: Who Is No Longer a Textualist?

At first, Justice Kagan's rescission may seem counterintuitive. We were all textualists in 2015, and the Court gained at least three textualists since.[44] But context resolves any mystery. Justice Kagan elaborates that "[t]he current Court is textualist only when being so suits it."[45] The 2015 statement describes a unifying commitment to

40. West Virginia v. EPA, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting) (citing Kagan, *2015 Scalia Lecture Series*, *supra* note 1).

41. Victoria Nourse, *The Paradoxes of a Unified Judicial Philosophy: An Empirical Study of the New Supreme Court, 2020–2022*, 38 CONST. COMMENT. 1, 24–25 (2023); *see also* Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 111 n.87 (2022); Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Progressive Textualism*, 110 GEO. L.J. 1437, 1437, 1439 n.1 (2022).

42. *See* Richard M. Re, *We're All Textualists Now. . . When It Suits Us*, PRAWFSBLAWG (Aug. 17, 2022, 1:13 PM), https://prawfsblawg.blogs.com/prawfsblawg/2022/08/were-all-textualists-now-when-it-suits-us.html [https://perma.cc/V7UY-8FV8].

43. *See* Yvette Borja, *Elena Kagan's Disavowal of Textualism Came Way Too Late*, BALLS & STRIKES (Aug. 10, 2022), https://ballsandstrikes.org/scotus/elena-kagan-textualist-disavowal/ [https://perma.cc/KXR8-BXGP].

44. Justices Gorsuch, Kavanaugh, and Barrett are textualists. *See* William Eskridge Jr., Brian Slocum & Kevin Tobia, *Textualism's Defining Moment* 5 (Dec. 28, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4305017 [https://perma.cc/83UZ-ZMMU]. At least one commentator has interpreted Justice Jackson's confirmation hearing remarks as consistent with textualism. *See* Adam Carrington, *Ketanji Brown Jackson's Welcome Praise of Originalism and Textualism*, WASH. EXAM'R (Mar. 24, 2022, 4:27 PM), https://www.washingtonexaminer.com/restoring-america/fairness-justice/ketanji-brown-jacksons-welcome-praise-of-originalism-and-textualism [https://perma.cc/D7C6-MPMZ]. However, Justice Jackson also emphasized that she carries no "judicial philosophy" and simply "[applies] the relevant law to the facts in the record." Adam Liptak, *By Turns Cautious and Confident, Judge Jackson Takes the Stage*, N.Y. TIMES (Mar. 22, 2022), https://www.nytimes.com/2022/03/22/us/ketanji-brown-jackson-judicial-philosophy.html [https://perma.cc/Y9J8-DB7Y].

45. West Virginia v. EPA, 142 S. Ct. at 2641 (Kagan, J., dissenting).

(starting with) text,[46] and the 2022 statement charges that some Justices have abandoned that (shared) commitment. Justice Kagan is challenging *textualists'* fidelity to textualism,[47] that is, the textualist commitment of Justices Roberts, Thomas, Alito, Gorsuch, Kavanaugh, and Barrett.[48]

The 2022 statement came in Justice Kagan's dissenting opinion in *West Virginia v. EPA*.[49] That case concerned the interpretation of the amended Clean Air Act, which authorizes the EPA to regulate power plants by setting a standard of performance for their emissions.[50] The EPA can regulate new and existing plants with different standards, but in each case, the standard should be "achievable through the application of the best system of emission reduction."[51] In 2015, the EPA proposed the Clean Power Plan, which concluded that the best system of emission reduction for existing plants involved a "generation shifting" substitution of cleaner energy sources (e.g., natural gas) for coal-produced electricity.[52]

Justice Roberts's majority opinion concluded that such a generation shifting plan is not authorized by the Clean Air Act.[53] Roberts described this case as "a major questions case," and Justice Gorsuch's concurring opinion further elaborated the meaning of this "major questions doctrine."[54] Gorsuch explains, "[u]nder that doctrine's terms, administrative agencies must be able to point to

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46. *See supra* Part I.B.

47. *See* Jonathan H. Adler, *Justice Kagan Throws Down the Gauntlet: We Are Not "All Textualists Now,"* REASON: THE VOLOKH CONSPIRACY (July 1, 2022, 3:40 PM), https://reason.com/volokh/2022/07/01/justice-kagan-throws-down-the-gauntlet-we-are-not-all-textualists-now/ [https://perma.cc/D83L-9G7L].

