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EXPECTED APPLICATIONS, CONTEXTUAL ENRICHMENT, AND OBJECTIVE COMMUNICATIVE CONTENT: THE LINGUISTIC CASE FOR CONCEPTION TEXTUALISM

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ABSTRACT

Textualist and originalist legal reasoning usually involves something like the following thesis, whether implicitly or explicitly: the legal content of a statute or constitutional clause is the linguistic content that a reasonable member of the relevant audience would, knowing the context and conversational background, associate with the enactment. In this paper, I elucidate some important aspects of this thesis, emphasizing the important role that contextual enrichment plays in textualist and originalist legal reasoning. The aim is to show how the linguistic framework underlying sophisticated versions of new textualism and public-meaning originalism can help to shed important light on the plausibility of what John Perry calls *conception textualism*. Contra Perry, I do not think that conception textualism—arguably best classified as a version of expected-applications originalism—is "confused, implausible, and unworkable." I also briefly compare my linguistic case for conception textualism with Justice Scalia's nonlinguistic argument for it, the main premise of which concerns the constitutive function of constitutions.

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I. INTRODUCTION

Textualist and originalist legal reasoning usually involves something like the following thesis, whether implicitly or explicitly: the legal content of a statute or constitutional clause is the linguistic content that a reasonable member of the relevant audience would, knowing the context and conversational background, associate with the enactment. Following Mark Greenberg, we can call this the *objective-communicative-content theory of law*.[1] Depending on the context, we could also choose to call it the *new-textualist thesis* or *public-meaning originalist thesis of legal content*.[2]

In this paper, I elucidate some important aspects of the objective-communicative-content theory, emphasizing the important role that contextual enrichment plays in textualist and originalist legal reasoning. The aim is to show how the linguistic framework underlying sophisticated versions of the theory can help to shed important light on the plausibility of what John Perry calls *conception textualism*—the (by his lights deeply mistaken) view that "the conceptions that the enactors had of the states, conditions, phenomena, and the like referred to by their words, used in the operative senses, are determinative [of statutory content]."[3]

Conception textualism, as defined by Perry, is arguably best classified as a version of what has come to be known in the legal literature as *expected-applications originalism*, which is often contrasted with public-meaning originalism.[4] Following Jack Balkin, we can say that expected-applications originalism is the view that the expectations that lawmakers have about the application of a statute or constitutional clause are legally binding on judges and other officials.[5] Such expectations, as Mark Greenberg and

1. Mark Greenberg, *Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication*, *in* THE PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 217–256 (A. Marmor & S. Soames eds., 2011), at 248.

2. *See, e.g.*, Antonin Scalia, *Address before the Attorney General's Conference on Economic Liberties in Washington, D.C. (June 14, 1986)*, *in* ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK 101 (U.S. DEP'T. OF JUSTICE, OFFICE OF LEGAL POLICY, 1987); and ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997); G. Lawson, *Proving the Law*, 86 NW. U. L. REV. 859 (1992); Jeffrey Goldsworthy, *Originalism in Constitutional Interpretation*, 25 FED. L. REV. (1997); R. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999); K. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004); and Lawrence B. Solum, *Semantic Originalism*, Illinois Public Law Research Paper No. 07–24 (2008), http://ssrn.com/abstract=1120244.

3. John Perry, *Textualism and the Discovery of Rights*, *in* THE PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 105–129 (A. Marmor & S. Soames eds., 2011), at 106. Similar attitudes are expressed in Goldsworthy, *supra* note 2; and in Mark Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L. REV. (1998).

4. *See, e.g.*, J.M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427 (2007); and Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, *in* THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION (G. Huscroft & B.W. Miller eds., 2011); though, as Solum points out, the earliest—and probably still most thorough—discussion of the concepts at play is found in Greenberg & Litman, *supra* note 3.

5. *See* Balkin, *supra* note 4, at 292–293; and Solum, *What Is Originalism?*, *supra* note 4, at 24–26.

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Harry Litman discuss in laudable detail, in turn often crucially depend on beliefs about the application of the terms used.[6] According to Justice Scalia, for example, even if the death penalty were in fact cruel and unusual, the Eighth Amendment of the U.S. Constitution would not prohibit it, since it is clear that the framers believed that it was not in the extension of the term "cruel and unusual," and so they did not expect the amendment to be applied to that particular form of punishment.[7]

During the past three decades or so, expected-applications originalism has fallen increasingly out of favor.[8] Some oppose it on normative grounds, while others accuse it of being linguistically confused.[9] Perry is one of the most recent additions to the latter group of critics, arguing that the view is—from the perspective of philosophy of language and linguistics—"confused, implausible, and unworkable."[10] His main argument is that the view clearly fails to satisfy a requirement necessary for the adequacy of any theory of legal interpretation—that its claims about the content of an enactment can be supported using the tools of contemporary philosophy of language and linguistics.

Contra Perry, I do not think that conception textualism is such an implausible view. In fact, a moderate version of it seems to fall quite naturally out of the linguistic framework underlying sophisticated public-meaning originalism. As I hope to show—at least in the case of speech acts with a world-to-mind direction of fit, such as legislation—once we fully appreciate the role of contextual enrichment in communication, it becomes plausible to think that when a speaker's (mutually known) false beliefs about that to which she wishes to refer or quantify over clash with the literal content of her remark, these beliefs manage to affect utterance content by making that content to some extent indeterminate. This has potential implications for a range of important and controversial legal cases, including *FDA v. Brown & Williamson Tobacco Corp.*[11]

Last, I briefly compare my linguistic case for conception textualism with Justice Scalia's nonlinguistic argument for it, the main premise of which concerns the constitutive function of constitutions.

II. COMMUNICATIVE CONTENT AND LEGAL CONTENT

I should note that it is not always clear exactly what relation proponents of the communicative-content theory take to obtain between the

6. *See* Greenberg & Litman, *supra* note 3, at 586–591, esp. 588–589.
7. SCALIA, MATTER, *supra* note 2.
8. *See* Balkin, *supra* note 4, at 293, fn. 4; and Solum, *What Is Originalism?*, *supra* note 4, at 22 ff.
9. The former include Greenberg & Litman, *supra* note 3; and Balkin, *supra* note 4; the latter include Greenberg & Litman, *supra* note 3; Balkin, *supra* note 4; Goldsworthy, *supra* note 2; and most recently Perry, *supra* note 3.
10. Perry, *supra* note 3, at 106.
11. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

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communicative content of a statute or constitutional clause and its legal content. It might be a metaphysically "tight" relation like identity or constitution, or it might a slightly "looser" relation like supervenience or "direct correspondence."

