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Learning Our Limits: The Decline of Textualism in Statutory Cases

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ARTICLE

LEARNING OUR LIMITS: THE DECLINE OF TEXTUALISM IN STATUTORY CASES

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In his recent book, *A Matter of Interpretation*,¹ Justice Antonin Scalia describes and argues for his textualist approach to statutory interpretation. Scalia's essay comes at an interesting time, for it has now been more than a decade since he joined the Supreme Court and began

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1. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION* 3 (1997) [hereinafter *A MATTER OF INTERPRETATION*].

advocating for an approach to statutory interpretation very much (but not exactly) like the one he describes in his book. In this Article, I argue that the textualist approach has not been successful, and has begun losing influence with the other members of the Court. The crux of my argument is that Scalia writes convincingly, both in his book and in his opinions, about why one would *want* to approach interpretation with such deference to the text. But because the textualist approach is based on an insufficiently sophisticated understanding of the human language faculty, it fails, regardless of how much one may agree with the considerations that motivate it.

INTRODUCTION

Imagine a Wittgensteinian parlor game, in which a participant begins by uttering a sentence that contains only commonly used words. Another player then must create the most bizarre story she can that is loyal to the language in the first player's sentence. When each person has had a chance to make up a story, the player who told the most imaginative one wins.

The trick is to imagine real, but unconventional uses of the words in the sentence. For example, if the sentence is, "Bill threw the ball over the tree," a winning story might be one in which "throw" means "corruptly cause the loss of a competitive event," as in, "the quarterback, who had accepted a bribe from organized crime, threw the game." "Ball" might mean a formal dance. "Over" is interpreted nonprototypically to mean "about" rather than "above." The story might involve some kind of inter-family competition among high society members over which family organizes the best ball. One member of one of the families, Bill, was angry over his sibling's unilateral decision to have his favorite tree cut down, and he decided to get his revenge by undermining the family's chances of winning the competition. Perhaps the reader can come up with an even wilder response.

What makes the game fun is that it forces us to suspend whatever conventional notions we have about how words are likely to be used. In understanding language, we ordinarily take advantage of contextual cues and of knowledge of how words are used prototypically.² The game, in contrast, requires us to take all words out of context, to ignore our knowledge of the prototypical uses of words, and to create arbitrary new contexts. Thus, the game depends on the notion that we ordinarily use context and our knowledge of prototypical instances of a concept when we

2. The importance of prototypes in the formation and interpretation of concepts is discussed in detail *infra* part V.

understand language. Otherwise, there would be nothing different between the game on the one hand, and ordinary language understanding on the other.

For the past ten years, the Supreme Court has been interpreting statutes according to a set of rules that very much resemble the rules of this parlor game. Developed largely by Justice Scalia, the methodology, which has been called the "new textualism,"³ intentionally eschews many of the contextual and cognitive cues that make language meaningful. Of course, the Court's textualism is not exactly like our parlor game. But the similarities are clear enough. Instead of insisting that the interpreter assume no context whatsoever, as does the parlor game, the Court has selected a few categories of contextual information as the only ones that the interpreter may consider. These include the language of related provisions of the statute being examined, and perhaps more remote sections of the United States Code, in the case of federal statutes.⁴ They also include the prior interpretive decisions of the Court. To the extent that other information, such as legislative history, is allowed into the picture at all (a move that Justice Scalia rejects but others accept), its role is limited to potentially disconfirming the plain language analysis in especially egregious cases.⁵ As in our game, the Court has rejected reliance on prototypical understandings of words, and has substituted the outer bounds of dictionary definitions for our everyday knowledge of how words are ordinarily used. Perhaps most significantly, neither the game nor the Court permits prior consideration of the broader ramifications of the proffered interpretation.

In this Article, I will show that this methodology flies in the face of the most basic strategies that we have for understanding natural language. Advances in linguistics and cognitive psychology have demonstrated that we simply do not understand language that way. Rather, we use contextual information and knowledge of prototypes in everyday speech and understanding, and we use this information automatically and unselfconsciously. In short, textualism does not work very well as a theory of interpretation if, by "interpretation," we mean getting to the

3. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990); see also Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 CARDOZO L. REV. 1597 (1991); Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277 (1990).

4. For a typical example, see *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83 (1991); see also discussion *infra* part II.

5. See, e.g., *Reves v. Ernst & Young*, 507 U.S. 170 (1993); see also discussion *infra* part IV.B.

meaning that the speaker, in this case Congress, intended the text to convey.⁶

I argue that this brand of textualism is best seen as an experiment in which the Court has tacitly posited an idealized theory of cognition in statutory cases in order to enhance the rule of law.⁷ The hypothesis of the experiment is that we can meaningfully understand the language of statutes by looking only at the limited materials that the theory makes available to us. Scalia calls this a search for "objectified intent."⁸ For the hypothesis to be confirmed, we need not actually use the textualist methodology to understand language in everyday life. Rather, the experiment will succeed if this reduced reliance on extra-textual information sufficiently emulates the results of ordinary language understanding so that it acts as a reasonable surrogate for our routine cognitive strategies. To the extent that we are successfully able to keep the materials relied upon to a clearly defined set, we eliminate whatever variability further exploration would necessarily entail.

To test this hypothesis, one would want to apply it in disputes over the meaning of various statutes over time. If the method results in argumentation that the Court itself soon feels obliged to abandon in future cases on the same subject matter, or in precedents that Congress routinely overrides, or that are clearly at odds with the contextual information that the method has instructed the Court to ignore, then the hypothesis will be disconfirmed.

6. In his opinions, Scalia appears to agree with this goal, but argues that the best evidence of intent is the language that the legislature actually used. See *INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992) (opinion of Scalia, J.) ("In construing statutes, 'we must, of course, start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used.'") (quoting *Richards v. United States*, 396 U.S. 1, 9 (1962)); *Morales v. TWA*, 504 U.S. 374, 382 (1992) (opinion of Scalia, J.) ("The question, at bottom, is one of statutory intent, and we accordingly 'begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purposes.'") (quoting *FMC Corp. v. Holliday*, 498 U.S. 52, 57 (1990)); *United States v. Fausto*, 484 U.S. 439, 452 (1988) (holding that statutory scheme is appropriate method to gauge "congressional intent."). I do not mean to imply that the interpretive process ends with that analysis, but I do agree that it should begin there. For some important works that discuss the need to reevaluate the meanings of statutes in light of contextual changes over time, see GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982); WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994); T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993).

7. Ironically, Scalia considers reference to legislative history by judges to be a "failed experiment." A MATTER OF INTERPRETATION, *supra* note 1, at 36.

8. A MATTER OF INTERPRETATION, *supra* note 1, at 17.

A successful experiment would bring substantial rewards. It would confirm that we really can elect a legislature to make rules by which we can govern ourselves, and that the rules really work. However, if the experiment were to fail, the result would be to have created a judicial system that has not done its duty to make its decisions based on its most considered wisdom, opting instead to make superficial decisions based on only a fraction of the information about which any serious person making important determinations would care. Let us not forget that the experiment is being performed on live subjects.

By these criteria, the decade-long experiment has not been a success. Congress has been especially quick to override significant textualist decisions,⁹ and the Court has offered interpretations that are almost certainly at odds with the intent of the enacting Congress.¹⁰ Most significantly, the Court has come to recognize the deficiencies of textualism, leading it to reverse field on several doctrinal fronts.¹¹ This recognition has led the various Justices in two directions. First, Justice Scalia himself has attempted to expand his notion of meaning to include information about prototypical understandings of words. This was missing from his early opinions that relied so heavily on the dictionary.¹² I argue that this is a giant step in the right direction, but cannot save the textualist enterprise since failure to recognize prototype information is only part of the problem. Using a different strategy, some of the other Justices are retreating from textualism, bringing context back into the analysis, and evaluating their interpretations by looking at the doctrinal consequences of their rulings. Both strategies show the Court's recognition that the parlor game is ending, and it is time to move on. *La commedia è finita*.¹³

9. See, e.g., *West Virginia Univ. Hosps. v. Casey*, 499 U.S. 83 (1991). But see Civil Rights Act of 1991, Pub. L. No. 102-166, § 113(b), 105 Stat. 1071 (codified at 42 U.S.C. § 2000e-5 (1994 & Supp. I 1995)) (effectively overruling *Casey*); see also *infra* note 42 and accompanying text.

10. See, e.g., *Moskal v. United States*, 498 U.S. 103 (1990) (construing a statutory ban against the interstate transportation of "falsely made" securities to mean a ban on documents containing false information). In a convincing dissent, Justice Scalia points out that "falsely made" meant forged or altered at the time of the statute's enactment. *Id.* at 123-26 (Scalia, J., dissenting). Justice Scalia's dissent in this case should serve as an appropriate illustration of the fact that it is not Scalia himself that is the subject of this Article, but rather a methodology that he largely developed.

11. See *infra* part V. For example, in *Bailey v. United States*, 116 S. Ct. 501 (1995), the Supreme Court adopted an analysis for what it means to "use a firearm" in a drug trafficking crime that differed substantially from the analysis the Court used just two years earlier in *Smith v. United States*, 508 U.S. 223 (1993).

12. See, e.g., *Smith*, 508 U.S. at 241-44 (Scalia, J., dissenting).

13. RUGGIERO LEONCAVALLO, PAGLIACCI, Act II (1892).

In Part I of this Article, I lay out the problem by focusing on the Supreme Court's 1985 decision in *United States v. Locke*.¹⁴ *Locke*, a case involving the Court's strict adherence to a deadline in an unambiguous, but trickily worded statute, has been widely criticized by scholars. I offer a reevaluation of *Locke* as an exercise in practical wisdom that brings to light the tension between the strict adherence to rules and the desire to do justice in the individual case. In Part II, I describe Justice Scalia's textualism more fully through an illustrative case, *West Virginia University Hospitals, Inc. v. Casey*.¹⁵ In Part III, I criticize textualism as being at odds with the way that we go about understanding language. I show that even under the hypothesis that textualism should be seen as the use of a set of idealized assumptions, it does not provide the level of understanding required to meet the goal of interpreting statutes to fulfil the wishes of the enacting legislature. The criticism makes use of a number of insights developed by linguists, psychologists and philosophers over the past few decades. Part IV describes a modified textualism that the Court frequently adopts, in which legislative history is considered, but only marginally. I argue that this is an improvement, but still inadequate if we wish to achieve a level of understanding of statutory language that at least matches our understanding of speech in everyday life. In Part V, I discuss recent cases in which the Supreme Court has broken away from the textualist model. I focus on the two distinct trends discussed above: Scalia's reliance on a more sophisticated notion of word meaning that allows for much more complete analysis of statutory language even within the textualist framework; and the Court's (sometimes surreptitious) rejection of the textualist approach altogether. I conclude that the recent trends are generally healthy ones that are far more in keeping with our cognitive strategies for interpreting language, and therefore more likely to lead to a coherent and thoughtful jurisprudence of statutory interpretation.

I. LOCKE REVISITED

In 1985, the Supreme Court decided *United States v. Locke*. In an opinion by Justice Marshall, the Court held that a deadline is a deadline. Section 314 of the then recently-enacted Federal Land Policy and Management Act of 1976 states that a notice of intention to hold one's unpatented mining claim must be filed with the Bureau of Land

14. 471 U.S. 84 (1985).

15. 499 U.S. 83 (1991).

Management (BLM) "prior to December 31 of each year."¹⁶ Locke filed his notice on December 31, 1980. He therefore suffered the statute's sanction for a late filing: a conclusive presumption that the mine has been abandoned.¹⁷ Locke and his family had been operating the mine since the 1960s.¹⁸ The Supreme Court's refusal to grant a one-day reprieve seemed to mean that they were to lose their family business.

Ironically, the BLM had made the same mistake in its 1978 question and answer brochure, in which it advised miners that the annual filing must be made on or before December 31.¹⁹ Moreover, at Locke's request, Locke's daughter called the local BLM office and was told that the filing had to be made "on or before December 31, 1980."²⁰ Locke complied with this advice.

Locke has been widely criticized for its "wooden" adherence to language that "create[s] a trap for valuable property rights."²¹ But a footnote in the majority opinion,²² and Justice O'Connor's concurrence,²³ hint otherwise. The decision may be much more directed toward fairness to the Locke family than initially appears. Justice Stevens argued in dissent that the phone call of Locke's daughter to the BLM should play a crucial role in the case's outcome.²⁴ In footnote 7, Justice Marshall, responding to this argument, suggests that it might have been appropriate for the district court to have applied the doctrine of equitable estoppel against the government for its poor advice about the deadline.²⁵

16. 43 U.S.C. § 1744(a) (1994). The statute reads in relevant part: "The owner of an unpatented lode or placer mining claim located prior to [the date of this Act] shall, within the three-year period following [the date of this Act] and prior to December 31 of each year thereafter, file the instruments required by paragraphs (1) and (2) of this subsection." § 1744(a).

17. See 43 U.S.C. § 1744(c).

18. *Locke*, 471 U.S. at 127 (Stevens, J., dissenting).

19. *Id.* at 90 n.7. By the time that Locke made his one-day error, the BLM had corrected its brochure. *Id.*

20. *Id.* at 89, 90 n.7.

21. RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 267-68 (1990); see William D. Popkin, *Law-Making Responsibility and Statutory Interpretation*, 68 *IND. L.J.* 865, 876-77 (1993); Zeppos, *supra* note 3, at 1614-18.

22. *Locke*, 471 U.S. at 90 n.7.

23. *Id.* at 110-12 (O'Connor, J., concurring).

24. *Id.* at 128-29 (Stevens, J., dissenting).

