

Textualism as an Equality Practice?

Katie Eyer*

Does textualism promote or protect equality? Several prominent textualist scholars and jurists have raised the possibility that textualism may serve equality values. And yet the role of textualism in protecting equality remains largely unexplored. This Article takes seriously the claim that textualism may promote equality: either as an absolute matter, or in comparison to other statutory interpretation methods. It asks: Can textualism be conceptualized as an equality practice, i.e., an interpretive practice that protects or promotes equality?

This Article answers this question with a qualified “yes.” Textualism can promote equality before the law, a thin form of equality often associated with the rule of law. Moreover, this thin form of equality can help to promote thicker forms of equality, by preventing the gerrymandering of disfavored groups out of rights protections, and of favored groups out of burdensome laws. This thin form of legal equality can also further substantive equality by preventing the judicial hobbling of legislative gains secured especially by or for historically marginalized groups (such as civil rights laws, public benefits laws, or immigration laws protecting migrants).

But this Article also cautions that the equality-promoting potential of textualism is qualified. Only certain forms of textualism—what other scholars have referred to as “formalistic” textualism—are likely to be sufficiently constraining to create meaningful protections for equality. Moreover, even applying formalistic textualism, there will surely be circumstances where textualism confronts true indeterminacy or even cuts against substantively equality-promoting results. Finally, legal realism poses a genuine challenge to

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claims that any interpretive theory can meaningfully constrain judicial preferences, and thus to any theory's claims of equality-promoting potential.

Nonetheless, this Article suggests that it is worth identifying equality as a nascent value of textualism, and theorizing the implications of textualism's equality-promoting potential. For those who self-identify as textualists—a group that includes a majority of the current Justices on the Supreme Court—understanding equality as one of the values that textualism protects has important methodological implications. Even for those who oppose textualism, consideration of the equality risks of non-textualist methodologies may help avoid the equality harms to which non-formalist methodologies may be susceptible. Finally, this Article argues that the rise of authoritarianism and disregard of legal constraints under the Second Trump administration makes it more, not less urgent to ensure that thin (and thus thick) equality are protected by rigorous and consistent adherence to statutory text.

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I worry, too, what these theories do to our commitment to equality. If a statute’s meaning isn’t determined by value-neutral rules seeking to enforce its written terms, who stands to benefit? Despite some popular belief, judges are only human. The more leeway a judge is given, the more likely the judge will engage, consciously or not, in motivated reasoning or bias in reaching a result. And it should come as little surprise if this bias will often harm minorities and disfavored groups, given that judges are, by and large, drawn from the majority or more powerful groups in society. The increase in flexibility gained by these theories comes with increased risks to equality. So if you think you might want judges to enact into law hidden legislative intentions or social policy, I ask you this. What happens when they come for you?

— Justice Neil Gorsuch, *A Republic, If You Can Keep It*¹

Introduction

Does textualism promote or protect equality?² For over two decades, important voices within the textualism literature have suggested that it does. Most notably, leading textualist scholar Professor John Manning articulated the view as far back as 2003 that textualism may uniquely protect the rights of “political and other minorities”—and that it can (and ought to) protect equality by preventing judicially created exceptions for the “powerful or politically favored interests.”³ Writing in 2019, Justice Neil Gorsuch echoed

1. NEIL GORSUCH WITH JANE NITZE & DAVID FEDER, *A REPUBLIC, IF YOU CAN KEEP IT* 139 (2019).

2. This Article addresses textualism as an interpretive theory, i.e., judicial fidelity to legal text. Although textualism and originalism are often conflated, textualism is a different interpretive theory than originalism, which is defined by fidelity to history. *See, e.g.*, Katie Eyer, *Disentangling Textualism and Originalism*, 13 *CONLAWNOW* 115, 115 (2022) (distinguishing textualism from originalism), <https://ideaexchange.uakron.edu/cgi/viewcontent.cgi?article=1138&context=conlawnow> [<https://perma.cc/3USG-GBAS>]; Frederick Schauer, *Unoriginal Textualism*, 90 *GEO. WASH. L. REV.* 825, 825 (2022) (same).

3. *See* John F. Manning, *The Absurdity Doctrine*, 116 *HARV. L. REV.* 2387, 2392, 2437 (2003) [hereinafter Manning, *Absurdity*] (explaining how the absurdity doctrine departs from textualism and undermines the rights of “political and other minorities” in favor of the powerful); *see also* John

and expanded on these sentiments, arguing that textualism best promotes equality, because “[e]veryone gets the benefit of the written law’s terms” from “[t]he least powerful among us” to “the most powerful.”⁴

Nevertheless, textualism’s equality-promoting potential has remained largely undertheorized in the legal literature. No scholar has undertaken to fully interrogate the question of whether textualism may serve equality values.⁵ And equality is *not* typically mentioned as among textualism’s core benefits—or among its important theoretical considerations.⁶ This Article

F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1314 (2010) [hereinafter Manning, *Second-Generation*] (directly arguing that textualism protects the interests of political minorities); John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1701–02 (2004) (making a similar argument in the context of constitutional amendments). Professor Manning is making a somewhat different point from my arguments here—his focus is more on the ways in which textualism’s respect for *specificity* in the level of generality protects concessions extracted by political and other minorities in our counter-majoritarian political process. See Manning, *Absurdity*, *supra* at 2392, 2437–38. However, the general points he makes—that textualism is unique among statutory interpretation methodologies in respecting the level of generality at which the law is written and protects minorities—is very much consistent with the arguments I make herein.

4. See GORSUCH, *supra* note 1, at 125, 139 (discussing equal application of the law in the context of originalism, but defining originalism in terms of equal adherence to text).

5. As described above, both Professor John Manning and Justice Neil Gorsuch have articulated the view that textualism may promote or protect equality, and I build upon their observations in this Article. However, the nuances of my argument in some respects differ from theirs (especially Professor Manning’s, which is focused much more on textualism’s respect for specificity in the law and the implications of that for protecting political minorities). See *supra* notes 1 and 3 and accompanying text; cf. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178, 1180 (1989) (discussing the ways that judicial adherence to a general rule, as opposed to one based on all of the facts and circumstances, can help protect or promote both thin and thick equality). For other work that addresses related issues or themes in a specific context, see, for example, Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 164–65 (2010); Maggie Blackhawk, *On Power and Law: McGirt v. Oklahoma*, 2020 S. CT. REV. 367, 370 (2020). For a short early sketch of my own thinking on this issue, see Katie Eyer, *Progressive Textualism in Statutory Interpretation*, in LAYING CLAIM TO THE CONSTITUTION, CONST. ACCOUNTABILITY CTR. 11 (2021), <https://www.theconstitution.org/wp-content/uploads/2021/09/The-2021-Edition-of-Laying-Claim-to-the-Constitution.pdf> [<https://perma.cc/QJ9V-K545>]. For one of the few responses to claims that textualism might promote thin equality before the law, see Richard Lavoie, *Subverting the Rule of Law: The Judiciary’s Role in Fostering Unethical Behavior*, 75 U. COLO. L. REV. 115, 120, 158–59 (2004) (arguing that textualism’s rigid approach actually undermines the rule of law by severing the connection of law to societal values, and for the achievement of “equality” through resort to shared judicial values, societal beliefs, and shared approaches to interpretation).

6. See, e.g., Anita S. Krishnakumar, *Textualism in Practice*, 74 DUKE L.J. 573, 581–82 (2024) (identifying the animating values articulated by proponents of textualism as limiting discretion, and enforcing Article I, Section 7); Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 273–74 (2020) [hereinafter Grove, *Which Textualism?*] (same); cf. sources cited *supra* note 5 (describing earlier work touching on the equality-promoting potential of textualism, which I build on herein). Note that there is also a literature that argues that textualism promotes rule of law values, but that literature (aside from works by Professor John Manning and Justice Gorsuch) has typically not focused significantly on the rule of law value of equality before the law. See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* xxix (2012) (arguing that textualism creates certainty and predictability within the law); Tara Leigh

aims to fill this gap by taking seriously the claim that textualism may help promote or preserve equality. It thus asks the question: Can textualism be conceptualized as an equality practice? That is, can textualism help promote or protect equality?

This Article answers this question with a qualified “yes.” Building on the work of prior textualist jurists and scholars, it suggests textualism may be uniquely likely to promote equality before the law, a “thin” conception of equality often associated with the rule of law.⁷ Thus, textualism—as compared to other interpretive methodologies—may be especially well suited to ensure that all constituencies, from the powerful to the marginalized, the rich to the poor, receive the equal benefit of the law as written.⁸ This arises from two specific characteristics of modern textualism: (1) textualism’s requirement that courts apply the law uniformly at the level of generality at which it is written (ensuring that *all* groups are treated the same absent textual differentiation); and (2) textualism’s commitment to respecting text as written no matter who it benefits or burdens (thus providing protections for the legislative victories of all, including minority groups).⁹

Moreover, this thin type of equality that textualism uniquely protects—equal treatment before the law—can help to protect other, more substantive, forms of equality. The history of legal interpretation is littered with contentions that marginalized groups ought to be written out of the benefits

Grove, *Is Textualism at War with Statutory Precedent?*, 102 TEXAS L. REV. 639, 672, 672 n.173 (2024) (noting that “[s]ome textualists argue that the interpretive approach serves rule of law values” and discussing “stability and predictability” in particular); *see also* Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 793 (2018) (describing the rule of law benefits associated with “ordinary meaning,” including reliance, consistency of application, and notice). I argue herein that equality should be among the factors that theorists and others consider in evaluating textualism as an interpretive theory.

7. I use the terms “thin” and “thick” equality herein in a manner that tracks the use of those terms in the rule of law literature to describe relatively more formal and substantive understandings of concepts. *See* Jeremy Waldron, *From Form and Procedure to Substance*, 43 L. & PHIL. 603, 604, 606, 610 (2024) (discussing “thick” and “thin” conceptions of the rule of law, as well as elsewhere, for example in definitions of democracy). This usage is roughly equivalent to the use by equality scholars of the terms “formal” and “substantive” equality. *See, e.g.*, Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1144 (1986). Some scholars and commentators might also refer to this as the difference between “formal equality,” which is understood to be limited to formally equal treatment, and “equity,” which may include differing levels of support or resources to achieve fair outcomes or meet unequal needs. *See, e.g.*, Erica Goldberg, *Defining and Balancing Equity*, 24 NEV. L.J. 115, 131–32 (2023). Thus, “equality before the law” is a “thin” form of equality—it ensures formal equal treatment of all groups under the law but need not necessarily correspond to substantive equality across groups (of resources, of benefits, of access, etc.). This Article claims that this relatively “thin” or formal type of equality that textualism helps protect before the law can also help protect more substantive forms of equality for subordinated groups (what I refer to herein as “thick” equality, but which other scholars may refer to as “substantive equality” or “equity”).

8. *See infra* Part I.

9. *See infra* notes 51–52 and accompanying text.

of broad rights laws, because surely those laws were not “intended” to reach such groups.¹⁰ So too, the wealthy and the powerful have sometimes successfully argued that “clearly” they were not within those that Congress¹¹ intended to burden with onerous legal requirements.¹² And the legislative victories of historically subordinated groups have routinely been diminished by post-hoc non-textual judicial decisions by judges who could not imagine that Congress truly intended to radically revise the status quo.¹³ Each of these represents a distinctive way in which substantive equality can be damaged by failures to afford thin equality before the law—and thus a distinctive way in which substantive equality may be safeguarded by textualism.

Numerous examples exist of the role that textualism can play in promoting this type of thin equality before the law—and thus guarding against deeper forms of substantive inequality. *Bostock v. Clayton County*—which applied textualism to refuse to gerrymander LGBTQ employees out of the protections of Title VII—is perhaps the most prominent recent example.¹⁴ But there are many other, less well-known examples. Thus, cases such as *McGirt v. Oklahoma* (relying on textualism to conclude that a large swath of East Central Oklahoma remains a part of Muskegee Nation land),¹⁵ *Pennsylvania Department of Corrections v. Yeskey* (finding that statutory text prohibited the exclusion of prisoners from the ADA),¹⁶ *Oncala v.*

10. See *infra* subparts I(B) and III(A).

11. I primarily focus on the paradigm of federal statutory interpretation herein, and thus, the reader will find references to Congress and the Congressional legislative process (involving bicameralism and presentment) throughout. The real-world examples are also drawn from the federal statutory interpretation domain. Thus, although the arguments presented herein ought to generalize to state-level statutory interpretation, I am comparatively less confident about their extension to this context and should note that there may be state-by-state variation in judicial or legislative dynamics that could be relevant.

12. See *infra* subparts I(B) and III(B).

13. See *infra* subparts I(B) and III(C).

14. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738–42 (2020).

15. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2474–76 (2020). Textualism protected Native rights in *McGirt*, and some scholars, including Maggie Blackhawk, have made the case that Native advocacy for legal texts has been important to Native sovereignty. See Blackhawk, *supra* note 5, at 402–04 (observing that *McGirt* “more closely resembles the success of Native advocates before administrative agencies and Congress” where “Native advocates have long focused their advocacy upon formal legal texts and have harnessed the power of those texts in order to prevent the dominant ideology from becoming law”). However, it is important to acknowledge that there are also ways in which textualism could undercut Native rights by undermining non-textual doctrines that have protected Native Nations, such as the Indian canons of construction. See, e.g., *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 200 (1999) (applying doctrine under which “Indian treaties are to be interpreted liberally in favor of the Indians . . . and that any ambiguities are to be resolved in their favor”) (internal citations omitted). I briefly discuss at *infra* note 272 how a more modest version of textualism, which I refer to as “presumptive textualism,” might be able to take on board both these canons and other equality-protective doctrines like the Rule of Lenity, an idea I am exploring further in ongoing work.

16. *Pennsylvania Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 212–13 (1998).

Sundowner Offshore Services (declining invitations to gerrymander same-sex harassment victims out of Title VII’s textual protections),¹⁷ and more,¹⁸ all demonstrate the real-world potential of textualism to promote or protect equality.

But although there is both theoretical and empirical support for the equality work that textualism can do, this Article cautions that the equality benefits of textualism also should not be overstated. Only certain versions of textualism (what Tara Leigh Grove has referred to as “formalistic” textualism) are likely to truly be capable of constraining adjudicators, and thus capable of achieving even a thin conception of equality before the law.¹⁹ But “formalistic” textualism is also, on its own, not capable of resolving all statutory interpretation problems (in part because it limits the interpreter to text and related semantic tools and thus will sometimes leave ineradicable ambiguity).²⁰ Thus, the promise of textualism as an equality practice—while real—is necessarily partial, insofar as it is limited to those contexts where “formalistic” textualism affords answers.²¹

Moreover, it is important to acknowledge that even where textualism does provide clear answers, it will not in all circumstances lead to equality-promoting results. In some cases there may be no equality stakes at all, and in others textualism may lead to outcomes that even promote substantive inequality.²² Finally, this Article acknowledges that the genuine problem of legal realism means that claims as to the capacity of any theory of interpretation to achieve particular outcomes (equality or otherwise) are necessarily partially speculative.²³

Nonetheless, I argue that there is value to theorizing textualism as an equality practice. First, as described more fully herein, history shows that textualism has at times genuinely shaped individual judges’ decision-making

17. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79–80 (1998).

18. For a striking example from the lower courts, see *United States v. Corrales-Vazquez*, 931 F.3d 944, 948–51 (9th Cir. 2019), which resulted in the reversal of some 400 convictions of undocumented immigrants for illegal entry. Email from Eric Fish, Professor of L., Univ. of Cal.-Davis Sch. of L., to Katie Eyer, Professor of L., Rutgers L. Sch. (July 16, 2021, 04:57 PM ET) (on file with author).

19. For Professor Grove’s discussion of formalistic textualism, see Grove, *Which Textualism?*, *supra* note 6, at 269–70. For more on the question of which types of textualism may promote equality, see *infra* subpart IV(A). Some, who are accustomed to thinking about formalism as an epithet, may find it odd to hear me describe it in positive terms. But I share the late Professor Fred Schauer’s view that “[o]nce we disentangle and examine the various strands of formalism . . . it turns out there is something, indeed much, to be said . . . for formalism.” Frederick Schauer, *Formalism*, 97 *YALE L.J.* 509, 510 (1988).

20. See *infra* subparts IV(A) and IV(E).

21. See *infra* subpart IV(E).

22. See *infra* subparts IV(C) and IV(E).

23. See *infra* subparts IV(B) and IV(F).

in ways that have protected or promoted equality.²⁴ That is, individual judges, whose ideological commitments likely pointed elsewhere, appear to have been driven by their methodological commitments to textualism toward thin equality—something that has, at times, led to profoundly substantively egalitarian results.²⁵ Thus, while the equality-promoting potential of textualism may not be certain, neither is it wholly ephemeral.

Moreover, theorizing textualism as an equality practice—even if it is sure to be a descriptively inconsistent one—can offer valuable insights both to those who conceptualize themselves as textualists, and those who do not. For those who self-identify as textualists (as many contemporary judges do),²⁶ identifying equality more clearly as a value that textualism promotes can help answer core methodological disputes—and can serve as an important lens through which to view the proper approach to particular cases.²⁷ And for those who do not self-identify as textualists, better understanding the equality risks of non-textualist methodologies (such as intentionalism, purposivism, eclecticism, and some versions of originalism) can provide valuable insights and help to avoid unintentional facilitation of inequality—regardless of whether it provokes methodological conversion.²⁸

Finally, this Article argues that contemporary threats to the rule of law here in the United States illustrate why even textualism’s incomplete protections against inequality matter. The second Trump administration has, in many respects, led the U.S. in the direction of authoritarianism: ignoring legal constraints, demonizing the vulnerable, and seeking to repress dissent.²⁹ At the same time, the Supreme Court has actively facilitated the administration’s agenda through rulings on its shadow docket: rulings that

24. See *infra* Part III.

25. See *infra* subparts III(A) and (B).

26. See, e.g., William N. Eskridge, Jr., Brian G. Slocum & Kevin Tobia, *Textualism’s Defining Moment*, 123 COLUM. L. REV. 1611, 1614–15 (2023) (describing textualism’s ascendance among Justices on the Supreme Court in statutory interpretation cases).

27. See *infra* subparts V(A) and V(C).

28. See *infra* subpart V(B).

29. See, e.g., Frank Langfitt, *Hundreds of Scholars Say the U.S. Is Swiftly Heading Toward Authoritarianism*, NPR (Apr. 22, 2025), <https://www.npr.org/2025/04/22/nx-s1-5340753/trump-democracy-authoritarianism-competitive-survey-political-scientist> [<https://perma.cc/A368-FN8T>] (noting that “[a] survey of more than 500 political scientists finds that the vast majority think the United States is moving swiftly from liberal democracy toward some form of authoritarianism”); Aaron Blake, *More Than a Dozen Judges Have Said Trump and Co. Probably Broke the Law*, WASH. POST (Mar. 20, 2025), <https://css.washingtonpost.com/politics/2025/03/20/more-than-dozen-judges-have-said-trump-co-likely-broke-law/> [<https://perma.cc/P888-5WLF>] (observing that in the first two months of the Trump administration, numerous judges “ha[d] ruled that the administration either ha[d] violated the law or ha[d] probably done so”); Justin Jouvenal, *Trump Officials Accused of Defying 1 in 3 Judges Who Ruled Against Him*, WASH. POST (July 21, 2025), <https://www.washingtonpost.com/politics/2025/07/21/trump-court-orders-defy-noncompliance-marshals-judges> [<https://perma.cc/4EWJ-LUHQ>] (noting that judges have accused the administration of “flouting courts” in dozens of lawsuits).

have mostly eschewed reasoned legal analysis (including but not limited to textualism).³⁰ But at the same time, the lower federal courts have continued to do important work to uphold the rule of law and protect vulnerable constituencies, often relying on plain statutory text in their rulings.³¹ And even the Supreme Court has begun to occasionally do the same.³² As this illustrates, the thin equality that textualism protects matters—especially in times of legal turmoil—even if those protections are only incompletely realized.³³

The remainder of the Article proceeds as follows: Drawing on the work of prior textualist scholars and jurists, Part I develops the argument for why textualism could, in theory, best promote a thin conception of equality before the law often associated with the rule of law. This Part further describes how thin equality could protect substantive equality in a variety of ways—by preventing the gerrymandering of marginalized groups out of the protections of the law and by preventing the gerrymandering of privileged groups out of its burdens. As this Part observes, laws intended to secure rights specifically for subordinated groups may be especially vulnerable to both of these types of judicial revision, precisely because their burdens are primarily felt by the powerful, and their benefits primarily enure to those outside of societal power structures.

Part II takes up the comparative aspect of the project, and asks whether textualism is uniquely situated to achieve these equality goods. It addresses textualism’s primary interpretative competitors—intentionalism, purposivism, eclecticism, and originalism—and concludes that the habits of reasoning associated with each of these theories carry with them greater equality risks than textualism.³⁴ Because each of textualism’s primary

30. See, e.g., Erwin Chemerinsky, *Why the Shadow Docket Should Concern Us All*, SCOTUSBLOG (Aug. 4, 2025), <https://www.scotusblog.com/2025/08/why-the-shadow-docket-should-concern-us-all/> [<https://perma.cc/37BJ-9XUV>] (discussing the Supreme Court’s emergency docket rulings, issued without opinions, which generally facilitated the administration’s actions).

31. See *infra* notes 357–73 and accompanying text.

32. See, e.g., *Trump v. Illinois*, 146 S. Ct. 432, 433 (2025); *Learning Resources, Inc. v. Trump*, Nos. 24-1287, 25-250, 2026 WL 477534, *13–14 (2026). In both cases, textualist arguments played a key role. See *Trump*, 146 S. Ct. at 433; *Learning Resources*, 2026 WL 477534, at *10–13.

33. Cf. Stephen Vladeck, *Law, Lawlessness, and Doomerism*, SUBSTACK: ONE FIRST (Sep. 4, 2025), <https://www.stevevladeck.com/p/bonus-176-law-lawlessness-and-doomerism> [<https://perma.cc/SD8U-47MA>] (arguing that the imperfection of law and legal constraints does not make them irrelevant and that arguments to the contrary are “affirmatively dangerous”). Responding to the claim that law doesn’t matter in the current moment, Professor Vladeck observes:

I’m not an expert on authoritarian regimes or the broader political science of democratic decline, but I don’t think one needs a Ph.D. in that field to understand the extent to which collapsing the distinction between what governments *claim* the law allows and what is actually *true* necessarily enables further bad behavior by the offending government actors

34. I recognize that some scholarly accounts of textualism’s competitors claim that the modern versions of such competitors *also* prioritize text in interpretation. See, e.g., Jonathan T. Molot, *The*

interpretive competitors permits—and may require—inquiries into how the original Congress (or original public) would have believed or wanted a statute to be applied, each can allow space for historical societal biases about to *whom* the benefits of the law should enure to enter into the interpretive enterprise. This in turn can create serious equality risks for disfavored and subordinated groups, since they may be gerrymandered out of the protections of otherwise broad text.

Part III turns to providing concrete examples of circumstances in which textualism has played—or could play—a key role in arresting inegalitarian approaches to statutory interpretation, and in safeguarding equality (both thick and thin). As this Part explores, while a complete account of textualism’s effects (or any other interpretive methodology) is impossible, it is possible to find numerous examples that support the idea that textualism can function as an equality practice, i.e., an interpretive approach that protects equality. This Part also identifies circumstances in which other interpretive methodologies have facilitated both thin and thick *inequality* through allowing judicial intuitions about Congressional or public disfavor for particular groups to enter into the interpretation of the law.

Part IV turns to important limitations to the claim that textualism does in fact promote equality. First, only certain forms of textualism (what Tara Leigh Grove has referred to as “formalistic” textualism)³⁵ hold the possibility of realistically constraining judges and thus promoting equality in even its thin sense. Second, it must be acknowledged that—especially in view of the multiplicity of theoretical approaches to each of the major theories of interpretation—it is impossible to conclusively prove that textualism is a superior methodology from the perspective of equality. At most, this Article can describe examples and tendencies of thinking that differing methodologies tend to promote. Third, even under the best of circumstances, there will still be cases where equality isn’t implicated, where there is genuine ambiguity textualism can’t solve—or even where textualism might lead to affirmatively inegalitarian (or less egalitarian) results. Finally, I acknowledge that legal realism—and the reality (vividly illustrated at the

Rise and Fall of Textualism, 106 COLUM. L. REV. 1, 3 (2006) (observing that “textualism has so succeeded in discrediting strong purposivism that it has led even nonadherents to give great weight to statutory text”). As I discuss at the end of this Introduction, insofar as such *approaches in fact* prioritize text, and eschew a search for artificial specificity where none exists in the text, they meet the definition of textualism I use herein. However, I am skeptical of strong versions of this claim, such as the claim that all theories of interpretation today fit the definition of textualism I use herein, both because of the methods of reasoning that such methodological competitors employ (which, as I lay out in Part II, may predictably lead the interpreter away from the plain meaning of text), and because of the existence of numerous cases applying such methodologies and departing from text in the real world. *See infra* Parts II–III.

35. *See* Grove, *Which Textualism?*, *supra* note 6, at 269–70 (coining the term “formalistic textualism” and describing its features).

present moment) that ideological preferences sometimes override interpretive commitments—poses a genuine challenge to the claims of any theory of interpretation to meaningfully constrain.

Nonetheless, Part V describes why—despite the real limitations of theorizing textualism as an equality practice—doing so is nonetheless a worthwhile endeavor. For those who conceptualize themselves as textualists, in both the courts and the academy, understanding textualism’s equality-promoting potential has important implications for both the theory and practice of textualism. Even for those who do not conceptualize themselves as textualists, understanding the equality risks of non-text-based approaches to interpretation may help those theorizing and applying other methodologies to take seriously, and guard against, such risks. Finally, Part V suggests that it is more, not less, critical in moments of rising threat to the rule of law to secure thin (and thus thick) equality—something that textualism is uniquely situated to achieve.

* * *

The above discussion has sketched out the core claims of the project. But before proceeding to the substance of the discussion, a few caveats regarding scope and terminology are in order. First, with regard to scope, textualism remains primarily (though not exclusively) a theory of *statutory* interpretation, and my discussion of textualism herein is overwhelmingly restricted to that context.³⁶ Although textualism can and does play a role in constitutional law, it is often intertwined or conflated there with originalism—perhaps because broad and unspecific constitutional text complicates the ability to use the plain meaning of text as a guide.³⁷ Thus, while the insights herein may have relevance to constitutional law—and I briefly touch on constitutional law in discussing the lower courts’ response to the current moment—this Article should be understood to be directed principally at understanding the equality-promoting potential of textualism as a theory of *statutory* interpretation.

Second, with respect to terminology, when I use the term “textualism” I mean an approach to interpretation in which the interpreter’s ultimate fidelity is to the language of the law (as opposed to any competing consideration, such as purpose, history, intent, or policy), and in which the interpreter must generally reject interpretations that deviate from the most

36. See Neil H. Buchanan & Michael C. Dorf, *A Tale of Two Formalisms: How Law and Economics Mirrors Originalism and Textualism*, 106 CORN. L. REV. 591, 621 (2021) (“Originalism is an approach to interpreting the U.S. Constitution, while textualism is an approach to interpreting statutes.”).

37. Eyer, *supra* note 2, at 116; see Bill Watson, *What Are We Debating When We Debate Legal Interpretation?*, B.U. L. REV. (forthcoming 2025) (manuscript at 45), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5149058 (arguing that “we should be wary of monolithic interpretive theories that claim to apply across the board”).

plausible meaning of the text.³⁸ I do not, to be clear, mean this term to include everything that self-professed textualist judges or self-identified textualist theorists have identified as consistent with or even required by textualism (and insofar as the practices of self-identified textualists contravene the definition given above, they are excluded from the definition I use herein).³⁹ I do not, moreover, define textualism primarily by reference to what is excluded (e.g., whether the adjudicator will consider legislative history), but instead by its primary, *affirmative* commitment to text.⁴⁰

Similarly, I rely on relatively basic and formal definitions of textualism's primary interpretive alternatives: "originalism," "purposivism," "intentionalism" and "eclecticism." "Originalism" I use to mean an interpretive theory that is defined by primary fidelity to history (which some, but not all originalists believe should be focused on the historical meaning of text).⁴¹ "Purposivism" I use to mean interpretive theories whose primary methodological commitment is to interpretation in view of the purpose(s) of

38. See ANTONIN SCALIA, A MATTER OF INTERPRETATION 22–23 (1997) (describing Justice Scalia's definition of textualism). Some readers who are familiar with the literature on interpretation may wonder how my discussion herein relates to the familiar interpretation/construction distinction. See Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 96 (2010) (characterizing "interpretation" as "linguistic meaning or semantic content" and "construction" as "the process that gives a text legal effect"). The short answer is that I do not view the "interpretation"/"construction" distinction as particularly useful for the purposes of this project, mostly because there are various possible accounts of what types of considerations or approaches should fall within the boundaries of "interpretation"—with the result that mapping the distinction onto my discussion herein seems more likely to complicate and confuse than to clarify. My own view would be that what I categorize as "textualism" herein, specifically "formalistic textualism" ought to be characterized as marking the outer boundaries of interpretation—but I recognize that others would not agree. See Lawrence B. Solum, *Pragmatics and Textualism*, 33 J.L. & POL'Y 2, 102–03 (2025) (offering a fairly rich account of what types of considerations can enter into the "interpretation" stage, even applying a textualist approach). Finally, with the exception of this footnote, I use "interpretation" and "interpretive" in the generic sense, rather than as a term of art meant to signify the boundaries of the interpretation/construction divide.

