PLAIN LANGUAGE TEXTUALISM: SOME PERSONAL PREDILECTIONS ARE MORE EQUAL THAN OTHERS

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Supreme Court Justices should not use personal predilections when interpreting the Constitution . . . unless, of course, they are my predilections. [FN1]

Introduction

Justice Story, in his concurrence in Dartmouth College v. Woodward, [FN2] described Sir William Blackstone's language as “elegant.” [FN3] One commentator called the Restatement (Second) of Contracts [FN4] “elegant[1].” [FN5] Similarly, Solicitor General Theodore B. Olson lauded as elegant Chief Justice John Marshall's opinion in Marbury v. Madison. [FN6] Others have agreed that the language of the Constitution is “elegant.” [FN7] Still others have used other adjectives. [FN8] Finally, while perhaps no one *338 has boldly declared the entire Constitution to be “plain,” many do use “plain” as the adjective to describe a variety of constitutional provisions. This Article does not take issue with describing the Constitution's language as “elegant,” “expansive,” “general,” or “broad.” Instead, this Article challenges the use of the adjective “plain” to describe the language of the Constitution, and the subsequent use of that description as a basis to interpret the Constitution.

This Article, often using as a foil a relatively recent article written by Vasan Kesavan and Michael Stokes Paulsen, [FN9] challenges the validity of plain language textualism, an allegedly superior method of constitutional interpretation based solely on the “plain language” of the Constitution. [FN10] First, this Article demonstrates that, notwithstanding the ebb and flow of support for this interpretive method, both the Supreme Court and its individual Justices often seek to “plainly” define various provisions in the Constitution. What matters most to this Article is not whether any individual “plain language” interpretation of a constitutional provision seems reasonable or even best, but rather whether the use of “plain language” is consistent with the expressed and unexpressed objectives and purposes of plain language textualism. This, of course, requires a review of the objectives and purposes of this interpretive method. In
the end, this Article asks the bigger question: whether one can self-righteously demand any interpretive method that requires assumptions and rationalizations inconsistent with the purposes of the interpretive method itself. In particular, one of the strongest arguments in favor of plain language textualism is that it eliminates the personal predilections of Justices interpreting the Constitution. This Article concludes, however, that plain language textualism actually ensconces the personal predilections of those who rely on it.

This Article first will introduce plain language textualism, and then review the use of plain language textualism, noting some of the occasions where the Court (or an individual Justice) has applied, or purported to apply, plain language textualism. Using both the words of the Court and its Justices, as well as scholarly defenses of textualism and plain language textualism, this Article will discern the justifications for (or perhaps purposes of) plain language textualism. Next, this Article will demonstrate that plain language textualism is a creation of non-textual or extra-textual assumptions or conclusions. The point is that textualism, especially plain language textualism, suffers from the same failures that it purports to eliminate, because it actually protects that which it seeks to eliminate. It seeks to eliminate the use of personal predilections in constitutional interpretation by ensconcing into the Constitution the personal predilections of the plain language textualist.

I. Plain Language Textualism

A. Introduction

Few would disagree that constitutional analysis would be simpler if it could begin and end with the text. For example, it is relatively simple to decide whether a person who has not attained the age of thirty-five or is not a natural born citizen is eligible to be President of the United States. Most of the Constitution's text, however, is not that simple or, to use the term of art, “plain.”

The Constitution, by its words, prohibits “unreasonable searches and seizures” but does not define “search” or explain “unreasonable.” The Constitution neither refers to e-mail or telephone conversations, nor discusses whether the government can read or listen to those messages as they travel via electromagnetic signals from one electronic device to another, such as satellites and cell phones. Even if the Constitution clearly defined unreasonable searches, the question (unanswerable by the words of the text) is what the proper remedy should be for such a search. For example, should the information gained through an illegal search be excluded from a criminal trial, or should the injured person be entitled to sue the government for the violation? Even assuming the Court held that each provision of the Constitution was clear, the text surely could not answer all questions.

The Constitution undeniably has gaps in it; for example, the Constitution mentions neither automobiles nor abortion. Regardless, this Article does not concern gaps. This Article does not argue that plain language textualism is an invalid approach to constitutional analysis based on the assertion that gaps exist in the Constitution; nor does it argue that some words cannot possibly be considered plain in their meaning. Instead,
this Article concerns the written words that are actually in the Constitution; it questions whether textualism, at least plain language textualism, is ever an appropriate method, particularly as a sole interpretive method of interpreting the black marks on the pieces of paper commonly referred to as the United States Constitution. The question is whether a constitutional interpreter may find meaning in the “indisputable” simplicity, i.e., “plainness,” of a word or phrase, or in the “indisputable” obviousness, i.e., “plainness,” of a word or phrase.

B. Plain Language Textualism Defined

Both beauty and beast can be found in the English language. Words have different meanings depending on context, inflection, tone, and timing. Generally, the understanding of a written document must rely on the meanings or possible meanings of words and their relationships with each other, that is, their context within a phrase, a clause, or a document. While there may be other meanings to textualism, this Article uses the phrase “plain language textualism” to encompass a method of Constitutional interpretation that relies on, or purports to rely on, only the words of the Constitution’s text. This type of plain language textualism purports to eliminate any reference to any outside source. Plain language textual interpretation proclaims the existence of a “plain” meaning, and then sets forth that relatively specific and singular meaning. Contradistinguishing plain language textualism are various contextual textualist theories or approaches. Under one theory of textualism known as “legislative contextualism,” judges are to determine the objective meaning of an enactment from its text and legislative context. Another theory of textualism known as “semantic contextualism” considers the semantic context of the surrounding law, or the “semantic context” in general. These contextual-textualist approaches generally seek to obtain the meaning of words from their context within other words in close physical proximity. Justices Scalia and Thomas claim “fidelity to the text,” but regularly rely on “original meaning” of the Constitution. These Justices and others refer to “original meaning,” “original intent,” and the “intent of the Founders.” Ironically, a look at historical and original meaning textualism begs the question of whether a person alive today, using a modern understanding of language, could actually understand the meaning of the Constitution. Those who rely on historical or original meaning textualism admit (at least implicitly) that the text itself fails to self-interpret or self-define. This approach significantly differs from plain language textualism.

Textualists who follow the above approaches seek to distance their version of “textualism” from “literalism.” One commentator, Kelly Hollowell, proposed a very intriguing version of textualism wherein she would demand that “the Supreme Court . . . apply to the words [of the Constitution] their plain meaning and give content to interests, which are within the scope of particular constitutional provisions.” According to Hollowell, various provisions imply the existence of “interests” which are then used to interpret the words. “Plain meaning” then, may have a variety of meanings, including at least one that is not apparent. While other textualist approaches exist, the plain language textualism reviewed here
asserts the existence of a one true and eternal meaning, a meaning that does not change with time or perspective—a non-debatable meaning. [FN32] For the purposes of this Article, plain language textualism refers to an effort to proclaim the one true and eternal, perhaps catholic, meaning to a word or phrase, without use of extra-textual sources or context.

II. Plain Language Textualism in the Supreme Court

A discussion on plain language textualism would have little relevance if no one on the Supreme Court ever relied on, or purported to rely on, plain language textualism. A review of the Court's decisions demonstrates that the Court regularly relies on, or purports to rely on, the "plain language . . . of the Constitution." [FN33] This section notes some of the cases in which the Court asserted its reliance on plain language textualism. The goal is not to demonstrate that the Court relies solely on plain language textualism. The Court surely relies on a variety of interpretive methods when ruling on constitutional questions, often doing so in a single case. This section seeks to demonstrate that the Court turns to plain language textualism often, and that the validity of plain language textualism is relevant to the actual work of the Court.

A. Supreme Court Decisions

In what might be a surprising revelation to those who teach or study constitutional law, the Court has indicated on at least one occasion that its analysis of the Commerce Clause was based on “plain language.” [FN34] In Addyston Pipe & Steel Co. v. United States, the Court “conclude[d] that the plain language of the grant of power to Congress to regulate commerce among the several states includes power to legislate upon the subject of those contracts in respect to interstate or foreign commerce which directly affect . . . that commerce.” [FN35] This version of the Commerce Clause’s plain language contradicts what Justice Thomas finds obvious, i.e., plain, in his Commerce Clause concurring opinion in United States v. Lopez. [FN36] While much of Justice Thomas’s opinion focuses on original meaning, his discussion also indicates the plain meaning of the Commerce Clause. [FN37] Justice Thomas, therefore, seems to agree that the Commerce Clause has a plain meaning, but he disagrees as to what meaning is in fact plain. Indeed, Justice Thomas suggests that the Court, subsequent to Addyston, has obliterated the idea of a plain language commerce clause. [FN38] Supporting his claim is the Court's own *345 statement interpreting the Commerce Clause in United States v. Darby: “[t]he power of Congress . . . over interstate commerce [i.e., commerce among the several states] is not confined to the regulation of commerce among the states.” [FN39] Inasmuch as the Commerce Clause confers power on Congress “[t]o regulate commerce . . . among the several States,” [FN40] a more express rejection of plain language could hardly be found. The Court's earlier holding in Addyston that the Commerce Clause contained “plain language” seems at best suspect where one member of the Court finds the “plain meaning” of the Commerce Clause to be completely contrary to the Court's plain meaning. [FN41] In perhaps another surprising conclusion, the Court has held that the terms “privileges” and “immunities” have an “ordinary,” if not technically a “plain,” meaning. [FN42]
While the Court was not construing the Constitution at the time, its conclusion is fascinating inasmuch as the Court had, thirteen years before that holding, found that the two Privileges and Immunities Clauses of the Constitution had different meanings. [FN43] Adding to the surprise, in Tennessee v. Whitworth, the Court stated, “[a] legislature . . . must be conclusively presumed to have used a word or term of the constitution in the sense and with the meaning given it by that constitution.” [FN44] Given the controversy over the Court's holding in the Slaughter-House Cases, [FN45] the Court's discussion of the terms “privileges” and “immunities” demonstrates one of the difficulties with plain language textualism: language may have two meanings one day and be “plain” the next.

*346* The Court has relied on plain language textualism on other occasions. In Pollock v. Farmers' Loan & Trust Co., the Court held that the Constitution's restriction on federal taxation, for example, Article 1, Section 9, Clause 4, “appear[s] to [the Court] to speak in plain language.” [FN46] In United States v. Ortega, the Court held that enforcement of the law of nations, which prohibits “offering violence to the person of” a public minister, “is not a case affecting a public minister, within the plain meaning of the constitution [],” [FN47] specifically, Article 3, Section 2. [FN48] In Okanogan v. United States, the Court held that the “plain language” of Article 1, Section 7 [FN49] clearly sets out the procedure the President must follow to perfect a veto. [FN50] Finally, in Ex parte Grossman, the Court held, as to the President's power to pardon, [FN51] “[n]othing in the ordinary meaning of the words ‘offenses against the United States’ excludes criminal contempts.” [FN52] Although these cases are not the only ones in which the Court has expressly and specifically relied on plain language textualism to support its holding, they are among the very few.

