ORDINARY MEANING AND PLAIN MEANING

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With textualism's ascendancy, courts increasingly invoke the canon to assume "ordinary meaning" unless the context indicates otherwise and the rule to enforce "plain meaning" regardless of extratextual considerations. Yet the relationship between ordinary meaning and plain meaning can become confused in practice. Courts use the terms interchangeably, and they conflate them doctrinally.

Ordinary meaning and plain meaning are distinct. Ordinary meaning is what the text would convey to a reasonable English user in the context of everyday communication. Plain meaning refers to a judgment that whatever the text conveys in context is clear from the text. Thus, a term's ordinary meaning is also its plain meaning only when it is clear from how the term is used in the statute that its context is ordinary, as opposed to technical. Courts conflate the two, however, when they assume ordinary meaning under the ordinary meaning canon and then conclude that they are therefore bound to enforce that meaning under the plain meaning rule. As a result, they end interpretation prematurely, excluding extratextual aids that might well show that the ordinary meaning assumption should give way.

This Article is the first to investigate the relationship between ordinary meaning and plain meaning. It clarifies their differences, identifies the ways in which they are conflated, and evaluates when they should converge. For textualists, greater clarity on this score illuminates when and how to bring ordinary meaning and plain meaning together in a principled manner. For methodological pluralists, understanding the gap between ordinary meaning and plain meaning opens opportunities to argue beyond the text in our increasingly textualist world.

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INTRODUCTION

Today, the two most fundamental doctrines of statutory interpretation are the ordinary meaning canon and the plain meaning rule. The ordinary meaning canon: assume statutory terms bear their "ordinary meaning" unless the context indicates otherwise.[1] The canon is regularly described as "the [m]ost [f]undamental [p]rinciple of [l]egal [i]nterpretation,"[2] and

[1] E.g., Gonzales v. Carhart, 550 U.S. 124, 152 (2007) ("In interpreting statutory texts courts use the ordinary meaning of terms unless context requires a different result.").

[2] Brian G. Slocum, Ordinary Meaning: A Theory of the Most Fundamental Principle of Legal Interpretation (2015); see also William N. Eskridge, Jr., Interpreting Law 33 (2016) (calling the ordinary meaning canon "[t]he prime directive in statutory interpretation"); Antonin Scalia & Bryan A. Garner, Reading Law 69 (2012) ("The ordinary-meaning rule is the most fundamental semantic rule of interpretation.").

the Supreme Court has long treated it as an "axiom."[3] The plain meaning rule: if the statutory text's meaning is "plain" (as in clear), then a court must enforce that meaning regardless of other considerations.[4] The Supreme Court has deemed it the "cardinal" rule of statutory interpretation that comes "before all others."[5]

Neither doctrine is textualism,[6] but their prominence has skyrocketed with textualism's ascendancy.[7] The ordinary meaning canon is an old practice with supporting aphorisms from Blackstone, Marshall, and Holmes,[8] and it "straddles judicial philosophies."[9] But the canon is particularly important to textualists.[10] Thus, courts invoke "ordinary meaning" today three times as often as they did half a century ago,[11] before the rise of "the new textualism."[12] As for the plain meaning rule,

[3] E.g., Burns v. Alcala, 420 U.S. 575, 580 (1975).

[4] E.g., United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989) ("[W]here . . . the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" (quoting Caminetti v. United States, 242 U.S. 470, 485 (1917))).

[5] Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253 (1992).

[6] Cf. John F. Manning, Textualism and Legislative Intent, 91 Va. L. Rev. 419, 420 (2005) ("[T]extualism does not admit of a simple definition.").

[7] See, e.g., Stephen C. Mouritsen, The Dictionary Is Not a Fortress: Definitional Fallacies and a Corpus-Based Approach to Plain Meaning, 2010 BYU L. Rev. 1915, 1973–74 (finding from a statistical analysis of the U.S. Reports that the Supreme Court's use of "plain meaning" and "ordinary meaning" has increased exponentially since the 1970s).

[8] See 1 William Blackstone, Commentaries *59 ("Words are generally to be understood in their usual and most known signification . . . ."); Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 332 (1827) (Marshall, C.J.) (observing that a legal text's "words are to be understood in that sense in which they are generally used by those for whom the instrument was intended"); Oliver Wendell Holmes, The Theory of Legal Interpretation, 12 Harv. L. Rev. 417, 417–18 (1899) (positing that legal interpretation asks "what [the] words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used").

[9] Valerie C. Brannon, Cong. Rsch. Serv., R45153, Statutory Interpretation: Theories, Tools, and Trends 23 & n.238 (2022) (documenting how "all current members of the Supreme Court have invoked this rule of ordinary meaning").

[10] See, e.g., Amy Coney Barrett, Assorted Canards of Contemporary Legal Analysis: Redux, 70 Case W. Rsrv. L. Rev. 855, 856 (2020) ("Textualism . . . insists that judges must construe statutory language consistent with its 'ordinary meaning.'").

[11] Kevin Tobia, Brian G. Slocum & Victoria Nourse, Statutory Interpretation from the Outside, 122 Colum. L. Rev. 213, 217 (2022) [hereinafter Tobia et al., Statutory Interpretation] (finding from a sample of six million cases that "[o]ver the past fifty years, citation to 'ordinary meaning' has tripled").

[12] See William N. Eskridge, Jr., The New Textualism, 37 UCLA L. Rev. 621, 623–24 (1990) (describing the development in the 1980s of a methodological commitment to enacted text over legislative history as "the new textualism").

it was not always in favor,[13] and Judge Wald even wrote its obituary in the early 1980s.[14] But the plain meaning rule is textualism's "bedrock principle,"[15] and the Supreme Court now invokes the plain meaning of text more than any other interpretive tool save for precedent.[16] Thus, when Justice Kagan said "we're all textualists now,"[17] presumably she meant at least this: the text has primacy over other considerations and therefore controls if what it says is plain.[18]

Yet despite how fundamental ordinary meaning and plain meaning are to our "law of interpretation,"[19] their relationship can become confused in practice. Courts, litigants, and commentators use the terms interchangeably[20] because "plain" can also be a synonym for "ordinary" (as in plain vanilla).[21] And courts conflate them doctrinally by beginning

[13] In 1892, the Supreme Court famously articulated a quite different 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." Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892).

[14] See Patricia M. Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term, 68 Iowa L. Rev. 195, 197–98 (1983); cf. Arthur W. Murphy, Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts, 75 Colum. L. Rev. 1299, 1302 (1975) (describing "the refusal of the courts to abandon" the plain meaning rule despite "reports of its death").

[15] Amy Coney Barrett, Substantive Canons and Faithful Agency, 90 B.U. L. Rev. 109, 164 (2010); see also John F. Manning, Second-Generation Textualism, 98 Calif. L. Rev. 1287, 1309–10 (2010) (describing the "defining feature of 'second-generation textualism' " to be the "proposition that courts must respect the terms of an enacted text *when its semantic meaning is clear*, even if it seems contrary to the statute's apparent *overall purpose*").

[16] Cf. Anita S. Krishnakumar, Cracking the Whole Code Rule, 96 N.Y.U. L. Rev. 76, 95–97 (2021) (finding that the "text/plain meaning" of a statute was the most used interpretive source other than precedent in a sample of statutory interpretation cases from 2005–2017 Supreme Court Terms).

[17] Harvard Law School, The 2015 Scalia Lecture | A Dialogue with Justice Elena Kagan on the Reading of Statutes, YouTube, at 8:29–30 (Nov. 17, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg [https://perma.cc/R67U-65ZS].

[18] Indeed, when Justice Kagan later quipped about this remark that "[i]t seems I was wrong," she was faulting the Court for using a "get-out-of-text-free card[]." West Virginia v. EPA, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting); John F. Manning, The New Purposivism, 2011 Sup. Ct. Rev. 113, 129–30 (describing "nontextualist" Justices' acceptance of the plain meaning rule). On Justice Kagan's remark and her later retraction, see generally Kevin Tobia, We're Not All Textualists Now, 78 N.Y.U. Ann. Surv. Am. L. 243 (2023).

[19] William Baude & Stephen E. Sachs, The Law of Interpretation, 130 Harv. L. Rev. 1079, 1084–85 (2017) (developing an account of legal canons as part of the unwritten law that governs legal interpretation).

[20] See sources cited infra notes 310–11.

[21] William Baude & Ryan D. Doerfler, The (Not So) Plain Meaning Rule, 84 U. Chi. L. Rev. 539, 545 (2017). The wonderful "plain vanilla" example is theirs.

interpretation with "ordinary meaning" (or "plain meaning" in the plain-vanilla sense) under the ordinary meaning canon and then concluding that they are therefore bound to end interpretation with that meaning, regardless of extratextual considerations, under the plain meaning rule.[22] The problem is that statutes sometimes have technical (i.e., non-ordinary or specialized) meanings.[23] When courts conflate ordinary meaning and plain meaning, they risk excluding extratextual interpretive aids that would illuminate whether the ordinary meaning assumption should give way to a different meaning.

Consider an example involving a term with a clear ordinary meaning but less clear statutory context. The Penobscot Nation is a "riverine" Native nation.[24] A statute defines the "Penobscot Indian Reservation" as "the islands in the Penobscot River reserved to the Penobscot Nation by agreement with the States of Massachusetts and Maine" as of June 29, 1818.[25] An "island," no doubt, ordinarily does not include its surrounding waters.[26] But is it *plain* in this statutory context that "islands" excludes the waters? Notably, the provision references a historical agreement as well as a specific set of "islands," and the Supreme Court has said that a reservation defined by reference to specific "islands" may encompass the surrounding waters.[27] Moreover, a neighboring provision guarantees fishing rights "within the boundaries of [the] Indian reservation[],"[28] and there is nowhere on the islands themselves to fish.[29] The U.S. Court of Appeals for the First Circuit nevertheless felt bound to enforce the

[22] See infra Part III.

[23] See Amy Coney Barrett, Congressional Insiders and Outsiders, 84 U. Chi. L. Rev. 2193, 2202 (2017) (noting that textualists accept that "terms are sometimes used in their ordinary and sometimes in their technical sense").

[24] H.R. Rep. No. 96-1353, at 11 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3786, 3787.

[25] Me. Stat. tit. 30, § 6203(8) (2023). The federal Maine Indian Claims Settlement Act of 1980, Pub. L. No. 96-420, § 3, 94 Stat. 1785, 1786–87 (1980), incorporates the definition from the Maine Implementing Act, Me. Stat. tit. 30, § 6203(8) (2023). See 25 U.S.C. § 1722(i).

[26] See Penobscot Nation v. Frey, 3 F.4th 484, 491 (1st Cir. 2021) (en banc) (determining from dictionary definitions that it is "clear" that "an island is 'a piece of land' " and that "[l]and does not ordinarily mean land and water").

[27] See Alaska Pac. Fisheries v. United States, 248 U.S. 78, 86–89 (1918) (interpreting a reference to "the body of lands known as Annette Islands" in the statutory definition of the Metlakahtla Reservation and holding that "the geographical name was used, as is sometimes done, in a sense embracing the intervening and surrounding waters as well as the upland—in other words, as descriptive of the area comprising the islands").

[28] Me. Stat. tit. 30, § 6207(4) (2023).

[29] Penobscot Nation v. Mills, 151 F. Supp. 3d 181, 186 (D. Me. 2015) ("None of those islands contains a body of water in which fish live.").

ordinary meaning of "island" under the plain meaning rule—regardless of what the historical agreement was, the purpose for codifying it, or the canon that ambiguous statutes are construed to Indians' benefit.[30]

Or consider an example of a term with a disputed ordinary meaning. *Bostock v. Clayton County*[31] held that the federal bar on workplace discrimination "because of . . . sex"[32] protects employees against discrimination based on sexual orientation or gender identity.[33] Much has been written in *Bostock*'s wake on the differences among textualist Justices' opinions in the case regarding what constitutes ordinary meaning.[34] Left out of that discussion is a stark point about what all the Justices signed on to: the provision's ordinary meaning was its plain meaning. Indeed, after determining the provision's "ordinary public meaning,"[35] the majority repeatedly justified enforcement of that meaning based on what the majority variously called the provision's "plain

[30] See *Penobscot Nation*, 3 F.4th at 491 & n.5 ("Because 'islands' is an undefined term, we construe it in accordance with [its] ordinary meaning." (internal quotation marks omitted) (citation omitted)); id. at 493 (citing McGirt v. Oklahoma, 140 S. Ct. 2452, 2469 (2020) ("There is no need to consult extratextual sources when the meaning of a statute's terms is clear.")); see also id. at 490–91 (citing additional plain meaning precedents); id. at 496 ("[The statute's] reference to these treaties does not alter the plain meaning of 'islands' and creates no ambiguity."); id. at 503 ("This canon only applies to ambiguous provisions."). But see County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 269 (1992) ("[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." (quoting Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985))).

[31] 140 S. Ct. 1731 (2020).

[32] Id. at 1738 (quoting 42 U.S.C. § 2000e-2(a)(1)).

[33] Id. at 1754.

[34] See, e.g., Tara Leigh Grove, Comment, Which Textualism?, 134 Harv. L. Rev. 265, 266 (2020) ("*Bostock* revealed . . . important tensions *within* textualism."); Ilya Somin, *Bostock v. Clayton County* and the Debate over the Meaning of "Ordinary Meaning," Volokh Conspiracy (June 19, 2020, 11:25 PM), https://reason.com/volokh/2020/06/19/bostock-v-clayton-county-and-the-debate-over-the-meaning-of-ordinary-meaning/ [https://perma.cc/ZS6W-YN87] (describing "an interesting dispute over what exactly counts as 'ordinary meaning'" between Justices Gorsuch and Kavanaugh in *Bostock*); Kevin Tobia & John Mikhail, Two Types of Empirical Textualism, 86 Brook. L. Rev. 461, 465–72 (2021) (arguing that *Bostock* revealed competing versions of "empirical textualism"—one focused on "what ordinary people understand [a provision] to mean, applying their own criteria" and the other focused "on the ordinary application of the established legal criterion . . . to interpret and apply the" provision).

[35] *Bostock*, 140 S. Ct. at 1741 ("From the ordinary public meaning of the statute's language at the time of the law's adoption, a straightforward rule emerges: An employer violates Title VII when it intentionally fires an individual employee based in part on sex.").

meaning,"[36] "plain terms,"[37] "plain text,"[38] and "plain statutory command[]."[39] The dissenters drew a similar equation; they just found a different ordinary meaning.[40] Sharp intramural, text-based disputes over the ordinary meaning of the provision would seem to suggest at least that there were other plausible, even if less ordinary, readings of the text. Yet not a single Justice posited that there was *any* textual ambiguity warranting recourse to additional interpretive aids.

What's more, Justice Gorsuch's majority opinion justified giving statutory terms their "ordinary public meaning" because "only the words on the page constitute the law adopted by Congress and approved by the President."[41] Yet while the fact that only the text has met the Constitution's bicameralism and presentment requirements for making statutory law may justify enforcing its *plain* meaning, even textualists recognize that those requirements do not mandate reading the text according to its *ordinary* meaning.[42] After all, the Constitution does not tell us *how* to read the text.

In short, how ordinary meaning and plain meaning relate under their respective doctrines has become something of an enigma in practice. Justice Scalia and Bryan Garner's influential treatise on statutory interpretation even gives a cryptic secondary definition for the plain meaning rule as: "Loosely, the ordinary-meaning canon."[43]

While there are rich literatures on both ordinary meaning[44] and plain meaning,[45] these literatures have studied the topics separately. Scholars have noted that ordinary meaning and plain (as in clear) meaning are different,[46] and others have flagged that "there may be important

[36] Id. at 1750.
[37] Id. at 1743, 1748–50, 1752.
[38] Id. at 1751.
[39] Id. at 1754.
[40] See infra notes 404–07 and accompanying text.
[41] *Bostock*, 140 S. Ct. at 1738.
[42] See John F. Manning, Textualism and the Equity of the Statute, 101 Colum. L. Rev. 1, 71–72 (2001).
[43] Scalia & Garner, supra note 2, at 436.
[44] See, e.g., sources cited infra notes 99, 103, 114–15, 120–22.
[45] See, e.g., sources cited infra notes 135, 196, 215.
[46] See Baude & Doerfler, supra note 21, at 545 (noting that "plain" means obvious under the plain meaning rule, as distinguished from its occasional use "to denote something like *ordinary* meaning"); Eskridge, supra note 2, at 33 ("'Plain meaning' ought to be reserved for a judicial declaration that there is a clear legal meaning for the provision in question . . . ."); Peter W. Schroth, Language and Law, 46 Am. J. Compar. L. 17, 26 n.41 (Supp. 1998) ("Ordinary meaning seems to differ from plain meaning, in that the former denotes something

differences" even between ordinary meaning and plain-vanilla meaning.[47] But no one has explained these differences in any depth. That is my goal—to clarify the differences between ordinary meaning and plain meaning, to identify the ways in which they are conflated, and to evaluate when they should converge.

My thesis: "ordinary meaning" under the ordinary meaning canon and "plain meaning" under the plain meaning rule have different definitions, functions, consequences, and justifications. Both are sensitive to context, however, because courts agree that statutory terms have meaning only in context.[48] Thus, a term bears its ordinary meaning unless the context indicates a technical meaning. But a term's ordinary meaning is also its plain meaning only when it is *plain* from how the term is used in the statute that its context is ordinary, not technical. How plain must it be? Because "plainness" is ultimately a legal characterization,[49] how plain (and to whom it must be plain) should depend on the court's purposes for assuming ordinary meaning. The following roadmap previews the details.

Part I defines "meaning." What the words and phrases in a statute "mean" in a legal sense differs from what they "mean" in a linguistic sense. Ordinary meaning and plain meaning are both claims about linguistic meaning—specifically, what the statutory words and phrases in context would convey to a reasonable English user. But the nature of their claims as well as the consequences for legal meaning are very different.

Part II clarifies the differences between ordinary meaning and plain meaning. First, different definitions: ordinary meaning refers to the content of what the statutory text would convey to a reasonable English user in the context of everyday communication. Plain meaning refers to a judgment that whatever the statutory text conveys in context is clear from the text. Second, different functions: ordinary meaning provides a starting point for what the statute means subject to other considerations, while

like 'the sense this expression usually has in such contexts' while the latter may require absence of ambiguity."); Slocum, supra note 2, at 23–25 (briefly distinguishing the ordinary meaning canon and plain meaning rule).

[47] Kevin P. Tobia, Testing Ordinary Meaning, 134 Harv. L. Rev. 726, 736 (2020) [hereinafter Tobia, Testing Ordinary Meaning]; see also Frederick Schauer, Statutory Construction and the Coordinating Function of Plain Meaning, 1990 Sup. Ct. Rev. 231, 234 n.6 (observing in a footnote "the important point that plain meaning is not equivalent to ordinary meaning").

[48] See infra note 84 and accompanying text.

[49] See Ryan D. Doerfler, How Clear Is "Clear"?, 109 Va. L. Rev. 651, 657–58 (2023); Richard M. Re, Clarity Doctrines, 86 U. Chi. L. Rev. 1497, 1505–09 (2019).

plain meaning acts as an evidentiary rule to bar other considerations if the statute's meaning is clear from the text. Third, different consequences: ordinary meaning provides a statute's default legal meaning, while plain meaning specifies its legal meaning (arguably subject to absurdity). Fourth, different justifications: because statutes are not, in fact, everyday communications, ordinary meaning must ultimately be justified counterfactually (e.g., asking how an ordinary member of Congress, as opposed to a court, would interpret the statute) or by normative values (e.g., democracy and the rule of law). In contrast, courts enforce plain meaning for an epistemic reason: the clear meaning of the text that survived the constitutional process for making statutory law is the best evidence of the legal norms that Congress promulgated.

Part III identifies how courts conflate these differences in practice. Courts refer to ordinary meaning and plain meaning interchangeably, which can lead them to invoke the plain meaning rule to enforce plain-vanilla meaning. Courts also conflate the doctrines by relying on the plain meaning rule to enforce ordinary meaning merely absent a statutory definition, like in *Penobscot Nation v. Frey*, or other clear statement from Congress. And in recent cases, such as *Bostock*, the Supreme Court has begun to muddle their justifications, suggesting that the rationale for enforcing plain meaning mandates reading statutes according to their ordinary meaning.

Part IV evaluates when courts *should* enforce ordinary meaning as plain meaning. A term's ordinary meaning—even when clear—is also its plain meaning only if the statutory context plainly supports that reading. Thus, ordinary meaning is not always plain meaning. But often they converge. Not only are there easy cases with only one—both ordinary and plain—meaning, but "plainness" also should not require the complete absence of alternative readings. Rather, whether a meaning is "plain" is ultimately a legal judgment that should depend on the court's purposes for assuming ordinary meaning. If a court assumes that "island" bears its ordinary meaning as an expedient method to reach an agreement among the judges, then the question is "how plain to us?" and the threshold for plainness is low—the whole point is to reach a solution efficiently. But if a court assumes that "island" bears its ordinary meaning because, in a democracy, laws should be interpreted according to how the public would understand them, then the question changes to "how plain to ordinary people?" And the threshold for plainness may go up, depending on the court's beliefs about how ordinary people distinguish between ordinary

and technical language. Thus, for plain meaning, much depends on the reasons for ordinary meaning.

The Conclusion sums up the implications for legal practice. First, courts and litigators should be clear about when they are making a claim about ordinary meaning as opposed to plain meaning, given their different interpretive consequences. Second, courts should ensure they match the correct consequences to ordinary meaning and plain meaning respectively. Third, courts should enforce ordinary meaning as plain meaning only when it is plain from a term's statutory context that it bears its ordinary meaning.

