Words, Meanings, and Plain Language Interpretation

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In 1744 Samuel Johnson entered into a contract with a group of London booksellers to produce an English dictionary. In order to prepare a ready market for the projected large and expensive volumes, Johnson published a tract titled *The Plan for a Dictionary of the English Language*. In the *Plan*, he explained that he intended to fix the definitions of words by giving their primary meanings first, with their more remote senses following. The dictionary was to be published in three years, but as that

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2 Allen Reddick, *The Making of Johnson’s Dictionary 1746-1773* 39 (1996). (“This was a system that Johnson felt would allow him to cover all possible meanings for any English word. The various definitions for those words with multiple meanings would be arranged under the following categories: (1) the primitive or natural sense; (2) the consequential or accidental; (3) the metaphorical; (4) the poetic (where it differs from common use); (5) the familiar; (6) the burlesque; (7) the peculiar sense as used by a great author.”).
deadline passed, Johnson was nowhere near completing a manuscript. Too often—and predominately with familiar words—the number of separate meanings was unexpectedly large. For example, he isolated more than 90 distinct meanings for the common word “set.” Among what he described as an “exuberance of signification,” it was impossible to identify definition one as primary or to maintain his pre-established categories of meaning. The dictionary could not be completed on time, because it could not be completed at all in conformity with his plan. The fundamental supposition of the existence of primary meanings was flawed. No single meaning stood out as the natural signification of words apart from external, non-textual, circumstances of use. “Set” was not primarily a noun meaning “a collection of numbers with common properties,” any more than it was primarily a verb meaning “to put in a stable position.” The mathematician would principally use the noun form, while the physician would usually employ the verb. To each, the peculiar use of “set” would be the primary, natural, and normal meaning of the word. The mathematician’s meaning does not have abstract priority over that of the physician. Johnson responded to this impasse by abandoning the attempt to fix a primitive meaning. When his dictionary was published in 1755 after ten years’ labor, he made no attempt to trace the listed meanings to an etymological original, except in a very general way, tracing their

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3 Reddick at 49.
4 Reddick at 45. ("It may be fair to say this philosophical or conceptual crux was the result of a conflict between reliance on etymology on the one hand, and usage on the other: etymology as a means for arriving at the “true meanings” of words, and usage as the state and content of the language as the lexicographer finds it to be written and spoken.”).
development with descriptions and illustrations of all the possible usages that he could
discern in standard literature.\textsuperscript{5}

In so doing, he was not admitting defeat and patching together a makeshift
dictionary. Rather, he was demonstrating—word, by word, by word—the discovery
that primary meanings do not exist and are not necessary to the proper functioning of
language. His discovery was analogous to the discovery in physics that the ether,
which supposedly provided the medium for the propagation of light waves through
space, did not exist. Indeed, Noah Webster, who was often critical of Johnson’s work
in other respects, acknowledged the accomplishment in similar terms, saying that
Johnson did for philology what Newton had done for physics.\textsuperscript{6} But despite the age
and the importance of Johnson’s discovery, it remains largely unknown or neglected.
This occurs perhaps for the same reasons that induced Johnson to believe that he
could easily find and list primary meanings. Meanings seem to be an aspect of words.
There are innumerable daily examples of words having clear and unambiguous
meanings, and usually we attribute these experiences to intrinsic properties. If a person
goes into a coffee bar and says “I would like a cup of coffee,” the barista does not
think, “What’s that supposed to mean?” The ordinary transaction proceeds smoothly
and everyone involved understands exactly what is meant, so that the words appear
to have their own peculiar significations.

\textsuperscript{5} Reddick at 51.
\textsuperscript{6} Hitchings at 245.
Judges have comparable experiences of clear and plain meanings as they interpret laws, rules, and statutes. This situation is considered to be normative, and the notion has been elevated to a principle encapsulated in the Plain Language Rule, which counsels a literal interpretation of statutes wherever their meanings are clear and do not lead to a result manifestly at odds with the intent of the legislation. Once it is determined that a word or text is clear and unambiguous on its face, interpretation stops, and the language is applied as written. The rule regards text itself is the source of meaning, and the courts frequently note that the ordinary text says what it means and means what it says. Accordingly, the hallmark of the plain language method is to stick to the text and exclude all non-textual material, or external aids to interpretation.

The rationale for the rule seems persuasive. Lawmakers must be presumed to have said what they meant to say, and if they had meant something else, they would have said something else. After all, if the language of a statute or other law says, X, it seems perverse to assert that it means, Y. It is one thing to engage in interpretation of a piece of obscure or complex draftsmanship, but it is unacceptable to interpret a plain, clear, or simple text. In the first case, the text is like an incomplete or complex puzzle or that must be worked out; mistakes and misinterpretations are accepted hazards. But where the language seems plain, one does not need to tease out the

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7 U.S. v. Smith, 857 F.2d 835, 836 (11th Cir. 1992), (“In this circuit the plain meaning of the statute controls "unless the language is ambiguous or leads to absurd results, in which case a court may consult the legislative history and discern the true intent of Congress.”).  
8 Connecticut National Bank v. Germain, 503 U.S. 249, 112 S. Ct. 1146, 117 L.Ed. 2d 391 (1992), 253-252 (“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.”).
meaning. If the would-be interpreter gets the correct answer, it is by seeking what is already found. If the interpreter gets the wrong answer, it is by abandoning plain language, whether due to lax attention, poor understanding, or desire to have the law say something other than what is written. Assuming that lawyers are generally both attentive and competent, the misinterpretation of a plain text can only be attributed to another cause—bad faith. The American Jurisprudence statement of the plain language rule says as much. Where the language of the statute is clear and unambiguous, its clear meaning “may not be evaded under a guise of construction.” The message of the rule is hard to avoid: in the ordinary case, interpretation of a plain text is a shady business whereby the interpreter misuses the language in order to evade its primary meaning. Interpretation forces the text to say something other than what it says or means, so that it is regarded as a distorting process where the features of X are deformed into the semblance of Y, whether by “logic chopping,” “twisting,” “slanting,” “spinning,” or “torturing.”

Though this rule seems to be the product of common sense, good will, and deference to the choices of legislators, it ignores the lessons of Johnson’s dictionary: Words have many meanings, primary meanings do not exist, and words do not say what they mean. One person talks about a “set” of numbers, and another about a broken bone being “set” by the doctor. Both meanings are common, ordinary, and

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9 73 AM. JUR. 2D Statutes §194 (1974).
10 Id.
11 STANLEY FISH, IS THERE A TEXT IN THIS CLASS? What Makes An Interpretation Acceptable? 338 (1980). ("To someone who believes in determinate meaning, disagreement can only be a theological error. The truth lies plainly in view, available to anyone who has the eyes to see; but some readers choose not to see it and perversely substitute their own meanings for the meanings that texts obviously bear.").
natural, but they are signified by the same word—one that now has more than 180 separate definitions. In order to declare one meaning "plain," it is necessary to have a standard by which the use of "set" can be primarily linked to the one definition rather than another. But such a standard must be given apart from the word itself; the word "set" does not say which use is correct; it only says "set." Nothing in the dictionary conjoins the defined term to one meaning or distances it from another. No lexicographer after Johnson has been able to overcome this problem and list words with primitive and natural significations. In fact, Johnson resolved his initial difficulty so well that it is no longer regarded as a "problem." Dictionaries are now considered to be descriptive of the language, rather than to be prescriptive. Neither does the order in which definitions are listed provide a key to original and primary meanings. Different publications list definitions in different arrangements, whether in the order of historical emergence of meanings or the order of calculated frequency of usage. But no method can prescribe in advance what the word means in a particular act of usage. Historically, the word "nice" originally meant "silly," but that is not what it is typically means today. Nor can frequency of usage determine meaning in a

12 WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1961). The definitions in WEBSTER’S THIRD are divided into senses that are designated by numerals and sub-senses that are designated by letters. See Explanatory Notes 12.1-12.2. In the illustrations from WEBSTER’S THIRD that follow, each sense and sub-sense is counted as a separate definition. See Explanatory Chart, where "definition" is illustrated by a sub-sense.

13 HERBERT C. MORTON, THE STORY OF WEBSTER’S THIRD: PHILIP GROVE’S CONTROVERSIAL DICTIONARY AND ITS CRITICS 85 (1994) (“But what seems so self-evident to lexicographers—that meaning depends on usage—makes many teachers, editors, and commentators on language uncomfortable. It strikes them as circular reasoning, dangerously close to the Wonderland assertion that a word “means just what I choose it to mean.” They are reluctant to give up the notion that there is a “true” meaning of a word and that the lexicographer’s job is to find it.”).