B. Dissenting and Concurring Opinions

At least as often as the Court explicitly relied on plain language textualism, a dissenting or concurring Justice has also relied on plain language textualism. Generally, these Justices often point out that what the majority asserted was an obviously (“plainly”) incorrect interpretation. They often suggest that the Court was wrong because it misinterpreted the Constitution’s “plain” language. Justice Black regularly advocated plain language textualism. In many of the cases involving the incorporation of the Bill of Rights *347* through the Fourteenth Amendment, Justice Black concurred (or wrote a plurality opinion) urging the Court to follow the plain language, and often indicated when the Court failed to do so. [FN53] Justice Black asserted that a number of the Constitution's provisions contain language sufficiently plain to control decisions of the Court, including the First Amendment, [FN54] the Sixth Amendment right to counsel as it applies to preliminary hearings, [FN55] and the Fifth and Sixth Amendments as they apply to federal prosecutions for crimes committed outside the United States. [FN56] Justice Thomas echoes Black's affiliation with plain language. Justice Thomas has asserted, in dissenting opinions, that both the Eighth [FN57] and Tenth Amendments [FN58] contain plain language. As Justice Thomas explains, rather than relying on other interpretational models, he prefers to “focus on the words of the adopted Constitution.” [FN59]
On another side of this multi-faceted gem of plain language textualism is Justice Stevens. He noted in a concurring opinion that the Eleventh Amendment's “plain language” does not create sovereign immunity, [FN60] and, in a dissenting opinion, that the language of the Warrant Clause of the Fourth Amendment is “plain.” [FN61] He also urged in a dissenting opinion that Article III plainly permits an excise of federal court jurisdiction over pendant party claims. [FN62]

Most of the Justices who have served on the Burger or Rehnquist Courts have joined, at some point, Justices Stevens, Thomas, and Black. Those who have authored dissenting opinions relying on plain language are (in no particular order) Justices Souter, [FN63] Kennedy, [FN64] Powell, [FN65] and Brennan. [FN66] Those from the Burger and Rehnquist Courts who have joined one or more dissenting opinions expressly relying on plain language textualism are former Chief Justice Rehnquist, [FN67] as well as Justices Scalia, [FN68] O'Connor, [FN69] Ginsburg, [FN70] Breyer, [FN71] Marshall, [FN72] and Blackmun. [FN73]

Almost every Justice since 1970 has written or joined a dissent espousing the virtues of plain language. [FN74] These opinions have asserted that a variety of provisions in the Constitution could be understood by looking solely to the “plain language” of the provision. These provisions include the Warrant Clause, [FN75] the Eighth Amendment, [FN76] the Tenth Amendment, [FN77] the Seventh Amendment, [FN78] and the Eleventh Amendment. [FN79]

The assertion that the Constitution contains “plain language,” however, is not confined to recent dissenting opinions. In the early 1900s and before, the Court and various Justices in dissent relied on, or purported to rely on, plain language textualism to support their positions. Again, these cases related to a variety of provisions in the Constitution, including provisions with relatively disparate interpretations. For example, in 1900, Justice Brewer asserted that the “plain language” of the Commerce Clause granted all power over commerce among the several states to Congress, and, therefore, it followed that such power was “wholly withdrawn from state control.” [FN80] Chief Justice Marshall asserted a plain language textualist argument to support his interpretation of the Contracts Clause in both Sturgis v. Crowninshield [FN81] and the casebook regular Dartmouth College v. Woodward. [FN82] Similarly, in 1895, Chief Justice Fuller stated that the Direct Tax Clause “appear[ed] to [the Court] to speak in plain language.” [FN83]

C. Conclusion as to the Supreme Court's Use of Plain Language Textualism

The Supreme Court has clearly turned to plain language textualism to decide constitutional questions. Perhaps just as often, Court dissenter use, or claim to use, plain language textualism to demonstrate what they perceive as the Court's error. Obviously, the Court used many interpretational models during the course of a century, and sometimes the Court even uses several models in interpreting a single case. The question considered by this Article, however, is whether the Court should ever use plain language textualism. This is a different question than whether the language of the Constitution serves as the primary guidepost to understanding the Constitution. In other words, although it is improper to ignore the language of the Constitution, this does not mean that analysis of a constitutional provision can or should begin and end with the “argument” that the language is “plain,” and that all who fail to see the “plain” meaning
are blind. Due to the use of plain language textualism, at least on occasion, by so many Justices, this Article seeks to determine the validity or value of such an interpretive model.

III. Justifying Plain Language Textualism

Justices who rely on plain language textualism, whether writing for the Court or in dissent, rarely justify the use of their interpretive methodology. Generally, Justices who rely on plain language textualism simply state that they have read the text to which they are referring, and then declare that it has a fixed meaning (a meaning which they have stated but which is usually controverted by others). They make no effort to explain why the Court, in the particular case, should interpret the Constitution without reference to any outside source. (Of course, one unstated outside source is always the Justice.) Consequently, explicit justification for using plain language textualism exists only outside Supreme Court decisions. And, as with perhaps any interpretive method, plain language textualism has friends and foes among commentators who can help supply that justification.

Those who believe that constitutional interpretation is more than resort to a dictionary [FN84] have suggested that the plain meaning of the Constitution is “elusive[,]” [FN85] suggesting that belief in plain meaning is “chimer [ical].” [FN86] Others have proclaimed the opposite, “that there is a single, ‘true’ method of constitutional interpretation . . . [and] that method is textualism.” [FN87] Commentators often provide no better explanation for using plain language textualism than the Court does. Commentators will often state that a particular decision is or is not consistent with the commentator's version of the “plain language,” *351 again, without suggesting why a plain language interpretation is valid, much less more valid than another method.

When commentators attempt to justify the use of plain language textualism, they often say little more than that the Constitution is a written document, so obviously plain language textualism must be used; that is, a written text implicitly requires plain language textualism. [FN88] A variation on that argument suggests that the Drafter, or Framers, or Founders implicitly intended the use of plain language textualism simply because they were great writers. [FN89] Kesavan and Paulsen do not rely solely on this implicit understanding of written text in general. Instead, they argue that the constitutional text explicitly requires textualism. [FN90] In the end, the most common argument for textualism is that the text implicitly or perhaps explicitly requires the use of plain language textualism. [FN91]

Rather than attempt to prove that the Court must use textualism, other commentators attempt to demonstrate why the Court should use *352 textualism. [FN92] They seek to show that plain language textualism better achieves certain values, purposes, or goals that the commentator deems paramount. [FN93] For example, one justification for using plain language textualism is that courts have, or should have, a limited or proper role. [FN94] This limited or proper role restricts the Court to using plain language textualism (at least where possible). Similarly, others see a limited role for the individual Justices. [FN95] This argument maintains that constitutional interpretation should not be a matter of personal predilections, and plain language textualism limits the personal predilections of the Justices. [FN96]
Restated, the arguments are:
1. The Constitution's text, explicitly or implicitly, requires plain language textual interpretation.
2. The Drafters/Framers/Founders were exceptional political thinkers and writers, and, therefore (and obviously), the Court must/should use plain language textualism in interpreting the Constitution.
3. Plain language textualism limits the personal predilections of the Justices on the Court.
4. Courts have, or should have, a limited or proper role in government; therefore, the Court must/should use plain language textualism in interpreting the Constitution.
While there may be other arguments for using plain language textualism, this Article will review only these four. These arguments may not be exclusive of each other, but they are grouped and classified here for ease of explanation and understanding.

A. The Constitution's Text Requires Plain Language Textualism

Professors Kesavan and Paulsen recently penned one of the strongest arguments supporting textualism, maybe even supporting specifically plain language textualism. They argue that the Supremacy Clause by its own terms requires textualism as the sole (or at least primary) interpretive model in constitutional interpretation. In their view, the Constitution “purports to be authoritative.” [FN100] This assertion follows, they say, from the existence of the Supremacy Clause, which they argue “proclaims” that the Constitution “shall be the supreme Law of the Land.” [FN101] According to Kesavan and Paulsen, if one “seeks to apply the Constitution as law[,]” then that person “must reckon with the fact that it is a written text that the Constitution purports to make authoritative.” [FN102] The only possible “reckoning” of that fact, so say the authors, is that the Constitution “itself thus appears to prescribe textualism (in some form or another) as the proper mode of interpretation.” [FN103] They support this conclusion by recognizing “the absence of any reference by the text to governing principles extrinsic to it.” [FN104] Add to this “the ordinary, common sense ‘default rule’ for interpreting texts in general and legal texts in particular,” and the only possible conclusion, outside of “an extraordinarily ingenious” and “disingenuous” conclusion, is that “textualism [is] the sole, legitimate method for interpreting and applying the Constitution as authoritative, controlling law.” [FN105] The authors might, they suppose, apply a different interpretive hermeneutic if reading the Constitution as literature, or poetry, or aspiration, or as some kind of eighteenth-century political novel. But that is not, or at least should not be, our enterprise as constitutional lawyers. It certainly is not the stated project of courts when they claim to apply the Constitution as law in judicial cases. [FN106]

Kesavan and Paulsen's textualist proof of textualism expresses what is often implied in the use of plain language textualism. This typical approach suggests that if a document is written, it is obvious that it is the plain words that are binding, that the whole reason to write something is to make the words “binding,” that is, to make the words the sole source of interpretation. Kesavan and Paulsen do not rely on the implicit assumption that words in a document, in this case the Constitution, are the sole source of meaning to the document, or at least they try not to. They conclude that if one argues that the
Constitution is binding law, that person must recognize that the words of the Constitution state that the Constitution is binding law. Put another way, they urge that if a person uses the words of the Constitution to demonstrate that the Constitution is binding, i.e., textualism, then that person recognizes textualism as the source of power and, therefore, must use textualism when asserting an exercise of that power.

B. Clever Draftsmen/Founders Argument

Some commentators support plain language textualism based on the argument that the Drafters (or the Founders) were particularly adept authors. [FN107] Justice Black described the authors of the Constitution and the Bill of Rights as “government-fearing” men who “did not, and I think wisely did not, use . . . vague, indefinite, and elastic language.” [FN108] Writing for a plurality, Justice Black earlier stated as an undisputed and indisputable fact that the Constitution was “drawn with . . . meticulous care and by men who so well understood how to make language fit their thought.” [FN109] Justice Thomas agreed, urging, “when members of the founding generation wished to make . . . a . . . constitutional guarantee, they knew how to do so.” [FN110] Similarly, Chief Justice Marshall assured the readers of Barron v. Baltimore that if the drafters of the Bill of Rights had intended to apply those rights to the States, the drafters would have done so in “plain and intelligible language.” [FN111] As explained by Justice Stevens, the Framers knew how to strike a balance between individual liberty and government power, and the “plain language” of the Constitution is an expression of that balance. [FN112] In other words, the Drafters/Founders of the Constitution (or the Constitutional era) knew how to be meticulous and careful when drafting the Constitution. [FN113] Textualists present this conclusion in part as a factual or at least indisputable truth. Implicit in this “truth” is the assumption that the Drafters/Founders intended to be meticulous and careful. [FN114]

*357 C. Avoiding a Personal Constitution

Another justification for plain language textualism is that its use eliminates constitutional interpretation based on personal predilections of the individual reader and, more important, the individual Justice. As noted by one commentator, “[c]hief among the virtues of textualism is that it removes the individual judge from inventing, instead of interpreting, the law.” [FN119] Justice Baldwin suggested there are provisions of the Constitution that have a “plain meaning,” [FN120] stating:

[W]here [the Constitution's] terms are plain, I should . . . deem it judicial sacrilege to put my hands on any of its provisions, and arrange or construe them according to any fancied use, object, purpose, or motive, which by an ingenious train of reasoning, I might bring my mind to believe was the reason for its adoption by the sovereign power, from whose hands it comes to me as the rule and guide to my faith, my reason, and judicial oath. [FN121]

He added, “I will not take away from the words of this book of prophecy.” [FN122] Put another way, Justice Baldwin would deem it inappropriate to personalize the Constitution. As Justice Black stated, a century and a half after Justice Baldwin, “I still
prefer to trust the liberty of the citizen to the plain language of the Constitution rather
than to the sense of fairness of particular judges.” [FN123] Chief Justice Burger dissented
in the opinion, while concurring in Justice Black's approach to constitutional
interpretation:

By inventing its own verbal formula the prevailing opinion simply seeks to reshape the
Constitution in accordance with predilections of what is deemed desirable. Constitutional
interpretation is not an easy matter, but we should be especially cautious about
substituting our own notions for those of the Framers. I heed Mr. Justice Black's recent
admonition on “the difference... between our Constitution as written by the Founders
and an unwritten *358 constitution to be formulated by judges according to their ideas of
fairness on a case-by-case basis.” [FN124]

