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Textualism in Context

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# Textualism in Context

Andrei Marmor

## **Abstract**

The main purpose of this essay is to show that the views about linguistic communication that make Textualism a plausible theory of what the law says, show why textualism is not nearly as helpful a theory of statutory interpretation as its proponents claim. The essay begins with a brief outline of what Textualism is, in light of its critique of Intentionalism and Purposivism; it then proceeds to explain the view of language, particularly asserted linguistic content, that is required to make sense of Textualism, and defends this view against a neo-Gricean critique; finally, the paper strives to show why those same ideas about determinants of communicated content help us to see that Textualism has very little to offer by way of a general theory of statutory interpretation.

## Textualism in Context

*Andrei Marmor*

I agree with Professor Manning that three main theories of statutory interpretation compete for dominance in U.S. federal courts: textualism, intentionalism and purposivism.<sup>1</sup> And I agree with him that it is difficult to get a sense of what textualism is all about without paying attention to the ways in which it forms a critique of the other two doctrines and aims to replace them. Manning is a textualist and I am not. My aim in this essay is to show why nobody should be – which is not to deny that textualism brings to the debate over statutory interpretation some important insights. It certainly does, and some of them need to be taken seriously. However, those sound insights do not lead to the conclusions textualists argue for and, as a whole, textualism is not nearly as helpful a theory of statutory interpretation as its proponents claim.

Any theory about statutory interpretation is partly normative and partly descriptive. A theory of statutory interpretation aims to answer the question of how judges should go about trying to resolve an interpretative question they encounter about statutory law. As such, the theory must be guided by some views about the role of the judiciary vis-à-vis the legislature in determining what the law is. Justice Scalia is very clear about this point when he says that “it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated.”<sup>2</sup> Two ideas are suggested in this statement: The first, which is quite sound, is that the starting point for a theory of statutory interpretation is normative, mostly about the appropriate allocation of power between the legislature and the judiciary in a democratic or, generally, a fair regime. However, there is also a second suggestion here – namely, that we face a genuine choice between two options: Either try to figure out what the lawgiver meant, or else comply with what the lawgiver promulgated. This is a spurious choice, I will argue. In most cases, and certainly in most cases that matter, there is no such interpretative choice to make.

The argument of this essay proceeds in three stages. First, I will briefly outline what textualism is in light of its critique of purposivism and intentional-

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<sup>1</sup> J. Manning, “What Divides Textualists from Purposivists?”

<sup>2</sup> A. Scalia, *A Matter of Interpretation*, 17.

ism. Second, I will try to explain the view of language and communication that is required to make sense of textualism, arguing that, at its core, textualism actually assumes a very sensible view of what is said by the law. In the third part, however, I will try to show why those same ideas about linguistic communication render textualism rather unhelpful as a theory of statutory interpretation.

## 1. Textualism as opposed to what?

It might be helpful to begin with a brief outline of the two main theories of statutory interpretation prevalent in U.S. federal courts, which textualism strives to replace – namely, intentionalism and purposivism. According to intentionalism, when judges face an interpretative question about statutory law, they should, first and foremost, strive to ascertain the actual intention of the legislature that bears on the issue at hand, and, if they manage to find out what that intention was, they must defer to it and decide the case accordingly. In other words, intentionalism urges judges to take the legislative history very seriously and try to figure out the actual intentions and purposes that guided the relevant piece of legislation, striving to extrapolate an answer to the question they face from those intentions and purposes. No serious intentionalist would argue that there is always some relevant legislative intention to discover. Sometimes, no doubt, knowing all the relevant legislative history, we will reach the conclusion that the legislature had no intentions or purposes that bear on the interpretative issue either way. The point that intentionalists make, however, is that when a particular legislative intention is ascertainable to a reasonable degree, judges should comply with it – that is, decide the case in a way that effectuates the relevant legislative intent.

There are three main and well-known objections to intentionalism, and textualists tend to flag those concerns. First, there is the normative question of why legislative intentions should matter at all. Why would it be legally relevant that the legislature intended to achieve X or promote Y in enacting a law, if that intention is not expressed in what the law says? Second, there are many who doubt that judges can figure out what the legislative intentions really were. In fact, some argue that the tools available for courts trying to figure out legislative intent are such that the courts are bound to yield skewed and biased results, mostly favoring the vocal supporters of a law who use strategic maneuvers to overemphasize their legislative agenda over of the views of the median legisla-

tors who formed the majority.<sup>3</sup> Finally, there are those who raise serious concerns about the conceptual possibility of attributing intentions to a large and diverse group of people such as a legislature.