14 Not only did “nice” originally mean “silly,” but “silly” originally meant “happy, blissful, or blessed,” so that the prophet Daniel was described in 1545 as “silly” when he was cast into the lion’s den. See SOL STEINMETZ, SEMANTIC ANTONICS 157, 207 (2008).
particular case. The most common use of the word “set” may be to refer to a collection of numbers, but if someone says that a doctor “set” a broken bone, then plainly, the less common definition would have to be selected. The implications for the plain language rule are ominous: If words have many meanings, then every text is ambiguous; if primary meanings do not exist, there is no plain meaning to be derived strictly from the text; and if words do not say what they mean, then neither will a text. Yet in case after case, disputes are settled, property is disposed of, and liberty granted or denied based on a supposition long demonstrated to be false.

II

A dictionary first lists a word and then follows it with a collection of meanings. Even this mundane circumstance graphically illustrates Johnson’s discovery, both by isolating words from their meanings and by failing to mark any single member of the given set of meanings as primary. Given these conditions, then, the advocates of plain language must recognize that texts do not literally say what they mean. They have their texts before them and can see that they do not; the texts contain only the words used by their authors, and these words are not followed by their supposed meaning-equivalents. The text, therefore, only “says what it says,” and does not purport to “say what it means.” This constricted definition of what a text says is difficult to keep in mind because for anyone fluent in a language words and meanings are quickly and
habitually joined so that they do not appear to be separate entities. The assertion of the distinction, however, is not a recent innovation, and dates back to Plato who illustrated the problem of textual interpretation by saying, “The painter’s products stand before us as though they were alive, but if you question them, they maintain a most majestic silence. It is the same with written words: they seem to talk to you as though they were intelligent, but if you ask them anything about what they say, from a desire to be instructed, they go on telling you just the same thing forever.” The issue can be put generally: If a text says X, it only says X. This is a mere tautology, the assertion of which is only of value in the case where there is a question as to whether the law says X, as where the parties and the court are not familiar with the text so that it must be looked up. The court and the parties, for example, may not recall what the law says about the response time for answering a pleading, and can find in rule 12 of the Federal Rules of Civil Procedure that the law says “twenty days.” The question, “What does the law say?” can be answered by quotation, and no matter how many times the text is consulted, it will always say the same thing.

Having found the rule the litigants know what the text says, but if the question is, “What does it mean?” a different standard must be applied. With regard to rule 12, suppose service of a Complaint is made on the first day of the month and the Answer is filed on the twenty-second. If there is a question as to whether the answer was

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15 This basic distinction is reflected in modern semiotics, where a sign, which is generally supposed to be a simple object, is analyzed into a “signifier” and a “signified,” with the “signified” being identified with a concept, and not with the object to which the sign as a whole points. See Ferdinand de Saussure, Course in General Linguistics 66-67 (Roy Harris trans., Open Court 1983) (1913). Here the words of the texts are considered to signify, and their meanings to be signified, so that a meaningful statement is already composed of a word and a meaning.

16 Plato, Phaedrus *275d. Plato attributes the distinction to an even older source, the Egyptians.
timely, the judge cannot resolve the dispute by quoting the text, any more than a
dictionary can define the meaning of a word by repeating the word to be defined.
The text says “twenty days,” but that does not mean that the words can be applied by
making a mathematical calculation using the calendar dates of service and response
to show that \(22 - 1 = 21\), and that therefore the Answer is late. The common law courts
had understood that the outcome of the calculation depended, not only upon the
number of days given in the rule, but also upon when the counting was to start. This
interpretation, now incorporated in Federal Rule 6, made it clear that the day of the
event that started the time running was not to be counted. This meant, in the example
above, that counting would not start on the first of the month, but on the second, so
that the Answer on the twenty-second was timely, because \(22 - 2 = 20\). The necessity
for a counting rule affirmed the fact that given stated dates the language of the text
led naturally to more than one result. Where the question regarding what the law said
could be answered by the recitation “twenty days,” this question regarding its
meaning and application could be resolved in at least two ways, because the rule
only said what it said, and not what it meant.

This example might seem to point to a different conclusion because the Federal
Rules have now made it explicit that days are to be counted starting on the day
following the act or event to which the reply is to be made. From a plain language
perspective this shows that “twenty days” was initially ambiguous, that the ambiguity
was recognized and resolved by the common law courts, and later the fix was
incorporated into the Federal Rules, so that now the rules say both how many days are
allowed for a response, and how to count the days. But the “fix” is like a patch over a puncture in the inner-tube of a tire. The leak is stopped, but there remain any number of places where future leaks could break out. In a world where people were obsessively prompt to perform required actions there would seldom, if ever, be a need to calculate whether a response filed on the last day allowed by the rule was made on time because all the responses would be in well within the limits. The counting issue arises, then, not because “twenty days” is an ambiguous term (a property of the text), but because lawyers often wait until the last allowed minute to file their responses (an external circumstance). Other issues could arise that would destabilize the words of the text in unexpected ways. There is presently no problem with the meaning of the word “day” in the rule. The counting is done starting on the calendar-day following the act that starts the time running. But nothing in the rule says that “day” means a “calendar-day.” That calendar-days are meant, as the saying goes, “goes without saying;” it is understood without being made explicit. That also means, however, that the text does not say “calendar-days.” Other matters in the directions given in rule 6 for calculating time seem to imply such a qualification, because it refers to Saturdays, Sundays, and legal holidays. But these references do not say when, for example, Saturday, is supposed to start and end. In some traditions it begins with sundown at the end of Friday, as where the Jewish Sabbath begins on Friday evening and continues until sunset on Saturday. Now, if a person from such a background were to be served after dark on what we call Friday, it would be natural for him to count the service as being made on a Saturday, and would start to count on Sunday rather than on our
Saturday. Since there is nothing in the rule that says that a court is to count in calendar days, the text could not possibly decide the issue. The text says “day,” and that is all; it does not say when a day is to start or end. An addition to the Federal Rules defining “day” to mean calendar-day, would only add another patch to an increasingly leaky tube --for one thing, it would have to specify whose calendar. In addition, other changes in circumstances could further destabilize the language, and require other patches. If, for example, an astronaut stationed on the moon were to receive a Complaint, the time for the Answer would vary dramatically depending upon whether the days were counted in earth-days or in lunar days (which last an earth-month). The rule, after all, does not say “earth-days.” For now it simply goes without saying, but not because the rule is inherently clear or because the qualification is internally implied by the text, but because of the circumstance that all our transactions now take place within the confines of a single planet. That being the case, if the Federal Rule were to contain such a designation, the language would be as peculiar as language in a restaurant menu that listed “chicken eggs” for breakfast. Such a designation is not required to make the word “eggs” more accurate, though that could change if restaurants began to serve other types of eggs. Likewise, changes in external circumstances would make it necessary to specify whether counting is to be done in earth-days or those of another celestial body.\(^{17}\) The incorporation into the Federal Rule of an explicit method of counting, then, does not make it say what it means. Not only does the method of counting need to be decided, such counting cannot be done

\(^{17}\) WEBSTER’S THIRD lists 23 meanings of “day,” with “the time required by a celestial body to turn once on its axis,” being the eleventh.
without assumptions or determinations being made regarding the meaning of the word “day,” because it is not possible to count undefined objects. The text, no less than a single word, says what it says, \( X \), but fails to say what it means, \( Y \).

In practice, courts acknowledge that such rules and laws never say what they mean, even though the plain language theory may say otherwise. For a judge to decide the case by repeating the words of a statute, would be as futile as an attempt to explain the law by issuing it in a large-print edition. Courts are not asked to declare what the law says; that is printed in the books. The lawyers before a tribunal also know what the law says, just as a lexicon user knows the identity of the word to be looked up. The lawyers, after all, typically provide the court with a copy of, or a reference to, the text at issue. They must know what the law says when they identify the text. The Plain Language Rule ignores this common circumstance, and makes it appear that either the parties cannot find the law that pertains to the case, cannot read what it says, or that at least one of them does not like what it says and seeks to evade it. While such circumstances exist, they are atypical. The more common problem is that the text means something different to each party; it means \( Y \) to one, and \( Z \) to the other, as where (before the enactment of rule 6) one person argued that days should be counted starting on the next calendar-day, and the other argued that the term day refers to a twenty-four hour length of time that must be calculated starting with the time and date of the actual service of process. A rule of interpretation that asserts that the law “says what it means and means what it says,” can not justify a move from
what is said to what is meant, can never judge between Y and Z, and restricts interpretation to repetition.

