

## TEXTUALISM AND PROGRESSIVE SOCIAL MOVEMENTS

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### Abstract

Should progressive movement lawyers avoid making textualist arguments? This Essay suggests that the answer is no. While there may be good reasons for movement lawyers to eschew arguments associated with their ideological opponents, none of those reasons apply to the embrace of textualist arguments by progressive movements today. Indeed, the time may be especially ripe for progressive social movements to make increased use of textualist legal arguments. The conclusion that textualist legal arguments ought to be embraced by progressive social movement lawyers has important implications for progressive legal academics. As teachers and scholars, progressive legal academics can play an important role in facilitating—or undermining—the efficacy of progressive textualist arguments in the courts. As such, even for those progressives who may not view textualism as a valuable normative project, there may be utility to engaging seriously with textualism as teachers and scholars.

### Introduction

Textualism has long been a methodology primarily associated with political conservatives.<sup>1</sup> Its leading adherents on the federal bench, including most prominently the late Justice Antonin Scalia, have been political conservatives.<sup>2</sup> In politics, textualism has typically been deployed rhetorically by those on the right, not the left.<sup>3</sup> Even academic commentary on textualism has remained politically polarized, with textualism's most prominent academic defenders being

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<sup>1</sup> Margaret H. Lemos, *The Politics of Statutory Interpretation*, 89 NOTRE DAME L. REV. 849, 851 (2014).

<sup>2</sup> *Id.* But cf. Scott Moss, *Judges' Varied Views on Textualism: The Roberts-Alito Schism and the Similar District Judge Divergence that Undercuts the Widely Assumed Textualism-Ideology Correlation*, 88 U. COLO. L. REV. 1, 3 (2017).

<sup>3</sup> See Lemos, *supra* note 1, at 853.

conservatives—and most of its most strident critics, progressives.<sup>4</sup> Set against this backdrop, it is no surprise that many continue to view textualism as a normatively conservative methodology.<sup>5</sup>

In other work, I take on the more difficult task of arguing that, normatively, textualism ought not be viewed as inherently conservative—and that there are important progressive values inherent to textualism.<sup>6</sup> In this Essay, I take on the more modest task of arguing that even if textualism is viewed as a conservative methodology, there are nevertheless strategic benefits to progressive lawyers of embracing textualist arguments. That is, even if progressive uses of textualism are viewed as contrary to the ideological goals that textualism’s primary proponents envision for it, the embrace of textualism may be useful to progressive social movements.<sup>7</sup>

To some extent, this argument is a straightforward one; it is typically taken for granted that lawyers will make any potentially promising arguments on behalf of their clients. But the reality is more complex: movement lawyers will sometimes forgo certain arguments if they feel that making them would be disadvantageous to the movement’s longer-term goals.<sup>8</sup> In order to assess whether textualism falls within the category of arguments that ought to be avoided despite

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<sup>4</sup> *Id.* at 853–54.

<sup>5</sup> Not all scholars and judges share this view. *See, e.g.*, Katie Eyer, *Progressive Textualism and LGBTQ Rights*, SCOTUSBLOG (June 16, 2020), <https://perma.cc/A5ZJ-XV7C>; Kathryn Kovacs, *Progressive Textualism in Administrative Law*, 118 MICH L. REV. ONLINE 134, 137 (2019); *see also* Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 793 n.10 (2018) (quoting Justice Elena Kagan’s statement that “we are all textualists now”).

<sup>6</sup> *See* Katie Eyer, *Progressive Textualism* (Dec. 22, 2023) (on file with author) [hereinafter Eyer, *Progressive Textualism*]. As I discuss in this ongoing work, textualism is more likely than other interpretive methodologies to promote equality under the law, as it best constrains the gerrymandering of the law’s benefits and burdens. As history shows, such gerrymandering is typically utilized to benefit the wealthy and the privileged and to limit the rights of subordinated groups.

<sup>7</sup> *Id.*

<sup>8</sup> This Essay focuses primarily on movement lawyers. But many of its observations extend to those whose practices are exclusively restricted to a particular type of client, such as plaintiff-side (or, for that matter, defense-side) employment discrimination. Such individuals may also perceive certain arguments as off-limits based on their longer-term commitments to a particular type of client.

their potential strategic utility, it is important to have a nuanced account of when lawyers may wish to forgo certain arguments in service of longer-term goals.

The considerations that may lead a movement to eschew an ideological opponent's arguments have rarely been theorized in the legal literature. This Essay thus provides a novel account of what factors may influence this decision. Drawing on historical examples, as well as the legal literature on ideological drift (the process whereby a legal argument once associated with one ideological perspective becomes primarily associated with another), the Essay suggests several factors that should ordinarily determine a movement's decision of whether to eschew an ideological opponent's arguments: (1) whether the argument in fact primarily benefits an ideological opponent; (2) whether the argument has been (or has yet to be) fully institutionalized or accepted; and (3) whether the argument carries with it an expressive message that is in tension with the movement's own normative agenda.

Applying these factors to textualism is illuminating. It suggests that progressive textualist arguments do not fall within the circumstances in which an ideological opponent's arguments ought to be avoided because of their potential to subvert a movement's wider or longer-term goals.<sup>9</sup> On the contrary, progressive textualism falls within the heartland of those circumstances in which deployment of an ideologically associated argument by those outside its ideological core may be most *useful* to movements: where such arguments are established in the law and have the potential to persuade otherwise ideologically opposed adjudicators. Indeed, textualism as a legal argument has many of the characteristics traditionally associated with an ideological opponent's successful cooptation of an argument. There are thus strong arguments for why progressive lawyers ought to embrace textualist arguments.

From this conclusion follows another: progressive *scholars* may wish to rethink how they write, teach, and think about textualism. Many progressive scholars continue to be stridently opposed to textualism as an interpretive methodology.<sup>10</sup> While there may be a

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<sup>9</sup> In some circumstances, a *specific* textualist argument may run afoul of the criteria set out below—the point is that textualist arguments as a category do not.

<sup>10</sup> See generally, e.g., Cary Franklin, *Living Textualism*, 2020 SUP. CT. REV. 199 (2021); Mitchell N. Berman & Guha Krishnamurthi, *Bostock was Bogus: Textualism, Pluralism, and Title VII*, 97 NOTRE DAME L. REV. 67 (2021). See also Doug Kendall & Jim Ryan, *The Case for New Textualism*, 21

place for such continued opposition (though as I write elsewhere, I do not agree with that position<sup>11</sup>), it comes with risks: that progressive academics will discourage future progressive lawyers from deploying textualist arguments (or will not equip them with the tools to do so); that progressive textualist arguments in particular areas of the law will go unexplored and undiscovered; and that textualism's contours will continue to be defined primarily by its conservative academic defenders. Thus, it is important for progressive legal scholars to be aware of how their teaching, writing, and mentoring may affect textualism's effectiveness as a tool of progressive lawyering.

One final clarification is important before proceeding to the substance of the discussion: this Essay addresses *textualism* as an interpretive theory, not *originalism*. While many scholars and commentators conflate textualism and originalism, they are, as I have previously written, “not the same interpretive theory.”<sup>12</sup> Textualism commands adherence to the text.<sup>13</sup> Originalism commands adherence to history.<sup>14</sup> Thus, while the criteria described herein may be relevant to whether progressive social movements should embrace originalist arguments, I offer no opinions here on how that question—which in my view is considerably more difficult—ought to be resolved.

Part I of this Essay lays out the considerations that may cause a movement to eschew an argument associated with its ideological opponents, and, in contrast, the conditions that may make cooptation of an ideological opponent's arguments an especially effective strategy. This Part suggests that—applying these criteria to textualism—there are good reasons to believe that progressive lawyers' embrace of textualist arguments would be strategically successful and few reasons to fear that such an embrace would undermine progressive lawyers' longer-term goals. Part II takes up the issue of how this conclusion might affect progressive academics' engagement with textualism as a methodology.

