The Use of "Obvious" Arguments in Legal Interpretation

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In legal interpretation, self-asserted truisms or "obvious" arguments are a frequent and frustrating encounter in judicial opinions and many scholarly writing. This article analyzes the various ways in which legal commentators rely on "obvious" arguments in their interpretations and the related issues such reliance raises, such as a legitimate skepticism on the reader's part. An argument is obvious only as long as it remains reasonably undisputed. As illustrated by their relation with basic methods of interpretation like the plain meaning rule, "obvious" arguments are a necessary evil resulting from the nature of language as practical consensus. "Obviousness" argumentation, however, appears legitimate only as a consensual means of interpretation, which occurs in two distinct instances: first, when there is no disagreement within the interpretive community as to the meaning of the interpreted word or expression; second, when there is no other justification for a meaning than an undocumented, generally accepted usage among the relevant linguistic community. In this second case, an assessment by members of the linguistic community enhances the legitimacy of the allegedly "obvious" meaning.

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Introduction

Judicial decisions, briefs, and articles by scholars not seldom contain assertions such as "Obviously,…", "Naturally, …", "It is clear that…", "Of course,…", and "Every one knows that…". These "obvious" arguments, or "obviousnesses," can be described as assertions of their own validity, with or without accompanying demonstration. The present paper aims to analyze these argumentative techniques in legal interpretation, *i.e.* where the demonstration or reasoning aims at establishing the meaning of a source of law, such as a statutory or contractual provision. In such a context, a mere reference to the "obviousness" of one or another meaning may be equated to an absence of any interpretative effort leading to a false (or at least unconvincing) result. On the other hand, there might be unquestionable or unquestioned truisms that form a necessary part of any interpretative argumentation.

Although "obvious arguments" are common in legal interpretation, scholars have neglected to analyze their use and implications.[1] The present research proposes to analyze the different uses of these interpretative arguments (How and when are they used?), their effect on the interpretative process (Do they form a specific mode of interpretation?), as well as their respective validity (Are they good arguments or not?).

It turns out that we cannot reject or accept the use of "obvious" arguments as a whole. "Obvious" arguments are justifiable in two instances. First, they economize the language of the interpretative discourse. Second, they refer to consensus on a meaning within a given linguistic community. In any event, "obvious" arguments always call for skepticism. The interpreter should avoid them to all possible extent. "Never assume the obvious is true"[2], goes the popular saying, the more so for lawyers. We therefore start by addressing the problem of "obvious" arguments.

1) The problem of "obvious" arguments

In its decision *Church of the Holy Trinity v. United States* regarding the interpretation of a federal alien contract labor law, the Supreme Court considered:

> "Now, the title of this act is, 'An act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its territories, and the District of Columbia.' *Obviously* the thought

[1] Although closely related, the question of "plain meaning" interpretation is different from the question of "obviousness" argumentation; see here under 3b).
[2] Attributed to William Safire.

> expressed in this reaches only to the work of the manual laborer, as distinguished from that of the professional man. *No one reading such a title would suppose that* congress had in its mind any purpose of staying the coming into this country of ministers of the gospel, or, indeed, of any class whose toil is that of the brain. *The common understanding* of the terms 'labor' and 'laborers' does not include preaching and preachers, and it is to be assumed that words and phrases are used in their *ordinary meaning*. So whatever of light is thrown upon the statute by the language of the title indicates an exclusion from its penal provisions of all contracts for the employment of ministers, rectors, and pastors."[3] (emphasis added).

On our part, we might doubt whether the ministry of a pastor cannot be "labor" as a matter of "common understanding". The disputed provision actually read "*labor or service of any kind,*"[4] which would indicate a broader scope than mere "labor." For the Supreme Court, "words as general as those used in the first section of this act were by that decision limited, and the intent of congress with respect to the act was gathered partially, at least, from its title."[5] With reference to "words of general meaning,"[6] it nonetheless "conceded that the act of the corporation [the Holy Trinity Church] is within the letter of this section, for the relation of rector to his church is one of service, and *implies labor on the one side* with compensation on the other"[7] (emphasis added). A coherent meaning of "labor" under the act as a whole is thus less obvious than the initial reading would suggest. Thus, regardless of which interpretation is best supported in the text, we can hardly qualify the meaning of "labor" as "obvious" or part of a "common understanding" which "no one" would doubt.

In this example of statutory interpretation, the question of the meaning of the disputed statute can be reduced to the question of whether the "obviousness" argument used by the Supreme Court in support of "an exclusion from its penal provisions of all contracts for the employment of ministers, rectors, and pastors"[8] is correct or incorrect. Yet, as Justice *Scalia* noted, "to say that the legislature *obviously* misspoke is worlds away from saying that the legislature *obviously* over-

[3] Holy Trinity Church v. United States, 143 U.S. 457, 463 (1892).
[4] *Id.* at 458.
[5] *Id.* at 463.
[6] *Id.* at 459.
[7] *Id.* at 458.
[8] *Id.* at 463.

legislated" (emphasis added).[9] The Court in *Holy Trinity* did not rely on the "obviousness" argument alone to support its decision. It brought several other arguments into its rationale, arguments unrelated to the "obviousness" argument. So the meaning of the disputed statute being through its title allegedly "obvious for everyone", two questions arise: 1) Does it make sense to assert the obviousness of a meaning as an independent argument where both the premise and the reason of the dispute are the ambiguity of this very meaning? and 2) Why develop additional arguments to support an "obvious" meaning? Or conversely, does it make sense to claim obviousness in addition to other interpretative arguments? These questions show that the use of an "obvious" argument may diminish rather than reinforce the power of the interpretative argument. Instead of confirming the proposed understanding, asserting a self-evident meaning may easily evince logical inconsistencies or insufficiencies, which leads to skepticism. Here lies the problem of "obvious" arguments. In order to determine if and possibly how this problem can be solved, we have to distinguish between different types of "obviousness" arguments.

2) How and when are "obvious" arguments used?

Several criteria can serve to classify "obvious" arguments, thus distinguishing the different manners and contexts in which they are used.

a) Direct and indirect arguments

First, "obvious" arguments may address the interpretative issue itself, like in the *Holy Trinity Church* case *supra*: "It is obvious that the labor statute does not apply to preachers." With regard to their immediate relationship with the interpreted norm, we can call this category "direct arguments."

An "obvious" argument can also refer only to an element or a step of the interpretative argumentation, one which is not directly related to the interpreted norm. This is the case in *McCulloch v. State of Maryland*, for example, where the Supreme Court argues that

> "The power of congress to create, and *of course*, to continue, the bank, was the subject of the preceding part of this opinion; and is no longer to be considered as questionable. That the power of taxing it by the states may be exercised so as to destroy it, is *too obvious to be denied*." (emphasis added).

[9] ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 21 (1997).

The interpretative question is not whether the states have the actual capacity to tax banks out of existence, but whether the state of Maryland may, without violating the Constitution, tax a branch of the Bank of the United States.[10] Here, the use of an "obviousness" argument is only problematic because the assertion is a necessary part of the interpretative argumentation. The asserted truism is a gap in the otherwise logical line of reasoning, and may therefore affect the validity of the overall argument. In *McCulloch v. State of Maryland*, the mere assertion that the State power of taxing the federal bank may be exercised so as to destroy it can be – legitimately or not – doubted. For the reader, this doubt would singularly affect (if it does not completely vitiate) the Court's whole demonstration that the state of Maryland may not tax a branch of the Bank. With regard to their mediate or indirect relationship with the interpreted norm, we can call this category "indirect arguments." These indirect "obvious" arguments are not limited to legal interpretation, but may be found in every type of argumentation. We will therefore not focus on them in our analysis.

b) Expressed and implied arguments

Second, "obvious" arguments can be either expressed or implied. Expressed "obvious" arguments claim their own authority with terms such as "Obviously,…", "Naturally, …", "It is clear that…", "Of course,…", "Every one knows that…". An example from the Supreme Court of Kansas employs the term "undoubtedly" to serve this function: "On the left-hand side of the page where the regular dates are printed there is written in for the first of these payments the figures "4-20" which undoubtedly means the payment was made on April 20."[11]

Implied "obviousness" arguments are more difficult to identify. They could be broadly defined as statements without expressed demonstration. This is generally the case with references to canons of interpretation, which are supposed to be well known and uncontested. The following example uses an implied "obvious" argument in interpreting the European Coal and Steel Community Treaty:

> "Article 4 is particularly instructive on the relationship between goals and means within the system of the Treaty, because the provision, like the policy statements in article 3, may not be changed by the so-called 'little revision' procedure of article 95(3). It therefore follows, *a maiore ad minus*, that the Community

[10] 17 U.S. 316, 427 (1819).
[11] Wilbourne v. Prudential Ins. Co. of Am., 145 Kan. 682, 66 P.2d 417, 418 (1937).

