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THE FALSE INTENT-PURPOSE DISTINCTION IN TEXTUALISM

A Thesis
presented in partial fulfillment of requirements
for the degree of Master of Arts
in the Department of Philosophy and Religion
The University of Mississippi

by

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May 2017

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ABSTRACT

Textualism is the theory of legislative interpretation championed most famously by the late Supreme Court Justice Antonin Scalia. Textualism adopts twin interpretive commitments: (1) the meaning of a legislative text should be discerned by application of long-established canons of construction, the most important of which is that the text means what its words convey; and (2) a legislative text means what it meant at the time it was enacted. This paper examines the first principle, and in particular Scalia and treatise coauthor Bryan A. Garner's belief that it mandates that judges forswear any consideration of legislative intent. This paper assesses the presupposition that linguistic meaning *can* be divorced from speaker intent.

The paper explicates Scalia and Garner's theory that linguistic meaning is purely conventional and critiques it in light of analyses of language philosophers to the effect that meaning is part conventional, part intentional. It then demonstrates that a number of Scalia and Garner's own canons of construction require attributions of legislative intent. When they sense this tension, Scalia and Garner tend to claim that they are interpreting the legislation in view of its "textually manifest purpose," but they fail to make any meaningful distinction between such purpose and an intent they are imputing to the enacting legislature. The paper concludes that the intent-purpose distinction is a false one that makes for disjointed interpretations and obscures the real debate over legislative interpretation: how wide to set the interpretive parameters.

TABLE OF CONTENTS

ABSTRACT ii

INTRODUCTION 1

I. “NO PERSON MAY BRING A VEHICLE INTO THE PARK” 4

II. MEANING WITHOUT A SPEAKER? 7

III. NO VEHICLES IN THE PARK, REDUX 13

IV. PURPOSE WITHOUT INTENT? 16

V. FROM SCALIAN TEXTUALISM TO HYPOTHETICAL INTENTIONALISM 30

VI. THE REAL DEBATE OVER LEGISLATIVE INTERPRETATION 42

BIBLIOGRAPHY 47

VITA 49

INTRODUCTION

Textualism is the theory of legislative interpretation championed most famously by the late U.S. Supreme Court Justice Antonin Scalia. In the view of Scalia and his treatise coauthor Bryan A. Garner,¹ textualism is motivated by the belief that judicial neglect of the language of legislation undermines democracy, the rule of law, and our constitutional system of separation of powers. The object of textualism is to secure an interpretive methodology that honors the primacy of legislation.² Consistent with those motivations and purposes, textualism adopts dual interpretive commitments: (1) the meaning of a legislative text should be discerned by application of long-established canons of construction and other interpretive principles, the most important of which is that the text means what its words convey³; and (2) a legislative text means what it meant at the time it was enacted.⁴ The second principle—commonly called

¹ Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul, MN: Thomson/West, 2012). I take Scalia and Garner’s treatise to be the most representative and exhaustive statement of textualism and for that reason use it almost exclusively as my foil in this paper. Alternate variants of textualism may elude some or all of my criticisms.

² *Ibid.*, xxvii-xxx. The chief rival to textualism these days, and the whipping boy throughout the treatise, is *purposivism*. According to Scalia and Garner, purposivism “facilitates departure from text in several ways. Where purpose is king, text is not—so the purposivist goes around or behind the words of the controlling text to achieve what he believes to be the provision’s purpose. Moreover, *purpose* is taken to mean the purpose of the author (the legislature or private drafter)—which means that all sorts of nontextual material such as legislative history . . . becomes [*sic*] relevant to revise the fairest objective meaning of the text.” *Ibid.*, 18.

³ *Ibid.*, 56.

⁴ *Ibid.*, 78.

“originalism”—is the better known of the two, especially in its application to constitutional interpretation. This paper will examine the first principle.

Scalia and Garner believe that principle mandates that interpreters of legislation forswear any consideration of the intent of the legislature. We can identify in their treatise three philosophical objections to judicial reliance on legislative intent, though Scalia and Garner do not classify them in this way:

The metaphysical objection: Legislative intent does not exist unless everyone who voted in favor of the statute shared a subjective preference as to the interpretive question at issue, which is unlikely in the extreme.

The epistemological objection: Even if there were such a legislative intent on an interpretive question, we have no reliable way of discovering it.

The political objection: Even if legislative intent existed and were known to us, judges should nevertheless ignore it and give effect only to the objective meaning of the statutory language because that is what the law is.

This paper will not answer any of these objections. Instead it will address an underlying presupposition shared by all three, and indeed upon which any objection to legislative intent must depend: that linguistic meaning *can* be divorced from speaker intent. If we cannot arrive at linguistic meaning without imputing some intent to the speaker, then it is no good exhorting judges *not* to look to legislative intent, never mind your philosophical objections.

Part I will set up the problem, employing a hypothetical case of statutory interpretation that Scalia and Garner use to illustrate how textualism works. Part II then explicates the theory of linguistic meaning that Scalia and Garner feel compelled to adopt and critiques it in light of more promising alternatives that incorporate both conventional meaning and speaker intent. Part III returns to the original hypothetical case and demonstrates that more is under consideration than just the conventional meanings of the words of the statute, of which fact Scalia and Garner are partially aware. Part IV turns to Scalia and Garner’s makeshift conventional meaning

auxiliary, statutory purpose, and queries whether it is not just legislative intent in disguise. Part V contends that textualists are not obliged by their motivations and purposes to deny legislative intent wholesale and proposes an alternative methodology still consistent with those purposes, hypothetical intentionalism. Finally, as Part VI elaborates, even should textualists reject that proposal, acknowledging the inescapable role played by intent will clear the stage for the real debate over legislative interpretation: how wide to set the interpretive parameters.

I. “NO PERSON MAY BRING A VEHICLE INTO THE PARK”

Scalia and Garner invite the reader to consider the fictitious statute “No person may bring a vehicle into the park.” Which of the following would the statute exclude from the park?

Airplanes
Automobiles
Bicycles
Roller skates
Toy automobiles⁵

Scalia and Garner first identify “vehicle” as the word whose meaning is at issue and survey some reputable dictionaries in an attempt to discover that word’s “ordinary meaning.” (One of the first canons of construction in the treatise is “Words are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense.”⁶) The first definition in some dictionaries is “a substance, esp. a liquid, serving as a means for the readier application or use of another substance mixed with or dissolved in it.” The authors quickly rule out this meaning on the grounds that the context of the statute, “which includes its purpose of excluding things from the park,” indicates the statute is not talking about mixing media: “There is no more reason to address intrusion into the park of mixing media than to address intrusion of elephants.”⁷

⁵ Scalia and Garner, 36. The example was invented by H.L.A. Hart. Scalia and Garner add several items to the list, but for our purposes we can stick to Hart’s original.

⁶ *Ibid.*, 69.

⁷ *Ibid.*, 37.

They next identify a few definitions they think are closer to the sense of the statute: “a means of carrying or transporting something”; “a means of conveyance, usu. with wheels, for transporting people, goods, etc.”; “any means of carriage or transport”; “a receptacle in which something is placed in order to be moved.” Still unsatisfied, Scalia and Garner continue their dictionary search until they hit on “a self-propelled conveyance that runs on tires; a motor vehicle.” The earlier definitions would have been so broad as to include luggage with wheels, supermarket grocery carts, and baby carriages, all of which the authors assert do not come within the ordinary meaning of vehicle. Even “self-propelled conveyance that runs on tires” is not quite correct, they say, because that would include in its scope remote-controlled miniature cars, “which does not seem right.”⁸

Thus, Scalia and Garner are forced to create their own definition: “The proper colloquial meaning in our view (not all of them are to be found in dictionaries) is simply a sizable wheeled conveyance (as opposed to one of any size that is motorized).” The authors justify their introduction of the size condition and their removal of the motor condition by the observation that designation of roadways for “vehicular traffic” would permit horse-drawn carriages or rickshaws but would disallow remote-controlled toy cars, baby carriages, tricycles, and maybe bicycles. Finally, they reason the ban on vehicles would not apply to airplanes because, as Justice Oliver Wendell Holmes, Jr., explained in ruling airplane theft outside the scope of the National Motor Vehicle Theft Act, “It is possible to use the word to signify a conveyance working on land, water, or air,” but “in everyday speech ‘vehicle’ calls up the picture of a thing moving on land.”⁹

⁸ Ibid.

⁹ Ibid., 37-38.

One worry the reader might have about the foregoing analysis is that it does not seem exactly to minimize room for judicial discretion, which was one of the concerns motivating textualism in the first place. Scalia and Garner write their own definition of a statutory term, after all. But the more fundamental inconsistency that I want to draw to the reader's attention is that Scalia and Garner appear to be considering the intentions of the enacting legislature. We will return to this case later on, but it will be helpful before discussing it further to examine Scalia and Garner's theory of linguistic meaning.