39. For a fuller discussion of practices that are sometimes characterized as "textualist" which, if incorporated in the definition of textualism, would render it so capacious as to be incapable of constraining inequality in the way I describe herein, see *infra* subpart IV(A).

40. As I am developing in other work, I view the conflation of textualism with the exclusion of particular sources, most commonly legislative history, as an unhelpful artifact of the conflation of textualism with its most famous modern proponent, Justice Scalia. See Katie Eyer, *RETHINKING TEXTUALISM: WHY PROGRESSIVES SHOULD EMBRACE THE COMMON-SENSE IDEA THAT THE LAW MEANS WHAT IT SAYS* (University of California Press, forthcoming 2028) (unpublished manuscript) (on file with author). This is not the definition of textualism I use herein, but instead one that focuses on textualism's core *affirmative* feature: fidelity to text.

41. See Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1755 (2015) (describing originalism as "the idea that the Constitution should be interpreted as it was understood at the time it was written by those with authority to enact it" and as "a species of intellectual history"); see also Eyer, *supra* note 2, at 117 (discussing the different ways that textualism and originalism can interact).

the statute.⁴² “Intentionalism” I use to mean interpretive approaches that look to Congressional intent in order to ascertain meaning.⁴³ And “eclecticism” is used to refer to the practice of drawing on multiple sources in order to ascertain statutory meaning (as for example in Professor Eskridge and Frickey’s “funnel of abstraction”).⁴⁴

I recognize that these definitions omit much of the rich detail that theorists have attached to the various theories of interpretation—and that the practice of self-professed adherents is even more messy and complex. Indeed, as a variety of theorists have pointed out, most theories of statutory interpretation have trended towards a more central role for text in the modern era, and thus there are today large areas of overlap between textualism and its predominant methodological alternatives.⁴⁵ Moreover, some modern textualists have sought to defend practices that I do not believe would fit within the basic constraint for textualism that I identify above (ultimate fidelity to the language of the law and treating the range of legitimate interpretation as bounded by the meaning the text of the law can bear).⁴⁶

Thus, and especially for those who do not consider themselves proponents of textualism, it may be most helpful to understand the arguments of this Article through the lens of an argument for the equality work that interpretive fidelity to text can do, regardless of how one self-identifies as an interpretive theorist or jurist. I use textualism herein because it is the familiar and convenient term—and because I believe that properly understood, textualism should be understood to be defined by fidelity to text—but this

42. See, e.g., WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 25–26 (1994) (describing purposivism as a separate legal theory from intentionalism and observing that “[a]s classically stated by Henry Hart and Albert Sacks, statutory ambiguities can be resolved, first, by identifying the purpose or objective of the statute, and then by determining which interpretation is most consistent with that purpose or goal”).

43. See, e.g., William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479–80 (1987) (defining the “intentionalist” approach as being focused on “how the legislature originally intended the interpretive question to be answered, or would have intended the question to be answered had it thought about the issue when it passed the statute”); ESKRIDGE, *supra* note 42, at 14 (defining intentionalism as a theory “which directs the interpreter to discover or replicate the legislature’s original intent as the answer to an interpretive question”).

44. See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 323, 352–53 (1990) (discussing eclecticism—or what Eskridge and Frickey refer to as “practical reasoning”—as the approach that “seems to describe what the Court actually *does* when it interprets a statute” and showing how various interpretive sources are accounted for by eclecticism in the so-called “funnel of abstraction”).

45. See Molot, *supra* note 34, at 3 (arguing that even textualism’s competitors today “give great weight to statutory text”); John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 75 (2006) (agreeing that purposivism and textualism have converged in certain respects, though also contending that in others they remain distinct).

46. For example, I find scholarly efforts to defend the major questions doctrine as a textualist doctrine unpersuasive. Cf. Ilan Wurman, *Importance and Interpretive Questions*, 110 VA. L. REV. 909, 916–17 (2024) (offering a defense of a qualified version of the major questions doctrine that Wurman argues would be consistent with textualism).

terminology is simply a shorthand for an interpretive commitment to text. So too, my use of other methodological terminologies is meant to harness familiar terms in their most straightforward sense in order to offer a starting point for analysis, not to suggest that those interpretive theories cannot ever include the types of fidelity to text that can protect equality in the ways suggested herein. Indeed, to the extent that proponents of purposivism, eclecticism, originalism, or intentionalism value adherence to text, equality, or both, I hope this Article may help such proponents better develop their own text-centered practice, and avoid the pitfalls of inegalitarian (and non-textual) reasoning.

I. The Theory of Textualism as an Equality Practice

This Part asks whether there is a plausible *theoretical* account of textualism as an equality practice and suggests that the answer is “yes.” That is, there are, at least in theory, reasons to believe that textualism may be uniquely situated to protect or promote equality, in both equality’s thin (formal) sense and in a thicker substantive sense. While later Parts provide real-world examples of the theoretical possibility that textualism can protect equality (Part III), as well as explore the theory’s likely real-world limitations (Part IV), this Part is focused on the theoretical question of how and why textualism could play an important role in protecting or promoting equality.

A. *Textualism as the Guardian of Thin Equality*

In asking whether textualism as a methodology can promote equality, it is useful to begin by pulling apart *thin equality* (formal notions of equality such as equality before the law) and *thick equality* (more substantive notions of equality such as what outcomes result for differing groups). This Part starts by asking the relatively limited question of whether or not textualism can promote equality in its thin sense (often associated with the rule of law). That is, could textualism help promote or safeguard equal treatment by adjudicators, i.e., equality before the law?⁴⁷

Both of the textualist jurists and scholars who have prominently argued for textualism’s equality-promoting potential—Justice Neil Gorsuch and Professor John Manning—have suggested that textualism can promote equality in at least this thin and formal sense (though both have also gone

47. This “thin” conception of “equality before the law” has been situated by numerous legal philosophers as a key aspect of the rule of law. For prior work developing this concept and situating it as a central aspect of the rule of law, see, A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 114–15, 118–20 (4th ed. 1893) (developing the idea of equality before the law as a component of the rule of law); JOSEPH RAZ, THE AUTHORITY OF LAW 215–16 (2d ed. 2009) (same); JEREMY WALDRON, THE RULE OF LAW AND THE MEASURE OF PROPERTY 78 (2012) (same); BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 94 (2004) (same).

further, to link this to more substantive equality guarantees). Thus, for example, Justice Gorsuch has observed that an important value of textualism is that textualism ensures that “[e]veryone gets the benefit of the written law’s terms.”⁴⁸ And Professor John Manning has suggested that one of the benefits of textualism may be its inhospitality to ad hoc exceptions, a classic deviation from equality before the law.⁴⁹

And indeed, consistent with this prior theorizing, there are straightforward reasons to think that textualism is especially well-situated to promote equality before the law. The basic premise of textualism is that judges ought to apply the law as written.⁵⁰ This has two important corollaries relevant here. First, a textualist judge ought to construe the law at the level of generality at which it is written—and in the same way vis-à-vis all parties to which it applies (absent textual indications to the contrary).⁵¹ Second, textualism requires enforcement of the law as written, no matter who it benefits or burdens—not as the judge imagines that Congress (or society) would have wished or imagined.⁵²

Each of these central features of textualism serves to protect in important ways the basic promise of equality before the law: that all groups will have equal access to the resource of the law itself. In respecting the level of generality at which the law is written, textualism ensures that general laws will be applied in the same way to all groups. As elaborated in subpart I(B) (addressing substantive equality), this means that even those who are disadvantaged or disfavored will have the benefit of general statutory rights, unless they are explicitly excluded—and those who are powerful and wealthy will be subject to general statutory burdens, absent explicit exemption.⁵³ This is in many ways the very definition of equality before the law.

Similarly, textualism’s demand that the law be applied as written serves to protect another type of equality before the law: the ability to rely equally on the law’s written promises. This type of equality before the law is also important, as it ensures that all of society’s groups can be assured that their legislative victories will be respected. As described at greater length in subpart I(B), this type of “thin” equality means, for example, that laws enacted for the particular benefit of minority groups, will, under textualism,

48. GORSUCH, *supra* note 1, at 125.

49. Manning, *Absurdity*, *supra* note 3, at 2391, 2433, 2436–37.

50. SCALIA, *supra* note 38, at 23.

51. See, e.g., SCALIA & GARNER, *supra* note 6, at 101–05 (describing what they refer to as the “general-terms canon” and asserting that under this canon “general words . . . are to be accorded their full and fair scope”); Manning, *Second-Generation*, *supra* note 3, at 1316 (emphasizing judicial adherence to the level of generality prescribed by the legislature as a key feature of second-generation textualism).

52. Manning, *Absurdity*, *supra* note 3, at 2391, 2431–37.

53. See *infra* notes 83–88 and accompanying text.

be assured the same judicial enforcement that those enacted for the benefit of the privileged majority receive.⁵⁴

At the risk of venturing prematurely into substantive equality (discussed in subpart I(B)) and real-world practice (discussed in Part II), some examples may be useful in illustrating these ways that textualism can help promote thin equality before the law. I begin with an example (*Pennsylvania Dep't of Corr. v. Yeskey*) that demonstrates the ways that textualism's commitment to applying the law the level of generality at which it is written can protect equality before the law, and then turn to an example (*McGirt v. Oklahoma*) that demonstrates the ways that textualism's respect for the law as written protects the ability to rely equally on the law's written promises.

Yeskey addressed the question of whether state prisoners were protected by Title II of the American Disabilities Act (ADA).⁵⁵ Title II of the ADA provides: "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."⁵⁶ Title II contains no exception for particular public programs or services, and its only statutory exclusion for particular disabilities was not relevant to the *Yeskey* case.⁵⁷ Thus, under an approach that respects the statute at the level of generality as written (as textualism does), there would be no basis for concluding that state prisoners were not covered.

Nonetheless, the state argued in *Yeskey* that the ADA should not be construed to extend to state prisons.⁵⁸ Doing so, they argued, would have profound federalism implications (by restricting how states managed their own prisons).⁵⁹ Moreover, they suggested "[t]he burdens that prisoner litigation places on state prison officials has been an area of immense concern for Congress" and thus "[i]t is nonsensical to think that Congress . . . [would give] inmates yet another avenue of legal recourse against the states."⁶⁰ These arguments were not frivolous factually—the ADA *did* in fact impose substantial federalism costs, and Congress of the 1990s was decidedly hostile

54. See *infra* notes 89–91 and accompanying text.

55. *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 208 (1998).

56. 42 U.S.C. § 12132.

57. *Id.*; cf. 42 U.S.C. § 12211 (excluding "homosexuality," "bisexuality," "transsexualism," and "gender identity disorders not resulting from physical impairments" from the protections of the ADA).

58. See Brief for the Petitioners, *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206 (1998) (No. 97-634), 1998 WL 93291, at *4 (arguing that "[t]he lower court erroneously concluded that Title II of the ADA is applicable to state prisoners").

59. *Id.* at *7–11.

60. *Id.* at *15.

to prisoners' access to judicially enforceable legal rights.⁶¹ And indeed, the District Court in *Yeskey*, relying on precisely these factors, had found that the ADA did not apply to state prisons.⁶²

But as Justice Scalia, writing for the unanimous Supreme Court, recognized, the text of Title II of the ADA offered no basis for applying the statute differently (or not at all) to the claims of prisoners.⁶³ As he wrote, “[t]he text of the ADA provides no basis for distinguishing [prison-based] programs, services, and activities from those provided by public entities that are not prisons.”⁶⁴ Because the text of the statute provided no basis for differentiating among groups or applications, the Court could not do so. In this way, the Court’s application of textualism in *Yeskey* is a classic example of how textualism’s respect for the level of generality in the law can promote equality before the law.⁶⁵

The recent case of *McGirt v. Oklahoma* illustrates the second way in which textualism can protect equality before the law: by protecting the ability of all groups to rely equally on the law’s written promises.⁶⁶ In *McGirt*, the immediate issue was a question of jurisdiction: whether the Oklahoma state courts lacked jurisdiction over a particular crime under the Major Crimes Act, insofar as it was committed by an “Indian” in “Indian country.”⁶⁷ But in order to answer that question, the Court had to determine a question of far more salience to modern Tribal sovereignty: whether a substantial portion of Eastern Oklahoma, promised to the Creek Tribe by treaty and statute, remained a Creek Reservation and thus a part of “Indian country.”⁶⁸

61. On the former point, see, for example, Katie Eyer & Karen M. Tani, *Disability and the Ongoing Federalism Revolution*, 133 YALE L.J. 839, 899–900 (2024). On the latter point, see the Prison Litigation Reform Act, 42 U.S.C. § 1997e (1996).

62. *Yeskey*, 524 U.S. at 208; see also *Yeskey v. Commonwealth of Pennsylvania*, Civ. Act. No. 1-cv-95-2125, at 6–7 (M.D. Pa. Apr. 9, 1996) (on file with the Philadelphia Branch of the National Archives) (quoting *Torcasio v. Murray*, 57 F.3d 1340, 1344, 1346 (4th Cir. 1995)).

63. *Yeskey*, 524 U.S. at 209; see also 42 U.S.C. § 12132 (imposing disability non-discrimination requirements on “public entit[ies]” and providing no basis for differentiating among groups or applications).

64. *Yeskey*, 524 U.S. at 210.

65. Moreover, although Congress could certainly adopt a “prisoner” exception to the ADA, there are reasons to believe that writing inequality explicitly into the law will prove more difficult than doing so through judicial interpretation. See *infra* subpart IV(C).

66. *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).

67. *Id.* at 2459.

68. *Id.* Under the Major Crimes Act, if Mr. McGirt, an “Indian,” committed his crimes in “Indian country” the state courts would have lacked jurisdiction over his crimes. See *id.* at 2459–60 (“State courts generally have no jurisdiction to try Indians for conduct committed in ‘Indian country.’” (citation omitted)). Thus, the question of whether the location where Mr. McGirt committed his crimes remained a Creek Reservation and thus part of “Indian country” was dispositive of whether the state courts had jurisdiction over his crimes. The focus of the textualist analysis in *McGirt* was not on the Major Crimes Act (which everyone agreed was clear) but instead on the statutes and treaties establishing (and failing to disestablish) the Creek Reservation.

The state, in its brief before the Court, stressed the “implausible” nature of the defendant’s argument that a large part of Eastern Oklahoma remained a part of the Creek Reservation.⁶⁹ Finding that the Reservation remained intact would, they argued “cause the largest judicial abrogation of state sovereignty in American history, cleaving Oklahoma in half.”⁷⁰ Moreover, “[r]eversal also would create the most populous Indian reservations in America, shocking the 1.8 million residents of eastern Oklahoma.”⁷¹ It was in short, simply “implausible” that the law required an outcome that would so substantially affect the rights of non-Native Americans.

Nevertheless, a majority of the Court, relying on a textualist analysis of the relevant treaties and statutes, ruled that the reservation did in fact remain intact.⁷² As the majority observed, the grant of a reservation to the Creek in the original treaties and statutes was unambiguous, fixing borders for a “permanent home to the whole Creek nation of Indians” and promising that the remaining land would “be forever set apart as a home for said Creek Nation.”⁷³ And, in contrast to these explicit textual grants, there was no later congressional statute or treaty that (in so many terms) *disestablished* the reservation.⁷⁴ Rejecting “dire [policy] warnings,” the Court thus rejected calls to “treat Native American claims of statutory right as less valuable than others.”⁷⁵

As Maggie Blackhawk has observed, this outcome—which resulted in much of the City of Tulsa, and many non-native residents of Oklahoma being located within a Native American reservation—“was unthinkable” to many majority group members, including the four Justices in dissent.⁷⁶ Nonetheless, in *McGirt* the Court “refused to allow dominant discourse and worldview to overcome the formal text of the law as it had been crafted by generations of past Native advocates. Its decision thus preserved the power of a marginalized community in spite of the broader public’s conviction that such an outcome was unthinkable.”⁷⁷

69. Brief for Respondent, *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (No. 18-9526), 2020 WL 1478582, at *1.

70. *Id.* at *3.

71. *Id.*

72. *McGirt*, 140 S. Ct. at 2474, 2482 (rejecting the idea that the Court should “ignor[e] the written law” based on practical concerns).

73. *Id.* at 2461 (quoting Treaty with the Creeks, Creek Nation-U.S., Feb. 14, 1833, 7 Stat. 417; Treaty with the Creeks, Creek Nation-U.S., June 14, 1866, 14 Stats. 785).

74. *Id.* at 2462–63.

75. *Id.* at 2470, 2481.

76. See Blackhawk, *supra* note 5, at 369–71 (“Most assumed that no matter what the law required, the Court could not possibly hold that the city of Tulsa rested within the borders of an Indian reservation . . .”).

77. *Id.* at 382.

Yeskey and *McGirt* are thus striking exemplars of the thin (and indeed thick) equality work that textualism can do. But they are also examples of the thin equality risks of alternative methodologies (an issue more fully taken up in Part II). Despite the text of the relevant laws, lower court judges (and in *McGirt*, the Supreme Court's dissenters) concluded that marginalized groups should lose because they believed Congressional intent to be clear (and adverse to such groups); because they thought federalism supported that result; or because of the dramatic policy implications of legally empowering subordinated groups.⁷⁸ This demonstrates an important fact, which is that none of textualism's competitors are *structurally* committed to equal application to the law as a matter of interpretive principle—though of course they may be committed to other types of consistency in interpretive approach, and may at times lead to equality-promoting results.⁷⁹

Thus, there are straightforward reasons to believe that textualism is especially well-suited to help protect a thin form of equality (often associated with the rule of law): equality before the law. This is true primarily because of two ways that textualism's respect for the law as written helps protect equal access to the law itself: respect for the law at the level of generality at which it is written, and equal respect for the law as written, no matter which group it benefits or burdens. The following subpart describes why this thin form of equality before the law may, in turn, help protect thicker, more substantive forms of equality.

B. *Textualism as the Guardian of Thick Equality*

The thin notion of equality before the law, described above, may seem to some to be unimportant. Indeed, more radical theories of law have argued that this type of formal equality can obfuscate and distract attention from far more important forms of material inequality.⁸⁰ But this Part suggests that

78. See *McGirt*, 140 S. Ct. at 2485–89, 2501–02 (Roberts, C.J., dissenting) (describing congressional purpose or intent as the Court's "touchstone" and finding that Congress intended to disestablish the reservation, despite never formally doing so—also relying on the policy implications of finding the reservation to remain). The District Court opinion in *Yeskey*—which found the ADA to be inapplicable to prisoners—is unreported, but is available through the National Archives. *Yeskey*, Civ. Act. No. 1-cv-95-2125, at *7.

79. Of course, one could contend that such methodologies are committed to the equal application of something else, such as Congressional intent or purpose—and thus "equality before the law." But while congressional intent or purpose may be relevant to understanding the law, I would argue that it is not the law itself. Even if one does not accept this premise, I do not understand equal application of purpose or intent to be a core principle of, for example, purposivism and intentionalism—nor is it self-evident that "equal application" of purpose or intent would lead to substantive equality for subordinated groups. Indeed, it appears quite possible that it would not, for reasons articulated in *infra* Part II.

80. See, e.g., Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 608 (1983) (arguing that pursuing formal equality is "an attempt to escape the burden of

within any system that respects the law as binding, this thin form of equality—protecting equal access to the law itself—is likely to *also* be critical to protecting more substantive forms of equality.⁸¹ As I discuss herein, in a society bounded by law, it is unlikely that *any* substantive form of equality will be adequately protected in the absence of equal access to the resource of the law.⁸² This is precisely the form of equality that thin equality before the law, and textualism, protects (both through assurances that the law will be applied equally to all groups when it is written at a high level of generality, and through ensuring that all laws are enforced equally as written, no matter who they benefit or burden).

It is important to be candid at the outset that this assertion—that thin equality before the law protects substantive equality—rests on an ultimately unprovable, though deeply plausible premise: that judges afforded discretion to deviate from the law’s language are unlikely, on balance, to use that discretion to disproportionately benefit the marginalized and the disadvantaged, as opposed to the wealthy and the powerful.⁸³ Instead, it seems far more likely that judges will, on balance, disproportionately use discretion to deviate from the language of the law to benefit the wealthy and the powerful—and conversely to disadvantage the marginalized and subordinated.⁸⁴ If this is true, preserving thin equality before the law will, on balance, have substantively egalitarian consequences.

judging and revising specific, contestable forms of social life, the institutional arrangements that define them, and the visions of human selfhood and association that they enact”).

81. By this, I mean I am not attending here to possibilities such as wholesale revolution. In contrast, the theory I describe here would apply to contexts where social movements or uprisings lead to dramatic forms of change to the written law, since as I argue herein equality before the law and textualism best protect the products of such change.

82. Evidently, in many societies, including our own, the resource of the law may include non-textual forms of law such as the common law. Because this Article is exclusively focused on statutory interpretation, and the issue of which forms of statutory interpretation methodology may best promote equality, I do not discuss the issue of equal access to purely non-statutory forms of law.

83. As prior scholars have argued, even if one simply believes that the ideological orientation of judges is uncertain and inconsistent over time, this may counsel in favor of weighing values such as the rule of law more heavily in our debates over interpretive theory. *See, e.g.*, Lawrence B. Solum, *Outcome Reasons and Process Reasons in Normative Constitutional Theory*, 172 U. PA. L. REV. 913, 920, 981–82 (2024) (rejecting outcome-driven constitutional theory due to uncertainty and unpredictability and arguing that process values like the rule of law are more appropriate foundations for constitutional decision making); *cf.* Schauer, *supra* note 19, at 538, 543 (observing that whether we prefer “ruleness” and thus formalism may depend considerably on whether we think we have good or poor adjudicators—and to the extent this is unknowable, it may depend on whether we are more concerned about constraining the good adjudicator or the bad).

84. Judges are commonly drawn from the social and economic elites and tend to share those groups’ perspectives. *See* DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* 54–55, 57, 60 (2d ed. 2004) (arguing that legal elites, including judges, are socialized through hierarchical institutions to adopt norms that disproportionately favor the powerful); RICHARD POSNER, *HOW JUDGES THINK* 10–11, 60, 94, 306 (2008) (noting that judicial decision-making is shaped by personal background and education, and

The reasons for this are fairly obvious. If judges are likely to use discretion to disadvantage, not advantage subordinated groups, thin equality before the law is required to safeguard any thicker protections the law can provide. In the case of laws affording rights (e.g., property rights, contract rights, civil rights), the assurance of equality before the law is the assurance that all groups' rights under law will be respected on equal terms.⁸⁵ A disfavored group cannot be given lesser rights—or gerrymandered out of broad textual rights—absent textual differentiation.⁸⁶ Rather, all people's rights under a textually undifferentiated law must be respected on equal terms.

Similarly, the thin notion of equality before the law that textualism protects can also ensure that a favored or powerful group is not gerrymandered out of the burdens of criminal or regulatory laws. This is perhaps a less intuitive form of substantive equality—equality of burdens, rather than equality of rights. But as numerous scholars and theorists have observed, this form of equality is also critical, for it helps ensure that the burdens the law imposes stay within reasonable bounds.⁸⁷ As the first Justice Jackson once put it:

federal judges are drawn from elite, self-selecting professionals, and that Justices are often wealthy, privileged, and detached from the general public); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 5–6 (2004) (arguing that judges, shaped by elite social and educational backgrounds, tend to reflect dominant or elite values rather than protect marginalized groups). Historically, there is ample evidence that judges have far more often served as the guardians of elite interests, rather than the interests of the marginalized and subordinated. *See, e.g.*, Unger, *supra* note 80, at 563 n.1 (noting that critical legal studies scholars argue law historically reflects and reinforces existing social and class hierarchies); ERWIN CHERMERINSKY, *THE CASE AGAINST THE SUPREME COURT* 5–6 (2014) (arguing that the Supreme Court is more likely to side with big businesses and the government than protect people's rights); IAN MILLHISER, *INJUSTICES: THE SUPREME COURT'S HISTORY OF COMFORTING THE COMFORTABLE AND AFFLICTING THE AFFLICTED* x, xiii–xv (2015) (arguing that the Supreme Court has historically used its power to entrench elite interests and undermine protections for marginalized groups); David Luban, *The Warren Court and the Concept of a Right*, 34 HARV. C.R.-C.L. L. REV. 7, 7 (1999) (noting that the liberal Warren Court was an anomaly as the only liberal Supreme Court in American history); Samuel Moyn, *Counting on the Supreme Court to Uphold Key Rights Was Always a Mistake*, WASH. POST (June 17, 2022), <https://www.washingtonpost.com/outlook/2022/06/17/supreme-court-rights-congress-democracy/> [<https://perma.cc/Z7HB-PX3T>] (arguing that the Court has historically upheld elite interests and failed to protect marginalized groups, including in abortion, civil rights, and labor contexts); Nikolas Bowie & Daphna Renan, *The Supreme Court Has Grown Too Powerful. Congress Must Intervene.*, N.Y. TIMES (Oct. 11, 2024), <https://www.nytimes.com/2024/10/11/opinion/laws-congress-constitution-supreme-court.html> [<https://perma.cc/N9E2-JVLB>] (explaining that the Court has often invalidated laws protecting minorities and undermined Congress's constitutional authority).

85. For concrete examples, *see infra* notes 168–88 and accompanying text.

86. *Cf.* SCALIA & GARNER, *supra* note 6, at 103–05 (noting that applying a textualist methodology means “giving general terms their general meaning”); Manning, *Second-Generation*, *supra* note 3, at 1316 (“[S]econd-generation textualism boils down to the simple idea that judges must respect the level of generality at which the legislature expresses its policies.”).

87. *See, e.g.*, MICHELLE ALEXANDER, *THE NEW JIM CROW* 96 (2010) (observing that “[i]n every state across our nation, African Americans—particularly in the poorest neighborhoods—are

[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.⁸⁸

Finally, the type of thin equality before the law that textualism protects is also likely to be essential to protecting any specific legal gains that subordinated groups achieve in moments of transformative politics (or to preserving specific protections that are promised to them in moments of transformative loss).⁸⁹ Indeed, bodies of law specifically affording rights to subordinated groups are likely to be especially vulnerable to contra-textual gerrymandering or abrogation by judges who may view them as too radical—or as transformative beyond what Congress could plausibly have intended—or simply inconsistent with majoritarian goals and desires.⁹⁰ Where this intuition leads to non-textual rulings that diminish or weaken legal protections afforded specifically to subordinated groups, this in turn is likely to have especially large substantive equality costs. Indeed, it should be apparent that the promises of law—and even more generally of democratic government—for subordinated groups effectively collapse if they cannot be

subjected to tactics and practices that would result in public outrage and scandal if committed in middle-class white neighborhoods”); WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 6 (2011) (arguing that “the equal protection guarantee is all but meaningless when applied to criminal law enforcement, one reason why both drug enforcement and enforcement of laws banning violent felonies are so different in black communities than in white ones”); *see also* *Ry. Express Agency v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) (“[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.”).

88. *Ry. Express Agency*, 336 U.S. at 112–13.

89. For concrete examples of this, see *infra* text accompanying notes 228–44.

90. See Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1357 (1952) (observing that, with respect to the “legislative program of the post-Civil War days” the “Supreme Court . . . has substituted its belief that civil rights lie within the realm of state power and that any federal attempt to encroach on that power is to be viewed narrowly and suspiciously”). My claim here is not that Congress in general is more likely to be equality-promoting than the courts, but rather that in the rare moments in which Congress does in fact enact transformative legislation intended to benefit subordinated groups, we often see those Congressional enactments subjected to non-textual retrenchment (via, for example, the engrafting of non-textual defenses) by the courts. See *infra* text accompanying notes 228–44. It is worth observing that when courts are inclined to be more egalitarian than Congress, they will typically have tools at their disposal outside of statutory interpretation, including most notably the Equal Protection clause.

assured that the promises of written law will be afforded to them on equal terms.

Importantly, the final way that thin equality before the law (and textualism) can protect substantive equality incorporates aspects of both of the *other* ways that textualism can safeguard equality as well. Because laws that specifically afford rights to subordinated groups (such as civil rights laws, legal protections for Native American sovereignty, or public benefits laws) are of particular (and sometimes exclusive) benefit to subordinated groups, any non-textual limitation of such laws will diminish equal access to rights for subordinated groups. Moreover, because such laws typically have as their target more privileged and powerful groups in society (such as the government or businesses), any non-textual limitations on liability will lead to privileged groups being exempted from the laws' burdens. Thus, non-textual gerrymanders of the specific legislative gains of subordinated groups are likely to lead to especially harmful forms of substantive inequality—which textualism, and the entitlement to equal application of the law as written, could forestall.

