What Does "Plain Meaning" Mean These Days?

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The Shifting Status of Legislative History

As one who teaches legal drafting and believes in both the power of words and their ability to convey meaning, I have welcomed the growing scholarly attention to statutes as sources of law and to the text of statutes as the source of their meaning. For many years, lawyers had overrelied on legislative history as a source of statutory meaning. Eventually, as Judge Patricia M. Wald's study of the 1981 United States Supreme Court term concluded, courts had begun to look at legislative history in virtually every case involving statutory construction, and the plain-meaning rule had "effectively been laid to rest."[1]

Recently, however, reliance on legislative history has been questioned more and more. The nature of the questioning has given me pause. For instance, the D.C. Circuit refused to enforce a statute that had been deleted from the United States Code by a scrivener's error.[2] It makes me wonder whether "plain meaning" is not only alive and well, but running amuck.

It causes me to question my own blithe preaching to students about plain language, implying an ability to guard successfully against inadvertent ambiguity. It brings to mind Karl Llewellyn's teaching of long ago that, for every canon of construction that thrusts, there is a companion that parries.[3] I decided to try to discover what "plain meaning" means these days. Here are my

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1. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 195 (1983).

2. Independent Ins. Agents of Am., Inc. v. Clarke, 955 F.2d 731, 739 (D.C. Cir.), *cert. granted*, 113 S. Ct. 810 (1992).

3. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401-06 (1950).

findings — and the drafters' messages that I find beneath the surface of the theories.

I explored these questions:

1. Assuming that meaning necessarily involves context, what is the appropriate context to consider?
2. To what extent should legislative history be part of the context?
3. If the ordinary meaning of the words in a statute differs from their technical meaning — or their meaning as terms of art — which meaning should prevail? To put it another way, whose definition should prevail? The nonlawyer's? The lawyer's? The specialist's?
4. Finally, are there many easy cases (statutes that pose virtually no interpretative problems) and only a few hard ones (those requiring us to have a theory or rules of interpretation), or is every case potentially a hard one?

The Rise of Plain-Meaning Theory

I begin with Justice Scalia's theory, which William N. Eskridge, Jr. calls the "new textualism."[4] Justice Scalia regards legislative history as irrelevant unless the statute's plain meaning is absurd. He first articulated this position in the D.C. Circuit[5] and then for the first time on the Supreme Court in his concurring opinion in *I.N.S. v. Cardoza-Fonseca*,[6] in which he criticized the

4. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623 (1990).
5. *See, e.g.*, Hirschey v. FERC, 777 F.2d 1, 7–8 (D.C. Cir. 1985) (Scalia, J., concurring).
6. I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 452–55 (1987) (Scalia, J., concurring); *see also* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

majority for rehearsing the history of section 208(a) of the Immigration and Nationality Act[7] in concluding that its standard for deporting an alien differs from that of section 243(h).[8]

Justice Scalia expressed his theory of plain meaning more fully in *Green v. Bock Laundry Machine Co.*:

> The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated — a compatibility which, by a benign fiction, we assume Congress always has in mind.[9]

Scalia is not alone in this position. Justice Kennedy has referred scornfully to the Supreme Court's "amble" through legislative history.[10] Similarly, Judge Frank H. Easterbrook, of the Seventh Circuit, has written about judges who "pawed through" it.[11] For Scalia, Kennedy, and Easterbrook, if a government of laws means a government of rules, it is ridiculous to think of a statutory text as merely evidence of what the legislators intended. The plain meaning of a rule or statute comes from its structure, with help, if necessary at all, exclusively from the canons that attend to grammar, punctuation, and logic.[12]

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7. 8 U.S.C. § 1158(a) (1988).

8. *Id.* § 1253(h)(1) (Supp. III 1991).

9. 490 U.S. 504, 528 (1989) (Scalia, J., concurring).

10. Public Citizen v. Department of Justice, 491 U.S. 440, 476 (1989) (Kennedy, J., concurring).

11. Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441, 441 (1990).

12. Eskridge, *supra* note 4, at 663–64.

Scalia, Kennedy, and Easterbrook would likely serve as cheerleaders for professional drafters. These jurists have confidence that if drafters draft skillfully and carefully, they can produce statutes with certain meaning — meaning that can be objectively determined.

