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CASE COMMENT

THE EMERGENCE OF CONTEXTUALLY CONSTRAINED PURPOSIVISM

Michael C. Mikulic∗

INTRODUCTION

Chief Justice John Marshall once famously wrote, "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule."[1] Chief Justice Marshall was describing the Supreme Court's most basic role: determining the meaning of legal provisions. Yet, despite how doctrinal these lines are, the Court has never established a uniform method of interpretation.[2] After years of the Court's drift towards new textualism, *King v. Burwell*[3] reaffirms that purposivism still has relevancy; contextually constrained purposivism is the new trend.

∗ Candidate for Juris Doctor, Notre Dame Law School, 2016; Master of Arts, Vanderbilt University, 2013; Bachelor of Arts, Vanderbilt University, 2012. I would like to extend my deepest gratitude to Judge Kenneth Ripple for all his invaluable guidance and direction on this Case Comment.

1 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). In his now famous book, *A Matter of Interpretation*, Justice Antonin Scalia quotes Joel Bishop, a renowned nineteenth century legal writer, who echoed Chief Justice Marshall's words: "[T]he primary object of all rules for interpreting statutes is to ascertain the legislative intent; or, exactly, the meaning which the subject is authorized to understand the legislature intended." ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (1997) (alteration in original) (emphasis omitted) (quoting JOEL PRENTISS BISHOP, COMMENTARIES ON THE WRITTEN LAWS AND THEIR INTERPRETATION § 70 (Boston, Little, Brown & Co. 1882)).

2 *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) ("The hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation."); *see also* SCALIA, *supra* note 1, at 14 ("Surely this is a sad commentary: We American judges have no intelligible theory of what we do most."). For purposes of this Case Comment, only the judiciary's interpretation of *statutes* will be analyzed.

3 135 S. Ct. 2480 (2015).

One of the central debates in statutory interpretation is whether judges should follow the spirit of the law or its letter.[4] Though these two approaches differ significantly, each ultimately focuses on ascertaining the congressional intent expressed in a statute.[5] At one end of the spectrum, to follow the spirit of the law means to try and interpret individual statutory provisions in light of the provision's larger purpose.[6] On this view, judges care more about *why* the law was passed, rather than how the law is communicated through the text. To find the statute's spirit, judges look to a wide variety of factors, including language, structure, history surrounding the enactment of the law, the evil Congress sought to combat by passing the law, and legislative history. At the other end of the spectrum, to follow the letter means to look only to the *stated text*. Congress's purpose—the law Congress intended to make—is there in the words. To such textualists, the plain meaning rule is sacrosanct.[7] If the provision remains vague or ambiguous, textualist judges look to more text, or the wider provisions surrounding the ambiguous one at hand. These judges rarely take into account extra-textual considerations.

In *King*, the Court grappled with this ideological debate and decided that, when the spirit and letter of the law directly conflict, the spirit trumps. The Court employed an almost purely purposivist approach to interpreting

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4 *See* Eyston v. Studd (1573) 75 Eng. Rep. 688, 695, 2 Plowd. 459, 465 (K.B.) ("Law . . . consists of two parts, *viz.* of body and soul, the letter of the law is the body of the law, and the sense and reason of the law is the soul of the law . . . ."); *see also* JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION: CASES AND MATERIALS 27–29 (2d ed. 2013) (offering an excellent overview of the debate).

5 This Case Comment argues that most judges see their roles as agents of Congress, tasked with trying to implement the decisions made by Congress. For more on this agency theory, see Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 415 (1989) ("In a democratic system, with an electorally accountable legislature and separated powers, it is said to be the appropriate and indeed constitutionally prescribed role of the courts to apply legislative commands . . . ."). Thus, this agency theory of the Court's role is said to be most in line with democratic principles of governance. *See* Letter from Oliver Wendell Holmes to Harold J. Laski (Mar. 4, 1920), *in* 1 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI 1916–1935, at 249 (Mark DeWolfe Howe ed., 1953) ("[I]f my fellow citizens want to go to Hell I will help them. It's my job.").

6 *See* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 174 (1921) ("We may figure the task of the judge, if we please, as the task of a translator, the reading of signs and symbols given from without. None the less, we will not set men to such a task, *unless they have absorbed the spirit*, and have filled themselves with a love, of the language they must read." (emphasis added)).

7 To see the Court's affinity for applying the plain meaning rule at the end of the twentieth century, see Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 238.

the Patient Protection and Affordable Care Act (ACA).[8] Instead of looking only to the plain language of the disputed provision, the Court readily took into account both the provision's context—the whole text and structure of the ACA—and the statute's implicit purpose. By doing so, the Court discounted the plain meaning of the specific provision in favor of the statute's overall purpose.

Regardless of whether the Court interpreted the provision correctly, *King* signals a change in the Court's methodology of statutory interpretation.[9] This change harkens back to a classical period of interpretation where purposivism was the main statutory interpretation approach. However, the Court in *King* did not fully embrace classical purposivism. Instead, it insisted that text still plays an important role, to such a degree that the Court essentially employed a hybrid approach: contextually constrained purposivism.[10] In other words, *King* suggests the Court has ushered in a new way to read statutes, primarily considering the purpose of the statute to find the provision's right meaning,[11] and then taking into account the statute's text.

This Case Comment will proceed by first outlining the various methods of statutory construction used by the Court throughout its history, leading up to the Court's implementation of contextually constrained purposivism in *King*. It will then provide a summary of the facts and procedural history of *King*, thereby setting the stage to explain how the Court invoked contextually constrained purposivism. Finally, the Case Comment will discuss some of the positive and negative implications of the approach.

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8 Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified in scattered sections of 5, 18, 21, 25–26, 29–31, 35 & 42 U.S.C.).

9 The Court's new technique in *King* was not a revolution in statutory interpretation. Indeed, the Court has long looked to both the text and purpose of a statute to determine a provision's meaning. As Chief Justice Roger Taney remarked over 150 years ago, "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." United States v. Boisdoré's Heirs, 49 U.S. (8 How.) 113, 122 (1850). More accurately, the Court's technique in *King* is an *evolution* in statutory interpretation. The Court utilizes purpose and text in a new way to find a provision's meaning. As this Case Comment contends, the Court primarily looked to purpose, and then to text, to determine meaning.

10 Contextually constrained purposivism—a hybrid term proposed by this Case Comment—is explained in greater detail in Section I.B. To be fair, another commentator, Professor Richard M. Re, calls this method "The New Holy Trinity"—named after a case of the same name that took into account the spirit of the law over the letter. *See* Richard M. Re, *The New Holy Trinity*, 18 GREEN BAG 2D 407, 407–08 (2015).

11 By "right meaning," this Case Comment means Congress's originally intended meaning.

I. CONTEXTUALLY CONSTRAINED PURPOSIVISM IN *KING*

Throughout our nation's history, the Supreme Court has engaged in roughly four different methods of statutory interpretation: (1) old textualism, (2) purposivism, (3) new textualism, and (4) textually constrained purposivism. The Court has engaged in all four methods (and variations of each method) at different junctions, and no approach is strictly constrained to a certain era. However, there has been a general progression among these four approaches.

Old textualism was used by the Court in the late nineteenth and early twentieth century when, according to Professor Cass Sunstein, "[t]he most important organizing principle for interpretation was that regulatory statutes should be construed narrowly—so as to harmonize as much as possible with principles of private markets and private rights."[12] Although the shift from old textualism towards purposivism was likely influenced by the New Deal and the growth of the administrative state,[13] the primary case exemplifying purposivism is *Holy Trinity Church v. United States*[14]—which was decided in 1892. In *Holy Trinity*, the Court stated, "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."[15] The purposivism exhibited in *Holy Trinity* is the classic interpretive approach[16] and was the dominant approach of the Court throughout most of the twentieth century.[17]

12 Sunstein, *supra* note 5, at 408. Professor Sunstein argues that the Court struck down regulatory statutes because it viewed them as "foreign substances"—new pieces of law. *Id.* (citing BENJAMIN N. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 9 (1928) ("The truth is that many of us, bred in common law traditions, view statutes with a distrust which we may deplore, but not deny.")). As examples of old textualism, Sunstein cites *Shaw v. Railroad Co.*, 101 U.S. 557, 565 (1879), and *Johnson v. Southern Pacific Co.*, 117 F. 462, 466 (8th Cir. 1902), *rev'd*, 196 U.S. 1 (1904). Sunstein, *supra* 5, at 408 n.5. For a modern example, see *Rehberg v. Paulk*, 132 S. Ct. 1497, 1502–03 (2012).

13 Starting in the 1930s and continuing in later cases, the Court abandoned favoring laissez-faire jurisprudence. *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483 (1955); W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Nebbia v. New York, 291 U.S. 502 (1934). As a result, no longer did the Court attempt to construe statutes narrowly in order to advance its favorite economic theory. Professor Sunstein generally explains why. *See* Sunstein, *supra* note 5, at 409 ("The demands of the modern administrative state ultimately made it impossible for courts to sustain a theory of interpretation rooted in nineteenth-century common law.").

14 143 U.S. 457 (1892).

15 *Id.* at 459.

16 *See* MANNING & STEPHENSON, *supra* note 4, at 29, 36–44.

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

Believing that purposivism invites too much discretion for judges to read their own morals and values into statutes,[18] the new textualist movement brings back the primacy of the letter of the law.[19] New textualists, like the late Justice Antonin Scalia[20] and Judge Frank Easterbrook,[21] start with the premise that this nation is a government of laws, not men.[22] This means judges do not need to consult external sources to find out what Congress intended to agree upon—because Congress's agreement is expressed *in the text* of the statute.[23] The fourth method, textually constrained purposivism,[24] emerged in response to the absurd results sometimes produced by new textualism. Under the approach of textually constrained purposivism, the Court first looks to the text of the provision for meaning.[25] If the text is unambiguous, there is no need for further analysis: the plain meaning of the text governs. As the Court explained, "Our first step in interpreting a statute is to determine whether

18 *See* SCALIA, *supra* note 1, at 17–18 ("The *practical* threat [of purposivism] is that, under the guise or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field.").

19 *See* MANNING & STEPHENSON, *supra* note 4, at 44–60.

20 *See* Amy Gutmann, *Introduction* to SCALIA, *supra* note 1, at vii.

21 *See* Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 60 (1988) ("The words of the statute, and not the intent of the drafters, are the 'law.'").

22 *See* SCALIA, *supra* note 1, at 17 ("Government by unexpressed intent is similarly tyrannical. It is the *law* that governs, not the intent of the lawgiver. That seems to me the essence of the famous American ideal set forth in the Massachusetts constitution: A government of laws, not of men. Men may intend what they will; but it is only the laws that they enact which bind us.").

23 Unlike purposivists, new textualists outright dismiss the use of legislative history. *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 640–56 (1990). Moreover, new textualists believe that it is almost impossible for judges to discern the one true purpose of why a statute was passed. Since each of the 535 members of Congress might have a different reason for approving of (or rejecting) a statute, the best way to discern Congress's collective purpose is to look at the statute's text, which is the only evidence of Congress's objectified intent.

24 For more on textually constrained purposivism, see MANNING & STEPHENSON, *supra* note 4, at 60–72; Manning, *supra* note 17. Professor Manning calls textually constrained purposivism by different names, including "textually-structured purposivism," "purpose-sensitive textualis[m]," and "new purposivism." *Id.* at 116, 119, 147; *see also* Cory R. Liu, Note, *Textualism and the Presumption of Reasonable Drafting*, 38 HARV. J.L. & PUB. POL'Y 711, 721 (2015) ("By giving primacy to the text and using evidence of purpose only to resolve ambiguities, modern textually-constrained purposivists can also be characterized as discerning how a reasonable reader would understand the text of the statute.").

25 *See* Re, *supra* note 10, at 408 n.4 ("The New Purposivism [i.e., textually constrained purposivism] resembles the New Textualism in that it honors clear text, viewing it as a 'trump' . . . .").

the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'"[26] Indeed, in many cases, the Court begins and ends with a reading of the plain text.[27] But, in the hardest cases, the language is not conclusive. Still, it is only when the text is ambiguous that judges look to other considerations. As Judge Easterbrook explained, "Knowing the purpose behind a rule may help a court decode an ambiguous text, but first there must be some ambiguity."[28] Thus, under textually constrained purposivism, judges must first establish ambiguity, and only then consider other sources.

