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Notes Toward a Postmodern Principle

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Introduction

Judicial engagement with statutory interpretation almost invariably invokes Elmer Driedger's "modern principle." In the *Construction of Statutes*, he famously observes that "[t]oday there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[1] If these directives continue to hold meaning for readers of Canadian law, it is not for a lack of *ad nauseam* repetition; as Ruth Sullivan observes, citations of this passage, in full, are "innumerable."[2] In fact, these words may constitute the most ubiquitous paragraph in our jurisprudence: One major legal search engine returns nearly 600 decisions that include each word of Driedger's methodology.

This consistency of approach is largely disingenuous. The oft-cited mandate performs a rhetorical function without constraining interpretive freedom. I submit that the modern principle fails to engage with contemporary understandings of textual signification, thereby impelling an outdated, conservative analysis that evokes the language of objectivity. This, in turn, performs a powerful legitimizing function, which instills a false sense of predictability and neutrality in an area of idiosyncratic decision-making. A close reading of the modern principle demonstrates its lack of analytical content and foregrounds its normative force. Accordingly, I will approach each clause of Driedger's observation through a postmodern framework of textual signification, which elucidates the dominant perspective from which this doctrine speaks. My central claim—that contemporary hermeneutical scholarship effectively dismantles the foundational underpinnings of the modern principle—also serves a progressive function. The process of deconstructing and repudiating our current approach provides several useful insights for aligning the theory and practice of statutory interpretation in Canada.

A Critical Reading of the Modern Principle

(a.) "Today there is only one principle or approach…"

(i.) The Unnoticed Introduction

The prefatory clause that introduces the modern principle is remarkably effective. These words begin countless interpretive discussions and seemingly take much for granted. Indeed, when contention arises concerning statutory language,

1. Elmer Driedger, *The Construction of Statutes*, 2nd ed (Butterworths, 1983) at 87.
2. Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (LexisNexis Canada, 2014) at 1.

this authority is invoked with enviably self-reifying force; without any justification, the ostensibly neutral voice of settled doctrine announces itself as the one true answer. And while these judgments reiterate the presence of a singular correct approach to statutory interpretation, virtually none of them critically engage with this bold statement.

In context, one reads the *Construction of Statutes* with a markedly different understanding.[3] Certainly, the author submits that the modern principle is the "only" interpretive mandate in contemporaneous favour, but Driedger's terms are descriptive, not advocative. This oft-cited passage is merely proffered as an observation: Today, there may well only be one approach to statutory interpretation but, as a matter of basic logic, this does not mean—and nor does he presume to argue—that this *should* be the case.

The lack of judicial attention surrounding this preambular clause owes, at least in part, to its outward neutrality.[4] Arguably, by asserting that the mandate that follows is valid, the introduction requires nothing but recognition from the court. Yet, while this reading is true insofar as no specific interpretive stipulation is made here, this clause does presume the efficacy of the words that follow—and does so in a manner that is markedly incongruous with the vast majority of credible hermeneutical scholarship.

There is no shortage of debate on the usefulness—if any—of linguistic criticism and philosophy in the study of law. This issue has been taken up in earnest by various scholars in treatises on, for instance, law and postmodernism. At the outset, it is important to question the utility of deconstructing "key boundaries"[5] in light of the often mechanical work performed by adjudicators. When a trial judge gives content to, say, a municipal zoning regulation, does it matter whether she is alive to the fissures in our linguistic superstructure? Moreover, deep theorizing about legal semiotics arguably culminates in an unproductive dualism: Interpretation is essential to our current iteration of legality; interpretation can never be objective when language constitutes the subject that is speaking.

With these theoretical difficulties in mind, many critics have adopted a useful habit of qualifying the significance of their preferred framework.[6] Far less

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3. *Supra* note 1.

4. While truly proving this negative would involve reference to the hundreds of relevant Canadian decisions, this phenomenon can be more succinctly explicated in two parts. First, an analysis of the formative cases demonstrate complete indifference to the apparent singularity of the modern principle. In *Rizzo Shoes*, for instance, Iacobucci J transgresses this rhetoric, suggesting the presence of hermeneutical alternatives: "Although much has been written about the interpretation of legislation … Elmer Driedger in *Construction of Statutes* … best encapsulates the approach upon which I prefer to rely" ([1998] 1 SCR 27 at para 21). The second part of this examination reviews the post-*Rizzo* jurisprudence, where the courts have—virtually without exception—justified the modern principle through appeals to *stare decisis*. These decisions generally fail to engage with even the interpretive efficacy of the doctrine—much less its apparent place as the "only" approach. See, e.g., *Rooney v ArcelorMittal SA*, 2016 ONCA 630 at para 13; *Diamond Estate v Robbins*, 2006 NLCA 1 at para 48.

5. This is submitted as one central feature of postmodern thought in Frederic Jameson's influential "Postmodernism and Consumer Society" in Vincent Leitch et al, eds, *The Norton Anthology of Theory & Criticism* (Norton, 2010) 1846 at 1847.

6. See, e.g., Douglas Litowitz, *Postmodern Philosophy and Law* (University Press of Kansas, 1997) at 5-6, 156-73.

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helpfully—but no less importantly—there is likely to be some judicial incredulity regarding the notion that, say, deconstructionism holds valuable insights for the interpretation of a statutory instrument. This general attitude is perhaps most concisely set out in the words of an administrative tribunal: "[W]e must admit that our overall impression is that the approach suggested by Local 793 is far too academic in nature—that is, 'book smart' rather than 'street smart.'"[7] Accordingly, while the effrontery of suggesting a singular correct interpretive framework is almost self-evident from an academic standpoint, the incoherence of this prefatory clause is readily demonstrable without recourse to killing any authors or navigating linguistic turns.[8]

While the idea that our language does not embody any inherent content arguably dates back several centuries,[9] the seminal *Course in General Linguistics* offers a useful starting point.[10] In the early twentieth century, Ferdinand de Saussure showed that the link between our words and their meaning is socially constructed; however it may seem, there is nothing inevitable about how our signs ultimately signify. Interpreting a text, then, begins at a level of artificiality; the visual stimuli that constitute the word, say, "pen" bear no necessary relation to any writing implement. A judge opening a statute book is, of course, in the same position: The meaning assigned to, e.g., "the principles of fundamental justice" depends entirely on (at least the appearance of) communal consensus and, so, this definition is deeply and inherently contingent.

To its credit, the legal scholarship in Canada engages with this inconvenient recognition. While the semiotic divide is uncontroversial in the abstract, it exists in fundamental tension with the notion that a legal text is imbued with certainty and definitional objectivity. In perhaps the most influential treatise on this subject, Sullivan notes that our interpretive methodologies are far less impactful than our psycholinguistic baggage.[11] Given that language is contingent upon social construction, there is nothing objective about the interpretation of a text; rather, "[w]hat readers bring to the text is their knowledge … [it] consists of values, assumptions, information, know-how and the like, knowledge that is taken for granted and assumed to be shared by everyone else."[12] Despite the law's assumption that textual meaning can be neutrally conveyed in a statutory instrument, the inherent play of language defies this possibility.

There is, of course, at least one strong rebuttal in defence of the conservative, textualist position. Critics and judges who maintain the continued possibility

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7. *IUOE Local 793 v Sarnia Cranes Ltd*, [1999] OLRD No 1282 at para 220.

8. That is, for the purposes of this preliminary argument, I will not take Roland Barthes' famous assertion as a given (see: Roland Barthes, "The Death of the Author" in *Image-Music-Text*, translated by Stephen Heath (Noonday Press, 1988) at 172). Nor will I presume familiarity (much less acceptance) of the term popularized in Richard Rorty's *The Linguistic Turn* (University of Chicago Press, 1992).

9. See, e.g., John Deely, *Four Ages of Understanding: The First Postmodern Survey of Philosophy from Ancient Times to the Turn of the Twenty-first Century* (University of Toronto Press, 2001).

10. Ferdinand de Saussure, *Course in General Linguistics*, translated by Wade Baskin (Columbia University Press, 2011).

11. *Supra* note 2 at 32.

12. *Ibid* at 19.

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of, say, the "plain meaning rule" can point to the relative efficacy of linguistic consensus in our society.[13] Returning for a moment to foundational semiotic theory, it should be noted that the subjective ephemerality of the signifier is not necessarily fatal to the transmission of textual meaning. So long as there is social agreement on the arbitrary sign/signified relationship, the theoretical possibility of communication persists.[14]

Unfortunately, this breaks down in the legal application of the modern principle. Linguistic consensus is, of course, enough for the transmission of commonplace directives—not even the staunchest postmodernist would advocate for, say, a poststructuralist reading of stop signs and instruction manuals—but disputes concerning statutory interpretation are replete with the nuances of constructed linguistic experience and coloured by the objectives of adversarial parties.[15] Discerning contextual meaning in light of conflicting proffered interpretations pushes the possibility of communicative consensus beyond its limits.[16]

Consider, for instance, the recent Supreme Court judgment of *R v Conception*.[17] While several issues required adjudication, a predominant question turned on conflicting interpretations of s 672.62 of the *Criminal Code*.[18] The accused, who was declared unfit to stand trial, was subjected to a treatment order pursuant to s 672.58, which essentially provides for a period of institutionalization in such cases. Under the section at issue, however, the treatment facility must consent to receiving the patient. In this case, the hospital cited logistical capacity and would not consent to treat the accused for several days. Despite the manifest simplicity of "without the consent of … the person in charge of the hospital," the Court was divided 5/4 on the definitional question—though both sides cited the same interpretive methodology.

