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# Two Kinds of Plain Meaning

Victoria F. Nourse<sup>†</sup>

Is plain meaning so plain? This is not meant to be a philosophical question, but one deserving serious legal analysis. The plain-meaning rule claims to provide certainty and narrow statutes' domains. As a relative claim, comparing plain meaning with purposivism, I agree. But I do not agree that plain-meaning analysis is as easy as its proponents suggest. In this piece, I tease out two very different ideas of plain meaning—*ordinary/popular meaning* and *expansive/legalist meaning*—suggesting that doctrinal analysis requires more than plain-meaning *simpliciter*. Perhaps more importantly, I argue that plain meaning, as legalist meaning, can quite easily expand a statute's scope, relative to a baseline of ordinary meaning or the status quo ex ante.

In 1987, Justice Scalia gave an extremely influential set of lectures<sup>1</sup> in which he set forth a doctrine of statutory interpretation known as the new textualism. The Scalia Tanner Lectures contain one of the most eloquent statements in print about the importance of legislation: "Every issue of law resolved by a federal judge involves interpretation of text—the text of a regulation, or of a statute, or of the Constitution."<sup>2</sup> Scalia's theory influenced me, and a generation of scholars and students. In a world where very few lawyers have any clue about how legislation is debated—or even how to find legislative history<sup>3</sup>—the textualism rule is easy to understand

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<sup>†</sup> Burrus-Bascom Professor of Law, University of Wisconsin. Special thanks to Professor Lawrence Solan whose essay on ordinary meaning, *The New Textualists' New Text*, 38 LOY. L.A. L. REV. 2027 (2005), inspired these thoughts and to the students in my 2010 Legislation Class at Georgetown University Law Center who were so eager to focus on "two kinds" of plain meaning. All errors are, of course, my own.

<sup>1</sup> See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3-47 (Amy Gutmann ed., 1997) (Justice Scalia's essay based on the lectures, with third-party commentary and Justice Scalia's response).

<sup>2</sup> *Id.* at 13.

<sup>3</sup> Elsewhere, I have been quite critical of law schools' failure to teach congressional literacy. See Victoria Nourse, *Misunderstanding Congress: Statutory*

and teach. It seems such a simple rule: “[W]hen construing statutes, consider the text, the whole text, and nothing but the text. Period.”<sup>4</sup>

*Church of the Holy Trinity v. United States*<sup>5</sup> figures prominently in Justice Scalia’s theory.<sup>6</sup> The question in *Holy Trinity* was whether a British minister contracting to serve a New York church fell within a statute aimed to prevent large-scale importation of immigrant laborers. The opinion opens by acknowledging Justice Scalia’s point: “It must be conceded that the act of the [church] is within the letter of [the] section,” the statute applying not only to “labor or service” but “labor or service of any kind.”<sup>7</sup> To top it off, the Court notes that the statute exempted even singers, lecturers, and domestic servants, and thus “strengthens the idea that every other kind of labor and service” came within the law.<sup>8</sup> Having noted all these textual arguments for covering the good rector, the Court ignored them; it read the statute to *exclude* him, relying on the rule that Congress’s intent trumped any plain reading. In the Court’s view, interpreting the statute to include a rector among imported “swine” was so broad that it “reach[ed] cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against.”<sup>9</sup> “[U]nder those circumstances,” the Court noted, “[i]t is the duty of the courts . . . to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute.”<sup>10</sup> Thus, a statute whose purpose was to prevent mass importation of manual laborers—not “brain toilers”—should not cover the rector.<sup>11</sup>

To Justice Scalia, *Holy Trinity* was obviously wrong: “Well of course I think that the act was within the letter of the statute, and was therefore within the statute: end of case.”<sup>12</sup>

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*Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO. L.J. 1119 (2011).

<sup>4</sup> William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1514 (1998) (reviewing A MATTER OF INTERPRETATION, *supra* note 1).

<sup>5</sup> *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892).

<sup>6</sup> Scalia, *supra* note 1, at 18-22.

<sup>7</sup> *Holy Trinity*, 143 U.S. at 458 (emphasis added) (internal quotation marks omitted).

<sup>8</sup> *Id.* at 458-59.

<sup>9</sup> *Id.* at 472.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 464.