48. *See also* Ryan D. Doerfler, *High-Stakes Interpretation*, 116 MICH. L. REV. 523, 524 (2018) ("We're all textualists now[, except in June]." (alteration in original) (quoting Kagan, *2015 Scalia Lecture Series*, *supra* note 1)). Doerfler proposes that the Justices claim fidelity to text, but when the policy interests are strong enough, text gives way to other considerations. *Id.* at 525. Doerfler argues that this phenomenon may not have a purely instrumental explanation; in high stakes cases, it can be more difficult than in lower stakes cases to know what a text means. *Id.* at 526–29. As such, "it is just sound epistemic practice for a court to construe a statute in a way that would unsettle an existing implementation regime only if it is especially well justified in its reading of the statutory text—that is, only if it really knows that its reading is correct." *Id.* at 523.

49. West Virginia v. EPA, 142 S. Ct. at 2641 (Kagan, J., dissenting).

50. *Id.* at 2599.

51. 42 U.S.C. § 7411.

52. West Virginia v. EPA, 142 S. Ct. at 2602–04.

53. *Id.* at 2615–16.

54. *Id.* at 2610; *id.* at 2616 (Gorsuch, J., concurring). *See generally* Daniel Deacon & Leah Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. (forthcoming 2023) (manuscript at 4, 22) (on file with authors).

'clear congressional authorization' when they claim the power to make decisions of vast 'economic and political significance.' Like many parallel clear-statement rules in our law, this one operates to protect foundational constitutional guarantees."[55]

Justice Kagan's dissenting opinion employed the language and practice of textualism, analyzing the meaning of the term "best system of emission reduction."[56] Kagan referred to dictionary definitions, which she described as "supposedly a staple of this Court's supposedly textualist method of reading statutes."[57]

Consider Justice Kagan's interpretive argument, which centered the meaning of the Clean Air Act's text and argument on the phrase "best system":

> The limits the majority now puts on EPA's authority fly in the face of the statute Congress wrote. The majority says it is simply "not plausible" that Congress enabled EPA to regulate power plants' emissions through generation shifting. But that is just what Congress did when it broadly authorized EPA in Section 111 to select the "best system of emission reduction" for power plants. The "best system" full stop—no ifs, ands, or buts of any kind relevant here. The parties do not dispute that generation shifting is indeed the "best system"—the most effective and efficient way to reduce power plants' carbon dioxide emissions. And no other provision in the Clean Air Act suggests that Congress meant to foreclose EPA from selecting that system; to the contrary, the Plan's regulatory approach fits hand-in-glove with the rest of the statute.[58]

Justice Kagan's arguments employed the reasoning of modern textualism. As Harvard Law School Dean John Manning writes: "[S]emantic detail offers a singularly effective medium for legisla-

55. West Virginia v. EPA, 142 S. Ct. at 2616 (Gorsuch, J., concurring) (citation omitted). Alongside debate about the major questions canon is a broad debate about agency delegations. *Compare* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002), Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021), *and* Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 GA. L. REV. 81 (2021), *with* Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (2021), Philip Hamburger, *Delegating or Divesting?*, 115 NW. U. L. REV. ONLINE 88 (2020), PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 377 (2014), Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297 (2003), *and* Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002).

56. West Virginia v. EPA, 142 S. Ct. at 2628–32 (Kagan, J., dissenting).

57. *Id.* at 2629–30.

58. *Id.* at 2628 (citations omitted) (quoting 42 U.S.C. § 7411(a)(1)).

tors to set the level of generality at which policy will be articulated."[59] A textualist, proposes Kagan, should honor the text's clear and general language: No "ifs," "ands," or "buts" means that no "ifs," "ands," or "buts" survived the legislative process.

