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Why Plain Meaning

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WHY PLAIN MEANING?

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"In determining the scope of a statute, we look first to its language, giving the words used their ordinary meaning."[1] The Supreme Court says something like this time and again in cases involving the interpretation of a statute.[2] 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. But the justification for this approach is not so obvious. The justification is important, because it may tell us something about how readily we may depart from the ordinary meaning of the statute, and in what direction to move when we do depart from it.

Is the justification for relying on "ordinary" or "plain" meaning (I will treat the two terms as interchangeable) that the ordinary meaning of the language is the best indication of what the legislature intended? Or that, whatever Congress intended, under the Constitution only the plain language has been duly enacted? Or that any other approach gives the judges who interpret the statutes too much discretion? Or that only a plain language approach can adequately discipline the legislature to adopt laws that truly reflect what it is trying to accomplish? All of these justifications have a degree of plausibility, but none of them is entirely satisfactory.

In this essay I will consider another justification, a justification suggested by one of Frederick Schauer's essays. Plain meaning is the place to begin in interpreting statutes, not because the meaning best reflects the legislature's intentions, or for any of the other reasons usually given, but just because the ordinary meaning is an obvious point of agreement in circumstances in which disagreement is too costly. Sometimes it is more important that things be settled than that they be settled right; ordinary meaning provides a way to settle things. The reason to settle them in this way is not that an authoritative body

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1 Moskal v. United States, 498 U.S. 103, 108 (1990).

2 See, for a very recent example, Ingalls Shipbuilding, Inc. v. Director, Office of Workers Compensation Programs, Dep't of Labor, 117 S. Ct. 796, 801 (1997).

enacted the words. It is simply that the words are a convenient, easy way to get matters settled.

Fred Schauer has written so much that is so good, that it does not do him justice to ascribe any single virtue to his work. But his work on interpretation bears Professor Schauer's trademark combination of sophistication and common sense. Sometimes the controversy about the soundness of the "plain meaning" approach to statutory construction becomes a battle of shibboleths. One side insists that plain meaning is a sure guide, ignoring or downplaying the problems that that approach presents; the other side insists that there is no such thing as plain meaning, ignoring the common sense intuition to the contrary.

To his great credit, Schauer has no patience for either position. Of course one cannot determine the "plain meaning" of words without accepting a variety of background assumptions established by the culture (including, in the case of statutes, the political culture). But of course it is also sophomoric to maintain that there is never any such thing as a plain meaning accessible to speakers of the language. If we are going to make progress on issues—issues of interpretation, but also other issues Schauer has discussed over the years, such as free speech—we have to acknowledge the common sense arguments. But we also have to grapple with the problems they raise, free of the pretense that the issues are easy or can be solved by reflex allegiance to familiar positions. That is one of the great lessons that Schauer's work teaches, and it teaches it not just explicitly but, time and again, by example. Schauer's article on interpretation, which puts forward an approach much like the one I am suggesting here, is one among many examples of this.[3]

I. THE SIMPLE CASE

In countless settings, the plain meaning approach is so instinctive that it does not begin to be controversial. If people want to know what the speed limit is, or how many witnesses must sign a will to make it valid, or whether they can build a gas station on a vacant lot, they look at the relevant piece of legislation and read its words. That will almost always be enough to give them their answer. The notion that they should do something other than read the words, and assign them the intuitively obvious meaning, is so alien that it is difficult even to describe what the alternative would be. No one would seriously say, for example, that the words of the controlling statute or ordinance are merely recommendations, a starting point for a discussion about

3 *See* Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231.

whether it makes sense to allow people to drive faster on that stretch of road than the speed limit permits.

It is worth reflecting for a moment on the justification for even this incontestable conclusion. It seems to go along these lines: the statute setting the speed limit was adopted by a legislature that, perhaps because it was elected by the people, is entitled to decide this question. We are (ordinarily at least, leaving aside such issues as civil disobedience) obligated to comply with its decisions. When the legislature makes such a decision, it tells us what its decision is by writing it in the form of a statute and promulgating it as such. The language of the statute therefore reflects what the legislature, whose decisions we are obligated to follow, has decided on this matter.

