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The Practice and Problems of Plain Meaning: A Response to Aleinikoff and Shaw

Frederick Schauer*

The attention so many of the participants in this Symposium have paid to my thoughts about the role of plain meaning in statutory interpretation¹ is both gratifying and surprising. Among those scholars finding my ideas worthy of note are Professors Aleinikoff and Shaw,² and my aim is both to comment on their contribution here and to respond more generally to what others have said about my views on the role of plain meaning. By continuing the discussion I hope to clarify some of the claims I have made about plain meaning, and in doing so to foster a better appreciation of how it figures in statutory interpretation.

I

I want to continue to distinguish three different types of claims—the descriptive, the explanatory, and the normative—recognizing that the boundaries among them are neither clear nor uncontested. Still, the distinction is tolerably useful,³ and I will stick to

* Frank Stanton Professor of the First Amendment and Professorial Fellow of the Joan Shorenstein Barone Center on the Press, Politics and Public Policy, John F. Kennedy School of Government, Harvard University. This Article, part of a Symposium on the Canons of Statutory Construction, has profited greatly from the comments of Scott Brewer and Sanford Levinson.

1. Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 S. Ct. Rev. 231.

2. T. Alexander Aleinikoff and Theodore M. Shaw, *The Costs of Incoherence: A Comment on Plain Meaning*, *West Virginia University Hospitals, Inc. v. Casey*, and *the Due Process of Statutory Interpretation*, 45 Vand. L. Rev. 687 (1992).

3. Thus, “she donated a thousand dollars to the World Wildlife Fund” (descriptive) is different from “because she thought it important to preserve endangered species” (explanatory) and from “but she should have used the money to help people rather than animals” (normative), even though in other contexts the differences are problematic. What Philippa Foot and Bernard Williams call “thick” descriptions combine the normative and the descriptive, since to describe some behavior as, for example, “rude” is in the normal case simultaneously to condemn it. Philippa Foot, *Virtues and Vices and Other Essays in Moral Philosophy* 102 (U. Cal., 1978); Bernard Williams, *Ethics and the Limits of Philosophy* 129-45 (Harvard, 1985). For further discussion of the issue of thick descriptions, see Judith Jarvis Thomson, *The Realm of Rights* 9-23 (Harvard, 1990); John McDowell, *Are Moral Requirements Hypothetical Imperatives?*, 52 *Proc. Arist. Soc.* 13 (Supp. vol. 1978). Important (and importantly different) precursors are Bentham, discussed on this point in H.L.A. Hart, *The Demystification of the Law*, in H.L.A. Hart, *Essays on Bentham: Juris-*

it here. Consequently, I will start with the descriptive claim, according to which I have concluded that both the discourse of plain meaning and the weight of plain meaning as a decisional factor increased noticeably in the Supreme Court during its 1989-1990 Term.⁴ This descriptive claim fits with Judge Wald's conclusions about the Supreme Court's 1988 Term,⁵ and appears to be acknowledged as well by Professors Macey and Miller in this Symposium,⁶ and elsewhere by Professors Eskridge⁷ and Sunstein.⁸ Nevertheless, Aleinikoff and Shaw take this descriptive claim to be false,⁹ and it is worth spending some time examining the substance of our disagreement.

prudence and Political Theory 21, 27-28 (Clarendon, 1982) ("Demystification of the Law"), and Charles L. Stevenson, *Ethics and Language* (Yale, 1944); Charles Stevenson, *Facts and Values* (Yale, 1963). In addition, the choice among logically equivalent explanations of the same set of facts is necessarily based on a partially normative presupposition about the goals of the explanatory process, as when economists prefer elegant or robust explanations and scientists prefer those that are simple or that have greater predictive potential. Still, the distinction seems to work fairly well for judicial behavior, and we can make some sense out of the difference between what a judge did, why she did it, and whether she should have done it.

4. Schauer, 1990 S. Ct. Rev. at 236-49 (cited in note 1). Although I claimed and still maintain that plain meaning increased in decisional import as well as in articulated justification, the relation between the two deserves further elaboration. It is hardly a necessary truth that the reasons *given* in an opinion for a decision accurately reflect the reasons actually *employed* by the decisionmaker in reaching that conclusion. We can debate normatively the desirability of candor in opinion-writing, compare Scott Altman, *Beyond Candor*, 89 Mich. L. Rev. 296 (1990), and Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 Georgetown L. J. 353 (1989), with Robert A. Leflar, *Honest Judicial Opinions*, 74 Nw. U. L. Rev. 721 (1979), and David L. Shapiro, *In Defense of Judicial Candor*, 100 Harv. L. Rev. 731 (1987), but that debate should not be collapsed into the descriptive issue of whether judicial opinions do reflect the actual reasons for decision. If on this descriptive issue we accept (as I do) the Realist thesis that the reasons given in an opinion frequently do not reflect the reasons employed in reaching a decision, see Jerome Frank, *Law and the Modern Mind* (Brentano's, 1930); Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 Harv. L. Rev. 1222 (1931), then the conclusion that the reasons given have changed does not entail the conclusion that the reasons used have changed. In this instance, however, my conclusion is that both the reasons given and the reasons used have changed. Still, even if the reasons used have not changed while the reasons given have, it is not implausible to suppose that a change in articulated reasons would have, over the longer term, an effect, albeit more diffuse, on the arguments used by lawyers, and then on the reasons actually employed by judges, particularly judges other than Supreme Court justices.

5. Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 Am. U. L. Rev. 277 (1990). Judge Wald, whose article had not yet been published when I wrote mine, concluded that reliance on plain meaning had increased in the 1988 Term (although not as much as its strongest adherent claimed or would have desired), and might very well continue to increase. My conclusion is that the Court in the following Term proceeded to do just what Judge Wald predicted and feared it would.

6. Jonathan R. Macey and Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 Vand. L. Rev. 647 (1992).

7. William N. Eskridge, Jr. *The New Textualism*, 37 UCLA L. Rev. 621 (1990).

8. Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 415-41 (1989).

9. Aleinikoff and Shaw, 45 Vand. L. Rev. at part III (cited in note 2).

Aleinikoff and Shaw start with the obvious (but no less important) point that in most instances the plain meaning of a statute¹⁰ will indicate the same result as would be indicated by consultation of that statute's purpose.¹¹ Just as both the plain language and most plausible purposes of a "no vehicles in the park" regulation would exclude from the park most fully operational private cars, trucks, and motorcycles, so too do consultation of purpose and consultation of text yield the same conclusion in most real cases. Because, as Aleinikoff and Shaw maintain, drafters are usually not idiots, we are not surprised to find that both the purpose and the plain meaning of Section 16(b) of the Securities Exchange Act of 1934 support the nonapplicability of that section to small shareholders who are neither officers nor directors.¹² Nor is it astonishing to discover that although we may debate the applicability of the registration provisions of the Securities Act of 1933 to sales of interests in citrus groves¹³ and scotch whiskey,¹⁴ both the purpose and the literal language of the Act lead to the conclusion that sales of stocks, bonds, and debentures are plainly encompassed.¹⁵ Thus, it is undoubtedly true that a result being supported by plain meaning is not inconsistent with the same result being supported by the purpose of a statutory provision. Aleinikoff and Shaw are right, therefore, in cautioning against judicial or other references to plain meaning being taken to prove too much.

Still, if every source of interpretive guidance indicated the same result, there would be no occasion for an interpretive quandary, and thus little incentive for disputants to pursue litigation.¹⁶ Thus, if we at

10. On what I mean by "plain meaning," see part IV.

11. See Gwen T. Handelman, *Zen and the Art of Statutory Construction: A Tax Lawyer's Account of Enlightenment*, 40 DePaul L. Rev. 611 (1991).

12. See 15 U.S.C. § 78p(b) (1988).

13. *Securities & Exchange Comm'n v. W.J. Howey Co.*, 328 U.S. 293 (1946).

14. *Securities & Exchange Comm'n v. M.A. Lundy Associates*, 362 F. Supp. 226 (D.R.I. 1973).