In contrast, Justice Kagan alleged, the majority and concurring opinions do not even start with text.[60] Their reliance on the "major questions" canon reveals that non-textual policy considerations are the driving force:

> The majority's decision rests on one claim alone: that generation shifting is just too new and too big a deal for Congress to have authorized it in Section 111's general terms. But that is wrong. A key reason Congress makes broad delegations like Section 111 is so an agency can respond, appropriately and commensurately, to new and big problems. Congress knows what it doesn't and can't know when it drafts a statute; and Congress therefore gives an expert agency the power to address issues—even significant ones—as and when they arise. That is what Congress did in enacting Section 111. The majority today overrides that legislative choice. In so doing, it deprives EPA of the power needed—and the power granted—to curb the emission of greenhouse gases.[61]

Kagan argued that debating whether a policy is "major" (versus minor) is not restrained to a textualist inquiry, but rather an unpredictable, subjective, policy-based analysis. It "replaces normal text-in-context statutory interpretation with some tougher-to-satisfy set of rules."[62] In fact, the inquiry is not a rule at all, but a loose standard: "First, a court must decide, by looking at some panoply of factors, whether agency action presents an 'extraordinary case[ ].'"[63] And if the court decides that this is an extraordinary case, there must be "clear" congressional authorization. Kagan described this as "statutory interpretation of an unusual kind," and provocatively posited that the *West Virginia v. EPA* Court "does not address straight-up what should be the question: Does the text of that provision, when read in context and with a common-sense awareness of how Congress delegates, authorize the agency action here?"[64]

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59. John Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 77 (2006).

60. *See* West Virginia v. EPA, 142 S. Ct. at 2641 n.21 (Kagan, J., dissenting).

61. *Id.* at 2628.

62. *Id.* at 2634.

63. *Id.*

64. *Id.*

The "major questions" canon, argues Kagan, is not a textualist canon. It replaces analysis of the text of the legislative bargain, including its semantic context and level of generality, with judicial policy analysis. It is a "get-out-of-text-free car[d],"[65] by which judges replace text-constrained interpretation with unconstrained policy analysis. Moreover, such unconstrained analysis easily permits the entry of judicial policy goals. In *West Virginia v. EPA*, Kagan explained that "one of those broader [policy] goals makes itself clear [in the majority opinion and concurrence]: Prevent agencies from doing important work, even though that is what Congress directed. That anti-administrative-state stance shows up in the majority opinion, and it suffuses [Justice Gorsuch's] concurrence."[66]

Many of the Court's most vocal textualists were in the majority of *West Virginia v. EPA*. In fact, many of those Justices have cited Kagan's original 2015 claim that "we are all textualists" as a victory for textualism. Justice Gorsuch wrote that "[w]e live in an age when the job of the federal judge is not so much to expound upon the common law as it is to interpret texts—whether constitutional, statutory, regulatory, or contractual. And as Justice Kagan acknowledged in her [2015] Scalia Lecture[,] . . . 'we're all textualists now.'"[67] Justice Kavanaugh cited the 2015 quote in connection with the statement that "[t]he text of the law is the law."[68] Justice Barrett quoted it in association with the claim that "statutory text is both the focal point of and a constraint on statutory interpretation."[69] Justice Alito also referred to the quotation in a speech.[70] Justice Thomas once joined a Gorsuch concurrence citing Kagan's 2015 phrase.[71]

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65. *Id.* at 2641.

66. *Id.* Major questions reasoning has surfaced in other recent Supreme Court opinions. *See* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 667–68 (2022) (Gorsuch, J., concurring) (using the major questions doctrine to invalidate OSHA's vaccination and testing mandate); Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (using the major questions doctrine to invalidate the extension of the CDC's eviction moratorium). Similar reasoning has appeared in high-impact textualist opinions from lower courts. *E.g.*, Health Freedom Def. Fund, Inc. v. Biden, 599 F. Supp. 3d 1144, 1164–66 (M.D. Fla. 2022) (using the major questions doctrine to invalidate the CDC's mask mandate for travel).

67. Gorsuch, *supra* note 3, at 906 (footnote omitted) (quoting Kagan, *2015 Scalia Lecture Series*, *supra* note 1).

68. Kavanaugh, *supra* note 4, at 2118.

69. Barrett, *supra* note 5, at 2195.

70. *See* Blackman, *supra* note 7.

71. Kisor v. Wilkie, 139 S. Ct. 2400, 2442 (2019) (Gorsuch, J., concurring); *see supra* note 6.

The shift from 2015 to 2022 is striking. Justice Kagan's latest remark highlights that (a thin, "start with the text") textualism has become so dominant that the most biting critique in 2022 is that an opposing interpretation is non-textualist.