Even this simple account makes a number of assumptions. Some might question, for example, whether it makes sense to speak of what "the legislature," a collective body, has decided. Only individuals, it might be said, can make decisions. The legislature's supposed decision actually reflects the outcome of some method for aggregating individual choices; to speak of the legislature's "decision" is to treat the legislature as a person, which it is not. Sometimes of course there will be force to this objection. But in many cases there will not be. We can meaningfully say, in many contexts, that a collective body has reached a decision. If we can say—as we comfortably do—that a group of people has decided to go out to lunch together, then in principle we can say that a legislature has decided on a speed limit. It will not always be right to speak of the legislature's collective intentions in this way, but sometimes it will be.

Even apart from that, though, the justification I just gave for the plain meaning approach to statutory construction—what I will call the "simple case" justification—rests on a number of assumptions that are so instinctive that it is hard to make them fully explicit. This is a point that Schauer has made as well as anyone.[4] We assume that the legislature will express its decision by speaking in a certain way, a way that makes an ordinary meaning approach appropriate. There are times when a plain meaning approach to a text is exactly the wrong way to proceed. Some authoritative sources might speak in parables, like parts of the Bible, or in riddles, like the Oracle at Delphi. Some important texts are written ironically, so that they say something like the opposite of what they mean. To interpret those texts according to the plain meaning of the words would be hopelessly obtuse. So even in

4 *See, e.g., id.* at 251; FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 207–08 (1991).

the simple case, the plain meaning approach rests on important understandings about how a legislature behaves.

Moreover, the so-called "ordinary meaning" is not so ordinary. It is the ordinary *legal* meaning—another Schauer point.[5] Terms like "witness," "zoning," and even "speed limit," when used in a legal context, can mean something quite different from what they might mean when used in other contexts. Even in the simple case, we are assuming that the legislature is expressing its decisions in a distinctive legal language. It is the ordinary meaning of the terms in that language that governs.

Once all these assumptions are made—no doubt some others are needed as well—the justification for using plain or ordinary meaning in the simple case does appear to hold up. The problem with the "plain meaning" approach on which the Supreme Court relies so heavily—and which has such vigorous and compelling defenders[6]—is that it is used not just in the simple case. It is used as well in cases in which we cannot say, with any confidence, that the legislature reached any decision on the issue in dispute. The question is whether the justification for the plain meaning approach that works in the simple case can be carried over to those other cases, which are the ones that end up in litigation.

Tennessee Valley Authority v. Hill,[7] one of the most celebrated plain language cases, is an example. *Hill* concerned the Endangered Species Act, which provides, in Section 7, that once the Secretary of the Interior has designated a species as "endangered," "[a]ll other Federal departments and agencies shall . . . tak[e] such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species."[8] The Secretary of the Interior had designated as endangered a fish, apparently otherwise quite undistinguished, known as the snail darter. At the time the snail darter's only known habitat was in a part of the Lower Tennessee River that would have been inundated if the TVA had placed into operation a dam that it had built on the river—a dam that was virtually completely constructed, at the cost of more than $100 million.

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5 *See* Schauer, *supra* note 3, at 234 n.6.

6 *See, e.g.*, Antonin Scalia, *Common-Law Courts in A Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3 (Amy Gutmann et al. eds., 1997).

7 437 U.S. 153 (1978).

8 Endangered Species Act of 1973, § 7, 87 Stat. 884, 892 (1973) (codified as amended at 16 U.S.C. § 1536 (1994)).

The Supreme Court ruled that the dam could not be opened. It stated that "[o]ne would be hard pressed to find a statutory provision whose terms were any plainer than those of § 7 of the Endangered Species Act."[9] That plain statutory language, the Court said, prohibited the TVA from opening the dam. Some passages in the Court's opinion suggested that the Court believed Congress had actually focused on the specific kind of case presented by the snail darter—one in which there was an apparently great disparity between the costs of protecting an endangered species and the importance of the species—and had deliberately decided that protection of the endangered species took priority. If Congress had done so, then *Hill* would resemble what I called the simple case—the text of the statute, read according to its ordinary meaning, expressed a shared legislative understanding on precisely the point in dispute.

