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HOW TEXTUALISM HAS CHANGED THE CONVERSATION IN THE SUPREME COURT

Jesse D.H. Snyder*

I. INTRODUCTION

Justice Elena Kagan announced, “we’re all textualists now,” during a lecture in November 2015 at Harvard Law School.¹ That remark in part reflected how far the textualist movement had come in the Supreme Court since Justice Antonin Scalia began fomenting its virtues as early as 1986.² And it was a comment offered *en passant* in a larger conversation without an air of triumphalism or poignant lament. The comment also occurred just months after the Supreme Court released *King v. Burwell*, in which the Court concluded that the phrase “an Exchange established by the State,” when interpreted in proper context to advance the overall statutory scheme, embraces a broader meaning, whereby enabling the federal government to establish exchanges as well.³ So when Justice Kagan made that

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1. *The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes*, HARVARD LAW TODAY 8:09 (Nov. 17, 2015), <https://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation/> (explaining that “the primary reason” Justice Scalia will “go down as one of the most important, most historic figures in the Court” is that he “taught everybody how to do statutory interpretation differently”); *id.* at 8:28 (“I think we’re all textualists now in a way that just was not remotely true when Justice Scalia joined the bench.”).

2. *See generally id.*

3. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015).

Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter. Section 36B can fairly be read consistent

statement, it was uncertain what she meant and to whom she was referring. But in view of some of the dissents she joined in October Term 2017, perhaps not even she understood the gravity of that statement or how the Court constituted years later would instantiate that idea.⁴

The first opinion released in October Term 2018 offers a blueprint for what it means to be a textualist in the Supreme Court three years after Justice Kagan's remarks, and it offers a glimpse into what might be the new norm for how the Court interprets statutes. This norm demonstrates a interpretative shift from context and purpose to the words themselves *tout court*.⁵ In *Mount Lemmon Fire District v. Guido*, Justice Ruth Bader Ginsburg hemmed a circuit split in a crisp 8-to-0 decision, cabining the Court's analysis to the statutory text to decide whether public employees could sue state and local employers of less than 20 employees on allegations of age discrimination.⁶ A public fire district had laid off its two oldest firefighters and then sought to dismiss an eventual lawsuit on the basis that the fire district was too small to qualify as an "employer," which federal law defined as "a person engaged in an industry affecting commerce who has twenty or more employees," with the added proviso that "[t]he term [employer] also means (1) any agent of such a person, and (2) a State or political subdivision of a State"⁷ In a slip opinion barely reaching the top of the seventh page, the unanimous decision all but limited its focus to the text in deciding that the term "also" removes the numerical requirement to be an employer under the statute.⁸ Passing reference to some enforcement evidence provided a coda to a decision otherwise unabated by extratextual arguments.⁹ Perhaps

with what we see as Congress's plan, and that is the reading we adopt.

Id. at 2496.

4. See, e.g., *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1627 (2018) ("What all these textual and contextual clues indicate, our precedents confirm. In many cases over many years, this Court has heard and rejected efforts to conjure conflicts between the Arbitration Act and other federal statutes."); *id.* at 1638 (Ginsburg, J., dissenting) ("In face of the NLRA's text, history, purposes, and longstanding construction, the Court nevertheless concludes that collective proceedings do not fall within the scope of § 7. None of the Court's reasons for diminishing § 7 should carry the day.>").
5. *Mount Lemmon Fire Dist. v. Guido*, 139 S. Ct. 22, 24 (2018) ("[T]wenty or more employees' is confining language, but the confinement is tied to § 630(b)'s first sentence, and does not limit the ADEA's governance of the employment practices of States and political subdivisions thereof.>").
6. See *id.*
7. 29 U.S.C. § 630(b) (2012) (emphasis added).
8. *Mount Lemmon*, 139 S. Ct. at 25–26.
9. See *id.* at 27.

because of the quotidian context of the underlying dispute, the decision received almost no press coverage.¹⁰

Yet contrasted with the interpretive approaches developed from the founding through the 1970s, the analysis on display in *Mount Lemmon* is a far cry from the once-commonplace, ubiquitous method of interpreting statutes by distilling legislative intent through review of a variety of sources, including the statutes themselves and legislative history.¹¹ Examining the disparity in methodology at different time periods, the Court—albeit composed differently—no longer appears to be doing the same thing.¹² As between the epochs, the players seem to be competing in different games, all of whom most likely to lose if they take an intractable position from one era and apply it to another.¹³ Social differences between the 1970s and present day¹⁴ cannot explain these differences in full. But one obvious agent of change, as Justice Kagan suggested at Harvard, is the difference in how the justices have shifted the locus of persuasion, and how zealous advocates have responded in kind.¹⁵

This paper argues that *Mount Lemmon* is a sleeper decision that should receive greater appreciation and reflection because the method of statutory interpretation on display seemingly caped a transition of displacement from divining intent through a variety of sources—including legislative history—to wholesale reliance on the statutory text. That *Mount Lemmon* passed without comment shows how far textualism has come in 30 years. In two parts, this article first introduces how textualism as an interpretative method began to shape

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10. See Edith Roberts, *Wednesday Round-Up*, SCOTUSBLOG (Nov. 7, 2018, 7:31 AM), <http://www.scotusblog.com/2018/11/wednesday-round-up-447/>.
 11. See, e.g., *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971); 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, 1302 (2018).
 12. See *infra* Section II.A.
 13. See, e.g., Jonathan R. Siegel, *Legal Scholarship Highlight: Justice Scalia's Textualist Legacy*, SCOTUSBLOG (Nov. 14, 2017, 10:48 AM), <http://www.scotusblog.com/2017/11/legal-scholarship-highlight-justice-scalias-textualist-legacy/> (describing different approaches to and interpretations of the idea of textualism over the years amongst the judiciary).
 14. See, e.g., Bob Cohn, *21 Charts That Explain American Values Today*, ATLANTIC (June 27, 2012), <https://www.theatlantic.com/national/archive/2012/06/21-charts-that-explain-american-values-today/258990/>.
 15. See Siegel, *supra* note 13; see also Ron Collins, *Ask the Author: Chief Judge Katzmann on Statutory Interpretation*, SCOTUSBLOG (Oct. 27, 2014, 8:00 AM), <http://www.scotusblog.com/2014/10/ask-the-author-chief-judge-katzmann-on-statutory-interpretation/>.

