ABSTRACT

Title of Thesis: SEARCHING FOR MEANING
IN LAW, LITERATURE AND LANGUAGE

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This paper presents a preliminary analysis of the potential application of literary theory and cognitive language theory to the law, specifically to the judicial process of statutory interpretation. The process of interpreting statutory text has long been the subject of a polarized debate in the law and has produced competing approaches for carrying out the task of meaning construction. Equally as intriguing as the merits of the debate itself, however, is the staunch reticence among members of the legal community to employ insights from other disciplines that have long grappled with similar debates over ways in which a written text acquires or is assigned meaning. Observations from literary theory and cognitive linguistic theory can be instructive in revealing the legal community's interpretive assumptions and in enriching the vocabulary of the legal debate.

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IN LAW, LITERATURE, AND LANGUAGE

by

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Thesis submitted to the Faculty of the Graduate School of the
University of Maryland, College Park in partial fulfillment
of the requirements for the degree of
Masters of Arts
2006

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Introduction

"It seems a simple matter, especially when the law is written down in a book with care and detail, just to read it and say what is its meaning."[1] Though we may wish that were true, the reality is that ascertaining meaning from any text, legal or otherwise, is anything but a simple matter.

The process of "statutory interpretation" has confounded scholars and judges for as long as our system of government has included a scheme that vests judges with the responsibility of determining the meaning of a legislature's words. Some argue that there already are as many theories of how to interpret statutes as there are statutes, yet the polarized debate over which theory is the "right one" continues. In fact, arguments over which interpretive theory is better often come at the expense of the process of interpretation itself. The debate is unlikely to subside any time in the near future. Statutes, which are codified legal texts (as opposed to common law), have become the dominant source of modern American law, and the construction of their meaning occupies the greatest percentage each year of the United States Supreme Court docket.[2]

The controversy surrounding the process of statutory construction is understandable, because as much as legal scholars insist that statutes are a unique

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[1] Learned Hand, "Is a Judge Free in Rendering a Decision?," *The Spirit of Liberty: Papers and Addresses of Learned Hand* 105 (3d ed. 1977), quoted in Amanda L Tyler, "Continuity, Coherence, and the Canons," *Northwestern University Law Review* 99 (2005): 1404.

[2] Ellen P. Aprill and Nancy Staudt, "Theories of Statutory Interpretation (and Their Limits)," *Loyola of Los Angeles Law Review* 38 (2005): 1899-1900, *Westlaw,* Thomson West (28 March 2006).

kind of text (and they are), the interpretation of *language* lies at the heart of the enterprise. Language is inherently imperfect and thus subject to interpretation. Nothing about its codification as *law* changes that fact, no matter how much we might wish it were so.

Of course, interpreting statutory text does raise special concerns that can compound the difficulties associated with ordinary textual interpretation. Statutes are written not by a single author, but by pluralist committees of legislatures — often decades or centuries before the interpretive act occurs. Likewise, statutes are read and interpreted not just by a single reader but by a plurality of judges (a minimum of 13 in any federal case that makes its way to the Supreme Court) who invariably come to the bench having had different life experiences and espousing wildly divergent political and judicial philosophies. More importantly, determining the meaning of a statute is not something on which a heterogeneous population of readers can simply agree to disagree. Statutes are legally operative and, in the crucible of litigation, must be applied to concrete sets of facts to mean something specific — typically either to permit or to prohibit particular conduct; two divergent interpretations of a statute literally can mean the difference between life and death.

Given the complexity of this interpretive enterprise, it is no surprise that a pointed debate over the process of interpreting the meaning of legal text is deeply rooted in the law and has long been the subject of inquiry among jurists, attorneys, and legal scholars. Equally as intriguing as the debate itself, however, is the legal profession's steadfast reluctance to seek guidance from non-legal sources, despite the

fact that similar debates over meaning construction have long been brewing in other disciplines. Instead, the tendency in the law has been to view legal texts as unique and their interpretation as an enterprise incapable of being informed by non-legal sources. However, at its core, the law ultimately is produced, implicated, interpreted, and ultimately reproduced, in a series of interactions between people. It therefore is a "communication" in the same way that any use of language attempts to convey meaning between reader and author, or speaker and listener.

Whether the reluctance to seek guidance from non-legal sources is attributable to the common misperceptions about other theories of meaning construction or the fear that expanding interpretive horizons necessarily means abandoning constraints on meaning that only the law can provide, the result is a willful blindness to concepts from other discourses that would otherwise shed light on the process of statutory interpretation.

This paper attempts to expose some of the many contributions that other disciplines concerned with the production of meaning – specifically, literary theory and cognitive language theory – can make to legal discourse. The same issues animating interpretive legal theories are longstanding points of inquiry in both literary theory and cognitive language studies. Though in literary theory the "text" typically falls into the category of what we commonly call "literature," the same basic processes defines what lawyers and judges do, as readers, when they "interpret" the language of a statute, or try to discern the meaning behind what the text is intended to represent. Insights from the long history in literary theory and cognitive linguistics of

investigating meaning production can help illuminate the many assumptions that language interpretation necessarily entails, thereby providing a deeper and richer vocabulary to the process.

Two caveats are required at the outset. First, this paper represents a preliminary investigation into an interdisciplinary project that has considerable potential for legal interpretive practices. A thorough treatment of the many issues raised in the crossover from literary and cognitive theory to statutory interpretation is beyond the scope of the present inquiry. Second, this paper does not attempt to resolve the "problems" of statutory interpretation but, instead, takes initial steps at exposing them more clearly. The ongoing debates in both legal and other arenas over the thorny issues involved in the interpretive process, after all, reflect tensions inherent the nature of language itself, which cannot be "solved."

This paper is organized as follows. Section I briefly examines the longstanding interpretive problem in legal studies of construing legal statutes – the quintessential legal "text." Section II provides an overview of the problem and the history of textual interpretation generally. It also discusses a number of assumptions driving statutory interpretation that may result in judges often asking the wrong questions about "finding" meaning "in" the text. These assumptions are revealed in lessons learned from decades (if not centuries) of language philosophy, which help to re-focus the inquiry on meaning as a *process* of interpretation, rather than merely a *product* of it.

Section III examines the issue of "representation" in literary theory. An examination of the major theories exploring the nexus between meaning and its visual representation in language offers legal theory a broader vocabulary to discuss the same issues that arise when judges confront legislative text and are asked to interpret it. Section III also explores the possibility that contemporary literary theory – associated in the law with Derridean deconstruction – typically has been rejected in the law primarily because it has been vastly misunderstood. A proper account of deconstruction might not be so easily discounted.

Finally, Section IV further explores the potential application of cognitive linguistic theory to statutory interpretation. Cognitive linguistic theory offers at least as much insight to the process as deconstruction theory and, in fact, shares with deconstruction an approach to texts as products of a culture. In addition, cognitive linguistic theory has at least one distinct advantage over literary theories: the incorporation of cognitive constraints that might make it more palatable to a generation of jurists demanding increased restraint in the interpretive process.

I. A Brief History of "Statutory Interpretation"

While many legal cases can be resolved simply by applying the words of a statute to a particular set of facts, circumstances frequently arise that are not clearly answered by the words of a statute under examination. Indeed, surrounding context — including legislative history[3] and policy considerations — often suggest a result directly at odds with the text standing alone. In these cases, it is the role of the judiciary to interpret statutory language and to apply its meaning to new factual situations. The appropriate method of ascertaining that meaning — and the role of the judge as interpreter — has long been the subject of debate.

Law Professors William F. Eskridge, Jr. and Phillip P. Frickey have identified three primary approaches that jurists have used in the past century to discern statutory meaning. "Purposivism" is the approach most often identified with Judge Learned Hand, quoted in the Introduction, above. Under this approach, the judge's aim is to select the interpretation of a statute's words and phrases that best carries out the legislative purpose. "Intentionalism" requires the judge to limit his or her application of the statute to match the original intent of its drafters. Finally, under the approach

[3] "Legislative history" refers to the volumes of written materials that accompany a statute but are not enacted into law with the statute itself. They include transcripts of floor debates by individual legislators, red-lined versions of earlier drafts of the statutory text, and reports of various legislative committees seeking to explain what the different provisions of the statute are intended to accomplish and what they mean.

known as "textualism," the judge attempts merely to apply the statute's "plain meaning" by relying on the words of the statute alone.[4]

Throughout most of the twentieth century, the prevailing approach was a combination of purposivism and intentionalism. Specifically, judges interpreted statutes based on the intent of the legislature, informed (in situations obviously not contemplated by the drafters) by the statute's more general purpose. Increasingly, however, many judges became frustrated by the indeterminacy of these approaches. They turned to a "soft" form of textualism, which involved applying the "plain meaning" of a statutory text, mollified by an examination of legislative history to be sure that the apparent "plain meaning" was equally plain to Congress.[5] Judge Hand and many purposivists and intentionalists rejected the kind of "strict literalism" that this approach emphasized. While they admitted that the words of a statute are of paramount importance, they felt strongly that strict literalism would lead to unfortunate results, noting that "the meaning of a sentence may be more than that of the separate words."[6]

The purposivist and intentionalist approaches ultimately became associated with an indeterminacy that made an increasingly more conservative judiciary distinctly uncomfortable. Indeed, Judge Hand specifically described his interpretive

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[4] William N. Eskridge, Jr. and Philip P. Frickey, *Legislation: Statutes and the Creation of Public Policy* (St. Paul (MN): West Publishing, 1995): 514.

[5] Eskridge and Frickey, 514.

