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THE CHAOTIC PSEUDOTEXT

*Paul F. Campos**

BEFORE THE LAW

The universe — which others call the classroom — consists of nine tables of semicircular wood, each of which provides a dozen seats whereon the students may sit. Before the tables, elevated and exposed, the gatekeeper of the law grasps both sides of a narrow lectern. His place of honor, his formal dress, the mound of mysterious texts that rise from the lectern — all these signs mark him as a man of arcane knowledge, of special wisdom. And so he is believed to be: for the texts he wields with such apparent confidence are thought to contain nothing less than the law itself. Students who strive to gain admittance to the law must answer whatever questions he should choose to ask. The gatekeeper leads them through logical conundrums and verbal mazes: precedent moves this way, policy that; the words of the law are ambiguous, their counsels obscure. Yet one question reverberates repeatedly to every corner of the classroom: *Is this case correctly decided?* The students hesitate, stumble, prevaricate. “On the one hand . . .” The gatekeeper favors them with an indulgent smile. Yet beneath that smile, beneath that confident manner, a remorseful conscience, a genbite of inwit, eats away at his soul. For in all truth, the gatekeeper has come to know that he does not even understand his own question.

I

The greatest of sorcerers would be the one who would cast a spell on himself to the degree of taking his own phantasmorgia for autonomous apparitions. Might that not be our case?¹

The first glimmer of the ideas that would eventually animate this essay came to its author while eating lunch in a law school faculty lounge. In his forthcoming book *Laying Down The Law*, Pierre Schlag

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1. See NOVALIS, *PHILOLOGICAL FRAGMENTS* 205 (1804), quoted in André Maurois, *Preface to JORGE LUIS BORGES, LABYRINTHS* at xii (preface trans. Sherry Mangan) (Donald A. Yates & James E. Irby eds., 1964).

notes that the faculty lounge is the sort of informal social space that often provides an excellent opportunity to get a glimpse of what law professors really believe.² Here various jurisprudential, political, and pedagogic commitments can be aired in a forum devoid of the pressures of semi-public performance imposed by the lecture hall and the law review. Such was the case on this particular day. A dismal November drizzle was pelting the windows, and the conversation had turned to poor classroom performance. Complaints were aired about lack of preparation and about upper-level students who were unable to parse a case or read a statute. What was the teaching of law coming to? Finally I added my voice to the occasion's choleric tone. How, I asked, was one supposed to teach students to "interpret" the "law" when the relevant materials seemed to be in such complete disagreement as to what that verb and noun might signify? It wasn't merely a matter of a lack of agreement about what the evidence indicated: so many legal disputes appeared to turn on fundamental disagreements about what this "evidence" was supposed to be evidence of. The basic pedagogical problem, it seemed to me, did not so much involve the practical difficulties of interpreting the content of law, but rather of conveying to students the deep theoretical difficulties inherent in a system of meaning that featured conflicting and incorrigible conceptual assumptions about the nature of "legal interpretation," and hence about the very identity of the objects being interpreted.

I would have gone on, but Professor X began to shake his head. All at once a respectful hush fell over the lounge. A true legend of the law, Professor X had, nearly sixty years earlier, clerked for the even more legendary Learned Hand; he had subsequently rubbed shoulders with several Presidents, been Solicitor General of the United States, and taught at the Harvard Law School for the better part of five decades. Age could not wither him, nor could custom stale his appetite for the elegant complexities of legal argument. His back still ramrod straight, his voice still crisp as the freshly starched bow tie that adorned his collar, he began to favor us with the wisdom of his experience.

"We have always understood that any truly interesting legal question lends itself to a number of what seem plausible enough answers. All of us" — here he made an ecumenical gesture — "appreciate the real intellectual and practical difficulties presented by such situations. That is why I have always believed that no quality of mind is more im-

2. See PIERRE SCHLAG, *LAYING DOWN THE LAW* (forthcoming 1996 [hereinafter *LAYING DOWN THE LAW*]).

portant to both the practice and the teaching of law than good judgment.”

With this he fell silent and turned again to his tomato soup. At that moment I began to suspect that, whatever “good judgment” was, I probably lacked it and seemed unlikely to acquire any.

This article is, in part, an attempt to explore what happens when the invocation of “good judgment” no longer seems adequate to meet the problems contemporary legal interpretation engenders. My particular focus is on the ontology of legal texts and the various practices called “legal interpretation,” rather than on the epistemological questions that have traditionally dominated discussions, both in the classroom and in the scholarly literature, of those texts and those practices. More specifically, this piece is structured as a performative critique of the case method of legal education, especially with respect to that method’s potential for exploring some relatively neglected questions regarding the nature of contemporary legal discourse, and of legal texts. Indeed, if we consider the traditional structure of American legal education, we will be struck by the ironic resonance of H.L.A. Hart’s observation that

[f]ew questions concerning human society have been asked with such persistence . . . as the question ‘What is law?’ Even if we confine our attention to the legal theory of the last 150 years and neglect classical and medieval speculation about the ‘nature’ of law, we shall find a situation not paralleled in any other subject systematically studied as a separate academic discipline. No vast literature is dedicated to answering the questions ‘What is chemistry’ or ‘What is medicine?’, as it is to the question ‘What is law?’ *A few lines on the opening page of an elementary textbook is all that the student of these sciences is asked to consider; and the answers he is given are of a very different kind from those tendered to the student of law.*³

Upon reflection, what is striking is how comparatively little salience this quote has to the ordinary work of the modern American law school. In particular, we might note the almost complete absence of questions regarding legal ontology from the pages of that standard text — the casebook — which is universally employed to introduce American law students to their subject, and which plays such a crucial role in the formation of their professional identities. Such questions, when they occur at all, are almost always exiled to what in most law schools are considered the exotic marginalia of the curriculum: a course on jurisprudence or a seminar on “legal philosophy.”⁴

3. H.L.A. HART, *THE CONCEPT OF LAW* 1 (1961) (emphasis added).

4. So complete is this marginalization that even a legal theory as peculiar as Ronald Dworkin’s — a theory that claims, among other things, that there are such entities

As the centerpiece of the Socratic method of teaching, the case method lends itself not to the question "What is law?" but rather to the query "What is the content of the law concerning x?" In other words, the case method's focus has been explicitly epistemological, rather than ontological.⁵ Casebooks present students with materials, mainly appellate court opinions and the purportedly canonical legal texts (statutes, constitutions, other case holdings) those opinions deploy, and these same students then hear in the classroom that these artifacts contain — that indeed in some unelaborated way these texts *are* — "the law." For the harried student, the nature of these legal materials with which she must grapple is rarely if ever brought into question. Thus, these materials remain in some precritical sense "the law" from which students must somehow extract a recalcitrant meaning.

Now certain institutional imperatives may well make this situation necessary, even desirable. Legal academics are, as is often pointed out, in the business of training lawyers, not legal philosophers.⁶ But even from the most practical standpoint, an exclusive focus on the supposed content of law at the expense of any inquiry into law's nature can produce dubious educational results. Consider the following passage from what, in my view, is the best casebook available in the field of legislation. The authors are in the process of summarizing various theories of statutory interpretation and have just introduced the student to their own theory of "dynamic" or "evolutionary" reading.

Consider these different theories in the context of the following two cases. *Li [v. Yellow Cab Co. of Calif]* is a case, like [*United Steelworkers of America v. Weber* . . . where the Court refused to enforce the (probable) original meaning of an old statute. *Shine [v. Shine]* is a case where the court disregarded the apparent meaning of a new statute. How would Dworkin decide these cases? We think they're both correctly decided. Are we crazy?⁷

as legal "principles" that are neither positive legal rules nor autonomous moral norms, and that always generate a single correct legal answer in "hard" cases — is treated with a symptomatic combination of respectful attention and fundamental indifference by an academic discourse whose real interests obviously are elsewhere. For an acute criticism of Dworkin's claims about legal principles, see Larry Alexander & Ken Kress, *Against Legal Principles*, in *LAW AND INTERPRETATION* 279 (Andrei Marmor ed., 1995).

5. As we shall see, the true situation is somewhat more complex than this claim would seem to suggest. Many apparently epistemological legal arguments are making highly contestable, yet basically covert, ontological claims. See *infra* note 101 and accompanying text.

6. See, e.g., Harry T. Edwards, *The Growing Disjunction between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1991).

7. WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 618 (1988).

Although one can only admire the authors' willingness to pose such a provocative question, I must admit I encounter a great deal of pedagogic difficulty when discussing both this passage and the referenced materials with the students in my legislation class. Perhaps unfortunately, both they and their teacher have by this point in our respective legal educations only a vague idea of what it even means, *at the most basic conceptual level*, to ask if a case is "correctly decided." Are we crazy?

This article tries to get away from the traditionally epistemological (and instrumental, and normative) focus of the case method. In what follows, I will introduce two interrelated ideas designed to elucidate the problematic nature of contemporary legal interpretation: the concept of law as a chaotic discourse, and the problem of the legal pseudotext. These ideas will be presented and explored while we undertake a close reading of an appellate court opinion; however, the purpose of this reading is not the traditional one of attempting to determine if the case is "correctly decided." Rather we will consider various questions that have a primarily ontological emphasis.⁸ What, for example, is "the text of a statute?" How is it that a statute's text "speaks?" What is the nature of a "subjective" as opposed to an "objective" phenomenon? What kind of thing is a legal rule? Where is "it" "located?" In particular, what (and where) are "the rules of language?" Such questions will lead us toward the main points of our inquiry: to what extent is what we call "law" a collection of conceptually incommensurable interpretive practices that undertake the paradoxical task of trying to "interpret" semantically impoverished pseudotexts? In what ways do the chaotic structure of contemporary legal discourse and the pseudotextual

8. What in this essay I will call the "chaotic" structure of legal argument can be understood, in part, as an attempt to give an account of the nature and causes of what in the realist and critical literatures has been thought of as the problem of legal indeterminacy. See, e.g., KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960); ROBERTO M. UNGER, *KNOWLEDGE AND POLITICS* (1975); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205 (1979). Such indeterminacy arguments, however, have tended to be framed in epistemological terms. These critiques usually involve some variation of the claim that, given the state of the relevant legal materials, it is difficult or impossible to determine if a dispute has been decided correctly, at least without referring to what in terms of the formalist orthodoxy are considered extra-legal considerations. See, e.g., Duncan Kennedy's elaboration of this point, quoted *infra* note 71.

By contrast, the claim in this article is not that the chaotic nature of legal argument makes it difficult or impossible to answer the epistemological question of whether or not a case has been correctly decided. My claim here is that if we properly understand the conceptually chaotic structure of our present legal system, we also will understand that this chaotic structure makes the question, in an important sense, a meaningless one.

character of various legal texts feed off each other? Moreover, how does the practice of law itself help produce the highly problematic documents I will name “chaotic pseudotexts?” These questions, and others like them, will not help readers decide whether or not this case — or any other — is correctly decided, nor will these questions help anyone devise an efficacious method of statutory interpretation. But they will — well, reader, the author of this text must leave it to you to decide if such questions are worth asking.

Two final introductory notes: I have lightly edited Judge Easterbrook’s opinion in *Matter of Sinclair*, removing most of the citations and a few sentences not germane to my argument. The reader may wish to review the entire opinion without interruption (it is only four pages long) at 870 F.2d 1340 before proceeding to my episodic exegesis. Because that exegesis can be interpreted as a harsh criticism of Judge Easterbrook’s performance, I want to emphasize that *Matter of Sinclair* lent itself to my critical purposes precisely because it represents such an intellectually sophisticated and rhetorically elegant defense of positions I wish to attack.⁹ If Judge Easterbrook failed to write a convincing opinion, perhaps that failure is due to the nature of the object of his hermeneutic inquiry — a nature that may make all attempts to interpret it examples of an impossible enterprise.

II

A review of these judgments shows that the authorities are in an unsatisfactory state.¹⁰

Matter of Sinclair

United States Court of Appeals for the Seventh Circuit

870 F.2d 1340

Text: EASTERBROOK, Circuit Judge.

This case presents a conflict between a statute and its legislative history. The Sinclairs, who have a family farm, filed a bankruptcy petition in April 1985 under Chapter 11 of the Bankruptcy Act of 1978. In October 1986 Congress added Chapter 12, providing benefits for farmers, and the Sinclairs asked the bankruptcy court to convert their case

9. In this regard — as well as because it actually was written by the judge who signed it — *Sinclair* is an unusual opinion. One question outside the scope of this article is how often and to what extent judicial opinions themselves manifest what I call “pseudotextual” characteristics.

10. See *Hannah v. Peel*, K.B. 509 (1945), reprinted in JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 113 (3d ed. 1993).

from Chapter 11 to Chapter 12. The bankruptcy court declined, and the district court affirmed. Each relied on [section] 302(c)(1) of the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986:

The amendments made by subtitle B of title II shall not apply with respect to cases commenced under title 11 of the United States Code before the effective date of this Act.

The Sinclairs rely on the report of the Conference Committee, which inserted [section] 302(c)(1) into the bill:

It is not intended that there be routine conversion of Chapter 11 and Chapter 13 cases, pending at the time of enactment, to Chapter 12. Instead, it is expected that courts will exercise their sound discretion in each case, in allowing conversions only whe[n] it is equitable to do so.'

Chief among the factors the court should consider is whether there is a substantial likelihood of successful reorganization under Chapter 12.

Courts should also carefully scrutinize the actions already taken in pending cases in deciding whether, in their equitable discretion, to allow conversion. For example, the court may consider whether the petition was recently filed in another chapter with no further action taken. Such a case may warrant conversion to the new chapter. On the other hand, there may be cases where a reorganization plan has already been filed or confirmed. In cases where the parties have substantially relied on current law, availability [sic] to convert to the new chapter should be limited.

The statute says conversion is impossible; the report says that conversion is possible and describes the circumstances under which it should occur.

Which prevails in the event of conflict, the statute or its legislative history?¹¹

Commentary: If our interest in this case were limited to its outcome we would not need to read any further. The issue has been framed, dichotomized, and rhetorically positioned so that we, as lawyers, know what the answer must be. Unfortunately this particular framing of the issue obscures a number of interesting questions. Let us begin by considering two.