Amid this backdrop of varied interpretation techniques, the Court in *King* introduced *contextually* constrained purposivism. In this approach, the statute's overall purpose is the chief tool a judge uses to understand a supposedly disputed provision in the statute—even a plainly worded provision. Judges under this approach begin with the text of the provision at hand, but will still look to the context, or surrounding provisions and structure of the statute, as well as extra-textual considerations, to determine that disputed provision's meaning. In this way, the approach differs from textually constrained purposivism in that even a plainly worded provision can be read in a different way. Section A of this Part provides an in-depth look at *King*: detailing the case's factual background, explaining the procedural history, and clarifying the central issue. It also describes the history of health care reform and the reasons why Congress passed the ACA. Section B then analyzes Chief Justice John Roberts's majority opinion and argues that the Court employed a new approach to statutory interpretation: contextually constrained purposivism. The Court primarily used purpose to find ambiguity in what was plain text, and then utilized purpose again to resolve the ambiguity. All the while, it looked to the context surrounding the challenged statutory provision to find ambiguity and ascertain the larger purpose of the statute.

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26 Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997) (quoting United States v. Ron Pair Enters., Inc., 489 U.S. 235, 240 (1989)). The Court has time and again explained this cardinal rule of interpretation: "We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).

27 *See* YULE KIM, CONG. RESEARCH SERV., RL97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 2 (2008).

28 Nat'l Tax Credit Partners, L.P. v. Havlik, 20 F.3d 705, 707 (7th Cir. 1994) (first citing Sundstrand Corp. v. Comm'r, 17 F.3d 965, 967 (7th Cir. 1994); then citing Calderon v. Witvoet, 999 F.2d 1101, 1104 (7th Cir. 1993); then citing Lincoln v. Virgil, 508 U.S. 182, 191 (1993); and then citing Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495, 501 (1988)).

A. Summary of the Facts and Procedural History

Before the ACA, many people were unable to afford health insurance.[29] Congress passed the ACA to combat two problems: first, a potential "economic 'death spiral'"[30] of rising health care insurance costs and, second, to expand access to health care insurance for as many people as possible.[31] One of the main causes of this death spiral was the phenomenon of "adverse selection."[32] In general, health insurance involves pooling risk, or transferring costs from high-cost insureds (who are the most sick) to low-cost insureds (who are the least sick) through the medium of the insurance company.[33] In adverse selection, sick people are more likely than healthy ones to purchase health insurance, driving insurance costs upwards for all insureds in the pool.[34] For some, the cost of insurance becomes too high to afford.

The ACA seeks to lower the cost of individual health insurance and combat adverse selection through a system of three interwoven mandates.[35] First, the Act bars insurers from taking a person's health into account when deciding to sell health insurance or how much to charge for that insurance.[36] The second is that the Act requires persons to have health insurance coverage, or risk making a payment to the Internal Revenue Service (IRS).[37] The third is that the Act affords premium tax credits

29 According to political analyst Yuval Levin, there were approximately fifty million people uninsured when Congress passed the ACA. Yuval Levin, *Help the Sick and Reduce the Debt: The Moral Economy of the Health-Care Debate*, WITHERSPOON INST. (Aug. 30, 2011), http://www.thepublicdiscourse.com/2011/08/3824/.

30 King v. Burwell, 135 S. Ct. 2480, 2486 (2015).

31 *See id.* at 2485.

32 BARRY R. FURROW ET AL., HEALTH LAW: CASES, MATERIALS AND PROBLEMS 637 (7th ed. 2013). Another main cause of the economic death spiral was a phenomenon called "moral hazard," which is the tendency of injured persons to excessively use services for which they are insured. *Id.* at 638. Consumers are not cost-sensitive when they do not have to foot the bill for these services. *Id.*

33 *See id.* at 633.

34 *See id.* at 637.

35 *See id.* at 540–44; *see also King*, 135 S. Ct. at 2486–87 (summarizing three elements of ACA).

36 These are called the "guarantee issue" and "community rating" requirements. *King*, 135 S. Ct. at 2485. The guaranteed issue requirement bars insurers from denying coverage to any person because of his or her health, and the community rating requirement bars insurers from charging a person higher premiums for the same reason. *Id.*

37 *See id.* at 2486. This is called the "individual mandate" requirement. *Id.* at 2502 (Scalia, J., dissenting). Congress sought this requirement to encourage more people to sign up for health insurance in order to pool risk and make it less costly to pay for high cost insureds. *See id.* at 2486 (majority opinion). That is why the individual mandate debate in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2585 (2012), was so important, for the mandate was one way to combat adverse selection. As the Court in

(subsidies) to certain individuals to make health insurance more affordable.[38] This third mandate is the ACA's primary strategy for expanding access.[39] The Act contemplates that the States or the Federal Government can establish Exchanges,[40] or marketplaces where people can purchase health insurance.

The main issue in *King* laid in the realm of these Exchanges. The ACA, codified in Section 36B of the Tax Code, mandates that only individuals enrolled in an insurance plan in an Exchange "established by a State" are entitled to premium tax credits.[41] The Act defines "State" as "each of the 50 States and the District of Columbia."[42] Thus, the issue of statutory interpretation before the Court concerned whether these tax credits, which are available in State Exchanges, are also available in Federal Exchanges. The implications of the Court's interpretation were of "deep 'economic and political significance.'"[43] By the time the case reached the Court, sixteen States and the District of Columbia had established their own Exchanges, whereas the Government had established Exchanges in thirty-four.[44] Under a narrow reading of Section 36B, millions stood to lose their insurance plans should the Court decide that individuals who had purchased their health insurance through Federal Exchanges could not receive tax credits.[45]

King explained, "Congress adopted a coverage requirement to 'minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums.'" *King*, 135 S. Ct. at 2486 (quoting 42 U.S.C. § 18091(2)(I) (2012)).

38 Americans earning up to 400 percent of the federal poverty level (calculated to be $46,680 for an individual and $95,400 for a family of four) are eligible for a tax credit. *See* 26 U.S.C. § 36B(c)(1)(A) (2012); *Eligibility for the Premium Tax Credit*, IRS, https://www.irs.gov/Affordable-Care-Act/Individuals-and-Families/Eligibility-for-the-Premium-Tax-Credit (last updated Jan. 12, 2016).

39 *See* FURROW ET AL., *supra* note 32, at 540 ("The primary strategy of the ACA for expanding access to health insurance for middle-income Americans is the use of the means-tested tax credits to subsidize the purchase of private health insurance.").

40 The ACA states that "[a]n Exchange shall be a governmental agency or nonprofit entity that is established by a State." 42 U.S.C. § 18031(d)(1).

41 26 U.S.C. § 36B(b)(2)(A).

42 42 U.S.C. § 18024(d).

43 King v. Burwell, 135 S. Ct. 2480, 2489 (2015) (quoting Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2444 (2014)).

44 *Id.* at 2487.

45 The Court in *King* wrote, "One study predicts that premiums would increase by 47 percent and enrollment would decrease by 70 percent." *Id.* at 2493 (citing EVAN SALTZMAN & CHRISTINA EIBNER, RAND CORP., THE EFFECT OF ELIMINATING THE AFFORDABLE CARE ACT'S TAX CREDITS IN FEDERALLY FACILITATED MARKETPLACES 1 (2015), http://www.rand.org/content/dam/rand/pubs/research_reports/RR900/RR980/RAND_RR980.pdf ("Enrollment in the ACA-compliant individual market . . . would decline by 9.6 million, or 70 percent, in federally facilitated marketplace (FFM) states.")). The Court then

The procedural history of the case is straightforward. Four Virginia residents, who did not want to purchase health insurance or make a payment to the IRS, brought an action challenging the ACA.[46] The petitioners argued that the Act only granted tax credits to individuals who purchased insurance from State Exchanges, not Federal ones.[47] The district court granted the Government's motion to dismiss.[48] The Court of Appeals for the Fourth Circuit affirmed.[49] On the same day in a different case, the Court of Appeals for the D.C. Circuit held that the Act restricted tax credits to State Exchanges only.[50] The Court granted the challengers' petition for a writ of certiorari in order to resolve the circuit split.

B. The Majority Opinion's Use of Contextually Constrained Purposivism

Writing for the majority,[51] Chief Justice Roberts held that premium tax credits are available to both State and Federal Exchanges under Section 36B.[52] His opinion proceeds in roughly two parts. First, he discusses the history of health care reform in the United States and why Congress implemented the ACA. Then, he engages in contextually constrained purposivism to understand the meaning of the challenged provision. Chief Justice Roberts reads ambiguity into what is a plainly written provision by looking to the purpose of the statute and the context surrounding the provision. To resolve the ambiguity, he again looks to purpose provided by the context of the statute's enactment.[53]

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cited another study that "predict[ed] that premiums would increase by 35 percent and enrollment would decrease by 69 percent." *Id.* at 2493–94 (citing LINDA J. BLUMBERG ET AL., URBAN INST., 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), http://www.rwjf.org/content/dam/farm/reports/issue_briefs/2015/rwjf417289 ("We estimate that a victory for the plaintiff would increase the number of uninsured in 34 states by 8.2 million people . . . .")).

46 *Id.* at 2487.

47 *See id.*

48 *Id.* at 2488.

49 *Id.*

50 *Id.*; *see* Halbig v. Burwell, 758 F.3d 390, 404–05 (D.C. Cir. 2014).

51 The case was decided by six votes to three, with Justices Anthony Kennedy, Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor and Elena Kagan joining the majority opinion. Justice Antonin Scalia authored the dissent, joined by Justices Clarence Thomas and Samuel Alito. *King*, 135 S. Ct. at 2484.

52 *Id.* at 2496.

53 This is not the first time the Court engaged in contextually constrained purposivism. See Re, *supra* note 10, at 409–13, for a discussion of cases, including *Bond v. United States*, 134 S. Ct. 2077 (2014), and *Yates v. United States*, 135 S. Ct. 1074 (2015). However, the Court has not uniformly applied the approach. See *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014), for a recent example where the Court chose to

Chief Justice Roberts begins the opinion by focusing on the history and purpose surrounding the ACA. The first line is telling: "The [ACA] adopts a series of interlocking reforms designed to expand coverage in the individual health insurance market."[54] The immediate focus on why Congress passed the ACA—to expand access to health insurance—supports the notion that this purpose is the most important consideration. He then spends three pages highlighting the history of health care reform, explaining how these reforms sought to combat an economic death spiral.[55] He also mentions how Massachusetts prevented the spiral by passing health care reform that significantly expanded coverage to all but 2.6% of the state's residents.[56] It was a great success, no doubt one Congress tried to replicate by passing the ACA.[57]

After discussing the history and purpose of the ACA,[58] Chief Justice Roberts commences his statutory analysis of Section 36B.[59] At first, he appears to apply a new textualist method by making it seem like text is of paramount concern: "We begin with the text of Section 36B."[60] But later in the opinion, it is evident that purpose is his most important consideration. He analyzes the language of Section 36B in depth for over three pages to determine what an "Exchange established by the State" means.[61] He readily admits, "If the statutory language is plain, we must enforce it according to its terms" and later, "Petitioners' arguments about the plain meaning of Section 36B are strong."[62] Under the plain meaning, only individuals who purchased insurance from State Exchanges would receive tax credits. A new textualist or textually constrained purposivist would start and end with the letter of the provision.[63]

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take a textualist approach to understand a provision—even though the Legislature would have probably rejected the interpretation.

54 *King*, 135 S. Ct. at 2485.

55 *See id.* at 2485–87.

56 *Id.* at 2486.

57 *See id.* ("The [ACA] adopts a version of the three key reforms that made the Massachusetts system successful.").

58 Chief Justice Roberts spends part of his opinion discussing whether the IRS had the authority to interpret the provision, but for purposes of this Case Comment, it will not be detailed. *See id.* at 2488–89.