II. MEANING WITHOUT A SPEAKER?

If laws are to make sense at all on Scalia and Garner's view, given their various objections to legislative intent, they seemingly must do so purely by operation of their words themselves. An illuminating discussion of this theory of meaning comes in Scalia's review of the book *Law's Quandary* by Steven D. Smith.¹⁰ Scalia tries to demonstrate that meaning need not incorporate the speaker's intent; moreover, he forecasts pernicious consequences if we let in speaker intent to our theory of meaning. In this section I will assess in turn Scalia's attempted exclusion of intent and his fears about its possible inclusion, deploying in response to his points some influential analyses by language philosophers. (This same theory of meaning is assumed throughout Scalia and Garner's treatise, although it is not defended as thoroughly as in Scalia's earlier article. I will note the brief corresponding discussion from the treatise.)

a. The Intention Presupposition

Scalia takes issue initially with Smith's assertion that "it is a 'basic ontological proposition that persons, not objects [*i.e.*, letters and words], have the property of being able to mean.'" Thus, "[l]egal meaning depends on the (semantic) intentions of an author."¹¹ Scalia

¹⁰ Antonin Scalia, "Review of Steven D. Smith's *Law's Quandary*," *Catholic University Law Review* 55, no. 3 (2006): 687.

¹¹ *Ibid.*, 691.

offers what he takes to be a counterexample. Two people happen upon the words “LEAVE HERE OR DIE” written in the desert sand: “It may well be that the words were the fortuitous effect of wind, but the message they convey is clear, and I think our subjects would not gamble on the fortuity.”¹²

Pace Scalia, John Searle thinks it “essential to any specimen of linguistic communication that it involve a linguistic act.”¹³ It is not the word or sentence, but rather “it is the *production* of the token in the performance of the speech act that constitutes the basic unit of linguistic communication.” Searle invites the skeptic to reflect on the fact that when he interprets a mark on a page to be an instance of linguistic communication, *i.e.*, a message, “one of the things that is involved in his so taking that [mark] is that he should regard it as having been produced by a being with certain intentions”: “He cannot just regard it as a natural phenomenon, like a stone, a waterfall, or a tree. In order to regard it as an instance of linguistic communication one must suppose that its production is what I am calling a speech act.” Had archaeologists been certain that hieroglyphs had been produced by water erosion, there would never have been any question of deciphering them or even of calling them hieroglyphs. To make sense of linguistic

¹² *Ibid.*, 691. See also Scalia and Garner, 25:

To say that words have no meaning, indeed no existence, apart from the intention of their author is a ludicrous extension of the thesis that a tree falling in a deserted forest makes no noise. *King Lear* would still be *King Lear* if it were produced by the random typing of a thousand monkeys over a thousand years. And a Bob Hope joke would still be funny if it were sculpted in sand by the action of the desert wind. To be sure, authors may use figures of speech that cause straightforward statements to mean the opposite of what they say. It is possible to write “That is a brilliant notion!” meaning to convey that the notion is quite absurd. But that the statement represents sarcasm or irony or satire is apparent from its context (the device would be ineffective otherwise)

¹³ John Searle, “What is a Speech Act?,” in *Pragmatics, Discourse Analysis and SocioLinguistics*, chap. 2, vol. 1 of *Methods in Language and Social Interaction*, ed. Ian Hutchby (Los Angeles: Sage Publications, 2008): 1.

communication, we must logically presuppose that the language in question was produced by an agent with certain intentions.¹⁴

Even Scalia cannot quite bring himself to deny the logical presupposition. Recall his explanation of the allegedly non-intentional meaning of “LEAVE HERE OR DIE”: “It may well be that the words were the fortuitous effect of wind, but the message they convey is clear, and I think our subjects would not gamble on the fortuity.” That last clause gives the game away to Searle. In speculating about how those who find the sandy missive will respond, Scalia implicitly concedes that they will contemplate the source and (if the source is intelligent) the intent of the message. Our desert trekkers will leave *because* they think someone was trying to warn them off, or at least because there is some possibility (a pretty good one) the words were not produced by “the fortuitous effect of wind,” and the stakes seem to be high. As Mark Liberman puts it, “[O]f course, the genuine human response to Scalia’s LEAVE HERE OR DIE example would be to reason, at least briefly, about the author of the message and the intent behind it—a threat? a prank? an improbable accident? the slogan of a defunct weight-loss camp, missing its last letter?”¹⁵

b. Meaning as Intention *plus* Convention

That the claim that meaning depends in part on the speaker’s intentions is an “extravagant and nonsensical one,” Scalia continues, is made plain by the case of Humpty Dumpty:

¹⁴ Ibid., 2.

¹⁵ Mark Liberman, “Scalia on the Meaning of Meaning,” *Language Log* (blog), October 29, 2005 (11:58 p.m.), <http://itre.cis.upenn.edu/~myl/languagelog/archives/002603.html>.

That is why Humpty Dumpty's statement of the claim ("When *I* use a word it means just what I choose it to mean—neither more nor less") has always been regarded—by all except Carroll's game-playing Logicians—as hilarious nonsense. Alice and I believe that words, like other conventional symbols, do convey meaning, an objective meaning, regardless of what their author "intends" them to mean¹⁶

But as Keith Donnellan and Donald Davidson have explained, the Humpty Dumpty counterexample does not show that speaker intention plays *no* part in linguistic meaning. It merely shows that "intentions are connected with expectations and that you cannot intend to accomplish something by a certain means unless you believe or expect that the means will, or at least could, lead to the desired outcome."¹⁷ Mr. Dumpty *cannot* mean what he says he means when he uses "glory" to mean (as he informs Alice later) "a nice knockdown argument" because he knows that Alice cannot interpret him in that way. So admitting the presupposition of speaker intent does not lead inexorably to the Humpty Dumpty theory of meaning. Although we approach language with the presupposition of a speaker-agent with intentions, that does not afford speakers complete latitude to communicate those intentions in whatever way their whims dictate: "Meaning is more than a matter of intention, it is also a matter of convention."¹⁸

On the question of what it is for speakers to *mean something* by what they say, Searle and Davidson both cite the influential analysis of H.P. Grice. In Grice's most basic formulation, what it is for speaker *A* to mean something by utterance *x* is that "A intended the utterance of *x* to produce some effect in an audience by means of the recognition of this intention."¹⁹ In Searle's paraphrase, "In speaking a language I attempt to communicate things to my hearer by means of

¹⁶ Scalia, "Review of Steven D. Smith's *Law's Quandary*," 692.

¹⁷ Donald Davidson, "A Nice Derangement of Epitaphs," in *The Essential Davidson*, Donald Davidson, with an introduction by Ernie Lepore and Kirk Ludwig (Oxford: Clarendon Press, 2006), 257.

¹⁸ Searle, 8.

¹⁹ H.P. Grice, "Meaning," *The Philosophical Review* 66, no. 3 (1957): 385.

getting him to recognize my intention to communicate just those things.”²⁰ And in Davidson’s, “A speaker cannot . . . intend to mean something by what he says unless he believes his audience will interpret his words as he intends (the Gricean circle).”²¹ Of course the conventional meanings of words play an important part in that calculus, too.

Davidson offers an intriguing account of exactly how convention and intention work together to create linguistic meaning. Although Humpty did not mean what he subsequently claimed to have meant, speakers often *do* mean things that their words, in a strictly conventional sense, do not—whether by accident (“Could you pass me that table on the book?”) or deliberately (“That’s brilliant!” said sarcastically²²). Davidson is interested to know how speakers and interpreters nonetheless communicate successfully in such instances. His proposal is that speakers and interpreters come to each “occasion of utterance” or “speech transaction” in possession of a *prior theory*—speakers with theories of how their utterances will be interpreted, and interpreters with theories of what speakers will mean by their utterances. As the speech transaction proceeds, interpreters (and often speakers, too) adjust their prior theories as necessary, given all of the new information about their conversation partners gained during the transaction. Thus, “the theory we actually use to interpret an utterance is geared to the occasion.” If and only if a speaker’s theory of how he *intends* to be interpreted and an

²⁰ Searle, 7.

²¹ Davidson, 257.

²² Scalia and Garner actually use this example to support their theory of meaning. They say the fact that the words *represent* sarcasm must be apparent from their “context.” Scalia and Garner, 25. One might fairly ask what the words are representing, if not the intent of the speaker. One might also fairly ask what Scalia and Garner mean by “context,” and in fact we will ask and attempt to answer that question in Parts IV and VI.

interpreter's theory of how she *does* interpret the speaker's utterance (their *passing* theories) coincide is understanding complete.²³

Davidson believes, and I agree, that the problem generalizes. It is not just unconventional uses of words that require adjustments of interpreters' prior theories. Conventions in ordinary language are loose enough so as to require interpreters' constant adjustments to try to get at what a speaker is meaning to convey: "understanding the speech of others depends on it."²⁴ There is a constant back-and-forth between our prior theories of conventional meanings and our passing theories of how speakers are intending to use those conventions on particular occasions.

²³ Davidson, 258-61.

²⁴ *Ibid.*, 259.

III. NO VEHICLES IN THE PARK, REDUX

If the foregoing is correct, it would not come as a surprise to find that Scalia and Garner face insurmountable difficulty in giving intent-free interpretations of legislation. Let us return to the “no vehicles in the park” statute. Recall that Scalia and Garner first rejected the definition of “vehicle” that pertained to mixing media on the grounds that those kinds of vehicles would not likely be in the park in the first place, so they would not need to be excluded. They then scoured the dictionaries for a definition they thought accorded with the “ordinary meaning” of “vehicle” and, finding none, made up their own: a sizable wheeled conveyance. Finally, they justified their invented definition on the grounds that their kind of vehicle would be what is contemplated by signs referencing “vehicular traffic.”

