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Questionable Uses of Canons of Statutory Interpretation: Why the Supreme Court Erred When It Decided Any Only Means Some

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QUESTIONABLE USES OF CANONS OF STATUTORY INTERPRETATION: WHY THE SUPREME COURT ERRED WHEN IT DECIDED "ANY" ONLY MEANS "SOME"

I. INTRODUCTION[1]

In *Small v. United States*,[2] the United States Supreme Court held that the phrase "convicted in any court" in the United States Criminal Code's unlawful gun possession statute, 18 U.S.C. § 922(g),[3] includes only convictions handed down by domestic, and not foreign, courts.[4] With this decision, the Court resolved a circuit split over the question of whether a defendant's convictions from jurisdictions other than U.S. federal and state courts could apply under the statute.

The Supreme Court's decision was incorrect because in statutory interpretation, a plain language reading, where possible, is preferable to a strained reading that may or may not lead to fairer results for criminal defendants. In the event of true ambiguity, legislative history and policy concerns can be considered, but unless the statutory language itself is obscure, courts should follow the language as written and permit Congress to change the result if it is not the one that it intended. The language of the statute in this case is clear as written. While the majority raises important concerns about potential dangers in the enforcement of the statute as written, they are likely overstated and do not warrant a departure from the usual approach to statutory interpretation. The dissent raises more significant concerns about future decisions based on questionable modes of statutory interpretation that are introduced by the Court in this decision.

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[1] The title of this note is inspired, in part, by Tracey A. Basler, Note, *Does "Any" Mean "All" or Does "Any" Mean "Some"? An Analysis of the "Any Court" Ambiguity of the Armed Career Criminal Act and Whether Foreign Convictions Count as Predicate Convictions*, 37 NEW ENG. L. REV. 147 (2002).

[2] 125 S. Ct. 1752 (2005).

[3] 18 U.S.C. § 922(g) (2000).

[4] *Small*, 125 S. Ct. at 1754.

The Court's approach in this case is inconsistent with its approach in other cases—including one decided on the same day[5]—and will lead to confusion among citizens in understanding their rights and responsibilities, as well as for Congress in understanding how its statutes will be interpreted. Looking beyond the decision itself, the Court's methods of reasoning could have ripple effects in future cases.

II. BACKGROUND

A. THE "FELON-IN-POSSESSION" STATUTE

The statute at issue in this case is 18 U.S.C. § 922, which enumerates unlawful acts with regard to firearms under federal law. The statute, in pertinent part, reads:

> (g) It shall be unlawful for any person—
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> (1) who has been *convicted in any court* of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.[6]

The Supreme Court in *Small*, and lower courts before it, had to interpret the phrase "any court" to determine whether convictions that take place in a foreign country serve as predicate convictions for purposes of this statute. While the legislature could have clearly articulated this in the statute itself, there is no reference to domestic or foreign courts in § 922(g), where the plain language simply reads "any court." Section 921 provides definitions for the chapter, and does not define "any court." The only part that references language in § 922(g) is § 921(a)(20), which exempts certain federal and state crimes from the reach of § 922(g) by slightly altering the definition of the predicate crime:

> (20) The term "crime punishable by imprisonment for a term exceeding one year" does not include—
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> (A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or
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> (B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.[7]

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[5] *Pasquantino v. United States*, 125 S. Ct. 1766 (2005), is discussed further, *infra*, in Part VI.B. of the text.

[6] 18 U.S.C. § 922(g) (emphasis added).

[7] *Id.* § 921.

There are two principal arguments that have been raised with regard to this language. First, the proponents of including foreign convictions note that the plain language excludes any specific mention of foreign convictions, and conclude that they should still be included.[8] Second, and in opposition to the first argument, some argue that the language excluding particular federal and state crimes from the reach of the larger statute indicates that Congress did not even consider foreign convictions when it drafted the felon-in-possession statute, and therefore they should not be included.[9]

Section 922(g) also has implications for repeat offenders. Under the Armed Career Criminal Act ("ACCA"),[10] an individual convicted of a § 922(g) violation who has three or more previous convictions for violent felonies or serious drug offenses in any court defined in § 922(g)(1) will be fined and imprisoned for a minimum sentence of fifteen years.[11]

B. PURPOSE AND HISTORY OF THE RELEVANT STATUTES

Two relevant firearms statutes were passed in 1968, the Omnibus Crime Control and Safe Streets Act ("Safe Streets Act") in June, and the Gun Control Act amending the Safe Streets Act in October.[12] While there had been little Congressional interest in gun control legislation between 1938 and 1965,[13] the assassinations of Dr. Martin Luther King, Jr. and Senator Robert Kennedy in 1968 altered the political landscape.[14] Title IV of the Safe Streets Act specifically addressed Congress's concern about firearms and firearm traffic. In the findings and declarations, Congress declared that "the ease with which any person can acquire firearms other than a rifle or shotgun (including criminals [and other parties of concern]) is a significant factor in the prevalence of lawlessness and violent crime in the

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[8] *Small*, 125 S. Ct. at 1759 (Thomas, J., dissenting).

[9] *Id.* at 1756 ("Congress likely did not consider the matter.").

[10] 18 U.S.C. § 924(e).

[11] *Id.*

[12] For a short summary of the relevant history, see Aron J. Estaver, Note, *Dangerous Criminals or Dangerous Courts: Foreign Felonies as Predicate Offenses Under Section 922(g)(1) of the Gun Control Act of 1968*, 38 VAND. J. TRANSNAT'L L. 215, 235-38 (2005); Christine A. Vogelei, Comment, *The Fundamental (Un)Fairness of Foreign Convictions as Predicate Felonies*, 38 U.C. DAVIS L. REV. 1317, 1320-24 (2005). For more detailed coverage of both pieces of 1968 legislation, the Omnibus Crime Control and Safe Streets Act and the Gun Control Act, see William J. Vizzard, *The Gun Control Act of 1968*, 18 ST. LOUIS U. PUB. L. REV. 79 (1999).

[13] Vizzard, *supra* note 12, at 80.

[14] *Id.* at 83.

United States."[15] The Gun Control Act modestly revised Title IV of the Safe Streets Act.[16]

In 1986, Congress passed the Firearm Owners' Protection Act ("FOPA"), which represented the first major revision of the firearm laws since the Safe Streets Act.[17] FOPA had great impact on the reach of state and federal gun laws. FOPA streamlined the law with regards to which classes of people would be prohibited from possessing or receiving firearms.[18] While these classes had been defined under the 1968 and subsequent law in two separate provisions in both Title IV and Title VII, FOPA repealed Title VII and incorporated its definitional categories into Title IV.[19] However, the relevant language of § 922(g)(1) pertaining to the current discussion remained essentially the same.[20]

C. PRIOR COURTS REVIEWING THE STATUTE HAVE DIFFERED ON WHETHER "ANY COURT" INCLUDES OR EXCLUDES CONVICTIONS IN FOREIGN COURTS

The Circuit Courts of Appeals have disagreed on whether a conviction occurring in "any court" includes foreign court convictions. Circuits that have permitted foreign convictions to stand as predicate offenses include the Third, Fourth, and Sixth Circuits. Circuits that have reviewed the same statute and have excluded foreign convictions include the Second and Tenth Circuits.

1. The Fourth and Sixth Circuits Focus on a Plain Language Reading of the Statute and Include Foreign Convictions

The first court of appeals to consider the issue of the meaning of "any court" with regard to foreign convictions was the Sixth Circuit in 1986 in *United States v. Winson*.[21] The defendant had been charged with unlawful receipt of two firearms pursuant to § 922(h)(1),[22] based upon two prior

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[15] Omnibus Crime Control and Safe Streets Act of 1968, State Firearms Control Assistance, Pub. L. No. 90-351, tit. IV, § 901(a)(2), 82 Stat. 197, 225 (1968).

[16] Vizzard, *supra* note 12, at 86.

[17] David T. Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 CUMB. L. REV. 585, 585 (1987).

[18] *Id.* at 639-42.

[19] *Id.* at 641.

[20] The changes to § 922(g) were, in large part, related to drugs, drug abuse, and aliens. Firearm Owners' Protection Act, Amendments to Section 922, Pub. L. No. 99-308, § 102, 100 Stat. 449, 451-52 (1986).

[21] 793 F.2d 754 (6th Cir. 1986).

[22] At the time, § 922(h)(1) was substantially the same as the current § 922(g)(1), "making it unlawful for any person 'who has been convicted *in any court* of . . . a crime punishable by

convictions he had received in Argentina and Switzerland for possession of counterfeit U.S. currency and fraud, respectively.[23] The district court reasoned that interpreting the statute to include foreign convictions would "require judicial recognition of military tribunal adjudications in Nicaragua, as well as condemnations of political prisoners in Poland," and Congress would not have intended such an unfair result.[24] Further, the court found ambiguity when it considered § 922 juxtaposed with a similar code section then in effect, § 1202, which by its terms only applied to domestic courts.[25] The district court concluded that the principle of lenity should control and dismissed the indictment.[26]

While the Sixth Circuit agreed that the principle of lenity should govern when a criminal statute is ambiguous, it disagreed with the trial court about the ambiguity of § 922.[27] It found that the plain language of § 922 was clear, and that the statute only appeared ambiguous when viewed in light of the limits of § 1202.[28] However, following the Supreme Court's reasoning in *United States v. Batchelder*,[29] the Sixth Circuit identified clear "congressional intent to give each statute an independent construction and application, especially where, as here, the express language of the two Titles indicates different meanings."[30] Further, with regard to fairness considerations, the court found no evidence that the defendant's prior convictions in Argentina and Switzerland were counter to American

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imprisonment for a term exceeding one year . . . to receive any firearm or ammunition which has been shipped . . . in interstate . . . commerce.'" *Id.* at 756 (quoting 18 U.S.C. § 922(h)(1) (1982)) (emphasis added by court).