<sup>12</sup> Scalia, *supra* note 1, at 20.

*Holy Trinity*, he argued, is “cited to us whenever counsel wants us to ignore the narrow, deadening text of the statute, and pay attention to the life-giving legislative intent. It is nothing but an invitation to judicial lawmaking.”<sup>13</sup> As this excerpt suggests, one of Justice Scalia’s greatest claims for his position is constraint on activist judges: “[T]extualism constrains judges’ decisions more than other methods do, and it gives judges a principled method for interpreting statutes separate from their own ‘policy preferences.’”<sup>14</sup>

There are many grounds on which I stand firmly with Justice Scalia. Law should be objective and restrained; it should not be the province of activist judges. Justice Frankfurter was right when he insisted, “read the text, read the text, read the text.”<sup>15</sup> But I am also skeptical about the “plainness” of some assertions of plain meaning. In constitutional law, as Philip Bobbitt has argued, certain forms of argument—such as originalism and structuralism—have always played a role.<sup>16</sup> So, too, in statutory interpretation. I teach the “Blackstone 5”—text, context, subject matter, effects/absurdity,<sup>17</sup> and reason.<sup>18</sup> These five forms of argument have been the consistent “liquidated” (to borrow a Madisonian phrase)<sup>19</sup> forms of argument used by American courts in statutory interpretation since the founding.

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<sup>13</sup> *Id.* at 21.

<sup>14</sup> Miranda McGowan, *Do as I Do, Not as I Say: An Empirical Investigation of Justice Scalia’s Ordinary Meaning Method of Statutory Interpretation*, 78 *MISS. L.J.* 129, 143 (2008) (citing Scalia, *supra* note 1, at 17-18).

<sup>15</sup> This is apparently filtered through the eyes of Judge Friendly. As a law professor, Justice Frankfurter advised his students to follow a three-pronged rule for statutory interpretation: (1) read the statute, (2) read the statute, and (3) read the statute. See HENRY J. FRIENDLY, *BENCHMARKS* 202 (1967).

<sup>16</sup> PHILIP BOBBITT, *CONSTITUTIONAL FATE* 74-92 (1982) (on structural argument); PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 178-79 (1991) (on originalism, which Bobbitt terms the historical mode of interpretation).

<sup>17</sup> I teach these as “originalist” forms of argument even though I have some concern that “absurdity” claims might be better resolved as conflicts between ordinary and legalist meaning. See *infra* note 22.

<sup>18</sup> 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 59 (1765) (“The fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by *signs* the most natural and probable. And these signs are either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law.”). Blackstone explains these with particular examples that give these terms greater meaning, consistent with the list asserted above. *Id.*

<sup>19</sup> THE FEDERALIST NO. 37, at 229 (James Madison) (Clinton Rossiter ed., 1999) (“All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and

Think hard now about two kinds of plain meaning. As linguist Larry Solan has written, ordinary meaning is prototypical meaning<sup>20</sup>—that is, meaning focusing on a core example, rather than reaching the conceptual or logical extension of the term. *Prototypical meaning picks the best example, not the peripheral one.* Now, let us apply this to *Holy Trinity*. In 1885 (when the *Holy Trinity* legislation was debated), the prototypical laborer was a miner or a railroad worker, not a minister—at least according to the dictionaries of the day.<sup>21</sup> As the *Holy Trinity* Court explained, the “whole history and life of the country”<sup>22</sup> rebelled at the notion that this law—aimed at “importing laborers as we import horses and cattle”<sup>23</sup>—could cover the voluntary passage of an upper-class minister. Justice Scalia, however, finds a different plain meaning; he finds the meaning prescribed by what the Court calls the letter of the law and what I will call legalist meaning (borrowing from Adrian Vermeule).<sup>24</sup> Justice Scalia abstracts from the core and considers all logical possibilities within the concept of a laborer.

Notice the difference between prototypical meaning and legalist meaning as it relates to the domain of the statute. As Chief Judge Easterbrook has written in a brilliant article, purposivism has a tendency to expand the range of a statute; this is certainly true if you assume that the baseline statute is

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equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.”)

<sup>20</sup> Lawrence M. Solan, *The New Textualists' New Text*, 38 LOY. L.A. L. REV. 2027 (2005).