15. Securities Act of 1933, § 2(1), codified at 15 U.S.C. § 77b(1) (1990).

16. See Theodore Eisenberg and Stewart J. Schwab, *What Shapes Perceptions of the Federal Court System?*, 56 U. Chi. L. Rev. 501, 503 (1989); Theodore Eisenberg and Stewart J. Schwab, *The Reality of Constitutional Tort Litigation*, 72 Cornell L. Rev. 641 (1987); George L. Priest and Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. Legal Stud. 1 (1984); Frederick Schauer, *Judging in a Corner of the Law*, 61 S. Cal. L. Rev. 1717 (1988). On the notion that we do not normally use the word "interpretation" unless some sort of "quandary" is presented, see Frederick Schauer, *Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* 207-12 (Clarendon, 1991). But there is no error in using the word differently, and those who would point out that even nonproblematic readings presuppose interpretations that might, under other circumstances, be different, see Mark V. Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. Cal. L. Rev. 683 (1985), have identified an undoubtedly important concern. Still, it remains useful to distinguish the problematic or contested from the unproblematic or uncontested, no matter what word we use to mark the distinction, and no matter how important it is to probe the bases of that which some domains take

times focus on those instances in which interpretive issues rise to the level of conscious examination, we will be concerned with a skewed subset of all instances of statutory direction—a subset consisting only of those instances in which nonfrivolous interpretive principles indicate mutually exclusive results.¹⁷

In this skewed subset, however, not all instances will involve plain meaning and purpose pointing in opposite directions. In some, both will point in the same direction, but the so-indicated result will appear unjust¹⁸ or inefficient.¹⁹ In these cases, attention to the effect of plain meaning alone is beside the point. As a result, Aleinikoff and Shaw imply, concern about the conflict between plain meaning and purpose is concern with the epiphenomenal.²⁰

In making this claim, Aleinikoff and Shaw are more right than they suppose. Cases in which interpretive quandaries arise are epiphenomenal in the same way that cases in general are epiphenomenal. The great bulk of legal events, whether it be a citizen's decision to stop at a "Stop" sign or file her income taxes by April 15, or the decision of a President not to run for a third term,²¹ do not raise interpretive quandaries.²² Nevertheless, the small proportion of all legal events that wind

to be unproblematic and thus uncontested.

17. In this sense, understanding a legal system requires less knowledge about which principles are right and wrong and more about which surpass a minimum threshold of nonfrivolity. See Sanford Levinson, *Frivolous Cases: Do Lawyers Know Anything At All?*, 24 Osgoode Hall L. J. 353 (1986). There is a slightly uncomfortable analogy here between the lawyer's ability and willingness to make any nonfrivolous argument on behalf of her client, and the "deniability" standard used by some officials as the standard for the rightness of an otherwise politically efficacious act.

18. See, for example, *United States v. Kirby*, 74 U.S. (7 Wallace) 482, 486-87 (1868). I bracket for now the possibility that avoiding injustice is part of the purpose of every statute. See Michael S. Moore, *Authority, Law, and Razian Reasons*, 62 S. Cal. L. Rev. 827, 868-73 (1989).

19. See, for example, *King v. St. Vincent's Hospital*, 112 S. Ct. 570, 574-75 (1991).

20. If their argument for epiphenomenality is sound, Aleinikoff and Shaw have (or should have) as much of a bone to pick with those who have criticized the reliance on plain meaning, for example, Eskridge, *The New Textualism* (cited in note 6); Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 Cardozo L. Rev. 1597 (1991), as with those who might find some value in it. After all, if plain meaning has, as a descriptive matter, little decisional import, then there is not much point in being against it. Indeed, Aleinikoff and Shaw's descriptive claims make their critique of Justice Scalia seem odd. I agree completely with their argument identifying Justice Scalia's selective reliance on text, but their very identification of the fact that a consistent "textualist" would have decided differently partially undercuts their descriptive thesis of general extensional equivalence between plain meaning and purpose.

21. For a more in-depth discussion of such events, see Frederick Schauer, *Easy Cases*, 58 S. Cal. L. Rev. 399 (1985). See also Steven J. Burton, *Judge Posner's Jurisprudence of Skepticism*, 87 Mich. L. Rev. 710, 712 n.6 (1988) (noting that it is a mistake to measure the degree of legal interest by the degree of lawyers' and judges' interest in the hard cases that happen to wind up in court).

22. This is to deny neither that nonproblematic interpretations still incorporate contingent presuppositions that could have been and may yet be different, nor that interpreters frequently, because of their own views, underestimate the interpretive possibilities open to them. See Freder-

up in litigation remain important for at least two reasons. First, that small proportion of cases is still large enough for adjudication to be a significant aspect of public life. Second, the decisions in adjudicated cases determine which cases will be deemed easy (and thus comparatively unlikely to be litigated) and which will be hard (and thus comparatively likely to wind up as disputes). If courts only reached conclusions consistent with the ordinary or technical meanings of relevant statutes, cases where plain meaning indicated a clear result would be easy—litigating against that plain meaning would be practically futile. But if, as is now the case, plain meaning may sometimes yield to countervailing considerations of purpose, justice, or efficiency, then a range of otherwise legally easy cases becomes legally hard and hence prone both to active dispute and to litigation. Consequently, the resolution of questions about what factors are legally relevant will likely affect the array of disputes that wind up in the courts.

This suggests that even if the number of cases in which plain meaning and purpose diverge are small, the decisions in those cases may have an effect larger than immediately apparent on legal understanding and on the composition of the set of cases disputed. Moreover, the tension between plain meaning and purpose is only the narrowest instantiation of an issue that may arise at a number of different interpretive levels. Commonly, a statute will reflect a background purpose, but that background purpose will itself reflect an even deeper background purpose, and so on. Accordingly, just as plain meaning may at times diverge from purpose, so too may the purpose behind a statute indicate a result different from the result indicated by the purpose behind it,²³ and so too may the result indicated by meaning and purpose together differ from that indicated by justice, efficiency, norms located elsewhere within the legal system, or the best all-things-considered judgment about what should be done. This is not to say that the preference for purpose over plain meaning in cases of divergence commits the exerciser of that preference to making the parallel choice at every other level. At different levels, considerations of result variability, the authority of rule-making and rule-applying institutions, and the likelihood of interpreter error may differ as well. Thus there is no inconsistency in locating the level of formality somewhere above (or behind) plain meaning, but still below that of the best all-things-considered judgment by the interpreter of what should happen in the case at hand. Still, once

ick Schauer, *Formalism*, 97 Yale L. J. 509 (1988). Nor is it to deny that the question of when we engage in interpretation and when we do not is itself based on normative presuppositions. See Frank H. Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 533 (1983).

23. For my more thorough discussion of this possibility, see Schauer, *Playing By the Rules* at 73-76 (cited in note 16); Schauer, 97 Yale L. J. at 533-35 (cited in note 22).

we recognize that comparable issues arise in a number of different ways, we see the dispute as not just about the primacy of plain meaning, but about the far more pervasive question of the entrenchment of some comparatively narrow legal rule in the face of comparatively broader considerations leading to the opposite result.

Yet Aleinikoff and Shaw make an even stronger claim than that plain meaning/purpose conflicts are too rare to worry about. They maintain that in none of the cases in the set I examined did plain meaning and purpose diverge. But that claim appears false. *Pavelic & LeFlore v. Marvel Entertainment Group*,²⁴ the case on which I originally focused, can only with enormous huffing and puffing (more on that shortly) be seen as a case in which language and purpose pointed in the same direction. It is far more plausible to suppose that the frivolity-discouraging purposes of Rule 11 of the Federal Rules of Civil Procedure would be served by imposing its sanctions on a two-person law firm rather than holding that only culpable individuals and not also culpable law firms could be subject to sanctions.²⁵ Similarly, in *Kaiser Aluminum & Chemical Corp. v. Bonjorno*²⁶ the more plausible conception of the "making whole" purpose of the postjudgment interest provisions of 28 U.S.C. section 1961 would have interest run from the date of verdict, although the statute, as followed by Justice O'Connor, required that it run only from the "date of judgment." And in *Northbrook National Insurance Co. v. Brewer*²⁷ the Court's conclusion that the statutory prohibition on use of the diversity jurisdiction "against" insurers did not apply to an action brought "by" an insurer was reached in a case in which the procedural posture was such that the action by the insurer was for all practical purposes one brought against an insurer. Nevertheless, the Court stuck to the plain meaning of the word "against," even while it admitted that this represented an "incongruity."²⁸ Moreover, at least three such cases arose a Term earlier, within which Judge Wald concluded that on occasion a majority of the Court had relied exclusively on the text to reach a conclusion opposite to that which the dissent claimed would have been reached by consultation of actual legislative purpose.²⁹ And similar cases existed in the 1990 Term as well. For example, in *Demarest v. Manspeaker*³⁰ the Court re-

24. 493 U.S. 120 (1989).

25. See David B. Wilkins, *Who Should Regulate Lawyers?*, 105 Harv. L. Rev. 799, 850-51 (1992).

26. 494 U.S. 827 (1990).

27. 493 U.S. 6 (1989).

28. *Id.* at 12.

29. Wald, 39 Am. U. L. Rev. at 298-300 (cited in note 5).

30. 111 S. Ct. 599 (1991).

lied on the plain meaning of the statute allowing witness fees to subpoenaed witnesses, despite the fact that the witness in that case was an incarcerated prisoner who was transported to and from and housed at the trial site at no cost to himself, and thus despite the fact that the most plausible purpose of the statute was not served by allowing costs in that case.