[6] John M.Walker, Jr., "Judicial Tendencies in Statutory Construction: Differing Views on the Role of the Judge," *New York University Annual Survey of American Law* 58 (2001): 216, *Westlaw*, Thomson West (21 February 2006).

method as an "undertaking of delightful uncertainty."[7] However, he also judged at a time when there were fewer statutes overall and therefore fewer such undertakings. As the body of statutory law grew over time, even the much stricter textualist approach seemed insufficient in reducing uncertainty. Where meaning was deemed "plain," the case was easy, and the textualist's inquiry was constrained. However, advocates of this method still would consider extra-textual sources, such as legislative history, to confirm plain meaning. Moreover, they seemed confident that external sources could assist them where the text at issue was deemed ambiguous.[8]

In the mid-1980s, a movement to develop a more stringent, radical version of textualism began to take hold among members of the judiciary. Identified primarily with certain opinions and other writings of United States Supreme Court Justice Antonin Scalia, the late Chief Justice William Rehnquist, and United States Court of Appeals Judge Frank Easterbrook, this more stringent approach has become popularly known as "New Textualism," a term first coined by Professor Eskridge. This new form of textualism has become increasingly popular in federal courts since then. The most likely explanation for the trend is that, in recent years, the federal judiciary has become more politically conservative, and the new textualist movement strongly adheres to the traditionally conservative notion of judicial constraint.

Unlike classic textualism, the new textualist approach is based on two relatively radical tenets. The first is that all that is "law" is the text (and only the text) actually adopted by the legislature and signed by the chief executive. The result is an

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7 Walker, 216.
8 Walker, 218.

even "harder" version of the plain meaning rule.[9] The second is that the words and, therefore, the meaning of statutory text is almost always "plain" (*i.e.*, not ambiguous).

For the new textualist, statutory text should be understood principally in light of "ordinary" usage of the language.[10] New textualists will consider the place of a word or phrase in a statute, the structure of the statute as a whole, and even other related statutory schemes.[11] Extra-textual considerations, such as statutory purpose and history, are largely rejected. Instead, the focus is on the words that the legislature actually adopted. Remarkably, however, new textualists also will consider dictionary definitions to supply a word's "ordinary" usage, the assumption being that "the dictionary" (though no one dictionary is consulted) is an unquestionably authoritative source for a word's common meaning.

As a result of their hard line approach, new textualists are more willing than their predecessors to accept interpretations that do not appear to produce the correct, optimal, or even fair result for the parties. For example, in *Chapman v. United States*, the statute in question assigned a minimum of five years in prison for the distribution of more than one gram of a "mixture or substance containing a detectable amount of [LSD]."[12] In order to be transmitted to a user, the LSD in question was absorbed onto a piece of blotter paper, which weighed a total of 5.7 grams. Chief Justice Rehnquist referenced two different dictionaries to reach the conclusion that the term "mixture"

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[9] Walker, 219.

[10] William N. Eskridge, Jr., "All About Words: Early Understandings of the 'Judicial Power' in Statutory Interpretation, 1776-1806," *Columbia University Law Review* 101 (2001): 1090.

[11] Walker, 219.

[12] *Chapman v. United States*, 500 U.S. 453, 457 (1991).

included the blotter paper that was used as the medium for transporting the drug, thus making the prison sentence for the sale of one dose of LSD disproportionately higher than for one dose of equally dangerous and illegal substances, such as heroin or cocaine.

The result is remarkable. The defendants sold relatively small amounts of LSD (one defendant sold fewer than 12,000 doses), but combined with the weight of the blotter paper, they received sentences comparable to selling 325,000 doses of cocaine or more than a million doses of heroin.[13] Judge Easterbrook, who had reached the same outcome when the case was on appeal to the Seventh Circuit, did not deny the absurd results; he simply did not believe that it was the responsibility of judges to rectify.[14]

II. Meaning as an Interpretive Process

Despite the identification of three clearly delineated theories of statutory interpretation and their documentation in a century worth of cases, many legal scholars today maintain that: "The hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation" but, rather, "the American judiciary has ad-libbed for generations on a

[13] Andrei Marmor, "The Immorality of Textualism," *Loyola of Los Angeles Law Review* 38 (2005): 2067, *Westlaw*, Thomson West (10 April 2006).

[14] Marmor, 2067.

very important area of judicial responsibility, and [thus] the conventional wisdom [is] that statutory interpretation is a mess."[15]

It is in this vein that relatively dogmatic views of what a judge *should do* when she approaches statutory text have taken root. However, the tendency to search for hard-and-fast rules has eclipsed the study of what judges already *are doing* when they are called upon to "find meaning" in written text. Thus, relatively little attention has been paid to the "construction" of meaning – the idea that ascertaining meaning is the product of a dynamic *process*, and not simply a singular matter of unpacking statutory words to reveal some essential core.

Several assumptions about language are embedded in this formulation, which insights from both literary theory and cognitive linguistic theory can help tease out. Revealing these assumptions can assist interpreters of statutory texts faced with disputes over construction by refocusing the inquiry on the process of meaning construction rather than merely the product of it.

A. The Assumption that Words "Contain" Meaning

The primary fiction under which new textualists are operating is that meaning is inherent in linguistic expressions; it is the role of the judge to unpack a word or phrase, thereby exposing the meaning that is contained in its core. This approach views ideas and meanings as static objects "held" by words. It also assumes that words and sentences have meaning in themselves, divorced from the speaker that

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[15] Mullins, 3-4.

utters them or the context in which they are uttered.[16] Communication, then, is the process of a speaker sending that meaning (contained in the words) to a listener, who understands its content upon reception. Together, these assumptions comprise the "conduit metaphor," a way of conceptualizing the reification of meaning.

The conduit metaphor is a theory first analyzed by Michael J. Reddy to explain a large set of observations he had about the ways people talk about meaning, interpreting and communicating. The theory subsequently has been analyzed and re-analyzed by numerous linguists. In George Lakoff and Mark Johnson's formulation, "the speaker puts ideas (objects) into words (containers) and sends them (along a conduit) to a hearer who takes the idea/object out of the word/containers."[17]

For the new textualists, words clearly hold ideas; in the case of statutory text, they hold the "law." The conduit metaphor is absolutely essential to the core premise of the new textualist theory that the statutory text is an end in itself and is all a judge needs for determining and applying the law. It drives their view that the "law" consists exclusively of the words actually adopted by the legislature and signed by the chief executive. And it explains their view of the role of the judiciary – simply to open up a statute's word-containers and take out their contents. Indeed, Justice Scalia describes his own views and methodology very much along these lines: "A text . . . should be construed rationally, to contain all it fairly means," and: "I thought we had

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[16] George Lakoff and Mark Johnson, *Metaphors We Live By* (Chicago: University of Chicago Press, 1980), 11.

[17] Lakoff and Johnson, 10-11.

adopted a regular method for interpreting the meaning of language in a statute: first, find the ordinary meaning of the language . . . ."[18]

In many cases, there may be considerable consensus about the meaning we attribute to words and thus assume they contain. In such cases, it may be harmless to accept the conduit metaphor or even to remain unconscious about its application. However, "when dealing with abstractions – and statutes are abstractions – any theory suggesting that words "have" meaning can be dangerous."[19] The danger lies in one's thinking that all she is doing is objectively attributing meaning to the text, when what she is really doing is projecting her own beliefs about meaning onto it.

To see the system break down, one need only look at an opinion in which two or more Justices disagree over the supposed "ordinary" meaning of a particular word or phrase in a statute. If two of the country's smartest jurists cannot agree, it is difficult to argue that the meaning of the critical statutory word is "plain." Yet, as explained above, new textualists regularly adopt a dogmatic view of a potentially ambiguous statute's plain meaning, either by refusing to recognize alternative uses or by wrenching statutory language into artificial clarity. The result seems to be too much "pretending that our laws work better than they ever can."[20]

A classic example is a recent dispute between Justices Scalia and Souter over the meaning of the word "impair" in the 1996 Telecommunications Act. There,

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[18] Mullins, n. 90 (quoting, respectively, Antonin Scalia, *A Matter of Interpretation* Princeton: Princeton University Press, 1997): 23, and *Chisom v. Roemer*, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting)).

[19] Mullins, n. 90.

[20] Lawrence Solan, "Learning Our Limits: The Decline of Textualism in Statutory Cases," *Wisconsin Law Review* 1997 (1997): 283, *Westlaw,* Thomson West (9 March 2006).

Congress disbanded the existing monopoly control over the nation's local telephone markets by allowing new competitors to access and use components of the monopolist's network. New market entrants, however, were allowed access to a particular component only if the monopolist's failure to provide access to it would "impair" the ability of the new entrant to provide the services it sought to offer.[21] Applying this provision, the Federal Communications Commission (FCC) held that a new market entrant was "impaired" in providing the services it sought to offer if denial of access to the network component (*i.e.*, if the new entrant had to find a substitute or build its own component) resulted in *any* increase in cost for the new entrant.[22] On appeal, Justice Scalia disagreed. Though he did not purport to know precisely what "impair" meant, he felt confident that it was not what the FCC had said it meant. As he explained, the FCC's assumption that "any increase in cost [would] 'impair' the entrant's ability to furnish its desired services *is simply not in accord with the ordinary and fair meaning of those terms.*"[23]

If the meaning of "impair" is truly so plain, then one would not anticipate disagreement. Justice Souter, however, took exactly the opposite view, agreeing with the FCC's decision. In his view, any increase in cost, no matter how small, could fairly be termed an "impairment." As he explained, "one can say his ability to replace a light bulb is 'impaired' by the absence of a ladder . . . even though one

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21 *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 388 (1999).
22 *AT&T Corp.,* 389.
23 *AT&T Corp.*, 390 (emphasis added).

could stand instead on a chair, a milk can, or eight volumes of Gibbon."[24] According to Justice Souter, this interpretation is a meaning of the word "impair" as ordinary as any other. In other words, an impairment is still an impairment no matter how trivial. Justice Scalia (in a rare display of collegiality) responded:

> True enough (and nicely put), but the proper analogy here, it seems to us, is not the absence of a ladder, but the presence of a ladder tall enough to enable one to do the job, but not without stretching one's arm to its full extension. A ladder one-half inch taller is not, 'within an ordinary and fair meaning of the word necessary, nor does its absence "impair" one's ability to do the job. We similarly disagree with Justice Souter that a business can be impaired in its *ability* to provide services . . . when the business receives a handsome profit but is denied an even handsomer one.[25]

The debate may be intellectually fascinating, but the practical reality is that billions of dollars rode on this exchange, and the issue was decided *without citation to any legal precedent or theory but, instead, by reference only to the purportedly "ordinary" meaning of the text in question*. That the Justices so strongly disagreed on how to interpret *identical* statutory language, however, suggests that the meaning was not so plain and, moreover, indicates that two people can hold very different belief sets about the meaning of even the most seemingly "ordinary" words. By keeping these belief sets concealed, the Justices are only subjecting themselves to a kind of "linguistic enslavement" that risks cutting off the analysis too soon.[26] Recognizing the assumptions animating such a tendency, in contrast, may promote a

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[24] *AT&T Corp.,* 390 n.11.