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DEMOCRACY (2011), <https://perma.cc/B3KA-ECZ5> (making this observation, and arguing against this tendency).

<sup>11</sup> See Eyer, *Progressive Textualism*, *supra* note 6.

<sup>12</sup> See Katie Eyer, *Disentangling Textualism and Originalism*, 13 CONLAWNOW 115, 115 (2022) [hereinafter Eyer, *Disentangling Textualism*]; see also Frederick Schauer, *Unoriginal Textualism*, 90 GEO. WASH. L. REV. 825, 827–29 (2022).

<sup>13</sup> See ANTONIN SCALIA, A MATTER OF INTERPRETATION 23 (1997).

<sup>14</sup> See, e.g., Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1756 (2015).

## I. Considerations Guiding Movements in Embracing Ideological Opponents' Legal Arguments

Legal arguments may be, at any given moment of time, associated primarily with a particular ideological group or normative commitment.<sup>15</sup> Modern textualism and originalism were, at their origins, predominantly associated with conservative social movement actors and conservative social movement goals.<sup>16</sup> So too during the civil rights era, colorblindness and intent doctrine were associated with progressive racial justice goals—though they would later come to be associated with racial justice retrenchment.<sup>17</sup> For a social movement on the opposite side of the ideological or normative divide (for example, progressives in the case of textualism and originalism or segregationists in the case of colorblindness and intent<sup>18</sup>), this raises an important question: whether the movement should make legal arguments premised on a legal theory predominantly associated with the “other side.”

Even asking this question departs in important ways from the presumption that lawyers ought to make all potentially successful arguments on behalf of their clients.<sup>19</sup> But it is an important question

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<sup>15</sup> See, e.g., J.M. Balkin, *Ideological Drift and the Struggle Over Meaning*, 25 CONN. L. REV. 869, 870–72 (1993) [hereinafter Balkin, *Ideological Drift*].

<sup>16</sup> Lemos, *supra* note 1, at 853.

<sup>17</sup> See, e.g., Balkin, *Ideological Drift*, *supra* note 15, at 872; Katie R. Eyer, *Ideological Drift and the Forgotten History of Intent*, 51 HARV. C.R.-C.L. L. REV. 1, 3–4 (2016) [hereinafter Eyer, *Ideological Drift*].

<sup>18</sup> Throughout this Part, I rely on the experience of segregationists in successfully coopting colorblindness and intent doctrine during the 1970s to provide examples of the conditions under which adoption of an opponent's legal arguments may be strategically advantageous. I acknowledge that readers may find it jarring to draw on this example in a piece directed at progressive social movement actors. But segregationists' success in coopting colorblindness and intent doctrine remains one of the most prominent examples of successful adoption of an opponent's legal arguments—such that those of any social movement background should attend to the details of how segregationists successfully did so.

<sup>19</sup> See, e.g., Sanford Levinson, *The Limited Relevance of Originalism in the Actual Performance of Legal Roles*, 19 HARV. J.L. & PUB. POL'Y 495, 506 (1996) (“As lawyers, your duty is to make the best arguments you can for your client, where ‘best’ is defined, for better or worse, in the crassest, most instrumental terms possible: the best argument is the one that is in fact likely to be accepted by your audience.”).

for legal social movement actors because of their crosscutting commitment to larger movement objectives, rather than exclusively to atomized victories for particular clients.<sup>20</sup> In some circumstances, deploying an argument that is predominantly associated with the “other side” may nonetheless be useful to a movement, and even transformational: it may redeploy the argument in service of new goals aligned with the movement’s own interests (as for example in the case of segregationists’ 1970s deployment of colorblindness and intent doctrines). But in other contexts, it may undermine the movement’s goals by aiding the institutionalization of a legal argument or idea that is likely to, on balance, hinder the movement—or that is in normative tension with the movement’s core objectives.

Although there is an extensive literature on the denouement of a movement’s successful cooptation of its opponents’ arguments—a phenomenon Professor Jack Balkin has termed “ideological drift”<sup>21</sup>—relatively little writing directly addresses the criteria that may influence a social movement’s decision about whether to embrace an opponent’s argument in the first instance.<sup>22</sup> Drawing on historical examples, as well as scholarly accounts of the criteria that facilitate ideological drift, the Parts that follow theorize the considerations that may render a movement’s adoption of an argument associated with its ideological opponents useful from a movement’s perspective.<sup>23</sup> It

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<sup>20</sup> This primary social movement commitment to longer-term goals may raise ethical issues in the representation of individual clients. For recent work addressing important ethical issues that can arise in the context of movement lawyering, see generally Susan Carle & Scott L. Cummings, *A Reflection on the Ethics of Movement Lawyering*, 447 GEO. J. LEGAL ETHICS 447 (2018).

<sup>21</sup> Balkin, *Ideological Drift*, *supra* note 15, at 870–71.

<sup>22</sup> See J.M. Balkin, *The Promise of Legal Semiotics*, 69 TEX. L. REV. 1831, 1834 (1991) [hereinafter Balkin, *Legal Semiotics*]; J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, DUKE L.J. 375, 383–84 (1990) [hereinafter Balkin, *Realism*]; David Pozen, *Transparency’s Ideological Drift*, 128 YALE L.J. 100, 106–07 (2018); David Schraub, *Sticky Slopes*, 101 CAL. L. REV. 1249, 1283 (2013); Eyer, *Ideological Drift*, *supra* note 17, at 19.

<sup>23</sup> In theorizing these considerations, I draw on historical examples of the adoption by movements of their ideological opponents’ *doctrinal* arguments. I acknowledge that none of these examples are precisely analogous, insofar as opinions adopting interpretive methods like textualism are not formally considered precedential, whereas doctrinal arguments are. See, e.g., Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Precedents?*, 96 GEO. L.J. 1863, 1866 (2008). Nevertheless, they provide the most closely analogous historical context from which to draw.

suggests that textualist arguments raise none of the concerns that should cause a movement to avoid an argument and many of the hallmarks of those contexts where adoption of an opponent's argument is most likely to be a promising legal strategy.

#### A. Considerations Guiding Movement Lawyers' Avoidance of Arguments Associated with Ideological Opponents

1. Does the argument disproportionately or exclusively benefit one side (at this moment in time)?

The most obvious question for any social movement deciding whether to deploy a legal argument associated with its ideological opponents is whether that argument is likely to disproportionately (or exclusively) benefit those opponents.<sup>24</sup> In the absence of expressive concerns of the kind addressed in Part I.A.3, the answer to this question will typically resolve the question of whether reliance on a promising argument in a particular case is nonetheless out of bounds for systemic reasons. If an argument will not disproportionately aid the "other side," there are few reasons for avoiding it based on its current ideological association alone.

Of course, the fact that an argument *has* a clearly defined ideological association often arises precisely because a particular ideological constituency perceives that argument as disproportionately benefitting "their side" of the legal debate. But this perception of disproportional benefit should not be mistaken for reality, especially at a given moment in time. Those associated with the argument may be mistaken in their belief that it will disproportionately benefit them.<sup>25</sup> Or, more commonly, who the argument benefits may shift over time.<sup>26</sup> As a result, it is important for movements to independently assess whether they believe a particular argument disproportionately harms them at this particular moment in time.

Whether or not they employed this type of reassessment consciously in the 1960s, the shift in segregationists' arguments

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And there are reasons to believe that there is at least as much inertia inherent in dominant interpretive methods as there is in formal doctrinal precedent, especially (as is typically the case), where a social movement's arguments are calling for an expansion of such precedent in new directions.

