Pace Environmental Law Review

Volume 25
Issue 2 *Summer 2008*

Article 3

June 2008

Animal Farm Jurisprudence: Hiding Personal Predilections behind the Plain Language of the Takings Clause

Stephen M. Durden

Animal Farm[1] Jurisprudence:[2] Hiding Personal Predilections Behind the "Plain Language" of the Takings Clause

STEPHEN M. DURDEN*

INTRODUCTION

For a decade, the author has stood in front of law students asking questions about constitutional law and occasionally answering them, more often responding to questions with questions. For that same amount of time, students have requested and demanded and begged for simple answers. They want, for example, a note card version of the Political Question Doctrine. The author has, perhaps unnecessarily, chafed at such requests, commenting, "Constitutional analysis is not simplistic."[3] Notwithstanding this effort at proclaiming the difficulty of constitutional analysis to the students, an elusive animal regularly appeared in Supreme Court decisions, an animal known as plain language (plain meaning) textualism. This animal proclaimed, to all who would open their literal and figurative eyes, the "plain" meaning of this or that constitutional provision. This sporadic, yet persistent, appearance of the "plain language" animal has created doubts in the mind of the author, forcing the author to consider the possibility that the Constitution is indeed "plain." What follows is the journey of the author to understand this animal or at least some aspect of it.

The paper first defines plain language textualism and demonstrates that the Supreme Court and its individual justices as well as many commentators regularly call upon plain language textu-

* Professor of Law, Florida Coastal School of Law. Thank you to my family and Masahiro Takeda my research assistant.

1. George Orwell, Animal Farm (Penguin Group 1996) (1946).

2. Stephen M. Durden, *Plain Language Textualism: Ensconcing Personal Predilections into the Constitution,* 26 QUINNIPIAC L. REV. 337 (2008).

3. Besides, if constitutional analysis was simplistic, constitutional law professors would be out of business except to read the simplistic black letter law to the students. And while students might be spellbound to hear a professor read a Harry Potter book, e.g., J.K. ROWLING, HARRY POTTER AND THE SORCERER'S STONE (1998), those students are not likely to be spellbound when the same professor reads "Black Letter Constitutional Law."

alism. Next, the paper seeks to determine why these people seek plain language textualism as a constitutional interpretive methodology, attempting to explain what others see as the benefit of that methodology. In other words, the paper presumes that those who use plain language textualism believe that such a method is a better method of interpretation. The paper next reviews the justification for using plain language textualism. The final question concerns how a person "plainly" interprets the Constitution and whether the application of plain language textualism furthers the justification for using that interpretive methodology.

More specifically, this article seeks to demonstrate that plain language textualism, an interpretive method that purports to eliminate the personal predilections of individual justices when interpreting the Constitution, instead ensconces personal predilections[4] and requires inconsistent interpretive methodologies. In order to do so, this paper will review the use of plain meaning or plain language textualism as applied to the Takings Clause. After showing that commentators have asserted at least two very different and inconsistent textualist meanings to the Takings Clause, the paper will demonstrate that even accepting a single meaning of the Takings Clause requires a number of separate non-textual conclusions as to the assumptions to be made as to the application of textualism. On the surface, this paper seeks to demonstrate that plain meaning textualism incorporates the personal predilections of the interpreter.

In the end, this paper seeks to be a voice of reason. By demonstrating the inconsistencies in the use of plain meaning textualism, this paper seeks to eliminate interpretive stridency and superiority. This paper seeks to show that even plain meaning textualism, perhaps the simplest (and most simplistic) interpretive methodology, requires non-textual, individual choices by justices. If all justices must resort to individual choices, then such individual choices (often labeled as "personal predilections") cannot, or at least should not, be labeled as inappropriate (or worse) simply or merely because they are individual choices. The question should be whether the choices that are made make sense, and whether they resonate within the society known as the Supreme Court, the society of the rest of the bench, the bar, and society as a whole.

4. Durden, *supra* note 2.

PLAIN LANGUAGE TEXTUALISM DEFINED OR DESCRIBED

The Constitution does not define "textualism" or "plain language textualism." Indeed, the Constitution does not mention textualism or plain language. While many have described "textualism,"[5] perhaps, none have actually defined or attempted to define "plain language textualism."[6] Consequently, this paper must, in some sense, define the term. In many ways this task is equivalent to defining a more concrete noun, such as a tree. The definition of the tree, outside of a biological science context, is, of necessity, a matter of describing what is seen or perceived by other senses. Because plain language textualism is no more self-defining than a tree, this paper describes what appear to be the observable characteristics of plain language textualism, based on observations of its use in various writings. The paper, to aid in understanding plain language textualism, will also distinguish a few other versions of textualism.

Textualism comes in many flavors,[7] including, inter alia, plain meaning or plain language textualism. Arguably, each version of textualism claims "fidelity to the text."[8] Various forms of contextual textualism include: (1) "legislative contextualism,"[9] (2) "semantic contextualism,"[10] or (3) "linguistic context[ualism]."[11] Contextual textualists seek the true meaning of words and phrases by using various contexts. Others, such as Justices Scalia

5. *E.g.*, Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State,* 95 COLUM. L. REV. 749, 750 (1995) ("Textualism refers to . . . deriv[ing] the putatively objective meaning of [a] word or phrase."); Andrew S. Gold, *Absurd Results, Scrivener's Errors, and Statutory Interpretation,* 75 U. CIN. L. REV. 25, 30 (2006). On the other hand, "Black's Law Dictionary does not contain a definition for 'textualism.'" Tom Levinson, *Confrontation, Fidelity, Transformation: The "Fundamentalist" Judicial Persona of Justice Antonin Scalia,* 26 PACE L. REV. 445, 445 n.3 (2006).

6. This author has made the effort in another article.

7. The author goes into greater detail as to the versions of textualism in another article. Durden, *supra* note 2.

8. G. Edward White, *Unpacking the Idea of the Judicial Center*, 83 N.C. L. REV. 1089, 1163 (2005).

9. Gregory E. Maggs, *Estoppel and Textualism*, 54 AM. J. COMP. L. 167 (2006) ("judges are to determine the objective meaning of an enactment from its text and legislative context").

10. *See, e.g.*, John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70 (2006); Joel Schellhammer, *Defining the Court's Role As Faithful Agent in Statutory Interpretation: Exxon Mobil Corp v. Allapattah Serv, Inc., 125 S. Ct. 2611 (2005)*, 29 HARV. J.L. & PUB. POL'Y 1119, 1128 (2006).

11. *E.g.*, Alex Glashausser, *Difference and Deference in Treaty Interpretation*, 50 VILL. L. REV. 25, 27 (2005).

and Thomas, assert textual fidelity while relying on "original meaning" of the Constitution,[12] "original intent,"[13] and "intent of the Founders."[14] An interesting example of textualism belongs to commentator Kelly Hollowell who asserts that the existence of a plain textual meaning is based on first determining the interests "within the scope of particular constitutional provisions"[15] and then declaring the meaning plain in light of the interests found.

The textualism reviewed in this paper does not rely on "contexts" or "interests" or even history. This paper refers to textualism which purports to interpret the words of the Constitution without outside assistance. Some authors refer to this interpretive model as "plain language textualism,"[16] while others refer to it as "plain meaning textualis[m]."[17] Rather than refer to the methodology by name, many, perhaps most, simply just use it. For example, many suggest that the Constitution, or at least a particular phrase or word has a plain meaning,[18] or instead, they refer to the

12. *See, e.g.*, Kelo v. City of New London, 545 U.S. 469, 523 (2005) (Thomas, J., dissenting); Roper v. Simmons, 543 U.S. 551, 608 (2005) (Scalia, J., dissenting). *See also* Robert J. Pushaw, Jr., *Methods of Interpreting the Commerce Clause: A Comparative Analysis*, 55 ARK. L. REV. 1185, 1187 n.10 (2003).

13. *See* Blakely v. Washington, 542 U.S. 296, 323 (2004) (O'Connor, J., dissenting); Barry P. McDonald, *Government Regulation or Other "Abridgements" of Scientific Research: The Proper Scope of Judicial Review under the First Amendment*, 54 EMORY L.J. 979, 1001 (2005).

14. *See, e.g.*, Richard A. Champagne, Jr., *The Problem of Integrity, Tradition, and Text in Constitutional Interpretation*, 72 NEB. L. REV. 78, 80, 88 (1993).

15. Kelly J. Hollowell, *Defining a Person under the Fourteenth Amendment: A Constitutionally and Scientifically Based Analysis*, 14 REGENT U. L. REV. 67, 82 (2002). According to Hallowell's "plain meaning," a fetus is a person within the words of the Fourteenth Amendment. Interestingly, this still would not support her view that the Fourteenth Amendment protects fetuses because the amendment protects "persons born." A fetus, by (scientific) definition is not born. Alternatively, according to her version of "plain meaning," the words "person born" refer to what is by any other definition the "unborn." To rephrase, under this "plain meaning," "born" and "unborn" have the same meaning. While perhaps the Fourteenth Amendment should be interpreted to protect the "unborn," that conclusion should be based on something other than a claimed reliance on the "plain meaning" of the text.

16. Very few articles use the term "plain language textualism." *See, e.g.*, Durden, *supra* note 2; Todd A. Hentges, *Driving in the Fairway Incurs no Penalty: Martin v. PGA Tour, Inc. and Discriminatory Boundaries in the Americans with Disabilities Act*, 18 LAW & INEQ. 131, 180 (2000).

17. *See, e.g.*, Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 34 (2006).

18. *See, e.g.*, J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 473 n.45 (2007). Interestingly, the author, J. Andrew Kent, first refers to "plain meaning" and then proceeds to state that in order to interpret the Constitution he will make inferences from the Constitution. He also confesses to his very personal approach to plain meaning textualism as he describes the interpretation of the Constitution as based on his "reading of text and structure" while

"plain language" of a particular word or phrase.[19] Rarely do those who use plain language textualism define or explain their interpretive model.[20] One can fairly gather that plain language textualists do not give an explanation because the plain language textualist views the method as obvious. This paper supplies a brief explanation, if not exactly a definition, of "plain language textualism."

A plain language interpretation begins by identifying a particular set of words in the Constitution and then stating that the language is "plain" or that the meaning is "plain." The plain language textualist does not, however, define the term, "plain." Plain could mean "obvious"[21] or "simple"[22] or both. Whichever "plain" approach the plain language textualist uses, the textualist clearly demands a catholic and non-debatable meaning to the constitutional term. Plain language textualism admits of only one interpretation, the interpretation stated (or demanded) by the plain language textualist.[23] Plain language textualism leaves no room for debate as to meaning or questioning of the authority of the person who uses plain language textualism. Because the plain language textualist demands that only one possible meaning exists, then implicitly, the definition is also eternal. Where only one possible meaning exists on the face of the Constitution, the plain language textualist cannot look to historical meanings. Plain lan-

---

"attempt[ing] to take into account the purposes animating the constitutional provisions." It is difficult to see what is plain about language if it is conjoined with a personal reading, as well as completely extra-textual purposes, and reader-drawn inferences (as opposed to what might be asserted to be objective implications of the words). In a sense, Mr. Kent makes the point of the article: that there is no plain language textualism without relying on personal predilections.

19. *See* Catherine L. Fisk, *The Last Article About the Language of ERISA Preemption? A Case Study of the Failure of Textualism*, 33 HARV. J. ON LEGIS. 35, 59 (1996).