[25] *AT&T Corp.,* 390 n.11.

[26] Lawrence Solan, "Learning Our Limits: The Decline of Textualism in Statutory Cases," *Wisconsin Law Review* 1997 (1997): 283, *Westlaw,* Thomson West (9 March 2006).

interpretive model that better equips judges to resolve disputes in meaning construction.

B. The Assumption of an External Reality

A second, closely-related assumption animating current theories of statutory interpretation is that linguistic expressions correspond to an external reality. For new textualists especially, language reflects that reality; otherwise words would not be deemed so singularly reliable in capturing meaning. The notion of a reality existing external and *a priori* to language is, of course, deeply rooted in Western philosophy. For Plato, and those theorists that follow him, the investigation of language concerns the relationship between words and the things in the world they designate – and our ability in thoughts and words to portray accurately the ideals, or the "Forms," for which they stand. Platonists thus adhere to what linguists call "truth conditional" semantics, where the relevant inquiry always concerns language's ability to represent reality. In such a system, a proposition is true relative to the outside world if it describes a state of affairs in that world.

The new textualists' ardent reliance on "plain language" to ascertain meaning is reflective of a Platonist world view; otherwise, there would be no sense of statutory text having the power to convey meaning and the ability to capture authorial intent. "What usually happens when a court 'interprets' a statute is that the court attributes some correspondence between the statutory words and items in the 'real world,'

namely a concrete set of facts described in the case."[27] In fact, new textualists are quite dogmatic in their view that language has the ability to capture a meaning to which everyone can relate and of which everyone has an inherent understanding.

This view of language likewise supports their claim to eschew external sources of meaning as only increasing the likelihood of distraction and confusion; rather, the "Forms" can be ascertained from words alone. The idea that statutory text represents "the law," moreover, produces the method of interpretation that Justice Scalia and others argue not only is required by the Constitution, but has the benefit of "enabl[ing] the enacting Congress to predict the effects of its language and, just as importantly, [to] stay[] the hand of the activist judges who might interpret statutes according to their own political preferences."[28] As the above exchange over competing meanings of the term "impair" suggests, real predictability can be hard to come by.

At least in the case of "impair," however, the Justices were relying on their own experiences as an interpretive guide. In contrast, warring *dictionary definitions* often become the touchstone for competing interpretations. The common judicial practice of relying on dictionaries for assistance in construing statutory language implicates both of the "folk theories" of language discussed thus far – specifically that a word's "true" meaning is available to interpreters and that it can be effectively ascertained.

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[27] Morell E. Mullins, Sr., "Tools, Not Rules: the Heuristic Nature of Statutory Interpretation," *Journal of Legislation* 30 (2003): 43-44, *Westlaw,* Thomson West (10 April 2006).

[28] Aprill and Staudt, 1901; Solan, "New Text," 2030-31.

C. The Focus on "Product"

The assumption that a word's "ordinary" meaning can be found in a dictionary is not altogether surprising; indeed, capturing and enumerating such meanings are likely the primary functions most of us would ascribe to dictionaries. The judicial practice of relying on dictionaries to determine meaning, however, underscores the notion that construing statutory text is solely about finding a *product.* This is especially true considering that judges who resort to using dictionaries rarely explain how the meaning they select for a particular word is the most "ordinary" among the many usages that dictionaries typically list for each entry and, as the case discussed below will show, there is no consensus on *which* dictionary is the "correct" one to use. If a judge can find a particular usage in a particular dictionary, the game is over; that usage prevails. But, as noted above, this practice can mask other potentially important considerations, such as the specific belief sets that a judge may be imparting on a word's interpretation.

In addition, even when jurists strive to derive meaning solely from within the four corners of the "text," they often cannot pinpoint meaning with such willed precision. As demonstrated by the classic exchange in *Muscarello v. United States,*[29] this practice only underscores the tendency to claim transparency for an interpretive process that is in fact far murkier and more complicated. Instead, the exercise often degenerates into an examination of seemingly random extrinsic text, not tethered to any coherent principle or theory.

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29 *Muscarello v. United States,* 524 U.S. 125 (1998).

Muscarello is one of three cases that the Court considered in the mid-1990s under a federal statute imposing an enhanced prison sentence on defendants who "use or carry" a firearm in connection with a felony or drug transaction. In an earlier case, *Bailey v. United States,*[30] the question was whether a defendant who drove to a drug exchange with a gun in his trunk (and the drugs in the front seat) had "used" a firearm in commission of the felony. The Supreme Court decided nine-to-zero that Bailey had not "used" a firearm within the meaning of the statute. A few years later, *Muscarello* presented almost the identical facts, except that Muscarello was charged with "carrying" a firearm rather than "using" it. The defense argued that the ordinary meaning of to "carry a firearm" was to carry on one's person and, therefore, the defendant could not have "carried" it in the trunk of his car. The government, in contrast, argued that carrying a gun in one's vehicle was an equally legitimate sense of the word "carry."

The Court ruled five-to-four in favor of the government, but not before looking to multiple dictionaries with varying definitions; several passages from the Bible; Daniel Defoe's *Robinson Crusoe,* and Herman Melville's *Moby Dick* to determine the "ordinary use" of the term.[31] The Court also conducted its own lexicography by searching through a database of thousands of newspaper and magazine articles for instances of the words "carry," "vehicle," and "weapon."[32] The four dissenting Justices turned to their own bevy of dictionaries, biblical passages,

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30 *Bailey v. United States*, 516 U.S. 137 (1995).

31 Lawrence Solan, "The New Textualists' New Text," *Loyola of Los Angeles Law Review* 38 (2005): 2051-52. *Westlaw,* Thomson West (28 March 2006).

32 Solan, "New Text," 2052.

and literary allusions, including a different translation of the Bible, two major novels, the poetry of Oliver Goldsmith, Rudyard Kipling's verse, Bartlett's *Familiar Quotations*, and even popular films and television shows such as *The Magnificent Seven* and M*A*S*H.[33] For a Court so expressly reticent to use extra-textual evidence of legislative intent, turning to this array of literary and lexicographic sources to ascertain the "plain and ordinary" meaning of a term seems particularly incongruous.

The practice of relying on dictionaries (or other singular instances of word usage) gives rise to other potentially problematic assumptions – including, for example, the necessity of making judgments about categorization, such as what does and does not constitute the category of "a mixture containing LSD" in *Chapman*. The tendency on the part of new textualists, however, is to view categories as consisting of necessary and sufficient conditions. Regarding "the meaning of a word [or category] as the set of conditions that must obtain for a statement using that word to be "true"[34] seems an especially useful, if not obvious, principle for a rule-oriented profession. Yet, any one of the cases cited in this paper as an example of how the "plain and ordinary meaning" approach often falls short suggests that it can be difficult, if not impossible, to define words in terms of necessary and sufficient conditions.

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[33] *Muscarello*, 143-44.
[34] Solan, "New Text," 2039.

This is true even for statutory terms that seem relatively more tangible than "use" or "impair." A well-worn example (among many) in the first-year law school curriculum is to suppose the existence of a statute stating, "No vehicles in the park." Ask an audience to define "vehicle," and certain obvious attributes come to mind. We might all agree that "cars" are clearly prohibited, but scooters, skateboards, and wheelchairs add complexities that begin to make the process quite confounding. The tendency in the law is to view the notion of a category as an *a priori* conceptual structure, membership in which can be defined by necessary and sufficient conditions.[35]

An item or idea either falls within the category or outside of it. Lakoff has shown, however, that we tend to categorize in terms of "radial categories," consisting of a central model with various extensions that, though related to the model, nevertheless cannot be generated by rule. Instead, we judge the propriety of an item's inclusion in a category in accordance with "prototype effects" – as better or worse examples of that category.[36] To take the "vehicle" example a step further, we might judge a "car" to be a better example of the category of things we call "vehicles" than a "skateboard," not because car satisfies a predetermined set of conditions that skateboard does not, but because car is a better (more prototypical) example of what we think of when we picture a "vehicle."

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[35] Steven L. Winter, *A Clearing in the Forest: Law, Life, and Mind* (Chicago: University of Chicago Press, 2001): 69.
[36] Winter, 71-78.

This type of reasoning cannot be explained by traditional rationalist models, yet the process is nevertheless systematic and constrained. There is little worry, for example, that "dog" would be posited as a good example of the category of things we call vehicles. Such a process no greater uncertainty than the use of dictionaries; in fact, the practice correctly shifts the inquiry from away from the notion that meaning in inherent in linguistic expressions and toward the mental processes involved in producing meaning.

There is already evidence of this type of reasoning process at work in statutory interpretation. In *McBoyle v. United States*, the question was whether a federal statute prohibiting interstate transportation of stolen "vehicles" applied to airplanes. Justice Holmes concluded that it did not, reasoning that:

> Fair warning should be given to the world in language that the common world would understand. . . . When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft simply because it may seem to us that a similar policy applies.[37]

As Justice Holmes seemingly recognized, a particular meaning is "ordinary" not simply because we can find *some instance* of its usage. Yet, that is precisely what the Justices in the *Muscarello* case were so intent on finding – a reference in a dictionary, newspaper article, work of literature (or even a statistical average among these sources) that supported their own conclusion.

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[37] *McBoyle v. United States*, 283 U.S.25, 26 (1931) (emphasis added). Winter discusses this case in depth, noting that prototype theory provides a much better account of the decision than an analysis focused on ordinary meaning. Winter, 37 and 200-206.

Even with more self-conscious reasoning, of course, challenging questions still remain, for example, "whether courts must limit their interpretation of statutory words to prototypical instances, even in the face of evidence that the legislature had a more expansive meaning in mind."[38] Such questions, however, are an integral part of the process – the careful communicative "duet" between the legislative and judicial branches that pragmatist Herbert Clark (discussed in Section IV) envisions, that the Constitution *requires*, and that ultimately is impossible to eliminate.

