

PICKING AND CHOOSING TEXT: LESSONS FOR STATUTORY INTERPRETATION FROM THE PHILOSOPHY OF LANGUAGE

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Abstract

Textualists claim that they follow statutory text. This Article argues that, in practice, textualists often create meaning rather than find it. Deploying the analytics of linguistic philosophy, this Article takes a deep dive into textualist methodology. The philosophy of language reveals what legal scholarship has left submerged: The very choice of text can put the thumb on the scales of any interpretation. When one pulls a term out of a statute and isolates it from the rest of the text (what I call “isolationist” method), this decontextualization offers the opportunity for adding and subtracting meaning from the statute by “pragmatic enrichment.” Only by working out these enrichments is it possible to assess whether the hypothesized meanings are cancelled by the rest of the statute. In the end, we need to ask of all interpreters, including textualists, whether they are making rather than finding the meaning of statutes.

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INTRODUCTION

It is conventional wisdom, by now, in statutory interpretation theory, to argue that the use of legislative history is unwise because it allows judges to pick and choose their friends in the legislative record.¹ What is not so conventional wisdom, but should be, is that *it is also possible to pick and choose one's friends in statutory text*. Anecdotal evidence of this can be gleaned from prominent statutory cases of the U.S. Supreme Court's recent terms, from the health care case, *King v. Burwell*,² to the fish case, *Yates v. United States*,³ to last Term's case on prior sex offenses, *Lockhart v. United States*.⁴ In each case, there were warring texts. In *King*, the law's opponents focused on the term "state" arguing that "federal" tax exchanges were excluded from tax benefits.⁵ In *Yates*, the government isolated the term "tangible object" in a financial fraud statute.⁶ In *Lockhart*, the defendant argued that the phrase "minor or ward" modified an entire string of offenses.⁷ Their opponents and members of the Supreme Court all emphasized equally small snippets—"such Exchange,"⁸ "records [or] documents,"⁹ and "abusive sexual conduct."¹⁰ This is not unique to statutory interpretation, nor to those wedded to textualist methods: Query whether the Justices of yesteryear would have spent so much time as the majority in the recess appointments case did on the term "the."¹¹

There should be something more troubling about reducing large and important laws, not to mention individual liberty, to such small chunks of text. These are Supreme Court cases, after all. Individual liberty and

1. This is attributed to a statement made by Judge Harold Leventhal of the U.S. Court of Appeals for the District of Columbia Circuit. Alex Kozinski, *Should Reading Legislative History Be an Impeachable Offense?*, 31 SUFFOLK U. L. REV. 807, 813 (1998).

2. 135 S. Ct. 2480 (2015).

3. 135 S. Ct. 1074 (2015).

4. 136 S. Ct. 958 (2016).

5. *King*, 135 S. Ct. at 2488 (explaining petitioners' argument emphasizing the term "state").

6. *Yates*, 135 S. Ct. at 1091 (Kagan, J., dissenting) ("The term 'tangible object' is broad, but clear.").

7. *Lockhart*, 135 S. Ct. at 961–62.

8. *King*, 135 S. Ct. at 2489 (discussing the phrase "such Exchange").

9. *Yates*, 135 S. Ct. at 1081, 1085 (plurality opinion) (discussing "records" and "documents").

10. *Lockhart*, 135 S. Ct. at 963 (explaining minor only modifies "abusive sexual conduct").

11. *NLRB v. Canning*, 134 S. Ct. 2550 (2014). Typically, cases of constitutional first impression focus on the constitutional text. *See, e.g., United States v. Nixon*, 418 U.S. 683 (1974); *Gibbons v. Ogden*, 22 U.S. 1 (1824).

major statutory reforms are at stake. Put more concretely, it should seem strange that a reform affecting one-sixth of the American economy should stand or fall on a five-letter word.¹² Nevertheless, despite the stakes, the cases, or at least the arguments leading to the cases, focused on what most citizens would find strange—tiny texts. Elsewhere, I have dubbed this method with the pejorative term “petty” textualism.¹³ Here, I try to formalize the concept of “petty textualist method,” by calling it *isolationist* (which is its effect)¹⁴ to distinguish it from the traditional form of “whole text” analysis.