Such profound disagreement surrounding linguistic meaning largely characterizes statutory interpretation. The foregoing case provides only a single, representative account of subjectivity in judicial hermeneutics.[19] It is therefore possible to acknowledge that, even if we can aspire to rudimentary consensus concerning many signifiers, this cannot subject the nuances of a text to the designation of

13. This argument, pushed to its limits, is perhaps most concisely demonstrated by Vern Krishna, "The 'Modern Rule' of Statutory Interpretation" (2013) 29:9 Bottom Line 23.

14. For an account that is mindful of the postmodern difficulties at play, see Valerio Nitrato Izzo, "Beyond Consensus: Law, Disagreement and Democracy" (2012) 25:4 Int'l J Sem L 563 at 566.

15. Alexander Platt, "Debiasing Statutory Interpretation" (2012) 39:1 Ohio NUL Rev 275.

16. It is, of course, possible to imagine definitional conflict that gives way to consensus, which is arguably an important tenet of deliberative democracy (see, e.g., Maria Barbaros, "Matters of Deliberative Democracy: Is Conversation the Soul of Democracy?" (2015) 7:1 Meta: Research in Hermeneutics, Phenomenology and Practical Philosophy 143). However, given the ubiquity of disputes concerning esoteric legislative provisions, it is unlikely that we can effect the reasoned, representative deliberation that lends this construct its legitimacy.

17. 2014 SCC 60.

18. RSC 1985, c C-46.

19. Here, the relevant distinction concerned the scope of "consent." A willingness to treat someone once resources become available was one formulation; the other side adopted a version of "consent" that required all "material elements" to be accepted before the threshold was satisfied. This latter reading arguably imports criteria that go beyond the bare meaning of the word, but both definitions are defensible, which exemplifies a central problem.

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objective meaning. Indeed, even a cursory glance at the relevant jurisprudence conforms to the observation that "today's writing has freed itself from the theme of expression. Referring only to itself, but without being restricted to the confines of its interiority, writing is identified with its own unfolded exteriority."[20] If we are, then, hopelessly adrift in a world of signs, claims to linguistic meaning are the outcomes of contested, political space.

(b.) Interpretation in a Post-Textual Landscape; Or, What do Definitions Mean?

Perhaps the most striking aspect of the clause that begins the modern principle lies in its evocation of neutrality and truth. The authoritative thrust of "only one principle or approach" is both overt and disingenuous. At first glance, one wonders whether an approach that depends on pure subjectivity can be said to apply uniformly, but such an inquiry is largely semantic.[21] More importantly, while it is undeniably odd that judges introduce a singular principle and proceed to reach irreconcilable conclusions, there is a far more insidious function of this statement that begins to elucidate the implications of a "correct" methodology for interpreting legal texts.

In the absence of judicial commentary on this prefatory clause, it is instructive to consider the rationale behind its continued use. Certainly, the interpretive framework of the modern principle has nothing to do with its status as the "only approach"; unlike the remainder of the principle, these words do not direct—they justify. At this point, it is important to recall that the case law in this area is consistently at pains to differentiate between the "discovery" of textual meaning—i.e., the valid exercise that courts undertake to give effect to democratically enacted legislation—and "construction," which evokes tyrannical notions of so-called judicial legislation.[22]

If, as we have seen, textual interpretation is necessarily subjective, the notion that a clear legal meaning resides in a text, waiting to be found, is incoherent. While this is a commonplace observation in various other disciplines, the impossibility of objective exegesis has not yet taken hold in Canadian jurisprudence. It has been argued that the modern principle exists predominantly for rhetorical

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20. Michel Foucault, "What is an Author?" in James Faubion, ed, *Aesthetics, Method, and Epistemology* (The New York Press, 1998) 205 at 206.

21. The concept of subjectivity—and its sibling, idiosyncrasy—is essential to my critique of statutory interpretation. By this, I mean that we approach constructed language in a state of "not-knowing," to use Donald Barthelme's phrase. In his eponymous text, he observes a "rage for final explanations" in language which can never be satisfied, since any answer can only signify within the imperfect language that created the uncertainty. While there is a rich body of literature on textual subjectivity in a variety of disciplines, Barthelme's observations hew closest to my use of the term here. The process of interpretation is profoundly personal, and assigning meaning to language imports experiential knowledge that cannot easily be shared. This, I submit, impels idiosyncratic results, which are as individualized as the interpreting subjects.

22. See, e.g., *Love v Flagstaff (County of) Subdivision and Development Appeal Board*, 2002 ABCA 292; *Mersey Seafoods Ltd v The Minister of National Revenue*, 85 DTC 731.

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effect; it justifies the conclusion that the decision-maker prefers.[23] While this will be discussed at length below, it is important to note that this legitimizing function is necessarily overdetermined given the impossibility of its mandate. The modern principle does not simply bolster the credibility of judicial interpretation; rather, it obscures the fact that this methodology is illusory.[24] It is productive, then, to consider how the introductory clause frames the modern principle as axiomatically legitimate and appropriately disinterested.

While the persuasive effect of positing "only one" interpretive approach is largely intuitive, these words embody a subtle—but sophisticated—appeal to naturalization and historicization. The aphoristic "only one principle" is taken up by courts *post*-critical engagement; this phrase is never omitted from Driedger's formulation, but judges invariably accept that "only one" principle exists. Ostensibly, there is some unstated justification for such a strong endorsement; we know, however, that the modern principle was composed as a summation of relevant case law and, while Driedger is undoubtedly a learned authority on statutory interpretation, courts have not generally made even that modest claim for the modern principle's doctrinal monopoly. Instead, the choice to begin quoting with this memorable introduction simply distracts from the stark absence of principled vindication.

The temporal aspect of this claim—i.e., "[t]oday"—suggests an implicit trajectory, reminiscent of Guy Debord's conception of "[t]he paradox which consists of making the meaning of all reality depend on its historical completion, and at the same time of revealing this meaning as it makes itself the completion of history."[25] In other words, this interpretive mandate makes an implicit claim to the metanarrative of history: Our current epoch is the culmination of benevolent historical forces that have led us to this inevitable and legitimate state of knowledge.[26] By importing the notion of progress, the authoritative voice of legal doctrine presents itself as self-evidently preferable to relatively undeveloped alternatives.

Understood this way, the modern principle functions as a self-perpetuating trope of legitimization. The prefatory clause is instructive in its refusal to engage with *why* there is only "one principle" for something so replete with subjectivity. In a recent paper, Noam Chomsky makes an apposite remark: "A broad tendency in human development seeks to identify structures of hierarchy, authority and domination … and then subject them to a very reasonable challenge: Justify yourself."[27] In contrast, the introductory words of the modern principle serve as a form of analytical misdirection. Never mind, it suggests, that the project of

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23. Stephane Beaulac & Pierre-André Côté, "Driedger's 'Modern Principle' at the Supreme Court of Canada: Interpretation, Justification, Legitimization" (2006) 40 Revue Juridique Themis 131.

24. On this point, it is instructive to recall Jean Baudrillard's epigram to *Simulacra & Simulation*: "The simulacrum is never what hides the truth—it is truth that hides the fact that there is none" (University of Michigan Press, 1994).

25. Guy Debord, *Society of the Spectacle* (Black & Red, 1970) at 76.

26. See generally: Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge* (University of Minnesota Press, 1984).

27. Noam Chomsky, "What is the Common Good?" in *What Kind of Creatures Are We* (Columbia University Press, 2016) 59 at 63

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textual interpretation is demonstrably idiosyncratic;[28] "today," and, indeed, for several decades, "there is only one principle or approach"[29]—but this formal consistency eschews the uncomfortable recognition that interpretive claims are necessarily external to the text.

Turning, then, to the implications of this subordinated notion of subjectivity, an important threshold question emerges: What does it mean for judges to assert definitional claims with the rhetorical force of objectivity? As alluded to earlier, the judicial expression of textual meaning is a necessarily ideological proposition. Statutory interpretation, after all, "is to discern meaning without many of the aids at our disposal in ordinary discourse."[30] The artificiality of our sign/signified relationship is omnipresent, but exacerbated in the "hard cases" that animate this area of the law.[31] Accordingly, the analytical space between legal texts and court-sanctioned meaning is both ill-defined and centrally important.

When decision-makers move from the impugned provision to its ultimate meaning, they must account for something that is external to the text. This is not, in itself, an unacknowledged feature; in parsing the tension between the traditional textualist approach and the burgeoning awareness of competing extra-textual values, Sullivan observes that "judges are concerned by violations of rationality, coherence, fairness and other legal norms."[32] While these are, of course, normative criteria, the relevant case law does not acknowledge the majoritarian resonance of, for instance, "rationality."[33] Instead, statutory interpretation is invariably conceptualized as the search for meaning that predates interpretation—the impugned definition is, on this view, always already in the text itself. My opposition to this reading is not simply that it ignores the vast majority of contemporary theory (though, for most contemporary thinkers, it would be seen as laughably naive to assert inherent textual meaning); rather, the current approach is objectionable because it refuses to engage with the ideological components of meaning.

