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William Baude

Ryan D. Doerfler

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The (Not So) Plain Meaning Rule

William Baude
UNIVERSITY OF CHICAGO

Ryan David Doerfler
UNIVERSITY OF PENNSYLVANIA

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The (Not So) Plain Meaning Rule

William Baude & Ryan Doerfler*

84 U. CHI. L. REV. (forthcoming 2017)

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Many tenets of statutory interpretation take a peculiar form. They allow consideration of outside information – legislative history, practical consequences, the statute's title, etc. – but *only* if the statute's text[1] is unclear or ambiguous. These tenets are often expressed as a variation of the "plain meaning rule." If the text's meaning is "plain," the other information can't be considered. If it's not plain, the information comes in.

On its surface, the rule has an intuitive appeal. It seems like a safe intermediate position between strict textualism and some form of all-things-considered eclecticism or pragmatism. But if we poke below the surface, we ought to see that the basic structure of the plain meaning rule is quite puzzling. In our

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* Neubauer Family Assistant Professor of Law, The University of Chicago Law School; and Assistant Professor of Law, University of Pennsylvania Law School. We appreciate helpful comments and criticisms from Larry Alexander, Samuel Bray, Eric Citron, Jonah Gelbach, Abbe Gluck, Sean Mirski, Eric Posner, Richard Re, Stephen Sachs, Fred Schauer, James Stern, David Strauss, Ilan Wurman, the participants in the Legislation Roundtable at Cardozo Law School, and the editors of the University of Chicago Law Review. We also appreciate excellent research assistance from Kelly Holt.

[1] Though, to be sure, considering 'just' the text requires attention to minimal information *about* the text (e.g., that it is a *legislative* text). *See, e.g.*, John Searle, *Literal Meaning*, 13 EKRENNTNIS 207 (1978).

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normal lives, in most contexts under the rules of evidence, and elsewhere, information is either useful or not. Information that is relevant shouldn't normally become irrelevant just because the text is clear. And vice versa, irrelevant information shouldn't become useful just because the text is less than clear.

This puzzling structure – "consider-only-in-case-of-ambiguity" – deserves investigation. In this essay we first explain the puzzle more formally, and then begin that investigation. It turns out that we can sketch some conditions under which this puzzling structure could be justified, for certain kinds of evidence. But nobody has shown that the plain meaning rule in fact meets these conditions, and we rather doubt that they could justify the plain meaning rule across the board. More importantly, we suspect that most interpreters have never even asked themselves the question.

Note that we do *not* take a position on whether one ought to be a textualist or an intentionalist or something else in the first place. That is of course "the big debate"[2] in statutory interpretation. Similarly, we take no position here on the correct theory of statutory "meaning."[3] This is not to deny that there are right answers to these questions. But the plain meaning rule attempts to transcend those debates, and our criticisms of it do too.

Textualists who think they have good reasons to ignore legislative history or the like should not automatically cave when the statute is ambiguous. Intentionalists who insist that the legislative history is relevant should not automatically discard it when the text by itself seems clear. The plain meaning rule asks both sides to surrender the courage of their convictions. That surrender has not been justified, and perhaps cannot be.

I. The Plain Meaning Rule

The plain meaning rule says that otherwise-relevant information about statutory meaning is forbidden when the statu-

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[2] William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 532 (2013); *see also* Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1241 (2006) (observing the "lively and ongoing academic debate over whether it is legitimate for courts to rely on extratextual sources when construing statutes").

[3] *See* Richard H. Fallon Jr, *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235 (2015); *see also* Frederick Schauer, *An Essay on Constitutional Language*, 29 UCLA L. REV. 797, 798 (1982).

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tory text is plain or unambiguous. To see the rule in action, we need not look far. Consider one of the Court's recent and entertaining statutory interpretation cases, *Yates v. United States*, where the Court split 4-1-4 on interpreting a provision of Sarbanes-Oxley, now codified at 18 U.S.C. § 1519.[4] Did Section 1519's prohibition on impeding a federal investigation by "knowingly ... conceal[ing] ... any record, document, or tangible object"[5] apply to a boat captain who threw undersized fish back into the sea? In particular, can "tangible object" include things that are quite different from records and documents? Five Justices said no; four said yes.

There is much to be said about the case,[6] but for our purposes the noteworthy exchange was about the relevance of the statute's title. The plurality that narrowly construed the statute started by pointing out that both the provision's caption[7] and the title of its section[8] of the statute mentioned only "records" and "documents." While "not commanding," the majority said, these headings "supply clues" that tangible object should be construed very narrowly.[9] Justice Alito, who concurred in the judgment and provided the fifth vote for the defendant, similarly noted that his view was "influenced by § 1519's title."[10]

Justice Kagan wrote the dissent. She replied that the Court had never before "relied on a title to override the law's clear terms."[11] Instead, she invoked "'the wise rule that the title of a statute and the heading of a section *cannot* limit the plain meaning of the text.'"[12] This is an instance of the plain meaning

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[4] Yates v. United States, 135 S. Ct. 1074 (2015)

[5] 18 U.S.C. § 1519. We might be accused of stacking the deck in the government's favor by omitting the other verbs from our quotation, see *id*. at 1086 (plurality); *id*. at 1089-1090 (Alito, J., concurring) (relying on the verbs) but we're not actually concerned here with the many other interpretive moves in *Yates*, so we assure you they are omitted without prejudice.

[6] *See, e.g.*, Tobias A. Dorsey, *Some Reflections on Yates and the Statutes We Threw Away*, 18 GREEN BAG 2D 377 (2015); Richard M. Re, *The New Holy Trinity*, 18 GREEN BAG 2D 407, 411-412 (2015).

[7] 18 U.S.C. § 1519 ("Destruction, alteration, or falsification of records in Federal investigations and bankruptcy.").

[8] Pub. L. 107-204, 116 Stat. 745, 800 ("Sec. 802. Criminal penalties for altering documents.").

[9] *Yates*, 135 S. Ct. at 1083 (plurality).

[10] *Id.* at 1090 (Alito, J., concurring).

[11] *Id.* at 1094 (Kagan, J., dissenting).

[12] *Id.* at 1094 (quoting Trainmen v. Baltimore & Ohio R. Co., 331 U.S. 519, 528–529 (1947)) (emphasis added); *see also Trainmen*, 331 U.S. at 528 ("Where the text is complicated and prolific, headings and titles can do no more than indicate the provisions in a most general manner; to attempt to refer to each specific provision would often be ungainly as well as useless.").

rule, whose key feature is to deny the relevance of other interpretive data if the text's meaning is "plain" or "clear."