Little serious analytic attention has been paid to isolationist method. This is unfortunate because it is everywhere: It infects arguments and opinions from all sides of the political spectrum and without regard to interpretive philosophy. It is deployed by textualists and purposivists alike in statutory interpretation cases.¹⁵ It also infects arguments characterized as originalist or textualist in constitutional interpretation. Of course, one can be a “textualist” or an “originalist” without ascribing to isolationist method, just as one can be a statutory purposivist or living constitutionalist and adopt textual isolationism. Nevertheless, the precise relationship between how one chooses text and these methods has not been elaborated in any great detail, making both textualism and originalism undertheorized.¹⁶

Isolationist textual method deserves greater scrutiny. To fully appreciate this, however, requires the analytic muscle of the modern philosophy of language, beginning with, but not limited to, the work of philosopher Paul Grice,¹⁷ whose mode of analysis has become interesting

12. National health care spending constituted approximately one-sixth of the economy in 2014. CONG. BUDGET OFFICE, THE 2016 LONG-TERM BUDGET OUTLOOK 30 (2016), <https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51580-ltbo-one-col-2.pdf>.

13. See generally VICTORIA NOURSE, MISREADING LAW, MISREADING DEMOCRACY (2016) (discussing petty textualism analysis and its effect on statutory interpretation).

14. One might think the term “isolationist” less than rhetorically neutral as it suggests analogues to the cold war between the United States and Russia. The term best fits what I am trying to say, however, because “isolation” is the first step to pragmatic enrichment.

15. I use the terms “textualist” and “purposivist” to describe the principal theories of statutory interpretation used by academics and judges. Textualists stick to the text and refuse to look to legislative materials; purposivists view the text as effecting a purpose and generally are willing to look at legislative materials.

16. For an application of this theory to originalist approaches to the President’s power, see Victoria Nourse, *Reclaiming the Constitutional Text from Originalism: The Case of Executive Power*, 106 CALIF. L. REV. (forthcoming Feb. 2018).

17. See generally PAUL GRICE, STUDIES IN THE WAY OF WORDS (1989) (discussing modern Anglo-American language philosophy); STEPHEN C. LEVINSON, PRESUMPTIVE MEANINGS: THE THEORY OF GENERALIZED CONVERSATIONAL IMPLICATURE (2000) (explaining the processes that underlie presumptions in communication).

to very different constitutional scholars.¹⁸ The philosophy of language helps us to see that the *very act of textual isolation* leads to unstated implications, and pragmatic enrichment of text.¹⁹ It also helps us to see that these implications can be quite false based on an examination of the whole text. The whole text can in fact “take back” the silent implications of the isolating procedure, either by creating contrary enrichments or implied *cancellations*.²⁰

My ultimate point is that isolationist method, and the pragmatic enrichment that follows, can be a spurious form of interpretation, whether deployed by a textualist or purposivist. If I am correct, “isolating” textualism allows interpreters to, in effect, add meaning at the initial stage of interpretation, based not on the actual text of the statute, but based on “pragmatic” inference. That inference may have nothing to do with the actual text, or the whole text; it may even “cover” one’s preferred policy preference. If this is correct, then “isolating textualism” can lead to self-fulfilling results: Choosing one piece of text over another can amount to assuming that which one is trying to prove. *This is important for all interpreters*, not simply self-described textualists or originalists. All interpretive methods are capable of “cherry-picking” text and “cherry-picking” pragmatic enrichment, thus violating the principles of restraint and fixity common both to textualism in statutory interpretation and to originalism in constitutional interpretation.²¹

Part I begins with the basic principles of linguistic philosophy and pragmatic inference, with special attention to, but not limited to, Gricean implicature, a particular form of pragmatic enrichment. This Part applies these principles to two recent Supreme Court cases, *King v. Burwell* and *United States v. Yates*,²² to show how isolationist textualism trades upon enriched meanings that may be contrary to the meaning of the whole text. This Part shows how interpreters pragmatically enrich text. The analysis raises a serious question for textualism as it appears that interpreters are deciding cases as much by their own additions or enrichments of the text

18. John Mikhail, *The Constitution and the Philosophy of Language: Entailment, Implicature, and Implied Powers*, 101 VA. L. REV. 1063, 1069 (2015); Lawrence B. Solum, *Intellectual History as Constitutional Theory*, 101 VA. L. REV. 1111, 1129–30 (2015); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 519–20 (2013); Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 U. ILL. L. REV. 1935, 1955 (2013).