There are thus a sufficient number of cases to support the conclusion that plain meaning trumped inconsistent purpose more than one would expect had the plain meaning rule no or very little decisional force. It is, however, likely that the true import of the tilt towards plain meaning is both broader and less concretely verifiable. With respect to many cases, perhaps even including some of those I have just noted, it is possible (with some effort) to construct two different purposes indicating mutually exclusive results for the same event. If that is so, then a choice must be made between two different not-totally-implausible purposes. Under one approach, in fact the one that Aleinikoff and Shaw endorse, a not-totally-implausible purpose consistent with plain meaning will be preferred to an even-more-plausible purpose that is inconsistent with plain meaning. Thus, for the array of cases in which conflicting plausible purposes can be constructed by the interpreter or gleaned from the legislative history,³¹ the question arises as to the principle of selection between the two inconsistent purposes. One principle would look first at the text, and then prefer the purpose more consistent with that reading. Another principle would look first at the two purposes, and then select the more plausible or simply better purpose. And a third principle, perhaps the more sensible mirror image of the first, would select the better purpose as long as it could be supported by a possible reading of the text. In other words, texts as well as purposes can be strained to be consistent with something else. Just as strained purposes can be constructed to support a reading of the text, so too can strained readings be constructed to support a preferred purpose. Those of us who sense a tilt towards plain meaning are best "interpreted" as claiming that the recent trend seems more in the direction of finding a plausible purpose to support a reading rather than vice versa,³² a conclusion that, for those cases in which several purposes and several readings are available, is in fact consistent with Aleinikoff and Shaw's own prescriptions.

None of this is at odds with my original descriptive claims, for I have often maintained that the most plausible description of the effect

31. Of course these are not the same.

32. For a recent example of this style, see *Ardestani v. Immigration and Naturalization Service*, 112 S. Ct. 515 (1991).

of formality in American law is as presumptive rather than conclusive.³³ If this is so, then a descriptive claim about the weight of the presumption would have to be supported by reference to a full set of cases (which is what I tried to do), for only such a large-scale survey could support (or undercut) the hypothesis that the array of results within the set is different from what one would expect with different or differently weighted presumptions in effect. As an example, take a hypothetical set of 1000 cases. If for those 1000 cases plain meaning and purpose diverge in 100, and if under one interpretive approach plain meaning is preferred to purpose in 23 cases, and if under another plain meaning is preferred to purpose in 37 cases,³⁴ then the existence of 63 cases in which the presumption might have been overcome under the latter approach does not undercut the claim that the presumption still appears stronger for the second set than for the first.³⁵ This is the claim Judge Wald, Professor Eskridge, Professor Sunstein, and I all make, and I am still satisfied that it is sound.

II

So assume that the descriptive claim—that there is a stronger presumption in favor of plain meaning (or a weaker presumption against it) on the Supreme Court than there was a few years ago—is sound. The task then becomes explanation (which is not the same as justification), and now the ranks of my supporters diminish and those of my critics increase.

In trying to explain the tilt towards plain meaning, I have offered

33. Schauer, *Playing By the Rules* at 179-80 (cited in note 16); Schauer, 97 Yale L. J. 509 (cited in note 22); Frederick Schauer, *Rules and the Rule of Law*, 14 Harv. J. L. & Pub. Pol. 645 (1991); Frederick Schauer, *The Jurisprudence of Reasons* (book review), 85 Mich. L. Rev. 847 (1987).

34. I assume the same 100 cases.

35. Thus, *pace* Aleinikoff and Shaw, my recognition that plain meaning appears to have presumptive rather than conclusive force for this set of cases is no smoking gun, for I have never claimed that plain meaning does or should have conclusive weight for any interpreter. Still, I believe that presumptions matter, at least in the aggregate, and that there is thus a difference, to oversimplify, between no presumption, a weak presumption, and a strong presumption. If what had been a weaker presumption becomes stronger, the outcomes over a large enough array of cases are likely to be different, and the phenomenon thus worthy of identification and evaluation. And this is why Aleinikoff and Shaw are mistaken to assume that a presumptive rather than conclusive use of plain meaning shows that "we are all Hart and Sacksians after all." Aleinikoff and Shaw, 45 Vand. L. Rev. at part III (cited in note 2). A very strong but still surmountable presumption in favor of plain meaning, like the Golden Rule, see note 68 and accompanying text, which preceded Hart and Sacks by several hundred years, is plainly different in thrust from the importance that Hart and Sacks give to purpose. To say that Hart and Sacks's prescriptions do no more than restate the Golden Rule dramatically understates their contribution, but to assume that their prescriptions are correct for all times and all places and all courts dramatically understates the contingency of judicial empowerment, an issue I address fully in Part III.

the possibility that members of a multi-member court, for cases they find less engaging, might use plain meaning as a second-best coordinating device given their stipulated comparative lack of individual engagement in the outcomes or nuances of the cases, and given a stipulated desire to reach some agreement for the sake of agreement.

Some of the tone of their remarks notwithstanding, Professors Macey and Miller appear to agree with me.³⁶ They maintain that the canons of statutory construction (including but not limited to the plain meaning canon³⁷) permit judges to use less effort in some cases than in others.³⁸ Moreover, they agree that one reason judges will be inclined towards the use of less effort in some cases than in others is that judges will be more interested in some cases than in others.³⁹ They also agree

36. Macey and Miller, 45 Vand. L. Rev. at part III (cited in note 6).

37. I agree with them that any canon of statutory construction might be analyzed in the same way, and might have the same effect. Principles of statutory construction, including but not limited to a presumption in favor of plain meaning, are rules, capable under some empirical conditions of generating a set of results that would have been different in the absence of the principles or in the presence of other ones. One of those empirical conditions is the absence of a countervailing principle of equal applicability and equal weight, and it was Llewellyn's argument that this empirical condition did not exist. Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 Vand. L. Rev. 395 (1951). Insofar as I claim that there is (descriptively) for some group of interpreters a presumption in favor of plain meaning, I claim that for this set of interpreters any countervailing principle is of lesser weight. Given that the plain meaning canon is an interpretive canon far more applicable to statutes than to common law decisionmaking, a presumptive use of this canon would call into question Llewellyn's claim, Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* 371 (Little, Brown, 1960), that the leeway available to a judge in interpreting statutes (even those in which there is a plain meaning) is as great as that available to her in interpreting case law materials. The notion of leeway in Llewellyn's thought is perceptively discussed in William Twining, *Karl Llewellyn and the Realist Movement* 240-57 (Weidenfeld & Nicolson, 1973).

38. Macey and Miller, 45 Vand. L. Rev. at part III (cited in note 6).

39. *Id.* at part III.A. Despite conceding at one point that comparative interest in the cases might be one factor in determining the level of judicial engagement, *id.*, Macey and Miller at another point in the same article, *id.* at part III, reject this explanation, attributing it only to the narrowness of my own interests. Maybe they are upset because I used the word "boring," which seems to have upset Professor Farber as well, Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 Vand. L. Rev. 533, part III.B. (1992), although since the opposite of Macey and Miller's term "more interesting" is not implausibly "less interesting," I hardly think that using the term "boring" as a synonym for "less interesting" is a crime of major proportions. Or maybe Macey, Miller, and Farber, along with Aleinikoff and Shaw, 45 Vand. L. Rev. at part III (cited in note 2), take me to be claiming, by saying that certain cases strike me or the justices as boring, that I or the justices are bored with our jobs and just want to leave early so we can get in a quick eighteen holes before sunset. But that is hardly a fair inference from the claim that some cases strike me (and the justices) as boring. Moreover, Macey and Miller explicitly (and the others by implication) claim that because I find the substance of many statutory interpretation cases boring, then I must find issues of statutory construction boring, as opposed to issues of constitutional law. In addition to being empirically false (I will spare readers a string cite to my own writings dealing with issues of statutory construction far removed from any constitutional context), that claim confuses interest in the jurisprudential question of statutory construction with interest in the substantive regulatory context in which many of those issues arise. Just as Professor Farber's belief that the dormant commerce clause is "probably the dullest

that there are other reasons, in addition to less interest in certain cases, that are significant in inclining judges to spend less effort on some cases than others. In particular, the judges are constrained from becoming, as I said, "truly internally expert" in every area.⁴⁰ Thus Miller and Macey quite correctly stress the increasing necessity of specializing in an increasingly technical legal world. We might, however, add even more possibilities to this list. It could be that in some areas the judges are more politically, socially, or culturally interested in the outcome than in others. I do not mean this to cast aspersions on the judiciary. I mean only to suggest that a fair reading of the difference in tone between Justice Blackmun's dissent in *DeShaney v. Winnebago County Department of Social Services*⁴¹ and his dissent in, say, *United States v. Verdugo-Urquidez*,⁴² would indicate that perhaps Justice Blackmun's concern about who won and who lost was substantially greater in the former than the latter. And if it is more typical than unusual that judges will have varying degrees of engagement in the outcome, it is possible that this will also influence the allocation of their own scarce resources of time and effort.⁴³ Thus, although there is probably some disagreement about the weight of various effort-allocating factors, Macey, Miller and I seem to agree that one possible explanation for use of formal and thus comparatively acontextual decisionmaking devices is that they reduce the amount of required decisionmaker attention.

