Order in Multiplicity: Aristotle on Text, Context, and the Rule of Law

Maureen B. Cavanaugh

ORDER IN MULTIPLICITY:* ARISTOTLE ON TEXT, CONTEXT, AND THE RULE OF LAW

MAUREEN B. CAVANAUGH**

Justice Scalia has made the question of textual interpretation tantamount to a referendum on whether we are a government characterized by the "rule of law" or the "rule of men." Aristotle is frequently quoted in support of statements about the rule of law and methods of statutory interpretation. While frequent, quotation of and reliance on Aristotle has been selective. The dichotomy between methods of interpretation and the rule of law turns out to be a false one. This Article examines Aristotle's theories of interpretation, especially his analysis of homonymy, non-univocal uses of the same word, to show that not all homonyms are random. Aristotle's contribution, that associated homonyms allow us to understand related ideas, along with his principles of language and logic, permit us to address the central question of how to interpret a text. Following an explication of Aristotelian methodology, this Article then considers Gregory v. Helvering, *an early tax case articulating a non-literal statutory interpretation of*

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* The title of this Article references CHRISTOPHER SHIELDS, ORDER IN MULTIPLICITY: HOMONYMY IN THE PHILOSOPHY OF ARISTOTLE (1999), whose explication of homonymy in Aristotle's philosophy is crucial to my application of Aristotelian methodology. Shields's concern is with the significance of homonymy to Aristotle's central philosophical concepts; whereas, my concern is to apply not only Aristotle's understanding of homonymy, but also other Aristotelian principles of interpretation, language, and logic, such as definition, priority, and the law of non-contrariety, to modern statutory interpretation. Aristotle recognized that homonymy ("words spoken in many ways") creates the possibility of confusion because seemingly identical words lack identical accounts. Aristotle's contribution is to identify significant philosophical terms (justice, good) as core-dependent homonyms. Lacking univocal accounts but nevertheless related around an identifiable core, such homonyms by their complexity do not inhibit but rather improve philosophical analysis. Aristotle's analysis now provides similar benefits when applied to statutory interpretation by allowing ordering of complexity created by words with associated multiple accounts.

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"reorganization" as a paradigm. This Article demonstrates that Aristotle, by helping us avoid unwarranted assumptions of univocity, provides a positive mechanism for finding order in multiplicity. Only by recognizing and ordering language complexity through interpretation and application of Aristotelian principles is it possible to give full effect to the rule of law.

INTRODUCTION

> [I]t is preferable for the law to rule rather than any one of the citizens, and according to this same principle, even if it be better for certain men to govern, they must be appointed as guardians of the laws and in subordination to them . . . .[1]

The appeal of plain meaning statutory interpretation is obvious when the rule of law is seen as preferable to the rule of men. Justice Scalia, the most prominent supporter of plain meaning statutory interpretation, argues for his method by articulating its democratic pedigree and linking the "rule of law" directly with textualism.[2] By framing the debate to advance his position, and by selectively quoting Aristotle's rule of law statement without regard to the passage or context,[3] Justice Scalia has left the issue of what method of interpretation can most fully give effect to the "rule of law" at a stalemate.

Legal realists and postmodernists have undercut the theoretical foundation of plain meaning—that language is both objective and determinate.[4] Legal realists, who examine the reality of the political

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1. ARISTOTLE, POLITICS, 1287a20–29 (H. Rackham trans., Harvard University Press 1990) (1944); *see infra* note 3 (reprinting the translation quoted by Justice Scalia); *infra* note 294 (quoting and discussing the passage in its entirety). For the course of transmission of Aristotle's "rule of law" into American jurisprudence, see JEROME FRANK, IF MEN WERE ANGELS: SOME ASPECTS OF GOVERNMENT IN A DEMOCRACY 190–211 (1942).

2. *See* William D. Popkin, *An "Internal" Critique of Justice Scalia's Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133, 1165–66 (1992) (examining Justice Scalia's justification for and method of statutory interpretation and noting that "[b]y linking injustice with judicial discretion, Justice Scalia puts his critics at a rhetorical disadvantage").

3. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176 (1989) [hereinafter Scalia, *Rule of Law*] (selectively quoting Aristotle from a translation by Ernest Barker (1946)).

> Rightly constituted laws should be the final sovereign; and personal rule, whether it be exercised by a single person or a body of persons, should be sovereign only in those matters on which law is unable, owing to the difficulty of framing general rules for all contingencies to make an exact pronouncement.

Id at 1176. The entire passage, including its context, in which Aristotle discusses the rule of law and the interpretation required by magistrates in applying the rule is quoted and discussed below. *See infra* note 294.

4. Postmodernists include both those who work in the discipline of philosophical hermeneutics, including HANS-GEORG GADAMER, TRUTH AND METHOD (Garett Barden & John Cumming trans., 1975) (advancing the hermeneutic approach viewing interpretation as a conversation between the interpreter and the textual or historical perspective of text), and those described as deconstructionists, such as JACQUES DERRIDA, OF GRAMMATOLOGY (Gayatri Chakravorty Spival trans., 1976) (arguing that meaning is nothing but signs; signified refers always to other concepts). Legal realists include Charles P. Curtis, *A Better Theory of Legal Interpretation*, 3 VAND. L. REV. 407

process, and post-modernists, who explore the contextual nature of language and the process of interpretation, conclude that one determinate answer is not possible. A middle ground has been advanced by other scholars[5] who argue for a dynamic approach to statutory interpretation, an approach based on practical reasoning that seeks to mediate between a text created in the past by a previous legislature and as applied to a current problem by the judiciary charged with its interpretation. The difficulty with each of these positions is that none has established a completely coherent and systematic approach that assures us of the maximum level of determinacy that our society, with its preference for the rule of law, expects.[6] This Article proposes to do just that by considering Aristotle's approach to interpretation—an approach recognizing not only the primacy of the text and the necessarily contextual nature of interpretation, but also the basically determinate nature of language and legal concepts.[7] Aristotle's "rule of law" passage, when

(1950) and Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930). For an overview of the subject, see Stephen M. Feldman, *The Politics of Postmodern Jurisprudence*, 95 MICH. L. REV. 166 (1996) (stating that postmodern interpretivism is our "being-in-the-world"); Mark Poster, *Interpreting Texts: Some New Directions*, 58 S. CAL. L. REV. 15 (1985) (noting the rejection of traditional Aristotelian analysis, defined as interpreting text to determine its meaning because it represents a reasoned position).

5. *See infra* notes 68–74 and accompanying text (discussing dynamic or practical reason models of statutory interpretation proposed by William Eskridge, Daniel Farber, and Philip Frickey).

6. Our daily experience as competent speakers (i.e., people who use and understand language with reasonably predictable results) suggests that it should be possible to arrive at more, rather than less, determinate answers for the meaning of most statutes, despite the frequency with which we tackle issues of ambiguity.

7. Aristotle has historically provided common inspiration for quite disparate approaches to statutory interpretation. *See, e.g.*, Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259, 1259 (1947) [hereinafter Frank, *Words and Music*] (noting Aristotle's discussions of problems of statutory interpretation and concluding that most modern expositions are "but restatements, with here and there a bit of embroidery, of what Aristotle said"); Scalia, *Rule of Law*, *supra* note 3, at 1176 (quoting Aristotle to support the rule of law as a law of rules); *see also* FRANK, *supra* note 1, at 190–211 (discussing Aristotle, "rule of law" vis-à-vis relative functions of legislature and judiciary, and cautioning against "using [Aristotelian] phrases torn from their context").

Aristotle is also recognized as providing the inspiration for some modern theories of interpretation, including practical reason. *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 323 (1990) [hereinafter Eskridge & Frickey, *Practical Reasoning*] (crediting Aristotle's theory of practical reason (*phronesis*) as inspiration); *see also* GADAMER, *supra* note 4, at 278–89 (1975) (examining the importance of distinction in Aristotle's *Ethics* between *phronesis* and *episteme* (moral and technical knowledge) to a hermeneutical problem, the relationship between the universal and the particular). Gadamer's focus is on Aristotle's

considered in its entirety, will show that the dichotomy articulated by the textualists is false. Principled interpretation is not antithetical, but is indeed essential to the rule of law. While various problems of interpretation have been raised by all quarters, Aristotle will be seen to provide help in addressing problems of interpretation generally. Ultimately, Aristotle will provide guidance to the question of what method of textual interpretation those charged with both interpreting and giving effect to the law can be best reconciled with the principle of the "rule of law."

Difficulties occasioned by ambiguity within the context of statutory interpretation often result in modern legal scholars assuming away ambiguity[8] or accepting it as inevitable.[9] Reference to Aristotle will demonstrate that recognition of non-univocity does not, however, result in only indeterminacy and incoherence. On the contrary, when properly applied, Aristotelian analysis reduces incoherence and provides a theory of interpretation superior to the methods of statutory interpretation currently in use. While frequently criticized (and certainly not all of his ideas have withstood the test of time), Aristotle remains a figure of unparalleled importance in the history of philosophy, including political philosophy, logic, and rhetoric.[10] The wealth of ideas contained in his corpus continues to be the subject of fruitful research with much to offer those willing to consider carefully his arguments and apply them beyond the domain of traditional Aristotelian scholarship.[11]

Ethics; he does not apply Aristotle's contributions in logic, language, or politics to the problem of interpretation.

8. *See infra* note 55 (discussing textualists assuming away ambiguity).

9. *See infra* notes 74–75 (discussing the failure of other methods of interpretation to respond to textualist and formalist concerns).

10. Aristotle is accepted as the founder of logic, a field in which he occupied an unparalleled position of importance until the twentieth century. Even now Aristotelian methods inform modern logical theory. *See, e.g.*, Robin Smith, *Logic*, *in* THE CAMBRIDGE COMPANION TO ARISTOTLE 27 (Jonathan Barnes ed., 1995) [hereinafter COMPANION] (stating that Aristotle was the first to conceive of a "systematic treatment of correct inference"); J.L. ACKRILL, ARISTOTLE THE PHILOSOPHER 80–81 (1981) (noting Aristotle's reputation for founding formal logic and quoting Kant for the view that logic has not advanced since Aristotle). Ackrill provides the salutary reminder that "there can be a great difference between Aristotle and his own words on the one hand, and Aristotelianism and the long tradition on the other." *Id.* at 81.

11. *See, e.g.*, MARTHA C. NUSSBAUM, POETIC JUSTICE (1995); MARTHA C. NUSSBAUM, SEX AND SOCIAL JUSTICE (1999) (discussing authors who use aspects of Aristotle's work in looking at a variety of legal problems); Ernest J. Weinrib, *Aristotle's Forms of Justice*, *in* 2 RATIO JURIS 211 (1989); Ernest J. Weinrib, *The Intelligibility of the Rule of Law*, *in* THE RULE OF LAW, IDEAL OR IDEOLOGY 59 (Allan C. Hutchinson & Patrick Monahan eds., 1987).

This Article begins with a review of the major theories of statutory interpretation, beginning historically with the early prominence of intentionalism, which we might equally term purposivism because of its focus on the legislative purpose of the enacting legislature. Part I then discusses textualism, whose exclusive focus on the statutory text can be seen as intentionalism's opposite. Finally, Part I discusses dynamic or practical interpretation, which contains elements of both intentionalism and textualism. In Part II, this Article then considers *Gregory v. Helvering*,[12] an early tax case articulating a non-literal statutory interpretation of "reorganization" with its statement of the business purpose doctrine.[13] Part III examines major reactions to the judicially articulated business purpose doctrine, reactions representative of the major schools of statutory interpretation.[14] Part IV sets out various ideas explored by Aristotle as he addressed issues of crafting and interpreting language and argumentation. Specifically, this Article concentrates on Aristotle's understanding of homonymy, synonymy, priority within homonymy and between levels of definition.[15] The importance of homonymy as a complex theory has only recently been fully explicated in the compendious literature devoted to Aristotle.[16]

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12. 293 U.S. 465 (1935).

13. The business purpose doctrine is of far-reaching and long-lasting importance in interpretation of tax statutes. *See infra* note 93 (discussing the business purpose doctrine and describing its variants). It and other doctrines, deemed variants of business purpose, are now offered as a bulwark against corporate tax shelters, not just in their judicially articulated form, but more importantly in current proposals to codify the economic substance doctrine. For a summary explanation of the principles at work in tax shelters, see Kenneth W. Gideon, *Mrs. Gregory's Grandchildren: Judicial Restriction of Tax Shelters*, 5 VA. TAX REV. 825, 849–50 (1986) (describing common aspects of tax shelters that rely on deferral, conversion and leverage for taxpayer advantage). For the current proposal to codify the economic substance doctrine, see DEPARTMENT OF THE TREASURY, THE PROBLEM OF CORPORATE TAX SHELTERS: DISCUSSION, ANALYSIS AND LEGISLATIVE PROPOSALS, 1999 TAX NOTES TODAY 127-12, July 2, 1999, at LEXIS, LEXSTAT, 1999 TNT 127-12 [hereinafter TREASURY, WHITE PAPER] (ascribing to *Gregory* the origin of most *judicial* doctrines, including business purpose, substance over form, step transaction, and economic substance, that override purely literal interpretations of tax statutes to disallow transactions deemed to fall outside the scope of the provisions).

14. *See infra* notes 106–66 and accompanying text.

15. *See infra* notes 173–74 (discussing importance of homonymy ("words spoken in many ways") for Aristotle and noting modern denomination by "vague" or "ambiguous"); *infra* notes 176–77 (discussing Aristotle's definition of homonymy and synonymy in contrast to later scholars); *infra* notes 182–92 (discussing homonymy and synonymy); *infra* notes 193–217 (discussing definitions); *infra* notes 201–05 (discussing priority); *infra* notes 198, 257 (discussing law of non-contrariety).

16. The significance Aristotle attaches to understanding core-dependent homonymy has not been fully understood until recently. Even those twentieth-century scholars, such as H.L.A. Hart, who understood the significance of homonymy, recognized no distinction

Ultimately, the methodology Aristotle develops for considering the relationship of words and their definitions allows a determinate, yet open-ended method for understanding language that corresponds well with our experience in reality, but is supported by sophisticated logical and philosophical underpinnings. Aristotle reveals order in multiplicity, providing a method for principled analysis, the true base requirement in a society that values the rule of law, as well as a method that allows for resolution of some hard and interesting cases.

Finally, this Article examines how Aristotle's theories of interpretation may contribute specifically to an understanding of "reorganization" and the business purpose doctrine. More generally, Aristotle's theories of interpretation offer a resolution of some current problems inherent in standards of statutory interpretation.[17] Specifically, the long tradition of some judicial interpretations requiring satisfaction of implied requirements, including business purpose in the Internal Revenue Code, despite the absence of any express statutory statement, can now be justified where the statutory language is shown to be homonymous and the homonyms are ones whose core definition contains requirements essential to the very statutory language.

This Article thus demonstrates that Aristotle provides a positive mechanism for finding order in multiplicity and sets forth a methodology that is based on a conceptual and logical framework familiar to those employing a judicial language frequently conceived in similar logical and philosophical terms.[18] Above all, Aristotle's

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between discrete homonymy and synonymy. *See* H.L.A. Hart, *Definition and Theory in Jurisprudence*, 70 LAW Q. REV. 37 (1954). Most importantly, the distinction between discrete and core-dependent homonymy and the distinction between core-dependent homonymy and synonymy has only recently been explicated within Aristotelian scholarship and thus its significance for interpreting statutes has yet to be understood. *See infra* notes 218–27 and accompanying text (discussing core-dependent homonymy); *infra* note 177 (discussing Hart's understanding of homonymy).

17. This method will provide insight for cases involving ambiguity in word meaning, including *National Organization for Women [NOW] v. Scheidler*, 510 U.S. 249 (1994) ("enterprise"), and *Chisom v. Roemer*, 501 U.S. 380 (1991) ("representative"). For linguistic analysis applied to these cases, see LAWRENCE M. SOLAN, THE LANGUAGE OF JUDGES (1993) (offering critique of judicial attempts at linguistic analysis ranging from use of antecedents and pronouns to ambiguous "clear" language in a variety of situations, including RICO); Clark D. Cunningham et. al., *Plain Meaning and Hard Cases*, 103 YALE L.J. 1561, 1588–1613 (1994) (reviewing SOLAN, *supra*, and offering empirical linguistic analysis of the term "enterprise" in *NOW*).

18. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE (1986) (describing legal interpretation in philosophical terms and urging judges to determine interpretive questions by integrating decisions into a community of principles). While Solan's linguistic approach has great utility, a conceptually-based approach may ultimately be

analysis has the potential for improving our comprehension of language with special applicability to theories of statutory interpretation seeking more determinate answers satisfying "rule of law" concerns while acknowledging language's complexity.

I. THEORIES OF STATUTORY INTERPRETATION

This Article does not describe every theory advanced for how statutes may best be interpreted nor does it seek to give a complete history of statutory interpretation.[19] Rather, this Article sets forth the leading theories of statutory interpretation, shows the advantages of each, and demonstrates that none offers a principled methodology for negotiating between text and context.[20] The leading theories can be described as textualism, purposivism (intentionalism), and dynamic interpretation (practical reasoning).[21] While text-based formalism endures as a method of interpretation because of its appeal to those who value the rule of law, its proponents generally assume away difficult cases by declaring *ipse dixit* a single "ordinary meaning."[22] In

more useful for application by lawyers not trained in linguistics. *See* SOLAN, *supra* note 17, at 175–78. A system of analysis such as that provided by Aristotle in philosophical terms, already familiar to lawyers trained in methods of legal argumentation and persuasion (including rhetoric) may provide a more accessible common ground. *See* STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 39 (1989) (arguing that philosophically conceptual terms are what the legal community expects to hear).

19. For a comprehensive overview of the subject of statutory interpretation, see generally WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994); Gregory Scott Crespi, *The Influence of a Decade of Statutory Interpretation Scholarship on Judicial Rulings: An Empirical Analysis*, 53 SMU L. REV. 9 (2000) (reviewing increased law review scholarship during 1988–1997); Thomas William Mayo, *Foreword: Symposium on Statutory Interpretation*, 53 SMU L. REV. 3 (2000) (describing generally the articles presented in the symposium).

20. For a textualist, context would include at most the surrounding text. *See infra* notes 53–56 (discussing Justice Scalia's approach to context). For others, whether intentionalists or dynamic interpreters, context could variably include the legislative history of the enacting legislature or the current socio-political context. *See infra* notes 68, 73 (discussing dynamic interpretation's hierarchy of concerns).

21. *See* WILLIAM ESKRIDGE & PHILIP FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY (1988) (describing the various theories of statutory interpretation). While a desire for historical precision and accuracy might suggest that a detailed analysis is necessary for every theory of statutory interpretation, with each variant separately described, most can be fairly accurately classified as a variant of one of these three.

22. *See infra* notes 42–46 (describing formalism and its variant definitions); *infra* notes 47–56 (describing textualism). Although textualism and formalism need not necessarily be defined as coterminous, for many the value of formalism, providing as it does definitive rules leaving little room for judicial interpretation, requires a textualist method of interpretation. Less constrained methods of interpretation would necessarily undercut the definitive nature of legal formalism.

contrast, both purposivism and dynamic methods of interpretation, while recognizing the importance of arriving at principled decisions in difficult cases, offer little systematic methodology, prompting formalist criticisms that each of these methods fails to produce bounded, consistent results.[23] In short, all of these methods suffer from problems of reliability and validity, producing, as their critics have amply demonstrated, neither consistent nor necessarily correct results.[24]

Despite significant scholarly and judicial attention,[25] no universally accepted approach to statutory interpretation has

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23. *See infra* notes 35–38, 71–75 (discussing the limitations inherent in current formulations of purposivism or dynamic interpretation).

24. By "correct results," I advocate no position about legal positivism's tenets. *See, e.g.*, Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, *in* LAW AND INTERPRETATION 203, 274–75 (Andrei Marmor ed., 1995) (discussing generally differing views of liberalism and critical legal studies' views on law's determinacy and objectivity and discussing specifically Dworkin's commitment to legal positivism); Brian Leiter, *Positivism, Formalism, Realism: Legal Positivism in American Jurisprudence*, 99 COLUM. L. REV. 1138, 1141–42 (1999) (book review) (describing positivist theories as distinguished by their commitment to social thesis—law fundamentally related to social fact—and separability thesis—that law is distinct from what law ought to be). Rather, by "necessarily correct" I mean to signify only that, based on the stated premises and assumptions of any given interpreter, the results proposed by that interpreter necessarily follow. Although their origin is from logic and proof, the terminology of reliability and validity, as used here, are more familiar to legal readers from discussions of the standards by which we judge scientific evidence. *See, e.g.*, Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993) (reliability and validity are overarching subject of Federal Rule of Evidence 702 (discussing admissibility of scientific evidence)); Bert Black, *A Unified Theory of Scientific Evidence*, 56 FORDHAM L. REV. 595, 600 (1988) (stating that "valid reasoning and reliable conclusions" are focal points of legal analysis of scientific evidence); *id.* at 607 (explaining that the law of evidence incorporates validity and reliability into relevancy: validity of reasoning links facts to conclusions and to reliability of conclusions); Recent Development, *Confronting the New Challenges of Scientific Evidence*, 108 HARV. L. REV. 1481, 1532–34 (1995) (differentiating functions of reliability and validity as measures of scientific evidence). Absent reliability and validity between assumptions, methods of reasoning and outcome, the legitimacy of the outcome is subject to attack. *See, e.g.*, *infra* note 28 (discussing hard cases and the difficulty of establishing "plain meaning" when Justices split 5–4 over "plain" meaning). For discussions of the need for and importance of reliability and validity in proof, logic, and argumentation, see, for example, THE CAMBRIDGE DICTIONARY OF PHILOSOPHY 948 (Robert Audi ed., 2d ed. 1999) ("valid" argument if true under every admissible reinterpretation of non-logical symbols); *id.* at 66 ("axiom of consistency" for formal language and system where no derivable contradiction); *id.* at 177 (in Aristotelian and modern logic, statements called consistent with respect to certain logical calculus); *id.* at 750–51 (proof theory).

25. Justice Scalia justifies his essay on interpretation as an "attempt to explain the current neglected state of the science of construing legal texts." ANTONIN SCALIA, A MATTER OF INTERPRETATION 3 (1997) [hereinafter SCALIA, INTERPRETATION]. The literature attempting to explicate theories of statutory interpretation is, however, voluminous. *See* ESKRIDGE, *supra* note 19, at 1 (discussing renewed interest in statutory interpretation); *see also* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U.

emerged in America.[26] The main theories of interpretation—textualism, purposivism, and dynamic (practical) interpretation—can be reduced further by considering whether the statutory text is the only valid text[27] for consideration and by evaluating how successfully each method allows for consistent resolution of hard cases.[28]

PA. L. REV. 1479 (1987) [hereinafter Eskridge, *Dynamic Statutory Interpreation*] (reviewing various methods of interpretation and noting their deficiencies in support of his dynamic method); William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. CHI. L. REV. 671 (1999) [hereinafter Eskridge, *Norms, Empiricism, and Canons*] (same); William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691 (1987) (endorsing more attention to legislation as a discipline); Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241 (1992) [hereinafter Frickey, *From the Big Sleep*] (describing the revival of interest in theories of statutory interpretation); Daniel A. Farber & Philip P. Frickey, *Public Choice Revisited*, 96 MICH. L. REV. 1715 (1998) [hereinafter Faber & Frickey, *Public Choice Revisited*] (reviewing MAXWELL L. STEARNS, PUBLIC CHOICE AND PUBLIC LAW: READINGS AND COMMENTARY (1997)) (discussing public choice literature within the context of statutory interpretation).

26. It may be that no one theory is possible or even desirable. *See, e.g.*, Eskridge & Frickey, *Practical Reasoning*, *supra* note 7, at 321–22 (contrasting "foundational" approach of law professors who seek one "grand theory" of statutory interpretation with practitioners who employ an eclectic mode of analysis in trying to advise clients on the meaning of statutes and ultimately advocating the more eclectic "practical reasoning" approach). However, to the extent that no systematic methodology is offered, practical reasoning will remain subject to formalist objections. For some examples of formalist critiques of practical reasoning, see Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409 (1990) (arguing that pragmatism provides no satisfactory theory); David E. Van Zandt, *An Alternative Theory of Practical Reason in Judicial Decisions*, 65 TUL. L. REV. 775 (1991) (same).

27. The answer to whether the text of the statute alone is primary might seem obvious: as the only legally valid document, the text alone must control all issues of statutory interpretation. Yet as Eskridge notes, the interpretation of any statute presents an "analytical conundrum." William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990) [hereinafter Eskridge, *New Textualism*]. Eskridge describes the conundrum of text and context:

> The statute's text is the most important consideration in statutory interpretation, and a clear text ought to be given effect. Yet the meaning of a text critically depends upon its surrounding context. Sometimes that context will suggest a meaning at war with the apparent acontextual meaning suggested by the statute's language. How should the judge proceed?

Id. at 621.

28. Hard cases, commentators agree, are those presenting difficult issues of interpretation. *See, e.g.*, *infra* note 55 (discussing a case where Justices split 5–4 on the "plain meaning"). Difficult issues of interpretation that occasion different conclusions about the meaning of the law may result because of word ambiguity or because of the application of words to the facts at hand. *See* DWORKIN, *supra* note 18, at 39 (stating that "hard cases" explicable because rules for using words are not precise); SOLAN, *supra* note 17, at 10–11 (asserting that language used without an awareness of operative processes produces difficult cases); Cunningham et al., *supra* note 17, at 1561 (noting the paradox of the plain meaning method of analysis applied to hard cases). Ultimately, whether we agree that there are "hard cases" of contested meaning rests on how we answer the

Given the common law tradition of case-by-case application of legal authorities,[29] it is not surprising that initially interpretive techniques that began with the text of the statute employed what has been called a "soft" plain meaning approach, emphasizing the statute's purpose and surrounding policy, a method rather closer to the common law method of adjudication than to "hard" plain meaning's focus on the statutory text alone. According to this approach, the statute's "plain meaning" can be trumped by contradictory legislative history because the sole task of any judge interpreting a given statute is simply to give effect to the legislature's intent in enacting the statute.[30] The leading case cited[31] both for and

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question whether any text has an objective and determinate meaning. *See also* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 116 (1977) (stating that "hard cases," in which no settled rule dictates a decision, urge development of principles).

On the issue of whether the text has an objective, determinate meaning separate and apart from its interpreter, compare Daniel A. Farber and Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 457 (1988) [hereinafter Farber & Frickey, *Legislative Intent*] ("[O]ne fundamental flaw in the Scalia-Easterbrook conception is its assumption that statutes have a legal meaning that exists before the process of statutory interpretation."), with Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 67 (1994) (arguing for a "relatively unimaginative, mechanical process of interpretation"). Easterbrook concedes that the distinction between interpretation and application is a difficult one. *See* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 535 (1983) [hereinafter Easterbrook, *Statutes' Domains*] ("The distinction between application and interpretation is a line worth drawing—however difficult to maintain because of the malleability of words.").

29. *See* William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1548 (1998) [hereinafter Eskridge, *Unknown Ideal*] (reviewing ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997)) (describing the "common law method" as an incremental process, "a case-by-case judgment [that] work[s] by analogy from authorities and precedents to unanticipated facts"); *see also* Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533, 535 (1992) [hereinafter Farber, *Inevitability*] (describing common law and decision making).

30. Eskridge, *New Textualism*, *supra* note 27, at 626 (describing the role of the Supreme Court in interpreting a statute as being the "honest agent" of Congress). The use of legislative history is then justified as a "check" on the court's reading of even plain statutory language. *See id.* at 627 ("In almost all of the leading plain meaning cases of the Warren and Burger Courts, the Court checked the legislative history to be certain that its confidence in the clear text did not misread the legislature's intent.").

31. *See, e.g.*, ESKRIDGE, *supra* note 19, at, 208–09 (discussing *Holy Trinity* and reaction to the decision); SCALIA, INTERPRETATION, *supra* note 25, at 18–21 (arguing that legislative intent is often a "handy cover" for judicial law making); Carol Chomsky, *Unlocking the Mysteries of* Holy Trinity*: Spirit, Letter, and History in Statutory Interpretation*, 100 COLUM. L. REV. 901, 907 (2000) (approving the result in *Holy Trinity*); Daniel A. Farber, *The Hermeneutic Tourist: Statutory Interpretation in Comparative Perspective*, 81 CORNELL L. REV. 513, 514 (1996) [hereinafter Farber, *Hermeneutic Tourist*] (reviewing INTERPRETING STATUTES: A COMPARATIVE SUMMARY (D. Neil MacCormick & Robert S. Summers eds., 1991)) (noting that the "absurdity" rule, first

against this approach is *Church of the Holy Trinity v. United States*,[32] in which the Supreme Court relied on the spirit, rather than the letter, of the law.

A. *Intentionalism*

The "intentionalist," or "archaeological," approach to statutory interpretation allows, and even encourages, courts to determine the "intent" of the enacting legislature by referring to the legislative history of the statute in question. As such, intentionalism was a natural first theory of statutory interpretation in an era where common law adjudication, that naturally focused on the laws' purpose, was the norm. By focusing on the enacting legislature, such an approach elevates historical above contemporary concerns.[33] Given the wide range of materials included in legislative history,[34] from committee reports of enacted statutes to rejected proposals and even legislative silence, courts' variable use of available material

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articulated in *Holy Trinity*, is a "staple" of statutory interpretation throughout the countries encountered in MacCormick and Summers' comparative study).

32. 143 U.S. 457, 472 (1892) (holding that a statute prohibiting anyone from aiding foreigners' transport to the United States in order to perform "labor or service of any kind" did not apply to a church hiring and paying for transportation of English clergyman). *Holy Trinity* also stated that "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *Id.* at 459. This problem of how to reconcile "plain meaning" with absurd consequences is not unique to American statutory interpretation. *See* Farber, *Hermeneutic Tourist*, *supra* note 31, at 514.

