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ARTICLE

Patent Textualism

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Abstract. The Supreme Court today embraces textualism—the practice of interpreting legal text by reference to how an ordinary person would have understood that text at the time it was promulgated. Yet, when it comes to patent cases at the Court interpreting the statutory provision governing patent eligibility, textualism has rarely been used as an interpretive tool. This Article, besides highlighting this contradiction, will consider how textualism's application to this foundational aspect of the patent statute would change patent law.

This Article will analyze the Supreme Court's adoption of textualist principles in other fields and then evaluates the application of textualism to the field of patent law. In particular, this Article will consider the extent to which the Supreme Court has interpreted the patent statute consistent with the tenets of textualism. There is surprisingly little prior analysis of textualism applied to the patent statute—no one else has systematically analyzed the Court's use of textualism in the patent field. Thus, this Article will be the first to identify the Court's failure to apply textualism consistently to the patent statute.

The most notable exception to the Court's general practice of using textualism to interpret the patent statute relates to the statutory provision governing patent eligibility. Because this provision defines the types of inventions that are and are not eligible for patenting, it serves as the gateway to the patent system. It is the foundation for the whole patent system. Despite its importance, this Article's analysis will show the Court has interpreted this provision using interpretive tools the Court has

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generally rejected in other fields to reach interpretations of the patent statute that are inconsistent with textualism.

This Article will conclude by highlighting how a textualist approach to interpreting the statutory provision governing patent eligibility would broaden eligibility. In other words, a textualist approach will expand the scope of which types of inventions are eligible for patenting. More importantly—regardless of whether one views expanded eligibility as an advance—textualism would return political power over the doctrine of patent eligibility to the political branches of our government, while also providing needed clarity over the question of what is and is not eligible for patenting.

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Introduction

Justice Elena Kagan once famously said, "we're all textualists now."[1] In context, Justice Kagan's statement referred, in part, to Justice Antonin Scalia's preference and, indeed, evangelism of the benefits of textualism—the practice of interpreting legal text by reference to how an ordinary person would have understood that text at the time it was promulgated.[2] Justice Kagan was indicating that, not only was Justice Scalia applying textualist principles, but all of the Justices were, to one degree or another, applying textualist principles as a result of his influence.[3]

Since Justice Kagan's statement, the makeup of the Supreme Court has changed significantly. At the time of her statement, several Justices did not wholeheartedly embrace textualism.[4] Even on the conservative side of the bench, for example, Justice Anthony Kennedy was characterized as merely "textualist-leaning."[5] On the liberal side of the bench, "neither textualism nor intentionalism" defined Justice Ruth Bader Ginsburg's approach.[6] Justice Stephen Breyer, moreover, was a noted evangelist of intentionalism or purposivism, an approach to interpreting legal texts with an eye toward achieving the intent or purpose of the institution that promulgated the legal text.[7] Since Justice Kagan spoke her words, however, several conservative Justices have joined the Supreme Court.[8] And two noted textualists, Justices Brett Kavanaugh and Amy Coney Barrett, have replaced Justices Kennedy and Ginsburg.[9] These

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1 Harvard Law School, The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes, YouTube, at 08:28 (Nov. 25, 2015), https://perma.cc/SQ5A-LBKD ("I think we're all textualists now in a way that just was not remotely true when Justice Scalia join[ed] the bench.").

2 *See* Diarmuid F. O'Scannlain, *"We Are All Textualists Now": The Legacy of Justice Antonin Scalia*, 91 ST. JOHN'S L. REV. 303, 304, 312 (2017).

3 *See* Harvard Law School, *supra* note 1, at 08:09 (claiming "the primary reason" Justice Scalia will "go down as one of the most important, most historic figures in the Court" is how he "taught everybody how to do statutory interpretation differently").

4 Anita S. Krishnakumar, *Textualism and Statutory Precedents*, 104 VA. L. REV. 157, 163 n.18 (2018) ("I count as 'textualists' Justices Scalia and Thomas and as 'textualist-leaning' Justices Alito, Roberts, and Kennedy.").

5 *Id.*

6 James J. Brudney, *The Supreme Court as Interstitial Actor: Justice Ginsburg's Eclectic Approach to Statutory Interpretation*, 70 OHIO ST. L.J. 889, 891 (2009).

7 John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 113, 145 n.162 (2011).

8 Since 2015, Justice Gorsuch replaced Justice Scalia, Justice Kavanaugh replaced Justice Kennedy, and Justice Barrett replaced Justice Ginsburg. *See Justices 1789 to Present*, SUP. CT. OF THE U.S., https://perma.cc/22RS-89KH.

9 Anita S. Krishnakumar, *The Common Law as Statutory Backdrop*, 136 HARV. L. REV. 608, 659 n.269 (2022).

newer Justices have embraced textualism to a far greater degree than their predecessors.[10]

This Article studies the Supreme Court's increased emphasis on textualist principles and then deeply considers the application of textualism to patent law. In particular, this Article considers the extent to which the Supreme Court has interpreted the patent statute consistent with the tenets of textualism by conducting a comprehensive study of the Court's use and disuse of textualism in patent cases over the past ten years.[11] There is surprisingly little prior analysis of textualism applied to the patent statute.[12] This Article thus provides, for the first time, a deep analysis of this application in the patent field.

This Article identifies how certain aspects of the statute have been interpreted by the Supreme Court consistent with textualist principles.[13] Examples include the statutory provisions governing the award of enhanced damages and attorneys' fees.[14] It then identifies how other aspects of the patent statute have not been interpreted by the Supreme Court consistent with textualist principles.[15] The most notable example of the Supreme Court's failure to apply textualism to the patent statute turns out to be one of the foundational aspects of the patent statute—its provision governing patent eligibility.[16]

When it comes to patent cases at the Supreme Court interpreting the statutory provision governing patent eligibility, textualism has rarely been used as an interpretive tool. This is a striking deviation from the general rule. Because this provision defines the types of inventions that are and are not eligible for patenting, it serves as the gateway to the patent system.[17] It is not only the patent statute's foundation but also the

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10 *Id.*

11 In the past ten years the Court has fairly consistently applied textualism outside of the interpretation of the statutory provision governing patent eligibility. *See infra* Part II.

12 More than a decade ago, Professor Jonathan Siegel lambasted the Supreme Court for what he perceived as "naïve textualism" in its approach to deciding a case addressing patent eligibility. *See* Jonathan R. Siegel, *Naïve Textualism in Patent Law*, 76 BROOK. L. REV. 1019, 1020 (2011) [hereinafter Siegel, *Naïve Textualism*]. This Article responds to Professor Siegel. *See infra* Part II. But the main point (for now) is the dearth of other consideration of textualism applied to either the patent statute or claim construction.

13 *See infra* Section II.A.

14 *See infra* Section II.A.

15 *See infra* Section II.B.

16 This Article explores the Supreme Court's treatment of patent eligibility in its four most recent cases: *Alice Corp. v. CLS Bank International*, 573 U.S. 208 (2014); *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576 (2013); *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66 (2012); *Bilski v. Kappos*, 561 U.S. 593 (2010). *See infra* Section II.B.

17 *See* 35 U.S.C. § 101 ("Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.").

foundation of the whole patent system. Despite its importance, the Court has interpreted this provision using interpretive tools the Court has generally rejected in other fields to reach interpretations of the patent statute that are inconsistent with textualism. In short, the Court significantly deviates in its treatment of a foundational patent law doctrine.

Finally, this Article explores why the Supreme Court has not embraced textualist interpretations of the patent statute and the ramifications if the Court were to do so in the future.[18] It highlights how a textualist approach to patent eligibility would broaden it. In other words, a textualist approach would expand the scope of inventions eligible for patenting. More importantly, textualism would return political power over the doctrine to the political branches of our government. It would also provide certainty over the question of what is and is not eligible for patenting.[19] Thus, this Article is not only novel in its analysis, and it does not merely identify a significant deviation in the Court's use of textualism, it suggests a pathway to boost both the democratic legitimacy and accurate functioning of the patent system.

This Article is organized into two main parts. Part I discusses textualism generally, first by providing a review of the textualist approach to interpreting legal texts and then by highlighting the recent trend toward the increased use of textualism and textualist interpretations by the Supreme Court. Part II then considers textualism in the patent field, identifying and analyzing the Court's use and disuse of textualism with respect to the patent statute before considering several important takeaway points based on my analysis.

I. Textualism Generally

A. *Interpreting Legal Texts to Identify Their Original Ordinary Meaning*

So, what is textualism? It is an interpretive approach that focuses on how an ordinary person would have understood legal texts at the time they were promulgated.[20] According to its leading proponent, Justice

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[18] *See infra* Sections II.B, II.C.

[19] *See id.*

[20] *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, at xxvii (2012) ("Both your authors are textualists: We look for meaning in the governing text, ascribe to that text the meaning that it has borne from its inception, and reject judicial speculation about both the drafters' extratextually derived purposes and the desirability of the fair reading's anticipated consequences."); Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610, 1610 (2012) ("In a Government of Laws, one in which the people and agents of the people owe fidelity to democratically enacted texts, it would perhaps seem uncontroversial to suggest that an interpreter's job entails determining what those texts convey to a reasonable person—one conversant with our social linguistic conventions. Indeed, the

Scalia, textualism embraces the "oldest and most commonsensical interpretive principle," that is, "[i]n their full context, words mean what they conveyed to reasonable people at the time they were written—with the understanding that general terms may embrace later technological innovations."[21] While academics now identify (and critique) what they see as various versions of textualism,[22] the common idea is that the text of the law must be understood in light of the original ordinary meaning of the text's words rather than the presumed intention of the legislature or the more sweeping idea of using "judicial power to render the law more just."[23]

Justice Scalia argued that textualism holds the ability to gain "society's confidence in the rule of law."[24] It does so, he said, by (1) "curb[ing]—even revers[ing]—the tendency of judges to imbue authoritative texts with their own policy preferences," (2) "discourag[ing] legislative free-riding, whereby legal drafters idly assume that judges will save them from their blunders," and (3) "provid[ing] greater certainty in the law," all of which creates "greater predictability and greater respect for the rule of law."[25]

Others focus on textualism's ability to promote the law's legitimacy. Textualism is rooted "in straightforward faithful agent theory," the idea that judges should interpret legal texts as a faithful agent of the political branches of government.[26] Toward that end, proponents of textualism argue that it "provide[s] a superior way for federal judges to fulfill their presumed duty as Congress's faithful agents."[27] Focusing on the enacted text of the law rather than seeking to identify and fulfil the purposes of the law's drafters, textualists highlight how "many statutes result from bargains struck among interest groups competing for advantage in the legislative process."[28] Textualists "contend that judges simply cannot

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same conclusion follows if one believes (as we do not) that the object of the interpretive enterprise is to determine what the lawmakers meant rather than what the words convey: one should presumably focus upon the way a reasonable lawmaker—one conversant with our social linguistic conventions—would have understood the chosen language.").

21 SCALIA & GARNER, *supra* note 20, at 15–16.

22 *See, e.g.*, Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Progressive Textualism*, 110 GEO. L.J. 1437 (2022); Victoria Nourse, *Textualism 3.0: Statutory Interpretation After Justice Scalia*, 70 ALA. L. REV. 667 (2019); Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265 (2020); Kevin Tobia & John Mikhail, *Two Types of Empirical Textualism*, 86 BROOK. L. REV. 461 (2021).