I also hypothesized that some of the same forms of comparatively acontextual decisionmaking might be seen in coordination terms. A group of diverse decisionmakers might suppress some of that diversity and achieve agreement by the use of decisionmaking methods, such as

subject in constitutional law," Daniel A. Farber, *The Zapp Complex*, 5 Const. Comm. 13, 14 (1988), should not be taken as indicating his uninterest in constitutional law, so too should relative lack of interest in, for example, ERISA, not be taken as uninterest in the issues of statutory interpretation that might arise in ERISA cases. In this context, I note that simultaneously with my claim, Professor Langbein attributed the Court's shoddy performance in an ERISA case to its being "bored" with the issues. John H. Langbein, *The Supreme Court Flunks Trusts*, 1990 S. Ct. Rev. 207, 228-29. Given that I only purport to be describing and explaining, and not justifying or prescribing, the similarity of the two explanations is revealing.

40. Schauer, 1990 S. Ct. Rev. at 255 (cited in note 1).

41. 489 U.S. 189, 212-13 (1989) (Blackmun dissenting) (stating that "[t]oday, the Court purports to be the dispassionate oracle of the law, unmoved by 'natural sympathy.' But, in this pretense, the Court itself retreats into a sterile formalism which prevents it from recognizing either the facts of the case before it or the legal norms that should apply to those facts. . . . Poor Joshua!" (citation omitted)).

42. 494 U.S. 259, 297-98 (1990).

43. My suppositions here track those in Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. Legal Educ. 518 (1986), insofar as Kennedy argues that in some cases a judge is sufficiently interested in the outcome that she will invest substantial resources of thought and research to try to overcome what at first blush appears to be a field of legal materials unfavorable to the judge's preferred result.

treating plain meaning as paramount, that avoid areas of potential disagreement and focus on areas in which agreement is more likely. Because this explanation is more controversial, it might be useful to say something about what it might mean to offer an explanation of judicial behavior. Initially, it seems unlikely that an explanation is meant to be a "law" in the scientific positivist sense, a factor that produces a certain outcome whenever it appears. Thus, I believe that the claim made when saying "the metal expanded because it was heated"⁴⁴ is, in the usual case, quite different from the claim made when saying "the judge decided for the plaintiff because the plaintiff had a more effective lawyer." Whether because any scientific law must be highly complex, or simply because the "covering law" model seems inapt to historical explanation, few who attempt to explain the actions of judges suppose that the explanations they proffer are meant as statements of universal laws of judicial behavior.

Alternatively, therefore, the explanatory inquiry, similar to much of historical analysis, is motivational, seeking in the absence of better evidence to determine what factor or factors caused, prompted, induced, or inspired (whether consciously or not⁴⁵) certain decisionmakers to make the decisions they did. Here two caveats are in order. First, human motivation is highly complex, and it is often the case that actions are taken for multiple reasons. I had dinner at Il Ristorante Italiano because I was hungry, because it is inexpensive, because it was dinner time, because I like Italian food, and because it is near my home. No one of these factors is all-important, but rather they all operate concurrently, such that any one of them alone, when combined with different factors, might have produced a different action. To say that, however, is not to open the door for any possible explanations. Certain facts may not have influenced my behavior at all, either because I did not know of them⁴⁶ (had I known that the owner contributes 10% of her profits to Oxfam I would have taken that as a reason to eat at the restaurant, but I did not know it), or because even had I known of them some facts would not be for me reasons to take an action (I knew the restaurant is well-known for its anchovy soufflé, but because I do not like anchovies this fact was not for me a reason for action).

44. The example comes from Peter Achinstein, *The Nature of Explanation* 6 (1983).

45. Note that empirical economic analyses of judicial motivation, for example, Richard S. Higgins and Paul H. Rubin, *Judicial Discretion*, 8 *J. Legal Stud.* 129 (1979), remain agnostic on the question of the consciousness of a motivation. Thus, even apart from the question whether explanations of judicial behavior are meant to be universal, it is still the case that explanations of human behavior need not pertain to consciously held motivations of the actors.

46. But this is not to say that all factors influencing my behavior are ones of which I am aware. See note 45.

Second, much of historical inquiry is secondary, in the sense that it would be easier to find out why James Madison refused to free his slaves if we could just ask him, and if when asking we could also employ some number of veracity-checking devices, such as truth-serum, cross-examination, or psychoanalysis. But Madison is dead, so historians attempt to discover with secondary evidence what in theory primary evidence would have told them much more straightforwardly.

So too with judicial motivation. If judges were willing to talk about why they reached a decision, if when doing so they talked with complete honesty, and if when talking honestly they spoke with total self-awareness of their own actual motivations, then academic speculation about possible motivations would be of little assistance.⁴⁷ Even when the speculation is based on evidence, commonly the evidence for one or more reasons falls short of the "ideal" evidence I have just described.

Thus, the explanations that legal scholars offer for why judges made the decisions they did, and why they wrote the opinions they did, is a frightfully inexact process. At its most inexact it involves making statements virtually incapable of falsification, as in, "Judge Timberlane decided against the government in *United States v. Merriday* because that was the decision most consistent with the Judge's evaluation of the complex range of factors the assessment of which defines the judicial role." But once we depart from the vacuously unfalsifiable, we increase the risk that the explanations we offer may be not only falsifiable but false.

Thus, when I say that the desire to seek agreement for the sake of agreement may be one of the reasons for the reliance on plain meaning, I remain open to the possibility that it was not one of the reasons, in which case I was wrong. This would not be the case if it could be shown that other reasons were at work as well, for this being a reason is consistent with other things being reasons at the same time. Similarly, this being a reason is not inconsistent with other reasons being at times, or even frequently, stronger, for what we have a reason to do is not the same as what we should do all things considered, and so too with influences of which we are not consciously aware. This applies to a desire to reach agreement for the sake of reaching agreement. Consider in this regard a faculty meeting. When colleagues offer proposals with which I slightly disagree, or disagree more than slightly but with little feeling about the issue, I am likely to go along with the proposals because I think that collegiality and intercollegial agreement is an independent

47. On the unwillingness of judges to talk honestly and with self-awareness, see Sanford Levinson, *Strolling Down the Path of the Law (and Toward Critical Legal Studies?): The Jurisprudence of Richard Posner* (Book Review), 91 Colum. L. Rev. 1221, 1246-48 (1991).

good. But when my disagreement is great on an issue about which I have strong feelings, the reason for agreeing for the sake of agreeing does not disappear, but is outweighed or dominated by other factors.⁴⁸

Thus, my claim is that the desire to reach agreement for the sake of agreement is a reason for adopting a decision procedure for the justices of the Supreme Court, the negation of which is that it is not a reason, not that there are other reasons as well. That it is not a reason seems to be the position taken by Farber,⁴⁹ by Macey and Miller,⁵⁰ and (seemingly) by Aleinikoff and Shaw.⁵¹ All, and especially Farber and Macey and Miller, appear to base their explanatory hypotheses on a scientific positivism pursuant to which a cause, in order to be a cause, must produce the effect in all cases in which it appears. Now it may be that scientific positivism is correct, and that our differences are primarily at a degree of methodological abstraction. Macey and Miller, for example, take the increasing reliance on the canons of statutory construction as the "inevitable consequence of the increasing technical complexity of the law,"⁵² and Farber, who takes practical reason rather than the use of the canons as "inevitable," maintains that the existence of greater ideological diversity among members of the Court ten years ago than now proves that the "coordination problem" explanation is empirically false.⁵³ Macey and Miller, who seem to take the existence of one "inevitable" cause as preclusive of all others, assert that there has been no new "mutual understanding."⁵⁴

But as I have said, to claim that something was a factor, based on some evidence pointing in that direction, is not to claim that it is the only factor. Just as most of us have multiple motivations for our actions, so too might the Supreme Court justices. Thus, if one takes the explanatory task not as searching for scientific laws whose effects are inevitable if the laws are sound, but rather as searching in the face of limited evidence for possible motivations of human decisionmakers,

48. Aleinikoff and Shaw ask "What, after all, is a dissent for?," 45 Vand. L. Rev. at part III (cited in note 2), but the evidence indicates that judges on multi-member courts do not dissent in all cases in which they disagree. See Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. Chi. L. Rev. 541, 598 (1989).