For nearly every interpretive dispute, there are powerful considerations militating in opposite directions. In *R v Tse*, for instance, the Supreme Court employed the modern principle toward a determination of the constitutional validity of wiretapping.[34] In construing the relevant *Criminal Code* provision, the Court explicitly weighed the conflicting hallmarks of privacy and public security; the

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28. The impossibility of linguistic objectivity is perhaps most effectively glossed in Wallace Steven's masterful "The Idea of Order at Key West" in *The Collected Poems of Wallace Stevens* (Vintage, 1990) at 128. His mythic artist stands next to the ocean, interpreting stimuli and creating song, but "[t]he sea was not a mask. No more was she. / The song and water were not medleyed sound / Even if what she sang was what she heard, / … The grinding water and the gasping wind; / But it was she and not the sea we heard."

29. *Supra*, note 1 at 87.

30. John Keyes, "Judicial Review and the Interpretation of Legislation: Who Gets the Last Word?" 19:2 Can J Admin L & Prac 119 at 130

31. *Supra* note 2 at 9.

32. *Ibid* at 8.

33. For an interesting argument on the impossibility of objective rationality, see Daniel Epstein, "Rationality, Legitimacy, & the Law" (2014) 7:1 Wash U Jur Rev 1.

34. 2012 SCC 16 [*Tse*]. See also: Duncan Kennedy, "Freedom and Constraint in Adjudication: A Critical Phenomenology" (1986) 36:4 JL & Educ 518.

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eventual holding, however, was decided on the basis of latent bias in interpretive doctrine.[35] Whether or not this decision constitutes a principled balancing of important ideals—an issue that extends well beyond the scope of this paper—there is a significant analytical elision embodied in this form of reasoning. The citation of Driedger does nothing to engage with the political components of the holding. This is the danger and seductiveness of "only one principle": An ostensibly neutral method not only legitimizes ideological conclusions—it effectively immunizes them from sustained critique.

Under the current application of the modern principle, judges are imposing legal change without expressly reconciling the competing interests at play. The act of defining our textual laws necessarily involves making a claim to the ascendancy of one reading over others; the democratically elected legislature can render law in text but cannot infuse that text with a universal meaning. Instead, judges are called upon to navigate the political space of definitional claims and resolve the attendant disputes. This space, properly construed, is the site of ideological conflict—which is *not* resolved by the words Driedger wrote several decades ago. Through its silence, the relevant case law allows this prefatory clause to implicitly legitimize the following interpretive stipulations. As we have seen, "only one principle" cannot be defended in light of semiotic uncertainty, but these words are instructive in spite of their inaccuracy. This rhetoric underscores the macrocosmic function of the current law of statutory interpretation; as we turn to consider the discrete mandates in the modern principle, it is important to remain mindful of the self-perpetuating legitimation at play, which obscures judicial reasoning while it asserts fairness and neutrality.

(c.) "…the words of an Act are to be read in their entire context…"

The first explicit directive in the modern principle is essentially meaningless. While subsequent jurisprudence has asserted definitional clarity, the decision to read an impugned provision in light of, say, the entire statutory instrument or Hansard debates cannot be supported on the basis of this clause alone.[36] The "entire context" of legislation is, after all, virtually limitless; judges have, in turn, circumscribed this mandate but have done so with characteristic silence. While there is an undeniable ideological component to the ensuing analytical partition—this judicial conception of the "entire context" has not yet, for instance, engaged disproportionate legislative impacts on marginalized peoples—there is also a degree of necessity in their task. At a certain point, the sociolegal context of an enactment will exceed the interpretive relevance of any given dispute. There is, however, a marked lack of critical scrutiny surrounding the considerable discretion involved in, quite literally, defining the applicable context in the face of textual ambiguity. In this way, the clause under consideration performs an immunizing function; the courts assign meaning

35. *Tse*, *supra* note 34 at paras 20-21.

36. These oft-cited contextual factors are concisely set out at Halsbury's Laws of Canada, *Legislation* (LexisNexis Canada, 2008) at HLG-55 "Meaning, intention and consequences."

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to this broad mandate but act as though their definition is somehow implicit in the words of Driedger's observation.

Most commonly, the "entire context" of a provision includes legislative history—both in terms of political debates and relevant amendments.[37] By privileging these textual aspects, statutory instruments are framed as self-enclosed vessels of meaning. At the outset, it is important to note that this ostensible deference to the legislators advances two interdependent ideas: First, that legislative intent is possible and, second, that it will manifest in the historical lineage of each statutory instrument. On this reading, law cannot be enacted without the benefit of observable motive from our elected representatives.[38]

Much has, of course, been written concerning the unique formal character of statutory instruments. Perhaps most notably, Jeremy Waldron asserts—both in his famous *Law and Disagreement*[39] and several ancillary texts[40]—that law commands respect based on the deliberate, dialogic compromise embodied in our legislative texts.[41] For our purposes, this insight suggests that authorial intent cannot be understood as a singular assignation of meaning but rather as the resolution of conflicting interests rendered in language. As a necessary implication, Waldron posits the observability of disagreement—and, more importantly, compromise—in legislative texts.

If we accept this contention that the ideal statutory text is imbued with political conflict, there is still some question regarding the interpretive project. The judicial treatment of the "entire context"—that it involves "a review of legislative evolution and history"[42]—presumes the judicial capacity to discern this unique form of intent. On this point, the work of William Eskridge is particularly apposite. He observes that, "[g]iven the epistemic, vote-counting, and aggregation problems with any inquiry focusing on the precise intentions of legislators, what intentionalists usually mean by the term is conventional rather than actual legislative intent."[43] This qualification is, of course, necessary; no one can reasonably expect judges to discern the actual intent of legislators in the course of rendering a decision. Instead, we accept a construction of intent that is "created by agents trying to push legislation through the [House]."[44] We settle on a necessary fiction.

As a result, the object of interpretation changes. While the judicial treatment of the mandated "entire context" posits the elucidation of idealized democratic

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37. This has been repeated innumerable times in trial level decisions, but these cases most commonly refer to a set of Supreme Court judgments: *Rizzo Shoes*, *supra* note 4; *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53; and *Merk v International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, 2005 SCC 70.

38. Despite the dissonance between this idea and contemporary hermeneutics, the legislator as an intentional actor pervades the popular account of our legal system. See, for instance, Library of Parliament, *Guide to the Canadian House of Commons*, online: https://lop.parl.ca/About/Parliament/GuideToHoC/pdf/guide_canadian_house_of_commons-e.pdf.

39. (Clarendon Press, 1999).

40. See, e.g., "Stare Decisis and the Rule of Law: A Layered Approach" (2012) 111:1 Mich LJ 1.

41. For a concise survey of this argument, see Andrei Marmor, "Law and Disagreement/The Dignity of Legislation" (2002) 112:2 Ethics 410 at 411.

42. *Keizer v Slauenwhite*, 2012 NSCA 20 at para 18.

43. William Eskridge, *Dynamic Statutory Interpretation* (Harvard University Press, 1994) at 18.

44. *Ibid* at 20.

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intent, there is a complete absence of engagement with the epistemic impossibility of this exercise. Despite the burgeoning recognition that courts interpret statutes in the necessary subjectivity of our constructed language, this observation has been inadequately directed at lawmakers. One of the foundational tenets of modern textual theory is the impossibility of understanding how language signifies to other people, and, if we cannot presume to understand how the legislators interpret a bill, we can hardly claim knowledge of their creative intent. Unfortunately, the jurisprudence surrounding this aspect of the modern principle ignores this challenge.

The case of *Imasco Minerals Inc v Vonk*[45] exemplifies the disconnect between textual subjectivism and claims to legislative intent. In the process of determining whether a provision of the *Mining Right of Way Act*[46] included private roads, the Court presumed intent from the words of the *Act*, read in concert with the Hansard debates. In response to the losing party's submissions, it was held that legislative silence indicated an intentional omission; if the impugned road was covered under the *Act*, "the Legislature could have easily made that clear."[47] This typifies another important aspect of judicially constructed intent: namely, that both words and silences constitute the outer limits of an internally coherent legal plan. The fact that ambiguities and omissions are often characterized as convenient political mechanisms for avoiding controversy is essentially ignored.[48]

While any interpretive work necessarily begins with the reader's claim to definitional meaning, the judicial treatment of statutory context is marked by both (requisite) subjectivity and heightened artificiality. With the invocation of context, there is an implicit shift from legislative text as the result of our lawmaking process to a text (which can include relevant debates and amendments) that contains its own history. The process of reading a statute in its "entire context" presumes a historical progression toward a coherent, defined end.[49] This preliminary move is charged with idiosyncratic choice—but, crucially, without accountability. By engaging with the dominant approach to the "entire context," the layers of arbitrary construction become manifest. Statutory interpretation that insists on both coherent legislative intent and the discoverability of the same has entered into a constructed language game, which can be productively unpacked using the work of the poststructuralists.

This concept—the "language game"—requires some discussion of Ludwig Wittgenstein's famous coining of the phrase. While this may appear as a digression from the poststructural discussion in progress, his insights offer a

45. 2007 BCSC 1755.
46. RSBC 1996, c 294.
47. *Supra* note 45 at para 89.
48. *Supra* note 43 at 20.
49. This is among the most pronounced examples of historicization in the current approach to statutory interpretation. The evocation of historical progress as a legitimizing ideological trope was first noted by Marx, and has been summarized as "ideological structures appear[ing] to be the logical conclusion to an historical development" (John Lye, "Ideology: A Brief Guide" online: www.brocku.ca/english/jlye/ideology.php).

