The Multiple Faces of Textualism

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Tara Leigh Grove, *Which Textualism?*, 134 **Harv. L. Rev.** 265 (2020).

In her wonderfully-titled article, Which Textualism?, Tara Leigh Grove uses the recently decided Bostock v. Clayton County case to highlight a truth about statutory interpretation theory that scholars have largely ignored: Textualism is not a monolithic interpretive approach, but one that contains multiple competing strands. This observation is long overdue, and *Bostock* is an excellent vehicle for exploring its implications, given that the three separate opinions issued by the Court all claimed to employ a textualist interpretive approach—while reaching different outcomes.

Which Textualism? begins by differentiating between what Grove calls "formalistic textualism," on the one hand, and "flexible textualism," on the other—and uses this frame to discuss "some real, but underappreciated, disputes among textualists" regarding the universe of interpretive tools and resources courts should avail themselves of when interpreting statutes. Specifically, Grove argues that "formalistic textualism" authorizes interpreters to apply only a "closed set" of normative canons, whereas "flexible textualism" allows interpreters to consult a much wider range of canons, such as the absurdity doctrine, that invite considerable judicial discretion.

In *Bostock*, Grove contends that Justice Gorsuch's majority opinion exemplified "formalistic textualism" because it focused intently on the statutory term "because of sex" and what that term means in the context of sexual orientation-based discrimination. By contrast, Grove characterizes both *Bostock* dissenting opinions as engaging in "flexible textualism"—because the dissents relied on atextual considerations including public views about homosexuality in 1964, other statutes enacted after Title VII, and the "far-reaching" consequences of construing Title VII to cover discrimination based on sexual orientation.

After elaborating the differences between "formalistic" versus "flexible" textualism, Grove provides some historical context for the *Bostock* case, tracking both the rise of textualism as a response to purposivism and the early judicial treatment of Title VII and sexual orientation claims based on a purposivist approach. Her point is that purposivism does not always tend toward "progressive" outcomes, and textualism does not always favor "conservative" ones. It is a point that others have made, but that bears repeating because it often gets lost in the focus on the U.S. Supreme Court, where the conservative Justices also tend to be the biggest proponents of textualism.

In the end, Grove endorses "formalistic," as opposed to "flexible," textualism—arguing that "formalistic textualism" is better at constraining judicial discretion and producing a predictable result, both rule of law values to which textualism aspires. But consistency with textualism's own avowed interpretive goals is not Grove's primary reason for championing "formalistic textualism;" rather, she has in mind her own unique normative goal for textualism: Grove argues that textualism can and should function in a manner that protects the legitimacy of the judiciary, by mitigating the ideological pressure judges naturally feel to rule consistently with their political preferences. Grove situates this new normative goal for textualism in Article III of the Constitution, which she reads to call for judicial independence and

apolitical decisionmaking. Conversely, she notes that Article II injects politics into judicial appointments, by giving the appointment power to the President and Senate—and urges that a more cabined form of textualism could serve to alleviate the tension that inevitably exists between judges' Article II-ensured political leanings and their Article III obligation to be independent.

Grove's analysis of *Bostock*'s multiple textualisms is insightful and provocative. And her efforts to promote judicial independence and greater predictability in statutory interpretation are admirable. I am less enamored of her push for courts to adopt a more formalistic approach to textualism. (As I have explained elsewhere, I have doubts about whether a "formalistic" textualism can truly constrain judges in the manner Grove envisions and favor a more pluralistic approach to statutory construction, at least as a check on judges' inevitable personal biases). That said, Grove's recommended formalistic textualism approach—and particularly her Article III legitimacy rationale—is highly original and well-reasoned, and is worthy of attention from statutory interpretation scholars. Grove's Article III arguments appear to be part of a larger project to promote judicial legitimacy, but that does not detract from the utter novelty of her normative take on textualism, or the incisiveness of her exposition of the multiple textualisms at work on the modern Supreme Court.

In short, *Which Textualism?* is a thought-provoking article and a highly enjoyable read, and it should be on the to-read list of anyone interested in *Bostock*, textualism, or questions about the judicial role and/or legitimacy of the Court.

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