and take hold as a dominate approach to legal reasoning in the Supreme Court.¹⁶ This article then examines how appellate courts, without the benefit of the Supreme Court's conclusive endorsement of textualism, have approached the question presented in *Mount Lemmon*.¹⁷ The final section studies *Mount Lemmon* and observes what the decision means for litigants.¹⁸ *Mount Lemmon* enshrines a break from decisions dating from the founding era through the 1970s, making risible in the Supreme Court usage of once-unexceptionable advocacy based on pragmatism and extratextual considerations. The decision shows that, for the mine-run of cases, the interpretative process in the Supreme Court begins—and unless compelling reasons counsel otherwise—ends with the text. The pendulum has swung, and the movement appears to have reached a near-apex resting point. Whether that resting point comes an inflection point toward something else remains unanswered. Yet it should not be lost that *Mount Lemmon* delivered a viable progressive victory to aggrieved employees.¹⁹ So while textualism is generally extolled as a conservative appellation,²⁰ the right arguments can, in some cases, produce victories no matter the cause.

II. HOW THE SUPREME COURT HAS SHIFTED IN ITS INTERPRETIVE METHODS

A. *Extratextual Sources Complement the Understanding of Statutory Text*

The Supreme Court long has been comfortable with relying on a variety of sources, including legislative history and other extratextual evidence, to interpret statutes.²¹ As early as 1816, the Supreme Court made clear that

16. See *infra* Part II.

17. See *infra* Sections III.A–B.

18. See *infra* Section III.C.

19. See Mark Joseph Stern, *The Gorsuch Brief*, SLATE (Oct. 11, 2018, 6:29 PM), <https://slate.com/news-and-politics/2018/10/nielsen-preap-aclu-neil-gorsuch-briefs.html>; see also Howard Fischer, *US Supreme Court Says Mount Lemmon Fire District Can Be Sued for Age Discrimination*, ARIZ. DAILY STAR (Nov. 8, 2018), https://tucson.com/news/local/us-supreme-court-says-mount-lemmon-fire-district-can-be/article_9ad583e2-0ccd-5bf6-a51b-d9d71dfc6804.html.

20. See Barbara Perry et al., *In Trump's Court Pick, Who Won?*, CABLE NEWS NETWORK (July 10, 2018, 5:59 PM), <https://www.cnn.com/2018/07/10/opinions/trump-second-supreme-court-pick-opinion-roundup/index.html>.

21. Collins, *supra* note 15.

In the construction of the statutory or local laws of a state, it is frequently necessary to re[fer] to the history and situation of the country, in order to ascertain the reason, as well as the meaning, of many of the provisions in them, to enable a court to apply, with propriety, the different rules for construing statutes.²²

In interpreting a North Carolina statute, the Court relied on “a legislative declaration, explaining and amending” the law at issue as well as “the history and situation of the country at that time.”²³ The Court made clear in 1842 that “the journals of [C]ongress and of the state legislatures are evidence” when reviewing and interpreting statutes.²⁴ In 1866, the Court reviewed drafting histories before concluding that “it was the intention of Congress to subject the sales made by brokers for themselves to the same duties as those made by them for others . . . though it must be admitted their intention is rather obscurely expressed.”²⁵ Justice Oliver Wendell Holmes Jr., accompanied by a unanimous court, found nothing untoward in 1911 about using legislative history to understand “the mind of Congress” in order to interpret a statute.²⁶ And by 1948, the Supreme Court regularly reviewed “‘legislative reports and debates’ so as ‘to indicate that the legislative mind.’”²⁷

So by the 1970s, the Supreme Court had arrived at the comfortable, accepted idea that interpreting statutes meant reviewing legislative intent through textual and extratextual considerations to arrive at a conclusion best serving the aims of the legislature, as understood through examination of those considerations.²⁸ Lest there be any doubt, even in those cases highlighted in infamy for strident reliance on exogenous evidence,²⁹ the text remained a salient tool of statutory interpretation.

For example, in 1971, the Supreme Court heard *Citizens to Preserve Overton Park, Inc. v. Volpe*, a dispute about a federal statute constraining the government’s ability to provide funding for highways through areas designated as public parks.³⁰ Justice

22. *Preston v. Browder*, 14 U.S. 115, 121 (1816).

23. *Id.* at 123.

24. *Watkins v. Lessee of Holman*, 41 U.S. 25, 56 (1842).

25. *United States v. Cutting*, 70 U.S. (3 Wall.) 441, 444 (1865).

26. *United States v. Atchison, Topeka & Santa Fe Ry. Co.*, 220 U.S. 37, 44–45 (1911).

27. *Mitchell v. Cohen*, 333 U.S. 411, 418–20 (1948).

28. *See Siegel, supra* note 13.

29. *See generally id.*

30. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 404–06 (1971).

Thurgood Marshall offered an extensive review of the operative legislative history in the case before concluding that the Court's analysis should focus "primarily" on the statutory text because of ambiguities among the committee reports.³¹ In agreeing with the government that the statute did not require the agency to provide formal findings of fact before expending federal funds, Justice Marshall never once suggested that reliance on the text was a last resort otherwise to be forgotten.³² That legislative history does not jettison the utility in reviewing the text was evident in Justice Marshall's often misunderstood opinion.³³ Although the decision was rife with discussions of and citations to certain legislative-history documents and evidence,³⁴ along with the statutes themselves, nothing in the decision suggested that, as a default position, the text should be subordinate to extratextual evidence. Dictionaries were not discussed. Nor was the concept of common usage.

Justice Marshall's analysis, joined by all justices, was couched in terms of understanding "legislative intent," but this phrase, at that time, embodied interpreting the text through various tools rather than attempting hermeneutics or some preternatural distillation of a collective truth.³⁵ Although the phrase seems well-nigh pejorative now,³⁶ *Citizens to Preserve Overton Park* encapsulates the current position championed by Chief Circuit Judge Robert A. Katzman, in which courts should consult extratextual sources to best understand "how Congress works" and "what the legislative branch thinks is important in understanding its statutes."³⁷ To do otherwise "impugns Congress's work process."³⁸

Toward the end of the decade, in another often-maligned case by those who now disfavor extratextual considerations,³⁹ the Supreme Court in *Monell v. Department of Social Services of City of New York* considered whether a municipality could be a "person" subject to liability under 42 U.S.C. § 1983.⁴⁰ Justice William J. Brennan Jr.,

31. *Id.* at 412 n.29.