This is not the place to elaborate on these concerns and assess their plausibility. I will confine myself here to a few remarks. First, textualism would be ill advised to make too much of the last, skeptical point: If you doubt that it is possible to attribute some collective intentions to the legislature as a whole, you might get into trouble when you claim that judges should take very seriously what the law actually communicates as opposed to what you might think that the law aimed to achieve. Communication by legislation is a speech act and, like any other act, it is normally done intentionally. If legislatures cannot act with a collective intention, then enactment cannot be a speech act either. In other words, if you take the communicative aspect of lawmaking seriously, as textualism clearly does, you must allow for the possibility of collective intentionality, simply because legislation, on this view, must be viewed as a form of a collective speech act.<sup>4</sup>

Indeed, I do not think that this point has entirely escaped textualists' attention. Most of the skepticism they raise about intentionalism as a doctrine of statutory interpretation pertains to the first two points – namely, to the idea that in most cases there is any relevant legislative intent to discover, or that courts would have the requisite tools to discover what those intentions were, even if there was something to discover. And, perhaps first and foremost, the objection to intentionalism is a normative one: Textualists doubt that legislative intent is a legitimate source of law. The main argument is that intentions or purposes and the like are not what legislators vote on. The law, they claim, is what gets to be voted on by the legislators in the final passage of the bill. Therefore, the content that is democratically enacted is the content expressed by the bill that is voted on, not by the various intentions and motives that lay behind it.<sup>5</sup>

The second main doctrine of statutory interpretation that textualists object to is purposivism. This is not really one doctrine but a whole family of views – some made very influential by the Hart and Sacks legal process view, others by Ronald Dworkin – arguing that the task of statutory interpretation

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<sup>3</sup> See, for example, A. Vermeule, *Judging Under Uncertainty: An Institutional Theory of Legal Interpretation*; Rodriguez & Weingast, “The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation.”

<sup>4</sup> On the idea of legislation as a speech act I have elaborated on in my “Truth in Law.”

<sup>5</sup> See, for example, J. Waldron, *Law and Disagreement*, ch. 6.

should be seen as continuous with the legislative task of making the law in the first place or, at least, coherent with it.<sup>6</sup> Roughly, the idea is this: When faced with an interpretative question about a statute, judges should ask themselves what the relevant purpose of the law is and how that general purpose can best be achieved by resolving the particular interpretative question one way or the other. And how do we know what the relevant purpose of the law is? Not by trying to figure out the actual intentions of the legislators, but by asking what a reasonable legislature would have reasonably wanted to achieve by enacting the piece of legislation that it did. In other words, all forms of purposivism are committed to the stipulation of some idealized conditions under which we conceive of the legislature and the purposes of its enactment. We derive the putative purposes of the law from the facts concerning the circumstances that brought about the legislation, or the mischief it aimed to fix, and, crucially, from some normative assumptions about what a reasonable or morally idealized legislature would have wanted to achieve under those conditions.

Needless to say, views may differ, as they do, about what makes a legislature reasonable and its aims morally legitimate, and about how to determine such matters. I think that the Hart and Sacks view assumed that common sense and reasonably informed, perhaps enlightened and progressive, views about the world would normally suffice. Dworkin is much more elaborate on this issue, and much more explicit in articulating a liberal, moral political philosophy that, in his view, underlies the constructive model of interpretation he offers. All purposivists emphasize, however, that in attributing a purpose to a piece of legislation, it is not the actual purposes of the legislators that judges should try to discover, but the purposes or intentions of an idealized, partly normatively constructed legislature.

More or less the same considerations that make purposivism attractive to its proponents make purposivism very suspicious to textualists. Two main kinds of considerations are contentious here. First, textualists object to the very idea that statutory interpretation by the courts ought to be seen as continuous with the process of making the law. The enactment of a law is a democratic process; the judicial interpretation of the law is not. The enactment of a law aims to achieve some policy goals; the judicial interpretation of a statute should have no such aims, as it is not the role of judges to enact new policies. And so on and so forth. Second, textualists seem to be very dubious about the possibility of objectivity concerning the idealized legislative purposes. To quote Scalia again: “[Y]our best shot at figuring out what the legislature meant is to ask

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<sup>6</sup> See, for example, H. M. Hart & A. Sacks, *The Legal Process*, at 1374-81; L. Fuller, *The Morality of Law*; R. M. Dworkin, *Law's Empire*.

yourself what a wise and intelligent person *should* have meant; and that will surely bring you to the conclusion that the law means what you think it *ought* to mean.”<sup>7</sup> The emphasis, however, is not on the “ought,” where Scalia put it and where Dworkin, for example, would be happy to leave it; it is on the “*you think*,” meaning the particular judge who happens to adjudicate the case. In other words, purposivism according to textualism is nothing less than an invitation for judges to make the law as they see fit, as *they* think it ought to have been made. And that, according to textualists, is not a legitimate role for the judiciary in a democratic regime.

