Perplexing Problems with Plain Meaning

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NOTE

PERPLEXING PROBLEMS WITH PLAIN MEANING

I. INTRODUCTION

Judge Learned Hand once said "[t]here is no surer way to misread any document than to read it literally."¹ Throughout history the plain meaning rule has been implemented by many courts as a tool in statutory interpretation.² Even though the plain meaning rule was borrowed from British law, its roots run deep in the American judicial system.³

Despite its roots, the shortcomings of the plain meaning rule recently became apparent when the Tenth Circuit Court of Appeals issued its decision in United States v. Singleton.⁴ There, the court interpreted 18 U.S.C. § 201(c)(2), the anti-bribery statute, according to its plain meaning.⁵ In holding that an Assistant United States Attorney who offers a plea bargain to a co-conspirator in exchange for testimony violates the law, the court jeopardized the future of plea bargaining, one of the most effective tools used in the prosecution of criminals.⁶ Without this tool the hands of prosecutors throughout the nation would be tied.⁷ Unable to offer incentives to witnesses willing to cooperate in exchange for their testimony, prosecutors would be left with uncooperative witnesses and the difficult job of convicting criminals without accomplice testimony. Decisions like Singleton shine an unforgiving light on the plain meaning rule. Without invoking substantive policy or social prin-

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¹ Guiseppi v. Walling, 144 F.2d 608, 624 (2d Cir. 1944).
² See infra Parts II.B, II.C.
³ See infra Part II.B.
⁴ 144 F.3d 1343 (10th Cir. 1998).
⁵ See id. at 1344-51.
⁶ See infra Part III.D.
Part II of this Note discusses the development of the plain meaning rule. Section A gives the definitions of the plain meaning rule which will be discussed throughout this Note. Section B traces the history of the plain meaning rule from its biblical roots to its present day use, and Section C sets forth the various forms which the plain meaning rule has taken. Part III addresses the plain meaning rule at work by beginning with supporting arguments in Section A. Section B evaluates numerous Supreme Court cases which have applied the plain meaning rule, and Section C sets forth the rule's weaknesses and shortcomings. Finally, Section D discusses the recent Tenth Circuit decision, United States v. Singleton, where the plain meaning rule, in effect, outlawed plea bargaining. Part IV of this Note proposes and discusses the advantages of a judicially mandated plain meaning rule which would provide for its uniform application. Finally, Part V briefly revisits United States v. Singleton and discusses the three opinions of the en banc court, all of which use the plain meaning rule to come to different conclusions. The uniform plain meaning rule proposed by this Note addresses and attempts to resolve much of the criticism surrounding the rule's current use. While its implementation may come with many costs, the advantages of this judicially mandated rule will far outweigh its shortcomings.

II. DEVELOPMENT OF THE PLAIN MEANING RULE

A. Definition of the Plain Meaning Rule

There are two very different interpretations of plain meaning. The first interpretation is that which every person uses every day in conversation, and the second is the canon of construction upon which judges rely in judicial opinions.

1. Everyday Meaning

In conversation and writing, people interpret words based on their understanding of the language in which the words are communicated. This understanding comes from a person's experience with that language and the context in which the communication is received. For ex-

8. See infra Part III.C.
ample, the word “fault” means something entirely different to a tennis player than it does to a law school student. Further, each person interprets words within the context in which they find them. For example, the meaning of “whoever” might significantly change depending on the context in which it is used.

Besides the exercise that every person makes every day in interpreting words, this form of plain meaning plays an important role in the reading of statutes. Every time a judge, a lawyer, or even a potential litigant reads a statute, they are assigning their plain meaning to it.

2. Judicial Meaning

The plain meaning rule has taken on another function, that which the judiciary has come to rely upon as a foundation for judicial opinions. This rule has taken on many forms, and generally states that a “court will interpret words in the statute according to their usual or ‘plain’ meaning as understood by the general public.” This rule of

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10. A tennis player defines fault as “a served ball that does not land in the proper section of an opponent’s court,” or “a failure to serve the ball according to the rules.” RANDOM HOUSE COLLEGE DICTIONARY 482 (revised ed. 1988). A law student may define fault as “any shortcoming, or neglect of care or performance resulting from inattention, incapacity, or perversity” or more plainly, “neglect of a duty.” BLACK’S LAW DICTIONARY 421 (abridged 6th ed. 1991).

11. See Farber, supra note 9, at 544. Farber presents the hypothetical case of an employee who is told to “bring all of the ashtrays you can find” and responds by ripping ashtrays off the wall.” Id. (quoting RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 268 (1990)). Farber concludes that “[u]nderstanding why the employee’s response is inappropriate requires more than ‘a shared language’; it requires tacit understandings about the purpose and limitations of the request.” Id.

12. See United States v. Singleton, 144 F.3d 1343, 1345 (10th Cir. 1998) (relying upon the plain meaning rule to interpret the word “whoever” in 18 U.S.C. § 201(c)(2)); see also infra Part III.D. (discussing United States v. Singleton and the court’s use of the plain meaning rule to interpret the anti-bribery statute, 18 U.S.C. § 201(c)(2)).

13. Plain meaning is “the meaning most likely to leap to mind on initial reading.” Peter C. Schanck, Understanding Postmodern Thought and Its Implications for Statutory Interpretation, 65 S. CAL. L. REV. 2505, 2536 (1992).

14. See Smith v. United States, 508 U.S. 223, 223 (1993) (following the plain meaning rule to interpret 18 U.S.C. § 924(c)(1) and the phrase “use” of a firearm); Chism v. Roemer, 501 U.S. 380, 404-17 (1991) (Scalia, J., dissenting) (arguing that “representative,” as used in the Voting Rights Act of 1965, did not include judges); Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120, 123-24 (1989) (reasoning that the plain meaning of Rule 11 of the Federal Rules of Civil Procedure’s phrase “upon the person who signed it” did not permit the imposition of sanctions against any person or entity other than an individual attorney); Tennessee Valley Auth. v. Hill, 437 U.S. 153, 173 (1978) (relying on the plain meaning rule in interpreting the Endangered Species Act of 1973, enjoining the Tennessee Valley Authority from completing a dam which was virtually complete and had already cost tax-payers millions of dollars); Singleton, 144 F.3d at 1343 (relying on the plain meaning rule to interpret 18 U.S.C. § 201(c)(2), the anti-bribery statute, concluding that plea bargaining is illegal under the statute).

Statutory construction is followed by jurists who subscribe to the textualist approach, which asserts the "primacy of the language and structure of the statute as the basis for discerning Congress' intent in enacting the law." This function of the plain meaning rule presents the problem upon which this Note will focus. Judges should not be permitted to rely solely upon their plain meaning interpretation of a statute in rendering an opinion, for there are far better indications of the meaning of a statute than mere linguistics.

B. History of the Plain Meaning Rule

The plain meaning rule has been traced back to numerous places by countless judges and commentators. For example, in In re Kolinsky, a United States Bankruptcy judge traced the plain meaning rule to biblical times, stating that "[t]he concept calling for strict construction of statutes has roots in the Old Testament: ‘You shall not add to the word which I command you, nor take from it.’" The modern version of the plain meaning rule can be traced to nineteenth century England. The American rule is a derivative of English literalism and finds its roots in two basic rules, the literal rule and the golden rule. The literal rule states, "[i]f the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity." The golden rule states, "[w]e must . . . give to the words used by the legislature their plain and natural meaning, unless it is manifest from the general scope and intention of the statute that injustice and absurdity would result." Both of these rules were created in response to, and were in disagreement with, the mischief rule which allows courts to "make such construction as shall suppress the mischief, and advance the remedy" that Parliament created in the statute.