With the foregoing qualifications, then, it is possible to accept the plain language accusation that interpretation makes a statement mean what it does not say. The alternative is to have it mean nothing, because the text is cut off from whatever it might signify. The text must be related to a meaning, just as a word in a dictionary is associated with a definition. In performing this function, interpretation does not distort the text. It does twist the X until it looks like a Y, and does not conceal X and replace it with an imposter; it leaves the text in plain sight, so that in saying “X means Y,” it encompasses both X and Y, just as a dictionary says what words mean by publishing not only definitions, but also the terms defined. To leave out either component would make the dictionary useless. So, a person who interprets a text to mean what it does not say, no more evades or disguises its meaning than a student avoids finding the meaning of an unfamiliar word by looking it up in the dictionary. Rather, this constitutes a description of how meanings are routinely determined, so that by “evasion of meaning,” the advocates of the plain language rule depart from common usage and signify the same process that most of the world describes as the “determination of meaning.”

18 DANIEL CHANDLER, SEMIOTICS: THE BASICS 74 (2002). See also, note 17.
19 SUSANNE K. LANGER, PHILOSOPHY IN A NEW KEY 64 (1951), (“The relation between a symbol and an object, usually expressed by “S denotes O,” is not a simple two-termed relation which S has to O; it is a complex affair: S is coupled for a certain subject with a conception that fits O, i.e., with a notion which O satisfies.”).
Of course, plain language interpretation—inasmuch as it is interpretation and is used to decide cases—makes X mean Y just as much as any other type of interpretation. As noted above, plain language advocates are very unlikely to decide a case by parroting the text, even if a literal interpretation of their rule demands that they do so. They simply skip the process of selecting the meaning because they assume, contra Johnson, that words encountered in common usage are linked already with primary, literal, natural, or normal meanings. The function of interpretation, which relates a word or text to its particular meaning, is replaced with the assumption that a pre-established equivalence exists between the terms. The supposed primary member of the meaning set is then thought to be the normal meaning-equivalent of the original word, so that the one can be substituted for the other in any given text. If the defined term and the definition are interchangeable, Y can be substituted for X without alteration of content.

Such links no more exist in ordinary speech than in the dictionary. Just as dictionary meanings must be selected based on context of usage, ordinary language relies on non-verbal background assumptions in order to achieve determinate meanings. In the example of a clear meaning above, where a person orders a cup of coffee, there appears to be a link between the words and the meaning. The customer says, “I would like a cup of coffee,” and appears to mean that he or she would like a cup of coffee. The barista does not have to wonder what it is supposed to mean. The order is clear and is immediately understood to mean one particular thing. But that does not in itself imply that there is a single primary meaning that is instantly triggered
by the words used, any more than the mathematician’s mention of a set of numbers implies that the mathematical use of the term has priority over the other 179 uses. Rather, ordinary transactions succeed because both parties recognize where they are situated and know how the words are used in those circumstances; they are in a coffee bar where the speaker is a customer and the listener is an employee. In a 1920’s-era speakeasy, by contrast, the words would not request caffeine, but alcohol. These extrinsic matters are not stated in the request for a cup of coffee. The words “I would like a cup of coffee, please,” do not say, “Here we are in a coffee bar, and you work here and I am a customer.” But it is precisely such background considerations, and not textual markers, that determine meaning and give ordinary language its observed stability and clarity.

The setting is so dominate that it can supply the place of many words. It is not even necessary for the customer in the above example to use a complete sentence, which is supposed to be the smallest container for a complete thought. The customer could simply say, “House,” and the barista would know that this referred to a cup of house blend. But this is not because the word “house” has a primary meaning. In fact, were the word spoken at random, most people would think of a dwelling, because, as Dr. Johnson explained long after the completion of the dictionary, “(W)e understand what is most general and we name what is less frequent.” 20 To be correctly understood in the abstract, it would be necessary, then, to say “house coffee.” –not because one meaning is primary, but because of subjective perceptions of the frequency of usage.

When not uttered at random, the word has a plain and clear meaning because it is uttered in a particular situation—at a coffee bar. The determining influence of the background can be verified by changing it. If the speaker went into a real estate office and stated a desire for a “house,” the word, its letters, and their arrangement would be unchanged, but the meaning would be different. The ordinary conversation succeeds, not because extrinsic influences are eliminated so that the words can transparently convey their meanings, but because the extra-textual influences are assumed to be in operation and in some cases are actually present to the senses.21

Other factors related to the presence of the background help account for the efficacy of such communications. As the example shows, not only is the physical background frequently present, but the interlocutors are present both to the background and to each other. Any attempt by one party to disregard the presence of the background brings an automatic correction that references the obvious. If the barista responded to the request for a “house” by replying, “There is a large one for sale at Elm and Second,” the customer might reply, “Excuse me, but this is a coffee bar and not a real estate office.” The implication is that if the barista will simply look around the room, the meaning of the statement will be plain. The type of excuse typically made after such a correction is, itself, instructive. The barista would not reply, “But you said “house,” not “coffee!”” Rather the barista would say “My mind was somewhere else.” Where the background is not physically present to both parties,

21 See e.g., STANLEY FISH, DOING WHAT COMES NATURALLY, Rhetoric 491 (1989). (“[O]nly because the stage settings within which everyday life are so powerfully—that is, rhetorically—in place...they are in effect invisible, and therefore the meanings they make possible are experienced as if they were direct and unmediated by any screens.”).
ordinary language facilitates understanding by allowing one interlocutor to correct
the other by, so to speak, getting the other’s mind in the right place. By making the
situation present to the mind of the listener, the speaker makes the meaning clear. It is
reference to the background, as much as to the words, that effects the
communication.\textsuperscript{22}

These factors make legal interpretation difficult because the courtroom is
removed from the scene of the events that gave rise to the litigation, and from the
desuion in which words are spoken. The mind of the interpreter must be brought to
these places and events, so to speak, but this can only be done in the imagination.
Statements such as “I promise to buy fifty widgets,” must therefore be put in context
for the judge or the jury. If they are spoken at a business meeting, they are probably
part of a contract, but if they are spoken in jest at an informal venue, or in the course
of a game where widgets are sought and sold, the same words have no such effect.
Similarly, statutes are interpreted by lawyers and judges who were not present in the
legislature as they were formulated, debated and passed, and the interpreters must
be put in mind of the situations that prompted passage for the text to make sense.
Otherwise, the court is put in the position of a person who is asked whether the word
“house” refers to a home, a cup of coffee, or an imperial dynasty (as in the House of
Windsor).\textsuperscript{23} Such a judgment is impossible. The only reasonable response is that of the

\textsuperscript{22} This is more than a matter of merely putting a word in its proper setting, and requires a conscious
speaker making associations and judgments. The written word, “house,” neither orders coffee or
dwellings. If the word were printed on a piece of paper and blew into the coffee shop, it would not
count as an order for coffee. See, e.g., Langer’s description of the semiotic relationship at note 17.

\textsuperscript{23} See, e.g., the 28 meanings of “house” in WEBSTER’S THIRD.
lexicographers, who give a non-exclusive list of possible meanings taken from previous usages in the linguistic community.

The movement from X to Y, or from the letters of a text to their meanings, then, is never automatic. Links appear natural because, as Johnson stated, we understand what is most general, and he meant “general,” not in the sense of “non-specific” or “abstract,” but in the sense of “what is usually experienced.” But perception of what is general does not create an objective link between the word and the text, and rather depends upon the subjective experience of the interpreter, which is the very thing that plain language interpretation seeks to avoid. Since links between words and meanings are necessary before a text can make sense, and since all links are products of interpretation, whether the interpretation is adopted by unconsciously assuming what is most general, or by a process of conscious deliberation, courts are never given the option of applying plain language to a case, but only a choice between making an chance decision based upon its subjective predilections, or a rational decision that considers the propriety of contesting interpretations.

III

24 WEBSTER’S THIRD lists 20 definitions, of which the given examples are the fourth and third meanings of the adjectival form.
Once plain language decisions are recognized as products of unexamined meaning-equivalents that are uncritically regarded as natural or normal, it is possible to show that the “plainness” of any reading or interpretation always results from substituting the words of a statute with meanings that are not in the text. *Riggs v. Palmer* provides the textbook illustration of a court faced with apparently indisputable language, so that all the members of that court believed that the law stated something specific, plain, and unambiguous. Unfortunately, what it supposedly said was so detestable that the court split—not over what it meant, for that seemed clear—but between a majority who refused to follow its plain meaning and a minority who reluctantly advocated that its harsh dictate be followed. The familiar facts are these: A grandfather wrote his will leaving the bulk of his estate to his grandson, who knew of the bequest. The grandfather remarried and declared his intention to change his will in favor of his new wife. The grandson successfully prevented the modification of the will by poisoning his grandfather. Though convicted of murder, the grandson brought a suit to be allowed to recover the property left to him in his grandfather’s will, alleging that he was the declared beneficiary under a will that had not been revoked or modified, so that by law he was entitled to the bequest.

