TURNER:

Hello and welcome back to Wisconsin Law in Action, a podcast where we discussed new and forthcoming scholarship with University of Wisconsin Law School professors. I'm your host, Kris Turner and my guest today is William Voss-Bascom Professor of Law, Anuj Desai. Professor Desai teaches classes at both the Law School and the iSchool here at UW-Madison on Cyberlaw, First Amendment Rights, Intellectual Freedom, Statutory Interpretation, Legislation, Regulation and Copyright.

TURNER:

Today we'll focus on statutory interpretation and textualism as Professor Desai discusses his newest article, Text is Not Enough, published in the Colorado Law Review. The article examines how judges employ textualism and when they use other forms of legal argumentation to interpret statutes all through the lens of the 2020 Title VII case, Bostock v Clayton County. Thank you for joining the podcast today, Professor Desai.

PROF. DESAI:

Thanks for having me, Kris. I'm really thrilled to be here.

TURNER:

Sure, it's always a pleasure to speak with you. Thanks for joining. Let's start our discussion by first learning a little more about your background. What is your professional experience and what led you to researching and teaching statutory interpretation?

PROF. DESAI:

Yeah, well, I don't want to say it's a long story, it is a long story at this point and I will try my best to abbreviate it. But the short of it is as you pointed out in the intro, I also teach at what we call here the iSchool. So I also teach in areas related to new communication technology. And that was the practice area I was in before coming into the legal academy. And in that area, there is as you might expect a lot of new technology.

PROF. DESAI:

And so there are a lot of circumstances in which you have a preexisting law that doesn't quite fit. And it doesn't quite fit not because somebody messed up, but because the world changes and we have new technology and that new technology isn't quite like what they thought of before, when the legislature passed some previous law. And so I've always had an interest in thinking about difficult questions in statutory interpretation because the ones I faced in practice were in that category of, it just isn't quite as obvious as one might have wanted in the abstract from a statute.

PROF. DESAI:

And so although I did not teach statutory interpretation or the legislation and regulation class for the first 10 years I was teaching here, I was always interested in it. And so I decided that I would pick it up and I'm really glad I did. I also just to throw one more point out there, I'm convinced it's indispensable for lawyers in practice. And so that's another reason I like to continue teaching it, even if it isn't directly in my substantive area.

TURNER:

Right, and it seems to becoming something that's more important as textualism as you go through in this article becomes more and more prevalent in opinions that Supreme Courts and other courts release. But we'll go through those in a minute here-

PROF. DESAI:

Sure, yeah.

TURNER:

... I agree that the statutory interpretation class is just so important for students to understand how interpretation itself is interpreted. It's not just on the page, it's elsewhere as well.

PROF. DESAI:

Yeah, absolutely. Right, now I often say to my students and I think everybody understands this once they think about it. Part of the... What statutory interpretation is about is about taking words that are written down somewhere and making them real. So it is, this is our podcast, it's Law in Action. It really is bringing to life, to the real world words and how interpreters go about doing that. My focus certainly in this article and in a lot of what I do is on judges, but judges are by no means the only ones who do that interpretation.

TURNER:

Oh, not at all. And so I hope that the readers of this article and the listeners to this podcast will be able to apply some of these arguments in their own cases and understand how it's used against them or for them. So let's start digging into this article and about the actual meat of it. To begin, can you tell me what a textualist is when it comes to statutory interpretation in case law?

PROF. DESAI:

Sure. Yeah, and I may step back a little bit, but let me just start with what might be definitional in some sense. So textualism is an approach to interpreting statutes that focuses on what one could call the semantic meaning of the text, the linguistics that tells the interpreter to really think primarily and indeed if possible I think some texts would want entirely about what we refer to as the plain meaning of the words of the statute. And then to apply that meaning to the facts scenario of any particular case.

PROF. DESAI:

But if you don't mind, just let me step back a little bit though and just talk a little bit more broadly about what are traditionally viewed as different approaches to statutory interpretation, just a fit where textualism is situated. So I would say two other ways of thinking about statutory interpretation that date back centuries really are what are known as intentionalism and purposivism. And both intentionalism and purposivism take as their principle goal the furthering of the will of the enacting legislature.

