NOTE

TEXTUALISM'S MISTAKE

In 1920, seventeen-year-old Salvatore Eugene Scalia arrived in the United States from Italy with his family.[1] He picked up English quickly and decided to pursue a career in academia studying Romance languages. He got married, earned a master's degree, and had a son, the future Supreme Court Justice Antonin Scalia.[2] Salvatore[3] earned his Ph.D. in 1950 and became a professor at Brooklyn College, where he taught Italian, French, and Spanish.[4] He was known in his field for his scholarship on and translations of Italian poets,[5] but he also had a lasting impact on legal theory that has gone largely unacknowledged. Salvatore was a conduit between literary criticism and statutory interpretation, two fields that rarely intersect. Salvatore influenced his son's approach to reading a text, and his son in turn influenced a generation of judges and scholars in developing and refining textualism.

Salvatore was affected by the New Critics, and theirs was the set of critical beliefs that he seems to have imparted to his son.[6] New Criticism was the dominant American approach to literary criticism in the mid-twentieth century, and its principles were well established over the decades in which it was theorized and taught in universities.[7] First, its adherents advocated for the method of close reading, by which they meant focusing on "'the work itself' and 'literature qua literature.'"[8] Second, they emphasized formalism over social context and other external factors in pursuit of objective, scientific analysis.[9] Finally, the kind

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[1] JOAN BISKUPIC, AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA 13 (2009).

[2] *Id.* at 14.

[3] This Note refers to Professor Salvatore Eugene Scalia by his first name in order to avoid confusion with his son.

[4] BISKUPIC, *supra* note 1, at 15. Justice Scalia would later recall his father working on his doctorate in the basement during his childhood. *Id.* at 18.

[5] *Id.* at 15–16.

[6] *See* George Kannar, Comment, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1316–17 (1990) ("Believing, like the New Critics, that '[a] poem is a poem, not this plus that,' the first Professor Scalia almost surely brought home the message he so vigorously asserted in his own 'texts.'" (footnote omitted)); Jeannie Suk Gersen, *Could the Supreme Court's Landmark L.G.B.T.-Rights Decision Help Lead to the Dismantling of Affirmative Action?*, NEW YORKER (June 27, 2020), https://www.newyorker.com/news/our-columnists/could-the-supreme-courts-landmark-lgbt-rights-decision-help-lead-to-the-dismantling-of-affirmative-action [https://perma.cc/JNF7-RHHJ] (citing Kannar, *supra*).

[7] Miranda Hickman, *Introduction* to REREADING THE NEW CRITICISM 1–2 (Miranda B. Hickman & John D. McIntyre eds., 2012).

[8] *Id.* at 2; *see also* William Logan, *Foreword* to PRAISING IT NEW: THE BEST OF THE NEW CRITICISM xii (Garrick Davis ed., 2008) (referring to the years 1913 to 1963 as "the age in which [the New Critics] practiced most fruitfully").

[9] *E.g.*, JOHN FEKETE, THE CRITICAL TWILIGHT 86–92 (1977).

of close reading that the New Critics espoused largely did away with authorial intention as a relevant area of inquiry.[10] As this Note will demonstrate, these tenets of New Criticism are reflected in many of Justice Scalia's core textualist convictions — notably his close attention to statutory text, his certainty in reaching definitive outcomes in interpretive questions, and his rejection of congressional intent as a relevant factor in statutory interpretation.

This connection between New Criticism and textualism would be nothing more than an interesting footnote in legal history were it not for the very different trajectories of the two movements. New Criticism began falling out of fashion in the late 1960s, as poststructuralism and postmodernism swept into the academy.[11] In 1967, Roland Barthes published his landmark essay *The Death of the Author*, which embraced the multiplicity of viewpoints resulting from dynamic interactions with other texts and the readers themselves.[12] On this view, the text is not a closed entity that can be reduced to the words on the page; rather, "[t]he Text is plural" and draws meaning from disparate other sources.[13] Barthes and other poststructuralists[14] also urged considerations of social and political context when considering a text, eschewing the narrower kinds of close reading that shut out external forces. While these theorists were not always directly responsive to New Criticism, their ideas can be read in concert: where the New Critics prized certainty and objectivity, the poststructuralists celebrated subjectivity and variability. These are profoundly different ways of looking at the same fundamental insight: that authorial intent is not a valid way to interpret a text.

Meanwhile, textualism — particularly Justice Scalia's version of textualism — remains the dominant method of statutory interpretation among the federal judiciary.[15] Justice Kagan remarked in 2015 that

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[10] Cecily Devereux, *"A Kind of Dual Attentiveness": Close Reading After the New Criticism*, *in* REREADING THE NEW CRITICISM, *supra* note 7, at 219, 220 n.2.

[11] *See* Hickman, *supra* note 7, at 1; *id.* at 14–15 (noting contemporaneous critiques of New Criticism).

[12] ROLAND BARTHES, *The Death of the Author*, *in* IMAGE-MUSIC-TEXT 142, 148 (Stephen Heath trans., 1977) ("[T]he birth of the reader must be at the cost of the death of the Author.").

[13] ROLAND BARTHES, *From Work to Text*, *in* IMAGE-MUSIC-TEXT, *supra* note 12, at 155, 159.

[14] This Note uses the label of poststructuralism to discuss the work of Roland Barthes, Michel Foucault, and Jacques Derrida, among other theorists generally associated with them, as this is the conventional term used today. *See, e.g.*, SEÁN BURKE, THE DEATH AND RETURN OF THE AUTHOR: CRITICISM AND SUBJECTIVITY IN BARTHES, FOUCAULT, AND DERRIDA 10 (3d ed. 2008). These theorists largely rejected this label and others that scholars have applied to them (including, confusingly, structuralism). *See* EVE TAVOR BANNET, STRUCTURALISM AND THE LOGIC OF DISSENT: BARTHES, DERRIDA, FOUCAULT, LACAN 3 (1989) (defending the use of the term structuralist while pointing out the problems with it).

[15] *See, e.g.*, William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 656 (1990) ("In each year that Justice Scalia has sat on the Court, . . . his theory has exerted greater influence on the Court's practice."); Tara Leigh Grove, *The Supreme Court, 2019 Term — Comment: Which*

"we're all textualists now,"[16] and the three most recent appointees to the Supreme Court are "eager to follow and expand [Scalia's] program."[17] But textualism's early connection to New Criticism has been underexplored, and as a result the legal theory has not grappled with the poststructuralist response.

This Note examines both the similarities between textualism and New Criticism and one of the consequences of that similarity — namely, the relevance of poststructuralism. Part I discusses New Critical theory, both on its own terms and as it influenced and appeared in Salvatore's publications on Italian poetry. It then addresses Justice Scalia's writings on statutory interpretation to show the ideas shared by the two movements. Part II considers the poststructuralist response to New Criticism, noting the interrelated critiques revolving around authorial intent and the practice of close reading as a lens through which to analyze textualism. Poststructuralism cannot offer a model for statutory interpretation because it embraces indeterminacy and subjectivity, in stark contrast to the consistency needed in reading statutes. However, its theoretical insights can be used to parse textualist opinions, which section II.B demonstrates by examining two recent opinions from the Roberts Court, *Bostock v. Clayton County*[18] and *Niz-Chavez v. Garland*.[19] In so doing, this Note shows how textualism fails to grapple with the consequences of its interpretive approach and leads to the very subjectivity that it strives to avoid.

I. FROM LITERARY THEORY TO STATUTORY INTERPRETATION

This Part traces the connections between the New Critical school of thought and Justice Scalia's textualist philosophy. It first provides an overview of the New Critics' central arguments concerning authorship and the correct way to read a text, then turns to the impact of these ideas on legal scholarship through Scalia's father. Finally, it addresses Scalia's scholarly writings and judicial opinions to show the echoes of New Criticism present in his work.

Textualism?, 134 HARV. L. REV. 265, 265 (2020) (noting the "considerable prominence" of textualism on the federal bench, despite "academic indictment" of the theory).