Legal-Process Theory

The new textualism pushes to an extreme the traditional legal-process theory, which championed plain meaning unless there was ambiguity or strongly contradictory legislative history. According to this theory, the statute is what matters, not the legislature's intent. Unless we have indications to the contrary, we assume that the statute accurately reflects the legislature's intent.

The legal-process theory of the 1950s reflected the belief that legislation both is the product of reasonable people with reasonable purposes *and* is to be reconstructed in the context of specific cases. This was the thinking of Henry Hart and Albert Sacks,[13] and of Reed Dickerson.[14] For them, legislative history is evidence of the legislature's general intent. It helps resolve ambiguities by identifying the statute's underlying purpose or policy and then reaching the result that most logically follows from it. They believed in a creative, dynamic interpretation in which the interpreter finds the meaning that pre-exists in the text.

Today's revised version of legal-process theory is championed by W. David Slawson, who assures us that we have the ability to write unambiguously and that indeed ambiguity is rare in statutes.[15] He has nothing but scorn for a court that acts as if the law is what the legislature intended and a statute only the best

13. *See generally* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS (tent. ed. 1958).

14. *See generally* REED DICKERSON, LEGISLATIVE DRAFTING (1954). *See also* REED DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING (2d ed. 1986).

15. *See* W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383, 422 (1992).

evidence of intent.[16] He worries that people are more interested in intent than in meaning.[17] He thinks legislative history should be used only to resolve the rare ambiguity, not to reduce purposeful vagueness.[18]

I cheer upon seeing his reminder[19] of what is so often forgotten: the difference between inadvertent ambiguity — careless use of a word or phrase that might mean this or might mean that — and purposeful vagueness, which casts a wide net over a whole continuum of meanings, making language flexible and freeing us from having to think of and write down every particular that might be covered.

Critical Legal Scholarship and Postmodernism

One current critique of the legal-process theorists comes from the critical legal scholars, who accuse them of creating a construct to prove that objective, neutral law exists, without ever questioning the effect of this construct on the many outgroups that it does not protect. For the critical legal scholars, there are no easy cases. Every statute is indeterminate in meaning and susceptible to various interpretations depending on the interpreter. For this school of critics, legislative history may be the only hope of keeping judges honest.

Both the critical legal scholars and those styled postmodernists believe that the judicial reader plays an inevitably creative role in shaping the interpretation of the text.[20] The schools differ, however, in their judgment of this role as malign or benign. For

16. *Id.* at 395–410.

17. *Id.* at 398–400.

18. *Id.* at 423.

19. *Id.* at 421–22.

20. Robin West, *The Meaning of Equality and the Interpretive Turn*, 66 CHI.-KENT L. REV. 451, 456 (1990).

critical legal scholars such as Mark Kelman,[21] judicial interpretation is dangerously influenced by unacknowledged, pernicious interests, mainly class interests.[22] For postmodernists such as Stanley Fish,[23] the process is not pernicious. Rather, judges are appropriately in the business of interpretation. The text constrains but is never plain or pure. The judge interprets it in an "interpretive community" that is usually "principled and rational."[24]

Both critical legal scholars and postmodernists have a strong interest in the interpretive philosophy known as hermeneutics.

> Hermeneutics suggests that truth is the common understanding reached by an interpreter and a text about the case . . . . [I]nterpretation is a dialogue between text and interpreter seeking common ground, a shared understanding of the truth of the statute as applied to the particular case.
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> Hermeneutics . . . admits the possibility that the "best" interpretation will vary over time and even among interpreters. Therefore, it refuses to accept legislative history as a static thing waiting to be mined . . . . Instead, a hermeneutical approach would use legislative history as a source of possibilities and ideas . . . .[25]

If meaning is never certain, then "the interpreter . . . creates rather than discovers . . . meaning."[26] In other words, there is no such thing as an easy case, or a statute with only one meaning, plain on its face.

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21. *See generally* Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981).

22. West, *supra* note 20, at 460.

23. *See generally* STANLEY FISH, DOING WHAT COMES NATURALLY (1989); STANLEY FISH, IS THERE A TEXT IN THIS CLASS? (1980).