Needless to say, both of these concerns are serious and both deserve serious answers. I will not attempt to engage with these normative issues here, however, only to show, in the last section, that textualism faces exactly the same challenges, and that it is not less normatively contentious than purposivism or any other theory of statutory interpretation. But first, we need to see what textualism offers and how it is supposed to work. If neither the actual intentions of legislators nor the putative reasonable purposes of the law are guides to statutory interpretation, what is left for judges to consider? The textualist answer consists in the idea that judges have to rely, first and foremost, on what the relevant statutory provision actually says. And what the law says or asserts is determined by what a reasonably informed person, knowing the relevant context and the relevant legal background, would infer from the words expressed by the statute in the context of its expression. In other words, we seek to grasp the meaning of the statutory text in the context of its expression, as that meaning would be grasped by a reasonable hearer aware of the legal and other background conditions of the legislation.<sup>8</sup>

## 2. What does the law say?

The starting point of textualism is, I believe, a very plausible thesis and, thus, before we explore the linguistic aspects of it, it may be worth putting that thesis up front. The main idea is that legislation is a speech act, an act of communication, whereby the legislature, by voting on a bill, communicates a certain legal content, and that legal content is the content of the statutory law. It is important to bear in mind that voting procedures in a democratic legislature are formal mechanisms that enable a large institution, often comprising hundreds of people, to make a collective, institutional speech act. It is an essential aspect

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<sup>7</sup> *A Matter of Interpretation*, 18.

<sup>8</sup> See Scalia & Garner, *Reading Law*, 33; see also Manning, “What Divides Textualists from Purposivists?” 79-85.

of this procedure that voting on a proposed bill is a vote taken on a particular text; whatever bargaining or horse trading may have taken place before the final vote, there is in the end always a text, carefully worded, that members of the legislature get to vote up or down. And if the law passes, it is because most legislators voted for it. Voting procedures in a democratic institution are not meant to aggregate the subjective states of mind of the members of the institution. Voting procedures are meant to generate an institutional decision. Participants in such procedures often have many reservations about the resolution they vote for; it often does not reflect their subjective preferences. But when they vote for approving a certain resolution, they express the intention to communicate the content of the resolution as the official decision of the institution in question. This is what voting on resolutions is, as a matter of social-institutional facts.<sup>9</sup>

Thus, textualism's sensible starting point here is that the content actually communicated by a legislative speech act is the content of the statutory law: It is what the law is. And this raises two questions: What are the determinants of communicated content, and how helpful are those determinants in solving the kind of interpretative issues that courts need to decide? In order to get a clear answer to both questions, we must be more clear about the relevant kinds of content that speakers can convey by a speech act and how they would normally succeed.

There are at least three or four different kinds of content that we can look at when we try to grasp the meaning of an utterance.<sup>10</sup> First, there is the *semantic content* of the expression, which is the kind of content that is fully determined by the lexical meaning of the words used and the syntactical structure of the sentence. Second, there is *assertive content*, which is the content that the speaker actually says or asserts by an occasion of speech in the context of its expression. This is normally the truth-evaluable proposition or propositional content that the speaker conveys by expressing the utterance in its particular

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<sup>9</sup> The idea that voting in a legislative assembly is a form of institutional decision making seems to have escaped Greenberg's attention in his skepticism about legislative speech acts. Greenberg's skeptical arguments about the communicative aspect of legislation rely on some familiar worries about potential differences between voters' subjective intentions and election results, reminding us that voters often intend to convey different messages by casting their votes, not necessarily the intention to communicate their approval of the relevant resolution. (See his "Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication.") The point in the text above aims to clarify, if clarification is needed, that such worries are not relevant to the speech-act aspect of legislation as a form of institutional decision making.

<sup>10</sup> I have elaborated on these issues in greater detail in "The Pragmatics of Legal Language."

context. Third, in some cases there might be content that is *implicated*, though not quite said, by the speaker in the context of speech, which is the kind of content that the speaker is committed to, in some sense, even though the speaker has not actually said it. Finally, there might be certain *presuppositions* that speakers rely on (and rely on the hearers to rely on), as some content that is taken for granted in the context of the conversation.