What lies outside this Article's scope, however, is whether ordinary meaning and plain meaning are coherent guideposts for statutory interpretation. There is, to be sure, profound disagreement on that score. But what I take to be a less controversial point is that today's practitioners and courts operate in an environment in which claims about ordinary meaning and plain meaning are facts of life. So this Article is written in the spirit that, regardless of one's views on ordinary meaning and plain meaning, it is worth trying to understand how they relate.

I. MEANING

Ordinary meaning and plain meaning share one thing in common: they are both claims about "meaning." This Part thus lays a foundation for the Article by defining "meaning." While the word has many senses,[50] this Article refers to two: what a statute means in a legal sense and what it means in a linguistic sense. These senses of meaning are distinct.[51]

Legal meaning is what statutory interpretation seeks.[52] It refers to the legal norms—rules, standards, doctrines, etc.—to which a statutory

[50] See Reed Dickerson, The Interpretation and Application of Statutes 34 (1975) ("The philosophers of language are fond of pointing out the uncertainties in the meaning of the word 'meaning' itself.").

[51] See Lawrence B. Solum, Communicative Content and Legal Content, 89 Notre Dame L. Rev. 479, 479–80 (2013).

[52] See Mark Greenberg, Legal Interpretation and Natural Law, 89 Fordham L. Rev. 109, 125–29, 126 n.61 (2020) (developing an account of why "legal interpretation is best understood as seeking the content of the law" and observing "a perceptible trend in the literature toward the position").

provision contributes,[53] often described as a provision's "legal content."[54] For example, the Supreme Court holds that the Sherman Antitrust Act's provision outlawing "[e]very" agreement "in restraint of trade"[55] means, in a legal sense, that "only *unreasonable* restraints" are prohibited.[56]

In contrast, linguistic meaning is what a text says. It refers to the information that a speaker conveys to a listener through language,[57] often called a statutory provision's "communicative content."[58] The linguistic meaning of words and phrases can be "semantic" (roughly, literal) or "pragmatically enriched" by context based on the speaker and listener's shared background.[59] So, if one thinks that, when read in context, a reader would understand the Sherman Act provision barring "every" agreement "in restraint of trade"[60] to convey that only unreasonable agreements were barred, then the provision's legal and (context-sensitive) linguistic meanings correspond. But if one thinks that this "rule of reason"[61] supplements what the Sherman Act otherwise says, the provision's legal and linguistic meanings diverge.[62]

Arguably the "standard" view in legal practice today is that what a statute means in a legal sense reflects what it means—or, to a reasonable reader, would mean—in a linguistic sense (to the extent it can be

[53] See Mark Greenberg, The Moral Impact Theory of Law, 123 Yale L.J. 1288, 1296 n.18 (2014) ("[T]he legal meaning of, say, a statutory text is simply its contribution to the content of the law."); Greenberg, supra note 52, at 126 n.61 (noting that the alternative phrasing "the legal norms to which the provision contributes" may be a more precise definition).

[54] See Solum, supra note 51, at 507–08.

[55] 15 U.S.C. § 1.

[56] State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) (emphasis added). My point is that the Supreme Court's holding is a *claim* about the provision's legal meaning, not that the provision lacks legal meaning until courts interpret it.

[57] See Greenberg, supra note 53, at 1296 n.18.

[58] See Solum, supra note 51, at 484–86, 488.

[59] See id. at 486–89; Andrei Marmor, The Pragmatics of Legal Language, 21 Ratio Juris 423, 424 (2008). The literature on textualism often uses "semantic" meaning in a different sense to refer to linguistic meaning that takes into account at least some context. See Greenberg, supra note 52, at 113 n.18 (citing John F. Manning, What Divides Textualists from Purposivists?, 106 Colum. L. Rev. 70, 76 (2006)).

[60] 15 U.S.C. § 1.

[61] *State Oil Co.*, 522 U.S. at 10.

[62] A third possibility would be that both the linguistic meaning and the legal meaning are indeterminate. See infra note 76.

determined).[63] "What the law says is what the law is."[64] The premise is that statutes are best understood as or akin to instances of communication, such as commands.[65]

Some scholars, however, have powerfully objected to regular communication as a coherent framework for understanding statutory lawmaking because, among other differences, there is no unitary speaker with identifiable intentions.[66] On this skeptical view, there is never an underlying linguistic fact about what someone said in a statute to someone else. What the words and phrases in a statute would arguably convey to a reasonable reader (either literally or in context) as if in conversation is thus only one candidate among others for legal meaning.[67] For example, a word or phrase in a statute might have a dynamic meaning that incorporates changing understandings of moral or normative values or some other referent.[68] The Sherman Act's prohibition on "restraint of

[63] See, e.g., Andrei Marmor, The Language of Law 12 (2014) (defending the "'standard' view" that "the collective action of the legislators enacting a law is a collective speech act, whereby some content is communicated that is, essentially, the content of the law voted on" and that "the content that was successfully asserted by the legislature is the legal content of the act"); see also Mark Greenberg, The Standard Picture and Its Discontents, *in* 1 Oxford Studies in Philosophy of Law 39, 42 (Leslie Green & Brian Leiter eds., 2011) (arguing that the "*Standard Picture*" of legal texts is that "the content of the law is some kind of ordinary linguistic meaning").

[64] Marmor, supra note 63, at 12.

[65] See Mark Greenberg, Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication, *in* Philosophical Foundations of Language in the Law 217, 217–19 (Andrei Marmor & Scott Soames eds., 2011).

[66] See, e.g., Richard H. Fallon, Jr., The Statutory Interpretation Muddle, 114 Nw. U. L. Rev. 269, 283–97 (2019); Greenberg, supra note 65, at 217–21; Greenberg, supra note 63, at 77–80.

[67] See generally Richard H. Fallon, Jr., The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation, 82 U. Chi. L. Rev. 1235 (2015) (developing a theory that interpretation requires a case-by-case choice among several possible referents for legal meaning—which include "literal" and "contextual" meanings—based on distinctly legal norms); Greenberg, supra note 53, at 1303 (arguing that interpretation seeks "what is morally required as a consequence of the lawmaking actions," for which a statute's linguistic meaning "is only one relevant consideration" (emphasis omitted)).

[68] See Jam v. Int'l Fin. Corp., 139 S. Ct. 759, 773 (2019) (Breyer, J., dissenting) (stating that there is "no single, universally applicable answer" to whether statutes refer to their subject matters "statically" or "dynamic[ally]"); cf. Fallon, supra note 67, at 1248 (discussing a related notion of "[r]eal conceptual meaning"). For an influential theory of dynamic statutory interpretation, see William N. Eskridge, Jr., Dynamic Statutory Interpretation 5–6 (1994) ("The interpretation of a statutory provision by an interpreter is not necessarily the one which the original legislature would have endorsed, and as the distance between enactment and interpretation increases, a pure originalist inquiry becomes impossible and/or irrelevant.").

trade,"[69] for instance, might change over time based on new understandings of the economic values it incorporates.[70] Alternatively, that term might bear a precedential meaning based on how courts interpreted it in the past.[71] Still more, the term could be said to have a reasonable meaning that imputes the intentions of hypothetical, reasonable legislators.[72] And so on. On this skeptical view, then, multiple ways of reading the text—only some of which correspond with linguistic meaning[73]—might be candidates for legal meaning.[74]

I will assume in this Article, however, that legal meaning reflects linguistic meaning to the extent it can be determined. My reason is straightforward: the plain meaning doctrine quickly becomes too thin, or even incoherent, otherwise. That is, if linguistic meaning does not constrain legal meaning, the meaning of a statute could be considered "plain" only when all interpretive methods converged on the same meaning. I do not believe that is what courts have in mind when they describe the plain meaning rule as the principle that Congress "means in a statute *what it says* there."[75] Context-sensitive linguistic meaning can also account for some of the diversity among other candidates for legal meaning. It can do so if we posit that linguistic context includes considerations such as a word's incorporation of an evolving moral value or precedential understandings of the word.[76]

Even assuming linguistic meaning generally reflects legal meaning, though, this Article treats them as distinct.[77] First, legal meaning and

[69] 15 U.S.C. § 1.

[70] See Kimble v. Marvel Ent., LLC, 576 U.S. 446, 461 (2015) ("Congress . . . intended that law's reference to 'restraint of trade' to have 'changing content,' and authorized courts to oversee the term's 'dynamic potential.'" (citation omitted)).

[71] See Fallon, supra note 67, at 1251 (discussing "interpreted meaning").

[72] See id. at 1250–51 (discussing Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process* 1374–80 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994)).

[73] See Greenberg, supra note 52, at 125 n.60 (noting that "the different items that competing theories of legal interpretation seek," as described by Professor Fallon, are not necessarily "all kinds of linguistic meaning").

[74] See also Michael L. Geis, The Meaning of *Meaning* in the Law, 73 Wash. U. L.Q. 1125, 1128–32 (1995) (describing "conventional meaning," "contextual significance," and the speaker's "'intention' or 'goal'" as different senses of meaning in law).

[75] E.g., Dodd v. United States, 545 U.S. 353, 357 (2005) (emphasis added) (quoting Conn. Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992)).

[76] See Fallon, supra note 67, at 1267 (attributing this view to Andrei Marmor).

[77] Not everyone agrees. See Baude & Sachs, supra note 19, at 1128–29 (surveying objections). Some philosophical accounts of the "standard" view, for instance, maintain that a provision's linguistic meaning and legal meaning cannot diverge because a "legal text's

linguistic meaning will not necessarily be identical because of the indeterminacy of language. As anyone who has ever been the victim of miscommunication knows, communication can be ambiguous, vague, incomplete, or conflicting.[78] Thus, a court will often have to determine the legal meaning of a statutory provision from among possible linguistic meanings or supplement the text to resolve the indeterminacy (such as by using a default rule).[79] Interpretive doctrines like the ordinary meaning canon provide legal rules to help guide that process.[80] Second, even when legal meaning and linguistic meaning perfectly correspond, the court still must "translate the linguistic meaning . . . into doctrine."[81] That is, the court must hold that what the statute says in a linguistic sense is also what it means in a legal sense.

To sum up so far: "meaning" can refer to legal meaning or linguistic meaning. The two can correspond, and I assume that they generally do correspond. However, the court will always have to determine the legal meaning—sometimes, if not often, in the face of linguistic indeterminacy.

Now to apply that framework, claims about ordinary meaning and plain meaning both use the word "meaning" in the same sense: linguistic meaning. After all, ordinary meaning refers to "ordinary

communicative content *just is* its legal content." Bill Watson, In Defense of the Standard Picture: What the Standard Picture Explains That the Moral Impact Theory Cannot, 28 Legal Theory 59, 77 (2022). On this view, if the provision's linguistic meaning is indeterminate, then so is its legal meaning. My description of the two meanings as distinct attempts to track how the term "legal meaning" is used more conventionally in legal practice, but nothing in this Article turns on this point.

[78] See Solum, supra note 51, at 509–10.

[79] See id.

[80] See Baude & Sachs, supra note 19, at 1129–31.

[81] Lawrence B. Solum, The Interpretation-Construction Distinction, 27 Const. Comment. 95, 103 & n.19 (2010). Professor Solum distinguishes the activity of identifying a legal text's linguistic meaning ("interpretation") from the activity of translating that linguistic meaning into doctrine or otherwise determining the legal text's legal meaning ("construction"). See id. at 96; cf. Richard H. Fallon, Jr., Foreword: Implementing the Constitution, 111 Harv. L. Rev. 54, 57 (1997) (discussing the gap between the Constitution's precise linguistic meaning and the crafting of constitutional doctrine). I use the term "interpretation" in its broader, more familiar sense in law to refer to both activities, but I am cognizant of the distinction between them.

communication,"[82] and, as just noted, courts regularly refer to plain meaning as what the statute "says."[83]

More specifically, both doctrines refer to linguistic meaning in context. No court today would assert that words and phrases should be read literally. Even textualists are committed to reading statutory words and phrases contextually.[84]

However, the context-sensitive linguistic meaning of statutes must be determined objectively. That is, while the linguistic meaning of a text, when read in context, normally depends on the author's intentions,[85] a statute has no unitary author with identifiable intentions.[86] As a result, at best the court can ask what a speaker would have intended to communicate if she used the words and phrases in the statute according

[82] See Stefan Th. Gries & Brian G. Slocum, Ordinary Meaning and Corpus Linguistics, 2017 BYU L. Rev. 1417, 1424 ("The basic premise of the ordinary meaning doctrine is that a legal text is a form of communication that uses natural language in order to accomplish its purposes.").

[83] See, e.g., Henson v. Santander Consumer USA Inc., 582 U.S. 79, 89 (2017) (quoting Dodd v. United States, 545 U.S. 353, 357 (2005)).

[84] See, e.g., Bostock v. Clayton County, 140 S. Ct. 1731, 1766–67 (2020) (Alito, J., dissenting) (collecting sources for the proposition that "[t]extualists do not read statutes as if they were messages picked up by a powerful radio telescope from a distant and utterly unknown civilization"); Barrett, supra note 10, at 857 (describing how textualists "have spent more than thirty years driving home the point" that textualism is not literalism); Frank H. Easterbrook, Text, History, and Structure in Statutory Interpretation, 17 Harv. J.L. & Pub. Pol'y 61, 61 (1994) ("Words take their meaning from contexts, of which there are many—other words, social and linguistic conventions, the problems the authors were addressing. Texts appeal to communities of listeners, and we use them purposively. The purposes, and so the meaning, will change with context, and over time."); 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 3, 24 (Amy Gutmann ed., 1997) ("[T]he good textualist is not a literalist . . . .").

[85] On the role of authorial intention—that is, how an author *uses* words—for establishing the contextual meaning of words, see, e.g., Quentin Skinner, Meaning and Understanding in the History of Ideas, 8 Hist. & Theory 3, 37 (1969) ("The appropriate, and famous, formula—famous to philosophers, at least—is . . . that we should study not the meanings of the words, but their use. For the given idea cannot ultimately be said in this sense to *have* any meaning that can take the form of a set of words which can then be excogitated and traced out over time. Rather, the meaning of the idea must *be* its uses . . . ." (citing Ludwig Wittgenstein, Philosophical Investigations ¶ 43 (Oxford 1953))); Ludwig Wittgenstein, Philosophical Investigations ¶ 43 (G.E.M. Anscombe trans., 2d ed. 1958) ("[T]he meaning of a word is its use in the language.").

[86] On this point, including challenges to it, see sources cited *infra* note 229.

to the usual norms governing communication familiar to reasonable English users.[87]

To synthesize these points: ordinary meaning and plain meaning are both claims related to what the statute's words and phrases in context objectively convey to a reasonable English user. As we will see in the next Part, the nature of the claims about that sense of linguistic meaning and their consequences for legal meaning are very different. For now, though, the key point is just that ordinary meaning and plain meaning both refer to *something* about context-sensitive linguistic meaning from an objective perspective.

II. ORDINARY MEANING VS. PLAIN MEANING

From that shared reference to contextual, objective linguistic meaning, ordinary meaning and plain meaning diverge. Ordinary meaning is the starting point for interpretation and thus the default candidate for legal meaning subject to other considerations. Per the Supreme Court, "[i]t's a 'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute.'"[88] In contrast, plain meaning concludes interpretation and thus specifies legal meaning regardless of extratextual considerations (arguably subject to absurdity). The classic formulation: "[W]here . . . the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'"[89]

[87] See Greenberg, supra note 52, at 122 & n.52 (citing H. Paul Grice, Logic and Conversation, *in* 3 Syntax and Semantics 41, 49–51 (Peter Cole & Jerry L. Morgan eds., 1975)).

[88] New Prime Inc. v. Oliveira, 139 S. Ct. 532, 539 (2019) (quoting Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067, 2074 (2018) (quoting Perrin v. United States, 444 U.S. 37, 42 (1979))). For additional formulations of the canon, see sources cited *infra* notes 140–45. All sources with two or more nested citations that appear in this Article have been substantiated only up to the first nested citation.

[89] United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989) (quoting Caminetti v. United States, 242 U.S. 470, 485 (1917)); see also McGirt v. Oklahoma, 140 S. Ct. 2452, 2469 (2020) ("There is no need to consult extratextual sources when the meaning of a statute's terms is clear."); BedRoc Ltd., LLC v. United States, 541 U.S. 176, 183 (2004) ("[O]ur inquiry begins with the statutory text, and ends there as well if the text is unambiguous."); Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999) ("As in any case of statutory construction, our analysis begins with 'the language of the statute.' And where the statutory language provides a clear answer, it ends there as well." (citations omitted)); Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992) ("[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says

This Part elucidates the differences between ordinary meaning and plain meaning under their respective doctrines. That is, from the methodological baseline that the ordinary meaning canon and the plain meaning rule are different doctrines, this Part describes how to distinguish ordinary meaning and plain meaning so that they respectively serve those doctrines. Section A distinguishes their definitions. Section B describes their different doctrinal functions. Section C sums up their different consequences for legal meaning. Section D compares the different justifications for the two doctrines. Finally, Section E gives the bottom line: ordinary meaning is not necessarily plain meaning. A statute can have a clear ordinary meaning without a plain meaning or a plain meaning without an ordinary meaning.

A. Different Definitions

The first difference between ordinary meaning and plain meaning is definitional. As just explained in Part I, they refer to the same sense of linguistic "meaning"—what the words and phrases would convey in context to a reasonable English user. But the claims about that meaning under the two doctrines are categorically different. "Ordinary meaning" is a claim about the *content* of what a statute says while "plain meaning" is a *judgment* that whatever the statute says is clear.

1. Ordinary Meaning as Content

Ordinary meaning refers to the content of what statutory words and phrases convey. Specifically, ordinary meaning is what the statutory text would convey to a reasonable English user in the counterfactual context of "ordinary" communication. Admittedly, that is an unsatisfying definition.

But the problem is that ordinary meaning is a notoriously fuzzy category.[90] Rather than define ordinary meaning, the Supreme Court has used a slew of synonyms—including "ordinary public meaning,"[91] "ordinary, contemporary, common meaning,"[92] "everyday

there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" (citations omitted)).

[90] See generally Slocum, supra note 2 (describing how ordinary meaning is often conflated with textualism, plain meaning, and literal meaning).

[91] Bostock v. Clayton County, 140 S. Ct. 1731, 1738, 1741 (2020).

[92] *Wis. Cent.*, 138 S. Ct. at 2074 (quoting *Perrin*, 444 U.S. at 42).

understanding,"[93] "ordinary or natural meaning,"[94] "normal and customary meaning,"[95] and, of course, "ordinary and plain meaning."[96] While the current Court says that the relevant timeframe is when the statute was enacted,[97] at least three key features of ordinary meaning are unclear or disputed—spawning many variants of ordinary or "plain" (as in plain-vanilla) meaning.

First, what is ordinary? "Ordinary" is often referred to as "everyday" meaning.[98] But ordinary meaning might refer either to anything encompassed by a common definition of a term or to only the "best examples" or prototypes of the term that most commonly come to mind.[99] For example, under its most common definition, a "fruit" encompasses any part of a plant containing seeds, which would include, say, tomatoes. But the prototypical "fruits" that come to mind might be apples, bananas, and oranges that are eaten outside a meal or as dessert, and tomatoes might be too far from those core examples to qualify.[100] Professor Victoria Nourse has referred to this distinction as "two very different ideas of plain meaning" (in the plain-vanilla sense): "expansive/legalist meaning" (a tomato is a fruit) and "ordinary/popular meaning" (a tomato is not a fruit).[101] Her distinction draws from Professor Lawrence Solan's

[93] Lopez v. Gonzales, 549 U.S. 47, 53 (2006) (using "everyday understanding" and "regular usage" interchangeably).

[94] FDIC v. Meyer, 510 U.S. 471, 476 (1994).

[95] Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 388 (1951).

[96] Stenberg v. Carhart, 530 U.S. 914, 993 n.9 (2000) (Thomas, J., dissenting).

[97] See, e.g., New Prime Inc. v. Oliveira, 139 S. Ct. 532, 539 (2019) (describing "the time Congress enacted the statute" as the relevant timeframe under the ordinary meaning canon (quoting *Wis. Cent.*, 138 S. Ct. at 2074)). But see Frederick Schauer, Unoriginal Textualism, 90 Geo. Wash. L. Rev. 825, 828 & n.8 (2022) ("If we were dealing with statutes . . . , textualism might be understood as committed to interpretation on the basis of what the relevant statutory language means *now*, not to what that language meant at some point in the past . . . ."). On the challenges of an "originalist" approach to statutory interpretation, see Victoria Nourse, Textualism 3.0: Statutory Interpretation After Justice Scalia, 70 Ala. L. Rev. 667, 676–80 (2019).

[98] See, e.g., Eskridge, supra note 2, at 34 (defining ordinary meaning as "the 'everyday meaning' or the 'commonsense' reading" (citation omitted)); Scalia & Garner, supra note 2, at 69 ("Words are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense."); cf. McBoyle v. United States, 283 U.S. 25, 26 (1931) ("[I]n everyday speech 'vehicle' calls up the picture of a thing moving on land.").

[99] See Victoria F. Nourse, Two Kinds of Plain Meaning, 76 Brook. L. Rev. 997, 1000–01 (2011); Lawrence M. Solan, The New Textualists' New Text, 38 Loy. L.A. L. Rev. 2027, 2039–44 (2005).

[100] Cf. Nix v. Hedden, 149 U.S. 304, 306 (1893) (discussing "whether tomatoes . . . are to be classed as 'vegetables' or as 'fruit' ").