First, what is the relationship between a statute and the history of that statute's creation? Note that it would be most peculiar if a historian were to claim that he had discovered a conflict between the battle of Waterloo and the history of the battle of Waterloo and to declare that henceforth historical accounts of the battle of Waterloo should not reflect the *history* of the battle but rather the battle *itself*. What could an account of the battle be primarily other than an account of what those

11. *In re Sinclair*, 870 F.2d 1340, 1341 (7th Cir. 1989) (citations omitted).

persons involved in it did and thought? In a similar vein we might ask, what is a statute other than a record of the subjective process that created it? Judge Easterbrook's answer to this question will be that a statute is a "text." So let us consider what this "text" is.

Second, how is it that this "text" can "speak?" Here close attention to the use of metaphor may prove rewarding. Judge Easterbrook asserts that "[t]he statute says conversion is impossible." Of course we understand the judge to be employing a metaphor: no one believes that the statute literally "says" anything. Now the question that needs more attention than we are accustomed to giving it is just this: for precisely *what* is this figure of speech a metaphor?

Text: The statute was enacted, the report just the staff's explanation. Congress votes on the text of the bill, and the President signed that text.¹²

Commentary: What does it mean to vote "on" the text of a bill? That the members of Congress who voted on the bill's passage actually read, or should have read, that text? That the President who signed that text also read it? The Bankruptcy Act, and the proposed amendments to it under scrutiny here, are extremely long, technically dense documents. It is difficult to believe that any more than a handful of members of Congress have looked at anything other than the relevant committee reports or, more likely, their staffs' summations of those reports.¹³ Empirically speaking, the claim that "Congress votes on the text of the bill" teeters on the brink of an empty formalism.

Text: Committee reports help courts understand the law, but this report contradicts rather than explains the text. So the statute must prevail.¹⁴

Commentary: When they are deployed in the interpretive contexts presented by contemporary legal documents, so-called "plain meaning" arguments continually face the kind of problem that Judge Easterbrook here attempts to evade indirectly. The claim that the quoted committee report "contradicts rather than explains the text" seems obvious enough — if, that is, "the text" under interpretive consideration is limited to section 302(c)(1) of the 1986 statute. But if "the text" means "the text of the entire statute," then the situation becomes considerably more complicated. If we look a little more closely at the relevant materials, we will find that the language in the committee report cited by Judge Easterbrook does not refer to section 302(c)(1) at all, but rather to sec-

12. 870 F.2d at 1341.

13. See generally ERIC REDMAN, *THE DANCE OF LEGISLATION* (1973).

14. *Sinclair*, 870 F.2d at 1341.

tion 256(1). Section 256(1) describes the standards for converting a case from Chapter 11 to Chapter 12, just as the Sinclairs wish to do.¹⁵ Now it is true that section 256(1) does not necessarily conflict with section 302(c)(1) — *if* the former section is interpreted not to apply to proceedings pending at the time of the statute's enactment. But there are, as we shall see, all sorts of reasons not to interpret it in this way.

More generally, this example points to a larger methodological problem that plagues the proponents of what has come to be called "the new textualism."¹⁶ This problem is a product, ironically enough, of a recurrent and indeed theoretically inescapable ambiguity that must trouble the meaning of the phrase "the text" in the context of the formula "the plain meaning of the text." For the purposes of any particular plain meaning analysis "the text" in question could be a single word ("what is 'chicken?' "),¹⁷ a phrase, a sentence, a section of statute, an entire statute, a group of related statutes, an entire body of law, or even, as in the grand visions of legal thinkers from Blackstone to Dworkin, the brooding omnipresence of "the law" itself. And because it is never possible to predict *prior to undertaking interpretation* the level of textual generality at which textual meaning will seem "plain," plain meaning methodology cannot tell the interpreter at what level of textual comprehensiveness the analysis of the plain meaning of the text should take place — at least not without first begging the crucial interpretive question of what it even means to assert that, in a particular case, the relevant materials make the text's meaning so plain as to obviate the need to understand the text within the context of various "extrinsic" interpretive sources. As Stanley Fish puts it, "categories like [plain meaning] are not essential but conventional. They refer not to properties of the world but to properties of the world as it is given to us by our interpretive assumptions."¹⁸

As a concrete illustration of this rather abstract point, consider the following statutory language:

15. Section 256(1) reads:

(d) The Court may convert a case under this chapter to a case under chapter 12 or 13 of this title only if —

(1) the debtor requests such conversion;

(2) the debtor has not been discharged under section 1141(d) of this title; and

(3) if the debtor requests conversion to chapter 12 of this title, such conversion is equitable.

16. See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990); Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 CARDOZO L. REV. 1597, 1598 (1991).

17. See *Frigalment Importing Co. v. B.N.S. Intl. Sales Corp.*, 190 F. Supp. 116 (D.N.Y. Dec. 27, 1960).

18. STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?* 271 (1980) (emphasis added).

[An employer shall be defined as] any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization.¹⁹

Does this federal statutory language apply to employers of lay teachers at church-operated private high schools?²⁰ Today a lawyer confronted with such language would, as an initial matter, almost certainly answer "yes." Yet a lawyer reading this statutory language when it was enacted in 1935 would probably have replied that because such schools "plainly" were not engaged in interstate commerce, it was equally plain that the language of the federal statute did not encompass such employers. My point here is that a reader cannot simply "read off" the language of any text without regard to some enabling context of interpretation. Indeed, to engage in the act of reading *is* to assume some interpretive context that always supplies what is being read with whatever meaning the interpreter finds. It follows from this that any preinterpretive methodological stipulation of what constitutes such an appropriate interpretive context must either be fruitlessly circular or ineluctably misinterpretive.²¹

Text: Yet the advice from the Supreme Court about how to deal with our situation seems scarcely more harmonious than the advice from the legislature. The reports teem with statements such as: "When we find the terms of a statute unambiguous, judicial inquiry is complete" [and] "where, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" Less frequently, yet with equal conviction, the Court writes: "When aid to the 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.'" Some cases boldly stake out a middle ground, saying, for example: "only the most extraordinary showing of contrary intentions from [the legislative history] would justify a limitation on the 'plain meaning' of the statutory language." This [approach] implies that once in a blue moon the

19. National Labor Relations Act, § 2(2), 29 U.S.C. § 152(2) (1994).

20. See, e.g., *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

21. See Paul Campos, *That Obscure Object of Desire: Hermeneutics and the Autonomous Legal Text*, 77 MINN. L. REV. 1065, 1090-93 (1993) (demonstrating that if the interpreter really is *reading*, then the interpreter is searching for the author's meaning, which itself is not amenable to methodological regulation; conversely, if the "interpreter" is doing something else, then the putative interpreter really is not interpreting, but rather is engaged in some methodologically driven form of creative misreading).

legislative history trumps the statute (as opposed to affording a basis for its interpretation) but does not help locate such strange astronomical phenomena[, however]. [Yet,] [t]hese lines of cases have coexisted for a century, and many cases contain statements associated with two or even all three of them, not recognizing the tension.

What's a court to do? The answer lies in distinguishing among uses of legislative history.²²

Commentary: Note the strained character of this transition. Why does not the case simply end with the declaration in the previous paragraph that "the statute must prevail?" The answer lies, perhaps, in distinguishing among uses of judicial rhetoric. Specifically, in this passage we can see two distinct yet complementary juridical impulses at work. Frank Easterbrook the formalist jurisprudential thinker knows that matters are not nearly as simple as he has so far made them out to be. Frank Easterbrook the judge has the legal formalist's totalizing urge to demonstrate that "the law" — here meaning certain Supreme Court precedents regarding statutory interpretation — is nothing less than a coherent, monistic, non-contradictory whole. Judge Easterbrook thus sets himself the task of exploring the interpretive complexities of the situation, but in a way that will ultimately affirm the unity and autonomy of legal reasoning.

Note also the potential strangeness of the question, "What's a court to do?" — with its implication that if these apparent tensions in the precedent cannot be reconciled, then something is fundamentally amiss. I imagine that if this implication does not strike us as strange, it is only because we at some level accept the unstated supposition that "the law" is indeed a coherent, monistic, non-contradictory whole. If we do not accept that supposition, then the question itself will seem as peculiar as would a literary critic's query regarding how we should account for the "inexplicable" fact that while Emma Bovary drinks poison, Anna Karenina throws herself under a train.²³

Text: An unadorned "plain meaning" approach to interpretation supposes that words have meanings divorced from their contexts — linguistic, structural, functional, social, historical. Language is a process of communication that works only when authors and readers share a set of rules and meanings. What "clearly" means one thing to a reader unac-

22. *In re Sinclair*, 870 F.2d 1340, 1341-42 (7th Cir. 1989) (citations omitted).

23. "[D]espite the fact that law is . . . a rich amalgamation of feudal social aesthetics, nineteenth century juristic science, early twentieth century legal realist policy analysis, legal process proceduralisms, and Warren Court normativity, courts routinely represent this rather dissonant melange as if it were coherent." Pierre Schlag, *The Legal Form of Being*, in *LAYING DOWN THE LAW*, *supra* note 2.

quainted with the circumstances of utterance — including social conventions prevailing at the time of drafting — may mean something else to a reader with a different background. Legislation speaks across the decades, during which legal institutions and linguistic conventions change. To decode words one must frequently reconstruct the legal and political culture of the drafters. Legislative history may be invaluable in revealing the setting of the enactment and the assumptions its authors entertained about how their words would be understood. It may show, too, that words with a denotation “clear” to an outsider are terms of art, with an equally “clear” but different meaning to an insider. It may show too that the words leave gaps, for short phrases cannot address all of human experience; understood in context, the words may leave to the executive and judicial branches the task of adding flesh to bones. These we take to be the points of cases such as *American Trucking* holding that judges may learn from the legislative history even when the text is “clear.” Clarity depends on context, which legislative history may illuminate.²⁴

Commentary: What should be emphasized here is that Judge Easterbrook is essentially right about everything that he asserts in this passage, and that the very cogency of the passage fatally undermines the major jurisprudential assertions he will proceed to make. A minor caveat: it is not merely that “to decode words one must frequently reconstruct the . . . culture of the drafters.” All successful interpretation requires an accurate reconstruction of the linguistic culture of a text’s author, for the successful interpretation of a text is always nothing other than the determination of that author’s linguistic intentions. That this process is usually invisible to us because we undertake it more or less unconsciously does not make it any less pervasive.

There is, however, nothing inevitable about undertaking the process of interpretation that Judge Easterbrook is describing — the process of attempting to answer the historical question of what a group of authors meant (intended) by the words they employed, in order to answer the (identical) question of what their text means.²⁵ After all, an activity called “interpretation” can be — and indeed often is — basically

24. 870 F.2d at 1342 (citations omitted).

25. Here I am asserting what I argue for elsewhere: as Steven Knapp and Walter Benn Michaels have demonstrated, the semantic meaning of a text is identical to the linguistic intentions of its author, and it follows from this that the correct interpretation of a text is always the act of successfully determining those intentions. See Steven Knapp & Walter Benn Michaels, *Against Theory*, in *AGAINST THEORY: LITERARY STUDIES AND THE NEW PRAGMATISM* 11 (W.J.T. Mitchell ed., 1985); Paul Campos, *Against Constitutional Theory*, 4 *YALE J.L. & HUMAN.* 279 (1992) [hereinafter Campos, *Constitutional*]; Paul Campos, *Three Mistakes About Interpretation*, 92 *MICH. L. REV.* 388 (1993).

tautological or instrumental, rather than interpretive in the sense of the attempt to determine a text's meaning. The "interpreter" can disavow any interest in recovering the semantic intentions of the text's author, and can instead treat the text as an object that provides an occasion for the deployment of formal semantic rules, or for the pursuit of some instrumental end.²⁶ But if the interpreter is really *interpreting* — if he is taking part in "a process of *communication* that works only when authors and readers share a set of rules and meanings" — then Judge Easterbrook's insistence upon the historical and hence the empirical character of the enterprise is completely correct.²⁷

Text: The process is objective; the search is not for the contents of the authors' heads but for the rules of language they used.²⁸

Commentary: This assertion about the nature of textual interpretation is every bit as wrong as those made in the previous passage were right. Let us first ponder what might be meant by the assertion that the process of statutory interpretation is "objective." The claim here seems to be that an interpretive search could focus on objective phenomena or, alternatively, on subjective phenomena — a claim that can hardly be disputed. Roughly speaking, our interpretations can focus on states of affairs or states of mind; and although a materialist may treat the latter as merely a special subclass of the former, that does not render them any less "subjective" in this sense of the word. For example, the focus of a historical interpretation could be on the objective phenomenon of the weather at the battle of Waterloo or on the subjective phenomenon of Napoleon's emotions on the night before that battle. Clearly a question about the "contents of the authors' heads" is, in this sense of the word, a question about a *subjective* fact,²⁹ just as a question about their mean weight would be a question about an objective fact. What sort of question results when we inquire into "the rules of language [the authors] used?"

26. I place "interpreter" and "interpretation" in quotation marks to indicate that I am using these words in a conceptually distinct sense from a usage that signifies the attempt to discover what the author of a text meant to say. Such "interpretive" methods replace the author's text with a verbally identical artifact whose meaning is determined by the intentions of some meaning-conferring agent other than the author of the original text. Thus in this style of "interpretation" the putative "interpreter" of the text becomes the author of a new text.

27. For an argument that legislation should not be considered a communicative enterprise, see Heidi M. Hurd, *Sovereignty in Silence*, 99 YALE L.J. 945, 990 (1990).

28. *In re Sinclair*, 870 F.2d 1340, 1342 (7th Cir. 1989).

29. A subjective fact — a fact about a state of mind — is just as much a fact as a fact about an object. The pervasive suspicion that it is not — because such facts are not "objective" — is, as John Searle argues, a residue of what he identifies as a kind of dualistic anxiety. See JOHN R. SEARLE, *THE REDISCOVERY OF THE MIND* 93-100 (1992).