33. *See* Eskridge, *New Textualism*, *supra* note 27, at 625 (emphasizing that the intent of the enacting legislature elevates the importance of an historical perspective—what Eskridge terms "vertical coherence"—of statutory meaning at the expense of contemporary legal and social issues—what Eskridge terms "horizontal coherence"). For views attaching greater importance to horizontal coherence and suggesting the impossibility of reconstructing the text's history because of the interpreter's own assumptions, see *id.* at 644–45. *See also* GADAMER, *supra* note 4 (describing philosophical hermeneutics and dialectic between the text and the interpreter necessarily resulting from interpretation of text itself lacking objective meaning); William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609 (1990) (applying Gadamer's hermeneutical method to statutory interpretation).

34. What materials from the entire range of materials denominated as "legislative history" may legitimately be consulted raises serious questions. *See, e.g.*, Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195 (1983) (describing the problematic nature of legislative material actually available for consultation). For an attempt to create a hierarchy of materials, see ESKRIDGE & FRICKEY, *supra* note 21, at 569–639 (describing a descending hierarchy of sources as a mini-funnel that begins with the most reliable material (committee reports and sponsor statements), moves to material of more uncertain import (rejected proposals, floor and hearing colloquies, testimony of nonlegislative drafters and sponsors), and ultimately to material too ambiguous to provide a firm basis for conclusion (legislative silence and subsequent history)); Eskridge, *New Textualism*, *supra* note 27, at 636.

results in significant problems.[35] For instance, is the court, by examining the legislative history, simply "looking over a crowd and picking out [its] friends" to find support for its interpretation?[36] Apart from issues of the appropriateness of particular materials, the very idea of legislative "intent" is problematic, according to the realists—who argue against the possibility of collective intent[37]—and the proponents of public choice theory—who de-couple the process of legislative decision making from any resulting statutes.[38] Empirical

35. *See* Eskridge, *New Textualism*, *supra* note 27, at 641. While these critics noted the problems with the use of legislative history, they did not necessarily reject the notion of intentionalism. *See* REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 155–56 (1975). Criticism of intentionalism intensified during the 1980s, in part due to objections offered by realists, historicists, and formalists. Until Justice Scalia, however, criticism of the Supreme Court's use of legislative history operated at the margins, with general acceptance of the assumption that the Court's proper role was "to divine" legislative intent and that the use of legislative history posed no particular constitutional problems. Eskridge, *supra* note 27, at 624.

36. Wald, *supra* note 34, at 214 (describing a conversation with Judge Levanthal). Justice Scalia offers a variant of this comment. *See* Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring). Judge Leventhal's criticism could be applied equally to the new textualists' selection of dictionaries when trying to choose the "plain meaning" of a term. *See infra* notes 57–61 and accompanying text (discussing the applicability of Judge Leventhal's criticism to textualists' use of dictionaries and canons of construction). Farber and Frickey describe the "assault" on the use of legislative history as self-serving and linked to the cynical notion that "legislative history is the product of legislators at their worst—promoting private interest deals, strategically posturing to mislead judges, or abdicating all responsibility to their unelected staffs (who presumably either have their own political agendas or randomly run amok)." Farber & Frickey, *Legislative Intent*, *supra* note 28, at 437–38.

37. Eskridge, *New Textualism*, *supra* note 27, at 642. The difficulty with identifying a legislature's intent was stated initially and forcefully by Max Radin. Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870–72 (1930) (articulating the realist position that to speak of "collective legislative intent" is incoherent because no "intent" can be attributed to the individuals collectively involved in the legislative process, because they do not comprise any unified whole); *see also* William R. Bishin, *The Law Finders: An Essay in Statutory Interpretation*, 38 S. CAL. L. REV. 1, 16–17, 29 (1965) (criticizing judicial use of legislative history in place of reason and judgment to "find" nonexistent legislative intent).

38. Applying economic and game theory to the legislative process, public choice theory undermines the likelihood of ascertaining legislative "intent" by denying its coherence. Eskridge, *New Textualism*, *supra* note 27, at 642–43 (describing the outcome of the legislative process as highly dependent on a variety of issues both related and unrelated to the specific statute—including who controls the agenda—with the result that legislative history is at best inconclusive and at worst suspect, given the potentially strategic nature of the legislative process). For other discussions of the problematic nature of legislative intent based on public choice theory, see Easterbrook, *Statutes Domains*, *supra* note 28, at 547–48 (applying the public choice view to reject judicial interpretation that seeks legislative intent); and Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962–1987*, 100 HARV. L. REV. 761, 774 (1987) (citing social choice theory as one reason for questioning the ability to reconstruct legislative intent). *But see* Farber & Frickey, *Public Choice Revisited*, *supra* note 25, at 1735 (discussing the

work, based on sophisticated formal models, has demonstrated a greater level of institutional stability than suggested by public choice theory,[39] but does not restore intentionalism to its previous dominant position.[40]

Another, more cogent objection to a potentially unbounded search for the statute's meaning comes from the formalists, who echo Justice Holmes's aphorism that "[w]e do not inquire what the legislature meant; we ask only what the statute means."[41] Formalism,

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varying utility of the diverse body of "public choice" theory, the application of various modes of economic reasoning to political institutions, and concluding that, while offering insights, it fails to provide a unified model of political institutions or acts).

39. Public choice theory applies economic theory and mathematical techniques to issues of group decision making, whether exercised through elected representatives or directly, to analyze a range of problems from unpredictable or arbitrary outcomes in the legislative process to the strengthening or weakening of special interest groups as a result of that process. *See* Farber & Frickey, *Legislative Intent*, *supra* note 28, at 432 (noting "[v]arious institutional features of [the] legislature" that actually "promote stability and coherence"). Farber and Frickey acknowledge skepticism toward legislative integrity and the incoherent possibility of majority voting based on Arrow's Paradox—majority voting leads to cycling majorities that cannot choose among three or more mutually exclusive alternatives—or the chaos result theorem, given a large number of voters and issues, cycling is inevitable and will include almost every possible outcome. *Id.* at 425–27. Farber and Frickey, however, conclude that there are a relatively small number of possible outcomes, based on empirical results of sophisticated formal models. *Id.* at 435 ("In short, we have very strong reasons, both empirical and theoretical, for believing that actual legislatures do not suffer from the instability and incoherence some public choice theories have predicted."). For discussions of the theories applied to decision making, see KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 96–100 (1963) (stating general possibility theorem (paradox) that conditions of methodological fairness and logical conditions cannot be satisfied simultaneously for voting or individual choices generally); WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM 1–2 (2d ed. 1982) (explaining that though the individual voters may have a coherent set of values, the majority rule necessitates a collectively incoherent intent); Ronald A. Cass, *Looking with One Eye Closed: The Twilight of Administrative Law*, 1986 DUKE L.J. 238, 244–45 (noting lack of consensus on principles of public decision making and problematic result described by Arrow's "impossibility theorem" that democratic decisions are not derivable free from arbitrary constraints on social choice).

40. *See supra* note 35 (describing intentionalism's persistence); *see also infra* notes 49–54 (describing formalist objections to intentionalism).

41. Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899). Although Holmes's statement is frequently cited by those advancing formalism, they fail to mention Holmes's willing use of legislative history to resolve the meaning of language. For examples of those citing Holmes's statement, see SCALIA, INTERPRETATION, *supra* note 25, at 22–23 (citing Felix Frankurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 538 (1947)); Bishin, *supra* note 37, at 3. *But see* Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 48 (1928) (Justice Holmes, writing for the majority, stated, "It is said that when the meaning of language is plain we are not to resort to [extrinsic] evidence in order to raise doubts. This is rather an axiom of experience than a rule of law and does not preclude consideration of persuasive evidence if it exists.").

a term without any single definition and subject to its own interpretative dilemmas,[42] nevertheless argues for "tightly constrained" statutory interpretation based only on the text: judicial freedom to make law is contrary to the democratic nature of the American legislative process, and violates the Constitution's authorization of Congress as the sole body capable of enacting legislation.[43] When judges perform a function that could be described as legislative, they violate the constitutionally prescribed separation of powers.[44] Formalists also make efficiency arguments for relying on

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42. Larry Alexander, *"With Me, It's All er Nuthin": Formalism in Law and Morality*, 66 U. CHI. L. REV. 530, 544 (1999) (describing formalism as a system of "formal rules" that provide a "posited norm that settles all questions about what ought to be done that fall within its scope"). Definitions of "formalism" are plentiful and conflicting. *See* Daniel A. Farber, *Legal Formalism and the Red-Hot Knife*, 66 U. CHI. L. REV. 597, 599 (1999) [hereinafter Farber, *Legal Formalism*] (questioning the truth of whether "law is 'essentially formalistic'—only truly law-like to the extent it is made up of rules rather than standards"); Daniel Farber, *The Ages of American Formalism*, 90 NW. U. L. REV. 89, 99–101 (1995) (distinguishing formalist psychology and methodology); Frank I. Michelman, *A Brief Anatomy of Adjudicative Rule-Formalism*, 66 U. CHI. L. REV. 934, 934 (1999) (distinguishing "sundry formalisms"); Richard H. Pildes, *Forms of Formalism*, 66 U. CHI. L. REV. 607, 607–17 (1999) (describing three rather distinct modern modes of formalism: classical legal formalism, rule formalism, and nonconsequentialist formalism); Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 542 (1988) (seminal article describing types of formalism and identifying the appeal of formalism with its stabilizing influence); Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L. J. 949, 953–57 (1988) [hereinafter Weinrib, *Legal Formalism*] (describing formalism as the belief that specific norms are immanent in their forms).

43. "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. CONST. art. I, § 1. The Constitution prescribes that law is created only when it has passed both houses of Congress—the bicameralism requirement—and approved by the President—the presentment requirement. *Id.* at § 7; *see also* INS v. Chadha, 462 U.S. 919, 956–58 (1983) (invalidating legislative vetoes as violative of these legislative requirements).

44. The separation of powers argument relies on the Constitution's division of government among the three branches—Article I for Congress's legislative competence, Article II for implementation by the Executive branch, and Article III for judicial competence. ESKRIDGE, *supra* note 19, at 118. Separation of power between the legislature (charged with enacting statutes) and the judiciary (charged with applying those statutes to particular facts), it is argued, requires giving meaning to the words only as codified. *See* Eskridge, *New Textualism*, *supra* note 27, at 648. Some criticize intentionalism and the use of legislative history as anti-democratic because it represents judicial "usurpation" of legislative power. *Id.* For examples of judicial expressions of discomfort with judicial legislation, see INS v. Cardoza-Fonseca, 480 U.S. 421, 452–53 (Scalia, J., concurring) (concluding that "[j]udges interpret, not replace the law with legislative intent"); Am. Mining Cong. v. EPA, 824 F.2d 1177, 1190 n. 19 (D.C. Cir. 1987) (noting that democratic theory supports judicial caution in going beyond the plain language of the statute).

Alternatively, legislative control of judicial process through legislative history can also be seen to violate the separation of powers. *See* OFFICE OF LEGAL POLICY, UNITED STATES DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL, USING AND

the text's "plain meaning."[45] Formalism, for all its high-minded justifications, is ultimately plagued by its own problems—coherence, morality and effectiveness.[46]

MISUSING LEGISLATIVE HISTORY: A RE-EVALUATION OF THE STATUS OF LEGISLATIVE HISTORY IN STATUTORY INTERPRETATION 34 (1989) ("Intended meaning is a form of extra-statutory legislative interpretation of a statute, and judicial reliance upon it allows the legislature to exercise essentially judicial power.").

45. Formalism's efficiency gains are frequently cited as one of its justifications. *See, e.g.*, Alexander, *supra* note 42, at 536 (describing as efficient the authoritative settlement of a legal rule); *infra* notes 154–66 (discussing the efficiency argument within tax rules). The argument for formalism based on efficiency cuts both ways: to the extent that a statute represents an efficient compromise, it is inefficient to apply it beyond its terms. *See* Easterbrook, *Statutes' Domains*, *supra* note 28, at 540 (discussing gap filling as inefficient when legislation imposes regulation up to the limit of benefits). To the extent that courts force Congress to revisit and to specify every detail to which a statute could possibly apply, judicial and legislative resources are misallocated. As Justice Stevens noted:

> In the domain of statutory interpretation, Congress is the master. It obviously has the power to correct our mistakes, but we do the country a disservice when we needlessly ignore persuasive evidence of Congress' actual purpose and require it 'to take the time to revisit the matter' and to restate its purpose in more precise English whenever its work product suffers from an omission or inadvertent error.

W. Va. Univ. Hosp., Inc. v. Casey, 499 U.S. 83, 110–13 (1991) (Stevens, J., dissenting). For an example of possible misallocation of judicial resources due to vast litigation and judicial reliance on broad dictionary definitions with significant potential for insufficient guidance in place of consideration of Congressional intent, see Pegram v. Herdich, 120 S. Ct. 2143, 2158 (2000) (preemption is not presumed absent clear Congressional intent, especially in traditional areas of state regulation); N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 656–57 (1995) ("relate to" should be defined relative to the statute's objectives); Shaw v. Delta Airlines, Inc., 463 U.S. 85, 96–97 n.16 (1983) ("relate to" includes any connection).

46. Because formalism places a premium on the benefits derived from its rule-based system, and on the theoretical moral gains derived from anti-consequentialist enforcement of those rules (thereby eliminating the need for difficult individualized determinations in order to arrive at the most just results), formalism's benefits are undercut by the morally problematic consequences of rules being both over- and under-inclusive. Punishment of all rule violations will necessarily result in both just and unjust rule violations being punished equally. Yet punishing the morally innocent is problematic from a deontological perspective. Similarly, because formalism will encourage narrow compliance with rules, the morally problematic anti-consequentialist concerns for the effects of those rules will only be exacerbated. Therefore, the effectiveness of any theoretical formalist gains is called into question. Ultimately, formalism may be counterproductive of a society where uniform rules are actually followed and applied. *See* Alexander, *supra* note 42, at 530, 548 (arguing that while formalism is absent from morality, it offers prospects of moral gains through its posited norms but noting that the gap between its results and goals calls into question the "very possibility of law itself"); Farber, *Legal Formalism*, *supra* note 42, at 601, 605–06 (noting insufficient consideration by formalists of difficulties of formalism for deontological ethics—by doing injustice today so that we may attain future beneficial consequences—and consequences for actors in exploiting path dependence—actions that ultimately may be bad for your character); Leo Katz, *Form and Substance in Law and Morality*, 66 U. CHI. L. REV. 566, 569–79 (1999) (arguing that everyday morality is highly

B. Textualism

Textualism, a method that seeks to limit judicial discretion, rejects theories of statutory interpretation that aim to discover the intent of the legislature and focuses instead only on the "plain meaning" of the text.[47] Modern, or "new," textualism[48] is closely associated with Justice Scalia, who begins with the assumption that judge-made law is essentially undemocratic.[49] Justice Scalia rejects judicial interpretation as tyrannical if it seeks to discover unexpressed intent. "It is the *law* that governs, not the intent of the lawgiver. A government of laws, not of men."[50] Because it is only the enacted law

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formalistic, just as law is, and that lawyers who exploit path dependence of law are acting legitimately and morally); *see also infra* note 156 (discussing the use of a formalist approach in a tax context as productive of a "rule of men" able to exploit discontinuities in tax law).

47. Justice Scalia likens the common-law judge to someone "playing king—devising, out of the brilliance of one's own mind, those laws that ought to govern mankind." SCALIA, INTERPRETATION, *supra* note 25, at 7. He describes judicial decision making by such great judges as Holmes or Cardozo as an "unqualified good"—were it not for our democratic government founded on the separation of powers. *Id.* at 9. For a less cynical view of the causes of judicial activism, see GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 6–7 (1982) ("[M]uch of the current criticism of judicial activism, and of our judicial system generally, can be traced to the rather desperate responses of our courts to a multitude of obsolete statutes in the face of the manifest incapacity of legislatures to keep those statutes up to date.").

48. "New textualism" is the label coined by Eskridge, *New Textualism*, *supra* note 27, at 623 (describing Scalia's textualism as "new textualism" because its "intellectual inspiration" derives from public choice theory).

49. How "democracy" is to be defined within the context of describing the form of government adopted by the United States is somewhat more complicated than those advocating new textualism suggest. *See, e.g.*, CARL J. RICHARD, THE FOUNDERS AND THE CLASSICS (1994) (discussing the classical education of the founders and their ambivalence toward pure democracy); *see also supra* note 44 (describing constitutional allocation of power).

50. SCALIA, INTERPRETATION, *supra* note 25, at 17 (comparing judicial interpretation seeking the intent of the legislature through legislative history to the Roman emperor Nero's reported practice of posting edicts at a height above which his subjects could read their content). It is important to recognize that for Justice Scalia there appears no distinction between interpretation by judges (elected or not) and the edicts of tyrants. *Id.* (judging attempts to discover legislative intent to be worse than a totalitarian regime under an irrational despot, the emperor Nero); *see also infra* note 294 (discussing Aeschines's differentiation between types of government and distinguishing tyrannies administered according to the directions of those who are in positions of authority from states administered according to their established laws). For a more accurate description of Nero's reign and the three readily distinguishable systems of government in Rome from the Roman Republic, which had a truly republican government (*res publica*), to its replacement by the Augustan principate through Nero, see H.H. SCULLARD, FROM THE GRACCHI TO NERO 226 (1970) (describing Augustan principate as a monarchy despite the attempt to create an appearance of a dyarchy with the Senate); *id.* at 332 (arguing that Nero's reign was ultimately absolutist).

which is binding, legislative intent is without force. Justice Scalia defends his form of textualism from criticisms of "formalism" by arguing that "[t]he rule of law is *about* form."[51] Indeed, Justice Scalia equates textualism and formalism with a government of laws, not men.[52]

Refusing to define his "plain meaning" approach as "strict constructionism," Justice Scalia claims to construe a text "reasonably, to contain all that it fairly means."[53] To construe a text reasonably, however, Justice Scalia eschews any recourse to legislative history[54] and focuses his analysis on the "plain meaning"[55] of the text. For

51. SCALIA, INTERPRETATION, *supra* note 25, at 25; *see also* Schauer, *supra* note 42, at 510 ("[I]nsofar as formalism is frequently condemned as excessive reliance on the language of a rule, it is the very idea of decisionmaking by rule that is being condemned, either as a description of how decisionmaking can take place or as a prescription for how decisionmaking should take place.").

52. SCALIA, INTERPRETATION, *supra* note 25, at 17; *see also* Scalia, *Rule of Law*, *supra* note 3, at 1182–83 (selectively quoting Aristotle, among others, to support his position that the rule of law is *ab initio* a law of rules). Because predictability is the cardinal value for Justice Scalia, any legal form that requires interpretation of a law's meaning is suspect. *Id.* at 1179 ("There are times when even a bad rule is better than no rule at all."). Because Justice Scalia begins with this assumption, there is no other conclusion than the one he advances: the rule of law is the law of rules. *Id.* at 1187; *see also supra* note 3 and accompanying text. That this is tautological is problematic only for his critics. *See infra* note 294 and accompanying text (discussing the rule of law passage).

53. SCALIA, INTERPRETATION, *supra* note 25, at 23. Indeed, Justice Scalia derides strict constructionism as "a degraded form of textualism that brings the whole philosophy into disrepute." *Id.* Others would disagree with Justice Scalia's assessment that he is not a "strict constructionist." *See, e.g.*, Bradley C. Karkkainen, *"Plain Meaning": Justice Scalia's Jurisprudence of Strict Statutory Construction*, 17 HARV. J.L. & PUB. POL'Y 401, 474 (1994) (describing Justice Scalia as a strict constructionist and ultimately characterizing his method as "an eclectic form of strict constructionism").

54. The use of legislative history—that is, going beyond the text—is for Justice Scalia, the use of "democratically adopted texts" as "mere springboards" for "judicial lawmaking." SCALIA, INTERPRETATION, *supra* note 25, at 25. The only "law" is the "objective indication of the words" and so legislative history should not be used as an authoritative source from which a statute's meaning can be derived. *Id.* at 29–30.

55. "Plain meaning" is by definition something of a paradox. *See* Karkkainen, *supra* note 53, at 433–35 (describing the development of the "plain meaning rule" in American jurisprudence). According to Karkkainen:

> [C]ontrary to Justice Scalia's view, the use of legislative history in statutory interpretation actually coincides historically with the introduction of the Plain Meaning Rule in its modern form. The Rule itself was meant not to preclude the use of legislative history generally, but only to prevent a court from using it when the meaning of a statute was so plain on its face as to make a search of the legislative history unnecessary.

Id.

"Plain" can mean "clear" or it can mean "unambiguous." *See* Cunningham et al., *supra* note 17, at 1564 (noting that "[o]ne of Solan's most powerful critical moves is to analyze the seemingly embarrassing paradox in Supreme Court cases where all nine

example, he has argued that statutory interpretation should be based on the ordinary meaning of the statute's language, as most likely to have been how Congress understood the statute as enacted, assuming all the while that Congress understood the entire body of law into which the provision must be integrated.[56]

While textualists generally avoid legislative history, they freely consult assorted dictionaries,[57] make use of various linguistic

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Justices agreed that the meaning of a provision was 'plain,' but split five to four over what that provision meant").

56. Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring); Eskridge, *New Textualism*, *supra* note 27, at 679 (describing ordinary meaning as the clearest statement of Justice Scalia's methodology). Eskridge concludes that Justice Scalia's "benign fiction" is based on unrealistic assumptions, most notably that "when it enacts statutes Congress is omniscient," not only about all of the currently applicable law, but also about judicial interpretations of the law, including canons of statutory construction that might be applied. *Id.* In short, Justice Scalia's "new textualism" replaces recourse to legislative history with reliance on judge-made and judge-changed canons of construction, characterized by a "bait-and-switch" quality. *Id.* at 681–84; *see also* Popkin, *supra* note 2, at 1159–60 (summarizing Justice Scalia's assumptions and criticizing his lack of realism as well as the rigidity of his methodology).

57. Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1437–39 (1994). While no one appears to challenge the legitimacy of using dictionaries, those who have studied the Court's recent use of and reliance on dictionaries have persuasively criticized its approach. *See id.* at 1444–45 (describing the Court as treating dictionaries as "a sort of default source, presumptively decisive"). Dictionaries are neither compiled nor intended to be used as such. *See* Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275, 279 (1998) (describing in detail the sources and limitations of how dictionaries are compiled and concluding that dictionaries do not include every possible meaning). "They may well exclude meanings that are quite ordinary although less common .... Dictionary definitions are only generalizations, summaries, and approximations. Their definitions are not right or wrong in any absolute, objective sense." *Id.* Aprill advocates using dictionary definitions as "beginning points" not "end points" in the Court's search for meaning. *Id.* at 313. Above all, "[i]f the Court is serious about its quest for ordinary meaning, it should not continue to employ dictionaries in such a chaotic fashion." Note, *Looking It Up*, *supra*, at 1448. The Court's use of dictionaries is inconsistent with quite variable results. *See, e.g.*, MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 225–26 (1995) (Justice Scalia supporting his conclusion that "modify" means only minor or moderate change by reference to dictionary definition); Smith v. United States, 507 U.S. 197, 201 (1993) (denying recovery for death in Antarctica under the "foreign country exception" of the Federal Tort Claims Act because the first dictionary definition of "country" included "tract of land" while "political state" was second entry); Chisom v. Roemer, 501 U.S. 380, 404–05, 410–11 (1991) (Scalia, J., dissenting) (majority discussion of possible meanings of "representative" to include elected judges rejected by Justice Scalia on basis of one definition as definitive of opposite result). Earlier, H.L.A. Hart noted the lack of utility of dictionaries for authoritatively settling questions of legal meaning. *See* Hart, *supra* note 16, at 37 (noting that transformation of the question from "[w]hat is a right? to [w]hat is the meaning of the word right?" suggests that the dictionary has greater utility than it does and arguing that questions of legal meaning can only be settled by stating conditions under which the statements containing legal terms are true).

arguments without benefit of linguistic study,[58] and selectively employ canons[59] of statutory interpretation in their textual analyses. The advocates of plain meaning textualism do so without the benefit of any principled methodology justifying these extra-statutory tools.[60]

In the absence of an articulated, consistent, and principled methodology for discovering the plain meaning of a text,[61] the textualists fail to deliver on their promise of interpretation in

58. *See* SOLAN, *supra* note 17, at 94–117 (providing a linguistic critique of Supreme Court opinions that claim to be based on "plain meaning"). Solan is openly critical of the way judges currently employ linguistic arguments, asserting that "judges resort to linguistic argumentation in what appears to be an effort to find a seemingly scientific and neutral justification for difficult decisions." *Id.* at 1–11. Frequently, linguistic argumentation either fails or collapses into incoherence, masking some other agenda at the root of the judge's opinion. *See also* Cunningham et al., *supra* note 17, at 1561 (noting the lack of a systematic methodology in the Court's use of linguistics and suggesting that such a methodology could assist judges in interpreting statutes "in a principled and objective way").

59. Canons of statutory construction are "a homely collection of rules of thumb for interpreting statutes." Eskridge, *New Textualism*, *supra* note 27, at 663. Their use is not new; Anglo-American treatises have relied heavily on the canons as an aid to statutory interpretation. *See* ESKRIDGE, *supra* note 19, at 275. Since Karl Llewellyn demonstrated in 1950 that "there are two opposing canons on almost every point," their utility has been called into question. Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950). For a trenchant attack on the canons, see Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 805–07 (1983) (rejecting the utility of any canon as an aid either to decipherment, common sense guide, method of constraining judges or forcing legislatures to draft statute more carefully). Indeed, Justice Scalia himself reveals a troubling ambivalence to the canons: "To the honest textualist, all of these preferential rules and presumptions are a lot of trouble." SCALIA, INTERPRETATION, *supra* note 25, at 28.

60. Justice Scalia acknowledges the dangers of selective reliance on the canons. SCALIA, INTERPRETATION, *supra* note 25, at 27–29. Although Justice Scalia appears ready to accept their utility in spite of their indeterminacy in both selection and applicability, Eskridge notes that the result will be as unpredictable as "the doppelganger of the willful judge" relying on legislative intent. Eskridge, *Unknown Ideal*, *supra* note 29, at 1545–46. For a discussion of Justice Scalia's variable and troubling approach to canons, see Eskridge, *Unknown Ideal*, *supra* note 29, at 1542 (describing Justice Scalia's skepticism toward but selective use of the canons as deeply problematic because of formalism's need for a system of rules); *infra* note 61. Because Justice Scalia differentially accepts which canons to use, describing them as "artificial rules" and "dice-loading rules," their use serves only to increase both the unpredictability and arbitrariness of judicial decision making. Eskridge, *Unknown Ideal*, *supra* note 29, at 1542. For example, some, but not all, of the canons are considered acceptable. *See* Eskridge, *New Textualism*, *supra* note 27, at 664 ("Inclusio unius [*inclusio unius est exclusio altrerius*] arguments have grown like weeds in a vacant lot during the last two Terms."). Absent a coherent system for discrimination between and use of judicially created canons of interpretation, it is hard to justify preference for these various canons over legislative history.

61. *See supra* note 57 (discussing the inconsistent use of dictionaries); *supra* note 58 (discussing the ad hoc use of linguistic arguments); *supra* notes 59–60 (discussing the selective use of canons of statutory construction).

accordance with the text as the sole arbiter of the "rule of law."[62] Because of this absence of consistency, textualists are thus subject to many of the same charges they level at others. As Solan notes, judges who varyingly apply standards and tools yet pronounce the meaning clear are "judges attempt[ing] to mask the fact that a case is hard in the first place."[63] Daily evidence of our ability to communicate does not obviate the need for judicial interpretation.[64] Few would argue that the basic ability of competent speakers to communicate, coupled with a desire for government by the rule of law, removes all possibility for hard cases or the need for a methodology to deal with such cases.[65]

Critics of Justice Scalia's "new textualism" argue that this method is subject to the same criticisms leveled by its proponents against intentionalism: it offers no more determinate results in hard cases than any other method and contributes little to the legitimacy of the judicial process because of its lack of candor.[66] Textualists who

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62. *See infra* notes 66, 74–75 (discussing textualism's failure to overcome the criticisms it levels at other methods).

63. SOLAN, *supra* note 17, at 208 n.10. Attempts to make decisions appear both neutral and definitive originate from concern with preserving judicial legitimacy. Solan argues that better methods and greater candor will improve the legitimacy of judicial decision making. *Id.* at 170–71; *see also* Karkkainen, *supra* note 53, at 476–77 (finding Justice Scalia's method, whether relying on originalism in constitutional adjudication or plain meaning in statutory interpretation, "particularly troubling" because it asserts a "false claim to objectivity" in order to limit discourse and claim that there is only one possible result).

64. *See supra* note 28 (discussing hard cases); *infra* note 65 (discussing limitations on the ability to communicate a single meaning). Nevertheless, this Article will show that language complexity need not impede our ability to communicate effectively, if we recognize it and develop an effective method of analysis. Indeed, our failure to allow for hard cases serves only to undermine our ability to reason and argue persuasively. The principles by which Aristotle examines and explicates language complexity will provide such an effective method. *See infra* notes 182–92 and accompanying text (discussing Aristotle's identification of homonymy and associated homonymy); *infra* notes 193–217 (discussing Aristotle's explication of definition); *infra* notes 201–05 (describing modes of argumentation and analysis); *infra* notes 223–24 (discussing priority in associated homonymy and definition).

65. For a discussion of both our general ability to communicate through language and limitations on that ability, see SOLAN, *supra* note 17, at 11–13, 169. Solan quotes Justice Cardozo who described as unattainable a legal code "so minute, as to supply in advance for every conceivable situation the just and fitting rule. But life is too complex to bring the attainment of this ideal within the compass of human powers." *Id.* at 13 (quoting BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 143 (1921)).