16 Justice Elena Kagan, The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes at 8:29 (Nov. 17, 2015), http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation [https://perma.cc/3BCF-FEFR].

17 Victoria Nourse, *Textualism 3.0: Statutory Interpretation After Justice Scalia*, 70 ALA. L. REV. 667, 668 (2019) (discussing Justices Gorsuch and Kavanaugh); *see also* Michael Tarm, *Amy Coney Barrett, Supreme Court Nominee, Is Scalia's Heir*, AP NEWS (Sept. 26, 2020), https://apnews.com/article/election-2020-ruth-bader-ginsburg-chicago-us-supreme-court-courts-547b7de5b6ebabedee46b08b5bb37141 [https://perma.cc/YH6G-FQPR].

18 140 S. Ct. 1731 (2020).

19 141 S. Ct. 1474 (2021).

A. The New Critics

The New Critics are perhaps best known for championing the use of close reading, the practice of closely studying the details of a text, as the correct way to understand and engage with that text. Their most direct influences from England advocated for paying close attention to the words on the page,[20] a practice that the New Critics "intensified as a fetish."[21] The technique was highly teachable[22] and focused on formally analyzing the words, syntax, metaphors, and other aspects of the text.[23] Meaning emerged from the text only after this close consideration,[24] so the conclusions of the New Critics tended to be limited in scope.[25]

Close reading called for "attend[ing] to the ways in which a text produces value in relation to itself, as a more or less autonomous object that can be detached from its author and from the circumstances of its production."[26] Following this method, the reader was "not to say anything that was not derived from the text they were considering," nor "make any statements that . . . could not [be] support[ed] by a specific use of language that actually occurred in the text."[27] John Crowe Ransom, a leading figure of New Criticism,[28] specifically identified areas of study to be excluded from the realm of what he considered to be proper criticism. Notably on his list were "[p]ersonal registrations," meaning an individual reader's experience of the text,[29] and "historical studies," a category that included the author's biography and "autobiographical evidences" in the text.[30]

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[20] *See* T.S. ELIOT, THE SACRED WOOD viii (2d ed. 1928); Alastair Morrison, *Eliot, the Agrarians, and the Political Subtext of New Critical Formalism*, *in* REREADING THE NEW CRITICISM, *supra* note 7, at 47, 49 (noting the influence of T.S. Eliot on the New Critics).

[21] FEKETE, *supra* note 9, at 44.

[22] *See, e.g.*, CLEANTH BROOKS, JR. & ROBERT PENN WARREN, UNDERSTANDING POETRY: AN ANTHOLOGY FOR COLLEGE STUDENTS (1938); Andrew DuBois, *Close Reading: An Introduction*, *in* CLOSE READING: THE READER 1, 2 (Frank Lentricchia & Andrew DuBois eds., 2003).

[23] *See* DuBois, *supra* note 22, at 2.

[24] *See, e.g.*, *id.* at 19–20 (discussing a paradigmatic New Critical essay that features an argument that "coalesces only at the essay's end, and seems generated by, rather than generative of, the observations that precede it," *id.* at 20).

[25] *See, e.g.*, *id.* at 16, 21 (offering examples of arguments in the New Criticism tradition).

[26] Devereux, *supra* note 10, at 219.

[27] PAUL DE MAN, *The Return to Philology*, *in* THE RESISTANCE TO THEORY 21, 23 (1986). Paul De Man goes on to argue, in a critique that will recur for New Criticism, that students of close reading "were asked . . . to begin by reading texts closely as texts and not to move at once into the general context of human experience or history." *Id.*

[28] *See* Hickman, *supra* note 7, at 6–7 (describing Ransom's role in the rise of the movement).

[29] JOHN CROWE RANSOM, THE WORLD'S BODY 342 (1938).

[30] *Id.* at 344. Ransom did, however, acknowledge the use of biography as an aid to better understand an author's frame of reference. *See id.* at 339–40.

As their focus on close reading suggests, the New Critics advocated for an empirical, formalist approach to literary criticism. From positivist philosophy came the idea that linguistic analysis meant that "all genuine questions were answerable."[31] Close reading was meant to bring objective interpretation and exacting formalist precision to the study of poetry, thus leaving the realm of the subjective.[32] The New Critics were interested in the experiments of I.A. Richards, an English critic who had his students read poems without their titles and authors,[33] but many rejected this psychological approach as overly focused on the reader's experience.[34] Instead, Ransom argued that "[c]riticism must become more scientific, or precise and systematic,"[35] embracing the idea that science was the "dominant form of social rationality."[36]

Another important piece of the New Critics' philosophy of close reading was downplaying the importance of the author of a text. In 1919, T.S. Eliot argued for a "diver[sion of] interest from the poet to the poetry" and a recognition that "[t]he emotion of art is impersonal."[37] The New Critics picked up this idea and ran with it. In a landmark 1946 essay, W.K. Wimsatt and M.C. Beardsley made the case that critical consideration of authorial intent was a fallacy.[38] They argue:

> The poem is not the critic's own and not the author's (it is detached from the author at birth and goes about the world beyond his power to intend about it or control it). The poem belongs to the public . . . . What is said about the poem is subject to the same scrutiny as any statement in linguistics or in the general science of psychology or morals.[39]

Their method of close reading thus facilitated a focus on the text alone,

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[31] FEKETE, *supra* note 9, at 33.

[32] *See* Jane Gallop, *The Historicization of Literary Studies and the Fate of Close Reading*, 2007 PROFESSION 181, 183 ("According to the standard histories of our profession, when New Criticism took over English studies, it injected methodological rigor into what had been a gentlemanly practice of amateur history. We became a discipline, so the story goes, when we stopped being armchair historians and became instead painstaking close readers.").

[33] *See* I.A. RICHARDS, PRACTICAL CRITICISM 3 (2d ed. 1930).

[34] *See* Cleanth Brooks, *The Critics Who Made Us: I.A. Richards and* Practical Criticism, 89 SEWANEE REV. 586, 591 (1981) ("John Ransom made the point that what the reader had before him as positive evidence was the text itself, not certain presumed goings-on in the reader's head; these latter were no more than speculative inferences."); Hickman, *supra* note 7, at 11 ("The critics who would become the New Critics were . . . primarily concerned with 'the naked texts,' rather than, as was Richards, in what occurred in students' minds as they engaged with them.").

[35] RANSOM, *supra* note 29, at 329.

[36] FEKETE, *supra* note 9, at 88.

[37] T.S. Eliot, *Tradition and the Individual Talent* (1919), *reprinted in* AUTHORSHIP: FROM PLATO TO THE POSTMODERN 73, 80 (Seán Burke ed., 1995).

[38] W.K. Wimsatt Jr. & M.C. Beardsley, *The Intentional Fallacy*, 54 SEWANEE REV. 468, 468 (1946); *see* RÓNÁN MCDONALD, THE DEATH OF THE CRITIC 97 (2007).

[39] Wimsatt & Beardsley, *supra* note 38, at 470. This approach did not wholly exclude biographical evidence, as Wimsatt and Beardsley recognized that studying a word used by an author may entail studying "the associations which the word had for *him*." *Id.* at 478. But this was a far cry from relying on authorial intent to interpret a text.

"without befuddling the issue with any appeals to authorial intention."[40] Critical engagement was boiled down to the essential elements: the words on the page and their reader.

Though the specifics of the methodological approach varied over time and by critic, New Criticism's core tenets remained stable for the decades in which it dominated the American academy. It involved "[t]he exclusive focus on the formal integration of the object, the extreme empiricism of method, . . . the isolation of the resulting studies from their historical context, [and] their negligible comparative value owing to the stress on internal empirical criteria."[41] New Criticism thus consisted of a technique and a set of theoretical commitments that came with said technique. Close reading brought with it a focus on empirics, a belief in scientific rationality, an understanding of literature as a solvable problem of linguistics, and a disregard of authorial intention.