I think if we consider the question carefully we will conclude that a question about the content of linguistic or, for that matter, any other sorts of rules must always be a question about intrinsically subjective phenomena. This is because the content of a rule is simply identical with the beliefs that various subjects have about that content.³⁰ Consider a straightforward example. What does it mean to say that the rules of chess prohibit horizontal moves by the bishop? It means, ultimately, that players of chess *believe* that the bishop cannot move horizontally; and indeed this shared belief about the bishop's qualities gives the bishop those same qualities. An ineluctable feature of rules is that their content must be determined — in both senses of the word — by the very states of mind that interpret and deploy them.³¹ By contrast, if a chess player believes that the pieces in her set are made out of gold, this may or may not prove to be the case, and whether or not other chess players share this belief has no effect on the facts of the matter. In this instance, the question concerns an objective state of affairs that remains unaffected by subjective belief.³² But if the player believes that the rules of the game allow her to make a certain move, then this belief must be about a subjective phenomenon in at least two closely related senses. First, because she is a chess player, the content of her belief helps form the very thing that her belief is about — the contents of the rules of chess. Second, if she should choose to consider the question in the abstract, she will see that her beliefs about the rules of chess are ultimately beliefs about what she and other chess players believe about the rules of chess. All social rules³³ share this parasitic, self-referential character.

How does this analysis apply to the interpretation of language? Consider Judge Easterbrook's assertion that "language is a process of communication that works only when authors and readers share a set of rules and meanings." If this is true — and who doubts that it is — then the question of whether *in fact* authors and readers shared a set of linguistic rules and meanings on some discursive occasion will always be

30. In much the same way that the meaning of a text is identical with its author's intentions. See *supra* note 25 and accompanying text. In both cases, the semantic content of the linguistic artifact (a rule, a text) must be identical with the beliefs or intentions of some meaning-conferring agent or agents.

31. Obviously, I am using the word "rule" here in its purely prescriptive sense. See FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 17-37 (1991).

32. The phrase "subjective belief" is of course redundant — all beliefs are subjective in this sense — but I employ it here for clarity's sake.

33. Another redundant phrase. All rules are social by nature: even a rule for myself, to be deployed, must interact between a previous and a present self.

a question about subjective phenomena. And this is just another way of saying that to ask a question about the rules of language an author used is simply the same thing as to ask a question about the linguistic contents of that author's head.

One immediate objection to this view is that it seems to leave no room for the formal autonomy of linguistic, or legal, or any other kind of rules. Now if "formal autonomy" means "autonomous from the beliefs of subjects" then the answer to this objection is that there are not and cannot be any such autonomous rules. Rules can be autonomous from the beliefs of *particular* subjects, but this more limited kind of autonomy is of no methodological use to the interpreter of the *particular* text.³⁴ For example, suppose an interpreter wants to decode a certain text. Will it be of any formal assistance to that interpreter to attempt to follow the rules of language the author used? Such rule-following would be useful methodologically if, for example, the rules of English indeed determined the content of an English language writer's authorial intentions. In fact the causal sequence is just the reverse of that assumed by such an assertion. By way of illustration, consider the following passage from Book VII of *Paradise Lost*.

Others on Silver Lakes and Rivers Bath'd
Thir downy Breast; the Swan with Arched neck
Between her white wings mantling proudly, Rows
Her state with Oary feet³⁵

What semantic rules does Milton use in this passage? The rules of English, no doubt; but what semantic rule governs the author's use of the word "mantling?" Apparently, this use of "mantling" is unique to the above quotation and to one other passage in *Paradise Lost*.³⁶ Nevertheless we can with a little effort grasp the text's — which is to say Milton's — meaning. So this example presents us with a "rule" of the English language that has apparently been used by only one English-language author. The larger point is that the only way the interpreter can follow the rules of language an author used is to search successfully for the contents of the author's head regarding the use of that language, given that it is those very contents that always determine the content of whatever linguistic rules the author actually employed.

34. Which is to say the interpreter of any text, as all texts are particular texts. See Paul F. Campos, *This Is Not A Sentence*, 73 WASH. U. L.Q. 971 (1995) [hereinafter Campos, *Sentence*].

35. VII JOHN MILTON, *PARADISE LOST* 177, lines 437-40 (Merritt Y. Hughes ed., 1962) (2d ed. 1674).

36. For the other usage, see *id.* Book V at 279.

Text: Quite different is the claim that legislative intent is *the* basis of interpretation, that the text of the law is simply evidence of the real rule. In such a regimen legislative history is not a way to understand the text but is a more authentic, because more proximate, expression of legislators' will.³⁷

Commentary: Judge Easterbrook is about to assert that the will of the legislature, as that will is evidenced by the statutory text, is not in itself "the law." Again there is no reason why it has to be. In practice, "statutory interpretation" could consist of interpreting the legislature's text in order to determine the legislature's will, or it could instead require the putative "interpreter" of that text to deploy formal rules upon the marks that encode the legislature's text, thereby producing another text which would then be treated as the repository of legal meaning. Conversely, this process could involve imposing a preferred meaning on those marks for pragmatic reasons that might have little or nothing to do with either formal procedures for generating textual meaning, or with any attempt to determine what the authors of those marks meant by them.³⁸ Indeed, an activity called "statutory interpretation" could well involve some blending of these activities, or consist of something else altogether. Nothing of interest need turn on the particular meaning given to that phrase.

What is interesting is the implication, made more explicit further on in Judge Easterbrook's opinion,³⁹ that legal meaning is not the expression of anyone's "will" but rather is an objective fact that simply inheres in the formal linguistic characteristics of certain stipulated texts. I think we can now see why this cannot be the case. Facts about such intrinsically subjective phenomena as rules and texts are always created by someone's will (intention) to create those facts. If a rule or text is "interpreted" tautologically, then its meaning is created by the will to tautology manifested by the "interpreter."⁴⁰ More precisely, the "interpreted" artifact is *itself* created by the deployment of tautological procedures on the artifact that is the putative object of interpretation. The

37. *In re Sinclair*, 870 F.2d 1340, 1342 (7th Cir. 1989).

38. Not that a pragmatic approach necessarily will be hostile to such considerations. One always can choose to follow formal semantic rules or to interpret the authors' text for pragmatic reasons. See, e.g., RICHARD A. POSNER, *OVERCOMING LAW* 229-36 (1995).

39. "Legislative history offers *wilful* judges an opportunity to pose questions and devise answers, with predictable divergence in results." *Sinclair*, 870 F.2d at 1343. (emphasis added).

40. The quotation marks indicate that if by "interpretation" we mean the act of determining the semantic intentions of a text's author then the idea of a tautological "interpretation" becomes oxymoronic. See Campos, *Sentence*, *supra* note 34.

meaning of a legal artifact — a rule, a text, a practice, and so on — can be a product of the will of the artifact's creator, or of the will of the artifact's putative interpreter, or of the will of some other subject or subjects. This meaning cannot be produced by the imaginary, and thus all the more powerful "will" of the artifact itself. This, ultimately, is why the assertion "the statute says conversion is impossible" must be a *metaphor*. Such an assertion is a metaphorical allusion to some meaning-conferring agent's act of saying and, by that act, of meaning.⁴¹

Text: One may say in reply that legislative history is a poor guide to legislators' intent because it is written by the staff rather than by members of Congress, because it is often losers' history ("If you cannot get your proposal into the bill, at least write the legislative history to make it look as if you'd prevailed"), because it becomes a crutch ("There's no need for us to vote on the amendment if we can write a little legislative history"), because it complicates the task of execution and obedience (neither judges nor those whose conduct is supposed to be influenced by the law can know what to do without delving into legislative recesses, a costly and uncertain process). Often there is so much legislative history that a court can manipulate the meaning of a law by choosing which snippets to emphasize and by putting hypothetical questions — questions to be answered by inferences from speeches rather than by reference to the text, so that great discretion devolves on the (judicial) questioner. Sponsors of opinion polls know that a small change in the text of a question can lead to large differences in the answer. Legislative history offers wilful judges an opportunity to pose questions and devise answers, with predictable divergence in results. These and related concerns have led to skepticism about using legislative history to find legislative intent.⁴²

Commentary: All of these caveats regarding the evidentiary value of what is usually called "legislative history"⁴³ are quite necessary and proper to any discussion of the problems of legal interpretation. Judge Easterbrook's catalogue of pitfalls that await the interpreter of a legislature's text reminds us both of the often enormous empirical difficulties that beset historical inquiry, and of the special conditions that make such inquiry especially difficult in the context of modern statutory interpretation.

41. On this account of semantic meaning it is no coincidence that the word "meaning" functions as both a noun and a verb.

42. *In re Sinclair*, 870 F.2d 1340, 1343 (7th Cir. 1989) (citation omitted).

43. If what interests the interpreter is the meaning of the legislature's text, then anything that provides evidence of the legislature's semantic intentions qualifies as "legislative history."

The potential difficulties of empirical investigation are hinted at by the dictum, “in order to discover the facts, look at the evidence.” Obviously this advice is both completely correct and completely useless to the interpreter. In this regard statutory interpretation is like any other interpretive activity: no theoretical generalization can tell the interpreter what counts as valid evidence; no methodology can help the interpreter distinguish the useful from the misleading, the revelatory from the specious.⁴⁴ As Chief Justice Marshall put it rather plaintively, “[w]here the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived”⁴⁵ And as Judge Easterbrook reminds us, the character of the contemporary legislative process tends to exacerbate significantly the problems of empirical investigation. The examples given in his opinion are only some of the ways in which this process often resembles an elaborate experiment in game theory or some other deeply strategic practice that has inspired the most abstruse musings of an army of public choice scholars.⁴⁶ Indeed, as we shall see, the dispute dealt with in *Matter of Sinclair* may itself be a product of bureaucratic rationality run amok — of a process that leaves Judge Easterbrook no choice but to wrestle with a hydra-headed monster of textual and jurisprudential chaos.

Text: These cautionary notes are well taken, but even if none were salient there would still be a hurdle to the sort of argument pressed in our case.

Statutes are law, not evidence of law. References to “intent” in judicial opinions do not imply that legislators’ motives and beliefs, as opposed to their public acts, establish the norms to which all others must conform. “Original meaning” rather than “intent” frequently captures the interpretive task more precisely, reminding us that it is the work of the political branches (the “meaning”) rather than of the courts that matters, and that their work acquires its meaning when enacted (“originally”).⁴⁷

Commentary: What could it mean to assert that “statutes are law, not evidence of law?” Compare the assertions “rocks are rocks, not evidence of rocks” and “chess is chess, not evidence of chess.” In the

44. See generally Knapp & Michaels, *supra* note 25.

45. *United States v. Fisher*, 6 U.S. (2 Cranch) 496 (1805).

46. A good introduction to the use of public choice theory in legal scholarship is DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991). Of special interest in the context of the argument here is Frank Easterbrook, *The Supreme Court, 1983 Term — Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984).

47. *In re Sinclair*. 870 F.2d 1340, 1343 (7th Cir. 1989).

former case the statement might be translated, "the nature of rocks is not altered by the beliefs that anyone has about rocks. Putative evidence about rocks might be right or wrong, true or false. But the evidence is not the rock." Yet we have already seen that this line of argument does not really apply to intrinsically subjective phenomena. The nature of a rule-governed practice is not merely *altered* by the beliefs that persons engaged in that practice hold concerning the nature of the practice: the nature of such an activity is *determined* by those beliefs.

Imagine if an anthropologist of games were to say "in the analysis of chess playing references to the beliefs of chess players do not imply that players' beliefs, as opposed to their public acts, establish the norms to which all who wish to play chess must comply." It should be obvious that, in regard to chess playing, the beliefs of chess players qua chess players and their "public acts" of chess playing are, in an important sense, one and the same thing. When a chess player makes a move, the relevant public act is not that of picking up a piece of carved wood and placing it six inches farther down a checkered board — an act, after all, that has at this level of theoretical abstraction an infinite number of possible significations⁴⁸ — but rather that of moving the "queen's bishop" into the "sixth square" of the "king's rook's file."⁴⁹ Moreover, the queen's bishop can be moved in this way only if chess players *believe* the queen's bishop can be moved in this way.

Thus if it is indeed the case that it is "the work of the political branches rather than of the courts that matters," and that "their work acquires its meaning when enacted," these facts can only *be* facts because, within this particular discourse, it is the beliefs of the *subjects* in the political branches regarding what they think they are doing that count, rather than the beliefs of the judicial subjects who must interpret the content of the former beliefs. Once again, my point here is that *some meaning-conferring agent's* beliefs or intentions concerning the semantic significance of an artifact will always determine the semantic significance — and indeed even the identity of — that artifact.⁵⁰ Judge

48. See SAUL A. KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGES 7-54 (1982).

49. The quotation marks that bracket these phrases indicate that the ontological status of the entities referred to by these phrases is itself a product of the beliefs of the subjects participating in the practice.

50. That is to say, if the interpreter misinterprets the meaning of the artifact, but the interpreter's misunderstanding becomes definitive of the artifact's meaning, then the interpreter's misinterpretation has generated a new artifact. See Steven Knapp & Walter Benn Michaels, *A Reply to Our Critics*, in *AGAINST THEORY: LITERARY STUDIES AND THE NEW PRAGMATISM*, *supra* note 25 (noting that William Blake's attribution of a new meaning to one of his own poems resulted in two different, verbally identical poems).

Easterbrook's attempt to objectify the materials of judicial interpretation must fail, for there can be no objective "public acts" of the kind he envisions for a court to interpret.

Text: Revisionist history may be revelatory; revisionist judging is simply unfaithful to the enterprise. Justice Holmes made the point when denouncing a claim that judges should give weight to the intent of a document's authors:

[A statute] does not disclose one meaning conclusively according to the laws of language. Thereupon we ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used. . . . But the normal speaker of English is merely a special variety, a literary form, so to speak, of our old friend the prudent man. He is external to the particular writer, and a reference to him as the criterion is simply another instance of the externality of the law We do not inquire what the legislature meant; we ask only what the statute means.⁵¹

Commentary: Here we come to the heart of the jurisprudential matter. The central question Judge Easterbrook's opinion attempts to answer is, what does it mean to be "faithful to the enterprise?" Let us try to unpack some of the surprisingly radical implications for the practice of legal interpretation that follow from *Sinclair's* line of argument.