Invocations of the rule are common. The same term, in *King v. Burwell*, the Court dutifully reported that "[i]f the statutory language is plain, we must enforce it according to its terms."[13]

Often the rule is invoked to forbid reliance on a specific kind of source. The statutory titles ignored by Justice Kagan's opinion in *Yates* may seem like a minor point, but consider these perhaps more significant examples:

Legislative History. Despite its critics, the Supreme Court as a whole has not categorically foresworn the use of legislative history. In some opinions, however, it *has* said that legislative history can be considered only if the text is ambiguous or unclear. In *TVA v. Hill*, for instance, the Court said that "When confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history as a guide to its meaning."[14] Similarly, in its more recent decision in *United States v. Woods*, the Court dismissed legislative history arguments with a footnote saying: "We do not consider Woods' arguments based on legislative history. Whether or not legislative history is ever relevant, it need not be consulted when, as here, the statutory text is unambiguous."[15] Similar invocations of the rule are plentiful.[16]

Policy Considerations. Once again, the Court has certainly deemed the practical consequences or policy implications of interpretation to be relevant in some cases. But it has also said that they need not be considered when the meaning of the text is plain. For example, in *Carcieri v. Salazar*, the Court concluded that it "need not consider ... competing policy views," in interpreting the word "now" because "Congress' use of the word 'now' ... speaks for itself."[17] Similarly, in *Sebelius v. Cloer* the Court turned aside the government's arguments that the Vaccine Act "should be construed so as to minimize complex and costly fees litigation" concluding that such "policy arguments come into

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[13] King v. Burwell, 135 S. Ct. 2480, 2489 (2015). As you probably know, the Court found that the language was not plain.

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

[15] United States v. Woods, 134 S.Ct. 557 (2013).

[16] See, e.g., Milner v. Department of the Navy, 131 S.Ct. 1259, 1266 (2011); United States v. Lamie, 540 U.S. 533, 534 (2004); Barnhart v. Sigmon Coal, 534 U.S. 438, 457 (2002).

[17] Carcieri v. Salazar, 555 U.S. 379, 392-393 (2009)

play only to the extent that the Vaccine Act is ambiguous,"[18] which it was not.

Practice. The plain meaning rule may also operate to forbid invocations of practice. For instance, in *United States v. Ron Pair Enterprises*, the Court concluded that "pre-Code practice" was relevant to interpreting the Bankruptcy Code only if the text was not clear.[19] And in *Milner v. Department of the Navy*, the Court rejected the government's and dissent's invocation of 30 years of lower court practice "even if true, because we have no warrant to ignore clear statutory language on the ground that other courts have done so."[20]

Substantive Canons. Several of the so-called "substantive canons" of interpretation turn on whether the statute is ambiguous, and so they present instances of the plain meaning rule as well.[21] For instance, the Court has rejected an "effort to avoid the plain meaning of the statute," by "invok[ing] the canon of constitutional avoidance" because "that canon 'has no application in the absence of statutory ambiguity.'"[22] The same may be true of a range of other substantive canons.[23]

All of them. Other times, the rule is invoked more categorically, as in this oft-quoted statement in *Connecticut National Bank v. Germain*:

> In interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.[24]

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[18] 133 S.Ct. 1886, 1895 (2013) (quoting Government's Brief at 28).
[19] 489 U.S. 243, 245 (1989).
[20] Milner, 131 S.Ct, at 1268.
[21] We limit our consideration to the extent that the substantive considerations tied to those canons are evidence of statutory *meaning*, and not policy tools used to fill statutory *gaps*. *See generally* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 105-107 (2010).
[22] Dep't of Housing & Urban Development v. Rucker, 535 U.S. 125, 134 (2002) (citing United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483, 494 (2001)).
[23] *See generally* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2146-2155 (2016).
[24] Connecticut Nat. Bank v. Germain, 503 U.S. 249, 253-54 (1992) (internal citations and quotation marks omitted). *See also* John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 127 (2011) (suggesting that "the Court's

Again, in each instance the role of the plain meaning rule is not to categorically rule these sources in or out. Rather, it is to make them *contingently* irrelevant. The category of extraneous information is not considered if the statute is plain, but can be if it is not plain.

Two notes of clarification before proceeding. First, we should note that the word "plain" is (ironically) itself ambiguous. Courts and scholars sometimes use the phrase "plain meaning" to denote something like *ordinary* meaning—i.e., the normal meaning, or the meaning one would normally attribute to those words given little information about their context.[25] The ordinary meaning is "plain" in the sense of "plain vanilla." But the plain meaning rule uses the phrase in a different sense, to denote *obvious* meaning—i.e., the meaning that is clear.[26] Here, meaning is "plain" in the sense of "plain to view." Again, the "plain meaning rule" uses this latter sense of "plain" – the meaning that is clear or obvious.

Second, while the "rule" is asserted in plenty of cases and has been defended by Justice Scalia and Bryan Garner as "essentially sound,"[27] we don't mean to assert that the plain meaning rule is inviolably observed. For despite the rule that plain text is supposed to be preclusive the Court has also said that the "meaning—or ambiguity—of certain words or phrases may only

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new approach …. is perhaps best captured by the Court's oft-cited opinion in *Connecticut National Bank v. Germain*.").

[25] *See, e.g.*, Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 251; see also David A. Strauss, *Why Plain Meaning?*, 72 NOTRE DAME L. REV. 1565, 1565 (1997) (treating "'ordinary'" and "'plain' meaning" as "interchangeable"). As Fred Schauer observes, the "plainness" of statutory meaning in this sense is complicated by the question of whether statutory language is ordinary or technical. *See* Frederick Schauer, *Is Law A Technical Language?*, 52 SAN DIEGO L. REV. 501 (2015). To the extent that statutory language consists of "terms of art" familiar to lawyers, such language might have a "plain" *technical* meaning—the meaning *a lawyer* would normally attribute to the words upon knowing they were uttered by another lawyer.

[26] *See, e.g.*, United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 242 (1989) ("The language and punctuation Congress used *cannot be read in any other way*. By the *plain* language of the statute, the two types of recovery are distinct." (emphasis added)).

[27] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 436 (2012). Scalia & Garner acknowledge the difficulty of determining what is unambiguous. *See infra* note 75 & more generally the surrounding text.

become evident when placed in context,"[28] and context is sometimes conceived quite expansively. Indeed, William Eskridge argues that despite invocations of the plain meaning rule, "In a significant number of cases, the Court has pretty much admitted that it was displacing plain meaning with apparent legislative intent or purpose gleaned from legislative history."[29]

But our point stands regardless of whether the plain meaning rule really is a "rule" or merely a common trope. Our inquiry here is fundamentally normative – when does this kind of contingent irrelevance *make sense*? As we hope to show, the answer to that question is far trickier than most everybody seems to assume.

II. The Puzzle

Upon closer examination, there is something puzzling about the plain meaning rule. There are reasons to consider all pertinent information. There are reasons to categorically discard certain kinds of pertinent information. But why consider it only *sometimes*?

For examples of considering all pertinent information, think of federal agencies, which "must consider" all "significant comments" received during notice-and-comment rulemaking,[30] even if they were very confident in their proposed rule in the first place. The Environmental Protection Agency, likewise, must consider cost when deciding whether to regulate power plants, no matter the degree of non-economic concern.[31] Along the same lines, Jeremy Bentham famously advocated a system of "free proof," or admission of all logically relevant evidence, on the grounds that it "was simply ordinary epistemology applied to legal matters."[32]

Conversely, to Bentham's likely dismay, the law is also full of cases where information is excluded, whether because it is intrinsically irrelevant or normatively problematic or too likely

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[28] Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000).

[29] William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 628 (1990).

[30] *See* Perez v. Mortgage Bankers Ass'n, 135 S.Ct. 1199, 1203 (2015) (citing Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971)).