In the end, however, the Supreme Court eschewed reliance on the idea that Congress had specifically anticipated this case. The Court said: "It is not for us to speculate, much less act, on whether Congress would have altered its stance had the specific events of this case been anticipated."[10] This is the situation—common in cases that reach litigation—that presents problems for the plain language approach. It is one thing to say that the obligation to comply with the decisions of a democratic (or other authoritative) decisionmaker requires us to follow the plain language approach in the simple case, when that language encodes the decision that was made on the question at issue. It is quite another to say that we should follow that approach when the language cannot plausibly be said to reflect a decision, by the authoritative body, on the point in dispute. In those circumstances, reliance on plain language is open to the charge of being a fetish—of endowing the words with a significance that is not warranted. Much of the intuitive appeal of the plain language approach in statutory interpretation cases, I believe, derives from uncritically extrapolating the logic of the simple case to cases like *Hill*—cases that are surely less common in the world at large, but probably much more common than the simple case in the world of litigation.

II. Plain Language and Legislative Intentions

Most of the justifications commonly given for the plain language approach founder, at least to some extent, on this difficulty. Often, for example, the Supreme Court says that the ordinary meaning of the plain language is the best indication of what the legislature in-

9 *Hill*, 437 U.S. at 173.

10 *Id.* at 185.

tended.[11] Of course, as many have pointed out, the notion of a legislative intention is highly problematic.[12] Intentions can be specified on any number of different levels. (A legislator might vote for a tax reduction in order to return a favor for a colleague, help a constituent, position herself for the next election, squeeze social spending, enhance economic growth, or any combination of those reasons, for example.) In any event, legislators may agree on language even though they all intend different things. But even assuming, as I did in the simple case, that the notion of a legislative intent is coherent and useful, the question arises whether the ordinary meaning of the language is a reliable indication of that intent.

Even when the question in dispute before a court actually did occur to the members of the legislature, or to some number of them, it is far from clear that the plain language will reliably reflect how they wanted to resolve it. Sometimes the language of a particular provision is drafted and considered by the members of the legislature with great care. In such circumstances, it seems plausible to say that the language is the best indication of the legislature's intent. Even so there are problems with this claim. It is unlikely that more than a small percentage of the members of the legislature will actually sit down and participate in drafting the language. One will have to attribute their intentions to their colleagues who voted for the measure. But at least one can say that some members of a legislative body deliberately drafted language with a specific problem in mind, and the other members, acting with full knowledge, adopted that language, and therefore the language in a significant sense reflects the intentions of the legislature.

But litigation seldom arises in such instances. If the members of a legislature foresaw an issue and specifically drafted the language of a statute to resolve that precise issue, then the chances are good that there will be no reasonable grounds for dispute over how the statute should be interpreted when that issue arises. Litigation comes about either because of a failure of foresight by the legislature, or a dispute over just how to characterize the issue that the legislature did foresee, or because the legislature, while perhaps foreseeing the issue, inadver-

11 *See, e.g.*, United States v. Locke, 471 U.S. 84, 95 (1985) ("[D]eference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires us to assume that 'the legislative purpose is expressed by the ordinary meaning of the words used.'") (quoting Richards v. United States, 369 U.S. 1, 9 (1962)).

12 The point has been made many times; for a classic statement, see Max Radin, *Statutory Interpretation*, 43 HARV. L. REV 863, 870–75 (1930).

tently or advertently did not draft language with sufficient clarity to foreclose further dispute.

In *Smith v. United States*,[13] for example, the question was whether exchanging a gun for narcotics constituted "use" of a firearm "during and in relation to . . . [a] drug trafficking crime" within the meaning of a federal statute that imposes an enhanced penalty for such "use."[14] The case is particularly notable, for purposes of the plain language approach, because both the opinion of the Court, by Justice O'Connor, and the dissenting opinion, by Justice Scalia, claimed to follow the ordinary meaning of the plain language of the statute.[15] The Court concluded that bartering a weapon "[s]urely . . . can be described as 'use' within the everyday meaning of that term."[16] Justice Scalia insisted that the majority "does not appear to grasp the distinction between how a word *can be* used and how it *ordinarily is* used."[17]

Whichever side has the better of that argument, one thing seems clear: the statute was not drafted with this case in mind. No responsible drafter who had been asked to write the statute in a way that resolved this issue could claim that the language of the statute does so. Of course sometimes a legislature will draft language deliberately in order to *avoid* resolving an issue.[18] Then, too, it is of course pointless—it is perfectly circular—for the Court to try to resolve the case by treating the plain meaning, as the best evidence of the legislature's intention. (The legislature's intention was to pass the buck to the courts.) Buck-passing is not a likely explanation for *Smith*, however; the issue was just not sufficiently controversial, and Congress's attention was no doubt focused on the core case addressed by the statute, one in which the gun is used as a weapon.