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valuable starting point for navigating the textual system of legislative intent. For Wittgenstein, the language game is a form of linguistic primitivism; as he put it in *The Blue Book*, these are

> the forms of language with which a child begins to make use of words. … If we want to study the problems of … the agreement and disagreement of propositions with reality, of the nature of assertion, assumption, and question, we shall with great advantage look at primitive forms of language in which these forms of thinking appear without the confusing background of highly complicated processes of thought.[50]

The reductive tendency to distil and presume to discover intent in a statutory instrument embodies this form of analytical helpfulness. Unlike the complex, political nature of lawmakers' inner states and motivations, the courts have imposed a relatively simple interpretive regime. Generally, these linguistic structures demonstrate a "craving for generality," which erroneously assume that "the meaning of a word is an image, or a thing correlated to the word."[51]

This is perhaps most clearly set out in *Montréal (City) v 2952-1366 Québec Inc*,[52] which is frequently cited in cases that turn heavily on the "entire context" stipulated in the modern principle. In determining the content of a noise pollution by-law, the Supreme Court held that "[t]he context of legislation involves a number of factors. The overall context in which a provision was adopted can be determined by reviewing its legislative history and inquiring into its purpose."[53] The suggestion that purpose and history are mutually informing is persuasive at first glance. Even if we refute the possibility of fixed textual meaning, the notion of a legislator working toward a defined purpose—which, presumably, would manifest in the historical account of enactment—is at least theoretically possible. An approach to statutory interpretation that begins with a claim to legislative purpose and organizes the ensuing historical analysis around this point is likely to render justifiable conclusions.[54] In contrast, this step in the modern principle typically locates intent within a set of texts and then works backwards to the purpose. In the end, the finding of legislative intent approximates the *mise-en-abîme* postulated in postmodern thought: We understand the text in light of the purpose, which we presume on the basis of the text.

The implications of this self-enclosed language game are important for an understanding of how our current interpretive regime disappears the inherent subjectivity of interpretation. The application of the modern principle requires an assertion of self; the decision-maker must become an "*I-subject*," to use Lacan's phrase, within a system of textual signification. As a result, "the subject can only take up a relatively stable discursive subject-position within the Symbolic

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50. Ludwig Wittgenstein, *The Blue Book* in Gertrude Margaret et al, eds, *The Collected Works of Ludwig Wittgenstein* (InteLex, 1998) at 17.
51. *Ibid*.
52. 2005 SCC 62.
53. *Ibid* at para 17.
54. This is discussed in greater detail below, but the explicit postulation of purpose as the logical outcome of interpretive reasoning is, if nothing else, preferable to the current approach in which legislative objective appears predominantly rhetorical.

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order."[55] Given that, as Wittgenstein points out, this order will be marked by a set of reductive rules about how words signify, the outcome of examining the "entire context" is largely predetermined by these latent guidelines that animate the relevant symbolic order. In this way, the process of "doing law can be seen as a highly rationalized … enterprise whereby affectively and sensory charged data are stripped of their intensities as the phenomenal experience (the "what happened?") undergoes translation into legal thought acceptable in a court of law."[56] Ultimately, the judicial treatment of this step in the modern principle eschews the responsibility of selecting an appropriate—and inherently political—context from which to impose meaning. It is certainly possible to imagine a progressive iteration of the "entire context" of interpretation—one that takes its task seriously and engages with the experiential realities of those most affected by the relevant statute—but the modern principle fails on a far more fundamental level. The application of this step in the modern principle elides any account of how context was determined while expounding on the unknowable phenomenon of legislative intent. Returning once more to Wittgenstein, the problem here is perhaps most eloquently stated in the closing sentence of his *Tractatus Logico-Philosophicus*: "What we cannot speak about we must pass over in silence."[57]

(d.) "…in their grammatical and ordinary sense…"

Once context has been judicially constructed and the historical record coheres with legislative intention, the modern principle mandates an "ordinary" reading of the impugned text. It is difficult to imagine a more overtly normative stipulation; the grammar of ordinariness reads as an impressively concise repudiation of subjectivism and sociocultural difference. The assertion of normalcy necessarily imports a central perspective, which is an almost trite criticism to direct at the judiciary. The privileged sphere of legality has long been decried as exclusionary and patriarchal;[58] an accepted and ubiquitous doctrine that imposes a euphemistic "ordinary sense" is unlikely to alleviate such concerns.

With the critical deck stacked decidedly against the decision-making elite, judicial engagement with ordinary grammar ultimately conforms to the highly normative approach anticipated by the words of the modern principle, but does so in a manner that is both unexpected and illuminating. The ideological workings of the modern principle—which, as discussed, are largely obscured by its rhetorical function—evoke false neutrality while legitimizing haphazard judicial

55. Dragan Milovanovic, *Postmodern Law and Disorder: Psychoanalytical Semiotics, Chaos and Juridic Exegeses* (Deborah Charles Publications, 1992) at 105.
56. *Ibid* at 114.
57. Ludwig Wittgenstein, *Tractatus Logico-Philosophicus*, translated by DF Pears & BF McGuiness (Routledge Classics, 2001) at 89.
58. As Michel Foucault memorably remarks in *Discipline & Punish*, "disciplinary power appears to have the function not so much of deduction as of synthesis, not so much of exploitation of the product as of coercive link with the apparatus of production" (translated by Alan Sheridan (Vintage Books, 1995) at 153). For a contemporary empirical analysis, see Jonathan Kastellec, "Racial Diversity and Judicial Influence on Appellate Courts" (2013) 57:1 American J Political Science 167.

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decision-making. Its remarkable efficacy in rendering the simulacrum of objectivity (which it has done, with scarcely a critical comment, for nearly two decades) depends on the combined force of each interpretive stipulation. The modern principle has not simply been employed in virtually each relevant case since *Rizzo Shoes*—it has also never deviated from the initial formulation. Despite the incredible diversity of interpretive disputes since the late nineties, decision-makers have never expanded the contours of their quotation from Driedger. The invocation of ordinary grammar serves these ends in a very specific way. This aspect of the modern principle explicitly posits a dominant legal perspective, which implicitly makes a claim to communal consensus as the source of definitional certainty. There is not, of course, any recognition of the exclusionary bent within this project; the argument that legislative language has simply become the language of (probably white male) judges is simply ignored. Instead, the jurisprudence of ordinary grammar harnesses many of the hallmarks of anti-intellectualism and establishes an inherently conservative analytical structure.

In a particularly direct judgment on the subject, the Supreme Court held that this stage of interpretation discerns "the reader's first impression meaning, the understanding that spontaneously emerges when words are read in their immediate context."[59] This is perhaps the clearest deviation from hermeneutical criticism that exists even within the mainstream legal literature. Pierre-André Côté, for instance, observes that "[t]he official doctrine presents interpretation as an activity devoid of any creative dimension … This being so, it is impossible to explain the interpretation of statutes without acknowledging that it may require the interpreter to make choices based on his or her personality, beliefs or values."[60] Such an intuitive approach clearly privileges a dominant set of experiences to render legal meaning as the product of something approaching a judicial Rorschach test. In many ways, this strange practice—wherein the judiciary overtly valorizes uncritical reflection—can be understood through Cass Sunstein's notion of the judicial ideology triad.

In *Are Judges Political?*,[61] he examines decision-making behaviour from the bench, specifically as it manifests in discourse. The performative language within court proceedings offers an insight into how the appropriate contours of political coercion are perceived by the judiciary. He writes,

> [t]hree different ideological frameworks … inform the judicial behaviour of the judges and can be seen as enacted … *Legal ideology* clearly predominates. *Political ideology* is denied. And *everyday ideologies of control* are quite explicit but viewed the judges as of marginal relevance to the legal task at hand.[62]

There is, in other words, considerable scope for unexamined judicial authority within the amorphous boundaries of legal ideology. With statutory interpretation,

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59. *Pharmascience Inc v Binet*, 2006 SCC 48 at para 30 citing Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed (Butterworths, 2002) at 21.

60. Pierre-André Côté, *The Interpretation of Legislation in Canada*, 4th ed (Carswell, 2011) at 15-16.

61. Cass Sunstein, *Are Judges Political?: An Empirical Analysis of the Federal Judiciary* (Brookings Institution Press, 2006).

62. *Ibid* at xiv.

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there is an explicit bifurcation between law and politics; it is important to remember that—ostensibly—the legal interpretive process seeks to *discover* the (fictitious) intent of the legislature. In the process, this arbitrary demarcation is observed and presented as an implicit justification for unfettered decisional autonomy. This paper does not seek to expound upon the appropriate interplay between branches of state power; rather, my interest lies in how these respective functions are conceptualized in the course of interpreting statutes. Under our current regime, it is democratic (and, thus, immunized) policy to enact an ambiguous legislative instrument; it is appropriately legal to decide what that instrument means with recourse to, *inter alia*, reflexive sign/signified association. The outcome of the interpretive analysis—backed, as it is, by the "everyday ideologies of control"—cannot be logically separated from political action. Whether legal force is imposed at the time of enactment or at the time of judicial pronouncement on linguistic meaning, the result is the same. The ordinary grammar stipulation in the modern principle disguises the politics of interpretation by normalizing and prioritizing the judicial perspective, but these ideological workings can be refuted by recognizing their anti-intellectual character.