<sup>24</sup> Cf. Lemos, *supra* note 1, at 884, 898–99 (arguing that textualism does not reliably or systematically lead to conservative results); Alexander Volokh, *Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else*, 83 N.Y.U. L. REV. 769, 820–23 (2008) (same).

<sup>25</sup> See, e.g., Lemos, *supra* note 1, at 884.

<sup>26</sup> See, e.g., Pozen, *supra* note 22, at 106, 158.

toward embracing colorblindness and intent tracks precisely this type of cost-benefit assessment. In the 1950s and early 1960s, colorblindness and intent remained doctrines overwhelmingly associated with racial justice advocates, and overwhelming likely to serve such advocates' goals, rather than the goals of segregationists.<sup>27</sup> Both theories were put forward to support the legal eradication of Jim Crow (colorblindness)—and to oppose attempts to reconstitute Jim Crow in facially neutral forms (intent).<sup>28</sup> But by the late 1960s and early 1970s, these doctrines increasingly offered opportunities to those seeking to oppose racial integration and other racial justice reforms.<sup>29</sup> It is perhaps unsurprising then that such arguments came to be adopted (some would say coopted) by opponents of racial justice precisely at this temporal juncture.<sup>30</sup> As this example suggests, where an argument is already fully institutionalized, there is likely to be far less downside for movements of embracing it—and greater costs to declining to do so.<sup>31</sup>

2. Is the argument not yet institutionalized (at this moment in time)?

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<sup>27</sup> This temporality can be overstated. Even before *Brown*, and certainly in *Brown*'s wake, there were segregationists who sought to deploy colorblind methods of maintaining segregation. See, e.g., ANDERS WALKER, *THE GHOST OF JIM CROW: HOW SOUTHERN MODERATES USED BROWN V. BOARD OF EDUCATION TO STALL CIVIL RIGHTS* 12–13, 15–16, 21–22, 113–14 (2009); JOSEPH CRESPIANO, *IN SEARCH OF ANOTHER COUNTRY: MISSISSIPPI AND THE CONSERVATIVE COUNTERREVOLUTION* 18–24, 26–35, 48 (2007); Katie Eyer, *The New Jim Crow is the Old Jim Crow*, 128 *YALE L.J.* 1002, 1032–41 (2019) [hereinafter Eyer, *The New Jim Crow*].

<sup>28</sup> See *supra* note 17.

<sup>29</sup> See Eyer, *Ideological Drift*, *supra* note 17, at 34–64; Katie Eyer, *The Declaration of Independence as Bellwether*, 89 *S. CAL. L. REV.* 427, 444–47 (2016) [hereinafter Eyer, *Declaration*]; Eyer, *The New Jim Crow*, *supra* note 27, at 1032–41; see also Whiteford S. Blakeney, *Segregation-Integration and the U.S. Constitution*, *CHARLOTTE OBSERVER*, Oct. 14, 1969, at A9 (segregationist Whiteford Blakeney, articulating an early version of the conservative colorblindness theory in the school desegregation context) (copy in the files of, and with markings by, prominent segregationist lawyer John C. Satterfield); SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT* 371 n.17 (2014) (noting that Blakeney was a segregationist and suggesting that “[c]onservatives ha[ve] since worked to distance this approach [i.e., colorblindness] from its segregationist roots”).

<sup>30</sup> See *supra* note 29.

<sup>31</sup> See, e.g., Pozen, *supra* note 22, at 158.



One of the factors that profoundly affects the cost-benefit analysis described above—and is likely to render it fundamentally contingent and temporal—is the issue of whether an argument has been fully institutionalized at any given moment in time. When the legitimacy of an argument remains contested, there may well be good reasons for a movement to categorically oppose it, if they (accurately) perceive it as likely to disproportionately benefit their opponents. In contrast, once the legitimacy of a particular legal argument is established, this motivation for global opposition dissipates—and the costs of not making arguments from what is now established law may radically increase.<sup>32</sup>

Another way of looking at this is that often much of the initial work of a particular argument for its proponents is done via the process of institutionalization.<sup>33</sup> Once an argument is established within the law, much of the “harm” from the perspective of its opponents has been done—it is now a legally viable argument. Instead, the important terrain shifts to the nuances of how and in what contexts the argument will be applied.<sup>34</sup> Thus, the importance of engagement with the argument on its own terms becomes dramatically more important—and opposing it wholesale far more risky.

Consider again the example of colorblindness. By the mid-1960s, it was clear that the Supreme Court had embraced the colorblindness principle, and thus that taking openly anticolorblindness positions was a risky legal strategy.<sup>35</sup> At this point, the benefits to segregationists of continuing to oppose colorblindness as a legal strategy were de

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<sup>32</sup> See, e.g., Eyer, *Ideological Drift*, *supra* note 17, at 71–72 (arguing that “it is in the nature of law that doctrines developed in a particular context will be picked up and deployed by new actors” and that “[w]here the law’s content has been defined by a social movement’s own successes, it is on the contours of those successes that battles over meaning will be fought”).

<sup>33</sup> Cf. Pozen, *supra* note 22, at 158 (describing “the most basic driver of transparency’s ideological drift” as the “diminishing marginal returns” of transparency once a basic measure of transparency has been institutionalized).

<sup>34</sup> *Id.*

<sup>35</sup> See, e.g., Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 254–56 (1991) (situating the time frame for the adoption of a clear anticlassificationist rule on the Court at the mid-1960s); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1478–89 (2004) (same).

minimis, whereas the risks of not engaging it were high.<sup>36</sup> This was true both on a retail level (failing to argue factually that state actors *had* been colorblind) and a wholesale level (failing to consider whether the colorblindness argument could be extended to new contexts, not intended by its originators).

Most people, of course, know the outcome of this story: faced with this changed strategic landscape, segregationists shifted their arguments from open opposition to the colorblindness principle to an active outward embrace of colorblindness.<sup>37</sup> Starting in the mid-1960s, they and their successors argued—increasingly successfully—for the application of the colorblindness principle to attack racial justice measures, including affirmative action and voluntary integration efforts.<sup>38</sup> They also succeeded in arguing as a factual matter that they *were* colorblind across a host of circumstances, even as racial inequality was partially reinstated through new means.<sup>39</sup> Ultimately, the cooptation of colorblindness by opponents of racial justice has been so successful that colorblindness—both as a doctrine and as a concept—has come to be viewed by many as one of the primary obstacles to effective racial justice reform today.<sup>40</sup>

3. Is the argument’s expressive message (at this moment in time) in tension with the movement’s goals?

The question of whether an argument (at this moment in time) is likely to disproportionately benefit or harm a movement is typically the core concern in the movement’s analysis of whether it should eschew available legal arguments. But in some instances, social movements decline to make legal arguments not because they are

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<sup>36</sup> See, e.g., *Griffin v. Prince Edward County*, 377 U.S. 218, 231 (1964) (making clear that where a state’s purpose was to perpetuate segregation—i.e., they had not been colorblind—that was potentially a basis for constitutionally invalidating their actions).

<sup>37</sup> See *supra* note 29.

<sup>38</sup> *Id.*

<sup>39</sup> See, e.g., Elise C. Boddie, *Adaptive Discrimination*, 94 N.C. L. REV. 1235, 1239–44 (2016); see also, e.g., Eyer, *The New Jim Crow*, *supra* note 27, at 1032–41.