William Eskridge has called Scalia and Garner’s interpretation “an utterly judicious, well-informed, and highly illuminating linguistic analysis—but a crazy legal analysis.”²⁵ Eskridge contends that, in the case of this most brief and ambiguous statute, no judge “can even begin to answer the interpretive questions . . . without understanding, from the perspective of the legislature and the political culture that produced the statute, what the purpose of the statute was.” Eskridge imagines a world in which the *status quo ante* involved children too often bicycling and motor-scootering into other park visitors, who sustained annoyance and perhaps

²⁵ William N. Eskridge, Jr., “The New Textualism and Normative Canons,” *Columbia Law Review* 113, no. 2 (2013): 560.

injuries. In that scenario, the purpose of the enactment was to safeguard park visitors, and clearly it should be interpreted to exclude bicycles. Eskridge notes that if the statute were enacted against a different background—perhaps one featuring complaints about noise and air pollution—Scalia and Garner’s interpretation that motor vehicles are banned but bicycles allowed would be more apt. In all events, “knowing the statutory purpose helps us ask the right questions.”²⁶

I disagree with Eskridge’s assessment on two counts. First, Scalia and Garner *do* attribute an intent to the no-vehicles law. They rule out the paint-thinner definition of vehicle on the grounds that there is no “reason” to exclude mixing media from a park. But why need there be a reason for excluding what the statute excludes? If Scalia’s theory of meaning is correct, then the conventional meanings of the words must accomplish whatever they accomplish entirely on their own. In eliminating one possible conventional meaning by saying there would be no *reason* for the statute to bear that meaning, Scalia and Garner are acknowledging their own presupposition that standing behind the statute is some intelligent agent with certain intentions.

Continuing on, wheeled luggage, grocery carts, and baby carriages are not “commonly called” vehicles. But remember that Scalia and Garner are supposed to be giving the word its “reasonable” meaning in light of its “context.”²⁷ Perhaps the park context indicates that the prohibition’s extension is not just those things commonly called vehicles in the relevant sense, just as it indicated that a conveyance rather than mixing media was the relevant sense of the word? Nor does motorized vehicle “seem right” as a definition because that would include miniature remote-controlled cars. Again, Scalia and Garner do not specify what seems wrong

²⁶ *Ibid.*, 561.

²⁷ Scalia and Garner, 16 (“In their full context, words mean what they conveyed to reasonable people at the time they were written . . .”).

about including remote-controlled cars, but it must be that it does not jibe with the intent of the statute they have in mind. Without such an end in sight, in view of what could they be determining which among all of these possibilities is the correct meaning in this case?

Finally, Scalia and Garner add their own condition that the vehicle must instead be “sizable” on the grounds that signs referring to “vehicular traffic” would refer only to sizable vehicles. But whence this allusion to traffic? Here we have the giveaway that Scalia and Garner attribute to the statute the intent of excluding automobiles from the park: the legislature’s intent was to keep the park from being used as a thoroughfare. I emphasize that *nothing* in the bare prohibition “No person may bring a vehicle into the park” prefers paint thinner to conveyances, or baby carriages to remote-controlled cars, or remote-controlled cars to sedans. The differentiation is entirely the function of the intent that Scalia and Garner have imputed to the statute, based on their experience of vehicles and parks and imaginings of their possible interactions.

As to my second disagreement with Eskridge: the problem isn’t the bicycles; it’s the *planes*! Scalia and Garner contend that a correct reading of the statute would allow *airplanes* in the park, but not automobiles. I will return to just why that is. But first let us examine what Scalia and Garner take to be guiding their interpretation in the above case: statutory purpose.

IV. PURPOSE WITHOUT INTENT?

Conventional meaning alone is inadequate in almost all cases, and Scalia and Garner realize that. But since they believe they cannot, given their broader commitments, augment conventional meaning with speaker intent, they turn to a different additive: textually manifest purpose.²⁸ As the formulation takes pains to indicate, that interpretation-guiding purpose is supposed to be expressed entirely by the conventional meanings of the statute’s words.²⁹ “[T]he purpose is to be gathered only from the text itself, consistently with the other aspects of its context. The critical word *context* embraces not just textual purpose but also (1) a word’s historical associations acquired from recurrent patterns of past usage, and (2) a word’s immediate syntactic setting—that is, the words that surround it in a specific utterance.”³⁰

In the case just discussed, for instance, “the one purpose unquestionably demonstrated from reading the text in context,” according to Scalia and Garner, is “the exclusion from the park of things that would otherwise commonly be introduced and that common usage would include within the prohibition.”³¹ Unquestionably there is a *purpose* to the statute of excluding things from the park—whether those need be such things as are commonly introduced or commonly

²⁸ Scalia and Garner say variously that the purpose is “manifested by,” “derived from,” “apparent from,” and “evident from” the text, and perhaps some others. I subsume all of these under “textually manifest purpose.”

²⁹ I say “expressed” for lack of a more precise word. Scalia and Garner are not clear on the nature of the relation of conventional meaning to purpose, as we will see.

³⁰ Scalia and Garner, 33.

³¹ *Ibid.*, 38.

called “vehicles” is less apparent. But more to the point, this freestanding “purpose” looks a lot like what we might ordinarily call the author’s intent. My contention is that the vague notion of purpose (and its cousin, context) is in the final analysis simply the intent Scalia and Garner impute to the enacting legislature. This section will take the form of a critique in practice, demonstrating how imputed intent factors in interpretations throughout Scalia and Garner’s treatise.³²

a. Canons that Rely on Conversational Implicature

One kind of imputed intent that recurs frequently in the treatise is conversational implicature, on which several of Scalia and Garner’s canons rely. First explicated by H.P. Grice, conversational implicature is the phenomenon of a speaker’s intending to convey, and an interpreter’s understanding that intention to convey, something that the speaker’s utterance does not expressly state or logically imply. The implicature succeeds in meaning something because both the speaker and the hearer assume that the speech transaction is going to proceed in accordance with certain governing communicative principles or maxims.³³

We see conversational implicature at work in Scalia and Garner’s discussion of the omitted-case canon (“Nothing is to be added to what the text states or reasonably implies (*casus*

³² This is the “if it looks, walks, and quacks” section of the paper.

³³ H.P. Grice, “Logic and Conversation,” in *Speech Acts*, vol. 3 of *Syntax and Semantics*, ed. Peter Cole and Jerry L. Morgan (New York: Academic Press, 1975), 41-58. Grice distinguishes between conventional implicature and conversational implicature. Unlike conversational implicature, conventional implicature does not rely on the assumption that the speaker is complying with certain communicative maxims in order to communicate his or her intent, but rather relies on conventions of semantics or syntax—for instance, that we order clauses according to time sequence. “They put on their bathing suits and went to the beach” does not strictly say that they put on their bathing suits *before* going to the beach, but it certainly implicates it. Conventional implicature would not seem to pose a challenge for textualism.

omissus pro omisso habendus est). That is, a matter not covered is to be treated as not covered.”³⁴). The Maryland Court of Appeals was presented the question whether the state’s election statute required that referendum petitions be signed legibly in order that an elections board could determine whether the petitioner’s name was signed “as it appears on the statewide voter registration list.” The court decided not, and Scalia and Garner approve: “The court noted that the legislature could have added legibility as a prerequisite for validation, as several other states have done. But in the absence of such a penmanship prerequisite, the Board could not create one.”³⁵ If, however, the statute had not required that a printed name also appear on the petition, then legibility of the signature may have been an implicit requirement.³⁶ “The omitted-case canon—the principle that what a text does not provide is unprovided—must sometimes be reconciled with the principle that a text does include not only what is express but also what is implicit.”³⁷

The negative-implication canon (“The expression of one thing implies the exclusion of others (*expression unius est exclusion alterius*).”³⁸) depends completely on conversational implicature. As we encounter this “communicative device” so often in our daily lives, Scalia and Garner illustrate it first with some mundane, non-legal examples. “When a car dealer promises a low financing rate to ‘purchasers with good credit,’ it is entirely clear that the rate is *not* available to purchasers with spotty credit.” The important thing to note here is that the exclusion

³⁴ Scalia and Garner, 93.

³⁵ *Ibid.*, 95. That the legislature could have done otherwise is a strange justification to rely on for authors who deny that legislative intent exists.

³⁶ *Ibid.*, 97.

³⁷ *Ibid.*, 96.

³⁸ *Ibid.*, 107.

of bad credit risks from the offer is not a function of the conventional meanings of the words themselves, nor of *logical* implication. Rather, we infer that the car dealer *intends* not to extend the offer to them, on the assumption that the dealer is complying with standard communicative maxims—perhaps the maxim “Do not make your contribution more informative than is required,” or the maxim “Be brief (avoid unnecessary prolixity).”³⁹ Furthermore, “[t]he doctrine properly applies only when the *unius* (or technically, *unum*, the thing specified) can reasonably be thought to be an expression of *all* that shares in the grant or prohibition involved”:

The sign outside a restaurant “No dogs allowed” cannot be thought to mean that no other creatures are excluded—as if pet monkeys, potbellied pigs, and baby elephants might be quite welcome. Dogs are specifically addressed because they are the animals that customers are most likely to bring in; nothing is implied about other animals.⁴⁰

Why exactly does the canon not apply to “no dogs allowed”? Scalia and Garner slip into the passive voice here, which they often do when trying not to mention the subject behind the language, but the reason they offer is plainly about that subject’s likely intentions: “Dogs are specifically addressed because they are the animals that customers are most likely to bring in; nothing is implied about other animals.” There is no other way in which this canon can operate—and no other basis on which it can be determined *not* to apply. The same goes for the following: the surplusage canon (“If possible, every word and every provision is to be given effect (*verba cum effectu sunt accipienda*). None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.”)⁴¹; the general/specific canon (“If there is a conflict between a general provision

³⁹ Grice, “Logic and Conversation,” 45-46.