Justice Scalia [FN125] and the second Justice White have also expressed concern with a
constitution based on the predilections of individual Justices. [FN126] The overriding
implication appears to be that “plain language textualism” is justified by the desire to
eliminate from constitutional interpretation the personal views of the individual Justices.
When Justices roam untethered, “[t]he Judiciary...is the most vulnerable and comes
nearest to illegitimacy.” [FN127] In the above noted cases, the dissenting Justices
[FN128] urged that the Court was bound by, but failed to follow, the plain language of
the Constitution. Justice Stevens has urged that the “plain language of the Constitution”
demands the “respect” of the Court. [FN129] Explicating this thought in an earlier case,
Justice Stevens argued that when the Court ignores the plain language of the Constitution,
it “is unfaithful to the balance struck by the Framers.” [FN130]

The Supreme Court's two newest Justices, Chief Justice Roberts and Justice Alito, may or
may not be textualists, but they agree that personal beliefs of Justices should not be part
of constitutional interpretation. During his confirmation hearings, Justice Roberts stated:
[T]he ideal in the American justice system is epitomized by the fact that judges, justices
do wear the black robes, and that is meant to symbolize the fact that they're not
individuals promoting their own particular views, but they are supposed to be doing their
best to interpret the law, to interpret the *359 Constitution according to the rule of law,
not their own preferences, not their own personal beliefs. That's the ideal. [FN131]

Justice Alito said during his confirmation hearing:
[My] obligation as a judge is to interpret and apply the Constitution and the laws of the
United States and not my personal religious beliefs or any special moral beliefs that I
have.... I have a particular role to play as a judge. [FN132]

Commentators have noted other Justices of the Court who expressed similar views that
Justices should avoid letting personal predilections or beliefs control their interpretation
of the Constitution. [FN133] Justice Blackmun, for example, “engaged in a career-long
struggle to reconcile his personal opposition to the death penalty with his view that
judicial duty required him to refrain from interpreting the Constitution to conform to his
personal beliefs.” [FN134] Such “accusations that justices have allowed their personal
predilections to drive their interpretations of constitutional text are common.” [FN135]

After Brown v. Board of Education, [FN136] many in the South rallied around the
condemnation of the Court for “substitut[ing] naked power for established law and the
imposition of personal predilections of public officeholders.” [FN137]

Put in a more affirmative tone, the “judiciary [should] serve as a disinterested guardian of
the people in interpreting the Constitution.” [FN138] This means that “[i]f members of
the Court were not capable of interpreting the law in some more or less objective manner, then judicial review would be indefensible—or, at least, not defensible under the logic of Marbury [v. Madison].” [FN139] As one professor observed, “judicial review is tolerable only to the extent that the Supreme Court operates as a disinterested decision maker, insulated as far as humanly possible from the personal predilections of the justices.” [FN140] Justices should not be interested in a result, they should be interested in only the meaning of the Constitution.

Not all those who would limit the personal predilections and beliefs of judges necessarily support plain language textualism. On the other hand, plain language textualism is consistent with the desire to limit judicial use of personal predilections and beliefs. [FN141] Indeed, it seems the core purpose of plain language textualism is to suggest one possible, i.e., “plain,” meaning to the Constitution, and if it has only one plain meaning, then Justices who rely on that meaning could not possibly infuse their own personal predilections or beliefs.

D. Courts Have a Limited or Proper Role [FN142]

Implicit or perhaps subsumed in the argument that interpretive models should limit the personal predilections of individual Justices is the argument (perhaps assumption, perhaps moral judgment) that courts have a proper or limited role in the government. [FN143] Courts should defer to the “political branches.” [FN144] Courts should not make law; they should only interpret it. [FN145] The platitudes are innumerable. While not all of these references and quotes specifically deal with support of plain language textualism, they express what is at the heart of at least one assumption: courts are implicitly charged with the responsibility of limiting their role. One of the best ways to limit the interpretation of the Constitution is to limit courts' interpretive method to textualism. The corollary to the goal of limiting personal predilections of individual Justices, therefore, is that plain language textualism limits the “personal” predilection of the Court as a whole. In other words, the Constitution should be no more the creation of the Court than the creation of an individual who just happens to be a Justice on the Court.

IV. Plain Language Difficulty - Ensconcing Personal Predilections

To this point, this Article has attempted to demonstrate that Supreme Court Justices and some of those who monitor and influence the work of the Supreme Court (professors and commentators) rely on, purport to rely on, or ask the Court to rely on, plain language textualism. Next, this Article sets forth four justifications behind the use of plain language textualism. This will demonstrate, however, that such justifications use the same faulty logic and extra-textual or non-textual assumptions that plain language textualism seeks to eliminate. This section demonstrates the plain language difficulty, that is, that plain language textualism is inconsistent with its purposes and justifications. In particular, plain language textualism fails to achieve its primary goal of eliminating the use of personal predilections in constitutional interpretation. Similarly, textualism cannot be supported or justified without relying on the sort of non-textual or extra-textual sources that plain language textualism deems inappropriate.
A. The Constitution's Text Explicitly or Implicitly Requires Plain Language Textualism

In seeking to demonstrate the textual basis for their argument for textualism, Kesavan and Paulsen rely, knowingly or unknowingly, on a variety of nontextual or extra-textual sources or assumptions. First, Kesavan and Paulsen, in order to demonstrate that the Supremacy Clause demands textualism, rewrite it using an extra-textual characterization that gives the Clause a meaning they have chosen. Without their rewrite by characterization, Kesavan and Paulsen's version of the Supremacy Clause would not exist. According to Kesavan and Paulsen, the Supremacy Clause “proclaims” that the Constitution is “the supreme Law of the Land.” [FN148] The Constitution, however, does not contain the word “proclaim.” Grammatically, the Supremacy Clause by its words alone is nothing more than that, a clause or statement. Although the Supremacy Clause indeed may be a proclamation of ascendancy or superiority, Kesavan and Paulsen declare with certainty that it is. [FN149] *363 The words of the Supremacy Clause, however, could have a different meaning. The Clause may be no more than a statement of fact. Perhaps the Clause is nothing more than a redundancy. [FN150] Suppose one could show that the rest of the Constitution indicates in certain, i.e., textual, terms that the Constitution is supreme over the laws and constitutions of states. Suppose that the supreme nature of the Constitution could be proved based on explicit statements from the states which sent delegates to the Constitutional Convention; for example “[w]e the Legislature of Virginia, hereby send delegates to Philadelphia to create a constitution that is Supreme over our laws and constitution.” Suppose, finally, that the legislative history of the Constitutional Convention contained a debate on the need for a Supremacy Clause, with one side arguing that “it is unnecessary because a constitution ordained and established by the people of the United States is obviously supreme over the laws and constitutions created in the name of or on behalf of the people of any single individual state.” Indeed, Hamilton makes this argument in Federalist No. 33, so the same sort of argument could have occurred at the Constitutional Convention. [FN151] Any such documents, individually or collectively, would be very supportive of the argument that the Supremacy Clause is not a “proclamation” of supremacy, but merely a redundant restatement of supremacy. [FN152]

*364 As it happens, however, documents such as those mentioned above do not appear to exist. Even if they did exist, a clause in the Constitution indicating how such documents are to be interpreted certainly does not exist. [FN153] Kesavan and Paulsen note this non-existence and, quite naturally, rely on it to support their argument as to the proper method of interpreting the Constitution. But by referring to the Constitution’s “absence of any reference . . . to governing principles extrinsic” to the Constitution [FN154] (i.e., by relying on the non-existence of other words or documents to interpret the Constitution), the authors undercut their very argument that the text of the Constitution (specifically the Supremacy Clause) demands the use of textualism. Indeed, they conclude that anyone who insists that the Constitution is “law must be bound by the meaning of the words and phrases written down in the text.” [FN155] Kesavan and Paulsen, however, release themselves from the text in coming to the above conclusion. Not only do they look for other words in the Constitution that might be relevant to interpretive models (they find none), they also support their claim to
textualism by relying on the “ordinary, common sense ‘default rule’ for interpreting texts in general and legal texts in particular.” [FN156] In other words, they look at a variety of contexts (the rest of the Constitution and “default rules”) while suggesting that the words of the Constitution “bind” the interpreter. The conundrum for Kesavan and Paulsen is that they effectively say that the words of the Supremacy Clause undeniably make the document authoritative, which, if true, should in their world make the Supremacy Clause binding, and yet they still use outside sources (at times by *365 asserting the non-existence thereof) to support their interpretation of the Supremacy clause. While those efforts at looking at context may comport with some versions of textualism, they do seem consistent with declaring the words of the Constitution to be binding. In that sense, they are using an argument inconsistent with plain language textualism to justify a form of textualism apparently akin to plain language textualism.

Kesavan and Paulsen's failure to follow their textualist North Star goes beyond relying on the non-existence of other documents or words. Implicit in their understanding of the Supremacy Clause is the pivotal non-textual assumption that the Constitution would not be supreme law without the Supremacy Clause. [FN157] Kesavan and Paulsen “declare,” albeit without using the word “declare,” that the Constitution would be non-binding without that Clause. [FN158] They argue that any person who asserts that the Constitution is binding law necessarily must agree that the Supremacy Clause makes it binding. [FN159] The converse is that the Constitution would not be binding without the Supremacy Clause. While Kesavan and Paulsen do not discuss whether the Constitution would be binding without the Supremacy Clause, their analysis raises the question, and whether the Constitution would be binding without the Supremacy Clause merits more than their unsubstantiated assumption. A constitution is a form of contract that binds the parties. [FN150] The assertion, “We the People . . . do ordain and establish . . . [,]” suggests a power superior to any existing and created government. The Constitution asserts significant authoritative power over the States in the Privileges and Immunities, Ex Post Facto, and Contracts Clauses, among other provisions. [FN162] Any or all of the above assertions suggest that the Constitution would be “authoritative,” to use the word of Kesavan and Paulsen, *366 without the Supremacy Clause. Indeed, to find that the Constitution would not be authoritative without the Supremacy Clause would require significant review of the meaning of “constitution” and “judicial power.” Such a finding would also probably require an extra-textualist argument that the Constitution is not binding on any authority or person, notwithstanding: 1) the use of the term “Constitution”; 2) the express (textual) restrictions on State power (for example, the Ex Post Facto, Contracts, and Privilege and Immunities Clause); and 3) the express (textual) grant of jurisdiction over cases and controversies in law and equity arising under the Constitution, including those cases and controversies in which a state is a party (i.e., a case in which the state must answer to the jurisdiction and power of federal courts). Furthermore, the Constitution is not itself the actual creation of a country, but recognition in writing, a memorialization, of the prior agreement among the people of the United States to coexist as one nation. The Constitution itself essentially is a written (and necessarily flawed) effort to record that which is already accepted and agreed to. Although one might conclude, after discussion and debate, that the Constitution would not be binding but for the Supremacy Clause, the textualist would have to still engage in significant argument, none of which would be based on textualism, to prove that the
Constitution would not be binding but for the Supremacy Clause. Indeed, to demonstrate that any word or clause in the Constitution is the only word or clause in the document that discusses an idea necessarily requires resort to outside texts and sources. Such reference to outside sources, or an assertion that such sources are non-existent, implicitly recognizes the validity of using outside sources to demonstrate the meaning of words or clauses within the Constitution, or any other document for that matter.

Rather than using the previously discussed argument regarding non-textual references to demonstrate how Kesavan and Paulsen necessarily (at least implicitly) rely on non-textualism to justify textualism, an alternative argument is to analyze how a textualist approach works. According to Kesavan and Paulsen, the Constitution must be interpreted solely by reference to its text. [FN163] They believe that the Supremacy Clause is a call for textualism rather than a redundancy. [FN164] While they believe that the drafting history of the Constitution can be used to interpret the Constitution, [FN165] even an explicit statement in the drafting history that negates their understanding of the Supremacy Clause as a call for textualism cannot be used to demonstrate the error of their approach. Of course, no other non-textual references, documents, or arguments can be used either. In other words, because Kesavan and Paulsen believe in the Supremacy Clause's call for textualism, only the text of the Constitution can be used to demonstrate the error of their belief. In their minds, any number of explicit statements contradicting their view would be irrelevant to the argument if such statements are outside the text of the Constitution.