18. Id. at 704 (quoting Deuteronomy 4:2).
20. See id.
21. The Queen v. Judge of the City of London Court, 1 Q.B. 273, 290 (1892).
23. Heydon’s Case, 76 Eng. Rep. 637, 638 (Ex Ch. 1584); see also Rupert Cross, Statutory Interpretation 14 (John Bell & George Engle eds., 2d ed. 1987) (providing an explanation of the mischief rule).
In addition to those who trace the rule to British law, others have found its roots in early American jurisprudence. Judge Patricia Wald, one of the most outspoken critics of the plain meaning rule, believes that it emerged as an early modification of the British rule, and traces the rule’s historical roots to the end of the nineteenth century in *Caminetti v. United States.*24 Professor Reed Dickerson traces the plain meaning rule to the 1889 case of *Lake County v. Rollins.*25 Additionally, Supreme Court Justice Pierce Butler adopted the plain meaning rule in 1929 in *United States v. Missouri Pacific Railroad Co.*26 Finally, United States Supreme Court Associate Justice Antonin Scalia, the major present day proponent of the plain meaning rule, traces its history to the early nineteenth century.27

Despite its deep roots, many judges, lawyers, and scholars presumed the plain meaning rule had suffered its demise in 1940 when Supreme Court Justice Stanley Reed declared, “[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no ‘rule of law’ which forbids its use, however clear the words may appear on ‘superficial examination.’”28 From that point, until Justice Scalia’s appointment in 1986, the plain meaning rule was occasionally cited, but never strictly relied upon by the Supreme Court.29

In fact, shortly before Justice Scalia’s appointment, the Justices consulted the legislative records in almost every case involving the in-

24. “[W]here the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion.” See Patricia M. Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term, 68 Iowa L. Rev. 195, 197 & n.12 (1983) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

25. See Reed Dickerson, The Interpretation and Application of Statutes 229 (1975).

26. 278 U.S. 269 (1929). “[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.” Id. at 278.


29. See Arthur W. Murphy, Old Maxims Never Die: The “Plain-Meaning Rule” and Statutory Interpretation in the “Modern” Federal Courts, 75 Colum. L. Rev. 1299, 1301-08 (1975); Karkkainen, supra note 19, at 436.
interpretation of a statute.\textsuperscript{30} Today, despite years of Justice Scalia's advocacy for the plain meaning rule, "legislative history is [still] used by at least one Justice in virtually every decision of the United States Supreme Court in which the meaning of a federal statute is an issue."\textsuperscript{31}

C. The Various Forms the Plain Meaning Rule Has Taken

Throughout history, the plain meaning rule has taken on many forms.\textsuperscript{32} The plain meaning rule has been subscribed to by judicial formalists who generally prefer logic and symmetry, and therefore prefer doctrinal development in which the judge's sole function is to apply rules mechanically to the case at hand.\textsuperscript{33} For this reason, formalists prefer clear, bright-line rules.\textsuperscript{34} Since there is no bright-line rule for inquiry into the legislative intent of a statute, formalist judges dispense with the legislature's original intent, and instead interpret solely what the words of the statute mean.\textsuperscript{35} Though formalists use different approaches to interpret statutes, most agree that it is impermissible to use legislative history to help determine the plain meaning of a statute.\textsuperscript{36}

One variation of the plain meaning rule employed by formalists, the rule of literalness, stretches the plain meaning rule to its bounds, and states that statutory words must be given effect according to only their relevant dictionary sense.\textsuperscript{37} Under the literal rule, the court should follow the statute's plain, or literal, meaning even if it leads to absurd re-

\begin{itemize}
  \item \textsuperscript{31} W. David Slawson, Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law, 44 STAN. L. REV. 383, 383 (1992).
  \item \textsuperscript{32} See Dickerson, supra note 25, at 230.
  \item \textsuperscript{34} See Farber, supra note 9, at 553; Robert W. Gordon, The Elusive Transformation, 6 YALE J.L. & HUMAN. 137, 155 (1994) (book review); Matthew James Tanielian, Comment, Separation of Powers and the Supreme Court: One Doctrine, Two Visions, 8 ADMIN. L.J. AM. U. 961, 973 (1995).
  \item \textsuperscript{35} See Farber, supra note 9, at 553; Kelso, Statutory Interpretation Doctrine, supra note 33, at 48; Stephen F. Ross & Daniel Tranen, The Modern Parol Evidence Rule and Its Implications for New Textualist Statutory Interpretation, 87 GEOR. L.J. 195, 223-24 (1998).
  \item \textsuperscript{36} See Farber, supra note 10, at 553; Kelso, Statutory Interpretation Doctrine, supra note 33, at 52-53.
  \item \textsuperscript{37} See Dickerson, supra note 25, at 230.
\end{itemize}
This literal meaning is determined by considering the dictionary meanings of the statute's words, supplemented by basic rules of grammar. While this was a commonly used method of interpretation under English law, no American court has ever adopted such an extreme approach.

A second version of a formalist approach to statutory interpretation is what was previously referred to as the golden rule. The golden rule differs from the literal rule in that the golden rule will not follow the plain, literal meaning of a statute's words if it results in an absurdity. This rule, as previously mentioned, finds its roots in British law and was stated in the case of Grey v. Pearson.

A modern, and possibly the best, example of this formalist approach is seen in the writings of Justice Scalia. Justice Scalia follows a variation of the golden rule, by refusing to use statutory purpose to determine the meaning of a statute, but also considers the use of statutes in pari materia (upon the same matter or subject) in determining meaning.

Justice Scalia explains that the Court's "regular method for interpreting the meaning of language in a statute [is to]: first, find the ordinary meaning of the language in its textual context; and second, using established canons of construction, ask whether there is any clear indi-

38. See id.; Kelso, Statutory Interpretation Doctrine, supra note 33, at 49.
40. See Kelso, Statutory Interpretation Doctrine, supra note 33, at 49.
41. See supra note 22 and accompanying text.
42. See Hamilton v. Rathbone, 175 U.S. 414, 420-21 (1899); Kelso, Statutory Interpretation Doctrine, supra note 33, at 50.
43. 10 Eng. Rep. 1216, 1234 (1857). [T]he grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther.
44. See William N. Eskridge, Jr., Should the Supreme Court Read The Federalist but Not Statutory Legislative History?, 66 GEO. WASH. L. REV. 1301, 1302 (1998); Autumn Fox & Stephen R. McAllister, An Eagle Soaring: The Jurisprudence of Justice Antonin Scalia, 19 CAMPBELL L. REV. 223, 244 (1997); Kelso, Statutory Interpretation Doctrine, supra note 33, at 54.
45. See Maxwell O. Chibundu, Structure and Structuralism in the Interpretation of Statutes, 62 U. CIN. L. REV. 1439, 1456 n.56 (1994); Kelso, Statutory Interpretation Doctrine, supra note 33, at 54; Zeppos, supra note 39, at 1615.
cation that some permissible meaning other than the ordinary one applies.”

Justice Scalia’s approach has been labeled “new textualism” by William N. Eskridge, Jr. and can best be explained by Justice Scalia himself, in Green v. Bock Laundry Machine Co.: Further, he argues for the total exclusion of legislative history in the interpretation process. He stated:

We are here to apply the statute, not legislative history, and certainly not the absence of legislative history. Statutes are the law. Our highest responsibility in the field of statutory construction is to read the law in a consistent way, giving Congress a sure means by which it may work the people’s will.

46. Chisom v. Roemer, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting); see Farber, supra note 9, at 546.
48. Id. at 528 (emphasis omitted).
I. THE PLAIN MEANING RULE AT WORK

A. Pro Plain Meaning

When Justice Scalia invokes the plain meaning rule, he gives controlling weight to the text which makes up the statute. William N. Eskridge, Jr., sets forth several justifications for the reliance on the text of a statute. These arguments include: (1) the ordinary meaning of the text is a more reliable guide (than legislative history) to the intent of all the actors in the federal legislative process; (2) the ordinary meaning is more accessible and comprehensible to officials and citizenry affected by the legislation; and (3) the ordinary meaning can constrain judicial discretion more effectively than can recourse to legislative history.

As far as reliability, Justice Scalia argues that when analyzing legislative history to uncover intent, one is working under the assumption that reading committee reports, floor speeches, and other sources can uncover this intent. New textualists argue that with the volume of legislation passed by Congress every session, it is unrealistic to believe that every senator and representative reads all of the committee reports and other material before voting on the proposed law. If this is so, it cannot be said that Congress’ intent is fully explained in the legislative history.

Further, Justice Scalia argues that judicial reliance on legislative history encourages cynical attempts by interest groups to influence and add to legislative history in a back-door attempt to include statutory terms which are not actually part of the statute’s text. He writes:

As anyone familiar with modern-day drafting of congressional committee reports is well aware, the references . . . were inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform the Members of Congress what the bill meant . . . but rather to influence judicial construction.

