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## Supreme Silence and Precedential Pragmatism: *King v. Burwell* and Statutory Interpretation in the Federal Courts of Appeals

Michael J. Cedrone

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# SUPREME SILENCE AND PRECEDENTIAL PRAGMATISM: *KING V. BURWELL* AND STATUTORY INTERPRETATION IN THE FEDERAL COURTS OF APPEALS

MICHAEL J. CEDRONE\*

*This Article studies statutory interpretation as it is practiced in the federal courts of appeal. Much of the academic commentary in this field focuses on the Supreme Court, which skews the debate and unduly polarizes the field. This Article investigates more broadly by looking at the seventy-two federal appellate cases that cite King v. Burwell in the two years after the Court issued its decision. In deciding that the words “established by the State” encompass a federal program, the Court in King reached a pragmatic and practical result based on statutory scheme and purpose at a fairly high level of generality. Cases that cite King might be expected to accept or reject this kind of purpose move, and to generally be more attentive to matters of interpretation.*

*The results presented here reveal a dynamic landscape in which federal appeals courts seem relatively uncommitted to ideological battles over interpretive principles, notwithstanding the relatively small number of opinions that contain rhetorical flourishes in this area. Courts freely pursue the best reading of statutory text through textual and purposive means: linguistic analysis of the words, contextual readings of multiple statutory provisions and analysis of the statutory scheme, and evidence of purpose gleaned from textual and extra-textual sources. While not pervasive, legislative history commonly guides interpretation. These results hold across cases where text and purpose conflict and where text and purpose are in harmony. In cases of conflict, the results also hold across cases that reach results primarily based on text and*

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\* Michael J. Cedrone is Professor of Law, Legal Practice at Georgetown University Law Center. I am most grateful to many people who have engaged with me regarding the ideas in this article, most especially my colleagues in the Georgetown Legal Writing program. Professor Jeffrey Shulman read the article and engaged deeply with it; I am grateful for his constant support. Professors Sonya Bonneau, Erin Carroll, Fran DeLaurentis, Diana Donahoe, Susan McMahon, Jonah Perlin, Jarrod Reich, Julie Ross, Rima Sirota, Kris Tiscione, and Jessica Wherry each made important contributions at various times.

*cases that reach results based primarily on purpose. Further, given the opportunity to weigh in on lower court statutory construction debates, the Supreme Court has remained silent. This Article concludes that it is normatively desirable that lower federal courts have not embraced the statutory construction battles in an all-encompassing way. The Article concludes with the caveat that this research should be revisited to assess the effect of Donald Trump's appointments to the judiciary.*

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## I. INTRODUCTION

Statutory interpretation has been an intractable focus of contention for a very long time because the debate about the proper result in any particular case can be a proxy for underlying assumptions about ways of reading language and the proper role of the courts in the United States legal system.<sup>1</sup> The stakes are high: statutory issues pervade the federal courts: nearly two-thirds of the Supreme Court’s recent docket focuses on the meanings of federal statutes, and statutory issues abound in the lower federal courts as well.<sup>2</sup> While statutory interpretation is often simplified into a text-vs.-purpose zero-sum tug-of-war, this view posits a false dichotomy: the actual landscape is considerably more complex and nuanced.

Textualists have been ascendant at the Supreme Court for decades and that their influence has been felt throughout the federal judiciary and academia.<sup>3</sup> However, few judicial or academic interpreters are textual exclusivists.<sup>4</sup> Most judges and theorists agree that purpose is a relevant consideration, though they differ about how much to consider the purpose when purpose and text are in tension—and even when they are not.<sup>5</sup> Further, they also disagree about what evidence of statutory purpose is legitimate.<sup>6</sup> Some look for purpose primarily in the text and structure of the statute as a whole, while others would admit legislative history as evidence of legislative purpose.<sup>7</sup> These debates over the proper role of purpose and the legitimate evidence of purpose are where much of the real debate lies.

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1. Compare ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 5 (2012) (arguing that the notion that judges invented the common law over time has “stretched into a belief that judges ‘make’ law through judicial interpretation of democratically enacted statutes”), with ROBERT A. KATZMANN, *JUDGING STATUTES* 10 (2014) (arguing that courts should “[r]espect[] Congress’s work product” so that “courts will interpret the law in a manner consistent with legislative purposes” and “Congress will perceive the courts as productive partners rather than as meddlers substituting their own preferences for that of the legislative branch”).

2. KATZMANN, *supra* note 1, at 3, 122 n.1.

3. See generally Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016) (describing a textualist method of statutory interpretation).

4. See John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 115.

5. See *id.*; Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 2 (2006).

6. See Molot, *supra* note 5, at 2.

7. See *id.*

Both of these dilemmas were presented to the Supreme Court in *King v. Burwell*,<sup>8</sup> which presents the strongest purposive result reached by the Court in decades. In *King*, the Court held that the words “established by the State,” used in the Affordable Care Act,<sup>9</sup> encompassed a program established by the federal government.<sup>10</sup> Reaching this holding required the Court to sidestep the textual meaning of “established by the State.”<sup>11</sup> Instead, the Court relied on the structure of the Act as a whole and on legislative purpose at a fairly broad level of generality.<sup>12</sup> As Chief Justice John Roberts declared in his opinion for a 6-3 majority, “Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them.”<sup>13</sup> Notably, the Court did not meaningfully rely on legislative history in reaching this conclusion.<sup>14</sup>

The result in *King* is unusual for a Court with a majority of textualists; indeed, it has been termed “one of the most interesting statutory interpretation cases in recent years” by now-Justice Brett Kavanaugh.<sup>15</sup> The case seems a vivid demonstration that purpose is not dead, nor is it on life support, and that purpose still has outcome-determinative effect in at least some difficult and consequential cases where the language of particular provisions seems at odds with the statutory purpose and scheme.

Academic discussion of statutory interpretation has tended to focus on the Supreme Court to the exclusion of other tribunals.<sup>16</sup> This state of affairs leads the academy to focus overly on the statements and commitments of Members of the Court and not to focus on the business of judging as it is practiced in courts with substantial impact on the lives of many Americans.<sup>17</sup> There is some

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8. 135 S. Ct. 2480 (2015).

9. Patient Protection and Affordable Care Act, 42 U.S.C. §§ 18001–121 (2010).

10. *King*, 135 S. Ct. at 2494–95. The federal exchange is established under the statute for states that elect not to set up and manage their own exchanges. *Id.* at 2494.

11. *Id.* at 2495.

12. *Id.* at 2494–95.

13. *Id.* at 2496.

14. *See id.* at 2492–96.

15. Kavanaugh, *supra* note 3, at 2158–59. Then-future-Justice Kavanaugh said it was “not [his] place to say whether *King v. Burwell* was right or wrong in its outcome,” but he said that the question would depend on whether courts could “look at the overall Act and adopt what they [i.e. courts] conclude Congress *meant* rather than what Congress *said*.” *Id.*

16. *See* Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1300 (2018) (“[T]he Supreme Court’s practice has received nearly all of the attention from academics and practitioners.”).

17. *See id.* at 1300–01.

indication that this situation is beginning to change. Prof. Abbe Gluck has studied state court statutory interpretation,<sup>18</sup> and she and Judge Richard Posner recently surveyed the statutory interpretation views of judges on the federal courts of appeal.<sup>19</sup>

This Article furthers the study of lower federal court statutory interpretation through a different approach. It reviews the seventy-two federal court of appeals decisions that cite *King v. Burwell* during the two-year period following its issuance. The selection of *King* as a starting point is intentional. While perhaps not representative of the entire corpus of federal statutory interpretation jurisprudence, the seventy-two cases that cite *King* are likeliest to embrace (or strongly reject) the kind of purposive moves made by the Supreme Court in *King*. They are also somewhat more likely to contain an explicit discussion of interpretive method. Finally, two years' worth of cases generates a sample sufficiently large to obscure the effect of outliers and permit some tentative observations to be reached.

The results of this study reveal a dynamic landscape in which courts seem relatively uncommitted to ideological battles over interpretive principles, notwithstanding a relatively small number of opinions which contain rhetorical flourishes in this area.<sup>20</sup> Courts freely pursue the best reading of statutory text through textual and purposive means: linguistic analysis of the words, contextual readings of multiple statutory provisions and analysis of the statutory scheme, and evidence of purpose gleaned from textual and extra-textual sources.<sup>21</sup> While not pervasive, legislative history appears commonly in these cases.<sup>22</sup>

This study divides the cases based upon whether text and purpose appear to be in tension or harmony. Throughout all categories, there are numerous

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18. Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1761–70 (2010).

19. See Gluck & Posner, *supra* note 16, at 1300.

20. See *infra* Part III.

21. See *infra* Part III.

22. See, e.g., *Owner-Operator Indep. Drivers Ass'n v. U.S. Dep't of Transp.*, 840 F.3d 879, 884 (7th Cir. 2016); *In re Tribune Co. Fraudulent Conveyance Litig.*, 818 F.3d 98, 118 (2d Cir. 2016); *United States v. Epskamp*, 832 F.3d 154, 165 (2d Cir. 2016); *Hernandez v. Williams*, 829 F.3d 1068, 1078 (9th Cir. 2016); *G.L. v. Ligonier Valley Sch. Dist.*, 802 F.3d 601, 621 (3d Cir. 2015); *In re Google Inc. Cookie Placement & Consumer Privacy Litig.*, 806 F.3d 125, 147 (3d Cir. 2015); see also *infra* note 415.

examples of courts pursuing the best result through text and purpose, using a wide range of evidence, including legislative history.<sup>23</sup>

Cases where text and purpose appear to be in tension or at odds require that courts decide when and whether to consider purpose and what kind of evidence or purpose to admit.<sup>24</sup> In these cases, courts are attuned to the relative clarity of the text and the relation between the apparent plain meaning of the text and the apparent purpose of the provision within the statute as a whole.<sup>25</sup> Some sixteen cases in the set use purpose to resolve questions on which statutory text is silent, internally conflicted, or at odds with the court's view of purpose.<sup>26</sup> These cases depend on a wide array of evidence and arguments.<sup>27</sup> Most cite legislative history.<sup>28</sup> Nine cases in which text and purpose are in tension reject purposive readings and stick with text in the face of arguments that text and purpose conflict.<sup>29</sup> A few of these cases contain language that explicitly questions the legitimacy of purposive interpretation or the use of extra-textual evidence.<sup>30</sup> Yet, a large number of these cases also cite legislative history.<sup>31</sup> In twenty-two cases, text and purpose appear not to be at odds.<sup>32</sup> In those cases, courts freely consult context, statutory structure and scheme, statutory purpose to confirm their readings of text.<sup>33</sup> Legislative history is cited in five of these cases.<sup>34</sup>

Moreover, given an opportunity to weigh into the statutory construction wars explicitly and in a way that could (at least in theory) control the lower federal courts, the Supreme Court has refused to do so.<sup>35</sup> Thus, for the foreseeable future, the courts of appeal are likely to continue taking an eclectic

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23. *See infra* Section III.B.

24. *See infra* Part III.

25. *See infra* Part III.

26. *See infra* note 259.

27. *See infra* Section III.B.

28. *See supra* note 22.

29. *See infra* Section III.C.

30. *See infra* Section III.C.2.

31. *See, e.g., In re Settoon Towing, L.L.C.*, 859 F.3d 340, 352 (5th Cir. 2017); *Pakootas v. Teck Cominco Metals, Ltd.*, 830 F.3d 975, 985 (9th Cir. 2016); *In re Schwartz-Tallard*, 803 F.3d 1095, 1100 (9th Cir. 2015).

32. *See infra* Section III.D.

33. *See infra* Section III.D.

34. *See infra* note 412 and accompanying text.

35. *See infra* Part IV.

approach, although it will be important to return to this research to consider the impact of judges appointed by Donald Trump.

This Article proceeds as follows: Part II briefly surveys the landscape of academic discussion surrounding statutory interpretation.<sup>36</sup> It summarizes differences in method and basic jurisprudential philosophy between New Textualist and purposive schools of interpretation, ultimately concluding that the differences are quite narrow.<sup>37</sup> Part III summarizes the issues raised by *King v. Burwell* and assesses the textual and purposive moves in the case.<sup>38</sup> Ultimately, it concludes that King demonstrates the sort of pragmatic approach to interpretation that is common in the lower courts.<sup>39</sup> Part IV discusses court of appeals cases that cite *King* in the two years following its issuance.<sup>40</sup> Following a note about the method of this study, this Part divides the cases into three categories: cases that embrace purposive readings of text, cases that rely on a textual approach, and cases where text and purpose do not conflict.<sup>41</sup> Most courts across these categories take a pragmatic, encompassing approach to statutes, considering text and purpose, and in a substantial number of cases, looking to legislative history for guidance. Part V considers the significance of two cases where courts of appeals reached strongly purposive results only to be overturned by the Supreme Court in opinions that do not mandate a narrow textualist approach to interpretation.<sup>42</sup> In view of these developments, the paper concludes that pragmatism is likely to continue as the order of the day in the lower courts, though the impact of judges appointed by Donald Trump will have to be assessed through further study.<sup>43</sup>

## II. DO THEORIES OF STATUTORY INTERPRETATION MATTER?

The legal community has long weighed the question of how a court should treat enacted legislative text when it is called on to decide meaning. For a court

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36. See *infra* Part II.

37. See *infra* Part II.

38. See *infra* Part III.

39. See *infra* Part III.

40. See *infra* Part IV.

41. See *infra* Part IV.

42. See *infra* Part V.

43. See *infra* Part VI.



trying to interpret or construe<sup>44</sup> legislation, the three canonical starting points have been statutory text, statutory purpose, and legislative intent.<sup>45</sup>

These three starting points have spawned a vast, fascinating commentary. Scholars have proffered numerous theories of statutory interpretation.<sup>46</sup> Judges, on the front lines of statutory interpretation wars, have also produced articulate and eloquent justifications for various positions.<sup>47</sup> In the past twenty or so years, looking principally to the Supreme Court, the two main approaches to interpretation have been the “New Textualism” championed by Justice Antonin Scalia and others,<sup>48</sup> and a modern approach to Purposivism, which has been

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44. For a discussion of the differences between interpretation and construction, see Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 100–08 (2010) (“As I discuss the distinction, I will use constitutional interpretation and construction in an illustrative context, but the distinction itself applies whenever an authoritative legal text is applied or explicated.”). On Solum’s account of the distinction, interpretation is an attempt to ascertain linguistic meaning while construction is the process of assigning legal effect to the semantic content of an authoritative legal text. *Id.* at 100, 103. For purposes of this article, I will use the term “statutory interpretation,” recognizing that this process often involves both interpretation and construction, particularly in cases where interpretation is insufficient to decide the matter in question because of linguistic ambiguity or conflict among particular statutory provisions.

45. William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 321–22 n.2 (1990) (referring to intent, purpose, and text as “foundational” approaches, and identifying such an approach in pure form as “a theory that identifies a single primary legitimate source of interpretation . . . and adheres to the statutory meaning that source suggests, regardless of circumstances or consequences”).

46. Scholarly commentary in this area is vast. For a general overview and commentary, see generally WILLIAM D. POPKIN, *STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION* (1999); Eskridge & Frickey, *supra* note 45, at 324–45. A “Brief Overview of the Mainstream Debates” may be found in Gluck, *supra* note 18, at 1761–70.

47. For the work of judges, compare Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS. & THE LAW* 3, 3 (Amy Guttmann Ed., 1997) (espousing a textualist perspective), with STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 17–18 (2005) (advocating a purposive approach), and KATZMANN, *supra* note 1, at 31 (“[T]he fundamental task . . . is to interpret language in light of the statute’s purpose(s) as enacted by legislators, with particular attention to those legislative materials that reliably contribute to understanding the statute’s meaning.”); see also Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817–18 (1983) (imaginative reconstruction); RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 286–90 (1985).

48. See, e.g., SCALIA & GARNER, *supra* note 1, at 15–16; William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623 (1990).

described as “textually constrained,”<sup>49</sup> and is most prominently espoused by Justice Breyer.<sup>50</sup>

A brief description of these differences sets the stage for the issues that dominate *King v. Burwell* and its progeny. Each philosophy has its own methods of interpretation, preferred evidence, and underlying assumptions. Understanding the context of the New Textualism and modern Purposivism permits a judgment to be made about *King v. Burwell*'s true legacy and the effects it may have in the lower federal courts.

#### A. *The New Textualism*

The New Textualism, associated primarily with Justices Antonin Scalia and Clarence Thomas, has been ascendant at the Supreme Court of the United States for the better part of the last twenty-five years.<sup>51</sup> Justice Scalia has identified the object of interpretation as looking for “‘objectified’ intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*.”<sup>52</sup> Scalia derides the search for legislative intent from extra-textual sources as undemocratic, a process that provides “‘handy cover for judicial intent.’”<sup>53</sup> Scalia consequently concludes that “[t]he text is the law, and it is the text that must be observed.”<sup>54</sup>

This elevation of text has important ramifications for the kinds of evidence a court may accept to determine what the law is. The tools of textualism are

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49. Manning, *supra* note 4, at 118–19 (arguing that even the Supreme Court’s nontextualist members “rely on the text to structure and constrain their use of purpose”); Gluck, *supra* note 18, at 1764–65 (“[T]extualism has had a significant impact across the spectrum, leading ‘even nonadherents to give great weight to statutory text.’”).

50. Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 86 (referring to Justice Breyer, along with Justice Stevens, as the Court’s “most committed purposivists”); Manning, *supra* note 4, at 128 (identifying Justices Breyer and Stevens as “the Court’s strongest purposivists”).

51. Manning, *supra* note 4, at 114 (“While one can point to the rare exception, the Court in the last two decades has mostly treated as uncontroversial its duty to adhere strictly to the terms of a clear statutory text, even when doing so produces results that fit poorly with the apparent purposes that inspired the enactment.”) (citation omitted).

52. Scalia, *supra* note 47, at 17.

53. *Id.* at 17–18; see also Frank H. Easterbrook, *Foreword to SCALIA & GARNER*, *supra* note 1, at xxii–xxiii.

54. Scalia, *supra* note 47, at 22.

well-known: a textualist judge will consult dictionaries,<sup>55</sup> textual context,<sup>56</sup> and canons of construction, which are linguistic presumptions about legislation's meaning.<sup>57</sup>

Beyond use of these tools, there are two additional defining features of modern textualism: substantial limitations on the use of purpose, and a rejection of legislative history as a legitimate source of meaning.<sup>58</sup> Textualist judges will make reference to the purpose of the statute in a limited way.<sup>59</sup> Purpose must be derived from the text of the statute,<sup>60</sup> that is, from “concrete manifestations as deduced from close reading of the text.”<sup>61</sup> On this view, purpose may not be

55. Jeffrey L. Kirchmeier & Samuel A. Thumma, *Scaling the Lexicon Fortress: The United States Supreme Court's Use of Dictionaries in the Twenty-First Century*, 94 MARQ. L. REV. 77, 86 (2010) (charting an increase in dictionary use in Court opinions from the 1970s to the 1980s and the 1980s to the 1990s, but finding a flattening of the rate of use in the first decade of the 2000s); see also SCALIA & GARNER, *supra* note 1, at 69–77 (describing and defending use of dictionaries as part of the “Ordinary-Meaning Canon”); *id.* at 415–24 (Appendix A: A Note on the Use of Dictionaries).

56. Gluck, *supra* note 18, at 1763 n.37 (“‘Context’ generally refers to how the contested term fits into the statutory scheme as a whole—e.g., how it is used in other statutes, or later in the same statute.”).

57. Scalia, *supra* note 47, at 25–29; SCALIA & GARNER, *supra* note 1, at 53–411 (describing canons of construction in great detail). To be sure, reliance on canons has not gone unchallenged, dating back to the 1950s, when Karl Llewellyn declared “there are two opposing canons on almost every point.” Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950). Not surprisingly, Justice Scalia has rejected Llewellyn’s attack on multiple occasions. Scalia, *supra* note 47, at 26–27; SCALIA & GARNER, *supra* note 1, at 59–62 (rejecting Llewellyn and defending the use of canons). A more recent and substantial attack on the canons comes from Professors Bressman and Gluck, whose empirical work suggests that many canons of construction are not well-known among legislative drafters working for the United States Congress. Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 728 (2014); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 926 (2013).

58. Manning, *supra* note 4, at 123–24 (defining the rejection of legislative history as a source of meaning and the rejection of purpose to trump clear text as the “two major components” of “the new textualism”); Gluck, *supra* note 18, at 1765 (“A judge who acknowledges the importance of text but still takes various positions from case to case regarding whether text trumps other interpretive tools is not a textualist.”).

59. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015). See, e.g., *In re Wright*, 826 F.3d 774, 779, 782–83 (4th Cir. 2016); *Zero Zone, Inc. v. U.S. Dept. of Energy*, 832 F.3d 654, 689 n.41 (7th Cir. 2016).