In sum, the Kesavan and Paulsen argument fails. First, it relies on the assumption that the Constitution is binding only because the Supremacy Clause says so. [FN166] This is, at best, a debatable position. Second, it assumes that anyone who asserts the authority of the Constitution must rely on the text, and, therefore, must rely on textualism. [FN167] Again, the Supremacy Clause is not necessary to demonstrate the binding effect of the Constitution. With regard to any written contract or agreement, the binding effect of the agreement is assumed, and any statement indicating that the agreement is binding is a mere redundancy. Finally, Kesavan and Paulsen cannot, or at least do not, attempt to leave their proof of textualism in the words of the Supremacy Clause. Instead, they say that they have found no other evidence that the Constitution is the supreme law of the land. Therefore, having looked for and found no relevant (to them) context (or argument) to create or demonstrate supremacy, they demand that all agree with their conclusion that the Supremacy Clause creates supremacy. [FN168]

In summary, Kesavan and Paulsen have reviewed a variety of non-textualist sources and arguments, found that none support the supremacy of the Constitution, and thus conclude that it is inappropriate to look to (or for) any others, or to reinterpret the evidence which they have reviewed and which they have declared would not support supremacy without the Supremacy Clause. [FN169] In the end, they make the quintessential non-textualist argument that the Constitution does not textually refer to an interpretive method. [FN170] They argue, therefore, one must infer that textualism is the only method, and any inference (or *368 argument) that is not textually based “cuts off its own legs.” [FN171]

In the end, the Supremacy Clause mentions supremacy, but it does not necessarily create supremacy.

B. Obviousness for the Oblivious
While Kesavan and Paulsen have decreed that the Constitutional text demands textualism, scholars have not yet universally accepted this position. Indeed, Kesavan and Paulsen are, as of the date of their article, among the very few people to suggest that the Constitution's text explicitly demands textualism. They are so certain of their conclusion that they decry as “disingenuous” any future argument that would seek to disagree with their position. [FN172] Millions of people, including over one hundred Supreme Court Justices and thousands of law professors, read the Supremacy Clause prior to Kesavan and Paulsen publishing their article. None of those millions understood the Supremacy Clause explicitly, that is, textually, to demand textualism as the primary method of Constitutional interpretation. Even if someone had understood the Supremacy clause this way, Kesavan and Paulsen failed to note such prior support. Despite the millions who have read the Supremacy Clause without seeing its allegedly explicit command to use textualism in interpreting the Constitution, Kesavan and Paulsen suggest the obviousness of their understanding of the Supremacy Clause, and (implicitly) the obliviousness of all those who read the Supremacy Clause before them. [FN173] Kesavan and Paulsen, then, judge both those who preceded them as unenlightened, and those who follow as either in agreement, (i.e., enlightened), or in disagreement and thus unenlightened or disingenuous. [FN174] By example and by word, they have most clearly set out the implicit position of those who urge plain language textualism as the sole, proper interpretive model for any particular phrase or clause of the Constitution: enlightened author (or Justice) enlightens the unenlightened.

*369 Before reviewing the significance of plain language textualism's place in the minority, one should note that a plain language textualist who agrees with the majority adds little to a constitutional debate. For example, if constitutional scholars and the Supreme Court almost uniformly agree with the meaning of a word or phrase, resort to textualism or plain language textualism is unnecessary. Little added value comes from agreeing with a vast majority. Put another way, when virtually all agree to a meaning demanded by a textualist, most critics likely also agree to the general understandings supporting that meaning—general understandings such as constitutional purpose or reasonable context (within sentences, history, documents and society). For example, when the Constitution refers to an age, such as twenty-five, most agree with the contextual assumptions that would require an interpretation of twenty-five full calendar years after the date of birth, rather than counting the day of birth as the first “birthday.” The textualist simply says that the constitutional meaning of the reference to age is “plain,” and no further discussion is necessary (or, perhaps, relevant).

Plain language textualism can be most strident when the person asserting a textualist approach disagrees with an important minority (members of the Supreme Court, or even a majority of the members), and the textualist maintains that a provision has a plain, unchallengeable meaning. A textualist, particularly a plain language textualist, cannot accept the possibility of disagreement. Indeed, implicit in textualism is moral superiority. Textualists use ugly names to describe arguments contrary to their own, occasionally suggesting ugly names for the people who disagree with them. [FN175] Textualists take this approach notwithstanding the fact that most people may disagree with their understanding for a variety of reasons. [FN176]
Morality also enters into this approach, perhaps not a morality of good and evil, but certainly a morality of right and wrong. Plain language textualism, to those who declare words and phrases in the *370 Constitution to contain plain meaning or language, is simply correct. [FN177] It is unassailable. It is proper. It is necessary. The irony of plain language textualism is this: textualists assert enlightenment, and they see the word or phrase “plainly” even though the textualist is in the midst of a majority of unenlightened, i.e., those who do not see what is “plain” to the textualist. For example, Kesavan and Paulsen have asserted a plain meaning to the Supremacy Clause. [FN178] While it is plain to them, few others see it. [FN179] And although few others see this meaning, Kesavan and Paulsen suggest that any other understanding, especially the understanding of the vast majority of people, is simply wrong or, worse, disingenuous. [FN180] Plain language textualism, then, is enlightenment. Others may read the words, but if those readers do not understand the words to have “plain meaning” as determined by a textualist, those readers are unenlightened. [FN181] A plain language textualist reads words and demands that only one definition is possible or permissible. Plain language textualism prohibits resort to dictionaries (new or old), “secret drafting societies,” use of the same words elsewhere in legal literature, and interpretation of early courts. [FN182] Indeed, the point of plain language textualism is that its *371 attempts to explain a word are antithetical to understanding the true meaning of a word. In the end, therefore, a plain language textualist states his meaning of the word, denouncing all attempts to demonstrate error as inappropriate and improper. Plain language textualism demands that others agree with the textualist meaning; those others who disagree are simply wrong, and are entitled to no explanation. [FN183] Constitutional interpretation should be more than a question of personal enlightenment. Indeed, as shown above, plain language textualists regularly attack any non-textualist approach as leaving too much to the personal predilections of individual parties. Ironically, where most people disagree with the textualist, the textualist seeks to impose a personal definition or meaning upon a word or phrase in order to prevent personal predilections. [FN184] Plain language textualism, justified as a method to eliminate personal predilections from constitutional interpretation, is the quintessential personalization of constitutional interpretation.

C. Great Authors Use Plain Language

Plain language textualists often support their position by referring to the great writing skill of the drafters of the Constitution. This mere recognition of the Drafters’ exceptional writing ability, however, naturally is based on documents other than the Constitution. It also suggests that this skill proves that the Drafters/Founders intended to use *372 plain language. Referencing documents other than the Constitution to prove intent to create a living constitution, however, violates the tenets of plain language textualism. For example, assume for a moment that the Drafters/Founders’ notes from the Constitutional Convention indicate extraordinary talent with the English language, as well as the Drafters’ intent to use vague constitutional language which would permit the meaning of important terms to change over time, as society evolves. Plain language textualists might urge the Supreme Court to review non-Constitutional documents to prove the drafting skill of the Drafters/Founders, and thereby prove intent of the Drafters/Founders to use
plain language. Yet, they would likely discourage review of those same documents if those documents supported any constitutional interpretive methodology other than textualism, even the fact that the Drafters purposely used vague language.

Second, assume that the Drafters/Founders' notes indicate that the purpose of the Constitution was to restate and reorganize what was created by the Declaration of Independence: a new country founded on the North American continent, a country composed of smaller geographic parts to be known as states. For textualists, such notes would be irrelevant to understanding the Constitution if the “plain language” of the Constitution indicated otherwise. Indeed, any documents written by the Drafters/Founders indicating the intent to create states as sub-governments to the national government would be irrelevant and insufficient in constitutional analysis and interpretation. On the other hand, textualists would use such documents to demonstrate skillful writing and, therefore, the Drafters' intent to be clear and careful when drafting the Constitution.

The argument that the Drafters/Founders, as skilled writers, used plain language contains a number of extra-textualist assumptions. These assumptions are the sort that textualism seeks to eliminate; they are assumptions that textualism either explicitly or implicitly suggests are inappropriate in constitutional interpretation.

One assumption involves the intent of the Drafter. The “careful Drafters/Founders” argument asserts that an interpreter of the Constitution must know, be aware, or assume that the Drafters/Founders had great writing skill and, therefore, intended to use that great writing skill to be careful with their words. Textualists argue that, when interpreting a document written by someone who intended to be careful with words, the interpreter should (must) limit interpretation to the plain language of the carefully written document. In other words, an interpreter of the Constitution must look to the intent of the Drafters/Founders.

Textualism, in particular plain language textualism, is based on clarity of words, and nothing need be added to, or subtracted from, those words. As a textualist Justice or commentator might say about the words of the Constitution when confronting a person who claims a constitutional right of privacy, “Read 'em and weep. The words of the Constitution do not include ‘right of privacy.’” Presented with the argument that the Drafters/Founders “intended” to protect human dignity, the textualist cries, “Foul. The intent of the Drafters/Founders is not relevant.” As discussed below, plain language textualist Justices, commentators, and scholars fail to suggest why the Drafters/Founders' intent to be clear or precise can be used to interpret the words of the Constitution, while the Drafters/Founders' intent to protect human dignity (or any other intent) is irrelevant or even inappropriate.

Reliance on intent demonstrates one intellectual conundrum for plain language textualism. Plain language textualism, by its terms, prohibits use of intent to interpret the Constitution. Textualism purports to rely solely on the “plain meaning” of the words of the Constitution. A plain language textualist approach forbids inquiry into the intent of the Drafters or the Founders, yet one justification for such textualism is intent. This inconsistency could be categorized with judgmental terms, but such terms add nothing to the most important fact of inconsistency. Textualism is left with the conclusion that intent is inappropriate unless that intent can be used to justify textualism. This leads to a second point regarding assumptions. This Article now asks the reader to
assume, arguendo, that a supporter of the “careful Drafters/Founders” argument could prove that the Drafters/Founders intended to be clear, and to further assume proof of intent to be clear then proves that plain language textualism must be the primary, if not the only, method of constitutional interpretation. Such assumptions and proofs create difficulty for the plain language textualist. In relying on proof of intent to be clear to justify plain language textualism, the textualist must rely on intent of the drafter, the intent of the drafter to be clear. Reliance on such proof also requires the textualist to select as acceptable proof of one category of intent, i.e., intent to be clear, but reject proof regarding other categories of intent, e.g., intent to protect individual liberties, whether or not such other proof of these other categories of intent may be stronger than the intent to be careful.

To begin, while textualists and others assume that the Drafters/Founders were skilled drafters, that assumption alone should not be considered proof of skill or care or meticulousness. If the assumption alone justified plain language textualism, then the proof would look like the following: (1) we can assume that the Drafters/Founders were skilled drafters; (2) that assumption proves that the Drafters/Founders intended to be careful with their words, (3) therefore, textualism is proven to be the sole (primary) interpretive method for understanding the Constitution. In other words, the textualist has done no more than assume some intent of the Drafters/Founders. The statement that the Drafters/Founders were skilled drafters should be proved, not simply assumed. This cannot be proved, however, by pointing to the Constitution, as such an approach would be circular, as follows: The Drafters/Founders were skilled draftsmen, as demonstrated by the language of the Constitution, which we know was carefully drafted, because it was drafted by careful authors. We know they were careful authors because they drafted the Constitution, which was, as stated earlier, carefully drafted. Another method to learn about the writing skill of the Drafters/Founders would be to read their other works. These non-Constitutional works, presumably, would demonstrate that the Drafters/Founders were indeed skilled drafters. What follows is the assumption that because it has been proven that the Drafters/Founders were skilled draftsmen, they intended to use that skill when drafting the Constitution. Put another way, the plain language textualist would assume that skilled drafters intend to be careful and skillful with their words whenever they put pen to paper.