49. Daniel A. Farber, 45 Vand. L. Rev. at part III.B. (cited in note 39).

50. Macey and Miller, 45 Vand. L. Rev. at part III (cited in note 6).

51. Aleinikoff and Shaw, 45 Vand. L. Rev. at part III. I say "seemingly" because Aleinikoff and Shaw appear here to conflate the explanatory and the normative. That agreeing for the sake of agreeing (or accomplishing that goal through the use of plain meaning interpretation) might be a bad idea is hardly conclusive evidence of the fact that it is not happening. To repeat an example I have used previously, the fact that I find anchovies distasteful does not mean that they do not exist.

52. Macey and Miller, 45 Vand. L. Rev. at part III.

53. Farber, 45 Vand. L. Rev. at part II.B., n.57.

54. Macey and Miller, 45 Vand. L. Rev. at part III.

then the fact that the justices were, say, more ideologically divided in the late 1970s than now is relevant, but hardly dispositive. After all, I am hardly the first to notice that the degree of acrimony among the justices is greater now than then.⁵⁵ So as is the case with most other social phenomena, it is likely that there are numerous causal cross-currents, such that one might increase even as a simultaneous increase in a countervailing reason will decrease the number of cases in which the former dominates.

As with most attempts at explanation, the real problem is one of underdetermination of the explanation by the data. We know what the courts have done, but numerous explanations (some mutually exclusive and some not) can explain that data. Some explanations are rejected because they are inconsistent with too much of what we know. I am not persuaded, however, that my explanation of less judicial engagement with some cases than with others, and relatively greater interest in some cases than in others, is inconsistent with what we know about the behavior of the 1989 Term justices or with judicial behavior in general. So once we exclude large scale inconsistency with the data, it turns out that we are selecting among explanations, none of which is flat-out inconsistent with the data, based on the closeness of their "fit" with the data. But given that no one explanation need exclude all others, we are not looking for the single right explanation, but possibly one among several explanations. Here again, based on the data now available, I still believe that one possible explanation for how courts behave is that they use various information-limiting decisional devices, of which plain meaning is a preeminent example, to allocate scarce decisional resources and to achieve a degree of agreement for the sake of agreement which might be harder to achieve were decisions based on a wider set of decisionally relevant information.

III

The normative inquiry remains. Even supposing that reliance on plain meaning is increasing, and even supposing that one explanation for this is judicial allocation of scarce decisional resources for reasons of

55. And this is not just in cases in which so-called "liberals" are angry at so-called "conservatives," or vice-versa. Notice, for example, the tenor of Justice Scalia's opinion in *Morrison v. Olson*, 487 U.S. 654, 697-734 (1988), dissenting in an 8-1 case in which the opinion of the Court was written by Chief Justice Rehnquist, and that of Justice Kennedy's opinion in *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 668-77 (1989), disagreeing with Justice O'Connor's approach in establishment of religion cases. These cases and others suggest the possibility of the relationship I am positing. Temporal correlation does not establish a causal relationship, but the fact that the acrimony decreased in the following Term while the reliance on more mechanical forms of decisionmaking in a large number of cases increased suggests possibilities for speculation.

specialization, comparative interest in the cases, comparative engagement in the outcomes, and some desire to achieve agreement for the sake of agreement, is this a good thing? Here again, there is disagreement among the participants in this Symposium, with most taking issue with my claim that there might be more to be said for attention to plain meaning than is commonly supposed.

Let us take another look at one of the modern Supreme Court's most academically excoriated decisions, especially in the context of statutory interpretation, *United States v. Locke*.⁵⁶ In *Locke* the Court enforced as literally written, over dissents by Justices Stevens, Brennan, and Powell, a statute that required land claims of a certain variety to be filed "prior to December 31" of the relevant year, thus making a December 31 filing one day late and consequently invalid.⁵⁷ I know of few cases in which the plain meaning was so at odds with the result that would have been indicated by recourse to virtually every other interpretive source or principle—overwhelmingly likely legislative intent, avoidance of absurdity, and justice, to name just three—so if there is a case for the result in *Locke*, presumably there is *a fortiori* a case for a plain meaning approach in less dramatically discordant cases.

The case for *Locke*, however, is in some sense not a case for *Locke* at all, in that it is not, narrowly speaking, an argument that the result in *Locke* was correct. Rather, the case for *Locke* maintains that although the result in *Locke* was incorrect, there is the possibility that alternative approaches to judicial authority might in some environments produce an even greater number of incorrect results. Thus, the case for *Locke* is that *Locke* is one of a number of incorrect results that are the consequence of a second-best approach to judicial authority in some environments in which a first-best approach would yield an even greater number of incorrect results.⁵⁸

In order for this relationship to hold, however, two conditions must obtain. First, this incorrect decision must be one instance of a category that cannot be made relevantly and workably smaller. If the disempowering category is larger than it need be, then it is not necessarily true that a different result in this case would produce the feared incorrect results in others. Second, a different decision rule for the instances

56. 471 U.S. 84 (1985). The leading excoriation is Richard Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 Case West. Res. L. Rev. 179 (1986). See also Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 Va. L. Rev. 1295, 1314-16 (1990).

57. 471 U.S. at 96.

58. My argument here is an abbreviated version of that in Schauer, *Playing By the Rules*, at 77-111, 135-166 (cited in note 16). To the same effect is Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 Yale L. J. 31 (1991).

in the category must yield a higher number of incorrect results than does the decision rule under inspection. The case for *Locke*, therefore, is based on two controversial but not self-evidently-wrong presuppositions: first, that the category “cases in which a literal application of the rule flies in the face of legislative intent to the point of absurdity, and where literal application would produce an injustice to a party litigating against the government” is about as small as we can get without drawing distinctions that are either arbitrary (do so in all cases in which the claimant’s last name begins with “L”) or so complex and qualified as to be unlikely to be understood by the set of potential appliers;⁵⁹ and, second, that institutionalizing⁶⁰ a “reject plain meaning” rule for that category would produce a greater number of errors than would institutionalizing the “follow plain meaning” rule of the *Locke* majority for the same category. The second presupposition would likely be based on the belief that interpreters, because of confusion or outcome preference, would be likely to find a larger number of instances of “flies in the face of legislative intent to the point of absurdity” and “injustice to a party litigating against the government” than would in fact (from the perspective of the creator of the rule of decision) be the case. If each such false positive is an error, and if false negatives like the actual result in *Locke* are errors as well, then it should be possible in theory to calculate, and in practice at least to assess, the likelihood and consequences of the two types of errors, thus producing a notion of which decision rule was less harmful.⁶¹ To put it more simply, therefore, the result in *Locke* is premised on the controversial but not implausible supposition that interpreters empowered to set aside plain language in the service of intent-negating absurdity would be so over-inclined to place cases in this category as to outweigh in expected harm the harm that would come from prohibiting them from placing *any* cases in this category.⁶²

59. See Frederick Schauer, *Slippery Slopes*, 99 Harv. L. Rev. 361 (1985).

60. See John Rawls, *Two Concepts of Rules*, 64 Phil. Rev. 3 (1955).

61. See Elhauge, 101 Yale L. J. at 110 (cited in note 58) (stating that “[a] more accurate measure of the desirability of any legal process, or for that matter any law, is whether the mix of results it produces is better than the mix of results we could get with alternative processes or laws”).

62. Thus, Cass Sunstein maintains that “literal language must yield” when it produces a result that could not “reasonably” be taken to be among the harms a “statute could be thought to prevent.” Sunstein, 103 Harv. L. Rev. at 419 (cited in note 8). My quarrel with Sunstein is not so much with his conclusion as with his use of the word “must,” for it is not difficult to imagine settings in which empowering interpreters to assess reasonableness and to identify nonarticulated statutory purposes would produce more mistakes than would an alternative procedure pursuant to which the literal language would never yield. By using “must” rather than “should,” Sunstein and others suggest, in my view erroneously, that certain results follow from the necessary nature of law or the necessary nature of language, rather than being a matter of political and social choice.

Note that this way of looking at *Locke* and its ilk is independent of any conception of the primacy of one governmental body rather than another as a matter of political theory. In the existing debate, Justice Scalia and his followers rely on the ideas that Congress has priority in lawmaking, and that the only politically legitimate manifestation of this priority is the actually adopted language of the statute.⁶³ But even if Justice Scalia were faithful to his own approach (and I am persuaded by Aleinikoff and Shaw that he is not), it still rests on a number of propositions about separation of powers that can reasonably be resisted. For example, it is hardly a necessary truth that courts do not have a cooperative role to play in lawmaking.⁶⁴ Nor is it a necessary truth that attending to the goals of Congress would not require recourse to legislative history as well as to the meaning of the words of the statute.