66. *See* Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in 1988–89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 306–07 (1990). Judge Wald argues that:

> To disregard committee reports as indicators of congressional understanding because we are suspicious that nefarious staffers have planted certain

argue for "plain meaning" interpretation lose their claim to greater objectivity when they wage in a battle of the dictionaries, opportunistically engage in structural or linguistic arguments, and selectively rely on canons of statutory interpretation.[67]

C. *Dynamic-Pragmatic Interpretation*

While rejecting neither textualism's concern with the text nor intentionalism's concern with statutory purpose (current or past), some scholars, most notably Professors Eskridge, Frickey, and Farber, have argued for a more dynamic, more practical, and less foundational approach to statutory interpretation. This approach begins with the text, addresses concerns that are both historical (the purpose of the enacting legislature) and evolutive (current factual situations perhaps unanticipated by the original legislature along with the interpreter's own perspective shaped by current social and legal norms).[68] This mode of analysis is rooted in practical reason,

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> information for some undisclosed reason, is to second-guess Congress' chosen form of organization and delegation of authority, and to doubt its ability to oversee its own constitutional functions effectively. It comes perilously close . . . to impugning the way a coordinate branch conducts its operation and, in that sense, runs the risk of violating the spirit if not the letter of the separation of powers principle.

Id. For a complete discussion of the flaws of Justice Scalia's constitutionally based arguments necessitating "new textualism," see, inter alia, Eskridge, *New Textualism*, *supra* note 27, at 670 (criticizing constitutionally based arguments offered by Justice Scalia to support his approach); Eskridge, *Unknown Ideal*, *supra* note 29, at 1548–52 (same); Karkkainen, *supra* note 53, at 475–76 (same).

67. *See* Eskridge, *Unknown Ideal*, *supra* note 29, at 1546 (describing the "phenomenon of shopping the canons—picking out the friendly ones and ignoring or explaining away the rest"); *see also* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 861–71 (1992) (responding to legislative history's critics that no strong theoretical argument exists against use of legislative history and questioning the benefits of either traditional or newly-developed canons in its place); Karkkainen, *supra* note 53, at 449–50 (describing as "aggressive" Justice Scalia's use of canons to rule out possible interpretations and use of grammatical and structural arguments to arrive at a result "far from any plain meaning or ordinary usage" understood by either an ordinary reader or a legislator voting on the statute, and concluding that "[o]ne must question the application of the Plain Meaning Rule when it renders the meaning of a statute plain only to a single Justice of the Supreme Court"); Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 749–52 (1995) (describing the resulting incoherence for the administrative state of textualism's extreme reliance on dictionaries, rules of grammar, and canons of construction in place of intentionalism's reliance on legislative purpose and history); Popkin, *supra* note 2, at 1140–42 (discussing Justice Scalia's use of ordinary meaning, canons, and dictionaries); *id* at 1142–48 (discussing Justice Scalia's assumptions of proper grammar and style).

68. *See, e.g.*, Eskridge, *Dynamic Statutory Interpretation*, *supra* note 25 *passim* (describing benefits of and how the model of dynamic statutory interpretation works);

described by its proponents as a "structured problem-solving process."[69] Practical reason proposes a model of statutory interpretation that "mediates between the general standard and the specific case," taking its inspiration from what its proponents describe as Aristotelian practical reasoning (*phronesis*).[70] Practical reason recognizes the problems inherent in discovering meaning in statutes. Whether because of lapse of time or because the problem at issue was not one explicitly addressed by the enacting legislature, the judiciary must confront problems of interpretation. Practical reasoning seeks to contribute to the legitimacy of our republican constitutional framework by expressly recognizing the judiciary's constitutional responsibility for interpreting the statutes that the legislature crafts.

Practical reason does not present a single unified theory of how to approach statutory interpretation,[71] but instead urges a concrete

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Eskridge, *Norms, Empiricism, and Canons*, *supra* note 25 *passim* (urging empirical testing of textualism's claims of superiority over other methods, including dynamic, of statutory interpretation); Eskridge, *Unknown Ideal*, *supra* note 29, at 1556–60 (proposing practical reason as a model for statutory interpretation); Eskridge, *New Textualism*, *supra* note 27, at 690–91 (describing textualism's contribution in support of dynamic statutory interpretation); Eskridge & Frickey, *Practical Reasoning*, *supra* note 7, at 321 (urging practical reason as the most satisfactory method of statutory interpretation); Farber, *Hermeneutic Tourist*, *supra* note 31, at 516–18 (drawing on comparative material to support use of practical reason as a method of statutory interpretation); Farber & Frickey, *Legislative Intent*, *supra* note 28, at 461–65 (proposing practical reason as a superior model of interpretation); Farber & Frickey, *Public Choice Revisited*, *supra* note 25, at 1736–37 (using public choice theory to argue for practical resaon as a method of statutory interpretation); Frickey, *From the Big Sleep*, *supra* note 25, at 262–67 (using the link between scholarship and pedagogy to urge a more practical method of interpretation). *But see* Easterbrook, *Statutes' Domains*, *supra* note 28, at 544–51 (describing reasons against gap-filling methods of statutory interpretation).

69. Farber, *Inevitability*, *supra* note 29, at 536 (describing judicial process as involving common sense, respect for precedent, and appreciation of society's needs).

70. *Id.* at 538 (quoting Frank Michelman's definition of "practical reason"); Eskridge & Frickey, *Practical Reasoning*, *supra* note 7, at 323 (discussing Aristotle's theory of practical reasoning—*phronesis*—as inspiration for their model). *Phronesis* is perhaps best defined as "practical wisdom." HENRY G. LIDDELL ET AL., A GREEK-ENGLISH LEXICON (1969); *see also* GADAMER, *supra* note 4, at 280 (emphasizing the practical nature of *phronesis* in distinction to *episteme*—theroretical knowledge).

71. *See* Eskridge & Frickey, *Practical Reasoning*, *supra* note 7, at 323 (arguing that "concrete situatedness of the interpretive enterprise ... militates against overarching theories"); Farber, *Inevitability*, *supra* note 29, at 539 (describing diverse proponents of practical reason as united in their "rejection of foundationalism"). It is unclear whether Aristotle would agree with proponents of practical reason's rejection of the need for theory. Aristotle reasons, in language, argumentation, and dialectic, by working from the particular to the general and from the general to the particular. For Aristotle this provides no substitute for first principles; indeed, it is a method predicated on the need for arriving at first principles. *See infra* notes 200–05 and accompanying text. Nowhere does Aristotle reject the need for a theory or set of first principles. Aristotle's theories of definition,

approach to each case, by applying either Llewellyn's five factors[72] or Eskridge and Frickey's similar "funnel of abstraction."[73] The absence of either a unified theory or more specific guidance for the application of their factors, however, leaves proponents of practical reasoning open to charges of proposing an ad hoc method unsatisfactory to a government by the rule of law.[74]

Despite arguments advanced by all sides, the question remains: Which method of interpretation is most compatible with the rule of law? Adherents of purposivism whose focus is the intent behind the statute, adherents of textualism with their focus on plain meaning, and dynamic or practical reasoning adherents who rely on some combination of elements of both textualism and purposivism have all amply demonstrated the inadequacies of opposing viewpoints without delivering a decisive blow.[75] Even if we prefer a presumption in favor

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logic, and priority provide at least some first principles that permit articulation of a more unified theory allowing reasoned statutory interpretation generally.

72. Farber, *Inevitability*, *supra* note 29, at 536–37 (describing Llewellyn's proposed "structured problem-solving process" as similar to the current practical reason method). A judge would decide a case within the common law by a combination of common sense, respect for precedent, and cognizance of current societal needs. Llewellyn proposed a parallel system for construing statutes that evaluated five factors: 1) the court's sense of the situation, 2) overall coherence of the legal system, 3) presumed statutory purpose, 4) legislative history of recent statutes, and, most importantly, 5) statutory language. *Id.* at 535–36.

73. Eskridge & Frickey, *Practical Reasoning*, *supra* note 7, at 353–62 (describing the funnel of abstraction). Eskridge and Frickey propose that an interpreter look at a range of evidence, including the text, the historical evidence, and the text's evolution. While evaluating the evidence, an interpreter will be guided by the hierarchy of sources filtered through general practical and hermeneutical principles. *Id.*

74. See Farber, *Inevitability*, *supra* note 29, at 538–39, for a cogent defense of practical reason against these charges, replying to the formalists that "[f]ormalist methods of statutory interpretation neither eliminate the need for practical reason nor ease communication between legislatures and citizens." *Id.* at 534. Despite obvious problems, the appeal of plain meaning and formalism lies with the linking of such an approach to democracy and the notice function it serves. *Id.* at 549. Farber is, nonetheless, correct in pointing out the fallacy of this function, and the possibility of a contrary result when this is assumed for most statutes. *See infra* note 126 (discussing the technical nature of tax statutes). "Formalism may merely confuse ordinary citizens by forcing legislators to resort to more specific but also more numerous and complex rules." Farber, *Inevitability*, *supra* note 29, at 552. For a discussion of this very result in tax law, see *infra* notes 157–64 and accompanying text.

75. On the one hand, formalism is flawed because of its "excessive confidence in the power of 'the word' and excessive distrust of the ability of judges to exercise good judgment." Farber, *Inevitability*, *supra* note 29, at 559. On the other hand, practical reason's ad hoc approach may impart too much "informality" to statutory interpretation thereby giving "short shrift to statutory language and leav[ing] too much to the unguided discretion of judges." *Id.* at 559; *see also id.* at 541 (citing Nancy Levit, *Practically Unreasonable: A Critique of Practical Reason*, 85 NW. U. L. REV. 494 (1991), and David E. Van Zandt, *An Alternative Theory of Practical Reason in Judicial Decisions*, 65 TUL. L.

of plain meaning, what rules exist to help decide those difficult cases of contested meaning? Alternatively, how can we be assured that the rule of law will not be compromised by the application of general principles of practical reason?

This Article will show that Aristotle through his theories of language and logic, especially his interpretation of words "spoken in many ways," will provide a principled method of analysis superior to these methods. Before considering Aristotle, it will be helpful to consider *Gregory v. Helvering* and the business purpose doctrine articulated there. *Gregory*'s judicial opinions explicating the statute and their articulation of the business purpose doctrine will serve as our exemplar for applying the Aristotelian theories of homonymy, priority, and levels of definition to statutory interpretation.

II. TAX STATUTORY INTERPRETATION: *GREGORY V. HELVERING* AND BUSINESS PURPOSE

Gregory v. Helvering[76] seems at first glance to provide a simple case, requiring nothing more than application of the "plain meaning" of statutory provisions to the facts in order to arrive at the correct result. Instead, *Gregory* provides us with an opportunity to consider the fundamental question of whether a statutory provision governing a commercial transaction must be evaluated in light of the overriding purpose of the entire Code. As such it can serve as a paradigm for considering the appropriate methods of interpreting a statute situated within a larger, presumably coherent Code. Thus, the lower court, satisfied that the steps of the transaction were actually undertaken, interpreted the facts as companying with the statute. This decision was overturned by the Second Circuit Court of Appeals and sustained by the Supreme Court. These courts developed the business purpose doctrine by looking to the larger issue of whether benefits were to be conferred by mere literal compliance with the statutory requirements or whether the function of the statutory provisions were integral to their consideration. Interpretation of the statute by the three courts

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REV. 775 (1991), as examples of the scholarly criticism of the practical reason approach). In particular, adherents of plain meaning formalism argue that practical reasoning is anti-intellectual, ad hoc and ultimately "incoherent, subjective and unpredictable." Farber, *Inevitability*, *supra* note 29, at 534, 541. While adherents of practical reasoning reject the legal formalism of plain meaning, they deny that an inexorable legal result can be deduced from a "pre-existing set of rules." *Id.* at 539 (citing Robert Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213, 232–33 and Llewellyn, *supra* note 59, at 399).

76. 27 B.T.A. 223 (1932), *rev'd* 69 F.2d 809 (2d Cir. 1934), *aff'd* 293 U.S. 465 (1935).

thus not only illustrates how the result under the "plain meaning" and purposive approaches differs, but also introduces us to the business purpose doctrine. First articulated in *Gregory*, the business purpose doctrine extends far beyond these reorganization provisions.[77] Indeed, the business purpose doctrine's validity can serve as a paradigm for analysis of the appropriateness of considering the extent to which the function of associated statutory provisions must be given effect in any interpretation. The result of this analysis will necessarily affect not only the central issue of statutory complexity but, concomitantly, how the co-ordinate branches of our government will function and interact, determining to what extent courts should require a clear statement from the legislature within each narrow statutory provision.[78] A discussion of the *Gregory* opinions will be followed by an assessment of the case by adherents of the different methods of interpretation. An Aristotelian approach will then be used to reach a more principled, determinate result.

A. Gregory v. Helvering

Mrs. Gregory, as the sole shareholder of the United Corporation, wanted to sell Monitor shares, stock of a subsidiary corporation held as an asset by United.[79] However, a distribution directly to her as shareholder by the United Corporation of the Monitor stock would be taxed at its fair market value as a dividend.[80] Mrs. Gregory

77. *Gregory* and the business purpose doctrine loom large in most tax discussions of statutory interpretation. *Gregory* has had an almost unparalleled vitality in the case law. The business purpose doctrine and now in its permutation, the "economic substance doctrine," are seminal to the United States Department of Treasury's efforts to curb corporate tax shelters. *See* TREASURY, WHITE PAPER, *supra* note 13, at viii (describing *Gregory* as the origin of various judicial doctrines).

78. *See supra* notes 43–44 (discussing constitutional and separation of powers issues implicated by methods of statutory interpretation); *infra* notes 157–66 (discussing statutory complexity and concomitant negative implications for the rule of law with increasing complexity of formalist requirements).

79. A "sale" generally constitutes a taxable event. I.R.C. § 1001 (1994). For discussions of the realization doctrine, see David J. Shakow, *Taxation without Realization: A Proposal for Accrual Taxation*, 134 U. PA. L. REV. 1111 (1986) (urging accrual taxation); Daniel N. Shaviro, *An Efficiency Analysis of Realization and Recognition Rules under the Federal Income Tax*, 48 TAX L. REV. 1 (1992) (asserting that the realization requirement promotes efficiency in the tax system); David A. Weisbach, *Line Drawing, Doctrine, and Efficiency in the Tax Law*, 84 CORNELL L. REV. 1627 (1999) [hereinafter Weisbach, *Line Drawing*] (urging efficiency as a better measure).

80. Reorganization provisions at issue in *Gregory*, added in 1918, provide an exception to the general rule of taxing corporate distributions as dividends. *See* Rockefeller v. United States, 257 U.S. 176, 184 (1921) (holding a pre-1918 *Gregory*-type transaction taxable as dividend); United States v. Phellis, 257 U.S. 156, 175 (1921) (same);

consequently chose a different structure for her transaction.[81] Complying with the literal language of the "reorganization" provisions of the 1928 Revenue Act, she relied on provisions allowing for tax-free receipt of corporate stock acquired as part of a corporate reorganization.[82] If respected, this transactional form would allow Mrs. Gregory to avoid dividend treatment of the full value of the stock received, and ultimately pay a lower total tax on the transaction due to preferential capital gains rates.[83] The statutory language upon which Mrs. Gregory relied stated the following: "The term 'reorganization' means . . . a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer

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Shaviro, *supra* note 79, at 20 (describing the rationale for the exception from taxation represented by reorganization provisions).

81. Mrs. Gregory wished to sell her shares of Monitor to an unrelated third party paying the least tax. *Gregory*, 293 U.S. at 467. She structured the transaction as follows. As the sole shareholder of United, the actual owner of the Monitor Securities shares, she caused United to form a new corporation (Averill) by transferring the Monitor Securities to it in exchange for its stock. *Id.* Averill Corporation then transferred its Monitor shares to Mrs. Gregory, its sole shareholder, and immediately dissolved. *Id.* Mrs. Gregory sold the shares and calculated her gain on sale by the amount received less the basis in the Monitor shares (the portion of her United basis allocable to the Monitor shares), taxable at capital gains rates. *Id.* at 468. Assuming that the entire transaction qualified as a "reorganization," the transfer of the Averill shares to Mrs. Gregory was tax-deferred by virtue of the corporate reorganization provisions—sections 112(g) and (i)(B) of the Revenue Act of 1928. *Id.* at 468–69.

82. Beginning with the 1918 Act, Congress sought, because of changing economic conditions following the First World War, to facilitate "necessary business adjustments" while preventing tax avoidance by describing the forms in which reorganizations could occur tax-deferred. For example, Congress wrestled in 1918, 1921, and 1924 with language equal to the task of permitting the various business transactions considered "reorganizations" to occur tax-deferred. *See, e.g.*, H.R. REP. NO. 67-350 (1921), *reprinted in* J.S. SEIDMAN, SEIDMAN'S LEGISLATIVE HISTORY OF FEDERAL INCOME TAX LAW 1861–1938, at 790 (1938); S. REP. NO. 67-275 (1921), *reprinted in* SEIDMAN, *supra*, at 791. Throughout, the impetus for these provisions was clearly understood: to avoid impeding transactions necessitated by business needs when the taxpayer's investment remained "substantially the same." Homer Hendricks, *Developments in the Taxation of Reorganizations*, 34 COLUM. L. REV. 1198, 1209 (1934). For a discussion of congressional concerns about using the provisions for tax avoidance, see Comment, *Corporate Reorganization To Avoid Payment of Income Tax*, 45 YALE L.J. 134 (1935).

83. Mrs. Gregory argued that the transfer to the new corporation of the Monitor shares (part of the assets of United) qualified as a "reorganization" so that the receipt of shares of the new corporation would be tax-free. *Gregory*, 293 U.S. at 468–69. The Revenue Act of 1928 allowed tax-free receipt of stock received in a "reorganization":

> If there is distributed, in pursuance of a plan of reorganization, to a shareholder in a corporation a party to the reorganization, stock or securities in such corporation or in another corporation a party to the reorganization, without the surrender by such shareholder of stock or securities in such corporation, no gain to the distributee from the receipt of such stock or securities shall be recognized.

Revenue Act of 1928, Pub. L. 70-562, § 112(g), 45 Stat. 791, 818.

the transferor or its stockholders or both are in control of the corporation to which the assets are transferred."[84]

The Commissioner assessed a deficiency in tax paid, arguing that the intermediate steps of Mrs. Gregory's transaction, United's transfer of the Monitor shares to a newly formed corporation, which immediately distributed those shares in liquidation, were a sham and "without substance." As a result, the Commissioner argued that the transaction should be re-characterized, and taxed, as a dividend.[85] Although the Board of Tax Appeals initially ruled in favor of Mrs. Gregory, the Second Circuit, in an opinion written by Judge Learned Hand, reversed. Ultimately, the Supreme Court affirmed, but not because the transaction was merely a sham (i.e., not having been carried out in fact). If the steps undertaken were respected, the issue thus raised becomes instead what, beyond mere compliance with the steps of the transaction, was required.

Finding literal compliance with the statutory provision (there had been an actual transfer of assets and a receipt of stock), the Board of Tax Appeals concluded that "[a] statute so meticulously drafted must be interpreted as a literal expression of the taxing policy, and leav[ing] only the small interstices for judicial consideration."[86] On appeal, Judge Hand disagreed. While agreeing that the more

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84. *Id.* at § 112(i)(1).

85. Disregarding the reorganization provisions and the creation of the Averill Corporation, the Commissioner viewed the distribution of the Monitor shares as a dividend with no basis thus allocable to it and fully taxable in the amount of its fair market value at ordinary income rates. *Gregory*, 293 U.S. at 467.

For a discussion of how basic principles of corporate taxation result in their corresponding avoidance techniques, see Robert Charles Clark, *The Morphogenesis of Subchapter C: An Essay in Statutory Evolution and Reform*, 87 YALE L.J. 90, 97–130 (1977) (identifying first, separate taxation of corporate entity; second, taxation of shareholder only upon distribution of corporate earnings; third, preferential tax rate for capital assets; fourth, taxation of dividends at ordinary income rates; fifth, taxation of corporate stock dispositions as capital assets; sixth, nonrecognition provisions; and seventh, *General Utilities* doctrine, all as fundamental corporate principles from which all tensions in corporate tax arise, and proposing alteration of some principles to resolve corporate tax discontinuities). Clark identifies the tension created by combination of principles one through five leading inexorably to the *Gregory*-type bail-out. *Id.* at 120–23. A "bail-out" is generally defined to include extraction at capital gains rates of a corporation's profits that would otherwise be taxed at ordinary income rates. BORIS I. BITTKER & JAMES S. EUSTICE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS 11.06[1] (7th ed. 2000).

86. Gregory v. Comm'r, 27 B.T.A. 223, 225 (1932). For a discussion of related but distinct issues of specificity and complexity in the area of tax-deferred corporate reorganizations, see BITTKER & EUSTICE, *supra* note 85, at 12.01[4] (stating that "[t]he reorganization provisions are extraordinarily complex, even for the Code"); Lawrence Zelenak, *Thinking About Nonliteral Interpretation of the Internal Revenue Code*, 64 N.C. L. REV. 623, 660 (1986) (noting the distinction between complexity and specificity).

articulated the statute, the less room available for interpretation, Judge Hand reasoned, nevertheless, that something more than literal compliance with each separate statutory term was required. Analogizing the reorganization provisions to a melody, Judge Hand remarked that "the meaning of a sentence may be more than that of the separate words, as a melody is more than the notes, and no degree of particularity can ever obviate recourse to the setting in which all appear, and which all collectively create."[87] As a result, although "[a]ny one may so arrange his affairs that his taxes shall be as low as possible,"[88] Judge Hand concluded that "it does not follow that Congress meant to cover such a transaction, not even though the facts answer the dictionary definitions of each term used in the statutory definition."[89]

Though unstated, it was clear to Judge Hand that the transactions to which the reorganization sections were to apply must be prompted by a business purpose:[90]

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87. Helvering v. Gregory, 69 F.2d 809, 810–11 (2d Cir. 1934). For a discussion of Hand's musical analogy, see Frank, *Words and Music*, *supra* note 7, at 1267 (comparing the interpretation of statutes by judges with the interpretation of musical scores by performers and noting that Hand's pronouncement echoes Gestalt psychology). For a recent review of Frank's theory of statutory interpretation, see Kent Greenawalt, *Variations on Some Themes of a "Disporting Gazelle" and His Friend: Statutory Interpretation as Seen by Jerome Frank and Felix Frankfurter*, 100 COLUM. L. REV. 176 (2000); compare Llewellyn, *supra* note 59, at 399 (analogizing the role of courts to finding the music of the statute as written by the legislature and playing it in harmony with other music of the legal system).

88. *Gregory*, 69 F.2d at 810. For the interpretation of this statement by Hand as encouraging tax avoidance, see Marvin A. Chirelstein, *Learned Hand's Contribution to the Law of Tax Avoidance*, 77 YALE L.J. 440, 441 (1968); David A. Weisbach, *Formalism in the Tax Law*, 66 U. CHI. L. REV. 860, 869–70, n.25 (1999) [hereinafter Weisbach, *Formalism*]. An important distinction is lost here. That someone is entitled to arrange business affairs to choose among better tax results simply means that a taxpayer capable of satisfying all requirements for a transaction to qualify for nonrecognition is not forced to effect a similar transaction with far worse tax consequences simply because it would yield more revenue for the Treasury. However, the converse is not true; because there are two ways of effecting a transaction, a taxpayer may not elect the better form when substantively all necessary requirements cannot be satisfied.

89. *Gregory*, 69 F.2d at 810. Importantly, Judge Hand did not agree with the Commissioner's position that the intermediate steps should be disregarded as a sham, since in fact they were carried out. *Id.* at 811 (declining to agree with Commissioner that the steps taken were inoperative).

90. The business purpose doctrine has not always been narrowly interpreted or applied only to the reorganization provisions. It has been implied generally as a requirement in tax provisions governing commercial transactions. *See, e.g.*, Loewi v. Ryan, 229 F.2d 627, 629 (2d Cir. 1956) (holding that tax statutes should be interpreted against their own background so "it is proper to exclude those that had no other result than to evade taxation"); Comm'r v. Transp. Trading & Terminal Corp., 176 F.2d 570 (2d Cir. 1949) (construing a tax statute governing commercial or industrial transactions "to

> The purpose of the section is plain enough; men engaged in enterprises—industrial, commercial, financial, or other—might wish to consolidate, or divide, to add to, or subtract from, their holdings. Such transactions were not be considered as "realizing" any profit, because the collective interests still remained in solution. But the underlying presupposition is plain that the readjustment shall be undertaken for reasons germane to the conduct of the venture in hand, not as an ephemeral incident, egregious to its prosecution. To dodge the shareholders' taxes is not one of the transactions contemplated as corporate "reorganizations."[91]

Justice Sutherland, writing for the Supreme Court, agreed.[92] The Court concluded that the transaction was "[s]imply an operation having no business or corporate purpose," a "mere device."[93] The

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understand them to refer to transactions entered upon for commercial or industrial purposes and not to include transactions entered upon for no other motive but to escape taxation"); *see also* Robert Thornton Smith, *Business Purpose: The Assault Upon the Citadel*, 53 TAX LAW. 1 (1999) (indicating that the underlying justification of business purpose is found in avoiding "self-defeating" interpretations of the Code).

91. *Gregory*, 69 F.2d at 811; *see infra* note 101 (discussing tax avoidance and taxpayer motive).

92. Justice Sutherland similarly related the business purpose of a reorganization to the business or businesses being reorganized. Specifically, the Court found that a transfer of assets made by one corporation to another must, for purposes of section 112(g), be made "in pursuance of a plan of reorganization," not "in pursuance of a plan having no relation to the business of either." Gregory v. Helvering, 293 U.S. 465, 469 (1935).

93. *Id.* The Court regarded the transaction as a "mere device" to disguise in corporate reorganization form what was essentially a sale. *Id.* The Board of Tax Appeals had based its decision in large part on the need to respect the corporate form of the transaction. Gregory v. Comm'r, 27 B.T.A. 223, 225 (1932). The Supreme Court rejected this position because the new corporation was formed only for the transfer of the shares and ceased to exist once it had performed that function. Gregory v. Helvering, 293 U.S. 465, 469–70 (1935). The "device" language ultimately is codified as a requirement for tax-free spin-offs in the 1954 Code. I.R.C. § 355 (1994 & Supp. IV 1998). Characterizing the transaction as a "device," the Court refused to disregard it as a sham. *Gregory*, 293 U.S. at 469–70. The "device" language here can be seen as describing a transaction undertaken for purely tax reasons and lacking a business purpose. A discussion of the evidence that the "device" language codified the business purpose doctrine or, conversely as some have argued, specifically made it inapplicable in the context of divisive reorganizations is beyond the scope of this Article. *See* John F. Bales, *The Business Purpose of Corporate Separations*, 56 VA. L. REV. 1242, 1262 n. 104, 1266 (1970) (arguing that the "device" language and the "active trade or business" requirement were preferable to and indeed pre-empted *Gregory's* business purpose language).

For a discussion of *Gregory* as merely a different formulation of the "sham transaction" doctrine and urging its limitation to sham transactions, see Harvey M. Spear, *"Corporate Business Purpose" in Reorganization*, 3 TAX L. REV. 225, 234–235 (1947). While a common assessment, it is also inaccurate: Judge Hand recognized the validity of the steps in *Gregory* but disagreed that they resulted in a reorganization. *See* Gregory v.

Court further concluded that "[t]o hold otherwise would be to exalt artifice above reality and to deprive the statutory provision in question of all serious purpose."[94] Because there was no reorganization (i.e., no continued business) but simply a distribution followed by a sale of the shares, Mrs. Gregory had not satisfied the statute's requirements.[95]

Helvering, 69 F.2d 809, 811–12 (1932) (disagreeing with the Commissioner that steps should be disregarded), *aff'd* 293 U.S. 465 (1935).

The business purpose doctrine has been cited as the origin of and used as the equivalent of most other important interpretive doctrines, most notably substance over form (was the substance of the transaction consistent with its chosen form), economic substance (is there economic purpose or risk to the transaction apart from its tax benefits), and sham transaction (did the transaction occur as described for tax purposes). *Gregory* is thus regarded as the bedrock of tax statutory interpretation, limiting taxpayers' ability to benefit from Code provisions. For a recent articulation of the economic substance doctrine, see ACM v. Comm'r, 73 T.C.M. (CCH) 2189, 2214–29 (1997) ("The doctrine of economic substance becomes applicable, and a judicial remedy is warranted, where a taxpayer seeks to claim tax benefits, unintended by Congress, by means of transactions that serve no economic purpose other than tax savings."). This statement of the doctrine, of course, does not specify the requisite quantum of economic substance. On the equivalence of business purpose with the substance over form doctrine, see Chisholm v. Comm'r, 79 F.2d 14, 15 (2d Cir. 1935) (citing *Gregory* and stating that central question is whether the substance was consistent with the form of the transaction). "Had they [the incorporators] really meant to conduct a business by means of the two reorganized companies, they would have escaped whatever other aim they might have had, whether to avoid taxes, or to regenerate the world." *Id.* For a discussion of the substance over form doctrine generally, see Ronald Jensen, *Of Form and Substance: Tax-Free Incorporations and Other Transactions Under Section 351*, 11 VA. TAX REV. 349 (1991).

However, the very malleability of the business purpose doctrine and its permutations have prompted the Treasury to urge its abandonment in favor of a more mechanical comparison of the present value of a transaction's pre- and post-tax benefits. *See* TREASURY, WHITE PAPER, *supra* note 13, at viii–ix (rejecting the utility of these judicial doctrines because of their uncertain application, in definition and use, and proposing instead a codification of the economic substance doctrine that compares the present value of expected pre-tax profit and expected tax benefits). On the appropriateness of just such a seemingly mechanical test and its ability to accomplish its stated goals, see David A. Weisbach, *Implications of Implicit Taxes*, 52 SMU L. REV. 373 (1999).