⁴⁰ Scalia and Garner, 107.

⁴¹ *Ibid.*, 174.

and a specific provision, the specific provision prevails (*generalia specialibus non derogant*).”⁴²; the associated-words canon (“Associated words bear on one another’s meaning (*noscitur a sociis*).”) ⁴³; and the *ejusdem generis* canon (“Where general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class specifically mentioned (*ejusdem generis*).”).⁴⁴

b. Canons that Expressly Presuppose Legislative Intent

The very existence of the reenactment canon can only be justified in terms of legislative intent. That canon provides, “If the legislature amends or reenacts a provision other than by way of a consolidating statute or restyling project, a significant change in language is presumed to entail a change in meaning.” Scalia and Garner effectively concede that this canon requires consideration of legislative intent:

We oppose the use of legislative history, which consists of the hearings, committee reports, and debate leading up to the enactment in question (see § 66). But quite separate from legislative history is *statutory* history—the statutes appealed or amended by the statute under consideration. These form part of the context of the statute, and (unlike legislative history) *can properly be presumed to have been before all the members of the legislature when they voted*. So a change in the language of a prior statute presumably connotes a change in meaning.⁴⁵

Recall that Scalia and Garner’s primary objection to judicial resort to legislative intent is that legislative intent does not *exist*. Yet here they defend the reenactment canon precisely on the

⁴² Ibid., 183.

⁴³ Ibid., 195.

⁴⁴ Ibid., 199.

⁴⁵ Ibid., 256 (second emphasis added).

ground that there *is* a legislative meeting of the minds over the import of a particular change in statutory language. By way of example, Scalia and Garner cite a Texas appellate court dispute over whether a person who had enjoyed custody of a child for an aggregative, though not consecutive, six months counted under the Texas Family Code as “a person who has had actual care, control, and possession of [a] child for not less than six months preceding the filing of the petition.” The prior version of the statute had included the word “immediately” before “preceding,” and Scalia and Garner say that change alone should have decided the case.⁴⁶ That can only be because they conclude the Texas legislature *intended* deletion of the word “immediately” to make a substantive difference—on its own, “six months preceding the filing” certainly admits of an interpretation requiring consecutive custody.

A more famous example of a canon of this type is the absurdity doctrine (“A provision may be either disregarded or judicially corrected as an error (when the correction is textually simple) if failing to do so would result in a disposition that no reasonable person could approve.”⁴⁷). No one suggests, say Scalia and Garner, that judges may not transpose letters in obviously misspelled words. The line between such scrivener’s errors and drafter’s errors, which make grammatical sense but produce evaluative absurdities, “is generally not a principled one”: “In both cases we are *not revising the apparent meaning of the text* but are giving it the meaning that it would convey to a reasonable person, who would understand that misprints had occurred.”⁴⁸ One wonders what the word “apparent” means in that remark; it cannot signify the

⁴⁶ *Ibid.* Amusingly, Scalia and Garner accuse the court of taking a purposivist approach for reasoning that the purpose of the statute was to accord standing only upon those with a current relationship with the child. Better to have said the court was purposivist *in the wrong way* (see Part VI below). First remove the plank from your own eye

⁴⁷ *Ibid.*, 234. See also John F. Manning, “The Absurdity Doctrine,” *Harvard Law Review* 116, no. 8 (2003): 2387, arguing the doctrine is incompatible with textualism.

⁴⁸ *Ibid.*, 235 (emphasis added).

conventional meaning of the text. Scalia and Garner certainly seem to be revising (or approving the revising) of the meaning of the text in the examples they give: “the *winning party* must pay the other side’s reasonable attorney’s fees” should be read to say the “losing party”⁴⁹; “Chapter 601 offenses” should be read as “driving-without-insurance offenses,” else a defendant be allowed to produce a car insurance policy as a defense to driving on a suspended license⁵⁰; and “All laws and parts of laws are hereby repealed” should be read to say “All laws and parts of laws *in conflict herewith* are hereby repealed,” lest the state of Arkansas be plunged into anarchy.⁵¹

Scalia and Garner try to forestall a charge of purposivism here by explaining that averting absurdity is still a “basis” for a judgment and not a “purpose” of a judgment.⁵² Yet “sanity of outcome” is not a basis for a judgment of what words mean, which is all that textualism is supposed to concern itself with. Scalia and Garner say too that, as long as the result would be

⁴⁹ Ibid. “That is entirely absurd, and it is virtually certain that *winning party* was meant to be *losing party*.” One might wonder, meant by *whom*?

⁵⁰ Ibid., 236. In this case a Texan was convicted of driving with a suspended license. At the time, a Texas statute provided that presenting to the court a valid car insurance policy was an absolute defense to “Chapter 601 offenses.” The legislature had overlooked (or, as Scalia and Garner say in the passive voice, it “was obviously an error”) that Chapter 601 included not just the offense of driving without insurance but also that of driving without a license. So if given its conventional meaning, the defense would have allowed the defendant to produce an insurance policy as a defense to the charge of driving without a license.

Scalia and Garner justify the court’s decision by the fact that the legislature amended the statute in question shortly thereafter to apply only to driving-without-insurance cases. The authors are of course right that the court got the legislature’s *intent* correct. But a textualist cannot make that argument. Moreover, their reasoning is precisely backwards from their reasoning at multiple other places where they say courts’ hewing to a close reading of statutes enforces bad law (their job) and thereby prompts legislatures to write better ones (their job). Ibid., 301, 344. Heads, I win; tails, you lose.

⁵¹ Ibid., 236-37. The Arkansas legislature had a practice of appending the boilerplate “All laws and parts of laws in conflict herewith are hereby repealed” to its bills. In this case, the drafters left out the critical “in conflict herewith,” with the result that, had the court closed its eyes to legislative intent and enforced the law as written, the entire state code would have been eradicated.

⁵² Ibid., 235.

truly absurd and the fix simple, that is enough to “absolve the doctrine of the charge that it is an application not of textualism but of purposivism—seeking to give the text not the meaning that it objectively conveys but the meaning that was in the mind of the drafter.”⁵³ The word “objective” is getting a very liberal construction here. Recall Davidson’s point that malapropisms and other fumble-mouthing can be made sense of only in light of what we take to be the speaker’s intent.⁵⁴

c. Canons that Establish Rebuttable Presumptions

A number of the canons are styled “presumptions”: the presumption against ineffectiveness, the presumption of validity,⁵⁵ the presumption of nonexclusive “include,”⁵⁶ the

⁵³ Ibid., 238.

⁵⁴ Another canon that expressly presupposes legislative intent is the flip side of the reenactment canon, the prior-construction canon (“If a statute uses words or phrases that have already received authoritative construction by the jurisdiction’s court of last resort, or even uniform construction by inferior courts or a responsible administrative agency, they are to be understood according to that construction.”). Ibid., 322. Scalia and Garner do all they can to justify this canon by resort to the settled expectations of the bar rather than the “fanciful presumption of legislative knowledge” of the relevant judicial or administrative interpretation. Query first the compatibility of such a defense with the authors’ democratic commitment that legislatures make the law. But the authors moot the point in the end: “this canon applies only to *presumed legislative approval* of prior judicial or administrative interpretations.” Ibid., 326 (emphasis added).

Finally, I would contend that the presumption against ineffectiveness (“A textually permissible interpretation that furthers rather than obstructs the document’s purpose should be favored.” Ibid., 63.) is no more defensible on the textualist program than is the absurdity doctrine. The Slave Trade Act of 1794 disallowed any person to “prepare[] any ship or vessel, within any port or place of the said United States . . . for the purpose of carrying on any trade or traffic in slaves.” Shipowners argued that “prepare” meant to *complete* preparations. Scalia and Garner approve the Supreme Court’s holding the other way: the shipowners’ interpretation would have rendered the law ineffective. Ibid., 63-64. But ineffective at *what*? Once we rise above the conventional meaning of the text, we can only be pursuing authorial intent. See Parts IV.d and V.b below.

⁵⁵ “An interpretation that validates outweighs one that invalidates (*ut res magis valeat quam pereat*.)” Ibid., 66.

⁵⁶ “The verb *to include* introduces examples, not an exhaustive list.” Ibid., 132.

presumption of consistent usage,⁵⁷ the presumption against retroactivity,⁵⁸ the presumption against waiver of sovereign immunity,⁵⁹ the presumption against federal preemption,⁶⁰ the presumption against implied right of action,⁶¹ the presumption against change in common law,⁶² and the presumption against implied repeal.⁶³ As to each of these canons we must ask, how is an interpretive presumption overcome? How is an interpreter to know when the presumption is inapplicable to a particular text?