32. *See id.* at 410–20.

33. Siegel, *supra* note 13.

34. *See generally* *Citizens*, 401 U.S. at 406.

35. *See generally id.*

36. *Dig. Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 783 n.* (2018) (Thomas, J., concurring in part and concurring in judgment) ("For what it is worth, I seriously doubt that a committee report is a 'particularly reliable source' for discerning Congress' intended meaning.").

37. Collins, *supra* note 15.

38. *See id.*

39. *See* Siegel, *supra* note 13.

40. *Monell v. Dep't of Soc. Services*, 436 U.S. 658, 662 (1978).

writing for the Court, overruled precedent and concluded, after “[a] fresh analysis of the debate on the Civil Rights Act of 1871,” that municipalities could be liable for civil-rights violations.⁴¹ The Court devoted twenty-five pages to recounting congressional debates on the issue, concluding that Congress “intend[ed]” municipalities to be covered.⁴² Still, the majority made plain that the analysis should “begin with the language of § 1983 as originally passed.”⁴³ So, to Justice Brennan, text always has a role in any interpretive analysis, which cannot be divorced from other materials used to understand its meaning.⁴⁴ Even in dissent, then-Justice William H. Rehnquist discussed and relied almost exclusively on legislative history and extratextual evidence to argue that municipalities cannot be liable for civil-rights violations.⁴⁵ No justice brought up dictionaries or common usage.

B. Legislative History Cannot Be Trusted

Although ascribing the success of a movement to any individual is fraught and generally overlooks the contributions of others, at least on the Supreme Court, Justice Scalia was one of the first to challenge the efficacy of reviewing legislative history and extratextual documents.⁴⁶ And, as one of his many contributions during a nearly thirty-year tenure on the Supreme Court, his arguments eventually displaced as “almost unimaginable today” roughly two hundred years of practice in arguments and decision-making.⁴⁷ Justice Scalia’s approach, most frequently referred to as textualism,⁴⁸ has in effect erased time and experience.

41. *Id.* at 664–65.

42. *Id.* at 665–90.

43. *Id.* at 691.

44. *See, e.g., id.*

45. *See, e.g., id.* at 720–23 (Rehnquist, J., dissenting).

46. *See* Siegel, *supra* note 13.

47. *See id.*

48. *See generally* Lawrence B. Solum, *Legal Theory Lexicon 030: Textualism*, LEGAL THEORY LEXICON: LEGAL THEORY BLOG (Jan. 21, 2018), https://lsolum.typepad.com/legal_theory_lexicon/2004/04/legal_theory_le_3.html; Lawrence B. Solum, *Legal Theory Lexicon 078: Theories of Statutory Interpretation and Construction*, LEGAL THEORY LEXICON: LEGAL THEORY BLOG (Dec. 2, 2018), https://lsolum.typepad.com/legal_theory_lexicon/2017/05/theories-of-statutory-interpretation.html; Kevin Walsh, *Tribute: Justice Scalia and the Next Generation of Constitutional Custodians*, SCOTUSBLOG (Feb. 26, 2016, 11:38 AM), <http://www.scotusblog.com/2016/02/tribute-justice-scalia-and-the-next-generation-of-constitutional-custodians/>.

In *Blanchard v. Bergeron*, Justice Scalia questioned in 1989 the Supreme Court's reliance on legislative history on grounds that legislative reports are unreliable and misleading guides to legislative intent.⁴⁹ In a separate opinion joined by no other justice, Justice Scalia argued that committee reports had become "increasingly unreliable evidence of what the voting Members of Congress actually had in mind," thereby implicitly accepting that a court should care to some degree what members of Congress had in mind.⁵⁰ He also made plain his disdain for the prospect of a judicial practice that motivates congressional staffers to pad the record with biased evidence:

As anyone familiar with modern-day drafting of congressional committee reports is well aware, the references to the cases were inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform the Members of Congress what the bill meant (for that end *Johnson* would not merely have been cited, but its 12 factors would have been described, which they were not), but rather to influence judicial construction. What a heady feeling it must be for a young staffer, to know that his or her citation of obscure district court cases can transform them into the law of the land, thereafter dutifully to be observed by the Supreme Court itself.⁵¹

A few years later, in *Conroy v. Aniskoff*, Justice Scalia honed this argument: "The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators."⁵² His solo opinion did cite four legislative-history excerpts "unearthed by a hapless law clerk to whom [he] assigned the task."⁵³ Yet Justice Scalia leveled his view that when "language of the statute is entirely clear," legislative history should not be consulted because "if [the clear result] is not what Congress meant then Congress has made a mistake and Congress will have to correct

49. *Blanchard v. Bergeron*, 489 U.S. 87, 98 (1989) (Scalia, J., concurring in part and concurring in judgment).

50. *Id.* at 99.

51. *Id.* at 98–99.

52. *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in judgment).

53. *Id.* at 527.

it.”⁵⁴ The “hapless law clerk” to whom he assigned the case later surfaced, remarking that reviewing legislative history was “beneath” the justices as well as “work hardly fit even for a hapless law clerk.”⁵⁵

Justice Scalia crystalized his thoughts on textualism in 1995 through a series of lectures delivered at Princeton University, which later appeared in book form.⁵⁶ He complained about reliance on legislative history, but that was one piece in a larger mosaic: “[T]he text is the law, and it is the text that must be observed.”⁵⁷

Years later, *Bilski v. Kappos*, a 2010 case about whether a business method can constitute a patentable “process,” instantiated a model for textualism through its adoption by the other justices.⁵⁸ Justice Anthony M. Kennedy, writing for the Court, declined to address the history, policies, and background understandings of the patent system, focusing instead on “dictionary definitions” and “common usage” to understand the word “process.”⁵⁹ The only reference to legislative history came from a concurrence in judgment authored by Justice John Paul Stevens, joined by Justices Ruth Bader Ginsburg, Stephen G. Breyer, and Sonia Sotomayor.⁶⁰

As textualism gained traction in the Supreme Court, the usage of canons of statutory construction (i.e., generalized precepts to assist in reading statutes) seemed to shift, turning the lens through which the text is viewed from extratextual policy concerns to mantras like “the people may rely on the original meaning of the written law.”⁶¹ A five-justice majority during October Term 2017 seemed to capture the zeitgeist of the moment with this statement: “Written laws are meant to be understood and lived by. If a fog of uncertainty

54. *Id.* at 528.