23 *See* Amy Coney Barrett, *Assorted Canards of Contemporary Legal Analysis: Redux*, 70 CASE W. RSRV. L. REV. 855, 856, 864 (2020) [hereinafter Barrett, *Assorted Canards*]; Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 112, 164 (2010).

24 SCALIA & GARNER, *supra* note 20, at xxviii.

25 *Id.*

26 John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 18 (2001) [hereinafter Manning, *Textualism and the Equity of the Statute*].

27 *Id.* at 9.

28 *Id.* at 18.

discover an actual (but unexpressed) legislative 'intent.'"[29] Moreover, textualists maintain, "enforcing the purpose, rather than the letter, of the law may defeat the legislature's basic decision to use rules rather than standards to articulate its objectives."[30] And when judges simply give the words used by the political actors their original, ordinary meaning—when judges are faithful agents of the legislative branches—the result is more legitimate law.[31] Stated otherwise, textualism is "politically and policy neutral when applied across the board."[32]

Textualism's advocates identify functional advantages associated with the doctrine. Textualism, for example, promotes fair notice of the law by seeking to identify how an ordinary person would understand the law's text.[33] Consistent with the faithful agency theory, textualism respects compromise by seeking the ordinary meaning of the words used to craft a legislative compromise rather than seeking the unexpressed intention of one or more of those involved in crafting the compromise.[34] Textualism also restrains judges from seeking to displace the text of the law with their own sense of right and wrong—restraint that reflects the separation of powers between the judicial and legislative branches of government.[35] Finally, textualism promotes judicial economy by focusing judges on "those tasks that judges are best equipped to perform."[36]

Textualism's critics focus on the assumptions underlying textualism, textualism's methodology, and the incentives and results it creates. For example, Justice Scalia highlighted the criticism that "[y]ou can never tell what a word means," a criticism that, he noted with dry humor, is "usually express[ed] . . . in words."[37] Beyond this challenge to the assumption underlying textualism—that words have an ascertainable original, ordinary meaning—critics argue textualism invokes a methodology that

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29 *Id.* at 19.

30 *Id.* at 20.

31 Barrett, *Assorted Canards*, *supra* note 23, at 864.

32 Brett M. Kavanaugh, *Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*, 89 NOTRE DAME L. REV. 1907, 1926 (2014).

33 Note, *Textualism as Fair Notice*, 123 HARV. L. REV. 542, 542 (2009).

34 *Id.* at 551–52.

35 *Id.* at 553–54.

36 *Id.* at 555 ("Another argument for textualism focuses on judicial behavior in a related but different manner from the judicial restraint argument. This argument is concerned with judicial competence — confining judicial behavior to those tasks that judges are best equipped to perform. As such, it is less concerned with democratic legitimacy and the separation of powers and more concerned with promoting efficient government.").

37 Antonin G. Scalia, *A Look Back: 1994 William O. Douglas Lecture Series Transcript*, 51 GONZ. L. REV. 583, 590 (2016).

"requires judges to apply a literal and static interpretive framework."[38] Critics also claim that "textualism overemphasizes the importance of the text and undervalues other evidence in conveying Congress's policymaking directives."[39] Relatedly, textualism is said to be "insensitive to the actual workings of Congress."[40] As for incentives created by textualism, critics argue textualism "compels legislators to specify policy at an impossible level of detail."[41] And, as for the results it creates, critics argue textualism "often compels judges to enforce irrational or unjust results."[42]

Other criticisms seem to focus more on textual*ists* than textual*ism*, or perhaps reflect the belief that textualism does not adequately constrain those who use it.[43] Critics, for example, "claim that textualists behave selectively in their allegiance to the text and their willingness to rely on extrinsic evidence."[44] As a result, these critics argue, textualists "find it necessary to act inconsistently in constitutional and statutory cases."[45] Similarly, others contend textualism is "overly malleable" and thus "not a neutral method of interpretation."[46]

In short, despite its identified advantages, textualism has its critics. Even its leading advocate, Justice Scalia, admitted that textualism is "not perfect."[47] In his view, however, textualism "just happens to be better" than any other method of interpreting legal texts.[48]

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38 Manning, *supra* note 26, at 106; *see also* Barrett, *Assorted Canards*, *supra* note 23, at 856 ("Some who have only passing familiarity with the theory assume that textualism requires judges to construe language in a wooden, literalistic way. And that, of course, would lead to absurd results.").

39 Scalia & Manning, *supra* note 20, at 1611.

40 Grove, *supra* note 22, at 265.

41 Manning, *supra* note 26, at 106.

42 *Id.*; *see also* Barrett, *Assorted Canards*, *supra* note 23, at 856. Responses to these criticisms exist, of course. *See, e.g.*, WILLIAM D. POPKIN, MATERIALS ON LEGISLATION: POLITICAL LANGUAGE AND THE POLITICAL PROCESS 224 (3d ed. 2001) ("Literalism is a kind of 'spurious' textualism, unconcerned with how people actually communicate—with how the author wanted to use language or the audience might understand it. It holds up the text in isolation from actual usage."); Barrett, *Assorted Canards*, *supra* note 23, at 858 ("[B]ecause textualism isn't literalism, textualists do not come to the enterprise of statutory interpretation armed only with a dictionary.").

43 *See, e.g.*, West Virginia v. EPA, 597 U.S. 697, 779 (2022) (Kagan, J., dissenting) ("Some years ago, I remarked that '[w]e're all textualists now.' It seems I was wrong. The current Court is textualist only when being so suits it." (alteration in original) (citation omitted)).

44 Scalia & Manning, *supra* note 20, at 1611.

45 *Id.*

46 Grove, *supra* note 22, at 265 (summarizing criticisms of textualism, including "that textualism is insensitive to the actual workings of Congress, overly rigid" and "not a neutral method of interpretation").

47 Scalia, *supra* note 37, at 590.

48 *Id.*

B. *Textualism at the Supreme Court*

Beyond understanding what textualism is and its purported advantages and disadvantages, it is helpful to consider the Supreme Court's recent embrace of textualism. A brief study of the history of references to textualism at the Supreme Court reveals how the doctrine has gone from being scorned to being embraced. Whatever textualism's benefits or faults, several Justices of the Supreme Court have recently adopted it as their preferred approach to interpreting legal texts.

Interestingly, the first reference to "textualism" in a Supreme Court opinion appeared in 1952 with Justice Robert Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*,[49] the so-called Steel Seizure Case.[50] Justice Jackson agreed with the majority that President Truman was not "acting within his constitutional power when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills."[51] But, in his concurrence, Justice Jackson highlighted how his interpretation of the Constitution allowed for "some latitude of interpretation for changing times" and "elasticity afforded by what seem to be reasonable, practical implications."[52] Moreover, he contrasted his approach with "the rigidity dictated by a doctrinaire textualism."[53] In other words, he sought to make clear that his conclusion—that President Truman did not have the power he claimed under the Constitution—did not reflect a rigid textualist interpretation of the Constitution. This, unmistakably, was a criticism of textualism. And no Justice working on this case wrote in response to Justice Jackson in defense of textualism.

The next reference to textualism would not occur in a Supreme Court opinion until forty-one years later (1993) in *Deal v. United States*.[54] Yet again, textualism was criticized, this time by Justice John Paul Stevens in a dissenting opinion joined by Justices Harry Blackmun and Sandra Day O'Connor.[55] While Justice Jackson had merely distanced himself from "doctrinaire textualism," Justice Stevens provided a scathing criticism of textualism more generally; he referred to textualism as "replac[ing] common sense" and as an exercise in "sentence parsing."[56] This time, however, Justice Scalia was there, on behalf of the Court in its majority opinion, to defend textualism against these criticisms. Justice Scalia argued that it did not take much "sentence parsing" to reject the

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49 343 U.S. 579 (1952).

50 *Id.* at 640 (Jackson, J., concurring).

51 *Id.* at 582 (majority opinion); *id.* at 634 (Jackson, J., concurring).

52 *Id.* at 640 (Jackson, J., concurring).

53 *Id.*

54 508 U.S. 129 (1993).

55 *See id.* at 137, 146 (Stevens, J., dissenting).

56 *Id.* at 146.

interpretation put forward by Justice Stevens.[57] By contrast, he characterized the position put forward by Justice Stevens as "requir[ing] a degree of verbal know-nothingism that would render government by legislation quite impossible."[58] He derisively characterized the approach advocated by Justice Stevens as the "text-insensitive" approach.[59] And, in the end, Justice Scalia argued, "nothing but personal intuition" supported the interpretation Justice Stevens advocated.[60]

Seven years would pass before the next reference to textualism appeared in a Supreme Court opinion, and again textualism would be criticized. In 2001, in *Johnson v. United States*,[61] Justice David Souter, on behalf of the Court, needled Justice Scalia for his embrace of textualism. Justice Souter argued Justice Scalia's "erudite explanation" and "virtuoso lexicography" proved only that "English is rich enough to give even textualists room for creative readings."[62] Never avoiding a fight, Justice Scalia crafted a dissenting opinion that, in effect, rejoined the broader debate over textualism and its role in statutory interpretation. He began by highlighting his view that the term at issue, which was not defined by the statute, "should be construed 'in accordance with its ordinary or natural meaning.'"[63] Then, while diving into details of how the particular term should be construed, he identified "the acid test of whether a word can reasonably bear a particular meaning."[64] According to Justice Scalia, that test "is whether you could use the word in that sense at a cocktail party without having people look at you funny."[65]

On a more serious note, Justice Scalia also highlighted the importance of his dispute over textualism with Justice Souter and the majority. In his view, "nothing but the Court's views of policy and 'congressional purpose'" supported its judgment, and that, in Justice Scalia's view, was "a matter of great concern, if only because of what it tells district and circuit judges."[66] He explained, "The overwhelming majority of the Courts of Appeals—9 out of 11—notwithstanding what they might have viewed as the more desirable policy arrangement, reached the result unambiguously

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57 *Id.* at 134 (majority opinion) ("It takes not much 'sentence parsing' to reject the quite different argument of the dissent that the terms 'subsequent offense' and 'second or subsequent conviction' mean exactly the same thing, so that 'second conviction' means 'first offense after an earlier conviction.'").

58 *Id.* at 135.

59 *Id.*

60 *Deal*, 508 U.S. at 136.

61 529 U.S. 694 (2000).

62 *Id.* at 705 n.7.

63 *Id.* at 715 (Scalia, J., dissenting) (quoting FDIC v. Meyer, 510 U.S. 471, 476 (1994)).

64 *Id.* at 718.

65 *Id.*

66 *Id.* at 727.

demanded by the statutory text."[67] But, he continued, the majority's decision "invites them to return to headier days of not-too-yore, when laws meant what judges knew they ought to mean."[68]

Despite Justice Scalia's description of the importance of textualism, another eight years would pass before the Court would refer again expressly to textualism. And, yet again, the methodology would be criticized. In 2008, in *Florida Department of Revenue v. Piccadilly Cafeterias, Inc.*,[69] Justice Breyer filed a dissenting opinion joined by Justice Stevens.[70] In it, he took a position similar to Justice Souter's position in *Johnson*, arguing that textualism did not answer the relevant interpretive question.[71] Expressing his view that the "statutory language itself is perfectly ambiguous,"[72] Justice Breyer characterized Justice Clarence Thomas's majority opinion as having "methodically comb[ed] the textualist beaches" to no avail.[73] But, beyond criticizing textualism, his opinion espoused a different approach to interpreting legal texts.[74] According to Justice Breyer, "[j]udges are free to consider statutory language in light of a statute's basic purposes."[75] Indeed, according to Justice Breyer, "the majority's failure to work with this important tool of statutory interpretation . . . led it to construe the present statute in a way that . . . runs contrary to what Congress would have hoped for and expected."[76]

The next year, Justice Thomas found an opportunity to respond to the idea suggested by Justice Breyer that statutes should be interpreted consistent with their "basic purposes" and "what Congress would have hoped for and expected." In *Wyeth v. Levine*,[77] Justice Thomas argued "there is no factual basis for the assumption . . . that every policy seemingly consistent with federal statutory text has necessarily been authorized by Congress."[78] Rather, he explained, the right analysis requires identifying

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[67] *Johnson*, 529 U.S. at 727 (Scalia, J., dissenting).