As the quote from Holmes indicates, Judge Easterbrook rejects the notion of attempting to understand legal texts in a tautological manner: he does not advocate the ambitious idea of trying to reduce legal utterances to the status of logical propositions. Instead, he believes statutory texts should be "interpreted" — not in the sense of attempting to determine what the author of the text actually meant, but in the sense of attempting to determine what some theoretically stipulated author would have meant by those "same" words. Although this no more involves a search for an objective fact than would a search for the meaning of the author's text — perhaps less so, given that the search for the author's meaning is a search for a subjective fact, while the Holmes-Easterbrook method attempts to determine the content of a subjective counterfactual — it nevertheless represents a possible procedure. The method as stated is vulnerable to the *reductio* that it cannot be taken *too* literally, as the formula "a normal speaker of English, using [the words] in the circum-

Pierre Schlag points out that "[the Knapp and Michaels'] argument [has] a certain intellectually therapeutic effect, for it asks of anyone who claims to be practicing "interpretation" to come forward and disclose the animating source, the animating agency, the subject who produces the text's meaning." Pierre Schlag, *Without Authority, Beyond Interpretation*, 96 COLUM. L. REV. (forthcoming 1996) (manuscript at 37, on file with author).

51. *Sinclair*, 870 F.2d at 1343.

stances in which they were used," must ultimately lead the interpreter back to the actual speaker's circumstances of use, given that the identity of the speaker is inseparable from those circumstances; thus any accurate account of the circumstances of use must necessarily include a description of the speaker's actual semantic intentions. This technical objection does not, however, obviate the method's pragmatic possibilities.⁵²

Nevertheless, a much more important objection to Judge Easterbrook's claim can be made. The method of statutory "interpretation" he recommends is *a* method for determining legal meaning; it is hardly the only one. What basis does he have for declaring that the results of this method represent, in some meaningfully exclusive sense, "the law?"⁵³ After all, many perfectly respectable legal arguments depend upon assertions that the legislators' semantic intentions determine the meaning of their text; or that formal canons of statutory interpretation do; or that considerations of precedent are paramount; or that the equitable requirements of substantial justice sometimes outweigh all these factors. Many other claims remain available as well.⁵⁴ It is certainly not the case that what results from Judge Easterbrook's preferred method of "interpretation" is understood as "the law" by either strict formal definition, or by some robust social consensus within the relevant community of interpreters; and yet it remains absolutely central to his argument to deny this. This general point can be seen to encompass two related propositions: (1) it is a constitutive element of our legal system that those who engage in legal argument are required to make assertions that themselves depend for their validity upon controversial, conceptually incommensurable claims regarding just what "the enterprise" to which one might or might not be faithful actually consists of, and (2) it is another constitutive element of the system that almost all forms of legal argument also require the implicit or — as in *Sinclair* — explicit denial of the first proposition.

How is the cognitive dissonance that marks this state of affairs maintained? How is it that legal argument can so often involve both

52. The formula can be reinterpreted pragmatically as advocating something along the lines of "understanding the speaker to mean what most speakers would mean when using those words in circumstances substantially similar to those in which they were actually used."

53. To answer "because he is the judge" is to fall back on a trivially circular functionalism. See *infra* note 71 and accompanying text.

54. To mention just one, various versions of what William Eskridge calls "dynamic statutory interpretation" call for the development of a methodology that will attempt to synthesize all these factors as a matter of course. See William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987).

conceptually incommensurable claims about the nature of legal interpretation and the simultaneous denial of this incommensurability, without those who make the claims seeming to notice either the incommensurability or its denial?⁵⁵

In his book *The Construction of Social Reality*, the philosopher John Searle provides us with a useful model for thinking about the ontological status of various types of facts, a model we can employ to analyze this seemingly paradoxical feature of our own legal system. Searle asks us to think of so-called "socially constructed" facts in terms of the following schematization.⁵⁶ Let X stand for a *brute, observer-independent fact*, for instance, the fact that a bishop in a particular chess set is made out of wood. Let Y stand for a *socially constructed institutional fact that is the product of shared belief* — of what Searle calls "collective intentionality."⁵⁷ Such a fact is always observer-relative, which is to say its facticity is dependent on the beliefs of the interpreting subjects who create it.⁵⁸ For example, the fact that a particular piece of wood is a bishop in a chess set is a fact by virtue of the beliefs of the subjects who believe this is the case. Let C stand for *the social context of shared belief that gives X the status of Y*. Thus this piece of wood (brute fact) is a bishop (institutional fact) in the social context of that practice (the practice constituted by the beliefs of the subjects who practice it) called "chess." Then for any socially constructed fact — for any rule, for any text, for any artifact — it must always be the case that *X counts as Y in C*.⁵⁹ Examples: A certain piece of wood counts as a bishop in the context of its use in a chess game; a rectangle of illustrated paper counts as a five-dollar bill in the context of its use within a particular monetary system; a mark counts as a word in the context of its linguistic use within a system of communicative discourse.

55. Compare Pierre Schlag's assertion that the issue in many a legal case comes down to asking an impossible question: "Given something whose essence is to be two or more things at once, which one of the two or more things is it?" Pierre Schlag, *Hiding the Ball*, 71 N.Y.U. L. REV. (forthcoming 1996) (manuscript at 42, on file with author).

56. See JOHN R. SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* (1995).

57. See *id.* at 23-26.

58. See SEARLE, *supra* note 29, at 211-12.

59. SEARLE, *supra* note 56, at 27-57. A more extreme version of social construction theory would deny that there are any "brute facts." On this view, all "facts" are products of some socially contingent organization of the world into arbitrary categories. For the purposes of the argument here we need only admit that certain facts (the valid movement of the bishop) at least appear to be much more socially contingent than others (the chemical composition of a chess piece).

If we wish to use this model in order to analyze the status of any socially constructed fact within a legal system — and, naturally, all legal facts must be socially constructed by those social systems of meaning that make them *legal facts*⁶⁰ — the crucial question then becomes “what is C?” In other words, what is the social context of shared belief that gives brute fact X the status of legal fact Y? My thesis is that *in the contemporary American legal system, arguments about legal interpretation are processed routinely within a meta-context in which a multiplicity of constitutive contexts are treated as the singular constitutive context of the activity*. Thus C=(c-1, c-2, c-3 . . .), in which it is a feature of C that c-1 will be presented as C to the exclusion of c-2 and c-3, while c-2 will be presented as C to the exclusion of c-1 and c-3, and so on.

I will now elaborate this thesis through a description of other sorts of practices that help create socially constructed facts.⁶¹ Chess is that game in which, among other things, all the game’s players agree that the bishop is the piece that can move diagonally and only diagonally. Hence in this system of meaning, all the participants agree that X (this object) counts as Y (the bishop, i.e., the piece that moves diagonally) in C (the practice of chess playing). Let us call such a system of meaning — a system in which, *as a conceptual matter*,⁶² everyone must agree about the manner in which X counts as Y in C, and in which the participants actually *do* agree about how it is the case that, conceptually speaking, X counts as Y in C — a “monistic practice.”

Conversely, imagine a conversation between two readers of nineteenth-century novels regarding the question of what work each considers the greatest novel of that time. Kevin says that he considers *Bleak House* the best novel of its era because of the moral fervor that animates its vivid descriptions of corrupt Victorian social institutions. On the other hand, his friend Susan prefers *Madame Bovary* precisely because of that text’s insistence on pursuing purely aesthetic values rather

60. I ignore for the moment the natural lawyer’s claim that certain sorts of legal facts are not socially constructed.

61. For an influential analysis of the distinction between interpreting a practice and interpreting particular acts within that practice, see John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955).

62. That is, the players treat the constitutive rules of the practice as something more than a merely contingent agreement about the matter (i.e., from the participants’ perspective, the rules of the practice are treated as if they have a formal existence that transcends the contingent fact that, for example, these particular players just happen to treat the bishop in this way). Conversely, such conceptual agreement does not rule out the possibility of an empirical dispute about, say, which piece of wood in a particular chess set is actually the bishop.

than on making moral judgments. Because Kevin and Susan believe that it is in some discursively constitutive sense legitimate, and hence reasonable, acceptable, and perhaps inevitable to hold materially different definitional conceptions of what qualities are most important in judging a novel to be "great," their conversation can be represented logically as *both* X (this set of marks) *and* X-1 (this other set of marks) count as Y (the best nineteenth-century novel) and not-Y (not the best nineteenth-century novel) in C (a discussion between Kevin and Susan about the best novel of the nineteenth century). Simply put, these two readers mean different things when they call a novel "great," and they also accept the legitimacy of the fact that they use, and that people in general use, different conceptual criteria to answer such questions. Following this line of reasoning, let us call a system of meaning in which, as a conceptual matter, X has more than one identity in the formula X counts as Y in C, and in which the various identities of X are conceptually contradictory in just such a nonparadoxical fashion,⁶³ a "plural practice."

Note that a plural practice does not preclude the possibility of arguments within the practice about the relative desirability of one or another conceptual approach employed within that practice. What it *does* preclude is any recourse to the sort of formal definitional stop — and its resulting sense of closure — that a monistic system of meaning always makes available.⁶⁴ Thus, while one can with perfect justice respond to the statement that in chess the rook moves diagonally with the reply "that's not chess," a structurally similar response to the statement that *Bleak House* is a great work of art because of its moral persuasiveness ("that's not art") is both pointless and wrongheaded. This response is wrongheaded because our society lacks any sort of consensus as to what aesthetic qualities mark a text as "art," and it is pointless because that very lack of consensus makes such a response an empty tautology.⁶⁵

63. That is, for each interpreter within C it is a fact that X or X-1 or X-2 and so on either is or is not Y in C, but within C as a whole it is also a fact that X, X-1 and so on, both are and are not Y, *and the interpreters in C understand this to be the case*. In other words, they acknowledge that the constitutive context of the activity as a whole includes a number of conceptually incommensurable constitutive contexts.

64. For a discussion of the uses and abuses of definitional stops, see H.L.A. Hart, *Prolegomenon to the Principles of Punishment*, in *PHILOSOPHY OF PUNISHMENT* 15, 18 (Robert M. Baird & Stuart E. Rosenbaum eds., 1988).

65. "Empty" when compared to the use of that response within a monistic discourse. By comparison, responding "that's not chess" to the claim that the rook moves diagonally is an example of the use of a valid tautology within the sort of discourse where such tautological responses can be employed properly.

Note that in the case of chess the social fact of the matter is that the answer to the question "which chess piece can move only diagonally?" has only one correct answer, while in the case of our hypothetical literary conversation the social fact of the matter is that the answer to the question "what is the best novel of the nineteenth century?" has two correct answers, which (nonparadoxically) are also incorrect answers. This difference flows from our understanding of chess as a practice constituted by a monistic system of formal rules and our corresponding understanding of conversations about aesthetic preferences as generally pluralistic practices that admit legitimate and perhaps inevitable variations between different conceptual schemes.⁶⁶ The crucial distinction between the types of socially constructed facts generated by monistic and plural systems of meaning is that, in a monistic system, the presence of real conceptual disagreement about which brute fact counts as what institutional fact within the context of the practice is fundamentally incompatible with the constitutive assumptions of that practice. By contrast, the possibility of such disagreement is, within a plural system of meaning, accepted as a constitutive element of the practice. Given the different contexts which generate the relevant social facts in each case, it is as absurd to claim that "for some people chess is the game in which the bishop moves horizontally" as it is to say "it is simply a fact that salmon tastes better than tuna, even though some people prefer tuna." Both statements are nonsensical: the first because it assumes the presence of a diversity of subjective understandings about a certain type of social fact that indeed depends for its very existence *as* that type of fact on the absence of a diversity of subjective understandings; the second precisely because that statement assumes that there could be some fact of the matter that would be constituted by something other than a diversity of subjective understandings.

Now consider a third type of practice. In this type of practice, *the participants treat a practice which in other respects operates as a plural system of meaning as if it were a monistic system of meaning*. Let us call such a discursive system a "chaotic practice."⁶⁷ The chaotic nature of such a system is a product of an unacknowledged and perhaps invisible incongruity between its rhetorical superstructure and its constitutive base. In such a system, the conceptual incommensurability of the various assumptions the participants hold about the constitutive elements of

66. This itself is a contingent social fact, of course. It would be possible to treat matters of aesthetic judgment with the same degree of rigid formalism we apply to certain rules of chess, and vice versa.

67. I use "chaotic" here in terms of its classical significations, without any intended allusion to its contemporary resonances; the chaos is Milton's, not Mandelbrot's.

the practice is itself denied by the constitutive rhetorical structure of that practice.⁶⁸ For example, if chess were such a practice it might feature a recurring series of disputes in regard to the most basic constitutive elements of the game, perhaps regarding how pieces were allowed to move, or even what the point of the game was supposed to be. Such disputes, however, could not then be resolved by appeal to some agreed-upon set of sufficiently comprehensive formal rules (there would be no such rules) nor could they end with an acknowledgment that the disputants were simply playing different games that they each happened to call "chess" (the constitutive rhetoric of the practice would utterly reject such a possibility). In a chaotic system of meaning, the participants do not perceive the lack of agreement about the identity of C in the formula X counts as Y in C in the rhetorical structure of their own arguments because those arguments always already assume that there is *no* disagreement among participants concerning the answer to the basic conceptual question, what is C? Thus the constitutive rhetoric of such arguments is itself crucial to the system's denial of the conceptual incommensurability at the base of the disputed questions.

This is, of course, the rhetorical structure of the dispute in *Matter of Sinclair*. The dispute turns on arguments concerning "statutory interpretation," arguments that themselves do not acknowledge that the disputants are employing conceptually incommensurable definitions of what they each call "statutory interpretation." Hence the Sinclairs' counsel argues that X counts as Y in C, where the brute psychological fact X — the beliefs of certain persons, that is to say, various members of Congress — regarding the convertibility of Chapter 11 cases, becomes the institutional fact of the legal rule Y, in the context of C ("the law"), where C is assumed to be the social practice whose features require the construction of this particular institutional fact out of that brute psychological fact. Judge Easterbrook replies that X is the brute fact, or counterfactual, of what an ordinary person would mean by the words of section 302(c)(1),⁶⁹ Y is the institutional fact of the legal rule which X becomes in C and C is, needless to say, "the law." Note that this dispute is conceptual rather than empirical, and therefore it cannot be resolved by gathering more and better "evidence" (evidence of what?).⁷⁰ Furthermore, the conflict between the various legal actors' un-

68. By "constitutive" I mean to emphasize that the presence of these elements and this structure is integral to the identity of the practice.