PROF. DESAI:

So the idea is there's a legislating body and we have to figure out what it is that the enacting legislature want. And so these ideas are premised on the notion that the point of interpretation, particularly for judges is to serve as a, what they call a faithful agent of the enacting legislature. And the difference between these two, intentionalism and purposivism is really at the level of generality at which the interpreter is supposed to determine the legislature's will.

PROF. DESAI:

So intentionalism is generally attentive to the legislature's really specific intent with respect to particular language whereas purposivism focuses on the legislature's broader purposes. And this stuff goes back. I mean, in the common law to the early statutes in England back in the 16th century. But for present day purposes, one thing that I think is really important is that purposivism in particular became an ascendant approach to interpretation during the second half of the 20th century and in particular what is known as the legal process school of thought.

PROF. DESAI:

Under that school of thought, purposivism was premised on this underlying notion that courts should interpret statutes so as to "carry out the purpose as best they can." And this is actually quite important, as best they can. And importantly, the most famous expositors of this legal process theory basically took legislatures as reasonable. And so said part of the point is to assume unless the contrary unmistakably appears that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably.

PROF. DESAI:

And by the 1980s, many people believed, and this is most prominently, the late Justice Scalia, the purposivism and intentionalism were basically proxies for judges doing whatever the heck they wanted. And I'm exaggerating slightly, but you get the idea that once you start talking about purposes of statutes at a certain level of generality, you have a lot of leeway, a lot of breathing room, so to speak. And so Justice Scalia thought this gives too much discretion to judges. And so the better approach and one that would constrain judges more, he thought, was to just reject any attempt to determine purpose and then look specifically just at the words and apply those words.

PROF. DESAI:

And so this basic idea was motivated in part by a fear of too much judicial discretion, but also this idea, and maybe we'll get into this a little bit later, this idea that people who are subject to the law should be able to pick up the law book, namely the statute and read it and figure out how to adjust their behavior according to what they read. And so if that's true, then one could imagine that taking this plain language, plain meaning approach would be a really good way to make sure that people who are subject to the law can figure out how to adjust their behavior to it.

PROF. DESAI:

And Justice Scalia had... He was very famous for... He had lots of really clever whips, but the one in this idea, which we refer to broadly as the fair notice of the law, the basic principle of fair notice. He often referred to Caligula, the Roman emperor, who apparently, I don't know whether this is true, could be all apocryphal, but who was said to have written the laws in very, very small characters and hanging them up on high pillars so as better to ensnare the public. So the law is way up there on the high pillar. And if you can't get up there to read them, too bad for you, but I can just tell you that you just violated something kind of thing. And so that's really paradigmatic example of the fear that a lack of notice about law would further.

TURNER:

Right, to even have it written down in a statutory book that you have in front of you, but you can't comprehend what it means would be not as harsh as hanging it up on a high pillar, but all in the same thing .

PROF. DESAI:

Exactly, and one of the things, Kris that Justice Scalia was really opposed to was using what we call legislative history, but the idea is these are documents and evidence about what the legislators thought when they were writing the laws. And he was categorically opposed to that because his basic argument was, I don't care what the legislators thought, what I care about is what law they passed. And the law they passed are the words that are in the federal system at least, the statutes at large, they've been codified in the United States Code. And that's all I care about. So that was his basic take. And that has been the driving force behind textualism since Justice Scalia's days, mid to late 80s.

TURNER:

Let's see how that applies to the case that you discussed in your paper, Bostock v Clayton County. So what about Bostock v Clayton County lent itself to textualist arguments seemingly?

PROF. DESAI:

Yeah, so it's an incredibly clever argument and more than clever just a spoiler alert, I guess. Tell you it was a winning argument six to three. So Bostock was a case about Title VII of the federal Civil Rights Act of 1964, as you mentioned earlier, which is conventionally known as the statute that prohibits discrimination in employment. And if you want, I can read you a full text of the relevant provision, but for right now, let's focus on the key question.

PROF. DESAI:

And the key question was whether firing someone because he was gay. And there was evidence that Bostock, or I should say this was a motion to dismiss, but Bostock basically argued that he was fired because he was gay. Whether or not that constituted a "discharge because of his sex." So those are the words, just because of sex, because of his sex. Now Bostock, as I said, and another plaintiff from a companion case named Zarda were both gay and their allegation was that that was why they were fired because they were gay.