Thus, there are at least three ways in which the thin type of equality that textualism protects—equality before the law—may help protect thicker, more substantive forms of equality. First, textualism can help discourage the gerrymandering of disfavored or subordinated groups *out* of rights—absent textual differentiation, rights laws mean the same thing for all. Second, textualism can help forestall the gerrymandering of the privileged or the wealthy out of burdens—thus ensuring that the costs of the law are borne more equally. Finally, textualism can help protect against the diminishment of legal rights specially secured by subordinated groups through subsequent non-textual abrogation or gerrymandering by judges.⁹¹

II. Alternative Interpretive Theories and Equality

Thus far, I have made the case only that textualism can help preserve thin equality before the law—which can in turn promote thicker forms of equality. But the claims of textualist scholars that textualism promotes equality are at least implicitly comparative—that textualism is *more likely* to promote equality than its other interpretive theory competitors (intentionalism, purposivism, eclecticism, and originalism).⁹² This Part thus

91. These types of protections of substantive equality, especially the first and the third, may be especially important to poor and otherwise disadvantaged groups who may lack alternative forms of achieving their aims (unlike the wealthy and the powerful, who often have other mechanisms, such as money, to achieve their goals).

92. See, e.g., Manning, *Absurdity*, *supra* note 3, at 2391 (discussing how textualism preserves the legislation created by bicameralism and presentment, two processes designed to control factions and protect minorities); GORSUCH, *supra* note 1, at 125, 139 (emphasizing that textualism

takes up the question of whether other interpretive theories are equally well-situated to protect equality—and suggests that they likely are not. Specifically, this Part suggests that each of textualism’s interpretive competitors can encourage habits of reasoning that are vulnerable to (though they need not lead inexorably to) the diminishment of equality before the law and thus anti-egalitarian judicial decision-making.

It is important to stress at the outset that the claim of this Part is *not* that textualism’s interpretive competitors can never adequately protect (thick or thin) equality. Indeed, the convergence of many of the theories of interpretation on more textual approaches may mean that some such theories, as theorized or practiced by their adherents, actually meet the definition of textualism I use herein: “ultimate fidelity . . . to the language of the law (as opposed to any competing consideration, such as purpose, history, intent, or policy), and . . . reject[ion of] interpretations that deviate from the most plausible meaning of the text.”⁹³ Because I use a functional definition of textualism, rather than one that is derivative of the varying claims of self-professed textualists (or their methodological competitors), if other practices of interpretation meet that functional definition, this comparative argument is not intended to apply to them.⁹⁴

But as described herein, many versions of textualism’s primary interpretive competitors—intentionalism, purposivism, eclecticism, originalism—leave space for the type of thin or formal inequality that may in turn lead to substantive inequality. Moreover, each encourages habits of reasoning that—situated in a hierarchical society in which judges are drawn primarily from the elites—seem predictably vulnerable to precisely the type of anti-egalitarian gerrymandering that textualism is theoretically well-suited to prevent. While, as described in Part IV, legal realism requires us to acknowledge that nominal adherents of *any* interpretive theory may ultimately justify decision-making in accordance with political preferences, this Part suggests that textualism’s competitors channel reasoning into habits of thought that are especially dangerous for subordinated groups.

“ensure[s] equality in the law’s application” and that other interpretive theories may undermine equality).

93. See Molot, *supra* note 34, at 3 (observing that “textualism has so succeeded in discrediting strong purposivism that it has led even nonadherents to give great weight to statutory text”); Manning, *supra* note 45, at 75 (agreeing that purposivism and textualism have converged in certain respects, though also contending that in others they remain distinct).

94. Moreover, as taken up more fully in Part IV, the claim herein is not that textualism, or thin equality before the law, always best promotes substantive equality. Indeed, in the context of genuinely substantively inegalitarian laws, “thin” equality may promote substantive inequality. Rather, the claim is that, on balance, textualism does a better job of protecting equal access to the resource of the law than do competing interpretive methodologies.

A. *Intentionalism*

As the most immediate methodological predecessor to textualism—and often its foil in theoretical debates—it is worth beginning with intentionalism in considering textualism’s interpretive theory alternatives.⁹⁵ As described in the Introduction, I use a fairly simple definition of intentionalism herein: theories of interpretation that use as their ultimate guiding principle legislative intent (here, Congressional intent). As I discuss below, while equality risks typically have not featured prominently in critiques of intentionalism, they ought to: Intentionalism necessarily encourages habits of reasoning that are especially likely to pose risks to thin (and thus thick) equality.⁹⁶

The reasons for this are threefold. First, intentionalism (as opposed to purposivism) is by its nature granular: it asks how Congress would have answered the question of how the statute should be applied in *this* circumstance, which necessarily diminishes the likelihood that general law will be applied generally.⁹⁷ Second, because legislative intent is often in fact indeterminate, it runs the risk of devolving (self-consciously or not) into what Judge Posner has referred to as “imaginative reconstruction,” in which the judges ask themselves what Congress of the time *would* have wanted or intended (a practice likely to have predictably negative results for

95. Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 265 n.127 (2009).

96. For a description of the central textualist critiques of intentionalism and purposivism, see Manning, *supra* note 45, at 73–74 (discussing both the constitutional argument that only the text has survived bicameralism, as well as the concern that there is no realistic method for judges to accurately reconstruct what Congress would have intended given the problems associated with multi-member body decision-making).

97. E.g., Linda D. Jellum, *The Art of Statutory Interpretation: Identifying the Interpretive Theory of the Judges of the United States Court of Appeals for Veterans’ Claims and the United States Court of Appeals for the Federal Circuit*, 49 U. LOUISVILLE L. REV. 59, 87–88 (2010). In the constitutional interpretation context, largely left to the side here, most originalist theorists have purported to move decisively away from this type of specific “original intent” approach (also referred to as “original expected applications”)—although as I have written elsewhere, the modern construction embraced by judges and theorists (“original public meaning”) often devolves in practice back into such an inquiry. Eyer, *supra* note 2, at 124. Note also that some scholars subsume both intentionalism and purposivism under the name “intentionalism” in the statutory interpretation context. See James J. Brudney & Lawrence Baum, *Does Textualism Constrain Supreme Court Justices?* NW. L. REV. (forthcoming 2026) (manuscript at 10–11), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5122933 (distinguishing textualism from “intentionalism” and treating both the use of legislative history—a quintessentially intentionalist resource—and legislative purpose—a quintessentially purposivist resource—as “intentionalist” approaches to statutory interpretation). For those scholars, my description of “purposivism” as a more general purpose-driven inquiry, see *infra* subpart II(B), may be a more apt discussion of how they conceptualize “intentionalism.” But, as I discuss, even this more general purpose-driven inquiry is susceptible to similar risks.

subordinated groups).⁹⁸ Finally, because intentionalism is necessarily backward looking—looking at what Congress actually or by hypothesis would have wanted with respect to a particular group or application—it brings with it the “old soil” of historical cultural biases.⁹⁹

The risks of the specificity inherent in intentionalism for thin equality before the law are perhaps most obvious. Unlike textualism, which generally insists that broad law be applied in the same way to all litigants (absent textual specificity), intentionalism searches for specific Congressional intent even in the absence of textual specificity.¹⁰⁰ This leads to precisely the opposite pull of textualism (at least in the case of broad text)—towards bespoke individual answers for each circumstance or application that comes before the court, rather than towards broadly egalitarian application of general legal principles.¹⁰¹

Even more problematically from an equality perspective, because Congressional intent will often be unknowable or indeterminate (even with resort to all tools, such as legislative history) intentionalism often devolves in practice into “imaginative reconstruction.”¹⁰² In this circumstance, “[t]he judge should try to [editorial note: or does in fact] think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar.”¹⁰³ Thus, the judge undertakes to imagine how Congress would have wanted the statute to be applied to this specific application, if it had clearly considered the matter.

The inherent pull away from thin equality here (i.e., equality before the law) is obvious, since such specificity asks the judge to tailor their answer to the specific litigant/circumstance/group before them. But does this necessarily harm thicker forms of equality? After all, one could imagine a circumstance in which Congress left specific and concrete evidence of substantive egalitarian desires in how the law should be applied—overwhelmingly privileging subordinated or economically disadvantaged groups, rather than the rich or the powerful.¹⁰⁴ Or, in theory judges’

98. For an explanation of “imaginative reconstruction,” see Richard A. Posner, *Statutory Interpretation: In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983). See also Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 381–82 (1907) (providing an early description of this approach to statutory interpretation); ESKRIDGE, *supra* note 42, at 21–22, 211 (describing the origins and nature of the “imaginative reconstruction” approach).

99. Cf. Michael C. Dorf, *The Undead Constitution*, 125 HARV. L. REV. 2011, 2046 (2012) (making a similar observation with respect to originalism).

100. Jellum, *supra* note 97, at 87–88.

101. Cf. sources cited *supra* note 51.

102. Posner, *supra* note 98, at 817.

103. *Id.*

104. Cf. 42 U.S.C. § 12101(a)(3) (setting out the “Findings and Purpose” of the Americans with Disabilities Act, including “institutionalization” as among the areas of discrimination that Congress sought to redress).

imaginative reconstruction could lead them in a similar direction—towards reasoning that Congress surely intended to benefit the poor and the subordinated, and away from applying the law in ways that on balance benefit the rich and the powerful.

But while this certainly may happen in individual cases or before individual judges, it will strike many as “pie in the sky” optimism to believe that this egalitarian outcome will happen as a regular matter. How much easier it is to imaginatively reconstruct a reality in which of course Congress did not intend to radically reshape our current social and political hierarchies—and of course Congress did not intend to give a despised (and not specifically mentioned) group powerful new rights. To the extent that members of Congress are the product of our unequal society—and judges asked to imagine Congress’s intent are effectively using contextual cues (including the backdrop of widespread social biases) to engage in imaginative reconstruction—both the practice of discerning actual, and the practice of reconstructing imagined Congressional intent seem likely to on balance lead to substantive inequality, not more equal outcomes.

This is especially so because intentionalism—like originalism—is necessarily backward looking, in a society in which biases against a variety of groups have long been substantial, but have diminished over time.¹⁰⁵ Thus, in the absence of (rarely present) specific and clear Congressional intent—historically prevalent social biases may seem the most obvious indicator of whether Congress would have, had it considered the matter, intended to specifically afford rights to a particular group. This is, of course, precisely the role that intentionalist arguments (often mis-described as textualist arguments) played in the dissenters’ arguments in *Bostock v. Clayton County*: that surely in an era when sodomy was affirmatively criminalized, and the federal government explicitly discriminated against LGBTQ workers, Congress could not have intended to afford LGBTQ people equal rights.¹⁰⁶

Of course, it is important to acknowledge that there are limited circumstances in which intentionalism could in theory do important substantive equality work. For example, scholars of the Reconstruction Era have pointed out that the Radical Republicans were indeed radical: they wanted to dramatically transform racial relations in this country through their

105. See Dorf, *supra* note 99, at 2045 (explaining that “[o]riginalism is backward-looking and thus, other things being equal, more likely to yield results that either preserve the status quo or roll back the clock to an earlier status quo . . . insofar as one assumes that over the long run societies make moral progress”).

106. See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754–55, 1770–72 (Alito, J., dissenting) (arguing that in an era when sodomy was criminalized and the federal government explicitly discriminated against LGBTQ workers, it was implausible to believe that Congress would have intended to afford LGBTQ people employment discrimination rights).

constitutional and legislative reforms.¹⁰⁷ But even here, this argument can be overstated. Even Radical Republicans were to some extent the product of their time and of its biases, in ways that limited their imagination for what work the law could (or should) do.¹⁰⁸ Perhaps more importantly, as described more fully in Part III, actual practice suggests that by far the largest threats to radical lawmaking come from allowing departures from text—rather than from foreclosing such departures.¹⁰⁹

In short, intentionalism—with its focus on discerning or imaginatively reconstructing the specific intent of Congress with respect to a particular application—necessarily leans away from the type of generality that best preserves thin equality before the law. Moreover, this departure from thin equality creates obvious substantive equality risks in a society where biases against a variety of groups have long been robust. Finally, the necessarily backward-looking orientation of intentionalism—asking what the enacting Congress *would* have intended in this specific circumstance—makes social historical context (including historical biases) salient to interpretation in ways that have self-evident equality risks.

B. Purposivism

Purposivism is the practice of looking at the purpose of the statute as the foundational guide to interpretation. As other scholars have noted, purposivism and intentionalism can run together, and they are not always neatly separable.¹¹⁰ To the extent that purposivism effectively devolves into

107. See, e.g., Alexis Hoag, *Reclaiming Reconstruction*, in LAYING CLAIM TO THE CONSTITUTION 9, 9–10 (2021), <https://www.theconstitution.org/wp-content/uploads/2021/09/The-2021-Edition-of-Laying-Claim-to-the-Constitution.pdf> [https://perma.cc/463Q-86QD] (arguing that the context surrounding the adoption of the Fourteenth Amendment is beneficial to progressive arguments and that many of the Court’s conservative decisions in the criminal justice space “make little sense when proper attention is paid to the work of the Joint Committee on Reconstruction”).

108. For example, although some originalist scholars have attempted to defend *Loving* on originalist grounds, many agree that the legislative and constitutional products of Reconstruction were not intended to reach bans on interracial marriage, at least not in the specific sense. See, e.g., Kermit Roosevelt III, *Interpretation and Construction: Originalism and Its Discontents*, 34 HARV. J.L. & PUB. POL’Y 99, 102 n.15 (2011) (arguing that the “[i]t is about as plain as such things can be . . . that the ratifiers of the Equal Protection Clause did not think it would immediately create a right to interracial marriage”); see also Josh Blackman, *Balkin’s Right, Scalia’s Wrong*, *Bolling v Sharpe and Loving v VA Bigger Originalist Quandary than Brown*, JOSH BLACKMAN’S BLOG (Oct. 28, 2009), <http://joshblogs.wordpress.com/2009/10/28/balkins-right-scalias-wrong-bolling-v-sharpe-and-loving-v-va-bigger-originalist-quandry-than-brown/> [https://perma.cc/X9CC-AV3R] (“how can [a] miscegenation ban . . . possibly be unconstitutional if it was a common at the time of Reconstruction.”).

109. See *infra* subpart III(C).

110. See, e.g., Michael Francus, *Digital Realty, Legislative History, and Textualism After Scalia*, 46 PEPP. L. REV. 511, 517 n.30 (2019) (noting that “[c]onflating intentionalism and purposivism is not uncommon, even among scholars”).

what I describe as intentionalism, above, I leave my analysis of its potential equality concerns to my discussion in subpart II(A). Here, I focus instead on a form of purposivism that is arguably meaningfully distinct from intentionalism in its potential implications for equality: purposivism that looks to more general or objective statutory purposes as a guide to interpretation.¹¹¹

Unlike more specific types of intentionalism—which ask how Congress would have intended the statute to apply in this specific circumstance—this more general type of purposivism appears at first glance to raise lesser equality concerns. Thus, asking about Congress’s general purposes, and using those as a guide to interpretation, seems less fraught—and less likely to lead to equality harms—than asking whether Congress specifically intended to afford rights to a specific, not explicitly mentioned, disfavored group. Because purposivism lacks the facial drive toward specificity that facilitates inequality in the practice of intentionalism, purposivism’s equality risks may not be as readily apparent.

But while it is more subtle, purposivism also often tends towards methods of reasoning that can pose meaningful equality concerns. At least where there are equality stakes—where the question being posed by the case is how or whether a rights law should be extended to a less favored group, or whether the burdens of a law ought to fall on a particular privileged group—even purposivism can effectively serve as intentionalism’s mirror image.¹¹² Even if our question is, as it would be in purposivism, “what is the purpose of this law,” the follow-on question will often be, “who was this law meant to benefit?” or “what problematic set of actions was this law meant to address?” And these questions may predictably lead to modes of reasoning that hold risks for both thin and thick equality.

Consider for example, what has long been considered the classic example of purposivism, *Church of the Holy Trinity v. United States*.¹¹³ In

111. See, e.g., Lawrence Solum, *Legal Theory Lexicon 078: Theories of Statutory Interpretation and Construction*, LEGAL THEORY LEXICON (May 19, 2024), <https://legalthorylexicon.com/2017/05/theories-of-statutory-interpretation/> [https://perma.cc/PB36-E27B] (defining “purposivism” as an “approach to statutory interpretation that maintains that the legal effect of a statute should be determined by the objective purpose of the statute”).

112. See *infra* notes 113–21 and accompanying text.

113. *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892); see also John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 113 (characterizing *Holy Trinity* as articulating the “traditional purposivist framework.”). Although *Holy Trinity* has long been thought of as a classic example of purposivism, recent articles have relied on corpus linguistics to speculate that the Supreme Court may have been wrong to conclude that the text of the statute included a minister, and thus have suggested *Holy Trinity* could have been decided on textualist grounds. See, e.g., Tammy Gales & Lawrence M. Solan, *Revisiting a Classic Problem in Statutory Interpretation: Is a Minister a Laborer?*, 36 GA. ST. U. L. REV. 491, 491–92 (2020) (arguing that the statutory term “labor or service” may have been a term of art that excluded clergy members); Nicole Steitz, Brian G. Slocum & Kevin Tobia, *The Broad Church of Modern Textualism*, BROOK. J.L. & POL’Y, Dec.

Holy Trinity, the Court addressed the question of whether the Alien Contract Labor Law extended to a contract between an American church and an English minister.¹¹⁴ The Court concluded that it did not, despite the statute's broad proscription on "in any way assist[ing] or encourag[ing] the importation or migration of any alien or aliens . . . into the United States . . . under contract or agreement . . . to perform labor or service *of any kind*."¹¹⁵ A core part of the Court's reasoning in *Holy Trinity* relied on Congress's presumed (and likely actual) purposes in enacting the ban on importation of employees: to prevent the bringing to the U.S. of large numbers of economically marginalized laborers.¹¹⁶ As the Court put it, quoting Justice Brown sitting as a District Judge, the purpose of the statute was "to raise the standard of foreign immigrants, and to discountenance the migration of those who had not sufficient means in their own hands, or those of their friends, to pay their passage."¹¹⁷

But what is the salience of this purpose in the context of an evaluation of whether or not a preferred group (here a minister) ought to be made subject to the burdens of the law? This conclusion appeared obvious to the Court in *Holy Trinity*: "It was never suggested that we had in this country a surplus of

2024, at 94, 129 (arguing that *Holy Trinity*'s holding could have been reached on textualist grounds). *But cf. Holy Trinity*, 143 U.S. at 458 (beginning the Court's discussion by stating "[i]t must be conceded that the act of the [church] 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"). While a full discussion of this hypothesis is beyond the scope of this Article, I will note here that the use of corpus linguistics, while potentially consistent with textualism, often devolves in practice into original applications reasoning by looking at the most common context in which a phrase was used and then assuming that this was the only context to which it applies. As a type of textualism, this involves a serious logical error: a phrase can be used overwhelmingly in a particular context not because it is a term of art or because its terms are logically limited to that context, but because that was the primary context in which people were thinking about its application (original expected applications). *See Eyer, supra* note 2, at 127 (discussing this problem with corpus linguistics). For example, Gales & Solan's survey of the U.S. Code, which shows that "labor or service" was until the mid-1860s used exclusively in federal legislation addressing slaves and indentured servants, does not demonstrate that "labor or service" was linguistically understood to be limited to compelled labor. *See Gales & Solan, supra* at 502, 505 (arguing that "[t]he term 'labor or service' may not be a matter of ordinary meaning at all but may rather be a legal term of art used to describe the work of slaves."). An equally (or perhaps even more) plausible explanation of this pattern of usage in the early U.S. code is that the federal government at that time did not regulate workers except in the area of slavery and involuntary servitude—something that could easily have arisen from the perceived limitations of the authority of the federal government, not the linguistic limits of the words "labor or service." *See, e.g., Luke Chesek, Solutions for the Uninsured: Federal, State, and Local Initiatives*, HEALTH L. & POL'Y, 2009, at 32, 42 (observing that "[p]rior to the New Deal, Supreme Court decisions made it very difficult for the federal government to enact national workers' rights laws.").

114. *Holy Trinity*, 143 U.S. at 457.

115. *Id.* at 458 (emphasis added) (quoting Alien Contract Labor Law, ch. 164, 23 Stat. 332, 332 (1885)).

116. *See id.* at 464 (discussing Congress's intent to prevent trouble from "cheap unskilled labor").

117. *Id.* at 463–64.

brain toilers, and, least of all, that the market for the services of Christian ministers was depressed by foreign competition.”¹¹⁸ Nor, the Court strongly implied, could the type of case here—involving a professional paid to come to the United States—be seen as implicating the concerns regarding the degradation of American society that Congress also feared: the influx of workers “ignorant of our social condition . . . generally from the lowest social stratum” who “do not become citizens” and were “not a desirable acquisition to the body politic.”¹¹⁹ Professional contracts, such as those at issue in *Holy Trinity*, simply were not within Congress’s concerns.¹²⁰

Thus, the Court’s purposivist reasoning in *Holy Trinity*—that the law was targeted at the importation of an undesirable class of immigrants, who created unfair competition for American workers—ultimately devolved into simply the flip side of the intentionalist inquiry. The Alien Contract Labor Law’s *purpose* was to end the practice of companies paying the passage of poor, culturally undesirable workers—thus we cannot assume that Congress *intended* to cover contracts of professional workers, even though such workers fell within the Act’s broad text.¹²¹ Even though such inquiry begins with the question of purpose, its ultimate inquiry—into whether that purpose extended to a particular, not textually mentioned, favored group—looks much like the intentionalist inquiry with all of its attendant equality risks.

Nor is *Holy Trinity* unique in this regard. Relying heavily on Congressional purposes to answer the question of whether specific constituencies should be covered (either in the case of marginalized groups and rights laws, or in the case of privileged groups and criminal or regulatory burdens) will often lead to comparable results.¹²² Because purposivism—like intentionalism—does not use the text (and the absence of textual specificity) as its ultimate guide to *who* is included in a law, it invites the gerrymandering of those groups who were not specifically within the law’s purpose out of the law.¹²³ But to the extent that the law primarily is enacted to serve the purposes of the status quo (i.e., the interests of the comparatively privileged and the powerful), this will predictably lead to the disproportional exclusion of

118. *Id.* at 464.

119. *Id.* at 465.

120. *Id.*

121. *See id.* at 464–65 (discussing the legislative history of the Alien Contract Labor Law).

122. Another example of this phenomenon can be seen in the role that arguments regarding the purposes of sex discrimination protections such as Title VII and Title IX (i.e., to address discrimination against women) have played in judicial reasoning regarding why anti-LGBT discrimination should not be understood to fall within the scope of such laws. *See, e.g., Zarda v. Altitude Express*, 883 F.3d 100, 143–44 (2d Cir. 2018) (Lynch, J., dissenting) (relying on arguments that the purpose of Title VII’s sex discrimination provision was to prevent discrimination against women as a reason to conclude that it was not intended to cover anti-LGBT discrimination); *Louisiana v. U.S. Dep’t of Educ.*, 737 F. Supp. 3d 377, 389 (W.D. La. 2024) (same, Title IX).

123. *Cf.* cases cited *supra* note 122.

marginalized groups from the benefits of the law—and of privileged groups from its burdens.

Of course, the fact that purposivism appears to be a worse guardian of thin equality than textualism, does not mean that purposivism will lead in all cases to substantively inegalitarian results. Where a statute has a broad and substantively egalitarian purpose, purposivism may in some cases lead to substantive egalitarian results—at times even more substantively egalitarian results than relying on plain text.¹²⁴ This is especially obvious with respect to laws passed for the particular benefit of marginalized groups, such as civil rights law, which may have genuinely broad and egalitarian purposes that can at times exceed even their limited text.¹²⁵ However, as described more fully in Part III, on balance it appears that the threat to laws that specifically benefit marginalized groups from permitting textual departures are greater than any advantages obtained thereby. At a minimum, as described in Part V, it is worth being cognizant of the equality risks that can come with a purposivist approach—and the role that text can play in forestalling such risks.

C. *Eclecticism*

Of the major modern theories of statutory interpretation, eclecticism is in some respects the most difficult to characterize for analysis, since it by definition relies on multiple resources for interpretive clarity, privileging none of them decisively.¹²⁶ Some versions of eclecticism can be consistent with textualism—giving priority to the text, where the text is clear.¹²⁷ But others may include a more fulsome consideration of a variety of interpretive considerations, including indicia of Congressional purpose and intent (sometimes otherwise referred to as statutory and legislative history),

124. For an example of this, see *King v. Burwell*, 576 U.S. 473, 492–96 (2015), which relies nominally on textualist reasoning, but also draws heavily on the purposes of the Affordable Care Act (ACA) and legislative intent in concluding that the ACA authorized tax credits for insurance purchased on federal exchanges.

125. Affirmative action under Title VII is likely the most striking example of this, as the Court acknowledged in its seminal decision allowing affirmative action that doing so went beyond what the text of the statute allowed and instead relied on purposivist reasoning. See *United Steelworkers v. Weber*, 443 U.S. 193, 201–02 (1979). For further discussion of the challenge posed by *Weber* and similar cases for the theory articulated herein, see *infra* notes 304–16 and accompanying text.

126. See Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1313–15 (2018) (describing the eclectic approach to statutory interpretation taken by most Courts of Appeals judges without a particular hierarchy of authority).

127. For example, under Professors Eskridge and Frickey’s “funnel of abstraction,” an “interpreter will value more highly a good argument based on the statutory text than a conflicting and equally strong argument based upon the statutory purpose.” Eskridge & Frickey, *supra* note 44, at 353.

administrative practice, and public values and norms.¹²⁸ This subpart takes up the equality risks of eclecticism insofar as it relies on other sources of authority to go beyond clear text, or to add artificial specificity to text when none is present.

In those circumstances, eclecticism can pose the same equality concerns as intentionalism or purposivism (unsurprisingly, given that it can incorporate intentionalist or purposivist forms of reasoning into its approach). Thus, by imposing weaker constraints on judges to treat broad undifferentiated text as applicable in the same way to all parties (thin equality), it can lead to the gerrymandering of disfavored groups out of rights—and favored groups out of burdens.¹²⁹ But eclecticism also can be especially susceptible to another type of equality risk: the weakening of textually guaranteed rights applicable specifically to subordinated groups. Because eclecticism affords judges a wealth of possible considerations to draw on in interpretation, it affords judges numerous ways of justifying (to themselves and publicly) their intuitions that minority-protective laws ought not be construed in a truly transformative fashion.

A good example of this phenomenon can be seen in the case of *Albertson's, Inc. v. Kirkingburg*.¹³⁰ Kirkingburg was a truck driver with monocular vision (significantly impaired vision in one eye) who was hired by Albertson's for a truck driving job after a medical examiner erroneously certified him as meeting the Department of Transportation (DOT) visual acuity standard (DOT certification was required for the Albertson's job).¹³¹ This error was later detected by an examining doctor who told Kirkingburg that he needed to seek a waiver from the DOT.¹³² Albertson's terminated Kirkingburg from his job as a truck driver without affording him the time to

128. See, e.g., Gluck & Posner, *supra* note 126, at 1313–15 (describing the eclectic approach taken by federal Courts of Appeals judges); Daniel A. Farber, *Statutory Interpretation and the Idea of Progress*, 94 MICH. L. REV. 1546, 1547 (1996) (explaining that modern courts rely on an eclectic mix of “text, legislative history, statutory purpose, and public policy”).

129. For example, even famous purposivist opinions such as *Holy Trinity*, whose problematic reasoning is discussed in subpart II(B), can be characterized as examples of eclecticism, since they also employed other modalities of reasoning beyond statutory purpose. See *Church of the Holy Trinity v. United States*, 143 U.S. 457, 465, 471 (looking to the nation's Christian history as critical context for interpreting the statute). In the case of *Holy Trinity*, the most prominent example of this was the Court's understanding of the United States as a “Christian nation” as a backdrop to its belief that Congress could not have intended to reach contracts between a church and its minister. See *id.* at 471 (relying on this understanding).

130. 527 U.S. 555 (1999). Although *Kirkingburg* was partially overruled by the ADA Amendments Act of 2008, insofar as it addressed the ADA definition of disability, the portion of the decision described herein (addressing the ADA's definition of “qualified”) remains good law.

131. *Id.* at 558–59.

