

WORDS AND THEIR MEANINGS: THE ROLE OF TEXTUALISM IN THE PROGRESSIVE TOOLBOX

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I. INTRODUCTION

Statutory interpretation is governed by a single, fundamental rule: “when the statute is clear, apply it.”¹ But this rule has not always been followed. Writing in 1997, the late Justice Antonin Scalia could find few extant treatises, and no law schools teaching courses, on statutory interpretation.² Yet a strong history of statutory interpretation existed within American jurisprudence. In 1958, Henry Hart and Albert Sacks’s

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² See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 14-15 (Amy Gutman ed. Princeton University Press New Edition 2018) (1997).

seminal work *The Legal Process* first appeared, offering an academically acceptable rule for interpretation:

The function of a court in interpreting a statute is to decide what meaning ought to be given to the directions of the statute in the respects relevant to the case before it...[This] does not say that the court's function is to ascertain the intention of the legislature with respect to the matter in issue.³

This idea, along with decisions in subsequent case law, has been seen as heralding the arrival of statutory interpretation.⁴

Early Supreme Court jurisprudence offered a focus on legislative "intent" as the primary means of statutory interpretation.⁵ In the 1980's, a formalist view of statutory interpretation began to appear, shepherded by intellectual heavyweights such as Justice Scalia and Judge Frank Easterbrook.⁶ This view, referred to as textualism, is equal parts philosophy and practice; it is based on the proposition that "judges must seek and abide by the public meaning of the enacted text, understood in context."⁷ Perhaps because its chief proponents sit on the bench rather than in the classroom, textualism has seeped into our case law from the United States Supreme Court on down.⁸

Because of the emphasis jurists such as Scalia, Easterbrook, and others, placed on textualism, it has gained a reputation as a politically conservative method of legal interpretation.⁹ Political Conservatives often cite a judge's tendency to adhere to a textualist approach as an important criteria for picking federal judges.¹⁰ Finally, politicians

³ The Harv. L. Rev. Ass'n, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 Harv. L. Rev. 892, 892-93 (1982).

⁴ *See id.* at 893-94.

⁵ *See, e.g.*, *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975) ("Our objective in a case such as this is to ascertain the congressional intent and give effect to the legislative will."); *U.S. v. Am. Trucking Ass'n's*, 310 U.S. 534, 542 (1940) ("In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress.").

⁶ John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 420 (2005).

⁷ *Id.* at 420.

⁸ *See, e.g.*, *W. Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991) ("As we have observed before, however, the purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone.... The best evidence of that purpose is the statutory text adopted by both Houses of Congress and submitted to the President."); *Guzman v. Denny's Inc.*, 40 F. Supp. 2d 930, 934 (S.D. Ohio 1999) ("All questions of statutory construction must start with the plain language of the text itself.").

⁹ *See Infra* Part III.

¹⁰ *See, e.g.*, Elizabeth Dias & Adam Liptak, *To Conservatives, Barrett Has 'Perfect Combination' of Attributes for Supreme Court*, N.Y. TIMES (Oct. 26, 2020),

describing their ideal jurist often pair textualism with originalism, furthering the notion that textualism is a politically conservative exegetical tool.¹¹

This Article argues that textualism is not merely a vehicle for Conservative judges to push an agenda, but rather a powerful tool in the progressive toolbox. Section II discusses some of the foundational ideas of textualism, including the use and meaning of words and how these ideas translate to statutory interpretation. Section III examines textualism's reputation as a conservative doctrine of statutory interpretation and argues that this reputation is a function of its application by Conservative judges rather than an inherent trait of textualism. Finally, Section IV argues that textualism has played an important role in court decisions that would be considered "progressive" and then contemplates certain scenarios in which a purely textualist approach necessitates an outcome consistent with progressive goals.

II. TEXTUALISM

A. TEXTUALISM

So what is textualism and why does it matter? There are many types of textualism, yet all share the same foundational premise that "the text of the law is the law."¹² One way to view textualism is as an ideological rejection of the judicial excesses of "legislative intent."

i. Legislative intent

"Legislative intent" has roots beyond American jurisprudence. Justice Scalia traces the notion at least as far back as William Blackstone.¹³ Evidence suggests that even older precedent exists in English law, with one Supreme Court case quoting Edward Coke: "Acts of parliament are to be so construed as no man that is innocent or free

<https://www.nytimes.com/2020/09/20/us/politics/supreme-court-barrett.html>;
Veronica Stracqualursi & Jim Acosta, *Trump on Supreme Court Nominee: 'It will be a woman'*, CNN (Sept. 19, 2020, 8:31 PM)
<https://www.cnn.com/2020/09/19/politics/trump-ruth-bader-ginsburg-vacant-seat-fill/index.html>.

¹¹ See Dias, *supra* note 10.

¹² Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2118 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)).

¹³ SCALIA, *supra* note 2, at 16 (citing SIR WILLIAM BLACKSTONE, *Commentaries on the Laws of England* 59-62, 91 (1765)).

from injury or wrong be, by a literal construction, punished or endangered.”¹⁴

The high-water mark for legislative intent is the case of *Church of the Holy Trinity v. United States*.¹⁵ This case involved a church in New York City contracting with an Englishman to come to the United States and serve as its rector, all in violation of a statute making it “unlawful for any person, company, partnership, or corporation, in any manner whatsoever . . . or in any way assist or encourage the importation or migration, of any alien or aliens, any foreigner or foreigners, into the United State . . . under contract or agreement . . . to perform labor or service of any kind in the United States.”¹⁶

It seems obvious that the acts of Holy Trinity Church clearly fall within the statute, yet the Court disagreed.¹⁷ In a central part of the Court’s ruling, Justice Brewer stated:

It must be conceded that the act of the corporation is within the letter of this section, for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other. Not only are the general words ‘labor’ and ‘service’ both used, but also, as it were to guard against any narrow interpretation and emphasize a breadth of meaning, to them is added ‘of any kind;’ and, further, as noticed by the circuit judge in his opinion, the fifth section, which makes specific exceptions, among them professional actors, artists, lecturers, singers, and domestic servants, strengthens the idea that every other kind of labor and service was intended to be reached by the first section. While there is great force to this reasoning, we cannot think congress intended to denounce with penalties a transaction like that in the present case. It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers.¹⁸

This passage encapsulates the Court’s placing of “intent” above the law itself. Still good law, *Holy Trinity* closed with a wholesale endorsement of departure from statutory text:

¹⁴ *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892).