19. To be more precise, the act of textual isolation leads to the misidentification of apparent implicatures and other pragmatic enrichments. My thanks to the linguist Nick Allott for this and many other careful interventions with this text.

20. For a path-breaking application of “cancellation” to constitutional law, and the necessary and proper clause, see Mikhail, *supra* note 18, at 1081, 1088.

21. See, e.g., John McGinnis & Michael Rappaport, *The Abstract Meaning Fallacy*, 3 U. ILL. L. REV. 737, 755 (2002).

22. *King v. Burwell*, 135 S. Ct. 2480 (2015); *Yates v. United States*, 135 S. Ct. 1074 (2015).

as by the text itself. Can textualism really be textualism if the interpreter's enrichments are doing so much work? Can textualism in practice be textualism in theory, if interpreters inject their preferred policy positions into the text by virtue of pragmatic inference?

Part II urges that this is a problem for all interpreters, without regard to apparent political or interpretive affiliation. A wide array of opinions and arguments and cases depend on textual choice and enriched meaning. This raises questions about whether interpreters are pushing their preferred "constructions" of text into claims that what they are doing is finding "plain meaning." As this Part shows, unless one acknowledges pragmatic enrichment, it is perfectly possible for a committed textualist to inject her preferred purpose into the text via pragmatic enrichment, doing precisely what, theoretically, she decries. It is also perfectly possible, and more likely, that a committed purposivist will do the same thing, but "cover" their purposivism by injecting it in text.

Part III puts this analysis in a broader context of the information economy used in statutory interpretation. Enriching meaning by implication depends upon economy of expression; the interpreter is forced to add or subtract information because of the lack of information. Thus, the narrower the information economy (i.e., reducing the amount of relevant information to small bits of text) the more likely the silent use of pragmatic enrichment. This Part concludes by comparing isolationist method to conventional pluralist analyses. This Part argues that pluralist tools may have an unseen virtue: They add information to the interpretive economy and thus can resist or defeat apparent, but falsely enriched, meanings. If deployed properly, they can disconfirm unstated, silent, statutory meanings that the whole text rejects. Put bluntly and counterintuitively, pluralism tends to increase the likelihood that the interpreter will honor the whole text. This challenges, indeed reverses, the conventional idea of pluralist method as an undisciplined grab bag.

Part IV considers some objections to these claims. First, some might argue that it is impossible to interpret any language without isolating particular terms. This objection simply shows the importance of the problem: Interpreters should be much more attentive to their pragmatic enrichments—how their choice of terms may lead to false, or at least implausible, enrichment. Here, this Part considers the age-old "vehicles in the park" hypothetical and shows how the isolation of the term "vehicle" creates interpretive problems that only law professors would take seriously. Second, for those who believe this entire argument is pitched at an incredibly picayune level, one can only beat a formalist argument by taking formalist theory seriously, and textualism is a formal theory. If judicial meaning is added even at the smallest of levels—at the level of word choice and pragmatic enrichment of those words—then textualism as currently practiced cannot be as constraining as its

proponents insist. So-called “plain texts” turn out to be constructions of meaning that are not *in fact in the text*, often *rejected by the whole text*, and in some cases, purposivism-in-false-textualist guise.

I. PRAGMATIC ENRICHMENT: GRICE AND BEYOND

By now, interpreters, including those who call themselves “new” textualists, agree that text must be understood in context.²³ Take the word “fifth,” which appears seemingly incapable of ambiguity—it is the number 5, after all. By manipulating the context in which the term “fifth” appears, however, we can see that it could mean many very different things. In the context of the Constitution, “fifth” typically implies the Fifth Amendment to the Constitution. In the context of a liquor store, “fifth” suggest the size of a liquor container.²⁴ “Fifth” is a relative term, both in quantitative terms (larger than fourth and smaller than sixth), and in contextual terms, in that it takes much of its meaning from context.

