ARE WE ALL TEXTUALISTS NOW?

2025 SCALIA LECTURE

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I'm very honored to be giving this lecture named in honor of Justice Scalia, a legal giant and, of course, an alumnus of this law school. This lecture has special significance for me because of the role that Justice Scalia played in my life as a lawyer.

I had the good fortune to clerk for Justice Scalia, and it was a formative experience, not just in terms of learning about the law, but in terms of learning about how to be a lawyer and, for that matter, a judge. Justice Scalia had been on the Court for more than twenty years at that point, and all of us clerks were just a couple years out of law school. But if we had one reaction, and he had another, he wanted to hash the issues out through argument, sometimes for hours. His commitment to reasoned debate was inspiring. Maybe a less widely known fact about Justice Scalia is that he was a mensch to work for. I never saw him lose his temper with someone in chambers, and the buck always stopped with him. I think of him often now that I'm a judge and have my own chambers.

I was lucky to cross paths with Justice Scalia a second time in my career about five years later when I worked at the Office of the Solicitor General in the Department of Justice and got to argue some cases in front of him before he passed away. He was especially fun to appear before because he liked to mix it up with lawyers as much as he did with his clerks. In the first case I argued, as a brand-new advocate, I defended a traffic stop based on an anonymous tip of reckless or drunken driving. Justice Scalia took the opportunity to

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write a dissent, in which he called the position I was defending "a freedom-destroying cocktail."[1] As a lawyer, it was a relief to have the Justice on your side in a case, but somehow Justice Scalia made being on the other side entertaining, too.

Because this is the Scalia Lecture, I thought it might be appropriate to reflect on those two experiences in combination, by talking about textualism—one of Justice Scalia's most enduring legal contributions—and both the role and the limits of the role that it plays on the Supreme Court today. After all, it was in a conversation on statutory interpretation as part of this lecture series that Justice Kagan famously declared, "[w]e are all textualists now."[2] What I am curious about is: are we? or, more precisely, is the Supreme Court a court of textualists now? Justice Kagan herself suggested in a recent dissent that she's not currently so convinced of the Court's commitment to textualism after all.[3]

In exploring that question, let me say off the bat that textualism is certainly dominant as a first-order methodology on the Supreme Court these days, and it would be hard to argue otherwise. The argument I want to offer today, though, is that considerations of purpose *also* play an important role in statutory interpretation decisions of the current Supreme Court. Specifically, while the Court is loath to describe itself as reasoning from purpose, it does so in statutory interpretation cases not infrequently, often under banners like "context." Further, while textualists like Justice Scalia left some room for the use of purpose in statutory interpretation, the current Court's use of purpose is not confined to the narrow limits that textualists like Justice Scalia allowed.

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[1] Navarette v. California, 572 U.S. 393, 413 (2014) (Scalia, J., dissenting).

[2] Harvard Law School, *The 2015 Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes*, YOUTUBE (Nov. 17, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg (relevant discussion begins at 8:28).

[3] West Virginia v. EPA, 142 S. Ct. 2587, 2641 (2022) ("Some years ago, I remarked that '[w]e're all textualists now.' It seems I was wrong. The current Court is textualist only when being so suits it. When that method would frustrate broader goals, special canons like the 'major questions doctrine' magically appear as get-out-of-text-free cards." (internal citations omitted)).

I. BACKGROUND

Before developing these points a bit, let me back up and talk about the understanding of textualism that I'm operating from.

Justice Scalia described textualists as those who "look for meaning in the governing text . . . and reject judicial speculation about both the drafters' extra-textually derived purposes and the desirability of the fair reading's anticipated consequences."[4] He and others often defined this philosophy in opposition to purposivism. And purposivism, in turn, was exemplified for Justice Scalia and others by *Church of the Holy Trinity v. United States*,[5] where the Court famously identified a conflict between what it described as the letter of the statute and its spirit, and determined that, in such a conflict, the spirit should prevail.[6]

Textualists, of course, say the opposite. One reason is that textualists are skeptical about whether it makes sense for courts to infer a guiding purpose or spirit from a statute enacted by a multi-member body. These statutes are often the product of compromise between individuals with differing and perhaps conflicting goals. Proponents may put forward a bill to serve one set of goals, but others indispensable to its passage may insist on changes or limitations designed to serve entirely different purposes—hence the saying that no statute pursues its purpose at all costs. Given this reality, textualists often caution that the words of a statute are the only reliable indicator of the actual bargain that the legislature made, and that abstracting an underlying purpose from those words can lead courts astray.

