Reading Materials for Class

A Mock Regulatory State Class

with Dean Lisa Bressman

Dear Admitted Students:

Congratulations on your admission to Vanderbilt Law School! This packet contains a short reading assignment for our mock Regulatory State class. As you may know, the Regulatory State course is one of the features that distinguish Vanderbilt Law School from most other leading law schools. It prepares students for the practice of law involving statutes, which are sources of law that legislatures such as Congress enacts, and regulations, which are sources of law that administrative agencies such as the Environmental Protection Agency (EPA) or the Federal Communications Commission (FCC) issue. Perhaps you are familiar with statutes and regulations – if not, pull up www.cnn.com, glance at The Wall Street Journal, or turn on The Daily Show. You will quickly see that statutes and regulations abound, governing the conduct of society in diverse areas ranging from human health to financial stability to environmental quality and more. As a result, statutes and regulations provide much work for lawyers, whether in the government, a private firm, or a non-for-profit organization. To “think like a lawyer,” you must understand how to navigate this world. Vanderbilt Law School provides the tools.

This packet contains an excerpt of a U.S. Supreme Court decision involving a statute, the federal criminal statute imposing a 5-year mandatory prison term on certain persons involved in gun-related drug activity. The decision is Muscarello v. United States, 524 U.S. 125 (1998). Following the excerpt are some notes from the coursebook in which the excerpt appears. Read the decision carefully and ask yourself: (a) what was the precise issue confronting the Court, (b) how did the Court resolve that issue, and (c) what reasons did the Court give for reaching that conclusion? Ask yourself why some Justices dissented from the Court’s opinion – that is, resolved the issue for the opposite party in the case? Then read and consider the notes.

I look forward to seeing you in class.

Best wishes,

Lisa S. Bressman
Muscarello v. United States
524 U.S. 125 (1998)

Justice Breyer delivered the opinion of the Court.

A provision in the firearms chapter of the federal criminal code imposes a 5-year mandatory prison term upon a person who “uses or carries a firearm” “during and in relation to” a “drug trafficking crime.” 18 U.S.C. §924(c)(1). The question before us is whether the phrase “carries a firearm” is limited to the carrying of firearms on the person. We hold that it is not so limited. Rather, it also applies to a person who knowingly possesses and conveys firearms in a vehicle, including in the locked glove compartment or trunk of a car, which the person accompanies.

I

The question arises in two cases, which we have consolidated for argument. Petitioner in the first case, Frank J. Muscarello, unlawfully sold marijuana, which he carried in his truck to the place of sale. Police officers found a handgun locked in the truck’s glove compartment. During plea proceedings, Muscarello admitted that he had “carried” the gun “for protection in relation” to the drug offense, though he later claimed to the contrary, and added that, in any event, his “carrying” of the gun in the glove compartment did not fall within the scope of the statutory word “carries.”

Petitioners in the second case, Donald Cleveland and Enrique Gray-Santana, placed several guns in a bag, put the bag in the trunk of a car, and then traveled by car to a proposed drug-sale point, where they intended to steal drugs from the sellers. Federal agents at the scene stopped them, searched the cars, found the guns and drugs, and arrested them.

In both cases the Courts of Appeals found that petitioners had “carried” the guns during and in relation to a drug trafficking offense. 106 F.3d 636, 639 (C.A.5 1997). We granted certiorari to determine whether the fact that the guns were found in the locked glove compartment, or the trunk, of a car precludes application of §924(c)(1). We conclude that it does not.

II

A

We begin with the statute’s language. The parties vigorously contest the ordinary English meaning of the phrase “carries a firearm.” Because they essentially agree that Congress intended the phrase to convey its ordinary, and not some special legal, meaning, and because they argue the linguistic point at length, we too have looked into the matter in more than usual depth. Although the word “carry” has many different meanings, only two are relevant here. When one uses the word in the first, or primary, meaning, one can, as a matter of ordinary English, “carry firearms” in a wagon, car, truck,
or other vehicle that one accompanies. When one uses the word in a different, rather special, way, to mean, for example, "bearing" or (in slang) "packing" (as in "packing a gun"), the matter is less clear. But, for reasons we shall set out below, we believe Congress intended to use the word in its primary sense and not in this latter, special way.