132. *Id.* at 559.

seek a waiver and then refused to rehire him even when he successfully obtained a DOT waiver.¹³³

Kirkingburg sued under the Americans with Disabilities Act, and Albertson's moved for summary judgment, arguing that Kirkingburg was not "qualified."¹³⁴ Under the ADA's statutory text, the term "qualified" was specifically defined: "The term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."¹³⁵ This definition, which reflects the disability rights theories that helped animate the ADA, focuses on the functional capacity of the person with a disability, i.e., their ability to perform the essential functions of the job.¹³⁶ On its face, it requires an individualized approach to people with disabilities, requiring an employer to ask whether this disabled employee can do this job, rather than permitting broad disability-based screening rules.¹³⁷

A court that started and stopped with this statutory text should have easily found for the employee, Kirkingburg. Kirkingburg had in fact driven successfully for Albertson's for over a year and had worked without incident as a driver for other companies for more than a decade before that.¹³⁸ There clearly was at least a jury question as to whether he could "perform the essential functions of the employment position that [he] holds or desires"¹³⁹ (and indeed, arguably summary judgment may have been appropriate for *Kirkingburg* on these facts). But instead, the Supreme Court ruled against the disabled employee in a unanimous opinion—and in so doing appeared to validate employer-adopted physical and mental qualifications, even as applied to an individual employee who could do the job.¹⁴⁰

In so doing, the Court did not rely primarily on Congressional intent or Congressional purpose, neither of which appeared to support this outcome.¹⁴¹

133. *Id.* at 560.

134. *Id.* at 560–61.

135. 42 U.S.C. § 12111(8) (1994).

136. *Id.*

137. *Id.*

138. *Kirkingburg*, 527 U.S. at 558–59; see also Brief for Respondent, *supra* note 136, at *2 (observing that Kirkingburg had been a commercial truck driver since 1979 and had a "near-perfect driving record").

139. 42 U.S.C. § 12111(8).

140. See *Kirkingburg*, 527 U.S. at 577–78 (concluding that the employer could terminate an employee for failure to meet a vision acuity standard, even where the employee had in fact been successfully performing the "essential functions" of the job for over a year).

141. Congressional intent did support the narrower proposition that Congress had expected that compliance with federally mandated safety requirements (such as DOT certification) would not subject employers to ADA liability, even where those federal safety requirements turned on physical or mental criteria. See *id.* at 573–74 (stating that Congress recognized that federal safety rules would limit the ADA). But federally mandated safety requirements were not at issue in *Kirkingburg*, since

Rather, in an example of interpretive eclecticism, the Court relied predominantly on an extensive critique of the DOT waiver program (which the Court viewed as not sufficiently protective of safety), and the Court's own view that it was unreasonable to require employers on "a case-by-case basis" to produce evidence that employees such as Kirkingburg could not safely perform the job.¹⁴² But of course that is exactly what the language of the statute—which the Court almost entirely ignored—requires: individual evaluation of a disabled employee and their ability to do the job.¹⁴³

The equality costs of a case like *Albertson's* may seem at first glance more amorphous—after all no specific group was gerrymandered out of the law's benefits, nor out of its burdens. But in a very real sense, people with disabilities were deprived in *Albertson's* of another, more basic type of equality: equal ability to rely on, and defend, their clearly articulated legislative victories. And this came with substantive equality costs: the judicial undermining of a definition that was key to implementing the disability justice vision of employment that the ADA embodied. After *Albertson's*, employees with disabilities could no longer rely on an employer to be legally required to look at their abilities rather than the proxy of their physical and mental condition—and this had genuine equality costs.¹⁴⁴

Thus, eclecticism, no less than purposivism and intentionalism, can lead to statutory interpretation approaches that have equality costs—in both the thick and thin sense. While the mechanisms by which eclecticism operates are more variegated, it is precisely this interpretive pluralism that may make it difficult to constrain inegalitarian judicial intuitions. Because eclecticism will often afford the tools to make multiple interpretive arguments, versions of eclecticism that do not treat the text as binding can come with substantial equality risks.

the federal government considered *Albertson's* safety obligations to be satisfied by the waiver. See Brief for Respondent, *supra* note 136, at *5–7 (describing the waiver program).

142. See *Kirkingburg*, 527 U.S. at 571–78 (finding that federal regulation's waiver scheme lacked a factual basis grounded in public safety).

143. See 42 U.S.C. § 12111(8) (defining a "Qualified individual" as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires").

144. See Michelle A. Travis, *Disqualifying Universality Under the Americans with Disabilities Act Amendments Act*, 2015 MICH. ST. L. REV. 1689, 1712 (describing a case in which the police chief employer was allowed to tell the jury that a police officer employee has to "be of sound mind, clear-thinking, able-bodied people in good physical health and mental health"). As Travis points out, the police chief's testimony "would be similar to an employer in a sex discrimination case saying that employees 'have to be male' or in a race discrimination case saying that employees 'have to be white.'" *Id.*

D. *Originalism*

The final alternative theory of statutory interpretation that is worth addressing herein is originalism. Textualism is often conflated with originalism, and thus some readers may question addressing it as a unique theory of interpretation.¹⁴⁵ But as I have written elsewhere: “Textualism and originalism are not the same interpretive theory. Textualism commands adherence to the text. Originalism, in contrast, commands adherence to history.”¹⁴⁶ These divergent ultimate guiding principles mean that although some approaches to originalism are consistent with textualism (what I refer to as allied approaches), others are not (antagonistic approaches).¹⁴⁷

Moreover, although it has long been conceptualized as predominantly a theory of constitutional interpretation, originalism has recently made inroads into statutory interpretation.¹⁴⁸ While originalism—and its most common contemporary avatar, “original public meaning”—was largely absent from Supreme Court practice prior to 2018,¹⁴⁹ several Supreme Court decisions from 2018 onward have treated “statutory originalism” as a legitimate approach to statutory interpretation.¹⁵⁰ Thus, while history has always played a role in statutory interpretation, the conceptualization of that role as a form

145. Eyer, *supra* note 2, at 116.

146. *Id.* at 115. Many originalist scholars disagree with this perspective, and consider at least some forms of originalism to simply be a form of textualism, and vice versa. *See, e.g.*, Lawrence B. Solum, *Disaggregating Chevron*, 82 OHIO ST. L.J. 249, 265 (2021) (describing statutory textualism as definitionally including resort to “the content conveyed by the text to the intended readers . . . at the time the statute was enacted”). My own view is that although there are some forms of originalism that can be applied *consistently* with textualism, and vice versa, it is necessary for analytic clarity to consider the two as distinctive methodologies with differing ultimate commitments. Eyer, *supra* note 2, at 116–17. Indeed, I would argue that such analytical clarity is especially important for those who consider themselves proponents of both textualism and originalism (or of a single theory that seeks to combine both)—in order to ensure that their use of originalist concepts (such as “original public meaning”) does not slide unaware into what I refer to as textualism-antagonistic approaches. *Id.* at 138–39.

147. *Id.* at 118.

148. *See, e.g.*, SCALIA, *supra* note 38, at 23, 37–38 (treating textualism and originalism as overlapping theories in part, but making clear that textualism predominantly applies to the interpretations of statutes, and originalism predominantly applies to interpretation of the constitution); Ilan Wurman, *What Is Originalism? Debunking the Myths*, THE CONVERSATION (Oct. 24, 2020), <https://theconversation.com/what-is-originalism-debunking-the-myths-148488> [<https://perma.cc/XT9D-9BXR>] (describing textualism and originalism as essentially the same theory, but with textualism applying to statutory interpretation and originalism applying to constitutional law).

149. *See, e.g.*, Katie R. Eyer, *Statutory Originalism and LGBT Rights*, 54 WAKE FOREST L. REV. 63, 87 (2019) (noting that before 2018, “no Justice on the Court had ever used the term in a statutory interpretation opinion”).

150. *See* *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020) (“This Court normally interprets a statute in accord with the ordinary public meaning . . .”). The Court also sometimes substitutes the phrase “ordinary public meaning . . . at the time of [] enactment” for “original public meaning” when describing originalism in this context. *See id.* (using both phrases interchangeably).

of originalism—and the translation of that role into modes consistent with originalism theorizing—is a recent development.

It is thus worth asking the question of how originalism, as a mode of statutory interpretation, fares in its ability to protect equality (both thick and thin). Here, it is necessary to pull apart those forms of originalism that are consistent with textualism (allied approaches) and those that are not (antagonistic approaches).¹⁵¹ Allied approaches to originalism and textualism rely on history simply to understand relevant temporal shifts in language or legal terminology—for example, the use of “domestic violence” in the Constitution to refer to home-grown extremism as opposed to intimate partner violence.¹⁵² In contrast, antagonistic approaches to textualism and originalism allow history to supersede text by, for example, asking what groups and applications were—or would have been expected to be—covered historically, and then limiting otherwise broad text to only those contexts.¹⁵³

The equality risks of the latter approach should be obvious. Just as intentionalism employs habits of reasoning that predictably are likely to lead to both thin and thick equality costs in an unequal society, so too originalist approaches that look to historical expectations, or even historical real-world applications, are likely to have inequalitarian results.¹⁵⁴ Rather than asking what broad text means at the level at which it is pitched—and then affording those rights to all—an “original intent” or “original expected applications” approach invites the judge to ascertain the actual or assumed groups that were expected to be benefitted and exclude others.¹⁵⁵ This both undermines equality before the law (thin equality) and is predictably likely in an unequal society to lead to substantive equality costs.

Moreover, like intentionalism, originalism is inherently backward-looking in ways that can predictably tilt the scales of interpretation toward inequality in a society that has experienced considerable movement away from social subordination and inequality over time.¹⁵⁶ This risk is, again, especially pronounced in forms of originalism in which the judge asks what applications broad text was expected to (or was historically understood to) extend to. Because rights simply were not provided generally during broad

151. See Eyer, *supra* note 2, at 118 (identifying this distinction).

152. *Id.* at 120–21.

153. *Id.* at 121–23 (discussing how textualism and originalism can be applied in ways that make originalism antagonistic to, or inconsistent with, textualism).

154. *Id.* at 136–37 (discussing the dissenters’ reasoning in *Bostock*).

155. *Id.* at 136.

156. See Farah Peterson, *The Fourteenth Amendment and the Vénus Noire*, 66 WM. & MARY L. REV. 191, 207 (2024) (arguing that the only way to achieve “the full potential” of the text of the Fourteenth Amendment “is to bring our current social context to the interpretive project”); Jamal Greene, *Originalism’s Race Problem*, 88 DENV. U. L. REV. 517, 521–22 (2011) (arguing that originalism’s commitment to a fixed meaning precludes receptivity to the interpretive possibilities for historically subordinated groups such as African Americans).

swaths of our history to African Americans, women, people with disabilities, LGBTQ individuals, and other minorities, such an approach predictably is likely to lead to the gerrymandering of such groups and their interests out of even textually broad guarantees.¹⁵⁷

But what about “allied” approaches to originalist interpretation—those approaches to originalism that are themselves textualist in nature? After all, most modern originalists argue for forms of originalism that are centrally focused on textual interpretation.¹⁵⁸ And indeed, like all the competing interpretive theories discussed herein (purposivism, intentionalism, eclecticism), insofar as originalism is in fact practiced consistently with the definition of textualism provided herein, it is not the subject of this comparative critique.¹⁵⁹ Moreover, to the extent that originalism is predominantly a theory of constitutional interpretation, a full exploration of its implications for equality is beyond the scope of the discussion herein.¹⁶⁰

Nonetheless, even limiting our discussion to the statutory interpretation context, it is important to stress that it is not always easy to disentangle “allied” and “antagonistic” approaches to originalism, and thus to disentangle equality-risky and equality-promoting versions of originalism. Most notably, the use of an “original public meaning” framework—the dominant approach among modern originalists—does not guarantee the application of an “allied” approach to history and text.¹⁶¹ Rather, the search for “original public meaning” in statutory interpretation often devolves in practice into a focus

157. See Jamal Greene, *On the Origins of Originalism*, 88 TEXAS L. REV. 1, 75 n.524 (2009) (“For many women, blacks, immigrants, gays, and members of other historical out-groups, the ‘Founding Fathers’ to whom originalists turn for certainty not only do not look like *their* fathers but symbolize a hostile, even genocidal, social order.”); Peterson, *supra* note 156, at 191, 206 (arguing that “[o]ur Constitution is also a palace filled with treasures, also largely omitting the Black subject—that is, until one turns the corner and finds the Reconstruction corrective,” but that even with this corrective “originalism is not a promising path for progressive causes”); see also *Dobbs v. Jackson Women’s Health*, 142 S. Ct. 2228, 2235–36, 2252–53 (2022) (applying a version of originalism, concluding that because state laws generally prohibited abortion in the nineteenth century, the Constitution could not protect a woman’s right to abortion today—even though most women could not vote at the time those laws were enacted); *Obergefell v. Hodges*, 576 U.S. 644, 715 (2015) (Scalia, J., dissenting) (arguing that because “[w]hen the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman” same-sex marriages could not be protected under the constitutional “right to marry”).

158. See, e.g., Lawrence B. Solum, *Original Public Meaning*, 2023 MICH. ST. L. REV. 807, 809 (2023) (discussing “Public Meaning Originalism,” which focuses on the fixed original understanding of the constitutional text).

159. See *supra* notes 93–94 and accompanying text.

160. See *supra* note 37 and accompanying text.

161. For an extended discussion of this issue, see Eyer, *supra* note 2, at 125–38. For readers who are unfamiliar with the nuances of modern originalism, and are interested in this issue, it may be helpful to read this prior article, which explains the “original public meaning” approach and discusses in-depth why it does not preclude antagonistic approaches to textualism and originalism.

on how the “original public” would have understood a statute to apply.¹⁶² This is, of course, nothing more than an original expected applications approach, with the “original public” as the relevant audience.

Thus, while it is possible for originalism to be applied consistently with textualism (and thus consistently with textualism’s equality-promoting potential), in practice textualism-consistent originalism tends to be more elusive. Even claimed adherence to nominally text-centered forms of originalism, such as “original public meaning,” does not, in practice, predictably lead to reasoning in which textualism and originalism are “allied.”¹⁶³ For this reason, primary fidelity to originalism—as opposed to textualism—may be equality-risky in similar ways to the other interpretive theories described herein.

III. Statutory Interpretation and (In)equality in the Real World

The foregoing sections provide a theoretical account of why textualism is well-equipped to protect thin equality before the law—and thus also thicker forms of equality—and why textualism’s interpretive-theory competitors are less secure guardians of equality. This Part takes up more fully this Article’s theoretical claims in the context of the real world. Thus, it provides examples of contexts where textualism has in fact prevented exactly the type of substantive equality harms described in Part I—as well as contexts where a failure to apply textualism has led to equality harms. As set out herein, it is not hard to identify circumstances where simply adhering equally to the language of the text (the type of thin equality before the law promoted by textualism) could have prevented, or did in fact prevent, real substantive equality harms.

To be clear, the goal is not to prove decisively that textualism operates at a net benefit for equality in the real world—nor that alternative forms of interpretation are definitively inferior in this regard. As set out in Part II, there are reasons to believe that each of textualism’s primary methodological competitors rely on habits of reasoning that can facilitate inequality, but the

162. For example, this was the nature of the argument made against LGBTQ inclusion under Title VII—that because the original public would not have understood the words “because of . . . sex” to protect LGBTQ employees, such employees should not be covered. *See Eyer, supra* note 149, at 74–75 (responding to this argument pre-*Bostock*). But as I have elaborated in other work, this argument ignores the multiplicity of reasons *why* the original public might not understand statutory language to apply to a group—including, for example, that biases against the group were historically strong enough to make granting rights to them seem implausible. *Id.* at 75–80. In the case of Title VII, even applying the narrowest historical meaning to the words of the statute, discrimination against LGBTQ people is literally covered. *Id.* at 79. Thus, the nature of the argument being made against LGBTQ inclusion was really one about historical biases, not the historical meaning of text. *Id.* at 80.

163. *See Eyer, supra* note 2, at 137 (observing “the easy slide [] from what could be an ‘allied’ approach to textualism and originalism . . . to an ‘antagonistic’ one, in which the expectations of the original public about a particular application are deemed controlling”).

question of whether they ultimately are comparatively worse from an equality perspective is likely impossible to decisively prove or disprove (as I discuss more fully in Part IV). As such, this Section is meant merely to illustrate that the theoretical premises described herein are not merely conceptual but have real-world application.

As set out more fully in Part V, this alone is significant. If indeed, the methods of reasoning that textualism employs can help protect equality in real-world cases, that should inform how we reason, think, and argue around textualism. Conversely, the equality risks that can come from departures from text should also inform how proponents of other theories of statutory interpretation understand their own project. Finally, as we consider how best to secure equality in the face of contemporary threats to the rule of law, it is important to recognize the role that textualism can and has played in securing thin (and thus thick) equality—and conversely the role that other methodological approaches have played in facilitating inequality.

A. *Textualism as a Way of Preventing the Gerrymandering of Subordinated Groups Out of Rights*

Perhaps the most striking real-world evidence of textualism’s ability to protect equality comes from a series of cases that have rejected attempts to gerrymander subordinated groups out of textually broad rights. Thus, in cases such as *Bostock v. Clayton County*,¹⁶⁴ *Oncale v. Sundowner Offshore Services*,¹⁶⁵ and *Pennsylvania Department of Corrections v. Yeskey*,¹⁶⁶ the Supreme Court has relied on textualism to reject intentionalist, purposivist and originalist arguments that certain disfavored groups ought not be included within broad textual rights.¹⁶⁷ Notably, each of these cases was authored by a conservative proponent of textualism—suggesting that textualism played a genuine role in shaping the egalitarian outcome arrived at by the Court.¹⁶⁸

The first of these cases—*Oncale v. Sundowner Offshore Services*, authored by the late Justice Antonin Scalia—is a striking exemplar of this. While *Oncale* is remembered as the case that declined to exclude same-sex sexual harassment from coverage under Title VII, the defendants in *Oncale* in fact had a more pointed argument: “Same-gender sexual harassment claims invariably devolve into allegations of conduct that conflates gender

164. *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

165. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998).

166. *Pennsylvania Dep’t of Corr. v. Yeskey*, 524 U.S. 206 (1998).

167. Drawing on *Oncale* and *Yeskey*, Justice Scalia described the principle they articulate—that “[g]eneral terms are to be given their general meaning”—as a foundational principle of textualism in his co-authored 2012 book. SCALIA & GARNER, *supra* note 6, at 101, 103–05.

168. *Yeskey* and *Oncale* were authored by Justice Scalia, while *Bostock* was authored by Justice Gorsuch. *Yeskey*, 524 U.S. at 208; *Oncale*, 523 U.S. at 75; *Bostock*, 140 S. Ct. at 1736.

with sexual orientation”¹⁶⁹ Thus, they argued, a finding for Oncale “would expand Title VII beyond its language and legislative purpose by conflating sex discrimination with sexual orientation discrimination.”¹⁷⁰ This, they suggested, would improperly extend Title VII coverage to gay and lesbian employees (a result, they implied, that was surely not intended by Congress).¹⁷¹

The Defendants had reason to believe that this argument would appeal to many of the Court’s conservatives, including Justice Scalia. Just two years earlier, in 1996, Justice Scalia had dissented vigorously in the Equal Protection case of *Romer v. Evans*, in which the Court had invalidated Colorado’s Amendment 2 for discriminating against lesbians and gay men.¹⁷² Claiming that “[t]his Court has no business . . . pronouncing that ‘animosity’ toward homosexuality . . . is evil,” he argued that state discrimination against gays and lesbians—of virtually any kind—was justified by their presumed illicit sexual conduct.¹⁷³ Joined by Chief Justice Rehnquist and Justice Thomas, Justice Scalia could not have made more obvious his disdain for claims of LGBT equality in his *Romer* dissent.¹⁷⁴

But in *Oncale*, the text of the statute compelled a different result as Justice Scalia held, writing for a unanimous Court.¹⁷⁵ Rejecting the respondent’s arguments, Justice Scalia observed that:

[M]ale-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits “discriminat[ion] . . . because of . . . sex” in the “terms” or “conditions” of employment. Our holding that this includes sexual

169. Brief for Respondents, *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998) (No. 96-568), 1997 WL 634147, at *7.

170. *Id.* at *5.

171. *Id.* at *6–7.

172. See *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (arguing that “[t]his Court has no business imposing upon all Americans” the idea “that ‘animus’ toward [LGBT people] is evil.”).

173. *Id.* at 636, 640–41.

174. See *id.* at 640–41 (arguing that under *Bowers*, it was generally permissible for states to adopt laws that discriminated against gays and lesbians, since *Bowers* validated the far extreme of states “criminaliz[ing] the behavior that defines the class”) (quoting *Padula v. Webster*, 822 F.2d 97, 103 (1987)).

175. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 79–80 (1998). It is worth emphasizing that, as a unanimous opinion, *Oncale* attracted the votes of not only Justice Scalia, but also all of the Court’s other conservative Justices, including Chief Justice Rehnquist and Justice Thomas. *Id.* at 75.

harassment must extend to sexual harassment of any kind that meets the statutory requirements.¹⁷⁶

Just months later, Justice Scalia would author a second opinion for the Court, in *Pennsylvania Department of Corrections v. Yeskey*,¹⁷⁷ doubling down on this understanding of the necessary implications of broad text. As described in Part I, in *Yeskey*, the argument of the petitioner was that—despite the ADA’s broad, unqualified text—prisoners should not be understood to be covered by Title II of the ADA.¹⁷⁸ They suggested that Congress would not have contemplated giving prisoners access to such broad and powerful rights against states—especially in view of the federalism costs that enforcement would impose on the states’ operation of their own prisons.¹⁷⁹

But Justice Scalia again rejected these arguments. He wrote:

[Even] assuming . . . that [the ADA’s statement of findings and purpose] proves, as petitioners contend, that Congress did not envisio[n] that the ADA would be applied to state prisoners . . . in the context of an unambiguous statutory text that is irrelevant. As we have said before, the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.¹⁸⁰

Again, this outcome is striking from the perspective of Justice Scalia’s ideological views, which otherwise showed little empathy or respect for the rights of prisoners.¹⁸¹ But while inconsistent with Justice Scalia’s normative views, the result in *Yeskey* was consistent with his view of what textualism required.¹⁸² In his 2012 co-authored book, *Reading Law: The Interpretation of Legal Texts*, Justice Scalia discussed both *Oncala* and *Yeskey* as exemplars of the requirement that “[g]eneral terms are to be given their general meaning.”¹⁸³ As he argued to the next generation of textualist judges and scholars, “general words are general words, and they must be given general effect”—even where that leads to surprisingly egalitarian results.¹⁸⁴

176. *Id.* at 79–80.

177. 524 U.S. 206 (1998).

178. See Brief for the Petitioners, *Pennsylvania Dep’t of Corr. v. Yeskey*, 524 U.S. 206 (1998) (No. 97-634), at *4–5 (making this argument).

179. *Id.* at 7–11, 13–15.

180. *Yeskey*, 524 U.S. at 212 (internal quotation marks and citations omitted).

181. See Christopher E. Smith & Madhavi McCall, *Justice Scalia’s Influence on Criminal Justice*, 34 U. TOL. L. REV. 535, 540–45 (2003) (describing Justice Scalia’s rulings in the area of prisoners’ rights, which tended to constrict both substantive and procedural rights for prisoners).

182. See SCALIA & GARNER, *supra* note 6, at 103–05 (discussing the requirements of the general terms canon).

183. *Id.* at 101, 104–05.

184. *Id.* at 101–02.

In many ways, the textualist opinion of Justice Neil Gorsuch in *Bostock v. Clayton County* can be seen as the successor of this commitment to interpreting broad language as it is written—rather than as Congress may have imagined it applying. *Bostock*, like *Oncale*, raised the question of whether or not LGBT employees were within the coverage of Title VII, this time directly.¹⁸⁵ As the Plaintiffs and amici in *Bostock* observed, there was a strong argument that Title VII’s broad text—prohibiting all discrimination “because of . . . sex” compelled this result.¹⁸⁶ After all, the Court’s textualist Justices had already held that the plain meaning of “because of” was but-for causation—and each and every instance of anti-LGBT discrimination would in fact not have occurred “but for” that individual’s sex.¹⁸⁷

Thus, as the Court observed in an opinion authored by Justice Gorsuch:

[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer’s mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee’s sex, and the affected employee’s sex is a but-for cause of his discharge. Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee’s sex plays an unmistakable and impermissible role in the discharge decision.¹⁸⁸

As Justice Gorsuch noted, the Defendants’ arguments to the contrary rested primarily on the argument that “because few in 1964 expected today’s result, we should not dare to admit that it follows ineluctably from the statutory text.”¹⁸⁹ But as Justice Gorsuch wrote for the Court, “[t]hat is exactly the sort of reasoning this Court has long rejected.”¹⁹⁰ Moreover,

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

186. Brief for Respondent Aimee Stephens at 20–21, *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020); Brief of Statutory Interpretation and Equality Law Scholars as Amici Curiae in Support of the Employees at 5, *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

187. See sources cited *supra* note 186.

188. *Bostock*, 140 S. Ct. at 1741–42.

189. *Id.* at 1750.

190. *Id.*

echoing Justice Gorsuch's own prior writings about textualism and equality, he observed:

One could also reasonably fear that objections about unexpected applications will not be deployed neutrally. Often lurking just behind such objections resides a cynicism that Congress could not *possibly* have meant to protect a disfavored group . . . But to refuse enforcement just because of that, because the parties before us happened to be unpopular at the time of the law's passage, would not only require us to abandon our role as interpreters of statutes; it would tilt the scales of justice in favor of the strong or popular and neglect the promise that all persons are entitled to the benefit of the law's terms.¹⁹¹

Of course, *Bostock*, unlike *Yeskey* and *Oncala*, was not unanimous, and in dissent, some of the Justices argued that they—not the majority—had the right of the textualist argument.¹⁹² As Tara Leigh Grove has observed, these arguments rested on a different approach—what she refers to as “flexible textualism”—and what I would call non-textualism, given its inconsistency with the basic requirement of ultimate fidelity to text.¹⁹³ But regardless of whether one classifies the dissenters' arguments as non-textualism, or simply as “flexible textualism,” they illustrate an important point: not all approaches that are self-identified as textualist carry with them the equality-promoting

191. *Id.* at 1751; *cf.* Eyer, *supra* note 149, at 97–100 (arguing with respect to original expected applications approaches that “[w]e should not easily accept a theory whose natural consequence is to harness the biases of the [historical] public to argue for the exclusion of a group from the law's protections”).

192. *See Bostock*, 140 S. Ct. at 1776 (Alito, J., dissenting) (claiming that although the majority opinion “flies a textualist flag,” textualism in fact cuts in the opposite direction).

193. *See* Grove, *Which Textualism?*, *supra* note 6, at 267 (describing the *Bostock* dissent's flexible textualism). As I have laid out in other work, several of the dissenting *Bostock* Justices had previously embraced the very same textualist understanding of “because of . . . [protected class status]” that the majority in *Bostock* applied (that the plain language “because of . . . [protected class status]” connoted the prohibition of employer actions that would differ “but for” the plaintiff's protected class status). *See* Eyer, *supra* note 2, at 136–37 (discussing Justices Alito and Thomas's adoption of the “but-for” interpretation of “because of sex” in prior cases). In *Bostock*, the dissenters sought to slide from this already-answered question of “[h]ow would the terms of a statute have been understood by ordinary people at the time of enactment” (i.e., to apply where protected class status was a “but for” cause)—to the distinctive question of “[w]ould [the original public] have thought that this language prohibited discrimination because of sexual orientation or gender identity?” *Bostock*, 140 S. Ct. at 1766–67 (Alito, J., dissenting). But this latter question is not a textualist approach. The original public may think language does not apply to a particular group for many reasons other than the linguistic meaning of the statute's terms, including widespread bias against a particular group. In his dissent in *Bostock*, Justice Alito candidly acknowledged this was a part of his argument, suggesting that it was implausible to think the original public would have thought Title VII afforded protections to LGBTQ people at a time that they were deemed “sexual psychopath[s].” *Id.* at 1770.

potential described herein.¹⁹⁴ Indeed, the dissents in *Bostock* demonstrate that even approaches that are described as textualist can devolve in practice into approaches to interpretation that create materially indistinguishable equality risks to those described in relation to other interpretive methods in Part II (a point taken up more fully in Part IV).

Nonetheless, the work that textualism appears to have done in protecting equality—both thick and thin—in *Oncale*, *Yeskey*, and *Bostock* is striking. All three cases rejected arguments to gerrymander disfavored groups out of textually broad rights—arguments that were not frivolous from the perspective of non-textualist interpretive approaches. And yet in all three cases, conservative textualist Justices embraced the principle that broad text must be applied broadly—even where it leads to surprisingly egalitarian results. In this sense, *Oncale*, *Yeskey*, and *Bostock* represent the best of the rule of law tradition of equality before the law: that even those groups who are most disfavored can be assured that the language of the law means the same thing when it is applied to them as when it is applied to all others.

B. Textualism as a Guardrail Against Gerrymandering Privileged Groups Out of Burdens

The forgoing discussion has centered on textualism’s real-world application to prevent the gerrymandering of subordinated groups out of textually broad rights. But as described in subpart I(B), another way in which textualism may in theory protect equality is by preventing the gerrymandering of privileged groups out of legal burdens. Just as inequality can arise from the gerrymandering of disfavored groups out of legal rights, so too it can arise from the gerrymandering of favored groups out of legal burdens.