[23] *Id.* at 755-56.

[24] *Id.* at 756 (quoting United States v. Winson, No. 3-84-00060, slip op. at 2-3 (M.D. Tenn. Mar. 6, 1985)).

[25] *Id.* Section 1202 stated that:

> Any person who- (1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony . . . and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

Id. at 756 n.3.

[26] *Id.* The rule of lenity is a substantive canon of construction, as opposed to a linguistic canon (focusing on the text of the statute) or a presumption about extrinsic sources (such as those that consider appropriate the use of legislative history). William N. Eskridge, Jr., *Norms Empiricism, and Canons in Statutory Interpretation*, 66 U. CHI. L. REV. 671, 674 (1999). The Supreme Court has stated on multiple occasions that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." Jones v. United States, 529 U.S. 848, 858 (2000) (quoting Rewis v. United States, 401 U.S. 808, 812 (1971)).

[27] *Winson*, 793 F.2d at 757.

[28] *Id.*

[29] 442 U.S. 114 (1978).

[30] *Winson*, 793 F.2d at 757.

principles of constitutional law or in violation of the defendant's civil rights.[31] The court also found it highly persuasive that mechanisms were in place for an individual to seek relief from foreign convictions with regard to the code sections at issue.[32] Accordingly, the court vacated the district court's decision and remanded with directions to reinstate the indictment.[33]

Three years after *Winson* was decided, the Fourth Circuit decided *United States v. Atkins*.[34] The defendant in that case had received a conviction by a court in England for unlawful possession of a firearm with intent to endanger life, and had served three years of a five-year sentence.[35] After being found by military police with a handgun attached to his ankle, he was arrested under § 922(g).[36] He conditionally pleaded guilty, reserving the question of whether his English conviction was a conviction in "any court" under the statute.[37] In a short opinion, the Fourth Circuit agreed with the Sixth Circuit's approach in *Winson*.[38] Based on their analysis of legislative history and cases construing the statute, they determined that Congress's intended meaning was unclear, but that there was no uncertainty in the language itself.[39] They concluded that "[i]f statutory language is unambiguous, the principle of lenity is inapplicable."[40] The court then affirmed the judgment of the lower court against the defendant.[41] The *Atkins* court closed by suggesting that any attack on this statute should center on the word "court" rather than the word "any," given that the plain meaning of "any" is expansive, and that different courts may provide different experiences for defendants.[42] However, the Fourth Circuit

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[31] *Id.*

[32] *Id.* at 758. The court noted that "Section 925(c) authorizes the Secretary of the Treasury to grant such relief where an applicant shows that 'the circumstances regarding the conviction, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest.'" *Id.* (quoting 18 U.S.C. § 925(c) (1982), which in its current form remains substantially the same, except that the Attorney General and not the Secretary of the Treasury has the power to grant the relief, 18 U.S.C. § 925(c) (2000), *amended by* Homeland Security Act of 2002, Pub. L. No. 107-296, § 1112(f)(6), 116 Stat. 2135, 2276 (2002)).

[33] *Winson*, 793 F.2d at 759.

[34] 872 F.2d 94 (4th Cir. 1989).

[35] *Id.* at 95.

[36] *Id.*

[37] *Id.*

[38] *Id.* at 96.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

declined to explore this issue because "Atkins suffered the misfortune of violating foreign law in England, the country which provides the origin or antecedent of the jurisdictional system employed in the United States of America."[43] It is unclear whether the Fourth Circuit would have decided differently had the predicate offense taken place in a country with a legal system less similar to that of the United States.

2. The Second and Tenth Circuits Excluded Foreign Convictions, Focusing on Potential Inequities Resulting from the Inclusion of Foreign Convictions as Predicate Crimes

In recent years, additional court challenges have addressed the language of the felon-in-possession statute. In 2000, the Tenth Circuit decided *United States v. Concha*,[44] in which the defendant was charged with assault with intent to commit murder, assault with a dangerous weapon, use of a firearm in connection with these charges, and being a felon in possession of a firearm.[45] The jury acquitted him of the assault and use of a firearm charges, but convicted him of the lesser charge of simple assault.[46] He also was convicted of being a felon in possession of a firearm.[47] His predicate crimes for the felon-in-possession statute included two burglary convictions, an arson conviction, and a sex offense conviction.[48] Based on his felony record, his sentence was enhanced under ACCA.[49] The defendant challenged the enhanced sentence on appeal, on the grounds that three out of four prior felony convictions took place in the United Kingdom.[50]

In determining whether the foreign convictions would serve as predicate crimes under ACCA, the Tenth Circuit looked to the statutory

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[43] *Id.*

[44] 233 F.3d 1249 (10th Cir. 2000).

[45] *Id.* at 1251.

[46] *Id.*

[47] *Id.*

[48] *Id.* The sex offense conviction was for a lewd or lascivious act with a child under 14, a felony crime which, under current law, carries a punishment of imprisonment for three, six, or eight years. CAL. PENAL CODE § 288(a) (West 2005).

[49] ACCA, 18 U.S.C. § 924(e) (2000), imposes a harsher sentence on repeat criminals with serious records. It institutes a minimum sentence of fifteen years imprisonment without the possibility of probation for being a felon in possession of a firearm if the defendant has three or more convictions for "violent felonies" or "serious drug convictions" that meet the requirements of § 922(g)(1).

[50] *Concha*, 233 F.3d at 1251. The burglary and arson convictions took place in the United Kingdom, while the sex offense conviction took place in California. *Id.*

definitions under 18 U.S.C. § 921.[51] Specifically, it focused on a limiting provision under § 921(20):

> The term "crime punishable by imprisonment for a term exceeding one year" does not include—
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> (A) any *Federal or State* offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or
>
> (B) any *State* offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.[52]

The court expressed concern that by mentioning solely domestic offenses within this limiting provision, fewer domestic crimes would be covered by the statute than equivalent foreign crimes.[53] This court found it to be an anomalous result; two similarly situated defendants who had committed identical crimes in the United States or a foreign country would be treated differently in the eyes of the law.[54]

The Tenth Circuit additionally found persuasive authority in the United States Sentencing Guidelines, which did not permit foreign convictions to be considered for purposes of computing a defendant's criminal history, but instead allowed such considerations only at a judge's discretion in order to permit an enhanced sentence above the Guidelines range for a particular defendant and crime.[55] The court further found it anomalous not to use prior foreign convictions to determine a sentence if there were one or two convictions, but to require their use for sentencing when there are three.[56] The court took issue with including foreign convictions in the absence of clear statutory directive because foreign defendants do not always receive the constitutional protections that are mandatory in the United States.[57] Finally, the court reasoned that after the Supreme Court had decided in *Custis v. United States*[58] that § 924(e) does

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[51] *Id.* at 1253-54.

[52] *Id.* (emphasis by court, not in original statute).

[53] *See id.* at 1254.

[54] *Id.* The court used the example that a person convicted of a an American antitrust violation would be allowed to possess a firearm, while a person convicted of a British antitrust violation would not, though it did note that neither of these would serve as an enhancing prior crime under ACCA because an antitrust violation would be neither a violent felony nor a serious drug offense. *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] 511 U.S. 485 (1994).

not authorize collateral attacks on prior convictions, only very limited challenges to foreign convictions were possible.[59]

The Tenth Circuit addressed the arguments of the Fourth and Sixth Circuits in making its decision.[60] On textual grounds, it weighed the argument for including foreign convictions—based on the plain meaning of "any" in "any court"—against the argument for not including them—the definition in § 921(20) that limited only state and federal crimes—and found that neither was compelling.[61] On policy grounds, it weighed the reasons for including foreign crimes—foreign criminals as likely to be as dangerous as domestic—against reasons for not including them—unfair foreign convictions can be challenged only with difficulty, if at all—and again found that neither was compelling.[62] It turned to the legislative history of the statute, but found that it did not help clarify the issue, and therefore, the court concluded that the statute was ambiguous.[63] Based on this, the Tenth Circuit relied on the rule of lenity and held that foreign convictions cannot be used as predicate offenses for sentencing enhancement.[64]

The Second Circuit encountered the same question in *United States v. Gayle*.[65] The defendant was found with multiple boxes of firearms in a hotel room and was charged with two counts of firearms-related conspiracy and one count for being a felon in possession of a firearm under 18 U.S.C. §

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[59] *Concha*, 233 F.3d at 1254. According to the Tenth Circuit, *Custis* held that § 924(e) does not authorize collateral attack on prior convictions, except for jurisdictional attacks based on total deprivation of the right to counsel. *Id.* It did, however, leave open the possibility of challenge by habeas petition. *Id.* The court was concerned, however, that even if a habeas petition could be filed, that it might not be of much value, for two reasons. *Id.* at 1255. First, a habeas petition could not be filed until after the defendant began serving a sentence. *Id.* If the defendant was otherwise innocent, he could end up serving time only because of the inappropriate foreign convictions. *Id.* Second, in a habeas petition, the burden of proof would lie on the defendant to show defects in previous convictions. *Id.* Because the records kept in foreign court systems may be nonexistent or incomplete, it might not even be possible to adequately challenge such a conviction. *Id.* The court viewed these two factors as placing a substantial burden on a defendant in the absence of clear congressional intent. *Id.*

[60] *Id.* at 1255-56.