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53. See id.; see also Clark D. Cunningham et al., Plain Meaning and Hard Cases, 103 YALE L.J. 1561, 1566 & n.18 (1994) (reviewing LAWRENCE M. SOLAN, THE LANGUAGE OF JUDGES (1993)).
54. See Polich, supra note 30, at 266.
55. See Eskridge, supra note 52, at 642; Polich, supra note 30, at 266.
56. See Karkkainen, supra note 19, at 420; Polich, supra note 30, at 266.
Others believe that judicial reliance on legislative history in statutory interpretation allows judges and legislatures too much latitude to write and interpret statutes loosely. Justice Scalia fears that, unconstrained by the statutory language, judges can use legislative history to justify decisions consistent with their political, social, or policy views. Many commentators believe the plain meaning rule acts as a penalty default rule and encourages the legislature to draft statutes precisely. A justification expressed by most advocates of the plain meaning rule is that by interpreting legislative histories, courts are exercising legislative, rather than judicial functions. Justice Scalia stated:

The... threat is that, under the guise or even the self-delusion of pursuing unexpressed legislative intents, ... judges will in fact pursue their own objectives and desires. ... When you are told to decide, not on the basis of what the legislature said, but on the basis of what it meant, and are assured that there is no necessary connection between the two, your best shot at figuring out what the legislature meant is to ask yourself what a wise and intelligent person should have meant; and that will surely bring you to the conclusion that the law means what you think it ought to mean.

A common argument in favor of the plain meaning rule is that it saves potential litigants money and allows smaller law firms with limited resources to compete. The plain meaning rule allows lawyers to consult the statutory terms and avoid the time-consuming process of sifting through and interpreting the entire body of relevant legislative history.

Finally, some critics of legislative history argue that a reliance on legislative history provides judges with a convenient "out" in order to

58. See Karkkainen, supra note 19, at 419-20.
60. See David A. Strauss, Why Plain Meaning?, 72 NOTRE DAME L. REV. 1565, 1574 (1997). The penalty default rule, borrowed from contract interpretation, specifies a default rule, a rule that supplies the meaning of a contract term that the parties have not specified, that is so unattractive to the parties that they will have an incentive to avoid its application by specifying their intentions. For a discussion of penalty default rules see Ian Ayres & Robert Gertner, Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules, 99 YALE L.J. 87, 95-107 (1989).
61. See Strauss, supra note 60, at 1577.
62. Scalia, supra note 50, at 17-18 (emphasis omitted).
63. See Polich, supra note 30, at 269; Slawson, supra note 31, at 408.
64. See Slawson, supra note 31, at 408.
avoid blame for controversial decisions, allowing courts to avoid the intellectual labor required to solve difficult moral or policy problems.65

B. Illustrative Examples of The Plain Meaning Rule’s Use

One of the most celebrated pronouncements of the plain meaning rule came in *Tennessee Valley Authority v. Hill.*66 In that case, decided prior to Justice Scalia’s appointment to the Supreme Court, Chief Justice Warren E. Burger, writing for the majority, invoked the plain meaning rule as it pertained to the Endangered Species Act of 1973.67 The Act read, in part:

[Once a species is designated as endangered] [a]ll other Federal departments and agencies shall . . . tak[e] such action necessary to ensure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of [their] habitat.68

During the construction of the Tellico Dam and Reservoir Project by the Tennessee Valley Authority (“TVA”), which would have “stimulate[d] shoreline development, generate[d] sufficient electric current to heat 20,000 homes, and provide[d] for flatwater recreation and flood control, as well as improve[d] economic conditions in ‘an area characterized by underutilization of human resources and outmigration of young people’” a new species of perch, the snail darter, was discovered.69 Pursuant to statutory authority, the Secretary of the Interior declared the snail darter to be an endangered species.70 At that time, the snail darter’s only known habitat was the part of the Little Tennessee River that would have been “completely inundated” if the TVA had begun operation of its dam, which was substantially completed at a cost of more than 100 million dollars.71

Pursuant to the Endangered Species Act of 1973, the TVA was required to halt construction and cease operations of the dam as it would

65. *See Polich,* supra note 30, at 270; *Slawson,* supra note 31, at 383.
68. 16 U.S.C. § 1538 (1994); *see MIKVA & LANE,* supra note 66, at 12; *Strauss,* supra note 60, at 1568.
70. *See id.* at 153, 158-59, 161.
71. *See id.* at 153, 172.
be a threat to the snail darter’s only known environment.\textsuperscript{72} In challenging the Secretary of the Interior’s decision, the TVA argued that the halting of a substantially completed project, which would deliver substantial benefits when operational, was not the intent of the statute and that such application would be absurd, a proposition which the dissenting opinion adopted.\textsuperscript{73} Despite this, the majority ruled that the dam could not be opened. In invoking the plain meaning rule the Court stated:

One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. Its very words affirmatively command all federal agencies "to insure that actions . . . do not jeopardize the continued existence" of an endangered species or "result in the destruction or modification of habitat of such species." . . . This language admits of no exception. . . . To sustain [the TVA’s or the dissenter’s] position . . . we would be forced to ignore the ordinary meaning of plain language.\textsuperscript{74}

Shortly following his appointment to the Supreme Court in 1986, Justice Scalia challenged the Court’s use of legislative history in Immigration & Naturalization Service v. Cardoza-Fonseca.\textsuperscript{75} Under the Immigration and Nationality Act of 1952 Luz Maria Cardoza-Fonseca applied for asylum which, according to the Act, could be granted to refugees who had a "well-founded fear of persecution."\textsuperscript{76} The case hinged on the definition of "well-founded fear" which was defined by the government as requiring a petitioner to demonstrate a clear probability that she would be persecuted.\textsuperscript{77} Alternatively, Cardoza-Fonseca argued that the Act only required her to have a good reason to fear for her safety.\textsuperscript{78}

In the majority opinion ruling that the Act’s "well-founded fear" language could not support the government’s clear probability standard,
Justice John Paul Stevens reviewed numerous volumes of legislative materials and other extrinsic sources including House and Senate Committee Reports, Board of Immigration Appeals decisions, the 1946 Constitution of the International Refugee Organization, and a United Nations' handbook which dealt with refugee protocols. After a lengthy analysis, Justice Stevens wrote that "the plain language of this statute appears to settle the question before us." Justice Stevens reasoned that the detailed analysis of the legislative history was necessary to "determine only whether there is a 'clearly expressed legislative intention' contrary to that language."

Although he concurred in the decision, Justice Scalia denounced the majority opinion for unnecessarily delving into legislative history when the statute's plain meaning provided the correct interpretation of the language. Justice Scalia described the majority's efforts as an "ill-advised deviation," and as "gratuitous." Since then, Justice Scalia has issued concurring or dissenting opinions in almost every case where the majority has strayed from the plain meaning rule and used legislative history to interpret a statute's meaning, oftentimes with a sharp critique of the majority's use of legislative history.

In *Pavelic & LeFlore v. Marvel Entertainment Group,* Justice Scalia, writing for the majority, reasoned that the plain meaning of the
Federal Rules of Civil Procedure’s Rule 11’s language, “impose[d] upon the person who signed [the pleading] . . . an appropriate sanction,” required that sanctions for signing a pleading which had “no basis in fact and had not been investigated sufficiently by counsel” could only justify sanctions against the individual attorney who signed the pleading and not against the law firm on whose behalf the attorney signed. Justice Scalia concluded that the plain meaning of the first part of Rule 11, “[e]very pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney’s individual name,” when read with the later section, “impos[ing] upon the person who signed it . . . appropriate sanction[s]” can have but one plain meaning as to allow sanction upon the individual only.

While this reasoning may seem sound on its face, Justice Thurgood Marshall, in his dissent, argued that “[a]lthough the text of the Rule does not foreclose the reading the Court finds compelling, that interpretation is by no means the only reasonable one—and certainly is not required by the ‘plain meaning.’” He took issue with the majority’s failure to consider the intent and purpose of Rule 11 sanctions, and in doing so relied on Advisory Committee Notes in concluding that:

The policies underlying Rule 11 decisively indicate that “person” should be interpreted broadly so that a court can effectively exercise discretion in formulating appropriate sanctions. . . . Admittedly, in some cases, sanctions imposed solely on the individual signer may halt abusive practices most effectively. In other cases, however, deterrence might best be served by imposing sanctions on the signer’s law firm in an attempt to encourage internal monitoring. The trial judge is in the best position to assess the dynamics of each situation and to act accordingly.

Recognizing the need to tailor the sanction to each particular situation, the Advisory Committee emphasized . . . the need for “flexibility.”

