

THE PLAIN LANGUAGE COURT

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We often identify an era in the Supreme Court's history by associating it with the Chief Justice: the Marshall Court, the Warren Court, the Rehnquist Court, the Roberts Court. But of course that practice can be misleading. The Chief Justice has just one vote, and new Justices can change the character of the Court even if the Chief Justice is the same. The Marshall Court became more fragmented after 1827, when Chief Justice Marshall's original colleagues were succeeded by new appointees. The Warren Court is said to have become more "liberal and activist" when Justice Arthur Goldberg replaced Justice Felix Frankfurter. And the Rehnquist Court arguably "took a distinctive turn in the mid-1990s."¹ The new appointee who will replace Justice Antonin Scalia may, similarly, change the character of the Roberts Court in significant ways.

In one respect, though, a distinctive feature of the Roberts Court seems destined to persist for some time, no matter who replaces Justice Scalia. The Roberts Court has embraced a plain language approach to statutory interpretation. That approach often prevailed in previous Courts, but it was controversial, and the Court, previously, was closely divided on the question whether it was the right approach. On the Roberts Court, though, the plain language approach seems to be accepted nearly unanimously.

The plain language approach is more easily illustrated than described, but roughly it is a matter of trying to resolve issues about

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¹ Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 570 (2003); *see id.* at 569 & n.1 (quoting DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888*, at 127–28 (1985) (discussing the Marshall Court)); *id.* at n.2 (quoting DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888–1986*, at 415 (1990) (discussing the Warren Court)).

statutory interpretation by looking exclusively, or nearly exclusively, to the language of the statute.² Other materials—legislative history, possible purposes of the statute, settled administrative or judicial practice under the statute, or policy judgments—come into the picture, if at all, only to resolve otherwise intractable vagueness in the statutory language or, more often, to reinforce conclusions that are derived from the language alone. The plain language approach is vulnerable to the objection that the drafters of a statute will not have the foresight, or the linguistic resources, to provide for every contingency. The language alone might, for that reason, not be a good guide to the legislature’s judgment about the issue before the court. Especially in cases that are controversial enough to give rise to litigation, one might argue that judges should be prepared to look beyond the words of the statute and try to carry out the purposes of the statute even if the ultimate conclusion is not the one that emerges most clearly from the words alone. But that kind of “purposivist” approach, which has been losing ground for some time,³ now seems to be in near-total eclipse on the Supreme Court—so nearly total that it is unlikely to emerge again no matter what the views of the next appointee.

I.

The Roberts Court’s decision in *Milner v. Department of the Navy*,⁴ decided in 2011, makes the point nicely.⁵ In *Milner*, the plain language of the statute pretty clearly dictated the result that the Court reached, but that result was questionable on many other grounds. The Court could easily have justified a departure from the plain language in *Milner*. Instead, the Court—which was fully aware of the counter-arguments—followed the plain language. And, most important, the decision was nearly unanimous. Only Justice Breyer dissented. All of that makes *Milner* a powerful indication of the hold that the plain language approach has on the Roberts Court.

² For leading accounts, defining this approach in various ways, see, for example, John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287 (2010); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1 (2006).

³ For an argument that the plain language approach has prevailed in both the Rehnquist and the Roberts Courts, see John F. Manning, Foreword, *The Means of Constitutional Power*, 128 HARV. L. REV. 1, 22–29 (2014). That approach was much more controversial within the Rehnquist Court than it appears to be today. Compare, for example, *Milner v. Department of the Navy*, 562 U.S. 562 (2011) (8-1 decision resting on plain language arguments) with *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (5-4 decision).

⁴ 562 U.S. 562.

⁵ John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 116–17, similarly treats *Milner* as an important illustration of the Court’s approach to statutory interpretation.

Milner concerned the interpretation of the Freedom of Information Act (FOIA).⁶ FOIA imposes a general requirement on federal agencies to disclose government records on request, but there are several specific exemptions for certain categories of records that need not be disclosed. The records at issue in *Milner* concerned weapons, ammunition, and explosives that the Navy stores at a base in Washington State. Specifically, the records were “Explosive Safety Quantity Distance (ESQD) information . . . [which] prescribes ‘minimum separation distances’ for explosives and helps the Navy design and construct storage facilities to prevent chain reactions in case of detonation.”⁷ The ESQD information would, quite obviously, be helpful to, for example, a foreign enemy or someone planning a terrorist attack on the naval base. When an individual filed a FOIA request for that information, the Department of the Navy refused to disclose it.

The Navy invoked an exemption—Exemption 2—that applies to records “related solely to the internal personnel rules and practices of [the] agency.”⁸ The Navy relied on an interpretation of that exemption that the District of Columbia Circuit provided in a case it decided in 1981, *Crooker v. Bureau of Alcohol, Tobacco & Firearms*.⁹ *Crooker* ruled that Exemption 2 applied not just to such matters as “pay, pensions, vacations, hours of work, lunch hours, parking[,] etc.,”¹⁰ but more broadly to any “predominantly internal”¹¹ records if the disclosure of those records would “significantly risk[] circumvention of agency regulations or statutes.”¹² At least three other courts of appeals followed the *Crooker* court’s interpretation of Exemption 2.¹³ The Supreme Court noted in *Milner* that *Crooker* “spawned a new terminology: Courts applying the *Crooker* approach . . . refer to the ‘Low 2’ exemption when discussing materials concerning human resources and employee relations, and to the ‘High 2’ exemption when assessing records whose disclosure would risk circumvention of the law.”¹⁴

The Supreme Court ruled that the Navy had to disclose the ESQD material because *Crooker*’s “High 2” interpretation of Exemption 2 was

⁶ 5 U.S.C. § 552 (2012).