20. One commentator suggests that the plain meaning "is the only meaning that fits the relevant interpretive evidence." Richard M. Cooper, 58 FOOD & DRUG L.J. 1, 6 (2003) (footnote omitted).

21. *See* Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 YALE L.J. 922, 947 (2006). The Supreme Court has used the phrase "plain and obvious" perhaps indicating a redundancy or at least an overlap in meaning. *See, e.g.*, International Harvester Cr. Corp. v. Goodrich, 350 U.S. 537, 545 n.11 (1956). *But see, e.g.*, Cooper, *supra* note 20, at 6 (2003) (footnote omitted) ("Plain meaning is not the same as obvious or obviously correct meaning; often, it takes hard work to show that a particular meaning is the plain meaning of a statute") (i.e., that it is the only meaning that fits the relevant interpretive evidence).

22. *See, e.g.*, City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 335 (1958) ("This statute is written in simple words of plain meaning . . . .").

23. *See, e.g.*, Caminetti v. United States, 242 U.S. 470, 485 (1917) ("Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise.").

guage textualism does not provide reasoning or rational as to determining the meaning of the word. Indeed, rationalization would be irrational or at least superfluous if the phrase has an obvious, simple, timeless and catholic meaning.[24] Finally, the plain language textualist does not rely on or refer to dictionaries or other sources.[25] Again, relying on dictionaries would be an admission that the words are not so plain after all and may subject the interpretation to a separate debate as to whether an old or new dictionary is appropriate as reference.[26] In the end, this paper defines plain language textualism as an interpretative method whereby the interpreter states the meaning of a word or phrase without any explanation other than to say that the meaning or language is "plain."

PLAIN LANGUAGE TEXTUALISM: A COMMON INTERPRETIVE METHOD

The Supreme Court has applied, or purported to apply, plain language textualism to a variety of provisions of the Constitution.[27] Indeed, justices of the Court have relied on "plain" meaning in cases from 1798[28] to 2003.[29] Among the various provisions declared to have a plain meaning are (1) the Commerce Clause;[30] (2)

24. *See, e.g.*, Earl M. Maltz, 71 B.U. L. REV. 767, 771 (1991) (footnote omitted) ("Scalia and like-minded textualists argue that where the import of the language is clear on its face, the courts should end their analysis without considering extrinsic explanations of meaning.").

25. *See, e.g.*, Steven J. Johansen, *What does Ambiguous Mean? Making Sense of Statutory Analysis in* Oregon, 34 WILLAMETTE L. REV. 219, 229–30 (1998); Eileen A. Scallen, *Classical Rhetoric, Practical Reasoning, and the Law of the Evidence*, 44 AM. U. L. REV. 1717, 1771 (1995). Of course, many textualists consult dictionaries. What this article describes and defines is the form of textualism where the textualist proclaims the meaning of the word or phrase, proclaims that the meaning or language is "plain" and offers no explanation and no reference, to a dictionary or otherwise. *See also* Jason J. Czarnezki & William K. Ford, *The Phantom Philosophy? An Empirical Investigation of Legal Interpretation*, 65 MD. L. REV. 841, 861 (2006); Rickie Sonpal, *Old Dictionaries and New Textualists*, 71 FORDHAM L. REV. 2177, 2193 (2003).

26. See Rickie Sonpal's outstanding review of the use of dictionaries and the various choices that can and must be made in choosing a dictionary definition. Sonpal, *supra* note 25.

27. *See, e.g.*, Perpich v. Dep't of Def., 496 U.S. 334, 339–40 (1990). *See also* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 857 (1995) (Thomas, J., dissenting).

28. Calder v. Bull, 3 U.S. 386, 390 (1798) (Chase, J.)

29. Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721, 741 (2003) (Stevens, J., concurring).

30. Addyston Pipe & Steel Co. v. United States 175 U.S. 211, 234–35 (1899). For a completely different "plain" meaning see United States v. Lopez, 514 U.S. 549, 589 (1995) (Thomas, J. concurring).

Article I, Section 9, Clause 4;[31] (3) Article I, Section 7.[32] Dissenting and concurring justices also often rely on plain language textualism. Some of the constitutional provisions asserted to be plain include (1) the First Amendment;[33] (2) the Sixth Amendment;[34] (4) the Fifth Amendment; (5) the Eighth Amendment;[35] (6) the Tenth Amendments;[36] (7) the Eleventh Amendment;[37] (8) the Fourth Amendment;[38] and (9) Article III.[39] Virtually every justice since 1970 has relied upon or purported to rely upon "plain" language either via his or her own opinion or through joining an opinion rely upon "plain" language. These justices include Chief Justices Burger[40] and Rehnquist,[41] as well as Associate Justices Souter,[42] Kennedy,[43] Powell,[44] Brennan,[45] Scalia,[46] O'Connor,[47] Ginsburg,[48] Breyer,[49] Marshall,[50] and Blackmun.[51] Commentators also routinely assert that constitutional provisions have a plainly observable and stated meaning. Some of those purportedly plain provisions include (1) the First Amendment;[52] (2) the Second

31. Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601, 622 (1895).

32. Okanogan v. United States (The Pocket Veto Case), 279 U.S. 655, 686 n.11 (1929).

33. Smith v. California, 361 U.S. 147, 160 (1959) (Black, J., concurring).

34. Coleman v. Alabama, 399 U.S. 1, 12–13 (1970) (Black, J., concurring).

35. Helling v. McKinney, 509 U.S. 25, 39 (1993) (Thomas, J., dissenting).

36. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 855–56 (1995) (Thomas, J., dissenting).

37. Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003) (Stevens, J., concurring).

38. Marshall v. Barlow's, Inc., 436 U.S. 307, 325 (Stevens, J., dissenting).

39. Finley v. United States, 490 U.S. 545, 559–60 (1989) (Stevens, J., dissenting).

40. Patsy v. Bd. of Regents of Fla., 457 U.S. 496, 519 (1982) (Powell, J., dissenting).

41. *U.S. Term Limits*, 514 U.S. at 855 (Thomas, J. dissenting).

42. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 114 (1996) (Souter, J., dissenting).

43. Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 592–93 (1990) (Kennedy, J., dissenting).

44. *Patsy*, 457 U.S. at 519 (1982) (Powell, J., dissenting).

45. Nat'l League of Cities v. Usery, 426 U.S. 833, 866–68 (1976) (Brennan, J., dissenting).

46. *Id. See also* Helling v. McKinney, 509 U.S. 25, 39 (1993) (Thomas, J., dissenting); *Terry*, 494 U.S. at 592–93 (Kennedy, J., dissenting).

47. *Terry*, 494 U.S. at 592–93(Kennedy, J., dissenting).

48. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 114 (1996) (Souter, J., dissenting).

49. *Id.*

50. Finley v. United States, 490 U.S. 545, 559–60 (1989) (Stevens, J., dissenting).

51. Marshall v. Barlow's, Inc., 436 U.S. 307, 325 (Stevens, J., dissenting).

52. *See, e.g.*, Tom W. Bell, *Treason, Technology, and Freedom of Expression*, 37 ARIZ. ST. L.J. 999, 1030 (2005). *Cf.* H. Franklin Robbins, Jr. & Steven G. Mason, *The Law of Obscenity—or Absurdity?*, 15 ST. THOMAS L. REV. 517, 541 (2003).

Amendment;[53] (3) the Fourth Amendment;[54] (4) the Fifth Amendment;[55] (5) the Sixth Amendment;[56] (6) the Seventh Amendment;[57] (7) the Eighth Amendment;[58] (8) the Ninth Amendment;[59] (9) the Tenth Amendment;[60] (10) the Eleventh Amendment;[61] and

---

53. *See, e.g.*, Kenneth Lasson, *Blunderbuss Scholarship: Perverting the Original Intent and Plain Meaning of the Second Amendment*, 32 U. BALT. L. REV. 127, 130 (2003); Roy Lucas, *From Patsone & Miller to Silveira v. Lockyer: To Keep and Bear Arms*, 26 T. JEFFERSON L. REV. 257, 301 (2004); Matthew S. Nosanchuk, *The Embarrassing Interpretation of the Second Amendment*, 29 N. KY. L. REV. 705, 793 (2002); Ronald S. Resnick, *Private Arms as the Palladium of Liberty: The Meaning of the Second Amendment*, 77 U. DET. MERCY L. REV. 1, 2, 10 (1999).

54. *See, e.g.*, Jose Felipe Anderson, *Accountability Solutions in the Consent Search and Seizure Wasteland*, 79 NEB. L. REV. 711, 724 (2000); Bill O. Heder, *The Development of Search and Seizure Law in Public Schools*, 1999 BYU EDUC. & L.J. 71, 78 (1999).

55. *See, e.g.*, Heather G. Wight-Axling, *Will the Durational Element Endure? Only Time Will Tell: Temporary Regulatory Takings in the Court of Federal Claims and Federal Circuit after Tahoe-Sierra*, 45 NAT. RESOURCES J. 201, 205 (2005); Michael Edmund O'Neill, *The Fifth Amendment in Congress: Revisiting the Privilege Against Compelled Self-Incrimination*, 90 GEO. L.J. 2445, 2448, 2450 (2002); Mark Tunick, *Constitutional Protections of Private Property: Decoupling the Takings Clause and Due Process Clauses*, 3 U. PA. J. CONST. L. 885, 886 (2001); J. H. Reichman, *Computer Programs as Applied Scientific Know-How: Implications of Copyright Protection for Commercialized University Research*, 42 VAND. L. REV. 639, 647, 658 n.58 (1989); Thomas R. McCoy & Michael J. Mirra, *Plea Bargaining as Due Process in Determining Guilt*, 32 STAN. L. REV. 887, 938 n.183 (1980).

56. *See, e.g.*, Michael J. Polelle, *The Death of Dying Declarations in a Post-Crawford World*, 71 MO. L. REV. 285, 310 (2006).

57. *See, e.g.*, Suha A. Thomas, *Re-Examining the Constitutionality of Remittitur Under the Seventh Amendment*, 64 OHIO ST. L.J. 731, 753 (2003).

58. *See, e.g.*, Barry L. Johnson, *Purging the Cruel and Unusual: The Autonomous Excess Fines Clause and Desert-Based Constitutional Limits on Forfeiture After United States v. Bajakajian*, 2000 U. ILL. L. REV. 461, 513 (2000); Joseph L. Lester, *Presumed Innocent, Feared Dangerous: The Eighth Amendment's Right to Bail,* 32 N. KY. L. REV. 1, 2, 22 (2005).

59. *See, e.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY, 242 (2004).

60. *See, e.g.*, Robert J. Condlin, *"A Formstone of Our Federalism:" The Erie/Hanna Doctrine and Casebook Law Reform*, 59 U. MIAMI L. REV. 475, 511 (2005); Lang Jin, Printz v. Unites States*: The Revival of Constitutional Federalism*, 26 PEPP. L. REV. 631, 634 (1999); Nancie G. Marzulla, *Clarence Thomas and the Fifth Amendment: His Philosophy and Adherence to Protecting Property Rights*, 12 REGENT U. L. REV. 549, 554 (1999); Saikrishna B. Prakash & Michael D. Ramsey, *Foreign Affairs and the Jeffersonian Executive: A Defense*, 89 MINN. L. REV. 1591, 1600 n.26 (2005); Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 WM. & MARY L. REV. 379, 380 (2000); Carol Tebben, *Native Americans and the Constitution: An American Trifederalism Based Upon the Constitutional Status of Tribal Nations*, 5 U. PA. J. CONST. L. 318, 330 (2003).