It is important to acknowledge at the outset that there will necessarily be some limits on this aspect of textualism’s ability to forestall inequality.¹⁹⁵ This is because of the important role that prosecutorial discretion plays in determining who is, practically speaking, subject to many of the most onerous burdens of the law (such as criminal prosecution or immigration enforcement).¹⁹⁶ If a prosecutor can decide, as they can today, to prioritize

194. See, e.g., *Bostock*, 140 S. Ct. at 1767–70 (Alito, J., dissenting) (relying extensively on the type of equality-risky purposivist and originalist reasoning described above, in the context of a purportedly textualist analysis).

195. The same is true of textualism’s ability to forestall inequality in the context of rights, given that litigating for rights requires access to resources, time and expertise, all of which are distributed unequally in society. I thank Alma Diamond for this important insight.

196. Indeed, many of the most egregiously examples of this phenomenon in the modern era have arisen from the problem of prosecutorial discretion. See ALEXANDER, *supra* note 87, at 100–01 (explaining the role of prosecutorial discretion in generating racial disparities in the War on Drugs); STUNTZ, *supra* note 87, at 6 (discussing prosecutorial discrepancies in “poor city neighborhoods” compared to “wealthier urban and suburban communities”).

only a particular population of offenders, inequality may arise, *even if* courts do not formally exempt privileged groups from the operation of the law.

But this Part suggests that textualism can nonetheless play a role in checking the tendency to exempt privileged groups from the burdens of the law. Part II has already described one famous real-world example of purposivism’s facilitation of the gerrymandering out of privileged groups from burdens (a place where textualism would have demanded a differing result): *Holy Trinity v. United States*.¹⁹⁷ In *Holy Trinity*, the Supreme Court gerrymandered a broad prohibition on “the importation or migration of any alien or aliens . . . into the United States . . . under contract or agreement . . . to perform labor or service *of any kind*” to exclude a professional contract between a minister and a New York church from its burdens.¹⁹⁸ As the Court held, “it was this cheap, unskilled labor which was making the trouble, and the influx of which Congress sought to prevent. It was never suggested that we had in this country a surplus of brain toilers”¹⁹⁹

Scholars have long debated whether this conclusion—that Congress *intended* the Alien Contract Labor Law to be limited to the disfavored class of foreign manual laborers—is an accurate reading of the legislative history and congressional intent.²⁰⁰ But regardless, *Holy Trinity* is a striking example of the Court gerrymandering a textually unqualified law to exclude the privileged from those subject to its mandates. After *Holy Trinity*, manual laborers who lived in foreign countries—those least likely to be able to pay their own way to the United States—remained subject to a categorical ban on employer assistance while upper class, professional workers were exempted from its reach.²⁰¹

The recent case of *Nestlé v. Doe* demonstrates the contrary pull of modern textualism in the context of another textually unqualified law.²⁰² *Nestlé* addressed the Alien Tort Statute (“ATS,” also known as the Alien Tort Claims Act), which provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in

197. *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892); *see also supra* note 113 and accompanying text.

198. *Holy Trinity*, 143 U.S. at 458, 472 (emphases added).

199. *Id.* at 464.

200. Compare Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1837 (1998) (concluding that the Supreme Court “misread the legislative history in *Holy Trinity*”), with Carol Chomsky, *Unlocking the Mysteries of Holy Trinity: Spirit, Letter, and History in Statutory Interpretation*, 100 COLUM. L. REV. 901, 906–07 (2000) (reaching the opposite conclusion). For a discussion of recent scholarship suggesting *Holy Trinity* could have been decided as a textualist precedent, and my own critique of the reasoning relied on in that recent scholarship, *see supra* note 113 and accompanying text.

201. *Holy Trinity*, 143 U.S. at 463–65.

202. *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931 (2021).

violation of the law of nations or a treaty of the United States.”²⁰³ The ATS has long been understood not only as a jurisdictional statute, but “to implicitly enable courts to create causes of action.”²⁰⁴

While the Supreme Court (including in *Nestlé* itself) has continued to narrow the ATS’s applicability in various ways, in *Nestlé* five Justices across separate opinions refused the defendant corporations’ invitation to hold that corporations are simply not subject to suit under the ATS.²⁰⁵ As Justice Gorsuch stated in his concurring opinion, “[t]he notion that corporations are immune from suit under the ATS cannot be reconciled with the statutory text.”²⁰⁶ While the statute “specifies which plaintiffs may sue (‘alien[s]’)” and “the sort of claims those plaintiffs can bring” “nowhere does it suggest that anything depends on whether the defendant happens to be a person or a corporation.”²⁰⁷

There is little reason to believe that Justice Gorsuch (or Justice Alito, who joined his opinion) are sympathetic to the aims of the ATS. Indeed, elsewhere in his concurring opinion, Justice Gorsuch signaled that he would strip the judiciary of the ability to recognize causes of action under the ATS.²⁰⁸ Instead, it seems far more likely that Justice Gorsuch’s refusal to carve corporations out of the ATS arises from his principled commitment to textualism. The result was that while *Nestlé* limited the ATS in important ways, a majority of Justices nonetheless declined the invitation to wholly exempt corporations from liability where they commit violations of international law.²⁰⁹

A more thoroughgoing example of the role that textualism *could* play, if taken seriously, in preventing the gerrymandering of favored groups out of otherwise general law is in the application of the law’s burdens to the government. The exemption of government actors from otherwise applicable legal obligations goes to the very heart of traditional concerns over the rule of law value of equal application of the law—and is also a striking example of (as discussed in this subpart), the potential of non-textual methodologies

203. 28 U.S.C. § 1350.

204. *Nestlé*, 141 S. Ct. at 1936.

205. *Id.* at 1940–42 (Gorsuch, J. concurring) (relying on textual arguments to decline to exclude corporations from ATS liability); *see also id.* at 1947–48 n.4 (Sotomayor, J., concurring in part) (“[T]here is no reason to insulate domestic corporations from liability for law-of-nations violations simply because they are legal rather than natural persons.”).

206. *Id.* at 1940 (Gorsuch, J., concurring).

207. *Id.* at 1941.

208. *Id.* at 1942–43.

209. *Id.* at 1940–42; *see also id.* at 1947–48 n.4 (Sotomayor, J., concurring in part) (“[T]here is no reason to insulate domestic corporations from liability for law-of-nations violations simply because they are legal rather than natural persons.”).

to lead to the exemption of powerful and privileged actors from the law.²¹⁰ Historically, a number of different “substantive” canons have been deployed by judges to exempt government entities from otherwise generally applicable statutory burdens, including the “governmental exemption canon” (treating the sovereign as exempt from generally applicable statutes) and the “sovereign immunity clear statement rule” (requiring an exceptionally clear statement from Congress to abrogate government sovereign immunity).²¹¹

As then-Professor, now-Justice Amy Coney Barrett has observed, these canons are in apparent tension with textualism “insofar as their application can require a judge to adopt something other than the most textually plausible meaning of a statute.”²¹² This is certainly true for both the “government exception canon” and the “sovereign immunity clear statement rule,” which have been used to exempt governments from otherwise clearly stated obligations.²¹³ Take for example, the case of *Dellmuth v. Muth* in 1989, in which the Court found that a state government was entitled to sovereign immunity in the context of the Individuals with Disabilities in Education Act (IDEA).²¹⁴ The relevant statutory language stated: “A State shall not be immune under the Eleventh Amendment of the Constitution . . . from suit in Federal court for a violation of [the Rehabilitation Act] . . . or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.”²¹⁵ The IDEA is of course a “[f]ederal statute prohibiting discrimination by recipients of Federal financial assistance”²¹⁶—

210. For discussion of this issue in the traditional rule of law literature, see, for example, DICEY, *supra* note 47, at 118–21; TAMANAHA, *supra* note 47, at 94.

211. See, e.g., Barrett, *supra* note 5, at 150, 164–65, 173 (discussing the “governmental exemption canon” and the “sovereign immunity clear statement rule”).

212. *Id.* at 123–24; see also Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 HARV. L. REV. 515, 521 (2023) (considering the substantive canons and the justifications for their consistency with textualism, ultimately concluding “that substantive canons are generally just as incompatible with textualists’ jurisprudential commitments as they first appear”). Note that Justice Barrett ultimately concludes that many substantive canons may be consistent with textualism (or at least with textualism’s commitment to faithful agency to Congress) insofar as they: (1) simply serve as a tie-breaker between equally plausible meanings of text, as in the case of the rule of lenity or (2) seek to implement discrete constitutional values without abrogating the plain meaning of the statutory text. Barrett, *supra* note 5, at 133–34; see Barrett, *supra* note 5, at 181 (suggesting that courts should be able to “push a statute in a direction that better accommodates constitutional values” but only insofar as the interpretation is not “at the expense of a statute’s plain language”).

213. See *infra* notes 214–17 and accompanying text.

214. *Dellmuth v. Muth*, 491 U.S. 223, 232 (1989). The IDEA was then known as the “Education for All Handicapped Children Act.” Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975); Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1482 (2018).

215. 42 U.S.C. § 2000d-7(a)(1) (1982) (emphasis added).

216. *Id.*

and yet the Court ignored this clear language to conclude that sovereign immunity applied.²¹⁷

Recognizing the tension between textualism and such substantive canons (including specifically the “sovereign immunity clear statement rule”), Justice Scalia initially referred to substantive canons as “a lot of trouble” for “the honest textualist.”²¹⁸ In Justice Scalia’s early years on the Court, he objected to the clear statement requirement for the abrogation of sovereign immunity (because of its inconsistency with textualism), and declined to join a number of opinions applying it.²¹⁹ So too then-Professor, now-Justice Amy Coney Barrett has criticized the “governmental exemption” canon as both inconsistent with textualism, and for its equality costs (since “the United States government is surely a politically powerful interest subject to legislative favoritism”).²²⁰

But despite these critiques, the ultimate willingness of many textualists to embrace and apply the substantive canons²²¹—including those that exempt government entities from the burdens of otherwise-applicable laws²²²—also shows the limitations of textualism as a method of forestalling inequality. As described further in Part IV, only certain types of textualism (what Tara Leigh Grove has referred to as “formalistic textualism”²²³) are likely to protect equality.²²⁴ And as the treatment of substantive canons by prominent textualists shows, whether “textualism” should be limited to “formalistic textualism” very much remains an issue of active dispute.²²⁵ As explored more fully in Part V, I would contend that the costs of “flexible textualism” for textualism’s protection of equality before the law can and should inform these ongoing disputes.²²⁶

C. *Textualism as a Means of Protecting the Legal Entitlements of Minority and Subordinated Groups*

The final way that textualism can serve as a safeguard of substantive equality is by protecting against the diminishment of textual legal rights

217. *Dellmuth*, 491 U.S. at 230.

218. SCALIA, *supra* note 38, at 28.

219. Eyer & Tani, *supra* note 61, at 891–93.

220. Barrett, *supra* note 5, at 164–65.

221. *See, e.g.*, Eidelson & Stephenson, *supra* note 212, at 519 (observing that despite the tension between textualism and the substantive canons, “textualist judges have frequently deployed substantive canons anyway”); Barrett, *supra* note 5, at 121 (observing that “[t]extualists . . . also embrace substantive canons”).

222. *See* SCALIA & GARNER, *supra* note 6, at xi, 281, 284–85 (defending the “presumption against waiver of sovereign immunity” as a “sound principle[] of interpretation”).

223. Grove, *Which Textualism?*, *supra* note 6, at 267.

224. *See infra* notes 251–70 and accompanying text.

225. *See infra* notes 251–70 and accompanying text.

226. *See infra* subpart V(A).

specially secured by or for subordinated groups. As both our history and our present demonstrate, this form of legal inequality (the inability of subordinated groups to depend on the textual legal rights they have secured) has long been widespread, and deeply problematic for substantive equality.²²⁷ One of the most striking examples of this (and the one this subpart takes up) is the judicial undermining of legislation intended to protect African American civil rights.

This country has witnessed two periods of transformative lawmaking intended to protect African American civil rights: First during Reconstruction, and later during the “second Reconstruction” of the 1960s. And yet, virtually from the beginning those legislative gains have been undermined by judicial refusal to fully enforce the expansive language of such civil rights enactments.²²⁸ As described below, the non-textual limitations imposed by the judiciary in this area have included both familiar and widely criticized doctrines (such as qualified immunity) and far more obscure ones (like the “same actor” inference).²²⁹ Ultimately, such judicial gerrymanders have seriously undermined the effectiveness of textually broad statutory enactments protecting civil rights.²³⁰

In the case of the legislative products of the First Reconstruction, many such laws were limited or struck down as a result of the Supreme Court’s *constitutional* rulings.²³¹ But non-textual gerrymanders and limitations also played a key role in limiting such statutes’ transformative potential, both at the time of Reconstruction and today.²³² Perhaps the best-known example of this phenomenon is the Supreme Court’s adoption of a qualified immunity defense to section one of the Ku Klux Klan Act (today codified at 42 U.S.C.

227. See *infra* notes 228–44 and accompanying text.

228. See sources cited *infra* notes 229–44.

229. See Katie Eyer, *The But-For Theory of Anti-Discrimination Law*, 107 VA. L. REV. 1621, 1637 (2021) (“same actor” inference); see *infra* notes 234–36 and accompanying text (qualified immunity).

230. See SANDRA F. SPERINO & SUJA A. THOMAS, *UNEQUAL: HOW AMERICA’S COURTS UNDERMINE DISCRIMINATION LAW* 13–14, 41–44, 158 (2017) (describing “a host of judge-made procedural and evidentiary rules” that, “[i]n many instances,” “distract courts away from the central question in many discrimination cases: was the worker treated differently because of her race, sex, or other trait”); Eyer, *supra* note 229, at 1637–40 (describing how “judges deploy a wide array of technical doctrines” instead of answering “any ultimate question of discrimination”).

231. See, e.g., *The Civil Rights Cases*, 109 U.S. 3, 24–26 (1883) (invalidating key parts of the Civil Rights Act of 1875 on the grounds that Congress lacked authority under the Reconstruction Amendments to prohibit private discrimination).

232. See *Blyew v. United States*, 80 U.S. 581, 591–93 (1871) (reading a Reconstruction Era civil rights jurisdictional statute contra-textually to avoid what the Court perceived as an excessively radical result in a case involving a racially motivated murder); David H. Gans, *Repairing Our System of Constitutional Accountability: Reflections on the 150th Anniversary of Section 1983*, 2022 CARDOZO L. REV. DE NOVO 90, 92 (discussing the problem of non-textual and ahistorical limitations imposed on § 1983 by the modern Supreme Court).

§ 1983)²³³ in 1967, close to a century after the law’s enactment.²³⁴ Although ubiquitous in § 1983 litigation, qualified immunity is a judicially created defense that has no textual basis in the law, and that scholars have also concluded is not supportable by reference to historical common law analogues.²³⁵

Moreover, the role of qualified immunity in hindering racial justice can hardly be characterized as *de minimis*. Indeed, the role of qualified immunity in hindering accountability for police brutality is so substantial that the abolition of qualified immunity has become an important legislative goal of the Black Lives Matter movement, and other aligned movements.²³⁶ As the national Black Lives Matter organization’s website puts it:

The belabored process of pursuing justice is an experience Black families have had to deal with for far too long. That is why it should be a top priority for Congress and the White House to end qualified immunity—to end the prioritization of protecting white supremacy in policing and start prioritizing the safety of our people.²³⁷

And yet, qualified immunity is a doctrine with no sound legal basis to begin with—certainly no basis in the language of the law.²³⁸

233. 42 U.S.C. § 1983.

234. See *Pierson v. Ray*, 386 U.S. 547, 557 (1967) (holding that the police have partial immunity from § 1983 liability, a doctrine that has later come to be known as qualified immunity); JOANNA SCHWARTZ, SHIELDED: HOW THE POLICE BECAME UNTOUCHABLE 73 (2023) (“The Supreme Court created qualified immunity out of thin air six years after it recognized the right to sue under Section 1983.”). Of course, it is also true that § 1983 was rarely used before *Monroe v. Pape*, 365 U.S. 167 (1961), because of early holdings that § 1983’s proscription of actions taken “under color of state law” did not include state actors’ actions taken in violation of state law. See, e.g., *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1168–69, 1175 (1977) (“*Monroe v. Pape* resurrected section 1983 from ninety years of obscurity.”). But this reading of § 1983 itself appears to have been an erroneous judge-made limitation. See, e.g., Steven Winter, *The Meaning of “Under Color of” Law*, 91 MICH. L. REV. 323, 325 (1992) (suggesting that the argument that “under color of state law” does not include actions taken in violation of state law is “not only wrong, but wildly ahistorical”).

235. See William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 49–51 (2018) (observing that neither the original statutory language nor the modern the text of § 1983 makes any reference to immunity and that “none of [the] rationales [offered to support qualified immunity, including the common law analogue argument] can sustain the modern doctrine of qualified immunity”); Gans, *supra* note 232, at 101–04 (arguing that the qualified immunity doctrine disregards both the text and intent of § 1983). Moreover, recent work by Alex Reinert has uncovered explicit statutory text, which was a part of § 1983 as originally enacted, but lost in codification, which repudiated any possible state law defenses like qualified immunity. Alexander A. Reinert, *Qualified Immunity’s Flawed Foundation*, 111 CALIF. L. REV. 201, 207–08 (2023).

236. *Demand Congress End Qualified Immunity*, BLACK LIVES MATTER, <https://blacklivesmatter.com/actions/demand-congress-end-qualified-immunity/> [<https://perma.cc/EE86-67FL>].

237. *Id.*

238. See sources cited *supra* note 235.

Far less well-known (except among specialists) are the many non-textual burdens that have been imposed on litigants seeking relief pursuant to the civil rights legislation that was enacted during the Second Reconstruction.²³⁹ Such legislation included landmark statutes, such as Title VII of the Civil Rights Act of 1964 (prohibiting employment discrimination *inter alia* on the basis of race), Title II of the Civil Rights Act of 1964 (prohibiting public accommodations discrimination on the basis of race and other protected statuses), Title VI (prohibiting race, color and national origin discrimination in federally funded programs and activities), the Fair Housing Act of 1968 (prohibiting housing discrimination on the basis of race, among other characteristics), and more.²⁴⁰

And yet many such statutes have been dramatically undermined by the engrafting of non-textual burdens on plaintiffs who seek relief.²⁴¹ Such judge-made doctrines (many, but not all of which have entered the doctrine as embellishments on the itself-non-textual *McDonnell Douglas* paradigm) have esoteric names like “the same actor inference,” the “stray remarks” doctrine, “nearly identical” comparators requirement, and “the honest belief doctrine.”²⁴² But the impact of such judge-made doctrines has been far from

239. Although this set of non-textual limitations is far less well-known by the public than, for example, qualified immunity, it is a very familiar problem within the community of scholars who study statutory anti-discrimination law, especially in employment discrimination. *See, e.g.*, SPERINO & THOMAS, *supra* note 230, at 13–14, 40–44, 158 (discussing a variety of non-textual limitations imposed on employment discrimination law by the judiciary); Eyer, *supra* note 229, at 1621, 1637–38 (same); Deborah A. Widiss, *Proving Discrimination by the Text*, 106 MINN. L. REV. 353, 355 (2021) (observing that courts in employment discrimination cases “funnel the evidence through a convoluted body of judge-made law” which is “unanchored to the statutory language” and erects “judicially-created hurdles”); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229, 2273–74 (1995) (raising the concern that special rules such as the McDonnell-Douglas framework can undermine the effectiveness of discrimination law); Suja A. Thomas, *The Customer Caste: Lawful Discrimination by Public Businesses*, 109 CALIF. L. REV. 141, 148 (2021) (observing that “[m]ost courts have declared that as long as people of color are admitted or served, places of public accommodation can otherwise freely discriminate against them” “despite broad statutory language”); Kerri Thompson, *Fair Housing’s Trap Door: Fixing the Broken Disparate Impact Doctrine Under the Fair Housing Act*, 25 J. AFFORDABLE HOUS. & CMTY. DEV. L. 435, 456–59 (2017) (explaining how narrow judicial interpretation of the Fair Housing Act creates unnecessary obstacles for plaintiffs).

240. 42 U.S.C. §§ 2000e–2000e-17 (Title VII); 42 U.S.C. §§ 2000a–2000a-6 (Title II); 42 U.S.C. §§ 2000d–2000d-7 (Title VI); 42 U.S.C. §§ 3601–3619 (Fair Housing Act). The Voting Rights Act (VRA) is obviously another critical legislative victory secured through the advocacy of civil rights advocates during the Second Reconstruction. I omit it here because the primary ways in which the VRA has been limited through judicial action have been distinctive, and have tended to be more related to constitutional constraints than to non-textual gerrymanders. *See, e.g.*, *Shelby County v. Holder*, 570 U.S. 529, 557 (2013) (constitutionally invalidating the pre-clearance formula of the VRA).

241. *See* sources cited *supra* note 239.

242. *See* Eyer, *supra* note 229, at 1637–38, 1637 n.64 (discussing the “same actor inference,” “stray remarks” doctrine, and “nearly identical” comparators requirement); Eric Schnapper, *Honest Belief and Proof of Unlawful Motive*, 71 BUFF. L. REV. 769, 770–72 (2023) (discussing the “honest belief doctrine”).

de minimis, dramatically limiting the ability of minority litigants to bring discrimination claims.²⁴³ The result has been to hollow out the promise of the Second Reconstruction to eliminate race discrimination from public life, with employers, businesses, and others often having little to fear from anti-discrimination law.²⁴⁴

Strikingly, some of the Court's most conservative Justices, Justices Thomas and Gorsuch, have recently assumed leadership on the Court in arguing that these judge-made doctrines should be eliminated. In a dissent from denial of certiorari, and subsequently in a concurring opinion, Justice Thomas (joined by Justice Gorsuch) opined that these non-textual rules "[are] incompatible with the summary-judgment standard; [] fail[] to encompass the various ways in which a plaintiff could prove his claim; [] require[] courts to maintain artificial distinctions between direct and circumstantial evidence; and [] ha[ve] created outsized judicial confusion."²⁴⁵ Moreover, the rules "have no basis in the text of Title VII."²⁴⁶

Just like Justice Scalia in *Oncale* and *Yeskey*—and like Justice Gorsuch in *Bostock*—it seems unlikely that Justices Thomas and Gorsuch reached this conclusion purely out of a normative commitment to anti-discrimination or to workers' rights. Rather, it seems likely that those Justices' commitment to textualism caused them to view such judge-made rules as unacceptable.²⁴⁷ Importantly, and by way of contrast, such doctrines *were* a well-established and accepted part of the interpretation of Title VII and other civil rights laws under textualism's interpretive competitors/predecessors.²⁴⁸ Textualism thus may ultimately play an important role in this area in moving us closer to equality before the law—and substantive equality—for Black Americans.

In conclusion, disregard of statutory text has significantly limited the potential of the legislative reforms that have been secured by the civil rights movements of the last 150 years. But would we see *radical* differences in our modern society had the courts not nickled-and-dimed civil rights law with judge-made doctrines for over a century? Candor requires acknowledging that the answer to this question is unclear. The law is a limited tool, and White Supremacy is surely our nation's most ugly and stubbornly persistent

243. See sources cited *supra* note 239.

244. See sources cited *supra* note 239.

245. *Ames v. Ohio Dep't of Youth Servs.*, 145 S. Ct. 1540, 1553 (2025) (Thomas, J., concurring); see also *Hittle v. City of Stockton*, 145 S. Ct. 759, 761–63 (Thomas, J., dissenting from denial of certiorari) (making similar points regarding the *McDonnell Douglas* framework in the summary judgment context).

246. *Ames*, 145 S. Ct. at 1552 (Thomas, J., concurring) (citing his own opinion in *Hittle*); see also *Hittle*, 145 S. Ct. at 760 (Thomas, J., dissenting from denial of certiorari) (making a similar observation).

247. See cases cited *supra* note 245.

248. See sources cited *supra* note 239 (describing the longstanding nature of these judge-made doctrines during the era from the 1970s-date).

failing.²⁴⁹ But it is also true that Black Americans have not received the full benefit of their hard-fought legislative gains, either in the aftermath of Reconstruction or today. The civil rights laws enacted during the first and second Reconstructions had broad, potentially transformative, language.²⁵⁰ And yet Black Americans have consistently seen the statutes that they fought, and even died, for rewritten and limited by the courts. It is hard to imagine a more straightforward abrogation of equality before the law than the inability to be assured that such hard-fought legislative enactments will be taken to mean what they say.

IV. Challenges and Exceptions to the Theory

The foregoing Parts have made the case that, textualism, as an interpretive practice, can protect or promote equality. Moreover, those Parts have suggested that textualism not only holds the potential to protect equality, but that it may do so uniquely, i.e., to a greater extent than its interpretive competitors. This Part acknowledges that this claim must be tempered by significant caveats; caveats that, for some skeptical readers, may be so substantial as to undermine the core equality claim. Nonetheless, I urge even these skeptical readers to read on to Part V where I explore the reasons why even a tempered theory of textualism as an equality practice may offer important insights to textualists and non-textualists alike.

What are some of the limitations of a theory of textualism as an equality practice? As I elaborate further below, there are many. First, only some types of textualism are likely to be capable of having the thin (and thus thick) forms of equality-protecting capabilities that I have described herein. Second, as I have already acknowledged, while there are certainly examples of textualism doing the equality work I describe herein (and of other modes of reasoning leading to inequality), I do not purport to empirically “prove” textualism’s superiority in this regard (and it may not be possible to do so). Third, thin equality does not always lead to thick equality: some laws are themselves genuinely inegalitarian—and some substantively egalitarian rulings may not be consistent with fidelity to statutory text. It is also the case that in some

249. See, e.g., DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 3, 98 (1992) (arguing that “American racial history has demonstrated [] steady subordination of blacks”); Derrick Bell, *Foreword: The Final Civil Rights Act*, 79 CALIF. L. REV. 597, 597 (1991) (“The commonly held view of racial advancement as a slow but steady surge forward is wrong.”).

250. See sources cited *supra* note 240 (collecting civil rights legislation); see also 42 U.S.C. § 1981 (equal rights under the law); 42 U.S.C. § 1982 (property rights); 42 U.S.C. § 1983 (civil action for deprivation of rights); 42 U.S.C. § 1985 (conspiracy to interfere with civil rights). For sources discussing the breadth of the text as compared to the narrower interpretation in the courts, see sources cited *supra* note 239; see also Nancy Leong, *Enjoyed by White Citizens*, 109 GEO. L.J. 1421, 1425–26 (2021) (describing the radical potential of the text of § 1981 and § 1982, if taken seriously, to require examination of the privileges of whiteness).

instances, the theory may simply not apply: laws may be genuinely textually ambiguous or lack any equality stakes. Finally, and most critically, legal realism poses a genuine challenge to the normative claims of *any* interpretive theory (including textualism)—a challenge that is presented especially vividly at the current moment.

A. *Only Some Types of Textualism*

The first important caveat to the idea that textualism can serve as an equality practice is that only some versions of what is referred to as textualism possess equality-protecting potential.²⁵¹ Indeed, many self-professed textualist jurists and scholars have adopted or argued for “textualist” rules of law that are essentially indistinguishable from purposivist, intentionalist, eclectic, or non-text-aligned originalist approaches—and that as such bear precisely the same equality risks as those other methodological approaches.²⁵² As set out in the Introduction of this Article, I would not characterize such approaches as “textualist,” insofar as they permit “interpretations that deviate from the most plausible meaning of the text”—but it is important to acknowledge that others would.²⁵³

What characteristics are necessary then for textualism to actually be capable of fulfilling the equality-protective purpose described herein? Most simply, textualism must adhere to its core commitment: i.e., to situate the text of the law as the central guiding constraint, and to eschew interpretive glosses that permit deviations from the most natural or obvious meaning of text. As observed previously, this is closely akin to what Tara Leigh Grove refers to as “formalistic textualism”: “an approach that instructs interpreters to carefully parse the statutory language, focusing on semantic context and downplaying policy concerns or the practical (even monumental) consequences of the case.”²⁵⁴ Perhaps most critically, this formalist approach

251. For this reason, among others, studies that try to look generally at the presence of certain textualist markers as an indication of the application of textualism—and reason from there—while quite useful for some purposes, are not especially useful in helping to discern whether a particular type of textualism, like formalistic textualism, achieves its putative aims. For more on this, see *infra* subpart IV(B).

252. For more on this, see *infra* notes 257–65 and accompanying text. For an excellent example of this, see, for example, Samuel L. Bray, *The Mischief Rule*, 109 GEO. L.J. 967, 968–73 (2021) (arguing for the consideration of “the mischief rule,” i.e., “the problem to which the statute was addressed” as a part of textualism—in ways that would effectively incorporate original expected applications reasoning to limit statutory applications, with predictably inegalitarian consequences).