94. *Gregory*, 293 U.S. at 470.

95. *Id.* at 469–70. The business purpose doctrine and continuity of interest doctrines are thus intertwined, as both Justice Sutherland and Learned Hand's opinions indicate. Citing *Pinellas Ice & Cold Storage Co. v. Commissioner*, 287 U.S. 462 (1933) and *Cortland Specialty Co. v. Commissioner*, 60 F.2d 937 (2d Cir. 1932), Judge Hand noted that literal compliance was not sufficient in either case. Both cases could have been decided on narrower grounds (short-term notes were not securities for purposes of "reorganization"); however in both cases the transactions failed for lack of continuity of interest. Gregory v. Helvering, 69 F.2d 809, 811 (2d Cir. 1934). For examples of commentators equating business purpose with the continuity of interest requirement, see Allan F. Ayers, Jr., *How to Insure Recognition of a Corporation Formed to Fit a Tax-Free Reorganization Pattern*, 8 N.Y.U. INST. ON FED. TAX'N 165, 166 (1949) (business purpose is satisfied if there is continuity of business enterprise and shareholder interest); Spear, *supra* note 93, at 234

The three opinions aptly illustrate the different methods of statutory interpretation. The Board of Tax Appeals, employing a plain meaning approach, interpreted the statutory definition of "reorganization" as including all conditions both necessary and sufficient for its benefits.[96] Literal compliance with the statutory language was, however, insufficient for both the court of appeals and the Supreme Court. Interpreting the statute's language within the context of related provisions to give effect to its purpose, Learned Hand understood the term "reorganization" to require a "readjustment undertaken for reasons germane to the conduct of the venture in hand."[97] The Supreme Court agreed that a "reorganization" required the reorganization of all or part of a business.[98] These decisions were based on the reorganization provisions' purpose, as articulated in prior judicial interpretations (requiring continuity of interest)[99] and the statute's legislative history (emphasizing that such provisions would facilitate necessary business purposes).[100] As a result, the taxpayer could not be granted the benefits of the provisions because "the transaction upon its face lies outside the plain intent of the statute," not because of any tax avoidance motive.[101]

(explaining *Gregory* by the continuance of business requirement); *see also infra* notes 278–84 and accompanying text (discussing business purpose and continuity of interest as characteristics of the genus of tax-deferred reorganizations).

96. Gregory v. Comm'r, 27 B.T.A. 223, 224–25 (1932).

97. Gregory v. Helvering, 69 F.2d 809, 811 (1932).

98. *Gregory*, 293 U.S. at 469.

99. For a discussion of the overlap between the business purpose and continuity of interest doctrines, see *supra* note 95.

100. Citing both the 1924 House Report, H.R. REP. NO. 68-179 (1924), and Senate Report, S. REP. 68-398 (1924), Judge Hand noted that the reorganization provisions were added to "exempt 'from tax the gain from exchanges made in connection with a reorganization in order that ordinary business transactions will not be prevented.' " Gregory v. Helvering, 69 F.2d 809, 811 (1932) (citation omitted). The congressional reports state that the justification for the reorganization provisions receiving such favorable tax treatment was based on their characteristic as *"purely a paper affair. It is the exchange of the stock of different corporations for business purposes."* SEIDMAN, *supra* note 82, at 795 (statement of Rep. Watson) (emphasis added).

101. *Gregory*, 293 U.S. at 470 (emphasizing that no "ulterior purpose" (i.e., tax avoidance) was important for the decision). Justice Sutherland reaffirmed this by stating that "the legal right of a taxpayer to decrease the amount of what otherwise would be his taxes ... by means which the law permits, cannot be doubted." *Id.* at 469 (citing, inter alia, United States v. Isham, 68 U.S. (17 Wall.) 496, 506 (1873) (early statement of taxpayer's right to avoid taxes by legal means)). Judge Hand added, "there is not even a patriotic duty to increase one's taxes." Gregory v. Helvering, 69 F.2d 809, 810 (1932).

Nevertheless, the business purpose doctrine is routinely criticized for introducing the taxpayer's motive into judicial decision making and thereby turning an analysis of the objective characteristics of the transaction into a subjective analysis. *See, e.g.*, RANDOLPH

A brief review of *Gregory* reveals how tax commentators have viewed its approach to statutory interpretation and, in turn, allows *Gregory* to serve as a paradigm for an Aristotelian re-examination.[102]

B. Reaction to Gregory

Before considering *Gregory v. Helvering* generally, it may be helpful to note that the literal reading of the statute approving of Mrs. Gregory's transaction—that no business purpose was required for a tax-deferred reorganization[103]—prompted an immediate expression of congressional dissatisfaction: the provision upon which Mrs. Gregory attempted to rely was repealed.[104] Given Congress's response,

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E. PAUL, STUDIES IN FEDERAL TAXATION 152 (1937) (stating that *Gregory* "imported into the statutory provision, a meaning which made relevant the [taxpayer's] motive"). However, the need to inquire into a taxpayer's state of mind is much less than the rhetoric suggests, given that an assessment of the relative weight of tax and non-tax goals can readily be made. *See* Walter J. Blum, *Motive, Intent and Purpose in Federal Income Taxation*, 34 U. CHI. L. REV. 485, 543–44 (1967) (noting limitations of motive analyses and commenting that because purpose can be equated with function "it is possible largely to ignore state of mind considerations and to rely almost entirely on external factors"). Blum observes that, for purposes of identifying tax avoidance, difficulties in measuring motive are avoided by assessing the relative weights of non-tax and tax goals. *Id.* at 516. "All in all, the role of any state of mind inquiry is very much smaller than the rhetoric might seem to suggest." *Id.* at 523–24; *see also* Edwin S. Cohen, *Tax Avoidance Purpose as a Statutory Text in Tax Legislation*, *in* NINTH ANNUAL TULANE TAX INSTITUTE 229, 257 (1960) (distinguishing business purpose from test for taxpayer motive and urging adoption of the former as the standard for taxability).

102. For example, business purpose has been castigated and praised because of its vagueness. *Compare* BITTKER & EUSTICE, *supra* note 85, ¶ 11.01[2] (benefits of *in terrorem* effect), *and* Boris I. Bittker, *What is "Business Purpose" in Reorganizations?*, 8 N.Y.U. INST. ON FED. TAX'N 134, 134 (1949) (Noting, with specific reference to *Gregory*, that literal compliance is insufficient and stating that "[t]hose who hope that the courts can be induced to ignore the spirit of the Code for its letter are doomed to disappointment. Courts are not what they used to be—and probably never were."), *with* Spear, *supra* note 93, at 246 (arguing that it is a vague doctrine operating only for the benefit of the Commissioner).

103. The business purpose doctrine appears as a requirement in the regulations for both acquisitive and divisive reorganizations. *See* Treas. Reg. §§ 1.368-1(b) (as amended in 2000) (acquisitive), 1.355-2(b) (as amended in 1989) (divisive). The nature of the requirement is much more vigorous within the context of divisive reorganizations.

104. Revenue Act of 1934, Pub. L. No. 73-216, 48 Stat. 680; Ways and Means Committee, H. Rep. of Dec. 4, 1933, 73 Cong., 2d Sess. (1933), *reprinted in* SEIDMAN, *supra* note 82, at 332–38 (three of eight scenarios representing tax avoidance transactions resembled *Gregory*, which was cited by name in the seventh scenario and offered as the basis for urging repeal of all provisions providing tax-deferred treatment for reorganizations). Dissatisfaction with the decision was significant enough to lead to the repeal of only that provision, even after the lower court was reversed. *See* H. REP. NO. 73-704 (1933), *reprinted in* SEIDMAN, *supra* note 82, at 338. Although repeal of the entire "reorganization" provision was urged, the remaining provisions survived. *See id.* (describing legislative efforts to prescribe permitted reorganization forms in detail but noting with displeasure the result and stating that "astute lawyers frequently attempted,

Gregory's importance could be limited if viewed narrowly as part of a tradition of nonliteral interpretations of the reorganization provisions.[105] Or, of slightly broader but still limited utility, if read to apply to statutes which must be fitted within the Code's unique structure.[106] Tax statutes are thus seen as distinct or at the extreme end of the continuum,[107] requiring a particular methodology of statutory interpretation with limited utility.[108] More interestingly, however, *Gregory* invites a re-consideration generally of statutory interpretation. Any text, whether part of a constitution or code, poses the same problem: by what method is the language of the text to be understood and interpreted; into what context must this text be read and integrated? This will become clear after a review of tax statutory interpretation of *Gregory*.

A code[109] (including the Internal Revenue Code) arguably requires a purposive interpretation cognizant of the it's overall

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especially during the prosperous years, to take advantage of these provisions by arranging in the technical form of a reorganization, within the statutory definition, what were really sales").

The Supreme Court decisions in the reorganization cases, *see e.g.*, Pinellas Ice & Cold Storage Co. v. Comm'r, 287 U.S. 462 (1933) (establishing continuity of interest and business purpose); Cortland Specialty Co. v. Comm'r, 60 F.2d 937 (2d Cir. 1932) (same), were cited with approval. H. REP. NO. 73-704 (1933), *reprinted in* SEIDMAN, *supra* note 82, at 338–39.

105. Bittker, *supra* note 102 (noting that it is commonly known that literal compliance with the reorganization provisions is insufficient).

106. *See* Zelenak, *supra* note 86, at 638–66 (advancing the theory that nonliteral interpretations may be permissible for the Internal Revenue Code because of tax statutory complexity, necessity of preserving underlying structure of the Code and fact that intended audience is comprised of specialists).

107. Michael Livingston, *Practical Reason, "Purposivism," and the Interpretation of Tax Statutes*, 51 TAX L. REV. 677, 679 (1996) [hereinafter Livingston, *Practical Reason*] (describing tax as one end of a continuum because it is "a detailed and programmatic legal code" but denying unique nature of tax).

108. Arguments for treating tax differently have been advanced by both courts and commentators. For example, on the sheer volume of the Code, see Deborah A. Geier, *Interpreting Tax Legislation: The Role of Purpose*, 2 FLA. TAX REV. 492, 511 (1995) [hereinafter Geier, *Purpose*]. On the Code as a code, see Zelenak, *supra* note 86, at 638 (noting that the meaning of a " 'single section of a statute in a setting as complex as that of the revenue acts, however precise its language, cannot be ascertained ... apart from related sections, or if the mind be isolated from the history of the income tax legislation of which it is an integral part' " (quoting Helvering v. Morgan's, Inc., 293 U.S. 121, 126 (1934)). On the issue of factual complexity, see Frankfurter, *supra* note 41, at 528 ("The imagination which can draw an income tax statute to cover the myriad transactions of a society like ours, capable of producing the necessary revenue without producing a flood of litigation, has not yet revealed itself.").

109. Given the increasing importance of codes—the Uniform Commercial Code, Bankruptcy Code, the Internal Revenue Code, etc.—it could be argued that any improvement in their interpretation would be beneficial. *See* Bruce Frier, *Interpreting Codes*, 89 MICH. L. REV. 2201 (1991) (discussing interpretive methods for the UCC and

structure precisely because of the interaction of specific provisions within the code of which they are necessarily only a part. Interaction of specific provisions within the larger code perhaps could justify a more structural or collaborative approach (precisely as a result of the need to respect the code's structure), whether because a creative judicial role in statutory interpretation is seen as normatively desirable, or because an approach based on practical reasoning that evaluates the text along with the code's overall purpose, is seen as justifying such an approach. The theoretical basis for the difference in these modes of interpretation lies not primarily in their use or non-use of extrinsic materials,[110] but in their view that the function or the "structure of the code" may suggest its own mode of analysis.

Professors Geier[111] and Zelenak[112] are among those arguing eloquently for a more structural approach; Professors Livingston[113] and Popkin[114] argue respectively for practical reason or a collaborative approach. Despite raising the very important question of how to interpret statutes that are part of a code, ultimately these proposals are in their own way raising the basic question of statutory interpretation already discussed: How should we interpret a text? If methods of textual interpretation raise issues of legitimacy, then what

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distinguishing between types of codes, those that seek systematic structure of law distinguished from simple regroupings of existing statutes). Frier notes the impact of codes on "fundamental issues of interpretation." *Id.* at 2210. According to German jurist Rudolph Sohm, an important method of working out a "rule of law" is by developing the wider principles, which the rule presupposes. *Id.* Once the rule's major premises are ascertained, the logical consequences of these premises provide an additional series of other legal rules not directly contained in the source of the rule itself. *Id.* This Article proposes a method of interpretation that will also develop wider principles that work equally well for statutes whether or not part of a code.

110. Tax scholars align themselves along a continuum of methods of statutory interpretation. It should be noted at the outset, however, that these methodologies uniformly do not reject the use of legislative history or external sources. Tax statutes are at once more complex and detailed than other statutes or a Constitution, yet tax scholars uniformly embrace extra-textual materials. Tax provisions thus provide a useful place to re-examine the assumption, frequently unstated, that language alone through greater detail can solve any problems of its inherent imprecision.

111. Geier, *Purpose*, *supra* note 108, at 492; Deborah A. Geier, *Commentary: Textualism and Tax Cases*, 66 TEMP. L. REV. 445 (1993).

112. Zelenak, *supra* note 86, at 623.

113. Livingston, *Practical Reason*, *supra* note 107, at 677; Michael Livingston, *Congress, The Courts, and The Code: Legislative History and the Interpretation of Tax Statutes*, 69 TEX. L. REV. 819 (1991).

114. William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541 (1988); *see also* Popkin, *supra* note 2, at 1133 (critiquing Scalia's "plain meaning" methodology).

method we use will ultimately determine whether we really are a government by rule of law.

Geier proposes no simple choice between textualism and purposivism.[115] Although she articulates a purposive approach, it must be distinguished from traditional intentionalism or purposivism.[116] Geier aims not simply to identify the purpose of a single statutory provision, but essentially interprets individual tax provisions so as not to damage the "fundamental structure underlying the income tax." By focusing on the larger structure, this structural purposivism echoes those who propose fitting any statute into the larger fabric of the law, in an almost common-law approach.[117] Disagreement about the nature of what constitutes the Code's essential characteristics is ultimately problematic.[118] Nonetheless, Geier argues that this structure, despite not being immediately transparent, is both determinate and determinable.[119] For example,

115. *See* Livingston, *Practical Reason*, *supra* note 107, at 684 (describing Geier's articulation as the "most sophisticated statement of the purposive argument"). Thus, Geier advocates no "one size fits all" approach to statutory interpretation, no "simplistic reduction" to a dichotomy between textualism and a purposive approach. Geier, *Purpose*, *supra* note 108, at 496. Giving effect to the statute's purpose may require various and alternative approaches, in Geier's view, including: 1) a textualist approach, 2) a nonliteral approach, 3) informing the express language of the statute with knowledge of its purpose, and 4) application of the common law principles (such as substance over form) where a literal interpretation does not yield results consistent with the provision's purpose. *Id.* at 496–97.

116. *See supra* notes 33–41 and accompanying text (describing intentionalism as purposivism in statutory interpretation).

117. *See* Geier, *Purpose*, *supra* note 108, at 497–502; *see also supra* note 72 (discussing Llewellyn's five factors).

118. *See* Geier, *Purpose*, *supra* note 108, at 497. Geier explains that the "fundamental structure" is the "theoretical construct that overarches the sum of the entire Internal Revenue Code and is intended to be captured by it." *Id.* This includes the distinction necessitated by our choice of an income, not a consumption, tax system; such distinctions as that between ordinary and capital income; and the realization requirement. *Id.*

Because, for example, these distinctions are not necessarily understood or accepted by all as part of the "structure" of the Code, the limitation to this approach becomes apparent—it falters in the absence of agreement by all parties affected by the Code. Geier herself notes the problem. *Id.* at 510–11. Nor does this method adequately address formalist concerns. *See supra* notes 41–45; *infra* notes 141–42.

119. On the one hand, by arguing that language is determinable, Geier distinguishes herself from deconstructionists who insist that definitive meaning is impossible while at the same time agreeing with the impossibility of an interpreter's ability to find only one meaning. On the other hand, by agreeing that language is determinate, Geier asserts only that there are a limited range of meanings for words in tax statutes, not that there is no possibility of ambiguity. Geier, *Textualism*, *supra* note 111, at 449 (rejecting Justice Scalia's ability to find language determinate and thus find clarity where others find ambiguity); *id.* at 488 (noting disadvantages of both "hard- core deconstruction" and "hard-core textualism"). Grier also contends that "[h]ard-core deconstruction insists upon a chaotic lack of definitive meaning, often in spite of the text. Hard-core textualism insists

Geier views the *Gregory* decision as correct because it comports with the fundamental structure of the Code, an income based system with a realization requirement that distinguishes between dividends and stock sales. Based on these structural features, the *Gregory* transaction should simply be re-characterized, and taxed, as a dividend. Thus, Geier argues that the decision in *Gregory* could be more convincingly explained as required by the Code's structure rather than through the articulation of the business purpose doctrine.[120]

Zelenak generally allows a nonliteral approach to tax statutory interpretation because "[t]he Internal Revenue Code has a way of saying one thing while seeming to mean something else."[121] His interpretive method recognizes tax interpretation not as distinct from statutory interpretation generally but requiring recognition that the complexity of the Code makes it more than "just another statute."[122] Zelenak describes the approach sanctioned by *Gregory*, and generally applied in the reorganization area, as one asking whether the literal language of the statutory provision comports with the structures and

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upon a single meaning arrived at by a sterile parsing of the statutory words often in spite of the factual and statutory context." *Id.*

120. Geier, *Purpose*, *supra* note 108, at 500–01 (citing *Gregory* approvingly). Geier argues that "[b]y providing one set of rules for dividends and another for corporate reorganizations, Congress implied in the statutory structure that there is a substantive difference between these two types of transactions." *Id.* Therefore, any "transaction that is in substance a dividend should be taxed as such." *Id.* Geier questions, however, the utility of the business purpose doctrine because "it is easy to come up with a business purpose when it is convenient to do so." *Id.* Ultimately, Geier argues that most common law doctrines are thus supportable by the structure rationale. *Id.*

121. Zelenak, *supra* note 86, at 624. Because of the contextual nature of interpreting provisions within a code, Zelenak concludes that "[s]ufficiently strong evidence can justify a contextual interpretation, even when that interpretation is irreconcilable with the statutory language," but cautions that "the greater the conflict between a proposed contextual interpretation and the literal language of the statute, the stronger the evidence for the contextual interpretation must be." *Id.* at 675. Ultimately, Zelenak argues for no "absolute rule" but greater candor, describing as "chaos" the current approach to statutory interpretation because of a lack of general "principles" for applying literal or contextual interpretation. *Id.* at 675–76; *see also id.* at 661–62 (noting the difficulty in discerning when underlying policies "permit or require nonliteral interpretation"); *id.* at 640–41 (cautioning that the flexibility of words may lead judges to reject reconcilable contextual interpretations).

122. Zelenak, *supra* note 86, at 630. Zelenak also distinguishes between complexity and the Code's direction at specific fact patterns. *Id.* at 675. This additional distinction seems especially important in tax. As Zelenak notes, "[j]udges who rely on statutory complexity as a reason for strictly adhering to the literal terms of a statute may be confusing statutory complexity with the question whether Congress considered and addressed a particular fact pattern in enacting the statute." *Id.* at 660.

policies of related provisions.[123] Such a structural approach has merit where the policies and structure are obvious. His discussion of *Gregory,* however, suggests his concerns with the limitation of, and corresponding ambivalence toward, a nonliteral, structural approach—because such an approach may lead to unrestrained "progovernment bias."[124]

Despite Geier's and Zelenak's call for recognition of tax statutes presence as part of the Code, other tax commentators object to any such structural approach. Livingston rejects as "radical purposivism" methods of "inductive reasoning that use[] the provisions of the code to derive general principles and policies that then may be applied to the resolution of specific legal problems."[125] The inductive reasoning method's elevation of scholars and experts to a status equivalent to the legislature is unacceptable. Because Livingston rejects tax's uniqueness, what might otherwise be termed "tax essentialism,"[126]

123. *Id.* at 668–70.

124. *Id.* at 667–68. Zelenak cites *Gregory* as "the most influential case in the development of the progovernment interpretive bias" and notes that "[t]he spirit of *Gregory* has infused the entire law of the tax treatment of corporate reorganizations." *Id.* Zelenak specifically attributes the courts' willingness to require nonliteral interpretations within the reorganization area to *Gregory. Id.* at 668. Finding this appropriate within the context of reorganizations, Zelenak nevertheless articulates the frequent complaint that a nonliteral approach tends to favor the government over individual taxpayers. *Id.* at 669–70.

125. Livingston, *Practical Reason, supra* note 107, at 688. Livingston objects to the use of inductive reasoning by "tax cognoscenti" working from the code's principles to trump plain statutory language in what he describes as "radical purposivism." *Id.* at 709. In addition to questioning the validity of a purposive approach, Livingston questions the legitimacy of any approach that seems to confer legislative authority on scholars and experts. He describes the limits of purposivism generally as including three problems: 1) descriptive (does it adequately describe the results of tax cases), 2) practical (does it yield positive long-term results), and 3) theoretical (questioning tax cognoscenti interpreting underlying principles to trump plain meaning). *Id.* at 701–12.

126. If tax can make no claim to special status, the importance of the Code as justifying a structural or inductive method of interpretation is undercut. Livingston's current rejection of tax's special nature stands in stark contrast to his earlier detailed exposition of the tax legislative process as making a very persuasive case for why tax is different. *Id.* at 679. Citing *Gregory,* Livingston described it as the classic case of contextual interpretation, an approach to tax statutory interpretation that was not only proper but the dominant one because "[f]ew if any tax terms have a plain meaning that can be divorced from the statutory and decisional context in which the terms arise." Livingston, *supra* note 113, at 830–31. He then identified the following distinguishing characteristics of tax: first, its "complex and constantly changing character;" second, the necessarily "contextual style of tax interpretation" needed to account for Treasury regulations, prior judicial opinions, and "the broader structure" of the statute; finally, the "conceptual nature" of the tax legislative process because "members of Congress set only general guidelines for both the statute and legislative history." *Id.* at 822. No literal or plain meaning approach to interpretation would result in either the individual case or the statutory provision being fit

openly rejecting his earlier assessment based on the special nature of the tax legislative process, he argues that Eskridge and Frickey's method of "practical reason" is all the more attractive as a realistic method that recognizes tax's competing concerns.[127] He distinguishes a "practical reason"-based method from purposivism because of practical reason's refusal to elevate any one interpretive perspective, including the Code's structure.[128] Although recognizing strong similarities between the two, Livingston offers practical reasoning as a "more realistic (if less exalted) version" preferable to any structural approach, precisely because it openly acknowledges that tax law is a product of practical compromises.[129]

Popkin offers a model of interpretation that is structured and above all normatively collaborative, based on the contingent process of interpretation, but one that recognizes the necessarily creative role of judges who operate based on a community of principle.[130] Popkin thus represents a distinct voice in statutory interpretation based on the contributions of those critics (whether deconstructionists or philosophical hermeneutics)[131] challenging the determinacy of language and others, especially Dworkin, who propose as a solution for problems of interpretation the development of a community of principle.[132] Popkin thus places statutes firmly within the common law.[133] Popkin approves of *Gregory*, especially Judge Hand's analogy of statutory interpretation to music, regarding it as the "classic criticism of literalism," despite objections that contextual readings

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into the entire matrix that is "tax law" (regulations, judicial and administrative decisions and legislative history). *Id.*

127. Livingston, *Practical Reason*, *supra* note 107, at 720–24; *see* Eskridge & Frickey, *Practical Reasoning*, *supra* note 7, at 332–39; *supra* notes 68–74 (discussing practical reason).

128. Livingston defines practical reason in the context of interpreting tax as allowing courts to consider a variety of interpretive factors, including the age of the Code (thereby allowing greater weight for an evolutive perspective), the existence of a "unified tax code" (not simply a series of distinct statutes), and the revenue effects associated with decisions. Livingston, *Practical Reason*, *supra* note 107, at 720–21.

129. *Id.* at 723.

130. Popkin, *supra* note 114, at 543.

131. *See supra* note 4 (discussing the postmodern critics challenge to the determinacy of language).

132. DWORKIN, LAW'S EMPIRE, *supra* note 18, at 195–215; DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 28, at 81–84.

133. Popkin, *supra* note 114, at 580 (proposing an approach that combines aspects of critical legal study's contingency of meaning with Dworkin's community of principle). Popkin's approach is controversial not because he recognizes that judges import their own values, but because he views this as normatively desirable. *Id.* at 590.

upset "reliance" concerns (what we might term formalist concerns by another name).[134]

Whether considered through the lens of contextual, structural, or practical reasoning interpretation,[135] the result in *Gregory* is likely to be the same. Those who disapprove of the result in *Gregory*—who might be loosely described as "textualists"[136]—are, however, in agreement about *Gregory*'s limitations. Describing *Gregory* as a landmark case that has been frequently used by courts to justify "antitextual" readings of the Code,[137] Coverdale utters a plea for textualism.[138] Beginning from the statutory language at issue in

134. *Id.* at 592; *see also id.* at 592 n.213 (distinguishing literalism, which "wrenches a word completely out of context," from plain meaning, which requires examination of context, both internal and external). Because background considerations—including consideration of purpose—may unsettle statutory plain meaning, reliance interests argue for adhering to the statute's literal meaning. Popkin argues against weighting "reliance interests"—the importance of "certainty of legal rules"—to defeat a contextual reading since such interests are weaker when tax avoidance is a serious concern (as today). *Id.* at 599–600. In tax discussions generally, formalist concerns are voiced in language based on a taxpayer's right to rely on the literal language of the statute. *See* Weisbach, *Formalism*, *supra* note 88, at 875 (discounting the importance of reliance concerns in tax).

135. Earlier, Livingston argued for a contextual mode of interpretation in tax. Livingston, *supra* note 113, at 830 n.49 (citing *Gregory* as the classic nonliteral interpretation). In *Practical Reason* he does not discuss *Gregory*, but an application of his factors to be considered in interpretation does not suggest a different result. *See supra* notes 125–26.

136. "Textualist," as used here, is a term of convenience that describes a presumed attitude of deference to the statutory text. Certainly, while Coverdale, Isenbergh, and Hariton may place greater emphasis on the text than their contextualist counterparts, they do not seem to share Justice Scalia's abhorrence of legislative history. *See infra* notes 142–43 (discussing Coverdale's definition of modern textualism); *infra* notes 144–52 (discussing Isenbergh).

137. John F. Coverdale, *Text as Limit: A Plea for a Decent Respect for the Tax Code*, 71 TUL. L. REV. 1501, 1502 (1997) ("For more than sixty years courts have cited *Gregory v. Helvering* to justify reading the tax laws in ways their texts simply will not bear."); *id.* at 1503 (noting that *Gregory* is used as justification for reading provisions in the Code in ways that "fall outside the range of meanings that their text, taken in context, has in ordinary speech or in other provisions of the Code"); *id.* at 1507–08 (indicating that analysis of *Gregory* "reveals significant reasons for questioning whether the decisions could be said to reflect even probable congressional intent or purpose"); *id.* at 1529 (indicating that *Gregory* and its progeny "exemplify the pernicious tendency of courts interpreting the Code to ignore Congress's commands to achieve the results they consider desirable"). Coverdale is not troubled by the use of extrinsic material, including material outside of the legislative process, to buttress his claim. *See id.* at 1533–35 (explaining that statutory changes enacted between 1921 and 1924 prompted by congressional desire to impart clarity and certainty to this area of the law). At least based on the materials deemed acceptable, Coverdale would seem to be a textualist of quite a different stripe than Justice Scalia.

138. *Id.* at 1501. He distinguishes his "rule against antitextual interpretations" from "naive plain-meaning," that presupposes no interpretation. *Id.* at 1513. Describing naive plain-meaning as "an impoverished view of interpretation that fails to recognize that all

Gregory, Coverdale asserts that by defining "reorganization" with the word "means," Congress provided therein all the necessary and sufficient elements of that provision. For Coverdale, Congress could hardly have indicated more clearly that all conditions, both necessary and sufficient, were expressly set forth.[139] As a result, Coverdale concludes that "[t]he *Gregory* court's reliance on arguments about 'underlying presuppositions' to justify reading a business purpose requirement into a definition that includes no such requirement is a case of a court taking a pencil to the statute to correct what it considers to be Congress's mistake."[140] Accordingly, Coverdale urges the adoption of a "rule against antitextual interpretations." Coverdale's justifications for textualism are the same as those offered generally by textualists. First, as the enacted text, the statutory language has unique claims to legitimacy.[141] Second, statutes, including the Code, that appear generally in the form of rules should not be interpreted as standards.[142] Finally, there is no need for courts to go beyond the statutory text given the frequency of post-enactment legislation, which provides Congress with opportunity to correct any errors.[143]

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interpretation involves a dynamic interaction of reader and text with both objective and subjective aspects," he thus describes himself in terms similar to those used by Justice Scalia. *Id.* at 1514; *supra* notes 53–56.

139. Coverdale, *supra* note 137, at 1532. Coverdale offers no support for his assumption that Congress intended to indicate a shift to all necessary and sufficient conditions by substituting the word "means" for "includes" in the 1924 changes. *Id.*

Cunningham notes that to qualify as a definition, a statement must include the necessary and sufficient conditions. Cunningham, *supra* note 17, at 1590. *But see infra* notes 268–72 and accompanying text (explaining that as homonyms, the necessary and sufficient conditions of "reorganization" cannot be limited to the express language of the statute).

140. Coverdale, *supra* note 137, at 1533.

141. *Id.* at 1515–21. Textualism's justification based on legitimacy arguments and constitutional requirements are similar to those advanced by Justice Scalia. *See supra* notes 37–38, 41–44. For a discussion of the limitations inherent in these arguments, see *supra* notes 66–67.