B. Salvatore Scalia

As an academic in mid-twentieth-century America, Salvatore would have been trained in the close reading methodology of the New Critics. He published on two Italian writers, Giosuè Carducci[42] and Luigi Capuana.[43] These volumes reveal the degree to which he agreed with and argued for some of the central ideas of the New Critics, which would later find similar expression in his son's work.

Salvatore embraced close reading and its stress on the naked text above all else, echoing the New Critical views in vogue at the time. He rejected readings of poetry that relied on elements that were "external or foreign" to the text itself, arguing that a critic should find fault with a poem only on the basis of its "congenital flaws and failings."[44] He insisted that the work must be considered as a whole, explaining: "A poem is a poem, not this plus that . . . . Words and metres . . . form an integral part of [the] poem, just as body and soul are an integral part of man's individuality and personality."[45] Like the New Critics who analyzed poetry by closely attending to the words on the page, Salvatore

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[40] MCDONALD, *supra* note 38, at 96; *see also supra* note 30 and accompanying text.

[41] FEKETE, *supra* note 9, at 35 (finding that these features were common to New Criticism and the I.A. Richards school in England).

[42] S. EUGENE SCALIA, CARDUCCI: HIS CRITICS AND TRANSLATORS IN ENGLAND AND AMERICA, 1881–1932 (1937) [hereinafter SCALIA, CARDUCCI]. Note the publication date — one year after Antonin Scalia's birth.

[43] S. EUGENE SCALIA, LUIGI CAPUANA AND HIS TIMES (1952) [hereinafter SCALIA, CAPUANA].

[44] SCALIA, CARDUCCI, *supra* note 42, at 44.

[45] *Id.* at 45. Professor George Kannar has observed that the "essentialist locution" apparent in the phrase "[a] poem is a poem" was a rhetorical device also used by Justice Scalia. *See* Kannar, *supra* note 6, at 1322 n.128 (citing, inter alia, Schmuck v. United States, 489 U.S. 705, 723 (1989) (Scalia, J., dissenting)).

focused on the lines of poetry themselves and urged "direct communion with [the] page."[46]

The New Critics' attitudes toward objectivity, empiricism, and authorship are similarly reflected in Salvatore's work. While writing about the task of translating an Italian poet, Salvatore revealed an ambivalence about the degree to which translation could be successful.[47] Echoing Ransom's search for scientific precision, Salvatore believed that "[l]iteralness . . . is essential."[48] As such, he "preferr[ed] strict textual fidelity over loose interpretive 'translation'"[49] and criticized other translators for deviating from the original text.[50] Salvatore noted the importance of literalness in "prevent[ing] the translator from yielding to the temptation of following the line of least resistance,"[51] suggesting his concern with objective standards that would not change based on the identity of the intermediary. In presenting his own objective, literal translation, Salvatore considered authorial biography but not intent,[52] in general accordance with the New Critical approach.[53] Salvatore's approach to poetry thus mirrored the New Critical approach that was dominating the American academy at the time.

C. Justice Scalia's Textualism

Salvatore's approach to translation and literary criticism left an enduring impact on his son's ideas about text and interpretation. Although Justice Scalia discussed the influence of his mother more than his father — describing her as "doting" and him as "stern"[54] — Justice Scalia's biographers have recognized the subtler ways that Salvatore shaped his scholarly instincts. Professor Bruce Murphy writes that Scalia was "imbued with the conservative, text-oriented Catholicism of his father"[55] and considered following in his footsteps to be a college

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46 SCALIA, CARDUCCI, *supra* note 42, at 95; *see also* Kannar, *supra* note 6, at 1316.

47 Kannar, *supra* note 6, at 1316.

48 SCALIA, CARDUCCI, *supra* note 42, at 90; *see also* Kannar, *supra* note 6, at 1316 (discussing this belief); Tom Levinson, *Confrontation, Fidelity, Transformation: The "Fundamentalist" Judicial Persona of Justice Antonin Scalia*, 26 PACE L. REV. 445, 476 n.204 (2006) (same).

49 Kannar, *supra* note 6, at 1317.

50 *E.g.*, SCALIA, CARDUCCI, *supra* note 42, at 81.

51 *Id.* at 90.

52 *E.g.*, SCALIA, CAPUANA, *supra* note 43, at 1, 9–10.

53 *See* RANSOM, *supra* note 29, at 345; *supra* notes 30 and 39.

54 BRUCE ALLEN MURPHY, SCALIA: A COURT OF ONE 11 (2014) (quoting Scalia).

55 *Id.* at 21; *see also id.* at 38 (noting the "close, textual analysis taught [to Justice Scalia] by his father"). Several commentators have noted the Catholic Church's influence on Justice Scalia's thinking about statutory interpretation. *See* Kannar, *supra* note 6, at 1310, 1317–20; Levinson, *supra* note 48, at 476 & n.204, 480; Michael Stokes Paulsen & Steffen N. Johnson, Essay, *Scalia's Sermonette*, 72 NOTRE DAME L. REV. 863, 866 (1997). This source of influence, while undoubtedly important, is outside of the scope of this Note.

professor.[56] Similarly, journalist Joan Biskupic remarks that Salvatore "taught Antonin to value the words of a text and appreciate cast-iron rules"[57] and set high expectations for his son.[58] Professor George Kannar, when analyzing Scalia's methodology on the bench, notes that Salvatore "almost surely brought home the message he so vigorously asserted in his own 'texts.'"[59] Kannar pictures the Scalia family "dinner table forum," at which the "distinction between vague notions of authorial 'intent' and the poet's . . . precise 'words' must have been drawn especially sharply for Antonin Scalia; and the fundamental importance of preferring strict textual fidelity over loose interpretive 'translation' must have been strongly emphasized."[60] As Murphy, Biskupic, and Kannar have all observed, the evidence of Salvatore's influence can be found in Justice Scalia's writings, especially those on textualist theories of statutory interpretation. When discussing the meaning of words and the right ways to read a text, Scalia sounds remarkably similar to his father — and, by extension, to the New Critics.

1. Close Reading. — The first and most fundamental similarity is the technique of close reading. Justice Scalia's articulation of textualism[61] is built on a foundation of close reading; it begins and often ends with nothing more than the naked text.[62] The primary tenet of his approach to statutory interpretation is that "[t]he text is the law, and it is the text that must be observed."[63] Scalia's textualism is a "rigorously text-based methodology" that prioritizes and deeply considers the words of the statute from many angles.[64] This approach recalls the New Critical practice of attending to a text as an "autonomous object"[65] and Salvatore's insistence on the poem qua poem.[66] It plays out in legal opinions where Scalia starts by honing in on the particular word choice or syntax of a statute and crafting text-based arguments to support his

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56 MURPHY, *supra* note 54, at 29–30.

57 BISKUPIC, *supra* note 1, at 17.

58 *See id.* at 20.

59 Kannar, *supra* note 6, at 1316–17.

60 *Id.* at 1317.

61 This is commonly called "new textualism," in recognition of earlier theories of interpretation that emphasized beginning with the text. *See* Nourse, *supra* note 17, at 669; William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1511 & n.7 (1998) (reviewing ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE FEDERAL SYSTEM (1997) [hereinafter SCALIA, A MATTER OF INTERPRETATION]).

62 *E.g.*, SCALIA, A MATTER OF INTERPRETATION, *supra* note 61, at 20 ("Well of course I think that the act was within the letter of the statute, and was therefore within the statute: end of case.").

63 *Id.* at 22.

64 Eskridge, *supra* note 61, at 1512.

65 Devereux, *supra* note 10, at 219; *see* David Aram Kaiser, *Entering onto the Path of Inference: Textualism and Contextualism in the* Bruton *Trilogy*, 44 U.S.F. L. REV. 95, 102 (2009) (noting parallels between Scalia's interpretive technique and the close reading of the New Critics).

66 *See* SCALIA, CARDUCCI, *supra* note 42, at 45.

reading. Regardless of the nature of the evidence Scalia considers,[67] the form of his textualist opinions was an extended exercises in close readings.

