Journal of Legislation

Volume 30 | Issue 1 Article 1

1-1-2004

Tools, Not Rules: The Heuristic Nature of Statutory Interpretation

Morell E. Mullins

ARTICLES

TOOLS, NOT RULES: THE HEURISTIC NATURE OF STATUTORY INTERPRETATION

Morell E. Mullins, Sr.[*]

* Professor of Law, The University of Arkansas at Little Rock, William H. Bowen School of Law. Research for this article was supported in part by a summer research grant from the law school. Special thanks are due to my wife Barbara for her professional editing of earlier drafts, to Professors Mark Drumbl, Theresa M. Beiner, Kenneth S. Gallant, and Rodney K. Smith for their encouraging comments, to Robert J. Hines, Ph.D., the UALR Department of Psychology, for reviewing a penultimate draft in light of his cognitive psychology expertise, and to my student research assistants, Kami Wallace and Tracey Rothermel.

I. INTRODUCTION

Around the middle of the 20th century, Professors Henry Hart and Albert Sacks published an influential "tentative edition" of teaching materials, which declared: "The hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation."[1]

Early in the twenty-first century, it is fashionable to accept those words as gospel. At least they are widely quoted and largely unchallenged.[2] Justice Scalia apparently agrees with them.[3] Academic commentators sometimes expressly concur.[4] Moreover, the continuing cascade of statutory interpretation theories over the past twenty years[5] suggests that no one has yet discerned any coherent theory or theories underlying statutory interpretation cases.[6] The Hart-Sacks dictum continues to support a notion that the American judiciary has ad-libbed for generations on a very important area of judicial

---

1. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 1201 (tentative ed. 1958), *reprinted in* HENRY M. HART, JR. AND ALBERT M. SACKS, THE LEGAL PROCESS 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds. 1994).

2. Among the articles more or less uncritically reciting the Hart and Sacks passage quoted in the text above, are: Rev. Robert John Araujo, *Method in Interpretation: Practical Wisdom and the Search for Meaning in Public Texts*, 68 MISS. L.J. 225, 226 n.5 (1998); Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV.16, 65 n.188 (2002); Patrick McKinley Brennan, *Realizing the Rule of Law in the Human Subject*, 43 B.C. L. REV 227, 302 n.266 (2002); Leigh M. Chiles, Case Note, *Summers v. Baptist Medical Center Arkadelphia: A "Disparate" Application of EMTALA's Terms*, 50 ARK. L. REV. 559, 583 (1997); Maura A. Flood, *"Kennewick Man" or "Ancient One"—A Matter of Interpretation*, 63 MONT. L. REV. 39, 65 (2002); Carlos E. Gonzales, *Reinterpreting Statutory Interpretation*, 74 N.C. L. REV. 585, 588 (1996); John C. Grabow, *Congressional Silence and the Search for Legislative Intent: A Venture into 'Speculative Unrealities,"* 64 B.U. L. REV. 737, 765 n.153 (1984); Theodore W. Jones, *Textualism and Legal Process Theory: Alternative Approaches to Statutory Interpretation*, 26 J. LEGIS. 45, 45 n.1 (2000); Clark Kelso & Charles D. Kelso, *Statutory Interpretation: Four Theories in Disarray*, 53 S.M.U. L. REV. 81, 81 (2000); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2086 (2002) (contending apparently that Congress should statutorily dictate a set of rules for interpretation); M.B.W. Sinclair, Review Essay, *Legislative Intent: Fact or Fabrication?* 41 N.Y.L. SCH. L. REV. 1329, 1346 (1997) (reviewing WILLIAM N. ESKRIDGE , DYNAMIC STATUTORY INTERPRETATION (1994)) [hereinafter Sinclair, *Legislative Intent*]; M.B.W. Sinclair, *Statutory Reasoning*, 46 DRAKE L. REV. 299, 314 (1997) [hereinafter Sinclair, *Statutory Reasoning*]; Leonard O. Townsend, Note, *Hey You, Get Off [of] My Cloud: An Analysis of Citizen Suit Preclusions Under the Clean Water Act*, 11 FORDHAM ENVTL. LAW J. 75, 119 (1999).

3. ANTONIN SCALIA, A MATTER OF INTERPRETATION 14 (1997).

4. "[S]tatutory interpretation remains as complex, convoluted, and in need of clarification today as when Professors Hart and Sacks wrote in the fifties, if not more so." Gonzales, *supra* note 2, at 588. *See also* Kelso & Kelso, *supra* note 2, at 81 ("It is just so."); Flood, *supra* note 2, at 65 ("[I]n the year 2002, there remains no better way to describe the current state of affairs with regard to statutory interpretation than to borrow the very same words used by Hart and Sacks forty-four years ago.").

5. For an article containing an invaluable bibliography of articles published between 1988-1997, see Gregory Scott Crespi, *The Influence of a Decade of Statutory Interpretation Scholarship on Judicial Rulings: An Empirical Analysis*, 53 SMU L. Rev. 9 (2000) (part of an important symposium on statutory interpretation). *See also*, Araujo, *supra* note 2, at 226-27 ("[W]e have become awash in theories and meta-theories . . . .").

6. *See* Kelso & Kelso, *supra* note 2, at 81.

responsibility, and it continues to reinforce the conventional wisdom that statutory interpretation is a mess.[7]

At the risk of being subversive, however, this article will maintain (and try to do so in ordinary English) that the conventional wisdom is flawed. Considering the complexities involved in applying statutes to live cases,[8] overall courts have done fairly well. They may not have a "theory" in the sense of a simplistic template that can be mechanically applied to reach "determinate results."[9] However, they do have a familiar framework for analysis and a stable set of concepts and tools that they use in explaining their statutory interpretation decisions.[10] These concepts and tools are pervasive, and they are remarkably durable. Courts have been using them for more than 200 years. The "hard

---

7. "At first glance, there appears to be nothing but a hodge-podge of ways to discover or resolve ambiguity in order to find legislative 'intent.'" *Id.* at 81. For examples of other remarks, see Roger Colinvaux, Note, *What Is Law? A Search for Legal Meaning and Good Judging Under a Textualist Lens*, 72 IND. L.J. 1133, 1154 (1997) ("[F]or deciding cases, the methods of statutory interpretation are a mess."); Jones, *supra* note 2, at 45 ("Although it has repeatedly been called upon to interpret federal statutes, the Supreme Court of the United States has not done so in a consistent fashion."); Maxwell O. Chibundu, *Structure and Structuralism in the Interpretation of Statutes*, 62 U. CIN. L. REV. 1439, 1543 (1994) (referring to "the incoherence of contemporary statutory interpretation").

8. *See infra* Part III.

9. "Determinate results" seems to be a fashionable academic phrase used to connote predictability, for lack of a better word. A search on February 1, 2003, of the law review data base for "determinate results" yielded 182 results, so the phrase certainly is used rather frequently. However, at least one writer, other than the writer of the present article, has expressed some uncertainty about the meaning of "determinate" when used in legal literature: "In any event, I do not understand what a more determinate standard of review means. Do Shapiro and Levy believe that any five judges approaching the same problem will come out with the same 'determinate' result?" Marshall J. Breger, *Indeterminacy and Craft in Judicial Review of Administrative Law: A Comment on Shapiro and Levy*, 45 CATH. U.L. REV. 109, 114 (1995).

When we look at the standard definitions of "determinate" we find: "having defined limits," "not uncertain," "definite," "fixed by rule or by some definite and constant cause," "invariable," "definitely settled," "determined by coming to a conclusion . . . ." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 616 (1986). If a theory of statutory interpretation must have "determinate results," in the sense of predictable or fixed results, then any theory which truly yielded "determinate results" would render judges obsolete. We could just apply the theory and let the "determinate results" emerge.

Nevertheless, "determinate results" seems to be a favorite phrase of some writers who criticize other theories of statutory interpretation because they do not yield "determinate results." *See, e.g.* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 325 (1990) [hereinafter Eskridge & Frickey, *Practical Reasoning*]. "A *grand theory* loses much of its raison d'etre, we argue, if it cannot reliably assure determinate results." *See id.* (emphasis added); *see also* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 14 (1994) [hereinafter ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION] (criticizing various theories of statutory interpretation [which compete with his own] as not yielding determinate results, and stating, "None of the methodologies yields determinate results. Consequently, none fully constrains statutory interpreters . . . ."). In response to such statements, Professor Sinclair has asserted that it requires too much of statutory interpretation theories, and is downright fallacious, to demand "determinate results" in disputable cases. *See* Sinclair, *Legislative Intent*, *supra* note 2, at 1345-58.

10. Although there arguably is a difference between "statutory interpretation" and "statutory construction," the term "statutory interpretation" generally will be used throughout this article to denote the process of applying statutory language to live cases. In this respect, I gladly follow the lead of two eminent authorities: REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 19 (1975) (referring to the distinction between "interpretation" and "construction" as being "now generally disregarded"); and Frederick J. deSloovere, *Preliminary Questions in Statutory Interpretation*, 9 N.Y.U. L.Q. R. 411 (1932) (saying that "For all practical purposes, they may be regarded as synonymous terms") (footnote and citation omitted). For a discussion of the arguable differences, see *id.* at 407-11.

truth of the matter" may well be something different from the conventional wisdom of Hart & Sacks.

Part II.A of this article briefly discusses the following: (1) the prevalent, pervasive framework for analysis that American courts commonly use in statutory interpretation cases; (2) the traditional concepts and tools of statutory interpretation that are used within this framework; and (3) the durability (for more than 200 years) of these concepts and tools. Then, in somewhat of a detour, Part II.B reviews a few academic theories of statutory interpretation that are particularly relevant to this article.

Part III examines, in light of information from cognitive psychology (and common sense), a few of the complexities involved in reading and applying statutory language. Statutory interpretation requires some of the most complex mental processing that ordinary human beings are called upon to perform. Moreover, much of that mental processing is unconscious. Research from cognitive psychology suggests that the traditional concepts and tools of statutory interpretation are reflections, tempered by collective judicial experience, of how our minds work when confronted with the complexities (and uncertainties) of processing written statutory words and explaining the application of those abstract written words to real cases. The concepts and tools of statutory interpretation are not the mechanical product of some kind of positivistic, intellectual assembly line. Statutory interpretation is a process of the mind, not the application of a yardstick.

Part IV, using a term from modern cognitive psychology and related disciplines, contends that the traditional concepts and tools of statutory interpretation are "heuristics,"[11] or at least heuristic in nature.[12] Most definitely, they are not "rules," in the sense of common law substantive rules having the force of law. Rather, they are deeply rooted ways of explaining how we cope with the complexities of inferring meaning from written words, and it is very dangerous to drift (or be pushed) toward a formalism that treats them as substantive "rules."[13]

Part V emphasizes the benefits of realizing that traditional concepts and tools of statutory interpretation are heuristics, or heuristic in nature. Once we understand the heuristic nature of these concepts and tools, we have a powerful explanatory framework for what American courts have been doing for more than 200 years. Furthermore, once we understand the heuristic nature of these concepts and tools, a lot of confusion about "plain meaning," "textualism," "legislative intent," and other aspects of statutory interpretation can be reduced. Moreover, once we understand the heuristic nature of statutory interpretation, it may be more difficult to criticize courts for the lack of an academically satisfying "theory." It may no longer be so easy to imply that the messiness of statutory interpretation cases is entirely the fault of an inept, or a "willful, law-bending,"[14] judici-

11. For purpose of this article, the term "heuristics" is used as rough rules of thumb, mental short-cuts, or simplifying devices of the mind for coping with complexity and the need to make decisions under conditions of uncertainty.

12. *See infra* Part IV.A-B.

13. *See infra* Parts V.B.6, V.B.8, VI.

14. SCALIA, *supra* note 3, at 26 (discussing "canons" of statutory interpretation and contending, with

ary. With a better understanding of the nature of the concepts and tools of statutory interpretation, we can begin to study more effectively the enterprise of statutory interpretation.

II. STATUTORY INTERPRETATION: THE THEORISTS AND THE JUDICIARY

A. What the Courts Say, and Have Said

1. Inevitable Micro-Level Inconsistencies and Broader Consistencies

At the micro-level of individual cases, we cannot expect, much less demand, consistency of each case with every other case. Courts decide a staggering number of cases involving statutes. Statutes involve every conceivable subject. The sheer number of written opinions and the diversity of subjects guarantee that there will be some degree of inconsistency (both real and arguable) among those opinions.

However, when we broaden our perspective—looking at the concepts and tools that courts use in explaining their decisions—the picture is different.[15] There is a surprising degree of overall consistency in the concepts, tools, and techniques that courts use in explaining their decisions. Variations in the details are still abundant, but these variations are variations on a finite range of themes. Basically, there is a two-step framework.[16]

a. First Step (and Two Variants of the First Step): Look at the Text

Courts almost universally begin their explanation of reasons for their decisions in statutory interpretation cases with the statutory text at issue.[17] There are two main judi-

---

literal but misleading accuracy, that canons do not include "every vapid statement that has ever been made by a willful, law-bending judge").

15. At least one academic theorist has admitted that, at a high level of abstraction, statutory interpretation is very stable, a point which is being made in the text of the present article. However, he argues that a high level of abstraction "is too airy to be interesting" [to academics, one supposes] and that, at a detailed level, statutory interpretation "fluctuates rather dramatically over short periods." Adrian Vermeule, *The Cycles of Statutory Interpretation*, 68 U. CHI. L. REV. 149, 149 (2001) [hereinafter Vermeule, *Cycles of Statutory Interpretation*]. The present article has no real quarrel with contentions that, when examined at a micro-level of "detail," statutory interpretation, like almost any phenomenon, will seem to be unstable—even fluctuating wildly. In fact, like many subjects, statutory interpretation when examined at a micro-level will seem more incoherent than it really is. In this regard, statutory interpretation can be compared to a newspaper photograph. When observed in extreme detail, through a magnifying lens, the photograph is nothing but a blur, and we fail to see the picture. It is all too easy for academics to use the technique of "zooming in" to point out the blurred details and "incoherence" of a particular judicial subject, and then "zooming out" to justify their own theories, or to criticize other approaches as "too airy to be interesting."

16. This "two-step" approach actually is a matter of two basic heuristics of statutory interpretation. *See infra* Part IV.B.2-4.

17. *See, e.g.*, Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 739 (1989) ("The starting point for our interpretation of a statute is always its language."). For additional examples of cases using exactly the same words, see Pipiles v. Credit Bureau of Lockport, Inc., 886 F.2d 22, 26 (2d Cir. 1989) and Yates Dev., Inc. v. Old Kings Interchange, Inc., 256 F.3d 1285, 1288 (11th Cir. 2001). "It is a truism that statutory inter-

cial variants of this textual foundation. First, according to one highly questionable but currently fashionable variant of the judicial descriptions,[18] the process may end (supposedly) at that point. If the relevant statutory text is deemed to be clear and unambiguous (a.k.a. has a "plain meaning"), then the court simply "applies" that statutory text[19]—unless there is some ill-defined exception, such as "absurd results,"[20] or "clearly expressed legislative intent to the contrary."[21]

This variant has numerous flaws.[22] However, we are concerned at this juncture only with describing the general judicial framework as the courts themselves describe it. The

---

pretation begins with the plain meaning of the statute's language." Seal 1 v. Seal A, 255 F.3d 1154, 1160 (9th Cir. 2001).

This first step has a long pedigree. According to one writer, "Grotius and Pufendorf down through Blackstone and Marshall all agree that interpreters must first consult the text, and enforce the 'plain meaning' (i.e., the 'natural sense' or 'ordinary meaning' in the sense of consensual and normative meaning) if this is available." Robert Lowry Clinton, *Classical Legal Naturalism and the Politics of John Marshall's Constitutional Jurisprudence*, 33 J. MARSHALL L. REV. 935, 949 (2000). Two early cases that used "plain meaning" in a statutory context are: Baileu & Bogert v. Ogden & Ogden, 3 Johns. 399, 421 (N.Y. Sup. Ct. 1808) ("[O]ur leaning should be towards the plain meaning of the statute. The circumstances which are to be tantamount to an actual delivery should be very strong and unequivocal, so as to take away all doubt as to the intent and understanding of the parties."); and Parker & Gantz v. Ogden, 2 N.J.L. 136, 140 (N.J. 1806) ("The plain meaning and intention of the statute is, that no man shall be deprived of his liberty in a civil suit, until affidavit be made of the cause of action, and that affidavit filed.").

18. *See infra* note 29 and accompanying text; *supra* Parts II.B.2, V.B.2-4.

19. *See, e.g.*, Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997) ("Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and *the statutory scheme is coherent and consistent.*") (citation and quotation marks omitted) (emphasis added); Snukal v. Flightways Mfg., Inc., 3 P.3d 286, 304 (Cal. 2000) ("Ordinarily, if the statutory language is clear and unambiguous, there is no need for judicial construction."); Holly v. Auld, 450 So.2d 217, 219 (Fla. 1984) ("[W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.") (citation omitted).

20. For a general discussion of the "absurd results" concept, see Veronica Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 AM. U.L. REV. 127 (1994). "The term absurd represents a collection of values, best understood when grouped under the headings of reasonableness, rationality, and common sense." *Id.* at 133.

21. "In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of *'a clearly expressed legislative intent to the contrary*, that language must ordinarily be regarded as conclusive.'" Reves v. Ernst & Young, 507 U.S. 170, 177 (1993) (emphasis added) (quoting United States v. Turkette, 452 U.S. 576, 580 (1981)). For another recent "exception," see *Robinson*, 519 U.S. at 340 ("Our inquiry must cease if the statutory language is *unambiguous and the statutory scheme is coherent and consistent.*") (emphasis added).

22. For purposes of the present article, a few flaws of "plain meaning" are worth noting here. To begin with, the "plain meaning" "rule" does not explain how to discern whether or not the relevant language has a "plain meaning," which is a serious defect in the shibboleth. One writer has expressed it this way: "The problem is that the meaning of plain meaning is itself not plain. As the Supreme Court has observed, '"There is no errorless test for identifying or recognizing plain or unambiguous language."' George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321, 356-57 (1995) (quoting *Turkette*, 452 U.S. at 580) (footnotes omitted).

This variant also fails to acknowledge that the actual process of attributing "meaning" to statutory words involves complex, and often unconscious, mental processing. As one authority on statutory interpretation has noted, "The interpretive process is almost certainly, as Judge Posner suggests, one of moving back and forth between words and other indicia of meaning without preconceived notions about whether the words are clear." William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 543, 596 (1988) (citing Richard Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983)).

problems with this particular variant of "plain meaning" will be addressed later in this article.[23]

The second main variant rejects any notion that statutory meaning must be attributed on the basis of naked text alone. This variant, which seems to intuit the human fallibility of relying on our own preconceptions about "meaning,"[24] is most clearly reflected in a position to which the United States Supreme Court expressly adhered for at least forty years: "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'"[25] A number of state courts follow or echo this position,[26] although some U.S. Supreme Court Justices today seem to ignore it deliberately.[27]

Moreover, this variant is misleading. It implies a process in which a court reaches a conclusion about "meaning" and then stops its analysis. A judicial opinion, however, does not necessarily reflect the actual process by which a court arrived at a "meaning." The judicial opinion is "a reasoned justification of the decision prepared after the decision is made. The principal purpose of the opinion is to make the decision appear consistent with the facts and the relevant statutory and judicial authority." Robert J. Martineau, *Craft and Technique, Not Canons and Grand Theories: A Neo-Realist View of Statutory Construction*, 62 GEO. WASH. L. REV. 1, 27 (1993).

23. As implied later in this article, the heuristic nature of statutory interpretation and the unconscious nature of mental processing of language help explain the tendency of courts to cling to the shibboleth that statutory interpretation should cease, "if the meaning is clear and unambiguous." *See infra* Parts III.A, V.B.2-4.

24. *See infra* Part III.F-G.

25. United States v. Am. Trucking Ass'ns., 310 U.S. 534, 543-44 (1940) (footnotes and citations omitted). Actually, this variant had been recognized for more than 40 years. Prior to the *American Trucking* case, Justice Holmes had written for the Court, "It is said that when the meaning of language is plain, we do not resort to evidence to raise doubts. That is rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists." Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 48 (1928). For a good discussion, see Arthur W. Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299 (1975).

Some contemporary academics refer to this interpretive position as "soft" plain meaning. *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 626-30 (1990) [hereinafter Eskridge, *New Textualism*] (describing the Court's traditional approach as the "soft plain meaning" rule, under which literal text could be trumped by strong indications of a different meaning, even indications found in legislative history). Other writers have also used this terminology, albeit in a context limited to the consideration of legislative history. "[I]t was always possible that statutory language, no matter how plain, could be interpreted differently if its apparently plain meaning was contradicted by legislative history. This 'soft plain-meaning rule' followed from the Court's intentionalist approach to statutory interpretation." Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1026 (1998).

26. *See, e.g.*, State v. Golino, 518 A.2d 57, 60 (Conn.1986); Four Star Ins. Agency, Inc. v. Hawaiian Elec. Indus., Inc., 974 P.2d 1017, 1021 (Haw. 1997) (pointing out that rigidly adhering to literal text could render it impossible to determine, among other things, whether there is an absurd result); Wegener v. Comm'r of Revenue, 505 N.W.2d 612, 615 (Minn. 1993); Riley v. County of Broome, 742 N.E.2d 98, 102 (N.Y. 2000). Many state and federal court opinions use the same basic language. For example, a search of all federal and state cases on March 7, 2003, for pertinent language from the Supreme Court opinion disclosed 213 cases. More opinions probably use the same concept but not the same words.

One of the most interesting developments and variations at the state court level is found in Alaska, which has "rejected a mechanical application of the plain meaning rule in matters of statutory interpretation, and . . . adopted a sliding scale approach instead." State v. Alex, 646 P.2d 203, 208-09 n.4 (Alaska 1982) (citing State Dep't of Nat. Resources v. City of Haines, 627 P.2d 1047, 1049 n.6 (Alaska 1981)).

27. The *American Trucking* line of cases seems to have been simply ignored by members of the Supreme Court today. It appears that the last time a Supreme Court majority opinion cited *American Trucking* for the

The differences between these two main variants[28] are not particularly important. The first variant sounds more absolute, literally barring any further consideration of "meaning" if the meaning seems to be "plain." Even on its own terms, however, the first variant recognizes blurry, easily manipulable exceptions, such as "absurd results" and the overriding force of legislative "intent" or "purpose."[29] The second variant rejects an absolutely preclusive concept of "plain meaning" and therefore does not need any expressed exceptions. The crucial similarity is that both put initial emphasis on statutory text, suggesting a fundamental consistency among the courts.

b. Second Step: If It is Not Clear and Unambiguous

If the statutory text is *not* deemed to be clear and unambiguous, or is deemed to lack "plain meaning," then a court must go further. Many courts have described this aspect of statutory interpretation in terms of discerning or finding the "legislative intention" or "intent."[30] The terminology of "intent[ion]" has a venerable ancestry. It was used in the era of Chief Justice John Marshall,[31] and the basic concept is found in Blackstone.[32] Unfortunately, the subjective connotations of the words "intent" and "intention" have

---

proposition that there is no "rule" regarding adherence to the "plain meaning" of statutory language was in 1989. *See* Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 455 (1989).

28. There are, of course, other variants on the theme of "text" in statutory interpretation. An interesting modern case recognizes that text and extra-textual considerations cannot be separated all that neatly:

> In interpreting and determining legislative intent, we must look to the plain language of the enactment, while keeping in mind its overall purpose and aim. Only when both of these tasks are done *concurrently* do we obtain an accurate interpretation of the statute . . . . Moreover, the statute should be examined in its entirety and not just as isolated, independent sections.

Waters v. Pleasant Manor Nursing Home, 760 A.2d 663, 675 (Md. 2000) (citations and quotation marks omitted). Likewise, Justice Scalia has told us that "Statutory construction . . . is a holistic endeavor." United Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs. Ltd., 484 U.S. 365, 371 (1988).

Sometimes a court totally conflates "plain meaning" with the "legislative intention" aspect of statutory interpretation:

> Our analysis commences with the premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. Our first step [in determining legislative intent] is to scrutinize the actual words of the statute, giving them a plain and commonsense meaning. In analyzing statutory language, we seek to give meaning to every word and phrase in the statute to accomplish a result consistent with the legislative purpose . . . .

Snukal v. Flightways Mfg., Inc., 3 P.3d 286, 304 (Cal. 2000) (citations and quotation marks omitted). But even in such cases, the central role of statutory language is a fundamental constant.

29. *See supra* Parts II.A.1.b, II.B.2, V.B.2-4.

30. *See, e.g.*, Tabb v. State, 297 S.E. 2d 227, 230 (Ga. 1982) ("But where, as here, the words of the statute are inherently ambiguous, our task is to 'look diligently for the intent of the General Assembly.'") (citations omitted).

31. *See, e.g.*, United States v. Potts, 9 U.S. (5 Cranch) 284, 287 (1809) ("T]he copper in question cannot be deemed manufactured copper within the intention of the legislature."); Scott v. Lloyd, 34 U.S. 418, 446 (1835) ("[I]t was not the intention of the legislature to interfere with individuals in their ordinary transactions of buying and selling . . . .").

32. At least Professor Manning tells us that, "[T]he practice of determining—or ascribing—legislative intent is so traditional that it is recorded matter-of-factly in Blackstone's Commentaries." John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 677-78 (1997). *See also*, SCALIA, *supra* note 3, at 16 (conceding that "intent of the legislature . . . goes at least as far back as Blackstone").

created considerable confusion and academic consternation.[33] A conglomerate legislative entity does not have an "intention" in the same sense that an individual has a subjective intention.[34] In order to avoid semantic confusion, this article will remain purely descriptive. Simply put, there are two basic variants in the judicial description of the second step of the conventional and traditional judicial framework. One variant uses the words, "intent" or "intentions." For example,

> In determining legislative intent, we look first to the plain and ordinary meaning of the statute . . . . However, if a statute is ambiguous because it is 'reasonably susceptible to more than one meaning,' we may consider *among other factors* the object the legislature sought to obtain by its enactment, the circumstances under which it was adopted, the legislative history of the statute, and the legislative declaration or purpose.[35]

The other variant may, with or without using the word "intent(ion)," say something on the order of, "Because some ambiguity exists, the court may examine *a variety of factors* including the language used, the context, the subject matter, the effects and consequences, and the spirit and purpose of the law."[36]

The key to understanding "legislative intent[ion]" is understanding that these variants have the underlined words in each quoted passage—"variety of factors" and "other factors" in common. These "factors" are a wide assortment of concepts and tools variously labeled maxims, precepts, principles, canons, etc.[37] They are shorthand for what the courts say they will consider if they admit that the statutory language at issue is not plain, clear, or unambiguous. They are wild cards, to borrow a poker metaphor.

---

33. *See infra* Part II.B.2.

34. *See infra* Parts II.B.2, V.B.4.

35. Park County Sportsmen's Ranch, LLP v. Bargas, 986 P.2d 262, 268 (Colo. 1999) (emphasis added) (citations and quotation marks omitted); *see also* Calvert v. Farmers Ins. Co., 697 P.2d 684, 687 (Ariz. 1985) ("In determining the Legislature's intent in enacting a statute, this Court will look to the policy behind the statute and the evil which it was designed to remedy. Additionally, we will look to the words, context, subject matter, and effects and consequences of the statute.") (citations omitted).

36. State v. Reynolds, 823 P.2d 681, 681 (Ariz. 1992) (emphasis added).

37. For purposes of this article, I label these factors "concepts and tools."

Unfortunately, there are a significant number of such wild cards.[38] The profusion of "other factors" contributes too much of the messiness in statutory interpretation. In fact, on the surface, these numerous "other factors" and wild cards give the impression of judicial incoherence. However, there actually are a finite number of fairly standardized concepts and tools. Courts are not making them up as they go along.[39] These concepts and tools are stable enough for a census to be taken, and various writers catalogue them.[40] Referring to them loosely as "canons," one leading theorist has remarked that

---

38. For more examples, in addition to those in the text accompanying *supra* notes 35-37, see the following: Gade v. National Solid Wastes Mgmt Ass'n, 505 U.S. 88, 99 (1992) ("'We must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law.'") (citation omitted) (utilizing the "whole statute" concept); Shump v. First Continental-Robinwood Assocs., 741 N.E.2d 232, 237 (Ohio Ct. App. 2000) ("There is a presumption that every word in the statute is designed to have legal effect, and every part of the statute must be regarded where practicable so as to give effect to every part of it.") (discussing a concept related to the "whole statute," a presumption against surplusage, i.e., a presumption that every word in a statute is to be given effect.). For variations on this concept, see Dept. of Gen. Servs. v. Super. Ct., 147 Cal. Rptr. 422, 427 (Cal. Ct. App. 1978) (interpretation of certain provisions of State Contract Act); Murphy Exploration & Prod. Co. v. U.S. Dept. of Interior, 252 F.3d 473, 481 (D.C. Cir. 2001) ("when construing a statute, we are obliged to give effect, if possible, to every word Congress used"). For an interesting discussion of a case in which different justices and a judge used this presumption to justify different interpretations, see Bradford C. Mank, *Textualism's Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 KY. L.J. 527, 594-98 (1997-98) (pointing out differing opinions of Judge Sentelle, Justice Stevens, and Justice Scalia).