<sup>40</sup> See, e.g., Neil Gotanda, *A Critique of “Our Constitution is Colorblind,”* 44 STAN. L. REV. 1, 2–7 (1991) (discussing colorblindness); Ian Haney López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1784 (2012) (discussing colorblindness and intent); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1136–44 (1997) (discussing intent).

legally problematic but because they are viewed as normatively problematic. In these circumstances, the movement's concern may not be specifically for the legal consequences of embracing a particular argument, but instead for the moral or normative message that embracing the argument would send.<sup>41</sup>

This final type of movement constraint on legal arguments can generate significant intramovement debate. Consider the debates within the LGBTQ rights movement about whether to rely on disability arguments to further transgender rights because of the medicalized model of transgender identity that some feel such disability arguments promote.<sup>42</sup> Not everyone within the movement agrees on the foundational basis for avoiding such arguments: that reliance on disability rights arguments promotes a negative expressive message about transgender people.<sup>43</sup> And for some, the downsides of such purely expressive concerns may be outweighed by the need to access legal protections, especially in contexts where such protections are otherwise unavailable.<sup>44</sup> But for others, disability arguments—even where raised on behalf of others—may be perceived as stigmatizing to the community as a whole.<sup>45</sup>

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<sup>41</sup> *Id.* The debates in the LGBTQ rights movement over immutability arguments in the context of Equal Protection doctrine provide another excellent example of this type of concern. See, e.g., Janet Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 506 (1994); Hadar Aviram & Gwendolyn Leachman, *The Future of Polyamorous Marriage: Lessons From the Marriage Equality Struggle*, 38 HARV. J.L. & GEND. 269, 312 (2015).

<sup>42</sup> See, e.g., Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN'S L.J. 15, 34–35 (2003) (critiquing as ableism the idea that “trans people do not want to be seen as ‘disabled,’” but describing other important reasons why medicalization of civil rights may be problematic); Kevin M. Barry & Jennifer L. Levi, *The Future of Disability Rights Protections for Transgender People*, 35 TOURO L. REV. 25, 49–52 (2019) (describing contemporary intramovement discussions of this issue, which reflect a nuanced set of views); Jennifer L. Levi & Kevin M. Barry, *Embracing the ADA: Transgender People and Disability Rights*, HARV. L. REV. BLOG (Feb. 22, 2021), <https://perma.cc/98NA-CDGT> (noting the opposition of some within the LGBTQ rights movement to disability arguments based on fears of associating the transgender community with disability).

<sup>43</sup> See *supra* note 42.

<sup>44</sup> *Id.*

<sup>45</sup> See, e.g., s.e. smith, *Is Being Trans a Disability Rights Issue?*, BUSTLE (June 12, 2017), <https://perma.cc/JDL3-V97K>.

Notably, these expressive concerns—like the other strategic concerns addressed above—can also have a temporal dimension. Returning to the example of segregationists, many initially eschewed potentially effective colorblind legal arguments because they wished to send the expressive message that they stood for segregation.<sup>46</sup> But as the political and legal landscape shifted, so too did the outward *expressive* commitments of opponents of racial equality. Thus, by the mid-1970s, even many former ardent segregationists had adopted colorblindness as a normative principle, in addition to a legal one, and the conservative movement increasingly marginalized those who continued to openly express non-colorblind ideals.<sup>47</sup>

As this suggests, even expressive opposition by a social movement to a particular legal argument may be temporally contingent. Whether expressive opposition is a good reason for eschewing a legal argument will thus turn on many factors which may vary over time, including both the shifting normative and expressive commitments of the movement, and the changing strategic costs and benefits of avoiding a legal approach for expressive reasons.

#### B. The Conditions for Cooptation of an Ideological Opponent's Legal Arguments

The above Part outlined the circumstances in which a movement's embrace of legal arguments predominantly associated with an opposing ideological constituency may interfere with the movement's own objectives, and thus ought to be eschewed. But of course in some circumstances, a movement's embrace of an argument championed by an ideological opponent may be so successful as to be transformational—it may turn that argument against its original proponents' aims.<sup>48</sup> In some instances, these types of coopted legal arguments may be among a movement's most effective tools, as they allow a movement to harness the doctrinal belief systems that their

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<sup>46</sup> Even in the immediate aftermath of *Brown*, there was reason to believe that facially colorblind approaches were likely to be a more effective way of obstructing desegregation, and indeed many “moderate segregationists” embraced these approaches immediately. *See generally, e.g.*, ANDERS WALKER, *THE GHOSTS OF JIM CROW: HOW SOUTHERN MODERATES USED BROWN V. BOARD OF EDUCATION TO STALL CIVIL RIGHTS* (2009). Nevertheless, the broader political environment was such that the decisively noncolorblind “massive resistance” remained the primary legal argument of many segregationists until the early 1960s. *See Eyer, The New Jim Crow, supra* note 27, at 1036.

<sup>47</sup> *See Eyer, Declaration, supra* note 29, at 444–47.

<sup>48</sup> *See supra* note 21 (discussing the phenomenon of ideological drift).

opponents have helped to create among (even otherwise ideologically unsympathetic) adjudicators.<sup>49</sup> Because most judges strive to faithfully apply neutral legal principles, they may be reluctant to abandon legal arguments or principles that they have recently embraced, even where this leads to what judges perceive as unfortunate normative ends.<sup>50</sup>

There are a number of factors that create the conditions for this type of normative cooptation, many of which simply mark the flip side of those considerations that might cause an argument to be avoided. First, it is useful if an argument is relatively well-established in the law (though not necessarily fully established).<sup>51</sup> So, too, it is useful if the argument has been explicitly embraced in opinions by (or joined by) judges who might otherwise be ideological opponents of a movement's cause.<sup>52</sup> Finally, it seems likely that apparent sincerity is important to the effectiveness of efforts to coopt an opponent's arguments. For example, segregationists' initial attempts to deploy colorblindness as a sword were largely ineffective, since they were made while simultaneously continuing to argue that they were constitutionally permitted to segregate.<sup>53</sup> So while a movement may be allowed as a matter of litigation practice to make inconsistent arguments in the alternative, this may not be effective as a cooptation strategy.

The work of scholars of ideological drift also suggests that “[c]ertain sorts of ideas may be especially susceptible to ideological

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<sup>49</sup> See, e.g., Eyer, *Ideological Drift*, *supra* note 17, at 4–6 (describing the role of background beliefs around intent doctrine to bringing on board progressive Justices during the initial institutionalization of intent doctrine in the mid-1970s).

<sup>50</sup> See, e.g., David Klein, *Law in Judicial Decision-Making*, at 236–41, in *THE OXFORD HANDBOOK OF U.S. JUDICIAL BEHAVIOR* (Lee Epstein & Stefanie A. Lindquist, eds. 2017); Lee Epstein & Jack Knight, *Reconsidering Judicial Preferences*, 16 *ANN. REV. POL. SCI.* 11, 24–25 (2013); see also Eyer, *Ideological Drift*, *supra* note 17, at 5–7.

<sup>51</sup> See, e.g., Schraub, *supra* note 22, at 1283; see also, e.g., Eyer, *Ideological Drift*, *supra* note 17, at 5–7 (describing the ways that the temporal overlap between the institutionalization of permissive intent and a mandatory intent standard may have facilitated the redeployment of intent for anti-civil rights aims).

<sup>52</sup> See, e.g., Eyer, *Ideological Drift*, *supra* note 17, at 5–7 (describing the failure of the Court's race liberals—who had been leading proponents of the institutionalization of a regime that permitted consideration of intent—to object to the institution of an intent-mandatory standard).

<sup>53</sup> See Eyer, *Declaration*, *supra* note 29, at 444–45.

drift” (and thus cooptation).<sup>54</sup> Thus, as Professor David Pozen has suggested, ideas that “lack[ ] an intrinsic political valence”—even where initially promoted for particular reformist aims—may be particularly vulnerable to drift.<sup>55</sup> (Of course, as both Balkin and Pozen himself have observed, it is possible that most ideas and doctrines are to some extent lacking in “intrinsic political valence,” and thus “cooptable”—a view I share).<sup>56</sup> Nevertheless, the fact that a doctrine or idea lacks an inherent political valence may be an important component of whether it can productively be relied on by its current ideological opponents.

