IS TEXTUALISM AT WAR WITH STATUTORY PRECEDENT?

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Scholars have long assumed that textualism is at odds with statutory precedent. Thus, when the Court in Bostock v. Clayton County *relied on precedent in determining that Title VII protects gay, lesbian, and transgender individuals, many critics responded that the opinion was not true textualism. This Article challenges this longstanding assumption about textualism and precedent. By offering a novel typology of statutory precedent, the Article demonstrates that textualism is quite compatible with important uses of precedent. Prominent textualists have turned to what this Article calls the first category of statutory precedent—reliance on Supreme Court cases to define the meaning of terms and phrases—in determining the plain meaning of laws. The Article further argues that this use of precedent is defensible on textualist principles. The Article then identifies a second and third category of precedent—past statutory holdings and implementation tests, as well as efforts to preserve consistency in an area of law—that become relevant for textualists, when they conclude that there is no plain meaning. This Article not only complicates assumptions about the relationship between textualism and statutory precedent but also has important implications for our understanding of the interpretive enterprise. First, textualists' reliance on statutory precedent to define the meaning of statutory terms and phrases indicates, contrary to the assumption of many scholars, that textualists do not simply seek out the meaning that lay people would ascribe to certain words. Second, and relatedly, this analysis also upends assumptions that plain meaning analysis is primarily a linguistic and empirical inquiry. For many textualists, the effort to identify the meaning of a federal statute is a legal and normative, not simply a linguistic, exercise.*

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INTRODUCTION

Textualism seems to have a tense relationship with statutory precedent. Jurists and scholars, including prominent textualists, have repeatedly insisted that stare decisis is largely incompatible with textualism.[1] As Justice Scalia and Bryan Garner put it in their treatise on statutory interpretation, "[s]tare decisis…is not a part of textualism. It is an exception to textualism…born not of logic but of necessity."[2] Relatedly, some jurists and scholars suggest that textualists are—or should be—more willing than other interpreters to overrule statutory precedents.[3]

Accordingly, when purportedly "textualist" opinions use precedent, that practice can invite charges that the Justices are not engaging in true textualism. This critique has, for example, been leveled against *Bostock v. Clayton County*, which involved whether discrimination against a gay, lesbian, or transgender individual qualifies as "discriminat[ion]…because of such individual's…sex" under Title VII of the Civil Rights Act of 1964.[4] Writing for the Court, self-proclaimed textualist Justice Gorsuch[5] turned to precedent to determine that "[i]n the language of law, …Title VII's 'because of' test incorporates the 'simple' and 'traditional' standard of but-for causation."[6] Justice Gorsuch later emphasized that the Court's reading of the statute—to bar the disparate treatment of gay, lesbian, or transgender

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[1] *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 413-14 (2012) ("Stare decisis…is not a part of textualism. It is an exception to textualism"); Anita S. Krishnakumar, *Textualism and Statutory Precedents*, 104 VA. L. REV. 157, 160-61, 164-65, 182 (2018) (asserting, based on an empirical study of the Roberts Court, that textualists are "far more willing" to overturn statutory precedents than "their purposivist counterparts"); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 Va. L. Rev. 1, 50-52 (2001) (those who "believe[] in the determinacy of the underlying legal texts" may be less inclined to adhere to precedent); Lawrence B. Solum, *Disaggregating* Chevron, 82 OHIO ST. L.J. 249, 295 (2021) (holdings "not based on textualist reasoning…are not entitled to stare decisis effect"); Josh Blackman, *Justice Gorsuch's Legal Philosophy Has a Precedent Problem: How should a textualist deal with bad case law?*, THE ATLANTIC (July 24, 2020). Then-Professor Amy Barrett offered seemingly different views. *Compare* Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 326 (2005) (suggesting a textualist commitment to statutory stare decisis), *with* Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1724-25 (2013) (suggesting those who adopt text-based theories may be less committed to precedent).

[2] SCALIA & GARNER, *supra* note 1, at 413-14; *see also* Richard H. Fallon Jr., *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1284-85 (2015) (asserting that stare decisis presents a "dilemma" for textualists).

[3] *See, e.g.*, Gamble v. United States, 139 S. Ct. 1960, 1984-88 (2019) (Thomas, J., concurring) ("federal judges should…correct [a demonstrable] error"); *supra* note 1; *see also* Margaret H. Lemos, *The Politics of Statutory Interpretation*, 89 NOTRE DAME L. REV. 849, 898-900 (2013) (reviewing SCALIA & GARNER, *supra* note 1) (arguing that Justices Scalia and Thomas proved willing "to overturn or severely prune statutory precedents").

[4] 42 U.S.C. § 2000e-2(a)(1); *see* 140 S. Ct. 1731, 1737, 1754 (2020).

[5] *See* NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 131–32 (2019).

[6] Bostock, 140 S. Ct. at 1739 (quoting Univ. of Tex. Southwestern Med. Ctr v. Nassar, 570 U.S. 338, 350 (2013), and citing Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009)).

employees—was more consistent with prior Title VII sex discrimination cases than that offered by the dissenting opinions.[7] Some commentators have argued that this use of precedent demonstrates that the *Bostock* majority opinion relied on "non-textualist tools" or was, at best, a bad or "halfway" version of textualism.[8]

This Article aims to reexamine the relationship between textualism and statutory precedent. The Article asserts, contrary to prevailing assumptions, that textualism is quite compatible with important uses of statutory precedent. Moreover, the Article contends, understanding the (proper) use of statutory precedent tells us a good deal about not only textualism and precedent but also the nature of the interpretive enterprise.

To make sense of all this, it is important to break down the analysis in two respects. First, the Article offers a typology of statutory precedent, demonstrating that case law can be and is used in markedly different respects in statutory analysis. Notably, this typology should be useful to interpretive theorists, whether or not they accept textualism. Second, the Article argues that, for textualists, these different types of precedent matter at distinct stages of the statutory analysis.

So let's begin with the typology. I will start first with a category that is crucially important but has thus far received only limited attention in the literature: Supreme Court precedent can help an interpreter determine the meaning of statutory terms and phrases.[9] I have already offered one illustration: *Bostock*'s reliance on precedent to determine that, "[i]n the language of law," "because of" signals but-for causation.[10]

Second, statutory precedent can embody a specific holding—that a given statute applies (or does not apply) in a particular context. For example,

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[7] *See id.* at 1743-44 (discussing Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971), Los Angeles Dept. of Water and Pwr v. Manhart, 435 U.S. 702 (1978), and Oncale v. Sundowner Offshore Servs, Inc., 523 U.S. 75 (1998)).

[8] *E.g.*, Josh Blackman & Randy Barnett, *Justice Gorsuch's Halfway Textualism Surprises and Disappoints in the Title VII Cases*, NAT'L REV. (June 26, 2020) [https://perma.cc/3CDJ-Z7VE]; James Andrew Wynn, *When Judges Throw Out Tools: Judicial Activism in* Rucho v. Common Cause, 96 N.Y.U. L. REV. 607, 640 (2021) (arguing Justice Gorsuch used "non-textualist tools," when he "relied, in part, on precedent to determine the plain meaning of Title VII"); *see* William Baude, *Conservatives, Don't Give up on Your Principles or the Supreme Court*, N.Y. TIMES (July 9, 2020) ("What made Justice Gorsuch's opinion most persuasive was not its textualist analysis but its use of precedents"); Erik Encarnacion, *Text Is Not Law*, 107 IOWA L. REV. 2027, 2059-60 & n.212 (2022) ("textualists routinely rely on extratextual resources," such as *Bostock*'s "reliance on statutory precedent"); William N. Eskridge Jr. & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 N.Y.U. L. REV. 1718, 1771-72 (2021) ("[S]tatutory precedents complemented and then overtook language analysis" in *Bostock*).

[9] One thoughtful piece does note the practice. In an article exploring textualists' *disregard* of statutory precedent, Anita Krishnakumar suggests that interpreters may rely on precedent to define the meaning of terms. But the piece does not focus on that practice and instead examines textualists' apparent willingness to reject statutory implementation tests. *See* Krishnakumar, *supra* note 1, at 160-61, 164-65, 182 (urging "the disregard for statutory stare decisis" is "a natural corollary to the textualist jurisprudential approach").

[10] Bostock, 140 S. Ct. 1731, 1739 (2020).

in *United Steelworkers v. Weber*, the Supreme Court famously held that Title VII permits voluntary employer affirmative action programs.[11] This second category also encompasses the Court's statutory implementation tests, such as the burden-shifting framework that the Court has established for some discrimination claims.[12] The Supreme Court has stated that a super-strong version of stare decisis applies to such statutory precedents.[13] This second type of precedent—and particularly the super-strong stare decisis approach—has been the focus of most commentary on statutory precedent.[14]

Third, a judge may seek to ensure—or at least to doublecheck—that there is consistency ("fit") between the Court's holding in the present case and the larger array of prior decisions in the area.[15] Justice Gorsuch also turned to this third type of statutory precedent in *Bostock*. The Court suggested that its holding—that Title VII prohibits the disparate treatment of gay, lesbian, and transgender employees—was more persuasive because it fit nicely into the broader array of the Court's Title VII cases, such as those involving sexual harassment.[16]

Of these three types of statutory precedent, which one(s) could a textualist use? I argue that it depends on the stage of the statutory inquiry. So now it is important to break down the analysis in another respect. For textualists, statutory analysis consists of at least two distinct stages. First, interpreters aim to determine whether a statute has a plain meaning. If not,

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[11] *See* 443 U.S. 193, 197, 208-09 (1979).

[12] *See* McDonnell Douglas v. Green, 411 U.S. 792, 802-03 (1973) (establishing a burden-shifting framework for discrimination claims that rely on circumstantial evidence).

[13] *See* Patterson v. McLean Credit Union, 491 U.S. 164, 172-73 (1989) (Kennedy, J.) ("Considerations of stare decisis have special force in the area of statutory interpretation"); William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1409 (1988) (dubbing this practice a "super-strong presumption against overruling statutory precedents").

[14] Some jurists and scholars have advocated super-strong (or even absolute) statutory stare decisis. *See* Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 257-58, 260 (1970) (Black, J., dissenting); Frank E. Horack, Jr., *Congressional Silence: A Tool of Judicial Supremacy*, 25 TEX. L. REV. 247, 251 (1947); Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 143-45 (2000) (advocating absolute statutory stare decisis as a means of reducing decision costs); Lawrence C. Marshall, "*Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 183, 215 (1989) (advocating absolute statutory stare decisis to make it more difficult for Congress to avoid overseeing statutory development). Others—textualists and non-textualists alike—doubt that statutory precedents deserve special protection. *See* Gamble, 139 S. Ct. at 1987-88 (Thomas, J., concurring); Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 429-31, 433 (1988); Eskridge, *Overruling*, *supra* note 13, at 1409, 1426; *see also* Randy J. Kozel, *Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis*, 97 TEX. L. REV. 1125, 1130 (2019) (noting the debate over "elevated stare decisis"); Krishnakumar, *supra* note 1, at 219 (urging ordinary stare decisis for some implementation tests); Thomas Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 730-31 (1999) (the heightened stare decisis test was a late-nineteenth century development).

[15] I borrow the term "fit" from Ronald Dworkin. *E.g.*, Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1094 (1975). One can see value in consistency among precedents and within the law, even if one does not accept a Dworkinian approach to interpretation.

[16] *See* Bostock, 140 S. Ct. 1731, 1743-44 (2020).

then, second, they turn to additional sources to try to discern the best understanding of the statute, in the context of the case.[17]

Much of the literature on textualism focuses on the first stage—determining whether a statute has a plain meaning. But interestingly, textualists often define the first stage by identifying what is *not* relevant to the inquiry. Thus, commentators insist that, under a good textual approach, interpreters should not look to a broader statutory purpose, most substantive canons, or legislative history.[18] But jurists and scholars say far less about what *is* part of the plain meaning analysis. One can discern from the case law and literature broad agreement that textualists may legitimately look to the text and structure surrounding the operative provision at issue as well as dictionary definitions in determining the plain meaning of the law.[19]

This Article highlights another common source of statutory meaning at the first stage: judicial precedent. That is, *Bostock*'s "because of" analysis is no outlier. Prominent textualists on the Supreme Court—including not only Justice Gorsuch but also Justices Scalia, Thomas, Alito, Kavanaugh, and Kennedy[20]—have all turned to the Court's own precedents to define the meaning of statutory terms and phrases. Textualists use precedent not only to guide the analysis of recognized legal terms of art but also to inform the understanding of seemingly ordinary terms or phrases; to resolve a potential conflict among competing definitions; and to conclusively determine the meaning of terms or phrases in a single provision.[21] Moreover, the Article argues, this use of statutory precedent in determining the plain meaning of a law can be defended on textualist principles.

The second and third categories of precedent, by contrast, become significant in the second stage of the statutory analysis. If a textualist interpreter concludes that the operative provision does *not* have a plain meaning, other factors may come into play. Although textualists still tend to avoid resort to legislative history, they may turn to statutory purpose or

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[17] Notably, some scholars might describe these stages as "interpretation" and "construction." I discuss those labels below. *See infra* notes 29-32 and accompanying text; Part III(B).

[18] *See* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 164 (2010) (substantive canons that "permit a court to qualify clear text…are inconsistent with" textualism); John F. Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 68 (2014) (noting the rejection of legislative history); John F. Manning, *Competing Presumptions About Statutory Coherence*, 74 FORDHAM L. REV. 2009, 2010 (2006) (rejecting the use of purpose to "smooth over the details of an agreed-upon text"); *see also* Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism* (manuscript at 3-5) (urging textualists to abandon all substantive canons).

[19] *See* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 64 (1994); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 109 (2001) ("Textualists…often consult dictionaries").

[20] These Justices are viewed as textualist or textualist-leaning. *See* Anita S. Krishnakumar, *Statutory History*, 108 VA. L. REV. 263, 284 n.59 (2022); John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1973 n.179 (2011).

[21] *See* Part I.

substantive canons.[22] At this stage, textualists can also be guided by case law holding that a statute applies (or does not apply) in a particular context and by statutory implementation tests. Textualists may further consider whether a particular holding is more consistent (has a closer "fit") with the broader body of case law in a given area. That is, at this second stage, textualists can seek to "make sense, rather than nonsense, out of the corpus juris."[23]

This breakdown gives us some insight into Justice Gorsuch's discussion of past cases in *Bostock*. The Court used precedent at the first stage to determine that "because of" signals but-for causation. The Court then built on that definition to conclude that "taken together," the phrase "discriminat[ion]…because of such individual's…sex" prevents an employer from "intentionally treat[ing] a person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual of another sex."[24] The Court found that this principle prevents an employer from terminating a male employee who is romantically attracted to men, or from dismissing a female employee after she announces her transition from male to female.[25] That was enough to resolve the case on textualist principles—and to do so at the first stage, based on the plain meaning of the law. That the Court's decision was also consistent with prior holdings was, to be sure, a nice touch. But it was unnecessary to the analysis—akin to "'extra icing on a cake already frosted.'"[26]

This Article has important implications for our understanding of not only textualism and precedent but also some ongoing interpretive debates. First, the typology offered by this Article should be useful in any examination of statutory precedent. Indeed, one of this Article's central contributions is to explore the first category: the use of precedent in determining the meaning of statutory terms and phrases. Second, the Article shows that the tension between textualism and precedent has been exaggerated (or at least insufficiently understood); textualists often rely heavily on Supreme Court precedent in identifying a law's plain meaning.

Moreover, that reliance sheds important light on the interpretive inquiry. There is a growing debate over whether the "ordinary meaning" sought by textualists refers to lawyerly meaning or lay meaning.[27] This

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[22] *See* Barrett, *Substantive Canons*, *supra* note 18, at 109-10; John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 75-76 (2006).
[23] West Va. Univ. Hospitals, Inc. v. Casey, 499 U.S. 83, 100-01 (1991) (Scalia, J.).
[24] Bostock, 140 S. Ct. 1731, 1740 (2020).
[25] *See id.* at 1741-42.
[26] Van Buren v. United States, 141 S. Ct. 1648, 1661 (2021) (Barrett, J.) (quoting Yates v. United States, 574 U.S. 528, 557 (2015) (Kagan, J., dissenting)). Indeed, that is how Justice Gorsuch characterized his discussion of the third type of statutory precedent. *See* Bostock, 140 S. Ct. at 1738-39, 1743-44 (pointing to precedent "[i]f more support…were required").
[27] *Compare* Anita S. Krishnakumar, *The Common Law as a Statutory Backdrop*, 136 HARV. L. REV. 608, 660-61 (2022) ("modern textualism increasingly has focused not just on the ordinary meaning of statutory language, but on the ordinary *reader* of statutory language"); James A. Macleod, *Finding Original Public Meaning*, 56 GA. L. REV. 1, 4-5 (2021) (arguing that textualists "ask how ordinary readers would have understood the relevant language"); Brian G. Slocum, *Introduction*, *in* THE NATURE OF LEGAL INTERPRETATION 1, 7-8 (Brian G.