For an example of the presumption against implied repeals so a later statute will not casually be read as impliedly repealing part of an earlier statute, see Patten v. United States, 116 F.3d 1029, 1034 (4th Cir. 1997) ("Because of the strong presumption against implied repeal, we will not find an implied repeal unless one of these conditions [irreconcilable conflict of the two provisions or the later statute covering the entire subject of earlier provisions] is satisfied.").

For an example of the factor, *in pari materia*—a fancy law-Latin phrase for the proposition that a court may consider other statutes of the same general kind or type when attributing meaning to a statutory provision, see Ruth Fisher Elem. Sch. Dist. v. Buckeye Union High Sch. Dist. 41 P.3d 645, 648 (Ariz. App. 2002) ("If the statutes relate to the same subject or have the same general purpose—that is, statutes which are *in pari materia*—they should be read in connection with, or should be construed together with other related statutes, as though they constituted one law.").

39. If the situation were as incoherent and messy as some folks imply, there would be no way in which reference works such as West's Key Digest and American Jurisprudence 2d could have intelligible sections on statutory construction. *See, e.g.*, WEST'S ANALYSIS OF AMERICAN LAW, *Statutes*, key numbers 174-278 (1994); 73 AM. JUR. 2D., *Statutes* §§ 60-261 (2001).

It should be noted here that, although most courts use the traditional concepts and tools of statutory interpretation, there is an unfortunate tendency on the part of some latter-day theorists and even jurists to use new labels for these old concepts. Justice Scalia, for example, refers to statutory interpretation as being "holistic" in nature, but his elucidation of "holistic" is not much more than a description of the "whole statute" concept—reading all parts of a statute when attributing meaning to a particular provisions. United Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988) ("Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.") (citations omitted).

"Clarified by the remainder of the statutory scheme" restates the core of the traditional "whole statute" concept, stated in different language and using the label "holistic." *See supra* note 38 (parts thereof discussing "whole statute"). Nor does it appear that the quoted passage even pays lip service to the similarity between "holistic" and the old "whole statute" concept. Justice Scalia, of course, is not the only offender in this regard. However, he is one of the most prominent, and he asserts some expertise on statutory interpretation. *See* SCALIA, *supra* note 3, at 1-47.

40. One important example is found in ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION, *supra* note 9,

they can be "look[ed] at . . . as an interpretive regime that has been created by our courts over the centuries and that can be set forth *systematically*."[41] The various factors mentioned by the courts therefore are not in hopeless disarray. At least, they are orderly enough for academics and reference works to identify and list them.

c. Interim Conclusion

Our courts do not seem to be acting totally without any kind of methodology or framework for statutory interpretation, whether we want to call it a "theory" or not. If they are ad-libbing, they are ad-libbing in the sense of improvising, like Johann Sebastian Bach[42] or a jazz musician. Not every judge or Justice is a Bach or a jazz musician, of course, and to some people, jazz sounds incoherent. The problem for academics lies in discerning the difference between valid judicial improvisation and judicial fumbling or rationalization.

2. Durability

Even more significant than the existence of pervasive, fairly consistent concepts and tools of statutory interpretation is the longevity of those concepts and tools. Many of these judicially described concepts and tools have changed very little since the time of William Blackstone. In his treatise, *Commentaries*, William Blackstone's description of statutory interpretation was brief and off-handed,[43] but his observations sound remarkably familiar today. The following passages from Blackstone will depart from bluebook conventions by interspersing in the quoted text some footnotes citing to modern cases using the same or similar language:

> 1. *Interpretation by the Usual Meaning of Words.* – The fairest and most rational method to interpret the *will* of the *legislator*[44] is by exploring his *intentions* at the

---

at 323-33. A similar list is found in William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court 1993 Term: Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 97-107 (1994). "The Appendix divides the canons into three conventional categories: the textual canons setting forth conventions of grammar and syntax, linguistic inferences, and textual integrity; extrinsic source canons, which direct the interpreter to authoritative sources of meaning; and substantive policy canons which embody public policies drawn from the Constitution, federal statutes, or the common law." *Id.* at 97. Another important article with an appendix of statutory interpretation concepts and tools is Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 506-08 (1989).

41. William Eskridge, Jr., *Remarks at Northwestern University/Washington University Law School and Linguistics Conference*, 73 WASH. U. L. Q. 800, 872 (1995) (emphasis added).

42. DOUGLAS HOFSTADTER, GOEDEL, ESCHER, BACH: AN ETERNAL GOLDEN BRAID 3-4 (1988) (citing and quoting from H.T. DAVID & A. MENDEL, THE BACH READER 305-06) (describing Johann Sebastian Bach's musical improvisation).

43. 1 WILLIAM BLACKSTONE, COMMENTARIES 59-62, 87-92 (1765).

44. "Will of the legislator," coupled with "intentions," certainly resembles "legislative intention" in modern terms. Moreover, while it is rare in modern times, the quaint and outmoded "will of the legislator" was repeated as late as Koster v. Turchi, 173 F.2d 605, 607 (3d Cir. 1949) ("As was said in *United States v. Goldenberg*, 168 U.S. 95, 103 [1897], 'The courts have no function of legislation, and simply seek to ascertain

time when the law was made, by *signs* the most natural and probable. And these signs are either *the words, the context, the subject-matter, the effects and consequence, or the spirit and reason of the law.*[45] Let us take a short view of them all.

Words are generally to be understood in their usual and most known signification[46] .... [T]erms of art, or technical terms, must be taken according to the acceptation of the learned in each art, trade, and science....

2. *According to context.* If words happen to be still dubious, we may establish their meaning from the *context*[47]. . . . Of the same nature and use is the comparison of a law with other laws, that are made by the same legislator, that have some affinity with the subject, or that expressly relate to the same point ....[48]

...

5. *According to the reason of the law.* But, lastly, the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by con-

---

the will of the legislator.'").

45. For a recent example of a case using some of this verbal formula, see Aitken v. Indus. Comm'n of Arizona, 904 P.2d 456, 461 (Ariz. 1995) ("We now hold that a carrier may assert a lien on a third party recovery only to the extent that the compensation benefits paid exceed the employer's proportionate share of the total damages fixed by verdict in the action. In doing so, we are particularly mindful of the *context, subject matter, and effects and consequences of the statute.*") (emphasis added).

There has, of course, been some reshuffling of the order and precise words in the 20th century, but the basic components of Blackstone are still very much with us. *See, e..g.*, Spencer v. West Alabama Prop., Inc., 564 So.2d 425, 427 (Ala. 1990) (stating that statutes often drafted so poorly that it is necessary to put more reliance on "context, the subject-matter, the consequences and effects, and the reason and spirit of the law, in endeavoring to arrive at the will of the law giver.") (citations and internal quotation marks omitted); State v. Korzep, 799 P.2d 831, 833 (Ariz. 1990) ("To determine legislative intent, we consider the statute's context, the language used, the subject matter, the historical background, the statute's effects and consequences, and the statute's spirit and purpose. . . . Additionally, we consider the policy behind the statute and the evil it was designed to remedy. . . . We give words their usual and commonly understood meaning unless the legislature clearly intended a different meaning. . . .") (citations omitted); Livingood v. Negrete, 547 N.W.2d 196, 197 (Iowa 1996) ("In seeking legislative intent, the subject matter, effect, reason for the statute and consequences of proposed interpretations must all be considered.") (citations omitted); Sagar v. Warren Selectboard, 744 A.2d 422, 426 (2000) ("In construing a statute, our objective is to implement the intent of the Legislature. . . . We look to the 'whole of the statute and every part of it, its subject matter, the effect and consequences, and the reason and spirit of the law.' . . . Of course if the statute is unambiguous and the words have a plain meaning, we apply that meaning.") (citations omitted).

46. *See, e.g.*, Valentino v. Franchise Tax Bd., 105 Cal. Rptr. 2d 304, 308 n.3 (Cal. Ct. App. 2001) ("[W]e look first to the words of the statute itself, endeavoring to accord them their usual and ordinary meaning. We construe the language in the context of the statutory framework as a whole, always mindful of the policies and purposes underlying the enactment and endeavoring to read the language so as to conform to its spirit.") (citations omitted).

47. *See, e.g.*, Gade v. Nat'l Solid Waste Mgm't Ass'n., 505 U.S. 88, 99 (1992) ("We must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law.") (citation and internal quotation marks omitted); Andreiu v. Ashcroft, 253 F.3d 477, 480 (9th Cir. 2001) ("Our analysis is governed by fundamental principles of statutory construction. A basic guide to the meaning of statutory language is the context of the statute as a whole."). Similarly, "statutes must be interpreted, if possible, to give each word some operative effect." Walters v. Metro. Educ. Enters., Inc., 519 U.S. 202, 209 (1997).

48. This tool or concept is also known in its latinate form, *in pari materia.*

> sidering the reason and spirit of it; or the *cause, which moved the legislator to enact it.*[49]

There are, of course, other familiar statutory interpretation tenets to be found in Blackstone's works.[50]

The long and short of the matter is that judicial descriptions of many statutory interpretation concepts and tools have not changed very much since the late 18th Century. Although the words are not always identical to Blackstone's, the basic semantic content has been changed very little, or not at all.[51]

This persistence seems particularly odd when we consider that, quantitatively, far fewer statutes existed 200 years ago, and qualitatively, many statutes today are of a very different order than those of the early 19th century.[52] Given such differences, we might be inclined to predict that there would have been significant changes in the way courts describe the process of attributing meaning to statutory language. However, the tools

---

49. BLACKSTONE, *supra* note 43, at 60-62 (partial emphasis added). The "cause which moved the legislator to enact" is semantically equivalent to phrases such as purpose or motive when used in connection with statutory interpretation cases. For example, "We may also look to the reason and necessity for the statute and the purpose sought to be obtained by enacting the statute." Pace v. Armstrong World Indus., Inc., 578 So.2d 281, 283 (Ala. 1991); Quarry Knoll II Corp. v. Planning & Zoning Comm'n, 780 A.2d 1, 41 (2001) ("Therefore, on the basis of the plain language of § 8-30g (c) and its legislative history, the circumstances surrounding its enactment, and the purpose for which it was designed, we conclude that the legislature intended that the commission have the burden of proving that the public interest cannot be protected by reasonable changes to the proposed development.").

50. "Construction of Remedial Statutes.—There are three points to be considered in the construction of all remedial statutes: the old law, the mischief, and the remedy. . . . And it is the business of the judges so to construe the act, as to suppress the mischief and advance the remedy. . . ." BLACKSTONE, *supra* note 43, at 87. Even today, one can find recent cases which recite the quaint "mischief to be remedied" formula. *See, e.g.*, Carlon Co. v. Bd. of Review, 572 N.W.2d 146, 154 (Iowa 1997) ("A further rule of statutory construction requires us to look to the object to be accomplished and the evils and mischiefs to be remedied."). *See also* BLACKSTONE, *supra* note 43, at 88 ("Construction of Penal Statutes.—Penal statutes must be construed strictly. . . ."); *Id.* ("Construction by Context.—One part of a statute must be so construed by another that the whole may (if possible) stand . . . ."). *Id.* at 89.

51. Blackstone is not the only evidence for the durability of these and other concepts and tools of statutory construction. The Arguments of Counsel preceding an early reported New Jersey case contain a veritable gold mine of early statutory construction maxims, most of which have changed very little in more than 200 years. *See* Den, On the Demise of Hinchman v. Clark & Zilcar, 1 N.J.L. 391 (N.J. 1795). Among the concepts and tools cited in these arguments of counsel, we find a familiar statement of the maxim against implied repeals. "The law does not favor repeals by implication. If both acts be merely affirmative, and the substance such that both may stand together, the latter does not repeal the former, but they shall both have a concurrent efficacy." *Id.* at 404.

52. "[N]ineteenth-century legislative activity at both federal and state levels still lacked the broad programmatic and reformist themes of modern twentieth-century legislation. . . . The dominant view (at least among most lawyers in the first half of the century) was that legislation primarily patched up the common law." WILLIAM POPKIN, STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION 61 (1999) [hereinafter POPKIN, STATUTES IN COURT]. A writer in 1835 characterized state statutes as predominantly either to "define and affirm some principle of the common law" or "to carry into operation a newly formed government, by organizing its departments, directing the election of its officers, and regulating those innumerable details, which the exigencies of society present, in the early stages of an original political system." FRANCIS HILLIARD, THE ELEMENTS OF LAW 6 (1835).

and concepts that courts say they use today have not undergone all that much change for the past 200 years.[53] This is a matter which should puzzle us considerably.[54]

Is it some kind of weird coincidence that American courts for over two hundred years have consistently referred to certain concepts and tools in cases involving the application of statutes? Did it just happen? Why have so many of the key concepts endured, with relatively little change, for over two hundred years, even though the number and types of statutes have changed dramatically? The tools and concepts of statutory interpretation are a *constant*, and a pretty remarkable constant, when you think about it. When something is a constant in a system, it is worth studying.

As one writer has put it, these concepts and tools ("practices of statutory interpretation") have "shown robust durability for centuries . . . ."[55] This consistency over time may be very significant.[56] If the words used over the past 200 years to describe judicial methodologies of statutory interpretation do have some reasonably consistent content, despite two centuries of revolutionary changes in social conditions, then it would seem that courts are doing *something* that overall is fairly consistent, and that merits study.

3. Summation: Prevalence and Durability

Simply put, courts have developed a large and stable assortment of tools and concepts in dealing with statutory interpretation. Many of these concepts and tools demonstrably have been around for a long time. If we do not understand something of their nature and how they are used, then we hardly can expect to understand what courts are doing in statutory interpretation cases. A better understanding of those concepts and tools is crucial to statutory interpretation theory.

---

53. Even a term such as "liberal construction," with all its modern overtones, has been around for a long time. "The statute [Laws, Vol. I., 536] gives to executors an action of trespass, for taking and carrying away the goods of their testator, in his lifetime. This statute was borrowed from 4 E. III., ch. 7, which had made a similar provision; and by the equity and liberal construction of that statute it has been extended to almost every injury done to the personal estate of the testator before his death." Snider & Van Vecten v. Croy, 2 Johns. 227, 228-29, (N.Y. Sup. Ct. 1807). Moreover, the relationship of "liberal construction" to earlier doctrines has been recognized. For an article that discusses the relationship between equitable construction and liberal construction, see William S. Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799, 805-08 (1985).

54. Moreover, as we enter the 21st century, the three dominant theories or models of statutory interpretation retain most of the concepts and tools that existed 200 years ago. *See infra* Part II.B.1-4.

55. Sinclair, *Statutory Reasoning*, *supra* note 2, at 381-82. *See also*, Sinclair, *Legislative Intent*, *supra* note 2, at 2.

56. This consistency does not mean that the concepts and tools of statutory interpretation are utterly static. One writer explains that there are cycles and refinements in statutory interpretation, as in any other area of the law. He states, "My basic strategy is to explore the possibility that interpretive doctrine displays a regular tendency to oscillate, or cycle, over a defined range of positions on major doctrinal questions." Vermeule, *Cycles of Statutory Interpretation*, *supra* note 15, at 150. The very existence of cycles implies recurrence and hence stability in the main concepts.

B. Academic Theories

Meanwhile, back at the law schools, the period since 1980 has been a tremendously exciting, productive, and frustrating era for discourse about statutory interpretation.[57] If anything, we have today a surplus of theories.[58] It is becoming very difficult to keep up with all of the "literature," and it is impossible to summarize adequately and do justice to all extant theories in one article. If nothing else, it is impossible because new theories and variations on theories keep coming out.[59] A whole new vocabulary has become

57. A couple of short pieces discussing the "revival" of theory in statutory interpretation are especially readable. *See, e.g.*, Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241 (1992) [hereinafter Frickey, *The Big Sleep*]; Philip P. Frickey, *Essay: Revisiting the Revival of Theory in Statutory Interpretation: A Lecture in Honor of Irving Younger*, 84 MINN. L. REV. 199 (1999) [hereinafter Frickey, *Revisiting the Revival*].

58. For an article containing an invaluable bibliography of articles published between 1988-1997, see Crespi, *supra* note 5. For some articles and books published since 1997, see *infra* note 59.

59. For just a sampling of articles and books published since 1997, see Bernard W. Bell, *Legislative History Without Legislative Intent: The Public Justification Approach to Statutory Interpretation*, 60 OHIO ST. L. J. 1, 6 (1999) (advancing a "public justification" theory which "seeks to justify the use of committee reports and floor statements in interpreting statutes because legislatures are under a duty to 'explain statutes as well as enact them" and those documents are part of the 'public justification' of the statute"); William S. Blatt, *Interpretive Communities: The Missing Element in Statutory Interpretation*, 95 NW. U. L. REV. 629, 630 (2001) [hereinafter Blatt, *Interpretive Communities*] (suggesting that statutory interpretation should adopt the perspective of the "interpretive community" responsible for the statutory issue); William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171 (2000) (criticizing legal fiction of "one congress" as resulting in interpretive practices, such as examining other statutes, which give too much power and discretion to the courts); Maureen B. Cavanaugh, *Order in Multiplicity: Aristotle on Text, Context, and the Rule of Law*, 79 N.C. L. REV. 577, 583 (2001) [hereinafter Cavanaugh, *Aristotle*] (arguing that the "methodology Aristotle develops for considering the relationship of words and their definitions allows a determinate, yet open-ended method for understanding language that corresponds well with our experience in reality, but is supported by sophisticated logical and philosophical underpinnings . . . providing a method for principled analysis . . . as well as a method that allows for resolution of some hard and interesting cases"); Carol Chomsky, *Unlocking the Mysteries of Holy Trinity: Spirit, Letter, and History in Statutory Interpretation*, 100 COLUM. L. REV. 901 (2000) (examining the *Church of the Holy Trinity* case in detail and arguing in favor of using legislative history materials in statutory interpretation); William N. Eskridge, Jr., *Formalism and Statutory Interpretation: Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. CHI. L. REV. 671 (1999) [hereinafter Eskridge, *Formalism*] (discussing subjecting theories of statutory interpretation to empirical testing); Daniel A. Farber, *Do Theories of Statutory Interpretation Matter? A Case Study*, 94 NW. U. L. REV. 1409, 1409-11 (2000) (discussing opinions and theories of two academics sitting on the same U.S. court of appeals and concluding that theories have only a marginal effect on the outcome of the four cases studied); Frickey, *Revisiting the Revival*, *supra* note 57 (reviewing developments and issues in statutory interpretation); Scott Fruehwald, *Pragmatic Textualism and the Limits of Statutory Interpretation:* Dale v. Boy Scouts of America, 35 WAKE FOREST L. REV. 973 (2000) (offering a statutory interpretation theory which merely uses the same old traditional concepts and tools discussed in the text of the present article); Michael P. Healy, *Communis Opinio and the Methods of Statutory Interpretation: Interpreting Law or Changing Law*, 43 WM & MARY L. REV. 539 (2001) (examining Supreme Court's interpretive methodology in context of *communis opinio* canon); Jones, *supra* note 2 (discussing legal process versus textualist debate in context of a particular case); Kelso & Kelso, *supra* note 2 (arguing that the actual methods of statutory interpretation are aligned more with the judges' overall approach to decision making, rather than any theory of statutory interpretation); Eric S. Lasky, Note, *Perplexing Problems With Plain Meaning*, 27 HOFSTRA L. REV. 891 (1999) (discussing plain meaning rule); Jeffrey G. Miller, *Evolutionary Statutory Interpretation: Mr. Justice Scalia Meets Darwin*, 20 PACE. L. REV. 409 (2000) (arguing, analogous to scientific complexity theories, that the interpretation of a statute can change over time); POPKIN, STATUTES IN COURT, *supra* note 52 (major work reviewing history of statutory interpretation and advancing a theory of "ordinary judging"); Rosenkranz, *supra* note 2 (suggesting that many problems of statutory interpretation could be solved in federal courts if Congress were to enact

associated with statutory interpretation theory, along with the inevitable disagreement and confusions about what each of the new terms denotes. To list a few: "originalism,"[60] "intentionalism,"[61] "modified intentionalism,"[62] "imaginative reconstruction,"[63] "pur-

---

more detailed rules to govern statutory interpretation); Jane S. Schachter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1, 5 (1998) (actual interpretive practices in recent Supreme Court cases do not follow conventional dichotomies but "[draw] from an array of judicially-created sources to delineate the range of plausible textual meanings and then to select from among them."); Michael B. Slade, Note, *Democracy in the Details: A Plea for Substance Over Form in Statutory Interpretation*, 37 HARV. J. ON LEGIS. 187 (2000) (arguing that courts should use legislative history materials); Peter L. Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. 225 (1998) (discussing, among other things, the "presuppositions and effects of a common law system of legislating and judging"); Siegel, *supra* note 25 (advocating "contextualism," the interpretation of statutes in light of background legal principles, e.g., interpretation of administrative law statutes in light of background principles of administrative law); Cass R. Sunstein, *Must Formalism Be Defended Empirically*, 66 U. CHI. L. REV. 636 (1999) (discussing whether a valid defense of formalism in statutory interpretation must be empirical); Vermeule, *Cycles of Statutory Interpretation*, *supra* note 15 (offering a theory regarding the various cycles in statutory interpretation); Adrian Vermeule, *Interpretation, Empiricism, and the Closure Problem*, 66 U. CHI. L. REV. 698 (1999) (discussing the application of empiricism to statutory interpretation); Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74 (2000) (discussing problems of empirical uncertainties in choosing interpretive doctrine and arguing that courts consequently should embrace a formalist approach to statutory interpretation) [hereinafter Vermeule, *Interpretive Choice*]. One of the few systematic, book-length, pre-1980 treatments of statutory interpretation written at a theoretical level is DICKERSON, *supra* note 10.

60. There are various shades of "meaning" attached to the term "originalism" in statutory interpretation theory. The daddy of modern usage of "originalism" in this context is, of course William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987) [hereinafter Eskridge, *Dynamic Statutory Interpretation*], especially the discussion at 1480-88. There, "originalism" is characterized in the following way: "Theoretically, these 'originalist' approaches to statutory interpretation assume that the legislature fixes the meaning of a statute on the date the statute is enacted. The implicit claim is that a legislator interpreting the statute at the time of enactment would render the same interpretation as a judge interpreting the same statute fifty years later." *Id.* at 1480. *See also*, ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION, *supra* note 9, at 13-47. Some other articles which discuss "originalism" are: Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803, 805 (1994) (announcing prematurely the death of originalism and stating, "originalist interpretive models treat statutes as commands that emanate from the legislative branch"); Kelso & Kelso, *supra* note 2, at 81; R. Randall Kelso, *Statutory Interpretation Doctrine on the Modern Supreme Court and Four Doctrinal Approaches to Judicial Decision-Making*, 25 PEPP. L. REV. 37, 37 (1997) ("Originalism resolves interpretive questions by asking how the enacting Congress would have decided the question."); Karen M. Gebbia-Pinetti, *Statutory Interpretation, Democratic Legitimacy, and Legal-System Values*, 21 SETON HALL LEGIS. J. 233, 280 (1997) [hereinafter Gebbia-Pinetti, *Statutory Interpretation*] ("Originalists view statutes as expressions of legislative policy choices. The judge's task is to discover and implement those policy choices as the legislature's good faith agent.").

61. A key player with respect to describing, although certainly not defending, intentionalism is, again, Professor Eskridge. *See* ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION, *supra* note 9, at 14 ("[I]ntentionalism . . . directs the interpreter to discover or replicate the legislature's original intent as the answer to an interpretive question."). For other articles which discuss intentionalism, see Richard J. Pierce, Jr., *Justice Breyer, Intentionalist, Pragmatist, and Empiricist (Symposium)*, 8 ADMIN. L.J. AM. U. 747, 747 (1995) (describing intentionalism as "interpreting a statute based on a judicial determination of the intent of the legislature" and saying further, "Intentionalists attempt to draw interpretive inferences from the legislature's stated goals and from a statute's legislative history."); Earl M. Maltz, *Statutory Interpretation and Legislative Power: The Case for a Modified Intentionalist Approach*, 63 TUL. L. REV. 1, 2 (1988) (describing intentionalism simply as the approach "which uses the intent of the enacting legislature as the basis for judicial decisionmaking"). For articles by the strongest defender of intentionalism, see Sinclair, *Statutory Reasoning*, *supra* note 2, at 381-82. *See also* Sinclair, *Legislative Intent*, *supra* note 2 (critical review of ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION, *supra* note 9). One writer has informed me that the terms "intentionalism" and "textualism" were "first employed by Dean Brest in the context of constitutional interpretation." Daniel B.

posivism,"[64] "textualism,"[65] "New Textualism,"[66] "structural textualism,"[67] "dynamic statutory interpretation,"[68] and "practical reasoning."[69] Nor do these exhaust the list.[70]

For several reasons, this article will not even attempt any detailed summaries of the current theories. First, of course, the sheer number of theories precludes such an approach. Second, these theories actually are impossible to summarize adequately, because they are mental constructs composed largely of the theorists' own abstractions. To

---

Rodriguez, *Review Essay, The Substance of the New Legal Process*, 77 CAL. L. REV. 919, n.62 (1989).

62. Maltz, *supra* note 61, at 1.

63. Eskridge & Frickey, *Practical Reasoning*, *supra* note 9, at 329-30 (1990) (a version of intentionalism under which the judge imagines a reasonable interpretation on the basis of how the legislators would have responded to the interpretive question at issue).

64. Although "purposivism" usually is included in the litany of dominant theories and distinguished from "intentionalism," it sometimes is described in terms comparing it to intentionalism. "Purposivists use a more objective approach in which the court first reviews the statute, its context, and history to discern the statute's original purpose, then applies the statute in light of that underlying purpose." Gebbia-Pinetti, *Statutory Interpretation, supra* note 60, at 283. "Purposivism," as a theory, generally is linked to Hart & Sacks. "Professors Henry Hart and Albert Sacks developed purposivism in their legal process approach. The approach differs from intentionalism in that the judge is not limited by the inquiry of whether the enacting legislature considered the issue before the court." Martineau, *supra* note 22, at 18. However, Hart & Sacks hardly invented the larger concept of discerning or attributing the "purpose(s)" of a statute and interpreting the statute in ways consistent with the discerned or attributed purpose(s). This use of purpose is a basic and long established concept or tool of statutory construction, traceable to Heydon's Case, 76 Eng. Rep. 637, 638 (K.B. 1584) (stating that courts should consider the "mischief" to be remedied by the statute). *See, e.g.*, Martineau, *supra* note 22, at 6. For some early cases where courts say that they consider the purpose or object of the statute, see Rice v. Danville, L. & N. Turnpike Road Co., 37 Ky. 81, 83 (1838) (referring to the "manifest purpose of the statute"); Blossom v. Goodwin, 1 Mass. (1 Will.) 502, 506 (1805) ("The purpose of the statute will be completely answered by constructing the word 'action' to intend process . . . ."); Overseers of Poor v. Overseers of Poor, 14 N.J.L. 321, 330 (1834) ("A contrary rule would defeat the object of the act, part of which is to secure a proper super intendance of the youth, and to watch the inexperience of the apprentice.").

It would seem that "purposivism" might more accurately be regarded as a concept or tool of statutory interpretation than a stand-alone "theory." Nevertheless, academic writers—perhaps mistakenly—tend to identify "purposivism" as some separate kind of theory or model. *See, e.g.*, Morell E. Mullins Sr., *Coming to Terms With Strict and Liberal Construction*, 64 ALB. L. REV. 9, 43 (2000) (referring to "the triumvirate of textualism, purposivism, and intentionalism").