Consider first the word's primary meaning. The Oxford English Dictionary gives as its first definition "convey, originally by cart or wagon, hence in any vehicle, by ship, on horseback, etc." 2 Oxford English Dictionary 919 (2d ed. 1989); see also Webster's Third New International Dictionary 343 (1986) (first definition: "move while supporting (as in a vehicle or in one's hands or arms)"); Random House Dictionary of the English Language Unabridged 319 (2d ed. 1987) (first definition: "to take or support from one place to another; convey; transport").

The origin of the word "carries" explains why the first, or basic, meaning of the word "carry" includes conveyance in a vehicle. See Barnhart Dictionary of Etymology 146 (1988) (tracing the word from Latin "carum," which means "car" or "cart"); 2 Oxford English Dictionary, supra, at 919 (tracing the word from Old French "carier" and the late Latin "caricare," which meant to "convey in a car"); Oxford Dictionary of English Etymology 148 (C. Oxions ed. 1966) (same); Barnhart Dictionary of Etymology, supra, at 143 (explaining that the term "car" has been used to refer to the automobile since 1896).

The greatest of writers have used the word with this meaning. See, e.g., The King James Bible, 2 Kings 9:28 ("[H]is servants carried him in a chariot to Jerusalem"); id., Isaiah 30:6 ("[T]hey will carry their riches upon the shoulders of young asses"). Robinson Crusoe says, "[w]ith my boat, I carry'd away every Thing." D. Defoe, Robinson Crusoe 174 (J. Crowley ed. 1972). And the owners of Queequeg's ship, Melville writes, "had lent him a [wheelbarrow], in which to carry his heavy chest to his boarding-house." H. Melville, Moby Dick 43 (U. Chicago 1952). This Court, too, has spoken of the "carrying" of drugs in a car or in its "trunk." California v. Acevedo, 500 U.S. 565, 572-573 (1991); Florida v. Jimeno, 500 U.S. 248, 249 (1991).

These examples do not speak directly about carrying guns. But there is nothing linguistically special about the fact that weapons, rather than drugs, are being carried. Robinson Crusoe might have carried a gun in his boat; Queequeg might have borrowed a wheelbarrow in which to carry not a chest, but a harpoon. And, to make certain that there is no special ordinary English restriction (unmentioned in dictionaries) upon the use of "carry" in respect to guns, we have surveyed modern press usage, albeit crudely, by searching computerized newspaper databases — both the New York Times data base [sic] in Lexis/Nexis, and the "US News" data base in Westlaw. We looked for sentences in which the words "carry," "vehicle," and "weapon" (or variations thereof) all appear. We found thousands of such sentences, and random sampling suggests that many, perhaps more than one-third, are sentences used to convey the meaning at issue here, i.e., the carrying of guns in a car.

Now consider a different, somewhat special meaning of the word "carry" a meaning upon which the linguistic arguments of petitioners and the dissent must rest. The Oxford English Dictionary's twenty-sixth definition of "carry" is "bear, wear, hold up, or sustain, as one moves about; habitually to bear about with one." 2 Oxford English Dictionary, at 921. Webster's defines "carry" as "to move while supporting," not just in a vehicle, but also "in one's hands or arms." Webster's Third New International Dictionary, supra, at 343. And Black's Law Dictionary defines the entire phrase "carry arms or weapons" as "To wear, bear or carry them upon the person or in the clothing or in a pocket, for the purpose of use, or for the purpose of being armed and ready for offensive or defensive action in case of a conflict with another person." Black's Law Dictionary 214 (6th ed. 1990).

These special definitions, however, do not purport to limit the "carrying of arms" to the circumstances they describe. No one doubts that one who bears arms on his person "carries a weapon." But to say that is not to deny that one may also "carry a weapon" tied to the saddle of a horse or placed in a bag in a car.