25. Although equitable estoppel is rarely applied against the government, the Court had only recently decided *Heckler v. Community Health Servs. of Cranford County, Inc.*, 467 U.S. 51 (1984), in which it denied estoppel, but commented: "[W]e are hesitant . . . to say that there are no cases in which the public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government." *Id.* at 60. Justice Marshall's threat

Since the district court had not considered this estoppel claim, the Court remanded the case for further consideration. Justice O'Connor's concurrence was based entirely on the possibility of equitable estoppel.²⁶ Interestingly, *Locke* was never actually decided on remand. Having read footnote 7, the government decided to abandon the case, and the Lockes got back their mine.²⁷

Of course, the Court could have maintained the sanctity of deadlines by holding that Congress had made a drafting error, and that December 31 will be the absolute filing deadline each year. This possibility is what prompted the sharp criticism by Judge Posner and others.²⁸ Regardless, the majority opinion does provide an elegant combination of respect for the plain rule of law on the one hand, and compassion for the individual on the other. The opinion is about the strict adherence to deadlines, but the result is about the obligation of government agencies to treat the citizenry fairly.

The happy outcome for the Locke family was the result of a combination of fortuitous circumstances and some skillful judging. Marshall reached an accommodation between respect for legislative action and fairness to the parties without resorting to the common law judging that Scalia complains so forcefully is inappropriate in statutory cases.²⁹ But the availability of a solution to *Locke* based on practical wisdom obscures the difficult question that at other times cannot be avoided: Can we have a satisfactory theory of statutory interpretation that attempts to rely on a literal reading of statutes, and little else? Posner's reaction to *Locke*, notwithstanding that the facts were not as they seemed, suggests that the answer is no. We cannot always construe statutes in a manner that will both preserve a strong rule of law and resolve disputes in a way that fulfills some reasonable sense of the purpose behind the law's original enactment.³⁰ By looking closely at the textualist experiment, and comparing its hypotheses and assumptions to the ways in which we actually comprehend language, we can see why this is so.

was, no doubt, that the *Locke* case may be just such an instance.

26. *Locke*, 471 U.S. at 111-12.

27. Telephone interview with Harold Swafford, Esq. (Aug. 1996). Mr. Swafford represented the Locke family.

28. See, POSNER, *supra* note 21, at 267-69.

29. A MATTER OF INTERPRETATION, *supra* note 1, at 10-11.

30. See CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* (1996).

II. THE TEXTUALIST EXPERIMENT

One year after *Locke* was decided, Justice Scalia was appointed to the Court. Scalia's approach relies heavily on detailed analysis of statutory language and rejects extra-textual considerations. While not all justices have accepted his approach, without question it has been an enormous influence on the Court. Even those opinions that are based on considerations other than plain language now routinely go through painfully detailed grammatical analysis.³¹

Scalia's textualism rejects reliance on extra-statutory phenomena, such as the legislative history of the statute's enactment, subsequent legislative history, and efforts to ascertain the mischief that the statute seeks to address.³² Underlying this textualist approach is a confidence that at the very least, a substantial part of the meaning of a statute is ordinarily ascertainable from a close reading of the statutory language,³³ and from "commonsensical" inferences deriving from the canons of construction.³⁴ The further a court ventures from the statute itself, therefore, the less respect the court is affording the legislative will, and the more the court is finding a way to impose its own wishes on the population. Conversely, the more we allow rules to speak for themselves, the stronger the rule of law.³⁵

31. See, e.g., *Reves v. Ernst & Young*, 507 U.S. 170, 177-79, 184-86 (1993), discussed *infra* part IV.B.

32. *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 617 (1991) (Scalia, J., concurring in judgment) (stating that Committee Reports are unreliable "not only as a genuine indicator of congressional intent but as a safe predictor of judicial construction . . . [the Court] use[s] them when it is convenient, and ignore[s] them when it is not"); *Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., concurring in part) (stating that "[a]rguments based on subsequent legislative history . . . should not be taken seriously"); *Moskal v. United States*, 498 U.S. 103, 131 (1990) (Scalia, J., dissenting) (criticizing the majority for adopting a rule that "[w]here a term of art has a plain meaning, the Court will divine the statute's purpose and substitute a meaning more appropriate to that purpose").

33. Cf. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856 (1989) (arguing that words have "meaning enough, as the scholarly critics themselves must surely believe when they choose to express their views in text rather than music").

34. A MATTER OF INTERPRETATION, *supra* note 1, at 25-26. Referring to certain canons, Scalia writes: "All of this is so commonsensical that, were the canons not couched in Latin, you would find it hard to believe anyone could criticize them. But in fact, the canons have been attacked as a sham." *Id.* at 26.

35. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

Among Scalia's greatest concerns is the use of legislative history in the judicial process.³⁶ Even scholars with diverse ideological orientations have agreed that inquiry into the collective "will" of hundreds of senators and representatives who did not necessarily even speak with one another during the legislative process is not a coherent enterprise.³⁷ Moreover, to the extent that legislators, and even staff members, are aware that their pre-enactment statements will be used by courts in subsequent interpretation, there is room—and even motive—for abuse.³⁸

36. A MATTER OF INTERPRETATION, *supra* note 1, at 16-18, 29-37; *see also* United States v. Thompson/Ctr. Arms Co., 504 U.S. 505, 521 (1992) (Scalia, J., concurring in judgment) (referring to legislative history as "that last hope of lost interpretive causes, that St. Jude of the hagiology of statutory construction").

37. *See* RONALD DWORIN, LAW'S EMPIRE 342-47 (1986); POSNER, *supra* note 21, at 276-78; *see also* Bank One Chicago v. Midwest Bank & Trust Co., 116 S. Ct. 637, 645 (1996) (Scalia, J. concurring in part) ("Legislative history that does not represent the intent of the whole Congress is nonprobative; and legislative history that does represent the intent of the whole Congress is fanciful.").

38. For example, a stated reason for President Clinton's veto of the Private Securities Litigation Reform Act of 1995 was a statement in the Conference Report concerning the requirements for pleading scienter. President's Message to the House of Representatives Returning Without Approval the Private Securities Litigation Reform Act of 1995, 31 WEEKLY COMP. PRES. DOC. 2210, 2210 (Dec. 19, 1995) [hereinafter President's Message].

The statute requires that a complaint, for each alleged act or omission, "state with particularity facts giving rise to a *strong inference* that the defendant acted with the requisite state of mind." Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 21D(b)(2), 109 Stat. 737 (to be codified at 15 U.S.C. § 78u-4(b)(2)) (emphasis added). The Conference Committee noted that under prior law, the "most stringent pleading standard" was that of the Second Circuit, which required that the facts pleaded in the complaint "must give rise to a '*strong inference*' of the defendant's fraudulent intent." H.R. CONF. REP. NO. 369, 104th Cong., 1st Sess. 41 (1995) (emphasis added). Even though the statute adopts the Second Circuit's very words, the report went on to comment, perhaps disingenuously: "Because the Conference Committee intends to strengthen existing pleading requirements, it does not intend to codify the Second Circuit's case law interpreting this pleading standard." *Id.* Notwithstanding the similar language in both the statute and the Second Circuit rule as articulated by the Conference Committee, the President made frequent reference in his veto message to the statements in the Committee Report concerning rejection of the Second Circuit standard. President's Message, *supra*, at 2210-11. The President noted that the Statement of Managers in the Report "will be used by courts as a guide to the intent of Congress with regard to the meaning of the bill." *Id.* at 2210. Nevertheless, on December 22, Congress enacted the statute over the President's veto.

So far, the President's fear concerning courts' reliance on the Conference Report has been unfounded. In *Marksman Partners, L.P. v. Chantal Pharmaceutical Corp.*, 927 F. Supp. 1297, 1308-12 (C.D. Cal. 1996), the court rejected the defendant's argument which relied on the Conference Report, and construed the statute as adopting the Second Circuit's pleading requirement of scienter.

In its structure, the textualist position closely resembles economic argumentation. Both begin with an idealized model of certain aspects of human psychology. In the case of economics, the theory is one of human behavior in transactional situations. In the case of textualism, the theory is one of language use and comprehension. In both instances, the idealization is self-evidently less complicated than actual human psychology. We know that people really are not always motivated by wealth maximization. We also know that comprehension of language depends on the use of a much broader range of contextual information than textualism allows.³⁹

Economic theory admits this gap, but argues that the idealization is harmless, as the goal of the theory is to create a predictive model, not to create a descriptively adequate picture of human motivation.⁴⁰ But to the extent that human motivation is a complicated matter, the economist argues that the idealization permits focused research, since it allows us to bypass aspects of the human condition about which we do not have a very good understanding. To attack economic theory successfully, an economist would argue, one must show not only that its assumptions are false, but that the idealizations that make them false are not innocent in that they lead to insupportable conclusions.

Similarly, in assessing textualism, one would first want to determine whether the interpretive devices that the theory accepts conform adequately to the way that human beings generally understand language. If that inquiry is answered affirmatively, then textualism is no more problematic than is ordinary language understanding. But if textualism is deficient in some additional ways, then we must also ask whether these shortcomings make any difference. If they do not, then textualism should be deemed a success. It would, in that case, succeed in eliminating procedures that reduce the impact of the rule of law without compromising understanding in any significant way.

Let us examine textualism by means of an example. The centerpiece of textualist methodology has been the plain language rule. *West Virginia University Hospitals, Inc. v. Casey*,⁴¹ a 1991 case, illustrates how the debate over plain language plays out in the textualist era. In *Casey*, West Virginia University Hospital had won its § 1983⁴² case against the state

39. See discussion *infra* part III.

40. Posner begins his text by making this fact clear: "Rational maximization should not be confused with conscious calculation . . . [e]conomics is not a theory about consciousness . . . Behavior is rational when it conforms to the model of rational choice, whatever the state of mind of the chooser." RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 3-4 (4th ed. 1992).

41. 499 U.S. 83 (1991).

42. See 42 U.S.C. § 1983 (1994).

of Pennsylvania (Casey was its governor) over Medicaid reimbursement rates that Pennsylvania was paying for treatment of Pennsylvania patients at the hospital in West Virginia. Section 1988 authorizes a court to award attorney's fees to successful § 1983 litigants.⁴³ The issue was whether "a reasonable attorney's fee" in § 1988 cases includes experts' fees. The question was an important one to the parties involved because most of the cost of the case was for experts in medical economics.

Justice Scalia, who wrote the majority opinion, said that attorney's fees do not include fees for expert witnesses. He relied on the plain language rule:

[T]he purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone. . . . The best evidence of that purpose is the statutory text adopted by both Houses of Congress and submitted to the President. . . .

"Where as here, the statute's language is plain, 'the sole function of the court is to enforce it according to its terms.'"⁴⁴

In determining that the language was "plain," Scalia looked not only to the language of the statute itself, but also to other provisions in the United States Code that deal with the same issue. Because these other statutes specifically referred to expert fees, he concluded that Congress, had it wished to authorize reimbursement for expert fees, would have done so explicitly.⁴⁵

Justice Stevens, the leading anti-textualist on the Supreme Court,⁴⁶

43. 42 U.S.C. § 1988 (1994) provides in pertinent part: "In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985 and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

44. *Casey*, 499 U.S. at 98-99 (citation omitted) (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)).

45. *Id.* at 88 (citing, inter alia, Toxic Substances Control Act, 15 U.S.C. §§ 2618(d), 2619(c)(2) (1994); Consumer Product Safety Act, 15 U.S.C. §§ 2060(c), 2072(a), 2073 (1994)). Scalia's use of this canon in this case has been criticized. See T. Alexander Aleinikoff & Theodore M. Shaw, *The Costs of Incoherence: A Comment on Plain Meaning*, *West Virginia University Hospitals, Inc. v. Casey, and Due Process of Statutory Interpretation*, 45 VAND. L. REV. 687, 693 (1992).

46. For example, dissenting in *Deal v. United States*, Stevens wrote of Scalia's majority opinion:

Between 1968, when the statute was enacted, and 1987, when textualism replaced common sense in its interpretation, the bench and bar seem to have understood that [18 U.S.C. § 924(c)] applied to defendants who, having once been convicted under § 924(c), "failed to learn their lessons from the initial punishment" and committed a repeat offense.

508 U.S. 129, 146 (1993) (Stevens, J., dissenting).

responded in dissent. Stevens observed that Congress is forced to override Supreme Court decisions legislatively “[o]n those occasions . . . when the Court has put on its thick grammarian’s spectacles and ignored the available evidence of congressional purpose and the teaching of prior cases construing a statute.”⁴⁷

Stevens argued further that the majority opinion creates an incoherent jurisprudence of fee shifting. The Court had held earlier that paralegal and law clerk fees count as attorney’s fees for purposes of § 1988,⁴⁸ and it is difficult to reconcile this earlier decision with the majority opinion in *Casey*. Furthermore, the consequence of the majority opinion would be to deny the recovery of expert fees available to litigants successfully asserting rights under other statutes that shift fees to the victors in civil rights cases. Stevens looked to the legislative history and other indications of congressional purpose, and discovered no evidence that Congress intended to create such a disparity.⁴⁹ Thus, looking both backward at the legislative history and forward at the consequences of the decision, Stevens argued that the plain language should not have been the end of the inquiry.

Stevens’ prediction concerning congressional reaction to the decision proved to be correct. *Casey* was decided on March 19, 1991. On November 21, 1991, Congress enacted the Civil Rights Act of 1991.⁵⁰ Section 113(b) of that Act overrides the *Casey* decision by permitting courts to award expert fees in civil rights actions.⁵¹ While not dispositive, since we cannot tell how the original enacting Congress would have reacted to *Casey*, a rapid congressional rebuke of a plain language interpretation is, at the very least, some evidence that the legislature does not believe the Court to be furthering the statute’s goals. This is especially so where, as in this case, the political party in control of Congress at the time of the override is the same (Democratic) as it was at the time of the statute’s enactment. Below we examine some of the linguistic facts that make this inference stronger.

47. *Casey*, 499 U.S. at 113.

48. *Missouri v. Jenkins*, 491 U.S. 274, 285 (1989).

49. *Casey*, 499 U.S. at 108-11.

50. Pub. L. No. 102-166, 105 Stat. 1071 (codified at various sections of 42 U.S.C. (1994)).

51. § 113(b), 105 Stat. 1071, 1079. Moreover, congressional overrides of Supreme Court cases come predominantly in plain language rule cases. See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 347, app. at 450-55 (1991).

