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THE LEGAL PHOENIX: THE PLAIN MEANING RULE IS DEAD, LONG LIVE THE RULE!

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One of the earliest approaches to statutory interpretation was the Plain Meaning Rule.[1] Simply stated, the Plain Meaning Rule is that a court should stop at interpreting an unambiguous statute with its plain meaning.[2] Although it had its days of unquestioned authority, most attorneys who are called upon to litigate a statute's meaning reject boring the court with arguments based on the Plain Meaning Rule.[3] Rather to everyone's

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1. More modern nomenclature is calling the Plain Meaning Rule part of textualism, which seems to parallel constitutional interpretation methodology. *Cf.* Hans W. Baade, *'Original Intent' in Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001, 1062 (1991). It is also called literalism, due to the focus on the text.

I use Plain Meaning Rule due to my prejudice as a Legal Method Professor, having utilized the classic textbook in the field. HARRY JONES, ET AL., LEGAL METHOD: CASES AND TEXT MATERIALS 388-466 (1980) (classic textbook for Legal Method) [hereinafter CASEBOOK]; *see* John Kernochan, *Statutory Interpretation: An Outline of Method*, 3 DALHOUSIE L.J. 333, 338-45 (1976).

2. Caminetti v. United States, 242 U.S. 470, 485 (1917). There is recent indication that a treaty will be interpreted according to its plain meaning, too. *Cf.* United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992).

3. Justice Scalia, in fact, has indicated that attorneys should not bore him with legislative history. "It is regrettable that we have a legal culture in which such arguments (legislative-history and policy) have to be addressed . . . with respect to a statute utterly devoid of language that could remotely be thought (to be interpreted beyond its plain meaning)." Union Bank v. Wolas, 112 S. Ct. 527, 534 (1991) (Scalia, J., concurring); *see also* Patterson v. Shumate, 112 S. Ct. 2242, 2250 (1992) (Scalia, J., concurring) (When the phrase "applicable nonbankruptcy law" is considered in isolation, the phenomenon that three Courts of Appeals could have thought it a synonym for "state law" is mystifying. When the phrase is considered together with the rest of the Bankruptcy Code (in which Congress chose to refer to state law as, logically enough, "state law"), the phenomenon calls into question whether our legal culture has so far departed from attention to text, or is so lacking in agreed-upon methodology for creating and interpreting text, that it any longer makes sense to talk of "a government of laws, not of men.") United States v. Taylor, 487 U.S. 326, 345 (1988) (Scalia, J., concurring in part) ("By perpetuating the view that legislative history *can* alter the meaning of even a clear statutory provision, we produce a legal culture" in which statements from floor debates are taken for evidence of a particular result.).

surprise the rule is not dead and, in fact, may be very well indeed, thank you. This article will explore the rise, fall and renewal of the Plain Meaning Rule, both within the federal system and within state judicial systems. In section one of the article, the rise and fall of the Plain Meaning rule will be explored. In the second section, the current rise of the rule in the United States Supreme Court will be reviewed. In the third section, this article will discuss the Plain Meaning Rule within state courts. Finally, the concluding section of this article will show that the Plain Meaning Rule continues to exist in both the federal and state judicial systems. Therefore, attorneys must be sensitive to the significance of the Plain Meaning rule, lest they do both their client and the court a disservice.[4]

A HISTORY LESSON IN PLAIN MEANING

The history of the Plain Meaning Rule can be traced to the English courts. In 1603, the court of common pleas held that because the words of a statute express the intent of the makers of the Act[5] judges should interpret a statute in harmony with the Plain Meaning. However, this decision must be read against the precedent of the *Heydon's Case*[6] decided in 1584. In *Heydon's Case*, the court held that a fundamental rule of statutory construction is to determine the purpose of the statute and interpret the statute to facilitate the purpose.[7] Therefore, although English jurisprudence indicates that a court should enforce the unambiguous words of the Parliamentary Act,[8] the English judicial system did not, in fact, adhere to a pure Plain Meaning Rule for statutory interpretation.[9]

In the American judicial system, the genesis of the Plain Meaning Rule can be discerned in early Supreme Court decisions. The Supreme Court, in

4. It has been suggested that the Plain Meaning Rule has an adverse affect on legal fees by not requiring as many bankable hours. Attorneys will not be required to pour over volumes of legislative history, but only the text of the statute. Anthony D'Amato, *Pragmatic Indeterminacy*, 85 NW. U. L. REV. 148, 175 n.88 (1990). I would just add, that if the statute is clear, it is better for society to have any conflict settled at a very early stage. Furthermore, it is the legislature that creates the volumes of legislative history. Even if the Plain Meaning Rule is rejected, legislatures, especially Congress, should attempt to limit legislative history. There has been a recent example during the Civil Rights Act of 1991. There was unanimous consent to an interpretive Memorandum included in the record which stated it was the "exclusive legislative history." S. 1745, 102d Cong., 1st Sess., 137 Cong. Rec. 15275 (1991).

5. Edrich's Case, 77 Eng. Rep. 238, 239 (1603). The court notes that the words will be given the express meaning because nothing can so express the meaning of the makers of the Act, as their own direct words.

6. 76 Eng. Rep. 637 (1584).

7. To interpret a statute, four things are to be discerned and considered: (a) what was the common law before the making of the Act; (b) what was the mischief and defect for which the common law did not provide; (c) what remedy the Parliament has resolved and appointed to cure the disease of the commonwealth; and (d) the true reason of the remedy. Then interpret the statute to suppress the mischief and advance the remedy. *Id.* at 638.

8. The Mary, 165 Eng. Rep. 1235, 1237 (1811).

9. R. v. Wensley, 101 Eng. Rep. 88, 89 (1793).

an opinion by Justice Story, clearly held that the plain meaning was a method of statutory interpretation because "[t]he legislature must be presumed to use words in their known and ordinary signification. . . ."[10] The rule continued to be applied[11] and continued to be widely accepted at the turn of this century.[12] Yet, for most attorneys, the clearest statement of the rule appeared in *Caminetti v. United States*.[13] Therein, Justice Day stated the Plain Meaning Rule as follows: "[w]here the language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the

10. Levy v. M'Cartee, 31 U.S. (6 Pet.) 102, 110 (1832). Chief Justice Marshall adopted a plain meaning approach to interpreting contracts. Sturges v. Crowninshield, 17 U.S. (4 Wheat) 120 (1819). The authors of the casebook use this as an early example of the plain meaning rule. CASEBOOK, *supra* note 1, at 389. Although it is some evidence of Marshall's position in interpreting statutes, I cannot embrace it as binding authority. However, in the case of United States v. Wiltberger, 18 U.S. (5 Wheat.) 76 (1820), Marshall clearly stated the Plain Meaning Rule, of statutory interpretation. "The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words . . . in search of an intention which the words themselves did not suggest." *Id.* at 95-96.

11. Maillard v. Lawrence, 57 U.S. (16 How.) 250, 261 (1853) ("The popular or received import of words furnishes the general rule for the interpretation of public laws.").

12. *See, e.g.*, Hamilton v. Rathbone, 175 U.S. 414, 419 (1899). It was not the exclusive method of statutory interpretation. In *Church of the Holy Trinity v. United States*, the Supreme Court was asked to interpret a statute which prohibited contracting "to prepay the transportation, or in any way assist or encourage the importation or migration, of any alien . . . to perform labor or service of any kind in the United States. . . ." Church of The Holy Trinity v. United States, 143 U.S. 457, 458 (1892). Defendant, a religious society, had contracted with an alien residing in England to be its pastor. Clearly, the plain meaning rule would have required the Court to hold that defendant had violated the statute. However, the Supreme Court found evidence that the purpose of the law was to prohibit manual labor from coming into the country. Therefore, "the reason of the law in such cases should prevail over its letter." "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *Id.* at 459. The Court went on to indicate that giving the language a broad purpose would be against religion, which *cannot* be imputed to Congress. The Court reviewed the history of religion in the country to establish that Congress could never intend an interpretation which would infringe on religion, *Id.* at 465-72. Although *Holy Trinity* has been cited as authority against the Plain Meaning Rule, the religious aspect should not be minimized as a moving factor.

