Reconstructing the Plain Language Rule of Statutory Construction: How and Why

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ARTICLE

RECONSTRUCTING THE PLAIN LANGUAGE RULE
OF STATUTORY CONSTRUCTION:

HOW AND WHY

Maxine D. Goodman*

I. INTRODUCTION

The plain language rule of statutory construction befuddles lawyers, jurists, and scholars. Courts have described the rule as follows:

Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise;¹ [W]here the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended;² In all cases involving statutory construction, ‘our starting point must be the language employed by Congress,’ . . . and we assume ‘that the legislative purpose is expressed by the ordinary meaning of the words used;’³ Since it

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should be generally assumed that Congress expresses its purposes through the ordinary meaning of the words it uses, we have often stated that "[absent] a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive." 4

Generally speaking, every judge and lawyer knows what the plain language rule means, yet each attributes different properties to the rule. For example, under the rule, is the plain language of a text the starting point of statutory construction (to be supplemented with legislative history and contextual clues), or is the text conclusive? And when is the meaning of textual language plain?

Because of the uncertainty in how the rule should apply and the inconsistency with which judges apply the rule, the plain language rule fails to afford any measure of predictability to lawyers, lower courts, and law students in construing statutes. Even knowing the broad interpretive theories of the Supreme Court Justices does not facilitate predicting outcomes in plain language cases.

My goal in writing this paper is not to criticize the rule, which many have already done. 5 Though I share much of the criticism, and have some of my own, I like the idea of a plain language rule because it concerns the meaning of words and, in theory, is easy for law students studying statutory construction to grasp. So, because I like the idea of the rule and appreciate its traditional role in construing statutes, I will offer a fix, a way to reconstruct the broken rule.

I am also not defending the rule. At the outset, defending the rule is problematic because so many different versions of the rule exist. In addition, defending the rule typically means advancing the text as the primary source of a statute's meaning, as against legislative history. I am not presently joining the debate over the virtues of legislative history versus text as the best indicator of a statute's meaning. 6 Rather, my paper seeks to ex-


6. Generally, it is well-established that judges attempt to give effect to legislative intent in construing statutes. United States v. American Trucking Ass'ns, 310 U.S. 534, 542 (1940) (stating the function of courts in interpreting statutes is to construe the lan-
plore the problems with the rule, offer a fix, and encourage the Court to refrain from using the rule in its present state(s).

My paper is also aimed at the legislature, encouraging Congress to include more definition and purpose sections in statutes. Increasing the use and effectiveness of statutory definition and purpose sections will, ideally, eliminate the need for applying the rule and/or ease the task of judges applying the rule. Further, Congress could also identify the proper source (a particular dictionary, for example) for the text's meaning.

In Section I, I describe the plain language rule as used by Justice Scalia, the most outspoken proponent of the plain language rule on the United States Supreme Court. Justice Scalia's version of the rule is contrasted with William Blackstone's plain language rule. Section II contrasts the two versions to show how a single rule can have various properties and can function differently depending on the user. Today, the plain language rule is a messy and haphazard compilation of the different properties and functions of the rules announced by Justice Scalia, William Blackstone, and other commentators and jurists. There is no single plain language rule; at present, how the rule functions depends on the jurist calling it forth.

In Sections III and IV, I dissect the plain language rule, revealing its flaws. First, in Section III, I illustrate the different sources used by jurists to find the plain meaning of a text. So, to start, I focus not on how the rule functions according to the particular jurist, but rather on what source the jurist employs to decide the plain meaning. In Section IV, I explore the different ways in which the rule functions depending on the jurist applying the rule. In other words, some jurists start with the text and then include legislative history. Others seek to find the meaning in the text alone. I dissect the rule not simply to show its flaws but to provide a necessary backdrop for the proposed remedy.

In Section V and VI, I emphasize why the Court must fix the rule. Finally, in Section VII, I analyze two possible solutions so as to give effect to the intent of Congress. I am not joining this debate either (whether legislative intent is the proper goal of statutory construction) but rather am accepting this premise.

tions, ways to give the plain language rule the properties of a rule. I highlight one as the only effective and plausible remedy.

This paper is a plea for the Court to scrutinize and ideally fix the plain language rule, thus allowing the rule to aid in statutory construction. My remedy would enable the rule to function as a rule, giving lawyers, lower court judges, and law students a high measure of predictability in plain language statutory construction cases. My less ambitious goal is to reiterate that the rule is broken and clarify the consequences of the broken rule; as described in Section V, the Court's current use of the plain language rule undermines the role of Supreme Court opinions.

Again, I also urge the legislature to include definition and purpose sections in statutes, defining any terms likely to cause confusion, thus lessening the need for judges to delve into the text or to look outside the text for meaning. Congress, composed largely of lawyers who are seemingly well-equipped to predict potential problems in construing statutory language, should strive to define all but the obvious statutory terms. Congress could also provide the proper source of a text’s meaning, in the event the statute requires judicial construction.

A. William Blackstone’s Plain Language Rule

More than 200 years ago, William Blackstone prescribed a form of the plain language rule in Commentaries on the Laws of England. Blackstone’s rule was as follows:

The fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by signs the most natural and probable. And these signs are either the words, the context, the subject-matter, the effects and consequences, of the spirit and reason of the law.

Blackstone instructed, “[w]ords are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use.” Blackstone gave as an example “the law mentioned by Puffendorf, which forbad a layman to lay hands on a

8. BLACKSTONE, supra note 7 at 43.
9. Id. at 43.
10. Id. at 44.
priest . . . ."11 Obviously, this law meant "him who had hurt a priest with a weapon."12 Thus, Blackstone's rule required a common sense approach to language, similar to Scalia's, avoiding both overly literal and overly lenient constructions.

Blackstone went on to explain that "if words happen to be still dubious,13 we may establish their meaning from the context; with which it may be of singular use to compare a word or a sentence, whenever they are ambiguous, equivocal, or intricate."14 Blackstone cited the "proem," or preamble, as a contextual clue. "Of the same nature and use is the comparison of a law with other laws, that are made by the same legislator, that have some affinity with the subject, or that expressly relate to the same point."15 Blackstone stated, "words are always to be understood as having a regard" to subject matter, "for that is always supposed to be in the eye of the legislator, and all his expressions directed to that end."16

Blackstone explained when courts should deviate from the text as follows: "As to the effects and consequence, the rule is, that where words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them."17

To illustrate, Blackstone referred to the Bolognian law, "that whoever drew blood in the streets should be punished with the utmost severity."18 This law "was held after a long debate not to extend to the surgeon, who opened the vein of a person that fell down in the street with a fit."19 Thus, Blackstone started with the text then looked to the "effects and consequences of the spirit and reason of the law" to determine its meaning.

11. Id.
12. Id.
13. "Dubious" is not defined in Blackstone's text. The sentence suggests Blackstone meant when the words are "ambiguous, equivocal, or intricate." As I will discuss later, part of the current confusion with the rule lies in knowing what is ambiguous for purposes of applying the rule.
14. BLACKSTONE, supra note 7 at 44.
15. Id.
16. Id.
17. Id.
18. Id.
19. Id.
B. Justice Scalia’s Plain Language Rule

According to Justice Scalia, the Court’s “regular method” of construing a statute\(^{20}\) is as follows:

[F]irst, find the ordinary meaning of the language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies. If not—and especially if a good reason for the ordinary meaning appears plain—we apply that ordinary meaning.\(^{21}\)

To Justice Scalia, the ordinary meaning is neither mechanically literal nor overly lenient, it is reasonable: \(^{22}\) “that which an ordinary speaker of the English language—twin sibling to the common law’s reasonable person—would draw from the statutory text.”\(^{23}\)

Regarding textual context, Justice Scalia describes “the fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.”\(^{24}\)

A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.\(^{25}\)

Textual context means any of the following three structural indicia of meaning: 1) how the word or phrase is used throughout the statute or in other statutes; 2) how the possible meanings fit with the statute as a whole; or 3) “the interaction of different statutory schemes to determine statutory plain meaning.”\(^{26}\)

According to Scalia, judges should deviate from the plain

\(^{21}\) Id.
language of the text only where the textual reading leads to an absurd result.