III. TEXTUALISM VS. LANGUAGE

A. *Linguistics and the Allure of Textualism*

I have suggested that it is useful to look at textualism in terms of an idealized model of a particular cognitive process—the language faculty. I have further suggested that the motivations for a legal system's attempting such an idealization are laudable, although the experiment does not ultimately succeed. In this section, I explore how aspects of our linguistic competence could lead one to posit a set of interpretive principles in which context plays a marginal role. The answer will help to explain the allure of textualism, that is, what in our psychology permits us to think that we can govern ourselves by virtue of a rule-governed system expressed in language. The extent to which this aspect of language understanding underdetermines meaning, moreover, should point to ways in which we might expect to have difficulty applying rules mechanically to events in the world to yield a rule-ordered regime.

During the past forty years, linguists have discovered that a great deal of our knowledge of language is rule-governed and predictable, much the way textualists would have it. This knowledge explains our ability to understand, rapidly and unselfconsciously, the many new utterances we hear and read daily without any effort or further instruction. Consider, for example, the following simple sentence:

The yellow bus crashed into the blue car.

While context may play some role in how we interpret this sentence, our understanding of many of its elements is well beyond doubt, whatever the context in which it is uttered. For example, we know that the speaker is telling us that the bus, and not the car, is yellow, and the car, and not the bus, is blue. We know that “the blue car” is the object of the preposition, “into.” Thus, the sentence cannot be interpreted to mean that the yellow bus and the blue car jointly crashed into some unnamed object. And we know that the speaker is telling us that the bus crashed into the car and not that the car crashed into the bus.

That these limitations on possible interpretations may seem trivial reflects the fact that this knowledge is tacit and unselfconscious. But there is nothing at all trivial about it. It follows from the fact that sentences in English consist of certain kinds of phrases. For example, prepositional phrases (e.g., *into the blue car*) have prepositional “heads” and noun phrase “complements.” Noun phrases have determiners (e.g.,

the), nouns as their heads and adjectival modifiers. We recognize “crash” as a verb that allows a prepositional phrase, and so on.⁵²

These aspects of interpretation do not depend on inferences drawn from context. Context, however, no doubt does play a role in other aspects of the interpretation of this sentence. For example, the definite article “the” implies that the participants in the discourse have already identified the particular vehicles under discussion. Prototype effects also play a role. How hard did the bus have to hit the car for there to have been a crash? Was it a gruesome crash, or was the impact just barely strong enough to justify using the word “crash” at all? Crucially, these questions have nothing to do with the aspects of meaning that follow from the structure of the sentence.

We need not limit ourselves to the structure of phrases to find aspects of meaning that do not seem to be context driven, but instead are driven by the structure of language. Compare the following:⁵³

He twice knocked intentionally.
He intentionally knocked twice.

Only in the second of these can we understand the speaker as conveying the thought that the number of knocks was intentional. Changing the context in which the sentence is uttered will not alter this fact about our understanding of the scope of the adverb “intentionally.” Rather, the scope relations follow from the syntax of the sentence.

Or, take a more complicated pair:⁵⁴

More than one fireman checked every building.
Every fireman checked more than one building.

The first sentence is ambiguous. It can mean either that certain particular firemen (e.g., Bill and Fred) went around checking every building, or it can mean that every single building got checked by more than a single fireman. The second sentence, in contrast, lacks the equivalent of the first reading. Obviously, context plays no role here in determining which sentence allows an additional reading, since I have presented no context,

52. For early work that captures these generalizations, see RAY S. JACKENDOFF, *X-SYNTAX; A STUDY OF PHRASE STRUCTURE* (1977). For recent theory, see NOAM CHOMSKY, *THE MINIMALIST PROGRAM* 241-49 (1995).

53. See DENIS BOUCHARD, *THE SEMANTICS OF SYNTAX* 91 (1992) (discussing these examples and also taking a strong position on the different roles that structurally motivated semantics and pragmatics play in interpretation).

54. See Anna Szabolcsi, *Quantifier Scopepe* (Feb. 4, 1997) (paper presented to the N.Y.U. Department of Linguistics).

and since precisely the same context might motivate a speaker to utter either of these sentences.

Finally, consider the following pair:

John saw Mary wandering around the garden.

Mary was seen by John wandering around the garden.

Again, while there are plenty of questions that might arise that require us to consider the context in which the sentence is uttered (Who is John? Who is Mary? What do you really mean by "wandering?"), we cannot understand the second sentence as conveying the proposition that Mary saw John wandering around the garden, despite the fact that the order of the words is the same in the two sentences.⁵⁵

Linguists and philosophers of language often refer to this distinction as one between linguistic semantics and pragmatics.⁵⁶ Our understanding of language requires us to use both types of knowledge.⁵⁷

55. Interestingly, research shows that people with Williams Syndrome, a form of developmental disability that compromises intellectual functioning but spares certain islands of cognitive activity, are able to interpret reversible passive sentences of this type accurately, despite serious mental retardation that impairs thought in general. This and other similar facts have led cognitive psychologists to posit a modular approach to cognitive processes, in which the brain has different centers for different functions, with various interfaces to permit communication among modules. See Ursula Bellugi et al., *Williams Syndrome: An Unusual Neuropsychological Profile*, in *ATYPICAL COGNITIVE DEFICITS IN DEVELOPMENTAL DISORDERS: IMPLICATIONS FOR BRAIN FUNCTION 18* (Sarah H. Broman et al. eds., 1994).

56. See, e.g., KENT BACH, *THOUGHT AND REFERENCE* (1987):

Without getting into the many controversies surrounding the precise nature and goal of the linguistic enterprise, I think it is safe to say that for linguists the semantics of an expression gives the information that a competent speaker can glean from it independently of any context of utterance. Whenever he hears a particular utterance of it in a given context, he uses this information, in tandem with specific information available in the context, to understand the speaker's communicative intent.

Id. at 5.

57. Chomsky draws the distinction between knowledge of language and use of language. See NOAM CHOMSKY, *KNOWLEDGE OF LANGUAGE 3* (1986); see also NOAM CHOMSKY, *REFLECTIONS ON LANGUAGE* (1975) (discussing this perspective). The distinction is between knowledge of the syntactic and other grammatical environments in which certain expressions can be used, including the range of meanings contained in those linguistic environments, and the set of inferences that a hearer must draw from context to further understand what the speaker intended to convey. Recent research suggests that the sharp distinction between semantics and pragmatics may not be correct. Rather, aspects of meaning that are regular incorporate some pragmatic information. For an account that is both sophisticated and accessible see RAY S. JACKENDOFF, *THE ARCHITECTURE OF THE LANGUAGE FACULTY* (1997). For purposes of this discussion, the precise architecture of the language faculty is not important. My point is simply that,

As we see even from this brief discussion, the semantic portion of our linguistic understanding includes, in addition to other things, aspects of meaning concerning phrasal structure, the scope of adverbs and the scope of quantifiers.

Returning to the interpretation of statutes, the greater the role that linguistic semantics plays in interpretation, the more the textualist experiment will succeed. Conversely, the more that contextual information is required,⁵⁸ the more room for misunderstanding without enriched information about context and the less hope we should have for the success of the experiment.

This understanding of the role of context in interpretation thus not only explains what is wrong with Scalia's textualism, but it also explains what is attractive about it. In reality, a great deal of interpretation can and does occur independent of context.⁵⁹ When ambiguity does arise, certain aspects of context, such as surrounding text, are often relevant hints to interpretation. To the extent that we can avoid inquiry into those contextual areas that are murky, we can introduce certainty into the law, and reduce the motivation for doctoring the trail of events from which inferences about intent and purpose must be drawn.⁶⁰ The problem, as we shall see in detail, is that this vision of interpretation gives too much credit to those aspects of our linguistic competence that operate independent of context, and puts too little focus on the types of contextual information that we actually use.

B. Where Textualism Falls Short

Notwithstanding the ability of the textualist approach to deal with a substantial amount of interpretation with minimal analysis of contextual information, the effort falls short. The residue of interpretation left for pragmatics is simply too great for textualism to work. The problems radiate from the core fact that textualism, however well-motivated, is by

with respect to certain aspects of meaning, uttering the sentence in different circumstances will not lead to different interpretations.

58. That is, the more that pragmatic information is required apart from any worldly knowledge incorporated into semantic rules. See JACKENDOFF, *supra* note 57, at 47-82.

59. For a discussion of the relationship between linguistic and contextual information in legal rules, see FREDERICK F. SCHAUER, *PLAYING BY THE RULES* 38-72 (1991).

60. In many easy cases, the plain language of the statute is at peace with the statute's purpose, adding to the attractiveness of textualism. For a discussion applauding both the ease of applying textualism and its success in restraining judicial adventurism in such cases, see John Copeland Nagle, *Review Essay: Newt Gingrich, Dynamic Statutory Interpreter*, 143 U. PA. L. REV. 2209 (1995).

definition a know-nothing approach; it requires that we intentionally ignore exactly the kind of additional contextual information that we use routinely and unselfconsciously in everyday life to understand communications. The Court repeatedly states that words must be understood in their context, and that words that may seem unclear on their face become clear when one understands their context.⁶¹ But textualist methodology limits the notion of "context" to the statutory language surrounding the disputed words and sometimes to other sections of the United States Code.⁶² This limitation is by no means necessary, and is, as discussed below, unnatural. Similarly, textualism forbids any consideration of the consequences of the Court's interpretation. Yet in everyday speech, we routinely and automatically look at the consequences of our interpretations to see if they make sense.

These interpretive problems are straightforward, and are predictable from the structure of discourse in general. In understanding speech, we use whatever information we have available to divine the goals of the speaker, and then make the automatic assumption that the speaker is acting in accordance with these goals.⁶³ Paul Grice's Cooperative Principle captures this fact about the communication process: "Make your conversational contribution such as is required, at the stage at which it occurs, by the accepted purpose or direction of the talk exchange in which you are engaged."⁶⁴ Grice then presents several maxims which

61. See, e.g., *Brown v. Gardner*, 115 S. Ct. 552, 555 (1994) (unanimous Court) ("Ambiguity is a creature not of definitional possibilities but of statutory context . . ."); *Smith v. United States*, 508 U.S. 223, 229 (1993) ("Language, of course, cannot be interpreted apart from context."); *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (unanimous Court) ("[T]he meaning of statutory language, plain or not, depends on context.").

62. See, e.g., *West Virginia Univ. Hosps. v. Casey*, 499 U.S. 83, 100 (1991) ("Where a statutory term presented to us for the first time is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law."); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring in judgment) ("The meaning of terms on the statute books ought to be determined . . . on the basis of which meaning . . . is . . . most compatible with the surrounding body of law . . ."). When it comes to constitutional analysis, Scalia takes the much broader view that "context is everything." A MATTER OF INTERPRETATION, *supra* note 1, at 37.

63. See GEORGIA GREEN, PRAGMATICS AND NATURAL LANGUAGE UNDERSTANDING 90 (2d ed. 1996).

64. Paul Grice, *Logic and Conversation*, in SYNTAX AND SEMANTICS 3: SPEECH ACTS 41, 45 (P. Cole & J. Morgan eds., 1975). For a study that argues persuasively that the canons of construction used by courts, and similar maxims used in other cultures, derive from Grice's principles, see Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179. For an introduction to Gricean analysis with a discussion of how Grice's work fits into legal analysis, see generally BERNARD S.

we use to accomplish cooperation. Among them are the maxim of quantity ("make your contribution as informative as is required for the current purposes of the exchange,") and the maxim of relevance ("be relevant.").⁶⁵

Grice's Cooperative Principle is not intended as a prescription for good conversational behavior, as Georgia Green points out.⁶⁶ Rather, it is intended to be descriptive, characterizing what we automatically and unselfconsciously assume discourse is about every time we hear or read language, putting aside such issues as sarcasm, irony and so on. Significantly, the various maxims that we use in implementing the Cooperative Principle require us to use whatever knowledge we have to come to an appreciation of the speaker's goals. Again, we do this every time we listen, and we assume, again unselfconsciously, that when we speak, the listener is making similar assumptions about us.

The notion of coherence follows from these Gricean principles as well: "A coherent text is one where the interpreter can readily reconstruct the speaker's plan with reasonable certainty, by inferring the relations among the sentences, and their individual relations to the various subgoals in an inferred plan for the enterprise understood to be at hand."⁶⁷

To illustrate, assume that two men, *A* and *B*, are in a cocktail lounge having a drink together. It is 5:30 in the afternoon, and they have agreed to stay until 6:00, when *A* is supposed to meet his wife. *A* and *B* have young children, jobs, and wives who also work, and they are talking about the difficulties they and their wives have juggling all their responsibilities. *A* finished his drink a few minutes earlier. When *B* finishes his, *A* says to *B*: "Are you going to have another one?" *B* must decide whether *A* is talking about babies or martinis. How did he understand the remark?

To answer this question, we search as hard as we can for contextual clues.⁶⁸ The only one that I have included so far is the time: there are

JACKSON, MAKING SENSE IN LAW (1995). Other scholars have also used the Gricean model of communication to explain legal issues. See Peter Tiersma, *The Language of Silence*, 48 RUTGERS L. REV. 1, 99 n.34 (1995); M.B.W. Sinclair, *Law and Language: The Role of Pragmatics in Statutory Interpretation*, 46 U. PITT. L. REV. 373 (1985).

65. Grice, *supra* note 64, at 45-46. It has been argued that Grice's principles can be reduced to the notion that people try to make their contributions relevant, given a detailed understanding of relevance, which essentially requires that new information take into account the context of the communication, and then make an incremental contribution. See generally DAN SPERBER & DIERDRE WILSON, RELEVANCE (1995).

66. GREEN, *supra* note 63, at 96.

67. *Id.* at 106.