61. *See, e.g.*, Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 WASH. & LEE L. REV. 493, 521 (2006).

(11) the Twelfth Amendment.[62] These justices, commentators and the Supreme Court regularly refer to some form or other of "plain" meaning/language. However, they may or may not be suggesting that all the parts of the particular amendment or provision's area is "plain." As for this paper, the task of taking on the validity vel non of every assertion of "plain meaning" would be akin to counting grains of sand on the beach. Instead, this paper will focus on one provision of the Constitution, the Takings Clause.[63] This article does not propose to demonstrate that one or more plain language interpretations is more or less plain or valid than another. Instead, this article seeks to demonstrate that plain language textualism is merely another form of constitutional interpretation wherein the interpreter makes, perhaps countless, personal choices in creating an interpretation of the Constitution with which the interpreter hopes others will agree.

USING "PLAIN LANGUAGE" TO INTERPRET THE TAKINGS CLAUSE

The Supreme Court commonly refers to the "plain" language or meaning of the Takings Clause.[64] The Court has noted, "As its text makes plain, the Takings Clause 'does not prohibit the taking of property, but instead places a condition on the exercise of that power.'"[65] According to the Court, the Takings Clause "plainly" permits the government to "take" property[66] so long as it compensates the former owner.[67] In this case, the Court refers to "acquir[ing]" property via "condemnation" or "physical appropriation."[68]

This interpretation has created, in and of itself, little debate. Takings Clause debate often revolves around "Regulatory Tak-

62. *See, e.g.*, Peter Berkowitz and & Benjamin Wittes, *The Lawfulness of the Election Decision: A Reply to Professor Tribe*, 49 VILL. L. REV. 429, 437 (2004).

63. Occasionally, the Supreme Court and commentators will also refer to the Just Compensation Clause. For ease of discussion, this paper for the most part refers to the Takings Clause.

64. *See, e.g.*, Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 536 (2005); John D. Echeverria, *From a "Darkling Plain" to What?: The Regulatory Takings Issue in U.S. Law and Policy*, 30 VT. L. REV. 969, 975 (2006).

65. *Lingle*, 544 U.S. 528 at 536 (quoting First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 314 (1987)).

66. What is "property" is not so plain.

67. *See also* Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 321–22 (2002).

68. Brown v. Legal Found., 538 U.S. 216, 233 (2003).

ings."[69] Oversimplified, a regulatory taking occurs when a regulation goes "too far."[70] The Court has recently divided claims in this area into three[71] or four[72] categories of regulatory takings.[73] For the moment, the exact boundaries (if any) for regulatory takings is not significant. What matters here is that the Court asserts that these types of takings can be (perhaps should be) distinguished from "Plain Language Takings," i.e., takings claims permitted/created under the "plain language" of the Constitution. For example, the Court has stated, "[t]he Constitution contains no comparable reference [i.e., no plain language reference] to regulations that prohibit a property owner from making certain uses of her private property."[74] Consequently, "[t]he text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings."[75] In this case, the Court has relied on plain language textualism in order to support both its opinion as to what the language plainly incorporates and what it plainly leaves out. However, the Court has not used plain language textualism as the definitive boundary when interpreting the Takings Clause.

As noted, the Court has not limited takings claims to those claims that fall squarely within its view of the plain language of the Takings Clause, regularly permitting claims to be brought under the Takings Clause even when government makes no attempt to acquire or appropriate property. In order to maintain what the Court perceives as necessary control over regulatory tak-

69. *See also Lingle*, 544 U.S. 528 (discussing three standards of regulatory takings); *Regulatory Takings—"Substantially Advances" Test*, 119 HARV. L. REV. 297 (2005) (reviewing the "substantially advances" test of regulatory takings); Jonathan Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 130, 143 n.46 (2005).

70. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

71. Hannah Jacobs, *Searching for Balance in the Aftermath of the 2006 Takings Initiatives*, 116 YALE L.J. 1518, 1535–36 (2007); Robert S. Mangiaratti, *Regulatory Takings Claims in Massachusetts Following the Lingle and Gove Decisions*, 90 MASS. L. REV. 54 (2006).

72. John C. Keene, *When does a Regulation "Go Too Far?"—The Supreme Court's Analytical Framework for Drawing the Line between and Exercise of the Police Power and an Exercise of the Power of Eminent Domain*, 14 PENN ST. ENVTL. L. REV. 397, 419–20 (2006); Jennie C. Nolon, Comment, *Kelo's Wake: In Search of a Proportional Benefit*, 24 PACE ENVTL. L. REV. 271, 274–77 (2007).

73. Perhaps it is three. Perhaps it is four. One commentator says "four tests . . . three distinct types of takings." *See* Mark W. Cordes, *Takings Jurisprudence as Three-Tiered Review*, 20 J. NAT. RES. & ENVTL. L. 1, 3 (2005–2006).

74. Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 321 (2002).

75. *Id.* at 321–22.

ings claims, the Court has attempted to keep all Takings Claims at least "tethered . . . to the text of the Takings Clause [or] to the basic justification for allowing regulatory actions to be challenged under the Clause."[76] In sum, as to the Takings Clause, while the Supreme Court's decisions indicate that the clause has "plain" language, and while these decisions attempt to maintain a tie to that "plain" language, the Court certainly does not employ plain language textualism as its sole interpretive methodology as to the meaning of that clause. Essentially, the Court indicates that the Takings Clause has plain meaning, plus what the Court adds to it.

Oversimplified, commentators often agree with the Court's version of the plain meaning of the Takings Clause.[77] They also tend to agree that regulatory takings are not within the plain language of the Constitution.[78] These commentators part ways with the Court as to the validity of recognizing regulatory takings as legitimate constitutional claims. Many commentators agree that the Takings Clause has a plain meaning.[79] Some commentators note, almost in passing, the "plainness" of the meaning of the Takings Clause.[80] These authors merely note the "plainness" and move on.[81] Other commentators state the "plainness" of the clause

76. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 542 (2005).

77. *See, e.g.*, John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099, 1148 (2000).

78. *Id.*

79. *See, e.g.*, Mark A. Bross, *The Impact of Ornelas v. United States on the Appellate Standard of Review for Seizure under the Fourth Amendment*, 9 U. PA. J. CONST. L. 871, 886 (2007); Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1564, 1665 (2003); Hart, *supra* note 77, at 1134–35; Daniel A. Jacobs, *Indigestion from Eating Crow: The Impact of Lingle v. Chevron U.S.A., Inc. on the Future of Regulatory Takings Doctrine*, 38 URB. LAW. 451, 458 (2006); Douglas T. Kendall & Eric Sorkin, *Nothing for Free: How Private Judicial Seminars are Undermining Environmental Protections and Breaking the Public's Trust*, 25 HARV. ENVTL. L. REV. 405, 453 (2001); Ronald J. Krotoszynski, Jr., *Expropriatory Intent: Defining the Proper Boundaries of Substantive Due Process and the Takings Clause*, 80 N.C. L. REV. 713, 732 (2002); Kenneth Salzberg,*"Takings" as Due Process, or Due Process as "Takings?"*, 36 VAL. U. L. REV. 413, 420 n.42 (2002); Andrew W. Schwartz, *Reciprocity of Advantage: The Antidote to the Antidemocratic Trend in Regulatory Takings*, 22 UCLA J. ENVTL. L. & POL'Y 1, 16 (2004); Joseph William Singer, *After the Flood: Equality and Humanity in Property Regimes*, 52 LOY. L. REV. 243, 286 (2006); David A. Thomas, *Finding More Pieces of the Takings Puzzle: How Correcting History Can Clarify Doctrine*, 75 U. COLO. L. REV. 497, 541 (2004); Jonathan Zasloff, *Left and Right in the Middle East: Notes on the Social Construction of Race*, 47 VA. J. INT'L. L. 201, 227 (2006).

80. *See, e.g.*, Hart, *supra* note 77, at 1148; Kendall & Sorkin, *supra* note 79, at 453; Zasloff, *supra* note 79, at 227.

81. *See, e.g.*, Hart, *supra* note 77, at 1148; Kendall & Sorkin, *supra* note 79, at 453; Zasloff, *supra* note 80, at 227.

and assert that the Court should limit takings claims to that singular meaning.[82] In doing so, they often argue what the "plain" meaning does not incorporate.[83]

Essentially, the debate concerns whether the Court's interpretation of the Takings Clause, i.e., its failure to rely solely on the asserted plain language of the clause, can be justified. The anti-regulatory takings commentators urge that the Takings Clause contains plain language and the Court should be limited to that plain language. This article does not seek to prove or disprove any particular plain meaning. Instead, this article reviews how plain language textualism works by reviewing its application to the Takings Clause. This process of applying plain language textualism will shed light on the value of plain language textualism as a method of constitutional interpretation.

JUSTIFYING PLAIN LANGUAGE TEXTUALISM AS A METHOD OF ELIMINATING PERSONAL PREDILECTIONS IN CONSTITUTIONAL INTERPRETATION

As noted, this article seeks to judge the value, perhaps validity, of plain language textualism based on one of the justifications for using that interpretive model. In order to achieve that goal this paper will look for the justifications for using plain language textualism. Forms of this question might be: (1) what interpretational benefit does plain language textualism purport to achieve; (2) what interpretational problem does plain language textualism seek to elimintate; or (3) in what way is plain language textualism a better (more valid) interpretive method? For ease of understanding, the answers to these questions will be referred to as justifications for plain language textualism. Rather than attempt to identify and then discuss each possible or asserted or alleged justification, this paper will focus only on one.

82. *See, e.g.*, Tunick, *supra* note 55, at 886.

83. *Id.*

Supreme Court justices[84] and commentators[85] often decry the use of personal predilections in constitutional interpretation.[86] Justices assert their duty to avoid personalizing their interpretation. During their confirmation hearings, the two people most recently elevated to the Supreme Court, Chief Justice Roberts and Justice Alito, who may or may not be textualists, agreed that Supreme Court justices should not permit personal beliefs to affect or interfere with constitutional interpretation. As stated by Chief Justice Roberts:

> [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 Constitution according to the rule of law, not their own preferences, not their own personal beliefs. That's the ideal.[87]

Justice Alito echoed these sentiments stating: "[M]y 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."[88] While these comments may not be directly tied to textualism, other justices have relied on the elimination of personal predilections when justifying the use of plain language or

84. Justice Scalia often attacks jurisprudence based on what he terms "personal predilections." *See, e.g.*, John L. Horan, *A Jurisprudence of Doubt: Planned Parenthood v. Casey*, 26 CREIGHTON L. REV. 479, 494–95 (1993). Interestingly, Justice Scalia himself is not immune to claims that his jurisprudence is based on personal predilections. Susan M. Raeker-Jordan, *Parsing Personal Predilections: A Fresh Look at the Supreme Court's Cruel and Unusual Death Penalty Jurisprudence*, 58 ME. L. REV. 99, 102 (2006). *See also* Thomas B. Stoddard, *Bowers v. Hardwick: Precedent by Personal Predilection*, 54 U. CHI. L. REV. 648 (1987).