59 *See id.* at 2489.

60 *Id.*

61 *See id.* at 2489–92.

62 *Id.* at 2489, 2495 (citing Hardt v. Reliance Standard Life Ins. Co., 560 U.S. 242, 251 (2010)).

63 For an illustration of what a new textualist or textually constrained judge would do, see Justice Scalia's concurrence in *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2592 (2014) (Scalia, J., concurring in the judgment) (arguing that the Constitution's Recess Appointments Clause, whose meaning was in contention, should have been resolved based on its seemingly clear text, without regard to its purpose).

But Chief Justice Roberts is neither.[64] Instead, he looks to two sources to determine that the provision is ambiguous: context and, more importantly, purpose. Chief Justice Roberts first looks to the context.[65] He analyzes Section 36B by reading other provisions and the structure of the Act.[66] These other provisions contemplate there being qualified individuals who merit tax credits in every type of Exchange—including Federal. For example, Section 18041 dictates that if States choose not to establish an Exchange, the Government will establish "*such Exchange*."[67] Using Black's Law Dictionary, Chief Justice Roberts finds that this phrase means that if States do not establish Exchanges, the Government will step in to establish the same type of Exchange.[68] He then looks to two other provisions, one mandating that "all Exchanges 'shall make available qualified health plans to qualified individuals,'"[69] and another mandating for "all Exchanges to create outreach programs that must 'distribute fair and impartial information concerning . . . the availability of premium tax credits under section 36B.'"[70] Chief Justice Roberts concludes, "If tax credits were not available on Federal Exchanges, these provisions would make little sense."[71] They presuppose the availability of tax credits for Federal Exchanges.

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64 In fact, Chief Justice Roberts never has been. In his confirmation hearings, he lays out his philosophy on statutory interpretation: "You begin with the text, and as the Supreme Court has said, in many cases, perhaps most cases, that's also where you end. The answer is clear. I have, though, as a judge, relied on legislative history to help clarify ambiguity in the text." *Confirmation Hearing on the Nomination of John. G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 319 (2005) (statement of John G. Roberts, Jr.).

65 Chief Justice Roberts explains, "[M]eaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *King*, 135 S. Ct. at 2489 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000)).

66 He writes, "[W]e 'must do our best, bearing in mind the 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 [i.e., structure].'" *Id.* at 2492 (quoting Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2441 (2014)). For a discussion of the importance of utilizing structure in statutory interpretation, see generally Kenneth W. Starr, *Of Forests and Trees: Structuralism in the Interpretation of Statutes*, 56 GEO. WASH. L. REV. 703 (1987).

67 42 U.S.C. § 18041(c)(1) (2012) (emphasis added).

68 *King*, 135 S. Ct. at 2489 ("By using the phrase 'such Exchange,' Section 18041 instructs the Secretary to establish and operate the *same* Exchange that the State was directed to establish under Section 18031.") (citing *Such*, BLACK'S LAW DICTIONARY 1661 (10th ed. 2014) (defining "such" as "[t]hat or those; having just been mentioned")).

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

70 *Id.* at 2491 (alteration in original) (quoting 42 U.S.C. § 18031(i)(3)(B)).

71 *Id.* at 2492. Chief Justice Roberts also mentions other provisions that would not make sense if tax credits were not available for Federal Exchanges. *See id.* at 2489–92. For a study detailing over fifty provisions of the ACA that would not make sense if Federal

Second, Chief Justice Roberts reads ambiguity into Section 36B by considering the purpose of the statute. He maintains that he only reads ambiguity into the provision by using context, but it is evident by the latter part of the opinion that he also utilizes purpose.[72] Though he never explicitly states this, he hints at it: "But while the meaning of the phrase . . . may seem plain 'when viewed in isolation,' such a reading turns out to be '*untenable* in light of [the statute] as a whole.'"[73] His subsequent focus on the purpose of the statute to determine the true meaning of the provision suggests that purpose drove him to find the provision ambiguous in the first place.

After finding ambiguity in the statutory language, Chief Justice Roberts resolves that ambiguity by again looking to purpose. He writes, "Here, the statutory scheme compels us to reject petitioners' interpretation because it would destabilize the individual insurance market in any State with a Federal Exchange, and likely create the very 'death spirals' that Congress designed the Act to avoid."[74] No doubt, Congress's reason for passing the ACA drives his interpretation of what Section 36B was supposed to originally say. Chief Justice Roberts ended his opinion with what seems like a confession:

> [W]e must respect the role of the Legislature, and take care not to undo what it has done. *A fair reading of legislation demands a fair understanding of the legislative plan*.
>
> Congress passed the [ACA] 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.[75]

Exchanges did not receive tax credits, see Timothy Stoltzfus Jost & James Engstrand, *Anomalies in the Affordable Care Act that Arise from Reading the Phrase "Exchange Established by the State" Out of Context*, 23 U. MIAMI BUS. L. REV. 249, 260–66 (2015).

72 He proclaims, "In this instance, the context and structure of the Act compel us to depart from what would otherwise be the most natural reading of the pertinent statutory phrase." *King*, 135 S. Ct. at 2495.

73 *Id.* (alteration in original) (emphasis added) (quoting Dep't of Revenue v. ACF Indus., 510 U.S. 332, 343 (1994)).

74 *Id.* at 2492–93 (citing N.Y. State Dep't of Social Servs. v. Dublino, 413 U.S. 405, 419–20 (1973)).

75 *Id.* at 2496 (emphasis added). One commentator exclaimed that these were the most important words of the opinion, "sounding the death-knell . . . for the Scalian revolution in statutory interpretation." Marty Lederman, *Textualism? Purposivism? The Chief Justice Comes Down on the Side of Interpretive Pragmatism*, SLATE (June 25, 2015, 4:26 PM), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2015/scotus_roundup/supreme_court_2015_john_roberts_ruling_in_king_v_burwell.html.

In short, Chief Justice Roberts utilized contextually constrained purposivism to determine the meaning of Section 36B. Though the text of the provision was plain, he found ambiguity in it by looking to context—the provisions surrounding Section 36B and the statute's structure—as well as purpose. He then used the purpose of the statute again to ascertain the meaning of Section 36B. The main difference between contextually constrained purposivism and textually constrained purposivism is that the former approach disregards the plain meaning of the disputed provision if context and the purpose of the statute conflict with that plain meaning. A textually constrained purposivist judge, however, does not consider context or overall purpose if the meaning of the disputed provision is plain. Thus, contextually constrained purposivism is a novel, albeit hybrid, purposivist technique. It falls short of classical purposivism because text still plays an important role—judges first look to the text, not the statute's overall purpose, to understand meaning. Interestingly, Chief Justice Roberts does not rely on the ACA's legislative history to ascertain purpose, but that may be more because it was not readily available.[76] Under contextually constrained purposivism, it would not be surprising if the Court also looks to legislative history in order to better understand why Congress passed a statute. After all, legislative history is a rich source—and marque technique—for any purposivist.[77]

II. THE IMPLICATIONS OF CONTEXTUALLY CONSTRAINED PURPOSIVISM

What are the implications of the Court's new method of interpretation? Does it remain true to the Court's role as Congress's supposed agent? Or does it distort Congress's true intentions, negatively impacting the democratic process? May it also invite too much judicial discretion, bringing to mind fears of justices imposing their own views into laws? This Part seeks to analyze these questions in depth, postulating the advantages and disadvantages of this new approach.

A. The Positive Implications of Contextually Constrained Purposivism

Contextually constrained purposivism appears to take the best elements from both purposivism and textually constrained purposivism: judges may consider both the purpose and the text to figure a provision's

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

77 Looking to legislative history would seem to help the purposivist in finding Congress's true intent in passing a certain provision. For an excellent discussion regarding the benefits of using legislative history, see generally Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 848–61 (1992). *But see* Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 375–79 (offering a brief rebuttal regarding some of the concerns of using of legislative history).

meaning.[78] Even though purpose is the judge's most important consideration, the text still curtails a judge's analysis to a degree. As Professor Re explains, "On the up side, [contextually constrained purposivism] offers a way of preserving distinctly textual constraints on interpretation while also leaving analytical room to give in to the persuasive force of purposivism . . . ."[79] Even though text is an important consideration, a judge can deviate from it in special circumstances, like in *King*, to effectuate the true purpose of the statute.

Utilizing contextually constrained purposivism arguably allows the Court to be a more faithful agent of Congress. Under the approach, the Court takes into account the wider purpose of the statute, as opposed to the immediate meaning of a single provision. In this way, it may be that the Court respects the true intent of Congress and, consequently, the American structure of representative democracy. The Court in *King* believed that it most respected the will of the people when it tried to interpret Section 36B in light of the statute's overall purpose. Chief Justice Roberts highlighted the Court's facilitative role in the democratic process: "In a democracy, the power to make the law rests with those chosen by the people. Our role is more confined—'to say what the law is.'. . . [W]e must respect the role of the Legislature, and take care not to undo what it has done."[80] The Court read Section 36B broadly in order to not undo what it believed the people wanted: more access to health insurance. Due to Congress passing statutes like the ACA that have headings indicating the explicit goal(s),[81] it seems like contextually constrained purposivism is a germane way for finding the right meaning of a disputed provision.

Similarly, if the Court takes care to effectuate only Congress's will, there should be less risk of judges imposing their own subjective moral philosophies into the meaning of provisions. Congress's purpose is the guidepost (alongside considerations like text, context, legislative history, and more) that the Court follows when fulfilling its judicial function of "say[ing] what the law is."[82] In theory, this additional guidepost should curtail judges' ability to impute their own moral values and beliefs into the text.

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78 As Professor Re writes, "[Contextually constrained purposivism] strives to get the best of both worlds. It aims to adhere to clear text when it's the product of deliberate compromise, but not when it springs from an inattentive mistake." Re, *supra* note 10, at 418.

79 *Id.*

80 *King*, 135 S. Ct. at 2496 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

81 For instance, the first heading of the ACA is: "Quality, Affordable Health Care for All Americans." Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1, 124 Stat. 119, 119 (2010).

82 *Marbury*, 5 U.S. at 177.

Finally, by reading provisions in light of the statute's greater purpose, the Court is able to fix ambiguous or seemingly contradictory provisions to avoid absurd results.[83] The Court in *King* believed it was doing this. Had the Court read Section 36B narrowly and held that only State Exchanges merited tax credits, millions of Americans would have lost health insurance—an absurd result contradicting the statute's purpose of expanding access to health insurance.[84] Although it seems like the Court rewrote Section 36B to say, an Exchange established by the State *and Federal Government*,[85] the Court insisted it did no rewriting.[86] Instead, it was merely reading the provision that way in order to make it coherent with Congress's greater purpose.

B. The Negative Implications of Contextually Constrained Purposivism

While contextually constrained purposivism may appear to have many advantages, it is by no means flawless. First, the approach may actually invite too much judicial discretion. Judges can impose their own values and beliefs under the pretense that they are imposing the purpose of the statute.[87] Instead of purpose being a useful guidepost that constrains the Court's interpretation, its use can lead to manipulation. As Justice Scalia remarked in his dissent in *King*, "More importantly, the Court forgets that ours is a government of laws and not of men. That means we are governed by the terms of our laws, *not by the unenacted will of our lawmakers*."[88] It is easier for a judge to impose his or her own will into a provision's reading under a purposivist approach rather than textualist. Any reviewer of a

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83 For more on this idea, see William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479 (1987) (arguing that judges should interpret statutes dynamically—"that is, in light of their present societal, political, and legal context"). Professor Eskridge argues that judges are relational agents who should use their best efforts to carry out the *general* goals of the legislature. Since circumstances change over time, it is up to judge to keep the law updated for the legislature. *See id.* at 1480, 1544–45.

84 The Court wrote, "So without the tax credits, the coverage requirement would apply to fewer individuals. And it would be a *lot* fewer. . . . It is implausible that Congress meant the Act to operate in this manner." *King*, 135 S. Ct. at 2493–94 (citing Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2674 (2012) (joint dissent)).