[101] Nourse, supra note 99, at 997 (emphasis omitted).

similar distinction between what he calls a "plain meaning, dictionary approach" and an "ordinary meaning, probabilistic approach."[102]

Second, ordinary for whom? Ordinary meaning depends on the relevant perspective—say, the everyday meaning that words might convey for most speakers of the language or the everyday meaning that those same words might convey to the profession of lawyers and judges engaged in statutory interpretation.[103] Professors Frederick Schauer and David Strauss have used "plain" (as in plain-vanilla) meaning specifically to denote the latter notion of "ordinary *legal* meaning."[104] Justice Barrett has similarly distinguished between "ordinary English speaker" meaning and "ordinary lawyer" meaning.[105]

Third, what is the relevant context? As already noted, ordinary meaning "do[es] not aim for 'literal' interpretations."[106] Thus ordinary meaning under current doctrine should not be confused with a literalist approach conventionally attributed to an earlier "'plain meaning' school."[107] Yet ordinary meaning does not depend on the *actual* context

[102] Solan, supra note 99, at 2060; see also id. at 2030–31 (distinguishing a word's "ordinary meaning," as in "the one that was likely intended," from its "plain meaning, as found in dictionary definitions"—both of which are used "[i]n everyday life"); Lawrence M. Solan & Tammy Gales, Corpus Linguistics as a Tool in Legal Interpretation, 2017 BYU L. Rev. 1311, 1342–43 (further distinguishing "a description of the circumstances in which the term is most likely to be used" from "a description of the circumstances in which members of a relevant speech community *would express comfort in using the term* to describe the circumstances" (emphasis added)).

[103] See Barrett, supra note 23, at 2202, 2209 (noting that textualists sometimes adopt the perspective of an "ordinary lawyer" and other times the perspective of an "ordinary English speaker"); Anita S. Krishnakumar, Metarules for Ordinary Meaning, 134 Harv. L. Rev. F. 167, 170–71 (2021) (emphasizing the significance of whether the "ordinary reader[s]" are "judges, the average person on the street, or some other group of people" (emphasis omitted)); cf. David S. Louk, The Audiences of Statutes, 105 Cornell L. Rev. 137, 168–73, 219–20 (2019) (considering the relevance of audience for claims about "ordinary meaning").

[104] David A. Strauss, Why Plain Meaning?, 72 Notre Dame L. Rev. 1565, 1568 (1997) (specifying that his use of "plain meaning" refers to "ordinary *legal* meaning"); see also Schauer, supra note 47, at 234 n.6 (distinguishing "plain meaning" from "ordinary meaning" to refer to a distinctive legal language shared by a discrete professional community).

[105] Barrett, supra note 23, at 2209.

[106] Niz-Chavez v. Garland, 141 S. Ct. 1474, 1484 (2021); see also Bostock v. Clayton County, 140 S. Ct. 1731, 1750 (2020) (cautioning that the Court "must be attuned to the possibility that a statutory phrase ordinarily bears a different meaning than the terms do when viewed . . . literally").

[107] See, e.g., Manning, supra note 42, at 108 ("Modern textualists, however, are not literalists. In contrast to their early-twentieth-century predecessors in the 'plain meaning' school, they do not claim that interpretation can occur 'within the four corners' of a statute . . . ." (footnote omitted)). But cf. Tara Leigh Grove, The Misunderstood History of Textualism, 117 Nw. U. L. Rev. 1033, 1037 (2023) (challenging the conventional historical

in which statutory words and phrases are communicated. Even assuming statutory drafters intend to use ordinary language, the actual context is that of legislative drafting and interpretation.[108] Ordinary meaning's context is thus a counterfactual one of "ordinary" communication.[109] But given its counterfactual nature, courts may take any range of views on how to construct it, and ordinary meaning textualism has been criticized for "cherry-picking" among contexts.[110]

Among textualists, for instance, fault lines emerged over the relevant contextual indicia in *Bostock v. Clayton County*.[111] Justice Gorsuch's majority opinion allowed for occasionally consulting "contextual clues" such as "the understandings of the law's drafters," but he rejected the relevance of common expectations at the time of enactment about future applications of the statutory text.[112] The dissenters had a broader understanding of the relevant context for ordinary meaning, emphasizing what Justice Alito called "social context"—or background facts about society when a statute was enacted that would inform how someone at the time would have understood the statute and how it would apply.[113] Professor Tara Grove has referred to the Justices' differences as a distinction between Justice Gorsuch's "formalistic textualism" and the dissenters' "flexible textualism."[114]

In addition, the content of ordinary meaning in any given case will also depend on how courts go about discovering it. Dictionaries have been courts' main tool.[115] Yet, among other variances, some dictionaries seek

account of a "literalist" approach to statutory interpretation in the late nineteenth and early twentieth centuries).

[108] See Greenberg, supra note 52, at 122.

[109] See id.

[110] See William N. Eskridge, Jr. & Victoria F. Nourse, Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism, 96 N.Y.U. L. Rev. 1718, 1762 (2021).

[111] 140 S. Ct. 1731.

[112] Id. at 1750.

[113] Id. at 1767 (Alito, J., dissenting); see also id. at 1824–26 (Kavanaugh, J., dissenting) (distinguishing his view of ordinary meaning from what he described as the majority's literalism).

[114] Grove, supra note 34, at 267.

[115] See generally Samuel A. Thumma & Jeffrey L. Kirchmeier, The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries, 47 Buff. L. Rev. 227 (1999) (documenting the Supreme Court's historical use of dictionaries through the end of the twentieth century); Jeffrey L. Kirchmeier & Samuel A. Thumma, Scaling the Lexicon Fortress: The United States Supreme Court's Use of Dictionaries in the Twenty-First Century, 94 Marq. L. Rev. 77 (2010) (expanding the study into the first decade of the twenty-first

to describe how words are used, while others aim to prescribe how words ought to be used.[116] To determine ordinary meaning, judges also rely on their own introspection[117] and the books they read,[118] which pulls ordinary meaning toward "ordinary lawyer" (er, "ordinary judge") meaning.[119] In pursuit of a more quantitative approach, some judges and scholars have turned to corpus linguistics, by which judges analyze corpora (or bodies of textual sources on which lexicographers rely) with search queries.[120] This method is most effective in identifying the distribution of language usage,[121] however, so its use pulls courts toward a more probabilistic understanding of ordinary meaning. Finally, a recent empirical turn to studying how "ordinary people" understand language and interpretation presages a methodology that could account for how

century). But see Abbe R. Gluck & Richard A. Posner, Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals, 131 Harv. L. Rev. 1298, 1317–19 (2018) (finding from a survey of circuit judges that they consulted dictionaries for "everyday words" less than once in 200 statutory interpretation cases).

[116] See Kory Stamper, Word by Word: The Secret Life of Dictionaries 182–88 (2017) (describing the genesis of the more prescriptive *American Heritage Dictionary* as a response to the more descriptive *Webster's Third New International Dictionary*); David Foster Wallace, Tense Present: Democracy, English, and the Wars over Usage, Harper's Mag., Apr. 2001, at 39, 44–57 (contrasting "Prescriptivists" and "Descriptivists"). On the implications for statutory interpretation, see Ellen P. Aprill, The Law of the Word: Dictionary Shopping in the Supreme Court, 30 Ariz. St. L.J. 275, 283–300 (1998); Phillip A. Rubin, Note, War of the Words: How Courts Can Use Dictionaries in Accordance with Textualist Principles, 60 Duke L.J. 167, 177–98 (2010).

[117] See, e.g., Wooden v. United States, 142 S. Ct. 1063, 1069 (2022) (beginning the statutory analysis of the term "occurrence" by "[c]onsider[ing] . . . how an ordinary person . . . might describe [the defendant's] ten burglaries—and how she would not").

[118] See Louk, supra note 103, at 170–71 (observing that the Court's reliance on "the King James Bible, Daniel Defoe's *Robinson Crusoe*, and Herman Melville's *Moby Dick*" in *Muscarello v. United States*, 524 U.S. 125, 129 (1998), invoked sources that were "not especially 'ordinary' at all").

[119] See Eskridge & Nourse, supra note 110, at 1728 ("When Justices—elite lawyers—debate how 'ordinary people' talk, there is a serious risk that their renderings will speak with an upper-class, judicially-inflected accent.").

[120] See Thomas R. Lee & Stephen C. Mouritsen, Judging Ordinary Meaning, 127 Yale L.J. 788, 828–36 (2018).

[121] See Solan & Gales, supra note 102, at 1313.

actual ordinary people understand legal texts.[122] Or a combination of the above methods could be used to "triangulate" ordinary meaning.[123]

In sum, given three open features of ordinary meaning, plus methodological variance, there are at least eight permutations of what a court might mean by "ordinary meaning" today. Those permutations subsume different uses of "plain" (as in plain-vanilla) meaning, including the use of "plain meaning" to denote either a more definitional approach or "ordinary legal meaning." A court's choices about how to resolve these open features as well as its methodology will affect what constitutes ordinary meaning in any given case. But across cases, ordinary meaning corresponds to the same thing: the content of what the statutory text conveys in a linguistic sense.

2. Plain Meaning as Judgment

In contrast to ordinary meaning, plain meaning under its doctrine is not a claim about the content of a statute's linguistic meaning but rather a judgment that whatever the statutory text happens to convey, in context, is clear on its face. As the Supreme Court has put it, a provision's meaning is "plain" if it "cannot be read in any other way."[124] It is, so to speak, plain to view.[125]

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[122] Kevin Tobia, Brian G. Slocum & Victoria Nourse, Progressive Textualism, 110 Geo. L.J. 1437, 1444 (2022) [hereinafter Tobia et al., Progressive Textualism] (developing a methodological theory along these lines); see also Tobia et al., Statutory Interpretation, supra note 11, at 245–74 (empirically testing linguistic canons through a survey of how thousands of people understand language); Kevin Tobia, Brian G. Slocum & Victoria Nourse, Ordinary Meaning and Ordinary People, 171 U. Pa. L. Rev. 365, 393–414 (2023) [hereinafter Tobia et al., Ordinary People] (presenting a series of empirical studies to test whether and how broadly ordinary people understand legal texts to communicate technical meanings); James A. Macleod, Finding Original Public Meaning, 56 Ga. L. Rev. 1, 9 (2021) (developing an "applied-meaning-experiment" methodology that "ask[s] ordinary readers to apply disputed statutory language in context" (emphasis omitted)); cf. Tobia, Testing Ordinary Meaning, supra note 47, at 753–77 (undertaking experimental studies to determine whether leading sources of "ordinary meaning" reflect how judges, law students, and "ordinary people" understand the meaning of legal texts).

[123] See generally Kevin Tobia, Jesse Egbert & Thomas R. Lee, Triangulating Ordinary Meaning, 112 Geo. L.J. Online 23, 24–25 (2023) (arguing that textualists should "triangulat[e] ordinary meaning" through the use of multiple interpretative methods (emphasis omitted)).

[124] United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (1989); see also Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997) ("Our inquiry must cease if the statutory language is unambiguous . . . ."); Caminetti v. United States, 242 U.S. 470, 485 (1917) ("Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise . . . .").

[125] The "plain to view" example is from Baude & Doerfler, supra note 21, at 545.

Whether a term's meaning is plain depends on context because, again, courts today do not read statutes literally.[126] Thus, even in its opinions authored by textualists such as Justice Scalia and Justice Thomas, the Court has instructed: "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."[127]

The context is limited, however, to the text.[128] In other words, the relevant context is the statutory context. It includes the larger phrase,[129] provision,[130] and statute[131] in which the term appears.[132] "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme," the Court has said, "because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."[133]

A judgment that the text's linguistic meaning is "plain" when read within this context may be partly empirical but is ultimately a legal characterization. That is, whether text is clear can always be tested empirically by, for instance, inquiring into whether people agree on its

[126] See, e.g., King v. Burwell, 576 U.S. 473, 486 (2015) ("[W]hen deciding whether the language is plain, we must read the words 'in their context and with a view to their place in the overall statutory scheme.'" (citation omitted)); Yates v. United States, 574 U.S. 528, 537 (2015) (plurality opinion) ("Whether a statutory term is unambiguous . . . does not turn solely on dictionary definitions of its component words."); King v. St. Vincent's Hosp., 502 U.S. 215, 221 (1991) ("[T]he meaning of statutory language, plain or not, depends on context.").

[127] *Robinson*, 519 U.S. at 341 (Thomas, J.); see also Deal v. United States, 508 U.S. 129, 132 (1993) (Scalia, J.) (invoking the "fundamental principle of statutory construction . . . that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used").

[128] The context must also include "minimal information about the text (for example, that it is a legislative text)," Baude & Doerfler, supra note 21, at 540 n.1 (citing John R. Searle, Literal Meaning, 13 Erkenntnis 207 (1978)), and minimal background information about how the legal system and world work.

[129] See, e.g., Bostock v. Clayton County, 140 S. Ct. 1731, 1750 (2020) ("[W]e must be attuned to the possibility that a statutory phrase ordinarily bears a different meaning than the terms do when viewed individually . . . .").

[130] See, e.g., Ark. Dep't of Health & Hum. Servs. v. Ahlborn, 547 U.S. 268, 281 (2006) (interpreting the phrase at issue to be consistent with "the rest of the provision").

[131] See, e.g., *Robinson*, 519 U.S. at 341–43 (considering how other provisions of the statute used the term at issue).

[132] On whether it should include the entire U.S. Code, see Krishnakumar, supra note 16, at 84–90.

[133] United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988) (citations omitted).

meaning. But whom do you ask and how many must agree? Indeed, "plainness" or "clarity" is criticized for having no clear metric,[134] and thus potentially inviting bias.[135] But, as recent scholarship on clarity doctrines has illuminated, whether something is "clear" and thus what "clarity" means depends on one's purposes for asking the question and thus will vary by context.[136] Consider, for example, the rule of lenity, by which ambiguous criminal statutes are construed in favor of defendants.[137] If one thinks the doctrine's purpose is to ensure fair notice of conduct that could incur criminal penalties, then the relevant clarity determination is a prediction about how likely it is that regular people will agree on what behavior the criminal law forbids.[138] But if one instead understands the doctrine's purpose as seeking to avoid convictions that are illegitimate (either because Congress did not in fact forbid the conduct or because the defendant did not have fair notice), then the clarity determination instead depends on the court's certainty that it has correctly construed the statute.[139] Either way, doctrinal purpose determines what plainness requires.

Bottom line: While ordinary meaning and plain meaning are both claims about what the statute would convey in context to a reasonable English user, the claims are categorically different. Ordinary meaning refers to the content of what would be conveyed. Plain meaning refers to a judgment that whatever is conveyed is clear.

[134] See, e.g., Brett M. Kavanaugh, Fixing Statutory Interpretation, 129 Harv. L. Rev. 2118, 2121 (2016) (reviewing Robert A. Katzmann, Judging Statutes (2014)) (raising skepticism about the use of "plainness" as a trigger for doctrines of statutory interpretation); see also Frank H. Easterbrook, The Role of Original Intent in Statutory Construction, 11 Harv. J.L. & Pub. Pol'y 59, 62 (1988) ("There is no metric for clarity.").

[135] See Ward Farnsworth, Dustin F. Guzior & Anup Malani, Ambiguity About Ambiguity: An Empirical Inquiry into Legal Interpretation, 2 J. Legal Analysis 257, 259 (2010) (finding that judgments about textual ambiguity tend to reflect policy preference biases when framed as internal judgments about how the reader understands the text, but not when framed as external judgments about how others might read the text); Lawrence Solan, Terri Rosenblatt & Daniel Osherson, False Consensus Bias in Contract Interpretation, 108 Colum. L. Rev. 1268, 1298 (2008) (relying on psychology studies to suggest that judges are overly confident in their determinations that language is unambiguous).

[136] See Doerfler, supra note 49, at 657–58; Re, supra note 49, at 1505–09.

[137] Staples v. United States, 511 U.S. 600, 619 n.17 (1994).

[138] See Re, supra note 49, at 1548–50.

[139] See Doerfler, supra note 49, at 694–95.

B. Different Functions

The second difference between ordinary meaning and plain meaning concerns their doctrinal functions. The ordinary meaning canon gives a starting point—apply ordinary meaning unless context indicates a technical meaning—but without managing what evidence may bear on whether that default should be set aside. The converse is true of the plain meaning rule. The rule does not privilege any candidate for legal meaning but rather provides an evidentiary rule for ordering the considerations that may bear on deciding among candidates.

1. Ordinary Meaning as Starting Point

The Supreme Court has articulated the ordinary meaning canon in different ways: "begin with,"[140] "look first to,"[141] "assume,"[142] or "typically give"[143] ordinary meaning. The common principle is that if a

[140] Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."); see also Sebelius v. Cloer, 569 U.S. 369, 376 (2013) ("As in any statutory construction case, '[w]e start, of course, with the statutory text,' and proceed from the understanding that '[u]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning.'" (alterations in original) (quoting BP Am. Prod. Co. v. Burton, 549 U.S. 84, 91 (2006))); Richards v. United States, 369 U.S. 1, 9 (1962) ("[W]e must, of course, start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used.").

[141] Moskal v. United States, 498 U.S. 103, 108 (1990) ("'In determining the scope of a statute, we look first to its language,' giving the 'words used' their 'ordinary meaning.'" (citations omitted)); see also Schindler Elevator Corp. v. United States ex rel. Kirk, 563 U.S. 401, 407 (2011) ("Because the statute does not define 'report,' we look first to the word's ordinary meaning."); Wooden v. United States, 142 S. Ct. 1063, 1069 (2022) ("Consider first how an ordinary person (a reporter; a police officer; yes, even a lawyer) might describe [the conduct at issue]. . . . That usage fits the ordinary meaning of [the statutory term at issue].").

[142] INS v. Phinpathya, 464 U.S. 183, 189 (1984) ("This Court has noted on numerous occasions that 'in all cases involving statutory construction, "our starting point must be the language employed by Congress," . . . and we assume "that the legislative purpose is expressed by the ordinary meaning of the words used.'" (quoting Am. Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982))); see also INS v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987) ("With regard to this very statutory scheme, we have considered ourselves bound to '"assume 'that the legislative purpose is expressed by the ordinary meaning of the words used.'"'" (quoting *Phinpathya*, 464 U.S. at 189)).

[143] FCC v. AT&T Inc., 562 U.S. 397, 403 (2011) ("When a statute does not define a term, we typically 'give the phrase its ordinary meaning.'" (quoting Johnson v. United States, 559 U.S. 133, 138 (2010))); see also *BP Am. Prod. Co.*, 549 U.S. at 91 ("Unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning.").

statutory term is undefined by its statute,[144] then a court should begin with ordinary meaning as its "starting point."[145] But ordinary meaning, even when clear, is not necessarily an ending point. Rather, the assumption of ordinary meaning is subject to whether other considerations indicate a different meaning. Nor are those other considerations limited to the text, given that the ordinary meaning canon is not an evidentiary rule that manages permissible sources of meaning.

To see these points, consider *Perrin v. United States*,[146] on which many Supreme Court cases invoking the ordinary meaning canon ultimately rely.[147] *Perrin* concerned whether the term "bribery" in the Travel Act was limited to its common law meaning of bribery of a public official, as opposed to private persons as well.[148] The Court's analysis "beg[a]n" with

[144] See Stenberg v. Carhart, 530 U.S. 914, 942 (2000) ("When a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning.").

[145] Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2364 (2019) ("In statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself.").

[146] 444 U.S. 37, 41–49 (1979).

[147] See, e.g., Delaware v. Pennsylvania, 143 S. Ct. 696, 705 (2023) (gleaning an undefined statutory term's features according to its "ordinary, contemporary, common meaning" (quoting Sandifer v. U.S. Steel Corp., 571 U.S. 220, 227 (2014) (quoting *Perrin*, 444 U.S. at 42))); Sw. Airlines Co. v. Saxon, 142 S. Ct. 1783, 1788 (2022) ("We interpret this [statutory] language according to its 'ordinary, contemporary, common meaning.'" (quoting *Sandifer*, 571 U.S. at 227 (quoting *Perrin*, 444 U.S. at 42))); New Prime Inc. v. Oliveira, 139 S. Ct. 532, 539 (2019) ("[I]t's a 'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute.'" (quoting Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067, 2074 (2018) (quoting *Perrin*, 444 U.S. at 42))); Taniguchi v. Kan Pac. Saipan, 566 U.S. 560, 566 (2012) ("When a term goes undefined in a statute, we give the term its ordinary meaning." (citing Asgrow Seed Co. v. Winterboer, 513 U.S. 179, 187 (1995) (citing FDIC v. Meyer, 510 U.S. 471, 476 (1994) (citing Smith v. United States, 508 U.S. 223, 228 (1993) (citing *Perrin*, 444 U.S. at 42))))); Mohamad v. Palestinian Auth., 566 U.S. 449, 454 (2012) ("Because the [statute at issue] does not define the term [at issue,] we look first to the word's ordinary meaning." (citing FCC v. AT&T, 562 U.S. at 403 (quoting *Johnson*, 559 U.S. at 138 (citing Bailey v. United States, 516 U.S. 137, 144–45 (1995) (quoting *Smith*, 508 U.S. at 228–29 (citing *Perrin*, 444 U.S. at 42)))))).

Several other cases cite either *New Prime* or *Wisconsin Central*, thus also leading back to *Perrin*. See, e.g., BP P.L.C. v. Mayor of Baltimore, 141 S. Ct. 1532, 1537 (2021) ("When called on to interpret a statute, this Court generally seeks to discern and apply the ordinary meaning of its terms at the time of their adoption." (citing Niz-Chavez v. Garland, 141 S. Ct. 1474, 1480 (2021) (citing *Wis. Cent.*, 138 S. Ct. at 2067, 2070))); Bostock v. Clayton County, 140 S. Ct. 1731, 1738 (2020) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." (citing *New Prime*, 139 S. Ct. at 539)).

[148] 444 U.S. at 41.

"the common understanding and meaning of 'bribery'" at the time the Travel Act was enacted, which the Court concluded "had extended beyond its early common law definitions."[149] But rather than end there, the Court also considered the Act's legislative history and its prior precedent construing the Act "[i]n light of the scope of the congressional purpose" to eschew "an unnaturally narrow reading."[150] The Court thus treated the ordinary meaning of "bribery" as a starting point and then considered extratextual sources in deciding whether there were reasons to give it a different meaning.

