THE ROBERTS COURT AND THE NEW TEXTUALISM

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INTRODUCTION

The late Justice Scalia was undoubtedly one of the most influential jurists of recent memory, and nowhere is his influence more obvious than the current Court's text-based approach to statutory interpretation.[1] Along with Seventh Circuit Judge Easterbrook, Justice Scalia consistently pressed what academics have labeled the "new

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1 *See, e.g.*, Brett M. Kavanaugh, *Fixing Statutory Interpretation Judging Statutes*, 129 HARV. L. REV. 2118, 2118 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2016)) ("Statutory interpretation has improved dramatically over the last generation, thanks to the extraordinary influence of Justice Scalia. Statutory text matters much more than it once did. If the text is sufficiently clear, the text usually controls. The text of the law is the law." (footnotes omitted)); Interview by John Manning with Justice Elena Kagan, The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes at Harvard Law School, at 7:59 (Nov. 17, 2015) [hereinafter Kagan, The Scalia Lecture], http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation (explaining that Justice Scalia will "go down as one of the most important, most historic figures in the Court" because he "taught everybody how to do statutory interpretation differently").

textualism."[2] This approach to statutory interpretation is often associated with the rejection of legislative history as a relevant guide to statutory interpretation.[3] But the more fundamental innovation of the "new textualism" is this: when faced with clear statutory text, a court must give effect to that text even if the statute's semantic meaning is inconsistent with its perceived purpose.[4] As John Manning—the "new textualism's" most prominent academic theorist—has described the governing rule: "if the text of the statute is clear, deviation from the clear import of the text cannot be justified on the ground that it better promotes fidelity to legislative purposes."[5] The Court can go beyond the statutory text to purposive considerations only in the case of "genuine semantic ambiguity."[6]

Until recently, it had been accepted wisdom that the Roberts Court had wholly embraced the "new textualism" as an approach to statutory interpretation.[7] But in recent terms, the Court has decided a series of cases—most notably, *King v. Burwell*,[8] *Bond v. United States*,[9] and *Yates v. United States*[10]—that appear to reject textualism, instead elevating statutory purpose over semantic textual meaning. Based in large part on statutory context and purpose, the Court held in *Burwell* that a health insurance exchange is an "Exchange established by the State" under the Affordable Care Act (ACA)[11] even if it is established not by a state but by the federal government.[12] In *Bond*, the Court held that chemicals that are not only toxic to humans but also potentially lethal are not "toxic chemicals" under the Chemical Weapons Convention Implementation

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2 *See, e.g.*, William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990); John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 123–24; Richard M. Re, *The New Holy Trinity*, 18 GREEN BAG 2D 407, 407 (2015).

3*See, e.g.*, William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990); John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 123–24; Richard M. Re, *The New Holy Trinity*, 18 GREEN BAG 2D 407, 407 (2015).

ant. Legislative history should not even be consulted to confirm the apparent meaning of a statutory text.").

4 *See* Manning, *supra* note 2 , at 124.

5 *Id.* (footnote omitted).

6 *Id.* at 117.

7 *Id.* at 125 ("Instead, broad majorities of both the Rehnquist and Roberts Courts have taken pains to emphasize the unyielding quality of a semantically clear statutory text."); Kagan, The Scalia Lecture, *supra* note 1, at 8:28 ("I think we're all textualists now in a way that just was not remotely true when Justice Scalia joined the bench.").

8 135 S. Ct. 2480 (2015).

9 134 S. Ct. 2077 (2014).

10 135 S. Ct. 1074 (2015).

11 Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 5, 18, 20, 21, 25, 26, 29, 30, 31, 35, 36, and 42 U.S.C.).

12 *Burwell*, 135 S. Ct. at 2495–96.

Act of 1998[13] even though "toxic chemical" is defined simply as a chemical that "can cause death, temporary incapacitation or permanent harm to humans or animals."[14] And in *Yates*, the Court held that a fish is not a "tangible object" under 18 U.S.C. § 1519, even though a fish is both tangible and an object.[15] In each case, in other words, the Court failed to give effect to the semantic meaning of the relevant statutory text. Unsurprisingly, Justice Scalia rejected the majority's reasoning in each case.[16]

Some commentators have argued that some or all of these cases represent a departure from the new textualist approach,[17] and it is hard to argue that the result in each case departed from what one would expect from a strict application of the new textualist methodology. But while the Court's *conclusions* surely reflect a deviation from the new textualism's focus on semantic textual meaning, each opinion's recitation of its own methodology describes the new textualist approach to a tee: The Court in each case recited the rule that the Court must give effect to the statute's plain text, and that the Court may look beyond the text only if it is ambiguous.[18] And in each case, the Court first concluded that the applicable text *was* ambiguous before relying on non-textual, purpose-based interpretive evidence.[19]

Why would the Court studiously frame each of these opinions under the modern textualist paradigm even while reaching results that seemingly depart from the semantic meaning of the statutory text? The main (perhaps counterintuitive) claim of this Essay is that the Court's rhetorical approach in these cases—i.e., the majority's description of its own reasoning—actually demonstrates the Roberts Court's deep commitment to the new textualist methodology. Indeed, the fact that the Court frames its opinions as applying the new textualism even in cases where its conclusion is in tension with the statute's semantic meaning—i.e., cases that *could have*, but were not, framed in explicitly purposive terms—seems to me to reflect the current Court's view that

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13 Chemical Weapons Convention Implementation Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681–856 (codified as amended in scattered sections of 2, 3, 5, 6, 7, 8, 10, 11, 12, 13, 15, 16, 18, 19, 20, 21, 22, 23, 25, 28, 29, 30, 31, 33, 36, 37, 38, 39, 40, 42, 43, 44, 45, 46, 47, 48, 49, 50, and 54 U.S.C.).