III. A Single Interpretive Schema

The debate over how language produces meaning is not unique to the law; rather, it is well-entrenched in other discourses, including in literary theory. It is traceable as far back as Plato and continues in full force in schools of literary criticism today. Nonetheless, the knee-jerk reaction by most lawyers, legal scholars, and certainly most judges is that legal text and literary text are such vastly different forms of communication that these two discourse communities have nothing whatsoever to offer one another. Richard Posner, a federal appeals court judge and lecturer at the University of Chicago Law School captures this reticence in his review of *Literary Criticisms of Law*, by Guyora Binder and Robert Weisberg, a relatively recent addition to a field seeking to explore the intersection of law and literature. Concluding what many lawyers and legal scholars might guess without reading either the book or Judge Posner's review of it, Judge Posner writes:

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[38] Solan, "New Text," 2046.

> The authors are fascinated by, and minutely examine, a set of scholarly literatures that have no practical significance for law; some of them are not about law at all. The book has no pedagogic function or potential that I can see, will be in accessible by reason of its length and its heavy weight of erudition to all but the tiniest sliver of the legal profession (even to most law professors), and **contains nothing that could be used to understand or improve the law** . . . .[39]

The bulk of Judge Posner's critique turns on the very basic and undeniable fact that the law, stated simply, is not "literature." Defining "literature" is not a simple task, though the distinction between "literature" and other types of written discourse, such as legal writing, is important, because "[a] precondition to the application of literary theory to legal interpretation is their initial separation."[40] The task is not as simple as it may seem, because "literature" only became a discrete enterprise in the nineteenth century when two conceptual divisions developed. The first was a division between scientific and expressive discourses; the second was a functional division of "letters" into categories that separated the instrumental from the aesthetic and the prosaic from the poetic. But ultimately, they conclude that: "The very category of literature – writing presented as art – was a creature of Romanticism, and insofar as we continue to view literature as an autonomous category of writing or experience, we moderns remain committed to Romantic aesthetics[,]"in particular,

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[39] Richard Posner, review of *Literary Criticisms of Law*, by Guyora Binder and Robert Weisberg, *Stanford Law Review* 53 (2000-2001): 195-96 (emphasis added), *HeinOnline,* William S. Hein & Co., Inc. (6 March 2006).

[40] Binder and Weisberg, 7.

"the emergence of a purely aesthetic sensibility for receiving writing, defined by contrast to a merely instrumental sensibility."[41]

Interestingly, Judge Posner suggests that an analysis of legal texts *as* literature might well be worthwhile. Here, though, he squarely means the analysis of the "imagery, narrative techniques, character portrayal, voice, tone, and other literary properties" of a legal text, but not of the law as a "'cultural activity' and 'a process of meaning making'" that Binder and Weisberg seek to explore.[42] Judge Posner's reaction to such an attempt is simply that a literary critic cannot be expected to have much to say about law so conceived – hence his charge that their book has nothing useful to say about the law, how we understand it, or how it might be improved.

Judge Posner's sweeping dismissal of the application of literary theory to law as an enterprise ultimately may have less to do with the merits of any of its insights and more to do with the nature of Binder and Weisberg's particular analysis – namely, they seem to gloss over the undeniable fact that the law *is* different from literary text. In addition, their analysis is limited largely to a discussion of "the law" at a high level of abstraction rather than to specific examples where the law may be analyzed *as* a text.[43] The assumption here, however, is that "law" *can never* be analyzed as text, that the law uniquely contains or produced meaning in a way that other texts do not.

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[41] Binder and Weisberg 9, 11-12.
[42] Posner, 196.
[43] Posner, 196.

For all the differences between legal statutes and other texts, however, they share more in common than members of the legal profession seem willing to admit. Indeed, precisely the same issues over how language produces meaning have been debated for centuries in literary theory, with similar assumptions concerning "interpretation" and "representation" animating theories far more diverse than those at play in statutory interpretation. Ironically, even new textualists are to some degree embracing the very language of literary theory that they are so quick to reject. Far from shunning it, moreover, the legitimacy of their approach to meaning production actually may depend on it.

A. The Issue of Representation

As noted above, the hallmark of new textualism is the notion that meaning is inherent in language; statutory text carries that meaning and, more often than not, its language is transparent enough for readers to see it and known what it means. The debate in statutory interpretation thus can be analogized to the parallel debate in literary theory in that both have at their core the same schema about the way in which interpretation occurs. Specifically, both debates implicate the same dichotomy about the way in which language produces meaning. At one end of the divide are "formalists" – new textualists and, in literary theory, many New Critics – who contend that language is transparent and has inherent meaning, which can be transmitted like an object from the speaker or author to the listener or reader. The assumption here – identified above as the "conduit metaphor" – is that words contain

meaning and that a reader or listener should be able to unpack spoken or written text to uncover the inherent meaning that the speaker or author intended to convey.

At the other end of the spectrum are those who believe that meaning is entirely socially constructed and context-dependent. For adherents to the social construction or "social coherence" view, meaning resides somewhere exterior to the text. "The social coherence view of meaning is related to a view of indeterminacy of reference of language terms. On this view, words do not 'fit' the world at all[.]"[44] Instead, the relationship between words and "reality" is arbitrary. Depending on the particular school to which she subscribes, a social constructionist might say that the meaning of any single term is determined solely by its relationship to other terms in the same language system; or that meaning is determined by convention, or by agreement of an "interpretive community."[45]

Notably, even the latter view starts from the premise that words alone establish certain interpretive parameters. Both views, therefore, are really two conclusions drawn from the same conceptual premises – namely, the conduit metaphor and the view that language has an "inside" and an "outside." Formalists conclude that meaning is inside the text, whereas social constructionists argue that meaning comes from the outside. Regardless of viewpoint, both legal and literary theorists have tended to conceive of language as a material object with physical boundaries demarking its inside and outside, and to insist that meaning is deeply connected to this linguistic structure, whether it comes from within or without.

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[44] Winter, 7.
[45] Winter, 7.

Two ironies lie buried in this idea, which the present analogy to literary theory is able to help unearth. First, though, like Platonists, the new textualists exalt language's power to capture single-handedly a reality that exists exterior to it, so much so that courts typically should eschew reliance on virtually all other extra-textual evidence of meaning, they actually miss one of Plato's central points – language, especially written language, *dilutes* reality. If a reality exists *a priori* to language, any expression of that reality in words is one step removed from it. In other words, while language may be absolutely necessary to our ability to express the "things in the world it designates," language is nevertheless always and only a representation of reality (judged based on the accuracy of its representation), and not reality itself. In the *Phaedrus*, this issue of representation was extended to the written word, and the inquiry became doubly complicated. If language itself interferes with truth, then written language is even more faulty, because the symbols we use to represent words only takes us further away from the truths that those words symbolize.[46]

Second, at the same time that they tout language's ability to represent reality, new textualists are remarkably quick to apply theories of language that are directly contrary to the Platonic world view. Namely, most jurists rightfully espouse the view that law is its own system of signs, the truth value of which does not depend on any nexus to an external reality. In addition, within such a system, it is entirely reasonable to determine the meaning of a word by comparison to what it is not, rather

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[46] The "speech/writing binary," to which this classic Platonic assumption gives rise, is discussed in more detail in the following Chapter.

than to determine what it is or what it represents. Before examining the application of these principles, a brief explanation of their genesis is in order.

In contrast to Plato, philosopher Friedrich Nietzsche maintained that we do not have the ability to conceive of the essential qualities called the Forms. That "Truth" is unknowable renders the question whether language corresponds to it a flawed inquiry in the first instance. Central to Nietzsche's view of language is that the "thing-in-itself" (Immanuel Kant's term for the real object independent of our awareness of it) is impossible even for the creator of a language to grasp.[47] Though we believe that when we speak of certain things – trees, leaves, and tables, for example – we have knowledge of the things themselves, all we really possess are *metaphors* created by the cognitive process of translating concepts into words. These metaphors consist of multiple layers of substitutions that move us further and further away from the things-in-themselves. Truth thus is nothing more than a "mobile army of metaphors"[48] that, over time and through convention, become so ingrained in our experience that we come to believe that they are exactly the same as the things-in-themselves. For Nietzsche, then, *everything* resides in language and language alone. Accordingly, it is language that gives rise to concepts – and not concepts that give rise to language.

Ferdinand de Saussure agreed with Nietzsche, but he changed the inquiry to focus instead on the *internal constitution* of linguistic signs, not on what those signs

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[47] Friedrich Nietzsche, "From *On Truth and Lying in a Non-Moral Sense*," in *The Norton Anthology of Theory and Criticism*, ed. Vincent B. Leitch (New York: Norton, 2001), 877.

[48] Nietzsche, 878.

designate. This "structuralist" approach focuses on how the elements of a language relate to each other in the present (synchronically) rather than over time (diachronically). For Saussure, there is only an *arbitrary* relationship between a linguistic sign and the thing it signifies.[49] Saussure also agreed with Nietzsche that language gives rise to concepts, not the other way around: "[t]here are no pre-existing ideas, and nothing is distinct before the appearance of language."[50] What, then, is "Truth?" For structuralists, it is nothing more than a matter of agreement.

Critics of structuralism, Platonist among them, have a difficult time accepting this view that meaning is unattached to the expression of some non-linguistic Form. To some extent, their fear of complete indeterminacy is unwarranted. By "arbitrary" Saussure did not mean that a word could mean anything anyone wanted it to mean in a particular instance. To the contrary, he saw language as a *social phenomenon* that was entirely dependent on an agreement between the speaker and listener to interpret linguistic signs in a similar manner. Accordingly, he rejected the view that any one individual could effect linguistic change; however, that is not to say he believed change impossible. He simply argued that one person acting alone cannot prevail.[51] For example, I cannot decide today to call the sun the moon and expect meaning to flow from my decision automatically. However, if I persuade at least one other person to accept my proposal, then we have an agreement. Communication can be

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[49] Saussure, Ferdinand de, "From *Course in General Linguistics*," in *The Norton Anthology of Theory and Criticism*, ed. Vincent B. Leitch (New York: Norton, 2001), 964.
[50] Saussure, 965.
[51] Saussure, 968.

successful, and nothing about the word "moon" when referring to the sun is inappropriate; there is no "reality" being violated.