Again, assume that other papers written by authors can prove both skill with the quill and intent to use that skill to be careful in other documents. The question then is whether these non-Constitutional works can be used to demonstrate characteristics of the Drafters other than that they were skillful writers. The text of the Constitution mentions neither these other works nor their appropriate uses. The textualist uses these works in a very one-sided manner. The textualist uses the written works of the Drafters/Founders to demonstrate that they possessed quill skill. The textualist then asks those who interpret the Constitution to assume that these same unidentified people would have used that same skill in drafting the Constitution. Put another way, the textualist insists that when interpreting the Constitution, one must assume that the Drafters/Founders intended to use their formidable skills as drafters to draft a clear Constitution containing nothing but plain language. The unasked, unanswered question is whether these other documents can be used to demonstrate the political views of the Drafters/Founders (e.g., that they were concerned about an overly powerful federal government). Plain language textualism
cannot explain why one assumption and conclusion is more or less valid than the other assumption and conclusion.

This “careful Drafter/Founder” argument requires significant extra-textual support and leaps of faith as well as logic. It permits the textualist to assert a fact about completely unidentified people, including Founders, Drafters, Framers, and members of an entire generation. The textualist argument is that the Drafters wrote well, therefore, textualism must be used, and, because textualism must be used, other “facts” about the Drafters cannot be used. [FN189] Non-textualist references to the goals of *376 the Drafters, such as the preservation of liberty, are not permitted to explain the words of the Constitution. Only the unsubstantiated (although substantiation may be possible) assertion of draftsmanship skill is permitted.

To give life to the above argument, consider how this type of analysis would apply to a constitution written by Thomas Jefferson, what this Article will call “Jefferson's Constitution.” (Although not a drafter of the Constitution, Jefferson is regularly recognized as a Founder.) [FN190] “Founder” Jefferson is recognized as “a masterful writer.” [FN191] one “skill[ed] with the pen and written word.” [FN192] Indeed, R.B. Bernstein dubbed Jefferson “the finest writer of his era.” [FN193] From the assumption or proof that Jefferson could write well, the plain language textualist would infer that whenever Jefferson wrote, he did so skillfully, and therefore always intended to write with “plain language,” regardless of what he was writing. To the textualist, this “intent of the drafter” is not only acceptable to aiding understanding of Jefferson's Constitution, but also necessary and undebatable. On the other hand, the textualist, according to this argument, limits acceptable “intent” to inferred (not proven) intent about drafting skill.

The textualist brands as unacceptable the inference that the person who wrote that there are “certain inalienable Rights” [FN194] intended to create a government that never infringed upon those rights. Ironically, the textualist could use the *377 Declaration of Independence of proof that Jefferson was a skilled writer (and therefore intended to use plain language) when drafting Jefferson's Constitution, but not proof that he intended to protect liberties mentioned in the Declaration.

The textualist approaches the United States Constitution in a similar fashion. A textualist (after having assumed, in order to justify textualism, the Drafters' intent to draft the Constitution with clarity) uses textualism to reject any effort to demonstrate a Drafter/Founder's specifically stated intent as to the meaning of language (or any other general intent as to purpose in adopting the Constitution).

For the textualist, presumed skilled authorship by the Founders requires the assumption that the authors intended “plain language.” That intent cannot be shown in the Constitution, or via the historical evidence related specifically to the Constitution. Textualists use this implied intent to eliminate evidence of expressed intent. So, in the end, the textualists suggest that the Drafters/Founders' implied intent to write clearly supersedes any use of expressed intent of those same people.

Finally, the conclusion that the Drafters/Founders of the Constitution were particularly intelligent people and were particularly skilled with written language is completely irrelevant to whether constitutional language itself is plain. Those who are particularly good with written language can choose either plain or ambiguous language. The “clever Drafter/Founder” argument includes the conclusion or judgment that words have meaning, and, therefore, textualism must be used. The conclusion that textualism
must be used to understand words does not necessarily follow, however. Poems are also made of words, but no one suggests that poetry, in general, is best interpreted textually. Poetry's greatness often flows from the ideals and ideas it inspires. Poetry inspires great thoughts, profound thoughts. Understanding poetry is almost antithetical to plain language textualism. The same could be said for essays, novels, and plays. Many documents are to be understood, if at all, without resort to plain language textualism. Part of the magic of the written word is that words can express ideas or thoughts that are amorphous, perhaps inspirational.

It is said, however, that the Constitution is neither a novel, an essay, a play, nor a poem. Nevertheless, the assumed fact that the Constitution falls outside any of the prior categories does not prove the validity of plain language textualism as a constitutional interpretive method. By the same token, the acknowledgement that poems and the Constitution each use words does not necessarily indicate that the same interpretive method must be, or even should be, used to interpret each. Quite simply, the point is that the use of words by itself does not determine the appropriate interpretive methodology.

According to the plain language textualists' justification regarding excellent writing skills, either Jonathan Swift was a poor writer or Jonathan Swift, as an excellent writer, plainly meant that the Irish children should be eaten when he wrote such words in his essay, A Modest Proposal. Taking Swift's words literally would be absurd. The reader of Swift's words knows that he intended biting, even vitriolic sarcasm. That understanding follows from the reader recognizing that not all great authors intend the plain meaning of their words. The assumption that Swift did not intend the plain meaning of his words, however, is not based on Swift's inability to wield the pen. Indeed, only Swift's extraordinary writing skill permits him to make his point without using "plain language." Put another way, the skill of the author in no way indicates whether the author intended his words to be read as plain language text. The conclusion to use a plain language understanding or interpretation of words, then, must be made by the reader; but the conclusion cannot be justified solely because the authors were skilled writers.

*379 V. Textualism: Extra-Textualism Behind the Textualist Curtain

In justifying their personal predilections, plain language and other textualists essentially conclude that the Constitution is a “legal text.” Commentators regularly make this same assumption. Some commentators, dissatisfied with the term “legal text,” modify it when referring to the Constitution, calling it a “major legal text[1]” or an “authoritative legal text[].”

This assumption that the Constitution is a legal text is somewhat of a corollary to the above conclusion that the Constitution is not a poem. The legal text characterization has more specificity than characterizing the Constitution as merely non-fictional. Without a prior definition, legal text could be similar to legal writing. This category could include statutes, contracts, constitutions, legislative history, administrative regulations, administrative rulings, wills, and court decisions. Indeed, without an agreed-upon definition (a definition which is certainly not within the words of the Constitution) legal text could even include
The interpretation of these categories of legal text does not require textualism. In order to conclude that constitutional interpretation requires textualism, textualists must explicitly or implicitly assume that the Constitution is akin to a legislatively created set of rules or statutes. Concluding that the Constitution is statutory in nature, however, goes against the early understanding of the Constitution. Chief Justice Marshall distinguished the “prolixity of a legal code” from the Constitution: “[W]e must never forget that it is a constitution we are expounding.” Of course, turning to some form of original intent to demonstrate whether the Constitution is in the nature of a legal text would be contrary to the idea of textualism.

More important, declaring the Constitution to be a “legal text” is completely contrary to textualism. The text of the Constitution in no way declares itself a legal text. In other words, the textualist must either use analogy to demonstrate the need for textualism, (i.e., that the Constitution is like a legal text), or make an extra-textual but purportedly definitive declaration (e.g., declaring that “the Constitution is a legal text” even though no such declaration is found in the text of the Constitution). The characteristics of legal texts are not described in the Constitution. The interpretive model to be used in understanding legal texts is not in the Constitution. Textualists simply declare the Constitution to be a “legal text,” and for them it is so. Textualists then baselessly declare that “legal texts” are to be interpreted via textualism. A plain language textualist must wander far from the text to justify the conclusion that the Constitution is a “legal text,” and that as a legal text the Constitution requires textual interpretation.

The conclusion that the Constitution is akin to a statute is faulty for another reason. The Constitution is arguably more analogous to a contract than a statute. This conclusion suggests that the law of contractual interpretation is far more relevant to constitutional interpretation than the law of statutory interpretation. Of course, textualists must avoid this path. This path could include doctrines such as subjective intent of the parties, as well as refusal to enforce contracts for an immoral purpose, both of which involve the recognition of principles outside the contract, such as natural law, which affect the understanding of the document. It is unimportant, at this stage, to determine how the Constitution would be interpreted under the law of contracts. Even recognizing the Constitution as a legal text does not require acceptance that it is akin to a statute. Instead, the only word of the Constitution that appears to textually answer the questions of whether the Constitution is more like a contract or a statute indicates that contract is closer than statute. The best a textualist can say is that the term Constitution is ambiguous. Unfortunately, for the plain language textualist, the Constitution's text cannot support a plain language conclusion that the Constitution is like a statute. The following alternate conclusions follow from this discussion: (1) the Constitution is not a legal text akin to a statute; that is, it is more akin to a contract; or (2) proving that legal texts require textualism can be done only by ignoring textualism and concluding extra-textually that textualism is required. Either way, the plain language textualist is roaming in territory claimed to be inappropriate for the textualist.

The textualist must turn from the text to support the necessity of textualism. A textualist cannot use the text as a source of proof that textualism stands as the only rational
interpretive method, because the text does not identify a preferred method of interpretation. In order to conclude that textualism is the only rational interpretive method, the textualist must first conclude that the Constitution is a legal text, and that legal texts must be interpreted rationally. While textualism may be a rational approach to constitutional interpretation, such an argument is either a statement of “fact” or is founded on extra-textual assumptions.

Suppose the interpreter of the Constitution assumes that the document is primarily a document intended to secure the autonomy or primacy of the individual in our form of government. Perhaps the interpreter assumes that the purpose of the document is to hold the government in check. Suppose the interpreter assumes that the document primarily seeks to foreclose the government and all government officials from arguing that they have inherent power. Each of these suppositions could be used either together or separately, and could be used with the concept that the document is rational. An interpreter could use any of these series of suppositions, and each supposition could result in a different interpretation of the Constitution. The plain language textualist begins and ends with the supposition (conclusion) that the Constitution must be interpreted rationally, and the only rational interpretation is plain language. However accurate that conclusion may be after extra-textual analysis, it certainly is not in the plain language of the text.

The heart of many arguments or conclusions in support of textualism is the call for a rational Constitution. This Article previously noted that an idea, a process, is rational only in relation to an assumed beginning or an assumed end. For example, assume that the Constitution is a legal text and it is to be interpreted rationally. This begs the question as to why rationality should be used as the sole format for understanding the Constitution. Perhaps the Constitution would be better understood in light of the fears of the founding generation. *383 Perhaps aspirations to a “more Perfect Union” [FN221] would be a better place to begin understanding the Constitution.

People wrote the Constitution. People ratified the Constitution. People are more than, perhaps significantly more than, mere rational beings. To cut all humanness out of the Constitution, except rationality, is wrong, especially without engaging in any extra-textual analysis. Indeed, to eliminate all humanness from the Constitution and thus from its interpretation is a grievously irrational elimination of all other humanness from the document without any textual or historical basis.

Perhaps the most significant extra-textual conclusion is that the role of the Court is limited. Certainly, nothing in the text in any way notes limitations on federal judicial power, at least no more so than the limitations of power on Congress. The Constitution grants Congress limited power. [FN222] The Courts have jurisdiction over acts of Congress, [FN223] as well as a number of other areas, in particular, cases arising under the Constitution. [FN224] Nothing in the text of the Constitution calls for the Courts to defer to the Congress, to grant deference to the executive branch, etc. This lack of textual support has not, however, stopped the textualist from urging that the (non-textual) limited role of the Court requires textualism.