142. Coverdale, *supra* note 137, at 1522–25. Placing great emphasis on the "rule-like" nature of the Code, Coverdale argues that the "highly formal rules" result in economically equivalent transactions being treated quite differently by reason of their form. *Id.* at 1522. While recognizing that judges "simply free to do justice" might arrive at different results, Coverdale argues that the decision to adopt rules mandates respect of those rules. *Id.* at 1523. The importance of both notice and predictability argue against courts relying on purpose, intent, or policy in reading the enacted language in a way that "the words will not bear." *Id.* at 1510, 1524–25. Repeatedly stating this as the standard, or rule, for statutory interpretation, Coverdale unfortunately provides little guidance on how to discern the difference within the context of the Code. *See, e.g.*, *id.* at 1503–04.

143. *Id.* at 1525–28 (noting the frequency of major tax bills in recent years). Although he acknowledges the difficulty of passing legislation, Coverdale rejects this as an argument

Isenbergh, musing on the doctrine of substance over form and not proposing a general theory of statutory interpretation,[144] distinguishes between statutes by asking whether statutory terms draw their meaning from the statute itself or the real world: if from the statute itself, statutory terms of art define both form and substance.[145] Because there is no "natural law of reverse triangular mergers,"[146] Isenbergh initially classifies the reorganization statutes as creatures without real-world antecedents.[147] Because the statute draws from itself and not from the real world, enlarging the statutory language by the addition of the business purpose requirement is therefore inappropriate. Isenbergh frames the question in this way: Is the 1928 statute self-contained?[148] If yes, Gregory should win. If the term "reorganization" is "bounded to some extent by its antecedents in the world," the government should win.[149] By concluding that it is a close call, Isenbergh ultimately retreats from his characterization of the reorganization provisions as self-contained, without any real world antecedents, thereby calling into question the utility of his initial classification.[150] In the end, what is most troubling

for broader interpretation. *Id.* at 1527; *see supra* notes 37–44 (discussing legitimacy issues).

144. Joseph Isenbergh, *Musings on Form and Substance in Taxation*, 49 U. CHI. L. REV. 859 (1982) (reviewing BORIS I. BITTKER, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS (1981)) (noting origin of substance over form doctrine, that form of transaction will not be allowed to defeat its substance, as deriving from general agreement among both tax lawyers and theorists that the tax revenues should not be "defeated by certain entirely artificial maneuvers" and identifying as the more difficult question how to discern whether the substance of any particular transaction is consistent with its form).

145. *Id.* at 879 (stating "[t]he most important inquiry at the threshold is whether a statutory provision draws its meaning from the terms of the statute itself or (and to what extent) from outside"); *see also id.* at 864–65 (distinguishing terms imported into the Code from the real world from those that are "creatures of art"). Unfortunately, nowhere does Isenbergh offer any rules or standards for determining whether a statute is self-contained or bounded by real-world antecedents.

146. *Id.* at 879.

147. Surely Isenbergh does not mean that Congress created random, apurposive rules to define those transactions to which it granted preferred tax treatment. For a more complete discussion of some of the real world concerns motivating the evolution of the statute governing reorganizations, see Steven A. Bank, *Federalizing the Tax-Free Merger: Toward an End to the Anachronistic Reliance on State Corporation Laws*, 77 N.C. L. REV. 1307 (1999) (describing the competing concerns motivating the statutory changes, including the broader range of business transactions covered by these provisions as well as the desire to limit their benefits, including their inappropriate uses in triggering loss recognition).

148. Isenbergh, *supra* note 144, at 868.

149. *Id.*

150. Isenbergh concedes it is a close call. *Id.* at 868. Nevertheless, on the basis of the means/includes distinction, Isenbergh seems to prefer an apurposive rule:

to Isenbergh is the introduction of tax avoidance or taxpayer motive generally in such cases and the resulting license afforded to judges by non-textual interpretations.[151] Indeed, *Gregory* epitomizes for Isenbergh not only the generally sorry state of statutory interpretation, but also the failure of the judiciary to respect its appropriate sphere.[152]

The logical extension of Isenbergh's identification of self-contained statutes allowing no reference beyond their four corners is a method of statutory interpretation that satisfies formalist concerns, whether motivated by efficiency, anticonsequentialist, or apurposive concerns.[153] Such pure formalism might appear attractive, if the rule

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> As an abstract proposition, it is not immediately obvious why a division of corporate assets would have to be germane to the conduct of the remaining business or even what it means to be germane ... what is meant by germane [is] that the end of a reorganization as such cannot be tax avoidance. This also is far from self-evident, however, for the whole point of the reorganization provisions in the Code is to make certain transactions tax-free.

Id. at 869; *see also* Steven M. Surdell, *The Emerging Role of Business Purpose in Corporate Tax-Motivated Transactions*, 431 PLI/TAX 1133, 1144 (1998) ("It is significant to note, however, that by enacting provisions such as the reorganization provisions, Congress could be seen to have granted those transactions special status so that tax avoidance motives are less relevant.").

Isenbergh's analysis seems to ignore the historical context of the reorganization provisions. Even prior to *Gregory*, Congress wrestled with the process of successfully writing a statute to govern tax-deferred divisive reorganizations so as to permit necessary business reorganizations while not allowing their use for transactions that do not meet a "business exigency" standard. *See supra* note 82.

151. Isenbergh, *supra* note 144, at 863. Isenbergh is most troubled by the business purpose doctrine as providing an anti-tax avoidance doctrine. *See also id.* at 870 (decrying subsequent decisions using *Gregory* to "attack perceived 'bad' features of transactions").

152. On the matter of judicial license, see *id.* at 880 (rejecting gap-filling by the courts to preserve fisc as justification for "extrastatutory or remedial forays"). *See also id.* at 882 (describing judicial aspirations); *id.* at 883 (describing *Gregory* as nothing less than the reason for the sorry state of current statutory interpretation and judicial excess).

153. *See* Pildes, *supra* note 42, at 607 (describing divergent views of formalists as making it implausible to see "any unified, coherent vision of modern legal formalism"). Pildes identifies three modes of formalism: (1) formalism as anticonsequential morality in law, (2) formalism as apurposive rule-following, and (3) formalism as a regulatory tool for producing "optimally efficient mixes of law and norms." *Id.* Pildes notes that preference for formalism, as well as for rule-following, makes sense in "conditions of distrust." *Id.* at 614. This is certainly the case within tax. Tax textualists might be better denominated as tax formalists since as a group they share a greater distrust of the judiciary than of legislative history or extrinsic sources. *See also* David P. Hariton, *Sorting Out the Tangle of Economic Substance*, 52 TAX LAW. 235 *passim* (1999) (analyzing the economic substance doctrine in light of *ACM v. Commissioner*, 157 F.3d. 231 *passim* (3d Cir. 1998)). Hariton alternatively seems to identify apurposive and anticonsequentialist concerns. A commitment to a "relatively objective system" militates against overturning "technical" results. Hariton states:

> [t]he taxpayer, we believe, is entitled to rely on the rules and the answers to which those rules give rise. She should not be denied beneficial tax results which

of law did not depend on the effectiveness of the law. Instead, the failure of this pure "rule-oriented approach" in tax, forcefully stated by Weisbach[154] and Levmore,[155] calls into question the validity of such a formalist approach. Indeed, failed formalism creates only a rule of men where those capable of manipulating the rules do so for their own narrow advantage.[156]

Describing tax as the "paradigmatic system of rules," Weisbach nonetheless concludes that a "purely rule-oriented approach" has failed, whether analyzed on efficiency grounds or respect for the law.[157] Weisbach applies an economic[158] analysis to consider the relative efficiency of rules or standards in tax.[159] Weisbach performs a

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she stumbles upon, or, even seeks out, in the course of her legitimate business dealings, even if those results are obviously unanticipated, unintended or downright undesirable.

Id. at 237. His description of the realization requirement suggests a more apurposive formalism, stating that "the timing of realization is essentially formalistic, and the proposition that taxpayers are getting away with something to which they are not properly entitled when they use transactions to alter the timing of realization is therefore dubious." *Id.* at 254.

154. Weisbach, *Formalism*, *supra* note 88, at 860.

155. Saul Levmore, *Double Blind Lawmaking and Other Comments on Formalism in the Tax Law*, 66 U. CHI. L. REV. 915 *passim* (1999).

156. Increasing statutory complexity that allows the well-advised to manipulate the rules for their narrow advantage with the resulting loss of respect for the system's ability to function as a whole contributes nothing at all to the rule of law. For a description of the nature of current tax law as "niggardly, complex, and narrow of spirit," see Harition, *supra* note 153, at 237; *infra* note 157. For the increasing disrespect accorded tax law, see MICHAEL J. GRAETZ, THE DECLINE (AND FALL?) OF THE INCOME TAX 7–8 (1997) (noting as serious the pervasive problem of disrespect when the tax system is dependent on taxpayers' voluntary complicance).

157. Weisbach, *Formalism*, *supra* note 88, at 860 (defining failure as taxpayers' ability to manipulate endlessly the rules to produce results not intended by the drafters). This failure is inefficient, resulting in a loss of revenue and demoralizing others. Even Hariton, who argues for a highly formalistic perspective in the application of tax statutes, recognizes the difficulties of a rule-based system in an increasingly complex business world where the consequences of our failure to maintain limits results in:

(1) an increasingly defensive set of rules—niggardly, complex and narrow of spirit—designed with a view to potential abusers, real and imagined; (2) an increasingly inequitable allocation of tax liabilities, with relatives benefits inuring to bigger taxpayers that are able and willing to enter into costly tax-motivated transactions; and (3) primarily as a result of (2), an erosion of confidence in what is functionally a self-enforced honor system of determining tax liabilities.

Hariton, *supra* note 153, at 237.

158. By "economic approach," Weisbach considers whether anti-abuse rules are welfare maximizing. Weisbach, *Formalism*, *supra* note 88, at 862. Weisbach is not offering a theory of statutory interpretation, although he notes that the literature on anti-abuse provisions is frequently found within statutory interpretation scholarship. *Id.* at 861 n.3.

159. *Id.* at 865–72. Weisbach considers the work of Isaac Ehrlich and Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 265 (1974)

useful, indeed essential, service—forcing us to examine the consequences of a choice between rules and standards in tax. A conclusion that rules are inefficient appears somewhat counterintuitive, even when considered in light of Kaplow's analysis that challenges assumptions of the inherent nature of rule simplicity and standard complexity.[160] Rules should be more efficient than standards, given the numerous transactions to which tax rules apply. The counterintuitive result that rules are inefficient in tax arises precisely because in tax, by their very particularity, rules must be more complex than standards. Because of tax arbitrage, taxpayers exploit discontinuities that result from gaps in tax rules. As a result, tax rules must necessarily become increasingly complex because they cannot afford to overlook the uncommon.[161] And, as Weisbach demonstrates, once the discontinuities in tax are identified, the uncommon becomes common.[162]

(arguing that rules reduce cost and simplify prediction); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J., 557 568–88 (1992) (arguing there is no necessary connection between complexity and the use of either rules or standards). Weisbach concludes that, in tax at least, rules are more complex and inefficient than standards. Weisbach, *Formalism*, *supra* note 88, at 861–63.

160. Kaplow questions the assumption that *a priori* rules are simple and standards are complex. Kaplow, *supra* note 159, at 588–90. Because rules may be highly complex while standards can be quite simple, Kaplow urges that we hold constant the law's content, including its complexity, and keep separate the choice between rules and standards. *Id.* at 621–23. Kaplow asserts that the only difference between rules and standards is whether costs are incurred ex ante or ex post. *Id.* at 593–96. On this basis alone, rules should always be more efficient in tax where any given rule will be applied to significant numbers of transactions. *See* Weisbach, *Formalism*, *supra* note 88, at 865–66 (summarizing Kaplow's thesis in the context of tax rules and standards). Weisbach challenges Kaplow's distinction between content and complexity precisely because of the common versus uncommon distinction created by rules but not by standards. *Id.* at 866–67. Because very complex rules must be created to avoid overlooking the uncommon and because the government as the first-mover necessarily operates with incomplete information, rule complexity results in significant inefficiencies in tax. *Id.*

161. Weisbach uses as one example of rule complexity the partnership rules governing "mixing bowl" transactions. I.R.C. § 721 (1994 & Supp. IV 1998) (establishing rules for tax-free contributions); I.R.C. § 731 (1994 & Supp. IV 1998) (establishing rules for distributions). To prevent their manipulation to achieve sale-like results, a series of complex rules have been added to prevent sale-like transactions. I.R.C. § 704(c)(1)(B) (1994 & Supp. IV 1998); Treas. Reg. § 1.704-4 (as amended in 1997). More problematic are positions in financial contexts where avoiding discontinuities, even with complex rules, is extremely difficult. For example, a taxpayer's ability to obtain interest deductions by borrowing money to purchase a financial interest with deferred interest income is very difficult to prevent absent anti-abuse standards. For a simple example, see Knetsch v. United States, 364 U.S. 361, 362–64 (1960) (denying a deduction for interest expense to purchase annuity from same company that lent funds in order to generate deductions in advance of interest income).

162. Weisbach, *Formalism*, *supra* note 88, at 869.

In particular, Weisbach then considers the use of anti-abuse[163] rules (more properly called standards) to limit tax avoidance and concludes that anti-abuse provisions are efficient and could even appropriately be read into tax statutes.[164] Because rules, even where they are complex and detailed, create discontinuities in tax and discontinuities are exploited by taxpayers, "uncommon transactions" become common.[165] Standards, including anti-abuse provisions, are "fuzzy at the borders." As a result, they not only decrease tax arbitrage but are more efficient since they reduce complexity within the law.[166] Thus, the problems with a complex, detailed rule-based system provide a salutary reminder of the consequences generally of our choice of methods of statutory interpretation. Unwieldy complexity may yield only increased disrespect for the rule of law.

Given the failure of a "purely rule-oriented" approach, a failure conceded by some formalists, and given that those advocating a more

163. Anti-abuse rules, appearing in both Code provisions and in tax regulations, allow the government to override the literal language of the statute or regulation if a taxpayer uses a transaction for tax avoidance purposes contrary to the purpose of the statute or regulation. *Id.* at 860.

Treasury regulations contain examples of anti-abuse provisions, the most notable being the partnership anti-abuse regulation, the promulgation of which occasioned a great deal of discussion about the merits of anti-abuse provisions generally. *See* Treas. Reg. 1.701-2 (as amended in 2000). For a discussion of anti-abuse provisions, see Sheldon I. Banoff, *The Use and Misuse of Anti-Abuse Rules*, 48 TAX LAW. 827 (1995) (discussing whether the Internal Revenue Service should use anti-abuse rules and, if so, under what conditions); Frank V. Battle, Jr., *The Appropriateness of Anti-Abuse Rules in the U.S. Income Tax System*, 48 TAX LAW. 801 (1995) (questioning the effectiveness of anti-abuse rules which require such specificity in explication that they only lead to more abusive transactions); Kenneth W. Gideon, *Use, Abuse, and Anti-Abuse: Policy Considerations Affecting the Nature of Regulatory Guidance*, TAXES, Dec. 1995, at 637 (arguing that anti-abuse rules are a second-best solution but may be necessary); Daniel Halperin, *Are Anti-Abuse Rules Appropriate?*, 48 TAX LAW. 807 (1995) (discussing the literalism versus purposivism debate in the context of anti-abuse rules as inseparable from a discussion of methods of statutory interpretation); William F. Nelson, *The Limits of Literalism: The Effect of Substance over Form, Clear Reflection and Business Purpose Considerations on the Proper Interpretation of Subchapter K*, TAXES, Dec. 1995, at 641 (arguing that partnership anti-abuse provisions are inappropriate and supplant current law); Pamela Olson, *Some Thoughts on Anti-Abuse Rules*, 48 TAX LAW. 817 (1995) (exploring the history, significance, and effect of anti-abuse rules).

164. Weisbach, *Formalism*, *supra* note 88, at 884. Weisbach does not necessarily suggest the wholesale judicial application of anti-abuse provisions. Because anti-abuse provisions are not always appropriate, courts might not accurately apply them in all cases.

165. *Id.* at 869–71.

166. For a discussion of the evolution of the law from standards to rules to standards within the context of a discussion of the organic development of Subchapter C of the Internal Revenue Code, see Clark, *supra* note 85; see also Bayless Manning, *Hyperlexis and the Law of Conservation of Ambiguity: Thoughts on Section 385*, 36 TAX LAW. 9, 11 (1982) (defining problem with hyperlexis [elaboration]: efforts to eliminate ambiguity through the use of detail only create more ambiguity and are thus doomed to failure).

contextual approach have failed to articulate a method of statutory interpretation that is sufficiently determinate and bounded on a theoretical, as well as practical, basis to satisfy formalist concerns, what is the next step? A re-consideration of the reorganization provision at issue in *Gregory* through an Aristotelian lens will yield an alternative means of analysis that has much to offer statutory interpretation generally.

III. ARISTOTELIAN ANALYSIS

A. Introduction

The utility of Aristotle and Aristotelian writings to current issues of statutory interpretation has not gone unnoticed.[167] Aristotle's importance should not be surprising given his attention to theories of language and proof, which were critical to the system of logic he developed. Dialectic, argumentation and reasoning based on accepted premises, is a natural way to proceed in a forensic or legal setting.[168] Aristotle's careful attention to sophistic fallacies and philosophical errors relating to linguistic ambiguity[169] are as helpful today for the judge parsing statutory language as they were for the rhetorician of fifth and fourth century Athens.[170] In short, Aristotle

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167. *See supra* note 7 (discussing Aristotle's importance for different methods of statutory interpretation and quoting Frank for his view that modern work in the area is but a restatement of what Aristotle said).

168. *See supra* note 10 (discussing Aristotle's importance in the area of logic); *infra* notes 169–70, 204 (discussing dialectic).

169. Philosophical errors often originate from equivocity. *See infra* note 174 (discussing modern terminology: ambiguity and vagueness). Anyone recognizing such errors has obvious advantages over his opponents. Aristotle places much emphasis on clarity in logic and language as a necessary precondition for successful reasoning and debate. In this he follows in a well-established tradition that includes Plato and the Sophists. For example, Aristotle begins the *Topics* as follows: "The purpose of the present treatise is to discover a method by which we shall be able to reason from generally accepted opinions about any problem set before us and shall ourselves, when sustaining an argument, avoid saying anything self-contradictory." ARISTOTLE, TOPICS I.100a18–21 (E.S. Forster ed. & trans., Harvard University Press 1997) (1960). On the sophists and the tradition leading up to Aristotle, see W.K.C. GUTHRIE, THE SOPHISTS (1971) (including a discussion of the sophists that may well remind modern scholars of the deconstructionists' rejection of determinacy of meaning).

170. *See* ARISTOTLE, RHETORIC 1354a14–15 (John Henry Freese trans., Harvard University Press 1982) (1926) (describing dialectic argumentation as main body of rhetorical persuasion); Smith, *supra* note 10, at 59–60; *see also* THOMAS COLE, THE ORIGINS OF RHETORIC IN ANCIENT GREECE 10 (1991) (describing rhetoric as compounded out of skills that require ability to produce premises and inferences that a deliberative or judicial body is likely to accept). The active law courts of ancient Greece

represents a tradition closely linked with our own legal, logical, and philosophical tradition and as such has much to offer.[171]

Despite Aristotle's recognized contribution to logic and language generally and the importance of these contributions specifically to the legal academy, there has been a dearth of scholarship covering Aristotle's extensive discussion of "words spoken in many ways." Only recently[172] have commentators adequately addressed Aristotle's extensive discussion[173] regarding both the importance of and methods for distinguishing "multivocal"[174] words—words we might describe as "equivocal" or "ambiguous," because they do not admit of one single meaning. Aristotle's important contribution to the understanding of all uses of language on the one hand and statutory language on the other hand, is to identify a middle ground—termed associated homonyms—between univocity and equivocity. This middle ground, associated homonyms, exists between discrete homonyms (whose definitions are distinct) and synonyms that require univocity. Aristotle thus offers a welcome voice in modern discussions of statutory interpretation, which have not yet recognized associated homonyms. Absent Aristotle's contribution in identifying a class of homonyms that offer the possibility of resolving ambiguity through

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required skill in questions of argument, evidence, confirmation, and refutation—precisely the training provided by dialectic and rhetoric.

171. *See supra* note 18 (discussing familiarity of philosophical modes of thought in legal discourse).

172. Until recently, there was limited discussion of "words spoken in many ways," a topic that pervades much of Aristotle's corpus. Now thanks to Christopher Shields, who has systematically considered the topic throughout Aristotle's corpus, it is possible to apply a unified analysis of Aristotelian homonymy beyond Aristotle. CHRISTOPHER SHIELDS, ORDER IN MULTIPLICITY: HOMONYMY IN THE PHILOSOPHY OF ARISTOTLE (1999). Much of the following analysis relies heavily on Shields's work. Important earlier discussions of homonymy can be found chiefly in Terence Irwin, *Homonymy in Aristotle*, 34 REV. METAPHYSICS 523 (1981), and in the seminal work of G.E.L. Owens, *Logic and Metaphysics in Some Earlier Works of Aristotle*, *in* ARISTOTLE AND PLATO IN MID-FOURTH CENTURY 163–90 (I. During et al. eds., 1957), *reprinted in* LOGIC, SCIENCE, AND DIALECTIC (Martha Nussbaum ed., 1986).

173. On the importance of homonymy in Aristotle's entire corpus and the development of his metaphysics, a topic beyond the scope of this Article, see, for example, SHIELDS, *supra* note 172, *passim*.

174. Multivocal, because they are without a single meaning, is an easier term for what Aristotle frequently describes as "words spoken of in many ways" (*pollakis legomenon*). Modern commentators prefer "vague" or "ambiguous." For examples of cases using "vague" or "ambiguous" to describe language, see Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, 467 U.S. 837, 862 (1984) (stating "we know full well this language is not dispositive"); United Steelworkers v. Weber, 443 U.S. 193, 217 (1979) (Burger, C.J., dissenting) ("Often we have difficulty interpreting statutes because of imprecise drafting or because legislative compromises have produced genuine ambiguities."). *See also* Karkkainen, *supra* note 53 (discussing "ambiguity" and the use of legislative history).

their association, the discussion of how to resolve issues of interpretation remains at a stalemate between those who assert univocity and others who maintain that such assumptions are unrealistic.[175] Aristotle provides us with analytical tools for more complex linguistic and philosophical understanding.

Homonyms present a class of equivocal words. An example of a common, discrete homonym that is easily recognized, easily resolved and thus generally dismissed as unhelpful, is the word "bank" (as in, "river bank" and "savings bank")—the name given is common but the account of being that corresponds to the name (i.e., river bank or savings bank) differs.[176] Aristotle's important contribution is the identification within homonymy generally of a class of homonyms (associated homonyms) that can help us rethink issues of equivocity and ambiguity and, in the process, refine our ability to understand language. In modern discussions of statutory interpretation, discrete homonyms are recognized as creating, by their ambiguity, the possibility of confusion, but generally capable of easy resolution or, if not, of little utility. H.L.A. Hart provides the fullest account, but does not appreciate the associated nature of some homonyms, seeing no middle ground between discrete homonyms and synonyms.[177]

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175. *See supra* note 28 (discussing hard cases).

176. Aristotle discusses homonymy early and develops his theory of homonymy throughout his work. Aristotle's important contribution is the identification of both discrete (unrelated) and core-dependent (associated) homonyms. For example, in the *Categories* (generally considered an early work), Aristotle distinguishes homonymy and synonymy: "Those things are called homonymous of which the name alone is common, but the account of being corresponding to the name is different .... Those things are called synonymous of which the name is common, and the account of being corresponding to the name is the same." SHIELDS, *supra* note 172, at 11 (translating and discussing ARISTOTLE, CATEGORIES Ia1–4); *see infra* note 185 and accompanying text (discussing "healthy" as an incorrect example of synonymy, as defined by Aristotle).

177. Hart, for example, provides the fullest account but does not distinguish a middle ground (*tertium quid*) between "mere homonyms" (discrete homonyms that are easily identifiable) and what Aristotle would describe as a synonym, thereby demonstrating a mistaken notion of univocity. Hart, *supra* note 16, at 38 n.1. Hart describes the alternative use of the homonymy of important legal concepts as:

> the mistaken belief (false not only of complex legal and political expressions like "law," "state," and "nation," but of humbler ones like "a game") that if a word is not a mere homonym then all the instances to which it is applied must possess either a single quality or a single set of qualities in common.

Id. Hart's description here acknowledges only discrete homonymy and synonymy (and no *tertium quid*) and thus helps us realize our failure to recognize Aristotle's contribution: establishing a definition of homonymy that recognizes it as more than mere homonymy and thus establishing the importance of not only the non-univocity but also the associatedness of key words. *See infra* notes 219–26 (discussing associated and core-dependent homonymy and recognizing its importance as distinct from either mere homonymy or synonymy).

Consideration of Aristotle's extensive discussion of homonymy, and above all his important contribution in recognizing associated homonymy, will thus be a useful starting point.

A discussion of why Aristotle's recognition of both discrete (unrelated) and associated homonymy is important will also be considered.[178] This will lead to a consideration of Aristotle's approach to methods and levels of definition:[179] understanding levels and functions of definition will in turn help clarify how we should approach issues of definition, including priority within definitions and among homonyms.[180] Ultimately, combining aspects of Aristotle's theories of language and signification, definition and priority will allow us to reconsider the statutory term "reorganization."[181]

B. Homonymy

Aristotle clearly distinguishes homonyms from synonyms.[182] What is initially unclear is how Aristotle defines homonyms and why

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Current discussions of homonymy recognize only the less interesting and less helpful discrete homonyms. *See* SCALIA, INTERPRETATION, *supra* note 25, at 26 (discussing an example of discrete homonyms within his discussion of the canon of statutory construction known as *noscitur a sociis* (a word is known by its companions)). Scalia argues, "If you tell me, 'I took the boat out of the bay,' I understand 'bay' to mean one thing; if you tell me, 'I put the saddle on the bay,' I understand it to mean something else." *Id.*; *see also* Cunningham, *supra* note 17, at 1610 (discussing empirical research on "enterprise" and noting that disagreement among respondents about its meaning is not "result of speakers choosing between two meanings which all speakers use, as is the case of homonym pairs like bank as the land edge next to a river and bank as a financial institution"). This "homonym pair" (river bank and savings bank) is frequently used by Shields, but only as a discrete homonym, not the more interesting associated homonyms of importance to Aristotle. *See, e.g.*, Shields, *supra* note 172, at 11, 30, 44; *see infra* notes 218–27 (discussing core-dependent homonyms).

178. *See infra* notes 182–92, 218–27.

179. *See infra* notes 193–217.

180. *See infra* notes 218–56.

181. *See infra* notes 260–84.

182. ARISTOTLE, CATEGORIES Ia1–4 (Harold P. Cooke ed. & trans., Harvard University 1996) (1938); *see also supra* note 176 (quoting Aristotle defining homonyms as having a common name but with the account corresponding to the name differing while synonyms have both name and account in common); SHIELDS, *supra* note 172, at 11 (describing Aristotle's account of synonymy as straightforward: "x and y are synonymously F iff [if but only if] (i) both are F and (ii) the definitions corresponding to 'F' in 'x is F' and 'y is F' are the same"). What is initially unclear is whether there is a middle ground, *tertium quid*, between homonyms and synonyms. Hart, *see supra* note 177, and others do not recognize any middle ground. Hart, *supra* note 16, at 38 n.1. Perhaps Hart and others have been influenced by Plato's emphasis on univocity, as expressed in his Forms. *See id.* (stating view that much confusion comes from the belief that a word that is not a "mere homonym" must possess "a single quality or set of qualities" in common); *infra* note 247 (discussing Platonic Forms); *infra* notes 248–49 (discussing Aristotle's

homonyms constitute an important category. The difficulty is that as multivocal words, homonyms permit different definitions for the same words, hence there is not a single, simple definition. The complexity of defining homonyms becomes obvious when the examples by which Aristotle illustrates homonymy are examined. While such equivocity or ambiguity might at first appear problematic or unhelpful, upon closer examination, we begin to understand how homonymy provides a source of philosophical and philological interest for Aristotle.[183] If we return to our first example of a homonym, "bank," we see that river bank and savings bank suggest that homonyms are "discrete"[184] (i.e., non-overlapping) in their definitions. Non-overlapping homonyms do not seem to offer much for the philosopher; although presenting some possibility of ambiguity, their distinct nature makes it unlikely that they will confuse competent speakers.

Not all homonyms, however, are so discrete or obvious, as illustrated by Aristotle's favorite example, "healthy," from which we

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rejection of such univocity); *cf.* Weisbach, *Line Drawing*, *supra* note 79, at 1644 (discussing "platonic essentialism"); *infra* note 206 (discussing Aristotle's use of "essence").

183. *See infra* notes 248–49 (discussing centrality of homonymy to Aristotle's *Metaphysics*). Words with subtly overlapping meaning interest Aristotle because of their potential philosophical significance. *See* Shields, *supra* note 172, at 36. For example, "justice" and "good" are prime examples of homonyms of philosophical import. Consider Aristotle's discussion of "justice" as a homonym.

> Justice and injustice seem to be spoken of in many ways, although this escapes our notice because of the extreme closeness of their homonymy. These cases are unlike cases where <the homonymy> is far apart (for here the difference in form is great), as for example <it is clear> that the collar bones of animals and that with which we open doors are homonymously called "keys."

ARISTOTLE, NICOMACHEAN ETHICS 1129a26–31 (Martin Ostwald trans., Bobbs-Merrill Co. 1962) (author's translation).