It is also not always clear what people mean when they talk about the legal content of a statute or constitutional clause. Sometimes it seems to refer simply to the legally relevant propositional content of the authoritative utterance in question, which makes sense if the relation between communicative content and legal content is taken to be one of identity or constitution. Legally authoritative utterances, however, do more than simply represent what legal obligations, powers, permissions, and so on we have in virtue of the law being what it is; they also create them, which is why we can speak about the "effect" that the enactment of a statute or constitutional clause has on the law. It seems appropriate, therefore, to identify the legal content of a statute or constitutional clause with the contribution that it makes to our legal obligations, powers, permissions, and so on. If that is correct, then supervenience- or correspondence-based versions of the communicative-content theory seem to provide a better choice.[12]

Fortunately, we can, at least for the purposes of our discussion here, be agnostic about the costs and benefits of different versions of the theory (and about who holds which version of it). Instead, we can rephrase the general theory in a less committed albeit slightly more cumbersome way and take that as our point of departure in the following discussion: the legal content of a statute or constitutional clause is identical with, constituted by, supervenes on, or directly corresponds to its communicative content, where such content is, as a general matter, the content that a rational hearer, knowing the relevant conversational background and context, would be warranted in taking the speaker to be intending to assert.[13] In what follows, I programmatically assume this theory and proceed to explore how far this can take us both in terms of elucidating the role of contextual enrichment in textualist and originalist legal reasoning and in terms of shedding light on the plausibility of conception textualism.

For various reasons, many people are skeptical of the communicative-content theory and hold that there is more to the legal content of a statute or constitutional clause than what is provided by way of legislative

12. For a sketch—and defense—of a correspondence-based version of the theory, *see* Hrafn Asgeirsson, *Can Legal Practice Adjudicate between Theories of Vagueness?*, *in* VAGUENESS AND THE LAW: PHILOSOPHICAL AND LEGAL PERSPECTIVES 95–126 (G. Keill & R. Poscher eds., 2016).

13. *See, e.g.*, Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441 (1990), at 443; *see also* J.F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419 (2005), at 434; and SCALIA, MATTER, *supra* note 2, at 17, quoting and endorsing the claim in JOEL PRENTISS BISHOP, COMMENTARIES ON THE WRITTEN LAWS AND THEIR INTERPRETATION (1882), at 57–58, that "the primary object of all rules for interpreting statutes is to ascertain . . . *the meaning which the subject is authorized to understand the legislature intended*" (Scalia's emphasis).

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communication. In general, although not without exception, critics of the theory tend to see little or no value in theoretical accounts of law that aim to elucidate the contribution that individual laws make to people's legal-normative status by "carving small and manageable units out of the total legal material in a way that will promote our understanding of the law by classifying laws into various types and by showing how these laws interrelate and interact with one another," to borrow a (long) phrase from Raz.[14]

Some but by no means all of the doubts that critics have about such atomistic accounts come from what we might call the "holistic appearance" of the law.[15] The law simply does not look much like a structured set of discrete norms, and the legal effect of many—or, some say, most—statutes and constitutional clauses does not seem to mirror completely their communicative content. Greenberg argues, for example, that "[t]he content of the law is not determined by any kind of summing procedure, however complicated."[16] And it is a mistake, he thinks, to assume that there are "discrete issues of what considerations are relevant to the content of the law and how the relevant considerations combine to determine the content of the law."[17]

One might wonder, therefore, whether the discussion in this paper is relevant only to those who already hold some version of the objective communicative-content theory of law. I think that is not the case. As Greenberg himself points out, it is still "uncontroversial that, on any plausible view, the meaning of a statute's text is highly relevant to the statute's contribution to the content of the law."[18] So even if we were to reject (every version of) the communicative-content theory of law, the considerations discussed in the remainder of this paper would still carry significant weight vis-à-vis determining the legal content of statutes and constitutional clauses. Or, to put it another way, if the notion of communicative content matters on any reasonable theory of legal content, then everyone should care about what sorts of things can affect such content.

It is important to emphasize that the aim in this particular paper is not to grapple with the many issues and potential problems that face the communicative-content theory of law. Rather, it is to remind ourselves, first, to what extent textualists seem to embrace contextual enrichment of literal content, and second, to see whether we can provide a sound linguistic basis

14. Joseph Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823–854 (1972).

15. Many prominent critics also point out that legal textbooks are full of examples familiar to any lawyer in which what the law is appears to be different from what the relevant statute or constitutional provision says. In recent work, e.g., Greenberg, Lawrence Solum, and Dale Smith all use a wide range of such apparent "gaps" to cast serious doubt on the communicative-content theory. *See, e.g.*, Greenberg, *supra* note 1; Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479–519 (2013); and Dale Smith, A Problem for the Equivalence Thesis (2016) (unpublished manuscript) (on file with author); *and see* Asgeirsson, *supra* note 12, for a defense of the communicative-content theory against this apparent "gappiness" problem.

16. Mark Greenberg, *How Facts Make Law*, 10 LEGAL THEORY 157–198 (2004), at 177.

17. *Id.* at 192.

18. *See* Greenberg, *Legislation as Communication?*, *supra* note 1, at 219.

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for certain claims and assumptions that textualists and originalists sometimes make about the way in which a lawmaker's beliefs about, say, the extension of a particular predicate may affect the content of a legislative utterance. This requires simplifying the terrain a great deal, setting aside many interesting and controversial issues at the heart of the debate about the nature of law and legal interpretation. On this occasion, however, it is most beneficial to fix a great deal of the many moving parts in this debate, in order to see how far some of them will take us. Keeping this approach in mind throughout the paper should suffice, I think, to dispel any worry that I am unwarrantedly simplifying or ignoring certain important issues in the wider and perhaps more fundamental debate surrounding the topic of legal interpretation.