68. These clues are relevant in determining the intended antecedent for "one," but by no means cover our knowledge of when we can use that expression, and to what possible antecedents "one" can refer. Rather, they apply only after we have already

still 30 minutes remaining before *A* is to meet his wife. If it were already 6:00, then *A* would more likely be talking about babies since there would be no time for another drink. We naturally want to know more. Exactly what were they talking about when *A* asked the question? Expenses? Vacation plans? It makes a difference. We have two inferred plans—the evening schedule and the substance of the conversation—and we cannot tell from the information I have provided which plan was the one that *A* had in mind. Thus, even if *B* could understand *A*'s question as part of a coherent conversation, we cannot.

Significantly, to the extent that the context clarifies the situation, *B* is not even likely to perceive any ambiguity even though the ambiguity continues to exist. For example, let us say that *B* suffers from an insurmountable fertility problem that has arisen since the birth of his children, and that *A* knows about this problem. *A* is talking about *B*'s having another drink, not another child—neither of them would imagine otherwise. It is not that the word “one” has become determinate in meaning in some abstract sense. Rather, the circumstances lead us to infer that the speaker intended a particular referent for “one.” Other possible referents go unnoticed.

The phenomenon that context makes the indeterminacies in language seem to disappear is quite general and routinely forms a tacit part of statutory analysis. Consider, for example, the word “enterprise” in the Racketeer Influenced and Corrupt Organizations Act (RICO).⁶⁹ The Supreme Court has on two occasions construed “enterprise.” In *United States v. Turkette*,⁷⁰ the Court held that an arson ring counts as an enterprise even though it is not a legitimate business entity. In *National Organization for Women, Inc. v. Scheidler*,⁷¹ the Court held that a coalition of antiabortion groups called the Pro-Life Action Network (PLAN) also constituted a RICO enterprise even though PLAN is not pecuniary in nature. These were both difficult cases, in that the entities alleged to be enterprises appear to come within the statutory definition of

limited the range of possible interpretations based on the sorts of grammatical principles discussed above. For example, we can say, “Jack’s old car runs better than Harry’s new one,” but we cannot say, “Jack’s car runs better than Harry’s one.” For a linguistic analysis of the environments in which “one” can appear, see CARL L. BAKER, INTRODUCTION TO GENERATIVE-TRANSFORMATIONAL SYNTAX 327-42 (1978) (presenting the examples discussed in this Article); see also ROBERT FREIDIN, FOUNDATIONS OF GENERATIVE SYNTAX 46-47 (1992) (providing a similar but more contemporary analysis).

69. 18 U.S.C. §§ 1961-1968 (1994).

70. 452 U.S. 576 (1981).

71. 510 U.S. 249 (1994).

“enterprise,”⁷² but are nonprototypical uses of the term, whether under the statutory definitions or everyday usage.⁷³

While these difficult cases illustrate how words generally become indeterminate at the margins, in easy cases the indeterminacies go unnoticed. Thus, there are large numbers of civil RICO cases in which there is no question that an enterprise exists. These include whether the alleged acts of racketeering activity form a pattern,⁷⁴ as required under § 1962;⁷⁵ or what it means to participate in the conduct of an enterprise;⁷⁶ or what kind of injury a plaintiff must prove to be entitled to RICO damages.⁷⁷

These other RICO cases are not easier because the word “enterprise” has become clear. The indeterminacy has not gone away. Rather, whatever indeterminacy exists is not relevant to the dispute, and therefore goes unnoticed. When someone offers me a glass of juice, I do not have a fit of concern over whether the speaker has used a slang word to offer me some electric current. That thought would never occur. However

72. 18 U.S.C. § 1961(4) provides: “‘enterprise’ includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.”

73. I will argue below that the prototype approach to word meaning leads to significant improvement in the interpretation of statutes. *See infra* part V.A. For a discussion of the psychological literature underlying some of these observations, see Lawrence M. Solan, *Judicial Decisions and Linguistic Analysis: Is there a Linguist in the Court?*, 73 WASH. U. L.Q. 1069 (1995); Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1172-80 (1989); *see also* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958). Winter uses the notion of prototype to evaluate the Hart/Fuller debate on the interpretation of a hypothetical statute prohibiting vehicles in the park. Winter, *supra*, at 1172-80. Winter argues convincingly that Hart’s position, *see* Hart, *supra*, at 606-08, which relies on word meaning having a “core” and a “penumbra,” is consistent with linguistic research that demonstrates that our knowledge of concepts is structured in this way, but wrong in its understanding of the implications of that phenomenon. *Id.*; *see also* Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 988-89 (1995). * I return to the concept of prototypes in language processing. *See infra* part V.A.

74. *E.g.*, *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989).

75. 18 U.S.C. § 1962(a), for example, provides; in pertinent part:

It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest . . . any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

76. *E.g.*, *Reves v. Ernst & Young*, 507 U.S. 170 (1993); *see also* text accompanying *infra* notes 123-33.

77. *E.g.*, *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985).

many meanings are possible, the context determines whether words appear to be clear or ambiguous. Thus any interpretive methodology that commands us to ignore a significant portion of the context that we would ordinarily use, and forces us instead to rely on "the plain language," dooms us to inevitable misunderstandings, as our parlor game illustrates.

Judge Posner refers to the failure to look at context in order to evaluate the clarity of a text as the "plain meaning fallacy."⁷⁸ He highlights the problem in a series of opinions addressing Illinois contract law in which he reaffirms the parol evidence rule, but permits the use of extrinsic evidence to determine whether a document suffers from what he calls "extrinsic ambiguity."⁷⁹ Extrinsic ambiguity "is present when, although the agreement itself is a perfectly lucid and apparently complete specimen of English prose, anyone familiar with the real-world context of the agreement would wonder what it meant with reference to the particular question that has arisen."⁸⁰ The Restatement adopts a similar position.⁸¹ In contrast, "intrinsic ambiguity," according to Posner, is ambiguity readily apparent on the face of the document.⁸²

Posner's distinction is not susceptible to uniform application. After all, the only difference between intrinsic and extrinsic ambiguity is the extent to which the reader is surprised to learn that the document is subject to numerous interpretations. The degree of surprise, in turn, is a function of the reader's expectations, which are based in large part on his knowledge of how subcultures use different words. A document, therefore, may be intrinsically ambiguous to you, because you understand the nuances of the writer's use of relevant words, but only extrinsically ambiguous to me, because I do not.

Regardless, the thrust of Posner's point is correct. We should not insulate ourselves from the context in which legally significant words were uttered if we care about ascertaining what the speaker intended to convey. Whether we see this upon our initial reading of the document (intrinsic ambiguity), or only later after we have conducted adequate investigation (extrinsic ambiguity) is ultimately of little significance.

The Supreme Court's pronouncements that meaning depends on context⁸³ should be seen in this light. Context does not eliminate

78. POSNER, *supra* note 21, at 263-64.

79. *E.g.*, *Federal Deposit Ins. Corp. v. W.R. Grace & Co.*, 877 F.2d 614 (7th Cir. 1989).

80. *Federal Deposit*, 887 F.2d at 620.

81. RESTATEMENT (SECOND) OF CONTRACTS § 214(c) (1979). Comment b remarks in part: "Even though words seem on their face to have only a single possible meaning, other meanings often appear when the circumstances are disclosed."

82. POSNER, *supra* note 21, at 263-64.

83. *See supra* note 61-62.

possible interpretations of an utterance. Nor does it create possible interpretations. No amount of context will cause me to conclude that "Bill hit John" really means, "the air conditioner on the train was broken, and all the passengers were sweating when they got off." Rather, context makes certain possible interpretations more salient and others less salient.

Our story of the two men in the cocktail lounge provides a good example of this phenomenon. Let us say that *A*, after leaving *B*, is arrested for driving while intoxicated. He claims that he and *B* had only one drink, but a witness had overheard *A* asking *B* if *B* was going to have another one, and *B* said yes, thus undermining *A*'s credibility. For the sake of discussion, let us assume this time that the context of the discussion makes it clear that *A* and *B* really were talking about babies, but the witness did not hear that part of the conversation. It is a more complete understanding of the context that brings home the ambiguity of a seemingly clear statement and vindicates *A*. But the context did not create the ambiguity. The word "one" is indeterminate in its referent, whether we focus on its indeterminacy or not. Rather, the context alerted us to the presence of the ambiguity, and that it is now appropriate to resolve the ambiguity in a manner that had not occurred to us earlier.

Of course, textualism has always recognized that the interpretation of ambiguous statutes requires reference to information outside the statute, just as the parol evidence rule acknowledges the need for extrinsic evidence when a contract is ambiguous. But this recognition does not give enough of a boost to the textualist approach to overcome our inability to recognize the range of sensible interpretations that come to light only *after* we have looked at context as an initial matter.⁸⁴ Whether we are attempting to interpret concepts, such as "enterprise" or "attorney's fees," or simply to find the antecedent of a pronoun such as "one," language is not always fully determinate. When it is not, we ordinarily use whatever information is available to us to resolve vagueness and ambiguity.

Let us say that we have information, such as legislative history and evidence that the legislature is unhappy with prior court decisions, that enables us to infer what the legislature's plan is.⁸⁵ But, having adopted

84. For discussion of the overriding significance of context in legal interpretation, see PIERRE SCHLAG, *LAYING DOWN THE LAW: MYSTICISM, FETISHISM, AND THE AMERICAN LEGAL MIND* (1996); Lessig, *supra* note 6, at 1174-82.

85. Although Scalia argues against the use of this sort of information on institutional grounds, even he occasionally admits that the information may be informative. Thus, in *Sullivan v. Finkelstein*, 496 U.S. 617 (1990), Scalia makes the point that *subsequent* legislative history is of no use to the interpreter, by comparing it to *contemporaneous* legislative history, which he claims can be much more useful:

the methodological constraints of textualism, we deny ourselves the opportunity to take advantage of this information.⁸⁶ The result can be either an incoherent interpretation, or a coherent interpretation that is off-base because it draws the wrong inferences about the legislature's plan. This is exactly what Stevens' *Casey* dissent says about Scalia's majority opinion.⁸⁷ And Stevens' observation is not new. Almost 200 years ago, Chief Justice Marshall insightfully observed that "[w]here the mind labors

In some situations, of course, the expression of a legislator relating to a previously enacted statute may bear upon the meaning of a provision in a bill under consideration—which provision, if passed, may in turn affect the judicial interpretation of the previously enacted statute, since statutes *in pari materia* should be interpreted harmoniously. Such an expression would be useful, if at all, not because it was subsequent legislative history of the earlier statute, but because it was plain old legislative history of the later one.

Id. at 631-32 (Scalia, J., concurring in part); *see also* *United States v. Fausto*, 484 U.S. 439, 444 (1988) (using legislative history to determine the purpose of the Civil Service Reform Act of 1978).

86. Of course, in many instances, legislative history will be inconclusive, or just uninformative, as Scalia and many others point out. However, justices do appear to find it helpful not only in cases in which Scalia agrees with the result reached by the majority but thinks reference to the legislative process unnecessary, but also in cases in which other members of the Court disagree with Scalia based in part on historical material that these justices believe sheds light onto the overall meaning of the statute. *See, e.g.*, *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 340-49 (1994) (Stevens, J., dissenting). Scalia, writing for the majority, criticizes the dissenter's reliance on a Senate Committee report, stating "it is the statute, and not the committee report, which is the authoritative expression of the law." *City of Chicago*, 511 U.S. at 337; *see also* *Moskal v. United States*, 498 U.S. 103, 110-14 (1990) (finding legislative purpose in legislative history). Scalia's dissent argues that perceived purpose should not override plain meaning. *Moskal*, 498 U.S. at 129-31; *United States v. Nordic Village, Inc.*, 503 U.S. 30, 37 (1992) (opinion of Scalia, J.) (holding that a waiver of sovereign immunity must be unequivocally expressed in the statutory text, and not in the legislative history). Stevens, dissenting, uses legislative history to confirm his "literal reading" of the statutory text. *Nordic Village*, 503 U.S. at 41; *West Virginia Univ. Hosps. v. Casey*, 499 U.S. 83, 97-99 (1991) (opinion of Scalia, J.) (refusing to look to statements of individual legislators where the statute is unambiguous). In contrast, the dissent by Stevens relies on legislative history to show a broad remedial purpose behind the statute. *Casey*, 499 U.S. at 108-16; *Chisom v. Roemer*, 501 U.S. 380, 404-05 (1991) (Scalia, J., dissenting) (criticizing the Court for adopting an unjustifiably broad reading of the statute after finding no indication in the legislative history that Congress intended the narrow, ordinary meaning of a statutory term).

87. It also accounts for what commentators remarking about this case have said "is a Court-imposed incoherence, blind both to the manifest congressional purpose and to the real-world consequences of the literalistic reading." Aleinikoff & Shaw, *supra* note 45, at 689.

to discover the design of the legislature, it seizes everything from which aid can be derived."⁸⁸

Again focusing on Grice's Cooperative Principle and the concept of coherence, Scalia's notion of context in *Casey* is also too broad. It is too broad because it makes the unjustified empirical assumption that Congress, in enacting § 1988, was focused on the wording of other fee-shifting statutes in the United States Code, and decided to give fewer fee-shifting benefits to successful civil rights litigants. It is equally plausible that Congress was not trying to distinguish § 1988 from the others. Congress may have been directing its attention to overturning the Supreme Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*.⁸⁹ As Stevens points out, *Alyeska Pipeline* prompted § 1988 and Congress may have assumed that its enactment of § 1988 would include whatever reimbursement is usually associated with such statutes.⁹⁰ In fact, courts had been construing similar language as permitting reimbursement for expert fees.⁹¹ One can draw the inference that Congress focused on such substantive problems just as easily as one can infer that Congress matched the language of this provision with that of other Code provisions out of fear that the Supreme Court would later take advantage of any stylistic inconsistencies in the outcome of the drafting process.