Article demonstrates that to determine the "ordinary meaning" of a federal statute, textualists (as well as non-textualists) often look to judicial precedent—relying on case law to make sense of statutory terms and phrases.[28] This use of precedent strongly suggests that many textualists view the statutory analysis as involving a distinctively legal inquiry.

Finally, and relatedly, this analysis also has significant implications for debates about the nature of the interpretive enterprise. Some prominent scholars split the inquiry into two stages called "interpretation" and "construction." Although this terminology has been most influential in constitutional theory,[29] the concepts have begun to make headway into statutory debates as well.[30] Many scholars define "interpretation" as largely a search for *linguistic* meaning, while "construction" is the process of giving legal effect to that meaning.[31] This Article's analysis complicates assumptions about the nature of "interpretation." Judicial precedents are part and parcel of defining statutory meaning—for many textualists as well as other interpreters. For such textualists, plain meaning is not equivalent to linguistic meaning. These textualists seek to determine the meaning of terms and phrases "[i]n the language of law."[32]

At the outset, I want to clarify a few points. First, this Article focuses on the Supreme Court. As many scholars have observed, precedent of any kind exerts less force on a court of last resort, which in contrast to courts lower down in a judicial hierarchy, has the power to depart from its own

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Slocum ed., 2017); Kevin P. Tobia, *Testing Ordinary Meaning*, 134 HARV. L. REV. 726, 801 (2020) (textualist and originalist theories assume that ordinary meaning is "an empirical *fact*…grounded in what language communicates to ordinary people"), *with* Mitchell N. Berman & Guha Krishnamurthi, Bostock *Was Bogus: Textualism, Pluralism, and Title VII*, 97 NOTRE DAME L. REV. 67, 97 (2021) ("committed textualists have often insisted that ordinary meaning is…a partially normalized or idealized [inquiry]"); Tara Leigh Grove, *Testing Textualism's "Ordinary Meaning"*, 90 G.W. L. REV. 1053, 1082-84 (2022) (arguing that "ordinary meaning" can be understood as a legal concept).

[28] Scholars who view the textualist enterprise as a search for lay meaning do recognize an exception for legal terms of art. But the assumption appears to be that such terms of art are rare. *See* Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 792 n.4 (2018) (treating legal terms of art as "*extra*ordinary"); Macleod, *supra* note 27, at 56-57 & n.230. This Article shows that there is often no sharp line between ordinary terms and legal terms of art in federal statutes. *See* Part I.

[29] *See* KEITH WHITTINGTON, CONSTITUTIONAL CONSTRUCTION 6 (1999); Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 10-13 (2018); Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 9-10 (2015).

[30] *See* Lawrence B. Solum & Cass R. Sunstein, Chevron *as Construction*, 105 CORNELL L. REV. 1465, 1468-70 (2020); Solum, *Disaggregating*, supra note 1, at 264-70.

[31] *E.g.*, Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 101-02, 104-05 (2010); *see* Slocum, *supra* note 27, at 4-8; Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 65-66 (2011); *see also* Jamal Greene, *A Nonoriginalism for Originalists*, 96 B.U. L. REV. 1443, 1450 (2016) (noting the distinction).

[32] *See* Bostock, 140 S. Ct. 1731, 1739 (2020).

precedents.[33] Nevertheless, as scholars have also acknowledged, precedent does still matter, even in such a court of last resort.[34] This Article seeks to show how different types of statutory precedent may impact the Court's work—in an age where textualism appears to be the dominant approach.[35]

Second, in past work, I have described how textualism is divided between a stricter, more formal version and a more relaxed, flexible version.[36] This Article's analysis of statutory precedent highlights a separate divide in interpretive theory: a dispute between those who treat the determination of meaning as a principally linguistic exercise and those who view it as involving legal and normative judgments. This latter division likely cuts across different interpretive methods—and may prove to be one of the most significant debates going forward.

The Article proceeds as follows. Part I explores the use of judicial precedent in identifying the plain meaning of a law. That Part further examines how this practice can be justified on textualist assumptions. Part II considers textualists' approach to the second and third categories of statutory precedent and explores how the precedential force of a decision very much depends on the category. Part III examines some implications of this argument, including for assumptions about ordinary meaning and the nature of "interpretation." The Article argues that the use of judicial precedent underscores how the interpretive inquiry can be seen as a distinctively legal endeavor.

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[33] *See* Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 TEX. L. REV. 1843, 1849-51 (2013); Frederick Schauer, *Has Precedent Ever Really Mattered in the Supreme Court?*, 24 GA. ST. U. L. REV. 381, 385, 393, 399 (2007). The Supreme Court can also narrow its own precedents, without overruling them. *Compare* Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to* Miranda v. Arizona*)*, 99 GEO. L.J. 1, 4–5 (2010) (criticizing "stealth overruling"), *with* Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1865–66 (2014) (defending "narrowing"). *Cf.* Richard M. Re, *Precedent as Permission*, 99 TEX. L. REV. 907, 908-12 (2021) (questioning common assumptions about precedential constraint).

[34] That is true, even with respect to constitutional precedents—an area where the Supreme Court itself has asserted greater authority to correct mistakes. *See* Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. Rev. 1107, 1108 (2008); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 723-24 (1988).

[35] *See, e.g.*, Kevin Tobia, Brian Slocum & Victoria Nourse, *Progressive Textualism*, 110 GEO. L.J. 1437, 1439 (2022) (noting textualism's influence at the Supreme Court). This Article sets aside debates over methodological precedent—whether judges should be bound by prior statements about how the statutory analysis should proceed. Whatever the wisdom of such an approach, judges of all interpretive stripes tend to reject giving stare decisis effect to methodology. *See* Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863, 1875 (2008); Abbe R. Gluck, *What 30 Years of* Chevron *Teach Us About the Rest of Statutory Interpretation*, 83 FORDHAM L. REV. 607, 613 (2015); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2144-45 (2002). *But see* Aaron-Andrew P. Bruhl, *Eager to Follow: Methodological Precedent in Statutory Interpretation*, 99 N.C. L. REV. 101, 105 (2020) (arguing, based on a detailed survey, that there is "much more" methodological precedent than most recognize, particularly in the lower federal courts).

[36] *See* Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265 (2020); *infra* note 38.

I. PRECEDENT AS A MEANS OF DETERMINING THE PLAIN MEANING OF A LAW

For textualists, statutory analysis consists of at least two distinct stages. The first is determining whether a statute has a plain meaning.[37] Although textualists often focus on what is *not* relevant to the plain meaning inquiry,[38] it is important to consider what *is* part of the analysis. Modern textualists insist that they are not "literalists."[39] They do not simply look at the "four corners" of a written document to divine statutory meaning.[40] So what can they look at? There seems to be broad agreement that textualists may legitimately look to the text and structure surrounding the operative provision at issue as well as dictionary definitions.[41] This Article highlights another common source of statutory meaning: Supreme Court precedent. The Article further argues that the use of this first category of statutory precedent can be defended on textualist assumptions.

A. Statutory Precedent as a Source of Meaning

Prominent textualists on the Supreme Court have repeatedly turned to precedent in determining the meaning of statutory provisions. Textualists use precedent not only to guide the analysis of recognized legal terms of art but also to inform the meaning of seemingly ordinary terms or phrases; to settle a potential conflict among competing definitions; and to resolve the meaning of terms or phrases in a single provision. In short, statutory precedent is a crucial part of determining the plain meaning of a law.

1. Not Just (Apparent) Legal Terms of Art

In one respect, the use of precedent to determine statutory meaning may come as no surprise. Textualists, like other interpreters, acknowledge that judges should turn to common law cases to figure out the meaning of legal terms of art, such as "actual fraud."[42] But the use of precedent does not

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[37] This Article describes the first stage as a search for "plain meaning," rather than as an effort to determine whether a provision is "ambiguous," because textualists have at times discussed a "prima facie ambiguity" that can be resolved at the first stage of analysis. *E.g.*, Manning, *What Divides*, *supra* note 22, at 95-96.

[38] *See supra* note 18 and accompanying text (noting statutory purpose, most substantive canons, and legislative history are excluded). There is a division among textualists as to whether to exclude at this first stage other evidence, such as the social context surrounding a statute's enactment or the assumed practical consequences of a decision. *See* Grove, *Which Textualism?*, *supra* note 36, at 265-71, 279-90.

[39] ANTONIN SCALIA, A MATTER OF INTERPRETATION 24 (1997); *see* Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 376 & n.87 (2005).

[40] John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 696 (1997).

[41] *See supra* note 19 and accompanying text. Some scholars suggest that judges should also use corpus linguistics methods. *See* Lee & Mouritsen, *supra* note 28, at 792, 828–30. As discussed in Part III, this Article's exploration of precedent has some implications for the debate over corpus linguistics. For now, however, I simply note that corpus linguistics is not yet an accepted tool for identifying plain meaning on the Supreme Court.

[42] *E.g.*, Field v. Mans, 516 U.S. 59, 61, 69 (1995) (Souter, J.); *see* Moskal v. United States, 498 U.S. 103, 121 (1990) (Scalia, J., dissenting); Manning, *Nondelegation*, *supra* note 40, at

stop with (what many of us would call) legal terms of art. Nor does it stop with the common law.

In fact, interpreters, including textualists, turn to the Supreme Court's own precedents to make sense of seemingly ordinary terms and phrases, such as "or,"[43] "any,"[44] "now,"[45] "because of,"[46] and "in connection with."[47] Thus, Justice Thomas's opinion for the Court in *Carcieri v. Salazar* (2009) turned to precedent to determine that "now" in the Indian Reorganization Act of 1934 referred to the time of statutory enactment, rather than to the time at which the Department of Interior sought to take land into trust.[48] "That definition," Justice Thomas observed, "is consistent with interpretations

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695. Non-textualists also look to case law to define legal terms of art. *See* Merck & Co., Inc. v. Reynolds, 559 U.S. 633, 644-48 (2010) (Breyer, J.) (relying on case law to determine the meaning of "discovery" "in the statute of limitations context"). This rule is longstanding. *See* G.A. ENDLICH, A COMMENTARY ON THE INTERPRETATION OF STATUTES 5 (1888); Krishnakumar, *Common Law*, *supra* note 27, at 668-69.

[43] *E.g.*, Encino Motorcars, LLC v. Navarro, 138 S. Ct. 1134, 1141-42 (2018) (Thomas, J.) (observing, in interpreting the Fair Labor Standards Act's exemption from overtime pay for "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles," 29 U.S.C. § 213(b)(10)(A), that "'or' is 'almost always disjunctive.'") (quoting United States v. Woods, 571 U.S. 31, 45 (2013)).

[44] *E.g.*, Ali v. Federal Bureau of Prisons, 552 U.S. 214, 215-16, 218-20, 227-28 (2008) (Thomas, J.) (stating, in interpreting a Federal Tort Claims Act provision that declines to waive sovereign immunity for claims arising from the detention of property by "any officer of customs or excise or any other law enforcement officer," 28 U.S.C. § 2680(c), that "[w]e have previously noted that '[r]ead naturally, the word "any" has an expansive meaning'") (relying on United States v. Gonzales, 520 U.S. 1, 5 (1997), and Harrison v. PPG Industries, Inc., 446 U.S. 578 (1980)); *see also* Encino Motorcars, 138 S. Ct. at 1141 (relying on *Ali*'s expansive interpretation of "any"). The dissenting opinion in *Ali* relied on different precedents in arguing that the term "any" may have a narrower meaning in some contexts. *See* Ali, 552 U.S. at 234-35 (Kennedy, J., dissenting).

[45] *E.g.*, Carcieri v. Salazar, 555 U.S. 379, 381-82, 388-90, 395-96 (2009) (Thomas, J.) (relying on 1933 and 1934 dictionaries, statutory structure, as well as Supreme Court precedent to determine that the "plain meaning" of the term "now" in the Indian Reorganization Act of 1934 refers to "the time of statutory enactment").

[46] *E.g.*, Bostock v. Clayton Cty, 140 S. Ct. 1731, 1739 (2020) (Gorsuch, J.) ("In the language of law…Title VII's 'because of' test incorporates the '"simple"' and 'traditional' standard of but-for causation.") (quoting Univ. of Tex. Southwestern Med. Ctr v. Nassar, 570 U.S. 338, 350 (2013), and citing Gross v. FBL Financial Servs., Inc., 557 U.S. 167, 176 (2009)).

[47] *E.g.*, Mont v. United States, 139 S. Ct. 1826, 1832 (2019) (Thomas, J.) ("The Court has often recognized that 'in connection with' can bear a 'broad interpretation'" although concluding that the Court did not need to "consider the outer bounds" of the phrase in 18 U.S.C. § 3624(e), given that "a pretrial detention" was clearly "imprison[ment] in connection with a conviction" and thus tolled the supervised-release term) (quoting Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 85 (2006), and citing United States v. American Union Transport, Inc., 327 U.S. 437, 443 (1946)). The dissenting opinion in *Mont*, written by Justice Sotomayor and joined by Justices Breyer, Kagan, and Gorsuch, relied in part on precedent to argue that the majority had misconstrued "imprisonment." *See* Mont, 139 S. Ct. at 1838-39 (Sotomayor, J., dissenting) (urging that other federal statutes and the Court's precedents treated "imprisonment" as "post-trial detention") (relying on Tapia v. United States, 564 U.S. 319, 327 (2011), and Barber v. Thomas, 560 U.S. 474, 484 (2010)).

[48] 555 U.S. at 381-82, 388-90, 395-96 (the statute defines "Indian" to "include all persons of Indian descent who are members of any recognized Indian tribe *now* under Federal jurisdiction," 25 U.S.C. § 479).

given 'now' by this Court both before and after the IRA's passage."[49] Indeed, precedent may show that a seemingly ordinary term is, in the statutory context, a term of art. In *Rimini Street, Inc. v. Oracle USA, Inc.* (2019),[50] Justice Kavanaugh's opinion for a unanimous Court declared that, under the Court's precedents, the term "costs" is "'a term of art that generally does not include expert fees.'"[51]

The cases involving "because of" offer a vivid example of the Court's use of precedent to make sense of seemingly ordinary terms and phrases. Certainly, the phrase "because of" can be used in ordinary conversation. My six-year-old daughter often claims that she has misbehaved "because of Brother." But much like "now" or "costs," when the phrase "because of" is placed in a federal statute, it may take on a more distinctively legal meaning. The concept of causation runs throughout our legal system—encompassing ideas such as proximate cause, but-for cause, or sole cause.[52]

In several cases, the Supreme Court found that "because" or "because of" in certain employment discrimination statutes signaled but-for causation. Justice Kennedy's opinion in *University of Texas Southwestern Medical Center v. Nassar* (2013)[53] involved a retaliation claim under Title VII of the Civil Rights Act of 1964, which prohibits an employer from "discriminat[ing] against any of his employees…because he has opposed any practice made an unlawful employment practice" by the statute.[54] In *Nassar*, the plaintiff claimed that his employer retaliated after he complained of discrimination based on race and religion.[55] To determine the meaning of "because," Justice Kennedy relied in large part on precedent, particularly a 2009 case involving the Age Discrimination in Employment Act of 1967, which prohibits an employer from "discriminat[ing] against any individual…because of such individual's age."[56] In that earlier case, *Gross v. FBL Financial Services*, Justice Thomas turned to dictionaries from 1933 and 1966 to conclude that

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[49] *Id.* at 388.

[50] 139 S. Ct. 873 (2019) (Kavanaugh, J.).

[51] *Id.* at 877 (quoting Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 297 (2006), and relying on Crawford Fitting Co. v. J. T. Gibbons, Inc., 482 U.S. 437, 439 (1987); West Va. Univ. Hospitals, Inc. v. Casey, 499 U.S. 83, 86 (1991)). In *Rimini*, the Court went on to conclude, based on the text, structure, and history of the Copyright Act, that the term "full costs" did not change the calculus; the plaintiffs could not recover expert fees. *See id.* at 875-76, 877-78. Some readers might argue that litigation "costs" *is* a legal term of art. As discussed below, the line between legal terms of art and ordinary terms is a good deal fuzzier in the statutory context than many commentators have appreciated. In this case, a person could understand the term "costs"—even costs related to litigation—without legal training. Such a lay person might be quite surprised to learn that "costs" does not include fees used to hire experts.

[52] *Cf.* Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833, 1842 (2018) (Alito, J.) (noting that a statute with "an undefined causation requirement" refers to one of these concepts).

[53] 570 U.S. 338 (2013) (Kennedy, J.).

[54] 42 U.S.C. § 2000e-3(a); *see* Nassar, 570 U.S. at 343.

[55] Nassar, 570 U.S. at 344-45.

[56] 29 U.S.C. § 623(a)(1); *see* Gross v. FBL Fin. Servs, 557 U.S. 167, 169 (2009) (Thomas, J.); Nassar, 570 U.S. at 351 (*Gross* offers textual insights "concern[ing] the proper interpretation of the term 'because'").