PROF. DESAI:

And then they said, the plaintiffs said that the plain meaning of the statute required ruling in their favor. Now I hope, even though... And they win. So just, yeah, as I said, spoiler alert, they win six to three. Now on first blush, I hope... If you don't know anything about this game, this should seem a little odd because the language is because of such individual's sex, not sexual orientation. And so when somebody's fired because they're gay, that seems different at least at first blush from being fired because, in the case of Bostock and Zarda because they were, let's say male.

PROF. DESAI:

But this textual argument, and as I said is incredibly clever and here's how it goes. So first, remember the languages because of such individual sex. And the court starts by saying the term because of embodies what we refer to as "but for causation." And I'll give you a little more on that in a second, but the basic idea is, but for the person's sex, the person would not have been fired. So another way to say

this in the context of Bostock himself is just to say, but for the fact that Bostock was male, he would not have been fired.

PROF. DESAI:

And you're going to see I'm saying probably the same thing over and over and over and over again. So Kris, bear with me here, but the slight variations here. Or if Bostock had not been male, he would've been fired. And maybe now you can see where this is going. If Bostock had been female and here's the important part and everything else about him had been the same, he would not have been fired. Now it's that everything else about him had been the same that comes to the fore. So the majority says if Bostock had been female and had as he is been attracted to males, then he would not have been fired, okay?

TURNER:

Mm-hmm (affirmative).

PROF. DESAI:

And so the idea is every thing else about him would have been the same requires that, however you want to think about it, Bostock's partner or the persons to whom Bostock is attracted or whatever category you want to say, that remains the same. And then we just take Bostock, the male, make Bostock female and keep that all about him the same and voila, he would not have been fired. And therefore he was fired "because of his sex." So that's the argument and that's the winning argument. And I just want to repeat. So it is now the case that under federal civil rights law, the prohibition on no discharging and not hiring and treating differently in employment terms and conditions, et cetera, et cetera because of sex applies to sex orientation.

TURNER:

That's a major ruling.

PROF. DESAI:

It's a major ruling. It is probably the major ruling of this nearly 60 year old statute. I mean, it's 56. It was 56 years at the time. The Civil Right Act of 1964. I mean, there are a lot of rulings and we can talk about some of them later as well, but this really is a major, major step. And again, just to recap, the argument is, it's the plain meaning. And so even though it took 56 years for this case to be decided by the Supreme Court, the theory at least, the statutory interpretation theory is though that's what the words say. And therefore those were the words that said it in 1964. And so that, and maybe we'll talk about this. You can tell me if you want to talk about this, but this is where the dissenters take issue with the majority or there's one place the dissenters take issue with the majority, so.

TURNER:

Sure, I think that'll be worthwhile to dig into, but first I want to take a slight divergence to talk about any other arguments that were made by Bostock beyond the plain meaning argument, sexualism argument.

PROF. DESAI:

Yeah, so Bostock made a bunch of other arguments. Bostock, Zarda and there were other cases in lower courts before this one. So let me give you a couple of the main ones both of which are based on

precedent. So both of which depend on Title VII jurisprudence up until this time. So the first is what is known as a sex stereotyping argument. And the basic argument goes like this. And it depends on a, in presidential terms, it depends on a plurality opinion in a case from 1989 called Price Waterhouse.

PROF. DESAI:

And the basic argument goes like this. If I fire someone or treat them differently, not literally, I guess, one might say because of their sex, but I treat someone who is of one sex, but exhibits characteristics that I ordinarily associate with the other sex. If that's the reason I fire them or fail to hire them or treat them differently or something like that, that can count as "discharge because of sex." And so the case, the Price Waterhouse case involved a woman whom the partners at Price Waterhouse thought was too aggressive, too "masculine." And there was, or at least there was evidence to this effect.

PROF. DESAI:

And she claimed that was sex discrimination. And the court effectively said, if it's okay to have a discrimination because of aggressiveness, let's say. I mean, that's okay. If you want people who are not overly aggressive for certain jobs, that's okay. But what you can't do is say you could be overly aggressive if you're a man, but you can't be overly aggressive if you're a woman because that constitutes a sex stereotype. And therefore that's a difference that the way you are treating your male and female employees and therefore that constitutes a discharge or a differential treatment because of sex.