85. John F. Basiak, Jr., *The Roberts Court and the Future of Substantive Due Process: The Demise of "Split-The-Difference" Jurisprudence?*, 28 WHITTIER L. REV. 861 (2007).

86. *See, e.g., id.* at 892; Charles I. Lugosi, *Conforming to the Rule of Law: When Person and Human Being Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence*, 22 ISSUES L. & MED. 119, 160 (2007).

87. Rebekah L. Osborn, *Beliefs on the Bench: Recusal for Religious Reasons and the Model Code of Judicial Conduct*, 19 GEO. J. LEGAL ETHICS 895, 899, n.31 (2006) (quoting *U.S. S. Judiciary Comm. Holds a Hearing on the Nomination of John Roberts to be Chief Justice of the Supreme Court*, 109th Cong. (2005) (statement of Judge John Roberts).

88. Osborn, *supra* note 87, at 896 n.8 (quoting *S. Judiciary Comm. Holds a Hearing on Nomination of Judge Samuel Alito to the U.S. Supreme Court*, 109th Cong. (2005) (statement of Judge Samuel Alito).

some other form of textualism. For example, "the Great Chief Justice,"[89] John Marshall, wrote:

> Where [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.[90]

While the Chief Justice does not use the terms "plain language textualism" or "personal predilections," those terms certainly are consistent with his discussion.

Justices Black[91] and the second Justice Harlan[92] concurred in Chief Justice Marshall's view that "plain language" must supersede the "personal predilections" of justices. Justice Scalia[93] and the second Justice White have also expressed concern with creating a constitution based on the predilections of individual justices.[94] 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. Often the assertion of plain language relates to asserting

---

89. CHARLES F. HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW (Wilson Carey McWilliams & Lance Banning eds., 1996). *See also* Jack N. Rakove, *The Original Justifications for Judicial Independence*, 95 GEO. L.J. 1061, 1062 (2007) (referring to Chief Justice John Marshall as "the Great Chief Justice").

90. Cherokee Nation v. Georgia, 30 U.S. 1, 41 (1831). An irony lost on the Chief Justice, his justification for using plain language required both a metaphor ("hand") and a reference to "sovereign power," a term nowhere in the Constitution. He added, "I will not take away from the words of this book of prophecy." *Id.* Perhaps another irony, that books of prophecy are notoriously arcane and oblique, perhaps the antithesis of plain.

91. Coleman v. Alabama, 399 U.S. 1, 13 (1970) (Black, J., concurring) ("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.").

92. *Id.* at 23–24 (Harlan, J., concurring in part and dissenting in part) ("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.").

93. Michael H. v. Gerald D., 491 U.S. 110, 121 (1989).

94. Moore v. City of East Cleveland, 431 U.S. 494, 544 (1977) (White, J., dissenting).

that an interpretation conflicts with plain language.[95] Justice Black wrote that he "prefer[red] to trust the liberty of the citizen to the plain language of the Constitution rather than to the sense of fairness of particular judges."[96] Commentators have noted that other justices of the Court have expressed similar views, i.e., that justices should not let personal predilections or beliefs control their interpretation of the Constitution.[97] Linda Greenhouse notes that Justice Blackmun "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."[98]

Commentators often parrot the idea that personal predilections should not be part of constitutional interpretation[99] and that using plain language textualism (or at least textualism in general) eliminates or attempts to eliminate those personal predilections.[100] One commentator notes that, "[c]hief among the virtues of textualism is that it removes the individual judge from inventing, instead of interpreting, the law."[101] "Of course, accusations that justices have allowed their personal predilections to drive their interpretations of constitutional text are common."[102] According to Barry Friedman, many in the South condemned the justices of the Court, because in its Brown v. Board of Education

95. *E.g.*, Chauffers, Teamsters & Helpers, Local 391 v. Terry, 494 U.S. 558, 593 (1990) (Kennedy, J. dissenting); Patsy v. Bd. of Regents of Fla., 457 U.S. 496, 525 (1982) (Powell, J. dissenting).

96. *Coleman*, 399 U.S. at 13 (Black, J., concurring). *See also* Uphaus v. Wyman, 364 U.S. 388, 392–93 (1960) (Black, J., dissenting).

97. *See, e.g.*, G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 VA. L. REV. 485, 532 (2002).

98. Linda Greenhouse, *Marvin Anderson Lecture: Harry Blackmun, Independence and Path Dependence*, 56 HASTINGS L.J. 1235, 1236 (2005).

99. *See, e.g.*, Yao Apasu-Gbotsu et al., *Survey on the Law: Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 540 (1986); Raoul Berger, *Some Reflections on Interpretivism*, 55 GEO. WASH. L. REV. 1, 12 (1986); Kevin McNamee, Comment, *Do as I Say and Not as I Do: Dickerson, Constitutional Common Law and the Imperial Supreme Court*, 28 FORDHAM URB. L.J. 1239, 1300 (2001); Neil M. Richards, *Clio and the Court: A Reassessment of the Supreme Court's Uses of History*, 13 J.L. & POL. 809, 824 (1997); Lee J. Strang, *The Meaning of "Religion" in the First Amendment*, 40 DUQ. L. REV. 181, 210 n.163 (2002).

100. *See, e.g.*, Darlene Addie Kennedy, *Eschewing the Superlegislative Prerogative: Tax Opinions of Justice Clarence Thomas*, 12 REGENT U. L. REV. 571, 582 (1999–2000). *But see* Eugene Gressman & Eric K. Gressman, *Necessary and Proper Roots of Exceptions to Federal Jurisdiction*, 51 GEO. WASH. L. REV. 495, 497 (1983).

101. Levinson, *supra* note 5, at 471.

102. Ellen E. Sward, *Justification and Doctrinal Evolution*, 37 CONN. L. REV. 389, 472 n.468 (2004).

decision,[103] the Court "substiut[ed] naked power for established law" and "impos[ed]" "personal predilections."[104] Put in a more affirmative tone, the "judiciary [should] serve as a disinterested guardian of the people in interpreting the Constitution."[105] As put by one commentator:

> If 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.[106]] As Professor Frickey observed, 'judicial review is tolerable only to the extent that the Supreme Court operates as a disinterested decisionmaker, insulated as far as humanly possible from the personal predilections of the justices.'[107]

According to these commentators, justices should not be interested in a particular result, only the (plain) meaning of the Constitution.[108]

While the desire to eliminate personal predilections does not necessitate support of plain language textualism, the elimination of personal predilections from constitutional interpretation is a justification of plain language textualism.[109] Indeed, inasmuch as plain language textualism asserts the existence of only one possible meaning, relying on plain language textualism "necessarily" eliminates or seeks to eliminate personal predilections.

DOES PLAIN LANGUAGE TEXTUALISM ELIMINATE PERSONAL PREDILECTIONS?

The heart of this paper is the question whether plain language eliminates or ensconces personal predilections. Ironically,

---

103. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

104. Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five,* 112 YALE L.J. 153, 190, 236 (2002).

105. *See* White, *supra* note 97, at 532.

106. Marbury v. Madison, 5 U.S. 137 (1803).

107. Emery G. Lee, III, *Overruling Rhetoric: The Court's New Approach to Stare Decisis in Constitutional Case*, 33 U. TOL. L. REV. 581, 586 (2002).

108. Note that these commentators rely on their personal predilections in setting forth the proper role of the Supreme Court. Certainly, the Constitution in no way requires justices to be "disinterested," and only a subjective view of judicial review requires the Court to act "objectively." And all of this discussion begs the question whether the Supreme Court could "objectively" mete out "justice" as is perhaps implied by the Preamble to the Constitution. U.S. CONST. pmbl.

109. *See, e.g.*, Scott C. Idleman, *The Concealment of Religious Values in Judicial Decisionmaking,* 91 VA. L. REV. 515, 523–524 (2005).

the significance and importance of this question, varies depending on the personal predilections of those who ask the question. For those who believe that personal predilections cannot be eliminated from constitutional interpretation, this question has an obvious answer, that plain language textualism does not and cannot eliminate personal predilections. By extension, for those who believe that constitutional interpretation necessarily includes personal predilections, the fact that plain language textualism cannot eliminate those predilections does not in and of itself suggest that plain language textualism is flawed or is otherwise an inappropriate interpretational methodology.

What seems important in looking at this question is what the plain language textualist values. Assume that the prior section sufficiently proves that the plain language textualist values the elimination of personal predilections and that plain language textualism is a better interpretive method because it eliminates personal predilections. If such textualism does not eliminate personal predilections, then does textualism really provide any value to such a textualist? Or, perhaps equally as important, if textualism does not eliminate personal predilections, the plain language textualist cannot claim that textualism is superior to other interpretive methods that also fail to eliminate personal predilections. At the very least, the claim of interpretive superiority cannot be based on the elimination of personal predilections.

The following sections will demonstrate that even plain language textualism requires the use of significant personal choices, i.e., predilections, before the Constitution can be interpreted as "plain."

WHAT ARE THE VARIOUS "PLAIN" MEANINGS TO THE TAKINGS CLAUSE?

Plain language textualism is premised on the idea that the Constitution, or at least an identified section of it, has plain language or a plain meaning. As previously noted, this implies that only one such meaning can exist. This section points out that differing plain meanings often exist, strongly suggesting, to the disinterested observer, that perhaps none of the differing meanings are so plain if different people assert the existence of more than one such plain meaning. This article uses the Takings Clause to illustrate this point.

Professor Andrew Schwartz suggests that the language of the Takings Clause is plain to him, and his plain reading is that the

Takings Clause does no more than "protect against [the] government's physical appropriation of property."[110] J. Peter Byrne writes that, "plainly," "the word 'take' denotes some change in possession or title[,]"[111] and that "the regulatory takings doctrine . . . rests on no textual . . . support."[112] Professor Mark Tunick explains that in his "plain" view of the Takings Clause, "'does not take property' is not 'do not regulate unfairly' or 'do[es] not fail to promote social utility.'"[113] Put in the affirmative, "the plain meaning" of the Takings Cause "requires only that government must not 'take'—grasp, seize, lay hold of—property without paying just compensation."[114] Putting "plain language" into context with the compensation requirement William Michael Treavor, explains (perhaps commands) that "the text" of the Takings Clause "tells[s] us that regulations never give rise to a compensation requirement."[115]

Meanwhile, Professor Richard A. Epstein has urged a radically different "plain" meaning of the Takings Clause. As explained by Douglas T. Kendall and Charles P. Lord, "Epstein . . . blithely contends . . . that the language of The Takings Clause alone . . . renders suspect any interference with any strand in a property owner's bundle of rights . . . ."[116] Epstein "suggests" that this conclusion is based on "the ordinary language of the text."[117] Leif Warner, a Lecturer in Philosophy at the University of Sheffield agrees with this analysis of Epstein. Warner also finds that "Epstein believes" that "discoverable within the plain meaning of the Takings Clause" is the principle that "state action triggers

110. Schwartz, *supra* note 79, at 38.

111. J. Peter Byrne, *Regulatory Takings and "Judicial Supremacy"*, 51 ALA. L. REV. 949, 955 (2000).

112. *Id. See also* Andrew S. Gold, *The Diminishing Equivalence Between Regulatory Takings and Physical Takings,* 107 DICK. L. REV. 571, 588 (2003) ("The plain language of the Takings Clause. . .refers to neither eminent domain, physical appropriation, nor regulatory takings").