Before we move on to the main discussion, it is also important to note briefly that there are two main theories or notions of communicative content in the contemporary literature in philosophy of language and linguistics; we can call them the *objective theory* and the *subjective theory*. According to the objective theory, the content that a speaker counts as having communicated is determined by the inferences that a rational hearer, knowing the context and conversational background, is warranted in making about the speaker's communicative intentions.[19] In contrast, on the subjective theory, the communicative content of a speaker's remark is simply the content that she intended to communicate.[20] A speaker—in uttering a sentence—means, says, asserts, and so on what she intends to mean, say, assert, and so on.

The objective theory of communicative content obviously fits the objective communicative-content theory of law very nicely, but it can also be made to work with the subjective theory. For many purposes, the choice between these two notions of communicative content does not matter at all. As shown below, however, the difference between them is crucial when it comes to assessing the plausibility of conception textualism. This is one way, then, in which relatively subtle choices between linguistic theories can have significant consequences for theorizing in philosophy of law. For the time being, however, we approach our task using the framework of the objective theory.

19. See, e.g., Jeffrey Goldsworthy, *Moderate and Strong Intentionalism: Knapp and Michaels Revisited*, 42 SAN DIEGO L. REV. 669 (2005); Scott Soames, *What Vagueness and Inconsistency Tell Us about Interpretation*, *in* PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 31–57 (A. Marmor & S. Soames eds., 2011); and Andrei Marmor, *Truth in Law*, *in* CURRENT LEGAL ISSUES: LAW AND LANGUAGE (M. Freeman & F. Smith eds., 2013).

20. *See, e.g.*, H.P. GRICE, STUDIES IN THE WAY OF WORDS (1989); S. SCHIFFER, MEANING (1972); S. Neale, *Pragmatism and Binding*, *in* SEMANTICS VERSUS PRAGMATICS 165–285 (Z. Szabó ed., 2005); and K. Bach, *The Top 10 Misconceptions about Implicature*, *in* DRAWING THE BOUNDARIES OF MEANING (B.J. Birner & G. Ward eds., 2006). Note that on most sophisticated subjective theories, the formation of the relevant intentions is subject to certain constraints, which safeguards them from the so-called "Humpty-Dumpty" objection. Although a speaker simply says, asserts, etc. what she intends to say, assert, etc., it is *not* the case that she can intend to say, assert, etc. whatever she likes.

III. TEXTUALISM/ORIGINALISM AND CONTEXTUAL ENRICHMENT

Let us recall the objective-communicative-content theory: the legal content of a statute or constitutional clause is identical with, constituted by, supervenes on, or directly corresponds to its communicative content, where such content is—as a general matter—the content that a rational hearer, knowing the relevant conversational background and context, would be warranted in taking the speaker to be intending to assert. Now, simply stating the theory of course does not say anything about what sort of content can, according to the new-textualist/public-meaning originalist, form part of the objective content of a legislative utterance. However, as shown below, standard textualist reasoning in prominent legal cases suggests that new textualists/public-meaning originalists are at least willing to concede that insofar as such content forms part of the primary content of the relevant utterance, contextually enriched content can form part of the content of the law.[21]

This is just as well, since it is by now commonplace to recognize that linguistic intuitions—that is, the "data" by which we determine what content a rational hearer, knowing the relevant conversational background and context, would be warranted in taking the speaker to be intending to assert—do not track literal content but rather utterance content, which is often contextually enriched. Generally, competent speakers of language have reliable intuitions about the content communicated via an utterance without having reliable intuitions about the exact literal content of the words used and the details of how such content is affected by context to produce the content communicated.[22] Thus, if new textualism/public-meaning originalism is to have a sound linguistic basis, it must concern utterance content rather that literal content.

The examples I discuss below are well-worn by now, but they are worth recalling, along with some linguistic commentary, in order for us to see just how natural it might be for new textualists/public-meaning originalists to acknowledge the relevance of application beliefs for legal content. In briefly rehearsing these examples through the lens of philosophy of language, we will be reminded both of the role of contextual enrichment

21. In addition, SCALIA, MATTER, *supra* note 2, at 24, explicitly states that "the good textualist is not a literalist"; rather, "the import of language depends upon its context, which includes the occasion for, and hence the evident purpose of, its utterance"; *id.* at 144. *See also* Manning, *supra* note 13, at 434. I should note that in this paper I am not concerned with the question of whether presuppositions or implicatures can form part of the content of the law. For a discussion, *see* Andrei Marmor, *Can the Law Imply More Than It Says?*, *in* PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 83–104 (A. Marmor & S. Soames eds., 2011).

22. *See, e.g.*, Neale, *supra* note 20, at 183–184; K. Bach, *Seemingly Semantic Intuitions*, *in* MEANING AND TRUTH 21–33 (J. Keim Campbell, M. O'Rourke & D. Shier eds., 2002), at 29–32; and S. Soames, *Drawing the Line between Meaning and Implicature—and Relating Both to Assertion*, 42 NOUS 440–465 (2008), at 460–462.

in communication and of the extent to which contemporary textualists embrace its contribution to legal content. This, in turn, helps us evaluate the plausibility of conception textualism, which is the main purpose of the paper. As I hope to make clear, the view's plausibility lies to a significant extent in the fact that—contra Greenberg & Litman—what needs to be established in order to demonstrate the relevance of application beliefs to new textualism and public-meaning originalism is a relation not between application beliefs and literal meaning but between such beliefs and the broader notion of utterance content.[23]

Let us first consider Scalia's famous dissent in the case of *Smith v. United States*.[24] During a drug-trafficking crime, Mr. Smith had exchanged a firearm for drugs, and the question was whether he had thereby violated 18 U.S.C. §924(c)(1) of the *United States Code*, which mandates certain penalties if the defendant "during and in relation to... [a] drug trafficking crime[,] uses... a firearm."[25] In the case of a firearm of the sort used for bartering by Mr. Smith (a MAC-10), the mandatory sentence is thirty years.

The majority held that Smith had indeed violated the statute, arguing that its content did not specify any particular way in which the firearm in question had to be used. All that was required was that Smith used it in *some way or other*. And if the legal content of a statute is confined to its literal content—perhaps including semantic presuppositions—then the majority's position appears to be correct.