55. John Duffy, *Tribute: Justice Scalia’s Hapless Law Clerk*, SCOTUSBLOG (Mar. 6, 2016, 11:31 AM), <http://www.scotusblog.com/2016/03/tribute-justice-scalias-hapless-law-clerk/>.

56. *See* Siegel, *supra* note 13.

57. *Id.*

58. *Bilski v. Kappos*, 561 U.S. 593, 598, 602 (2010).

59. *Id.* at 601–03.

60. *See id.* at 641–42 (Stevens, J., concurring in judgment).

61. *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018); *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018) (“We reject this principle as a useful guidepost for interpreting the FLSA. Because the FLSA gives no ‘textual indication’ that its exemptions should be construed narrowly, ‘there is no reason to give [them] anything other than a fair (rather than a “narrow”) interpretation.’” (citation omitted)).

surrounded them, if their meaning could shift with the latest judicial whim, the point of reducing them to writing would be lost.”⁶²

As *Bilski* and later decisions demonstrate, the hallmarks of a textualist opinion include resisting the temptation to find textual ambiguity, while eschewing legislative history, intent, pragmatism, historical context, and analogous or adjoining precedent; the opinion instead should follow a familiar path of reciting the text, analyzing grammar, referencing dictionaries, and briefly rebutting practical counterarguments against a conclusion already drawn from the proceeding analysis of foreordained clear text.⁶³

President Donald J. Trump has accelerated the role of textualism as the principal driver in statutory interpretation in the Supreme Court by making it part of a litmus test for any nominee.⁶⁴ Justice Neil M. Gorsuch was not shy in attesting to his fealty to this approach as a circuit judge—even questioning outright whether legislative intent could ever be discerned.⁶⁵ Nor was Justice Brett M. Kavanaugh timid in his views, espousing thoughts on occasion akin to Justice Scalia.⁶⁶

Despite textualism’s momentum in the Supreme Court, the federal courts of appeals have been slow adopters, and even skeptics, of a regimented approach to interpreting federal statutes.⁶⁷ After surveying forty-two federal courts of appeals judges, Circuit Judge

62. *Wis. Cent. Ltd.*, 138 S. Ct. at 2074.

63. *See, e.g., Encino Motorcars*, 138 S. Ct. at 1140 (citing a dictionary definition to ascertain “ordinary meaning”). *See also* *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 368 (2018).

Our analysis starts with the phrase ‘critical habitat.’ According to the ordinary understanding of how adjectives work, ‘critical habitat’ must also be ‘habitat.’ Adjectives modify nouns—they pick out a subset of a category that possesses a certain quality. It follows that ‘critical habitat’ is the subset of ‘habitat’ that is ‘critical’ to the conservation of an endangered species.

Id.

64. Perry et al., *supra* note 20.

65. Kevin Russell, *Judge Gorsuch on Separation of Powers and Federalism*, SCOTUSBLOG (Mar. 15, 2017, 3:22 PM), <http://www.scotusblog.com/2017/03/judge-gorsuch-separation-powers-federalism/> (“And guesses about legislative intentions are, as we’ve seen, never a proper basis for overruling plain statutory language.”).

66. Edith Roberts, *Potential Nominee Profile: Brett Kavanaugh*, SCOTUSBLOG (June 28, 2018, 5:48 PM), <http://www.scotusblog.com/2018/06/potential-nominee-profile-brett-kavanaugh/> (“Perhaps because of his years of executive-branch experience, Kavanaugh generally brings a pragmatic approach to judging, although his judicial philosophy is conservative, and he has applied principles of textualism and originalism espoused by the late Justice Antonin Scalia.”).

67. Gluck & Posner, *supra* note 11, at 1343–48.

Richard A. Posner and Professor Abbe R. Gluck found that none endorsed textualism outright and all consulted legislative history:

None of the forty-two judges whom we interviewed—judges from across the political and theoretical spectrum—was willing to associate himself or herself with “textualism” without qualification. All consult legislative history. Many eschew dictionaries. Many of them utilize at least some canons of construction, but for reasons that range from “window dressing,” to canons as vehicles of opinion writing, to a view that they are actually useful decision tools.⁶⁸

The authors also discovered that “the judges [they] spoke to are willing to consider many different kinds of material” because it is “defensible to gather as much information as you can to make the best-informed decision you can.”⁶⁹

Even so, as textualism has gained greater purchase in the legal mainstream, circuit splits have inevitably formed as this once-nascent movement cleaves newer decisions from those applying the methods of old.⁷⁰ *Mount Lemmon* demonstrates how a circuit split can occur subtly through interpretative-regime displacement.

III. *MOUNT LEMMON* AND THE TRIUMPH OF TEXTUALIST DISPLACEMENT

A. *How U.S. Circuit Courts Interpreted the ADEA Amid the Rise of Textualism*

In many ways, interpretations of the Age Discrimination in Employment Act of 1967 grew up alongside the emergence of textualism.⁷¹ The ADEA sought to protect workers against “arbitrary age discrimination.”⁷² As originally enacted, both Title VII of the Civil Rights Act of 1964 and the ADEA “imposed liability on ‘employer[s],’ defined in both statutes as ‘a person engaged in an industry affecting commerce’ whose employees met a numerical

68. *Id.* at 1302.

69. *Id.*

70. *See* *Mount Lemmon Fire Dist. v. Guido*, 139 S. Ct. 22, 25 (2018) (“Federal courts have divided on this question.”).

71. *See* Sandra F. Sperino, *Let’s Pretend Discrimination Is a Tort*, 75 OHIO ST. L.J. 1107, 1112–14 (2014).