69. I ignore the difficult question of whether there can ever be brute linguistic facts.

70. That is, the dispute is a product of ontological incoherence rather than of epistemological disagreement.

derstandings of what constitutes C also cannot be resolved by reference to some meta-context of C where C, as here, *already* represents a chaotic meta-context of social meaning.⁷¹ Again, such a system is itself constituted by a multiplicity of constitutive contexts, each of which must claim to be the sole legitimate constitutive context of the system, to the exclusion of all of its rivals.⁷²

In summarizing these claims, I want to emphasize that what makes a practice that creates socially constructed facts monistic, plural, or chaotic is not interpretive agreement or interpretive disagreement per se. It is the *kind* of agreement or disagreement that takes place within a practice that identifies the practice's basic conceptual structure. Consider one more hypothetical example: Suppose a certain school of literary critics defines "textual interpretation" as the act of determining the semantic intentions of a text's author. Another critical school defines in-

71. In the classical legal realist tradition this conflict is resolved in two ways: first, through reference to some purely functional meta-context that operates as a plural practice (that is to say, C is whatever this legal decisionmaker happens to say it is). Such a meta-context is, of course, wholly trivial as a matter of methodology — it does not tell the decisionmaker anything about how to determine the relevant institutional facts — as well as being fundamentally repugnant to the rhetorical structure of what all the participants are required to treat as a monistic practice. The legitimacy of this meta-context is then determined by reference to decisional criteria that are understood to be in some way external to the formal structure of the legal system, that is, by determining whether or not the decision reflects "good policy."

A similar response to the covertly pluralistic nature of legal discourse has been elicited from a contemporary heir to the realist tradition:

Teachers teach nonsense when they persuade students that legal reasoning is distinct, *as a method for reaching correct results*, from ethical and political discourse in general (*i.e.*, from policy analysis). . . . There is never a "correct legal solution" that is other than the correct ethical and political solution to that legal problem.

Duncan Kennedy, *Legal Education as Training for Hierarchy*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 40, 47 (David Kairys ed., 1982).

One problem with the policy-politics move favored by realist and critical thinkers is that, given the state of contemporary political culture, much of the same critique that interprets law as a chaotic discourse can simply be replicated at the level of political discourse. *See, e.g.*, UNGER, *supra* note 8, at 95 ("The characteristic predicament of the modern lawyer is to argue constantly about policy, as if rational choice among competing values were possible, yet to remain faithful to the idea that values are subjective and to the political doctrine of which that idea is a part."). For an example from the world of high political theory of these same contradictory beliefs in action, see Paul F. Campos, *Secular Fundamentalism*, 94 *COLUM. L. REV.* 1814, 1817-21 (1994).

72. The chaotic nature of legal discourse is thus, ironically enough, a product of the discourse's need to deny its own chaotic quality. This same need can also be understood as a key source of what Robert Cover identified as the "jurispathic" character of legal decisionmaking: faced with "the luxuriant growth of a hundred legal traditions, [judges] assert that *this one* is law and destroy or try to destroy all the rest." Robert Cover, *The Supreme Court, 1982 Term — Foreword: Nomos and Narrative*, 97 *HARV. L. REV.* 4, 53 (1983).

terpretation as the act of attempting to ascertain the text's public, formally determined meaning — a meaning that, according to this view, remains independent of the text's author's intentions.⁷³ A third school of critics takes the view that interpretation should consist of giving the text whatever meaning the interpreter believes will have the most counter-hegemonic effect on society as a whole.

From within their own interpretive perspectives the members of each of these schools participate in a monistic practice. This *does not* mean that all the members of each school agree regarding which acts of "textual interpretation" best fit the particular interpretive criteria of that school. But within each school, there will be no conceptual disagreement as to what those criteria are. Disagreements will be limited to empirical disputes about which interpretations most accurately describe an author's semantic intentions, or which interpretation best represents what the critic believes is the text's formal, public meaning, or which interpretation will be most successful in producing counter-hegemonic social effects.

In this hypothetical the practice of "textual interpretation," when considered as a whole, is obviously not a monistic practice. That is, no conceptual agreement exists between (as opposed to within) these various schools regarding what "the" activity of textual interpretation either is or should be.⁷⁴ Whether the practice as a whole will be understood as (and therefore will be) a plural system of meaning, or, by contrast, whether it will be characterized by its participants as a monistic practice, and therefore will in fact be an example of a chaotic system of meaning, will depend on the interpretive attitude of the participants in the broader practice towards that broader practice.⁷⁵ If they simply acknowledge that different schools of criticism mean different things when they speak of "interpreting a text," they will understand the practice of literary evaluation in general to be constituted as a plural system of meaning. Again, such an acknowledgement does not preclude the

73. Because of its relevance to Judge Easterbrook's claims, it is worth emphasizing that this is an impossible operation. It is impossible because texts do not have formal meanings for an interpreter to discover. See Campos *Sentence*, *supra* note 34.

74. One common source of confusion in both literary and legal discussions of "interpretation" is the failure to distinguish between descriptive and normative accounts of the various activities that go by that name. See Paul F. Campos, *A Text Is Just A Text*, 19 HARV. J.L. & PUB. POLY. 327, 329-30 (1996).

75. Let me again emphasize that this discursive typology simply does not apply to the interpretation of objective, "brute" facts — to facts that do not depend for their facticity on the beliefs of interpreting subjects. Thus the natural-law theorist who asserts that certain positive legal rights are given their status as legal rights by the fact that they are also metaphysically transcendent "natural rights" would deny that all legal facts are socially constructed.

possibility of normative arguments concerning the strengths and weaknesses of different conceptual approaches to the practice of "textual interpretation." This kind of acknowledgement does, however, preclude the members of various schools from claiming that what *they do* is "textual interpretation," while at the same time insisting that other forms of approaching questions of textual meaning are not really forms of "interpretation" at all.⁷⁶ Such an attempt to treat a plural system of meaning as if it were a monistic system of meaning would signal the presence of a quintessentially chaotic social practice.⁷⁷

Text: An opinion poll revealing the wishes of Congress would not translate to legal rules If Congress enacts a *parens patriae* statute "intending" thereby to allow states to represent indirect purchasers of overpriced goods, that belief about the effects of the enactment does not become law. If Congress were to reduce the rate of taxation on capital gains, "intending" that this stimulate economic growth and so yield more tax revenue, the meaning of the law would be only that rates go down, not that revenue go up — a judge could not later rearrange rates to achieve the "intent" with respect to federal coffers.⁷⁸

Commentary: These observations reflect a common confusion in discussions of legal interpretation between two meanings of "intent." A speaker can have a semantic intention — the intention to use this sign to signify that thing — and a speaker can have the hope or expectation that this semantic intention will produce particular results. The former denotes an intention to give a sign a particular meaning, while the latter

76. This point might seem to be in some tension with my assertion that the interpretation of text is always the attempt to determine what its author meant by it. It isn't: the latter claim merely aims to clarify the status of certain linguistic activities and the artifacts they produce. It is not an attempt to regulate the use of the term "interpretation."

77. Compare Ronald Dworkin's well-known distinction between the "internal" and "external" perspective:

People who have law make and debate claims about *what law permits or forbids* This crucial argumentative aspect of legal practice can be studied in two ways or from two points of view. One is the external point of view of the sociologist or historian The other is the internal point of view of those who make the claims.

RONALD DWORIN, *LAW'S EMPIRE* 13 (1986) (emphasis added). Dworkin's account emphasizes that, when it takes place from this internal perspective, legal argument never takes the form "my version of law is *better* (in the sense of more desirable) than your version." The argument, as both Dworkin's jurisprudence and Judge Easterbrook's opinion demonstrate with admirable clarity, is always framed as "my version of law is *law* and yours isn't." Note that from such an internal, monistic perspective, legal claims must always represent themselves as being of a descriptive rather than of a "merely" normative nature.

78. *In re Sinclair*, 870 F.2d 1340, 1343-44 (7th Cir. 1989).

indicates a desire that one's semantic intentions have certain effects.⁷⁹ The two categories are theoretically conjoined in the idea of a successful performative utterance: for instance, saying "I do" in a valid marriage ceremony itself brings about the state of affairs the "intending" (first meaning) speaker "intends" (second meaning) to bring about.⁸⁰ Judge Easterbrook's analysis treats legislative utterances as if to speak of their authors' intentions at all requires the interpreter to treat those acts as performative utterances when, as he points out, they seldom are. But the judge's analysis is a product of his conflation of these two distinct senses of "intend." Thus in Judge Easterbrook's second example, Congress has succeeded in meaning ("intending" in the first sense) "the capital gains tax is hereby reduced;" and the authors of this text have therefore manifested efficacious constative intentions.⁸¹ By contrast, they merely hope (intend in the second sense) that those intentions will have an efficacious performative result — that of stimulating sufficient economic growth so as to raise tax revenues. Although declaring "the capital gains tax is hereby reduced" *may* be a performative utterance in regard to changing the rate itself, that same statement is not a performative utterance with regard to the authors' expectations concerning what the new rate will accomplish.

This point aside, to what extent are Judge Easterbrook's apparently unexceptionable claims about the consequences of different sorts of legislative intent accurate? In fact these supposedly unproblematic examples, intended to illustrate the limits of legal interpretation, demonstrate just how chaotic certain elements of the system of meaning we call

79. Even a scholar as sensitive to the subjectivity and complexity of legal meaning as Jack Balkin has made this mistake:

[T]he Rule of Law *requires* that a legal text be separated from the purpose present in the mind of the creator of the text Assume that the sole purpose of price control regulation is to benefit the airline industry. After intense lobbying, the legislators are convinced that they need to outlaw "cutthroat competition" among the airlines. Suppose that economic conditions then change, and the airlines will lose revenue unless they can increase volume by dropping their prices below the minimum price levels. We would not read the statute to mean that minimum prices no longer control, even though that would achieve the authors' purpose of benefiting the airline industry. Rather, we must admit that the text of the statute has taken on a life of its own, apart from the original purpose of the legislators who created it.

J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 783 (1987). Professor Balkin has informed me that he now rejects the conflation of two different meanings of "intent" implicit in this passage. Telephone Interview with J.M. Balkin (Sept. 1995) (discussing Balkin's 1987 article).

80. See J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 4-24 (1962).

81. That is, they have generated a text.

“the law” have become.⁸² It is, after all, a commonplace of modern legal rhetoric for legal actors to distinguish between the “narrow intent” of a statute’s authors and their more general “purpose,” and to declare that the content of the latter sometimes requires dispensing with the apparent constraints of the former.⁸³ In the context of such a broadly defined interpretive practice, we need not be startled by declarations that, as the legislature intended to accomplish X, the contingent fact that it chose route Y to do so must yield to the subsequent judicial realization that X could be more readily accomplished via route Z.⁸⁴

Text: To treat the text as conclusive evidence of law is to treat it as law — which under the constitutional structure it is. . . . The “plain meaning” rule of *Caminetti* rests not on a silly belief that texts have timeless meanings divorced from their many contexts, not on the assumption that what is plain to one reader must be clear to any other (and identical to the plan of the writer), but on the constitutional allocation of powers. The political branches adopt texts through prescribed procedures; what ensues is the law. Legislative history may show the meaning of the texts — may show, indeed, that a text “plain” at first reading has a strikingly different meaning — but may not be used to show an “intent” at variance with the meaning of the text. . . .

82. Not that I want to make any sort of comparative historical claim on this score. Before lamenting the degenerate state of our present condition, we should remember that even in the nineteenth century the common law was sometimes referred to as “a chaos with an index.”

83. Especially well-known examples of this phenomenon are provided by the decisions in the *Weber* and *Li* cases mentioned earlier. See *supra* note 7 and accompanying text. Grant Gilmore’s description of the holding in *Li* is mostly, but not completely, accurate:

The Court concluded that the California Civil Code of 1872 had adopted the common law contributory negligence rule . . . took note of the fact that the California legislature had refused to amend the Code provision and held that, *despite the Code*, California would now adopt a “comparative negligence” rule.

GRANT GILMORE, *THE AGES OF AMERICAN LAW* 144 (1977) (emphasis added). The Court rather held that the Code also expressed the legislature’s intent that the Code “be interpreted so as to give dynamic expression to the fundamental precepts which it summarizes.” *Li v. Yellow Cab Co. of Calif.*, 532 P.2d 1226, 1239 (Cal. 1975). The judicial discernment of this sort of “meta-interpretive” authorial intent is now routine. In many areas of constitutional law, to pick an obvious example, this distinction is familiar enough to have achieved the status of a platitude.

84. Perhaps Judge Easterbrook’s example seems initially nonproblematic because it involves altering legislatively determined *numbers*. For some reason (maybe we are all at heart Pythagoreans when it comes to matters of mathematical representation) legal actors in our system remain squeamish about ignoring textual meaning when it is expressed numerically. This may also be why fancy arguments about the interpretive plausibility of twenty-five-year-old presidents, etc., always seem somewhat absurd, if not downright ridiculous.

Ours is now an easy case. Section 302(c)(1) of the statute has an ascertainable meaning, a meaning not absurd or inconsistent with the structure of the remaining provisions. It says that Chapter 11 cases pending on the date the law went into force may not be converted to Chapter 12. No legislative history suggests any other meaning. The committee report suggests, at best, a different intent. Perhaps a reader could infer that the committee planned to allow conversion but mistakenly voted for a different text. So two members of the committee have said since, calling section 302(c)(1) an oversight. Not only the committee remarks on conversion but also the omission of section 302(c)(1) from the section-by-section description of the bill suggest that whoever wrote the report (a staffer, not a member of Congress) wanted section 302(c)(1) deleted and may have thought that had been accomplished. Still another possibility is that the Conference Committee meant to distinguish Chapter 11 from Chapter 13. On this reading the gaffe is the failure to delete the reference to Chapter 11 from the report, which could still stand as a treatment of conversions from Chapter 13.