Nor is there any linguistic reason to think that Congress intended to limit the word "carries" in the statute to any of these special definitions. To the contrary, all these special definitions embody a form of an important, but secondary, meaning of "carry," a meaning that suggests support rather than movement or transportation, as when, for example, a column "carries" the weight of an arch. 2 Oxford English Dictionary, at 919, 921. In this sense a gangster might "carry" a gun (in colloquial language, he might "pack a gun") even though he does not move from his chair. It is difficult to believe, however, that Congress intended to limit the statutory word to this definition-imposing special punishment upon the comatose gangster while ignoring drug lords who drive to a sale carrying an arsenal of weapons in their van.
We recognize, as the dissent emphasizes, that the word “carry” has other meanings as well. But those other meanings (e.g., “carry all he knew,” “carries no colours”) are not relevant here. And the fact that speakers often do not add to the phrase “carry a gun” the words “in a car” is of no greater relevance here than the fact that millions of Americans did not see Muscarello carry a gun in his truck. The relevant linguistic facts are that the word “carry” in its ordinary sense includes carrying in a car and that the word, used in its ordinary sense, keeps the same meaning whether one carries a gun, a suitcase, or a banana.

B

We now explore more deeply the purely legal question of whether Congress intended to use the word “carry” in its ordinary sense, or whether it intended to limit the scope of the phrase to instances in which a gun is carried “on the person.” We conclude that neither the statute's basic purpose nor its legislative history support circumscribing the scope of the word “carry” by applying an “on the person” limitation. . . .

This Court has described the statute's basic purpose broadly, as an effort to combat the “dangerous combination” of “drugs and guns.” Smith v. United States, 568 U.S. 223, 240 (1993). And the provision's chief legislative sponsor has said that the provision seeks “to persuade the man who is tempted to commit a federal felony to leave his gun at home.” 114 Cong. Rec. 22231 (1968) (Rep. Poff).

From the perspective of any such purpose (persuading a criminal “to leave his gun at home”), what sense would it make for this statute to penalize one who walks with a gun in a bag to the site of a drug sale, but to ignore a similar individual who, like defendant Gray-Santana, travels to a similar site with a similar gun in a similar bag, but instead of walking, drives there with the gun in his car? How persuasive is a punishment that is without effect until a drug dealer who has brought his gun to a sale (indeed has it available for use) actually takes it from the trunk (or unlocks the glove compartment) of his car? It is difficult to say that, considered as a class, those who prepare, say, to sell drugs by placing guns in their cars are less dangerous, or less deserving of punishment, than those who carry handguns on their person.

We have found no significant indication elsewhere in the legislative history of any more narrowly focused relevant purpose. We have found an instance in which a legislator referred to the statute as applicable when an individual “has a firearm on his person,” ibid. (Rep. Meskill); an instance in which a legislator speaks of “a criminal who takes a gun in his hand,” id., at 22239 (Rep. Pucinski); and a reference in the Senate Report to a “gun carried in a pocket,” S. Rep. No. 98-225, p. 314, n. 10 (1983); see also 114 Cong. Rec. 21788, 21789 (1968) (references to gun “carrying” without more). But in these instances no one purports to define the scope of the term “carries”; and the examples of guns carried on the person are not used to illustrate the reach or the term “carries” but to illustrate, or to criticize, a different aspect of the statute.
Regardless, in other instances, legislators suggest that the word "carries" has a broader scope. One legislator indicates that the statute responds in part to the concerns of law enforcement personnel, who had urged that "carrying short firearms in motor vehicles be classified as carrying such weapons concealed." Id., at 22242 (Rep. May). Another criticizes a version of the proposed statute by suggesting it might apply to drunken driving, and gives as an example a drunken driver who has a "gun in his car." Id., at 21792 (Rep. Yates). Others describe the statute as criminalizing gun "possession" a term that could stretch beyond both the "use" of a gun and the carrying of a gun on the person. See id., at 21793 (Rep. Casey); id., at 22236 (Rep. Meskill); id., at 30584 (Rep. Collier); id., at 30585 (Rep. Skubitz).

We are not convinced by petitioners' remaining arguments to the contrary. . . .