⁷ *Milner*, 562 U.S. at 568 (citation omitted).

⁸ 5 U.S.C. § 552(b)(2).

⁹ 670 F.2d 1051 (D.C. Cir. 1981) (en banc), *abrogated by Milner*, 562 U.S. 562.

¹⁰ *Id.* at 1056 (quoting *Jordan v. Dep’t of Justice*, 591 F.2d 753, 763 (D.C. Cir. 1978)).

¹¹ *Crooker*, 670 F.2d at 1056–57.

¹² *Id.* at 1074.

¹³ *Milner v. U.S. Dep’t of the Navy*, 575 F.3d 959, 965 (9th Cir. 2009), *rev’d and remanded by Milner*, 562 U.S. 562; *Massey v. FBI*, 3 F.3d 620, 622 (2d Cir. 1993), *abrogated by Milner*, 562 U.S. 562; *Kaganove v. EPA*, 856 F.2d 884, 889 (7th Cir. 1988), *abrogated by Milner*, 562 U.S. 562.

¹⁴ *Milner*, 562 U.S. at 567 (citing *Milner*, 575 F.3d at 963, and *Schiller v. NLRB*, 964 F.2d 1205, 1208 (D.C. Cir. 1992), *abrogated by Milner*, 562 U.S. 562).

inconsistent with the language of the statute. The “key word” in the text of Exemption 2, the Court said, is “personnel,”¹⁵ and “personnel,” in “common parlance,” refers to “human resources matters.”¹⁶ The Court noted that the word “personnel” was used elsewhere in FOIA as well—in Exemption 6, which applies to “personnel and medical files”¹⁷—and that in Exemption 6, the word unquestionably meant “human resources.”¹⁸ The Court—using the typical plain language technique of looking at the words of the statute, but only the words of the statute, to determine their proper interpretation—reasoned that the parallel use of the term “personnel” in another FOIA exemption was an important indication of how that term should be construed throughout the statute. And the Court said that “[b]y no stretch of imagination” does the ESQD material “relate to ‘personnel rules and practices,’ as that term is most naturally understood.”¹⁹

The plain language arguments in support of the Court’s conclusion are, without question, very strong. In fact, Justice Breyer, the sole dissenter, did not challenge them.²⁰ But for several reasons, *Milner* presents an unusually strong case for departing from the plain language. The fact that the Court nonetheless followed the plain language—and, as I said, did so nearly unanimously—shows how firm a grip the plain language approach has on the Roberts Court

A.

The first reason for departing from the plain language approach in *Milner* is that it is difficult to believe that Congress would have wanted the ESQD materials disclosed. No one could say that this was a case in which the government was resisting a FOIA request for illegitimate reasons. In fact, the Court itself explicitly “recognize[d] the strength of the Navy’s interest in protecting the ESQD data and maps and other similar information.”²¹ The Court even noted that the Navy had said that “[p]ublic[ly] disclosing the [ESQD] information would significantly risk undermining the Navy’s ability to safely and securely store military ordnance”²² and that the Court had no reason to doubt that that was true. What is more, the Court went out of its way to try to show that the ESQD information could, in the end, be kept secret. The Court

¹⁵ *Milner*, 562 U.S. at 569.

¹⁶ *Id.*

¹⁷ 5 U.S.C. § 552(b)(6) (2012).

¹⁸ *Milner*, 562 U.S. at 570.

¹⁹ *Id.* at 572.

²⁰ *See id.* at 585–93 (Breyer, J., dissenting).

suggested three other exemptions that might apply to the ESQD material,²³ and Justice Alito devoted a concurring opinion to explaining in detail how the Navy, on remand, could argue that a different exemption applied to that material.²⁴ One might reasonably ask: if the reasons for allowing the government to withhold these materials are so strong, why, exactly, should FOIA be interpreted to mandate their disclosure?

One brief passage in the majority's opinion might be seen as answering this question. The Court asserted that "[t]he statute's purpose reinforce[d]" the Court's interpretation of Exemption 2 because the Court "ha[s] often noted 'the Act's goal of broad disclosure' and insisted that the exemptions be 'given a narrow compass.'"²⁵ But the question, of course, is whether the Court gave the exemption *too* narrow a compass. One purpose of FOIA is to provide broad disclosure; but at the same time, it is a purpose of FOIA to exempt some materials from disclosure.²⁶ Otherwise there would be no exemptions in the statute. The Court, in fact, seemed to recognize that its argument about FOIA's purpose did not add much, because it concluded its discussion by saying that it had "give[n] the exemption the 'narrower reach' Congress intended through the simple device of confining the provision's meaning to its words."²⁷ That is, the Court recognized that its decision really relied just on the language of the statute. That is how the plain language approach works; arguable statutory purposes are consulted, if at all, only in a limited and secondary way.

B.

The second reason for questioning the Court's reliance on the language of the statute is that the decision overturned a long-standing

²¹ *Id.* at 580.

²² *Id.* (citation omitted) (alteration in original).

²³ *Id.* at 580–81.