PROF. DESAI:

And so what Bostock and Zarda argued is we're just like that. You are treating us differently because we're attracted to men, but you don't treat women who are attracted to men. You don't fire women who are attracted to men. Or put another way, you expect men to be attracted to women. And we are acting in ways that are counter to that stereotype. The stereotype that men must be attracted to women. And because we are acting contrary to that stereotype, that is the reason you're firing us. And so this is of a piece so to speak. This is of the same ilk. This is the same discrimination as discrimination because of sex stereotyping.

PROF. DESAI:

And the one thing that you should know, Kris about this argument and it's a really, actually I think important point, for more than a decade, when the sex stereotype typing cases came up, one of the most difficult things courts had to determine was whether or not, in circumstances when the employee was gay, whether or not the reason the employee was being fired, let's just say as an example, was because they were gay or because of some other stereotype.

PROF. DESAI:

So if a gay person "acts gay." So if they are acting, let's say a male person is acting in a feminite ways and he is gay, then the employer might fire the person. And under this old jurisprudence, it was okay to fire them if they were gay, but it was not okay to fire them if they walked around with a list or if they walked around acting particularly a feminite or any of those other things that would ordinarily constitute sex stereotyping. So that was one argument they made. The other argument, and again, it's a really, really clever argument you'll see.

PROF. DESAI:

So the argument goes something like this, and it connects to the fact that the statute also prohibits discharge and differential treatment "because of race." And it goes something like this. It's based on, they refer to it as the loving argument. And it comes from this famous case from 1967 called Loving versus Virginia, which is not a Title VII case at all, but is an Equal Protection Clause case.

PROF. DESAI:

And in that case, the Supreme Court of the United States held that a Virginia law that prohibited miscegenation meaning prohibited blacks from marrying whites and whites from marrying blacks, that that law was unconstitutional. It violated the Equal Protection Clause because it prohibited people from marrying in essence someone of the other race. And the way the argument goes here under Title VII is something like this. So if someone who is white marry someone who's black or vice versa and the employer fires the person because of that marriage, that violates Title VII. That is treating them different because of race.

PROF. DESAI:

Now some of this you can see sounds like some of the earlier argument, but it is one of those things where that sounds pretty obvious on its face. I mean, the idea that you could fire somebody because of the race of the person they marry, I mean, it just sounds like that's race discrimination. I mean, clearly that's race discrimination. I mean, people don't... So because we think of antimiscegenation laws as race discrimination. I mean, it is just part and parcel of American history and we understand what they mean.

PROF. DESAI:

They really are aimed at black inferiority is the argument. That's really what they're about and we understand that. And so that we've assumed violates Tittle VII. And there are some cases in lower courts about this, but the Supreme Court has never held that under Title VII. But we have to assume that. And the argument here goes, this is the same thing and here's why it's the same thing because if you're saying, so for Zarda's case, I can marry a woman, but I can't marry a man. I'm basically being treated differently because of the person I married or the person that I am in a relationship with.

PROF. DESAI:

And if you can't treat me differently because of the race of the person with whom I'm in a relationship with, you shouldn't be allowed to treat me differently because of the sex I'm in a relationship with. Why? Because the statute has the words race and sex right next to each other. There's no difference as a matter of the way the statute is written between race and sex. And so if treating me differently because of the race of the person I marry violates Title VII, then treating me differently because of the sex of the person I marry or I'm in a relationship with or I'm attracted to or whatever it is also violates Title VII.

PROF. DESAI:

And so this argument again, relies to a certain extent on precedent, it relies on some lower court Title VII cases and then on this Equal Protection Clause case, Loving versus Virginia from 1967 rather than directly relying on the words of the statute. I mean, there's a little bit of the words of the statute in the sense of sex and race are right next to each other in the statute, but it's really about thinking about precedent.

TURNER:

Right, clever and compelling arguments, but both losing arguments. At least not the ones that won out in the opinions of the Supreme Court. They went with the plain meaning, with the words you're saying. So with that, let's get to what these opinions are saying. As you said, it was a six to three, the majority was written by Justice Gorsuch, correct?