113. Tunick, *supra* note 55, at 886. Interestingly, Professor Tunick restates the Takings Clause ("does not take property") in order to state what the Takings Clause plainly means or does not mean. It seems as though a clause that is "plain" need not be restated before giving its "plain meaning."

114. *Id. See also* Timothy J. Dowling, *Reflections on Urban Sprawl, Smart Growth, and the Fifth Amendment,* 148 U. PA. L. REV. 873, 881 (2000) (the "term 'take' most naturally refers to an actual expropriation of property").

115. William Michael Treanor, *Takings Law and the Regulatory State: A Response to R.S. Radford,* 22 FORDHAM URB. L.J. 453, 458 (1995).

116. Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. ENVTL. AFF. L. REV. 509, 523 (1998).

117. *Id.*

'takings' scrutiny if it alters any incident of any private parties property bundle."[118]

Plain language interpretation cannot be too plain if, as shown, even plain language advocates fundamentally disagree as to the plain meaning of the Takings Clause. Tunick limits his "plain take" to physical possession of a physical thing, likening a taking to "grasp[ing], seiz[ing], or lay[ing] hold of."[119] While Byrne agrees that "take" includes the physical, such as taking possession, he properly notes that the term "take" includes taking title.[120] And, while these two versions of plain language are somewhat consistent, Professor Epstein declares that the Takings Clause has a third, but very different meaning that contradicts the other two plain meanings.

Perhaps the existence of three plain meanings suggests the non-existence of plain language. Indeed, these three "blithe[ ] conten[tions],"[121] without more, demonstrate the utter failure of plain language textualism. The reasoning of these contentions cannot be attacked because these contentions provide no reasoning. Instead, these contentions provide no more than a simple statement of what each author maintains as "fact" or, at least, "law" or "The Law." One can imagine a discussion between the three scholars as little more than:

"The Takings Clause means [blank]."

"Does not."

"Does too."

Ultimately, an outside reader of a plain language interpretation cannot rationally argue with such an interpretation based the interpreter's internal belief (or perhaps internal knowledge) as to an eternal and plain meaning. The plain language textualist cannot deny the internal source of this meaning, because the textualist, in stating the plain meaning, refuses to create an external record as to the source of the meaning. The source of meaning, therefore, remains solely the person giving the interpretation. In day to day life a person may cause personal conflicts by asserting a certainty as to meaning of words without setting forth the rationale for this certainty, but generally, this belief absolutism has few ramifications outside the life of the believer.

---

118. Leif Wenar, *The Concept of Property and the Takings Clause*, 97 COLUM. L. REV. 1923, 1937 (1997).

119. Tunick, *supra* note 55.

120. Byrne, *supra* note 111, at 955.

121. Kendall & Lord, *supra* note 116, at 523.

Constitutional interpretation is different. Suppose the commentators were instead members of the Supreme Court. Consider an opinion that might be given in a Takings Clause case.

> *Justice Tunick: "The Takings Clause plainly means grasping, seizing, or holding a tangible object."*
> *Justice Byrne: "Justice Tunick is partially correct, but the Takings Clause also plainly means taking of title to property."*
> *Justice Epstein: "Justices Byrne and Tunick may think they are partially correct, but the Takings Clause plainly includes interference with property rights."*
> *Justice Kendall, with whom Justice Lord concurs: "Justice Epstein's opinion is merely a blithe contention."*

Plain language textualism, although prestidigitized with hopes of eliminating personal predilections instead, ensconces them. Indeed, plain language textualism epitomizes using personal predilections in constitutional interpretation.

Some have attacked the judiciary as being a sort of "priesthood" that believes only the priesthood can "render [the Constitution] intelligible,"[122] and plain language textualism renders the judiciary most like a priesthood where the justices read the "sacred text"[123] and declare the meaning. Such an approach requires no rationalization, no explanation, just, "The Founder's wrote it. I restated it. And that settles it."

This article does not choose the "correct" plain meaning of the Takings Clause. Instead, the article points out that each plain language textualist declares language to be plain. Plain language textualism declares what is. Plain requires no analysis. Either the language is plain or it is not. Either all agree as to the plain meaning or they do not. Those who plainly see yellow flowers will never see blue flowers. Those who see the blue ones will never see the yellow. This discussion demonstrates a fundamental flaw in plain language textualism.

Plain language textualism cannot be used to resolve a dispute between two people who claim two different plain meanings. Each must either explicitly or implicitly assert the invalidity of the other relying on nothing more than Because-I-Said-So interpre-

122. Philip P. Houle, *Eminent Domain, Police Power, and Business Regulation: Economic Liberty and the Constitution,* 92 W. VA. L. REV. 51, 55 (1989).

123. Anthony V. Baker, *"So Extraordinary, So Unprecedented an Authority": A Conceptual Reconsideration of the Singular Doctrine of Judicial Review*, 39 DUQ. L. REV. 729, 732 n.17. *Cf.*, LOUIS B. BOUDIN, GOVERNMENT BY JUDICIARY 287–288 (1932).

tive methodology. The first must reject the meaning asserted by the second based solely on the first's belief that the first correctly understands the plain meaning of the term while the second misunderstands the term. This discussion of differing plain meanings demonstrates that the only basis for determining a plain language definition is resort to the internal thoughts of the textualist. The plain language textualist simply states that some clause of the Constitution is plain, and others either see the same meaning or they do not. They cannot rely on the persuasiveness of the analysis, rationale, or argument of the textualist, because none exist. This discussion scenario points out the futility of determining the validity or correctness of a plain language definition based on plain language methodology. Indeed, inasmuch as plain language textualism provides no methodology it is impossible to determine whether plain language textualism has been properly applied.

Plain language textualism has flaws other than the inability to test whether the methodology has been properly used. In particular, and perhaps more important, plain language textualism is inconsistent with its core justification—the elimination of personal predilections. As noted, the mere selection of an actual, declared plain meaning can vary from person to person. The discussion of the various meanings of the Takings Clause demonstrates this. What the article next seeks to demonstrate is that before a person declares the language of a clause of the Constitution to be plain, the interpreter must make a variety of implicit or explicit choices, choices based on the personal predilections of the interpreter, the plain language textualist.

WHICH PLAIN LANGUAGE DOES THE PLAIN LANGUAGE TEXTUALIST USE: "LAY," "ORDINARY," OR "LEGAL"?

Commentators regularly refer to the Constitution as a "legal text."[124] Some further modify the description by referring to the Constitution as an "authoritative legal text[ ]."[125] In order to emphasize the authoritativeness and legal nature of the text, some

124. *See, e.g.*, Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1802 (2007); Paul R. Baier, *The Supreme Court, Justinian, and Antonin Scalia: Twenty Years in Retrospect*, 67 LA. L. REV. 489, 516 (2007).

125. Lawrence B. Solum, *Pluralism and Public Legal Reason*, 15 WM. & MARY BILL RTS. J. 7, 16 (2006); Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419, 471 (2006).

even liken the Constitution to the Bible,[126] even suggesting that the two have an equivalent "sacred character."[127] One conclusion that follows would be that the Constitution should be interpreted as a legal text or a legal document. What this means may not be so clear. Gary Lawson and Guy Seidman recently asked, "What assumptions is [the interpreter of the Constitution] going to make when interpreting a legal text?"[128] This is, of course, a continuing question of interpretive theory. Indeed, "[w]e as a society, or as a legal culture, have not even agreed on a methodology for interpretation of legal texts."[129] Thus, in some ways, noting that the Constitution is "authoritative" or a "legal text" does little to answer the question as to how best to interpret it.

The particular problem that is not answered is what kind of "plain" language should the plain language interpreter use. It may be that "judges are professionally trained to interpret legal text."[130] Presumably, this means that lawyers are trained to look at legal documents a different way, in the way that a "doctor reads a medical text differently form the way an ordinary person reads a novel."[131] These assumptions or conclusions, in and of themselves, do not answer the question of where to find meaning in a word or phrase.

Some seek to provide the answer by suggesting that a legal text requires interpretation based on the "plain"[132] or "ordi-

126. *See, e.g.*, George P. Fletcher, *Three Nearly Sacred Books in Western Law*, 54 ARK. L. REV. 1, 10 (2001); Samuel J. Levine, *Unenumerated Constitutional Rights and Unenumerated Biblical Obligations: A Preliminary Study in Comparative Hermeneutics*, 15 CONST. COMMENT. 511, 511–12 (1998). *But see generally* Francis J. Mootz, III, *Rethinking the Rule of Law: A Demonstration that the Obvious is Plausible*, 61 TENN. L. REV. 69, 127–31 (1993).

127. Michael Sink, *Restoring our Ancient Constitutional Faith*, 75 U. COLO. L. REV. 921, 932 (2004).

128. Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 70 (2006).

129. Michael R. Dimino, *The Futile Quest for a System of Judicial "Merit" Selection*, 67 ALB. L. REV. 803, 816 (2004).

130. Damien M. Schiff, *Purposivism and the "Reasonable Legislator": A Review Essay of Justice Stephen Breyer's Active Liberty*, 33 WM. MITCHELL L. REV. 1081, 1088 n.44 (2007).

131. M. H. Hoeflich, *The Lawyer as Pragmatic Reader: The History of Legal Common-Placing*, 55 ARK. L. REV. 87, 89 (2002).

132. Rev. Robert John Araujo, S.J., *Method in Interpretation: Practical Wisdom and the Search for the Meaning in Public Legal Texts*, 68 MISS. L.J. 225 n.69 (1998); Wilson Huhn, *The Stages of Legal Reasoning: Formalism, Analogy, and Realism*, 48 VILL. L. REV. 305, 309 (2003).

nary"[133] meaning of a word. But if that is true then what is the point of suggesting that any particular document is a "legal text?" Presumably, newspapers are read based on the plain and ordinary meaning of the words. And if newspapers and legal texts use the same method of interpretation, then what is the point of legal education? More to the point, why bother describing a document as a legal text, if that declaration does not affect the meaning of the words?

These questions matter because some believe/argue/assert that words have a "legal meaning."[134] Others assert that words have "lay" meanings.[135] Indeed, other meanings to words include "natural" and "common." The problem for the "plain" language textualist is that some interchange "plain" with "ordinary." Even more difficult is that some textualists assert that a legal text looks to "plain" or "ordinary" meanings. While others make it clear that legal meanings and lay meanings are very different and use of one rather than the other may create drastically different results.[136] Undeniably, words have both legal and lay meanings. Some assert that constitutional interpretation be based on the "legal" meaning of a word. Others assert that it must be based on the lay meaning.

The existence of these various forms of meanings has dire consequences for the plain language textualist. Such a textualist must surreptitiously choose one form of meaning, whether it be "lay" or "legal." Such a surreptitious choice seems incongruous with the assertion that language is plain. Openly making the choice, openly contradicts the assertion that the language is plain. Finally, not recognizing the existence of the difference may be the worst yet.

---

133. Dennis Patterson, *Interpretation in Law*, 42 SAN DIEGO L. REV. 685, 693 (2005). *See also* Cass R. Sunstein, *Justice Breyer's Democratic Pragmatism*, 115 YALE L.J. 1719, 1725 n.94 (2006).

134. Robert G. Natelson, *The Legal Meaning of "Commerce" in the Commerce Clause*, 80 ST. JOHN'S L. REV. 789 (2006). *See, e.g.*, Daniel J. Hulsebosch, *The Constitution in the Glass Case and Constitutions in Action*, 16 LAW & HIST. REV. 397, 397–98 (1998); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1201–02 (2003); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 523–24 (2003).

