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Eliot Tracz  
eliottracz@yahoo.com

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# Discrimination and the Limits of Textualism

Eliot T. Tracz\*

## ABSTRACT

*The use of statutes to discriminate against minorities, whether racial, ethnic, or religious, has had a long history in the United States as a tactic for enforcing unconstitutional and illegal social policies. While the United States Supreme Court has a history of striking down such statutes, recent developments have changed the way statutes are interpreted, as well as the manner in which statutes are drafted.*

*In this brief Article, I examine the intellectual and judicial history of textualism, including its limitations, before applying a textualist analysis to two examples of discriminatory voting laws drafted using neutral language. It is my aim to show that textualism falls short in its ability to discover and adequately dispose of discriminatory laws drafted using sophisticated language to hide discriminatory intent and that, at least in this category of cases, it is acceptable to consider legislative intent.*

## INTRODUCTION

For much of the late nineteenth and most of the twentieth century, the United States Supreme Court looked to legislative intent as the essence of statutory interpretation.<sup>1</sup> The 1980s saw a revolution in statutory interpretation emerging through both judicial activity and legal academia.<sup>2</sup> This was the beginning of the emergence of the method of statutory interpretation known as textualism.

Although textualism lacks an exact definition, it can be identified by its chief characteristics: the practice of judicial adherence to the “public meaning of the enacted text, understood in context,” and the general rejection of legislative history as evidence of judicial intent.<sup>3</sup> In other words, textualists seek to “read the words of [a statutory] text as any ordinary Member of Congress would have read them . . . and apply the meaning so determined.”<sup>4</sup>

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\* J.D. DePaul University College of Law. I am grateful to Kellie Tracz for her insights during the writing process. Any errors are entirely my own.

1 See John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 419 (2005); see also *Philbrook v. Glodgett*, 421 U.S. 707, 713–14 (1975) (“Our objective . . . is to ascertain the congressional intent and give effect to the legislative will.”); *ICC v. Baird*, 194 U.S. 25, 38 (1904) (“The object of construction, as has been often said by the courts and writers of authority, is to ascertain the legislative intent, and, if possible, to effectuate the purposes of the lawmakers.”).

2 Manning, *supra* note 1, at 419–20.

3 *Id.* at 420.

4 *Chisom v. Roemer*, 501 U.S. 380, 405 (1991) (Scalia, J., dissenting).

The cause of textualism has been chiefly advanced through the work of the late Supreme Court Justice Antonin Scalia, and the jurisprudence and academic work of Judge Frank Easterbrook of the Seventh Circuit.<sup>5</sup> Under their stewardship, courts have moved away from consideration of legislative intent and now, as is proper, “[t]he text of the law is the law.”<sup>6</sup> This approach has yielded good results in cases ranging from securities regulation violations to criminal offenses.<sup>7</sup>

Yet textualism is not without its limits. Even the staunchest textualists recognize that where adherence to the text would lead to an absurd or unconstitutional outcome, it is appropriate to consider legislative history in order to determine the intent of the statute.<sup>8</sup> This short Article contends that another class of cases, those alleging discrimination despite facially neutral statutes, may require the use of statutory interpretation in order to arrive at the best possible outcome.

Part II looks at the history and development as well as the core beliefs of textualism as a method of statutory interpretation. Beginning with the decline of purposivism and the focus on the purpose or intent of a statute, it then moves on to discuss the influence of Supreme Court justices and appellate judges in the move toward textualism. Finally, it touches on the adoption of textualism as the preferred method of statutory interpretation for the United States Supreme Court.

Part III discusses the limits of textualism. It is widely accepted among textualists that when strict adherence to the text of a statute would lead to an absurd or potentially unconstitutional result, it is appropriate to consider information such as legislative history.<sup>9</sup> This Article goes a step further and argues that there is another scenario, cases alleging discrimination, in which examining the legislative history and other available, related information is appropriate.

Finally, in Part IV, this Article examines two cases alleging discrimination, as well as the courts’ reasoning in finding that discriminatory intent did exist. After examining both cases, this Part discusses how the outcome would likely be different had the courts applied a textualist method of statutory interpretation. These cases expose textualism’s inability to address facially neutral statutes that implement discriminatory actions.