253. See *supra* note 38 and accompanying text.

254. See Grove, *Which Textualism?*, *supra* note 6, at 267. As I intend to explore more fully in future work, this is not a claim that interpretation should never go beyond “formalistic textualism.” Rather, my tentative view is that going beyond formalistic textualism may sometimes be justified by ambiguity or by competing values, but ought to be done with caution and not characterized as a part of the practice of textualism. The risk of diminishing or wholly abandoning textualism’s

includes respect for the text at the level of generality at which it is written, even where it is written in expansive terms.²⁵⁵

This strict adherence to the meaning of text as written—and eschewing of broader contextual considerations—may seem overly rigid, formal or mechanistic.²⁵⁶ But it is also the only plausible way in which textualism (or possibly, any other interpretive methodology) can meaningfully ensure that all groups receive “equality before the law.” Indeed, insofar as self-professed textualists embrace considerations or doctrines that permit departures from the most natural meaning of text, their approaches to interpretation are likely to create precisely the same equality risks as are presented by competing methodologies.

For example, as alluded to in Part III, many of the “substantive” canons of interpretation (which some self-described textualists endorse), explicitly and systematically favor powerful groups like the government.²⁵⁷ Others, like the “major questions doctrine,” abandon the most natural reading of the text in furtherance of an ideologically freighted political project (here, the disempowerment of the administrative state).²⁵⁸ Even interpretive mainstays like the “absurdity” doctrine are, as Professor John Manning has observed, likely in practice to disproportionately disadvantage less powerful or

equality-promoting potential is one key reason for my belief that such departures ought to be explicit and considered. See *infra* note 272 and accompanying text for further discussion of this issue.

255. See SCALIA & GARNER, *supra* note 6, at 101 (“[G]eneral words . . . are to be accorded their full and fair scope”); Manning, *Absurdity*, *supra* note 3, at 2433 (noting that both “original and contemporary understandings of the constitutional structure” mandate respecting the level of generality at which a statute is framed); Manning, *Second-Generation*, *supra* note 3, at 1316 (emphasizing judicial adherence to the level of generality prescribed by the legislature as a key feature of second-generation textualism).

256. See Grove, *Which Textualism?*, *supra* note 6, at 270 (describing critiques of “formalistic textualism” as “wooden” (citing *Bostock v. Clayton County*, 140 S. Ct. 1731, 1745 (2020))); see also Tara Leigh Grove, *The Misunderstood History of Textualism*, 117 NW. U. L. REV. 1033, 1037 (2023) [hereinafter Grove, *The Misunderstood History*] (describing critiques leveled by legal realists and legal process scholars of the “plain meaning” school of interpretation as “wooden,” “mechanical” and “literal”).

257. See *supra* notes 210–26 and accompanying text. Of course, some, like the rule of lenity, in contrast favor the weaker party. Justice Barrett in prior published work has argued that the rule of lenity operates simply as a tie-breaker between equally plausible textual interpretations and thus is not inconsistent with textualism. See Barrett, *supra* note 5, at 133–34. Even if this is true, it is clearly a substantive tie-breaker that does not arise from the text or statutory context itself. As described *infra* note 272, my own tentative view is that in that type of context, going beyond text may be appropriate (and indeed necessary), but ought not be characterized as textualism.

258. See, e.g., Anita S. Krishnakumar, *What the Major Questions Doctrine Is Not*, 92 GEO. WASH. L. REV. 1117, 1159–62 (2024); see also *West Virginia v. E.P.A.*, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting) (“The current Court is textualist only when being so suits it. When that method would frustrate broader goals, special canons like the ‘major questions doctrine’ magically appear as get-out-of-text-free cards.”).

politically disfavored groups in creating ad hoc exceptions from the protections of the law.²⁵⁹

So too, when originalism is conflated with textualism, it can lead to deviations from text, which, in turn, can eliminate textualism's equality-protective potential.²⁶⁰ Indeed, despite theoretical efforts to realign modern originalism into a textualism-consistent theory, originalism's modern avatar—"original public meaning"—often devolves in practice into an inquiry into what applications the public (or the public in the judge's imagination) would have believed were covered by the law.²⁶¹ But this of course, is not textualism (insofar as it is not actually about the language of the law, but expectations about that language's application), and as such, leads to precisely the same equality risks as explicitly non-textualist theories.²⁶² Thus, while some forms of originalism can be consistent with textualism (and thus with textualism's equality-promoting potential), others (even when applied by self-professed textualists) are not.²⁶³

Finally, many self-professed textualists embrace considerations of "context."²⁶⁴ But as scholars such as Tara Leigh Grove and Jamie Macleod have observed (and as many self-identified textualists have freely acknowledged), not all self-described textualists limit this context to *textual* context like semantic context and statutory structure. Rather, "flexible textualists" treat considerations as diverse as policy implications, social context, and the original expected applications of a law as permissible forms of "context."²⁶⁵ These are, of course, precisely the types of "context" on

259. Manning, *Absurdity*, *supra* note 3, at 2438 n.188.

260. Eyer, *supra* note 2, at 121–23.

261. *Id.* at 126–28.

262. *Id.*

263. *See supra* notes 151–53 and accompanying text (discussing "allied" and "antagonistic" approaches to originalism).

264. *See* Grove, *The Misunderstood History*, *supra* note 256, at 1037–38 (observing that some textualists have advocated for consideration of contextual factors far beyond semantic context, such as "'social context,' 'social and linguistic context,' and even 'full context'"); James A. Macleod, *Finding Original Public Meaning*, 56 GA. L. REV. 1, 13–14 (2021) (noting that while at times textualists limit the relevant context to "surrounding text" and "ordinary linguistic usage" at other times "textualists imply that the reader treats various types of additional extratextual considerations as relevant" such as "the public's preferences for this or that legal outcome, the public's implicit (non-textualist) theories of interpretation, and the public's expectations regarding this or that application of a statute"); *see also* Bray, *supra* note 252, at 970–74 (arguing for textualists to consider the "mischief" behind a statute in ways that would permit them to gerrymander the text to reach only a narrower sub-set of applications, precisely the type of inegalitarian reasoning that this Article has suggested is a problematic feature of non-textualist methodologies); Lee & Mouritsen, *supra* note 6, at 859 (arguing based on corpus linguistics that the most common application of a word should be decisive of ordinary meaning, effectively importing original expected applications into textualism).

265. For my own tentative views on why it is important to carefully disaggregate textualism from other forms of context, and why—even if departures from thin text may be appropriate—it is

which purposivism, originalism, and eclecticism rely—and as such, bear with them precisely the same sorts of equality risks.

Of course, as a number of scholars have argued, some contextual enrichment of text may be both inevitable and necessary in some instances.²⁶⁶ Most recently, a diverse group of scholars has drawn on linguistic theory to argue that “pragmatic enrichment” is required in order for statutes not to be radically under-determinate.²⁶⁷ Some of the forms of pragmatic enrichment that scholars have described do not require going beyond text or statutory context—or represent the type of intuitive filling-in of meaning that almost any interpreter will perform in the same way—and may thus (at least in my view) be consistent with “formalistic textualism,” and with equality.²⁶⁸ However, other types of pragmatic enrichment of text may look to a richer set of shared context between the legislature and its presumed intended audience—which may in turn allow a slide into precisely the types of inegalitarian reasoning to which textualism’s competitors are susceptible.²⁶⁹

In short, only a small sub-set of the theories that are today referred to as “textualist” actually hold the equality-protective potential described herein: i.e., those that in fact treat text as binding, at the level of generality at which

important to do so with self-awareness, and an acknowledgment that one is relying on something other than plain text, see *supra* note 254 and *infra* note 272.

266. See BRIAN G. SLOCUM, *ORDINARY MEANING: A THEORY OF THE MOST FUNDAMENTAL PRINCIPLE OF LEGAL INTERPRETATION* 27 (2015) (arguing that “[o]ne main flaw in the judiciary’s approach is a failure properly to consider context”); Bray, *supra* note 258, at 969 (observing that “bare words are not always enough, for there may be facts an interpreter needs to know to make sense of those words”); Lee & Mouritsen, *supra* note 6, at 816 (arguing that “[e]veryone takes nonsemantic context—pragmatics—into account in deriving meaning from language”); Lawrence B. Solum, *Pragmatics and Textualism*, 33 J.L. & POL’Y 2, 7 (2025) (“Good textualism requires pragmatics.”); Brian G. Slocum & Kevin Tobia, *Pragmatic Textualism*, 75 DUKE L. J. 413, 418 (2026) (suggesting that “[t]he linguistic meanings of statutory terms are context-sensitive, and consequential considerations can help determine those context-specific meanings”).

267. See Victoria Nourse, *Picking and Choosing Text: Lessons for Statutory Interpretation from the Philosophy of Language*, 69 FLA. L. REV. 1409, 1437 (2017) (arguing that “textualist and purposivist judges of all stripes, are [already] adding or subtracting meaning by pragmatic enrichment”); Bill Watson, *Literalism in Statutory Interpretation: What Is It and What Is Wrong With It?*, 2021 U. ILL. L. REV. ONLINE 218, 221–22 (discussing the role of pragmatic enrichment in statutory interpretation); see generally Solum, *supra* note 266.

268. See Solum, *supra* note 266, at 76–82 (offering fairly mundane and straightforward types of contextual and pragmatic enrichment that almost all adjudicators would be likely to intuitively fill in the same way).

269. See *id.* at 102–03 (characterizing the relevant context as “the shared context of statutory communication” including “salient information that is accessible to the enactors and primary intended readership of the statute” with the ultimate aim of ascertaining the “meaning communicated by the official promulgation of the statutory text to the primary intended readership of the statute”). I have particular concerns with framing the inquiry as the “communicative content” of a statute to its primary intended audience, since there may be many things beyond the actual words of a law that can influence the way a communication is received and understood, including most obviously widely shared social prejudices or biases.

it is written, without “load[ing] the dice for or against a particular result.”²⁷⁰ While I would characterize such text-adherent theories, which respect text at the level of generality as written, as the only true forms of “textualism,” other self-professed textualists would not. It is thus important to acknowledge that the insights of this Article are primarily about the equality-promoting potential of faithful adherence to text, and to the levels of generality in text, rather than the equality-promoting potential of all versions of interpretive theory that are characterized as “textualism.”

Is it then the claim of this paper then that we need to entirely eradicate considerations like statutory purpose, pragmatic enrichment, or the substantive canons from the interpretive enterprise if we care about equality? To be clear: no. Formalistic textualism cannot always do all of the work of interpretation, most obviously because there will be occasions when text runs out, or when there is ineradicable textual ambiguity.²⁷¹ Allowing other considerations may thus be sensible, and indeed necessary in some circumstances.²⁷² But that does not make such extra-textual considerations “textualism”—nor does it diminish the anti-egalitarian possibilities that allowing a richer set of factors into the interpretive enterprise can create.

270. See SCALIA, *supra* note 38, at 27–28 (characterizing the substantive canons in this way and suggesting that they “are a lot of trouble” for “the honest textualist”).

271. See *infra* subpart IV(E).

272. My own view, which I am currently developing in a forthcoming book project, is that the most sensible interpretive framework in statutory interpretation would be one of “presumptive textualism,” in which a judge would first apply formalistic textualism, looking narrowly to statutory text and context—but then might, in some circumstances, go beyond that. See, e.g., Schauer, *supra* note 19, at 546–47 (articulating a theory of “presumptive formalism”); Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1758–59 (2010) (describing a “modified textualism” adopted in many state jurisdictions which is similar, but not the same, as my proposal herein). When the inquiry produces no clear result, other considerations could be drawn on to produce one, though the inegalitarian potential of many non-textual considerations counsels caution, and self-awareness of the potential for importing inequality in so doing. Insofar as the initial textual inquiry *does* produce a clear result, such result should be presumptively binding—and the onus should be on the judge to justify any departure from clear text. It may be that there are occasionally reasons for doing so. An example is *King v. Burwell*, 576 U.S. 473 (2015), where it appears that it was simply a textual oversight in a long and complicated law. *Id.* at 491–92. Long-standing doctrines favoring substantive equality—such as the rule of lenity, and the Indian treaty canon—might also provide a principled reason for such departures in some instances. See, e.g., *United States v. Winans*, 198 U.S. 371, 380–81 (1905) (observing that “we will construe a treaty with the Indians as ‘that unlettered people’ understood it, and ‘as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection’”); *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion) (observing that “[t]he rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them” in a context where two equally plausible interpretations were possible). But, in my view, equality is best safeguarded in that circumstance through candor that one is departing from textualism, and through a requirement that such departures be explicitly justified.

B. Empirical Unprovability and the Theory/Practice Divide

The second major limitation of the theory described herein is that it is, like many claims about interpretive theory, likely not provable in any empirically rigorous way.²⁷³ Thus, while it is possible to lay out the theoretical case for the egalitarian potential of textualism, and to offer examples of where textualism has—or would if operationalized—promoted equality before the law, it is likely not possible to definitively *prove* that textualism is superior to other methodological approaches in this regard. While the converse (i.e., that textualism is worse for equality than its methodological comparators) is likely equally unprovable, this limitation may nonetheless be a genuine obstacle to persuading the skeptical reader.

What creates this methodological difficulty? Most notably, disagreement about what *is* textualism (described in subpart IV(A)) and the vagaries of legal realism (described in subpart IV(F)), create a situation in which one cannot rely on judges' self-characterization as textualists to identify what is a textualist decision.²⁷⁴ This is because many self-professed textualist judges do not in fact consistently prioritize text in their interpretive practices, either because they apply a version of “textualism” that does not require them to do so (something I would characterize as non-textualism in the first instance), or because their normative commitments lead them to depart from their methodological commitments in some instances.²⁷⁵

Nor is it systematically possible in the muddy real world to independently categorize statutory interpretation decisions as “textualist” or “non-textualist.”²⁷⁶ Even leaving aside the problem of disagreement about

273. This is not to suggest that one could not perform some forms of empirical study of the proposition laid out herein, simply that they are unlikely to produce definitive and reproducible results. See *infra* notes 274–93 and accompanying text. If one had access to a representative group of judges, it might be possible to provide more robust experimental evidence for or against the theory laid out herein through the types of studies undertaken by Professors Rachlinski, Wistrich, Guthrie, and Johnson which have used sophisticated randomized experimental design to examine, for example, the impact of implicit bias on judges. See Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1207–15, 1217–18, 1233–40 (2009) (describing empirical studies of implicit bias that were conducted on judges). I thank Naomi Schoenbaum for bringing this point to my attention.

274. See *supra* subpart IV(A) and *infra* subpart IV(F).

275. See *supra* subpart IV(A) and *infra* subpart IV(F).

276. I make this observation mostly from personal experience, having attempted the type of systematic empirical study described herein, and found no approach I could use that seemed likely to lead to replicable results. Among the approaches I considered included judicial self-identification (rejected both because many self-identified textualists employ approaches I would not describe as textualism, and because self-professed non-textualists sometimes employ textualist reasoning), comparison across interpretive eras (rejected because even in eras thought of as purposivist, such as the 1970s, textualist approaches were sometimes applied), dictionary definitions (rejected because usage is not an accurate proxy for adherence to text), and my own self-assessment (rejected because of the subjectivity involved in classifying a decision as “textualist” or “non-textualist,” as

what “textualism” is (much less “purposivism,” “eclecticism,” or other competing theories), many decisions are not easily classifiable as “textualist” or “non-textualist” in nature.²⁷⁷ While certainly there are exemplars at both ends of the spectrum—where text does or does not clearly play the dominant role—many real-world decisions, even today, include a variety of types of reasoning.²⁷⁸ Moreover, as described in subpart IV(E), because many cases involve genuine textual ambiguity or ambiguous equality stakes, the possibility of systematic assessments is rendered even more unlikely.²⁷⁹

It is important to note, however, that this is a limitation of *most* claims of interpretive theory, at least insofar as they relate to the follow-on implications of a particularly defined interpretive approach (in this case, respect for statutory text, at the level of generality at which it is written). While it is certainly possible to study what self-professed textualists (or purposivists, or originalists, or intentionalists) do in practice, and what types of interpretive moves accompany certain methodological calling-cards (such as use of dictionary definitions for textualists, or citations to *Holy Trinity* for purposivists), this is not the same as studying the results that true fidelity to text (or purpose, or any other consideration) would produce.²⁸⁰ In such contexts, often the best we can do is to attempt to reason through what *would* be the implications, if such an approach were systematically applied.

Indeed, even sophisticated and well-designed attempts to measure specific aspects of textualism demonstrate these difficulties. For example, a recent study authored by Professors James Brudney and Lawrence Baum that looks across all of the conservative justices finds, on average, no constraining effect of textualism on judicial ideology—something the authors measure through each justice’s relative proportion of pro-employee (versus pro-employer) rulings where they author opinions that rely on particular markers of textualism (such as plain meaning) vs. intentionalism (such as legislative

well as in characterizing a decision as producing equality-promoting results). It is perhaps instructive in this regard to consider that *Holy Trinity*, long described as the quintessential purposivist and anti-textualist decision, has recently been defended by some scholars on textualist grounds. See *supra* note 113 and accompanying text.

277. See *supra* subpart IV(A) and *infra* subpart IV(F).

278. Again, this observation is drawn primarily from my own personal experience, surveying a large number of statutory interpretation cases. Cf. Gluck & Posner, *supra* note 126, at 1313–15 (describing the methodologically pluralist approaches taken by most judges in the federal courts of appeals).

279. See *infra* subpart IV(E).

280. There is much excellent work relying on precisely these types of methodological approaches, which has produced valuable scholarly insights, some of which I rely on herein. See, e.g., Krishnakumar, *supra* note 6, at 579–80 (providing empirical and doctrinal observations about the various interpretative tools that the Roberts Court utilizes); Brudney & Baum, *supra* note 97, at 4 (discussing whether textualism actually constrains judicial discretion). My point here thus is not that such approaches cannot produce important scholarly insights, but rather that they are not especially well-suited to assessing the results that *actual* fidelity to a particular version of an interpretive practice would generate.

history).²⁸¹ The study thus suggests that, when taken as a whole, the fact that conservative justices on the Court use textualist markers in an opinion does not mean that their ideological preferences are constrained.²⁸²

But other results complicate this picture.²⁸³ Both of the conservative Justices on the Court most committed to a comparatively formalistic version of textualism during the time that Brudney and Baum study—Justices Gorsuch and Scalia—have opinions that reflect a less pro-employer bent than their other conservative-leaning counterparts.²⁸⁴ This is most striking for Justice Gorsuch, who reached pro-employer results in only one of his six majority opinions (or roughly 17%), overwhelmingly siding with employees instead (67% of the time).²⁸⁵ While this trend is less striking for Justice Scalia, for whom 19 of 33 (or 58%) of his majority opinions were pro-employer—it is still less one-sided than the average for his conservative-leaning brethren, for whom the equivalent figure is 62%.²⁸⁶ Given that Justice Scalia was a noted ideological conservative—and that the 62% figure includes the opinions of moderates such as Justices Kennedy, O’Connor, and Powell (all of whom Brudney and Baum include in their “conservative” tally)²⁸⁷—even this relatively modest disparity seems to suggest some degree of influence of Justice Scalia’s textualist methodology.

So too when you compare Justice Scalia’s opinions in the labor and employment context—a context overwhelmingly governed by statutory law—as compared to his overall ideological orientation, the results are striking. According to Brudney and Baum’s data, Justice Scalia reached progressive (pro-worker) results across all of his opinions (majority and dissenting) in the labor and employment context 37.5% of the time.²⁸⁸ This may not seem that remarkable. But when compared with Justice Scalia’s

281. See Brudney & Baum, *supra* note 97, at 4, 33–34 (finding that judicial discretion was not constrained whether legislative history or ordinary meaning was used).

282. *Id.* at 34.

283. I thank Professors Brudney and Baum for their generous willingness to share this unreported data with me and to allow it to be used in this Article.

284. This data was not reported in the Brudney and Baum study, but was generously shared by the authors with me upon request. See Email from James Brudney, Joseph Crowley Chair in Labor and Emp. L., Fordham Univ. Sch. of L. & Lawrence Baum, Professor Emeritus of Pol. Sci., Ohio State Univ. Dep’t of Pol. Sci., to Katie Eyer, Professor of L., Rutgers L. Sch. [hereinafter Brudney and Baum Emails] (June 3, 2025, 03:16 PM ET) (on file with author) (showing outcome of Justices Gorsuch and Scalia in majority and dissenting opinions).

285. *Id.* There was also one Justice Gorsuch opinion that Brudney and Baum coded as non-ideological.

286. See *id.* (discussing unpublished research regarding Justice Scalia’s 33 majority opinions in labor and employment cases).

287. See Brudney & Baum, *supra* note 97, at 18 n.63 (describing how they assigned conservative and liberal labels to the Justices).

288. Brudney and Baum Emails, *supra* note 284. I use the combined data for majority and dissenting opinions here, because the Dorsen data I am comparing it to was also a combined tally of majority and dissenting opinions.

overall jurisprudence—in which other scholars have found progressive results 15% of the time—this number appears far more significant.²⁸⁹ It suggests that—in at least one area governed by statutory law (and thus textualism)—Justice Scalia was far more likely to reach progressive outcomes than his overall jurisprudence.

It is also the case that for progressive justices, association with textualist markers was strongly associated in Brudney and Baum's data with more pro-employee outcomes (at least during the modern era).²⁹⁰ Brudney and Baum observe that this data does not necessarily support the constraint thesis, since it does not go against the progressive Justices' presumed ideological orientation.²⁹¹ But does it support the equality thesis? In this regard, it is important to observe that progressive Justices have *also* been responsible for the engrafting of non-textual limitations on civil rights law.²⁹² As such, the comparatively pro-worker tilt of the liberals' textualist opinions may suggest that textualism has played an important role in steering them away from both thin and thick inequality in this domain.

I do not mean to contend here that these more nuanced results prove the theory of this piece, i.e., that textualism can serve as an equality practice—or even that textualism constrains. But the point here is that, in the muddy real world, it is exceptionally hard to empirically prove the impact of genuine judicial belief in, much less adherence to, a particular interpretive theory. Even more difficult is testing adherence to a specifically defined version of such a theory (here, formalistic textualism). What outcomes would Justice Scalia and Justice Gorsuch have reached had they not been committed adherents to textualism? Or the progressive Justices on the Court? Would the current Supreme Court be even further to the right on labor and employment matters if not for the rise of textualism?²⁹³ We do not know, and it is hard to imagine an experimental design that would tell us.

289. See, e.g., Stephen B. Presser, *The Principled Scalia: A Liberal Friend on Scalia's Liberal Opinions*, FEDERALIST SOC. REV., 2017, at 164, 165 (describing data collected and reported by David M. Dorsen in THE UNEXPECTED SCALIA: A CONSERVATIVE JUSTICE'S LIBERAL OPINIONS (2017)).

290. See Brudney & Baum, *supra* note 97, at 34 (showing no support for the constraint hypothesis).

291. *Id.*

292. For example, the majority opinion in *Pierson v. Ray*, the case that first engrafted the doctrine of qualified immunity onto § 1983, was written by Chief Justice Earl Warren. *Pierson v. Ray*, 386 U.S. 547, 555–57 (1967). The *Kirkingburg* opinion described in subpart III(C) is another example; it was authored by Justice Souter (appointed by a Republican but commonly considered a progressive by the time of the *Kirkingburg* opinion in 1999).

293. The Supreme Court is commonly believed to have taken a hard rightward turn since the time of Justice Gorsuch's appointment. See, e.g., Masood Farivar, *Trump's Lasting Legacy: Conservative Supermajority on Supreme Court*, VOA (Dec. 24, 2020), https://www.voanews.com/a/usa_trumps-lasting-legacy-conservative-supermajority-supreme-court/6199935.html [https://perma.cc/RQ9E-H422] (claiming that Trump ushered in a “dramatic ideological shift” on the Court

Thus, the improbability of being able to empirically demonstrate textualism's superiority to its methodological comparators as a means of producing equality is a real limitation of the theoretical work herein. This, however, is a universal limitation of all scholarly claims about the outcomes of true fidelity to interpretive theory. While it is possible to systematically study what self-professed adherents of textualism (or purposivism, originalism, intentionalism, or eclecticism) *do*, or what results go along with markers of textualism (or competing methodologies), it is far more difficult (if not impossible), to empirically validate in the real world the results that fidelity to a specifically defined interpretive practice would produce.

C. *The Problem of Genuinely Inegalitarian Laws*

A third significant limitation of the theory of textualism as an equality practice is the problem of substantively inegalitarian laws. Adhering to the text of Jim Crow laws or those targeted at Jewish people in Nazi Germany may be characterized as a form of “thin” equality before the law—but evidently such “thin” equality is meaningless alongside the substantive *inequality* they produce.²⁹⁴ Nor is the problem of substantively inegalitarian laws purely historical in nature: numerous substantively inegalitarian laws exist in the U.S. today, and more are likely imminent.²⁹⁵ Thus, the claim of this Article is not (and could not be) that adherence to text always leads to substantively egalitarian results—textualism can and does prop up substantive inequality when applied to substantively inegalitarian laws.

Nonetheless, there are reasons to believe that, on balance, textualism and its thin guarantee of equality before the law will better serve marginalized communities than the alternative.²⁹⁶ As described in Part II, non-textualist alternatives often employ habits of reasoning that—in an

“by forging a [] 6-3 conservative majority”). Nonetheless, Brudney and Baum’s data show that during that same time frame, the Court’s proportion of pro-employer outcomes in the labor and employment context has stayed essentially the same. See Brudney and Baum Emails, *supra* note 284 (comparing outcomes of decisions during the 1986–2015 terms with outcomes of decisions during the 2017–2023 terms).

294. See Robert M. Cover, Book Review, 68 COLUM. L. REV. 1003, 1005–07 (1964) (reviewing RICHARD HILDRETH, *ATROCIOUS JUDGES: LIVES OF JUDGES INFAMOUS AS TOOLS OF TYRANTS AND INSTRUMENTS OF OPPRESSION* (1856)) (discussing the dilemma presented by judges being expected to enforce immoral laws); cf. Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 657–59 (1958) (arguing that the affinity for positivism in pre-war German legal thought contributed to the rise of Hitler and Nazism and critiquing positivism on the grounds that it would treat the Nazi legal regime as binding law).

295. In contemporary times, probably the most notable example of this is the large body of legislation targeting the transgender community. See *2025 Anti-Trans Bills Tracker*, TRANS LEGIS. TRACKER, <https://translegislation.com/> [<https://perma.cc/QBJ7-5FVE>] (documenting anti-trans bills nationwide).

296. Cf. RAZ, *supra* note 47, at 225 (arguing that “conformity to the rule of law” is a virtue despite enabling the law to serve “bad purposes” “just as the fact that a sharp knife can be used to harm does not show that being sharp is not a good-making characteristic for knives”).

unequal society—are predictably likely to lead to the exclusion of subordinated groups from the law’s benefits, and to the exclusion of more favored groups from the law’s burdens, even where laws are nominally equal.²⁹⁷ Moreover, as described in Part III, there are numerous real-world examples of how textualism has protected—or would protect if taken seriously—substantive equality in the application of the law.²⁹⁸

But as importantly, as generations of theorists have argued, there are reasons to believe that *requiring* legislatures to be explicit in their substantively inegalitarian aims will reduce the probability of such inegalitarian rules coming to fruition in the first instance. For example, scholars such as Lon Fuller have articulated the view that (as paraphrased by Jeremy Waldron) “bad things happen[] in the dark as opposed to the sunlight of legality” and that “even in the most perverted regimes there is a certain hesitancy about writing cruelties, intolerances, and inhumanities into law.”²⁹⁹ Scholars such as John Manning have offered a procedural account of the same hypothesis, observing that the American system of bicameralism and presentment creates important constitutional safeguards for “political and other minorities,” safeguards which may be “dilute[d]” or altogether overridden by judge-made rules effectuating non-textual inegalitarian carveouts.³⁰⁰

Finally, unequal legal rules, when nonetheless adopted, are far more susceptible to constitutional challenge when they are effectuated via legislative carveout rather than via judicial interpretation. For example, a judicial holding in *Bostock* that Congress simply didn’t mean to cover LGBT people in their enactment of Title VII’s proscription of discrimination “because of . . . sex” would be highly unlikely to be susceptible to an Equal Protection challenge.³⁰¹ Among other things, judges rarely view a legislature’s failure to adopt specific protections for a group as susceptible to Equal Protection challenge, and the same Court that held that Congress did not intend such coverage seems highly unlikely to validate a constitutional

297. *See supra* Part II.

298. *See supra* Part III.

299. Jeremy Waldron, *The Rule of Law* § 3.6, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2016), <https://plato.stanford.edu/entries/rule-of-law/> [https://perma.cc/68ZV-KQFD]; Fuller, *supra* note 294, at 637. Fuller takes this as evidence for his anti-positivist theory of law, and the idea that law has inherent moral content. I agree with Fuller’s initial observation here, while disagreeing with his anti-positivist conclusions.

300. Manning, *Absurdity*, *supra* note 3, at 2437. In today’s era of congressional gridlock, these procedural protections may be especially strong, since it is far easier for a court to engage in an inegalitarian gerrymander of the law than it would be for today’s Congress to amend existing law by adopting an inegalitarian carveout. *See* Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 2 (2014) (discussing the problem of legislative gridlock).