65. *See infra* Part II.B.1.

66. Eskridge, *New Textualism*, *supra* note 25, at 626-30. For Eskridge's summary of Justice Scalia's version of New Textualism, see *infra* Part II.B.1.

67. Taylor, *supra* note 22, at 378-83 (arguing, among other things, for a limited use of legislative history even in a textualist approach to statutory interpretation).

68. ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION, *supra* note 9, at 9-11 (arguing for partial rejection of originalist, intentionalist, and textualist theories in favor of a theory which, under some circumstances, allows interpretation of statutory provision in light of contemporary conditions). *See also infra* Part II.B.3.

69. "Practical reasoning" or a pragmatic theory has gained increasing support among academics in recent years. The theory was christened in Eskridge & Frickey, *Practical Reasoning*, *supra* note 9. As discussed in more detail below, practical reasoning retains all of the traditional concepts, tools, models, and anything else relevant when interpreting statutes. *See infra* Part II.B.3. In this respect, of course, "practical reasoning" and its cousins echo the voice of Chief Justice John Marshall, "[where] the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived." United States v. Fisher, 2 U.S. (Cranch) 358, 386 (1805).

70. *See, e.g.*, Blatt, *Interpretive Communities*, *supra* note 59 (advancing a theory that interpretation should be in accordance with the "interpretive communities" involved under the particular statute); Cavanaugh, *Aristotle*, *supra* note 59, at 584 (advancing a theory based on works of Aristotle); POPKIN, STATUTES IN COURT, *supra* note 52 (suggesting a theory of "ordinary judging"); Rosenkranz, *supra* note 2 (suggesting that many problems of statutory interpretation could be solved in federal courts if Congress were to enact more detailed rules to govern statutory interpretation).

summarize them is to distort them. As one particularly painstaking commentator stated, "The interpretive debate has been complicated by conflicting ways of distinguishing and naming the divergent interpretive methods."[71] Consequently, the precise content of some theories is far from clear. One acerbic critic has even remarked that "[w]e are awash in fancy theories of statutory interpretation,"[72] some of which aren't really about interpretation. "[These theories] are attempts to trade on the authority of statutes to enact the interpreter's own preferences. . ."[73] A less severe critic has remarked, "'Theories' of statutory interpretation, such as intentionalism, purposivism, public choice analysis, textualism, and practical reasoning, are simply rhetoric."[74] In any event, no single theory has yet achieved consensus among academics or the courts.[75]

Finally, and most importantly, this article marches to its own drummer. The theories mentioned above do not focus on the nature of the statutory interpretation concepts and tools.[76] This article tries to examine some very basic questions about the nature of the concepts and tools which courts use when explaining or describing how they resolve statutory interpretation issues. Because dominant[77] theories, or "models,"[78] of textual-

---

71. Gebbia-Pinetti, *Statutory Interpretation, supra* note 60, at 346 n.95.

72. Larry Alexander, *On Statutory Interpretation: Fancy Theories of Statutory Interpretation Aren't*, 73 WASH. U. L.Q. 1081, 1081 (1995).

73. *Id.* at 1082.

74. Eileen A. Scallen, *Classical Rhetoric, Practical Reasoning, and the Law of Evidence*, 44 AM. U. L. REV. 1717, 1731 (1995).

75. *See infra* Part II.B.4. *See also* Kelso & Kelso, *supra* note 2, at 81; POPKIN, STATUTES IN COURT, *supra* note 52, at 153 ("[A]s the twentieth century comes to a close . . . a sense grows that no single approach—purposivism, Republicanism, or textualism—can explain statutory interpretation."). Several astute commentators have reduced the number of theories to two. Professor Jonathan R. Siegel, for example, describes two main strands of competing theories: textualism and intentionalism. *See* Siegel, *supra* note 25, at 1025-26.

76. Put another way, few of the theorists or theories seem to have addressed the fundamental nature of these concepts and tools. The most notable exception seems to be Sunstein, *supra* note 40. His article argues, among other things, for a new set of background interpretive principles in the context of regulatory statutes and the "regulatory state." "The traditional understandings of statutory construction are inadequate." *Id.* at 503. However, he only partially rejects, and does not seem to examine doctrinally, the traditional tools and concepts. He goes on to say, "Under the approach suggested here, the statutory text is the foundation for interpretation, but structure, purpose, intent, history, and 'reasonableness' all play legitimate roles." *Id.* Apparently, he would retain many of the traditional concepts and tools, but deploy some other background or interpretive principles. He also provides an interesting appendix of old and new precepts, or background norms. *Id.* at 506-508. He then offers:

> [U]nderstandings about how statutory interpretation will improve or impair the performance of governmental institutions. Some such understandings are a firmly rooted and probably unavoidable part of interpretation. One might, for example, conclude that legislative history, produced by private groups and never enacted, is entitled to little weight; or that appropriations statutes, written hastily and without deliberation, should be narrowly construed. If one were simply describing statutory construction as it is currently practiced, one would find a number of background norms traceable to understandings of precisely this sort.

Id. at 466.

77. One of the most meticulous pieces of legal scholarship to date on statutory interpretation theory identified "three predominant methods of statutory analysis: originalism (comprising intentionalism and purposivism), textualism, and dynamism." Gebbia-Pinetti, *Statutory Interpretation, supra* note 60, at 267. She also provides an excellent summary of articles justifying her conclusion. *See id.* at 346 n.95. She is not alone in finding a limited number of common denominators or models. Another careful legal scholar has written: "The leading theories can be described as textualism, purposivism (intentionalism), and dynamic interpretation

ism, intentionalism, and dynamic statutory interpretation (along with its cousin, "practical reason") are highly relevant to this article, they are also briefly discussed.[79]

The reasons why these particular theories or models dominate are found in the nature of the traditional concepts and tools of statutory interpretation. Each of these theories or models reflects an important chunk of the "heuristics" of statutory interpretation.[80]

To summarize by way of preview, textualism is highly relevant to this article because it employs a reader-centered strategy (or heuristic) for attributing meaning to statutory text, emphasizing the "meanings" of statutory text as perceived by a reader,[81] and it retains most of the traditional concepts and tools of statutory interpretation. Intentionalism is highly relevant because it employs a writer-centered strategy for attributing meaning to statutory text, emphasizing "meaning(s)" "intended" by the writer,[82] and it retains *all* of the traditional concepts and tools of statutory interpretation. Dynamic statutory interpretation, practical reason and their relatives are highly relevant because they recognize that neither textualism nor intentionalism, standing alone, provide an adequate explanation or theoretical basis for understanding statutory interpretation[83] and they retain the traditional concepts and tools of statutory interpretation.

(practical reasoning)." Cavanaugh, *Aristotle*, *supra* note 59, at 584.

Other commentary provides:

> There are three basic modes of statutory interpretation: 1) textual interpretation; 2) analysis of legislative intent; and 3) incorporation of extra-legislative values. This categorization emphasizes the differences among complete theories of interpretation advocated by individual jurists or scholars. In fact, any complete theory of interpretation relies on all three modes of interpretation at one time or another. However, competing theories of interpretation do tend to emphasize a particular mode: 1) textualism emphasizes an analysis of the statutory text; 2) intentionalism emphasizes inquiry into the intent of the enacting legislature; and 3) public values analysis emphasizes incorporation of values into the interpretive process, even if these values were not communicated by the enacting legislature.

Edward O. Correia, *A Legislative Conception of Legislative Supremacy*, 42 CASE W. RES. L. REV. 1129, 1139-40 (1992) (footnotes and citations omitted).

78. In many respects, "model" is a far better and more descriptive term than "theory" for describing textualism, intentionalism, and several other "theories" discussed in the text. The author is indebted to Professor Gebbia-Pinetti for this term and insight. *See* Gebbia-Pinetti, *Statutory Interpretation*, *supra* note 60, at 234.

79. *See infra* Part II.B.3.

80. *See infra* Parts IV, V.B.2-4.

81. *See infra* Part II.B.1.

82. *See infra* Part II.B.2. No claim of originality is made by this article regarding the insight concerning reader-centered and writer-centered strategies for reading statutory text. Much the same point has been made in Singer's treatise on statutory interpretation. "It seems evident that 'intent of the legislature' concentrates attention upon the 'sending' end of the communication relationship, whereas the 'meaning of the statute' concentrates attention on the 'receiving' end." *See* NORMAN J. SINGER, 2A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION §§ 45:07, 45:39 (6th ed. 2000).

83. *See infra* Part II.B.3. *See also*, Eskridge & Frickey, *Practical Reasoning*, *supra* note 9, at 325 ("[*N*]*one of the three anchors* (intent, purpose, text) can altogether exclude the other two.") (emphasis added).

1. Textualism

If by "textualism" we mean simply that due regard must be given to statutory text, then everybody is a textualist. No one, to my knowledge, has ever said that we should totally ignore statutory text. However, to the extent that the "textualism" label implies a total, or near-total, reliance on statutory text for the attribution of meaning, it is misleading and downright fraudulent.

Proponents and critics alike agree that textualism does not rely solely on the text of a disputed statutory provision to attribute "meaning" to the statute.[84] As one of textualism's critics has put it, "While textualists generally avoid legislative history, they freely consult assorted dictionaries, make use of various linguistic arguments without benefit of linguistic study, and selectively employ canons of statutory interpretation in their textual analyses."[85]

Nor would it be possible to rely totally on statutory text. As will be discussed later,[86] "meaning" is not something that words "have" or readers "find." "Meaning," in the context of written language, is something that we attribute to marks on paper.[87] "Meaning is what emerges when linguistic and cultural understandings and experiences are brought to bear on the text."[88] "Meaning is patterns in human brains."[89] We use our minds when we draw inferences about what a statutory provision "means." We do not "find" the meaning of statutory language by looking at statutory text. We ourselves attribute "meaning" to those words in light of our own backgrounds.[90]

---

84. *See, e.g.*, SCALIA, *supra* note 3, at 23-25.

85. Cavanaugh, *Aristotle*, *supra* note 59, at 595-96 (footnotes omitted).

86. *See infra* Part III.E-F.

87. *See infra* Part III.A-G.

88. RICHARD POSNER, THE PROBLEMS OF JURISPRUDENCE 296 (1990).

89. Mark Turner, *Design for a Theory of Meaning*, *in* THE NATURE AND ONTOGENESIS OF MEANING 91, 93 (W. Overton & D. Palermo eds.) (1994).

90. However, Justice Scalia, in an oft-quoted passage, describes his methodology in terms that sound very much like he *does* believe that words somehow contain meanings, which the Justices "find": "I thought we had adopted a regular method for interpreting the meaning of language in a statute: first, *find* the ordinary meaning of the language in its textual context . . . ." Chisom v. Roemer, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting) (emphasis added). Justice Scalia also stated, "A text . . . should be construed reasonably, to *contain* all it fairly means." SCALIA, *supra* note 3, at 23 (emphasis added).

True enough, it is often harmless to speak of words as "containing" or "having" meaning. There frequently is remarkable consensus about the "meaning" that we attribute to statutory and other words. When I say, "I saw a cat in the yard," it is unlikely that anyone will conclude that I am saying that I saw a dog. Often, therefore, it makes no difference whether we think that words "have" meaning or we realize that we attribute "meaning" to the words. As one writer has put it, the "intended meaning [sometimes] is so clear that everyone—including potentially disadvantaged litigants—concedes the proper interpretation of the provision." Maltz, *supra* note 61, at 24.

However, when dealing with abstractions—and statutes are abstractions—any theory suggesting that words "have" meaning can be dangerous. Such suggestions can lull an honest "textualist" into sincerely believing that he or she objectively attributes "meaning" to statutory text, rather than attributing his or her own "meaning" to the words. The fact that other Justices happen to agree with that "meaning" (or are willing to go along with an opinionated Justice) does not change the reality that the textualist has attributed meaning to words. *See infra* Part III.A-G. Professor Flood puts it quite well:

Moreover, apart from a common core of rejecting legislative history,[91] it is becoming difficult to say exactly what constitutes modern "textualism." There already are several different kinds of "textualism," including new textualism,[92] structural textualism,[93] pragmatic textualism,[94] "radical textualism,"[95] and "sympathetic textualism."[96] In any event, as its critics point out, "textualism" by no means limits itself to using only statutory text.[97]

One early description of textualism is highly relevant to the present article, because it demonstrates that textualism retains most of the traditional concepts and tools of statutory interpretation. Cast in terms of describing Justice Scalia's methodology, this de-

---

> Another circumstance that has prevented the ascension of one theory of interpretation to a position above all others is the simple fact that judges are human. As human beings, whether they realize it or not and whether they admit it or not, judges are influenced in every situation by what they value, what they believe, and what they understand about the world around them. In a diverse society, there will always be divergent views about what is right and good and just. A review of the decisions rendered by the U.S. Supreme Court in the last fifteen months should convince all doubters that it is indeed impossible for justices to completely set aside everything that makes them who they are, even when they make the best of efforts to do so.

Flood, *supra* note 2 at 66-67 (footnotes omitted).

91. *See, e.g.*, Cavanaugh, *Aristotle*, *supra* note 59, at 595 ("[T]extualists generally avoid legislative history . . . .") (footnote omitted); Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VAND. L. REV. 1457, 1473-74 (2000) ("Although textualism rejects legislative history, the rise of textualism has been marked by increased judicial consultation of other extrinsic aids, such as dictionaries. In fact, when Justice Scalia is in need of interpretive assistance, he sometimes seems to go out of his way to consult any and all extrastatutory texts, provided they are not legislative history.") (footnote omitted).

92. *See, e.g.*, Eskridge, New *Textualism*, *supra* note 25, at 621, 625. *See generally* Lee Epstein et al., *Dynamic Agenda-Setting On the United States Supreme Court: An Empirical Assessment*, 39 HARV. J. ON LEGIS. 395, 396 n.1 (2002).

93. *See* Taylor, *supra* note 22, at 321.

94. *See* Fruehwald, *supra* note 59, at 974.

95. *See* John C. Roberts, *Are Congressional Committees Constitutional?: Radical Textualism, Separation of Powers, and the Enactment Process*, 52 CASE W. RES. L. REV. 489, 494 (2001).

96. *See* James E. Pfander, *Supplemental Jurisdiction and Section 1367: The Case for a Sympathetic Textualism*, 148 U. PA. L. REV. 109, 112 (1999).

97. For some of the growing body of work criticizing textualism, see Mank, *supra* note 38, at 527 (arguing that textualist judges are selective in the canons and other extrinsic aids which they use in statutory interpretation, overusing those which restrict statutory meaning when it will promote federalism and states' rights, and neglecting those which promote individual liberty and executive authority); William D. Popkin, *An "Internal" Critique of Justice Scalia's Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133, 1138 (1992) (critiquing Justice Scalia's approach to statutory construction from an "internal" legal perspective); Muriel Morisey Spence, *The Sleeping Giant: Textualism as Power Struggle*, 67 S. CAL. L. REV. 585, 588 (1994) ("This [a]rticle addresses the textualism controversy in two ways. First, I argue that the debate about the use of legislative history illuminates a power struggle between Congress and the courts. My thesis is that textualism enhances judicial power at the expense of Congress' primacy as the authors and masters of statutes, and at the expense of Congress' right to determine the authoritative sources of statutory meaning.") (footnotes omitted); Peter L. Strauss, *Comment: Legal Process and Judges in the Real World*, 12 CARDOZO L. REV. 1653, 1656 (1991) (suggesting that "the move to textualism is being orchestrated by recent Republican appointees" with "political reasons for hostility to Congress relative to the President"). For an article that is almost regretful in its tone, but all the more damning of textualism because of its tone of regret, see Lawrence M. Solan, *Learning Our Limits: The Decline of Textualism in Statutory Cases*, 1997 WIS. L. REV. 235 [hereinafter Solan, *Learning Our Limits*] ("[B]ecause the textualist approach is based on an insufficiently sophisticated understanding of the human language faculty, it fails, regardless of how much one may agree with the considerations that motivate it.").

scription baptized the entire movement: The New Textualism.[98] Some of the details, however, will be omitted here to conserve space:

> First, Justice Scalia will consider how the word or phrase is used elsewhere in the same statute, or how it is used in other statutes. . .
>
> Second, Justice Scalia will consider how the possible meanings fit with the *statute as a whole*. Does one meaning render other provisions duplicative or *superfluous*? Is there a structure in the statute, or a pattern of assumptions, that supports one of the plausible meanings? . . .
>
> Third, Justice Scalia will rely on the interaction of *different statutory schemes* to determine statutory plain meaning. In *Jett*, for example, . . . [h]e cited the "principles of construction that the *specific governs the general*, and that, where text permits, *statutes dealing with similar subjects should be interpreted harmoniously.*"
>
> All of these structural arguments have been used by the Court in the past and so are *hardly unique to the "new" textualism*. . . .[99]

Furthermore, "[t]he canons of statutory construction, a homely collection of *rules of thumb* for interpreting statutes, have *long been used by judges in writing statutory interpretation opinions*. . . ."[100]

The concepts and tools mentioned above should sound familiar to anyone who has worked with statutes in any meaningful way. What we have in latter-day textualism is simply most of the same old concepts and tools of statutory interpretation.[101] There has been, of course, reshuffling and revisionism, some of which may be strategic. For example, there has been an apparent textualist emphasis, and over-emphasis, on the traditional "canons" of statutory interpretation, such as the very malleable concept of "*inclusio unius est exclusio alterius.*"[102] This Latin maxim can be translated roughly as "the express mention of one thing excludes anything else not mentioned." For an example of

---

98. *See* Eskridge, *New Textualism*, *supra* note 25, at 623-24.

99. *Id.* at 661-663 (emphasis added).

100. *Id.* at 664 (emphasis added).

101. *See supra* Part II.A. Other descriptions in other articles also indicate that textualism is using many of the same old concepts and tools of statutory interpretation. For example, textualism will "interpret the words in a manner consistent with similar phrases in other statutes . . .and might consult 'textualist' interpretive canons . . . ." Gebbia-Pinetti, *Statutory Construction*, *supra* note 60, at 274. "Recourse to other statutes," of course is the old tool "*in pari materia*" and the canons of statutory interpretation, whether "textualist" or not, are part of the traditional judicial methodology described by the courts in statutory interpretation cases. Another description puts it this way:

> The new textualist's methodology is simple. Courts should interpret statutes based on the ordinary meaning of the words used in the statute and various rules of grammar and syntax, such as the interpretive canon that a court must interpret a statute so as to give every word some effect. If the ordinary meaning of the words and the syntax and grammatical devices do not yield an interpretation, the court should fit the statute into the corpus of the law. Ordinarily, a court should not refer to legislative history when interpreting a statute.

Bell, *supra* note 59, at 59 (footnotes omitted).

102. Eskridge, *New Textualism*, *supra* note 25, at 664 ("*Inclusio unius* arguments have grown like weeds in a vacant lot during the last two Terms [1987-88, 1988-89] of the Court.") (footnote omitted).

the fallacies luring in *inclusio*, consider the statement, "I saw a cat in the yard." That statement tells us absolutely nothing about what else is in the yard and certainly does not even suggest that there are no trees, shrubs, junked cars, or dead leaves in the yard.[103]

In addition to textualism's continued use of traditional concepts and tools of statutory interpretation,[104] there is another aspect of today's textualism that is highly relevant to the present article. Briefly put, textualism reflects one of the basic strategies, or heuristics,[105] for attributing meaning to a written text—already referred to above as a reader centered strategy or heuristic.[106] "[T]he judge should ask what the *ordinary reader* of a statute would have understood the words to mean at the time of enactment, not what the intentions of the enacting legislators were."[107] (Of course, a number of serious questions about textualism are embedded in the "ordinary reader" concept, but are beyond the scope of this article).[108]

---

103. The *inclusio* "canon" essentially involves the *negative implications* of language. Justice Scalia, in his essay, tries to make it sound like a very simple precept. "What it means is this: If you see a sign that says children under twelve may enter free, you should have no need to ask whether your thirteen-year-old must pay." SCALIA, *supra* note 3, at 25. Of course, there are situations where it is a simple matter of twelve-year olds. However, the negative implications of *all* statements, especially statements in statutes, are not always that simple. What if I ask a student to close the door, and there are two doors which are open? Even this simple example should make it clear that the implications of statutory language can be a very complex matter, not so easily dealt with as Justice Scalia seems to believe. Justice Souter has given us some very cogent remarks about *inclusio*. *Inclusio* "is notoriously unreliable and does not bear the weight here. While 'often a valuable servant,' the maxim that the inclusion of something negatively implies the exclusion of everything else (*expressio unius*, etc.) is 'a dangerous master to follow in the construction of statutes.' . . . . [O]ur decisions support the proposition that [s]ometimes [the canon] applies and sometimes it does not, and whether it does or does not depends largely on context.'" Custis v. United States, 511 U.S. 485, 501-02 (1994) (Souter, J. dissenting) (citations omitted). *See also* Mullins, *supra* note 64, at 27-43. Certainly *inclusio* is much more complex than Justice Scalia seems to make it to be in his book. In fact, *inclusio* itself is worthy of a separate article, or several articles. *See infra* Part V.C.

104. *See supra* Part II.A.2

105. *See infra* Parts IV.B, V.B.2.

106. *See supra* Part II.B. Again, I must give credit for this idea to Singer's treatise. *See* SINGER, *supra* note 82, §§ 45:07, 45:39.

107. Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L. Q. 351, 352 (1994) (footnote and citations omitted) (emphasis added). For similar statements, see Mank, *supra* note 38, at 533-34 ("Textualists believe that interpreters should not focus on the highly subjective issue of the intentions of the enacting legislators, but instead should assess what the ordinary reader of a statute would have understood the words to mean at the time of enactment to ascertain a statute's 'plain' meaning."); William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1512 (1998) [hereinafter Eskridge, *Textualism*] (reviewing SCALIA, *supra* note 3) ("[T]he new textualist starts with the meaning an ordinary reader would draw from the statutory language.").

108. Those questions involve, but are not limited to: (1) the massive epistemological problems of a term like "ordinary reader;" (2) the incomplete and therefore misleading dichotomy between the intentions of enactors and the readers of statutes; (3) the simple fact that statutory language is not necessarily "ordinary usage ;" (4) the danger of mistaking one's own attributed "meaning" for common usage; and probably most crucial, (5) the misleading way in which such language subsumes an assumption that "meaning" of statutory provisions is nothing more than the "meaning" of their individual words. Such questions await future articles, which if this article's suggestions are followed, will be addressed in a kind of scholarship that examines the concepts and tools of statutory interpretation themselves. *See infra* Part V.C.

As discussed in more detail below, the reader-centered heuristic[109] is one of the most basic strategies for reading text. The other is a writer-centered strategy, which brings us to so-called "intentionalism."

2. Intentionalism

"Intentionalism" signifies reliance to a greater or lesser degree on something called "legislative intent(ion)." It is typified by judicial statements such as "Our analysis commences with the premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent."[110] Despite a pedigree going back at least to the era of Blackstone and the first Justice Marshall,[111] "intentionalism" has become academically disreputable, or at least unfashionable, in this era of "new textualism."[112] To some extent, this is understandable. "Intention" strongly connotes a state of mind. This makes any theory christened "intentionalism" vulnerable to criticisms that conglomerate legislative bodies do not have "intentions."[113]

Moreover, the contours of this "theory" or (more properly speaking) "model" were never very clear.[114] However, several different varieties of "intentionalism," or the concept of intentionalism by some other name (such as "purposivism"[115]), have been identified.

---

109. *See infra* Part V.B.2-4.

110. Snukal v. Flightways Mfg. 3 P.3d 286, 304 (Cal. 2000) (citations and quotation marks omitted).

111. *See supra* Part II.A.1.b.

112. *See, e.g.*, SCALIA, *supra* note 3, at 16-18 (criticizing the concept and application of "legislative intent").

113. The classic statement of this is found in Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1929-30) ("The chances that of several hundred men each will have exactly the same determinate situations in mind as possible reductions of a given determinable, are infinitesimally small."). However, at least two factors complicate the various attempts to discredit "intentionalist theories." First, theories based on "legislative intent" have a strong and understandable appeal in our democratic society, because legislative bodies are the primary policy-makers in our democratic society, rather than the judiciary. "If the legislature is the primary lawmaker and courts are its agents, then requiring the courts to follow the legislature's intentions disciplines judges by inhibiting judicial lawmaking, and in so doing seems to further democracy by affirming the will of elected representatives." Eskridge & Frickey, *Practical Reasoning*, *supra* note 9, at 326. There is much to be said for the idea that courts should be faithful agents of the legislature, and try to carry out the legislative policies that are reflected in statutes. *See e.g.*, T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 23-24 (1988). Second, there is the longevity of an "intentionalist" judicial rhetoric, if not practice. Despite criticism and ridicule, legislative intent and its variants have long been, and remain, embedded in the judicial vocabulary. As Professor Sinclair put it, "We should not quite so readily consign the concept of legislative intent to oblivion. After all, many judges have been relying on it in difficult cases for a very long time, and understanding that doing so was their constitutional duty. Were they really under some delusion?" Sinclair, *supra* note 2, at 308. Professor Sinclair, by the way, also has demonstrated that "intentionalism" can be a very sophisticated theory. *See* Sinclair, *Legislative Intent*, *supra* note 2, 1351; *see also* Sinclair, *Statutory Reasoning*, *supra* note 2, at 381-82 (1997).

114. As implied earlier in this article, "legislative intent(ion)" probably is best conceived of as a shorthand label for what the courts consider if they conclude, or admit, that the statutory language at issue is not plain, clear, unambiguous, etc. *See supra* Part II.A.1.b.

115. For example, one writer has implied that "intentionalism" and "purposivism" are so closely related that they can be used interchangeably. *See* Cavanaugh, *Aristotle*, *supra* note 59, at 582 (referring to "intentionalism, which we might *equally* term purposivism"). This is an important insight.

To take only one example, Professors Eskridge and Frickey, in an important article, limited themselves—for some reason—to addressing "three different versions of intentionalism."[116] First, "the actual intent of the legislators who enacted the statute."[117] This straw man is unacceptable because, again, conglomerate bodies do not have an actual intent, in the sense that you or I have a personal, subjective intent.[118]

Second, there is a version which they label "conventional" intent, i.e. attribution of intent or meaning based on inferences from materials such as committee reports and floor statements.[119] Underlying this category, apparently, is the notion that legislative "intent" can be attributed to the whole legislature on the basis of statements made in legislatively authorized records and statements.

Third, they describe a fictionalized kind of intent, which they relate to Richard Posner's "imaginative reconstruction," under which a judge imagines a reasonable interpretation based on how reasonable legislators would have responded to the interpretive question at issue.[120] However (and Judge Posner himself would probably agree), "intent" as reflecting the "intent" of an objectified imagined legislator has *long* been part of the statutory interpretation methodologies employed by the courts. A rather famous 19th century example is found in *Riggs v. Palmer*,[121] which in turn reaches back to Bacon's Abridgments as support for conjuring up a reasonable legislator and asking him what to do.[122]

---

116. Eskridge & Frickey, *supra* note 9, *Practical Reasoning*, at 326.

117. *Id.*

118. However, we often do attribute "meaning" on the basis of what we think some anonymous or collective author "intended." As Professor Sinclair points out, "Attacks on the notion of the intention of the legislature presume that this intention is a perfect analogue of the intention of an individual human in giving a direction or command. Unless something can be found in the legislative process which is equal to the mental process or state of the individual, there will be no such thing as legislative intent. But why should we expect the intent of a legislature to be such perfect analogue of an individual human's intent in the utterance of an order or direction?" Sinclair, *supra* note 2, *Legislative Intent*, at 1351. Another author expressed,

> Our frequent references to the intentions and intentional acts of collective bodies suggests that some alternative conception is already well-established. For example, 'we find no problem in attributing intentions to corporations, groups, and institutions in ordinary life, and the law assumes that corporations and some other legal subjects who are not human beings can act intentionally.'

John M. Breen, *Statutory Interpretation and the Lessons of Llewellyn*, 33 LOY. L.A. L. REV. 263, 430 (2000) (quoting Joseph Raz, *Intention in Interpretation*, *in* THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM 249, 263 (Robert P. George ed., 1996). *See also* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 865 (1992) ("In practice, we ascribe purposes to group activities all the time without many practical difficulties.").