PROF. DESAI:

Correct.

TURNER:

I mean, dissenting was Alito and Kavanaugh.

PROF. DESAI:

Yeah.

TURNER:

So what did these opinions say? What do they rely on? And do they all sound the same?

PROF. DESAI:

Just as Gorsuch's majority opinion, as I said before, is really quite straightforward. It's almost as one scholar has put an algorithmic. It's almost really just a syllogism. It's if Bostock had been a woman, he would have not been fired, therefore it's because of sex, therefore he wins. End of story. I mean, that's really the nature of the argumentation. And just to clarify, it's not that Justice Gorsuch rejected in any way either of the two other arguments that I just mentioned, he just doesn't mention.

PROF. DESAI:

He just does feel the need because he thinks, or at least he says he thinks this is really straightforward. That's all. I'm done. So here's the difficulty with that argument. And Justice Alito lays it out quite nicely I think. So Justice Alito in dissent says, "Wait a minute, you haven't kept everything the same when you changed Bostock to a woman." It's true you kept the sex of his partner or the people he's attracted to or his husband or whatever it is the same, that's true, but notice what you've also done.

PROF. DESAI:

You've changed not just his sex, you've also changed his sexual orientation. And so you haven't kept everything the same. So the right comparator for Bostock is not a female who is attracted to men, but instead a female who is attracted to women because if you change Bostock to a female who is attracted to women, then you are changing the sex, but you are not changing the sexual orient. So that's how you keep everything the same. And now notice that's not right either. And here's why that's not right or it's not obviously right I guess, is that what Justice Alito has done is change the sex of Bostock's partner.

PROF. DESAI:

So he is correct that Justice Gorsuch changed more than one thing when changing Bostock's sex. Justice Gorsuch in majority did change both Bostock's sex and Bostock's sexual orientation. So yes, it's true he changed more than one thing, but at the same time, Justice Alito when changing Bostock from a gay man to a gay woman is changing both Bostock's sex and the sex of Bostock's partner or people to whom

he's attracted. But Justice Alito, it was quite interesting at oral argument, he asked a question and got an answer that actually quite helped him.

PROF. DESAI:

So the question he asked, so Title VII prohibits, not just discharge, that is not just firing people or treating them differently on the job, but it actually prohibits treating people differently when hiring as well on these basis, sex and race and national origin, religion, that thing. And so what Justice Alito did is he hypothesized a situation in which you might have someone whose name is such that you can't tell the person's sex. Pat or Jean or-

TURNER:

Or Kris with a K.

PROF. DESAI:

... Or Kris, exactly. There are a lot of names like that. Or he actually hypothesized farming out the decision. So you just didn't even know the person's name at all or something like that. But you do know that they're gay. And he says, if that person, if that employer refuses to hire the gay person who's sex the employer does not know, does that violate Title VII? And so you can see where this is going because the idea is he doesn't even know the person's... The employer doesn't even know the punitive employee's sex.

PROF. DESAI:

And the lawyer for Bostock, who is one of the world's greatest arguers. I mean, so modern day Daniel Webster in my view, Pam Karlan, she's a professor at Stanford said, "No, but it does doesn't matter," she said, "because there are no cases like that." I mean, all the cases involve real people whom the employer knows the person's sex. And so there are no cases like that. But if there were a case like that, yeah, you're right, that case wouldn't violate Tittle VII. But Justice Alito and maybe rightly I'm not sure, but took that and said, "But then sexual orientation is not the same as sex."

PROF. DESAI:

And so discriminating somebody or firing them or whatever it is because of their sexual imitation is not the same. And that's why Justice Alito says, my comparator is better than justice Gorsuch's comparator. My comparator of the lesbian rather than the straight woman is a better comparator for Bostock because in essence, the employer is saying, I don't care about the person's sex, all I care about is the person's sexual orientation. That's what I care about. And so that's the core, we'll call it textual dispute.

PROF. DESAI:

But notice, I guess, one thing that I will just emphasize and then we can get into what I wrote about, but notice that to choose between these two comparators. So let's say you're trying to decide which comparator is the right one. Both of them change the sex and something else. Again, Justice Gorsuch changes the sex and the sexual orientation and Justice Alito changes the sex and the partner's sex. Both of them change something. Now, but how do I choose between those comparators? Notice there's nothing in the words of the statute that can tell you which of those comparators is correct.