One final consideration may also be important to the effectiveness of cooptation efforts: such efforts are likely to be especially effective at the time they are initially undertaken and become less so as time passes. As Balkin has observed, once a legal argument or idea becomes associated with a new normative or political constituency, its original proponents typically also realign.<sup>57</sup> Often, such proponents will attempt to justify this realignment in a principled fashion to themselves (for example, by reasoning that the legal argument was simply a proxy for a broader principle).<sup>58</sup>

But this process of realignment often takes time, and in the initial period, proponents may not immediately perceive principled reasons for departing from their prior legal commitments. Again, the example of segregationists is illustrative. Intent doctrine originated as an argument racial justice advocates raised in order to *permit* invalidation of facially race-neutral efforts to oppose *Brown v. Board of Education*.<sup>59</sup> Historically, such consideration of intent was not permitted, something that effectively eviscerated efforts to meaningfully enforce desegregation in the initial years after *Brown*.<sup>60</sup> Instead, constitutional invalidation required a showing of virtually

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<sup>54</sup> See Pozen, *supra* note 22, at 107.

<sup>55</sup> *Id.*

<sup>56</sup> See, e.g., Balkin, *Legal Semiotics*, *supra* note 22, at 1834; Pozen, *supra* note 22, at 146; see also Eyer, *The New Jim Crow*, *supra* note 27, at 1064 n.300.

<sup>57</sup> See Balkin, *Ideological Drift*, *supra* note 15, at 869–73.

<sup>58</sup> *Id.* at 887–89.

<sup>59</sup> See Eyer, *Ideological Drift*, *supra* note 17, at 8–21.

<sup>60</sup> *Id.*

complete racial gerrymandering—a showing that Southern states quickly discovered token desegregation could defeat.<sup>61</sup>

But in the 1970s, segregationists began to recognize the potential of arguing that discriminatory intent *must* be shown as a way of defeating discrimination claims.<sup>62</sup> Racial justice advocates and progressives eventually regrouped around a defense of why intent as a *requirement* should be treated differently than a principle that intent is *sufficient* to allow constitutional invalidation.<sup>63</sup> But in the early and mid-1970s when the intent requirement was being institutionalized, that had not yet happened.<sup>64</sup> As a result, none of the Supreme Court’s race liberals opposed the instantiation of intent as a requirement, nor the related rejection of a constitutional disparate impact (or de facto discrimination) claim.<sup>65</sup>

Therefore, there is likely to be a limited window for the most effective efforts at movement cooptation of an ideological opponent’s legal arguments. Especially if the movement deploys the argument so successfully that it comes to be primarily associated with their own cause, there may be ideological drift and realignment on the courts around new doctrinal commitments.<sup>66</sup> But this process is likely to take time. In particular, it may take time for adjudicators and others to develop the type of apparently principled justifications that allow them to comfortably embrace such drift.<sup>67</sup> Thus, raising an ideological

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 34–64.

<sup>63</sup> *Id.* at 3.

<sup>64</sup> For example, Owen Fiss’s *Groups and the Equal Protection Clause*, 5 PHIL & PUB. AFFAIRS 107 (1976), which many regard as offering the seminal defense of an antistatutory theory of antidiscrimination law, was published *after* most of the Supreme Court’s initial cases instantiating an intent requirement, and mere weeks before *Washington v. Davis*, 426 U.S. 229 (1976), which was the final case in this line. See Eyer, *Ideological Drift*, *supra* note 17, at 34–53; Sergio J. Campos, *Subordination and the Fortuity of Our Circumstances*, 41 U. MICH. J.L. REFORM 585, 667 (2008).

<sup>65</sup> See Eyer, *Ideological Drift*, *supra* note 17, at 34–64.

<sup>66</sup> See Balkin, *Ideological Drift*, *supra* note 15, at 871–72; see also, e.g., Josh Blackman, *Collective Liberty*, 67 HASTINGS L.J. 623, 625–26 (2016).

<sup>67</sup> See Balkin, *Ideological Drift*, *supra* note 15, at 887–89 (describing the variety of ways that those who once ascribed to a doctrine or legal idea may explain to themselves a realignment caused by ideological drift in principled ways).

opponent's arguments may be especially effective initially in attracting the votes of ideologically opposed judges.

Nevertheless, it is important not to overstate the temporality of cooptation as a strategy. While the initial circumstances for cooptation may be temporal, coopted doctrines themselves can have an exceedingly long staying power. Ideologically realigned versions of colorblindness and intent remain entrenched today—and indeed even appear poised to gain further ground on the current Supreme Court.<sup>68</sup> Similarly, the ideologically realigned conservative First Amendment—the beginnings of which was first noted thirty years ago—has only continued to grow in its impact and expansiveness.<sup>69</sup> Thus, the staying power of coopted arguments may extend far beyond the period in which such arguments are most likely to appeal to ideological opponents.

### C. Should Progressive Social Movements Make Textualist Arguments?

Let us now return to the question with which we began: Should progressive attorneys embrace textualist arguments, despite their continued association with conservative legal actors? Having sketched the criteria that may cause a movement to eschew legal arguments predominantly associated with its opponents, it seems apparent that textualism is not the type of argument that progressive lawyers ought to categorically avoid. On the contrary, the conditions for redeploying textualist arguments for progressive aims are likely quite favorable at this time.<sup>70</sup>

First, it is important to note that while there may have once been reasons for progressive lawyers to wholesale oppose textualism,

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<sup>68</sup> See *supra* notes 37–40; see also notes 62–65 and accompanying text. For continued efforts to rely on colorblindness and intent today by opponents of racial equity measures, see, for example, *Students for Fair Admissions v. President and Fellows of Harvard College*, 600 U.S. 181, 230 (2023) (quoting Justice John Marshall Harlan's statement that "our Constitution is colorblind" in support of the restriction of race-based affirmative action); Sonja Starr, *The Magnet-School Wars and the Future of Colorblindness*, 76 STAN. L. REV. 161, 164–65 (2024) (describing efforts to use colorblindness and intent to constitutionally invalidate efforts to address racial disparities or promote integration, even where those efforts do not racially classify).

<sup>69</sup> See, e.g., Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1465–71 (2015); Brian Soucek, *The Constitutional Irrelevance of Art*, 99 N.C. L. REV. 685, 715–19 (2021); cf. Balkin, *Realism*, *supra* note 22, at 383–84.

<sup>70</sup> *Id.*



those reasons no longer exist.<sup>71</sup> While not all federal judges subscribe to textualism, it is well-accepted today, especially at the Supreme Court.<sup>72</sup> Indeed, it is not uncommon today to see *both* sides of the Court express their arguments in textualist terms, with both the majority and the dissent arguing that they have the better of the textualist argument.<sup>73</sup> Thus, while there may be reasons for progressive lawyers to continue to consider and debate the nuances of textualist analysis (for example, the application of stare decisis to precedents inconsistent with textualism), there is little apparent strategic benefit to continuing to reject textualism wholesale.<sup>74</sup>

On the contrary, as attorney Anton Metlitsky has suggested, textualism is so well-established that for any advocate to “have a hope of winning a statutory case before the current [Supreme] Court” “they must always present at least a plausible text-based argument.”<sup>75</sup> No federal court today would openly cite the calling card of purposivism,

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<sup>71</sup> See Lemos, *supra* note 1, at 884, 898–99 (making the case that textualism does not systematically lead to conservative results, though also explaining why it was initially strategically valuable to conservatives).

<sup>72</sup> See, e.g., Anton Metlitsky, *The Roberts Court and the New Textualism*, 38 CARDOZO L. REV. 671, 671–74 (2016); Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Progressive Textualism*, 110 GEO. L.J. 1437, 1443 (2022); cf. 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, 1309–47 (2018).