14 18 U.S.C. § 229F(8)(A) (2012); *see also Bond*, 134 S. Ct. at 2085, 2093.

15 *Yates*, 135 S. Ct. at 1079.

16 *See Burwell*, 135 S. Ct. at 2496 (Scalia, J., dissenting); *Yates*, 135 S. Ct. at 1090 (Kagan, J., dissenting) (Justice Scalia joined in the dissent); *Bond*, 134 S. Ct. at 2094 (Scalia, J., concurring in the judgment).

17 *See, e.g.*, Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 80–96 (2015); Re, *supra* note 2, at 407–09.

18 *See infra* Part II.

19 *See infra* Part II.

the new textualism is the only legitimate method for reading statutes. At the very least, these cases demonstrate that the Roberts Court has so thoroughly internalized the new textualism that it refuses to offer any other doctrinal framing, even when an alternative, more purposive analysis, may fit better with the Court's conclusion.

This short Essay proceeds in four parts. Part I surveys the Court's relatively recent progression from purposivism to textualism. Part II describes the Court's recent decisions in *Burwell*, *Bond*, and *Yates*. Part III argues that while these cases each appear to reach results inconsistent with the relevant statutes' clear text, they also demonstrate the Court's deep commitment to textualism as the only legitimate method for interpreting statutes—a view that is likely to have a significant impact not only on the Supreme Court's own statutory interpretation decisions, but also on the approach of lower federal courts, and on the manner in which appellate advocates frame their arguments in statutory cases. In the last Part, I briefly conclude.

I. THE OLD PURPOSIVISM AND THE NEW TEXTUALISM

Over the last several decades, the new textualism has asserted itself as the dominant method of statutory interpretation. Here is the overly simplified version of the story: For much of the twentieth century, courts—including the Supreme Court—were "purposivists," meaning that when a statute's plain text and its evident purpose appeared to contradict each other, they would often elevate purpose over text. The example routinely highlighted by modern textualists is *Church of the Holy Trinity v. United States*,[20] a nineteenth-century opinion in which the Court disregarded the "letter of the statute" in favor of its "spirit."[21] And while *Church of the Holy Trinity* seems to be modern textualists' prime exemplar of the bad old days,[22] there are plenty of more modern examples.

For example, the Court explained in 1940 that "even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words."[23] In the 1980s, the Court confidently declared that "[i]t is a

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20 143 U.S. 457 (1892).

21 *Id.* at 459.

22 *See, e.g.*, Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 108 (2007) (Scalia, J., dissenting); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 14 (2001).

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

'familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers,'"[24] and that

> [l]ooking beyond the naked text for guidance is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress' intention, since the plain-meaning rule is "rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists."[25]

This is not to say that the purposivist approach ignored statutory text. Explicitly purposive opinions readily acknowledged that, in Learned Hand's words, "the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing."[26] Yet even clear text is not always determinative: again, in Hand's words, "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."[27]

Beginning in the 1980s, in large part due to the powerful and pervasive critiques of Justice Scalia and Judge Easterbrook, this purposive approach began to yield to the modern textualism. On the Court's evolving view, elevating purpose over text ignored—and, indeed, effectively overrode—the unknowable legislative compromises without which the legislation could not have been enacted.[28] Thus, as the Court explained in 1986, even if Congress is "unanimous in its intent to stamp out some vague social or economic evil," "its Members may differ sharply on the means for effectuating that intent," so "the

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24 Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 284 (1987) (alteration in original) (quoting United Steelworkers of Am. v. Weber, 443 U.S. 193, 201 (1979)).

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

26 *Id.* at 454 (quoting Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945) (Hand, J.)).

27 *Id.* at 454–55 (quoting *Cabell*, 148 F.2d at 739).

28 *See, e.g.*, Manning, *supra* note 22, at 7. As Manning explains,

> [T]extualists maintain for several reasons that variance between a clear text and its apparent purpose does not show that Congress, in some sense, poorly communicated its intent. First, because lawmaking often entails compromise among interest groups with diverse goals, legislators do not necessarily pursue a statute's background purpose to its logical end. Second, in a complex legislative process that includes agenda manipulation and logrolling, it is impossible to reconstruct what a legislature would have "intended" if put to a choice between the letter and purpose of the law. Third, enforcing the background purpose, rather than the details, of a precise text may, in fact, defeat Congress's evident choice to legislate by rule rather than by standard.