[31] *See* Michigan v. E.P.A., 135 S. Ct. 2699 (2015)

[32] Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 169 (2006) (Discussing JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE (1827)).

to mislead.[33] Federal trial courts, for example, exclude most evidence of character or past acts.[34] And federal anti-discrimination laws prohibit employers from basing employment decisions on an applicant's race, religion, or sex.[35]

These categorical exclusions are easy for most to accept. But why make otherwise relevant information only *conditionally* admissible? If legislative history is bad evidence of statutory meaning, shouldn't it be ignored both when the meaning is plain and when it is less than clear? Conversely, if it is good evidence, shouldn't we always at least *look* at it, even when the text seems pretty clear on its own? Why should legislative history's admissibility depend on the evidence we get from another source, like the text?

As we will explain below, one might be able to construct a justification for considering pertinent information only sometimes—but such a limit makes sense only if that 'sometimes' is connected to some epistemic or other practical end. What makes little sense, is a blanket prohibition against considering pertinent non-textual information if plain statutory language is "clear." This is especially so if the courts' main concern is interpretive *accuracy*—i.e., getting it right. Courts justify adherence to the plain meaning rule as a way to avoid interpretive mistakes, but the rule seems ill-suited to the task.

To see the concern more formally, suppose that plain-language clarity is *factive*, i.e. that, if it is "clear" that some statutory language means that *p*, then that language means that *p* in fact. So understood, to say that statutory language's meaning is "clear" is akin to saying that its meaning is *known*—if, after all, a court knows that some statutory language means that *p*, then that language in fact means that *p*.[36] As a linguistic matter, this is a plausible analysis of "clear." The problem is that, if this is what courts mean by "clear," then the plain meaning rule does no work with respect to accuracy. If a court *knows* that some statutory language means that *p* just on the basis of the plain text, then considering, say, legislative history is pointless but also harmless. This is because the court knows, in turn, that the corresponding legislative history is misleading to the

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[33] *Cf*. Schauer, *supra* note 32, at 194 ("[T]he idea of Free Proof may have more cognitive and epistemic disadvantages than Bentham thought almost two centuries ago. . . .").
[34] Fed. R. Evid. 404.
[35] 42 U.S.C. § 2000e-2(a)(1).
[36] *See* TIMOTHY WILLIAMSON, KNOWLEDGE AND ITS LIMITS 34 (2000).

extent that it indicates the statutory language means something other than that *p*.

Suppose then that courts in this area are, instead, speaking loosely, and that, when a court says that statutory language is "clear," what it means is that it has a high degree of confidence in a particular reading just on the basis of the text. On this understanding, there are two possibilities. The first possibility is that the court has such high confidence that, in principle, nothing in the legislative history could dissuade it. But, if this is the case, then the analysis is the same as above: considering legislative history is pointless but harmless. The second possibility is that, in principle, something in the legislative history could dissuade the court. If this is the case, however, then refusal to consider legislative history amounts to something like willful ignorance. In the case of the second possibility, the prohibitions at issue do have an effect, but the effect is mischievous.[37] As Judge Friendly observed, it is "[i]llogical … to hold that a 'plain meaning' shut[s] off access to the very materials that might show it not to have been plain at all."[38]

Implicit in all of this, of course, is the assumption that the non-textual evidence at issue is neither intrinsically irrelevant nor more likely than not to mislead. If courts may consider legislative history if the plain statutory text is *not* clear, then legislative history sheds light on interpretive questions. But it is easy to see how the same point works for those who categorically reject using legislative history because it is "counterproductive" or error-prone.[39] If those concerns make legislative history so unre-

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[37] This is what differentiates the "plain meaning rule" invoked in the cases we cite from a more sensible "presumption" in favor of the plain meaning that "is subject to rebuttal," as described by John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2400 (2003). It also differentiates it from rules of cumulativeness, or "marginal probative value," *e.g.*, Old Chief v. United States, 519 U.S. 172, 185 (1997).

[38] Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, *in* BENCHMARKS 196, 206 (1967); *cf.* Pac. Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co., 69 Cal. 2d 33, 39 (1968) (Traynor, C.J.) ("The exclusion of parol evidence regarding such circumstances merely because the words do not *appear* ambiguous to the reader can easily lead to the attribution to a written instrument of a meaning that was never intended.") (emphasis added).

[39] *See, e.g.*, Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1838 (1998) (arguing that "problems of judicial competence create grave risks that judicial resort to legislative history to gauge legislative intent will prove counterproductive"); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE

liable that it shouldn't even be considered when the text is clear, the concerns don't go way just because the text is less clear. Better to soldier on with one's best estimate of the text's meaning, even if uncertain, then to introduce information that is more misleading than informative.

Our overall point is that the relevance of information is not normally conditional. Either legislative history, or statutory titles, or what-have-you, tells us something relevant about meaning or they don't. But whether they do or don't, that doesn't suddenly change when the text is clear. The puzzle is thus why courts would ignore non-textual evidence, but only when textual evidence points strongly in one direction.

III. Possible Justifications

Having said all of that, we can imagine some justifications for some applications of the plain meaning rule – i.e. some cases where the conditional relevance of non-textual evidence could make sense. But even so, we stress that these justifications are both conditional and incomplete. They are conditional because they are merely an outline of the circumstances under which a plain-meaning threshold might make sense. We don't think adherents to the rule have shown that those circumstances actually obtain, and we are not sure that they do. They are incomplete because, even if those circumstances do obtain in some classes of cases, they are unlikely to result in an across-the-board version of the plain meaning rule.

A. Cost-Efficiency

The plain meaning rule might make sense for evidence that is probative but also expensive to collect or consider.

To illustrate, suppose that considering information A is low-cost and easy whereas considering information B is expensive and cumbersome. Even if A and B are equally reliable, it might make sense, on a cost-efficiency rationale, to start by considering A, considering B only if A leaves one uncertain. After all, if considering A is cheap and good enough for practical pur-

LAW 3, 31-32 (Amy Gutmann ed., 1997) ("[T]he use of legislative history . . . is much more likely to produce a false or contrived legislative intent than a genuine one.").

poses, why incur the expense of considering B? The expected marginal benefit, after all, is low, and the cost high.[40]

Less abstractly, consider in-person apartment viewing. Seeing an apartment in person is a reliable way of assessing its suitability. It also takes a great deal of time and energy. For that reason, one will often reject an apartment just on the basis of pictures or information contained in a description (e.g., square footage, floor, etc.). Because one can consider such information quickly and from the comfort of one's couch, driving across town is often simply not worth it.[41] If an apartment is a clear 'no' based just on the ad, why bother? If, by contrast, the apartment is a 'maybe,' it is plausibly worth scheduling a visit.

Note that a cost-efficiency story for the plain meaning rule is still a little tricky. In the apartment example above, many people might find it less intuitive to accept an apartment and sign a lease without ever bothering to see it in person, because the square footage and price are so perfect. Yet the plain meaning rule asks interpreters to ignore extraneous information both if the plain meaning of the statute is the equivalent of "yes" and if it is the equivalent of "no." That may be a tougher sell.