<sup>21</sup> So, too, the prototypical “service” provider was a maid, not a rector. Eskridge, *supra* note 4, at 1518 (“The first definition of the term ‘labor’ listed in the 1879 and 1886 editions of *Webster’s Dictionary* was ‘Physical toil or bodily exertion . . . hard muscular effort directed to some useful end, as agriculture, manufactures, and the like . . .’” (quoting NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 745 (Chauncey A. Goodrich & Noah Porter eds., rev. ed. 1879))); *see also id.* at 1515-18 (discussing cases and the definition of labor in BLACK’S LAW DICTIONARY 682 (1st ed. 1891), in which labor was equated with manual laborers and service to servants). Of course, there were secondary definitions, but the point is to find the “best” example under prototypical meaning, not any possible example.

<sup>22</sup> *Church of the Holy Trinity v. United States*, 143 U.S. 457, 472 (1892). *Holy Trinity* is typically known as an “absurdity” case, but one way of thinking about absurdity is to view it as arising when there is a strong conflict between legalist meaning (e.g., all workers) and prototypical meaning (e.g., manual labor or service). Compare, for example, standard examples of absurdity: *blood-letting* (prototypical meaning = fight; legalist meaning = any bloodletting, including by a surgeon); and *prison escape* (prototypical meaning = escape to flout law; legalist meaning = any escape even if to escape fire).

<sup>23</sup> 16 CONG. REC. 1782 (1885) (statement of Sen. Platt).

<sup>24</sup> ADRIAN VERMEULE, LAW AND THE LIMITS OF REASON 2-3 (2008).

in fact expanding the range of law.<sup>25</sup> Notice, however, how a similar expansion may occur when one moves from ordinary to legalist meaning. By definition, prototypical meaning looks for the “best example”; legalist meaning looks for all examples, examples that may invite fringe or peripheral meanings.<sup>26</sup> In *Holy Trinity*, the plain-meaning approach expands the meaning of the statute beyond the status quo ex ante (all labor, including the minister, versus the original baseline of no regulation of alien contract labor). More importantly, it expands the baseline relative to ordinary meaning. If the ordinary meaning was “manual labor or service” in 1885, then “all labor” expands the domain of the statute. Plain meaning of this kind (legalist meaning) expands the domain of the statute relative to plain meaning of another kind (ordinary meaning), suggesting that it should be important to decide which meaning counts.

I am not confident enough of the distinction between ordinary/prototypical and legalist/expansive meaning to urge it as a matter of logic or linguistics. At the same time, there are enough examples to make this more than an academic curiosity. For example, in *Green v. Bock Laundry Machine Co.*, the ordinary meaning (to the average person on the street) of *defendant* was *criminal defendant*; relative to a legalist meaning of *defendant*—which comprised all possible defendants, civil and criminal<sup>27</sup>—the ordinary-meaning interpretation narrowed the range of the balancing act at issue. Similarly, in *Public Citizen v. Department of Justice*,<sup>28</sup> the question was whether a government advisory committee was subject to a legalist meaning (i.e., any two persons conferring with the President, which could include his children or his political advisors), or an ordinary best-example meaning (i.e., an advisory committee created by the government). At the same time, it is important to acknowledge that, in some cases, prototypical or ordinary meaning itself may be contested.<sup>29</sup>

One may conceive of the way legalist meaning may expand the range of the statute in the following diagram:

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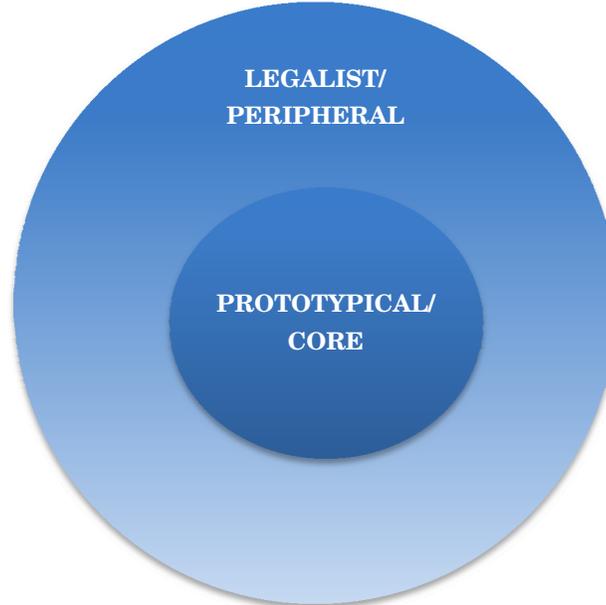
<sup>25</sup> Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983).