In *Smith*, the only conclusion that can reliably be drawn from the language is that the legislature (or some subgroup of members who were involved in the drafting, or supervised the drafting, or carefully examined the text) did not think about this specific problem. Perhaps one might say that the language, as written, did not strike the members of the legislature as resolving this specific problem in the wrong way; if it had, they would have changed it. Even that assumes that the legislators knew what the language was, scrutinized it care-

13 508 U.S. 223 (1993).

14 18 U.S.C. § 924(c)(1) (1994).

15 *See, e.g.*, *Smith*, 508 U.S. at 228; *id.* at 241–42 (Scalia, J., dissenting).

16 *Id.* at 228.

17 *Id.* at 242 (Scalia, J., dissenting).

18 *See, e.g.*, Landgraf v. USI Film Prod., 511 U.S. 244, 263 (1994) ("[T]he history of the . . . Act conveys the impression that legislators agreed to disagree about whether and to what extent the Act would apply to preenactment conduct.").

fully, and foresaw the cases that might come up. All of those assumptions are probably unrealistic except in very unusual circumstances. Whenever a dispute about the interpretation of a statute is evenly-balanced enough to make a court hesitate about the right answer, it will be a safe bet that either the legislature passed the buck, or it did not focus on the precise issue at stake. Otherwise the language would not be so unclear.

In fact, the matter is even worse than this. Even when Congress does specifically anticipate an issue, plain language may not be a reliable guide to its intentions. The "plain language" approach, in a court, involves more than a quick or casual reading of the statute. It means that every word, indeed every punctuation mark of the statute, will be examined with enormous intensity and care by parties operating in an adversarial setting, often with much at stake. It would not be surprising if lawyers examining a statute in those circumstances were able to find "meanings" that wholly escaped even a relatively careful legislative drafter.

The problem is one of a difference in incentives. The parties to litigation are focused on one specific interpretive issue. The stakes will often be very large; in general, they have to be large, or it would not make sense for the parties to carry their dispute into court. A great deal of talent and energy will be directed to squeezing every last ounce of "plain meaning" out of the language in question. Legislative drafters will seldom—very seldom—have an incentive to devote so much energy to scrutinizing the possible interpretation of statutory language. They will draft the language with care, but not with so much care that they have anticipated every possible interpretation of the language that a highly-motivated team of lawyers and judges might come up with over the course of several years' litigation. When the judicial inquiry into "plain meaning" is so much more intensive than the legislative inquiry, the judicial inquiry will often be a bad vehicle for discovering the understandings that the legislature had.

III. Does the Constitution Require the Plain Meaning Approach?

A second reason commonly given for relying on the ordinary meaning of a statute is a more formal one. Justice Scalia, who has vigorously and effectively criticized the notion that the plain meaning encodes the legislature's intentions, nonetheless is, of course, a strong proponent of the plain meaning approach, for a different reason: "The text is the law, and it is the text that must be observed. . . . A statute . . . has a claim to our attention simply because Article I, sec-

tion 7 of the Constitution provides that since it has been passed by the prescribed majority . . . it is the law."[19]

Of course it is true that the text passed by both houses of Congress and signed by the President is the law, under Article I, Section 7. But 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. Examining the ordinary meaning is only one possible approach to resolving such a dispute. One might alternatively look to the legislative history, or adopt an interpretation that promotes the statute's apparent purposes. Or theoretically, as some Legal Realists suggest, a judge might, in case of any ambiguity, disregard any indicia of legislative intent and simply interpret the statute in a way that promoted what the judge thought was the best policy, all things considered.[20] Few would endorse that last approach, perhaps, but not because Article I, Section 7 specifically precludes it. In order to choose among these various approaches, one must do more than simply point to Article I, Section 7.

Here again, the argument for the plain language approach seems to be based on an unwarranted extrapolation from the simple case I described above. Recall that, in order to explain why we rely on the ordinary meaning of the words in the simple case, one has to invoke a number of assumptions—that the legislature does not speak in riddles, that it relies on the specialized legal meanings of words, and so on. We also had to rely on the assumption that the legislature has the authority to make certain decisions, and that its enactments are binding, not merely hortatory or a starting point for further consideration of the appropriate course of action. These assumptions are surely correct, but they are not spelled out in Article I, Section 7. That is, even in the simple case, Article I, Section 7, standing alone, does not tell us how to interpret a statute. It follows that it does not tell us what to do when there is a dispute about the proper interpretation of a statute.