By interpreting this statute according to its plain meaning, and ignoring the Advisory Committee’s legislative history, Justice Scalia

86. Id. at 122, 123 (quoting FED. R. CIV. P. 11). For a discussion of Justice Scalia’s opinion in Pavelic & LeFlore see Frederick Schauer, Statutory Construction and the Coordinating Function of Plain Meaning, 1990 SUP. CT. REV. 231, 231-38.
88. Id. at 128 (Marshall, J., dissenting).
89. Id. at 130.
"unwisely tie[d] the hands of trial judges who must deal frequently and
immediately with Rule 11 violations."90

In Chisom v. Roemer91 the Supreme Court was confronted with the
question of whether "representative," as used in the 1982 amendment to
§ 2 of the Voting Rights Act, included the election of state judges.92
Prior to this amendment the Voting Rights Act applied indisputably to
tall elections.93 In ruling that the term "representative" included the
elections of state judges, the majority defined "representative" as "the win-
ners of representative popular elections" and reasoned that "[i]f executive
officers, such as prosecutors, sheriffs, state attorneys general, and
state treasurers, can be considered ‘representatives’ simply because
they are chosen by popular election, then the same reasoning should apply to
elected judges.94

The Court reasoned that if Congress had intended to amend the
Voting Rights Act to eliminate a category of protection they "would
have made it explicit in the statute, or at least some of the Members [of
Congress] would have identified or mentioned it at some point in the
unusually extensive legislative history of the 1982 amendment."95 It is
difficult to believe that Congress, in an express effort to broaden the
protection afforded by the Voting Rights Act, withdrew, without com-
ment, an important category of elections from that protection.96

In his dissent in Chisom, Justice Scalia argued that it is not the Su-
preme Court’s job "to scavenge the world of English usage to discover
whether there is any possible meaning of ‘representatives’ which suits

90. Id.
92. See id. at 390-91, 398-99.
93. See id. at 390. The original text of § 2 read: “[n]o voting qualification or prerequisite to
voting, or standard, practice, or procedure shall be imposed or applied by any State or political
subdivision to deny or abridge the right of any citizen of the United States to vote on account of
race or color.” Id. at 391 (quoting the Voting Rights Act of 1965, 42 U.S.C. § 2 (1982)). The Act
defined “vote” and “voting” as “all actions necessary to make a vote effective in any primary,
special, or general election.” Id. at 391, 405 (emphasis omitted) (quoting the Voting Rights Act of
94. Chisom, 501 U.S. at 399.
95. Id. at 396. In his dissent in Chisom, Justice Scalia summarized his impression of the
majority’s view: “[I]f the dog of legislative history has not barked nothing of great significance
can have transpired.” Id. at 406 (Scalia, J., dissenting). Chief Justice Rehnquist, referring to a lack
of comments in the legislative history of a statute, once said: “In a case where the construction of
legislative language such as this makes so sweeping and so relatively unorthodox a change as that
made here, I think judges as well as detectives may take into consideration the fact that a watch-
dog did not bark in the night.” Harrison v. PPG Indus., Inc., 446 U.S. 578, 602 (1980) (Rehnquist,
J., dissenting).
96. See Chisom, 501 U.S. at 404 (Scalia, J., dissenting).
our preconception that the statute includes judges; our job is to determine whether the ordinary meaning includes them. Justice Scalia concluded that the ordinary speaker in 1982 would not have included judges as "representatives," and concluded his opinion with an attack on the majority's use of legislative history, or lack thereof, in determining meaning. He stated:

When we adopt a method that psychoanalyzes Congress rather than reads its laws, when we employ a tinkerer's toolbox, we do great harm. Not only do we reach the wrong result with respect to the statute at hand, but we poison the well of future legislation, depriving legislators of the assurance that ordinary terms, used in an ordinary context, will be given a predictable meaning.

In Conroy v. Aniskoff, Justice Scalia's concurring opinion begins by critiquing the majority's venture into legislative history after determining the plain meaning of "shall not be included" under the Soldiers' and Sailors' Civil Relief Act as it pertains to a member serving in the military and the tax sale of property for failure to pay taxes while on active duty. Justice Scalia stated "[t]hat [looking into legislative history] is not merely a waste of research time and ink; it is a false and disruptive lesson in the law." He went on to sharply criticize the use of any legislative history when a statute has a clear plain meaning, stating: "If one were to search for an interpretive technique that, on the whole, was more likely to confuse than to clarify, one could hardly find a more promising candidate than legislative history."

In John Doe Agency v. John Doe Corp, the dispute hinged on the meaning of the word "compiled" in the Freedom of Information Act as it pertained to the phrase "'records or information compiled for law enforcement purposes.'" Although the majority used a plain meaning approach, Justice Scalia still dissented, disputing the majority's plain meaning definition. While the majority invoked the plain meaning rule and defined "compiled" according to Webster's Third New Intern-

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97. Id. at 410 (emphasis omitted).
98. See id. at 417.
99. Id.
100. 507 U.S. 511 (1993).
101. See id. at 518-19 (Scalia, J., concurring).
102. Id. at 519.
103. Id. (emphasis omitted).
105. Id. at 147; see Schauer, supra note 86, at 242-43.
106. See id. at 160-64 (Scalia, J., dissenting).
national Dictionary, as "something composed of materials collected and assembled from various sources or other documents," they only did so after an analysis of the Freedom of Information Act's legislative history. Without explicitly stating so, the Court performed the same analysis as in Immigration & Naturalization Service v. Cardoza-Fonseca, looking for, and ruling out, any legislative intention to the contrary.

On the other hand, in Justice Scalia's dissent, he argued that the majority had incorrectly defined "compiled" according to its plain meaning, and argued that their definition failed to take into account instances where one can compile items without pulling together papers to show results, such as when a politician "compile[s] an 'enviable record or achievement' or a baseball pitcher 'compile[s] a 1.87 earned run average.'" Instead, Justice Scalia chose to define "compile" by reference to Roget's Thesaurus of Synonyms and Antonyms which likens "compile" to "compose, constitute, form, make; make up, fill up, build up; weave, construct, fabricate; compile; write, draw; set up (printing); enter into the composition of etc. (be a component)," all of which are a far cry from the majority's definition.

Similarly, in Smith v. United States, both the majority opinion, written by Justice Sandra Day O'Connor, and the dissent, written by Justice Scalia, claim to have defined "use" according to its ordinary or plain meaning. In the majority opinion, Justice O'Connor argued that exchanging a gun for narcotics constitutes "use" of a firearm "during and in relation to . . . [a] drug trafficking crime" within the federal statute which provides for enhanced penalties for such use. The majority concluded that bartering a weapon "[s]urely . . . can be described as 'use' within the everyday meaning of that term," and defined "use" according to Webster's New International Dictionary and Black's Law Dictionary as "'[t]o convert to one's service" or "to employ." The majority went on to find that by attempting to trade his gun for narcot-

108. Id. at 151-53.
111. Id. at 161 (Scalia, J., dissenting).
112. Id. (emphasis omitted).
114. See id. at 228-29, 244 (Scalia, J., dissenting); Strauss, supra note 60, at 1571.
116. Smith, 508 U.S. at 228.
117. Id. at 228-29 (citation omitted).
ics, the defendant “used” or “employed” it as an item of barter, and that he derived service from the gun because it was the gun which facilitated the transaction.\textsuperscript{118}

Conversely, Justice Scalia, in his dissent, argued that the phrase “uses a firearm” is ordinarily and plainly understood more narrowly to mean using a firearm as a weapon.\textsuperscript{119} In arguing that the plain meaning should encompass only using a firearm as a weapon, Justice Scalia turned to the \textit{United States Sentencing Guidelines} to provide an example of the term being used to encompass incidents where a gun is used as a weapon.\textsuperscript{120}

\subsection*{C. Plain Meaning Criticized}

While Justice Scalia and many other scholars advocate for the complete elimination of legislative history in statutory interpretation, there are numerous flaws with this approach. Relying solely on the plain meaning rule and eliminating legislative history in the case of “unambiguous” statutes can only lead to more confusion and ambiguity.

First, while Justice Scalia argues for the complete elimination of legislative history in interpreting statutes, he contradicts himself by often relying on history to interpret the Constitution. Justice Scalia argues that the goal of constitutional interpretation is to determine “the original meaning of the text.”\textsuperscript{121} To accomplish this, Justice Scalia often consults historic writings, including \textit{The Federalist} by Hamilton and Madison.\textsuperscript{122} This is in direct contradiction to Justice Scalia’s method of statutory interpretation in which he refuses to use legislative history and other extrinsic evidence, except dictionaries and thesauri, and only attempts to discover what the words mean, and not what they were intended to mean.