Conclusion

Textualism is an extra-textually supplied limitation on constitutional interpretation.
Textualists make significant assumptions regarding significant factors which at best are arguable. They take the approach that personal or non-textual assumptions are made before actual interpretation of the document occurs. This approach, according to the textualist, eliminates the personal predilections of the interpreter. It has the advantage of inserting policy and moral ideas into the interpretive method, and then applying the interpretive method “objectively.” The textualist cannot avoid or solve the conclusion that only extra-textualism begets textualism, and only the personal predilections of textualism justify the elimination of the personal predilections of non-textualists, particularly those who do not rely on “plain language.” An interpretive model inconsistent with its own principles must at least be questioned, if not rejected. Plain language textualism creates jurisprudence where all personal predilections are improper, but some are less improper than others.

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[FN1]. This phrase, though neither a quotation nor the sentiment of the author, encapsulates the spirit of this Article. In particular, this Article argues that textualists, who assert that personal predilections should not be part of constitutional decision-making, regularly use their own personal predilections in both constitutional interpretation and their very argument against using personal predilections.


[FN3]. Id. at 673 (Story, J., concurring).


[FN10]. Id. at 1128 (“The Constitution ... prescribes textualism as the sole, legitimate method for interpreting and applying the Constitution as authoritative, controlling law.”).

[FN11]. This would, of course, eliminate much of the need for constitutional law, thereby reducing scholarship and shortening Supreme Court decisions implementing (not interpreting) the Constitution.

[FN12]. U.S. Const. art. II, § 1, cl. 4; see also John F. Manning, The Eleventh Amendment and the Reading of Precise Constitutional Texts, 113 Yale L. J. 1663, 1708 (2004) (“First, the everyday meaning of some clauses will be clear and precise in context. Unsurprisingly, the bellwether example here involves the Constitution's age requirements for various federal officeholders.”); Richard H. Fallon, Jr., A Constructivist Coherence Theory of Constitutional Interpretation, 100 Harv. L. Rev. 1189, 1195 (1987) (“Where the text speaks clearly and unambiguously--for example, when it says that the President must be at least thirty-five years old--its plain meaning is dispositive.”). But see Paul E. McGreal, There is No Such Thing as Textualism: A Case Study in Constitutional Method, 69 Fordham L. Rev. 2393, 2437-38 (2001) (arguing that people accept the term “age” in the Constitution as referring to chronological age rather than maturity level, although the text does not express that meaning). See also Boris I. Bittker, Interpreting the Constitution: Is the Intent of the Framers Controlling? If Not, What Is ?, 19 Harv. J.L. & Pub. Pol’y 9, 24 (1995). Here, Bittker notes a significant number of questions unanswered by the so-called plain-language of the age requirement, for example, that the clause does not tell us whether the thirty-five year period is to commence on the day of birth, at the candidate’s conception (as in Chinese imperial astrology), or (as in some cultures) on the first day of the calendar year of birth; whether the candidate must be thirty-five years old on Election Day, on the day of the Electoral College’s report to Congress, or upon taking the oath of office .... Id.

[FN13]. U.S. Const. art. II, § 1, cl. 4; but see 8 U.S.C. § 1401 (2000) (defining “nationals and citizens of the United States at birth”); Elwood Earl Sanders, Jr., Could Arnold Schwarzenegger Run for President Now?, 6 Fla. Coastal L. Rev. 331, 358-59 (2005) (suggesting that the constitutionally mandated requirements of citizenship for President have been modified by the Fourteenth Amendment).

[FN14]. U.S. Const. amend. IV.
See, e.g., Kenneth Einar Himma, Making Sense of Constitutional Disagreement: Legal Positivism, the Bill of Rights, and the Conventional Rule of Recognition in the United States, 4 J.L. Soc'y 149, 210 (2003) (“If the Justices were collectively practicing a recognition norm that required them to decide constitutional issues according to the ordinary meaning of terms, then the Constitution would be objectively indeterminate on any issue in which the ordinary lexical meanings of the constitutional terms are objectively indeterminate.”).

For example, the Constitution neither authorizes nor prohibits the United States from acquiring land known as territories. The following question could be raised on the basis of that “gap”: is a person born in a territory, for example, Guam, a citizen of the United States? See Downes v. Bidwell, 182 U.S. 244, 281 (1901) (discussing the status of “conquered” territories).

In declaring that a meaning is plain, or declaring that language is plain, the plain language textualist rarely, if ever, states whether the meaning is simply obvious or obviously simple (or perhaps even simply and obviously obvious and simple).

Douglas J. Goodman, Approaches to Law and Popular Culture, 31 Law & Soc. Inquiry 757, 759 n.4 (2006) (“[T]extualism in constitutional interpretation attempts to proscribe ambiguity by invoking a commonsense meaning that is asserted to be singular and unambiguous.”). But see, e.g., Michael D. Ramsey, Textualism and War Powers, 69 U. Chi. L. Rev. 1543, 1555 (2002) (“[F]ew textualists suppose that a text can have a single meaning, shorn of its context.”). Ramsey's assertion indicates the fluid approach to text by textualists. Ramsey recognizes that a text's meaning must be placed in context, but does not say which context is relevant. And, of course, any effort to prove relevance of some context and irrelevance of other context takes the textualist far from the text itself. This Article, in general, does not concern itself with the difficulty of determining which textualism the Constitution commands, but, instead, remains focused on that textualism that purports to rely not on context, but on plain meaning.


[FN29]. Kelly J. Hollowell, *Defining a Person Under the Fourteenth Amendment: A Constitutionally and Scientifically Based Analysis*, 14 Regent U. L. Rev. 67, 82 (2002). Hollowell, relying on “plain meaning,” attempts to demonstrate that the “plain meaning” of the term “person” includes a fetus. Id. at 99. While the analysis and conclusion may make sense, the conclusion can be justified as “plain meaning” to the Constitution only if “plain meaning” incorporates interests within the meaning of the words.

[FN30]. Id.; see also *Clark v. Martinez*, 543 U.S. 371, 390 (2005) (Thomas, J., dissenting). This approach permits the interpreter to claim “fidelity to the text,” while at the same time adding unwritten principles to the interpretation of the Constitution. See Matthew D. Adler, *Constitutional Fidelity, the Rule of Recognition, and the Communitarian Turn in Contemporary Positivism*, 75 Fordham L. Rev. 1671, 1674 (2006).

[FN31]. Hollowell, supra note 29 at 82; see also Lawrence B. Solum, *Aretaic Turn in Constitutional Theory*, 70 Brook. L. Rev. 475, 483-84 (2005). Professor Solum recognized that “plain meaning” may have a different meaning depending on how it is used.

One might assert that the meaning of the United States Constitution is equivalent to the plain meaning of the text of each clause of the constitution. Or one might assert that the
meaning of the United States Constitution is that it is a charter of liberty preserving the maximum possible freedom of each individual.
Id.

[FN32]. See Brian F. Havel, Forensic Constitutional Interpretation, 41 Wm. & Mary L. Rev. 1247, 1250-51 (2000) (suggesting that plain language textualism is a form of “monotheistic vanity”).


[FN34]. Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 234-35 (1899). The Commerce Clause of the Constitution provides that Congress has the exclusive power to regulate trade between the states and with foreign nations and Indian tribes. U.S. Const. art. I, § 8, cl. 3.

[FN35]. Id.


[FN37]. See id. at 586-89. In this discussion, Justice Thomas discusses the simple and plain meaning of the Commerce Clause, making the textual distinction between commerce and, for example, manufacturing. The discussion implies that there is a plain meaning to the Commerce Clause.

[FN38]. Id. at 589 ("Put simply, much if not all of Art. I, § 8 (including portions of the Commerce Clause itself), would be surplusage if Congress had been given authority over matters that substantially affect interstate commerce. An interpretation of cl. 3 that makes the rest of § 8 superfluous simply cannot be correct.").

[FN39]. United States v. Darby, 312 U.S. 100, 118 (1941). See also United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942) ("The commerce power is not confined in its exercise to the regulation of commerce among the states.").

[FN40]. U.S. Const. art. I, § 8, cl. 3.

[FN41]. Perhaps more interesting is the question related to the Court's choice of constitutional analysis. If indeed some language is plain, should the Court adopt that plain meaning, knowing that plain meaning with regard to other Constitutional words has not only been avoided or ignored but also explicitly rejected. Restated, Darby very clearly holds that the power to regulate interstate commerce is not limited to the power to regulate interstate commerce.


[FN43]. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 37 (1872) ("The second
clause protects from the hostile legislation of the States the privileges and immunities of citizens of the United States as distinguished from the privileges and immunities of citizens of the States.”).

[FN44].  Whitworth, 117 U.S. at 147 (quoting Wilson v. Gaines, 68 Tenn. 546 (Tenn. 1877)).

[FN45].  The Slaughter-House Cases, 83 U.S. at 37.


[FN48].  U.S. Const. art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls ....”).

[FN49].  U.S. Const. art. I, § 7, cl. 2 (“Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States ....”).

[FN50].  Okanogan et al. v. United States (The Pocket Veto Case), 279 U.S. 655, 686-87 (1929).

[FN51].  U.S. Const. art. II, § 2, cl. 1 (“The President ... shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.”).


[FN53].  Apparently, Justice Black never perceived the irony of purporting to rely on plain language in these Due Process “incorporation” cases. Indeed, the Due Process Clause of the Fourteenth Amendment in no way references the first eight amendments of the Constitution. Furthermore, it fails to use the word “incorporate” or any variation of that word. Notwithstanding that failure, Justice Black argues that the Fourteenth Amendment incorporates the first eight and only the first eight Amendments to the Constitution. Particularly ironic is the incorporation of the Fifth Amendment Due Process Clause, which is identical to the Fourteenth Amendment. And yet, somehow, the Due Process Clause of the Fourteenth Amendment has a very different and, at the same time, plain meaning.


[FN56]. Reid v. Covert, 354 U.S. 1, 7-8 (1957) (Black, J., plurality opinion).


[FN62]. Finley v. United States, 490 U.S. 545, 559-60 (1989) (Stevens, J., dissenting) (“Given the plain language of Article III, there is not even an arguable basis for questioning the federal court's constitutional power to decide it.”).


[FN68]. Id. at 855-56. See also Helling v. McKinney, 509 U.S. 25, 37 (1993) (Thomas, J., dissenting); Chauffeurs, 494 U.S. at 592 (Kennedy, J., dissenting).

[FN69]. Chauffeurs, 494 U.S. at 584 (Kennedy, J., dissenting).


[FN71]. Id.

[FN72]. Finley v. United States, 490 U.S. 545, 559-60 (Stevens, J, dissenting).


[FN75]. Marshall, 436 U.S. at 326.


[FN85]. Id.

[FN87]. Kesavan & Paulsen, supra note 9, at 1129.

[FN88]. See, e.g., Michael Stokes Paulsen, How To Interpret the Constitution (And How Not To), 115 Yale L.J. 2037, 2056 (2006). (“My un-grand but radical position (within the small world of academic constitutional theoreticians) is simply this: The enterprise of constitutional interpretation--of discerning the document's meaning--consists of giving to the Constitution's words and phrases the meaning they would have had, in context, to informed readers of the language at the time of their adoption as law, within the relevant political community. Contrary to Rubenfeld's assumption, and that of many other academic theorists, this seems to be the interpretive method prescribed by the Constitution itself. The straightforward internal textual argument for original-meaning textualism is that the Constitution is a written document; that it specifies “this Constitution” as the thing that is to be considered supreme law; that the default rule for textual interpretation was, at the time of the Constitution's adoption, the natural and original linguistic meaning of the words of the text; and that any argument for anachronistic interpretations of the text--that is, for substituting a personally idiosyncratic, nonstandard, or time-changed meaning in preference to the one that would have been understood at the time, and in the context, in which the text was adopted--ends up substituting some other words for the words chosen in ‘this Constitution.’ In short, the Constitution is written law, and the meaning of a written legal instrument is the original meaning of its words, not a different meaning substituted by someone else.”).