60. See discussion *supra* notes 48–49 and accompanying text.

61. SCALIA & GARNER, *supra* note 1, at 20.

used to “contradict text or to supplement it”; to do so would disrespect the democratic compromise encapsulated in the legislative text.<sup>62</sup>

Further, when textualists rely on purpose, they require that it be “defined precisely” and “described . . . concretely.”<sup>63</sup> At a broad enough level of generality, any result could be sustained, regardless of text. The textualist interpreter will generally limit her consideration to the specific purposes of the particular provision at issue, seen in the context of the structure and language of the statute as a whole.<sup>64</sup> As an evidentiary matter, textually defined purpose does not admit evidence beyond plain meaning, statutory structure, context, and canons.<sup>65</sup> Instead, it relies on text and textual context to be used to better define and understand the language of particular provisions.<sup>66</sup>

Most prominently, textualism rejects legislative history and other extrinsic sources (such as “assumptions about the legal drafter’s desires”) as evidence of purpose.<sup>67</sup> Textualists reject legislative history because they harbor deep skepticism about whether statements contained in legislative history actually reflect the will of the enacting majority and because they consider it illegitimate to grant legislative history the same authoritative status as duly enacted statutory text.<sup>68</sup>

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62. *Id.* at 57 (“[T]he limitations of a text—what a text chooses *not* to do—are as much a part of its ‘purpose’ as its affirmative dispositions.”).

63. *Id.* at 56–57.

64. *Id.* at 167.

65. *Id.* at 53–76, 156–60.

66. *Id.*

67. Scalia, *supra* note 47, at 29–37; SCALIA & GARNER, *supra* note 1, at 56; *see also* Manning, *supra* note 4, at 123–24. There is some irony here. The canons of construction are quite obviously extrinsic to statutory text, and recent work discussed above (Gluck and Bressman articles) suggests they are not universally known among legislative drafters, but they are admitted as legitimate evidence of meaning by textualists while legislative history is not.

68. Manning, *supra* note 4, at 123–24. This skepticism has been noted to be an outgrowth of public choice view of the legislative process, which holds that because “legislation is a product of compromises among groups, . . . attributing a purpose to a statute either may improperly privilege the interests of one group over another (thereby undermining the bargain) or may impute a purpose where none (other than the desire to reach agreement) existed.” T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 28 (1988). The literature here is vast: representative cites must suffice. Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 547–48 (1983); Kenneth A. Shepsle, *Congress is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239, 244–45 (1992).

The jurisprudential philosophy of textualists is rooted in realist institutional views about the work of Congress and the proper role of courts.<sup>69</sup> Textualists' vision of Congress' work is at once encompassing and skeptical. It is encompassing in that textualists seek to vindicate legislative supremacy by respecting Congress' power to define rules of law (through its enacted text) that bind all other governmental actors, including judges.<sup>70</sup> It is skeptical in that textualists do not trust efforts to understand Congressional intent from any source other than enacted text.<sup>71</sup>

The implication of textualism for judges is a much more limited role. By valorizing text and rejecting legislative history, textualists seek to cabin judicial discretion: judges are to "interpret" and not "make" law.<sup>72</sup> The view reflects "a new appreciation of the judiciary's limited role in the constitutional structure and of the dangers of judicial self-aggrandizement."<sup>73</sup> As such, judges are "agent[s]" and not "partners[]" of the legislature when they interpret statutes, and must defer to duly enacted Congressional pronouncements with only a limited role for judicial discretion.<sup>74</sup>

### B. Textually Constrained Purposivism

For all the influence that textualism has had in recent decades, purposive interpretation is still an important part of the modern landscape, as *King v. Burwell* itself illustrates.<sup>75</sup> The archetypical case illustrating a strong purposive approach—dating from 1892—is *Holy Trinity Church v. United States*.<sup>76</sup> In *Holy Trinity*, the Supreme Court had to decide whether a statute that forbade anyone from "in any manner whatsoever, to prepay the transportation, or in any

69. Molot, *supra* note 5, at 25 ("Textualism's core interpretive theory found its origins in legal realism.").

70. Earl M. Maltz, *Statutory Interpretation and Legislative Power: The Case for a Modified Intentionalist Approach*, 63 TUL. L. REV. 1, 7–9 (1988).

71. See Molot, *supra* note 5, at 26–29; see also Manning, *supra* note 4, at 123–24.

72. Gluck, *supra* note 18, at 1763; see also Molot, *supra* note 5, at 26–29 (describing textualism's affinity with *Erie* and *Chevron* doctrines as reflecting "both a realist appreciation of the leeway inherent in interpretation and a formalist aspiration to cabin that leeway.").

73. Molot, *supra* note 5, at 29.

74. EVA H. HANKS, MICHAEL E. HERZ, & STEVEN S. NEMERSON, *ELEMENTS OF LAW* 253–54 (2d ed. 2010).

75. Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress' Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 81 (2015) (observing that *King v. Burwell* is decided using "objectified, text-derived purpose").

76. 143 U.S. 457 (1892).

way assist or encourage the importation or migration” of an “alien” or “foreigner” into the United States under contract “to perform labor or service of any kind” applied to the Rev. E. Walpole Warren, called in 1887 from the United Kingdom to the rectorship of Holy Trinity Church in New York City.<sup>77</sup>

The Court’s crucial move in *Holy Trinity* divorced legal effect from the semantic meaning of the text; put differently, the Court used purpose to trump text.<sup>78</sup> While acknowledging that the contract between the church and Warren was indeed “within the letter of this section,” the Court nonetheless held that the contract did not violate the statute because it was “not within its spirit nor within the intention of its makers.”<sup>79</sup> Along the way, the Court observed that the purpose of the statute was to keep “cheap unskilled labor” out of the country<sup>80</sup> and that, as legislature of a “Christian nation,” the Congress can hardly have seriously intended to prevent the entry of a minister.<sup>81</sup> In reaching this conclusion, the Court analyzed “the title of the act, the evil which was intended to be remedied, the circumstances surrounding the appeal to Congress, [and] the reports of the committee of each house.”<sup>82</sup> Indeed, the Court quotes legislative history from both the Senate and House of Representatives in support of its view of the legislative purpose.<sup>83</sup>

The holding in *Holy Trinity* is a high-water mark for the use of purpose. In the face of clear text, the Court departed from the semantic meaning of the words in order to effectuate what it considered to be the Congressional purpose

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77. *Id.* at 457–58.

78. *Id.* at 458–59.

79. *Id.*

80. *Id.* at 465.

81. *Id.* at 471. The Court noted that the statute contained specific exceptions for “professional actors, artists, lecturers, singers, and domestic servants,” but was not troubled by the lack of a textual exception for ministers. *Id.* at 458–59. It is tempting to deconstruct the Court’s assumptions about “unskilled laborers” and the character of the United States as a “Christian nation” in 1892, *id.* at 471, but those temptations do not further the ends of this article and are best addressed separately.

82. *Id.* at 465.

83. *Id.* at 464–65.

of the statute.<sup>84</sup> There has been much commentary about this decision,<sup>85</sup> but there is little doubt that this approach has profoundly influenced courts in the United States, in particular after the New Deal.<sup>86</sup> In *United States v. American Trucking Associations Inc.*, the Court observed that when plain meaning produced an “unreasonable” result “plainly at variance with the policy of the legislation as a whole,” the Court would “follow[] that purpose, rather than the literal words.”<sup>87</sup> The scope of purpose, and consequently the power of the Court, is quite broad: on this view, the Court will disregard text not only when the result is absurd (a modest claim even embraced to some extent by milder schools of textualism), but the Court will cast text aside when it is merely unreasonable.<sup>88</sup>

Modern purposivists rarely go so far. As discussed further below, modern purposivism is perhaps best described as “textually constrained.”<sup>89</sup> In many ways, this is the result of the New Textualism.<sup>90</sup> It is not uncommon to read cases from the Supreme Court, lower federal courts, and state courts from judges of all stripes that pronounce: where the language of the statute is clear, that is the end of the matter.<sup>91</sup>

As to the question of legislative history, modern textualists are also cautious. In her confirmation hearings, Justice Ruth Bader Ginsburg described her own attitude when consulting legislative history as one of “hopeful

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84. In more complete historical accounts, academics have differentiated between intentionalism and purposivism. See JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION* 19–20 (2010) (differentiating “intentionalism” as the attempt to focus on the legislative intent of a specific provision from “purposivism” as taking account of general statutory purposes); HANKS, HERZ, & NEMERSON, *supra* note 74, at 264 (using intent to refer to “what the legislature meant, the specific understanding it had in mind” and purpose to refer to “what it is the legislature ultimately sought to accomplish”). Because the current sketch is intended only to set the stage for a discussion of modern approaches to statutes, this distinction does not figure prominently in the discussion above.

85. See, e.g., Scalia, *supra* note 47, at 18–23; Manning, *supra* note 4, at 122.

86. Manning, *supra* note 4, at 122 (purposivism “reached its apogee after the New Deal”).

87. 310 U.S. 534, 543 (1940) (quoting *Ozawa v. United States*, 260 U.S. 178, 194 (1922)).

88. See Manning, *supra* note 4, at 129–30.

89. *Id.* at 118; see *infra* notes 109–12 and accompanying text.

90. See Manning, *supra* note 4, at 146–47.

91. See Manning, *supra* note 4, at 125–30 n.66–86 (citing example cases from the Supreme Court); see also KATZMANN, *supra* note 1, at 29 (“When statutes are unambiguous, . . . the inquiry for a court generally ends with an examination of the words of the statute.”); Gluck, *supra* note 18, at 1819.

skepticism.”<sup>92</sup> More recently, Chief Judge Robert Katzmann of the Second Circuit has penned a brief but influential book entitled *Judging Statutes*, which argues in favor of courts consulting “authoritative” and “reliabl[e]” legislative history.<sup>93</sup> Katzmann argues for treating different forms of legislative history differently.<sup>94</sup> At the top of the paradigm are committee reports, which “have long been important means of informing the whole chamber about proposed legislation” and are “often the primary means by which staffs brief their principals before voting on a bill.”<sup>95</sup> The views of Justice Ginsburg and Chief Judge Katzmann demonstrate a sound basis for careful, educated use of legislative history in purposive statutory interpretation.<sup>96</sup>

The jurisprudential view of purposivists sways between the idea that courts must be faithful agents of Congress when they interpret statutes and the idea that courts partner with Congress to effect the intended statutory purpose.<sup>97</sup> Judge Katzmann’s book reflects this tension.<sup>98</sup> He believes that “the role of the courts is to interpret the law in a way that is faithful to its meaning . . . not to

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92. *Nomination of Ruth Bader Ginsburg, To Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 224 (1993).

93. KATZMANN, *supra* note 1, at 29, 31. For a thoughtful and sympathetic review, see John F. Manning, *Why Does Congress Vote on Some Texts But Not Others?*, 51 TULSA L. REV. 559, 559 (2016) (calling *Judging Statutes* a “great book”).

94. KATZMANN, *supra* note 1, at 29.

95. *Id.* at 19. Katzmann recognizes that careful and modest use of legislative history requires courts to know more about the workings of Congress so they can better differentiate various types of Congressional work-product. *Id.* at 22. In support of this view, Judge Katzmann points to an influential empirical study by Abbe Gluck and Lisa Schultz Bressman that finds that “legislative history was emphatically viewed by almost all of our respondents—Republicans and Democrats, majority and minority, alike—as the *most important* drafting and interpretive tool apart from text.” *Id.* at 37 (citing Gluck & Bressman, *supra* note 57, at 965).

The work of Professor Victoria Nourse broadens and deepens Judge Katzmann’s observations, offering “five rule-based decision theory Principles, akin to canons, for judges and lawyers to make readings of legislative history more objective.” Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 76–77, 90–134 (Nourse’s rules are the following: (1) know Congress’s rules; (2) focus on the most recent legislative decision first; (3) proximity to text and specificity to the interpretive issue are central to the most reliable history; (4) never cite losers’ history as an authoritative source of textual meaning; and (5) congress does not play by judicial rules).

96. The principal objection to Judge Katzmann’s book and to work advocating use of legislative history generally is that Congress does not vote on committee reports, even when it plainly could. *See* Manning, *supra* note 93, at 561–62.

97. HANKS, HERZ, & NEMERSON, *supra* note 74, at 253–54.

98. KATZMANN, *supra* note 1, at 29–31.



substitute its judgment or to alter the terms of the statute.”<sup>99</sup> However, he also embraces use of purpose so that “Congress will perceive the courts as productive partners . . .”<sup>100</sup>

Purposive interpreters are fundamentally optimistic about their own ability to figure out what Congress was trying to accomplish.<sup>101</sup> This optimism grows out of the Legal Process school of Hart and Sacks, whose defining advice is that courts should assume in difficult cases that “the legislature was made up of reasonable persons pursuing reasonable purposes reasonably,”<sup>102</sup> Hart and Sacks have been accused of inconsistency because they appear to recognize the important of text yet also hold that text should sometimes yield to purpose.<sup>103</sup> Their view has also been critiqued as being based on undue optimism about the courts’ ability to discern Congress’ purposes.<sup>104</sup> However, their central contribution is that legislature and court partner to effect the Congressional purpose, and this view supports judges in a robust inquiry into the purpose of legislation.<sup>105</sup>

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99. *Id.* at 29.

100. *Id.* at 10; *see also* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 434–35 (1989) (“Legal process approaches stand poised somewhere between agency theories of the judicial role and understandings of an altogether different sort.”).

101. KATZMANN, *supra* note 1, at 33–34.

102. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1378 (William N. Eskridge, Jr. & Philip C. Frickey eds., 1994).

103. John F. Manning, *Justice Ginsburg and the New Legal Process*, 127 HARV. L. REV. 455, 455–56 (2013) (“[T]he Legal Process materials developed by Harvard Professors Henry Hart and Albert Sacks presented two conflicting techniques for effectuating statutory purpose.”). The first technique is the familiar textual constraint: “[J]udges must not ‘give the words . . . a meaning they will not bear.’” *Id.* at 455. The second is the apparent assumption that text can at times yield to purpose. *Id.* at 455–56.

104. Sunstein, *supra* note 100, at 435.

105. Subsequent theorists have carried the partnership idea much further. Addressing the difficult problem of how to apply older statutes in newer circumstances, Professor William Eskridge posits that statutory interpretation is and should be “dynamic”; that is, “as the distance between enactment and interpretation increases, a pure originalist inquiry becomes impossible and/or irrelevant.” WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 5–6 (1994). Eskridge argues that this thesis is both descriptive (i.e. it says what courts do) and normative (i.e. it describes what courts should do). *Id.* at 6. This theory explores how deeply purposive readings of statutory text support legislative intent.

### C. *Setting the Stage for King v. Burwell*

The courts for a long time have dwelt in a place of interpretive pluralism. Less charitably, one could accuse the courts of inconsistency, or even disarray, much as Hart and Sacks did fifty years ago, declaring the “hard truth of the matter” to be “that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation.”<sup>106</sup> These concerns continue to occupy scholars today, with calls for consistent interpretive rules to be followed by courts<sup>107</sup> or even imposed by Congress.<sup>108</sup>

Looking to the practical world of the courts, some have argued that a merger of sorts between purposivism and textualism seems to have taken place.<sup>109</sup> Professor John Molot of Georgetown considers the differences between textualist and purposivist scholars to be “narrow.”<sup>110</sup> Professor John Manning of Harvard, in evaluating members of the Supreme Court in 2011 says that most are “textually constrained purposivists” or “purpose-sensitive textualists,” and

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106. HART & SACKS, *supra* note 102, at 1169.

107. *See* Gluck, *supra* note 18, at 1767–68, 1848–55 (defending methodological consistency in statutory interpretation).

108. *See generally* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002) (arguing that Congress should exercise its constitutional power to dictate the tools for courts’ interpretation of federal statutes). Of course, not everyone views this situation as particularly problematic. Professor Eskridge, like the courts he studies, pushes away from “grand theory” which privileges one or another “foundational” theory, positing a theory of “practical reasoning” which has both descriptive and normative power for understanding the process of interpretation as it is actually undertaken by courts. Eskridge & Frickey, *supra* note 45, at 321–23. More recent academic writing has suggested a hierarchy among the foundational interpretive foci and the evidence that supports them. *See* Gluck, *supra* note 18, at 1758 (arguing for “modified textualism” which looks to text, legislative history, and interpretive canons in that order).

109. Molot, *supra* note 5, at 35–36 (“[T]hat which unites textualists and purposivists seems to outweigh that which divides them.”); *see also* Manning, *supra* note 4, at 146–47.

110. Molot, *supra* note 5, at 4. Molot identifies three potential differences; he claims that one is real but exaggerated in importance and the other two illusory. *Id.* at 36–43. The real-but-exaggerated difference concerns textualists’ rejection and purposivists’ embrace of legislative history. *Id.* at 38–39; *see infra* notes 67–68, 92–96, and accompanying text. The illusory distinctions concern how likely an interpreter is to find an ambiguity that invites consideration of purpose; this distinction is illusory, claims Molot, because the tendency to see language as clear of ambiguity is not correlated to interpretive philosophy. *Id.* at 39–42. Finally, a third potential difference concerns when it is appropriate to look to context: “Textualists accuse purposivists of continuing to look to context *after* they have arrived at a clear textual meaning.” *Id.* at 36–37 (emphasis in original). However, this too is illusory: “[T]o the extent that both schools use the same interpretive tools to reach the same interpretive result, it really does not matter if one purports to use context to decide on a textual meaning while the other admits that it is adjusting the text’s meaning to reconcile it with context.” *Id.* at 37–38.

suggests that these two positions “may be the same thing.”<sup>111</sup> Most centrally, if both a textualist and purposivist inquiry are limited by the reasonable semantic meaning of the text, again in the words of Molot, “[W]e are all textualists in an important sense.”<sup>112</sup>

Yet, Molot is correct that a “narrow” distinction remains. After starting with text and context, textualists will diverge into canons of construction and purposivists will likely consult legislative history.<sup>113</sup> The textualist will not depart from semantic meaning (informed by context and sometimes purpose) even in the face of very strong evidence of contrary legislative intent.<sup>114</sup> A purposivist will recognize the importance of text but read that text in light of its apparent purposes and will sometimes reach results that are in tension with the language of the statute.<sup>115</sup>

In light of the current state of affairs, *King v. Burwell* has much to offer. In many ways, the case reflects the state of the judiciary today: the Court uses many tools to find meaning: text, context and scheme, and purpose.<sup>116</sup> In reaching its result, the Court avoids legislative history.<sup>117</sup> The result itself is unusual: the Court makes sense of the statutory scheme, to the point of avoiding the implications of plain text.<sup>118</sup> While purposive in its basic orientation, the case reflects the relatively narrow distance between textualists and purposivists.<sup>119</sup>

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111. Manning, *supra* note 4, at 146–47 (identifying Justices Breyer and Stevens as embracing *Holy Trinity*-style purposivism and Justices Scalia and Thomas as embracing New Textualism); *see also id.* at 113 (observing in 2010 that the Supreme Court “has not cited *Holy Trinity* positively for more than two decades”).

112. Molot, *supra* note 5, at 43.

113. Sunstein, *supra* note 100, at 429. In view of the powerful critique of textualists, reliance on legislative history has declined in recent decades. *See generally* David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653, 1671–72 n.73–79 (2010) (empirical study; includes some information about lower federal courts at notes 73–79 and accompanying text).

114. The textualist will only depart from a textual interpretation in the very rare case of drafting error or more limited conceptions of absurdity. *See* SCALIA & GARNER, *supra* note 1, at 234–39 (discussing drafting error and the absurdity doctrine and noting limitations on the absurdity doctrine).

115. *See, e.g.*, *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892).

116. *King v. Burwell*, 135 S. Ct. 2480, 2489–96 (2015).

117. *See id.*

118. *Id.* at 2490.

119. *See id.* at 2495.

III. *KING V. BURWELL* AND THE USE OF TEXT AND PURPOSE

A close reading of the opinion and the dissent in *King v. Burwell* bears out the observation that all interpreters on the Supreme Court now give great weight to text.<sup>120</sup> Nonetheless, the seemingly plain meaning of the statutory phrase “established by the State” does not control the outcome of the case.<sup>121</sup> In *King*, the Court either interprets this phrase expansively or indeed pushes past its reasonable semantic meaning.<sup>122</sup> If the holding pushes past the reasonable semantic meaning of the text, then the case finds an important limit on the identified merger between textualism and purposivism because statutory purpose appears to trump the plain meaning of the text.<sup>123</sup> Even if the case merely reads “established by the State” expansively, it is still important for its use of purpose and scheme to read a statutory provision in the broadest possible terms.