I leave these debates to others, however, or at least for other times. My concern here is with how a hypothetical designer of a decisionmaking environment might choose to think about empowering a particular group of interpreters to interpret a set of governing rules to avoid absurdity.⁶⁵ Assuming that from the perspective of the environment-designer there is a conception of absurdity that allows the designation of results as absurd or not, the designer could then attempt to predict the number of absurd results that would appear in some future array of events. On the basis of this, she might start with Aleinikoff and Shaw's observation that Congress usually writes statutes that are not absurd. She might draw as well on two related empirical (but undeniably debatable) insights. One is the Legal Realist insight that given some interpretive freedom judges will often use that freedom to reach the result they

63. Compare, for example, *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 318 (1988) (Scalia concurring in part and dissenting in part); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Scalia concurring in the judgment), with William N. Eskridge, Jr. and Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 Stan. L. Rev. 321, 340-45 (1990). Much of the debate is reflected in the articles in Symposium, *The Jurisprudence of Justice Antonin Scalia*, 12 Cardozo L. Rev. 1583 (1991).

64. This is not only the theme of Aleinikoff and Shaw's contribution here, but is reflected as well in T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 Mich. L. Rev. 20 (1988); Zeppos, 12 Cardozo L. Rev. at 1334-42 (cited in note 20), and much of the rest of the modern literature. Nor do I mean to oversimplify the extent to which within that literature there are varying views about the way in which cooperativeness might be manifested, one of which would be a certain degree of deference. See Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 Georgetown L. J. 281 (1989).

65. When I say "hypothetical designer" I am just personalizing a process that society engages in incrementally over time, producing the political and social understandings that constrain judicial and other decisionmaker behavior. Charles Fried is correct in saying that a court that decides a case is at the same time acting as the designer of its own decisionmaking environment, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 Harv. L. Rev. 755 (1963), but a range of social and political incentives and pressures exist such that it seems over-simplified to suppose that a court is the only creator of its own decisionmaking authority.

prefer, all things considered. The second insight is that decisionmakers are likely to overassess their own competency as decisionmakers, or in other words, underassess the possibility that their decisions will be mistaken.⁶⁶ Since there might be substantially more false positives (erroneous identifications of absurdity) than false negatives (erroneous non-identifications of absurdity), it is possible that in assessing the expected number of errors, the designer would conclude that there would be fewer errors committed by interpreters bound to the plain meaning of the relevant language, even when absurd, than there would be if those interpreters were empowered to search for absurdity.

The case for *Locke*, therefore, is premised on the assumption that the assessment just described might, on occasion, produce the conclusion that looking for absurdity will produce more errors, such that empowering or allowing judges to look for absurdity would not be the best strategy if error-minimization were the goal. And if and when that is the goal, absurd results reached by refraining to exercise the power to correct them are merely the consequence of the approach I have just described.

Supposing this to be correct, the controversy is then about assessing whether this conclusion would ever be justified where the rulemaker is a legislature and the rule-interpreter is a court. Farber, for example, agrees that my conclusion might be plausible where the rule-interpreter is a police officer, but thinks that when we are talking about judges (including elected municipal judges and nonlawyer justices of the peace?) an approach based on practical reason, one that would probably, among other things, produce the opposite result in *Locke*, is "inevitable."⁶⁷

Here again the disagreements may be smaller than they first appear. The existence of the absurdity exception in the "Golden Rule" of statutory interpretation (and Aleinikoff and Shaw appear to be offering a variant on the Golden Rule) suggests that several centuries of Anglo-American legal cultures have been comfortable with empowering judges to search for and to correct statutory absurdity.⁶⁸ My claim is only that this fact is empirically contingent rather than inevitable, and that it might be different were we thinking about different cultures, different

66. See Donald H. Regan, *Authority and Value: Reflections on Raz's Morality of Freedom*, 62 S. Cal. L. Rev. 995, 1095 n.215 (1989).

67. Farber, 45 Vand. L. Rev. at Part II.A., n.39 (cited in note 39).

68. See *Caminetti v. United States*, 242 U.S. 470 (1916) (stating that "[i]n 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"). See generally Rupert Cross, *Statutory Interpretation* 14 (1976). The Golden Rule is also noted in Henry M. Hart, Jr. and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1144 (tent. ed. 1958) (hereinafter Hart and Sacks, *The Legal Process*).

legislatures, and different judges. It appears, for example, that judges in post-Revolutionary France were held to a high degree of formality precisely because the judiciary remained populated by the aristocracy, and the Revolutionary authorities were afraid that the judges would use any possible opportunity to interpret the laws to subvert the Revolution.⁶⁹ And it turns out that forms of statutory interpretation placing far heavier reliance on plain meaning, even when it diverges from anything or everything else, have much greater credibility in other countries than they do in the United States.⁷⁰

Even apart from questions of historical or comparative interest, well worth pursuing in their own right, there are two strong reasons for thinking about the contingency of the existing Anglo-American approach and the consequent plausibility of a literalism even more extreme (by not including an absurdity exception) than that of the Golden Rule.⁷¹ One is that the issue of absurdity is but one extreme on a spectrum of judicial empowerment and judicial law-revising authority. We better understand the issues involved in more active judicial revising or updating of statutes⁷² by understanding what is at issue when more extreme judicial disempowerment is involved. We thus benefit from understanding the circumstances under which we could say, for example, that *Locke* was rightly decided, or that an official rightly prohibited a candidate from filing his election petitions three minutes late,⁷³ for with this understanding we can better grapple with issues

69. The statement in the text is based on conversations with Professor Tony Honor. The question is not just of historical interest. In the short term the same situation might also exist in a transformed South Africa, given that one of the consequences of apartheid is that the class of technically qualified judges is overwhelmingly white.

70. See especially D. Neil MacCormick and Robert S. Summers, *Interpreting Statutes: A Comparative Study* (Dartmouth, 1991). On the substantially greater degree of legal formality in Great Britain than in the United States, see Patrick Atiyah and Robert S. Summers, *Form and Substance in Anglo-American Law* (Clarendon, 1986).

71. For examples of such an unqualified literalism, even in the face of an arguably absurd application, see *Commissioner of Immigration v. Gottlieb*, 265 U.S. 310 (1924); *Chung Fook v. White*, 264 U.S. 443 (1924); *Easson v. Commissioner of Internal Revenue*, 294 F.2d 653 (9th Cir. 1961), overruled in *Doyon, Ltd. v. Bristol Bay Native Corp.*, 569 F.2d 491 (9th Cir. 1978); *Ambros, Inc. v. Maddox*, 203 F. Supp. 934 (D. Guam 1962); *Hill v. East and West India Dock Co.*, 9 A.C. 448, 464-65 (H.L. 1884). See generally E. Russell Hopkins, *The Literal Canon and the Golden Rule*, 15 Can. Bar Rev. 689 (1937); Hart and Sacks, *The Legal Process*, at 1144-64 (cited in note 68).

72. See Guido Calabresi, *A Common Law for the Age of Statutes* (Harvard, 1982); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. Pa. L. Rev. 1479 (1987); Donald C. Langevoort, *Statutory Obsolescence and the Judicial Process: The Revisionist Role of the Courts in Federal Banking Regulation*, 85 Mich. L. Rev. 672 (1987); Note, *Intent, Clear Statements, and the Common Law: Statutory Construction in the Supreme Court*, 95 Harv. L. Rev. 892 (1982). A cautionary note is sounded in Daniel A. Farber and Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 Texas L. Rev. 873 (1987).

73. *Hunter v. Norman*, No. 5197-86-WRC (Vt. July 28, 1986), discussed in Schauer, 97 Yale

about interpreter power presented more plausibly in a wide range of less extreme cases.

In addition, although both this Symposium and my earlier article are about judicial interpretation, I and others are equally, if not more, interested in issues involving interpretation and enforcement of statutes and other rules by nonlawyer officials. In some of those contexts approaches that seem implausibly extreme when applied to the judiciary seem much more plausible when the interpreters are not judges.⁷⁴

But maybe not. Here Professor Rubin engages me directly on this issue, and argues, quite correctly, that we should be wary of too easily collapsing judicial interpretation, agency interpretation, and public (or subject) interpretation into the same model.⁷⁵ Acknowledging his debt to Kelsen, Rubin distinguishes those laws addressed to officials from laws addressed directly to subjects, although the latter, of course, also involve the potential for official enforcement. He then suggests, with echos of *Chevron*,⁷⁶ that intransitive laws, those directed primarily to agencies which will then make the micro-rules that govern public conduct, should be interpreted in light of the fact that agencies and legislatures are in many respects like families, joined by a close and interlocking network of relationships and understandings considerably richer and denser than the relationships among those who share little more than a common language.