Finally, petitioners and the dissent invoke the "rule of lenity." The simple existence of some statutory ambiguity, however, is not sufficient to warrant application of that rule, for most statutes are ambiguous to some degree. Cf. Smith, 508 U.S., at 239 ("The mere possibility of articulating a narrower construction . . . does not by itself make the rule of leniency applicable"). "The rule of leniency applies only if, after seizing everything from which aid can be derived," . . . we can make "no more than a guess as to what Congress intended." United States v. Wells, 519 U.S. 482, 499 (1997). To invoke the rule, we must conclude that there is a "grievous ambiguity or uncertainty" in the statute. Staples v. United States, 511 U.S. 600, 619 n.17 (1994). Certainly, our decision today is based on much more than a "guess as to what Congress intended," and there is no "grievous ambiguity" here. The problem of statutory interpretation in these cases is indeed no different from that in many of the criminal cases that confront us. Yet, this Court has never held that the rule of leniency automatically permits a defendant to win.

In sum, the "generally accepted contemporary meaning" of the word "carry" includes the carrying of a firearm in a vehicle. The purpose of this statute warrants its application in such circumstances. The limiting phrase "during and in relation to" should prevent misuse of the statute to penalize those whose conduct does not create the risks of harm at which the statute aims. For these reasons, we conclude that petitioners' conduct falls within the scope of the phrase "carries a firearm."

Justice Ginsburg, with whom The Chief Justice, Justice Scalia, and Justice Souter join, dissenting.

. . . Without doubt, "carries" is a word of many meanings, definable to mean or include carting about in a vehicle. But that encompassing definition is not a ubiquitously necessary one. Nor, in my judgment, is it a proper construction of "carries" as the term appears in §924(c)(1). In line with Bailey and the principle of leniency the Court has long followed, I would confine "carries a firearm," for §924(c)(1) purposes, to the undoubted meaning of that expression in the relevant context. I would read the words to indicate
not merely keeping arms on one’s premises or in one’s vehicle, but bearing them in such manner as to be ready for use as a weapon.

Unlike the Court, I do not think dictionaries, surveys of press reports, or the Bible tell us, dispositively, what “carries” means embedded in §924(c)(1). On definitions, “carry” in legal formulations could mean, inter alia, transport, possess, have in stock, prolong (carry over), be infectious, or wear or bear on one’s person. At issue here is not “carries” at large but “carries a firearm.” The Court’s computer search of newspapers is revealing in this light. Carrying guns in a car showed up as the meaning “perhaps more than one-third” of the time. Ante, at 1915. One is left to wonder what meaning showed up some two-thirds of the time. Surely a most familiar meaning is, as the Constitution’s Second Amendment (“keep and bear Arms”) (emphasis added) and Black’s Law Dictionary, at 214, indicate: “wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person.”

On lessons from literature, a scan of Bartlett’s and other quotation collections shows how highly selective the Court’s choices are. If “[t]he greatest of writers” have used “carry” to mean convey or transport in a vehicle, so have they used the hydra-headed word to mean, inter alia, carry in one’s hand, arms, head, heart, or soul, sans vehicle. Consider, among countless examples:

“[H]e shall gather the lambs with his arm, and carry them in his bosom.” The King James Bible, Isaiah 40:11.

“And still they gaz’d, and still the wonder grew,

That one small head could carry all he knew.”

1. I note, however, that the only legal dictionary the Court cites, Black’s Law Dictionary, defines “carry arms or weapons” restrictively. See ante, at 1915; supra, at 1919-1920.