The framework of anti-intellectualism is instructively set out in Richard Hofstadter's classic *Anti-Intellectualism in American Life*, where he posits a subtle analytical binary between critical thought and majoritarian values. This is not to suggest that these apparent poles are inherently incongruous; rather, there is a pervasive distrust of intellectualism, which is understood in relation to its opposition: "common sense." There is a latent, but barely contained, distrust of theory within dominant culture and institutions, and this notion of "common sense" is said to embody an appropriately democratic bent; it is readily available to everyone and fundamentally aligns with the *status quo*. The academic project of rethinking foundational assumptions is, after all, uncomfortable and destabilizing; in the context of institutions that enjoy substantial power and legitimacy based on social presumptions, the hostility toward intellectualism is (perhaps logically) pronounced.

There is relatively little scholarship on a specifically legal ethos of anti-intellectualism, but the characteristic distrust of critical reevaluation and abstraction is pervasive in several unique ways. When a decision-maker is pronouncing that, for instance, testimony is simply "book learning with no street-sense,"[63] there can be little doubt that the judicial function does not depend on a classically intellectual penchant. Again, this is largely unsurprising given the danger that social theorizing about power relations poses to hegemonic institutions such as courts; however, it embodies significant implications for how judges construe linguistic meaning. Anti-intellectualism helps explain the presence of an "ordinary sense" and elucidate its untenable underpinnings.

It is telling that judicial recourse to ordinary grammar under the modern principle frequently invokes "common sense." While this phrase is ubiquitous in some contexts, it seems to elide any specific content, which is perhaps its greatest rhetorical strength. Content, in other words, can be assigned by the reader in a

63. *Bourque v Janzen*, 2007 SKQB 297 at para 9.

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manner that conforms to their uncritical perspective. "Common sense," after all, has long been recognized as a vessel for unexamined majoritarian values; much like using ordinary grammar as an interpretive lens, the valorization of "common" intuition is explicitly normative. These two related concepts skew interpretive results toward the *status quo* while effectively obscuring this ideological function.

In his critical account of judicial reasoning, Pierre Schlag submits that the "'law of judges' is a law designed to deny and legitimate the violence necessarily implicit in the act of judging … law [is given shape by its] desire to hide from itself its own violent and destructive character."[64] If we understand the interpretive process as a creative action that must necessarily assert subjective values, there is a degree of unease surrounding the state sanctioned authority of the judicial perspective. The impulse to "hide" the interplay between idiosyncrasy and legal force is understandable but destructive to hermeneutical clarity and defensibility. Moreover, the anti-intellectual character of ordinary grammar impels an inherently conservative approach, which is antithetical to aligning exegetical practice with our current understandings of how language works. In his influential treatise on conventional modes of legal thought, Schlag observes the ambivalence of movements against the entrenched presumptions of the law:

> There is nothing quite like the exhilarating experience that comes from reading a provocative new piece of legal thought. Of course, at some point this exhilaration will give way to ennui as the new piece of legal thought unravels, ultimately to be classified as yet another possibly clever, perhaps thoughtful, but nonetheless utterly failed contribution. One characteristic feature of our own postmodern condition is the breakneck speed at which the second experience succeeds the first. From exhilaration to failure, the distance has been reduced to a couple of sentences.[65]

The current state of statutory interpretation exemplifies the legal perpetuation of pre-established and -sanctioned modes of thought, and it does so at the foundational level of language.

When the Supreme Court makes sweeping, reductive statements such as "for all issues of statutory interpretation, the basic question is what Parliament intended," without even the most rudimentary engagement with the attendant difficulties of textual transmission and linguistic signification (to say nothing of the distinct and complex nature of the statutory text), the interpretive outcome is largely predetermined. As Schlag concisely puts it, "this habit of thought can be counted on to produce … law that is in a state of arrested development … a law that cannot do anything except reaffirm itself as always already the same." The false neutrality of the modern principle comes at the cost of analytical proficiency; the stipulations in Driedger's observation must assume "that the words … are stable [and] the only coherent basis for the requisite continuities of history

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64. Pierre Schlag, "Anti-intellectualism" (1995) 16:3 Cardozo L Rev 1111 at 1115. For the definitive account of how law becomes state-sanctioned violence, see Robert Cover, "Violence and the Word" (1986) 95:8 Yale LJ 1601.

65. Pierre Schlag, *Laying Down the Law: Mysticism, Fetishism, and the American Legal Mind* (New York University Press, 1996) at 18.

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and meaning is found in the communitarian assumptions of conservative social thought."[66] As a result, the play of language is ignored and the interpretive monopoly is retained—largely through judicial silence.

The ordinary grammar that features prominently in modern principle jurisprudence embodies a virtual absence of inherent content. It valorizes the reflexive perspective of the bench and subordinates alternative experiential understandings of language. The "ordinary sense" analysis is an overt imposition of power and privilege; an inquiry into kneejerk judicial meaning is "a dead and circular response to a dead and circular interrogation."[67] This allows meaning to be imposed based on the preferences and biases of the decision-maker. As I have argued, this result is inevitable given the current approach to statutory interpretation, but endorsing the "grammatical and ordinary sense" as a hermeneutical tool explicitly accepts the validity of such a strange proposition. The generalized anti-intellectualism that pervades this area of the law helpfully obscures this celebration of decision-making impunity and perpetuates a logic of conservatism and "common sense." In our current epoch, where "the words used in everyday discourse … no longer make sense" because of the manifest stupidity that characterizes mainstream political discourse,[68] the project of identifying anti-intellectual tropes of judicial reasoning becomes crucial.[69] As we have seen, the thoughtless ideals of "common sense" can justify virtually anything—but, more often, this is a shorthand for reflexive prejudice, for rendering those outside of the common experience literally nonsensical.

(e.) "…harmoniously with…"

The requirement that legislative text must exist "harmoniously with" often unrelated interpretive criteria is perhaps the least coherent aspect of the modern principle. When words align with parliamentary intent—and the modern principle presumes that they can—there would appear to be little use for exegetical discussion. Conversely, when there is tension between how the words signify to legal thinkers and the apparent aims of the legislature—which, of course, is usually the case—it is difficult to imagine the utility of insisting on a harmonious reading. While the analytical helpfulness of this transitional clause is negligible, the forced reconciliation of disparate content is a well-known trope of legitimizing rhetoric.

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66. Mark Tushnet, "Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles" in Allan Hutchinson, ed, *Critical Legal Studies* (Rowman & Littlefield, 1989) 157 at 157.

67. Jean Baudrillard, *Simulacra & Simulation*, translated by Sheila Glaser (University of Michigan Press, 1994) at 9.

68. Chris Hedges, *Wages of Rebellion: The Moral Imperative of Revolt* (Vintage Canada, 2016) at 36.

69. The background conditions for any interpretive act are brilliantly set out in George Saunder's pastiche of a recent Presidential speech: "He's a man who has just dropped a can opener into his wife's freshly baked pie. He's not about to start grovelling about it, and yet he's sorry—but, come on, it was an *accident*. He's sorry, he's sorry, O.K., but do you expect him to *say it*? He's a good guy. Anyway, he didn't do it" (George Saunders, "Who are All these Trump Supporters?", *The New Yorker* (18 July 2016), online: www.newyorker.com/magazine/2016/07/11/george-saunders-goes-to-trump-rallies).

Although his comments arise in a markedly different context, the work of Sacvan Bercovitch is instructive on this point. The language of over-determination makes frequent recourse to ideational harmony; he observes that, for the rhetorical advancement of an ideological position, the language of conflict will appear as "not *either/or* but *both/and*."[70] There is currently no recorded judicial comment on the illogic of forced reconciliation, and the political benefits of this are considerable. The invocation of a simplistic structure—here, the mandated coherence between governmental objectives and the statutory text—serves "above all to make sure that the organizing principle of the structure would limit what we might call the freeplay of the structure."[71] This is important because, as Ruth Sullivan notes, this interpretive step is deeply problematic in so-called "hard cases." Given the subjectivity of textual signification, one would expect divergences between the ostensible purpose of an enactment and its words would merit a reconsideration of the assumptions underlying either of these conceptions; presumably, few would argue that the best course of action is to impose harmony and ignore dissonance.

Interestingly, the (sparse) case law on this point suggests that such a reading is informed by "established legal norms."[72] While this assertion would be unsurprising—and, indeed, redundant—in relation to the ordinary grammar stipulation, it serves an almost latent naturalizing function within the (il)logic of forced reconciliation. There is, of course, some content that can be given to Canadian "legal norms," but these necessarily operate at a level of abstraction.[73] The normative qualities of our legal system cannot be factual given the diversity of circumstances giving rise to adjudication; instead, these are overarching concepts such as *Charter* values.[74] This generality may be necessary in some contexts, but it also lends a significant degree of malleability to reading texts "harmoniously with" legislative intent *et al*. We are left with an interpretive step that literally disclaims the points of inconsistency that likely gave rise to the dispute rather than frank engagement with them. As a result, the aims of the legislature are presented as natural and inevitable—and already contained within the text itself. The "both/and" approach to statutory interpretation allows the passage of politically convenient legislation—with its attendant ambiguities and gaps—and abnegates the logical scrutiny that should arise when tension between words and purpose comes before the courts.