85 *See id.* at 2497 (Scalia, J., dissenting) ("Who would ever have dreamt that 'Exchange established by the State' means 'Exchange established by the State *or the Federal Government*'?"); *see also* 26 U.S.C. § 36B(b)(2)(A) (2012) (providing monthly premiums for qualified health plans "which were enrolled in through an Exchange *established by the State*." (emphasis added)).

86 *See King*, 135 S. Ct. at 2495–96.

87 As Professor Re notes, "On the down side, [contextually constrained purposivism] affords the Court even greater power and discretion . . . increas[ing] the risk of biased, insincere, and unexpected rulings." Re, *supra* note 10, at 418.

88 *King*, 135 S. Ct. at 2505 (Scalia, J., dissenting) (emphasis added).

judge's textualist reading only needs to see the words of a statute to determine if the judge followed them. Justice Scalia wrote many disparaging remarks in his dissent in *King*, but none more critical than this: "And the cases will publish forever the discouraging truth that the Supreme Court of the United States favors some laws over others, and is prepared to do whatever it takes to uphold and assist its favorites."[89]

The primary consideration in contextually constrained purposivism is Congress's purpose. Yet how are judges sure they know it? There are 535 members of Congress; each one might have a different reason for yelling "yea." As Professor Max Radin explained, "There are purposes and purposes."[90] In *King*, the Court reminded petitioners that the purpose of the ACA was to expand access to health insurance. After all, Title I of the ACA reads: "Quality, Affordable Health Care for All Americans."[91] But, should every provision be read in light of this one purpose? Or might provisions reflect different purposes? At what level of generality should the Court frame the purpose? Petitioners made a plausible argument for the purpose of Section 36B: to compel the States to establish Exchanges, in order for their citizens to get tax credits.[92] How is the Court so sure this is not the true purpose of Section 36B?

Another criticism is that the approach discourages judges from being faithful agents of Congress. Judges are not faithful when they impose their own will into statutes or miss the reason(s) the statute was passed. They also are not faithful when they look to extra-textual considerations to determine purpose. Justice Scalia argues that the Court in most circumstances should deduce purpose from text: "The purposes of a law must be 'collected chiefly from its words,' not 'from extrinsic

89 *Id.* at 2507. Due to the Court's "favoritism" of the ACA, Justice Scalia, now rather (in)famously, wrote: "We should start calling this law SCOTUScare." *Id.* If the Court did indeed play favorites with the ACA, was it not being candid when it read Section 36B broadly? Did it perhaps do so for political reasons? *See* David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 731 (1987) ("The scholar's obligation is to '*think*, lucidly and openly,' about the issues; the judge must *act* in a manner sensitive to political and other realities and thus may opt for something less, or least different." (quoting GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 181 (1982)).

90 Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 876 (1930) (explaining that "[w]e distinguish in our conduct and our thinking between immediate and ulterior purposes.").

91 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1, 124 Stat. 119, 119 (2010).

92 *See King*, 135 S. Ct. at 2494. Justice Scalia agrees with petitioners. Establishing and running an Exchange is a costly process. If it were not for the tax credits, why would States elect to establish Exchanges in the first place? *See id.* at 2504 (Scalia, J., dissenting) ("A State would have much less reason to take on these burdens [i.e., establishing an Exchange] if its citizens could receive tax credits no matter who establishes its Exchange.").

circumstances.'"[93] As Justice Scalia noted in another case, "[T]he purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone."[94] Judges violate Congress's intent when they delve behind the words in the law. They instantly change the meaning by looking to any other source than the text. By "fixing" ambiguous or seemingly contradictory provisions, the Court is interfering with the provision Congress *meant* to pass. In this day and age, it takes great legislative compromise to decide on the passing of a statute—perhaps these poorly worded provisions are supposed to be that way.[95] When the Court "fixes" the meaning of such provisions, it hurts the democratic process.

When judges change the plain meaning of laws, they not only violate their roles as agents, they also violate the principle of separation of powers. An unhappy Justice Scalia criticized the Court for stepping into the Legislature's boundary:

> The Court's decision reflects the philosophy that judges should endure whatever interpretive distortions it takes in order to correct a supposed flaw in the statutory machinery. That philosophy ignores the American people's decision to give *Congress* "[a]ll legislative Powers" enumerated in the Constitution. They made Congress, not this Court, responsible for both making laws and mending them.[96]

By usurping the Legislature's role to make laws, the Court aggrandizes its own power. It rewrote the phrase "Established by the State" effectively seven times—that is how often the phrase appeared in the ACA.[97] The Court also encourages "congressional lassitude."[98] The Court

93 *Id.* at 2503 (quoting Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 202 (1819)). He reiterates that "[o]ur task is to apply the text, not to improve upon it." *Id.* at 2505 (quoting Pavelic & LeFlore v. Marvel Entm't Grp., 493 U.S. 120, 126 (1989) (alteration in original)). Justice Scalia maintains that the Court is only allowed to improve the text when there is a "patently obvious" scrivener's error: "Only when it is patently obvious to a reasonable reader that a drafting mistake has occurred may a court correct the mistake." *Id.* at 2504–05. For one example of a court fixing a scrivener's error, see *Cernauskas v. Fletcher*, 201 S.W.2d 999, 1000 (Ark. 1947), where the court read the words "in conflict herewith" into a statute that stated, "All laws and parts of laws . . . are hereby repealed." The court explained: "No doubt the legislature meant to repeal all laws in conflict with that act, and, by error of the author or the typist, left out the usual words 'in conflict herewith.'" *Id.*

94 W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 98 (1991) (citing Rodriguez v. United States, 480 U.S. 522, 525–26 (1987) (per curiam)).

95 *See* MANNING & STEPHENSON, *supra* note 4, at 54 ("[L]aws will be messy, uneven, and ill-fitting with their apparent purposes not because Congress is short-sighted or imprecise, but rather because legislation entails compromise, and compromise is untidy by nature.").

96 *King*, 135 S. Ct. at 2505 (Scalia, J., dissenting) (alteration in original) (citation omitted) (quoting U.S. CONST. art. I, § 1).

97 *See id.* at 2499.

98 *Id.* at 2506.

basically gave the drafters, who engaged in "inartful drafting,"[99] a get-out-of-jail-free card. What impetus does Congress now have to not continue writing legislation sloppily?

CONCLUSION

In *King*, Justice Scalia criticized the majority's interpretive approach, exclaiming, "Today's interpretation is not merely unnatural; it is unheard of."[100] Justice Scalia's critique is persuasive, because the Court employed an entirely new method of statutory interpretation: contextually constrained purposivism. This method has emerged in only the last few years, harkening back to a classical era of interpretation where the Court read statutes in light of their purpose. Nowhere is this approach more evident than in *King*, where the Court had to grapple with one of the most storied debates facing the judiciary: whether to interpret a provision according to its spirit, or letter. The Court, in the face of plainly worded text, decided to effectuate the spirit of the statute. This was to the dismay of textualists, none more so than Justice Scalia, but to the joy of millions who could now continue to afford health insurance.

The Court in *King* used contextually constrained purposivism to broadly interpret Section 36B. It looked to the context surrounding the provision to read ambiguity into it. By looking to other provisions that assumed tax credits were available on Federal Exchanges, the Court surmised that the provision did not make sense. What is more, the Court looked at the effects of interpreting the provision narrowly, finding it would be contrary to the ACA's purpose for millions to lose their health insurance. Determining that the provision was open-ended, the Court then looked to the statute's purpose to make sense of it. The Court's actions were self-serving—after having just used purpose to initially find ambiguity, the Court would use purpose again to resolve it. In light of the ACA's true purpose to expand access to health insurance, the Court held that the phrase "an Exchange established by the State" should have been written, for all intents and purposes: "an Exchange established by the State [and Federal Government]."

How the Court reached its holding has possibly great implications. For one, it suggests the Court believes it is acting as a faithful agent of Congress when it corrects inartful drafting in light of a statute's purpose.

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99 *Id.* at 2492 (majority opinion). Congress's "inartful drafting" of the ACA brings to mind a description by Roger Traynor, Chief Justice of the Supreme Court of California, regarding the many statutes that came before his court: "Ordinarily what passes before judges on the reviewing stand is not a well-programmed, orderly parade, but fragments from a circus on the loose." Roger J. Traynor, *The Limits of Judicial Creativity*, 63 IOWA L. REV. 1, 2 (1977).

100 *King*, 135 S. Ct. at 2497 (Scalia, J., dissenting).

Text still plays an important, constraining role. Even though the Court disregarded the plain wording of Section 36B, it still looked to context to make sure that its new interpretation would be consistent with the ACA as a whole. Though this Case Comment takes no sides in whether the Court interpreted the provision correctly, the Court's interpretation does make sense if Congress's true goal was to expand access to health insurance.

Did the Court in *King* finally find a Holy Grail methodology for interpreting statutes? A foolproof method that can be used in any case under any circumstance? Probably not. When it comes to interpretation, perhaps there exist so many modes because the subject of interpretation, human language, is imprecise.[101] Maybe this very human, very imperfect exercise called speaking is to blame for why there will never be just one method of interpretation. As John Locke once wrote long ago regarding interpretation: "[T]here is no end; comments beget comments, and explications make new matter for explications; and of limiting, distinguishing, varying the signification of . . . moral words there is no end. These ideas of men's making are, by men still having the same power, multiplied *in infinitum*."[102]

101 This brings to mind Justice Oliver Wendell Holmes's wise observation regarding the very enterprise of law itself: "The danger of which I speak is . . . the notion that a given system, ours, for instance, can be worked out like mathematics from some general axioms of conduct." Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 465 (1897).

102 2 JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 109 (Alexander Campbell Fraser ed., Dover Publ'ns, Inc. 1959) (1690).

RECENT CASE

OHIO V. CLARK

Supreme Court Holds Out-of-Court Statements Made by Child to Preschool Teacher Were Not "Testimonial" Statements

Peter M. Torstensen, Jr.∗

INTRODUCTION

Cross-examination has long been considered a vital aspect of a fair trial.[1] In fact, the Sixth Amendment's provision that criminal defendants "be confronted with the witnesses against [them]" has been held to guarantee an opportunity for cross-examination in criminal trials.[2] Even in cases where the Court has admitted out-of-court statements without cross-examination, it has adhered closely to the view of cross-examination as a core protection of defendants' rights.[3] The fundamental issue regarding the relationship between hearsay evidence and the Constitution's right of confrontation is whether and to what extent they pursue similar objectives. In *Ohio v. Roberts*, the Court collapsed any distinction between the Confrontation Clause and the federal and state hearsay evidence rules,

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1 *See, e.g.*, Mattox v. United States, 156 U.S. 237, 244 (1895) (explaining that "[t]he substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination"); *see also* 5 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1367 (3d ed. 1940) (declaring cross-examination "the greatest legal engine ever invented for the discovery of truth").

2 U.S. CONST. amend. VI; *see, e.g.*, Faretta v. California, 422 U.S. 806, 818 (1975) (finding that the Sixth Amendment guarantees the right of cross-examination in criminal trials); Snyder v. Massachusetts, 291 U.S. 97, 106 (1934) (same).

3 This was at the core of the Court's holding in *Ohio v. Roberts*, which conditioned its admission of hearsay evidence by an unavailable declarant on the "indicia of reliability" that rendered cross-examination unnecessary. 448 U.S. 56, 65–66 (1980).

holding that the right of confrontation was not offended so long as the statements bore sufficient "indicia of reliability."[4] After nearly a quarter-century of this reliability analysis, the Court changed course, as *Roberts* often admitted hearsay evidence that the Confrontation Clause intended to exclude.[5] Instead of looking for "indicia of reliability," the Court now considers whether out-of-court statements by an unavailable declarant "bear testimony" against the accused—if so, admission of the hearsay evidence violates the right of confrontation unless there was a prior opportunity for cross-examination.[6]

Rather than providing an exhaustive definition of "testimonial" statements, *Crawford v. Washington* left the resolution of that issue to future cases,[7] and the development of an analytical framework for testimonial statements has been uneven.[8] In an effort to provide clarity to the testimonial inquiry, the Court announced in *Davis v. Washington* what has come to be known as the "primary purpose" test, which requires an objective inquiry into the purposes of the out-of-court statements being offered as evidence.[9] However, it is not immediately apparent *whose* primary purpose must be considered,[10] as the articulation of the test can easily be read to require an inquiry into the purposes of the interrogator or the declarant, or both.[11] *Michigan v. Bryant* also added several other considerations to the "primary purpose" inquiry,[12] which risk complicating

4 *Id.*; *see* KENNETH S. BROUN ET AL., EVIDENCE: CASES AND MATERIALS 892 (8th ed. 2014) (noting that "Confrontation Clause analysis under *Roberts* and admission under the hearsay rules . . . merged into a single inquiry").