Id. (footnotes omitted).

final language of the legislation may reflect hard-fought compromises."[29] And the "invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise."[30]

Thus, beginning in the mid-1980s and proceeding through the present day, "both the Rehnquist and Roberts Courts have taken pains to emphasize the unyielding quality of a semantically clear statutory text."[31] Examples of the Court's approach are legion, but the upshot is that if the statutory language is unambiguous, courts must give effect to that language.[32] As one oft-cited passage explains, the modern Court has repeatedly enforced the principle that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'"[33]

That is not to stay that statutory purpose is irrelevant. Although the strictest textualists—Justice Scalia is the prime example—refuse to consider legislative history as evidence of congressional purpose, even Justice Scalia agrees that statutory purpose is an appropriate measure of statutory meaning *if the text is ambiguous*: as Justice Scalia himself has explained, a "*textually permissible* interpretation that furthers rather than obstructs the document's purpose should be favored."[34] Thus, unlike in the days of strong purposivism, in which the statute's purpose could *override* statutory text, the general understanding is that the current "Court's propensity to rely on background purpose now depends upon the degree to which the text of the statute permits it."[35]

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29 Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361, 374 (1986).

30 *Id.*

31 Manning, *supra* note 2, at 125.

32 *See, e.g.*, Sebelius v. Cloer, 133 S. Ct. 1886, 1895 (2013) ("Our 'inquiry ceases [in a statutory construction case] if the statutory language is unambiguous and the statutory scheme is coherent and consistent.'" (alteration in original) (citation omitted)); Millbrook v. United States, 133 S. Ct. 1441, 1446 (2013) (declining "to read [] a limitation into unambiguous text"); Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 270 (2010) ("It is our function to give the statute the effect its language suggests, however modest that may be; not to extend it to admirable purposes it might be used to achieve."); Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 255 (2004) ("As 'in all statutory construction cases, we begin . . . with the language of the statute.'" (citation omitted)); Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002) ("As in all statutory construction cases, we begin with the language of the statute. The first step 'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.'" (citations omitted)).

33 Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992) (citations omitted) (quoting Rubin v. United States, 449 U.S. 424, 430 (1981)).

34 ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 63 (2012) (emphasis added).

35 Manning, *supra* note 2, at 147.

II. THREE RECENT TESTS FOR TEXTUALISM

Three recent cases—two of which were authored by Chief Justice Roberts, and the other joined by him—do not fit comfortably within the above narrative. As Richard Re has explained,[36] it is very difficult to reconcile the results in these cases—*King v. Burwell*,[37] *Yates v. United States*,[38] and *Bond v. United States*[39]—with the modern approach to statutory interpretation just described, in which statutory purpose cannot override the clear semantic meaning of the statutory text. As described below, each case appears to reach a conclusion incompatible with the statutory text's plain meaning. But while the seemingly atextual results in these cases may themselves be notable, one surprising (at least to me) feature of these cases is that each describes its own methodology in expressly textualist terms—i.e., the Court must give effect to plain statutory language, and can only consider statutory purpose if the statute is ambiguous—and each first concludes that the statutory language is in fact ambiguous before applying the non-textual evidence of statutory purpose that ultimately drives the result in each case.

A. King v. Burwell

Burwell concerned the proper interpretation of one of the key provisions of the ACA.[40] As the majority opinion explained, that Act principally adopted "a series of interlocking reforms designed to expand coverage in the individual health insurance market."[41]

> First, the Act bars insurers from taking a person's health into account when deciding whether to sell health insurance or how much to charge. Second, the Act generally requires each person to maintain insurance coverage or make a payment to the Internal Revenue Service. And third, the Act gives tax credits to certain people to make insurance more affordable.[42]

The Act also requires "the creation of an 'Exchange' in each State—basically, a marketplace that allows people to compare and purchase insurance plans."[43] "The Act gives each State the opportunity to

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36 Re, *supra* note 2.
37 135 S. Ct. 2480 (2015).
38 135 S. Ct. 1074 (2015).
39 134 S. Ct. 2077 (2014).
40 *Burwell*, 135 S. Ct. at 2485.
41 *Id.* at 2485.
42 *Id.*
43 *Id.*

establish its own Exchange, but provides that the Federal Government will establish the Exchange if the State does not."[44]

The question in *Burwell* concerned the third of the reforms described above. One portion of the ACA amended the Internal Revenue Code to provide tax credits to certain taxpayers who purchase insurance on the individual market through "an Exchange *established by the State* under [42 U.S.C. § 18031],"[45] and the issue before the Court was whether a taxpayer on the individual market residing in a State that had not set up an Exchange—and, thus, must purchase insurance through a federally-created Exchange—was entitled to receive a tax credit under § 36B.[46] The Court, in an opinion authored by the Chief Justice, held that tax credits were in fact available under federally-created Exchanges—i.e., that an Exchange established by the federal government counts as "an Exchange established by the State."[47]

That result seems on its face to disregard the semantic meaning of the statutory text, yet the Court very clearly described its own methodology according to the modern textualist method. After concluding that there was no basis to apply to the Internal Revenue Service's interpretation of the statute the deferential standard of review under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[48] the Court explained that "[i]f the statutory language is plain, we must enforce it according to its terms."[49] The Court explained, as it has repeatedly explained in the past, that the "meaning—or ambiguity—of certain words or phrases may only become evident when placed in context,"[50] such that "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.'"[51]