[61] *Id.* at 1256.

[62] *Id.*

[63] *Id.*

[64] *Id.* (holding that the court "will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended" (quoting United States v. Diaz, 989 F.2d 391, 393 (10th Cir. 1993))).

[65] 342 F.3d 89 (2d Cir. 2003).

922(g)(1).[66] The predicate offense for his felon-in-possession charge was a Canadian conviction for using a firearm in the commission of an indictable offense.[67] The defense moved to dismiss the felon-in-possession charge on the grounds that a Canadian conviction should not count as a predicate crime, but the trial court followed the Fourth and Sixth Circuits' reasoning in denying the motion to dismiss and held that the Canadian conviction was a proper predicate offense under the statute.[68] The jury found the defendant guilty on all three counts and sentenced him to over six years.[69]

The only issue for the court to decide on appeal was whether the Canadian conviction satisfied the "any court" provision of § 922.[70] By the time the Second Circuit decided this case, the Third, Fourth, and Sixth Circuits had decided that the "any court" language included foreign convictions, while the Tenth Circuit had decided that it did not.[71] The Second Circuit began with the plain language of the statute.[72] It noted that some courts had included foreign courts within the definition of "any court," while other courts had also included military courts within the term "any court."[73] However, the court quickly moved beyond the language itself to attempt to gain a contextual understanding by reviewing the definition provisions in § 921, as the Tenth Circuit had in *Concha*.[74] Identifying the same ambiguity in the language as the Tenth Circuit had, the Second Circuit attempted to clarify the meaning of "any court" with an analysis of the legislative history.[75]

The Second Circuit found evidence for a domestic-only reading of the statute in the Senate Judiciary Committee Report on the Gun Control Act, which had defined a felony as a "Federal crime punishable by a term of imprisonment exceeding 1 year and in the case of State law, an offense determined by the laws of the State to be a felony."[76] When the Conference Committee combined the House and Senate versions of the language, the

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[66] *Id.* at 90.

[67] *Id.*

[68] *Id.* at 90-91.

[69] *Id.* at 91.

[70] *Id.*

[71] *Id.* at 92. The decision of the Third Circuit in *United States v. Small*, 333 F.3d 425 (3d Cir. 2003), *rev'd*, 544 U.S. 385 (2005), is discussed in Part III.B.2 of the text, *infra*.

[72] *Gayle*, 342 F.3d at 92.

[73] *Id.* (citing to decisions of the Sixth, Seventh, and Ninth Circuits in which convictions by military courts were held to satisfy the "convicted in any court" requirements of the felon-in-possession statute).

[74] *Gayle*, 342 F.3d at 93; United States v. Concha, 233 F.3d 1249, 1254 (10th Cir. 2000).

[75] *Gayle*, 342 F.3d at 93; *Concha*, 233 F.3d at 1254.

[76] *Gayle*, 342 F.3d at 94 (quoting S. REP. NO. 90-1501, at 31 (1968)).

court found it persuasive that it adopted the House's language, "crime punishable by imprisonment for a term exceeding one year,"[77] and that it had "voiced no disagreement with the Senate Report's explicit limitation of felonies to include only convictions attained in domestic courts."[78] Accordingly, the court held that using foreign convictions as predicate crimes was inconsistent with Congressional intent, and reversed the lower court's decision.[79] The government filed a petition for rehearing the case en banc, in part because it believed the panel had "anchored its decision to an analysis of the wrong legislative history,"[80] arguing that the "in any court" language had roots in the Federal Firearms Act of 1938, and that the reports relied on by the court were actually issued three to four months after relevant legislation was passed into law.[81] The Second Circuit denied the petition, but amended its original decision, adding a footnote that dismissed the government's claim because the reports relied upon were still "directly part of the legislative history of the Gun Control Act of 1968."[82]

III. FACTS AND PROCEDURAL HISTORY

Gary Small faced similar issues as Gayle and Concha under the felon-in-possession statute. Small's predicate crime was a Japanese conviction,[83] placing it squarely within the disagreement among the circuits discussed above.[84] Small's case went up to the Supreme Court,[85] allowing the Court to definitively resolve the question of whether foreign court convictions serve as predicate crimes under § 922.

A. FACTS

In 1992, Gary Small was arrested by Japanese authorities at Naha Airport in Okinawa, Japan, when he tried to pick up a water heater he had

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[77] *Id.* at 95 (quoting H.R. CONF. REP. 90-1956, at 4, 8, 28-29 (1968), *reprinted in* 1968 U.S.C.C.A.N. (82 Stat.) 4426, 4428).

[78] *Id.*

[79] *Id.* at 95-96.

[80] Petition for Rehearing En Banc or Alternatively Petition for Panel Rehearing at 2, *Gayle*, 342 F.3d 89 (No. 02-1095), 2003 WL 24147468.

[81] *Id.* at 6-7, 14.

[82] *Gayle*, 342 F.3d at 95 n.7; *see also* Dionna K. Taylor, Comment, *The Tempest in a Teapot: Foreign Convictions as Predicate Offenses Under the Federal Felon in Possession of a Firearm Statute* [United States v. Gayle, *342 F.3d 89 (2d Cir. 2003)*], 43 WASHBURN L.J. 763, 763 n.1 (2004) (discussing the *Gayle* decision and subsequent amendment to the opinion; characterizing footnote 7 as "hastily added").

[83] Small v. United States, 125 S. Ct. 1752, 1754 (2005).

[84] *See* discussion of circuit split *supra* Part II.C.

[85] *Small*, 125 S. Ct. 1752.

mailed to himself from Pittsburgh.[86] Inside the water heater were "two rifles, eight pistols, 420 rounds of ammunition, and five bags of gunpowder."[87] In April 1994, Gary Small was convicted in Japanese District Court for violations of Japanese firearm and customs law.[88] Small was sentenced to five years in Japanese prison.[89] He was paroled in November 1996, and his parole term ended in May 1998.[90] In June 1998, Small purchased a firearm from a dealer in the United States and represented to the dealer that he had never been convicted of a crime punishable by a sentence of more than one year.[91] This formed the basis of Small's August 2000 indictment before a federal grand jury in which he was found to have made a false statement to a firearms dealer.[92] His foreign conviction also served as the basis for additional charges: two counts of possession of a firearm by a felon and one count of possession of ammunition by a felon.[93]

B. PROCEDURAL HISTORY

1. The District Court Considered the Plain Language of § 922 and the Fundamental Fairness of Small's Japanese Conviction in Determining that the Foreign Conviction Qualified as a Predicate Crime

At the district court, Small moved to dismiss his indictment on the grounds that the Japanese conviction should not have qualified as a prior conviction under § 922.[94] In the alternative, he argued that even if foreign convictions were covered under the statute, his Japanese conviction failed to meet protections guaranteed by the United States Constitution.[95] At the time of the decision the Third Circuit had not yet considered the issue, so the District Court for the Western District of Pennsylvania looked to other circuits for guidance. The court reviewed the relevant decisions of the Fourth, Sixth, and Tenth Circuits, first considering whether foreign

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[86] Torsten Ove, *Former Officer in New Round of Legal Woes*, PITTSBURGH POST-GAZETTE, Feb. 18, 2001, at C1.

[87] *Id.*

[88] United States v. Small, 183 F. Supp. 2d 755, 757 (W.D. Pa. 2002), *aff'd*, 333 F.3d 425 (3d Cir. 2003), *rev'd*, 125 S. Ct. 1752 (2005).

[89] *Id.* at 757 n.3.

[90] *Id.*

[91] *Id.* at 757.

[92] *Id.* at 756-57. 18 U.S.C. § 922(a)(6) (2000) prohibits making false statements to licensed firearm dealers. *Id.* at 756 n.1.

[93] *Id.* at 756-57.

[94] *Id.* at 757.

[95] *Id.*

convictions should generally qualify as predicate crimes under the statute.[96] It agreed with the Fourth and Sixth Circuits, finding the "in any court" language of § 922 to be unambiguous, thereby making the rule of lenity inapplicable.[97]

Once the court found that foreign convictions could generally apply for purposes of § 922, it turned to an analysis of which foreign convictions should specifically apply.[98] The court did not take the government's expansive view that *all* such convictions should qualify, regardless of fairness.[99] The court noted that "procedural due process concerns are automatically raised with the use of foreign criminal convictions"[100] and that "[t]he criminal conduct underlying a foreign conviction may also be an issue, given the differing views among foreign nations as to what constitutes illegal conduct."[101] Based on these concerns, the district court allowed Small to raise a constitutional challenge to his Japanese conviction,[102] which the court believed to turn on the question of whether the Japanese conviction comported with American concepts of fundamental fairness.[103] The court began with a review of relevant provisions of the Japanese Constitution, which it found guaranteed many of the same rights as the U.S. Constitution.[104] After considering Small's specific challenges, the district court held that the Japanese conviction was sufficiently consistent with American notions of fundamental fairness and that the fact-finding process leading to his conviction was sound.[105] As a result, the court denied Small's motion to dismiss.[106]

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[96] *Id.* at 757-60. The Second Circuit had not decided on the issue at the time of this decision.