5 *See* Crawford v. Washington, 541 U.S. 36, 61–63 (2004) (arguing that the right of confrontation was not intended to be subject to "amorphous notions of 'reliability'" and criticizing *Roberts* for admitting "core testimonial statements that the Confrontation Clause plainly meant to exclude").

6 *Id.* at 68; *see id.* at 51 (finding the Confrontation Clause applicable to statements bearing testimony against the accused).

7 *Id.* at 68.

8 *See* David Crump, *Overruling* Crawford v. Washington*: Why and How*, 88 NOTRE DAME L. REV. 115, 136–37 (2012) (arguing that the development of the "testimonial-nontestimonial" distinction from *Crawford* may have been uneven, at least in part, because it attempts to discern the subjective motivation of the declarant through objective factors).

9 *See* 547 U.S. 813, 822 (2006). The Court decided *Davis* and *Hammon v. Indiana* in the same opinion. *Id.* at 813.

10 *See* Michigan v. Bryant, 562 U.S. 344, 368 (2011) (arguing that the problem of mixed motives requires an inquiry into both).

11 *See id.* at 381 (Scalia, J., dissenting) (conceding that neither *Crawford* nor *Davis* addressed whose perspective was relevant to the "primary purpose" inquiry).

12 The Court considered additional factors for determining whether there was an ongoing emergency—such as the presence of a weapon, the injuries suffered by a declarant, whether there was an interrogation, and the formality surrounding the statements, *see id.* at 363–69 (majority opinion)—which has arguably complicated the analysis, *see* Crump, *supra* note 8, at 136.

the analysis of testimonial statements even further. While *Bryant* did not address the question, reserved in *Davis*, regarding the effect of statements made by a declarant to a private party,[13] that situation was squarely presented in *Ohio v. Clark*.[14]

I. CASE FACTS

Darius Clark, or "Dee," lived with his girlfriend and her two children in Cleveland, Ohio.[15] Clark was also his girlfriend's pimp, and he frequently sent her to Washington, D.C. to work as a prostitute.[16] In March 2010, while his girlfriend was on one such trip, Clark was left in charge of her three-year-old son, L.P., and eighteen-month-old daughter, A.T.[17] The following day, L.P.'s teacher noticed that he had a bloodshot eye and red lash marks on his face.[18] L.P.'s preschool teacher, Ramona Whitley, notified the lead teacher, Debra Jones, who asked L.P. about what had happened.[19] After initially saying he had fallen, L.P. eventually answered the questions by saying, "Dee, Dee."[20] Whitley contacted a child abuse hotline regarding the suspected abuse.[21] When Clark came to pick up L.P. from school, "he denied responsibility for the injuries and . . . left with L.P."[22] The next day, a social worker went to the Clark residence and took the two children to the hospital, where a physician discovered additional injuries consistent with child abuse.[23] L.P. had a black eye, several belt marks, and numerous bruises, while A.T. had two black eyes, a burn mark on her cheek, and indications that her pigtails had been ripped out at the base.[24]

The grand jury indicted Clark for five counts of felonious assault, two counts of domestic violence, and two counts of child endangerment.[25] At trial, the State introduced the out-of-court statements made by L.P. as evidence establishing Clark's guilt, but L.P. did not testify as the Ohio trial

13 *Bryant*, 562 U.S. at 357 n.3.
14 135 S. Ct. 2173, 2177 (2015).
15 *Id.*
16 *Id.*
17 *Id.* at 2177–78. The Court noted that it, like the Ohio courts, used initials to refer to Clark's victims. *Id.* at 2177 n.1.
18 *Id.* at 2178.
19 *Id.*
20 *Id.*
21 *Id.*
22 *Id.*
23 *Id.*
24 *Id.*
25 *Id.*

court found him incompetent to testify.[26] Under Ohio law, children younger than ten years of age are incompetent to testify if they "appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly."[27] The Ohio trial court relied on state evidence rules to admit the out-of-court statements made by L.P. to his teacher, finding that they bore adequate indicia of reliability.[28] Clark moved to exclude the statements made by L.P. to his teacher under the Confrontation Clause, but the trial court denied the motion, finding that the statements made by L.P. did not implicate the protections of the Sixth Amendment.[29] The jury found Clark guilty of all but one of the assault counts and sentenced him to twenty-eight years' imprisonment.[30]

On appeal, the state appellate court reversed the conviction on the ground that admission of L.P.'s out-of-court statements violated the Confrontation Clause.[31] The Ohio Supreme Court affirmed the decision of the appellate court, albeit on slightly different grounds.[32] The court determined that L.P.'s statements were testimonial, as the primary purpose of the teacher's questioning was "to gather evidence potentially relevant to a subsequent criminal prosecution" rather than "to deal with an existing emergency."[33] In addition, the court also found that Ohio had a mandatory reporting obligation law, which requires certain professionals, including teachers, to report instances of suspected child abuse to the authorities.[34] In the court's view, the mandatory reporting obligation transformed the teachers into agents of the State, which made the statements they elicited from L.P. "functionally identical to live, in-court testimony."[35]

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26 State v. Clark, No. 96207, 2011 WL 6780456, at *1 (Ohio Ct. App. Dec. 22, 2011), *rev'd*, 135 S. Ct. 2173 (2015). The trial court held a hearing on November 16, 2010, and found L.P.—then four years old—incompetent to testify. *Id.*

27 *Clark*, 135 S. Ct. at 2178 (quoting OHIO R. EVID. 601(A)).

28 *See id.* (citing OHIO R. EVID. 807).

29 *Id.*

30 *Id.*

31 *See Clark*, 2011 WL 6780456, at *2, *11.

32 *See* State v. Clark, 999 N.E.2d 592, 600–01 (Ohio 2013), *rev'd*, 135 S. Ct. 2173. The Ohio Supreme Court found that the primary purpose of both teachers, Jones and Whitley, was to collect evidence to fulfill their duty to report abuse. *See id.* at 600.

33 *Id.* at 597.

34 *See id.* at 596.

35 *Id*. at 600 (quoting Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310–11 (2009)).

II. MAJORITY OPINION

It is worth noting that this appeared to be an easy case for the Court.[36] It concluded, somewhat narrowly, that the out-of-court statements by L.P. to his teacher did not implicate the protections of the Confrontation Clause, as the primary purpose of the statements was not testimonial.[37] After curiously referencing *Roberts*' "indicia of reliability" standard,[38] the majority summarized the Court's confrontation precedents—beginning with *Crawford v. Washington* and concluding with *Michigan v. Bryant*.[39] The Court explained that *Crawford* applied the Confrontation Clause to witnesses who bear testimony against the accused, and it defined "testimony" as "a solemn declaration or affirmation made for the purpose of establishing or proving some fact."[40] Having defined "testimonial" statements, *Crawford* held that the Confrontation Clause prohibits the introduction of testimonial evidence by witnesses not testifying in court, unless they were unavailable to testify *and* the defendant had a prior opportunity to cross-examine the witness.[41]

The Court then reviewed its subsequent confrontation cases—in particular *Davis v. Washington*[42] and *Michigan v. Bryant*[43]—which have further developed the requirements for determining when a statement is testimonial.[44] It noted that *Davis* articulated what had come to be known as the "primary purpose" test, defining when statements made to police officers would—and would not—be testimonial.[45] The Court explained:

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36 The Court unanimously found that these statements were not testimonial. *Clark*, 135 S. Ct. at 2183; *id.* at 2183–84 (Scalia, J., concurring in the judgment); *id.* at 2185 (Thomas, J., concurring in the judgment). But there was strong disagreement in the proper reasoning to be applied. *See infra* Part III.

37 *See Clark*, 135 S. Ct. at 2183.

38 *Id.* at 2179 (quoting Ohio v. Roberts, 448 U.S. 56, 66 (1980)). The reference is curious, in part, because the Court's decision in *Crawford* overruled *Roberts*, and the majority opinion referenced *Roberts* in such a way as to suggest that it was still a viable approach. *Compare id.* (describing *Crawford* as a new approach without suggesting that *Roberts* had been overruled), *with* Crawford v. Washington, 541 U.S. 36, 68–69 (2004) (rejecting the *Roberts* approach), *and id.* at 69 (Rehnquist, C.J., concurring in the judgment) ("I dissent from the Court's decision to overrule . . . *Roberts*." (citation omitted)). Moreover, subsequent opinions of the Court have expressly recognized that *Crawford* overruled *Roberts*—it did not simply provide another approach. *See, e.g.*, Michigan v. Bryant, 562 U.S. 344, 353 (2011) (noting that *Crawford* overruled *Roberts*); Whorton v. Bockting, 549 U.S. 406, 413 (2007) (same).

39 *See Clark*, 135 S. Ct. at 2179–80.

40 *Id.* at 2179 (quoting *Crawford*, 541 U.S. at 51).

41 *Id.* (citing *Crawford*, 541 U.S. at 68).

42 547 U.S. 813 (2006).

43 562 U.S. 344.

44 *Clark*, 135 S. Ct. at 2179–80.

45 *Id.* (citing *Davis*, 547 U.S. at 822).

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.[46]

According to the Court, *Bryant* determined that the "primary purpose" inquiry required consideration of "all of the relevant circumstances."[47] *Bryant* had reiterated the primary purpose requirements from *Davis*, but it also noted that there might be circumstances beyond those indicating the existence of an ongoing emergency that could objectively indicate that a statement was not made with the primary purpose of establishing facts for future prosecution.[48] The *Bryant* Court considered the existence of an ongoing emergency as simply an additional factor informing the ultimate "primary purpose" inquiry.[49] The Court noted that *Bryant* also viewed the formality of the interrogation as another factor that required consideration, noting that informal "questioning [was] less likely to reflect a primary purpose aimed at obtaining testimonial evidence against the accused."[50] Finally, the Court observed that the Confrontation Clause was not meant to preclude admission of those out-of-court statements that were understood at the time of the founding to be admissible in criminal trials without cross-examination.[51] Thus, the majority determined "the primary purpose test is a necessary, but not always sufficient, condition for the exclusion of out-of-court statements under the Confrontation Clause."[52]

While the Court indicated that this case presented the very question that it had reserved in earlier cases—whether out-of-court statements made to private persons implicated the Confrontation Clause—it declined to adopt a categorical rule excluding out-of-court statements made to private persons as beyond the Sixth Amendment's reach.[53] However, the Court

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46 *Id.* (quoting *Davis*, 547 U.S. at 822).

47 *Id.* at 2180 (citing *Bryant*, 562 U.S. at 369).

48 *Id.* (citing *Bryant*, 562 U.S. at 374).

49 *Id.* (quoting *Bryant*, 562 U.S. at 366). *Bryant* considered additional factors that could have a bearing on the inquiry. *See Bryant*, 562 U.S. at 371–75 (considering circumstances, such as a shooting victim found alone in a parking lot without knowledge of the party responsible for the injuries, the fact that the involvement of a gun created an additional danger to the public at large, and the purpose of the officers' questions).

50 *Clark*, 135 S. Ct. at 2180 (quoting *Bryant*, 562 U.S. at 366, 377).

51 *Id.* (citing Giles v. California 554 U.S. 353, 358–59 (2008); Crawford v. Washington, 541 U.S. 36, 56 n.6, 62 (2004)).

52 *Id.* at 2180–81.