Scalia, on the other hand, argued that the communicative content of the statute was a specific contextual enrichment of its literal content and that in order to violate the code, Smith would have had to use the firearm *as a weapon*. "When someone asks 'Do you use a cane?,'" Scalia said, "he is not inquiring whether you have your grandfather's silver handled walking stick on display in the hall; he wants to know whether you *walk* with a cane."[26] "Similarly," he continued, "to speak of 'using a firearm' is to speak of using it for its distinctive purpose, *i.e.*, as a weapon."[27]

In linguistic terms, *Smith* was a case of *required enrichment*—a case in which the literal content of the sentence uttered has to be contextually enriched in order for the speaker to count as having successfully conveyed a complete proposition.[28] A verb like "use," for example, may occur in a sentence with a *purpose parameter* but may also occur without one; compare, for example, "He used a hammer to pound in the nails" and "He used a hammer." In the

23. *See* Greenberg & Litman, *supra* note 3, at 601–602.
24. Smith v. United States, 507 U.S. 197 (1993).
25. 18 U.S.C. §924(c)(1).
26. *Smith*, *supra* note 24 (Scalia, J., dissenting).
27. *Id.* (Scalia, J., dissenting).
28. K. Bach, *Conversational Impliciture*, 9 MIND & LANGUAGE, 124–162 (1994), calls this *completion*; F. RECANATI, LITERAL MEANING (2004), calls it *saturation*. For a helpful discussion of contextual enrichment in general and of the difference between required and optional enrichment in particular, *see* F. Recanati, *Pragmatic Enrichment and Conversational Implicature*, *in* THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LANGUAGE (D. Graff Fara & G. Russell eds., 2012).

latter case, the literal content of the sentence does not express a complete (i.e., truth-evaluable) proposition, and contextual enrichment is therefore required. The general explanation for this systematic necessity of contextual enrichment is that speakers routinely compress intended communicative content into linguistic structures, or forms, which subsequently require contextual enrichment in order to be expanded.[29]

With a term like "use," there will of course be a range of possible enrichments, corresponding (at a minimum) to the range of possible parameters: he used a hammer {to pound in the nail/as a door prop/as a weapon to fight off the burglar/etc.}. In all these cases, we look to context and the norms of conversation in order to determine the speaker's communicative intention. Some enrichments, of course, may be more "natural" than others, due, perhaps, to the way in which an object is typically used. For example, if someone says to me that a person needs to use a hammer, I will probably infer that she needs to use it in the way that people normally use hammers—to pound in nails. Similarly, if someone tells me that a person used a firearm during a crime, I will take the speaker to be saying that the person used the firearm as a weapon. And although we cannot really say that "use" by itself, unaccompanied by any noun phrase, has a "default" enrichment of this sort, it is still sensible to say that in cases in which a speaker uses a verb phrase of the form "[use] an *F*," the hearer is justified in taking the speaker to have in mind the normal use of an *F* (if there is one), unless, of course, the context provides significant evidence to the contrary.[30]

It appears, then, that Scalia's reasoning in *Smith* allows us to conclude that contemporary textualists think that required contextual enrichment can form part the content of the law.[31] But there seems to be clear evidence that they want to allow for (at least) the possibility that legal content also

29. For similar discussions of *Smith*, *supra* note 24, *see, e.g.*, S. Neale, *On Location*, *in* SITUATING SEMANTICS: ESSAYS ON THE PHILOSOPHY OF JOHN PERRY 251–261 (M. O'Rourke & C. Washington eds., 2007), at 251–261; and M.L. Geis, *The Meaning of Meaning in the Law*, 73 WASH. U. L.Q. 1125 (1995), at 1136.

30. This notion of *default enrichment* is perhaps sufficiently captured by Grice's notion of *generalized conversational implicature* if we allow the relevant considerations to affect the *primary* content of the utterance. The idea is that a default enrichment is an enrichment *e* of the literal content *q* of a sentence *s* uttered such that *e* would *normally*—i.e., in the absence of special circumstances—be associated with utterances of *s*.

31. I should note that it may seem reasonable to ask whether we are talking about *ambiguity*, or even *polysemy*, rather than contextual enrichment; *see, e.g.*, ANDREI MARMOR, THE LANGUAGE OF LAW (2014), at 120–125. The significance of settling this issue is that if what is going on in *Smith* has to do with ambiguity or polysemy, then Scalia's reasoning in the case is simply a matter of disambiguation, in which case *Smith* does *not* count as evidence that contemporary textualists are willing to count anything beyond literal meaning as contributing to legal content. That is, if *Smith* is really a case of ambiguity or polysemy, then the function of contextual inference is in this case to give us the relevant literal meaning of the phrase "use a firearm" rather than to provide us with a contextual completion of such content.There are two good reasons, however, to believe that the relevant issue in *Smith* does in fact concern pragmatic enrichment rather than ambiguity or polysemy. (Similar considerations, e.g., motivate A. Kratzer, *The Notional Category of Modality*, *in* WORDS, WORLDS, AND CONTEXTS 38–74 [H.J. Eikmeyer & H. Rieser eds., 1981] to provide a monosemic account of modals and arguably also motivate GRICE, *supra* note 20, to postulate a unified semantics for "or.") The first rests on the fact that semantics is in

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includes *optional enrichment*, that is, contextual enrichment of literal content that already constitutes a complete proposition prior to enrichment.[32] In his concurring opinion in *Green v. Bock Laundry Machine Co.*,[33] for example, Scalia argued for such a conclusion.

Bock Laundry was a civil product-liability case in which petitioner Paul Green sued Bock Laundry Machine Company after having been injured by one of its machines while he was on work-release from a county prison. He testified that he had received inadequate information about the machine's operation and risks of use. Bock, however, impeached Green's testimony on the basis that he was a convicted felon. Green had filed a pretrial motion for the exclusion of impeaching evidence, which was denied, and on appeal Green argued that the trial court had erred in denying his pretrial motion, citing Rule 609(a) of the Federal Rules of Evidence, which—at the time—stated the following:

> For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect *to the defendant*, or (2) involved dishonesty or false statement, regardless of the punishment.[34]

the business of describing those features of expressions that are invariant between contexts of use. And considering the various uses of the verb "use," there really is a feeling of invariance present. This invariance can be exemplified, e.g., by paraphrasing simple sentences containing the verb so that the purpose parameter is made explicit: "He used a hammer" might, e.g., be paraphrased as "He used a hammer to pound in the nails." But if the (here, stereotypical) "sense" of the verb has been given by the infinitive clause "to pound in the nails," then, since the sentence still contains the verb "use," the meaning of "use" must be neutral between various types of purposes, or else what is said by the infinitive clause would be redundant—and it clearly is not. This strongly suggests that the verb "use" is not ambiguous; rather, it is "skeletal" and requires a piece of information to be provided by the context of use, information comparable to the infinitive clause.