"because of" meant "by reason of: on account of."[57] He then found that, under the Court's precedents, "by reason of"—and, thus, "because of"—required a showing of but-for causation.[58]

In *Nassar*, Justice Kennedy reasoned that, given the textual similarities between the ADEA and Title VII, "the proper conclusion here, as in *Gross*, is that Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action."[59] Justice Kennedy asserted that this but-for test was consistent with tort law principles that pre-dated the enactment of the 1964 Civil Rights Act, as well as earlier Title VII precedents.[60] The *Nassar* Court pointed, for example, to *Los Angeles Department of Water and Power v. Manhart* (1978), where female employees brought a Title VII sex discrimination suit, challenging a requirement that they pay more into a pension fund than male employees (on the stated ground that women tend to live longer than men).[61] In *Manhart*, the Court declared that "[s]uch a practice does not pass the simple test of whether the evidence shows treatment of a person in a manner which but for that person's sex would be different."[62]

The Court's opinion in *Bostock* built on these cases. Relying on *Nassar* and *Gross*, Justice Gorsuch declared: "[A]s this Court has previously explained, 'the ordinary meaning of "because of" is "by reason of" or "on account of."'"[63] "In the language of law," Justice Gorsuch continued, "this means that Title VII's 'because of' test incorporates the '"simple"' and 'traditional' standard of but-for causation."[64]

2. Precedent as a Way to Choose Among Contending Meanings

Precedent may be used to clarify the scope of a term. *Pierce v. Underwood* (1988),[65] for example, involved the Equal Access to Justice Act, which directs a court to award "fees and other expenses" to a party that prevails in a case against the United States "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."[66] The Court had to determine the meaning of the phrase "substantially justified."

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[57] *See* Gross, 557 U.S. at 176.

[58] *See id.* at 176-77 (relying on Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639 (2008), and Safeco Ins. v. Burr, 551 U.S. 47, 63-64 & n. 14 (2007), in arguing that "the phrase, 'by reason of,' requires at least a showing of 'but for' causation"). Justice Thomas also pointed to past ADEA cases, which seemed to require plaintiffs to prove but-for causation. *See id.* at 176-77 (citing Ky Retirement Sys. v. EEOC, 554 U.S. 135, 138-142, 146-151 (2008); Reeves v. Sanderson Plumbing Prods, Inc., 530 U.S. 133, 141, 143 (2000)).

[59] Nassar, 570 U.S. at 352.

[60] *See id.* at 344-47.

[61] 435 U.S. 702, 704 (1978).

[62] *Id.* at 711 (internal quotation marks omitted); *see* Nassar, 570 U.S. at 344-45.

[63] Bostock, 140 S. Ct. 1731, 1739 (2020) (quoting Nassar, 570 U.S. 338, 350 (2013), and citing Gross, 557 U.S. 167, 176 (2009)).

[64] *Id.*

[65] 487 U.S. 552 (1988) (Scalia, J.).

[66] 28 U.S.C. § 2412(d)(1)(A); *see* Pierce, 487 U.S. at 554-56.

In an opinion by Justice Scalia, the Court noted that "the word 'substantial' can have two quite different—indeed, almost contrary—connotations."[67] Dictionary definitions suggested that "substantial" could mean either "'[c]onsiderable in amount, value, or the like; large,'" or "'in substance or in the main,'…as, for example, in the statement, 'What he said was substantially true.'"[68] Justice Scalia declared: "Depending upon which connotation one selects, 'substantially justified' is susceptible of interpretations ranging from" the plaintiff's call for a "high standard"[69] to the government's view that its legal arguments must simply have "'some substance and a fair possibility of success.'"[70]

The Court found that case law could help clarify this uncertainty.[71] Under the Court's precedents addressing whether agency action was supported by "substantial evidence," the standard did "not mean a large or considerable amount of evidence, but rather 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'"[72] Building on these and other precedents,[73] the Court concluded that "as between the two commonly used connotations of the word 'substantially,' the one most naturally conveyed" is that the government's position is "substantially justified" under the Equal Access to Justice Act when it has a "reasonable basis in law and fact."[74]

In *Southwest Airlines Co. v. Saxon* (2022),[75] the Court again relied on its own precedents to resolve a tension among potential statutory meanings. Latrice Saxon, an airline ramp supervisor who often engaged in loading and unloading cargo, brought a class action against Southwest Airlines, arguing that the airline had neglected to properly pay overtime.[76] Southwest contended that the case had to go to arbitration, but Saxon insisted that her case qualified for an exemption from the Federal Arbitration Act.[77] The Court had to determine whether an airline employee who loads cargo onto airplanes "belongs to a 'class of workers engaged in foreign or interstate commerce'' that is exempt from arbitration under the Act.[78]

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[67] Pierce, 487 U.S. at 564.
[68] *Id.* at 564 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 2514 (2d ed. 1945)).
[69] Brief for Respondents at 20-28, Pierce v. Underwood, 487 U.S. 552 (1988) (No. 86-1512).
[70] Brief for Petitioner at 16, Pierce v. Underwood, 487 U.S. 552 (1988) (No. 86-1512); Pierce, 487 U.S. at 563-64.
[71] Pierce, 487 U.S. at 564 ("We are not, however, dealing with a field of law that provides no guidance in this matter.").
[72] *Id.* at 564-65 (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)).
[73] *See id.* at 565 (the lower standard was also consistent with the rule applied in another "related" area: sanctions for resisting discovery under Federal Rule of Civil Procedure 37).
[74] *Id.* at 565-66 & n.2. Justice Scalia's opinion went on to affirm the district court's decision that the government's position in the underlying litigation was *not* "substantially justified." *See id.* at 558-63, 570-71; *see also id.* at 571-74 (remanding as to the amount of fees).
[75] 142 S. Ct. 1783 (2022) (Thomas, J.).
[76] *See id.* at 1787.
[77] *See id.*
[78] 9 U.S.C. § 1; Saxon, 142 S. Ct. at 1787.

Southwest argued that the exemption did not apply: cargo loading "lack[ed] a necessary nexus to interstate commerce," given that "ramp-agent supervisors and ramp agents work only at the airport where they are based. Saxon worked solely at Chicago Midway International Airport."[79] Saxon responded that her work was inherently bound up with transportation.[80] She supported her argument with several precedents that pre-dated the 1925 enactment of the Federal Arbitration Act. "For decades," Saxon insisted, "this Court had held that loading and unloading *is* commerce, because goods can't cross state lines if they're never loaded in the first place."[81]

In an opinion by Justice Thomas, the Supreme Court unanimously agreed with the plaintiff Saxon.[82] The Court found that the pre-1925 precedents largely settled the matter: "[O]ur case law makes clear that airplane cargo loaders plainly do perform 'activities within the flow of interstate commerce.'"[83] Relying on precedents interpreting the Hepburn Act of 1906 and the Federal Employers Liability Act of 1908, which held that loading and unloading goods for an interstate train shipment were "plain[ly]…so closely related to interstate transportation as to be practically a part of it,'" the *Saxon* Court found it "equally plain" that airline cargo loaders "form 'a class of workers engaged in foreign or interstate commerce.'"[84] This interpretation was supported by other precedents as well as the structure of the Act.[85]

Importantly, the *Saxon* Court made clear that this text, structure, and precedent all served to establish the plain meaning of the operative provision. For that reason, the Court rejected Southwest's invitation to look at the purpose of the Federal Arbitration Act: to ensure the enforcement of arbitration agreements.[86] Justice Thomas declared: "[Section 1]'s *plain text* suffices to show that airplane cargo loaders are exempt from the FAA's

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[79] Saxon, 142 S. Ct. at 1792; Brief for Petitioner at 7-8, 33, Southwest Airlines Co. v. Saxon, 142 S. Ct. 1783 (2022) (No. 21-309).

[80] *See* Brief for Respondent Latrice Saxon at 1-2, 24, Southwest Airlines Co. v. Saxon, 142 S. Ct. 1783 (2022) (No. 21-309).

[81] *Id.* at 1-2, 20-24.

[82] *See* Saxon, 142 S. Ct. at 1793.

[83] *Id.* at 1787.

[84] *Id.* at 1789 (quoting Balt. & Ohio SW R. Co. v. Burtch, 263 U.S. 540, 544 (1924), and 9 U.S.C. § 1). Under the Federal Employers Liability Act (FELA), railroads were required to compensate employees who were injured while the railroad was "engaging in commerce" and the employee was "employed by such carrier in such Commerce." Act of April 22, 1908, ch. 149, 35 Stat. 65, 65 (1908); *see* Burtch, 263 U.S. at 542-44 (1924) (finding train loaders engaged in commerce such that the case was governed by FELA rather than state law).

[85] *See id.* at 1789-90 (relying on statutory context; Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 119 (2001), which held the FAA exemption applied only to transportation workers; and Erie R. Co. v. Shuart, 250 U.S. 465 (1919), which further demonstrated that "[c]argo loaders" are "intimately involved with the commerce (e.g., transportation) of that cargo."); *see also* Erie R., 250 U.S. at 466, 468 (relying on a definition of "transportation" in the Hepburn Act in determining the contractual liability of a railroad).

[86] *See* Saxon, 142 S. Ct. at 1792-93 ("Southwest falls back on statutory purpose.").

scope…. [W]e have no warrant to elevate vague invocations of statutory purpose over the words Congress chose."[87]

3. Establishing the Meaning of a Single Provision

As the previous sections demonstrate, the Justices, including the Court's textualists, give significant weight to precedents that have defined the meaning of similar terms and phrases in other statutes and statutory provisions. One might expect the Court to give the *most* weight to past decisions that determined the meaning of a term or phrase in the very same provision. Indeed, that is the practice. The Supreme Court has repeatedly announced that it will read the same statutory provision in a uniform way across contexts (a rule that this Article will call the "one-meaning rule").[88] Thus, for example, if a statute establishes both civil and criminal penalties for prohibited conduct, the Court will give the prohibition "the same construction" in a criminal prosecution and a civil enforcement action.[89]

Justice Scalia's opinion for the Court in *Clark v. Martinez*[90] illustrates the principle. *Clark* was an immigration case involving the Attorney General's authority to detain undocumented persons. In general, under the Immigration and Nationality Act, once the federal government determines that an individual is subject to removal, "the Attorney General shall remove the alien from the United States within a period of 90 days."[91] But the statute also provides:

> An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, *may be detained beyond the removal period* and, if released, shall be subject to" the Attorney General's supervision.[92]

Under the statute, then, three different groups of undocumented persons may be detained beyond the 90-day removal period: (1) those who

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[87] *Id.* at 1792-93 (emphasis added).

[88] *See, e.g.*, FCC v. Am. Broad. Co., 347 U.S. 284, 296 (1954) ("If we should give [the provision] the broad construction urged by the [FCC in this civil case], the same construction would likewise apply in criminal cases."); United States ex rel. Marcus v. Hess, 317 U.S. 537, 541-42 (1943) ("the same substantive language" will be treated the same way in criminal prosecutions and civil actions under the False Claims Act); *see also* Leocal v. Ashcroft, 543 U.S. 1, 11 n.8 (2004) (Rehnquist, C.J.) ("we must interpret the statute consistently…in a criminal or noncriminal context"). For scholarly studies, see Margaret V. Sachs, *Harmonizing Civil and Criminal Enforcement of Federal Regulatory Statutes: The Case of the Securities Exchange Act of 1934*, 2001 U. ILL. L. REV. 1025, 1026-27, 1029-30 (arguing that courts often do and should read "prohibitions in hybrid statutes" uniformly); Lawrence M. Solan, *Statutory Inflation and Institutional Choice*, 44 WM. & MARY L. REV. 2209, 2218, 2272 (2003) (noting the practice).

[89] FCC, 347 U.S. at 296.

[90] 543 U.S. 371 (2005).

[91] 8 U.S.C. § 1231(a)(1)(A).

[92] 8 U.S.C. § 1231(a)(6) (emphasis added); *see* 8 U.S.C. § 1231(a)(3) (establishing guidelines for supervised release).

were from the outset deemed inadmissible to the United States; (2) those who were lawfully admitted to the country but were later subject to removal; and (3) those who present a risk of future dangerousness.[93] The question before the Court in *Clark* was whether the phrase—"may be detained beyond the removal period"—gave the Attorney General broad discretion or only limited authority to detain the first group of individuals: those deemed inadmissible at the outset.[94]

Notably, the Court in *Clark* was not writing on a clean slate. The Court had previously interpreted this same language as applied to the second group: those who were lawfully admitted but later became subject to removal.[95] In *Zadvydas v. Davis*, Justice Breyer's opinion for the Court found that the statutory phrase—"may be detained beyond the removal period"—did not permit unlimited detention.[96] That was in part because, Justice Breyer asserted, it would raise considerable constitutional difficulties to detain individuals—at least those who had initially been lawfully admitted—for an indefinite period.[97]

In *Clark*, the Court held that the provision must be interpreted in a uniform manner, thus making the *Zadvydas* Court's view authoritative as to all three classes of undocumented persons.[98] That is, the Attorney General had only limited authority to detain all of these individuals. In reaching this conclusion, Justice Scalia insisted that the "[t]he operative language…'may be detained beyond the removal period,' applies without differentiation to all three categories of aliens that are its subject."[99] So it did not matter that the constitutional concerns raised in *Zadvydas* may be less pressing in the context of individuals who had never been admitted to the country.[100] As illustrated by the cases reading criminal and civil prohibitions the same way, "[i]t is not at all unusual to give a statute's ambiguous language a limiting construction called for by [only] one of the statute's applications…. The lowest common denominator, as it were, must govern."[101] Otherwise, Justice Scalia admonished, the Court might "establish…the dangerous principle that judges can give the same statutory text different meanings in different cases."[102]

There are several notable things about this decision. First, Justice Scalia treated as binding a precedent from which he himself had dissented.

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[93] *See* Clark, 543 U.S. at 377-78 ("By its terms, this provision applies to three categories").
[94] *See id.* at 373.
[95] *See* Zadvydas v. Davis, 533 U.S. 678, 682 (2001).
[96] *Id.* at 682, 697.
[97] *See id.* at 682, 688-93, 697, 699-700. The Court added that, to guide lower courts in evaluating executive detentions, it would recognize a "presumptively reasonable period of detention" of six months beyond the 90-day removal period. *See id.* at 700-01.
[98] *See* Clark, 543 U.S. at 377-78.
[99] *Id.* at 378.
[100] *See id.* at 380 (even if "the constitutional concerns…are not present" in this case, "it cannot justify giving the *same* detention provision a different meaning").
[101] *Id.* at 380.
[102] *Id.* at 386. The Court went on to hold that the government should have the same presumptive six-month period in which to remove an undocumented immigrant as was recognized in *Zadvydas*. *See id.* at 386-87.

In *Zadvydas*, the dissenters insisted that the statutory language—"may be detained beyond the removal period"—was not ambiguous but clearly gave the Attorney General broad discretion to detain all three classes of undocumented persons.[103] Second, it is worth considering what the majority in *Clark* treated as precedential. The *Clark* majority viewed as binding both *Zadvydas*'s conclusion that the statutory language *was* ambiguous and its resolution of the ambiguity. Thus, once the *Zadvydas* Court had authoritatively interpreted that language, it was no longer ambiguous but binding in *Clark*.[104] Third, the Court's textualists were not united in *Clark*; Justice Thomas believed the Court should either depart from or overrule *Zadvydas*.[105] But Justice Scalia's opinion was supported by the longstanding legal rule that the very same statutory provision should mean the same thing across cases. Finally, and importantly, Justice Scalia's decision in *Clark* vividly illustrates how a textualist jurist may be influenced or even bound by an arguably nontextual opinion—as long as that earlier opinion aimed to define the meaning of a statutory term or phrase.

B. Making Sense of the Use of Precedent to Define Plain Meaning

Textualists are not the only interpreters to use judicial precedent to define statutory meaning. That is in fact a longstanding practice by textualists and non-textualists alike.[106] But textualists' use of precedent may surprise many readers. Indeed, as discussed, Justice Gorsuch's reliance on precedent

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[103] *See* Zadvydas, 533 U.S. at 707-08, 710, 716 (Kennedy, J., dissenting, joined by Chief Justice Rehnquist and Justices Scalia and Thomas); *see also id.* at 710-11 (urging that it would not be "a plausible construction" to treat the three classes differently).

[104] Indeed, that is also the pattern in the civil-criminal context. If the Court finds a statutory provision ambiguous in a *civil* enforcement action, the Court applies the rule of lenity—on the assumption that its interpretation will bind future *criminal* cases. *See* United States v. Thompson/Ctr. Arms Co., 504 U.S. 505, 518-19 n.10 (1992) (Souter, J.).

[105] The basis of Justice Thomas's dissent is not entirely clear. He seemed to disagree with the majority's conclusion that it was bound by a past interpretation of the same statutory language. But his dissent focused less on that principle and more on his view that the majority was either misreading—or should just overrule—*Zadvydas*. *See* Clark, 543 U.S. at 391-92, 401-04 (Thomas, J., dissenting) ("the Court's analysis cannot be squared with *Zadvydas*" and "even if it could be so squared, *Zadvydas* was wrongly decided and should be overruled"); *see also id.* at 393 ("If the majority is correct that the 'lowest common denominator' governs, then the careful distinction *Zadvydas* drew between admitted aliens and nonadmitted aliens was irrelevant at best and misleading at worst."). As this Article shows, Justice Thomas has often relied on precedent in determining the meaning of statutory terms and phrases. So he clearly accepts the practice as a general matter.