The court accepted the facts stated in the grandson’s argument. There was a valid will in which he was named as the beneficiary. It had been freely made and put in the appropriate form, so there was no question as to its initial, but only of its continuing validity. The Probate Code provided means for invalidating wills that were

25 115 N.Y. 506 (1889).
made under duress, but this particular will was valid when it was made, and the only question the court considered was whether the murder somehow changed the bequest. The code provided a list of the acceptable means by which a will could be altered, amended, or modified, and the list had previously been determined to be exclusive, and “Murder of the testator” was not on it. Thus positioned, it seemed clear that there was a valid and unmodified will that left the testator’s property to the murdering grandson, and the grandson wanted the inheritance. The court framed the issue before it, saying, “He now claims the property, and the sole question for our determination is, Can he have it?” 26 Though the majority of the court’s ultimate answer was “no,” it felt the constraining influence of the text, and admitted “(t)he statutes if literally construed, and if the force and effect can in no way and under no circumstances be controlled or modified, give this property to the murderer.” 27

The members of the Riggs court disagreed sharply over whether the court had the authority to control or modify the literal meaning of the statute by an equitable construction. For authority to make the modification the majority drew upon the principle that “(a) thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers.” 28 The maxim distinguishes between the statute and the text, and implies that the statute proper contains matters that are not in the written text, and excludes

26 Id. at 509.
27 Id.
28 Id. at 510.
matters that are. The court could not believe the legislature would have intended for a murderer to profit from his crime. And since the literal construction of the text appeared to require this result, the majority believed that it had grounds for controlling and modifying it, and that the true statute could be isolated from its literal incorporation and extracted in a pure form by an equitable construction. The minority, by contrast, was not willing, as the account in AmJur above put it, to evade the clear meaning of the text while dissembling under a guise of interpretation. Rather it embraced the disagreeable result, explaining: “We are bound by the rigid rules of law, which have been established by the legislature, and within the limits of which the determination of this question is confined.”\(^\text{29}\) To support its rigid result, the dissent cited a litany of similar cases where other courts had allowed wrongdoers to profit by their own misdeeds, all because they too were bound against their personal wishes by what the statute said.\(^\text{30}\)

Rather than supporting either side, the argument developed in the foregoing section that words and texts never say what they mean, should force a reexamination of the claim that the statute gives the property to the murderer.\(^\text{31}\) Neither the majority nor the minority produced a section of the probate code that contained letters and words that explicitly stated the proposition, “The murderer gets the property.” If the

\(^{29}\) Id. at 516.
\(^{30}\) Id. at 518-519.
\(^{31}\) See also, Fish, supra (1980), Normal Circumstances, Literal Language, Direct Speech Acts, the Ordinary, the Everyday, the Obvious, What Goes without Saying, and Other Special Cases. 278-280. The present analysis owes a debt to Fish’s discussion of Riggs v. Palmer, which takes another route to the same result and shows that every reading, even the presumptively literal reading, is always made with regard to assumptions about the purpose of the statute.
plain language test really depended on the literal wording of the statute, the absence of the words would end the discussion, because the rigid requirement would not be in the law. There would be no more doubt about whether a testator-murderer could take under a will than there is presently regarding whether the Federal Rules of Civil Procedure allow 20 days to file a responsive pleading. Insofar as the law says only what it says, it emphatically does not say, “The Murderer gets the property.”

As stated above, plain language interpreters do not decide cases by repeating the words of a statute. Consequently, the majority does not assert that the statute itself literally gives the property to the murderer, but only that it does so when it is literally construed. The use of the term “construed,” recognizes a distinction between what is said and what is meant in a particular application, and implies that the statute does not do all of the work. It says something general, though the argument can be drawn out to such a length that it will literally apply to the facts at hand. The assertion of a literal construction, then, implies that there is an automatic fit between the law and the situation to which the statute is applied. Oddly enough, for a court that insisted that the statute has a single literal construction or that it imposed rigid requirements, the language of the statute is not quoted in the case. The majority assumes that in the legal proceeding it is understood that when a valid will has named a beneficiary, the law will allow the latter to receive the designated property upon the death of the former. The minority notes simply that modern jurisprudence recognizes the right of the individual to dispose of his property after death. Both the law and its construction
appear to be so obvious that neither has to be stated explicitly. Still, if questioned, the implications of the law can easily be expanded into form of a syllogism as follows:

   Major Premise: The law gives the property to the beneficiary of a valid will.
   Minor Premise: The murderer is the beneficiary of a valid will.
   Conclusion: The law gives the property to the murderer.

Once the syllogism is spelled out, it embodies the minority’s notion of the rigid requirements of the law: The first proposition is contained in the law, the second is true, and the third is what the law literally means when combined with the facts.

The logical structure is nothing less than the formalized attempt to establish the link between what the law says, the major premise, and what it means, the conclusion.32 Leaving aside, for the moment, the issue of the soundness of the syllogism, the literal construction actually demonstrates that, the law does not say implicitly that the murderer gets the property, any more than it does so explicitly. The construction cannot be made without the crucial middle term, or minor premise, which, is absent from the text. “The major always loads the cannon,” as Schopenhauer

32 "Meaning," no less than other words, itself, signifies many different things. See, e.g., C. K. ODGEN & I. A. RICHARDS, THE MEANING OF MEANING. 186-187, which lists 16 meanings that the author’s regarded as “a representative list of the main definitions.” They further acknowledged the limited nature of their list in (App. D) 290, by citing letters from C.S. Peirce who isolated 59,049 types, which he believed might be reduced to a mere 66. As Peirce is often regarded as America’s greatest philosopher, his tabulation should meet with some attention, and perhaps shows what can be done when a great mind has leisure to concentrate on a single word, rather than upon, as in Johnson’s case, on an entire dictionary. WEBSTER’S THIRD, being subject to analogous constraints, lists a paltry seven definitions of “meaning.” In this context I have here identified the conclusion with the meaning, or implication, because that is the sense implied in the court’s claim that literally construed the statute means that the murderer gets the property.
The law speaks only in general, knows nothing of the grandfather’s will, and says nothing about the identity of the beneficiary. Even if the identity of the murderer and the beneficiary is a matter of fact, such a fact cannot exist within the text of the law, and must in principle be observed and articulated by the court. The literal construction, then, violates the plain language requirement that a law must say what it means, must speak for itself, and must not have its statements augmented by interpreters. The law supplies only the first of the premises contained in the syllogism; it does not say that the murderer is the beneficiary of the will, and for that reason the law does not, itself, say that he gets the property. The statute supplies only the major premise, X, and both the minor premise, which could be denoted by a lower case “x,” and the conclusion, Y, are added by the court. The syllogism fails in its attempt to have the law actually say what it means; at best, the law does not speak for itself, but requires the court to act as its oracle.

The plain language of the law, then, is neither explicit nor implicit, but can only be described as equivocal. The statute says that the beneficiary gets the property, and the will identifies the grandson/murderer as the beneficiary, so that in the context of the case, “the beneficiary” means the “grandson.” The equivalence between the general term in the law and the specified term, then means that, “beneficiary,” in the statement, “The beneficiary gets the property,” can be replaced by the equivalent

term, “the murderer,” so that the statute literally construed says “The murderer gets the property.” The Riggs court therefore not only had no difficulty in moving from the text to its meaning, but felt compelled to do so. The court’s construction, then, seemed to require no more than the recognition of the will named the murderer as the beneficiary.

There is a problem, however, with regard to the equation of the beneficiary with whoever is named in the will. While a testator has the right under modern codes to make a will, the insertion of a bequest in a will does not automatically mean that it will be approved and carried out by the courts. It is true that in the great majority of cases admitted to probate the disposition goes to whoever the testator designates, but that does not mean that the mere designation of a beneficiary in itself establishes all the requisites of being a beneficiary. In legal usage, a beneficiary signifies more than a person or entity named in a will to receive specified property. A fictional character, for example, has a name and an identity, but Harry Potter cannot receive property left to him in a non-fictional will. The list could be extended not only to imaginary persons, but to historical persons like Julius Caesar, or to enemies of the state like high-profile terrorists. Beyond that, other entities could be named, but could not inherit, e.g., the Chesapeake Bay, the Letter X, Spot the dog, or the Andromeda Galaxy. The fact that such entities would have to be named before they could possibly be excluded implies that being named in a will is not a sufficient condition for being a legal beneficiary. The law, however, does not expressly exclude fictional characters, historical persons, bays, letters, animals, and galaxies from the class of beneficiaries, for the exclusions go
without saying. The probate code does not need to articulate that particular any more than the federal rules need to say that time is to be counted in earth-days. The scarcity of such cases is enough to account for the fact that most dispositions proceed without recognition of limitations on the testator. The conditions, nonetheless, must be real, or the law would be charged with enforcing impossible, outrageous, or incoherent bequests.