The *Holy Trinity* Court cites United States v. Kirby, 74 U.S. (7 Wall.) 482 (1869) as authority for rejecting the plain meaning of a statute. In *Kirby*, the defendant was indicted for knowingly and willfully obstructing the passage of the mail of the United States, in violation of federal law. Kirby, a sheriff of Gallatin County, admitted that he had boarded the steamboat carrying the mail of the United States to arrest an alleged murderer, pursuant to grand jury indictments. The Court held that Kirby's actions did not constitute "knowingly and willfully obstructing the mail of the U.S." within the meaning of the federal law. In other words, the Court found that his actions were not the type Congress intended to prohibit by enacting the law. Although the court considered congressional intent when they construed the statute, the basis of its interpretation was not a rejection of the Plain Meaning Rule. In my opinion, the Court, used the Golden Rule. *See infra* notes 15. "General terms should be so limited in their application as not to lead to injustice, oppression, or an *absurd consequence*." *Id.* at 486 (emphasis added). Clearly, it would be absurd to hold a law enforcement agent guilty of a crime committed by another.

13. 242 U.S. 470 (1917).

rules which are to aid doubtful meanings need no discussion."[14] There exists an escape route, called the Golden Rule.[15] Under the Golden Rule, if the plain meaning of the statute leads to absurd results, the court will not interpret the statute using the plain meaning.[16] Because the exception is rarely employed, I like to call it the "all humankind jump up" exception. This nomenclature derives from a statement made by Chief Justice Marshall, who stated that the absurdity must "be so monstrous that all mankind would, without hesitation, unite in rejecting the application."[17]

Having proclaimed the Plain Meaning Rule, the Supreme Court attempted to practice what it ruled.[18] The Court failed. Initially, there

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14. *Id.* at 485. One problem in *Caminetti* is the majority's position on *Holy Trinity*. As noted, in *Holy Trinity*, the Court stated, "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because it is not within the its spirit, *nor within the intention of its makers.*" *Id.* at 459 (emphasis added). Yet the majority in Caminetti fails to address the "self-contradictory" rule, looking at the plain meaning *and* the intent, too. Baade, *supra* note 1, at 1087. Another aspect of Caminetti is that the language in question, "for any other purposes," had been used in another act by Congress, the Immigration Act of 1907, and was subsequently construed by the Supreme Court. United States v. Bitty, 208 U.S. 393 398 (1908). In 1908, the Supreme Court had held that Congress, in using this phrase, "had reference to the views commonly entertained among the people of the United States as to what is moral or immoral in the relations between man and woman in the matter of such intercourse. those views may not be overlooked in determining questions involving the morality or immorality of sexual intercourse between particular persons." *Id.* at 402. Since the Mann Act involved in Caminetti was enacted in 1910, it appears that Congress intended the phrase to have the same meaning reaching more than just commercial activities. ALEXANDER BICKEL & BENNO SCHMIDT, THE HISTORY OF THE SUPREME COURT, vol IX 426 (1984). Therefore, the Court held that to be a concubine was *immoral*. Furthermore, because the phrase had in fact previously been construed, stare decisis required the results that were reached in *Caminetti*. James F. Fagan, Jr., *Say It Ain't So, Lewis—The Agony of a New Legal Method Professor*, 4 ST. THOMAS L. REV. 149, 153-55 (1992).

15. Sorrells v. United States, 287 U.S. 435 (1932) (interpreting a statute not to allow the defense of entrapment is "so shocking to the sense of justice" that court refuses to apply the statute's plain meaning). CASEBOOK, *supra* note 1, at 388-89. Of course, another avenue around the Plain Meaning Rule, by its nature, is to hold that the statute is ambiguous. In fact, the dissent in *Caminetti* takes the position that the statute is ambiguous. 242 U.S. at 496-97 (McKenna, J., dissenting). Justice McKenna's position in interpreting statutes looks at the statute's context and the purpose of the statute. *Id.* at 497.

16. *Caminetti*, 242 U.S. at 490.

17. Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 120, 202 (1819). A more recent example is Chung Fook v. White, 264 U.S. 443 (1924), where the Court held that a native-born citizen of the United States could not utilize a statute intended for naturalized citizens of the United States.

18. Even in the year of Caminetti, the Supreme Court did use reports of committees and statements made by the *committee* chair-person to determine Congressional intent, but "not for the purpose of construing it contrary to its plain terms, but in order to remove any ambiguity. . ." United States v. St. Paul, M & M R. Co., 247 U.S. 310, 318 (1918); *see also* United States v. Standard Brewery, Inc., 251 U.S. 210, 217 (1920) ("Nothing is better settled than that in the construction of a law its meaning must first be sought in the language employed"); Railroad Com. of Wis. v. Chicago, B. & Q. R. Co., 257 U.S. 563, 589 (1922) (extrinsic aids "are only admissible to solve doubt and not to create it."). *But cf.* Ozawa v. United States, 260 U.S. 178, 194 (1922) (If the plain meaning leads to an "unreasonable result plainly at variance with the policy of the legislation as a whole" the court should 'look to the reason of the enactment and inquire into its antecedent history and give its effect in accordance with its design and purpose, sacrificing, if necessary, the Eternal meaning in order that the purpose may not fail. *See . . . Holy Trinity.*)

were cases which did not strictly apply the Plain Meaning Rule.[19] Then, less than a dozen years later, there was an even greater retreat from strict adherence, where some argue Justice Holmes "deruled the rule."[20] In *Boston Sand & Gravel Co. v. United States* he announced that the Plain Meaning rule "is an axiom of experience rather than a rule of law, and does not preclude consideration of persuasive evidence if it exists."[21] Holmes overrode the plain meaning of the statute where Congress used "a certain phrase with a more limited meaning."[22] I am not persuaded that a Holmesian approach to statutory construction is a rejection of the Plain Meaning rule. One reason is that prior to *Boston Sand & Gravel*, Holmes clearly admitted that he followed the rule.[23] Another reason is that the case quoted

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19. *See, e.g.*, United States v. Simpson, 252 U.S. 465 (1920). In *Simpson*, the Supreme Court was required to interpret the Reed Amendment which declared that "whoever shall . . . cause intoxicating liquors to be transported in the interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any State, the laws of which . . . prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes shall be punished." *Id.* at 466. Defendant had transported five quarts of whiskey in his car for his personal use. The majority of the Supreme Court held that the defendant had violated the Reed Amendment. "The evil against which the statute was directed was the introduction of intoxicating liquor into a prohibition State from another State. . ." *Id.* at 466. The dissent indicated that the term "interstate commerce" had a plain meaning, since early days the term meant commercial, business, intercourse carried on between the inhabitants of two or more of the United States. *Id.* at 468 (Clark, J. dissenting). *See also* Sharrenberg v. Dollar S.S. Co., 245 U.S. 122 (1917) (court uses the purpose of the act to interpret it, citing *Holy Trinity*). Justice Brandeis never accepted the rule, rejecting it in the same year as *Caminetti*. New York Cent. R. Co. v. Winfield, 244 U.S. 147, 154 (1917) (Brandeis, J., dissenting). Brandeis does state that to ascertain the intent of Congress we must look, of course, first at what Congress has said, then at the action it has taken "[f]or Congress must be presumed to have intended the necessary consequences of its action." *Id.* at 158. However, in determining whether the Employers' Liability Act preempts state regulation, Brandeis quickly leaves the plain words of the statute and jumps into legislative history. His analysis of the words of the statute, which he states is in his favor, is a mere paragraph, while his review of the origin, scope, purpose nature, methods and means of the law extends over ten pages. *Id.* at 158-71. Justice Brandeis led a direct challenge to the plain meaning rule later in his career, see notes 27-30, *infra*, but clearly he held that position from the beginning of his career. It should be noted that Justice Brandeis had knowledge of the legislative process obtained from his public interest fights in Massachusetts. PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 335 (1984). Thus, he would understand that statutes are the results of a political process and not exact rules. "The strict letter of an act must, however, yield to its evident spirit and purpose, when this is necessary to give effect to the intent of Congress." Fleischmann Constr. Co. v. United States, 270 U.S. 349, 360 (1926) (citing *Holy Trinity); cf.* United States v. Katz, 271 U.S. 354 (1926).

20. Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 280 (1990).

21. Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 48 (1928).

22. *Id.* at 48.