Indeed, as authority for the ordinary meaning canon, *Perrin* cited *Burns v. Alcala*,[151] which invoked "the axiom that words used in a statute are to be given their ordinary meaning *in the absence of persuasive reasons to the contrary*."[152] The question in *Alcala* was whether the term "dependent child" in a federal welfare statute included an unborn child.[153] The Court thought the "ordinary meaning" of the word "child" was "an individual already born, with an existence separate from its mother."[154] But the Court still separately considered "[t]he purposes of the Act," the administering agency's longstanding interpretation, and possible congressional acquiescence to that administrative practice.[155] The Court thus did not rest on ordinary meaning, to the exclusion of extratextual considerations, but rather considered whether there were "persuasive reasons"[156] to depart from ordinary meaning.

Likewise in the two cases that *Alcala* cited for the ordinary meaning canon[157]: *Banks v. Chicago Grain Trimmers Ass'n*[158] and *Minor v. Mechanics Bank of Alexandria*.[159] Both described the canon as a rebuttable starting point. *Banks* said: "*In the absence of persuasive reasons to the contrary*, we attribute to the words of a statute their ordinary meaning."[160] *Minor* instructed: "The ordinary meaning of the

[149] Id. at 42–45.
[150] Id. at 45–49 (quoting United States v. Nardello, 393 U.S. 286, 296 (1969)).
[151] Id. at 42 (citing Burns v. Alcala, 420 U.S. 575, 580–81 (1975)).
[152] *Alcala*, 420 U.S. at 580–81 (emphasis added).
[153] Id. at 577–78 (quoting 42 U.S.C. § 606(a) (1958)).
[154] Id. at 580–81.
[155] Id. at 581–86.
[156] Id. at 580.
[157] Id. at 581.
[158] 390 U.S. 459 (1968).
[159] 26 U.S. (1 Pet.) 46 (1828).
[160] 390 U.S. at 465 (emphasis added).

language, must be *presumed* to be intended, *unless it would manifestly defeat the object of the provisions*."[161]

Moreover, the Court's analysis in each case also applied the canon like a rebuttable starting point. In *Banks*, the question was whether the term "a mistake in a determination of fact" in a certain workplace compensation statute referred only to clerical errors and facts about an employee's disability but not facts about an employee's liability.[162] The employer "[c]onced[ed] that nothing in the statutory language support[ed] this reading."[163] Yet that concession was not the end of the matter for the Court, which went on to canvass the legislative history before holding that the statute bore its ordinary meaning.[164] In *Minor*, the Court had to decide whether the word "may" in a bank charter granted by Congress was permissive or imperative.[165] The Court determined that the word's "common" meaning is one of "imparting a power . . . and not an obligation."[166] But that ordinary meaning alone was not dispositive because the Court considered whether "any leading object in this charter . . . will be defeated by construing the word 'may' in its common sense."[167]

Not all cases rely on the line of cases leading back to *Perrin*, but those that do not rely on *Perrin* tend to rely on cases that similarly lead back to a precedent that treats the ordinary meaning canon like a starting point: *Richards v. United States*.[168] In tort claims against the federal government, the Federal Tort Claims Act instructs district courts to apply "the law of the place where the act or omission occurred."[169] One of the issues in *Richards* was which state's law should apply when the tortious conduct occurs in one state yet results in an injury in another state.[170] The

[161] 26 U.S. (1 Pet.) at 64 (emphasis added).
[162] 390 U.S. at 462 (quoting 33 U.S.C. § 922 (1964)).
[163] Id.
[164] See id. at 462–65.
[165] 26 U.S. (1 Pet.) at 63–64.
[166] Id. at 64.
[167] Id.
[168] 369 U.S. 1 (1962). For reliance on *Richards*, see, e.g., Schindler Elevator Corp. v. United States ex rel. Kirk, 563 U.S. 401, 407 (2011) ("Because the statute does not define [the term at issue], we look first to the word's ordinary meaning." (citing Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 175–76 (2009) (quoting Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 252 (2004) (quoting Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985) (citing Am. Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982) (quoting *Richards*, 369 U.S. at 9))))))).
[169] 28 U.S.C. § 1346(b).
[170] 369 U.S. at 8.

Court said—without citation or explanation—that "we must, of course, *start with the assumption* that the legislative purpose is expressed by the ordinary meaning of the words used."[171] The Court then held that "the law of the place where the acts of negligence took place[]" governs.[172] It did so not because ordinary meaning (the starting assumption) necessarily controlled but rather because the party disputing that holding offered no alternative meaning of the text, let alone a persuasive one, instead urging an extratextual argument based on legislative history.[173]

Thus, in the traditional articulation of the ordinary meaning canon, once the Court identified what it believed was the "ordinary meaning" of a statutory term, it began its analysis with that ordinary meaning. But the analysis did not end there, no matter how clear the ordinary meaning. Rather, the Court considered other interpretive aids to determine whether there were reasons to set aside the ordinary meaning assumption.

None of the above discussion goes to say that the ordinary meaning canon *requires* consideration of the sources of meaning that these precedents considered, such as legislative history or statutory purposes. There may be independent reasons to disregard those sources. Rather, the point is that the canon itself does not *foreclose* such consideration. The ordinary meaning canon merely provides a starting point.

When to depart from that starting point? If "context requires a different result."[174] As Justice Scalia and Bryan Garner's treatise puts it: "Words are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense."[175] That is hardly a bright-line standard. And sometimes the Supreme Court simply asserts

[171] Id. at 9 (emphasis added).

[172] Id. at 10.

[173] See id. at 9–10.

[174] Gonzales v. Carhart, 550 U.S. 124, 152 (2007) ("In interpreting statutory texts courts use the ordinary meaning of terms unless context requires a different result."); see also, e.g., Sandifer v. U.S. Steel Corp., 571 U.S. 220, 228 (2014) ("Although a statute may make 'a departure from the natural and popular acceptation of language,' nothing in the text or context of [the provision] suggests anything other than the ordinary meaning of [the term at issue]" (citations omitted)); Taniguchi v. Kan Pac. Saipan, Ltd., 566 U.S. 560, 569 (2012) (stating that a non-ordinary meaning "does not control unless the context in which the word appears indicates that it does"); FCC v. AT&T Inc., 562 U.S. 397, 404 (2011) ("[H]ere the context to which [the respondent] points does not dissuade us from the ordinary meaning of [the word at issue]."); Bailey v. Drexel Furniture Co., 259 U.S. 20, 36 (1922) ("The words are to be given their ordinary meaning unless the context shows that they are differently used.").

[175] Scalia & Garner, supra note 2, at 69.

that a statutory term is a "term of art"[176] or has a "technical meaning,"[177] without explaining why that specialized meaning displaces the ordinary meaning.[178]

One way of thinking about the context question is to ask whether the technical meaning is so pervasive in the legal culture that it is reasonable to assume Congress used the term in that pervasive, technical sense. That approach seemed to be at play in *United States v. Hansen*,[179] which concerned a federal statute making it a crime to "encourag[e] or induc[e]" illegal immigration.[180] Are "encourage" and "induce" terms of art that refer narrowly to criminal solicitation and facilitation, which require specific intent that the crime be carried out?[181] Or do they bear their broader, everyday meanings, which encompass forms of influence and inspiration absent any specific intent that a crime be committed?[182] Justice Barrett's majority opinion held that they are terms of art because they have "well-established legal meanings."[183] What makes their technical meanings well established, she reasoned, is that there was a "longstanding and pervasive" usage of those technical meanings at common law and in federal and state criminal codes.[184] To support the proposition that a technical meaning well established in this way should displace ordinary meaning, the opinion cited precedents suggesting that, at least in the criminal law context, courts should presume common law meaning, rather than ordinary meaning.[185] Perhaps the idea is that if a technical meaning

[176] E.g., FAA v. Cooper, 566 U.S. 284, 292 (2012). The Court said the Ninth Circuit had "explained" why, but it had not. The Ninth Circuit merely asserted that "there is no ordinary or plain meaning of the term actual damages because it is a legal term of art." Cooper v. FAA, 622 F.3d 1016, 1028 (9th Cir. 2010), *rev'd*, 566 U.S. 284.

[177] E.g., Van Buren v. United States, 141 S. Ct. 1648, 1657 (2021) ("When interpreting statutes, courts take note of terms that carry 'technical meaning[s].' . . . 'Access' is one such term, long carrying a 'well established' meaning in the 'computational sense'—a meaning that matters when interpreting a statute about computers." (citations omitted)).

[178] But see, e.g., Hall v. Hall, 138 S. Ct. 1118, 1125 (2018) (asserting "[t]his is not a plain meaning case"—as in plain-vanilla meaning—because the term at issue had "a legal lineage stretching back at least" 200 years).

[179] 143 S. Ct. 1932 (2023).

[180] Id. at 1940 (quoting 8 U.S.C. § 1324(a)(1)(A)(iv)).

[181] See id. at 1941.

[182] Id. at 1942.

[183] Id.

[184] Id. at 1941.

[185] Id. at 1942 (first citing Morissette v. United States, 342 U.S. 246, 263 (1952); and then citing United States v. Shabani, 513 U.S. 10, 13–14 (1994)); see also *Morissette*, 342 U.S. at 263 (stating, in a case interpreting a criminal statute, "where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably

is so pervasive in the legal culture, it no longer makes sense to assume, as an empirical matter, that Congress used the everyday meaning instead.

A different way of thinking about whether the context displaces the ordinary meaning assumption is to ask: To whom does the statute speak?[186] Under this approach, the ordinary meaning canon provides an assumption that "a statute is written for ordinary folk."[187] But "[i]f [statutes] are addressed to specialists," as Justice Frankfurter put it, "they must be read by judges with the minds of the specialists."[188] Consider, for example, that some statutes conceive complex regulatory schemes through words and phrases unrecognizable in ordinary communication.[189] And other statutes speak to only a specialized subset of the population. Statutes imposing tariffs, for instance, speak to importers and traders and are thus generally construed according to the technical meanings used by merchants.[190] In fact, the famous case on whether a tomato is a fruit or a vegetable concerned a tariff statute.[191] Although the case is often invoked

knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed"); *Shabani*, 513 U.S. at 13–14 (invoking, while interpreting a criminal statute, "the settled principle of statutory construction that, absent contrary indications, Congress intends to adopt the common law definition of statutory terms"). In *Hansen*, the majority also looked to the statutory history, which—in the majority's view—suggested that Congress adopted the terms "encourage" and "induce" merely as a "streamlined formulation" of earlier statutory language understood to establish a solicitation and facilitation offense. See 143 S. Ct. at 1944.

[186] See Frederick Schauer, Is Law a Technical Language?, 52 San Diego L. Rev. 501, 513 (2015) ("If we are to understand what law is and how it operates, we need to understand to whom it speaks. If it speaks to everyone, . . . then technical language in law is something to be lamented and expunged. But if law is substantially the internal dialogue of a professional culture with public goals but a nonpublic way of achieving them, then seeing law as a largely technical language . . . is the natural corollary."); Louk, supra note 103, at 168–73, 219–20 (arguing that interpretive choices must reflect considerations of statutory audience); Victoria Nourse, Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers, 99 Geo. L.J. 1119, 1132 (2011) ("There would be no purpose to a statute if it did not communicate rules to people . . . . Of course, statutes are also, to varying degrees, directions to those who would apply the statutes and thus are communications to legal experts (lawyers, agencies, and courts). For these reasons, statutory language is often an amalgam of . . . ordinary and legalist meanings." (footnotes omitted)).

[187] Felix Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 536 (1947).

[188] Id.

[189] See, e.g., infra note 299 and accompanying text.

[190] See, e.g., Arthur v. Morrison, 96 U.S. 108, 110–11 (1877) (holding that not all veils made out of silk were "silk veils" under a revenue statute because some were known as "crape veils" and "never understood by merchants and importers to be silk veils").

[191] See Nix v. Hedden, 149 U.S. 304, 305 (1893).

in support of ordinary meaning, it was only because there was "no evidence that the words 'fruit' and 'vegetables' have acquired any special meaning in trade or commerce" that the Supreme Court looked to "their ordinary meaning" to determine how a tomato should be classified under the statute.[192]

Notice that these two different ways of thinking about when technical meaning displaces ordinary meaning could be in tension. An assumption that Congress likely uses terms in criminal statutes according to their well-established common law meanings, for instance, may be inconsistent with an assumption rooted in notice and fairness concerns that criminal statutes speak to ordinary people.

Either way, the key point is that, given the context, a court might not end with ordinary meaning. But, under the ordinary meaning canon, a court at least begins there.

2. Plain Meaning as Evidentiary Rule

The plain meaning rule has a converse function. Unlike the ordinary meaning canon, the plain meaning rule does not place a thumb on the scale for a court's decision among candidates for legal meaning.[193] Rather, the plain meaning rule manages the evidence on which a court may rely to make that decision. The rule tells a court that if the text's meaning is plain, then the court must decide based on the text alone.[194] But if the text is ambiguous, then the court may consider extratextual sources of meaning. Accordingly, the plain meaning rule serves as an evidentiary principle of "lexical ordering"—that is, it "creates a particular kind of priority among considerations that might be used to make a single decision."[195] Specifically, the rule privileges the enacted text and demotes other sources of meaning.[196]

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[192] Id. at 306.

[193] See Dickerson, supra note 50, at 229 ("The [plain meaning] rule tells us to respect meaning but it does so without disclosing what the specific meaning is.").

[194] See supra note 4.

[195] Adam M. Samaha, If the Text Is Clear—Lexical Ordering in Statutory Interpretation, 94 Notre Dame L. Rev. 155, 157, 162 (2018) [hereinafter Samaha, If the Text Is Clear]; see also Adam M. Samaha, Starting with the Text—On Sequencing Effects in Statutory Interpretation and Beyond, 8 J. Legal Analysis 439, 441 n.1 (2016) ("By 'lexical priority' I mean that some source of information cannot be considered unless a more important source is deemed sufficiently unclear . . . .").

[196] Samaha, If the Text Is Clear, supra note 195, at 157.

More precisely, the rule consists of a series of subrules that each forbids a particular consideration if the text's meaning is plain, a point developed by Professors William Baude and Ryan Doerfler.[197] For example, the Supreme Court still considers a statute's purposes, even in its opinions authored by textualists.[198] But it will not do so if the meaning of the text is "clear."[199] Likewise, while the use of the following sources of meaning are not per se forbidden, the Court has said that plain meaning forecloses consideration of legislative history,[200] statutory titles and headings,[201] policy consequences,[202] and lower courts' prior practices.[203]

Crucially, invoking the "plain meaning" of the text can effectively foreclose much more than just extratextual considerations.[204] For instance, based on plain meaning, a court may decline to defer to an agency interpretation under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[205] see no need to use a tiebreaker such as the rule of lenity,[206] or rebuff falling back on a substantive canon like constitutional avoidance.[207] But recourse to these doctrines turns not on

[197] See Baude & Doerfler, supra note 21, at 543–44.

[198] See, e.g., ZF Auto. US, Inc. v. Luxshare, Ltd., 142 S. Ct. 2078, 2088 (2022) (Barrett, J.) (considering that "the animating purpose of § 1782 is comity" in construing the statute).

[199] E.g., Trump v. Hawaii, 138 S. Ct. 2392, 2412 (2018) (rejecting the relevance of purposivist arguments rooted in historical practice and statutory history "[g]iven the clarity of the text").

[200] United States v. Woods, 571 U.S. 31, 46 n.5 (2013) ("Whether or not legislative history is ever relevant, it need not be consulted when, as here, the statutory text is unambiguous.").

[201] See, e.g., Bhd. of R.R. Trainmen v. Balt. & Ohio R.R. Co., 331 U.S. 519, 528–29 (1947) (referring to "the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text").

[202] See, e.g., Bostock v. Clayton County, 140 S. Ct. 1731, 1753 (2020) (stating that a consideration of the "policy consequences" of "apply[ing] the statue's plain language" loses "any pretense of statutory interpretation"); Universal Health Servs., Inc. v. United States, 579 U.S. 176, 192 (2016) ("[P]olicy arguments cannot supersede the clear statutory text.").

[203] See, e.g., Milner v. Dep't of Navy, 562 U.S. 562, 575–76 (2011) (deeming thirty years of a contrary practice by lower courts "immaterial even if true, because we have no warrant to ignore clear statutory language on the ground that other courts have done so").

[204] See, e.g., Samaha, If the Text Is Clear, supra note 195, at 157 (referring to "plain meaning rules that demote without condemning considerations such as . . . deference to administrative agencies[] and the rule of lenity").

[205] See, e.g., Pereira v. Sessions, 138 S. Ct. 2105, 2113–14 (2018) (explaining that "the Court need not resort to *Chevron* deference" given "the plain text of the statute" (citing Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984))).

[206] See, e.g., Ocasio v. United States, 578 U.S. 282, 295 n.8 (2016) (stating that the rule of lenity "applies only when a criminal statute contains a 'grievous ambiguity or uncertainty' ").

[207] See, e.g., Dep't of Hous. & Urb. Dev. v. Rucker, 535 U.S. 125, 134 (2002) (stating that the canon of constitutional avoidance "has no application in the absence of statutory

whether the meaning of the text is plain on its face but rather on the presence of ambiguity after deploying the full toolbox of statutory interpretation.[208] Thus, the specific work that the plainness of the text is doing is still an evidentiary one—foreclosing tools beyond the text.

To sum up, unlike the ordinary meaning canon, the plain meaning rule is not a starting point for interpretation but rather an evidentiary principle of lexical ordering. The rule dictates that the interpretive analysis ends if the text's meaning is clear, but the analysis may otherwise proceed to extratextual considerations.

C. Different Consequences

The different doctrinal functions lead to different consequences for legal meaning. The relationship between ordinary meaning and legal meaning is straightforward. Because the ordinary meaning canon makes ordinary meaning the starting point for interpretation, ordinary meaning will always be a statute's default legal meaning. A court considers all the relevant sources of legal meaning, falling back on ordinary meaning if nothing recommends another reading. The relationship between plain meaning and legal meaning is more complicated because of the uncertain relationship between plain meaning and absurdity.[209]

Often the Court states that judicial inquiry into a statute's legal meaning "ends" with plain meaning.[210] On this view, to call a reading of the statute its "plain meaning" is to declare the legal meaning of the statute. There is nothing more for the court to do—the task of interpreting

ambiguity" (quoting United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 494 (2001))).

[208] See Doerfler, supra note 49, at 662–63. If one believes that only the text is a permissible tool of interpretation, however, then these doctrines could be thought of as plain meaning rules. Cf., e.g., infra note 376 (noting uncertainty over the permissible tools of interpretation under *Chevron*).

[209] Compare Scalia, supra note 84, at 16 (invoking "the rule that when the text of a statute is clear, that is the end of the matter"), with Scalia & Garner, supra note 2, at 436 (defining the plain meaning rule primarily as "[t]he doctrine that if the text of a statute is unambiguous, it should be applied by its terms . . . unless this application leads to an absurdity").

[210] E.g., Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999) ("[O]ur analysis begins with 'the language of the statute.' And where the statutory language provides a clear answer, it ends there as well." (citations omitted)); see also, e.g., Conn. Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992) ("When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" (citation omitted)).

the text's linguistic meaning corresponds perfectly with the task of determining its legal meaning.[211]

Other times, however, the Court says judicial inquiry into a statute's legal meaning only "generally"[212] or "ordinarily"[213] ends with plain meaning, subject to absurdity or some other clear expression of a contrary legislative intention.[214] These cases thus treat plain meaning as the statute's *presumptive* legal meaning.[215] To be sure, it is a very strong

[211] Cf. Solum, supra note 81, at 118 ("Advocates of 'plain meaning' are concerned with interpretation—with the notion that the linguistic meaning of a statute should constrain the range of acceptable constructions.").

[212] Pavelic & LeFlore v. Marvel Ent. Grp., 493 U.S. 120, 123 (1989).

[213] Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 552–53 (1987) ("When statutory language is plain, and nothing in the Act's structure or relationship to other statutes calls into question this plain meaning, that is ordinarily 'the end of the matter.'" (citation omitted)).

[214] See, e.g., Hubbard v. United States, 514 U.S. 695, 703 (1995) ("In the ordinary case, absent any 'indication that doing so would frustrate Congress's clear intention or yield patent absurdity, our obligation is to apply the statute as Congress wrote it.'" (citation omitted)); Ardestani v. INS, 502 U.S. 129, 135–36, (1991) ("The 'strong presumption' that the plain language of the statute expresses congressional intent is rebutted only in 'rare and exceptional circumstances' when a contrary legislative intent is clearly expressed." (citation omitted)); INS v. Cardoza-Fonseca, 480 U.S. 421, 432 n.12 (1987) ("[T]he plain language of this statute appears to settle the question before us. Therefore, we look to the legislative history to determine only whether there is 'clearly expressed legislative intention' contrary to that language, which would require us to question the strong presumption that Congress expresses its intent through the language it chooses." (citation omitted)); id. at 452 (Scalia, J., concurring) (referring to "the venerable principle that if the language of a statute is clear, that language must be given effect—at least in the absence of a patent absurdity"); United States v. Rodgers, 466 U.S. 475, 484 (1984) (declining "to question whether Congress actually intended what the plain language of [the statute] so clearly imports" absent an "absurd or glaringly unjust" result (quoting Sorrells v. United States, 287 U.S. 435, 450 (1932))); Rubin v. United States, 449 U.S. 424, 430 (1981) ("When we find the terms of a statute unambiguous, judicial inquiry is complete, except in rare and exceptional circumstances." (internal quotation marks omitted) (citation omitted)); Caminetti v. United States, 242 U.S. 470, 490 (1917) ("In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent.").