I acknowledge an interpretive doctrine of what the old writers call *lapsus linguæ* (slip of the tongue), and what our modern cases call 'scrivener's error,' where on the very face of the statute it is clear to the reader that a mistake of expression (rather than of legislative wisdom) has been made.27

When "the objective import" of a statute is clear, "it is not contrary to sound principles of interpretation... to give the totality of context precedence over a single word,"28 thus allowing courts to deviate from the text. In *Green v. Bock Laundry Machine Co.*,29 for example, the Court determined giving the word "defendant" in Federal Rules of Evidence 609(a) its plain meaning would lead to an absurd, unfair result. Justice Scalia concurred, agreeing the Court could determine meaning from legislative history:

[It is entirely appropriate to consult all public materials, including the background of Rule 609(a)(1) and the legislative history of its adoption, to verify that what seems to us an unthinkable disposition (civil defendants but not civil plaintiffs receive the benefit of weighing prejudice) was indeed unthought of, and thus to justify a departure from the ordinary meaning of the word "defendant" in the Rule.30

Legislative history is never a necessary or proper consideration where the textual meaning in context is plain.31 "My view that the objective indication of the words, rather than the intent of the legislature, is what constitutes the law leads me, of course, to the conclusion that legislative history should not be used as an authoritative indication of a statute's meaning."32 In *INS v. Cardoza-Fonseca*,33 Justice Scalia concurred only to express his dismay at the Court's "exhaustive" reliance on legislative history.

Justice Scalia's version of the plain language rule is commonly referred to as "the new textualism."34 The new textual-

30. *Id.* at 527 (Scalia, J., concurring).
34. William Eskridge gave Justice Scalia's interpretive theory this name in *New Textualism* at 623. Many commentators use the term to describe Justice Scalia's version of
ism is simple. According to William Eskridge, "[W]hen construing statutes, consider the text, the whole text, and nothing but the text. Period."35

Justice Scalia's and Blackstone's versions of the plain language rule share certain basic properties. In construing statutes, judges should be guided by the text in context, giving words their ordinary, common sense meanings. The two part ways dramatically, however, regarding the Court's proper role in construing a statute. When the words are dubious, Blackstone directed the judge to consider the "the reason and spirit" of the law. "The most universal and effectual way of discovering the true meaning of the law, when its words are dubious, is by considering the reason and spirit of it... for when this reason ceases, the law itself ought likewise to cease with it."36 Justice Scalia staunchly disagrees, believing "the text is the law, and it is the text that must be observed," rather than some "unexpressed legislative intent."37

C. Evolution of the Rule: The Plain Language Rule Today

Today, the long-running battle between legislative history and text as the primary source of legislative intent continues.38 The plain language rule has battle scars. The Rehnquist Court cites the plain language rule in the more than twenty cases cited herein; yet, how the rule functions varies dramatically from case to case, depending on the jurist and/or type of case. The Court should therefore either reconstruct the plain language rule or, if unable or unwilling to do so, acknowledge its flaws and cease citing and using the rule to construe statutes.

II. THE RULE FAILS TO AFFORD PREDICTABILITY IN STATUTORY CONSTRUCTION CASES

As illustrated below, the plain language rule, as used by the Rehnquist Court,39 fails to provide predictability in statutory

35. Eskridge, A Matter Of Interpretation, supra note 23, at 1514.
36. BLACKSTONE, supra note 7, at 44-45.
37. Scalia, supra note 22, at 22-23.
38. It is well-established, though certainly widely debated, that federal judges must act as Congress's faithful agents, following "the commands embedded in duly enacted statutes, to the extent that those commands are sufficiently clear." John F. Manning, The Absurdity Doctrine, 116 HARV. L. REV. 2387, 2393-94 (2003).
39. When I refer to the Court, I mean the institution rather than any single justice. My paper involves how the Rehnquist Court as a whole, rather than any single justice,
construction cases. This paper begins with the assumption that predictability is of value in our legal system. Thus, the “who cares” question is answered by the seemingly well-accepted premise that lawyers and jurists should be able to predict the outcome of statutory construction cases where the text is plain.

As shown below, even when the text is seemingly plain, and the Court purports to apply the plain language rule, predicting the outcome of statutory construction cases requires anticipating the ways in which the Court will stray from the text to achieve a particular result.

A. The Problem Illustrated

These hypotheticals come from recent United States Supreme Court cases where the Court applied the plain language rule to statutory construction cases. After reviewing the facts and law, try to predict the outcome.

The statute in Examples 1, 2, and 3, 18 United States Code § 924(c)(1), is a sentence enhancing statute that imposes a five year mandatory prison term on a person who “uses or carries a firearm during and in relation to a drug trafficking crime.” In each case, the Court, relying on the plain language rule, focused on the statutory “uses or carries” language to reach its outcome.

Example 1:

The petitioner unlawfully sold marijuana, transporting the marijuana to the drug sale in his truck. The police found a handgun locked in the truck’s glove compartment at the time of defendant’s arrest. The other petitioner, arrested for attempting to steal drugs from drug sellers, had placed several guns in a bag, put the bag in the trunk of a car, and then traveled by car to the proposed drug-sale point. The indictments alleged each petitioner had “carried” a firearm during and in relation to a drug trafficking crime.

Example 2:

The petitioner offered to trade an automatic weapon and silencer to an undercover officer for cocaine. He was charged with numerous firearm and drug trafficking offenses. The indictment alleged defendant knowingly “used” a MAC-10 and its silencer...
during and in relation to a drug trafficking crime.

Example 3:

One defendant was stopped after police noticed his car lacked a front license plate and inspection sticker. As the petitioner got out of his car, the officer saw defendant push something between the seat and front console. A search of the passenger compartment revealed ammunition and 30 grams of cocaine. After arresting defendant, the officers searched the trunk of his car and found a bag containing a pistol.

The other defendant was arrested after an undercover officer made a controlled buy of crack cocaine from defendant. Inside a locked trunk in the bedroom closet of defendant's house, the police found an unloaded, holstered gun and crack cocaine. The defendant was indicted on a number of counts, including "using" a firearm in violation of section 924(c)(1).

Should the Court enhance punishment under the statute in each case? Is the statute ambiguous? If not, does the plain meaning of "using or carrying a firearm" during and in relation to a drug trafficking offense cover the conduct described in each case?

Example 4 (involving a different statute):

Petitioner was convicted under 18 United States Code § 2119, the carjacking statute, which makes it a crime to take a motor vehicle "from . . . another by force or violence or by intimidation with the intent to cause death or serious bodily harm." Petitioner's accomplice testified the plan was to steal cars without harming the drivers; he would have used his gun "only if any of the victims had given him a hard time." Petitioner's accomplice approached each driver with a gun and threatened to shoot unless the driver gave him the car keys. When one driver hesitated, Petitioner punched the driver in the face; no other violence occurred. Petitioner appealed the conviction, arguing he lacked the requisite intent under the carjacking statute.

Should the Court affirm the conviction under the statute? Is the statute ambiguous? If not, does the plain meaning of "intent to cause death or serious bodily harm" cover Petitioner's mental state?

Now, once you have predicted the outcomes based on the plain language rule, review the Court's holdings.
Example 1:

The Court in *Muscarello v. United States*, 40 in an opinion by Justice Breyer, concluded the “generally accepted contemporary meaning” of “carrying a firearm” includes having a firearm in the glove compartment of a car or in the trunk of a car during a drug deal. Thus, the Court upheld the petitioners’ convictions under the statute. Justices Ginsberg, Rehnquist, Scalia, and Souter dissented based on the notion the plain meaning of carrying a firearm is bearing the weapon “in such manner as to be ready for use as a weapon.” 41

Example 2:

Justice O'Connor, writing for the Court in *Smith v. United States*, 42 concluded “using a firearm” includes bartering the weapon for drugs, thus affirming the conviction. Justice O'Connor relied on the “ordinary or natural” meaning of the word, obtained from the Webster’s New International Dictionary (2d ed. 1950) and Black’s Law Dictionary (6th ed. 1990). 43 Justice O'Connor disagreed with the dissenting view by Justices Scalia, Stevens, and Souter that the plain meaning of a word is the first meaning to come to mind when the word is uttered. According to Justice O'Connor, “[t]hat one example of ‘use’ is the first to come to mind when the phrase ‘uses ... a firearm’ is uttered does not preclude us from recognizing there are other ‘uses’ that qualify as well.” 44

Example 3:

Considering the “bare meaning” of “use” as well as its “placement and purpose in the statutory scheme,” the Court in *Bailey v. United States*, 45 in an opinion by Justice O'Connor, concluded the word “use” requires activity beyond mere possession. Thus, the word did not cover defendants’ conduct; “[t]o sustain a conviction under the ‘use’ prong of § 924(c)(1), the Government must show that the defendant actively employed the

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41. Id. at 140.
42. 508 U.S. 223 (1993).
43. Smith, 508 U.S. at 228.
44. Id. at 230.
firearm during and in relation to the predicate crime."\textsuperscript{46}

Example 4:

Justice Stevens, writing for the Court in Holloway v. United States,\textsuperscript{47} cited the plain language rule in affirming the conviction under the carjacking statute. "Intent," according to Justice Stevens, could mean either conditional intent (only if certain preconditions occurred) or unconditional intent (intent regardless of preconditions). Justices Scalia and Thomas disagreed with the Court's construction. Justice Scalia wrote, "it is not common usage—indeed, it is an unheard-of usage—to speak of my having an 'intent' to do something, when my plans are contingent upon an event that is not virtually certain, and that I hope will not occur."\textsuperscript{48}

III. DISSECTING THE PLAIN LANGUAGE RULE—THE SOURCE OF PLAIN MEANING

Before looking at how the rule functions, we first examine the isolated question of what plain language means. When the Court applies the plain language rule to a statutory text, what is the source of the text's plain meaning? The Court currently chooses among ten sources of "plain meaning" in construing texts. These sources include: 1) the "obvious, typical meaning," the "ordinary, contemporary, common meaning" when the word is used "in customary and preferred sense," and the "normal and ordinary meaning;" 2) the etymological meaning; 3) the "classic literary" meaning; 4) modern press usage; 5) dictionary meaning; 6) any plausible meaning attributed to a word; 7) the "generally accepted contemporary meaning;" 8) the technical, as opposed to colloquial or commonly understood, meaning; 9) the meaning of the word according to a majority of legislators at time the statute was enacted; and finally 10) the MEAD database (lexis).