Justice Scalia criticizes legislative history as being irrelevant in determining intent, because a legislature can have no collective or single intent.\textsuperscript{123} He also criticizes it as being an inaccurate representation of

\begin{itemize}
  \item \textsuperscript{118} See id. at 229.
  \item \textsuperscript{119} See id. at 242-43 (Scalia, J., dissenting).
  \item \textsuperscript{120} See id. at 243. The \textit{United States Sentencing Guidelines} provide for enhanced sentences when firearms are “discharged, brandished, displayed, or possessed” or “otherwise used.” See U.S. SENTENCING GUIDELINES MANUAL \textsection 2B3.1(b)(2) (Nov. 1992). As for the latter term, the Guidelines say, “‘otherwise used’ with reference to a dangerous weapon (including a firearm) means that the conduct did not amount to the discharge of a firearm, but was more than brandishing, displaying, or possessing.” \textit{Id.} at \textsection 1B1.1, commentary, n.1(g).
  \item \textsuperscript{121} Scalia, \textit{supra} note 50, at 45.
  \item \textsuperscript{122} See id. at 38.
  \item \textsuperscript{123} See id. at 32.
\end{itemize}
intention, if any can be found, given the modern day realities of the legislative process: many senators and representatives do not read committee reports or attend floor debates and thus do not base their votes on these bodies of information. Finally, Justice Scalia criticizes legislative history as being manufactured by interest groups in an attempt to influence the judiciary's future readings.

While Justice Scalia says these shortcomings of legislative history require interpreting courts to ignore it, he fails to heed his own advice in the interpretation of the Constitution. All of Justice Scalia's criticisms of legislative history equally apply to The Federalist. Just like legislative history, The Federalist is not the words of the law.

If the collective intent of a legislature is an impossible concept to attain, so must be the "collective 'understanding' of an entire nation during a constitutional moment." A statute's intention is framed and developed by a limited number of people; 1 president, 100 senators, and 435 representatives. On the other hand, the Constitution was passed by the Philadelphia Convention and thirteen ratifying states, a process which involved thousands of people who, according to Justice Scalia's reasoning, could not have had one single intent.

Additionally, The Federalist does not accurately represent the views of the entire nation, just as Justice Scalia says the views of a legislative sponsor or committee do not represent the views of the entire legislature. In fact, because The Federalist was propaganda, it might be even less reliable than committee reports, because it is possible that even the authors did not share the views for which their writings advocated. Further, The Federalist, which was written for only one state, New York's, ratifying convention, cannot be seen as representative of the views of all thirteen states. Finally, looking at 200 year old documents to interpret modern day problems seems counterintuitive because the drafters could not have conceived of the problems their works are being used to interpret. On the other hand, it seems more logical and relevant to use floor debates and committee reports in interpreting modern day statutes, a practice which Justice Scalia takes pain to criticize.

124. See id. Justice Scalia attributes this to the increase in size of the legislature and the amount and length of new legislation. See id.
125. See id. at 34.
126. Eskridge, supra note 44, at 1308.
127. See id.
128. See id. at 1309.
129. See id. at 1310.
130. See id. at 1311, 1312.
The second problem with relying solely on the plain meaning rule is evidenced by the cases discussed previously—it is unclear which meaning is "plain." The Supreme Court once noted, "there is no errorless test for identifying or recognizing 'plain' or 'unambiguous' language." 131 "How, for example, can meaning be called plain when . . . members of the majority and dissent disagree, not about whether the meaning of a statute is plain but about what that meaning is?" 132

Further, one version of the plain meaning rule, that which Justice Scalia endorses, which requires looking to the statutory language unless that language produces absurd results, internally conflicts with itself. 133 How can one determine if absurd consequences will result without looking outside the statutory language? 134 Judge Henry J. Friendly commented on the plain meaning rule by saying that it is illogical because it holds that "a 'plain meaning' shut[s] off access to the very materials that might show it not to have been plain at all." 135

An alternate version of the plain meaning rule, that which says a court may not look at legislative history when interpreting a statute if the meaning of the statute is "plain" on its face, does allow the use of legislative history in the case of ambiguity. 136 The question that presents itself is why should it be acceptable to use legislative history in some cases, but not in others, if legislative history is so unreliable? Even Justice Scalia himself, one of the biggest opponents of legislative history, discusses it in Green v. Bock Laundry Machine Co. in order to avoid an absurd result. 137 If courts can trust legislative history in the case of am-

134. See Lam, supra note 16, at 113.
137. See Bock Laundry, 490 U.S. at 527 (Scalia, J., concurring) ("I think it entirely appropriate to consult all public materials, including the background of Rule 609(a)(1) and the legislative history if its adoption . . .").
biguity or to avoid absurd results, then why is it unreliable and untrust-
worthy when there is no ambiguity? Does the value of legislative his-
tory truly hinge on the clarity of the statutory language? No court has
been able to articulate the answers to these questions in a persuasive
way.138

While Justice Scalia argues for the complete elimination of legis-
lative history, it cannot be so easily disregarded. The judiciary has a
duty to implement the will of Congress, which expresses that will
through legislative history and through statutory language.139 Congress
has made legislative history materials available to courts, lawyers, and
the general public through microfiche, hardbound and softbound compi-
lations, and computerized services, which are available in most librar-
ies, and certainly all government depository libraries, for this specific
purpose.140 To ignore these tools of interpretation would be to second
guess Congress and its chosen form of organization, and give no credit
to the legislative process which produces statutes.141

Addressing Justice Scalia’s criticisms of legislative history uncov-
ers a meaningful response to each one.142 First, Justice Scalia’s argument
that legislative history cannot show intent because it is unrealistic to
believe that every voting senator or representative read, and voted on
the legislative history, “denies legitimacy to all materials, even statutes,
that have not been personally read by all the members of a Congress.”143
Judge Patricia M. Wald stated:

It is difficult logically to justify crediting a congressperson’s vote on
the assumption that the member knows what is in [a complex and de-
tailed statutory scheme which the member might not have read or un-
derstood fully, which] . . . he or she supports while discrediting all
evidence of the process which produced the bill on the assumption that
the congressperson does not know what happened in it. 144

Justice Scalia’s contention that legislative history is manufactured,
not in an attempt to inform the members of Congress, but in an attempt

138. See Karkkainen, supra note 19, at 422; Maggs, supra note 136, at 60.
139. See Maggs, supra note 136, at 61; Patricia M. Wald, The Sizzling Sleeper: The Use of
Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme
140. See Stephen Breyer, On the Uses of Legislative History in Interpreting Statutes, 65 S.
CAL. L. REV. 845, 869 (1992); Wald, supra note 24, at 200.
141. See Breyer, supra note 140, at 863, 874; Wald, supra note 139, at 306-07.
142. For a short discussion of Justice Scalia’s criticisms of legislative history see supra notes
44-51 and accompanying text.
143. Wald, supra note 139, at 307.
144. Id. (emphasis omitted).
to influence future judicial construction, also holds little weight. While this practice does exist, it would be alarming if only a few “sneaky” members engaged in this practice.\textsuperscript{145} This is not the case.\textsuperscript{146}

Additionally, Justice Scalia’s concern that legislative history can be used to justify decisions which are not based on law, applies equally to his preferred method, the plain meaning rule.\textsuperscript{147} Moreover, legislative history can help illuminate drafting errors, which might not be evident from a statute’s plain meaning.\textsuperscript{148} Furthermore, with the increased availability of legislative history, the cost of researching it decreases.\textsuperscript{149}

Another main source of criticism of the plain meaning rule has come from linguists.\textsuperscript{150} They argue that “[a] statute . . . cannot be understood merely by [defining and] understanding the words in it,” as Justice Scalia often does by referring to dictionaries and thesauri.\textsuperscript{151} “Dictionaries are like . . . ‘word zoos.’ One can observe an animal’s features in the zoo, but one still cannot be sure how the animal will behave in its native surroundings. The same is true of words in a text.”\textsuperscript{152}

Two classic examples of the plain meaning of language not seeming so plain are put forward by linguists. In the first example a person says to his or her housemaid: “[D]rop everything and come running.”\textsuperscript{153} Surely the person does not mean to drop the newborn baby to the floor and come running, although according to the statement’s plain meaning this is exactly what the housemaid should have done.