[215] See Dickerson, supra note 50, at 233 ("At best, there should be no plain meaning 'rule,' only a plain meaning 'presumption.'"); John F. Manning, Absurdity Doctrine, 116 Harv. L. Rev. 2388, 2395–400 (2003) (describing "the 'plain meaning' presumption"). I believe that what these scholars call the plain meaning "presumption" is not categorically distinguishable in the case law from what other scholars call the plain meaning "rule." See, e.g., Baude & Doerfler, supra note 21, at 540 (referring to "the 'plain meaning rule'"). For instance, while Professors Baude and Doerfler suggest that "the 'plain meaning rule' invoked in the cases [they] cite" is different than the "presumption" described by Dean Manning's article, id. at 548 n.53 (citing Manning, supra, at 2399), some of the cases cited are the same. Compare, e.g., id. at 544–45 (relying on the "oft-quoted statement in *Connecticut National Bank v Germain*" to define the plain meaning rule), with Manning, supra, at 2398 & n.33 (citing *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992), for the "plain meaning presumption").

presumption, overcome only by an "absurd or glaringly unjust"[216] result in "rare and exceptional circumstances."[217] But the presumption still leaves a step between interpreting linguistic meaning and declaring legal meaning. To use Justice Souter's metaphor, "plain text is the Man of Steel"[218]—almost certain to prevail but still vulnerable to kryptonite.

Arguably, different approaches to plain meaning and absurdity have converged on the first view that plain meaning specifies legal meaning—but for starkly different reasons. On one hand, many textualists have abandoned the absurdity doctrine.[219] At the same time, judges who still think statutes should be construed to avoid absurdity may now view an absurd result as evidence of ambiguity—rather than as in tension with plain meaning—given that plain meaning is now understood to be sensitive to context.[220] For example, in *Bond v. United States*, the majority found that it was "ambigu[ous]" whether a scorned lover's use of toxic chemicals to give her victim a rash fell under the federal statute criminalizing the knowing use of chemical weapons.[221] Although the statute defined a "chemical weapon" to include any "toxic chemical" used for a non-peaceful purpose,[222] the majority reasoned that ambiguity arose

That said, I note that Dean Manning's discussion relies on at least some cases that I would describe as invoking the ordinary meaning canon, rather than the plain meaning rule or presumption. See, e.g., id. ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." (quoting Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985))).

[216] E.g., *Rodgers*, 466 U.S. at 484.

[217] E.g., *Rubin*, 449 U.S. at 430. The "rare and exceptional circumstances" language dates to *Crooks v. Harrelson*, 282 U.S. 55 (1930), in which the Court said that the principle that the "spirit" of a statute can "override [its] literal terms" applies "only under rare and exceptional circumstances." Id. at 59–60 (citing Church of the Holy Trinity v. United States, 143 U.S. 457 (1892)).

[218] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 116 n.13 (1996) (Souter, J., dissenting). While Justice Souter was discussing constitutional interpretation, the context is sufficiently analogous to statutory interpretation.

[219] See Manning, supra note 215, at 2392 (explaining that "a principled understanding of textualism would necessarily entail abandoning the absurdity doctrine").

[220] See Ryan D. Doerfler, The Scrivener's Error, 110 Nw. U. L. Rev. 811, 831–34 (2016); Michael C. Dorf, Why Can't Consequences Create Ambiguity?, Dorf on L. (June 4, 2014), http://www.dorfonlaw.org/2014/06/why-cant-consequences-create-ambiguity.html [https://perma.cc/V3V8-4NZR]; Richard M. Re, The New Holy Trinity, 18 Green Bag 2D 407, 409–15 (2015). All three use *Bond v. United States*, 572 U.S. 844 (2014), as an example.

[221] 572 U.S. at 860; see also id. at 851–53 (discussing the statute and facts).

[222] Id. at 851 (describing 18 U.S.C. § 229).

in part from "the deeply serious consequences of adopting such a boundless reading."[223] Hence, absurdity created ambiguity.[224]

In sum, plain meaning specifies legal meaning arguably subject to absurdity. Ordinary meaning, though, is merely a statute's default legal meaning.

D. Different Justifications

Finally, the reasons for assuming ordinary meaning and enforcing plain meaning are different. Because the context of "ordinary" communication is counterfactual, rationales for privileging ordinary meaning ultimately rely on normative values or counterfactual premises. In contrast, the rationale for enforcing plain meaning is epistemic and rooted in the actual constitutional process for statutory lawmaking.

1. Normative and Counterfactual Justifications for Ordinary Meaning

The Supreme Court has long treated the ordinary meaning canon as simply an "axiom."[225] There does seem to be something self-evident about it. A court must start somewhere. If not with ordinary meaning—and in the absence of any actual authorial intention—where else would a court begin?[226] When it comes to developing any fuller account of why ordinary meaning should be privileged in statutory interpretation, however, courts and commentators appeal to normative values or

[223] Id. at 859–60.

[224] Textualists who reject the absurdity doctrine (at least in its conventional form) may have an analogous understanding of the relationship between a scrivener's error and plain meaning. For example, Justice Gorsuch, while on the Tenth Circuit, argued that courts should correct obvious typographical errors in statutes in order "to enforce the statute's plain meaning," which he understood as what the statute would convey to a reasonable reader in context, as opposed to the literal meaning of the text. Lexington Ins. Co. v. Precision Drilling Co., 830 F.3d 1219, 1223 (10th Cir. 2016) (opinion of Gorsuch, J.); see also Yellen v. Confederated Tribes of the Chehalis Rsrv., 141 S. Ct. 2434, 2460 n.3 (2021) (Gorsuch, J., dissenting) (suggesting that, "[a]t most, [the absurdity doctrine] may serve a linguistic function—capturing circumstances in which a statute's apparent meaning is so 'unthinkable' that any reasonable reader would immediately (1) know that it contains a 'technical or ministerial' mistake, and (2) understand the correct meaning of the text").

[225] Burns v. Alcala, 420 U.S. 575, 580–81 (1975); see also Richards v. United States, 369 U.S. 1, 9 (1962) ("[W]e must, of course, start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used.").

[226] See Strauss, supra note 104, at 1565 ("The basic idea—that the interpretation of a statute begins by considering the ordinary meaning of its words—seems obviously right. Indeed it is hard to see where else one could begin.").

counterfactual premises outside the actual process for statutory lawmaking.

To begin with, ordinary meaning is sometimes justified based on legislative supremacy and courts' duty to be Congress's faithful agents.[227] An older version of this argument was in fact based on Congress's *actual* intentions when enacting statutes. That is, the Court used to sometimes say that ordinary meaning best reflects Congress's actual purposes.[228] Yet it is now "widely accepted" that the concept of a single, psychological congressional intention about the enacted text's meaning is incoherent because a single intention cannot be attributed to a multimember body.[229]

Thus, textualists instead invoke the idea of "'objectified' intent"—that is, the intent that a reasonable legislator would derive from the text according to the conventions of that legislator's linguistic community.[230] And those conventions include in part the ordinary meaning of words—plus colloquial meanings, terms of art, and arguably background conventions with which an ordinary member of Congress would be familiar.[231] But this theory rests on a counterfactual premise. The theory

[227] On this duty, see, e.g., Frank H. Easterbrook, Judges as Honest Agents, 33 Harv. J.L. & Pub. Pol'y 915, 915 (2010) (defending "the proposition that, when implementing statutes, judges should be honest agents of the enacting legislature"); Manning, supra note 215, at 2393–94 & n.18 ("In our constitutional system, it is widely assumed that federal judges must act as Congress's faithful agents.").

[228] See, e.g., *Richards*, 369 U.S. at 9 (assuming that the "legislative purpose is expressed by the ordinary meaning of the words used").

[229] Fallon, supra note 66, at 284–88; see also Manning, supra note 6, at 420–21 & n.8 (attributing this view to textualism); John F. Manning, Inside Congress's Mind, 115 Colum. L. Rev. 1911, 1915–16 (2015) (reaffirming "intent skepticism" in response to intervening empirical studies about legislative drafting practices). But see Marmor, supra note 63, at 14–18 (challenging skepticism of understanding legislation as a collective communicative act); Victoria F. Nourse, Elementary Statutory Interpretation: Rethinking Legislative Intent and History, 55 B.C. L. Rev. 1613, 1615 (2014) (arguing that "Congress has the functional equivalent of intent"—namely, "the context in which Congress has legislated").

[230] Scalia, supra note 84, at 17 ("We look for a sort of 'objectified' intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*."); see also Easterbrook, supra note 134, at 65 ("We should look at the statutory structure and hear the words as they would sound in the mind of a skilled, objectively reasonable user of words."); Manning, supra note 6, at 433, 438 (explicating "objectified intent" as "the notion that a judge should read a statutory text just as any reasonable person conversant with applicable social conventions would read it").

[231] See Manning, supra note 6, at 434–36; Chisom v. Roemer, 501 U.S. 380, 405 (1991) (Scalia, J., dissenting) ("We are to read the words of that [enacted] text as any ordinary Member of Congress would have read them . . . ."). But see Barrett, supra note 15, at 163–64 (arguing that courts should not rely on substantive canons unless the enacted text is ambiguous).

posits that if Congress alone holds the power to make statutory law under Article I, then any interpretive theory that respects legislative supremacy must assume at least that Congress intended to make the law that it made.[232] And that minimal condition of intentionality can be satisfied, on this theory, by interpreting the statute according to the conventions of the legislators' particular legal culture. The assumption is that if any individual legislator wanted to interpret the legislation that the legislator had knowingly helped enact as law, the legislator would turn to those conventions to do so.[233] Hence, the theory asks a counterfactual question: How would an "ordinary Member of Congress,"[234] as opposed to the court, interpret the statute?

In addition, ordinary meaning is often acclaimed with arguments about democracy and the rule of law. The basic intuition, at least on its face, is quite powerful: ordinary meaning is ostensibly legible to the public; and in a democracy, the meaning of laws should be legible to the people for whom they are enacted and by which they are ruled. Justice Scalia famously and colorfully said that the alternative to interpreting statutes according to their ordinary meaning would be "one step worse than the trick the emperor Nero was said to engage in: posting edicts high up on the pillars, so that they could not easily be read."[235]

Justifying ordinary meaning along these lines can refer to one or more of a whole cluster of rationales. Some of those rationales relate to the rule of law's "special claim to preference" in a democracy.[236] The rule of law requires applying the elected Congress's duly enacted laws fairly and predictably.[237] Ordinary meaning may promote these ends if it is fixed and objectively verifiable by providing fair notice of the law and

[232] See Manning, supra note 6, at 427 ("As a matter of political theory, any conception of judging rooted in the related premises of legislative supremacy and the faithful agent theory is, quite simply, unintelligible without an underlying conception of legislative intent. As Joseph Raz has explained '[i]t makes no sense to give any person or body law-making power unless it is assumed that the law they make is the law they intended to make.'" (alteration in original) (quoting Joseph Raz, Intention in Interpretation, *in* The Autonomy of Law 249, 258 (Robert P. George ed., 1996))); Manning, supra note 59, at 100 (similar).

[233] See Manning, supra note 6, at 432–33; Manning, supra note 59, at 100–01.

[234] *Chisom*, 501 U.S. at 405 (Scalia, J., dissenting).

[235] Scalia, supra note 84, at 17; see also Easterbrook, supra note 134, at 60 (arguing that "[s]tatutes are not exercises in private language" but rather "public documents").

[236] Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1176 (1989).

[237] See id. at 1179 (stating that "those subject to the law must have the means of knowing what it prescribes"); Michael S. Moore, A Natural Law Theory of Interpretation, 58 S. Cal. L. Rev. 277, 313–18 (1985).

restraining judicial discretion.[238] A related rationale is that ordinary meaning might promote democratic accountability. If legislators promote their bills to the public according to the ordinary meaning of the bills, for instance, then statutory interpretation that adheres to ordinary meaning might act as a disciplining mechanism to hold legislators accountable to how they sold the bills to the public.[239]

Whether ordinary meaning is in fact more predictable and objective is, of course, a controversial claim. Empirical studies suggest that reliance on ordinary meaning may not constrain ideological preferences.[240] And textual methods could never eliminate legal complexity[241]—which arises, for instance, from legal reasoning's dependence on the continuous consideration of new distinctions (and the high stakes that litigants have

[238] See Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067, 2074 (2018) ("Written laws are meant to be understood and lived by. If a fog of uncertainty surrounded them, if their meaning could shift with the latest judicial whim, the point of reducing them to writing would be lost."); Amy Coney Barrett, Countering the Majoritarian Difficulty, 32 Const. Comment. 61, 82–83 (2017) (book review) ("Textualists interpret statutes in accord with their original public meaning and maintain that their meaning is fixed until lawfully changed."); Scalia, supra note 84, at 17–18 (arguing that if statutes were not read according to their ordinary meaning, then the "*practical*" risk would be judicial manipulation of statutory meaning according to judges' "own objectives and desires").

[239] See Amy Widman, The Rostrum Principle: Why the Boundaries of the Public Forum Matter to Statutory Interpretation, 65 Fla. L. Rev. 1447, 1449 (2013) (citing Jonathan R. Macey, Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model, 86 Colum. L. Rev. 223, 232, 236, 243–44 (1986)); cf. Manning, supra note 6, at 433 ("Ascribing . . . objectified intent to legislators offers an intelligible way for textualists to hold them accountable for whatever law they have passed, whether or not they have *any* actual intent, singly or collectively, respecting its details.").

[240] See Frank B. Cross, The Theory and Practice of Statutory Interpretation 24, 158, 165–66 (2009) (finding that the probability that a given Justice will invoke "plain meaning"—defined as "the public meaning of the enacted text, understood in context"—correlated almost perfectly with the Justice's ideological preference, whether conservative or liberal, across all constitutional civil liberties cases); James J. Brudney & Lawrence Baum, Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras, 55 Wm. & Mary L. Rev. 483, 488–89 (2013) (finding that judges are selective among the dictionary definitions proposed to them by litigants, suggesting that dictionary definitions are susceptible to cherry-picking). These findings have theoretical support. Just because an ordinary meaning approach limits the number of sources of information that are consulted does not necessarily mean that discretion decreases. See Adam M. Samaha, Looking over a Crowd—Do More Interpretive Sources Mean More Discretion?, 92 N.Y.U. L. Rev. 554, 558 (2017).

[241] See Jeremy Waldron, Law and Disagreement 83–84 (1999) (explaining that "to the extent that legislative textuality secures predictability it may do so only if the text is of a certain sort—specific rather than general, univocal rather than ambiguous, determinate rather than vague, and devoid of terms that would leave the citizen at the mercy of an interpreter's judgement or discretion").

to develop them).[242] The idea that ordinary meaning provides fair notice of statutory law, some argue, is thus a fiction.[243]

Even apart from purported rule of law or democratic accountability advantages, though, democracy might justify ordinary meaning interpretation simply because, as Justice Barrett has suggested, courts are agents not of Congress but rather of the people themselves.[244] On this view, ordinary meaning textualism reflects a form of "judicial populism" that "presents *legal text* as the authoritative embodiment of the people's will, and purports to provide the only legitimate interpretive methods to do *the people's* bidding."[245] Even though democratic values underwrite the rule of law,[246] this more direct appeal to democracy is more prominent in more recent textualist theory.[247]

Lastly, ordinary meaning has been justified for practical reasons related to expediency and coordination. For example, Professor Strauss has argued that the best justification for adopting a statutory term's ordinary meaning (in the sense of "ordinary legal meaning")[248] in certain cases may be that a generalist court might simply need "a convenient, easy way to get matters settled" regarding esoteric statutes without investing extensive time or resources in trying to understand the technical intricacies of the statutory regime at issue.[249] Along similar lines, Professor Schauer has described the use of plain-vanilla meaning (as understood by the discrete legal community)[250] in statutory interpretation as a "second-best" solution to a coordination problem among multiple

[242] See Anya Bernstein & Glen Staszewski, Judicial Populism, 106 Minn. L. Rev. 283, 312 (2021) ("Once a statute is enacted, moreover, our legal system works against the possibility that its meaning will be plain. . . . [O]ur adversarial system encourages would-be litigants to see different potentials in the same words, fueling arguments about meaning that lead to periodic judicial elaboration and reinterpretation.").

[243] See Jesse M. Cross, The Fair Notice Fiction, 75 Ala. L. Rev. 487, 489 (2023) (arguing that "fair notice has always been a fiction" because "[t]he reading of statutory text has consistently been a language game accessible only to legal elites").

[244] See Barrett, supra note 23, at 2208–09.

[245] Bernstein & Staszewski, supra note 242, at 309–18 (developing a critical account of how ordinary meaning textualism reflects political populism).

[246] See Scalia, supra note 236, at 1176.

[247] See Tobia et al., Progressive Textualism, supra note 122, at 1448, 1452 (explaining "textualism's modern shift to 'democracy' ").

[248] Strauss, supra note 104, at 1566, 1568 (emphasis omitted).

[249] Id. at 1566.

[250] Schauer, supra note 47, at 234 n.6.

generalist decision-makers in a series of cases that for him all shared one factor: "None of them was interesting."[251]

In sum, ordinary meaning requires normative or counterfactual justification because legislation is not actually an everyday communication. While ordinary meaning is often described as (at least in part) "an *empirical* notion" insofar as it reflects what the text conveys to ordinary people,[252] the *justifications* for privileging ordinary meaning are not.

2. Epistemic Justification for Plain Meaning

In contrast, the rationale for following plain meaning is an epistemic one related to the constitutional process by which statutes are enacted. Because the text is what Congress enacted, the text's clear meaning is the best evidence of the legal norms that Congress promulgated.[253] This point is true even though the constitutional process by which statutes are enacted does not tell us how to interpret the enacted text because interpretations converge when there is a plain meaning. While a court may consider additional information beyond the text when the text's meaning is ambiguous,[254] arguably it may not be worth the cost or risk of bias to consult these other sources when the text is clear.[255]

[251] Id. at 232, 247.

[252] Tobia & Mikhail, supra note 34, at 461 & n.2 (citing sources for this proposition). But see Tara Leigh Grove, Testing Textualism's "Ordinary Meaning," 90 Geo. Wash. L. Rev. 1053, 1063 (2022) (arguing that textualism's "ordinary meaning" is in part a "legal concept" because it depends in part on legal questions about what evidence is relevant and what to make of the text's surrounding structure).

[253] See Caminetti v. United States, 242 U.S. 470, 490 (1917) ("[T]he language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent."); cf. Manning, supra note 215, at 2398 ("[T]he Court's plain meaning presumption is best understood as an evidentiary rule of thumb. Specifically, if a statutory text is clear by virtue of a perceived social consensus about the meaning of its words in context, that conventional meaning may supply the most reliable evidence of what a multimember legislative body collectively 'intended.'").

[254] See Manning, supra note 215, at 2408 ("Textualism does not purport to exclude all consideration of purpose or policy from statutory interpretation. . . . When statutory ambiguity leaves room for the exercise of . . . discretion, textualists believe it is appropriate, if not necessary, for an interpreter to consider a statute's apparent background purpose or policy implications in choosing among competing interpretations.").

[255] See Baude & Doerfler, supra note 21, at 549–65 (exploring rationales for why, under the plain meaning rule, the permissibility of consulting otherwise-relevant information turns conditionally on the facial plainness of the text).

One need not identify as a textualist to think that the clear meaning of the enacted text is the best evidence of what the promulgated law is, but it is hard to see how one could be a textualist without agreeing.[256] Textualists derive the principle from the constitutional process for making statutory law. The Constitution does not expressly state the plain meaning rule (or even directly address statutory interpretation),[257] but textualists infer the rule from two of its provisions: Sections 1 and 7 of Article I.[258] Section 1 provides that "[a]ll legislative [p]owers" are vested in Congress.[259] And Section 7 prescribes the process by which Congress may exercise its legislative powers to make statutory law—namely, approval by both chambers of Congress and presentment of the bill to the President (possibly followed by supermajority approval by both chambers if the President vetoes the bill).[260] The inference that textualists draw from these constitutional provisions is that the enacted text of the bill has primacy in interpreting the law because only that text has gone through the constitutionally mandated process for making statutory law.[261] Textualists posit that other considerations, such as the legislation's purported policy goals, are irrelevant if the text's meaning is plain, given their view that the complex legislative process under Article I protects political minorities through various "veto gates" and thereby promotes

[256] See Grove, supra note 34, at 267 ("Textualists argue that judges must respect the (often messy) compromises reached through the bicameralism and presentment process of Article I, Section 7 by enforcing a clear text, even if it seems in tension with the apparent intent or purpose underlying the statute.").

[257] See John F. Manning, Constitutional Structure and Statutory Formalism, 66 U. Chi. L. Rev. 685, 693 (1999) (noting that "no constitutional provision expressly speaks to statutory interpretation"); Cass R. Sunstein, There Is Nothing That Interpretation Just Is, 30 Const. Comment. 193, 193–94 & n.10 (2015) (arguing that the Constitution does not mandate any particular approach to either constitutional or statutory interpretation).

[258] See generally Manning, supra note 257 (defending statutory formalism, which is made operational through textualism, as an inference from constitutional structure—specifically the vesting of legislative power in Congress under Article I, Section 1 and the bicameralism and presentment requirements under Article I, Section 7); Manning, supra note 15, at 1304–07 (describing modern textualism's increased reliance on formal constitutional arguments predicated on the Legislative Vesting Clause and the bicameralism and presentment requirements).

[259] U.S. Const. art. I, § 1.

[260] Id. § 7.

[261] See, e.g., Easterbrook, supra note 84, at 68–69 ("*The Constitution limits what counts as 'law.'* . . . [T]he structure of our Constitution . . . requires agreement on a *text* by two Houses of Congress and one President. No matter how well we can know the wishes and desires of legislat*ors*, the only way the legislat*ure* issues binding commands is to embed them in a law.").

policy compromises that are borne out in the exact choices made in the text of a bill.[262]

E. Ordinary Meaning Is Not Necessarily Plain Meaning

To sum up the differences, ordinary meaning describes the content of what a statute might convey, and courts assume ordinary meaning (unless the context indicates otherwise) for one of a range of normative or counterfactual reasons. Plain meaning is a judgment that whatever the statute conveys in context is clear on its face, and courts enforce plain meaning regardless of extratextual considerations because the enacted text is the best evidence of the law.