Justice Scalia, in his latest detailed discussion of the plain meaning approach, effectively concedes this point, perhaps without recognizing that he has. Justice Scalia acknowledges that the plain meaning is not always decisive. He says that he would make allowances for "'scrivener's error,' where on the very face of the statute it is clear to

19 Scalia, *supra* note 6, at 22, 35; see also LAWRENCE H. TRIBE, *Comment*, *in* A MATTER OF INTERPRETATION *supra* note 6, at 65.

20 *See* Radin, *supra* note 12.

the reader that a mistake of expression (rather than of legislative wisdom) has been made."[21] This is surely a sensible approach.

But under Article I, Section 7, the statute that was enacted is the statute as written, scrivener's error and all. Nothing in Article I, Section 7 specifically authorizes a judge to correct scriveners' errors. The authority to do so must derive from an assumption like the others that we make. If Article I, Section 7 permits courts to depart from the ordinary meaning of the words Congress enacted in order to correct a scrivener's error, why does it not permit such a departure for other reasons as well? There may be answers, but a more elaborate argument is needed.

IV. PLAIN MEANING AS A PENALTY DEFAULT RULE

A third justification for the plain language approach borrows from a notion used in the law of contracts, another area, of course, where the interpretation of a text is at issue. This is the notion of a "penalty default rule." A default rule is a rule that supplies the meaning of a contract term that the parties have not specified. One approach to determining what the default rules should be is to choose a rule that best captures what the parties would have agreed to, had they addressed the issue. The idea behind a penalty default rule, however, is not to capture the parties' likely intentions, but to specify a default rule that is so unattractive to the parties that they will have an incentive to avoid its application by specifying their intentions.[22]

The plain language approach might be seen as a penalty default. As I have said, in a case that the legislature probably did not consider, the ordinary meaning of the language is not especially likely to be a good guide to what the legislature actually wanted to do. But the "penalty default" justification does not assume that the language accurately reflects the legislature's intentions. Rather, the idea is that the legislature, knowing that the courts will interpret the statute according to its plain language—no matter what conflicting indications of legislative intent there might be—will take special care to be sure that the plain language reflects its intentions. The plain language approach therefore serves the function of disciplining the legislature so that it expresses its intentions directly in the language of the statute

21 Scalia, *supra* note 6, at 20. Justice Scalia applied this doctrine in *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring).

22 *See* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989); Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941) (calling such a default rule a "formality").

and does not depend on the courts to clean up ambiguous or otherwise ill-drafted statutes.

The use of a penalty default rule, in the interpretation of either a statute or a contract, obviously depends on a weighing of costs and benefits. Someone who defends the plain language approach on penalty default grounds is saying, in effect, that she is willing to risk interpreting the statute in a way of which the legislature would disapprove. That is the whole idea of a penalty default: to do something that the legislature will find unattractive, so as to give it an incentive to be more precise or explicit in the future. This cost is offset, according to advocates of this approach, by the benefit—which is that the legislature, in the future, will draft more carefully, thus reducing both the number of difficult cases of statutory interpretation and the chance that in those future cases the court will misunderstand the decision that the legislature made.

The principal problem with this approach is that it is not clear why we should assume that the benefits will outweigh the undoubted costs. No doubt some disputes about statutory construction, with their attendant costs of litigation and risks of erroneous decision, could be averted if the legislative drafters were more careful or used more effort to foresee the situations that might arise under the statute. But sometimes the costs of making the plain language specify the result the legislature desires will be very great. Changes in circumstances may be difficult or impossible to foresee. Drafting to cover every possible contingency may simply be too time-consuming. In these circumstances, applying a penalty default rule could just lead to a potentially perverse result, with no offsetting gain.

In fact, even when there are no unforeseen circumstances, the penalty default approach to statutory construction will often be inappropriate, because of an important distinction between statutes and contracts. When a penalty default rule is applied because of a gap in the wording of a contract, the persons who are penalized are the parties to the contract. They were in a position to do something about the problem; they could have drafted language to fill the gap. It makes sense to give them an incentive to do so.