The second example is far less likely to be overruled by plain meaning’s absurd result exclusion. Judge Posner cites the example of an employer telling his employee to “bring all of the ashtrays you can find.”\textsuperscript{154} If the employee responds by ripping all of the ashtrays off of the wall it might be absurd, but if the employee brings in all of the ashtrays, including broken ones, it is not clear whether he has done what

\textsuperscript{145.} See id. at 306.
\textsuperscript{146.} See id.
\textsuperscript{147.} See infra notes 170-75 and accompanying text.
\textsuperscript{148.} See Breyer, supra note 140, at 850.
\textsuperscript{149.} See id. at 869.
\textsuperscript{152.} Randolph, supra note 151, at 73-74.
his boss has intended for him to do. While the employee did follow the plain meaning of the command, his actions can only be deemed correct or incorrect when we look to the intentions of the boss. If he intended to collect all ashtrays to inventory them, the employee was correct in following his plain meaning, but if the purpose was to clean the used ashtrays and return them for use, the employee clearly violated the boss's plain meaning of his statement by bringing the broken ones which could not be reused.

Through these two examples, linguists seek to prove that people can only assign plain meaning to words or phrases through their experiences. If people do not have shared experiences, plain meaning is useless.

Along with the linguistic concerns, another criticism of the plain meaning rule is that statutory interpretation will only be made more difficult. Non-criminal statutes are drafted for a sophisticated audience including lawyers, regulators, and people subject to their specific regulation, not to ordinary lay people. The more sophisticated audience approaches the statute[s] with a [previous understanding of the subject matter including previous laws], the politics of the enactment, the affected business activity, and the dynamics of legal implementation in the area. For these experts to check their knowledge at the door and interpret the statutes solely according to their dictionary meanings would be absurd.

Similarly, legislators do not draft statutes with the plain meaning rule in mind. "Statutes are usually drafted in general terms and address categories of conduct." Legislatures intentionally use general language and terms, expecting that courts and administrative agencies will interpret and define the specifics of the statute. As a result of this generality, the statute cannot have a plain meaning for every specific fact pattern which might be called into question under the law.

156. See Farber, supra note 11, at 552-53; Ross, supra note 155, at 1057.
157. Farber, supra note 9, at 552-53. This interpretive method has been labeled contextualism and requires interpretation of a statute according to background principles of law. See infra notes 208-12 and accompanying text, for a brief discussion of contextualism; see Jonathan R. Siegel, Textualism and Contextualism in Administrative Law, 78 B.U. L. REV. 1023, 1032-33 (1998), for a detailed description.
159. Id.
160. See id.
Additionally, statutes are sometimes unclear as a result of legislative compromise.\(^1\) In order to have a statute passed, opposing political groups often agree to leave terms undefined in order to protect a political position.\(^2\) These compromised, undefined terms cannot be seen as having a plain meaning in light of the fact that no meaning could be agreed upon by the legislature.

Finally, some commentators consider the plain meaning rule to be one of the canons of construction,\(^3\) and it has thus been criticized in works focusing on the canons.\(^4\) First, the plain meaning rule can and has been used by judges to justify judicial decisions, instead of facing complex or controversial social or policy issues.\(^5\) While there are several ways for courts to decide cases, on the basis of public policy, legislative history, community values, or using the canons of construction, "[p]olicy justifications clearly trump other justifications in any meaningful hierarchy of judicial values."\(^6\)

To illustrate this point, Professors Jonathan Macey and Geoffrey Miller pose the hypothetical of a judge who could decide a case one way by invoking the canons of statutory construction or the plain meaning rule, or another way by invoking a public policy rationale.\(^7\) Macey and Miller further hypothesize that societal wealth and human flourishing would increase dramatically if the decision were made on the basis of public policy, but would diminish just as dramatically if the canons of construction or the plain meaning rule were invoked.\(^8\) Quite clearly, the public policy justification should trump the canons or the plain meaning rule in this case.\(^9\)

161. See id.
162. See id.
165. See JAMES WILLARD HURST, DEALING WITH STATUTES 51 (1982); Lam, supra note 16, at 123; Macey & Miller, supra note 164, at 657; Polch, supra note 30, at 270; Taylor, supra note 132, at 356-58. See United States v. Singleton, 144 F.3d 1343, 1344-51 (10th Cir. 1998), and infra Part III.D, for an example of the plain meaning rule's use in this context.
166. Macey & Miller, supra note 164, at 656.
167. See id.
168. See id.
169. See id. For an illustrative example of the above hypothetical see infra Part III.D. discussing United States v. Singleton and the courts reading of 18 U.S.C. § 201 (c)(2) according to its plain meaning, which resulted in the abolition of plea bargaining in the 10th Circuit while the de-
Furthermore, if a judge lacks a policy based justification, but still wants to decide a case in a particular way, he can do so by invoking the canons of construction or the plain meaning rule. In short, the canons of construction and the plain meaning rule allow judges to set forth decisions that are not otherwise backed by policy, social concerns, or even law.\footnote{170}{See Lam, supra note 16, at 123; Macey & Miller, supra note 164, at 656-57; MIKVA & LANE, supra note 158, at 774.}

Additionally, the canons of construction allow judges to avoid potential errors and future embarrassment by avoiding research and analysis of complex legal and technical issues.\footnote{171}{See Macey & Miller, supra note 164, at 660-63.} Judges in this country are mostly judges of general jurisdiction.\footnote{172}{See id. at 660.} The canons of construction relieve judges of the responsibility to acquire specific knowledge or expertise in the area of law around which the case focuses.\footnote{173}{See id.} Without this specialized knowledge, judges can invoke the canons of construction in rendering a decision, and avoid all error costs associated with being proven wrong in the future.\footnote{174}{See id. at 662-63.} These error costs include being proven wrong in the future and the embarrassment which results.\footnote{175}{See id.}

Further, the invocation of the plain meaning rule leads to judicial inefficiency.\footnote{176}{See id. at 664.} Without the ability to render decisions based on the plain meaning rule or the canons of construction, judges would be forced to decide cases on policy grounds.\footnote{177}{See id. at 664.} This would be efficient because of the doctrine of \textit{stare decisis}, which provides guidance and authority for judges confronted with similar questions of fact and law.\footnote{178}{Stare decisis is defined as the “[p]olicy of courts to stand by precedent and not to disturb [a] settled point. [T]he doctrine that, when court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where facts are substantially the same.” BLACK’S LAW DICTIONARY 978 (abridged 6th ed. 1991).} In addition, writing content-rich decisions, based on the facts of a case as they relate to the laws and policies of the country and not on rules of construction, will attract the interest of economists, political scientists, legal scholars,
and other interested parties who will evaluate and scrutinize the content-based decision. 179 This evaluation and criticism will provide further information to judges deciding similar cases. 180

Finally, reliance on the canons of construction or the plain meaning rule can lead to unequal applications of law. As noted previously, Karl Llewellyn indicated that for every canon of construction there is an opposite canon which conflicts. 181 In addition, as linguists have noted, no one person assigns an identical plain meaning to a word or phrase. 182 As a result, two judges interpreting the same statute according to the same facts can come to opposite opinions. 183

D. United States v. Singleton

The many problems presented by the plain meaning rule are exemplified in United States v. Singleton. 184 In that case the Tenth Circuit Court of Appeals, utilizing the plain meaning rule, held that offering plea bargains to cooperating witnesses in exchange for testimony violates 18 U.S.C. § 201(c)(2), 185 the anti-bribery statute. 186

179. See Macey & Miller, supra note 164, at 664.
180. See id. at 664.
181. See Llewellyn, supra note 164, at 401-06. Some examples of these conflicts include: "A statute cannot go beyond its text; [BUT]; To effect its purpose a statute may be implemented beyond its text." Id. at 401. "Where design has been distinctly stated no place is left for construction; [BUT]; Courts have the power to inquire into real—as distinct from ostensible—purpose." Id. at 402. "Exceptions not made cannot be read; [BUT]; The letter is only the 'bark.' Whatever is within the reason of the law is within the law itself." Id. at 404.
182. See Lam, supra note 16, at 123; Taylor, supra note 132, at 356-57.
183. See, e.g., Smith v. United States, 508 U.S. 223 (1993); see also Lam, supra note 16, at 123 ("[T]hat which is ambiguous in one case is clear in another"); Taylor, supra note 132, at 356 (explaining that in a substantial proportion of Supreme Court cases the majority and minority disagree about what a statute means).
184. 144 F.3d 1343 (10th Cir. 1998).
185. 18 U.S.C. § 201(c)(2) (1994) reads:
    Whoever . . . directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of such person's absence therefrom.
    Id.
186. See Singleton, 144 F.3d at 1352. In Singleton the Wichita Police arrested Sonya Evette Singleton for money laundering and conspiracy to distribute cocaine. The police accused her of being part of an intricate drug smuggling and money laundering scheme in which she transferred and received money via Western Union for the conspiracy. Prior to her trial, Ms. Singleton moved to suppress the testimony of Napoleon Douglas, a co-conspirator who had entered into a plea agreement with the government. She argued that the government had impermissibly promised Mr. Douglas something of value, leniency, in return for his testimony, which violated 18 U.S.C.
Singleton demonstrates three of the major criticisms of the plain meaning rule. While there are numerous versions of the plain meaning rule, the court chose to apply the rule which states, "[t]he 'strong presumption' that the plain language of the statute expresses congressional intent is rebutted only in 'rare and exceptional circumstances,' when a contrary legislative intent is clearly expressed. In the absence of that rare and exceptional circumstance, 'we are bound to take Congress at its word.'"