The minor premise, which says that the murderer is the beneficiary, then, does not reflect a fact created by the testator, but the court’s judgment that there are no objections, such as would arise in the case of a disposition to Harry Potter, to the murderer being a beneficiary. In evaluating the assertions of the grandson, namely, that there was a valid will and that the grandson was the beneficiary, the court only considered the first, and never evaluated the grandson’s assertion that he was the beneficiary. The court mistakenly assumed the claim to be correct because the grandson was named in the will. But the testator cannot enforce the disposition merely by naming, and the court must consider other unwritten conditions that arise because of the background against which the will must be given effect, otherwise there could be no possible objection to disposition made to a fictional character. There is in the nature of the case no tabulation of things that go without saying, so they must be evaluated, not on whether or not they are said –that too should go without saying – but on whether or not they make sense with regard to the application of the law. Short of magic there is no way to transmit a bequest to Harry Potter, so fictional characters are not allowed to inherit from real testators. Other entities, like known terrorists or the
Andromeda Galaxy, cannot be beneficiaries, whether because a rational society will not aid those bent on its destruction, or because it is impossible to imagine how to make a bequest to an aggregate entity that is light years away from us. \(^{34}\) Likewise, it does not make sense for the law to allow murderers to inherit from their victims. Though the bequest could be physically transmitted to such a recipient, the practice would disrupt other legal norms and would reward behavior that is punished elsewhere. The law did not say that, but not because it did not mean it; it did not say it because it is rare for devisees to murder their beneficiaries. (Recall, also, that this situation cannot be contrasted with an application where the law has stated that the murderer gets the property, because it did not state that either.) Significantly, this was the reason given in Riggs for the court’s refusal to allow the murderer to take the property – murderers should not be allowed to benefit from their crimes – but it was stated in such a way as to make it appear to overturn rather than to uphold settled law. A person or thing may be named in a will, but whether he, she, or it will be allowed to take the bequest is not stated either in the law or in the will, but awaits the judgment of the court.

This brings back the original question phrased by the Riggs court: “He now claims the property, and the sole question for our determination is, Can he have it?” The court asked the correct question, inquiring whether someone in the plaintiff’s position, a convicted murderer, would be allowed to benefit under his victim’s will. The

\(^{34}\) Problems of this nature may be overcome, as where a trust is established for the upkeep of a pet or for the preservation of an identified area like the Chesapeake Bay. But in those cases, it is the trust that is the beneficiary because it is recognized that the benefit cannot be given directly.
only reason the case was brought was because of the crime, and the problem of the murder had to be addressed in terms of whether a murderer could be a member of the class of beneficiaries created by his victim’s will – “whether,” as the court put it, “he could have it.” The issue presented concerned the possibility of forming the minor premise. Unfortunately, the court assumed that the minor premise was a given fact, and got sidetracked in on the irrelevant question of whether there had been a valid modification of the will. This eliminated the murder as the central problem of the case, and made it seem almost regrettable that the legislature had not provided that a third party could modify a bequest in his behalf by murdering his benefactor. Had the court remained focused on its own question, though, it might have realized that the law did not answer it one way or the other. If it did not expressly exclude the murderer of a testator from the class of beneficiaries, neither did it include such a person. There was no need for the court to substitute its own judgment for the rigid requirements of the law, because no such rigid requirements existed; the court might have denied the petition on the very sensible ground that the wrongdoer should not be allowed to profit from his crime, and that correct legal usage required the exclusion of testator-murderers from the class of beneficiaries, no less than it required the exclusion of fictional characters. That, after all, was the cash value of the court’s chosen maxim regarding reading the statute in light of the lawmakers’ intention. If it is true that a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; then the statute does not say what it means. And, if it is true that a thing which is within the letter of the statute is not within the statute,
unless it be within the intention of the makers; then the statute does not mean what it says. If the law, then, neither says what it means, or means what it says, then it is the job of the court to engage in interpretation.\textsuperscript{35}

More contemporary cases depart only slightly from the pattern exhibited by \textit{Riggs}. In \textit{Smith v. United States}\textsuperscript{36} a criminal defendant had negotiated a deal to purchase drugs. He did not have the cash to pay for the transaction and offered to trade the seller a machine-gun in exchange. The putative drug-seller examined the unloaded gun and gave it back to the defendant, saying that he would return with the drugs. The seller was actually an undercover narcotics agent, and on their next meeting Mr. Smith was arrested. He was convicted of drug trafficking, and at the sentencing, the District Court enhanced his sentence under a federal law that added an additional 35 years to a sentence for a drug trafficking offence which involved the use of a gun. The defendant had argued that he had not “used” the gun within the meaning of the statute, because he had not used it as a weapon, but had only offered to trade it. The Eleventh Circuit Court of Appeals upheld the enhancement of the sentence, citing the plain language of the statute, and explained that the mere possession of a firearm in such circumstances was tantamount to use.\textsuperscript{37} The Supreme Court affirmed the decision, agreeing with the circuit court that Smith had clearly and

\textsuperscript{35} \textit{Marbury v. Madison}, 5 U.S. (1 Cranch) 136, 177, (“Those who apply the rule to particular cases, must \textit{of necessity} expound and interpret that rule.”) (emphasis added).
\textsuperscript{37} \textit{Smith}, at 837 (“The lesson of these opinions is that use may be established by evidence of possession – and Smith concedes possession....

-\textsuperscript{37}“).
plainly “used” a firearm, whether he used it to shoot someone or to trade for other items.

The Supreme Court recognized that the law did not explicitly state “The defendant used a gun in a drug trafficking offense.” Therefore the court could not set up a syllogism that used the foregoing sentence as the minor premise, as follows:

   Major Premise: Anyone who uses a gun in a trafficking offense gets an additional

   35-year sentence.

   Minor Premise: The defendant used a gun in a trafficking offense.

   Conclusion: The defendant gets an additional 35-year sentence.

The absence of explicit wording in *Riggs* had not been a problem because the will supplied a plausible identity between “the murderer” and “the beneficiary.” There seemed to be nothing analogous to a will that would supply the missing identity between Smith’s attempted barter and the use of a gun. If the statute implied that “use of a gun” meant “use as a weapon,” then Smith did not “use” the gun in that sense; but if it implied that it meant “use for any purpose at all,” then Smith did, in some sense, use the gun because he used it for barter. But the statute could not be literally construed because it did not say which sense was appropriate; it could not say that Smith used a gun, because it did not say whether “use” was qualified or unqualified. It said what it said, and nothing else.

Justice Scalia, an avowed textualist, agreed with the defendant that there had been no usage that would support enhancement of the sentence, but also believed
that the statute could be teased into saying more than it actually said. Although there
was no explicit qualification, he thought text as a whole implied that in order to trigger
the enhanced sentence the gun should be used as a weapon.\textsuperscript{38} The argument had
force because when the ordinary person hears of a gun being used in a drug
trafficking crime, such a person thinks of the gun being used as a weapon, as where
“(w)hen you ask someone, “Do you use a cane?” you are not inquiring whether he has
hung his grandfather’s antique cane as a decoration in the hallway.”\textsuperscript{39} It seemed
reasonable to assume that Congress would have had similar impressions, would have
thought of a gun being used as a weapon, and would only intended to enhance the
sentence in those circumstances. Not to imply such a limitation resulted in an irrational
application of the law because Congress was not concerned in the statute with
regulating trade, but only with prohibiting armed violence.\textsuperscript{40}

The supposed limitation, however, was precisely the problem, because it was
implied, rather than being explicit in the text. That was another way of saying that it
was not there. Justice O’Conner, who wrote for the majority, replied that the statute