Now, when textualism urges us to look at the meaning of an expression in the context of its utterance, it is clear that what they have in mind is what we called the *assertive* content of the utterance. It is what the speaker actually says by uttering the expression in the particular context of the speech. And textualists are quite right to recognize that assertive content is often very context sensitive. First, the same sentence, with the same semantic content, can be used to express different propositions in different contexts (e.g., “this is Joseph’s book” can either refer to the book that belongs to Joseph, or the book written by Joseph; which one of these is being asserted by the speaker is something we would normally infer from the context of the expression). Second, there are many cases in which the speaker asserts something different from the semantic content of the expression used (e.g., a doctor in the emergency room telling a patient with a gunshot wound, “Don’t worry, you are not going to die.” The doctor is not promising the patient eternal life; she is just saying that this particular wound is not life-threatening).<sup>11</sup>

The context sensitivity of assertive content is widely recognized. The relevant controversy here is about the exact determinants of assertive content. According a neo-Gricean view, articulated in this context by Stephen Neale, the content asserted by a speaker just *is* the content that the speaker *intended* to convey to the hearer by expressing the utterance in the particular context that she did.<sup>12</sup> As Neale rightly observes, according to this subjective conception of assertive content, textualism turns out to be incoherent. Once we admit that the context of the expression partly determines what the speaker actually said or asserted – as textualism does – one must concede that context matters precisely because it helps the hearer to figure out the relevant communication intentions of the speaker. Why else would it matter? But then, textualism can no longer deny that what the law actually says is what the legislators intended to say; on the contrary, by trying to ascertain what the law says, we inevitably try to grasp the communication intentions of those who enacted the law.

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<sup>11</sup> I have discussed all of this in my “Pragmatics of Legal Language.”

<sup>12</sup> S. Neale, “Textualism with Intent.”

Textualism, however, seems quite explicit in rejecting this subjective conception of assertive context, and for good reasons. Any plausible conception of how we characterize assertive content must make room for the possibility that speakers do not necessarily succeed in conveying all that they intend to convey by their utterances; people can simply fail to say exactly what they wanted to say. Therefore, any plausible conception of assertive content must comprise some objective criteria of success. The assertive content of an utterance is determined by what a *reasonable hearer*, knowing the relevant conversational background and context, would infer about the speaker's communication intentions from the words or sentences uttered in that context. A purely subjectivist view about assertive content – namely, that it is fully determined by the communication intentions of the speaker – would entail that one can never be quite sure about what has been asserted by an utterance, since we can never be quite sure about what the speaker may have intended to convey. This sounds implausible. Any plausible conception of what assertive content is must make room for the possibility that a speaker can fail to assert by her utterance all that she intended to convey.<sup>13</sup>

To be sure, I am not suggesting that communication intentions are irrelevant – far from it. Under normal circumstances, in an ordinary conversational context, we would try to grasp the communication intentions of the speaker by figuring out what is said. But again, speakers can fail to convey all that they intend to convey. The speaker's intention, by itself, does not fully constitute what has been said or asserted. Therefore, it makes perfect sense to define the assertive content of an utterance in a given context by reference to what a reasonable hearer, sharing the relevant contextual background, would infer about the content of the utterance in the context of its expression. Furthermore, I think that textualists are quite right to assume that the relevant reasonable hearer, in the context of statutory interpretation, is an adequately informed legal hearer, so to speak – namely, one who is reasonably informed about all the background legal landscape and the technicalities of legal jargon.<sup>14</sup>

Where does this leave the neo-Gricean critique? Neale is correct, I think, up to a point. He is correct to point out that there is a considerable exaggeration in the contrast textualism aims to emphasize between what the law says and what the lawmakers meant or intended to say. Since textualism admits that, in trying to figure out what the law says, we cannot be content with the semantic content of the relevant expression, and that we must be guided by various pragmatic factors in trying to determine the assertive content of the relevant

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<sup>13</sup> See my “Truth in Law.”

<sup>14</sup> See Scalia and Manning, note 8 above.

legal provision, textualism has already conceded that the communication intentions of the lawmakers is what we aim to ascertain. No plausible theory of what communicated content is can simply dispense with communication intentions. A hearer who wants to grasp what the speaker says aims to grasp what the speaker intended to communicate; legal speech cannot be a kind of striking exception. However, I do not think that textualism needs to deny this point. All it needs to say in response is that the main issue here is whether we rely on a purely subjective conception of assertive content, or on an objective conception, which relies on some notion of a reasonable hearer as a determinant of the content asserted by the legislature. As long as textualism endorses the objective view, which it clearly does, it is entitled to the conclusion that what the law says is not fully determined by what its enactors intended to say. What the law says is at least partly determined by what a reasonable hearer, knowing all the relevant background, would infer that it says. In other words, textualism can concede the idea that legal interpretation aims to ascertain the communication intentions of the legislature, as long as it is granted that the relevant communication intentions are understood objectively – that is, as they would be grasped by a reasonable hearer.