The *King* majority follows a unique interpretive path in the case. The Court views the case as exceptional; the majority explicitly finds it so when deciding the *Chevron* issue.<sup>124</sup> The majority then proceeds to engage deeply with the Congressional purposes for enacting the statute; indeed, the Court even begins, in a cursory and not entirely accurate way, to engage with the legislative process of the Affordable Care Act.<sup>125</sup> Finally, and perhaps most controversially, the case engages in prudential reasoning, looking to likely real-world implications of various constructions of the statute.<sup>126</sup>

This Section begins with a brief description of the legal issues in *King*, follows with some analysis of the textual arguments, and concludes with a description of the purposive arguments that lead the majority to hold as it does.

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120. *Id.* at 2488–92, 2502–03 (Scalia, J., dissenting).

121. 26 U.S.C. § 36B(b)(2)(A) (2012); *King*, 135 S. Ct. at 2495.

122. 135 S. Ct. at 2490. The Court suggests that an expansive reading is appropriate when it observes that “the Act may not always use the phrase ‘established by the State’ in its most natural sense.” *Id.* The dissent is considerably more direct: if the Court’s reading of “established by the State” is correct, “words no longer have meaning.” *Id.* at 2497.

123. Molot, *supra* note 5, at 35–43; *supra* notes 109–12 and accompanying text.

124. *King*, 135 S. Ct. at 2488–89.

125. *Id.* at 2490–92.

126. *Id.* at 2492–94.

A. *The Statutory Challenge to the Affordable Care Act*

There is little doubt that the Patient Protection and Affordable Care Act<sup>127</sup> was passed and has been implemented in an atmosphere of partisan political division and rancor.<sup>128</sup> After an epic legal battle over the constitutionality of statute's mandate that individuals purchase health insurance and the statute's conditional expansion of Medicaid funding,<sup>129</sup> the Supreme Court two terms later took up an enormously consequential question of statutory interpretation.<sup>130</sup>

The terms of the statute appear plain: states are permitted but not required to establish Exchanges, which are markets designed to sell health insurance to individuals.<sup>131</sup> Should a state refuse to establish an Exchange, the Secretary of Health and Human Services is directed to step in to "establish and operate such Exchange" within that state.<sup>132</sup> These two forms of Exchanges have colloquially become known as the State Exchanges and the Federal Exchange.<sup>133</sup>

For individuals with incomes between 100 and 400 percent of the federal poverty level, subsidies are available in the form of federal income tax credits; these subsidies offset the cost of health insurance purchased on an Exchange.<sup>134</sup> And now, the troublesome provision: the tax credit is available to taxpayers whose insurance plan was purchased on "an Exchange *established by the State*."<sup>135</sup> Thus, the Court must decide whether tax credits are available to taxpayers who live in states on the Federal Exchange, or whether they are only available to taxpayers in states that have chosen to establish State Exchanges?

The consequences of eliminating subsidies on the Federal Exchange would have been enormous. Without the tax credit subsidy, individuals would have been required to bear the full cost of premiums for insurance plans purchased

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127. 42 U.S.C. §§ 18001–121 (2010).

128. Tessa Berenson, *Reminder: The House Voted to Repeal Obamacare More Than 50 Times*, TIME (Mar. 24, 2017), <https://time.com/4712725/ahca-house-repeal-votes-obamacare/> [<https://perma.cc/L7VA-62TR>].

129. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

130. *King*, 135 S. Ct. at 2480.

131. 42 U.S.C. § 18031(b)(1) (2010).

132. 42 U.S.C. § 18041(c)(1) (2010).

133. *King*, 135 S. Ct. at 2487.

134. 26 U.S.C. § 36B(a), (b)(3)(A)(i) (2012).

135. *Id.* § 36B(b)(2) (emphasis added).

through the Federal Exchange.<sup>136</sup> Should an individual's cost for premiums on the least expensive plan exceed 8 percent of household income, that individual would be no longer mandated to purchase insurance.<sup>137</sup> As the Court explained, without a mandate to purchase insurance, healthier people would be less likely to do so, resulting in increasing premiums.<sup>138</sup> These premium increases would eventually render insurance unaffordable for all and drive insurers out of the marketplace.<sup>139</sup> The Court referred to this phenomenon as an "economic 'death spiral'" and pointed to the experience of many states in the 1990s as evidence of these dire consequences.<sup>140</sup>

As is well known by this point, the Court found that subsidies are available on both the State Exchanges and the Federal Exchange.<sup>141</sup> To reach this result, the Court took three legal steps.<sup>142</sup> First, it determined that it would not defer to IRS regulations, even though those regulations reached the same result as the Court.<sup>143</sup> Declaring this an "extraordinary case[]" of "deep 'economic and political significance,'" the Court declared, "This is not a case for the IRS."<sup>144</sup> Second, it determined that the critical language "an Exchange established by

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136. See *King*, 135 S. Ct. at 2493.

137. 26 U.S.C. § 5000A(e)(1)(A) (2012).

138. *King*, 135 S. Ct. at 2484.

139. *Id.*

140. *Id.* at 2482.

141. *Id.* at 2496.

142. *Id.* at 2488–96.

143. *Id.* at 2488–89.

144. *Id.* The circuit split that brought the case to the Supreme Court involved a difference over the deference due the IRS interpretation. The Fourth Circuit viewed the statutory language as "ambiguous and subject to at least two different interpretations" and deferred to the IRS interpretation. *King v. Burwell*, 759 F.3d 358, 372, 376 (4th Cir. 2014) (deferring to the IRS under *Chevron* U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)). On the same day the Fourth Circuit opinion issued, the D.C. Circuit vacated the IRS rule, holding that the language of the statute unambiguously forbids tax credit subsidies on the Federal Exchange. *Halbig v. Burwell*, 758 F.3d 390, 394 (D.C. Cir. 2014) (finding that *Chevron* deference did not apply because the language unambiguously forbid the agency's reading).

Notably, Justice Scalia, writing for himself, Justice Thomas, and Justice Alito in dissent, did not cite *Chevron*, although his view of the statute accords with the *Chevron* framework. Justice Scalia finds no ambiguity in the statute: the meaning of "established by the State" is to him "obvious—so obvious there would hardly be a need for the Supreme Court to hear a case about it." *King*, 135 S. Ct. at 2496 (Scalia, J., dissenting). The clear import of this reasoning is that there would be no need for agency deference: at so-called *Chevron* step one, the court decides whether a statute is ambiguous or not and enforces the plain meaning of the language if it is not ambiguous. *Id.* at 2488 (citing *Chevron*, 467 U.S. at 842–43).

the State under [42 U.S.C. § 18031]” is ambiguous.<sup>145</sup> Finally, considering the “context and structure” of the Act, the Court concluded that the provision in question “allows tax credits for insurance purchased on any Exchange created under the Act.”<sup>146</sup>

### B. *The Court’s Reasoning: Text and Purpose*

Most of the Court’s opinion in *King v. Burwell* turns on two modes of analysis: a deep look at the text, context, and structure of the statute and what one might call prudential or pragmatic analysis of the consequences of various interpretations of the statute.<sup>147</sup> The text-context-structure analysis is a very familiar form of analysis rooted in text, although executed in this case in a way that seems to subordinate text to purpose and scheme.<sup>148</sup> The prudential or pragmatic analysis has its eye on the consequences of particular interpretations.<sup>149</sup>

#### 1. Text-Context-Structure

##### a. *Using Structure to Set the Stage*

The stage is set for the Court’s textualist analysis through a five-page discussion of the ACA’s scheme and Congress’ purposes in enacting the ACA.<sup>150</sup> This structural understanding of the statute is clear from the first sentence, which recognizes the ACA’s “series of interlocking reforms designed to expand coverage in the individual health insurance market.”<sup>151</sup> The Court proceeds to describe these three interlocking reforms. The first reform consists of two parts: a “guaranteed issue” requirement which “bar[s] insurers from denying coverage to any person because of his [or her] health” and a “community rating” requirement which “bar[s] insurers from charging a person higher premiums for the same reason.”<sup>152</sup> The second reform consists of an

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145. *King*, 135 S. Ct. at 2491.

146. *Id.* at 2495–96.

147. *Id.* at 2488–96.

148. *See id.* at 2489.

149. In the words of Professor William Eskridge, “A pragmatic interpretation is one that most intelligently and creatively ‘fits’ into the complex web of social and legal practices.” ESKRIDGE, *supra* note 105, at 201.

150. *King*, 135 S. Ct. at 2485–89.

151. *Id.* at 2485.

152. *Id.*

individual mandate, which “require[s] individuals to buy insurance or pay a penalty.”<sup>153</sup> Finally, the third reform provides “tax credits to certain individuals to ensure that they could afford the insurance they were required to buy.”<sup>154</sup>

Unusually, the Court cites the Congressional findings that are part of the ACA for the proposition that “the guaranteed issue and community rating requirements would not work without the coverage requirement.”<sup>155</sup> In the statute, Congress finds that the individual mandate “together with the other provisions of this Act” is necessary to broaden participation in the health insurance pools and thereby guarantee a functioning health insurance market.<sup>156</sup> The Court spells out one of the more crucial “other provisions,” by declaring without further citation that the individual mandate “would not work without . . . tax credits,” and finds further evidence for its view that the three reforms are inextricably intertwined in the fact that the statute provides that the three reforms should take effect on the same day.<sup>157</sup>

In a section of the opinion that has had important influences on administrative law,<sup>158</sup> the Court also casts aside the notion that it owes *Chevron* deference to the Internal Revenue Service, which interpreted the statute to provide tax credits to individuals who obtained insurance on the Federal Exchange.<sup>159</sup> In a scant two paragraphs, the Court concludes “[t]his is not a case for the IRS,” finding that the case is “extraordinary” and the matter should therefore be decided by the Court because the question is one of “deep

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153. *Id.* at 2486.

154. *Id.* The credits at issue are refundable tax credits, and they are available to individuals with household incomes between 100 and 400 percent of the federal poverty line. *Id.* at 2487.

155. *Id.* at 2487 (citing 42 U.S.C. § 18091(2)(I) (2010)).

156. 42 U.S.C. § 18091(2)(I) (2010).

157. *King*, 135 S. Ct. at 2487.

158. See David Gamage, *Forward—King v. Burwell Symposium: Comments on the Commentaries (And on Some Elephants in the Room)*, 43 PEPP. L. REV. 1, 1–3 (2015) and the accompanying articles in the Symposium Issue, particularly Leandra Lederman & Joseph C. Dugan, *King v. Burwell: What Does It Portend for Chevron’s Domain?*, 43 PEPP. L. REV. 72 (2015).

159. *King*, 135 S. Ct. at 2489. The IRS interpretation of the statute can be found at 77 Fed. Reg. 30377, 30378 (May 23, 2012). See also *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). *Chevron* requires agencies to follow clear statutory commands but permits agencies to adopt reasonable constructions of ambiguous statutory language. *Id.* Thus, in evaluating agency action challenged under *Chevron*, a court first asks whether the statutory language is clear. *Id.* at 842. If it is, the court must ensure that the agency follow the statute. *Id.* at 842–43. If the language is ambiguous, *Chevron* requires that the court defer to the agency so long as it has construed the statute in a permissible way. *Id.* at 843.



economic and political significance that is central to [the] statutory scheme.”<sup>160</sup> The exception contemplates that Congress would not have left so important a matter to agency discretion without a clearer indication of its intent to do so.<sup>161</sup>

In addition to the Court’s philosophic decision not to leave this question to agency discretion, there is an important pragmatic dimension to the Court’s *Chevron* holding.<sup>162</sup> If the Court’s opinion treated the case as involving a question whether to defer to the agency, it could have affirmed the regulation and saved the subsidies, affirming the reasoning employed by the Fourth Circuit.<sup>163</sup> However, in the future, the IRS controlled by a Presidential administration hostile to the statute (such as the Trump administration) could then exercise its regulatory authority to reverse course.<sup>164</sup> Because the Court construed the statute *de novo*, its holding is not subject to future reversal by agency regulation.<sup>165</sup> At a basic level, the Court’s decision can be read to support the principle of legislative supremacy by limiting the executive’s ability to undercut the effectiveness of the statute through interpretation. However, in doing so, the Court also increases the judicial role by interpreting the statute with no deference to agency opinions.

Administrative law issues aside, the first five pages of the opinion look primarily to the structure of the Act to understand that plan.<sup>166</sup> Thus, this section of the opinion examines what the statute attempts to accomplish, its interlocking reforms intended to do so, and even the history of efforts to address the problem.<sup>167</sup> These considerations—in absence of any *Chevron* deference

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160. *King*, 135 S. Ct. at 2488–89.

161. *Id.* at 2489.

162. For further commentary, see Gluck, *supra* note 75, at 64–66 (arguing that the Court’s decision signals that the majority claims a larger role in statutory interpretation cases and that the “real divide” across the opinions is “how a Court that unanimously agrees on the priority of text-focused interpretation sees its *own role* in relation to Congress’ written plans”).

163. *King v. Burwell*, 759 F.3d 358, 372–76 (4th Cir. 2014).

164. Prof. Gamage believes that the Court found “deep economic and political significance” at least partly because of the presence of two deeply divided “epistemic communities” with “different worldviews and social networks.” Gamage, *supra* note 158, at 3–5. As Gamage notes, the Court would have been quite aware that if the Treasury Department were to be “controlled by the other epistemic community with its different worldview,” a revision of the IRS regulation could be made in short order; the Court effectively foreclosed this kind of political manipulation of the statute’s meaning based on partisan politics. *Id.* at 5.

165. *King*, 135 S. Ct. at 2488–89.

166. *Id.* at 2485–89.

167. *Id.*

and the associated insulation of the Court's interpretation from future regulatory reversal—provide important context for Court's textual analysis.<sup>168</sup>

b. *Establishing Textual Ambiguity and Interpreting the Statute*

Most of the Court's textualist arguments occur in the portion of the opinion that decides that the phrase “an Exchange established by the State under [42 U.S.C. § 18031]” is ambiguous.<sup>169</sup> This part of the opinion is prefaced by a textualist veneer declaration that “plain” statutory language must be “enforce[d] . . . according to its terms,” quickly followed by caveats that “the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.”<sup>170</sup>

The Court itself recognizes the difficulty in its mission. Before turning to context, it candidly makes two admissions: that it might “seem” that a Federal Exchange cannot be “established by the State,” and that it also might “seem” that a Federal exchange cannot be “established under 42 U.S.C. § 18031.”<sup>171</sup> While the Court does conclude that the provision in question “is properly viewed as ambiguous,” it concludes that section of the opinion with an odd circumlocution, saying only that, after reading the provision in context, “we cannot conclude that the phrase . . . is unambiguous.”<sup>172</sup> This underwhelming conclusion, embedded within a double-negative, nods at the uphill difficulty of the Court's textualist arguments.

Perhaps unsurprisingly, the Court's principal arguments establishing ambiguity do not turn on plain meaning.<sup>173</sup> Instead, the Court makes intertextual arguments, referring to how various provisions of the ACA are

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168. *Id.* at 2488.

169. *Id.* at 2489–92.

170. *Id.* at 2489 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000)).

171. *Id.* at 2490.

172. *Id.* at 2491–92. In his dissent, Justice Scalia has a field day with this part of the opinion. He considers the question to be “obvious—so obvious there would hardly be a need for the Supreme Court to hear a case about it.” *Id.* at 2496 (Scalia, J., dissenting). Even more bluntly, Justice Scalia asks, “Could anyone maintain with a straight face that § 36B is unclear?” *Id.* at 2502 (Scalia, J., dissenting). Justice Brett Kavanaugh commented (before he joined the Supreme Court) that the ambiguity analysis is already “indeterminate,” and noted that holding “established by the State” to be ambiguous may have “broader repercussions,” leading “some judges [to] find fewer statutes ‘clear’ because the statutory language in question is no less ambiguous than the phrase ‘established by the State’ . . . .” Kavanaugh, *supra* note 3, at 2159.

173. *See King*, 135 S. Ct. at 2489–92.

designed to interact.<sup>174</sup> For example, the Court places weight on the language in 42 U.S.C. § 18041(c)(1) that provides that the Secretary of Health and Human Services “shall . . . establish and operate *such Exchange* within the State” if a State elects not to establish its own Exchange.<sup>175</sup> The Court concludes that the word “such” indicates that “State Exchanges and Federal Exchanges are equivalent—they must meet the same requirements, perform the same functions, and serve the same purposes.”<sup>176</sup> Here the Court uses the word “such” as a linguistic hook, even providing the Black’s Law Dictionary definition of the word, to connect the Federal Exchange to the purposes of Exchanges in the first place, ultimately concluding that Federal and State Exchanges “do not . . . differ in any meaningful way.”<sup>177</sup>

The Court turns next to the statutory requirement, contained in § 18031 that Exchanges “shall make available qualified health plans to qualified individuals.”<sup>178</sup> Section 18032 defines a “qualified individual” in part as one who “resides in the State that established the Exchange.”<sup>179</sup> The Court rests on the fact that there could be *no* qualified individuals on the Federal Exchange if this language were taken at face value, and the Federal Exchange would be unable to function as an Exchange at all.<sup>180</sup>

Finally, the Court reads the provision authorizing the Federal Exchange, § 18041, which contains the “such Exchange” language, as directing the Secretary of HHS to establish and operate a § 18031 exchange in states that elect not to set up their own Exchanges.<sup>181</sup> In further support of this point, the Court notes that “[a]ll of the requirements that an Exchange must meet are in Section 18031, so it is sensible to regard all Exchanges as established under that provision [i.e. § 18031],” and then points to a number of specific requirements that are dependent on § 18031.<sup>182</sup> The ultimate conclusion the Court reaches on text is based on these contextual/intertextual arguments.<sup>183</sup> Interestingly,

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174. *Id.* at 2490.

175. *Id.* at 2489 (emphasis in original).

176. *Id.*

177. *Id.* at 2489–90.

178. *Id.* at 2490 (citing 42 U.S.C. § 18031(d)(2)(A)).

179. *Id.* (citing 42 U.S.C. § 18032(f)(1)(A)).

180. *Id.*

181. *Id.* at 2490–91.

182. *Id.* at 2491.

183. *See id.* at 2492 (first citing *Lamie v. U.S. Tr.*, 540 U.S. 526, 536 (2004); and then citing *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 385 (2013)).

one of the few canons cited in the Court's opinions does not control the day.<sup>184</sup> Responding to the dissent and the petitioners' argument that the phrase "established by the State" are surplusage on the Court's reading of the statute,<sup>185</sup> the Court declares that the canon against surplusage is "not absolute."<sup>186</sup>

## 2. Purposive, Pragmatic, and Prudential Reasoning

The first five pages of the Court's opinion portend something beyond an examination of the statutory scheme.<sup>187</sup> The Court recounts a detailed history of attempts to reform the United States health insurance market.<sup>188</sup> This history provides a deep and granular look at the backdrop against which Congress legislated, suggesting a far deeper dive into Congresses' purposes than the single Senate committee hearing cited in this portion of the opinion might suggest.<sup>189</sup>

First, the Court's definition of the subject matter of the legislation is precise and accurate: the reforms at issue in the case are not of the entire healthcare or even the entire health insurance system: instead, they are directed at the most problematic part—the individual insurance market.<sup>190</sup> Second, section I.A of the opinion details what it terms the "long history of failed health insurance reform," citing the experience of failures in Washington and New York—which enacted guaranteed issue and community rating requirements but no individual

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184. *Id.*

185. *Id.* The dissent charges that the Court gives the phrase "established by the State" as having no meaning at all. *Id.* at 2498 (Scalia, J., dissenting).

186. *Id.* While the dissent agrees that "the rule against treating a [statutory] term as a redundancy is far from categorical," it cites no less than *Marbury v. Madison* in support of the proposition that "the rule against treating [a statutory term] as a nullity is as close to absolute as interpretive principles get." *Id.* at 2498 (Scalia, J., dissenting) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

187. *Id.* at 2485–89.

188. *Id.* at 2485–86.

189. *Id.* at 2486 (citing *Examining Individual State Experiences with Health Care Reform Coverage Initiatives in the Context of National Reform: Hearing before the S. Comm. on Health, Educ., Labor, and Pensions*, 111th Cong. 9 (2009)). The Court cites this hearing for the fact that the combination of the three interlocking reforms reduced the uninsured rate in Massachusetts to 2.6 percent. *Id.* This is a seemingly minor use of legislative history to support a background detail, but it is worth noting that the point about interlocking reforms in Massachusetts is central to the Court's understanding of the ACA. (Interestingly, the Court cites page 9 of the transcript, but the document makes reference to the uninsured rate in Massachusetts on page 8.)