> institutions may not disregard article 4 to achieve any of the Treaty's goals, absent a specific provision in the Treaty itself." (emphasis added).[12]

Another example of implied "obvious" argument, from the *Brown v. Board of Education of Topeka, Kansas* case:

> "We must look instead to the effect of segregation itself on public education. In approaching this problem, *we cannot* turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. *We must* consider public education in the light of its full development and its present place in American life throughout the Nation. *Only in this way can it be determined* if segregation in public schools deprives these plaintiffs of the equal protection of the laws." (emphasis added).[13]

Here, the Supreme Court declares it an unavoidable necessity to construe the Fourteenth Amendment as applied to racial segregation public education from a non-originalist point of view. Many reasons can be advanced to support this approach, among which the "inconclusive nature of the Amendment's history."[14] It remains, however, that the Court does not express the absolute compelling reason of its argument.

c) Notion of implied obviousness

Interestingly, most single sentences in a legal argument can be implied "obviousness" arguments, insofar as these statements are left without expressed demonstration. It is practically impossible to go through the bother of explaining and demonstrating every single element of an argumentation, back to the creation of the world. Correspondingly, "[t]he mental act of reading would be impossible if we perpetually looked for alternative meanings in everything we read."[15] Assumptions are unavoidable in every discourse. In this sense, every statement made without expressed explanation or justification is implicitly meant as evident. As a result, a more or less significant amount of "obvious" assumptions are systematically left to the reader's understanding. In legal interpretation, such assumptions sometimes refer directly to an undisputed meaning. This is by example the case in the following excerpt from a District Court

[12] Ernst-Joachim Mestmacker, *The Applicability of the Ecsc-Cartel Prohibition (Article 65) During A "Manifest Crisis'*, 82 MICH. L. REV. 1399, 1403 (1984).
[13] Brown v. Bd. of Ed. of Topeka, Shawnee County, Kan., 347 U.S. 483, 492-93 (1954).
[14] *Id.* at 489.
[15] Morell E. Mullins, Sr., *Tools, Not Rules: The Heuristic Nature of Statutory Interpretation*, 30 J. LEGIS. 1, 57 (2003).

decision: "[T]he term "employment hereunder," which undisputedly means "employment under the employment agreement" when it appears in section 1 […]."[16] The fact that a meaning is allegedly not disputable supports its implied obviousness, and vice-versa.

Such a broad, negatively conceived definition of (implied) "obviousness" arguments as undemonstrated assertions may concededly differ from a narrower, commonsensical notion of "obviousness". In a positive sense, and following its Latin etymology of "across the way,"[17] "obvious" (and like expressions of self-evidence[18]) ought to mean "easily seen or understood; evident."[19] It also intuitively means something that cannot be reasonably otherwise conceived. However, in the field of legal interpretation, it is not possible to ascertain whether an undemonstrated statement is meant as obvious in this narrow sense or not. Only an interpretation of the interpretation itself could claim to solve this question one way or another, and so on for as many successive interpreters involved. As we will see, there is no ontologically obvious argument.[20] Something is obvious only as long as it remains reasonably undisputed. Obviousness is part of the common sense within a community. "[C]ommon sense, as anthropologists have begun to show, is basically a culturally constructed use of experience to claim self evidence; it is neither more nor less than "an authoritative story" made out of the familiar."[21] Furthermore, "common sense is not what the mind cleared of cant spontaneously apprehends; it is what the mind filled with presuppositions […] concludes."[22] Argumentative appeals to this common sense therefore need not be explicit. An implied reference to a set of familiar experiences can be rhetorically sufficient to gain the agreement of the audience sharing in this set (that is, part of the same culture of presuppositions). It makes no difference for the purpose of this article if an undemonstrated assertion (in other words, an assumption) is or is not self-qualified as "obvious." When referred to the meaning of a text, every unsubstantiated interpretative argument (whether

[16] Grizzard Communications Group v. Monk, 4:05 CV 3182, 2005 WL 2563046 (D. Neb. Oct. 11, 2005).
[17] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1559 (Philip Babcock Gove; Merriam-Webster, Inc., Springfield 1993).
[18] E.g. "evident", "clear, "natural", "logical", "of course", "every one knows", etc.
[19] See THE AMERICAN HERITAGE DICTIONARY FOR LEARNERS OF ENGLISH 601 (Houghton Mifflin Harcourt 2002), as well as WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1559 (Philip Babcock Gove; Merriam-Webster, Inc., Springfield 1993). Compare the definition of obviousness in the BLACK LAW DICTIONARY 1183 (9th ed. 2009): "quality or state of being easily apparent".
[20] *Cf.* especially hereunder by n. 130.
[21] Robert Ferguson, *Untold Stories in the Law*, *in*: LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 87 (Peter Brooks & Paul Gewirtz eds., 1996).
[22] Clifford Geertz, *Commonsense as a Cultural System*, *in:* GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 73 (1983).

or not claimed as obvious) indicates an intended communicational/commonsensical understanding. And every unsubstantiated statement finds its place on the sliding scale of more or less obvious arguments. The matter of when a mere assertion absolutely ceases to be obvious should not depend on the interpreter's lack of corresponding qualification. Conversely, an argument self-qualified as "obvious" does not necessarily entail obviousness in one or the other in the above mentioned narrow senses. The common denominator is that the interpreter deems it unnecessary to furnish an explanation for her statement. We may therefore assume that the interpreter intends the explanation for her assertion to be "obvious" enough (or "easily seen or understood; evident"[23] enough) not to be expressed. The question of whether or not this appreciation is justified is precisely the one at issue when dealing with "obvious" arguments. For this reason, we adopt a broad, negative definition of implied "obviousness" arguments: any statement made without expressed explanation or justification.

d) Intrinsic and extrinsic references

"Obvious" arguments can further be used as implied references, either to another part of the argumentation, or to an external source. In the first category of intrinsic references, the "obvious" argument constitutes the result of reasoning based on surrounding expressed elements. The reader has to fill in for himself the gap in the reasoning. By example, in its decision in *Thomas Jefferson Univ. v. Shalala*, the Supreme Court stated: "Section 413.85(a) authorizes a provider to "include its net cost of approved educational activities" in its allowable Medicare costs and provides that the "net cost" of such activities is to be "calculated under paragraph (g) of this section." Section 413.85(g), in turn, defines "[n]et cost of approved educational activities" as the provider's "total costs of these activities," less "revenues it receives from tuition." Section 413.85(g) therefore *clearly* establishes the level of reimbursement a provider may expect for approved educational costs and the only source of funding that is to be offset against such costs is tuition revenues." (emphasis added).[24] Here the reference to the preceding sentences is provided by a linking conjunction ("therefore"). However, no reason is provided as to the *clarity* of the conclusion.

[23] *Cf.* above by n. 19.
[24] Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 530 (1994).

On the other hand, an "obvious" argument may refer to some external sources, such as morality, logic, the "nature of things", the general experience of life.[25] This is the case in Justice Harlan's dissent in *Plessy v. Ferguson*, where he states that "*Every one knows* that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. […] *No one would be so wanting in candor as to assert the contrary.*" (emphasis added).[26] In the same decision, Justice Brown for the majority also refers to the "nature of things" to state that the Fourteenth Amendment "could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either."[27] A double weakness affects such extrinsic references. First, the object of the reference is not identified (Is the "nature of things" an empirical state of things, a logical state of things, or something else?). Second, no justification is given as to the implied "obvious" conclusion.

In some instances, the "obvious" argument can be linked both to an intrinsic and extrinsic source. For example, in the *United States v. Butler* decision, the Supreme Court stated that "the power of taxation, which is expressly granted, may, *of course*, be adopted as a means to carry into operation another power also expressly granted. But resort to the taxing power to effectuate an end which is not legitimate, not within the scope of the Constitution, is *obviously* inadmissible." (emphasis added).[28] The argument then refers to authoritative precedents to support its latter claim, but does not evince how this demonstration amounts to become obvious. Moreover, one of the precedents cited contains itself an "obvious" argument: "There are, indeed, certain virtual limitations, arising from the principles of the Constitution itself. It would *undoubtedly* be an abuse of the (taxing) power if so exercised as to impair the separate existence and independent self-government of the States, or if exercised for ends inconsistent with the limited grants of power in the Constitution." (emphasis added).[29] Here the "obvious" argument functions as rhetorical technique to exclude further discussion: after presenting arguments in favor of its

[25] Compare the list of relevant factors in judicial process by BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 112 (New Haven: Yale University Press, 1921): "My analysis of the judicial process comes then to this, and little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law."
[26] Plessy v. Ferguson, 163 U.S. 537, 557 (1896).
[27] *Id.* at 544.
[28] United States v. Butler, 297 U.S. 1, 69 (1936).
[29] *Id.* at 69-70.

opinion, the Court appeals to the obviousness of its conclusion, thus implying the absence of any (valid) counter-arguments. In a brief submitted by one party in dispute, this technique could also be regarded as a reversal of the burden of argumentation; a failure by the opposite party to find a valid counter-argument would amount to the acknowledgment of the proposed conclusion.

e) Authoritative and persuasive arguments

The preceding remark leads to a distinction between authoritative and persuasive "obvious" arguments when interpreting a norm. The main purpose of a lawyer's brief or a scholarly article is to convince the reader. We saw that an "obviousness" argument tends to be deficient as a rhetorical or persuasive device within an actual dispute on meaning.[30] On the other hand, given the authority vested by law in judicial opinions, the purpose of a court's opinion is not so much to convince as to expose or explain. This is particularly the case in the field of legal interpretation, inasmuch as the court presents the result of a henceforth-settled dispute over meaning. As stated in *Marbury v. Madison*, "[i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule."[31] Thus, an "obviousness" argument in a judicial decision will tend to claim more authority than in any other interpretative argumentations, the more so for decisions of higher jurisdictions. However, this does not mean that an "obviousness" argument used by a court will be stronger than one used by a lawyer or a scholar. The possibility of a judicial dissent or a reversal on appeal as to the "obviousness" of a given interpretation shows that the latter is not more convincing (albeit authoritative) when claimed by a judge. A judicial "obvious" argument always bears the risk of the reproach brought against the famous *Raffles v. Wichelhaus* decision[32]: "[T]he judges […] thought the solution to the problem presented to them to be so obvious that they gave judgment for the defendants without troubling to give any reasons for their decision."[33]

The recent decision of the Supreme Court in *Brown v. Entertainment Merchants Association* illustrates this point. The majority considered that a law prohibiting persons under 18 to speak or