The second reason for thinking that we are dealing with contextual enrichment rather than polysemy comes from the fact that we do not want to postulate *indefinite polysemy*. Given the uncountable variety of uses to which we can put a verb like "use" (no pun intended), a proper linguistic account of the expression would require an indefinite number of lexical entries plus an explanation of the relation between all of them. Further, since we have already established that "use" has a neutral sense, a lexical entry would also be required for that. But then the other (indefinitely many) entries become redundant. A single lexical entry for the neutral "use" provides a much more plausible semantics. The general principle underlying this second part of my argument is generally known as the *modified Occam's razor*: senses are not to be multiplied beyond necessity; *see* GRICE, *supra* note 20, at 47.

32. Bach, *supra* note 28, calls this *expansion*; RECANATI, *supra* note 28, calls it *strengthening*; others have called it *free enrichment*. Implicit quantifier domain restriction is a good example of such enrichment: a speaker may, e.g., utter the sentence "Everyone is coming to the party," which expresses a complete proposition, intending to communicate that everyone *in the department* is coming to the party.

33. Green v. Bock Laundry Machine Co., 490 U.S. 504 (1989).

34. FED. R. EVID. 609(a); emphasis added. The rule has since been amended to address the issue that arose in *Bock Laundry*.

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Green claimed that the probative value of admitting the testimony of his prior convictions did *not* outweigh its prejudicial effect. The problem with Green's argument was that Rule 609, read literally, does not apply to him, since he was a plaintiff and not a defendant. So the question was whether or not it was reasonable to read the rule nonliterally, so as to refer not just to civil and criminal defendants but also to civil plaintiffs. If so, then the trial court did in fact err in allowing testimony regarding Green's prior convictions.

The Supreme Court majority—led by Justice Stevens—held that Rule 609 could indeed not be interpreted literally. The reason was that on a literal interpretation, the rule would establish an odd asymmetry between the rights of the disputing parties in civil cases: the defendant, but not the plaintiff, would have special protection from impeaching evidence. But neither party in a civil case, the Court said, enjoys any protection over the other party, and so the rule "can't mean what it says." We can say that given the common ground between lawmakers and the courts (concerning the proper way in which to treat parties to a civil case), it would be unreasonable for the court to attribute to the legislature the intention to establish special protection against impeaching evidence for civil defendants but not for plaintiffs. To use Scalia's phrase, such an intention would constitute an "unthinkable disposition."[35] Assuming that the legislature did not just make a mistake, it must therefore have intended to communicate something other than what it literally said.

If this is all correct, what has been shown is of course just that it is very unlikely that the legislature intended to enact the literal content of the legislative text. It remains to be seen what inference, if any, can be legitimately drawn about what content the legislature *did* intend to enact. In order to determine the proper nonliteral content of Rule 609, the majority turned to a close examination of legislative history, concluding that it did not provide sufficient evidence that the lawmakers intended the protection provided by the rule to extend to parties other than criminal defendants. The Court therefore held that Rule 609 did not apply to Green, thereby affirming the court of appeal's decision that the trial court had not erred in admitting evidence regarding Green's prior convictions.

Scalia, in his concurring opinion, agreed with the majority's conclusion and with certain aspects of its reasoning.[36] He disagreed, however, with the majority's use of legislative history in determining the nonliteral content of the rule, arguing that there was only one relevant nonliteral interpretation that the language of the rule could bear; the term "defendant" as it occurs in Rule 609, he said, was *obviously* being used to mean *criminal defendant*. As Scalia rightly notes, it makes sense to say that speakers sometimes use "defendant" to mean *criminal defendant*, but makes little sense to say that

35. *Bock Laundry*, *supra* note 33, at 527.
36. *Id.* at 529–530.

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speakers sometimes use "defendant" to mean *civil plaintiff*, *civil defendant*, *prosecutor*, and *criminal defendant* or *civil plaintiff and defendant and criminal defendant*. To quote his dissent in *Johnson v. United States*, a word or phrase will bear a suggested meaning only if "you could use the word in that sense at a cocktail party without having people look at you funny."[37]

Scalia's reasoning in *Bock Laundry*, then, is easy enough to model on the linguistic framework underlying the objective-communicative-content theory of law. And note that it does not really make a difference whether the word "defendant" was being used intentionally to mean *criminal defendant* or whether it was a "scrivener's error" (an inadvertent omission of the word "criminal"). As a general matter, there is often no way to tell when it comes to the suspected omission of words and phrases—due simply to the way in which we use language. But the reasoning is the same—in both cases, the primary question is whether or not there is sufficient evidence that the speaker intended to communicate something other than what she literally said.

The point of the preceding examples is not to show anything new but rather to highlight the role that contextual enrichment plays in textualist legal reasoning. In the next—and primary—section, the aim is to show how a good understanding of this important aspect of new textualism and public-meaning originalism can help to shed light on the plausibility of what John Perry dubs *conception textualism*. If what I say is correct, then it is, contra Perry, far from clear that this view is "confused, implausible, and unworkable."[38]

IV. ON THE PLAUSIBILITY OF CONCEPTION TEXTUALISM

Perry distinguishes between two types of textualism that can be extracted from Scalia: *meaning textualism* and *conception textualism*. Meaning textualism, says Perry, is the view that "the content of a statute is determined by the words in the text of the statute, given the meaning that those words had at the time of enactment or ratification."[39] Conception textualism, on the other hand, is the view that "the conceptions that the enactors had of the states, conditions, phenomena, and the like referred to by their words, used in the operative senses, are determinative [of statutory content]."[40] Although formulated as theories of statutory interpretation, Perry takes these views to extend to constitutional clauses as well.[41]

According to Perry, what makes it the case that meaning textualism is a sensible philosophy of legal interpretation while conception textualism

37. Johnson v. United States, 529 U.S. 694, 718 (2000).
38. Perry, *supra* note 3, at 106.
39. *Id.*
40. *Id.*
41. One of the main examples that Perry discusses is the constitutionality of the death penalty.