The people who are in a position to do something about gaps in statutes are the legislators (and their agents). When a plain meaning approach is applied to the interpretation of a statute on a penalty default rationale, the members of the legislature are, in a sense, potentially penalized, because their intentions, by hypothesis, might have been thwarted. But others might be penalized, too: the persons whom the legislature intended to benefit. They may not be in a position to do anything about poor drafting (assuming they do not have

access to well-organized lobbying groups), and it may be particularly unfair to saddle them with the consequences of Congress's poor drafting in the hope of giving Congress an incentive to do better in the future.

The Supreme Court's decision in *United States v. Locke*[23] is an example. *Locke* involved a federal statute that provided that a firm wishing to renew an unpatented mining claim had to make a specified filing "prior to December 31."[24] The Court rejected the argument that a claim filed on December 31 should be allowed. As a result a claim was forfeited. This may even be a case of a scrivener's error; the end of the year is a much more customary deadline, and there is a good chance that the understanding of the members of Congress, to the extent there was one, was that the renewal had to be filed "by December 31."

The logic of the penalty default approach would hold that the Court reached the right conclusion in *Locke*. The problem was not one that Congress was unable to foresee. If there was an error, it was just a case of sloppy drafting. Congress should be given an incentive to draft carefully. The Court's opinion in *Locke* emphasized, as a reason for taking such a strict plain meaning approach, that the case involved a filing deadline.[25] If one accepts the penalty default rationale, a filing deadline is, arguably, an especially suitable occasion for applying it: Congress should not be allowed to get away with sloppiness in the drafting of filing deadlines and count on the courts to find an equitable way out. That would undermine the entire purpose of having filing deadlines in the first place. In dealing with filing deadlines, perhaps above all, Congress's mistakes should be treated unforgivingly, so that Congress is given every incentive to draft carefully.

The problem, of course, is that Congress was not the principal party who suffered because of the (probable) sloppy drafting. The firm whose claim was canceled bore the brunt of the penalty. The argument in support of the penalty default approach would have to be that even that price—inflicting a substantial harm on a firm that acted in a way that might have complied with Congress's intentions, although not with the plain language—was worth paying in order to give Congress an incentive to draft with precision. That seems to be a difficult argument to make out. When the reason for a lack of preci-

23 471 U.S. 84 (1985).

24 43 U.S.C. § 1744(a) (1994).

25 *See Locke*, 471 U.S. at 93 ("[W]ith respect to filing deadlines a literal reading of Congress's words is generally the only proper reading of those words.").

sion is not sloppiness but the unforeseeability of an issue, the basis for the penalty default argument is even weaker.

V. Legislative Supremacy and Judicial Restraint

A final justification rests on legislative supremacy and the need for judicial restraint. As Justice Scalia puts it, in explaining why judges should follow the plain language rather than seek legislative intent from legislative history or other sources:

> The . . . threat is that, under the guise or even the self-delusion of pursuing unexpressed legislative intents, . . . judges will in fact pursue their own objectives and desires. . . . When you are told to decide, not on the basis of what the legislature said, but on the basis of what it *meant*, and are assured that there is no necessary connection between the two, your best shot at figuring out what the legislature meant is to ask yourself what a wise and intelligent person *should* have meant; and that will surely bring you to the conclusion that the law means what you think it *ought* to mean.[26]

Again this is a plausible argument. But it rests on a number of empirical and normative premises that are not obvious. It assumes, first, that a judge who looks at legislative history or statutory purpose instead of just at the plain language has more latitude to indulge her own views, advertently or inadvertently, than a judge who considers herself bound to the plain language. Often this is true, but it is not always true. *United States v. Smith*[27], the case about whether bartering a gun constituted "using" it, is a counterexample; the language was uncertain enough to allow a judge to read her own views into the statute, consciously or not.

In addition, Justice Scalia's argument assumes that the outcome, if a judge is influenced by her own views, is likely to be worse than if the judge follows the plain language of the statute. This is another one of those defenses of plain language that owes much of its plausibility to an uncritical extrapolation from the "simple case." Assuming, as we must, that the judge should subordinate her judgments to those of the legislature (issues of constitutionality aside), then *if* the plain language faithfully reflects the legislature's judgments, it is certainly true that a judge should not substitute her own views for what the plain language of the statute seems to say. But if the plain language does not reflect the legislative understanding, then the conclusion that the judge should not substitute her views for the plain language does not necessarily follow.

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26 Scalia, *supra* note 6, at 17–18.