[68] *Id.*

[69] 554 U.S. 33 (2008).

[70] *Id.* at 53 (Breyer, J., dissenting).

[71] *Id.* at 54.

[72] *Id.*

[73] *Id.*

[74] *Id.* at 56 ("The absence of a clear answer in text or canons, however, should not lead us to judicial despair. Consistent with Court precedent, we can and should ask a further question: *Why* would Congress have insisted upon temporal limits? What reasonable *purpose* might such limits serve?").

[75] *Fla. Dep't of Revenue*, 554 U.S. at 59 (Breyer, J., dissenting) (quoting Dole Food Co. v. Patrickson, 538 U.S. 468, 484 (2003) (Breyer, J., concurring in part and dissenting in part)).

[76] *Id.*

[77] 555 U.S. 555 (2009).

[78] *Id.* at 602 (Thomas, J., concurring in the judgment).

"policies that are actually authorized by and effectuated through the statutory text."[79] Justice Thomas, in other words, joined Justice Scalia in defending textualism.

Over the next decade, between 2009 and 2019, a handful of Supreme Court opinions included a brief statement referencing textualism or cited one or more law review articles discussing textualism.[80] Then, beginning in 2019, the floodgates, so to speak, were opened: More than half of all Supreme Court opinions in history that include the word "textualist" or "textualism" have been issued since June 26, 2019, in just over five years as of the date of this writing.[81] Moreover, while Justice Jackson disassociated himself with "doctrinaire textualism" and Justices Stevens, Souter, and Breyer criticized textualism, the latest opinions routinely laud the doctrine.

Consider, in particular, Justice Neil Gorsuch's concurring opinion in *Kisor v. Wilkie*.[82] In his opinion, Justice Gorsuch explained why the Court should have overruled *Auer v. Robbins*[83] and eliminated the requirement that federal courts defer to an agency's interpretation of its own regulations.[84] In a portion of the opinion joined by Justices Thomas and Kavanaugh, Justice Gorsuch highlighted how "during the period of *Auer*'s ascendancy some suggested that the meaning of written law is always 'radically indeterminate' and that judges expounding it are 'for the most part, guided by policy—not text.'"[85] But, he explained, "we've long since come to realize that the real cure doesn't lie in turning judges into rubber stamps for politicians."[86] Instead, he continued, the real cure lies "in redirecting the judge's interpretive task back to its roots, away from open-ended policy appeals and speculation about legislative intentions and toward the traditional tools of interpretation judges have employed for

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79 *Id.*

80 *See* Rehaif v. United States, 588 U.S. 225, 246 (2019) (Alito, J., dissenting) (referring to a "purportedly textualist argument that we were sold at the certiorari stage"); Sessions v. Dimaya, 584 U.S. 148, 177 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) (citing *Textualism as Fair Notice*, *supra* note 33, at 543); NLRB v. SW Gen., Inc., 580 U.S. 288, 315 n.2 (2017) (Thomas, J., concurring) (citing Steven G. Calabresi & Gary S. Lawson, *The Unitary Executive, Jurisdiction Stripping, and the* Hamdan *Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1018–19 (2007)); McQuiggin v. Perkins, 569 U.S. 383, 409–10 (2013) (Scalia, J., dissenting) (first citing Manning, *Textualism and the Equity of the Statute*, *supra* note 26, at 36–37; and then citing John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 81–82, 82 n.42 (2006) [hereinafter Manning, *What Divides Textualists from Purposivists?*]).

81 As of October 1, 2024, a search for the Boolean term "textualis!" under "Supreme Court Cases" in the Westlaw database returns twenty-five cases, fifteen with issue dates June 26, 2019 or later.

82 588 U.S. 558 (2019); *id.* at 591–92 (Gorsuch, J., concurring in the judgment).

83 519 U.S. 452 (1997).

84 *Kisor*, 588 U.S. at 592 (Gorsuch, J., concurring in the judgment).

85 *Id.* at 621 (quoting Diarmuid, *supra* note 2, at 304–05).

86 *Id.*

centuries to elucidate the law's original public meaning."[87] In this way, Justice Gorsuch directed judges to focus on what textualism focuses on: the law's original public meaning. As if to make this point about the importance of textualism crystal clear to lower court judges, he concluded this portion of his analysis with the same turn of phrase invoked by Justice Kagan in 2015: "Today it is even said that we judges are, to one degree or another, 'all textualists now.'"[88] In short, the early criticism of textualism has given way to praise of textualism.

C. *The Modern, Textualist Court*

As of this writing, the Supreme Court includes four Justices who have identified themselves as textualists and applied textualist interpretive methods (Justices Thomas, Gorsuch, Kavanaugh, and Barrett) and two Justices who have applied textualist interpretive methods, albeit less absolutely (Chief Justice John Roberts and Justice Samuel Alito).[89] In a sign of how far the Supreme Court's discourse has changed, rather than always responding to criticisms of textualism or even praising textualism, these Justices now sometimes find themselves arguing about which Justice is more faithfully applying textualism.

Consider as a prime example *Bostock v. Clayton County*,[90] decided by the Supreme Court in 2020.[91] In this case, Justice Gorsuch authored a majority opinion concluding that "[a]n employer who fires an individual merely for being gay or transgender defies the law," in particular Title VII of the Civil Rights Act of 1964.[92] Regardless of whether you agree or disagree with the Court's holding or analysis, one thing is clear: Justice Gorsuch repeatedly indicated he believed he was applying textualism to decide the case. He began his analysis by describing how the "Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment,"[93] a statement that effectively summarizes textualism. He then described the use of textualism as the clear task of the Court:

> With this in mind, our task is clear. We must determine the ordinary public meaning of Title VII's command that it is "unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect

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87 *Id.* at 621–22.

88 *Id.* at 622 (quoting Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1057 (1998)).

89 Krishnakumar, *supra* note 9, at 659 n.269.

90 590 U.S. 644 (2020).

91 *Id.* at 649.

92 *Id.* at 682–83.

93 *Id.* at 654.

> to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[94]

Justice Gorsuch's later statement reinforces his belief that he was applying textualism to decide the case: "From the ordinary public meaning of the statute's language at the time of the law's adoption, a straightforward rule emerges."[95] He similarly indicated certain "cases involve no more than the straightforward application of legal terms with plain and settled meanings."[96] In these ways, he was identifying the goal of his task: to identify the ordinary public meaning, or the plain and settled meanings, of the language in the statute. Indeed, he later described how "when the meaning of the statute's terms is plain, our job is at an end."[97]

As it turns out, however, Justice Gorsuch did not stop there. In response to arguments that a different ordinary meaning controlled, he suggested that, "[b]ecause the law's ordinary meaning at the time of enactment usually governs," it is possible that "a statutory term that means one thing today or in one context might have meant something else at the time of its adoption or might mean something different in another context."[98] And, he continued, "we must be attuned to the possibility that a statutory phrase ordinarily bears a different meaning than the terms do when viewed individually or literally."[99] Thus, he professed to focus on the ordinary meaning of the language in the context of the governing statute at the time of its enactment. In short, Justice Gorsuch repeatedly argued that textualism supported his conclusion.

Justice Alito, however, in a dissenting opinion joined by Justice Thomas, denounced the majority opinion on this exact point. According to Justice Alito, while the Court sought "to convince readers" that it was "merely enforcing the terms of the statute, . . . that is preposterous."[100] Indeed, he continued, "no one should be fooled" by the Court's "attempts to pass off its decision as the inevitable product of the textualist school of statutory interpretation championed by our late colleague Justice Scalia."[101] Comparing the Court's opinion to "a pirate ship," he said "[i]t sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated––the theory that courts should 'update' old statutes so that they better reflect the current

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94 *Id.* at 655 (quoting 42 U.S.C. § 2000e-2(a)(1)).

95 *Id.* at 659.

96 *Bostock*, 590 U.S. at 662.

97 *Id.* at 674–75.

98 *Id.* at 675–76.

99 *Id.* at 675.

100 *Id.* at 684 (Alito, J., dissenting).

101 *Id.* at 685.

values of society."[102] In the process of leveling these criticisms, Justice Alito contrasted Justice Gorsuch's approach with what he described as the "duty . . . to interpret statutory terms to 'mean what they conveyed to reasonable people *at the time they were written*.'"[103] This, then, was a dispute over which set of judges were more faithfully applying the tenets of textualism to the dispute before the Court.

This dispute between adherents to textualism about the proper application of the doctrine in a particular case demonstrates quite clearly just how far textualism has come. It is no longer merely the subject of criticism, but instead the central methodology for resolving disputes over statutory interpretation at the Supreme Court. Justices no longer dispute whether to apply textualism, but instead how it applies in particular cases. Scholars, in turn, have turned from comparing and contrasting various interpretive methodologies, such as textualism and purposivism,[104] to comparing and contrasting *versions* of textualism itself.[105] In short, it has become quite clear that interpreting legal texts requires applying textualism.

II. Textualism Applied to the Patent Statute

Understanding both what textualism is and how it has become a central tenet of the Supreme Court's approach to interpreting legal texts provides a precursor to the question: How would a textualist interpret the patent statute? The answer can be easily found by reviewing the Supreme Court's patent cases issued in the past ten years—just before and ever since Justice Kagan's pronouncement in 2015 that the Supreme Court Justices were "all textualists now."[106] Cases that interpret statutory provisions (or, in one case, a Federal Rule of Civil Procedure) are categorized as textualist or atextualist.[107]

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102 *Bostock*, 590 U.S. at 685 (Alito, J., dissenting) (citing ANTONIN SCALIA, A MATTER OF INTERPRETATION 22 (1997)).

103 *Id.* at 685 (quoting SCALIA & GARNER, *supra* note 20, at 16).

104 *See, e.g.*, Manning, *What Divides Textualists from Purposivists?*, *supra* note 80, at 81–82, 82 n.42.

105 *See, e.g.*, Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2194 (2017) ("The disagreement is not about statutory meaning versus congressional intent, as it was in the old days, but about which set of linguistic conventions determine what the words mean.").

106 *See* Harvard Law School, *supra* note 1. This Article considers the twenty-six patent cases the Supreme Court decided between January 1, 2013, and January 1, 2023.

107 *See* discussion *infra* Sections II.A., II.B. Supreme Court interpretations of the patent statute that go so far as to contradict textualism are referred to as atextualist. *See, e.g.*, Matthew L.M. Fletcher, *Muskrat Textualism*, 116 NW. U. L. REV. 963, 976 (2022). Such cases include: *Nautilus, Inc. v. Biosig Instruments, Inc.*, 572 U.S. 898 (2014), *Limelight Networks, Inc. v. Akamai Technologies, Inc.*, 572 U.S. 915 (2014), *Impression Products, Inc. v. Lexmark International, Inc.*, 581 U.S. 360 (2017), and *Minerva Surgical, Inc. v. Hologic, Inc.*, 594 U.S. 559 (2021).