This is not to say that textualists leave no room for anything described as "purpose." Justice Scalia wrote that it is wrong to think textualism "precludes consideration of a text's purpose," because "[t]he evident purpose of what a text seeks to achieve is an essential

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[4] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 56 (2012).

[5] 143 U.S. 457 (1892).

[6] *See id.* at 459.

element of context that gives meaning to its words."[7] Noting this point, some commentators have argued that because textualists do not entirely swear off consideration of purpose, the difference between textualism and purposivism today may be more semantic than substantive, or at least a matter of degree.[8] Indeed, Justice Scalia acknowledged that even the judges he regarded as purposivist commonly start decisions by saying they begin with the statutory text, although Justice Scalia joked that they were saying this in the manner of someone starting out on a long voyage.[9] Nevertheless, if textualists are willing to look at purpose and purposivists start with text, the argument goes, maybe at this point the differences between these theories is a matter of degree.

I'd like to return to the question of whether at least some of the Supreme Court's statutory interpretation decisions bear this out later in this talk.

For now, let me note that some textualists would resist this conclusion because they see the use of purpose permitted by textualism as very limited. For example, Justice Scalia wrote that "purpose is to be gathered only from the text itself, consistent with the other aspects of its context," and never from "extrinsic sources . . . or an assumption about the legal drafter's desires."[10] Beyond this, he added, "the purpose must be defined precisely, and not in a fashion that smuggles in the answer to the question before the decisionmaker;"[11] it must be "described as concretely as possible, not abstractly;"[12] and "except in the rare case of an obvious

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[7] *See* SCALIA & GARNER, *supra* note 4, at 20.

[8] *See, e.g.*, Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 3 (2006).

[9] *See* SCALIA & GARNER, *supra* note 4 at 16 ("In the broad sense, everyone is a textualist. Even judges without textualist convictions habitually open their opinions by stating: 'We begin with the words of the statute.' . . . But to say that one begins with the words of the statute is to suggest that one does not end there. Like the starting line of a boat race, the text is (on this view) thought to be a point of departure for a much longer journey." (internal citations omitted)).

[10] *See id.* at 33, 56.

[11] *Id.* at 56.

[12] *Id.*

scrivener's error, purpose—even purpose as most narrowly defined—cannot be used to contradict text or to supplement it."[13] It was only because Justice Scalia defined the permissible use of purpose in this limited way that he could say, on the one hand, that textualists do consider purpose, and on the other hand, that textualism is defined by "exclusive reliance on text."[14]

Then-Professor, now Provost, John Manning offered a similar view when responding to the argument I have just described: that the differences between textualism and purposivism are now mostly differences of degree. He argued that when textualists are considering purpose, they are mostly looking to semantic cues—like dictionary definitions and canons—to come up with the most coherent account of the statute. In other words, they are focused on "evidence that goes to the way a reasonable person would use language under the circumstances."[15]

In contrast, Provost Manning suggests, purposivists are focused on "the way a reasonable person would address the mischief being remedied."[16] They therefore give priority to "matters such as public knowledge of the mischief the lawmakers sought to address; the way competing interpretations of a discrete statutory provision fit with the policy reflected in the statute's preamble, title, or overall structure; and the way alternative readings of the statute fit with the policy expressed in similar statutes."[17] Provost Manning notes the reasons why this policy context may not be a reliable guide to the meaning of the statute from the perspective of a textualist. Specifically, he observes that, "[s]tatutes are seldom crafted to pursue a single goal, and [that] compromises necessary to their enactment may require adopting means other than those that would most effectively pursue the main goal."[18]

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[13] *Id.* at 57.

[14] *Id.* at 16.

[15] John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 76 (2006).

[16] *Id.*

[17] *Id.* at 93.

[18] *Id.* at 108 (alterations in original) (internal citations omitted).