[106] *See* Part I(A); *e.g.*, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 547 U.S. 71, 85-86 (2006) (Stevens, J.) ("[W]hen 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its...judicial interpretations as well.'") (quoting Bragdon v. Abbott, 524 U.S. 624, 645 (1998)); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947) ("[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.").

to define "because of" in *Bostock* led to accusations that the Court's opinion was not true textualism.[107]

This Article shows that *Bostock* is no outlier. Many textualists have turned to precedent to determine the meaning of statutory terms and phrases. I argue that this practice can be defended on textualist principles. First, and fundamentally, reliance on precedent accords with textualists' emphasis on the hypothetical "reasonable reader" of a statute. Second, the use of statutory precedent, particularly rules such as that in *Clark*, comports with the interest of many textualists in cabining judicial discretion.

1. Reasonable Reader of a Federal Statute

Let's begin with the (relatively) uncontroversial case: terms of art.[108] Although there appears to be no agreed-upon definition of "terms of art," the basic idea is that it can be challenging to comprehend certain technical terms, without training in the relevant area—science, commercial trade, or other specialty.[109] For example, in *McCaughn v. Hershey Chocolate Company* (1931), the Hershey company argued that chocolate was "food," not "candy," asserting that "candy" had a specialized industry definition limited to "confectionery, made principally of sugar or molasses, with or without the addition of coloring or flavoring matter."[110] Thus, the company contended, chocolate should not be taxed at the higher "luxury" rate for "candy" under the Revenue Acts of 1918 and 1921.[111] Absent specialized knowledge of the candy industry, one would have difficulty comprehending the argument that chocolate is not "candy."[112]

Legal terms of art function in a similar fashion. The importance of legal training is most evident when a term means entirely different things in legal parlance as opposed to ordinary speech. For example, early in my career, I told my (nonlawyer) mother that I was writing an article on "standing." She replied: "Okay…. And your next paper will be on 'sitting'…and then 'walking'?" As my mom's response suggests, in ordinary

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[107] *See* Part I(A).

[108] *See supra* note 42 (collecting sources). Anita Krishnakumar has criticized the Supreme Court's use of the common law, but she acknowledges that such case law may help to understand legal terms of art. *See* Krishnakumar, *Common Law*, *supra* note 27, at 668-69.

[109] *See* Manning, *Equity*, *supra* note 19, at 112 (describing "terms of art" as "phrases that acquire specialized meaning through use over time as the shared language of specialized communities (legal, commercial, scientific, etc.)."); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 503-04 (2013); *see also* DAVID MELLINKOFF, THE LANGUAGE OF THE LAW 16-17, 391 (1963) (a legal "term of art" is one that through recurrent use "conveys a workably clear notion to the lawyer").

[110] 283 U.S. 488, 490–91 (1931).

[111] The two revenue statutes were precisely the same, except that candy was subject to a 3% luxury tax under the 1918 Act and a 5% tax under the 1921 Act. *See* Revenue Act of 1918, Pub. L. No. 65-254, § 900, 40 Stat. 1057, 1122 (1919); Revenue Act of 1921, Pub. L. No. 67-98, § 900, 42 Stat. 227, 292 (1921); *see also McCaughn*, 283 U.S. at 489–90.

[112] Ultimately, although the Supreme Court acknowledged that "the word 'candy'…may be used in [the] narrower and more restricted sense" urged by the Hershey company, the Court found that, in the context of the Revenue Acts, it was used "in a popular and more general sense" and embraced Hershey chocolate. *McCaughn*, 283 U.S. at 491.

parlance, "standing" refers to the upright position. But lawyers know that the term can also refer to one requirement for filing suit in court.[113] With legal training, particularly because these definitions of standing are so different, we can easily tell from context which type of "standing" a statute employs.[114]

Other legal terms of art, however, are less detached from their ordinary meaning. Consider the term "fraud." In ordinary parlance, "fraud" can mean a trick or an imposter.[115] For example, if someone boasts—perhaps in an online dating profile—that he is a "25-year-old hunk," and it turns out that he is in fact a few decades older than that (and not quite as handsome as the profile suggests), the boaster might be called a "fraud," a "total fraud," or perhaps an "actual fraud." That lay concept is not entirely divorced from the legal concept of "fraud," which also encompasses a misrepresentation of fact. But the legal concept contains additional elements—requiring not only such a misrepresentation but also (for example) that the misrepresentation induce reliance.[116]

In *Field v. Mans* (1995), the Court understood the term "actual fraud" in the Bankruptcy Code to refer to the legal term of art, rather than to the ordinary meaning.[117] The Court did not explain that assumption,[118] but the Justices were unanimous on that point.[119] Nor did the litigants question that common law precedent should inform the meaning of the statutory term (although they disagreed on precisely which aspects of the common law the Court should adopt).[120] In short, no one argued that the ordinary meaning of "fraud"—as simply a misrepresentation of fact—should apply. And I suspect that most of us in the legal community—textualists and non-textualists alike—believe the Court was correct to turn to the legal concept and, accordingly, to look to common law cases. But why?

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[113] Under current Article III standing doctrine, a private party must demonstrate a concrete injury that was caused by the defendant and that can be redressed by the requested relief. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

[114] *See, e.g.*, 2 U.S.C. § 288e(a) ("The [Senate] Counsel shall be authorized to intervene only if standing to intervene exists under…article III").

[115] *See* OXFORD ENGLISH DICTIONARY (3d ed. 2008) (defining "fraud" in part as "[o]ne who is not what he appears to be; an impostor, a humbug"); MERRIAM-WEBSTER DICTIONARY (2022) (defining "fraud" as "one that is not what it seems or is represented to be").

[116] *See* RESTATEMENT (SECOND) OF TORTS § 525-531C 53-57 (1977).

[117] *See* 516 U.S. 59, 69 (1995) (Souter, J.).

[118] Instead, the Court simply asserted that the statutory terms were "common-law terms" that "carr[ied] the acquired meaning of terms of art." *Id.* at 69; *see id.* at 70 ("there is no reason to doubt Congress's intent to adopt a common-law understanding of the terms"). The Court thus presupposed that the legal meaning, rather than the ordinary meaning, applied.

[119] *See id.* at 79-80 (Breyer J., with Scalia, J., dissenting) (agreeing that the common law meaning applied, and dissenting on the ground that the bankruptcy court actually applied the correct standard, even if it used the wrong words).

[120] The dispute in the case was not over whether the common law concept applied, but over one element of that common law concept: the type of reliance necessary. *See* Brief for Petitioner at 8, 19-20, Field v. Mans, 516 U.S. 59 (1995) (No. 94-967) (arguing for justifiable reliance); Brief for Respondent at 9, Field v. Mans, 516 U.S. 59 (1995) (No. 94-967) (advocating reasonable reliance); *see also* Field, 516 U.S. at 74-75 (holding 11 U.S.C. § 523(a)(2)(A) "requires justifiable, but not reasonable, reliance").

Let's consider some possibilities. One potential explanation is that members of Congress, in enacting the Bankruptcy Code, subjectively opted for the legal concept. But few interpretive theories today focus on Congress's subjective intentions; textualism in particular rejects them.[121] After all, it is doubtful that many members of Congress gave particular thought to this provision, much less to any differences between the ordinary and legal meaning of fraud. A second approach is to assume that we don't actually know whether Congress has relied on a legal or an ordinary term, so we should turn to legislative history to figure it out. Although textualists are in general opposed to legislative history, some have expressed a willingness to look at such history to see if Congress has used a term of art.[122] But what if there is no legislative history on point? If (as seems likely) no one in Congress specifically considered whether to use the ordinary or legal meaning, the legislative history might not provide an answer. Yet a court still has to decide the case.

So let's recall again that *no one* involved in the *Field v. Mans* litigation questioned that Congress was using a legal term. That is, no one argued that to prove fraud, the creditor simply needed to show some misrepresentation of fact. What accounts for this universal acceptance? I think that the answer is quite simple. As scholars of interpretive theory (including textualists) have repeatedly said, we must understand language in context.[123] The most basic context of a federal statute—indeed, so basic that it is too often overlooked—is that it is a *legal* document.

Several important features follow from the legal nature of a federal statute—again, seemingly so basic that they are often overlooked. First, in contrast to ordinary conversation, we do not expect federal statutes to use metaphor, irony, or innuendo.[124] Second, and relatedly, we do not expect

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[121] *See* John F. Manning, *Without the Pretense of Legislative Intent*, 130 HARV. L. REV. 2397, 2400 (2017) (noting various approaches, including purposivism and textualism, decline to focus on "what Congress intended about the problem at hand"); *see also* Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 248 (1992) (noting the influence of the legal realist position that "legislative intent is a myth….How can 535 legislators have an intent about anything?").

[122] *See* SCALIA & GARNER, *supra* note 1, at 382; John F. Manning, *Why Does Congress Vote on Some Texts but Not Others?*, 51 TULSA L. REV. 559, 570-71 (2016).

[123] *See, e.g.*, SCALIA & GARNER, *supra* note 1, at 15–16 (advocating a focus on "full context"); Manning, *What Divides*, *supra* note 22, at 76 ("[t]extualists give precedence to *semantic context*").

[124] *See* Brian G. Slocum, *Replacing the Flawed* Chevron *Standard*, 60 WM. & MARY L. REV. 195, 252–53 (2018) ("Natural '[l]anguage is full of nonliteral meanings, such as metaphors, idioms, slang, and polite talk.'….[S]uch usages of language are far less common in legal texts." (quoting BRIAN G. SLOCUM, ORDINARY MEANING 26 (2015))); *see also* Brian Flanagan, *Revisiting the Contribution of Literal Meaning to Legal Meaning*, 30 OXFORD J. LEG. STUD. 255, 260-61 (2010) (there may be "a convention whereby" legislative utterances "lack ironic, counter-attributive or metaphorical meanings"); Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 ARK. L. REV. 1149, 1158 (2003) ("We certainly do not expect double entendres (bawdy or otherwise) in the Constitution.").

federal statutes to contain puns or other humor.[125] Third, and perhaps most basic of all, we expect federal statutes to use legal concepts.[126] That is why it likely strikes many readers as odd even to ask the question whether the term "actual fraud"—in the Bankruptcy Code or elsewhere in the Statutes at Large—refers to the ordinary concept (any misrepresentation of fact) as opposed to the legal concept of fraud.

Once we focus on the legal nature of federal legislation, we also begin to see that in a federal statute, the line between ordinary terms and legal terms of art becomes fuzzier. Indeed, even terms and phrases that would strike many (lawyers and laypersons alike) as perfectly "ordinary" may take on a distinctively legal connotation as used in a federal statute. In federal legislation, "now" may no longer be the present time but the moment of the enactment of the statute.[127] The term "costs" may not mean any expenses, nor even any expenses related to litigation, but may exclude expert witness fees.[128] And the phrase "because of" may not be the ordinary concept invoked by my daughter to cast blame on her older brother. When "because of" is placed in a federal statute—for example, to prohibit an employer from discriminating against an employee "because of such individual's race, color, religion, sex, or national origin"[129]—the phrase may take on a distinctively legal connotation.

That was a major aspect of the analysis in *Nassar*, *Gross*, and *Bostock*. Relying in part on dictionary definitions, the Court found that in the 1960s, when Title VII and the ADEA were enacted, the "ordinary meaning" of "because of" was "by reason of: on account of."[130] The Court then turned to precedent to specify the *legal* meaning of the phrase. As Justice Gorsuch put it in *Bostock*, "Title VII's 'because of' test incorporates the…standard of but-for causation" "[i]n the language of law."[131] Ordinary terms and phrases may take on a distinctively legal hue when used in federal legislation.

Indeed, some terms and phrases may be more likely to strike us as legal concepts only if we have legal training. Consider the statutory language at issue in *Saxon*: "class of workers engaged in foreign or interstate

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[125] Theorists have understood this point for a long time. *See* FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS 96 n.1 (1839) (noting that, in contrast to theatrical performances, "the object of law and politics is neither to amuse or touch"); Ryan D. Doerfler, *Can a Statute Have More than One Meaning?*, 94 N.Y.U. L. REV. 213, 220 (2019) ("legislative language typically lacks" "humorous effect"); Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339, 366-67 (2005) ("Humor is not a quality one typically associates with statutes").

[126] Indeed, according to a recent empirical study, *lay* people expect even seemingly ordinary terms and phrases, such as "intent" and "because of," to take on a distinctively legal meaning when used in a federal statute. *See* Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Ordinary Meaning and Ordinary People*, 171 U. PA. L. REV. (forthcoming 2023) (manuscript at 7); Part III(A).

[127] *See* Carcieri, 555 U.S. 379, 381-82, 388-90, 395-96 (2009) (Thomas, J.).

[128] *See* Rimini, 139 S. Ct. 873, 877-78 (2019) (Kavanaugh, J.).

[129] 42 U.S.C. § 2000e-2(a).

[130] *See* Nassar, 570 U.S. 338, 350 (2013) (citing Gross, 557 U.S. 167, 175-78 (2009)).

[131] Bostock, 140 S. Ct. 1731, 1739 (2020).

commerce."[132] A lay person *could* understand this phrase, without taking a course in law school. And such a person might quite reasonably conclude that a cargo loader, who never leaves Chicago's Midway Airport, is *not* engaged in foreign or interstate commerce. But those of us with legal training know that there is a vast array of jurisprudence on foreign and interstate commerce.[133] With that background, we can better understand the Supreme Court's conclusion in *Saxon* that the phrase had a distinctively legal meaning, such that pre-1925 precedent could inform the plain meaning of the law.[134]

Relatedly, precedent can help fill gaps left by dictionary definitions. As scholars (including textualists) have repeatedly observed, the dictionary is not a "fortress."[135] Instead, dictionaries offer a range of possibilities as to how people might use a term or phrase.[136] To figure out which definition makes sense in the context of a federal statute, judges can look to legal sources, including judicial precedents. That is what the Court did in *Nassar* and *Gross* after examining dictionary definitions of "because of." Likewise, Justice Scalia turned to precedent in *Pierce v. Underwood* to navigate between dictionary definitions of "substantial" in order to discern the legal meaning of "substantially justified" in the Equal Access to Justice Act.

Once we recognize statutory language as legal language, it makes a good deal of sense to look at legal sources to determine the meaning of terms and phrases. Such legal sources may, of course, include the surrounding statutory text and structure and related provisions.[137] Such sources also include judicial precedents.

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[132] 9 U.S.C. § 1.

[133] Law school casebooks spend a good deal of space on the subject. *See, e.g.*, NOAH R. FELDMAN & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 115-92 (21st ed. 2022).

[134] *See* Southwest Airlines v. Saxon, 142 S. Ct. 1783, 1787, 1792-93 (2022) (Thomas, J.).

[135] Manning, *Equity*, *supra* note 19, at 111; *cf.* Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945) (Hand, J.) ("a mature and developed jurisprudence" does not "make a fortress out of the dictionary"). Nevertheless, textualists' use of dictionaries has drawn a good deal of criticism. *See* Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275, 280–81 (1998); James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483, 488–94 (2013); *see also* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 907 (2013) (finding that legislative staffers "do not consult dictionaries when drafting").

[136] *See* Easterbrook, *supra* note 19, at 67; John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2456–57 (2003) (dictionaries provide only "historical records" of potential uses of words). Indeed, in this respect, textualists do not differ from their purposivist counterparts. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 1375-76 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) ("Unabridged dictionaries are historical records" which help show whether "a particular meaning is linguistically permissible.").

[137] *See supra* notes 19, 38 and accompanying text. Some scholars have criticized the Court's reliance on the "whole code" to make sense of statutory provisions. But these scholars still endorse reliance on related statutes (those in pari materia). *See* William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171, 173-76, 246 (2000); Anita S. Krishnakumar, *Cracking the Whole Code Rule*, 96 N.Y.U. L. REV. 76, 82-84, 153-55 (2021).