135. *See, e.g.*, Sam Erman, *Word Games: Raising and Resolving the Shortcomings in Accident-Insurance Doctrine that Autoerotic-Asphyxiation Cases Reveal*, 103 MICH. L. REV. 2172, 2175 n.13 (2005); Buckner F. Melton, Jr., *Eminent Domain, "Public Use," and the Conundrum of Original Intent*, 36 NAT. RESOURCES J. 59, 72 (1996).

136. *See* Robert Ryan Morishita, *Patent Infringement After GATT: What is an Offer to Sell?*, 1997 UTAH L. REV. 905 *passim* (1997).

This discussion as to choosing between "lay" and "legal," albeit "plain," meanings demonstrates an internal failure of plain meaning textualism, particularly with regard to constitutional interpretation. First, the lay/legal choice cannot be found in the text. The Constitution does not refer to any interpretive methodology nor does it demand that the interpreter use lay or legal language. So the textualist leaves the text to choose a lay or legal approach. Having looked beyond the text to make that choice, the textualist then asserts a meaning which the textualist claims is to be found on the surface of the text. Second, the lay/legal choice is clearly not obvious. There is no evidence that most people involved in the ratification process, from drafters to delegates to the Constitutional Convention to the delegates to the ratifying conventions to the voters were lawyers or understood legal language. The Federalist Papers sought to convince the lay voter to support the ratification of the Constitution. Perhaps this indicates that the document should be interpreted using lay understanding of words. Third, and perhaps most important, the choice is a personal predilection to the textualist. The textualist must necessarily base choice of lay or legal language on personal predilections. In other words does the vote for persons to the ratification conventions indicate using lay language or does the formalized ratification process demand using legal language? The question whether to use lay or legal language could be guided by a variety of other factors, but whatever those factors in making that choice the language of the Constitution says nothing about using lay or legal language. In the end the plain language textualist must make a variety of extra-textual choices before ultimately choosing to use a lay or legal approach to interpreting the plain language of the Constitution. Each such choice is based on the personal predilections of the plain language textualist.

LEGAL AND LAY MEANINGS TO THE WORDS OF THE TAKINGS CLAUSE LEAD TO DIFFERENT MEANINGS

The difference between choosing a lay meaning approach and a legal meaning approach substantially affects the final interpretation of a constitutional provision. A review of the plain language of the Takings Clause will demonstrate the conflict between lay and legal meanings. This conflict will demonstrate the significance of choosing between a lay and legal approach to textual interpretation. As noted above, the most common plain meanings to

the Takings Clause are (1) taking possession of a physical thing or (2) taking title to a physical thing, or (3) both. The question is whether any one if these both works and uses a consistent approach to the question of lay or legal language. The following discussion demonstrates that if the lay approach is used, the Takings Clause must be limited to the physical appropriation of a physical thing, and if the legal approach is used the textualist must drastically limit the meaning of the words.

To overview, the Takings Clause requires compensation if "private property" is "taken for public use." The lay understanding of "take" implies physical possession, and the lay understanding of "property" is limited to a physical thing.[137] "Most lay people believe the term 'property' means a tangible or intangible thing."[138] Others urge, "Tangible property, both real and personal, still forms the core of the lay conception of private property."[139] The lay meaning of the Takings Clause, i.e., limiting the words to the lay meaning, is limited to the requirement that "just compensation" be paid if the government takes physical possession. This meaning, however, creates a problem for the most common form of taking of property, the condemnation of property. In a condemnation, the government takes "title." But "title" does not fall within the lay meaning of property. "Title" is within a legal meaning to the term property. Limited strictly to the lay understanding of the words, the Takings Clause would not require payment when the government takes title, only when it takes possession. Of course, no one (so far as the article can determine) seriously suggests that any meaning of the Takings Clause is limited to taking possession. The only conclusion is that the "plain meaning" of the Takings Clause must be based legal understandings of words. This approach is certainly consistent with the conclusion that the Constitution is a legal text.

Before turning to the legal meanings of the words of the Takings Clause, another problem with using the lay interpretation must be addressed. For the moment the discussion concedes that

137. *See, e.g.*, Brian J. Nolan, *The Metaphysics of Property: Looking Beneath the Surface of Regulatory Takings Law After* Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 48 ST. LOUIS U. L.J. 703, 751 (2004).

138. Vada Waters Lindsey, Casebook Review, 22 SEATTLE U. L. REV. 977, 978 (1999) (reviewing EDWARD H. RABIN & ROBERTA ROSENTHAL KWALL, FUNDAMENTALS OF MODERN REAL PROPERTY LAW (3d ed. 1992)).

139. Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1174 (1999). *See also* Kenneth L. Port, *The Illegitimacy of Trademark Incontestability*, 26 IND. L. REV. 519, 552 (1993).

the individual words "property" and "taken" would only require compensation when the government takes possession or title. The plain language textualist would, presumably, claim victory. But the textualist must first recognize that occasionally words that individually have one meaning, but when placed together, they have a different meaning, i.e., phrases often have an idiomatic meaning. So the real question is not whether the plain language textualist "correctly" identifies the lay understanding of the two words "taken" and "property" but whether the plain language textualist correctly identifies the lay understanding of the Takings Clause. What if it could be demonstrated that the lay understanding of the Takings Clause is that property owners must be compensated whenever the government seeks to control the use of private property? The plain language textualist must then argue that the plain meaning of the Takings Clause is based on the plain (lay) meaning of the words "taken" and "property," but not on the plain (lay) meaning of the "Takings Clause." An alternative would be that that lay understanding of the words "taken" and "property" can (must?) be used because those understandings are "plain," but the lay understanding of the "Takings Clause" cannot (must not) be used because that understanding is not "plain." One question presented is whether an idiomatic understanding of words can ever be plain. Alternatively, whether plain language interpretation can rely on lay plain meaning of words, but not lay plain meaning of the entire clause.

In the end the plain language textualist using a lay language approach must make a number of language choices which lead to different meanings. As noted earlier, even if a lay approach is limited to lay understanding of individual words, the textualist runs into a serious conundrum. Lay meaning limiting property to a physical object does not, using lay terms, include taking title (without possession) via eminent domain.

So the textualist must choose to use the legal meaning of the words in order to find the plain meaning of the "Takings Clause." This discussion of the legal meaning of the words of the Takings Clause begins with the word "take." For example, title to property (a word to be discussed later) can be taken in a variety of ways to "take" title. Title can be taken under a will.[140] An obvious way to take title is through purchase, including purchase at a sheriff's

140. *See generally* Robinson v. Armistead, 2 Va. Colonial Dec. B223, 1737 WL *4 (Gen. Ct. 1737).

sale.[141] Title may be taken by power.[142] Title may also be taken by force. Whereas it may no longer be true, in the Eighteenth Century there was a time when belligerents in war or privateers could take title by capture and sale in a neutral port.[143] Similarly, and more commonly, title may also be "taken" by adverse possession.[144] As it relates to title, a taking infers more of a reception or obtaining, and while a person may "take" (or obtain) title by possession, a person may take (or obtain) title by virtue of other physical acts or deeds. In that sense the term "take" has nothing to do with possession. A thief takes possession without taking title, and at a real estate closing the new owner usually takes title without taking actual possession at the moment of the closing. Indeed, the process of condemnation is a "taking" of title before taking of possession.

For the purposes of this discussion, the significant question is whether the legal meaning of "take" must be limited to these ideas of taking physical control of the property or actual or constructive title. As noted above, many commentators seek to limit the "plain" meaning of the Takings Clause to these ideas. More important, they seek to eliminate any meaning of the Takings Clause which would support Regulatory Takings jurisprudence. These commentators recognize that Epstein seeks to demonstrate that his understanding of the Takings Clause, justifies the regulatory takings jurisprudence. They also each suggest that he is simply wrong. As put by Kendall and Lord, "There is . . . no way to justify Epstein's conclusion as flowing from the text of the Takings Clause."[145] Kendall and Lord attack Epstein's interpretation from positions of certitude. For example, after they assert that "[a]ccording to Epstein, a 'taking' has occurred whenever the government 'diminishes the rights of the owner in any fashion,'" they confidently assert that "the word 'take' does not mean 'diminish' today, and there is no evidence that it ever did."[146] Certitudinal argument, however, has its flaws. A chink in the armor is, essentially, de-

141. *See generally* Johnson ex dem. Tuthill v. Dubois, 4 Johns. 216 (N.Y. Sup. Ct. 1809).

142. *See generally* Prescott v. Trueman, 4 Mass. 627, 1808 WL 1194 (1 Tyng 1808).

143. *See generally* Wheelwright v. Depegster, 1 Johns. 471 (N.Y. Sup. Ct. 1806).

144. *See generally* Trowbridge v. Royce, 1 Root 50, 1772 WL 1 (Conn. 1772).

145. Kendall & Lord, *supra* note 114, at 524 (citing RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 57 (Harvard Univ. Press 1985)).

146. *E.g.*, Commonwealth v. Herrick, 60 Mass. 465, 468, 1850 WL 4609, at *2–*3 (1850). *See also* Croft v. Arthur, 3 S.C. Eq. 223, 1811 WL 316 (Ct. App. 3 Des. Eq. 1811); The Oxford English Dictionary Vol. 17, 557–73 (2d ed. 2000) (1989).

struction of the protection of certitude. In this case, the Oxford English Dictionary disagrees with Kendall and Lord. This dictionary has no fewer than 15 pages of definitions, examples and discussion of the word "take."[147] Most importantly for these purposes, one of the dozens of definitions of "take" is: "To detract from, lessen, diminish."[148]

Kendall and Lord also demand that readers accept their statement that "alter" and "take" cannot be used interchangeably.[149] While the words may or may not have exactly the same connotation and denotation, they can be used to convey similar ideas. As argued by a lawyer nearly two hundred years ago in a case concerning legislative power over property: "No legislature has a right to interfere with, alter or take away private property . . . without making a compensation to the person from whom it is taken."[150] Undoubtedly, Kendall and Lord would urge that this Nineteenth Century lawyer, born in the age of the creation of our country, was wrong then and would be wrong today. And their proof would be that he was "plainly" wrong.

It may be that "take" and "alter" do not have exactly the same meaning. This may also be said for "take" and "diminish." For the purposes of this paper, the exact meaning of "take" is irrelevant. The point is that commentators and courts regularly refer to the "plain" meaning or understanding of the Takings Clause. It has been shown that people have very different understandings of what they "plainly" understand by the words of the "Takings Clause." With regard to the word "take," the apparently simplest of the words in the Takings Clause, Corpus Juris explains that it "has very many shades of meaning[;] [t]he precise meaning which is to bear in any case depends upon the subject in respect to which it is used."[151] The Oxford English Dictionary best describes how to understand the word take: "It is one of the elemental words of the language, of which the only direct explanation is to show the *thing* or *action* to which they are applied."[152]

The legal meaning of the word "take" is further complicated, because outside the area of modern Takings Clause jurisprudence, courts have recognized the existence of non-physical takings. In

147. THE OXFORD ENGLISH DICTIONARY Vol. 17, 557–73 (2d ed. 2000) (1989).
148. *Id.* at 565. *See, e.g.*, Commonwealth v. Herrick, 60 Mass. 465, 468 (1850).
149. Kendall & Lord, *supra* note 114, at 524.
150. Partridge v. Dorsey's Lessee, 3 H. & J. 302, 1813 WL 277, at *4 (Md. 1813).
151. 41 WORDS AND PHRASES 14 (1965) (referring to "take").
152. OXFORD ENGLISH DICTIONARY, *supra* note 147, at 557.

particular, a taking can occur constructively. For two centuries, the courts within the United States have recognized "constructive taking."[153] American courts in the Nineteenth Century found constructive taking by a defendant may give rise to a suit by the owner of the property.[154] Alternatively, an owner's constructive possession of property, according to Nineteenth Century courts, may support an action for trespass.[155] Some of these courts held that possession of goods may be considered a constructive taking sufficient to support a crime based on unlawful taking.[156] At the same time they recognized constructive possession of property.[157] More important, a Nineteenth Century Pennsylvania Supreme Court decision noted the interrelationship of property to "unrestricted enjoyment" and that there is little difference between "actual taking" and "constructive taking away the right to present use."[158] To return to the legal meaning of "take," the plain legal meaning of the word includes far more than taking physical possession of a physical thing, and includes more than the obtaining of title.