301. *Cf. Bostock v. Clayton County*, 140 S. Ct. 1731, 1757–58 (2020) (Alito, J., dissenting) (making this argument).

challenge to its own carve-out.³⁰² In contrast, requiring Congress, if it wishes its operative legal standard to not apply to LGBT people, to actually adopt a textual exception excluding the LGBTQ community *would* be far more likely to be vulnerable to constitutional challenge.³⁰³

Thus, while the problem of genuinely inegalitarian laws is a real one for any theory of textualism as equality-promoting, it is not clear that the *alternative* (i.e., judicial non-textualism) would lead to less inequality in the law. Instead, it seems likely that demanding (as textualism does) that inequality be specified by the legislature—rather than read into it by judges—will, on balance, lead to fewer inegalitarian legal rules, and will render those inegalitarian rules that are adopted more likely susceptible to constitutional challenge.

D. Foreclosing Non-Textual Decisions That Promote Substantive Equality

An additional related, but distinctive critique of considering textualism as an equality practice may be the fact that—in specific cases—textualism may foreclose particular equality-promoting outcomes that advocates favor.

302. While some scholars have suggested that such legislative inaction *should* in some circumstances violate Equal Protection, the limited judicial authority in the United States is generally to the contrary. *See, e.g.,* *Webb v. Puget Sound Broad. Co.*, 93 Wash. App. 1042, 1998 WL 898788, at *1, *6 (Wash. Ct. App. 1998) (finding that the Washington State legislature’s failure to adopt sexual orientation discrimination protections did not violate the Equal Protection Clause); *Perry v. Brown*, 671 F.3d 1052, 1083–84 (9th Cir. 2012), *vacated sub nom.*, *Hollingsworth v. Perry*, 570 U.S. 693 (2013) (in dicta, articulating the view that failing to adopt anti-discrimination protections for sexual orientation would not violate the Equal Protection Clause); *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 953–54 (7th Cir. 2002) (holding that a school district’s adoption of an anti-harassment policy for only certain types of harassment did not violate the Equal Protection Clause); *see also* Akhil Reed Amar, *Attainder and Amendment 2: Romer’s Rightness*, 95 MICH. L. REV. 203, 206 (1996) (arguing that if Colorado cities had not adopted protections for sexual orientation in the first instance this would not have violated the Equal Protection clause). For a contrary scholarly view, *see* James M. Oleske, Jr., “*State Inaction, Equal Protection, and Religious Resistance to LGBT Rights*,” 87 COLO. L. REV. 1, 8 (2016) (arguing that “states unconstitutionally deny equal protection of the law through inaction when they fail to protect against sexual-orientation discrimination while protecting against similar invidious discrimination”).

303. *See, e.g.,* *Romer v. Evans*, 517 U.S. 620, 635–36 (1996) (invalidating state constitutional amendment prohibiting sexual orientation discrimination protections); *cf. Williams v. Kinkaid*, 45 F.4th 759, 772–74 (4th Cir. 2022) (holding that the exclusion of transgender people whose gender dysphoria would otherwise be covered by the ADA’s disability standard from the protections of the ADA would likely violate the Equal Protection Clause, and thus construing the ADA to avoid this conclusion). As is likely apparent by this point, I suggest that the proper approach in cases like *Williams* is to constitutionally invalidate the exclusionary provision, rather than rely on text-straining canons like the canon of constitutional avoidance.

This is of course different than the problem of genuinely inegalitarian laws. Instead, the critique here is that taking the text as constraining (above purpose, intent, judicial common law development, or other factors) may in some instances limit the range of how even generally equality-promoting laws are likely to be construed.

The paradigm case here is *United Steelworkers v. Weber*, the 1979 Supreme Court decision that addressed voluntary affirmative action.³⁰⁴ *Weber* was a self-consciously non-textualist opinion, holding that voluntary affirmative action is permissible under Title VII of the Civil Rights Act of 1964, despite the lack of a textual hook.³⁰⁵ Citing *Holy Trinity*, the Court in *Weber* opined that the plaintiff's textual argument—based on the race-symmetrical language of Title VII (“because of . . . race”)—was “not without force” but that “[i]t 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.’”³⁰⁶ It thus held that voluntary affirmative action was, under certain judicially defined circumstances, permitted by the statute.³⁰⁷

Scholars have long debated whether *Weber* was an appropriate application of intentionalism or purposivism—or of some other non-textualist interpretive methodology.³⁰⁸ But regardless, *Weber* illustrates an important point, which is that although textualism may promote substantive equality *on balance*, it may constrain substantively egalitarian interpretive possibilities in any given circumstance. The Supreme Court itself apparently believed that a textualist interpretative approach in *Weber* would not have resulted in the validation of voluntary affirmative action plans.³⁰⁹ And for

304. 443 U.S. 193 (1979). I recognize that some readers may not perceive *Weber* as an opinion that promotes equality, depending on one's perspective on affirmative action. My point here is not to offer a defense of the idea that *Weber* promoted substantive equality (though I personally believe that to be true)—but rather to explain why *even if* one believes that to be true of *Weber*, it does not answer the broader question of, on balance, what methodology would best promote or protect equality.

305. *Id.* at 201–04.

306. *Id.* at 201 (citation omitted).

307. *Id.* at 204.

308. Compare Eskridge & Frickey, *supra* note 44, at 337 (concluding that “*Weber* overstates its [purposivist] argument and distorts the evidence. At best, the *Weber* result is judicial gapfilling of an indeterminate statute. At worst, it is judicial lawmaking inconsistent with legislative supremacy,” though defending *Weber* elsewhere on alternate grounds), with RONALD DWORKIN, A MATTER OF PRINCIPLE 326–28 (1985) (defending *Weber*'s purposivist account).

309. See *Weber*, 443 U.S. at 201 (observing that *Weber*'s textual argument was “not without force” and instead relying on *Holy Trinity*'s 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” (quoting *Holy Trinity*, 143 U.S. 457, 459 (1892))). For a differing perspective on whether the text could potentially support voluntary affirmative action plans, see ESKRIDGE, *supra* note 42, at 39 (arguing that the word “discrimination” might be understood to mean only certain types of invidious treatment, not including voluntary affirmative action).

some, this may appear at first blush to be a damning critique of any project that characterizes textualism *in general* as equality-promoting.

But whether this particular case (or any other particular example of how textualism could constrain equality law) undermines the overall theory of textualism as an equality practice in fact requires a much more nuanced analysis. The question, again, is whether *on balance* textualist reasoning is more likely to globally lead to thin, and thus in turn thick, equality. And this very different question requires training our attention not only on the ways that text may constrain more expansive egalitarian interpretations—but also on the ways that it may avoid inegalitarian gerrymandering.

And here, as Parts II and III suggest, it is far from clear that the balance favors non-textualism.³¹⁰ As set out below, even *Weber* itself is rarely the basis on which race-based action under Title VII is affirmed today.³¹¹ But as importantly, when we look at the broad sweep of the law over time—at the judicial larding of § 1983 with non-textual defenses, at the non-textual limits imposed on § 1981, the Fair Housing Act and Title II of the Civil Rights Act of 1964, at the ways that numerous non-textual gerrymanders have undermined Title VII itself—the balance sheet looks markedly poor for non-textualism and its promotion of substantive equality.³¹² That is, it appears on balance that departures from text have harmed, rather than helped subordinated groups. And unlike the choice of arguments by an individual advocate in a particular case—which will necessarily focus on the granular and specific—our assessment of a methodology ought not do so.

This is not to undercut the impact that *Weber* has had on substantive equality in the labor market, which by many accounts has been non-trivial.³¹³ But it should be self-evident that more than non-textualism alone explains the substantively egalitarian outcome in *Weber* (and thus its impact)—and more than textualism alone puts that outcome under threat today.³¹⁴ Today, the very type of purposivist anti-subordination arguments *Weber* embraced are being used primarily by the courts as a rationale for *excluding* new groups

310. See *supra* Parts II–III.

311. See *infra* note 316.

312. See *supra* subpart III(C).

313. See Harry J. Holzer & David Neumark, *Affirmative Action: What Do We Know?*, 25 J. POL'Y ANALYSIS & MGMT. 463, 483 (2006) (finding modest redistributionist effects from affirmative action).

314. Most obviously, *Weber* was decided by a far more progressive court than the Supreme Court that exists today. It seems extraordinarily unlikely that today's Supreme Court would reach comparable results applying a purposivist approach to Title VII today. See ESKRIDGE, *supra* note 42, at 30 (observing that “[t]he two statutory purposes emphasized by [the majority and the dissent in *Weber*] are potentially the same [statutory] purpose” but that that same purpose led to differing conclusions in the hands of different judges about the legality of voluntary affirmative action).

from anti-discrimination law, i.e., to undermine substantive equality.³¹⁵ And *Weber* itself appears to play little role in defending affirmative action today, since most courts find its judicially created requirements not to be met.³¹⁶ As these trends demonstrate, it was only in particular conditions of timing and judicial politics that even *Weber*'s specific (non-textual) logic operated to promote substantive equality.

Of course, as I have emphasized from the start, it is possible to conceive of a world in which on balance, judges were more likely to use their discretion to deviate from the language of the law to benefit subordinated groups (and thus to promote substantive equality). But as both this Article—and many other scholars' work—suggest, the sweep of American history provides little reason for optimism on this front.³¹⁷ Nor, even more self-evidently, does the present moment.³¹⁸ In short, the conditions of judicial behavior that one must believe will exist on a sustained basis in order to believe that a lack of textual restraints is more likely to produce substantive equality than its alternative will strike many as simply implausible.

315. *Weber*-style purposivist arguments—that the purpose of civil rights law was to benefit particular subordinated groups, and that such laws should be interpreted through that lens—is primarily finding purchase today in the context of efforts to *exclude* LGBTQ people from the protections of sex discrimination law. *See, e.g.*, *Bostock v. Clayton County*, 140 S. Ct 1731, 1768–69 (2020) (Alito, J., dissenting) (arguing that Title VII was the product of the struggles of women's rights activists, and thus should be read to exclude LGBTQ employees); *see also* *Louisiana v. U.S. Dep't of Educ.*, 737 F. Supp. 3d 377, 399 (W.D. La. 2024) (granting preliminary injunction against Biden-era Title IX rule protective of LGBTQ equality, on the grounds that “Title IX was written and intended to protect biological women from discrimination. Such purpose makes it difficult to sincerely argue that, at the time of enactment, ‘discrimination on the basis of sex’ included gender identity, sex stereotypes, sexual orientation, or sex characteristics.”). The resurgence of such purposivist anti-subordination-based arguments has not led to more expansive interpretations of the law when they would directly benefit traditionally subordinated groups—and my point is not to suggest that such arguments are experiencing a genuine revival. *See* *SFFA v. Harvard*, 143 S. Ct. 2141, 2148, 2175, 2230 n.2 (2023) (construing Title VI to largely prohibit race-based affirmative-action in the university context). Rather, the point here is simply that the results of purposivist analysis—even an analysis that assumes similar purposes on the part of the legislature, i.e., a purpose to protect subordinated groups—may lead in very different directions depending on the judge's ideology.

316. *See, e.g.*, Stacy Hawkins, *How Diversity Can Redeem the McDonnell Douglas Standard: Mounting an Effective Defense of the Commitment to Diversity in the Legal Profession*, 83 *FORDHAM L. REV.* 2457, 2469 (2015) (showing that almost three quarters of those cases involving a traditional affirmative action plan result in rulings against the employer, but that a far higher percentage of cases involving diversity plans succeed).

317. *See* sources cited *supra* note 84.

318. *See* Sonam Sheth, *Half of All Federal Judges Could Be Trump Appointees by End of His Next Term*, *NEWSWEEK* (Nov. 7, 2024), <https://www.newsweek.com/donald-trump-federal-judges-appointments-judiciary-1982390> [<https://perma.cc/T6KB-JBD3>] (“Legal scholars say that . . . by the time Trump leaves office, half of all federal judges could be Trump appointees.”).

E. Not All Statutory Interpretation Issues Have Equality Stakes & Some Statutes Are Genuinely Textually Ambiguous

The foregoing sections have dealt with the limitations of a theory of textualism as an equality practice in cases where there are clear equality stakes. But another important limitation arises from the converse: some statutory interpretation cases may not raise substantive equality stakes, or may deal with circumstances that are genuinely textually ambiguous. In either of these circumstances, adhering to textualism, and thus thin equality before the law, may have no impact on substantive equality—either because no substantive equality stakes exist, or because in situations of true textual ambiguity, equal application of the law cannot determine the outcome. While the exact proportion of statutory interpretation cases in which one or both of these two circumstances exist is uncertain, it is surely not *de minimis*, and thus one might critique the theory as having impacts in practice only in the context of a small slice of the statutory interpretation landscape.

This is a real limitation of the theory presented herein, though not a challenge to its veracity in the circumstances in which it does apply. I do not deny that—in addition to the problem of genuinely inegalitarian laws—there are many statutory interpretation cases that simply present no obvious substantive equality stakes.³¹⁹ And, there are also many cases that present genuine textual ambiguity (though I, like many textualists, would argue that this ambiguity is less pervasive than non-textualists often claim it to be).³²⁰ In either of these circumstances, it is true that the choice of textualism as an interpretive theory may continue to promote thin equality before the law—but that thin equality before the law is unlikely to do any further substantive equality work.

Of course, one could argue (as I would) that the limited applicability of the theory to some statutory interpretation cases is not a reason to discount textualism's equality-promoting role in the cases to which it does apply. While not every case may involve subordinated groups, those that do often present critical substantive equality stakes—stakes that are most likely to be protected by textualism.³²¹ So too, the fact that some cases involve genuine textual ambiguity does not mean that adhering to textualism (and thus

319. See *Abitron Austria GmbH v. Hetronic Int'l, Inc.*, 143 S. Ct. 2522, 2527 (2023) (discussing a dispute between corporate parties regarding the extraterritorial application of a particular provision of the Lanham Act, with no obvious substantive equality stakes). The argument herein is of course that—over the long haul—promotion of thin equality in the way that textualism is uniquely situated to accomplish will help achieve substantive equality by ensuring all are burdened and benefitted by the law equally. But in any given individual case, there may not be immediately obvious substantive equality stakes—for example, in cases where two large wealthy corporations are litigating against each other, substantive equality simply may not be implicated.

320. See, e.g., *Rudisill v. McDonough*, 144 S. Ct. 945, 951–52 (construing a genuinely textually ambiguous set of legal provisions).

321. See *supra* Parts II–III.

protecting equality) is unimportant in the cases that do not turn on such ambiguous language.

But ultimately, there can be reasonable disagreement on whether the limited scope of where the theory described herein has application renders it more, or less, of an argument for the endorsement of textualism as an interpretive method. For scholars who believe there are serious problems with textualism as an interpretive methodology, the fact that textualism may, in one out of one hundred cases, help protect substantive equality, may be insufficient to override those concerns. (Conversely, for those who do not care in the first instance about substantive inequality, the limited applicability of the theory may be simply irrelevant, or even an argument *for* textualism.) But at least, this Article suggests, equality as a value should be weighed in the balance.

F. *Reckoning with Legal Realism*

The most fundamental limitation of the theory of textualism as an equality practice is undoubtedly legal realism.³²² Despite continued protestations to the contrary, few people today doubt that non-legal factors (such as the facts of the case, or the judges' personal beliefs) play a role in judges' approach to adjudicating cases.³²³ This is true even where judges identify themselves as adhering to a theoretically constraining interpretive methodology such as textualism.³²⁴ In the real world, any interpretive methodology is only as good as the judges that apply it, and real-world experience demonstrates that theoretical fidelity to text does not always equate to real-world practice. Thus, legal realism—understood here as the claim that law, including legal methodology, cannot genuinely constrain—

322. It is worth acknowledging at the start of this discussion that I grapple here primarily with the more extreme version (some would say caricature) of the legal realist claims: that the influence of politics on judging is so pervasive as to fundamentally call into question the ability of law to constrain. See Owen M. Fiss, *The Death of the Law?*, 72 CORN. L. REV. 1, 9–11 (1986) (critiquing this version of legal realism). Note that regardless of whether this is an accurate account of the original legal realist position, it is a position taken by a significant number of legal observers today, and thus one worth responding to.

323. This is perhaps most concisely captured by the oft-repeated expression that “[w]e are all legal realists now.” See, e.g., Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 467 (1988) (using the phrase and suggesting that “[a]ll major current schools of thought are, in significant ways, products of legal realism”). But cf. Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEXAS L. REV. 267, 268–69 (1997) (observing that critiques of realism are often directed at more extreme versions of the characterization of the views of the legal realists—of judging as politics all the way down—and arguing that these characterizations are inaccurate).

324. See Tara Smith, *Why Originalism Won't Die—Common Mistakes in Competing Theories of Judicial Interpretation*, 2 DUKE J. CONST. L. & PUB. POL'Y 159, 213, 213 n.150 (2007) (observing that Justice Scalia “has often been criticized for inconsistency in his adherence to Textualism on the bench” and collecting sources).

poses a real challenge to this, or any other claim that legal methodology can genuinely constrain.

And indeed, it is especially hard to deny the truth of legal realism's core insight at the present moment. At a time when the Supreme Court has dramatically increased the issuance of unreasoned orders, favoring the most powerful institution in the country (i.e., the presidency), and often harming the marginalized, it may be hard to take seriously arguments that *any* methodology (including textualism) will reliably restrain judges.³²⁵ After all, a majority of the Justices joining such orders explicitly self-identify as textualists.³²⁶ And yet, we have seen repeated, unreasoned orders from the Court, many of which ignore plain statutory commands.³²⁷

Nevertheless, though the challenge presented by legal realism is most assuredly real, there are a number of reasons for not allowing it to overly dominate how we think and reason around the law. Most obviously, legal realism, in its most extreme form (i.e., when understood to stand for the claim that law is politics all the way down), is not an actionable theory of law.³²⁸ It is not a legal argument that lawyers can take into the courts—and it is certainly not an interpretive perspective that we should wish judges to embrace. Legal realism of this kind calls into question the fundamental ability of the law to constrain under any interpretive theory. This is as true of textualism's interpretive competitors, such as purposivism, eclecticism, and

325. See Chemerinsky, *supra* note 30 (describing some of the Supreme Court's recent unreasoned orders favoring the presidency and harming the marginalized).

326. See Krishnakumar, *supra* note 6, at 575 n.1 (identifying Justices Thomas, Barrett, Kavanaugh, and Gorsuch as those on the Court who self-identify as textualists).

327. A particularly egregious example of this was the Court's order in *Department of Homeland Security v. D.V.D.*, 145 S. Ct. 2153 (2025), which allowed immigrants to be deported to countries they had no relationship with and in which they faced a genuine risk of harm by granting stay of a lower court's injunction without articulating any reasons. As Justice Sotomayor, joined by Justice Kagan and Justice Jackson noted, this government action was a clear violation of statutory limits on third-country removal and the Convention Against Torture (also codified in American law). *Id.* at 2154, 2162 (Sotomayor, J., dissenting); *see also* Opposition to Application to Stay at 5–14, *Dep't of Homeland Security v. D.V.D.*, 145 S. Ct. 2153 (No. 24A1153), 2025 WL 1605329, at 4–8 (detailing the relevant statutory backdrop). For another example, *see Dep't of State v. AIDS Vaccine Advoc. Coal.*, 146 S. Ct. 19, 19 (2025) (concluding without addressing the relevant statutory language that “[t]he Government, at this early stage, has made a sufficient showing that the Impoundment Control Act precludes respondents’ suit,” and thus granting a stay); *cf. id.* at 21 (Kagan, J., dissenting) (observing that “[i]n its very first section, titled ‘Disclaimer,’ the ICA declares: ‘Nothing contained in this Act . . . shall be construed’ as ‘affecting in any way the claims or defenses of any party to litigation concerning any impoundment’” and that “[i]t is hard to write a clearer and more emphatic *non*-preclusion provision than that”). For a more extensive discussion of the Court's unreasoned decision-making in recent orders favoring the Trump administration see Chemerinsky, *supra* note 325.

328. I am not the first to make this observation. See Fiss, *supra* note 322, at 9–10 (arguing that, “[w]hen critical legal studies scholars insist that ‘law is politics,’ they . . . want to unmask the law, but not to make law into an effective instrument of good public policy or equality” and that “[t]he aim of their critique is critique”).

originalism, as it is of textualism itself. It is so fundamental a challenge to any claims of methodological constraint that allowing it to dominate our reasoning can only lead to legal nihilism.³²⁹

Fortunately, in the real world, it is equally clear that legal realism—understood as ubiquitous judicial prioritization of ideology above all else—is not an accurate descriptive account.³³⁰ Indeed, as taken up more fully in Part V, even today, many lower court judges—including even judges appointed by President Trump—are ruling against the Trump administration applying straightforward textualist analysis.³³¹ As this demonstrates, the words of the law—and methodological approaches that encourage courts to bind themselves to them—may matter even more in moments like the present, where powerful entities seek to hold themselves above the law. To the extent there is hope to preserve equality before the law—in the present moment and beyond—it lies not in legal nihilism, but in leaning into unambiguous textual restraints on power.

V. Why Does Theorizing Textualism as an Equality Practice Matter?

If the promise of textualism as an equality practice is inconsistent and ultimately unprovable, why bother engaging in this project? Does it matter that textualism could in theory promote equality, if we are unable to be assured that it will predictably do so in the real world? This Part argues that—even conceding the genuine critiques discussed in Part IV—theorizing textualism as an equality practice is important.

There are a number of reasons why this is so. First, for those of us who self-identify as textualists, understanding equality as a nascent value of textualism can and should shape how we theorize textualism. So too understanding textualism as an equality practice may shape how textualist judges approach the practice of judging in specific cases. And even for those who steadfastly oppose textualism (and embrace a competing methodological approach), understanding the equality-promoting potential of greater adherence to text—and incorporating these insights into non-textualist practices—may help to avoid the inegalitarian pitfalls that this article has identified.

329. Cf. Fiss, *supra* note 322, at 10 (characterizing the extreme version of legal realism embraced by certain critical legal studies scholars as “nihilistic”).

330. See Schauer, *supra* note 19, at 530–31 (asserting that rules help generate judicial outcomes, with those outcomes often deviating from what judges think the outcome should be); Lawrence B. Solum, Book Review, *The Positive Foundations of Formalism: False Necessity and American Legal Realism*, 127 HARV. L. REV. 2464, 2478 (2014) (reporting findings that “legal variables” as opposed to the ideology of individual judges “are the primary determinant of judicial behavior”).

331. See *infra* subpart V(E).

But the benefits of theorizing textualism as an equality practice extend beyond the potential of such future impact. Theorizing textualism as an equality practice matters *today*, precisely because we find ourselves in a moment of rising threats to subordinated groups and to the rule of law. Since the start of the second Trump administration, textualist approaches have often operated in the lower courts precisely in the way theorized in this paper—to protect the weak and the marginalized, and to ensure that the law’s written words are respected even when the forgotten or disfavored invoke them.³³² And as these cases illustrate, textualism’s egalitarian potential need not be universally realized—nor decisively proven—to be important in the here and now.

A. *Theorizing Textualism*

The first reason why theorizing textualism as an equality practice may matter resides in how such theorizing can influence broader theoretical discussions of textualism. As described more fully herein, understanding equality as one of the nascent values of textualism should have two important implications for broader textualist theorizing: First, it can inform the ways that textualists think about, describe, and debate the comparative merits of textualism as an interpretive theory. And second, it can help inform intra-textualist debates about what “textualism” is.

With respect to the first issue, textualists making the normative case for textualism have typically focused on one of two claims: First, textualism’s ability to constrain judges, nudging interpretation away from pure judicial preferences; and second, textualism’s greater consistency with Article I § 7, insofar as it is the theory of interpretation that takes the products of bicameralism and presentment at face value.³³³ But some textualist scholars and jurists, including leading figures in the field such as Professor Manning and Justice Gorsuch, have also articulated equality as a nascent benefit of textualism, although this value is not commonly mentioned today as one of textualism’s benefits.³³⁴

For those who consider themselves textualists, then, it is important to consider the possibility that one of textualism’s other benefits is the fact that it is well-situated to promote equality.³³⁵ Not all textualists may agree that this is normatively desirable, or that it is descriptively true. But for those who

332. *See infra* subpart V(E).

333. *See* sources cited *supra* note 6.

334. *See* sources cited notes 48–49, and accompanying text.

335. Professor Bill Watson also makes the claim that “[i]nterpretive theories . . . require a moral-political defense”—something that situating textualism as an equality practice could provide. Watson, *supra* note 37, at 46; *cf.* Solum, *supra* note 83, at 981–82 (arguing that outcome reasons for interpretive theories cannot form a reliable basis for interpretive theory choices, so process values, such as the rule of law, should play a greater role in debates over interpretive theory).

agree with both claims, having a well-developed theoretical account of textualism as an equality practice is important. Moreover, simply highlighting and articulating clearly this nascent value of textualism may encourage other textualists to consider—and perhaps embrace—equality as a value that textualism promotes.

And for those textualists who do view textualism’s equality-promoting potential as an important part of its normative benefits, this in turn has important downstream implications. We are at a moment in which there are critical ongoing internal debates about what textualism is, and which approaches (such as the substantive canons, the major questions doctrine, or the use of non-linguistic context) are or are not an appropriate part of textualist practice.³³⁶ Theorizing textualism as an equality practice can help us to see that allowing non-textual glosses on textualism is not only formally inconsistent with the basic premise of textualism (fidelity to text), it eliminates one of the core benefits of textualism (i.e., the promise of the equal application of the law to all).³³⁷ At a minimum, such glosses ought not be characterized as textualist—preserving analytic clarity even where countervailing values might cause otherwise textualist theorists or judges to depart from their commitment to textual fidelity, and partially embrace such non-textual elements.³³⁸

Thus, for those who view protecting the equal application of the law as an important value of textualism, this, in turn, will have important downstream implications for how textualism itself is theorized. Because only certain versions of textualism (i.e., “formalistic textualism”) actually constrain adjudicators to apply text equally, only those versions of textualism even arguably promote equality.³³⁹ Thus, for those scholars and jurists who believe that textualism’s equality-promoting potential is one of its normative

336. See Barrett, *supra* note 5, at 110 (observing the facial “tension” between the substantive canons and textualism, and proceeding to make in-depth arguments regarding the compatibility of the substantive canons and textualism’s commitment to “faithful agency”); John Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 125 (2001) (observing that “it is unclear how comfortably” the “canon of avoidance and clear statement rules” “fit with the most basic textualist assumptions”); Wurman, *supra* note 46, at 914–16 (arguing that the major questions doctrine can be considered a linguistic, rather than substantive, canon, and that it can be consistent with textualism); Grove, *Which Textualism?*, *supra* note 6, at 267 (describing two broadly distinctive approaches to textualism, and characterizing them as “flexible textualism” and “formalistic textualism”); see also sources cited *supra* notes 264–65.

337. See *supra* subpart IV(A).

338. In my view, this type of candor is an important backstop on such non-textual doctrines. Where, instead they are characterized as somehow “textualist” in nature this absolves the textualist theorist or judge of any obligation to justify departures from the most natural meaning of text, and to weigh in the balance the costs that such departures from text might have for textualism and its alleged benefits (including but not limited to equality). Cf. Schauer, *supra* note 19, at 546–47 (articulating a theory of “presumptive formalism”).

339. See *supra* subpart IV(A).

assets, this belief should further inform how they theorize what textualism is, and which doctrines are or are not textualist in nature.

This may seem like a circular argument: “we care about theorizing textualism as an equality practice, because those who believe it is an equality practice may be influenced by that belief.” But the reality is that ideas matter. It is important to provide a catalyst for those of us who consider ourselves textualists to consider the following two questions: First, do I think that textualism’s potential to protect equality before the law is a normative advantage of textualism as a theory of interpretation? Second, if so, what are the downstream consequences of that for how I conceptualize what is textualism? Not all will arrive at an affirmative answer to the first question, but for those who do, it should shape their answers to the second.

B. *Theorizing Non-Textualism*

What about for those who conceptualize themselves as non-textualists? While it is possible that the account of textualism as an equality practice provided herein may cause some non-textualists to rethink their perspective on textualism, surely it will not cause such an interpretive conversion for all non-textualists. This Part thus invites even those firmly committed to a differing interpretive approach to consider the implications of the discussion herein for their own interpretive projects. Regardless of which interpretive approach one adheres to, the question of how to protect equality before the law—and the risks in this regard of departures from text—is important to explore.