Moreover, contrary to the concerns of some critics,[138] such reliance on precedent can be quite consistent with a search for the meaning of a statute at the time of enactment.[139] In *Pierce* and *Saxon*, the Court turned to Supreme Court precedent that predated the Equal Access to Justice Act and the Federal Arbitration Act. In *Bostock*, the Court relied on decisions (*Nassar* and *Gross*) that had themselves aimed to identify how "because" and "because of" were understood in the 1960s. (Notably, although scholars have written extensively about the Court's causation analysis in *Bostock*,[140] neither dissenting opinion in that case called into question the Court's adoption of a but-for test.) Supreme Court precedent was useful in those cases—not to invent a post-enactment meaning of a term or phrase, but to help specify the *legal* meaning of a term or phrase at the time of enactment. Case law guides judges by showing them how certain terms and phrases have been understood "in the language of law."[141]

This notion of federal legislation as full of legal concepts accords with longstanding textualist principles. Many prominent textualists have argued that legal texts must be interpreted from the perspective of a hypothetical "reasonable reader."[142] Justice Gorsuch, for example, has written that "the task in any case is to interpret and apply the law" from the standpoint of "a reasonable and reasonably well-informed citizen."[143] In their treatise, Justice Scalia and Bryan Garner envision a highly sophisticated "reasonable reader":

> The interpretive approach we endorse is that of the "fair reading": determining the application of a governing text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued. The endeavor requires aptitude in language, sound judgment, the suppression of personal preferences regarding the outcome, and, with older texts, historical linguistic research.[144]

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[138] *See* Blackman & Barnett, *supra* note 8 (criticizing *Bostock*'s reliance on cases from 2009 and 2013—*Gross* and *Nassar*—in examining the meaning of the 1964 Civil Rights Act).

[139] To be sure, precedent-as-meaning (like any interpretive technique) can be misused. For that reason, as discussed in Part III(B), I believe there should be guidelines for this practice.

[140] *See* Berman & Krishnamurthi, *supra* note 27, at 94; Katie Eyer, *The But-for Theory of Antidiscrimination Law*, 107 VA. L. REV. 1621, 1684 (2021); Benjamin Eidelson, *Dimensional Disparate Treatment*, 95 SO. CAL. L. REV. 785, 794–96 (2022).

[141] Bostock, 140 S. Ct. 1731, 1739 (2020).

[142] Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988) (emphasizing "the understanding of the objectively reasonable person"); *see* SCALIA, *supra* note 39, at 17; SCALIA & GARNER, *supra* note 1, at 15–16 ("[i]n their full context, words mean what they conveyed to reasonable people at the time they were written"); *infra* notes 143-146 and accompanying text.

[143] GORSUCH, *supra* note 5, at 51 ("[T]he task in any case is to interpret and apply the law as a reasonable and reasonably well-informed citizen might have understood it"); *id.* at 55–56 (arguing that the judge should ask "What might a reasonable person have thought the law was at the time?"); Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RSRV. L. REV. 905, 910 (2016).

[144] SCALIA & GARNER, *supra* note 1, at 33. The writers also state that such a reasonable reader can consider purpose but only as derived from the text itself. *Id*.

John Manning also argues that "textualists interpret statutory language by asking how 'a skilled, objectively reasonable user of words' would have understood the statutory text, as applied to the problem before the judge."[145] As both Manning and Justice Barrett have observed, "the statutory meaning derived by textualists" is thus "a construct."[146]

This approach makes a good deal of sense if one understands that federal legislation includes legal concepts—and, indeed, that even seemingly ordinary terms and phrases, such as "costs" and "because of" (or "any" and "now") may take on a distinctively legal meaning in a federal statute. A reasonable reader can be expected to look not only at dictionary definitions but also at the text and structure surrounding the operative provision at issue as well as judicial precedents construing similar terms. Indeed, this construct accords with the way that textualist Justices often conduct statutory analysis: only a hypothetical reasonable reader who is familiar with law can determine that "costs" is a term of art; that a cargo loader is engaged in interstate commerce; and that "because of" signals but-for causation.

To be sure, as discussed in Part III, some scholars, including some self-described textualists, argue that the search for "ordinary meaning" is an empirical and linguistic exercise and are likely to resist this legalistic vision of legislation. I examine such concerns below. My goal in this section is to show that reliance on statutory precedent in determining the meaning of terms and phrases *can* be defended on textualist principles. Textualists' reasonable reader can be understood as recognizing that the "ordinary meaning" of *statutory* terms and phrases involves a good deal of law.

2. Legal Rules to Guide the Interpretation of Legal Documents

Once we view federal statutes as legal documents, we can also understand textualists' (and other interpreters') embrace of legal rules to govern interpretation. Such legal rules and presumptions are pervasive.[147]

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[145] Manning, *Absurdity*, *supra* note 136, at 2458 (quoting Easterbrook, *supra* note 19, at 65).

[146] Manning, *What Divides*, *supra* note 22, at 83 ("[T]he statutory meaning derived by textualists is a construct. Textualists do not…claim that a constitutionally sufficient majority of legislators *actually* subscribed to the meaning that a textualist judge would ascribe to a hypothetical reasonable legislator conversant with the applicable social and linguistic conventions."); *see* Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2200-04, 2211 (2017) (arguing that surveys of congressional staffers do not properly test textualism, because "textualists use the construct of a hypothetical *reader*," not "the construct of a hypothetical *writer* of a statute," and noting that textualists have "identified their construct as a skilled user of language, typically familiar with legal conventions"). Justice Barrett recognizes that textualists have not clearly explained whether they refer to "the perspective of the 'ordinary lawyer' or the ordinary English speaker." Barrett, *Congressional Insiders*, *supra*, at 2022, 2209-10; Part III(A).

[147] Consider the range of what are known as linguistic canons. *See* SCALIA & GARNER, *supra* note 1, at 33 (listing a few dozen canons as "semantic," syntactic," or "contextual"). Although some scholars assume that such canons are valid only to the extent that they mirror usage in ordinary conversation, my own view is that such canons may be useful in interpreting legal instruments, whether or not they accurately depict ordinary conversation. A full argument regarding the canons is beyond the scope of this Article, but I plan to address the issue in future work.

One such rule is the presumption that the same term means the same thing across a statute.[148] The one-meaning rule in *Clark* is an extension of that: If "[a] term appearing in several places in a statutory text is generally read the same way each time it appears," there is "even stronger cause to construe a single formulation…the same way."[149] Moreover, once we consider federal statutes as distinctively legal documents, it is not at all surprising that such legal rules and presumptions may not translate to ordinary conversation.

A few scholars have taken aim at the one-meaning rule, arguing that it makes little sense as a matter of linguistics. Jonathan Siegel contends that "as a purely linguistic matter, it is possible, though admittedly uncommon, for a single term in a single sentence to have multiple meanings."[150] Siegel points to a syllepsis, such as in the sentence, "I ran ten miles on Monday and the Marathon Oil Company on Thursday."[151] But as Siegel himself acknowledges, just as federal statutes tend not to use humor, they are also unlikely to employ a syllepsis.[152]

Ryan Doerfler goes further, insisting that "as a purely linguistic matter, multiple statutory meanings are not only possible but likely."[153] Doerfler asserts, for example, that "the famous Uncle Sam poster that says 'I Want YOU for U.S. Army,'" means "that Uncle Sam wants A for U.S. Army" if A reads the poster, and that "Uncle Sam wants B for U.S. Army, if B reads it."[154]

Assuming that "YOU" really does mean different things as a linguistic matter in this example,[155] there are good reasons to reject the view that the same federal *statutory* term should mean different things in different cases. When a statute such as Title VII provides that "an employer" may not discriminate because of certain traits,[156] it seems reasonable to apply that

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[148] *See* Milner v. Department of Navy, 562 U.S. 562, 569-73 (2011) (Kagan, J.) (finding that "personnel" means the same thing across provisions of the Freedom of Information Act); *see also* Brown v. Gardner, 513 U.S. 115, 118 (1994) (Souter, J.) ("there is a presumption that a given term is used to mean the same thing throughout a statute, a presumption surely at its most vigorous when a term is repeated within a given sentence").

[149] Ratzlaf v. United States, 510 U.S. 135, 143 (1994) (Ginsburg, J.).

[150] Siegel, *supra* note 125, at 366.

[151] *Id.* at 366.

[152] *See id.* at 366-67.

[153] Doerfler, *supra* note 125, at 222; *see also id.* at 215 ("This Article…assumes that what a statute 'means' in a linguistic sense corresponds, at least presumptively, to what it 'means' in a legal sense—that is, to its legal effect.").

[154] *Id.* at 218.

[155] This example strikes me as questionable even as a linguistic matter. It seems that both A and B could understand that the advertisement is directed at any listener. Presumably Uncle Sam would like as many people as possible to join the army. But that linguistic argument is not central here. For an article that agrees with Doerfler's linguistic understanding, see Andy *Egan, Billboards, Bombs and Shotgun Weddings*, 166 SYNTHESE 251, 261-65 (2009) (defending the singular reading, although recognizing that others may read "you" as addressed to a group).

[156] 42 U.S.C. § 2000e-2(a) ("It shall be an unlawful employment practice for an employer…to discriminate against any individual…because of such individual's race, color, religion, sex, or national origin").

prohibition equally to *all* employers—rather than envision that different employers might read the prohibition in different ways. A uniform reading likewise seems appropriate when Congress declares in a single provision that undocumented individuals "may be detained beyond the removal period."

That is particularly true, given that Congress could have structured each statute differently. Congress could have created different classes of employers in Title VII.[157] Or Congress could have written separate detention rules for each class of undocumented persons—distinguishing those who were initially lawfully admitted from those who were not so admitted or who present a risk of future dangerousness. Interpreters respect Congress's decision to craft a legal requirement in a single provision, as opposed to separate sections, by interpreting the same statutory language in the same way. Such respect for Congress's structural choices accords with longstanding textualist assumptions.[158]

3. Guiding and Constraining Judicial Discretion

Adherence to the first category of precedent seems likely to appeal to textualists who care about guiding and constraining judicial discretion (as many do).[159] To be sure, precedent is never completely binding on a court of last resort. Such a court always has the option to depart from its prior decisions.[160] But as we have seen, statutory precedent on the meaning of terms and phrases can and does inform the analysis in later cases.[161]

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[157] Congress could, for example, have created different requirements for small and large businesses. Instead, Title VII excludes *any* "employer" with fewer than fifteen employees. *See* 42 U.S.C. § 2000e(b).

[158] *See* Nassar, 570 U.S. 338, 353 (2013) (Kennedy, J.) ("Just as Congress' choice of words is presumed to be deliberate, so too are its structural choices."); *see also* SAS Institute, Inc. v. Iancu, 138 S. Ct. 1348, 1355 (2018) (Gorsuch, J.) (Congress's structural choices "deserv[e] respect"); John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2007 (2009) (interpreters should respect Congress's "specific choices…about how [statutory] goals are to be achieved").

[159] *See* Easterbrook, *supra* note 19, at 67, 69; Grove, *Which Textualism?*, *supra* note 36, at 290-307; John F. Manning, *Justice Scalia and the Idea of Judicial Restraint*, 115 MICH. L. REV. 747, 749–50, 770, 781 (2017) (reviewing SCALIA, *supra* note 39) (Justice Scalia's preference for textualism was driven by an "anti-discretion principle"); Nelson, *supra* note 39, at 403 (noting many textualists' skepticism about judicial discretion); *see also* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 4–5, 150, 181, 186–87 (2006) (advocating textualism based on concerns about the judiciary's limited institutional capacities).

[160] *See supra* notes 33-34 and accompanying text. For example, the one-meaning rule did not prevent the *Clark* Court from reconsidering *Zadvydas* as to all classes of undocumented immigrants. But, with the exception of Justice Thomas, no member of the Court entertained that option, perhaps because the government did not request such an overruling, *see* Brief for the Petitioners at 13-14, 27-29, 35-36, Clark v. Martinez, 543 U.S. 371 (2005) (No. 03-878).

[161] Notably, even though this use of precedent does not dictate the holding of a case, it does have a significant impact on the analysis. For explorations of how decisions have a precedential impact, even beyond the usual holding/dicta distinction, see Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 187-97 (2014); Allison Orr Larsen, *Factual Precedents*, 162 U. PA. L. REV. 59, 62 (2013); *see also* Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2003-05 (1994) (discussing the difficulty of distinguishing

Case law can, for example, provide guidance when dictionaries seem incomplete or offer competing definitions, as illustrated by *Nassar* and *Gross* ("because of") and *Pierce* ("substantial"). And the judicial precedents identifying the meaning of terms and phrases then influence subsequent interpretations.[162] Notably, Justice Alito's dissenting opinion in *Bostock* argued that the decision would affect the interpretation of "[o]ver 100 other federal statutes" that also "prohibit discrimination because of sex."[163] Justice Alito did not explain why *Bostock* was likely to have such an impact, but this Article's discussion of the first type of statutory precedent offers an answer: Both textualist and non-textualist Justices are likely to be influenced by the meaning attributed to similar statutory language in prior decisions.

Indeed, when the Court identifies the meaning of a term or phrase in one case, it may have quite unexpected ramifications in subsequent cases.[164] In *Clark*, Justice Scalia's reliance on *Zadvydas* to issue a decision that protected a class of undocumented immigrants from unlimited detention was likely a surprise to many observers. Consider also in this regard *Nassar* and *Gross*, which found "because" and "because of" to signal but-for causation. In each case, the employee lost—in large part due to the but-for causation requirement.[165] It does not appear that many observers anticipated how that definition of "because of" would later be used in *Bostock* to lead to a monumental plaintiff employee victory.[166]

Finally, textualists' reliance on precedent to define statutory terms and phrases suggests how textualists may be influenced by past precedents that did not apply a strictly textualist approach. In *Clark*, for example, Justice Scalia announced as binding a decision from which he had dissented on textualist grounds. As discussed below, statutory precedents may thus exert

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holding from dicta); David Klein & Neal Devins, *Dicta, Schmicta: Theory Versus Practice in Lower Court Decision Making*, 54 WM. & MARY L. REV. 2021, 2024-27 (2013).

[162] That could lead a judge to be more thoughtful about the precedent(s) that she establishes. But whether or not precedent has that constraining impact, the new precedent will shape the future course of the law. For discussions of the forward-looking nature of precedent, see Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 572-73, 589 (1987) ("the conscientious decisionmaker" must consider how "future conscientious decisionmakers will treat" a precedent); *see* Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEXAS L. REV. 1, 11-12 (1994); Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 2 (2012).

[163] Bostock, 140 S. Ct. 1731, 1778 (2020) (Alito, J., dissenting) ("The Court's brusque refusal to consider the consequences of its reasoning is irresponsible.").

[164] Stare decisis is said to have its most important bite when it constrains judges who view the prior decision as incorrect. *See* Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 4 (1989); Schauer, *Precedent*, *supra* note 162, at 575.

[165] *See* Nassar, 570 U.S. 338, 362-63 (2013) (Kennedy, J.); Gross, 557 U.S. 167, 180 (2009) (Thomas, J.) (holding the lower courts should have required the plaintiff to prove but-for causation).

[166] For an article that did anticipate this application of *Gross* and *Nassar*, see Katie R. Eyer, *Statutory Originalism and LGBT Rights*, 54 WAKE FOREST L. REV. 63, 78-79 & n.65 (2019); *cf.* Katie Eyer, *Disentangling Textualism and Originalism*, 13 CONLAWNOW 115, 130 (2022) (arguing that, absent consistency across cases such as *Gross*, *Nassar*, and *Bostock*, textualism cannot maintain a reputation for "neutrality and…restrain[t]").

a substantially greater influence, to the extent that those precedents engage with the statutory language.[167]

II. TEXTUALISTS' USE OF OTHER TYPES OF STATUTORY PRECEDENT

Statutory precedent, it turns out, is an important component of the textualist inquiry. At the first stage of the analysis, textualists often rely on Supreme Court precedent in determining the plain meaning of a statutory provision. But that version of statutory precedent—case law to define the meaning of terms and phrases—is only one type. This Article also identifies two other categories. The second category includes the holdings of specific past cases (whether a statute applies or does not apply to a given factual scenario) as well as statutory implementation tests. The third category encompasses a judge's effort to ensure consistency ("fit") between the holding in the present case and the larger body of precedents in a given area.

This Article argues that textualists may properly rely on these latter two types of statutory precedent at the second stage of the interpretive inquiry—when the interpreter has determined that a federal statute lacks a plain meaning.[168] Just as a textualist may look to statutory purpose and substantive canons, textualists may be influenced by the Court's holdings in prior cases. And a textualist may seek to ensure that a new holding fits more neatly within the broader legal framework.[169]

There are important implications of breaking down the analysis in this respect. First, textualists properly rely on the second and third types of precedent only if a statute lacks a plain meaning. Conversely, if a textualist concludes at the first stage that a statute has a plain meaning, a textualist will naturally be skeptical of prior holdings and implementation tests that seem at odds with that meaning. Notably, as discussed below, that does not mean that a textualist will call for a reversal of such precedents, just that they warrant more scrutiny. Second, and crucially, this Article's typology of precedent helps illuminate that the influence of a past precedent will depend in large part on the way in which the prior opinion was written. If a past precedent has defined a statutory term or phrase—thus creating the first category of statutory precedent—it will exert considerable influence on future textualist opinions. This analysis has important lessons for understanding the precedential strength of one of the most-discussed cases in the interpretive literature: *United Steelworkers v. Weber*.[170]

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[167] *See* Part II(C).

[168] To be sure, there will be disagreements about when a statute has a "plain meaning"—in part because there are debates among textualists as to what evidence goes into the first stage of the statutory analysis. *See supra* note 38. For purposes of this Article's typology, it is enough that textualists do sometimes find a statute to have *and* not to have a plain meaning, as illustrated by the cases discussed in Parts I(A) and II(A).