II. TEXT AND PURPOSE IN RECENT CASES

With that background about these interpretive strategies in mind, let me turn back now to the question—is the Supreme Court a court of textualists now? I have previewed that I am not going to dispute that text is currently the first stop—and in many cases the only stop—in statutory interpretation for the Supreme Court. In that way, the answer is obviously yes. But I would like to argue, through some examples, that purpose-based reasoning also plays an important role in a variety of the Court's statutory interpretation decisions—often coming in under the label of "context" or "history." I will leave it to you to decide whether these cases invoke purpose only after the text runs out. That is a topic the Court debated in each case, in parts of the decisions that I am going to bypass. And when you read the statutory text, you will have your own perspective. Rather, the point I intend to make today is that these uses of purpose are not limited to the type of purpose that Justice Scalia or Provost Manning described as compatible with textualism, which is gathered from the text itself, without judicial inferences about how a reasonable person would have wanted to address the mischief in question.

Moreover, these uses of purpose cut across the ideological spectrum on the Court. They are not simply reflective of the Court having a textualist wing and a purposivist wing. In that way, I would submit, purposivism is not dead, and it coexists with textualism on the Supreme Court today.

A. Mellouli v. Lynch

Let me start by discussing a Supreme Court case that I argued for the government, *Mellouli v. Lynch*.[19] This is an ordinary meat-and-potatoes statutory case, concerning whether a conviction under a Kansas drug law made an alien removable from the United States.

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[19] 575 U.S. 798 (2015).

It involves a provision of the immigration laws that makes an alien removable if he has been "convicted of a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance," as defined under the federal drug schedules.[20] Now, Kansas is like most states in that it has its own drug schedules, which generally track federal law but do not do so precisely. At the time this case was litigated, Kansas controlled 306 drugs in total, of which nine were not federally controlled. Put another way, 97% of the substances on Kansas's schedule were federally controlled; 3% were not.[21] So, the Court had to determine: was an alien who violated a Kansas drug law someone who had violated a law of a state *relating to* a controlled substance, as defined in federal law?

The Court answered that question no, in an opinion by Justice Ginsburg, joined by Justices Roberts and Scalia, among others, over the dissent of Justices Thomas and Alito.[22] (This was before the most recent appointments to the Supreme Court.) The Court agreed that the question was whether the Kansas law, under which the alien was convicted, *relates to* a controlled substance. And the Court agreed that the phrase "relating to" is "broad."[23]

Why is a conviction under Kansas's law not a conviction under a law that relates to federally controlled substances, when the Kansas law reaches hundreds of drugs that are controlled under federal law?

The Court's answer relied on what it called "context"—specifically two features of context.[24] The first is historic: Congress and immigration authorities had historically required a link between a conviction and a drug that was actually federally controlled to support deportation.[25] The second is a concern about the breadth of a reading of "relating to" that would include the

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[20] 8 U.S.C. § 1227.

[21] *Mellouli*, 575 U.S. at 816 (Thomas, J., dissenting).

[22] *See id.* at 801 (majority opinion).

[23] *Id.* at 811.

[24] *Id.* at 812.

[25] *Id.*

Kansas statute. While Kansas's drug schedules had substantial overlap with the federal schedules, the Court wrote, "[a] statute with *any* overlap would seem to be *related to* federally controlled drugs."[26] Indeed, maybe even "offenses related to drug activity more generally, such as gun possession," would qualify, in an indirect way, as related to federally controlled drugs.[27] The Court suggested that these broad potential applications mean the statutory language should be read quite narrowly, because reading the statute to reach crimes like gun possession "departs so sharply from the statute's text and history that it cannot be considered a permissible reading."[28]

This decision never used the word "purpose" to describe how it is construing the statute. But the considerations it described as "context" and "history" are all about implicit statutory purpose. The Court relied on an inference that the enactors of this provision had the purpose of continuing, rather than disrupting, what the Court saw as a historical practice of linking deportation only to convictions that, by their nature, involve federally controlled drugs.