¹⁵ *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892).

¹⁶ *Id.* at 457-58.

¹⁷ *Id.* at 458-59.

¹⁸ *Id.*

The construction invoked cannot be accepted as correct. It is a case where there was presented a definite evil, in view of which the legislature used general terms with the purpose of reaching all phases of that evil; and thereafter, unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the courts, under those circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute.¹⁹

The lasting effect of *Holy Trinity*, Justice Scalia wrote, is that “*Church of the Holy Trinity* is cited to us whenever counsel wants us to ignore the narrow, deadening text of the statute, and pay attention to the life-giving legislative intent. It is nothing but an invitation to judicial lawmaking.”²⁰

The chief criticisms of legislative intent are related and share one common factor: Congress. First, as Scalia suggests, relying on legislative intent opens the door to judicial lawmaking and encourages the court to usurp the law-making function of Congress. Separation of powers is a fundamental part of our system of government. “In this system what counts as law is texts enacted by two branches of the legislature and signed by the President (or enacted by supermajority over his veto), and these laws are effective on the date of their enactment until their repeal.”²¹ Bicameralism and presentment are two principles that form a bedrock of the democratic process in which the peoples’ elected representatives draft legislation, and their elected leader signs that legislation into law. Legislative intent, on the other hand, invites unelected, unaccountable judges to legislate from the bench as they see fit.

The second criticism of legislative intent relates to the idea of Congress having any single, discernable intent in the first place. As Justice Scalia wrote, “the quest for the ‘genuine’ legislative intent is probably a wild-goose chase.”²² Congress has two branches, the House

¹⁹ *Id.* at 472.

²⁰ SCALIA, *supra* note 2, at 21.

²¹ Frank Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1119 (1998); U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”).

²² Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L. J. 511, 517 (1989).

of Representatives and the Senate, which together consist of 535 members. Each member has their own interests and motivations, making the existence of a collective intent to pass a piece of legislation impossible.²³ Furthermore, the idea of legislative intent requires an inquirer to set aside reason and ignore the influence of interest groups,²⁴ while also turning a blind eye to the reality that many legislators do not read every bill on which they vote.²⁵ One need merely tune in to CSPAN to be disabused of the notion of legislative intent.

ii. Textualism

If legislative intent is unreliable, there must be some other means of interpreting the meaning of a statute. Determining the proper method of statutory interpretation depends on the goals of the interpreter. Textualism, as Judge Easterbrook defines it, has five goals: (1) to give understandable commands; (2) to confine judges; (3) to empower Congress; (4) to constrain Congress; and (5) to improve the substance of rules.²⁶

A legal system should give understandable commands that can be consistently interpreted.²⁷ This requires simplicity. A system of laws that courts can consistently interpret confines judges in the sense that it produces predictable results and honors the democratic system of legislation.²⁸ This, in turn, empowers Congress by letting it alone make the rules.²⁹ At the same time, the system constrains Congress through

²³ See, e.g., Frank H. Easterbrook, *Some Tasks in Understanding Law Through the Lens of Public Choice*, 12 INT'L REV. L. & ECON. 284, 284 (1992) (“[T]he concept of ‘an’ intent for a person is fictive and for an institution hilarious. A hunt for this snipe liberates the interpreter, who can attribute to the drafters whatever ‘intent’ serves purposes derived by other means.”); Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 547 (1983) (“Because legislatures comprise many members, they do not have ‘intents’ or ‘designs,’ hidden yet discoverable.”).

²⁴ See William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest Group Perspective*, 18 J. L. & ECON. 875, 877 (1975) (arguing that interest groups “purchase” legislation using “campaign contributions, votes, implicit promises of future favors, and sometimes outright bribes.”).

²⁵ SCALIA, *supra* note 2, at 32 (“In earlier days, when Congress had a smaller staff and enacted less legislation, it might have been possible to believe that a significant number of senators or representatives were present for the floor debate, or read the committee reports, and actually voted on the basis of what they heard or read. Those days, if they ever existed, are long gone.”).

²⁶ Easterbrook, *supra* note 1, at 63-64.

²⁷ Easterbrook, *supra* note 1, at 63.

²⁸ Easterbrook, *supra* note 1, at 63 (“[Judges] are supposed to be faithful agents, not independent principals. Having a wide field to play—not only the statute but also the debates, not only the rules but also the values they advance, and so on—liberates judges.”).

²⁹ Easterbrook, *supra* note 1, at 63

the requirements of bicameralism, presentment, and publication of the laws, all of which drag law making out into the public view.³⁰

Improving the substance of the law—one goal of textualism—is somewhat at odds with the other goals of textualism stated by Judge Easterbrook. Improving the substance of laws “can be accomplished only by the strategy of defining ends and seeking them, a strategy that costs us dearly in ability to achieve the principal objectives.”³¹ Generally, however, substance is within the realm of the legislature.³²

On a theoretical level, textualism rejects legislative history and intent while labeling both “an unreliable proxy for the intentions of a whole legislative body.”³³ Instead, textualism seeks a method of interpretation that supplies simple rules that facilitate consistent outcomes, while stifling judicial activism. At its core, textualism is about predictable results emanating from democratically created statutes.

B. WORDS AND THEIR MEANINGS

Setting theory aside, what does textualism mean in a practical sense? First, it should be stated that textualism is not necessarily “literalism.” Neither is it strict-constructionism, which Justice Scalia describes as “a degraded form of textualism that brings the whole philosophy into disrepute.”³⁴ Similarly, some argue that the concept of the “plain meaning” of words holds no sway in a textualist analysis.³⁵ And yet, words are at the very heart of a textualist approach to statutory interpretation.