[169] I do not claim, as a normative matter, that a textualist must always rely on precedent at the second stage. At times, there may be no case on point. I argue that reliance on the second and third categories is permissible, when a textualist concludes that there is no plain meaning.

[170] 443 U.S. 193 (1979).

A. The Use of Precedent When There is No Plain Meaning

When a statute lacks a plain meaning, textualist jurists have proven quite open to considering a range of materials. For example, in *Robinson v. Shell Oil Company* (1997), the Court examined whether the term "employee" in Title VII could encompass former employees, so that they could bring retaliation claims.[171] Writing for the Court, Justice Thomas concluded first that the statute contained no "plain and unambiguous meaning."[172] Accordingly, the Court turned to purpose, concluding that the term "employees" included former employees, in large part because that was more consistent with the "primary purpose of antiretaliation provisions: Maintaining unfettered access to statutory remedial mechanisms."[173] In *United States v. Santos* (2008), Justice Scalia's opinion first found that the federal money-laundering statute was ambiguous as to whether the term "proceeds" referred to "receipts" or "profits."[174] Given the lack of a plain meaning, the Court applied a substantive canon—the rule of lenity—in favor of the defendant.[175]

Likewise, when a statute lacks a plain meaning, a textualist jurist may look to past judicial holdings and statutory implementation tests. *Salman v. United States* (2016)[176] offers an illustration. Maher Kara was an investment banker who passed along confidential information to his older brother, who then shared the information with Bassam Salman.[177] The issue in *Salman* was whether a tippee (Salman) could be held liable for insider trading, when the original tipper (Maher Kara) did not get any *monetary* benefit from sharing the information.[178]

Interestingly, in challenging his conviction, Salman argued that the "plain language" of the Securities and Exchange Act did not prohibit insider trading at all, much less impose liability on tippees[179]—an argument that, as the government pointed out, would "upend insider-trading law."[180] But the Court did not accept Salman's textual attack on insider trading. Instead, Justice Alito's opinion for a unanimous Court led off by acknowledging that

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[171] 519 U.S. 337, 339 (1997).
[172] *Id.* at 340, 345.
[173] *Id.* at 345-46.
[174] *See* 553 U.S. 507, 509, 511-14 (2008).
[175] *Id.* at 514, 524 ("Under a long line of our decisions, the tie must go to the defendant."). Ben Eidelson and Matthew Stephenson have recently argued that textualists should abandon substantive canons. *See* Eidelson & Stephenson, supra note 18, at 3-5. Their argument seems to focus on what I call the first stage of the statutory analysis—the plain meaning stage. On that understanding, their argument is not inconsistent with the discussion here.
[176] 137 S. Ct. 420 (2016) (Alito, J.).
[177] *See id.* at 424 (Maher sought to "appease" his brother, "who pestered him incessantly" for the information).
[178] *See id.* at 425.
[179] Brief for Petitioner at 20-22, Salman v. United States, 137 S. Ct. 420 (2016) (No. 15-628) ("If the Court were inclined to reconsider its prior cases, it could readily hold, based on the plain language of the statute, that §10(b) does not prohibit insider trading at all").
[180] Brief for the United States at 12, Salman v. United States, 137 S. Ct. 420 (2016) (No. 15-628) (urging that the prohibition does "not reflect judge-made law unmoored from the text").

the Securities and Exchange Act, together with Rule 10b-5, "prohibit undisclosed trading on inside corporate information by individuals who are under a duty" not to "secretly us[e] such information for their personal advantage."[181]

But neither the statutory text nor the regulation resolved the specific issue of tippee liability. For that, the Court turned to precedent.[182] A 1983 decision, *Dirks v. SEC*, offered a test for tippee liability: "whether the insider personally will benefit, directly or indirectly, from his disclosure."[183] One example, the *Dirks* Court advised, would be "when an insider makes a gift of confidential information to a trading relative or friend," given that such a tip was similar to "trading by the insider himself followed by a gift of the profits to the recipient."[184] In *Salman*, Justice Alito asserted that the test in *Dirks*, and that precedent's discussion of gift giving, "resolve[d] [the] case" before the Court.[185] Because the tipper Maher presumptively benefitted from the "gift" of information to his brother, the tippee Salman could be held liable for insider trading.[186]

Just as a textualist may take account of past holdings and implementation tests, a textualist may seek to ensure consistency ("fit") with the surrounding statutory precedents, when dealing with a provision that lacks a plain meaning. Notably, some scholars have argued that there was no plain meaning to guide the Supreme Court in *Bostock*.[187] On that view, the statutory prohibition on "discrimination…because of such individual's… sex" did *not* clearly instruct the Court on how to view the disparate treatment of a gay, lesbian, or transgender employee.

For one who takes that position, it would have been entirely appropriate for an interpreter, including a textualist, to rely on the array of past cases involving Title VII. In *Bostock*, the Court pointed to several Title VII precedents.[188] For example, in *Phillips v. Martin Marietta Corp.* (1971), the Court held that an employer engaged in sex discrimination, when it was willing to hire men, but not women, with young children.[189] In *Los Angeles Department of Water and Power v. Manhart* (1978), the Court likewise found sex discrimination, when an employer required female employees to pay

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[181] Salman, 137 S. Ct. at 423; *see* 15 U.S.C. § 78j(b) (prohibiting "any manipulative or deceptive device" "in connection with the purchase or sale of any security" in violation of SEC rules); 17 C.F.R. § 240.10b–5(a),(b).

[182] *See* Salman, 137 S. Ct. at 423, 237 (2016) (relying on Dirks v. SEC, 463 U.S. 646 (1983)).

[183] 463 U.S. 646, 662 (1983) (Powell, J.).

[184] *Id.* at 664.

[185] Salman, 137 S. Ct. at 427-28.

[186] *See id.* at 429.

[187] *See* Anuj C. Desai, *Text Is Not Enough*, 93 U. COLO. L. REV. 1, 2-3 (2022); Cary Franklin, *Living Textualism*, 2020 SUP. CT. REV. 119, 139-40, 151 (2021) (there was no single "ordinary meaning" in *Bostock*).

[188] *See* Bostock, 140 S. Ct. 1731, 1738-39, 1743-44 (2020).

[189] *See* 400 U.S. 542, 544 (1971). The Court, however, permitted the employer to show that hiring only men with young children was a "bona fide occupational qualification." *See id.*; *see also* Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1356-57 (2012) ("what the Court gave [in *Phillips*], it then took away").

more into a pension fund than male employees.[190] As the *Bostock* Court observed, in those prior cases, the employers had tried to label the distinction at issue as something other than sex discrimination. In *Phillips*, the employer argued that it was making a distinction based on "motherhood," not sex.[191] In *Manhart*, the employer asserted that its pension policy was motivated not by animosity toward women, just the simple fact that women tend to live longer than men.[192] Likewise, in *Bostock*, the employers argued that they were making distinctions on the basis of sexual orientation or gender identity, not sex. The *Bostock* Court reasoned: "[J]ust as labels and additional intentions or motivations didn't make a difference in *Manhart* or *Phillips*, they cannot make a difference here."[193]

The *Bostock* Court could have further relied on *Price Waterhouse v. Hopkins* (1989), which established that Title VII bars sex stereotyping; in that case, an accounting firm denied a promotion to a woman who was deemed overly "aggressive."[194] Along the same lines, scholars have argued, when an employer terminates (or otherwise penalizes) a gay, lesbian, or transgender employee, the employer is likely doing so on the ground that the employee is not conforming to traditional gender roles.[195]

My own view, as I have argued in past work, is that *Bostock* correctly held that there was a plain meaning in that case—that terminating a male employee who is romantically attracted to men, or dismissing a female employee after she announces her transition from male to female is "discrimination…because of such individual's…sex."[196] But if the *Bostock* Court had found no plain meaning, it would have been entirely appropriate for the Court to rely on this precedential landscape. Just as a textualist may consider statutory purpose and substantive canons to make sense of an unclear provision, a textualist may look to precedent—and seek to ensure that the decision in the present case is more consistent with the overall body of law in a particular area. Such reliance does not, as some have suggested, make an opinion "atextual."[197] Instead, the textual interpreter turns to the second and third categories of precedent when the provision lacks a plain meaning.

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[190] 435 U.S. 702, 704 (1978).

[191] Bostock, 140 S. Ct. at 1744. Notably, the lower court in *Phillips* accepted that argument. *See* Phillips v. Martin Marietta Corp., 411 F.2d 1, 4 (5th Cir. 1969) (rejecting the sex discrimination claim, given that "[t]he discrimination was based on a two-pronged qualification, i.e., a woman with pre-school age children").

[192] Bostock, 140 S. Ct. at 1744.

[193] *Id.*

[194] 490 U.S. 228, 250-51 (1989) (Brennan, J.) (plurality opinion).

[195] *See* William N. Eskridge, Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 YALE L.J. 322, 362, 370-80 (2017); Andrew Koppelman, Bostock, *LGBT Discrimination, and the Subtractive Moves*, 105 MINN. L. REV. HEADNOTES 1, 9-11 (2020).

[196] *See* Grove, *Which Textualism?*, *supra* note 36, at 266.

[197] *See* sources cited *supra* note 8.

B. What If There Is a Plain Meaning?

But what if a textualist decides that there *is* a plain meaning? More specifically, what if a textualist determines after the first stage of the analysis that a statute has a plain meaning that is difficult to reconcile with the second and third categories of precedent (past holdings and implementation tests, or the broader array of prior decisions)? I believe it would be challenging on textualist grounds to give super-strong stare decisis effect to such statutory precedents.

Consider the primary argument that the Supreme Court has offered in favor of super-strong stare decisis: Congress can override a judicial decision interpreting a federal statute. So, the argument goes, when Congress fails to overturn a statutory precedent, it has acquiesced in the Supreme Court's earlier decision.[198]

Jurists and scholars of all interpretive stripes have raised important objections to this acquiescence argument—and more generally, to granting statutory precedents super-strong stare decisis effect.[199] For example, William Eskridge has forcefully argued that the acquiescence argument presumes that congressional "inaction" signals "approval"; yet we have no idea why a subsequent Congress did or did not enact a law.[200] Anita Krishnakumar has thoughtfully asserted that Congress may not be motivated to revise some statutory implementation tests, so the Supreme Court may need to do so.[201]

But for a textualist, the central problem with the acquiescence theory is that it relies on assumptions about the actions (or inactions) by the *present-day* Congress. The actions (or inactions) of subsequent legislatures tell us very little about the meaning of a statute enacted by an earlier Congress.[202]

That does not mean a textualist must ignore past holdings. As Caleb Nelson has recounted in impressive detail, historically, when a text-focused interpreter found fault with a prior statutory decision, the interpreter would seek to overturn the decision, unless there were reasons to preserve it, such as reliance interests.[203] Any statutory decision may create important reliance interests—among interested parties, government officials, or the general public, and that may be enough for a textualist jurist to conclude that the

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[198] *E.g.*, Johnson v. Transp. Agency, 480 U.S. 616, 620 (1987) (Brennan, J.) ("Congress has not amended the statute to reject our construction,…and we therefore may assume that our interpretation was correct."); *cf.* Neal v. United States, 516 U.S. 284, 295 (1996) (Kennedy, J.) ("One reason that we give great weight to [statutory] stare decisis…is that 'Congress is free to change this Court's interpretation of its legislation.'" (quoting Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977)).

[199] *See supra* note 14 (collecting sources).

[200] *See* Eskridge, *Overruling*, *supra* note 13, at 1364, 1409-14 (describing the Court's reliance on acquiescence as "a fallacious argument"); *see also* William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 94-95, 98-99 (1988) ("legislative inaction rarely tells us much about relevant legislative intent").

[201] *See* Krishnakumar, *supra* note 1, at 219.

[202] *See* Nelson, *supra* note 39, at 367 ("[T]he typical textualist judge seeks to unearth the statutes' *original* meanings").

[203] *See* Nelson, *Stare Decisis*, *supra* note 1, at 4-5, 21, 8-45.

precedent should be retained.[204] Nevertheless, when a textualist determines that past holdings or implementation tests conflict with the plain meaning of the law, the textualist should at least look skeptically at these categories of statutory precedent.

Is this cause for concern? That normative question is difficult to answer in the abstract, given that for most observers, the value of stare decisis likely depends on the specific statutory holding(s) at issue. But I do want to address one common concern: Because textualism has long been associated with the conservative legal movement,[205] many observers assume that textualism could lead to a conservative revolution.[206] I argue, however, that textualist skepticism toward past decisions does not have a clear ideological valence. Indeed, textualism may offer opportunities to question statutory holdings and implementation tests that have long been criticized by progressives.

A few recent examples illustrate this point. In the wake of *Bostock*, Katie Eyer has argued that the but-for causation test offers a way to upend a good deal of Title VII case law that tends to undermine employment discrimination claims.[207] Deborah Widiss builds on *Bostock*'s textual analysis to contend that the longstanding *McDonnell Douglas* framework for employment discrimination claims should be dismantled.[208] Along similar lines, scholars have argued that the limitations on civil rights claims under 42 U.S.C. § 1983, particularly the official immunity doctrines that shield government officials from personal liability, are difficult to reconcile with the text of that statute.[209]

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[204] For valuable scholarship exploring which reliance interests should count for stare decisis purposes, see Randy J. Kozel, *Precedent and Reliance*, 62 EMORY L.J. 1459 (2013); Nina Varsava, *Precedent, Reliance, and* Dobbs, 136 HARV. L. REV. (forthcoming 2023). A full exploration of reliance is beyond the scope of this Article.

[205] *See* NEAL DEVINS & LAWRENCE BAUM, THE COMPANY THEY KEEP 117 (2019); STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT 145 (2008).

[206] *See* Neil H. Buchanan & Michael C. Dorf, *A Tale of Two Formalisms: How Law and Economics Mirrors Originalism and Textualism*, 106 CORNELL L. REV. 591, 640 (2021) (statutory textualism and constitutional originalism are "a rhetorical smokescreen for extremely Conservative results"); William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 77 (1994); *see also* Lemos, *supra* note 3, at 851 ("textualism is widely regarded as a politically conservative methodology"); Alexander Volokh, *Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else*, 83 N.Y.U. L. REV. 769, 771–75 (2008) (recognizing, but questioning, the "conventional wisdom" that "[t]extualism is a 'conservative' method").

[207] *See* Eyer, *supra* note 140, at 1624-27, 1657 n.4, 1661 (advocating a textual approach to Title VII to challenge "pathologies" that "currently plague" anti-discrimination law).

[208] *See* McDonnell Douglas v. Green, 411 U.S. 792, 802-03 (1973) (establishing a burden-shifting framework for discrimination claims that rely on circumstantial evidence); Deborah A. Widiss, *Proving Discrimination by the Text*, 106 MINN. L. REV. 353, 355-58 (2021) (*McDonnell Douglas* is "deeply in tension with" the statutory language).

[209] *See* Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 101 CALIF. L. REV. (forthcoming 2023) (arguing "no qualified immunity doctrine at all should apply in Section 1983 actions, if courts stay true to the text adopted by the enacting Congress") (manuscript at 107, 112-14, 185); *see also* William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 77-78 (2018) (arguing that qualified immunity under Section 1983 is "far

My goal here is not to weigh in on whether these scholars are correct about the plain meaning of Title VII or Section 1983. Instead, I seek to point out that any attack on this jurisprudence confronts a heavy burden of stare decisis. The implementation test in *McDonnell Douglas* is fifty years old and has given birth to a web of subsidiary precedent.[210] Likewise, the Supreme Court's qualified immunity jurisprudence dates back several decades.[211] Revisiting these precedents would seem to be a tall order, particularly to the extent that the Supreme Court accords super-strong stare decisis effect to its statutory holdings. But such reconsideration seems more plausible on textualist assumptions—if, as these scholars argue, these holdings and implementation tests are contrary to the plain meaning of the law.[212]

C. The Importance of Opinion Writing

One of the main goals of this Article is to distinguish among types of statutory precedent. It turns out that, in seeking the plain meaning of a federal statutory provision, textualists often give significant weight to precedents that define the meaning of terms or phrases. Textualists tend to be moved by other precedents, such as past holdings and implementation tests, when a statute appears to have no plain meaning. This Article's typology not only gives us a new way of understanding statutory precedent generally but also underscores the importance of opinion writing. The Justices can establish very different—and differently influential—precedents, depending on the way that they craft the opinion. *United Steelworkers v. Weber* (1979) provides a powerful example.

1. Weber *and* Johnson *(as Written)*

Weber involved a challenge to a voluntary affirmative action plan, which provided that around half of those selected for a training program should be persons of color.[213] After failing to qualify for the program, Brian

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removed from ordinary principles of legal interpretation"); Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 70 (1989). For a small sample of the (many) other criticisms of qualified immunity, see Katherine Mims Crocker, *Qualified Immunity and Constitutional Structure*, 117 MICH. L. REV. 1405 (2019); Alexander Reinert, Joanna C. Schwartz, & James E. Pfander, *New Federalism and Civil Rights Enforcement*, 116 NW. U. L. REV. 737, 752-54 (2021); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018).