A. "obvious, typical meaning;" "ordinary, contemporary, common meaning" when word is used "in customary and preferred sense;" "normal and ordinary meaning;"

\textsuperscript{46} Id. at 150.

\textsuperscript{47} 526 U.S. 1 (1999).

\textsuperscript{48} Id. at 14.
Justice Kennedy, writing for a unanimous court in *Williams v. Taylor*, analyzed the meaning of "failed" in a habeas statute. The statute provided a federal district court could not hold an evidentiary hearing on a petitioner's state court claims if the petitioner had "failed to develop the factual basis of a claim in State court proceedings . . ." The Commonwealth in *Williams* argued that because the factual basis of petitioner's three state court claims had not been developed in state court, the federal court could not hold an evidentiary hearing on the claims (regardless of whether petitioner was at fault for the handling of the state court claims). Justice Kennedy rejected this "no-fault" reading of the statute, determining the term "failed" required lack of diligence or some greater fault, rather than just a neutral inability to develop the facts. He contrasted this meaning with the plausible but less common meaning of a neutral lack of activity: "[w]e do not deny 'fail' is sometimes used in a neutral way, not importing fault or want of diligence . . . . This is not the sense in which the word 'failed' is used here, however." Justice Kennedy relied on two editions of Webster's New International Dictionary and Black's Law Dictionary to determine the meaning of failed in its "customary and preferred sense."

Justice White in *Dunn v. Commodity Futures Trad. Comm.*, defined "transactions in foreign currency" in the Treasury Amendment exemption to the Currency Exchange Act to include options to buy and sell foreign currency. Justice White rejected as "quite unnatural" the Commission's view that the phrase included only the actual purchase or sale of foreign currency (rather than purchasing the option to purchase or sell) and adopted, "as a more normal reading of the key phrase all transactions in which foreign currency is the fungible good whose fluctuating market price provides the motive for trading . . . . There can be no question that the purchase or sale of a foreign currency option is a transaction 'respecting' foreign currency. We think it equally plain as a matter of ordinary meaning that such an option is a transaction 'in' foreign currency for

51. Williams, 529 U.S. at 431.
52. Id. at 431-32.
purposes of the treasury amendment."\textsuperscript{55}

Justice Scalia in his concurring opinion expressed dismay at the Court's "extensive discussion of legislative history,... as though that were necessary to confirm 'the plain meaning of the language,' or (worse) might have power to overcome it."\textsuperscript{56}

\textbf{B. Etymological meaning:}

In \textit{Muscarello}, Justice Breyer, citing the Barnhart Dictionary of Etymology, stated "the origin of the word 'carries' explains why the first, or basic, meaning of the word 'carry' includes conveyance in a vehicle."\textsuperscript{57} Justice Breyer also cited the Oxford Dictionary of English Etymology to support his definition of "carry."

\textbf{C. "Classic Literary" meaning:}

Justice Breyer, cited verses from Isaiah and Kings from the King James Bible, a passage from Robinson Crusoe, and a quote from Moby Dick as textual support for his definition of carry.\textsuperscript{58} He concluded "[t]he greatest of writers . . . ,"\textsuperscript{59} attributed the meaning he adopted to the word "carry."

\textbf{D. Modern press usage:}

In \textit{Muscarello}, Justice Breyer also considered the word "carry" as used in a sampling of articles from the New York Times and US News.\textsuperscript{60}

\textbf{E. Dictionary meaning:}

In \textit{Chapman v. United States},\textsuperscript{61} the petitioners were convicted of selling ten sheets of blotter paper containing LSD in violation of federal law. The applicable statute, 21 United States Code $ 841(b)(1)(A)(v)$, set out a mandatory minimum of ten years imprisonment for ten grams or more of a "mixture or substance containing a detectable amount" of LSD. Justice Rehnquist concluded that the term "mixture" required the entire

\textsuperscript{55} Dunn, 519 U.S. at 470-471.
\textsuperscript{56} \textit{Id.} at 480.
\textsuperscript{57} \textit{Muscarello}, 524 U.S. at 128.
\textsuperscript{58} \textit{Id.} at 129.
\textsuperscript{59} \textit{Id.}
\textsuperscript{60} \textit{Id.} at 129-130.
mixture or substance be weighed when calculating the sentence. To determine the meaning of "mixture", Justice Rehnquist used Webster's New Third International Dictionary 1449 (1986) and Oxford English Dictionary (2d ed. 1989).

Of course, pursuing a dictionary meaning raises a host of issues concerning which dictionary to use and which definition for a particular word within the dictionary. Of course, pursuing a dictionary meaning raises a host of issues concerning which dictionary to use and which definition for a particular word within the dictionary. Dictionaries, for one, "do not represent facts of a language that are independent of the users of that language." Further, "[w]hether a particular usage is listed first or last in an entry has no bearing on whether it is the 'plainest' meaning for a word in context." Although "dictionary definition" suggests more of a source of meaning rather than a category of possible meanings, the Justices often refer to the "dictionary definition" without referring to a particular category of meaning. There is no consistency in which dictionary or which sense of a particular word is selected. Justice Thomas in Roell v. Withrow relied on the Random Houston Dictionary of English Language 1570 to define "upon" in the phrase "upon the consent of the parties" in the Federal Magistrate Act of 1979. Justice Thomas relied on the American Heritage Dictionary 1598 (4th ed. 2000) in Barnhart v. Bellaire Corp. to define "shall." Justice Stevens relied on Webster's Third New International Dictionary 645 (1976) in United States v. Doe, to define "disclose" for the grand jury statute at issue in that case.

F. Any plausible meaning attributed to a word;

Justice O'Connor in United States v. Smith, expressly acknowledged that "use a weapon" was one of several possible definitions. "That one example of 'use' is the first to come to mind when the phrase 'uses... a firearm' is uttered does not preclude us from recognizing there are other 'uses' that qualify as well." In other words, rather than looking to the single,
most fitting definition, Justice O'Connor looked to any of the possible plausible definitions.

G. "Generally Accepted Contemporary Meaning;"

Ultimately, in Muscarello, Justice Breyer relied on a combination of possible sources: dictionaries, classic literature, etymology, and modern press usage to arrive at the plain meaning of "carry." He referred to his result as the "generally accepted contemporary meaning." 70

H. Technical, as opposed to colloquial or commonly understood, meaning;

Justice Kennedy, writing for the Court adopted a technical definition of "own" and "ownership" in Dole Food Co. v. Patrickson. 71 "The Dead Sea Companies urge us to ignore corporate formalities and use the colloquial sense of that term. They ask whether, in common parlance, Israel would be said to own the Dead Sea Companies. We reject this analysis." 72 Without explaining their departure from the everyday usage of the terms, Justices Scalia and Thomas joined the Court in rejecting the everyday meanings of "own" and "ownership."