[30] *Cf.* above "1) The problem of "obvious" arguments" on pp. 2 ff.
[31] Marbury v. Madison, 5 U.S. 137, 177 (1803); see also Sanchez-Llamas v. Oregon, 548 U.S. 331, 353-54 (2006).
[32] 2 H. & C. 906, 159 Eng.Rep. 376 (Ex. 1864).
[33] Alfred William Brian Simpson**,** *Contracts for Cotton to Arrive: The Case of the Two Ships Peerless*, 11 CARDOZO L.REV. 287, 287-288 (1990).

be spoken to without their parents' consent would be "obviously" unconstitutional.[34] In his dissenting opinion, Justice *Thomas* countered:

> "We have recently noted that this Court does not have "freewheeling authority to declare new categories of speech outside the scope of the First Amendment." […] *But* we also recognized that there may be "some categories of speech that have been historically unprotected [and] have not yet been specifically identified or discussed as such in our case law." […] In my opinion, the historical evidence here *plainly* reveals one such category. […] The majority responds that "it does not follow" from the historical evidence "that the state has the power to prevent children from hearing ... anything without their parents' prior consent." […] Such a conclusion, the majority asserts, would lead to laws that, in its view, would be undesirable and "obviously" unconstitutional. […] The majority's circular argument misses the point. The question is not whether certain laws might make sense to judges or legislators today, but rather what the public likely understood "the freedom of speech" to mean when the First Amendment was adopted. […] *I believe it is clear* that the founding public would not have understood "the freedom of speech" to include speech to minor children bypassing their parents. It follows that the First Amendment imposes no restriction on state regulation of such speech. To note that there may not be "precedent for [such] state control," […] "is not to establish that [there] is a constitutional right," […]." (emphasis added).[35]

For the majority opinion, Justice Scalia responded: "In the absence of any precedent for state control, uninvited by the parents, over a child's speech and religion (Justice THOMAS cites none), and in the absence of any justification for such control that would satisfy strict scrutiny, those laws must be unconstitutional. This argument is not, as Justice THOMAS asserts, "circular," […]. It is the absence of any historical warrant or compelling justification for such restrictions, not our *ipse dixit*, that renders them invalid."[36] The reproach of "circular" and "*ipse dixit*" argumentation points to the problem of self-evident arguments. The majority opinion rejects this reproach by pointing out the absence of justification to support the contrary opinion.

[34] Brown v. Entm't Merchants Ass'n, 131 S. Ct. 2729, 2736 (n. 3) (2011).
[35] *Id.* at 2759 (including n. 2).
[36] *Id.* at 2736 (n. 3).

Its "obviousness" argument therefore appears as a kind of reversal of the burden of demonstration of contrary (valid) argument(s), failing which the validity of the "obviousness" argument would supposedly be confirmed.[37] On the other hand, the "obviousness" argument of the minority opinion seems to refer to undisclosed historical grounds, which in turn are contested by the majority. As a result, each competing opinion claims the obviousness of its position based on interpretative methods, while contesting the obviousness of the opposite position.[38] This situation occurs more often than one may initially suppose. Scholars have found that "in a substantial proportion of Supreme Court decisions, members of the majority and dissent disagree not about whether the meaning of a statute is plain but about what that meaning is".[39] The fact that the Supreme Court generally hears only highly disputed or difficult cases would suggest on the contrary that nothing would be obvious in the dispute. This allows us to extrapolate how frequently the lower courts use disputable – and actually disputed – "obvious" arguments.

It is consequently doubtful, though not excluded, whether an "obviousness" argument asserted by a court could actually reach the authoritative status that judicial reasoning and ensuing holdings otherwise mean to vest. Members of the Supreme Court themselves tend to express such doubt.[40]

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[37] The fact that the disputed issue turns on the question of an exception to an asserted constitutional right does not necessarily imply that the burden of proof lies on the supporter of this exception. Actually, Justice Thomas seems less to support a justified infringement to the disputed right, than to claim that there is no right at all in this case. Hence, the "strict scrutiny" standard of review for an asserted violation of a fundamental right referred to by the majority and its burden of proof on the challenger would not apply in this case where the right itself is contested.

[38] See for another example Justice Stewart's dissenting opinion in Baldwin v. New York, 399 U.S. 117, 144-45 (1970): "His opinion relies instead upon the '*plain and obvious meaning'* of the 'specific words' of the Fifth Amendment and other 'provisions of the Bill of Rights' which, together with 'the history surrounding the adoption of those provisions,' *make clear* that '(t)he Framers designed' those rights 'to shield the defendant against state power.' Though I admire the rhetoric, I submit with all deference that those statements are, to quote their author, '*plainly and simply wrong* as a matter of fact and law.' If the Constitution forbids the Florida alibi-defense procedure, it is because of the Fourteenth Amendment, and not because of either the 'specific words' of the Bill of Rights or 'the history surrounding' their adoption. For *as every schoolboy knows*, the Framers 'designed' the Bill of Rights not against 'state power,' but against the power of the Federal Government." (emphasis added).

[39] George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321, 356 (1995); see also Morell E. Mullins, Sr., *Tools, Not Rules: The Heuristic Nature of Statutory Interpretation*, 30 J. LEGIS. 1, 25, by n. 321 (2003).

[40] See the critic of "*ipse dixit*" arguments, which cannot constitute a "controlling authority", in Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2084 (2011). "Unabashed *ipse dixit* cannot wutweigh a constitutional right.", Goldman v. Weinberger, 475 U.S. 503, 516 (1986). "[T]he "reasoning" consisted of leaping from the correct premise, that Congress limited the purposes for which exempt trust funds could be used, to the entirely unsupported conclusion, that § 302(e) rather than state trust law was to be the means by which that limitation was enforced. It is an ipse dixit, rather than a reasoned conclusion—and, to boot, an ipse dixit contradicted by the very holding of the case in which it was pronounced.", Local 144 Nursing Home Pension Fund v. Demisay, 508 U.S. 581, 592 (1993). "With no support beyond its own ipse dixit, the Court concludes that the Kentucky statute involved in this case "has *no* secular legislative purpose," [...] (emphasis supplied), and that "[t]he pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature," [...]", Stone v. Graham, 449 U.S. 39, 43 (1980); see also United States v. Turkette, 452 U.S. 576, 580 (1981): "Of course, there is no errorless test for identifying or recognizing "plain" or "unambiguous" language."

In short, if a meaning is obvious, it will supposedly not be disputed before (higher or even lower) courts. But again, it is conceivable for a court to use a truly "obvious," *i.e.* both unsubstantiated and undisputable, interpretative argument. Conversely, disputed "obviousness" arguments authoritatively stated by courts would constitute "an absolute assumption of discretion and power by the judiciary."[41] As Posner noted, "the Supreme Court's reading would be authoritative – but only in the sense that a gun held at your head is authoritative."[42]

3) Relation to two core methods of interpretation

Having identified different categories of "obvious" arguments, we ask whether they form a specific and distinct mode of interpretation. For this purpose, it will suffice to examine the relationship between "obvious" arguments and two core methods of interpretation: the use of intrinsic and extrinsic sources of interpretation, and the plain meaning rule. The generic distinction between intrinsic and extrinsic sources covers all types of interpretation methods. And the plain meaning of the eponym rule is intuitively similar to an obvious meaning.

a) Intrinsic and extrinsic sources of interpretation

In statutory as in contractual interpretation, a basic distinction is drawn between intrinsic and extrinsic sources with reference to the words of the interpreted norm. Intrinsic sources are generally defined as those which derive meaning from the internal structure of the text (or the orally expressed norm) and conventional or dictionary meanings of the terms used in it. Reference is made to the text (or the orally expressed norm) only. Extrinsic interpretative sources typically consist of information which can comprise the background of the text (or the orally expressed norm), such as legislative or negotiations history, as well as further outward circumstances, such as interpretative precedents or ensuing practice. Reference is made to elements other than the text or the orally expressed norm itself.[43]

An "obviousness" argument used in interpretative argumentation can refer either to the interpreted text itself, or to any outward circumstance. By example, in the *Church of the Holy Trinity v. United States* case cited above, the Court refers both to the "common understanding"

[41] George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321, 358 (1995).
[42] RICHARD POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 242 (Cambridge, Mass.: Harvard University Press, 1988).
[43] See among others for statutory interpretation 2A SUTHERLAND STATUTORY CONSTRUCTION § 45:14 (7th ed.). For contractual interpretation, see among others 11 WILLISTON ON CONTRACTS § 33:1 (4th ed.).

and "ordinary meaning" of the statute's title, as well as to the "purpose" of the legislator that "[n]o one reading such a title would [wrongly] suppose".[44] The former reference is intrinsic; the latter is extrinsic. In both regards, the "obviousness" argument appears as a shortcut in the demonstration. The references to the alleged textual meaning as well as to the alleged legislative purpose are explicit yet unsubstantiated so far as "obviousness" is concerned.

Although rare, it is also conceivable that an "obvious" argument be made without any reference at all. By example, in its statutory interpretation in *Seeberger v. Schweyer*, the Supreme Court made the following statement: "In the first section the language is, 'any merchandise imported at the port of New York,' etc., which *naturally* means that such importation is the original importation." (emphasis added).[45] More frequently, courts express an "obviousness" argument with some reserve, or with some accompanying demonstration.[46]

When no demonstration is provided, the frame of reference for the obviousness of the argument, if any, cannot be as ascertained. In the *Seeberger v. Schweyer* example, it is not clear whether the obviousness refers to an intrinsic (common meaning, systematical analysis of the statute, etc.) or to an extrinsic (common practice, logic, public policies, historical materials of the legislator, etc.) approach. In this case, the "obviousness" argument is autonomous, *i.e.* it operates without any given reference other than the supposed understanding of the reader. In this sense, such "obviousness" arguments could be regarded as *autonomous* modes of interpretation.

b) Relationship with the "plain meaning rule"

An "obviousness" argument is very similar to a "plain meaning" argument. Indeed, "plain" serves as a synonym for "obvious" in common language.[47] The "plain meaning rule" is actually a common method of interpretation, which applies both in contractual and statutory construction.