At the same time that textualism denies the interpreter the opportunity to investigate the context from which one ordinarily tries to infer the goals or plan of the speaker, it also denies the necessity—even the legitimacy—of the interpreter's considering the consequences of her interpretation, short of a check for outright absurdity.⁹² It is not easy to state any reason for why Congress would have wanted to single out victorious § 1988 civil rights litigants for less fee-shifting benefits than those who prevail under other sections of the Code, and Scalia does not

88. *United States v. Fisher*, 6 U.S. (2 Cranch) 356, 385 (1805).

89. 421 U.S. 240 (1975).

90. See Aleinikoff & Shaw, *supra* note 45, at 694-98; William D. Popkin, *An "Internal" Critique of Justice Scalia's Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133, 1148-50 (1992).

91. See Peter Margulies, *After Marek, the Deluge: Harmonizing the Interaction Under Rule 68 of Statutes that Do and Do Not Classify Attorney's Fees as Costs*, 73 IOWA L. REV. 413 (1988) (discussing the difficulties in interpreting fee shifting statutes); Monique Michal, Comment, *After West Virginia: The Fate of Expert Witness Fee Shifting in Patent Litigation*, 59 U. CHI. L. REV. 1591, 1592-93 (1992) (citing cases in which attorney fee awards under the Patent Act had been construed to include expert witness fees).

92. See *Dewsnup v. Timm*, 502 U.S. 410, 426-27 (1992) (Scalia, J., dissenting); *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 510-11 (1989); *United States v. Turkette*, 452 U.S. 576, 588 (1981).

even try. Yet, by focusing only on other fee-shifting sections of the Code without regard to the circumstances surrounding the enactment of *this* particular section, the majority has concluded that is just what Congress intended to do. The Court ignored the likely consequence of closing the court house door to many victims of civil rights violations.⁹³ In fact, textualism makes it illicit to try to understand this central issue because the Court is not permitted to investigate either the motivations of the legislators or the doctrinal consequences of its decision. Those are considered to be exclusively in the domain of the legislature. The Court's role, in contrast, is solely as the enforcer of legislative decisions.

Finally, *Casey* illustrates another problem that is very common in plain language cases: the language in § 1988 is simply not plain. We can just as easily understand "attorney's fees" to mean all the fees paid to an attorney, including both fees for the attorney's services and various disbursements such as expert fees, or we can understand it to mean the fees paid to an attorney just for the attorney's services. This is true of all structures involving a possessive: "Bill's wallet" can mean the wallet that Bill has, likes, saw at Saks Fifth Avenue, etc.⁹⁴

The elegance and apparent simplicity of the plain language rule encourage courts to find language plain even when it is not. The absence of contextual information from the analysis makes this conclusion easier for a court to reach. The problem becomes especially vivid when courts are confronted with a choice between applying the plain language rule, or applying various substantive canons of construction, which dictate what happens when language is not plain.⁹⁵

For example, the rule of lenity says that criminal statutes are to be construed strictly, with ambiguities resolved in favor of the defendant. In many cases the language is not really plain, but the more sensible reading of the statute—especially from the perspective of a Court as conservative as the present one—would include the disputed events within the scope of the statute. Thus, in *Chapman v. United States*,⁹⁶ the Court held that a statute providing a minimum sentence for distribution of one gram or more of a "mixture or substance" containing a detectable quantity

93. Aleinikoff & Shaw, *supra* note 45, at 696-98.

94. See LAWRENCE M. SOLAN, *THE LANGUAGE OF JUDGES* 116 (1993) for a discussion of the linguistic theory underlying this indeterminacy. Lessig, using his theory of translation, appropriately characterizes this statute as one in which the source (i.e., the text from which translation must occur) is underdetermined. See Lessig, *supra* note 6, at 1203.

95. See CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* (1990). Scalia himself recognizes this danger. See *A MATTER OF INTERPRETATION*, *supra* note 1, at 27-29.

96. 500 U.S. 453 (1991).

of LSD,⁹⁷ applied to the full weight of blotter paper impregnated with LSD. Using the dictionary as authority, the Court held that the LSD-soaked blotter was clearly a mixture, even though it is not, and thus avoided triggering the rule of lenity. The tension between the substantive canons and the goal of reaching a desired result frequently pressures the Court to find ambiguous language plain.⁹⁸

Similar problems arise when battles occur over which of several available grammatical canons should be applied in a particular case. In *Moskal v. United States*,⁹⁹ for example, the majority applied the canon that all words in a statute be given effect, so that none are understood as surplusage.¹⁰⁰ Justice Scalia, in dissent, focused on the canon requiring the Court to apply the common law meaning of the disputed phrase at the time that the statute was enacted.¹⁰¹ There is nothing wrong with either of these canons. But when the inferences drawn from them conflict, they are of little use.¹⁰²

97. See 21 U.S.C. § 841(b)(1)(B)(v) (1994).

98. For other rule of lenity cases in which the language is arguably not plain, but in which the Court found it plain, see *Reno v. Koray*, 115 S. Ct. 2021 (1995) ("official detention" limited to detention by court order committing the detainee to custody of the Attorney General, and thus not encompassing court-ordered confinement to a community treatment center); *Smith v. United States*, 508 U.S. 223 (1993) ("using" a gun during and in relation to a drug trafficking crime includes trading a gun for drugs); *Deal v. United States*, 508 U.S. 129 (1993) ("second or subsequent convictions" refers to finding of guilt rather than entry of judgment, thus penalty enhancement is appropriate for five of six counts tried together).

99. 498 U.S. 103 (1990).

100. *Moskal*, 498 U.S. at 109-10.

101. *Id.* at 128-29 (Scalia, J., dissenting). The disputed statutory language reads as follows: "Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any *falsely made, forged, altered, or counterfeited securities* or tax stamps, knowing the same to have been *falsely made, forged, altered, or counterfeited* . . . shall be fined . . ." 18 U.S.C. § 2314 (1994) (emphasis added). The issue was whether "falsely made" should be understood in its ordinary sense as "made to be false," or in its common law sense, in which the term is a synonym for "forged." The majority took the former position; Justice Scalia, in his dissent, took the latter. See *Moskal*, 498 U.S. at 128-29 (Scalia, J., dissenting).

102. In *A Matter Of Interpretation*, Scalia marvels at the literature debunking the canons. See A MATTER OF INTERPRETATION, *supra* note 1, at 26 (criticizing 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 (1950)). An expanded discussion of the canons is beyond the scope of this Article. My own view is much like that of Judge Posner, who takes the position that the canons are useful guides to available inferences, but that absent a full theory of when to apply one instead of another, they will not help much when they produce conflicting inferences. See POSNER, *supra* note 21, at 279-80.

The result: not only do courts avoid addressing important policy issues, substituting linguistic analysis instead, but they do not even engage in good linguistic analysis. It is only by manipulating the discussion of language that the result can be manipulated. In fact, many cases use the dictionary as the principal basis for the decision.¹⁰³

The textualist hypothesis, then, cannot be confirmed. Textualism fails to achieve the degree of understanding that ordinary linguistic processes would provide us, and the gap in understanding is not innocent. Textualist methodology causes us to ignore contextual information that would ordinarily change our understanding of a text, and encourages us to find meaning plain where it is not. Moreover, as congressional reaction to *Casey* and other plain language cases shows,¹⁰⁴ Congress does not embrace plain language decisions that are at odds with congressional purpose that can be discovered through a review of the very contextual information that textualism eschews. We will see in Part V that the Court itself has not retained its textualist perspective on major doctrinal issues.

Of course, the failure of the textualist hypothesis comes with a price. That price is a diminution in the extent to which we can take comfort in a rule of law. Justice Scalia is certainly right that once we start investigating the context in which a legislature enacted a statute, and once we begin deciding how much to interpret old statutes to conform to current circumstances, a degree of discretion has entered the system. Certainty is reduced. But this price, I maintain, is merely a reflection of the structure of our cognitive capacities. Thus, we may be disappointed in the results of the textualist experiment, but we probably should not be surprised. In any event, disappointments in our own biological makeup are of little use.

103. See A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 71 (1994); Lawrence Solan, *When Judges Use the Dictionary*, 68 AM. SPEECH 50 (1993); Note, *Looking it Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437 (1994).

104. See Eskridge, *supra* note 51, at 450-55.

IV. THE SUPREME COURT'S MODIFIED TEXTUALISM

While Justice Scalia's textualist approach to statutory interpretation has received great attention, mostly critical,¹⁰⁵ the other members of the Court do not routinely demonstrate a high level of comfort with his methodological limitations.¹⁰⁶ There exist numerous opinions in which the majority appears to accept Scalia's approach of highly technical linguistic analysis, declaring the meaning of a statute plain based on dictionary definitions and the like, only to add a section that deals with legislative history.¹⁰⁷ Ordinarily, the Court justifies the inclusion of the historical section as confirming its construction of the statute's language.¹⁰⁸ In many of these cases, Scalia concurs in the judgment, rejecting only the portion of the majority's opinion that looks beyond the statutory language.¹⁰⁹ In others, such as *Casey*, members of the Court

105. See Eskridge, *supra* note 3; William N. Eskridge, Jr. & Philip Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 340-45 (1990); Melvin A. Eisenberg, *Strict Textualism*, 29 LOY. L.A. L. REV. 13 (1995); Popkin, *supra* note 21, at 888-89; Zeppos, *supra* note 3; John Polich, Note, *The Ambiguity of Plain Meaning: Smith v. United States and the New Textualism*, 68 SO. CAL. L. REV. 259 (1994).

106. For example, in *Wisconsin Pub. Intervenor v. Mortier*, Justice White, writing on behalf of all the justices except for Scalia, remarked:

As for the propriety of using legislative history at all, common sense suggests that inquiry benefits from reviewing additional information rather than ignoring it. . . . Legislative history materials are not generally so misleading that jurists should never employ them in a good-faith effort to discern legislative intent. Our precedents demonstrate that the Court's practice of utilizing legislative history reaches well into its past. We suspect that the practice will likewise reach well into the future.

501 U.S. 597, 611-12 n.4 (1991) (citation omitted).

107. See, e.g., *Reves v. Ernst & Young*, 507 U.S. 170, 179-83 (1993); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432-43 (1987); *P.U.D. No. 1 v. Washington Dep't of Ecology*, 511 U.S. 700, 720-23 (1994).

108. See *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 n.29 (1978) (analyzing legislative history, despite unambiguous statutory language, to meet dissenter's objection that "absurd" result reached by the Court is at odds with legislative intent); *Smith v. United States*, 508 U.S. 223, 240 (1993) (discussing legislative purpose to bolster finding of unambiguity); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987) (examining legislative history to determine if plain language contravenes a "clearly expressed legislative intention"); *Russello v. United States*, 464 U.S. 16, 26 (1983) ("If it is necessary to turn to the legislative history . . . one finds that history does not reveal . . . a limited congressional intent."); see also Eskridge, *supra* note 3, at 626-40 (providing a historical discussion of this perspective on the use of legislative history).

109. See, e.g., *Reves*, 507 U.S. at 170 (Scalia, J., joining all but legislative history discussion); *Taylor v. United States*, 495 U.S. 575, 603 (1990) (Scalia, J., concurring); *United States v. Stuart*, 489 U.S. 353, 371 (1989) (Scalia, J., concurring in judgment); *United States v. Taylor*, 487 U.S. 326, 344-46 (1988) (Scalia, J., concurring in part);

making use of statutory interpretation and Scalia are on opposite sides.¹¹⁰

This limited use of legislative history—to confirm what detailed grammatical analysis has independently taught the Court about the intent of Congress—is itself textualist in nature, even if it is less methodologically constrained than Scalia's textualism. A glance at the history of the statute's enactment can be of some use in telling a court whether its proposed interpretation is so at odds with what the legislature was considering as to constitute an obvious misreading. Moreover, no Supreme Court justice, as far as I know, has rejected the absurd result rule as a canon of construction. To some extent, we can measure the notion of absurdity by determining whether the interpretation to which the plain language seems to lead us is wildly at odds with what the legislative history tells us that the legislature had in mind.

Though less restrained than Scalia's, this modified textualism continues to look only backward in time to the language used by the legislature and to the events that led to that language being adopted. The approach is not dynamic, as Eskridge puts it.¹¹¹ Moreover, by looking at the context only as a *post hoc* check against obvious errors, the Court underutilizes the information that it is willing to consider. As the Gricean model shows, we commonly use this sort of contextual information to help us understand in the first place, not only as protection against absurdity after the fact.

The most glaring omission is the absence of any analysis of the doctrinal consequences of the Court's interpretation. Even as modified, textualism takes the position that the legislature has spoken, and that it is not appropriate for the Court to consider the wisdom of the legislature's decisions.¹¹²

One may be tempted to conclude that this approach reflects a repudiation of Scalia's textualism. But such a conclusion would be too strong. While most members of the Court adhere to the tradition of looking at legislative history notwithstanding Scalia's protests, the

Cardoza-Fonseca, 480 U.S. at 452 (Scalia, J., concurring in judgment).

110. See, e.g., *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328 (1994) (opinion of Scalia, J.); *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992) (opinion of Scalia, J.); *Chisom v. Romer*, 501 U.S. 380 (Scalia, J., dissenting); *West Virginia Univ. Hosps. v. Casey*, 499 U.S. 83 (1994) (opinion of Scalia, J.); *Moskal v. United States*, 498 U.S. 103 (1990) (Scalia, J., dissenting).

111. See generally WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994).

112. For a recent discussion of negative consequences flowing from the Court's failure to consider in advance the doctrinal consequences of its plain language decisions, see Catherine L. Fisk, *The Last Article About the Language of ERISA Preemption? A Case Study of the Failure of Textualism*, 33 HARV. J. ON LEGIS. 35, 97-98 (1996).

structure of the argumentation has changed, with Scalia's thumbprint apparent even where his signature is absent.¹¹³ To see how this has happened, let us compare the structure of the arguments in *Tennessee Valley Authority v. Hill*,¹¹⁴ the most prominent plain language case of the Burger Court,¹¹⁵ and *Reves v. Ernst & Young*,¹¹⁶ a 1993 case that employs the Court's more recent modified textualism.