Take the presumption against federal preemption. Scalia and Garner's discussion of this canon focuses not on directly conflicting commands, in which event federal law trumps state law, but rather on the trickier question of field preemption: "Sometimes . . . the federal statute is meant to establish a *maximum* standard or requirement on which everyone can rely . . ." ⁶⁴ Note that Scalia and Garner are already having difficulty avoiding intent language in this discussion. It only gets more difficult: "Even if Congress has not enacted such an express [preemption] provision, state law will be preempted 'when Congress intends federal law to occupy the

⁵⁷ "A word or phrase is presumed to bear the same meaning throughout a text; a material variation in terms suggests a variation in meaning." *Ibid.*, 170.

⁵⁸ "A statute presumptively has no retroactive application." *Ibid.*, 261.

⁵⁹ "A statute does not waive sovereign immunity—and a federal statute does not eliminate state sovereign immunity—unless that disposition is unequivocally clear." *Ibid.*, 281.

⁶⁰ "A federal statute is presumed to supplement rather than displace state law." *Ibid.*, 290.

⁶¹ "A statute's mere prohibition of a certain act does not imply creation of a private right of action for its violation. The creation of such a right must be either express or clearly implied from the text of the statute." *Ibid.*, 313.

⁶² "A statute will be construed to alter the common law only when that disposition is clear." *Ibid.*, 318.

⁶³ "Repeals by implication are disfavored—'very much disfavored.' But a provision that flatly contradicts an earlier-enacted provision repeals it." *Ibid.*, 327.

⁶⁴ *Ibid.*, 290.

field.”⁶⁵ And still worse: “[T]he preemption canon ought not to be applied to the text of an explicit preemption provision. . . . The reason is obvious: The presumption is based on an assumption of what Congress, in our federal system, would or should normally desire. But when Congress has explicitly set forth its desire, there is no justification for not taking Congress at its word.”⁶⁶

If an interpretive presumption is to have any effect, it must mean that we are going to start by reading the words of a statute to mean one thing rather than another (semantic presumptions), or to relate to each other in a certain way (syntactic presumptions), or to bring about or not to bring about a particular outcome (policy presumptions)—until it becomes clear that the legislature *meant* to do otherwise. The words are *not*, to begin with, to be given their most natural reading. Rather they are skewed one way or the other, absent a clear showing of contrary legislative intent. How else could an interpretive presumption operate?

Some of the canons not titled “presumption of *x*” are presumptions nonetheless. One example is the extraterritoriality canon (“A statute presumptively has no extraterritorial application (*statute suo clauduntur territorio, nec ultra territorium disponunt*).”⁶⁷). And here again appeal to legislative intent is inescapable: “It has long been assumed that legislatures enact their laws with this territorial limitation in mind.”⁶⁸ Because we presume that legislatures do not intend to make rules for lands in which they are not sovereign, we interpret words with facially global geographic scope to have a much more limited ambit. That is, we do so until it becomes

⁶⁵ *Ibid.*, 291 (quoting *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000) (internal quotation marks omitted)). The authors follow immediately with the caveat that such intent “must derive from the text of the federal laws and not from such extraneous sources as legislative history.” More on this below.

⁶⁶ *Ibid.*, 293.

⁶⁷ *Ibid.*, 268.

⁶⁸ *Ibid.*

plain that the legislature intended the law to reach beyond its territorial boundaries. Scalia and Garner give the example of the Second Circuit’s construction of a federal statute criminalizing travel in foreign commerce for the purpose of engaging in a sexual act with a minor. “Congress does not intend a statute to apply to conduct outside the territorial jurisdiction of the United States,” the court said, “unless it clearly expresses its intent to do so.”⁶⁹ In this case it had.

In a sense, *all* of the canons are rebuttable presumptions. Scalia and Garner say as much in their Prefatory Remarks: “Properly regarded, they [*i.e.*, the canons] are not ‘rules’ of interpretation in any strict sense but presumptions about what an intelligently produced text conveys.”⁷⁰ One of their Fundamental Principles is the principle of interrelating canons: “No canon of interpretation is absolute. Each may be overcome by the strength of differing principles that point in other directions.”⁷¹ If that is so, then the remarks above about how interpretive presumptions are overcome—by the interpreter’s recognition of the legislature’s intent to do so—apply to the functioning of the canons across the board. But for now let us postpone reaching that conclusion and assess rather how Scalia and Garner might respond to this point. Here is our situation, put in Davidsonian terms. Scalia and Garner have recommended a prior theory of legal interpretation. Interpreters should approach a legal text in the expectation that it will communicate in accordance with certain principles. When the text does not cooperate, it falls to the interpreter to make the necessary adjustments in order to come to a successful passing theory: “The skill of sound construction lies in assessing the clarity and weight of each clue and

⁶⁹ *Ibid.*, 271 (quoting *United States v. Weingarten*, 632 F.3d 60, 64 (2d Cir. 2011) (internal quotation marks omitted)).

⁷⁰ *Ibid.*, 51.

⁷¹ *Ibid.*, 59. “Principles of interpretation are guides to solving the puzzle of textual meaning, and as in any good mystery, different clues often point in different directions.” *Ibid.*

deciding where the balance lies.”⁷² But what guides the adjusting? How do interpreters know when they have found that balance, the correct interpretation?

d. The Metaphysics and Epistemology of “Purpose”

So far in this part, I have tried to identify from among Scalia and Garner’s canons groups that require consideration of legislative intent in distinct ways. In particular the group just discussed, canons that establish interpretive presumptions, seem to rely on legislative intent in a way that generalizes to all of the canons. At this point, I must concede that Scalia and Garner could reply in each of these cases that what is guiding the application of the canons is not legislative intent but rather the purpose that is evident from the text of the legislation. But just what is this purpose? And how do we identify it?

Scalia and Garner discuss purpose quite a lot in the earlier sections of the treatise, usually in the service of contrasting textualism with its rival purposivism. They say first that their opposition to purposivism does not mean textualists do not consider a text’s purpose: “[T]he textualist routinely takes purpose into account, but in its concrete manifestations as deduced from close reading of the text.” For the purposivist, on the other hand, “abstract purpose is allowed to supersede text.” Put another way, the purposivist “goes beyond the immediate purpose evident from the text (climbs the ladder of generality) to find another purpose.”⁷³ This concrete-versus-abstract purpose distinction is a theme for Scalia and Garner. Another of their Fundamental Principles is the supremacy-of-text principle (“The words of a governing text are of

⁷² Ibid.

⁷³ Ibid., 20.

paramount concern, and what they convey, in their context, is what the text means.”). Under this precept follows most of their direct explication of purpose and its role. Words are given meaning by their context, Scalia and Garner say, and context always includes purpose. But that purpose (1) “must be derived from the text, not from extrinsic sources such as legislative history or an assumption about the legal drafter’s desires,” (2) “is to be described as concretely as possible, not abstractly,” and (3) except in the case of a scrivener’s error, “cannot be used to contradict text or supplement it.”⁷⁴

The obvious question here is, why do Scalia and Garner’s objections to judicial reliance on legislative intent not apply with equal force to reliance on purpose? Its existence and knowability are just as dubious as intent’s—moreso, I submit. Where does it come from? Scalia and Garner insist that it is “evident” or “apparent” or “manifest” in the words themselves, but such cryptic relations don’t get us very far. It must be abstract to some degree. If it were entirely concrete, it would be the mere conventional meanings of the words and phrases in relations dictated by their syntax and grammar, which would provide no guide for resolving vagueness or ambiguity, implicature or absurdity, or for applying or rebutting any interpretive presumption. Perhaps the textualist might respond that even if purpose is not concrete, it is still grounded in the text in a way that intent is not. I cannot see how that could be, and Scalia and Garner offer no analysis of this mysterious text-purpose relation. They talk as if purpose arises

⁷⁴ *Ibid.*, 56-57. The third condition strikes me as a corollary to Scalia and Garner’s claim regarding the absurdity doctrine that it is founded on the “basis for the judgment” and not the “purpose of the judgment.” As I said above, that claim makes little sense, so I would include cases of absurdity here, along with scrivener’s errors, as exceptions when purpose is allowed to contradict the text.

Scalia and Garner also include a fourth condition (on their list, it’s the second): purpose must be defined precisely and not in a way that “smuggles in the answer to the question before the decision-maker.” But what if the textually manifest purpose plainly does answer the interpretive question? It seems to me that Scalia and Garner’s next condition, that purpose must be defined as concretely as possible, would prevent such smuggling.

sua sponte from the words themselves (whereas to find intent we must plumb the psychology of every individual legislator). Is it not a much more plausible explanation that the purpose Scalia and Garner are “deriving” from the text is actually the intent they are imputing or attributing to the collective legislative author?

V. FROM SCALIAN TEXTUALISM TO HYPOTHETICAL INTENTIONALISM

Textualism is not inevitably consigned to cling to such inscrutables as purpose and context. There is another conventional-meaning auxiliary of which textualists can avail themselves while still keeping faith with their core commitments: hypothetical legislative intent.

a. Textually Manifest Purpose and the Reasonable Reader

In his 1997 essay *A Matter of Interpretation*, Scalia remarked that what judges are looking for is not any subjective intent of the legislature but rather its “objectified” intent, “the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*.”⁷⁵ As we have seen, by the 2012 treatise Scalia had expunged such approving references to legislative intent, objectified or otherwise, and had replaced them with references to the legislation’s textually manifest purpose. I tend to think the change was stylistic, not substantive: Scalia and Garner wanted to avoid any confusion that might be sown by attempting to distinguish a permissible objectified intent from an impermissible subjective one.