Applying these concepts to legal interpretation, we see that a "striking feature of legislative discourse is the general irrelevance of truth."[52] Statutory concepts often have no "natural" meaning; instead, their meaning is wholly supplied by the legislature, and possibly later by the judiciary through the interpretive process. In other words, it is not necessarily important or relevant that statutory words be "true" in the Platonic sense, because the underlying purpose of legislative discourse is only "the creation of laws within the bounds of which the addresses are to be required to act."[53] As a result, words and concepts can be defined and limited solely at the behest of the legislature.

The "No vehicles in the park" statute references above is a good example. There is no truth-conditional sense of the word "vehicle," but only the range of objects that the legislature defines as covered by the statute. Thus, there is no "reality," no real "vehicle" that is prohibited. In fact, the legislature might decide to define "vehicle" to include not only motorized vehicles but also largely unanticipated items, such as baby carriages, skateboards, or even pogo-sticks. Moreover, it might exclude items one would expect to be included, such as emergency vehicles or "military trucks participating in a parade."

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[52] M.B.W. Sinclair, "Law and Language: The Role of Pragmatics in Statutory Interpretation," *University of Pittsburgh Law Review* 46 (1985): 386-87, *Westlaw*, Thomson West (9 March 2006).

[53] Sinclair, 387.

At a certain level, this Sausseurean proposition may not be so profound; indeed, it suggests simply that meaning is a matter of convention – or, at least, of express definition. But Saussure says something distinctly more radical: in language there are only *differences*, and these differences exist wholly *without positive terms*.[54] These differences can take two forms: material and conceptual.[55] For example, I know what "red" is because it is not "bed," "led," "rid," or "rod" (material differences). I also know what red is because it is not blue, pink, or magenta (conceptual differences). But whereas a "difference" generally implies that there is some positive term to which the differing one is being contrasted (for example, I know what the sun is because it is not the moon), in Saussure's view, everything in language is purely relational. The identification of a difference does not depend on the prior existence or knowledge of the idea or the entity to which it is compared (the moon in this example). Thus, even if one accepts a system of meaning based solely on contrasting effects, to embrace Saussure, one must also abandon any sense of language as a substance. For structuralists, language is purely a form.

For all of the fear associated with the notion that meaning can be informed by something other than the words actually adopted by a legislature, both new textualists and adherents to other forms of statutory interpretation have shown a remarkable tendency to accept even this most radical Sausseurean principle. In fact, judges commonly arrive at statutory meaning by considering not only what was said, but

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[54] Saussure, 972.
[55] Saussure, 969-71.

what was *not said* in the course of a legislative enactment. This principle is well-entrenched in statutory interpretation.

For example, *Bailey v. United States*, presented the Supreme Court with virtually the same set of facts as *Muscarello*, discussed above. In *Bailey*, however, the defendant was charged with "using" the firearm located in his trunk rather than "carrying" it. The Court discussed the juxtaposition of the two terms in the statute as follows:

> We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning. While a broad reading of "use" undermines virtually any function for "carry," a more limited, active interpretation of "use" preserves a meaningful role for "carries" as an alternative basis for a charge.[56]

In other words, in defining "use" the Court relied in part on the Sausseurean proposition of conceptual differences. They reasoned that, because both terms appear in the legislation, they cannot be deemed to mean the same thing. Moreover, they derived a basis for their definition of "use" by contrasting it to "carry," noting that the use of two different words *necessitated* a difference in meaning.

New textualists often profess a hard-line Platonist view of the interpretive process whereby words represent exterior realities that any reader can understand simply by reading the words themselves. Yet, as we have seen, new textualists in practice apply many modes of interpretation that, as literary theory illuminates, are antithetical to the Platonic world view and undermine its fundamental assumptions. By self-consciously recognizing this and embracing concepts derived from literary

[56] *Bailey*, 145-46.

theory, new textualists could employ a broader and richer vocabulary to frame and convey more concretely a comprehensive interpretive theory uniquely tailored to statutory interpretation.

B. A Legitimate Interpretive Method

Before concepts from literary theory can be employed, however, certain myths associated with its "message" require debunking. The application to law of "literary theory," broadly construed, tends to come under considerable fire especially from conservatives, who have tended to view its introduction into legal arenas as an attempt by the left to destabilize traditional (read: conservative) interpretations and thus nothing but a rich resource for leftist critiques. The early 1990s in particular produced a surge in scholarship purporting to constitute a "postmodern jurisprudence."[57] That surge arguably is attributable to the "culture wars" of the late 1980s and early 1990s when, even within the field of literary criticism, strains of postmodern literary theory became synonymous with leftist politics, and "conservatives accused postmodernists of making all things relative, to the detriment of the canon, critical values, and the culture at large."[58] The "construction of the individual by culture" became a central theme in criticism during this period, and so too in the then-"emerging category of postmodern jurisprudence."[59]

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[57] Jack Balkin, "What is a Postmodern Constitutionalism?," *Michigan Law Review* 90 (1992): 1977 n. 25 for citations to Fish and numerous additional works.

[58] Jennifer Howard, "The Fragmentation of Literary Theory," *Chronicle of Higher Education*, 16 December 2005, A12.

[59] Balkin, "Postmodern,"1977 n. 25. See also David Aram Kaiser and Paul Lufkin, "Deconstructing *Davis v. United States*: Intention and Meaning in, Ambiguous Requests for Counsel," *Hastings Constitutional Law Quarterly* 32 (2005): 738, *Westlaw,* Thomson West (15 March 2006).

At the same time, however, Justice Scalia, appointed to the Supreme Court in 1986, had already become one of the law's foremost intellectual leaders. As explained above, Justice Scalia vehemently supports a "constitutional jurisprudence of tradition, coupled with a return to an interpretive theory of plain meanings for statutes and original intention with respect to the Constitution."[60] Where a case requires textual interpretation – such as where the words of the Constitution or a legal statute is implicated – Justice Scalia firmly rejects extra-textual considerations, such as a statute's social context, the history surrounding its enactment, subsequent history of its operation, and even efforts to discern the harm it was intended to address. The assumption is that considerations outside the text rarely can contribute to our understanding; to the contrary, such extra-textual phenomena can cause deception.

One of the central problems in describing postmodernism's influence and potential application has been its relationship to deconstruction theory, associated primarily with the writings of Jacques Derrida.[61] Deconstruction has been poorly defined in law and as a result largely disfavored. Specifically, two assumptions about deconstruction theory have undermined its utility. The first assumption is a functional critique and concerns a common misperception about deconstruction theory. Deconstruction, construed (broadly) as an obsession with or fixation on the

[60] Balkin, "Postmodern," 1966.

[61] Kaiser and Lufkin, 738. Certainly, deconstruction is associated with the work of Derrida; however, its full legacy also is attributable to the vast body of writings produced in response to Derrida. Derrida's death in 2004 provided an opportunity for reconsideration of the influence of deconstruction in many disciplines, including the law. Kaiser and Lufkin, 737. Rather than close the door on deconstruction's application to law, its reconsideration may shed new light on its potential contribution.

ambiguities of meaning that emerge when a text is inspected, "has obvious if unacceptable implications for legal interpretation, because fixity of meaning is necessary to minimize legal uncertainty and cabin judicial discretion."[62] Thus, the primary fear associated with its application to the law is that it will produce a fragmented jurisprudence – an undesirable method of legal interpretation that "celebrates surfaces, irony, and pastiche, and eschews master narratives because those are postmodernist themes and so that is what a postmodern jurisprudence should look like."[63] As one of the very purposes of codifying law into written statutes is to provide certainty and predictability for the population that they govern, any theory that serves only to undermine that certainty and predictability has no place in jurisprudential theory.

The second assumption raised as a criticism is a substantive one in that it constitutes a purely leftist assault on traditional juridical values. This allegation is not unrelated to the first assumption, and the reality is that many literary deconstructionists have associated themselves with the political left:

> When deconstruction moved from literature departments to the legal academy, it was modified further. Legal academics on the left, particularly feminists and members of the Critical Legal Studies (CLS) movement, saw deconstruction as a way of challenging legal orthodoxies. They assumed pretty much without question that they could adapt

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62 Posner, 205.

63 Balkin, "Postmodern," 1973, n. 16, n. 17. Quoting Robert Post in his review of Fredric Jameson's book on postmodernism, Balkin writes that "it is 'obvious[] that postmodernism affects only certain segments of contemporary life. . . . There is no postmodern law, although there are postmodern commentaries on law.'"

> deconstructive techniques to critique unjust legal doctrines and advocate more just arrangements.[64]

However, this assumption on its own is problematic. As the following discussion shows, Derridean deconstruction theory, properly construed, actually can be extremely beneficial to the traditionally more conservative new textualists.[65]

Based in large part on these misperceptions, the law's extremely negative reaction to the importation of deconstruction theory is predictable. Moreover, so construed, the criticism is justified, and it is here that the application of literary theory, especially deconstruction, to law finds itself most at odds with the goals of ordinary legal interpretation and jurisprudence. If the goal of deconstruction is solely to destabilize a written text, in most instances with a hidden political agenda, then legal interpretation has little use for it.

That is not, however, deconstruction's only, or even its primary, function.[66] Deconstruction provides insights into language and meaning that are critical to our understanding not only of legal institutions as products of our culture but specifically

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[64] Jack Balkin, "Deconstruction's Legal Career," *Cardozo Law Review* 27, no. 2 (2005): 102.

[65] Importantly, references to Derrida herein are to the "apolitical Derrida," as reflected in his early writings, such as in *Of Grammatolgy* and *Dissemination* (as opposed to his more political writings, which came later).