I. Meaning of word according to a majority of legislators at time statute was enacted;

In Chisom v. Roemer, 73 a case brought by a class of black registered voters under the Voting Rights Act of 1965, the Court held that Section 2 of the Act (involving vote dilution) covers judicial elections. The Court focused on the term "representatives" in subsection 2(b) of the Act. The Fifth Circuit Court of Appeals had previously held that Congress, by including "representatives" in the phrase "to elect representatives of their choice," showed that Congress did not intend to include judicial elections under Section 2. The Court rejected this argument, holding that "the better reading of the word 'representatives' describes the winners of representative, popular elections," 74 which would in-

70. Muscarello, 524 U.S. at 139.
72. Id. at 1660.
74. Id. at 399.
clude popular elections.

In dissent, Justice Scalia chided the majority for its "backwards" method of construing the statute. "Our job begins with a text that Congress has passed and the President has signed. We are to read the words of that text as any ordinary Member of Congress would have read them... and apply the meaning so determined."75 In 1982, when the amendments to the Voting Rights Act at issue were adopted, "the ordinary speaker in 1982 would not have applied the word to judges."76

In Justice Stevens's dissenting opinion in McNally v. United States,77 he examined the meaning of "to defraud" for purposes of the federal mail fraud statute, 18 U.S.C. § 1341 (whether the mail fraud statute protects not only property rights but also intangible rights such as the right to honest government). The Court concluded the statute did not cover a scheme to defraud the citizens and government of Kentucky of their right to have the Commonwealth's affairs conducted honestly. Justice Stevens disagreed, relying, in part, on the meaning of "to defraud" at the time the statute was enacted. "Examination of the way the term 'defraud' has long been defined, and was defined at the time of the statute's enactment, makes it clear that Congress' use of the term showed no intent to limit the statute to property loss."78 Stevens cited Bouvier's Law Dictionary (1897) and A Dictionary of Law (1893) to support his construction of the statute.

J. MEAD database (lexis) - Linguists discuss the NEXIS database produced by Mead Data Central for "actual documented uses of words in natural language" as an alternative to dictionaries.79

These various sources of meaning show why the Court's current use of the plain language rule makes predicting outcomes of statutory interpretation cases impossible. As long as the source of a text's plain meaning varies from case to case, lawyers must continue to speculate as to not only the role context and legisla-
tive history play in deciding meaning but also what source the Court will use to determine the plain meaning of a statutory text.

IV. DISSECTING THE PLAIN LANGUAGE RULE - LACK OF INTERNAL COHERENCE

In mathematics, a rule is "a determinate method for performing . . . [an] operation and obtaining a certain result." In theory, every rule of statutory construction should be a determinate method of arriving at an outcome in statutory construction cases. As currently used, however, the plain language rule lacks coherent steps and a fixed order of steps. When the Court seeks to apply the rule, what role, if any, should legislative history play? Should the Court consider statutory context? What is an absurd result, and what if one exists?

Now, after examining the various sources jurists use to find a text's plain meaning, we will consider the various ways in which the rule functions. As exemplified below, the Court typically uses one of five different methodologies, to determine the outcome of statutory construction cases:

A. Plain Language Alone (the Court relies on only the text).

Meaning of "related persons" in *Barnhart v. Sigmon Coal Co.* In a decision by Justice Thomas, the Court relied on only the plain meaning of the phrase “related persons” in the Coal Industry Retiree Health Benefit Act of 1992. The Act permitted assigning retired miners to the coal companies as successors in interest for purposes of paying the miners' health premiums. The coal companies had sued the Commissioner of Social Security for improperly assigning health premium responsibility for retired miners to the companies as successors in interest of an out of business operator.

The Commissioner contended the statute permitted assignment of retired miners to the coal companies as successors-in-interest. Justice Thomas relied on a strict reading of the statute to conclude Jerichol, successor in interest to an out of business coal company, was not responsible for the health care benefits of retired miners. Jerichol did not fall within any of the three categories of "related person."

Justice Thomas refused to consider legislative history or the agency interpretation; "Floor statements from two Senators cannot amend the clear and unambiguous language of a statute. We see no reason to give greater weight to the views of two Senators than to the collective votes of both Houses, which are memorialized in the unambiguous statutory text." In their dissent, Justices Stevens, O'Connor, and Breyer stated "[w]hile the Court trumpets the clear language of the statute, the language here is not clear enough to require disregard of 'clearly expressed legislative intention to the contrary.'"

B. Plain Language in Statutory Context (the Court relies on the text as it fits into either the structure of the statute or the entire statutory scheme).

Meaning of "delay" in United States v. Pedro Alvarez-Sanchez. Justice Thomas relied on plain language in context to determine whether a confession was inadmissible given the delay between a state court narcotics charge and presentment before the federal magistrate on a related federal crime. The statute, 18 United States Code § 3501(c), provides a confession is inadmissible given "any delay between arrest and presentment on federal charges."

Justice Thomas concluded the statute refers to a delay between arrest on federal charges and presentment on federal charges, although this limitation is not expressly provided in the statutory language. "Delay," according to Justice Thomas, means a postponement. Thus one must have an obligation to act before there can be a delay.

The Court relied on the statutory context and stated, "[w]e believe respondent errs in placing dispositive weight on the broad statutory reference to 'any' law enforcement officer or agency without considering the rest of the statute." "In short, it is evident 'from the context in which [the phrase] is used'... that the 'arrest or other detention' of which the subsection speaks must be an 'arrest or other detention' for a violation of federal law."

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82. Id. at 457.
83. Id. at 468.
84. 511 U.S. 350 (1994).
85. Id. at 357.
86. Id. at 358.
Meaning of "use" in *Smith v. United States*. In *Smith*, the Court considered the meaning of "use" in 18 United States Code § 924(c)(1), a federal sentence enhancing statute imposing a five-year mandatory prison term on a person who "uses or carries" a firearm "during and in relation to a drug trafficking crime." The Court, in an opinion by Justice O'Connor, held "use" includes bartering a firearm for drugs. The Court relied on plain language and the statutory scheme: "When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning. Surely petitioner's treatment of his MAC-10 can be described as 'use' within the everyday meaning of the term."

The Court relied on the statutory context:

To the extent there is uncertainty about the scope of the phrase 'uses . . . a firearm' in § 924(c)(1), we believe the remainder of § 924 appropriately sets it to rest. Just as a single word cannot be read in isolation, nor can a single provision of a statute . . . . Here, Congress employed the words 'use' and 'firearm' together not only in § 924(c)(1), but also in § 924(d)(1), which deals with forfeiture of firearms.

In dissent, Justice Scalia distinguished between a word's ordinary meaning and the other possible meanings of a word: "In search for statutory meaning, we give nontechnical words and phrases their ordinary meaning . . . . To use an instrumentality means to use it for its intended purpose." (Emphasis added) Justice Scalia chastised the majority for failing to heed the distinction between a word's ordinary meaning and other possible meanings.

Justice O'Connor, responding to Scalia's "plain language" critique of the majority, stated that just because "using a gun" typically means shooting someone, does not mean other definitions are excluded. "That one example of "use" is the first to come to mind when the phrase 'uses a firearm' is uttered does not preclude us from recognizing there are other "uses" that normally qualify as well."

Meaning of "Use" in *Bailey v. United States*. In *Bailey*, the Court considered the meaning of "use" in 18 U.S.C. § 924(c)(1) (see above). The weapon was found in petitioner's locked car trunk and, in a related case, in a locked trunk in a closet of a defendant's house. The Court of Appeals held in both

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88. Id. at 233.
cases defendants had "used a firearm" during and in relation to a drug trafficking crime.

Justice O'Connor, writing for a unanimous Court, disagreed the weapon had been "used," concluding that "use" "must con- note more than mere possession of a firearm by a person who commits a drug offense." Looking to the word itself, the entire statute, and the sentencing scheme, O'Connor held "use" "re- quires active employment of the firearm." Justice O'Connor ar- rived at this definition by considering the "ordinary or natural" meaning of "use" in context: "We consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme . . . . The meaning of statutory language, plain or not, depends on context."

According to O'Connor, "the active-employment understand- ing of 'use' certainly includes brandishing, displaying, bartering, striking with, and, most obviously, firing or attempting to fire a firearm." 90 (Emphasis added)

Meaning of "any" in United States v. Gonzales. 91 Justice O'Connor, writing for the Court, relied on the plain lan- guage of 18 U.S.C. § 924 (c)(1) in context. Justice O'Conner held the plain meaning of "any" in the phrase "nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment . . . ." (emphasis added) means any state as well as any federal terms of imprisonment. Thus, the statute did not allow state convictions to run concur- rently with federal convictions for the crimes under the statute.

Justice O'Connor rejected the Court of Appeals' reliance on legislative history, claiming the history "muddies the waters."

Meaning of "conviction" in Deal v. United States. 92 The statute at issue, 18 U.S.C. § 924(c)(1) provides:

Whoever, during and in relation to a crime of violence . . . uses or carries a firearm, shall, in relation to the punishment provided for such crime of violence . . . , be sentenced to imprisonment for five years . . . In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years . . . .

The petitioner committed six bank robberies, using a gun in each, during four months in 1990 and was convicted of six counts of bank robbery and six counts of carrying and using a

90. Id. at 148.
91. 520 U.S. 1 (1997).
firearm during these crimes. The United States District Court sentenced petitioner to five years’ imprisonment on the first count and to twenty years on each of the other five counts, the terms to run consecutively.

Petitioner argued ambiguity in the language of § 924(c)(1). Conviction, according to petitioner, could mean either “the return of a jury verdict of guilt” (of which there were six) or the entry of a final judgment on the verdict (of which there was only one).