53 *See id.* at 2181.

found it highly relevant that L.P. was speaking to his teachers.[54] Comparing the facts and circumstances of the instant case with those present in *Davis*, *Hammon v. Indiana*, and *Bryant*, the Court determined that the primary purpose of the conversation between L.P. and his teacher, similar to the conversations in *Davis* and *Bryant*, was to respond to an ongoing emergency, as opposed to an effort to gather evidence to be used in a future prosecution.[55] The Court also observed that it was incredibly unlikely that a child of his age would ever "intend his statements to be a substitute for trial testimony."[56] Finally, the Court found that statements similar to those at issue in the instant case had been generally admissible at common law.[57]

The Court also rejected Clark's contentions that Ohio's mandatory reporting requirements transformed the statements L.P. made to his teachers into testimonial statements, given the "natural tendency [of these kinds of statements] to result in [the] prosecution [of a defendant]."[58] It dismissed this argument for two reasons. First, the Court found that any good teacher would have acted with the primary purpose of removing the child from harm's way, regardless of any state reporting requirement.[59] Second, the Court found it irrelevant that the mandatory reporting requirement "had the natural tendency to result in Clark's prosecution."[60] It noted that both *Davis* and *Bryant* permitted the introduction of statements that were provided in response to police interrogations, as their purpose was not *primarily* testimonial.[61] The reporting obligation, the Court concluded, "does not change our analysis."[62]

III. CONCURRING OPINIONS

A. Justice Scalia Joined by Justice Ginsburg

Justice Scalia, joined by Justice Ginsburg, agreed with the Court's judgment and with its decision to avoid answering two questions unnecessary to decide the case: (1) whether the Ohio mandatory reporting law transformed private actors into agents of the State for purposes of the

54 *See id.*

55 *See id.* (noting that *Davis* and *Bryant* both involved circumstances that were unclear to the responding officers that required asking questions of the victim to secure their safety, while the victim in *Hammon* had already been separated from her alleged attacker).

56 *Id.* at 2182.

57 *See id.*

58 *Id.* at 2183.

59 *Id.*

60 *Id.*

61 *Id.*

62 *Id.*

Confrontation Clause, and (2) whether a more permissive test for determining whether a statement is testimonial should apply to interrogations by private actors.[63] Applying the "usual test applicable to informal police interrogation," Scalia concluded that L.P.'s statements were not testimonial.[64] In particular, L.P.'s primary purpose in making the statements was "not to invoke the coercive machinery of the State," nor were his teachers attempting to "establish[] facts for later prosecution."[65] Finally, the conversation, viewed as a whole, did not possess the "requisite solemnity…. adequate to impress upon [L.P.] the importance of what he [was] testifying to."[66] This, according to Justice Scalia, was all that was necessary to decide the case.[67]

As the majority opinion went beyond what he believed was necessary to decide the case, Justice Scalia wrote separately to "protest the . . . shoveling of fresh dirt upon the Sixth Amendment right of confrontation so recently rescued from the grave in *Crawford v. Washington*."[68] He argued that the Court's recent cases, beginning with *Crawford*, sought to bring the application of the Confrontation Clause back in line with its original meaning: testimonial statements by out-of-court witnesses must be excluded unless the witness is unavailable *and* the defendant had a prior opportunity for cross-examination.[69] Scalia took issue with the characterization of *Crawford* as a different approach.[70] While noting that "snide detractions do no harm," Scalia argued that dicta on legal points has a significant potential to mislead.[71] In particular, the suggestion that the

63 *Id.* (Scalia, J., concurring in the judgment). While Scalia expressed relief that the majority declined to employ a more permissive test for interrogations by private persons, there is some reason to believe that in function, if not in form, the Court's opinion would allow just that. Despite declining to hold statements made to persons who are not police officers as categorically beyond the reach of the Confrontation Clause, the Court noted that "[s]tatements made to someone who is not *principally charged* with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial." *Id.* at 2182 (majority opinion) (emphasis added) (citing Giles v. California, 554 U.S. 353, 376 (2008)). Given the suggestion that statements made to persons who are not police officers are unlikely to implicate the Confrontation Clause, it is no stretch to conclude that a more permissive test is a likely consequence of the Court's decision—or a step in that direction.

64 *Id.* at 2183–84 (Scalia, J., concurring in the judgment).

65 *Id.* at 2184.

66 *Id.*

67 *Id.*

68 *Id.*

69 *See id.*

70 *See id.* ("*Crawford* remains the law. But when else has the categorical overruling, the thorough repudiation, of an earlier line of cases been described as nothing more than 'adopt[ing] a different approach,' as though *Crawford* is a matter of twiddle-dum twiddle-dee preference . . . ?" (citation omitted) (quoting *id.* at 2179 (majority opinion))).

71 *Id.*

"primary purpose" test was "necessary, but not always sufficient" had no support in the Court's confrontation case law.[72] Instead, he argued, the "primary purpose" test sorted out interactions with a police officer where an individual was, and was not, acting as a witness.[73] In addition, he referred to the majority's assertion that a party seeking the protection of the Confrontation Clause must provide "evidence that the adoption of the Confrontation Clause was understood to require the exclusion of evidence that was regularly admitted in criminal cases at the time of the founding."[74] Scalia argued this was backwards, as the Confrontation Clause was a procedural requirement that, once invoked by the defendant, required the prosecution to introduce evidence sufficient to establish a longstanding practice of admitting evidence of this type without the need for cross-examination.[75] The Court's opinion, Scalia suggested, appeared to be "an attempt to smuggle longstanding hearsay exceptions back into the Confrontation Clause."[76]

B. Justice Thomas

Despite agreeing with much of the majority's analysis, Justice Thomas wrote separately to highlight the missed opportunity to provide guidance on the application of the Confrontation Clause to out-of-court statements made to private persons.[77] Finding the "primary purpose" test inapplicable,[78] Thomas advocated an approach—also advocated in *Davis v. Washington*[79]—that "assess[ed] whether [the] statements [bore] sufficient indicia of solemnity to qualify as testimonial."[80] Thomas argued that the Confrontation Clause was designed to protect against the particular abuses

72 *Id.* at 2184–85 (quoting *id.* at 2180–81 (majority opinion)).

73 *See id.* at 2185. This assumes the Sixth Amendment operates as a procedural rule, as opposed to an evidentiary rule.

74 *Id.* (quoting *id.* at 2182 (majority opinion)).

75 *See id.*

76 *Id.*

77 *See id.* (Thomas, J., concurring in the judgment).

78 *See id.* (arguing that "[t]he primary purpose test . . . is just as much 'an exercise in fiction . . . disconnected from history' for statements made to private persons as it is for statements made to agents of law enforcement, if not more so" (alteration in original) (quoting Michigan v. Bryant, 562 U.S. 344, 379 (2011) (Thomas, J., concurring in the judgment))).

79 547 U.S. 813, 836–37 (2006) (Thomas, J., concurring in the judgment in part and dissenting in part) (advocating an approach to analyze testimonial statements based on sufficient indicia of solemnity).

80 *Clark*, 135 S. Ct. at 2186 (Thomas, J., concurring in the judgment) (citing Crawford v. Washington, 541 U.S. 36, 51 (2004); *Davis*, 547 U.S. at 836–37 (Thomas, J., concurring in the judgment in part and dissenting in part)) (asserting that he would apply "the same test for statements to private persons that I have employed for statements to agents of law enforcement").

that occurred under the English bail and committal statutes—in particular, the "use of *ex parte* examinations as evidence against the accused."[81] Given this history, Thomas asserted that the Confrontation Clause was targeted to confront witnesses who bear testimony against the accused, where testimony is defined as a "*solemn* declaration or affirmation made for the purpose of establishing or proving some fact."[82] Thus, he argued that a confrontation analysis should turn, at least in part, on a solemnity analysis.[83]

IV. FUTURE BATTLEGROUNDS

Given the tenor of the Court's confrontation cases since *Davis* and its recent decision in *Clark*, it is worth considering the potential battlegrounds in future cases attempting to provide needed clarity to the "testimonial" framework. In particular, the Court needs to address (1) the scope of an "ongoing emergency," (2) whose perspective (interrogator or declarant) is relevant to the "primary purpose" inquiry, and (3) whether the testimonial inquiry changes when evaluating statements made to private individuals. *Bryant* offers some preliminary answers to these issues,[84] but they have proven less than desirable for lower courts.[85] *Clark* considered creating a different test to evaluate statements made to private persons for their testimonial or nontestimonial character.[86] Ultimately, the Court declined to provide a categorical rule, likely due to the fact that the "primary purpose" test proved sufficient to resolve the case without resort to an in-depth analysis of the identity of the person to whom the statements were made.[87] Each of the aforementioned problems will be considered in turn.

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81 *Id.* (quoting *Davis*, 547 U.S. at 835 (Thomas, J., concurring in the judgment in part and dissenting in part)).

82 *Id.* (emphasis added) (quoting *Crawford*, 541 U.S. at 51).

83 Justice Thomas referred to certain categories of out-of-court statements that would bear adequate indicia of solemnity, which would thus be excluded under the Confrontation Clause. *See id.* "Statements 'contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions' easily qualify." *Id.* (quoting White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in the judgment)). In addition, he noted that "formalized dialogue" while in police custody, as long as it followed any *Miranda* warnings, could bear adequate indicia of solemnity to qualify as testimonial statements. *Id.* (quoting *Davis*, 547 U.S. at 840 (Thomas, J., concurring in the judgment in part and dissenting in part)).

84 *Bryant* provided a more expansive view of an "ongoing emergency," *see* Michigan v. Bryant, 562 U.S. 344, 359–65 (2011), and concluded that the perspectives of both the interrogator and the declarant were relevant, *see id.* at 367.

85 *See, e.g.*, People v. Fackelman, 802 N.W.2d 552, 573 (Mich. 2011) (attributing a split decision to the difficulty in "synthesiz[ing] several very-difficult-to-synthesize Confrontation Clause decisions of the Supreme Court").

86 *See supra* note 53 and accompanying text.

87 *See supra* notes 53–56 and accompanying text.

A. Ongoing Emergencies and Relevant Perspectives for the Primary Purpose Inquiry

The confrontation jurisprudence in the wake of *Crawford*—particularly in *Bryant*—has not been the model of clarity.[88] While *Clark* did not have occasion to consider the scope of ongoing emergencies or the proper perspective to consider in a primary purpose inquiry, its casual reliance upon the principles from *Bryant*[89] suggests further retrenchment from the categorical overruling of *Roberts*. *Clark* did not engage in much of an analysis regarding the potential reach of ongoing emergencies, yet it found *Bryant* instructive. The teachers were concerned with the safety of a vulnerable child, the identity of the abuser was unknown, and the teachers had no way of knowing whether any other children in their charge might be at risk. Based on these factors, the Court found that the teachers' questions were aimed at resolving an ongoing emergency.[90] The real problem with ongoing emergencies after *Bryant* is overinclusiveness—the broader the conception of "ongoing emergency," the narrower the applicability of the Confrontation Clause.[91] This overinclusiveness could essentially eviscerate the right of confrontation, and it is hard to imagine that "[t]he Framers could . . . have envisioned such a hollow constitutional guarantee."[92] Such a broad view of an ongoing emergency might portend a return to the *Roberts* regime.

In conducting the primary purpose inquiry, the majority considered the perspectives of both the interrogators (L.P.'s preschool teachers) and the declarant (L.P.).[93] Without much difficulty, the Court concluded that the primary purpose of both the teachers and L.P. was to resolve an

88 *See Fackelman*, 802 N.W.2d at 573 (referencing the Court's "tortuous [confrontation] jurisprudence").

89 *See* Ohio v. Clark, 135 S. Ct. 2173, 2181 (2015). The Court concluded that L.P.'s statements occurred in the midst of an ongoing emergency, *see id.*, but it is not clear that this characterization of L.P.'s statements was necessary to the decision. In particular, the existence of an ongoing emergency was not an essential predicate to finding that the statements were nontestimonial. *See id.* at 2180 (citing *Bryant*, 562 U.S. at 374). In addition, the majority considered the perspective of both the declarant and the interrogator, *see id.* at 2181–82, which was the approach suggested in *Bryant*, *see supra* note 84.