23. Justice Holmes joined the majority in *Caminetti*. In Grogan v. Hiram Walker & Sons, Ltd., 259 U.S. 80 (1922), Holmes used a plain meaning analysis and was chided by Justice McKenna, in his dissent, for not following *Holy Trinity*, in that a statute should not be taken at its word against its spirit, and intention. *Id.* at 93 (McKenna, J., dissenting). Justice McKenna went on to note that the Court had followed *Holy Trinity*, which sanctioned rejecting plain meaning as a "destructive revolution" argument. *Id.* For an earlier Justice Holmes opinion employing the Plain Meaning Rule, see United States v. Johnson, 221 U.S. 488 (1911). In an even earlier article, Justice Holmes stated that in jurisprudence, "[w]e do not inquire what the legislature meant; we ask only what the statute means." Oliver W. Holmes, *The Theory of*

involved a limited public law passed specifically to waive sovereign immunity so that the owner of the steam lighter Cornelia could sue the United States for damage rising out of a collision between it and the United States destroyer.[24] When Congress passed a general law as a substitute for using special public bills similar to the one in the above mentioned case, it clearly established its position on the issue involved in the case based upon prior practice.[25] Furthermore, even though not applicable to the case at bar, Justice Holmes, was influenced by a later general law, and interpreted the public law in harmony with it.[26] Finally, Justice Holmes, in the same term, joined a unanimous court that stated "[a]dherence to [the statute's] terms leads to nothing impossible or plainly unreasonable. We are therefore bound by the words employed and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction."[27] Consequently, a Holmesian jurisprudence of the Plain Meaning Rule exists.

The 1930's started the demise of the Plain Meaning Rule. Initially several scholars detected problems with the rule.[28] Although most lower federal courts continued to follow the Plain Meaning Rule,[29] there were

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Legal Interpretation, 12 HARV. L. REV. 417, 419 (1899).

As Justice Frankfurter noted years later, "One gets the impression that in interpreting statutes Mr. Justice Holmes reached meaning easily, as was true of most of his results, with emphasis on the language in the totality of the enactment and the felt reasonableness of the chosen construction." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 532 (1947).

24. Special Act of May 15, 1922, c. 192, 42 Stat., Part 2, 1590. *See Boston Sand & Gravel*, 242 U.S. at 46.

25. The issue was whether the United States was liable for interest on damages done by public vessels. The public act did not specially exclude interest, although it had been the policy of the United States for years before 1922 not to allow interest. *Boston Sand & Gravel*, 278 U.S. at 47. However, four members of the court dissented based upon the plain meaning of the statute, finding that the plain language of the law did not exclude interest. *Id.* at 49 (Sutherland, J., dissenting).

26. *Id.* at 48-49. Justice Holmes noted that the United States is not liable for interest in any general case, a presumption of law that also influenced his position. The absence of language would not overcome the presumption. *Id.* at 47.

27. United States v. Missouri Pac. R. Co., 278 U.S. 269, 277 (1929). The Court went on to state: "Construction may not be substituted for legislation." *Id.* at 278.

Justice Frankfurter quoted a letter written by Justice Holmes' which strongly evidenced his position. "Only a day or two ago—when counsel talked of the intention of a legislature, I was indiscreet enough to say I don't care what their intention was. I only want to know what the words mean." Frankfurter, *supra* note 23, at 538. In my opinion this statement is similar to the one recently made by J. Scalia, "It is regrettable that we have a legal culture in which such arguments (legislative intention) have to be addressed . . . with respect to a statute utterly devoid of language (that is ambiguous)." Union Bank v. Wolas, 112 S. Ct. 527, 534 (1991) (Scalia, J., concurring).

28. James M. Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886 (1930); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 872 (1930). *But see* Frederick J. de Sloovere, *Preliminary Questions in Statutory Interpretation*, 9 N.Y.U. L. Q. REV. 407 (1932).

29. *See, e.g.*, Fleming v. Hawkeye Pearl Button Co., 113 F.2d 52 (8th Cir. 1940); McDonald v. United States, 89 F.2d 128 (8th Cir.), *cert. denied*, 301 U.S. 697 (1937). In Echols v. Commissioner, 61 F.2d 191 (8th Cir. 1932), the Court noted that *Holy Trinity* was limited to a case where a court was refusing to enforce a statute not intended to be enacted by

small movements away from it.[30] In the state courts, there was clear division. Some courts rejected the Plain Meaning Rule, using legislative history and purpose as a basis to interpret a statute.[31] Other state courts continued to interpret state statutes using a plain meaning approach.[32] In the Supreme Court, clear rejection of the plain meaning rule could be found in a dissent by Justice Brandeis, who analyzed a law by its language, but stated that his statutory analysis "is confirmed by reference to legislative history of the Act."[33] Justice Brandeis was honest by citing *Caminetti* during his analysis, but with the signal "compare."[34] Thereafter, a case arose where the majority rejected legislative history, but Justice Brandeis garnered two other justices to concur "on the ground[s] that the statute . . . reads as its legislative history shows Congress intended it to read. . . ."[35] One could argue that the Plain Meaning Rule was resuscitated when an unanimous Supreme Court stated: "We have refused to nullify statutes, however hard or unexpected the particular effect, where unambiguous language called for a logical and sensible result."[36] However, it was a short lived last hurrah, because the fatal blow would come two years later in 1940, in the case of *United States v. American Trucking Assn's.*[37] Therein the Supreme Court clearly killed the Plain Meaning Rule. "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be

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the legislature. This construction seems to be indicating that *Holy Trinity* was only establishing the Golden Rule. *See supra* note 15. The illustrative cases cited in the opinion demonstrate that, to justify a departure from the letter of the law upon that ground, the absurdity must be so gross as to shock the general moral or common sense. *Compare* Pirie v. Chicago Title & Trust Co., 182 U.S. 438, 451-52 (1901). Furthermore, there must be something to make plain the intent of Congress that the letter of the statute is not to prevail. Treat v. White, 181 U.S. 264, 268 (1901); *see* Crooks v. Harrelson, 282 U.S. 55, 59-60 (1930); Old Colony R. Co. v. Commissioner, 284 U.S. 552, 560 (1932).

30. Grier v. Kennan, 64 F.2d 605 (8th Cir. 1933). Some courts tried to use both legislative history, citing *Holy Trinity,* and plain meaning, citing *Caminetti. See* Reichelderfer v. Johnson, 63 App. D.C. 334, 72 F.2d 552 (1934).

31. Collins v. Superior Ct., 62 P.2d 131 (Ariz. 1936); Realty Bond & Share Co. v. Englar, 143 So. 152 (Fla. 1932); Moran v. Bowley, 179 N.E. 526 (Ill. 1932); Brustein v. New Amsterdam Casualty Co., 174 N.E. 304 (N.Y. 1931); Bayonne Textile Corp. v. American Fed'n of Silk Workers, 172 A. 551 (N.J. 1934); Watkins v. Hall, 172 S.E. 445 (Va. 1933).

32. Higgins' Case, 187 N.E. 592 (Mass. 1933); City of Spokane v. State, 89 P.2d 826 (Wash. 1939).

33. Crowell v. Benson, 285 U.S. 22, 72 (1932) (Brandeis, J., dissenting). Justice Frankfurter noted later that he believed that Justice Brandeis "would draw on the whole arsenal of aids to construction" for statutory interpretation cases. Frankfurter, *supra* note 23, at 532.

34. Crowell v. Benson, 285 U.S. at 72 (Brandeis, J., dissenting). I think it should have been a negative signal. Justice John Clarke, who served six years with Justice Brandeis, on the Supreme Court indicated that Justice Brandeis overloaded opinions with citations "which often we require foreign to the subject in hand and as if conscious of this he introduced them often by the word 'compare'" Letter from John Clarke to Newton Baker (June 22, 1934) (on file with the Case Western Reserve University Archives).

35. United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 85 (1932) (Brandeis, J., Stone J. & Cardozo J., concurring in results).

36. Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U.S. 315, 333 (1938).