The Court, in an opinion by Justice Scalia, relied on the plain language of the text in context to conclude conviction means only the return of a jury verdict of guilt. “In the context of § 924(c)(1), we think it unambiguous that ‘conviction’ refers to the finding of guilt by a judge or jury that necessarily precedes the entry of a final judgment of conviction.”

C. Combination Plain Language and Legislative History (the Court first considers the text, then supports its construction with legislative history).

Meaning of “Carry” in Muscarello v. United States. The Court considered the meaning of the term “carry” in 18 U.S.C. § 924(c)(1), a federal statute imposing a five-year mandatory prison term on a person who “uses or carries” a firearm “during and in relation to” a drug trafficking crime.” Two cases had been consolidated in Muscarello. In the first, the defendant Frank Muscarello unlawfully sold marijuana, transporting the marijuana to the sale in his truck. The police found a handgun locked in the truck’s glove compartment at the time of his arrest. The other defendants, arrested for attempting to steal drugs from sellers, had several guns in a bag in the trunk of their car. The Supreme Court considered whether the defendants had “carried” firearms during and in relation to a drug trafficking offense, thus satisfying the statute.

In determining the statute’s meaning, the Court, in an opin-
ion by Justice Breyer, first distinguished between the "primary" and "special" meanings of the term "carry," without explaining either category. The "primary" meaning, according to Justice Breyer, "as a matter of ordinary English," means "carry firearms" in a "wagon, car, truck, or other vehicle that one accompanies." The "special" definition means, for example, "bearing" or (in slang) "packing a gun." Justice Breyer concluded Congress intended to use the word "in its "primary sense," and not in this latter, special way.96

The Court derived the word's primary meaning from the Oxford English Dictionary, which defines carry to mean "convey, originally by cart or wagon, hence in any vehicle, by ship, on horseback, etc." The Court cited the Webster's Third New International Dictionary and the Random House Dictionary of the English Language Unabridged. The Court described the origin of the word with sources ranging from The Barnhart Dictionary of Etymology to The King James Bible.

The Court, conceded the notion of carrying by conveying an object by cart, wagon, or ship does not fit the gun in the glove compartment scenario. Accordingly, the Court reviewed "modern press usage," using the New York Times database in Lexis/Nexis and the US News database in Westlaw, as well as searched for sentences using the words "carry," "vehicle," and "weapon." Many of these, according to the Court, convey the meaning "the carrying of guns in cars."

Ultimately, the Court concluded the "generally accepted contemporary meaning" of the term includes the carrying of a firearm in the glove compartment of a vehicle.97 Then, after defining the term to include defendants' conduct, Justice Breyer set out to "explore more deeply the legal purely question of whether Congress intended to use the word 'carry' in its ordinary sense...."98 The Court quoted legislators in enacting the statute, attempting to show nothing in the legislative history contradicted the definition adopted by the Court.

In dissent, Justices Ginsburg, Souter, and Scalia, defined "carry" to mean "not merely keeping arms on one's premises or in one's vehicle, but bearing them in such manner as to be ready for use as a weapon."99 The dissenting Justices focused on the

96. Id. at 132.
97. Id. at 139.
98. Id. at 132.
99. Id. at 140.
statutory context, "just as 'uses' was read to mean not simply 'possession,' but 'active employment,' so 'carries,' correspondingly, is properly read to signal the most dangerous cases—the gun at hand, ready for use as a weapon."\(^\text{100}\)

**D. Express Rejection of Plain Language** (the Court refuses to rely on the text because of an alleged absurd result or ambiguity)

**Meaning of "defendant" in Green v. Bock Laundry Machine Co.**\(^\text{101}\) The Court, in an opinion by Justice Stevens, considered the word "defendant" in Fed. R. of Evid. 609(a). The statute allows for impeachment of a witness’s credibility by certain criminal convictions, but only if the court determines “the probative value of admitting this evidence outweighs its prejudicial effect to the defendant.” The question facing the court was whether the word “defendant” should be read to include both civil and criminal defendants or should be limited to criminal defendants. After considering the plain meaning and legislative history of the rule of evidence, the Court concluded the plain meaning of “defendant” (to include both) would lead to an absurd, unfair result. “The Rule’s plain language commands weighing of prejudice to a defendant in a civil trial as well as in a criminal trial. But that literal reading would compel an odd result in a case like this.”\(^\text{102}\) Thus, the Court read the term to mean only “criminal defendant” to avoid prejudice to civil plaintiffs, as a civil defendant could never be prejudiced by the admission of impeachment evidence against the plaintiff’s witnesses.

**E. Purported, but not Actual, Reliance on Plain Language** (the Court, after citing the plain language rule, rejects the plain language by either adopting an unconventional definition or by failing to analyze the meaning of the word)

**Meaning of "revoke" in Johnson v. United States.**\(^\text{103}\) Justice Souter delivered the Court’s opinion concerning the meaning of “revoke” in 18 U.S.C. § 3583(e)(3). This statute authorizes the court to revoke a term of supervised release (upon

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100. *Id.* at 144-145.
102. *Id.* at 509.
103. 529 U.S. 694 (2000).

https://scholarship.law.umt.edu/mlr/vol65/iss2/1
violating a term of release) and require the person to serve in prison all or part of the term of supervised release without credit for time previously served on post-release supervision. Petitioner was sentenced to a term of imprisonment, to be followed by three years of supervised release. After petitioner committed a crime while on supervised release, the court "revoked" his supervised release and imposed a prison term, to be followed by twelve months of supervised release. The appeal concerned whether the statute authorized the additional supervised release after petitioner's prison term.

Believing that Congress used the term "revoke" in an unconventional and uncommon way, Justice Souter found § 3583(d) permitted the Court to require service of an additional term of supervised release following revocation of the original term of supervised release. Justice Souter looked to Webster's Third New International Dictionary, which gives "recall" as a synonym for revoke. And, while stating the unconventional dictionary definition was not dispositive, Justice Souter believed the definition would "soften the strangeness of Congress's unconventional sense of 'revoke' as allowing a "revoked" term of supervised release to retain vitality after revocation." 104

In response to Justice Scalia's retort for the majority's failure to follow the plain text, Justice Souter replied, "this is exactly what ought to happen when the ordinary meaning fails to fit the text and when the realization of clear congressional policy (here, favoring the ability to impose supervised release) is in tension with the result that customary interpretive rules would deliver." 105 Justice Souter outwardly rejected what he referred to as Justice Scalia's "cocktail-party textualism," when, as here, "the text implies that a word is used in a secondary sense and clear legislative purpose is at stake." 106

Interestingly, Justices Scalia and Thomas, both textualists, reached different results—adding another layer of trouble to the overburdened plain language rule. Justice Thomas concurred and Justice Scalia dissented based on plain language.

**Meaning of "intent" in car jacking statute in Holoway v. United States.** 107 Justice Stevens cited the plain language rule as authoritative in this case involving the car jacking

104. *Id.* at 707.
105. *Id.* at 707, n. 9.
106. *Id.*
statute, 18 U.S.C.S. § 2119. This statute makes it a crime to take a motor vehicle "from . . . another by force or violence or by intimidation with the intent to cause death or serious bodily harm." Petitioner's accomplice testified their plan was to steal cars without harming the drivers; he would have used his gun only if any of the victims had given him a "hard time." Petitioner's accomplice approached each driver with a gun and threatened to shoot unless the driver gave him the car keys. When one driver hesitated, petitioner punched the driver in the face; no other violence occurred.

Petitioner was found guilty of car jacking under the statute. The Court agreed that the petitioner had the necessary intent under the statute. In deciding the meaning of "intent" for purposes of the statute, Justice Stevens stated, "we typically begin the task of statutory construction by focusing on the words that the drafters have chosen." However, before analyzing the meaning of intent, Justice Stevens first considered "what sort of evil Congress intended to describe when it used the words 'with the intent to cause death or serious bodily harm' in the 1994 amendments to the car jacking statute." 108

Justice Stevens again referred to the "natural reading of the text" but never clarified what a "natural reading" of intent would yield. Rather, Justice Stevens focused on the purpose of the statute—authorizing federal prosecutions to deter a particular type of robbery—then held the "natural meaning" of intent (which Justice Stevens determined to include the case at hand in which the defendant did not intend, at the outset, to attempt to kill or harm) was consistent with that purpose. Though repeatedly calling forth the text, Justice Stevens never expressly analyzed the word's meaning, relying instead on the purpose of the law to decide the necessary meaning.

Justices Scalia and Thomas rejected this construction. Justice Scalia, relying on a definition of "intent" from Black's Law Dictionary, stated it is "unheard-of usage—to speak of my having an 'intent' to do something, when my plans are contingent upon an event that is not virtually certain, and that I hope will not occur." 109

These five methodologies illustrate the initial problem with either defending or criticizing the plain language rule; the commentator must first identify which version of the rule he is cri-

108. *Id.* at 6.
109. *Id.* at 14.
tiquing. If our legal system is to afford predictability, five different methodologies for applying a single rule of statutory construction inevitably undermines this goal. Thus, how the rule functions (the methodology) should be consistent in all plain language rule cases.