²⁴ *Id.* at 581–85 (Alito, J., concurring).

²⁵ *Id.* at 571 (quoting *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989)).

²⁶ This is a general problem with arguments that invoke the purpose of a statute: no statute pursues a single purpose; there are always cross-cutting purposes. *See, e.g., Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (per curiam) ("[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice . . ."). For a general discussion, see David A. Strauss, *Not Unwritten, After All?*, 126 HARV. L. REV. 1532, 1537 (2013) (reviewing AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* (2012)).

²⁷ *Milner*, 562 U.S. at 572 (citation omitted).

and uniform interpretation of Exemption 2. That is how Justice Breyer began his dissenting opinion:

Justice Stevens has explained that, once “a statute has been construed, either by this Court or by a consistent course of decision by other federal judges and agencies,” it can acquire a clear meaning that this Court should hesitate to change. I would apply that principle to this case and accept the 30-year-old decision by the D.C. Circuit in *Crooker*²⁸

Even apart from the point Justice Breyer was making—that the exemption should have been interpreted in a way that was consistent with established practice—this passage is notable for a couple of reasons. As I mentioned earlier, Justice Breyer did not even engage the majority’s arguments about the language of the statute. He effectively conceded that the majority had the better arguments on that point. And Justice Breyer’s reference to Justice Stevens was revealing. Justice Stevens was a frequent critic of what he considered to be the over-use of plain language arguments; as I will discuss later, Justice Stevens wrote an opinion in an earlier Roberts Court case, when the Court was much more closely divided about the use of the plain language approach, sharply questioning the use of that approach.²⁹ But Justice Stevens was, of course, not on the Court by the time *Milner* was decided. In fact, he had been replaced by the author of the *Milner* majority opinion, Justice Kagan.

Just as Justice Breyer did not quarrel with the majority’s view of the language of Exemption 2, the majority did not strongly contest Justice Breyer’s assertion that the *Milner* decision was inconsistent with long-standing practice. The majority recognized that three circuits had adopted *Crooker*’s “High 2” interpretation.³⁰ Three other courts of appeals had adopted a contrary view before *Crooker* was decided.³¹ Justice Breyer asserted that two of those courts of appeals had changed their view;³² the majority disagreed on that point,³³ but the majority did not deny that the *Crooker* approach was dominant in the lower courts.

²⁸ *Id.* at 585 (Breyer, J., dissenting) (citations omitted).

²⁹ See *Circuit City Stores, Inc., v. Adams*, 532 U.S. 105, 133 (2001) (Stevens, J., dissenting) (citation omitted) (quoting with approval the observation that “the ‘minimalist’ judge ‘who holds that the purpose of the statute may be learned only from its language’ has more discretion than the judge ‘who will seek guidance from every reliable source.’”); *infra* notes 77–80 and accompanying text.

³⁰ See *supra* note 13 and accompanying text.

³¹ See *Milner*, 562 U.S. at 567 n.2 (citing *Cox v. U.S. Dep’t of Justice*, 576 F.2d 1302, 1309–10 (8th Cir. 1978); *Stokes v. Brennan*, 476 F.2d 699, 703 (5th Cir. 1973); and *Hawkes v. IRS*, 467 F.2d 787, 797 (6th Cir. 1972)).

³² *Milner*, 562 U.S. at 586 (Breyer, J., dissenting).

³³ *Id.* at 576 n.7 (majority opinion).

As Justice Breyer said in his dissent, “the *Crooker* interpretation of Exemption 2 has guided nearly every Freedom of Information Act (FOIA) case decided over the last 30 years.”³⁴ In fact, the majority explicitly “acknowledge[d] that our decision today upsets three decades of agency practice relying on *Crooker*, and therefore may force considerable adjustments.”³⁵

But the majority rejected the idea that that practice could alter the proper interpretation of Exemption 2. The majority said that Justice Breyer’s assertions about the court of appeals cases “would be immaterial even if true, because we have no warrant to ignore clear statutory language on the ground that other courts have done so.”³⁶ This statement of the majority’s is, in fact, almost certainly stronger than it should have been. It is hard to believe that the Justices in the majority would *never* defer to established precedent that interpreted a statute in a way that departed from the plain language. In fact, as I will suggest below, there are several important statutes that are uncontroversially interpreted in ways that are hard to reconcile with their language. But the majority’s willingness to make such a flat statement indicates just how strong a hold the plain language approach has on the current Court.

C.

The final reason to question the Court’s reliance on plain language in *Milner*—and to view that reliance as a sign that a substantial majority of the Court is firmly committed to a plain language approach—has to do with the nature of the Freedom of Information Act. It is one thing to adhere closely to the language of a statute that is narrowly drawn to address a specific problem. But FOIA is not that kind of statute. One might describe FOIA as quasi-constitutional, in the sense that it established a disclosure regime that governs a wide variety of materials, circumstances, and government agencies. Justice Breyer made this point as well. He referred to the Court’s “longstanding recognition that it cannot interpret the FOIA . . . with the linguistic literalism fit for interpretations of the tax code.”³⁷ The reason, he said, is that FOIA “must govern the affairs of a vast Executive Branch with numerous different agencies, bureaus, and departments, performing numerous tasks of many different kinds. Too narrow an interpretation, while

³⁴ *Id.* at 586 (Breyer, J., dissenting).