How should we interpret "textualism" in the new conclusion that we're not all "textualists"? Here again, there are multiple available interpretations, but the most plausible one renders Justice Kagan's two statements as employing the same concept of (shared, "start with the text") "textualism." In 2015, there was a shared commitment to start with the text, but in 2022 even that thin textualist commitment is eschewed—by Scalia's heirs no less!

Justice Kagan describes "text-in-context . . . interpretation" as "normal,"[72] because we're all textualists now. But now, the textualists ignore text in favor of a new values-based canon.[73] "When [the textualist] method would frustrate broader goals, special canons like the 'major questions doctrine' magically appear as get-out-of-text-free cards."[74]

These 2022 comments have a striking resonance with the 2015 comments. Justice Kagan described to Dean Manning the pre-textualist (pre-Scalia) approach to interpretation.[75] Kagan describes how one opinion "didn't get to the text [of the statute] until like page 17 in a footnote someplace." Dean Manning responds, "And they didn't really talk about it seriously even then." Later in the exchange, Kagan explains:

> [The opinions] were mostly about two things, extensive things about legislative history, like everything that . . . every member of Congress might have been thinking . . . . And then a lot about . . . grand purposes or just what Congress must have been thinking or something like that, which was really sort of like what makes sense to us. And it was just a wildly different

72. West Virginia v. EPA, 142 S. Ct. 2587, 2634 (Kagan, J., dissenting).

73. Justice Kagan stated:

> The majority claims it is just following precedent, but that is not so. The Court has never even used the term "major questions doctrine" before. And in the relevant cases, the Court has done statutory construction of a familiar sort. It has looked to the text of a delegation. It has addressed how an agency's view of that text works—or fails to do so— in the context of a broader statutory scheme. And it has asked, in a common-sensical (or call it purposive) vein, about what Congress would have made of the agency's view—otherwise said, whether Congress would naturally have delegated authority over some important question to the agency, given its expertise and experience.

Id.

74. *Id.* at 2641.

75. Kagan, *2015 Scalia Lecture Series*, *supra* note 1, at 09:20–09:50.

> form of interpretation than anything written by anybody on the Supreme Court now.[76]

In 2022, Kagan proposes that some of the self-professed "textualists" have come full circle:

> The concurrence . . . concludes that the Clean Air Act does not clearly enough authorize EPA's Plan without ever citing the statutory text. Nowhere will you find the concurrence ask: What does the phrase "best system of emission reduction" mean? So much for "begin[ning], as we must, with a careful examination of the statutory text."[77]

In recent commentary, Justice Kagan has connected this criticism to a broader debate about the Court's legitimacy. The public's confidence in the Court has hit historic depths.[78] Concerns about the politicization and legitimacy of the Court grow. These worries stem not only from the substantive outcomes, but also from the disconnect between (i) the Court's statement of (textualist) judicial method and values, including restraint and fair notice and (ii) the Court's (non-textualist) practice.[79] As Justice Kagan recently commented: "When Courts become extensions of the political process, . . . when people see them as trying to impose personal preferences on a society irrespective of the law, that's when there's a problem and that's when there ought to be a problem."[80]

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76. *Id.* at 11:24–12:32.

77. West Virginia v. EPA, 142 S. Ct. at 2641 n.8 (Kagan, J., dissenting) (citations omitted) (first quoting 42 U.S.C. § 7411(a)(1); and then quoting Henson v. Santander Consumer USA Inc., 137 S. Ct. 1718, 1721 (2017)).

78. *See* Jeffrey M. Jones, *Approval of U.S. Supreme Court Down to 40%, a New Low*, GALLUP (Sept. 23, 2021), https://news.gallup.com/poll/354908/approval-supreme-court-down-new-low.aspx [https://perma.cc/7AEA-3G44]; Jeffrey M. Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low*, GALLUP (June 23, 2022), https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx [https://perma.cc/DBP3-T7Q4]; Mohamed Younis, *Democrats' Approval of Supreme Court at Record-Low 13%*, GALLUP (Aug. 2, 2022), https://news.gallup.com/poll/395387/democrats-approval-supreme-court-record-low.aspx [https://perma.cc/J7TS-RCNH].