Consistent with the Court's description of its own methodology, the Court "beg[a]n with the text of Section 36B,"—that an individual may receive a tax credit "only if the individual enrolls in an insurance plan through '*an Exchange established by the State under [42 U.S.C. § 18031]*.'"[52] And the Court concluded for several reasons that the emphasized language is ambiguous as to whether it encompasses Exchanges created by the federal government.[53] After considering

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44 *Id.*
45 26 U.S.C. § 36B (2012) (emphasis added).
46 *Burwell*, 135 S. Ct. at 2487.
47 *Id.* at 2483.
48 467 U.S. 837 (1984); *see Burwell*, 135 S. Ct. at 2495–96.
49 *Burwell*, 135 S. Ct. at 2489.
50 *Id.* (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000)).
51 *Id.* (quoting *Brown & Williamson*, 529 U.S. at 133).
52 *Id.* (alteration in original) (emphasis added) (quoting 26 U.S.C. § 36B).
53 *Id.* at 2491–92.

provisions in the Act that the majority believed would not operate properly if the phrase "Exchange established by the State" were read as limited to State-created exchanges, the Court concluded that "the Act may not always use the phrase 'established by the State' in its most natural sense," and "[t]hus, the meaning of that phrase may not be as clear as it appears when read out of context."[54] For this and other contextual reasons, the Court explained that the "upshot of all this is that the phrase 'an Exchange established by the State under [42 U.S.C. § 18031]' is properly viewed as ambiguous"[55]: the "phrase may be limited in its reach to State Exchanges," but "it is also possible that the phrase refers to *all* Exchanges—both State and Federal—at least for purposes of the tax credits."[56]

The Court flatly rejected a seemingly powerful, traditional textualist counterargument, i.e., that if "an Exchange established by the State" referred to (or even could plausibly have referred to) exchanges established by the federal government, the phrase "established by the State" would be entirely superfluous.[57] The Court explained that, as a general matter, "our preference for avoiding surplusage constructions is not absolute."[58] And the Court further noted that, specifically as applied to the ACA, "rigorous application of the canon does not seem a particularly useful guide to a fair construction of the statute," because that statute "contains more than a few examples of inartful drafting," and "does not reflect the type of care and deliberation that one might expect of such significant legislation."[59]

Having concluded that the "the text is ambiguous," the Court then "turn[ed] to the broader structure of the Act to determine the meaning of Section 36B."[60] Citing *New York State Department of Social Services v. Dublino*[61] for the proposition that the Court "cannot interpret federal statutes to negate their own stated purposes,"[62] the majority explained that "the statutory scheme compels us to reject petitioners' interpretation because it would destabilize the individual insurance market in any State with a Federal Exchange."[63] Exchange subsidies, the majority noted, were an integral part of the ACA's tripartite scheme: "The guaranteed issue and community rating requirements ensure that

54 *Id.* at 2490.
55 *Id.* at 2491.
56 *Id.*
57 *Id.* at 2492.
58 *Id.* (quoting Lamie v. U.S. Trustee, 520 U.S. 526, 536 (2004)).
59 *Id.*
60 *Id.*
61 413 U.S. 405 (1973).
62 *Id.* at 419–20.
63 *Burwell*, 135 S. Ct. at 2492–93.

anyone can buy insurance; the coverage requirement creates an incentive for people to do so before they get sick; and the tax credits—it is hoped—make insurance more affordable."[64] And if the challengers' reading were correct—i.e., if tax credits were not available through federally-created exchanges—the Court concluded that the statute simply would not work, undermining the Act's coverage requirement and potentially "push[ing] a State's individual insurance market into a death spiral."[65] "It is implausible," the Court explained, "that Congress meant the Act to operate in this manner."[66] Because "Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them," the Court stated that, "[i]f at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter."[67] And because the Court concluded that "Section 36B can fairly be read consistent with what we see as Congress's plan, and that is the reading we adopt," it held that a federal exchange is an "Exchange established by the State."[68]

The Court thus concluded that while the key term "an Exchange established by the State" is ambiguous, statutory context resolves that ambiguity in favor of allowing federal exchanges to fall within the statute's scope.[69] But before concluding, the Court acknowledged the obvious: "Petitioners' arguments about the plain meaning of Section 36B are strong."[70] The Court nevertheless rejected that reading because "the context and structure of the Act compel[led] [the majority] to depart from what would otherwise be the most natural reading of the pertinent statutory phrase."[71]

Unsurprisingly, Justice Scalia (joined by Justices Thomas and Alito) dissented, dubbing "quite absurd" the proposition that "'Exchange established by the State' . . . means 'Exchange established by the State or the Federal Government.'"[72] In his view, "[u]nder all the usual rules of interpretation . . . the Government should lose this case."[73] "Words no longer have meaning," Justice Scalia charged, "if an Exchange that is *not* established by a State is 'established by the State.'"[74]

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64 *Id.* at 2493.
65 *Id.*
66 *Id.* at 2494.
67 *Id.* at 2496.
68 *Id.*
69 *Id.* at 2495.
70 *Id.*
71 *Id.*
72 *Id.* at 2496–97 (Scalia, J., dissenting).
73 *Id.*
74 *Id.* at 2497.