Paradigmatic of this approach is Scalia's opinion in *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*[68] At issue in the case was whether the FCC could permissibly interpret the statutory authority to "modify" a particular tariff requirement to mean the authority to make such tariff filing optional for certain parties.[69] Writing for the majority, Justice Scalia looked to multiple dictionaries that defined "modify" as some kind of moderate change[70] and rejected one that offered substantial change as an acceptable definition.[71] The ease with which he dismissed the contrary reading came from his close attention to the text and his own linguistic intuition, as he wrote off other uses of "modify" as irony or political spin.[72] After this intense focus on the word,[73] he was comfortable concluding that the statute had a clear meaning based on the text alone.[74] In response, Justice Stevens accused the majority opinion of "rigid literalism,"[75] a charge that Scalia sought to deny in other writings[76] — but one that recalled his father's approach to translation.[77]

A key aspect of Scalia's textualism that is apparent in *MCI* and other cases is his certainty in his intuition about the meaning and usage of language. Like Salvatore "directly commun[ing] with [the] page,"[78] Scalia often considered his own use of the words appearing in the statute and relied on those instincts as additional grounds of support. In *Smith v. United States*,[79] where the majority held that "using" a firearm during a narcotics sale encompassed trading a gun for drugs,[80] Scalia dissented based on the ordinary meaning of the phrase "to use a firearm."[81] His argument opened with a series of hypotheticals, discussing ways in

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67 *See infra* section I.C.2, pp. 899–900.

68 512 U.S. 218 (1994).

69 *Id.* at 220.

70 *Id.* at 225.

71 *Id.* at 225–28.

72 *See id.* at 228. He went on to state his "hypothesis," *id.* at 228 n.3, that misuse "must have formed the basis" for the idiosyncratic dictionary definition, *id.* at 228.

73 *Cf.* FEKETE, *supra* note 9, at 19 (noting the New Critics displayed a "fetish of the text abstracted from its context").

74 *MCI*, 512 U.S. at 228; *see also* Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 41 (2006) (noting *MCI* as an example of "a case in which textualist strategies were used to achieve clarity").

75 *MCI*, 512 U.S. at 235 (Stevens, J., dissenting).

76 SCALIA, A MATTER OF INTERPRETATION, *supra* note 61, at 24 ("[T]he good textualist is not a literalist . . . .").

77 *See* SCALIA, CARDUCCI, *supra* note 42, at 90.

78 *Id.* at 95.

79 508 U.S. 223 (1993).

80 *Id.* at 225.

81 *Id.* at 241–43 (Scalia, J., dissenting).

which the so-called ordinary person would use the word and seemingly anticipating the reader's agreement with his conclusions.[82] He deployed a similar rhetorical strategy in *Moskal v. United States*,[83] presenting the relevant statutory phrase in other contexts[84] in order to advance "what [he] consider[ed] to be its ordinary meaning."[85] In both cases, he foregrounded his own interaction with the text in order to build up the basis for his legal reasoning, echoing the New Critics' practice.

2. Empiricism and Formalism. — With Scalia's technique of close reading came the second similarity to Salvatore and the New Critics: a claim to near-scientific empiricism. Scalia referred to statutory interpretation as a "science"[86] and criticized "piecemeal" approaches to studying it that did not "treat the subject in a systematic and comprehensive fashion."[87] In his later work, *Reading Law*, he sought to do just that; Scalia and his coauthor Professor Bryan Garner purported to be the voice of authority for the correct way to read a statute.[88] The empiricism of his method brought with it an attention to formalism, a label he embraced when it came to textualist interpretation. He writes:

> Of all the criticisms leveled against textualism, the most mindless is that it is "formalistic." The answer to that is, *of course it's formalistic*! The rule of law is *about* form. . . . Long live formalism. It is what makes a government a government of laws and not of men.[89]

His goal as a textualist was ultimately to find "a uniform, objective answer to the question whether a statute, on balance, more reasonably means one thing than another"[90] — a goal that presupposes, as the New Critics did,[91] that uniformity and objectivity are possible to achieve in linguistic interpretation.

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[82] *See id.* at 242–43 ("When someone asks, 'Do you use a cane?,' he is not inquiring whether you have your grandfather's silver-handled walking stick on display in the hall; he wants to know whether you *walk* with a cane." *Id.* at 242.).

[83] 498 U.S. 103 (1990).

[84] *See id.* at 119 (Scalia, J., dissenting).

[85] *Id.* at 120.

[86] SCALIA, A MATTER OF INTERPRETATION, *supra* note 61, at 14.

[87] *Id.* at 15; *see* SCALIA, CARDUCCI, *supra* note 42, at 81 (critiquing a similar phenomenon in literary criticism).

[88] *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 3–9 (2012).

[89] SCALIA, A MATTER OF INTERPRETATION, *supra* note 61, at 25. Taking Scalia on his own terms, some commentators have argued that textualism is insufficiently rigorous on a formal level. *See* Eskridge, *supra* note 61, at 1542 ("[A] formalist theory has got to have *rules about rules*. It is not enough to say, follow the ordinary meaning of plain texts, without providing secondary rules about how to determine such meaning."); Abbe R. Gluck, *Justice Scalia's Unfinished Business in Statutory Interpretation: Where Textualism's Formalism Gave Up*, 92 NOTRE DAME L. REV. 2053, 2054 (2017) (arguing that textualism is not truly formalist because it lacks "a defined set of predictable rules" and "[t]he doctrines of the field are not treated as law").

[90] SCALIA, A MATTER OF INTERPRETATION, *supra* note 61, at 28.

[91] *See* FEKETE, *supra* note 9, at 31.

The kinds of evidence that Scalia invoked further demonstrate his focus on empirical analysis and belief in right answers. He often turned to linguistic canons of construction, which operate as rational explanations of the way that language functions.[92] The chief advantage of the canons for the "science" of statutory interpretation is that they put into formulas what might otherwise be nonscientific intuition.[93] Indeed, Scalia described canons like *noscitur a sociis*, the principle that a word gains contextual meaning from those surrounding it, as "commonsensical."[94] Although the linguistic canons were famously criticized as malleable by Professor Karl Llewellyn,[95] Scalia sought to apply them according to certain rules and principles.[96] *Reading Law*, the ultimate guide to the textualist's proper application of canons, contains guidelines for each "approved" canon, as well as examples of variations or unusual patterns.[97] Another kind of empirical evidence that Scalia often invoked was dictionary definitions, such as in *MCI* and other cases.[98] Like Ransom arguing for precision and scientific analysis, Scalia relied on the dictionary to show objective meaning — data in its most neutral form.[99] A poem is a poem, not anything else.

3. Authorial Intent. — The third and final parallel between Justice Scalia's textualism and New Criticism is the rejection of authorial intent

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92 *See* Freeman v. Quicken Loans, Inc., 566 U.S. 624, 634–35 (2012); RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 645 (2012). *See generally* SCALIA & GARNER, *supra* note 88, at 50 (introducing canons of interpretation).

93 *See* Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179, 1191–94 (explaining philosopher Paul Grice's theory of meaning generated through cooperative conversation and arguing that some semantic canons of statutory interpretation align with his insights).

94 SCALIA, A MATTER OF INTERPRETATION, *supra* note 61, at 26; *see also id.* (characterizing the canon of *ejusdem generis*, the principle that a general word at the end of a list applies only to the same general kind of things as the other elements, as similarly noncontroversial).

95 *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950).

96 *E.g.*, Setser v. United States, 566 U.S. 231, 238–39 (2012) (explaining when a particular canon is applicable); *see also* SCALIA, A MATTER OF INTERPRETATION, *supra* note 61, at 26–27 (responding to Llewellyn's critique).

97 *See, e.g.*, SCALIA & GARNER, *supra* note 88, at 122–23 (cautioning that the "wording of the lead-in," *id.* at 122, may impact the meaning of the use of "and" or "or" while explaining the conjunctive/disjunctive canon, *id.* at 122–23).