190. This is clear from the first sentence of the opinion. *See id.* at 2492.

mandates or subsidies—and the more successful program in Massachusetts—which enacted the same three basic reforms as the ACA.<sup>191</sup>

Given that this is the starting point for the Court’s analysis, the ending should come as no surprise. The final paragraphs of the opinion begin, perhaps somewhat defensively, by reminding the reader that “[i]n a democracy, the power to make the law rests with those chosen by the people,” and noting that the judicial role is “more confined.”<sup>192</sup> While claiming to “respect the role of the Legislature,” the Court intones that “[a] fair reading of legislation demands a fair understanding of the legislative plan.”<sup>193</sup>

However, as the very next sentence reveals, the words “legislative plan” should not be read only to mean that the Court considers the structure of the act when interpreting its provisions.<sup>194</sup> Indeed, the next paragraph, worth quoting in full, says:

Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter. Section 36B can fairly be read consistent with what we see as Congress’s plan, and that is the reading we adopt.<sup>195</sup>

The Court here candidly admits that its decision is rooted in the purpose of the statute: “[T]o improve health insurance markets, not destroy them” and that its interpretation “if at all possible” must be consistent with this purpose.<sup>196</sup>

And yet, an important issue remains. Does the holding of *King v. Burwell* discard the text of the statute in reaching its admittedly purposivist result? Chief Justice Roberts’ opinion argues that the holding does no such thing, finding ambiguity in the text and adopting a reading that the Court labors to present as plausible.<sup>197</sup> The dissent views the Court’s reading as ridiculous and

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191. *Id.* at 2485–86.

192. *Id.* at 2496.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *See id.* at 2489, 2491.

plainly contrary to the statutory text.<sup>198</sup> To the dissenters, the Court has wholesale discarded text in favor of purpose, à la *Church of the Holy Trinity*.<sup>199</sup>

The dissent criticizes two aspects of the majority's reliance on purpose.<sup>200</sup> First, the dissent says that the purpose identified by the Court does not come from the text of the statute, which clearly makes tax credits unavailable on the federal exchanges.<sup>201</sup> Second, the dissent points out that involving states in the administration of the statutory health insurance regime is also an important part of the purpose of the Affordable Care Act.<sup>202</sup> If premium support is not available on the federal exchange, states have a greater incentive to set up their own state exchanges<sup>203</sup>—an incentive which is no longer present once the Court decides to make premium support available on the federal exchange.<sup>204</sup>

The consequences of these disputes are important. Whether one supports the outcome or not, if one views this case as allowing purpose to trump text, then the Court has indeed returned to old-style *Church of the Holy Trinity* purposivism. If one instead views the case as one where the Court derived purpose from a close reading of text and then used that purpose to animate a textually plausible reading of an ambiguous provision, then this case falls into some mild form of textually constrained purposivism, to return to John Manning's terms.<sup>205</sup> Indeed, the opinion labors to put the case into the latter

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198. *Id.* at 2502 (Scalia, J., dissenting) (“Statutory design and purpose matter only to the extent they help clarify an otherwise ambiguous provision. Could anyone maintain with a straight face that § 36B is unclear?”).

199. *Id.* Needless to say, the dissent finds this approach thoroughly illegitimate. Justice Kavanaugh notes that the court seems to employ a type of “mistake canon” that does not allow recourse to legislative history but that does permit courts to “adopt what they conclude Congress *meant* rather than what Congress *said*.” Kavanaugh, *supra* note 3, at 2159 (reviewing KATZMANN, *supra* note 1). Kavanaugh considers this type of mistake correction a “narrower form of *Holy Trinity*.” *Id.* In response, Judge Katzmman argued that in *King*, the Court “showed that it was willing to depart from what would otherwise be the most natural reading of a phrase when context and the structure of a statute require it.” Robert Katzmman, *Response to Judge Kavanaugh’s Review of Judging Statutes*, 129 HARV. L. REV. F. 388, 394 (2016). Katzmman seeks to avoid the *Holy Trinity* comparison entirely, declaring that “the interpretive exercise can be complicated, and is not usefully reduced to characterizations of the *Holy Trinity* rubric as simplistically substituting a law’s spirit for clear text.” *Id.*

200. *King*, 135 S. Ct. at 2502 (Scalia, J., dissenting).

201. *Id.* at 2502–05 (Scalia, J., dissenting).

202. *Id.* at 2504 (Scalia, J., dissenting).

203. *Id.*

204. *See id.*

205. *See* discussion *supra* Section I.B.

category, or even into the category of purpose-sensitive textualism.<sup>206</sup> However, these efforts are not compelling.

Instead, it is plain from reading the opinion that the Court ventured far beyond statutory text in reaching its conclusions.<sup>207</sup> Prudential reasoning—that is, evaluating a decision in view of its likely consequences—is usually only explicitly invoked in the context of constitutional interpretation.<sup>208</sup> Indeed, prudential reasoning in statutory interpretation cases risks collapsing judicial interpretation into the legislative function: deciding the best outcome on policy grounds, and setting a legal rule that encompasses that outcome, a result generally thought undemocratic and undesirable when undertaken by a court.<sup>209</sup>

Yet, *King v. Burwell* seems a prime case for prudential reasoning. Two major studies, one from the Urban Institute and the other from the Rand Corporation had each concluded that eliminating subsidies on the federal exchanges would result in approximately eight million citizens becoming uninsured and premiums increasing by more than 35% in the nongroup market.<sup>210</sup> This research was before the Supreme Court, most clearly described

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206. See *King*, 135 S. Ct. at 2492.

207. See *id.* at 2493–96.

208. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992) (noting that decisions to overrule prior holdings are “customarily informed by a series of prudential and pragmatic considerations . . .”); Neil S. Siegel, *Prudentialism in McDonald v. City of Chicago*, 6 DUKE J. CONST. L. & PUB. POL’Y 16, 21–25 (2011) (identifying forms of prudential reasoning by Justices Stevens, Alito, and Scalia); see also PHILIP BOBBIT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 61 (1982); PHILIP BOBBIT, *CONSTITUTIONAL INTERPRETATION* 16–17 (1991).

209. This collapse would destroy any notion that the legislature is or ought to be supreme and that the judge ought to be a “faithful agent” of the legislature, a widely held assumption across the ideological spectrum. KATZMANN, *supra* note 1, at 29 (“I start with the premise that the role of the courts is to interpret the law in a way that is faithful to its meaning. The role of the court is not to substitute its judgment or to alter the terms of the statute.”); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J. L. & PUB. POL’Y 61, 63 (1994) (“We [judges] are supposed to be faithful agents, not independent principals.”). But see Richard A. Posner, *Comment on Professor Gluck’s “Imperfect Statutes, Imperfect Courts”*, 129 HARV. L. REV. F. 11, 11–13 (2015) (referring to “judicial deference to Congress” as a “pretense,” asserting that “most of the time statutory interpretation is better described as creation or completion than as interpretation and that politics and consequences are the major drivers of the outcome,” and stating bluntly that “judges prefer for reasons of self-protection to be thought of as agents rather than as principals”).

210. LINDA J. BLUMBERG, MATTHEW BUETTGENS, & JOHN HOLAHAN, *THE IMPLICATIONS OF A SUPREME COURT FINDING FOR THE PLAINTIFF IN KING V. BURWELL: 8.2 MILLION MORE UNINSURED AND 35% HIGHER PREMIUMS* 1 (2015), <https://www.urban.org/sites/default/files/publication/49246/2000062-The-Implications-King-vs-Burwell.pdf> [<https://perma.cc/5PJM-CN7K>] (finding that 8.2 million people would become uninsured

in amicus briefs.<sup>211</sup> The merits briefs acknowledged the consequences of eliminating subsidies on the federal exchange as well, although it argued that these disastrous consequences showed that the phrase “established by the State” should not be read to defeat the purposes of the entire statute.<sup>212</sup>

Moreover, just five days before oral argument, Secretary of Health and Human Services Sylvia Matthews Burwell sent a letter to key Congressional leaders that spelled out that “a decision against the Administration in the *King* case would cause massive damage” in the form of millions of people losing insurance, rising premiums for those who remain insured in the individual insurance market, and greater reliance on emergency room care by uninsured individuals, driving up health insurance costs “for everyone.”<sup>213</sup> Further, repeating the phrase “massive damage” for the second time in two paragraphs, Secretary Burwell stated that she knew of “no administrative actions that could . . . undo the massive damage to our health care system that would be

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in federal exchange states under the study’s assumptions and that average premiums in the nongroup insurance market would increase by an estimated 35 percent); Evan Saltzman & Christine Eibner, *The Effect of Eliminating the Affordable Care Act’s Tax Credits in Federally Facilitated Marketplaces*, RAND CORP. (2015), <https://www.rand.org/pubs/periodicals/health-quarterly/issues/v5/n1/07.html> [<https://perma.cc/X9CA-ZNLD>]; EVAN SALTZMAN & CHRISTINE EIBNER, THE EFFECT OF ELIMINATING THE AFFORDABLE CARE ACT’S TAX CREDITS IN FEDERALLY FACILITATED MARKETPLACES 2 (2015) [https://www.rand.org/content/dam/rand/pubs/research\\_reports/RR900/RR980/RAND\\_RR980.pdf](https://www.rand.org/content/dam/rand/pubs/research_reports/RR900/RR980/RAND_RR980.pdf) [<https://perma.cc/N47F-4CQU>] (finding that 8.0 million people become uninsured in federal exchange states under the study’s assumptions and that unsubsidized premiums in the ACA-compliant individual market would increase 47%).

211. See Brief for Bipartisan Economic Scholars as Amici Curiae Supporting Respondents at 16–24, *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14-114) for a robust summary of the Urban Institute and Rand studies mentioned below in note 210. Many other amicus briefs used this data as the basis for examining the consequences within subsections of the US population. See, e.g., Brief of Catholic Health Association of the United States and Catholic Charities USA as Amici Curiae Supporting Respondents, *King*, 135 S. Ct. 2480 (No. 14-114); Brief of American Cancer Society et al. as Amici Curiae Supporting Respondents, *King*, 135 S. Ct. 2480 (No. 14-114). Amici supporting the petitioner largely did not dispute the disruptive effects of eliminating subsidies on the federal exchange; in their view, if the language of the statute created a problem, it was a problem for Congress and not the Court to fix. See, e.g., Brief of Jonathan H. Adler and Michael F. Cannon as Amici Curiae Supporting Petitioners at 36–37, *King*, 135 S. Ct. 2480 (No. 14-114).

212. Brief for the Respondents at 36–37, *King*, 135 S. Ct. 2480 (No. 14-114) (citing Urban Institute and Rand Corporation studies as evidence of declines in enrollment and premium increases).

213. Letter from Sylvia Matthews Burwell to Senator Orrin G. Hatch (Feb. 24, 2015). A similar letter was sent to the House, although I have only been able to locate online versions with the addressee redacted.



caused by an adverse decision.”<sup>214</sup> The New York Times viewed the letter as “put[ting] pressure on the [Supreme Court] to rule in favor of the administration,” viewing the letter’s “implicit message” as telling the Court “that the White House has no contingency plans” and that “if the court strikes down subsidies, the justices will be responsible for causing hardship to lower-income people and chaos in insurance markets around the country.”<sup>215</sup>

At oral arguments five days later, several Justices considered the consequences of a ruling for the petitioners. At different points in the argument, the basic factual picture painted by the Urban Institute and Rand Corp. research was acknowledged by Justices Scalia, Kennedy, Ginsburg, Breyer, Alito, Sotomayor, and Kagan.<sup>216</sup> A look at context of the Justices’ comments about the consequences of the case reveals both that members of the Court were aware of the consequences and that they struggled to find an appropriate way to take account of the consequences within accepted principles of statutory interpretation and related legal doctrine.<sup>217</sup>

For instance, Justices Sotomayor and Kennedy, in colloquy with counsel for the petitioners, questioned whether states that chose to have the federal government establish their exchanges and whose citizens were denied subsidies on that federal exchange would be unconstitutionally coerced into setting up their own exchange.<sup>218</sup> Justice Kennedy suggested that the Court should

214. *Id.* It is notable that both uses of the phrase “massive damage” occur in the first sentence of their respective paragraphs.

215. Robert Pear, *Congress Is Told Administration Has No Remedy for a Ruling Against Health Law*, N.Y. TIMES, Feb. 25, 2015, at A15.

216. See Transcript of Oral Argument at 54–55, *King*, 135 S. Ct. 2480 (No. 14-114) (Scalia, J.) (“If the consequences are as disastrous as you say, so many million people without—without insurance and whatnot, yes, I think this Congress would act.”); *id.* at 16–17 (Kennedy, J.) (“[F]rom the standpoint of the dynamics of Federalism, it does seem to me that there is something very powerful to the point that if your argument is accepted, the States are being told either create your own Exchange, or we’ll send your insurance market into a death spiral.”); *id.* at 20 (Ginsburg, J.) (“I have never seen anything like this where [a state that allows the federal government to set up its Exchange] get[s] these disastrous consequences.”); *id.* at 13 (Breyer, J.) (“[I]f you want to go into the context, at that point it seems to me your argument really is weaker . . . The Exchanges fall apart, nobody can buy anything on them.”); *id.* at 53 (Alito, J.) (pointing out that the Court has often stayed its mandate to avoid “disruptive consequences” of a decision); *Id.* at 15 (Sotomayor, J.) (“In those States that don’t—their citizens don’t receive subsidies, we’re going to have the death spiral that this system was created to avoid.”); *id.* at 34–35 (Kagan, J.) (“[U]nder your theory, if Federal Exchanges don’t qualify as Exchanges established by the State, that means Federal Exchanges have no customers.”).

217. See *infra* notes 218–25 and accompanying text.

218. Transcript of Oral Argument, *supra* note 216, at 14–17 (Sotomayor, J.) (Kennedy, J.).

interpret the statute to avoid what he called a “serious constitutional question.”<sup>219</sup> The constitutional objection does not seem strong. Indeed, in *NFIB v. Sebelius*, the Court allowed states to opt out of the Affordable Care Act’s expansion of Medicaid.<sup>220</sup> The Court held that it would be coercive to deny funding for the entire Medicaid program to a state that opted out, but the Court explicitly permitted the federal government to withhold funding for the expansion to states that opted out.<sup>221</sup> This colloquy is better explained as an attempt to wrestle with—and avoid if possible—the acknowledged disastrous consequences of petitioners’ reading of the statute.

Even Justices Scalia and Alito, the two strongest proponents of a literal reading of the statute, wrestled with the consequences of the statute.<sup>222</sup> Justice Scalia said, “If the consequences are as disastrous as you say . . . I think this Congress would act.”<sup>223</sup> Justice Alito suggested that the consequences of an adverse ruling could be mitigated by “stay[ing] the mandate until the end of this tax year” if the Court ruled subsidies unavailable on the federal Exchange.<sup>224</sup> As one prominent commentator stated at the time, “There was nothing in those remarks, by either of those two Justices, to indicate that they were questioning whether the predictions of a serious social problem would, in fact, follow the ruling against a nationwide subsidy system.”<sup>225</sup>

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219. *Id.* at 18 (Kennedy, J.). Interestingly, when counsel for the petitioners pointed out that the government had not advanced a constitutional argument, Justice Kennedy quipped, “Sometimes we think of things the government doesn’t.” *Id.* at 17.

220. Nat’l Fed’n of Indep. Bus. v. *Sebelius*, 567 U.S. 519, 585 (2012).

221. *Id.* Indeed, this point was made at oral argument, Transcript of Oral Argument at 17, *King*, 135 S. Ct. 2480 (No. 14-114), though Justice Kennedy did not seem convinced by it. *Id.* at 18 (Kennedy, J.).

222. See *infra* notes 223–25 and accompanying text.

223. Transcript of Oral Argument at 54–55, *King*, 135 S. Ct. 2480 (No. 14-114). It is interesting to consider what Congress would and would not do. Both houses of Congress were under Republican control at that point; numerous repeal votes were held, and in fact in January 2016, the Congress sent a repeal bill to President Obama’s desk, which he promptly vetoed. Alex Moe, *Congress Sends Obamacare Repeal to President for First Time*, NBC NEWS (Jan. 6, 2016, 11:50 AM), <https://www.nbcnews.com/news/us-news/congress-send-obamacare-repeal-president-n491316> [<https://perma.cc/2RX7-N6KC>]. Indeed, as of this writing in 2018, with Republicans controlling both houses of Congress and the White House, repeal has proven elusive. If the Court held subsidies unavailable, it would perhaps have been easier to harm the Obamacare regime passively by refusing to enact a “fix.” However, Republicans have as yet been unable to actively sabotage the law.

224. Transcript of Oral Argument at 53, *King*, 135 S. Ct. 2480 (No. 14-114).

225. Lyle Denniston, *Argument Analysis: Setting up the Private Debate on the ACA*, SCOTUSBLOG (Mar. 4, 2015, 1:43 PM), <http://www.scotusblog.com/2015/03/argument-analysis-setting-up-the-private-debate-on-the-aca/> [<https://perma.cc/W3VN-P56B>].

The opinion in the case itself grapples with consequences.<sup>226</sup> By starting with five pages detailing the history of health reform and the interdependence of the guaranteed issue, community rating, and individual mandate, the opinion not only describes the statutory scheme but demonstrates that the scheme falls apart if the statute is interpreted in a way that eviscerates part of its reforms.<sup>227</sup> Indeed, in refusing *Chevron* deference to the IRS ruling on the availability of subsidies on the federal Exchange, the Court notes that the subsidies “involve[e] billions of dollars in spending each year and affect[] the price of health insurance for millions of people,” along the way to concluding that the question is one of “deep economic and political significance.”<sup>228</sup>

Perhaps most strikingly, the Court cites both the Urban Institute and Rand Corporation studies for the number of people who would be forced off health insurance and the percentage of premium increase for the those who manage to keep their insurance.<sup>229</sup> The Court concludes that it is “implausible that Congress meant the Act to operate in this manner.”<sup>230</sup> This argument seems to go to the intent of Congress, or to the statutory scheme. Further, it seems likely that the Court also chose a reading of the statute designed to avoid a truly disastrous consequence.

### C. Conclusion

*King v. Burwell* presents a thorny interpretive problem. The language “established by the State” seems clear, yet the structure and purpose of the act (at least at a broad level of generality) raised a serious interpretive question.<sup>231</sup> Further, other provisions of the Act appear not to make sense if the narrowest linguistic meaning of the “established by the State” provision is followed.<sup>232</sup> Thus, the Court reached a result designed to harmonize the provision at issue with the structure and purpose of the Act.<sup>233</sup> It is the clearest recent example of a Supreme Court opinion relying on purpose, nearly to the contradiction of plain text. For a court that has preached textualism for decades, the decision appears

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226. *King*, 135 S. Ct. at 2493–94.

227. *Id.* at 2485–89.

228. *Id.* at 2489 (internal quotations omitted).

229. *Id.* at 2493–94 (citing SALTZMAN & EIBNER, *supra* note 210; BLUMBERG, BUETTGENS, & HOLAHAN, *supra* note 210).

230. *Id.* at 2494.

231. See Katzmann, *supra* note 199, at 394.

232. *Id.*

233. *King*, 135 S. Ct. at 2490–96.

out of step. While it is tempting to view it as one-off, the decision in *King* is best seen as a pragmatic choice to reach what appears to be a correct result that does the least violence to a statutory scheme in a very difficult case.

#### IV. *KING V. BURWELL* AS RECEIVED BY THE FEDERAL COURTS OF APPEALS

In the two years following its issue, some seventy-two federal courts of appeals decisions have cited *King v. Burwell*.<sup>234</sup> While a small number of these decisions relate to the law of the Affordable Care Act or to administrative law topics, the vast majority deal with the proper reading of a the federal statutes at issue.<sup>235</sup> This group of cases reflects the diverse approaches one would expect from American statutory interpretation jurisprudence: courts generally rely on text as the starting point, looking to context, statutory structure and scheme, legislative purpose, and legislative history in varying proportions depending on the clarity of the evidence and the predilections of the judges on the panel.<sup>236</sup>

Three major trends involving *King* arise from the cases. First, there is a group of cases that uses scheme and purpose as in *King* to give effect to text that is unclear, to broaden the meaning of seemingly clear text, and even, upon occasion, to trump the meaning of seemingly clear text.<sup>237</sup> Second, at the other end of the spectrum, there is a small group of cases that reject *King*'s reliance on scheme and purpose to trump or even illuminate the meaning of statutory text.<sup>238</sup> Some of these cases engage in philosophical and jurisprudential jousting, but at little cost: it's easy to affirm textualist principles in the context of a case easily resolved by text.<sup>239</sup> The remainder of cases, which are the vast majority, pose little conflict between text and purpose: they use context, scheme, and purpose to reinforce a semantically plausible reading of the text.<sup>240</sup>

While *King* is not the harbinger of a new day in statutory interpretation, it demonstrates beyond dispute that text and purpose remain the central tools of American statutory interpretation.<sup>241</sup> In legal process terms, courts that (tell themselves they) hew most closely to text and reject *King*'s model of context, scheme and purpose as interpretive guides are those that distinguish most

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234. See *infra* notes 246–47 and accompanying text.