The philosophy of language, especially the work of Ludwig Wittgenstein, holds that words possess no intrinsic meanings, nor can intrinsic meanings be given to words.³⁶ In fact, Wittgenstein states that speakers do not even have determinative intents about the meanings of their own words.³⁷ So if words have no intrinsic meanings, and speakers

³⁰ Easterbrook, *supra* note 1, at 63-64.

³¹ Easterbrook, *supra* note 1, at 64.

³² Easterbrook, *supra* note 1, at 64.

³³ Eliot T. Tracz, *Discrimination and the Limits of Textualism*, 6 IND. J. L. AND SOC. EQUALITY 33, 37 (2018).

³⁴ SCALIA, *supra* note 2, at 23-24.

³⁵ Easterbrook, *supra* note 1, at 67 (“‘Plain meaning’ as a way to understand language is silly. In interesting cases, meaning is not “plain”; it must be imputed; and the choice among meanings must have a footing more solid than a dictionary—which is a museum of words, an historical catalog rather than a means to decode the work of legislatures.”).

³⁶ LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS*, §§ 138-242 (G.E.M. Anscombe trans.) (1953).

³⁷ *Id.* at 53-56.

have no determinative intent as to meaning, from where do words derive their meanings? Justice Oliver Wendell Holmes, Jr., writing well before the advent of textualism, provides a possible answer to this question by stating that “we ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used.”³⁸

What Holmes is talking about, and what textualism considers, is context. But consideration of context is not enough to get us to a satisfactory system of statutory interpretation. What do words mean within the context of the statute? The answer to this question depends wholly upon the interpretive community seeking to provide an answer. When that interpretive community is a court, a new set of questions arises: is it a court of general jurisdiction or specific jurisdiction, which is to ask, are the members of the court generalists or specialists? Trial court judges — both state and federal — tend to be generalists in need of a simple and reliable approach to statutory interpretation, whereas specialists—for example judges in tax, admiralty, or bankruptcy courts—may benefit from more nuanced approaches to interpretation.³⁹

But, back to context. Assume for the purposes of this Article that we have determined our interpretive community to consist of generalist judges (and their equally generalist law clerks). How should a generalist judge approach statutory interpretation? A good place to start is “with contextual evidence that goes to customary usage and habits of speech.”⁴⁰ This may include terms of art, or specialized conventions and linguistic practices peculiar to law.⁴¹ Through these considerations, the words of the text derive their meaning and the statute becomes accessible for interpretation.

How does this work in practice? Consider an enhancement statute that aggravates a drug trafficking offense if a gun or silencer is “used” in the commission of the offense. Now consider a scenario where John Doe offers to trade his MAC-10 and silencer for two ounces of cocaine during an attempted drug transaction. Is the trade of a gun a “use” within the meaning of the statute? The Supreme Court thought so, finding that the pairing of the terms “uses...a firearm” with “during and in relation to” a

³⁸ Oliver Wendell Holmes, Jr., *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 417-18 (1899).

³⁹ Easterbrook, *supra* note 1, at 69-70.

⁴⁰ John F. Manning, *What Divides Textualists from Purposivists*, 106 COLUM. L. REV. 70, 92 (2006).

⁴¹ *Id.* at 80-82.

drug trafficking crime encompasses a gun-for-drugs trade.⁴² Context is key.

C. CANONS OF CONSTRUCTION- WHAT HAPPENS WHEN THE TEXT IS VAGUE?

So what happens when the language of the text is ambiguous, or the application of the text would lead to an absurd or unconstitutional outcome? Most textualists would agree that in these scenarios it becomes acceptable to look outside the statute to determine its purpose. One widely accepted outside source is legislative history, but this Article has already addressed the shortcomings of that approach. Another widely used approach is to use canons of construction.

Canons of construction are rules particular to the legal community that serve as “off-the-rack provisions that spare legislators the costs of anticipating all possible interpretive problems and legislating solutions for them.”⁴³ Put another way, canons of construction are rules of interpretation that the courts use to determine the meaning of statutes. Canons of construction have long been linked to textualism.⁴⁴

Opinions on canons of construction are mixed. Karl Llewellyn was skeptical about canons, writing that “there are two opposing canons on almost every point.”⁴⁵ He elaborated on this point, creating a list of canons arranged into two categories: “thrust” and “parry.”⁴⁶ Llewellyn further argued that “to make any canon take hold in a particular sense, the construction must be sold, essentially by means other than the use of the canon.”⁴⁷

Justice Scalia took issue with Llewellyn’s list, arguing that “if one examines the list, it becomes apparent that there really are not two opposite canons on ‘almost every point’ — unless one enshrines as a canon whatever vapid statement has ever been made by a willful, law bending judge.”⁴⁸ Scalia argued that some of Llewellyn’s “generally accepted” canons are not, in fact, generally accepted, such as the canon stating: “To effect its purpose a statute may be implemented beyond its text.”⁴⁹ For the most part, however, Scalia mainly argues that

⁴² *Smith v. United States*, 508 U.S. 223, 232 (1993).

⁴³ Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 540 (1983).

⁴⁴ SCALIA, *supra* note 2, at 27.

⁴⁵ Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1949).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ SCALIA, *supra* note 2, at 26.

⁴⁹ SCALIA, *supra* note 2, at 26.