(f.) "…the scheme of the Act, the object of the Act, and the intention of Parliament…"

While the foregoing analysis has suggested latent content within the modern principle based on a close reading of each discrete mandate, the final

70. Sacvan Bercovitch, *The American Jeremiad* (University of Wisconsin Press, 1978) at 12.
71. Jacques Derrida, *Writing and Difference*, translated by Alan Bass (University of Chicago Press, 1980) at 278.
72. See, e.g., *Zacharias v Zurich Insurance Co*, 2012 ONSC 4209 at para 37.
73. Mans Svensson, "Norms in Law and Society: Towards a Definition of the Socio-legal Concept of Norms" in Matthias Baier, ed (Ashgate, 2013) at 39.
74. See, e.g., *R v Lewandowski*, 2010 NSPC 37 at para 25.

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three considerations—scheme, object, and intention—are largely indivisible. According to Sullivan, the "scheme analysis … explores how the legislation is intended to operate so as to bring about desired goals."[75] This, of course, informs the heuristic conception of the "object of the Act," particularly since the decision-maker must presume that "the legislature has devised a coherent … implementation plan."[76] Notably, the invocation of "object," which refers to the text, and "the intention of Parliament" formally acknowledges the possibility of language and authorial intent as separable, but there is, to date, no judicial explication on this subject. In fact, courts have sometimes endorsed Driedger's clarification of the interplay between the scheme, object, and intent: The proper approach to this final interpretive triad, he suggests, is to inquire into the expressed intent, the implied intent, the presumed intent, and the declared intent.[77] In other words, the foregoing analysis must exist in harmony with the stated goals of Parliament, which signify both within and outside of the impugned text.

This final grouping of interpretive mandates embodies a significant deferential bent, which is arguably appropriate. In its most classical formulation, statutory interpretation is a very narrow exercise: "In every case, the duty of the court is to endeavour to ascertain the intention of the legislature by reading and interpreting the language the legislature has selected for the purpose of expressing its intention."[78] As discussed above, there is no logical basis for criticizing the judicial response to the linguistic turn while ignoring many of the same difficulties that inhere to the legislative task. The act of interpreting from the bench, however, takes place in a markedly different context; as Richard Risk puts it, "society's basic commitment to democracy impose[s] an obligation to respect the purpose of the legislature."[79] Language depends, after all, on (a functional appearance of) consensus for communicative meaning—a consensus that is arguably achieved through Parliament's representative function. Waldron (among others) convincingly argues that the inefficiencies and ambiguities that culminate in legislative text are an expression of the democratic process; despite the play of language, Parliament either passes a set of signifiers or it does not—definitional certainty is simply unnecessary. In contrast, when there is controversy regarding this democratic language, courts make a claim to meaning in virtual isolation. The profound difficulty of contemporary hermeneutics is mitigated by the communal and representative nature of the legislature; it is exacerbated by the elite status of the judiciary.

There is, then, a disconnect between the understandable calls for interpretation that gives effect to the directives and objects of Parliament and the circumstances of (post)modern judging. It is important not to conflate the recognition of legislative intent as a necessary fiction with further latitude for the exegetical

75. Ruth Sullivan, "Statutory Interpretation in a New Nutshell" (2003) 82:1 Can Bar Rev 51 at 61.
76. *Ibid* at 62.
77. See, e.g., *Kenora (Town) Police Services Board v Ontario (Civilian Commission on Police Services)*, [2008] OJ No 3920 at para 27.
78. CED 4th (online), *Statutes*, "Interpretation of Statutes: Duty of Court" (III.1) at §40.
79. Richard Risk, "Here be Cold and Tygers: A Map of Statutory Interpretation in Canada in the 1920s and 1930s" (2000) 63:1 Sask L Rev 195 at 202.

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monopoly enjoyed by the judiciary. Much like the poststructuralists who problematize the reality/fiction binary, we must avoid subordinating the fictive character of legislative intent as infinitely pliable. Given our understanding of psycholinguistic subjectivity, statutory instruments cannot benefit from a coherent purpose—we will never know how the texts signified to MPs or why they were supported on an individual basis—and, while it may be far from perfect, the bare act of democratic assent is enough to meaningfully distinguish these words (with their attendant instability) from the context in which they are assigned meaning when disputes arise.

With its inquiry into the scheme, object, and intention, the modern principle evokes both governmental and logical legitimacy. The latter makes its first appearance in this closing triad of interpretive stipulations, suggesting a relationship between a desire, a plan to effect it, and the means of doing so. This is hardly a novel project; in "The Empty Circles of Liberal Justification," Schlag observes that "it is the hallmark of liberalism to seek reconciliation of authority, reason, and freedom in terms that are consonant with each."[80] Accordingly, while the final section of the modern principle is ostensibly deferential, it also depends on this invocation of the legislative process for greater legitimacy. Unfortunately, the circumstances that merit such deference cannot be replicated through an interpretive model that denies its own role in creating meaning.

(g.) Conclusion

In 1938, John Willis mused that, when it comes to statutory interpretation, "[y]ou should not be too much impressed by this heartening phenomenon of judicial uniformity, or by the amount of space which judges devote to it in their opinions. No technique has much effect on final result."[81] While he was writing about an entirely different doctrinal approach—the predecessor to the modern principle: the "plain meaning rule"—these words remain an apt summary of hermeneutical jurisprudence in Canada. His conclusion, too, could be validly raised in our current "modern" epoch: Courts use interpretive "rules" to "achieve a desired result."[82] Perhaps the greatest difference between this (further) outdated approach and the modern principle is the sophistication of the latter's rhetorical function. Statutory interpretation in (post)modernity is profoundly complicated by our burgeoning awareness of the instability of language. The enthusiastic and consistent endorsement of Driedger's observation in *The Construction of Statutes* exists in fundamental tension with—and denial of—contemporary hermeneutics.

Today, and since the late-nineties, there is only one principle or approach to judicial interpretation; this clause is as instructive as it is nonsensical. Given the inherent subjectivity of language, a single methodology is pointless unless it serves as a formal checklist that must be expounded upon, creating accountability and transparency in an area necessarily rife with value judgments. This,

80. Pierre Schlag, "The Empty Circles of Liberal Justification" (1997) 96:1 Mich L Rev 1 at 7.
81. John Willis, "Statute Interpretation in a Nutshell" (1938) 16:1 Can Bar Rev 1 at 4.
82. *Ibid* at 15.

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of course, has not happened, but the instructiveness of this clause lies in its status as an obvious trope of legitimization; the fact that it asserts a monopoly that has not been challenged since its inception nearly two decades ago speaks to its remarkable efficacy. The subsequent discretion afforded to the judiciary in defining the "entire context" of the linguistic dispute and the invocation of an "ordinary" perspective builds on the introductory rhetoric by creating an unabashedly normative regime of interpretation. If we understand definitions as claims to (contested) meaning, the modern principle ensures that these claims issue from the dominant perspective while the presentation of neutral doctrine masks the unequal distribution of authority.

These amorphous categories of hermeneutical inquiry are further legitimized by the harmony requirement and the ostensible deference to the democratic process. Although cases arise where the text and the apparent intent conflict and the decision-maker must necessarily choose a side, it is disingenuous to suggest that this process is a matter of harmonious reading. Indeed, transparency requires the opposite; an interpretive approach that seeks both a democratic basis and (relative) textual certainty should be preoccupied with this tension whenever it arises. Similarly, the implicit relationship between respect for the legislative function and the current approach to reading statutes eschews the important differences between these contexts. Judicial interpretation cannot approximate the Parliamentary imposition of meaning when the latter is understood in light of its predominantly representative importance. It is possible, in other words, to accept the semiotic divide of postmodernism and view legislative text as legitimate insofar as it depends on democratic will for its enactment. Legislative text—like language in general—signifies differently for each reader and the fictitious nature of Parliamentary intent arises because it is impossible to know (a.) what individual MPs understood the texts to mean and (b.) why these individuals voted the way that they did. Democratic legitimacy does not depend on the stability of language but on the representative nature of Parliament. This is not to suggest that Canada has actualized perfect representative politics but rather to show that poststructuralism is theoretically coherent with a written system of laws. In contrast, the modern principle depends on discoverable, universal meaning within the text to justify the unilateral imposition of definitional meaning under the guise of "the scheme of the Act, the object of the Act, and the intention of Parliament."

It is worth noting, however, that the law of statutory interpretation does not exist without a purpose. While it is possible to imagine a form of governance that does not depend on judicial exegesis, the Canadian legal system would be unrecognizable without the availability of dispute resolution on questions of legislative meaning. Just as we must presume that "legislation is intended to operate so as to bring about desired goals," we must also presume that valid enactments will affect the lives and behaviour of virtually everyone. Further, if we accept the inherent subjectivity of language—and, by all contemporary accounts, we should—there will often be uncertainty surrounding the operation of statutory instruments, which must be mitigated to attain the basic predictability required

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by (what judges call) the rule of law.[83] It appears, then, that our reliance on textual laws requires an interpretive monopoly held by decision-makers, but the modern principle erodes, rather than advances, the metanarratives of certainty and predictability. When interpretive doctrine serves a predominantly rhetorical function, there can be little predictability regarding how language will signify, or even what questions will be asked. The problem of textual interpretation in (post)modernity is complex and defies any singular answer, but it also provides the basis for meaningful change. By engaging with what the modern principle obscures—that is, the inherent instability of language and the ideological nature of claims to meaning—it is possible to imagine an approach that foregrounds linguistic subjectivity and the perspective of the decision-maker to produce transparent results that do not assume the legitimacy of the speaking subject.