³⁵ *Id.* at 580 (majority opinion).

³⁶ *Id.* at 576.

³⁷ *Id.* at 589 (Breyer, J., dissenting).

working well in the case of one agency, may seriously interfere with congressional objectives when applied to another.”³⁸

In fact, there are several important statutes that the courts treat in the way that Justice Breyer urged the *Milner* Court to treat FOIA. The Sherman Antitrust Act is a familiar example. The Court has explicitly treated the Sherman Act as an authorization to create a body of judge-made law “to meet the dynamics of present economic conditions.”³⁹ The Administrative Procedure Act (APA), of which FOIA is a component, has also been interpreted in ways that are difficult to reconcile with its text (as Justice Breyer’s dissent pointed out)⁴⁰—again because of the APA’s quasi-constitutional character.⁴¹ Section 1983 of Title 42, which authorizes private parties to sue state actors for violations of federal constitutional rights, has also been interpreted in a way that makes it a workable and practical enforcement scheme, without close attention to the text.⁴² Section 1331 of Title 28, which gives federal district courts jurisdiction over cases arising under federal law, is the basis for a complex body of judge-made law that is designed to advance the apparent purposes of the statute while accounting for the practicalities of litigation.⁴³

The Court in *Milner* could, then, easily have decided the case in a way that departed from the plain meaning of Exemption 2. Whether the Court should have done so is fairly arguable. The text is, after all, quite clear, and there is a risk that the *Crooker* interpretation of the exemption would allow the government, in other cases, to withhold materials that should be disclosed, even if the Navy had excellent reasons not to disclose the materials at issue in *Milner* itself. On the other hand, one might say that the *Milner* Court attached too much significance to the language of the statute and should instead have seen itself as more of a partner with Congress and the lower courts, allowing the workable scheme established by *Crooker* to continue to operate. What purpose is

³⁸ *Id.*

³⁹ *Leegin Creative Leather Prods., Inc., v. PSKS, Inc.*, 551 U.S. 877, 899 (2007).

⁴⁰ *See Milner*, 562 U.S. at 589 (Breyer, J., dissenting) (“Judicial interpretation of the malleable language of the APA has produced changes in the rulemaking procedure that could be characterized as revolutionary if they had been affected [sic] in a day or a year rather than gradually over a period of decades.” (quoting RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE 413 (4th ed. 2002))).

⁴¹ *See, e.g.*, Gillian E. Metzger, Foreword, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293 (2012). *See generally* David A. Strauss, Foreword, *Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 25–26 (2015).

⁴² *See, e.g.*, Richard H. Fallon, Jr., *Three Symmetries Between Textualist and Purposivist Theories of Statutory Interpretation—And the Irreducible Roles of Values and Judgment Within Both*, 99 CORNELL L. REV. 685, 691–92, 718–22 (2014).

⁴³ *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 780–95 (6th ed. 2009).

served by reaching a result that Congress could not plausibly have intended, in the interpretation of a statute that invites courts to partner with Congress in fashioning a workable scheme, when the lower courts and the executive agencies have, for several decades, followed a practice that is at least not clearly unacceptable? Be that as it may, the strength of the argument for departing from plain meaning in *Milner*—and the fact that the Court’s refusal to depart from it was nearly unanimous—suggest that the plain language view is a deeply rooted aspect of the Roberts Court’s approach to statutory interpretation, one that is likely to persist no matter who the next appointee is.

II.

Of course, most statutory interpretation cases are not like *Milner*. They do not produce counter-intuitive results; they do not overturn long-standing judicial and administrative practice; and they do not involve quasi-constitutional statutes like FOIA. In those run-of-the-mill cases, too, the Roberts Court has consistently followed a plain language approach. There has been disagreement, but the disagreement has been over the right way to read the language of the statute, not over whether the issue should be approached in a different way. These cases, with their more quotidian character, illustrate in a different way from *Milner* the appeal that the plain language approach has for the Roberts Court.

Two very recent cases, chosen more or less at random, make the point. In *Simmons v. Himmelreich*,⁴⁴ the issue was whether the so-called “judgment bar” provision⁴⁵ of the Federal Tort Claims Act (FTCA)⁴⁶ applied to a prisoner’s claim against government employees. Ordinarily, the U.S. government is protected against damages actions by the doctrine of sovereign immunity. The government cannot be sued for damages unless it waives its immunity. The FTCA is such a waiver of the sovereign immunity of the United States, thus permitting damages actions against against the government, for torts committed by federal employees, in certain circumstances. But the FTCA specifies exceptions to the waiver of sovereign immunity—cases in which suits against the government are not allowed. One of those exceptions is for claims based upon the exercise of a “discretionary function”⁴⁷ by a government employee.

⁴⁴ 136 S. Ct. 1843 (2016).

⁴⁵ 28 U.S.C. § 2676 (2012).

⁴⁶ 28 U.S.C. §§ 1346(b), 2671–80.

⁴⁷ 28 U.S.C. § 2680(a).