Llewellyn's "Parry" canons do not actually contradict their opposing canon, but "merely show that it is not absolute."⁵⁰

The canons of construction certainly have their issues. For those inclined to favor the use of canons, there are many to choose from. It has been estimated that the U.S. Supreme Court follows as many as 187 different canons.⁵¹ "No canon of interpretation is absolute. Each may be overcome by the strength of differing principles in other directions."⁵² The superabundance of available canons can lead to absurdity even within the confines of a single case. Consider *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*.⁵³

Babbitt involved a section of the Endangered Species Act of 1973 (ESA) that made it unlawful for any person to "take any such species within the United States or the territorial sea of the United States."⁵⁴ The ESA defines "take" to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."⁵⁵ A Department of the Interior regulation further defined "harm" to mean "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering."⁵⁶

The respondents in *Babbitt* were a group of landowners, logging companies, and families who brought a declaratory judgment action against the Department of the Interior challenging the Department's regulation that added the definition of "harm."⁵⁷ Respondents offered three arguments: (1) the Senate considered similar language but deleted it from the bill; (2) Congress intended the ESA express authorization for the Federal Government to buy private land to act as a means to prevent habitat degradation as an exclusive check against habitat modification; and (3) because the Senate added the term "harm" to the definition of "take" in a floor amendment without debate, the court should not

⁵⁰ SCALIA, *supra* note 2, at 26.

⁵¹ William N. Eskridge, Jr., *Reading Law: The Interpretation of Legal Texts* by Antonin Scalia and Bryan A. Garner, 113 COLUM. L. REV. 531, 541 (2013).

⁵² ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXT* 59 (2012).

⁵³ *Babbitt v. Sweet Home Chapter of Comtys. for a Great Or.*, 515 U.S. 687 (1995).

⁵⁴ *Id.* at 691; 16 U.S.C. §1538(a)(1)(B).

⁵⁵ 16 U.S.C. §1532(19).

⁵⁶ 50 C.F.R. § 17.3 (2006).

⁵⁷ *Babbitt*, 515 U.S. at 692.

interpret the term expansively.⁵⁸ A District Court judge entered summary judgment and dismissed the complaint.⁵⁹

The Court of Appeals affirmed, but after a rehearing, the panel reversed the District Court basing its reasoning on the canon of construction called *noscitur a sociis*, which means that a word is known by the company it keeps.⁶⁰ The United State Supreme Court granted certiorari and reversed the Court of Appeals.⁶¹ Justice Stevens delivered the majority opinion, while Justice Scalia wrote for the dissent.⁶² The result was a battle of the canons, with the Justices invoking over a dozen canons of construction between the two of them.⁶³

Babbitt represents one of the problems with canons of construction: with so many cherries, how does one decide which one to pick? There is no canon for selecting canons. Perhaps it is this abundance of canons without any system for selection that led Professor Eskridge to describe the selection of canons in *Babbitt* as “[j]ust as if he was picking out friends from the crowd at a cocktail party, each Justice picked out friendly canons from the crowd of applicable rules and principles.”⁶⁴

Professors Abbe R. Gluck and Lisa Schultz Bressman have discovered yet another wrinkle in the use of canons for statutory construction. In a survey of congressional counsel tasked with drafting legislation, Gluck and Bressman found that respondents widely consider some specific canons such as: 1) the *expressio unius* canon (the inclusion of specific terms or exceptions indicates an intent to exclude terms or exceptions not included), 2) *noscitur a sociis* (construe ambiguous terms in a list in reference to other terms in the list), and 3) *eiusdem generis* (construe general, often catch-all, terms in a list in reference to other, more specific, terms in a list).⁶⁵ Respondents generally rejected other

⁵⁸ *Id.* at 693.

⁵⁹ *Id.* at 693-94

⁶⁰ *Id.* at 694.

⁶¹ *Id.* at 695.

⁶² *Id.* at 690, 714.

⁶³ Eskridge, *supra* note 51, at 547. Professor Eskridge lists some of the canons relied on by each Justice: Justice Stevens: Interpretive direction canon, ordinary meaning for definitional term canon, surplusage canon, presumption against ineffectiveness, whole text canon. Justice Scalia: Ordinary meaning canon, canon of imputed common-law meaning, associated words canon, presumption against ineffectiveness caveat, rule of lenity, whole text canon, whole text canon, presumption of consistent usage, material variation canon.

⁶⁴ Eskridge, *supra* note 51, at 547.

⁶⁵ See Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 *Stan. L. Rev.* 901, 930-33 (2013).

canons such as the rule against superfluities and the presumption of consistent usage.⁶⁶ With over 50% responding that dictionaries are never or rarely used, the survey showed that the use of dictionaries was particularly reviled, one respondent noting Scalia's specific use of dictionaries, saying "Scalia is a bright guy, but no one uses a freaking dictionary."⁶⁷

If drafters of legislation often disregard canons, it is natural to wonder whether canons are truly helpful to courts interpreting statutes. And even if one were to concede that canons are helpful, there is still a need to address how a judge selects the right canon for a statute rather than the right canon for the judge's preferred outcome. If the goal is judicial restraint, then canons of construction seem to undermine rather assist this goal. This concern brings us back to textualism.

D. SOME CRITICISMS

Like any theory or system of interpretation, textualism has its flaws. One widely accepted limit of textualism is a case where enforcing the unambiguous language of the statute would lead to an absurd result.⁶⁸ An example is §1 of the Sherman Antitrust Act: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."⁶⁹ On its face this is an unambiguous statute, yet, in practice, "every contract is a restraint of trade."⁷⁰ Clearly it would be absurd to find every contract to be a violation of the Sherman Act.

Another limitation of textualism exists in cases where a textualist approach to interpreting the unambiguous text would result in an unjust or unconstitutional outcome. This is particularly true in voting rights cases. In *N.C. State Conference of the NAACP v. McCrory*,⁷¹ North Carolina had enacted a law — Session Law 2013-381⁷² — that imposed a number of voting restrictions including invalidating certain types of ID,⁷³ reducing early voting from seventeen days to ten days,⁷⁴ eliminating

⁶⁶ *Id.* at 933-37.

⁶⁷ *Id.* at 938. Gluck and Bressman also note how researchers have found that between 2000 and 2010, the U.S. Supreme Court used dictionaries in 225 opinions, while in the 1960s, the Court only used dictionaries sixteen times.