The first problem is the court's application of its own rule. While the rule which the court sets forth requires a detailed reading and analysis of the legislative history for a contrary intent, the court only dedicated one paragraph of its twenty page opinion to the statute's history. While it is possible that the court did an exhaustive analysis of the legislative history, it is not difficult to find a contrary intention in the only piece of legislative history it cites.

More revealing is the court's choice of plain meaning rules. Had it followed Justice Scalia's version of the plain meaning rule it would have come to a different conclusion. While the plain meaning of "whoever" arguably includes the government, applying § 201(c)(2) to the government, and making plea bargaining illegal, clearly produces an absurd result. Plea bargaining has been one of the cornerstones of the American criminal justice system, and without it, prosecutors will be

§ 201(c)(2). The district court denied the motion, ruling that § 201(c)(2) did not apply to the government. Ms. Singleton was subsequently convicted of conspiracy to distribute cocaine and appealed the district court's decision, which was reversed and remanded by the 10th Circuit Court of Appeals in this decision, ruling that "whoever" included the government. See id. at 1343-45.

187. Id. at 1344.
188. See id. at 1352.
189. See id.; see also H.R. REP. No. 87-748, at 29 (1961). The proposed language which became § 201(c)(2) (identified in the report as § 201(d)) required an "intent to influence the testimony," whereas the enacted language in the statute does not require intent, but merely requires that a thing of value be given "for or because of the testimony." Id.; Singleton, 144 F.3d at 1345. Had the court focused on this language it would have understood that the legislature expressed an intention which contradicted the statute's language and would not have allowed for the court's reading of the statute to include plea bargaining because plea bargains are not offered to influence testimony.


Whatever might be the situation in an ideal world, the fact is that the . . . plea bargain [is an] important component of this country's criminal justice system. Properly administered, [it] can benefit all concerned. The defendant avoids extended pretrial incarceration and the anxieties and uncertainties of a trial; he gains a speedy disposition of his case, the chance to acknowledge his guilt, and a prompt start in realizing whatever
unable to convict many criminals. Eliminating this tool, which aids in many prosecutions, would be absurd because the only way to convict many criminals is through the testimony of accomplices, who would not testify truthfully without the plea bargain, having no other incentive to cooperate.

In addition, the elimination of this tool would be absurd in light of the fact that Congress has adopted and specifically mentioned plea bargaining in legislation subsequent to § 201(c)(2). Clearly, making a criminal out of every prosecutor would be an absurd result.

The second criticism of the plain meaning rule which Singleton illustrates is that statutes are not drafted with the plain meaning rule in mind. As previously discussed, statutes are often written generally as a result of compromise or left ambiguous for courts or agencies to define their terms. When reading the legislative history of § 201(c)(2), it is evident that the language actually passed was the result of just such a compromise. The proposed language for what was codified as 18 U.S.C.
§ 201 (c)(2), noted as § 201(d) in the House Report, required that in order to be illegal under the anti-bribery statute, something of value must have been given “with intent to influence the testimony.” When reading § 201(c)(2) as codified, it merely requires that the thing of value must have been given “for or because of the testimony.” A plain reading of the statute will not reveal the intent that the House of Representatives attached, and thus, such a reading would not do justice to the statute or the legislative process.

Finally, Singleton can be seen as a classic example of a court using the plain meaning rule to decide a case in a way which is not backed by social or policy goals. By invoking the plain meaning rule, the court was able to avoid considering any policy-based justifications which could have resulted in the opposite decision. This is evidenced by the court’s reluctance to apply its own version of the plain meaning rule, only spending one paragraph of a lengthy opinion on legislative history and contrary legislative intent. If the court had spent adequate time analyzing the legislative history, it would have found that the House of Representatives intended for the statute to be applied in an entirely different way. Furthermore, in the court’s twenty page opinion, it spent no time discussing the practice of plea bargaining and the role it plays in the criminal justice system, an important policy implication of the case it decided. It seems that in Singleton, the plain meaning rule was used to justify a decision that was not based on policy, social, or legal concerns.

IV. A PLAIN MEANING PROPOSAL

As evidenced by the previous discussion the plain meaning rule’s roots run deep in the American legal system. While the plain meaning rule does have its share of problems, it cannot be so easily discarded. The plain meaning rule plays an important role in judicial decision making, but it must not play that role in isolation. Definitions alone should never determine the meaning of a statute.

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199. See Singleton, 144 F.3d at 1352.
200. See H.R. Rep. No. 87-748, at 29 (1961). It is clear from the proposed language that the House only intended to apply this section of the anti-bribery statute to instances where the thing of value was offered to influence the testimony. Plea bargaining is in no way designed to influence testimony. It is used as an inducement for witnesses to testify honestly and is in no way meant to influence or suggest testimony. Therefore, “whoever,” when interpreted along with the House Report, was not intended to include prosecutors. See id.
201. See supra Part II.B.
The first problem which must be addressed in the effort to make the plain meaning rule a usable and efficient tool in statutory interpretation is its definition. There are numerous versions of the plain meaning rule in use today, none of which are judicially mandated. There must be one clear and concise plain meaning rule which judges throughout the nation can implement uniformly.

As a first step in statutory interpretation, a judge should look for the plain meaning of a statute through an examination of that statute’s language, and absent a clearly expressed legislative intention to the contrary, if that language is not ambiguous it will be regarded as conclusive unless that language leads to an absurd consequence or result.

This version of the plain meaning rule eliminates some of the criticism of the rule in that it requires judges not only to determine the plain meaning of a statute, but also to examine the statute’s legislative history in searching for a contrary legislative intent. It also requires an interpreting judge to examine and confront social and policy issues in an effort to avoid absurd results. After this analysis, a judge should be required to state the reasons for following or disregarding the plain meaning rule.

By mandating an examination of a statute’s legislative history, this version of the plain meaning rule respects the intention of the legislature and the legislative process. Courts have a duty to implement the will of Congress, which is expressed through the statutory text and through the legislative history. “[L]egislative history is the authoritative product of the institutional work of the Congress. It records the manner in which Congress enacts its legislation, and it represents the way Congress

202. See supra Part II.C.

203. This proposed plain meaning rule was created by combining the rules of Justice Sandra Day O’Connor and the golden rule which is subscribed to by Justice Antonin Scalia. In Bread Political Action Comm. v. Federal Election Comm’n., Justice O’Connor stated that “[o]ur analysis of this issue of statutory construction ‘must begin with the language of the statute itself,’ and ‘[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.’” 455 U.S. 577, 580 (1982) (citations omitted). The golden rule states: “We must . . . give to the words used by the legislature their plain and natural meaning, unless it is manifest from the general scope and intention of the statute injustice and absurdity would result.” Mattison v. Hart, 14 C.B. 147, 159 (1854); accord Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527 (1989) (Scalia, J., concurring).

204. This can be done through a short paragraph in the opinion, stating the sources which the judge examined and why or why not these sources are determinative of the plain meaning approach. For example a judge can write: “After examining House Report No. xx-xxx (19xx) I find no contrary legislative intention which would prevent the application of this statute’s plain meaning. Further, after considering the consequences of applying this statute’s plain meaning I find that the effect it will have on the policy and social factors involved (which would be listed) will not be absurd.”

205. See Maggs, supra note 136, at 61; Wald, supra note 139, at 306-07.
communications with the country at large. Reading a statute without looking to the negotiations, understandings, and proposed language before its enactment will often distort a statute’s meaning.