Moreover, the cost-efficiency justification for the plain meaning rule would have to justify the *conditional* exclusion of evidence. Some scholars have argued, for example, that most non-textual evidence should be categorically excluded in part on cost-efficiency grounds.[42] That kind of categorical argument, of course, is too strong to yield the plain meaning rule. Rather, a cost-efficiency justification for the plain meaning rule would require a particular ratio of costs and accuracies such that the extra evidence is too costly when A is clear, but not *so* costly that it is prohibitive when A is unclear. Again, this is *possible*, but

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[40] *See, e.g.*, Remco Heeseen, *How Much Evidence Should One Collect?*, 172 PHIL. STUD. 2299 (2015) (discussing the trade-off between accuracy and cost in the context of scientific research); *cf.* JOSEPH RAZ, PRACTICAL REASON AND NORMS 60 (1990) (observing that "[f]act-finding and evaluating the different reasons for action consume time and effort," and that these costs "will often outweigh the marginal benefits" that "ensue from engaging in a complete assessment of the situation on its merits").

[41] *See* Tim Logan, *Apps, Sites Aim to Transform Apartment Rental Listings*, L.A. TIMES (Nov. 30, 2014), http://www.latimes.com/business/la-fi-rental-marketing-20141130-story.html; Jonah Bromwich, *Apartment Hunting With a Mobile App*, N.Y. TIMES (Mar. 14, 2014), http://www.nytimes.com/2014/03/16/nyregion/apartment-hunting-with-a-mobile-app.html.

[42] *See generally* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 189-205 (2006).

would require a more precise quantification of the decision costs of considering different kinds of evidence than we have seen.[43]

A cost-efficiency justification for the plain meaning rule is at least conceivable for some classes of evidence, but for others it is not even plausible. Legislative history, for example, might be time-consuming for courts to consider.[44] The relevant documents are often spread out rather than collected in a single place, and even once they are collected it can take some time and mental effort to put them in their proper context – a skill at which many lawyers and law students are not particularly good.[45] Thus, even assuming that legislative history is probative with respect to statutory meaning, refusing to consider such history if the text is "clear" might make sense for already overburdened courts. Again, if considering just the text is cheap and good enough for practical purposes, maybe it is sometimes better to move on to the next case rather than to engage in additional, expensive investigation.[46] In this respect, legislative history contrasts sharply with, say, titles or section headings, which are easy for courts to consider. It is therefore hard to imagine any cost-exclusion justification for excluding those kinds of materials.[47]

B. Bias

[43] *Cf*. Vermeule, *supra* note 42, at 159 ("[S]o little work has been done to assess the empirical consequences of interpretive choice.").

[44] *See* Scalia, *supra* note 39, at 36 ("The most immediate and tangible change from the abandonment of legislative history would effect is this: Judges, lawyers, and clients will be saved an enormous amount of time and expense.").

[45] *See* Vermeule, *supra* note 39; *see also* Frederick Schauer, *On Informationally Disabled Courts*, 143 DAEDALUS 105 (2014); *but see* Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 91, 134 (2012) (arguing that "no one should try to understand legislative history without understanding Congress's own rules" but then asking: "Is it really 'too complex' or difficult for judges and academics to learn a dozen congressional rules?").

[46] Vermeule notes this possibility, *supra* note 42, at 195 ("intermediate solutions include a rule … that consults legislative history only if the statute lacks a plain meaning"). But he is skeptical, *id*. ("in practice such intermediate solutions prove highly unstable over any extended period and inevitably dissolve back into plenary consideration of legislative history.").

[47] We also note that costs might vary over time. The cost of considering other statutes, for example, has decreased significantly with the development of electronic search tools. *See* Ellie Margolis & Kristen E. Murray, *Say Goodbye to the Books: Information Literacy As the New Legal Research Paradigm*, 38 U. DAYTON L. REV. 117, 121-26 (2012).

Perhaps the plain meaning rule could make sense for certain kinds of evidence that has both potential value but also a hard-to-assess sort of bias.

To describe this formally, imagine that I can consult information A and/or B on some question. I know that A is 90% reliable and that B is only 60% reliable. On the other hand, I also know that once I consult B there is a substantial risk that I will be incapable of rationally factoring in A's response. Somehow source B is so powerful or charismatic that I will start convincing myself to prefer it to A, or start using it to reinterpret A's response—*even though A is more reliable than B!*

In such a situation, something like the plain meaning rule would be a rational result: consult A first, and consult B only if A is unsure. This is better than *always* consulting both, because I avoid the biasing effect of B in cases where A is more likely to be correct. And it is probably better than *never* consulting B because I avoid "throwing away" the relevant information of B in cases where A is unsure.

Now even in this scenario, it's not certain that consulting B is a good idea, for two reasons. First, it's possible that there could be moral objections to the form of bias at issue in B. (As we'll discuss, you could imagine that B involves demographic stereotypes or political partisanship, for example.) If so, one might actually prefer never to use B, even at the cost of accuracy. Second, even in cases where A is unsure, A still might yield *some* information. True equipoise is rare.[48] So considering B where A is unsure still risks overpowering the more-reliable A with the less-reliable B. It's just that this is one of A's less reliable moments, so the risk is smaller.

To describe this much less formally, think of a job interview. One might well think that a candidate's suitability for a job is best assessed by reading his or her resume. One might also think that in-person interviews are a useful, but secondary, source of information about a candidate's suitability. On the other hand, in-person interviews can introduce subconscious biases, favoring candidates who are more attractive, who have particular demographic characteristics, etc.[49] And yet because

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[48] *Cf.* O'Neal v. McAninch, 513 U.S. 432, 435 (1995).

[49] *See e.g.*, Regina Pingitore, Berard L. Dugoni, R. Scott Tindale & Bonnie Spring, *Bias Against Overweight Job Applicants in a Simulated Employment Interview*, 79 J. APP. PSYCH. 909 (1994); David C. Gilmore, Terry A. Beehr & Kevin G. Love, *Effects of Applicant Sex, Applicant Physical Attractiveness, Type of Rater, and Type of Job on Interview Decisions*, 59 J. OCCUPATIONAL PSYCH. 103 (1986); Comila Shahani, Robert L. Dipboye & Thomas M. Gehr-

the biases are subconscious one may not be able to fully correct for them either. Indeed, one might worry that the irrelevant factors one learns from the interview will color one's view of the paper record in a way that one can't in good faith disentangle.[50]

In that case, it seems quite sensible for an employer to decide that candidates with very strong or very weak paper records will be in or out on that basis alone. The philosophy department at Princeton, for example, does entry-level hiring without conducting in-person interviews for these and similar reasons.[51] (Or for certain jobs instead of a paper record one might have a blind audition, as orchestras have discovered.)[52] One might still resort to in-person interviews as a tiebreaker, but only in cases where the resumes or other blind qualifications are indeterminate. This obtains useful information while reducing bias.

Is this too far-fetched to be helpful to the plain-meaning rule? We're not so sure. It seems at least conceivable to us that something like the practical consequences of a statutory interpretation might fit that model. Judges might well be committed to the view that practical consequences are relevant but of secondary importance to more standard legal materials like text and so on. On the other hand, judges might also worry that once they take into account practical considerations, it is hard to think clearly about anything else, and hard to resist the urge to start reinterpreting the standard materials to match the consequences the judges want to see. Alternatively, even if judges are confident in their *own* ability to weight practical consequences appropriately, those same judges might worry about the ability of *other* judges to do the same.