⁶⁸ Tracz, *supra* note 33, at 39.

⁶⁹ 15 U.S.C. §1 (2004).

⁷⁰ *National Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 98 (1984).

⁷¹ 831 F.3d 204 (4th Cir. 2016).

⁷² 2013 N.C. Sess. Laws 381.

⁷³ *Id.* § 2.1; *McCrory*, 831 F.3d at 216.

⁷⁴ *McCrory*, 831 F.3d at 216.

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same day registration,⁷⁵ eliminating out of precinct voting,⁷⁶ and eliminating preregistration that would allow sixteen and seventeen year olds obtaining driver's licenses to identify themselves and indicate their intent to vote.⁷⁷

Session Law 2013-381 was challenged under § 2 of the Voting Rights Act, which, at the time, read:

No voting qualifications or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial abridgment of the right of any citizen of the United States to vote on account of race or color....⁷⁸

On its face, nothing about Session Law 2013-381 seems to violate § 2, and in fact the District Court entered judgment against the plaintiffs, finding no discrimination or discriminatory intent.⁷⁹ Looking past the text of the law, however, it seems clear that its voting restrictions were intended to adversely impact certain classes of voters. Ultimately the Fourth Circuit reversed the decision, but this case demonstrates the limits of textualism when facing sophisticated drafting used to mask nefarious intent.⁸⁰

III. TEXTUALISM AS BIG “C” OR LITTLE “C” CONSERVATIVE

Textualism has a reputation as a “Conservative” doctrine. It is true that textualism has been advocated by Conservatives, both on the bench and in academia. Indeed, a list of jurists who embrace a textualist approach to statutory interpretation would read like a Who's Who of Conservative jurists — Justices Antonin Scalia, Clarence Thomas, Neil Gorsuch, Brett Kavanaugh, and Circuit Judge Frank Easterbrook — who have not only adopted textualism as means of statutory interpretation, but have also endorsed textualism in an academic sense.⁸¹

⁷⁵ *Id.* at 217.

⁷⁶ *Id.*

⁷⁷ *Id.* at 217-18.

⁷⁸ 52 U.S.C. § 10301(a) (2012) (formerly 42 U.S.C. § 1973(a)).

⁷⁹ *McCrary*, 831 F.3d at 219.

⁸⁰ *Tracz*, *supra* note 33, at 42-43.

⁸¹ *See, e.g.,* SCALIA, *supra* note 2; NEIL GORSUCH, *A REPUBLIC, IF YOU CAN KEEP IT* (2019); Brett Kavanaugh, *Fixing Statutory Interpretation*, *Judging Statutes* 129 HARV. L. REV. 2118

As a political tool, Conservative politicians have seized onto “textualist” as a buzzword for “Conservatism” in the selection of Donald Trump’s judicial nominees.⁸² Big “C” Conservatives sell the idea of “textualism” as a means of limiting judicial activism.⁸³ Many of the most recent Conservative members of the Supreme Court — Scalia, Thomas, Alito, Gorsuch, and at times Kavanaugh — have adhered to the idea of textualism.⁸⁴ Some scholars have speculated that Conservative judges have used the inherently narrowing nature of textualism as a means to prevent Congress from achieving its underlying goals.⁸⁵ In this sense, textualism would appear to be Conservative with a “C”: a doctrine to be applied to keep the liberal congressional agenda at bay.

The term “conservative,” however, may have different meanings. There is a second argument to be made that textualism is a conservative doctrine, but this argument paints textualism as small “c” conservative. Here, conservative could be defined not as a political ideology, but rather using its dictionary definition: (1) preservative; (2) moderate, cautious.⁸⁶ Small “c” conservative textualism preserves a statute (or constitutional clause) by limiting its reading to the text alone. As Justice Gorsuch has described it, “Textualism honors only what’s survived bicameralism and presentment- and not what hasn’t. The text of the statute and only the text becomes law.”⁸⁷ In this way, small “c” textualism narrowly confines judges; their political preferences and

(2016) (book review); Frank Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533 (1983).

⁸² See Jimmy Hoover, *Bold New Bench: How Trump’s Judges are Changing the Law*, Law360, (Sept. 10, 2019) <https://www.law360.com/articles/1196504/how-trump-s-judges-are-changing-the-law>.

⁸³ See Easterbrook, *supra* note 1, at 63-64.

⁸⁴ See *supra* note 81. See also Nancie Marzulla, *The Textualism of Clarence Thomas: Anchoring the Supreme Court’s Property Rights Jurisprudence to the Constitution*, 10 AM. U. J. GENDER SOC’L POL’Y & L. 351 (2002).

⁸⁵ Scott A. Moss, *Judges’ Varied Views on Textualism: The Roberts-Alito Schism and the Similar District Judge Divergence That Undercuts the Widely Assumed Textualism-Ideology Correlation*, 88 U. COLO. L. REV. 1, 22 (2017) (citing Glen Staszewski, *Textualism and the Executive Branch*, 2009 MICH. ST. L. REV. 143, 183 n.178 (2009)). See also Simon Lazarus, *Stripping the Gears of National Government: Justice Stevens’s Stand Against Judicial Subversion of Progressive Laws and Lawmaking*, 106 NW. U. L. REV. 769, 786 (2012) (“[I]n the great majority of cases in which the challenge is to choose among plausible alternative interpretations of nondefinitive statutory words, . . . the practical effect of the rigidities of contemporary conservatives’ textualist doctrine is to deny judges the most commonsense options for resolving ambiguities—thoughtful analysis of reliable indicia of purpose and legislative history materials generally.”).

⁸⁶ *Conservatism*, THE MERRIAM-WEBSTER DICTIONARY 154 (2004) (There is an additional definition, “disposed to maintain existing views, conditions, or institutions,” which perhaps better defines big “C” Conservatism.).

⁸⁷ GORSUCH, *supra* note 81, at 132.

ideals about the intent of a statute must be thrust aside in favor of the text. Sometimes the result is an outcome that big “C” Conservatives oppose.