[FN89]. See discussion infra at notes 111-22.

[FN90]. Paulsen, supra note 88, at 2056; see also discussion infra at notes 101-10.


[FN93]. Id.

[FN94]. See, e.g., Thomas E. Baker, Constitutional Theory in a Nutshell, 13 Wm. &


[FN96]. See, e.g., Cherokee Nation v. Georgia, 30 U.S. 1, 41 (1831) (Baldwin, J., concurring).

[FN97]. Kesavan & Paulsen, supra note 9, at 1168. Note the use of the word “penned.” I clearly have no idea whether Kesavan or Paulsen own or use pens for drafting articles. Plain language textualism has a bit of trouble explaining the meaning, whereas a reader of this Article may find the meaning quite easily from the context.

[FN98]. Id. at 1127.

[FN99]. Id. Christopher R. Green is apparently working on a theory similar to that proposed by Kesavan and Paulsen. See Christopher R. Green, Originalism and the Sense-Reference Distinction, 50 St. Louis. U. L.J. 555, 566 n.35 (2006). He consider[s] one way to use the Constitution's self-referring clauses (the clauses which use “this Constitution” or “here” or “now”) to construct an argument that, if we agree with the Constitution's view of itself, we should think of it as a historically embodied textual assertion of authority, and that such a constitutional ontology would point toward some form of originalist textualism as the proper theory of constitutional law (if we agree with that assertion of authority).

[FN100]. Kesavan & Paulsen, supra note 9, at 1127.

[FN101]. Id. (quoting U.S. Const. art. VI, § 1, cl. 2) (internal quotation marks omitted). Note that these plain language adherents cannot even rely on the language of the Supreme Court to support their position. They describe the Constitution as a proclamation notwithstanding the fact that the words “proclaim” and “proclamation” are nowhere in the document. Contracts do not necessarily proclaim that they are binding on the parties. Such statements of binding effect may simply be restatements of fact or law or both. A textualist must rely on the words of the text. Reliance on non-textual words of characterization such as “proclaim” are indeed anathema to textualism.

[FN102]. Kesavan & Paulsen, supra note 9, at 1128.

[FN103]. Id.

[FN104]. Id.

[FN105]. Id. (citations omitted).

[FN106]. Kesavan & Paulsen, supra note 9, at 1129.

[FN107]. Note that because the text neither refers to drafters or founders, either can be
referenced, and both are referenced in order to justify textualism.

[FN108]. Coleman v. Alabama, 399 U.S. 1, 12 (1970) (Black, J., concurring). The idea of government-fearing founders raises a number of questions. First, for a textualist, what is the relevance of their fear? If the text speaks for itself, then how does this knowledge of fear assist in understanding the text? Second, did those who feared government fear it when they controlled the government? Third, if fear of government is significant to understanding the Constitution, then how can the Court begin with the presumption that Congress, the President, and the states exercised their power constitutionally? This third question is relevant to the very non-textual presumption that a statute (or executive act) is constitutional. If indeed fear of government is a relevant consideration (an assumption in no way disputed by this author), then why should a court show deference to Congress or the President?

[FN109]. Reid v. Covert, 354 U.S. 1, 8 n.7 (1957) (Black, J., plurality opinion).

[FN110]. Helling v. McKinney, 509 U.S. 25, 39 (1993) (Thomas, J., dissenting) (referring to prison conditions as a violation of the Eighth Amendment). Note that Justice Thomas refers to an entire generation without definition. Was he referring to all those alive during the Revolution, or possibly those alive at the time of drafting the Constitution? Was he referring to the thousands, maybe millions, who could not read or write? How can this statement be proven true or false?

[FN111]. Barron v. City of Baltimore, 32 U.S. 243, 250 (1833). Ten years before Barron, the Supreme Court of Mississippi was just as certain that Chief Justice Marshall was wrong, and that the Bill of Rights did (quite obviously) apply to the states. State v. Moor, 1 Miss. (1 Walker) 134 (1823) (holding that the Fifth Amendment “was binding in ... the state courts of the Union, ... it has never been questioned, but that the constitution of the United States is the paramount law of the land, any law usage or custom of the several states to the contrary notwithstanding”). While it would require another article to review the state cases prior to Barron that disagreed with the result in Barron, suffice to say, that not all those who read the Constitution agreed with Chief Justice Marshall's conclusion.


[FN113]. For the moment, the term “Drafter/Founder” is created as a term of art. As anyone who has read the Constitution is aware, the terms “Drafter” and “ Founder” and their variations are nowhere referenced in the Constitution. The term Drafter has a bit more specificity. In general, James Madison, working with others, “drafted” the Constitution, i.e., put pen to paper. Trent Oram & Kara Gleckler, Comment, An Analysis of the Constitutional Issues Implicated in Drug Courts, 42 Idaho L. Rev. 471, 487 n.80 (2006). See also, Thomas B. Colby, Revitalizing the Forgotten Uniformity Restraint on the Commerce Power, 91 Va. L. Rev. 249, 282 (2005) (describing Madison as “the putative father of our Constitution”). This technical skill in using the quill does not mean, however, that he originated the words marked on the paper. Founder, on the other hand, has almost no meaning. Rarely do those who use the term in any way attempt to define
the class of persons known as “Founders,” “founding generation,” or any other variation.
I use the term Drafter/Founder in an effort to address textualist arguments based on one
or more of these terms, noting that the idea of referring to terms outside the Constitution,
particularly completely undefined (and perhaps indefinable) terms outside the
Constitution, seems completely inconsistent with the concept of textualism. Of course,
one of the purposes of this Article is to demonstrate such inconsistencies, and to
demonstrate that such inconsistencies cut to the heart of textualism. Another word to use
is “Framers.” Professor Bederman refer [red] to the ‘Framers’ as including the entire
generation of politicians who drafted, ratified, and implemented in practice the
Constitution.” David J. Bederman, Admiralty and the Eleventh Amendment, 72 Notre
Dame L. Rev. 935, 1008 (1997).

[FN114]. See Bradford R. Clark, Separation of Powers as a Safeguard of Federalism, 79
Tex. L. Rev. 1321, 1347 (2001) (“[T]he Founders gave careful thought to the distinct
procedures they established for adopting the Constitution ....” (internal quotation marks
omitted)); Carol S. Steiker, Foreword, The Limits of the Preventative State, 88 J. Crim.
L. & Criminology 771, 778 (1998); Christopher Chrisman, Constitutional Structure and
the Second Amendment: A Defense of the Individual Right to Keep and Bear Arms, 43
Ariz. L. Rev. 439, 454 (2001) (“[I]t is reasonable to presume that the Founding Fathers--
deliberate, careful statesmen--employed language commensurate with their intent.”). See
also United States v. Morrison, 529 U.S. 598, 619 n.8 (referring to the Constitution’s
“careful enumeration ... of federal powers”).

189 (1994) (reviewing Harry Jaffa, Original Intent and the Framers of the Constitution
Punishment: Its Constitutionality, Morality, Deterrent Effect, and Interpretation by the
Court, 8 Notre Dame J.L. Ethics & Pub. Pol'y 11, 22 (1994).

(noting the “Framers' careful design”); see also Keith E. Whittington, Yet Another
Constitutional Crisis?, 43 WM. & MARY L. REV. 2093, 2108 (2002) (“The Founders were
equally careful in creating the system of presidential election.”); Bederman, supra note
113, at 935 (“[T]he Framers of the Constitution ... were careful drafters.”); A. Michael
Froomkin, The Imperial Presidency's New Vestments, 88 NW. U. L. REV. 1346, 1352
(1994) (noting that whether the drafters of the Constitution were “careful framers” is
simply a matter of belief).

[FN117]. See, e.g., Jonathan R. Cohen, When People are the Means: Negotiating with
Respect, 14 Geo. J. Legal Ethics 739, 764 (2001) (noting that the Constitution’s “drafters
were careful not to use the word ‘slave’” (quoting Juan F. Perea et al., Race and Races:
Cases and Resources for a Diverse America 104 (2000))); Stephen Kanter, The Griswold
Diagrams: Toward a Unified Theory of Constitutional Rights, 28 Cardozo L. Rev. 623,
653-54 (2006) (“[T]he founders chose broad, clear language ....”).

[FN118]. Some recognize that this is either a matter of belief or a rule adopted by those
who would interpret the Constitution. Froomkin, supra note 116, at 1352.

[FN119]. Levinson, supra note 92, at 471.


[FN121]. Id. It is ironic that Baldwin's justification for using plain language required both a metaphor (“hand[s]”) and a reference to “sovereign power,” a term nowhere in the Constitution.

[FN122]. Id. Again, it is ironic that a book of “prophecy” is to be understood with plain language.


[FN125]. Michael H. v. Gerald D., 491 U.S. 110, 122 (1989) (“The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution.” (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 544 (1977) (White, J., dissenting))).


[FN127]. Id.


[FN132]. Id. at 896 n.8 (quoting U.S. Senator Arlen Specter (R-PA) Holds a Hearing on the Nomination of Judge Samuel Alito to the U.S. Supreme Court: Hearing Before the


[FN138]. See White, supra note 133, at 532.


[FN140]. Id. (citation and internal quotation marks omitted).


[FN144]. Baker, supra note 94, at 72 (“The most fundamentalist textualists would opine that if the answer is not found in the text then the matter is left to the elected branches
and ultimately to the people. This theory thus would significantly limit the role of courts and judges.”). See also Jonathan Turley, The Military Pocket Republic, 97 Nw. U. L. Rev. 1, 41 (2002); David M. Zlotnick, Battered Women & Justice Scalia, 41 Ariz. L. Rev. 847, 849 (1999) (“[Justice] Scalia's constitutional methodology [consists of] textualism, faint-hearted originalism, and the clear rules principle.... [H]is motivating ideology [is] the belief that only a methodology that restricts the intrusion of judicial bias can properly confine the Court to its limited constitutional role.”).

[FN145]. More than 15 years ago, Professor Michael J. Perry argued that “debate about the legitimacy of particular conceptions of constitutional interpretation ... [is] best understood ... as [a] question[] about the character of American politics and, especially, about the proper role of the courts (in adjudicating constitutional conflicts) in American politics.” Michael J. Perry, The Legitimacy of Particular Conceptions of Constitutional Interpretation, 77 Va. L. Rev. 669, 673-74 (1991). He suggested, “questions about politics and proper judicial role (rather than tired, spent questions about the legitimacy of particular conceptions of constitutional interpretation) are now the very heart of the inquiry ... call[ed] constitutional theory.” Id. at 674.


[FN147]. See, e.g., William J. Michael, The Original Understanding of Original Intent: A Textual Analysis, 26 Ohio N.U. L. Rev. 201, 220 (2000) (“The framers' intent that judicial and legislative power be separate indicates they wanted original intent to control constitutional interpretation. This is because if a court does not interpret the text of the Constitution, as written and originally intended, the court necessarily makes law.’’). But see Richard Lavoie, Subverting the Rule of Law: The Judiciary's Role in Fostering Unethical Behavior, 75 U. Colo. L. Rev. 115, 157 (2004) (“[L]aw is not static and judges must facilitate the ability of the law to reflect its changing cultural context.”).

[FN148]. Kesavan & Paulsen, supra note 9, at 1127 (quoting U.S. Const. art. VI, § 1 cl. 2).

[FN149]. Id. (“‘This Constitution,’ the Constitution itself proclaims, ‘shall be the supreme Law of the Land ....’’”). The Constitution does not declare itself a proclamation. The Constitution contains the words quoted by the authors, but it does not use the word “proclaim.” The authors use the verb to create an active voice, whereas the document cannot engage in any activity. The Constitution exists and has words, but any effort to describe the action of those words is, to one degree or another, a modification of their meaning.
[FN150]. It is often argued that a redundancy in the Constitution should not be assumed. While this may be an excellent interpretive rule, such rule certainly is not justified by any reference to the text of the Constitution.