119. Eskridge & Frickey, *Practical Reasoning*, *supra* note 9, at 326-27.

120. *Id.* at 329-30. *See also* Gebbia-Pinetti, *Statutory Interpretation*, *supra* note 60, at 282-83 (referring to Judge Posner as a "leading modern advocate of imaginative reconstruction").

121. 22 N.E. 188 (N.Y. 1889) (murderer barred from taking under victim's will) (discussed in BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 40-43 (1921) and RONALD DWORKIN, LAW'S EMPIRE, 15-20 (1986)).

122. "In order to form a right judgment whether a case be within the equity of a statute, it is a good way to suppose the law-maker present, and that you have asked him this question, did you intend to comprehend this case? Then you must give yourself such answer as you imagine he, being an upright and reasonable man, would have given. If this be that he did mean to comprehend it, you may safely hold the case to be within the equity of the statute; for while you do no more than he would have done, you do not act contrary to the statute, but in conformity thereto." *Riggs*, 22 N.E. at 189. A similar prescription for questioning a make-believe law-

There undoubtedly are more than three varieties of "intentionalism" and "legislative intent," as used by theorists and the courts.[123] However, the ones already discussed should be more than enough for introductory purposes.

If we discount for the confusion created by the various concepts of "intention" and look for common denominators, certain points should emerge. First, as with "textualism," a major problem is the misleading nature of a label. "Intentionalism's" connotations lead us conceptually astray. We drift into thinking in terms of subjective individual mental states. But at bottom, "intentionalism" merely reflects a willingness to recognize that, even if statutory text seems very clear, there may be other indications (often loosely called "legislative intent") that a non-obvious meaning should be attributed to that text. Probably the best description of the concept is found, again, in the following passage from a currently neglected (but not entirely neglected) case: "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'"[124]

Second, when there is uncertainty about meaning, "intentionalism" is almost congruent with the entire body of traditional concepts and tools of statutory interpretation. "Intentionalism," in fact, not only retains but also embodies those concepts and tools.

Third, just as today's "textualism" embodies a reader-centered strategy or heuristic for attributing "meaning" to a statutory text, intentionalism is a "writer-centered" strategy or heuristic for attributing "meaning."[125] There is nothing particularly deep or esoteric about this, even though the word "heuristic" is used to describe the phenomenon. A "writer-centered" (or speaker-centered) strategy is a common phenomenon in every-day discourse. For example, while discussing a medical malpractice case in class, the professor may mis-speak by referring to the "practice of law," when he intended to say "the practice of medicine." His *intended* meaning is clear enough to most of the students, who know from experience that he frequently makes such mistakes.[126] Moreover, this attribution of meaning on the basis of the speaker's intent is not limited to figuring out

---

maker is attributed to Plowden. *See* Sinclair, *Legislative Intent*, *supra* note 2, at 1329.

Justice Scalia also recognizes an "objectified" form of legislative intent. Although this article does not agree with him entirely, he writes, "The evidence suggests that . . . we [the courts] do not really look for subjective legislative intent. We look for a sort of 'objectified" intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*." SCALIA, *supra* note 3, at 17. It is more likely that courts often, but not always, write in terms of an objectified or fictionalized intent.

123. Professor Gebbia-Pinetti splits it up a bit differently, with two kinds of subjective intentionalism and purposivism. Gebbia-Pinetti, *Statutory Interpretation*, *supra* note 60, at 281-84. Professor Campos has used the term "strong intentionalism" to describe theories where authorial intent is dominant. Paul Campos, *That Obscure Object of Desire: Hermeneutics and the Autonomous Legal Text*, 77 MINN. L. REV. 1065, 1083-95 (1993).

124. United States v. American Trucking Ass'n, 310 U.S. 534, 543-44 (1940) (footnotes omitted). *See also supra* Part II.A.1.a.

125. *See infra* Parts IV.B, V.B.4.

126. If my intended meaning is not clear, the students immediately can interrupt me and get clarification. This point distinguishes the professor from the legislative body, and is the source of a lot of problems and complications in the statutory interpretation setting.

an individual's verbal lapses. Even where there is no single or known author, we still use a "writer-centered" strategy for attributing meaning in obvious, and not so obvious, cases. Consider the perennially purported newspaper headline: "Enraged Cow Injures Farmer with Ax."[127] We realize, after blinking a time or two, that there probably was no ax-wielding cow. We know what any anonymous head-line writer(s) *intended* to mean, assuming that there ever was such a headline. We also know that informed readers would interpret the words in the context of knowledge which they have in common with the writer(s)—a cow does not wield an ax. Here, as with many other cases, the "reader-centered" and "writer-centered" strategies for attributing "meaning" would coincide.[128]

In fact, among the tools and reference points we use in attributing meaning, we are perhaps more likely to ask, as a touchstone for attributing meaning to textual words, "what was intended?" than "what is the common usage of the words?"[129] Everyday experience is admissible here. We simply are accustomed to attributing meaning on the basis of what we *think* or assume a "speaker" intended. We do it every day. It is only reasonable to assume that we do the same thing when we are processing or disambiguating written text, even statutory text.

Summing up, "intentionalism" generally is a writer-centered strategy, which focuses on attributing (often unconsciously[130]) to the words a meaning that the author—even an anonymous or collective author—would have intended.[131] With regard to statutory interpretation, then, there really is nothing novel about recognizing this point. As already mentioned, one can find something very similar to it in the leading multi-volume United States treatise on statutes and statutory interpretation.[132]

Attributing meaning on the basis of "intended" meaning or intended consequences is no worse (and no better) than attributing meaning on the basis of what we think the "ordinary" reader would attribute to the language.[133] There is no "ordinary reader." The ordinary reader is a mental construct, a first cousin to the "reasonable person" in torts. Legislative "intent(ion)" is a mental construct. Both the "ordinary reader" and "legisla-

127. Reported, among other such headlines, in the humor column, Michael Storey, *Otis the Head Cat*, ARKANSAS DEMOCRAT-GAZETTE, April 12, 1997 at 3E. *See also*, Sinclair, *Legislative Intent*, *supra* note 2, at 1351-59 (noting that "intent" in the collective entity or enterprise context is not necessarily identical to individual subjective intent, and discussing theories of collective intent).

128. The situations where reader-centered and writer-centered strategies for attributing meaning coincide are not limited to the simple example of ax-wielding cows. As at least one writer has recognized, "Textual meaning and authorial intention are not separable concepts, and searching for one is by necessity synonymous with seeking the other." Campos, *supra* note 123, at 1091.

129. For a fairly concise, but critical discussion of a theory that authorial intent is actually a dominant mode of interpretation, see *id.* at 1084-95 (discussing Fish and Perry, among others).

130. *See infra* Parts III.A, V.B.2.b.

131. We read far more "collective" writings each day than we realize. The infamous "Bluebook" readily comes to mind. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (17th ed. 2000). Other examples are abundant. For example, newspaper reportage is not written solely by reporters themselves. There is an editing process that involves a whole section of any large daily newspaper. *See e.g.*, *Leacock Is Promoted on State Journal News Staff*, WISCONSIN STATE JOURNAL, September 22, 2002 at C2 (referring to "supervising the copy desk, which is responsible for editing news stories and writing headlines").

132. SINGER, *supra* note 82, §§ 45:07, 45:39.

133. *See supra* Part II.B.1.

tive intent(ion)" are fictions. Both are mental tools, strategies, or heuristics for resolving indeterminate meanings or validating what *appears* to be a "plain meaning."[134]

3. Dynamic Statutory Interpretation and Practical Reasoning

Among the most academically influential theories of the late 20th century are "dynamic statutory interpretation" and its close relative, practical reasoning (or pragmatism).[135] Neither are self-explanatory on their face, but both are highly relevant to this article because they leave untouched (and largely unexamined) most of the traditional concepts and tools of statutory interpretation. According to the creator of dynamic statutory interpretation, at least in his original manifesto, "Interpretation is not static, but dynamic. Interpretation is not an archeological discovery, but a dialectical creation. Interpretation is not mere exegesis to pinpoint historical meaning, but *hermeneutics* to apply that meaning to current problems and circumstances."[136]

As he put it in a later work, "interpretation is dynamic, in the sense that the meaning of a statute will change as social context changes, as new interpreters grapple with the statute, and as the political context changes."[137] Apparently he means that: (1) judges inevitably import their own experience into the context used when applying statutes; and (2) we should not necessarily be tied to any notion that a statutory provision must be interpreted in accordance with the original meaning or intent that the enacting legislator (or "ordinary reader" at the time of enactment) would have attributed to it.[138]

To that extent, the dynamic theory may be adding something new, because, under traditional tools and concepts of statutory construction, the intention of the enacting legislature or the original meaning of the statutory language, rather than the meaning that we today would attribute to it, controls.[139] However, in other respects, this dynamic

---

134. *See infra* Part V.B.2-4.

135. As noted *infra* Part II.B.3, dynamic statutory interpretation theory and practical reasoning are closely related, if for no other reasons than that they have common authors, and a propensity in common to use most of the traditional concepts and tools of statutory interpretation.

136. Eskridge, *Dynamic Statutory Interpretation*, *supra* note 60, at 1482 (emphasis added).

137. ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION, *supra* note 9, at 199.

138. The United States Supreme Court does not seem to agree with this argument. *See* AMOCO Prod. Co. v. Southern Ute Indian Tribe, 526 U.S. 865, 880 (1999) (holding that Congress did not intend to include coalbed methane gas when using the word "coal" in statutes enacted in 1909 and 1910 reserving coal mining rights, even though the "meaning" of coal today, scientifically, may include methane trapped in solid coalbeds).

139. *See, e.g.*, People v. Cruz, 919 P.2d 731, 737 (Cal. 1996) ("The words of a statute are to be interpreted in the sense in which they would have been understood at the time of the enactment.") However, this generalization is subject to a flotilla of exceptions and refinements. Dynamic statutory interpretation theory, which seems to change only the basic concept of courts' being limited to the meaning or intention at the time of enactment, may be overkill, because the traditional concept is so full of loopholes. *See, e.g.*, Fidelity & Guar. Ins. Corp. v. Mondzelewski, 115 A.2d 697, 700 (Del. 1955) ("It is an elementary rule of statutory construction that legislative enactments couched in general terms broad enough to include conditions that the future may bring forth apply to the new conditions if they come within the general purview of the statute.").

theory does not depart from—or explain—the traditional judicial methodologies as described by the courts.[140]

Likewise, "practical reason," or pragmatism, a theory endorsed by the creator of dynamic statutory interpretation and one of his close colleagues,[141] and by other academics worthy of attention,[142] expressly retains the traditional concepts and tools of statutory interpretation, while recognizing the reality of a judge's inevitable tendency to read a statute in light of his or her own contemporary background. As described by a pair of its capable proponents, some of the factors considered in a practical reasoning approach to statutory interpretation include the time-honored statutory text and related concepts:

> Textual analysis starts with the specific words of the statutory provision being interpreted. The interpreter should approach the statutory text as a reasonably intelligent reader would and give the text its most commonsensical reading. That reading should be sensitive to any special senses the words have acquired, and should also consider the placement of words in the sentence, and even the punctuation of the sentence. Textual analysis should further consider how the statutory provision at issue coheres with the general structure of the statute, since other provisions in the statute might shed light on the one being interpreted.[143]

The discussion continues, touching on some other familiar concepts and tools: *e.g.*, legislative intent, legislative history, imaginative reconstruction, legislative purpose.[144] The problem is that, again, such theories of "practical reason," while adding a few notions (such as "evolutive considerations"[145]), largely restate what the courts have been doing for two hundred years,[146] without examining in any detail the basic nature of the basic concepts and tools of statutory interpretation.

---

140. In describing the process of statutory interpretation, this author depicts the statutory interpreter as sliding "up and down the funnel." ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION, *supra* note 9, at 56. This "funnel" is just a diagram in form of a large "V," with labels along its sides. Most of the labels themselves are familiar to those who work with statutes. For example, there is "statutory text," "Whole Act and Integration into Structure of Law," "Imaginative Reconstruction" (a.k.a. one version of "legislative intent"), and "Legislative Purpose." Although the "funnel" adds a few new labels, such as "Evolution of Statute" and "Current Values," which seem unique to his dynamic theory, Professor Eskridge overall describes the statutory interpreter's methodology in familiar terms. For example, he describes the process as "considering the strengths of various considerations . . . weighing them against one another along conventional criteria." *Id.* All of this differs little from conventional descriptions of what is to be considered in statutory interpretation cases. *See supra* Part II.A.1.

141. *See* Eskridge & Frickey, *Practical Reasoning*, *supra* note 9, at 326.

142. *See, e.g.*, Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533 (1992).

143. Eskridge & Frickey, *Practical Reasoning*, *supra* note 9, at 354-55 (citations omitted). The funnel of abstraction also appears here, suggesting again that the differences between dynamic statutory interpretation and theories of "practical reason" are marginal. *Id.* at 353-54.

144. *Id.* at 355-57.

145. *Id.* at 358-62.

146. *See supra* Part II.A.2. It does add the notion that contemporary circumstances and values play a role in

As with "dynamic statutory interpretation," however, such "practical reasoning" theories are important because they recognize that neither "textualism" nor "intentionalism" provide, by themselves, a satisfactory theory. "None of the three anchors (intent, purpose, text) can altogether exclude the other two."[147]

4. Some New Directions in Statutory Interpretation Theory

The "vibrant scholarly debate about statutory interpretation"[148] has not resulted in any consensus, among either the academics or the courts.[149] As one important writer has put it, "a sense grows that no single approach—purposivism, Republicanism, or textualism—can explain statutory interpretation. A 'pragmatic' mood has set in, giving each approach its due . . . ."[150]

As early as 1993, a prophetic, but somewhat neglected, article by Professor Robert Martineau foresaw the problems inherent with much contemporary theorizing about statutory interpretation. He asserted that:

> The unstated premise of those who develop or write about the grand theories is that judges decide or should decide statutory construction cases on the basis of a grand theory. The task of the scholar [espousing a grand theory] is to discover the grand theory that was used in deciding past cases or that *should* be used in deciding future cases. Whatever the purpose, the scholars use appellate court opinions to develop and demonstrate their theses.[151]

---

statutory interpretation (at least unconsciously). But it does not explain anything about the concepts and tools which the courts use, or say they use, in carrying out the enterprise of statutory interpretation.

147. Eskridge and Frickey, *Practical Reasoning*, *supra* note 9, at 325.

148. Muriel Morisey Spence, *The Sleeping Giant: Textualism as Power Struggle*, 67 S. CAL. L. REV. 585, 588 (1994).

149. Kelso & Kelso, *supra* note 2 at 81. In addition, Professor Araujo observes:

> [W]e have become awash in theories and meta-theories. But on closer scrutiny, we see that many of these writers who have offered theories of interpretation (whether they be academics, judges, or practitioners) have advocated or preferred one particular theory of interpretation over others. The spectrum of theories (and, consequently my critique) ranges from plain meaning, originalist, textualist, intentionalist, purposivist, contextualist or dynamist. At the outset, I suggest two things about these theories of legal interpretation. First, each has something of value to offer to the interpreter who tackles a public legal text in order to ascertain its meaning. Second, each of these approaches tends to exclude important, even vital, aspects of the interpretive enterprise so that something essential to the discernment of the text's meaning is lost . . . .

Araujo, *supra* note 2, at 226-27 (footnotes omitted).

150. POPKIN, STATUTES IN COURT, *supra* note 52, at 153.

151. Robert J. Martineau, *Craft and Technique, Not Canons and Grand Theories: A Neo-Realist View of Statutory Construction*, 62 GEO. WASH. L. REV. 1, 23 (1993) [hereinafter Martineau, *Craft and Technique*] (emphasis added).

Professor Martineau, a true authority on the appellate process,[152] tried to explain to us that appellate courts simply do not decide cases on the basis of some "grand theory." Nor is a written judicial opinion the detailed, official account of the thought processes of the deciding appellate judges. The judicial opinion is "a reasoned justification of the decision prepared after the decision is made. The principal purpose of the opinion is to make the decision appear consistent with the facts and the relevant statutory and judicial authority."[153]

Part of his message seems to be that we cannot construct a worthwhile theory about a human activity by disregarding the realities behind that activity, or by treating that activity as a set of abstract "-isms." Or, as Professor Sinclair has tried bluntly to remind us, "Theories must account for data."[154]

There are indications that statutory interpretation theory is moving more in this direction. Professors Clark Kelso and Charles D. Kelso suggest that "[W]e have been asking the wrong question and searching for the wrong answer."[155] The Kelsos, along with at least two other important writers, suggest that theories should focus on statutory interpretation as part of the larger enterprise of "judging."[156] As the Kelsos also say:

> First, statutory interpretation is a process engaged in by judges who are, after all, only human. The process of deriving meaning from words, which lies at the heart of statutory interpretation, is a peculiarly individual one. Computers can be programmed to mimic a process of interpretation, but that does not mean that each individual's process of interpretation is the same or can be made the same. . . .
>
> Second, a judge or court may not so much engage in a process of statutory interpretation as make a decision about the meaning of a statute. The difference is a subtle, but important one.[157]

Recognizing that statutory interpretation is a very complex and human process is a crucial step. The next step, it would seem, should be to consider human behavior, or at least the cognitive processes involved in statutory interpretation.[158]

---

152. *See, e.g.*, ROBERT J. MARTINEAU, MODERN APPELLATE PRACTICE: FEDERAL AND STATE CIVIL APPEALS (1983); ROBERT J. MARTINEAU, APPELLATE JUSTICE IN ENGLAND AND THE UNITED STATES: A COMPARATIVE ANALYSIS (1990).

153. Martineau, *Craft and Technique*, *supra* note 151, at 27.

154. Sinclair, *Statutory Reasoning*, *supra* note 2, at 305.

155. Kelso & Kelso, *supra* note 2, at 82.

156. *See* Kelso & Kelso, *supra* note 2, at 83 (hypothesizing "that actual methods of statutory interpretation used by judges are more closely aligned with a particular judge's overall approach to decision-making than with independent theories of statutory interpretation"); POPKIN, STATUTES IN COURT, *supra* note 52, at 207-46 (discussing what he christens "ordinary judging"); Gebbia-Pinetti, *Statutory Interpretation*, *supra* note 60, at 236, 242-57 (interpreting statutes to accord with legal-systems values).

157. Kelso & Kelso, *supra* note 2, at 83.

158. In other areas of legal studies, there already is a strong movement, often referred to as "behavioralism," which is turning to insights from cognitive psychology, decision theory and related fields. *See, e.g.*, Symposium, *The Legal Implications of Psychology: Human Behavior, Behavioral Economics, and the Law*, 51 VAND. L. REV. 1499 (1998). *See also* Donald C. Langevoort, *Behavioral Theories of Judgment and Decision*

Professor Dan Simon has written that "The nature of judicial reasoning is inextricably related to the mental processes operative in the making of judicial decisions. Thus, to understand the central features of judicial reasoning one must investigate the cognitive operations through which these decisions are made."[159] Although discussing judicial decision making in general, Professor Simon's article necessarily addresses many of the same cognitive concerns and processes that are at work in statutory interpretation. The author of the present article owes much to Professor Simon and others whose efforts coincide with the direction of this author's thinking and research over the past decade.[160]

It must immediately be emphasized, of course, that insights from psychology and decision theory are not fool-proof. They are especially fragile in the hands of a legal academic, such as the author of this article, who lacks systematic education in those disciplines. However, it seems both natural and necessary to consider the relevance to statutory interpretation of scientific disciplines which inquire into human mental processes and are subject to some empirical rigor and the scientific method.

Few of us are qualified scientists, but all of us can use insights from more scientific disciplines to study and think about the problems involved in statutory interpretation. Statutory interpretation is an enterprise very much involving the human mind, with all its limitations.

Moreover, if there is one thing to learn from trying to study materials from the scientific disciplines, it is that the sciences move cautiously, insisting upon experiment or other empirical evidence, and even then remaining subject to conflicting theories and contentions.[161] The ordinary article in a scientific publication does not make sweeping claims, does not announce a "grand theory," and does not set out prescriptions for decision makers (such as the courts). One is struck, when reading some of the original scientific literature in the cognitive disciplines, with the very narrow and careful nature of the procedures used and the conclusions reached.[162]

Making in Legal Scholarship: A Literature Review, 51 VAND. L. REV. 1499 (1998) (providing a survey of the literature); Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420 (1999); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1057 (2000) (referring to the movement as "law and behavioral science").

159. Dan Simon, *A Psychological Model of Decision Making*, 30 RUTGERS L.J. 1, 18 (1998).

160. *See* Mullins, *supra* note 64, at 11 n.5 (quoting and citing, among others, LYLE E. BOURNE, JR., ET AL., COGNITIVE PROCESSES 157 (1979)). *See supra* notes 158, 159; *see generally infra* Part IV.

161. *See* Erica Beecher-Monas, *The Heuristics of Intellectual Due Process*, 75 N.Y.U. L. REV. 1563, 1575 (2000) ("Scientists recognize that what matters most is the explanatory power of the proffered theory and how well the data support the theory.").

162. *See, e.g.*, Edward E. Smith et al., *Category Membership, Similarity, and Naive Induction*, *in* 2 FROM LEARNING PROCESSES TO COGNITIVE PROCESSES: ESSAYS IN HONOR OF WILLIAM K. ESTES 181, 189-92 (Alice F. Healy, et al. eds., 1992) (describing experiment involving subjects' perceptions of similarities and dissimilarities among mammals to evaluate proposed explanatory models); Walter Kinsch, *How Readers Construct Situation Models for Stories: The Role of Syntactic Cues and Causal Inferences*, *in* 2 FROM LEARNING PROCESSES TO COGNITIVE PROCESSES: ESSAYS IN HONOR OF WILLIAM K. ESTES 181, 261 (Alice F. Healy, et al. eds., 1992) (discussing the "literature" on discourse comprehension). For a more generally available work containing a number of such scientific articles relevant to, and influential on, this article, see JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman, et al. eds., 1982) [hereinafter

This article, admittedly, is not "scientific" in this sense. However, it does try to consider some data, and make observations about, the concepts and tools of statutory interpretation in light of common sense and insights from sources that may tell us something about how our minds process the written word and deal with making decisions under conditions of uncertainty.[163]

III. STATUTORY INTERPRETATION: COMPLEXITIES AND DECISION MAKING UNDER CONDITIONS OF UNCERTAINTY

Statutory interpretation involves some of the most complex and problematic mental processing that ordinary lawyers and judges are called upon to perform.[164] Many of the complexities and sources of uncertainty are obvious enough. Every statute is different. Every fact pattern is different.[165] Every case applying reasonably disputable general statutory language to a particular fact pattern is a difficult problem to be solved, and difficult problem solving is unavoidably messy and complex. Even Aristotle, in a much simpler age, recognized the core problem of applying generally worded laws to specific factual disputes: "[T]he general principle must be stated in writing, the action taken depends upon the individual case."[166]

Moreover, the complexity of statutory interpretation is not always fully appreciated because it is rooted in the often-unconscious ways in which we mentally process language, especially written language. To further complicate matters, statutory words are written in a particular, even unique, sort of context—the legislative process—and then applied or "read" in a very different context—the judicial process.

In order to appreciate the complexity, and some of the sources of uncertainty, involved in statutory interpretation, we should begin by considering a few basic points about mental processing, words, reading, comprehension, and statutes.

A. Complexities and Uncertainties Related to Unconscious Mental Processing

To begin with, the very act of reading is complex, uncertain, and fallible, partly because much of the mental processing involved is unconscious. This is a major paradox.

JUDGMENT UNDER UNCERTAINTY].

163. For a leading and accessible work on cognitive psychology and decision making under conditions of uncertainty, see SCOTT PLOUS, THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING (1993) (winner of the William James Book Award). *See also* JUDGMENT UNDER UNCERTAINTY, *supra* note 162.

164. *See generally infra* Part III.

165. *See infra* Part III.I.

166. ARISTOTLE, THE POLITICS 138 (Bk. II, ch. viii) (T.A. Sinclair trans., 1951). For another example from Aristotle, "the laws, if rightly established, ought to be sovereign, and also that officials . . . ought to have sovereign powers to act in all those various matters *about which the laws cannot possibly give detailed guidance; for it is never easy to frame general regulations regarding every particular.*" *Id.* at 206 (emphasis added). A slightly different translation of this quotation refers, in pertinent part, to "matters on which law is unable, owing to the difficulty of framing general rules for all contingencies, to make an exact pronouncement." ARISTOTLE, THE POLITICS 127 (Bk. III, xi) (Ernest Barker trans., 1958).

Our minds constantly disambiguate sounds and written marks without being fully aware of the processing involved.[167] As Professor Simon points out, a great deal of our mental processing *generally* is not entirely conscious.[168] (It must be emphasized immediately that we are not talking about any kind of Freudian theories of the unconscious here. We are merely talking about the simple fact that we are not consciously aware of all of our mental processing.[169])

Moreover, when we disambiguate the sounds or the marks on paper, each of us will have different mental pictures regarding those sounds and marks. A common sense demonstration can be conducted in a classroom to verify this. I sometimes tell my students to close their eyes. Then I say something like, "On my way to work this morning, I saw a cat." Then I quickly tell them to open their eyes and describe whatever they visualized. Most of them visualized a cat, but no two individuals have yet visualized the

---

167. For example, consider a few sentences which are part of a brief narrative. "(1) John is a programmer who works for a large corporation. (2) John entered his manager's office. (3) He was sitting at his desk. (4) John asked for a raise. (5) He wanted to buy a home computer for his child with the money." KATHLEEN DAHLGREN, NAIVE SEMANTICS FOR NATURAL LANGUAGE UNDERSTANDING 3 (1988). As the writer then tells us, "Just these few words call up a small but rich naive theory of the world, the theory associated with business, the social roles and relations within it, the field of computer programming, family relations, and so on." *Id.* (citation omitted).

168. *See* Simon, *supra* note 158, at 21.

> In sum, judicial decisions are determined by legal materials that are restructured [internally in the judge's mind] in turn by the processes of making the decision. . . . It is very important to note that judges are mostly unaware of the cognitive processes that are responsible for the restructuring of the legal materials. They are also generally unaware that their evaluation of the materials is effected by the coherence bias. . . . Furthermore, judges tend not to recognize that these experiences are mostly a product of their mental process; instead, they misattribute them to the law itself."

Id. at 21. *See also* Solan, *Learning Our Limits*, *supra* note 97, at 237 ("We use contextual information and knowledge of prototypes in everyday speech and understanding, and we use this information automatically and unselfconsciously.").

169. *See* John F. Kihlstrom, *The Cognitive Unconscious*, 237 SCIENCE 1445, 1447 (1987) ("Now it is clear that there are circumstances under which the meanings and implications of events can be unconsciously analyzed as well. Thus people may reach conclusions about events . . . and act on these judgments without being able to articulate the reasoning by which they were reached."). *See also* PAWEL LEWICKI, NONCONSCIOUS SOCIAL INFORMATION PROCESSING ix (1986) ("The research program presented in this book began with observations which suggest that nonconscious acquisition and processing of information play a major role in human development and adjustment."). Professor Lewicki's studies also drew a connection to research on "implicit learning," which, among other things proposes "that complex structures, such as those underlying language, socialization, perception, and sophisticated games are acquired implicitly and unconsciously . . . ." *Id.* at 21 (citations omitted). For another relevant article cited by Professor Lewicki in his book, see A.S. Reber, et al., *Syntactic Learning and Judgments: Still Unconscious and Still Abstract*, 114 J. OF EXPERIMENTAL PSYCHOLOGY: GENERAL 17-24 (1985).

For another work touching on the unconscious nature of much mental processing, see UNINTENDED THOUGHT (James S. Uleman & John A. Bargh eds. 1989). In the Introduction to that book, the editors made the following interesting points:

> Up to the mid-1970s or so, information processing approaches to the study of learning and memory . . . did essentially assume that a person had a rational, logical, and intentional control over the flow of thought and decisional output. . . . But by . . . 1975 . . . these assumptions were under attack. Cognitive models were being developed in which the information processing involved in reading or answering questions about category membership were seen as largely uncontrolled, automatic, 'spreading activation' phenomena. . . .