235. See *infra* notes 249–50 and accompanying text.

236. See *infra* Sections IV.B–D.

237. See *infra* Section IV.B.

238. See *infra* Section IV.C.

239. See *infra* Section IV.C.

240. See *infra* Section IV.D.

241. See *infra* Section IV.D.

sharply between the roles of courts and the roles of legislatures in giving effect to statutes.<sup>242</sup> Those that engage in *King*-like reasoning view courts as complementary partners to legislatures in making meaning of the words in statutes.<sup>243</sup>

#### A. A Note About Method

This Article considers all federal court of appeals cases citing *King* issued within a two-year period after the Supreme Court announced its decision.<sup>244</sup> Selecting this time period has advantages. First, it is a sufficient period for litigants and courts to absorb the *King* decision and to consider its application in a wide variety of legal contexts, as will be clear from the discussion below. Second, none of these cases have pending certiorari petitions to the Supreme Court.<sup>245</sup> Thus each of these cases has by now made its complete contribution to the law.

Cases were identified through the “Citing References” feature on Westlaw and the Shepard’s feature on Lexis Advance.<sup>246</sup> This identified seventy-two unique cases.<sup>247</sup> Each case was then analyzed for the purpose of determining

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242. See *infra* Section IV.C.

243. See *infra* Section IV.B.

244. As will be clear from the discussion below, this Article does not attempt quantitative analysis of the decisions. While it would be possible to code the decisions in various ways and perform statistical analyses on them, a qualitative approach to the cases facilitates a more nuanced understanding of the interpretive moves courts are making. For an interesting discussion of the merits of quantitative vs. qualitative approaches to sets of cases, see Gregory Klass, *Empiricism and Privacy Policies in the Restatement of Consumer Contract Law*, 36 YALE J. ON REG. 45, 45, 96, 101 (2019) (claiming that results of certain quantitative studies used in the Restatement of Consumer Contract Law cannot be replicated and arguing that qualitative study of the cases reveals a more accurate picture of the law).

245. Indeed, the last cert petition, relating to *In re Tribune Co. Fraudulent Conveyance Litig.*, 818 F.3d 98 (2d Cir. 2016), *cert. dismissed*, 139 S. Ct. 2050 (2019), was dismissed while this Article was in production.

246. See WESTLAW, [www.westlaw.com](http://www.westlaw.com); LEXIS, [www.lexisnexis.com](http://www.lexisnexis.com). I consulted these websites a final time and saved to my computer the list of citing references from both sources on June 15, 2018.

247. Interestingly, four cases were identified by Lexis that were not identified by Westlaw. These cases are *Cumberland Cty. Hosp. Sys. v. Burwell*, 816 F.3d 48 (4th Cir. 2016); *Assocs. Against Outlier Fraud v. Huron Consulting Grp., Inc.*, 817 F.3d 433 (2d Cir. 2016); *Knox Creek Coal Corp. v. Sec’y of Labor*, 811 F.3d 148 (4th Cir. 2016); and *United States v. Chafin*, 808 F.3d 1263 (11th Cir. 2015). I have excluded *Knox Creek Coal* from the set and do not count it among the seventy-two because the opinion in that case cites the Fourth Circuit and not the Supreme Court opinion in *King v. Burwell*. 811 F.3d at 158 (citing *King v. Burwell*, 759 F.3d 358, 363 (4th Cir. 2014) for the proposition

why *King v. Burwell* was cited and what interpretive moves the courts made. From there, the cases were divided into the groups identified in the introduction to this Section.

Seventeen of the seventy-two cases do not pertain primarily to statutory interpretation and are not considered in the Sections that follow. These seventeen cases fall into three groups. The first is a group of five cases that cite *King v. Burwell* for its description of the Affordable Care Act and do not cite *King* for statutory interpretation principles.<sup>248</sup> The six cases in the second group concern themselves with the major questions doctrine, that is the language in *King* that states that the Court should not defer to an administrative agency on a question of “deep economic and political significance that is central to [the] statutory scheme.”<sup>249</sup> Each of these cases considers whether the matter is at issue is a major question.<sup>250</sup> Finally, the six cases in the third group merely cite

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that the language of a statute is ambiguous if it is subject to multiple interpretations). Digital research, while facilitating efficient manipulation of large data sets, is not yet perfect.

248. These cases are *Ohio v. United States*, 849 F.3d 313, 315–16 (6th Cir. 2017) (rejecting challenge by the State of Ohio, its political subdivisions and four public universities against the Transitional Reinsurance Program of the ACA; citing *King* for general description of the ACA’s purposes and requirements); *Ohio State Chiropractic Ass’n v. Humana Health Plan Inc.*, 647 Fed. Appx. 619, 623 (6th Cir. 2016) (rejecting removal of case against Medicare Advantage organization to federal court on the grounds that the MAO does not act under a federal agency; citing *King* for background principles on the functioning of insurance markets); *Eternal Word Television Network, Inc. v. Sec’y of U.S. Dept. of Health and Human Servs.*, 818 F.3d 1122, 1175–76 n.16 (11th Cir. 2016) (Tjoflat, J., dissenting) (rejecting RFRA and First Amendment challenge to regulations implementing ACA mandate to provide contraceptive coverage as part of group health insurance plans; Judge Tjoflat, in dissent, cites *King* for the proposition that the ACA contemplates each state setting up its own health insurance exchange); *Cutler vs. U.S. Dept. of Health and Human Servs.*, 797 F.3d 1173, 1175–76 n.1 (D.C. Cir. 2015) (rejecting Establishment Clause challenge to ACA and finding no standing to pursue equal protection claims against certain ACA policies; citing *King* for background on the structure of health insurance markets and for a description of the three interlocking reforms mandated by the ACA); *Sissel v. U.S. Dept. of Health and Human Servs.*, 799 F.3d 1035, 1035, 1040 (D.C. Cir. 2015) (Rogers, Pillard, and Wilkins, JJ., concurring in the denial of rehearing en banc) (denying rehearing en banc to Origination Clause challenge to ACA; citing *King v. Burwell* for background on the ACA’s three interlocking reforms).

249. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015).

250. *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 402–03 (D.C. Cir. 2017) (Brown, J., dissenting from denial of rehearing en banc) (challenge to net neutrality rules); *Valenzuela Gallardo v. Lynch*, 818 F.3d 808, 825–26 (9th Cir. 2016) (Seabright, J., dissenting) (arguing that a provision of the Immigration and Nationality Act does not present a major question and thus the Board of Immigration Appeals’ interpretation is entitled to *Chevron* deference); *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1031–32 (6th Cir. 2016) (Sutton, J., concurring in part and dissenting in part) (arguing that a provision of the Immigration and Nationality Act with both civil and criminal consequences should not be given

*King* for a canon of construction,<sup>251</sup> for a very basic principle of statutory interpretation,<sup>252</sup> or for Justice Scalia’s memorable barb terming reasoning he disagreed with “interpretive jiggery-pokery.”<sup>253</sup>

Assigning the fifty-six remaining cases to categories proved complicated. As has often been noted, text that is crystal-clear to one reader is ambiguous to another.<sup>254</sup> And courts are not above manipulating text to find ambiguity.<sup>255</sup> To sidestep the inevitable difficulties of attempting to second-guess the courts’

*Chevron* deference; citing the major questions doctrine as described in *King* as an example of a categorical exception to *Chevron*); *ClearCorrect Operating, LLC v. ITC*, 810 F.3d 1283, 1302–03 (Fed. Cir. 2015) (O’Malley, J., concurring) (arguing that *Chevron* deference is not appropriate under the major questions doctrine to International Trade Commission’s claim of jurisdiction over “all incoming international Internet data transmissions”); *Texas v. United States*, 809 F.3d 134, 181 n.179 (5th Cir. 2015) (arguing that Deferred Action for Parents of Americans and Lawful Permanent Residents program (DAPA) presents a major question inappropriate for administrative action); *id.* at 218 (King, J., dissenting) (arguing that DHS is the appropriate agency to administer immigration matters); *FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236, 253 (3d Cir. 2015) (noting Wyndham’s argument that the FTC’s regulatory actions in the cyber security area involved major questions); *Suprema v. ITC*, 796 F.3d 1338, 1360 (Fed. Cir. 2015) (O’Malley, J., dissenting) (arguing that a provision of the Tariff Act of 1930 is clear, and thus the International Trade Commission’s interpretation is not entitled to deference; citing *King* for the proposition that the Supreme Court has indicated that courts “should not nonchalantly defer to an agency’s interpretation for questions of ‘deep economic and political significance’”).

251. *Def. Distributed v. U.S. Dep’t of State*, 838 F.3d 451, 467 (5th Cir. 2016) (Jones, J., dissenting) (quoting *King*, 135 S. Ct. at 2495) (“Congress does not . . . hide elephants in mouseholes”); *Castañeda v. Souza*, 810 F.3d 15, 53 (1st Cir. 2015) (Kayatta, J., joining) (surplusage canon not absolute); *BancInsure, Inc. v. FDIC*, 796 F.3d 1226, 1239 (10th Cir. 2015) (surplusage canon not absolute).

252. *Villarreal v. R.J. Reynolds Tobacco Co.*, 806 F.3d 1288, 1292 (11th Cir. 2015), *reh’g en banc granted, opinion vacated*, *Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958, 962 (11th Cir. 2016) (“If the statutory language is clear, then our inquiry ends.”). *PHH Corp. v. Consumer Fin. Protection Bureau*, 839 F.3d 1, 44 (D.C. Cir. 2016), *vacated and remanded*, 881 F.3d 75 (D.C. Cir. 2018) (en banc) similarly cited *King* for the general proposition that “[i]n a democracy, the power to make the law rests with those chosen by the people.” *Id.* The citation is offered in support of the panel’s holding that CFPB, as an agency, was not free to rule on a legal question in the absence of statutory authority. *Id.*

253. *McCarthy v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1095 (11th Cir. 2017).

254. *Molot*, *supra* note 69, at 39–40; *Kavanaugh*, *supra* note 3, at 2159 (calling the ambiguity issue “indeterminate”).

255. *But see* Ryan D. Doerfler, *High-Stakes Interpretation*, 116 MICH. L. REV. 523, 523 (2018) (arguing that courts’ tendency to see language as ambiguous in high-stakes cases is not a function of court’s desire to reach particular results on instrumentalist grounds but is instead a rational reaction when stakes are heightened; put differently, courts are justifiably more cautious about the meaning of text as an epistemic matter when the consequences of their decisions are heightened).

conclusions, this article accepts the courts' characterizations of the language they are interpreting. If the court claims ambiguity in the statute, this analysis examines which tools the court uses to find ambiguity: whether linguistic and semantic, or contextual and purposive. At times, divided panels of the appeals courts have disagreed about whether text is clear or ambiguous.<sup>256</sup> In those instances, this article presents those disagreements in the discussions below (often in the footnotes). To be sure, the choice not to devote substantial space to independent analysis of whether the courts accurately characterize the language of cases risks missing a few instances where courts may be mistaken or disingenuous. However, cases in that category did not seem particularly common; more often, these issues were made plain through majority and dissenting opinions.<sup>257</sup>

### B. Cases that Embrace a Purposive Reading of Text

Sixteen cases plus three dissents use *King v. Burwell* to support a reading of text that relies in a substantial way on the court's view of the statutory scheme or purposes.<sup>258</sup> At least three variations of this maneuver may be identified. First, some cases take a step that is substantially similar to what the Supreme Court did in *King*: they find that some combination of context, scheme, and purpose creates ambiguity where the text read in isolation seems facially clear.<sup>259</sup> Second, some cases use subsequent legislative developments to inform the meaning of prior legislative enactments.<sup>260</sup> Third, and finally,

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256. See, e.g., *Bodine v. Cook's Pest Control Inc.*, 830 F.3d 1320, 1329–30 (11th Cir. 2016) (Martin, J., dissenting); *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 157 (2d Cir. 2015).

257. For instance, consider *Bodine v. Cook's Pest Control, Inc.*, 830 F.3d 1320, 1325–28 (11th Cir. 2016), in which a divided panel holds that a statute providing rights to reentering veterans in the employment context does not require invalidation of an arbitration clause. Both the majority, *id.* at 1327, and the dissenting judge, *id.* at 1329–32, claim that text, context, and purpose support their respective readings of the statute. I have not attempted to arbitrate which side is correct in such cases; rather, both are unremarkable for purposes of understanding the application of *King* because the case does not present a conflict between text and purpose in any form. Instead, it seems to me, the case is best understood as one in which language and context are flexible enough to be read in different ways, and the majority and dissent would decide the case based mostly upon different visions of legislative priority and meaning.

258. See *infra* Sections IV.B.1–3.

259. See *infra* Section IV.B.1.

260. See *infra* Section IV.B.2.



some cases use context, scheme, and/or purpose to illuminate the meaning of text that is unclear or ambiguous.<sup>261</sup>

### 1. Cases in Which Context, Scheme, and Purpose Appear to Override Text

The five cases described in this Section embody the strongest form of purposive interpretation of any cases in this set. All of them consider statutory purpose, using in turn, the scheme and structure of the Act, statutory declarations of purpose, and (in four cases) legislative history.<sup>262</sup> Each of these cases claims to respect Congress' intent in enacting the statute at issue.<sup>263</sup>

Perhaps the clearest, though certainly not the only, instance of a court departing from the apparent plain meaning of a statutory term occurs in *Owner-Operator Independent Drivers Association v. United States Department of Transportation*.<sup>264</sup> In this case, the Seventh Circuit considered pragmatic consequences, statutory purpose, scheme, and legislative history in upholding Department of Transportation rules that, in part, mandate electronic logging devices (ELD) in most interstate commercial motor vehicles.<sup>265</sup>

The plaintiffs, a trade organization, challenged the rule on the grounds that it did not fulfill the statutory command that ELDs be “capable of recording a driver’s hours of service and duty status accurately and automatically.”<sup>266</sup> Petitioners argued that the term “automatically” requires a device that is “entirely automatic; no human involvement is permitted.”<sup>267</sup> The court rejected

261. See *infra* Section IV.B.3.

262. *Rubin v. Islamic Republic of Iran*, 830 F.3d 470, 479–80 (7th Cir. 2016), *affirmed*, 138 S. Ct. 816 (2018); *Owner-Operator Indep. Drivers Ass’n v. U.S. Dep’t of Transp.*, 840 F.3d 879 (7th Cir. 2016), *cert. denied*, 137 S. Ct. 2246 (2017); *In re Tribune Co. Fraudulent Conveyance Litig.*, 818 F.3d 98, 105 (2d Cir. 2016) *cert. dismissed*, 139 S. Ct. 2050 (2019); *In re Trump Entm’t Resorts*, 810 F.3d 161, 167–68 (3d Cir. 2016); *G.L. v. Ligonier Valley Sch. Dist.*, 802 F.3d 601 (3d Cir. 2015). Denials of certiorari will be noted for all cases discussed in this Section because they are “particularly relevant.” See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 10.7 (Columbia Law Review Ass’n, Harvard Law Review Ass’n, University of Pennsylvania Law Review, and Yale Law Journal eds., 20th ed. 2015).

263. *Owner-Operator Indep.*, 840 F.3d at 888; *In re Tribune*, 818 F.3d at 120; *In re Trump Entm’t Resorts*, 810 F.3d at 171; *Rubin*, 830 F.3d at 483; *Ligonier Valley*, 802 F.3d at 616–17.

264. 840 F.3d 879.

265. *Id.* at 883. The long history of Congress’ attempts to get the agency to issue a rule requiring electronic monitoring devices on long-haul trucks, the agency’s responses, and various rebukes of the agency by the D.C. and Seventh Circuits is recounted in the background section of the opinion. See *id.* at 885–87.

266. *Id.* at 887 (citing 49 U.S.C. § 31137(f)(1)(A)).

267. *Id.* (emphasis in original).

this interpretation of the term, first penning two paragraphs making the pragmatic and prudential argument that devices that require no human interaction whatever are not feasible and are undesirable.<sup>268</sup> Further, and most relevant here, the court termed itself “confident that Congress did not intend” the word “automatically” to entirely preclude human interaction with ELDs.<sup>269</sup> The court cited *King* for the proposition that it should “construe statutes, not isolated provisions” and proceeded to consider “other parts of the statute” which provide “context” that undermined plaintiffs’ reading of the term “automatic.”<sup>270</sup> For instance, the statute directs that the agency ensure that ELDs will not be used to harass drivers and consider ELD’s implications for drivers’ privacy.<sup>271</sup> From these provisions, the court concluded that Congress meant for the agency to “balance competing goals” of accuracy and privacy when deciding which ELDs the rules would permit.<sup>272</sup> Finally, the court deployed two additional arguments: that the Congressional language came from a vacated prior version of the agency rule that defined “automatically” as meaning something less than entirely automatic, and that if Congress had intended to change the meaning of “automatic” between the prior, vacated agency rule and the current statute, it would have done so explicitly, without “hid[ing] elephants in mouseholes.”<sup>273</sup>

These arguments are sensible, and square with the long dialogue between Congress, the courts, and the agency about how best to regulate long-distance truck drivers and how to avoid fraud in paper driver logs.<sup>274</sup> However, it is notable that they stretch the meaning of the word “automatically” to include functions that must be performed by the driver, for example, recording changes of status from “off-duty” to “on-duty, not driving.”<sup>275</sup> This expansion of meaning, and the concomitant blessing of agency rules reflecting the expansion,

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268. *Id.* at 887–88 (noting the difficulty, for example, of a fully automatic device that would “record a driver’s change from ‘off duty’ to ‘on-duty, not driving,’” and rejecting constant video surveillance and bio-monitoring devices as “breathhtakingly invasive”).

269. *Id.*

270. *Id.* (citing *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015)).

271. *Id.* (citing 49 U.S.C. § 31137(a)(2), (d)(2)).

272. *Id.*

273. *Id.* at 888–89.

274. *See id.*

275. *Id.* at 888. It is worth noting that the opinion cites *King* a second time for the unremarkable proposition that ambiguity in a statutory term implies a delegation to the relevant agency to “fill in the statutory gaps.” *Id.* at 889–90 (citing *King*, 135 S. Ct. at 2488).

is based on the court's view of statutory purpose buttressed by statutory scheme.<sup>276</sup>

The Second Circuit made a similar move in the course of construing a safe harbor provision of the Bankruptcy Code in *In re Tribune Company Fraudulent Conveyance Litigation*.<sup>277</sup> Section 544 of the Bankruptcy Code, in general terms, permits a Chapter 11 trustee in bankruptcy to recover certain funds transferred to other parties by the debtor before filing bankruptcy.<sup>278</sup> This powerful avoidance power is limited by § 546(e), which provides a safe harbor, preventing a trustee from avoiding certain securities-related payments made to defined participants in the financial markets.<sup>279</sup> The payments at issue include margin payments, settlement payments or transfers in connection with a securities contract, commodity contract, or forward contract; the protected entities consist largely of financial institutions.<sup>280</sup> Section 546(e) provides a federal cause of action for avoidance of these payments only when there is intentional fraud, i.e. when the payments are made with “actual intent to hinder, delay, or defraud” creditors, but it provides no federal cause of action for constructive fraud.<sup>281</sup>

Noting that § 546(e) by its terms applies only to claims brought by the bankruptcy trustee, creditors in the *Tribune* bankruptcy claimed a power to bring state law constructive fraud claims (i.e. non-intentional fraud claims) notwithstanding the limits of § 546(e) (and other sections of the bankruptcy code).<sup>282</sup> The Second Circuit rejected this claim, finding that § 546(e)

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276. *Id.* at 887–88.

277. 818 F.3d 98, 105 (2d Cir. 2016).

278. 11 U.S.C. § 544 (2012).

279. 11 U.S.C. § 546(e) (2012).

280. *Id.*

281. 11 U.S.C. §§ 546(e), 548(a)(1)(A) (2012).

282. *In re Tribune Co.*, 818 F.3d at 105 (Creditors argued that they were not barred by the automatic stay or by § 546(e)). For the sake of simplicity, this discussion avoids an important complexity here. There is a question whether the creditors' state law constructive fraud claims survive the automatic stay provision. *Id.* at 105. Creditors argue that the claims are prevented during the stay but revert back to the creditors after the stay is completed. *Id.* at 114. This question turns on the “debated and somewhat metaphysical” question about who owns the claims. *Id.* at 116. The claims belong either to the creditors or to the debtor's estate. Either way, the trustee has power to bring the claims within the allowed period. *Id.* at 106–07. If they remain property of the creditors, it seems possible that they can revert back after the stay expires or is lifted. *Id.* at 114. If the claims become property of the debtor's estate, the notion that they revert back to the creditors after the expiration or lifting of the stay seems “counterintuitive” to the court because the trustee is empowered to make decisions about which claims to bring. *Id.* at 117. Because this issue is unsettled and was unsettled at

preempted such power in the hands of creditors as well as trustees.<sup>283</sup> In reaching this holding, the court looked to “language, legislative history, and purposes.”<sup>284</sup> The court noted that the purpose of § 546(e) is to provide certainty as to completed securities transactions, speed to allow parties to adjust to market conditions, finality as to investors’ stakes in firms, and stability of financial markets.<sup>285</sup> The court held that allowing creditors to bring claims that were forbidden to the trustee undermined these statutory purposes.<sup>286</sup> Citing *King*, the court warned against “putting lynchpin reliance on the word ‘trustee’” and emphasized the importance of considering context and statutory scheme.<sup>287</sup> Thus, the court found that creditors were also prohibited by § 546(e) from asserting the claims described in the section.<sup>288</sup> This move looks a great deal like applying “established by the State” to the federal exchange—precisely what the Supreme Court did in *King*.