27 508 U.S. 223 (1993); *see supra* notes 13–18 and accompanying text.

If the drafting is shoddy, or if Congress has not foreseen the issue before the court, then the ordinary meaning of the language of the statute will not be a particularly good indication of the legislature's judgments. Following the ordinary meaning might just lead to a result that the legislature would find arbitrary or perverse. There is at least a good chance that that would have been the legislature's reaction to the decision in *Tennessee Valley Authority v. Hill* [28] and *Smith v. United States*, and an excellent chance that the legislature would have had that reaction to the decision in *Locke*[29]. If the idea is to vindicate legislative supremacy, then following language that does not track the legislature's understandings may be a poor way to do it. A judge who instead directly tries to implement the legislature's purposes may do better. She may do better even if, as Justice Scalia suggests, her own views about the advisability of different interpretations of the statute affect her decision. After all, the judge's views about what makes sense may not deviate that far from the legislature's. Once we are no longer dealing with the simple case, but instead have a case involving failures of drafting or foresight, the ordinary meaning of the language may deviate further from the legislature's intentions than the judge's own views do.

This point can also be put in terms of a meta-intent on the part of the legislature. Would a legislature—knowing that, routinely, it will draft statutes imprecisely and will fail to foresee developments—want its language to be taken at face value in all cases? Or would it prefer for judges to try to follow their understanding of the legislature's purposes, even if that increased the risk that the judges would unconsciously impose their own judgments about policy matters? It is far from clear that a legislature, faced with such a question, would choose the course Justice Scalia prescribes. It might prefer to leave itself at the mercy of judges' more open-ended judgments about legislative purpose.

In fact, of course, sometimes legislatures do that by design, when they draft statutes that deliberately leave an issue unresolved. In such cases, the goals of legislative supremacy and judicial restraint are simply inconsistent—the legislature does not want the judges to be restrained. But even in the absence of such buck-passing, a legislature might prefer, in cases of imprecise drafting or unforeseen circumstances, to have a judge take a good-faith stab at carrying out its purposes, rather than being held to the ordinary meaning of the words it has used.

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28 437 U.S. 153 (1978); *see supra* notes 7–10 and accompanying text.

29 471 U.S. 84 (1985). *See supra* note 11.

VI. Plain Meaning as Common Ground[30]

This brings me to what I think is the most promising justification for the use of plain meaning, the one derived from Professor Schauer's article.[31] One of the functions of law is to resolve disputes. One way it can resolve disputes is by establishing common ground among people who would otherwise disagree. We may disagree about what proper welfare or taxation or environmental policy should be, but we at least agree that what Congress enacts is the law until it is changed. This kind of agreement is valuable for many reasons, some obvious and some subtle. It enables people to plan their actions with more security. It provides a way for people to manage their disagreements, so that no matter how severe they are, there is at least something they hold in common. And it allows for people to express a form of mutual respect, by conducting their arguments in terms of shared premises, instead of by resorting to first principles on which they disagree.[32]

The ordinary meaning of a statute provides this kind of a basis of agreement. The plain language is significant not (or not exclusively) because it expresses the legislature's intentions, or for any of the other reasons I have canvassed, but just because, so to speak, it is there. It is an obvious thing for people to agree on, when the only alternative is too-costly disagreement. Professor Schauer offered this as a descriptive explanation for why the Justices of the Supreme Court resort to ordinary language: the Justices, he suggested, consider it desirable to establish common ground, and plain language furnishes such common ground. By and large the Justices can live with the interpretation supplied by the plain language approach; each of them may think that it is not perfect from his or her point of view, but each recognizes that others have different ideas about what is perfect. The plain language is good enough, and the alternative would be potentially divisive disagreement. Schauer offers this mostly as a descriptive, not normative account, although he acknowledges that it provides a "plausible normative argument" for the plain language approach.[33] It

30 *See* Schauer, *supra* note 3, at 250.

31 *See id.*

32 These ideas about the function of law go back to Aristotle and were expounded by Hume. *See* Aristotle, The Nicomachean Ethics 1134b, 18–35 (Terence Irwin trans., Hackett Publ., Co. 1985); David Hume, A Treatise of Human Nature 489–90 (L.A. Selby-Bigge ed., 2d ed. 1978); David Hume, An Inquiry Concerning the Principles of Morals 125 (Bobbs-Merrill 1957). For other sources, see Schauer, *supra* note 3, at 254 n.86; and David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. Chi. L. Rev. 877, 908 n.73 (1996).