Id. at xiii-xiv (citations omitted).

same cat.[170] None of them has ever visualized an elephant—but it is possible. The human mind can be very contrary. But most of them visualize something which their classmates probably would recognize as a cat. (The way in which our minds use "prototypes" in communicating concepts such as "cats" at least partially explains this phenomenon.[171])

Unconscious mental processing and individualized internal responses certainly are not limited to ordinary language in ordinary settings. They are found also in a more complex phenomenon: the expert's ability to readily understand passages of written language that the rest of us find incomprehensible. Experts in a particular field, such as taxation, environmental law, or banking law, often will agree that the "meaning" of a particular statutory provision is unambiguous, even though the rest of us are bewildered and reduced to guessing about the same provision. The expert has a lot of background information, which forms a context—largely unconscious—rendering the "meaning" plain to the expert.[172]

A powerful example of expertise unconsciously influencing the interpretation of statutory language may lurk in an article by Edward L. Rubin.[173] This article was not about statutory interpretation directly, but about administrative "discretion" and (among other things) German banking regulations.[174] German banking regulators had insisted to

170. Some students, of course, may have ignored the cat and visualized the professor on the way to work in his 1966 Mustang. This only reinforces the point in the text, however. Confronted with a statement, people visualize different things in reaction to that statement. Moreover, some students might visualize nothing, or perhaps refuse to admit they had visualized anything.

171. *See* Lawrence M. Solan, *Law, Language and Lenity*, 40 WM. & MARY L. REV. 57, 66 (1998) (discussing linguistic prototype theory in relation to criminal statutory interpretation). *See infra* Parts III.C, III.H, III.I, V.B.3.

172. At a more scientific level, the "meanings" attributed to words by experts often are discussed in terms of "schema." "Background information therefore provides a meaningful context for the acquisition of new information. This information provides a conceptual structure or *schema* that contains the implications of facts and bits of information that seem unrelated when read by a person with little background knowledge." MARGARET W. MATLIN, COGNITION 288 (3d ed. 1994) (effect of background information in the reading process) (emphasis added) [hereinafter MATLIN, COGNITION]. *See also* JOHN B. BEST, COGNITIVE PSYCHOLOGY 447 (1986) ("For the last several years, cognitive psychologists have come to appreciate that the knowledge of the expert is probably organized differently from knowledge in the mind of the novice.") [hereinafter BEST, COGNITIVE PSYCHOLOGY].

For some law review discussions of expertise, see *Session 2: Training the Creative Problem Solver*, 37 CAL. W. L. REV. 51, 60-62 (2000); Edward S. Adams & Daniel A. Farber, *Beyond the Formalism Debate: Expert Reasoning, Fuzzy Logic, and Complex Statutes*, 52 VAND. L. REV. 1243, 1284-90 (1999) (discussing the nature of expertise); Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 821-23 (1993) (discussing expertise and "practical reason"); Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 560 (2002) ("Expertise produces a useful set of schema to guide decisionmaking, but like all schema, they limit a decisionmaker's ability to think differently about a problem and to recognize the limitations inherent in the schema.").

173. Edward L. Rubin, *Discretion and Its Discontents*, 72 CHI.-KENT L. REV. 1299 (1997).

174. As Professor Rubin describes his project and its surprising data:

> This article employs a case study of bank supervision in . . . Germany and a comparison of the German view of administrative discretion . . . with the American view of our own supervision process. The most startling aspect of this comparison, from the American perspective, is that the German officials *claim they have no discretion at all*; they assert that all their actions are determined by law.

Professor Rubin that they had no "discretion" about applying a particular statute because "their activities were *fully specified* in the seventy-five page, large print, single column Banking Act."[175] Professor Rubin made it very clear that the "meanings" of many of those statutory provisions were far from self-evident in their application to particular situations, but the regulators were reluctant to agree with him.[176] It turned out that the regulators shared a common and very specialized background of expert knowledge. They had gone through two or three extra years of intensified training at a special school.[177] From Professor Rubin's point of view, "The question, then, is how a group of reasonable, intelligent people can persuade themselves of such an implausible, albeit *much-desired*, view of their own level of discretion."[178] From our point of view, however, the matter is not just one of administrative discretion. Another (but not necessarily conflicting) assessment is available. In our terms, these regulators were unconsciously using a lot of internalized information. They had a much broader—and not fully conscious—context for ascribing "meaning." They considered many of the statutory provisions to be clear, and their discretion correspondingly limited, because they knew much more than the bare bones of the statutory language. The substantive "meanings," which they asserted to be in the statutory language, were a matter of what they already knew. They had imbibed a lot of information during a lot of extra training.

A lesson to be drawn at this juncture is that, no matter how "plain" or "clear and unambiguous" a passage of statutory language may seem to be, there are a lot of very real complexities, uncertainties, and risks of error involved in attributing "meaning" to that language. Even when a judge acts in utmost good faith, striving to attribute "ordinary meaning" to the words, there is always a possibility of error, because the "plain meaning" of a statutory provision is being inferred from a lot of unconscious mental processing which uses a lot of unconscious mental background. Unconscious mental

---

Id. at 1299-1300 (emphasis added); *cf.* Part II.B.2 (discussing Textualism and its implied reliance, and actual non-reliance, on pure statutory text).

175. Rubin, *supra* note 173, at 1325 (emphasis added).

176. *Id.* at 1299-1300.

177. As Professor Rubin describes the situation:

> When people are hired to be bank regulators in Germany, they are sent to a special "university" in Hachenburg, run by the Bundesbank. High school graduates, that is, twenty-year olds with a baccalaureate degree, are trained at this institution for three years; university graduates with practical experience are trained for two years. The training is conducted by specialized staff members of the Bundesbank. There are no course books and no theoretical instruction. Instead, the students are taught the rules and procedures of their particular role for the entire two or three year period.
>
> . . .
>
> In light of this extended training period, the absence of detailed statutory or regulatory instructions in Germany no longer seems quite so astonishing. No such instructions are required to ensure administrative regularity. Two or three years of full-time training in the specifics of one's job, at a relatively isolated facility devoted solely to that purpose, will produce regularity quite nicely.

Id. at 1330-31 (footnotes and citations omitted).

178. *Id.* at 1329 (emphasis added). For a discussion of the egocentric bias and related biases, see *infra* Part V.B.2.b.

processing—and internal certainty about "meaning"—is very fallible and the subject of considerable uncertainty.[179]

B. Complexities and Uncertainties from the Symbolic and Arbitrary Nature of Words

Next, there is the confounding problem of words themselves. It is widely recognized and conceded that written words have no inherent meaning.[180] "Words are only meaningless marks on paper or random sounds in the air until we posit an intelligence which selected and arranged them."[181] If you don't believe this, try to read the simplest passage in a language with which you are totally unfamiliar—for most of us, this could be Arabic or Chinese. Written words, in short, are symbols. They have no particular sanctity, much less any inherent "meaning." It's all going on inside our heads.[182]

A couple of generations ago, we seemed to be on the way to understanding this. Words are symbols. "The word is not the thing"[183] which it symbolizes. The map is not the territory.[184] If we imbue these symbols with some kind of mystical power over us, we forget that words not only are symbols but also are nothing more than a means to an end—communication. They also are imperfect tools for communication. Justice Frankfurter realized this, referring to words as "clumsy tools."[185]

---

179. For an example of overconfidence in one's own ability to discern the "plain meaning" of a statutory provision, see the neolithic majority opinion in Robinson v. Shell Oil, 70 F.3d 325 (4th Cir. 1995), *rev'd* 519 U.S. 337 (1997). There, the Court of Appeals insisted that the word "employee" simply could not include "former employee" in the anti-retaliation provisions of Title VII. On appeal, the Supreme Court unanimously ruled that the statutory language at issue was ambiguous and "interpreted" the word "employee" to include a former employee who had been the subject of later adverse communications to a potential future employer. Robinson v. Shell Oil Co., 519 U.S. 337, 345-46 (1997).

180. *See, e.g.*, John M. Breen, *Statutory Interpretation and the Lessons of Llewellyn*, 33 LOY. L.A. L. REV. 263, 433 (2000). The author asserts:

> Indeed, we could not recognize something as a word, rather than as merely a contour (or range of contours) of sounds or a certain form (or range of forms) of scribblings if we were not aware that sounds and scribblings with such contours and forms have a significance, function, or value resulting from the growth or stipulation of such conventions.

Id. (footnote omitted).

181. Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 230 (1988).

182. The process going on inside our own heads is, of course, not totally unconscious and subjective. The mental processing gains some objectivity because it is affected by the conventions of the "language communities" to which we belong. However, the incorporation and operation of those conventions still is likely to be unconscious in many respects. For some discussion of interpretive communities and statutory interpretation see Blatt, *Interpretive Communities*, *supra* note 59 (advancing a theory that interpretation should be in accordance with the "interpretive communities" involved under the particular statute); Peter C. Schanck, *The Only Game in Town: An Introduction to Interpretive Theory, Statutory Construction, and Legislative Histories*, 38 KAN. L. REV. 815, 835-39 (1990) (discussing conventionalism and interpretive communities). "In this instance, the definition of 'farm products' is lexically clear because there is a consensus in all potentially relevant language communities that the soybeans qualify as crops, one of the subcategories into which the defined category has been divided by the drafters." Julian B. McDonnell, *Definition and Dialogue in Commercial Law*, 89 NW. U. L. REV. 623, 643 (1995).

183. S.I. HAYAKAWA, LANGUAGE IN THOUGHT AND ACTION 24 (4th ed. 1978)

184. *Id.* at 25.

185. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 546 (1947).

At a cerebral level, then, we all know that words are symbols, lacking any inherent "meaning," and that most words are imprecise.[186] But we keep forgetting this simple point. We ignore the major complexities and uncertainties involved in translating a set of symbols written by someone else, in a different setting, and perhaps in a different era, into "meaning" in our own minds.[187]

C. Complexities from the Imprecision of Words Generally

As symbols, words usually are imprecise. "Cat" does not precisely identify any particular animal.[188] It is an abstract category into which we mentally "put" a creature which we identify as a cat.[189] As approximations and abstractions, words symbolize whole classes of objects (or behaviors) and even collections of abstractions. Consequently, *we can be precise only in our own minds.* "Our dog Bitsy" conjures up a picture (or cascade of pictures[190]) in the minds of those who know the particular dog. However, someone who has never seen "our dog Bitsy" has no mental picture of the dog herself. The name, "Bitsy," conjures up the image of a small dog, but "Bitsy" might be an ironic or whimsical name for a St. Bernard.[191]

The more we think about words, the worse the complications and uncertainties become. Words can give our minds the illusion of being precise, but generally they are mere approximations. Words are a great illusion-maker, but they are necessary. They help us communicate, but they give us an illusion of precision, when what we have are a mere range of possibilities.

---

186. *See supra* Part III.A-B.

187. For one of many examples of remarks which seem oblivious to the uncertainties involved in reading, consider the following: "A text . . . should be construed reasonably, to *contain* all it fairly means." SCALIA, *supra* note 3, at 23.

188. HAYAKAWA, *supra* note 183, at 156-57.

189. According to one important theory in cognitive psychology, people decide whether a particular item belongs to a particular category by comparing that item to a "prototype." However, this does not mean that membership in a particular abstract category, such as cat, is always obvious or clear-cut. For example, robins and sparrows are prototypical birds, but an ostrich is not. MATLIN, COGNITION, *supra* note 172, at 224. "[A] category tends to have a graded structure, beginning with the most representative or prototypical members and continuing on through the categories nonprototypical members . . . ." *Id.* Professor Solan has given us one of the more cogent discussions of prototype theory available in the law reviews. Solan, *supra* note 171, at 67-75. Among other things, he points out that "prototype theory correctly predicts that concepts will become fuzzy at the margins." *Id.* at 67 (discussing the concepts behind the word, "drizzle"); *see also*, Solan, *Learning Our Limits*, *supra* note 97, at 237-38 (discussing the use of contextualism and prototypes relative to textualism).

190. I may for example visualize her in a series of mental images—as I saw her this morning, or as a puppy, or at a time when she was sick, etc. In other words, the picture in my mind is not static. Even in our own minds, therefore, we will be imprecise because the items symbolized by words will not conjure up a fixed image or completely stable network of associations. For one description of a psychological model of mental activity which may be related to this phenomenon, see BEST, COGNITIVE PSYCHOLOGY, *supra* note 172, at 193-96 (1986) (spreading activation model).

191. In order for the passage in text to have a "plain meaning," or even be intelligible, the reader must already know what a St. Bernard is. If the text above had alluded to some other large, but unfamiliar breed, many readers would not have understood it. Unfortunately, when drafting statutes, one sometimes must use abstract and even unfamiliar terms and reference points. We inevitably encounter the "use of undefined defining terms." Universal Camera Corp. v. NLRB, 340 U.S. 474, 489 (1951) (discussing "substantial evidence").

D. Complexities from the Very Approximate Nature of Statutory Words

Statutory words, in particular, are approximations.[192] Sometimes they are mental constructs generalizing from tangible things, such dogs and birds. But even there, complications and nagging uncertainties of meaning can arise. Dogs and birds, after all, are still categories, mental constructs, and abstractions.[193] Moreover, key statutory words often are symbols denoting very abstract, imprecise categories of things, or pure abstractions such as "reasonable,"[194] "professional,"[195] "administrative,"[196] "substantial evidence,"[197] or "use."[198] So much for words themselves and their complexities, and really we are only scratching the surface.

E. Complexities and Uncertainties from the Process of Reading

Before addressing some problems about the concept of "meaning" in both a general and statutory context, it is probably a good idea to examine some insights from modern psychology about the process of reading itself. Works on cognitive psychology and the psychology of reading give us more complications to consider.

> As we all know, reading is not just a matter of transfer of information from the print to the reader's mind; there is also an active contribution from the reader's store of knowledge. We bring our own experiences to bear on what is being read by *filling gaps, by interpretation,* and by *extrapolating* from what is given in the text.[199]

In statutory interpretation terms, Lawyer A brings one set of experiences to the statutory language. Her adversary brings another. The judges bring their own. Because we have a shared body of legal education and cultural experience, we usually can communicate, and sometimes even agree. But how do we explain "red" to someone who has been blind since birth?

---

192. Justice Frankfurter intuited this quite well. "Unlike mathematical symbols, the phrasing of a document, especially a complicated enactment, seldom attains more than approximate precision." Felix Frankfurter, *Some Reflections, supra* note 185, at 529.

193. For example, it is not too far-fetched to consider the situational ambiguity of wolf-dog hybrids under a statute literally pertaining to dogs. *Cf.*, People v. Hepburn, 180 Misc.2d 265 (N.Y. County Ct. 1999) (dismissing charge of possessing a wolf hybrid without a permit, but refusing to return the animal to its owner).

194. Fair Labor Standards Act, 29 U.S.C. § 216(b) (allowing recovery of "reasonable attorney's fee to be paid by the defendant").

195. Fair Labor Standards Act, 29 U.S.C. § 213(a)(1) (exempting employees who are employed in a bona fide "executive, professional, or administrative capacity").

196. *Id.*

197. Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) (discussing statutory term, "substantial evidence").

198. *See infra* Part V.B.3.

199. ROBERT G. CROWDER & RICHARD K. WAGNER, THE PSYCHOLOGY OF READING 131 (2d ed. 1992).

There is no doubt that, when we read, we are attributing "meaning."[200] "[M]uch 'meaning' is *created* by us in response to the material presented. In other words, we add, we infer, we create. All this is a necessary part of the comprehension of natural language."[201] As one basic text on cognitive psychology explains, "When people try to form a coherent representation of the text they are reading, they often make inferences that go beyond the information supplied by the writer."[202]

"As you might expect, people who have been instructed to read a passage carefully are especially likely to draw inferences during reading. When reading slowly and carefully, we have the time to search for connections that we might otherwise miss."[203] Unfortunately, this also suggests that when we do the slow and careful reading necessary in reading statutes, our tendency to draw inferences (from our own minds and our own experiences) gets stronger. Again, we are not "finding" meaning in the statutory words.[204] We are making inferences from our own minds and experiences. We can complicate statutory interpretation, without even realizing it, by confusing the results of our own mental processing of marks on the paper with some absolute "meaning" which we insist those words "have."[205]

What kinds of inferences are readers likely to make? Again, a basic introductory text on cognitive psychology tells us that one study "examined four kinds of inferences that people could draw when reading a story. Specifically, people can make inferences about the *goal*, the *plan*, the action, or the state of characters in a story."[206] If people tend to do that about a *story*, which almost by definition is written at a more concrete level than abstract statutory language, just imagine what people (even judges and lawyers) will do when reading statutory language, which is by its very nature expressed at a high level of abstract generalization. Certainly, the established concept of attributing "purposes"[207] to a statute is closely related to our more general psychological tendency to draw inferences about goals and plans when we read written materials.

We also tend to incorporate *assumptions* into our reading of language, including statutory language. One introductory text on cognitive psychology refers to these assumptions as "presuppositions."[208] Individuals shown a picture of an automobile accident with *no* shattered glass on the street are likely, when their recall is tested later, to

---

200. *See supra* Parts III.A, III.F.

201. LYLE E. BOURNE, JR. ET AL., COGNITIVE PROCESSES 157 (1979) (discussing the ways in which we "elaborate" on written words) [hereinafter COGNITIVE PROCESSES].

202. MATLIN, COGNITION, *supra* note 172, at 289.

203. *Id.* at 290 (citation omitted) (emphasis added).

204. *See supra* Parts II.B.1, III.E-F.

205. Again, in light of contemporary knowledge about cognitive processes, it is quite likely that we cannot limit ourselves to considering only statutory text. *See supra* Part II.B.1.

206. MATLIN, COGNITION, *supra* note 172, at 290 (emphasis added).

207. For just one example of cases mentioning "purpose" in statutory interpretation: "If the statute is ambiguous, several principles guide the Court's interpretation. First, the statute must be read as a whole in a manner that will promote its purposes." Rubick v. Sec. Instrument Corp., 766 A.2d 15, 18 (Del. 2000) (citations and quotation marks omitted).

208. COGNITIVE PROCESSES, *supra* note 201, at 159

remember shattered glass as part of the picture. This phenomenon probably occurs because we have seen automobile accidents with glass on the street.[209]

This has more relevance to statutory interpretation than we might realize. For one thing, statutory text is generally written at a fairly high (or very high) level of generalization.[210] Hence, our "reading" of statutory language to some extent will be infected by our *natural* tendency to elaborate and, sometimes erroneously, fill in "gaps" inherent in the generalized language of statutes.[211] More complexities and sources of uncertainty arise when the lawyers' and the judges' presuppositions are different.

For another thing, and more importantly, when we are applying statutory provisions to real cases and thus drawing inferences from written text, we are engaged in a form of mental processing. We are *not* following legal "rules." Drawing inferences from text, including statutory text, is a matter of mental processing which involves presuppositions, background knowledge, and decision making. This mental processing is not a matter of artificial substantive rules having the force and effect of law, and probably cannot be controlled by such rules.[212] Statutory interpretation is a process of the mind, not the application of a yardstick.

F. Complexities from the Concept of "Meaning" Generally

The very concept of "meaning" poses serious complications and sources of uncertainty for statutory interpretation. More than fifty years ago, Professor Chaffee noted that there were at least sixteen different definitions of the word "meaning."[213] "[T]his word 'meaning' which we lawyers and judges use so blithely as if it were a clear path out of our tangles, is really a network of paths in which we are likely to get worse lost than ever."[214] More recently, Professor Greenawalt has written, "In everyday life, people talk without difficulty about what someone or something means. Yet, when we pause to

---

209. PLOUS, *supra* note 163, at 33; COGNITIVE PROCESSES, *supra* note 201 at 156-158. This phenomenon probably is related to general schema theories and the ways in which our general background knowledge sometimes misleads us. MATLIN, COGNITION, *supra* note 172, at 245.

210. *See supra* Part III.D.

211. MATLIN, COGNITION, *supra* note 172, at 245 (discussing studies in which "background knowledge misleads people and they recall inferences that were not actually stated.").

212. *See infra* Part V.B.8. However, one recent theorist seems to prescribe an approach which is tantamount to requiring an arbitrary selection of "rules" to govern the reading of statutes. *See* Vermeule, *supra* note 59, at 74 (arguing for a normative theory, apparently based on law and economics jargon coupled with aspects of decision-theory, and suggesting that—at least with respect to three areas—"judges should embrace a formalist approach to statutory interpretation, one that uses a minimalist set of cheap and inflexible interpretive sources"); *see also* Rosenkranz, *supra* note 2, at 2086-90 (suggesting that many problems of statutory interpretation could be solved in federal courts if Congress were to enact more detailed rules to govern statutory interpretation). For another writer who suggests that statutory interpretation needs to be placed under a regime of normative rules, see W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383, 397 (1992).

213. Zechariah Chafee, *The Disorderly Conduct of Words*, 41 COLUM. L. REV. 381, 386 (1941) (referring to the concept of "meaning" examined in C. K. OGDEN & I. A. RICHARDS, THE MEANING OF MEANING (4th ed. 1936)).

214. *Id.*

ask seriously what is involved when we assign a meaning to something, puzzling questions confront us."[215]

Among other things, "meaning" depends on context. "To understand the meaning of a language item, we must take context into account . . . ."[216] Attribution of "meaning" must be based on the totality of contexts.[217] On that basic point, most legal academics agree. For example, Judge Richard Posner has written, "Meaning depends on context as well as on the semantic and other formal properties of sentences."[218]

"Meaning" consists in how we use words to symbolize events and situations in the world *as we know it.* "Meaning" is not a tangible quality that can be measured in the same way as mass, height, color, weight, etc. "Meaning" is how we use the words which are at issue. "Meaning is what emerges when linguistic and cultural understandings and experiences are brought to bear on the text."[219] "Meaning is patterns in human brains."[220] It is our own minds which we are relying on when we draw inferences about what a statutory provision "means."

G. "Meaning" in Statutory Interpretation: Major Complications

1. The Special Meaning of "Meaning" in Real Cases

"Meaning," in the context of statutory interpretation, has special complexities and sources of uncertainty. "Meaning" in statutory interpretation cases is *not* the abstract "definition" of the individual words of a statutory provision, nor is "meaning" in a live case a matter of abstract philosophical considerations. Nor is the "meaning" of a statutory provision in a live controversy a matter of explicating or extricating different plausible "meanings" from a poem, story, or novel. Statutory interpretation cases are not part of an imagined universe. They are not a passive or academic exercise.

Moreover, when we read a statutory provision in the abstract, without a particular case in mind, the "meaning" which we attribute to the words may change when we encounter the facts of a particular case. When statutory language goes to court, it is no longer an abstraction. It becomes part of the judicial process of making a decision.[221]

The "meaning" of statutory words is a matter of how they apply in the resolution of a dispute between contending parties. What usually happens when a court "interprets" a

---

215. Kent Greenawalt, *The Nature of Rules and the Meaning of Meaning*, 72 NOTRE DAME L. REV. 1449, 1450 (1997).

216. COGNITIVE PROCESSES, *supra* note 201, at 157.

217. HAYAKAWA, *supra* note 183, at 55.

218. POSNER, *supra* note 88, at 269; *see also* Sunstein, *supra* note 40, at 504 (stating that "language 'by itself' lacks meaning'").

219. POSNER, *supra* note 88, at 269.

220. Mark Turner, *Design for a Theory of Meaning*, *in* THE NATURE AND ONTOGENESIS OF MEANING 93 (W. Overton & D. Palermo eds., 1994).

221. Kelso & Kelso, *supra* note 2, at 82-83 (hypothesizing that the actual methods of judicial statutory interpretation are linked to judges' overall approach to judging); POPKIN, *supra* note 52, at 247-48 (discussing a theory of "ordinary judging").

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.* The court concludes that certain concrete facts are inside or outside the range of possible situations symbolized by the general statutory words.[222]

2. Inchoate, not Indeterminate

Incidentally, this simple point indicates how erroneous it is to be preoccupied with—or even worry about—the "indeterminate" nature or aspects of statutory interpretation.[223] The "meaning" of a statutory provision in the context of a judicial decision is not so much indeterminate as it is *inchoate*. The very word "decision" should give us a clue. Implicit in the very concept of the word "decision" is that it (the judicial decision) did not previously exist because it had not been made. It was inchoate.

Before the opinion was rendered, there was *no* authoritative "meaning" relative to the fact pattern before the court. An appellate court rendering a precedential opinion *creates* "meaning" by resolving competing "interpretations" into a precedential case.[224] Before the binding precedential opinion was rendered, there was uncertainty about some aspect of the statutory "meaning." After the opinion is rendered, there is a court-fashioned equivalent of a substantive rule.[225] To take a simple example discussed later in this article, consider the issue of whether a phrase such as "used a firearm" includes bartering a firearm for drugs.[226] A high court decision that "use" does include such an exchange establishes the equivalent of a substantive rule *under that statute*: "used a firearm" includes bartering a firearm for drugs. The court has taken a situation of uncertainty[227] and used the tools and concepts of statutory interpretation to explain, and fashion, a new rule of law, operating under the aegis of the statute itself.

Judges, textualist or not, *make inferences* from text and context. Those inferences, when made by the highest court in a jurisdiction, are about, and control, how the statutory words will be used in future cases. They are not matters of "abstract" "meaning." In

222. "Statutory interpretation inevitably involves questions about line drawing: Was the injured plaintiff a member of the class for whose benefit Congress enacted a particular piece of legislation?" Michael P. Kenny & Teresa D. Thebaut, *Misguided Statutory Construction to Cover the Corporate Universe: The Misappropriation Theory of Section 10(b)*, 59 ALB. L. REV. 139, 141 (1995).

223. *See, e.g.*, ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION, *supra* note 9, at 29. *See also* text accompanying *supra* note 9.

224. *See, e.g.*, Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 466 (1989) ("The process of statutory interpretation inevitably involves some lawmaking, as well as law finding, component."). *See also Fifty Years of Judicial Service, reprinted in* 264 F.2d (2nd Cir. April 10, 1989) (special session before the Second Circuit to commemorate the judicial service of Judge Learned Hand).

225. Some courts, in an outbreak of *hubris*, express this concept in terms such as, "In the ordinary case, when this court interprets a statute, that interpretation becomes part of the statute as if it were written into the law at the time of its enactment." Holcomb v. Sunderland, 894 P. 2d 457, 460 (Or. 1995) (citations omitted).

226. *See infra* Part V.B.3.

227. *See infra* Part III.G.

a very real sense, the courts are constructing a substantive rule for the future, *under that statute.*

3. "Meaning" in Statutory Interpretation: Interaction

"Meaning" is also, or therefore, a matter of interaction with facts and the judicial mind in statutory interpretation cases. The question for decision in a statutory interpretation case is not really the "meaning" of the individual statutory words in the abstract. It is whether the particular fact pattern of the case fits inside or outside the classes, categories, or prototypes[228] represented by the statutory words. In statutory interpretation, the complications and uncertainties are such that a tomato may be a vegetable, or it may be a fruit, depending on the case and context.[229]

H. Complexities from Statutory Words Symbolizing Purposes and Policies

In a very real sense, a statute is more than the text itself. This fact, and our failure to realize it, injects further complications and uncertainties into statutory interpretation. After all, words are just symbols.[230] Words have no particular sanctity, much less any particular "meaning." This is not to say that they are completely malleable. It *is* to say that generations of courts were correct when they recognized that the literal words of a statute do not necessarily reflect the "meaning" of the statute.[231]

Even if they have been carefully drafted, statutory words are still nothing more than symbols for policies which have been enacted, and symbols for what the implementers and deciders (mainly agencies and courts) are supposed to do in certain abstractly described situations. The statute is not just the words. It is the purposes and policies which its words symbolize, and that are to be established and implemented through the attribution of "meaning" to the words of the statute. Statutory words themselves are nothing

228. *See, e.g.*, MATLIN, COGNITION, *supra* note 172, at 224; Solan, *Learning Our Limits*, *supra* note 97, at 237-38 and *passim* (discussing the use of contextualism and prototypes relative to textualism).

229. *See* Nix v. Hedden, 149 U.S. 304, 306 (1893) (discussing whether a tomato is a fruit or vegetable for purpose of customs tariff statute).

230. *See supra* Part III.A.