If this bias is worrisome – and it might be especially worrisome if the practical considerations are ones with a deeply contested partisan valence – then we can see why judges might want the plain meaning rule to deal with it. Blind yourself to practical consequences in a range of cases where the text is clear and therefore the likelihood of changing the outcome is small relative to the likelihood of bias. But consider practical conse-

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lein, *Attractiveness Bias in the Interview: Exploring the Boundaries of an Effect*, 14 BASIC AND APP. SOCIAL PSYCH. 317 (1993).

[50] *See generally* David Hausman, Note, *How Congress Could Reduce Job Discrimination by Promoting Anonymous Hiring*, 64 STAN. L. REV. 1343 (2012).

[51] *See* Brian Leiter, *Farewell to the Eastern APA, Redux?*, THE LEITER REPORTS: A PHILOSOPHY BLOG (Sept. 13, 2011), http://leiterreports.typepad.com/blog/2011/09/farewell-to-the-eastern-apa-redux.html.

[52] Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 AMERICAN ECONOMIC REVIEW 715 (2000).

quences where the text is unclear, and the information provided by those consequences is more important.

But again, even so, this bias justification for the plain meaning rule is tricky. The biasing information has to be of a specific type that slightly defies rational thought. And it has to be useful enough to be worth accepting that bias in some cases, and yet not *so* useful that it is worth accepting that bias in all cases.[53] That *might* happen to be true of something like practical consequences, but we don't really know for sure.

At the same time, we are fairly confident that most other instances of the plain meaning rule – the title, statutory context, legislative history, etc. – could not be justified this way. Judges are likely capable of rationally counting or discounting this material as appropriate. Or at least, they are as capable of dealing rationally with this material as they are with anything else.

C. Legal Convention

An alternative justification, of sorts, might proceed in a more legalistic way: Judges should follow the plain meaning rule because it's a rule, and judges should follow the rules. We recognize that this argument sounds hilariously circular – where did the rule *come from*? – but we think of a version of it can be made to work.

One way is by focusing on the "law of interpretation." The first step is to accept that rules of statutory interpretation can be set by law, in which case they need not be justified on first-order normative grounds. (Judges should follow the rules of criminal procedure, one might say, not because the rules are necessarily justified on first principles but because judges have assumed an obligation to follow the rules.) The second step is to accept that those rules can also be established by *unwritten law*, judicial custom that we often call common law.[54]

Under this argument, maybe the plain-meaning rule is simply a common-law rule of statutory interpretation. It might not make perfect logical sense, but judges should apply it just as much other logically imperfect common-law rules.

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[53] We would add that this justification is even harder to sustain if the plain-meaning threshhold is itself subject to bias, as some have argued. See sources cited infra notes 66-75.

[54] For an extended argument in defense of these claims, see William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. (forthcoming 2017) available at http://ssrn.com/abstract=2783398.

There's another variation of this argument: Even if one doesn't accept that unwritten law can create binding rules of interpretation (though one should!), one could arrive at a version of this argument through expectations. Perhaps Congress knows about the plain-meaning rule and intends (or means) that its work should be interpreted through the rule.

These justifications seem logically possible to us, but we still have doubts about them. As to the second, expectations-based version of the argument, recent empirical research by Abbe Gluck and Lisa Bressman has suggested that Congress does not know very much about the Supreme Court's statutory interpretation rules, suggesting that we should be hesitant to justify rules purely on the basis of expectations.[55] To be sure, the plain meaning rule might turn out to be an exception. The Gluck and Bressman study does report that when asked to name an "interpretive rule[] or convention[] in particular that you think that the U.S. Supreme Court consistently follows," staffers did frequently come up with "the plain meaning rule" by name.[56] But because of the strictly consistent empirical method of the study, we do not know if the respondents specifically had in mind the consider-only-in-case-of-ambiguity version of the plain meaning rule, or instead associated "plain" with "ordinary,"[57] or something else.[58]

Similarly, we doubt that the plain meaning rule is sufficiently well established to qualify as a binding rule of the unwritten law of interpretation. While such rules don't depend on Congress's affirmatively invoking them,[59] judicial invocations of the plain meaning rule are sufficiently incoherent and inconsistent that we doubt that the rule qualifies. It is more plausible, however, that some limited instances of the plain meaning rule could be part of the law of interpretation – for instance one of us has argued that this is the best way to judge the "substantive canons" of interpretation.[60]

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[55] *See generally* Abbe Gluck & Lisa Bressman, *Statutory Interpretation from the Inside – an Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN L. REV. 901 (2013); Lisa Bressman & Abbe Gluck, *Statutory Interpretation from the Inside – an Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN L. REV. 725 (2014).

[56] *See* Gluck & Bressman, Part I, *supra* note 55, at 995 n. 340 (2013); see also *Statutory Interpretation from the Inside: Methods Appendix*, at 40.

[57] *Supra* note 25 and accompanying text.

[58] *See* e-mail from Abbe Gluck to William Baude (Jan. 21, 2016).

[59] Baude & Sachs, *supra* note 54, at 36.

[60] *Id*. at 53-54.

In any event, even if one of these convention-based justifications for the plain ruling did hold, it would be a justification of a limited sort. It would justify judges' invoking and applying the rule now, but it would tell us little about whether we ought to change the convention going forward, or about whether we ought to replicate it when implementing authoritative rules of interpretation in other contexts. Indeed, if one accepts our other normative doubts about the plain meaning rule, then they provide reason to approach these conventions with a wary eye.

D. Public-Facing Explanation

It's also possible that there's a difference between the court's own reasoning process and the reasoning process it presents to the audience of its opinions. Or to put a finer point on it, maybe the plain meaning doctrine is a public lie, or more generously, an oversimplification.[61] The court does in fact consider all of the evidence but it doesn't want *the reader* to do so because it doesn't trust the reader to weigh the evidence accurately.

For instance, when interpreting a statute maybe a Justice really does consider the title of the statute, or the legislative history, even when the text seems plain to that Justice. (Indeed, one would often have to go out of one's way not to consider it, and we doubt that Justice Kagan gets mad at her clerks if they present her with information outside of the text.)[62] The Justices thus don't think those things are really *irrelevant*, the same way they might think that a litigant's race or criminal history are irrelevant.[63] At the same time, they want to encourage the reader not to worry himself or herself about them.

Under this justification, then, it's not actually true that outside information is ignored when the meaning is plain. Rather, the justices think that the outside information will change the purely textual result only in an unusual case, and when the information doesn't change the result, it is better to pretend that it *couldn't* have changed the result. In other words the Court considers both text and other materials, but in cases where the

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[61] *Cf*. Return of the Jedi (Lucasfilm 1983) ("So, what I told you was true . . . from a certain point of view.").

[62] Indeed, in several cases where the Court invokes the plain meaning rule, it has gone on to discuss the evidence it just declared irrelevant. *See, e.g.*, Milner v. Department of the Navy, 131 S.Ct. 1259, 1269 (2011).

[63] But on the former, see Justin Driver, *Recognizing Race*, 112 COLUM. L. REV. 404, 432 (2012) (noting gratuitous judicial references to the race of litigants and others).

text wins, the Court pretends it didn't look at the other materials in the first place.