Congress has done nothing to change section 302(c)(1), implying that the statement in the committee report may have been the error. It is easy to imagine opposing forces arriving at the conference armed with their own texts and legislative histories, and in the scramble at the end of the session one version slipping into the bill and the other into the report. Whichever was the blunder, we know which one was enacted. What came out of conference, what was voted for by House and Senate, what was signed by the President, says that pending Chapter 11 cases may not be converted. Accordingly, pending Chapter 11 cases may not be converted.⁸⁵

Commentary: As noted earlier, the legislative history that conflicts with the language of section 302(c)(1) is the conference committee report's discussion of section 256(1), which does appear to contemplate conversions of pending cases from Chapter 11 to Chapter 12.⁸⁶ Judge Easterbrook points out that section 302(c)(1) is not mentioned at all in the section-by-section analysis contained in the conference committee's report, and he discusses several possible explanations for its absence. His discussion of the byzantine maneuvers that often accompany the playing of the legislative endgame does not, however, mention the most interesting hypothesis regarding this curious omission.

According to prevalent rumors in one segment of the bankruptcy bar, at the behest of lending interests a Senate staff member put section 302 into

85. *In re Sinclair*, 870 F.2d 1340, 1344-45 (7th Cir. 1989).

86. *See supra* note 15 and accompanying text.

the bill, contrary to the apparent wishes of the sponsors and supporters of the 1986 statute. It appears that sponsors and supporters of the statute did not even notice section 302 until well after the statute had been adopted.⁸⁷

It turns out that in an important sense *Sinclair's* extensive discussion of plain meaning, textual ambiguity and the uses and abuses of legislative history may ultimately be quite beside the point. Contrary to the main thrust of Judge Easterbrook's argument, the real interpretive question presented by the case has nothing to do with the meaning of the words that make up section 302(c)(1). No one need dispute that those words mean exactly what Judge Easterbrook says they mean. The real interpretive question is, *what should the interpreter of this text do with it?*

Let us return to the question with which we began: what is "the text of a statute?" I will now use the strange genesis of section 302(c)(1) to illustrate the following idea. Texts — acts of signification — will to some degree meet or fail to meet the interpretive needs of those who interpret them. Metaphorically speaking, a text may or may not "contain" the meaning we seek to find "in" it.⁸⁸ As a very simple example, consider two questions we might ask of the text of the United States Constitution.

- (1) How many Senators is each state permitted?
- (2) At what rate should capital gains be taxed?

In our legal culture, almost all interpreters properly take the view that the Constitution's text provides a perfectly satisfactory answer to the first question and no answer at all to the second. Constitutional interpreters properly take this view because they do not doubt that the semantic intentions of the constitutional text's authors both clearly address and answer the first question, and just as clearly fail to address and answer the second — although, of course, they might not frame the issues in these precise terms.⁸⁹ With this interpretive dichotomy in mind, let us consider a spectrum of semantic richness that runs from one ideal type — a text that answers any question we might ask of it —

87. WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 757-58 (2d ed. 1995).

88. Our ordinary parlance about such questions employs what George Lakoff and Mark Johnson have identified as a reifying "container schema." See, e.g., GEORGE LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS* 271-73 (1987). The physical instantiation of a text does not literally "contain" any semantic content, of course. It is merely evidence of some particular mental state (the author's). See the work cited *supra* in note 25 for a full elaboration of this claim.

89. Which is to say interpreters can answer such constitutional questions by reading the Constitution's text. See Campos, *Constitutional*, *supra* note 25, at 305.

to another — a text that answers no question we might have. Let us call the former a “total text” and the latter an “empty text.” Obviously these are ideal types in the sense that it is unlikely any actual text represents a pure example of either of these phenomena. A true total text would have to be the product of what to the modern mind is an almost unimaginable metaphysical situation: something akin to the Bible of the Cabalists, whose omniscient author has encrypted not only every word, but every letter of every word — and the order of every letter of every word, and so on — with a universe of meanings. By contrast an empty text would, strictly speaking, not be a text — an act of signification — at all. Even the most semantically impoverished text must provide *some* answer to at least one question, even if it is only “what did this text’s author mean?”

Leaving aside such theoretical musings,⁹⁰ every text we interpret will, as a practical matter, occupy a place somewhere on a semantic spectrum between the total and the empty text. Another way of putting this point is to say that the semantic intentions of a text’s meaning-conferring agent — its author — will answer some of the potential interpretive questions of the text’s interpreters, and cannot answer other potential interpretive questions. Any text, then, will answer some possible interpretive questions and fail to answer others. Let us call a text that can successfully answer a *particular* question a “valid text,” and a text that cannot answer a particular question a “pseudotext.” It follows logically that every text which is neither a total text nor an empty text will prove to be for some interpretive purposes a valid text, and for other purposes a pseudotext.

Now let us consider some of the ways in which a text might prove to be a pseudotext in the context of a *particular* interpretive purpose. For those who interpret legal texts, three forms of semantic failure are especially important.⁹¹ First, a text may lack the necessary semantic

90. Readers of Jorge Luis Borges will note that the ideas of the total text and the empty text merge harmoniously in his *Library of Babel*, where an almost infinite collection of books contain every possible orthographic combination that can occur in a particular alphabet. As a formal matter, the comprehensive volumes of such a semantic monstrosity would appear to express everything that has been or could be said in any actual or possible language. Leafing through those volumes, an immortal reader would eventually discover that the library’s texts seem to “affirm, negate and confuse everything like a delirious divinity [*como una divinidad que delira*].” Jorge Luis Borges, *La Biblioteca de Babel*, in *FICCIONES* 85, 93 (1956), translated as *The Library of Babel*, in *LABYRINTHS*, *supra* note 1, at 51, 57.

91. Again, the claim here is that the interpretation of a text is always the act of determining what its author meant by it. The text’s meaning is always already identical with the author’s intentions precisely because it is those intentions that must determine the text’s semantic identity. See *supra* note 25 and the literature cited therein for a fuller

richness to answer the question we ask of it. Second, the semantic content of a text may have been generated by an author whose identity was deficient in some way. Third, the relevant texts may display *too much* semantic richness, a richness that leads to what I will call “semiotic paradox.”

A legal text may prove to be a pseudotext if that text simply does not contain an answer to the interpretive question we pose to it. For example, suppose a legislature passes a statute creating a new cause of action in tort. Because they neglected to consider the matter, the members of the legislature failed to stipulate what statute of limitations would govern the bringing of the action. Now in one trivial sense it is true that, as a matter of interpreting the text of the statute, the question “what is the statute of limitations for this action?” can be answered, “there is none.” This answer is trivial because it wrongly implies that the text of the statute answers the interpretive question. The text of the statute does not answer the question: the statute — which is to say its authors — merely failed to consider it. Silence in this case does not signal an intended acquiescence to the absence of a statute of limitations. Rather, the silence of the text is quite literally meaningless: it is the silence of a semantic void. To be clear about the matter, it is *not* the case that if some default rule of the relevant legal system governs this situation — “if the legislature fails to choose a statute of limitations the limit is one year” — then the statute’s text is thereby transformed into a valid text in regard to the interpretive question. This default rule is a *default* rule because it tells you what to do if the statutory text turns out to be this type of semantically deficient pseudotext in the context of an attempt to answer a particular interpretive question.

At first glance the text at issue in *Matter of Sinclair* would seem to have avoided this variety of semantic failure. As Judge Easterbrook says, the text of section 302(c)(1) has an ascertainable meaning, a meaning that answers the interpretive question posed by the case. Hence for at least this interpretive purpose the statute’s text does not suffer from a pseudotextualizing⁹² semantic poverty — *if* the text of section 302(c)(1) is indeed part of the statute.

explanation of these claims. Nevertheless, the forms of semantic failure that strike the author’s text can also plague the texts created by those acts of creative misinterpretation I elsewhere call “misreading” and “reauthoring.” See Campos, *Constitutional*, *supra* note 25.

92. “To make into a pseudotext.” This definition is, I hope, redundant. Its point is to note the parallel with the “mantling” example above. See *supra* notes 35 & 36 and accompanying text. Obviously we do not follow “the rules of language” in any useful sense when we interpret *nonce words* — from “once,” not from “nonsense.”

Now I can well imagine my readers wringing their hands (metaphorically speaking) over the apparent extravagance of this argument. *Of course* the text of the statute is part of the statute. How could anyone suppose that it wasn't? My imagined reader's hypothetical question brings us to the second major source of pseudotextuality that troubles the practice of contemporary legal interpretation.

Assume that the "prevalent rumors in the bankruptcy bar" concerning the dubious parentage of section 302(c)(1) were in fact true.⁹³ Then consider the implications of the following narrative. Judge Easterbrook has completed the final draft of his opinion for the court in the case *Matter of Sinclair*. He gives a computer disk containing that draft to his law clerk, who must prepare the official copy for the judges to sign. The clerk, who sympathizes deeply with the plight of the American family farmer, decides to resign in protest over what she considers an outrageous decision. Before doing so, however, she decides to engage in an act of political rebellion *cum* postmodernist performance art. She adds a final paragraph to Judge Easterbrook's draft of the opinion, a paragraph explaining that up to this point the opinion has been — as perceptive readers have already realized — a scintillating piece of ironic satire intended by its author to lampoon the excesses of formalist legal reasoning. The final sentence of the new text reads, *The judgment of the district court is reversed, and the case is remanded for further proceedings consistent with this opinion*. When Judge Easterbrook and his brethren receive the signing copy of the modified opinion, they simply sign what they assume is a text identical in all relevant respects to Judge Easterbrook's final draft. This "opinion" is then published before "its" "authors" notice "their" "mistake." What's a court to do?

The interesting jurisprudential question posed by this hypothetical has nothing to do with how long it will take for the clerk's rogue text to be vacated and replaced by a properly pedigreed successor. The truly interesting question concerns what the district court's attitude should be toward this text in the interim. What was signed by the judges says Chapter 11 cases may be converted. Is this text "law, not evidence of law?" I very much doubt Judge Easterbrook would see *this* question in just those terms. Yet is this admittedly somewhat surreal hypothetical⁹⁴

93. See *supra* note 87 and accompanying text.

94. Not *that* surreal, apparently; given the fractured quality of much contemporary professional discourse, the line between sincere argument and subversive parody becomes fuzzier all the time. See, e.g., the (in)famous recent performance of Professor Alan Sokal in Alan D. Sokal, *Transgressing the Boundaries: Toward a Transformative Hermeneutics of Quantum Gravity*, SOCIAL TEXT, Spring/Summer 1996, at 217; Alan Sokal, *A Physicist Experiments with Cultured Studies*, LINGUA FRANCA, May/June 1996,

different in any significant respect from what we have good reason to believe was the actual genesis of section 302(c)(1)?

Section 302(c)(1) and the clerk's addition to Judge Easterbrook's draft opinion are both classic examples of a certain kind of pseudotext. The semantic contents of both texts are perfectly adequate to the interpretive questions that will be posed to them, but those contents have been generated by the semantic intentions of meaning-conferring agents whose identities are inadequate to the authorial tasks they attempted to perform.⁹⁵ Their identities are inadequate, of course, because no conceivable theory of political obligation would posit that, in principle, the substance of legal rules should be determined by the semantic contents of "unauthorized"⁹⁶ textual interventions carried out by subversive staffers and rebellious clerks.⁹⁷

A third type of pseudotext arises not from an absence of textual meaning, or from the text's lack of an appropriate meaning-conferring agent, but rather from an *excess* of these same qualities. Yet again, the interpretive question posed by *Matter of Sinclair* provides an excellent illustration. It may seem paradoxical to affirm that a legal dispute can be burdened both with an absence and an excess of meaningful texts, but *Matter of Sinclair* appears to present us with just such a situation. As Judge Easterbrook notes in the very first line of his opinion, the basic conflict in the case is between a portion of a statute and that statute's legislative history; more precisely, as we have seen, the interpretive battle must be fought between the will of the legislators who supported the statute and the meaning of a text that was inserted into the statute against their explicit intentions. We should recall that this dispute cannot be resolved by merely dismissing the quoted committee report as lacking the canonical status of a relevant legal text; for it is simply not the case that the conflict is between the *statute* and its legislative history. *Matter of Sinclair* features a conflict between, among other things, different portions of the same statute. Again, the meaning of section 256(1) can only be reconciled with the meaning of section 302(c)(1) if we assume that the former section was meant to be read *in*

at 62. See also Stanley Fish, *Professor Sokal's Bad Joke*, N.Y. TIMES, May 21, 1996, at A23.

95. "Attempted" because the interpretive question is not whether these authors managed to produce sufficiently meaningful *texts*, but whether they were able to generate, respectively, a *statutory text* and a *judicial text*.

96. Here the very structure of our language reflects the idea that a text's lack of authority and of an appropriate author are synonymous concepts.

97. However, "principle" is one thing, practice another. In other words, once you are stuck with an authorially deficient pseudotext you have to do something with it — perhaps even interpret it.

pari materia with the latter: but the only reason to assume such an obvious counterfactual is precisely that it allows the interpreter to avoid what would otherwise prove to be an incoherent interpretive result.

Whenever the accurate interpretation of different legal texts reveals that those texts give fundamentally incompatible answers to a particular interpretive question and, furthermore, there exists a *conceptual* (as opposed to a merely empirical) disagreement about how those texts should either be sorted hierarchically, or reconciled through some species of strategic misreading, the relevant texts suffer from *semiotic paradox*.⁹⁸ Semiotic paradox renders what otherwise might be a valid text for a particular interpretive purpose into a pseudotext in regard to that same purpose.

I will now summarize the foregoing textual taxonomy with the aid of an example. Suppose a question arises among chess players concerning what the rules of chess require if, in the course of a match, an audience member suggests a move to one of the players. If the regulative materials that chess players consider authoritative (let us call such materials "the rule book") do not address this question then the rule book of chess is, in regard to this particular question, a semantically impoverished pseudotext. On the other hand, if the regulative materials contain an answer to the question, but it develops that answer was generated by the semantic intentions of a meaning-conferring agent who was not properly qualified to contribute to the materials, then in regard to this question the rule book is an authorially deficient pseudotext. Finally, if the regulative materials contain contradictory answers to the question, and chess players cannot reach some conceptual agreement regarding how to determine which answer will be treated as definitive, then the rule book has, in regard to this interpretive question, been rendered a pseudotext by virtue of semiotic paradox.