### **3. How Helpful Textualism Is?**

So far so good. Textualism tells us that statutory law consists in what the law says, what it actually asserts. And, at least in my mind, textualism seems to rely on a very plausible conception of what assertive content is – namely, an objective one. But now the main question is, how helpful is all this as a theory of statutory interpretation? It is not all that helpful, I will argue, because it is not frequently the case that a question of statutory interpretation arises due to some plausible question about the assertive content of the relevant legal expression. In most cases of statutory interpretation the problem is not that we are not quite sure about what the law says; the problems arise because what the law says is not sufficient to determine how to resolve the particular dilemma that the court faces. For one, many cases of statutory interpretation arise due to a conflict between different laws. What the law says in one instance may not be what it says in a different instance and the two may come into conflict in some concrete cases. Many other questions of statutory interpretation are due to vagueness: Courts often face a dilemma about how to apply a legal provision to a borderline case where there is no linguistic answer to the question of whether or not the relevant legal term applies to a given object or instance. And then there are cases in which, though the law does not actually say that X, it may implicate it. Does this mean that the law mandates that X? Finally, it is worth

keeping in mind that countless pieces of legislation explicitly transfer the decision making to courts (or agencies), often by using such hedging expressions as “reasonable” or “equitable,” etc. Legislatures do not always opt for settling particular issues *ex ante*.

Let me demonstrate with some examples, beginning with the case of vagueness. Consider a fairly simple case: The criminal offense of burglary requires, among other things, “entering” the premises. Now suppose that in a particular case, the defendant broke the window of somebody’s house and was caught while having his arm extended through the broken window. Did he enter the premises? Or suppose that only his finger got through? Or not even that, only the hammer he used to break the window. Can we say, in any of these cases, that the defendant entered the premises? Such borderline cases of vague terms cannot be resolved by paying closer attention to what the law says – namely, to the assertive content of the legal expression of what “entering” the premises means in the relevant context. Entering the premises is a vague term: There are some instances that clearly qualify as entering premises, others that clearly do not constitute entering and then, as we just saw, there are some borderline cases. Those are cases about which there is no answer (or, as some theories of vagueness claim, there is an answer but it is not knowable) to the question of whether the borderline case is or is not an instance of “entering” the premises. From a linguistic perspective, it would not be a mistake to say that having one’s arm through the window is a case of entering, nor would it be a mistake to deny it. This is what borderline cases of vague terms essentially are: cases about which there is no saying whether the instance falls within the extension of the term or not. Linguistically it can go either way. Therefore, when a court faces such a borderline case, paying close attention to what the law says is not going to be helpful at all. The court must decide one way or the other, according to the relevant normative considerations that apply.<sup>15</sup>

Furthermore, at least in some of the cases that call for decision on borderline cases of vague expressions, appeal to the law’s reasonably presumed purpose seems all but absolutely inevitable. Consider the case of *Lawrence Burr*. The British Road Traffic Act 1930 stipulated that any “vehicle” traveling on a public highway must be fitted with pneumatic tires. Burr fitted his poultry shed with iron wheels, attached it to his tractor, and pulled it down a stretch of public road. The lower court acquitted Burr on the grounds that a chicken coop is not a “vehicle.” Indeed, it is not. But the court of appeals overturned the acquittal, reasoning, quite sensibly, that the manifest purpose of the Road Traffic Act in this case was to prevent damage to the roads; why else require pneumat-

<sup>15</sup> I explained all this in much greater detail in my “Varieties of Vagueness in the Law.”

ic tires? Therefore, any heavy structure with wheels attached should count as a vehicle for the purposes of *this* rule.<sup>16</sup>