33 *See* Schauer, *supra* note 3, at 232.

seems to me the argument can be made both normative and more general: not just for the Supreme Court, but for the legal community generally, and to some degree for the society as a whole, plain language can perform such a unifying function.[34]

This may be the most satisfactory justification for the plain meaning approach that dominates the Supreme Court's statutory construction cases: it provides an easy, relatively non-divisive way to resolve difficult issues. It is a considerable benefit to have such a way of resolving these questions. But that benefit does not outweigh every cost. Sometimes a departure from plain meaning might be justified. If a judge is convinced that the plain meaning leads to a result that is grossly at variance with the legislature's understandings—or if the judge believes that the legislature intended the statute to develop to deal with new circumstances, and that following plain meaning will hamper *that* intention unduly—then a departure from plain meaning is warranted. Following plain meaning is not a matter of constitutional command, or legislative supremacy, as Justice Scalia suggests. It is simply a useful way of getting a matter settled so that we can move on. When the value of doing that is outweighed, plain meaning is not the right approach.

One final example, again drawn from Professor Schauer's article on this subject, may make this point. Schauer suggests that the Justices are especially likely to use plain meaning when the subject matter of a statute is particularly esoteric and the Justices lack expertise in the area.[35] His argument is that the Justices are especially likely to distrust their (and their colleagues') ability, in such areas, to reach the answers that are right as a matter of first principles, so the reasons to use plain language, as a second-best solution, are especially compelling. As a descriptive matter that seems at least plausible.

It may be, however, that the use of plain meaning is in fact least justified in such areas. At least that will be true if an elaborate set of common-law-like understandings has developed that is at variance with the plain meaning. One of the most questionable trends in the Supreme Court's statutory decisions in recent years has been the tendency to use the plain meaning to sweep away understandings of statutes that have grown up, often over many years or decades, among the institutions directly involved in their enforcement, such as administrative agencies and lower courts. The Supreme Court sometimes seems to conclude that it owes little deference to those understandings when

34 I offer a similar argument about the text of the Constitution in Strauss, *supra* note 32, at 916–24.

35 *See* Schauer, *supra* note 3, at 253–54.

they are inconsistent with (what the Court takes to be) the ordinary meaning of the statute.[36]

This kind of decision—casting aside well-established understandings of what a statute requires because they are inconsistent with the plain language—might be justifiable if one accepted one of the other justifications I have canvassed for the plain language approach. If following the ordinary meaning were the best way to carry out legislative intentions, then the accumulated understandings perhaps should be discarded; the legislature's intentions should be vindicated instead. Certainly if Article I, Section 7 of the Constitution required the plain meaning approach, one could not deviate from that approach simply because the institutions that have administered a statutory scheme had arrived at a different understanding about its requirements. Or if one believed that considerations of legislative supremacy and judicial restraint required following the plain meaning, the fact that various lower courts had deviated from plain meaning would not be a reason for the Supreme Court to continue to do so.

But none of these justifications for the plain meaning approach is really adequate. As I have said, the best justification for plain meaning is a much less weighty one: it provides a basis of agreement that reduces the danger of unproductive and costly disagreement. When there is already a settled understanding among the lower courts and the agencies involved in interpreting a statute, then there is already a basis for agreement. It is correspondingly much less necessary to resort to plain meaning. Moreover, that settled understanding may reflect the accumulated experience and insight of those involved in carrying out the statutory scheme. Arguably that experience should not count if legislative supremacy, or the commands of the Constitution, were at stake. But if they are not—and, as I have said, in plain meaning cases, other than the "simple case" that is unlikely to end up in litigation, they will probably not be—then the collective institutional wisdom that constitutes the "common law" in an area should count for something, perhaps for quite a lot.

That is not to say that plain meaning should never be used to upset settled understandings. It is possible for a subculture to develop around a particular statutory scheme, a subculture that develops norms that are at odds with the legislative decision about an issue. If so, the legislative decision should prevail. But that has to be the argument: that there is some reason, in addition to the bare language of the statute, to believe that the settled understanding is at variance with

36 *See* Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 SUP. CT. REV. 429.

the initial legislative understanding. The plain meaning approach is the right one to use in an important range of disputes. But it should not be given a priority that outruns its justification.