The Third Circuit interpreted another provision of Chapter 11 of the Bankruptcy code in a primarily contextual manner in *In re Trump Entertainment Resorts*, and in fact admitted that it was not interpreting the code provision at issue in “the most natural reading.”<sup>289</sup> This bankruptcy, filed on

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the time § 546(e) was added to the Code, the meaning of § 546(e) with respect to state law constructive fraud claims is ambiguous. *Id.* at 118–19.

283. *Id.* at 124.

284. *Id.* at 118–19.

285. *Id.* at 119.

286. *Id.*

287. *Id.* at 120 (citing *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015)). As noted above, *supra* note 280, further appellate review is not exhausted in this case. Creditors sought certiorari on September 9, 2016. *Deutsche Bank Trust Co. Ams. et. al. v. Robert R. McCormick Found. et. al.*, No. 16-317 (U.S. Sept. 9, 2016). On April 3, 2018, Justices Kennedy and Thomas issued a statement deferring the disposition of the petition “for an additional period of time” to allow the lower courts to consider the Supreme Court’s decision in *Merit Management Group, LP v. FTI Consulting, Inc.*, 138 S. Ct. 883 (2018), and specifically noting that the lower courts “could decide whether relief from judgment is appropriate given the possibility that there might not be a quorum” at the Supreme Court to decide the case. *Deutsche Bank Trust Co. Ams. et. al. v. Robert R. McCormick Found. et. al.*, 138 S. Ct. 1162, 1163 (2018) (Kennedy and Thomas, JJ., statement respecting the petition for certiorari). In *Merit Management*, the Court unanimously held that that § 546(e) permitted avoidance of transfers to financial institutions where the covered financial entities are merely intermediaries and not the real party in interest. 138 S. Ct. at 888. The Court did not consider the question of who is empowered to bring such claims. The Second Circuit has not yet ruled on how it would apply the *Merit Management* decision to this case.

288. *In re Tribune Co.*, 818 F.3d at 124.

289. *In re Trump Entm’t Resorts*, 810 F.3d 161, 169 n.32 (3d Cir. 2016) (citing *King*, 135 S. Ct. at 2489).

September 9, 2014, involved the Trump Taj Mahal casino in Atlantic City, New Jersey.<sup>290</sup> Following the filing, the debtor sought to reject an expired collective bargaining agreement (CBA) with a labor union under the provisions of 11 U.S.C. § 1113.<sup>291</sup> Section 1113 permits a debtor to “reject a collective bargaining agreement” after the bankruptcy court agrees that certain procedural and substantive conditions have been met; it further forbids debtors from “terminat[ing] or alter[ing] any provisions of a collective bargaining agreement” without meeting its terms.<sup>292</sup> The statute does not say whether it applies to expired CBAs or to the obligations imposed on an employer to maintain the status quo following expiration under the National Labor Relations Act (NLRA).<sup>293</sup> The labor union claimed that the provisions of § 1113 do not apply to expired CBAs and that the debtor could only avoid its status quo obligations by following the stricter procedures of the NLRA.<sup>294</sup>

In considering whether § 1113 applies to expired CBAs, the Third Circuit refused “to embark, as the parties [did], on a hyper-technical parsing of the words and phrases” of the provision, or to “focus on a meaning that may seem plain when considered in isolation.”<sup>295</sup> In a footnote, the court quoted *King v. Burwell*’s statement that “[i]n this instance, the context and structure of the [statute] compel us to depart from what would otherwise be the most natural reading of the pertinent statutory phrase.”<sup>296</sup>

Following this path, based on “the situation in which § 1113 was enacted” and an “examin[ation] of the provision in the context of the Bankruptcy Code as a whole,” the court held § 1113 allows a debtor to reject the continuing obligations imposed by an expired CBA.<sup>297</sup> The Third Circuit noted that § 1113 was enacted to overturn a Supreme Court decision that held that CBAs were rendered unenforceable when a debtor filed a Chapter 11 bankruptcy petition.<sup>298</sup>

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290. *Id.* at 164–65.

291. *Id.* at 163. As the Third Circuit noted, the National Labor Relations Act, 29 U.S.C. § 158(a)(5), prevents an employer from altering the status quo with respect to “mandatory subjects of bargaining” even after a CBA expires. *Id.* at 168.

292. 11 U.S.C. § 1113 (2012).

293. *Id.*

294. *In re Trump Entm’t Resorts*, 810 F.3d. at 164.

295. *Id.* at 169.

296. *Id.* at 169 n.32.

297. *Id.* at 169, 173. The court cited *King* for the proposition that a phrase which may seem plain in isolation may be ambiguous in context. *Id.* at 167, n.22.

298. *Id.* at 169–70 (noting that § 1113 was enacted to overturn the second holding in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984)).

In response to that decision, Congress imposed the procedural and substantive safeguards of § 1113, to ensure that “when the NLRA yields to the Bankruptcy Code, it does so only for reasons that will permit the debtor to stay in business.”<sup>299</sup> The court then embarked on a review of evidence in the case demonstrating that the debtor needed to avoid its CBA obligations in order to stay in business.<sup>300</sup> The court further argued that its holding was “consistent with the purpose of the Bankruptcy Code which gives debtors latitude to restructure their affairs,” citing *King*’s admonition that “[w]e cannot interpret federal statutes to negate their own stated purposes.”<sup>301</sup>

This brief case is remarkable. The Third Circuit explicitly admits that it is not following the “most natural reading” of the phrase “collective bargaining agreement” in holding that it includes continuing obligations imposed by the NLRA after a collective bargaining agreement expires.<sup>302</sup> Congress could easily have used the term “collective bargaining obligations” if it wished to specify something broader than the contractual agreement between the parties. The result is a purposive interpretation that is in significant tension with text.

In *Rubin v. Islamic Republic of Iran*, the Seventh Circuit used context and purpose, though not legislative history, to narrow the reach of a provision of the Foreign Sovereign Immunity Act (FSIA).<sup>303</sup> The case grew out of an attempt by U.S. citizens injured in a Hamas suicide bombing in Jerusalem to execute on a \$71.5 million dollar default judgment against the Islamic Republic of Iran that they obtained in 1997.<sup>304</sup> The plaintiffs’ attempts at executing on this judgment sprawl across two decades, across the country, and across the pages of federal case reporters.<sup>305</sup>

In its 2016 decision, the Seventh Circuit considered whether the plaintiffs could execute against Persian antiquities that belong to Iran but were in the possession of two Chicago institutions: the University of Chicago and the Field Museum of Natural History.<sup>306</sup> One of the plaintiffs’ arguments was that the Foreign Sovereign Immunity Act (FSIA) permits execution on a foreign state’s

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299. *Id.* at 171.

300. *Id.* at 171–72.

301. *Id.* at 173–74 n.60 (citing *King v. Burwell*, 135 S. Ct. 2480, 2492–93 (2015)).

302. *Id.* at 168–69 n.32.

303. 830 F.3d 470, 479–80 (7th Cir. 2016), *affirmed*, 138 S. Ct. 816 (2018).

304. *Id.* at 473.

305. For a mere snippet, *see id.* at 473. The subsequent appellate history on Lexis contains eighty-four items as of October 20, 2019.

306. *Id.*

property that is “used for a commercial activity in the United States.”<sup>307</sup> The Seventh Circuit admitted that the statute does not, by its terms, require that the foreign sovereign itself put the assets to commercial use.<sup>308</sup> Nonetheless, it read this statutory provision to “require commercial use by the foreign state itself, not a third party.”<sup>309</sup> Based on this view of the statutory rule, the court easily concluded that Iran did not itself engage in commercial use and the assets should be shielded from judgments.<sup>310</sup>

In reaching its holding, the court relied on the holdings of three other circuits and made a *King*-type context argument to narrow the reach of the provision.<sup>311</sup> The *Rubin* court also relied on the declaration of purpose codified in the statute itself; this declaration refers to the international law norm that “states are not immune from the jurisdiction of foreign courts insofar as *their* commercial activities are concerned, and *their* commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with *their* commercial activities.”<sup>312</sup> The *Rubin* court read this language as an instruction that execution immunity exists only where the foreign state itself has used its property for commercial purposes.<sup>313</sup>

As if these examples are not clear enough, perhaps a clearer instance of a court setting aside the textual meaning of the statute for a contextual solution is found in the Third Circuit’s decision in *G.L. v. Ligonier Valley School District*.<sup>314</sup> This case involved a child’s claim for compensatory education under the Individuals with Disabilities Education Act (IDEA).<sup>315</sup> The court

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307. *Id.* The Supreme Court did not grant certiorari on this issue and therefore did not consider it in its review. *Rubin v. Islamic Republic of Iran*, 137 S. Ct. 2326 (2017) (granting certiorari only as to one question presented by the petition); Petition for Writ of Certiorari, *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816 (No. 16-534). The issue described in the text did not create a circuit split, *Rubin*, 830 F.3d at 481. The Court noted that it was granting cert. on a different issue “to resolve a split among the Courts of Appeals.” *Rubin*, 138 S. Ct. at 821.

308. *Rubin*, 830 F.3d at 479 (observing that “[t]he passive voice focuses on an event that occurs without respect to a specific actor”) (citing *Dean v. United States*, 556 U.S. 568, 572 (2009)).

309. *Id.* at 473.

310. *Id.*

311. *Id.* at 479–80 (citing *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) for the proposition that the meaning or ambiguity of certain words or phrases only becomes apparent when they are placed in context and examining a provision that extends jurisdictional immunity).

312. *Id.* at 479 (citing 28 U.S.C. § 1602).

313. *Id.*

314. 802 F.3d 601 (3d Cir. 2015).

315. *Id.* at 604.

confronted an apparent conflict between two limitations provisions.<sup>316</sup> The first, a statute of limitations found at 20 U.S.C. § 1415(f)(3)(C), provides that a due process complaint under the statute must be filed by the parents “no more than two years *after* the parents ‘knew or should have known’ about the alleged deprivation.”<sup>317</sup> In other words, a complaint must be filed within two years of the discovery of the deprivation.<sup>318</sup> The second, a prefatory provision found at 20 U.S.C. § 1415(b)(6)(B), describes a due process complaint as alleging “an injury that occurred not more than two years *before* the reasonable discovery date.”<sup>319</sup> The court sketched out four ways this second provision could impact the first:

Does § 1415(b)(6)(B) limit compensatory education to injuries occurring two years before the filing of the complaint, even if earlier injuries are claimed within two years of their reasonable discovery, as urged by Appellant Ligonier Valley School District Authority? Does it limit compensatory education to injuries that occurred from two years before their reasonable discovery through the filing of the complaint, up to two years after that discovery, i.e., the “2+2” approach taken by the District Court and urged by [the plaintiff]? Does it impose only a pleading requirement, without affecting the availability of a remedy for timely and well-pleaded claims, as argued by Amici Appellees and [the plaintiff] in the alternative? Or is it simply a restatement, albeit ill-phrased, of the same two-year statute of limitations set forth in § 1415(f)(3)(C), as asserted by the United States Department of Education (“DOE”)?<sup>320</sup>

The court concluded that § 1415(b)(6)(B) was merely an inartful restatement of the two-year statute of limitations found in § 1415(f)(3)(C).<sup>321</sup> In reaching this conclusion, the court considered plain language arguments, the broader context of the statute, the views of the U.S. Department of Education, and the legislative history of the provisions at issue.<sup>322</sup> The court cited *King* for the proposition that the “words of a statute must be read in their context and

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316. *Id.*

317. *Id.* (emphasis in original) (discussing 20 U.S.C. § 1415(f)(3)(C)).

318. *Id.* (discussing 20 U.S.C. § 1415(f)(3)(C)).

319. *Id.* (emphasis in original) (discussing 20 U.S.C. § 1415(b)(6)(B)).

320. *Id.*

321. *Id.* at 604–05.

322. *Id.* at 611–12.



with a view to their place in the overall statutory scheme.”<sup>323</sup> Upon lengthy analysis of each of these sources, the court concluded that this was a “rare case[] [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters.”<sup>324</sup> The court said that IDEA “needs common sense revision,” but then proceeded to interpret the provision in a way that the court believed effected that revision and gave effect to the court’s perception of Congress’ intent.<sup>325</sup>

## 2. Cases Where Future Legislative Enactments Change the Meaning of Text

In two cases, courts treat the meaning of text as subject to change in view of future legislative enactments.<sup>326</sup> These cases are important because they subordinate text to a larger view of Congressional purpose—indeed, a purpose not even noted in the original legislative enactment.<sup>327</sup>

In an important case involving the National Security Agency’s bulk telephone metadata collection program, the Court considered the effect of the USA FREEDOM Act (“Freedom Act”) on statutory language that appeared to remain unchanged.<sup>328</sup> The NSA relied on the authority of § 215 of the USA PATRIOT Act (“Patriot Act”), enacted in the shadow of the September 11th attacks, in undertaking bulk collection of telephone metadata involving calls made by and to citizens of the United States.<sup>329</sup> On May 7, 2015, the Second Circuit held that the NSA’s bulk collection program exceeded the authority of § 215.<sup>330</sup>

Less than one month later, on June 1, 2015, the Patriot Act expired.<sup>331</sup> The very next day, June 2, 2015, Congress enacted the Freedom Act.<sup>332</sup> The Freedom Act amended § 215 to make clear that it did *not* authorize bulk

323. *Id.* at 611 (citing *King v. Burwell*, 135 S. Ct. 2480, 2492 (2015)).

324. *Id.* at 624 (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)).

325. *Id.* at 625–26.

326. *ACLU v. Clapper*, 804 F.3d 617 (2d Cir. 2015); *Mantena v. Johnson*, 809 F.3d 721 (2d Cir. 2015).

327. *Clapper*, 804 F.3d at 624; *Mantena*, 809 F.3d at 734–36.

328. *Clapper*, 804 F.3d at 622–23. Telephone metadata “does not include the contents of a telephone call, but rather the details *about* the call, such as the length of the call, the phone number from which the call was made, and the phone number at which the call was received—information sometimes referred to as call detail records.” *Id.* at 619.

329. *Id.* at 618–19.

330. *Id.* at 620.

331. *Id.*

332. *Id.*

collection programs; however, it also contained a provision in § 109 that delayed the effectiveness of these amendments for 180 days and provided that “[n]othing in this Act shall be construed to alter or eliminate the authority of the Government to obtain an order under [§ 215] as in effect prior [to the effective date of the amendment].”<sup>333</sup> Having found that § 215 did not authorize the program, the Second Circuit considered whether it would allow the program to continue during the 180-day transition period.<sup>334</sup>

The court decided that the program was authorized during the transition, despite the lack of explicit language from Congress saying so.<sup>335</sup> Even though the language of § 215 was not changed, the court said that the statutory context changed, citing *King v. Burwell* for the proposition that § 215 had to be considered in the context of the subsequent Freedom Act amendments.<sup>336</sup> Though it previously held that § 215 did not authorize the program, the court concluded that its holding must give way to Congress’ intent in enacting the Freedom Act that the program continue during the 180-day transition.<sup>337</sup> Interestingly, the court was transparent in its readings of Congress’ intentions: the court admitted that “the present Congress cannot tell us what the Congress that passed the Patriot Act intended to authorize,” but nonetheless found Congress’ intent in passing the Freedom Act to be “clear.”<sup>338</sup> The language of § 215 did not change, but its meaning and interpretation was changed by a subsequent enactment.<sup>339</sup>

A second case from the Second Circuit made a similar move involving regulatory text. In *Mantena v. Johnson*, the court considered an immigration regulation that required notice to a skilled foreign worker’s employer (the “petitioner”) when the government denies the employer’s I-140 “Immigrant Petition for Alien Worker,” a necessary step en route to permanent residency (i.e. a “green card”).<sup>340</sup> The regulation requires notice to the “petitioner,”

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333. *Id.*

334. *Id.* at 622.

335. *Id.* at 623.

336. *Id.* at 624 (citing *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015)) (“That Congress did not change the language of § 215 must be viewed in the context of the larger changes to the statute.”).

337. *Id.* at 626.

338. *Id.* at 623.

339. *Id.* at 624.

340. *Mantena v. Johnson*, 809 F.3d 721, 723, 733 (2d Cir. 2015). The regulation at issue may be found at 8 C.F.R. § 205.2. *Id.* at 733. As preliminary matters, the court determined that a procedural challenge to the notice provision did not fall within the Immigration and Naturalization Act’s

however, subsequent to the enactment of the regulation, a statute was enacted that provided that immigration-related applications, including the I-140, would be portable when the immigrant changed jobs.<sup>341</sup> In litigating the matter at the Second Circuit, the government took the position that the regulation did not change textually, and for that reason, the original employer is the only party who needs to be notified of the government's decision to deny an I-140 petition.<sup>342</sup> However, the court held that the government acted inconsistently with the context of the "portability provisions" by failing to provide notice to either the successor employer as adopter of the petition or to the immigrant as the petition's beneficiary.<sup>343</sup> While regulations are perhaps under greater pressure to harmonize with a subsequent statutory amendment than are statutes, this case provides an example of a post-enactment statutory change altering the meaning and effect of a regulation.<sup>344</sup>

### 3. Purpose Used to Decide Among Permissible Readings of Statutory Language

In nine cases and three dissents, the courts have relied on purposive readings where statutory language is unclear, silent, or interpreted differently by various courts.<sup>345</sup> These courts typically cite *King's* admonition to consider context and statutory scheme.<sup>346</sup>

In *United States v. Epskamp*, the defendant was convicted of possession with intent to distribute a controlled substance on an aircraft registered in the

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jurisdiction-stripping provisions, *id.* at 728–30, and that the immigrant had standing to raise the procedural challenge that notice to the employer was insufficient, *id.* at 730–33.

341. *Id.* at 733–34.

342. *Id.* at 735.

343. *Id.* at 736.

344. To be clear, the court did nothing more than hold that the agency acted inconsistently with the statutory scheme. It remanded on the "precise way to read the notice regulations" for further development in the District Court and at the agency. *Id.* at 736.

345. In one additional case, a court relied primarily on a textual reading of statutory scheme to reject a narrow reliance on a single provision. In *National Mining Association v. Secretary, United States Department of Labor*, the Eleventh Circuit considered a provision that appeared to require the Secretaries of Labor and Health and Human Services to jointly promulgate certain mine safety regulations. 812 F.3d 843, 863 (11th Cir. 2016). However, the court did not agree that joint promulgation was required under the circumstances of the case, finding that such an interpretation "misconstrues the statutory scheme." *Id.* at 864.

346. See, e.g., *United States v. Epskamp*, 832 F.3d 154 (2d Cir. 2016); *Hernandez v. Williams*, 829 F.3d 1068 (9th Cir. 2016).

United States.<sup>347</sup> Because the aircraft flew from the Dominican Republic to Antwerp, Belgium, the court needed to consider whether the statute had extraterritorial effect.<sup>348</sup> Notwithstanding the statute's "less than crystalline drafting," the court determined that it could "discern[] its meaning, particularly with the aid of broader statutory context."<sup>349</sup> The defendant based his primary argument on a sentence in the venue provision of the statute that provided that the "section is intended to reach acts of manufacturing or distribution committed outside the territorial jurisdiction of the United States."<sup>350</sup> The defendant argued that this language deliberately excluded extraterritorial application of a provision outlawing possession with intent to distribute.<sup>351</sup> Though finding this argument "not wholly without force," the court nonetheless concluded that the possession-with-intent provision had extraterritorial effect based on the "statutory scheme," "context of the statute," and "authoritative legislative history."<sup>352</sup> Indeed, the court found these arguments sufficient not only to overcome the text of the venue provision but also the presumption against extraterritoriality.<sup>353</sup>

In an additional case with "less than pellucid" language, the Third Circuit used context to decide that a provision of the bankruptcy code did not permit the trustee to aggregate small, prepetition payments to different creditors so that they would fall above a \$5,850 threshold and consequently be "avoidable," that is, recoverable by the trustee.<sup>354</sup> While the statute provides that the "aggregate value" of transfers to "a creditor" could be considered, and while a bankruptcy rule of interpretation provides that "the singular includes the plural," the court rejected the Trustee's reading of these provisions as allowing the aggregation of transfers to multiple creditors, claiming that such an aggregation would "make[] little sense" in view of the "statutory scheme."<sup>355</sup> Rather than relying on a narrow textualist reading of these provisions, the court considered instead

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347. 832 F.3d at 160.