231. For example, the eminent Chancellor Kent wrote, "The real intention, when accurately ascertained, will always prevail over the literal sense of terms." JAMES KENT, 1 COMMENTARIES ON AMERICAN LAW 462 (1826) (Hein & Co, Historical Reprints). An example of a case which followed Chancellor Kent is Mayor of the City of Jeffersonville v. Weems, 5 Ind. 547, 549-50 (1854) ("[I]t is the duty of Courts to execute all laws according to their true intent and meaning; that intent when collected from the whole and every part of a statute must prevail, even over the literal import of terms, and control the strict letter of the law, when the latter would lead to possible injustice and contradictions.") (citing 1 KENT'S COMMENTARIES 462). For a United States Supreme Court case that recognizes that the literal words are not always equivalent to "meaning," see Lynch v. Overholser, 369 U.S. 705, 710 (1962) ("The decisions of this Court have repeatedly warned against the dangers of an approach to statutory construction which confines itself to the bare words of a statute, for 'literalness may strangle meaning.'") (citations omitted).

more than approximations of the things and concepts which the writer or drafter is trying to symbolize.[232] There was a time when judges realized this:

> [W]ords . . . do not constitute the statute, but are only the image of it, and the life of the statute rests in the minds of the expositors of the words, that is, the makers of the statutes. And if they are dispersed, so that their minds cannot be known, then those who may approach nearest to their minds shall construe the words, and these are the sages of the law whose talents are exercised in the study of such matters.[233]

As a more recent writer has put it, "Text primacy ought not mean text fetishism, however, especially when the texts are normative, as they are with statutes."[234]

Worship of text is misplaced. Words are a vehicle, a means to an end. Therefore, statutes are just a vehicle, a means to an end. The words in statutes are symbols used to achieve that end. Words are not an end in themselves—at least not in the law. Words are tools, clumsy tools.[235] Words are approximations.[236] Therefore, it would seem to follow that laws are approximations, reflecting goals and purposes which are to be achieved, and not mechanical limits to be imposed by *apparatchiks*.

I. Complexities and Uncertainties from the Variables

As if the complexities of reading and applying language (and statutory language) were not enough, there is another set of complicating factors in statutory interpretation. Countless variables are involved in attributing "meaning" to statutory language in live cases. Every statute is different. Every fact pattern is different. The differences may be slight, and may not affect the outcome in a particular case, but the differences are there. They are real. They are potentially significant. As the United States Supreme Court has recognized, with only a slight exaggeration, "The variables render *every problem* of statutory construction unique."[237]

To develop this notion a bit further, the meaning of words depends on context,[238] but the context of every statutory provision is different. No two statutory contexts are exactly the same. Obviously, different statutes involve different subjects. Different statutes will have different contexts, in terms of the statutory context in which each appears,

---

232. *See supra* Part III.C-D.

233. POPKIN, STATUTES IN COURT, *supra* note 52, at 12 (quoting Partridge v. Strange & Croker, 75 Eng. Rep. 123, 130 (K.B. 1553)).

234. Eskridge, *supra* note 107, at 1557.

235. Frankfurter, *supra* note 185, at 546.

236. "Condemned to the use of words, we can never expect mathematical certainty from our language." Grayned v. City of Rockford, 408 U.S. 104, 110 (1972) (discussing wording of anti-noise ordinance in first amendment case).

237. United States v. Universal Corp., 344 U.S. 218, 221 (1952) (citation omitted) (emphasis added).

238. *See supra* Parts III.F-G; *see also*, DICKERSON, *supra* note 10, at 271 (1975) ("One basic, well established principle of communication is that meaning is carried not only by express words but also by the factual implications that arise from particular context.").

and in terms of the circumstances of each enactment. In cases involving the same statute, the facts almost invariably will be different from those of the leading precedential cases. If they are not, the case should not reach the highest court of the jurisdiction.

J. Conclusions Regarding the Complexities and Sources of Uncertainty

This is not the whole picture, and these are not the only difficulties and complications involved in dealing with statutes.[239] But the long and short of the matter is that the ways in which we process the written word, and the special problems of processing the statutory word when we are making decisions about cases in the real world, involve some of the most complex mental operations that ordinary human beings are called upon to perform.

It is difficult to improve on the following summary:

> Ultimately, all communication is translation; ultimately, all listeners and readers are *imperfectly* recoding speech or text into their own personal language. Learned conventions and generalized, recurrent contexts for the deployment of natural languages desensitize us to the *complexity* of communication through language, especially among those who "share" the same natural language. But confronted with Babel—with the confusion of tongues—we cannot escape this engagement with the capacities and limitations of human language.[240]

Yet, decisions must be made. Lawyers must advise clients. Agencies must issue a rule or order based on the "meaning" of statutory language. Courts must ascribe "meaning" to the statutory language, with or without a theory. Professors must theorize, or at least try to make sense out of the mess.

A worthwhile next phase may be to consider a possibility. Perhaps these tools and concepts reflect the main *coping* mechanisms which we and the courts use in dealing with the complexities of applying abstract statutory provisions to particular facts (real or hypothetical).

IV. THE HEURISTIC NATURE OF CONVENTIONAL STATUTORY INTERPRETATION CONCEPTS AND TOOLS

To repeat, statutory interpretation is an extremely complex mental process. The complications start with the very basics of written communication, involve unconscious

---

239. For example, many of the concepts and tools of statutory interpretation used by the courts seem to be in conflict with each other, or at least in tension with each other. *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401-06 (1950); *see also infra* Part V.B.6.

240. Roderick A. Macdonald, *Legal Bilingualism*, 42 MCGILL L.J. 119, 123-24 (1999) (footnote omitted) (emphasis added).

mental processing, and then multiply when we encounter the special province of statutory communication, with its difficulties of applying generalizations to particular factual cases and its countless variables. When confronted by this order of complexity, we are unable to consciously process all of the factors involved.

A. Bounded Rationality

Our ability to deal with complexity and variables is limited, because the human mind is limited. In more scientific circles, our limited mental capacities are sometimes called "bounded rationality."[241] "Essentially, bounded rationality describes the observable fact that decision makers fail to 'process information perfectly even if they wish to do so, because human ability to calculate consequences, understand implications, and make comparative judgments on complex alternatives is limited.'"[242] A leading article in the growing movement toward making better use of insights from modern psychology has described "bounded rationality" as referring "to the obvious fact that human cognitive abilities are not infinite. We have limited computational skills and seriously flawed memories."[243]

Still, our limited mental processing capacities do not necessarily mean that we are irrational. "People can respond sensibly to these failings; thus it might be said that people sometimes respond rationally to their own cognitive limitations, minimizing the sum of decision costs and error costs. To deal with limited memories we make lists. To deal with limited brain power and time we use mental shortcuts and rules of thumb."[244]

B. Introducing Heuristics and Biases

1. Heuristics

A term increasingly used to denote these "mental shortcuts and rules of thumb" is "heuristics." As is usual with words, "heuristics" is not a monolithic term with a single

---

241. "Bounded rationality" is a term that has infiltrated the legal literature. It is summarized quite well in the following note:

> The term 'bounded rationality' encompasses the notion that human cognitive abilities are finite and imperfect; it is a recognition that humans have limited knowledge and computational capacity. . . . These limitations include the time, energy, and financial costs of searching for and processing information, as well as general imperfections in human processing ability. Studies show that bounded rationality plays an especially significant role in cognition whenever actors assess the probability of uncertain events or values.

Rena Mara Samole, Note, *Access to Justice, The Social Responsibility of Lawyers: Real Employees, Cognitive Psychology and the Adjudication of Non-Competition Agreements*, 4 WASH. U. J.L. & POL'Y 289, 302-03 (2000) (footnotes omitted).

242. *Id.* at 302 (quoting Melvin A. Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 216 (1995)).

243. Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1477 (1998).

244. *Id.*

meaning.[245] However, current usage of the term "heuristics" has been influenced and shaped over the past several decades by important work in fields such as cognitive psychology and decision theory.[246] "Heuristics" in this sense has become a fairly common term in legal academia, where a growing body of work is influenced by, or seeks to apply, the insights drawn from these fields.[247] As used in much of the legal literature today, "[heuristics refers to] a rule of thumb, simplification or educated guess that reduces or limits the *search for solutions in domains that are difficult and/or poorly understood.*"[248] Heuristics are "cognitive simplifying strategies used to reduce the complexity of information that must be considered in making a decision."[249]

A very helpful discussion explains heuristics in terms of playing chess, pointing out that heuristics refers to:

> [A] strategy, usually a simplifying strategy, which provides aid and guidance in solving a problem. A heuristic is the opposite of an algorithm. In deciding what move to make in a chess game, one could systematically consider and evaluate every possible move. This would be an algorithmic strategy. Or one could evaluate only the positions of pieces in the center of the board and the most important pieces. That would be a heuristic strategy.[250]

The chess metaphor is highly appropriate here. The normal human mind, even in chess, literally cannot proceed in completely algorithmic fashion, considering and evaluating every possibility.[251] In statutory interpretation, there are far more "pieces" and possible "moves" than in chess. Statutory interpretation is not a closed game system

---

245. Among other things, "heuristics" is: (1) an ancient term; (2) a term used by the mathematician, G. Polya; and (3) a term which has taken on some psychological connotations in the past few decades. For a more learned disquisition on heuristics stretching back to the ancient Greeks and coming forward to the modern mathematician Polya, see John W. Cooley, *Descartes' Analytic Method and the Art of Geometric Imagineering in Negotiation and Mediation*, 28 VAL. U. L. REV. 83, 111-113 (1993) (relating some of Descartes' methodologies to Polya's "heuristic."). Polya's heuristics especially could warrant further study in this context because they have certain features which could be very relevant to statutory interpretation. *See generally* G. POLYA, HOW TO SOLVE IT (2d ed., 1985). However, limits of time and space require deferring such inquiry to another time and another article.

246. The single most influential text in this area is JUDGMENT UNDER UNCERTAINTY, *supra* note 162. A more recent and introductory work is PLOUS, *supra* note 163.

247. *See supra* Part II.B.4.

248. Christopher T. Furlow, *Erogenous Zoning on the Cyber-Frontier*, 5 VA. J.L. & TECH. 7, 11 n.35 (2000) (citation omitted) (emphasis added).

249. David B. Hennes, Comment, *Manufacturing Evidence for Trial: The Prejudicial Implications of Videotaped Crime Scene Reenactments*, 142 U. PA. L. REV. 2125, 2164 (1994) (footnotes omitted).

250. Michael J. Saks & Robert F. Kidd, *Human Information Processing and Adjudication: Trial by Heuristics*, 15 LAW & SOC'Y REV. 123, 131 n.11 (1980-81).

251. For an interesting discussion of the importance among chess masters of patterns of the pieces on chessboards and previous knowledge of many classic chess matches, see Adams & Farber, *supra* note 172, at 1286. ("[W]hen chess pieces were randomly placed on the board, the chess masters did little better than the novices. Moreover, when recalling real chess positions, chess masters did not place the pieces on the board on an individual basis but in clusters of strategically meaningful groups . . . . In short, the experts "chunk" the information into meaningful units--they recognize patterns and associate those patterns with potential strategies.").

with finite rules. We cannot expect the human mind to be more than heuristic when deciding how to apply a statute to facts in live and messy cases, a task which involves much more complexity than a game with several kinds of pieces, sixty-four squares, and some true "rules" governing the movement of the pieces.

Generally, the relevant law journal articles accurately convey the essential concept of heuristics, as that term has been developing over the past few decades in the cognitive disciplines. Certainly they seem consistent with one of the most accessible explanations of heuristics for non-psychologists:

> When people are faced with a complicated judgment or decision, they often simplify the task by relying on heuristics, or general rules of thumb. In many cases, these shortcuts yield very close approximations to the 'optimal' answers suggested by normative theories. In certain situations, though, *heuristics lead to predictable biases and inconsistencies.*[252]

2. Biases and Errors

Unfortunately, biases and errors are inseparable from heuristics. To use imprecise "rules of thumb" in making decisions under conditions of complexity and uncertainty is to invite biases and errors stemming from the decision makers' own psychological backgrounds and tendencies. In fact, the "literature" on heuristics understandably emphasizes the biases and errors more than the basic "heuristics" themselves.[253]

3. A Detour and Caveat

Before going further, however, it is necessary to interrupt this discussion of heuristics and biases from the cognitive disciplines with a very important disclaimer about the present article. As will be discussed below,[254] a major point of this article is that statutory interpretation has developed its own heuristics, in the form of the traditional concepts and tools of statutory interpretation.[255]

This article maintains, in other words, that the traditional concepts and tools of statutory interpretation are heuristics, or at least heuristic in nature. The courts, more or less intuitively, have developed (and continue to develop) these heuristics to deal with the complexities and uncertainties of statutory interpretation. Furthermore: (1) these statutory interpretation heuristics have associated with them biases and sources of error, which in turn generate other statutory heuristics;[256] and (2) some of these biases and

252. PLOUS, *supra* note 163, at 105 (emphasis added).

253. Indeed, the complete title of the seminal work on this topic is contained the term "Biases." *See* JUDGMENT UNDER UNCERTAINTY, *supra* note 162.

254. *See infra* Parts IV.C, V.A-B.

255. *See supra* Part II.A.

256. *See infra* Part V.B.2-4.

sources of error are unique, while others are closely related to biases and sources of error identified in the cognitive psychology and decision making literature.[257]

Still, in order to understand better the significance of realizing that the tools and concepts of statutory interpretation are heuristic in nature, or akin to heuristics, we need to consider at least one example of a heuristic from modern-day studies of heuristics and biases. One of the more relevant of these heuristics is "representativeness."

4. Representativeness

An important heuristic from modern psychology is the "representativeness heuristic."[258] It denotes decision making based on the similarities between one situation and another. One of the most succinct descriptions of this heuristic is "reliance upon stereotypical characterizations to the point of insensitivity to relevant prior probabilities and sample sizes."[259]

This heuristic should sound familiar to lawyers and legal academics, because we have been brain-washed since law school on the fine art of reasoning (and misleading) by analogies, a device rooted in similarities and differences.[260] Like most of the heuristics identified by modern psychological research, "representativeness" is a natural and valuable mental device for dealing with complex problems.[261] We run our lives on similarities. Common sense tells us that a person who displays certain symptoms of a particular disease may have some form of that disease. The brake lights of the cars in front of us start turning red. On the basis of similar situations, we assume they are stopping and we hit our own brakes. Students with high LSAT scores and high grade point averages from reputable universities are similar to students who have been successful in law school, so we admit them to our law school.[262] Again, this is all a matter of common sense and common experience, but a matter which now has been subjected to some scientific study which helps us better understand the representativeness heuristic, and even more importantly, the biases and dangers of using it.[263]

The representativeness heuristic, then, is about similarities, and very sound decisions can be based on similarities. In law, as we already know, the value of the similarities underlying an analogy can be very persuasive, depending on the relevance, quality, and quantity of those similarities.[264]

---

257. *See infra* Parts IV.B.4 (representativeness), V.B.2.b (egocentric and related biases).

258. For a general discussion of the representativeness heuristic, see PLOUS, *supra* note 163, at 109-20.

259. Gregory Scott Crespi, *The Mid-Life Crisis of the Law and Economics Movement: Confronting the Problems of Nonfalsifiability and Normative Bias*, 67 NOTRE DAME L. REV. 231, 249 (1991).

260. *See, e.g.*, RUGGERO J. ALDISERT, LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING 93-102 (3d ed. 1997) (discussing analogies).

261. *See generally* PLOUS, *supra* note 163, at 109.

262. For one article (but not the only article) which discusses "representativeness" in this context, see Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations after Affirmative Action*, 86 CAL. L. REV. 1251, 1295 (1998).

263. *See generally* PLOUS, *supra* note 163.

264. For a discussion of analogies, see ALDISERT, *supra* note 260, at 93-102.

Moreover, when we take a broader view, we realize that the representativeness heuristic is very relevant to dealing with statutes. Most statutes reflect generic similarities synthesized by abstract categories and classes.[265] From the relatively primitive criminalization of murder and robbery, to the more sophisticated regulatory regimes of environmental law, statutes exemplify "representativeness." Thus, certain killings with similar features, such as self-defense, are permissible. Degrees of murder and manslaughter are based on "representative" similarities within the same degree or category of behavior.[266] Regulatory violations may involve generically similar prohibited conduct. Unfair labor practices[267] and unfair employment practices[268] readily come to mind.

Indeed, "representativeness" is central to statutes. The very concept of categories and generalizations, which are necessary to having statutes as we conceive them today, requires that we be able to recognize certain similarities among individual instances. As Hayakawa and his kindred tried to tell us, we cannot "think" or discuss anything in abstract fashion without the ability to discern similarities and form categories.[269] But with this ability, and the resulting heuristic of "representativeness," there come biases and risks of error. An example from the pioneers Kahneman and Tversky is a good place to start. Their example concerns "Steve," and certain experimental subjects who were to guess Steve's occupation from the following description: "Steve is very shy and withdrawn, invariably helpful, but with little interest in people or in the world of reality. A meek and tidy soul, he has a need for order and structure, and a passion for detail."[270] If we were required to guess his vocation from a list of possibilities—e.g., pilot, salesman, farmer, steel worker, or librarian—we would likely guess that Steve is a librarian. After all, he has the stereotyped characteristics of a librarian. Yet what if there are only two or three librarians in a particular rural demographic area and hundreds of farmers? Although the statistical population indicates that there is a very low probability that Steve is a librarian, many people will persistently conclude that someone like "Steve" is most likely a librarian.[271] Statistically, he is more likely to be a shy farmer.[272] An article regarding securities regulation states:

> [T]he representativeness heuristic . . . causes people to tend to judge probabilities by flouting numerous rules of statistics and to focus instead upon the degree of similarity

---

265. *See supra* Part III.C-D.

266. *See, e.g.*, 18 U.S.C. §1111 (2002) (setting out what constitutes first degree and second degree murder).

267. "It shall be an unfair labor practice for an employer . . . to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." 29 U.S.C. § 158(a)(4).

268. "It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 USC § 2000e-2(a)(1).

269. HAYAKAWA, *supra* note 183, at 156-57.

270. JUDGMENT UNDER UNCERTAINTY, *supra* note 162, at 4.

271. Daniel Kahneman & Amos Tversky, *On the Psychology of Prediction*, 80 PSYCHOL. REV. 237 (1973).

272. *Id.*; *see generally* JUDGMENT UNDER UNCERTAINTY, *supra* note 162, at 4-11; PLOUS, *supra* note 163, at 110-16.

> that an item seems to bear to a category or parent population. . . . The representativeness heuristic plays a large role in investing, leading investors to see patterns in truly random sequences . . . .[273]

To use a more familiar term, a major bias or source of error in using the "representativeness" heuristic is stereotyping.[274] This bias or risk of error can be found in the implementation of law generally and is associated with statutory interpretation heuristics as well as in statutes themselves.[275]

C. Statutory Heuristics

The list of heuristics, biases, biases without heuristics, and insights from modern psychological research can be spun out at length,[276] but further discussion on this would not be fruitful here. Although some of the biases investigated by cognitive research may be the same or similar to biases in statutory interpretation,[277] the heuristics of statutory interpretation are different from those identified by general cognitive research.

The most important difference (apart from being based on relatively controlled scientific or empirical studies) is that the cognitive behavior heuristics have been identified in the study of "decisions based on beliefs concerning the likelihood of uncertain events such as the outcome of an election, the guilt of a defendant, or the future value of the dollar."[278] In the framework of the cognitive field, heuristics are mentioned in a number of settings, such as: the future value of a stock,[279] the risk of a heart attack,[280] and clini-

---

273. Robert Prentice, *Whither Securities Regulation: Some Behavioral Observations Regarding Proposals for Its Future*, 51 DUKE L.J. 1397, 1470 (2002) (citations and footnotes omitted).

274. *See, e.g.*, Kevin M. Clermont, *Procedure's Magical Number Three: Psychological Bases for Standards of Decision*, 72 CORNELL L. REV. 1115, 1140-41 (1987) ("In a study of the representativeness heuristic, the subjects gave virtually the same probability that a stereotypically described man was a lawyer [regardless of other factors]."); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 403 (1999) ("The first heuristic is 'representativeness'—the common human tendency to reason by anecdote and stereotype rather than through the use of group-based knowledge.").

275. For an excellent article discussing stereotyping in the context of statutory interpretation cases under the Americans with Disabilities Act, see Jane Byeff Korn, *Cancer and the ADA: Rethinking Disability*, 74 S. CAL. L. REV. 399 (2001). For an example of a case, see Geduldig v. Aiello, 417 U.S. 484 (1974) (involving denial of health insurance benefits for pregnancy). Commentary on this case has been extensive, but one of the most quotable is, "Revealing a telling blindness, the Supreme Court's answer . . . defined the relevant groups to compare in a way that severed the connection between gender and pregnancy." Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 841 (1990) (discussing responses to what the author describes as "the woman question," i.e., "examining the gender implications of rules and practices which might otherwise appear to be neutral or objective." *Id.* at 837). For a discussion of *Geguldig* itself, see Diane L. Zimmerman, Comment, *Geduldig v. Aiello: Pregnancy Classifications and the Definition of Sex Discrimination*, 75 COLUM. L. REV. 441 (1975).

276. For a general discussion of various heuristics, see PLOUS, *supra* note 163, at 107-88.

277. This article discusses some of the standard "biases" that may infect the "plain meaning" or "textual" heuristic *infra* Part V.B.2.b.

278. JUDGMENT UNDER UNCERTAINTY, *supra* note 162, at 3.

279. *Id.* at 8.

280. *Id.* at 11.

cal diagnoses.[281] These topics are different from judicial statutory interpretation. They often, or typically, involve the prediction of events *over which the participants have little or no control.*

The heuristics of statutory interpretation operate in a different field. The outcomes relevant to statutory interpretation are very much under the control of human beings—the judges. Judicial orders and opinions resolve the disputed application of statutory language to a particular set of facts. The judges make the event—the particular application of statutory law to facts—happen.[282] Again, the situations we confront in certain statutory interpretation cases are inchoate,[283] and to that degree uncertain, but they are categorically different from situations studied by folks like Kahneman, Slovic and Tversky. United States Supreme Court Justices cannot predict or order the future performance of a stock or the occurrence of a particular person's heart attack. They can, however, decide the "meaning" of a provision of statutory language in a particular case. And they operate under conditions of uncertainty, whether they admit it or not.[284]

The concepts and tools of statutory interpretation are a different kind of heuristic from those which have been identified and studied in fields related to cognitive behavior. They are nevertheless heuristics and they carry with them their own set of biases and problems, in addition to general biases and problems. Thus, the work from cognitive psychology and decision theory remains highly relevant, both in a general sense and perhaps specifically with regard to biases.[285] The differences simply mean that we cannot mindlessly or mechanically transfer the heuristics which the cognitive scientists have pioneered into the domain of statutory interpretation.

The point here is, in a sense, larger and more ambitious. The traditional tools and concepts of statutory construction are themselves heuristics, or at the very least akin to heuristics. Interpreting and applying statutes is extremely complex and involves an inordinate number and variety of variables.[286] Every statutory provision is unique in some way, and every fact-pattern worth litigating is unique in some way. Judicial decisions involving statutory interpretation are often complex and made under conditions of uncertainty.[287] This is precisely the situation that causes the human mind to resort to heuristics.[288]

---

281. *Id.* at 13.

282. Of course, from the perspective of the lawyer, statutory interpretation heuristics *is* about prediction. The lawyer is trying to predict how the courts will interpret a particular statutory provision or to influence a court to interpret a particular statutory provision in his or her favor.

283. *See supra* Part III.G.2.

284. Sometimes the Supreme Court does admit it. *See, e.g.*, Weinberger v. Rossi, 456 U.S. 25, 36 (1982) ("While the question is not free from doubt, we conclude that the 'treaty' exception contained in § 106 extends to executive agreements.").

285. *See infra* Part V.B.2.b.

286. "The variables render every problem of statutory construction unique." United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221 (1952) (citation omitted).

287. *See supra* Part III.

288. For whatever it is worth, it must be conceded that, in a sense, there is nothing new in recognizing the heuristic nature of the concepts and tools of statutory interpretation. It is just that the courts have not called them "heuristics." The courts have, however, occasionally expressly referred to them as "tools," (Chevron

There are a number of consequences in realizing that the traditional concepts and tools of statutory interpretation are heuristics. Some of these consequences will be discussed, but not developed to the extent warranted by their importance, in Part V. More extensive discussion awaits future articles.[289]

V. THE IMPORTANCE OF BEING HEURISTIC

A. Summary of Benefits of Recognizing the Heuristic Nature of Statutory Interpretation Concepts & Tools

At least two significant consequences or benefits flow from recognizing that the tools and concepts of statutory interpretation are heuristics which come with an inextricable assortment of biases and sources of error. First, the heuristic nature of the traditional concepts and tools of statutory interpretation offers plausible explanations for many aspects, and much of the messiness, of statutory interpretation. For example, as discussed below, it accounts for the widespread judicial use of those concepts and tools, and their durability over at least the past 200 years.[290] As discussed below,[291] several puzzling, and messy, aspects of statutory interpretation become more understandable once we realize that the concepts and tools of statutory interpretation are heuristic in nature, and that biases and sources of error probably are inevitable in a heuristic regime.

Furthermore, and still with regard to the first benefit, realizing that the concepts and tools of statutory interpretation are heuristic in nature not only explains a major source of confusion in statutory interpretation but also prevents us from perpetuating some serious mistakes. Specifically, it would keep us from the morass created by confusing statutory interpretation concepts and tools with substantive rules having the force and effect of law. The statutory heuristics are mental tools, not substantive rules. No small part of the present judicial and academic confusion about statutory interpretation is caused by this basic misunderstanding.[292]

U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843 n.9 (1984)), or "rules of thumb" (Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253 (1992) (stating, even in the Supreme Court's New Textualist era, "In any event, canons of construction are no more than rules of thumb that help courts determine the meaning of legislation . . . ."). But the courts often turn around, as in the *Germain* case itself, and immediately confuse matters by sounding like they *do* conceive of these "rules of thumb" as hard and fast rules, to-wit: "[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Id.* at 253-54.

As discussed *infra* Part V.B.8, a major source of confusion in statutory interpretation is the tendency to slide into referring to statutory interpretation concepts and tools as "rules" with a connotation that they have the force and effect of law. This source of confusion could be dispelled if the heuristic nature of statutory interpretation concepts and tools were recognized and firmly implanted into the judicial and academic consciousness.

289. *See infra* Part V.C.

290. *See infra* Part V.B.1.

291. *See infra* Part V.B.2-9.

292. *See infra* Part V.B.8.

Second, realizing that the concepts and tools of statutory interpretation are heuristics with the associated biases and sources of error provides a better foundation on which to build and study statutory interpretation. Each of these benefits and consequences will be addressed below, although they will be discussed much more briefly than they deserve.

B. Explanatory Force

1. Prevalence and Durability

Once we understand that the traditional concepts and tools of statutory interpretation are heuristics, or heuristic in nature, it is hardly surprising to realize that they are so pervasive and durable. Being heuristic in nature, they reflect important aspects of the ways in which human minds work when processing written text. They are a natural phenomenon, reinforced by experience dealing with statutory language. They change very slowly, if at all. To the extent that they change, their evolution is unlike substantive common law rules of law, which are under severe pressures to change as society changes. Statutory heuristics are reflections of natural and fairly stable mental processes interacting with the collective experience of many judges over many generations of working with statutes. Heuristics are similar to proverbs, many of which have been essentially unchanged for millennia.[293] Like proverbs, they grow from human insights and have endurance because they reflect worthwhile, but not necessarily consistent,[294] strategies for coping with complex problems and making decisions. Like the kinds of heuristics identified in the cognitive disciplines, our statutory interpretation heuristics have been around a long time, but they have never been studied systematically.

2. The Explanatory Force of Viewing Plain Meaning (or Textualism) and Intent as Heuristics, and Some Biases

a. The Textual Heuristic

A lot of the messiness and confusion about "plain meaning"[295] and even "textualism" becomes more understandable after we realize that those two labels actually reflect

---

293. *See generally* G. Polya, *supra* note 245, at 221-25. Among other things, Polya suggests that:

> [T]here are a good many proverbs which characterize strikingly the typical procedures followed in solving problems, the common sense involved, the usual tricks, and the usual errors . . . . [M]any a proverb can be matched with another proverb giving exactly opposite advice, and there is a great latitude of interpretation. It would be foolish to regard proverbs as an authoritative source of universally applicable wisdom, but it would be a pity to disregard the graphic description of heuristic procedures provided by proverbs.

Id. at 222.

294. For example, "absence makes the heart grow fonder," versus "out of sight, out of mind."

295. *See supra* Part II.A.1.

a basic heuristic of statutory interpretation. For the sake of simplicity, we can retain some of the conventional terminology and refer to this heuristic as a "textual" heuristic.