[97] *Id.* at 759-60.

[98] *Id.* at 760.

[99] *Id.* at 761.

[100] *Id.* at 762 n.7 (quoting Bean v. United States, 89 F. Supp. 2d 828, 838 n.8 (E.D. Tex. 2000)).

[101] *Id.* at 762 n.9.

[102] *Id.* at 763.

[103] *Id.* at 765.

[104] *Id.* at 766.

[105] *Id.* at 770. The court considered a number of claims by Small, including denial of bail, lack of a speedy trial, judge substitution, testimony of a handwriting expert, lack of jury trial, denial of right to remain silent, denial of right to confront accusers, and effectiveness of counsel. *Id.* at 767-69.

[106] *Id.* at 770.

2. The Third Circuit Adopted the Restatement of Foreign Relations Law in Evaluating Foreign Judgments for the Purposes of the Felon-in-Possession Statute and Held that the District Court Correctly Recognized the Judgment of the Japanese Court

Small appealed the district court's judgment against him by making two arguments: first, that the district court failed to consider the totality of circumstances in holding that the Japanese conviction was fundamentally fair; and second, that an evidentiary hearing should have been held to make that determination.[107]

In analyzing the first question, the Third Circuit agreed with the district court that not all foreign convictions could be recognized, given the possible lack of fundamental fairness under foreign systems of law.[108] In order to ensure that foreign convictions used as predicate offenses comport with American notions of fairness, the Third Circuit adopted the approach of the Restatement (Third) of Foreign Relations Law provision for non-recognition of foreign judgments.[109] The Restatement provides two mandatory grounds and six discretionary grounds for which a court may not recognize a foreign judgment.[110] The Third Circuit found that the district court's analysis satisfied the elements of the Restatement test, and that the use of Small's Japanese conviction as a predicate offense for the felon-in-

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[107] United States v. Small, 333 F.3d 425, 427 (3d Cir. 2003), *rev'd*, 125 S. Ct. 1752 (2005).

[108] *Id.*

[109] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482 (1987).

[110] Section 482 of the Restatement states:

(1) A court in the United States *may not* recognize a judgment of the court of a foreign state if:

(a) the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law; or

(b) the court that rendered the judgment did not have jurisdiction over the defendant in accordance with the law of the rendering state and with the rules set forth in § 421.

(2) A court in the United States *need not* recognize a judgment of the court of a foreign state if:

(a) the court that rendered the judgment did not have jurisdiction of the subject matter of the action;

(b) the defendant did not receive notice of the proceedings in sufficient time to enable him to defend;

(c) the judgment was obtained by fraud;

(d) the cause of action on which the judgment was based, or the judgment itself, is repugnant to the public policy of the United States or of the State where recognition is sought;

(e) the judgment conflicts with another final judgment that is entitled to recognition; or

(f) the proceeding in the foreign court was contrary to an agreement between the parties to submit the controversy on which the judgment is based to another forum.

Id. (emphasis added).

possession statute was appropriate.[111] On the second question of whether the district court should have held an evidentiary hearing, the Third Circuit again looked to the Restatement, which states that the recognizing court is able to make the determination of fundamental fairness by judicial notice and on the basis of general knowledge.[112] Hence, the court found no abuse of discretion.[113] Because the district court's analysis satisfied the Restatement test, and there was no abuse of discretion in failing to hold an evidentiary hearing, the Third Circuit affirmed the district court decision.[114] Small appealed, and the Supreme Court granted certiorari on March 29, 2004.[115]

IV. SUMMARY OF OPINIONS

The Supreme Court entered into this confused fray of felon-in-possession cases to resolve the circuit split. It held, in a 5-3 decision written by Justice Breyer, that the phrase "convicted in any court" encompassed only domestic, and not foreign, convictions.[116] Justice Breyer was joined by Justices Stevens, O'Connor, Souter, and Ginsburg.[117] Justice Thomas authored the dissenting opinion, and was joined by Justices Scalia and Kennedy.[118] Chief Justice Rehnquist took no part in the decision of this case.[119]

A. MAJORITY OPINION

The Court began its analysis by considering whether the word "any" alone in the statute was dispositive.[120] It concluded that in both ordinary life and in the law, "any" is normally constrained in its scope.[121]

In attempting to understand Congress's intent regarding the statute, the Court began by referencing the "commonsense notion that Congress

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[111] *Small*, 333 F.3d at 428.

[112] *Id.* (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482 cmt. b (1987)).

[113] *Id.*

[114] *Id.* at 429.

[115] Small v. United States, 333 F.3d 425 (3d Cir. 2003), *cert. granted*, 541 U.S. 958 (2004).

[116] Small v. United States, 125 S. Ct. 1752, 1753, 1758 (2005).

[117] *Id.* at 1753.

[118] *Id.*

[119] *Id.* at 1753-54.

[120] *Id.* at 1754.

[121] *Id.* The Court used the following example: "[A] speaker who says, 'I'll see any film' may or may not mean to include films shown in another city." *Id.* The Court followed with a long string cite to many cases supporting the idea that "any" must be interpreted in context. *Id.*

generally legislates with domestic concerns in mind."[122] This, the Court reasoned, has led to the common presumption by Congress against extraterritorial application of domestic statutes.[123] While the Court admitted that the presumption did not apply directly in this case, it reasoned that "a similar assumption is appropriate when we consider the scope of the phrase 'convicted in any court' here."[124] The Court identified two reasons why this assumption was appropriate: first, a conviction in any court is a necessary element of the gun possession activity prohibited by domestic law; and second, foreign convictions may differ in important ways from domestic convictions.[125] Three potential problems with foreign convictions were highlighted. First, foreign laws may criminalize activities that are permitted or even encouraged under U.S. law. Second, foreign legal systems may be inconsistent with American notions of fairness. Third, similar crimes may be punished much more severely in foreign systems than in the United States.[126] The Court found no convincing information that Congress intended the statute to reach beyond domestic convictions, and found that the statute's "subject matter [was not] special" as in "immigration or terrorism, where one could argue that foreign convictions would seem especially relevant."[127] As a result, the Court assumed that Congress intended that the phrase "convicted in any court" apply only domestically.[128]

The Court then reviewed what the effects of including foreign convictions under the statute might be, and found them to be anomalous.[129] It analyzed the exception for federal or state antitrust crimes, the inclusion of those with federal or state misdemeanor crimes of domestic violence, and the enhanced penalties for drug offenders.[130] The Court found that in each area, similarly situated persons convicted of domestic as opposed to foreign

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[122] *Id.* at 1755 (citing Smith v. United States, 507 U.S. 197, 204 n.5 (1993)).

[123] *Id.* (citing Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949)).

[124] *Id.*

[125] *Id.*

[126] *Id.* For examples of each problem, the Court identified that: 1) private entrepreneurial activity (buying and reselling for the purpose of making a profit) was criminalized under Soviet law; 2) our notions of due process were violated by some countries' laws, for instance, countries in which the testimony of one man equals that of two women; and 3) vandalism in Singapore carried a harsh prison sentence of up to three years. *Id.* at 1755-56.

[127] *Id.* at 1756.

[128] *Id.*

[129] *Id.*

[130] *Id.* at 1756-57.

versions of the same crime would suffer different consequences under the statute.[131]

The Supreme Court then went on to consider the legislative history of the statute.[132] Like the *Gayle* court, the Supreme Court identified that the Senate bill had included a definition of the predicate crimes in terms of federal and state crimes, which the Conference Committee ultimately rejected in favor of the current "convicted in any court" language.[133] Also like the *Gayle* court, the Supreme Court concluded that the change did not reflect a change in congressional view.[134] Rather, the Court wrote that "those who use legislative history to help discern congressional intent will see the history here as silent . . . that simply confirms the obvious, namely that Congress did not consider the issue."[135]

The Court admitted that the statute's purpose could support reading an inclusion of foreign convictions based on the goal to keep firearms out of the hands of people who are dangerous.[136] The Court, responding to the dissent, also agreed that a person convicted of a serious crime abroad may be just as dangerous as one who commits a serious crime in the United States.[137] However, the Court dismissed the argument as weakened by the few instances since 1968 in which a foreign conviction has been used as a predicate for a felon-in-possession prosecution.[138] The majority reasoned that this empirical fact "reinforces the likelihood that Congress, at best, paid no attention to the matter."[139]

The majority concluded that "convicted in any court" referred only to domestic courts and not foreign ones.[140] It could not find enough evidence that Congress had intended specifically to include foreign convictions within the reach of the statute. The Court reasoned that any added enforcement advantages from the inclusion of foreign convictions were outweighed by the potential for unfair outcomes, and neither the statutory language nor the legislative history showed clear evidence of Congressional intent.[141]

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[131] *Id.*

[132] *Id.*

[133] *Id.* (citing S. REP. NO. 90-1501, at 31 (1968); H.R. CONF. REP. 90-1956, at 28-29 (1968), *reprinted in* 1968 U.S.C.C.A.N. (82 Stat.) 4426, 4428).