Importantly, none of the critiques described in Part IV undermine the conclusion that alternative interpretive theories (including intentionalism, purposivism, eclecticism, and originalism) have equality risks, and that those risks arise in part from their willingness to depart from text (or to read text through such a thick contextual lens that it becomes highly manipulable). As discussed in Parts II and III, while it is empirically unprovable whether, in the real world, adherence to such theories leads to *greater* departures from equality before the law than textualism, it is unquestionable that adherence to such theories *sometimes* leads to inegalitarian interpretation. Real world cases, described throughout this Article, show us that this is so.³⁴⁰ Thus, it is important for adherents of non-textualist interpretive theories—to the extent

340. See, e.g., *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 571–78 (1999) (applying eclecticism to reach an inegalitarian result inconsistent with text); *Pierson v. Ray*, 386 U.S. 547, 556–57 (1967) (applying eclecticism to reach an inegalitarian result inconsistent with text); *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892) (applying purposivism to reach an inegalitarian result inconsistent with text); *Bostock v. Clayton County*, 140 S. Ct. 1731, 1769–70 (2020) (Alito, J., dissenting) (applying intentionalism/originalism to argue for an inegalitarian result inconsistent with text); *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2485 (2020) (Roberts, J., dissenting) (applying intentionalism to argue for an inegalitarian result inconsistent with text).

that they care about preventing such inequality—to think about how to avoid the risks of inegalitarian reasoning described herein.

Insofar as such equality risks are baked into the habits of thought associated with some such interpretive theories this may be a difficult charge. For example, intentionalism’s focus on the intent of Congress (imagined or real) as to a specific issue, seems predictably likely to work to the disadvantage of subordinated groups, and to the advantage of high-status ones (since, on balance, judges are likely to conclude that Congress intended to further the stratified status quo).³⁴¹ But there are nonetheless a variety of ways that being cognizant of the equality risks associated with departures from text, and a search for specific Congressional intent, could help avoid inegalitarian results, even within intentionalist practice.

One could imagine, for example, affording greater weight to the fact of uniform text even under intentionalism, in ways that would better serve to protect equality before the law (and thus substantive equality). For example, intentionalist theorists might suggest a rule in which judges should start from the assumption that a uniform textual rule was meant to apply in the same way to all litigants, and depart from that assumption only in the presence of compelling evidence that Congress intended a different result. Alternatively, even a self-awareness of the inegalitarian potential of intentionalist reasoning—and a commitment to attempting to avoid such inegalitarian speculation (surely Congress did not intend *this* group to be protected)—might help avoid the worst inegalitarian outcomes of intentionalism.³⁴²

Similar techniques could also help avoid the risks of inegalitarian reasoning associated with other interpretive approaches, such as purposivism and eclecticism. For example, greater attentiveness to level of textual generality—and the equality risks of treating groups differently absent textual variation—could potentially help ameliorate such risks across all interpretive projects.³⁴³ So too, understanding the potential equality risks associated with non-textual judge-made constraints on laws adopted for the special benefit of subordinated groups (such as civil rights laws, public benefits laws, or protections against sexual violence) could lead to theorizing around why such departures are problematic, even under non-textualist approaches to interpretation.³⁴⁴

Finally, for projects such as originalism, with adherents who already profess a fidelity to text, a more developed theoretical account of how

341. See *supra* subpart II(A).

342. See Jerry Kang, *What Judges Can Do About Implicit Bias*, 57 CT. REV. 78, 83–88 (2021) (describing the various approaches judges can take to addressing implicit bias, virtually all of which begin with a self-awareness of the existence of such biases).

343. For discussion on alternative interpretative theories, and the equality risks their habits of reasoning can generate, see *supra* Part II.

344. See *supra* subpart III(C).

textualism can promote equality may be especially valuable. As described in subpart II(D), there are versions of originalism that are consistent with textualism (“allied” approaches)—and others that are not (“antagonistic” approaches). And yet many—including both originalism’s adherents and opponents—categorically conflate originalism with textualism, treating them as one and the same.³⁴⁵

Textualism’s equality-promoting potential (and conversely, many variants of originalism’s inegalitarian potential) provides a powerful reason not to engage in this faulty conflation. For those who self-identify as both textualists and originalists, it is important to recognize that only “allied” approaches actually lead to ultimate fidelity to text and thus to the preservation of equality before the law. And for opponents of originalism, who may oppose originalism in part because of its inegalitarian consequences, it is important to recognize that some forms of originalism (those truly allied with textualism) are far less likely to lead to such inegalitarian results.³⁴⁶

Thus, understanding the equality risks of departures from text can and should shape the theorizing of even those who adhere primarily to a non-textualist interpretive approach. Those who care about equality, no matter what their interpretive commitments, ought to consider how their preferred interpretive approach may lead to inegalitarian outcomes, and theorizing about the risks of non-textualism can help us to do so. Insofar as equality before the law is a widely shared value, we all have a stake in ensuring that it is one effectively protected by statutory interpretation.

C. *Shaping Judicial Self-Conception and Practice*

The foregoing Parts have focused primarily on the value that theorizing textualism as an equality practice may have for scholars of textualism and other interpretive methodologies. But can we expect that theorizing textualism’s potential value as an equality practice will affect real-world decision-making by judges? This Part suggests that the answer to this question is a qualified “yes.” Indeed, this Part suggests that the natural consequence of the type of theorizing described in subparts V(A) and V(B) would be to increase the practice of *all* interpretive methodologies in ways that are attentive to the value of equality before the law.

This is most obvious in the context of textualism itself, where increased attention to equality as a nascent value of textualism would have the result of directing textualist judges toward a particular model of textualism, i.e., formalistic textualism. While one could argue, already, that many of the other

345. See Eyer, *supra* note 2, at 116–17 (discussing the conflation of textualism and originalism by both originalism’s opponents and adherents).

346. See *supra* subpart II(D).

models of textualism are, in reality, non-textualist (insofar as they allow deviations from the most natural meaning of text), identifying equal application of the law as a key value of textualism helps to show why this is so.³⁴⁷ For example, substantive canons that explicitly privilege the powerful, such as government actors, become much harder to justify if one believes one of textualism's benefits is its ability to promote equal application of the law as written.³⁴⁸

While legal realism means that even judges that purport to adhere to textualism will not always do so, that problem is magnified where there is theoretical inconsistency in how leading scholars and jurists describe what textualism *is*. To the extent that theorizing textualism as an equality practice may lead to greater consistency in how textualism's parameters are characterized, this may in turn influence good-faith textualist judges in their interpretive decision-making in individual cases. Moreover, for judges who genuinely believe (or may come to believe as described in subpart V(A)), that equality before the law is an important benefit of textualism, this is likely to have an even more direct and substantial impact on their interpretive practice.

Consider Justice Gorsuch's repudiation in *Bostock* of the Defendants' originalist (but non-textualist) argument: that the original public in 1964 surely would not have understood anti-LGBT discrimination to be prohibited by Title VII (and thus that the original public meaning of "because of sex" in 1964 required LGBT exclusion).³⁴⁹ Justice Gorsuch, despite being an originalist, rejected this argument forcefully, observing that to do so "would not only require us to abandon our role as interpreters of statutes; it would tilt the scales of justice in favor of the strong or popular and neglect the promise that all persons are entitled to the benefit of the law's terms."³⁵⁰ It is hard to believe that he would have written similar language had he not previously committed himself to an understanding of textualism and originalism as methodologies that promote equality before the law.³⁵¹ That

347. See *supra* notes 336–38 and accompanying text.

348. See Barrett, *supra* note 5, at 164–65 (using the "governmental exemption" canon as an example).

349. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1750–51 (2020).

350. *Id.*

351. See GORSUCH, *supra* note 1, at 139 (discussing textualism's commitment to equality). Gorsuch's language in other textualist cases has similarly reflected his belief in the importance of textualism to equality. For example, as he put it in *McGirt*:

The dissent charges that we have failed to take account of the "compelling reasons" for considering extratextual evidence as a matter of course . . . But Oklahoma and the dissent have cited no case in which this Court has found a reservation disestablished without first concluding that a statute required that result. Perhaps they wish this case to be the first. To follow Oklahoma and the dissent down that path, though, would only serve to allow States and courts to finish work Congress has left undone, usurp the

is, judges' self-conceptions of their own interpretive projects matter to how they decide real-world cases—and thus encouraging more textualists of all kinds (but especially textualist judges) to conceptualize equality before the law as a part of their project, matters.

So too for non-textualist jurists, who may nonetheless care about equality, being aware of the equality risks of their interpretive approaches can be important. It is not only conservative judges and justices with an anti-equality agenda who have adopted inegalitarian non-textual gerrymanders burdening subordinated groups. Instead, judges from across the ideological spectrum—including many who otherwise valued equality—have played important roles in engrafting the law as written with non-textual limitations that help the powerful and harm the powerless.³⁵² While theorizing around the equality risks of non-textualism—and how non-textualists can forestall such risks—surely will not eradicate such inegalitarian decision-making, they can at least help direct judicial attention to such risks, and how to avoid them.

And, as social psychology suggests, simply being aware of our inegalitarian patterns of thought is often the first step to addressing them.³⁵³ Insofar as methodologies such as intentionalism, purposivism, or eclecticism leave space for gerrymandering disfavored groups out of protections, or may even channel interpretation in that direction, simply being aware of this risk is important. While the choice a judge makes about how to proceed from that starting point of self-awareness is up to them, without self-awareness, addressing inequality in interpretive practice simply is not possible.

D. *Reconsidering Ideological Assumptions*

An additional value of theorizing textualism as an equality practice—even if an incompletely actualized one—arises from its value in reorienting our ideological assumptions about the inherent political valence of textualism (and its interpretive competitors). Perhaps because modern textualism was initially associated heavily with conservative theorists and jurists, such as the late Justice Scalia, many non-conservatives have traditionally viewed it with suspicion and sometimes outright hostility.³⁵⁴ Conversely, many (though

legislative function in the process, and treat Native American claims of statutory right as less valuable than others.

McGirt v. Oklahoma, 140 U.S. 2452, 2469–70 (2020) (citation omitted).

352. See *supra* note 292 and accompanying text.

353. See Kang, *supra* note 342, at 83–88 (discussing the role of self-awareness in addressing implicit biases).

354. See Margaret H. Lemos, Book Review, *The Politics of Statutory Interpretation*, 89 NOTRE DAME L. REV. 849, 851 (2013) (observing that “textualism is widely regarded as a politically conservative methodology”); cf. Cary Franklin, *Living Textualism*, 2020 SUP. CT. REV. 119, 120–23 (2021) (progressive scholar, critiquing textualism in the wake of *Bostock*); Mitchell N. Berman

certainly not all) non-textual theories have traditionally had a patina of progressivism, simply by virtue of their historical associations.³⁵⁵

But the discussion laid out in Parts I through III of this Article suggests that these associations are neither inevitable nor wholly accurate, at least insofar as equality is concerned. Textualism can do—and has done—genuine work in protecting equality. Conversely, non-textualist methodologies embrace habits of reasoning that can lead (and have led) to real-world inequality. This reality scrambles what we often think of as the clear ideological associations of textualism with conservatism and non-textualism with progressive causes.³⁵⁶

This suggests, at a minimum, that we ought not think of textualism as a theory that is inevitably associated with a particular ideological project—nor non-textualist methodologies as inevitably associated with an opposing project. Indeed, the importance of promoting equality before the law—and thus equal application of statutory text—is a value on which, in theory, all of us ought to agree. At a moment when ideological divides in the legal community are especially deep and destabilizing, finding such a space in which shared interpretive values may be found is itself important.

E. In the Real World, Even Incomplete Protection of Equality Matters

Finally, the present moment illustrates vividly what should be obvious: even if the protections that textualism provides for equality are incomplete or not fully realized, such incomplete protections nonetheless matter. Since the beginning of 2025, we have seen the second Trump Administration take numerous actions to target marginalized communities (such as immigrants, transgender people, and people of color), often in ways that appear to contradict the letter of the law.³⁵⁷ The willingness of the lower courts—

& Guha Krishnamurthi, *Bostock Was Bogus: Textualism, Pluralism, and Title VII*, 97 NOTRE DAME L. REV. 67, 72 (2021) (same).

355. See Lemos, *supra* note 354, at 901 (noting that even though textualism is not an inherently conservative methodology, it has come to be associated with conservatism, and that purposivism is often characterized as the non-conservative alternative).

356. Perhaps for this reason, we have already seen a partial realignment of textualism in the real world, with progressive justices claiming its mantle in some cases, while conservative justices adopt arguments consistent with purposivism. See, e.g., Richard M. Re, *Legal Realignment*, 92 U. CHI. L. REV. 1965, 1987–88 (2025) (discussing realignment using Justices Scalia—who once was the Court’s predominant defender of textualism—and Kagan—who often makes textualist arguments today—as examples).

357. See, e.g., Exec. Order No. 14160, 90 Fed. Reg. 8449 (Jan. 20, 2025) (purporting to withdraw birthright citizenship from the children of undocumented and temporary visa-holder parents, despite the plain language of the Fourteenth Amendment and 8 U.S.C. § 1401(a) (first quoting U.S. CONST. amend. XIV, § 1; and then 8 U.S.C. § 1401(a))); Katie Eyer, *Title IX in the Age of Textualism*, 86 OHIO ST. L.J. 335, 394–402 (2025) (describing the ways that Trump Administration executive orders targeting the transgender community conflict with the text of Title IX).

including even some Trump appointees—to insist on the enforcement of the plain meaning of the law has served as a bulwark against inequality, both thick and thin.³⁵⁸ Indeed, the lower courts’ insistence on respecting plain text has often operated just as this Article describes, ensuring that the powerless receive the equal benefit of the language of the law, even in the face of arguments that other interpretive methodologies might permit.³⁵⁹

Perhaps the most striking example of this—although drawn partially from the constitutional law context—is the lower courts’ virtually unanimous

358. See, e.g., *J.A.V. v. Trump*, 781 F. Supp. 3d 535, 541, 562 (S.D. Tex. 2025) (finding that the President’s invocation of the Alien Enemies Act to deport Venezuelan immigrants was inconsistent with “the plain, ordinary meaning of ‘invasion’ or ‘predatory incursion’ for the purposes of the AEA”), *appeal stayed pending a related case*, No. 25-40400 (5th Cir. July 14, 2025); *M.A.P.S. v. Garite*, 786 F. Supp. 3d 1026, 1049 (W.D. Tex. 2025) (same); *D.B.U. v. Trump*, 781 F. Supp. 3d 1158, 1170–71 (D. Colo. 2025) (same), *appeal abated pending a related case*, No. 25-1265 (10th Cir. Sep. 11, 2025); *Hernandez Marcelo v. Trump*, 801 F. Supp. 3d 807, 819–20 (S.D. Iowa 2025) (rejecting the Administration’s argument—that undocumented immigrants already in the country are subject to mandatory detention—as inconsistent with the “plain text” of the relevant statute); *Hyppolite v. Noem*, 808 F. Supp. 3d 474, 486–87 (E.D.N.Y. 2025) (same); Stephen Vladeck, *The Fifth Circuit Jumps the Immigration Detention Shark*, SUBSTACK: ONE FIRST (Feb. 7, 2026), <https://www.stevevladeck.com/p/208-the-fifth-circuit-jumps-the-immigration> [<https://perma.cc/BL4U-Y2N9>] (observing that an enormous number of judges, across the ideological spectrum, have rejected the administration’s arguments on the mandatory detention issue, though the Fifth Circuit had recently reached a contrary result); *Ozturk v. Hyde*, 136 F.4th 382, 392–93 (2d Cir. 2025) (holding that Ozturk’s failure to name her immediate custodian in her habeas petition was not fatal to the petition because the plain text of the habeas statute only requires that the custodian be named “if known”), *reh’g denied*, No. 25-1019, 2025 WL 2679904 (2d Cir. Sep. 19, 2025); *Fed. Educ. Ass’n v. Trump*, 795 F. Supp. 3d 74, 95–98 (D.D.C. 2025) (concluding that the Trump Administration’s attempt to remove collective bargaining rights for roughly “two-thirds of the federal workforce” under a narrow provision allowing certain intelligence or national-security-based exclusions “disregard[ed] the specific and unambiguous statutory directives” in the Federal Service Labor-Management Relations Statute (quotation omitted)), *appeal docketed*, No. 25-5303 (D.C. Cir. Aug. 20, 2025); see also *infra* notes 364–69 and accompanying text (discussing the birthright citizenship cases). Courts have also relied on plain textual meaning in a variety of other contexts involving the Trump administration in attempting to preserve the rule of law and prevent evasion of legal constraints. See, e.g., *New York v. Trump*, No. 25-cv-39, 2025 WL 440873, at *1–2 (D.R.I. 2025) (binding the administration to the “plain text” of existing orders), *appeal dismissed*, No. 25-1138 (1st Cir. Feb. 13, 2025); *PFLAG, Inc. v. Trump*, 766 F. Supp. 3d 535, 562–63 (D. Md. 2025) (rejecting arguments that savings clauses can immunize executive orders whose “plain text” and “plain meaning” were in violation of the law), *temporary injunction granted*, 769 F. Supp. 3d 405, 416 (D. Md. Mar. 4, 2025).

359. See, e.g., *J.A.V.*, 781 F. Supp. 3d at 547–48, 553–54 (rejecting the Administration’s argument that the atextual political questions doctrine precludes judicial review of statutory compliance); *M.A.P.S.*, 786 F. Supp. 3d at 1047 (same); *D.B.U.*, 781 F. Supp. 3d at 1167 (same); *Hernandez Marcelo*, 801 F. Supp. 3d at 821 (rejecting the Administration’s congressional intent argument); *Hyppolite*, 808 F. Supp. 3d at 488–89 (rejecting the Administration’s arguments based on extrapolations from case law because they conflict with the statute’s plain text); *Ozturk*, 136 F.4th at 392–93 (rejecting the Administration’s argument for additional rules that would narrow the statute’s plain text); *Fed. Educ. Ass’n.*, 795 F. Supp. 3d at 87–88 (rejecting the Administration’s argument that the statute grants broad presidential discretion despite its narrow text); see also *infra* notes 364–69 and accompanying text (discussing the birthright citizenship cases).

rejection³⁶⁰ of the Trump Administration’s attempts³⁶¹ to eliminate birthright citizenship for the children of undocumented immigrants and short-term visa holders. Under the Fourteenth Amendment and its statutory counterpart, 8 U.S.C. § 1401(a), any “person[] born . . . in the United States, and subject to the jurisdiction thereof” is a citizen.³⁶² The Trump Administration—and its academic defenders—have nonetheless attempted to draw on a thick version of originalism to justify the withdrawal of birthright citizenship, arguing that historical context should override the plain meaning of “jurisdiction” as subject to governmental authority (as the children of undocumented immigrants and short-term visa holders unquestionably are).³⁶³

But as numerous lower court judges have held, the meaning of the relevant language in the Fourteenth Amendment and its statutory counterpart are not ambiguous.³⁶⁴ As the Ninth Circuit put it in *Washington v. Trump*:

[T]he Executive Order is invalid because it contradicts the plain language of the Fourteenth Amendment’s grant of citizenship to “all persons born in the United States and subject to the jurisdiction thereof” When the Fourteenth Amendment was adopted, as it is today, “jurisdiction” was commonly used in reference to the power of the courts, defined as “[t]he legal power or authority of hearing and

360. See *infra* notes 364–69 and accompanying text (describing the lower courts’ findings that the executive order is invalid); Marty Lederman, *Taking Stock of the Birthright Citizenship Cases, Part II: Making Sense of the Three Established Exceptions*, JUST SECURITY (Aug. 18, 2025), <https://www.justsecurity.org/119104/taking-stock-birthright-citizenship-cases-part-ii/> [<https://perma.cc/C4GK-X5CY>] (observing that the Ninth Circuit’s recent merits opinion in *Washington v. Trump* rejecting the EO, “nicely summarizes the judiciary’s uniform views on the merits thus far”).

361. Exec. Order No. 14160, 90 Fed. Reg. 8449 (Jan. 20, 2025).

362. U.S. CONST., amend. XIV, § 1; 8 U.S.C. § 1401(a).

363. These originalist/historical claims are themselves highly contested. See Marty Lederman & John Mikhail, *Taking Stock of the Birthright Citizenship Cases, Part III: DOJ’s Arguments Regarding Domicile and Unauthorized Immigrants*, JUST SECURITY (Sep. 8, 2025), <https://www.justsecurity.org/120152/birthright-citizenship-domicile/> [<https://perma.cc/BZN3-LZE2>] (describing the government’s historical arguments, and explaining why they fail even on those terms); Ilan Wurman, *Jurisdiction and Citizenship 4–7* (May 22, 2025) (unpublished manuscript) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5216249) (making academic arguments based on history for why the Executive Order may be valid); Evan D. Bernick, Paul Gowder & Anthony Michael Kreis, *Birthright Citizenship and the Dunning School of Unoriginal Meanings*, 111 CORN. L. REV. ONLINE 101, 105–06 (2025) (arguing that the position taken by Wurman and other academic defenders of the Executive Order is historically and legally inaccurate).

364. See cases cited *infra* notes 365–69; see also *Barbara v. Trump*, 790 F. Supp. 3d 80, 102 (D.N.H. 2025) (reaching the conclusion that the Executive Order likely contradicts the text of the Fourteenth Amendment); *Doe v. Trump*, 766 F. Supp.3d 266, 278 (D. Mass. 2025) (“The Citizenship Clause speaks in plain and simple terms.”). See generally Gregory Ablavsky & Bethany Berger, “Subject to the Jurisdiction Thereof”: *The Indian Law Context*, 100 N.Y.U. L. REV. ONLINE 201, 202 (2025) (“At the time of the Fourteenth Amendment’s adoption, the ordinary and legal meaning of jurisdiction was similar to its meaning today: the power to make, decide, and enforce the law.”).

determining causes” [I]n reference to nations, “jurisdiction” was also defined as the “[p]ower of governing or legislating; the right of making or enforcing laws; the power or right of exercising authority;” and the “limit within which power may be exercised,” or “extent of power or authority” This ordinary meaning of jurisdiction is consistent with Plaintiffs’ interpretation of “subject to the jurisdiction thereof” as subject to the laws and authority of the United States.³⁶⁵

Other courts have put it similarly, observing that the Executive Order “flouts the plain language of the Fourteenth Amendment to the United States Constitution,”³⁶⁶ that it conflicts with the “unambiguous ordinary meaning of ‘subject to the jurisdiction’ of the United States,”³⁶⁷ and that “[t]he amendment and statute are unambiguous, and the plaintiffs argue for the ordinary meaning of the phrase as understood by reasonable American English speakers at the time of enactment.”³⁶⁸ They have noted moreover that the Supreme Court has “stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.”³⁶⁹ In short, in the current disputes over birthright citizenship, textualism has played precisely the role imagined for it in this article: protecting the marginalized (here the children of undocumented immigrant parents and temporary visa-holders) by ensuring that they too get the benefit of the law as written.

Neither the birthright citizenship disputes nor most of the other disputes currently pending in the lower courts over the second Trump Administration’s actions have yet been resolved by the Supreme Court on the merits.³⁷⁰ Instead, the Court has, to date, largely taken procedural steps—mostly but not exclusively in the form of unexplained actions on its shadow docket—to permit the Trump Administration’s controversial actions to proceed.³⁷¹ These unreasoned orders—often issued in apparent contravention of plain text—are a sobering reminder that when judges are freed from the

365. *Washington v. Trump*, 145 F.4th 1013, 1019, 1027 (9th Cir. 2025) (citations omitted).

366. *CASA, Inc. v. Trump*, 793 F. Supp. 3d 687, 697 (D. Md. 2025) (quoting the CASA Court’s own prior opinion in the same case).

367. *N.H. Indonesian Cmty. Support v. Trump*, 765 F. Supp. 3d 102, 111 (D.N.H. 2025).

368. *Id.* at 110.

369. *Id.* at 111 (quoting *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992)) (internal citations and quotations omitted).

370. The Court has, however, granted certiorari on the merits in several major disputes already, and resolved one. *See Trump v. Barbara*, 2025 WL 3493157 (S. Ct. 2025) (granting a writ of certiorari before judgment in a birthright citizenship case); *Learning Resources, Inc. v. Trump*, Nos. 24-1287, 25-250, 2026 WL 477534, *13–14 (2026) (ruling on the merits in a major tariff dispute).

371. *See Chemerinsky*, *supra* note 30 (discussing the Supreme Court’s frequent use of the shadow docket to lift injunctions and lower-court orders).

requirement of reasons-giving, the constraints imposed by the law are thin indeed.

But even at the Supreme Court it appears that fidelity to text matters sometimes, even if less consistently than we might hope. After all, the Court *has* issued some opinions countermanning the Trump administration's lawless actions.³⁷² And where it has done so, it has largely done so on textualist grounds.³⁷³ As this demonstrates, in a time of the breakdown of the rule of law, text may well be the last restraint that ideologically faithful judges are willing to enforce. And this matters, perhaps now more than ever.

Moreover, it is important to remember that it is not only what the Supreme Court does in this moment that is of consequence. Most obviously, not every dispute has been or will be taken up by the Supreme Court, and thus the work of the lower courts is important.³⁷⁴ Even more, as we rebuild faith in our legal system and our rule of law, we will need principles on which we can agree. That the language of the law should be followed—and should protect us all equally—would seem an obvious place to start.³⁷⁵

Conclusion

This Article has suggested that textualism can serve as an equality practice, i.e., an interpretive practice that protects or promotes equality. Specifically, I have argued that textualism, to a greater extent than its interpretive competitors, can promote the concept of equality before the law. This type of “thin” equality can itself serve as an important bulwark against substantive inequality in interpretation by preventing the gerrymandering of subordinated groups out of the law's protections and by ensuring that privileged groups are not exempted from the law's burdens.

This account may strike some as misguided. At a time of deep cynicism about the influence of politics on law, some may find the idea that text or

372. See, e.g., *Trump v. Illinois*, 146 S. Ct. 432, 433 (2025) (holding that President Trump exceeded his statutory authority in deploying the National Guard to Illinois); *Learning Resources, Inc. v. Trump*, No. 25A443, 2026 WL 477534, *13–14 (2026) (holding that the International Emergency Economic Powers Act did not afford the President the power to adopt tariffs).

373. See *Trump*, 146 S. Ct. at 433; *Learning Resources*, 2026 WL 477534 at 10–13.

374. See Stephen Vladeck, *Law, Lawlessness, and Doomerism*, ONE FIRST (Sep. 4, 2025), <https://www.stevevladeck.com/p/bonus-176-law-lawlessness-and-doomerism> [<https://perma.cc/5GWY-M84A>] (observing that claims that the law doesn't matter fails to consider that the Trump Administration is frequently losing in the lower courts and failing to appeal many of these adverse rulings).

375. See Ivar R. Hannikainen, Kevin P. Tobia, Guilherme da F.C.F. de Almeida, Noel Struchiner, Markus Kneer, Piotr Bystranowski, Vilius Dranseika, Niek Strohmaier, Samantha Bensinger, Kristina Dolinina, Bartosz Janik, Eglé Lauraitytė, Michael Laakasuo, Alice Liefgreen, Ivars Neiders, Maciej Próchnicki, Alejandro Rosas, Jukka Sundvall & Tomasz Żuradzki, *Coordination and Expertise Foster Legal Textualism*, 119 PROC. NAT. ACAD. SCI., no. 44, 2022, at 1–6 (finding that both lay people and legal professionals across a wide variety of countries prioritized text over purpose in judging what was unlawful in an experimental context).

textualism can ever constrain courts to be hopelessly naïve. Others may point to our contemporary landscape of genuinely inegalitarian legislation to suggest that the promise of thin equality before the law is not worth the candle. And some may believe that instead of trying to modify the enterprise of judicial interpretation, equality would be better promoted by finding ways to undermine the “juristocracy.”³⁷⁶

Those critics are surely not wholly wrong. Even those nominally committed to a particular interpretive regime will not always follow it faithfully. Few would deny that politics plays a role in the outcome of many high-profile cases. There surely are inegalitarian laws today whose implementation in literal terms would have terrible (substantive) equality consequences. And the courts *have* increasingly centered their own role in shaping the law in ways that may not be healthy for our system of government.

And yet, we also stand at a moment in which faith in the rule of law, and in the power of legal texts, has arguably never been more essential. For many individuals and groups today—for immigrants, for transgender children, for federal workers—the courts’ willingness to apply the law as written, or their refusal to do so, will be the difference between legal protection and certain harm.³⁷⁷ We should hope—even if we do not blindly believe—that courts will feel themselves bound by the language of the law to equally respect the rights of all: even those who are despised, pitied, or forgotten.

376. See Samuel Moyn, *Resisting the Juristocracy*, BOSTON REV. (Oct. 5, 2018), <https://www.bostonreview.net/articles/samuel-moyn-resisting-juristocracy/> [https://perma.cc/W4VL-5ZXR] (arguing that the Supreme Court has become “a tool of the rich and powerful against political majorities”).

377. See *Litigation Tracker: Legal Challenges to the Trump Administration’s Actions*, JUST SECURITY (Oct. 17, 2025), <https://www.justsecurity.org/107087/tracker-litigation-legal-challenges-trump-administration/> [https://perma.cc/35TA-WEMT] (cataloguing litigation against the second Trump Administration, much of which includes claims that its Executive Orders contravene explicit statutory requirements).