37. 310 U.S. 534 (1940).

no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'"[38] Thereafter, for another twenty-five years, the rule lay dead.[39] In 1975, one scholar indicated that with one exception, "in no case since *American Trucking* has the Supreme Court actually refused to look at legislative history."[40]

Without the constraints of the Plain Meaning Rule, courts had a "full range of legislative history materials" at their disposal for use in construing a statute.[41] In attempting to interpret a statute according to the intent of the legislature, the courts used both intrinsic and extrinsic tools. Intrinsic tools include the act as a whole,[42] the Act's title[43] and preambles.[44] Extrinsic evidences of legislative intent can be found in committee reports,[45] statements made by witnesses during committee hearings,[46] interpretation by the sponsor of the bill,[47] deletions of provisions from the bill during a conference committee,[48] rejection of a limiting amendment[49] and the history of the language as it evolved.[50] These were just some of the "full range" of tools available to courts in interpreting statutes after rejection of the Plain Meaning Rule.

THE RESURRECTION OF THE RULE

The Plain Meaning Rule is a Legal Phoenix.[51] Within fifty years after its alleged demise in *American Trucking*, it is clear that it is rising again. At first, it was only noted in a footnote.[52] Many were slow to acknowledge

38. *Id.* at 543-44.

39. Arthur Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299, 1303 (1975). The one possible exception noted by Professor Murphy was Packard Motor Car Co. v. N.L.R.B., 330 U.S. 485 (1947)z. *Id.* at 1302-03.

40. Murphy, *supra* note 39, at 1302-03.

41. Kernochan, *supra* note 1, at 351.

42. Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 633 (1973).

43. F.T.C. v. Mandel Bros., Inc., 359 U.S. 385 (1959).

44. Coosaw Mining Co. v. South Carolina, 144 U.S. 550, 563 (1892).

45. Cole v. Young, 351 U.S. 536, 550 (1956).

46. Chicago & N.W. Ry. Co. v. United Transp. Union, 402 U.S. 570, 576-77 (1971).

47. United States v. Enmons, 410 U.S. 396, 404-07 (1973).

48. Gulf Oil Corp. v. Copp Paving Co., Inc., 419 U.S. 186, 200 (1974).

49. National Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689, 706 (1971).

50. Israel-British Bank (London) Ltd. v. Federal Deposit Ins. Corp, 536 F.2d 509, 512-13 (2d Cir. 1976), *cert. denied*, 429 U.S. 978 (1976).

51. In Egyptian mythology, the Phoenix was an eagle-like bird, which appeared only once every five hundred years. NEW LAROUSSE ENCYCLOPEDIA OF MYTHOLOGY 45 (1968 ed.). As the legend goes, when the Phoenix felt it was going to die, it made a nest and set fire to itself, whereas a new phoenix rose from the ashes. PIERRE GRIMAL, THE DICTIONARY OF CLASSICAL MYTHOLOGY 369 (1986).

52. Tennessee Valley Auth. v. Hill, 437 U.S. 153, 184 n.29 (1978).

the rise.[53] This was to be expected, since there was only a shadow, a specter if you will, of the Plain Meaning Rule.[54] Now, within the last several years, there is clearly a battle to resurrect the Plain Meaning Rule at least in some form.[55] Although some argue that several justices apply the Plain Meaning Rule,[56] there are two clear proponents, Justice Kennedy and Justice Scalia.[57] I believe that for the most part both Justices apply the Plain Meaning Rule in a similar manner. However, each approach does possess a slightly different focus. Justice Kennedy seems to have a Hamiltonian basis.[58] Justice Scalia, however, who has been called the

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

54. "We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive." Consumer Prod. Safety Comm. v. GTE Sylvania Inc., 447 U.S. 102, 108 (1980).

55. I believe that Justice Scalia already believes the war has been won. Chisom v. Roemer, 111 S. Ct. 2354, 2369 (1991) (Scalia, J. dissenting) ("I *thought we had adopted* a regular method for interpreting the meaning of language in a statute. . .") (emphasis added).

56. Some note Justice White, who does seem to apply the rule. Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 298 (1990). *But see* Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827-33 (1991) (only Justices Scalia and Kennedy seem firmly attached to the Plain Meaning Rule).

57. Although it is too early to categorize Justice Thomas, there are clear suggestions that he adheres to the Plain Meaning Rule. *See* United States v. Salerno, 112 S. Ct. 2503 (1992); "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, the first canon is also the last: 'judicial inquiry is complete.' Rubin v. United States, 449 U.S. 424, 430 (1981)." Connecticut Nat. Bank v. Germain, 112 S. Ct. 1146, 1149 (1992) (some citations omitted). In fact, Justice Thomas has indicated that he will go to great lengths to find a statute unambiguous using the United States Reports as a deposit of "innumerable rules of construction powerful enough to make clear an otherwise ambiguous penal statute." United States v. R.L.C., 112 S. Ct. 1329, 1341 (Thomas, J., concurring in part and concurring in judgment).

58. Hamilton noted, "The courts must declare the sense of the law; and if they should be disposed to exercise will instead of judgment, the consequence would equally be the substitution of their pleasure to that of the legislative body." THE FEDERALIST PAPERS 78, 493 (Benjamin Fletcher-Wright ed. 1961). (emphasis omitted) Hamilton noted that due to the judiciary's "comparative weakness," any judicial encroachment on the legislative authority will be corrected. THE FEDERALIST PAPERS 82. Therefore, Hamilton understood as important the separation of powers, which is prominent in Justice Kennedy's jurisprudence on the Plain Meaning Rule. *See* Public Citizen v. Department of Justice, 491 U.S. 440, 467-68 (1989) (Kennedy, J., concurring). Yet, Justice Kennedy would consider the "practical realities" of the business sphere to properly determine the sense of the law. Wisconsin Dep't of Revenue v. William Wrigley Jr., Co., 112 S. Ct. 2447, 2461 (1991) (Kennedy, J., dissenting). Hamilton, from the commercial center, would clearly concur.

"high priest"[59] and "spiritual leader"[60] of the Plain Meaning Rule, seems to have a Holmesian approach.[61]

Justice Kennedy indicates that courts must use the Plain Meaning Rule based upon the doctrine of separation of powers.[62] Departing from the plain meaning of the statute would substitute the judges' predilections for the will of the Congress.[63] It is the courts' function, in the federal system, to interpret laws passed by Congress and signed by the President.[64] Therefore, interpretations that go beyond the plain meaning of the statute intrude upon the province of the legislature.[65] To Justice Kennedy, using the Plain

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59. Mashaw, *supra* note 56, at 835. Justice Scalia had stated that the "St. Jude of the hagiology of statutory construction" is legislative history. United States v. Thompson/Ctr. Arms Co., 112 S. Ct. 2102, 2111 (1992) (Scalia, J., concurring).

60. Wald, *supra* note 56, at 281.

61. Although Holmes used the Plain Meaning Rule, he seemed to look at the section of the law in context, therefore using a "text and context" approach. Justice Kennedy seem less likely to use context.

62. *See* Public Citizen v. Department of Justice, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring). "It remains one of the most vital functions of this Court to police with care the separation of the governing powers. That is so even when . . . no immediate threat to liberty is apparent."

63. Rejecting the Plain Meaning Rule leads to "woolly judicial construction that mars the plain face of legislative enactments." *Id.* at 470 (Kennedy, J., concurring).

64. "The first (of two issues involving separation of powers) concerns the rules this Court must follow in interpreting a statute passed by Congress and signed by the President." *Id.* at 468 (Kennedy, J., concurring). This protects the values of bicameralism and presentment. Mashaw, *supra* note 39, at 840-45. Justice Kennedy seems concerned for the executive branch's position in the process, more than other aspects of the rule. *Compare* I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 439 n.22 (1987), where Justice Stevens notes the constitutional allocation of power among three branches, reserving the legislative power exclusively to Congress. This neglects the presentment aspect of the legislation process.

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> [I]t does not foster a democratic exegesis for this Court to rummage through unauthoritative materials to consult the spirit of the legislation in order to discover an alternative interpretation of the statute with which the Court is more comfortable . . . The problem with spirits is that they tend to reflect less the views of the world whence they come than the views of those who seek their advice.