As a high-level summary, some of these opinions do reflect textualist interpretations; others, despite Justice Kagan's pronouncement, do not. The following table summarizes the past decade of interpretations of the patent statute, including any application (or lack thereof) of textualist principles. An analysis of particularly good or important examples of textualist and atextualist Supreme Court opinions in the patent arena follows. Given the Court's noticeable rejection of textualism to interpret the statutory provision governing patent eligibility, this Article also considers the Court's earlier cases related to the same statutory provision.

Year	Opinion	Provision	Author	Textu-alist?
2013	*Bowman v. Monsanto Co.*[108]	None: Exhaustion[109]	Kagan	N/A
2013	*Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*[110]	35 U.S.C. § 101[111]	Thomas	No
2014	*Medtronic, Inc. v. Mirowski Family Ventures, LLC*[112]	None; Burden of Proving Infringement[113]	Breyer	N/A
2014	*Octane Fitness, LLC v. ICON Health & Fitness, Inc.*[114]	35 U.S.C. § 285[115]	Sotomayor	Yes
2014	*Highmark Inc. v. Allcare Health Management System, Inc.*[116]	35 U.S.C. § 285[117]	Sotomayor	Yes

108 569 U.S. 278 (2013).

109 *Id.* at 280.

110 569 U.S. 576 (2013).

111 *Id.* at 580.

112 571 U.S. 191 (2014).

113 *Id.* at 193.

114 572 U.S. 545 (2014).

115 *Id.* at 548.

116 572 U.S. 559 (2014).

117 *Id.* at 560.

Year	Opinion	Provision	Author	Textu-alist?
2014	*Nautilus, Inc. v. Biosig Instruments, Inc.*[118]	35 U.S.C. § 112, ¶ 2[119]	Ginsburg	No
2014	*Limelight Networks, Inc. v. Akamai Technologies, Inc.*[120]	35 U.S.C. § 271(b)[121]	Alito	No
2014	*Alice Corp. v. CLS Bank International*[122]	35 U.S.C. § 101[123]	Thomas	No
2015	*Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc.*[124]	Fed. R. Civ. P. 52(a)(6)[125]	Breyer	Yes
2015	*Commil USA, LLC v. Cisco Systems, Inc.*[126]	35 U.S.C. § 271(b)[127]	Kennedy	Yes
2016	*Halo Electronics, Inc. v. Pulse Electronics, Inc.*[128]	35 U.S.C. § 284[129]	Roberts	Yes
2016	*Cuozzo Speed Technologies, LLC v. Lee*[130]	35 U.S.C. §§ 314(d), 316(a)(4)[131]	Breyer	Yes and No
2016	*Samsung Electronics Co. v. Apple Inc.*[132]	35 U.S.C. § 289[133]	Sotomayor	Yes

118 572 U.S. 898 (2014).

119 *Id.* at 901.

120 572 U.S. 915 (2014).

121 *Id.* at 917.

122 573 U.S. 208 (2014).

123 *Id.* at 212.

124 574 U.S. 318 (2015).

125 *Id.* at 321–22.

126 575 U.S. 632 (2015).

127 *Id.* at 638.

128 579 U.S. 93 (2016).

129 *Id.* at 97.

130 579 U.S. 261 (2016).

131 *Id.* at 265–66.

132 580 U.S. 53 (2016).

133 *Id.* at 55.

Year	Opinion	Provision	Author	Textu-alist?
2017	*Life Technologies Corp. v. Promega Corp.*[134]	35 U.S.C. § 271(f)[135]	Sotomayor	Yes
2017	*SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*[136]	35 U.S.C. § 286[137]	Alito	Yes
2017	*TC Heartland LLC v. Kraft Foods Group Brands LLC*[138]	28 U.S.C. § 1400(b)[139]	Thomas	Yes
2017	*Impression Products, Inc. v. Lexmark International, Inc.*[140]	35 U.S.C. § 154(a)[141]	Roberts	No
2018	*Oil States Energy Services, LLC v. Greene's Energy Group, LLC*[142]	Article III and the Seventh Amendment of the Constitution[143]	Thomas	N/A
2018	*SAS Institute, Inc. v. Iancu*[144]	35 U.S.C. § 318(a)[145]	Gorsuch	Yes
2018	*WesternGeco LLC v. ION Geophysical Corp.*[146]	35 U.S.C. §§ 271, 284[147]	Thomas	No

[134] 580 U.S. 140 (2017).
[135] *Id.* at 146.
[136] 580 U.S. 328 (2017).
[137] *Id.* at 331–32.
[138] 581 U.S. 258 (2017).
[139] *Id.* at 261.
[140] 581 U.S. 360 (2017).
[141] *Id.* at 366.
[142] 584 U.S. 325 (2018).
[143] *Id.* at 328–29.
[144] 584 U.S. 357 (2018).
[145] *Id.* at 359.
[146] 585 U.S. 407 (2018).
[147] *Id.* at 409.

Year	Opinion	Provision	Author	Textu-alist?
2019	*Helsinn Healthcare S.A. v. Teva Pharmaceuticals USA, Inc.*[148]	35 U.S.C. § 102(a)(1)[149]	Thomas	Yes
2019	*Return Mail, Inc. v. U.S. Postal Service*[150]	35 U.S.C. §§ 311(a), 321(a)[151]	Sotomayor	Yes
2019	*Peter v. NantKwest, Inc.*[152]	35 U.S.C. § 145[153]	Sotomayor	Yes
2020	*Thryv, Inc. v. Click-To-Call Technologies, LP*[154]	35 U.S.C. § 314(d)[155]	Ginsburg	Yes and No
2021	*United States v. Arthrex, Inc.*[156]	Appointments Clause of the Constitu-tion[157]	Roberts	N/A
2021	*Minerva Surgical, Inc. v. Hologic, Inc.*[158]	35 U.S.C. § 282(b)[159]	Kagan	No
2023	*Amgen Inc. v. Sanofi*[160]	35 U.S.C. § 112(a)[161]	Gorsuch	Yes

A. *Textualist Interpretations*

Several of the Supreme Court's cases interpreting provisions of the patent statute in the past ten years demonstrate strong textualist analyses.

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148 586 U.S. 123 (2019).

149 *Id.* at 125.

150 587 U.S. 618 (2019).

151 *Id.* at 623–24.

152 589 U.S. 23 (2019).

153 *Id.* at 25.

154 590 U.S. 45 (2020).

155 *Id.* at 48.

156 594 U.S. 1 (2021).

157 *Id.* at 6.

158 594 U.S. 559 (2021).

159 *Id.* at 571.

160 598 U.S. 594 (2023).

161 *Id.* at 599.

So, too, do some of the Court's older cases interpreting the statutory provision governing patent eligibility.

1. Statutory Provisions Related to Remedies

In the past decade, four patent cases interpreting statutory provisions related to remedies present strong textualist analyses.

The first two examples related to the interpretation of the statutory provision governing awards of attorney fees. In both *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*[162] and *Highmark Inc. v. Allcare Health Management System, Inc.*,[163] the parties called upon the Court to interpret 35 U.S.C. § 285. This section of the patent statute states: "The court in exceptional cases may award reasonable attorney fees to the prevailing party."[164] Both opinions demonstrate textualist analyses. Interestingly, one of the Court's liberals, Justice Sonia Sotomayor, authored them.

In *Octane Fitness*, the Court identified the "question before us" as one to be decided by textualism: whether the "framework" established by the lower court (the U.S. Court of Appeals for the Federal Circuit) for determining whether a case may be deemed exceptional "is consistent with the statutory text."[165] Although Justice Sotomayor cited the statutory provision's legislative history when reviewing the history of the revision of the statutory language,[166] the Court's analysis turned on the text of the provision. The Court held that the "framework established by the Federal Circuit . . . is unduly rigid, and it impermissibly encumbers the statutory grant of discretion to district courts."[167] Then, the Court indicated its "analysis begins and ends with the text of § 285."[168] Because the Patent Act did not define "exceptional," the Court said it would "construe it 'in accordance with [its] ordinary meaning.'"[169] And so it did, identifying the ordinary meaning of the term "[i]n 1952, when Congress used the word in § 285."[170] In rejecting the lower court's framework, moreover, the Court noted that the Federal Circuit's "formulation superimposes an inflexible framework onto statutory text that is inherently flexible."[171] In short, the Court rooted its analysis in textualism.

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162 572 U.S. 545 (2014).

163 572 U.S. 559 (2014).

164 35 U.S.C. § 285.

165 *Octane Fitness*, 572 U.S. at 548.

166 *Id.* at 549 n.2.

167 *Id.* at 553.

168 *Id.*

169 *Id.* (alteration in original) (quoting Sebelius v. Cloer, 569 U.S. 369, 376 (2013)).

170 *Id.*

171 *Octane Fitness*, 572 U.S. at 555.

The Court likewise applied textualism in the second case, *Highmark*. There, the Court considered whether the Federal Circuit correctly held that it should review a district court's award of attorney fees under a de novo standard of review.[172] The Supreme Court again disagreed with the Federal Circuit based on the text of § 285. The Court explained that "[b]ecause § 285 commits the determination whether a case is 'exceptional' to the discretion of the district court, that decision is to be reviewed on appeal for abuse of discretion."[173]

The third case applied textualism to interpret a different remedial statutory provision governing enhanced damages. In *Halo Electronics, Inc. v. Pulse Electronics, Inc.*,[174] the Court considered 35 U.S.C. § 284,[175] the section of the patent statute that states a court "may increase the damages up to three times the amount found or assessed."[176] The Court's opinion, authored by Chief Justice Roberts, again demonstrated a textualist approach.

The Court expressed the question presented as one governed by the text of the statutory provision: whether the Federal Circuit's two-part test for when a district court may increase damages pursuant to § 284 "is consistent with § 284."[177] The Court reviewed the history of the development of the modern statutory provision to identify the historical "backdrop that Congress, in the 1952 codification of the Patent Act, enacted § 284."[178] Then, in analyzing how to interpret the provision, the Court began with its language. Highlighting the "pertinent text," the Court noted that it "contains no explicit limit or condition" and emphasized "that the word 'may' clearly connotes discretion."[179] Later, in rejecting the Federal Circuit's two-part test, the Court quoted *Octane Fitness* for the proposition that the test "impermissibly encumbers the statutory grant of discretion to district courts."[180] The Court likewise quoted *Octane Fitness* when it said the test "is also inconsistent with § 284" because § 284 "imposes no specific evidentiary burden, much less such a high one."[181] The Court also supported its conclusion by another textualist

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[172] Highmark Inc. v. Allcare Health Mgmt. Sys., Inc., 572 U.S. 559, 563 (2014).

[173] *Id.*; *see id.* at 564 (explaining that "the text of the statute 'emphasizes the fact that the determination is for the district court,' which 'suggests some deference to the district court upon appeal'" (quoting Pierce v. Underwood, 487 U.S. 552, 559 (1988))).

[174] 579 U.S. 93 (2016).

[175] *Id.* at 97.

[176] *Id.* (quoting 35 U.S.C. § 284).

[177] *Id.*

[178] *Id.* at 100.

[179] *Id.* at 103 (quoting Martin v. Franklin Capital Corp., 546 U.S. 132, 136 (2005)).

[180] *Halo*, 579 U.S. at 104 (quoting Octane Fitness, LLC v. ICON Health & Fitness, Inc., 572 U.S. 545, 553 (2014)).