The Court also relied on an inference about how far Congress would have intended to reach as a substantive matter, including, specifically, its preference for under-breadth versus overbreadth. Under laws like Kansas's, many drug convictions will involve federally controlled substances, but some will not. Would Congress have prioritized ensuring the removal of all aliens whose convictions involved federally controlled drugs, in which case convictions under Kansas's law should count? Or would Congress have prioritized preventing the removal of aliens whose convictions involved exclusively state-controlled substances, in which case Kansas convictions should be outside the removal provision's scope? The text doesn't tell us, and the Court's inferences about these questions are inferences—to use Provost Manning's framing—center on "the way a reasonable person

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[26] *Id.*

[27] *Id.*

[28] *Id.* at 813.

would address the mischief being remedied."[29] They are not—to use Justice Scalia's framing—"gathered only from the text itself."[30]

B. Pulsifer v. United States

Let me jump forward to a statutory interpretation case decided a year ago, *Pulsifer v. United States*.[31] This decision has some interesting back and forth between the majority and the dissent, in which, I would submit, both are using purpose. *Pulsifer* concerns language enacted in the First Step Act.[32] Federal law contains a provision known as the "safety valve," which allows some drug offenders to be sentenced below the mandatory minimum that would otherwise apply.[33] The First Step Act expanded the availability of this safety-valve relief, and the question in *Pulsifer* was about the size of the expansion.

Specifically, the First Step Act makes a sentence below the mandatory minimum available only to a defendant who "does not have . . ." and then it gives a three-item list:

> A. more than four criminal history points, excluding any criminal history points resulting from a one-point offense, as determined under the sentencing guidelines;
> B. a prior three-point offense, as determined under the sentencing guidelines; *and*
> C. a prior two-point violent offense, as determined under the sentencing guidelines.[34]

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[29] Manning, *supra* note 15, at 76.

[30] SCALIA & GARNER, *supra* note 4, at 33.

[31] 144 S. Ct. 718 (2024).

[32] Pub. L. No. 115-391, 132 Stat. 5194 (2018) (codified as amended in scattered sections of 18 U.S.C. and 21 U.S.C.).

[33] *Pulsifer*, 144 S. Ct. at 723.

[34] *Id.* at 724 (emphasis added).

The question was whether a defendant is disqualified from safety valve relief if he falls into any one of these three categories, or only if falls into all three.

The Court held that falling into *any* of these buckets is disqualifying, in an opinion by Justice Kagan that was joined by Justices Roberts, Kavanaugh, Barrett, Thomas, and Alito. The Court reasoned that the statutory language was ambiguous, so it was required to examine what the majority describes as "content" or "context." [35] The Court has one context argument that is quite textual, involving whether the first (A) provision would be superfluous on the defendant-friendly reading of the statute.[36]

But beyond this, the majority suggests that construing the statute requires looking to the substance of the three buckets to determine which reading would reflect a more sensible statutory design. Reading the statute to disqualify defendants who fall into any one of the buckets "unerringly separates more serious prior offenders from less serious ones, allowing only the latter to get through the gate."[37] In contrast, in the Court's view, disqualifying only offenders with *all three* types of convictions "allows and denies relief in ways that do not correspond to the gravity of what a defendant has previously done."[38] I will skip the details of the anomaly the Court uses to argue this point. It involves a situation where on the more defendant-friendly reading, a person with a less serious criminal history would be ineligible for the safety valve, while a person with a more serious criminal history could get that relief. Invoking that comparison, the Court concludes that the defendant-friendly construction that denies the safety valve to only individuals who fall within all three buckets does not effectively separate serious offenders from less serious ones.

The Court reaches this conclusion over the objection of Justice Gorsuch, joined by Justices Sotomayor and Jackson. Justice

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[35] *Id.* at 726.
[36] *See id.* at 731.
[37] *Id.* at 734.
[38] *Id.* at 735.