Public Citizen, 491 U.S. at 473 (Kennedy, J., concurring in judgment). Justice Kennedy believes that *Holy Trinity* allowed "Judges to substitute their personal predilections for the will of the Congress. . . ." *Id.* at 474. Even an administrative interpretation followed by congressional reenactment does not trump the plain language of a statute. Estate of Cowart v. Nicklos Drilling Co., 112 S. Ct. 2589, 2596 (1992). Most times the courts do give deference to a reasonable statutory interpretation by an administering agency. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Judge Wald notes that "legislative history is the authoritative product of the institutional work of the Congress" so that rejecting it "comes perilously close . . . to impugning the way a coordinate branch conducts its operations and, in that sense, runs the risk of violating the spirit if not the letter of the separation of powers principle." Wald, *supra* note 56, at 306-07. Judge Easterbrook would answer that such use of legislative history "would demean the constitutionally prescribed method of legislating to suppose that its elaborate apparatus for deliberation on, amending, and approving a text is just a way to create some evidence about the law, while the real source of legal rules is the mental processes of legislators." *In re* Sinclair, 870 F.2d 1340, 1344 (7th Cir. 1989) (emphasis omitted).

Meaning Rule requires the courts to interpret a statute according to "the basic meaning of words in a normal manner."[66]

Justice Kennedy would allow for the Golden Rule exception to the Plain Meaning Rule. In this narrow exception, "[w]here the plain language of the statute would lead to 'patently absurd consequences' that 'Congress could not possibly have intended,' we need not apply the language in such a fashion."[67] This position is in harmony with separation of powers because it assumes that the coequal branch would not act in an absurd way.[68]

Although there are many similarities to the approach of Justice Kennedy, the jurisprudence of Justice Scalia in utilizing the Plain Meaning Rule seems to have a Holmesian focus. Justice Scalia holds that where a statute is unambiguous, the interpretation should not be "expanded or contracted by the statements of individual legislators or committees during the course of the enactment process."[69] After finding the plain, unambiguous meaning of a statute, Justice Scalia holds the court should, "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."[70] Furthermore, Justice Scalia is slow to find indication of another meaning.[71] Of course, if the literal interpretation is absurd or unconstitutional, it is "appropriate to consult all public materials . . . and the

66. *Public Citizen*, 491 U.S. at 469 (Kennedy, J., concurring in judgment). Justice Kennedy has noted that the court should look at the design of the statute as a whole. K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988). However, unlike Justice Scalia, Justice Kennedy does not believe the context of the statute is talismatic.

67. *Public Citizen*, 491 U.S. at 470 (Kennedy, J., concurring in judgment) (citations and emphasis omitted).

68. *Id.*

69. West Virginia Univ. Hosp., Inc. v. Casey, 111 S. Ct. 1138, 1147 (1991).

70. Chisom v. Roemer, 111 S. Ct. 2354, 2369 (1991) (Scalia, J., dissenting) (citations omitted); *see also* United States v. Burke, 112 S. Ct. 1867, 1875 (1992) (Scalia, J., concurring) (using the maxim *noscitur a sociis*, that words are understood by the surrounding words).

71. *See, e.g.*, American Nat. Red Cross v. S.G., 112 S. Ct. 2465 (1992). In *American National Red Cross v. S.G.*, the Supreme Court was asked to interpret the charter of the American National Red Cross, which provides, in pertinent part, that the organization is authorized "to sue and be sued in courts of law and equity, State or Federal, within the, jurisdiction of the United States." 36 U.S.C. § 2. The issue as whether the language confirmed original jurisdiction on federal courts over all cases to which the Red Cross was a party. The majority of the court determined that four earlier cases resulted in "the rule that a congressional charter's 'sue and be sued' provision may be read to confer federal court jurisdiction if, but only if, it specifically mentions the federal courts." *American Nat. Red Cross*, 112 S. Ct. at 2471. Justice Scalia disagreed stating that cases did not "establish the cryptology the Court attributes to them." *Id.* at 2478. "This wonderland of linguistic confusion-in which words are sometimes read to what they say and other times read also to mean what they do not say is based on the erroneous premise that our cases in this area establish a 'magic words' jurisprudence that departs from ordinary rules of English usage." *Id.* at 2476 (Scalia, J., dissenting). For Justice Scalia, the language of the charter only conferred capacity, not jurisdiction.

legislative history" can be used.[72] But its use is limited to "verify that what seems to [the Court] an unthinkable disposition . . . was indeed unthought of, and thus to justify a departure from the ordinary meaning of the word [in the statute]."[73] Justice Scalia would not allow the legislative history to be used to establish legislative intent. Instead, in a situation where the plain meaning of the words of the statute would lead to an absurd result, the words are given a meaning that is,

> (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the whole Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated—a compatibility which, by a benign fiction, we assume Congress always has in mind.[74]

Moreover, according to Scalia, Congressional silence can never be used as a tool of statutory interpretation.[75] Justice Holmes seems to have also utilized this analysis.[76]

What are the reasons for Justice Scalia's rejection of tools of the statutory interpretation trade in favor of a limited method, the Plain Meaning Rule. Clearly Justice Scalia utilizes a political science approach to Congress. He believes that Reports of the House of Representatives and the Senate do not provide evidentiary elements for a court to find the intentions of the

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72. Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527 (1989) (Scalia, J., concurring). Judge Wald asks why legislative history is good in cases where Justice Scalia finds the plain meaning absurd, and not reliable in other cases. Wald, *supra* note 56, at 296-97. I believe that the Plain Meaning Rule is used first, as the best evidence of the intent of the legislature. When it does not provide such function, another method is appropriate. Such a hierarchy restrains judicial action, provided that the legislatures are on notice of the rules of construction. The Plain Meaning Rule is "a political strategy for disciplining both judges and legislators." T. Alexander Aleinikoff, *Updating Statutory Interpretation,* 87 MICH. L. REV. 20, 32 (1988).

73. *Green*, 490 U.S. at 527 (Scalia, J., concurring).

74. *Id.* at 528 (emphasis omitted).

75. "Statutes are the law though sleeping dogs lie." Chisom v. Roemer, 111 S. Ct. 2354, 2370 (Scalia, J., dissenting). Justice Scalia was answering the majority's determination that Congressional silence can be used to interpret a statute because "(c)ongress' silence in this regard 'Can be likened to the dog that did not bark. *See* A. Conan Doyle, Silver Blaze, in The Complete Sherlock Holmes 335 (1927)." *Id.* at 2364 n.23. Justice Thomas also holds that congressional silence does not provide implicit ratification of a judicial decision interpreting a statute. Evans v. United States, 112 S. Ct. 1881, 1903 n.8 (1992) (Thomas, J., dissenting). Justice Scalia is very concerned in using legislative history in criminal law, where it results in a harsher interpretation of the statute against a criminal defendant than a common-sense interpretation. *See* United States v. Thompson/Ctr. Arms Co., 112 S. Ct. 2102, 2111 (1992) (Scalia, J., concurring) (calling legislative history the "last hope of lost interpretive causes"). Justice Thomas also agrees with this "rule of lessity" where a criminal statute should be interpreted when two construction have different results, according to the harsher interpretation only when the language of the statute is clear and definite. *Evans,* 112 S. Ct. at 1900 (Thomas, J., dissenting).

76. Compare Justice Holmes position and language, *supra* notes 19-26 and accompanying text with Justice Scalia's opinion in Moskal v. United States, 498 U.S. 103, 121 (1990) ("The Court acknowledges, as it must, the doctrine that when a statute employs a term with a specialized legal meaning relevant to the matter at hand, that meaning governs.").

Congress in enacting a law.[77] In fact, Justice Scalia seems to believe that the method courts have been using to interpret statutes since *American Trucking* has become corrupt.[78] At one time it was possible that legislative history did have meaning.[79] However, since people are now aware of the tools courts use to interpret a statute, they can obtain the results desired, by simply altering the legislative history.[80] Justice Scalia concurs with Justice Kennedy in that the Plain Meaning Rule is in harmony with the doctrine of

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77. In Blanchard v. Bergeron, 489 U.S. 87 (1989), the majority used a reference in a lengthy Senate Report to three district court opinions as bases for interpreting the "reasonable attorney's fee" (The cases had considered awarding an attorney's fee under the Civil Rights laws prior to the enactment of the Civil Rights Attorney's Fee Award Act of 1976). Justice Scalia, in a concurring opinion, mentions these cases, and in fact discusses a Circuit Court opinion that construes the three district court opinion. Furthermore, Justice Scalia notes, that "anyone familiar with modern-day drafting of congressional committee reports is well aware, the references to the cases were inserted, as 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." *Id.* at 98 (Scalia, J., concurring). Justice Scalia noted that "only a small proportion of the Members of Congress read either one of the Committee Reports in question, even if (as is not always the case) the Reports happened to have been published before the vote. . ." *Id.*

As a Judge on the District of Columbia Circuit Court of Appeals, Scalia noted his political science position.