24. West, *supra* note 20, at 460.

25. William N. Eskridge, Jr., *Legislative History Values*, 66 CHI.-KENT L. REV. 365, 428–29 (1990).

26. West, *supra* note 20, at 451.

Now, here begins an echo in my head, reminding me of what my drafting students say when I tell them about Slawson's critique of the "objective theory of contract."[27] Under this theory, courts bring to bear on the contract, especially the form contract, extrinsic information about what the "reasonable" person would take this contract to mean, regardless of what the conniving seller wrote in the small print. My students say, "Then what difference does it make what we write?" And I have to work very hard to keep them from throwing their hands up.

Let's face it. It is the critical legal scholars that the students are worried about, not the postmodernists. And even if every case is potentially a hard case, there are odds. Rejecting Justice Scalia's notion of plain meaning does not require adopting Humpty Dumpty's version of the universe in *Alice in Wonderland*: "When *I* use a word, it means just what I choose it to mean — neither more nor less."[28] To the contrary, there is a lot of comfortable room between Justice Scalia and Humpty Dumpty.

A Debate on Indeterminacy

Enter Kenney Hegland and Anthony D'Amato, whose debate in print is juicy enough even for summer reading.[29] It's not every day you can find a law-review article that has you laughing *out*

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27. W. David Slawson, *The New Meaning of Contract*, 46 U. PITT. L. REV. 21, 30–31 (1984).

28. LEWIS CARROLL, *Through the Looking Glass*, ALICE IN WONDERLAND 163–64 (Donald J. Gray ed., 1971).

29. *See* Anthony D'Amato, *Counterintuitive Consequences of "Plain Meaning,"* 33 ARIZ. L. REV. 529 (1991) [D'Amato, *Counterintuitive Consequences*]; Anthony D'Amato, *Pragmatic Indeterminacy*, 85 NW. U. L. REV. 148 (1990) [D'Amato, *Pragmatic Indeterminacy*]; Anthony D'Amato, *Aspects of Deconstruction*, 84 NW. U. L. REV. 250 (1989) [D'Amato, *Aspects of Deconstruction*]; Kenney Hegland, *Looking for Certainty in All the Wrong Places*, 33 ARIZ. L. REV. 577 (1991) [Hegland, *Looking for Certainty*]; Kenney Hegland, *Indeterminacy: I Hardly Knew Thee*, 33 ARIZ. L. REV. 509 (1991) [Hegland, *Indeterminacy*]; Kenney Hegland, *Goodbye to Deconstruction*, 58 S. CAL. L. REV. 1203 (1985) [Hegland, *Goodbye to Deconstruction*].

loud on nearly every page. Kenney Hegland will do that for you. I recommend him to professional statute drafters, especially when they are feeling low — feeling, as some students do, like throwing their hands up because it doesn't matter what they write. For Hegland, it does matter. For him, there are plenty of easy cases.[30]

He reminds us that we don't all "see" something significantly different when somebody says "dog." Not even when somebody says "justice" or "fair." We do know that ambiguity and misunderstanding are possible, and so we take pains.[31] We are willing even to indulge in some redundancy to reduce ambiguity, and that is all right with him.[32] Even though we attach different meanings to a given word, we know that close is usually good enough. You may see a black dog, I may see a brown one. You may see a poodle, I a doberman. That's all right.

For Hegland, there are plenty of easy cases — sure winners and sure losers.[33] As a writer and teacher, he offers two analogies.[34] As a writer, he refines his topic sentence as he writes the rest of the paragraph. As a teacher, he refines his sense of the "A" answer on the essay exam as he reads through the set of papers. Those refinements do not erase the value of the original formulation, which directed the inquiry and governed the scope of revision.[35] In other words, difficult calls don't invalidate the criterion.

D'Amato believes every case is a hard case. That is the nature of lawyering for him.[36] Ambiguity and misunderstandings for him are constant, pervasive.[37] There are no easy cases because it is always possible that the rule will be changed, because the facts

30. *See, e.g.*, Hegland, *Goodbye to Deconstruction, supra* note 29, at 1203.

31. Hegland, *Indeterminacy, supra* note 29, at 515.

32. *Id.* at 515 n.25.

33. *Id.* at 518.

34. *Id.* at 522–23.

35. *Id.* at 523.