[181] *Id.* at 107 (internal quotation marks omitted) (quoting *Octane Fitness*, 572 U.S. at 557).

principle, the idea that "Congress expressly erected a higher standard of proof elsewhere in the Patent Act but not in § 284."[182]

The fourth case involved an interpretation of another remedial statutory provision, this one governing the remedy for infringement of a design patent. In *Samsung Electronics Co. v. Apple Inc.*,[183] the Court explained that "the Patent Act provides a damages remedy specific to design patent infringement."[184] That provision, as codified at 35 U.S.C. § 289, indicates a "person who manufactures or sells 'any article of manufacture to which [a patented] design or colorable imitation has been applied shall be liable to the owner to the extent of his total profit.'"[185] To set the stage for the interpretive question the Court faced, the Court first explained that "'[t]otal,' of course, means all" and that the "'total profit' . . . is thus all of the profit made from the prohibited conduct, that is, from the manufacture or sale of the 'article of manufacture to which [the patented] design or colorable imitation has been applied.'"[186] The Court then explained that the case "requires us to address a threshold matter: the scope of the term 'article of manufacture.'"[187]

"The text," the Court decided, "resolves this case."[188] According to the Court, "The term 'article of manufacture,' as used in § 289, encompasses both a product sold to a consumer and a component of that product."[189] Quoting definitions of "article" and "manufacture" from 1885, the Court concluded: "So understood, the term 'article of manufacture' is broad enough to encompass both a product sold to a consumer as well as a component of that product."[190] The Court then found this understanding of the phrase consistent with other portions of the patent statute.[191] It also determined that the "Federal Circuit's narrower reading of 'article of manufacture' cannot be squared with the text of § 289."[192] Notably absent from the Court's analysis is any consideration of the legislative history behind § 289. This is notable because that legislative history arguably contradicts the Court's holding.[193] But textualism would not give effect to

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182 *Id.* (citation omitted).

183 580 U.S. 53 (2016).

184 *Id.* at 55.

185 *Id.* (alteration in original) (quoting 35 U.S.C. § 289).

186 *Id.* at 58–59 (second alteration in original) (quoting 35 U.S.C. § 289).

187 *Id.* at 59.

188 *Id.*

189 *Samsung*, 580 U.S. at 59 (quoting 35 U.S.C. § 289).

190 *Id.* at 59–60.

191 *Id.* at 60–61.

192 *Id.* at 61.

193 *See, e.g.*, H.R. REP. NO. 49-1966, at 2–3 (1886) ("It is expedient that the infringer's entire profit on the article should be recoverable, . . . for it is not apportionable . . . [and] it is the design that sells the article . . . ."); Jason J. Du Mont & Mark D. Janis, *American Design Patent Law: A Legal History*, *in*

the legislative history to the extent it contradicts the fairest reading of the statutory language.[194]

In all four of these cases addressing remedies for patent infringement, the Court interpreted the patent statute based on textualist principles.

2. Statutory Provisions Related to the America Invents Act

Another set of four cases highlights the Court's use of textualism (at varying levels of enthusiasm or consistency) to interpret provisions of the patent statute set forth in the Leahy-Smith America Invents Act ("AIA").[195]

In *Cuozzo Speed Technologies, LLC v. Lee*,[196] the Court addressed two of these provisions.[197] The first, 35 U.S.C. § 314(d), states that the "determination by the Director [of the Patent Office] whether to institute an inter partes review under this section shall be final and non-appealable."[198] The second, 35 U.S.C. § 316(a)(4), states that the "Director [of the Patent Office] shall prescribe regulations establishing and governing inter partes review under this chapter."[199] As to the first provision, in an opinion authored by Justice Breyer, the Court concluded that, "though it may not bar consideration of a constitutional question, for example," it "does bar judicial review of the kind of mine-run claim at issue here, involving the Patent Office's decision to institute inter partes review."[200] As to the second provision, the Court concluded that it "authorize[s] the Patent Office to issue a regulation stating that the agency, in inter partes review, 'shall [construe a patent claim according to] its broadest reasonable construction in light of the specification of the patent in which it appears.'"[201] More significant, for this Article's purposes at least, is the Court's method of interpretation applying textualist principles.

DESIGN PATENT REMEDIES (forthcoming) (manuscript at 6-55) (available at https://perma.cc/EBY6-8KFP) ("In the legislative history of the 1887 Act, the House and Senate Reports definitively reject the apportionment principle that the Carpet Cases had endorsed. . . . There is no support in the historical record for the argument that courts applying the 1887 Act were free to redefine the article of manufacture so as to achieve the equivalent of apportionment.").

194 John F. Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 68 (2014) ("The Court's new textualism . . . . rejects legislative history when it conflicts with the statutory text.").

195 Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (codified in scattered sections of 35 U.S.C.).

196 579 U.S. 261 (2016).

197 *Id.* at 265–66.

198 35 U.S.C. § 314(d).

199 35 U.S.C. § 316(a)(4).

200 *Cuozzo*, 579 U.S. at 266.

201 *Id.* (second alteration in original) (quoting 37 C.F.R. § 42.100(b) (2015)).

With respect to the first provision, the Court noted its agreement with the lower court that "Cuozzo's contention that the Patent Office unlawfully initiated its agency review is not appealable."[202] As for why, the Court said, "For one thing, that is what § 314(d) says."[203] So far, so textualist. Later, however, Justice Breyer injected a distinctly non-textualist analysis by citing legislative history and indicating "a contrary holding would undercut one important congressional objective, namely, giving the Patent Office significant power to revisit and revise earlier patent grants."[204] In rejecting an argument made in a dissent, however, the Court returned (somewhat) to a textualist approach. The Court could not accept the dissent's interpretation because "[i]t reads into the provision a limitation (to interlocutory decisions) that the language nowhere mentions and that is unnecessary."[205]

With respect to the second provision, the Court based its decision on the provision's text. "No statutory provision unambiguously directs the agency to use one standard or the other," explained the Court.[206] Again, so far, so textualist. Justice Breyer, however, later considers the argument that the Court would "reach a different conclusion if we carefully examine the purpose of inter partes review."[207] The Court grapples with this question—a decidedly purposivist approach to interpreting the relevant statute. But, in the end, the Court indicated that the "upshot is, whether we look at statutory language alone, or that language in context of the statute's purpose, we find an express delegation of rulemaking authority, a 'gap' that rules might fill, and 'ambiguity' in respect to the boundaries of that gap."[208]

In *SAS Institute Inc. v. Iancu*,[209] a second case interpreting the AIA, the Court more enthusiastically demonstrated textualism.[210] In an opinion authored by Justice Gorsuch, the Court addressed 35 U.S.C. § 318(a). This section of the patent statute states that, "[i]f an inter partes review is instituted and not dismissed . . . the Patent Trial and Appeal Board shall issue a final written decision with respect to the patentability of any patent claim challenged by the petitioner."[211] The Court concluded that "the plain text of § 318(a) supplies a ready answer" to the question of whether the Board was required to decide the patentability of "every

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202 *Id.* at 271.

203 *Id.*

204 *Id.* at 272.

205 *Id.* at 272–73. This Article states "somewhat" because of the "unnecessary" justification.

206 *Cuozzo*, 579 U.S. at 277.

207 *Id.*

208 *Id.* at 280.

209 584 U.S. 357 (2018).

210 *See id.* at 362–63.

211 35 U.S.C. § 318(a).

claim" challenged in a petition or instead "just some" of those claims.[212] The Court, for example, highlighted that the "word 'shall' generally imposes a nondiscretionary duty" and "the word 'any' naturally carries 'an expansive meaning.'"[213] Moreover, the "trouble" with the government's position was that "nothing in the statute says anything like" the idea that the Director "retains discretion to decide which claims make it into an inter partes review and which don't."[214] The Court went on to explain that the "rest of the statute confirms, too, that the petitioner's petition, not the Director's discretion, is supposed to guide the life of the litigation."[215] In rejecting the government's policy argument, the Court stated that "[p]olicy arguments are properly addressed to Congress, not this Court," given that "[i]t is Congress's job to enact policy and it is this Court's job to follow the policy Congress has prescribed."[216]

Another example of the use of textualism in the context of interpreting the patent statute is *Return Mail, Inc. v. U.S. Postal Service*.[217] In an opinion authored by Justice Sotomayor, the Court answered the question "whether a federal agency is a 'person' able to seek" inter partes or post-grant review of a patent under the relevant statute.[218] The first provision, 35 U.S.C. § 311(a), states that "a person who is not the owner of a patent may file with the [Patent] Office a petition to institute an inter partes review of the patent."[219] The second, 35 U.S.C. § 321(a), similarly states that "a person who is not the owner of a patent may file with the [Patent] Office a petition to institute a post-grant review of the patent."[220] The Court applied textualist principles to conclude that a federal agency is not a "person" under these provisions.[221] In particular, the Court applied a presumption based in part on "common usage" as well as the Dictionary Act that "person" does not encompass the federal government.[222] The Court, however, did go on to state the Postal Service ultimately failed to "point to some indication in the text or context of the statute that affirmatively shows Congress intended to include the Government."[223] This last sentence mixes textualism with purposivism.

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212 *SAS Inst.*, 584 U.S. at 362.

213 *Id.* at 363 (first citing Lexecon Inc. v. Milberg Weiss Bershad Hynes & Learch, 523 U.S. 26, 35 (1998); and then citing United States v. Gonzales, 520 U.S. 1, 5 (1997)).

214 *Id.* at 363.

215 *Id.* at 366.

216 *Id.* at 368.

217 587 U.S. 618 (2019).

218 *Id.* at 621.

219 35 U.S.C. § 311(a).

220 35 U.S.C. § 321(a).

221 *Return Mail*, 587 U.S. at 621.

222 *Id.* at 626.

223 *Id.* at 628–29.

In *Thryv, Inc. v. Click-To-Call Technologies, LP*,[224] the Court considered "a statutorily prescribed limitation of the issues a party may raise on appeal from an inter partes review proceeding."[225] In an opinion authored by Justice Ginsburg, the Court determined that the limitation in question, expressed at 35 U.S.C. § 314(d), does preclude appellate review of the timeliness of a request for inter partes review.[226] Section 314(d) states that "[t]he determination by the [Patent Office] Director whether to institute an inter partes review under this section shall be final and nonappealable."[227]

The Court interpreted this language, first, by analyzing its plain meaning. "That language," said the court, "indicates that a party generally cannot contend on appeal that the agency should have refused 'to institute an inter partes review.'"[228] After noting that in *Cuozzo* the Court refrained from answering the question presented in *Thryv*, the Court proceeded to address whether a challenge to the timeliness of a request for inter partes review "ranks as an appeal of the agency's decision 'to institute an inter partes review'" pursuant to the text of § 314(d).[229] The Court answered this question based on the text of § 314(d). Because the statutory provision related to timeliness "expressly governs institution and nothing more, a contention that a petition" was not timely "is a contention that the agency should have refused 'to institute an inter partes review.'"[230]

Under a textualist analysis, that would have been enough to justify the Court's conclusion in the case. But Justice Ginsburg went on to consider what she deemed to be the "AIA's purpose and design," finding they "strongly reinforce our conclusion."[231] Thus, while starting its analysis using textualist principles, the Court veered away from these principles toward a purposive approach.

* * *

Still, other cases highlight a textualist approach by the Supreme Court in interpreting the patent statute during the past decade.

In *Life Technologies Corp. v. Promega Corp.*,[232] for example, the Court analyzed "whether 35 U.S.C. § 271(f)(2)'s requirement of 'a substantial portion' of the components of a patented invention refers to a quantitative

224 590 U.S. 45 (2020).