[210] Eyer and Widiss recognize that stare decisis presents an obstacle. *See* Eyer, *supra* note 140, at 1683-85, 1694-95; Widiss, *supra* note 208, at 410-13 ("Calling for the Supreme Court to consider abandoning…'the most important case' in employment discrimination law—as well as a significant number of subsidiary precedents—is no small matter.") (quoting SANDRA F. SPERINO, *MCDONNELL DOUGLAS*: THE MOST IMPORTANT CASE IN EMPLOYMENT DISCRIMINATION LAW (2020)).

[211] *See* Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1855 (2018) (arguing that the attacks on qualified immunity face a heavy burden of stare decisis).

[212] *Cf.* Eyer, *supra* note 140, at 1685 ("the time may have come for progressives to cut loose of their long-standing opposition to textualism"); Widiss, *supra* note 208, at 358 -59 ("A fair reading of a progressive statute will often…advance progressive objectives.").

[213] *See* Weber, 443 U.S. 193, 197-99 (1979).

Weber, a white worker, brought suit under Title VII, alleging that the affirmative action plan constituted "discrimin[ation]…because of…race."[214]

Writing for the Court, Justice Brennan found that the voluntary affirmative action plan did not violate Title VII.[215] Justice Brennan's opinion made little effort to parse the terms of the statute. Instead, as Philip Frickey would later observe, the Court "essentially conceded that Title VII's plain language supported Weber."[216] But Justice Brennan insisted that Weber's "reliance upon a literal construction of" Title VII was "misplaced."[217] Turning to the Court's decision in *Church of the Holy Trinity v. United States* (1892), Justice Brennan announced that "[i]t is a 'familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers.'"[218] The Court then looked to the legislative history and historical context of Title VII, which made "clear that an interpretation…that forbade all race-conscious affirmative action would 'bring about an end completely at variance with the purpose of the statute' and must be rejected."[219]

There was an extremely critical reaction to *Weber*, particularly among conservative commentators.[220] But even more progressive observers found the decision "difficult to justify," given that Justice Brennan had suggested that "the 'spirit of the statute' may trump seemingly plain statutory text and legislative intent."[221] As Frickey put it, "In my legislation course, I tell my

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[214] *Id.* at 199, 201.

[215] *See id.* at 197, 208-09.

[216] Frickey, *supra* note 121, at 246.

[217] Weber, 443 U.S. at 201.

[218] *Id.* at 201 (quoting Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892)). *Holy Trinity* involved an 1885 statute that prohibited "any person" from entering a "contract or agreement" to bring "any foreigner…into the United States…to perform labor or service of any kind." Act of Feb. 26, 1885, ch. 164, § 1, 23 Stat. 332, 332 (repealed 1952). The question in the case was whether the law prohibited the Holy Trinity Church from contracting with a pastor from England. *See Holy Trinity*, 143 U.S. at 458. Although the Court acknowledged that the statutory language was "broad enough to reach" the pastor, it found that such an interpretation would violate the law's "spirit." *Id.* at 459, 461-63, 472.

[219] *Id.* at 201-02 (1979) (quoting United States v. Public Utilities Comm'n, 345 U.S. 295, 315 (1953)); *see id.* at 202-04 (examining Title VII's legislative history). Justice Brennan did later point to one statutory provision—and its legislative history—as support for the view that Title VII did not prohibit voluntary affirmative action programs. *See id.* at 204-07 (discussing § 703(j), which provides that "'[n]othing contained in this title shall be interpreted to require any employer…to grant preferential treatment," and does not say Title VII would not "*permit* racially preferential integration efforts"). As scholars have observed, that provision seems directed at courts and government agencies—prohibiting them from requiring affirmative action programs—and does not appear to comment on voluntary programs. *See* Bernard D. Meltzer, *The* Weber *Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment*, 47 U. CHI. L. REV. 423, 445-46 (1980). In any event, the Court in *Weber* clearly did not view this text as central to the analysis.

[220] *See, e.g.*, Terry EASTLAND & WILLIAM J. BENNETT, COUNTING BY RACE 197-210 (1979) (discussing and criticizing *Weber*); *see also* NANCY MACLEAN, FREEDOM IS NOT ENOUGH 250-51, 255, 304 (2008) (discussing conservative opposition, and noting that the Reagan Justice Department "pledged to find a case…to overthrow" *Weber*).

[221] Frickey, *supra* note 121, at 247; *see* Part II(C)(2).

students that *Holy Trinity Church* is the case you always cite when the statutory text is hopelessly against you," akin to "the 'hail Mary' pass in football."[222]

Eight years after *Weber*, Justice Scalia called for the overruling of the case, largely on textualist grounds.[223] *Johnson v. Transportation Agency* (1987) involved a challenge to a gender-based affirmative action program.[224] Paul Johnson alleged that he was passed over for a promotion in favor of a female employee, in violation of Title VII's prohibition on "discrimination …because of…sex."[225]

Writing for the Court, Justice Brennan upheld the validity of the affirmative action plan and—most relevant for present purposes—reaffirmed *Weber*.[226] The Court emphasized that "Congress has not amended the statute to reject our construction [in *Weber*], nor have any such amendments even been proposed, and we therefore may assume that our interpretation was correct."[227] Although Justice Brennan acknowledged that congressional silence is not "acquiescence under all circumstances," he stressed that such an assumption made sense in this context: "*Weber*…was a widely publicized decision that addressed a prominent issue of public debate. Legislative inattention thus is not a plausible explanation for congressional inaction."[228]

Dissenting, Justice Scalia insisted that *Weber* was wrong and "should be overruled."[229] "The language of [Title VII] is unambiguous: it is an unlawful employment practice '…to discriminate against any individual, …because of such individual's race.'"[230] Yet "*Weber* disregarded the text of the statute, invoking instead its 'spirit.'"[231] Justice Scalia further argued that any assumption that Congress had ratified *Weber* or any other decision by failing to overturn it "should be put to rest."[232] That position was based on what Justice Scalia described as "the patently false premise that the correctness of statutory construction is to be measured by what the current Congress desires, rather than by what the law as enacted meant."[233] Moreover, given the constitutional and other roadblocks to legislation, it was

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[222] Frickey, *supra* note 121, at 247.
[223] *See* Johnson v. Transp. Agency, 480 U.S. 616, 657-58, 670-71 (1987) (Scalia, J., dissenting); *see* Frickey, *supra* note 121, at 255 (noting Scalia's textual attack on *Weber*).
[224] 480 U.S. 616, 619-22 (1987).
[225] 42 U.S.C. § 2000e-2(a)(1); *see* Johnson, 480 U.S. at 623-25.
[226] *See* Johnson, 480 U.S. at 619-20, 627, 629 n.7, 641-42. Notably, as Justice O'Connor observed in her concurrence, no party asked the Court to overrule *Weber*. *See id.* at 648 (O'Connor, J., concurring).
[227] Johnson, 480 U.S. 616, 629 n.7.
[228] *Id.* at 629 n.7. William Eskridge has argued, by contrast, that there was insufficient political will in Congress to overrule *Weber*. *See* Eskridge, *Overruling*, *supra* note 13, at 1410-11 (asserting that powerful interests supported the decision, while there was only diffuse opposition).
[229] Johnson, 480 U.S. at 673 (Scalia, J., dissenting).
[230] *Id.* at 670.
[231] *Id*. (noting that *Weber* relied on and quoted *Holy Trinity*).
[232] *Id.* at 671.
[233] *Id.*

"impossible to assert with any degree of assurance" why Congress failed to enact legislation addressing *Weber*.[234] "[V]indication by congressional inaction," Justice Scalia insisted, "is a canard."[235]

2. Changing the Category of Statutory Precedent

Justice Scalia was not the only one unhappy with the Court's analysis in *Weber*. Commentators much more sympathetic to affirmative action have described the opinion as "a failure."[236] Accordingly, scholars have offered ways to rewrite it. This Article's typology underscores that such a different approach would not only make for better craftsmanship but should also affect the precedential impact of the decision.

Notably, as written, *Weber* established the second category of statutory precedent, holding that Title VII did not bar voluntary affirmative action programs. The Court in *Weber* did not attempt to define the meaning of any statutory term or phrase. Instead, as Frickey has observed, Justice Brennan's opinion "essentially conceded that Title VII's plain language supported Weber."[237]

Yet scholars have contended that the *Weber* Court did not need to punt quite so quickly. Instead, the Court might have interpreted the term "discriminate" in a way that did not clearly encompass voluntary affirmative action programs. As Eskridge, Frickey, and Ronald Dworkin have (separately) argued, the term "discriminate" contains—and contained in the 1960s—different dictionary definitions.[238] Although "discriminate" may refer to any differential treatment (as Brian Weber argued), the term may more narrowly refer to "invidious" distinctions— "classifications that reflect a desire to put one race at a disadvantage against another" or that are "arbitrary, because they serve no legitimate purpose."[239] Under the latter view of "discrimination," these scholars argue, efforts to expand opportunities to historically disadvantaged groups would not be "discrimination."[240]

In this alternative formulation, *Weber* would become a very different statutory precedent. *Weber* would define the term "discriminate." In the

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[234] *Id.* at 671-72 (arguing that a "congressional failure to act" could mean "(1) approval of the status quo, …(2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice").
[235] *Id.* at 672.
[236] Philip P. Frickey, *John Minor Wisdom Lecture: Wisdom on* Weber, 74 TUL. L. REV. 1169, 1177 (2000).
[237] Frickey, *supra* note 121, at 246.
[238] *See* Frickey, *Wisdom*, *supra* note 236, at 1180 (relying on a 1968 dictionary); *accord* RONALD DWORKIN, A MATTER OF PRINCIPLE 318 (1985) ("'discriminate against someone because of race'…may be used…so that *any* racial classification whatsoever is included" or "in an evaluative way, to mark off racial classifications that are invidious"); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1489 (1987) (urging that "discriminate" could apply to "any and every differential treatment of employees on racial grounds," but could also "penalize only discrimination which is invidious").
[239] DWORKIN, *supra* note 238, at 318; Eskridge, *Dynamic*, *supra* note 238, at 1489.
[240] *See supra* note 238.

typology of this Article, *Weber* would fall into the first category of statutory precedent. As discussed in Part I, like other interpreters, textualists give significant weight to precedents that define the meaning of statutory terms and phrases. That is true, even if the prior precedent defining the relevant term or phrase was not itself a purely textualist opinion (as illustrated by *Clark* and *Zadvydas*). Indeed, under this alternative formulation, *Weber* would look a good deal like *Zadvydas*. The Court would have found that the relevant statutory term (discrimination) was ambiguous, and then resolved the ambiguity. Accordingly, *Weber* would be on much firmer ground as a precedent among textualists and non-textualists alike, if the Court had engaged with the text and endeavored to define the relevant statutory terms.

I do not endeavor to say whether that would have been better as a normative matter. That likely depends both on one's view of *Weber* itself and on the potential implications of a decision narrowing the definition of "discrimination." As Eyer and others have thoughtfully observed, the broad definition of discrimination in *Bostock* as a difference in treatment, and the but-for causation test, seem to be in serious tension with the holding in *Weber*.[241] Yet the *Bostock* framework may bode well for employment discrimination plaintiffs going forward.[242] My goal here is to show that, once we grasp that there are different categories of statutory precedent, we can better understand the long-term impact of any given case.

III. IMPLICATIONS FOR INTERPRETIVE DEBATES

This Article aims to show that we can better understand statutory precedent, and its relationship to textualism, once we break down both the categories of precedent and the stages of analysis. Textualists often turn to one type of precedent—case law defining the meaning of terms and phrases—in determining the plain meaning of a law (a practice that, I argue, can be defended on textualist assumptions). Textualists may properly be guided by other types of precedent, such as past holdings and implementation tests, when they determine that a statute lacks a plain meaning. This Article not only clarifies the relationship between textualism and statutory precedent but also has implications for broader debates about "ordinary meaning" and the nature of the interpretive enterprise.

A. The "Ordinary Meaning" of a Federal Statute

There is a growing debate over whether the "ordinary meaning" sought by textualists refers to lawyerly meaning or lay meaning.[243] Many scholars seem to assume that textualists generally look for lay meaning—that is, how a person without any legal training would understand statutory terms

[241] *See* Eyer, *supra* note 140, at 1685-88 (acknowledging the "obvious tension"); Jeannie Suk Gersen, *Could the Supreme Court's Landmark L.G.B.T-Rights Decision Help Lead to the Dismantling of Affirmative Action?*, THE NEW YORKER (June 27, 2020).
[242] *See* Part II(B).
[243] *See supra* note 27 (collecting sources).

and phrases. This assumption has driven a good deal of recent theoretical and empirical literature on interpretive theory. William Eskridge, Victoria Nourse, and Anita Krishnakumar have, for example, criticized textualists' use of legal terms of art, canons, and the common law to make sense of federal statutes, on the ground that such materials are largely inaccessible to the general public.[244] Meanwhile, empirical scholars have suggested that corpus linguistics methods[245] or surveys of the general public can help determine the "ordinary meaning" of terms and phrases in federal statutes.[246]

At the outset, I acknowledge that textualists themselves are partly responsible for the confusion. Although textualist opinions regularly reference "ordinary meaning,"[247] there is little textualist scholarship exploring the concept.[248] Moreover, textualists at times seem to endorse the idea that they are looking for a lay person's perspective—as suggested by their use of what Eskridge and Nourse have dubbed "homey examples."[249] For example, dissenting in *Smith v. United States*,[250] Justice Scalia used a homey reference to make sense of a statute imposing sentencing enhancements for the "use [of]…a firearm" "during and in relation to…[a] drug trafficking crime."[251] The Court held that a defendant "used" a firearm in violation of the statute when he offered to trade an automatic MAC–10 for two ounces of cocaine.[252] But Justice Scalia insisted that the Court misunderstood the ordinary meaning of "use":

> To use an instrumentality ordinarily means to use it for its intended purpose. When someone asks, "Do you use a cane?," he is not inquiring whether you have your grandfather's silver-

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[244] *See* Eskridge & Nourse, *supra* note 8, at 1727-28; Krishnakumar, *Common Law*, *supra* note 27, at 663-63 ("The Court's emphasis…on how 'most people' or one's 'friends' talk in everyday contexts is in notable tension with its reliance…on" the common law).

[245] *See* Lee & Mouritsen, *supra* note 28, at 813-14, 818. Corpus linguistics involves the use of datasets to study linguistic phenomena, including searching databases to determine the frequency with which a word appears alongside other words in a given time period. *See id.* at 792, 828–30 (describing and advocating the method).

[246] *See, e.g.*, Macleod, *supra* note 27, at 4-6, 8–10 (using surveys to test the results in *Bostock*); *see also* Kevin Tobia & John Mikhail, *Two Types of Empirical Textualism*, 86 BROOK. L. REV. 461, 483-85 (2021) (also using surveys to test the results in *Bostock* but cautioning against "any uncritical reliance" on that approach). To be sure, not all recent survey work has the goal of testing the results of specific decisions. For a general survey of empirical work on not only statutory interpretation but also common law concepts, see Kevin Tobia, *Experimental Jurisprudence*, 89 U. CHI. L. REV. 735 (2022).

[247] *E.g.*, BP P.L.C. v. Mayor and City Council of Baltimore, 141 S. Ct. 1532, 1537 (2021) (Gorsuch, J.) (the Court looks for "the ordinary meaning of [statutory] terms at the time of their adoption").

[248] That is why, in a recent essay, I examine the concept of ordinary meaning. *See* Grove, *Testing*, *supra* note 27, at 1082-84. This Article's exploration of textualists' use of statutory precedent offers considerable support for my instincts in that essay—that ordinary meaning, as understood by textualists, can be seen as largely a legal concept.

[249] Eskridge & Nourse, *supra* note 8, at 1728, 1777, 1780–82.

[250] 508 U.S. 223 (1993).

[251] 18 U.S.C. § 924(c)(1); *see* Smith, 508 U.S. at 225–27.

[252] *Smith*, 508 U.S. at 225-26, 228–29, 241. Smith made the offer to an undercover police officer. *See id.*

> handled walking stick on display in the hall; he wants to know whether you walk with a cane. Similarly, to speak of "using a firearm" is to speak of using it for its distinctive purpose, i.e., as a weapon.[253]

As I have argued in past work,[254] Justice Scalia's homey example was entirely unnecessary to the statutory analysis. The surrounding text and structure strongly supported the reading in his dissent. Under the statute, "the sentence to be imposed on the defendant" "var[ied] with the nature of the firearm."[255] The more dangerous the firearm at issue, the higher the sentence; thus, the "use" of a short-barreled rifle came with a minimum ten-year prison term, while the "use" of a machine gun triggered a thirty-year prison term.[256] As Michael Geis asserts, this statutory context "provides strong support for the view" that Congress was focused on not just *any* use of a firearm, but rather on the "use [of] a firearm as a weapon."[257]

To be sure, textualists are not the only members of the Court to use homey examples; it has become something of a sport on the Court generally to offer such examples in statutory analysis.[258] But these references have (understandably) fueled assumptions that textualists and other interpreters seek a lay, rather than a legal, view of statutory meaning.