36. D'Amato, *Counterintuitive Consequences, supra* note 29, at 540–42, 550.

37. *Id.* at 531–34.

are never entirely known, because both sides can make compelling arguments based on the same rule. D'Amato, speaking as a true critical legal scholar, tells us he is less interested in law and more in justice.[38]

Instead of analogies about writing topic sentences and grading papers, he asks us to contemplate that ingenious device, the row of curved spikes that allow us to enter the parking lot but not leave with our tires intact.[39] He says plain-meaning theory is like those curved spikes. In most cases, it works fine, but when it does not, it can produce a disaster. (Should you have to stay in the parking lot even if a mugger approaches or your passenger suffers a heart attack?) Likewise, the rigidity of the plain-meaning formalists and their lack of human reasonableness results in a cost distributed over many cases, a few of which are as expensively counterproductive as keeping the heart-attack victim in the parking lot.[40]

For D'Amato, even the plain meaning of a red light has potential ambiguity.[41] Where are you precisely when you no longer are legitimately driving through the yellow light but instead are running the red one? He is not satisfied to say that plain meaning works most of the time. That is not good enough because the workability may be only apparent. And if it does not work all the time, the plain-meaning people have a duty to show when it does not work. Because they cannot do it, D'Amato concludes that we need instead to look to the normative value of justice to decide cases.[42]

Once again I hear my drafting students saying, "Then it doesn't matter what we write." Well, consider this: to make his point, D'Amato looks with scorn at what he calls the "runaway formal-

38. *Id.* at 542, 550.

39. *Id.* at 529.

40. *Id.*

41. *Id.*

42. *Id.* at 529–30.

ism"[43] of *United States v. Locke*, in which the Supreme Court enforced the literal meaning of a statute requiring land claims to be filed "prior to December 31," disallowing a claim filed *on* December 31 and passing the decision off by merely observing that deadlines are "inherently arbitrary."[44] Every source of interpretation other than the literal reading of the phrase "prior to December 31" would have allowed filing on December 31.

D'Amato calls to mind Lon Fuller's story of the master saying to the servant, "Drop everything and come running."[45] What if the servant happens to be rescuing a child who is drowning in the rain barrel? Should we punish the servant for refusing to drop the child? D'Amato concludes that insisting on plain meaning induces a state of mind that thrives on arbitrariness and forces lawyers to nitpick to achieve justice.[46] He prefers a theory of "pragmatic indeterminacy": an infinite number of exceptions is possible to every rule. Therefore, they are really part of the rule. In turn, therefore, a rule is never fully stated.[47]

Likewise, the number of potentially relevant facts is always infinite. Therefore, no matter how general or specific the language of the rule, its application is still uncertain.[48] Increasing the density of rules only increases the appearance of legal control over our lives. This is D'Amato's rejoinder to Justice Scalia's belief that the more general the rules, the more predictable court decisions become. D'Amato thinks that tinkering with rules to make them either more general or more specific does not aid predictability,

43. *Id.* at 536.

44. 471 U.S. 84, 94 (1985) (quoting United States v. Boyle, 469 U.S. 241, 249 (1984)).

45. Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 625 (1949).

46. D'Amato, *Counterintuitive Consequences, supra* note 29, at 538.

47. *Id.* at 555.

48. *Id.* at 569.

although he does concede that "general rules are more likely to track our felt conceptions of justice."[49]

In his debate with D'Amato, Hegland has had the last word — so far.[50] He says that knowing there are sometimes injustices does not lead to throwing out law. One form of justice, after all, is the correct application of law. He tires of D'Amato's nitpicking and harping about there being no easy cases. For him, what matters is whether the ordinary judge is constrained by law, and for him, the answer is a resounding yes.[51] Hegland complains about the deconstructionists ridiculing people for being uncomfortable with uncertainty.[52] And he reassures me about the pleasure I take in comparing theories. Theories, he recognizes, are helpful ways to try to increase certainty and make it easier to find our way through our complicated lives.[53]

The Practical-Reason Theory

The theory of "practical reason" most appropriately responds to the literal-minded nonsense-producers. This theory is reflected in the writing of T. Alexander Aleinikoff and Theodore M. Shaw, who propose a new canon of construction, a constraint they call "due process of statutory interpretation."[54] It would require a court to identify some "plausible purpose" consistent with its reading of statutory language; making good "linguistic sense" would not be sufficient for an interpretation to comply with this test.[55]

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49. *Id.* at 569–70.

50. Hegland, *Looking for Certainty, supra* note 29, at 577.

51. *Id.* at 578–80.