\textsuperscript{38} \textit{Id. at 242.}
\textsuperscript{39} \textit{Id. See also, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 24 (1997). Justice
Scalia’s arguments in the case were very sensitive to context, as where he stated that it is a
fundamental principle of statutory interpretation that the meaning of a word must be drawn from the
context of its usage. Smith v. U.S., \textit{Id. at 241. His arguments at pages 244-245 show this in detail, so that
his position seems to be very close to Johnson’s. The parallel, however tempting it may be to draw, goes
askew because much of the argument invokes the pre-Johnsonian spirit of a meaning that is itself
ordinary, natural, and primary. For example: “In the search for statutory meaning, we give non-technical
words and phrases their ordinary meaning …To use an instrumentality ordinarily means to use it for its
intended purpose … The Court does not appear to grasp the distinction between how a word can be
used and how it \textit{ordinarily} is used… But that says nothing about whether the ordinary meaning of the
phrase “uses a firearm” embraces such extraordinary employments.” \textit{Id. 241-243. In his most explicit
affirmation of ordinary meanings, he adds: “Given our rule that ordinary meaning governs, and given
the ordinary meaning of “uses a firearm,” it seems to me inconsequential that “the words ‘as a weapon’
appear nowhere in the statute … they are reasonably implicit. \textit{Id. at 244.}
\textsuperscript{40} \textit{Id. at 246.}
had to be interpreted to say what it said, and not to say what it did not say; it said “used,” but it did not say “used as a weapon.” Congress might have attached a particular meaning to the term, but it did not attach the particular words indicating that meaning to the text, and a textualist is bound by the text. While Justice O’Conner conceded that a person upon hearing that a gun was used in a crime would think of it being used as a weapon, she noted that the significant flaw in the dissent’s argument was to say that merely because one meaning came immediately to mind, that other meanings were eliminated:

It is one thing to say that the ordinary meaning of “uses a firearm” includes using a firearm as a weapon, since that is the intended purpose of a firearm and the example of “use” that most immediately comes to mind. But it is quite another to conclude that, as a result, the phrase also excludes any other use. Certainly that conclusion does not follow from the phrase “uses … a firearm” itself. As the dictionary definitions and experience make clear, one can use a firearm in a number of ways.\footnote{Id. at 230.}

In reply to Justice Scalia’s example of the ordinary use of a cane, she noted that the most infamous use of a cane in American history was when a cane was used as a weapon to strike a Senator, rather than as an aid to walking.\footnote{Id.} The dictionary, as she pointed out, contains other definitions that make it clear that a gun can be used in many ways. “Use,” not only meant to use for a specific purpose, but “to employ,”\footnote{WEBSTER’S NEW INTERNATIONAL DICTIONARY (2d ed. 1934).} and a gun could be employed in any number of ways.\footnote{Id. It does not follow that Justice O’Conner would admit any use whatever of the gun to support sentence enhancement. See, Smith v. U.S., Id. at 232-233, where she explains that any incidental use that does not support the perpetration of the crime, such as using a gun to scratch one’s head, would support enhancement. Such an exclusion for incidental usage, however, would not be effective where}
had attempted to employ the gun as an article of trade; therefore, it was true that “Smith employed a gun in the commission of a drug trafficking crime.” Since “use” and “employ” were equivalent terms, one could be substituted for the other without alteration of content. Also, it was reasonable to think that Congress was concerned, as the Eleventh Circuit had pointed out, with the mere presence of a firearm in such a volatile situation. Consequently it was necessarily true that “Smith used a gun in the commission of a drug trafficking crime." The minor premise for the literal construction above could be established without altering the text or the meaning. The court was at the same time able to both be more literal than a textualist, and to move to a meaning that was not in the text.

There are, however, significant flaws in the Court’s own attempt to have things both ways. After noting that the ordinary meaning of “uses a firearm,” includes its use for the purpose for which it was designed, Justice O’Conner considered it fallacious to conclude that the ordinary meaning excluded any other use, saying “certainly” that conclusion did not follow from the phrase itself, and citing the dictionary to show that other meanings could be included. While the Court was certain that Justice Scalia’s conclusion did not follow from the phrase used in the text, the argument might have gone the other way. Though the Court implied that “use,” meant any manner of employment “so long as the use is “during and in relation to” a drug trafficking

the test for usage is not an overt act, but mere possession in the trafficking context. See, the Eleventh Circuit’s test in U.S. v Smith, Id.

45 See, Smith v. U.S., Id at 230, where this transmutation of base fact into a minor premise is made explicit resulting in the statement that “(I) It is both reasonable and normal to say that petitioner “used” his MAC 10 in his drug trafficking offense by trading it for cocaine…”
offense,” and considered that the significant flaw in Justice Scalia’s argument was to restrict the meaning of the term, the examples cited in the dictionary all consisted of objects being employed for the purposes for which they were fabricated, as in a book for reading, a chair for sitting, and a plow for tilling. Unless the dictionary user might be expected to think primarily of using plows, chairs, and books for something other than the purposes for which they were manufactured, the dictionary seems to support Justice Scalia’s original point that the text implied that the gun would be used as a weapon. Furthermore, establishing “to employ” as a meaning-equivalent for the term “to use,” only pushes the problem back a step. The word “employ” no more says what it means than does “use.” It does not specify whether employment for a specific purpose or whether employment for any purpose whatsoever is contemplated, and has the additional disadvantage of being absent from the text. The illustrations in the dictionary for “employ,” however, are parallel to those given to explain the meaning of the term “use,” in that they do imply employment of a thing for a specific designed-in purpose. The non-exclusive reading does seem to follow from the text, with regard both to the expectations of the ordinary reader and to the definitions of the dictionary. While the term “used” may carry no restrictions, so that a Doctor could use a stethoscope as a tourniquet to stop bleeding, such a use would not be general and would normally, as Johnson noted, be followed by a restriction, such as “used as a tourniquet.” By contrast, if the physician used a stethoscope to listen to a patient’s

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46 Id., at 229.
47 See WEBSTER’S THIRD, (“(a) pen for sketching ….metal girders for building construction ….questionable methods in business….”).
heartbeat it would be unnecessary to add that it was used “as an aid to hearing.” The
Court’s argument effectively reverses the natural order so that the most general usage
is required to be qualified and the least general is assumed. Johnson condemned
such reversals in his definition of “etymology,” where he illustrated the term with the
following quotation: “When words are restrained, by common usage, to a particular sense,
to run up to etymology, and construe them by dictionary, is wretchedly ridiculous.”48

The point here is not that Justice Scalia was right and that Justice O’Conner was
wrong. Rather, if the statute only says what it says, and not what it means, then neither
argument can be correct because the argument must always be that the text says
something that it does not say. There is no implied limitation because no matter how
the statute is examined, it does not contain the language it is said to imply; as Justice
O’Conner correctly noted, the implication is not in the text. But if the limitation is
absent, so is the expansion; and the statute does not state —though the Court did state
—that the “language sweeps broadly.”49 The expanded inclusion of other meanings is
just as much of an absent qualification as is their restricted exclusion, and the absence
of one does not imply the presence of the other. The dictionary cannot be used as an
arbiter in such cases. While on the face of it, one dictionary —the then out-of-date
Webster’s Second50 —seemed to support the defendant’s position by offering examples
of things being used or employed for the purposes for which they were designed, a

48 See Reddick, at 49. This illustration was included in the dictionary precisely to distinguish Johnson’s
reliance on usage in contrast to his predecessor’s reliance on primitive meanings.
49 Id. at 229.
50 The court’s choice of dictionaries is problematic because the reference work used to decide the
case was outdated, having been replaced by WEBSTER’S THIRD, which had, as noted in its Preface,
derived its content exclusively from examples of usage after the 1934 publication of WEBSTER’S SECOND.
current dictionary was not consulted, other dictionaries might have contained examples that were not similarly qualified, or Congress may have used the term in a specialized, new, or counterintuitive sense. The case cannot be decided by the consideration of the text alone, and all arguments that attempt to do so are misguided. If the text really said what it meant, there would be no more argument than there is over the words that are actually present. Neither party doubted that the text said “used,” and so if the text similarly stated its meaning, they should have no more uncertainty about what it meant.

The plain language equivocation between what is said and what is meant ultimately creates the same type of equivocal construction found in Riggs v. Palmer, insofar as the statute is reconstructed to say what it does not actually say. This can be seen in Smith at both appellate levels. The Eleventh Circuit said that “use” could be established by “possession,” so if a defendant possessed a firearm at the time of the drug transaction, that circumstance counted as use; but while making any act of possession count as a use of a weapon might constitute an acceptable interpretation, the connection is not stated in the statute. The statute says “use,” and not “possess,” and a miser notoriously possesses money without using it. The court might just as easily have held that use was established by the employment of an instrument for its intended purpose, and the result would have departed no further from the text. Likewise, the Supreme Court might have picked another definition listed in Webster’s Second, might have chosen a definition from Webster’s Third, might have used a different dictionary altogether, or might have done as the Eleventh Circuit did, and
made it’s own meaning –since “possession” is an unusual and specialized meaning of the term “use.” The meaning of the statute could thereby be modified and controlled by the substitution of meaning-equivalents, without resort to cumbersome equitable terminology, and without restraint by anything in the text.