## I. TEXTUALISM

### A. A Purposivist History

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5 William N. Eskridge, Jr. *The New Textualism*, 37 UCLA L. REV. 621, 650 (1990) (“...Justice Scalia and Judge Easterbrook have essentially founded a new school of legislative history”).

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

7 *See, e.g.*, *Morrison v. National Australia Bank*, 561 U.S. 247 (2010) (holding that §10(b) of the Securities Exchange Act of 1934 does not provide a cause of action for foreign plaintiffs against American defendants in connection with securities traded on foreign exchanges); *Brogan v. United States*, 522 U.S. 398 (1998) (holding that 18 U.S.C. §1001 does not allow the use of an “exculpatory no”).

8 *See*, Andrew S. Gold, *Absurd Results, Scrivener’s Errors, And Statutory Interpretations*, 75 U. of Cinn. L.Rev. 25 (2006) (arguing that many textualists are willing to consider alternative approaches when a strict textualist approach yields an untenable result.)

9 *Id.*

Through most of the twentieth century, courts, including the Supreme Court, leaned toward a purposivist view of statutory construction, which means that when the statute's plain text appeared to contradict its evident purpose, courts would often elevate the purpose of the statute over the text.<sup>10</sup> This line of statutory interpretation can be traced back to the nineteenth-century case of *Church of the Holy Trinity Church v. United States*,<sup>11</sup> in which the Supreme Court chose to eschew "the letter of the statute" in favor of its "spirit."<sup>12</sup> It became a policy of the Court that "even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words."<sup>13</sup>

Purposivism considers the perceived intent of the framers of a piece of legislation as well as the intentions of the Congress which passed it. For this reason, purposivist judges have felt that:

Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress' intention, since the plain-meaning rule is "rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists."<sup>14</sup>

Yet, it would be inaccurate to suggest that all purposivist judges ignored all statutory text. Judge Learned Hand acknowledged that "the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing."<sup>15</sup> But even Judge Hand was quick to qualify his statements by writing that "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."<sup>16</sup>

The emphasis on legislative intent, however, is the greatest flaw of purposivist jurisprudence. Ascribing a collective intent to a piece of legislation passed by a multimember legislature is impossible.<sup>17</sup> In a functional democracy, a piece of

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10 Anton Metlitsky, *The Roberts Court and the New Textualism*, 38 CARDOZO L. REV. 671, 674 (2016).

11 143 U.S. 457 (1892).

12 *Id.* at 459.

13 *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 543–44 (1940) (citations omitted).

14 *Pub. Citizens v. U.S. Dep't of Justice*, 491 U.S. 440, 455 (1989) (quoting *Bos. Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1928)).

15 *Id.* at 454–55 (quoting *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945)).

16 *Id.*

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

legislation that receives bicameral approval as well as a presidential signature represents a series of compromises from a number of parties with different intents or agendas, as well as the inevitable votes of individuals who have not read the bill at all. Further, if courts place higher value on the purpose or “intent” of the statute, then the written text of the statute reflects imperfectly what the law truly is.<sup>18</sup> In other words, the true law is in the minds of the enacting legislature rather than on the printed page of statutory text.<sup>19</sup>

### B. *Textualism: A Method of Statutory Interpretation*

In the early 1980s, purposivism began to face an intellectual backlash from conservative judges. Seventh Circuit Judge Frank Easterbrook, embracing public choice theory, asserted that judicial reliance on legislative history to discern legislative intent merely results in “wild guesses.”<sup>20</sup> Just a few years later a newly appointed Supreme Court Justice named Antonin Scalia would echo this sentiment in a remarkable concurring opinion in the otherwise unremarkable case of *INS v. Cardoza-Fonseca*.<sup>21</sup> This case dealt with a question regarding the Immigration & Nationality Act of 1952. Section 243(h) of the Act required that the Attorney General withhold the deportation of an alien who can demonstrate, through special factors, that their “life or freedom would be threatened.”<sup>22</sup> In 1980, Congress added § 208(a),<sup>23</sup> which granted the Attorney General the discretion to grant asylum to a “refugee” who is unwilling to return to their home due to a “well-founded fear of persecution on account of race, religion, nationality, membership in particular social group, or political opinion.”<sup>24</sup>

The Immigration and Naturalization Service (INS) determined that Ms. Cardoza-Fonseca could not remain in the United States under either provision because there was no “clear probability” that she would be persecuted were she to be deported to her native Nicaragua.<sup>25</sup> Arguing that the INS applied an incorrect burden of proof to her § 208(a) request, Ms. Cardoza-Fonseca appealed the decision. Upon review, the Supreme Court agreed with Ms. Cardoza-Fonseca and agreed that § 208(a) only required a “good reason” to fear future persecution.<sup>26</sup> The Court reasoned that the “ordinary and obvious meaning” of § 208(a) is that the burden is more lenient

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Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L. J. 511, 517 (“[T]he quest for the ‘genuine’ legislative intent is probably a wild-goose chase.”).