[66] Binder and Weisberg, 461. As Binder and Weisberg indicate, deconstruction has a pragmatic value that most critics overlook given the common but erroneous charge that deconstruction is exclusively skeptical. Jack Balkin posits one such potential pragmatic application by enforcing a separation between normative standards and cultural phenomenon. In his words, "even if one believes . . . that postmodern normative claims are unsuited or inapplicable to certain social practices, it does not follow that the cultural forces we collectively label 'postmodernity' have not affected these practices." Thus, he flatly rejects any notion that postmodernism's primary relevance to the American legal system lies in its methods or theories of interpretation or "insights gained from understanding the 'postmodern' or the socially constructed self." Instead, he argues that its relevance is purely – or primarily – as a mechanism for understanding cultural change. Balkin, "Postmodern," 1978.

to the assumptions underlying the meaning for which judges search in statutory text. In this vein, deconstruction and cognitive linguistic theory actually share much in common. Both approaches are focused on revealing tensions in a text and uncovering the assumptions underlying language use; both approaches seek to bring these otherwise hidden assumptions to the analytical surface.

As applied to legal meaning, deconstruction can illuminate "the sensitivity of legal meaning to changes in interpretive context, and [can help] uncover[] the competing policies and potentialities buried in the words and expressions of legal texts."[67] The real connection between deconstruction and legal interpretation thus may lie in deconstruction's *method* – something that many critics are quick to overlook. Derridean deconstruction is, at bottom, a technique for reading texts, and Derrida himself remained loyal to the text by hinging his analysis always on close readings.

One of Derrida's many significant contributions to literary theory was his masterful deconstruction of the speech/writing binary. By deconstructing the speech/writing binary, Derrida demonstrated that writing can add meaning to oral speech; it can provide its own kind of presence rather than just signify the author's physical absence. As explained below, far from undermining it, this conclusion adds considerable *legitimacy* to the new textualists' view of language.

The speech/writing debate has a long history in literary theory. The origin of the speech/writing dichotomy is traceable to Plato's *Phaedrus*. There, Plato

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[67] Balkin, "Deconstruction," 114.

notoriously condemned writing and exalted speech as the proper vehicle through which one can obtain true knowledge about the world. That condemnation comes from the Platonic view that, as compared to writing, speech is closer to "Truth" and thus is better able to represent reality.

In a world premised on the existence of absolute Truth, any "representation" is inherently inferior. For Plato, the distance between representation and truth was sufficiently vast so as to render them polar opposites, and it was precisely this dichotomy that gave rise to his negative view of aesthetic representation. Artistic and literary representations for Plato were mere imitations of nature, necessarily removed from the Real and likely to cause mischief and confusion. "[R]epresentation . . . produce[s] a product which is far from truth [and] also forms a close, warm, affectionate relationship with a part of us which is, in its turn, far from intelligence. And nothing healthy or authentic can emerge from this relationship."[68] Plato's view of representation and resulting charge against aesthetics derives from "mimesis," the Greek word for imitation.

More than two millennia later, Derrida termed this bias in favor of speech "logocentrism," which he explained in terms of "presence." According to Derrida, logocentrism is a "metaphysics of presence" motivated by a desire for a "transcendental signified," or a meaning that transcends all signs.[69] If "presence" is "the essence of the signified," then the proximity of the signifier to the signified

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[68] Plato. "From *Republic, Book X*," in *The Norton Anthology of Theory and Criticism*, ed. Vincent B. Leitch (New York: Norton, 2001), 75-76.

[69] Jacques Derrida, "From *Dissemination*," in *The Norton Anthology of Theory and Criticism*, ed. Vincent B. Leitch (New York: Norton, 2001), 1822-23.

suggests a better ability to express meaning. Whereas a speaker is present at the moment of communication, the author of a written text typically is not. If a reader and writer were present simultaneously, the writer undoubtedly would speak rather than write. In such a logocentric system, writing always is only a mere substitute for speech and thus has been relegated to a secondary status in Western thought.

In *Dissemination* Derrida carries out this long overdue task of exposing what animates the speech/writing binary by carefully and methodically examining the textual moment in the *Phaedrus* where Plato compares writing to a "drug," or "pharmakon," which in Greek can mean either "remedy" or "poison."[70] Derrida's analysis is masterful but complex, and this paper does not attempt to capture it in full. Instead, there are several key points to be made both about the binary's deconstruction and about what that deconstruction could mean for the process of statutory interpretation.

The ambiguity of the word "pharmakon" is crucial; Derrida's rigorous analysis of its multiple meanings, and its usage by Plato both within the *Phaedrus* and in other contexts, enables him to demonstrate the term's inherent instability. Although Plato invokes the word "pharmakon" in the context of a myth that is universally construed as condemning writing in favor of speech, Derrida shows how its meaning "slips" in transmission, even within the text of the *Phaedrus* itself. For Derrida, this slippage is proof that the "essential meaning" of the term cannot be contained within traditional, fixed Platonic categories. By analogy, Derrida argues

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[70] Derrida, "From *Dissemination,*" 1835.

that the allegedly clear-cut distinction between "speech-as-presence" and "writing-as-absence" is not as fixed as Plato would have us believe. Rather, Derrida shows that both speech and writing have elements of presence *and* absence, and that both operate positively *and* negatively on memory.[71] The result is a destabilization of the speech/writing binary opposition.

What is of greater interest to Derrida, however, is how the discourse of logocentrism transforms speech's *de facto* primacy to its primacy *de jure*. In other words, Derrida probes the assumption in Western thought that speech is "better" than writing simply because of its alleged primary relationship to presence. The answer is partially bound up in our tendency to rely on binary oppositions in the first instance. Such binary pairs certainly exist in nature (day/night is a good example) and may even conform to our natural instinct to think antagonistically. The danger, however, is that the practice of defining one of a pair in terms of the absence of the other establishes a *hierarchical* relationship.

While we might not see the harm in defining "night" as "not day," when we examine the binaries of white/black and man/woman, the problem of defining "black" as "not white" or "woman" as "not man" is more readily apparent: the second term in the pair becomes associated with that which is lacking. The result is that within each opposing pair, one term becomes privileged and the other marginalized. What Derrida unearths is that merely by positing the binary structure, we necessarily elevate the former over the latter in a value-laden judgment.

[71] Derrida, "From *Dissemination,*" 1859-60.

Derrida's goal in deconstructing these pairs is to excavate the bases on which the binary is constructed and to expose what is at stake in its preservation. What is perhaps most remarkable about his methodology is that this exposure comes about by his destabilization of *both* terms in the hierarchy. His intent is not simply to reverse the opposition, but to jettison it entirely in favor of the "free-play of meaning" – or an understanding of opposites in an inherently non-hierarchical way. In this way, he suggests that Western thought's elevation of speech over writing is a function not of the relative value of each as compared to the other, but as a subconscious – and potentially illegitimate – consequence of the dichotomy itself.

The close reading in which Derrida engages bears striking similarity to the process that judges encounter when searching for meaning in an ambiguous statutory word or phrase. Ironically, however, his conclusion lends legitimacy to the central tenet in statutory interpretation that the *text* is paramount, and thus to the new textualists' belief that pursing evidence of legislative intent *beyond the evidence that the text provides* is highly problematic.

Although the traditional preference for speech over writing is highly problematic in statutory interpretation, it is noteworthy that the very notion of any distinction between the two is never discussed in the law. Rarely is any mention made of the fact that that spoken and written language is not the same thing. Yet, new textualists find themselves constantly embroiled in debates over what written words "mean" versus what the legislature "intended." Perhaps even without understanding what they are fighting *against*, they place considerable emphasis on

"the law" as the written words actually adopted by the legislature and signed by the chief executive. Indeed, in the new textualists' view, it is precisely because statutory text is produced by an intricate process in which alternative texts are discussed and rejected, one cannot legitimately rely on legislators' statements in the course of the process as proof of meaning. Instead, the sole evidence we have of "the law" is that which is written down. What the new textualists are fighting against is, arguably, the subconscious preference for spoken language and the perception of a marked distinction between the two.

For the new textualists especially, a preliminary reaction to Derrida's conclusion thus might be an instinct to extend it even beyond where Derrida was willing to go. If in the debate over statutory meaning, the written text is indisputably paramount, the speech/writing binary should be *reversed* and the text exalted. This view accords with a common translation of Derrida's famous quote in *Of Grammatology*: "*Il n'y a pas de hors-texte*," often translated as "there is nothing outside the text."[72] In principle, new textualists likely would agree.[73] Indeed, a number of cases employing a new textualist jurisprudence expressly mark the parameters between the words of a statute and "everything outside." And even where the intent of the legislature – the touchstone of statutory interpretation – seems largely at odds with the text, the text retains primacy.

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[72] Leitch, 1817; Jacques Derrida, "From *Of Grammatology*," in *The Norton Anthology of Theory and Criticism*, ed. Vincent B. Leitch (New York: Norton, 2001), 1825.

[73] For new textualists, the phrase would mean something slightly different than it did for Derrida, specifically, that nothing is outside a *particular* text (the statute under investigation). For Derrida, of course, the phrase was directed toward the notion of textuality itself – *i.e.*, what is outside of one text is simply another text.

The Supreme Court's decision in *Griffin v. Oceanic Contractors, Inc.*,[74] illustrates this viewpoint. There, the Court was called upon to interpret a statute requiring ship owners to pay their workers immediately upon discharge or be responsible for "a sum equal to one day's pay for each and every day during which payment is delayed . . . ." At the time of Mr. Griffin's discharge, his employer improperly withheld $412 in back pay. The Court found in Mr. Griffin's favor. Reading the statute literally, they determined that given the years it had taken for the case to be litigated and appealed, Mr. Griffin was owed over $300,000 for the $412 that had been wrongfully withheld.

Justice Rehnquist, writing for the majority, recognized that "[i]t is probably true that Congress did not precisely envision the grossness of the difference in this case between the actual wages withheld and the amount of the award required by the statute." Nevertheless, in the spirit of new textualism, Justice Rehnquist reasoned that:

> Laws enacted with good intention, when put to the test, frequently, and to the surprise of the lawmaker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such cases, the remedy lies with the lawmaking authority . . . . The remedy for any dissatisfaction with the results in particular cases lies with Congress and not with this Court. Congress may amend the statute; we may not.[75]

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74 *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982).

75 *Griffin*, 576.

For the *Griffin* Court, Congress's intent was expressed in, and only in, the words of the statute. Any other inquiry into authorial intent simply had no role in the Court's interpretive process.