98 *See, e.g.*, Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 31 (2003) ("origin"); Walters v. Metro. Educ. Enters., Inc., 519 U.S. 202, 207–08 (1997) ("have"); Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 745 (1996) ("interest"); *see also* James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483, 494–502 (2013); Charlie D. Stewart, Comment, *The Rhetorical Canons of Construction: New Textualism's Rhetoric Problem*, 116 MICH. L. REV. 1485, 1497–500 (2018) (linking reliance on dictionary definitions to new textualism).

99 The emphasis on empirics has only become stronger in statutory interpretation, with the corpus linguistics movement advocating for the use of linguistic tools to empirically study the ordinary usage of words. *See generally* Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788 (2018).

as a valid mode of reading a text. For the New Critics and Salvatore, this meant biography was verboten, intention was a fallacy, and translations should be literal. For Scalia, this meant a deep skepticism of legislative history.

Justice Scalia had a number of critiques of legislative history as it had been operationalized in statutory interpretation decisions. Most of the issues in statutory interpretation cases, he argued, are minor points that legislators likely did not consider, so legislative history cannot resolve these disputes.[100] He was concerned about the ease with which legislators and lobbyists could manipulate the record and "portray a phony purpose."[101] Scalia also acknowledged the potential for judges to distort the record, noting the tendency to "look over the heads of the crowd and pick out your friends."[102]

But Scalia had a more fundamental problem with the use of legislative history as indicia of congressional purpose.[103] Intentions do not go through the constitutional requirements of bicameralism and presentment; the text alone is the law.[104] Therefore, even if legislative history *could* provide insight into the purpose of a statute, such insight would be fundamentally illegitimate.[105] He explained: "I don't care what the legislators intended. I care what the fair meaning of [a] word is."[106] Scalia's skepticism of legislative history was closely tied to his commitment to close reading, which he believed would produce the "objective

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[100] SCALIA, A MATTER OF INTERPRETATION, *supra* note 61, at 32; *see also* Bank One Chi., N.A. v. Midwest Bank & Tr. Co., 516 U.S. 264, 280 (1996) (Scalia, J., concurring in part and concurring in the judgment) ("Legislative history that does not represent the intent of the whole Congress is nonprobative; and legislative history that does represent the intent of the whole Congress is fanciful.").

[101] Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610, 1612 (2012); *see also* SCALIA, A MATTER OF INTERPRETATION, *supra* note 61, at 34 ("One of the routine tasks of the Washington lawyer-lobbyist is to draft language that sympathetic legislators can recite in a prewritten 'floor debate' — or, even better, insert into a committee report.").

[102] SCALIA, A MATTER OF INTERPRETATION, *supra* note 61, at 36.

[103] *See* Eskridge, *supra* note 15, at 624 (describing Scalia's critique of legislative history as "radical" and representing a "bold rethinking of the Court's role").

[104] *See* Thompson v. Thompson, 484 U.S. 174, 191–92 (1988) (Scalia, J., concurring in the judgment).

[105] Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment) ("The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators."); *see also* Michael Francus, Digital Realty*, Legislative History, and Textualism After Scalia*, 46 PEPP. L. REV. 511, 519 (2019) (noting that Scalia's textualism "reject[s] legislative history as illegitimate in principle, counseling against ever using it — no matter the value it might add").

[106] Scalia & Manning, *supra* note 101, at 1616. Scalia did believe that it was valid to use legislative history to "show that a word could bear a particular meaning." *Id.* However, he was careful to draw a distinction between "using legislative history as (mildly) informative" and using it as an "authoritative" source in which the intention of the drafters controlled over ordinary meaning. *Id.*

indication of the words."[107] This perspective, taken to its logical conclusion, suggests that even a perfectly accurate statement of unified congressional intent is simply not relevant to the judge interpreting the statute,[108] in the same way that the New Critics argued that asking a poet for the meaning of a poem is not relevant to the literary critic.[109]

* * *

These core principles of Scalia's textualism — an attention to close reading, a belief in empirical and formalist analysis, and a disregard for authorial intent — have much in common with the work of Salvatore and the New Critics, and they continue to reverberate in the field of statutory interpretation. These three ideas have laid the groundwork for the many textualists and textualisms[110] currently active on the bench. But, as the next Part will discuss, Scalia's textualism is a dangerous foundation on which to build.

II. TEXTUALISM IN A POST–NEW CRITICAL WORLD

In 1984, two years before Scalia was appointed to the Supreme Court, the *Southern California Law Review* held a symposium on interpretive methodologies and principles from other disciplines.[111] Professor Mark Poster, a historian, spoke about "[t]he phenomenon of poststructuralism in France in recent years," sharing his belief that the movement "promised to transform drastically the theory and method of textual interpretation."[112] It certainly achieved that vision in the literary world, as poststructuralism is widely acknowledged today to have unseated New Criticism from its dominant place in the academy. However, poststructuralism failed to make inroads in legal scholarship on statutory interpretation. To some extent, this discrepancy makes sense: poststructuralism embraces ambiguity and multiplicity of meaning, which is not a useful frame in which to conduct legal interpretation given the need for stable and reliable results. But in its absence, textualism — with its similarities to New Criticism — flourished without ever confronting the poststructuralist critique.

This Part explains the aspects of the poststructuralist critiques of New Criticism that are most relevant for the study of textualism. First,

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107 SCALIA, A MATTER OF INTERPRETATION, *supra* note 61, at 29.

108 *See Conroy*, 507 U.S. at 519 (Scalia, J., concurring in the judgment); Scalia & Manning, *supra* note 101, at 1612–13.

109 *See* Wimsatt & Beardsley, *supra* note 38, at 487 ("Our point is that such an answer [from the poet] to such an inquiry [regarding meaning] would have nothing to do with the poem . . . ; it would not be a critical inquiry.").

110 *See* Grove, *supra* note 15, at 267 (discussing the dueling types of textualism in *Bostock*).

111 Christopher D. Stone, *Introduction: Interpreting the Symposium*, 58 S. CAL. L. REV. 1, 1–2 (1985).

112 Mark Poster, *Interpreting Texts: Some New Directions*, 58 S. CAL. L. REV. 15, 15 (1985).

the poststructuralist viewpoint rejects the supposed empiricism and objectivity of the New Critics; it instead acknowledges the subjectivity of textual meaning. Second, poststructuralism problematizes close reading by pointing to its decontextualization and supposed lack of politics. After discussing these critiques, this Part applies them to recent textualist decisions from the Supreme Court.

A. The Poststructuralist Critique of New Criticism

While poststructuralism was not a single unified school of thought and did not always directly respond to New Criticism, its insights contributed to the decline of the latter movement's popularity and helpfully examined some of its central theoretical flaws.

1. The Death of the Author. — In 1968, Roland Barthes published his manifesto *The Death of the Author*.[113] He began from the same assumption as the one held by many of the New Critics: authorial intent should not be used to interpret a text.[114] But where the New Critics contended that freedom from consideration of authorial intent allows the critic to read a text objectively, authoritatively, and scientifically, Barthes rejected empirics[115] and embraced a multiplicity of viewpoints.[116] This perspective is embodied in the concept of intertextuality,[117] the idea that a text should be understood not as a self-contained entity, but as a dynamic intersection point of other writings.[118] The text is shaped by its encounters with other texts and contexts, then located in the reader. Barthes explains:

> [A] text is made of multiple writings, drawn from many cultures and entering into mutual relations of dialogue, parody, contestation, but there is one place where this multiplicity is focused and that place is the reader, not, as

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113 BURKE, *supra* note 14, at 19.

114 *See* BARTHES, *supra* note 12, at 143 ("The image of literature to be found in ordinary culture is tyrannically centred on the author, his person, his life . . . . The *explanation* of a work is always sought in the man or woman who produced it, as if it were always in the end . . . the voice of a single person, the *author* 'confiding' in us.").

115 *See* BURKE, *supra* note 14, at 19–20 ("With 'The Death of the Author', . . . revolutionary impulses entirely overwhelm any scientific aims.").

116 BARTHES, *supra* note 12, at 146 ("We know now that a text is not a line of words releasing a single 'theological' meaning (the 'message' of the Author-God) but a multi-dimensional space in which a variety of writings, none of them original, blend and clash."); *see also* BURKE, *supra* note 14, at 23 (discussing the "liberating consequences of abandoning an authocentric apprehension of the text").