18 Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J. L. & PUB. POL’Y 59, 60 (1988).

19 *Id.* at 60–61.

20 Easterbrook, *Statutes’ Domains*, *supra* note 15, at 548.

21 480 U.S. 421 (1987).

22 8 U.S.C. § 1253(h) (1982) (originally enacted as Immigration & Nationality Act, Pub. L. No. 414, § 243(h), 66 Stat. 163, 214 (1952)).

23 Refugee Act of 1980, Pub. L. No. 96–212, § 208(a), (b), 94 Stat. 102, 105 (1980) (amending 8 U.S.C. § 1158(a) (1976)).

24 8 U.S.C. § 1101(a)(42)(A) (1988) (definition of “refugee” who is entitled to asylum under § 208(a)).

25 *Cardoza-Fonseca*, 480 U.S. at 425.

26 *Id.* at 438.

than the probability standard of § 243(h).<sup>27</sup> The legislative history of the statute, especially legislative expectations that the 1980 amendment would bring the United States into conformance with international practices that required less than a probability standard for refugees seeking asylum, provided confirmation to support the Court's opinion.<sup>28</sup>

While Scalia agreed with the majority opinion that the statute in question supported Ms. Cardoza-Fonseca, he would not join the majority opinion because he found any discussion of legislative intent to be irrelevant.<sup>29</sup> In support of his stance, Scalia wrote:

Although it is true that the Court in recent times has expressed approval of this doctrine [that legislative history can sometimes trump plain meaning], that is to my mind an ill-advised deviation from the venerable principle that if the language of a statute is clear, that language must be given effect—at least in the absence of a patent absurdity.<sup>30</sup>

Justice Scalia would continue to build on this idea, laying a foundation for textualism as a method of statutory interpretation which would continue to be developed by Judge Easterbrook of the Seventh Circuit, Judge Alex Kozinski of the Ninth Circuit, and former Judge and later Solicitor General Kenneth Starr.

So what does textualism entail? The trait that ultimately distinguishes textualists from proponents of other methods of statutory interpretation is that textualists reject internal legislative history, like the statements of a sponsor or the report of committee, because it is an unreliable proxy for the intentions of a whole legislative body.<sup>31</sup> Because textualists eschew the idea of legislative intent, what is left is “to read the words of [a statutory] text as any ordinary Member of Congress would have read them, . . . and apply the meaning so determined.”<sup>32</sup>

A major reason for textualists' disdain for legislative history is that many textualists believe that giving authority to unenacted expressions of legislative intent violates the constitutional requirements of bicameralism and presentment.<sup>33</sup> Furthermore, legislation pushed by special interest groups is likely to reflect the intent of very few members of Congress and more likely to reflect the interests of those groups.<sup>34</sup> Some theorists have even gone so far as to suggest that legislation can be viewed as a commodity, part of an economic transaction between special

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27 *Id.* at 430–32.

28 *Id.* at 432–43.

29 William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623 (1990).

30 *Cardoza-Fonseca*, 480 U.S. at 452 (Scalia, J., concurring).

31 See Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 361–67 (2005).

32 *Chisom v. Roemer*, 501 U.S. 380, 405 (1991) (Scalia, J., dissenting) (citation omitted).

33 John Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 695 (1997); *see also* U.S. CONST. art. I, § 7.

34 *See* Manning, *supra* note 31, at 687.

interest groups and legislators.<sup>35</sup> To a certain extent, textualism contains a healthy skepticism toward the ability of judges to discern the intent of a legislative body.