348. *Id.* at 161.

349. *Id.* at 162–63 (citing *King v. Burwell*, 135 S. Ct. 2480, 2492 (2015)); *Hernandez*, 829 F.3d at 1072 (language is "ambiguous when read in isolation," but its meaning was made clear by "context" and "the statute's remedial purpose").

350. *Epskamp*, 832 F.3d at 161 (citing 21 U.S.C. § 959(c)).

351. *Id.*

352. *Id.* at 162–66.

353. *Id.* at 164.

354. *In re Net Pay Sols., Inc.*, 822 F.3d 144, 149–50 (3d Cir. 2016) (text is "less than pellucid" but meaning clear when "read in context").

355. *Id.* at 149–51 (citing 11 U.S.C. §§ 547(c)(9), 102(7)).

that the purpose of the provision is to “discourage litigation over relatively insignificant transfer amounts.”<sup>356</sup> While the text is at best indeterminate, purpose and scheme allowed the court to reach a sensible interpretation of the statute.

The Third Circuit reached a similar result in a case considering the meaning of the term “facility” in the Stored Communications Act.<sup>357</sup> The court considered whether a personal computer could be considered a “facility” such that defendant Google violated the act by placing tracking cookies on plaintiffs’ web browsers.<sup>358</sup> While conceding that the semantic meaning of “facility” is broad enough to encompass a personal computer, the court said that such a reading would undermine statutory plan, and looked to “textual clues . . . legislative history and enactment context” to conclude that “facility” is a “term of art” which excludes personal computers from coverage under the statute.<sup>359</sup>

Finally, the court in *Hernandez v. Williams* used context and purpose to construe an indeterminate provision of the Fair Debt Collection Practices Act (FDCPA).<sup>360</sup> The provision requires that a debt collector take certain action following “the initial communication” with a debtor; the question in the case is whether the action needed only be taken by the initial debt collector or whether each and every subsequent collector also needs to take the action.<sup>361</sup> The court held that the statute applies to each and every collector who attempts to collect the debt; the court found the text ambiguous and based its conclusion on the structure of the FDCPA, its purposes, and a brief foray in to the legislative history of the provision.<sup>362</sup>

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356. *Id.* at 151 (citing *In re Bay Area Glass, Inc.*, 454 B.R. 86, 90 (B.A.P. 9th Cir. 2011)).

357. *In re Google Inc. Cookie Placement & Consumer Privacy Litig.*, 806 F.3d 125, 145–48 (3d Cir. 2015) (citing 18 U.S.C. § 2701).

358. *Id.* at 132–33, 145–46.

359. *Id.* at 147.

360. 829 F.3d 1068, 1072 (9th Cir. 2016) (citing 15 U.S.C. § 1692g(a)).

361. *Id.*

362. *Id.* at 1073–80. The court noted that resort to legislative history was “unnecessary,” but found its conclusion reinforced by that source. *Id.* at 1079–80. For an additional case in this genre, see *Alamo v. United States*, 850 F.3d 1349, 1354 (Fed. Cir. 2017), which affirms the method the Army used to calculate overtime pay for EMTs. The court found that any ambiguity or lack of clarity in the applicable regulations was resolved by “contextual analysis” of the Fair Labor Standards Act. *Id.* at 1352–53 (citing *King v. Burwell*, 135 S. Ct. 2480, 2492 (2015)).

In several cases, courts turn to context and scheme to reach different readings than have already been reached by different circuits.<sup>363</sup> For example, the Second Circuit in an ERISA case found that the phrase “normal retirement age” could not refer to a period of five years of service for employees of an accounting firm.<sup>364</sup> The court had no problem defining “normal retirement age” as a period of years of service, and the court recognized that the term “confers considerable discretion on retirement plan creators to determine normal retirement age.”<sup>365</sup> However, in view of the statutory scheme, it found that so short a time period was not a “normal” retirement age, directly contrary to a Seventh Circuit decision which approved a five-year period as the “normal retirement age” in an ERISA plan.<sup>366</sup> The textual conflicts in this case are not so sharp; nonetheless, the case provides an example of a court choosing a reading it believes to be faithful to the statute’s purpose in the face of a contrary reading by a different federal court of appeals.<sup>367</sup>

Similarly, the Seventh Circuit has held that the meaning of an attorney fee provision in a class action lawsuit involving coupon settlements becomes “clearer” when considered in context, and the Ninth Circuit’s contrary interpretation of that provision becomes “less persuasive.”<sup>368</sup> The provision in question set a requirement that attorney fees in coupon-settlement class actions must be based on a percentage of coupons actually redeemed, not the entire number of coupons made available.<sup>369</sup> A divided panel of the Ninth Circuit held that this provision foreclosed the lodestar method of calculating attorney fees in coupon-settlement class action cases.<sup>370</sup> The Seventh Circuit disagreed and viewed this provision as defining how to calculate attorney fees when they are based on coupon settlements, but looking to neighboring subsections to

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363. *Laurent v. PricewaterhouseCoopers LLP*, 794 F.3d 272, 280, 283 (2d Cir. 2015) (a reading in context and with a view towards place in statutory scheme results in circuit split); *In re Southwest Airlines Voucher Litig.*, 799 F.3d 701, 708–09 (7th Cir. 2015) (meaning of statute becomes “clearer” when considered in context, and the “Ninth Circuit’s reading becomes less persuasive”).

364. *Laurent*, 794 F.3d at 273.

365. *Id.* at 280–81.

366. *Id.* at 281–85.

367. *See generally id.*

368. *In re Southwest Airlines*, 799 F.3d at 708–10.

369. *Id.* at 707 (citing 28 U.S.C. § 1712(a) (2012)). The statute envisions a more complex arrangement where the settlement includes coupons and other relief. 28 U.S.C. § 1712(b)–(c).

370. *In re Southwest Airlines*, 799 F.3d at 706 (citing *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1183–85 (9th Cir. 2013)).

govern lodestar and mixed settlements.<sup>371</sup> Again, in a case where the language seemed susceptible to multiple readings, the court followed its view of what the statutory scheme required, even in the face of a contrary holding from a different circuit.<sup>372</sup>

### C. Cases that Reject a Purposive Reading of Text

Some nine cases plus two separate opinions reject plan and purpose arguments in statutory construction cases.<sup>373</sup> The concerns of these courts, while overlapping, fall into two basic categories. First, these courts find purpose to be an imprecise interpretive guide and prefer text and linguistic

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371. *Id.* at 710.

372. In three cases in the set, judges writing separately accuse the majority of adopting a narrow textualist reading that is both incorrect and that does not pay sufficient attention to the context, structure, and purpose of the statute as a whole. See *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 537–40 (2d Cir. 2017) (Chin, J., dissenting) (quoting *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442 (2014)) (arguing that “[w]hen the Act is read as a whole, it is clear that Congress did not intend the phrase ‘navigable waters’ to be interpreted as a single water body because that interpretation is ‘inconsisten[t] with the design and structure of the statute as a whole’”); *Jabateh v. Lynch*, 845 F.3d 332, 344 (7th Cir. 2017) (Hamilton, J., concurring in part and concurring in the judgment) (arguing that “sporadic and largely unpaid help” with translation at medical appointments could not constitute “material support” for terrorism because that reading “loses sight” of “broader statutory context and purpose”); *Ledezma-Cosino v. Sessions*, 857 F.3d 1042, 1054–59 (9th Cir. 2017) (Thomas, J., dissenting) (arguing that various uses of the statutory terms in different places in the Immigration and Naturalization Act leads to the conclusion that “a diagnosis of the disease of alcoholism does not, as a matter of immigration, mean that a petitioner lacks good moral character as a ‘habitual drunkard’”).

Finally, in *Sijapati v. Boente*, the Fourth Circuit embraced purpose to guide the meaning of ambiguous text in the course of deferring to an agency interpretation under *Chevron*. In this case, the Fourth Circuit affirmed the Board of Immigration Appeals’ construction of a statute that governs the removability of a person who is not a citizen (in the terms of the INA, an “alien”) convicted of a crime of moral turpitude. 848 F.3d 210, 213 (4th Cir. 2017) (construing 8 U.S.C. § 1227(a)(2)(A)(i)). The statute provides that such a person is removable if convicted of a crime of moral turpitude within five years of “the date of admission.” *Id.* In this case, the defendant Sijapati was initially admitted to the United States in 2001, reentered the country in 2003, and was convicted of a crime of moral turpitude in 2007. *Id.* at 213–14. Sijapati argued that the term “the date of admission” contemplates only a single date of admission (because of its use of the definite article “the”) and that this date referred only to the date of initial admission (2001), not to the date of readmission after travel abroad (2003). *Id.* at 216. The court found the language ambiguous and deferred to BIA’s conclusion that while “the date of admission” indeed referred only to one date, the date it referred to which the admission most proximate in time to an alien’s criminal conviction. *Id.* at 216–17. This deference was due, said the court, because BIA “tethered its interpretation to traditional tools of statutory interpretation,” including language, statutory context, statutory scheme, and purpose. *Id.* at 217–18.

373. See *infra* Sections IV.C.1–2.

canons to ground interpretation.<sup>374</sup> Second, these courts assert that contextual and purposive interpretation treads too close to the legislative function.<sup>375</sup>

### 1. Cases Where Purpose Arguments Do Not Overcome Text and Context

In *Michigan Flyer, LLC v. Wayne County Airport Authority*, the Sixth Circuit considered a provision of the Americans with Disabilities Act (ADA) that forbids retaliation against “individuals” who have complained about an ADA violation.<sup>376</sup> The plaintiffs in the case were transportation companies involved in a dispute with the local airport authority that included claims the airport authority violated the ADA.<sup>377</sup> The court affirmed dismissal of the complaint, holding that the meaning of the term “individual,” which is not defined in the ADA, “is unambiguous and does not include corporations.”<sup>378</sup> The court rejected the plaintiffs’ argument that the “remedial scheme of the ADA” requires a broad interpretation which would allow corporations to bring suit, thus rejecting the plaintiffs’ reliance on *King v. Burwell* on the grounds that purpose cannot be used to overcome plain, unambiguous statutory meaning.<sup>379</sup>

Interestingly, the *Michigan Flyer* court affirmed the trial court’s discretionary decision not to award attorney fees because the case involved “a matter of first impression” that clarified law “not known to the Plaintiffs” at the beginning of the suit.<sup>380</sup> While the language of the statute may have been “unambiguous,” it was apparently not so clear that the plaintiffs should have known it from the very beginning of the suit.<sup>381</sup>

A perhaps more candid account of the court’s treatment of language can be found in *Pakootas v. Teck Cominco Metals, Ltd.*<sup>382</sup> In that case, the Ninth Circuit rejected a claim under CERCLA (the so-called Superfund statute) that a smelter located ten miles north of the Canadian border “deposit[ed]” pollutants (and therefore arranged for their “disposal”) when it emitted them

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374. See *infra* Section IV.C.1.

375. See *infra* Section IV.C.2.

376. 860 F.3d 425, 428 (6th Cir. 2017) (examining 42 U.S.C. § 12203(a)).

377. *Id.* at 427.

378. *Id.* at 427–28, 431.

379. *Id.* at 429 n.1.

380. *Id.* at 433.

381. *Id.* at 427–28, 431.

382. See 830 F.3d 975, 980–86 (9th Cir. 2016).



through a smoke stack.<sup>383</sup> The court recognized the flexibility of the language involved, calling plaintiffs' broad reading of the terms of the statute "reasonable enough," but it found itself bound by past precedents (including an *en banc* decision) to a narrower interpretation.<sup>384</sup> In reaching this finding, the court rejected plaintiffs' invocation of CERCLA's "broad remedial purpose" because the purpose argument at its highest level would result in a reading not grounded in text, structure, and past precedent.<sup>385</sup>

The Seventh Circuit has similarly affirmed that "vague notions of a statute's 'basic purpose' are inadequate to overcome the words of its text regarding the specific issue under consideration."<sup>386</sup> The court held that an ERISA provision authorizing suits for "appropriate equitable relief" does not permit a suit against other insurers involving a coordination of benefits dispute because the relief sought is legal, not equitable.<sup>387</sup> The court rejected the ERISA-trustee-plaintiff's high-level purpose argument that allowing his suit would be "consistent with ERISA's underlying purposes of protecting plan assets and enforcing plan terms."<sup>388</sup>

In *B.D. v. District of Columbia*, the D.C. Circuit considered whether a provision of IDEA that allowed a cause of action to "any party aggrieved by the findings and decision of a hearing officer" allowed a prevailing party to bring a suit for enforcement of a hearing officer's favorable decisions.<sup>389</sup> In holding that enforcement suits were not authorized by this provision, the D.C. Circuit reached an opposite conclusion to the First and Third Circuits, which relied on "purpose arguments" to find such suits authorized.<sup>390</sup> The D.C. Circuit, however, found both that the text and the statutory context as found in the "most related provision" reinforced the "plain meaning," and thus refused to rely on purpose to reach a different result.<sup>391</sup>

Wholesale rejection of purpose, even where it merely reinforces the apparent meaning of text, is highly unusual; indeed, only one case that does this can be found in the set under examination, and even then only two judges

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383. *Id.* at 978 (citing 42 U.S.C. § 9607(a)(3)).

384. *Id.* at 983.

385. *Id.* at 985.

386. *Cent. States v. Am. Int'l Grp., Inc.*, 840 F.3d 448, 454 (7th Cir. 2016) (citations omitted).

387. *Id.* at 449.

388. *Id.* at 454 (citations omitted).

389. 817 F.3d 792, 800 (D.C. Cir. 2016) (considering 20 U.S.C. § 1415(i)(2)(A)).

390. *Id.* at 801.

391. *Id.* at 802.

subscribe to so staunchly an anti-purpose view.<sup>392</sup> In *In re Schwartz-Tallard*, the *en banc* Ninth Circuit found that a provision of the Bankruptcy Code permitting the debtor to recover “actual damages, including costs and attorneys’ fees” permitted recovery of attorney fees both to remedy a violation of the automatic stay as well as fees in the subsequent damages action against the violator.<sup>393</sup> The majority found the provision unambiguous, and it cited *King* for the idea that its language-based holding was also supported by the statute’s “plan.”<sup>394</sup> In concurrence, Judge Bea, joined by Judge O’Scannlain, asserts that the unambiguous meaning of the statute “should be the beginning and end of our analysis,” and proclaims himself “troubled” that the majority “proceeds to speculate” about Congress’s plan.<sup>395</sup> Judge Bea regards that discussion as “unnecessary” and a violation of “judicial restraint.”<sup>396</sup>

From these cases, one can conclude that highest-level purpose arguments are suspect, and that these courts are most receptive to structure and scheme arguments where they reinforce a linguistically plausible reading of the text. A small number of judges apply textualist principles in such a way as to reject purposive arguments, but these judges hew to an outlier position.<sup>397</sup>

## 2. Cases in Which Courts Reject Purposive Readings for Institutional Reasons

In setting forth interpretive principles, the Fifth Circuit in *In re Settoon Towing, LLC* pointed to “plain statutory language” as the “most instructive and reliable indicator of Congressional intent,” and stated that judicial power is “constrained by our mandate to respect the role of the Legislature, and take care not to undo what it has done.”<sup>398</sup> The decision in the case follows the text of

392. *In re Schwartz-Tallard*, 803 F.3d 1095, 1101–02 (9th Cir. 2015) (Bea, J., concurring).

393. *Id.* at 1097 (interpreting 11 U.S.C. § 362(k)).

394. *Id.* at 1100.

395. *Id.* at 1101 (Bea, J., concurring).

396. *Id.* (Bea, J., concurring).

397. See *Somers v. Dig. Realty Tr., Inc.*, 850 F.3d 1045, 1048–50 (9th Cir. 2017); *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 146–55 (2d Cir. 2015).

398. 859 F.3d 340, 345 (5th Cir. 2017) (quoting *King v. Burwell*, 135 U.S. 2480, 2496 (2015)) (internal quotation omitted). The dissenting judge in *Stiltner v. Hart*, cited the same language objecting to the panel majority’s holding that a mentally incompetent defendant was entitled to equitable tolling of the one-year statute of limitations found in the habeas corpus statute. 657 Fed. Appx. 513, 527 (6th Cir. 2016). The judge declared that “[w]e do not have the power to carve a blanket exception into AEDPA that does not exist, yet that is exactly what the majority does.” *Id.* at 528. The answer in this case is not as clear as one may imagine; the courts have a long history of applying equitable doctrines to statutes that do not contain express provisions of same. See *Filarsky v. Delia*, 566 U.S. 377, 383–

the statute at issue; the court cites legislative history to support its read of the text, but only after an extensive textual discussion.<sup>399</sup> However, the Court's invocation of *King* language relating to judicial power raises an institutional concern that purpose not be used to create law not found in the statutory text. This point is made clearly in several cases that cite *King*.<sup>400</sup>

Judge O'Scannlain is even clearer on this point in a concurrence to the Ninth Circuit unpublished decision in *Compton v. Dyncorp Int'l, Inc.*<sup>401</sup> Facing a situation where an earlier statute lodged jurisdiction for an administrative appeal in the district court but a later amendment to a companion statute appears to lodge jurisdiction in the court of appeals, the Ninth Circuit held in 1979 that the later statute governed, speculating that Congress' failure to amend the earlier statute must have been "inadvertent."<sup>402</sup> Judge O'Scannlain noted that five subsequent courts of appeals have rejected this reasoning, and that the earlier statute contains language suggesting it should control where the two statutes differ.<sup>403</sup> Based upon these observations, Judge O'Scannlain urged that the 1979 decision be overruled, arguing that departing from what he considered to be the plain text of the earlier provision "aggrandizes judicial power and encourages congressional lassitude," borrowing the phrase from Justice Scalia's dissent in *King*.<sup>404</sup> Put differently, the courts should not attempt to update a statute in light of later amendments to a cognate provision.<sup>405</sup> Instead, the courts should enforce the result of the statute as written and leave to Congress to fix any results it doesn't like.

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84 (2012) (recognizing that common law qualified immunity is available to defendants sued under 42 U.S.C. § 1983 even though the statutory text does not explicitly provide for this defense; qualified immunity is a "common law protections well-grounded in history and reason" that has "not been abrogated" by the general language of the statute).

399. *In re Settoon Towing, L.L.C.*, 859 F.3d 340, 352 (5th Cir. 2017). Arguably, the citation to legislative history suggests that this case belongs in Section IV.D below. However, I resist putting it there because the court employs clear textualist techniques and only deploys legislative history to confirm its read on one particular point.

400. For an example, see *In re Google Inc. Cookie Placement Consumer Privacy Litig.*, 806 F.3d 125, 147 (3d Cir. 2015) (citing *King*, 135 S. Ct. at 2496).

401. See generally 650 Fed. Appx. 550, 553–55 (9th Cir. 2016) (O'Scannlain, J., concurring).

402. *Id.* at 554–55 (describing *Pearce v. Dir., Office of Workers' Comp. Programs*, 603 F.2d 763, 770 (9th Cir. 1979)).

403. *Id.*

404. *Id.* at 555 (quoting *King*, 135 S. Ct. at 2506 (Scalia, J., dissenting)).

405. *Id.*

In *Chu v. United States Commodities Futures Trading Comm'n*, the Ninth Circuit followed closely the language of a statute, even when an amendment appeared not to make sense.<sup>406</sup> Congress in the Dodd-Frank law inexplicably removed a preponderance-of-the-evidence standard of review for decisions of the Commodities Futures Trading Commission.<sup>407</sup> As a result, the court held, it would not read that standard back into the statute, but instead applied the lesser “substantial evidence” standard from the Administrative Procedure Act.<sup>408</sup> The court commented that this was not a “patently obvious . . . drafting mistake” that it could correct, and declared that it was “beyond our province to rescue Congress from its drafting errors, and to provide for what we think . . . is the preferred result.”<sup>409</sup>

#### D. Cases Where Purpose and Text Do Not Conflict

In twenty-two cases in the set, the opinions do not recognize a conflict between purpose and text. Indeed, in most of these cases, there is no significant conflict in this area. What a careful reader can glean from these cases is the methods used by the court in reaching decisions. The cases fall rather easily into broad categories, and analysis of the specific case facts and rules adds little to the present discussion. Consequently, the discussion below will outline the various approaches taken by the courts and will cite cases illustrating those approaches in the footnotes.

The formulation of priority in *King* reads as follows:

If the statutory language is plain, we must enforce it according to its terms. But oftentimes the “meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.” So when deciding whether the language is plain, we must read the words “in their context and with a view to their place in the overall statutory scheme.” Our duty, after all, is “to construe statutes, not isolated provisions.”<sup>410</sup>

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406. 823 F.3d 1245, 1250 (9th Cir. 2016).