> I frankly doubt that it is ever reasonable to assume that the details, as opposed to the broad outlines of purpose, set forth in a committee report come to the attention of, much less are approved by, the house which enacts the committee's bill. And I think it time for courts to become concerned about the fact that routine deference to the detail of committee reports, and the predictable expansion in that detail which routine deference has produced, are converting a system of judicial construction into a system of committee staff prescription.

Hirschey v. Federal Energy Regulatory Com., 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J., dissenting) (footnote omitted).

78. Justice Scalia notes that references in Congressional Reports are not used to inform the Members of Congress but rather to influence judicial construction. *Blanchard,* 489 U.S. at 98-99 (Scalia, J., concurring). Judge Wald notes Justice Scalia's "mistrust . . . of those staffers to whom our elected legislators have delegated authority for certain parts of the [legislative] process." Wald, *supra* note 56, at 284. Judge Wald holds that Justice Scalia provides no documentation for his conclusion. However, it is clear that Justice Scalia could take judicial notice of such legislative facts. *See* Edmund M. Morgan, *Judicial Notice,* 57 HARV. L. REV. 269, 270 (1944) A judge is unrestricted in his investigation and conclusion of legislative facts). Even if proof is required, there is evidence that legislative reports once written to inform legislators about a statute and floor debates intended 'to provide a forum for deliberation are now primarily constructed to influence future judicial decisions. *See* W. ESKRIDGE & P. FRICKEY, LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 698-754 (1988).

79. But now reports are "increasingly unreliable evidence" of any Congressional Members intention on the pending Act. *Blanchard,* 489 U.S. at 99 (Scalia, J., concurring).

Justice Thomas agrees with Justice Scalia's rejection of use of extra-legal material for interpreting statutes, noting committee reports and floor statements are not law. Unlike the presumption that all citizens know the law, there is no presumption, or even inference, that any citizen knows such extralegal material. United States v. R.L.C., 112 S. Ct. 1329, 1341-42 (1992) (Thomas, J., concurring in part and concurring in judgment).

80. Lawyer-lobbyists understand the system, probably schooled in Legal Method, see CASEBOOK, *supra* note 1. Thereafter, they will attempt to have evidence placed in the legislative history which can be used as a basis for interpreting the statute contrary to the statute's Plain Meaning, knowing that courts will "give legislative force to each snippet of analysis" found in legislative history. *Blanchard,* 489 U.S. at 99.

separation of power.[81] However, Justice Scalia seems sensitive to the context of the law, derived from either language used by Congress in other laws,[82] specialized legal meaning of language,[83] or language used within the same section of the same enactment.[84] Furthermore, Justice Scalia minimizes the executive role in the legislative process.[85]

Justice Scalia perceives the Plain Meaning Rule as a source of predictability.[86] Recently, Justice Scalia noted his "sympathy" for lower courts, because departing from the Plain Meaning Rule undermines predictability.[87] As a natural result, Justice Scalia believes more cases requiring judicial intervention will arise since "innumerable statutory tests become worth litigating."[88] He views the fact that two parties disagree on the meaning of a section as establishing "ambiguity," therefore rejecting the words of the law in favor of legislative history.[89]

THE RULE IN STATE JURISPRUDENCE

The Plain Meaning Rule is clearly alive as seen in opinions of state courts. A majority of the state courts clearly use the rule. Several indicate some adherence. Others follow the rule based upon statutory mandates. At least one state clearly rejects the Plain Meaning Rule, applying its own method of statutory interpretation.

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81. *See* I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring) "Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent."; *see also* Wald, *supra* note 56, at 282-83 ("Justice Scalia paints a thumbnail sketch explaining the justification of the textual approach. Because the text of the statute is the only thing that the legislators actually referred to when they voted, only the language itself was enacted into law").

82. West Virginia Univ. Hosps., Inc. v. Casey, 111 S. Ct. 1138, 1147 (1991). Wald, *supra* note 56, at 284.

83. Moskal v. U.S., 498 U.S. 103, 119 (1990) (Scalia, J., dissenting). Justice Holmes, in a case of a statute focused at Native Americans, stated "The word was addressed to the Indian mind." Fleming v. McCurtain, 215 U.S. 56, 60 (1909). Justice Frankfurter noted about Justice Holmes, in statutory interpretation cases, "If a statute is written for ordinary folk, it would be arbitrary not to assume that Congress intended its words to be read with the minds of ordinary men. If they are addressed to specialists, they must be read by judges with the minds of the specialists." Frankfurter, *supra* note 23, at 536.

84. Dewsnup v. Timm, 112 S. Ct. 773, 781 (1992) (Scalia, J., dissenting.) In *Dewsnup*, the Supreme Court was asked to interpret the Bankruptcy Code. The majority, including Justice Kennedy, held that the Bankruptcy Code must have been enacted against the background and with a full understanding of the pre-Code practice. Therefore, the court will not interpret the Bankruptcy Code to effect a major change in the pre-Code practice "that is not the subject of at least some discussion in the [legislature]." *Id.* at 779. The majority held that the words of the Bankruptcy Code at issue were ambiguous, however, it seems clear that the precode practice created the ambiguity, not the words of the Bankruptcy Code.

85. Justice Scalia's focus is on legislative history, not the legislative process. *Id.* at 781.

86. *Dewsnup*, 112 S. Ct. at 787 (Scalia, J., dissenting). Predictability is always an important aspect of the judicial system.

87. *Id.*

88. *Id.* at 788.

89. *Id.* at 781.

As a preliminary note, most courts seek to interpret a statute according to the intent of the legislature.[90] I categorized the states, where courts limit review of legislative history and policy, and, instead, focus on the words of the statute to interpret the statute in harmony with legislative intent, as utilizing a plain meaning method. Many state opinions are a type of hybrid, in that there is an attempt to use the plain meaning method of statutory interpretation. However, state courts also review legislative history and purpose to strengthen the court's interpretation of the statute as found by the plain meaning method. Although I concede that one can reach another conclusion, in my opinion these states are still Plain Meaning Rule states. I limit the category to those states that reject the Plain Meaning Rule decisions clearly using non-textual tools to interpret a statute, when the statute's language provides an unambiguous interpretation.

As another caveat, I am sure that for most states a researcher could find opinions seeming to interpret a state statute without following the Plain Meaning Rule. I believe that such state courts are in a period similar to the period between *Caminetti* and *American Trucking*, where there existed decisions from the same court, where the court on one day follows the Plain Meaning Rule and on another day does not use it. In part, this is the reason for this piece; to attempt a movement in both state and federal systems to either adopt or reject the Plain Meaning rule, so as to establish a fixed method for statutory interpretation and give citizens predictability in reviewing a legislative enactment.

With these ideas in mind, let us look at state court decisions to understand the Plain Meaning Rule in state systems. Many states indicate that an unambiguous statute must be interpreted according to its plain meaning.[91]

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90. *Compare* Caltabiano v. Planning & Zoning Comm., 560 A.2d 975, 977 (Conn. 1989) (when the words of a statute are clear and unambiguous, we assume that the words themselves express the legislature's intent); Beau Brummell Ties, Inc. v. Lindley, 383 N.E.2d 907, 908 (Ohio 1978) (in determining legislative intent, it is the duty of the court to give effect to the plain meaning of the language used in the statute) *with* Gilbane Co. v. Poulas, 576 A.2d 1195, 1196 (R.I. 1990) (the statute before us does not require a search for discernment of legislative intent as we believe the language is unambiguous); State *ex rel.* Roach v. Dietrick, 404 S.E.2d 415, 417 (W. Va. 1991) (where the statute is not ambiguous, we need not ascertain the legislative intent).