Similarly, textualists favor what Professor Caleb Nelson has termed a “rule-like” principle.<sup>36</sup> This means that statutory directives may include generalizations that implementing officials might find ill suited in certain cases but that they follow nonetheless.<sup>37</sup> This rule-like principle can best be illustrated by the well-known case of *United States v. Locke*.<sup>38</sup> In that case, the Supreme Court had to address the question of whether a Bureau of Land Management (BLM) filing made on December 31 was timely. The statute in question required that all filings to preserve certain rights to extract minerals from federal lands had to be filed prior to December 31.<sup>39</sup> The textualists, along with BLM, interpreted the statute as meaning that the filings could not be filed any later than December 30 and still be considered timely.<sup>40</sup>

### C. *Supreme Court Textualism*

Since the ascendancy of the late Justice Scalia to the Supreme Court, that Court has seemingly adopted textualism as its standard means of statutory interpretation.<sup>41</sup> Both the Rehnquist and Roberts Courts have demonstrated a propensity toward favoring textualism as means of statutory interpretation, even going so far as to frame cases decided in a non-textualist manner in textualist language.<sup>42</sup> Along the way, both Courts endeavored to “emphasize the unyielding quality of a semantically clear statutory text.”<sup>43</sup>

Often considered a conservative<sup>44</sup> method of statutory interpretation, and espoused most visibly by conservative or conservative-leaning judges such as Justices Scalia and Thomas, or Judges Easterbrook, Kavanaugh, or Kozinski, it is perhaps not surprising that a conservative-leaning Supreme Court would adopt textualism as its standard method of statutory interpretation. However, even liberal Justice Elena

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

36 Nelson, *supra* note 29, at 374.

37 *Id.* at 375 (citing FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION MAKING IN LAW AND IN LIFE 51–52 (1991)).

38 471 U.S. 84 (1985).

39 43 U.S.C. § 1744(a) (2000).

40 *Locke*, 471 U.S. at 90.

41 *See, e.g.*, Kavanaugh, *supra* note 5, at 2118 (“Statutory interpretation has improved dramatically over the last generation, thanks to the extraordinary influence of Justice Scalia. Statutory text matters much more than it once did. If the text is sufficiently clear, the text usually controls. The text of the law is the law.”) (footnotes omitted).

42 *See* Metlitsky, *supra* note 8, at 684–89 (arguing that textualism is so deeply ingrained in the Roberts Court that it refuses to offer any alternative type of framing, even when another type of statutory interpretation better suits the case).

43 John Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 125 (2011).

44 It is debatable whether adhering to the text of a statute is a mark of Conservatism or instead of judicial restraint.

Kagan has admitted an adherence to textualism to a certain degree.<sup>45</sup> This seemingly bipartisan statement of support for textualism speaks to the perceived effectiveness it yields as a frame of statutory exegesis, as well as its appeal on more than simple ideological grounds.

## II. THE LIMITS OF TEXTUALISM

Despite its growing wide use and support, textualism is not without its limits. Most textualists will agree that occasionally cases appear in which applying the text of a statute alone will lead to a conclusion that is either “absurd or unconstitutional.” I would argue, however, that there is another scenario in which textualism is not an effective tool for statutory interpretation: cases alleging discrimination. This section looks at both of these situations in order to examine the true limits of textualism and when a consideration of legislative history may be appropriate.

### A. *Absurd or Unconstitutional Outcome*

On occasion, the manner in which a law is drafted may result in language which is unclear; at other times the language may, if taken at face value, result in an outcome which is either absurd or even unconstitutional. Whether such outcomes are a result of scrivener’s error, technical subject matter beyond the ken of a busy Congress-person, or that no one in the legislature read the law closely before voting on it, what matters is that the text itself leads to an untenable result. In such a case, looking at the available, relevant legislative materials is a constructive means to allow the court to reach the best decision.

One such example is the case of *Green v. Bock Laundry Co.*<sup>46</sup> In that case the plaintiff, Mr. Paul Green, was an inmate at a county prison.<sup>47</sup> Mr. Green was fortunate enough to obtain work release employment at a nearby car wash.<sup>48</sup> Six days into his new job, Mr. Green reached inside a large dryer in an attempt to cause it to stop.<sup>49</sup> As a result, his right arm was subsequently caught by a heavy, rotating drum and separated from his body.<sup>50</sup> Mr. Green then brought suit against Bock, the manufacturer of the machine.<sup>51</sup>

At trial, Mr. Green testified that he had been instructed inadequately concerning the operation of the machine, as well as concerning its dangerous

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45 Interview by John Manning with Justice Elena Kagan, U.S. Justice, The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes at Harvard Law School, at 8:28 (Nov. 25, 2015), <http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation/> (“I think we are all textualists now in a way that just was not remotely true when Justice Scalia joined the bench.”).