[134] *Id.*

[135] *Id.*

[136] *Id.* at 1758.

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *Id.*

B. DISSENTING OPINION

The dissenting opinion, authored by Justice Thomas, took issue with the majority's conclusion that "any" means only "a subset of any" as well as its departure from established principles of statutory construction.[142] The dissent began by analyzing the word "any," just as the majority had, but came to the conclusion that "[r]ead naturally, the word 'any' has an expansive meaning"[143] and "[n]o exceptions appear on the face of the statute."[144] The dissent concluded that "[t]he broad phrase 'any court' unambiguously includes all judicial bodies with jurisdiction to impose the requisite conviction—a conviction for a crime punishable by imprisonment for a term of more than a year."[145] The dissent considered the statute in context, and was not moved by the presence of other provisions that limit application or make exceptions for federal and state crimes.[146] The dissent noted that there was no jurisdictional qualification on the term "any court."[147] Further, there were "no special federalism concerns or other clear statement rules that have justified construing 'any' narrowly in the past."[148]

Perhaps of greater concern to the dissent were the methods by which the majority made its arguments. The dissent first questioned the Court's "ordinary assumption about the reach of domestically oriented statutes."[149] The dissent saw that the logical result of this assumption was the creation of a clear statement rule for Congress; the legislature would need to explicitly describe when it intended for anything beyond the borders of the United States to be included under a given statute.[150] While the canon against extraterritorial application of federal statutes is familiar and well-supported, the dissent argued that it should not apply in this case.[151] The dissent noted that the criminal activity prohibited by the statute is gun possession *within the United States*, not abroad.[152] The dissent argued that the two main

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[142] *Id.* at 1758 (Thomas, J., dissenting).

[143] *Id.* at 1759 (Thomas, J., dissenting) (citing United States v. Gonzales, 520 U.S. 1, 5 (1976)).

[144] *Id.* (Thomas, J., dissenting) (quoting Lewis v. United States, 445 U.S. 55, 60 (1980)).

[145] *Id.* at 1759-60 (Thomas, J., dissenting) (footnote omitted).

[146] *Id.* at 1760 (Thomas, J., dissenting).

[147] *Id.* (Thomas, J., dissenting).

[148] *Id.* (Thomas, J., dissenting).

[149] *Id.* at 1761 (Thomas, J., dissenting).

[150] *Id.* (Thomas, J., dissenting).

[151] *Id.* (Thomas, J., dissenting).

[152] *Id.* (Thomas, J., dissenting). The dissent cited to a number of cases supporting the canon against extraterritorial application of federal statutes, including some cases also cited by the majority. *Id.* (Thomas, J., dissenting). However, the dissent concluded that in every case, the Court had restricted "federal statutes from reaching conduct *beyond U.S. borders*,

reasons for applying the doctrine of extraterritoriality related to first, Congress legislating with domestic concerns in mind, and second, that extraterritorial application of U.S. laws could conflict with foreign laws.[153] Neither of these issues was implicated by applying the felon-in-possession statute in this case.[154] Further, the dissent noted that the Court had introduced this assumption without briefing or argument by the parties and that it provided no guidance on what should constitute a "domestically oriented statute."[155] The dissent noted that while the majority identified immigration and terrorism as non-domestic concerns, in the past, "the extraterritoriality canon 'has had special force' in statutes 'that may involve foreign and military affairs.'"[156] The dissent cautioned that this "threaten[ed] to wreak havoc with established rules for applying the canon against extraterritoriality."[157]

The dissent then considered the majority's assertion that reading the statute broadly has inappropriate results.[158] With regard to this, the dissent disagreed with the notion that foreign convictions are necessarily less reliable indicators of dangerousness than domestic convictions.[159] The dissent characterized the examples of foreign crimes the majority used to illustrate the problem as a "parade of horribles" and "cherry-pick[ed]."[160] The dissent also pointed out that the majority ignored the facts of this specific case, in which a man was convicted under foreign law for serious weapons charges, and then purchased a gun in this country.[161]

The dissent then raised the issue of the canon against absurdities, which should be employed only "where the result of applying the plain language would be, in a genuine sense, absurd . . . ."[162] The dissent argued that the anomalies identified by the majority where some domestic offenders were treated more harshly than similar foreign ones, as well as the

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lend[ing] no support to the Court's unprecedented rule restricting a federal statute from reaching conduct *within U.S. borders*." *Id.* (Thomas, J., dissenting).

[153] *Id.* at 1761-62 (Thomas, J., dissenting).

[154] *Id.* (Thomas, J., dissenting).

[155] *Id.* at 1762 (Thomas, J., dissenting).

[156] *Id.* (Thomas, J., dissenting) (quoting Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 188 (1993)).

[157] *Id.* (Thomas, J., dissenting).

[158] *Id.* (Thomas, J., dissenting).

[159] *Id.* at 1763 (Thomas, J., dissenting).

[160] *Id.* (Thomas, J., dissenting). Further, the dissent argued that the rarity of actual prosecutions under § 922 for defendants with foreign convictions showed the majority's "parade of horribles" to be overstated. *Id.* (Thomas, J., dissenting).

[161] *Id.* (Thomas, J., dissenting).

[162] *Id.* at 1764 (Thomas, J., dissenting) (quoting Public Citizen v. Dep't of Justice, 491 U.S. 440, 470-71 (1989) (Kennedy, J., concurring)).

opposite being true, did not rise to the level of absurdity.[163] The dissent wrote: "As with the extraterritoriality canon, the Court applie[d] a mutant version of a recognized canon when the recognized canon is itself inapposite."[164] The dissent then criticized the anomalies generated by the Court's reading of the statute.[165] For instance, individuals convicted of serious offenses abroad, like murder, rape, and kidnapping, could now freely possess firearms in the United States, while a person convicted domestically of tampering with a vehicle identification number[166] would be prohibited from possessing firearms. The dissent wrote that "[t]he majority's concern with anomalies provides no principled basis for choosing its interpretation of the statute over [the dissent's]."[167]

Finally, the dissent criticized the majority's reliance on silence in the legislative history, in particular the majority's interpretation that the absence of discussion of foreign convictions persuasively showed a lack of Congressional intent to include foreign convictions.[168] The dissent noted that the change from the original Senate bill as amended in the Conference Committee (removing the reference to state and federal crimes) is at least suggestive that Congress intended to include more than domestic convictions.[169] In the end, the dissent concluded that the majority never convincingly explained why it departed from the natural reading of § 922(g)(1).[170]

V. ANALYSIS

Small v. United States was wrongly decided. It appears to have been guided by a desire to reach a particular outcome rather than one of following precedent and accepted modes of statutory analysis. The Court ignored the specific facts of this case, and set the stage for unpredictability in future decisions. Further, the Court gave no clear guidance about how statutory language should be interpreted in the future, particularly regarding the intersection of foreign and domestic law. On the same day that the

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[163] *Id.* (Thomas, J., dissenting).

[164] *Id.* (Thomas, J., dissenting).

[165] *Id.* (Thomas, J., dissenting).

[166] 18 U.S.C. § 511(a)(1) (2000) provides a sentence of up to five years in prison for a person who "knowingly removes, obliterates, tampers with, or alters an identification number for a motor vehicle or motor vehicle part . . . ."

[167] *Small*, 125 S. Ct. at 1764 (Thomas, J., dissenting).

[168] *Id.* at 1764-65 (Thomas, J., dissenting).

[169] *Id.* at 1765 (Thomas, J., dissenting). While the majority characterized the change as simplification of the statutory language, the dissent noted that this characterization was merely the majority's interpretation of the legislative history. *Id.* (Thomas, J., dissenting).

[170] *Id.* (Thomas, J., dissenting).

Small decision was released, the Court, in *Pasquantino v. United States*, upheld a broad reading of the word "any" in the wire fraud statute where the defrauding scheme involved a foreign crime.[171] The Court's methods of analysis set an unfortunate precedent with the potential for further confusion.

A. THE COURT'S FAIRNESS CONCERNS ARE OVERSTATED

The majority in *Small* seemed most concerned with the potential that innocent victims of foreign convictions would be swept up in the reach of the felon-in-possession statute.[172] The Court identified two major concerns: first, that judges and prosecutors would not be able to adequately determine whether foreign convictions merit inclusion; and second, that those who had been convicted in foreign courts would be uncertain about their legal status.[173] While the Court raised these concerns, it did not persuasively explain the rationale behind them. Further, these concerns are seemingly inconsistent with the Court's own understanding of Congressional intent from previous case law.

Regarding the first concern regarding the ability of courts and prosecutors to make a fairness determination, it is clear that lower courts have already grappled with this, and will likely continue to do so, regardless of the Supreme Court's decision in *Small*.[174] In fact, in the lower court decisions that led up to *Small*, both the trial court and circuit court discussed and chose reasonable methods for assessing the quality of the foreign convictions and making certain that they comport with American notions of fundamental fairness prior to using them as predicate crimes under the statute in question.[175]

If the trial court reviews both the characteristics of the foreign crime itself to determine whether it satisfies American notions of legality, as well

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[171] 125 S. Ct. 1766 (2005).

[172] *Small*, 125 S. Ct. at 1755-56.

[173] *Id.* at 1756.