Why might the Court do this? Perhaps it doesn't fully trust its audience. When presenting its textual argument to non-judges and even lay people, who are not as steeped in the Court's conventions of statutory interpretation it makes sense to speak in accessible shorthand. The Court really means something like "when the text is 80% clear, it's almost impossible for even 100% clear legislative history to outweigh it." But it's easier for it to say, as it does, that we shouldn't even consider the legislative history at all in cases of textual clarity.

Or to put it slightly less nobly, maybe the justices worry that acknowledging the countervailing factor will make their interpretation seem much weaker. Better to invoke a legalistic-sounding reason that the title and legislative history don't matter rather than to candidly say "true enough, but still..." the text wins.

As a descriptive matter, these accounts seem plausible to us, at least some of the time. But as a normative matter they raise the usual questions about a duty of judicial sincerity.[64] And in any event they "justify" invocations of the plain meaning rule only in the pyrrhic sense of saying that none of them should be taken seriously by legally sophisticated readers.

E. Predictability/Consistency

Additionally, the plain meaning rule might make sense—under certain extremely specific assumptions—if one were willing to trade *accuracy* for *predictability*. Suppose, for example, that a regulated private party cares not very much about whether she's got the meaning of the statute 'right' in the abstract, but cares a great deal about whether a judge would ultimately interpret the statute in the same way as she does. That party might prefer that the range of considerations for a judge be limited in cases where one consideration—the text—points clearly in one direction. "If I look up the statute and see that it says clearly that I can or can't do X," that party might reason, "I want to be able take that to the bank."

A judge might reason similarly, regarding consistency in decision-making across courts as worth promoting so long as the accuracy tradeoff is minimal. Thus, a judge might think it best

[64] Micah Schwartzman, *Judicial Sincerity*, 94 Va. L. Rev. 987 (2008); David Shapiro, *In Defense of Judicial Candor*, 100 Harv. L. Rev. 731 (1987); *but see* Scott Altman, *Beyond Candor*, 89 Mich. L. Rev. 296 (1990).

to stop if the text is "clear" because she is confident that her colleagues would read the statute in the same way. More still, since plain meaning is reasonably probative of statutory meaning, the resulting gains in consistency would be accompanied only by minimal losses in accuracy.

As before, note that this justification requires some tricky assumptions. It is not enough to argue – as many have[65] – that text is a useful coordinating point. That argument would be more likely to point towards textualism across the board. Rather, it requires an argument that text is only *sometimes* useful as a coordinating point. The underlying intuition seems to be that when the text is plain, the coordinating function is strong and the loss in accuracy is weak, but when the text is less plain, we should flip to emphasizing accuracy over coordination.

Maybe that argument could work, but it rests upon several empirical assumptions. And these assumptions seem even more questionable than in the examples above.

The first required assumption is that the plain meaning *threshold* is itself reasonably plain – i.e., that most interpreters can agree on which textual meanings are plain. Consider the regulated private party who wants to "take it to the bank." For her to do so sensibly, her perception of the plainness of statute's meaning would itself need to be widely shared. If, by contrast, interpreters frequently disagree over whether a statute's meaning is plain, then the private party can't be sure that what is plain to her will be plain to others.

Worse, if courts don't agree on the plain-ness thresholds in particular cases, the plain meaning rule can actually *exacerbate* unpredictability. Courts that are 80% sure from the text that the statute meant X will sit resolute in their convictions, because the plain meaning rule tells them to consider no other evidence. Courts that are merely 54% from the text sure that the

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[65] Fred Schauer, for example, argues that a *general* presumption in favor of ordinary meaning, has a coordinating function since courts are more likely to converge on a statute's ordinary meaning than on its actual meaning, i.e., the meaning one "would glean from consideration of every aspect of the context of utterance." Schauer, *supra* note 25, at 253. As Schauer explains it, the apparent meaning of a text in relative isolation is, in most instances, "common ground" among members of a linguistic community. *Id.* at 250. For that reason, Schauer continues, a "group of [otherwise] diverse decisionmakers might suppress some of that diversity and achieve agreement" by substantially restricting the basis for decisionmaking to that which is common to the group, namely ordinary meaning. Frederick Schauer, *The Practice and Problems of Plain Meaning: A Response to Aleinikoff and Shaw*, 45 VAND. L. REV. 715, 724 (1992). But Schauer's argument would not seem to point toward the conditional evidence rules of the "plain meaning rule."

statute means X, however, will open the door to other evidence, which in turn increases the risk that they will move from X to Y or Z. Because the plain meaning rule creates an interpretive cliff between "plain" and "non-plain" meaning, the predictability of that threshold becomes important to predicting what courts will do.

The current evidence suggests that this assumption is false—*i.e.*, the plain meaning threshold is highly vulnerable to dispute (good-faith and otherwise[66]). The leading empirical study shows that different interpreters attribute ambiguity to the same text at quite different rates,[67] and that those "simple judgments about ambiguity are entwined with policy preferences and . . . there may well be a causal relationship between them."[68] It also shows that even when asked a less policy-laden question, to *predict* whether others will find a text ambiguous, they remain divided.[69] Another study, this one of contract interpretation, found that both judges and laypeople overestimate the extent to which their interpretation is widely shared.[70] "Thus," they conclude, "a judge may consider language to be plain when in fact different people do not understand it the same way, and this may happen even when the judge's understanding is shared only by a minority of people in general."[71]

Even worse, Brett Kavanaugh, a sitting judge on the D.C. Circuit, tells us that his colleagues cannot even agree on what the plain meaning threshold *is.* He reports:

> In practice, I probably apply something approaching a 65-35 rule. In other words, if the interpretation is at least 65-35 clear, then I will call it clear and reject reliance on ambiguity-dependent canons. I think a few of my colleagues apply more of a 90-10 rule, at least in certain cases. Only if the proffered interpretation is at least 90-10 clear will they call it clear. By contrast, I have other colleagues who appear to apply a 55-45

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[66] *See* Ryan D. Doerfler, *The Scrivener's Error*, 110 Nw. U. L. Rev. (forthcoming 2016) at 26-27, available at http://ssrn.com/abstract=2652687 (discussing willful or motivated mischaracterization of the clarity of legislative texts).

[67] Ward Farnsworth, Dustin F. Guzior, & Anup Malani, *Ambiguity About Ambiguity: An Empirical Inquiry into Legal Interpretation*, 2 J. LEGAL ANALYSIS 257, 260-271 (2010).

[68] *Id*. at 271.

[69] *See, e.g.*, *id*. at 272 ("All respondents considering that case are 55 percent likely to say the statute is ambiguous when asked for an external judgment.").

[70] Lawrence Solan, Terri Rosenblatt & Daniel Osheron, *False Consensus Bias in Contract Interpretation*, 108 COLUM. L. REV. 1268, 1285-1294 (2008).

[71] *Id*. at 1294.