The *Slaughter-House Cases*⁸⁸ represent one example of the small “c” conservative nature of textualism actually expanding the coverage of a statute.⁸⁹ In that case, Justice Miller wrote:

We do not say that no one else but the negro can share in this protection [of the 13th, 14th, and 15th Amendments]. Both the language and spirit of these articles are to have their fair and just weight in any question of construction. Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void. And so if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent.⁹⁰

This is an example of the Supreme Court interpreting “every person” to mean “every person” and in the process extending the coverage of three Constitutional amendments beyond their intended beneficiaries.

A more recent example is *Bostock v. Clayton County, Georgia*.⁹¹ This case featured the interpretation of a statute, the Civil Rights Act of 1964, rather than the Constitution, but textualism still played a role in expanding coverage.⁹² In *Bostock*, each of the plaintiffs had been fired for being gay or transgender.⁹³ In turn, each had brought suit under Title VII alleging sex-based discrimination.⁹⁴ Writing for the majority, Justice Gorsuch—one of those big “C” Conservatives — wrote:

⁸⁸ *Slaughter-House Cases*, 83 U.S. 36 (1872).

⁸⁹ *Id.*

⁹⁰ *Id.* at 72.

⁹¹ *Bostock v. Clayton Cty.*, 140 S.Ct. 1731 (2020).

⁹² *Id.* at 1743 (“At bottom, these cases involve no more than the straightforward application of legal terms with plain and settled meanings. For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex. That has always been prohibited by Title VII’s plain terms—and that ‘should be the end of the analysis.’”) (internal citations omitted)).

⁹³ *Id.* at 1737-38.

⁹⁴ *Id.* at 1738 (citing 42 U.S.C. §2000e-2(a)(1)).

Discrimination sometimes involves “the act, practice, or an instance of discriminating categorically rather than individually.” Webster’s New Collegiate Dictionary 326 (1975); see also *post*, at ---- - ----, n. 22 (ALITO, J., dissenting). On that understanding, the statute would require us to consider the employer’s treatment of groups rather than individuals, to see how a policy affects one sex as a whole versus the other as a whole. That idea holds some intuitive appeal too. Maybe the law concerns itself simply with ensuring that employers don’t treat women generally less favorably than they do men. So how can we tell which sense, individual or group, “discriminate” carries in Title VII?

The statute answers that question directly. It tells us three times—including immediately after the words “discriminate against”—that our focus should be on individuals, not groups: Employers may not “fail or refuse to hire or . . . discharge any *individual*, or otherwise . . . discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual’s* . . . sex.” § 2000e-2(a)(1) (emphasis added). And the meaning of “individual” was as uncontroversial in 1964 as it is today: “A particular being as distinguished from a class, species, or collection.” Webster’s New International Dictionary, at 1267. Here, again, Congress could have written the law differently. It might have said that “it shall be an unlawful employment practice to prefer one sex to the other in hiring, firing, or the terms or conditions of employment.” It might have said that there should be no “sex discrimination,” perhaps implying a focus on differential treatment between the two sexes as groups. More narrowly still, it could have forbidden only “sexist policies” against women as a class. But, once again, that is not the law we have.⁹⁵

In making this finding, Gorsuch’s adherence to the plain language of the text enabled the individual employees to seek, and receive, recompense.⁹⁶

It should be clear that narrow readings of operative words or phrases do not necessarily lead to outcomes consistent with the policy goals of political Conservatives. Even those big “C” Conservative judges,

⁹⁵ *Id.* at 1740-41.

⁹⁶ *Id.* at 1741-43.

when applying textualism in a non-ideological manner, reach conclusions that may be considered progressive. It may be the case then, that textualism is often classified as a big “C” Conservative doctrine not because of the outcomes it generates, but rather because its most vocal proponents are political and ideological Conservatives.⁹⁷

An additional, often undiscussed, fact that supports the idea of small “c” conservative textualism has to do with the use of textualism by the various states themselves. As Professor Linda Jellum points out, while the Congress of the United States has not adopted statutes detailing how courts should interpret statutes, some state legislatures have.⁹⁸ This includes states across the political spectrum.⁹⁹

In sum, there is evidence to support the claim that textualism is a big “C” Conservative doctrine. At the same time, however, there is evidence from the courts and the state legislatures that textualism is more of a small “c” conservative doctrine. If textualism is indeed a small “c” conservative doctrine, occupied entirely with judicial restraint rather than support for a political agenda, then it is possible that textualism may be of value to political moderates or progressives as well.

IV. TEXTUALISM AS A PROGRESSIVE TOOL

If textualism is an approach that is more accurately described as small “c” conservative than big “C” conservative, how is it an effective tool for Progressives? Progressive can be defined as “one believing in moderate political change and especially social improvement by governmental action,”¹⁰⁰ although some might argue that political Progressives are anything but “moderate.” It may seem counterintuitive that a doctrine which is “preservative” and “moderate or cautious” may be useful in pursuing Progressive goals, but the reality is that textualism has played a role in advancing Progressive goals and has a role to play in the future.

⁹⁷ See Paul Killebrew, *Where are all the Left-Wing Textualists?*, 82 N.Y.U. L. REV. 1852, 1900 (2007).

⁹⁸ LINDA D. JELLUM, *MASTERING STATUTORY INTERPRETATION* 33 (2013).

⁹⁹ See *e.g.*, Conn.Gen. Stat. Ann. § 1-2z; Colo. Rev. Stat. § 2-4-203; Haw. Rev. Stat. Ann. § 1-15; Iowa Code Ann. § 4.6; N.D. Cent. Code § 1-02-39; Ohio Rev. Code Ann. § 1.49; 1 Pa. ons. Stat. § 1921(b).

¹⁰⁰ *Progressive*, THE MERRIAM-WEBSTER DICTIONARY 154 (2004).