90 *See supra* note 89. It is hard to imagine that, in the absence of finding an ongoing emergency, the Court would be forced to conclude that L.P.'s statements were made with the primary purpose of establishing facts for future prosecution. Unnecessarily expanding the scope of an "ongoing emergency," however, carries a very real risk of undermining the right of confrontation in closer cases.

91 *See Bryant*, 562 U.S. at 387–89 (Scalia, J., dissenting) (arguing that the Court's definition of "ongoing emergency" had no real limiting principle).

92 *Id.* at 389; *see also id.* at 388–89 (arguing that the "distorted view" of the Court created an "expansive exception" to the right of confrontation, which would not have been endorsed by the Framers).

93 *See supra* note 89.

ongoing emergency.[94] The Court's evaluation of the perspectives of both the interrogator and the declarant appears to further entrench the approach taken in *Bryant*.[95] Justice Scalia has argued, however, that the only relevant perspective is that of the declarant.[96] The *Bryant* approach created no problems in *Clark* because the motives, at least when viewed through the lens of a reasonable person, were aligned.[97] However, it is not hard to imagine circumstances when a declarant and an interrogator have conflicting motives.[98] While the *Bryant* approach does not propose a direct solution to this issue, it seems likely that the resolution of these cases would be left to the discretion of judges, who would be "free to reach the 'fairest' result under the totality of the circumstances"[99]—an outcome that would be a step back towards *Roberts*.

B. Placing Statements Made to Private Persons Within the "Testimonial" Framework

The Court was unwilling to establish a categorical rule for statements made to private persons, but its approach suggests that these statements are significantly less likely to implicate the Confrontation Clause.[100] In the context of out-of-court statements made to police officers, the "primary purpose" test functions as a binary approach to the testimonial determination. That is, a statement is either determined to be made for the purpose of resolving an ongoing emergency (nontestimonial) or with a view towards prosecution (testimonial).[101] As the "primary purpose" inquiry is an objective one,[102] this makes sense. The police officer stands clothed in the compulsory authority of the State, charged with the duty of investigating crimes. When there is not an ongoing emergency, it is quite reasonable to assume that police interviews, even those of a more informal nature, are likely to be used in future prosecutions. Statements made to private persons, however, are more likely to fall into a hazier middle ground—neither made to resolve an ongoing emergency nor made for the purpose of future prosecution. This appears to be an area with great

94 *See supra* note 89.

95 *See supra* notes 89–90 and accompanying text.

96 *Bryant*, 562 U.S. at 381 (Scalia, J., dissenting).

97 *See* Ohio v. Clark, 135 U.S. 2173, 2181–82 (2015) (finding that the primary purpose of both L.P. and his teachers was to resolve an ongoing emergency).

98 *Bryant*, 562 U.S. at 383 (Scalia, J., dissenting).

99 *Id.*

100 *See supra* notes 53–57 and accompanying text.

101 *See* Davis v. Washington, 547 U.S. 813, 822 (2006).

102 *See id.*

potential for confusion.[103] For the time being, however, it appears that the "primary purpose" inquiry may be sufficient for the task. Clarifying its confrontation jurisprudence should be a point of emphasis for the Court in the near future.

CONCLUSION

The heart of the debate over the purpose of the Confrontation Clause is the manner in which confrontation was intended to secure a defendant's rights—either through procedural fairness or ensuring evidentiary reliability. The eventual direction the Court takes will depend, in large part, on which of these visions of the Confrontation Clause ultimately prevails. *Bryant* marked a potential step in the direction of the *Roberts* vision, and *Clark* does not appear to have departed from the course set in *Bryant*. Thus, while *Crawford* marked a sea change in the Court's confrontation jurisprudence, the Court's recent decisions—including *Clark*—appear to have chipped away at *Crawford*'s categorical holding: testimonial statements offered by an unavailable declarant are inadmissible unless the defendant has had a prior opportunity for cross-examination. It remains to be seen how much of *Crawford*'s holding will ultimately survive.

103 In this respect, the approach advocated by Justice Thomas is commendable, as it would likely make the "testimonial" inquiry much clearer. *See supra* notes 77–83 and accompanying text.

ESSAY

MILITARY MOTHERS AND CLAIMS UNDER THE FEDERAL TORT CLAIMS ACT FOR INJURIES THAT OCCUR PRE-BIRTH

Tara Willke∗

Although she is a servicewoman, a mother cannot be confined to her military status.[1]

INTRODUCTION

Federal courts treat military mothers and their children differently from male military members and their children for claims sought under the Federal Tort Claims Act ("FTCA") for a military doctor's medical malpractice in the treatment and delivery of the child. For instance, most recently, in *Ortiz v. United States ex rel. Evans Army Community Hospital*, the Court of Appeals for the Tenth Circuit held that the FTCA barred the husband of a female Air Force officer from bringing a claim against the government when his child suffered brain trauma that resulted from a negligent delivery.[2] The *Feres* doctrine, a judicially created exception to the FTCA, bars members of the military from bringing claims under the FTCA if the injury was sustained "incident to service,"[3] and thus compelled the court to hold that the government was not liable under the FTCA in this case.[4] This arcane and overly broad doctrine has also been

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1 Atkinson v. United States, 825 F.2d 202, 207 (9th Cir. 1987) (Noonan, J., concurring).

2 786 F.3d 817, 818 (10th Cir. 2015).

3 *Id.* at 820 (quoting Feres v. United States, 340 U.S. 135, 146 (1950)).

4 *Id.* at 818.

applied to bar third party claims if the injury to the third party derived from an injury to the service member.

The *Ortiz* court was only compelled to reach this result because the child's mother was in the military. If the child's mother had not been a member of the military but was a spouse of a military member, the *Feres* doctrine would not have applied. The *Ortiz* decision is the most recent in a patchwork of decisions that outline the unfairness and inconsistency in the application of the *Feres* doctrine. A petition for certiorari has been filed, but the Court has denied review in earlier cases.[5]

In order to right a longstanding wrong perpetrated against military mothers and their children, the Court should grant review. Part I of this Essay provides a brief discussion of the FTCA and the *Feres* doctrine. Part II discusses the facts and holding in *Ortiz* and its rejection of the approaches taken in other circuits involving pregnant service members and pre-birth injuries, which has caused a clear split in the circuits. Part III argues that these types of claims are not subject to the *Feres* doctrine because pregnancy and injuries that occur incident thereto do not occur "incident to service."

I. THE FEDERAL TORT CLAIMS ACT AND THE *FERES* DOCTRINE

While the government is otherwise immune from civil lawsuits under the doctrine of sovereign immunity,[6] in 1946 Congress passed the FTCA,[7] which allows injured parties to recover when the government is at fault.[8] There are certain enumerated exceptions, but none of the exceptions unambiguously bars members of the military from bringing a claim under the FTCA.[9] Only three of those exceptions could be read as pertaining to members of the military. One exception concerns claims "arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."[10] The other two exceptions that may be read as

5 *See, e.g.*, Ritchie v. United States, 733 F.3d 871 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2135 (2014); Irvin v. United States, 845 F.2d 126 (6th Cir.), *cert. denied*, 488 U.S. 975 (1988); Atkinson v. United States, 825 F.2d 202 (9th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988); Scales v. United States, 685 F.2d 970 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983).

6 *See, e.g.*, Price v. United States, 174 U.S. 373, 375–76 (1899) ("It is an axiom of our jurisprudence. The Government is not liable to suit unless it consents thereto, and its liability in suit cannot be extended beyond the plain language of the statute authorizing it." (citing Schillinger v. United States, 155 U.S. 163, 166 (1894))).

7 Federal Tort Claims Act, ch. 753, 60 Stat. 842 (1946) (codified as amended at scattered sections of 28 U.S.C.).

8 *See* 28 U.S.C. § 1346(b) (2012).

9 *See id.* § 2680.

10 *Id.* § 2680(j).

applying to members of the military are those for claims arising in a foreign country and for the exercise of a discretionary function.[11]

Four years after the FTCA was passed, the Supreme Court decided *Feres v. United States*.[12] *Feres* addressed three cases that were factually similar: in each case a member of the military suffered injuries at the hands of government employees while on active duty, and two of the three cases concerned negligent medical care.[13] Even though none of the enumerated exceptions in the FTCA was implicated, because the plaintiffs were on active duty at the time of the injuries, the Court held the FTCA was not a viable remedy "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."[14]

Over the years, the Court's justifications for the doctrine have become known as the *Feres* rationales.[15] These rationales have been heavily criticized as being irrational and unfair.[16] One rationale focuses on the relationship between the federal government and members of the military.[17] The theory is that because those in the military are federal employees, federal law, and not state tort law, should govern claims brought by these federal employees.[18] Another rationale focuses on the existing availability of benefits for those in the military.[19] If members of the military already have a system of benefits that provide them with recovery, then there is no need for them to bring claims under the FTCA.[20] The final rationale focuses on military discipline, under the theory that if members of the military are allowed to bring claims under the FTCA it will undermine the military discipline structure.[21] At one point, the Court seemed to emphasize and prioritize this rationale over the other two,[22] but it ultimately reiterated that the doctrine was underpinned by all three of the rationales.[23]

Other than articulating these three rationales, the Court has not provided any other guidance as to when an injury occurs "incident to

11 *See id.* § 2680(a), (k).

12 340 U.S. 135 (1950).

13 *See id.* at 136–38.

14 *Id.* at 146.

15 *See* United States v. Johnson, 481 U.S. 681, 688–91 (1987) (outlining three rationales).

16 *See, e.g.*, *id.* at 703 (Scalia, J., dissenting).

17 *See id.* at 689 (majority opinion).

18 *See id.*

19 *See id.* at 689–90.

20 *See id.*

21 *See* United States v. Brown, 348 U.S. 110, 112 (1954).

22 *See* United States v. Shearer, 473 U.S. 52, 57 (1985) (citing United States v. Muniz, 374 U.S. 150, 162 (1963)).

23 *See Johnson*, 481 U.S. at 688–91.

service." As a result, lower courts have had difficulty in making this determination.[24] Some have created factor-based tests to aid in the inquiry, and others have taken different approaches.[25] One court has noted that it has "reached the unhappy conclusion that the cases applying the *Feres* doctrine are irreconcilable."[26] Ultimately, in most cases, the *Feres* doctrine has been used to prevent military members from recovering for almost any injury caused by government personnel, no matter how tenuously connected to the person's military service.

Regardless of the criticism the doctrine has received, it has been extended to claims brought by third parties when the third party's claim derived from an injury that a member of the military sustained incident to service.[27] This has become known as the "genesis test."[28] This test has taken on a life of its own and has been applied to a number of situations, like the claims at issue in *Ortiz*.

II. *ORTIZ* AND THE PRE-BIRTH INJURY CASES

A. Ortiz*'s Facts and Holding*

In *Ortiz*, Captain Heather Ortiz was scheduled for a routine Caesarean section at a military hospital.[29] In preparation for that procedure, hospital staff negligently provided her with a drug to which she was allergic.[30] To counteract the negative effects of that drug, she was given another, which caused her blood pressure to drop, causing hypotension, "an injury that occurs when blood flow is inadequate to perfuse the uterus and the placenta."[31] As a result, her unborn child experienced "brain trauma that caused cerebral palsy."[32]

Ortiz's husband filed a claim on the child's behalf under the FTCA.[33] The district court granted the government's motion to dismiss the case under the *Feres* doctrine.[34] On review, the Tenth Circuit noted that courts have looked to different policy reasons and rationales or "special factors"

24 *See, e.g.*, Taber v. Maine, 67 F.3d 1029, 1043 (2d Cir. 1995).

25 *Compare* Costo v. United States, 248 F.3d 863, 867 (9th Cir. 2001) (outlining four factors), *with* Purcell v. United States, 656 F.3d 463, 466 (7th Cir. 2011) (applying a single, dispositive inquiry).

26 *Costo*, 248 F.3d at 867.

27 *See* Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 673 (1977).

28 Ortiz v. United States *ex rel.* Evans Army Cmty. Hosp., 786 F.3d 817, 824 (10th Cir. 2015).

29 *Id.* at 818–19.

30 *Id.* at 819.