<sup>73</sup> See, e.g., Victoria Nourse, *Textualism 3.0: Statutory Interpretation After Justice Scalia*, 70 ALA. L. REV. 667, 668 (2019).

<sup>74</sup> For example, for progressives who support affirmative action, the question of whether stare decisis applies to contra-textualist precedents is important, given that the Supreme Court explicitly situated its foundational Title VII affirmative action decision as contra-textualist. See *United Steel Workers of America v. Weber*, 443 U.S. 193, 201 (1979) (citing *Holy Trinity v. United States*, 143 U.S. 457, 459 (1892), for the proposition 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’” in the context of rejecting the argument that Title VII’s prohibition on discrimination because of race proscribes affirmative action).

<sup>75</sup> See Metlitsky, *supra* note 72, at 688; see also Tobia, Slocum & Nourse, *supra* note 72, at 1443. (“[T]extualism is, in large part, the Court’s *lingua franca*.”).

*Holy Trinity v. United States*,<sup>76</sup> to disregard text.<sup>77</sup> Even in circumstances where critics have suggested that ostensibly textualist opinions are really purposivism in textualist garb (such as in *King v. Burwell*<sup>78</sup>), the Court in recent Terms has generally offered a textualist *justification* for the positions it has taken.<sup>79</sup>

And yet, as suggested at the outset, textualism remains a methodology that is widely embraced by conservative judges, and primarily perceived as aligned with conservative causes.<sup>80</sup> These are the circumstances in which movements may be most effective in coopting a legal argument associated with an ideological opponent.<sup>81</sup> Because many conservative judges have existing commitments to textualism—and may be reluctant to abandon those commitments—this creates opportunities for progressive lawyers to persuade judges who might be otherwise ideologically opposed to their aims.

We can see the effectiveness of this approach in a number of recent cases that have attracted the votes (or authorship) of conservative judges in opinions that reach progressive results. One of the most important victories of the LGBTQ rights movement—the holding in *Bostock v. Clayton County*<sup>82</sup> that LGBTQ workers are protected against discrimination under Title VII—was achieved on textualist grounds.<sup>83</sup> While a variety of progressive commentators have critiqued *Bostock*, arguing that its majority opinion employs poor textualist reasoning (a premise with which I disagree), there appears little doubt that textualist arguments were central to attracting the votes of its author, Justice Neil Gorsuch, as well as Chief Justice John Roberts.<sup>84</sup> Indeed, most commentators expected the Court's

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<sup>76</sup> 143 U.S. 457 (1892).

<sup>77</sup> See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 11–12 (2012) (observing that the Supreme Court has not relied on *Holy Trinity* in more than two decades).

<sup>78</sup> 576 U.S. 473 (2015).

<sup>79</sup> See Metlitsky, *supra* note 72, at 671–74.

<sup>80</sup> See Lemos, *supra* note 1, at 851.

<sup>81</sup> See *supra* Part I.B.

<sup>82</sup> 140 S. Ct. 1731 (2020).

<sup>83</sup> *Id.* at 1738–43.

<sup>84</sup> See, e.g., Ian Millhiser, *The Supreme Court's Landmark LGBTQ Rights Decision, Explained in Five Simple Sentences*, VOX (June 15, 2020), <https://perma.cc/UQY5-A696>; cf. Berman & Krishnamurthi, *supra* note 10 (critiquing the *Bostock* majority's textualist reasoning). *But cf.* Eyer,

conservative majority to rule *against* the plaintiffs and were surprised by the 6–3 victory.<sup>85</sup>

In the lower courts, there are a number of less well-known examples of Republican-appointed judges reaching remarkably progressive results based on textualist arguments. In a recent case affecting hundreds of undocumented immigrants charged with illegal entry, conservative Judge Jay Bybee concluded that § 1325(a)(2) of the illegal entry statute did not, as a textual matter, reach those who crossed the border in a location other than a port of entry.<sup>86</sup> Despite his apparent sympathy for the government (expressed in a concurring opinion to his own majority), Judge Bybee concluded that he was compelled by textualist reasoning to find against the government’s position.<sup>87</sup> As a result, some four hundred cases involving convictions for illegal entry were reversed on direct appeal, and many more may be subject to challenge on collateral attack.<sup>88</sup>

Of course, the effectiveness of these types of progressive textualist arguments may fade over time with conservative judges. In the wake of *Bostock*, some conservatives called for abandoning textualism or for reimagining it in ways that would make the outcome in *Bostock* less likely.<sup>89</sup> If textualism comes to be associated substantially with progressive outcomes, it seems plausible that we may at some point see the type of ideological drift that has characterized other ideologically associated ideas in the past once they have been substantially coopted by their initial opponents. Nevertheless, at the present moment, this has not yet come to pass,

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*Disentangling Textualism*, *supra* note 12, at 130–35 (responding to these critiques).

<sup>85</sup> See, e.g., Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 266 (2020) [hereinafter Grove, *Which Textualism*].

<sup>86</sup> See *United States v. Corrales-Vazquez*, 931 F.3d 944, 948–51 (9th Cir. 2019). I thank Eric Fish for pointing me to this example.

<sup>87</sup> *Id.* at 948–51, 954–55 (Bybee, J., concurring).

<sup>88</sup> See Email from Professor Eric Fish to Professor Katie Eyer (July 16, 2021) (on file with author).

<sup>89</sup> See, e.g., Josh Hawley, *Was it All for This? The Failure of the Conservative Legal Movement*, PUBLIC DISCOURSE (June 16, 2020), <https://perma.cc/PKA9-P67Y>; see also *Bostock*, 140 S. Ct. at 1824–28 (Kavanaugh, J., dissenting) (arguing that “literal” meaning is not the same as “ordinary” meaning, and suggesting—contra Supreme Court precedent finding that the “ordinary” meaning of “because of” is but-for causation—that the Court here was erroneously employing literal meaning).

and it seems unlikely in the immediate future.<sup>90</sup> As such, progressive lawyers may be especially well-situated at this time to harness conservative judges' methodological commitments in service of progressive objectives.

Moreover, even if a substantial ideological realignment of textualism does occur in the future, history suggests that ideologically coopted doctrines can be remarkably difficult for their initial proponents to dislodge. As described in Part I.B, numerous ideologically coopted doctrines—including colorblindness, intent, robust free speech and religion protections, and more—have continued to provide successful arguments for their former opponents for decades after their ideological realignment.<sup>91</sup> Thus, while the current moment may be a particularly promising one for progressive social movements to persuade conservative adjudicators to rely on textualist arguments in their favor, the longer-term utility of textualism need not depend on this (potentially) temporally contingent feature of the adoption of an ideological opponent's arguments.

Finally, it is important to note that textualism lacks an “intrinsic political valence.”<sup>92</sup> This is important for two reasons. First, it makes textualism precisely the type of construct that is most susceptible to redeployment in service of new ideological aims.<sup>93</sup> Second, there few reasons to think that the type of expressive concerns that cause movement lawyers to eschew otherwise effective legal arguments exist in the context of textualism. As a legal methodology,

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<sup>90</sup> While textualism has undergone some ideological reorientation in recent years, it remains predominantly associated with conservatives. *See supra* notes 1–4 and accompanying text. Moreover, because many judges are long-serving and embrace a self-conception of ideological neutrality, it seems unlikely that a massive realignment away from textualism will be occasioned in the near term. Finally, there are reasons to doubt that the basic intuition that underlies textualism and has contributed to its success and staying power—that “the text of any document must be the starting point for understanding it”—will lose its public appeal simply because of an ideological reorientation. *See, e.g.*, Ruth Marcus, Opinion, *Originalism is Bunk. Liberal Lawyers Shouldn't Fall For It.*, WASH. POST (Dec. 1, 2022); *cf.* Eric Encarnacion, *Text is Not Law*, 107 IOWA L. REV. 2027, 2027 (2022) (“[T]extualist judges will continue to claim, falsely, that text is law” because it “provides rhetorical advantages.”).