A. *The Snail Darter Case: Plain Language in the Burger Court*

In *Hill*, the issue was whether an agency's allowing the floodgates of the already-constructed Tellico Dam to close, which would lead to the extinction of the snail darter, constituted an "action" that "jeopardize[d] the continued existence of [an] endangered species. . . or result[ed] in the destruction or modification of habitat of such species."¹¹⁷ In an opinion written by Chief Justice Burger, the Court answered this question affirmatively, and enjoined the opening of the dam.

The Court's holding in *Hill* was that the plain language of the statute must prevail:

One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. Its very words affirmatively command all federal agencies "to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence" of an endangered species or "result in the destruction or modification

113. In a very informative article, Professor Merrill quantifies this phenomenon. See Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351 (1994). According to his tally, the majority opinions in all 69 statutory interpretation cases decided by the Supreme Court in the 1981 term made reference to legislative history, while only 12 of 66 (18%) did so in the 1992 term. Correspondingly, there was an increase from one case in 1981 to 22 cases in 1992 in which the Court relied on a dictionary. *Id.* at 355.

114. 437 U.S. 153 (1978).

115. Eskridge discusses *Hill* as the prototypical case of what he calls the "soft plain meaning rule," i.e., the Court's traditional position that strong legislative history can trump statutory language when the two seem to be at odds. See Eskridge, *supra* note 3, at 627-28. Here, I focus on the fact that even where plain meaning prevailed, the Court had traditionally been more interested in legislative purpose than with which dictionary to use. This, as I show below, has changed in the age of textualism, even in cases in which the Court looks at legislative history.

116. 507 U.S. 170 (1993).

117. 16 U.S.C. § 1536 (1976).

of habitat of such species." . . . This language admits of no exceptions.¹¹⁸

Yet, the Court devoted exactly one paragraph in a long opinion to the language of the statute.

In contrast, the Court devoted some fourteen pages of the United States Reports to discussing the legislative history,¹¹⁹ and many more pages discussing the relevance of congressional action concerning the dam subsequent to the enactment of the Endangered Species Act. While counting the pages devoted to each argument may not be a scientific measure of the Court's focus, anyone reading *Hill* will inevitably conclude that the thrust of the opinion is about the purpose of the Endangered Species Act as reflected in the congressional debate and subsequent congressional action, and that the plain language was more or less assumed. The Court, indeed, acknowledged in a footnote the maxim that "when confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history as a guide to its meaning,"¹²⁰ and blamed the dissent's misunderstandings for forcing it to discuss the matter at all. Nonetheless, this "plain language" opinion is about legislative purpose—not about dictionaries, which played no role in the majority opinion.

In fact, the *Hill* Court was so acutely aware of the economic consequences of its decision that its foray into legislative history was partially motivated by the need to explain how a court could cause such extensive waste of time and resources. The Court explained:

Concededly, this view of the Act will produce results requiring the sacrifice of the anticipated benefits of the project and of many millions of dollars in public funds. But examination of the language, history, and structure of the legislation under review here indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities.¹²¹

In keeping with the Gricean model, the Court recognized that establishing the goals of the speaker is central to interpretation and thus concentrated its efforts on this issue.

118. *Hill*, 437 U.S. at 173 (citations omitted).

119. *Id.* at 174-87.

120. *Id.* at 184 n.29.

121. *Id.* at 174.

B. Legislative History in the Textualist Court

The rhetorical style of *Hill*—brief discussion of statutory language followed by extensive discussion of non-linguistic issues—is characteristic of the pre-Scalia Court, but is very different from the Court's recent style. *Reves*, one of many Supreme Court cases that interpret RICO, is a good illustration of the Court's use of its recent method of augmenting an otherwise textualist opinion with discussion of legislative history. The issue in *Reves* was the interpretation of § 1962(c), which makes it unlawful for "any person employed by or associated with any enterprise engaged in . . . interstate commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprises's affairs through a pattern of racketeering activity."¹²²

Lenders to a Farmers Cooperative had been misled because the Co-op overvalued its principal asset—a gasohol plant—by millions of dollars. Ernst & Young (actually its predecessor, Arthur Young) had been working with the Co-op and had prepared the financial statements. While a note in the financial statement disclosed the problem, a short version, distributed at the Co-op's annual meeting, did not. This condensed report, it was claimed, induced certain individuals to invest money in what was an insolvent entity. The investors lost their money.

Ernst & Young was found to have committed securities fraud. The issue in *Reves* was whether it also could be liable under RICO. The Supreme Court held that the plain language of the statute requires that a defendant participate in the operation or management of the enterprise. Thus, there was no liability under RICO.

Justice Blackmun, who was generally not inclined to rely on dictionaries, wrote the majority opinion and headed straight for the dictionary. Blackmun relied heavily on the definition of the verb "conduct," which the dictionary defined as, "to lead, run, manage, or direct." He then made the less than logical leap to the conclusion that the noun, "conduct," being a cognate of the verb, must be given the same definition.¹²³ Thus, the majority held, participation, directly or indirectly, in the conduct of an enterprise's affairs requires that the defendant participate in the operation or management of the enterprise. Since Ernst & Young clearly did not conduct the affairs of the Cooperative in this sense, it could not be held liable under RICO. The plain language rule prevailed.

122. 18 U.S.C. § 1962(c) (1994) (emphasis added).

123. *Reves*, 507 U.S. at 177-78.

Having found the language clear, the Court then took the next step: "This test finds further support in the legislative history of § 1962."¹²⁴ Committee reports make frequent mention of the need to prohibit "the control or operation" of business through racketeering activity.¹²⁵ This support, however, is quite weak, because the goal of prohibiting the use of racketeering in the operation of an enterprise says little about the role that particular potential defendants must play in this operation to be held liable.

Somewhat stronger was the remark of Representative Cellar, the chairman of the House Judiciary Committee that voted on RICO in 1970. Cellar commented that RICO would prohibit "conduct of the affairs of a business by a person acting in a *managerial* capacity through racketeering activity."¹²⁶ Similarly, Senator McClellan reassured those who thought that RICO would be too strong that the statute's scope would be limited to individuals who "use [a] pattern [of racketeering activity] to obtain or operate an interest in an interstate business."¹²⁷

This use of legislative history to confirm the Court's understanding of the statutory language is typical of the modified textualism that the Court frequently employs. The Court has taken background information into account to confirm the reasonableness of its understanding of the statutory language. But while this brand of textualism fits the Gricean model of communication better than Scalia's version of textualism does, it still leaves interpretive gaps. The legislative history brought to bear on interpretation in *Reves* is relatively straightforward, but the text is not. Ordinarily, we interpret text according to what makes sense in light of whatever background information we have already absorbed. This is the major teaching of Grice. We would not, as the majority in *Reves* did, determine in advance that rather murky language is in fact plain, and then confirm the accepted reading by looking at the background facts later.

Scalia and Thomas signed on to all but the section of the majority opinion in *Reves* that discussed statutory history. The dissent, written by Justice Souter, ignored the legislative history and adopted the pure textualist perspective. Its focus was on the majority's effort to make the noun and verb, "conduct" and "conduct," equivalent in meaning. The dissent looked up the noun in the dictionary, and found it to mean "carrying out."¹²⁸ Since financial reports are the responsibility of management, and since Ernst & Young both assisted management in

124. *Id.* at 179.

125. *See id.* at 180-81 (citing various committee reports).

126. *Id.* at 182 (citing 116 CONG. REC. 35,196 (1970) (statement of Rep. Cellar)).

127. *Id.* at 183 (citing 116 CONG. REC. 18,940 (1970) (statement of Sen. McClellan)).

128. *Reves*, 507 U.S. at 188.

preparing the reports and made presentations to the board on behalf of management, the dissent concluded that the language of the statute could easily support a conclusion that Ernst & Young participated indirectly in the conduct of the enterprise's affairs.

Reves actually presented a significant doctrinal issue. Federal courts have been grappling for two decades with the scope of RICO. The statute is drafted in broad terms, and is seemingly abused by plaintiffs seeking treble damages and attorney's fees.¹²⁹ Why did the Court not admit that the statute is unclear with respect to how much involvement constitutes direct or indirect participation in the Cooperative's conduct and address the question as a serious jurisprudential issue? One answer may simply be the Court's commitment to textualism as a methodology. Another is that RICO has a legislative note, which provides that "the provisions of this title shall be liberally construed to effectuate its remedial purposes."¹³⁰ Contradicting this legislative statement is the rule of lenity, which requires that ambiguities in the statute be resolved in the defendant's favor, at least in criminal applications.¹³¹ Faced with these irreconcilably inconsistent principles for resolving ambiguity in RICO, the Court simply found RICO to be a clear statute, thus averting an interpretive crisis. This case is typical of the Supreme Court's handling of RICO cases over the years.¹³²

My point is not that clear, understandable language should always yield to speculation about what a legislature had in mind. To the contrary, often enough the legislature will have said clearly enough what it had in mind when it enacted the statute. This is especially true in easy cases, where the disputed events are prototypical instantiations of the concepts contained in the statute. That is the attraction of textualism. Rather, my point is that application of a methodology that insists that we ignore information that anchors our understanding of the world is so inconsistent with our cognitive strategies for interpreting ordinary language, and so full of its own risks of creating misunderstanding, that

129. See Philip A. Lacovara & Geoffrey F. Aronow, *The Legal Shakedown of Legitimate Business People: The Runaway Provisions of Private Civil RICO*, 21 NEW ENG. L. REV. 1 (1985-86); Marvin G. Pickholz, *The Firestorm Over Civil RICO*, 71 A.B.A. J. 78 (1985); Curtis Roggow, Note, *Of Rum, Rights and RICO: Are Plaintiffs Intoxicated With The Power of Civil RICO? What Is Falling Victim to the Statute?* 40 DRAKE L. REV. 577 (1991).

130. Pub. L. No. 91-452, § 904(a), 84 Stat. 947, 1073 (1970) (codified at 18 U.S.C. § 1961 (1994)).

131. See *supra* notes 96-98 and accompanying text.

132. See, e.g., *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985). *Sedima* was a five-to-four decision in which both the majority and the dissent found RICO clear with respect to the type of injury that Civil RICO requires, but came to opposite conclusions about the meaning of this "clear" language.

it should require very strong justification. In fact, the justification must be so compelling that it induces us to accept an otherwise unnecessarily high rate of incoherence, a price that no one has advocated paying. The Supreme Court's modification of the textualist methodology does not remove much of this incoherence.

V. BREAKING AWAY

In the midst of considerable criticism from scholars, and obviously failed efforts to interpret statutes both according to their plain language and according to what appears to be Congress' purpose in enacting the statute, the Supreme Court appears to be moving in two directions. Both lead to more considered decision making in statutory cases. First, Justice Scalia is expanding his textualist position to recognize that the interpretation of language requires analysis of how far a particular use of a word strays from the ordinary or prototypical meaning of a statutory term. In essence, Scalia has begun to use the prototype as a surrogate for investigating the evil that Congress was most likely addressing, with the result of much more thoughtful analysis. At the same time, Justice Stevens has shown progress in his long-fought battle against worship of the text. While the Court continues to rely on the dictionary and to analyze remote sections of the United States Code, it has, in several recent cases, taken huge steps toward considering both the history of the statute's enactment and the jurisprudential consequences of its decisions. Interestingly, these two developments are well-illustrated by two cases that interpret the same statute, § 924(c)(1) of the Criminal Code: *Smith v. United States*¹³³ and *Bailey v. United States*.¹³⁴

A. Using Prototypes to Expand the Text

In *Smith v. United States*, the defendant had travelled to Florida in his van to attempt to procure some cocaine. Smith's Floridian contact, however, had turned into a government informant. At a meeting between Smith, the informant, and undercover government agents, Smith tried to arrange to trade a machine gun for some drugs. When the agents left,

133. 508 U.S. 223 (1993). This case is discussed in several papers published in a symposium issue of the Washington University Law Quarterly. See Clark D. Cunningham & Charles J. Fillmore, *Using Common Sense: A Linguistic Perspective on Judicial Interpretations of "Use a Firearm,"* 73 WASH. U. L.Q. 1159 (1995); Michael L. Geis, *The Meaning of Meaning in the Law,* 73 WASH. U. L.Q. 1125 (1995); Solan, *supra* note 73; see also John Polich, Note, *The Ambiguity of Plain Meaning: Smith v. United States and the New Textualism,* 68 S. CAL. L. REV. 259 (1994).

134. 116 S. Ct. 501 (1995).

purportedly to get the drugs, Smith bolted. He was subsequently arrested after a high-speed chase. Smith was convicted of using a machine gun in the course of attempting to procure cocaine, and sentenced to the thirty-year mandatory prison sentence. The governing statute imposes a five-year sentence if the defendant, “during and in relation to any crime of violence or drug trafficking crime[,] uses or carries a firearm.”¹³⁵ When the firearm is a machine gun, the minimum is thirty years.

The Supreme Court affirmed Smith’s conviction in an opinion written by Justice O’Connor. Keeping to textualist form, she relied most heavily on the definitions of “use” in many dictionaries. They provided such helpful hints as “to convert to one’s service” and “to employ.”¹³⁶

Substituting the definitions for the word itself, the majority found that attempting to trade a gun for drugs is one way of using the gun, and therefore upheld the conviction. O’Connor also relied on such maxims as “[w]hen a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning,”¹³⁷ and “[l]anguage, of course, cannot be interpreted apart from context. The meaning of a word that appears ambiguous if viewed in isolation may become clear when the word is analyzed in light of the terms that surround it.”¹³⁸

Absent from the majority opinion is any discussion of legislative history. Instead, the Court noted that in enacting § 924(c)(1), Congress “was no doubt aware that drugs and guns are a dangerous combination,”¹³⁹ and cited statistics on drug-related murders published by the American Enterprise Institute. A review of committee reports for the various iterations of the statute does not reveal any discussion about the outer limits of “use” in any event.¹⁴⁰

Cass Sunstein argues that the majority in *Smith* merely offered a “bow in the direction of literalism,” but that the Court was really arguing analogically: the evil that the statute was intended to address is similar enough to the evil in this case to permit application of the statute.¹⁴¹ I agree with Sunstein that analogical reasoning about the statute’s purpose is appropriate here. But I do not agree with Sunstein’s characterization of what the Court did. For example, in rejecting the rule of lenity, the Court stated: “Not only does petitioner’s use of his MAC-10 fall squarely within the common usage and dictionary definitions of the terms ‘uses .