[44] See above by n. 3.
[45] Seeberger v. Schweyer, 153 U.S. 609, 613 (1894).
[46] See by example Tapia v. United States, 131 S. Ct. 2382, 2389 (2011): ""Imprisonment" as used in the clause most naturally means "[t]he state of being confined" or "a period of confinement." Black's Law Dictionary 825 (9th ed.2009); see also Webster's Third New International Dictionary 1137 (1993) (the "state of being imprisoned")".; Limtiaco v. Camacho, 549 U.S. 483, 489 (2007): "Though it has no established definition, the term "tax valuation" most naturally means the value to which the tax rate is applied."; Eli Lilly & Co. v. Medtronic, Inc., 496 U.S. 661, 666, 668-669 (1990): "On the other side of the ledger, however, one must admit that while the provision more naturally means what respondent suggests, it is somewhat difficult to understand why anyone would *want* it to mean that."; Roberts v. Lewis, 153 U.S. 367, 377 (1894): "She is also vested, in the most comprehensive terms, 'with full power, right, and authority to dispose of the same [which, as no less title has yet been mentioned, naturally means the whole estate] as to her shall seem most meet and proper, so long as she shall remain my widow.'"
[47] See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1729 (Philip Babcock Gove; Merriam-Webster, Inc., Springfield 1993).

The Supreme Court thus considers that "[w]here the words of a law, treaty, or contract, have a plain and *obvious* meaning, all construction, in hostility with such meaning, is excluded. This is a maxim of law, and a dictate of common sense; for were a different rule to be admitted, no man, however cautious and intelligent, could safely estimate the extent of his engagements, or rest upon his own understanding of a law, until a judicial construction of those instruments had been obtained." (emphasis added)[48] According to the Supreme Court, the prevalence of the obvious meaning serves the interest of predictability and reliability. However, we already noted that in many instances, the obvious meaning of a statutory or contractual term is subject to dispute. In fact, would the meaning of the contractual or statutory language be "plain and obvious", there would most probably not be any dispute on its interpretation.[49] "Common and ordinary words oftentimes prove most difficult to give common and ordinary meaning."[50] The mere – *i.e.* unsubstantiated – assertion of the obviousness or plainness of a meaning becomes accordingly problematic. We therefore determine the relationship between "obviousness" arguments and the "plain meaning rule," both in statutory and in contractual interpretation.

In statutory interpretation

In statutory interpretation, the "plain meaning rule" excludes any specific interpretative effort when the meaning of the language used in the statute is "plain", *i.e.* obvious, clear, or unambiguous.[51] This rule is sometimes expressed in a contradictory manner: among other cases, "[c]ourts may only look beyond the plain language of a statute if the statute's language is ambiguous".[52] However, language cannot be at the same time "plain" and "ambiguous." This contradiction illustrates that in any interpretative context, the mere decision that a meaning is clear or plain, or ambiguous, supposes to question this meaning, that is, to interpret its conveying language.[53] In this strict sense, there is no such clear meaning that does not require some

[48] State of N.J. v. State of N.Y., 120, 1997 WL 291594 (U.S. Mar. 31, 1997); compare BLACK LAW DICTIONARY 1069-1070 (9th ed. 2009) with reference to "plain meaning".
[49] See however Needles v. Kansas City, 371 S.W.2d 300, 304 (Mo. 1963): "The fact that the parties do not now agree upon the proper construction of their contract does not make it ambiguous.", as well as: "Outside the courts, it is obvious that the seemingly clearest term may be variously understood.", United States v. Lennox Metal Mfg. Co., 225 F.2d 302, 319 (2d Cir. 1955). This illustrates the point that the interpretative dispute can even take place within the boundaries of a plain meaning.
[50] 1 BRUNER & O'CONNOR CONSTRUCTION LAW § 3:37.
[51] 2A SUTHERLAND STATUTORY CONSTRUCTION § 46:1 (7th ed.).
[52] *Id.* at § 46:1, with further ref.
[53] See Stanley Fish, *Don't Know Much About the Middle Ages: Posner on Law and Literature*, 97 YALE L.J. 777, 784 (1988), with reference to an example of contractual interpretation: "The document is neither ambiguous nor

interpretation. The language of a statute cannot be plain by itself.[54] The mere fact that the meaning of a statute is disputed tends to indicate that its language is not clear.[55] Only interpretation(s) thereof in a given application could possibly be. By example, a law "prohibiting theft" would not be plain as to copyright infringement or the provisory use of property without authorization, whereas it would be plain as to sneezing (not prohibited by the statute) or shoplifting (prohibited by the statute). Even then, we might raise doubts; it is still "unclear what it means to claim a statute's meaning is "plain." It would seem that this determination does not call for argument: Meaning is "plain" because it is obvious or immediately apparent. Yet, obvious, apparent, or plain on what grounds?"[56]

Asserting without demonstration the plain meaning of a statutory provision corresponds to an "obviousness" argument as defined here. The absence of any other reference as the very language of the statute constitutes an *autonomous* "obviousness" argument as identified at the end of the preceding section. Consequently, such an unsubstantiated argument will correspond to an attempt to reverse the burden of demonstration as to any contrary meaning.[57] If no convincing counter-argument is brought against the plain meaning assertion, this meaning will be confirmed as clear, plain or obvious (terms which become synonyms in this context). However, such a conclusion does not necessarily entail that the admitted meaning is affirmatively established, or else *positively* obvious in a narrow sense[58]. It only implies that, *negatively*, no valid counter-argument

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unambiguous in and of itself. The document isn't *anything* in and of itself, but acquires a shape and a significance only within the assumed background circumstances of its possible use, and it is those circumstances—which cannot be *in* the document, but are the light in which 'it' appears and becomes what 'it,' for a time at least, is—that determine whether or not it is ambiguous and determine too the kind of straightforwardness it is (again for a time) taken to possess. It could well be that in the industry related to the contract of Posner's example it is understood by everyone experienced in the trade that when a price per pound has been negotiated, it goes without saying that there is an escalation of 20% after the first ten pounds. Within that understanding, the document would have, and have obviously and without dispute, the meaning Posner scoffs at. Of course within a *different* understanding, a different sense of the way business is typically done, the document will have just the obvious meaning Posner claims for it, but that obvious meaning will be no less circumstantial—no less the product of interpretive assumptions that are not in the text because it is within *them* that the text acquires intelligibility—than the meaning he rejects. This does not mean that the document is ambiguous, but that the shape of its straightforwardness (or of its ambiguity should that be the face it presents) will always be a function of something prior to it."; George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321, 355 (1995); William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541, 594-95 (1988): "When courts rely on plain meaning, they are stating a conclusion reached after the interpretive process is complete, not specifying a stopping point in the judicial thought process."; Overhauser v. United States, 45 F.3d 1085, 1088 (7th Cir. 1995) (Posner, J.): "Meaning does not inhere in words; meaning is interpretation."

[54] *Cf.* especially hereunder n. 60 for references, and by n. 130.

[55] 2A SUTHERLAND STATUTORY CONSTRUCTION § 46:1 by n. 15 (7th ed.).

[56] George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321, 356 (1995).

[57] 2A SUTHERLAND STATUTORY CONSTRUCTION § 46:1 by n. 18 to 23 (7th ed.).

[58] *Cf.* for narrower definitions of "obviousness" above by n. 19.

as to any other meaning succeeded. An autonomous "obviousness" argument is not convincing by itself, but only by the absence of successful counter-argument(s).

In contractual interpretation

In contract interpretation, the "plain meaning rule" attaches to determine whether an (integrated) contractual provision admits only one plausible meaning or is ambiguous. If the language is not ambiguous, extrinsic evidence as to its meaning will be excluded. However, even if a judge determines that the language is clear, the judge must still establish its meaning using only intrinsic evidence.[59] The operational distinction between determining a clear or single plausible meaning and the identification of this very meaning appears tautological. It does not seem conceptually possible to establish the clarity (*i.e.* unambiguousness) of a meaning without identifying the same.[60] That is probably the reason why courts employing the "plain meaning" rule often do so with little discussion or analysis. The court merely states that the contract language at issue is "clear and unambiguous" and then offers its meaning.[61]

The "plain meaning rule" in contractual interpretation is criticized insofar as the rule is grounded on the possibility that a language used in a contract can have only one single meaning.[62] Such an assumption does not necessarily imply that this single meaning is obvious or does not need a proper explanation. It will, however, seem contradictory to provide a justification for the asserted clarity or unambiguousness of one single meaning. The frequent absence of argumentation for the asserted meaning "is only natural as whatever is "clear" is evident on its face and there's not much discussion necessary to explain the court's decision. It is almost ironic if a court finds a contract "clear and unambiguous" and then goes on at great length to explain why this is the

[59] E. ALLAN FARNSWORTH ET AL., CONTRACTS – CASES AND MATERIALS, 382 (7th ed. 2008); 11 WILLISTON ON CONTRACTS § 32:3 (4th ed.).