Our close reading of Judge Easterbrook's opinion has revealed that what at first appeared to be a straightforward exercise in statutory interpretation was in fact something much more complicated and interesting. We have seen, in the classic legal pedagogic context of appellate case analysis, the rhetoric of a chaotic discourse grappling with the profound interpretive problems occasioned by an encounter with a species of legal pseudotext. How often do the chaotic and the pseudotextual features of our legal system manifest themselves in practice, and in what ways are they linked? What implications do these features have for the tradi-

98. For some examples of misinterpretive textual strategies, see Campos, *Constitutional*, *supra* note 25.

tional structure of legal education? These questions will be touched on in the remainder of my argument.

III

What rendered problematic for Bloom the realization of these mutually selfexcluding propositions?⁹⁹

I have argued that in our legal culture disputes that involve the various activities that go by the name "statutory interpretation" often manifest the characteristics of a chaotic practice: a discursive system marked both by a multiplicity of constitutive contexts, and by a constitutive rhetoric that denies this multiplicity. I have also tried to show that arguments about statutory interpretation are complicated significantly by the phenomenon of the pseudotext. In what follows, I will argue that the chaotic character of contemporary legal discourse often both helps reveal the presence of an otherwise hidden pseudotextuality and can, moreover, actually play a role in the production of legal pseudotexts. But the causal relationship between chaotic legal discourse and pseudotextuality is a complicated one. Indeed, I will suggest that what might be called the intrinsically pseudotextual character of various legal texts itself contributes to the production of a chaotic legal discourse. I conclude there are reasons to suspect certain features of our formal dispute processing system bias the system toward encouraging a mutually reinforcing relationship between chaotic forms of argument and legal pseudotextuality, especially whenever that system is actively employed to process disputes.

How often, and under what conditions, will legal argument display the characteristics of a chaotic practice? How common or uncommon is the problem of the pseudotext for the practice of contemporary legal "interpretation?" These are, needless to say, extremely complex questions; and all I can do here is to begin to suggest some possible answers.

As an initial matter, I believe we should be wary of the claim that a case like *Matter of Sinclair* presents the interpreter with an extraordinary situation — that it is hardly an everyday thing for the legislative process to produce such a thoroughly dubious text as that embodied in section 302(c)(1) of the Bankruptcy Act. This claim, no doubt, is true enough; but we should note that most legal pseudotexts are not the products of such obviously pathological breakdowns in the authorial processes that are supposed to create legal texts. Indeed, in an important

99. JAMES JOYCE, *ULYSSES* 680 (1946).

sense *it is the processes that are called "legal interpretation" themselves*, or rather the semantic pressure generated by the chaotic elements in those processes, that help generate pseudotexts. There are, after all, an almost unlimited number of potential legal questions for which the texts of our legal system, including Chapter 12 of the Bankruptcy Act, provide perfectly adequate answers. A valid text will be transformed into a pseudotext only when we ask a question of it that the text cannot answer in a satisfactory way. What is rarely appreciated is the nature of the interpretive dynamic that guarantees such questions will dominate the practice of "textual interpretation" within the context of formal legal argument.

Let us explore the plausibility of this conclusion by beginning with some fairly uncontroversial observations about the character of dispute processing systems. Generally, disputants will employ such systems only if they anticipate the gains from success multiplied by the probability of success outweigh the probable costs of employing the system to resolve the dispute.¹⁰⁰ Given this, it follows that valid legal texts are unlikely to become the interpretive focus of actual litigation. For if a text has (1) the necessary semantic content to answer a particular interpretive question, and (2) that semantic content has been generated by an appropriate meaning-conferring agent, and, furthermore, (3) that text has no conceptual rivals for authoritative legal status, then it is extremely improbable that such a text will be the subject of formal interpretive argument, at least in regard to that question. Such a valid text will rather provide an opportunity for avoiding formal legal action, as it will not be worth anyone's while to contest either its semantic meaning or its functional significance.¹⁰¹ On the other hand, if a dispute arises where the interpretive pressures brought to bear on the relevant text reveal that the text is in some way semantically deficient in regard to its ability to answer the disputed question, then it will almost certainly make sense, as a strategic matter, for the disputants to attempt to con-

100. This is not to say that litigants are always rational maximizers of something that can be monetized; that is, unless we understand some litigation as a type of consumption. *See, e.g.,* Pierson v. Post, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805). The litigants expended a small fortune in a dispute over a fox pelt, leading one observer to note that "the love of law suits had not entirely disappeared, although, as by this time lawyers were employed, they were much more in the nature of luxuries." JAMES T. ADAMS, MEMORIALS OF OLD BRIDGEHAMPTON 165 (1962).

101. Again, let me emphasize that I am purposely ignoring the whole question of epistemological disagreement. Disagreement about the semantic meaning of a text, per se, isn't relevant to the analysis of the chaotic features of a discourse. The question I am pursuing here is not the empirical question "what does this text mean?" but rather the conceptual question "what do we mean when we ask what a text means?"

vince the legal decisionmaker that what appears to be a pseudotext in regard to this question is in fact a valid text, at least to the extent that this counterfactual argument furthers their various strategic purposes.¹⁰²

But this account is too simple. Merely stating that the formal legal process avoids, naturally enough, making valid texts the focus of legal argument does not account for the complexity of this process. Rather, the chaotic elements of the legal process play a role in both the discovery and the creation of legal pseudotexts. Once again, *Sinclair* illustrates the point well.

The pseudotextual character of section 302(c)(1) would never have surfaced if not for the interpretive pressures brought to bear on that text by the litigating parties. If the Sinclairs' lawyer had merely read 302(c)(1), and, having accepted the text's apparent meaning, informed his clients that their case could not be converted, then the semantically deficient nature of that text's meaning would have remained hidden.¹⁰³ As a functional matter, section 302(c)(1) would continue to be treated as a valid text for the purposes of the interpretive question posed by *Sinclair*, and consequently the legal system would in these circumstances retain the appearance of a monistic practice. Only a lawyer's relentless search for a plausible interpretive argument eventually forced the legal system, in the person of Judge Easterbrook, to deal with the newly discovered pseudotextual character of this portion of the statute.

Judge Easterbrook's opinion also demonstrates how the pressures of litigation do not merely reveal the presence of pseudotexts — those same forces actually help produce them. The opinion's jurisprudential arguments themselves provide indirect evidence of how the advocate's hunger for plausible interpretive claims helps produce the chaotic structure of formal legal discourse, and of how the resulting chaotic system of meaning systematically transforms potentially valid legal texts into plausibly litigable pseudotexts.

Let us begin to explore this phenomenon by considering briefly under what sorts of circumstances the legal system will tend to function as a monistic or a plural practice, rather than as a chaotic system of meaning. For instance, if the interpretive question that must be an-

102. This strategic imperative to deny the potentially pseudotextual nature of legal texts is a consequence of our system's metainterpretive assumption that the "relevant" legal materials always provide an answer to whatever interpretive question might arise. As A.W.B. Simpson points out, it just is not an option in the Anglo-American legal tradition for the judge to say to the parties "sorry, but there's no law here to decide your dispute. Everybody go home." A.W.B. Simpson, unpublished review of RONALD DWORKIN, *LAW'S EMPIRE* (1986).

103. For the sake of simplicity of analysis I am assuming that no other dispute would have revealed the text's deficiencies.

swered is, “how many United States Senators can represent the state of New York at any one time?” then we can be confident the legal system will appear to function as a monistic practice. Again, the apparently monistic character of the practice does not arise merely as a consequence of a lack of epistemic disagreement about the correct answer to the question. The legal system will be a monistic practice in regard to this question because there is no real *conceptual* disagreement about *how* to answer it — by reading the Constitution’s text, with “reading” here meaning, whether the interpreter is aware of it or not, the act of determining the intentions of the text’s authors.¹⁰⁴ By contrast, suppose that while the Sinclairs’ lawyer argues that the will of the legislature should determine the outcome of the dispute, and the government’s attorney asserts that the “plain meaning of the text” should control, both also believe that the formal features of our dispute processing system do not actually require a particular outcome in this situation. If they were in fact to hold such views, the advocates in *Matter of Sinclair* would understand the legal system (at least in regard to this particular question) to be functioning as a plural system of meaning.¹⁰⁵

Now we can posit several good reasons for supposing that the advocate’s need to generate plausible interpretive arguments will encourage a systemic bias toward the encouragement of chaotic modes of discourse over monistic or plural systems of legal meaning. First, if a legal system is structured as a monistic practice then arguments within that system will be limited to the realm of the epistemic, which is to say the empirical. For example, if Judge Easterbrook’s claims about legal interpretation were, as a sociological matter, essentially correct — if the results of his preferred interpretive method were acknowledged generally as representing “the law,” rather than being merely a *kind* of law — then the only argument available to the Sinclairs’ lawyer in regard to the meaning of section 302(c)(1) would be that what an ordinary speaker of English would mean by the words of the section was that Chapter 11 cases were indeed convertible to Chapter 12. And that, of course, would be no argument at all. Similarly, if everyone agreed that what made the brute fact X become the legal rule Y in social context C was the will of the legislature then — although the result of this inquiry

104. See *supra* note 89 and accompanying text.

105. This essay makes no claim about the actual phenomenology of legal practice. While the rhetoric of our legal system requires that lawyers often engage in what is conceptually structured as a chaotic practice, this does not necessarily mean, of course, that all lawyers have in fact internalized that structure. In other words some lawyers and perhaps even a few judges may well understand the system’s monistic claims to be rhetorical exaggerations or outright fictions.

would be the reverse of that produced by Judge Easterbrook's interpretive method — the answer to the empirical question posed by the case would be just as transparent, which is to say just as unsuitable for interpretive dispute. *Sinclair* thus demonstrates how what appear to be trivially obvious epistemic questions are often actually signs of complicated conceptual, which is to say ontological, disagreements. Indeed, both the very complexity and the subtexual character of these conceptual disagreements create a much richer field for the generation of plausible interpretive arguments than that made available by a straightforwardly monistic practice, within which interpretive arguments must be limited to what are, in the end, empirical disputes.¹⁰⁶

Conversely, imagine if Judge Easterbrook announced that his choice of a particular interpretive method was in fact a highly contingent matter, and admitted that it was a conceptually respectable option within our legal system for a judge to declare the intentions of the legislature, or the demands of broader legal policy, or something else altogether the source of "the law." In the wake of such an admission, it would become difficult to explain why the *Sinclairs* should invest significant resources in attempting to influence what they would then perceive (correctly) as an unavoidably pluralistic, deeply unpredictable and basically randomized decision process. Who, after all, would pay a lot of money to try to influence the systemic equivalent of a coin flip? In a candidly pluralistic practice, whatever real value the advocate's skill for generating plausible interpretive arguments retains within a chaotic system of meaning would be rendered more or less worthless by the sheer ease of doing so. When, because of a profusion of what are recognized as legitimate constitutive contexts, almost any interpretive argument is understood to be plausible the value of producing plausible interpretive arguments disappears.

The pluralistic structure of a chaotic practice thus suits the needs of lawyers who must continually produce a rich variety of plausible interpretive arguments because it broadens the field of available arguments from the epistemological and empirical to the ontological and conceptual. The monistic rhetoric of such a discourse also continually affirms the supposed conceptual unity of the enterprise: a conceptual unity that is necessary both to the creation of a stable enough system of

106. Another way of putting this point is to say that arguments about the correct interpretation of particular legal texts regularly disguise conceptual disputes about what, as a general matter, it even means to "interpret" a legal "text." As *Sinclair* illustrates, putative arguments about the meaning of legal texts are often best understood as subtexual disagreements concerning the *identity* of the meaning-conferring agents who must give those texts whatever meaning it is claimed they possess.

meaning to produce demonstrably “correct” — and hence predictable — answers, and to the avoidance of the system’s devolution into what would then be understood as a series of essentially particularistic exercises in decisional subjectivity.

We can now begin to see how a chaotic legal practice actually helps create the three types of legal pseudotexts discussed earlier. For ease of analysis, let us severely restrict our inquiry by limiting it to the constitutive contexts represented by, on the one hand, Judge Easterbrook’s ordinary language methodology, and on the other, the claim that the semantic intentions of the legislature determine a statute’s meaning. Recall that initially section 302(c)(1) did not appear to suffer from any relevant semantic impoverishment. Yet if the constitutive context of statutory interpretation is understood to be limited to the interpretation of the speech acts of *legislators*, then section 302(c)(1) arguably lacks *any* relevant semantic content, and is thereby transformed into the most extreme form of semantically impoverished pseudotext. By contrast, if Judge Easterbrook’s method of interpretation supplies the constitutive context then section 302(c)(1) and section 256(1) are rendered pseudotexts by virtue of semiotic paradox.¹⁰⁷ Of course we have already seen how Judge Easterbrook’s interpretive method requires the interpreter to treat the potentially crucial evidence provided by the conference committee report as the illegitimate byproduct of an authorially deficient pseudotext, because in his view that text is not a product of the proper authorial process for producing “law, not evidence of law.”¹⁰⁸ Finally, section 302(c)(1) is without question an authorially deficient pseudotext in any constitutive context that identifies the semantic content of the law with those intentional semantic states that represent the legislative will.

Thus we see how even within this greatly simplified example the various interpretive possibilities made available by two conceptually incommensurable constitutive contexts tend to have a pseudotextualizing effect on the interpretive materials. And we can also anticipate that, as the number of potentially valid constitutive contexts operating within a putatively monistic legal discourse increases, the greater the odds become that a text which functions as a valid legal text within a particular constitutive context will nevertheless be transformed into an eminently litigable pseudotext by the interpretive demands of some other concep-

107. Again, Judge Easterbrook avoids acknowledging this result through what is by his own methodological lights an obvious misinterpretation of section 256(1). See *supra* note 15 and accompanying text.

108. See *supra* note 48 and accompanying text.

tually incommensurable — yet still undeniably “legal” — constitutive context.