B. Bond v. United States

The Court granted certiorari in *Bond* principally to decide a controversial question concerning Congress's authority under the Treaty Clause,[75] but in the end avoided that question by deciding the case on statutory grounds.[76] The statutory question concerned the scope of the Chemical Weapons Convention Implementation Act of 1998—a well-named statute that implements the multilateral Chemical Weapons Convention, and "makes it a federal crime for a person to use or possess any chemical weapon."[77] The case's underlying fact pattern was far removed from the "horrors of chemical warfare"[78] that inspired the Convention: the United States had decided to prosecute "an amateur attempt by a jilted wife to injure her husband's lover, which ended up causing only a minor thumb burn readily treated by rinsing with water,"[79] and the statutory question presented was whether the Implementation Act reaches that "purely local crime."[80]

The plain language of the statute suggested that the answer to this question was yes. Following the language of the Convention it implemented, the Act forbids "any person knowingly to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon."[81] Carol Anne Bond had been prosecuted under the Act for assaulting her husband's lover (and former best friend) with chemicals that "are toxic to humans and, in high enough doses, potentially lethal," but that Bond only hoped would cause her victim to "develop an uncomfortable rash."[82] The government argued that Bond used a "chemical weapon," because the Act defines "chemical weapon" to mean "[a] toxic chemical and its precursors, except where intended for a purpose not prohibited under" the Act, and "toxic chemical" means "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals."[83] There was no *factual* dispute that the chemicals that Bond used to assault her victim "can cause death, temporary incapacitation or

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75 Petition for Writ of Certiorari, Bond v. United States, 134 S. Ct. 2077 (2014) (No. 12-158).

76 *Bond*, 134 S. Ct. at 2088.

77 *Id.* at 2083.

78 *Id.*

79 *Id.*

80 *Id.*

81 18 U.S.C. § 229(a)(1) (2012).

82 *Bond*, 134 S. Ct. at 2085.

83 *Id.* (alteration in original) (quoting § 229F(1)(A), (8)(A)).

permanent harm to humans," so the government contended that Bond's conduct fell within the plain terms of the statute as a legal matter.[84]

The Court disagreed, based on "basic principles of federalism" under which "'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' the 'usual constitutional balance of federal and state powers.'"[85] Notably, however, the Court acknowledged these principles can apply "to resolve *ambiguity* in a federal statute."[86] But the Court concluded that the statute *is* ambiguous, not because of any semantic ambiguity in the definition of "chemical weapon," but rather because of

> the improbably broad reach of the key statutory definition given the term—"chemical weapon"—being defined; the deeply serious consequences of adopting such a boundless reading; and the lack of any apparent need to do so in light of the context from which the statute arose—a treaty about chemical warfare and terrorism.[87]

And "[t]his exceptional convergence of factors," the Court concluded, not only gave rise to the requisite statutory ambiguity, but also gave the Court "serious reason to doubt the Government's expansive reading of section 229," thus calling for it "to interpret the statute more narrowly" to exclude Bond's conduct from its scope.[88]

Justice Scalia—again joined by Justices Thomas and Alito—concurred in the judgment, but disagreed with the Court's statutory analysis.[89] Justice Scalia did not dispute the general federalism principles invoked by the Court, but concluded that the statute clearly applied to the charged conduct.[90] According to Justice Scalia, the analysis was simple—Bond's acts were covered by the Implementation Act because (i) she "possessed and used 'chemical[s] which through [their] chemical action on life processes can cause death, temporary incapacitation or permanent harm'"; (ii) she possessed "toxic chemicals"; and (iii) "because they were not possessed or used only for a 'purpose not prohibited,' they were 'chemical weapons.'"[91] The majority's contrary conclusion, Justice Scalia charged, was based on a "result-driven antitextualism."[92]

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84 *Id.* at 2085, 2088.
85 *Id.* at 2089–90 (quoting Gregory v. Ashcroft, 501 U.S. 452, 460 (1991)).
86 *Id.* at 2090 (emphasis added).
87 *Id.*
88 *Id.* at 2093.
89 *Id.* at 2094 (Scalia, J., concurring in the judgment).
90 *Id.*
91 *Id.* at 2094 (alterations in original) (citations omitted).
92 *Id.* at 2095.