225 *Id.* at 47–48.

226 *Id.*

227 35 U.S.C. § 314(d).

228 *Thryv, Inc.*, 590 U.S. at 52.

229 *Id.* at 53.

230 *Id.* at 54.

231 *Id.*

232 580 U.S. 140 (2017).

or qualitative measurement."[233] In an opinion authored by Justice Sotomayor, the Court decided to "look first to the text of the statute."[234] Given that the "Patent Act itself does not define the term 'substantial,'" the Court "turn[ed] to its ordinary meaning" in isolation and found "little help."[235] In isolation, the Court found, the term "might refer to an important portion or to a large portion."[236] Citing dictionary definitions from the time of the enactment of the statutory language, the Court noted that "'[s]ubstantial,' as it is commonly understood, may refer either to qualitative importance or to quantitatively large size."[237] Ultimately, however, the Court determined that "[t]he context in which 'substantial' appears in the statute . . . points to a quantitative meaning here."[238]

The overarching point is that, in several opinions interpreting the patent statute, the Supreme Court applied basic principles of textualism. In short, it repeatedly looked for the original, ordinary meaning of terms used in various provisions of the patent statute.

B. *Atextualist Interpretations*

Other interpretations of the patent statute in the past ten years have veered away from textualism. These atextualist interpretations wholly contradict the tenets of textualism.

1. Various Statutory Provisions Related to Claiming, Infringement, the Right to Exclude, and Defenses

The following four cases highlight the Court's failure to apply textualism meaningfully to the patent statute.

First is an opinion drafted by Justice Ginsburg. In *Nautilus, Inc. v. Biosig Instruments, Inc.*,[239] the Court interpreted 35 U.S.C. § 112, ¶ 2, the statutory provision dictating "that a patent specification 'conclude with one or more claims *particularly pointing out and distinctly claiming* the

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233 *Id.* at 146.

234 *Id.* (citing Sebelius v. Cloer, 569 U.S. 369, 376 (2013)).

235 *Id.*

236 *Id.*

237 *Id.*

238 *Life Techs.*, 580 U.S. at 146. Another example also relates to the interpretation of 35 U.S.C. § 271, *Commil USA, LLC v. Cisco Sys., Inc.*, 575 U.S. 632, 642 (2015). There the Court, in an opinion by Justice Kennedy, answered the question "whether a defendant's belief regarding patent validity is a defense to a claim of induced infringement" based on the text of § 271(b) and its context in the patent statute. *Id.* at 642–43. Other examples include *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, 580 U.S. 328 (2017), and *Peter v. NantKwest, Inc.*, 589 U.S. 23 (2019).

239 572 U.S. 898 (2014).

subject matter which the applicant regards as [the] invention.'"[240] The Court rejected the Federal Circuit's interpretation of this provision, but this time based primarily on the Court's own understanding of the relevant "concerns" it identified rather than on the text of that provision.[241]

In reviewing the history of the statutory language, the Court seemingly sought to identify the relevant timeframe to govern its analysis. The Court, in particular, noted that "[t]he 1870 [Patent] Act's definiteness requirement survives today, largely unaltered."[242] But later, in determining the correct interpretation of that language, the Court resolved the interpretive question based on its own views of how to resolve the "competing concerns" it identified.[243] Indeed, the Court stated, "To determine the proper office of the definiteness command, . . . we must reconcile concerns that tug in opposite directions."[244] And then, "[c]ognizant of the competing concerns," the Court "read § 112, ¶ 2 to require that a patent's claims, viewed in light of the specification and prosecution history, inform those skilled in the art about the scope of the invention with reasonable certainty."[245]

In *Limelight Networks, Inc. v. Akamai Technologies, Inc.*,[246] Justice Alito addressed the question "whether a defendant may be liable for inducing infringement of a patent under 35 U.S.C. § 271(b) when no one has directly infringed the patent under § 271(a) or any other statutory provision."[247] While the Court stated that "[t]he statutory text and structure and our prior case law require that we answer this question in the negative,"[248] its analysis strayed far from textualist principles. Without truly consulting the text of § 271(b), the Court simply pointed to its precedent.[249]

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240 *Id.* at 901 (alteration in original) (quoting 35 U.S.C. § 112, ¶ 2).

241 *Id.*

242 *Id.* at 902.

243 *See id.* at 909–10.

244 *Id.* at 910.

245 *Nautilus, Inc.*, 572 U.S. at 910.

246 572 U.S. 915 (2014).

247 *Id.* at 917.

248 *Id.*

249 *Id.* at 921 ("[O]ur case law leaves no doubt that inducement liability may arise 'if, but only if, [there is] direct infringement.'" (second alteration in original) (quoting Aro Mfg. Co. v. Convertible Top Replacement Co., 365 U.S. 336, 341 (1961))). The Court ventured even further away from textualism by rejecting an analogy to the federal aiding and abetting statute. *Id.* at 924–25. That statute, the Court noted, makes two parties who divide all the necessary elements of a crime between them both guilty of the crime. *Id.* at 925. The Court, however, concluded that it was "unlikely that Congress had this particular doctrine in mind when it enacted the Patent Act of 1952." *Id.*

Likewise, Chief Justice Roberts authored an opinion for the Court in *Impression Products, Inc. v. Lexmark International, Inc.*[250] that failed to apply textualist principles. The opinion begins by recognizing that the relevant statutory text, 35 U.S.C. § 154(a), states that a patent grants its owner for a limited time the right to "exclude others from making, using, offering for sale, or selling the invention throughout the United States or importing the invention into the United States."[251] Rather than attempt to understand the original meaning of this text, however, the Court relied upon a non-statutory doctrine—exhaustion—to conclude that a first authorized sale of a patented device eliminates the possibility of infringement.[252] Moreover, Chief Justice Roberts strangely chastised the lower court for believing that the question of the scope of patent exhaustion is answered by the statutory text.[253]

In *Minerva Surgical, Inc. v. Hologic, Inc.*,[254] Justice Kagan authored an opinion for the Court that, in part, interprets the subsection of the patent statute identifying defenses to claims of patent infringement.[255] Section 282(b) states that "[i]nvalidity" of a patent "shall be [a] defense[] in any action involving" infringement.[256] According to one of the parties, this language left no room for the doctrine of assignor estoppel, which, when established, would prevent an assignor of a patent from arguing invalidity in infringement litigation.[257] But the Court dismissed this argument, not by finding it would subvert the statutory language, but instead by finding "it would subvert congressional design."[258] Justice Barrett's dissent, joined by Justices Thomas and Gorsuch, took the majority to task by explaining that the statute "nowhere mentions the equitable doctrine of assignor estoppel" and, "[t]o the contrary, where the Act does address invalidity defenses, it states that invalidity 'shall' be a defense 'in any action involving the validity or infringement of a patent.'"[259]

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250 581 U.S. 360 (2017).

251 *Id.* at 366 (alteration in original) (internal quotation marks omitted) (quoting 35 U.S.C. § 154(a)).

252 *Id.* at 377.

253 *Id.* at 374 ("The Federal Circuit reached a different result largely because it got off on the wrong foot. The 'exhaustion doctrine,' the court believed, 'must be understood as an interpretation of' the infringement statute . . . .").

254 594 U.S. 559 (2021).

255 *Id.* at 571.

256 *Id.* (alterations in original) (internal quotation marks omitted) (quoting 35 U.S.C. § 282(b)).

257 *Id.*

258 *Id.* at 572.

259 *Id.* at 583 (Barrett, J., dissenting) (quoting 35 U.S.C. § 282(b)).

2. Statutory Provision Related to Eligibility

The most significant departures from textualism in patent cases in the last ten years, however, come in two cases interpreting the statutory provision governing patent eligibility, which states: "Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title."[260] The two cases are *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*[261] and *Alice Corp. v. CLS Bank International*.[262]

The Court's analysis in *Myriad* rightly begins with the relevant statutory text.[263] But the analysis quickly diverges from any version of textualism. In the next breath, relying upon the Court's most recent precedent, the opinion states "[w]e have 'long held that this provision contains an important implicit exception[:] Laws of nature, natural phenomena, and abstract ideas are not patentable.'"[264] By "implicit," the Court seemingly admitted that this supposed exception is not expressly written in the text of the provision.

Likewise, the Court's analysis in *Alice* rightly begins with the relevant statutory text.[265] But, again, the analysis quickly diverges from any version of textualism. The opinion in *Alice* relies upon *Myriad* for the "implicit exception" for "laws of nature, natural phenomena, and abstract ideas." But, beyond this reliance on a non-statutory exception, the Court's opinion in *Alice* diverges much further from the tenets of textualism.

The Court, notably relying upon the same recent precedent relied upon in *Myriad*, announced that it would utilize "a framework for distinguishing patents that claim laws of nature, natural phenomena, and abstract ideas from those that claim patent-eligible applications of those concepts."[266] Rather than simply use the test set forth in the statute—asking whether the inventor has claimed a "process, machine, manufacture, or composition of matter, or any new and useful improvement thereof"—the Court instead asked "whether the claims at issue are directed to one of those patent-ineligible concepts" and, if so, "whether the additional elements 'transform the nature of the claim' into a patent-eligible application."[267] The Court described this second part of

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[260] 35 U.S.C. § 101.

[261] 569 U.S. 576 (2013); *see id.* at 589.

[262] 573 U.S. 208 (2014); *see id.* at 216.

[263] *Myriad Genetics*, 569 U.S. at 589 (quoting 35 U.S.C. § 101).

[264] *Id.* (second alteration in original) (quoting Mayo Collaborative Servs. v. Prometheus Lab'ys, Inc., 566 U.S. 66, 70 (2012)).

[265] *Alice Corp.*, 573 U.S. at 216 (quoting 35 U.S.C. § 101).

[266] *Id.* at 217.

[267] *Id.* at 216–17 (quoting *Mayo Collaborative*, 566 U.S. at 79).

its test as "a search for an 'inventive concept'—*i.e.,* an element or combination of elements that is 'sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the [ineligible concept] itself.'"[268]

Notably, while Justice Thomas authored both opinions for the Court in *Myriad* and *Alice*, the source of the atextualism in these opinions is Justice Breyer's opinion for the Court just a few years earlier in *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*,[269] the Court's most recent precedent on point. Justice Breyer's opinion for the Court in *Mayo* takes a textualist approach—at least for its first two sentences. The opinion begins by stating that "Section 101 of the Patent Act defines patentable subject matter."[270] It then quotes the full text of the statutory provision: "Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title."[271] From there, however, the text of the statute takes a backseat to the Court's (not Congress's) historical and current view of what should not be eligible for patenting.

After stating "[t]he Court has long held that this [statutory] provision contains an important implicit exception,"[272] which, as discussed above, seemingly admits that this supposed exception is not present expressly in the text of the provision, the opinion lists certain exclusions. The problem is not so much the exclusions themselves, given that some (many?) might be justified by a close analysis of the statutory text, but rather the expressed justifications for these exclusions. The Court does not rely on the statutory language; rather, it justifies these exclusions based on the Court declaring (in the past) that the exclusions represent "the basic tools of scientific and technological work."[273] Continuing its justification, the Court decided (in this case) that "monopolization of those tools through the grant of a patent might tend to impede innovation more than it would tend to promote it."[274] This reasoning represents a downhill, slippery slope constructed entirely of judge-made eligibility law.