Thus, ordinary meaning (understood in any of its various permutations) is also plain meaning only when it is clear from the text that the context does not indicate a different meaning. That is, the ordinary meaning canon and the plain meaning rule combine as follows:

> Assume ordinary meaning unless context indicates otherwise.
>
> +
>
> Enforce plain meaning regardless of extratextual considerations if text's meaning is clear from the text.
>
> =
>
> Enforce ordinary meaning regardless of extratextual considerations if clear from the text that context does not indicate otherwise.

As a result, ordinary meaning—even when clear—is not necessarily plain meaning.

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[262] Manning, supra note 59, at 99–109; see also Manning, supra note 215, at 2410 ("The legislative process, [modern textualists] argue, is too complex, too path-dependent, and too opaque to allow judges to reconstruct whether Congress would have resolved any particular question differently from the way the clear statutory text resolves that question."); id. at 2417 ("The reality is that a statutory turn of phrase, however awkward its results, may well reflect an unrecorded compromise or the need to craft language broadly or narrowly to clear the varied veto gates encountered along the way to enactment."); Manning, supra note 15, at 1290 (noting that, from a textualist perspective, "lawmaking inevitably involves compromise; that compromise sometimes requires splitting the difference; and that courts risk upsetting a complex bargain among legislative stakeholders if judges rewrite a clear but messy statute to make it more congruent with some asserted background purpose"); id. at 1309–17 (explicating this claim).

1. Clear Ordinary Meaning but No Plain Meaning

A statute can have a clear ordinary meaning yet not a plain meaning if it is ambiguous from the statutory context whether a technical meaning applies. Consider, for example, a revisionist reading of the *King v. Burwell*[263] decision on the Affordable Care Act.[264]Among several interdependent reforms in health insurance markets, the Act requires the creation of a health insurance "Exchange" in each state—that is, a government established market in which individuals can buy private health insurance.[265] Under the Act, each state may set up its own Exchange, but the federal government must do so if a state opts not to.[266] To help make insurance more affordable, the Act also made tax credits available to taxpayers purchasing insurance through "an Exchange established *by the State*."[267] Is the tax credit available to a taxpayer who purchases insurance through an Exchange established *by the federal government*?

All the Justices accepted that the "most natural reading" of an Exchange "established by the State" excluded one established by the federal government.[268] Yet that reading would push individual insurance markets in states with federal exchanges into "death spiral[s]" because of the complicated way in which the credits supported the Act's other reforms.[269]

Hence, the conventional way of understanding the case is as a dispute over whether those practical consequences trumped plain meaning by creating ambiguity.[270] On this view, the majority concluded that consequences trumped plain meaning, and the dissent disagreed.

But a different way to understand the case is to see that Chief Justice Roberts's majority opinion concluded there was no plain meaning (just a clear ordinary meaning) before even turning to the practical consequences. That is, he concluded that the text, "when read in context," was "ambiguous" in a standalone section[271] *before* turning to the

[263] 576 U.S. 473 (2015).

[264] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code).

[265] *King*, 576 U.S. at 479.

[266] Id.

[267] 26 U.S.C. § 36B(a)–(c) (emphasis added).

[268] *King*, 576 U.S. at 476, 488; id. at 499–500 (Scalia, J., dissenting).

[269] Id. at 492–94 (majority opinion).

[270] See, e.g., Re, supra note 220, at 413–15.

[271] *King*, 576 U.S. at 486–92 (Section II.A).

discussion of the potential "death spiral[s]."[272] He observed that giving the phrase "established by the State" its ordinary meaning would create several contradictions elsewhere in the Act.[273] For instance, it would mean "there would be *no* 'qualified individuals' on Federal Exchanges" because the Act defines a "qualified individual" in part as someone who "resides in the State that established the Exchange."[274] "But the Act clearly contemplates that there will be qualified individuals on *every* Exchange."[275] He also observed that the Act appeared written in a hurried fashion, resulting in a statute that "does not reflect the type of care and deliberation that one might expect of such significant legislation."[276] A hurried effort to conceive major regulatory reform through words might result in the use of words in less ordinary fashion. For these reasons, despite the clear ordinary meaning, he deemed the provision's meaning was "ambiguous," and only then turned to considering the practical consequences.[277] In short, it was at least not clear from the text and its statutory context that the Act's ordinary meaning applied.

Nor is *King* a unicorn. In *Yates v. United States*,[278] Justice Ginsburg's plurality opinion noted there was "no doubt" that the ordinary meaning of the term "tangible object" in a provision criminalizing the destruction of such objects included a fish.[279] But the ordinary meaning was "not dispositive" because the statutory context was ambiguous.[280] That context suggested the "provision target[ed] fraud in financial recordkeeping," not "general spoliation."[281] For instance, Justice Ginsburg pointed to the provision's headings (which referred to "records" and "documents")[282] and to the fact that "tangible object" appears as a general term at the end of a list of specific terms that begins "any record [or] document."[283] Justice Kagan's dissent disagreed with how Justice Ginsburg understood the statutory context, but the dissent agreed that the ordinary meaning of

[272] See id. at 494.
[273] See id. at 488.
[274] Id. (quoting 42 U.S.C. § 18032(f)(1)(A)).
[275] Id.
[276] See id. at 491–92.
[277] Id. at 492.
[278] 574 U.S. 528 (2015).
[279] Id. at 531–32 (plurality opinion) (quoting 18 U.S.C. § 1519).
[280] Id. at 537–38.
[281] Id. at 546.
[282] Id. at 539–40.
[283] Id. at 543–46 (quoting 18 U.S.C. § 1519).

"tangible object" controlled only if the context supported that reading.[284] In her view, though, "the text and its context point the same way."[285]

Or consider an example authored by a textualist, Justice Thomas: *Robinson v. Shell Oil Co.*[286] Title VII of the Civil Rights Act of 1964 bars employers from retaliating against their "employees" who have availed themselves of Title VII's anti-discrimination protections.[287] Title VII defines an "employee" as "an individual employed by an employer."[288] The Fourth Circuit found that, "[c]ertainly," the ordinary meaning of "employee" excludes former employees, and the court then excluded "resort to legislative history" on that basis alone under the plain meaning rule.[289] But the Supreme Court reversed.[290] Justice Thomas did not dispute the term's ordinary meaning.[291] Rather, he determined it was "ambiguous" whether the term "employee[]" bears that ordinary meaning given "the broader context of the statute as a whole."[292] He noted the absence of a "temporal qualifier in the statute such as would make plain that [the provision] protects only persons still employed at the time of the retaliation."[293] He also observed that "a number of other provisions in Title VII use the term 'employees' to mean something more inclusive or different from 'current employees.'"[294] Justice Thomas thus found no plain meaning and thus considered, among other things, the interpretive consequences for the "effectiveness of Title VII" and the "purpose of antiretaliation provisions."[295] Again, clear ordinary meaning, but no plain meaning.

To be sure, because ordinary meaning is a fuzzy concept, one might respond that the statutory terms in these cases lacked a clear ordinary meaning on the view that the contexts made it uncertain how ordinary

[284] Id. at 555 (Kagan, J., dissenting).
[285] Id.
[286] 519 U.S. 337, 338 (1997).
[287] 42 U.S.C. § 2000e-3(a).
[288] Id. § 2000e(f).
[289] Robinson v. Shell Oil Co., 70 F.3d 325, 330 (4th Cir. 1995) (en banc), *rev'd*, 519 U.S. 337.
[290] *Robinson*, 519 U.S. at 346.
[291] See id. at 341 ("At first blush, the term 'employees' . . . would seem to refer to those having an existing employment relationship with the employer in question.").
[292] Id.
[293] Id.; see also id. at 342 ("Title VII's definition of 'employee' likewise lacks any temporal qualifier and is consistent with either current or past employment.").
[294] Id. at 342.
[295] Id. at 345–46.

people would read those terms. But that reading requires a very broad understanding of ordinary meaning—simply what the statutory text would convey to a reasonable English user in context. My reading of the cases relies on an understanding of ordinary meaning that narrows the relevant contexts to "ordinary" (or everyday) contexts. That is, I suggest the Court in these cases thought that in any hypothetical, everyday context, ordinary people would understand "an Exchange established by the State" to exclude one established by the federal government, a "tangible object" to include a fish, and an "employee" to exclude someone who did not work for the employer. And for that reason, in each case, there was clear ordinary meaning without plain meaning.

2. Plain Meaning but No Ordinary Meaning

Conversely, a statute might have a plain meaning but not an ordinary meaning. A majority of the Supreme Court reached that conclusion in *Becerra v. Empire Health Foundation*.[296] Justice Kagan's majority opinion recognized that the statute governing Medicare hospital payments was written in "technical" language and "must be read by judges with the minds of the specialists."[297] The rates at which the Medicare program reimburses hospitals depends on each hospital's percentage of low-income patients, and the case concerned the statutory formula for calculating enhanced rates for hospitals serving especially high percentages of low-income patients.[298]

One component of that formula is the Medicare fraction:

> [A] fraction (expressed as a percentage), the numerator of which is the number of [a] hospital's patient days for [the fiscal year] which were made up of patients who (for such days) were entitled to benefits under part A of [Medicare] and were entitled to [supplementary security income] benefits[,] . . . and the denominator of which is the number of such hospital's patient days for such fiscal year which were made up of patients who (for such days) were entitled to benefits under [Medicare] part A.[299]

[296] 142 S. Ct. 2354, 2362 (2022).
[297] Id. at 2362 (quoting Frankfurter, supra note 187, at 536).
[298] Id. at 2359.
[299] Id. at 2360 (quoting 42 U.S.C. § 1395ww(d)(5)(F)(vi)(I)).

The case was about how to count the "patients who (for such days) were *entitled to benefits* under [P]art A" of Medicare.[300] Individuals qualify for Part A if they are over 65 or disabled.[301] The question was whether such individuals count as patients "entitled to benefits under [P]art A" even when the Medicare program was not paying for their hospital treatment because, say, they were covered by private primary insurance.[302]

Justice Kagan observed that the fraction's ordinary meaning "does not exactly leap off the page."[303] Yet her majority found a plain meaning from the statutory text and context, concluding that "entitled to benefits" is "essentially a term of art, used over and over [in the Medicare statute] to mean qualifying . . . for benefits—*i.e.*, being over 65 or disabled."[304] Because that was the interpreting agency's reading, she could have simply deferred under *Chevron*, as some lower courts had.[305] Instead, Justice Kagan found the provision to be "surprisingly clear"[306] from the text alone.

By contrast, Justice Kavanaugh reached a different result through a different text-based method. Although he recognized that the statutory formula for Medicare reimbursements was "mind-numbingly complex,"[307] he found a "straightforward and commonsensical" answer to what the "entitled to benefits" provision means based on its ordinary meaning.[308] In support, he invoked a thought experiment from everyday conversation:

> Suppose that a college says that your academic record entitles you to a scholarship for next year if your family's income is under $60,000, unless you have received another scholarship. And suppose that your family's income is under $60,000, but you have received another scholarship. Are you still entitled to the first scholarship? Of course not. So too here.[309]

[300] 42 U.S.C. § 1395ww(d)(5)(F)(vi)(I) (emphasis added).
[301] *Becerra*, 142 S. Ct. at 2359.
[302] See id. at 2360–61 (quoting 42 U.S.C. § 1395ww(d)(5)(F)(vi)(I)).
[303] Id. at 2362.
[304] Id. (internal quotation marks omitted).
[305] See Cath. Health Initiatives Iowa Corp. v. Sebelius, 718 F.3d 914, 920 (D.C. Cir. 2013); Metro. Hosp. v. U.S. Dep't of Health & Hum. Servs., 712 F.3d 248, 270 (6th Cir. 2013).
[306] *Becerra*, 142 S. Ct. at 2362.
[307] Id. at 2368 (Kavanaugh, J., dissenting).
[308] Id. at 2368–69 (quoting 42 U.S.C. § 1395ww(d)(5)(F)(vi)(I)).
[309] Id. at 2369.

For Justice Kagan, though, such an analogy was out of place given that specialists, not ordinary people, speak the Medicare fraction. There was a plain meaning, but not an ordinary meaning.

III. ORDINARY MEANING AS PLAIN MEANING

In practice, however, ordinary meaning and plain meaning can be conflated. This Part describes how. Section A addresses how the terms are used interchangeably insofar as "plain" can be a synonym for ordinary. This semantic conflation can cause confusion; it can also lead to a doctrinal conflation between the ordinary meaning canon and the plain meaning rule. Section B focuses on cases in which courts say that the ordinary meaning of undefined terms "controls," as if it were plain meaning. Section C shows how courts sometimes treat ordinary meaning like a clear statement rule based on plain meaning precedent. Section D identifies how the Supreme Court (and lower courts following its lead) has recently started to justify ordinary meaning with the rationale for enforcing plain meaning.

A. Plain-Vanilla Meaning

Courts often use "plain meaning" as in plain-vanilla meaning to refer to what, under the ordinary meaning and plain meaning doctrines, is

ordinary meaning.[310] So do litigants[311] and commentators.[312] As seen in Part II, sometimes "plain" (as in plain-vanilla) meaning is used to refer to a specific variant of ordinary meaning, such as "ordinary legal meaning." More often, though, it seems to be used as a pure synonym. In the abstract, using "plain" as a synonym for "ordinary" is fine.

If it is not clear whether someone is using "plain meaning" in the plain-vanilla sense, however, the claimed consequences of that meaning will also be unclear. Is the claim only that the court should *begin* interpretation with that meaning or also that it should *end* there regardless of other considerations?

Consider, for example, *Wooden v. United States*,[313] which concerned the meaning of an "occasion[]" under a federal provision that enhances criminal sentences for prior crimes "committed on occasions different from one another."[314] The defendant's brief began by invoking the

[310] See, e.g., Janko v. Gates, 741 F.3d 136, 140 (D.C. Cir. 2014) ("[I]n the absence of a statutory definition, we give statutory language its 'ordinary or natural meaning.' . . . But 'plain meaning' takes us only so far. Because many words are susceptible of multiple meanings, plain meaning is frequently not so plain." (quoting FDIC v. Meyer, 510 U.S. 471, 476 (1994))); Fulkerson v. Unum Life Ins. Co. of Am., 36 F.4th 678, 681 (6th Cir. 2022) ("[W]e first turn to dictionaries to determine the term's plain meaning."); United States v. Bedi, 15 F.4th 222, 228 (2d Cir. 2021) (considering "the ordinary meaning" of a statutory phrase and referring to the interpretation as "the plain meaning of the words"); Flo & Eddie, Inc. v. Sirius XM Radio, Inc., 9 F.4th 1167, 1173 (9th Cir. 2021) ("Dictionaries and tools of grammatical construction can help determine plain meaning of specific words . . . .").

[311] See, e.g., Brief for Respondents Facebook, Inc. & Google LLC Supporting Petitioner at 23, Twitter, Inc. v. Taamneh, 143 S. Ct. 1206 (2023) (No. 21-1496) (developing a "[p]lain meaning" argument based on the term's "ordinary meaning" from dictionaries); Brief for Respondents at 41, Biden v. Sierra Club, 142 S. Ct. 46 (2021) (No. 20-138) (mem.) (arguing that "[t]he words 'item' and 'denied' have readily ascertainable plain meanings" given their "ordinary meaning[s]" found in a dictionary (quoting FCC v. AT&T Inc., 562 U.S. 397, 403 (2011))); Brief for Respondent Mayor of Baltimore at 25, BP P.L.C. v. Mayor of Baltimore, 141 S. Ct. 1532 (2021) (No. 19-1189) (referring to the "ordinary meaning" of the provision at issue as its "plain-meaning construction"); Brief for the Respondent at 16, U.S. Dep't of Just. v. Comm. on the Judiciary of the U.S. House of Representatives, No. 19-1328 (U.S. Oct. 14, 2020) (stating that the directive to give terms "their plain meaning" requires interpreting them according to "their 'ordinary meaning'" (first quoting Bus. Guides, Inc. v. Chromatic Commc'n Enters., Inc., 498 U.S. 533, 540 (1991); and then quoting Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067, 2070 (2018))).

[312] See, e.g., Stephen C. Mouritsen, Hard Cases and Hard Data: Assessing Corpus Linguistics as an Empirical Path to Plain Meaning, 13 Colum. Sci. & Tech. L. Rev. 156, 164 (2011) (treating "ordinary meaning" and "plain meaning" interchangeably); Brannon, supra note 9, at 21 n.216 (same).

[313] 142 S. Ct. 1063 (2022).

[314] Id. at 1067 (quoting 18 U.S.C. § 924(e)(1)).

"ordinary meaning" canon,[315] yet the rest of the brief referred to the ordinary meaning of "occasion[]" as the word's "plain meaning."[316] The government likewise used "plain meaning" to refer to the definition of "occasion" that it drew from dictionaries and other ordinary meaning sources.[317]

Was each party urging that the term "occasion" could be read only in one way, such that the Court should disregard any aids beyond ordinary meaning? Perhaps that is what they were implying, yet neither brief invoked the plain meaning rule. Moreover, both sides pressed the Court to consider arguments based on the provision's legislative history and purposes, as well as the consequences and administrability of their dueling interpretations.[318] And, at oral argument, counsel for the defendant urged that, at minimum, the rule of lenity should prompt the Court "to choose a plain meaning."[319] He could not have meant a clear meaning, given that the standard for lenity is ambiguity.[320]

In a concurring opinion, Justice Gorsuch, too, at one point referred to the defendant's reading as a "plain meaning" when relying on lenity in its favor.[321] And he, too, was referring to what doctrinally we would call "ordinary meaning"—what he called the "terms an ordinary person can understand."[322]

Justice Kagan's majority opinion, for its part, eschewed any confusion by referring to this reading solely as the "ordinary meaning."[323] Then, because this ordinary meaning was not the plain meaning, she also considered "[s]tatutory history and purpose."[324]

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[315] Brief for the Petitioner at 12, *Wooden*, 142 S. Ct. 1063 (No. 20-5279) (quoting *Wis. Cent. Ltd.*, 138 S. Ct. at 2070).

[316] Id. at 3, 8–9, 18, 25, 30, 44.

[317] Brief for the United States at 15–16, 35, 37, *Wooden*, 142 S. Ct. 1063 (No. 20-5279).

[318] See, e.g., id. at 23–24, 38–45; Brief for the Petitioner, supra note 315, at 20–25, 31–33, 37–44.

[319] Transcript of Oral Argument at 34, *Wooden*, 142 S. Ct. 1063 (No. 20-5279).

[320] See Staples v. United States, 511 U.S. 600, 619 n.17 (1994).

[321] *Wooden*, 142 S. Ct. at 1082 (Gorsuch, J., concurring) (invoking "the right of every person to suffer only those punishments dictated by 'the plain meaning of words'" to support the view that, "[w]here the text of a law mandates punishment for the defendant's conduct in terms an ordinary person can understand, a court's job is to apply it as written" (quoting United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 96 (1820))).

[322] Id.

[323] Id. at 1069, 1071 (majority opinion).

[324] Id. at 1072. Justice Barrett "agree[d] with the Court's analysis of the ordinary meaning of the word 'occasion'" but would not have considered these other sources of meaning. Id. at 1076 (Barrett, J., concurring). Her reason, though, was not that the text's meaning was

Thus, *Wooden* shows how, in legal practice, litigants and judges refer to "ordinary meaning" and "plain meaning" interchangeably. In this case, though, there was no doctrinal conflation between the ordinary meaning and plain meaning doctrines.

A doctrinal conflation arises, however, when calling ordinary meaning "plain meaning" in the plain-vanilla sense leads the court to *treat* ordinary meaning as plain meaning in the sense of clear meaning. Take, for example, a seemingly routine statutory interpretation decision from the Second Circuit called *Spadaro v. U.S. Customs & Border Protection*.[325] The Immigration and Nationality Act protects records "pertaining to the issuance or refusal of visas" from disclosure.[326] Do records related to the *revocation* of a visa fall within this disclosure bar?[327]

Based on the ordinary meaning canon, the court "beg[a]n" with what it called "the plain language of the statute," by which it meant the "ordinary or natural meaning."[328] The court found that the ordinary meaning of records "pertaining to the issuance or refusal of visas" encompassed revocation records.[329] A dictionary defines "[p]ertain" as "[t]o relate directly to," the court reasoned, and "a revocation constitutes a nullification of [an] issuance."[330]

Based on the plain meaning rule,[331] however, the court also "*conclude[d]*" its analysis with this ordinary meaning, "hold[ing] that the plain language of [the provision] encompasses revocation documents."[332] A different court, however, had found a contrary meaning of this provision based on the *expressio unius* linguistic canon, by which expressly including certain things (here, "issuance" and "refusal") implicitly excludes others ("revocation").[333] The *Spadaro* court's view,

unambiguous but rather her view that these other considerations were "weak evidence" of the statute's meaning. Id. at 1079.

[325] 978 F.3d 34, 39 (2d Cir. 2020).

[326] 8 U.S.C. § 1202(f).

[327] *Spadaro*, 978 F.3d at 38–39.

[328] Id. at 46 (quoting United States v. Lockhart, 749 F.3d 148, 152 (2d Cir. 2014)).

[329] Id. (quoting 8 U.S.C. § 1202(f)).

[330] Id. (internal quotation marks omitted) (quoting Pertain, Black's Law Dictionary (11th ed. 2019)).