Aligning Theory with Practice: On the Possibility of a Postmodern Principle

(a.) Introduction

Given the marked divergence between the Canadian approach to statutory interpretation and the study of hermeneutics, the project of dismantling the modern principle from the latter perspective is relatively straightforward. This is not to suggest that various scholars have wasted their talents by holding up the law to a foreign theoretical frame; rather, critical insights often provide foundational starting points for aligning our legal system with important sociocultural movements. It is, however, one thing to criticize the lacuna of constraint and coherence in the modern principle, and quite another to fill the ensuing interpretive gaps. On this point, Catharine MacKinnon poses a pertinent challenge: "It is common to say that something is good in theory but not in practice. I always want to say, then it is not such a good theory, is it?" To the extent that the foregoing postmodern critique serves as a repudiation of the modern principle, it must do so in both theory and practice. More specifically, we can (rightly) claim that the linguistic turn severely problematizes the current regime of statutory interpretation, but the practical force of this observation turns on its ability to suggest a viable alternative. Our current legal system would be unrecognizable without both written laws and judicial interpretation. If the theoretical force of contemporary hermeneutics displaces the usefulness of the modern principle, it should also serve a progressive function—toward (literally) a postmodern principle of statutory interpretation.

In one of the most thoughtful pieces of Canadian scholarship on the problem of statutory interpretation, Daniella Murynka writes, "[t]hose who insist or imply that legislative intent is incommunicable take an unhelpfully postmodern

83. In a recent decision, the Supreme Court held that "[t]he cardinal values of certainty and predictability … are themselves core principles of the rule of law." *Wilson v Atomic Energy of Canada Ltd*, 2016 SCC 29 at para 86.

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view of statutory language, particularly in an era of plain-language writing."[84] Her argument, in brief, posits the dangers associated with the "distrust of statutes as communicative tools." Although she is mindful of the difficulties surrounding the discovery of this intent, Murynka characterizes intent—specifically as embodied in the text—as the only legitimate means of constraining judicial activism.[85]

Admittedly, this embodies a degree of practical persuasiveness. If the legislature and judiciary conceded that, say, "the entire question of meaning can be bracketed,"[86] it is difficult to imagine any written system of laws. Even as communicative language breaks down in our postmodern over-saturation of signs, the vast majority of Canadians would likely prefer the continued subsistence of many textual laws. Arguments concerning the semiotic divide that separates our word for "assault" in the *Criminal Code* from the historical events that are typically adjudicated under the relevant section are likely to be nonsensical from a legal standpoint. Moreover, beyond the clear societal interest in prohibiting certain activities—and, indeed, promoting others—it is essential to advance informational accessibility as a function of our legal system. As one classical English case put it: "There is one quite general question affecting all sub-delegated legislation and of supreme importance to the continuance of the rule of law under the British Constitution, namely, the right of the public affected to know what the law is."[87] Accordingly, one can agree language constitutes and constrains us as speaking subjects—that we are locked in the "prison-house of language"—while accepting the necessity of a "right" interpretation vested in the court of last word.

While the project of rethinking interpretive practice is imbued with considerable difficulties, it also has the potential to subvert the legal subjugation of difference. It has been said that law is "always-already intertwined with the Other," which includes "the traditional connotation of the marginalised, the oppressed, the subaltern, the minorities as represented … before the law."[88] This is, of course, a sweeping statement about the nature of legality in its current iteration, but this theme is particularly pronounced in the workings of statutory interpretation. If we acknowledge the creativity of interpretation—i.e., the notion that meaning is not within a text to be neutrally discovered—then we must also be mindful of the ideology of authorship. The application of the modern principle, properly construed, invokes the "metaphor of literary paternity"[89] with its attendant anxieties. Here, the decision-maker who claims definitional authorship must assert their (but, statistically, probably his) speaking position. This involves both the adoption and refutation of conventional narratives, since the judicial

84. Daniella Murynka, "Some Problems with Killing the Legislator" (2015) 73:1 UT Fac L Rev 11 at 14.
85. *Ibid* at 32.
86. Paul de Man, "Semiology and Rhetoric" in Vincent Leitch et al, eds, *The Norton Anthology of Theory & Criticism* (Norton, 2010) 1365 at 1367.
87. *Blackpool Corp v Locker*, [1948] 1 All ER 85 at 87.
88. Stamatina Dimakopoulou, Christina Dokou & Efterpi Mitsi, *The Letter of the Law: Literature, Justice and the Other* (Peter Lang, 2013) at 1.
89. Sandra Gilbert & Susan Grubar, *The Madwoman in the Attic: The Woman Writer and the Nineteenth-Century Literary Imagination*, 2nd ed (Yale University Press, 2000) at 46.

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author is simultaneously constrained by traditional form (if not in any substantive ways) and required to make a subjective pronouncement with the force of legal authority.

Conversely, those addressed by judicial language occupy a form of otherness which is particularly marked in the context of historically disadvantaged groups. Although it functions as a synecdoche, statutory interpretation should be understood in relation to "the law's systematic backgrounding, devaluation, and instrumentalization of the other."[90] For the purposes of this argument, it is worth noting that judicial claims to meaning issue, by definition, from the privileged sphere of legal authority. As discussed, the tremendous flexibility of signifiers extends considerable scope for judges' biases and experiences, which cannot be unpacked when they are left unstated. In his recent treatise on legal interpretation, Allan Hutchinson writes, "it is no longer acceptable or feasible to talk about facts as something that exist entirely outside of the disciplinary or theoretical paradigm within which they are apprehended and through which they are supposed to be validated."[91] It is therefore essential, in conceptualizing a postmodern principle of interpretation, to effect a self-conscious theoretical paradigm as the basis of validation; that is, we cannot rely on the metanarrative of legal fact but should instead render interpretive moves within the framework that gives rise to their legitimacy.

The indeterminacy of language concurrently problematizes and necessitates statutory interpretation. If we cannot render objective textual meaning then someone must have the last word on legal hermeneutics; however, that final pronouncement cannot logically claim neutrality or even legitimacy outside of the necessity of its task. In many ways, the linguistic turn of postmodernism facilitates a methodology that is aware of its contingent nature and the political aspects of linguistic meaning. If a postmodern principle is possible, it is also more equitable for its recognition of sociocultural difference embodied in language construction and more justifiable for its explicit engagement with the problem of inescapable subjectivity.

(b.) Agreeing to Disagree

While it may appear counterintuitive to an argument dependent upon the refutation of outdated modes of thought, many of the insights from Ronald Dworkin's *Law's Empire* provide an insightful starting point toward a postmodern principle.[92] At the outset, it is important to be mindful of the overarching challenge of this discussion: Navigating the linguistic turn without drifting too far into absolute skepticism (if not outright nihilism) is a delicate balancing exercise. To this end, a close reading of Dworkin's most famous treatise suggests a productive

90. Nicole Power, "The Problem of False Comparisons: Animal Welfare Discourse and the Anti-Choice Movement" (2016) 25 Dal J Leg Stud 105 at 121.
91. Allan Hutchinson, *Toward an Informal Account of Legal Interpretation* (Cambridge University Press, 2016) at 124.
92. Ronald Dworkin, *Law's Empire* (Belknap Press, 1986).

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alternative to definitional agreement which, in turn, helps to identify the political interests at play.

While it forms a relatively minor part in the construction of his "semantic sting"—an anti-positivist refutation of Hart's rule of recognition—Dworkin's account of empirical disagreement provides a logical introduction to the interpretive act. Much of the foregoing discussion takes issue with the unstated presumptions of the modern principle. Accordingly, productive work toward a postmodern principle should explicitly render each posited analytical step. It is important to remember, then, that statutory interpretation arises out of disagreement—a concept that is ubiquitous in legal scholarship[93] while remaining largely ignored in the context of interpretive doctrine.

A framework for hermeneutical disagreement should ideally elucidate the specific points of contention. In this way, Dworkin's hypothetical empirical disagreement is instructive: "We can disagree over borderline cases," he writes, referring to a scenario in which the number of books on his shelf are discussed, "[b]ut we cannot disagree over what I called pivotal cases. If you do not count my copy of *Moby-Dick* … any disagreement is bound to be senseless."[94] In other words, meaningful resolution (or compromise) requires a preliminary discussion concerning the specific scope of the disagreement. Although this is surely an uncontroversial and transferable point, it is markedly incongruous with contemporary interpretive jurisprudence. In *Manitoba v Russell Inns Ltd*, for instance, the Court of Appeal submits that "[a]ny decision dealing with statutory interpretation must begin with the modern principle."[95] After a perfunctory quotation of Driedger, the Court immediately shifts to a discussion of relevant legislative principles, ultimately rendering a definitional decision as the necessary outcome of *stare decisis* in action.[96]

An interpretive mandate that engages with the indeterminacy of language requires more than this disingenuous evocation of doctrinal certainty. The discussion of empirical disagreement in *Law's Empire* accommodates postmodern skepticism because it foregrounds the incoherence that arises when presumptions fail to signify at a communal level. To continue the foregoing metaphor, a judgment that claims definitional certainty based on the presumed universality of a language effectively begins counting books before discussing the status of Melville's cetacean masterpiece. This is not, of course, to suggest that a prefatory interpretive step, wherein the judiciary clarifies the exact point(s) of disagreement, is likely to be uncomplicated and sufficient; rather, moving beyond the modern principle requires—but is not limited to—consistency in rendering linguistic disagreement.