Justice Breyer continues with policy-based (non-textualist) reasons to support why, in his opinion, some things are and are not eligible for patenting. For example, he explains that "a process is not unpatentable

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[268] *Id.* at 217–18 (alteration in original) (internal quotation marks omitted) (quoting *Mayo Collaborative*, 566 U.S. at 72–73).

[269] 566 U.S. 66 (2012).

[270] *Id.* at 70.

[271] *Id.* (quoting 35 U.S.C. § 101).

[272] *Id.*

[273] *Id.* at 71 (quoting Gottschalk v. Benson, 409 U.S. 63, 67 (1972)).

[274] *Id.*

simply because it contains a law of nature or a mathematical algorithm."[275] Indeed, the statute—quoted in the second sentence of his opinion—states that a "process" *is* eligible.[276] But, rather than refer to the statutory text, the opinion recites a statement by Justice Harlan Stone that "a novel and useful structure created with the aid of knowledge of scientific truth may be" eligible for patenting.[277] Why consult Justice Stone? The statute, besides reciting "process," identifies as eligible for patenting a "machine" or "manufacture," and a "structure" would likely fit into the original, ordinary meaning of "manufacture."[278]

Given that the statute lists a "process" as a patent-eligible subject matter, one might have thought that Justice Breyer was joking when he denied protection to patent claims that "cover[] *processes* that help doctors who use thiopurine drugs to treat patients with autoimmune diseases determine whether a given dosage level is too low or too high."[279] If the claims cover processes, and processes are listed in the governing statute, then the analysis is complete. Yet, Justice Breyer's slippery slope remains. As if in a sleight of hand or twist of fate, he proceeds to ignore the statutory language and analyze the claims within the three-part exclusion the Court identified along with the Court-announced justifications for the exclusion. He concluded that "the processes are not patentable"[280]—an ironic way of concluding given that the statute states "[w]hoever invents or discovers any new and useful *process* . . . may obtain a patent therefor."[281]

At least Justice Breyer did not hide his disregard for the statutory language. He indicated quite clearly that, rather than compare the claim language to the categories of eligible subject matter identified in the statute, the Court's conclusion "rests upon an examination of the particular claims before us in light of the Court's precedents."[282] Unflinchingly, Justice Breyer proceeds to describe those precedents as articulating policy-based (non-statutory) considerations for the Court to use to determine eligibility:

> Those cases warn us against interpreting patent statutes in ways that make patent eligibility "depend simply on the draftsman's art" without reference to the "principles underlying the prohibition against patents for [natural laws]." They warn us against upholding patents that claim processes that too broadly pre-empt the use of a natural law.

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275 *Mayo*, 566 U.S. at 71 (internal quotation marks omitted) (quoting Diamond v. Diehr, 450 U.S. 175, 187 (1981)).

276 *Id.* at 70 (quoting 35 U.S.C. § 101).

277 *Id.* at 71–72 (quoting *Diehr*, 450 U.S. at 188).

278 *Id.* at 70 (citing 35 U.S.C. § 101).

279 *Id.* at 72 (emphasis added).

280 *Id.*

281 35 U.S.C. § 101 (emphasis added).

282 *Mayo*, 566 U.S. at 72.

> And they insist that a process that focuses upon the use of a natural law also contain other elements or a combination of elements, sometimes referred to as an "inventive concept," sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the natural law itself.[283]

The Court reached its ultimate conclusion, that an "inventive concept" must be present for a claim to include eligible subject matter, without considering the original, ordinary meaning of the relevant language of § 101. There is no attempt to show that the language ("process, machine, manufacture, or composition of matter") means "inventive concept." In summing up the Court's conclusion, the Court again ironically highlighted its conclusion that "the claimed processes" are not processes at all.[284] As for why, Justice Breyer explained that the Court found "that the process claims at issue here do not satisfy" the conditions the Court derived from its precedent.[285] "In particular," the Court explained, "the steps in the claimed processes (apart from the natural laws themselves) involve well-understood, routine, conventional activity previously engaged in by researchers in the field."[286] There was no explanation how "well-understood, routine, conventional activity" cannot qualify as a "process."[287] Instead, the Court simply referred to its own view of the relevant policies, regardless of how Congress drafted the relevant statutory provision—"upholding the patents would risk disproportionately tying up the use of the underlying natural laws, inhibiting their use in the making of further discoveries."[288] The rest of the opinion evinces how the Court reached this conclusion: by applying the non-statutory considerations the Court identified in its precedent. In short, rather than apply the statutory language, the Court decided to apply its own view of the *purpose* of the statutory language.

Justice Breyer's failure in *Mayo* to embrace the text of § 101 to enforce Congress's decision about what ought to be eligible for patenting and instead to supplant that text with his own view of the purpose of the statutory scheme was not new. In the past, however, he expressed his approach more clearly as a purposive one. In particular, he dissented in another patent case addressing eligibility. In that case, *J.E.M. Ag Supply,*

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[283] *Id.* at 72–73 (alteration in original) (citations omitted) (first quoting Parker v. Flook, 437 U.S. 584, 593 (1978); then citing O'Reilly v. Morse, 56 U.S. 62, 112–20 (1853); then citing Gottschalk v. Benson, 409 U.S. 63, 71–72 (1972); and then quoting *Parker*, 437 U.S. at 594)).

[284] *See id.* at 73.

[285] *Id.*

[286] *Id.*

[287] *See id.* While the relevant statutory provision does recite "new" in describing what is eligible for patenting, the Court does not rely on that term to justify its search for something that is not well understood, routine, or conventional. For good reason: Congress defined patent law's novelty requirement in 35 U.S.C. § 102.

[288] *Mayo*, 566 U.S. at 73.

Inc. v. Pioneer Hi-Bred International, Inc.,[289] he expressed disagreement with the Court's holding that inventions in the field of plants are eligible for utility patents.[290] In his dissent, he made his purposivism explicit, stating that interpretive canons "are guides to help courts determine likely legislative intent."[291] "And," he continued, "that intent is critical."[292] As for why, he argued: "Those who write statutes seek to solve human problems. Fidelity to their aims requires us to approach an interpretive problem not as if it were a purely logical game, like a Rubik's Cube, but as an effort to divine the human intent that underlies the statute."[293] "[T]hat effort," he went on, "calls not for an appeal to canons, but for an analysis of language, structure, history, and *purpose*."[294] It was on this basis—the purpose he identified for the relevant statute—that he believed "the Utility Patent Statute does not apply to plants."[295]

Returning to Justice Breyer's opinion for the Court in *Mayo*, a textualist approach to the question in that case would have required explaining why the claimed processes are not actually "processes" under the statute—an admittedly difficult task. Justice Breyer, however, as shown, is no textualist. He relies upon no textualist analysis. That, however, is not surprising given, for example, *J.E.M. Ag Supply*. The absence of any textualist analysis reflects Justice Breyer's purposive approach to interpreting statutory provisions. Why, however, Justices Scalia and Thomas signed on to his opinion in *Mayo* is left unexplained.[296] Justices Scalia and Thomas for some reason did not hold the Court to apply textualism in this context, and they did not draft their own opinions explaining why.

Still, Justice Breyer is not wholly responsible for the current state of the law governing patent eligibility and its failure to reflect textualism. The precedent relied upon by Justice Breyer in *Mayo* also failed to utilize textualism. Indeed, Justice Breyer's purposive approach to statutory interpretation aligns with prior cases (not authored by Justice Breyer) addressing the doctrine of patent eligibility.

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289 534 U.S. 124 (2001).

290 *Id.* at 156 (Breyer, J., dissenting).

291 *Id.*

292 *Id.*

293 *Id.*

294 *Id.* (emphasis added).

295 *J.E.M. Ag Supply*, 534 U.S. at 156 (Breyer, J., dissenting).

296 Neither Justice Scalia nor Justice Thomas filed an opinion in *Mayo*. Justice Thomas, however, authored the majority opinions in *Myriad* and *Alice*, both of which were issued after *Mayo*. Notably, neither of those opinions provide any explanation of how any textualist principles support the test for patent eligibility created by Justice Breyer in *Mayo*.

Take, for example, *Diamond v. Chakrabarty*,[297] a patent eligibility case decided by the Court in 1980.[298] In that case, the Court recognized the separation of powers between Congress and the courts as the primary justification for the Court to interpret the language Congress employed.[299] "Congress, not the courts, must define the limits of patentability," explained the Court.[300] And once Congress has done so, the Court performs its constitutional role by "construing the language Congress has employed."[301] But after noting these foundational principles, the Court left the door open for a purposive approach to interpretation. The Court stated, "our obligation is to take statutes as we find them, guided, if ambiguity appears, by the legislative history and statutory purpose."[302] Note this reference both to legislative history and statutory purpose, key aspects of a purposive approach to statutory interpretation. The Court then identified the relevant purpose in the context of patent eligibility, quoting the Constitution's Intellectual Property Clause, as "the constitutional and statutory goal of promoting 'the Progress of Science and the useful Arts.'"[303]

For another example, consider *Bilski v. Kappos*,[304] another patent eligibility case decided by the Court more recently (2010).[305] In terms of applying textualism, the Supreme Court half-baked the cake. At times it applied textualist principles, but at other times it drew ideas about the purpose of the statute from the Court's precedent.

As to the former, consider that the Court drew from *Diamond v. Chakrabarty* the point that, "[i]n choosing such expansive terms . . . modified by the comprehensive 'any,' Congress plainly contemplated that the patent laws would be given wide scope."[306] But then in the very next sentence, the Court drew from the same precedent the idea that the correct interpretation of the statutory text depends on identifying the purpose of the statute: "Congress took this permissive approach to patent eligibility to ensure that 'ingenuity should receive a liberal

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297 447 U.S. 303 (1980).

298 *Id.* at 305.

299 *See id.* at 315.

300 *Id.*

301 *Id.*

302 *Id.*

303 *Chakrabarty*, 447 U.S. at 315. Strangely, the Court "perceive[d] no ambiguity" in the statute, but only because "[b]road general language is not necessarily ambiguous when congressional objectives require broad terms." *Id.* As a result, by its own terms, arguably the "legislative history and statutory purpose" should not have guided the interpretation of the statutory eligibility provision. *Id.*

304 561 U.S. 593 (2010).

305 *Id.* at 593.

306 *Id.* at 601 (internal quotation marks omitted) (quoting *Chakrabarty*, 447 U.S. at 308).

encouragement.'"[307] Likewise, later in the opinion the Court discusses how "[t]he term 'method,' which is within [35 U.S.C.] § 100(b)'s definition of 'process,' at least as a textual matter and before consulting other limitations in the Patent Act and this Court's precedents, may include at least some methods of doing business."[308] Again later, the Court highlighted how it was "unaware of any argument that the 'ordinary, contemporary, common meaning' of 'method' excludes business methods."[309] It also recognized how "[t]he argument that business methods are categorically outside of § 101's scope is further undermined by the fact that federal law explicitly contemplates the existence of at least some business method patents" in other statutory provisions, including 35 U.S.C. § 273(b)(1).[310] So far as these points go, so far, so textualist.

But then the Court later explains how, "[e]ven though petitioners' [patent] application is not categorically outside of § 101 under the two broad and atextual approaches the Court rejects today, that does not mean it is a 'process' under § 101."[311] What followed was another example of the Court's use of its precedent to identify non-textualist limitations on patent eligibility based on the concept of "attempt[ing] to patent abstract ideas."[312] It is this latter identification of a non-statutory exception to patent eligibility—and in this respect the Court's failure to provide any interpretation of the relevant statutory language—that required the Supreme Court to grant three more petitions on the same subject of patent eligibility in the next four years.[313] To be clear, this mess was not because of the Court's use of textualism. It was the Court's reliance on conflicting, atextual precedent to interpret the statutory provision governing patent eligibility.