This is of course true, but let us see where Rubin goes with this. Putting aside his erroneous attribution to me of the preposterous position that plain meaning should be the exclusive method of statutory interpretation in all contexts,⁷⁷ we can take seriously the issue of how an approach to statutory interpretation might vary depending on the identity of the primary addressee of that statute. First we must recognize that this issue will vary dramatically with the context in which the discussion is taking place. That is, the question of how an agency should interpret a statute is not the same question as how a court

L. J. at 515 (cited in note 22).

74. See Schauer, 58 S. Cal. L. Rev. 399 (cited in note 21).

75. Edward L. Rubin, *Modern Statutes, Loose Canons and the Limits of Practical Reason: A Response to Farber and Ross*, 45 Vand. L. Rev. 579, part B (1992). A similar perspective, differentiating textualism by courts from textualism by agencies, and exploring the effect of a text-based approach on the teachings of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), is found in Michael Herz, *Textualism and Taboo: Interpretation and Deference for Justice Scalia*, 12 Cardozo L. Rev. 1663 (1991).

76. 467 U.S. at 837 (1984).

77. To say, as I acknowledge I do, that there is more to be said for a plain meaning approach than is commonly supposed is *not* to say that there is nothing to say for any other approach, is *not* to say that plain meaning is the only factor that should be consulted, and is *not* to say that plain meaning is better than any other approach in all contexts. Attributing to me some combination of these views makes Rubin's case much easier, but for what purpose I am not sure.

should interpret a statute that is addressed primarily to an agency (and the latter question may depend on whether there is an existing agency interpretation or not).⁷⁸ As to the former, one approach would start from the premise that the agency sees itself as a partner with the legislature in an ongoing cooperative enterprise, such that the agency should not see itself as saddled to an admittedly acontextual rule-based approach, of which plain meaning is but one exemplar. And another approach would start with the premise that some agencies might be inclined to overestimate their own comparative competence, or inclined to view the extension of their own authority as an independent good. An agency self-consciously worried about its own pathologies in this way might decide to pause before relying too easily on its own judgment, and might in Ulysses-like fashion impose upon itself some devices designed to entrench this self-doubt against spasms of overconfidence in particular cases. In other words, even an agency part of a cooperative enterprise with the legislature might still impose upon itself constraints against the possibility that *it* will see *itself* as too large a participant in the cooperative process.⁷⁹ Thus, an agency might as an exercise in decisional or institutional modesty take, for example, plain meaning more seriously than it otherwise might. This is not to say that it would take plain meaning as the exclusive guide. But the agency might impose upon itself more of a presumption in favor of plain meaning than might otherwise be the case, merely as self-prophylaxis against its own worst tendencies.

More plausibly (since individuals or institutions too rarely precommit themselves in order to guard against their own pathologies), a society might plausibly seek to guard against these possibilities in some or all of its agencies. Apart from the distinction between whether this society has done so and whether it should do so, it is again not implausible to suppose that this might vary with time, place, and agency. First of all, there are agencies and there are agencies.⁸⁰ Not all agencies are federal, not all agencies are (comparatively) immunized from short-term

78. And if we take seriously the presence of independent professional responsibilities of lawyers, the role of a lawyer interpreting a statute in the context of giving advice to a client is different from the role of a court in interpreting the same statute. Handelman, 40 DePaul L. Rev. at 613-14, 650 n.174 (cited in note note 11).

79. The likelihood of this seems at first counterintuitive, in that we normally assume that institutions take the expansion of their own power as very important in its own right. But, intriguingly, the courts may provide a useful counter-example, because much of nonjusticiability doctrine is just about this kind of self-limitation. It is possible that federal courts use notions of standing, ripeness, mootness, and political questions merely to reach certain desired substantive results, in which case courts using these devices are not limiting their involvement at all. But if this hypothesis is even partly false, then the part that is false supports the proposition that institutions can and sometimes do seek to limit their own degree of participation in the process of governance.

80. See generally Geoffrey P. Miller, *Independent Agencies*, 1986 S. Ct. Rev. 41.

political pressures, not all agencies are involved in areas of considerable technical expertise, and not all agencies face issues of low public short-term visibility. Thus, a society might think differently about the Selma Police Department and the Securities and Exchange Commission, just as it may think about the Office of Economic Opportunity under Howard Phillips (whose mandate as head of the agency in the Nixon administration was to dismantle it) differently from how it thinks about the Federal Reserve Board from how it thinks about the International Trade Commission.⁸¹ With all of the possible differences among agencies, the degree to which comparatively acontextual interpretive approaches in the service of some diminution of agency power would be desirable will vary as well. So in this sense Rubin is right, although wrong about whether I disagree with him. Since I have never claimed that acontextual decisionmaking is desirable in all contexts, nothing I say is inconsistent with the view that for some agencies, at some times, releasing (or not imposing) the shackles of plain meaning, even with only a slight presumption, is desirable. But to say this for all agencies at all times, or even for all federal agencies at all times, or even for all federal agencies at this time, seems a bit institutionally acontextual for my tastes.

This approach is also relevant to the different question of how a court should interpret a statute directed primarily to an agency rather than directly to the addressee public, for here again it may be unwise to generalize across all agencies at all times. Surely we can understand the plausibility of Rubin's worry about outsider courts using techniques such as reading the statutes as outsiders to interfere excessively with the ongoing and arguably family-like relationship between agency and legislature. But so too might we understand the plausibility of courts worrying that sometimes-captured agencies⁸² with a practical last word on many issues might overassess or overclaim their own place in the governmental family. If and when this concern is plausible, courts viewing themselves as delegated agents of the legislature⁸³ might see their role as one of enforcing the language of a statute against the efforts of an agency to bend that language to its own will.⁸⁴

81. See Ronald A. Cass, *Trade Subsidy Law: Can a Foolish Inconsistency Be Good Enough For Government Work?*, 21 *Law & Policy in Int'l Bus.* 609, 657-58 (1990) (noting that Congress, with good reason, appears to trust the International Trade Commission more than it trusts the Treasury Department).

82. On capture, see Ian Ayres and John Braithwaite, *Tripartism: Regulatory Capture and Empowerment*, 16 *Law & Social Inquiry* 435 (1991); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 *Harv. L. Rev.* 1667 (1975).

83. Courts certainly see themselves as legislative agents with respect to issues arising under the dormant commerce clause. See *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 534-35 (1949).

84. Consider in this regard the ability of agencies to make recourse to principles of fairness

I do not mean to say that agencies are always or even usually to be distrusted. But I do mean to suggest that distrust of some agencies at some times is hardly a preposterous position, and that some courts at some times in some places might be less protective of "our governmental system" than are Rubin and others. For those who think that "our governmental system" has gone in some ways awry, interpretive approaches designed as correctives can hardly be dismissed as absurd.

So as I have said before, my claims about strong rule-boundedness or about plain meaning are not claims that these acontextual forms of decisionmaking are exclusive, or even nonexclusively desirable in all decisionmaking domains. I claim only that they are not always undesirable. But if I might be forgiven for a lapse into logic, the negations of "always" are both "never" and "sometimes," and thus for me to say that plain meaning is not always undesirable is *not* to make the claim that it is always desirable (or never undesirable), but only to make the claim that it is sometimes desirable. And the determination of when it might be desirable is necessarily domain-contextual.

IV

So if it might at some times in some domains be useful to take plain meaning as presumptively controlling in interpreting statutes, what is the "plain meaning" that is to have this force? Here it is important to start with a caveat and then draw a few distinctions. The caveat is that no sensible defense of a plain meaning approach takes it to be applicable to all items of statutory language, since many are simply not plain. The degree of plainness, that is the degree of convergence of extension of language among readers of that language,⁸⁵ is just that—a

to create case-specific exceptions to otherwise applicable administrative rules. See Alfred C. Aman, Jr., *Administrative Equity: An Analysis of Exceptions to Administrative Rules*, 1982 Duke L. J. 277. A court might at times treat such power as a recognition of the agency's greater expertise and sensitivity to context, but might at other times worry about the potential for favoritism that such a power involves. As a result, a court more concerned about the latter than the former might plausibly impose something like a plain meaning rule on an agency.

85. Perhaps a simpler way of making the point is to say that the extent of plainness is measured by the degree of agreement among language users about whether the term is or is not properly used in some instance, or does or does not refer to some particular. Under this definition, it is possible that some term, like "reasonable," could be *plainly* vague.

It might be useful to expunge from discussions about the effect of legal rules the words "deduce" or "deductive," since both suggest that an interpreter starts with a rule and then generates an outcome with the benefit of no supplemental premises. In fact I know of no one who believes that, and if anyone does I maintain they are mistaken. By contrast, what I and others do believe is that if we start with the particular and not the general (as is the case when we identify an act and then ask whether it is or is not unlawful according to some rule), we can say about a large number of acts and a large number of rules that the act is or is not within the linguistic scope of the rule. Or, to put it differently, we can say that the act is or is not *subsumed* within the language of the rule. See Stanley L. Paulson, *Subsumption, Derogation, and Noncontradiction in "Legal Sci-*

matter of degree. At one end of this spectrum of determinacy, it is implausible to suppose that linguistically indeterminate language, language in which there is limited convergence of interpretation within the field of likely interpreters, can be interpreted according to a plain meaning approach.⁸⁶ It is true that judges have historically tended to mask contested social and political choices of interpretation of indeterminate texts in the language of linguistic inexorability.⁸⁷ But if the distinction between more or less indeterminate language is sound, as I believe it is, then the fact that some judges have disingenuously treated some language as more determinate than it is is not overly relevant to thinking about how genuinely more determinate language should be treated. Thus, a case for taking meaning as important when it is plain is in no way a case for treating meaning as plain when it is not.