91. Volkswagen of America, Inc. v. Dillard, 579 So.2d 1301, 1305 (Ala. 1991); Graham v. Forrest City Housing Auth., 803 S.W.2d 923, 924 (Ark. 1991); Danielson v. Castle Meadows, Inc., 791 P.2d 1106, 1111 (Colo. 1990); Winchester Woods Assoc. v. Planning & Zoning Comm., 592 A.2d 953, 957 (Conn. 1991); Spielberg v. State, 558 A.2d 291, 293 (Del. 1989); J. Frog, Ltd. v. Fleming, 598 A.2d 735, 738 (D.C. App. 1991); Holly v. Auld, 450 So.2d 217, 219 (Fla. 1984); Ringewald v. Crawford W. Long Mem. Hosp., 368 S.E.2d 490 (Ga. 1988), *overruled on other grounds,* Spivey v. Ehiddon, 397 S.E.2d 117 (1990); Thomas v. Greer, 573 N.E.2d 814 (Ill. 1991); State v. Neary, 470 N.W.2d 27, 29 (Iowa 1991); Brabander v. Western Co-op Elect., 811 P.2d 1216, 1219 (Kan. 1991); Lincoln County Fiscal Ct. v. Department of Public Advocacy, 794 S.W.2d 162, 163 (Ky. 1990); Standiford v. Standiford, 598 A.2d 495, 504 (Md. App. 1991); Massachusetts Community College Council MTA/NEA v. Labor Relations Comm., 522 N.E.2d 416, 417 (Mass. 1988); Browder v. International Fidelity Ins. Co., 321 N.W.2d 668, 673 (Mich. 1982); Commissioner of Revenue v. Richardson, 302 N.W.2d 23, 26 (Minn. 1981); Wolff Shoe Co. v. Director of Revenue, 762 S.W.2d 29, 31 (Mo. 1988); Thiel v. Taurus Drilling Ltd. 1980-II, 710 P.2d 33, 35 (Mont. 1985); State v. Schuh,

Resort to any outside aid is not proper.[92] One method employed by some jurisdictions is to review statutes and laws passed contemporaneously with the statute to assist in finding the plain meaning of the statute at issue.[93] Others limit review, using *Caminetti* as a precedent, that unambiguous language is the only answer, save the Golden Rule, for statutory interpretation.[94] Some courts reason that the Plain Meaning Rule is required so that "determinations of the elected representatives will be effective without judicial adjustment or gloss."[95] Courts feel that the "legislative will" is expressed in the language of the statute so that speculation as to other meanings of the statute is judicial activism.[96] Courts presume that legislatures know the meaning of the words chosen.[97] Or, as one court more poetically stated, "[t]his court assumes that statutes mean what they say and that legislators have said what they meant."[98]

Several states have general statutory construction guidelines enacted by statute; which courts are required to utilize in construing a state statute. Several states have statutes which indicate that any legislation must be

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467 N.W.2d 409 (Neb. 1991); Roberts v. State, 752 P.2d 221, 223 (Nev. 1988); State v. Johnson, 595 A.2d 498, 502 (N.H. 1991); Twiss v. State Dept. of Treasury, 591 A.2d 913, 918 (N.J. 1991); Landavazo v. Sanchez, 802 P.2d 1283, 1286 (N.M. 1990); Shover v. Cordis Corp., 574 N.E.2d 457 (Ohio 1991); Sisney v. Smalley, 690 P.2d 1048, 1051 (Okla. 1984); Mercy Health Promotion v. Dept. of Revenue, 795 P.2d 1082, 1084 (Or. 1990); Frontini v. Dept. of Transportation, 593 A.2d 410, 412 (Pa. 1991) (Larsen, J., concurring); Philadelphia Housing Authority v. Commonwealth, Pennsylvania Labor Relations Bd., 499 A.2d 294, 297 (Pa. 1985); Ellis v. Rhode Island Public Transit Authority, 586 A.2d 1055 (R.I. 1991); State v. McKnight, 352 S.E.2d 471, 473 (S.C. 1987); *In re* Petition of Famous Brands, Inc., 347 N.W.2d 882, 885 (S.D. 1984); National Gas Distr. Inc. v. State, 804 S.W.2d 66 (Tenn. 1991); Morrison v. Chan, 699 S.W.2d 205, 208 (Tex. 1985); Schurtz v. BMW of N. Amer., Inc., 814 P.2d 1108, 1112 (Utah 1991); In re Graziani, 591 A.2d 91, 94 (Vt. 1991); Brown v. Lukhard, 330 S.E.2d 84, 87 (Va. 1985); *In re* Personal Restraint of Long, 815 P.2d 257, 262 (Wash. 1991) State *ex rel.* Roach v. Dietrick, 404 S.E.2d 415, 417 (W. Va. 1991); State v. Martin, 470 N.W.2d 900, 904 (Wisc. 1991); DiVenere v. University of Wyoming, 811 P.2d 273 (Wyo. 1991).

92. Lincoln County Fiscal Ct. v. Dept. of Public Advocacy, 794 S.W.2d 162, 163 (Ky. 1990); Phelps v. Hillhaven Corp., 752 P.2d 737, 741 (Mont. 1988), *overruled on other grounds*, Anderson v. Hammer 1991 WL 182110; Brown v. Lukhard, 330 S.E.2d 84, 87 (Va. 1985).

93. City of Lakewood v. Mavromatis, 817 P.2d 90, 96 (Colo. 1991); Collier v. Connolley, 400 A.2d 1107 (Md. 1979).

94. James J. Welch & Co. v. Deputy Comm'r of Capital Planning and Operations, 443 N.E.2d 382, 384 (Mass. 1982) (quoting *Caminetti*).

95. Allied-Signal, Inc. v. Wyoming State Bd. of Equalization, 813 P.2d 214, 219 (Wyo. 1991); *see* Hinchey v. Thomasson, 727 S.W.2d 836, 838 (Ark. 1987); Simpson v. Office of Human Rights, 597 A.2d 392, 400 (D.C. 1991); Ringewald v. Crawford W. Long Memorial Hosp., 368 S.E.2d 490 (Ga. 1988), *overruled on other grounds,* Spivey v. Ehiddon, 397 S.E.2d 117 (1990); Loewenstein v. Amateur Softball Assoc. of Amer., 418 N.W.2d 231, 234 (Neb. 1988).

96. American Bankers Life Assurance Co. of Fla. v. Williams, 212 So.2d 777, 778 (Fla. Dist. Ct. App. 1968); State v. Neary, 470 N.W.2d 27, 29 (Iowa 1991); Brabander v. Western Coop Elect., 811 P.2d 1216, 1219 (Kan. 1991); *In re* Closing of Jamesburg High School, 416 A.2d 896 (N.J. 1980); Sisney v. Smalley, 690 P.2d 1048, 1051 (Okla. 1984).

97. Hinchey v. Thomasson, 727 S.W.2d 836, 838 (Ark. 1987); Baskerville-Donovan v. Pensacola Executive House Cond. Assoc., 581 So.2d 1301 (Fla. 1991).

98. *In re* Petition of Famous Brands, Inc., 347 N.W.2d 882, 885 (S.D. 1984).

interpreted by a Plain Meaning method.[99] Other states have statutes that direct the courts to interpret words and phrases according to their plain meaning, unless such are technical words and phrases.[100] Although this should require a plain meaning approach, the command does not always result in courts employing the Plain Meaning Rule.[101]

There are several courts that are hybrid Plain Meaning Rule jurisdictions. These courts give some respect to the Plain Meaning Rule.[102] However, most of these courts will go beyond the plain meaning of the statute, if reference to legislative history provides an "appropriate interpretation,"[103] to effectuate the purpose of the law,[104] to interpret according to the clearly expressed legislative intent[105] or implement the legislative intent to the fullest degree.[106] Another state rejects the literal meaning and

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99. ME. REV. STAT. ANN. tit. 1, § 71 (West 1989 & Supp. 1992) ("The following rules shall be observed in the construction of statutes, unless such construction is inconsistent with the plain meaning of the enactment. . ."); MINN. STAT. § 645.16 (West 1947) ("When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit"); N.Y. STATUTES § 76 (McKinney 1971) ("Where words of a statute are free from ambiguity and express plainly, clearly and distinctly the legislative intent, resort may not be had to other means of interpretation"); N.D. CENT. CODE § 1-02-05 (1987) "When the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing, its spirit." 1 PA. CONS. STAT. § 1921(b) (1992) (When the word, of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit).