The plaintiff in *Simmons* sued the United States under the FTCA, but his suit was dismissed under the “discretionary function” exception. The plaintiff then tried to sue the individual government employees who, he claimed, had injured him. The employees asserted that that individual action was barred by another provision of the FTCA, the “judgment bar” provision. That provision states that a judgment in an FTCA action bars any suit against individual defendants.⁴⁸

The plaintiff’s response relied on the language of the FTCA. The specific wording of the discretionary function exception (and other similar exceptions) is that “[t]he provisions of this chapter [the chapter that includes the FTCA] . . . shall not apply to” claims based on the performance of a discretionary function.⁴⁹ This is a straightforward way of implementing an exception: it states that the provisions of the FTCA do not apply to certain claims, so the government has not waived its sovereign immunity and an FTCA action cannot be brought on the basis of such claims.

The problem for the individual defendants was that the judgment bar is part of the same “chapter.”⁵⁰ So the statute says, clearly enough, that the judgment bar does not apply to cases that are within the discretionary function exception. The result was that the plaintiff, whose case against the government was dismissed because it fell within that exception, was not restricted by the judgment bar and could bring suit against individual defendants.

The Court reached that conclusion, unanimously, on the basis of the language of the statute, in two brisk paragraphs.⁵¹ Indeed, the Court said, the statute was so clear that “a reader might be forgiven for wondering how there could be any confusion about the statute’s operation.”⁵² The Court acknowledged, though, that there were some complications. In an earlier case, involving an exception in the FTCA for claims arising in a foreign country, the Court had held that the judgment bar *did* apply. And it acknowledged that declining to apply other provisions of the same “chapter” to cases that fell within an exception might produce troubling results.⁵³ But the earlier case could be distinguished, and the potentially troublesome hypotheticals, the Court said, could be dealt with as they arose.⁵⁴

⁴⁸ 28 U.S.C. § 2676.

⁴⁹ 28 U.S.C. § 2680(a).

⁵⁰ See *Simmons v. Himmelreich*, 136 S. Ct. 1843, 1847 (2016).

⁵¹ See *id.* at 1847–48.

⁵² *Id.* at 1848.

⁵³ *Id.* at 1849.

⁵⁴ *Id.*

Again what is notable about the case is how easily, even reflexively, the Court used the plain language approach. The result in *Simmons* was certainly plausible. As the Court said, there would be a reason to bar a suit against individuals if the judgment in favor of the United States were based on, for example, a conclusion that the plaintiff was not injured, or that government employees committed no wrongful act.⁵⁵ By contrast, a ruling that a suit against the United States falls within the “discretionary function” exception does not obviously provide a similar reason to bar a suit against individuals. As the Court noted, the common law doctrine of claim preclusion operates in that way.⁵⁶ The Court could have rested its decision on precisely that ground. It could have drawn the analogy to claim preclusion and reasoned that whatever might be said about other exceptions, the dismissal of an FTCA action under the “discretionary function” exception should not bar an individual action. That would have avoided the awkwardness of saying, as the Court did in its opinion, that the language was clear but that, despite the language, it might have to reach a different result in future cases. But for the Roberts Court, the path of least resistance was to follow the plain language, and that was the path that it unanimously took.

Another recent case, *Lockhart v. United States*,⁵⁷ similarly shows how the Court’s instinct is to do everything it can to decide a case on the basis of the statutory language; the Court relegates other possible sources to the background, to be used only secondarily. *Lockhart* involved a badly drafted statute that, unsurprisingly, spawned litigation. The statute provided that offenders convicted of possessing child pornography are to receive a mandatory minimum sentence of ten years’ imprisonment if they have “a prior conviction . . . under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward.”⁵⁸ The defendant in *Lockhart* had previously been convicted, in a state prosecution, of sexual abuse involving an adult. So the question was whether the phrase “involving a minor or ward” applied only to “abusive sexual conduct” or applied to the entire list (“aggravated sexual abuse, sexual abuse, or abusive sexual conduct”). If it applied to the entire list, the defendant was not subject to the mandatory minimum sentence. But if the correct way to read that statute was that it was referring to “aggravated sexual abuse” or “sexual abuse” or “abusive sexual conduct involving a minor,” then the defendant was subject to the mandatory minimum.

⁵⁵ *Id.* at 1850.

⁵⁶ *Id.* at 1849 n.5.

⁵⁷ 136 S. Ct. 958 (2016).

⁵⁸ 18 U.S.C. § 2252(b)(2) (2012).

The Court ruled, over two dissenting votes, that the phrase “involving a minor” applied only to “abusive sexual conduct.” Both the majority and the dissent focused very closely on the language of the statute and related statutes. Specifically, the majority “applied an interpretive strategy called the ‘rule of the last antecedent.’”⁵⁹ According to that rule, “a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows.”⁶⁰ The dissent argued, in response, that the rule of the last antecedent does not apply to a “single, integrated list.”⁶¹ The dissent said that when the list has that character, the modifier applies to every item on the list. So, in *Lockhart*, the mandatory minimum sentence would be imposed only if the prior conviction involved a minor or a ward.

Much of the back-and-forth between the majority and the dissent took the form of offering examples of common speech in which the rule of the last antecedent either would or would not apply. So, for example, the majority gave this example:

[I]magine you are the general manager of the Yankees and you are rounding out your 2016 roster. You tell your scouts to find a defensive catcher, a quick-footed shortstop, or a pitcher from last year’s World Champion Kansas City Royals. It would be natural for your scouts to confine their search for a pitcher to last year’s championship team, but to look more broadly for catchers and shortstops.⁶²

And:

It would be as if a friend asked you to get her tart lemons, sour lemons, or sour fruit from Mexico [and] . . . you brought back lemons from California, but your friend insisted that she was using customary speech and obviously asked for Mexican fruit only, you would be forgiven for disagreeing on both counts.⁶³

The dissent responded:

Imagine a friend told you that she hoped to meet “an actor, director, or producer involved with the new Star Wars movie.” You would know immediately that she wanted to meet an actor from the Star Wars cast—not an actor in, for example, the latest *Zoolander*. Suppose a real estate agent promised to find a client “a house, condo, or apartment in New York.” Wouldn’t the potential buyer be annoyed if the agent sent him information about condos in Maryland

⁵⁹ *Lockhart*, 136 S. Ct. at 962 (citation omitted).