184. Shields defines *discrete* homonymy in the following terms: "x and y are homonymously F iff [if but only if] (i) they have their name in common, but (ii) their definitions have nothing in common and so do not overlap in any way." SHIELDS, *supra* note 172, at 11. Discrete homonyms, also called "homonyms by chance" (*apo tyches*), are accidents of language and thus easily identifiable. As a result, discrete homonyms are frequently found in jokes. *See also* ARISTOTLE, TOPICS, *supra* note 169, at 106a23–25 (noting that identical terms are sometimes obviously distinct, as "clear" when used of sounds and colors); ARISTOTLE, SOPHISTICAL REFUTATIONS 182b33 (E.S. Forster trans., Harvard University Press 1992) (1955) (discussing comparative difficulties in detecting misleading arguments and noting that homonyms by chance are generally regarded as the most obvious and silliest fallacies); *supra* note 177 (discussing the homonymous "bay" noted by Justice Scalia).

can begin to understand the actual complexity of homonyms. Consider the following four sentences:[185]

(1) Socrates is healthy.

(2) Socrates's complexion is healthy.

(3) Socrates's regimen is healthy.

(4) Socrates's salary is healthy.

Without closer examination, the competent speaker might conclude that "healthy" appears synonymously here: the predicates are all the same word with the same account.[186] However, the predicate "is healthy" differs in each of the four sentences, appearing more closely related in the first three sentences. Its appearance in the fourth is somewhat more distinct.[187] If we examine the use of "healthy" in each sentence, we see that they are far from being synonyms; they are instead both distinct and irreducible: "Socrates is healthy" indicates a state of well-being for Socrates; a "healthy" complexion indicates a complexion that may reflect not only its own healthy state but Socrates's healthy state; a "healthy" regimen contributes to and is perhaps causally related to Socrates's generally healthy condition. In short, we see that these terms are not synonyms (having both common names and accounts), but homonyms: their name is common but their accounts differ.

As Aristotle describes the term in the first three sentences, "the term 'healthy' always relates to health (either as preserving it or as producing it or as indicating it or as receptive of it)."[188] In this example, a "healthy complexion" is *indicative of* Socrates's state of health; his "healthy regimen" is *contributory to* his state of health. Because "healthy" as it is used in these sentences is not univocal

185. ARISTOTLE, METAPHYSICS 1003a34–b6 (Hugh Tredennick trans., Harvard University Press 1996) (1933) (illustrating the homonynous nature of "being" by the term "healthy" and noting its use in various senses always with reference to one central idea); SHIELDS, *supra* note 172, at 37; *infra* note 220.

186. *See supra* notes 176, 182 (discussing synonymy).

187. The nonreducibility of the sentences is as follows: "Socrates is healthy" signifies that Socrates is in a state of being free of disease and functioning well. "Socrates's complexion is healthy" indicates that Socrates's outward appearance is reflective of that state described by the sentence "Socrates is in a state of being free of disease and functioning well." "Socrates's regimen is healthy" signifies that Socrates's regimen creates circumstances that allow the sentence "Socrates is in a state of being free of disease and functioning well." Therefore, as Shields explains, the accounts of the second two sentences are not "reducible to the account of the predicate in the initial sentence nor independent of it. Rather, they must appeal to it in order to be correct and complete; but since they mean more than the predicate of [the first sentence] taken alone, such an appeal is insufficient by itself." SHIELDS, *supra* note 172, at 38.

188. ARISTOTLE, METAPHYSICS, *supra* note 185, at 1003a34–b6.

(synonymous),[189] but neither is it simply discrete (unrelated), we have identified a word exhibiting more than ambiguity (mere "equivocity").[190] Because "healthy" in these associated examples is neither reducible to nor independent of our core example, "Socrates is healthy," we have identified a word displaying "genuine and ineliminable multiplicity."[191] In other words, homonyms such as "healthy" differ from other, discrete (merely ambiguous) homonyms (such as "bank"), demonstrating that some homonyms require a more complex explanation: while not synonyms, these homonyms are related and can be defined as common words with definitions that do not completely overlap.[192] It is in their relationship, demonstrating an overlap but an incomplete overlap, that homonyms offer their greatest interest to the philosopher, logician, or rhetorician.

C. Definitions

Before examining the significance of and manner in which homonyms are related, it will be helpful to discuss further Aristotle's method and understanding of definition. How Aristotle understands

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189. Aristotle urges careful examination of terms to avoid lack of clarity:

> Homonymy often trails into the accounts themselves unnoticed, and for this reason one needs to look into the accounts. For example should someone say that what is indicative or productive of health is what has balance with respect to health, one should not stand fast but must inquire further in what balance was mentioned in each case, for example, if in the one case it means to be of a sort as to produce health, but in the other it means to be of such a sort as to be able to indicate what kind of state <health> is.

SHIELDS, *supra* note 172, at 18–19 (translating and quoting ARISTOTLE, TOPICS 107b6–b12).

190. *See infra* notes 218–27 and accompanying text (discussing associated, core-dependent homonymy).

191. SHIELDS, *supra* note 172, at 38. Shields makes a distinction between "equivocity" and "ambiguity" that is useful not only for his discussion of homonymy but may well help in our statutory interpretation efforts. He uses "equivocity" to indicate a term with more than one meaning "even when those meanings might be connected in various ways." *Id.* at 44. He distinguishes "equivocity" from "ambiguity," which also denotes a term with more than one meaning, but "where those meanings are not connected in any semantically interesting ways;" in other words, they are *merely* equivocal. *Id.* at 44 n.1. For Hart's similar distinction, see Hart, *supra* note 16, at 38 n.1 (describing "mere homonymy").

192. If they overlapped completely, then they would be synonyms, not homonyms. *See supra* notes 176, 182. Shields defines *comprehensive or associated* homonymy thus: "x and y are homonymously F iff [but only if] (i) they have their name in common, [and] (ii) their definitions do not completely overlap." SHIELDS, *supra* note 172, at 11. The distinction between comprehensive and discrete homonymy in Aristotle is critical, a distinction carefully demonstrated by Shields. If homonymy is only discrete and not associated, then there must be some *tertium quid* between homonyms and synonyms, viz., healthy. *Id.* Since there is no *tertium quid* for Aristotle, he must subscribe to a view of comprehensive homonymy. *Id.*

definitions helps us approach and answer difficult questions of interpretation by forcing us to reconsider what we mean when we use the word "definition." Once we reexamine the various levels at which we use the term and what we mean by "definition," it becomes apparent that, as competent speakers, by "definition" we mean something that might more properly be termed "signification" (a nominal account, that is, to denominate or name something signified by a term), rather than a strict "definition."[193] This distinction is both reinforced and made more obvious when we consider how to define homonymous words. First, it will be helpful to consider Aristotle's notion of definition alone before considering it within the context of homonymy.

1. Identification of Genus in Complete Definition

Aristotle distinguishes not only between better (more complete) and worse (less complete) "definitions" but also between levels of definition. For Aristotle, a "better definition" must satisfy certain minimum conditions.[194] More specifically, "it is necessary for the one

193. On signification as a nominal account, see ARISTOTLE, POSTERIOR ANALYTICS 93b29–37 (Hugh Tredennick ed. & trans., Harvard University Press 1997) (1960) (describing different forms of definition including nominal accounts). *See also infra* notes 206–17 (discussing Aristotle's equivocal use of "definition" to indicate a nominal account as well as an account stating the necessary conditions to describe "what it is to be something"); ARISTOTLE, CATEGORIES, *supra* note 182, at 3b10–23 (discussing signification in context of primary substances and qualities); ARISTOTLE, TOPICS, *supra* note 169, at 122b16–17 (stating that differentia never indicate genus); ARISTOTLE, CATEGORIES, *supra* note 182, at 16a16–18 (distinguishing between words' ability to signify something and the reality of that which is signified by the word).

194. ARISTOTLE, TOPICS, *supra* note 169, at 141b25–27. A detailed discussion of Aristotle's corpus that seeks to elaborate systems of classification by division (i.e., definition) is beyond the scope of this Article. For key discussion of classification in Aristotle's corpus, see TOPICS, *supra* note 169, at I.v.101b–102a (identifying four predicates: definition, property, genus, and accident); CATEGORIES, *supra* note 182, at 1b25ff (listing ten divisions: 1) substance ("what it is"), 2) quantity ("how large"), 3) quality ("what sort is it"), 4) relation ("related to what"), 5) where ("what place"), 6) posture/position ("in what attitude"), 7) state or condition ("how circumstanced"), 8) action ("doing what"), 9) passivity ("how passive"), and 10) affection ("what suffering")). For a discussion of the importance of this system of classification for Aristotle's logical works, see Smith, *supra* note 10, at 27–65. For a detailed commentary, see ARISTOTLE, TOPICS, BOOKS I AND VIII (Robin Smith trans., 1997). *See also* SHIELDS, *supra* note 172, at 21 (describing Aristotle's four types of being corresponding to four types of predications: "some things are said-of and in other things; others are said-of and not in; others are in but not said-of; and still others are neither said-of nor in"). Because these predications are irreducibly distinct, no one can be identified with any other by reason of Leibniz's law (identity of indiscernibles). *See* Christia Mercer & R.C. Sleigh, *Metaphysics: The Early Period to the Discourse on Metaphysics* 67, 104–05 *in* THE CAMBRIDGE COMPANION TO LEIBNIZ (Nicholas Jolley ed., 1995) (discussing development of identity of indiscernibles throughout Leibniz's corpus). For Cunningham's statement that a

defining well to define through genus and differentiae."[195] By requiring identification of the genus,[196] the class to which that being defined belongs, in a true definition ("what it is to be something"), Aristotle imposes a *priority* requirement because genus exists prior to and is better known than the individual case.[197]

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definition necessarily states all necessary and sufficient conditions, see Cunningham, *supra* note 17, at 1590 (discussed *supra* note 139).

195. SHIELDS, *supra* note 172, at 91 (discussing and translating ARISTOTLE, TOPICS 141b25–27). For purposes of this discussion, differentiae need not be precisely defined but can be assumed to include characteristics of the item defined that are more specific to the particular than the genus, of which it is necessarily a member. *See supra* note 194 (describing Aristotle's system of classification in *Topics* and *Categories*); *see also* SHIELDS, *supra* note 172, at 250 n.70 (discussing various passages to decide if differentia includes "quality").

Hart recognizes the limitations of this requirement, defining by genus and differentia. Hart proposes instead defining by "paraphrase" as the method by which we seek to define important legal terms. *See* Hart, *supra* note 16, at 41. In particular, Hart sees the requirement for identifying the genus as problematic for anomalous cases. Hart's method of paraphrase has the advantage of emphasizing the importance of context for defining legal terms. His assertion, however, that one defines by stating the conditions under which statements using the legal terms to be defined are true, provides no solution for whether the necessary and sufficient conditions for tax-free "reorganizations" are met, because it assumes the very issue in question. In other words, textualists and structuralists would define those conditions quite differently, as the discussion has shown. *See supra* notes 139–40 and accompanying text (discussing tax commentators' definition of "reorganization"). For cases such as "reorganization" we must employ different methods, such as those found in Aristotle.

196. Nothing can be categorized as belonging to more than one genus; therefore, no two definitions of the same thing are possible. *See* ARISTOTLE, TOPICS, *supra* note 169, at 141b22–142a2 (describing true definition—stating the essence of that being defined necessarily includes genus and differentia—and noting that because different things are differently intelligible to different people "definitions" should be framed with that in mind); *id.* at 144a11–15 (noting difference between definition by genus and by differentia); *id.* at 151a32–b2 (definitions including different contraries are not equally helpful); *id.* at 151b15–17 (better definitions should replace less complete definitions as better laws replace laws that are then abrogated). *See also* SHIELDS, *supra* note 172, at 91. Since differentiae (individual characteristics) are required, things within the genus will thereby be distinguishable.

197. Foregoing a detailed analysis, we can say that Aristotle notes the existence of primary substances: those things that must exist or without which no other types of "being" would exist. *See* ARISTOTLE, CATEGORIES, *supra* note 182, at xii, 14a27ff (discussing four senses in which something may be called prior); JOHN J. CLEARY, ARISTOTLE ON THE MANY SENSES OF PRIORITY 65 (1988) (discussing priority of "essence" to all other characteristics); SHIELDS, *supra* note 172, at 122–27 (discussing *Categories* xii). Within intra-categorical instances, Aristotle seems to recognize primary and secondary instances within categories (including substance and quantity). *See* SHIELDS, *supra* note 172, at 21; *see also* ARISTOTLE, POSTERIOR ANALYTICS, *supra* note 193, at 96b15–17 ("In making a systematic study of a whole class of objects, one should first divide the genus into the primary [those which exhibit the properties of the genus in their simplest form] infimae species.").

2. Genus and the Law of Non-Contrariety

The importance of the genus serves not only to define "what it is to be something;" the essential nature of classification by genus illustrates one of the most fundamental logical principles: the law of non-contrariety. Because either the assertion or the negation of a predicate—but not both—can be true at one time, and because nothing can be categorized as belonging to more than one genus, the identification of the genus serves uniquely to identify that being defined.[198]

3. Definitions Lacking Genus Incomplete

In fact, failure to identify—or correctly identify—the genus to which something belongs is recognized as a fundamental error, discrediting any proposed definition. A genuine definition requires the statement of the substance of that being defined. More precisely, for there to be a genuine definition, the genus must be correctly stated because the genus indicates the fundamental substance of that being defined. If one's opponent, therefore, has failed to specify the genus or has specified the genus incorrectly, such a definition can be shown to be false or insufficient.[199]

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198. *See* ARISTOTLE, POSTERIOR ANALYTICS, *supra* note 193, at 77a10–26.

> The law that either the assertion or the negation of every predicate must be true is used in demonstration by *reductio ad impossible.* It is not always applied universally, but only so far as is sufficient, *i.e.*, in reference to the genus. By "in reference to the genus," I mean, *e.g.*, as regards the genus which is the subject of the demonstration in question . . . .

Id.; *cf. id.* at 76a42 (discussing first principles or truths relative to genus with mathematical examples); *see also infra* notes 282–84 (discussing passage from *Metaphysics* and applying law of non-contrariety within context of "reorganization").

199. On the priority of genus in any definition, see CLEARY, *supra* note 197, at 64–69 (discussing the importance Aristotle ascribes to priority and describing different ways definitional priority allows rejection or refutation of a definition proposed by one's opponent within the framework of a dialectical joust). Cleary argues that:

> [i]n keeping with that purpose, [Aristotle] gives a number of ways in which one might overthrow such proposed definitions: (i) One could show that the description cannot be applied to the subject named; for instance, that the proposed definition (*horismos*) of man does not apply to everything called a man. (ii) *One might also show that, although the definiendum has a genus, your opponent has neglected to put it into any genus or has not placed it in the proper genus (to oikeiou genos). This would destroy any proposed definition because the definiendum must be placed in its proper genus with its appropriate differentiae if there is to be a genuine definition, especially since the genus is generally taken to indicate the substance of the definiendum (ten tou orizomenou ousian).* Furthermore, (iii) one could overturn a proposed definition by showing that the description is not peculiar to the definiendum, given that this is at least a necessary condition for a correct definition. *Finally, (iv) even if your opponent*

4. Priority

Priority, although occupying an important place in Aristotle's thought, does not immediately define itself. We must consider on what levels of our own experience we might classify something as "prior." For example, priority can be defined both as "what is better known" to us through appearances,[200] or "what is better known by nature," because it corresponds to a more detailed analysis of the nature of the object or belief in question.[201] These two notions of priority need not, and frequently will not, correspond. We are, nevertheless, able to coordinate our disparate notions of "priority" through inquiry and analysis: as we move between the particular and the general,[202] we strive to reconcile the contradictory results arising

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has satisfied all the foregoing, he may still have failed to give a definition inasmuch as he has not stated the essence (to ti en einai) of the definiendum.

Id. at 7 (emphasis added).

200. Aristotle assumes that perceptions or appearances—what is better known to us immediately—must form the beginning of an inquiry. *See, e.g.*, ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 183, at 1145b2–7 (describing inquiry as beginning from things observed and proceeding to eliminate or reconcile conflicting beliefs). It is clear that for Aristotle appearances can include common beliefs, not simply physical perceptions. *See* TERENCE IRWIN, ARISTOTLE'S FIRST PRINCIPLES 26–51 (1988) (describing and contrasting Aristotle's methods of inquiry (empirical and dialectic) whose aim is ultimately to arrive at first principles).

201. ARISTOTLE, PHYSICS 184a16–21, 188b32 (Philip H. Wickseed & Francis M. Cornford trans., Harvard University Press 1980) (1929) (contrasting that known by senses with that known by nature or intelligence); ARISTOTLE, POSTERIOR ANALYTICS, *supra* note 193, at 93b29–94a14 (contrasting types of definitions, i.e., a "definition" that denominates from one that describes the essence of that named); *see also* SHIELDS, *supra* note 172, at 93–97 (discussing what Aristotle means by "priority"). What is prior—better known and clearer to us—is not necessarily what is *naturally* prior, that which is inherent in what is being defined. In a sense, prior can mean "what is better known to us" because we have immediate experience with the object in question; however, from a perspective of a definition, what is prior must indicate the genus to which the thing defined belongs, since what is naturally prior contains the essential elements that characterize what is being defined. ARISTOTLE, PHYSICS, *supra*, at 184a16–21; SHIELDS, *supra* note 172, at 93.

Nevertheless, Aristotle recognizes the necessity of starting, whether for purposes of dialectic or scientific analysis, with what is known to us from appearance. By allowing for development in our beliefs that may incorporate inaccuracies due to the nature of perception, Aristotle ultimately must allow for different types of definitions, which reflect varying modes of appearance. In other words, we form our initial perceptions through properties that may or may not be accidental and thus correspond more or less well with the essential nature of that which we perceive. Through investigation (empirical or philosophical) we distinguish the essential from the accidental. "Accidental" characteristics are thus to be distinguished from the "essential" because the accidental is not inherent to that being investigated. *See generally* IRWIN, *supra* note 200, at 29–31 (discussing Aristotle's method of empirical and dialectic investigation).

202. Movement between the particular and general is also the hallmark of Aristotle's work that inspired "practical reason" as a method of statutory interpretation. *See supra*

from our two notions of "priority." The nature of the inquiry will dictate how we proceed between particularity and generality, whether empirically[203] or dialectically,[204] or some combination of both—to resolve the ambiguities inherent in our understanding. Recognition of the competing notions of priority is ultimately directed at clarifying what is confused. Only by clarifying what is incomplete or confused can we arrive at an understanding of what we seek to define.[205]

5. Levels of Definition

Because genus includes the essence ("what it is to be something")[206] of that being defined, a statement of the genus is a

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notes 70–71 (discussing practical reason as moving from particular to general in statutory interpretation).

203. Empirical inquiry begins from the accumulation of particular appearances from which it is then possible to extrapolate to generalizations. *See* ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 183, at 1145b2–7 (describing proper procedure in inquiry as analysis of observed facts to determine most authoritative); ARISTOTLE, PRIOR ANALYTICS 46a17–27 (Hugh Tredennick ed. & trans., Harvard University Press 1996) (1938) (discussing relationship of particular knowledge and principles of each discipline). Beginning from appearance, the empirical method runs the risk of crediting false impressions. Through experience and inquiry we can compile a fuller and more accurate picture, ultimately eliminating those impressions that are false. *See* IRWIN, *supra* note 200, at 30–36 (outlining realist difficulties with Aristotle's assumption of induction—generalization from particular to universals—but noting that through dialectic Aristotle restores our confidence in some non-perceptual appearances); *infra* note 204 (describing dialectic).

204. By "dialectic" Aristotle provides "a method from which we will be able to syllogize from common beliefs (*endoxa*) about every topic proposed to us, and will say nothing conflicting when we give an account ourselves." ARISTOTLE, TOPICS, *supra* note 169, at 100a18–21 (author's translation). In dialectic, in contrast to the empirical method, we may begin with generalizations, with common beliefs. Indeed, we may be proceeding from the universal to the particular, "since the inarticulate whole is better known to perception." IRWIN, *supra* note 200, at 43 (translating TOPICS). Essentially, in dialectic the goal is to move from the confused to the clear. Dialectic begins with a puzzle (when there are equally cogent arguments reaching contradictory conclusions, e.g., when nine Justices split 5–4 for two different "plain" meanings). *See* ARISTOTLE, TOPICS, *supra* note 169, at 145b17–20 (noting that we are at a loss when there are equally acceptable judgments from which to choose).

205. *See* ARISTOTLE, TOPICS, *supra* note 169, at 159b7–30 (Aristotle describes use of methods to arrive at what is generally accepted or rejected in argument); *id.* at 141b3–19 (illustrating with geometric terms mediation between what is better known (prior) by appearance or better known (prior) by nature in order to make any subject intelligible); *see also* JONATHAN LEAR, ARISTOTLE: THE DESIRE TO UNDERSTAND (1988) (giving philosophical introduction to Aristotle and his conviction that human beings by their nature desire to know and to understand).

206. ARISTOTLE, TOPICS, *supra* note 169, at 141b24–25 (author's translation). Shields explains the critical nature of Aristotelian "essence." "Essences are for Aristotle those properties which are not only necessary to a particular kind but are also fundamental in the sense of explaining the existence of other properties invariably realized by members of that kind (the *propria*)." SHIELDS, *supra* note 172, at 94. Aristotle's emphasis on

necessary constituent of a "better" or complete definition.[207] Essence should not be understood to imply what we might understand by "platonic essentialism," the assertion of a single unitary quality or qualities. Essence for Aristotle is rather something closer to the core element of "what it is to be something," or that without which something ceases to be what the term signifies. Following Hart, we might define essence then as that which must be included in order for the term to be true.[208]

Despite Aristotle's assertion that a "better definition" (a complete definition, not simply a signification) necessarily includes the essence of that being defined, Aristotle also recognizes that not all "definitions" state essences.[209] Competent speakers will concur with

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"essence," indicating the nature of that being defined, must be distinguished from any univocal "essence" we associate with the Platonic Forms. For a discussion of Aristotle's departure from Plato and the development of his system of categorization and classification as indicative of the importance of recognizing non-univocity, see *infra* notes 248–49 and accompanying text (discussing ARISTOTLE, NICOMACHEAN ETHICS 1096a11–17).

For a discussion of "platonic essentialism" as problematic for methods of statutory interpretation, see Weisbach, *Line Drawing*, *supra* note 79, at 1644 (criticizing failure of "platonic essentialism" as a line-drawing method). Weisbach attributes Oliver Wendell Holmes with the misguided introduction of "platonic essentialism" as a method of statutory interpretation. *Id.* at 1644 n.72 (citing Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 460 (1897)). However, an examination of Holmes reveals no mention of Plato or essentialism, but instead highlights Holmes's thoughts on the importance of first principles in jurisprudence—perhaps implicitly showing some Aristotelian, rather than Platonic, influence. *See* Holmes, *supra*, at 476–77 (discussing importance of theory); *id.* at 458 (aiming to set forth "some first principles").

207. The relationship between essence, genus, and priority in definition is explored in detail by Aristotle. *See* ARISTOTLE, TOPICS, *supra* note 169, at 141a24–b2.

> First <one must examine> whether he has not rendered the definition through what is prior and better known. Since ... we know not through what happens <to be the case> but through what is prior and better known .... It is clear, then, that the one not defining through what is prior and better known has not defined.

Id. (author's translation); *see also* SHIELDS, *supra* note 172, at 91 (discussing and translating passage).

208. Hart, *supra* note 16, at 55 (defining by stating conditions necessary for term to be true). On levels of definition, see ARISTOTLE, POSTERIER ANALYTICS, *supra* note 193, at 93b–94a14.

209. ARISTOTLE, TOPICS, *supra* note 169, at 141a23–142a16 (author's translation). Aristotle clearly recognized "better" and "worse" definitions, as well as the utility of "worse" definitions, since the purpose for which a definition is offered will affect whether a "worse" definition is in fact better for the particular purpose for which it is offered. Failure to specify the essence, therefore, does not entail that a statement is a non-definition; it simply results in a less complete definition. *See* SHIELDS, *supra* note 172, at 91–92 (discussing Aristotle's differentiation among varieties of definition).

On levels of definition, see ARISTOTLE, POSTERIOR ANALYTICS, *supra* note 193, at 93b29–94a14 (discussed *supra* note 201). According to Aristotle, incomplete definitions

Aristotle's observation that "different definitions reflect different degrees of scientific awareness."[210] A definition may "signify" (i.e., denominate or name) without necessarily describing the essential characteristics of the thing signified. The distinction among types of definition corresponds to Aristotle's "epistemic distinction" between things "better known to us" and things "better known by nature," recalling our discussion of priority.[211] Moreover, such a distinction helps us understand the relationship that exists between a more complete understanding of definitions and homonymy. Failing to recognize the existence of associated homonyms results in the fallacious assertion that varieties of definitions are synonymous—that because definitions are not discrete homonyms, they must be univocal.[212]

Levels of definition are a crucial point for homonymy. Because not all definitions state essences, the fact that homonymy marks definitional differences does not require that homonyms indicate essential differences, as is the case for discrete homonyms. Similarly, homonymy does not require univocity, as Aristotle has shown for associated homonyms such as "healthy." By recognizing a *tertium quid*, or middle ground, between synonymy and homonymy, Aristotle demonstrates the importance of careful recognition of levels of definition. These distinctions caution us that definition and signification are far from "mono-dimensional."[213]

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include those that state: (1) an account of what a name signifies (nominal account), (2) an account of why something is, and (3) a deduction of what something is. *Id.* Because not all definitions state essences, the fact that homonymy marks definitional differences does not require that homonym pairs necessarily indicate essential differences. *See* SHIELDS, *supra* note 172, at 95 (discussing types of definitions and their importance for homonymy).

210. SHIELDS, *supra* note 172, at 95 (discussing and translating ARISTOTLE, POSTERIOR ANALYTICS 93b29–94a14). Aristotle uses "thunder" as his example by which to illustrate levels of definition and scientific investigation. I follow Shields and use "dog" as a more readily accessible example. *See* SHIELDS, *supra* note 172, at 93–95 (illustrating with examples, including general familiarity with "dog," not necessarily indicating familiarity with essence of dog as canine and carnivore). If general familiarity with appearances entailed familiarity with essences, there would be no point in scientific investigation.

211. *See supra* notes 200–01 and accompanying text (describing priority as "prior by appearance" or "prior by nature").

212. The recognition of varying kinds of definitions is also important for another reason—distinguishing between definitions that are the result of scientific or philosophical investigation from those rendered by competent speakers. To assume that they are coterminous would be an unwarranted assumption of univocity, something Aristotle warns us against. *See infra* note 216 (discussing deep and shallow meaning).

213. SHIELDS, *supra* note 172, at 96. Levels of definition alone caution against mono-dimensional understanding. This conclusion is strengthened by Shields's demonstration

Aristotle's description of different types of definition, arising in part as a function of the particular inquiry (whether, for example, it is conducted by a physicist or as part of dialectic exercise),[214] suggests that the process of definition is more than "mere linguistic analysis."[215] This conclusion corresponds well with our understanding that signification occurs at multiple levels.[216] Because competent speakers share "shallow meanings," there is no disagreement about examples of discrete (non-overlapping) homonymy (e.g., bank in the case of "river bank" and "savings bank;" or crane (a bird or a machine)). Hence, we can readily converse as competent speakers of the language. However, the more closely associated are the homonyms (e.g., "healthy," "good," and "justice"), the more investigation and analysis is required to determine at what level discourse is occurring.[217] Such investigation will be rewarded because we will avoid error in these more philosophically interesting cases. Recognizing these as homonyms will prevent a mistaken assumption that we are dealing with a univocal account. If we fail to recognize

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that for Aristotle, homonymy is more than semantic. Homonymy indicates difference in things, not merely difference in signification. *Id.*

214. *See* ARISTOTLE, ON THE SOUL 403a29–b3 (W.S. Hett trans., Harvard University Press 1964) (1936) (describing the different definitions provided by physicist and dialectician). Explicit reference to physical properties will be necessary for a physicist since "heat" could not be explained merely by reference to linguistic meaning, while the philosopher may offer definitions uninformed by physical properties. SHIELDS, *supra* note 172, at 99.

215. SHIELDS, *supra* note 172, at 99. This is not to say that semantic differences are irrelevant; it is simply to say that recourse only to a dictionary or to linguistic analysis may be insufficient to solve a problem that requires a conceptual analysis. *See id.* at 98 & n.32 (discussing distinction between concepts and properties and reasoning that Aristotle appears to require reference to physical properties because "it would be foolish to believe that one could settle matters of empirically discernible identities by the meanings of terms as they have developed in natural language").

216. Shields describes meaning as *shallow* and *deep*. *Id.* at 100. Shallow meaning corresponds to meaning that is shared by competent speakers of a language while deep meaning requires some level of investigation (conceptual or empirical) that permits discovery of the more complete definition, the one containing the essence. *Id.* at 99–100 (illustrating shallow and deep meaning by describing Euthyphro's "pontification" on the subject of piety not as inept, that is, one that could not be understood by competent speakers, but as shallow, demonstrating no real understanding of the true nature of "piety").

217. *Id.* at 101 (explaining that investigation moves from shallow meanings (things as they appear to us) to deep meanings (things as signified by nature)). Competent speakers who share shallow meanings can disagree about interesting homonyms, cases that require analysis. For the type of investigation and analysis required, see ARISTOTLE, METAPHYSICS, *supra* note 185, at 1004b1–4 (ascribing to the philosopher the function of giving account of both "concepts and of substance" (author's translation)).

non-univocity, there will be a resulting lack of clarity in either our argumentation or analysis of our opponent's argument.