One might be tempted to think that at least in criminal cases, the rule of leniency might resolve the issue: If the definition of the criminal offense leaves some doubt about its application to the particular features of the conduct in question, as it clearly does when the conduct is a borderline case of the relevant definition of the offense, then the doubts must be resolved in favor of the defendant. But this is illusory. The rule of leniency may do the trick in cases of ambiguity, but not, generally speaking, in cases of vagueness. What makes vagueness semantically problematic is not simply the fact that there are borderline cases about the application of the vague term, but the fact that there is a great deal of fuzziness about where those borderline cases begin and where they end.<sup>17</sup> Suppose, for example, that you regard someone who broke the window and only got his tool through the border of the premises in question as a borderline case of entering the premises, and thus, true to the rule of leniency, you decide to acquit the defendant. Now another defendant comes along who had his finger through the premises, and you apply the rule of leniency here as well and acquit. And then the next one comes along who had his whole arm through the window, and then one who had half of his body through the window, and so on and so forth. In short, it is an essential aspect of vagueness that we have no clear demarcation of where borderline cases begin and where they end. The rule of leniency, even if you interpret it very broadly, just cannot solve such issues; it cannot determine its own application when its application is in doubt.

I hope that it is evident that the examples we used here generalize to countless other cases. It is a general feature of borderline cases of vague terms that they are not determined by the assertive content of the expression in which the vague term is used. There are some exceptions, of course. There might be contexts of conversation in which a vague term is used in a way that is sufficiently clear, in the particular context, whether it applies to a borderline case or not. Furthermore, as I argued elsewhere,<sup>18</sup> expressions that are semantically vague can be conversationally or pragmatically precise enough. In other words, there are cases in which a speaker can use a vague term applied to a borderline case yet succeed in conveying precise information. Consider this ex-

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<sup>16</sup> *Garner v. Burr* (1951), 1 KB 31. I am grateful to Robyn Carston for bringing this case to my attention.

<sup>17</sup> It is this fuzziness of borderline cases (or, as some call it, second-order vagueness) that gives rise to the famous sorites paradox; see my “Varieties of Vagueness in the Law.”

<sup>18</sup> “Varieties of Vagueness in the Law.”

ample: Suppose we are standing at a cocktail party, chatting about two people standing in the corner of the room. One of them is particularly short and the other, though much taller, is just slightly above average height. At some point in our conversation it is not clear to me which one of them you are talking about, so you clarify by saying, “I’m talking about the tall guy.” Surely this would be quite sufficient for me to identify the person you are talking about, even though the person you refer to is actually a borderline case of “tall.” Barring such exceptional cases, however, where the context of the conversation is rich enough to clarify how a vague term is meant to apply to a borderline case, mostly borderline cases are just that, borderline cases. This occurs much more frequently in law, where the context of the conversation, so to speak, is rarely rich enough to warrant such conclusions with a great deal of certainty. Trying to pay closer attention to what the law says, in such cases, is like hoping to get richer by gazing at your wallet.

Let us move beyond the issue of vagueness and consider an entirely different type of case that often arises in statutory interpretation. In countless ordinary contexts of conversation, speakers do not quite say something but only implicate it, given what they actually did say and certain norms of conversation that apply. These are mostly, but not exclusively, cases Grice labeled conversational implicatures. Other examples include utterance presuppositions and various other pragmatic completions of implied content. As I argued elsewhere at length, in some cases implicated content is semantically encoded and does not form any particular challenge in the interpretative context. But in most cases, grasping the content implicated by an utterance in a given context requires what linguists call nondemonstrative (or defeasible) inference. And those inferences require the assumption that speaker and hearer adhere to some norms of conversation that apply, norms that guide the communicative interaction in question. Roughly, these are the norms Grice originally labeled “conversational maxims.”<sup>19</sup>

Consider this example: The law stipulates that “R: All x’s who are F must  $\phi$ , unless x is an A, or B or C.” In an ordinary conversational context, assuming that the speaker is cooperative and adheres to the maxims of quantity (don’t say too little or too much), a reasonable hearer would rightly infer that the exceptions R mentions, namely, A, B and C, are exhaustive, and that the list excludes all other possible exceptions. Notice that this implicature is defeasible, the context of the expression may indicate otherwise and it is certainly cancelable without contradiction or any perplexity involved (e.g., the legislature could

<sup>19</sup> I discuss all this in much greater detail in my “Can the Law Imply More than It Says?”

add “or other similar cases”). Textualism is aware of all this, including the need for conversational maxims to enable such pragmatic inferences to go through. Lawyers call them canons of construction. In our example, the relevant canon is called *expressio unius est exclusio alterius* (the expression of one thing implies the exclusion of others). As Scalia demonstrates, “when a car dealer promises a low financing to ‘purchasers with good credit,’ it is entirely clear that the rate is not available to purchasers with spotty credit.”<sup>20</sup> Fancy Latin phraseology notwithstanding, this is quite simply the Gricean maxim of quantity: Do not say too little.