79. Concerning the Court's non-textualist practice, see, for example, Krishnakumar, *Backdoor Purposivism*, *supra* note 18 (explaining "textualists'" resort to purposive arguments); Nourse, *supra* note 41 (explaining "textualists'" resort to consequentialist argument). Other scholarship has suggested that the Court's practice reflects varying versions of textualism. *See, e.g.*, Tara Leigh Grove, Comment, *Which Textualism?*, 134 HARV. L. REV. 265, 279–90 (2020); Kevin Tobia & John Mikhail, *Two Types of Empirical Textualism*, 86 BROOK. L. REV. 461, 645–72 (2021); Eskridge, Slocum & Tobia, *supra* note 44, at 6–10.

80. Opinion: Potomac Watch, *Elena Kagan vs. John Roberts on Supreme Court Legitimacy*, WALL ST. J., at 00:55–01:16 (Sept. 16, 2022, 6:43 PM), https://www.wsj.com/podcasts/opinion-potomac-watch/elena-kagan-vs-john-roberts-on-su-

CODA: IT MATTERS WHAT WE SAY WE ARE

The rule of law requires that those in positions of authority do not exercise power arbitrarily or based on their own preferences. Judges who publicly announce their interpretive theories and commitment to those theories have taken an essential step in advancing the rule of law. But the rule of law can only be secured by following through on that announcement. When jurists claim that a theory (e.g., textualism) constrains their judicial decision-making, we should assess the truth of that claim.[81] Are self-professed textualists really textualists? No, alleges Justice Kagan, in an important and honest evaluation of the current Court.

There are other reasons to attend to judicial self-descriptions and for judges to offer accurate descriptions. An important tradition in legal philosophy locates law in the behavior, attitudes, and consensus of legal officials.[82] A recent originalist literature takes seriously judges' practice and statements about their methodology.[83] Statements like "we are all textualists" or "we are all originalists," alongside judicial practice consistent with that theory, can suggest a consensus that contributes to the theory's legitimacy.

This scholarly appeal to the practice of legal officials to justify interpretive theories is worth judicial attention. In today's interpretive debates, two of the most salient consensus claims are that we are "all" textualists and "all" originalists. This Article has argued that we are, at best, all textualists in a thin sense: We all *start* with the text. It is less clear that we are all originalists in any meaningful sense. As used today, "originalism" is a broader theoretical category than "textualism," admitting of fewer shared commitments. And

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preme-court-legitimacy/469a15fe-6c7d-4443-b4be-385d55ac83b1 [https://perma.cc/G6E5-ZKC3]. Not all share Justice Kagan's prescription or concern. For example, Justice Roberts remarked that "people can say what they want and they're certainly free to criticize the Supreme Court, and if they want to say that its legitimacy is in question, they're free to do so. But I don't understand the connection between opinions that people disagree with and the legitimacy of the Court." *Id.* at 12:17–12:34.

81. It is also important to assess the merits of the theory itself.

82. *See generally* H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1994); Scott J. Shapiro, *What Is the Rule of Recognition (and Does It Exist)?* (Yale L. Sch. Pub. L. & Legal Theory Rsch. Paper Series, Working Paper No. 181, 2009). Moreover, some legal philosophers understand interpretive debate to be debate about "the criteria of legal validity." *See, e.g.*, Shapiro, *supra*, at 14 ("As Dworkin correctly points out, the dispute over originalism is best understood as a dispute about the criteria of legal validity."); RONALD DWORKIN, LAW'S EMPIRE 29–30 (1986).

83. *See, e.g.*, William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2386–88 (2015).

while a large proportion of legal academics are friendly to some (perhaps thin) form of textualism, much fewer favor originalism.[84]

If we are not really all originalists (or textualists, or purposivists, or living constitutionalists), we should not say that we are—in part, so we can avoid making it so. Justice Kagan's 2015 statement concerning textualism proposes such a consensus, a shared commitment to "starting with the text." Her 2022 statement charges that textualists in *West Virginia v. EPA* flouted this consensus. Whether this is an aberration or signal of textualism's decline remains to be seen.

However American jurisprudence develops, there is value in calling attention to these realities, especially the connection between what judges do and what they say they do. If we're not all textualists or not all originalists, we should say so.

84. *See, e.g.*, Martínez & Tobia, *supra* note 19. While many law professors surveyed are favorable towards textualism, the vast majority are unfavorable towards originalism (76% unfavorable, 17% favorable, 7% other). *Id.* at 68.