On the surface, therefore, it might seem that the Court's conclusion adheres to the above-quoted Derridean principle that "there is nothing outside the text." Derrida's goal, however, was not to *invert* the speech/writing binary, but to *expose* its subconscious implications. The abovementioned translation of Derrida's famous quote only reinforces the kind of polarity that Derrida sought to undo; in fact, it preserves the very opposition between "inside" and "outside" that the statement seeks to dismantle.[76]

The more legitimately Derridean interpretation is one that transcends this distinction between the text and that which is "other" than it. In a Derridean world devoid of binary oppositions, the point is not that nothing of relevance exists outside the text but, rather, that nothing *is* outside the text. In other words, everything of relevance that initially might have pre-existed the text is subsumed within the text itself. The text is its own presence that embodies not only itself but all that is outside it as well. Remarkably, this conclusion seems to be precisely what the new textualists mean when they say, as in *Griffin*, that Congress's intent is *already* embodied in the words of the statute. To the extent that legislative intent is and can be relevant, it is already captured by the statutory language.

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[76] Leitch, 1817.

Griffin also demonstrates the presence of another embedded distinction: authorial intent versus textual meaning. For new textualists, meaning and the author's intent typically are *not* presented as one and the same, and this dichotomy has major implications in statutory interpretation. The debate is often cast in terms of a disagreement over whether and to what extent the *actual* intent of the legislature should play a role in statutory interpretation. In a series of recent articles on statutory interpretation published following a symposium on the topic, a number of scholars tackled this and other questions of meaning construction, such as whether collectivities such as legislatures can have intentions; whether judges can possibly discover them; and whether legislative intent should play a role at all in the process of statutory interpretation.[77]

Certainly, legislative intent has been of paramount importance to scholars that have taken either a purposivist or intentionalist approach to statutory interpretation, a combination of which dominated twentieth century jurisprudence prior to the introduction of new textualism.[78] As Roscoe Pound, Dean of Harvard Law School from 1916-36 described it:

> the object of genuine interpretation is to discover the rule which the lawmaker intended to establish; to discover the intention which the law-maker made the rule, or the sense which he attached to the words wherein the rule is expressed. Its object is to enable

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[77] Cheryl Boudreau, Matthew D. McCubbins, and Daniel B. Rodriguez, "Statutory Interpretation and the Interntional(ist) Stance," *Loyola of Los Angeles Law Review* 38 (2005): 2131, *Westlaw*, Thomson West (28 March 2006).

[78] See Chapter 1.

> others to derive from the language used "the same idea which the author intended to convey."[79]

Yet, the question of intent is often bound up with (and sometimes purposely masked by) the search for statutory "meaning." Thus, as Justice Oliver Wendell Holmes noted over a century ago: we "do not inquire what the legislature meant; we ask only what the statute means."[80]

A finer point regarding meaning and intent is lurking here beneath the surface. Derrida's goal was not only to deconstruct the speech/writing binary simply to deconstruct it, but to show that any word – indeed any linguistic utterance – holds a multiplicity of meanings beyond what many readers realize and, more importantly, *beyond what the author may have intended*. Of course, statutory interpretation cannot rest simply on the recognition of multiple meanings, but it can and should take into account Derrida's observation that writing is simply unable to sustain a univocal meaning. If, as Derrida posits, language and texts are so complex in their relationship that any word is always subject to meanings beyond what the author intended – as may have been the case with "pharmakon" and Plato's followers or perhaps even Plato himself – then the *only legitimate* inquiry should be about the text itself.

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[79] Eskridge and Frickey, 524.

[80] Boudreau, McCubbins, and Rodriguez, 2137 (quoting Oliver Wendell Holmes, "The Theory of Legal Interpretation," *Harvard Law Review* 12 (1899): 417).

IV. Communication as a Joint Activity

Cognitive linguistic theory further helps sort through some of the "mess" of current statutory interpretation by identifying and exploring the underlying patterns of thought involved in meaning construction. As discussed above, ascertaining meaning from any written text is no easy process, and the sheer number of approaches to this interpretive enterprise, both in the law and in other discourses, is evidence alone of the challenge a reader faces when she encounters the words of an author not in her presence and is expected to say what those words mean.

What the literary theories discussed above have in common is a rigid insistence on words "having" meaning in the first instance – whether or not arbitrarily assigned. But, as the wealth of literature analyzing the conduit metaphor suggests, "Meaning, is not something that that words 'have' or that readers "find. . . . Meaning is what emerges when linguistic and cultural understandings and experiences are brought to bear on the text."[81] This notion should be attractive to proponents of contemporary literary theory, including advocates of deconstruction theory, because the focus is not simply on linguistic forms. Instead, cognitive linguistics has shown that language expressions are not determined by some absolute truth and, thus, that meaning is not a consequence of the relationship between a linguistic sign and some external reality.

Practices placing undue reliance on linguistic forms obscure the fact that something more is going on "behind the scenes" of language use. That "something

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[81] Mullins, 21.

more" involves looking behind linguistic forms and language structure to the "deep features of our thinking, cognitive processes, and social communication" that are manifested in — and triggered by — our linguistic expressions.[82] But neither is meaning entirely arbitrary, nor purely a matter of differences between signs in a self-contained system. Instead, "[l]ike postmodern theory, [] cognitive approaches [to meaning construction] recognize that human cognition and the symbolic systems through which it works are neither unified nor primarily rational."[83] In this respect, cognitive linguistic theory further enriches the vocabulary that literary theory offers to lawyers and judges seeking to understand the way in which language produces meaning.

Furthermore, because its focus is on the mind's patterns and their predictability, cognitive theory may be an even more attractive theory for use in legal arenas. Specifically, because cognitive linguistic theory focuses on language as the product of an *embodied mind* – on our experience as individuals living in a body and interacting as such with the physical world – it identifies *constraints* on linguistic meaning and meaning construction that much of contemporary literary theory avoids in its sweeping rejection of objective Truth.[84] In this way, cognitive theory arguably

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[82] Fauconnier, Gilles, "Backstage Cognition," New chapter for the reissue of Fauconnier, G, *Mental Spaces: Aspects of meaning construction in natural language* (New York: Cambridge University Press, 1994). The process of drawing connections and coordinating large arrays of information is an elaborate and complex cognitive process that Fauconnier calls "backstage cognition."

[83] Mary Thomas Crane, *Shakespeare's Brain* (Princeton: Princeton University Press, 2001): 13.

[84] Winter, 2-12.

can "supplement" deconstruction, specifically, by adding "analysis of the patterns that *do emerge* from cognitive processes."[85]

That language may be subject to a multiplicity of meaning therefore is not the same as saying that there are no tools to reign in interpretation. Instead, the constraints that Justice Scalia and adherents to new textualism seek simply may come from elsewhere – not from fictitious boundaries ascribed to language in an attempt to manufacture artificial clarity. Though any theory of an embodied nature of meaning is fundamentally inconsistent with language as a system of differences, as discussed above in Section III, jurists already employ aspects of contradictory theories about meaning production. As this paper suggested at the outset, the solution may not involve unifying the various approaches into one meta-theory – indeed, that would seem an impossible task given the sheer number of approaches already fully engrained in legal theory – but to establish a better repertoire of tools for combating the problems impossible to avoid in the process of construing meaning.

Cognitive theory already has established a foothold in legal circles. Steven Winter, a law professor engaged in "Cognitive Legal Studies," proposes that "a better theory of the mind should facilitate a better understanding of the products of the mind. Law is one of those products and, so, should be amenable to an analysis informed by the tools of cognitive theory."[86] Specifically, cognitive theory provides something like a "map" of the pragmatic knowledge that influences the way we think and make decisions. It thus offers an:

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[85] Crane, 13 (emphasis added).
[86] Winter, xi.

> ability to make explicit the unconscious criteria and cognitive operations that structure and constitute our judgment. It is by laying bare these cognitive structures and their impact on our reasoning that we can best aid legal actors – whether advocates or decision-makers – who wish to understand the law better so that they can act more effectively.[87]

Applying aspects of cognitive theory to statutory interpretation is not a novel proposition. "Pragmatics," a field of study within linguistics that focuses on actual use of language, previously has been applied to the enterprise by a number of well-respected legal scholars.[88] Twenty years ago, law professor M.B.W. Sinclair, explored the application to legal statutes of social conventions analyzed by the philosopher H.P. Grice, which themselves date back to the 1970s. Sinclair's goal was to examine the extent to which Grice's relatively basic and well-established theories of communication apply to legislative speech.

Grice's theories and observations have roots as far back as John Locke and continue to influence the study of language use today. [89] They are not hard-and-fast rules but basic principles to which people engaged in conversation naturally adhere. In fact, they apply to all social and non-social interaction, not just to language. These maxims are, according to Grice, the very elements of rational behavior. Their relevance to the enterprise of statutory construction thus should be readily apparent.

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[87] Winter, xiii.

[88] Sinclair is not alone in his application of speech act theory to legal statutes; a number of other legal scholars have under taken the same project. For example, Geoffrey P. Miller, "Pragmatics and the Maxims of Interpretation," *Wisconsin Law Review* 1990 (1990): 1179-1227, *Westlaw*, Thomson West (9 March 2006), also had the goal of demonstrating that the statutory canons can be understood within Gricean pragmatic theory.

[89] H.P. Grice, "Logic and Conversation," in P. Cole and J. Morgan , eds., *Speech Acts, Syntax and Semantics III* (New York: Academic Press, 1989): 41-58.

After all, legislatures, when composing legal statutes, are initiating communications with an audience, whether that audience is constituents who will be bound by their words or the judges that will be asked to interpret them.

Grice's primary and most general principle is the "cooperative principle." This principle operates on the premise that participants in a conversation act rationally and cooperatively, with the shared goal of making communication successful. Certainly, legislatures are presumed to act rationally and thus according to this principle; indeed, it would be odd if their goal in enacting laws was not to maximize their effort of being understood and followed.