The relationship between chaotic legal discourse and pseudotextuality is, however, quite complex. Indeed, I suspect that legal pseudotexts themselves are important causes of the chaotic structure of legal argument, rather than being merely products of it. In this regard, we should consider the ways in which the intrinsically pseudotextual features of certain legal texts may help both to produce and to magnify the chaotic structure of contemporary legal discourse. At the very least, the semantic deficiencies of such pseudotexts tend to undermine the possibility of a straightforward positivism that would understand legal interpretation as the attempt to determine the will of the relevant political entity. Consider again the interpretive problem posed by *Sinclair*. Why does Judge Easterbrook — why do so many legal interpreters — rely on procrustean and ultimately incoherent distinctions between meaning and intent, between the text’s authors’ semantic intentions and their supposed “public acts?” Why does he not simply assert the intuitively pleasing and impeccably orthodox view that, in matters of statutory interpretation, the will of legislature is paramount?¹⁰⁹ One reason may be that this case confronts the judge with the task of “interpreting” the sort of legal pseudotext that makes such declarations ring hollow.

Section 302(c)(1) presents the interpreter with a classic product of the excesses of modern bureaucratic legalism.¹¹⁰ Cut off from any actual act of mind that would give it the kind of semantic pedigree necessary for even the appearance of true authoritativeness,¹¹¹ it can perhaps best be described as an intrinsically pseudotextual legal text. For if we accept that the most plausible account of what constitutes legal authority remains that which describes law as the will of the state, as represented

109. After all, he could do so without even altering the case’s result. A less imaginative judge of similar decisional inclinations would have dismissed the conference committee report with the perfectly true — and, from a methodological perspective, perfectly useless — interpretive insight that “the statutory text itself” is the best evidence of legislative intent. *See, e.g., United States v. American Trucking Assns.*, 310 U.S. 534, 543 (1940) (“There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.”).

110. “[M]odern writing at its worst does not consist in picking out words for the sake of their meaning It consists in gumming together long strips of words which have already been set in order by someone else, and making the results presentable by sheer humbug.” George Orwell, *Politics and the English Language*, in 4 *THE COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL*, 127, 134 (Sonia Orwell & Ian Angus eds., 1968).

111. *See generally* JOSEPH VINING, *THE AUTHORITATIVE AND THE AUTHORITARIAN* (1986); Steven D. Smith, *Law Without Mind*, 88 MICH. L. REV. 104 (1989).

by those semantic intentions signified in the authoritative utterances of its representatives, then this particular pseudotext inevitably leads its interpreter into a jurisprudential void.¹¹² Is it any wonder that Judge Easterbrook recoils from treating this bit of mongrel verbiage, in all likelihood smuggled into the statute through some Kafkaesque twist of a hypertrophied legal process gone berserk, as “evidence” of anything as comparatively exalted as the will of the sovereign? Hence the effort to formalize the text, to cut it off from its dubious authorial origins — to make it, in Judge Easterbrook’s telling phrase “law, not *evidence of law.*”

The various interpretive strategies employed by legal actors in their efforts to deal with the deep problems inherent in the “interpretation” of such pseudotexts may themselves be significant factors in the production of chaotic legal discourse. Insisting on the primacy of the “plain meaning” of the text, or on the statute’s supposed “broader purpose,” or on the making of the text “the best it can be” can be understood as attempts to compensate for the absence of an appropriate or non-contradictory meaning in the semantic intentions of the relevant authorities. And the continuing coexistence of such conceptually incommensurable textual strategies can be interpreted as one consequence of the struggle to devise a hermeneutic method that will successfully conjure up such a meaning from otherwise inadequate textual materials. Indeed, the theoretical complexities engendered by various conceptual disagreements masquerading as methodological disputes help repress or obscure the disturbing possibility that the interpreter of these materials may be faced with the absence of *any* authoritative meaning-conferring agent whatsoever.¹¹³ In a society as juridically saturated as our own, in which it often seems the ambition of law to regulate every possible sector of social life, the consequent dependence on excessively complex, contradictory or anachronistic legal texts ensures that those same texts

112. See Joseph Raz, *Authority, Law and Morality*, 68 *MONIST* 295 (1985); Larry Alexander, *All or Nothing at All? The Intentions of Authorities and the Authority of Intentions*, in *LAW AND INTERPRETATION* 357 (Andrei Marmor ed., 1995).

113. Pierre Schlag frames this possibility in characteristically stark terms:

What we are in the midst of recognizing at present is not, as in the 1970’s and 1980’s, the disappearance of the disinterested neutral interpreter of law. What we are encountering now is the disappearance of something much more serious — much more serious because much harder to replace. What we are in the midst of recognizing now is that law may well be without authors or authors worth heeding. And without authors or without authors worth heeding, law may well turn out to be little more than a series of fragmentary aesthetic and normative operations that legal professionals project on canonical materials that are themselves largely bereft of meaning.

SCHLAG, *supra* note 50, manuscript at 41.

are in constant danger of being transformed into pseudotexts by the interpretive pressures of a totalizing legal system. By the same token, the inevitably pseudotextual character of such overburdened documents helps to incite the unacknowledged conceptual pluralism that marks a chaotic discourse. Under such interpretive conditions, examples of what can be called the chaotic pseudotext — the end product of the process by which a chaotic discourse pseudotextualizes its texts, and by which legal pseudotexts themselves help produce and intensify the chaotic character of that discourse — become the interpretive focus of much legal argument.¹¹⁴

The main thrust of my argument is threefold. First, if the participants in an interpretive practice cannot agree on the basic constitutive elements of that practice — if they disagree about whether when they are “interpreting” a “text” they are searching for a text’s author’s intentions, or deploying formal rules of meaning, or disputing what constitutes a legitimate author for a certain kind of text, or contesting which texts count for how much in the production of the system’s meaning — then this lack of conceptual agreement concerning the nature of the constitutive elements of the practice will itself tend to have a pseudotextualizing effect on those texts the practice is attempting to interpret. And lack of such conceptual agreement, coupled with an insistence on both the absolute necessity and the assumed existence of such agreement, is precisely what identifies an interpretive practice as a chaotic discourse.

Second, the rhetorical economy of legal argument will tend to bias the legal system toward displaying the characteristics of a chaotic practice to the extent that the system is deployed formally to process disputes.¹¹⁵ Understood in this light, law seems — and insofar as law consists of socially constructed, institutional facts law therefore *is* — determinate, predictable and apparently “objective” precisely to the extent that law remains a set of unproblematic background conditions that

114. Good examples of chaotic pseudotexts are provided by, on the one hand, the often incredibly complicated regulatory schemes that dominate the modern administrative state (for instance the Bureau of Indian Affairs’ *internal* regulations run to 16,000 pages; apparently, only one complete copy of this textual Panopticon exists). On the other hand, the juridical saturation of modern life requires that legal actors “interpret” various venerable documents — texts whose original semantic contents were by comparison fairly modest or cryptic — “as if” the historical meaning of these documents provided answers to the most recondite of contemporary legal questions. See, for example, the interpretive legal traditions that have subsumed the original texts of such documents as the Securities Act of 1933, the Sherman Act, the Statute of Frauds, and most famously, the United States Constitution.

115. Law looks very monistic in a hornbook, less so when consulting an attorney, and even less so during a trial. As for appellate court opinions . . . *res ipsa loquitur*.

help mold people's actions and beliefs. Only when law is brought into the social foreground do the chaotic forces upon which much legal rhetoric depends reveal the conceptual pluralism hidden at the core of our legal system's discursive structure.

Third, this social foregrounding of law is itself the very process through which the inevitably pseudotextual character of various overly complex, inherently contradictory and historically overinterpreted legal texts helps to reinforce the chaotic structure of legal discourse. The essentially recursive relationship between legal pseudotexts and the chaotic discourse within which they are interpreted creates what can be called the "chaotic pseudotext" — the sort of text that, as we saw in *Matter of Sinclair*, tends to become the formal interpretive focus of a dispute processing system within which a chaotic social practice helps produce pseudotexts and pseudotexts, in turn, help produce that chaotic social practice.

Nevertheless, to assert that the current state of *our* dispute processing system produces a legal regime in which legal questions that do not have right answers would be a gross exaggeration. It would be closer to the truth to affirm that, as a matter of practice,¹¹⁶ those legal questions that are seldom asked always have right answers, while those that are always asked — again, "in practice" — seldom do.

Hence when Judge Easterbrook sums up his argument in *Matter of Sinclair* with the claim "ours is now an easy case" he does so despite the unavoidably ironic resonance that must accompany such declarations — an irony made all the more rich by the performative consequences of the author's sophisticated jurisprudential analysis.¹¹⁷ *Sinclair*, after all, appears to remain an easy case only so long as the interpreter does *not* do what Judge Easterbrook did when he insisted on examining the conceptual underpinnings of his assertion that, in a conflict between a "statute" and its "history," "the statute must prevail." Indeed, the very form and structure of the pedagogic methods traditionally employed by American law schools continually replicate the irony inherent in Judge Easterbrook's assertion. Surrounded by an ocean of legal meaning, we participate in a social system where millions of le-

116. The double meaning is intended. No one asks "in practice" (in both the broadly pragmatic and the narrowly economic senses) if a twenty-five year-old can run for President — only "in theory," that is to say, in the scholastic setting of the classroom and the law review.

117. At a minimum the argument in this essay suggests that, in the context of non-frivolous appellate court litigation, the idea of an "easy case" is oxymoronic. See Paul F. Campos, *Advocacy and Scholarship*, 81 CAL. L. REV. 817, 837-47 (1993). For a contrary view see Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985).

gally significant events happen every day, events that are understood perfectly well by social actors employing essentially monistic or plural interpretive frameworks.¹¹⁸ Yet what we choose to study, and what we present to our students, explicitly or implicitly, as that which represents the distilled essence of “the law” itself, is often nothing other than a set of texts — “interesting” appellate court opinions — whose simultaneous denial and intensification of the chaotic and pseudotextual characteristics of our legal system rivals or surpasses that denial and intensification of chaotic pseudotextuality we witnessed in *Matter of Sinclair*. The case system of legal education concentrates on just those manifestations of legal discourse where the presence of the chaotic pseudotext is most pronounced; and it often does so, perversely enough, for the express pedagogic purpose of demonstrating that despite all appearances, “ours is now an easy case.”

Perhaps, then, the traditional pedagogic method of the American law school has played a fundamental role in creating the chaotic structure of our legal system, especially given that method’s insistence that students see “the law” as seven hundred years of appellate court opinions: a body of texts that by now contains authority for almost every proposition under the sun.¹¹⁹ Wandering through the limitless corridors of our law — of that ever-growing semantic chaos that Christopher Columbus Langdell once dreamed, in the midst of his century’s scientific delirium, could be reduced to “certain doctrines and principles” — we might well come to wonder what meaning *cannot* be extracted from this vast labyrinth of letters: this total (or empty) text whose vertiginous volumes seem at times to affirm everything, deny everything, and confuse everything — like a raving god.

118. We might generalize and say that when the legal system remains a mostly invisible set of background conditions it tends to function as a monistic system of meaning; when it is understood sociologically, it often resembles a plural system; and when it is formally invoked as a source of justification, it rapidly takes on the characteristics of a chaotic system. Respective examples: “that’s my umbrella” (the social truth of such statements is so transparent that they are not usually understood as involving *legal* claims at all); “abortion is currently considered unconstitutional” (such statements implicitly invoke the contingent, pluralistic character of legal claims); “the Constitution protects abortion rights” (such statements disguise the chaotic structure of legal argument that renders them empty tautologies).

119. Recall Borges’s vision of a total library, cited *supra* in note 90.

IV

300.30 Obsessive Compulsive Disorder (or Obsessive Compulsive Neurosis)

Compulsions are repetitive and seemingly purposeful behaviors that are performed according to certain rules or in a stereotyped fashion. The behavior is not an end in itself, but is designed to produce or prevent some future situation. However, the activity is not connected in a realistic way with what it is designed to produce or prevent, or may be clearly excessive. . . . In some cases compulsions may become the major life activity.¹²⁰

I conclude by returning to the faculty lounge, where I have every reason to suspect that Professor X's placid enjoyment of his tomato soup will not be disturbed by these observations, in the unlikely event he should deign to notice them. "We," I can almost hear him saying, "are all well aware of these problems. True, we have not spoken of them in quite the same manner you have, but nevertheless it has been a long time since it was discovered that law was not an exact science, if indeed it is a science at all." Yes, I can even see Professor X fixing that unforgettable gaze, so like the nictitating membrane of a bird of prey, upon a very junior member of the law faculty, as if he were about to demand an answer to that classic question of American legal thought: "*Is this case correctly decided?*"

Reader, if you are still with me, shall we not at least consider the possibility that given the present state of the social practice we call "law" this might not be the most useful question to be asking right now? That, indeed, given the chaotic structure of that practice, and the concomitantly dubious ontological status of many its texts, it might even be the case that this has become in some significant sense *a meaningless question*? How is it possible — despite the routine claims that "we are all realists now," despite protestations that the critical thought of everyone from Oliver Wendell Holmes to Catharine MacKinnon has been "assimilated" by the ideological and pedagogical structure of the contemporary American law school — how is it possible that this question can still seem so real, so *interesting* to people who claim to know better? How does this happen?

120. TASK FORCE ON NOMENCLATURE AND STATISTICS, AMERICAN PSYCHIATRIC ASSN., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 234 (3d ed. 1980). In the course of presenting this paper to various law faculties I have encountered two recurrent questions that, curiously enough, are often asked sequentially by the same interrogator. They are: (1) What are you telling us that we don't already know? and (2) Is this case correctly decided?

This article has been about the cognitive dissonance that characterizes a certain type of social practice. In a chaotic social practice, people treat something that involves various incommensurable conceptions of that practice as if it involved a unitary conception of the practice. Those who engage in a chaotic social practice insist on treating something that is (in the relevant sense) many things as if it were (in that relevant sense) one thing. They do this even though they *in some sense* know that what they treat as one thing is in fact many things, and even though the cognitive dissonance inherent in such a practice can be predicted to cause a great deal of misunderstanding, frustration and anxiety. In psychology this pattern of thought is usually called "neurosis." In the American legal academy, it is called "law."