46 490 U.S. 504 (1989).

47 *Id.* at 506.

48 *Id.*

49 *Id.*

50 *Id.*

51 *Id.*

character.<sup>52</sup> Bock impeached Mr. Green's testimony by eliciting admissions that he had been convicted of conspiracy to commit burglary and burglary.<sup>53</sup> The jury returned a verdict for Bock.<sup>54</sup> Mr. Green appealed, arguing the district court had erred by denying his pretrial motion to exclude impeaching evidence.<sup>55</sup>

On appeal, the court was asked to determine whether Federal Rule of Evidence 609(a)(1) was appropriately applied. At the time Federal Rule of Evidence 609(a)(1) read as follows:

For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during cross-examination but only if the crime was (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant . . . .<sup>56</sup>

In a concurring opinion, Justice Scalia wrote that the court was "confronted here with a statute which, if interpreted literally, produces an absurd, and perhaps unconstitutional, result. Our task is to give some alternative meaning to the word 'defendant' in Federal Rule of Evidence 609(a)(1) that avoids this consequence."<sup>57</sup>

On its face, the plain text of the statute requires the weighing of prejudice to a defendant in both civil and criminal trials.<sup>58</sup> Evidence of Mr. Green's convictions may have a prejudicial effect on his case, but none on defendant Bock's case. Under a strict reading of Rule 609(a)(1), which allowed admissions of any impeaching evidence with minimal probative value (and we assume any evidence being offered for impeachment has some probative value), the balancing required by Rule 609(a)(1) would lead to the evidence in Mr. Green's case being admissible.<sup>59</sup> Furthermore, such a reading would mean that impeachment detrimental to a plaintiff would always have to be admitted.<sup>60</sup>

Such an outcome is, for many reasons, an undesirable one. In cases such as *Green* where the judge is faced with an inability to interpret a statute using the text of the statute, it becomes "entirely appropriate to consult all public materials, including the background of Rule 609(a)(1) and the legislative history of its adoption" in order to determine how to address the case.<sup>61</sup> Ultimately, the majority did choose

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52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.*

56 *Id.* at 509.

57 *Id.* at 527 (Scalia, J., concurring).

58 *See id.* at 509.

59 *See id.* at 509–10.

60 *Id.* at 510.

61 *Id.* at 527 (Scalia, J., concurring).

to address the legislative history of Rule 609(a)(1) in order to arrive at the best possible decision.

### *B. Discrimination*

While most textualists would stop with cases in which strict adherence to text would lead to an absurd or unconstitutional result, there is a second class of cases which ought to be considered in light of legislative intent, rather than the text of the statute itself. Those cases are discrimination cases. In the past, discriminatory statutes were often explicit about their purpose, as in the case of *McLaurin v. Oklahoma Board of Regents*,<sup>62</sup> in which an Oklahoma statute required that African-American students actively be segregated from their white peers.<sup>63</sup>

Today, however, “jurisdictions have substantially moved from direct, over[t] impediments . . . to more sophisticated devices.”<sup>64</sup> If legislatures and special interests are growing more sophisticated in their drafting of legislation and moving away from such overt language, this signals a problem for textualism as means of statutory interpretation. It is this potential difficulty that we examine and discuss in the next section of this Article.

## III. TWO TESTS OF THE EFFICACY OF TEXTUALISM IN DISCRIMINATION CASES

In order to discuss the limits of textualism in cases of discrimination, I have selected two voting rights cases to examine. These cases were selected on the simple basis that voting rights is currently a hot-button issue. The first case is a recent decision from the Fourth Circuit, while the second case is a 1984 Fifth Circuit decision.

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62 339 U.S. 637 (1950).

63 The Oklahoma statute at issue read:

Provided, that the provisions of this Section shall not apply to programs of instruction leading to a particular degree given at State owned or operated colleges or institutions of higher education of this State established for and/or used by the white race, where such programs of instruction leading to a particular degree are not given at colleges or institutions of higher education of this State established for and/or used by the colored race; provided further, that said programs of instruction leading to a particular degree shall be given at such colleges or institutions of higher education upon a segregated basis.