Another recent example of this type of meaning-substitution is provided by In Re Hamblin.\textsuperscript{51} At issue was whether Mrs. Hamblin, the parent of a student, could discharge her obligation as a cosigner of her daughter’s student loan. The Bankruptcy Code did not address the issue of whether non-student co-makers could qualify, but did prohibit the discharge to anyone who “received a loan for an educational benefit.”\textsuperscript{52} Taking that statutory language for a major premise, then the necessary minor premise exempting the loan from discharge would have to say “the debtor received a loan as an educational benefit.” But nothing in the code defined “educational benefit,” or said that a parental co-debtor received one. The code did not contain the words “parent” or “non-student debtors,” and there was no dictionary or other reference work that might equate a parent’s co-making of a loan for the education of a child with the receipt of a loan for an educational benefit. Further, the debtor denied that she had received such a benefit; while she acknowledged that she was the parent of a student, and admitted that she had incurred the obligation on

\textsuperscript{51} 277 Br. 676 (2002). I have used this case because being the product of an ordinary working court it is representative of many plain language cases that have neither the celebrity of a case like Riggs v. Palmer, or the importance of a case argued before the Supreme Court. Any criticism of the case should be tempered by the acknowledgement that it is the work of a court that has had plain language interpretation recommended to it by higher courts, and that such courts do not have the same leisure to ruminate over arguments that is afforded to authors of law review articles.

\textsuperscript{52} Id. at 678.
the note in order to provide an education for her daughter, she nonetheless argued that she should not be excluded from discharge because she herself “did not attend school nor did she receive any educational benefit from the loans.”

The court initially acknowledged the need for an interpretation by searching for one. It found a significant split of authority among the bankruptcy courts, but its own circuit, the Fifth Circuit Court of Appeals, had not considered the issue. The circuit court had decided that a student could not discharge loans taken to pay the indirect costs of his education, such as renting an apartment or purchasing a vehicle, and had stated that it was the purpose, and not the use of a loan was the controlling factor that determined whether or not a student debt was dischargeable.\footnote{Murphy v Pennsylvania Higher Educ. Assistance Agency, 282 F. 3d 868 (2002).} The Hamblin court extended the meaning of the distinction, reasoning that if the purpose of the loan was to finance an education, then the loan would have that purpose regardless of whether or not the borrower had received an education. Ordinarily an extension of a principle formulated by a higher court to cover a new situation could be unexceptional because the court had to decide the case, even though the statute did not say what it meant, authorities were split, and the use of its own circuit court’s distinction seemed to be in order.

The lack of authority, the split among the courts, and the extension of the circuit court’s distinction between “purpose” and “use,” however, did not lead the bankruptcy court to an ordinary interpretation of the case, but rather became the

\footnote{Id.}
occasion of a plain language interpretation. Acceptance of the purpose of the loan as a guiding principle supplied a background that made it possible. In order to think about the purpose of the loan, the court had to imagine what occurred at its inception. At that time the debtor was contemplating borrowing money for one purpose and not for another. Had she been asked whether she was borrowing money for her benefit as a consumer, for a benefit to her business, or for an educational benefit, it would have been normal and natural for her to state that the loan was for an educational benefit. That much follows from understanding that the purpose of the loan controls. But, since the statute does not make the distinction between the purpose and the use of the loan, it does not follow that the conditions at the inception of the loan are the proper background against which it is to be interpreted, or that it plainly says that the debtor received an educational benefit. The debtor, by contrast, had understood the words in another context where it would have been unnatural to describe her loan as being for an educational benefit. If at the time she filed for bankruptcy, she had been asked if she had received an educational benefit from the loan, it would have been normal and natural for her to reply that she had not, but that on the contrary the loan was taken out for her daughter who had received all the instruction, thus all of the educational benefit. Therefore, the problem for the interpreter is not to decide which interpretation is normal, natural, and ordinary. Given their respective background assumptions, both usages fit that description. In order to correctly interpret the statute it would be necessary to compare the background provided by the assumption that the purpose controls, with the background
assumptions incorporated into the debtor’s argument, just as to determine the
meaning of “house” one would have to know whether it was being used in a coffee
bar or in a real estate office.

The *Hamblin* Court never reached the point of evaluating the arguments for the
different contexts because it used the Fifth Circuit’s decision only as a lens through
which to view the case. From that perspective it was plain that the loan was taken out
for the purpose of providing an educational benefit. While, as stated above, there was
nothing wrong with the court’s extension of the principle articulated in its circuit, it was
necessary to acknowledge and justify the extension. By contrast, the bankruptcy court
simply used the distinction to bring a phrase into focus. In so doing, it merely did what
the Plain Language Rule recommends; once it latched onto a meaning, it stopped
interpreting. This created the illusion of a single plain and unambiguous meaning
because it created conditions under which the interpretation offered by the creditor in
the litigation made sense of the words in the statute. That criterion is a necessary, but
not a sufficient condition for the formation of a judgment. The debtor’s interpretation
also made sense, because it makes sense to think of the receipt of an educational
benefit as the receipt of an education. Further, there was a sizeable minority of courts
that believed that the debtor’s interpretation made more sense than that of the
creditor.

The illusion of a plain meaning, however, transformed the terms of the argument
between the parties. The reasons for the minority position could no longer be weighed
against those supporting the plain language, because in order to find that the language was plain in the first instance the court had to find that the language of the statute was not ambiguous. This implied, as the court stated, that the minority courts “…have found that the plain language of the statute is ambiguous and have agreed with the Debtor that parties who do not receive an educational benefit from student loans should be able to discharge them.” 55 Now, if the language was plain, it followed that it unambiguous; and if it was unambiguous, it followed that there was one and only one literal way to read it. For the minority courts to find that the plain language of the statute was ambiguous was the same as if they had looked at the letter X and had doubted whether it was an X or a Y. Such an aberrant reading could be accepted only in rare circumstances. The court deferred to a corollary of the plain meaning rule which states “that the plain meaning of legislation should be conclusive unless the literal application of the statute will produce a result demonstrably at odds with the intentions of its drafters.” 56 This put the burden on the minority courts of showing, not merely that their position is more reasonable than that of the plain language majority, but of showing that the literal reading produces results that are absurdly at odds with the clear intention of the drafters. Some minority courts had attempted to overcome that burden by showing that Congress was only concerned with preventing students from discharging their educational loans immediately after graduating. While this was the motivation behind the disallowance of student loan discharges, it was irrelevant insofar as it would tend to establish a meaning at odds with the plain meaning of the

55 Id. at 680.
56 Id.
statute. The Hamblin court did not need to reargue the case for establishing the plain meaning, but only to show that the plain meaning produced results consistent with Congressional intent. The plain meaning, after all, would prevent abuses by students, as well as by parents and other cosigners. In addition, the court noted that Congress also intended to preserve the financial integrity of the student loan system, and that denying the discharge to parents as well as to students would preserve that integrity to a greater extent than simply denying the discharge to students. Thus, while courts who did not think that the language of the statute was plain could not refer to Congressional intent to establish an interpretation at odds with the plain meaning, still a plain language court could use Congressional intent in order support a plain meaning against a charge of being at odds with the purpose of the legislation.

Having started from a plain language premise, the court could then justify its position in the written opinion. The justification, however, could not take the form of weighing the relative virtues of each position, but rather had merely to show that the conclusion of non-dischargeability followed inevitably from the plain meaning of the statute. Since any loan taken for the purpose of financing an education was now known not to be dischargeable, Mrs. Hamblin’s loan was automatically consigned to the non-dischargeable class. This supplied the missing minor premise to the syllogism above, because it equated the proposition “The debtor received the loan as an educational benefit,” with the proposition “The debtor took out the loan for the purpose of financing an education.” Despite the debtor’s protestations, her admission that she took the loan to finance an education could, by the identification of the
admission and its meaning-equivalent, be taken as an admission that she had received an educational benefit. The court was thereby able to translate the lack of an explicit statement by the statute and the lack of an authoritative declaration by the higher court into a plain and natural affirmation of one side of an argument.

The plain language argument bootstraps its way into place. Once the non-student debtor’s obligation is identified as a member of the class of non-dischargeable loans, the failure of the statute to exclude the loans of non-students from discharge would then leave their previous inclusion undisturbed. In order to determine whether her debt was dischargeable, the court only had to examine the statute to see if it contained a provision that removed her from the class into which she was put by the plain language. After a review of the text, the court concluded: “There is simply no distinction that an individual debtor’s status as borrower, be it maker, co-maker, spouse of a student, or parent of a student, negates the non-dischargeability of the educational debt.” Then, with the deference to legislative will characteristic of all plain language courts, the court stated “[i]f the Congress had intended to make such a distinction, we assume that it would have so stated.” The lack of a distinction, therefore, was clear. The statute did not exclude Mrs. Hamblin’s obligation from the class of non-dischargeable loans, therefore the statute unambiguously made her loan non-dischargeable.