A. PAST EXAMPLES OF TEXTUALISM HELPING A PROGRESSIVE AGENDA

One Progressive victory in which textualism played a major role was *King v. Burwell*,¹⁰¹ the famous Obamacare case, authored by a big “C” Conservative Supreme Court Justice who would not readily be identified as a textualist.¹⁰² In *King*, the plaintiff challenged Section 36B of the Patient Protection and Affordable Care Act questioning whether the Act’s tax credits are available in States that have a Federal Exchange.¹⁰³ Writing for the majority, Chief Justice John Roberts quietly affirmed the Supreme Court’s commitment to textualism, saying “[i]f the statutory language is plain, we must enforce it according to its terms.”¹⁰⁴ Roberts also stated that when deciding whether the language is plain, the court must look at the words both in their context and at their place within the statutory scheme.¹⁰⁵

Finding the text of the Act to be ambiguous, Roberts turned to the structure of the Act for clarity, arguing that “[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.”¹⁰⁶ The language used by Roberts is a rephrasing of one of the most important canons of construction relied on by textualists: the whole-text canon. The whole-text canon calls on the interpreter to consider the entirety of the text in light of its structure and the “physical and logical relation of its many parts.”¹⁰⁷

In the end, Roberts’ reliance on the whole-text cannon resulted in a finding that “Section 36B allows tax credits for insurance purchased on any Exchange created under the Act.”¹⁰⁸ Textualism delivered a big win for Progressives in a case that could have easily swung the other way based on the ideology of the Supreme Court’s members. While *King* is certainly not the only case in which textualism led to an outcome favored by Progressives, it is, along with *Bostock*, one of the most high profile.

¹⁰¹ *King v. Burwell*, 576 U.S. 473, (2015).

¹⁰² *Id.*

¹⁰³ *Id.* at 478.

¹⁰⁴ *Id.* at 486 (citing *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010)).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 492 (citing *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 371 (1988)).

¹⁰⁷ SCALIA & GARNER, *supra* note 52, at 167.

¹⁰⁸ *King*, 576 U.S. at 498.

B. FUTURE AREAS WHERE TEXTUALISM CAN SUPPORT PROGRESSIVE

Some areas where Progressive attorneys and judges should be looking to apply textualism are obvious: commonsense gun laws, voting access, and qualified immunity. While there are other areas in which textualism can be applied towards progressive ends, these three are hot-button issues at the moment. This Article considers gun reform and qualified immunity in closer detail.

i. Commonsense Gun Reform

Various states' ability to pass commonsense gun control legislation was dealt a severe blow when the United States Supreme Court handed down its decision in *District of Columbia v. Heller*.¹⁰⁹ Scholar Cass Sunstein has described *Heller* as "the most explicitly and self-consciously originalist opinion in the history of the Supreme Court."¹¹⁰ The majority opinion — authored by arch-textualist, Big "C" Conservative Justice Scalia — certainly deserves that reputation; but how does it hold up under a text-based analysis?

The text of the Second Amendment is well known: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."¹¹¹ The District of Columbia had, in practice, banned the possession of handguns; the carrying of an unregistered firearm had been outlawed, but it was not possible to register a handgun.¹¹² Richard Heller was a police officer who applied for, and was denied, a registration certificate for a handgun that he wished to keep in his home.¹¹³

At the very outset of the case, Justice Scalia rejected the idea that the phrase "[a] well-regulated Militia, being necessary to the security of a free State," had any value.¹¹⁴ He then proceeded to an "analysis" of the text by breaking it up in to two smaller clauses: (1) "the right of the people" and (2) "keep and bear arms."¹¹⁵ In defining "the right of the people," Justice Scalia—without the support of any precedent—appeared to find an implied individual right, rather than a right inherent to a class of individuals.¹¹⁶ In interpreting the phrase "keep and bear

¹⁰⁹ *District of Columbia v. Heller*, 554 U.S. 570 (2008).

¹¹⁰ Cass Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 246 (2008).

¹¹¹ U.S. CONST. amend. 2.

¹¹² *Heller*, 554 U.S. at 574-75.

¹¹³ *Id.* at 575.

¹¹⁴ *Id.* at 578.

¹¹⁵ *Id.* at 579-92.

¹¹⁶ *Id.* at 579-81.

arms,” Justice Scalia turned to dictionaries in order to reach a definition—which is admittedly a fair definition—but then he proceeds to argue that the phrase “keep and bear arms” does not relate to military service.¹¹⁷

Textualism—indeed Justice Scalia’s own textualism—necessarily leads to a different interpretive outcome. Indeed, in trying to reach a Conservative-friendly outcome, Justice Scalia abandoned many of the rules of interpretation that he would later, with the assistance of Bryan Garner, slap together in a book and make available to the public for purchase.¹¹⁸ A textualist reading of the Second Amendment should have proceeded differently.

A court addressing a challenge based on the Second Amendment should proceed with the understanding that the text of the law is the law.¹¹⁹ There are no outside sources—whether dictionaries, memoirs, or legislative history—that alter the meaning of the text. If the text is unambiguous, the court should simply stop with the text.

But suppose that the text of the Second Amendment was found to be ambiguous; what then? Here the canons of construction come into play. First, a court might consider the prefatory-materials canon. This canon acknowledges that a prefatory clause sets forth “the assumed facts and the purposes that the majority of the enacting legislature . . . had in mind, and these can shed light on the operative provisions that follow.”¹²⁰ Alternatively, Justice Joseph Story wrote that “the preamble of a statute is a key to open the mind of the makers, as to the mischiefs, which are to be remedied, and the objects, which are to be accomplished by the provisions of the statute.”¹²¹ Scalia’s outcome in *Heller* was dependent upon rejecting the prefatory-materials canon, because if the right to keep and bear arms is related to militia service, the argument for an implied individual right evaporates.