Once again the point of this discussion is to demonstrate that if the plain language textualist asserts that the meaning of the Takings Clause based on the plain legal meaning of the word take, the textualist has taken a very complex term and declared it to be simple and also obvious. Only the personal choice, i.e., personal predilection, of the textualist permits the textualist to eliminate all possible legal meanings of the word take other than the one indicating either the exercise of physical possession or the obtaining of title.

Assuming that the meaning of "take" has a "plain (legal) meaning," the next question is whether "property" also has a "plain (legal) meaning." To ask this question seems to answer it. Most law students take a year to study the nuances of the word property. Entire treatises attempt to explain the meaning of the

153. *E.g.*, Baker v. Fales, 16 Mass. 147, 150 (1 Tyng 1819).

154. *Id.*

155. *See, e.g.*, Root v. Chandler, 10 Wend. 110 (N.Y. Sup. Ct. 1833).

156. *See* State v. Vickery, 19 Tex. 326 (1857); Fulton v. State, 13 Ark. 168 (1852).

157. *See, e.g.*, Princeton Bank v. Crozer, 22 N.J. L. 383 (1850). There are, of course, other constructive acts in law related to property and titles such as constructive notice, e.g., Hatton v. McClish, 6 Md. 407 (1854) and constructive delivery, e.g., Moses v. Boston & Me. R.R., 32 N.H. 523 (1856). The curious reader who has made it to this parenthetical may also ask why Chief Justice Marshall did not find a way to hold that there had been "constructive delivery" of Marbury's commission. *See generally* Marbury v. Madison, 5 U.S. 137 (1803).

158. Welsh v. Bell, 32 Pa. 12 (1858).

word. One conclusion that is "plain" to many property scholars is that property and things are not the same. As simply explained by the 1984 edition of the *Property* hornbook, "For the lawyer, 'property' is not a 'thing,' although 'things' are the subject of property."[159] According to the hornbook a "layman" who "say[s] that 'property' is something tangible" has "confuse[d] 'property' with the various *subjects* of 'property'."[160] Property, then, is an idea, completely intangible. As put by Jeremy Benthan, property "is not material it is metaphysical, it is a mere conception of the mind."[161] In particular, Benthan urged that property is an idea born from and surviving only in law.[162] "Before laws were made there was no property; take away laws, and property ceases."[163]

Chief Justice Marshall, in 1830, stated, in a widely-followed opinion,[164] "[t]he term 'property,' as applied to lands comprehends every species of title inchoate or complete. It is supposed to embrace those rights which lie in contract; those which are executory; as well as those which are executed."[165] Perhaps more broadly, courts have also "construe[d] the term *property* as including every species of valuable vested interest."[166] In particular, as to the deprivation of property, property is one of "the three great subdivisions of all civil right"[167] and "embraces all valuable inter-

159. ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY 1 (Hornbook Series Lawyer's Edition 1984).

160. *Id.* (emphasis in original)

161. JOHN E. CRIBBET ET AL., PROPERTY 4 (8th ed. 2002) (quoting JEREMY BENTHAM, THEORY OF LEGISLATION, PRINCIPLES OF THE CIVIL CODE, Part I, 111–13 (Dumont ed., Hildreth trans. 1864)).

162. CRIBBET ET AL., *supra* note 161, at 4–5.

163. *Id.* at 5.

164. Prior to 1870, the Supreme Court quoted Marshall's words at least three times. *See* HORNSBY v. U.S., 77 U.S. 224, 242 (1869); POLLARD'S HEIRS v. KIBBE, 39 U.S. 353, 390 (1840); Smith v. Unites States, 35 U.S. 326, 330 (1836). State courts also regularly cited to or used the same definition. *See* IOWA HOMESTEAD CO. v. WEBSTER COUNTY, 21 Iowa 221, 1866 WL 286, at *7 (1866); Leese v. Clark, 20 Cal. 387, 421 (1862); Stockdale v. Treasurer of Webster County, 12 Iowa 536, 1861 WL 326, at *1 (1861); PUGET SOUND AGRIC. CO. v. PIERCE COUNTY, 1 Wash. Terr. 159, 170, 1861 WL 333, at *7 (1861); Teschemacher v. Thompson, 18 Cal. 11, 24 (1861); Figg v. Snook, 9 Ind. 202, 1857 WL 3586, at *1 (1857); Mussina v. Alling, 11 La. Ann. 568, 1856 WL 4589, at *25 (. 1856); Jones v. Menard, 1 Tex. 771, 1847 WL 3504, at *10 (1847); Eslava v. Doe, 7 Ala. 543, 1845 WL 3, at *8 (1845).

165. Soulard v. United States, 29 U.S. 511, 512 (1830).

166. Parks v. Boston, 32 Mass. 198, 203 (15 Pick. 1834) (emphasis added). *See also* Bd. of Educ. of Normal Sch. Dist. v. Blodgett, 40 N.E. 1025, 1027 (Ill. 1895); Territory ex rel. Wade v. Ashenfelter, 12 P. 879, 898 (N.M. 1887); Campbell v. Holt, 115 U.S. 620, 630–32 (1885) (Bradley, J., dissenting); Chi. & E. Ill. R.R. Co. v. Englewood Connecting Ry. Co., 17 Ill. App. 141, 143, 1885 WL 8359, at *4 (App. Ct. 1904).

167. McGrew v. Indust. Comm'n, 85 P.2d 608, 610 (Utah 1938).

ests which a man my possess *outside of himself.*"[168] "In an advanced civilization like ours, a very large portion of the property of individuals . . . consists of rights and claims against others, or against the government itself."[169] "Property is defined as the highest right a man can have to anything, being used for that right which one hath to lands or tenements, goods or chattels, which no way depend on a man's courtesy,"[170] and it "embrace[s]" "all titles . . . legal or equitable, perfect or imperfect,"[171] as well as, "things in action [and] in possession, including things both real and personal, promissory notes and money."[172] In the late Twentieth Century, the Supreme Court often described property as a bundle of rights.[173] Prior to that century courts often referred to "rights of property."[174] Among those "rights" are "the exclusive right of possessing, enjoying, and disposing of, a thing"[175] or the "free use, enjoyment, and disposal."[176] These may even imply the right to acquire property.[177] "Property" includes judgments[178] and an interest in a mining claim.[179]

At this point the article does not seek to prove that any or all or a combination of all these ideas defines "property." Instead, the article points out that according to the plain language textualist, none of these cases matter. To the textualist, the words of property scholars might be deceiving in their effort to urge a difference between property and things or their effort to demonstrate that property is a set of rights, but deceptive or not, the words of these scholars are not relevant. The plain language textualist need not demonstrate that these property scholars err in their understanding of property concepts. Similarly, the plain language textualist must look at the extensive definition of property in Black's Law

168. *Campbell*, 115 U.S. 620 at 630 (Bradley, J., dissenting) (emphasis added). *See also McGrew*, 85 P.2d 608 at 610.

169. *Blodgett*, 40 N.E. 1025at 1027.

170. Dow v. Curry Silver Mining Co., 31 Cal. 629, 637 (1867) (citations omitted).

171. HORNSBY v. U.S., 77 U.S. 224, 242 (1869).

172. Cate v. Cranor, 30 Ind. 292, 1868 WL 3081, at *1 (1868). *See also* Mitchell, 35 Miss. 108, 1858 WL 3057, at *4 (Miss. Err. &Ct. App. 1858) ("[T]here can be no doubt but that *money* is embraced in the legal term *property*.").

173. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982).

174. *E.g.*, Respublica v. Dore, 1 Yeates 501, 1795 WL 2 (Pa. 1795); State v. Van Waggoner, 6 N.J.L. 374, 1797 WL 629, at *2 (1797).

175. Banning v. Sibley, 3 Minn. 389, 1859 WL 389, at *9 (1859).

176. Stevens v. State, 2 Ark. 291, 1840 WL 267, at *2 (1840).

177. *Id.*

178. Adams v. Hackett, 7 Cal. 187, 1857 WL 688, at *203 (1857).

179. California v. Moore, 12 Cal. 56, 1859 WL 56 (1859).

Dictionary, a definition which incorporates many of these prior-discussed ideas,[180] declare that Black's is wrong, that the meaning of "property" plainly does not incorporate the multifarious and subtle meanings of property. The article does not suggest that these multiple meanings of "property" demand that a taking occurs whenever and however a regulation impacts a property right. Indeed, many of the cases which recognize the complexity of the term "property" also recognized the police power of the state may occasionally eliminate these rights without compensation.[181] The point is that all these connotations and denotations revolving around and in "property" are irrelevant to the plain language textualist. To such a person "property" is no more complex than suggesting that "property" is, has been and always will be the same whenever eight black marks on the page known as letters are put in the same order to create what the English language calls a word; that word being "property."

But even the plain language textualist's desire for simplicity cannot quite get the textualist to urge a single definition of "property." So, rather than embrace the complexity of property, the plain language textualist relies on the (relative) "plainness" of two meanings. As set forth above, one plain (legal) meaning to property is the "thing" referred to. Of course, that meaning belongs to the "confused" layman.[182] The other plain (legal) meaning is that "property" means "title." Given that the legal definition or meaning of property often revolves around title, that could, perhaps be an appropriate definition to "property." On the other hand the Supreme Court of Florida responded to an effort to equate property and title by stating, "[t]o so hold, it seems to us, would cut down the larger word 'property' to the narrow word 'title,' and say to the makers of the [Florida] Constitution: 'You were ignorant of the meanings of the two words.'"[183]

Even equating "title" and "property" still does not assist the plain language textualist in demonstrating that the meaning of the Takings Clause is plain. A "take title" meaning to the Takings Clause recognizes that "taking" "plainly" includes more than physical possession of things but at the same time suffers from inherent inconsistency. According to the plain meaning advocated, to "take property" means to "take property" and to "take title." This

180. BLACK'S LAW DICTIONARY 1232–34 (7th ed. 1999).
181. *See, e.g.*, Respublica v. Sparhawk, 1 U.S. 357 (1788).
182. CUNNINGHAM ET AL, *supra* note 159.
183. Florida Citrus Exch. v. Grisham, 61 So. 123, 124 (Fla. 1913).

approach begins by asserting that "Take" (plainly, perhaps obviously) means "to take." At the same time, the second half of this "plain" language approach rewrites the Takings Clause in the name of plain meaning, equating "property" with "title," while at the same time equating "property" with, well, "property." So under this plain meaning of the Takings Clause, "take" has one meaning, but the correct, i.e., "plain," understanding of the word "property" includes two plain meanings. "Property" means "property," i.e., the "thing" spoken of, and "property" also means "title" to that same thing. So for the plain language textualist, "property" and "title" are both incorporated into the term "property." Property and title are interchangeable, but perhaps different. Plain language textualism incongruously asserts that language is plain and at the same time subject to two, but only two, meanings. Undeniably, "property" includes "title," but the two concepts are far from synonymous. The "take title" plain meaning is no more "plain" nor accurate than the "take possession" plain meaning of the Takings Clause.