117 *See* JONATHAN CULLER, BARTHES: A VERY SHORT INTRODUCTION 71 (Oxford Univ. Press 2002) (1983) (describing Barthes's approach to a text as "analy[zing] it as an intertextual construct, the product of various cultural discourses").

118 María Jesús Martínez Alfaro, *Intertextuality: Origins and Development of the Concept*, 18 ATLANTIS 268, 268 (1996) ("There are always other words in a word, other texts in a text. The concept of intertextuality requires, therefore, that we understand texts not as self-contained systems but as differential and historical, as traces and tracings of otherness, since they are shaped by the repetition and transformation of other textual structures.").

> was hitherto said, the author. The reader is the space on which all the quotations that make up a writing are inscribed without any of them being lost; a text's unity lies not in its origin but in its destination. . . . [T]he birth of the reader must be at the cost of the death of the Author.[119]

This approach mirrored the New Critics' philosophy in that it rejected the oppressive voice of the author,[120] but it went on to reject the very idea of a "single . . . meaning."[121] By focusing intensely on the concept of the author,[122] Barthes identified a subjectivity[123] that the New Critics had missed.

Other poststructuralists similarly looked hard at authorship and intent, undermining the New Critical claim to objective meaning. Michel Foucault interrogated the authorship function[124] and argued for considering the modes of discourse circulating around a text rather than the identity of the author.[125] Jacques Derrida's writings on deconstruction challenged the possibility of a word or symbol having a stable meaning,[126] recognizing the importance of minimizing the controlling force of intention.[127] Derrida also wrote about the phenomenon of iterability, "the propensity of words to wander away from their original context and to garner new and unforeseeable meanings in alien habitations,"[128]

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119 BARTHES, *supra* note 12, at 148.

120 *See* BANNET, *supra* note 14, at 237; BURKE, *supra* note 14, at 23.

121 BARTHES, *supra* note 12, at 146; *see also* BARTHES, *supra* note 13, at 159 ("The Text is plural. Which is not simply to say that it has several meanings, but that it accomplishes the very plural of meaning: an *irreducible* (and not merely an acceptable) plural. . . . [W]hat [the reader] perceives is multiple, irreducible, coming from a disconnected, heterogeneous variety of substances and perspectives . . . .").

122 *See* BURKE, *supra* note 14, at xvii ("The poststructural 'death' rather than formalist [New Critical] 'irrelevance' of the author signalled a return — albeit negative — of critical attention to authorship.").

123 *See* Martínez Alfaro, *supra* note 118, at 268 (noting how intertextuality dissolves the "text as a coherent and self-contained unit of meaning"); Robin Sims, *Theory on Theory*, 25 YEAR'S WORK IN CRITICAL & CULTURAL THEORY 274, 276–77 (2017) ("[I]n 'The Death of the Author' . . . , emphasis is placed on the signifier and its capacity for equivocation, ambiguity and undecidability . . . ." *Id.* at 277.).

124 *See* Adrian Wilson, *Foucault on the "Question of the Author": A Critical Exegesis*, 99 MOD. LANGUAGE REV. 339, 343 (2004).

125 MICHEL FOUCAULT, *What Is an Author?*, *in* AESTHETICS, METHOD, AND EPISTEMOLOGY 205, 222 (James D. Faubion ed., Robert Hurley et al. trans., 1998) ("What are the modes of existence of this discourse? Where has it been used, how can it circulate, and who can appropriate it for himself? . . . And behind all these questions, we would hear hardly anything but the stirring of an indifference: What difference does it make who is speaking?").

126 *See* Jacques Derrida, *The Exorbitant. Question of Method* (1967), *reprinted in* AUTHORSHIP, *supra* note 37, at 117, 124; Dario Compagno, *Theories of Authorship and Intention in the Twentieth Century. An Overview*, 1 J. EARLY MOD. STUD. 37, 42 (2012).

127 JACQUES DERRIDA, *Signature Event Context*, *in* LIMITED INC. 1, 18 (Gerald Graff ed., Samuel Weber & Jeffrey Mehlman trans., 1988) (proposing a new "typology" of criticism in which "the category of intention will not disappear . . . [but] will no longer be able to govern the entire scene and system of utterance"); *see also* BURKE, *supra* note 14, at 135.

128 BURKE, *supra* note 14, at 204–05.

which stands in sharp contrast to the New Critical assumptions of the poem as an "unbroken, monadic and self-sufficient 'entity.'"[129]

This poststructuralist point of view thus responds to the New Critics' claims of objectivity and determinate meaning by heightening their premise (dead, not downplayed, authorial intent) and following it to a discursive, intertextual endpoint. Without the anchoring of authorial intent, the meaning of the text opens up[130] and the relevant perspective switches from author to reader. At the same time, the poststructuralists stress that there is a multiplicity of other texts and sources acting on the text to be interpreted, thereby destabilizing the idea of a common or ordinary meaning. Barthes, Foucault, and Derrida celebrate this freedom from the monolithic author and look to what can emerge in its wake — although, as commentators have recognized, this approach is not "a particularly effective tool for analyzing literary texts" given its celebration of ambiguity.[131]

This perspective is even more troubling when applied to the project of statutory interpretation. The textualist judge, for a number of sensible reasons,[132] does not decide the meaning of a statute based on the intent of its drafters. But silencing the legislature (author) creates space for the judge (reader) to bring their own subjective viewpoint to bear on the text. The intertextual forces acting on the text further impact the meaning and disrupt the possibility of an ordinary statutory meaning. Without an awareness of the relationship between death of the author and interpretive subjectivity, the judge risks assuming that they are accessing an objectivity that is simply not there.

2. The Politics of Close Reading. — A related critique of New Criticism that emerged with poststructuralism had to do with its politics. Poststructuralism has long been associated with leftist theory,[133] while New Criticism — like the textualism that emerged with Justice Scalia — has ties to the political right. New Criticism originated with Ransom in the prewar South, and the earliest political expressions of the movement's core figures were decidedly conservative.[134] In a 1930 manifesto of sorts, the early New Critics defended a traditional Southern

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[129] *Id.* at 204 (discussing Wimsatt and Beardsley's views in *The Intentional Fallacy*).

[130] *Cf.* Larry Alexander & Saikrishna Prakash, *"Is that English You're Speaking?" Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967, 977 (2004) ("Meaning cannot be autonomous from intent — one must always identify an author."); Stanley Fish, *There Is No Textualist Position*, 42 SAN DIEGO L. REV. 629, 640 (2005) (arguing that texts derive meaning only from authorial intent, and concluding that "a text intended by no author has no meaning because it is not a text").

[131] Martínez Alfaro, *supra* note 118, at 278.

[132] *See supra* p. 901.

[133] *See, e.g.*, Robert C. Holub, *Politicizing Post-Structuralism: French Theory and the Left in the Federal Republic and in the United States*, 57 GERMAN Q. 75, 81 (1984).

[134] *See* JOSEPH NORTH, LITERARY CRITICISM 26–27, 36 (2017).

agrarian form of life and the rights and privileges due to them as "white male Christian property owners brought up as the inheritors of a certain concept of culture."[135] Although many New Critics moved away from this position over time,[136] these political roots are evident in their practice of close reading and came under heightened scrutiny in the late twentieth century.[137]

As poststructuralism unseated New Criticism from its dominant position in the American academy, it cast an increasingly skeptical eye on the practice of stripping historical, social, and political context from texts.[138] The close reading conducted by the New Critics was found to exhibit a pronounced ahistoricism, an attitude toward literature which suggested that "[t]here is no history, only a continuum, composed of the great works of literature."[139] Professor Jane Gallop explains that, when poststructuralism emerged in the United States, this ahistoricism was "persuasively linked to sexism, racism, and elitism."[140] Historical decontextualization flattened diverse points of view, which in turn allowed a perpetuation of the straight white male canon under the guise of timeless aesthetic values.[141] The veneer of neutrality found in close reading was therefore inextricably linked to New Criticism's conservative political roots.[142] Indeed, the values that the New Critics espoused reflected an "index of [their] own cultural context rather than an enduring set of principles."[143]

Poststructuralism responded to the politics of New Criticism by arguing for a different kind of close reading. This alternative view still engages deeply with the words on the page, but rejects ahistoricism in

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135 *Id.* at 36; *see also* JOHN CROWE RANSOM ET AL., I'LL TAKE MY STAND: THE SOUTH AND THE AGRARIAN TRADITION (1930).