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93. While Jeremy Waldron provides the most obvious (and eponymous) example, see also: Michael Bryan, *Private Law in Theory and Practice* (Routledge-Cavendish, 2007) at 44. In his discussion of tort policy, Bryan argues that "managing disagreement" should not be reductively characterized as producing agreement. Instead, he submits that courts should earn public legitimacy to the point where citizens accept decisions with which they disagree.

94. *Supra* note 92 at 45.

95. 2013 MBCA 46 at para 109.

96. *Ibid* at para 142.

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As Dale Smith notes in his discussion of *Law's Empire*, judges can employ different principles while arriving at the same result.[97] Conversely, nominally identical principles may impel divergent results;[98] indeed, to the extent that the modern principle conforms to this (titular) designation, its multifarious outcomes are discussed at length above. In the interpretive context, the disputes that provoke adjudication arise from the profound malleability of language. The discrete points of disagreement are eminently variable. Identical signifiers can, of course, invoke different meanings—but so, too, can issues regarding appropriate context, methodologies, and syntax.[99] As a result, identifying disagreement helpfully acknowledges the profound subjectivity of language while rendering the competing, individualized interpretations at play.

Consider, for instance, the analytical advantages of a postmodern *Rizzo Shoes*.[100] Here, rather than quoting extensively from the *Employment Standards Act*, the *Employment Standards Amendment Act*, and the *Interpretation Act*, we begin by making a claim about the dispute. Both parties agree that the dispositive question is whether or not bankruptcy triggers severance pay obligations under the *Employment Standards Act*.[101] It stands to reason, then, that the disagreement centres on the meaning of s 7(5):

> Every contract of employment shall be deemed to include the following provision:
>
> All severance pay and termination pay become payable and shall be paid by the employer to the employee in two weekly instalments beginning with the first full week following termination of employment and shall be allocated to such weeks accordingly. This provision does not apply to severance pay if the employee has elected to maintain a right of recall as provided in subsection 40a (7) of the Employment Standards Act [emphasis mine].

More specifically, the competing views diverge on the question of whether bankruptcy constitutes termination in the foregoing statute. On one side, as the Court of Appeal put it, bankruptcy is an operation of law rather than a positive act of termination;[102] however, as the Supreme Court ultimately decided, the purpose of this legislation is the protection of workers' rights and the provision of economic stability during times of unemployment. The theoretical framework for unpacking the modern principle is helpful here: If we take contemporary hermeneutics seriously and accept the contingency of language, we cannot refer to the above concepts as though they have objective, stable content.

The relevant jurisprudence consistently presumes the universal signification of, e.g., "purpose"—to say nothing of how the ephemerality of something like "workers' rights" or "economic stability" can accommodate endlessly diverse meanings. In the Supreme Court's judgment in *Rizzo Shoes*, these issues are

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97. Dale Smith, "Agreement and Disagreement in Law" (2015) 28:1 Can JL & Jur 183 at 188.
98. *Ibid*.
99. See, e.g., *supra* note 60 at 16-18.
100. Since this is generally regarded as the ur-case for the modern principle, it serves as a familiar example, though nothing in particular turns on its factual matrix.
101. RSO 1980, c 137.
102. [1995] OJ No 586 at para 37.

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elided with commonplace invocations of *stare decisis* and interpretive principles. While the modern principle has nothing useful to say about whether "termination" should include bankruptcy, a more progressive interpretive principle does not seek to answer this uncertainty. Instead, just as Dworkin highlights in his empirical disagreement example, interpretation in (post)modernity should frankly engage with the contours of potential divergence. A postmodern reworking of *Rizzo Shoes*, for instance, does not raise *Machtinger* to justify a broad reading of the *ESA*;[103] rather, it sets out a clear position on how "termination" signifies in light of the conflicting, subjective readings proffered by both sides. This mode of interpretation necessarily issues from the justificatory register. By problematizing the presumption of universal linguistic or ideational meaning, the postmodern principle begins with a framework for hermeneutical disagreement. Claims can and should be made to principles such as workers' rights, but should also conform to Chomsky's reasonable demand, set out above: "Justify yourself."[104] Ultimately, the careful identification of the precise linguistic dispute at issue foregrounds the uncertainty of language in a manner that is respectful of difference. Those who must interpret legislation cannot claim access to an objective meta-language, but they can set out their understanding of the dispute and the analytical processes that produce their subjective linguistic understanding. While this is an undeniably modest proposal, when it comes to language, we can only ever disagree with varying levels of transparency. When much turns on an individual's exegetical act, it should accordingly embody as much of this openness as linguistic communication will allow.

(c.) Interpretation as Creation

As discussed above, claims to meaning bear no particular relation to their linguistic object. The interpretive act is not only subjective; it is fundamentally—and literally—creative. Gendered pronouns aside, Dworkin makes an insightful observation on this point; when his idealized judicial Hercules is confronted by a statute,

> [h]e will treat Congress as an author earlier than himself in the chain of law … and he will see his own role as fundamentally the creative one of a partner continuing to develop, in what he believes is the best way, the statutory scheme Congress began. … He must rely on his own judgment in answering these questions, of course, not because he thinks his opinions are automatically right, but because no one can properly answer any question except by relying at the deepest level on what he himself believes.[105]

In other words, Dworkin anticipates the impossibility of objective interpretation; even his hypothetical legal superhero can only develop meaning based on subjective value judgments.

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103. [1992] 1 SCR 986.
104. *Supra* note 27.
105. *Supra* note 92 at 313-14.

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This is a difficult foundation upon which to build an interpretive mandate. Given the certainty demanded by oft-cited legal principles, judicial discomfort with explicitly relying on personal value judgments is understandable. The alternative, however, simply assumes the pervasive signifying power of the dominant perspective. When judges render objective truths, they impose their elite legal perspective upon the infinitely varied "desert of the real itself."[106] Conversely, understanding the implications of creative interpretation provides a principled basis for proceeding with this daunting interpretive task without disappearing alternative perspectives.

In his engagement with Dworkin's "chain" of textual meaning, Stanley Fish makes an instructive comment: "The distinction between explaining a text and changing it [cannot] be maintained … To explain a work is to point out something about it that had not been attributed to it before and therefore to change it by challenging other explanations that were once considered changes in their turn."[107] Of course, the creation insight means relatively little in the abstract; Fish provides a concise summation of a relatively clear product of the linguistic turn. Statutory interpretation does not need to address postmodern skepticism to create meaning—this happens each time a definitional claim is made—but this conceptualization does provide a novel means of postmodernizing judicial hermeneutics.

If we understand interpretation as a creative process that superimposes itself upon both the text and the relevant history of definitional claims, we begin to see definitions as the act of bringing something new to the signifiers in question. This anticipates the practice of dynamic statutory interpretation, which is most convincingly set out in William Eskridge's eponymous text.[108] On this reading, the text is not assigned any inherent meaning; rather, it "ensures that statutes will evolve because the perspective of the interpreter will be different" over time.[109] This may present as a fairly commonplace observation, but it is diametrically opposed to the current regime of judicial exegesis, where objective meaning is presumed to exist within the legislative enactment. The recognition that individuals and context impose meaning on a text brings us far closer to contemporary understandings of language.

What, then, does this mean for the reconciliation of hermeneutics and a basic commitment to legal predictability? The theory shows that judges navigate the political space of definitional claims, and this space, properly construed, is the site of ideological conflict. Displacing the modern principle as an interpretive crutch would require the courts to engage with the context and subjectivity that animate creative interpretation—they would need to justify their (necessarily contingent) interpretations. This explicit recognition of linguistic play would promote predictability because it would render the determinative social context

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106. *Supra* note 67 at 1.
107. Stanley Fish, "Working on the Chain Gang: Interpretation in Law and Literature" in Lenora Ledwon, ed, *Law and Literature: Text and Theory* (Garland, 1996) at 55.
108. *Supra* note 43.
109. *Ibid* at 58.

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in each judgment. This is not, of course, to suggest faith in contextual diversity from the bench; however, an approach that requires the articulation of linguistic biases is preferable to one that actively obscures them.

Conclusion

Despite its apparent lack of content, the modern principle continues to serve as one of the most frequently endorsed sources in Canadian jurisprudence. While the certainty it evokes is demonstrably deceitful, it is also relatively easy to understand its privileged position in the citations of each statutory interpretation dispute in the past two decades. The ritualistic invocation of Driedger's interpretive mandate positions the authoritative reader beyond the controversy of linguistic subjectivity. As discussed, contemporary understandings of language demonstrate the impossibility of objective textual meaning—an insight that is fundamentally at odds with the primary utility of the modern principle. The relevant jurisprudence is characterized by the ostensible neutrality of settled doctrine, which elides the political interests that necessarily resonate in any claim to definitional meaning. Deconstructing this ubiquitous doctrine is productive for its elucidation of both the attendant tropes of legitimization and the potential workings of a postmodern principle. Our current system of laws necessitates statutory interpretation, which is profoundly complicated by the arbitrary, contingent nature of our language. The challenge, then, can be summarized as navigating the postmodern landscape of signs without accepting either the normative elitism of the modern principle or the nihilism that suggests itself within the "prison-house of language." Ultimately, the concepts that provoke this challenge also provide a way forward: By engaging with uncertainty and explicitly rendering our subjective hermeneutical processes, we can make justifiable claims to linguistic meaning as each successive reader builds on the creativity of interpretation.

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