In their new book, *Reading Law*, Scalia and Garner list 57 canons of construction that they claim apply in U.S. law. Some of these canons, as we just saw, are ordinary conversational maxims or close relatives of them. Some are special and widely recognized rules of legislative drafting, such as the rule that phrases in masculine formulation include the feminine. Most other canons, however, are substantive legal doctrines (e.g., “presumption against waiver of sovereign immunity,” or the “mens rea” canon, etc.). I will have nothing to say about the long list of substantive legal doctrines Scalia calls canons of construction, nor would I press the obvious question: Why not subsume countless other legal doctrines under canon formulations and give us a list of hundreds of them? The essential point, for our purposes, is that textualism seems to maintain that the legal content of statutes includes not only the kind of content that is actually asserted by the law but also content that is implicated by it. Furthermore, textualism’s explicit assumption here is that, by relying on canons of construction, judges can avoid the normative and potentially controversial forms of reasoning that plague purposivism and intentionalism. But both of these ideas are questionable.

Here is the essential point to bear in mind: Implicated content of an utterance depends, as we have seen, on the norms that govern the conversational situation in question. Where do those norms come from? They come from the nature of the conversation – that is, from the purposes and interests of the parties to the conversation. In an ordinary conversation, we are typically warranted in assuming that those aims and interests are fully cooperative; parties to an ordinary conversation are normally interested in a truthful exchange of information. But, of course, not all conversations are of this nature. There are numerous forms of communicative interactions where parties to the conversation are not interested, first and foremost, in a cooperative exchange of information; they may have some other purposes in mind, and those do not necessarily instantiate norms of truthfulness or full cooperation. A prominent example is po-

<sup>20</sup> *Reading Law*, 107.

lite conversation: You tell the host of the dinner party that the meal was delicious, and you had better say that even if you think that the dishes were wretched. Conveying true and relevant information in such a context is simply not what is expected of the speaker, as a matter of social norms that apply. What is expected is to be kind and polite. Or, to take a very different context: Consider a typical conversation with a car dealer trying to sell you a used car. Would you really expect him to fully adhere to the maxims of relevance and quantity?

In short, norms that govern communicative interactions are always sensitive to the nature of the conversation and its manifest purposes. Legislation is a form of conversation whereby some legal actors, the legislators, communicate certain content to various audiences, including to the relevant subjects of the law and, almost inevitably, to the courts. In fact, the conversation of the legislature with the courts is a continuous one; courts respond by ways in which they interpret and apply the laws to concrete cases, and legislatures respond by ways in which they phrase future laws aiming to achieve certain goals given the courts' expected reactions, based on their previous decisions. And this conversation is not fully cooperative. As I argued elsewhere in some detail, the nature of the conversation between legislatures and the courts is partly strategic in nature.<sup>21</sup>

Why does it matter? It matters because it is the nature of strategic conversations that the norms governing them are somewhat uncertain and in flux. If you *know* that the car dealer is not going to tell you the truth about the car he is trying to sell you, you will not bother asking. If you ask, it is because you have some partial and limited confidence in obtaining some information, even if it is not fully accurate. So you do not quite expect the car dealer to adhere to all the ordinary maxims of conversation, but you are not quite sure how much. You expect him not to lie to you outright, but you also do not expect him to tell you everything he deems relevant to your interests. Some uncertainty is crucially in play here.

Why couldn't textualism assume, however, that the nature of the conversation between the courts and the legislature is a fully cooperative one or, at least, should be assumed to be so? The answer is that it is an essential part of textualism's rationale, its *raison d'état*, to assume the strategic nature of the conversation here; after all, textualism repeatedly emphasizes the distinction between what the legislators may have wanted to convey and what they have actually succeeded in conveying, giving legal effect only to the latter. Had we as-

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<sup>21</sup> "Can the Law Imply More than It Says?"

sumed a fully cooperative type of conversation between the legislatures and the courts, intentionalism would have won the day, and it would make much more sense to strive to ascertain what it is that the legislature wished to accomplish, rather than focusing on what it said. After all, in an ordinary conversation, where parties are fully cooperative, it is precisely each other's intentions that parties to the conversation try to figure out, not only, or even mainly, what is said or asserted. Furthermore, the strategic nature of the conversation between legislators themselves during the enactment process forms an essential part of the textualist arguments about the serious difficulties of trying to ascertain what legislators may have wanted to convey and the inevitable unreliability of such attempts. In other words, part of the appeal of textualism crucially depends on the strategic nature of legislative processes and the idea that the conversation between courts and legislature cannot be modeled on an ordinary conversation between friends, as it were.