[60] So United States v. Lennox Metal Mfg. Co., 225 F.2d 302, 314 (2d Cir. 1955), referring to Corbin: "The terms of any contract must be given a meaning by interpretation before it can be determined whether an attempt is being made to 'vary or contradict' them." Even assuming that ambiguity is a distinct concept from that of vagueness or indefiniteness, E. Allan Farnsworth, *"Meaning" in the Law of Contracts*, 76 YALE L.J. 939, 953 (1967), a word cannot be at the same time vague and unambiguous, for "[w]hen language is indefinite or vague, it is not possible to reach even one reasonable meaning of the language", 1 BRUNER & O'CONNOR CONSTRUCTION LAW § 3:6. "Vagueness is ambiguity on a grand and systematic scale.", Kit Fine, *Vagueness, Truth, and Logic*, *in*: SYNTHESE, VOL. 30, NO. 3/4, ON THE LOGIC SEMANTICS OF VAGUENESS, 265, 282 (Springer ed., April - May, 1975). Consequently, either a word is clear and at the same time unambiguous and not vague, or it is not clear and ambiguous and/or vague. See also REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 229 (Little, Brown and Co. ed, 1975): "On its positive side, the plain meaning rule states a tautology: Words should be read as saying what they say. The rule tells us to respect meaning but it does so without disclosing what the specific meaning is."

[61] 1 BRUNER & O'CONNOR CONSTRUCTION LAW § 3:1, by n. 19.

[62] *Id.* at n. 14.

case."[63] Providing an explanation for something obvious could also simply prove difficult. Such a practice of asserting the unambiguousness or clearness of a contractual meaning without substantially establishing it is an example of "obviousness" argumentation. So applied, the "plain meaning rule" does not distinguish itself from the use of implied "obvious" arguments as defined herein[64] (not to speak of instances for which obviousness is expressly asserted). "Plain" and "obvious" thus become synonyms here. Moreover, the absence of any reference[65] or demonstration makes the argument *autonomous* in the meaning exposed above.[66] In effect, it comes to claiming that the interpreted contractual provision can only receive one plausible meaning, which is the asserted "plain" meaning. In an interpretative dispute, the use of such an argument practically equates the reversal of the burden of demonstration as to the interpreted provision of the contract.[67]

Presumption of plain meaning

To take the example of Pennsylvania contract law, a "contract is not ambiguous if the court can determine its meaning *without any guide other than a knowledge of the simple facts on which, from the nature of the language in general, its meaning depends*" (emphasis added).[68] The question of the plainness of a contractual term "cannot be resolved in a vacuum. [...]. Rather, a contractual term is deemed ambiguous after a court concludes that the term is subject to more than one reasonable interpretation when applied to a particular set of facts."[69] This single reference to the underlying facts could be explained by the specificity of every contractual provision, which is meant to apply to a specific given situation involving a specific group of determined individuals (as opposed to a statute, for instance, which typically has a broader and more abstract scope). "On this view, the apparent 'public' meaning must give way to the parties' 'private' meaning, for they have created their own little 'public,' their own private public."[70] According to Pennsylvania law, this necessary and sufficient relation between an alleged "plain"

[63] *Id.* at n. 19.
[64] *Cf.* above "c) Notion of implied obviousness" on pp. 6 ff.
[65] That is, "a number of different means by which to come to an appropriate interpretation of what both parties considered was an unambiguous term", *id.* at § 3:37.
[66] *Cf.* above after n. 46.
[67] Compare the patent law rule according to which advocating for ordinary meaning of a patent claim does not excuse a party from stating what it contends is that meaning, 1 ANNOTATED PATENT DIGEST § 4:5.
[68] Prudential Ins. Co. of Am. v. Prusky, CIV.A. 04-0462, 2008 WL 859217 (E.D. Pa. Mar. 31, 2008).
[69] Nat'l Cas. Co. v. Young, CIV A 07-CV-4836, 2009 WL 2170105 (E.D. Pa. July 17, 2009).
[70] *Cf.* United States v. Lennox Metal Mfg. Co., 225 F.2d 302, 311-12 (2d Cir. 1955).

language and the factual circumstances to which it allegedly refers is based on "the nature of the language in general."[71] In the context of language interpretation, it is difficult to conceive a more obscure rule or criterion. Hence it does not surprise that the assertion of the plainness of a meaning will tend to be simply "natural" or "obvious". The qualification of a contractual provision as "plain" therefore acts as an appeal to a kind of immediate understanding that dispenses with demonstrative reasoning. "In such a case, the contract speaks for itself".[72] This probably explains why the identification of a plain meaning is sometimes not considered as interpretation.[73]

Yet the fact that a language is *on its face* clear and unambiguous only indicates that it does not contain a patent ambiguity. The obviousness of the asserted meaning does not prevent the language to suffer from latent ambiguities, which arise from "extraneous or collateral facts" claimed by a party to support an alternative meaning.[74] However, "a contract is not rendered ambiguous by the mere fact that the parties do not agree on the proper construction".[75] Once a plain meaning has been identified, this meaning "cannot be distorted to establish the ambiguity;"[76] that is, "the alternative meaning that a party seeks to ascribe to the specific term in the contract must be reasonable".[77] "[I]t must be supported by contractual evidence that goes beyond the party's claim that the contractual hook has a certain meaning, and the interpretation cannot contradict the *standard meaning of a term* when the parties could have easily used another term to convey this contradictory meaning." (emphasis added).[78] This last explanation indicates that there is a presumption towards the "standard meaning of a term," identified as its "plain meaning."[79] As a matter of reliability and predictability, the presumption makes sense.[80] Likewise, statutory interpretation states a rule providing for a presumption favoring the common meaning of language in the absence of evidence that the legislator intended or manifested some other meaning.[81] The justification for this rule is the same as that for contractual interpretation:

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[71] *Cf.* by n. 68 above.
[72] 16 SUMM. PA. JUR. 2D COMMERCIAL LAW § 1:101.
[73] *Cf.* above by n. 51.
[74] Prudential Ins. Co. of Am. v. Prusky, CIV.A. 04-0462, 2008 WL 859217 (E.D. Pa. Mar. 31, 2008); Betz v. Erie Ins. Exch., 2008 PA Super 221, 957 A.2d 1244, 1254 (Pa. Super. Ct. 2008).
[75] Cont'l Cas. Co. v. Fleming Steel Co., 10-4524, 2011 WL 3020049 (3d Cir. July 25, 2011).
[76] Nat'l Cas. Co. v. Young, CIV A 07-CV-4836, 2009 WL 2170105 (E.D. Pa. July 17, 2009).
[77] Prudential Ins. Co. of Am. v. Prusky, CIV.A. 04-0462, 2008 WL 859217 (E.D. Pa. Mar. 31, 2008).
[78] *Id*.
[79] See 11 WILLISTON ON CONTRACTS § 32:3 (4th ed.).
[80] *Cf.* above by n. 48.
[81] 2A SUTHERLAND STATUTORY CONSTRUCTION § 47:28 (7th ed.).

"After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the *sense of the thing*, as the ordinary man has a right to rely on ordinary words addressed to him." (emphasis added).[82]

The presumption becomes nevertheless problematic when the assertion of a "plain meaning" lies on nothing else than its own obviousness, as the case will often be.[83] The reference above to the "sense of the thing", as the Supreme Court itself refers to at times[84], illustrates this concern. Such an assertion will not amount to more than a "party's claim that the contractual hook has a certain meaning."[85] This criticism entails the reproach of an unsatisfying interpretative effort, because "the more we study a passage of statutory language, the more likely we are to find uncertainties and ambiguities."[86] Furthermore, it is doubtful whether there could be any "standard" [87] meaning when applied to the "particular set of facts"[88] underlying the actual contractual language.[89] In addition, the distinction between "the simple facts on which, from the nature of the language in general, [the plain] meaning depends"[90] and the "extraneous or collateral facts"[91] on which the latent alternative meaning depends is questionable. Thus, the mere assertion of the "plainness" or the "obviousness" of an alleged meaning corresponds to a *default argument*, which, in accordance with the presumption of plain meaning, will prevail in the absence of any "reasonable" counter-argument in support of an alternative meaning.

In this light, the "obviousness" argument appears as an *absence* of justification for the asserted meaning. Failing a reasonable alternative meaning, the asserted, unsubstantiated "plain" or "obvious" meaning may then be negatively qualified as a reasonably uncontested meaning. In

[82] Addison v. Holly Hill Fruit Products, 322 U.S. 607, 618 (1944); see also Morell E. Mullins, Sr., *Tools, Not Rules: The Heuristic Nature of Statutory Interpretation*, 30 J. LEGIS. 1, 58 (2003).
[83] *Cf.* above by n. 63.
[84] See N.L.R.B. v. Coca-Cola Bottling Co., 350 U.S. 264, 268 (1956); Am. Sec. & Trust Co. v. Commissioners of Dist. of Columbia, 224 U.S. 491, 495 (1912); Addison v. Holly Hill Fruit Products, 322 U.S. 607, 618 (1944); Heckler v. Edwards, 465 U.S. 870, 879 (1984); Addison v. Holly Hill Fruit Products, 322 U.S. 607, 618 (1944).
[85] *Cf.* by n. 78 above.
[86] Morell E. Mullins, Sr., *Tools, Not Rules: The Heuristic Nature of Statutory Interpretation*, 30 J. LEGIS. 1, 57 (2003).
[87] *Cf.* by n. 78 above.
[88] *Cf.* by n. 69 above.
[89] This assumption of a "generally prevailing meaning", which could attach to language in some instances, is by example made by RESTATEMENT (SECOND) OF CONTRACTS § 202(3)(a), *cf.* in this regard here under by n. 95.
[90] *Cf.* by n. 68 above.
[91] *Cf.* by n. 74 above.

other words, the obviousness of a meaning can be defined as reasonable consensus on a meaning.[92]

The measure of "reasonableness" sufficient for an obvious meaning to prevail will be particularly difficult to assess. This is due to the absence of any justification for the asserted plain meaning, other than its obviousness. Practically, the criterion of reasonableness will then amount to deny the persuasiveness of alternative meanings. As a consequence, a meaning could then be "obvious" in the discussed sense (*i.e.* resulting from an unsubstantiated, reasonable consensus), although it could otherwise be less than obvious in a narrower sense.[93] This being said, dispensing with a demonstration of meaning that is agreed upon would likely qualify the latter as "easily seen or understood; evident," that is, "obvious" in a narrow sense[94].