31 *Id.*

32 *Id.*

33 *Id.*

34 *Id.*

to determine if the doctrine should apply,[35] but in the end it held that the primary inquiry was "whether the injury was 'incident to service.'"[36] The court admitted that the language "incident-to-service" was "neither self-defining nor readily discernible" from prior Supreme Court precedent.[37] Nevertheless, it found that the test applies broadly and "encompasses, at a minimum, *all injuries suffered by military personnel that are even remotely related to the individual's status as a member of the military*," and that "*[p]ractically any suit that implicates the military's judgments and decisions runs the risk of colliding with* Feres."[38]

Because a third party was bringing the claim, the court held the genesis test applied.[39] It found that in reviewing the pre-birth injury cases, some courts used the "treatment-focused" approach, holding that if the government's conduct was focused on the child and not the mother, then the *Feres* doctrine did not apply.[40] It rejected this approach in favor of an "injury-focused" approach, which "asks first whether there was an incident-to-service injury to the service member."[41] If that question is answered in the affirmative, then the inquiry focuses on "whether the injury to the third party was derivative of that injury."[42] In applying its test, the court found that the child's injuries were caused by the allergic reaction and drop in blood pressure experienced by her mother prior to the child's birth, so the *Feres* doctrine applied.[43]

The decision in *Ortiz* is the most recent example of the difficulty the courts have with determining whether the *Feres* doctrine should apply to these types of claims.

B. The Pre-Birth Injury Cases

In the early cases involving injuries sustained by pregnant female service members, the service member herself sought recovery.[44] The *Feres* doctrine was, however, used to bar the claims brought by those female

35 *See id.* at 821–22.

36 *Id.* at 822 (citing Tootle v. USDB Commandant, 390 F.3d 1280, 1282 (10th Cir. 2004)).

37 *Id.* at 820–21.

38 *Id.* at 821 (quoting Pringle v. United States, 208 F.3d 1220, 1223–24 (10th Cir. 2000) (per curiam)).

39 *See id.* at 824.

40 *Id.* at 828.

41 *Id.* at 825 (citing Feres v. United States, 340 U.S. 135, 144 (1950)).

42 *Id.* (citing Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 673–74 (1977)).

43 *See id.* at 831–32.

44 *See* Irvin v. United States, 845 F.2d 126, 127 (6th Cir. 1988); Del Rio v. United States, 833 F.2d 282, 284 (11th Cir. 1987); Atkinson v. United States, 825 F.2d 202, 203 (9th Cir. 1987).

service members.[45] The courts failed to provide any discussion as to how pregnancy and injuries sustained thereto relate to one's responsibilities as members of the military.[46] Regardless, at the end of the 1980s, it was clear that a female service member's claims for injuries she sustained during pregnancy would be barred by the *Feres* doctrine, and women stopped seeking claims on their own behalf.

When addressing claims brought on the behalf of service members' children, courts have used or proposed approaches other than the one used by the court in *Ortiz*. This has caused a clear circuit split. Early cases applied the rationales outlined in *Feres* to the child's claim to determine if the claim should be barred and reached inconsistent results applying those rationales.[47] In the early 1990s, the Fourth Circuit used the "treatment-focused" approach, which was rejected by the court in *Ortiz*, to determine if the claim should be barred.[48] Pursuant to this approach, if the "sole purpose" of the treatment that the mother received was for the child's benefit only, the *Feres* doctrine does not apply.[49] Courts are forced to engage in this analysis and chose one of these approaches because the child's mother is in the military.

III. INJURIES SUSTAINED DURING PREGNANCY DO NOT OCCUR "INCIDENT TO SERVICE"

In the pre-birth injury cases, application of the *Feres* doctrine hinges on the mother's military status, regardless of whether the claim is brought by the female service member or for her child. Even though the Supreme Court has stated that "[t]he *Feres* doctrine cannot be reduced to a few bright-line rules,"[50] that is exactly what has happened. In the pre-birth cases, it has been reduced to one bright-line rule: if the woman is in the military, her claim is barred, and her child's may be too, depending on the approach used by the court. The controversy surrounds the meaning of the phrase "incident to service." In finding that the injury has occurred "incident to service," courts have blindly assumed that injuries sustained during pregnancy occur "incident to service," as that phrase was used in *Feres*. Even though we cannot be certain regarding the exact driving force behind the Court's holding in *Feres*, it is possible that the Court only

45 *See Irvin*, 845 F.2d at 130; *Del Rio*, 833 F.2d at 286; *Atkinson*, 825 F.2d at 206.

46 *See, e.g.*, *Irvin*, 845 F.2d at 130 (relying only on a statement that the service member's "individual claim is barred under a straightforward reading of *Feres*").

47 *Compare* Scales v. United States, 685 F.2d 970, 973–74 (5th Cir. 1982) (barring suit initiated by child under *Feres*), *and Irvin*, 845 F.2d at 130–31 (same), *with Del Rio*, 833 F.2d at 287–88 (allowing maintenance of claim on child's behalf).

48 *See* Romero v. United States, 954 F.2d 223, 225 (4th Cir. 1992).

49 *Id.*

50 United States v. Shearer, 473 U.S. 52, 57 (1985).

intended to bar claims that would have been covered by the typical worker's compensation laws—claims that were, in some way, related to the service member's duties in support of the "military enterprise."[51] A closer review of the history of women in the military demonstrates that pregnancy was not part of the military enterprise at the time of the *Feres* decision and has never been.

Prior to World War II, if a nurse serving in the Army Nurse Corps became pregnant and was not married, she was dishonorably discharged.[52] The military's treatment of pregnancy was not altered significantly with the passage of the Women's Armed Services Integration Act, which provided for the integration of women into the armed forces, but which also provided that women could be discharged for reasons that were different from the reasons men could be discharged.[53] Thus, at the time *Feres* was decided, women were subject to discharge for almost any reason,[54] and in 1951, with President Truman's signing of Executive Order 10,240, it was clear that pregnancy and duties consistent with motherhood were grounds for discharge.[55] The policy allowing for the discharge of pregnant women was not officially deemed unconstitutional until 1976, long after the *Feres* doctrine was in place.[56]

Today, pregnancy has been and continues to be something that is treated as outside the realm of regular military service. If a woman becomes pregnant on active duty, she may seek a voluntary separation because of the pregnancy.[57] Upon confirmation of pregnancy, the military may impose restrictions on a pregnant service member's ability to change her duty station during the duration of the pregnancy and for a short time thereafter.[58] Likewise, pregnant service members may have their regular work duties altered during their pregnancy.[59] Thus, courts should not blindly assume that just because a female service member is pregnant, any

51 Taber v. Maine, 67 F.3d 1029, 1044 (2d Cir. 1995).

52 *See* JEANNE HOLM, WOMEN IN THE MILITARY: AN UNFINISHED REVOLUTION 71 (rev. ed. 1992).

53 Pub. L. No. 80-625, § 104(h), 62 Stat. 356, 359–60 (1948) (codified as amended at scattered sections of 10 U.S.C.); *see also* HOLM, *supra* note 52, at 124–26 (describing unprecedented discharge authority for women but not men who could only be involuntarily discharged for "moral dereliction, professional dereliction, or because his retention was not clearly consistent with the interests of national security").

54 *See* HOLM, *supra* note 52, at 124–26.

55 Exec. Order No. 10,240, 3 C.F.R. § 749 (1949–1953).

56 *See* Crawford v. Cushman, 531 F.2d 1114, 1126 (2d Cir. 1976).

57 *See, e.g.*, U.S. DEP'T OF AIR FORCE, INSTRUCTION 36-3208, ADMINISTRATIVE SEPARATION OF AIRMEN para. 3.17 (2004).

58 *See, e.g.*, U.S. DEP'T OF AIR FORCE, INSTRUCTION 36-2110, ASSIGNMENTS para. 2.39 (2009).

59 *See, e.g.*, U.S. DEP'T OF AIR FORCE, INSTRUCTION 10-203, DUTY LIMITING CONDITIONS para. 3.5 (2013).

injuries she or her child sustains during the pregnancy occur "incident to service" when every indication is that the military treats pregnancy as something that is outside the realm of ordinary service.

Furthermore, an application of the *Feres* doctrine to these types of cases reveals the absurdity it causes.[60] If a spouse of someone in the military becomes pregnant and the spouse is not serving on active duty, any injuries she or her unborn child sustains are not barred by the *Feres* doctrine because she is not a member of the military, even though she may have had the same military doctor, used the same military facilities as a pregnant female service member, and may have suffered the same types of injuries. Put more simply, a male service member whose wife is not in the military may bring a claim under the FTCA for damages sustained if his wife or their child is injured during the pregnancy, and, likewise, so may his wife and child.[61]

There is no sound basis to allow men to recover for injuries sustained by their pregnant wives just because the wife is not in the military: the primary concerns that underlie the application of the *Feres* doctrine to a female service member also exist if a male service member brings suit. In examining the rationales for the doctrine, male members of the military have the same "distinctively federal" relationship with the government as female members of the military, and a lawsuit brought by a male member of the military for injuries sustained by his wife or child during pregnancy will involve the same sort of inquiry into military decision-making that the courts are trying to avoid, especially if it involves the same doctor, hospital, or procedure.

The only current rationale that could possibly justify the application of the doctrine to a female service member and not a male service member is the availability of the no-fault compensation scheme provided under the Veterans' Benefits Act.[62] It is, however, unclear whether the types of damages claimed by the female service women are the type that would be covered by that Act. For instance, women have not always sought damages for their own injuries: female service members have sought damages for

60 "It is true, of course, that statutes are to receive a reasonable construction and that, in determining the legislative intent, exceptions are to be read into their language to avoid injustice, oppression or absurd consequences." United States v. Brooks, 169 F.2d 840, 850 (4th Cir. 1948) (Parker, C.J., dissenting) (first citing United States v. Kirby, 74 U.S. (7 Wall.) 482, 483 (1868); then citing Lau Ow Bew v. United States, 144 U.S. 47, 59 (1892); and then citing Sorrells v. United States, 287 U.S. 435, 446–48 (1932)), *rev'd*, 337 U.S. 49 (1949).

61 *See* Reilly v. United States, 665 F. Supp. 976, 1014–16 (D.R.I. 1987) (involving a claim under the FTCA brought by a male member of the service, his wife (who was not in the service), and their infant daughter, who suffered extreme injuries prior to her birth), *aff'd in part*, 863 F.2d 149 (1st Cir. 1988).

62 38 U.S.C. § 1131 (2012).

the costs of taking care of the injured child.[63] Without some proof that the female service member is seeking the types of damages covered by the Veterans' Benefits Act, that rationale alone should not be used to categorically bar her claim. Thus, as applied to these cases, the *Feres* doctrine raises equal protection issues that could be alleviated if pregnancy and injuries incident thereto are finally acknowledged as something that do not occur "incident to service."

Regarding the child's claim, if injuries that occur during pregnancy are not considered as occurring "incident to service," then the courts do not have to engage in a round of legal gymnastics to determine whether the *Feres* rationales apply to bar the child's claim, whether the treatment was to benefit the mother or the child, or whether the child's injury had its genesis in an injury to the child's military mother. In short, the child will not be prejudiced from bringing a claim just because the child's mother is in the military.

CONCLUSION

Application of the *Feres* doctrine to claims brought by pregnant female service members and their children pre-birth is only triggered if the woman is a member of the military; the Tenth Circuit's decision in *Ortiz* highlights the legal wrangling the courts have been forced to engage in solely because of this fact. Even if the *Feres* doctrine itself stands on solid ground, its application in these types of cases does not. Pregnancy is not something that has ever been part of the military enterprise and will occur regardless of the military's mission; as such, any injuries related thereto do not occur "incident to service." As noted by Judge Nelson in *Ritchie v. United States*, "To hold that these kinds of tortious acts against a pregnant servicewoman are per se judicially unreviewable because they are part of the military mission is to practice willful blindness at the expense of a woman's livelihood and the life of her unborn child."[64]

63 *See, e.g.*, Romero v. United States, 954 F.2d 223, 224 (4th Cir. 1992).

64 Ritchie v. United States, 733 F.3d 871, 881 (9th Cir. 2013) (Nelson, J., concurring).