64 *Id.* at 639 n.1 (quoting 70 OKLA. STAT. §§ 445, 456, 457 (1950)).  
Johnson v. De Grandy, 512 U.S. 997, 1018 (1994).

### A. North Carolina Gerrymandering

For many years, voting has been racially polarized in parts of North Carolina.<sup>65</sup> Such polarization makes minority voters vulnerable to the “tendency of elected officials to [seek to] entrench themselves by targeting groups [who are] unlikely to [support] them [at the ballot box].”<sup>66</sup> For this reason, North Carolina was subject to preclearance requirements whenever it sought to change voting rules.<sup>67</sup> As a result, by 2013 African-American voter registration and turnout was nearly on par with white registration and turnout rates.<sup>68</sup> In that same year, however, the Supreme Court issued its opinion in *Shelby County v. Holder*,<sup>69</sup> which eliminated preclearance obligations in the states that were subject to them.<sup>70</sup> The next day, a “leader of the party that newly dominated the legislature (and the party that rarely enjoyed African American support) announced [the] intention to enact . . . an ‘omnibus’ election law.”<sup>71</sup>

The omnibus law, referred to as Session Law (“SL”) 2013-381,<sup>72</sup> imposed a number of voting restrictions: certain types of ID were no longer valid;<sup>73</sup> early voting was reduced from seventeen days to ten days;<sup>74</sup> same day registration was eliminated;<sup>75</sup> out of precinct voting was eliminated;<sup>76</sup> and preregistration, allowing sixteen- and seventeen-year-olds obtaining driver’s licenses to identify themselves and indicate their intent to vote, was eliminated.<sup>77</sup> Suit was filed alleging a violation of Section 2 of the Voting Rights Act.<sup>78</sup> At the time of the suit, Section 2 read:

No voting qualifications or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.<sup>79</sup>

A district court entered judgment against the plaintiffs on all of their claims, finding no discrimination or discriminatory intent under Section 2.<sup>80</sup>

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65 See N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 214 (2016) (“Voting in many areas of North Carolina is racially polarized.”).

66 *Id.*

67 See *id.* (noting the years of preclearance and expansion of voting access).

68 *Id.*

69 133 S. Ct. 2612 (2013).

70 *McCrory*, 831 F.3d at 214.

71 *Id.*

72 2013 N.C. Sess. Laws 381.

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

74 See *McCrory*, 831 F.3d at 216.

75 See *id.* at 217.

76 See *id.*

77 2013 N.C. Sess. Laws 381 sec. 12.1, §§ 163-82.1(d), -82.3(a)(5), -82.4(d); see also *McCrory*, 831 F.3d at 217–18.

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

79 *Id.*

80 *McCrory*, 831 F.3d at 219.

On appeal, the Fourth Circuit acknowledged that SL 2013-381 is neutral on its face, while at the same time warning that it was still possible that the state may have had a discriminatory purpose.<sup>81</sup> Before beginning its analysis, the court recognized that determining whether discriminatory intent motivates a facially neutral law, inquiry must be made into “such circumstantial and direct evidence of intent as may be available.”<sup>82</sup> Those factors to be considered include: the historical background of the decision, the specific sequence of events leading up to the challenged decision, departures from normal procedural sequence, and legislative history of the decision.<sup>83</sup>

In looking into the legislative history, the court found that prior to enacting the omnibus bill, the legislature had requested, and received, information regarding minority voting habits including the use of early voting, same day registration, and provisional voting.<sup>84</sup> The choices of which election changes to make, coupled with information obtained by the North Carolina General Assembly, was clear evidence to the court of an intent to discriminate.<sup>85</sup> The court also took note of the sequence of events leading up to passing of the omnibus bill.<sup>86</sup> Prior to *Shelby County*, SL 2013-318 numbered sixteen pages; soon afterwards it had ballooned to fifty-seven pages.<sup>87</sup> It was rushed through the legislature, spending two days in the Senate and two hours in the House (which simply voted on concurrence with the Senate bill, thereby removing any potential for amendment).<sup>88</sup> The court found this sequence of events to be suspect.

Given the totality of circumstances, it was not difficult for the court to determine that the district court had erred and to reverse and remand the case.<sup>89</sup> Whether North Carolina adopts new election laws or otherwise addresses the outcome in this case is yet to be seen. The most important takeaway of this case for purposes of this Article is that the outcome of this case rests largely on the access of the court to legislative history and other non-statutory items.