⁶⁰ *Id.* (citation omitted).

⁶¹ *Id.* at 970 (Kagan, J., dissenting) (citation omitted).

⁶² *Id.* at 963 (majority opinion).

⁶³ *Id.* at 966.

or California? And consider a law imposing a penalty for the “violation of any statute, rule, or regulation relating to insider trading.” Surely a person would have cause to protest if punished under that provision for violating a traffic statute. The reason in all three cases is the same: Everyone understands that the modifying phrase—“involved with the new Star Wars movie,” “in New York,” “relating to insider trading”—applies to each term in the preceding list, not just the last. That ordinary understanding of how English works, in speech and writing alike, should decide this case.⁶⁴

Even apart from the tone of the examples, which might seem inappropriate for a criminal case, especially one involving serious offenses and a ten-year mandatory minimum sentence, it is not immediately clear why this battle of linguistic intuitions should resolve the case. The statute was obviously not well drafted: even apart from the ambiguity that created the issue in *Lockhart*, the phrase “aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward” is obviously redundant, because “sexual abuse” will include “aggravated sexual abuse” (as both the majority and the dissent noted). So it is not as if one can assume that Congress drafted this language with an eye to subtle linguistic nuances.

In fairness, there were other indications of how the case should be decided, and both the majority and dissent did address them. For example, the majority also argued, pretty persuasively, that previous convictions for *federal* sexual abuse offenses could also lead to the imposition of a mandatory minimum sentence, and that the federal offenses in those categories included both offenses involving adults and offenses involving minors.⁶⁵ That suggested, the majority concluded, that state offenses involving adults should also call for a mandatory minimum sentence. The dissent, for its part, discussed legislative history that supported its position fairly strongly.⁶⁶ Both of those arguments do seem to provide some genuine insight into what Congress actually was trying to do when it enacted the statute—greater insight, one might think, than trying to determine whether the list was one to which the rule of the last antecedent should apply.

Neither the majority nor the dissent ignored those other sources of statutory meaning. But the emphasis of both opinions was on the close reading of the words of the statute alone. The majority could have said, in effect: this statute is obviously poorly drafted, so we will get little enlightenment from parsing its exact words; instead, let’s see what we can learn from other potential sources. Or the dissent could have taken

⁶⁴ *Id.* at 969 (Kagan, J., dissenting).

⁶⁵ *Id.* at 963–64 (majority opinion).

⁶⁶ *Id.* at 973–75 (Kagan, J., dissenting).

that approach, criticizing the majority for claiming to find answers in the wording when plainly none were there. Instead, both opinions dwelt intensely on the wording of the statute. This uniformity of commitment to the plain language rule, whatever the other disagreements, is characteristic of the Roberts Court.

III.

The emphasis on plain language is not new. It has, as I have said, been a hallmark of Roberts Court opinions—and before that, Rehnquist Court opinions, and even Burger Court opinions⁶⁷—for quite some time. What *is* new is the nearly unanimous adoption of the plain language approach by the Justices, exemplified by Justice Breyer's lonely but very plausible dissent in *Milner*. The turning point, for the Roberts Court, seems to have been when Justices Souter and Stevens were replaced by, respectively, Justices Sotomayor and Kagan. I mentioned earlier that Justice Breyer, in his dissent in *Milner*, had singled out Justice Stevens's arguments about how consistent past practice might justify overriding the apparent plain meaning of the words of a statute. And in fact, in an earlier Roberts Court case, *Circuit City Stores, Inc. v. Adams*,⁶⁸ a dissenting opinion written by Justice Stevens provided a powerful counterpoint to the plain language approach. The contrast between *Circuit City* to *Milner* shows how the plain language approach, highly influential before, has now come to dominate the Roberts Court.

The issue in *Circuit City* was whether an employee's state-law employment discrimination claim could be brought in court or was subject to arbitration. The employee, Adams, had signed an employment application providing that all employment-related disputes would be arbitrated. When Adams sued in state court, the employer, Circuit City, sought a federal court injunction against the suit, asserting that the Federal Arbitration Act (FAA)⁶⁹ made the suit subject to arbitration, notwithstanding any provision of state law. Adams responded that the FAA did not apply to employment contracts.

⁶⁷ For example, one of the most famous plain language opinions is the majority opinion in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), which was written by Chief Justice Burger. In that case, the Court held that the plain language of the Endangered Species Act required the Tennessee Valley Authority to stop work on a mostly-completed dam in order to prevent a small and supposedly insignificant species of fish, the snail darter, from becoming extinct.

⁶⁸ 532 U.S. 105, 133 (2001) (Stevens, J., dissenting) (quoting with approval the observation that “the ‘minimalist’ judge ‘who holds that the purpose of the statute may be learned only from its language’ has more discretion than the judge ‘who will seek guidance from every reliable source’” (citation omitted)).