72. 29 U.S.C. § 621(b) (2012).

threshold,” all while excluding governmental entities from that definition and thus liability.⁷³

In 1972, Congress amended Title VII to reach state and local employers with fifteen or more employees by changing the definition of who is a “person”: “The term ‘person’ includes one or more individuals, governments, governmental agencies, [and] political subdivisions.”⁷⁴ The definition of “person” then rolled into the definition of “employer”: “The term ‘employer’ means a person engaged in an industry affecting commerce who has fifteen or more employees”⁷⁵

Congress amended the ADEA two years later to address its import on state and local governments.⁷⁶ But unlike Title VII, in which Congress added those entities to the definition of “person,” in the ADEA, Congress added them to the definition of “employer”:

The term “employer” means a person engaged in an industry affecting commerce who has twenty or more employees The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State⁷⁷

In that same 1974 enactment, Congress amended the Fair Labor Standards Act, on which parts of the ADEA had been modeled, to reach government employers regardless of their size.⁷⁸ Running concurrent with the gradual acceptance of textualism, courts began to interpret whether the numerical requirement of twenty employees applied to state and local governments under the ADEA.

In 1986, the Seventh Circuit, in *Kelly v. Wauconda Park District*, concluded that the numerical requirement applied to state and local employers because “the legislative histories of both the ADEA and Title VII amendments indicate that Congress’s main purpose in amending the statutes was to put public and private employers on the same footing.”⁷⁹ Circuit Judge Harlington Wood Jr. concluded that the statute is “ambiguous,” which compelled the appellate court to review holistically the text, various statements in the congressional record, and analogous precedent on how to interpret employment-law

73. *Mount Lemmon*, 139 S. Ct. at 24–25 (citations omitted).

74. 42 U.S.C. § 2000e(a) (1976).

75. *Id.* § 2000e(b).

76. *Mount Lemmon*, 139 S. Ct. at 25.

77. 29 U.S.C. § 630(b) (2012).

78. *See id.* § 203(d) (2012).

79. *Kelly v. Wauconda Park Dist.*, 801 F.2d 269, 271 (7th Cir. 1986).

statutes.⁸⁰ The decision was devoid of any evaluation of common usage, instead applying “common sense” to understand congressional intent.⁸¹ And although the panel made just one reference to a dictionary definition for the term “also,” it explained that “there are dangers in attempting to rely too heavily on characterizations such as ‘disjunctive’ form versus ‘conjunctive’ form to resolve difficult issues of statutory construction.”⁸² Judge Wood concluded with a pragmatic argument that nothing in the legislative history suggested that Congress sought to impose greater liability for age discrimination, as compared to the numerically restricted areas of racial, sexual, and religious discrimination under Title VII.⁸³

The Sixth Circuit reached the same conclusion in 1990, observing that the text is “ambiguous” and that “the legislative history of the statute indicates that the twenty employee statutory minimum applicable to private employers is likewise applicable to government employers.”⁸⁴ Circuit Judge James Leo Ryan was succinct:

The legislative history clearly expresses the intention that public sector employees are to be treated the same as private sector employees for purposes of the ADEA and, therefore, since the twenty employee minimum applies to private sector employees, Congress must have intended the twenty employee minimum requirement to apply to public sector employees.⁸⁵

The decision contained no references to dictionaries, the concept of common usage, or grammatical considerations.

Eight years later, the Eighth Circuit joined these ranks, concluding that the statute is “ambiguous” and that “[t]he legislative history of § 630(b)(2) shows that in adding agencies and instrumentalities to the ADEA definition of an employer, Congress intended to ‘treat both public and private employers alike, with “one set of rules”’ applying to both.”⁸⁶

80. *See id.* 270–72.

81. *See id.* at 272–73.

82. *Id.* at 270 n.1 (citation omitted).

83. *Id.* at 273.

84. *EEOC v. Monclova Twp.*, 920 F.2d 360, 361 (6th Cir. 1990).

85. *Id.* at 363.

86. *Palmer v. Ark. Council on Econ. Educ.*, 154 F.3d 892, 896 (8th Cir. 1998) (citation omitted).

In 2015, the Tenth Circuit, relying on these precedents, accepted the numerical requirement in a footnote without much discussion.⁸⁷ Rather than reciting legislative history or other extratextual evidence, Chief Circuit Judge Timothy Tymkovich “adopt[ed] that view” simpliciter, acknowledging that the other appellate decisions were “based on legislative history showing a general intent to treat government and private employers the same.”⁸⁸

Although the analysis varied over time, a circuit split did not emerge until 2017, when the Ninth Circuit, perennially maligned by President Trump for ostensibly “liberal” outcomes,⁸⁹ adopted a textualist approach to understanding the ADEA.⁹⁰

B. *Textualist Displacement on Display*

Mount Lemmon has its genesis in a decision by the fire chief of Mount Lemmon Fire District, a political subdivision in Arizona, to lay off its two oldest fulltime firefighters, John Guido (then 46) and Dennis Rankin (then 54) to resolve a budget shortfall.⁹¹ The Equal Employment Opportunity Commission, which long had maintained that the ADEA covers state and local employers of any size, found reasonable cause to believe that the fire district had discriminated on the basis of age.⁹² So the firefighters sued in 2013 on allegations that the fire district violated the ADEA.⁹³ In view of the uniform consensus among appellate courts in other circuits, the district court unsurprisingly granted summary judgment to the fire district on the basis that it was not an “employer” within the meaning of the ADEA.⁹⁴

Against a redoubt of unbroken precedent in one direction, the Ninth Circuit reversed the judgment of the district court in 2017,

87. See *Cink v. Grant Cty.*, 635 F. App'x 470, 474 n.5 (10th Cir. 2015).

88. *Id.*

89. Lyle Denniston, *Chief Justice, President in a Public Feud*, NAT'L CONST. CTR. (Nov. 22, 2018), <https://constitutioncenter.org/blog/chief-justice-president-in-a-public-feud> (“The President has been regularly a critic of the U.S. Court of Appeals for the Ninth Circuit, which has a reputation of being the most liberal tribunal in the federal court system.”).

