

The Journal of Contemporary Legal Issues

Volume 23 | Issue 1

Article 15

12-16-2021

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Recommended Citation

Alexander, Larry (2021) "Formalist Textualism and the Cernauskas Problem," *The Journal of Contemporary Legal Issues*: Vol. 23: Iss. 1, Article 15.

Available at: <https://digital.sandiego.edu/jcli/vol23/iss1/15>

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Formalist Textualism and the *Cernauskas* Problem

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In a recent article, Tara Grove distinguishes between what she calls “formalist textualism” and “flexible textualism.”¹ Formalist textualism is really another term for literalism, in which statutory and constitutional language is given its semantic meaning—presumably its meaning at the time of enactment²—in its “semantic context.”³ Grove illustrates the latter by pointing out that the phrase “domestic violence” appears in a statute that also mentions “insurrection,” thus suggesting that domestic violence there refers to acts similar to insurrection rather than to spousal abuse.⁴

Flexible textualism, on the other hand, looks beyond the semantic meaning of the text and its semantic context to the text’s purpose and the assumptions and understandings of the enactors and the public at the time of enactment.⁵ To put it in terms I prefer, flexible textualists want to know what the text—or more precisely, the legislature whose text it is—is *asserting*. And what the text is asserting may be different from its semantic meaning.

Grove illustrates the distinction between formalist and flexible textualism by reference to the opinion in *Bostock v. Clayton County, Georgia*.⁶ The

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1. Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265 (2020).
2. *Id.* at 305.
3. *Id.* at 266.
4. *Id.* at 290.
5. *Id.* at 306.
6. 140 S. Ct. 1731 (2020).

question there was whether firing someone for engaging in homosexual acts counted as sex discrimination under Title VII of the 1964 Civil Rights Act, which proscribes “discrimination . . . because of such individual’s . . . sex.”⁷ The dissenters argued that it did not. They pointed out that no one in the Congress that enacted Title VII thought that it did, and Congress had subsequently repeatedly rejected attempts to add protection for homosexuals to Title VII.⁸ Thus, it was clear to the dissenters that Congress, through the language of Title VII, was not *asserting* that firing someone for engaging in homosexual acts was what was meant by sex discrimination.

Justice Gorsuch, however, writing for the majority, took a formalist (literalist) approach to the text. Gorsuch argued that if people are subjected to different treatment because of their sex, they have suffered sex discrimination in violation of Title VII.⁹ And if a male employee is fired for having sex with men, but a female employee would not be fired for having sex with men, then the male employee has been fired because he is male, which is sex discrimination.¹⁰

Justice Gorsuch was surely correct as a literal matter. Sanctioning gay employees or transgender employees does treat them worse than other employees because of their sex. And to conclude that no more need be shown to make out a Title VII violation is Grove’s formalist textualism in action.

Grove’s purpose, however, is not merely to describe and contrast Gorsuch’s formalist textualism with the dissenters’ flexible textualism. She has a dog in the fight. She believes courts should follow Gorsuch and employ formalist textualism. She argues that flexible textualism risks the Supreme Court’s sociological legitimacy because its very flexibility, as compared to the more algorithmic literalism of formalist textualism, may lead the public to believe the Court’s decisions are affected by political pressures or preferences.¹¹

Groves sees the so-called absurdity doctrine as a tool of the flexible textualism that she urges the Court to abandon. That doctrine dictates that when a literal reading of a text produces results so bizarre that one cannot assume the legislature could have intended them, that literal reading should be abandoned in favor of a reading that avoids those results. And if the object of textual interpretation is to discover what the legislature is asserting, then the absurdity doctrine furthers that object.

7. 42 U.S.C. § 2000e-2(a)(1).

8. See 140 S. Ct. at 1767-78 (Alito, J., dissenting).

9. 140 S. Ct. at 1740 (Gorsuch, J.)

10. *Id.* at 1740.

11. Grove, *supra* note 1, at 296-99.

Grove, however, is willing to abandon the absurdity doctrine and other adjuncts of flexible textualism, even if that means, *inter alia*, upholding Carol Bond's conviction for using a "chemical weapon" when she attempted to poison her husband's mistress,¹² or reversing the Court's decision in *King v. Burwell*¹³ that purchase of health insurance through the health insurance exchanges established by the federal government was entitled to the same tax credit that the Affordable Care Act made available to purchases "through an Exchange established by the State."¹⁴

My question is whether Grove or any other advocate of formalist textualism is willing to go the whole way with it. Grove shows she's ready to stomach reversing *Bond v. United States* and *King v. Burwell*, bitter pills though they may be. (I suspect *Bostock* was *not* a bitter pill.)

But let me introduce the little case of *Cernauskas v. Fletcher*.¹⁵ Jacob Cernauskas brought suit against Bishop Albert Fletcher to enjoin him from closing an alley abutting Fletcher's property. Fletcher relied on a law that Cernauskas claimed had been repealed by a recent statute, the repealing clause of which stated, "All laws and parts of laws . . . are hereby repealed." The court stated, undoubtedly correctly, that the legislature had merely wanted to repeal those laws that conflicted with the statute it was enacting, and that the necessary part of the repealing clause, "in conflict herewith," had been omitted inadvertently. In other words, the Arkansas court was employing Grove's flexible textualism.

But consider what result a formalist textualism would produce in *Cernauskas*. When the statute in question was enacted, it would thereby become the *only* law in the state of Arkansas, all other laws having been repealed. That's what the semantics of the repealing clause dictate; and there is nothing in their "semantic context" that suggests that "all laws . . . are hereby repealed" doesn't mean what it says. So until the legislature passes new laws, Arkansas would not have laws against murder, rape, robbery, and so on. And anyone who committed those and numerous other crimes in the period after the repealing clause went into effect would have an ex post facto law claim against their prosecution.

Now, if one is truly a formalist textualist, reversing *Cernauskas* is the really bitter pill one would need to swallow. But I think the Arkansas court

12. *Bond v. United States*, 572 U. S. 844 (2014).

13. 135 S. Ct. 2480 (2015).

14. *See* 26 U.S.C. § 36(b)(2)(a).

15. 211 Ark. 678, 201 S.W.2d 999 (1947).

got it right. Formalist textualism is, I submit, thoroughly wrongheaded. Ascertaining what legislatures are asserting through their texts can never be as algorithmic and free of fallible judgment calls as formalist textualism requires. And if one is tempted, like Grove, by the judgment-free allure of formalist textualism, just remember *Cernauskas*. That will make it easier to resist.