⁶⁹ 9 U.S.C. §§ 1–14 (2012).

The case turned on two provisions of the FAA. One provision, section 2, specifies that “[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable.”⁷⁰ But another provision, section 1, exempts from the FAA “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”⁷¹ Adams asserted that his employment contract was not with section 2, because it was not “[a] maritime transaction or a contract evidencing a transaction involving commerce.”⁷² Adams also said that even if his contract was within the scope of section 2, it was exempted by section 1, because it was a “contract[] of employment of” a worker “engaged in . . . interstate commerce.”⁷³

A five-Justice majority resolved the case primarily on the basis of the language of the FAA. Adams said that the language of section 2, which made a “contract evidencing a transaction involving commerce” subject to arbitration, encompassed only commercial contracts, not employment contracts. The Court rejected that argument primarily on the ground that it would make the section 1 exemption for employment contracts superfluous, and the Court said—citing a familiar principle of statutory construction—a statute should generally be interpreted in a way that does not make any of its provisions superfluous.⁷⁴ Adams then said that section 1 exempted his employment contract because if his contract was one “involving commerce” within the meaning of section 2, then he must be a worker “engaged in” commerce, and such workers’ employment contracts are within the section 1 exemption.

The Court rejected that argument, too, again primarily by engaging in a close reading of the language of the statute. For one thing, the Court said, section 2 and section 1 were phrased differently. Section 2 used the term “involving” commerce; section 1 referred to workers “engaged in” commerce. “Involving,” the Court said, was a broader term.⁷⁵ Adams’s work might “involve” commerce because his employer shipped and received goods in interstate commerce, but Adams himself, who worked in a store, was not “engaged” in the movement of goods.

The Court also relied on the fact that section 1 referred to “seamen, railroad employees, or any other class of workers engaged in foreign or

⁷⁰ 9 U.S.C. § 2.

⁷¹ 9 U.S.C. § 1.

⁷² 9 U.S.C. § 2.

⁷³ 9 U.S.C. § 1.

⁷⁴ *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 113 (2001).

⁷⁵ *See id.* at 115–16.

interstate commerce.” The Court reasoned that when a general term, like “workers engaged in . . . commerce” was preceded by specific examples, the general term is limited to instances like the specifics. In reaching that conclusion, the Court relied on “the maxim *ejusdem generis*, the statutory canon that ‘[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.’”⁷⁶ So, the Court concluded, the exemption for “workers engaged in . . . commerce” extended only to employees who, like “seamen” and “railroad employees,” were actually engaged in the movement of goods.

More was involved in *Circuit City* than just the bare language of the statute; there were some precedents that had interpreted some of the terms of the FAA and similar terms in other statutes, and there was a background of Supreme Court decisions dealing with the scope of Congress’s power under the Constitution to regulate interstate commerce. But it is fair to say that the majority in *Circuit City* decided the case primarily by looking within the four corners of the statute. The Court examined the precise words used (“involving” versus “engaging”) and relied on principles about how to read a statutory text (*ejusdem generis*, and the presumption that no provisions are superfluous).

Justices Stevens, Souter, Breyer, and Ginsburg dissented; all four joined in each of the two dissenting opinions, written by Justices Stevens and Souter respectively. Justice Stevens’s approach—consistent with the role he played in Justice Breyer’s *Milner* dissent—offered the clearest contrast to the plain language view.⁷⁷ Rather than puzzling over the exact words of the text, he asked, in effect: what decisions did Congress make when it enacted the FAA? He looked at the legislative history of the statute and saw that it was prompted by the desire to make commercial contracts arbitrable.⁷⁸ No one at the time the FAA was being debated, he said, suggested that employment contracts should be subject to arbitration. Nonetheless, some representatives of organized labor objected that the FAA might be interpreted to apply to employment contracts. Although the supporters of the FAA insisted that section 2, as written, did not apply to employment contracts in the first place, they agreed to add section 1 to put the matter beyond doubt.⁷⁹ Section 1 was not superfluous; it was added out of an abundance of caution. That, Justice Stevens said, was what the legislative history of the FAA actually showed.

⁷⁶ *Id.* at 114–15 (citation omitted).

⁷⁷ *See id.* at 124–33 (Stevens, J., dissenting).

⁷⁸ *See id.* at 125.

⁷⁹ *See id.* at 128.

Justice Stevens criticized the majority for “[p]laying ostrich to the substantial history behind the amendment”⁸⁰ and “reason[ing] in a vacuum”⁸¹ that section 1 was superfluous—criticisms that will often apply to the plain language approach generally. But, as *Milner* illustrated, Justice Stevens’s skepticism about the plain meaning approach—which had four adherents at the time of *Circuit City* in 2001—now seems to be limited to a single member of the Court.

IV.

In some recent high-profile cases, the Roberts Court seems to have departed from the plain language approach. But the significant thing about the Roberts Court’s apparent commitment to the plain language approach is that the Court will use that approach, time and again, in the more ordinary statutory interpretation cases that come before the Court quite frequently. For that reason, focusing on the exceptional cases, in this respect, can be misleading.