PROF. DESAI:

You might have an intuition about which comparator is correct. And there might be other reasons why you think one comparator is correct rather another, but it's not because of a definition of the words because of, it's not because of the definition of the word sex, it's not because of the word discharge, it's not because of the word... It's none of the words. It's not like Justice Alito is pointing to a different dictionary and saying, "This is the right definition." And Justice Gorsuch say, "No, this is the right definition." There's no definitional difference in the words of the statute, right?

TURNER:

Right, so that makes it an interesting textualist argument that is not talking about the words on the page and the statute. So if these opinions might be actually using other legal arguments, what were they using in their opinions then? And what did you write about these opinions?

PROF. DESAI:

Right, so the core of my argument is that you can't choose between those two comparator arguments on the basis of the words of the statute. And therefore at core, what is differentiating the majority from the dissent is not a textual distinction. And I would say at least, unfortunately, most of what the opinions discuss doesn't tell you that. And so it's another example of the courts, either partly intentionally, but maybe partly unintentionally or subconsciously not laying out completely what is making them decide the way they're decided.

PROF. DESAI:

So as I referred to earlier, I do think there are other possible arguments. And one that I talked about the sex stereotyping argument is an argument that you could if you were inclined to agree with the plaintiff that I think is a really strong argument, but again, it requires that you accept a bunch of past precedent about Title VII. And so part of the core of my argument is that implicitly even Justice Gorsuch, who explicitly says, "I'm not relying on precedent here, I'm just relying on the plain meaning of the words." Implicitly he is relying on that precedent.

PROF. DESAI:

And in particular what he's relying on are the social changes that have taken place over the last 56 years that shaped all of that precedent through the history of Title VII. And so you can't, in 2022, you can't treat the statue anymore the way you could have in January 1st, 1965 or something like that soon after it had been passed. And the reason you can't is not articulated by the majority, but has to be implicit in the majority's conclusion because the majority's conclusion can't rely solely on the comparator, right?

TURNER:

Right, the plain meaning has seemingly changed a little bit from 1965 to 2020 when this was decided then.

PROF. DESAI:

Right, that's one way to frame it. You could talk about the plain meaning or you could say the meaning is no longer plain, right? I mean, the meaning-

TURNER:

Yeah, that's true.

PROF. DESAI:

... The meaning now has embedded in it a whole history of cases. And again, part of what I emphasize is those cases themselves are part and parcel of the social change that is happening over this 56 year period. It's not... So the sex stereotyping cases, again, you can make the same argument that Justice Alito made in the Bostock case about the sex stereotyping argument. You can say, "Look, it's true. I fired that woman because she was too aggressive, but I would also fire a man who's too passive. But all I want is sex conforming employees."

PROF. DESAI:

So I'm not treating any of them differently, I'm just saying, the males have to be male and the females have to be female. That's in essence the same argument that Justice Alito made with respect to being gay. I'm not treating the men and the women differently, I'm only saying men have to be attracted to women and women have to be attracted to men. That's not treating them differently, that's actually treating them just the same. It's just you have to be attracted to the opposite. And the same thing with sex stereotyping.

PROF. DESAI:

Again, if I want the women to conform and I want the men to conform. And the one thing I'll just tell you and I'm relatively confident is somebody made a sex stereotyping argument on January 1st, 1965 right after that statute even passed, they would've lost. And they would've lost because in 1965, it was largely before. I mean, in the early days, I suppose some people could argue, but before the larger feminist revolution that transformed the way we think about sex equality both in the context of the Equal Protection Clause.

PROF. DESAI:

I mean, Justice Ginsburg, when she was a lawyer for the ACLU became famous for bringing case after case after case involving differentials, differentials between genders in the law based on stereotypes. And so by 1989, the idea that an employer could stereotype their employees was something that just seemed much more plausibly treating people differently on the basis of sex.

TURNER:

Right, and times have obviously changed and that's-

PROF. DESAI:

And times have obviously changed, exactly.

TURNER:

Well, do you believe that Bostock could be resolved just textual arguments alone? Would the outcome be different?