4) Obviousness as consensus

According to Restatement (Second) of Contracts § 202 (3) (a), "[u]nless a different intention is manifested, where language has a generally prevailing meaning, it is interpreted in accordance with that meaning." The default prevalence of the "generally prevailing meaning" is thus justified: "In the United States the English language is used far more often in a sense which would be generally understood throughout the country than in a sense peculiar to some locality or group. In the absence of some contrary indication, therefore, English words are read as having the meaning given them by general usage, if there is one. This rule is a rule of interpretation in the absence of contrary evidence, not a rule excluding contrary evidence."[95] A similar rule establishing a presumption in favor of the common meaning exists in statutory interpretation: "Laws are enacted to be read and obeyed by the people and in order to reach a reasonable and sensible construction thereof, words that are in common use among the people should be given the same meaning in the statute as they have among the great mass of the people who are expected to read, obey and uphold them."[96]

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[92] Compare Loomis Inst. v. Healy, 98 Conn. 102, 119 A. 31, 38 (1922): "It is claimed by the defendant that the word "will" carries with its use an invariably imperative meaning by consensus of authority."
[93] *Cf.* for narrower definitions of "obviousness" above by n. 19.
[94] *Cf.* above by n. 19.
[95] RESTATEMENT (SECOND) OF CONTRACTS § 202 cmt. e (1981).
[96] City of Lewiston v. Mathewson, 78 Idaho 347, 354 (1956); see also Pioneer Inv. Services Co. v. Brunswick Associates Ltd. P'ship, 507 U.S. 380, 391 (1993): "there is no indication that anything other than the commonly accepted meaning of the phrase was intended by its drafters." For the importance of common meaning of words in statutory interpretation, see 2A SUTHERLAND STATUTORY CONSTRUCTION § 47:28 (7th ed.).

The conventional character of language can explain the reference to the general usage as a (default) source of interpretation. Insofar as it is defined as a means of communication,[97] language is basically a convention within a community of persons.[98] So it is with the language used for legal purposes. "[W]here the law is understood to be interpreted at least plausibly in accordance with the words by which it was first given, then it seems rather obvious its subjects might more nearly *consent* to the interpretation so given." (emphasis added)[99] Likewise, where a specific convention of meaning between the parties to a contract cannot be determined, the words used may still bear their general meaning as accepted by the broader community. "The plain, common or normal meaning of language will be given to the words of a contract unless the circumstances show that in a particular case a special meaning should be attached to them. Sometimes an ordinary word or phrase may bear an extraordinary meaning in the locality where the contract was executed, but in most cases this is not true."[100] "[U]nder the traditional, objective theory of contract interpretation, the ultimate standard for interpreting a contract when there is a fully integrated writing is the general usage standard, but when a local or limited meaning exists, the more limited, local meaning, under the surrounding circumstances, will be given to the words or symbols agreed upon by the parties."[101] And regarding statutory interpretation, "the meaning is plain only to the extent that it is shared by both parties to the communication. A typical use of common understanding to determine plain meaning is to specify how a nontechnical audience would understand a statute. Thus, a tomato is understood to be a vegetable, which is the common usage, rather than a fruit, which is botanically accurate, in a statute aimed at the general business public."[102] "Plain meaning" generally stands as synonym for "ordinary meaning."[103]

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[97] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1270 (Philip Babcock Gove; Merriam-Webster, Inc., Springfield 1993); BLACK LAW DICTIONARY 958 (9th ed. 2009); see also THE AMERICAN HERITAGE DICTIONARY FOR LEARNERS OF ENGLISH 499 (Houghton Mifflin Harcourt 2002).

[98] See Charles Fried, *The Rise and Fall of Freedom of Contract. by P.S. Atiyah. Oxford: Clarendon Press, Oxford University Press. 1979, book review*, 93 HARV. L. REV. 1858, 1863, n. 17 (1980); Charles Fried, *Sonnet LXV and the "Black Ink" of the Framers' Intention*, 100 HARV. L. REV. 751, 757 (1987), denoting the language as "a common and identical possession"; Dennis Chong, *Values Versus Interests in the Explanation of Social Conflict*, 144 U. PA. L. REV. 2079, 2117 (1996), according to which language is a convention; Morell E. Mullins, Sr., *Tools, Not Rules: The Heuristic Nature of Statutory Interpretation*, 30 J. LEGIS. 1, 38, n. 182 (2003); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2457, n. 257 (2003), according to which communication presupposes shared general understandings of language; RESTATEMENT (SECOND) OF CONTRACTS § 201 cmt. a (1981): "Words are used as conventional symbols of mental states, with standardized meanings based on habitual or customary practice."

[99] Thomas C. Folsom, *Evaluating Supernatural Law: An Inquiry into the Health of Nations (the Restatement of the Obvious, Part II)*, 21 Regent U. L. REV. 105, 146 (2009).

[100] 11 WILLISTON ON CONTRACTS § 32:3 (4th ed.).

[101] *Id.* at § 31:9

[102] William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541, 593 (1988).

Such a generally accepted meaning cannot be otherwise demonstrated than by identifying the common usage of the word. "Dictionaries, treatises, and jurisprudence are helpful resources in ascertaining a term's generally prevailing meaning," *i.e.* the "common and approved usage of words."[104] In many instances, the argument turns to a broad extent on an appeal to the reader's own knowledge and experience. This occurs by an implicit or explicit reference to the obviousness of the common usage. The necessity of referring to the obviousness of a commonly accepted meaning takes place when sources like dictionaries, treatises or jurisprudence do not provide a sufficient support.[105] In particular, "[t]he problem with using dictionaries to determine the ordinary meaning of a word [...] is that the purpose of a dictionary is to determine the outer boundaries of appropriate usage for each entry."[106] "[T]he literal or dictionary definitions of words will often fail to account for settled nuances or background conventions that qualify the literal meaning of language and, in particular, of legal language."[107] In other words, dictionary meanings are generally broader than the common usage of words in a given legal interpretative situation. Now, the linguistic usage within a community cannot be rationally explained. It can only be empirically assessed.[108] To "rent a car" in New York is *obviously* not the same thing as "louer un car" in Geneva. How to explain this obviousness otherwise than to refer to the different usage of the word "car" within the New York and the Geneva communities? There is no reason other than common usage why the people in Geneva mean a bigger vehicle than in New York. When actual evidence of a relevant linguistic usage is not available, or simply not provided, many assertions of a "commonly accepted meaning" are constructed as mere (however implied) "obviousness" arguments.[109] In effect, these arguments consist in statements of an asserted more

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[103] See BLACK LAW DICTIONARY 1069-1070, 1267 (9th ed. 2009)
[104] In re Katrina Canal Breaches Litig., 495 F.3d 191, 210 (5th Cir. 2007); *cf.* also Texas Digital Sys., Inc. v. Telegenix, Inc., 308 F.3d 1193, 1202 (Fed. Cir. 2002).
[105] It could be due to the mere fact that "words often have multiple dictionary definitions". Texas Digital Sys., Inc. v. Telegenix, Inc., 308 F.3d 1193, 1203 (Fed. Cir. 2002); RESTATEMENT (SECOND) OF CONTRACTS § 201 cmt. a (1981): "Usages of varying degrees of generality are recorded in dictionaries, but there are substantial differences between English and American usages and between usages in different parts of the United States."
[106] Lawrence M. Solan, *The New Textualists' New Text*, 38 LOY. L.A. L. REV. 2027, 2056 (2005).
[107] John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2393 (2003).
[108] See by example Overhauser v. United States, 45 F.3d 1085, 1087 (7th Cir. 1995) (Posner, J.): "More important than what a grammar book unlikely to have been consulted by anyone involved in the actual drafting of the agreement says is the actual *practice* of the relevant linguistic community, a practice that in matters of the placement of commas is notably casual [...]".
[109] See for examples the following Supreme Court cases: United States v. Stevens, 130 S. Ct. 1577, 1590 (2010) ("As the Government recognized below, "serious" ordinarily means a good bit more. [...] and the Government defended these instructions as properly relying on "a commonly accepted meaning of the word 'serious,'"); Bd. of Trustees of Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc., 131 S. Ct. 2188, 2190 (2011) ("That is certainly not the

or less broad consensus on a meaning.[110] A genuine "obviousness" argument amounts to such a community reference.

5) Legitimacy of the consensus on a meaning

The interpretative effort to assess the commonly accepted meaning of a word or an expression may be an exercise of textual heuristics, by which we try "to attribute a "meaning" which we objectively think the bulk of informed readers would attribute to the relevant statutory words."[111] Such an interpretative argument bears the risk that the common acceptance of a word or expression is common only to the court itself.[112] The problem is even more acute when a single judge asserts a consensus on a meaning. "Thus arises the risk of declaring meaning plain by judicial fiat, simply because the majority declares it so – an absolute assumption of discretion and power by the judiciary."[113] This will significantly affect the legitimacy of the interpretation, and therefore of the judicial ruling itself. The mere assertion of the obviousness of a plain meaning is likely to appear arbitrary, thus defeating the policy value of relying on the plain meaning.[114]

Judicially asserted "obvious" arguments can be compared on a broader basis with the practice of taking judicial notice of "self-evident truths that no reasonable person could question, truisms that approach platitudes or banalities."[115] When a matter is judicially noticed, "it is taken as true

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common meaning of "retain," which is "to hold or continue to hold in possession or use."); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 198-99 (1976) ("But apart from where its logic might lead, the Commission would add a gloss to the operative language of the statute quite different from its commonly accepted meaning. [...] The argument simply ignores the use of the words "manipulative," "device," and "contrivance" terms that make unmistakable a congressional intent to proscribe a type of conduct quite different from negligence."); Pioneer Inv. Services Co. v. Brunswick Associates Ltd. P'ship, 507 U.S. 380, 391-92 (1993) ("As with Rule 9006(b)(1), there is no indication that anything other than the commonly accepted meaning of the phrase was intended by its drafters. It is not surprising, then, that in applying Rule 6(b), the Courts of Appeals have generally recognized that "excusable neglect" may extend to inadvertent delays."); see also Julian B. Mcdonnell, *Definition and Dialogue in Commercial Law*, 89 NW. U. L. REV. 623, 643 (1995): "In this instance, the definition of "farm products" is *lexically clear because there is a consensus in all potentially relevant language communities* that the soybeans qualify as crops, one of the subcategories into which the defined category has been divided by the drafters." (emphasis added).