90. See *Guido v. Mount Lemmon Fire Dist.*, 859 F.3d 1168, 1173 (9th Cir. 2017) (“As a matter of plain meaning, the argument that § 630(b) can be reasonably interpreted to include its second sentence definitions within its first is underwhelming.”).

91. *Mount Lemmon Fire Dist. v. Guido*, 139 S. Ct. 22, 24 (2018).

92. Charlotte Garden, *Argument Preview: Age Discrimination and Small Public Employers*, SCOTUSBLOG (Sept. 24, 2018, 1:31 PM), <http://www.scotusblog.com/2018/09/argument-preview-age-discrimination-and-small-public-employers/>.

93. *Guido*, 859 F.3d at 1170.

94. *Id.*

concluding that the ADEA is “*not* ambiguous,” and that “[t]he twenty-employee minimum does not apply to definitions in the second sentence and there is no reason to depart from the statute’s plain meaning.”⁹⁵ Writing for the panel, Senior Circuit Judge Diarmuid O’Scannlain recited dictionary definitions to arrive at an understanding that the word “‘also’ is a ‘term of enhancement,’” which means it “adds another definition to a previous definition of a term—it does not clarify the previous definition.”⁹⁶ “As a matter of plain meaning,” Judge O’Scannlain continued, “the argument that § 630(b) can be reasonably interpreted to include its second sentence definitions within its first is underwhelming.”⁹⁷ The appeals court also rejected any notion that “common sense” should apply in this type of analysis because “any appeal to congressional intent is a non-sequitur” that does not “affect the determination of whether a statute’s plain meaning is ambiguous.”⁹⁸ Judge O’Scannlain’s brief discussion of legislative history only occurred at the end of the opinion in a section serving as an alternative basis to support the panel’s textualist conclusion.⁹⁹ The Ninth Circuit concluded by observing that “it is not our role to choose what we think is the best policy outcome and to override the plain meaning of a statute, apparent anomalies or not.”¹⁰⁰ This counterintuitive result, when measured against judicial consensus reaching the opposite conclusion, bears all the hallmarks of an instance of textualist displacement.

The fire district thereafter filed a petition for writ of certiorari on the issue of numerosity, which the Supreme Court granted to the Ninth Circuit in February 2018.¹⁰¹ The briefs on the merits focused on how the text of the ADEA and other statutes support their positions.¹⁰² With the support of the U.S. Solicitor General, the firefighters argued that the term “also” creates three unambiguous groups of employers subject to liability: “private employers with at least [twenty] employees; their agents; and state and local employers

95. *Id.* at 1174 (emphasis added).

96. *Id.* at 1171.

97. *Id.* at 1173.

98. *Id.*

99. *Id.* at 1174–75.

100. *Id.* at 1175.

101. *Mount Lemmon Fire Dist. v. Guido*, 859 F.3d 1168 (9th Cir. 2017), *cert. granted*, 138 S. Ct. 1165 (Feb. 26, 2018) (No. 17-587).

102. *See* Garden, *supra* note 92.

of any size.”¹⁰³ The fire district countered that “also” acts as “a transitional phrase that signifies amplification or clarification,” rather than defining a wholly new category of employer.¹⁰⁴ The fire district added that including “agents” as an independent category of “employer” is “unfathomable” because that would impose independent liability on those individuals.¹⁰⁵ Maintaining consistency between Title VII and the ADEA furthers congressional goals in this area, the fire district continued, which provides a space for large-office accountability without the threat of impairing small-employer operations.¹⁰⁶ Professor Charlotte Garden suggested ahead of oral argument that “[t]he fire district’s main challenge seems likely to be convincing the court to look beyond the most intuitive reading of [the statutory] words.”¹⁰⁷

The Court heard the case on the first day of October Term 2018.¹⁰⁸ An eight-member bench assembled due to the vacancy created by Justice Kennedy’s retirement and the pending confirmation of Justice Kavanaugh.¹⁰⁹ E. Joshua Rosenkranz, whose name was initially misspelled “Rosenberg” in the Court’s day call for arguing lawyers,¹¹⁰ represented the fire district and faced tough questioning on all sides.¹¹¹ Justice Gorsuch suggested that it made no sense to deviate from the “normal meaning” of the word “also.”¹¹² Both Chief Justice John G. Roberts Jr. and Justice Sotomayor made clear that they shared this view.¹¹³ In contrast, Jeffrey Fisher, representing the firefighters, and Jonathan Bond, arguing on behalf of the government, encountered little resistance for the proposition that “also” is used in both everyday conversation and federal statutes to “add[] something that wasn’t there before.”¹¹⁴ Rosenkranz exhorted

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. Mark Walsh, *A “View” from the Courtroom: Opening with an Empty Spot on the Bench*, SCOTUSBLOG (Oct. 1, 2018, 4:34 PM), <http://www.scotusblog.com/2018/10/a-view-from-the-courtroom-opening-with-an-empty-spot-on-the-bench/>.

109. *Id.*

110. *Id.*

111. Charlotte Garden, *Argument Analysis: “A Strange Statute that was Written in a Strange Way,”* SCOTUSBLOG (Oct. 2, 2018, 10:51 AM), <http://www.scotusblog.com/2018/10/argument-analysis-a-strange-statute-that-was-written-in-a-strange-way/>.

112. *Id.*

113. *Id.*

114. *Id.*

that “[t]his is a strange statute that was written in a strange way.”¹¹⁵ But, as Professor Garden predicted, “[a]n outcome that relies on a plain-language reading of ‘also means’ to decide the case in the employees’ favor seems likely.”¹¹⁶

C. Mount Lemmon Embodies the Court’s Shift in Thinking on Statutory Interpretation

In the first opinion of October Term 2018, just over one month after oral argument, the Supreme Court affirmed the judgment of the Ninth Circuit, concluding that “the text of the ADEA’s definitional provision, also its kinship to the FLSA and differences from Title VII, leave scant room for doubt that state and local governments are ‘employer[s]’ covered by the ADEA regardless of their size.”¹¹⁷ In a slip opinion barely crossing over onto a seventh page, Justice Ginsburg, writing for a unanimous eight-member bench, emphasized that “[f]irst and foremost, the ordinary meaning of ‘also means’ is additive rather than clarifying.”¹¹⁸ Hewing to the text, she explained that it would be “so strange” to impose a numerical requirement in one portion of the sentence for governments, while declining to do the same for agents in the other portion: “Its construction, however, would lift that restriction for the agent portion of the second sentence, and then reimpose it for the portion of that sentence addressing States and their political subdivisions.”¹¹⁹