> rule. If the statute is at least 55-45 clear, that's good enough to call it clear. Who is right in that debate? Who knows?[72]

Judge Kavanaugh also goes on to agree that "even if my colleagues and I could agree on 65-35" as the threshold for clarity, it would be "difficult" for them to apply it "neutrally, impartially, and predictably."[73] Rather, "'the magic wand of ipse dixit is the standard tool for deciding such matters.'"[74] For these reasons, Judge Kavanaugh advocates "eliminating or reducing threshold determinations of clarity versus ambiguity."[75]

A second assumption required for the consistency/accuracy argument is that non-textual evidence is substantially less probative of statutory meaning than text viewed in isolation. To see why, consider a case in which text in isolation points plainly in one direction but non-textual evidence points plainly in another. In such a case, a court that considers just the text will have reasonably high confidence as to statutory meaning.[76] If non-textual evidence has only limited weight, going on to consider that evidence will predictably leave the court only less confident. The reason is that considering this less-weighty evidence will not alter the court's confidence very much; certainly not enough to make it as or more confident in the alternate reading the non-textual evidence supports.[77] If, by contrast, non-textual evidence has significant weight, going on to consider it may leave the court as or more confident in the alternate reading. Particularly so if the non-textual evidence has an *undercut-*

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[72] Kavanaugh, supra note 23, at 2137-2138 (footnotes and paragraph break omitted).

[73] *Id.* at 2138.

[74] *Id.* at 2140 (quoting Farnsworth, Guzior & Malani, *supra* note 67, at 276) (further internal quotations omitted).

[75] *Id.* at 2134. Even Scalia and Garner, after describing the plain meaning rule as "essentially sound," concede that it is "largely unhelpful, since determining what is unambiguous is eminently debatable." SCALIA & GARNER, *supra* note 27, at 436. *See also* Aaron-Andrew P. Bruhl, *Hierarchy and Heterogeneity: How to Read A Statute in A Lower Court*, 97 CORNELL L. REV. 433, 447 (2012).

[76] This should be the case regardless of whether a court regards the text as "clear." *See infra* note __ and accompanying text. Even if a court takes the text to be less than clear, it should still be reasonably confident in the interpretation supported by the text in isolation (e.g., a confidence level of .7 as opposed to .9), at least absent additional, non-textual evidence.

[77] Again, this should be the case regardless of perceived clarity. *See supra* note __. As a practical matter, this is crucial to the attractiveness of the plain meaning rule since otherwise the rule would allow for wildly divergent outcomes depending on whether a text is regarded as "clear" or slightly less than.

ting effect, undermining the evidential connection between the text in isolation and the initial reading (e.g., by making apparent a previously unrecognized ambiguity).[78] The predictability of the plain meaning rule thus depends on the non-textual evidence being excluded having limited probative value.[79]

This empirical assumption is also open to question. As both of us have argued elsewhere, a court's perception of what Congress is trying to *say* depends in large part on that court's

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[78] *See* JOHN POLLACK, CONTEMPORARY THEORIES OF KNOWLEDGE (1986) (distinguishing between "rebutting" defeaters, which prevent evidence E from supporting belief in proposition P by supporting not-P more strongly, and "undercutting" defeaters, which prevent E from supporting belief in P by undermining the apparent rational connection between E and P).

[79] Philosopher Laura Buchak has argued that, as a matter of both instrumental and epistemic rationality, a "risk-avoidant" agent sometimes does best not to consider all available evidence before making a decision, even if considering additional evidence is cost-free. *See* Laura Buchak, *Instrumental Rationality, Epistemic Rationality, and Evidence Gathering*, 24 PHIL. PERSP. 85 (2010). On the standard picture of instrumental rationality, an instrumentally rational agent maximizes expected utility, which is to say that, of two acts, an instrumentally rational agent prefers the one with the higher expected-utility value. In a classic paper, I.J. Good showed that, assuming away behavioral irrationalities of the sort discussed in Part III.B., so long as considering additional evidence is cost-free, it always maximizes expected utility to do so before making a decision. *See* I.J. Good, *On the Principle of Total Evidence*, 17 Brit. J. Phil. Sci. 319 (1967). From this, Good inferred that it is always instrumentally rational to consider such evidence, and, from this, that to do so is always epistemically rational as well, i.e. rational in one's capacity as an agent concerned with truth or knowledge. *See id.* In her work, Buchak offers an alternative to the standard picture of instrumental, and in turn epistemic, rationality, arguing that actual agents are—according to Buchak, *reasonably*—risk-avoidant in the sense that such agents are unwilling to accept the possibility of a loss in exchange for an equivalently sized possibility of a gain. *See, e.g.*, LAURA BUCHAK, RISK AND RATIONALITY (2014). Needless to say, assessing the merits of Buchak's alternative, risk-avoidant picture of rationality goes well beyond the scope of this Essay. *See* Buchak, *Evidence Gathering*, *supra*, at 96 (conceding that there are "those who are inclined to think that theories like [hers] are theories of *predictable irrationality*" (emphasis added)). Of special interest here, though, is Buchak's observation that, to the extent that risk avoidance is rational, a risk-avoidant agent ought not to consider additional, cost-free evidence under certain conditions. Specifically, Buchak shows that a risk-avoidant agent should refuse to consider such evidence if she is antecedently fairly confident that X and if that evidence could tell somewhat in favor of ~X but not strongly in favor of ~X, i.e. if the evidence at issue has only limited weight. *See id.* at 100. Thus, to the extent that the risk avoidance recommends ignoring additional evidence, it does so under the same conditions as does the predictability/consistency rationale articulated here.

understanding of what Congress is trying to *do*.[80] By unsettling a court's priors about what Congress is plausibly trying to do, non-textual evidence can thus alter significantly a court's assessment of what Congress is attempting to say. For example, taken in isolation, a statute that reads, "No police officers are permitted to enter," would seem to tell law enforcement officials to stay out. Add as additional context, however, that the text at issue appears beneath the heading, "Costume restrictions for Halloween party," and that interpretation becomes much less obvious. Whether non-textual evidence can unsettle priors in this way—and, hence, exert significant evidentiary weight—is difficult to assess on a categorical basis. Sometimes bad practical consequences will, for instance, reveal a particular interpretation as implausible.[81] Other times, though, such consequences will show only that the most plausible interpretation is also bad policy.[82]

It may well be that some instances (or even all instances) of the plain meaning rule could be shown to satisfy these assumptions. But the current evidence makes that unlikely, and in any event we are pretty sure that those who invoke the plain meaning rule have rarely satisfied themselves of it.