136 NORTH, *supra* note 134, at 36 (noting that this viewpoint "began to seem unconscionable" over time).

137 *See* Seán Burke, *Ideologies and Authorship*, in AUTHORSHIP, *supra* note 37, at 215, 218.

138 *See* FEKETE, *supra* note 9, at 35 (noting the extreme formalism of New Critical close reading and the "isolation of the resulting studies from their historical context"); Hickman, *supra* note 7, at 2 ("[F]or many, . . . New Critical methods were understood as unfortunately insensitive to authorial intentions and readerly response; to the historical conditions of literary production and reception; and to the cultural relevance and political significance of literary work."). *But see* WILLIAM J. HANDY, KANT AND THE SOUTHERN NEW CRITICS 42–44 (1963) (defending New Critics from the charge that they "seek[] nothing but aesthetic meanings," *id.* at 42).

139 John Henry Raleigh, *The New Criticism as an Historical Phenomenon*, 11 COMPAR. LITERATURE 21, 24 (1959).

140 Gallop, *supra* note 32, at 181.

141 *See* NORTH, *supra* note 134, at 36; Gallop, *supra* note 32, at 181, 185.

142 *See* MCDONALD, *supra* note 38, at 96 (noting that the works prized by the New Critics tended to show "a balance, . . . which would operate as a balm to the rampant industrialism of twentieth-century American cities"); Raleigh, *supra* note 139, at 28 (discussing the ahistoricism of the New Critics and concluding that it is "no accident that the group of Southern poet-critics . . . were generally conservative in their political outlook").

143 MCDONALD, *supra* note 38, at 91 (discussing I.A. Richards in particular).

favor of close attention to competing social forces.[144] It is also transparent about its political aims, unlike the submerged politics of New Criticism. Interpretive methodologies are not politically neutral; questions of meaning and truth[145] are bound up in particular worldviews and larger goals.

The same ought to be recognized in the practice of statutory interpretation, a field rife with politics[146] but constantly professing neutrality.[147] Although judges aim for political neutrality when reading a statute and may believe themselves to be free of personal biases, such a viewpoint risks obscuring the political forces that are bound up in many statutory interpretation cases. As with the concerns about authorial intention discussed above, poststructuralism demonstrates that a frank acknowledgement of the politics at play is a crucial first step in rejecting a methodology of ahistoricized close reading.

B. Textualism Through the Lens of Poststructuralism

These two related critiques of New Criticism provide a novel lens with which to understand the theoretical problems of textualism as practiced today by Justice Scalia's successors. Poststructuralism has been influential for Critical Legal Studies (CLS),[148] a movement that seeks to highlight the subjective politics inherent in the supposedly objective rule of law.[149] However, it has generally not been considered in the context of statutory interpretation. This absence may be due to the gulf between academia and the courtroom: broadly speaking, CLS is the domain of

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144 *See* Gallop, *supra* note 32, at 182 ("Deconstructionism did not challenge the centrality of close reading to English; on the contrary, it infused it with new zeal.").

145 *See* Raleigh, *supra* note 139, at 28 (addressing the difference between movements that search for truth and movements that, like New Criticism, search for meaning).

146 *See, e.g.*, Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 373 (2005).

147 *See, e.g.*, SCALIA & GARNER, *supra* note 88, at 16–17; James J. Brudney & Corey Distlear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 3–4, 3 n.8 (2005); Margaret H. Lemos, *The Politics of Statutory Interpretation*, 89 NOTRE DAME L. REV. 849, 851 (2013) (reviewing SCALIA & GARNER, *supra* note 88).

148 *See* Jack M. Balkin, *Deconstruction's Legal Career*, 27 CARDOZO L. REV. 719, 720, 732 (2005) (discussing CLS's attention to deconstruction, *id.* at 720, but noting that deconstruction's use in legal interpretation is not clear, *id.* at 732); David Couzens Hoy, *Interpreting the Law: Hermeneutical and Poststructuralist Perspectives*, 58 S. CAL. L. REV. 135, 164–76 (1985) (discussing the relationship between deconstruction and CLS); Michel Rosenfeld, *Deconstruction and Legal Interpretation: Conflict, Indeterminacy and the Temptations of the New Legal Formalism*, *in* DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE 152, 152–53 (Drucilla Cornell, Michel Rosenfeld & David Gray Carlson eds., 1992); Natalie Stoljar, Survey Article, *Interpretation, Indeterminacy and Authority: Some Recent Controversies in the Philosophy of Law*, 11 J. POL. PHIL. 470, 493–94 (2003) (describing poststructuralist influence on critical theories that argue that "authoritative legal interpretation[] is a sham," *id.* at 493); RICHARD A. POSNER, LAW & LITERATURE 282–84 (3d ed. 2009) (discussing "the appropriation of [deconstruction] by leftist legal scholars," *id.* at 282).

149 *See* James F. Lucarello, Comment, *The Praise of Silly: Critical Legal Studies and the Roberts Court*, 26 TOURO L. REV. 619, 620 (2010).

professors engaging in theory, while rules about statutory interpretation are typically developed by judges drawing on their practical experience. And because of the practical nature of statutory interpretation, poststructuralism cannot (and should not) offer a guidepost to reading a statute. Nevertheless, it is crucial to bring the poststructural critique of New Criticism into dialogue with the field of statutory interpretation. The poststructuralist lens reveals shortcomings of textualism as an interpretive strategy, which can be seen in recent textualist opinions from the Roberts Court.

In *Niz-Chavez v. Garland*, the Court split over the best reading of a one-letter word in an immigration statute. The statute at issue requires the government to issue to a nonpermanent resident alien "a notice to appear" that contains certain prescribed information about the individual's removal hearing, including the place and time of that hearing.[150] The petitioner received the required information by installment, sent in two documents two months apart; the question before the Court was thus whether these two documents could constitute "a notice to appear" when taken together.[151] Justice Gorsuch, writing for the majority, approached the question by conducting an exacting close reading: he honed in on the ordinary meaning of the indefinite article "a"[152] and considered several examples of how the word is typically used in everyday speech.[153] He concluded that "a" means "one" in this particular context,[154] meaning that the government's delivery by installment constituted insufficient notice.[155] Justice Kavanaugh in dissent criticized the majority's parsing of the statute as being overly literal,[156] citing Justice Scalia's directive that a "good textualist is not a literalist."[157] He offered his own examples to argue that "a" can refer to a thing delivered by installment[158] and concluded based on the text that the best reading of "a" in this statute should include the government's notice in two parts.[159]

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150 Niz-Chavez v. Garland, 141 S. Ct. 1474, 1478–79 (2021); 8 U.S.C. § 1229(a)(1); *see also* Pereira v. Sessions, 138 S. Ct. 2105, 2110 (2018) (holding that government documents that failed to include the time and place for the hearing were statutorily deficient).

151 *Niz-Chavez*, 141 S. Ct. at 1479.

152 *Id.* at 1480–81.

153 *Id.* at 1481.

154 *See id.* at 1482.

155 *Id.* at 1486.

156 *Id.* at 1491 (Kavanaugh, J., dissenting).

157 *Id.* (quoting SCALIA, A MATTER OF INTERPRETATION, *supra* note 61, at 24). Recall, however, that Justice Scalia has been accused of literalness in his own statutory interpretation opinions. *See supra* p. 898. Salvatore, meanwhile, fully embraced literalness in his work translating poetry. *See supra* p. 896.

158 *See Niz-Chavez*, 141 S. Ct. at 1491–92 (Kavanaugh, J., dissenting).