[174] Both federal and state courts have had to consider how to treat foreign convictions under a number of state and federal laws. *See generally* Alex Glashausser, Note, *The Treatment of Foreign Country Convictions as Predicates for Sentence Enhancement under Recidivist Statutes*, 44 DUKE L.J. 134 (1995).

[175] *See supra* Parts III.B.1-2. In dicta, the district court in *Small* noted that a prior conviction by a Taliban court for illegal possession of a bible would have been inappropriate to recognize as a felony conviction. United States v. Small, 183 F. Supp. 2d 755, 762-63 n.9 (W.D. Pa 2002), *aff'd*, 333 F.3d 425 (3d Cir. 2003), *rev'd*, 125 S. Ct. 1752 (2005). However, in the case at bar, Small's conduct of firearms and ammunition smuggling were felonious under U.S. law, and as such, the court concluded that the crime was appropriate to recognize for purposes of the U.S. felon-in-possession statute. *Id.*

as the process by which the conviction was reached, it seems that the Court's fairness concerns will be satisfied. The Restatement (Third) of Foreign Relations Law chosen by the Third Circuit offers one clear approach.[176] One commentator has suggested requiring that two conditions be satisfied before a foreign crime be considered a predicate under § 922(g): first, that the foreign conviction would also have been a predicate crime had it taken place in the United States; and second, that the foreign court system be found fair.[177] In proposing new legislation in the Senate that addresses the decision of the Court in *Small*, the sponsors have approved the first prong of this suggested test. However, the proposed language does not consider any review of the fairness of the foreign court.[178] Should such a bill be passed and signed into law, it remains to be seen whether its exclusion of a fairness review of the foreign court proceeding would satisfy the Constitution.

The second concern raised by the Supreme Court regarding the uncertain legal obligations of those with foreign convictions is largely illusory. By enacting any rule at all, the Court would have clarified the legal obligations of those citizens with foreign convictions. In *Small*, by deciding that only domestic convictions satisfied the statute, the Court made it clear that citizens' foreign convictions will carry no weight under the felon-in-possession statute, and therefore those with foreign convictions have no legal obligations with respect to those convictions. However, if the court had alternatively ruled that foreign convictions *do* constitute predicate

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[176] United States v. Small, 333 F.3d 425, 428 (3d Cir. 2003), *rev'd*, 125 S. Ct. 1752 (2005); *see also supra* Part III.B.2 (describing the Third Circuit's use of the Restatement test, with its two mandatory and six discretionary grounds under which a U.S. court may or may not recognize a foreign conviction).

[177] Christine Aubin, Note, United States v. Gayle, 48 N.Y.L. SCH. L. REV. 847, 854 (2004).

[178] In the Senate, Senators Mike DeWine, a Republican, and Dianne Feinstein, a Democrat, have cosponsored the Firearms Fairness and Security Act. S. 954, 109th Cong. § 2 (2005). The bill explicitly addresses the intent to include both foreign and domestic convictions. *Id.* It includes only foreign convictions for conduct which would give rise to a term of imprisonment in the United States had the conduct taken place here. *Id.* As modified by the bill, § 922(g)(1) would read:

> (1) who has been convicted—
>
> (A) in any court within the United States, of a crime punishable by a term of imprisonment exceeding 1 year; or
>
> (B) in any court outside the United States, of a crime punishable by a term of imprisonment exceeding 1 year (except for any crime involving the violation of an antitrust law), if the conduct giving rise to the conviction would be punishable in any court within the United States by a term of imprisonment exceeding 1 year had such conduct occurred within the United States;

Id.

crimes, individuals with those crimes would have been placed on notice about their potential liability under the statute. Hence, the end result would have been increased clarity regarding their legal obligations.[179] Regarding the Court's concern about casting too wide a net by including foreign convictions, the Court could have required that individuals with foreign convictions be permitted to take advantage of the provisions already existing under the current statute to seek relief from the prohibitions against firearm possession.[180]

There is one wrinkle regarding the relief provision—applying for relief under the statute is essentially unavailable at this time because the agency responsible for reviewing such applications, the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), has lacked funding for this purpose since 1992.[181] While there also remains a statutory option for relief through an official pardon or expungement of a conviction,[182] this would be extremely difficult for those with either domestic or foreign convictions to pursue. Pardons are given at the complete discretion of the governor (at the state level) or the president (at the federal level), and a decision to pardon may be strongly affected by the perception of such an action by the voting

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[179] It is true that the *presumption* that a foreign conviction will count as a predicate crime under the felon-in-possession statute does not set as clear a rule as the one the majority picked in *Small*. However, the administrative convenience of completely eliminating liability for those with foreign convictions must be weighed against the costs to public safety that the majority's rules will bring (namely, exempting potentially dangerous individuals from the prohibition on gun possession).

[180] Citizens who wish to have their rights to possess firearms restored after a felony conviction may do so by following the review process outlined in § 925(c):

> A person . . . may make application to the Attorney General [or his designated representative] for relief from disabilities imposed by Federal laws . . . and [he] may grant such relief if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest.

18 U.S.C. § 925(c) (2000), *amended by* Homeland Security Act of 2002, Pub. L. No. 107-296, § 1112(f)(6), 116 Stat. 2135, 2276 (2002).

[181] Congress made an active decision to withdraw all funding for § 925(c) reviews by the ATF. *See* Mark M. Stavsky, *No Guns or Butter for Thomas Bean: Firearms Disabilities and Their Occupational Consequences*, 30 FORDHAM URB. L.J. 1759, 1759-60 (2003). It is important to note that an application submitted but not reviewed under the current system cannot be appealed into federal court, as per the Court's 2002 decision in *United States v. Bean*, holding that district courts do not have jurisdiction to review § 925(c) applications unless the ATF has made a final decision (namely, denial) with regards to their § 925(c) application. 537 U.S. 71, 74, 77-78 (2002).

[182] The statute also provides that any conviction "which has been expunged, or set aside, or for which a person has been pardoned or has had civil rights restored" is not considered a predicate conviction for purposes of the statute. 18 U.S.C. § 921(a)(20) (quoted in Black v. Snow, 272 F. Supp. 2d 21, 24 n.4 (D.D.C. 2003)).

public.[183] In essence, then, by eliminating foreign convictions from the reach of the statute, the Court has taken individuals who would have been burdened by this statute (albeit possibly unfairly) and given them an automatic "out." This raises the question of why those with foreign convictions should be in a better position as compared to their counterparts with domestic convictions, who are without practical means of seeking relief. The answer to this question is unclear, unless the Court simply believed that many individuals would be unfairly swept up by foreign convictions that would violate American notions of fairness. This appears to be an overstatement, however, given the evidence that few cases of felons with foreign convictions have been prosecuted by the government under this statute.[184]

Congress's lack of funding for § 925(c) application reviews indicates that it prefers to keep potentially dangerous people from having access to firearms, even if they may no longer be a threat to public safety and deserve to have their rights restored.[185] This reflects a response to pressure from citizens to prevent felons from having their rights restored.[186] Because this policy has continued to remain in effect, even after efforts were made to fund § 925(c) reviews in alternate ways, it seems clear that Congress has made the policy decision that it is preferable to keep the § 925(c) review process unavailable to convicted felons.[187] In a political environment employing such a sweeping net for felons, it is odd that the Court thought it appropriate to completely exclude all individuals with foreign convictions from the reach of the statute. This is even more puzzling because, in 2002, when the Court reviewed this issue in *United States v. Bean*, it issued a unanimous opinion confirming that the federal courts had no jurisdiction

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[183] *See* Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73, 102 (1999).

[184] In oral arguments, the government attorney stated that there had been "no more than '10 to a dozen' instances in which such a foreign conviction has served as a predicate for a felon-in-possession prosecution." Small v. United States, 125 S. Ct. 1752, 1758 (2005) (quoting Transcript of Oral Argument at 32, *Small*, 125 S. Ct. 1752 (No. 03-750)).

[185] The policy of restricting access to firearms by those deemed dangerous is consistent with the findings of Congress as incorporated into Title IV of the Safe Streets Act of 1968. *See supra* note 15 and accompanying text.

[186] *See* Michael Isikoff, *BATF Allows Some Felons to Own Guns: Violence Policy Center Calls U.S. Program "Unconscionable,"* WASH. POST, Sept. 24, 1991, at A21.

[187] The House Appropriations subcommittee overseeing the ATF budget voted to fund the review process by imposing a fee on felons requesting review of their status. *See* John Mintz, *Move to Allow Felons to Own Firearms Draws Criticism*, WASH. POST, July 1, 1995, at A8. There was a significant negative reaction to this move, however, and the language limiting the ATF from § 925(c) review has remained unchanged since it was introduced in 1992. *See* Stavsky, *supra* note 181, at 1773-74.

unless and until the ATF has issued a formal denial of a § 925(c) application, a move which seems to defer to the demonstrated preferences of the legislature.[188] Essentially, the Court is placing similarly situated individuals in different positions—those with domestic predicate felonies have almost no recourse under the statute, while those with foreign predicate felonies have no penalty and are outside the reach of the statute. This is hardly a fair result, and not one that Congress likely intended.