Although an exhaustive explication is beyond the scope of this article, the textual heuristic, in brief, is a reader-centered strategy or rule of thumb for dealing with statutory text.[296] In a manner very similar to modern textualism,[297] but without absolutes and dogmas,[298] the textual heuristic leads us to attribute a "meaning" which we objectively think the bulk of informed readers would attribute to the relevant statutory words. The textual heuristic is the most fundamental heuristic in statutory interpretation. It is the most fundamental because there would be no point in having the ideas behind a statute reduced to writing if we then ignored the writing,[299] or casually ignored the conventional meanings of the words.

A textual heuristic is also a natural response to the complexities involved in processing statutory language and applying it to live cases.[300] Because of those complexities, a textual heuristic is both natural and a good idea, if not carried to extremes. It would be inefficient to quibble with every possible verbal nuance. After all, human language is imperfect.[301] Reading is disambiguation.[302] The mental act of reading would be impossible if we perpetually looked for alternative meanings in everything we read.[303] Unlike fine literature, where disputes over the "meaning" of a passage or work cannot be definitively resolved, the main point of judicially interpreting statutes is to definitively resolve disputed meanings.

However, given the imperfections of language, and the level of generalization at which most statutes are expressed, the more we study a passage of statutory language, the more likely we are to find uncertainties and ambiguities.[304] It becomes important to prevent nagging uncertainties, resulting from too much analysis—or a lawyer's advocacy—from overwhelming us. A strong preference for reliance on reader-centered attribution of meaning is natural, at least in situations where a particular inference about

---

296. *See infra* Part V.B.2.

297. *See supra* Part II.B.2.

298. *See supra* Part II.A.1.a.

299. Chief Justice Marshall made this point in connection with the United States Constitution. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) ("To what purpose are powers limited, and to that purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?").

300. *See supra* Part III.

301. *See supra* Parts III.B-G.

302. *See supra* Part III.A.

303. Again, the courts have intuited heuristically the biases, complications, and sources of error which can result from reading too much into text. "It will always be true that the fertile legal 'imagination can conjure up hypothetical cases in which the meaning of (disputed) terms will be in nice question.'" Grayned v. City of Rockford, 408 U.S. 104, 111 n.15 (1972) (citation omitted). As another court said in connection with an insurance policy case, "[C]ounsel is indulging in the lawyer's favorite pastime of quibbling over the meaning of words." Robert L. Berner Co. v. Nat'l Fire Ins. Co., 72 N.E.2d 727, 728 (Ill. App. Ct. 1947) (responding to attorney's argument that "spoiled" and "rotted" are not synonymous). "Where Congress has manifested its intention, we may not manufacture ambiguity in order to defeat that intent." Albernaz v. United States, 450 U.S. 333, 342 (1981) (citation omitted).

304. *See supra* Part III.A-F.

"meaning" seems much more plausible than quibbling alternatives. Hence, the traditional "plain meaning" concept is so strong that courts may exaggerate and say that they must stop, once they determine that the statutory language is plain or unambiguous.[305]

Furthermore, in statutory interpretation, there may be strong reliance interests hinging on the apparent "plain meaning" of a passage of statutory language.[306] There would be a destabilizing effect throughout the legal system if apparently clear statutory text were not accorded considerable authority. There are strong policy justifications then for a correspondingly strong textual heuristic.[307]

In sum, a textual heuristic—resolving a case by attributing a "meaning" that the decision maker objectively thinks most informed readers would attribute to the relevant statutory words—is a very effective and natural rule of thumb. If the "meaning" of a statutory text, when context and language conventions are considered, seems on its face applicable to the facts of the case, we may very well end there. We do this not as a matter of a substantive rule having the force and effect of law, but because it is in the nature of our minds and validated by experience.

b. Some Biases of the Textual Heuristic

However, we must always remember that reading still is nothing more than attributing "meaning" to marks on a page, tempered by the conventions of whatever "language community" we belong to.[308] With heuristics come biases. The textual heuristic is no exception. In fact, there are several possibilities for biases and errors when using this heuristic (and others). These biases and errors explain why we cannot rely solely on the textual heuristic.

The first bias or distorting factor is directly related to the unconscious nature of our mental processing. As previously discussed, when we read we attribute "meaning" in our own minds to marks on a page.[309] Much of this attribution is the result of unconscious mental activity.[310]

The potential for biased reading should be obvious. Indeed, the biases here are directly related (and may be identical) to some biases identified and discussed in the literature related to cognitive functioning. Although there are probably different labels for them, two of them have been referred to as "egocentric" and "overconfidence" biases.[311]

---

305. *See supra* Part II.A.1.a.

306. *See* William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541, 595 (1988) ("[T]he text influences how people behave and departure from the plain meaning therefore disturbs reliance interests.") (citing Landreth Timber Co. v. Landreth, 471 U.S. 681, 696 (1985) (securities); United States v. Byrum, 408 U.S. 125, 135 (1972) (tax)).

307. The biases and sources of error related to the plain meaning or textual heuristic counsel strongly against treating it as an absolute preclusive rule. *See infra* Part V.B.2.b.

308. Two articles that discuss interpretive communities are: Blatt, *Interpretive Communities*, *supra* note 59, at 629, 640-61; Schanck, *supra* note 182, at 835-39.

309. *See supra* Part III.E.

310. *See supra* Part III.A.

311. For a few articles that mention or address the egocentric bias, see Russell Korobkin, *Aspirations and*

As one article has described it, the egocentric bias involves people's tendency "to make judgments about themselves that are 'egocentric' . . . People routinely estimate, for example, that they are above average in a variety of desirable characteristics, including . . . professional skills. . . ."[312] In what may be an understatement, the authors of that article conclude that, "[l]ike litigants and lawyers, judges might also be inclined to interpret information in self-serving or egocentric ways. Egocentric biases could lead judges to believe that they are better decision makers than is really the case."[313]

The link to the textualist heuristic should be obvious. A Justice may stubbornly attribute his own "meaning" to a passage of statutory language—even being unconscious about his stubbornness. He may sincerely believe that he merely is attributing the "meaning" which a reasonable reader would attribute to the words.[314]

"Overconfidence" is also a bias related to the textual heuristic. "People tend to be overconfident in their judgments. Not only do individuals tend to overestimate how much they already know, but they also tend to underestimate how much they have just learned from facts presented in a particular context."[315]

The seminal book edited by Kahneman, Slovic, and Tversky, for example, contains a paper which investigated clinical judgments by psychologists.[316] Although warning

---

Settlement, 88 CORNELL L. REV. 1, 13-14 (2002) (discussing study implicating egocentric bias in settlement bargaining); Joachim Krueger & Russell W. Clement, *The Truly False Consensus Effect: An Ineradicable and Egocentric Bias in Social Perception*, 67 J. PERSONALITY & SOC. PSYCHOL. 596 (1994); Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Cause Other Social Harms)*, 146 U. PA. L. REV. 101, 138 (1997) ("One of the most robust findings in the literature on individual decisionmaking is that of the systematic tendency of many people to overrate their own abilities, contributions, and talents. This egocentric bias readily takes the form of excessive optimism and overconfidence, coupled with an inflated sense of ability to control events and risks."); Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFFALO L. REV. 103, 147 (2002) ("[J]udges . . . are vulnerable to cognitive illusions such as hindsight bias, anchoring, [and] egocentric bias.") (footnotes omitted); Lee Ross et al., *The "False Consensus Effect": An Egocentric Bias in Social Perception and Attribution Processes*, 13 J. EXPERIMENTAL SOC. PSYCHOL. 279 (1977). For a telling remark on the unconscious nature of this bias, see Neal R. Feigenson, *Sympathy and Legal Judgment: A Psychological Analysis*, 65 TENN. L. REV. 1, 78 n.204 (1997) ("[N]on-sympathetic judgment may involve an egocentric bias of which the decision-maker remains unaware.").

For articles mentioning or addressing the overconfidence bias, see Korobkin & Ulen, *supra* note 158, at 1091; Robert R. Kuehn, *The Environmental Justice Implications of Quantitative Risk Assessment*, 1996 U. ILL. L. REV. 103, 134 (asserting that "the most famous and allegedly best risk assessment ever performed exhibited a sizeable over-confidence bias."); Philip G. Peters, Jr., *Hindsight Bias and Tort Liability: Avoiding Premature Conclusions*, 31 ARIZ. ST. L.J. 1277, 1314 n.78 (1999) ("The overconfidence bias causes people to place more confidence in their answers than they should.").

312. Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 811-12 (2001). Another illustrative description is that people "tend . . . to see their own behavioral choices and judgments as relatively common and appropriate to existing circumstances while viewing alternative responses as uncommon, deviant, or inappropriate." Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1512, 1576 n.133 (1992) (quoting Ross et al., *supra* note 311, at 280).

313. Guthrie et al., *supra* note 312, at 813.

314. *See supra* Parts II.B.1, III.A.

315. Saks & Kidd, *supra* note 250, at 143 (footnote omitted). *See also*, Michael L. Perlin, *Psychodynamics and the Insanity Defense: "Ordinary Common Sense" and Heuristic Reasoning*, 69 NEB. L. REV. 3, 17-18 (1990) ("[A]ttribution theory teaches that, once a person adopts a stereotype, a wide variety of information will be seen by that individual to reinforce that stereotype." (footnote omitted)).

316. Stuart Oskamp, *Overconfidence in Case-Study Judgments*, *in* JUDGMENT UNDER UNCERTAINTY,

against overgeneralizing from this study, the author concluded that the clinical psychologists in the study overestimated their accuracy in assessing a clinical situation that had been described to them.

> Regardless of whether the task seemed strange or the case materials atypical, the judges' confidence ratings show that *they became convinced of their own increasing understanding of the case*. As they received more information, their confidence soared. Furthermore, their certainty about their own decisions became entirely out of proportion to the actual correctness of these decisions.[317]

Judicial opinions expressing a judge's absolute confidence in his or her own conclusions about the "meaning" of a particular piece of statutory language may be an example of this syndrome.

These are not the only biases and problems which can be associated with a textual heuristic. Some of the biases and problems have names, such as "anchoring"[318] or "confirmatory."[319] Others may not have a name, but the basic point is clear enough: each reader brings a different background to a piece of writing. When dealing with statutes, we must consider the possibility that one person's genuine "plain meaning" is somebody else's genuine ambiguity—which brings us to the next section of this article.

---

supra note 162, at 287.

317. *Id.* at 292 (italics in original).

318. "Anchoring" involves the effects of a "first impression." Experiments have indicated that one's "first impression" of a situation may bias one in favor of that first impression. For a general discussion of "anchoring," see PLOUS, *supra* note 163, at 145-52. The relevance to statutory interpretation and the textual heuristic should be evident. A judge's first impression of the "meaning" of statutory language (perhaps a first impression given by the judge's clerk or the judge's reading of a party's brief) may dominate the judge's subsequent attribution of meaning to the statutory language at issue.

In the literature, anchoring often is discussed in conjunction with situations where the subjects of the experiment take an initial position or are given false information to see if the initial position or false information bias the conclusions which the subjects ultimately reach. The classic study involved appraisal of residential real estate, where some professional brokers were given information which included a bogus inflated listing price. The "anchoring" bias caused by the inflated initial appraisal tilted those experts into a final appraisal figure which was higher than the figure reached by those who had not been exposed to the inflated initial figure. For a summary of this study, see Richard Birke & Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 HARV. NEGOT. L. REV. 1, 10-11 (1999).

Again, the relevance to statutory interpretation is "plain." Once a judge or Justice gets the idea that the meaning is "plain," or that a passage of language "has" a particular "meaning," anchoring may close the judge's mind. In sum, anchoring is another bias or distorting phenomenon that affects the way we process statutory language. All of this may be nothing more than common sense, but it is common sense supported by empirical studies and reputable scientists.

319. One article has summed up the "confirmatory" or "self-serving" bias: "[T]he term to describe the observation that actors often *interpret* information in ways that serve their interests or *preconceived notions*." Korobkin & Ulen, *supra* note 158, at 1093 (emphasis added).

3. Explanation of Disagreements about Whether the Language is Plain or Unclear

If "plain meaning" and its variants[320] are heuristic in nature, then we have an explanation for one of the most confusing judicial tendencies in statutory interpretation cases. Statutory heuristics explains the inexhaustible supply of cases in which both the majority and the dissent(s) either: (1) disagree about whether a given statutory provision has a "plain meaning;" or (2) agree the meaning of a statutory provision is "plain," but attribute different plain "meanings" to the words.[321] Heuristically, such disagreements arise when different readers are using their own attributions of meaning. Even if they consciously are trying to use a reader-centered textualist heuristic,[322] these different readers may attribute very different "meanings" to the same statutory text.

This helps explain cases such as one described by Justice Scalia in his essay on interpretation.[323] The case involved a felon who had traded an unloaded gun for some drugs.[324] The statutory provision at issue increased the punishment if the defendant "used a firearm during and in relation to a drug trafficking crime."[325] Justice Scalia castigated those of his brethren who failed to attribute the same meaning as he did to "use." According to Justice Scalia,

> The vote [against his reading of the text] was not even close (6-3) . . . . [A] proper textualist, which is to say *my* kind of textualist, would *surely* have voted to acquit. The phrase 'uses a gun' *fairly* connoted use of a gun for what guns are *normally* used for, that is, as a weapon.[326]

The textual heuristic and its associated biases help explain the situation described by Justice Scalia. Justice Scalia, using his textualist, reader-centered heuristic, empha-

---

320. *See supra* Part II.A.1.a.

321. Only a few examples will be set out here: "The plain meaning of the Voting Rights Act mandates a negative answer to both of these questions." Morse v. Republican Party, 517 U.S. 186, 253 (1996) (Thomas, J., dissenting). "The majority succeeds in portraying the Act as 'unambiguous' by making light of its most relevant provisions." Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 637 (1989) (Blackmun, J., dissenting); "The majority simply asserts that the plain meaning of 'right to payment' is an 'enforceable obligation,' which gives a restitution order the 'character' of a 'right to payment.' I cannot accept this easy conclusion." Pa. Dept. of Public Welfare v. Davenport, 495 U.S. 552, 566 (1991) (Blackmun, J., dissenting); "I find the statutory language plainly and unambiguously to preclude the construction given the EAJA [Equal Access to Justice Act] by the majority." Sullivan v. Hudson, 490 U.S. 877, 897 (1989) (White, J., dissenting).

For an example of one academic who recognizes this point, see Taylor, *supra* note 22, at 356 n.162 (noting that conflict between Supreme Court majorities and dissents in 21 cases during the spring of the 1993 term "derived, at least in part, from disagreements over the plain meaning of the statute at issue"); *see also* Frickey, *Revisiting the Revival*, *supra*, note 57, at 210 ("The dissenting opinion chastised the majority for failing to follow the plain meaning of the statute. Oddly, the majority opinion was written by Justice Scalia; the dissent was by Justice Souter.").

322. *See supra* Parts II.B.1, V.B.2.a.

323. SCALIA, *supra* note 3, at 23-24. The case was *Smith v. United States*, 508 U.S. 223 (1993).

324. SCALIA, *supra* note 3, at 23-24.

325. *Id.* at 24.

326. *Id.* (emphasis added).

sizes the "meaning" which he himself attributed to the word.[327] But his attribution is only one of several possible meanings of "use."[328] "Use a gun" on its face is quite broad and literally would include using a gun as a medium of exchange for drugs. It would appear that Justice Scalia was "using" a prototype:[329] a perpetrator armed with a gun, ready to shoot somebody. This is a narrower "meaning" of "use," and it is a respectable interpretation. In fact, many of us might agree with Justice Scalia's attribution of meaning in that case, but such agreement would not be grounds to sneer at those who disagree.

A heuristics-based view of the tools and concepts of statutory interpretation helps explain why, on such a pipsqueak case, the United States Supreme Court disagreed on how to apply the statutory language. Because the textual (or "plain meaning") heuristic is reader-centered, it is prone to a number of biases related to the individual reader's experience and world-view.[330] "Using" a reader-centered, textual heuristic therefore easily can lead to different "interpretations" of the same language. Nor can we predict ahead of time, or have any "determinate" theory to achieve, the "correct" interpretation.[331] The reader's own attribution of "meaning" is inherently fallible.[332] Being heuristic means being fallible in our inevitably personal and subjective reading of anything written by someone else. Being fallible means that other heuristics are needed, most notably the heuristic commonly labeled "legislative intent."

4. The Intent Heuristic and Related Heuristics and Biases

Because reasonable people can disagree about "plain meaning" and because even latter-day textualists admit that ambiguities and genuine uncertainties about meaning exist,[333] courts deploy another heuristic. They use, and have used for generations,[334] an "intent" heuristic. This "intent" heuristic is nothing more than a variation on an everyday approach to ambiguities and uncertainties about the "meaning" of everyday utterances. In everyday discourse we ask the other person for clarification: "What do you

---

327. Justice Scalia's position here seems strange in light of his criticism, in the same essay, of *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892), in which the Court *refused* to be literal, in a fashion reminiscent of Scalia's refusal to be literal about "use." SCALIA, *supra* note 3, at 18-20. "Well of course *I* think that the act was within the *letter* of the statute, and was therefore within the statute: end of case." *Id.* at 20 (emphasis added).

328. Among the definitions of "use" found in a standard dictionary are "put into action or service . . . employ . . . exercise . . . expend or consume by putting to use . . . ." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2523-24 (1986).

329. For some discussions of prototypes, see MATLIN, COGNITION, *supra* note 172, at 224; Solan, *Learning Our Limits*, *supra* note 97, at 237-38 and *passim* (discussing the use of contextualism and prototypes relative to textualism).

330. *See, e.g.*, Guthrie et al., *supra* note 312, at 780-81; Oskamp, *supra* note 316, at 287; Saks & Kidd, *supra* note 250, at 143.

331. *See supra* Part III.G.2.

332. *See supra* Part III.A.

333. *See, e.g.*, SCALIA, *supra* note 3, at 28 ("It is hard enough to provide a uniform, objective answer to the question whether the statute, on balance, more reasonably means one thing than another.").

334. *See supra* Parts II.A.1.b, II.A.2.

mean?"[335] Clarification can be elicited by a quizzical look or a simple "Huh?" "Intent," as noted earlier in connection with "intentionalism,"[336] is a speaker-centered or writer-centered heuristic.

When dealing with written text, and the writer is unavailable, or the text is the product of a collective entity such as a legislature (or a disbanded committee[337]), we confront a special set of problems. Unlike our everyday conversations, or written text when the writer is available for clarification,[338] we cannot go back to the disbanded legislature to ask them what was intended.[339] If we are unsure about the "meaning" of such a text, then what do we do? We simply *ask* a variation on the question which we normally would ask in face-to-face conversations. We cannot directly ask a particular document to tell us, "What did you intend?" So, we ask, "what did the person who wrote this *intend*?" The nearly automatic, reflexive quality of this heuristic is exemplified by our old friend Blackstone. Despite rejecting the notion that interpretive issues should be referred back to the legislature, Blackstone still said, "The fairest and most rational method to interpret the will of the legislator is by exploring his *intentions* at the time when the law was made, by *signs* the most natural and probable."[340]

"Legislative intent" thus is simply a variation on one of the important mental devices we use when we are not certain about the meaning of an utterance. We try to figure out what the writer meant to say, or what the writer would have intended to happen in a set of unforeseen circumstances.

5. Other Heuristics

Once we recognize the basic textual and intent heuristics in statutory interpretation, others readily come to mind. For example, there are a number of "presumptions" about

---

335. If I am not sure what my wife means when she says something, I take a deep breath and say, "Sorry, I didn't understand you." Or if I am really feeling brave, I may ask, "What do you mean?" This, of course, is not foolproof, as anyone who has lived with someone else for a substantial period of time can tell you. *See generally* DEBORAH TANNEN, THAT'S NOT WHAT I MEANT!: HOW CONVERSATIONAL STYLE MAKES OR BREAKS YOUR RELATIONS WITH OTHERS (1986) (discussing problems of communication among individuals caused by differences in communication style and differences between intended meaning and perceived meaning of statements).

336. *See supra* Part II.B.2.

337. In some respects, each past "Congress" legalistically resembles a disbanded committee. The 95th Congress, for example, no longer exists.

338. For an example familiar to law professors, we can get clarification from a student about what the student meant in a murky passage in the student's seminar paper.

339. The conventional policy reason is found, for example, in BLACKSTONE, *supra* note 43, at 59 ("To interrogate the legislature to decide particular disputes, is not only endless, but affords great room for partiality and oppression."). For a few examples regarding the inadmissibility of legislator's testimony regarding intention or intended meaning, see Board of Trustees v. City of Little Rock, 750 S.W.2d 950 (Ark. 1988) (stating that testimony of former state legislator with respect to his intent in introducing legislation was clearly inadmissible); Claridge v. New Mexico State Racing Commission, 107 N.M. 632, 763 P.2d 66 (N.M. Ct. App. 1988) (stating that state supreme court had rejected efforts to introduce affidavits from legislators regarding interpretation of statutory provisions). *See also* SINGER, *supra* note 82, § 48:17.

340. BLACKSTONE, *supra* note 43, at 59 (emphasis added).

legislatures and about how legislatures use words. These presumptions are heuristic. To mention just one, there is a presumption against surplusage, even though statutes undoubtedly in fact do contain surplus words. However, courts have created a presumption to the contrary. It is presumed that legislatures do not put surplus or unnecessary words into a statute.[341] Conceived as a heuristic about "intention" or the "intended meaning" of words, it makes sense. If nothing else, a contrary presumption would be very disruptive. If courts were to presume that legislatures routinely inserted surplusage or unnecessary words, then we would be faced with the insurmountable task of discerning which words were, and were not, to be ignored. If surplusage were presumed, a whole additional set of heuristics would be necessary in order to identify when, how, and whether surplusage had occurred, and how to attribute meaning in light of a presumption that legislatures used surplus words. Therefore, we "presume" that legislatures do not use surplus words. Of course, the intent heuristic and all other heuristics, have biases and sources of error.[342] But this is neither the time nor the place for further census of statutory heuristics.[343]

6. Explaining the [In]tolerable Conflict Among the Canons and Maxims: Homage to, and a Raspberry for, Karl Llewellyn

The heuristic nature of statutory interpretation concepts and tools also helps explain one of the major sources of confusion and messiness in statutory interpretation—the apparent conflict among the various concepts and tools of statutory interpretation.[344] To

341. *See, e.g.*, United States v. Yophes Onyiego, 286 F.3d 249, 254 (5th Cir. 2002) (quoting Platt v. Union Pac. R. Co. 99 U.S. 48, 58 (1878) ("Congress is not to be presumed to have used words for no purpose.")); Carcamo-Flores v. Immigration & Naturalization Service, 805 F.2d 60, 66 (2d. Cir. 1986) ("There is a presumption against construing a statute as containing superfluous or meaningless words or giving it a construction that would render it ineffective."); Grodis v. Burns, 459 A.2d 994, 997 (Conn. 1983) (referring to "our presumption that every sentence, phrase, and clause of a statute has a purpose").

There are, of course, a slew of other presumptions which are heuristic in nature. For example, "Congress is presumed to enact legislation with knowledge of the law." United States v. Langley, 62 F.3d 602, 605 (4th Cir. 1995) (*en banc*), *cert. denied*, 516 U.S. 1083 (1996) (citations omitted). Then there is the presumption that the legislature, when using different words in the same statute intended for those words to be given different meanings. Iraola & Cia, S.A. v. Kimberly-Clark Corp., 232 F.3d 854, 858 (11th Cir. 2000).

342. *See supra* Parts IV.B.2, V.B.2.b.

343. However, it is worth noting here that support for the existence of both a textual and "intent" heuristic comes from today's "new textualism" itself. As discussed *supra* Part II.B.1, "textualism" still uses most of the traditional concepts and tools (heuristics) associated with "legislative intent"—for example, "common usage," the "whole statute," the canons (selective perhaps) of statutory interpretation, *ad nauseam*. Thus, the very theory that proclaims most stoutly that it is a reader-centered approach to statutory interpretation, and whose adherents sometime cast aspersions at the very term "intent," winds up using many of the concepts and tools historically associated with discerning "legislative intention."

344. For two examples of authorities who recognize the contradictions and inconsistencies among the tenets of statutory construction, see Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U.L. REV. 277, 305 (1990) (referring to the "whole raft of judicially-created canons of statutory construction—many of which contradict each other—through which courts have traditionally viewed legislative pronouncements"), and Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 807 (1983) ("[T]wo inconsistent canons can usually be found for any specific question of statutory construc-

understand the heuristic significance of this point, it is necessary to consider some background.

Back in 1950, Karl Llewellyn damaged the credibility of the traditional concepts and tools of statutory interpretation in a semi-famous article.[345] Referring to the concepts and tools of statutory interpretation generically as "canons," he used the simple device of putting 56 of them in two columns, with twenty-eight canons in each column.[346] For each canon in column one, he put in column two a canon which conflicted, or was in tension, with the first.[347] For some pairs, the canon in column one was not totally in conflict with its opposite number, but was countered by a canon which was an exception capable of swallowing up the first canon.[348] For many years, his tactic of setting one "canon" against its opposite (or an exception which could negate the "canon") was regarded as a devastating blow to the canons of construction.[349] Yet courts continued to use them.[350] Then, with the surge of interest in statutory interpretation theories, Justice Scalia[351] and others[352] started challenging Llewellyn's tactic. Some tried simply to reha-

---

tion.").

345. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401-06 (1950).

346. *Id.* at 401-06.

347. For example, consider #20: "Expression of one thing excludes another;" versus, "The language may fairly comprehend many different cases where some only are expressly mentioned by way of example." *Id* at 405. *See also supra* notes 100-101 and accompanying text.

348. For example, consider # 16. "Every word and clause must be given effect;" versus, "If inadvertently inserted or if repugnant to the rest of the statute, they may be rejected as surplusage." *Id.* at 404.

349. For an example of the conventional wisdom, "Over forty years ago . . . Professor Karl Llewellyn wrote a devastating critique of the canons of statutory construction. For virtually every canon of construction, he demonstrated that there was another canon that could be employed to reach the opposite result. His point was not to be critical, but to argue proscriptively that the process of statutory construction requires an interpretation in light of a judicial determination of 'some assumed purpose.'" Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 561-62 (1992) (footnotes omitted).

One writer refers to the same list, "the Legal Realist Karl Llewellyn offered a devastating critique of the idea that judges could decide cases simply by following precedent. In this appendix Llewellyn presented a comprehensive set of canons of statutory interpretation drawn from case law. His brilliant contribution was to show how these could be arranged in matched contradictory pairs, thrust-parry. For every maxim of statutory interpretation available to judges from somewhere in the prior case law, it turned out that there was another maxim also extracted from some place in the case law that would lead them to exactly the opposite conclusion." Robert J. Steinfeld, *Book Review: Gary Minda, Boycott in America: How Imagination and Ideology Shape the Legal Mind*, 20 L. & HIST. REV. 437, 437-38 (2002).

350. As one writer described it:

> How can one explain the puzzling persistence of maxims of statutory interpretation? Their intellectual justification was long ago considered demolished by Karl Llewellyn's devastating critique, in which he demonstrated—or appeared to demonstrate—that for every maxim there is an equal and opposite counter-maxim, thus casting maxims into a slough of indeterminacy. [Present author's insertion: Footnote 2 of the cited article states, in pertinent part, "Maxims, after Llewellyn's work, were considered by most legal academics to be mere conclusory explanations appended after the fact to justify results reached on other grounds."] . . . . Judges have continued to cite the maxims of statutory interpretation in deciding cases. Indeed, they have continued to speak as if the maxims have real bite in determining outcomes."

Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179, 1179-80 (footnotes omitted).

351. *See* SCALIA, *supra* note 3, at 26.

bilitate the "canons."[353] However, at least one writer has condemned Llewellyn's critique and impliedly, Llewellyn himself.[354] Notwithstanding these counterattacks, a simple fact remains. The canons are in tension with each other and can be deployed against each other. This is a major source of messiness in statutory interpretation, apparently contributing to inconsistent and unpredictable results among the cases.[355]

However, has anyone asked *why* so many of the "canons" behave this way, or to be more precise, why they can be arranged in opposition (or tension) with each other, and yet still survive? WHY haven't some become extinct in Social Darwinian fashion? How can these "conflicting" maxims have managed to *coexist* for so long?