Gorsuch's main argument is textual, and he raises the objection you might expect to what he describes as the majority's "purpose" or "policy" argument about separating serious offenders for less serious ones. He thinks these considerations are off-limits.[39]

But as the majority observes, Justice Gorsuch's opinion is not all about text.[40] Justice Gorsuch begins his dissent with a recounting of the First Step Act as "the most significant criminal justice reform bill in a generation," using a description he takes from an amicus brief filed by a senator in a different case.[41] He notes that the federal prison population grew in the 1980s and 1990s due to mandatory minimums, and he says that in the First Step Act, Congress "sought to recalibrate its approach," by making changes that reduced prison populations, including by expanding the safety-valve.[42] He emphasizes that the majority's reading of the statute will afford safety-valve relief to far fewer individuals than his. [43]

While Justice Gorsuch describes all this as "background" that "helps" in an unspecified way, a reader might draw the inference that this information is being offered to advance the view that the dissent's interpretation is superior because the thrust of the First Step Act was to make sentences more lenient.[44] And so it is that the majority accuses the dissent of relying on "a misguided argument about legislative purpose," and the dissent accuses the majority of the same thing.[45]

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[39] *See id.* at 756 (Gorsuch, J., dissenting) (arguing that the Court "elevate[s] unexpressed congressional purposes over statutory text").

[40] *Id.* at 736–37 (majority opinion) (describing the dissent's discussion of "how many more defendants would get safety-valve relief under Pulsifer's reading than under the Government" as "mak[ing] a misguided argument about legislative purpose" (internal citations omitted)).

[41] *Id.* at 738 (Gorsuch, J., dissenting) (citing Brief for Sen. Richard J. Durbin et al. as Amici Curiae at 9, Terry v. United States, 141 S. Ct. 1858 (2021) (No. 20-5904)).

[42] *Id.*

[43] *See id.* at 739.

[44] *Id.* at 739.

[45] *Compare id.* at 736 (majority opinion) (criticizing the dissent's use of legislative purpose), *with id.* at 756 (Gorsuch, J., dissenting) (arguing the Court ought not "elevate unexpressed congressional purposes over statutory text").

For me, that's what makes this case especially interesting. Both the majority and the dissent seem to be considering purpose, with the majority emphasizing an objective of sorting less serious offenders from more serious ones, and the dissent emphasizing an objective of leniency. But neither side couches this aspect of its own interpretation in the language of purpose. Instead, each side criticizes the other for invoking purpose when it should not.

C. Fischer v. United States

The last case I would offer up for consideration as evidence of the Court's approach to purpose and text is this past Term is *Fischer v. United States*,[46] which concerns the criminal liability of those who breached the Capitol on January 6, thereby delaying a congressional proceeding.

By way of background, federal law imposes penalties on any person who interferes with official proceedings, as set out in a two-part provision. One part, (c)(1), is about documents and things like that. It makes it a crime to "alter[], destroy[], mutilate[], or conceal[] a record, document or other object . . . with the intent to impair [its] integrity or availability for use in an official proceeding."[47] The next part, (c)(2), imposes penalties on anyone who "otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so."[48]

Fischer posed the question whether a person who obstructed the congressional proceeding to certify the 2020 presidential election could be convicted of violating the "otherwise" (c)(2) provision in the absence of any connection to documents, records, or similar materials. The alternative reading is that (c)(2) is also document-connected, and reaches only those who impair the availability or integrity of records, documents, or objects used in an official proceeding in ways other than those specified in (c)(1).

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[46] 144 S. Ct. 2176 (2024).

[47] 18 U.S.C. § 1512(c)(1).

[48] 18 U.S.C. § 1512(c)(2).

The majority reasons that impairment of records, documents, or objects *is* required, in part because "[i]t makes sense to read subsection (c)(2) as limited by (c)(1) in light of the history of the provision."[49] In support of this view, the majority observes that this statute was enacted after the Enron scandal revealed what the Court describes as a loophole in existing obstruction statutes. [50] Those statutes made it a crime to corruptly persuade others to destroy documents, but not to actually destroy the documents. [51] The Court reasons: "[i]t would be peculiar to conclude that in closing the Enron gap, Congress actually hid away," in (c)(2), "a catchall provision that reaches far beyond the document shredding and similar scenarios that prompted the legislation in the first place."[52]

A further problem, in the Court's view, is that the government's reading of (c)(2) would impose severe penalties on conduct that the Court describes as not especially grave.[53] In addition, it would impose serious penalties for types of obstruction already covered by other statutes for which Congress had set out more modest penalties.[54] The Court deems these results inconsistent with statutory "context."[55]

As you would probably guess by now, I think it's fair to bill what's being described as "context" here as statutory purpose. And these do not seem to be the inferences of purpose from text alone

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[49] *Fischer*, 144 S. Ct. at 2186.