Rejecting arguments that Title VII and the ADEA should have uniform application, Justice Ginsburg commented that “this disparity is a consequence of the different language Congress chose to employ.”¹²⁰ “The better comparator is the FLSA,” she observed, which defines states and political subdivisions as “employer[s]” irrespective of their number of employees.¹²¹ The Court made slight reference to some practical concerns in the opinion’s penultimate paragraph, suggesting that “experience” evinced “[n]o untoward service shrinkages” from the threat of liability.¹²² And the opinion made no mention of common-sense arguments, legislative history

115. *Id.*

116. *Id.*

117. *Mount Lemmon Fire Dist. v. Guido*, 139 S. Ct. 22, 27 (2018).

118. *Id.* at 25.

119. *Id.* at 26.

120. *Id.*

121. *Id.* at 26–27.

122. *Id.* at 27.

(despite its extensive reliance by circuit courts for decades), the historical context of the ADEA and Title VII, or congressional intent.

Mount Lemmon generated little coverage, scholarly or otherwise.¹²³ One article suggested that smaller school districts could be impacted.¹²⁴ Another, written by an amicus curiae in support of the fire district, remarked that the Court rejected its “policy arguments” that rural areas could become vulnerable to litigation because “few alternatives [exist] to layoffs and terminations when budget cuts must be made.”¹²⁵ The overwhelming consensus was that *Mount Lemmon* was a workmanlike decision with little on which to comment.¹²⁶

That *Mount Lemmon* received little fanfare proves just how far textualism has come, and at least three reasons demonstrate why the decision bears latent, almost *sub rosa*, importance. Most striking is how different the Court approached the question presented in *Mount Lemmon* when compared to courts just a few years ago. In the context of the ADEA, thirty years of precedent had concluded that the numerical requirement was ambiguous, necessitating review of extratextual sources.¹²⁷ What changed in 2018? Certainly different judges and justices are deciding the cases, but a lack of bald ideological valance in *Mount Lemmon* suggests that the method of interpretation mattered and is cardinal. As compared to *Monell* and *Citizens to Preserve Overton Park*, the style and methodology employed in *Mount Lemmon* could not be more divergent.¹²⁸ An educated person without legal training most likely would conclude that the Court had been asked to do different things, which required performing different tasks. Nothing about those cases, or the court of appeals cases leading up to *Mount Lemmon*, maps onto how the

123. Roberts, *supra* note 10.

124. Mark Walsh, *Supreme Court Says Federal Age-Bias Law Applies to Local Governments of Any Size*, EDUC. WEEK (Nov. 6, 2018, 1:08 PM), http://blogs.edweek.org/edweek/school_law/2018/11/supreme_court_rules_that_feder.html (“Most school districts tend to be quite large employers in their communities. But some regular districts with fewer than 20 employees likely exist, as do certain administrative or special-purpose school districts that may have light employment rosters.”).

125. Lisa Soronen, *Supreme Court Rules Against State and Local Governments in Age Discrimination Case*, COUNCIL STATE GOV'T. (Nov. 6, 2018, 3:17 PM), <http://knowledgecenter.csg.org/kc/content/supreme-court-rules-against-state-and-local-government-age-discrimination-case>.

126. Roberts, *supra* note 10.

127. *Compare* *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 411–12 (1971), with *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 664–65 (1978).

128. *Compare* *Citizens*, 401 U.S. at 411–12, and *Monell*, 436 U.S. at 664–65, with *Mount Lemmon Fire Dist. v. Guido*, 139 S. Ct. 22, 23 (2018).

Supreme Court approached its decision in 2018. Gone are references to intent, non-final legislative documents, practical considerations, and a wink to common sense. All of that has been replaced by grammar exegeses and dictionary citations.¹²⁹ Although the text played a role before, it is now the germane player on a team in a game that has evolved apace in just thirty years. And while some have questioned whether the Supreme Court can prescribe a certain method of statutory interpretation that would be binding on the lower courts, it does not need to if it in effect ignores extratextual arguments in favor of preferred methods.¹³⁰

The second lesson of *Mount Lemmon* is how advocates must approach statutory-interpretation cases in the Supreme Court.¹³¹ Textualism forces, as the primary (and perhaps only) argument, an explanation about why the text supports a particular position.¹³² Although the reasoning of similar precedent holds currency, reciting dictionary definitions is nigh mandatory in the Supreme Court in these types of cases. Also, an understanding of how basic grammatical principles affect an argument is invaluable.¹³³ Referencing canons of statutory construction, particularly those identified in *Reading Law* by Justice Scalia and Professor Bryan Garner,¹³⁴ can help salve the edges of an argument, especially when an argument is supported by the maxim “words generally should be interpreted as taking their ordinary, contemporary, common meaning

129. See *Mount Lemmon*, 139 S. Ct. at 23.

130. Gluck & Posner, *supra* note 11 at 1343–48.

131. See *Mount Lemmon*, 139 S. Ct. at 25–26.

132. See *id.* at 26–27.

133. See, e.g., Jennifer Chacon, *Argument Analysis: Are There Limits to the Government’s Power to Detain Immigrants Without a Hearing?*, SCOTUSBLOG (Oct. 11, 2018, 7:37 PM), <http://www.scotusblog.com/2018/10/argument-analysis-are-there-limits-to-the-governments-power-to-detain-immigrants-without-a-hearing/>.

But an entertaining exchange between Gorsuch and Wang about grammar (in which Wang won kudos from the justice) suggested that Gorsuch has at least some sympathy for Preap’s statutory construction argument, even if he is not yet completely convinced. And when Gorsuch pressed Tripp on whether there were ‘any limits on the government’s power’ under the government’s reading of the statute, it was reminiscent of the concerns about government overreach that Gorsuch signaled last term in *Sessions v. Dimaya*, in which he also came down in favor of the immigrant.

Id.