D. *Core-Dependent Homonymy*

Aristotle's identification and analysis of homonymy, distinguishing as it does between distinct and associated homonyms, is critically important because it establishes far more than mere non-univocity; it also establishes a positive mechanism by which we can understand associated homonyms and therefore avoid erroneous assumptions of univocity.[218] By examining the relationship of associated homonyms, Aristotle demonstrates that this association is meaningful because the associated homonyms are related around a "core."[219] Returning to the earlier example of "healthy," we can understand that this associated homonym is more appropriately called core-dependent, because "its various occurrences coalesce around a core notion."[220] As Aristotle noted in the previous

218. Aristotle demonstrates that the association shared by these homonyms is not a mere undifferentiated association but is association around a "core," which is an essential characteristic. Hence, associated homonymy is more properly termed core-dependent homonymy. *See infra* notes 219–27 and accompanying text. If Aristotle only established non-univocity, the result would largely be negative, a precursor to deconstructionism that questions our ability to arrive at any one known meaning. It is precisely because Aristotle provides a positive methodology, a way to find order in multiplicity that may have special value for hard cases in statutory interpretation.

219. "Core-dependent" is Shields's term. SHIELDS, *supra* note 172, at 104. Previously, these cases of associated homonyms were referred to as examples of "focal meaning" based on Aristotle's statement in the *Metaphysics* that "we shall discover other things said in ways similar to these—so too is being said in many ways, but always relative to some one source (*pros mian archen*)"). ARISTOTLE, METAPHYSICS, *supra* note 185, at 1003a34–b6.

G.E.L. Owen first discussed this passage using the phrase "focal meaning." *See* Owen, *supra* note 172 at 169. In contrast, Irwin proposed "focal connection" to emphasize that the association was not only semantic or linguistic. Irwin, *Homonymy*, *supra* note 172, at 523–44. Irwin explained his change to "focal connection" from Owen's "focal meaning" as an effort to avoid the "misleading suggestion that Aristotle means to indicate a relation between *senses* of a word . . . rather than between *the things the word applies to*." *Id.* at 531 n.12 (emphasis added); *see also* SHIELDS, *supra* note 172, at 12 n.7 (describing debate concern applicability of homonymy to word (semantic) meaning in contrast to things signified by homonymous words). A word has *focal* meaning if it is used in several ways, one of which is primary and the others derivative, the accounts of the derivative way containing the accounts of the primary. Jonathan Barnes, *Metaphysics*, *in* COMPANION, *supra* note 10, at 66, 76.

220. SHIELDS, *supra* note 172, at 105. Using the homonym "healthy," Aristotle illustrates the notion of core-dependence as follows:

> Just as everything which is healthy is related to health (*pros hugieian*), some by preserving health, some by producing health, others by being indicative of health, and others by being receptive of health; and as the medical is relative to the medical craft (*pros iatriken*), for some things are called medical because they

examples, "healthy" is always related in some manner to "health." Healthy regimens and healthy complexions necessarily make reference to Socrates's general state of health, but in a way that is not reducible to that simple statement describing Socrates's general state of well-being. As Shields describes it, *a* and *b* are homonymously F if and only if their accounts refer asymmetrically[221] to each other *or* there is some *c* to which the accounts "*a* is F" and "*b* is F" necessarily makes reference.[222]

In other words, in core-dependent homonyms, there exists a base referent[223] to which each of the homonyms displays a significant form

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> possess the medical craft, others because they are well-constituted relative to it, and others by being the function of the medical art—and we shall also discover other things said in ways similar to these—so too is being said in many ways, but always relative to some one source (*pros mian archen*).

Id. (translating ARISTOTLE, METAPHYSICS 1003a34–b6); *see also supra* notes 185, 188 and accompanying text (discussing "healthy" as a homonym, not a synonym).

221. The asymmetry of the relationship permits relationships to operate in any or multiple directions without a prescribed order. This asymmetricality is not at first obvious. If "healthy complexion" and "healthy regimen" make reference to "healthy person," it is not at first obvious why "healthy person" can not make reference to "healthy complexion" or "healthy regimen" to create a symmetrical relationship. Aristotle's focus on priority of relationship supplies the reason for the asymmetricality; the complexion and regimen exist only by reference to the individual (Socrates) to whose healthy state the associated uses necessarily make reference. The references are not, however, reducible because they state more than the specific statement to which they refer. *See* ARISTOTLE, EUDEMIAN ETHICS 1236a7–33 (H. Rackham trans., Harvard University Press 1996) (1952) (Aristotle illustrates the homonymous nature of "good" and "friendship" and notes that not all are primarily so called). "The primary is that of which the definition is implicit in the definition of all . . . ." *Id.*; *see also* SHIELDS, *supra* note 172, at 107 ("[A] core case of being *F* should be core minimally in the sense that non-core cases must make reference to the core case in their account, while the core case need not make reference to the non-core cases in its account."). *See* M.T. LARKIN, LANGUAGE IN THE PHILOSOPHY OF ARISTOTLE 69 (1971) ("In other words, no specific relation or set of specific relations between two things is necessary for one to be named by reference to the other.").

222. SHIELDS, *supra* note 172, at 104; *see infra* note 271 and accompanying text (discussing ARISTOTLE, TOPICS 122b and indicating that differentiae are never genus).

223. *See* SHIELDS, *supra* note 172, at 104 (describing that where c is the base referent to which a and b necessarily make reference in "*a* is F" and "*b* is F"). Shields defines core-dependent homonymy in a way that identifies the core as the base referent: "*a* and *b* are homonymously F in a core-dependent way iff [if and only if]: (i) *a* is F; (ii) *b* is F; and (iiib) there is some *c* such that the accounts of F-ness in '*a* is F' and '*b* is F' necessarily make reference to the account of F-ness in '*c* is F' in an asymmetrical way." *Id.*; *see* LARKIN, *supra* note 221, at 100 ("The criterion of *pros hen* [focal] equivocals is that the primary meaning is implicit in the definition of all secondary meanings because there is some relation between the things named."). Larkin notes that the relations between the primary and secondary meanings differ but "in virtue of *any* relation the primary definition or meaning is included in the definition or meaning of the thing to which the name is secondarily imposed." *Id.* at 100–01.

of association.[224] The association is also open-ended (allowing for inclusion of new examples) and asymmetrical.[225] Yet the association does not exist at so broad a level as to render the connection meaningless.[226] This allows us to recognize the fourth example, "Socrates's salary is healthy," as a non-core example.[227] The mechanisms by which we can identify and differentiate among associated homonyms must now be considered.

E. Methods for Identifying and Classifying Homonyms

Aristotle's functional analysis and principles of causation[228] provide mechanisms by which we can analyze the determinate but

224. The association is significant because the relationship offers some insight into words or concepts that are conceptually interesting and informed by these associated appearances. Discrete homonyms offer nothing similarly interesting. *See* SHIELDS, *supra* note 172, at 106 n.4 (discussing philosophers', including Aquinas, attempt to understand and explicate association); *id.* at 73–74 (discussing Wittgenstein's "doctrine of family resemblance" and its similarity but ultimately distinguishing it from Aristotelian association because the Wittgensteinean results are "often purely negative"); *see infra* notes 276–77 and accompanying text (proposing that core-dependent homonymy, as described in (iiib), applies in the case of "reorganizations"; there is a core to which all the variant forms refer by nature of their being "reorganizations").

225. If open-ended, the possibility for new instances (both core and non-core) exists. An example of a non-core relationship would be "healthy salary." *See infra* note 227. Aristotle's method is important because identification around a core prevents profligacy of association that would make the association less valuable for our ability to understand. Nevertheless, Aristotle's method is open-ended to allow for new instances, without which such a method would be less useful. SHIELDS, *supra* note 172, at 110 (explicating adequacy constraints (open-endedness, non-profligacy and asymmetry) of Aristotle's understanding of core-dependent homonymy).

226. *See* SHIELDS, *supra* note 172, at 105–08 (discussing previous example ("healthy regimen," "healthy complexion," and "healthy salary")). To include the last example (healthy salary) among other core examples (healthy regimen, healthy complexion—both indicative of and contributory to Socrates's health—state of well-being) would be to allow a trivial, or profligate (Shields's term), relationship to suffice for the association. However, as a non-core homonym, it is still understandable. Aristotle's methodology for establishing core-dependence must be determinate yet open-ended. *See id.* at 100. If it is not determinate, then we lack the positive methodology that does more than simply establish non-univocity; if it is not open-ended, it lacks future utility.

227. The fourth example is not necessarily a core-dependent homonym because of an absence of an obvious causal relationship to Socrates's healthy state. If by "healthy salary" we mean that Socrates's salary is sufficient to keep him healthy by means of adequate housing, food and medical care, then we might consider it a core example efficiently related to his health. If, however, by "healthy salary" we mean a salary relative to others', that is significantly higher than average, but unrelated to Socrates's state of well-being, as the phrase would commonly be understood, then it is an example of a non-core homonym. *See infra* notes 238–45 and accompanying text (discussing causal relationships as means of identifying core examples).

228. Through the principles of causation, Aristotle answers the question "why." ARISTOTLE, PHYSICS, *supra* note 201, at 198a14 (describing four causes as ways to understand "what it is" and "why it is" (author's translation)). Aristotle thinks that

open-ended and asymmetrical relationship that exists between homonyms and the core around which they are associated. "Functional determination"[229] is the means by which Aristotle identifies both kind membership and individuation. Indeed, Aristotle views function as critically important for any thing's identity. This can be illustrated by examining a well-known passage from his *Politics*. Following his famous statement in which he identifies man as a "political animal,"[230] Aristotle elaborates on the relationship of function and the true nature of that being identified:

> Thus also the city-state is prior in nature to the household and to each of us individually. For the whole must necessarily be prior to the part; since when the whole body is destroyed, foot or hand will not exist except in an equivocal [homonymous] sense, like the sense in which one speaks of a hand sculptured in stone as a hand . . . all things are defined by their function and capacity, so that when they are no longer such as to perform their function they must not be said to be the same things, but to bear their names in an equivocal [homonymous] sense.[231]

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identification of all four causes is the essential task of the natural philosopher, someone who is trying to understand and explicate. *Id.* at 198a22–25; *see also* SHIELDS, *supra* note 172, at 99 (discussing passages in which Aristotle distinguishes the differing functions of one investigating).

229. *See* SHIELDS, *supra* note 172, at 33 (defining functional determination for Aristotle as: "An individual x will belong to a kind or class F iff [if and only if]: x can perform the function of that kind or class"). Functional determinism specifies both necessary and sufficient conditions for membership in kind F such that x has the function definitive of being F. *See id.* "This reflects Aristotle's contentions that 'if something can perform its function, it truly is <an F>' (the sufficiency claim) and that 'when something cannot <perform that function> it is homonymously <F>' (the necessity claim)." *Id.*; *see infra* notes 273–81 and accompanying text (discussing genus of tax-deferred reorganizations as "non-sales," functioning to permit exceptions to realization and recognition requirements where necessitated by business purpose) so that various forms permitted all serve essentially the same function). If the formal reorganization (that is, Mrs. Gregory's transaction), however, does not serve the functional requirements of the genus ("not-sale"), then we would have a spurious example, similar to the ceremonial axe, to use one of Aristotle's examples.

230. ARISTOTLE, POLITICS, *supra* note 1, at 1253a7–8.

231. *Id.* Aristotle's definition by function might be challenged because his general teleological view towards the natural world has been subject to challenge. *See, e.g.*, ACKERILL, *supra* note 10, at 41–45 (describing Aristotle's teleology, including questions regarding its general validity). To challenge the purposive function of law generally is to raise difficult questions about the purposive nature of human activity beyond the level of the concerns raised regarding purposive statutory interpretation. *See supra* notes 42, 46 (discussing views of formalism); *supra* note 153 (discussing purposive interpretation within tax context). Because of the level of generality at which purposive statutory interpretation has operated, its legitimacy as a method has been challenged. *See supra* notes 35–38 (discussing theoretical difficulties with purposivism and intentionalism). In contrast, to

Functional determination thus allows not only for identification but also differentiation between true and spurious examples of class membership. Indeed, ability to perform the function associated with that being defined is a condition precedent for kind membership. For example, if an axe were to decay to the point where it could no longer function as an axe capable of cutting, then it no longer is an axe, "except homonymously."[232] Similarly, a representation of an axe or an eye is only called so homonymously.[233] An eye that can no longer see is only homonymously an "eye" because part of the true nature of an eye is its function.[234] While linguistic practice may disincline us from recognizing homonymy in these cases,[235] there are philosophical reasons inherent in the nature of definitions that warrant the recognition of functionally determined classes.[236] Once homonyms are recognized as such, testing for true or spurious class membership by identifying the correct genus through a functional analysis may be helpful.[237]

As our earlier examination of "healthy" demonstrates,[238] homonymy can also be understood by reference to Aristotle's

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examine identified homonyms with regard to their functional, core characteristics should not raise the same level of concerns as the less bounded, purposive approach that seeks general legislative purpose in a much more attenuated relationship with the text than the method proposed in this Article.

232. SHIELDS, *supra* note 172, at 29 (translating ARISTOTLE, DE ANIMA 412b10–15).

233. *Id.* at 35; *see also id.* at 31–35 (discussing passages where Aristotle describes no longer functional body parts as only homonymously so). Thus Aristotle states:

> All things are defined by their function: for <in those cases where> things are able to perform their function, each thing truly is <F>, e.g. an eye, when it can see. But when something cannot <perform that function> it is homonymously <F>, like a dead eye or one made of stone, just as a wooden saw is no more a saw than one in a picture. The same, then, <holds true> of flesh.

Id. at 33 (translating ARISTOTLE, METEOROLGY 390a10–15).

234. *See id.*; ARISTOTLE, POLITICS, *supra* note 1, at 1253b19–25; *see also* SHIELDS, *supra* note 172, at 31–35 (analyzing discourse, non-accidental homonymy, and functional determinism).

235. Language relies freely on ellipsis because of the breadth of common understanding shared by competent speakers. As a result, linguistic practice disinclines us from distinguishing the homonymous nature of words when we use "man" to describe Socrates the living individual and "man" to describe a representation, for example, a painting or sculpture, of an individual. This corresponds in some ways to the distinction between shallow and deep meanings and is related to the degree of scientific awareness. *See supra* notes 216–17.

236. *See* SHIELDS, *supra* note 172, at 31–35 (discussing the important relationship between homonymy and functional determination).

237. *See supra* notes 194–99 and accompanying text (discussing the importance of genus identification); *see also infra* notes 271–76 (identifying the function of the genus of tax-deferred reorganizations).

238. *See supra* notes 185–91.

theories of causation. The four identified causal relationships help to explain "why."[239] We can see that the various examples[240] of "healthy" stand in one (or more) of the four causal (efficient, material, final, formal)[241] relationships to the core example, "Socrates is healthy." "Healthy regimen," for example, is efficiently related to Socrates's health.[242] The lack of any one prescribed relationship, and thus the asymmetricality of the relationship, allows for multiple causal relationships at any one time.[243] Aristotle's recognition that homonyms are not only associated but related to a core in an asymmetrical relationship is also crucial for our ability to understand the philosophically interesting homonyms that Aristotle identifies. Although core instances need not make reference to derived instances, all derived instances necessarily make reference to the core

239. ARISTOTLE, PHYSICS, *supra* note 201, at 194b24–195a4, 198a14–21. The four causes (*aitia*) are: (1) material (such as the bronze of a statue), (2) formal (the form or characteristics of the generic type), (3) efficient (agent), and (4) final (aim). *Cf. infra* note 243 (discussing ARISTOTLE, PHYSICS 95a3–8 (stating that there are many causes of the same thing)).

240. *See supra* notes 185–91 and accompanying text (describing "healthy regimen," "healthy complexion").

241. Aristotle's four causes may best be explained by example. Of a house, the bricks and mortar are its material cause; its formal cause the design or arrangement of its constituent parts; its efficient cause the builder; and its final cause the purpose for which it is built—to provide a structure for habitation. Monique Canto-Sperber, *Quatrieme Partie: Aristotle*, *in* PHILOSOPHIE GRECQUE 337 (Monique Canto-Sperber et al. eds., 1997). As this example shows, Aristotle seeks to describe through his four causes the four ways in which the question "why" can be answered about that which we know: "the question of fact, the question of reason or cause, the question of existence, and the question of essence." ARISTOTLE, POSTERIOR ANALYTICS, *supra* note 193, at 89b23–27.

For an interesting discussion of the "formal" relationship of the law to its content, see Ernest J. Weinrib, *The Jurisprudence of Legal Formalism*, 16 HARV. J.L. & PUB. POL'Y 583 (1993); Weinrib, *Legal Formalism*, *supra* note 42 at 949, 953–57.

242. *See* SHIELDS, *supra* note 172, at 110–22 (discussing various examples of four causal relationships). It is not necessary that homonyms exhibit only one of the four causal relationships or that there be a predetermined, uni-directional relationship between the asymmetrical examples and the core around which they are associated. For example, Socrates's health and healthy regimen stand in an efficient causal relationship. It is not necessary that the regimen alone is sufficient to produce Socrates's healthy. There is a similar causal relationship between the healthy complexion that is reflective of Socrates's health and healthy regimen. *Id.* at 113–14.

243. Although identifying four causes, Aristotle recognizes the relationship of the other three within "efficient cause." ARISTOTLE, PHYSICS, *supra* note 201, at 195a3–8 (author's translation) (noting that the four causes jointly produce one effect); *see also* IRWIN, *supra* note 200, at 105 (discussing four causal structure and arguing that all—material, formal, and final—causation are types of efficient causation).

instance.[244] As a result, there is among core-dependent homonyms definitional asymmetry that assumes priority of the core instance.[245]

Aristotle provides a means by which he establishes non-univocity and thereby distinguishes in an important way his philosophy from his predecessor's through the identification of homonyms, especially philosophically interesting ones such as "healthy," "good," and "justice."[246] Plato's "Forms"[247] assume participation by anything that is described as "good" in the Form of the "Good." As a result, the Forms are based on unwarranted assumptions of univocity, in Aristotle's view,[248] because these are homonyms associated around a

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244. *See supra* notes 219–23 (describing the relationship of core and genus). *But see infra* note 271 (distinguishing the relationship of differentiae to genus).

245. In the *Categories*, Aristotle identifies different types of priority, including (1) temporal, (2) "priority as regards implications of existence," (3) priority in order (e.g., in presentation), and (4) priority in value (e.g., family over friends). ARISTOTLE, CATEGORIES, *supra* note 182, at 14a26–b8 (author's translation); *see* SHIELDS, *supra* note 172, at 122–26. Aristotle adds a fifth type of priority in the *Categories*: "reasonably prior by nature" to describe the relationship whereby "two things which reciprocate as regards implication of existence, one may nevertheless 'in some way be the cause of the existence of the other.' " ARISTOTLE, CATEGORIES, *supra* note 182, at 14b12–13; *see also* SHIELDS, *supra* note 172, at 123 (discussing Aristotle's addition of a fifth type of priority in *Categories*). For example, Socrates's being white and the true proposition that Socrates is white reciprocate: Socrates being white is true because Socrates is white; the truth of the proposition ("Socrates is white") is not responsible for Socrates's being white. *See id.*

246. For an example of assumptions of univocity, see *supra* note 177 (discussing Hart).

247. *See* ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 183, at 1096a11–17 (translating and discussing Aristotle's views of Plato's Forms). Aristotle describes the Forms thus:

> For the Good is most truly defined in terms of the Form of the Good (since all other goods are good <only> in terms of participating in it or resembling it), and it is the first of the goods: for if that in which things participate were to be destroyed, the things participating in the Form would also be destroyed, viz., the things which derive their definition from their participation in the Form. Now, this is the relation existing between the first and the latter <members of a series>. Hence the Good itself is the Form of the Good, for it exists separate from the things which participate in it just as the other Forms do.

Id. at 10 n.18 (translating ARISTOTLE, EUDEMIAN ETHICS 1217b2–16 and discussing Aristotle's views of Plato's Forms).

The standard philosophy dictionary describes Platonic Forms thus:

> The unchanged and incorporeal Form is the sort of object that is presupposed by Socratic inquiry; what every pious act has in common with every other is that it bears a certain relationship—called 'participation'—to one and the same thing, the Form of Piety. In this sense, what makes a pious act pious and a pair of equal sticks equal are the Forms Piety and Equality.

CAMBRIDGE DICTIONARY OF PHILOSOPHY 710 (2d ed. 1999).

248. Much of Aristotle's work can be seen as a response to Plato and the Platonic Forms and we can find specific statements to that effect. *See* ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 183, at 1096a11–17 ("But perhaps we had better examine the universal good and face the problem of its meaning, although such an inquiry is repugnant, since those who have introduced the doctrine of Forms are dear to us."); *see also* SHIELDS,

core, not synonyms. Recognition of Aristotle's crucial contribution, that non-univocity does not preclude significant association but significant association does not require univocity, is essential if we are to understand what his distinctions allow us to achieve in other areas. Moreover, it requires that we distinguish his contribution and not erroneously conflate his theories with Plato's. Equally important to the recognition of Aristotle's contribution by identifying non-univocity is his identification of core-dependent homonymy through which he provides a positive mechanism for scientific treatment of core philosophical ideas.[249] Hence the appeal of homonymy is obvious, not only for Aristotle but for us, providing as it does a method, based on definitional priority and causal relationships, for careful analysis of texts that require analysis beyond that of the competent speaker.

F. Identification of Homonyms—Signification

If equivocity or ambiguity left unclarified inhibits the possibility of meaningful discourse, then homonymy, recognized and accounted for through its association around a core, may actually prove useful. Words that are equivocal but associated because they relate to a core are useful by highlighting their similarity marked by difference. This association marked by difference helps us understand language complexity and refine our understanding of both words and entities. Because Aristotle's methodology—avoiding unwarranted assumptions of univocity while defining a mechanism whereby associated terms can be better understood as associated around a

supra note 172, at 20–21 (noting much of the *Categories* as anti-Platonic and explaining Aristotle's unexplained introduction of homonymy as consistent with Aristotle's goal of introducing both "inter- and intra-categorial non-univocity").

249. The importance of Aristotle's achievement for philosophy is significant. Owens, *supra* note 172, at 189 ("The concept of a word as having many senses pointing in many ways to a central sense is a major philosophical achievement; but its scope and power are to be understood by use and not by definition."); *see also* SHIELDS, *supra* note 172, at 70–72 (discussing Aristotle's criteria for "scientific" investigation). Because Aristotle maintains that a "science" requires a unified subject matter (i.e., a class of entities realizing a "single, unified universal"), and that there is a single unified subject only if there is an univocal account, it would seem that denying univocity to "goodness," "justice," etc. would preclude the possibility of scientific inquiry. *Id.* The development of comprehensive, or core-dependent, homonymy, rather than making scientific inquiry impossible, provides the very mechanism for scientific study unhampered by unwarranted assumptions of univocity.

core—is appealing, then further consideration of how to identify homonyms will be helpful.[250]

Although it is often easy to identify discrete homonyms,[251] those providing interesting cases, because they are associated, will often escape our attention. The question then becomes how to identify such cases, and in particular how to define them while not re-asserting some form of univocity. Aristotle provides a variety of indicators that include difference in signification, tests for forms and existence of contrariety,[252] and tests based on differentiae of genera or species.[253]

One important indicator of homonymy is difference in signification.[254] If the predicates signified by a name are not the same

250. It should be noted that this method is not a mechanical one, but rather a series of tests that increase the determinate nature of our understanding of language complexity. As such it provides a more principled method of analysis than other methods of statutory interpretation because it operates within fairly bounded constraints based on the text, word and logic-based interpretive rules.

251. *See* SHIELDS, *supra* note 172, at 29 & n.31 (discussing Aristotle's description of discrete homonyms with terms like "obvious" or "silly" and noting that discrete homonyms are mistaken only by the dim-witted).

252. *See supra* note 198 (discussing law of non-contrariety as it relates to identification of genus).

253. Aristotle discusses at least twelve indicators of non-univocity and homonymy in *Topics*. SHIELDS, *supra* note 172, at 51–53. The indicators include: (i) tests for forms of contrariety (for example, "sharp" applied to music is "flat"; applied to "intelligent" is "dull") (106a9–21); (ii) tests for the existence of contraries in variant uses (love (signifying emotion) and hate (physical love lacks contrary)) (106a24–35); (iii) test for intermediates (black and white issues contrast with colors black and white as opposites with host of intermediates) (106a35–b12); (iv) difference in contradictory opposites (for example, failing to perceive contrasted on the one hand by sensing and distinguished on the other from grasping the point) (106b14–20); (v) test based on inflections and paronomy (judicious as applied to judge or to billiard player is homonymous) (106b29–107a1); (vi) signification ("clear" applied to sheets of glass signifies transparency while "clear" applied to consciences signifies "free of guilt") (107a3–18); (vii) sameness of genus (cranes can refer to different genera, specifying both animals and machines) (107a3–18); (viii) test based on definition and abstraction (bright for girl signifies "intelligent" while bright for light signifies "shining"; if abstracted indicates that "bright" is not univocal) (107a36–b5); (ix) comparability (for example, while knives and professors are both sharp, they are not comparable since one can not be sharper than the other) (107b13–18); (x) a test based on the differentiae of genera which are not subordinate or superordinate to one another ("flat" differentiates one kind of sound from another and also one kind of terrain from one another; since sounds and terrains are not genera related by subordination or superordination, "flat" is non-univocal) (107b19–26); (xi) test based on distinctness of differentia (flowing symphonies versus flowing rivers do not describe same differentia) (107b26–31); (xii) test to see if one term is used as differentia on the one hand and as a species on the other demonstrates non-univocity since species is never also a differentia) (107b32–6). *See id.* at 51–53 (discussing these passages and noting that any one of the tests is sufficient for establishing homonymy).

254. *See supra* note 209 (discussing signification within context of definitions). On the importance of "signification" (signifying that for Aristotle homonyms are a semantic phenomenon and a metaphysical principle), see SHIELDS, *supra* note 172, at 54–56.

in all cases (i.e., if a common word signifies different accounts) this alone is sufficient to establish homonymy for Aristotle.[255] Because non-univocity represents more than a semantic distinction for Aristotle, difference in signification represents more than mere ambiguity; difference in signification represents homonymous entities. Hence the importance of defining well, in order to comprehend the nature of the homonyms identified. Because a true definition must contain both the genus and differentiae of that being defined, difference in signification may indicate not only that the words are homonymous but also that the account of each is incomplete as a definition. Without a complete definition, specifying the genera of the homonyms in question, it will not be possible to understand or speak clearly. Unrecognized homonyms, including homonyms that demonstrate absence of either the genus or the essence specified in the core will, therefore, result not only in lack of precise communication among speakers but in the possibility of speakers mistaking a spurious for a real example.[256]

Similarly through the law of non-contrariety, stating that no predicate can be asserted and denied simultaneously,[257] Aristotle has shown that at its most elemental application, something cannot be classified as belonging to two genera simultaneously. Genus represents the core characteristic of that being identified. Because of the relationship of the genus to the correct identification of that being defined, difference in genus will serve as an important indicator of homonymy.[258] If homonymous words indicate that their contraries

255. As Shields explains, if "F" in "*a* is F" and "*b* is F" signify different things, than "F-ness" is homonymous. SHIELDS, *supra* note 172, at 54–55. That difference in signification is sufficient to establish homonymy for Aristotle is clear: "It is necessary also to consider the types of predicates <signified> by the name, <to determine> whether it is the same in all cases. For if it is not the same, it is clear that what is said is homonymous." SHIELDS, *supra* note 172, at 54 (discussing and translating ARISTOTLE, TOPICS 107a3–12).

256. SHIELDS, *supra* note 172, at 55 ("When an *F* has lost what is definitive of being an *F*, it is no longer an *F* as such."). The significance of homonymy and definitional priority is critical for "reorganizations." *See infra* notes 263–71 and accompanying text (explaining that reorganization as defined in statute clearly homonymous and refers to genus of "non-sale"). Reorganizations that meet differentia of one of the forms without also making reference to non-sale characteristics of genus (including business purpose and continuity of interest) are only homonymously reorganizations and thus spurious ones.

257. *See supra* note 198.

258. *See supra* note 253 (listing tests i, ii, iv, vii, and x as set forth in the *Topics*: (i) tests for forms of contrariety (for example, "sharp" applied to music is "flat"; applied to "intelligent" is "dull") (106a9–21); (ii) tests for the existence of contraries in variant uses (love (signifying emotion) and hate (physical love lacks contrary)) (106a24–35); (iv) difference in contradictory opposites (for example, failing to perceive contrasted on the one hand by sensing and distinguished on the other from grasping the point) (106b14–20); (vii) sameness of genus (cranes can refer to different genera, specifying both animals and

belong to different genera, then the homonyms too will not belong to the same genus.[259] The conjunction of the rule of non-contrariety with the genus requirement for a more complete definition results in a helpful mechanism for homonymy recognition and understanding.

By combining Aristotle's theories of homonymy (common words signifying different predicates), definition (levels of definitions with "better," more complete, definitions specifying genus), logical principles regarding genus classification and the law of non-contrariety, and priority (what is known by nature is prior; associated homonyms refer to a core that is prior), we have discovered a method for approaching interesting problems of statutory interpretation that allows for greater clarity in the use and understanding of language. With these principles in mind, we can now return to a consideration of "reorganization."

IV. EXAMPLE OF HOMONYMY: "REORGANIZATION"

Looking again at the statutory provision at issue in *Gregory*, we can consider the utility of Aristotelian analysis. The applicable statutory provision states:

> The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.[260]

Textualists who rely on the plain meaning of the statutory text have interpreted this passage to indicate that "reorganization" as stated in each one of these alternative forms individually contains all

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machines) (107a3–18); (x) a test based on the differentiae of genera which are not subordinate or superordinate to one another ("flat" differentiates one kind of sound from another and also one kind of terrain from one another; since sounds and terrains are not genera related by subordination or superordination, "flat" is non-univocal) (107b19–26).

259. *See supra* note 196 (discussing the impossibility of something belonging to two genera at the same time).