V. INTERPRETIVE THEORIES OF JUSTICES

Predictability, some may argue, comes not in knowing how the methodology each Justice uses for the plain language rule but more simply in knowing the general interpretive theories of the Justices. According to commentators, each Justice subscribes to one or a combination of interpretive theories. Yet, as shown below, even knowing these theories does not eliminate the confusion.

Under one interpretive scheme, Justices Scalia and Thomas are the modern formalists, seeking to find meaning in the statute's language in context. Justice Scalia follows the Golden Rule, departing from the literal text only if the statute is ambiguous or the result is absurd.

Chief Justice Rehnquist, a purported Holmesian, is also described as following a combination of textualism and traditionalism, first applying textualism “and then if the textualist approach yields inconclusive results, . . .” applying “traditionalist principles.” The Chief Justice “prefers originalism to dynamic or evolutionary models of interpretation, and he prefers intentionalism rather than strict textualism. . . . Justice Rehnquist freely refers to legislative history and other materials insofar as they suggest the intention of the majority in the enactment of the law.”

Justices Breyer, O'Connor, Stevens, Souter, and Ginsberg are natural law theorists, seeking to promote the legislators' intent “as revealed by the traditional sources for determining in-

111. KELSO, supra note 110, at 64.
112. KELSO, supra note 110, at 50, 54.
113. KELSO, supra note 110, at 65.
115. Id. at 110-11.
Indicia of legislative intent include legislative history, statutory canons and plain meaning. Thus all are fair game for review and should certainly be relied on if there is any doubt concerning the meaning of the text.\textsuperscript{117}

Commentators call Justices Breyer and Stevens purposivists, looking beyond plain language to achieve legislative purpose.\textsuperscript{118} Another commentator views Justices Ginsberg and Breyer as the Court's traditionalists, who "consider contextual evidence—especially the statute's legislative history—as well as the statutory text itself, even when the statutory text has an apparent 'plain meaning.'"\textsuperscript{119}

More generally, commentators divide the Justices into liberals and conservatives.\textsuperscript{120} Justices Stevens, Souter, Ginsberg, and Breyer are supposedly the liberals on the Court while Justices Rehnquist, Scalia, and Thomas are the conservatives.\textsuperscript{121} Justices O'Connor and Kennedy share the distinction of voting at times as conservatives and at times as liberal.\textsuperscript{122}

Chief Justice Rehnquist and Justices Scalia and Thomas regularly vote together, although not quite as consistently as the liberal four. When they vote together in a divided decision, they always support the more conservative position, thus forming a generally reliable conservative bloc. The outcome in any split decision depends on the votes of the two remaining justices, Justices O'Connor and Kennedy, who are much less predictable. Though they lean toward the conservative side on some issues, one or both of them is likely to move to the liberal side on many others.\textsuperscript{123}

Yet, knowing a Justice's interpretive theory or even disposition toward liberalism or conservativism, does not facilitate predicting outcomes, \textit{where the Justices purport to rely on the plain language rule in a case}. The confusion, and corresponding lack of predictability, lies both in what the Justices actually do in terms of outcome in plain language cases, and in reconciling out-

\textsuperscript{116} Kelso, \textit{supra} note 110, at 41.
\textsuperscript{117} Id.
\textsuperscript{119} Spiro, \textit{supra} note 114, at 106.
\textsuperscript{121} Id. at 287.
\textsuperscript{122} Id.
\textsuperscript{123} Id.
come with rationale. Justices who fall into the same interpretive category often reach different results in plain language cases, and Justices who purport to rely on the plain language of the text often reach results at odds with that rationale.

For example, Justice O'Connor, described as a natural law adherent, in a plain language case where the Court construed the meaning of "any" in a criminal statute, stated "far from clarifying the statute, the legislative history only muddies the water."\textsuperscript{124} In other cases Justice O'Connor cited the plain language rule as governing, yet supported her conclusion regarding the meaning of the text with legislative history.\textsuperscript{125}

In \textit{Smith}, the bartering weapons for drugs case, Justice O'Connor affirmed the conviction, reaching a different result on the statutory construction of "using weapons" from the Court's other natural law adherents.\textsuperscript{126} Justices Stevens, Souter, and Scalia, a mix of the conservatives and liberals, joined in dissent.\textsuperscript{127}

In \textit{Muscarello}, Justice Breyer wrote the majority opinion concluding "carry" includes having a weapon in the trunk of a car.\textsuperscript{128} Justice Ginsberg, a natural law adherent and liberal, joined Justice Scalia, the textualist and conservative, in opposing the majority view.\textsuperscript{129} Justice Scalia, writing the dissent, adhered to an "ordinary" interpretation of carry and criticized the majority for relying on other indicia of legislative intent.

Chief Justice Rehnquist, the Holmesian, joined Justice Scalia, the textualist, in concluding the ash generated by a facility's incineration of municipal waste was not exempt from regulation as a hazardous waste under the Resource Conservation and Recovery Act in \textit{City of Chicago v. Environ. Defense Fund}.\textsuperscript{130} According to the Court, the ash was not exempt, despite a memorandum from the Environmental Protection Agency to the contrary, because the statutory text was clear.\textsuperscript{131} "But it is the statute, and not the Committee Report, which is the authorita-

\textsuperscript{124.} United States v. Gonzales, 520 U.S. 1, 6 (1997).
\textsuperscript{125.} \textit{See}, \textit{e.g.}, Bailey v. United States, 516 U.S. 137, 147 (1995) (describing the amendment history of the statute to "cast[s] further light on Congress' intended meaning."
\textsuperscript{126.} 508 U.S. 223.
\textsuperscript{127.} \textit{Id.} at 241.
\textsuperscript{128.} 524 U.S. at 126-27.
\textsuperscript{129.} \textit{Id.} at 139.
\textsuperscript{130.} 511 U.S. 328 (1994).
\textsuperscript{131.} \textit{Id.}
tive expression of the law...". Justices Stevens and O'Connor dissented, claiming the "relevant statutory text is not as unambiguous as the Court asserts;" thus, the Court should have adopted the construction of the EPA, rather than its own "surprising (and uninvited) decision."

The rule is so broken, and predictability so elusive, that even the textualists disagree over the plain meaning of words and reach different outcomes in statutory interpretation cases. In *Johnson v. United States*, for example, the Court concluded the statute permitted a court to impose additional supervised release after the prison term, despite the initial supervised release having been "revoked." The majority conceded it was adopting an "unconventional," but not "rare or obsolete" sense of the word, justifying its departure from the ordinary meaning by congressional purpose. Justice Thomas concurred, agreeing with the Court's textual analysis and outcome. Justice Scalia dissented, chastising the Court's "act of willpower rather than of judgment."

Dissecting the plain language rule reveals why it fails to afford predictability. The rule lacks coherent steps and lacks a fixed order of steps. The Justices even differ on the most basic and essential properties of the rule, like what does "plain meaning" mean, and what source should supply the meaning. So, before reconstructing the rule, the next two sections disrobe the rule, showing why the rule cannot, as currently used, function properly.

VI. WHY RECONSTRUCT THE PLAIN LANGUAGE RULE

Fixing the plain language rule is essential. With regard to statutory construction cases, the Court's current use of the rule undermines the role of Supreme Court opinions. According to one commentator, Supreme Court opinions are thought to serve at least three functions: first, the Court's opinions "confer legitimacy on the decisions to which the opinions appertain;"
second, the opinions constrain lawmakers by requiring reasons for judgments; and third, the opinions "vindicate the lawmaking role that appellate courts play in our legal system." Without debating whether Supreme Court opinions should serve these functions, the opinions described herein, viewed collectively as the Court's plain language statutory construction cases, lack legitimacy in terms of providing principled rationales for the underlying outcomes. In addition, the decisions lack constraint in terms of, reflecting principled reasons for the outcomes, and lack coherence in terms of following a set methodology for deciding "plain language" statutory construction cases.

One commentator suggests the Court may be motivated in its decision-making not by canons, rules, statutes, and precedent, or even by personal ideologies and attitudes, but rather by "a desire to conform their attitudes to the attitudes of the social and professional circles in which they travel, and thus to the attitudes of the intellectual elite in general, and to the attitudes of law professors at elite institutions in particular." This commentator suggests it is time to critically assess whether some type of self-interest motivates the Court's decision-making. Without joining the debate concerning whether self-interest motivates the Court, this commentary and articles cited therein concerning the absence of precedent as a motivating force reflect a tarnished view of the legitimacy of Supreme Court opinions.