This caveat aside, two important distinctions remain. One is the distinction between ordinary and technical meaning, where the latter involves the embellishment on, supplementation of, and, occasionally, substitution for, the former. Thus, the roofer's use of the word "thousand" to refer to 1200 shingles is decidedly nonordinary, and so too with numerous other domain-specific usages that are less diametrically opposed to ordinary usage.⁸⁸

Consistent with my resistance to claims of inevitability (noncontingency), I do not want to claim that use of plain meaning necessitates interpretation by recourse to the lawyer's technical usage or to ordinary usage. But given that lawyer's technical usage is shared by virtually all lawyers, it is not inconsistent with the general thrust of a plain meaning approach that statutes would be read not as a person on the street (or

ence," 48 U. Chi. L. Rev. 802 (1981).

86. Farber interprets my previous similar qualification as evidence that I think that vague or ambiguous language "is infrequent." Farber, 45 Vand. L. Rev. at part II.B. (cited in note 39). I do not. I do think, however, that the question of the force of moderately clear language in the face of concerns going in other directions is important enough to justify writing articles about it. And I also think that there are lots of important things, including but hardly limited to how judges should decide cases when the language of a statute or constitutional provision gives little guidance, that I do not write articles about. Although that should alone be sufficient, I should note that I further believe that when neither language nor the cases point with some strength in one direction rather than another, judges do decide roughly according to the same full range of social, political, and moral considerations that is often called "discretion." See Schauer, *Judging in a Corner of the Law* (cited in note 16). And I think as well that although within this field there are politically and morally better and worse answers, it is not clear to me that comparative competence in prescribing them is necessarily possessed by legal theorists.

87. For example, *Lochner v. New York*, 198 U.S. 45 (1905), which I discuss on this point in Schauer, 97 Yale L. J. at 511-14 (cited in note 22); *United Steelworkers v. Weber*, 443 U.S. 193 (1979), criticized on this point in Eskridge and Frickey, 42 Stan. L. Rev. at 343-44 (cited in note 63).

88. For a discussion of the English law on this issue, generally consistent with what I say in the text, see Cross, *Statutory Interpretation* at 64-67 (cited in note 68).

the Clapham omnibus) would read them, but rather as a nonspecialist lawyer would read them. So if my supposition about plain meaning as a coordinating device for members of a multi-member appellate court is correct, then in this context that function could be served by taking "plain meaning" as roughly equivalent to "lawyer's reading of the text." The goal here, after all, is to find something that nine American lawyers between the ages of 45 and 85 might read the same way, rather than something that those nine lawyers *and* the first hundred names in the District of Columbia telephone directory would read the same way.

Things get a bit tricky here, because it may very well be that at the least the Golden Rule of statutory construction is now part of lawyer's English in the United States in 1992. If so, then something resembling a plain meaning approach might take the "absurdity" exception of the Golden rule to be part of lawyer's plain meaning, in which case it could be said, again not implausibly, that *Locke* was a misapplication of a plain meaning approach rather than a pursuit of it.

If the goal of a plain meaning approach is something other than judicial coordination (or judicial minimalism constrained by the standards of the profession), however, then ordinary meaning rather than lawyer's meaning might be more germane. Just as ordinary meaning, rather than technical meaning, governs when penal statutes are construed strictly for reasons of notice to their addressees, in some other transitive contexts ordinary meaning might be dispositive. And if the issue is interpretation by an agency, or by some nonlawyer but still specialized group, other forms of technical meaning may be most appropriate.

Again, I cannot explore all of these domains here. The suggestion I make here is only that even a qualified and decidedly partial resurrection of what many take to be a heretical idea is especially susceptible to attack by caricature. One of those caricatures is that interpretation according to plain meaning involves the equivalent of handing out statutes at the entrance to the subway and then taking a poll of the subway riders to find out what the statute means. Now in some contexts even this (or an embodiment of this metaphor) might be plausible,⁸⁹ but my point here is only that forms of statutory reading far more sophisticated than this would still count as plain meaning so long as they took legislative intent, regulatory context, and interpreter conceptions of optimal-

89. Especially if we follow Bentham and many others in worrying that excess reliance on technical meanings has the antimajoritarian effect of excessively empowering an elite of lawyers and judges. For a discussion of Bentham's thoughts in this regard, see Hart, *The Demystification of the Law* at 21, 29-39 (cited in note 3). See also Martha Minow, *The Case of Legal Language*, in *The State of the Language* 246, 246 (Christopher Ricks and Leonard Michaels eds. 1990) (suggesting that "[l]awyers use terms that disable nonlawyers from commenting or understanding").

ity (on whatever basis) as relatively unavailable compared to what appeared within the four corners of the document. Now when a sophisticated reader reads "within the four corners," she reads in light of numerous understandings that do not come from within the four corners, just as with ordinary nontechnical language the reader understands in light of numerous contextual factors not themselves "on" the printed page or "in" the spoken word. This is noncontroversial, however, much of its denial is again one of the tendentious caricatures attributed to those of us who at times see more in language-dominant interpretive modes than is now fashionable. So the only issue is whether the contextual understandings that are shared by a given linguistic community will dominate, or whether finer contextual understandings, not themselves carried by relatively small linguistic units, will be available as an aid to interpretation. But even the preference for the former over the latter might, at times, tolerate a technical language rather than an ordinary language approach to what counts as plain meaning.

In addition, the reliance on plain meaning need not commit the interpreter to reading single words or even single sentences in isolation. The issue is one of the size of the domain of information available to the interpreter. Although an approach focusing on single sentences would be possible, it is not compelled by the notion of plain meaning. Much more plausibly, approaches commonly designated as "plain meaning" are approaches that prefer what can be gleaned from an entire statutory provision, or an entire statute,⁹⁰ to what can be recovered from a host of other legal and social sources. So again it is important to avoid the caricature. To prefer what the entire statute says to what the legislature meant or what is optimal when the two diverge is still to adopt basically a plain meaning approach, even though it involves looking at units larger than single words or sentences.

V

By resisting the caricatures I do not mean to suggest that there is not a real dispute here, but I do intend to focus on what the normative dispute really is. It is a dispute about whether interpreters of statutes might in some domains be constrained by methods of interpretation that are comparatively mechanical and comparatively acontextual, recognizing that any such interpretive method is destined to be subop-

90. Of course there could be conflicts between more or less "local" parts of the same statute, in which case some approaches within plain meaning would prefer the local over the distant, and others would take the opposite approach. And those preferring the local over the distant would in some sense be the plain meaning versions of a plain meaning approach while those preferring the reading of the full statute to a conflicting isolated passage, even in the most relevant section, would be in some sense the more contextual versions of a plain meaning approach.

timal. But all second-best approaches are suboptimal, and the best way in which the debate can continue is to identify and evaluate the *full* array of results produced by some array of interpreters in some interpretive domain. By engaging in this identification and evaluation we will be in a position to compare the number of "mistakes" made by interpreters attending to context as best they see it with the number made by interpreters attending to plain language as best they see it. Were we to do this, we might find that there is no difference, a quite conceivable verification of the Legal Realist hypothesis. And we might find that in some contexts, perhaps including much of American statutory interpretation, more mistakes were made by following the false paths of plain meaning than by interpreters using their best judgment. But we might also find that in some contexts more mistakes were made by wicked, misguided, overworked, or simply confused interpreters trying unsuccessfully at times to make the best of a context than would be made by the same interpreters under the same conditions restricting themselves (or being restricted) to a smaller range of sources, such as plain meaning. Some commentators, including many who are part of this Symposium, appear to assume that such a result is inconceivable. For my part, I assume the opposite, which again is not that such a result will always or even usually obtain, but only that it sometimes might.

My approach has a big disadvantage. If it is never true that one approach is preferable, then there is no reason to look at the data. But if it might under some circumstances be true, then it is necessary to look at full sets of decisions rather than selecting isolated cases. That, following loosely a tradition pioneered by Llewellyn, is what I have tried to do with the Supreme Court's 1989 Term, and what I will in the future try to do with other sets of data. Thus, the disadvantage of my approach is that it requires examination of interpreter performance under alternative approaches to interpreter empowerment. This in turn requires recourse to the data, or to experiments, both of which involve more work than the selection of isolated cases in order to support a large generalization. But it should be no fault of a hypothesis that it takes work either to verify it or to falsify it.