One immediately apparent problem with the application of Grice, though, is his reliance on face-to-face conversation as the prototypical model of communication. Herbert Clark, who builds on Gricean pragmatics by maintaining a focus on language as an intention to communicate, specifically anticipates the charge that his own pragmatic approach to finding meaning in language use does not work as well for written communication. He expressly notes that joint actions require coordination between participants "whether the participants are talking face to face or are writing to each other over vast stretches of time and space."[90] All settings are derivative in one respect or another of that paradigm. Clark also notes: "Writing and reading are no less joint actions for the lack of synchrony. . . . In conversation, speakers and

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[90] Herbert H. Clark, *Using Language* (Cambridge: Cambridge University Press, 1996): 23. Of course, this notion validates the logocentric assumptions of language that Derrida sought to undo.

addresses synchronize the phases of their actions. In asynchronous settings, speakers try to make processing optimal for their addresses."[91]

Perhaps more than providing a plausible justification for the application of pragmatic principles to written text, Clark may help bridge the perceived gap between using language in conversation and using it for legislative ends. As Clark posits, the use of language is not an end in itself but, rather, the vehicle by which broader activities — such as purchasing goods, playing games, and exchanging stories — are carried out. All of these activities are "joint activities" in which two or more people, in socially defined roles, simultaneously perform individual actions and take place in larger coordinated endeavors. In addition, Clark specifically recognizes that, "[i]n some written settings, the words are selected through an institutional procedure. . . . Although one person may have composed the words, it is the institution – [*e.g.,* the] legislature – that is ultimately responsible for approving the wording as faithful to the institution's collective intentions.[92]

As explained above, though judges may try to escape the fact that "meaning is not a property of words or of the categories they signify,"[93] they cannot deny that statutory interpretation is necessarily a two-party process: the legislature writes the laws, and the judiciary must interpret them. The notion of these processes coming together to produce a singular "joint activity" thus is compelling.

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[91] Clark, 90.
[92] Clark, 7. The prior discussion of Gricean pragmatics also supports this view.
[93] Winter, 103.

Certainly, the traditional purposivism and intentionalism approaches recognize that it is the judge (the reader) who must interpret the text, but they require her to do so first by uncovering and then by animating the purpose and intent of the legislature (the author). Under these interpretive models, "textual meaning and authorial intent are not separable concepts: the text has no autonomous significance" beyond the author's intent.[94] These approaches thus fit neatly within Clark's notion that language use always involves *both* a speaker's meaning and an addressee's understanding. And, they comport with the principle that meaning is a two-party enterprise that involves coordination between the lawmaker that makes the rules and the judge whose job it is to discover the meaning the lawmaker intended to convey.

Equally persuasive is Clark's view of successful communication as something greater than the sum of a speaker speaking and a listener listening — it is the joint action that emerges when they perform those acts in coordination — much like a piano duet performed by two people each playing different parts.[95] Both participants need to perform individually *and* together for the work of communication to be successful.[96]

This notion brings us back to the Gricean principle of cooperation. In addition to the cooperative principle, Grice posits several specific maxims applicable to conversation. A specific example of how these maxims operate, and their relevance to legislative speech, is illuminating. Grice's first specific maxim is the "quantity"

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[94] Eskridge and Frickey, 524.
[95] Clark, 22-23.
[96] Clark, 30-35.

maxim. According to the principle of quantity, contributions to a conversation should be only as informative as required, no more, no less. Here, the assumption is that people in conversation will say enough to be understood and to further the conversation, but not so much as to provide superfluous information.[97]

The "quantity" maxim presumes that the words a speaker chooses to utter are intended to "say something," and also that, if a particular piece of information is important to the conversation, the speaker would utter that, too. For example, if a speaker sees a car crash at an intersection and reports to a listener that he has just seen a "big crash with three cars," the listener will assume that the crash involved only three cars. If, in fact, the crash also involved a tanker-truck, a motorcycle, and a Greyhound bus, then the speaker violated the maxim of quantity.[98]

As applied to legislative utterances, Grice's maxims justify the common practice, even among new textualists, of relying on well-established textual or grammatical "canons" of statutory interpretation. The canons are accepted conventions that have been developed over time in the case law for reading legal texts. The most accepted conventions are known as "textual canons" of statutory interpretation, which make certain assumptions of meaning derived from the text itself. For example, "*expressio unius est exclusio alterius*" is a textual canon providing that the legislature's express identification of certain things in a statute must be read to exclude other like things not enumerated. According to this canon, a statute expressly prohibiting "concealed guns and knives" should be read to exclude

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[97] Sinclair, 377-80.
[98] Sinclair, 378.

other potential weapons, such as hand grenades or axes. The logic is that if the legislature had the more general category of "dangerous weapons" on its mind, it must have considered its options and would not have specified some weapons on the prohibited at the exclusion of others unless it meant to.

The "*expressio unius*" canon really amounts to a restatement of Grice's maxim of quantity. For example, if a statute provides that "no one under eighteen may operate a motor vehicle on a public street," the *expressio unius* principle suggests that a person under eighteen remains free to operate a tractor in a farmer's field.[99] Because the legislature specifically included "public street," we can infer that it meant to exclude "farmer's field." As in the example above of the car crash, if the legislature also meant to include farms in the scope of the prohibition but articulated only public streets, it would have violated the maxim of quantity.

The quantity maxim also gives rise to the presumption that each enacted provision of a statute is meaningful. If a particular provision seems repetitive, the quantity maxim suggests that, rather than assume the legislature said the same thing two different ways, one should try to find separate meaning in the seemingly repetitive provision. In other words, one should not presume that the legislature simply made a gratuitous utterance.[100] Exactly this presumption underlies the textual canon that "every word in a statute should be given meaning."[101]

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[99] Miller, 1196.
[100] Sinclair, 394.
[101] See *Williams v. Taylor*, 529 U.S. 362 (2000).

Grice's theory also offers assistance to new textualist judges seeking to employ the concept of "ordinary meaning." From Grice's "cooperative principle" comes his theory of "implicature." Implicatures are inferences generated from the assumption that a speaker is adhering to the cooperative principle and related maxims and intends his words to be interpreted in an ordinary sense. However, we can infer more about the semantic content of expressed words simply by the fact that the speaker chose certain words, and not others, at a particular juncture in the conversation.[102]

The discussion in *Smith v. United States*, one of the trilogy of cases that required the Supreme Court to interpret the "uses or carries a firearm" provision discussed above in connection with *Muscarello and Bailey,* highlights the potential use of Grice's theory of implicature. In *Smith,* the defendant "used" a firearm by trading it to the seller as partial payment for drugs.[103] The Court held that the enhanced sentencing provision applied, even though the defendant did not "use" the firearm as a weapon. According to the Court, he nevertheless "used" it as an article of barter. In dissent, Justice Scalia compared the situation to "using" a cane, saying that "to use an instrumentality ordinarily means to use it for its intended purpose" – *i.e.*, for walking.

However, if A tells B that he "used" a cane, is it necessarily obvious that A meant "used" for walking? What if B asked how A broke the window, and A

[102] Sinclair, 380-81.
[103] *Smith v. United States*, 508 U.S. 223 (1993).

responded, “I used a cane?”[104] Grice’s theory of implicature supports the presumption that A was not simply attempting to derail the conversation by suddenly announcing to B that he walks with a cane. Instead, we should assume that his answer intended to further the conversation. As a result, we understand the utterance “I used a cane” to mean that A broke the window with the cane – not the primary purpose for using a cane, but an “ordinary” one nonetheless. Such a discussion would preserve a focus on ordinary meaning; however, in this example, the process of finding “meaning” in statutory text is tied more to the “performance” of legislative pronouncements as speech acts than to “the abstract linguistic tokens found in dictionaries.”[105]

These theories provide a vocabulary to explain the use of traditional canons of statutory interpretation based on real principles of conversation, as opposed to malleable tools of persuasion invoked in hindsight by judges to support a predetermined conclusion. In addition, they can highlight more precisely the specific point about which there is disagreement or on which the court must render a conclusion. As a result, principles *already in use* by judges interpreting statutory language are rendered more reliable and legitimate:

> More importantly, in those cases in which this theory of pragmatics can determine the applicability of a rule or canon of construction, the determination will be on grounds independent of the choice of outcome. It is thus more likely to produce a result in accord with the

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[104] Marmor, 2073.
[105] Sinclair, 420.

> legislature's design than with the predilections of the judge, should those two not coincide.[106]

Their relevance, moreover, like all of the theories discussed here in lies not in their ability to solve the problems inherent in statutory interpretation by making the process more mechanical, but in their ability to make conscious the mental processes already at play in an endeavor that requires "some of the most complex mental processing that ordinary human beings are called upon to perform."[107]

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106 Sinclair, 409-10.

107 Mullins, 4. Mullins likewise recognizes that "[s]tatutory interpretation is a process of the mind, not the application of a yardstick," and that cognitive linguistic theory can help reveal how our minds work when confronted with the complexities of processing written statutory words and explaining their application to real cases.

Conclusion

Amidst the contradictions and assumptions embedded in the prevailing statutory interpretive practices, one thing is certain: the need for rational and self-conscious constraints. Without them, the fear is that "judges and other legal actors will be free to impose their personal values or political preferences."[108] If modern jurisprudence and the specific cases discussed herein teach us anything, however, it is that these sought-after constraints can be very difficult to locate and, once located, even tougher to apply.

Current practices for interpreting statutory text are quick to ignore the complexities attendant to the process of ascertaining meaning and instead focus considerable attention on its product – on the conclusions one can reach, in some cases, seemingly by the will to divine essential meaning. Observations and lessons from other disciplines that have studied similar interpretive issues receive little attention, and momentous conclusions are reached on the basis of dictionary entries and erroneous assumptions about the way language operates. Though the tacit assumptions underlying even the most extreme textualist approach to statutory construction suggest that "meaning" can be difficult to grasp, current methods seem largely unwilling to pursue a deeper understanding of the assumptions that the quest inevitably entails.

Insofar as transparency is valued above all else in judicial decision-making, it makes little sense for judges and the broader legal community to continue to ignore

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[108] Winter, 7.

the fact that insights from non-legal disciplines that have long grappled with the problem of meaning making are not only relevant to the exercise of statutory interpretation, but they necessarily lie at its heart.

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