135. 18 U.S.C. § 924(c)(1) (1994).

136. *Smith*, 508 U.S. at 228-29.

137. *Id.* at 228.

138. *Id.* at 229.

139. *Id.* at 240.

140. The legislative history is summarized in Cunningham & Fillmore, *supra* note 133, at 1189-1203.

141. SUNSTEIN, *supra* note 30, at 87.

... a firearm,' but Congress affirmatively demonstrated that it meant to include transactions like petitioner's as '[us]ing a firearm' by so employing those terms in § 924(d)."¹⁴² To the extent that there is any reference at all in *Smith* to the evil that the statute was intended to address, the discussion is based on the broad interpretation of "use" that comes from the dictionary definitions and statutory language.

It is not irrational, in my opinion, to decide that a statute that imposes harsh penalties for using a gun in a drug crime should apply to instances in which a defendant places a machine gun into the stream of commerce as part of a drug deal. This is especially so if one understands the purpose of the statute's long prison sentences to be the incarceration of those who make society more dangerous by introducing firearms into the commerce of illegal drug trade. But the language of the statute certainly does not necessitate this result (to the contrary, it must be stretched a bit to reach it), and the dictionary approach of the majority does not even allow for intelligent debate about the matter.¹⁴³ Justice Scalia's dissent, on the other hand, does.

Scalia agreed with O'Connor that ordinary meaning should prevail. But Scalia disagreed with the way in which O'Connor attempted to discover ordinary meaning. First, Scalia focused not on the meaning of "use," but on the meaning of the whole phrase, "use a firearm." Most significantly, Scalia stepped away from the dictionary. He argued instead that when we use the expression, "use a gun," we are most typically thinking in terms of using the gun as a weapon, not merely as an object of value that can be bartered: "When someone asks, 'Do you use a cane?' he is not inquiring whether you have your grandfather's silver-handled walking-stick on display in the hall; he wants to know whether you *walk* with a cane."¹⁴⁴

142. *Smith*, 508 U.S. at 240.

143. Sunstein's approach, of course, does permit just the right kind of debate. My only disagreement is with Sunstein's excessively generous treatment of the reasoning contained in the majority opinion.

144. *Smith*, 508 U.S. at 242 (Scalia, J., dissenting). Writing about his dissent in *Smith*, Scalia comments in *A Matter Of Interpretation*:

Now I cannot say whether my colleagues in the majority voted the way they did because they are strict-construction textualists, or because they are not textualists at all. But a proper textualist, which is to say my kind of textualist, would surely have voted to acquit. The phrase "uses a gun" fairly connoted use of a gun for what guns are normally used for, that is, as a weapon.

A MATTER OF INTERPRETATION, *supra* note 1, at 24.

Scalia's approach is inconsistent with his own heavy reliance on the dictionary in many other cases,¹⁴⁵ but is entirely consistent with his concurring opinion in *Green v. Bock Laundry Machine Co.*:¹⁴⁶

The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated—a compatibility which, by a benign fiction, we assume Congress always has in mind.¹⁴⁷

Investigation into the ordinary meaning of the words in a statute provides the best surrogate for understanding Congress' most likely intention.¹⁴⁸

The difference between the O'Connor and Scalia approaches has serious ramifications. O'Connor uses the dictionary to determine the outer boundaries of the meaning of the word, and asks whether the events in dispute fit somewhere within the boundary. If so, then the plain meaning of the statute includes the litigated events. Scalia, in contrast, proposes a three-step process. First, assume that Congress had in mind the ordinary, or prototypical, use of the statutory term. Second, determine what that ordinary use is, not with reference to dictionary definitions, but instead by introspection and reference to one's experience in using the language, which is far more subtle than the brief space afforded the lexicographer. Third, make a determination as to whether the event in dispute strays too far from the prototypical use of the word to regard this use as ordinary. In essence, Scalia promotes an approach in which the goal of the court is to determine whether the disputed event strays sufficiently far from the prototypical instance of the statutory ban to take the event outside the "ordinary meaning" of the statute.

145. See Solan, *supra* note 103, at 51; Note, *supra* note 103, at 1439 n.14.

146. 490 U.S. 504, 528 (1989) (Scalia, J., concurring in judgment).

147. *Id.* (Scalia, J., concurring in judgment).

148. Scalia must also regard this as a "benign fiction," since we really have no idea how Congress is using the words in the statute. As we have seen, his other benign fiction, that Congress keeps in mind all of the other instances in the United States Code that use the same statutory words that are used in the disputed statute, is not so benign after all. See Aleinikoff & Shaw, *supra* note 45, at 691-98; Popkin, *supra* note 90, at 1148-52.

Scalia's approach in *Smith* is consistent with the substantial psychological literature showing that we understand concepts by reference to prototypes, rather than by absorbing definitions.¹⁴⁹ The classic study was performed by Eleanor Rosch.¹⁵⁰ Testing Berkeley students, Rosch found that there was very strong consensus in ranking "items rated as very good examples of the category."¹⁵¹ For example, when asked to rank various words on a 1 to 7 scale on how good they were as examples of *furniture*, "chair" received an average score of 1.04, "piano" received an average score of 3.64, and "telephone" scored 6.68.¹⁵² Part of our knowledge of language, then, appears to include intuitions about how well concepts fit into categories.

Significantly, this ability is necessarily culture-bound. Rosch did not even think of listing "sari" in her list of examples of clothing, and "canoeing" scored a 1.41 as an example of a sport.¹⁵³ It is likely that the Berkeley students of the 1970s would rank canoeing higher than would people living where there is no water, inner city children, and other groups.¹⁵⁴ This means that notwithstanding its textualist orientation, Scalia's approach cannot ask about how a word is "ordinarily" used without assuming a particular group of speakers. In this case, that group consists of the members of Congress. Once we begin asking how members of Congress would ordinarily use the words contained in statutes, we begin to approach serious inquiry into the intent of the drafters. In essence, the inquiry into whether the disputed events are sufficiently prototypical to fit within the statute is providing a

149. For an excellent summary of this work and other theories concerning the formation of concepts, see MARY B. HOWES, *THE PSYCHOLOGY OF HUMAN COGNITION* 178-219 (1990). I do not take the position that prototypes provide anything even approaching a complete theory of the structure of the knowledge that we have about the words we use or the concepts that underlie them. Rather, prototypes provide a means for assessing the probability of what a speaker intends to convey. For a discussion of more recent developments in psychological research, which accept the prototype theory up to a point, but add additional knowledge of theory-driven categorization, see Douglas L. Medin, *Concepts and Conceptual Structure*, 44 *AM. PSYCHOLOGIST* 1469 (1989). For a recent linguistic analysis of other aspects of the structure of word meaning, see generally JAMES PUSTEJOVSKY, *THE GENERATIVE LEXICON* (1995).

150. See Eleanor Rosch, *Cognitive Representations of Semantic Categories*, 104 *J. EXPERIMENTAL PSYCHOL.: GENERAL* 192 (1975).

151. *Id.* at 198.

152. *Id.* app. at 229.

153. *Id.* at 232-33.

154. Some categories, such as color categories and other perceptual categories like shapes, may have an innately determined prototype. People have an easier time identifying certain "focal" colors regardless of the color vocabulary in the language they speak natively. See *id.* at 194.

substitute for an inquiry about legislative intent in a textualist era in which such inquiries are considered improper.

One can agree with this approach, but disagree with Scalia's resolution of this case. That is, one can argue that Congress would have intended a broad interpretation of "use" to encompass instances in which guns were used in the commerce of drug trade. Thus, the prototype approach to the interpretation of word meaning allows for focused disagreement, even if the debate occurs through the back door.

B. Expanding the Inquiry

In the past two terms, the Supreme Court has decided several cases in which it has employed the rhetoric of textualism, but has also engaged in substantive analysis of the issues that goes beyond Scalia's dissent in *Smith*. Probably the most dramatic is *Bailey v. United States*,¹⁵⁵ decided in December 1995. *Bailey* involved the same statute that was interpreted in *Smith*. In *Bailey*, the defendant was convicted of having a gun in the trunk of his automobile while transporting drugs in the front console. The issue again was whether the gun was being "used" during and "in relation to" a drug trafficking crime. In a related case, *Robinson v. United States*, which was decided with *Bailey*, the defendant had a gun in a locked trunk in her bedroom. The gun was recovered when federal agents executed a search warrant as part of a drug bust. The issue in *Robinson* was the same.

Again, Justice O'Connor wrote the opinion, but this time it was for a unanimous Supreme Court. Again, she began with a recital of dictionary definitions of "use." But this time, citing the same definitions, she wrote: "These various definitions of 'use' imply action and implementation."¹⁵⁶ In fact, they do not. If I say, "we use solar panels to heat our house," I do not mean to imply any action on my part, even though I have "employed" the solar panels. The Court then relied on the same maxims that it had in the *Smith* case: "[T]he meaning of statutory language, plain or not, depends on context."¹⁵⁷ But this time, the Court concluded that the maxims, like the dictionary definition, require "active employment" of the gun, and hiding a gun near the drug trafficking activity is not "active" enough.

In illustrating its point, the Court used (without attribution) this example from Cunningham and Fillmore's article about the *Bailey* case:

155. 116 S. Ct. 501 (1995).

156. *Bailey*, 116 S. Ct. at 506.

157. *Id.* (quoting *Brown v. Gardner*, 115 S. Ct. 552, 555 (1994)).

"I use a gun to protect my house, but I've never had to use it."¹⁵⁸ The Court held that it is only the second, active sense of use that triggers the statute. Drawing on terminology from the linguistic literature, Cunningham and Fillmore argued that this distinction reflects a "common sense" interpretation, since we ordinarily use "use" in what they call the "eventive" sense.¹⁵⁹ When we use the word in the other, designative sense, we generally add a phrase or clause describing the special purpose, such as "for protection," or "to protect my house." Because the statute has no such purpose clause, they argue in part, it is more likely that Congress intended to use "use" in the eventive sense, and we unselfconsciously lean toward that interpretation even though the broader interpretation is possible.

This mode of analysis, which O'Connor adopted on behalf of the entire Court in *Bailey*, resembles Scalia's approach in *Smith*, but is at odds with her approach in the earlier case. First, the Court does not seek to find the outer limits of the word, but rather attempts to ascertain the most likely meaning in light of everyday usage. Second, although the Court paid its usual homage to the dictionary earlier in the opinion, the more subtle analysis was performed by introspection—looking at what appear to be relevant examples of similar linguistic phenomena, and drawing conclusions about ordinary usage from them.¹⁶⁰

158. See Cunningham & Fillmore, *supra* note 133, at 1186. The authors present the following fictional dialogue:

This is the gun I use for domestic protection.

Have you actually used it?

No, thank God, I've never had to use it.

Id.; see also *Bailey*, 116 S. Ct. at 505.

159. Cunningham & Fillmore, *supra* note 133, at 1161 ("Thus far in our analysis, the methods of linguistics serve to bring to conscious awareness the 'common sense' that judges share with all native speakers about everyday language.").

160. *Bailey* and Robinson refer extensively to the Cunningham and Fillmore article in their reply brief, dated August 1995. At the time the brief was filed, the article had not yet been published, but a copy of the proofs was lodged with the clerk. See Petitioner's Reply Brief, 1995 WL 517580 at iii, *Bailey v. United States*, 116 S. Ct. 501 (1995) (Nos. 94-7448, 94-7492). Publication of the article occurred by the time the Court issued its opinion in December of that year.

The Court's decision not to acknowledge Cunningham and Fillmore is interesting. Cunningham and Fillmore accurately describe their analysis as bringing to "conscious awareness" that which we "know" anyway. That is, we already know how to use "use," although we may not already know how to characterize that knowledge. Obviously, it is not necessary that a linguist (Fillmore in this case) be the one to point out the linguistically relevant distinctions, and the Court most likely did not want to give the impression that it was encouraging the development of a cottage industry of linguists telling judges what statutes mean. See Marc R. Poirier, *On Whose Authority?: Linguists' Claim of Expertise to Interpret Statutes*, 73 WASH. UNIV. L.Q. 1025 (1995) (discussing this issue). On the other hand, as *Bailey* illustrates, linguistic analysis can sometimes

What is especially noteworthy about *Bailey* is what the Court says after it is done with its textual analysis. First, the Court turned to other sections of the Code, as it had done in *Smith*. Then the Court turned to the “amendment history” of § 924(c). An earlier version of the statute referred to defendants who “use[] a firearm to commit any felony which may be prosecuted in a court of the United States.”¹⁶¹ The 1986 version, which was in issue in both *Smith* and *Bailey*, punishes defendants who “use[] or carr[y] a firearm” “during and in relation to any crime of violence or drug trafficking crime.”¹⁶² O’Connor inferred from this history that while the change in statutory language might reflect Congress’ intent to use “use” expansively, thus supporting the Court’s earlier holding in *Smith*, it should not be interpreted so broadly as to encompass carrying a firearm, because § 924(c)(1) deals separately with those who “carry” a gun. Thus, § 924(c)(1), the Court argued, punishes those who use a firearm (in the active sense) and punishes those who carry a firearm, but does not punish those who merely possess a firearm. The disposition of the case was a remand to the district court to determine whether the defendants were carrying the weapons.¹⁶³

At the end of the opinion, the Court examines the doctrinal ramifications of its holding. It begins by giving examples of actions that are punishable under the statute as interpreted: “brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire, a firearm. . . . [A] reference to a firearm calculated to bring about a change in the circumstances of the predicate offense is a ‘use,’ just as the silent but obvious and forceful presence of a gun on a table can be a ‘use.’”¹⁶⁴ Responding to the government’s argument that bringing a gun along on a drug deal as a protective measure nonetheless serves the purpose of emboldening the defendant and therefore legitimately can be seen as a form of use, the Court notes:

bring relevant insight into statutory analysis. Thus, the Court, quite appropriately, in my opinion, took advantage of what it could learn from linguistic analysis about our everyday use of language, but did not create the misimpression that it was “relying” on the analysis in any authoritative sense.