[331] Id. ("[W]hen the language of a statute is unambiguous, judicial inquiry is complete." (internal quotation marks omitted) (quoting Marvel Characters, Inc. v. Simon, 310 F.3d 280, 290 (2d Cir. 2002))).

[332] Id. (emphasis added).

[333] El Badrawi v. Dep't of Homeland Sec., 583 F. Supp. 2d 285, 311 & n.20 (D. Conn. 2008) (internal quotation marks omitted) (quoting 8 U.S.C. § 1202(f)).

though, was that this canon could be considered "only if the language of the statute is ambiguous," which the court had concluded was not the case.[334] But all the court had found was that the *ordinary* meaning was unambiguous, not that the text's meaning within the context of this statute could not be read in any other way. *Spadaro* thus shows how sometimes when courts (or litigants) use "plain meaning" to refer to ordinary meaning, they are using it in *both* the plain-vanilla and clear-meaning senses—thereby conflating not only the terms but the doctrines.[335]

B. Ordinary Meaning Controls

A second way that courts conflate ordinary meaning and plain meaning is by stating as a rule that a statute's ordinary meaning "controls."[336] The most common variation of this conflation is when courts say that ordinary meaning controls "[i]n the absence of [a statutory] definition."[337]

[334] 978 F.3d at 47.

[335] See also, e.g., United States v. Connolly, 552 F.3d 86, 90 (2d Cir. 2008) ("In this case, the ordinary meaning of 'father' is a male parent, and it is the duty of the court to enforce the plain statutory language." (footnote omitted)); United States v. King, 244 F.3d 736, 740 (9th Cir. 2001) ("We begin with the plain, ordinary meaning of the word. . . . Unless the plain meaning leads to an absurd or unreasonable result, which it does not here, our 'judicial inquiry is at an end.'" (quoting Botosan v. Paul McNally Realty, 216 F.3d 827, 831 (9th Cir. 2000))); Murphy v. Millennium Radio Grp. LLC, 650 F.3d 295, 302 (3d Cir. 2011) ("Because it is presumed that Congress expresses its intent through the ordinary meaning of its language, every exercise of statutory interpretation begins with an examination of the plain language of the statute. . . . When the statute's language is plain, the sole function of the courts—at least where the disposition required by the test is not absurd—is to enforce it according to its terms." (alteration in original) (quoting Alston v. Countrywide Fin. Corp., 585 F.3d 753, 759 (3d Cir. 2009))).

[336] E.g., Durand v. U.S. Dep't of Lab., 662 F.3d 1106, 1109 (9th Cir. 2011) (invoking "the principle that the ordinary meaning of words in a statute controls"); see also, e.g., In re Sherman, 658 F.3d 1009, 1019 (9th Cir. 2011) (Fisher, J., dissenting) ("Causation is not the only possible meaning of 'for,' but it is the most ordinary and natural one and thus the controlling one." (emphasis omitted)); Doe #1 v. Red Roof Inns, Inc., 21 F.4th 714, 723 (11th Cir. 2021) (supporting the proposition that the court "begin[s]" statutory interpretation "with the common and ordinary meaning of the words used in a statute" with the rule that "when the statutory text is unambiguous, this Court should begin and end its analysis with the text's plain meaning"); cf. Macleod, supra note 122, at 5–6 & n.5 (describing "the 'plain meaning' rule" as the proposition that "[w]hen ordinary reader understanding accords with only one side's interpretation—as, for textualists, it usually does—that side's interpretations prevails, full stop" (footnote omitted)).

[337] FDIC v. Meyer, 510 U.S. 471, 476 (1994); see also, e.g., Penobscot Nation v. Frey, 3 F.4th 484, 491 (1st Cir. 2021) (en banc) ("Because 'islands' is an undefined term, we 'construe it in accordance with [its] ordinary meaning.'" (alteration in original) (quoting Octane Fitness, LLC v. ICON Health & Fitness, Inc., 572 U.S. 545, 553 (2014))); Little v. Shell Expl. & Prod. Co., 690 F.3d 282, 288 (5th Cir. 2012) (stating that "[b]ecause 'the federal lawmaking power

Return, for example, to the First Circuit's *Penobscot Nation v. Frey* case from the Introduction. The question, again, was whether the specific "islands" referenced in the statutory definition of the "Penobscot Indian Reservation" included their surrounding waters.[338] The court believed it was bound to construe the term "islands" according to its ordinary (water-exclusive) meaning "[b]ecause 'islands' is an undefined term."[339] The ordinary meaning was thus "[t]he plain meaning of 'island.'"[340]

Yet *Penobscot Nation*—and other cases saying that ordinary meaning controls unless the term is defined—trace their support to *Perrin v. United States*.[341] In *Perrin*, the Supreme Court did indeed say that, "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."[342] But *Perrin* did not simply enforce the ordinary meaning of the undefined term there ("bribery") as the Act's plain meaning regardless of extratextual considerations. Rather, *Perrin* considered legislative history and congressional purpose.[343] Again, the ordinary meaning canon itself does not exclude extratextual considerations. Hence, it is more accurate to say that, in the absence of a

is vested in the legislative, not the judicial, branch of government,'" the court could not go "beyond the 'ordinary or natural meaning' appropriate for undefined terms" (first quoting Nw. Airlines, Inc. v. Transp. Workers Union of Am., 451 U.S 77, 95 (1981); and then quoting *Meyer*, 510 U.S. at 476)); Limited, Inc. v. Comm'r, 286 F.3d 324, 332–35 (6th Cir. 2002) (stating that "[w]hen the text of a statute contains an undefined term, that term receives its ordinary and natural meaning" and that the lower court thus "[e]rred in [e]xamining [l]egislative [h]istory").

[338] *Penobscot Nation*, 3 F.4th at 488–89 (discussing 25 U.S.C. § 1722(i), which incorporates Me. Rev. Stat. Ann. tit. 30, § 6203(8)).

[339] Id. at 491 (citing *Octane Fitness*, 572 U.S. at 553 (quoting Sebelius v. Cloer, 569 U.S. 369, 376 (2013))); see also id. at 512 (Barron, J., concurring in part and dissenting in part) ("[T]he majority concludes, because neither the word 'islands' nor the word 'lands' is defined in [the statutes at issue], the ordinary, water-less meaning of 'islands' and 'lands' controls."). To be sure, the majority considered the statutory context but only to argue that it "reinforced" "[t]he plain meaning of 'island.'" Id. at 492 (majority opinion).

[340] Id. at 492.

[341] For example, *Penobscot Nation* cited *Octane Fitness*, 572 U.S. at 553, which quoted *Cloer*, 569 U.S. at 376. See *Penobscot Nation*, 3 F.4th at 491. In turn, *Cloer*, 569 U.S. at 376, quoted *BP America Production Co. v. Burton*, 549 U.S. 84, 91 (2006), which cited *Perrin v. United States*, 444 U.S. 37, 42 (1979). See also, e.g., *Meyer*, 510 U.S. at 476 (citing Smith v. United States, 508 U.S. 223, 228 (1993) (citing *Perrin*, 444 U.S. at 42)).

[342] *Perrin*, 444 U.S. at 42.

[343] See id. at 45–49.

statutory definition, the Court "normally,"[344] "generally,"[345] or "typically"[346] gives a term its ordinary meaning. As the Court has explained, when a "term . . . is not specifically defined in the . . . statute," a court must "*start with the assumption* that the legislative purpose is expressed by the ordinary meaning of the words used."[347]

C. Ordinary Meaning as Clear Statement Rule

Third, courts sometimes treat the ordinary meaning canon as a clear statement rule based on plain meaning precedent. Specifically, courts sometimes say that they must follow ordinary meaning "absent a clearly expressed legislative intention to the contrary," implying that ordinary meaning controls unless the statute clearly says otherwise.[348]

However, that standard comes from *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, in which the Supreme Court said the statute's "language"—not its ordinary meaning—"must ordinarily be regarded as conclusive."[349] Moreover, the standard "absent a clearly expressed legislative intention to the contrary" referred to whether Congress expressed a contrary intention in the "legislative history"[350] or post-enactment "legislative interpretations"[351]—not in the statutory text.

[344] E.g., *Smith*, 508 U.S. at 228 ("When a word is not defined by statute, we normally construe it in accord with its ordinary or natural reading.").

[345] HollyFrontier Cheyenne Refin., LLC v. Renewable Fuels Ass'n, 141 S. Ct. 2172, 2176 (2021) ("Where Congress does not furnish a definition of its own, we generally seek to afford a statutory term 'its ordinary or natural meaning.'" (citation omitted)).

[346] E.g., FCC v. AT&T, Inc., 562 U.S. 397, 403 (2011) ("When a statute does not define a term, we typically 'give the phrase its ordinary meaning.'" (citation omitted)).

[347] Russello v. United States, 464 U.S. 16, 21 (1983) (emphasis added) (citation omitted).

[348] E.g., Jam v. Int'l Fin. Corp., 139 S. Ct. 759, 769 (2019) (quoting Am. Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982) (quoting Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980))); Eli Lilly & Co. v. Novartis Pharma AG, 37 F.4th 160, 164 (4th Cir. 2022) (quoting United States v. George, 946 F.3d 643, 645 (4th Cir. 2020) (quoting United States v. Bell, 5 F.3d 64, 68 (4th Cir. 1993) (citing United States v. Sheek, 990 F.2d 150, 152 (4th Cir. 1993) (citing *GTE Sylvania*, 447 U.S. at 108)))); United States v. Ye, 588 F.3d 411, 414–15 (7th Cir. 2009) (quoting United States v. Berkos, 543 F.3d 392, 396 (7th Cir. 2008) (quoting United States v. Lock, 466 F.3d 594, 598 (7th Cir. 2006) (quoting *Am. Tobacco Co.*, 456 U.S. at 68 (quoting *GTE Sylvania*, 447 U.S. at 108)))); Minnesota v. Heckler, 718 F.2d 852, 860–61 (8th Cir. 1983) (citing *Am. Tobacco Co.*, 455 U.S. at 68 (quoting *GTE Sylvania*, 447 U.S. at 108)).

[349] *GTE Sylvania*, 447 U.S. at 108.

[350] Id. at 110.

[351] Id. at 116.

Recall from Part II that older cases describing the plain meaning rule sometimes described that rule as a presumption subject to absurdity or some other clear expression of a contrary legislative intention.[352] *GTE Sylvania* is an example. The Court rejected a federal agency's argument that certain statutory notice requirements applicable to the "public disclosure of any information"[353] did not apply to disclosures in response to requests under the Freedom of Information Act. The Court first observed tersely that "[n]othing in the language" of the statute supported that argument.[354] Thus, the "plain meaning" of the enacted text was that the notice requirements applied.[355] However, the Court then reviewed the provision's "legislative history" and post-enactment "legislative interpretations" at length to assess whether there was a clear legislative expression to countermand the language of the statute.[356] Finding none, the Court held that the statutory language controlled.[357]

Thus, contrary to how many cases cite *GTE Sylvania*, that precedent does not support the proposition that ordinary meaning controls absent a clear statement otherwise in the statutory text. Rather, as described by the Fourth Circuit, it supports the following (outdated) proposition: "Statutory construction must begin with the language of the statute and the court should not look beyond that language unless there is ambiguity or unless the statute as literally read would contravene the unambiguously expressed legislative intent *gleaned from the statute's legislative history*."[358] But boilerplate citations in judicial opinions have obscured this point over time.

D. Muddled Justifications

Finally, in recent cases, the Supreme Court has cited the rationale for the plain meaning rule to support giving terms their ordinary meaning. That rationale, again, is that the plain meaning of the text is the best evidence of the law because only the enacted text satisfied Article I's

[352] See supra note 214 and accompanying text.

[353] Consumer Product Safety Act, Pub. L. No. 92-573, § 6(b)(1), 86 Stat. 1207, 1212 (1972) (codified at 15 U.S.C. § 2051(b)(1)).

[354] *GTE Sylvania*, 447 U.S. at 108.

[355] Id. at 109.

[356] See id. at 110–19.

[357] Id. at 124.

[358] United States v. Sheek, 990 F.2d 150, 152–53 (4th Cir. 1993) (emphasis added) (first citing Russello v. United States, 464 U.S. 16, 20–28 (1983); and then citing *GTE Sylvania*, 447 U.S. at 108)).

bicameralism and presentment requirements for statutory lawmaking.[359] In these cases, the Court acknowledged division over how to read the text or was itself sharply divided between readings. Those circumstances might suggest that it at least might not be clear that the statute's meaning was plain on the face of the text.[360] Yet Justice Gorsuch's majority opinions suggested that the Court was duty-bound to enforce ordinary meaning without considering extratextual tools of interpretation. Lower courts have followed suit.[361]

Justice Gorsuch first subtly invoked the bicameralism and presentment requirements to justify ordinary meaning in *Wisconsin Central Ltd. v. United States*.[362] The Railroad Retirement Tax Act of 1937 funds a federalized railroad pension plan with taxes on railroad employees' "compensation"—defined by the statute as "any form of money remuneration."[363] It turns out that many railroad employees are compensated in part with stock options; are those stock options taxable as "money remuneration" under the Act?

Four dissenting Justices, in an opinion by Justice Breyer, found no clear answer in the text.[364] The term "money" could be understood formally and narrowly as a "medium of exchange" or functionally and broadly to include "property or possessions of any kind viewed as convertible into money," such as a paycheck or perhaps a stock option.[365] Contemporaneous dictionaries supported both definitions, and the dissenters found the broader understanding to be intuitive "in the context of compensation," given many workers—including top executives—are

[359] See supra Subsection II.D.2.

[360] See Nourse, supra note 97, at 669 ("[T]he number of 5-4 splits in cases involving textual method deployed by both sides is a sure sign that there is no plain meaning to the text.").

[361] See, e.g., United States v. Smukler, 991 F.3d 472, 482 (3d Cir. 2021) ("[Interpretation] does not invite invention. 'After all, if judges could freely invest old statutory terms with new meanings, we would risk amending legislation outside the "single, finely wrought and exhaustively considered, procedure" the Constitution commands.' Instead, we employ the 'fundamental canon of statutory construction' requiring that we 'interpret the words consistent with their ordinary meaning . . . at the time Congress enacted the statute.'" (citations omitted)); United States v. Jabateh, 974 F.3d 281, 292 (3d Cir. 2020) (similar); Calogero v. Shows, Cali & Walsh, L.L.P., 970 F.3d 576, 582 (5th Cir. 2020) (similar); Wilson v. Safelite Grp., Inc., 930 F.3d 429, 439 (6th Cir. 2019) (Thapar, J., concurring) (similar).

[362] Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067, 2071 (2018).

[363] 26 U.S.C. § 3231(e)(1).

[364] *Wis. Cent. Ltd.*, 138 S. Ct. at 2075–76 (Breyer, J., dissenting).

[365] Id. at 2075–76 (quoting Money, Oxford English Dictionary (1st ed. 1933)).

compensated with stock options.[366] Given textual "ambiguity,"[367] the dissent turned to other interpretive tools—including the purpose of using the word "money" to limit the forms of taxable remuneration,[368] the legislative history,[369] and the statute's structure[370]—to conclude that the statutory term "money remuneration" had the broader meaning under the Act.

The majority, however, concluded that the statutory term "money remuneration" plainly excluded stock options. And it did so, in an opinion by Justice Gorsuch, based on that term's ordinary meaning in the 1930s.[371] Justice Gorsuch acknowledged that the word "money" was "sometimes" used more expansively in ways that could encompass stock options.[372] But he concluded that "that isn't how the term was *ordinarily* used at the time of the Act's adoption (or is even today)."[373] And he said the "broader statutory context points to the same conclusion" because the Internal Revenue Code adopted two years later treated "money" and "stock" differently and a companion statute expressly taxed "*all* remuneration" in contrast to just "money remuneration."[374]

Justice Gorsuch then enforced the ordinary meaning as the plain meaning. He declined to defer to the Internal Revenue Service's contrary interpretation under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* because there was "no ambiguity for the agency to fill."[375] While *Chevron* is arguably not a plain meaning rule (insofar as all "traditional tools of statutory construction" may be considered at step one),[376] Justice Gorsuch declined to consider any of the other tools that

[366] Id. at 2076.
[367] Id.
[368] Id.
[369] Id. at 2077.
[370] Id. at 2077–78.
[371] Id. at 2070–71 (majority opinion).
[372] Id. at 2072 (citing Money, Oxford English Dictionary (1st ed. 1933)).
[373] Id.
[374] Id. at 2071.
[375] Id. at 2074.
[376] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984). What the "traditional tools of statutory construction" include, however, is debatable. See, e.g., Cass R. Sunstein, Law and Administration After *Chevron*, 90 Colum. L. Rev. 2071, 2105 (1990) (discussing the use of canons under *Chevron*); John F. Manning, *Chevron* and Legislative History, 82 Geo. Wash. L. Rev. 1517, 1539–40 (2014) (recognizing that, "as a matter of Supreme Court caselaw, . . . the Court today permits the use of legislative history to resolve indeterminacy under *Chevron* step one," but criticizing this practice in light of changed understandings of the traditional tools of statutory interpretation).

the dissent did. And he rebuked the lower court for having relied in part on "good practical sense" to have held that money included stock.[377] Justice Gorsuch wrote that policy considerations were illegitimate because "[w]ritten laws are meant to be understood and lived by."[378]

Then, after quoting the ordinary meaning canon from *Perrin*—the 1970s Bribery Act case that began with ordinary meaning but also considered legislative history and purpose—Justice Gorsuch wrote: "Congress alone has the institutional competence, democratic legitimacy, and (most importantly) *constitutional authority* to revise statutes in light of new social problems and preferences."[379] The implication is that interpreting a statute according to its less ordinary meaning would be to effectively—and impermissibly—amend the statute outside the constitutional process set forth in Article I that authorizes Congress alone to enact statutes.

Justice Gorsuch made the point more explicitly in his opinion for a unanimous Court in *New Prime Inc. v. Oliveira*,[380] which is now widely cited for the role of ordinary meaning in statutory interpretation.[381] The case concerned a provision in the Federal Arbitration Act of 1925 that exempts certain transportation workers' "contracts of employment" from the Act's domain.[382] The question was whether "contracts of employment" encompasses contracts with independent contractors or just contracts with employees. Lower courts had read the statute both ways.[383] And, to its credit, Justice Gorsuch's opinion acknowledged that, "[t]o many lawyerly ears today, the term 'contracts of employment' might call to mind only agreements between employers and employees."[384] He also acknowledged that a "vanguard" of "early 20th-century legal materials . . . seem to use the term 'contracts of employment' to refer *exclusively* to employer-employee agreements."[385] But he held that the term plainly includes agreements with independent contractors because "most people" in 1925 would have understood "contracts of employment"

[377] *Wis. Cent. Ltd.*, 138 S. Ct. at 2074 (quoting Wis. Cent. Ltd. v. United States, 856 F.3d 490, 492 (7th Cir. 2017)).
[378] Id.
[379] Id. (emphasis added) (citation omitted).
[380] 139 S. Ct. 532, 539 (2019).
[381] See, e.g., supra note 345.
[382] 9 U.S.C. § 1; see *New Prime*, 139 S. Ct. at 537.
[383] *New Prime*, 139 S. Ct. at 536.
[384] Id. at 539.
[385] Id. at 542.

that way.[386] Justice Gorsuch began with the ordinary meaning canon from *Perrin*. "[I]t's a 'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute.'"[387] Justice Gorsuch then wrote: after all, if judges could freely invest old statutory terms with new meanings, we would risk amending legislation outside the "single, finely wrought and exhaustively considered, procedure" the Constitution commands.[388] To support this proposition, Justice Gorsuch cited *INS v. Chadha*, which struck down the one-house legislative veto and is the leading case on "the prescription for legislative action in Art. I, §§ 1, 7"—that is, the constitutional provisions vesting all legislative power in Congress and setting forth the bicameralism and presentment requirements.[389] Justice Gorsuch was thus invoking the rationale for applying the plain meaning of the enacted text to justify giving that text its ordinary meaning.

Justice Gorsuch reiterated this approach in his much higher-profile majority opinion in *Bostock v. Clayton County*.[390] *Bostock* held that Title VII of the Civil Rights Act of 1964 protects against workplace discrimination based on sexual orientation or gender identity.[391] Title VII provides that employers may not "discriminate against any individual . . . because of such individual's . . . sex."[392] The majority relied on the ordinary meaning of "discriminate" (treating differently than others similarly situated) and "because of" (by reason of, even if not the sole or primary reason) in 1964 when Title VII was enacted, while assuming "sex" refers only to biological differences between male and female.[393] Thus, as its interpretive compass, the majority invoked the

[386] See id. at 538–44.

[387] Id. at 539 (quoting Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067, 2074 (2018) (quoting Perrin v. United States, 444 U.S. 37, 42 (1979))).

[388] Id. (quoting INS v. Chadha, 462 U.S. 919, 951 (1983)).

[389] *Chadha*, 462 U.S. at 951.

[390] 140 S. Ct. 1731 (2020).

[391] Id. at 1737.

[392] 42 U.S.C. § 2000e-2(a)(1).

[393] *Bostock*, 140 S. Ct. at 1739–41. While Justice Gorsuch relied on "the ordinary meaning of 'because of,'" he translated that ordinary meaning into what "the language of law" calls "but-for causation." Id. at 1739 (quoting Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 346, 350, 360 (2013) (citing Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009))); see also id. at 1741 ("From the ordinary public meaning of the statute's language at the time of the law's adoption, a straightforward rule emerges: An employer violates Title VII when it intentionally fires an individual employee based in part on sex."). On Justice Gorsuch's reliance on precedent to inform the ordinary meaning of "because of," see Tara Leigh Grove,

canon that "the law's ordinary meaning at the time of enactment usually governs."[394]

Justice Gorsuch's majority opinion again sought to justify the ordinary meaning canon based on the bicameralism and presentment requirements:

> This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives.[395]

In support, Justice Gorsuch cited only *New Prime*.[396]

The majority then justified enforcement of Title VII's ordinary meaning based on what it called Title VII's "plain meaning,"[397] "plain terms,"[398] "plain text,"[399] and "plain statutory command[].'"[400] And, in rebuffing counterarguments based on potential consequences and the purported expectations of Title VII's drafters, the majority invoked the plain meaning rule: "[W]hen the meaning of the statute's terms is plain, our job is at an end."[401] Thus, as Justice Alito's dissent pointed out, the majority made not just an ordinary meaning argument but also a plain meaning argument: "The Court . . . argues, not merely that the terms of

Is Textualism at War with Statutory Precedent?, 102 Tex. L. Rev. (forthcoming 2024) (manuscript at 10–11), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4583510 [https://perma.cc/C46M-2FR5].