This Article's exploration of statutory precedent sheds important light on the debate over "ordinary meaning." Despite occasional sloppy rhetoric and the use of homey examples, many textualists—like other interpreters—treat federal statutes as legal documents whose terms and phrases contain a legal meaning. Accordingly, textualists often turn to legal sources, including the Supreme Court's own precedents, to determine the plain meaning of statutory terms and phrases. Thus, the ordinary meaning of "now" in federal legislation may be the time of statutory enactment, rather than the present-day; "costs" may exclude expert witness fees; and "because of" may trigger distinctively legal notions of causation.

As discussed, such reliance on statutory precedent in determining the meaning of terms and phrases is consistent with longstanding textualist theory. Many textualists assert that statutory analysis must be done from the perspective of a reasonable and reasonably well-informed reader, not any actual reader—either in Congress or the general public.[259] Textualists thus often (albeit often implicitly) acknowledge what can be seen as the most basic

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[253] *Id.* at 242, 244–45 (Scalia, J., dissenting).
[254] *See* Grove, *Testing*, *supra* note 27, at 1082-84.
[255] Michael L. Geis, *The Meaning of* Meaning *in the Law*, 73 WASH. U. L.Q. 1125, 1138 (1995).
[256] *See* 18 U.S.C. § 924(c)(1)(B).
[257] Geis, *supra* note 255, at 1137.
[258] *Compare, e.g.*, Lockhart v. United States, 577 U.S. 347, 351-52 (2016) (Sotomayor, J.) (using, to illustrate the rule of the last antecedent, a hypothetical plan for a Yankees' 2016 roster), *with id.* at 362-64 (using, to illustrate the series-qualifier canon, a hypothetical conservation about Star Wars); *see* Eskridge & Nourse, *supra* note 8, at 1728, 1777, 1780–82 (observing that many members of the Court have used homey examples).
[259] *See* Part II(B).

context of a federal statute: that it is a legal document full of legal concepts. On this view, the ordinary meaning of a federal statute is not equivalent to a conversation on the street or an advertisement on television, radio, or social media. The ordinary meaning of a federal statute is full of law.

To be sure, this legalistic vision of federal statutes is contested—a point I explore further in the next section. But, interestingly, this more legalistic vision may *better* accord with the understanding of the general public. A recent empirical study by Kevin Tobia, Brian Slocum, and Victoria Nourse suggests that members of the public understand that the law is a special language.[260] According to the authors, even when a statute uses seemingly ordinary terms and phrases, such as "intent" or "because of," lay people assume that the terms may take on a distinctively legal meaning.[261] For that reason, the authors assert, members of the public are inclined to defer to legal experts on statutory interpretive questions.[262]

B. Legal Analysis at the "Interpretation" Stage

As this Article has described, for textualists, statutory analysis involves two distinct stages. First, interpreters endeavor to determine whether a statute has a plain meaning. Second, if not, they turn to additional tools to make sense of the statute, in the context of the case. Some prominent scholarship splits the inquiry into two stages called "interpretation" and "construction."[263] This Article has important implications for the concept of "interpretation" in statutory analysis.[264]

Many scholars define "interpretation" as largely a search for linguistic meaning, while "construction" is the process of giving legal effect to that meaning.[265] Thus, Larry Solum writes: "Because interpretation aims at the recovery of linguistic meaning, it is guided by linguistic facts—facts about patterns of usage," such as syntax and grammar.[266] On this view, "interpretation is 'value neutral,' or only 'thinly normative.' The correctness

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[260] *See* Tobia, Slocum & Nourse, *supra* note 126, at 7.
[261] *See id.*
[262] *See id.*
[263] *See* sources cited *supra* notes 29-31.
[264] As noted, this terminology has been most common in constitutional debates. *See supra* note 29 and accompany text. Because this Article focuses on statutory analysis, I make no claim about how the arguments here might carry over to the constitutional context. For scholarship questioning the interpretation-construction distinction in that realm, see Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 DUKE L.J. 1213, 1217 (2015); John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 751-53 (2009); John O. McGinnis & Michael B. Rappaport, *The Power of Interpretation: Minimizing the Construction Zone*, 96 NOTRE DAME L. REV. 919, 921-22 (2021). *See also* J. Joel Alicea, *Liberalism and Disagreement in American Constitutional Theory*, 107 VA. L. REV. 1711, 1724 (2021) ("[t]he interpretation/construction distinction is controversial among originalists").
[265] *See* sources cited *supra* note 31.
[266] Solum, *Interpretation-Construction*, *supra* note 31, at 99-100, 104-05; *see* Barnett, *supra* note 31, at 66; Tun-Jen Chiang & Lawrence B. Solum, *The Interpretation-Construction Distinction in Patent Law*, 123 YALE L.J. 530, 548 (2013).

of an interpretation does not depend on our normative theories about what the law should be."[267] Notably, this vision of interpretation accords with the assumption that "ordinary meaning" is an empirical concept—one that depends primarily on lay understandings of terms and phrases. On these assumptions, there is generally a single answer to the question of meaning of a term or phrase—one that should apply to both ordinary conversation and federal legislation.[268]

As Mark Greenberg has argued, the idea that the meaning of a legal text is equivalent to its linguistic meaning is commonplace among interpretive theorists. Indeed, Greenberg refers to this idea as the "Standard Picture."[269] But Greenberg and others have begun to question that standard picture, arguing that "[t]he assumption that legal interpretation should be modeled on the interpretation of ordinary conversation is problematic. Lawmaking has very different goals, presuppositions, and circumstances from ordinary conversation."[270] The lawmaking context is "impersonal" and "less cooperative" than ordinary communication.[271] These differences help explain why legislation does not contain—and we do not expect it to contain—irony or humor. In the impersonal and uncooperative context of legislation, the relevant audience would be less likely to "get the joke."

This Article builds on these critiques of the standard picture. As an initial matter, the image of the interpretive process—as a purely linguistic and empirical exercise—does not seem descriptively accurate. As this Article has shown, to make sense of federal legislation, judges rely on legal sources that do not have evident counterparts in ordinary conversation, such as the text and structure surrounding the operative provision at issue as well as judicial precedent defining the meaning of terms and phrases. Moreover, such statutory precedent may show that seemingly ordinary terms and phrases, such as "costs," "now," or "because of," take on different meanings in legislation than what we might expect in ordinary conversation. Thus, "now" may not mean the present moment but the time of statutory enactment; "costs" may exclude expert fees; and "because of" may signal a specifically

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[267] Solum, *Interpretation-Construction*, *supra* note 31, at 104.

[268] Scholars who endorse this idea do recognize an exception for legal terms of art. But they treat that category as limited. *See* Solum, *Disaggregating*, *supra* note 1, at 285-86; sources cited *supra* note 28.

[269] Mark Greenberg, *The Standard Picture and Its Discontents*, in 1 OXFORD STUDIES IN PHILOSOPHY OF LAW 39, 48-49, 54 (Leslie Green & Brian Leiter eds., 2011).

[270] Mark Greenberg, *Legal Interpretation and Natural Law*, 89 FORDHAM L. REV. 109, 122–23 (2020); *see* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1088-93 (2017); Richard H. Fallon, Jr., *The Statutory Interpretation Muddle*, 114 NW. U. L. REV. 269, 327 (2019); *cf.* Cass R. Sunstein, *There Is Nothing that Interpretation Just Is*, 30 CONST. COMMENT. 193, 212 (2015) ("The meaning of the Constitution must be made rather than found"). Greenberg argues that textualists have endorsed the Standard Picture. *See* Greenberg, *supr*a, at 111-24 (criticizing textualism on this basis). I consider myself a textualist who does not endorse that view.

[271] Mark Greenberg, *Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication*, *in* PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 217, 252 (Andrei Marmor & Scott Soames eds., 2011).

legal notion of but-for causation. Interpreters also apply legal rules—such as the one-meaning rule at issue in *Clark*—that do not have an obvious conversational analogue.

In using these legal sources and legal rules to determine the plain meaning of federal statutes, judges do not simply examine linguistic practices and rules of grammar but also make legal and normative judgments. For example, in using the first category of statutory precedent to help discern the meaning of terms and phrases, judges must make judgments about which precedents count.

Is this practice normatively attractive? Some might worry about allowing judges to make these legal and normative judgments. Indeed, this practice may seem particularly problematic for textualism, a methodology that (according to many of its proponents) is designed to constrain judicial discretion.[272] But I believe that reliance on legal tools, including judicial precedent, is defensible—and, indeed, normatively preferable. The critique overlooks both the ability of interpreters to craft legal rules and guidelines to constrain their interpretive discretion in specific cases, and (relatedly) how the use of statutory precedent to define the meaning of terms and phrases can serve to constrain, rather than to expand, judicial discretion.

First, interpreters, including textualists, can craft legal rules to guide their discretion on issues such as which statutory precedents are relevant. Given textualism's general emphasis on the time of statutory enactment,[273] textualists should focus on two sets of judicial precedent. Textualists should, as an initial matter, draw on cases that were issued before or around the time of the enactment of the relevant statutory provision. Such contemporaneous precedent can help inform the legal meaning of a term or phrase in the relevant era. Thus, *Pierce* and *Saxon* looked to precedents that predated the enactment of the Equal Access to Justice Act and the Federal Arbitration Act to capture the legal meaning of "substantially justified" and "class of workers engaged in foreign or interstate commerce." Textualists also properly rely on precedents that themselves aimed to determine the meaning of terms and phrases at the time of enactment. Thus, the *Bostock* Court looked to *Nassar* and *Gross*, which sought to identify the meaning of "because" and "because of" in the 1960s, when Title VII and the ADEA became law.[274]

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[272] *See supra* note 159 and accompanying text. *See also* William Eskridge, Jr., Brian Slocum, and Kevin Tobia, *Textualism's Defining Moment* (manuscript at 66) (arguing, to the extent textualists make choices about, for example, the relevance of certain text, context, history, or precedent, textualism is less constraining than advertised).

[273] *See* Nelson, *supra* note 39, at 367. Notably, building on prior work, I refer to original *meaning*, *not* to how the public at the time of enactment would have expected a statute to apply. *See* Grove, *Which Textualism?*, *supra* note 36, 303-04 (advocating formalistic textualism, which would instruct judges not to consider certain evidence, such as social context: past public understandings or expectations about how a statute would apply).

[274] *Clark*'s reliance on *Zadvydas* is, in my view, consistent with this principle. *Zadvydas* considered whether "may be detained beyond the removal period" was ambiguous (such that the avoidance canon would apply), not whether the Court should "update" the statute.

Second, and importantly, statutory precedent can constrain judicial discretion. As discussed, the first category of statutory precedent can provide considerable guidance in future cases.[275] Because of statutory precedent, judges have a better understanding of, for example, the legal meaning of "costs" and "discrimination because of sex." Moreover, statutory precedent may lead judges to issue decisions that are contrary to (what we might view as) their ideological priors. For example, while commentators have criticized the recent tendency of a conservative Supreme Court majority to favor arbitration,[276] statutory precedent led a unanimous Court in *Saxon*—in an opinion authored by Justice Thomas—to reject an employer's demand for arbitration. The one-meaning rule in *Clark* may be the most constraining. Justice Scalia relied on *Zadvydas* (a decision from which he himself had dissented) to issue a decision that protected a class of undocumented immigrants from unlimited detention.

To be sure, in crafting such legal rules and guidelines, judges must make legal and normative judgments. It is, after all, a normative decision (albeit one shared by most textualists) that the relevant time period for interpreting a federal statute is the time of enactment.[277] Likewise, judges made a normative judgment to adopt the one-meaning rule. But once interpreters adopt such legal rules and guidelines, they can provide considerable constraint in specific cases.

Moreover, it should be of some comfort to observers that such legal judgments are precisely the kinds of decisions that judges are most equipped to make. Scholars worry about the capacity of judges to engage in historical inquiry—with the concern that they may provide only "law office history."[278] Likewise, scholars, including even some supporters of corpus linguistics, have expressed doubts about the capacity of judges to search electronic databases for past usage of terms or phrases.[279] But establishing and applying

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[275] *See* Part I(B)(3).

[276] *See* Erwin Chemerinsky, *Abandoning the Courts*, 47 TRIAL 50, 51 (2011); Hila Keren, *Divided and Conquered: The Neoliberal Roots and Emotional Consequences of the Arbitration Revolution*, 72 FLA. L. REV. 575, 601-08 (2020).

[277] An interpreter who rejected an emphasis on original meaning would presumably adopt different guidelines. *Cf.* Frederick Schauer, *Unoriginal Textualism*, 90 GEO. WASH. L. REV. 825, 828–29 (2022) (suggesting an "unoriginal" textualist approach to statutory interpretation).

[278] *See* JACK N. RAKOVE, ORIGINAL MEANINGS 11 (1997); Saul Cornell, Heller, *New Originalism, and Law Office History: "Meet the New Boss, Same As the Old Boss"*, 56 UCLA L. REV. 1095, 1098 (2009) (criticizing "law office history" as "results oriented"); Larry D. Kramer, *When Lawyers Do History*, 72 GEO. WASH. L. REV. 387, 389 (2003). For more charitable perspectives, see William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 L. & HIST. REV. 809, 810–811 (2019); Mark Tushnet, *Interdisciplinary Legal Scholarship: The Case of History-in-Law*, 71 CHI.-KENT L. REV. 909, 934-35 (1996).

[279] *See, e.g.*, Stefan Th. Gries & Brian G. Slocum, *Ordinary Meaning and Corpus Linguistics*, 2017 BYU L. REV. 1417, 1423–24, 1440–42, 1470–71 (2017) (favoring corpora but suggesting that judges may need to rely on experts); *see also* Aaron-Andrew P. Bruhl, *Interpreting State Statutes in Federal Court*, 98 NOTRE DAME L. REV. 61, 113-14 (2022) (doubting federal judges' capacity to use corpus linguistics). For other criticisms, see Carissa Byrne Hessick, *Corpus Linguistics and the Criminal Law*, 2017 BYU L. REV. 1503, 1505,

precedential rules is the kind of analysis for which law school and legal practice most clearly prepare judges. Indeed, it makes sense to allocate the statutory interpretive inquiry to *judges*, rather than, say, linguists, historians, or philosophers, to the extent that interpretation is, at bottom, about law.

None of this is to suggest that there is no distinction between interpretation and construction. Thus, I do not endorse the position of Fred Schauer, who has argued that, to the extent law is a "technical language," there really is no difference.[280] I believe there are separate stages of the statutory inquiry—discerning whether a law has a plain meaning, and then figuring out how to resolve a case in the absence of a plain meaning. In my view, both stages involve law, but they involve resort to *different* legal sources, including different categories of precedent.[281] Accordingly, I do not seek to challenge the existence of an interpretation-construction distinction. Instead, I argue that "interpretation" involves some legal and normative judgments, as textualists and other interpreters aim to make sense of terms and phrases "in the language of law."[282]

CONCLUSION

This Article complicates common assumptions about the relationship between textualism and statutory precedent. Once we recognize that there are different types of statutory precedent, we can see that textualists do make important use of such precedent. In identifying the plain meaning of a federal statute, textualists often rely on precedent that defines the meaning of terms and phrases—a practice that, this Article argues, can be defended on textualist principles. Textualists properly rely on past holdings and implementation tests and seek consistency with the general body of law in a given area, when a statutory provision lacks a plain meaning. Conversely, textualists are likely to be more skeptical of such holdings and tests if they conflict with a statute's plain meaning. This Article illuminates not only textualism's relationship with statutory precedent but also the nature of the interpretive enterprise. Many textualists treat statutory provisions as legal documents that should be interpreted according to legal norms and conventions. For these textualists, like many other interpreters, the effort to identify the ordinary meaning of a federal statute is, at bottom, a legal and normative, not simply a linguistic, exercise.

1514–15 (2017); Matthew Jennejohn, Samuel Nelson & D. Carolina Núñez, *Hidden Bias in Empirical Textualism*, 109 GEO. L.J. 767, 770–71 (2021); Tobia, *supra* note 27, at 734.

[280] *See* Frederick Schauer, *Is Law a Technical Language?*, 52 SAN DIEGO L. REV. 501, 503, 513 (2015).

[281] Thus, some legal sources are relevant at the first stage of determining the plain meaning of the law: the text and structure surrounding the operative provision at issue, related statutes, and the first category of statutory precedent (cases identifying the meaning of terms and phrases). Other legal sources are relevant if the interpreter finds no plain meaning, such as purpose, substantive canons, and the second and third categories of precedent (past holdings and implementation tests, and an effort for consistency across an area of law).

[282] Bostock, 140 S. Ct. 1731, 1739 (2020).