[110] See for instance *a contrario* 16 SUMM. PA. JUR. 2D COMMERCIAL LAW § 1:102: "A contract term or provision may properly be deemed ambiguous if reasonable minds can differ as to its meaning."

[111] Morell E. Mullins, Sr., *Tools, Not Rules: The Heuristic Nature of Statutory Interpretation*, 30 J. LEGIS. 1, 57 (2003).

[112] Compare generally the phenomenon of "false consensus bias", *i.e.* "the propensity to believe that one's views are the predominant views, when in fact they are not", Lawrence Solan et. al., *False Consensus Bias in Contract Interpretation*, 108 COLUM. L. REV. 1268 ff. (2008).

[113] George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321, 358 (1995).

[114] See above by n. 82; Morell E. Mullins, Sr., *Tools, Not Rules: The Heuristic Nature of Statutory Interpretation*, 30 J. LEGIS. 1, 58-59 (2003).

[115] Maradie v. Maradie, 680 So. 2d 538, 541 (Fla. Dist. Ct. App. 1996). See by example Stokes v. Com., 275 S.W.3d 185, 188 (Ky. 2008): "A trial court may take judicial notice of the definition of a word as an adjudicative fact where

without the necessity of offering evidence by the party who should ordinarily have done so."[116] Courts have, however, acknowledged that the practice of taking judicial notice "should be exercised with great caution."[117]

The question of the commonly accepted usage of a word or an expression within a given community is a question of fact, rather than of law.[118] This could be a disputed question for a jury, conceived as a group of laywomen and laymen selected to represent this community. "If the meaning of a text depends on the shared background conventions of the relevant linguistic community, then any reasonable user of language must know "the assumptions shared by the speakers and the intended audience."[119] The solution given by the jury as a plural body enhances the legitimacy of an asserted common meaning. The same would conversely apply in the rather hypothetical case of an obvious, *i.e.* undocumented yet commonly accepted *technical* term or expression: the jury should then reflect the corresponding sophisticated community. As to contractual matters, the question of the existence and content of a usage or custom is a question of fact usually submitted to a jury as trier of fact.[120] However, we are not aware that the interpretation of a statute or a contract in its commonly accepted meaning is a question that is actually put to the jury.[121] In contractual interpretation, the determination of whether the contract is clear or ambiguous, and, if clear, the meaning of the contract, is generally held to be one for the

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the definition of a term is indisputable, that is, where it is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

[116] Maradie v. Maradie, 680 So. 2d 538, 541 (Fla. Dist. Ct. App. 1996).

[117] *Id.*; Dippin' Dots, Inc. v. Frosty Bites Distribution, LLC, 369 F.3d 1197, 1205 (11th Cir. 2004); Banks v. Schweiker, 654 F.2d 637, 640 (9th Cir. 1981).

[118] *Cf.* for contractual interpretation E. ALLAN FARNSWORTH ET AL., CONTRACTS – CASES AND MATERIALS, 400 (7th ed. 2008): "It is clear that the meaning of language is, strictly speaking, a question of fact." Compare Ty Inc. v. Softbelly's Inc., 00 C 5230, 2006 WL 5111124 (N.D. Ill. Apr. 7, 2006) (as to the question of the generic character of the mark "Beanie): "The purpose of Dr. Janda's testimony would be to establish that the majority usage of the word "Beanie" is generic; however, the data on which Dr. Janda relies was focused too narrowly to establish the majority usage of the word "Beanie." [...] Because Dr. Janda failed to demonstrate the reliability of the sources on which he relied for his opinion, Dr. Janda cannot establish the reliability of his opinion. Moreover, defendants have not refuted that Dr. Janda's methodology is unproven and not generally accepted within the linguistic community."

[119] John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2467 (2003)

[120] See 12 WILLISTON ON CONTRACTS § 34:19 (4th ed.).

[121] The question of a plain meaning determined by a jury is distinct from the question of a jury instruction according to which a term should be understood in its plain meaning. South Carolina criminal law provides for instance a capital defendant with the right, invoked by request, to a jury instruction at sentencing that "the term life imprisonment is to be understood in its ordinary and plain meaning." The purpose of the plain meaning instruction is to ensure that the jury understands its sentencing options (life imprisonment or death) without speculating about the possibility of parole. Williams v. Ozmint, 494 F.3d 478, 484 (4th Cir. 2007).

court rather than the jury.[122] In statutory interpretation, "[j]udges decide the meanings of statutes."[123] This leaves the court with the responsibility to use "obvious" arguments with (implied or explicit) reference to some "commonly accepted meaning."

Notwithstanding this evidentiary issue, expressly taking into account and arguably rejecting plausible alternative meanings may affirm the legitimacy of an unavoidable reference to a commonly accepted meaning. Such an argumentation may occur by considering "the words of the contract, the alternative meaning suggested by counsel, and the nature of the objective evidence to be offered in support of that meaning."[124] In short, the credibility of the asserted obvious meaning will be reinforced by an earnest inquiry for a possible latent ambiguity. Even an apagogic disapproval of an alternative reading may lend more legitimacy to an "obviousness" argument.[125]

6) "Obviousness" argumentation as consensual means of interpretation

In light of the preceding findings, "obvious" arguments serve as appeals to a consensus on meaning. In this regard, we may consider their use as a proper, albeit consensual means of interpretation. The specificity lies in the absence of substantiation or demonstration of the asserted obviousness. From a functional perspective, using an "obvious" argument is to imply

[122] *Cf.* 11 WILLISTON ON CONTRACTS § 32:1 (4th ed.); E. ALLAN FARNSWORTH ET AL., CONTRACTS – CASES AND MATERIALS, 382 (7th ed. 2008); William C. Whitford, *The Role of the Jury (and the Fact/law Distinction) in the Interpretation of Written Contracts*, 2001 WIS. L. REV. 931, 936 (2001).

[123] Lawrence M. Solan, *Can the Legal System Use Experts on Meaning?*, 66 TENN. L. REV. 1167, 1170 (1999). Solan advocates the use of experts to help determine a meaning when the matter is "not so difficult that a trier of fact should not interpret them at all, but difficult enough for the trier of fact to benefit from some guidance", *id.* at 1199.

[124] *Cf.* Cont'l Cas. Co. v. Fleming Steel Co., 10-4524, 2011 WL 3020049 (3d Cir. July 25, 2011); Prudential Ins. Co. of Am. v. Prusky, CIV.A. 04-0462, 2008 WL 859217 (E.D. Pa. Mar. 31, 2008). See for an example of examination of an alternative, not ordinary meaning Limtiaco v. Camacho, 549 U.S. 483, 489 (2007): "In its unmodified form, the word "valuation" means "[t]he estimated worth of a thing." Black's Law Dictionary 1721 (4th ed.1951) (hereinafter Black's). But as the parties' competing interpretations demonstrate, there are different sorts of valuations."

[125] See by example Associated Press v. Nat'l Labor Relations Bd., 301 U.S. 103, 137 (1937) (Sutherland, J., *et al.*, dissenting): "When applied to the press, the term freedom is not to be narrowly confined; and it obviously means more than publication and circulation. If freedom of the press does not include the right to adopt and pursue a policy without governmental restriction, it is a misnomer to call it freedom. And we may as well deny at once the right of the press freely to adopt a policy and pursue it, as to concede that right and deny the liberty to exercise an uncensored judgment in respect of the employment and discharge of the agents through whom the policy is to be effectuated."; Cuomo v. Clearing House Ass'n, L.L.C., 129 S. Ct. 2710, 2719 n. 4 (2009): "If it meant that, § 484(a)'s apparent limitation of visitorial powers would be illusory-saying, in effect, that national banks are subject to only those visitorial powers that the courts say they are subject to. [...] In both the statutory and regulation context, "federal law" obviously means federal statutes."; Patterson v. De La Ronde, 75 U.S. 292, 299 (1868): "But, upon examining the language of the article as given in French, in the same volume (the English and French being printed in parallel columns), this construction becomes impossible. Read in the light thus afforded its meaning is obvious."; Bd. of Trustees of Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc., 131 S. Ct. 2188, 2190 (2011): "That is certainly not the common meaning of "retain," which is "to hold or continue to hold in possession or use." You cannot retain something unless you already have it."

that there is no (valid) counter-argument or other meaning. That it is "so clear that it is not open to rational question"[126], "too clear for argument."[127]

Indeed, "obvious" arguments simplify the argumentation by assuming that there is no disagreement on meaning. It would be practically impossible to explain, justify, and demonstrate the meaning of each single word or expression. Interpretative argumentation is only needed when a meaning is disputed.[128] "Obvious" arguments therefore serve the goals of efficiency and economy in interpretation. Yet the absence of counter-arguments cannot be equated with the existence of affirmative, supporting arguments. A demonstration based on obviousness is particularly weak, or (more accurately) fragile, insofar as it entirely depends on the inability of contradictors or critical readers to provide valid counter-arguments or even sheer contradiction.