B. A LACK OF CLARITY AND CONSISTENCY RESULTS FROM A DIVIDED COURT

On the same day that the *Small* decision was released, *Pasquantino v. United States*[189] was also decided. In *Pasquantino*, the Court held that the U.S. wire fraud statute, 18 U.S.C. § 1343, covered a scheme taking place in the United States where the defendants smuggled large amounts of alcohol into Canada, resulting in a significant loss of tax revenue to Canada.[190] A central facet to the decision was interpreting that "any scheme" included one that involved a foreign crime.[191] Justice Ginsburg, in dissent, disagreed with what she characterized as domestic enforcement of foreign tax laws in violation of "our repeated recognition that 'Congress legislates against the backdrop of the presumption against extraterritoriality.'"[192] She reasoned that such a broad reading would give the statute extraterritorial effect without clear Congressional intent that extraterritorial effect was actually desired.[193] The Court, in contrast, characterized the case as about "a criminal prosecution brought by the United States in its sovereign capacity to punish domestic criminal conduct"[194]—namely, the use of interstate wires to effect "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."[195] So while the majority in *Pasquantino* permitted a foreign crime to trigger domestic criminal law, the majority in *Small* disallowed foreign convictions from being predicate crimes under the felon-in-possession gun statute. This apparent contradiction was picked up by the

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[188] United States v. Bean, 537 U.S. 71, 72, 77-78 (2002).

[189] 125 S. Ct. 1766 (2005).

[190] *Id.* at 1770.

[191] *Id.* at 1780-81.

[192] *Id.* at 1782 (Ginsburg, J., dissenting) (quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991)).

[193] *Id.* at 1784-85 (Ginsburg, J., dissenting).

[194] *Id.* at 1775.

[195] *Id.* at 1770 (quoting 18 U.S.C. § 1343 (2000)).

press and reflected in reports on the decisions in these two cases.[196] While the cases resulted in different outcomes, it is not clear whether there is a principle that underlies the different approaches between the two cases, other than the fact that different Justices wrote the majority opinions.[197] While one can easily see that Justices Breyer and Ginsburg disagreed with Justice Thomas, the curiosity comes in the positions of Justices Stevens and O'Connor, who voted with the majority in both decisions and Justice Scalia, who dissented in both decisions. It would appear that something other than a purely conservative-liberal split was at play here.[198]

In attempting to determine if there is a reasoned rationale for joining the majority in each case, it is important to consider the distinctions between the cases. In *Small*, the important consideration may have been removing potentially unfair "scarlet letters" from citizens' records that could limit their rights to possess firearms. For instance, the defendant in *United States v. Bean* was no longer able to pursue his career as a gun

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[196] The media reported on and commented on the inherent tension between these two cases. *See, e.g.*, Charles Lane, *2 Rulings Reveal Views on Effects of Overseas Law*, WASH. POST, Apr. 27, 2005, at A2 ("The Supreme Court ruled yesterday that the government may not deny a U.S. citizen gun ownership because of a criminal conviction abroad—but may prosecute one for plotting to cheat a foreign government out of tax revenue."); Marshall H. Tanick, *Meaning of 'Any' Dogs Difficult Decisions*, MINN. LAW., October 3, 2005, at 16 ("In *Small v. United States*, the Supreme Court, by a 5-3 vote, held that the word "any" in the federal statute prohibiting possession of guns by convicted felons applies only to convictions in this country and not abroad. . . . But Thomas, writing for a 5-4 majority, won his point on the meaning of "any" in *Pasquantino v. United States*. Construing the Federal Wire Fraud Statute, 18 U.S.C. § 1343, he gave the phrase the extra-territorial effect he longed for in his dissent in *Small*.") (citations omitted); Mark R. Winston, 'Pasquantino v. United States'—*New Ammunition Against Fraud*, N.Y. L.J., July 13, 2005, at 7 ("It is worth noting that, ironically, on the very day that it issued the *Pasquantino* decision, the Supreme Court issued another decision in a criminal case with an international component. However, in that case, *Small v. United States*, it was precisely because of the international aspect of the case that the Court reversed the defendant's conviction.") (citation omitted).

[197] In *Pasquantino*, Justice Thomas wrote for the majority and was joined by Chief Justice Rehnquist and Justices Stevens, O'Connor, and Kennedy. *Pasquantino*, 125 S. Ct. at 1769. As noted, *supra* Part IV, in *Small*, Justice Breyer wrote for the majority and was joined by Justices Stevens, O'Connor, Souter, and Ginsburg. Small v. United States, 125 S. Ct. 1752, 1753 (2005).

[198] One newspaper columnist characterized the differing decisions in the cases as a split between conservative and liberal ideology on whether to read statutory language literally or contextually. David G. Savage, *A Day of Semantics for High Court: Two Decisions, on Gun Ownership and Liquor Smuggling, Exemplify the Tension Between Literal and Contextual Readings of the Law*, L.A. TIMES, Apr. 27, 2005, at A10.

dealer after serving time for a questionable conviction in Mexican court.[199] While the Court ruled unanimously in that case against the defendant,[200] perhaps on reflection, the Justices in the majority in *Small* decided that the potential harms from lack of any meaningful review process were real and outweighed potential safety concerns. In contrast, in *Pasquantino*, it is possible that the majority identified fraud of all kinds, even that which ultimately places its burdens on foreign governments, as worthy of punishment under domestic law. This could be read into Justice Thomas's comments at the end of the majority opinion in *Pasquantino*, when in response to concerns made by the dissent, he wrote: "[T]he wire fraud statute punishes the scheme, not its success," and it is the "domestic element of petitioners' conduct" that "the Government is punishing in this prosecution."[201] It is unfortunate, however, that there is no clear articulation of how these cases should set precedents for future interpretation regarding when and how foreign criminal acts and convictions can trigger liability under domestic law. Perhaps the clearest outcome is that stated by Justice Thomas in dissent in *Small*—if Congress wants a predictable outcome when foreign laws might be implicated under a domestic statute, it must now clearly state what that correct interpretation should be.[202]

C. THE COURT'S USE OF METHODS OF STATUTORY CONSTRUCTION IS QUESTIONABLE

"Courts [] do their best work in construing statutes when they fulfill their role as guardians of the law's continuity and coherence."[203] While the

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[199] Bean was a gun dealer who drove into Mexico and maintained that the box of ammunition left in plain view inside his vehicle was accidentally left there. He was convicted in Mexican court for importing ammunition into Mexico and sentenced to five years in prison. United States v. Bean, 537 U.S. 71, 72-73 (2002).

[200] *Id.* at 72.

[201] *Pasquantino*, 125 S. Ct. 1766, 1780 (quoting, in part, United States v. Pierce, 224 F.3d 158, 166 (2nd Cir. 2000)).

[202] *Small*, 125 S. Ct. at 1761 (Thomas, J., dissenting) ("After today's ruling, the only way for Congress to ensure that courts will construe a law to refer to foreign facts or entities is to describe those facts or entities specifically as foreign."). As a matter of statutory interpretation, if there was evidence that Congress had considered the issue of foreign convictions, and if Congress had drafted the statute clearly with regards to the applicability of foreign convictions, it seems extremely unlikely that any court would have gone beyond the language of the statute itself to decide a specific case. A question that remains open, however, is whether a statute that *did* explicitly include foreign convictions would pass Constitutional muster, given the concerns noted by various courts and commentators regarding the validity of foreign convictions, see discussion *supra* in Part V.A.

[203] Amanda L. Tyler, *Continuity, Coherence and the Canons*, 99 NW. U. L. REV. 1389,

extent to which canons of construction improve predictability and constrain the judiciary are open to debate,[204] this is clearly part of their goal. When the Court uses a canon in novel ways, systemic predictability is decreased, which has negative effects on both the citizens and the legislature.

1. The Court Misleads in Its Use of the "Commonsense Notion That Congress Generally Legislates with Domestic Concerns in Mind"[205] to Justify Its Approach

Both the majority and dissent cited to a series of cases regarding the presumption (or canon) against extraterritorial application,[206] but these cases were used to different ends. The majority introduced them to analogize from them an ordinary assumption that Congress legislates with domestic concern.[207] The dissent reiterated the holdings to demonstrate that the presumption against extraterritorial application in its traditional form did not apply to conduct taking place within U.S. borders.[208] The presumption against extraterritorial application has a long history, though the weight that it has carried in judicial interpretation has varied over time.[209] It appears to have had a resurgence since 1991, with application by the Supreme Court to Title VII, the Foreign Services Immunity Act, the

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1461 (2005).

[204] *See, e.g.*, Eskridge, Jr., *supra* note 26, at 671-73 (discussing the difficulties that would be involved in creating empirical studies to determine the effectiveness of canons of statutory construction); Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about how Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401-06 (1950) (showing a series of canons ("thrust") and counter-canons ("parry"), along with examples of their use in various cases).

[205] *Small*, 125 S. Ct. at 1755 (quoting Smith v. United States, 507 U.S. 197, 204 n.5 (1993)).

[206] For an overview of the presumption against extraterritorial application, see William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERK. J. INT'L L. 85 (1998).

[207] *Small*, 125 S. Ct. at 1755. One of the cases the *Small* majority cited was *Foley Bros. v. Filardo*, 336 U.S. 281 (1949). In that case, the Court applied the presumption against extraterritoriality to labor law, reasoning that "unless a contrary intent appears, [legislation] is meant to apply only within the territorial jurisdiction of the United States" based upon "the assumption that Congress is primarily concerned with domestic conditions." *Foley Bros.*, 336 U.S. at 285.