C. Yates v. United States

Yates, like *Bond*, involved a federal criminal prosecution, this time of a commercial fisherman who had "caught undersized red grouper in federal waters in the Gulf of Mexico," and to "prevent federal authorities from confirming that he had harvested undersized fish," "ordered a crew member to toss the suspect catch into the sea."[93] The government charged Yates under a provision of the Sarbanes-Oxley Act subjecting to criminal prosecution anyone who "knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States."[94] The question, then, was whether the fish that Yates caused to be thrown overboard to evade the federal authorities was a "tangible object" within the meaning of that provision.[95]

A semantic meaning of the statutory text seemingly provided an easy answer to that question—as Justice Ginsburg's plurality opinion itself acknowledged, "[a] fish is no doubt an object that is tangible."[96] But Justice Ginsburg's plurality—like Justice Alito's concurrence in the judgment—rejected that conclusion because "it would cut § 1519 loose from its financial-fraud mooring to hold that it encompasses any and all objects, whatever their size or significance, destroyed with obstructive intent."[97]

As with *Burwell* and *Bond*, however, the Court reached this conclusion only after acknowledging that it would be precluded from doing so if the statute were "unambiguous."[98] And while the plurality also acknowledged that "[t]he ordinary meaning of an 'object' that is 'tangible,' as stated in dictionary definitions, is 'a discrete . . . thing' that 'possess[es] physical form'"[99]—like a fish—that term as used in § 1519 was ambiguous based on the "broader context of the statute as a whole."[100]

Having held that a fish may in fact not be a "tangible object" within the meaning of the statute, the plurality then construed the statute narrowly to apply only to destruction of records, not physical objects.[101]

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93 Yates v. United States, 135 S. Ct. 1074, 1078 (2015).
94 18 U.S.C. § 1519 (2012); *Yates*, 135 S. Ct. at 1078.
95 *Yates*, 135 S. Ct. at 1079.
96 *Id.*
97 *Id.*
98 *Id.* at 1081.
99 *Id.* at 1082 (alterations in original) (citations omitted).
100 *Id.* (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997)).
101 *Id.* at 1088–89.

The plurality emphasized that the Sarbanes-Oxley Act "was prompted by the exposure of Enron's massive accounting fraud and revelations that the company's outside auditor, Arthur Andersen L.L.P., had systematically destroyed potentially incriminating documents," and that § 1519's immediate purpose was to prohibit "corporate document-shredding to hide evidence of financial wrongdoing."[102] Based on this purpose, as well various canons of construction and contextual clues, the Court held that destruction of fish did not fall within its scope: "It is highly improbable," the Court concluded, "that Congress would have buried a general spoliation statute covering objects of any and every kind in a provision targeting fraud in financial record-keeping."[103]

Justice Kagan dissented, joined by Justices Scalia, Kennedy, and Thomas.[104] "The term 'tangible object' is broad, but clear," Justice Kagan would have held, because "[a] 'tangible object' is an object that's tangible," like a fish.[105]

III. THE ROBERTS COURT AND THE NEW TEXTUALISM

As the strict textualist dissents in each of the above cases noted, the results in *Burwell*, *Bond*, and *Yates* are difficult to reconcile with the modern textualism's commitment to the primacy of a statute's semantic meaning. But do these results signal the Roberts Court's retreat from textualism? I don't think so. If anything, the Court's approach to statutory interpretation in these cases suggests to me that the Court is more committed to the textualist method than ever before.

The existence of several decisions reaching non-textualist results would reliably signal a retreat from textualism only if the Court had strictly followed the textualist method before these decisions without exception. But no court applies any method of interpretation perfectly, consistently, and with strict precision. The current Court is rightly considered the most consistently textualist Court in modern history, despite the fact that it sometimes reaches seemingly atextual results. Take, for example, the Roberts Court's decision in *Zuni Public School District No. 89 v. Department of Education*.[106] There, the Court rejected the petitioner's challenge to a Department of Education regulation despite acknowledging that petitioner's "strongest argument rests upon

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102 *Id.* at 1081.

103 *Id.* at 1087. Justice Alito generally agreed with this analysis, though he emphasized in his concurrence the narrowness of the Court's conclusion. *Id.* at 1089–90 (Alito, J., concurring).

104 *Id.* at 1090–1101 (Kagan, J., dissenting).

105 *Id.* at 1091.

106 550 U.S. 81 (2007).

the literal language of the statute," because the Court believed that "[c]onsiderations other than language provide us with unusually strong indications that Congress intended" the opposite result.[107] To be sure, *Zuni* was authored by Justice Breyer, the current Court's most unrepentant purposivist. But Justice Breyer received four other votes. And more to the point, even the Court's most doctrinaire textualists have been known to slide into purposivism, well before the recent decisions described above. In *AT&T Mobility L.L.C. v. Concepcion*,[108] for example, the Court held in an opinion authored by Justice Scalia that states are precluded by the Federal Arbitration Act (FAA) from conditioning the enforcement of arbitration agreements on the availability of classwide arbitration procedures.[109] The Court did not cite any FAA provision specifically precluding states from establishing such a condition on arbitrabillity, but instead based its decision in large part on "[t]he overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4," which "is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings."[110]

While the three seemingly atextual *results* described above do not seem particularly probative of the overall degree of the Roberts Court's textualism, the *methodology* the Court applied—or, even more important, the manner in which the Court described its own methodology—is quite revealing. Professor Re has argued that these cases represent a new approach to statutory interpretation that deviates from orthodox textualism because the Court in each case appears to be looking outside the text itself to determine whether the statute is ambiguous, and thus departs from modern textualism's focus on the semantic meaning of the statutory text.[111] Re may be right that these cases signal a new approach to determining whether statutes are ambiguous, although, again, these cases may also signal nothing more than infrequent, to-be-expected deviations from an otherwise ubiquitous methodology.