161. 18 U.S.C. § 924(c)(1) (1968) (quoted in *Bailey*, 116 S. Ct. at 507).

162. *Id.*

163. *Bailey*, 116 S. Ct. at 509. It is much more difficult to determine whether *Bailey* was carrying a gun than whether *Robinson* was. The prototype analysis used by Scalia in his dissent in *Smith* is the appropriate way to approach the question: Does driving with a gun in the trunk of one’s car come close enough to the ordinary or prototypical sense of “carrying” a gun? There may be disagreement as to the answer, but debate will be focused on the doctrinal issue facing the court.

164. *Id.* at 508.

In our view, "use" cannot extend to encompass this action. If the gun is not disclosed or mentioned by the offender, it is not actively employed, and it is not "used." To conclude otherwise would distort the language of the statute as well as create an impossible line-drawing problem. How "at the ready" was the firearm? Within arm's reach? In the room? In the house? How long before the confrontation did he place it there? Five minutes or 24 hours? Placement for later active use does not constitute "use." . . . ¹⁶⁵

Were we to keep our focus only on the text, we would have to conclude that the government is right, at least in some cases (but not Bailey's case). A defendant who places a gun under his car seat, "just in case," and conducts the drug transaction in the front seat of his car may well be said to be using the gun.¹⁶⁶

But the Court's questions stray far from dictionary considerations. Rather than pretending not to be doing any interpretation at all, the Court admits the indeterminacy of language that it had only recently found clear. Further, the Court asks about the consequences of its decision to future cases. Of course, the Court appropriately insists on continuing to pay close attention to the statutory language. But here, it goes farther than the limited inquiry that Scalia's prototype analysis in *Smith* permits. Rather, staying within the general confines of the statutory language, the Court is making law and it is deciding what kind of law to make by looking seriously at the doctrinal consequences of its decision.

Bailey is thus a recognition that concepts can be indeterminate at the margins and that decisionmakers must decide what to do when that happens. Typically, the Court has been very reluctant to make such a concession to the frailty of the rule of law in recent years. In that regard, *Bailey* is a refreshing departure, both in its serious approach to the decision making process and in its acknowledgement that our linguistic capacity takes us only so far. As in its *Locke* decision ten years earlier,¹⁶⁷ the Court in *Bailey* combines talk of text with a serious consideration of the consequences of its decision. *Bailey* goes a long way toward instantiating the Gricean model. It asks not only what the words of the statute say, but looks backward and forward in time for contexts that will help to construe the language coherently in terms of the legislature's intent and the statute's goals.

165. *Id.* at 508-09.

166. I thank Steve Winter for this example.

167. *United States v. Locke*, 471 U.S. 84 (1985); *see also supra* part I.

Bailey is not unique. In 1995, the Court also decided *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*,¹⁶⁸ in which it abandoned the dictionary-oriented plain language approach to interpreting the preemption provision of ERISA. The unanimous opinion, written by Justice Souter, went “beyond the unhelpful text and the frustrating difficulty of defining its key term [‘relate to’], and look[ed] instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive.”¹⁶⁹

In past decisions, the Court had relied heavily on the dictionary, and interpreted “relate to” broadly, holding that ERISA’s plain language preempts a host of state legislative efforts to provide pension and/or health benefit protections.¹⁷⁰ In *District of Columbia v. Greater Washington Board of Trade*, for example, the Court used Black’s Law Dictionary and the “ordinary meaning” rule to invalidate a portion of the District of Columbia workers’ compensation statute that provided for workers to receive continued health benefits.¹⁷¹

In *Blue Cross & Blue Shield*, however, the Court evaluated the statutory history and the ultimate purpose of the statute in upholding a New York provision that requires the collection of surcharges by hospitals from patients, except those patients covered by Blue Cross and Blue Shield. The Court found that preemption would be inconsistent with what Congress intended the federal role to be and that the consequence of preemption would be to dismantle a state regulatory function that had been in place since well before ERISA. This change in the structure of the argument is very much like the change from *Smith* to *Bailey*, but is even more overt.

In 1995, the Supreme Court also decided *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,¹⁷² the “spotted owl” case. There the Supreme Court was confronted with a regulation the Department of the Interior had issued pursuant to its authority under the Endangered Species Act. The Endangered Species Act makes it illegal

168. 115 S. Ct. 1671 (1995).

169. *Blue Cross & Blue Shield*, 115 S. Ct. at 1677. Section 514 of the statute says that ERISA “shall supersede any and all State laws insofar as they . . . relate to any employee benefit plan” covered by ERISA. 29 U.S.C. § 1144(a) (1994).

170. See, e.g., *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985); *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125 (1992). But see *Fisk*, *supra* note 112, at 58-90 (criticizing these decisions and other decisions).

171. *Greater Washington*, 506 U.S. at 129.

172. 115 S. Ct. 2407 (1995).

for anyone to “take” an endangered species.¹⁷³ “Take,” in turn, is defined in the statute to mean, “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”¹⁷⁴ The regulation at issue in *Sweet Home* defined “harm” in the statutory definition to mean, “an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.”¹⁷⁵

The question raised in this case was whether the word “take” in the statute—which includes “harm” through the definitional section—could support the regulation, which prohibits modification of the habitat of an endangered species. The issue was an important one for both environmentalists and loggers. If the regulation were found to be unauthorized by the statute, then loggers, who are largely small business people, would be permitted to cut down trees that provided the only habitat for the northern spotted owl and another species of bird. Upholding the regulation would have serious negative effects on the logging industry and on many people living in the relevant area. Thus, like *Smith and Bailey*, *Sweet Home* was about the goodness of fit between events and statutory language. Under the *Chevron* doctrine, ambiguities are resolved in favor of the interpretation advanced by the agency promulgating the regulation.¹⁷⁶ Thus, it was up to the loggers to demonstrate that the statutory language could not possibly justify the regulation.

The Supreme Court, in an opinion written by Justice Stevens, upheld the regulation. Of course, it looked up “harm” in the dictionary. But most of the opinion was devoted to discussing the policies underlying the Endangered Species Act. The Court focused on legislative history and earlier precedents in which first Congress, and later the Supreme Court, had determined that the Act sets the preservation of nature’s diversity as a national priority, even when it causes substantial inconvenience. The Court referred heavily to *TVA v. Hill*,¹⁷⁷ for analysis of the legislative history of the Endangered Species Act. Despite its close linguistic analysis of the statute, which was lacking in *Hill*, the Court’s argumentation in *Sweet Home* far more closely resembles its earlier

173. 16 U.S.C. § 1538 (a)(1) (1994).

174. 16 U.S.C. § 1532(19) (1994).

175. 50 C.F.R. § 17.3 (1994).

176. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

177. 437 U.S. 153 (1978); see also discussion *supra* part IV.

Endangered Species Act decision in *Hill* than it does the more contemporary *Reves* case.

Justice Scalia dissented. Most of his points were textual. He argued, using the dictionary for support, that cutting down the trees in which the owls live would not “harm” any individual owl. It would merely prevent the birds from breeding, and would lead to their extinction through attrition. He called this “psychic injury,” well outside the ordinary (i.e., prototypical) meaning of “harm.” He further noted that all of the other proscribed actions in the statute, besides harm, required some sort of active injury to the endangered animals. “Harm,” he argued, should be interpreted similarly.

Given the standard of review, that ambiguities are resolved in favor of the Department of the Interior, Scalia’s textual arguments are probably not sufficient to carry the day. On purely linguistic grounds, however, he had the better of the argument.

But this case was not really about the text of the statute. It was about national policy concerning wildlife preservation. And Scalia knew this as well. His most telling argument comes right at the beginning of his dissent:

I think it is unmistakably clear that the legislation at issue here (1) forbade the hunting and killing of endangered animals, and (2) provided federal lands and federal funds *for the acquisition of private lands*, to preserve the habitat of endangered animals. The Court’s holding that the hunting and killing prohibition incidentally preserves habitat on private lands imposes unfairness to the point of financial ruin—not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use.¹⁷⁸

That is the issue: whether the regulation, which may be a stretch under the statutory language, but by no means an impossible interpretation, should prevail at the expense of the local economy. And that is something worth fighting about.

178. *Sweet Home*, 115 S. Ct. at 2421.

CONCLUSION

Courts have no choice but to start speaking where statutes stop.¹⁷⁹ Reluctant to admit that they are exercising state power in using their discretion, American courts during the past decade have all too often taken to pretending that this is not so, blaming instead the various publishers of dictionaries and the like for the results they reach.

Academic writers have almost uniformly suggested that interpretation requires more than analysis of the "plain" words of the statute, since words ordinarily are not as plain as they might at first seem, and for the other reasons discussed earlier in this Article.¹⁸⁰ Loyal to its textualist bent, however, the Court has apparently taken little interest in this barrage of criticism. In fact, the Court has abandoned its reference to older works that suggest that statutory interpretation requires analysis of the statute's purpose. For example, a LEXIS search shows that the Court has simply stopped referring to Hart and Sacks' *The Legal Process*,¹⁸¹ even though the Court had for many years referred to this work periodically,¹⁸² and even though the work is still very much alive in the academic community, perhaps more so than ever.¹⁸³

179. This point has been recognized in the literature dealing with the plain language approach to statutes. For an insightful and candid account by a sitting judge, see Stewart G. Pollock, *The Art of Judging*, 71 N.Y.U. L. REV. 591 (1996); see also Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533 (1992); Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225 (1989).

180. See, e.g., ESKRIDGE, *supra* note 111; DWORKIN, *supra* note 37; POSNER, *supra* note 21; Aleinikoff & Shaw, *supra* note 45; Eskridge, *supra* note 3; Popkin, *supra* note 90.

181. HENRY HART, JR. & ALBERT SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (Tentative ed. 1958).

182. The Court's only reference to Hart and Sacks from 1984 through the present is in the separate opinion of Justice Stevens in *Holder v. Hall*, 512 U.S. 874, 961-62 (1994). The Court had referred to the work nine times in the preceding thirteen-year period, and has referred to it thirteen times in total.

183. A second LEXIS search shows that Hart and Sacks has been cited in law reviews 450 times from 1984 through August 18, 1996, albeit critically in many instances. Moreover, in 1994, the work was finally published, increasing its access. HENRY HART, JR. & ALBERT SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MEANING AND APPLICATION OF LAW* (William Eskridge, Jr. & Philip Frickey eds. 1994). While Hart and Sacks may not have the prestige it once had, it is clearly of continuing interest to legal scholars. For discussion of the reduced influence of *The Legal Process*, see HART & SACKS, *supra*, at cxviii (Eskridge and Frickey's introduction). See also William S. Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799, 837 (1985); Anthony J. Sebok, *Reading The Legal Process*, 94 MICH. L. REV. 1571, 1594 (1996).

I see in *Bailey*, *Blue Cross & Blue Shield* and *Sweet Home* a trend away from the Court's linguistic enslavement, which I regard as positive. While it is too early to tell how substantial a trend it is, these cases are by no means isolated examples. Justice Stevens continues to take the lead in this attack.¹⁸⁴ But as *Bailey* and *Blue Cross & Blue Shield* illustrate, Stevens is not alone.¹⁸⁵

Significantly, these cases maintain the close examination of statutory language, including examination of surrounding sections of the statute, that Justice Scalia's textualism has made a routine part of statutory interpretation. Thus, they preserve the serious respect for Congress' words upon which Scalia has insisted. They also reflect a healthy caution about reference to legislative history. Their innovation is in the absence of absolute methodological constraints that cut off the analysis too early. The parlor game seems to be coming to a close.

To the extent that the Court's most recent explorations forthrightly recognize the difficulty we have in formulating rules of general application, they enhance the chances of creating a more thoughtful jurisprudence. This will be the case even when the Court feels obliged to maintain its display of heightened respect for linguistic argumentation. It worked in *Bailey*, just as it had in *Locke* ten years earlier. But often enough, it will force us to admit that the best we can expect from a rule in hard cases is focused disagreement about its application. This is a lesson worth accepting, since it follows from aspects of our cognitive organization that we can deny only at the cost of pretending that our laws work better than they ever can.

184. See, e.g., *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 345 n.7 (1994) (Stevens, J., dissenting); *P.U.D. No.1 v. Washington Dep't of Ecology*, 511 U.S. 700, 723 (1994) (Stevens, J., concurring); *Deal v. United States*, 508 U.S. 129, 146 (1993) (Stevens, J., dissenting); *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125, 138 (1992) (Stevens, J., dissenting);

185. See *United States v. Armstrong*, 116 S. Ct. 1480, 1489 (1996) (Breyer, J. concurring) (using legislative history to construe Rule 16 of the Federal Rules of Criminal Procedure in a selective prosecution case); *Bank One Chicago v. Midwest Bank and Trust Co.*, 116 S. Ct. 637, 642 (1996) (opinion of Ginsburg, J.) (scrutinizing drafting history of Expedited Funds Availability Act to determine if Congress intended agency both to regulate and to adjudicate disputes); *United States v. Noland*, 116 S. Ct. 1524, 1526-27, 1528 (1996) (opinion of Souter, J., for a unanimous Court) (using statements by members of Congress prior to enactment to construe the Bankruptcy Code, but rejecting statements by same individuals as authority on status of prior law); *Gustafson v. Alloyd Co., Inc.*, 115 S. Ct. 1061, 1071-73 (1995) (opinion of Kennedy, J.) (analyzing House and Senate reports to determine intended definition of "prospectus" in Securities Act of 1933).