⁷⁵ Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton, NJ: Princeton University Press, 1997), 17.

Yet even in the treatise there are a few provisional statements that could make the reader think Scalia and Garner are on the verge of endorsing an “objectified” intent view: “Traditional authorities on interpretation, while repeating the mantra that the objective of interpretation is to discern the lawgiver’s or private drafter’s intent, would add that this intent is to be derived solely from the words of the text. We would have no substantive quarrel with the search for ‘intent’ if that were all that was meant.”⁷⁶ Why then, in the end, do they reject the view that legal texts should be interpreted in light of the intent imputed to their authors? Because “describing the interpretive exercise as a search for ‘intent’ inevitably causes readers to think of *subjective* intent, as opposed to the objective words that the drafters agreed to in their expression of rights and duties. . . . Speculation about [subjective intent] . . . invites fuzzy-mindedness. Objective *meaning* is what we are after, and it enhances clarity to speak that way.”⁷⁷

To the contrary, asserting objective meaning in light of the text’s “purpose” or “context”—or simply saying the answer to the interpretive question is obvious to any “reasonable” reader—yields not clarity but confusion, with a whiff of arbitrariness. Some commentators have complained of the treatise’s *ad hoc* feel, with this canon prevailing in this instance, that canon in another, and no further explanation than Scalia and Garner’s saying the result is required by principles of sound interpretation, which conclusion is apparent to the reasonable reader.⁷⁸ That is Scalia and Garner’s polestar, the “fair reading”: “determining the

⁷⁶ Scalia and Garner, 30.

⁷⁷ *Ibid.*

⁷⁸ In reply to Scalia and Garner’s citing Judge Harold Leventhal’s famous quip that using legislative history is like “entering a crowded cocktail party and looking over the heads of the guests for one’s friends,” Eskridge retorts that “using the canons is like inviting only your friends to a cocktail party and then picking out those friends who best serve your purposes on this particular occasion.” Eskridge, 544. Elsewhere: “Indeed, their exegesis of dozens of canons actually undermines the conceptual theses of the book and of Scalia’s jurisprudence.” Eskridge, 535-36. And Judge Richard Posner skewered the treatise for “reveling in absurdity” and exhibiting “a pattern of

application of a governing text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood its text at the time it was issued.”⁷⁹ But just who is the “reasonable reader”? It is the interpretive counterpart to the familiar “reasonable person” from tort law:

In our view, the fair meaning of a statutory text is determined by a similar objectivizing construct—the “reasonable reader,” a reader who is aware of all the elements (such as the canons) bearing on the meaning of the text, and whose judgment regarding their effects is invariably sound. Never mind that no such person exists. Without positing his existence—as tort law posits the existence of the “reasonable person”—we could never subject the meaning of a statute to an objective test.⁸⁰

But there is a critical difference between tort law and statutory interpretation, which Scalia and Garner went to considerable lengths, at the very beginning of the treatise, to draw out. Tort law (at least the parts of it where the reasonable person still abides) is common law, and judges *make* the common law. “It was true, that is, that judges did not really ‘find’ the common law but invented it over time. Yet this notion has been stretched into a belief that judges ‘make’ law through judicial interpretation of democratically enacted statutes.”⁸¹ The reasonable non-tortious person is therefore the product of judicial exercise of reflective equilibrium. The judge presented a materially new set of facts asks herself, is it fair to hold the defendant liable in this situation? Should we in this jurisdiction expect people to do more than the defendant did to avoid a harmful result, or did the defendant act reasonably? The answer will be entirely a matter of the judge’s own moral intuitions and considered beliefs.

equivocation.” Richard A. Posner, “The Incoherence of Antonin Scalia,” *The New Republic*, August 23, 2012, <https://newrepublic.com/article/106441/scalia-garner-reading-the-law-textual-originalism>.

⁷⁹ Scalia and Garner, 33.

⁸⁰ *Ibid.*, 393.

⁸¹ *Ibid.*, 5.

That is decidedly *not* how legislative interpretation is supposed to work, on Scalia and Garner’s theory. “[G]ood judges dealing with statutes do *not* make law. They do not ‘give new content’ to the statute, but merely apply the content that has been there all along, awaiting application to myriad factual scenarios.”⁸² Unlike in the common-law context, the judge is not determining what the law *should be* but rather discerning what it *is*. And in that endeavor the construct of the reasonable reader is of no help. What do we know about the reasonable reader? He knows conventional meanings and grammar and the canons of construction, and his interpretation is always “fair” or “sound.” But how do we know which is the fair or sound interpretation? Well, it is the one the reasonable reader would give. And now we have a problem. It appears the fair reading and the reasonable reader are going to be forever pointing unhelpfully at each other. We need a truth-maker.

b. Hypothetical Intentionalism

I would like to propose one. Let us try changing the question from “What interpretation would the reasonable reader give?” to “What did the legislature intend here?” This new interpretation-guiding question will not necessarily involve us in a quest for what Scalia and Garner call “*subjective intent*,” or the actual mental states of individual legislators. Nor does it require resort to legislative history. Rather, we simply read the legislative text *as if* it were the product of a single author. What it *means* then is what we take the author to be saying. Conventional meaning still plays a very important role in that assessment, but so does our inference of what the author *intends* to convey.

⁸² Ibid., 5.

In the world of art criticism, this relationship of authorship to meaning—*i.e.*, the facially apparent intent of the artist is what determines the artwork’s meaning—is termed “hypothetical” intentionalism. It stands in opposition to “actual” intentionalism, which holds, predictably, that the meaning of the work is determined only by what its author *actually* intended, whether we could infer that intent from the art or not. I submit that hypothetical intentionalism is largely what is going on in textualist interpretations, anyway, as I have tried to demonstrate via all of the examples in the previous parts. The textually manifest purpose that Scalia and Garner say guides their interpretation is really just the intent they impute to the hypothetical legislative author.

i. Objection #1: Just a semantic dispute?

If textualists like Scalia and Garner are unwittingly repairing to hypothetical legislative intent anyway, then why urge its adoption as their express guiding principle? Why think this any more than a semantic point? Well for starters, Scalia and Garner do not *always* allow themselves to be guided by hypothetical legislative intent. Recall “no vehicles in the park.” As we saw, Scalia and Garner imputed to the legislature an intent to keep some things out of the park that otherwise would likely be in the park and, more important, that those things to be excluded were things that on roadways would contribute to traffic. But then they go one step more. They apply the ordinary-meaning canon⁸³ to conclude that “vehicle” does not include airplanes, so they are permitted in the park. And now we have descended into madness.

⁸³ For the first time in their analysis, I believe. Scalia and Garner purported to be searching for the definition of vehicle by way of application of the ordinary-meaning canon all along. But as I emphasized in Part III, in fact the definition of vehicle they settled on, and those they ruled out, had more to do with the intent they had already imputed to the legislature than it did any ordinariness of meaning. How ordinary can a meaning be if it does not appear in *any* reputable dictionary?

First of all, theirs is not a particularly rigorous ordinary-meaning analysis, even assuming that whether airplane fits the ordinary meaning of vehicle is an appropriate inquiry at this stage. An airplane is sizable, wheeled, and a conveyance, so it is unclear how Scalia and Garner can exclude it, even after they have formulated a definition expressly to exclude a number of things they didn't want to call "vehicles" (recall the baby carriages, grocery carts, and remote-controlled cars). The only reason they give for ruling out airplanes from the ordinary meaning is that Justice Holmes once wrote that airplane theft is not covered under the National Motor Vehicle Theft Act. But Holmes was construing a statute governing the theft of *motor vehicles*, after all, not vehicles *simpliciter*.⁸⁴ In any event, the more important point is that the imputed legislative intent, once the ordinary-meaning canon has been applied, is incoherent. Automobiles are forbidden because the legislature intended (according to Scalia and Garner's imputation) to keep out the kind of things that make for traffic—"sizable wheeled conveyances"—yet it is okay if park-goers taxi their Gulfstreams down the walking path? On the intention Scalia and Garner first impute, the legislature *could not* have intended the result that airplanes be allowed in the park.

Fortunately, the ordinary-meaning canon makes but few appearances in the remainder of the treatise. That is so because Scalia and Garner almost always interpret the words at issue in a text in light of the intent they attribute to the enacting legislature, not on the basis of some contrived "ordinary meaning." Which throws us back onto the original objection: why insist on hypothetical legislative intent in place of textually manifest purpose? At this point I will

⁸⁴ Furthermore, as Scalia and Garner footnote a hundred-some-odd pages later, Holmes was applying the *ejusdem generis* canon, not any ordinary-meaning rule. The relevant word "vehicle" appeared in the list "automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails." Scalia and Garner, 200. One begins to suspect Scalia and Garner were hiding the ball here for rhetorical purposes. In their zeal they failed to notice that intent was guiding their analysis and that airplanes met all three criteria of their custom-tailored "ordinary meaning."

concede that if Scalia and Garner made *purpose* their bellwether, I would have little to quarrel with. If they did so, I would lay down my weapons—just about (see immediately below for a remaining conceptual issue and Part VI for a methodological one). But they do *not* do so. Rather, only one of their fifty-seven principles and canons is dedicated to purpose in and of itself, and even that one does all it can to cabin the role purpose plays: it is no accident that it is titled the “supremacy-of-text principle.” One of those limitations is that the purpose that is apparent from the text may in no event “supplement” or “supersede” the text. But as I explicated in Part II and demonstrated repeatedly in Parts III and IV, that purpose, or hypothetical intent, *always* supplements the text. It is what guides the interpreter in deciding whether to apply a given canon or to follow one rather than another when they conflict, as happens not infrequently. Sometimes Scalia and Garner acknowledge purpose (or hypothetical intent) expressly; most times they are guided by it seemingly unawares; and on rare occasions they sense its presence and remember not to let it “supersede” the text—and we get airplanes in parks.