The problem, of course, is that if we assume that the conversation is strategic, rather than fully cooperative, then the norms that govern the conversation become somewhat questionable, and, in any case, the determination of what would count as content that has been implicated by a given utterance becomes very uncertain. Now, this would seem to entail that textualism should be much more skeptical about content that is allegedly implicated, but not quite asserted, by a piece of legislative utterance; but such skepticism comes with a high price, as it would deplete textualism even further of its otherwise meager resources in dealing with the variety of statutory interpretation challenges that judges face. We have already noted that textualism has no resources to deal with interpretative questions stemming from vagueness; it has no resources to deal with conflict between different laws, especially when the asserted content of each is in no serious doubt;<sup>22</sup> and, though this is an issue I have not dealt with here, textualism's record on dealing with cases where what the law actually says yields absurd results is uneven, at best.<sup>23</sup> In short, textualism turns out to

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<sup>22</sup> One might be tempted to think that some familiar canons of construction solve the problem of conflict, such as the canon that later laws prevail over older ones, or that specific laws prevail over more general ones. The problem, of course, is that the canons themselves may come into conflict – for example, when the newer law is the more general one. Which one prevails then?

<sup>23</sup> There is a striking dissonance between the stance Scalia takes in his writings about this issue and his actual judicial decisions. In his writings, Scalia clearly indicates that it is not the job of judges to correct the mistakes of the legislature when unintended and unforeseen consequences of their legislative language result in absurd consequences. But in some of his own rulings, Scalia has done just that, namely, corrected legislative formulation to avoid absurdity. See, for example, *Green v. Bock Laundry Co.* (1989) and *FDA v. Brown and Williamson* (2000). Judge Easterbrook is much more consistent with his view that absurd results do not count

be a very minimal interpretative tool, one that is simply not going to help judges solve most of the actual problems they face in statutory interpretation.

One may suspect that we have come a long way only to point out something that should have been obvious from the start: Textualism tells judges to focus on what the law actually says or asserts, rather than on speculations about what legislatures may have wanted to say, or what the reasonable purpose of the law may have been. Litigants, however, are not going to waste their time and money on litigation only to be told something they could easily have figured out by themselves. If cases dealing with statutory interpretation reach the courts (especially appellate courts) it is either because it is not sufficiently clear, under the circumstances, what the law says, or else because what the law says is clear enough but is not sufficient to determine the result of the interpretative question that arises. Not many cases, to put it cautiously, really depend on grasping what the relevant statutory phrase simply says or asserts in the context of its utterance.<sup>24</sup>

So it seems that textualism, though plausible within the narrow confines of articulating the determinants of what the law says, is rather unhelpful and vacuous as a general theory of statutory interpretation. But this is no accident; the debate between various theories of statutory interpretation is as much about political morality as it is about language and interpretation. And the debate is mostly about the level of cooperation that should be practiced between the legislature and the courts. Purposivism, and to some extent intentionalism, purport to be guided by a strong cooperative principle, whereby the role of the courts in interpreting the law is seen as continuous with the legislative process, aiming to give effect to the policy goals that the legislature strove to achieve. Textualism rejects, on moral-political grounds, this strong cooperative principle; it wants the courts to deal with the legislature at arm's length. The role of judges, on this view, is not to complete the project that the legislature has started, so to speak, but to implement what the legislature ordered, regardless of the policy goals that may have guided it. In other words, textualism is unhelpful as a theory of statutory interpretation at least in part because it does not want to be helpful, or at least not more than absolutely necessary. I am not trying to argue here that this is necessarily a wrong moral-political stance (or a right one), only to emphasize that it is just as political and just as normatively contentious

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against clear legislative language. See his majority opinion in *Marshall v. U.S.* (1990) Court of Appeal 7th Circuit.

<sup>24</sup> Almost every discussion about textualism ends up with only a handful of examples of actual Supreme Court cases from the last few decades, invariably discussing *Smith v. U.S.* and three or four others. There is no abundance of examples where textualism is actually in play.

as any of its rivals. Different moral-political understandings of democracy, and the values inherent in democratic legislation, yield different views about the appropriate role of the judiciary in a democratic regime. Textualism can present itself as avoiding the contentious normative considerations that seem inevitable in purposive statutory interpretation only because it relies on a certain vision of democracy that is, however, not less politically contentious than any other. Morality and politics form an integral part of statutory interpretation on any plausible view of it; the differences are in the morality, and in the politics, to which judges subscribe.<sup>25</sup>

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