Moreover, the fact that a meaning is undisputed does not necessarily mean that it is obvious; conversely, the fact that a meaning should be obvious does not mean that it is undisputed. As one author puts it regarding statutory interpretation, "[t]he statute's text may have a plain meaning, but that is not the same thing as the statute's meaning being plain."[129] For Stanley Fish analyzing the use of similarities in interpretation, similarity "is not a property of texts (similarities do not announce themselves), but a property conferred by a relational argument in which the statement A is like B is a characterization (one open to challenge) of both A and B."[130] A similar analysis could apply to "obviousness" arguments: obviousness is not a property of a text (obviousness does not announce itself), but a property conferred by an interpretative argument in which the statement A is obvious is a characterization (one open to challenge) of A.

On the other hand, as we have seen, there are instances where language is genuinely obvious, though not in the sense that its meaning is so apparent on the face of the text that its obviousness could be qualified as a property thereof and dispense any interpretation. When language is genuinely obvious, it would then be so in the sense that there is no other justification as to meaning than an undocumented, more or less broad convention on it. Such instances may be rare,

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[126] *Cf.* the expression used in *The Origin and Scope of the American Doctrine of Constitutional Law*, *in* JAMES B. THAYER, LEGAL ESSAYS 1, 21 (Boston 1908).

[127] *Cf.* the expression used in Plessy v. Ferguson, 163 U.S. 537, 542 (1896).

[128] See by example People v. Mathis, 173 Cal. App. 3d 1251, 1256 (Ct. App. 1985): "On the facts of this case, the statutory language regarding encouragement "to become a prostitute" poses no difficulty since it was not disputed that Dusty had not engaged in acts of prostitution prior to her meeting Tate and Mathis."; Harby ex rel. Brooks v. Wachovia Bank, N.A., 172 Md. App. 415, 429, 915 A.2d 462, 471 (2007): "The undisputed meaning of the contract is that Wachovia was obligated to arbitrate on the terms set forth in [...]".

[129] William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541, 598 (1988).

[130] Stanley Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 TEX. L. REV. 551, 558 (1982).

even under the presumption in favor of plain meaning outlined above. The circumstances surrounding a contract or a statute will often justify adopting a specific meaning, one which differs from the one generally accepted. Obviousness may nonetheless occur more frequently in cases where an insufficient or incomplete justification is provided for an asserted meaning. In this case, the "obvious" argument refers to an intrinsic or extrinsic element of demonstration, or both.[131] The gap between the referenced demonstration and the resulting meaning is bridged by a call on obviousness, *i.e.* a reference to the consensus on a given usage of a word or expression.[132] The demonstration provides legitimacy to the asserted meaning, but is not sufficiently strong to compel such a conclusion; obviousness is here used as a supplemental argument of last resort.

Admittedly, the theoretical distinction between a mere shortcut in demonstration and an unavoidable reference to the common usage of a word will not be easy to handle in practice. This difficulty could be an incentive to remain skeptical towards any "obviousness" argument. It could also be a reason to avoid "obviousness" arguments to all possible extent. That is, when the interpreter intends to refer to a linguistic common usage in a community, she should simply say so, rather than obscurely assert the obviousness or plainness of the resulting meaning. Her argument may not thereby be any more convincing, because linguistic usage is evidently subject to dispute,[133] but the claim will at least gain legitimacy by avoiding the reproach of argumentative shortcoming. Linguistic usage cannot be explained, but it can be referred to as a common experience.

Here the question of which common linguistic experience should be relevant is left to the circumstances of each case.[134] Even a sophisticated (technical or legal) community may be

[131] *Cf.* "d) Intrinsic and extrinsic references" on pp. 8 ff.

[132] See by example City of Chicago v. Morales, 527 U.S. 41, 92-93 (1999) (Scalia, J., dissenting): "the ordinance requires that the group be "remain[ing] in any one place with no apparent purpose." Justice O'CONNOR's assertion that this applies to "any person standing in a public place," ante, at 1864, is a distortion. The ordinance does not apply to "standing," but to "remain [ing]"—a term which in this context obviously means "[to] endure or persist," see American Heritage Dictionary 1525 (1992). There may be some ambiguity at the margin, but "remain[ing] in one place" requires more than a temporary stop, and is clear in most of its applications"; In re Katrina Canal Breaches Litig., 495 F.3d 191, 214 (5th Cir. 2007): "In light of these definitions, we conclude that the flood exclusions are unambiguous in the context of this case and that what occurred here fits squarely within the generally prevailing meaning of the term "flood.""

[133] "Justice POWELL initially relies on "ordinary linguistic usage" for the proposition that an order, once executed, cannot be "stayed." Ante, at 9. I have some doubt whether this proposition is true, even as a matter of linguistic usage." Graddick v. Newman, 453 U.S. 928, 943 (1981) (Rehnquist, J., dissenting).

[134] *Cf.* 11 WILLISTON ON CONTRACTS § 32:3 (4th ed.): "Sometimes an ordinary word or phrase may bear an extraordinary meaning in the locality where the contract was executed"; RESTATEMENT (SECOND) OF CONTRACTS § cmt. a 201 (1981): "Differences of usage also exist in various localities and in different social, economic, religious and ethnic groups. All these usages change over time, and persons engaged in transactions with each other often

considered if the interpreted term requires it.[135] In statutory interpretation, the identification of the relevant linguistic community will also depend on the broader debate between originalists and supporters of an evolutionary construction.[136] One can however not exclude a concern about a possible temptation of judges to assimilate their own linguistic experience with the relevant community usage in the case.[137] The function of "obviousness" arguments as reversal of burden of demonstration should therefore be attentively considered, and actual evidence – if available – should be sought and debated as to the generally accepted meaning of the disputed word or expression in its proper linguistic community.

In cases where the factual demonstration of a linguistic usage is not possible or not provided, the interpreter has no other choice than to refer to the *obviousness* of the asserted meaning. Now, "[a] text acquires meaning only by reference to its readers. The shared understanding of such readers constitutes the "interpretive community" for the text."[138] Due to the nature of language as convention, the "obvious" meaning will then depend on a consensus among the interpretive community. Again, in a judicial dispute about a case, this community will tend to be practically reduced to the majority of the court.[139] However, the limited judicial consensus will only artificially satisfy the conventionalist claim according to which "an interpretation is correct or best within the conventions of an interpretive community."[140] A jury composed of members of

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develop temporary usages peculiar to themselves. Moreover, most words are commonly used in more than one sense." Compare the various linguistic trade usages exemplified in Hurst v. W.J. Lake & Co., 141 Or. 306, 310-12 (1932), by example: "the custom of a locality considers 100 dozen as constituting a thousand".

[135] *Cf.* above after n. 119.

[136] Because of the mostly temporal interpretative gap in statute construction, the question of which linguistic community is relevant (the one at the time when the statute was enacted or the contemporary usage) will depend on the broader interpretative approach (originalist or non-originalist). *Cf.* Frank H. Easterbrook, *Pragmatism's Role in Interpretation*, 31 HARV. J.L. & PUB. POL'Y 901, 902 (2008), stating that "originalism requires us to understand how the linguistic community that approved the words understood their application."

[137] *Cf.* above by n. 111. See however William S. Blatt, *Interpretive Communities: The Missing Element in Statutory Interpretation*, 95 NW. U. L. REV. 629, 689 (2001): "Judges tend to adopt the theory of interpretation appropriate to the community responsible for the issue before them."

[138] *Id.* at 629.

[139] *Cf.* Pac. Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co., 69 Cal. 2d 33, 36-37 (1968): "Having determined that the contract had a plain meaning, the court refused to admit any extrinsic evidence that would contradict its interpretation. When a court interprets a contract on this basis, it determines the meaning of the instrument in accordance with the extrinsic evidence of the judge's own linguistic education and experience.' (3 Corbin on Contracts (1960 ed.) (1964 Supp. s 579, p. 225, fn. 56).)"; Overhauser v. United States, 45 F.3d 1085, 1088 (7th Cir. 1995) (Posner, J): "If, therefore, without taking evidence, a court can have reasonable confidence that it knows what the contract means, it ought not to put the litigants (and the trier of fact) to the bother, expense, and uncertainty of a trial or other evidentiary hearing."

[140] *Cf.* Peter C. Schanck, *The Only Game in Town: An Introduction to Interpretive Theory, Statutory Construction, and Legislative Histories*, 82 LAW LIBR. J. 419, 461.

the given linguistic community (if available),[141] and even from a sophisticated community (if applicable)[142] could then constitute a more legitimate interpretive community and could therefore lend more legitimacy than judges can to the interpretative "obviousness".

Conclusion

To conclude, "obvious" arguments are a problematic but unavoidable device of legal interpretation. If "language provides a meaningful constraint on public and private conduct,"[143] it also provides a marginal constraint on the rationality of legal interpretation. "Obvious" arguments are the interpretative response to the nature of language as consensus. The obviousness of a meaning can be defined as linguistic consensus on a meaning. Although they should always be regarded with skepticism, "obvious" arguments may therefore more justifiably be used in two cases of consensus. First, when there is no disagreement among the interpretive community as to the meaning of a word or expression. Second, when there is no other justification for a meaning than an undocumented, generally accepted usage among the relevant linguistic community. In this last case, an assessment by members of this linguistic community could enhance the legitimacy of the "obvious" meaning.

[141] In particular under an originalist method of interpretation, the passage of time will eventually prevent any direct intervention by members of the original linguistic community.
[142] *Cf.* above after n. 118 for the rather hypothetical case of an obvious, *i.e.* undocumented yet commonly accepted *technical* term or expression.
[143] Trident Ctr. v. Connecticut Gen. Life Ins. Co., 847 F.2d 564, 569 (9th Cir. 1988).