<sup>26</sup> Here, as well, there is an analogy to HLA Hart's famous distinction between core and penumbral meaning. See DAVID LYONS, MORAL ASPECTS OF LEGAL THEORY: ESSAYS ON LAW, JUSTICE, AND POLITICAL RESPONSIBILITY 84-86 (1993).

<sup>27</sup> See *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 511 (1989).

<sup>28</sup> *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 452-65 (1989).

<sup>29</sup> See Solan, *supra* note 20, at 2031 (“It is not always easy to decide what makes ordinary meaning ‘ordinary.’”).



There is nothing terribly modern about this idea. It has existed in statutory interpretation since the sixteenth century, expressed in the shell-and-kernel metaphor:

And the law may be resembled to a nut, which has a shell and a kernel within, the letter of the law represents the shell, and the sense of it the kernel, and as you will be no better for the nut if you make use only of the shell, so you will receive no benefit by the law, if you rely only upon the letter.<sup>30</sup>

Here, the kernel represents prototypical “sense” while the shell represents the legalist “letter of the law.” At the founding, American courts were fond of a similar idea, quoting the Latin phrase *nam qui haeret in litera, haeret in cortice* (he who sticks to the letter of the law will only stick to its bark).<sup>31</sup>

Academic textualists have not, in my opinion, grappled with this distinction as much as they might. Instead, there seems to be a good deal of talk of ordinary meaning

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<sup>30</sup> WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 4 (1994) (quoting Reporter’s Note to *Eyston v. Studd*, (1574) 75 Eng. Rep. 688 (K.B.) 695-96; 2 Plowden 459, 465).

<sup>31</sup> *E.g.*, *Church v. Thomson*, 1 Kirby 98, 99, 1786 WL 117 (Conn. Super. Ct. 1786); *Olin v. Chipman*, 2 Tyl. 148, 150, 1802 WL 778 (Vt. 1802); *Miller’s Lessee v. Holt*, 1 Tenn. 111, 5 (1805); *Commonwealth v. Andrews*, 2 Mass. 14, 29, 1806 WL 735 (1806); *Sumner v. Williams*, 8 Mass. 162, 183, 1811 WL 1169 (1811). My thanks to the research assistance of Asher Steinberg, Georgetown University Law Center Class of 2011, who found this phrase and its repetition in his research on founding statutory interpretation.

accompanied by a definition of ordinary meaning as technical or legalist. John Manning writes that “textualists seek out technical meaning, including the specialized connotations and practices common to the specialized sub-community of lawyers.”<sup>32</sup> As Jonathan Molot writes, textualists tend to see “words written on a piece of paper, rather than as a collective effort by elected representatives to govern on behalf of their constituents.”<sup>33</sup> This tendency to detach chunks of text from the statute and then hold them up to the light to test their logical extent reflects the lawyerly love of logic. Indeed, one leading scholar and Federalist Society member writes, “The textualist judge treats questions of interpretation like a puzzle to which it is assumed there is one right answer.”<sup>34</sup>

This tendency to prefer legalist meaning is reflected in two important aspects of textual theory. Generally, new textualism advertises itself as a more restrained view of statutory interpretation, relative to intentionalism or purposivism. Although textualists claim that, unlike purposivists, they do not “add” meaning to text, in fact, they do. They may reject legislative history, but they are perfectly willing to add lawyerly meanings taken from past precedents, canons of construction, and even the common law. The implied preference for specialized meanings speaks loudest in textualists’ affection for the common-law baseline. As one prominent textualist writes, “Textualists assign common-law terms their full array of common-law connotations; they supplement otherwise unqualified texts with settled common-law practices . . . .”<sup>35</sup> Surely, however, this affection for the common law stands in some tension with the notion of ordinary meaning. Does the ordinary man or woman on the street know much about the common law? Does the ordinary legislator?