2. Many newspapers, the New York Times among them, have published stories using “transport,” rather than “carry,” to describe gun placements resembling petitioners’. See, e.g., Atlanta Constitution, Feb. 27, 1996, p. 90, col. 2 (“House members last week expanded gun laws by allowing weapons to be carried into restaurants or transported anywhere in cars.”); Chicago Tribune, June 12, 1997, sports section, p. 13 (“Disable hunters with permission to hunt from a standing vehicle would be able to transport a shotgun in an all-terrain vehicle as long as the gun is unloaded and the breech is open.”); Colorado Springs Gazette Telegraph, Aug. 4, 1996, p. C10 (British gun laws require “locked steel cases bolted onto a car for transporting guns from home to shooting range.”); Detroit News, Oct. 26, 1997, p. D14 (“It is unlawful to carry a rifle or transport a rifle . . . or shotgun if you have buckshot, slug, ball loads, or cut shells in possession except while traveling directly to deer camp or target range with firearm not readily available to vehicle occupants.”); N.Y. Times, July 4, 1993, p. A21, col. 2 (“[T]he gun is supposed to be transported unloaded, in a locked box in the trunk.”); Santa Rosa Press Democrat, Sept. 28, 1996, p. B1 (“Police and volunteers ask that participants . . . transport their guns to the fairgrounds in the trunks of their cars.”); Worcester Telegram & Gazette, July 16, 1996, p. B8 (“Only one gun can be carried in per person. Guns transported in a vehicle should be locked in the trunk.”) (emphasis added in all quotations).

3. The translator of the Good Book, it appears, bore responsibility for determining whether the servants of Ahaziah “carried” his corpse to Jerusalem. Compare ante, at 1914, with, e.g., The New English Bible, 2 Kings 9:28 (“His servants conveyed his body to Jerusalem.”); Saint Joseph Edition of the New American Bible (“His servants brought him in a chariot to Jerusalem.”); Tanakh: The Holy Scriptures (“His servants conveyed him in a chariot to Jerusalem.”); see also id., Isaiah 30:6 (“They convey their wealth on the backs of asses.”); The New Jerusalem Bible (“[T]hey bear their riches on donkeys’ backs.”) (emphasis added in all quotations).


"There's a Legion that never was 'listed,
That carries no colours or crest."

R. Kipling, The Lost Legion, st. 1, in Rudyard Kipling's Verse, 1885-1918, p. 222 (1920).

"There is a homely adage which runs, 'Speak softly and carry a big stick; you will go far.'" T. Roosevelt, Speech at Minnesota State Fair, Sept. 2, 1901, in J. Bartlett, Familiar Quotations 575:16 (J. Kaplan ed. 1992).

These and the Court's lexicological sources demonstrate vividly that "carry" is a word commonly used to convey various messages. Such references, given their variety, are not reliable indicators of what Congress meant, in §924(c)(1), by "carries a firearm." . . .

[Moreover, re]ading "carries" in §924(c)(1) to mean "on or about [one's] person" is fully compatible with these and other "Firearms" statutes. For example, under §925(a)(2)(B), one could carry his gun to a car, transport it to the shooting competition, and use it to shoot targets. Under the conditions of §926A, one could transport her gun in a car, but under no circumstances could the gun be readily accessible while she travels in the car. "[C]ourts normally try to read language in different, but related, statutes, so as best to reconcile those statutes, in light of their purposes and of common sense." . . . So reading the "Firearms" statutes, I would not extend the word "carries" in §924(c)(1) to mean transports out of hand's reach in a vehicle.

II

Section 924(c)(1), as the foregoing discussion details, is not decisively clear one way or another. The sharp division in the Court on the proper reading of the measure confirms, "[a]t the very least, . . . that the issue is subject to some doubt. Under these circumstances, we adhere to the familiar rule that, 'where there is ambiguity in a criminal statute, doubts are resolved in favor

5. Popular films and television productions provide corroborative illustrations. In "The Magnificent Seven," for example, O'Reilly [played by Charles Bronson] says: "You think I am brave because I carry a gun; well, your fathers are much braver because they carry responsibility, for you, your brothers, your sisters, and your mothers." See http://www.imdb.com/Msearch_quotes?for=carry. And in the television series "M*A*S*H," Hawkeye Pierce (played by Alan Alda) presciently proclaims: "I will not carry a gun. . . . I'll carry your books, I'll carry a torch, I'll carry a tune, I'll carry on, carry over, carry forward, Cary Grant, cash and carry, carry me: back to Old Virginia, I'll even 'hav' kori' if you show me how, but I will not carry a gun!" See http://www.foxcities.com/Hollywood/8915/mashquotes.html.