<sup>91</sup> *See supra* notes 68–69 and accompanying text.

<sup>92</sup> *See supra* notes 54–56 and accompanying text.

<sup>93</sup> *Id.*

textualism in and of itself expresses nothing.<sup>94</sup> Unlike disability arguments for transgender rights or colorblindness arguments for segregation, there is no inherent normative tension between textualist arguments and *any* movement's goals.<sup>95</sup> Thus, there are strong arguments favoring progressive lawyers' embrace of textualist arguments at this time—and little to suggest that such embrace would subvert progressive movements' broader aims.

## II. Implications for Progressive Academics

As I suggested at the outset, this Essay takes on the comparatively modest task of demonstrating that progressive lawyers ought to deploy textualist arguments—rather than making here an argument for progressives' full-throated embrace of textualism as a desirable methodology.<sup>96</sup> This Essay thus may appear of little relevance to the many prominent progressive legal academics who continue to vigorously critique textualism.<sup>97</sup> This Part suggests, however, that there are important corollaries for progressive academics to the conclusion that progressive lawyers ought to embrace textualist forms of argument. In particular, progressive legal academics may wish to be attentive to the ways that their work as teachers and scholars has the potential to promote—or to undermine—the use of textualist arguments in the courts. This Part highlights some of the most substantial areas in which the work of progressive academics has the potential to either bolster or undermine the effectiveness of progressive textualist legal arguments in court.

### A. Teaching Textualism to Future Progressive Lawyers

Legal academics' greatest influence on the law may be as teachers of our students.<sup>98</sup> Many progressive legal academics teach and

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<sup>94</sup> This may not be true of originalism, which at a minimum expresses the view that “we are at our best when we are who we have been”—a perspective that African Americans and others committed to racial justice have taken issue with. See Jamal Greene, *Originalism's Race Problem*, 88 DENVER U. L. REV. 517, 521 (2011).

<sup>95</sup> This is true on a wholesale level, though movements will need to consider on a retail level whether any given textualist argument—just like any given purposivist argument—may itself raise concerns.

<sup>96</sup> I take on that more substantive task in other ongoing work. See Eyer, *Progressive Textualism*, *supra* note 6.

<sup>97</sup> See, e.g., *supra* note 10.

<sup>98</sup> See, e.g., David Partlett, *Reflections: Personal and Institutional, on the Past and Future Southeastern Association of Law Schools*, 86 U.M.K.C. L. REV. 559, 575 (2018).

mentor future progressive lawyers. To the extent that progressive legal academics view textualism as an undesirable or fraudulent form of legal reasoning, they may not teach textualism in their courses, or may not encourage their students to develop the tools of textualist reasoning. Moreover, they may convey the view (explicitly or implicitly) that textualism is an undesirable and problematic form of argumentation.<sup>99</sup>

Of course, many progressive legal academics will *also* teach and mentor conservative law students. But such conservative future lawyers are far more likely to be exposed to textualism *somehow*—in their summer jobs, in the context of Federalist Society events, or in courses taught by conservative law professors that they seek out. As such, there is much less risk that a conservative law student will escape law school without being meaningfully exposed to textualism. And there is very little risk that such conservative law students will graduate from law school with the perception that textualism is a methodology frowned upon, and indeed even ridiculed, by many of the leading academic minds who share their normative goals—a genuine risk in the case of progressive law students.<sup>100</sup>

This suggests that progressive legal academics should take care to ensure that all of their students are aware of the strategic value of textualist legal arguments—even if they continue to oppose textualism as a methodology on other grounds. Moreover, they should afford enough coverage to textualist forms of argumentation to ensure that law students are well-equipped to engage in this type of text-based reasoning—much as virtually all law professors take seriously educating our students in the common law case method.<sup>101</sup>

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<sup>99</sup> See, e.g., Stanley Fish, *A Simple Moral: Know Your Job and Do It*, 36 J. COLLEGE & UNIV. L. 313, 315 (2009) (“When I teach legal interpretation, I am not shy about saying that textualism is a misguided and impossible enterprise.”); Richard Lavoie, *Subverting the Rule of Law: The Judiciary’s Role in Fostering Unethical Behavior*, 75 U. COLO. L. REV. 115, 200 (2004) (arguing that “law professors persuasively teach[ing] the importance of inclusive interpretation”—as opposed to the New Textualism—might help produce desirable future change).

<sup>100</sup> Cf. Brian Tamanaha, *Fellow Liberals: Be a “Legal Formalist,” Join the Recovering Realists Club (Small Meetings Likely)*, BALKINIZATION (Dec. 29, 2006), <https://perma.cc/F4HW-VTH8> (discussing the disfavor and condescension with which many progressives view legal formalism).

<sup>101</sup> Many progressive professors who may disfavor textualism on other grounds of course already do this. See, e.g., William K. Eskridge, *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1509 n.a1 (1998).

## B. Identifying Progressive Textualist Arguments

A second area in which progressive legal academics could bolster—or fail to aid—the use of progressive textualist arguments by attorneys is through their work to identify and develop progressive applications of textualism. While it is possible to overstate the influence that legal scholarship has on real world practice, any number of prominent legal theories have historically emerged from legal scholarship.<sup>102</sup> To the extent that progressive legal academics are disinclined to engage in textualist forms of argument in their own legal scholarship—or are affirmatively hostile to such arguments—this may hinder the development of progressive textualist arguments in the courts.<sup>103</sup> Conversely, scholarly attention to potential progressive textualist arguments could potentially lead to substantial progressive victories when pressed by lawyers in the courts.

The LGBTQ rights movement’s recent victory in *Bostock* serves as an apt example. Movement attorneys have directly credited legal scholarship in fostering the development of the textualist argument that persuaded the Court.<sup>104</sup> While this argument might have been developed independently by movement attorneys—and indeed,

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<sup>102</sup> See, e.g., Julianne Scott, *Pragmatism, Feminist Theory and the Reconceptualization of Sexual Harassment*, 10 UCLA WOMEN’S L.J. 203, 210 (1999) (noting the influence of Professor Catherine MacKinnon’s work on the development of sexual harassment jurisprudence).

<sup>103</sup> For example, progressive scholars have been inclined to use the progressive textualist victory *Bostock* as an opportunity to (in my view wrongly) critique both the majority’s reasoning and textualism itself. See *supra* note 10. As such, many progressive scholars have ignored the possibilities that *Bostock*’s textualist but-for principle could offer for other antidiscrimination cases. For my own, as well as other progressive scholars’ takes on the wider potential of *Bostock* as a textualist precedent for antidiscrimination law, see generally Katie Eyer, *The But-For Theory of Anti-Discrimination Law*, 107 VA. L. REV. 1621 (2021); Deborah Widiss, *Proving Discrimination By the Text*, 106 MINN. L. REV. 353 (2021); Jessica Clarke, *Sex Discrimination Formalism*, 109 VA. L. REV. 1699 (2023). For my response to critiques that have argued the *Bostock* majority opinion is not textualist in nature, or that textualism did not determine the outcome in that case, see Eyer, *Disentangling Textualism*, *supra* note 12, at 130–35.

<sup>104</sup> See, e.g., Katie Eyer, *Statutory Originalism and LGBT Rights*, 54 WAKE FOREST L. REV. 63, 73–80 (2019) [hereinafter Eyer, *Statutory Originalism*]; see also Leah Litman, Melissa Murray & Chase Strangio, *2020 Bingo Card*, STRICT SCRUTINY (June 22, 2020), <https://perma.cc/3UJW-F5AE> (ACLU attorney describing the role of *Statutory Originalism* in advocates’ strategy).

important precursors of it were developed by movement attorneys—the specific textualist formulation that persuaded the Court was first formulated in legal scholarship.<sup>105</sup> This illustrates the commonsense reality that more thoughtful individuals considering the specific progressive arguments afforded by textualism will no doubt lead to the identification of more progressive textualist opportunities.