134. See generally ANTONIN SCALIA & BRIAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 247–340 (2012).

. . . at the time Congress enacted the statute.”¹³⁵ Extratextual canons on the other hand, such as the presumption that exemptions from complying with fair-labor practices should be construed narrowly,¹³⁶ seem to be losing favor in the Supreme Court, unless the dispute involves upholding the primacy of the Federal Arbitration Act over other laws and practices.¹³⁷

Anticipating a reluctance to find ambiguity perforce leaves a small window to argue away from the text. And if the text does not support a favored position, good reasons must exist to resort to external documents and intent-laden arguments. Perhaps pragmatism and consequentialism still have value in the appropriate context, as when Chief Justice Roberts, for example, salvaged a statute of immense national economic importance: “Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter.”¹³⁸ Still, in the ordinary case, extratextual arguments fall behind the predetermined attention that the text now demands.¹³⁹ No doubt if it were possible to transport and swap advocates from the 1970s with today, both sets would be ill-equipped to advance arguments in what assuredly would be a foreign place. With the stakes just as high, the game probably would not make a dram of sense to either side. But when, as now, the Court

135. *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018) (quotation marks omitted) (ellipses omitted) (citation omitted).

136. *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018) (“We reject this principle as a useful guidepost for interpreting the FLSA. Because the FLSA gives no ‘textual indication’ that its exemptions should be construed narrowly, ‘there is no reason to give [them] anything other than a fair (rather than a “narrow”) interpretation.’” (citation omitted)).

137. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1648–49 (2018) (Ginsburg, J., dissenting).
If these untoward consequences stemmed from legislative choices, I would be obliged to accede to them. But the edict that employees with wage and hours claims may seek relief only one-by-one does not come from Congress. It is the result of take-it-or-leave-it labor contracts harking back to the type called ‘yellow dog,’ and of the readiness of this Court to enforce those unbargained-for agreements. The FAA demands no such suppression of the right of workers to take concerted action for their ‘mutual aid or protection.’

Id.

138. *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015).

139. *See supra* notes 117–32 and accompanying text.

gives you textualism, saddle in because “we’re all textualists” at that point.¹⁴⁰

A third lesson from *Mount Lemmon* is that textualism can sometimes produce progressive outcomes. Assuming progressive values support empowering those aggrieved of employment discrimination with the ability to litigate against a broader range of employers, *Mount Lemmon* achieved that goal by affording the firefighters an opportunity to bring their case.¹⁴¹ The displacement of a panoply of extratextual sources in favor of reliance on text alone, to be sure, changes the game significantly in most circumstances—but the upshot for progressives is not necessarily transitioning from the tennis court to a rendezvous in the gladiatorial coliseum. A more apt analogy might be, in close cases, like changing sports from basketball to baseball. Michael Jordan had marginal success in his attempt to play baseball in the minor leagues, but he still played ball and hit a homerun three times.¹⁴² So obvious value exists for progressives to adopt a fake-it-until-you-make-it attitude on textualism.¹⁴³ It is moreover too soon to tell how textualism, once properly embraced by litigants in their briefing, will affect litigation. Also, although the wind is at textualism’s back right now, there is no guarantee that a shift in direction could not be in the offing.¹⁴⁴ And when all else fails, as Justice Brennan commended during a speech at the Playboy Great Gorge Resort in Vernon, New Jersey, litigants can always try their luck in state court under state law.¹⁴⁵

Mount Lemmon, all told, makes manifest that textualism matters now more than ever. And this abrupt change of circumstances, at least when compared to how courts have approached cases from the

140. See *The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes*, *supra* note 1.

141. Cf. Ronald Collins, *Ask the Author: Adler and Others on “Business and the Roberts Court,”* SCOTUSBLOG (Nov. 28, 2016, 4:53 PM), <http://www.scotusblog.com/2016/11/ask-the-author-adler-and-others-on-business-and-the-roberts-court/>; Roselyn Miller, *Seattle Considers a Domestic Workers Bill of Rights*, SLATE (June 29, 2018, 10:00 AM), <https://slate.com/human-interest/2018/06/domestic-workers-bill-of-rights-in-seattle-is-most-progressive-attempt-at-protection-yet.html>.

142. See *Michael Jordan*, BASEBALL REFERENCE, <https://www.baseball-reference.com/register/player.fcgi?id=jordan001mic> (last visited Apr. 5, 2019).

143. See Stern, *supra* note 19.

144. See *In Recess #9: “Hoofbeats in the Distance,”* FIRST MONDAYS (Sept. 3, 2018), <https://simplecast.com/s/3076452a>.

145. Stephen Wermiel, *SCOTUS for Law Students: Justice William Brennan and Supreme Court Avoidance*, SCOTUSBLOG (Nov. 21, 2018, 2:59 PM), <http://www.scotusblog.com/2018/11/scotus-for-law-students-justice-william-brennan-and-supreme-court-avoidance/>.

founding through the 1970s, deserves respect and is here to stay for the foreseeable future.

IV. CONCLUSION

If “we’re all textualists now,” *Mount Lemmon* helps us understand the breadth and scope of that charge.¹⁴⁶ Yet *Mount Lemmon* also represents a validation of a cause and a recognition of what types of arguments now matter to the Supreme Court and what has become *de minimis*.¹⁴⁷ Whether halcyon days are ahead or left in the past depends, at least partially, on whether you are an optimist or pessimist. No doubt leading an argument headfirst with legislative history is a poor decision. And ignoring the particularities of grammar comes at one’s peril.¹⁴⁸ Still, although today’s opinions look nothing like opinions from, frankly, the past 200 years, the playing field can still produce victories for progressives bracing the textualist revolution.¹⁴⁹ Each revolution is a product of its predecessor’s demise. And whether one revolution has staying power over another depends, in some circumstances, on the ability to persuade and attract acceptance. Textualism started with solo concurrences.¹⁵⁰ For those not troubled by learning about a statute through as many sources as possible before reaching a decision, 200 years of precedent provides a reference point from which to reinvigorate the debate—even if done one case at a time.

146. See *The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes*, *supra* note 1.

147. See *supra* Part I.

148. See, e.g., Chacon, *supra* note 133.

149. See Stern, *supra* note 19.

150. See *supra* Section II.B.