But setting aside the (no doubt important) analysis concerning the mechanics of the Court's search for ambiguity, a prior question presents itself—namely, why is the Court searching for ambiguity *at all*? That mode of analysis does not seem an obvious fit given the way the Court decided these cases. For one thing, resolving statutory ambiguity does

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107 *Id.* at 89–90; *see also* Gluck, *supra* note 17, at 90 & n.167 (explaining that *Zuni* is a rare recent example of a spirit-over-letter approach).

108 563 U.S. 333 (2011).

109 *Id.* at 348.

110 *Id.* at 344; *see also* Manning, *supra* note 2, at 129 n.80 (criticizing this decision from a textualist perspective as "reading a purposive limitation on class actions into the Federal Arbitration Act").

111 *See generally* Re, *supra* note 2.

not seem to precisely describe what the Court is actually doing in these cases. In each case, the statutory language seems clear enough—the Court's conclusion that these statutes do not mean what they seem to say based on contextual and purposive factors, *despite* their seemingly clear text, is better understood as another way of saying that context and purpose *unambiguously preclude* the meaning that the text alone would suggest. Thus, for example, the Court's ultimate conclusion in *Burwell* is that "exchange Established by the State" *cannot possibly* be limited to exchanges established by state governments to the exclusion of federal exchanges, because that holding would be contrary to Congress's evident plan and would cause the ACA to fail under its own weight.[112] Indeed, that is exactly what the Court said—the Court rejected the challengers' construction of the ACA because "[i]t is implausible that Congress meant the Act to operate in [the] manner" the challengers suggested[113]—but only after it concluded that the text itself was ambiguous.[114]

Moreover, it is not as if there were not readily available alternatives to the Court's search for ambiguity, particularly in *Burwell* and *Bond*, which seem particularly sui generis. As explained earlier, *Burwell* itself cited a 1973 decision for the proposition that the Court "cannot interpret federal statutes to negate their own stated purposes."[115] One can readily accept the textualist principle that the general purpose of a statute cannot override specific legislative compromises reflecting different legislators' views of how best to effectuate the purpose,[116] yet reject the extreme case where giving effect to the statute's clear semantic meaning would affirmatively cause the statutory scheme Congress enacted to implode. That is what the Court concluded would have occurred in *Burwell* had the petitioners' (and dissenters') position been adopted,[117] which seems like a plausibly sufficient basis to reject that position, whether the statutory text is ambiguous or not. And *Bond* involved the unusual circumstance where the Court was interpreting a congressional statute implanting verbatim a multilateral treaty.[118] Much of the Court's analysis for why the statute was ambiguous in *Bond* (and why it should be read narrowly) turned on the fact that it is implausible that the Chemical Weapons Convention, agreed to by the nations of the world to prevent chemical warfare, was remotely concerned with the

112 Gluck, *supra* note 17, at 74–75.

113 King v. Burwell, 135 S. Ct. 2480, 2494 (2015).

114 *Id.* at 2491–92.

115 *Id.* at 2493 (citing N.Y. State Dep't of Soc. Servs. v. Dublino, 413 U.S. 405, 419–20 (1973)).

116 *See supra* Part I.

117 *See supra* Section II.A.

118 *See supra* Section II.C.

local assaults of a spurned spouse using household chemicals.[119] It would seem to do the textualist principle of preserving legislative compromise[120] little damage to interpret a statute copied verbatim from an international treaty in accord with the apparent reach of that treaty, rather than under normal rules of domestic statutory interpretation.

Thus, the fact that the Court did not follow the most obvious textual reading is nothing new, nor is the fact that the Court relied on purposive considerations—as any appellate advocate understands, it is difficult to convince a court to adopt a position that does not make much intuitive sense. What does seem important about these cases is how hard the Court has tried to fit an orthodox textualist methodology into a case that is difficult to square with the semantic text. Even in seemingly unique cases that could be plausibly resolved in other ways without doing significant damage to textualism in the overwhelming majority of cases, the analytical/doctrinal approach the Court described in these cases is the same approach it uses in its routine statutory interpretation docket—i.e., the Court will only look beyond the statute's text if the text is ambiguous. Yes, the Court seemingly rejected the clear semantic meaning of the statutory text in each of these cases, but far from evidencing a departure from textualism, the Court's description of its own methodology in these cases, in my view, shows a strong reaffirmation that the new textualism is the only acceptable statutory interpretation methodology. After all, the fact that the Court insisted on the modern textualist model *despite* the fact that it rejected the apparent semantic meaning of the text—and despite the existence of other alternative modes of analysis that take account of the unique nature of these cases—suggests that the modern Court views the textualist model as the only legitimate theory of statutory interpretation. In other words, if the Court believes it must justify the result even in a case like *Burwell* through textualist orthodoxy, then the Court is signaling that there really is no other allowable method of interpreting statutes.