### C. Theorizing Textualism

The last arena in which progressive legal academics may wish to consider their potential role—even if they do not wish to fully embrace textualism as a normative matter—is in theorizing textualism’s methodological contours.<sup>106</sup> While this may seem at a greater remove from the arguments of progressive attorneys than the other contexts for progressive academic engagement identified here, the reality is that intratextualist methodological disputes can matter quite a lot in real world cases.<sup>107</sup> Without progressive academic voices helping to shape the contours of textualist methodology, or identifying inconsistencies in conservative applications of that methodology, the work of progressive lawyers in the courts will almost certainly be less effective.

An example of the potential importance of this type of theoretical work can be seen in the recent textualism scholarship of Professor Tara Leigh Grove.<sup>108</sup> Most notably, Grove has identified

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<sup>105</sup> See Eyer, *Statutory Originalism*, *supra* note 104. Important precursors of this argument were developed by, among others, attorney Greg Nevins, whose work on these issues in the lower courts was foundational to their ultimate success at the Supreme Court. *See generally, e.g.*, Brief of Lambda Legal Defense & Education Fund as Amicus Curiae in Support of Appellee, *Zarda v. Altitude Express*, 883 F.3d 100 (2d Cir. 2018) (No. 15-3775).

<sup>106</sup> *Cf.* Tobia, Slocum & Nourse, *supra* note 72, at 1443 (arguing for a “methodologically progressive textualism”). I do not agree with all of Tobia, Slocum, and Nourse’s conclusions about what textualism ought to look like methodologically, but their engagement with textualism is precisely the type of engagement by progressive scholars that this Essay advocates.

<sup>107</sup> *Bostock* is an excellent example of this, as both the majority and the dissent claimed that they were applying textualist methodologies. *See Bostock*, 140 S. Ct. at 1738; *id.* at 1756 (Alito, J., dissenting). Thus, being able to argue about whether a particular allegedly textualist argument raised by an opponent is actually faithful to textualism as an interpretive methodology may be as important as having one’s own textualist argument.

<sup>108</sup> Grove does not self-identify as a progressive textualist, and the point here is not to imply that her work arises from strategic progressive goals—Grove’s objectives have centered on judicial legitimacy. *See, e.g.*,



important divisions *among* those who self-identify as textualists, and has advocated for judicial embrace of “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.”<sup>109</sup> As Grove has observed, unlike “flexible textualism” (which takes into account a greater number of normative considerations), “formalistic textualism” is far more likely to bind an adjudicator to a particular result—including ones the judge might otherwise be ideologically uninclined to adopt.<sup>110</sup>

Grove lauds this for judicial legitimacy reasons (judges will become less ideologically identifiable to the public), but her theorizing is also important to progressives who may wish to embrace textualism, whether strategically or genuinely. What Grove refers to as “flexible textualism” holds almost endless possibilities for strategic manipulation and deviation from the text—indeed, some (including this Author) would not even identify it as textualism.<sup>111</sup> To the extent that progressives hope to hold conservative adjudicators to their textualist priors where it matters (i.e., where the outcome it would lead to contradicts conservative ideology), they are unlikely to be able to do so in a world where “flexible textualism” is the norm.<sup>112</sup> While

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Grove, *Which Textualism*, *supra* note 85, at 296–97; *see also* Tara Leigh Grove, *The Misunderstood History of Textualism*, 117 NW. U. L. REV. 1, 63 (2023) [hereinafter Grove, *Misunderstood History*]. Nevertheless, she is an important example of how the participation of legal academics outside of the conservative legal movement can be important in ensuring that the contours of textualist theorizing are not exclusively defined by conservative judges and scholars.

<sup>109</sup> Grove, *Which Textualism*, *supra* note 85, at 267; *see also* Grove, *Misunderstood History*, *supra* note 108, at 63.

<sup>110</sup> Grove, *Which Textualism*, *supra* note 85, at 295–97.

<sup>111</sup> *See* Grove, *Which Textualism*, *supra* note 85, at 282–90 (describing the factors that “flexible textualists” may consider in their analysis, including speculation about the expectations of the original public); *cf.* Eyer, *Disentangling Textualism*, *supra* note 12, at 124–38 (arguing that this type of original expected applications approach to original public meaning is inconsistent with true fidelity to text, and thus textualism); Eyer, *Statutory Originalism*, *supra* note 104, at 72–80.

<sup>112</sup> *Bostock*, where the dissenters embraced “flexible textualism” in a way that allowed them to eschew their own textualist precedents, is an excellent example of the manipulability of flexible textualism. *See* Eyer, *Disentangling Textualism*, *supra* note 12, at 129–35. The fact that the self-professed textualist dissenters in *Bostock* were the architects of the “but for”

Grove’s work does not constrain judges to “formalistic textualism,” it at least surfaces the important idea that not all textualists are in fact following the same methodology.<sup>113</sup> Moreover, it provides powerful arguments that those who purport to care about judicial constraint ought to follow the formalistic path.<sup>114</sup>

Thus, work by progressive scholars about the theoretical contours of textualism is likely to be important to the ultimate success of any progressive efforts to rely on textualism in the courts.<sup>115</sup> Without such theorizing, the very definition of what textualism *is*—both in theory and in application—will by default be defined by conservatives alone. It seems self-evident that such an arrangement is likely to, in practice, favor versions of textualism more compatible with current conservative ideological goals. Moreover, progressive absence from the conversation about what textualism *is* may facilitate endless—and comparatively invisible—reformulations of textualist methodology from case to case in favor of particular ideological results.

## Conclusion

Textualism is no longer the disruptive and novel legal innovation that it once was. Indeed, progressive luminaries like Justice Elena Kagan have argued that textualism is so well established that “we are all textualists now.”<sup>116</sup> The institutionalization of textualism suggests that—whatever reasons may have existed for progressive movement lawyers to eschew textualism at its origins—those reasons have passed. Indeed, textualism likely holds unique strategic potential

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understanding of “because of”—the cornerstone of the majority’s textualist reasoning—has gone underaddressed in the scholarship in part because many scholars have not focused on the origins of the textualist “but for” argument.

<sup>113</sup> See Grove, *Which Textualism*, *supra* note 85, at 267.

<sup>114</sup> *Id.* at 290–307.

<sup>115</sup> *Bostock* is another illustrative example of the importance of scholarly engagement on the application of theoretical contours of textualism to real-world outcomes—in that case, the proper relationship of textualism to originalism. *Cf.* Eyer, *Statutory Originalism*, *supra* note 104, at 72–80, 96–103; Brief of Statutory Interpretation and Equality Law Scholars as Amici Curiae in Support of the Petitioners, at 13–17, *Bostock*, 140 S. Ct. 1731 (No. 17-1618); *with Bostock*, 140 S. Ct. at 1749–51 (relying on virtually identical reasoning to that previously set out in scholarly work and amicus briefing).

<sup>116</sup> See Lee & Mouritsen, *supra* note 5, at 793 n.10 (2018) (quoting Justice Kagan).

for progressive social movements today, due to its ability to persuade otherwise ideologically opposed adjudicators.

The strategic value of textualism for progressive lawyers in turn has important implications for progressive legal academics. Many academics continue to normatively oppose textualism as a methodology and to vociferously critique its premises. In other work I suggest reasons to think that textualism as a methodology *ought* to normatively appeal to progressives. But regardless of whether one normatively embraces textualism, its strategic value to progressive lawyering suggests the importance of meaningful engagement by progressive academics.

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