An ancillary benefit of making the switch from textually manifest purpose to hypothetical intent is that it would sync up the vocabulary of legislative interpretation with that of the philosophy of language and thereby afford some analytic clarity. As discussed in Part II, language philosophers have been analyzing linguistic meaning in terms of convention and intention for decades. And the metaphysics of speaker intent are much more straightforward than those of textual purpose. Of course all of us are familiar with the phenomenon of first having a thought and then attempting to convey it in speech or writing. This ordering is what Searle means when he says thought has *original* or *intrinsic* intentionality, whereas language has *derived* intentionality.⁸⁵ Scalia and Garner never analyze the relationship of purpose or context

⁸⁵ John R. Searle, *Intentionality: An Essay in the Philosophy of Mind* (Cambridge: Cambridge University Press, 1983).

to the textual conventions of semantics, syntax, grammar, and punctuation. The little they do say makes it sound as if the purpose somehow arises *from* the language. That gets the sequence of intentionality precisely backwards. Texts do not have purposes *ex nihilo*, independent of any intelligent agent's intentions. Thinking that meaning can be sought without consideration of speaker intent is a conceptual confusion that can lead to inchoate, occasionally inscrutable interpretations, as we have seen.⁸⁶

A final point to make in this connection concerns the canons. If hypothetical intent is ultimately to guide legislative interpretation, what becomes of them? Basically, they play the same role they do now, except we are more candid about it. The canons are good guides to legislative drafting insofar as they alert legislators to the grammatical, syntactic, and policy presumptions with which judges will approach their handiwork. But ultimately their citation in judicial opinions is a matter of *ex post* justification, not *ex ante* analysis. Once the concession is made that the canons are not self-executing, then the choice whether to apply one or another in a particular case must be made in view of *something*—which must be the intent the judge has imputed to the legislative author. The canons are thus reduced to *descriptors* of intent-guided interpretations.

⁸⁶ Although it doesn't have to. The textualist might respond that intent is perhaps perfectly accessible from the speaker's side of the speech transaction, but not nearly so transparent from the interpreter's side. Even if the speaker makes his or her intent as plain as possible, the interpreter still cannot get inside the speaker's head and peer into his or her subjective psychological state.

So maybe intent is not actually the most fundamental constituent of meaning from the interpreter's side. Intent itself must be inferred on the basis of some more fundamental element, which could very well be the purpose of the communication that the interpreter believes to be the most likely. (Davidson realized that something like this must be informing the interpreter's attribution of intent to the speaker and suggested, as a start, that we proceed on the assumption that speakers hold beliefs that we believe to be true. See Donald Davidson, "Radical Interpretation," *Dialectica* 27, no. 1 (1973): 314-28.)

But a metaphysical-epistemological grounding of purpose along these lines does not appear in Scalia and Garner's treatise. As it is, they seem to be not very sure what purpose is or where it comes from, which is perhaps why they merely include it amongst the canons rather than according it its proper place as governing their application.

ii. Objection #2: Can a pretense really get us content?

Confirming evidence that this is not a mere verbal dispute comes in Scalia and Garner's express rejection of the hypothetical-intent alternative. In his review of *Law's Quandary*, Scalia remarks, "If the notion that language means whatever its author intends it to mean is strange, stranger still is the notion that the author need not be a *real* author but can be a *hypothetical* one. . . . The problem is not simply . . . that we cannot posit an *adequate* hypothetical author. It is that, even if we could, the law that would result would be a hypothetical law (whose violation would presumably be punishable by hypothetical incarceration)."⁸⁷ Here again we find Scalia knocking down straw men because of his failure to grasp that convention and intention do not mutually *exclude* one another but rather *complement* one another. Just as no one is arguing (or very few are arguing) that "language means whatever its author intends," almost no one is arguing that a real author is dispensable. I say *almost* no one because actually Scalia himself takes that very position—recall his "LEAVE HERE OR DIE" example (and the parallel treatise examples, which I footnoted, of the Bob Hope joke authored by the desert wind and the *King Lear* edition authored by the thousand monkeys).

Presumably Scalia's point here is that the words of the statute are the law, and contemplation of legislative intent will result either in (a) a Humpty Dumpty theory of meaning by which individual legislators' intentions, expressed somewhere in the legislative history, will cause the statutory language to mean something contrary to its conventional meaning; or (b) untethered invention by judges who apply the Humpty Dumpty theory but without even

⁸⁷ Scalia, "Review of Steven D. Smith's *Law's Quandary*," 693.

consulting the legislative history, preferring instead to make up the intentions of their own made-up legislators. But, as I hope by now is coming clear to the reader, we needn't arrive at either of these undesirable results. Rather, we read the statutory text as if it were the work of a single author with certain intentions, which is what we inevitably do when reading a work of multiple authors—take Scalia and Garner's treatise, for example. When an interpretive question arises, we answer it with an eye toward the intent that the language conveys. In a favorite bromide of Scalia and Garner's (though not one they adhere to faithfully), we “make sense rather than nonsense of the law.”

Scalia and Garner are less full-throated in their dismissal of hypothetical intentionalism in the treatise, but it is a dismissal nonetheless. They cite the recommendation of Tony Honoré that the interpreter “treat the text as if it represented the view of a single individual, and make it as coherent as the words permit.”⁸⁸ Scalia and Garner concede that such an approach would make legislative intent a “cogent fiction,” but they reject it as not what searchers for legislative intent mean by that phrase (curious that the immediately preceding quotation of Honoré didn't throw cold water on that claim). They suggest that Honoré instead adopt the term “statutory intent”: “Although even this term invites a search for some subjective intent, it accords more precisely with what Professor Honoré believes.”⁸⁹ Bewilderingly, they then change the subject without having responded substantively to Honoré's proposal.

Well I think Honoré's proposal a good one. It seems to me that the hypothetical intentionalism approach sidesteps all three of the objections to reliance on legislative intent with which we began. Hypothetical intent is not metaphysically dubious like the kind of actual

⁸⁸ Scalia and Garner, 393-94 (internal quotation marks omitted).

⁸⁹ *Ibid.*, 394.

legislative intent Scalia and Garner deny exists; it does not rely for its being on having been present in the psychologies of every legislator who voted to pass the bill and of the executive who signed it into law. Rather, the interpreter *imputes* it to those legislators. By the same maneuver, the epistemological objection is evaded. The interpreter does not have to go and discover some intent that is “out there”; again, we impute it. Finally, doing so does not require that we consult any forbidden sources of legislative intent, like legislative history. The intent that guides us appears in the law itself—in that we attribute a certain intent to the legislative author as we read the text—just as the “purpose” or “context” Scalia and Garner sporadically invoke is textually manifest.

One difficulty remains, however, and it is one that motivated textualism in the first place. It is the problem of judicial discretion, or latitude in interpretation. Yes, hypothetical intentionalism can get us meaningful *content* in the form of conventional meaning supplemented by attributed authorial intent. But can it get us *definitive* content, a *right* answer to interpretive questions? I do not think it holds that promise. But neither does textualism, as Scalia and Garner admit.⁹⁰

The textualist-cum-hypothetical-intentionalist thus faces a dilemma. Either accept that there will be some latitude in judicial interpretations of statutes, or find a way to nail down the intent component so that it makes a definitive selection from among the interpretations of which

⁹⁰ “[J]udges who use the fair-reading method will arrive at *fairly consistent* answers. We do not mean to say the decisions will be easy. *Nothing* is easy. But the relevant line of inquiry is pretty straightforward.” *Ibid.*, 36 (first emphasis added). It is worth noting that this “pretty straightforward” characterization comes in the lead-up to the tortuous “no vehicles in the park” analysis.

See also Judge Frank Easterbrook’s remarks in the Foreword: “The textualist method of interpretation cannot produce judicial unanimity across the board, however. . . . Imagine a Supreme Court comprising Justice Scalia and eight near clones. That Court would find lots of cases to be hard It would grant review of those hard cases and decide many of them five to four” *Ibid.*, xxiv-xxv.

the conventional meaning admits.⁹¹ Some options for nailing down the intent component are ruled out on account of the by-now familiar political objection. Legislative history, for instance. Perhaps taking judicial notice of the historical context, or the state of affairs surrounding enactment, would be more palatable. That certainly goes on in Scalia's interpretations of older legislation such as the Constitution, although Scalia swears such research merely serves a dictionary function—but as mentioned at the start, such issues surrounding originalism are outside the scope of this paper. Neither do I want to rule out categorically the possibility of identifying the genuine collective intent of the legislature, although settling the criteria for such collective intent would involve considerable further research into the metaphysics of shared agency, also beyond our present scope. In the ensuing, final part, I will proceed on the assumption that such genuine collective intent cannot be identified. How might the hypothetical intentionalist restrict judicial discretion in legislative interpretation?