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is "totally implausible" is the fact that the former—but not the latter—applies to statutes and constitutional clauses "the same apparatus we use to determine what some individual says when they are talking to us."[42] As I understand him, Perry thinks that it is a necessary requirement for the adequacy of any theory of legal interpretation that its claims about the content of an enactment can be supported using the tools of contemporary philosophy of language and linguistics. And he obviously thinks that conception textualism does not satisfy this requirement. Call this Perry's *foundational argument* against conception textualism.[43]

I think that Perry's requirement is a reasonable one—at the very least insofar as we are concerned with new textualism/public-meaning originalism. My aim in this section, therefore, is to show that it is far from obvious that conception textualism fails to satisfy his requirement. Although I am not necessarily convinced that the view can ultimately be made to work or that the best case for it is a linguistic one, I do think that once we have recognized the contribution that contextual factors make to utterance content, a very decent case can be made that conception textualism does in fact apply to legal texts the same apparatus we use to determine what a person says when she is talking to us. It seems to me that in at least some cases of linguistic communication, it is not implausible to argue that a speaker's (mutually known) beliefs about that to which she wishes to refer or quantify over manage to affect utterance content.[44] If what I say is correct, these cases put significant pressure on Perry's assessment of conception textualism.

The points I make below are for the most part general, but in the specific context of legislation, the cases I have in mind are ones in which (1) lawmakers enact a statute the literal content of which covers, among other things, a certain class of "objects" (broadly construed); (2) they clearly believe that the relevant predicate of the statutory or constitutional text does not apply to the class; and (3) they do not have a positive intention that the statute not cover the relevant class. The main question, then, to which this paper

42. *Id.*

43. Perry has at least one other argument against the view, one that we can call the *argument from convergence*; *see id.* at 108–109. The worry driving this argument is that conception textualism cannot explain "how people of diverse opinions about matters can nevertheless agree on principles, rules, policies, and laws, and expect the principles, rules, policies, and laws to be followed by others with different conceptions about things." Due to limitations of space, I cannot address this argument here. For the time being, suffice it to say that I do not think this is too much of a worry. First, the version of conception textualism that I am trying to motivate in this paper requires the relevant speaker beliefs to be part of the common ground between the speaker and hearer and so to be publicly available. Second, there will often be sufficient overlap between the conceptions that people have of the relevant things, which in turn produces sufficient agreement, or convergence, vis-à-vis the matter at hand. Third, conception textualism should not raise any more worries about convergence than should context-sensitive accounts of, say, gradable adjectives or modals. If we do not think that such accounts have a general "convergence problem," then we probably should not take conception textualism to have one either.

44. For an argument in a similar vein, *see* Gary Ostertag, Cruelty and Kinds: Scalia, Dworkin, and Constitutional Pragmatics (2012) (unpublished manuscript) (on file with author).

is meant to supply an answer, is whether in this kind of cases the resulting law covers the relevant class of objects. Unlike Perry, I think it is far from obvious what the answer is. If what I say below is correct, then beliefs about the application of a term sometimes do manage to affect utterance content by making that content to some extent indeterminate.

It is important to stress that the examples I discuss are cases in which there is no positive intention to exclude the relevant class of objects, but rather there is a clear (false) belief that the predicate does not cover the relevant class of objects. I take it that if it is possible to show that false beliefs about the application of a term sometimes manage to affect utterance content even in the absence of clear intention to exclude the relevant set of things, then presumably clear intention to exclude most certainly manages to do so, too. And although I discuss only cases that concern exclusion, I take what I say to apply equally to cases that concern inclusion.[45]

It is also important to emphasize that it is crucial to what follows that we adopt the objective notion of communicative content rather than the subjective one. The reason is that if we adopt the subjective notion—according to which speakers say, assert, and so on what they intend to say, assert, and so on—conception textualism never even gets off the ground, at least not insofar as it is supposed to have a linguistic basis (I discuss this further at the very end of the paper). The content of an utterance—on the subjective theory—is determined by the actual communicative intentions of the speaker, and since it is part of the description of the cases we are interested in that the lawmakers lack a positive intention that the statute in question not cover the relevant class of objects, it follows that the content of the respective utterance is unaffected by the lawmakers' false beliefs about the extension of the relevant predicate. On the subjective theory, a speaker's false beliefs about things—or any mental state of the speaker, for that matter—affect utterance content only insofar as they affect her actual communicative intentions. Thus the choice between the objective and the subjective notion of communicative content is crucial for assessing the plausibility of conception textualism.

Getting back to the relevant type of scenarios, say, for example, that Congress enacts a statute according to which "All *F*s ought to φ" and that Congress also *falsely* believes that *F* does not apply to a certain subset *X* of objects. Accordingly, in uttering the sentence, Congress neither intends *F*

45. I do not rely on this literature here, but there is a great deal of similarity between my concerns in this paper and the subject matter of recent work on so-called *ad hoc concepts*; in describing the general features of such a concept, Robyn Carston, *Explicit Communication and "Free" Pragmatic Enrichment*, *in* EXPLICIT COMMUNICATION: ROBYN CARSTON'S PRAGMATICS 217–285 (B. Soria & E. Romero eds., 2010), at 242, says that it is a:

> pragmatically derived concept [that] may be more specific or more general than the encoded concept; that is, its denotation may be either a proper subset or a superset of the denotation of the linguistically encoded concept, or it may be a combination, both extending the lexical denotation and excluding some part of it.

to cover *X* nor intends *F* not to cover *X*. Given its false belief, it simply has no intention regarding the relationship between *F* and *X* vis-à-vis this particular utterance. But if Congress's *belief* that the members of *X* are not within the extension of the predicate *F* is part of the conversational background, it becomes difficult to say whether or not this can affect the communicative content of the relevant speech act.