### *B. Texas At-Large Elections*

At least until 1984, the city of Lubbock, Texas, had enjoyed a racially homogenous political caste despite the presence of a substantial minority population.<sup>90</sup> In spite of the size of its population, in the time leading up to the filing of this case, no member of a racial minority had ever been elected mayor or to the city council.<sup>91</sup> At the time, Lubbock was organized so that it was governed by a mayor and

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81 *See id.* at 220.

82 *Id.* (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)).

83 *Id.*

84 *Id.* at 216–18, 230.

85 *See id.* at 230 (“In sum, relying on this racial data, the General Assembly enacted legislation restricting all—and only—practices disproportionately used by African Americans.”).

86 *See id.* at 227.

87 *Id.*

88 *Id.* at 228.

89 *Id.* at 242.

90 *See Jones v. City of Lubbock*, 727 F.2d 364, 368 (5th Cir. 1984).

91 *Id.* at 368.

a four-member city council.<sup>92</sup> The mayor and all of the council members were elected by the entire population in at-large elections, and while Lubbock was divided into precincts, it was not necessary for council members to live in any particular part of the city.<sup>93</sup>

The plaintiffs filed suit in 1976, seeking to force the City of Lubbock to abandon its at-large election system.<sup>94</sup> In their complaint, the plaintiffs alleged that the electoral scheme denied black and Mexican-American voters equal access to the political process, in violation of the Fourteenth Amendment, the Fifteenth Amendment, and Section 2 of the Voting Rights Act.<sup>95</sup> At trial, the district court found that, although a history of discrimination existed, a system of rules was in place which increased the opportunity to discriminate, and the universal lack of success of minority candidates, the at-large system was still sufficiently responsive to minority needs.<sup>96</sup> Accordingly, the court found in favor of the City of Lubbock; an appeal was subsequently filed.<sup>97</sup>

As the first appeal was pending, major changes occurred in the law, including a new Supreme Court ruling requiring that a claim of denial of access by a minority to the political processes required a showing of a purpose to discriminate.<sup>98</sup> Shortly afterwards, the Fifth Circuit remanded the case to the district court for reconsideration.<sup>99</sup> While on remand, the U.S. Congress changed the Voting Rights Act, effectively overruling the recent Supreme Court case.<sup>100</sup> Ultimately, the district court found that the at-large system did violate the Fifteenth Amendment and Section 2 of the Voting Rights Act.<sup>101</sup> As a remedy, the district court drew up plans for a six-member city council, with each councilperson coming from a single-voter district and the mayor elected at large.<sup>102</sup> This appeal followed.<sup>103</sup>

The district court found that the at-large electoral scheme violated § 2 of the Voting Rights Act for a number of reasons. The at-large system was adopted by Lubbock in 1917.<sup>104</sup> At that time, the voters of Lubbock were concerned about the potential for African-American influence on the local election system.<sup>105</sup> Between 1909 and 1924, a local newspaper ran numerous editorials commenting on subjects from black enfranchisement to the mere presence of blacks in Lubbock.<sup>106</sup>

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92 *Id.*

93 *Id.*

94 *Id.*

95 *Id.*

96 *Id.* at 368–69.

97 *Id.* at 369.

98 *City of Mobile v. Bolden*, 446 U.S. 55, 66–71 (1980).

99 *Jones*, 727 F.2d at 369.

100 *Id.*

101 *Id.*

102 *Id.*

103 *Id.*

104 *Id.* at 370.

105 *See id.*

106 *Id.*

Coincidentally, the chairman of the commission tasked with creating the at-large system was also the owner and editor of that local paper.<sup>107</sup>

The Fifth Circuit agreed with this view, finding that local political conditions existed that “disadvantage minorities. In the past, the State of Texas and the City of Lubbock discriminated against blacks and Mexican-Americans.”<sup>108</sup> In the opinion of the court, the persistence of polarized voting signaled that race and ethnicity continued to influence the preferences of voters.<sup>109</sup> Further, the court found that the at-large system diluted the value of minority votes and reduced the political power of minority voters.<sup>110</sup> The ultimate effect was that white candidates, who largely resided in the same, predominately white neighborhoods, dominated city politics.<sup>111</sup>