6. The Court places undue reliance on Representative Poff's statement that §924(c)(1) seeks "to persuade the man who is tempted to commit a Federal felony to leave his gun at home." ante, at 1916 (quoting 114 Cong. Rec. 22231 (1968)). As the Government argued in its brief to this Court in Bailey: "In making that statement, Representative Poff was not referring to the 'carries' prong of the original Section 924(c). As originally enacted, the 'carries' prong of the statute prohibited only the 'unlawful' carrying of a firearm while committing an offense. The statute would thus not have applied to an individual who, for instance, had a permit for carrying a gun and carried it with him when committing an offense, and it would have had no force in 'persuading' such an individual 'to leave his gun at home.' Instead, Representative Poff was referring to the 'uses' prong of the original Section 924(c)." Brief for United States in Bailey v. United States, O.T. 1995, Nos. 94-7448 and 94-7492, p. 28. Representative Poff's next sentence confirms that he was speaking of "uses," not "carries": "Any person should understand that if he uses his gun and is caught and convicted, he is going to jail." 114 Cong. Rec., at 22231 (emphasis added).]
of the defendant.’” Adamo Wrecking Co. v. United States, 434 U.S. 275, 284-285 (1978) (citation omitted); see United States v. Granderson, 511 U.S. 39, 54 (1994) (“[W]here text, structure, and history fail to establish that the Government’s position is unambiguously correct we apply the rule of lenity and resolve the ambiguity in [the defendant’s] favor.”). “Carry” bears many meanings, as the Court and the “Firearms” statutes demonstrate. The narrower “on or about [one’s] person” interpretation is hardly implausible nor at odds with an accepted meaning of “carries a firearm.”

Notably in view of the Legislature’s capacity to speak plainly, and of overriding concern, the Court’s inquiry pays scant attention to a core reason for the rule of lenity: “[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies ‘the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.’” United States v. Bass, 404 U.S. 336, 348 (1971) (quoting H. Friendly, Mr. Justice Frankfurter and the Reading of Statutes, in Benchmarks 196, 209 (1967)).

... [G]iven two readings of a penal provision, both consistent with the statutory text, we do not choose the harsher construction. The Court, in my view, should leave it to Congress to speak “in language that is clear and definite” if the Legislature wishes to impose the sterner penalty. Bass, 404 U.S. at 347.

**Notes and Questions**

1. The criminal provision at issue, 18 U.S.C. §924(c), provides that “whoever, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, shall, in addition to the punishment provided for such crime . . . be sentenced to imprisonment for five years.” This provision subjects a defendant to a “mandatory minimum” sentence of five years in prison. The majority and dissenting justices invoke a wide array of sources, all with the aim of discerning the ordinary English meaning of the phrase “carries a firearm.” Which sources are most persuasive in determining the meaning of a criminal statute: (1) the *Oxford English Dictionary*, (2) the *Barnhart Dictionary of Etymology*, (3) the Bible, (4) use in classic literature, such as *Moby Dick*, (5) use by the *New York Times*, or (6) Black's *Law Dictionary*?

2. If the Court was most interested in the “generally accepted contemporary meaning,” would other sources be relevant? For example, what role would surveys about how the public understands “carrying a firearm” play? Would it matter if half the public did not think that “carrying a firearm” includes stowing a firearm in one’s car?

3. One issue that divides the justices is whether to apply the rule of lenity, which is a substantive canon of construction. The rule of lenity directs courts to resolve “doubts” or ambiguities in criminal statutes in favor of criminal defendants. See Adamo Wrecking Co. v. United States, 434 U.S. 275, 284-85 (1978). We address the rule of lenity in the next section but want
to flag a point here. If a statutory phrase has two possible "ordinary meanings," isn't it ambiguous enough for the rule of lenity to apply? How would the majority respond? Does it believe that the phrase is ambiguous?

4. After *Muscarello*, Congress amended the statute to broaden the meaning of "use." Now a defendant is subject to a mandatory minimum sentence if she uses a gun "in furtherance" of a drug crime, and an even higher mandatory minimum sentence if she uses it actively, either by brandishing or discharging it. Congress has not amended the statute since. "Use" applies to the gun in the pocket and in the hand; "carries" applies to the gun in the car's trunk. Did the *Muscarello* Court interpret the statute correctly?