F. Contract Analogies

Finally, we think it instructive to contrast the plain meaning rule with seemingly analogous arguments in interpretation of private law. Consider first Eric Posner's argument in favor of the parol evidence rule in contract law, which has some analogies to the predictability justification canvassed above.[83] The parol evidence rule forbids courts from considering extrinsic evidence of a contract's meaning unless that contract is incomplete or ambiguous on its face. Posner defends the rule on the ground that "parties derive advantage from being able, in their contract, to limit the evidence a court can use to decide a dispute

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[80] Baude & Sachs, *supra* note 54; Ryan D. Doerfler, *Fictionalism About Legislative Intent* (draft on file with the authors).
[81] *See, e.g.*, United States v. X-Citement Video, Inc., 513 U.S. 64, 69-70 (1994).
[82] *See, e.g.*, Pavelic & LeFlore v. Marvel Entm't Grp., 493 U.S. 120, 126 (1989).
[83] Eric A. Posner, *The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. PA. L. REV. 533 (1998).

should one arise" since, among other things, limiting admissible evidence reduces variance in judicial outcomes.[84]

For our purposes what is particularly instructive about Posner's argument is that it highlights several important differences between contracts and legislation, and therefore between the parol evidence rule and the plain meaning rule. First, Posner's claim concerning derived advantage rests in large part upon the empirical observation that contracting parties make frequent use of so-called "merger" clauses, i.e. clauses directing courts not to consider extrinsic evidence, whereas "anti-merger" clauses, i.e. clauses directing court to consider such evidence, are more or less unknown.[85] In legislation, by contrast, analogues of merger clauses are rare,[86] whereas analogues of anti-merger clauses are, if anything, more common (though, as relevant below, both types of "clauses" are uncommon in the legislative setting overall).[87]

Second, Posner's prediction of reduced variance under the parol evidence rule assumes the relative unpredictability of judicial responsiveness to extrinsic evidence. Because the extrinsic evidence parties might introduce in a given case is so varied—anything from "excerpts from the general chit-chat" to "pages of scrawled notes"—Posner infers that how a given court will respond to the evidence introduced is much less predictable than how that court will respond to contractual language in isolation.[88] By contrast, the major categories of non-textual evidence in statutory interpretation are more systematic, and so judicial responsiveness to such evidence is more predictable. At a practi-

[84] *Id.* at 571; *see also id.* at 543. Posner also argues that contracting parties share an intention to about the conventions of contract interpretation, *id.* at 570, somewhat analogous to the argument we discuss in Part III.C.
[85] *See id.* at 570-71.
[86] For the rare example, see Civil Rights Act of 1991 § 105, Pub. L. No. 102-166, 105 Stat. 1071, 1075 ("No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S 15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to Wards-Cove–Business necessity/cumulation/alternative business practice."); *see also* LAWRENCE SOLAN, THE LANGUAGE OF STATUTES: LAWS AND THEIR INTERPRETATION 187 (2010) (observing that "even such small limits" on what evidence of statutory meaning courts can consider are "not easy to find").
[87] *See, e.g.*, 16 U.S.C.A. § 831dd ("This chapter shall be liberally construed to [e.g.,] … provide for the national defense, improve navigation, control destructive floods, and promote interstate commerce and the general welfare …."); 18 U.S.C.A. § 3731 ("The provisions of this section shall be liberally construed to effectuate its purposes.").
[88] See Posner, supra note 83, at 572.

cal level, for example, we think many lawyers have a good guess as to how different Justices on the Supreme Court would respond to the invocation of a committee report.

Finally, Posner's argument assumes that contracting parties are responsive to judicial interpretive rules. Plausible as that assumption might be for contracts, there are two reasons to doubt it in the case of legislation. One reason is recent empirical work that suggests that legislative drafters do not know much about the judicial interpretive rules.[89] The other is that the transaction costs for negotiating legislation are much higher than for contracts because of both the complexity and the conventions of legislation.[90]

As the example of the parole evidence rule suggests, practical differences between contracting and legislating will often differentiate the plain meaning rule from superficially similar rules from contract law. Such practical differences also explain away another superficially similar rule, the so-called "best evidence rule," which conditions admissibility of secondary evidence (e.g., facsimile, oral description) of the contents of a document on the unavailability of the original copy.[91] As Schauer observes, strict application of the best evidence rule "imposes cumbersome requirements on the introduction of reliable secondary evidence."[92] Nonetheless, Schauer reasons, the best evidence rule is plausibly justifiable as an *evidence-generating* rule since, by making it difficult for parties to introduce (presumably reliable) secondary evidence, the rule incentivizes parties to preserve and produce (presumably more reliable) primary evidence.[93]

As noted above, that legislators respond to incentives set by interpretive rules is, at best, questionable. More to the point

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[89] Gluck & Bressman, *supra* note 55; *see also* Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575 (2002).

[90] *See* Posner, *supra* note 83, at 553-55 (observing that parol evidence rule is least likely to be useful when transaction costs are high (as when the text is complex) and in which the form of the contract at issue is conventional (as is the case with, for example, ordinary consumer contracts)). *See also* Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807, 816 (2014) (describing the professionalization of legislative drafting process, noting the emphasis on "consistency of legislative drafting"); Josh Chafetz, *The Phenomenology of Gridlock*, 88 NOTRE DAME L. REV. 2065, 2075 (2013) ("The United States federal government has a relatively … cumbersome process for enacting laws").

[91] *See, e.g.*, Sirico v. Cotto, 324 N.Y.S.2d 483, 485-86 (Civ. Ct. 1971).

[92] Schauer, *supra* note 32, at 198.

[93] *Id.*

here, though, is that the practical problem the best evidence rule is designed to solve—failure to preserve and produce primary evidence—does not exist with respect to legislation, at least not today.[94] In the modern era, primary evidence of the contents of legislation (e.g., the Statutes at Large, the United States Code) is available to all at the click of a mouse. There is thus no need to cajole legislators or litigants to further preserve and produce that evidence.

Conclusion

There is much to be said about the comparative superiority of text, statutory context, legislative history, consequences, etc. in statutory interpretation. In this essay we've tried to make a related but different intervention, about the *relationship between* those things.[95] Whatever one thinks of the probative value of text and other evidence, it's not at all obvious why one's probative value should depend on the other.

The plain meaning rule reflects that kind of puzzling interdependence. There are indeed conditions under which such a rule would make sense, but they are more complicated and less universal than most uses of the plain meaning rule seem to assume.[96] It may well be that most interpreters should simply have the courage of their convictions – either to consider nontextual evidence in all cases or to ignore it across the board.

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[94] By contrast, in the decades after the Founding statutes "were not regularly published" and "[e]ven when copies of records could be found, the copies themselves were highly unreliable." Stephen E. Sachs, *Full Faith and Credit in the Early Congress*, 95 VA. L. REV. 1201, 1209 (2009). As Sachs also shows, this made the best evidence rule highly important to statutes at the Founding (and central to the Constitution's Full Faith and Credit Clause). *Id*. at 1209-1211.

[95] Ironically, the plain meaning rule may in fact cause courts to devalue the statutory text. The plain meaning rule requires text to be considered *first*, to decide what other sources can be considered. But as Adam Samaha observes, empirical evidence suggests that "[o]ften enough, last matters more than first," in that, as a psychological matter, decisionmakers often attribute greater significance to evidence considered at the end of a sequence than at the beginning. Adam M. Samaha, *Starting with the Text—On Sequencing Effects in Statutory Interpretation and Beyond*, 8 J. LEGAL ANALYSIS (forthcoming 2016), available at http://ssrn.com/abstract=2726140. Thus, textualists who do decide to retain the plain meaning rule might do well to counsel "circling back" to the unclear text after other sources have been let in.

[96] *Cf*. Kavanaugh, supra note 23, at 87 ("[E]ach ambiguity-dependent canon should be independently evaluated. I am not proposing a one-size-fits-all solution.").

Ultimately, though, we come neither to praise the plain meaning rule nor to bury it. Our main aim is to challenge those who use the rule to consider and explain why they think nontextual evidence is relevant sometimes but not others – and to show all readers that the challenge is harder to answer than they might have first thought.