Consider, for example, the case of *FDA v. Brown & Williamson Tobacco Corp.*,[46] in which the central question was whether the Food, Drug, and Cosmetic Act gives the FDA authority to regulate tobacco products.[47] In the first instance, the Food, Drug, and Cosmetic Act gives the FDA authority to regulate *drugs*; and "drugs," according to the act, means, among other things, "articles (other than food) intended to affect the structure or any function of the body of man."[48] So the literal meaning of the act *does* cover nicotine. However, it is not implausible to claim that the legislature lacked a positive intention to exclude nicotine with its particular use of the term "drugs"[49] because the lawmakers believed that nicotine was not in the extension of that term, as defined in the act. The question, then, is whether this (false) belief affects the content of the legislature's utterance in such a way that the Food, Drug, and Cosmetic Act does not count as giving the FDA the authority to regulate tobacco. As we see below, I do not have an entirely firm opinion either way, but I think that we should at least not be too hasty in ruling out the possibility that it does affect the utterance content in some relevant way.

Generally speaking, my intuition is that while it may be implausible to think that a speaker's false belief about the extension of a predicate affects the content of speech acts with a *mind-to-world fit* (such as assertions), it is not so implausible to think that they sometimes play a part in determining the content of speech acts with a *world-to-mind fit* (such as directives). What seems to make the difference is that a speaker's beliefs may well have special relevance when it comes to interpreting utterances in which the speaker represents the world not as she thinks it is but rather as she would like it to be. As mentioned above, one reason I am interested in these kinds of cases is that Perry thinks it is a "rather bizarre and hopeless" idea that the conception that a speaker has about that to which he wishes to refer or quantify over can affect the primary content of the speech act. Contra Perry, I think it is possible to make a decent case for this position, at least in the case of speech acts with a world-to-mind fit—including enactments.

46. *Brown & Williamson*, *supra* note 11. Other relevant cases arguably include the controversial case of Boutilier v. INS, 387 U.S. 118 (1967), in which the question was whether a 1952 immigration act applied to homosexuals in virtue of the fact that the lawmakers clearly but falsely believed that the term "afflicted with psychopathic personality" applied to them.

47. Food, Drug, and Cosmetic Act, 21 U.S.C. §301-399(a) (1938).

48. *Id.*, §321.

49. That is, it is *not* the case that the lawmakers thought that the term "drug" actually covered nicotine and that they just intended implicitly to exclude nicotine from the relevant domain of quantification.

First, consider the difference between assertions and directives, with respect to intuitions about how information about speaker beliefs may affect what gets communicated. Say that S utters the following: "All *F*s are *G*." Say also that it is part of the common ground that S believes that a class of objects, *C*, is not within the extension of the predicate *F*. Finally, say that *C* is in fact within the extension of *F*. The question, then, is this: In uttering "All *F*s are *G*," did S predicate *G*-hood of the objects in *C*? The answer is not entirely clear, but it seems more reasonable to say that the erroneous belief does *not* affect the communicative content in such cases.

Say, for example, that someone utters the following: "No mammal weighs more than 15,000 pounds." And that it is part of the common ground that the speaker believes that whales are not mammals. Does it follow from the communicative content of the speaker's utterance that she attributed the property of not-weighing-more-than-15,000-pounds to whales (among other things)? My intuition is that it does, since I am inclined to judge the speaker as having asserted something false. And if that is correct, then the speaker's false belief did not affect what was communicated. Assuming that the scenario is unexceptional, it is reasonable to generalize from the case and say that in the case of assertion, it does not make a difference to the communicative content of a speaker's utterance of '. . . *F*. . . ' that the speaker falsely believes of a class of objects that they are, or are not, within the extension of *F*. And I think it is not unreasonable to explain the intuition in part by reference to the fact that the speaker *misrepresented the world*. If that is correct, then I would like to generalize further and claim that *in the case of speech acts with mind-to-world fit*, false beliefs that a speaker has about that to which she wishes to refer or quantify over do *not* affect utterance content.

Next, consider a case in which a speaker utters these words: "Get me all the *F*s!" Say also that it is part of the common ground that S believes that a class of objects, *C*, is not within the extension of *F*. Finally, say that *C* is in fact within the extension of *F*. The question, as before, is this: In uttering "Get me all the *F*s!," did S direct the addressee to get her (among other things) the objects in *C*? Again, the answer is not entirely clear, but it does not seem totally unreasonable to say that the erroneous belief manages to affect the communicative content.

Say, for example, that a boss utters the following to her assistant: "Get me all the ashtrays you can find in the building!" Now, one issue concerns what further restrictions—if any—the speaker intends on the quantifier "all the ashtrays in the building."[50] This is a relevant issue but it is not the one I am interested in here. The issue I am concerned with is whether it would affect the communicative content of the speaker's utterance if it were part

50. For a discussion, *see, e.g.*, G. MacCallum, *Legislative Intent*, 75 YALE L.J. 754–787 (1966); and J.F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387–2486 (2003).

of the common ground between speaker and hearer, for example, that the speaker believes that the ashtrays that were ordered only last week are not in the building, when in fact they have just arrived.

Here I am not so inclined to say that it follows from the communicative content of the boss's utterance that the new ashtrays belong to the set of things that the assistant was directed to collect. However, I do not have a robust intuition that they do not belong to that set either. Nevertheless, what this indicates is that—contra Perry—it is not entirely implausible to think that the conception that a speaker has about that to which she wishes to refer or quantify over can affect the primary content of the speech act—at least, not in the case of directives. And since it is not unreasonable to think that this judgment is explained in part by reference to the fact that the speaker's utterance represented the world as she would (in some sense) like it to be, I think it is sensible to suggest that in the case of speech acts with world-to-mind fit, false beliefs that a speaker has about that to which she wishes to refer or quantify over can affect utterance content.

I do, of course, have to say something a bit more specific both about how and about in what way utterance content is supposed to be affected by a speaker's false beliefs about, say, the extension of a predicate. As I say above regarding the "ashtray directive," I do not have—putting myself in the hearer's shoes—a robust intuition that it follows from the communicative content of the boss's utterance that the new ashtrays belong to the set of things that the assistant was told to collect. But I do not have a robust intuition to the contrary either. If these intuitions are reliable, and thus reflect the hearer's epistemic situation with respect to the content of the speaker's utterance, then it seems warranted—given that we are operating with the objective notion of communicative content—to say that it is *indeterminate* whether it follows from the communicative content of the boss's utterance that the new ashtrays belong to the set of things that the assistant was told to collect.