[FN151]. See, e.g., The Federalist No. 33 (Alexander Hamilton) ("But it is said that the laws of the Union are to be the SUPREME LAW of the land. But what inference can be drawn from this, or what would they amount to, if they were not to be supreme? It is evident they would amount to nothing. A LAW, by the very meaning of the term, includes supremacy. It is a rule which those to whom it is prescribed are bound to observe. This results from every political association. If individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers intrusted to it by its constitution, must necessarily be supreme over those societies, and the individuals of whom they are composed.").

[FN152]. Some assert a “rule” of constitutional interpretation which prohibits finding a redundancy in the Constitution. A plain language textualist cannot, however, assert the validity of such a “rule,” because nothing in the Constitution states rules of construction. In particular, the Constitution does not prohibit an interpretation that would make a provision of the Constitution redundant, or partially redundant, to another provision of the Constitution. A textualist's argument that constitutional interpretation prohibits a redundancy as it relates to the Supremacy Clause might resemble the following hypothetical argument. An unwritten “rule” of constitutional interpretation, that is, the non-redundancy rule, requires that the Supremacy Clause be interpreted to be the sole source, i.e., the non-redundant source, of constitutional supremacy. Because the Supremacy Clause has been shown to be the sole source of supremacy, those who interpret the Constitution must rely solely on the text of the Constitution, unless, of course, the interpreter needs to use a non-textual rule, that is, the non-redundancy rule, to demonstrate that the Supremacy Clause requires the use of textualism for interpretation of all other provisions of the Constitution.

[FN153]. See Kesavan & Paulsen, supra note 9, at 1128 n.50 (noting that the Constitution does not contain a “rules-of-construction clause” nor does it “designate[ an] authoritative interpreter”).

[FN154]. Id. at 1128.

[FN155]. Id. at 1129.

[FN156]. Id. at 1128 (footnote omitted).

[FN157]. Kesavan & Paulsen, supra note 9, at 1127-29.

[FN158]. Id.

[FN159]. Id. at 1127-28.
[FN160]. For an interesting discussion on this idea in intercollegiate athletics, see Mark Jenkins, The United Student-Athletes of America: Should College Athletes Organize in Order to Protect Their Rights and Address the ills of Intercollegiate Athletics?, 5 Vand. J. Ent. L. & Prac. 39, 46 (2003) (“The NCAA Constitution is similar to a corporate charter or a standard form contract agreed to by the institutions and the NCAA.”).

[FN161]. U.S. Const. pmbl.


[FN163]. Kesavan & Paulsen, supra note 9, at 1129.

[FN164]. Id. at 1127-29.

[FN165]. Id. at 1214.

[FN166]. Id. at 1127-29.

[FN167]. Kesavan & Paulsen, supra note 9, at 1127-29.

[FN168]. Id.

[FN169]. Id. at 1128.

[FN170]. Id.

[FN171]. Kesavan & Paulsen, supra note 9, at 1129.

[FN172]. Id. at 1128.

[FN173]. Id. The authors state that the Constitution, in general, and the Supremacy Clause, in particular, “appear[] to prescribe textualism.” This statement, in and of itself, might not suggest self-righteousness, but they follow by suggesting that any effort to disagree would require “an extraordinarily ingenious--and we think, disingenuous” argument. Id.

[FN174]. Kesavan & Paulsen, supra note 9, at 1128.

[FN175]. See id. at 1128 (dismissing as disingenuous any argument which would seek to disagree with them, even before they have read the argument).
The approach taken by Kesavan and Paulsen epitomizes the case in which the majority disagree with the plain or obvious or clear meaning. Kesavan and Paulsen have declared that the Supremacy Clause undeniably requires the use of textualism in interpreting the Constitution. They take this position despite the fact that they do not cite a single person who agrees with what they describe as an undeniable understanding.

This conclusion is based on the way “plain language” and “plain meaning” are used. An interpreter of the Constitution reads a phrase, declares its meaning, and rejects any debate or disagreement.

Kesavan & Paulsen, supra note 9, at 1127-29. Admittedly, Kesavan and Paulsen have not used the word “plain,” but their analysis leaves little doubt that they believe their interpretation of the Supremacy Clause is unassailable, and obvious.

This conclusion is based on the fact that Kesavan and Paulsen cite to no one who agreed with their interpretation of the Supremacy Clause. In addition, although proving the non-existence of anything is difficult, there appear to be few, if any, who have agreed with the interpretation of Kesavan and Paulsen.

Kesavan & Paulsen, supra note 9, at 1128.

This conclusion follows from the way plain language textualism works. An interpreter of the Constitution declares a meaning to be “plain.” Such a declaration admits of no discussion, for discussion is unnecessary if the meaning is plain. If a person does not recognize the plain meaning, nothing can be done for that person. Such a person simply remains in the dark. Perhaps an example outside of Constitutional interpretation would help. This example begins with Object Z. The plain language textualist sees and declares that Object Z is a tree. The textualist does not attempt to demonstrate his assertion by referencing other objects; the plain language textualist does not open a book on biology or trees. Because nothing but Object Z is relevant to understanding what Object Z is, the plain language textualist cannot help others see that it is a tree. Notwithstanding the fact that Object Z is all that is relevant to understanding Object Z, the textualist demands that all others accept that Object Z is a tree. Those who do not agree are, to the textualist, necessarily wrong and “unenlightened.”

This conclusion is based on the definition of plain language textualism given at the start of Article. By definition, plain language textualism may not use any outside sources because the doctrine is premised on the assumption that the Constitution's language is in fact plain, as in not subject to interpretation.

This conclusion is also based on the Article's definition of plain language textualism. Where a court, Justice, or commentator uses plain language textualism, that person or court notes the language to be interpreted, then declares its meaning to be plain. No explanation can be given. The textualist simply declares the meaning to exist. If the plain language textualist uses historical sources to describe original meaning, or dictionaries to describe current meanings, the process is not plain language textualism.
Such a process may be a form of textualism, but it is not plain language textualism. The demand referred to in the test is that once the plain meaning has been declared, no method of interpretation to find a different meaning would be appropriate. Once the interpreter declares that a phrase or clause has a plain meaning, no other plain meaning can be asserted, and any assertion of a different meaning must necessarily be erroneous.

[FN184]. This conclusion refers to those occasions where a constitutional interpreter assigns a plain language textual meaning to a clause, and such interpretation is inconsistent with most other interpretations of the same clause. The plain language interpreter necessarily states a meaning that is “personal” in the sense that he or she declares plain a meaning which most others do not recognize or understand to be correct. In that sense, the “plainness” is in the eye of the beholder, making it a personal interpretation, even though one goal of plain language textualism is to eliminate personal choices in interpretation.


[FN186]. See Eric Alan Isaacson, The Flag Burning Issue: A Legal Analysis and Comment, 23 Loy. L.A. L. Rev. 535, 593 n.358 (1990); Polly J. Price, Precedent and Judicial Power After the Founding, 42 B.C. L. Rev. 81, 90 (2000) (“[T]he court's underlying method [is] originalist, meaning the method that uses history to interpret the Constitution in order to gain some understanding of what the Framers[] intended when they chose the words that they did. Under this theory the Framers' intent is controlling. The text itself is of binding authority.”). But see Vikram David Amar, The People Made Me Do It: Can the People of the States Instruct and Coerce their State Legislatures in the Article V Constitutional Amendment Process?, 41 Wm. & Mary L. Rev. 1037, 1044-45 (2000) (noting that “[w]e ... presume that the Framers of the Constitution chose their words carefully,” but that such a presumption does not necessarily require that the Constitution be interpreted using textualism).


[FN188]. As noted, plain language textualism, as herein defined, relies solely and completely on a particular meaning that an interpreter of the Constitution declares to be plain. See Neil M. Richards, CLIO and the Court: A Reassessment of the Supreme Court's Uses of History, 13 J.L. & Pol. 809, 881 (1997) (arguing that Justice Scalia engages in textualism but “claims to reject the ‘drafter's intent’”). Karen M. Gebbia-Pinetti summarizes an article by Professor Charles Fried as “advocating allegiance to the text over the drafters' intentions in constitutional interpretation.” Karen M. Gebbia-Pinetti, Statutory Interpretation, Democratic Legitimacy and Legal-System Values, 21
Seton Hall Legis. J. 233, 271 n.102 (citing Charles Fried, Sonnet LXV and the ‘Black Ink’ of the Framers' Intention, 100 Harv. L. Rev. 751, 754-55 (1987)).


[FN194]. The Declaration of Independence para. 2 (U.S. 1776).

[FN195]. “Never” is a strong word, but so is “inalienable.” Indeed, it would seem relatively clear that the government could “never” infringe an “inalienable right,” or at least such infringement would “never” be consistent with a government that began with the principle of “inalienable rights.”


Barnett, Restoring the Lost Constitution (2004)) (“That poetry is written, for example, does not mean that constitutional interpretation should employ the literary analysis needed to unpack the work of William Blake.”).

[FN198]. Id. (“There is much that is written in our world, but this common feature tells us little about the writings themselves.”).


[FN200]. This statement seems to capture the spirit of what some textualists claim. See, e.g., Kesavan & Paulsen, supra note 9, at 1119 (“Justice Scalia ... recognizes that context is critical to the proper interpretation of a legal text.”); id. at 1124 (“Is it even appropriate to ask about ‘the’ proper method ... for interpreting legal texts?”).


[FN203]. E.g., Lawrence B. Solum, Pluralism and Public Legal Reason, 15 Wm. & Mary Bill Rts. J. 7, 16 (2006).


[FN212]. Feinman & Brill, supra 205, at 61 n.1.


[FN216]. See, e.g., Ecclesiastical Soc. of S. Farms v. Beckwith, 1 Kirby 91, 96 (Conn. Super. Ct. 1786) (equating the term “constitution” with “contract”). See also Martin v. Hunter's Lessee, 14 U.S. 304, 373 (1816) (Johnson, J., concurring) (“To me the constitution appears, in every line of it, to be a contract ....”).

[FN217]. This point need not be proven, but simply noted. Textualists often assume that the Constitution is like a statute. The point here is that such an assumption is not a fact. Such an assumption is instead a debatable conclusion.

[FN218]. See, e.g., Ivinson v. Hutton, 98 U.S. 79, 82 (1878) (noting that under certain circumstances a contract will be reformed to “conform to the precise intent of the parties”).

[FN219]. See, e.g., Bank of the U.S. v. Owens, 27 U.S. 527, 539 (1829) ( “There can be no civil right where there can be no legal remedy; and there can be no legal remedy for that which is itself illegal. That this is true of contracts violating the laws of morality, is recognized in the familiar maxim, ex turpi causa non oritur actio; as has been exemplified in some modern cases of a house let for immoral purposes.” (internal quotation marks
and citations omitted)).

[FN220]. R.H. Helmholz, The Law of Nature and the Early History of Unenumerated Rights in the United States, 9 U. Pa. J. Const. L. 401, 415 (2007) (“[T]he duty to fulfill one's promises ... was held to be part of natural law, and the corresponding right in the promisee to secure enforcement of the contract was undoubted.”).

[FN221]. U.S. Const. pmbl. See also Howard J. Vogel, The Possibilities of American Constitutional Law in a Fractured World: A Relational Approach to Legal Hermeneutics, 83 U. Det. Mercy L. Rev. 789, 790 (2006); Vicki C. Jackson, Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity, 75 Notre Dame L. Rev. 953, 954 (2000) (“Federal courts scholars, like other constitutional scholars, should not be afraid of invoking the Preamble to the Constitution to inform interpretive choices that must be made --including its commitment to the formation of a ‘more perfect Union’ and to ‘establishing Justice.’”).


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