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.* at 2189–90 (criticizing the government's reading of (c)(2) because it "would criminalize a broad swath of prosaic conduct, exposing activists and lobbyists alike to decades in prison").

[54] *Id.* at 2189–90 ("The Government's reading of Section 1512 would intrude on that deliberate arrangement of constitutional authority over federal crimes, giving prosecutors broad discretion to seek a 20-year maximum sentence for acts Congress saw fit to punish only with far shorter terms of imprisonment—for example, three years for harassment under § 1512(d)(1), or ten years for threatening a juror under § 1503.").

[55] *Id.* at 2189 (holding that "we cabin our reading of subsection (c)(2) in light of the context of subsection (c)(1)").

that Justice Scalia and others have described as compatible with textualist approaches. For instance, the text does not seem to tell us whether a legislature confronting a huge, high-profile fraud would have wanted to pass robust additional penalties targeting obstructive conduct, as opposed to narrower penalties targeting the particular obstruction for which existing law seemed deficient in the context of the fraud that led to the bill. Moreover, given how common overlap is in the federal criminal code, the text alone does not seem to plausibly instruct us that these provisions were meant to be non-overlapping with other obstruction laws. These forms of reasoning seem most easily described as inferences about what a reasonable legislator would have thought or done when confronted with a particular problem, rather than inferences drawing only from text.

III. HAS TEXTUALISM TRIUMPHED OVER PURPOSIVISM ON THE SUPREME COURT?

Let me offer a few general observations about how these cases do and do not match up with textualism and purposivism.

While my focus has been on ways in which the Court uses purpose, these cases are consistent with the conclusion that, in substantial measure, textualism *has* carried the day on the Supreme Court. Virtually every statutory interpretation decision starts with an analysis of the text, as do the ones I have just discussed. And the Court routinely says that when the text is clear, its analysis ends there. Moreover, this triumph of textualism has brought with it explicit skepticism about considering statutory purpose. As I think these cases illustrate, the Court rarely describes its own reasoning in terms of purpose. Instead, it has turned to other labels—context and history for example—when it's engaged in reasoning that could readily be described as focused on purpose. When the term "purpose" is used, as in *Pulsifer*, it may well be to accuse a majority or a dissent of considering something that should be off the table. I

take that as a measure of how much sway the textualist critiques of purposivism have had on the Court.

That said, I hope the cases I have discussed show that purposive reasoning is playing a role on the Court alongside textualism. And I have respectfully submitted in discussing these cases that we are not talking about purpose in the limited sense that Justice Scalia and some other textualists have accepted, one in which purpose is closely connected to the statutory text. Instead, in at least some cases I have discussed, the Court seems to be inferring what a reasonable legislator would have done when faced with a particular problem. That type of reasoning is in some tension with the textualist critiques of purposivism, as I discussed earlier, because of how textualists see legislation as reflecting a compromise between individuals with many different goals, rather than as embodying one readily ascertainable purpose.

I also hope the cases I have discussed today provide some evidence that the Court's use of purpose is not limited to the group of Justices who are sometimes called "liberal," or the group of Justices who are sometimes called "conservative." Each of the Justices generally classified as conservative signed at least one of the three opinions I just discussed. For that matter, we see Justices who are often described as liberal joining dissents that fault the majority's invocation of purpose on the theory that the text is clear.

I mentioned at the outset that some scholars take the view that now that textualist arguments have taken hold across the judiciary broadly, the distinctions between textualism and purposivism are a bit overblown; on this view, textualists look to purpose when text runs out and purposivists agree that text is the best place to find purpose. To me, the cases I have just discussed provide some support for this view, by displaying some fluidity between textualist and purposivist approaches on the court. In at least some cases, Justices across the spectrum deploy both types of arguments. If textualism has triumphed on the Supreme Court, as Justice Kagan suggested, purposivism is not dead yet, and continues to play a role there too.