52. *Id.* at 582.

53. *See id.*

54. T. Alexander Aleinikoff & Theodore M. Shaw, *The Costs of Incoherence: A Comment on Plain Meaning,* West Virginia University Hospitals, Inc. v. Casey, *and Due Process of Statutory Interpretation*, 45 VAND. L. REV. 687, 704 (1992).

55. *Id.*

This due process of statutory interpretation has the same ring to it as Eskridge's call for "clear statement rules" to govern the use of legislative history, restricting reference to legislative history to cases in which there is more than one plausible meaning, there is a probable drafting error, or the text is unreasonable in view of a reasonable understanding of legislative purpose and policy.[56]

Daniel A. Farber reminds us that "[t]he vices of formalism are excessive confidence in the power of 'the word' and excessive distrust of the ability of judges to exercise good judgment."[57] The formalists are out of luck with a large piece of text. They have no way to decide whether to use ordinary or technical meaning. They cannot cope with conflicting provisions or conflicting canons. They want the judge to start with the statute in isolation, which is the very opposite of what the drafter does.[58]

Farber illustrates the point by recounting Judge Richard Posner's demolition of Frederick Schauer's definition of "plain meaning."[59] Schauer says that "plain meaning" is the quality that enables him to converse with an English speaker with whom he has nothing in common but their shared language.[60] Judge Posner's illuminating story is of an employee who is directed to fetch all the ashtrays he can find and who follows the direction by tearing ashtrays off the wall.[61] If Schauer's definition is sound, the employee has done the right thing. To understand why it is not the right thing "requires more than 'a shared language'; it

56. Eskridge, *supra* note 4, at 686–89.

57. Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533, 559 (1992).

58. *Id.*

59. *Id.* at 544.

60. Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 250.

61. RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 268 (1990).

requires tacit understandings about the purpose and limitations of the request."[62]

Creative, dynamic interpretation requires that the judge first search in the legislative history for any assumptions behind the statute. Then the judge is obliged to interpret the statute according to reason. The job of reason is to mediate between standards, which are general, and cases, which are specific. The very act of applying a standard to a case engages the judge in interpretation.[63]

Conclusion: Metaphor, Ambiguity, and Good Intentions

My reading about "plain meaning" brings me two memories from my days as a creative-writing teacher. I remember student authors' inclination to interrupt during class discussion of their work. They would say: "But that's not what I meant." And others might say: "Wait a minute. I intended for you to think . . . ." Whereupon I would remind them that it was their job to write the story or poem and someone else's job to read it. They could not go about trailing their reader or sitting on the reader's shoulder to prompt. "Write it and then get off the page," I would tell them. "No explanatory footnotes either. Let it go. It is out of your hands."

My second memory is of a film I saw once of Robert Frost reading his famous "Stopping By Woods on a Snowy Evening."[64] After the reading, someone in the audience asked him about saying he had miles to go before he slept. "Wasn't he really talking about death?" the questioner wanted to know. Frost replied that he meant what he said, which was that he had to get the hell out of the woods. To me, the glint in Frost's eye was clear. Of course he was talking about death. And of course he was not going to tell

62. Farber, *supra* note 57, at 544.

63. Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 28–29 (1986).

64. ROBERT FROST, ROBERT FROST: POETRY & PROSE 90 (Edward C. Latham & Lawrence Thompson eds., 1972).

that poor fool in the audience about it if the fool was too literal-minded to figure it out for himself. It was Frost's job to write about sleep, and it was the reader's job to get an idea about death. If Frost had written that he had a lot of things to do before he died, not many people would have thought him a very good poet.

Of course, poetry is the realm of metaphor. Statutes are not. If you have something to say about death in a statute, you know better than to write about getting out of a woods and going to sleep. But it is the context of Frost's poem that gives us the confidence in our interpretation. Statutory context functions in essentially the same way.