57 Id. at 681-682.
The problem with the argument lies in the supposition that loans to non-student debtors were included in the non-dischargeable class the first place. To reason in the plain language mode, we might assume that if the Congress had meant to exclude all loans for financing an education from discharge, it would have so stated. But those words are not in the statute, and Congress only said what it said. The inclusion or non-inclusion of the non-student debtors was the issue to be decided, and required the court to offer grounds for its minor premise, which had to assert that the debtor had received the loan as an educational benefit. The court, however, did not evaluate unstated grounds to supply its premise; rather, it failed to find ambiguity in the language of the statute because it failed to consider the debtor’s argument that to receive a loan as an educational benefit can mean to receive money for an education. Had it considered the debtor’s argument, rather than jumping to the conclusion that the creditor’s argument was plain, it would have seen that it was as reasonable for the debtor to claim that a loan was received as an educational benefit only if the recipient of the loan also received the education, as it was for the creditor to claim that the loan was not dischargeable because it was taken out for the purpose of financing an education.

Finally, in all the talk of the language of the statute being plain, the court lost all sight of the statute itself. Irving Younger had famously advocated that the Internal Revenue Code be declared unconstitutional because it was incomprehensible.58 The ordinary person, Younger reasoned, cannot follow the meaning of a sentence that

exceeds 50 words in length. Yet, the Tax Code has sentences that meander to over 500. If no one would say that the terms of the tax code were plain, the Bankruptcy Code is even more abstruse. The phrase that the Hamblin court construed was a sentence-fragment embedded in a sentence that exceeds 1,000 words, and that disallows a bankruptcy discharge in eighteen enumerated categories of loans, including those,

(F)or an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtors dependents; (emphasis added)\(^\text{59}\)

The language is not only long and convoluted, but uses a technical vocabulary that prevents any reading without reconstruction. Where the ordinary person speaks of “student loans,” the statute does not contain the term, but rather the terms “educational benefit overpayment” and “educational benefit.” The former phrase seems to be missing a comma after “benefit” so that it should read: “educational benefit, overpayment or loan made...” Without the comma, it seems that “educational benefit” only describes a particular type of “overpayment” that is guaranteed by a government or non-profit institution. If, on the other hand, there is not a comma missing, it raises the question both of what is meant by an “educational benefit overpayment,” and whether the subsequent reference to a “loan made” and guaranteed by a government or nonprofit institution must also be a loan for an

educational benefit, since if there is no comma and “educational benefit” modifies “overpayment,” it seems unlikely that it could also modify “loan made.” The second use of “educational benefit” seems to clear up the problem and apply the exception to any loan given for an educational benefit, scholarship, or stipend. Nonetheless, the second use is in a clause that is preceded by the word “or,” and leaves it unclear as to whether such educational benefits, scholarships, or stipends, are subject to the conditions given two clauses earlier, namely that they be guaranteed by a governmental unit or nonprofit institution. If that is not the case, then any loan by any lender given for an educational benefit is excluded from discharge. This could be extended to apply to ordinary bank loans obtained by parents to pay for the school supplies of elementary school students—it would be a loan for an educational benefit. Since Mrs. Hamblin’s loan was guaranteed by a governmental unit, the exclusion of her loan would seem to be more properly stated in the first usage of educational benefit—in which case the comma must be inserted by interpretation—though the second usage could apply.

While courts are adept at dealing with such issues, and may have no problem using the foregoing language to exclude debts like Mrs. Hamblin’s from the discharge if they could define “educational benefit” to apply to any loan given for the purpose of financing an education, the language is still not of the type found in ordinary plain speech. Therefore, it may be reasonable to decide the case against the debtor, but it is not reasonable to do it on the grounds that the statute is plain. The court, to paraphrase its own critique of the minority of courts above seemed to have found
“that the complex, specialized, and obscure language of the statute was plain,” and it did so by using a highly specialized, unusual, and non-intuitive meaning of the word “plain.”

Conclusion

Despite the familiarity of the dictionary, the Johnsonian insights into meaning and usage remain largely unknown or underappreciated. Denotative definitions continue to be described as “literal,” “obvious,” or “natural,” as though these meanings are somehow attached to words. The term “dictionary definition” is still employed, even in contemporary accounts of semiotics, to cover just such instances of usage. The Plain Language Rule establishes the error as a principle of legal interpretation by requiring courts to take the plain, natural, or literal meaning of a word or text, except in extraordinary circumstances. This cannot be done, however, because such meanings do not exist. Rather, the experience of a plain meaning is a subjective phenomenon based on the interpreter’s general experiences with particular words and contexts. The dictate to take the plain meaning of a text, then, amounts to nothing more than a counsel to lawyers and judges to take the first

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60 As seen above, plain language courts usually equate “plainness” with a lack of ambiguity in a text, or univocality. WEBSTER’S THIRD lists 24 meanings of the adjective form of “plain,” and the AMERICAN HERITAGE DICTIONARY (4th ed., 2000) lists 15 meanings, but nowhere does either list “unambiguous” as one of the recognized meanings. BLACK’S LAW DICTIONARY (6th ed., 1990) does not define the word, so that the definition appears to be peculiar to the specialized, technical, and esoteric usage of plain language courts.

61 CHANDLER 140. (“in the case of linguistic signs, the denotative meaning is what the dictionary attempts to provide.”).
presumed meaning-equivalent that pops into their heads. Lexicographers, literary critics, and philosophers have warned the public of the inappropriateness of such facile interpretations. These warnings are reflected in the following statement from the Preface to *Webster’s Third*:

> A dictionary demands of its user much understanding and no one person can understand all of it. Therefore there is no limit to the possibilities for clarification. Somewhat paradoxically a user of a dictionary benefits in proportion to his effort and knowledge, and his contribution is an essential part of the process of understanding even though it may involve only a willingness to look up a few additional words.\(^{62}\)

In other words, the dictionary helps the informed reader, one who by definition makes use of a wealth of extrinsic material, to deliberate over the fitness of particular meanings and does not assign them from on high. The “unlimited possibilities for clarification” to which the passage refers indicates a process that is more subtle than simply looking for a “dictionary definition.” One cannot simply reach down and pluck out definitions the way Scylla reached down and plucked out sailors. With this in mind, the research of the Supreme Court of the United States directed toward finding the meaning of the word “use” by taking a single definition without comment lacks nuance. And, the deliberation over the terms encountered by the *Riggs* and *Hamblin* courts hardly gets started. The former assumed that it already knew all subtleties of the term “beneficiary,” and the latter limited its definition of an “educational benefit” to a sum of money received at a banker’s office. But premature termination of deliberation is encouraged by the Plain Language Rule, which preserves interpretive spontaneity.

\(^{62}\) *Webster’s Third* at 4a.
by eliminating precisely those elements that are essential to understanding. The plain language view that extrinsic matters must be eliminated from interpretation strips language of all meaning, and leaves nothing but an empty signifier. There is no reason in such a case why the court should pick one listed meaning rather than another. This empty X can then be made to mean anything whatsoever so long as the interpreter is not aware of contributing to the process.

Unfortunately, when decrees are issued based on such random assumptions, they have the same effect on the parties as those reached through a process of deliberation. Thus, the minority in the Riggs court was ready to give the victim’s property to his murderer, Mr. Smith suffered a prolonged imprisonment, and one of Mrs. Hamblin’s debts was excluded from the bankruptcy discharge. Such cases, however, cannot properly be said to decide the legal questions put before their respective courts because they never address the issues presented. Despite the fact that it ultimately denied the murderer’s claim to his victim’s property, the Riggs court dodged the issue of whether or not a murderer could be a beneficiary. It assumed that the law allowed such a travesty, and proceeded to control and modify the unjust effect. The Smith court evaded the question of whether the defendant had used a firearm in the commission of a drug trafficking offence. It selected one definition of the word “used” and found that it could be applied to the events, but it never deliberated the appropriateness of the selection. Finally, the Hamblin court dissembled under a guise of plain language when called upon to decide whether the parent of a student is excluded from discharge by the Bankruptcy Code. The court only decided that one
reading was plain and that the statute was unambiguous; but that was only to say that it was clear to the court there was no argument for the other side: If the statute was unambiguous, there could be nothing to be said in favor of an aberrant reading; and if nothing could be said, nothing could be considered. Plain language principles, therefore, prevent courts from reaching the very issues presented to them. Fortunately, though their decrees may be distressful, harsh, or unfair to their immediate litigants, their effect upon the interpretive texture of the law should be reduced once their nature is understood. Whether their results are unjust, as in the literal construction in the Riggs case, harsh, as in the Smith case, or counterintuitive, as in the Hamblin case, they should be accorded no more precedential value than a single unlucky roll of the dice in an ongoing game of chance.