Although beyond the scope of this paper, the Court's reluctance to apply the ordinary meaning of a text reflects the Court's lack of confidence in the statutory texts. If our current constitutional balance of powers is to be preserved, the Court should adhere to the plain language rule (as described below). Unless, (2000).

140. Id. at 1401.
141. Id. at 1401-02.
143. Id. at 625.
144. Id. at 638.
145. Commentators of Jewish law describe the method of rabbinic exegesis of the Torah as hermeneutics, "the discipline of applying specific interpretive rules to make the meaning of the text clear." The willingness of rabbis, who are charged with interpreting the text, to follow these rules stems from an absolute confidence in the text. "[T]he rabbinic tradition of interpretation starts with extreme confidence that, however subtle the text may be, somewhere within it correct guidance on every legal issue can be found. . . . The text is authentic, complete and correct; it is just our ability to read and understand that is limited."
of course, the Supreme Court is meant to re-craft the law to satisfy its own law making agenda, rather than to construe statutory law.

VII. RECONSTRUCTING THE PLAIN LANGUAGE RULE

A. Enact a Statute of the Rule?

Nicholas Quinn Rosenkranz recommends Congress codify the rules of statutory interpretation, describing the merits of a congressionally mandated set of rules of statutory interpretation:

This Article concludes that Congress has constitutional power to codify some tools of statutory interpretation. Congress has used this power in the past, but only sporadically and unselfconsciously, at the periphery of the United States Code . . . used wisely, congressional power to legislate interpretive strategies may improve legislative-judicial communication and thus bring our system closer to its democratic ideal. 146

According to Rosenkranz, "Congress is better institutionally suited than the courts to develop such a coherent interpretive regime. This set of canons may be written by the Supreme Court, but should be subject to searching inquiry and disapproval or amendment by Congress." 147

While I agree with the underlying ideal to create a "clear, predictable and internally coherent regime" 148 for interpreting statutes, I disagree with the argument that Congress is best suited to develop a regime regarding the plain language rule. First, I doubt the efficiency of Congress drafting interpretive rules to govern the Court in serving the Court's most basic function. I join the ranks 149 in believing construing statutes is what courts do and determining how to best perform this role should remain the province of the courts.

Further, Congress, in all likelihood, does not like the notion of a plain language rule. 150 Thus, a plain language rule statute

146. Rosenkranz, supra note 5, at 2088.
147. Id. at 2157.
148. Id.
149. Rosencranz acknowledges "[t]he central, unquestioned premise in this field is that the judiciary is the proper branch to design and implement tools of statutory interpretation." Id. at 2086. In his article, Rosencranz challenges this premise.
150. Eskridge, A Matter of Interpretation, supra note 23, at 1513 (stating the new textualism "is appalling to many members of Congress.") (citing Statutory Interpretation and the Uses of Legislative History: Hearings Before the Subcomm. on Courts, Intellec-
would probably contain an interpretive agenda at odds with the rule itself.

In New York, for example, the legislature enacted Statutes, which includes rules governing statutory construction. The statute dictates that when language is "free from ambiguity and express plainly, clearly, and distinctly the legislative intent, resort may not be had to other means of interpretation." The courts are to refrain from "judicial legislation:"

The courts in construing statutes should avoid judicial legislation; they do not sit in review of the discretion of the Legislature or determine the expediency, wisdom, or propriety of its action on matters within its powers.

The plain language "rule" reads as follows:

Words of ordinary import use in a statute are to be given their usual and commonly understood meaning, unless it is plain from the statute that a different meaning is intended.

While the statute seemingly supplies a fixed order of coherent steps (thus satisfying my quest), the legislation also contains a clear interpretive agenda elevating legislative intent over the text as the primary indicator of legislative meaning:

The intention of the Legislature is first to be sought from a literal reading of the act itself, but if the meaning is still not clear the intent may be ascertained from such facts and through such rules as may, in connection with the language, legitimately reveal it.

Not surprisingly, the statute's interpretive agenda gives effect to the perceived intention of the legislature, even if it means departing from the text. The commentary to the section above provides, "the quest for legislative intent requires the court to pierce all disguises of verbal expression, and go straight to the purpose of the bill, aided by formulated rules when they serve, but bound by no rules that hinder discovery of such intent."

The Texas Code Construction Act requires that "words and phrases shall be read in context and construed according to the rules of grammar and common usage." The Texas statute
permits a court construing a statute, “whether or not the statute is considered ambiguous,” (emphasis added)\textsuperscript{159} to consider, among other indicia, “the object sought to be attained”\textsuperscript{160} and the “legislative history.”\textsuperscript{161} Thus, the Texas statute, like the New York legislation, contains a “wiggle-room” provision, giving the court leeway to depart from the text to facilitate the legislative purpose. The Texas statute provides, “[t]he legislature is presumed to have enacted a statute that will lead to a just and reasonable result and a result feasible of execution.”\textsuperscript{162}

Thus, at least two problems exist with codifying the plain language rule. First, a congressionally mandated version of the plain language rule would, in all likelihood, reflect an interpretive agenda at odds with the rule itself. The statutes of both New York and Texas make legislative intent or purpose, not the text, the primary source of meaning. The plain language rule is meant to produce the opposite result, elevating the text over any perceived legislative purpose or intent. Thus, it is unlikely Congress would codify a plain language rule that captures the essence of the rule - the primacy of the text.

The second and related problem is a legislatively mandated plain language rule would probably include a “wiggle-room” provision, thus producing the same confusion as exists with our current rule. As such, a plain language rule created by Congress would not remedy the ills of the rule, as currently used by the Court.

\textbf{B. Reconstructing the Plain Language Rule—Nine Steps}

The Court should use a single, coherent methodology and thus allow lawyers, lower court judges to predict results. At present even Justices Scalia and Thomas, who purport loyalty to the text, fail to apply the rule uniformly. First, these Justices routinely reach outside the text to determine meaning, even when the meaning is purportedly plain. At times, these Justices reject common parlance and apply technical definitions to statutory language. For example, in \textit{Dole Food Co. v. Patrickson}, Justices Scalia and Thomas applied a technical, rather than everyday, meaning to the word “own” and “ownership.”\textsuperscript{163} To fix the

\begin{itemize}
  \item \textsuperscript{159} \textit{Id.} § 311.011.
  \item \textsuperscript{160} \textit{Id.} § 311.011(1).
  \item \textsuperscript{161} \textit{Id.} § 311.023(3).
  \item \textsuperscript{162} \textit{Id.} § 311.021.
  \item \textsuperscript{163} See 538 U.S. 468 (2003) discussed in Section IV above.
\end{itemize}
rule, all the Justices must adhere to a single set of properties (source of plain meaning) and a consistent methodology.

Properties:

The Court must first decide, as to all statutory construction cases, what is an ambiguity.\textsuperscript{164} As Lawrence Solan points out the troubling paradox, where all nine Justices agree the meaning of the text is plain but the jurists split five to four over the plain meaning of the text.\textsuperscript{165} Generally, ambiguity means susceptible to two different meanings, doubleness of meaning.\textsuperscript{166} For purposes of the plain language rule, does this mean different shades of meaning, one broader and one more narrow or only two distinct (separate) meanings, not on the same continuum.

For example, intuitively, the word "employ" can mean either hire to work for (the flower shop employed her as a florist) or use (she employed a weapon), two distinct meanings. What about the word "carry." Intuitively, a woman "carries" a baby for nine months and can then carry her baby on her hip (two distinct meanings). But, if she puts the baby in the car and drives to the grocery store, is she "carrying" the baby to the store (a different shade of the baby on the hip meaning)? The Court must first determine and clarify what it means for the text to be ambiguous.

Further, what is an absurd result? Absurdity, according to Black's Law Dictionary, means "anything which is so irrational, unnatural, or inconvenient that it cannot be supposed to have been within the intent of men of ordinary intelligence and discretion."\textsuperscript{167} The flaw in the notion that jurists, as a rule, must rely on the plain meaning of the text, unless doing so leads to an absurdity is obvious. In his article, The Absurdity Doctrine,\textsuperscript{168} John F. Manning posits that the textualists, by having an "out," and straying from the text when they deem it necessary, are essentially rejecting textualism.\textsuperscript{169} As shown above, even the strict textualists will stray from the text when an outcome is, according to the jurist, "so unthinkable that the federal courts may safely presume that legislators did not foresee those par-

\textsuperscript{164} As Justice Scalia inquired as a Circuit Court Judge, "how much ambiguousness constitutes an ambiguity." United States v. Hansen, 772 F.2d 940, 948 (D.C. Cir. 1985).
\textsuperscript{165} SOLAN, THE LANGUAGE OF JUDGES, supra note 5 at 101.
\textsuperscript{166} BLACK'S LAW DICTIONARY 79 (6th ed. 1990).
\textsuperscript{167} Id. at 10.
\textsuperscript{169} Id. at 2406.
ticular results and that, if they had, they could and would have revised the legislation... “170 By allowing judges to reach outside the text based on judicial intuition regarding societal values and fairness, Manning posits the absurdity doctrine undermines the legitimacy of textualism. Thus, according to Manning, “a principled understanding of textualism would necessarily entail abandoning the absurdity doctrine.”171

However, if the Court limits the doctrine, applying it, for example, only when a particular application leads to an inconceivable, nonsensical outcome (akin to a scrivener’s error), the doctrine could still work with a plain language rule.