While proving the non-existence of an argument may be impossible, the conclusion here is that the take possession version of the plain meaning Takings Clause is consistent with any possible understanding of the Takings Clause[184] as is the take title version of the Takings Clause. As pointed out earlier, it may be even more consistent with a plain meaning Takings Clause, in that "title" is undoubtedly one form of or type of "property" in a physical thing, and therefore consistent with the plain (legal) meaning of the word, i.e., the concept of property. Limiting the Takings Clause to taking title, is, as pointed out, not plainly required by the word "property," an idea that encompasses far more than the limited ideas of possession or title.

This discussion points to the inconsistencies in concluding that that the Takings Clause contains plain language. Such a conclusion requires asserting that the word property includes both the thing and title, but none of the other myriad of aspects to property. At the same time that plain language textualism broadens the word "property" to include two distinct ideas, "things" and "ti-

184. This does not mean that the Court has always held that all possessory takings are indeed compensable takings. *See generally* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987) (the Court, while finding a taking in that case, held that the government could, under the proper circumstances, take possession—or at least effective possession of property—without paying compensation if it had a good enough reason to do so).

tle," it (at least implicitly) restricts the word title to title in fee simple absolute. For example, suppose the government were to completely obliterate the air rights over a piece of land when title to the air rights belonged to someone other than the person with title to the underlying land.[185] The two plain language versions of the Takings Clause ask two questions. One is whether such a regulation "takes" possession, and the answer is clearly no. The second question is whether the regulation takes title, and again the answer is no. But if the answer is no, then prohibition on any and all use of land would also not be a taking, because the regulation takes neither title nor possession. On the other hand, if the prohibition on any use of land, i.e., property, is effectively (or constructively) taking the thing, i.e., land, or title, then prohibition an any use of separately titled air rights should also be a taking. Alternatively, the plain language textualist must now account for title in something less than the fee, or perhaps one more time amend the plain meaning to refer to title in fee simple absolute and not title in any lesser property, including title in such things as an easement or mineral rights. In the end the plain language textualist has used a variety of personal predilections not to elucidate the meaning of the Takings Clause, but to limit it to the simplest of possible meanings. The plain language textualist has once again ensconced personal predilections in the name of eliminating them.

In sum, the plain language textualist relies on personal predilections in choosing a legal or lay version of the Takings Clause. Once having chosen such a version (at least implicitly) the plain language textualist then must either ignore very narrow (purportedly) lay verision of property, i.e., that property is limited to "things," or take a very complex and subtle legal term "property" and limit it to title, but only fee simple absolute title. And even if the plain language textualist asserts a different limited and plain meaning to "property" such an effort necessarily must make such choices without reference to constitutional text, i.e., through personal predilections. The plain language meaning of the Takings Clause, then, is a personal construct of the textualist who asserts that textualism is a superior form of constitutional analysis, because it eliminates personal predilections.

185. This, of course, was true in the Penn Central case. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).

THE FINAL HYPOCRISY: PRINCIPLES BEHIND PLAIN LANGUAGE TEXTUALISM

To this point this article has discussed application flaws to plain language textualism as applied to the Takings Clause. Some of these application flaws could, perhaps, be addressed and corrected. For example, plain language textualism could be applied consistently, to individual rights, liberties and property as well as to government powers and immunities. Other application errors cannot truly be connected. Where two persons disagree as to the plain meaning of the text, as is apparently true for the Takings Clause, no resort to plain language textualism will provide a basis for picking which of the two "plain meanings" is the true "plain meaning." Put in these terms, plain language textualism is a truly personal approach to constitutional law.

Even where there is no opposing "plain meaning," resort to plain meaning textualism is often a very personal approach to interpretation. The plain language textualist is, almost of necessity, urging that what cannot be seen as obvious can be seen clearly by the textualist. With regard to the Takings Clause, for example, it is obvious to the plain language textualist, that taking is limited to physical possession or taking title notwithstanding decades of jurisprudence to the contrary and, more important, notwithstanding what appears to be a very, very specific rejection by all property scholars of the idea that property is a thing to be possessed or at least is not limited to a thing to be possessed.

Where there is debate as to the meaning of a word or phrase or clause in the Constitution, resort to plain language textualism is a foreclosing argument or an effort to foreclose debate. It is a statement of certitude for which there is no adequate response, at least as to the plain language textualist. A response of "I don't see it that way" earns from the plain language textualist something akin to, "The fact that you don't see what is plainly there does not change what is plainly there." A response that the meaning should be looked at in light of anything other than the text earns a response akin to, "Reliance or such matters is an effort to amend the plain language." There is, consequently, no effective response. Plain language textualism, then, is more often a statement of truth not argument, and unless all people (or at least all reasonable people) agree, this "truth" comes from the individual or individuals speaking it. It is a purely personal truth which all are asked to believe. This personal aspect to plain language textualism makes it a fundamentally inappropriate form of analysis ex-

cept when, indeed all agree on the plain language textualist's interpretation. In which case it is a statement of fact.

INTERNAL INCONSISTENCY OF PLAIN LANGUAGE TEXTUALISM

Except where plain language textualism leads to a result that all agree on (which is not the result with the Taking's Clause), plain language textualism is inconsistent with its own fundamental purpose. Plain language textualists purport to rely on an approach to constitutional interpretation that leads away from a personalized constitution, away from a constitution based on personal predilections. Unless all agree on the meaning of a word, phrase or clause of the Constitution, plain language textualism is nothing but a personalized constitution, although, of course, many individuals may agree with this personalized constitution.

To the extent that plain language textualism may otherwise be an appropriate constitutional tool, its legitimacy as a definitive tool is utterly undermined by its internal inconsistency. Plain language textualism claims to root out a personalized approach to constitutional interpretation by relying on what necessarily may be a personalized approach.

The goal of plain language textualism, rather, the raison d'etre of plain language textualism is to eliminate personal predilections. It does with a tone of superiority, i.e., the answer is "plain" and therefore unchallengeable. Because the answer if "plain," the meaning is clear, non-debatable. A challenge to the plain meaning is an effort to turn the black (i.e., black letter) into gray. Such an effort, by necessity, plain language textualist would urge, is an effort to insert personal values into the constitution. The insertion of personal values is inappropriate, it is just plain wrong, suggests the plain language textualist. Indeed, the very purpose of plain language textualism is to eliminate the personal, e.g., personal values, personal predilections, etc. Implicit in the purported value and purpose of plain language textualism is that "personal" approaches to the Constitution are clearly to be avoided and are inherently suspect if not void on their face.

Because plain language textualism violates its own core premise, it is inappropriate as a single, binding constitutional interpretational approach. Any effort at applying plain language textualism demands a personal approach to the Constitution. This problem manifests itself at the beginning of an interpretation when two would-be constitutional interpreters finding two differ-

ent "plain" meanings from the same text. As noted, plain language textualism has been urged to have two very different meanings with regard to the Takings Clause. The plain language textualism appears to have two very different meanings if one looks at the plain meaning of "property" from the perspective of a lay person as opposed to a Property scholar. A plain language textualist would be required to choose between the meaning as understood by a lay person as opposed to meaning as understood by a Property scholar. This requires a "personal" choice, perhaps predilection.

Beyond the personal problems created by seeking or finding different meanings to be plain, is the far more difficult problem of deciding when to apply plain language. Again, as noted before, those urging applying textualism to the Takings Clause, do not urge application to the Preamble, Sovereign Immunity, or The Commerce Clause. Plain language textualism cannot be used to explain a choice as to when and to what part of the Constitution textualism applies. No textualism will or can explain use of textualism for one but not other parts of the Constitution, particularly when it is not used for all parts of the Constitution relevant to a single claim.

Beyond inconsistency in meaning of words (or phrases), beyond inconsistency in applications of plain language textualism, each of which could (theoretically) be corrected, is facially inconsistent with itself, with its goals and values. Textualism demands that constitutional analysis honor the text, and yet, textualism is completely inconsistent with textualism. Textualism demands self-righteous adherence to the text, and yet, the text itself says nothing about interpreting the text. The text does not, within its words, claim to be binding. It does not in any way suggest that the proper or, more important, necessary way to interpret the text is through textualism.

This lack of textual support for textualism exacerbates the failure to apply textualism consistently. The Constitution provides no clues as to when the text is to be limited to plain language. The text cannot explain using textualism for the Takings Clause, but not for the Eleventh Amendment or the Fourteenth Amendment. Textualism cannot use the text alone to explain creating of sovereign immunity. Perhaps, most important, textualism cannot use the text to explain why the Takings Clause should be interpreted with plain language rather than in light of the textual statements of purpose expressed on the Preamble.

Textualism, especially plain language textualism, implicitly asserts its superiority over other theories of constitutional analysis, yet the text cannot be used to justify either textualism or an inconsistent application of textualism. Using textualism both in theory and as applied is inconsistent with textualism.

Instead of eliminating a personalized constitutional interpretation, the plain language textualist relies on personal predilections in order to eliminate the personal predilections of others. Having eliminated the personal predilections of others, the textualist, implicitly or explicitly, asserts a form of moral superiority, i.e., elimination of personal predilections from constitutional interpretation. Restated, textualism is superior to other interpretational models because it ingrains the textualist's predilections into constitutional interpretations in order to eliminate the predilections inherent in those other models. But since the only justification for plain language textualism as a superior form of interpretation is its purported elimination of personal predilections and since plain language textualism fails at its core to eliminate the personal predilections inherent in the methodology, plain language textualism, by its own terms, is not superior to any other method of interpretation. Indeed, plain language textualism is hypocrisy in action, unable to justify itself by its own terms and inconsistent with its core purpose.

CONCLUSION

This is not to say that the text does not matter. Professor Polly Price bluntly demands that constitutional analysis "begin with the text."[186] Professor Akil Amar argues that text is no more than "a proper starting point for proper constitutional analysis."[187] "[O]ther proper constitutional arguments" occasionally overcome "plain-meaning textual arguments."[188] The point is that even if plain language textualism may be a place to begin constitutional analysis, surely it cannot be used to foreclose all other interpretational methodologies.

186. Polly J. Price, *Term Limits on Original Intent? An Essay on Legal Debate and Historical Understanding,* 82 VA. L. REV. 493, 500 (1996).

187. Akhil Reed Amar, *The Future of Constitutional Criminal Procedure,* 33 AM. CRIM. L. REV. 1123, 1132 (1996).

188. *Id.* For more on the discussion engendered by Amar's ideas, see, e.g., Louis Michael Siedman, *Akhil Amar and The (Premature?) Demise of Criminal Procedure Liberation,* 107 YALE L.J. 2281 (1997).