PROF. DESAI:

Right, so part of my claim is no. I mean, so in that sense, one could characterize this a bunch of different ways, but one way you can characterize this both sides were being textualist. But if that's right and if both sides arguments are equally good under a textualist approach, then that also tells you that textualism can't decide the case. And that's the core of my argument.

TURNER:

Right, the coin came up heads and tails at the same time and that's-

PROF. DESAI:

Yeah, that's a really nice way to put it. Yes, exactly.

TURNER:

So the court as we've been discussing arrived at different conclusions using this textualism. What could the signify for statutory interpretation generally and textualism in particular?

PROF. DESAI:

Yeah, no, it's a great question. So I'll just say this is not something that is new to me, but scholars have for decades. So Anita Krishnakumar at Georgetown, Nina Mendelson at Michigan, our former colleague, our former Wisconsin colleague, Jane Schacter, who's now at Stanford, they've all done empirical work about Supreme Court cases showing that even the justices who say they're textualist rely just as often as the other justices on other types of arguments, whether arguments based on precedent, arguments based on other statutes, arguments based on what we'd call pragmatic considerations, the implications, the actual conclusions, the results of interpreting the thing one way or the other.

PROF. DESAI:

And so among scholars, this is pretty well known. One of the reasons I wrote my article was really to say one of the nice things about this Bostock case is that it's almost like this paradigmatic example to help us better see what the empiricists have really shown us for years that you need in these hard cases. So this is not, I should back up, this is not every lawyer everywhere reading every statute, there are lots of circumstances in which the lawyer can open up the statute book exactly as we described when we started our conversation, read it and know what to do. I mean, or know how it applies to a particular circumstance.

PROF. DESAI:

But when cases go to the United States Supreme Court, usually there is, what they call a circuit split. There are judges in all parts of the country who are disagreeing about something. And there's a reason for that. And the reason is that the plain meaning of the statute usually can't decide it. And so that's part of my claim that in that sense Bostock is representative, it's just representative of this very small number of situations in which the text is not enough. I mean, that we need other modes of argumentation.

PROF. DESAI:

And that inevitably, even for the textualist judges, it is true that you need to give them a textualist argument, but the textualist argument will not win your case for you. That's the key thing. And so for lawyers and law students to take away, but another way to say it is text is necessary, but not sufficient. You definitely need an argument that comes from text, but you can't win one of these cases generally speaking by just saying text, text, text all the time.

PROF. DESAI:

This is the way it is. And so the fact that the plaintiffs had these other arguments, even though they don't show up in the majority's decision was in my view necessary, they would not have won otherwise. And they certainly would not have won in 1965. And I think even though it's the same statute and everybody say it's the same plain meaning. So that's I think one of the key things.

TURNER:

That's really interesting. Thank you. Where can researchers find more of your work?

PROF. DESAI:

So like a lot of us scholars, I use SSRN, the Social Science Research Network, ssrn.com. And so all of my work is there. There are links to it on my webpage, which you can get through law.wisc.edu. And/or I have a link too through, anujdesai.org is my personal page. They all link to the same place.

TURNER:

Wonderful. And of course we'll link to all those pages and Professor Desai's scholarship on our podcast page as well. Thank you again for joining the podcast today, Professor Desai for a fascinating art discussion.

PROF. DESAI:

Yeah, no, thank you, Kris. And thanks to the listeners. I hope it was helpful.

TURNER:

Yes. If anything else, it may be said that I did not take statutory interpretation in law school. So if anything else I have learned, I should go back and audit your class.

PROF. DESAI:

You got a brief primer already.

TURNER:

Okay, great. I got a leg up on the rest of the students. That's excellent. Well, we've been discussing Professor Desai's recently published article, Text is Not Enough published in the Colorado Law Review. Again, you can find the full text of this article on SRRN and links on our podcast page. Thank you all for listening. For a complete listing of Professor Desai's work, visit the University of Wisconsin Law School repository. Find all these links in all of our previous podcasts at wilawinaction.law.wic.edu. Stay upstate on Wisconsin Law School scholarship by either subscribing to this podcast by the Apple iTune store or follow either @WisconsinLaw or @UWLawProfs on Twitter for updates and news on faculty publications. See you next time and happy researching.