[208] *Small*, 125 S. Ct. at 1761-62 (Thomas, J., dissenting). The dissent focused on the holdings of the cases cited to by the majority, and in each case, the holding involved "restricting federal statutes from reaching conduct *beyond U.S. borders*, lend[ing] no support to the Court's unprecedented rule restricting a federal statute from reaching conduct *within U.S. borders*." *Id.* (Thomas, J., dissenting).

[209] *See* Dodge, *supra* note 206, at 85-87.

Federal Tort Claims Act, and the Immigration and Nationality Act.[210] It has even been used as part of the analysis in the "war on terror," as to whether federal district court has habeas jurisdiction over prisoners in Guantanamo Bay.[211]

To understand the disagreement between the majority and the dissent regarding the application of the presumption against extraterritoriality in this case, it is important to consider the rationale behind the canon, as well as the types of applications it has had historically. One author has identified five bases on which to find the extraterritoriality presumption.[212] The one relevant to this discussion is based on an attempt to predict the legislature's intent in the absence of explicit information—the idea that Congress normally legislates with domestic concerns in mind.[213] As there are cases where the Supreme Court has used this rationale to justify its application of the extraterritoriality presumption, this contradicts the dissent's remark that the Court "invent[ed] a canon of statutory interpretation" in *Small*.[214]

The dissent correctly noted, however, that the way the Court applies the principle against extraterritorial application in *Small* is at odds with the general historical precedent. The principle has generally been used when the *effects of conduct* are felt *within* the United States.[215] As articulated by the Court, "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."[216] Further, to apply this rule, the Court will consider whether the statutory language "gives any indication of a congressional purpose to

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[210] *Id.* at 87.

[211] *See* John K. Setear, *A Forest with No Trees: The Supreme Court and International Law in the 2003 Term*, 91 VA. L. REV. 579, 623 (2005) (discussing *Rasul v. Bush*, 124 S. Ct. 2686 (2003), which held that the extraterritoriality presumption did not apply to questions of habeas jurisdiction at Guantanamo Bay Naval Base because under the express terms of the agreement between the United States and Cuba, the United States had both jurisdiction and control over the naval base).

[212] Curtis A. Bradley, *Extraterritorial Application of U.S. Intellectual Property Law: Principal Paper: Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT'L L. 505, 513-16 (1997) ("A review of the Supreme Court's extraterritoriality decisions . . . reveals that the Court has articulated at least five justifications for the presumption: international law, international comity, choice-of-law principles, likely congressional intent, and separation-of-powers considerations.").

[213] *Id.* at 516, 516 nn.47-48 (citing Smith v. United States, 507 U.S. 197, 204 n.5 (1993); EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991); Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949)).

[214] Small v. United States, 125 S. Ct. 1752, 1761 (2005) (Thomas, J., dissenting).

[215] Dodge, *supra* note 206, at 119.

[216] *EEOC*, 499 U.S. at 248 (quoting *Foley Bros.* 336 U.S. at 285).

extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control."[217] Here, the statute applies specifically to domestic conduct—preventing possession of a firearm by persons convicted of serious crimes.

If the Court has interpreted Congress to be primarily concerned about conduct with effects within the borders of the United States, use of the presumption against extraterritoriality actually weighs in the dissent's favor. Crimes committed abroad will still have value in terms of this presumption of domestic concern because Congress sought to "keep guns out of the hands of those who have demonstrated that they may not be trusted to possess a firearm without becoming a threat to society."[218] Where the demonstrative conduct occurred is irrelevant if keeping guns out of the hands of dangerous people *within the United States* was the concern of Congress. In effect, by raising this presumption, and using it to these ends, the Court has subverted the principle's meaning.

2. The Court's Use of the Absurdity Doctrine Is Also Problematic

In general, the Supreme Court begins its analysis of "all statutory construction cases . . . with the language of the statute."[219] "When the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms."[220] As frequent disputes about statutory language show, however, courts often delve into the legislative history in order to decide their cases.[221] This is an approach that has had greater support at different times in history, and in different contexts, and continues to engender a lively discourse.[222]

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[217] *Id.*

[218] *Small*, 125 S. Ct. at 1758 (quoting Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 112 (1983)).

[219] Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002) (citing Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997)).

[220] Lamie v. U.S. Trustee, 124 S. Ct. 1023, 1030 (2004) (quoting Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000)).

[221] Stephen Breyer, *The 1991 Justice Lester W. Roth Lecture: On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 848-61 (1992) (identifying five broad categories of decision-making in which use of legislative history has been beneficial: avoiding absurd results, correcting drafting errors, clarifying words with special meanings in context, identifying a "reasonable purpose," and "choosing among reasonable interpretations of a politically controversial statute").

[222] *See* Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205, 206, 206 nn.1-2 (2000).

It seems that even those Justices who generally disfavor the use of legislative history will still support denying the plain meaning of a statute if the outcome of following the text is absurd.[223] This is confirmed by the Statutes and Statutory Construction treatise, which notes that "if the literal import of the text of an act is inconsistent with the legislative meaning or intent, or such interpretation leads to absurd results, the words of the statute will be modified to agree with the intention of the legislature."[224] The desire to reach the intent of the legislature must be carefully tempered, however, by the risk that such judicial interpretation may be viewed by the legislature or the citizenry as overreaching on the part of the judiciary.[225] This is reflected by a Court that will contradict legislative text only when such application would "produce results that [are] not merely odd, but *positively absurd*."[226]

In *Small*, Justice Thomas's dissent criticized the majority's approach on use of the absurdity doctrine.[227] The dissent acknowledged the majority's concerns about potential anomalies that might result from permitting foreign convictions to count as predicate crimes under the felon-in-possession statute.[228] However, the dissent argued that these anomalous results did not rise to the level of absurdity, and that they may even be sensible.[229] Further, the dissent showed that following the majority's reasoning produces anomalous results as well, and it argued that there was no principled reason for choosing one interpretation over the other.[230] The majority would likely counter that it used the anomalous results as one of multiple factors in making its decision to disallow foreign convictions. This would lead to inclusion of fewer individuals under the statute—essentially applying the rule of lenity.

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[223] *See* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2419-20 nn.122-24 (2003).

[224] NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46:7 (6th ed. 2000) (footnotes omitted).

[225] *Id.*

[226] United States v. X-Citement Video, Inc., 513 U.S. 64, 69 (1994) (emphasis added).

[227] Justice Thomas referred to the absurdity doctrine as "the canon against absurdities." *Id.* at 1764 (Thomas, J., dissenting).

[228] *Id.* (Thomas, J., dissenting).

[229] *Id.* (Thomas, J., dissenting).

[230] *Id.* (Thomas, J., dissenting).

The question that is raised by the disagreement between the majority and dissent on this point is where the line between anomaly and absurdity should lie. Historically, it seems as though the results of a statute would have to be fairly extreme and obvious for it to be declared absurd.[231] The problem with broadening this definition, and applying it in cases of mere anomaly, is that it reduces predictability in the legal system. This loss of predictability, in turn, may result in direct costs to those who have relied on the previous interpretation of the statutory language. It is also possible that public confidence in judicial decision-making could be eroded if judges were given additional latitude by which to overrule statutes. Because of its potential dangers, this is a tool that the Court should use only in very limited circumstances.[232]

VII. CONCLUSION

There is a legal maxim that "hard cases make bad law";[233] however, any case can make bad law if the wrong tools are used in making that decision. In this case, the Court employed questionable canons of construction, placed unnecessary new burdens on Congress in drafting legislation and, in a very real sense, contravened the plain language and purpose of a statute to reach a "fair" result. If the Court had used a plain language reading of the statute and this was not what Congress intended, Congress could have amended the statute. Of course, Congress can still amend the statute following the Court's decision here as well. However, Justice Kennedy wisely noted that "[i]t is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result."[234] By "rescuing" Congress here, the Court has placed a burden on the legislature to draft both more expansively and more precisely in the future.

Other than showing the public that different panels of the Court see things differently, this divergence failed to clarify what should happen generally when international law intersects with domestic law. Perhaps the ultimate takeaway is simply that Congress must explicitly define the boundaries of legislation when it comes to matters of both domestic and international concern. Because this case interpreted a statute and not the Constitution, the effects can be mitigated by Congressional action, and

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[231] *See* Manning, *supra* note 223, at 2399-2402.

[232] For more background on the doctrine of absurdity and ways that the courts have used it, see generally Veronica M. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 AM. U. L. REV. 127 (1995).

[233] *See* Hudson v. United States, 522 U.S. 93, 106 (1997) (Stevens, J., concurring).

[234] United States v. Granderson, 511 U.S. 39, 68 (1994) (Kennedy, J. concurring).

there are indications that this may indeed occur.[235] The ultimate outcome remains to be seen, both by Congress's and the Court's future actions.

Anthony L. Engel*

[235] In addition to the Senate bill discussed *supra* in note 178, members of the House have introduced their own bill in response to the *Small* decision. The Foreign Felon Gun Prohibition Act is sponsored by Representative Carolyn McCarthy of New York and is cosponsored by three other representatives. H.R. 1931, 109th Cong. § 2 (2005). The bill addresses the intent of these representatives to include foreign convictions as predicate crimes under the felon-in-possession statute, by adding "including any foreign court" explicitly to the "any court" language of 18 U.S.C. § 922(d)(1) and § 922(g)(1). *Id.*

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