This conclusion is important in itself. The Court's refusal to depart from textualist orthodoxy in *any* case, even in unique cases reaching

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119 *See, e.g.*, Bond v. United States, 134 S. Ct. 2077, 2090 (2014) ("When used in the manner here, the chemicals in this case are not of the sort that an ordinary person would associate with instruments of chemical warfare. The substances that Bond used bear little resemblance to the deadly toxins that are 'of particular danger to the objectives of the Convention.'" (quoting Ian R. Kenyon, *Why We Need a Chemical Weapons Convention and an OPCW?*, *in* THE CREATION OF THE ORGANISATION FOR THE PROHIBITION OF CHEMICAL WEAPONS: A CASE STUDY IN THE BIRTH OF AN INTERGOVERNMENTAL ORGANISATION 1, 17 (Ian R. Kenyon & Daniel Feakes eds., 2007))); *id.* at 2091 (adopting government's reading of Implementation Act "would transform a statute passed to implement the international Convention on Chemical Weapons into one that also makes it a federal offense to poison goldfish").

120 *See supra* Part I.

seemingly atextual results, seems to me to be a complete victory for textualism as a theory of statutory interpretation in the Supreme Court, even if (as is inevitable) that theory is not applied with perfect precision in every case. But the Court's textualism-no-matter-what approach may also have significant practical implications, in at least two ways.

First, the Court's insistence on the modern textualist method in every case provides a clear signal to lower courts—and especially the intermediate federal appellate courts—that they, too, must follow the modern textualist approach to reading statutes, meaning that they must give effect to clear text unless they can plausibly justify labeling the text to be "ambiguous." In some cases, to be sure, the federal courts of appeals will understand this directive as allowing the same sort of creative search for ambiguity as the Court's own analysis in *Burwell*, *Bond*, and *Yates*. But the courts of appeals are also likely to understand that open purposivism is verboten, which will likely mean fewer cases at the intermediate appellate level that depart from clear text in favor of statutory purpose.[121]

Second, and relatedly, the Court's insistence on adopting contextual and purposive grounds only upon discovering statutory ambiguity confirms what most Supreme Court advocates already knew—namely, that they must always present at least a plausible text-based argument if they have a hope of winning a statutory case before the current Court. The Court's recent insistence on textualist orthodoxy even in cases that cry out for purposive resolution makes all the more clear that, in cases with strong purpose- and context-based arguments, but weak "plain text" ones, the advocate's job is to offer the Court plausible avenues to declaring the statute ambiguous. In such cases, the actual driver of the Court's decision is highly likely to be based on purpose-based considerations, but if the advocate cannot provide the reviewing court with a plausible path to finding seemingly clear statutory text ambiguous such that the Court feels itself free to give effect to those purposive considerations, then she is likely to lose. Thus, appellate advocates must both use purposive arguments to convince the Court to rule their clients' way, while at the same time presenting textual arguments that may not themselves persuade the Court to side with the

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121 This prediction assumes that the courts of appeals feel bound—or at least, feel as though they must generally follow—not only the Supreme Court's direct holdings, but also its methodology. "Inattention in the scholarship to the federal courts of appeals makes it impossible to confirm whether" the new textualism is the dominant mode of interpretation in those courts. Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1831 (2010). But it certainly seems like a plausible assumption that the Supreme Court's insistence on a textualist methodology even in outlier cases will be seen as a strong signal to the courts of appeals that they must follow the same approach.

advocate, but that will provide the Court an avenue to do so once it is convinced about the merits of the advocate's position.[122]

The Court's recent cases, in other words, solidify the fact that while there may be outlier results in statutory interpretation cases, there really is no outlier approach. Judges and advocates alike are on notice that in the Supreme Court, the textualist method of statutory interpretation really is the only method, and purposive considerations will be considered only if the Court first determines the statute is ambiguous.

CONCLUSION

No one doubts that in cases of textual clarity, the current Court is highly likely to adopt a textualist approach when the statute's purpose matches its plain text, and even when there are not compelling reasons to displace the plain text in favor of its purpose. But recent cases demonstrate that even when there *are* compelling reasons to set aside a statute's clear semantic meaning, the Roberts Court nevertheless feels compelled to couch its analysis in textualist terms. While it is difficult to dispute that these cases rejected a pure textualist *result*, the Court's textualist methodology is, perhaps paradoxically, good evidence that the Roberts Court views the textualist model as the only legitimate method of statutory interpretation. After all, a strained textualism can be preferable to open purposivism only if the latter approach is outside what the Court sees as an allowable mode of interpretation. Justice Scalia's position lost in each of these cases, but the majority's methodology makes clear that Justice Scalia has won.

122 The flip side of this point is that advocates that find themselves with a strong textualist case cannot rest on their laurels, but must also offer the Court at least a plausible argument that the text is compatible with Congress's purpose. This was the *Burwell* petitioners' downfall—they tried but failed to convince the Court of a believable story for why Congress would have ever meant to preclude tax subsidies for taxpayers obtaining insurance on the individual market just because the taxpayer's state had decided not to establish its own exchange. *See* King v. Burwell, 135 S. Ct. 2480, 2495 (2015) (rejecting petitioners' contention that Congress intentionally withheld taxpayer subsidies from states that decline to create their own exchange to create an incentive for states to do so, holding that "[w]e doubt that is what Congress meant to do").