After all, I believe D'Amato describes the world I live in. It is a world in which rules get written that say such things as this:

> [E]vidence that [a] witness [in a civil trial] has been convicted of a crime shall be admitted [for impeachment purposes] if . . . the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant . . . .[65]

Could *defendant* here refer to a plaintiff in a civil case who has previously been a convicted criminal defendant, or does it refer exclusively to the defendant in the civil case? In *Green v. Bock Laundry Machine Co.*, the United States Supreme Court determined that the word *defendant* referred to the defendant in the civil case[66] and, having done that, initiated a rule change to give any witness the benefit of the balancing test.[67] The change was consistent with Justice Blackmun's analysis (in dissent) of the legislative history.[68]

D'Amato and I live in a world in which a statute intended to help welfare families by disregarding $50 of child support as income leaves unclear whether *child support* includes Social Security

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65. Fed. R. Evid. 609(a).

66. 490 U.S. 504, 523–24 (1989).

67. *Id.* at 524–27.

68. *Id.* at 530–35 (Blackmun, J., dissenting).

payments (ordinary meaning) or means exclusively payments from a noncustodial parent (technical meaning).[69] In *Sullivan v. Stroop*, the Court used the technical definition — to the detriment of the custodial parent, the intended beneficiary of the rule.[70]

We live in a world in which a statute gets written, leaving somebody else to decide whether expert-witness fees are recoverable as attorney's fees — in which, if Justice Scalia does the deciding, the "plain meaning" of the Civil Rights Attorney's Fees Awards Act of 1976[71] may be allowed to override the legislative history, the statutory scheme, and the purpose of the statute. That is what happened in *West Virginia University Hospitals, Inc. v. Casey*.[72]

Reading these cases reminds me of an experiment I perform in my classroom every semester when we talk about ambiguity. I have the students look at a picture that is an optical illusion.[73] Looked at one way, it is a picture of a young woman with a necklace, fine features, and a downcast eye facing away. Looked at another way, the picture is of an old woman with a babushka over her hair, facing more forward. Many but not all of the students have seen the picture before. So far, without exception, semester after semester, a few see only one face, not the other. Some see only the young woman; others see only the old one. I try to help the viewers free themselves from their set vision by telling them that the young woman's chin is the old woman's nose and the young woman's necklace is the old woman's mouth. Sometimes it helps, and sometimes it doesn't. Semester after

69. 42 U.S.C. § 602(a)(8)(A)(vi) (1988).

70. 496 U.S. 478, 485 (1990).

71. 42 U.S.C. § 1988 (1988).

72. 111 S. Ct. 1138, 1148 (1991).

73. BARBARA CHILD, DRAFTING LEGAL DOCUMENTS 317–18 (2d ed. 1992), *reprinted from* REED DICKERSON, TEACHER'S MANUAL FOR MATERIALS ON LEGAL DRAFTING 54a (1981).

semester, try as they may, some students take a long time, even with help and the best of intentions, to see the other face.

It is the most powerful lesson I know about ambiguity. It is finally what makes me mistrust Hegland's vision of the universe. The very nature of ambiguity is that it is inadvertent — and thus common. Above all, we can never be sure whether what we have written is ambiguous or not. Rarely does one find a judicial opinion in which the court writes, "The statute is ambiguous, and we have decided to resolve the ambiguity this way." Instead, one court says the provision is unambiguous: doubtless, it means *X*.[74] And then in the reversing opinion a higher court says the provision is unambiguous: it means *Y*.[75] One sees the young woman. The other sees the old.

As writers we do the same thing. We know perfectly well we have written *X*, and we are shocked when somebody reads *Y*. When what we write is a statute rather than a poem, it will not do for us to sit back with a glint in our eye and enjoy ourselves while the readers deconstruct our metaphors. Statutory drafters should relish legislative history, for it saves us from that terrible, impossible goal of perfection every single time we write a word.

Though Justice Scalia and other plain-meaning formalists might seem to be the drafters' cheerleaders — not only crediting drafters with the ability to draft unambiguously but also exhorting judicial interpreters to take them at their word — I believe drafters should beware. They should beware because they draft in a political and legal context to which the plain-meaning theorists would deny the interpreter any access. As a drafter, I would be more cheered by those who authorize creative, dynamic interpretation, who do not insist on dogged literalism that defies reason, common sense, and the readily discernible intent of the legislature. I would not want someone holding me to *X* when my *X* was clearly a slip of the pen. This is so because I know that all the exhortations and the

74. *See, e.g.*, Lewis v. Carnaggio, 183 S.E.2d 899, 900 (S.C. 1971).

75. *See, e.g., id.*

best intentions in the world will not keep me from an occasional slip of the pen — will not, that is, keep me from being human.