Even if Justice Scalia were correct in eschewing the prefatory-materials canon, he should still have had to contend with the whole-text canon. As Scalia and Garner wrote, when the whole-text canon is properly applied, “it typically establishes that only one of the possible meanings that a word or phrase can bear is compatible with the use of the same word or phrase elsewhere in the statute....”¹²² This makes it

¹¹⁷ *Id.* at 581-92.

¹¹⁸ See generally SCALIA & GARNER, *supra* note 52.

¹¹⁹ Kavanaugh, *supra* note 12, at 2118.

¹²⁰ SCALIA & GARNER, *supra* note 52, at 218.

¹²¹ 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §459, at 326 (2d ed. 1858).

¹²² SCALIA & GARNER, *supra* note 52, at 168.

difficult to establish “the people” as referencing individuals rather than as referencing a class, especially considering that the Supreme Court has written that:

“[T]he people” seems to have been a term of art employed in select parts of the Constitution [Its uses] suggest[] that “the people” protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.¹²³

Scalia, of course referenced this very case (in which he was in the majority) in *Heller*, before claiming that this reading of “the people” was inconsistent with the meaning of “militia”.¹²⁴

Scalia also ignored the negative-implication canon, which states that “the expression of one thing implies the exclusion of others” (expression unius est exclusion alterius).¹²⁵ As Scalia and Garner wrote, “[c]ontext establishes the conditions for applying the canon, but where those conditions exist, the principle that specification of the one implies exclusion of the other validly describes how people express themselves and understand verbal expression.”¹²⁶ Because the Second Amendment’s prefatory material includes a reference to the militia, but the entire amendment is silent about a private right to own firearms—whether for self-defense or any other reason—it is reasonable to conclude that the Second Amendment does not provide an individual right to gun ownership.

While *Heller* currently stands as a roadblock to commonsense gun reform, it will be challenged in the courts. When called to account, *Heller*’s reasoning is visibly contrived and partisan. Textualism provides an argument rooted in the text of the Second Amendment, and drawing upon accepted principles of interpretation, that inevitably leads to the conclusion that the Second Amendment does not provide a private right to gun ownership. That is not to say that there is no Constitutional right to own a gun (maybe it is one of those enigmatic Ninth Amendment rights), only that such a right does not reside in the Second Amendment.

¹²³ United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990).

¹²⁴ *Heller*, 554 U.S. at 580.

¹²⁵ SCALIA & GARNER, *supra* note 52, at 107.

¹²⁶ SCALIA & GARNER, *supra* note 52, at 107.

If the Second Amendment does not provide such a right, then the Second Amendment cannot restrict regulations on private gun ownership.

ii. Qualified Immunity

Following a disturbing number of high-profile police killings, the issue of qualified immunity has become a recent hot-topic of conversation. Federal law provides a means for bringing suit against government officials who have deprived an individual of their rights:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.¹²⁷

Qualified immunity, however, protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known[.]" thereby precluding suit in the first place.¹²⁸

The United States Supreme Court has embraced qualified immunity as a doctrine that offers protection for "all but the plainly incompetent or those who knowingly violate the law."¹²⁹ The Court has described its purpose as:

The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including "avoidance of disruptive discovery." There are serious and legitimate reasons for this. If a Government official is to devote time to

¹²⁷ Civil Action for Deprivation of Rights, 42 U.S.C. § 1983 (2020).

¹²⁸ Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

¹²⁹ Malley v. Briggs, 475 U.S. 335, 341 (1986).

his or her duties, and to the formulation of sound and responsible policies, it is counterproductive to require the substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed. Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government.¹³⁰

An extensive study by Joanna Schwarz shows a lack of evidence supporting the Supreme Court's reasoning.¹³¹

Regardless of the purposes the Supreme Court may envision qualified immunity serving, an analysis of the text of §1983 supports dismantling the doctrine of qualified immunity. The statute is clear about who is liable, and under what circumstances that liability arises.¹³² It is undisputed that police officers fall within the purview of § 1983. The statute also carves out a single exception for judicial officers' actions or omissions taken in a judicial capacity, where injunctive relief cannot be granted unless a declaratory decree were violated, or if declaratory relief was unavailable.¹³³

There does not appear to be an ambiguity in the text of § 1983, and so it should be applied as written. After all, a statute's "purpose must be derived from the text."¹³⁴ This leaves no place for qualified immunity within the law related to § 1983. But what if a court were to find that §1983 was ambiguous? Would qualified immunity be justifiable if such a finding were made?

The statute does not include any exemptions outside of judicial officers. Nor does § 1983—or, for that matter, any related section—include any affirmative defenses. The negative-implication canon, which states that the expression of one thing implies the exclusion of others, would lead to the conclusion that expression of an exception for judicial officers means that law enforcement officers were excluded intentionally from extra protection.¹³⁵ Even if the text of § 1983 were

¹³⁰ *Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009) (quoting *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in judgment)).

¹³¹ See generally Joanna C. Schwarz, *How Qualified Immunity Fails*, 127 *YALE L. J.* 2, 12 (2017).

¹³² 42 U.S.C. § 1983.

¹³³ *Id.*

¹³⁴ SCALIA & GARNER, *supra* note 52, at 56.

¹³⁵ SCALIA & GARNER, *supra* note 52, at 56.

ambiguous, qualified immunity is incompatible with § 1983 because explicit exceptions exist within the text.

V. CONCLUSION

Textualism has long enjoyed a reputation as a doctrine used by politically Conservative judges to reach politically Conservative outcomes. It is certainly true that many of textualism's greatest advocates and scholars have been politically Conservative jurists such as Justice Scalia and Judge Easterbrook. At the same time, as a doctrine of Constitutional and statutory interpretation textualism opens doors for Progressive lawyers and jurists to attack court-created doctrines that are inconsistent with the text of the law. While this Article names several areas in which textualism is a valuable tool for Progressives—gun control, qualified immunity, and voting rights—the list of areas where textualist-leaning Progressives could reshape law includes several vital fields: immigration, health care, criminal justice reform, campaign finance. If textualism can help Progressives reshape the law, why not adopt it?