If the example is not an exceptional one, we can generalize and say that—at least in normal cases of speech acts with world-to-mind fit—the fact that a speaker falsely believes of a subset *X* of objects that they are (or are not) within the extension of *F* makes it the case that the content of the speaker's utterance of '. . . *F*. . . ' is indeterminate with respect to the inclusion/exclusion of *X* (assuming that it is mutual knowledge between speaker and hearer that the speaker has this belief). This provides, I think, a reasonable and empirically testable explanation of *in what way* utterance content may be affected by a speaker's false beliefs about that to which she wishes to refer or quantify over.

In explaining *how* utterance content comes to be affected in this way, it is crucial to make sure that we are evaluating the situation from the perspective of the hearer. Unlike you and me, the hearer does not know that the speaker lacks a positive intention to include/exclude *X* in her utterance of '. . . *F*. . . ' After all, it is the hearer's task to figure out what the speaker's

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communicative intentions are in uttering it. It is my hypothesis that in the relevant scenarios, the reason the hearer has for believing that the speaker intended her utterance to cover *X*—provided by the fact that the speaker uttered '. . . *F*. . . '—is defeated (but undercut, rather than outweighed) by the (mutually known) fact that the speaker believes that *F* does not apply to *X*. Assuming absence of other decisive evidence, this leaves the hearer in a state of partial uncertainty vis-à-vis the speaker's utterance of '. . . *F*. . . ,' that is, uncertainty regarding the inclusion or exclusion of *X*. Since communicative content is—on the objective notion—determined by the inferences that the hearer is warranted in making about the speaker's communicative intentions, this uncertainty makes the content of the relevant utterance to some extent indeterminate.[51]

Coming back to *Brown & Williamson*, it seems, then, that it is not out of the question to argue that the communicative content of the Food, Drug, and Cosmetic Act does not entail that the FDA has authority to regulate nicotine—at least not determinately so—and this despite the fact that nicotine is in the extension of the term "drug" as it is defined in the act itself. This cautious conclusion also has significant counterparts in the domain of constitutional interpretation. On one reading of Scalia's argument about the legal content of the Eighth Amendment, for example, he can be taken to claim that, indeed, the conception that the framers had about the extension of the term "cruel and unusual punishment" somehow affects the content of the amendment.[52] In particular, Scalia thinks that the death penalty—which may in fact be within the extension of the term "cruel and unusual punishment"—is not among the punishments that are prohibited by the amendment because it is clear that the framers believed that it was not in the extension of that term.

As a final note, I should point out that in his discussion, Perry does not really distinguish between statutory interpretation and constitutional interpretation. This is significant, since Scalia endorses meaning textualism for statutes but conception textualism for constitutions. And although it may be possible to show that some form of conception textualism is defensible from a linguistic perspective, Scalia provides in his reply to Dworkin the ingredients to a nonlinguistic argument for the claim that the framers' beliefs about those things to which they intended to refer or quantify over affect the content of the Constitution.[53] According to Scalia, it is among the essential functions of constitutions that they "freeze" contemporary conceptions of morality; this is one of the things that make a constitution what it is. If Scalia is right, then he may have a nonlinguistic explanation of

51. There are other reasons—also having to do with contextual enrichment—for thinking that the content of legislative utterances is often to some extent indeterminate; *see* Hrafn Asgeirsson, *On the Possibility of Non-Literal Legislative Speech*, *in* PRAGMATICS AND LAW: PRACTICAL AND THEORETICAL PERSPECTIVES (F. Poggi & A. Capone eds., 2017).

52. SCALIA, MATTER, *supra* note 2, at 144–149.

53. Id.

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why the content of, say, the Eighth Amendment is affected by the beliefs that the framers had about cruel and unusual punishment; it is *their* beliefs about right and wrong that the Constitution—in virtue of being a constitution—"freezes" (insofar as these beliefs can be taken to have been representative of popular morality).

A fuller discussion is beyond the scope of this paper, but one of the distinct benefits that this functional argument for the legal relevance of the framers' mental states has over the linguistic argument for conception textualism is that if it works out, its conclusion appears to be decisive. Another benefit is that Perry's linguistic worries about conception textualism would have little or no bite. In contrast, my above linguistic case for the relevance of application beliefs for anyone committed to the objective-communicative-content theory of law guarantees only that we should not be too hasty to rule the view out as implausible. One of the major advantages of the linguistic argument, however, is that it does not rely on any controversial claims about the constitutive functions of constitutions.[54]

V. CONCLUSION

According to Perry's foundational argument against conception textualism, the view clearly fails to satisfy a requirement necessary for the adequacy of any theory of legal interpretation: that its claims about the content of a statute or constitutional clause can be supported using the tools of contemporary philosophy of language and linguistics. The requirement, I think, is a reasonable one, at least insofar as we are concerned with new textualism/public-meaning originalism, given their adherence to the objective communicative-content theory of law. But, as I hope to have shown, once we fully appreciate the role of contextual enrichment in communication, it becomes plausible to think—at least in the case of speech acts with a world-to-mind direction of fit, such as legislation—that when a speaker's (mutually known) false beliefs about that to which she wishes to refer or quantify over clash with the literal content of her remark, these beliefs manage to affect utterance content by making that content to some extent indeterminate. If that is correct, then conception textualism—at least the moderate version presented in this paper—does in fact satisfy Perry's requirement.

Although I am not necessarily convinced that conception textualism can ultimately be made to work or that the best case for it is a linguistic one, I do think that a decent case has been made that the view is, contra Perry, far from being confused, implausible, and unworkable from the perspective of

54. For a thorough critique of Scalia's normative argument, *see* Greenberg & Litman, *supra* note 3, at 604–605. However, if what I say in this paper is correct, then the normative considerations that determine the legal relevance of public meaning also sometimes make relevant mistaken application beliefs.

philosophy of language and linguistics. Perry, it seems, has been much too hasty in ruling conception textualism out on such grounds.

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