⁹¹ I believe that Scalia and Garner are right in their contention that a given piece of language can bear only a range of “permissible meanings.” *Ibid.*, 31-33. Where I disagree is that their methodological apparatus provides a principle of selection for choosing the correct permissible meaning. Ultimately the “reasonable reader” and the “fair reading” fail to explain; they just restate the problem at one remove.

VI. THE REAL DEBATE OVER LEGISLATIVE INTERPRETATION

One advantage of collapsing the false intent-purpose distinction is that we see that ground-level meaning is suffused with intent. Scalia and Garner talk as if purpose often appears at the ground level along with conventional meaning, while intent exists on some higher plane that need not and should not be accessed when interpreting legislation. I have tried to show that is not the case. If, as I contend, all of the constituents of meaning reside on a single plane, then the real debate over legislative interpretation becomes, how wide do we set the interpretive parameters? Put another way, if we adopt my proposed interpretation-guiding question—“What did the legislature intend here?”—how wide a berth do we give that crucial “*here*”?

By way of demonstration, once more unto the park. We saw that Scalia and Garner imputed a legislative intent to keep out of the park the kinds of things that make for traffic. They then bite back against that imputed intent with their application of the ordinary-meaning canon, to prove they are no purposivists: “The purposivist approach assumes that legal instruments make complete sense. Of course they should be so interpreted where the language permits—but not where it does not.” Pure applesauce. The word “vehicle” obviously permits an interpretation that includes airplanes, especially once Scalia and Garner impute the intent they so clearly do.

Now, a *real* interpretive question would arise if the case at bar involved an ambulance or other emergency vehicle having entered the park. Scalia and Garner imagine a purposivist judge reading the statute to exclude only noisy vehicles based on speculation that the purpose was to

preserve peace and repose: “The purposivist would probably make an exception to the noisy-vehicle ban for ambulances: What lawmaker could possibly place the objective of peace and quiet above the objective of saving a human life? What the purposivist comes up with is not (as our solution is) a selection from among the permissible meanings of *vehicle*. None of those meanings includes only noisy vehicles (except ambulances)”⁹² Just one paragraph on, however, Scalia and Garner grant that “it may well be that the undeniable exclusion of ambulances by the text of the ordinance is countermanded by an ordinance or court-made rule exempting emergency vehicles from traffic rules.”⁹³ As to any possible meaningful difference between making a judicial exception to the broad statutory ban on vehicles in the present case versus relying on a judicial exception for emergency vehicles made in an earlier case (such that the former should be condemned and the latter condoned), the reader’s guess is as good as mine. But for present purposes, the point of interest is that “no vehicles in the park” might be interpreted (a) in isolation, as Scalia and Garner do initially, (b) in light of other legislation, (c) in light of interpretations courts of the jurisdiction have given to related statutes in the past, or (d) in light of (b) and (c).

Scalia and Garner criticize their more jurisprudentially liberal counterparts for their propensity to “climb the ladder of abstraction” in order to reach the statutory purpose needed to justify their preferred reading. In my view, it makes more sense to frame the question in terms of how many legal sources we may consult: with each additional source, more information bearing on legislative intent comes in. As I remarked earlier, there are no “concrete” purposes. And when it comes to language, we are all of us purposivists, so we always find ourselves somewhere

⁹² Scalia and Garner, 39.

⁹³ *Ibid.*

on the ladder of abstraction. Perhaps keeping the interpretive parameters narrow will keep judges rooted to a lower rung, if that is what we want.

Typically that is what textualists want, so they home in on the single sentence or very few sentences at issue in a dispute (though certainly not always). Scalia and Garner criticize *United Steelworkers v. Weber*,⁹⁴ for instance, for “permit[ting] a racially-based affirmative action program in the face of a statute that made it unlawful to ‘discriminate . . . because of . . . race.’”⁹⁵ What Scalia and Garner omit is that another provision of the statute provided, “Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual . . . because of the race . . . of such individual”⁹⁶ If that provision is within the parameters of interpretation too, then Scalia and Garner’s own negative-implication canon would seem to indicate the Court’s holding was correct: if nothing in the law *requires* affirmative action, the implicated intent is that neither does anything in the law *prohibit* affirmative action. Justice Rehnquist, whom we might classify an actual (as opposed to hypothetical) intentionalist, dissented citing legislative history reflecting that the second provision was added to assuage concerns that the law as it stood *would* require preferential treatment of minorities—the possibility of voluntary affirmative action was not one that had occurred to the members of Congress.

Scalia and Garner would have decided *Weber* by determining the meaning of (a) the most relevant operative provision, in isolation. Another option, illustrated by the opinion of the Court, is to include also in the assessment (b) a second relevant provision of the same statute and (c) the

⁹⁴ 443 U.S. 193 (1979).

⁹⁵ Scalia and Garner, 12 (quoting § 703(a) and (d) of Title VII of the 1964 Civil Rights Act).

⁹⁶ § 703(j), Title VII, 1964 Civil Rights Act.

apparent intent (or canon of construction) of exclusion by negative implication. Justice Rehnquist took a third tack and looked also to (d) the legislative history of the statute. We can imagine still wider parameters that would let in (e) other federal anti-discrimination statutes or regulations, (f) any other federal employment statutes or regulations, (g) the statutory (as distinct from legislative) history, (h) prior judicial interpretations of similar statutory language, (i) relevant constitutional provisions, and (j) canons of construction that call for interpretation on the presumption that Congress intended to legislate constitutionally. No doubt there are others.

I think this is the other aspect, in addition to the shifting role of purpose and the cross-cutting canons, that gives Scalia and Garner's treatise its *ad hoc* feel. Sometimes "context," which is always relevant in interpretation, is a byword for purpose. Other times it means strictly the immediate syntactic setting of a word or phrase. Elsewhere it means the whole text of the statute, any related statutes and their prior judicial constructions, the settled expectations of the bar, the common-law elements of a codified crime (sometimes including the *mens rea* element), any relevant policy presumptions as embodied in the canons, and even the entire *corpus juris*.⁹⁷

It makes sense to hypothesize that there is generally a direct proportional relationship between the latitude a judge has in determining the meaning of a legislative provision and the number of legal sources permitted to supplement the conventional meaning of that provision. As I have argued, even reading the provision in isolation is going to involve some attribution of intent. Each of Scalia and Garner's canons, and the additional sources they bring in tow, augment the role of that hypothetical-intent attribution, and correspondingly diminish the role of the conventional meaning of the operative provision. And the greater the profile of the intent

⁹⁷ See Richard H. Fallon, Jr., "Three Symmetries between Textualist and Purposivist Theories of Statutory Interpretation—and the Irreducible Roles of Values and Judgment within Both," *Cornell Law Review* 99, no. 4 (2014): 685-734, discussing various elements providing context to textualist interpretations.

attribution, the more discretion the judge enjoys. A thoroughgoing textualist, then, should be more motivated to restrict the parameters of interpretation than are Scalia and Garner. At all events, once we recognize that there is no *categorical* difference between textualism and purposivism—because there is no way of excising speaker intent from linguistic meaning—we can move on to debating this central question of legislative interpretation and to the task of finding a principled methodology for setting those parameters of interpretation.

BIBLIOGRAPHY

- Davidson, Donald. "A Nice Derangement of Epitaphs." In *The Essential Davidson*, by Donald Davidson, with an introduction by Ernie Lepore and Kirk Ludwig, 251-65. Oxford: Clarendon Press, 2006.
- . "Radical Interpretation." *Dialectica* 27, no. 1 (1973): 314-28.
- Eskridge, William N., Jr. "New Textualism and the Normative Canons." *Columbia Law Review* 113, no. 2 (2013): 531-92.
- Fallon, Richard H., Jr. "Three Symmetries between Textualist and Purposivist Theories of Statutory Interpretation—and the Irreducible Roles of Values and Judgment within Both." *Cornell Law Review* 99, no. 4 (2014): 685-734.
- Grice, H.P. "Logic and Conversation." In *Speech Acts*. Vol. 3 of *Syntax and Semantics*, edited by Peter Cole and Jerry L. Morgan, 41-58. New York: Academic Press, 1975.
- . "Meaning." *The Philosophical Review* 66, no. 3 (1957): 377-88.
- Manning, John F. "The Absurdity Doctrine." *Harvard Law Review* 116, no. 8 (2003): 2387-2486.
- Posner, Richard A. "The Incoherence of Antonin Scalia." *The New Republic*. August 23, 2012. <https://newrepublic.com/article/106441/scalia-garner-reading-the-law-textual-originalism>.
- Scalia, Antonin. *A Matter of Interpretation: Federal Courts and the Law*. Princeton, NJ: Princeton University Press, 1997.
- . "Review of Steven D. Smith's *Law's Quandary*." *Catholic University Law Review* 55, no. 3 (2006): 687-94.
- Scalia, Antonin, and Bryan A. Garner. *Reading Law: The Interpretation of Legal Texts*. St. Paul, MN: Thomson/West, 2012.
- Searle, John R. *Intentionality: An Essay in the Philosophy of Mind*. Cambridge: Cambridge University Press, 1983.
- . "What is a Speech Act?" In *Pragmatics, Discourse Analysis and SocioLinguistics*. Vol. 1 of *Methods in Language and Social Interaction*, edited by Ian Hutchby, chap. 2. Los Angeles: Sage Publications, 2008.

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