If the tools and concepts of statutory construction are heuristics, then a lot of these conflicts and tensions, and the failure of courts to resolve these conflicts and tensions, are explained quite simply. Different heuristics are no more in conflict than different tools are in conflict. A hammer does not conflict with a wrench. They are just used differently, in different contexts.

---

352. One article criticizing Llewellyn's tactic is Sunstein, *supra* note 40, at 452 ("In fact, however, his claim of indeterminacy and mutual contradiction was greatly overstated; some of the canons actually influenced judicial behavior insofar as they reflected background norms that helped to give meaning to statutory words or to resolve hard cases.").

353. As characterized by one article, "More recent scholarship, however, has suggested that Llewellyn overstated his case, giving insufficient consideration to the judiciary's capacity to make sense of canons in context." John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 96 n.370 (2001) (citations omitted). Another criticism states, "By the thrust-and-parry display of individual canons and counter-canons, Llewellyn deflected attention from the most likely value of canons—to work together as an interpretive regime, yielding more consistent results than would exist in its absence." Eskridge, *Formalism*, supra note 59, at 679.

354. "But if one examines [Llewellyn's] list, it becomes apparent that there really are not two opposite canons on "almost every point"—unless one enshrines as a canon whatever vapid point has ever been made by a willful, law-bending judge." SCALIA, *supra* note 3, at 26. Justice Scalia further scolds Llewellyn by, among other things, saying, "There are a number of other faux canons in Llewellyn's list . . . ." *Id.* at 27. "Mostly, however, Llewellyn's "Parries" do not contradict the corresponding canon but rather merely show that it is not absolute." *Id.* Interestingly enough, Justice Scalia actually is supporting the contention of this article that the concepts and tools of statutory interpretation are heuristics. As he says, "Every canon is simply *one indication* of meaning; and if there are more contrary indications (perhaps supported by other canons), it must yield." *Id.* (italics in original). The canons, he seems to admit, are not rules, but merely indications of meaning. *See infra* Part V.B.8.

355. *See supra* Part II.A; *see also* Rosenkranz, *supra* note 2, at 2086-90 (suggesting that many problems of statutory interpretation could be solved in federal courts if Congress were to enact more detailed rules to govern statutory interpretation); Vermeule, *Interpretive Choice*, *supra* note 59, at 74 (2000) (arguing for a normative theory, apparently based on law and economics jargon coupled with aspects of decision-theory, that—at least with respect to three areas—"judges should embrace a formalist approach to statutory interpretation, one that uses a minimalist set of cheap and inflexible interpretive sources."). Another writer seems to recognize that the attribution of meaning at least involves factual elements but nevertheless insists that we need "rules for interpreting legislation." W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation under the Rule of Law*, 44 STAN. L. REV. 383, 384 (1992). These positions reflect a kind of decadent positivism, under which everything in the law must be a "rule," formalism is paramount, and judicial discretion (on the surface of things) is limited by "rules." As indicated earlier, this author's position is very different. These so-called "rules" are not rules, at least not rules in the sense of substantive rules having the force and effect of law. *See infra* Part V.B.8.

As will be discussed shortly,[356] if the tools and concepts of statutory interpretation were "legal rules," in the traditional black-letter sense, the differences between them would be true "conflicts," and therefore intolerable. If the concepts and tools of statutory interpretation were substantive, algorithmic "if-then" rules having the force and effect of law, they would have to be obeyed. Llewellyn would have been correct to point out the folly of using "rules" which are inconsistent, in tension, or in conflict, to make decisions.

But they are heuristics—tools, *not* "rules" in the sense of substantive rules having the force and effect of law. Different strategies or tools can simultaneously exist for dealing with a particular problem. One of the most basic examples in the repertoire of human behavior is a set of two crucial possibilities when we are confronted with a threat—"fight or flight."[357] You cannot actually do both at the same moment because the two strategies conflict. But nobody claims that one of them should be discarded entirely. Are the explanatory and decisional tools which we use in statutory interpretation so different?

We contain in our minds different mental tools and strategies for coping with the problems attendant upon making *decisions* generally. We are full of conflicting maxims and proverbs.[358] Is there any reason why the same should not be true of the concepts and tools that pervade statutory interpretation? These concepts and tools resemble mental strategies and tactics more than they do artificial "rules" of law.

7. Explaining the Strengths and Persistence of Current Theories

The heuristic nature of the concepts and tools of statutory interpretation also helps explain some of the fundamental strengths of many current theories, and why none have achieved consensus.[359] Textualism reminds us that statutory text is the single most important day-to-day factor in attributing meaning to statutory language. Intentionalism, dynamic theories, and theories of practical reason (or pragmatism) remind us that we can't focus solely on "text." Even the textualists admit that.[360]

Again, text itself is just marks on a page.[361] A statute is an idea (or assortment of ideas) reduced to writing, and operative over time, as the dynamic theory and "practical reason" theories remind us.[362] And if we start with the realization that two of the major points of academic dispute (text and "intention") are "heuristics," percolating in a com-

356. *See infra* Part V.B.8.

357. "It is important to understand what actually happens to the body when the stress response is activated. This is a kind of survival reflex, conserved in evolution because animals with a good fight-or-flight response tend to survive moments of danger or emergency." Edgar Garcia-Rill & Erica Beecher-Monas, *Gatekeeping Stress: The Science and Admissibility of Post-Traumatic Stress Disorder*, 24 U. ARK. LITTLE ROCK L. REV. 9, 12 (2001).

358. *See supra* notes 293-94 and accompanying text.

359. *See supra* Parts II.B, II.B.4.

360. *See supra* Part II.B.1.

361. *See supra* Part III.B-G.

362. *See supra* Part II.B.3.

plex assortment of other collateral heuristics, then we can see, among other things, why the conflicting theories have led to "impasse."[363] None of them describe the whole picture.

8. "Tools not Rules": Explaining a Major Source of Confusion

Much of the incoherence and messiness in statutory interpretation results from attempts to treat, and conceive of, these heuristics as if they were substantive rules having the force and effect of law. Realizing, once and for all, that the concepts and tools of statutory interpretation are heuristics would both explain and eliminate this source of confusion in statutory interpretation.

As already noted,[364] the concepts and tools of statutory interpretation are NOT "rules"[365] in the sense of being substantive rules having the force and effect of law.[366] If the concepts and tools of statutory interpretation were substantive rules having the force and effect of law, they would indeed be incoherent and make no sense. There is too much conflict and tension among them to be "rules" which have fixed substantive content and hierarchy.[367]

But they are not rules in that sense. They are heuristics. They are ways of coping with the complex enterprise of statutory interpretation. They are coping mechanisms

363. Gebbia-Pinetti, *Statutory Interpretation, supra* note 60, at 234; *see also* Kelso & Kelso, *supra* note 2, at 81; *supra* Part II.B.

364. *See supra* Part V.B.8.

365. Furthermore, jurisprudence and legal theories themselves are far from a consensus on the nature of "rules" generally. *See, e.g.*, Cass R. Sunstein, *Problems With Rules*, 83 CAL. L. REV. 953 (1995) (discussing the virtues and shortcomings of "rules"). "Whether a legal provision is a rule, a presumption, a principle, a standard, a guideline, a set of factors - or something else - cannot be decided in the abstract. Everything depends on the understandings and practices of the people who interpret the provision. Interpretive practices can convert an apparently rule-like provision into something very unrule-like." *Id.* at 959-60. Accordingly, there is a sense in which the concepts and tools of statutory interpretation could be called rules—if we include things like "guidelines" within the class or category of rules. The point emphasized in the text above, however, is that calling them "rules" generates a lot of the perceived messiness and incoherence of statutory interpretation. The semantic pull of a term like "rules" causes us to misconceive the very nature of the standard concepts and tools of statutory interpretation.

366. The phrase used in the text of the present article is "substantive rules having the force and effect of law." This term is borrowed from administrative law. *See, e.g.*, American Mining Congress v. Mine Safety and Health Admin., 995 F.2d 1106, 1109 (1992) (stating that "substantive rules have the force and effect of law," (quoting ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n. 3 (1947)). The phrase is used in an attempt to capture the essential point that statutory interpretation heuristics are not "rules" in the sense of imposing substantive requirements to use them, or to use them in any fixed way. The confusion created by speaking of statutory interpretation heuristics as "rules" is similar to the confusion created in administrative law by the distinction between "substantive rules" and other kinds of rules, namely "interpretative" rules and policy statements. 5 U.S.C. § 553. For some examples of cases conceding the confusion and uncertainty in administrative law, see Dia Navigation Co. v. Pomeroy, 34 F.3d 1255, 1264 (3d Cir. 1994) (saying that the "distinction . . . has proven to be one incapable of being drawn with much analytical precision"); Paralyzed Veterans of America v. D.C. Arena, L.P., 173 F.3d 579, 587 (D.C. Cir. 1997) ("As we have often recognized, it is quite difficult to draw a line between substantive and interpretative rules.") (citations omitted).

367. *See supra* Part V.B.6.

rooted in: (1) the ways our minds operate; (2) our cognitive limitations; and (3) the collective experience of applying statutes to live factual situations.

One of the few academics of his era to systematically study statutory interpretation recognized the essence, and importance, of this point. Although understandably he did not use the term "heuristics," Professor Dickerson's words in 1975 are very cogent today. He realized that many of the concepts and tools of statutory interpretation were not substantive rules. He referred to some of them as "principles of communication." "Principles of communication and specific tacit assumptions are matters of fact, *not law* . . . ."[368] Professor Dickerson discussed at some length the problems of any attempt to convert these tools and concepts into statutory "rules" for interpreting statutes.[369] Referring to the concepts and tools which take the form of "presumptions" (such as the presumption against implied repeals), he wrote, "Being presumptions and presumably rebuttable, they serve as innocuous reminders of *some of the elements that the reader should keep tentatively in mind. . . . Certainly they have no controlling force.*"[370]

To treat the statutory interpretation heuristics as "rules," in the substantive sense, is similar to treating a pig as if it were a horse. If we do that, then we start demanding from a pig all sorts of characteristics that a pig just does not have. We start prescribing for our theoretical pigs requirements that they behave certain ways—for example that they physically can be ridden by human beings if properly trained and bridled. Likewise, we start demanding (or pretending to demand) from statutory construction a determinacy[371] and limited range of judicial responses that are wholly inappropriate to the task of applying statutes to reality. The result, again, is confusion.

And confusion enough there already is. On some days, a court recognizes that the concepts and tools of statutory interpretation are not substantive rules having the force and effect of law.[372] On other days, the same court speaks as though the concepts and tools of statutory interpretation are rules in the substantive sense.[373]

Perhaps the most highly placed example of this confusion is found on the United States Supreme Court itself. The Court, in an opinion by Justice Thomas said:

---

368. DICKERSON, *supra* note 10, at 266 (discussing statutory interpretation acts).

369. *Id.* at 265-81.

370. *Id.* at 267 (emphasis added)

371. *See supra* note 9 and accompanying text.

372. Perhaps the most notorious example of referring to statutory interpretation concepts as tools is footnote 9 of the *Chevron* opinion, which states that, "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984). *See also* EEOC v. Wyoming, 460 U.S. 226, 244 (1983) ("The rule of statutory construction invoked in *Pennhurst* was, like all rules of statutory construction, a *tool* with which to divine the meaning of otherwise ambiguous statutory intent.") (emphasis added).

373. *See, e.g.*, K Mart Corp. v. Cartier, 486 U.S. 281, 291 (1988) ("If the statute is clear and unambiguous 'that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'") (citations omitted).

> In any event, canons of construction are *no more than rules of thumb* that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.[374]

Apparently, the good Justice was uttering for the Court a variation on the old "plain meaning" concept. He conceded that this concept is among the "canons" of construction and was no more than a "rule of thumb" (albeit a strong one). But then Brother Thomas turned around and immediately elevated this "rule of thumb," in self-contradictory fashion, into something indistinguishable from a substantive rule having preclusive effect. Writing as though it were a rule in a hierarchical setting, Thomas went on to say, "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'"[375]

By failing to realize that the "plain meaning" concept is not a substantive rule, Justice Thomas and a slew of other appellate court judges exaggerate the natural importance of text and create a "faux rule."[376] A steady realization that even the "plain meaning" concept is a heuristic, albeit a strong heuristic, would prevent such confusion.

To show how easily this confusion leads to an outright debacle, consider the Fourth Circuit's relatively embarrassing decision in *Robinson v. Shell Oil*.[377] There, a staunch majority, *en banc*, employed a primitive brand of textualism and insisted that the "meaning" of "employee" plainly did not and textually could not include a *former* employee.[378] A unanimous Supreme Court reversed, although the author of the opinion—Justice Thomas—apparently could not bring himself to depart from the faux rule pretense that judicially perceived unambiguous "meaning" must end judicial inquiry. Instead, he declared—perhaps disingenuously—that the term "employee" was ambiguous, because its usage in the particular statutory provision at issue did not have a "temporal qualifier."[379] One writer has described *Robinson*, perhaps unfairly, in the following terms: "In *Robinson* ambiguity becomes a magically liberating factor, a beautiful thing for judges—even if, or one might say, especially if, it is selectively employed."[380] However, if we realize that statutory heuristics are not "rules" having the force and effect of law, we can be less cynical and sarcastic. We can give text its due, but recognize that biases and sources of error, stemming from the Justices' and judges' own mental processing, require rejection of any absolute, preclusive "rule" about "plain meaning."

---

374. Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) (citations omitted).

375. *Id.* at 453 (citing Rubin v. United States, 449 U.S. 424 (1981)).

376. No apologies whatsoever to Justice Scalia for stealing his clever but distorting phrase, "faux canon," and converting it to my own use. *See* SCALIA, *supra* note 3, at 27.

377. 70 F.3d 325 (4th Cir. 1995), *rev'd* 519 U.S. 337 (1997)

378. *Id.* at 329.

379. Robinson v. Shell Oil, 519 U.S. 337, 341-42 (1997).

380. Frickey, *Revisiting the Revival*, *supra* note 57, at 214-15.

The confusion between heuristics and rules gets so bad that courts often mistakenly indicate that every pipsqueak canon or maxim is a "rule" which requires the court to decide the case a certain way. Examples can be found rather easily, but a particularly inane 1995 case involved the lowly "last antecedent" concept, which is a mildly presumptive linguistic canon related to placement of words in a sentence.[381] The court, however, wrote:

> Campbell's reading contradicts the well-established canon of construction named the "doctrine of the last antecedent," which *requires* that "qualifying words, phrases, and clauses are to be applied to the words or phrases immediately preceding, and are not to be construed as extending to or including others more remote."[382]

The doctrine of last antecedent *requires* no such thing. Numerous other opinions have characterized this tool much more accurately:

> This principle [last antecedent] is of no great force: it is only operative when there is nothing in the statute indicating that the relative words or qualifying provision is intended to have a different effect. And very slight indication of legislative purpose or a parity of reason, or the natural and common sense reading of the statute, may overturn it and give it a more comprehensive application.[383]

To say that a court is *required* to do something by the "rule of last antecedent" is to demonstrate ignorance of the very precept itself. To say that it is "required" is to perpetuate the confusion which plagues lawyers and courts, and provides fodder for academics to complain about incoherent judicial statutory interpretation. Such remarks show the kind of confusion which can result if we speak, and therefore drift into conceiving, of the tools and concepts of statutory construction as substantive "rules of law."

By itself, of course, this particular judicial error of elevating the "last antecedent" into the status of a binding substantive rule was minor. Another panel in the circuit probably will act later as though the words of that case were never written. That's part

---

381. The "last antecedent" concept is a minor tool related to the location of modifying words or phrases. Generally, there is a mild presumption that a modifying phrase located after a particular word in a statute refers only to the word preceding it. A good clarifying (and easy) example is "I would like to have a cat, a dog, or a cow that jumps over the moon." Jim Chen, *The Authority to Regulate Broadband Internet Access over Cable*, 16 BERKELEY TECH. L.J. 677, 712 (2001) (citation omitted). In that sentence, "that jumps over the moon" is taken as referring to the cow. Unfortunately, statutory language is not always so simple. For a general but oversimplified discussion of "last antecedent," see SINGER, *supra* note 82, § 47:33. There, in somewhat of an understatement, the author refers to the last antecedent concept as "not inflexible." *Id.*

382. United States v. Campbell, 49 F.3d 1079, 1085 (5th Cir. 1995) (dealing with enhancement of punishment after conviction on charges of transporting women across state lines for immoral purposes) (emphasis added).

383. Buscaglia v. Bowie 139 F.2d 294, 296 (1st Cir. 1943) (citing and quoting the standard multi-volume treatise of the time, "Lewis, Sutherland Statutory Construction, Vol. 2, § 420"). As another case said merely in passing, "[T]he rule of the last antecedent is hardly a mandatory rule of statutory construction." Am. Gen. Fin., Inc. v. Paschen, 296 F.3d 1203, 1208 n.4 (11th Cir. 2002).

of the incoherence of course, but the incoherence here results from an avoidable mistake—a mistaken characterization of a concept or tool as being a legal rule.

In any event, the cumulative impact of court after court writing as though these heuristics are rules having the force and effect of law increases the chaos and misconceptions that result from such misstatements. Characterizing these heuristics and tools as "rules" will not convert them into substantive rules of law. As pointed out above,[384] the concepts and tools of statutory interpretation often conflict and often are in tension. They are relative in nature and their force in a given case inevitably depends on context.

Deep down, moreover, we as lawyers know that everything is not a rule, and that we cannot have a rule for everything. Where we get confused and go wrong in our larger jurisprudence, of course, is our strong tendency to treat everything in this era of decadent positivism as a "rule." The very reference to something as a "rule," with all of the semantic baggage that comes with calling something a rule, leads courts and theorists into misunderstanding the concepts and tools of statutory interpretation, and consequently, misunderstanding statutory interpretation.[385]

Recognizing that the concepts and tools of statutory interpretation are heuristics—rules of thumb—about how we attribute meaning to statutory language could both explain a lot, and prevent a lot of confusion. Avoiding confusion and achieving greater clarity are not minor benefits, and certainly not to be scoffed at.[386]

They can fashion substantive rules of decision by attributing certain "meanings" to statutory language in the context of decided cases. They can even *say* that the heuristics they use in statutory interpretation are "rules" in the substantive sense, or at least write opinions as if they were. But the courts cannot change the nature of human mental processes, including their own. Reading and attributing meaning are human mental processes which involve inferring "meaning" from marks on a page.[387] The mental processing of written language, especially statutory language, ultimately cannot be a matter of "substantive" rules having the force and effect of law. To pretend that it is a matter of rules simply is wrong, just as it would be wrong and pig-headed to insist that human inductive processes could be confined to a set of substantive rules from which no departure was allowed.

Statutory interpretation would be much less confused and messy if we recognized the concepts and tools of statutory construction for what they are—heuristics, or at least heuristic in nature. We would no longer muddle things by trying to treat them as substantive rules, then wading into the resulting mire of conflicting "rules," and then complaining about the very conflicts, tensions and incoherence which we have created by insisting that these heuristics are substantive legal rules. To try to treat everything in the law as a substantive "rule" is to be like the proverbial fellow whose only tool was a

384. *See, e.g., supra* Part V.B.6.

385. *See supra* note 362.

386. *Cf.* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 597-600 (1958) (suggesting the value of clarity and dispelling confusion in legal theory).

387. *See supra* Part III.A-G.

hammer. To him, every problem was a nail.[388] If concepts and tools of statutory interpretation are heuristics, and not substantive rules having the force and effect of law, the conflicts, tensions, and even apparent incoherence are merely a by-product of their being different concepts and tools, all available to be taken out of our mental toolboxes for appropriate use.

9. Conclusion: Explanatory Force

The concepts and tools of statutory interpretation, being heuristics, are just different ways of drawing inferences. There are different mental tools, some relevant in some situations, some relevant in others, and yes, sometimes in conflict. With or without academic recognition of their nature, these heuristics continue. We can call the intent heuristic "legislative intent," or we can call it being "holistic," or we can call it "Hermen," as in hermeneutic. They are still heuristics, and they can help us explain a great deal about statutory interpretation.

Recognizing concepts and tools such as "plain meaning" and "intent" for what they are—heuristics or ways of thinking about how to arrive at (or explain) a decision when applying written text to a particular case—helps us use all of these tools, and helps explain why courts developed their use and continue to use them. All work. All have their legitimate uses. None can be totally ignored or mechanically "privileged" one above the other.

When we realize that the use of "text" and "intent" are matters of heuristics, then we have an explanatory framework for, and a different perspective on, statutory interpretation. We may not be able to so easily criticize courts for not having a "theory" of statutory interpretation, or imply that their lack of an academically satisfying theory is attributable to judicial messiness, or worse.[389] In fact, "grand theories"[390] in the abstract, philosophical sense could be disastrous. If courts actually tried to follow some abstract philosophical theory of statutory interpretation, they might wind up imposing the worst kind of artificial, mechanical, rule-bound jurisprudence on statutory interpretation.

C. Second Reason: Foundation for Study

A second benefit of realizing that the tools and concepts of statutory interpretation are heuristics is that this realization provides a foundation for further, and fruitful, development. Even if they are not heuristics, a large part of the study of statutory interpretation should be, and always should have been, the study of the tools and concepts of statutory interpretation.

---

388. *See* Jeffrey W. Stempel, *A Better Approach to Arbitrability*, 65 TUL. L. REV. 1377, 1378 (1991) ("If the only tool you have is a hammer, you tend to see every problem as a nail.")

389. *See supra* Parts I, II.A-B.

390. *See supra* note 150 and accompanying text.

Realizing that the tools and concepts of statutory interpretation are heuristics gives us a fresh starting point for study. These judicial heuristics, of course, are not necessarily the same "heuristics" which have been studied in cognitive research. But the methodology of people like Kahneman, Slovic, and Tversky suggests the value of an analogous approach for us. [391] That approach is to study the heuristics themselves, and their associated biases, as Tversky, Slovic, Kahneman, and hundreds of their colleagues did, and continue to do.[392]

Of course, they have a scientific, experimental methodology, which is not generally available to us. But an analogous approach is available. We could start working from the "bottom up," a term which already has surfaced with reference to statutory interpretation.[393] However, for the study of statutory heuristics and their associated biases, the "bottom up" approach would be the laborious task of studying the various heuristics—tools and concepts of statutory interpretation—which are used, *or could be used*, in the complex process of applying abstract statutory language to live disputes and problems. This would give us some new—actually old-fashioned—ways to study and think about statutory interpretation.

Of course, this would be tedious work. Building from the ground up, studying particular tools and concepts in detail, studying how the courts use them, and developing sound descriptive insights, is a mundane undertaking. Nor is it particularly fashionable in some legal academic circles.[394] But study is needed in these mundane areas, if we are to achieve a better understanding of statutory interpretation, of what the courts do, and of what they say they do. Once we start thinking about the tools and concepts of statutory interpretation as heuristics, all sorts of ideas and questions start coming to mind. To

---

391. *See generally* JUDGMENT UNDER UNCERTAINTY, *supra* note 162.

392. *See id.*; PLOUS, *supra* note 163; *see also infra* Parts III, IV (examining works on cognitive psychology and related fields).

393. *See, e.g.*, Edward J. Imwinkelried, *Moving Beyond "Top Down" Grand Theories of Statutory Construction: A "Bottom Up" Interpretive Approach to the Federal Rules of Evidence*, 75 OR. L. REV. 389, 410 (1996) (referring to "emerging consensus that courts need to develop interpretive approaches adapted to the unique features of the statutory scheme being construed . . . [and] widespread agreement that the Federal Rules of Evidence are special statutes," thus requiring courts "to tailor the interpretive strategy for the Federal Rules.")

The best known example probably is William Eskridge who, albeit in a different context, has used the term "bottom up" to describe his important insight that "we should stop looking at statutory interpretation just from the perspective of the Supreme Court and instead consider statutes from the 'bottom up,' from the perspective of private parties, agencies, and lower courts, whose work most shapes statutes and influences what the Court hears and how it will resolve cases." ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION, *supra* note 9, at 69 (footnote and citation omitted).

394. For some articles criticizing some tendencies in legal scholarship, see Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992) (criticizing, as the title suggests, lack of attention to doctrinal study of what courts actually are doing and emphasis on abstract theories); Deborah J. Merritt & Melanie Putnam, *Judges and Scholars: Do Courts and Scholarly Journals Cite the Same Law Review Articles?*, 71 CHI-KENT L. REV. 871, 871 (1996) (quoting, among others, Judge Laurence Silberman, who complained that "many of our law reviews are dominated by rather exotic offerings of increasingly out-of-touch faculty members. United States v. Six Hundred and Thirty-Nine Thousand Five Hundred and Fifty-Eight Dollars in U.S. Currency, 955 F.2d 712, 722 (D.C. Cir. 1992) (Silberman, J., concurring).

demonstrate that this article is offering slightly more than a vague "Let's do more study" finale, a few examples are offered below:

– Each of the standard concepts and tools of statutory interpretation could be the subject of significant work. For example, there seem to be several heuristics and biases related to "context." Most obviously, the "whole statute"[395] concept seems to be a "context" heuristic. Less obviously, the old *in pari materia* concept, which is praised by textualists in its simplistic contemporary form of "considering other statutes,"[396] seems to be a "context" heuristic. To take another heuristic (or pair of heuristics) the concepts of strict and liberal construction have already been the subject of some recent study, although not from a "heuristic" perspective.[397] There is plenty of room, and need, for development, refinement, improvement, and academic discussion of the traditional concepts and tools of statutory interpretation.

– How should academics critique the judicial use of heuristics? Because these heuristics are not substantive rules having the force and effect of law, it may be that a different kind of academic criticism and different set of standards should be developed—or refined. It goes without saying that the standards should NOT selectively approve some and disapprove others on the basis of some political or ideological agenda.

– Could new heuristic methods be developed, academically, to refine gloppy ones like "plain meaning"? Is "New Textualism" actually one of those refinements?[398] In different direction but related vein, one important article has proceeded in the direction of suggesting generally some new principles of statutory interpretation.[399]

The idea of statutory interpretation tools as heuristics is relatively simple, yet has a foundation complex enough—much like chess—that generations of legal scholars could profitably pursue this line of development. If this is an age of statutes,[400] then the judicial application of statutes is a matter of utmost importance, both theoretically and practically. If an important aspect of legal academia is, as Frankfurter implied, a play of informed critique on the work of judges,[401] we must first be accurate about what the courts are doing.

---

395. *See supra* note 38 and accompanying text.

396. *See* Siegel, *supra* note 25, at 1099 ("Textualists agree that other statutes form a part of the context in which a court must understand the text of any given statute; Justice Scalia says that the text of a statute must be interpreted in light of the entire corpus juris." (citations omitted)).

397. *See* Mullins, *supra* note 64, at 11-12. Although not expressed in terms of heuristics, that article studied in detail the concepts of strict and liberal construction, and was far from exhausting the subject. As a matter of hindsight, it would appear that strict and liberal constructions are heuristics, or labels for sets of heuristics.

398. *See supra* Part II.B.1.

399. Sunstein, *supra* note 40, at 476-81, 503-08 (arguing among other things for a new set of background principles and rejecting some of the traditional tools and concepts).

400. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1 (1982)

401. *See* NLRB v. Universal Camera, Inc., 340 U.S. 474, 489 (1951) ("The ultimate reliance for the fair operation of any standard is a judiciary of high competence and character and the constant play of an informed professional critique upon its work.").

VI. CONCLUSION

Sometimes, in order to think clearly, we must recognize complexity and admit our human limitations. By its nature, statutory interpretation is a complex exercise of the human mind that cannot be conducted rigidly, nor can judicial discretion about drawing inferences from statutory language be confined mechanically. Not everything in our legal system is a substantive "rule" having the force and effect of law. By understanding the concepts and tools of statutory interpretation as heuristics, and understanding those heuristics, we may find some coherence in a facially chaotic area of the law, and explanations for some of the phenomena of statutory interpretation.

If this article is correct, courts will continue to use the traditional tools and concepts, because they reflect how our minds, informed and reinforced by collective experience, work. The statutory heuristics, and their associated biases and risks of error, are more basic and enduring than any particular academic "theory."

Understanding that the concepts and tools of statutory interpretation are heuristics gives us a solid foundation on which to study our subject and perhaps, ultimately, build some grand theories. But theories, grand or otherwise, should proceed from an understanding of our subject not wishful thinking or ideological agendas. Theories which are not based on reality ultimately lead nowhere.