The Fifth Circuit could find no error in the district court’s ruling that the at-large system was in violation of Section 2 of the Voting Rights Act.<sup>112</sup> Further, the court found that the district court’s plan to redraw voting districts was sufficient despite some procedural missteps.<sup>113</sup> The court reversed the district court’s ruling of a violation of the Fifteenth Amendment but affirmed all of the district court’s other rulings, including a finding that the at-large system violated the Voting Rights Act.<sup>114</sup>

### C. *Analysis*

Both of the above cases deal with a very contemporary problem: voting restrictions placed on minority voters in order to reduce their political power in certain communities. When viewed through the case law, both cases can be easily seen for what they are: instances in which discriminatory intent resulted in the effective dilution of minority voting power. If viewed through the lens of textualism, however, both cases swing toward different results.

In *McCrory*, the Fourth Circuit itself acknowledged that the changes propounded by SL 2013-381 were facially neutral.<sup>115</sup> The ID requirements, reduction in days of early voting, and removal of preregistration and same-day registration all affected white voters as well, though perhaps not quite as severely. There is no indication that SL 2013-381 was drafted with thoughts of race discrimination in mind; instead it appears to simply be an attempt to change voting laws. Reviewing the text of the statute and applying it to Section 2 of the Voting Rights Act produces no result which is absurd or unconstitutional. Under a textualist interpretation, SL 2013-381 passes muster.

Similarly, the at-large system at issue in *Jones* is neutral on its face. While the effect of running at-large elections for city council positions may ultimately result in failure for minority candidates, the at-large system does not target or reduce access

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107 *Id.*

108 *Id.* at 383.

109 *Id.*

110 *Id.*

111 *Id.*

112 *Id.* at 387.

113 *Id.* at 386.

114 *Id.* at 387.

115 *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 220 (2016).

to the electoral process for minority voters in any explicitly illegal manner. Indeed, in an at-large voting system all discriminatory intent must be implicit because every voter has an opportunity to vote for every candidate. As with *McCrary*, a textualist review of the at-large system yields no absurd or unconstitutional result; therefore, a ruling in favor of the City of Lubbock is required.

Surely, these are not the outcomes that we would wish to arrive at. Decades of entrenched racism in the political process in Lubbock ought not to be perpetuated merely by the good fortune of having a panel of appellate judges who cannot find an absurdity or constitutional violation within the text of a local voting system. Nor should sophisticated statutory drafting which targets minorities with almost surgical precision be acquitted by virtue of its failing to produce a textual reading which is absurd or unconstitutional. Here, in discrimination cases of this kind, we find the limits of textualism.

If textualism will not suffice, then some other form of statutory interpretation must suffice. Purposivism, adequately provide a means to examine and interpret a statute when the statute's plain text and its evident purpose contradict each other. This allows a reviewing court to look beneath the text of the statute, even one that is facially neutral, and look at the intent of its framers. Without such an option, the *McCrary* court could never have considered the fact that the North Carolina legislature supplied itself with exhaustive amounts of data on the voting habits of black voters before targeting those very same voters with nearly surgical precision. Nor would the *Jones* court have been able to consider the history of racism and fear of racial voting equality that drove the creation of the at-large voting system in Lubbock. This just goes to show that, in cases involving discrimination, textualism may not be up to the task of evaluating increasingly sophisticated and well-disguised discriminatory laws.

## CONCLUSION

Textualism reigns as the statutory interpretation method of choice for the United States Supreme Court, as well as in many of the appellate courts, due in part to its pragmatic approach to the task of interpreting statutes in an impersonal manner and due in part to the efforts of staunch advocates such as the late Justice Antonin Scalia and Judge Frank Easterbrook. In dealing with cases alleging statutory violations, textualism has been remarkably adaptable at providing judges with a means to address the issues of the case without recourse to outside sources such a committee reports or legislative history, which do not make up part of the statutory code. Despite, or perhaps due to, the rapid success of textualism since the 1980s, legislatures and special interest groups have become more sophisticated in drawing statutes which are facially neutral, yet deeply discriminatory in nature.

While it has largely been accepted by textualists that sources such as legislative history may be considered in cases where strict adherence to the text would result in an absurd or unconstitutional outcome, there has been little

discussion about what should happen when a facially neutral statute results in the court upholding discriminatory laws. In such cases alleging discriminatory statutes, it may in fact be desirable to automatically consult the legislative history in order to divine whether such discrimination was truly the legislature's intent.