Finally, as discussed in section III, what does “plain meaning” mean for purposes of the rule, and what is the proper source for a word’s plain meaning.172

Methodology:

Once these properties are determined, I propose the following steps:

(1) The Court First Determines Whether the Statute is Ambiguous.

(2) If The Statute is Ambiguous, The Court Describes the Ambiguity. If the Court finds an ambiguity, the Court should describe the ambiguity in the opinion. In United States v. Labonte,173 for example, the dissenting Justices Breyer, Stevens, and Ginsberg stated an ambiguity exists and described the ambiguity: “In my view, however, the words ‘maximum term authorized’ are ambiguous. They demand an answer to the question ‘authorized by what?’ The statute itself does not tell us ‘what.’ Nor does the statute otherwise ‘directly speak to the precise Guideline question at issue.”174

(3) If an Ambiguity Exists, the Court May Look Outside the Text to Determine Meaning. The plain language

170. Id. at 2394.
171. Id. at 2392.
172. There is no ripeness problem in the Court determining these properties in the first plain language statutory construction case it decides after choosing to reconstruct the rule, as the first plain language statutory construction case, and each subsequent case, should raise the same questions regarding the Court’s method of interpretation. Thus, whatever basic properties of the rule the Court enunciates in the first case can then be applied to all subsequent cases.
174. Id. at 763.
rule of statutory construction does not apply.

(4) If No Ambiguity Exists, the Court Cites the Plain Language Rule as Governing.

(5) The Court Highlights the Word or Phrase it is Construing. The Court must state in the opinion which word or phrase it is construing. In other words, to which word or words is the court applying the plain language rule, and why. If the Court divides as to which word or phrase to construe, an ambiguity may exist, precluding the Court from applying the rule.

(6) The Court Determines the Source of Plain Meaning. If the Court establishes there is no ambiguity and cites the plain language rule as governing, the Court then decides the proper source of plain meaning. The Court should choose among the sources listed herein (1-10). As the generally used, "default" source, if the Court sees no reason to stray from the ordinary or commonly understood meaning (by lay people unless the statute is written for lawyers and thus as commonly understood by lawyers), the Court should use #1, the everyday, ordinary meaning. Determining this meaning requires no external source; rather, the Justice should use his or her intuitive sense of what the word means.

Linguistically, this is probably troubling, as jurists come from different regions of the country and from varying backgrounds and thus have varying senses of the meaning of words. Justice O'Connor, raised on a ranch in El Paso, Texas probably views certain words differently from Justice Ginsberg, who was born in Brooklyn, New York. In other words, as so many commentators suggest, there is no "plain meaning" of a text. However, according to a review of Lawrence Solan's The Language of Judges, there is an "ordinary language meaning" of words; yet the linguists alone are equipped to determine it. According to the article, "linguists can help a judge explore and articulate the judge's intuitive but usually unconscious understanding of a word." However, this is precisely the point of

175. Again, the Court will have determined what an ambiguity is for purposes of the rule.
176. Cunningham, Plain Meaning and Hard Cases, supra note 64, at 1565. This may sound like semantics, rejecting the notion the text has a plain meaning but submitting that the text has an ordinary meaning; yet, this is precisely the idea because the ordinary meaning (#1 of the sources) is a meaning the jurist, in theory, can decide regardless of his or her own innate sense of a word.
177. Id.
the plain language rule. If the language is plain, a judge should be able to, on her own, discern the ordinary language meaning without needing to resort to outside sources, like linguists, dictionaries, or legislative history.

For example, when interpreting a recent criminal statute, the Court would choose a source that best suits the statute. The Court may select #5 as the source, recognizing that this source best embodies the legislative goals reflected in the statute. In the opinion, the Court would then identify the source and describe the reason for the Court's choice.

Thus, the first six steps of this proposal call for a section of statutory construction opinions similar to a "jurisdictional" or "standard of review" section of an appellate brief. The Court precedes its analysis with a brief section explaining why the plain language rule applies and identifying the source of the meaning.

In Muscarello, for example, the "carry" case, the Court would begin its opinion as follows:

We find the term "carry" is not ambiguous. In the context of this criminal statute, which on its face criminalizes the combination of drugs and guns by providing, "uses or carries a weapon during and in relation to or possesses in furtherance of," the Court adopts the everyday meaning (#1) as the source of the term's meaning. We believe looking to any possible definition of the term (#6) will lead to an overly broad interpretation, which we reject in light of the legislative purpose reflected in the statute. We find no reason to look to the etymological (#2) or technical (#8) meaning, as this is a recently enacted statute with no expression of legislative intent.

Incidentally, based on this methodology the Court would reach a different result in Muscarello. The Court would conclude that carries a weapon does not include keeping a weapon locked in a closet of the house or in the trunk of a car. Carrying a weapon would certainly include having a gun in a holster, backpack, purse or other "carrier" on the person. If the legislature had wanted to include such conduct as keeping a weapon in a car, the statute would have read, "or keeps a weapon in a vehicle during a drug transaction." Here, a definition section may have eliminated the need for the judicial construction.

(7) The Court Then Determines the Meaning. The Court determines the meaning of the text, not looking outside the text.

(8) If the Plain Meaning Leads to an Absurd Result,
**The Court Departs from the Text.** This step creates the toughest challenge, as here is where the Court could potentially stray down the path of pursuing a legislative purpose and never return to the text. Only if reading the language in context leads to an absurd result. Of course, minds may differ as to whether the result is absurd. We, as lawyers, take pride in twisting meaning, yet, the Court will have already established what is an absurd result for purposes of the rule.

If the Court believes the plain language is inconsistent with the spirit of the law, but does not produce an absurd result, the Court should adhere to the plain meaning, knowing the legislature is free to correct the construction if necessary. Again, the functions of Supreme Court opinions will be fulfilled where the Court follows a determinate rule of construction. Whether the case is correctly decided, lower courts and lawyers will have a coherent methodology to follow in future plain language cases.

(9) **The Court Uses Legislative History Only Where an Ambiguity or Absurdity Exists.**

The Court should look to legislative history, expressly departing from the plain language rule, only if the Court finds an ambiguity (and describes it in the opinion) or an absurd result.

**CONCLUSION**

My goal in this paper is to advance a principled method of statutory construction when statutory language is plain. Congress could certainly help achieve a principled methodology by adding definition and purpose sections and even, when possible and necessary, providing a source (a particular dictionary) to use for determining meaning.

If the purposivists on the Court cannot depart from relying on legislative history even when language is plain or if the textualists cannot agree on which meaning is plain or the proper source of meaning, the Court should not cite the rule.

If the Court intends at the outset to rely on a mix of indicia of legislative meaning: textual language in context drawn from various sources and legislative history, the Court should not cite the plain language rule as a basis for its decision. Rather, the Court should explain its departure from the text, expressing the interpretive principle that governs the departure. Similarly, if the Court intends to use a technical or unconventional definition of a word or phrase, the Court should not claim reliance on the plain language rule.

These steps are meant to reconstruct the rule so that it
lacks an underlying interpretive agenda apart from the primacy of the text. The reconstructed rule may differ dramatically from the current textualism depending on how the Court formulates the basic properties of the rule: what is an ambiguity, what is an absurd result, and even, what should be the source of plain language.

Although I did not set out to criticize the plain language rule, but rather to resuscitate it, this paper necessarily emphasizes the problems with the rule. The problem, the rule's inability to serve its intended purpose of allowing lawyers, judges, and law students to predict the outcome of plain language statutory construction cases, is not just academic. Unless the rule is reconstructed, Supreme Court opinions construing statutes serve little purpose other than to announce a particular holding.

Naturally, this analysis gives rise to countless additional questions: at what point must Congress be held accountable for drafting vague language? Is Congress deliberately leaving language vague so the Court can “fill in the blanks?” Does Congress assume the Court will rely on legislative history and, accordingly, leave holes in the statute knowing the Court will resort to the drafting history? Will an increased use of definition and purpose sections alleviate some of the problems currently arising from statutory construction? For now, however, we are left with a canon of construction that the Court must either acknowledge is too flawed to use, or the Court must fix and thereby reinvigorate the rule, making it a viable tool of statutory construction.