It is noted that although states have rules for statutory interpretation, courts will interpret statutes without reference to the rule. Therefore, some cases from state courts interpreting statutes are included at other junctures, where the court's analysis is not based upon one of the rules of construction, but the courts own determination of a method of statutory construction.

100. ARIZ. REV. STAT. ANN. §§ 1-213 (1989); IND. CODE ANN. §§ 1-1-4-1 (1976); LA. CODE CIV. PROC. ANN. art. 5053 (1989); MICH. COMP. LAWS § 8.3a (1991); N.J.S.A. § 1:1-1 (1991); OKLA. STAT. ANN. tit. 25, § 1 (West 1987); TEX. GOV'T CODE ANN. § 312.002 (West 1988)(West 1992); V.I. CODE ANN. tit. 1, § 42 (1991); WIS. STAT. ANN. § 990.001 (West 1985).

101. For example, see California, where there is a statute, CAL. CIV. PROC. CODE § 1858 (Deering 1992) ("In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted. . ."), yet courts interpret statutes enacted by the state legislature by examining history to find the purpose of the law. *Cf.* People v. Pieters, 802 P.2d 420, 423 (Cal. 1991). *See also* Maine, which has a statute, *supra* note 99, yet the courts also seek to ascertain the real purpose of the statute, which includes review of the legislative history. Bangor Hydro-Electric Co. v. Board of Environmental Protection, 595 A.2d 438, 442 (Me. 1991). The Maine court does note that the purpose should be obtained "if possible" from the plain meaning of the statute, but the court is clearly not following the statutory construction statute. *Id.* at 442.

102. Paradis v. Webber Hosp., 409 A.2d 672, 675 (Me. 1979).

103. Girard v. Wagenmaker, 470 N.W.2d 372, 375 (Mich. 1991).

104. People v. Pieters, 802 P.2d 420, 423 (Cal. 1991); Bangor Hydro-Electric v. Board of Environmental Protection, 595 A.2d 438, 442 (Me. 1991); Electric Supply Co. of Durham, Inc. v. Swain Elec. Co., 403 S.E.2d 291, 294 (N.C. 1991).

105. George W. Watkins Family v. Messenger, 797 P.2d 1385 (Idaho 1990); Marion County Sheriffs Merit Bd. Peoples Broadcasting Corp., 547 N.E.2d 235, 237 (Ind. 1989).

106. Reefshare, Ltd. v. Nagata, 762 P.2d 169, 174 (Hawaii 1988).

demands that an interpretive reading be followed if the two are in conflict.[107] In contrast, the Plain Meaning Rule clearly requires the literal meaning to be used and stops the analysis before looking for a sensible meaning. A simple attempt at applying the Plain Meaning Rule is sufficient to label a state a "Hybrid Plain Meaning Rule Jurisdiction."

There exists only one state that clearly rejects the Plain Meaning Rule, that being Alaska.[108] In Alaska, the courts use a sliding scale for statutory interpretation cases, whereby the clearer and unambiguous the statute, the heavier the burden of demonstrating a legislative intent contrary to the literal meaning.[109] In reviewing legislative history, Alaskans are "mindful that the plainer the language, the more convincing contrary legislative history must be."[110]

THE RULE SHOULD LIVE

The Plain Meaning Rule is a rational method for a court to use or employ in interpreting a statute. I understand that other methods of interpreting a statute have a rational basis. My position is that one rule should be adopted by both federal and state judicial systems, and the most simple method would be adopting the Plain Meaning Rule. If the legislature understands that a court will interpret all statutes employing the Plain Meaning Rule, such legislative body would draft statutes accordingly.[111]

How should a legislature act? A few suggestions come to mind. One is that the legislature should use clear, precise words where possible. Where clarity and precision would be difficult, the legislature should include definitions to provide plain meanings for words or phrases. Courts could then interpret according to the purpose of the statute without the necessity for a search of extra-textual material.

Further, there should be an "established background of legal principles against which all enactments are adopted."[112] These maxims of statutory interpretation should clearly be few because legislators would not respect a

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107. Ryals v. Pigott, 580 So.2d 1140, 1148 n.15 (Miss. 1990), *cert. denied*, 112 S. Ct. 377 (1991).

108. University of Alaska v. Geistauts, 666 P.2d 424, 428 n.5 (Alaska 1983).

109. "Where a statute's meaning appears clear and unambiguous, . . . the party asserting a different meaning bears a correspondingly heavy burden of demonstrating contrary legislative intent." *Id.*

110. State v. Alex, 646 P.2d 203, 209 n.4 (Alaska 1982) (quoting United States v. United States Steel Corp., 482 F.2d 439, 444 (7th Cir.) *cert. denied* 414 U.S. 909 (1973)).

111. As Justice Scalia stated, "[w]hat is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts." Finley v. United States, 490 U.S. 545, 556 (1989). Courts should act to foster the democratic process by interpreting statutes according to the face of the law which was enacted. United States v. Taylor, 487 U.S. 326, 345-46 (1988) (Scalia, J., concurring in part).

112. Wisconsin Dep't of Revenue v. William Wrigley Jr., Co. 112 S. Ct. 2447, 2458 (1992).

long laundry list.[113] Consequently, courts would pick and choose the maxim, not to interpret the statute, but to use as a means for the decision's conclusion.[114] Therefore, the legislature will make the law and the courts will interpret and apply the law, not seek a "possible" interpretation of the law.

I believe, however, that it would be proper in some instances for the legislature to mandate a court to use legislative history. In other words, a statute may include a provision that such statute would be interpreted, not by the normal Plain Meaning Rule, but with use of legislative history to ascertain the legislative purpose. It would be advisable for such a statute to include, and thereby limit, the history which could be used by the court. The statute should specifically indicate the legislative history to be used by the courts in interpreting the statute. Such history, in my opinion, should be limited to either committee reports or statements of the floor manager of the bill. In such case, the limited legislative history could be used by the court to interpret the statute, which due to its nature, could not be drafted clearly employing normal language.[115]In such a situation, the court would be using the Plain Meaning Rule, which requires it to follow the language of the statute. Of course I believe that an emphatic reason would be needed for including a Plain Meaning Rule disclaimer. For example, when Congress is incapable of finding language that clearly sets forth the goals of the Act, one must review the sentiment of the legislature in order to ascertain its intent and understand its requirements. A Plain Meaning Rule disclaimer would certainly be appropriate in such a situation.

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113. The few I would suggest are:

1. Repeal by implication is disfavored.
2. Penal law are to be strictly construed.
3. Laws in derogation of *common* law are to be strictly construed.
4. Expression of one thing means the exclusion of another thing.
5. Remedial statutes are liberally construed.

Many of these maxims are used by the courts. However, in my opinion, courts use maxims as sayings to strengthen their opinions and not as moving forces which form the basis of the opinion's analytic development. Under my proposal, the few maxims would be actually employed both by the legislature in writing statutes and the judicial system in interpreting the statutes.

114. Of course, a clear disclaimer in a specific enactment would overcome using a statutory maxim.

115. Fundamentally, it is the legislature, not the judiciary, that enacts laws. Some may argue that it is politically impossible at times for the legislature to enact certain statutes, but it could enact vague statutes, with history that provides signals to the courts, so that the courts will interpret it properly. Therefore, the legislature avoids political problems. As I tell my legal methods students, it is the legislature's job to write the laws. Others may argue that statutes are the results of compromise, so that in order to pass, the statute must be vague. However, again I feel that the legislature is not doing its job, but delegating their function to the courts. And, as a political matter, the courts are not accountable if the public disfavors the law. My proposal is more democratic, with a small "d", in that it requires the branch of government who function is to write laws, to do so, accountable to their constituents for its actions.

Statutes should codify a public policy clearly. I believe by starting with the Plain Meaning Rule, all members of a democratic society could review any legislative enactments and understand the laws application. With the Plain Meaning Rule, there exists a better separation of powers. Without the Plain Meaning Rule, we become a country of libraries, not of laws, because the answer to problems is not found in the statute, but in some historical document, whose availability to society may be limited. Or, to paraphrase the "high priest," without the mooring of the language of a statute, society is left "to drift on the currents of lawyerly invention."[116]

116. K Mart Corp. v. Cartier, Inc., 485 U.S. 176, 196 (1988) (Scalia, J., dissenting).