Highlighting the failure of the Court to utilize textualism from *Bilski*, to *Mayo*, and, in turn, *Myriad* and *Alice*, requires this Article to engage the only prior scholarship addressing the same topic, viz, the use of textualism to interpret the patent statute. The Supreme Court's *partial* reliance on the statutory language of the Patent Act to decide eligibility in *Bilski* drew criticism from Professor Jonathan Siegal. He argued that in *Bilski*, "[t]he Supreme Court . . . provided an excellent example of its radical shift in the direction of naïve textualism in the field of patent law."[314] But, as shown,

[307] *Id.* (internal quotation marks omitted) (quoting *Chakrabarty*, 447 U.S. at 308–09).

[308] *Id.* at 607.

[309] *Id.* (citation omitted) (quoting Diamond v. Diehr, 450 U.S. 175, 182 (1981)).

[310] *Bilski*, 561 U.S. at 607.

[311] *Id.* at 609.

[312] *Id.*

[313] *See* Mayo Collaborative Servs. v. Prometheus Lab'ys, Inc., 566 U.S. 66, 72 (2012); Ass'n for Molecular Pathology v. Myriad Genetics, Inc., 569 U.S. 576, 579–80 (2013); Alice Corp. v. CLS Bank Int'l, 573 U.S. 208, 212 (2014).

[314] Siegel, *Naïve Textualism*, *supra* note 12, at 1020.

the Court in *Bilski* only partially relied upon textualist principles to decide the case. Indeed, Professor Siegal appears to take issue with *any* use of textualism by the Court.

Notably, outside of his criticism of the Court's analysis in *Bilski*, Professor Siegal has criticized textualism quite vociferously, for example, celebrating what he viewed as the "rejection of the textualist ideal."[315] While he gave faint praise to Justice Scalia for "call[ing] attention to intentionalist and purposivist excesses," Professor Siegal ultimately has taken the position that "the rest of the federal judiciary was right to reject [Justice Scalia's] call for adoption of the textualist ideal."[316] While a picture tells a thousand words, sometimes a short phrase likewise says a lot. In this regard, note that Professor Siegal has stated that the "text is usually the law, but not always."[317] But he then goes on to make his lack of support for textualism clear when he outs himself as a purposivist: "[N]either is a court to employ interpretive techniques so exacting that they destroy the legislative plan."[318] For Professor Siegal, it is the legislative plan he identifies that is most important, not the language Congress uses.

Returning to Professor Siegal's criticism of *Bilski*, he rails against *any* use by the Supreme Court of the actual, enacted statutory language of the Patent Act. For example, he (falsely) argues that "the Supreme Court looked to little more than the dictionary in deciding fundamentally important questions under the patent statute."[319] Even if this were true (it is not, as shown below), Professor Siegel appears to object to any use of the statutory language. Apparently, reference to the original, ordinary meaning of the text Congress used in the patent statute is the problem. It is, in his words, "naïve."[320] Returning to reality, it was the Court's reliance on non-textualist precedent (1) in *Bilski* to identify a search for an "abstract idea" and (2) in *Mayo* and *Alice* to focus on the quest for an "inventive concept" that, as it turns out, created significant confusion in patent eligibility law.[321]

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315 Jonathan R. Siegel, *The Legacy of Justice Scalia and His Textualist Ideal*, 85 GEO. WASH. L. REV. 857, 920–21 (2017).

316 *Id.*

317 *Id.* at 921. One cannot help but notice how thin the veneer of support for the importance of statutory text is in his statement that "statutory text plays a vital role in statutory interpretation." *Id.* at 920.

318 *Id.*

319 Siegel, *Naïve Textualism*, *supra* note 12, at 1020.

320 *Id.*

321 For more details about how *Mayo* and *Alice* both reflect and create confusion in the context of patent eligibility law, see generally David O. Taylor, *Confusing Patent Eligibility*, 84 TENN. L. REV. 157, 178–86 (2016).

C. *Ramifications of Applying Textualism to the Patent Statute*

As this Article has demonstrated, despite the Supreme Court's general turn toward textualism, not all of the patent statute has been interpreted consistently with textualism. The Court's failure to use textualism has been most prominently true in the context of patent eligibility. So, what would the result be if the Court applied textualism more seriously in interpreting the patent statute?

It might be hard to argue (Justice Breyer didn't even try) that a claimed process is not a statutory process. And if, indeed, a process is a process, then, at least on this basis, *Mayo* was wrong, and eligibility extends more broadly—for example, to methods (processes) of diagnosing disease and methods (processes) of treating patients. In other words, eligibility under the current statutory provision would be broader under textualism.

Broader eligibility would provide significant benefits to society. For example, a survey of investors illuminates how the Supreme Court's narrow interpretation of the patent statute's eligibility provision "reduced venture capital and private equity investment in technological development generally, but particularly in the biotechnology, medical device, and pharmaceutical industries."[322] The "major takeaway" of this particular study includes the likelihood of "lost investment in the life sciences that has delayed or altogether prevented the development of medicines and medical procedures."[323]

More importantly—regardless of whether one views expanded eligibility as an advance—embracing textualism would return political power to the President and Congress to decide as a matter of policy what inventions and discoveries should be eligible for patenting. Ironically, the Supreme Court has repeatedly recognized this ideal. Outside the context of patent eligibility, for example, the Court stated:

> Within the limits of the constitutional grant, the Congress may, of course, implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim. This is but a corollary to the grant to Congress of any Article I power. Within the scope established by the Constitution, Congress may set out conditions and tests for patentability.[324]

But even within the context of eligibility, the Court has made similar pronouncements about the role of Congress in deciding the extent of the availability of patents. Indeed, other Supreme Court opinions clearly make the case that eligibility law is a question of policy appropriately directed to Congress.

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[322] David O. Taylor, *Patent Eligibility and Investment*, 41 CARDOZO L. REV. 2019, 2094 (2020).

[323] *Id.*

[324] Graham v. John Deere Co., 383 U.S. 1, 6 (1966) (citation omitted).

In *Gottschalk v. Benson*,[325] for example, the Court indicated that "considerable problems are raised" by the idea of patent eligibility for computer programs.[326] The solution, however, would be for Congress to investigate and answer questions that "only committees of Congress can manage, for broad powers of investigation are needed, including hearings which canvass the wide variety of views which those operating in this field entertain."[327] Thus, the Court stated that "considered action by the Congress is needed."[328] Similarly, in *Parker v. Flook*,[329] the Court stated that "[d]ifficult questions of policy concerning the kinds of programs that may be appropriate for patent protection . . . can be answered by Congress on the basis of current empirical data not equally available to this tribunal."[330] More recently, in *Mayo* itself, the Court highlighted how it is "the role of Congress in crafting more finely tailored rules where necessary" such that the Court did not need to "determine here whether, from a policy perspective, increased protection for discoveries of diagnostic laws of nature is desirable."[331] A textualist approach to interpreting the statutory provision governing patent eligibility would return political power over the doctrine to the political branches of our government, starting with Congress.

But that's not all. The test for eligibility would be clearer. The test would turn on the original, ordinary meaning of the terms used by Congress in crafting the statutory text governing patent eligibility. As this Article has alluded, the problem that has plagued patent law since *Mayo* and *Alice* is largely the confusion resulting from the lack of clarity over what exactly is an "abstract idea" and, ultimately, an "inventive concept."[332] This confusion has resulted in numerous requests for the Supreme Court to provide more clarity on what exactly it meant when it used these terms to identify the test for eligibility. Indeed, the Supreme Court recently requested that the Solicitor General recommend whether the Court should grant certiorari in cases applying the test the Court identified in *Mayo* and *Alice.*[333]

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325 409 U.S. 63 (1972).

326 *Id.* at 73.

327 *Id.*

328 *Id.*

329 437 U.S. 584 (1978).

330 *Id.* at 595.

331 Mayo Collaborative Servs. v. Prometheus Lab'ys, Inc., 566 U.S. 66, 92 (2012).

332 *See supra* Section II.B.2.

333 *See* Petition for a Writ of Certiorari at i, Tropp v. Travel Sentry, Inc., 143 S. Ct. 2483 (2023) (mem.) (No. 22-22) (asking the Court to review the question of "[w]hether the claims at issue in Tropp's patents reciting physical rather than computer-processing steps are patent-eligible under 35 U.S.C. § 101, as interpreted in *Alice Corporation Pty v. CLS Bank International*"); Petition for a Writ of Certiorari at i, Interactive Wearables, LLC v. Polar Electro Oy, 143 S. Ct. 2482 (2023) (mem.) (No. 21-1281) (asking the Court to answer, among other questions: "What is the appropriate standard for

In short, the use of textualism to interpret the statutory provision governing patent eligibility would broaden eligibility, return political power over the doctrine to the political branches of our government, and provide clarity and predictability in determining patent eligibility.

Conclusion

Textualism is here to stay. Despite Justice Kagan's recent disavowal of her statement that all Supreme Court Justices are now textualists,[334] the Supreme Court shows no sign of turning away from this doctrine in its interpretation of statutes. Indeed, its use at the Supreme Court has only increased since Justice Scalia began defending this interpretive methodology thirty years ago.

In the field of patent law, while the Supreme Court has recently used textualism to interpret the patent statute, the most notable exception is its eligibility section, 35 U.S.C. § 101. Were the Supreme Court to apply textualism to the interpretation of its text, the result would be broader eligibility.

The Court has defended narrow eligibility based on policy. But whether broad eligibility is appropriate as a matter of policy is not a question textualism would address. Rather, that question would return to the political branches of our government, Congress and the President. Interestingly, that has long been the call of the Supreme Court in many of its past patent eligibility cases.[335] Moreover, applying textualism to the section of the Patent Act defining patent eligibility would restore certainty and predictability in the rights of patent owners and, in turn, the rights of those seeking to use patented technology. In short, applying textualism to the patent statute's eligibility provision would boost both the democratic legitimacy and function of the patent system.

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determining whether a patent claim is 'directed to' a patent-ineligible concept under step one of the Court's two-step framework for determining whether an invention is eligible for patenting under 35 U.S.C. § 101?"); Petition for Writ of Certiorari at i, Am. Axle & Mfg., Inc. v. Neapco Holdings LLC, 142 S. Ct. 2902 (2022) (mem.) (No. 20-891) (asking the Court to review the question: "What is the appropriate standard for determining whether a patent claim is 'directed to' a patent-ineligible concept under step 1 of the Court's two-step framework for determining whether an invention is eligible for patenting under 35 U.S.C. § 101?"). In each of these three cases, the Solicitor General recommended the Court grant certiorari. And, in each of these three cases, one of the justifications for granting certiorari is the confusion that exists over the Court's test for eligibility.

[334] West Virginia v. EPA, 597 U.S. 697, 779 (2022) (Kagan, J., dissenting) ("Some years ago, I remarked that '[w]e're all textualists now.' It seems I was wrong. The current Court is textualist only when being so suits it." (alteration in original) (citation omitted)).

[335] Graham v. John Deere Co., 383 U.S. 1, 6 (1966); Gottschalk v. Benson, 409 U.S. 63, 73 (1972); Parker v. Flook, 437 U.S. 584, 595 (1978); Mayo Collaborative Servs. v. Prometheus Lab'ys, Inc., 566 U.S. 66, 92 (2012).