In addition, by including the absurd result prong in the proposed plain meaning rule, it forces interpreting judges to consider the ramifications of their decisions before they are actually rendered. Judges will not be able to “hide the ball,” and must acknowledge that policy reasons, not language and text, drive their decisions. Instead of hiding behind the plain meaning rule, judges will be forced to take more risks in articulating policy reasons for their decisions at the possible expense of being proven wrong as law develops. The minimal cost of this embarrassment is far outweighed by the probative value of content-based policy decisions; for it is these decisions which expand our body of knowledge on existing laws through commentary and scrutiny by economists, political scientists, legal scholars, and other interested parties.

This version of the plain meaning rule also neutralizes many of the linguistic problems which the rule currently presents. While this version of the rule does not eliminate the use of dictionaries and thesauri, it does require the definitions used to conform with legislative intent and public policy.

In addition, since non-criminal statutes are written for a sophisticated interpreting audience, this plain meaning rule allows these interpreters to use their understanding of the subject matter including “previous laws, the politics of the enactment, the affected business activity, and the dynamics of the legal implementation in [their] interpretation.”

Furthermore, in determining whether a statute’s plain meaning leads to an absurd result, the interpreting court should read the text of

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206. Wald, supra note 139, at 306.
207. See Maggs, supra note 136, at 60.
208. See Lam, supra note 16, at 123.
209. See Macey & Miller, supra note 164, at 664. The Supreme Court has implicitly recognized the advantages of this point in its own policies and procedures for selecting cases on certiorari petitions. See id. Where an issue is brought before the Court in a petition the Justices will often refrain from granting certiorari until other courts have decided cases with similar facts and issues. See id. The new decisions provide the Supreme Court with information which helps clarify the issue for the Justices and eventually aids in rendering a final decision. See id. at 664-65. Clearly, a decision based on the plain meaning rule will be of little or no help as compared to a decision based on substantive policy issues surrounding the case. See id. at 664-65.
210. For a discussion of the linguistic concerns with the plain meaning rule see supra notes 150-62 and accompanying text.
211. See Farber, supra note 9, at 552-53.
the statute contextually. That is, read the statute with background principles of law in mind. More particularly, a contextual reading of a statute involves "searching the corpus juris" in order to discover principles underlying [the law being examined], which may be unrelated to particular words in the statute being construed, but which may assist an interpreter in understanding" the statute as a whole. These background principles can be found in the Constitution, other statutes, agency decisions and actions, judicial decisions and in scholarly writings, and make up the "legal topography" or the "societal and legal context."

Additionally, this version of the plain meaning rule will address another drafting problem which involves legislative compromise, and the failure of legislatures to consider the plain meaning rule in drafting statutes. When the plain meaning of a statute is unambiguous, a textualist would go no further than the words of the statute itself. On the other hand, a contextualist, using the above mentioned plain meaning rule would search the legislative history and could discover proposed language, which when compared to the adopted language, signals a legislative compromise. In this case, applying the plain dictionary meaning of the statute would not do justice, and would signify that the court paid no respect or placed no value on the drafting process. This version of the plain meaning rule requires interpreting judges to take this fact of statutory drafting into consideration when determining the plain meaning of a statute.

Moreover, this plain meaning rule would provide for uniform application of laws through precedent, and would provide for judicial efficiency. With numerous versions of the plain meaning rule being used by the judiciary, there can never be equal application of the law. As demonstrated previously in the discussion of Singleton, had the court used a different version of the plain meaning rule, it might have come up with a different verdict. If the above version of the plain meaning

212. See Siegel, supra note 157, at 1032-41, for an example of a court interpreting a statute contextually. See Wiener v. United States, 357 U.S. 349 (1958) (interpreting an administrative law statute in light of background principles of administrative law), for a full discussion of contextualism.

213. Corpus juris, in this context, is defined as a body of law. See Black's Law Dictionary 239 (abridged 6th ed. 1991).

214. Siegel, supra note 157, at 1043.


216. Macey & Miller, supra note 164, at 661.

217. See supra notes 190-93 and accompanying text.
rule was to be adopted and judicially mandated as the only version of the rule, it would result in equal application of the laws, as well as efficiency because precedent could easily be applied to similar situations with no question as to what version of the rule to apply.

However, there is one caveat to this, and any other version of the plain meaning rule. The plain meaning rule cannot be applied to ambiguous text because ambiguous text, quite obviously, cannot have a plain meaning. As a result of this qualification, the use of the plain meaning rule is severely limited. But, there is one question that lingers: Exactly what does “ambiguous” mean? Should a term be ambiguous per se when the majority and the dissent define the exact same statutory text in different ways? Until “ambiguous” is judicially defined, the plain meaning rule cannot operate efficiently and uniformly.218

V. SINGLETON REVISITED

As previously stated, the Tenth Circuit’s original decision in United States v. Singleton was vacated and the case was reheard en banc.219 On January 8, 1999, the en banc court held that 18 U.S.C. § 201(c)(2) does not apply to the United States or an Assistant United States Attorney, in essence, overturning the Tenth Circuit’s original opinion.220

While the court’s opinion did make some strides towards a better plain meaning rule, it did not go far enough.221 Even though the majority considered the policy arguments behind plea bargaining, in the end, it resorted to Justice Scalia’s plain meaning interpretation involving dictionary meanings.222

On the other hand, Judge Lucero, in his concurrence, used one of the interpretation tools which conforms to the proposed plain meaning rule discussed in Part IV of this Note.223 Although he failed to express the policy justifications for his decision, Judge Lucero did conduct a

218. For a complete discussion of “ambiguous” as it pertains to the plain meaning rule, see Steven J. Johansen, What Does Ambiguous Mean? Making Sense of Statutory Analysis in Oregon, 34 WILLAMETTE L. REV. 219, 264-68 (1998).

219. United States v. Singleton, 144 F.3d 1343, 1361 (10th Cir. 1998), rev’d en banc, 165 F.3d 1297 (10th Cir. 1999).

220. See Singleton, 165 F.3d 1297, 1300 (10th Cir. 1999).

221. Admittedly, advancing a better plain meaning rule was not the court’s intention or goal.

222. See Singleton, 165 F.3d at 1301 (stating that plea bargaining is a longstanding practice which can be traced back to common law). But see id. at 1300 (defining “whoever” as “what ever person: any person” so as not to include the United States because it is an inanimate object which is usually referred to as “whatever”).

223. See id. at 1303, 1305 (Lucero J., concurring).
detailed analysis of how 18 U.S.C. § 201(c)(2) fits into the existing laws and policies surrounding plea bargaining.\textsuperscript{224} In essence, he conducted a contextual reading of the statute, focusing on the background policies of law found in other statutes which deal with leniency and plea bargaining.

While both of these opinions used one of the elements found in the proposed plain meaning rule, they both failed to address the legislative history of 18 U.S.C. § 201(c)(2). In addition, the dissent in the \textit{en banc} opinion, the same three judges who issued the original vacated decision, argued for an alternative meaning to "whoever."\textsuperscript{225} This just adds fuel to the fire over the controversy involving plain meaning. Again, how can one word in a statute, read by two different judges, have two different plain meanings? Maybe the meaning is not so plain. Or, maybe the concept of plain meaning is just a wild goose chase.

\section*{VI. CONCLUSION}

The plain meaning rule clearly deserves a place in the statutory interpretation toolbox. Where and in what form are two questions which beg for answers. While Justice Scalia's version falls short of recognizing and acknowledging the entire legislative process, his method does make sense in the isolated world of scarce judicial resources and the associated atmosphere of judicial economy. However, the judicial system should not revolve around the economic concepts of supply and demand.

Implementing a new judicially mandated plain meaning rule will come with its costs. In addition to developing a universal plain meaning rule, such as the one proposed here, we must also establish rules governing the creation, use, and implementation of legislative history, of which there are currently none. Law schools throughout the country must develop and implement classes which thoroughly explore the legislative process and concentrate on teaching the use and interpretation of legislative history.

While a judicially mandated plain meaning rule may be costly, requiring judges to engage in the time-consuming, multi-step process of interpretation, the long term benefits of a judicially mandated rule will far outweigh its start-up, and operating costs. Efficiency and economy cannot be the driving force behind judicial decision making. As citizens, we use and rely upon the courts of the United States and expect them to

\textsuperscript{224} See \textit{id.} at 1303-07.

\textsuperscript{225} See \textit{id.} at 1310 (Kelly, J., dissenting).
render justice. Justice involves far more than merely defining terms in a statute. Policy and social issues are presented to the courts with the expectation that they will be considered in rendering a fair and just disposition. Relying solely on the meaning of words can never accomplish complete justice. "No word can capture the full richness of human existence, and hence there is always 'much more out there' than any word can represent."226

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