407. *Id.* at 1249.

408. *Id.* at 1250.

409. *Id.* (citations omitted). Apparently, the court views “drafting errors” differently from “drafting mistakes.” While there may be some ability to correct the latter, correcting the former raises institutional concerns for this panel.

410. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (internal citations omitted) (first citing *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010); then citing *FDA v. Brown & Williamson*, 529 U.S. 120, 132 (2000); and then citing *Graham County Soil and Water Conservation Dist. v. United States ex rel. Wilson*, 559 U. S. 280, 290 (2010)).

Thirteen cases cite the second, third, or fourth sentences of this paragraph as a lead in to discussions that analyze plain language followed by context and statutory scheme, where context and scheme are used to reinforce the court's view of the language.<sup>411</sup> Five additional cases rely on this language and then

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411. See *United States ex rel. Michaels v. Agape Senior Cmty., Inc.*, 848 F.3d 330, 338–39 (4th Cir. 2017) (holding that the Attorney General has “an absolute veto power over voluntary settlements in qui tam [False Claims Act] suits” by relying on plain language, context, and statutory scheme); *Rainero v. Archon Corp.*, 844 F.3d 832, 837–38 (9th Cir. 2016) (holding that federal courts lacked subject matter jurisdiction over certain state law securities class action claims based upon plain language and statutory scheme the Securities Litigation Uniform Standards Act); *Nat’l Biodiesel Bd. v. EPA*, 843 F.3d 1010, 1018–20 (D.C. Cir. 2016) (rejecting challenge to EPA application of record keeping requirements under the Renewable Fuel Standards program based on regulatory context and scheme); *Humana Med. Plan, Inc. v. W. Heritage Ins. Co.*, 832 F.3d 1229, 1236–38 (11th Cir. 2016) (holding that the Medicare Act repayment provisions permit a Medicare Advantage Organization to sue a primary payer in the same manner as the government could; relying on language confirmed by context and scheme); *Zero Zone, Inc. v. U.S. Dept. of Energy*, 832 F.3d 654, 689 n.41 (7th Cir. 2016) (holding that the Department of Energy issued regulations properly, using the text of the provision at issue as a basis for understanding the statutory plan); *Bodine v. Cook’s Pest Control Inc.*, 830 F.3d 1320, 1322–23, 1327 (11th Cir. 2016) (holding that the Uniformed Services Employment and Reemployment Rights Act of 1994 does not conflict with the Federal Arbitration Provision, based on plain language of the statute, context, and canons); *In re Wright*, 826 F.3d 774, 778–83 (4th Cir. 2016) (holding that a state prisoner challenging the “execution” of his sentence is required to file under 28 U.S.C. § 2254 and may not invoke § 2241 based upon “the plain language of the statutes at issue and the purpose and context of AEDPA”); *Assocs. Against Outlier Fraud v. Huron Consulting Grp., Inc.*, 817 F.3d 433, 436–37 (2d Cir. 2016) (holding that term “expenses” under the fee-shifting provisions of the False Claims Act does not include “costs” under Federal Rule of Civil Procedure 54(d)(1), and the terms have different meanings based upon contextual provisions in the FCA and the manner in which the FCA and the Federal Rules Civil Procedure use the two terms); *Cypress v. United States*, 646 Fed. Appx. 748, 752–54 (11th Cir. 2016) (holding that “[t]ribe” as used in the Miccosukee Reserved Area Act refers to the Native American tribe itself and not individual members of the tribe based upon statutory context and scheme); *Cumberland Cty. Hosp. Sys., Inc. v. Burwell*, 816 F.3d 48, 52–57 (4th Cir. 2016) (holding that Medicare Act does not provide recourse to an Article III court when Administrative Law Judge fails to issue a timely decision on a reimbursement claim, relying on statutory context and scheme of the Medicare administrative adjudication system); *Greater Missouri Med. Pro-Care Providers, Inc. v. Perez*, 812 F.3d 1132, 1137–41 (8th Cir. 2015) (holding that the Secretary of Labor is not authorized by the Immigration and Nationality Act to broaden the scope of an “aggrieved party” investigation to include other employees beyond the complainant based upon statutory language, purpose, and scheme); *United States v. Chafin*, 808 F.3d 1263, 1270–71 (11th Cir. 2015) (concluding that the federal criminal embezzlement statute is “consistent and coherent” after “considering the overall statutory scheme”); *DiBacco v. U.S. Army*, 795 F.3d 178, 196–99 (D.C. Cir. 2015) (holding that the CIA director is permitted to exercise discretion conferred on the Director of National Intelligence by the National Security Act for purposes of withholding materials from disclosure under Exemption 3 of the Freedom of Information Act; considering the context of the National Security Act regulatory scheme).

use context, scheme, and legislative history to support their interpretations of statutory language.<sup>412</sup> Finally, in at least two cases, the “context” at issue includes entirely different statutes and/or principles of the common law or of federalism.<sup>413</sup>

#### V. THE SUPREME COURT REFUSES TO REVISIT *KING V. BURWELL*, OR DOES IT?

As one might expect, the Supreme Court has weighed in on a very small number of decisions that cite *King*. Only two cases provide the Court an

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Two cases involve more straightforward application of statutory text with little interpretation; here too the courts state that context and scheme are important in understanding how the provisions apply. See *BWP Media USA, Inc. v. Clarity Dig. Grp., LLC*, 820 F.3d 1175, 1179–81 (10th Cir. 2016) (Digital Millennium Copyright Act); *I.R. ex rel. E.N. v. Los Angeles Unified Sch. Dist.*, 805 F.3d 1164, 1167 (9th Cir. 2015) (IDEA).

412. *SEC v. Jensen*, 835 F.3d 1100, 1114–15 (9th Cir. 2016) (holding that the CEO or CFO of an issuer may be liable under Sarbanes-Oxley § 304 when the issuer needs to prepare an accounting restatement due to misconduct even if the CEO or CFO is not personally responsible for the misconduct; textual reading supported by legislative history); *City & Cnty. of San Francisco v. U.S. Dep’t of Transp.*, 796 F.3d 993, 998–1001 (9th Cir. 2015) (holding that the city and county of San Francisco has no right of action for mandamus under the federal Pipeline Safety Act to force the Department of Transportation to regulate a natural gas transmission pipeline in a particular way; holding based on the “plain statutory language, the statutory structure, the legislative history, the structure of similar federal statutes, and interpretations of similar statutory provisions by the Supreme Court and our sister circuits”); *Mechammil v. City of San Jacinto*, 653 Fed. Appx. 562, 563–65 (9th Cir. 2016) (holding that local governments in California may not impose a special assessment or attach a lien to real property to collect fines or penalties for certain local ordinance violations; reading several statutes together and consulting legislative history of California statutes); *In re Certified Question of Law*, 858 F.3d 591, 595–604 (FISA Ct. Rev. 2016) (holding that relevant provisions of the Foreign Intelligence Surveillance Act permit capture of certain information in connection with a FISA warrant after considering statutory context and legislative history); *ClearCorrect Operating, LLC v. ITC*, 810 F.3d 1283, 1289–99 (Fed. Cir. 2015) (holding that the term “articles” in the Tariff Act of 1930 is unambiguous and does not include “electronic transmissions of digital data” in view of statutory context and legislative history).

413. See *Ojo v. Lynch*, 813 F.3d 533, 538–41 (4th Cir. 2016) (holding facially valid state court nunc pro tunc adoption orders merit deference in matters under provisions of the Immigration and Nationality Act that apply to children “adopted while under sixteen years of age”; interpreting the INA provision at issue in light of its own statutory context, state family law principles and principles of federalism); *Rai v. WB Imico Lexington Fee, LLC*, 802 F.3d 353, 358–64 (2d Cir. 2015) (holding that notice to an attorney is sufficient under provisions of the Interstate Land Sales Full Disclosure Act even where not explicitly provided by the statute in light of agency law principles).

opportunity to weigh in with meaningful guidance, and in both cases, it declines to do so.<sup>414</sup>

In *Digital Realty Trust, Inc. v. Somers*, the Supreme Court settled a circuit split over the reach of Dodd-Frank anti-retaliation protections for whistleblowers.<sup>415</sup> Dodd-Frank defines a whistleblower as an individual who “provides . . . information relating to a violation of the securities laws to the [Securities and Exchange] Commission.”<sup>416</sup> However, one subsection of the anti-retaliation provision protects individuals who “mak[e] disclosures that are required or protected [inter alia] under the Sarbanes-Oxley Act of 2002.”<sup>417</sup> Sarbanes-Oxley does not require disclosure to be made to SEC; under Sarbanes-Oxley, whistleblower protection is extended to all “employees” who report misconduct to the government or merely to an internal supervisor.<sup>418</sup> The question matters because Dodd-Frank provides more generous remedies to whistleblowers than Sarbanes-Oxley.<sup>419</sup> Thus, the question that divided the lower courts: Does the Dodd-Frank anti-retaliation provisions (and their associated more generous remedies) apply to employees who make internal disclosures of misconduct but do not report that misconduct to the SEC?<sup>420</sup>

The lower courts diverged on this question. The Fifth Circuit held that the answer was “no,” that Dodd-Frank protections only apply to individuals who report information to the SEC and fit within the Dodd-Frank definition of “whistleblower.”<sup>421</sup> Divided panels of the Second and Ninth Circuits reached

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414. See generally *Dig. Realty Tr. Inc. v. Somers*, 138 S. Ct. 767 (2018); *Mount Lemmon Fire Dist. v. Guido*, 139 S. Ct. 22 (2018).

415. 138 S. Ct. at 772, 776.

416. 15 U.S.C. § 78u-6(a)(6) (2012).

417. *Id.* § 78u-6(h)(1)(A).

418. *Somers*, 138 S. Ct. at 772 (quoting 18 U.S.C. § 1514A(a)(1)).

419. See *id.* at 778.

420. See generally *Somers v. Dig. Realty Tr. Inc.*, 850 F.3d 1045 (9th Cir. 2017); *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145 (2d Cir. 2015); *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620 (5th Cir. 2013).

421. *Asadi*, 720 F.3d at 630. This opinion, of course, does not cite *King v. Burwell* as it was issued before *King* was decided.

the opposite conclusion.<sup>422</sup> Both the majority opinions and the dissents in the Second and Ninth Circuits feature prominent discussions of *King*.<sup>423</sup>

The majority in the Second and Ninth Circuits follow the same essential analytical path. Both opinions did not find a clear textual solution.<sup>424</sup> Both majority opinions also rely on a Scalia-Garner observation that statutory definitions “are, after all, just one indication of meaning—a very strong indication, to be sure, but nonetheless one that can be contradicted by other indications.”<sup>425</sup>

Having found room for interpretation, both courts conclude that applying the narrower Dodd-Frank definition of “whistleblower” would undermine the regulatory purposes of the statute, spending a considerable amount of space exploring the pragmatic, real-world consequences of the narrower definition.<sup>426</sup>

The Second Circuit decision in *Berman* is interesting because it explicitly wraps itself in the mantle of *King*. At the beginning of the opinion, the Second Circuit majority says that the case contains a “similar issue” to *King*, though it later contends that the issue in *King* was “far more problematic” because the Supreme Court in *King* had to decide whether a “phrase means something other than what it literally says,” while the court in *Berman* need only decide how to reconcile a definitional provision that appears to conflict with a substantive provision.<sup>427</sup> Perhaps even more strikingly, *Berman* cites *Church of the Holy Trinity* as a case in which the Court refused to apply the express terms of a statute because they yielded a result “unlikely to have been intended by Congress.”<sup>428</sup> The Ninth Circuit’s citation of *King* in *Somers* is more discreet; the court relies on *King* for the less-controversial idea that “terms can have different operative consequences in different contexts.”<sup>429</sup>

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422. *Somers*, 850 F.3d at 1050 (concluding that the statute extends protections to individuals who report internally and concluding that SEC regulations taking the same position are entitled to deference); *Berman*, 801 F.3d at 146 (finding the statute ambiguous and extending *Chevron* deference to SEC regulation).

423. *Somers*, 850 F.3d at 1049; *id.* at 1051 (Owens, J., dissenting); *Berman*, 801 F.3d at 146, 150, 155; *id.* at 155–56, 159–60 (Jacobs, J., dissenting).

424. *Somers*, 850 F.3d at 1049–50 (Dodd-Frank’s definitional provision “should not be dispositive”); *Berman*, 801 F.3d at 155 (finding the Dodd-Frank language ambiguous).

425. *Somers*, 850 F.3d at 1049 (quoting SCALIA & GARNER, *supra* note 1, at 228); *Berman*, 801 F.3d at 154 (quoting the same language).

426. *Somers*, 850 F.3d at 1049–50; *Berman*, 801 F.3d at 151–52.

427. *Berman*, 801 F.3d at 146, 150.

428. *Id.* at 150.

429. *Somers*, 850 F.3d at 1049.



The dissents in the Second and Ninth circuit cases contest any number of points, but they are most interesting for their explicit rejections of *King*.<sup>430</sup> In his very first sentence, Judge Jacobs in *Berman* accuses the majority of “alter[ing] a federal statute by deleting three words (‘to the Commission’) from the definition of ‘whistleblower’ in the Dodd-Frank Act.”<sup>431</sup> He accuses the majority of relying “almost wholly” on *King* and contends that the case should not be understood as a “not a wholesale revision of the Supreme Court’s statutory interpretation jurisprudence, which for decades past has consistently honored plain text over opportunistic inferences about legislative history and purpose.”<sup>432</sup> Judge Jacobs argues that the Supreme Court decided *King* as it did to avert disaster, and the present case would hardly result in disaster if the language of the whistleblower definition was held to be controlling.<sup>433</sup> In *Somers*, Judge Owen’s dissent minces even fewer words: “In my view, we should quarantine *King* and its potentially dangerous shapeshifting nature to the specific facts of that case to avoid jurisprudential disruption on a cellular level. *Cf.* John Carpenter’s *The Thing* (Universal Pictures 1982).”<sup>434</sup>

The Supreme Court, in an opinion by Justice Ginsburg, reversed the judgment of the Ninth Circuit and held, based on the definition provision, that Dodd-Frank protections and remedies only apply to “whistleblowers” who report misconduct to the SEC.<sup>435</sup> The Court’s decision rests on textual justifications, beginning by admonishing that explicit statutory definitions must be followed.<sup>436</sup> The Court reinforces its textual reasoning with what it perceives to be the purpose of Dodd-Frank: to motivate individuals with knowledge of securities violations to report them to the Securities and Exchange Commission.<sup>437</sup> The Court then considers various consequences for the regulatory scheme raised by the *Somers* and by the Solicitor General, concluding that the regulatory scheme is not destroyed if Dodd-Frank

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430. *Id.* at 1051 (Owens, J., dissenting); *Berman*, 801 F.3d at 159 (Jacobs, J., dissenting).

431. *Berman*, 801 F.3d 155 (Jacobs, J., dissenting).

432. *Id.* at 159 (Jacobs, J., dissenting).

433. *Id.*

434. *Somers*, 850 F.3d at 1051 (Owens, J., dissenting).

435. *Dig. Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 772–73 (2018).

436. *Id.* at 776–77.

437. *Id.* at 777–78.

protection is limited to whistleblowers who make reports to the SEC as well as to internal corporate sources.<sup>438</sup>

Notably, the Court does not cite *King v. Burwell*, even where it could, declining to become involved in the dispute about its jurisprudential reach.<sup>439</sup> The Court's decision is rooted in text, informed by purpose, and considers the consequential arguments of the parties.<sup>440</sup> Concurring opinions debate the relevance of the single available piece of relevant legislative history, but ultimately only three justices (Thomas, Alito, and Gorsuch) would reject that source of meaning.<sup>441</sup> Thus, the Court does not commit the lower courts to a narrow form of textualism.

The Supreme Court made similar move in another 2018 opinion by Justice Ginsburg, this time for an 8-0 majority.<sup>442</sup> The Court reviewed the Ninth Circuit's decision in *Guido v. Mount Lemon Fire District*.<sup>443</sup> In *Guido*, a Ninth Circuit panel decision authored by Judge O'Scannlain creates a split with the sixth, seventh, eighth and tenth circuits by holding that the Age Discrimination in Employment Act's twenty-employee minimum does not apply to state and local government employers.<sup>444</sup> The Ninth Circuit relied on a plain-language reading of the text: in a two-pronged statutory provision defining a term "employer" for purposes of the Act, the twenty-employee minimum clearly applies to a "person in an industry affecting commerce," but does not appear in

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438. *Id.* at 778–82. An analysis of these consequentialist arguments is beyond the scope of the current discussion as it is not necessary to understand the Court's statutory construction moves.

439. *See generally id.*

440. *Id.* at 776–82.

441. *Id.* at 782 (Sotomayor, J., concurring); *id.* at 783–84 (Thomas, J., concurring in part and concurring in the judgement). The Supreme Court has reversed two additional cases that cite *King*. *Stapleton v. Advocate Health Care Network*, 817 F.3d 517 (7th Cir. 2016), *rev'd*, *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652 (2017); *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 807 F.3d 1311 (Fed. Cir. 2015) (*en banc*), *rev'd*, 137 S. Ct. 954 (2017). Both cases cite *King* for unremarkable propositions, and neither addresses conflicts between purpose and text. *Stapleton*, 817 F.3d at 526 ("Our duty, after all, is to construe statutes, not isolated provisions."); *SCA Hygiene*, 807 F.3d at 1336 (Hughes, J., concurring in part and dissenting in part) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). In both cases, as to the statutory interpretation issues, the Supreme Court appears to simply disagree on the meaning of less-than-clear statutory text. *Stapleton*, 137 S. Ct. at 1658–62; *SCA Hygiene*, 137 S. Ct. at 962–63. Neither case has clear signaling value on the question of how courts should reconcile text and purpose.

442. *Mount Lemmon Fire Dist. v. Guido*, 139 S. Ct. 22 (2018).

443. 859 F.3d 1168 (9th Cir. 2017), *cert. granted*, 138 S. Ct. 1165 (2018).

444. *Id.* at 1172–74.

a second sentence which provides that the term employer “also means” a state or local government.<sup>445</sup> The Ninth Circuit cited *King* for the notion that its reading “certainly does not threaten to destroy the entire statutory scheme.”<sup>446</sup> The court rejected purposive and legislative-history based arguments that counseled a contrary result.<sup>447</sup>

The Supreme Court, per Justice Ginsburg, affirmed the Ninth Circuit, relying heavily on textualist reasoning, but also taking a broad look at how similar remedial civil rights statutes treat the same issue.<sup>448</sup> Again, the Court does not cite *King* for any reason. The Court does compare the ADEA to Title VII of the Civil Rights Act of 1964 (Title VII) and to the Fair Labor Standards Act (FLSA).<sup>449</sup> Title VII imposes a textually-clear numerosity requirement on public employers; FLSA is equally clear, according to the Court, that it applies to all governmental employers regardless of their size.<sup>450</sup> The Court is not troubled that its decision renders the reach of the ADEA broader than Title VII because “this disparity is a consequence of the different language Congress chose to employ,” and because the FLSA, which served as a model for the ADEA is a “better comparator.”<sup>451</sup> The Court’s decision, while textual, is also deeply intertextual.

## VI. CONCLUSION

The text-vs.-purpose debate in statutory interpretation has been called “boring” by a very prominent academic and judge.<sup>452</sup> And indeed in its simplest form, it is. However, the real day-to-day work of courts is considerably more complex than caricatures of *Holy Trinity* or “[w]ords no longer have meaning” would suggest.<sup>453</sup> Understanding how courts use purpose and what evidence supports that use involves a close look at what courts actually do. This paper attempts to begin that process by looking at a discrete set of cases likely to provide strong evidence of the use of purpose. While further investigation is necessary to assess the impact of Donald Trump’s appointments to the judiciary, it seems clear at the present moment that the use of purpose is alive

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445. *Id.* at 1170.

446. *Id.* at 1174 (citing *King v. Burwell*, 135 S. Ct. 2480, 2495 (2015)).

447. *Id.* at 1174–75.

448. *Mount Lemmon Fire Dist. v. Guido*, 139 S. Ct. 22, 25–27 (2018).

449. *Id.* at 25–26.

450. *Id.*

451. *Id.* at 26.

452. Gluck & Posner, *supra* note 16, at 1300.

453. *King v. Burwell*, 135 S. Ct. 2480, 2497 (2015) (Scalia, J., dissenting).

and well in statutory interpretation and is likely to remain so. Further, the judicial role at the court of appeals level has not eroded into ideological battles or, worse yet, sloganeering. Instead, in the vast majority of cases studied here, the courts behave as courts, using all the tools available, to greater or lesser degrees, to give statutes their fullest and best meaning.