For example, one of the exceptions—*King v. Burwell*⁸²—was a very highly publicized case in which the plaintiffs sought a construction of the Affordable Care Act (ACA) that might have seriously undermined the workability of the ACA. The ACA is, of course, a very important statute that was highly controversial politically. The Court in *King* acknowledged that the plaintiffs’ “arguments about the plain meaning of [the relevant provision of the ACA] are strong.”⁸³ But the Court ruled that, in context, the language of that provision was “ambiguous”⁸⁴ and for that reason “turn[ed] to the broader structure of the Act to determine the meaning of” that provision.⁸⁵

The concluding passage in the majority opinion in *King* was, in fact, a summary of an approach that is very much in tension with the plain language view:

Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter. [The relevant section] can fairly be read consistent

⁸⁰ *Id.* at 128.

⁸¹ *Id.*

⁸² 135 S. Ct. 2480 (2015).

⁸³ *Id.* at 2495.

⁸⁴ *Id.* at 2492.

⁸⁵ *Id.*

with what we see as Congress's plan, and that is the reading we adopt.⁸⁶

The dissent, predictably, pilloried the majority for not following the plain language.⁸⁷ But because *King v. Burwell* was such a high-profile, politically-salient case, it would be a mistake to generalize from it in describing the Roberts Court's general approach to statutory interpretation.

The way the case was argued is, perhaps, more revealing. The brief for the federal government—urging the interpretation of the ACA that the Court ultimately adopted—overwhelmingly emphasized the textual argument in support of its position.⁸⁸ Arguments based on the ACA's structure and design were secondary,⁸⁹ and arguments based on the legislative history were tertiary.⁹⁰ The Solicitor General, representing the federal government, knew his audience. In order to have the best chance of prevailing, he would have to show the Court that there was a strong argument based on the language of the statute for the interpretation favoring the government. To concede that the language was contrary to the government's position—or even that it was ambiguous—would seriously damage the government's litigating position.

If, in fact, the Roberts Court has coalesced around a plain language approach to statutes, how are we to explain that? And is it a good development? An enormous amount has been written about the various approaches to statutory interpretation, but it may be worth identifying one major problem—and also one major virtue—of the plain language approach. The problem becomes apparent in a case like *Lockhart*. Whatever else one might say about the issue in that case, it is entirely clear that the drafters of the statute were not thinking about that issue when they drafted the statute; if they had been thinking of it, they would never have drafted the statute in the way they did. The majority and dissent disagreed about whether the “rule of the last antecedent” applied to the crucial phrase, but unless one is going to attribute some kind of unconscious intention to the drafters, the answer to that question has no relationship to any decision made by the legislature. In contrast, the other sources that the opinions considered—the parallel treatment of federal law, and the legislative history—do have a relationship to that decision, however difficult it might be to assign the proper weight to those sources. But those sources played second fiddle in both opinions.

⁸⁶ *Id.* at 2496.

⁸⁷ *See id.* at 2496–507 (Scalia, J., dissenting).

⁸⁸ *See* Brief for the Respondents at 19–35, *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14-114).

⁸⁹ *See id.* at 35–41.

⁹⁰ *See id.* at 45–51.

More generally, in any case where reasonable people might disagree about what outcome is dictated by the meaning of the words in a statute, it is very likely that the words were not written with that case in mind; if they had been written with that case in mind, the authors would have made the answer clear. So the resolution of the disagreement about the meaning of the words in a statute will often be divorced from the actual decisions made by the authors of the provision. And then it becomes unclear why we care about the meaning, since the point of the enterprise, presumably, is to give effect to a decision made by the legislature that drafted and enacted the words.⁹¹

The unobvious virtue of the plain language approach is, in a way, the other side of that problem. The plain language approach is, in an important way, easier and less divisive for the Justices.⁹² In principle, they need only look at a series of words in a statute. They do not have to consider the purposes of the statute, or the policy implications that might be advanced or defeated by one or another interpretation of the statute. Those latter considerations potentially implicate political or other sensitive views that might be divisive. Should employment contracts be subject to arbitration? How much leeway should government agencies have to withhold materials that might compromise their mission? Should people who possess child pornography receive a ten-year mandatory minimum sentence if they have previously been convicted of certain crimes? Those are difficult and controversial questions and, while the interpretation of the statutes in *Circuit City*, *Milner*, and *Lockhart* would not require answers to those questions specifically, an approach that went beyond the words—and looked at the underlying purposes, or at what the legislature was trying to accomplish, or at whether established practices should be preserved—could easily lead judges, or Justices, to engage those questions in some form.

By contrast, the plain language approach only requires an argument about language. Instead of considering difficult and potentially divisive policy issues, the Justices just have to consult the intuitions they have as people who speak English. Instead of having competing views about sensitive policy matters, we will have competing analogies to baseball general managers' decisions or shopping lists or other features of everyday conversation; or we will have an effort to put together pieces of a statutory jigsaw in a way that attaches different

⁹¹ This point has been made in many places, but for one such discussion, see, for example, David A. Strauss, *Why Plain Meaning?*, 72 NOTRE DAME L. REV. 1565, 1570–72 (1997).

⁹² This account is indebted to Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231. There is also a discussion in Strauss, *supra* note 91, at 1579–81.

meanings to different words (like “engaging” and “involving”) and makes no piece of the puzzle superfluous. It would be unfair to say that the plain language approach turns statutory interpretation into a kind of word game, but something like that is true. And it is not hard to see why, on a Court that often divides on highly controversial matters, word games might be pretty appealing.