[394] *Bostock*, 140 S. Ct. at 1750; see also id. at 1738 ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment.").

[395] Id. at 1738 (citing New Prime Inc. v. Oliveira, 139 S. Ct. 532, 538–39 (2019)); see also Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2208 (2023) (Gorsuch, J., concurring) ("When a party seeks relief under a statute, our task is to apply the law's terms as a reasonable reader would have understood them at the time Congress enacted them. 'After all, only the words on the page constitute the law adopted by Congress and approved by the President.'" (quoting *Bostock*, 140 S. Ct. at 1738)).

[396] *Bostock*, 140 S. Ct. at 1738 (citing *New Prime*, 139 S. Ct. at 538–39).

[397] Id. at 1750.

[398] Id. at 1743, 1748–50, 1752.

[399] Id. at 1751.

[400] Id. at 1754.

[401] Id. at 1749.

Title VII *can* be interpreted that way but that they *cannot reasonably be interpreted any other way*."[402]

The dissenters likewise merged ordinary meaning with plain meaning. They just interpreted the ordinary meaning of Title VII's ban on "discriminat[ion] . . . because of . . . sex" differently.[403]

Justice Alito's dissent argued that, read within the "social context" in which Title VII was enacted, "The *ordinary meaning* of discrimination because of 'sex' was discrimination because of a person's biological sex, not sexual orientation or gender identity."[404] For not enforcing that ordinary meaning, Justice Alito accused the majority of "[u]surping the constitutional authority of the other branches" to enact legislation "in accordance with the requirements in the Constitution (passage in both Houses and presentment to the President . . .)."[405] That is, he invoked the justification for enforcing plain meaning.

In his own dissent, Justice Kavanaugh agreed with Justice Alito's understanding of the statutory phrase's "ordinary meaning" and faulted the majority for instead applying what he called "literal meaning."[406] But, like his colleagues, Justice Kavanaugh then pivoted to an argument for plain meaning. Specifically, he invoked "the Constitution's separation of powers"[407] as the principal reason for his dissent, noting that "the responsibility to amend Title VII belongs to Congress and the President in the legislative process, not to this Court."[408]

In sum, *Bostock* revealed a Court divided over the ordinary meaning of Title VII, which suggests that the meaning of Title VII is at least not plain. Yet all the Justices signed on to opinions justifying the enforcement of *ordinary* meaning based on the rationale for *plain* meaning.

That rationale does not, however, justify ordinary meaning. While the Constitution vests legislative power in Congress and requires that a bill be passed by both chambers of Congress and approved by the President

[402] Id. at 1757 (Alito, J., dissenting); see also id. at 1763 ("The Court's excuse for ignoring everything other than the bare statutory text is that the text is unambiguous and therefore no one can reasonably interpret the text in any way other than the Court does.").

[403] 42 U.S.C. § 2000e-2(a)(1).

[404] *Bostock*, 140 S. Ct. at 1767 (Alito, J., dissenting); see also id. at 1767–73 (discussing the provision's "ordinary meaning").

[405] Id. at 1755.

[406] Id. at 1825–28 (Kavanaugh, J., dissenting); see also id. at 1828–33 (discussing the phrase's ordinary meaning).

[407] Id. at 1823; see also id. at 1824, 1834, 1837 (similarly invoking the Constitution's separation of powers).

[408] Id. at 1822.

(absent a congressional supermajority) to become law, the Constitution is agnostic about *how* to read the text and thus what the content of the law is.[409] Nor is *Chadha*, the sole authority on which *New Prime* (and, by extension, *Bostock*) relied to suggest that Article I's statutory lawmaking requirements somehow mandate ordinary meaning, relevant. *Chadha* had nothing to do with ordinary meaning or even statutory interpretation. Rather, the case concerned the constitutionality of the one-house legislative veto.[410] If the rationale for plain meaning required reading the enacted text according to its ordinary meaning, it would transform the ordinary meaning canon into an (arguably or nearly) irrebuttable rule like the plain meaning rule—at odds with courts' acceptance that statutes sometimes have technical meanings.

In fact, my claim that invoking the bicameralism and presentment requirements is insufficient to justify privileging the ordinary meaning of statutory text is hardly provocative. Dean John Manning has stressed that, while "[t]extualists often rely on the formal claim that bicameralism and presentment mandate textualism because the enacted text alone has survived the legislative process . . . [t]he process alone does not tell us how to interpret the law thus enacted."[411] This point has gotten lost, however, in recent cases blurring ordinary meaning and plain meaning.

IV. WHEN SHOULD ORDINARY MEANING BE PLAIN MEANING?

So, when *should* a court enforce ordinary meaning as plain meaning? That is, when is it clear from the text that the statutory context does not indicate a technical meaning?

[409] See Strauss, supra note 104, at 1573 ("Article I, Section 7 does not say anything explicit about what to do when a dispute arises about what a duly-enacted statute requires or permits."); Sunstein, supra note 257, at 193–94, 194 n.10 (arguing that the Constitution is agnostic about interpretive methods, including with respect to statutory interpretation); Frederick Schauer, An Essay on Constitutional Language, 29 UCLA L. Rev. 797, 812 (1982) ("The view that the text can be interpreted . . . as ordinary language . . . does not follow from the proposition that the text is authoritative."); cf. Erik Encarnacion, Text Is Not Law, 107 Iowa L. Rev. 2027, 2037–38 (2022) (explaining that the enacted text itself is not "law" simply because it has met the bicameralism and presentment requirements; rather, law refers to the norms that Congress promulgates). But cf. Dickerson, supra note 50, at 10–11 (arguing that the Constitution requires statutes to be interpreted at least according to "accepted" means of communication).

[410] See INS v. Chadha, 462 U.S. 919, 923 (1983).

[411] Manning, supra note 42, at 71; see also John F. Manning, Textualism as a Nondelegation Doctrine, 97 Colum L. Rev. 673, 695 (1997) ("Despite their devotion to bicameralism and presentment, textualists hardly believe that every detail of statutory meaning must emerge from the constitutionally-prescribed legislative process.").

The answer can't be always. Despite the Court's recent rhetoric suggesting that ordinary meaning follows from the Constitution's statutory lawmaking requirements, only the most fervent ordinary meaning textualist would deny that statutes at least sometimes use technical language.[412] The classic example: the undefined statutory term "person" includes a corporation.[413]

The answer also can't be never. Even plain language skeptics would accept that there are at least easy cases in which a term has a meaning that is both ordinary and plain.[414] When a criminal sentencing provision refers to "two" prior convictions, "'two' means two, not three."[415] So even Justice Breyer—the recent Court's most attentive Justice to statutory purposes and interpretive consequences[416]—agrees that "[a] statute that says it applies only to 'fish' does not apply to turnips."[417]

But is *any* textual ambiguity in the statutory context enough to conclude that the ordinary meaning is not the plain meaning? Intuitively, one might think so; how could the text's meaning be plain if it can be read in alternative ways?[418] That intuitive reaction prompts even the most

[412] See, e.g., Barrett, supra note 23, at 2202 (noting that textualists accept that "terms are sometimes used in their ordinary and sometimes in their technical sense").

[413] E.g., Cook County v. United States ex rel. Chandler, 538 U.S. 119, 125 (2003) ("While [31 U.S.C.] § 3729 does not define the term 'person,' we have held that its meaning has remained unchanged since the original [False Claims Act] was passed in 1863. There is no doubt that the term then extended to corporations . . . ." (citation omitted)).

[414] Thus, the plain meaning rule is not naïve in all cases even though it requires "a high degree of confidence in people's potential to communicate successfully." Lawrence M. Solan, The Language of Judges 95 (1993). First, plain meaning can exist when categories are not fuzzy. See id. at 98 (noting that "there are many cases in which . . . interpretive difficulties [with the plain language rule] do not arise"). Second, some legal texts are more autonomous than non-legal communication. See Peter M. Tiersma, A Message in a Bottle: Text, Autonomy, and Statutory Interpretation, 76 Tul. L. Rev. 431, 433–34 (2001) (suggesting that the plain meaning rule is "not as naïve as one might think" because, in contrast to regular communication, we can expect certain legal texts to be more "autonomous"—that is, to contain the author's communicative intentions within the text itself).

[415] United States v. Broxmeyer, 699 F.3d 265, 285 (2d Cir. 2012).

[416] See, e.g., Badgerow v. Walters, 142 S. Ct. 1310, 1322 (2022) (Breyer, J., dissenting alone) ("When interpreting a statute, it is often helpful to consider not simply the statute's literal words, but also the statute's purposes and the likely consequences of our interpretation."); see also John F. Manning, *Chevron* and the Reasonable Legislator, 128 Harv. L. Rev. 457, 457 (2014) (calling Justice Breyer "a quintessential Legal Process judge" given his belief that "all law is purposive").

[417] *Badgerow*, 142 S. Ct. at 1327 (Breyer, J., dissenting).

[418] See, e.g., Erwin Chemerinsky, Chemerinsky: The Myth of "Plain Meaning," A.B.A. J. (Oct. 31, 2017, 8:00 AM), http://www.abajournal.com/news/article/chemerinsky_plain_meaning_is_a_myth [https://perma.cc/9Y6F-FDSS].

distinguished textualists to quip at times that the plain meaning rule is "silly"[419] or "essentially sound but largely unhelpful."[420]

The better view, though, is that when to enforce ordinary meaning as plain meaning should depend on the court's purposes for assuming ordinary meaning in the first place. As explained in Part II, whether the text's meaning is "plain" is ultimately a *legal* judgment, even if empirical considerations factor into it.[421] Thus, the "plainness" inquiry should ask whether it is sufficiently plain that the ordinary meaning assumption is not overcome based on whatever *legal* purposes the ordinary meaning canon serves.

It thus matters a great deal why a court assumes ordinary meaning for deciding, as a legal judgment, whether it is "plain enough"[422] that the statutory context does not indicate otherwise. Different rationales for assuming ordinary meaning determine *to whom* it must be plain and *how plain* it must be. The rest of this Part demonstrates this point by reviewing the different rationales for ordinary meaning from Part II.

A. Need for a Starting Point?

Consider the simplest reason a court might assume ordinary meaning: interpretation must begin somewhere, and it has struck courts over the centuries as self-evident to begin with what terms ordinarily mean.[423] Ordinary meaning is thus a default starting point given no apparent alternative.

If a court assumes ordinary meaning for this reason, whether it is plain that the statutory context does not suggest a different meaning depends on the court's internal perspective. After all, the court is defaulting to ordinary meaning simply because of its own interpretive need for some starting point. So, the court needs to ask merely: "Is it plain to me?"

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[419] Easterbrook, supra note 84, at 67 (remarking that "'[p]lain meaning' as a way to understand language is silly" because "[i]n interesting cases, meaning is not 'plain'").

[420] Scalia & Garner, supra note 2, at 436 (stating that the plain meaning rule is "essentially sound but largely unhelpful, since determining what is unambiguous is eminently debatable"). But see INS v. Cardoza-Fonseca, 480 U.S. 421, 452 (1987) (Scalia, J., concurring) (faulting the majority for "an ill-advised deviation from the venerable principle that if the language of a statute is clear, that language must be given effect—at least in the absence of a patent absurdity").

[421] See supra notes 134–39 and accompanying text.

[422] Cf. Doerfler, supra note 49, at 657 (explaining that "[t]o say that a statutory text is 'clear' is, in effect, to say that it is clear *enough* for present purposes").

[423] See supra notes 225–26 and accompanying text.

In turn, the threshold for plainness is a high one because the commitment to ordinary meaning is thin. That is, once any ambiguity from the statutory context suggests an alternative reading of the term, the purpose for assuming ordinary meaning (simply needing *somewhere* to start) is no longer in play. To sum up, if a court begins with ordinary meaning simply as a default, any perceived ambiguity would suggest that the statute's ordinary meaning is not its plain meaning, inviting recourse to other interpretive tools.

B. Legislative Supremacy?

Now up the ante for the commitment to ordinary meaning. Recall that some textualists justify ordinary meaning on a theory of legislative supremacy. That is, to be a faithful agent to Congress, the court should look to the "'objectified' intent" that "any ordinary Member of Congress"[424] would reasonably derive from the text based on ordinary meaning—plus colloquial meanings, terms of art, and arguably background conventions with which the member would be familiar.[425]

What matters on this theory is whether an ordinary member of Congress (at least a reasonable one) would think it plain from the statutory context that a technical meaning does not apply. The inquiry thus shifts the court's gaze externally: How do legislators understand to whom their work product speaks? The threshold for plainness thus considers how likely legislators are to understand their statutes (or at least the category of statute at issue) as speaking in technical language to specialists, rather than in ordinary language to ordinary people. And empirical scholarship raises questions as to whether those involved in the legislative drafting process see themselves involved in an exercise of ordinary meaning.[426] If that's right, then the threshold for determining that the ordinary meaning is the plain meaning may still be high, even if lower than on a theory with a very thin commitment to ordinary meaning.

[424] Chisom v. Roemer, 501 U.S. 380, 405 (1991) (Scalia, J., dissenting).

[425] See supra notes 230–33 and accompanying text.

[426] See Abbe R. Gluck & Lisa Schultz Bressman, Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I, 65 Stan. L. Rev. 901, 938–39 (2013) (finding from survey of congressional staffers involved in legislative drafting that more than half of respondents reported that "dictionaries are never or rarely used when drafting").

C. Democracy and Rule of Law?

Much of textualism's emphasis on ordinary meaning today relies on arguments about democracy and the rule of law. Although the specifics vary, the core principle is that ordinary meaning ensures that laws are predictable and accessible, not posted high up on Nero's pillar.[427] The relevant perspective for the plainness inquiry, then, is that of the ordinary public.

On first glance, it might seem that, on this theory, the threshold for treating ordinary meaning as plain meaning is low. Indeed, much of the recent trend to enforce ordinary meaning as plain meaning seems underwritten by an implicit assumption that, in a democracy, laws must be *directly* legible to the public to ensure predictability and accessibility. But that implicit assumption is both theoretically and empirically questionable.

Theoretically, as Justice Barrett has observed, the mere fact that "specialized and technical" language must be understood through lawyers does not necessarily make the meaning of that language less predictable or accessible (other than having to enlist an intermediary).[428] Justice Barrett explains: "In reading a statute as a lawyer would, a court is not betraying the ordinary people to whom it owes fidelity, but rather employing the perspective of the intermediaries on whom ordinary people rely."[429]

Indeed, recent studies have found that most of the time people in fact expect that statutes are written in technical language and thus defer to experts on how to read them.[430] Even Justice Gorsuch recognizes that it is a "fantasy" to posit that ordinary people actually read statutes.[431] What matters to him though is that, if they need to know what the law is, they can figure it out.[432] And, as Justice Barrett has explained, they can do so using lawyers.[433]

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[427] See supra notes 235–47 and accompanying text.

[428] Barrett, supra note 23, at 2209.

[429] Id. at 2209–10.

[430] See Tobia et al., Ordinary People, supra note 122, at 69.

[431] Wooden v. United States, 142 S. Ct. 1063, 1083 (2022) (Gorsuch, J., concurring).

[432] Id.; cf. McBoyle v. United States, 283 U.S. 25, 27 (1931) ("Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.").

[433] See Barrett, supra note 23, at 2210.

As for whether democracy and the rule of law tend to recommend enforcing ordinary meaning as plain meaning, then, there is a threshold question about how ordinary people understand to whom law speaks. Is it plain that ordinary people will understand the statute to be written in ordinary language, or might ordinary people be uncertain as to whether the statute is written in technical language, requiring the aid of an intermediary? Given the recent empirical work suggesting that ordinary people often, if not most of the time, think statutes are written in technical language, the threshold for plainness is likely higher than simplistic equations between democracy and the direct legibility of law might initially suggest.

D. Expediency and Coordination?

Finally, courts might assume ordinary meaning for purposes of expediency or coordination.[434] In a single-judge decision seeking an expedient solution to a low-stakes or dull statutory question, the relevant perspective for the plainness inquiry is an internal one ("how plain to me?"). If a panel of judges is assuming ordinary meaning as a means of efficiently reaching an agreement, the relevant perspective expands to a judge's colleagues on the panel ("how plain to us?").

Perhaps surprisingly, given an expediency- or coordination-based theory's weak substantive commitment to ordinary meaning, it might be the theory that sets the lowest bar for determining that the ordinary meaning is the plain meaning. After all, the whole point of the theory is to reach an outcome or an agreement at the lowest cost.

Indeed, this theory might be the best way to understand a 5-4 case in the Supreme Court, such as *Bostock*, in which Justice Gorsuch and his more methodologically pluralist colleagues stood on the ordinary meaning of a statute as its plain meaning, despite text-based dissents that would suggest the statute's meaning was at least not plain.[435] Perhaps Justice Gorsuch does not think extratextual considerations such as policy arguments should ever be relevant. Yet it is easier to keep his majority if he says those considerations are irrelevant in the case at hand because the text's meaning is plain, rather than stating that the considerations are categorically illegitimate. Then, on the other side, perhaps more methodologically pluralist Justices go along with Justice Gorsuch in these

[434] See supra notes 248–51 and accompanying text.
[435] See supra notes 390–410 and accompanying text.

cases because they agree with the result and do not think extratextual considerations would change it. So they count to five by signing on to ordinary meaning as plain meaning.

CONCLUSION

Ordinary meaning and plain meaning are among our most fundamental categories of statutory interpretation, yet their relationship is uncertain in practice. My goal has been to understand how these categories relate, not to criticize or defend them.

My central claim has been that ordinary meaning is not necessarily plain meaning. They have different definitions, functions, consequences, and justifications.

As a result, easy ordinary meaning cases can still be hard plain meaning cases. "Islands" ordinarily do not include their surrounding waters,[436] "an Exchange established by the State" ordinarily is not established by the federal government,[437] a "tangible object" ordinarily includes a fish,[438] an "employee" ordinarily excludes someone who does not work for the employer.[439] These are easy ordinary meaning cases. But, within their respective statutory contexts discussed above, is it plain from the text that the ordinary meaning assumption should not give way to a technical meaning? Maybe or maybe not. They are hard plain meaning cases.[440]

On the flip side, there can be plain meaning cases without there even being an ordinary meaning. In ordinary communication, for instance, no one speaks the Medicare fraction. That is, in everyday conversation, an ordinary person would not refer to

> the fraction (expressed as a percentage), the numerator of which is the number of such hospital's patient days for such period which were made up of patients who (for such days) were entitled to benefits under part A of [Medicare] and were entitled to supplementary security income benefits (excluding any State supplementation) . . . , and the denominator of which is the number of such hospital's patient days for

[436] Penobscot Nation v. Frey, 3 F.4th 484, 491 (1st Cir. 2021) (en banc).

[437] King v. Burwell, 576 U.S. 473, 487–88 (2015).

[438] Yates v. United States, 574 U.S. 528, 532 (2015) (plurality opinion).

[439] Robinson v. Shell Oil Co., 70 F.3d 325, 330 (4th Cir. 1995) (en banc).

[440] See Raymond M. Kethledge, Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench, 70 Vand. L. Rev. En Banc 315, 319 (2017) (suggesting "plain meaning" is "a misnomer, precisely because a judge often needs to work hard to determine a statute's meaning").

> such fiscal year which were made up of patients who (for such days) were entitled to benefits under part A of [Medicare].[441]

But if you agree with Justice Kagan that it is "surprisingly clear" from the text and statutory context alone what this technical provision means,[442] then it has a plain meaning.

Clarifying the relationship between ordinary meaning and plain meaning has three important upshots for legal practice. First, courts and litigators should delineate carefully between claims about "ordinary meaning" and "plain meaning." When using "plain" in the plain-vanilla sense, for instance, they should be cognizant and transparent about the fact that they are making a claim about ordinary meaning, not plain (as in clear) meaning. The reason is not that we should all be "snoots,"[443] but rather that ordinary meaning and plain meaning have different interpretive consequences under their respective doctrines.

On the heels of that point, second, courts should ensure they match the correct doctrinal consequences to ordinary meaning and plain meaning, respectively. Start with ordinary meaning and end there, too, by default if the context does not indicate a technical meaning. But ordinary meaning alone does not preclude recourse to extratextual interpretive aids. In contrast, if the text does have a plain meaning, that meaning is the end of the matter, regardless of whether it corresponds with ordinary meaning.

Third, when courts *do* treat ordinary meaning as plain meaning, it should be because it is plain from the statutory context that the term bears its ordinary meaning. How plain and to whom it must be plain should depend on the court's reasons for assuming ordinary meaning because "plainness," at the end of the day, is a legal characterization. Thus, to enforce ordinary meaning as plain meaning, courts must first understand their reasons for assuming ordinary meaning.

In sum, this Article has sought to shine light not on whether to begin with ordinary meaning or on whether to end with plain meaning but rather on the space between.

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[441] 42 U.S.C. § 1395ww(d)(5)(F)(vi)(I).

[442] Becerra v. Empire Health Found., 142 S. Ct. 2354, 2362 (2022).

[443] Wallace, supra note 116, at 2 n.3 (defining "snoot" as "a really extreme usage fanatic").