159 *See id.* at 1493.

The majority and the dissent both emphasized the importance of context to understanding the meaning of "a" in the statute.[160] They turned to analogies, trying the word "a" in a variety of linguistic contexts and intuiting what an ordinary speaker of English would say. They considered the word within its statutory context and without. And yet the two readers, employing a very similar methodology, arrived at two different conclusions — despite textualism's claim that ordinary meaning is ascertainable to some degree of certainty.[161]

Poststructuralism explains the divide between the two opinions: two readers experienced the same word differently, due to the discursive and variable external forces operating on the text. There is not a stable meaning that the reader can access without bringing their own subjective experiences to bear on the interpretation. This is a logical consequence of downplaying or rejecting authorial intent as an interpretive guidepost, but one which textualism does not fully consider. As a result, the two readers speak past each other, each viewing the text from his own perspective and assuming a universality that does not exist.

Another kind of problem emerges with the dueling textualist opinions of *Bostock v. Clayton County*, which addressed whether Title VII's prohibition on discrimination "because of such individual's . . . sex"[162] encompassed discrimination perpetuated against gay and transgender individuals.[163] Justice Gorsuch, writing for the majority, held that it does.[164] His approach was highly formalistic, studying the meaning of each operative word in turn[165] and concluding in near tautology: "An employer violates Title VII when it intentionally fires an individual employee based in part on sex."[166] (Recall Salvatore and Antonin Scalia's fondness for this construction.[167]) Sexual orientation and gender identity count as sex for Justice Gorsuch because of the comparative method: if a man attracted to men is treated differently from a woman attracted to men, or a trans woman assigned male at birth is treated differently from a cis woman assigned female at birth, the difference is attributable in part to their sex.[168] Professor Tara Leigh Grove describes

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160 *See id.* at 1481 (majority opinion); *id.* at 1492 (Kavanaugh, J., dissenting).

161 Of course, this is not just a claim made by textualists; the very practice of adjudicating legal disputes requires a commitment to some degree of certainty in outcomes.

162 42 U.S.C. § 2000e-2(a)(1); *see* Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253–66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17).

163 Bostock v. Clayton County, 140 S. Ct. 1731, 1737 (2020).

164 *Id.*

165 *See id.* at 1739 ("sex"); *id.* at 1739–40 ("because of"); *id.* at 1740 ("discriminate"); *id.* at 1740–41 ("individual").

166 *Id.* at 1741.

167 *See supra* note 45 and accompanying text.

168 *See Bostock*, 140 S. Ct. at 1741–42; Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339, 345 (7th Cir. 2017) (en banc) (describing the comparative method as one "in which we attempt to isolate the significance of the plaintiff's sex to the employer's decision").

this reasoning as "almost algorithmic" in its formal treatment of language.[169] Justice Gorsuch mentions precedential, purposivist, and policy considerations only to fend off counterarguments and add further support to the already settled conclusion.[170] The text alone — stubbornly ahistorical and isolated from contextual external forces that can shape the meaning of a word — is dispositive.

Meanwhile, Justices Alito and Kavanaugh both argued in dissent for a different reading of the operative word "sex."[171] Justice Alito pushed back on Justice Gorsuch's assertion that the text was not ambiguous[172] and considered relevant to the definition of "sex" not only dictionary definitions but also the ordinary person's understanding of the term in 1964.[173] Justice Kavanaugh agreed, arguing that statutory interpretation ought to involve ordinary, not literal, meaning.[174] Grove labels their approach "flexible textualism": "[T]his version of textualism authorizes interpreters to make sense of the statutory language by looking at social and policy context, normative values, and the practical consequences of a decision."[175] In other words, the dissenters are reacting to Justice Gorsuch's textualism almost exactly like the poststructuralists reacting to the New Critics, criticizing the decontextualized close reading and accusing it of lacking necessary nuance.

However, the context that Justices Alito and Kavanaugh bring to bear on the statutory language still falls prey to textualist shortcomings. The interpretive community that they consider to be relevant, the supposedly neutral "ordinary Americans" of 1964,[176] reflects their own point of view. Like the New Critics who espoused universal values that in fact mirrored their particular circumstances, biases, and privileges,[177] Justices Alito and Kavanaugh's conception of the ordinary person is really a blank slate on which they project a particular type of person. That person is probably white, male, cisgender, straight,

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169 Grove, *supra* note 15, at 281; *see also id.* at 281–82 (labeling Justice Gorsuch's analysis an example of "formalistic textualism," *id.* at 281, an interpretive method characterized by carefully parsing the language and downplaying policy concerns). Professor Jeannie Suk Gersen has pointed out that this kind of formal approach puts policies like affirmative action at risk of judicial invalidation, because a race-conscious college admissions policy fits the literal definition of discrimination on the basis of race. *See* Gersen, *supra* note 6.

170 *See Bostock*, 140 S. Ct. at 1743, 1745, 1749.

171 *See id.* at 1756 (Alito, J., dissenting); *id.* at 1828 (Kavanaugh, J., dissenting).

172 *Id.* at 1763 (Alito, J., dissenting).

173 *Id.* at 1766–67 ("How would the terms of a statute have been understood by ordinary people at the time of enactment? Justice Scalia was perfectly clear on this point. The words of a law, he insisted, 'mean *what they conveyed to reasonable people at the time*.'" *Id.* at 1766 (quoting SCALIA & GARNER, *supra* note 88, at 16)).

174 *Id.* at 1825 (Kavanaugh, J., dissenting); *see also id.* at 1825–28.

175 Grove, *supra* note 15, at 286; *see also id.* at 288 (noting another feature of flexible textualism as "import[ing] normative concerns at the front end — to decide *whether* the law is ambiguous").

176 *Bostock*, 140 S. Ct. at 1767 (Alito, J., dissenting); *see id.* at 1825 (Kavanaugh, J., dissenting).

177 *See supra* p. 906.

Christian — someone who, in short, looks a lot like them. There may have been one particular understanding of "sex" in 1964 for that subgroup of the population, but a diverse society will produce diverse understandings. As Justice Gorsuch notes, shortly after Title VII's enactment, gay and transgender employees began filing complaints of workplace discrimination, indicating that they understood themselves to be discriminated against on the basis of sex.[178] Why are they not part of the relevant community? Poststructuralism, in its embrace of a multiplicity of social forces, might call for holding both of these communities as relevant, working through the contradictions to gain a more holistic view of what it means to discriminate because of sex. Bringing in one-sided context does nothing more than muddy the interpretive waters.

Textualism falls short in both *Niz-Chavez* and *Bostock* because it fails to interrogate the consequences of downplaying authorial intent and the corresponding rise of the judge's ability to read a text in different ways. The death of the author brings with it the birth of the reader, an unacceptably subjective outcome for statutory interpretation. Moreover, even when textualists like Justices Alito and Kavanaugh look to external context, their reasoning fails to consider the full social and political picture. Textualism without an awareness of the poststructuralist critique thus falls prey to the same pitfalls as New Criticism, focusing on the words on the page while shutting out the rest of the world.

CONCLUSION

Interpretation lies at the heart of legal debate. Statutes creating rights and duties are penned by legislators, then enforced by judges attempting to resolve the complexities and inherent ambiguities found in written language. The dominant interpretive methodology today, an outgrowth of Justice Scalia's textualism, seeks to resolve ambiguity in the search for ordinary meaning, a supposedly neutral way to read a statute. It is perhaps unsurprising, given this aim, that textualism has so much in common with the New Critics and Salvatore Scalia, who also strove for empiricism by focusing on nothing more than the words on the page. But as poststructuralism reveals, this approach fails to account for intertextuality and embraces an ahistoricized perspective in its close reading. More broadly, the poststructuralist lens applied to textualism shows the relevance of literary theory in the field of statutory interpretation. While literary criticism does not provide a guidepost for judges, it can illuminate salient aspects of language — including the interpretive pitfalls with which both fields have grappled.

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[178] *Bostock*, 140 S. Ct. at 1750–51.