Textualists reply that it is not fair to tar textualism with affection for arcane lawyerly meanings; textualists seek ordinary meanings. Justice Scalia writes,

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<sup>32</sup> John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 434-35 (2005).

<sup>33</sup> Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 48 (2006).

<sup>34</sup> Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 372 (1994).

<sup>35</sup> Manning, *supra* note 32, at 435 (citing *Moskal v. United States*, 498 U.S. 103, 121 (1990) (Scalia, J., dissenting)).

[F]irst, find the *ordinary meaning* of the language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the *ordinary* one applies. If not—and especially if a good reason for the *ordinary meaning* appears plain—we apply that ordinary meaning.<sup>36</sup>

I agree entirely. But, as other scholars have wondered, a gap may remain between *talking about ordinary meaning* and *applying ordinary meaning*. There is reason to wonder, for example, whether the best and brightest lawyers confuse ordinary meaning with expert or specialized meaning.<sup>37</sup> In one recent study of Justice Scalia's dissents, the author found that "plain meaning . . . refer[red] to something different than 'ordinary meaning' . . . to a *specialized* but accepted meaning of a term."<sup>38</sup> In another empirical study, the political scientist Frank Cross found that "[o]verall, the plain meaning standard seems ideologically manipulable and incapable of constraining preferences to provide greater consensus."<sup>39</sup> In yet another more recent empirical study based on over 1000 subject responses, Ward Farnsworth, Dustin Guzior, and Anup Mulani found that plain meaning correlated with ideological bias, whereas ordinary meaning did not.<sup>40</sup> There is a reason for this: plain meaning simply asserts its plainness, and thus bears the risk of dogmatism and self-regard (i.e., "it is plain because I say so"). Ordinary meaning requires the interpreter to put herself in the shoes of a nonlegal audience; it has a built-in form of impartiality, not to mention democratic appeal. Perhaps that helps explain empirical work showing that Congress has a greater tendency to "override" plain-meaning decisions than decisions relying on legislative history.<sup>41</sup>

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<sup>36</sup> *Chisom v. Roemer*, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting) (emphasis added). In the constitutional context, he is similarly insistent. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570, 584 (2008).

<sup>37</sup> Solan, *supra* note 20.

<sup>38</sup> McGowan, *supra* note 14, at 149 (emphasis added).

<sup>39</sup> FRANK B. CROSS, *THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION* 166 (2009).

<sup>40</sup> Ward Farnsworth, Dustin F. Guzior & Anup Mulani, *Ambiguity About Ambiguity: An Empirical Inquiry into Legal Interpretation*, 2 J. LEGAL ANALYSIS 257 (2010), available at <http://ssrn.com/abstract=1441860>. Farnsworth, Guzior, and Mulani usefully distinguish between plain meaning as an internal view and ordinary meaning as external. Whereas the question, "is this meaning plain?" tends to elicit views correlated with strong ideological positions (the internal view), the question, "would an ordinary person think this meaning is plain?" does not (the external view).

<sup>41</sup> *See* CROSS, *supra* note 39, at 82-83 (summarizing this evidence); *see also* Daniel J. Bussel, *Textualism's Failures: A Study of Overruled Bankruptcy Decisions*, 53

Here lies an important question for textualist theory. New textualism remains unclear about precisely what type of meanings it will apply.<sup>42</sup> While some textualists tend to emphasize expert meaning and semantic content, others emphasize ordinary meaning. Indeed, some textualists are quick, even within a single article, to refer to ordinary meaning and specialized meaning as if there were no difference between the two.<sup>43</sup> Perhaps textualists are assuming that the average citizen is a lawyer—something I am quite sure the voting public would find odd, if not offensive. The very existence of two kinds of plain meaning calls for a theory concerning when a court should apply expert meaning and when it should apply public, or prototypical, meaning.

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VAND. L. REV. 887 (2000); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 350 tbl.8 (1991); Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMP. L. REV. 425 (1992).

<sup>42</sup> See Molot, *supra* note 33, at 36 (“[L]ittle attention is devoted to the interpretive methodology textualism offers to replace strong purposivism and on variations within the textualist movement.”).

<sup>43</sup> See *supra* note 35 and accompanying text.