260. Revenue Act of 1928, ch. 852, Pub. L. No. 70-562, § 112(g), 45 Stat. 791, 818 (1928); *see supra* notes 76–102 and accompanying text (discussing the statutory development and its interpretation by the courts in *Gregory*).

conditions both necessary and sufficient to satisfy the requirements for tax-deferral. Thus, for a textualist, a "reorganization" occurring in the form of a "merger" or "a transfer of assets to another corporation" satisfies completely all the necessary and sufficient requirements for the benefits of tax-deferral.[261] Our examination of Aristotle has demonstrated, however, that the occurrence of a common word signifying different things cannot each signify a univocal account.[262]

A. Difference in Signification Establishes Homonymy

Indeed, "reorganization" as a common word used to signify four alternative accounts can be identified as a homonym according to Aristotle because difference in signification is sufficient to establish homonymy.[263] In other words, "reorganization" is a common name applied here to four alternative transactions. A "reorganization" that is a "merger" does not signify a transaction synonymous with a "recapitalization" or "mere change in place of organization." Because their accounts differ, yet each is termed a "reorganization," we can conclude based on our analysis that the inference that each provides a complete, univocal account[264] is suspect. In other words, because "reorganization" signifies different, alternative, and non-univocal accounts, we can identify "reorganization" as a homonym.

Once identified as a homonym, the next question is whether "reorganization" is an example of a discrete (unrelated) homonym or is better understood as an example of an associated or core-dependent homonym: a homonym where the accounts partially, but do not completely, overlap.[265] Because each of the alternative reorganization transactions[266] confers beneficial tax treatment through tax-deferral, their grouping suggests that they are not discrete homonyms, but are rather examples of associated homonyms.

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261. *See supra* notes 139–40.

262. *See supra* notes 189, 255.

263. *See supra* note 255. Aristotle argues that "[i]t is necessary also to consider the types of predicates <signified> by the name, <to determine> whether it is the same in all cases. For if it is not the same, it is clear that what is said is homonymous." SHIELDS, *supra* note 172, at 54 (translating and discussing ARISTOTLE, TOPICS 107a 3–4).

264. *See supra* notes 176, 182 (definitions of synonym and homonym); *supra* notes 206–11 (complete definition requires specification of genus).

265. *See supra* note 184 (identifying discrete homonyms (a and b) as homonymously F if and only if their names are common but their accounts have nothing in common); *supra* note 192 (defining associated homonyms (a and b) as homonymously F if their name is common and their definitions do not completely overlap).

266. *See infra* note 271 (discussing these alternative forms as specifying only the differentiae and not specifying the genus).

It does not seem a reasonable conclusion to infer that "reorganization" simply constitutes an ad hoc grouping of randomly, apurposively selected[267] transactions to which an exception to the realization and recognition requirement is granted. Further investigation of the nature of these homonyms will be helpful in resolving this question.

B. "Reorganization" as Definition

Aristotle's levels of definition will also be instructive in resolving the homonymous nature of "reorganization."[268] In fact, Aristotle cautions us that even the word "definition" is homonymous.[269] Thus, when we see a homonym, such as "reorganization," we need to inquire whether we have a "definition" that is really a denomination of something accurately called a "reorganization" or a "definition" offering a more complete account, including its genus. For example, as competent speakers we may be said to "define" a four-legged, furry creature by denominating it as a "dog." Our understanding of the object (dog) is based on our immediate knowledge and perception. Our designation ("definition") of "dog" need in no way include a statement of the particular nature of "what it is to be" a dog, as canine and carnivore. Similarly, we can generally understand a "reorganization" without understanding the precise nature or essence of "reorganization." However, in order to state "what it is to be" a dog, in the form of a "better" or more complete definition, we must include both the genus and the differentiae (characteristics) of that which we so define. We have seen that genus (canine, animal) is necessarily prior to the differentiae (individual characteristics, e.g., four-legged, furry); when we state the genus, we state the "essence" or definitive character of "what it means to be something."[270]

If we consider again "reorganization" as it appears in the statute, we see that not only is "reorganization" a homonym but the different

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267. As problematic as purposive interpretation may be, to begin from the premise that law is initially apurposive seems deeply troubling and unwarranted. *See supra* note 231 (discussing same).

268. *See supra* notes 194–99 (discussing Aristotle's assertion that one who defines well must include both genus and differentia); *supra* notes 209–11 (discussing Aristotle's recognition of levels of definition corresponding to the level of inquiry).

269. *See supra* notes 206–13 (discussing levels of definition and noting that "definition" is equivocal). By "definition" we can "signify," i.e., denominate something corresponding to that term; we can also "define" by stating the essential characteristics (including its genus) of that so denominated. *See supra* notes 209–10.

270. *See supra* note 199 (quoting Cleary on priority of genus in definition); *supra* notes 206–08 (discussing meaning of "essence" for Aristotle).

accounts, the terms specifying the permissible forms (e.g., merger, recapitalization) state only the particulars (differentiae) applicable to each type. Aristotle tells us that differentiae cannot function as the genus.[271] As such, the textualists who interpret "reorganization" to define all necessary and sufficient conditions are stating an incomplete definition because they state only the differentiae and do not state the genus to which they belong, viz., a group of transactions for which an exception to the realization/recognition requirement has been granted. As competent speakers, we can understand generally what is meant by a "reorganization" describing mergers and other forms of business adjustments. However, for a more sophisticated definition, the genus to which "reorganization" belongs must be specified. Here "reorganization" states a series of associated homonyms with only their differentiae and with no genus expressly stated. To define well or completely, we must state in any account the genus to which that being defined belongs. Because "reorganization" is an associated (a core-dependent) homonym, however, it will be possible to determine its genus.[272]

C. "Reorganization": A Complete Definition of Genus "Not-Sale"

Although no genus is expressly stated in the reorganization statute, it may be possible to infer the genus by virtue of the core around which these associated homonyms coalesce (i.e., characteristics consistent with the tax consequences applicable to the alternative transactions, deferral of immediate recognition of any gain). We do not merely assume the genus by reason of the tax consequences. Rather, we begin from a consideration of the characteristics of these transactions that justify their tax treatment (deferral) and investigate whether, in fact, characteristics of the genus correspond to characteristics associated with the tax consequences.

1. "Reorganization" as Incomplete Definition

The default characterization for all changes in ownership, whether termed "sale," "disposition," or "transfer of interest" is a

271. *See* ARISTOTLE, TOPICS, *supra* note 169, at 128a30 (differentia must be distinguished from genus); *id.* at 128a20–29 (differentia always indicates a quality of the genus and cannot be substituted for the genus because genus is predicated more widely than differentia). Aristotle illustrates by saying that he who describes a "man" as an "animal" indicates his essence better than he who describes him as a "pedestrian." *Id.* (author's translation).

272. *See supra* notes 223–24 (defining core-dependent homonyms that make reference to the core, the base referent implicit in each).

"sale." Any sale, transfer or other disposition of one's interest in a corporation, for whatever reason and for whatever type of consideration (e.g., cash), results in a taxable event requiring immediate recognition of any gain or loss.[273] If any change in ownership can be termed a "sale," then for convenience, we may refer to these four "reorganizations" to which deferral is granted as "not-sale." By "not-sale" we mean here a group of reorganizations that are accorded tax-deferral, thereby postponing the moment of taxation in spite of changes that would otherwise trigger a taxable event within a realization-based system. Because genera do not overlap,[274] we may assume that "reorganizations" that qualify for tax-deferral must constitute a genus ("not-sale") that is distinct from that of a "sale."

It is not the form (differentiae) described by the alternative transactions that of itself characterizes a distinct genus excepted from immediate tax. A "sale" or other realization event would include an alteration of one's ownership interest occurring in any one of the forms specified here (mergers, reorganizations or the like). We can, therefore, infer that a taxable reorganization would require recognition of gain or loss upon its occurrence. If the forms alone do not result in beneficial tax deferral, and indeed cannot constitute the genus to which they belong for purposes of a more complete definition, we may infer that characteristics of the genus constitute what it is to be "not-sale." Indeed, it is the genus to which these core-dependent homonyms ("reorganizations") belong that confers the benefit of non-recognition because its characteristics allow it to be characterized as a "not-sale." The two genera,[275] "sale" and "not-sale," two genera that do not and cannot overlap, provide the basis then for distinguishing between reorganizations that require immediate realization and recognition of gain and those to which tax-deferral is granted. The characteristics that distinguish the genus "not-sale," particularly its essence or its core characteristic, merit further examination.

2. Characteristics of Genus "Not-Sale": Business Purpose

Its essential nature, those characteristics that merit no immediate tax recognition, includes continuity of interest, because continuity

273. Within a realization based income tax system, the time for measuring gain or loss ends at the moment of disposition. I.R.C. § 1001 (1994); *see also supra* note 79.

274. *See supra* notes 196, 259.

275. *See supra* note 198 (noting that the law of non-contrariety operates to prevent assigning anything to two genera simultaneously).

itself allows for postponement until a later date for the measurement of any gain or loss inherent upon final disposition of one's ownership interest. But this is not sufficient. If one has continued one's ownership interest unchanged, no exception to realization is required, because there has been no "sale." In other words, there would be one genus, not two distinct genera. To require continued ownership of a business itself does not, however, take account of the nature of business and economic conditions. The need to make changes in business structure, ownership or combinations occurs independently of the willingness to recognize gain or loss and the attendant tax consequences. If continuity is required to avoid realization and recognition, there is no genus distinct from "sale." A tax system that does not, however, acknowledge business exigency creates a significant impediment to the conduct of business and the healthy functioning of an economy unimpeded by the system itself. What distinguishes the genus "not-sale" is not therefore unchanged ownership, that would be a not "sale," but the nature of the transactions that are prompted by business purpose, coupled with some level of continuity. Transactions prompted by business purpose are distinguishable from a disposition of an ownership interest for any reason or no reason because their very purpose is inherent in the nature of the business to be continued but in a somewhat altered form. Transactions prompted by business exigency despite incomplete continuity constitute members of the genus "not-sale." The combined characteristics of business purpose (a business justification for a transaction) plus some level of continuity that is less than complete but that is consistent with the business purpose (alteration in form or combination) constitute characteristics of the genus "not-sale."

A "not-sale" then can be characterized as a change in ownership and in a form that would otherwise require realization of gain but which is excepted from such realization and recognition because of both continuity of ownership and business purpose. What distinguishes then a "reorganization" to which tax-deferral is granted from those which require immediate tax consequences are those characteristics of a "not-sale," namely business purpose, whose origin is inherent in the very nature of its business and some level of continuity of interest. In short, a tax-deferred "reorganization" is within the genus "not-sale" because of the characteristics of significant, but less than complete, continuity of ownership interest; but a reorganization that is "not-sale" is one whose very incompleteness of continuity originates in and is prompted by

business purpose—those very characteristics identified by the judicial doctrines of business purpose and continuity (including continuity of enterprise and shareholder interest). We will see that these characteristics constitute the "core" principles defining "not-sales" around which these homonyms are associated and to which they must refer.[276]

3. Priority of Genus, Base Referent: Business Purpose

As stated, or "defined," in the statute, tax-deferred "reorganization" specifies only the differentiae and not the genus.[277] We can infer that each reorganization must make reference to and implicitly contain the essential characteristics of the genus, the base referent upon which tax-deferral is predicated: business purpose coupled with some level of continuity. While their forms[278] (differentiae) are included in the definitions as stated within the statute's provisions (and as such constitute "definitions" that we as competent speakers commonly understand as "reorganizations"), as core-dependent homonyms to which tax-deferral is granted, these provisions alone cannot be understood as complete definitions or what Aristotle called "better definitions." The statutory "definition" must therefore be understood to be incomplete. To provide a complete definition, we must understand the genus and that each form of "reorganization" relates efficiently to the core provisions that constitute its essential nature.

"Reorganization" as used in the statute is an example of a core-dependent homonym, associated around a core specified by the genus, because genus is prior to the differentiae specified and is related to the tax consequences accorded to these transactions. In defining associated, core-dependent homonyms, we have seen that they can be related in two ways. First, as in the example "healthy," we saw that a "healthy complexion" was indicative of Socrates's state of healthiness while "Socrates's healthy regimen" was contributory to

276. *See supra* notes 221–23 (describing core-dependent homonymy as where *a* and *b* are homonymously F if there is some *c* such that the accounts of F-ness in "*a* is F" and "*b* is F" necessarily make reference to the account of F-ness in "*c* is F" in an asymmetrical way).

277. *See supra* note 271 (noting that differentia can not function as genus).

278. The particular form that the transaction takes could be termed either its material, formal, or efficient cause. Identification of the exact causal relationship is not essential to the argument here as it applies to cases of business reorganizations. Given that Irwin argues effectively that the "efficient" causal relationship subsumes the other causes, it could be argued that an efficient causal relationship is the most appropriate designation. *See supra* note 243 (discussing the four causes and Irwin's assessment).

that state of Socrates being "healthy." In this example, associated homonyms relate causally and asymmetrically (since they are not reducible to but necessarily refer to Socrates's being healthy) to the core statement: Socrates is healthy. We can rely on what we learned from the definition of "core-dependent homonym" to see that the homonym "reorganization" must be defined to allow reference to some base referent, some core, that must exist prior to and to which reference must be made by each of the associated homonyms.[279]

4. Causal and Functional Relationship

We can also compare the two classes, the two genera, of reorganizations. These two genera of reorganizations are first, the genus "sale" comprising those which appear in the forms specified but without business purpose and continuity, and second, the genus "not-sale" comprising those that appear in the forms specified that also include both a business purpose and some level of continuity. The genus "not-sale" permits the same forms, the same differentia as the genus "sale." In other words, it is the genus, not the differentiae that distinguishes the two groups. Applying Aristotle's test of "functional determination,"[280] we can consider what function these "reorganizations" perform. The group specified here as tax deferred "reorganizations," "not-sales," functions to confer the benefit of tax deferral. The reorganization provisions function as an exception to the realization and recognition requirement to allow the benefits of deferral of immediate tax consequences. Where prompted by business exigency, the tax consequences otherwise resulting from such "reorganizations" might inhibit the very changes necessitated by that business purpose. Because the function of something is central to its identification for Aristotle, we can discern true from spurious examples by examining whether the function core to the identity can be performed. A homonym that does not share the base referent, that lacks the definitive, functional characteristics, is only homonymously so; indeed it is spurious.[281] Absent a business

279. *See supra* note 187 (describing nonreducibility of statements); *supra* notes 222–23 (defining core-dependent homonymy, in addition to asymmetrical relations found in our examples regarding Socrates's health as "*a* and *b* are homonymously F in a core-dependent way iff [if and only if]: (i) *a* is F; (ii) *b* is F; and (iiib) there is some *c* such that the accounts of F-ness in '*a* is F' and '*b* is F' necessarily make reference to the account of F-ness in '*c* is F' in an asymmetrical way," SHIELDS, *supra* note 172, at 104).

280. *See supra* note 229 (describing Aristotelian "functional determination" as where x will belong to a kind or class of F if and only if x can perform the function of that class).

281. *See supra* notes 232–33 (describing when an F has lost what is definitive of being an F, it is no longer an F as such, only homonymously so).

purpose, transactions merely taking one of the permissible forms but lacking characteristics of the genus, business purpose and some level of continuity, would be inappropriately granted tax-deferral because they are only homonymously reorganizations, lacking the function of permitting transactions to occur prompted chiefly by business exigency.

5. Application of Law of Non-Contrariety

We may find further support for our distinction between "sale" and "not-sale" by reference to a fundamental logical principle, the law of non-contrariety.[282] Aristotle describes the law of non-contrariety as the "most certain of all principles" and states this because "it is impossible at once to be and not to be."[283] In other words, the law of non-contrariety states explicitly that it is impossible for "contrary attributes" to belong to the same subject at the same time. For example, Socrates as a "man" is also an "animal," thereby correctly specifying the relative (ascending) hierarchical relationships of the genus and species to which Socrates, the individual, belongs. While it is possible to identify other, non-human, members of the genus "animal," and so correctly name a dog as an animal, it will not be true to call Socrates both an "animal" and a "not-animal": Socrates cannot simultaneously belong and not belong to the same genus.[284] By function of the law of non-contrariety, it would be false then to state simultaneously that "Socrates is an animal" and that "Socrates is a not-animal."

We can thereby logically infer that what is defined and classified as a "not-sale" cannot simultaneously be a "sale." Or, what is a "sale" cannot simultaneously be correctly assigned to the genus "not-sale." We can infer further that a "sale" or transfer—a severing or alteration of one's investment for no reason and with any type of consideration—can not also be defined as a "not-sale." Within a system predicated on the realization requirement, "not-sale" exists

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282. *See supra* notes 198, 257.

283. ARISTOTLE, METAPHYSICS, *supra* note 185, at 1005b35–1006a6; *see also supra* note 198 (discussing ARISTOTLE, POSTERIOR ANALYTICS 77a10–26). Aristotle illustrates the law of non-contrariety with the following example:

> If a man is truly called an animal, it will be true to call Callias (a man) an animal, even if a not-Callias (e.g., a dog) is also called an animal. But it will not be true to call Callias a not-animal. For the law of non-contrariety, the surest of all principles, requires that a man (Callias) can not be an "animal" and be a "not-animal" at the same time.

ARISTOTLE, POSTERIOR ANALYTICS, *supra* note 193, at 77a10–16 (author's translation).

284. *See supra* notes 198, 257.

because it is predicated on business purpose in conjunction with some requisite level of continuity of interest. To assure ourselves that Congress's lengthy effort to craft statutory provisions that accomplish their function (serving as an exception to the realization/recognition requirement predicated on business purpose) is not merely apurposive rule-making, we should consider the statute's extrinsic evidence.

D. Extrinsic Evidence

To confirm that our process of reasoning is consistent with congressional understanding,[285] we need look only briefly at the rather lengthy legislative history associated with the statute. The reorganization provisions were first introduced in 1921,[286] amended from 1924[287] until 1954,[288] when they assumed a form close to the their current one. Again amended in 1990 following codification in 1986,[289] these provisions continue to be amended, most significantly in 1997.[290] As the nature of business transactions and the ingenuity of tax lawyers evolved, Congress has revisited these provisions and will likely continue to do so. Throughout its development, business purpose is repeatedly discussed as the core justification for this increasingly complex provision.[291] Business purpose coupled with concern lest the provisions be misused for tax avoidance purposes (including loss recognition) is the most significant factor cited in the record of congressional efforts, which yielded increasingly complex

285. *See supra* notes 82, 100, 104 (discussing legislative history).

286. Revenue Act of 1921, ch. 136, Pub. L. No. 67-98, 42 Stat. 227.

287. Revenue Act of 1924, ch. 234, Pub. L. No. 68-176, 43 Stat. 253.

288. I.R.C. § 355 (1994 & Supp. IV 1998).

289. Section 355(d) was added by the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508 § 11321(a), 104 Stat. 1388–1460 (codified as amended at 26 U.S.C. § 355(d) (1994 & Supp. IV 1998)). The addition's motivation was expressed in a House report. H.R. REP. NO. 101-881, at 341 (1990), *reprinted in* 1990 U.S.C.C.A.N. 2017, 2343 (Y1.1/8:101-881) (enacting § 335(d) to prevent taxpayers from using § 355(a) to dispose of subsidiaries in transactions that resemble sales); *see also* H.R. REP. NO. 101-964 (Conf. Rep.) at 1044 (1990), *reprinted in* 1990 U.S.C.C.A.N. 2374.

290. Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-34, § 1012, 111 Stat. 789, 914 (codified at 26 U.S.C. § 355(e) (Supp. IV 1998)).

291. *See, e.g.*, SEIDMAN, *supra* note 82, at 790 (stating that no part of the present income-tax law produced such uncertainty and litigation or more seriously has interfered with necessary business readjustments); *id.* at 791 (stating that amendments will "not only permit business to go forward with the readjustments required by existing conditions" but increase revenue by preventing taxpayers from taking losses in sales and other fictitious exchanges); *supra* note 82 (discussing Congress's initial struggle to define "transactions" that qualify for tax-deferred reorganization treatment).

statutory language in an effort to make the provisions clearer.[292] However much public choice theory cautions us to view legislative history with suspicion, the mass of evidence in support of "business purpose" as the base referent seems to argue against simply dismissing decades of material as strategic.[293]

This examination of "reorganization" as a homonym where a common name signifies different predicates allows us to recognize "reorganization" as a definition understood by competent speakers but one which necessarily lacks all elements necessary to provide a "better," or more complete, definition. A "better definition" that recognizes the priority of the genus to which these tax-deferred reorganizations belong and to which these core-dependent homonyms necessarily make reference, demonstrates that as a genus distinct from "sale," a "not-sale" to which tax deferral is granted correctly incorporates business purpose within its core, or essential, attributes. As such, business purpose is correctly understood to be inherent in and to apply to all tax-deferred reorganizations, in whatever form they are structured. As homonyms, all reorganizations necessarily incorporate their essential nature, including business purpose.

The application of Aristotelian principles of homonymy, association and priority among homonyms, and priority in levels of definition, leaves many questions unanswered, including the quantum of business purpose necessary and whether the doctrine is correctly applied outside of the reorganization provisions. This examination will, nonetheless, have served its purpose if it helps definitively answer whether the *Gregory* decisions, articulating business purpose, are correct. If we are closer to agreeing on that fundamental question, it may now be possible to address these still unanswered issues.

CONCLUSION

We must now re-address the central question of whether the proposed method of statutory interpretation is suited to modern American society with its stated dedication to the "rule of law." Can application of the methods outlined be reconciled with the rule of law? These methods begin and ultimately rely on close examination

292. *See supra* notes 100, 104, 291 (discussing the business exigency standard).

293. *See supra* notes 34–36, 44, 66 (discussing the use of legislative history as problematic because of its strategic purpose premised on the public choice model of legislation).

of the text, considering first the nature of terms used, whether the terms are homonyms, and if homonymous, then considering whether the homonyms are associated or discrete. Once identified as associated homonyms, the text can then be examined to see if the base referent or the causal relationship of the homonym to a core idea is apparent. The text itself allows consideration of the level of definition provided, including whether a definition includes the genus, essential information to provide a more complete rather than an incomplete, definition and whether common principles of logic, such as the law of non-contrariety, can assist in our textual examination. As a text and contextually based system, the method proposed would seem to adhere more closely to the "rule of law" than current forms of textualism, with their ad hoc recourse to dictionaries and canons of statutory construction, whose very formalistic nature requiring anticonsequentialist application of increasingly complex but necessarily incomplete rules, undermines the rule of law. The methods advanced in this Article provide as well more determinate principles for analysis than dynamic statutory interpretation that lacks the structure provided by Aristotelian methods.

Aristotelian methods are probably not going to replace current methods of statutory interpretation. But if they allow the resolution of some common but difficult issues and provide some determinate answers based on a principled methodology, they will contribute to the development of ultimately more satisfying methods of statutory interpretation.

Finally, the "rule of law" passage, when considered in its entirety, instead of as selectively quoted by the textualists, itself shows that the dichotomy articulated by textualists is a false one: principled interpretation is not antithetical, but is indeed necessary to the rule of law. Aristotle himself answers the question of how textual interpretation and the function of those charged with both interpreting and giving effect to the law can be reconciled with the principle of the "rule of law":

> Therefore, it is preferable for the law to rule rather than any one of the citizens, and according to this same principle, even if it be better for certain men to govern, they must be appointed as guardians of the laws and in subordination to them; ... It may be objected that any case which the law appears to be unable to define, a human being also would be unable to decide. *But the law first specially educates the magistrates for the purpose and then commissions them to decide and administer the matters that it leaves over*

> *"according to the best of their judgment," and furthermore it allows them to introduce for themselves any amendment that experience leads them to think better than the established code.*[294]

Interpretation, therefore, is inescapable as part of the application of law to any factual situation. Principled analysis of words that are homonymous, by following a methodology such as Aristotle suggests, one that includes careful analysis of words, levels of definition and priority, will allow for a reasoned approach to common and important issues of statutory interpretation. However much we value the rule of law, language is not, except in the simplest cases, self-evident.[295] As a result, analysis and interpretation by those committed to judge in the

294. ARISTOTLE, POLITICS, *supra* note 1, at 1287a20–29 (emphasis added) (citation omitted). Aristotle continues: "He therefore that recommends that the law shall govern seems to recommend that God and reason alone shall govern, but he that would have man govern adds a wild animal also." *Id.* Noteworthy is the context in which Aristotle makes this statement. Aristotle is contrasting monarchy where law is dispensed by one individual having absolute power with a more mixed, democratic government that could justifiably be described as government by the rule of law, not the rule of man. *Cf.* AESCHINES, AGAINST CTESIPHON 3.6 (describing three forms of government (tyranny, oligarchy, democracy) and stating that "tyrannies and oligarchies are administered according to the directions of those who are in positions of authority while democratic city-states are administered according to their established laws." (author's translation)). *See generally id.* (describing forms of government and advocating mixed government, not monarchy or democracy because in their absolute forms they degenerate into tyranny and ochlocracy).

The expression "according to their best judgment" is formulaic, part of the oaths taken by the dikasts at Athens. DOUGLAS M. MACDOWELL, THE LAW IN CLASSICAL ATHENS 44 (1978). MacDowell notes that, once Athens had a written law code, jurors were expected to judge in accordance with the laws, as demonstrated by their oath "to judge according to the laws and decrees of Athens, and matters about which there are no laws I will decide by the justest opinion." *Id.* (citing various speeches written by Demosthenes (384–322 B.C.) who was Athens' greatest orator and whose orations, on both private and public matters, are the source of much information about fourth century Athens' legal system). *See, e.g.*, DEMOSTHENES, AGAINST LEPTINES 20.118 (reminding jurors of their duty since they have come into court "having sworn to judge according to the laws" and who have sworn about which there are no laws, "to judge in the most just opinion possible" (author's translation)); DEMOSTHENES, AGAINST ARISTOCRATES 23.96 ("jurors have sworn to judge with the most just opinion possible" (author's translation)); DEMOSTHENES, MANTITHEUS AGAINST BOEOTUS IN REGARD TO HIS NAME 39.40 (same); DEMOSTHENES, EUXITHEUS AGAINST EUBULIDES, AN APPEAL 57.63 (same). *Cf.* AESCHINES, AGAINST CTESIPHON 3.6 (noting lawgivers' recognition of importance of laws in democratic city-states because of inclusion in jurors' oath "I will cast my vote according to the laws" (author's translation)). MacDowell makes the important distinction here that "no law" is most sensibly interpreted to mean not an absence of any law, but the absence of a specific statutory provision applicable to the case at hand. He uses an example from Plato's *Euthyphron* (homicide law proposed against Euthyphron's father who left a man in a ditch absent law classifying specific activity as homicide). MACDOWELL, *supra*, at 60.

295. *See* Guiseppi v. Walling, 144 F.2d 608, 623 (2d Cir. 1944) ("Laws neither execute nor interpret themselves. Men must discharge those functions.").

"best manner possible" are both required to give effect to the rule of law and are thus essential and not contrary to it. We must begin with the text but we must necessarily consider the full context in which the text appears and then "judge in the best manner possible." If analysis and interpretation is undertaken by "well-trained, honest, able men [sic], conscientiously obeying the laws, and imbued with the spirit of democracy," then, but only then, will we actually construe a text "reasonably, to contain all that it fairly means."[296]

Ultimately the statutory text offers much more than any method of interpretation and specifically the methods offered by either textualists, intentionalists, or dynamic interpreters. Despite their assertions of devotion to the rule of law, neither textualism nor practical and dynamic methods of interpretation respond adequately to the multiplicity inherent in both language and the world it describes. To deny the flexibility and richness of language by denying the need for principled interpretation, as the textualists do, is to assert clarity and univocity in the face of competing meanings that can suggest only non-univocity. Such refusal to recognize language complexity is to rob the text of its ability, in conjunction with reasoned interpretation, to offer determinate and determinable results satisfying rule of law concerns. In essence, by requiring univocity as necessary for the rule of law, textualists undermine our ability to satisfy the rule of law in the face of multiplicity. At the same time, to abandon the text to consideration of extra-textual materials without taking all possible structured guidance from the text (including assessment of issues of homonymy, synonymy, priority in homonymy and definition) fails to use the determinacy of language to give fullest effect to rule of law concerns.

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296. *Id.*; *see also* SCALIA, INTERPRETATION, *supra* note 25, at 23 (describing his method of textualism as construing a text "reasonably, to contain all that it fairly means"); *supra* note 53 (describing critics' rejection of Scalia's description). Thus, this methodology should allow us to better accomplish what in fact Justice Scalia claims for his goal in interpreting statutes. Indeed this is Judge Frank's conclusion:

> The phrases 'separation of powers' and 'a government of laws, and not of men,' if properly construed, embody principles of the first importance in a democracy; but if so construed as seriously to cripple effective government, they will lead to democracy's downfall, for, as the Federalist tells us, an ineffective government paves the way to anarchy and thence to depotism [sic]. Laws neither execute nor interpret themselves. Men must discharge those functions. Above all what we need is the selection of well-trained, honest, able men, conscientiously obeying the laws, and imbued with the spirit of democracy, to serve as administrators and on the bench.

Guiseppi, 144 F.2d at 623 (citations omitted).

In short, improper consideration of the text (whether by asserting its univocity or denying order in the face of multiplicity) is to undercut the very rule of law on multiple fronts. Failing to consider all that the text can offer allows judges to exercise power, whether through ad hoc reliance on dictionaries or legislative history, beyond that consistent with the rule of law and allows advocates to manipulate the system for unfair individual advantage—both activities that are more consistent with a government described as the "rule of men." Only by applying a principled and consistent methodology to the very necessary process of statutory interpretation will it ultimately be possible to give effect to the rule of law, whose very premise is that both magistrates, bound to give their best judgment, and citizens, those who are governed, agree to be bound by the terms of those laws.