Semanticists have come to accept this point because of the potential ambiguity of even the tiniest of terms, such as the word “and.”²⁵ Although the line between semantics and pragmatics—two schools of linguistic thought—remains a perpetual source of dispute,²⁶ it is by now well known that simple words like the conjunction “and” can lead to different meanings, even without the kind of contextual change described above. Take the following two sentences:

(1) The Lone Ranger jumped on his horse and rode into the sunset.

(2) The Lone Ranger and Tonto rode into the sunset.²⁷

We can with no trouble reverse the “and” in sentence (2) as follows: “Tonto and the Lone Ranger rode into the sunset.” Put in other words, “and” has the conventional meaning of a connector and is logically reversible. One cannot perform that operation on Sentence (1), however, because “and” has a different meaning; it appears to mean “follow in time.”²⁸ It would make little sense to say, “The Lone Ranger rode into the

23. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 40 (2012) (“The soundest legal view seeks to discern literal meaning in context.”).

24. *Fifth*, URBAN DICTIONARY, <http://www.urbandictionary.com/define.php?term=fifth> (last visited June 27, 2017).

25. I refer here to the loose sense of ambiguity—having different meanings in different contexts.

26. See, e.g., Josh Dever, *The Revenge of the Semantics-Pragmatics Distinction*, 27 PHIL. PERSP. 104, 104 (2013).

27. This is a variation on an example explained in STEPHEN C. LEVINSON, *PRAGMATICS* 108 (1983).

28. It is possible that the work being done by “and” is superfluous here, that the meaning comes about by the simple ordering of phrases. See ROBYN CARSTON, *THOUGHTS AND*

sunset and jumped on his horse.” Based on such an example, even those focused on semantic meaning have accepted that context is important, even if that context is limited to surrounding text.

A. *Enriched Meaning*

Linguistic philosophy offers some important tools to assess semantic context. For purposes of this Article, the term “pragmatic enrichment” means the kind of addition philosophers of language describe when they talk about interpretation. Pragmatic enrichment can go by many different names, including implicature, implicature, explicature, presupposition, and others.²⁹ In my terms, “enriched meaning” refers to the addition of apparent meaning to a literal text. So, for example, if I say “fifth” and the interpreter reads this as the “Fifth Amendment to the Constitution,” she has used her context (the legal one) to add apparent meaning to the word “fifth.”

Almost all communication requires some form of pragmatically enriched meaning. These meanings can be true, false, and cancellable. To understand this idea, let us consider the kind of examples used by the famous linguistic philosopher Paul Grice who introduced the notion of the linguistic implicature.³⁰ The classic example is a recommendation letter. Imagine that Professor Eskridge writes a letter as follows: “Dear Judge Posner, Susan X has attended class regularly.” Given the context of a letter of recommendation, the implicature is that Susan is not a very good student. Of course, the letter does not say anything of the kind. It simply says that Susan attended class. The background context—our assumptions about the standard letter of recommendation—provides the implicature, the meaning of the letter. If Professor Eskridge were to add to the letter, “and I believe Susan X is the best student I have ever taught,” then the implicature would disappear. Grice called this notion, essential to the idea of implicature, cancellation.³¹

From Grice’s example, we can glean an important feature of meaning: the power of unstated background context. In the example, normal conventions of recommendation-letter writing govern its meaning. Notice that the meaning comes, as well, from *what is absent from the text—what is omitted*. Providing a small amount of information about the

UTTERANCES: THE PRAGMATICS OF EXPLICIT COMMUNICATION 222 (2002). My point is simply that semantic context can change even the most apparently obvious of terms.

29. Salah Mohammed Salih, *Nuances of Implicitness*, 2 INT’L J. EDUC. INVESTIGATIONS 126, 126 (2015).

30. *Implicature*, STAN. ENCYCLOPEDIA OF PHIL. (June 24, 2014), <https://plato.stanford.edu/entries/implicature/>.

31. Mikhail, *supra* note 18, at 1073–75 (using a similar example drawn from Grice). Cancellation comes in two varieties, one explicit and the other contextual. The examples that follow are contextual cancellations.

candidate suggested something negative. This principle, however, can be generally stated in more conventional terms. When we interpret language, we bring stereotypical conventional background assumptions to ascribe meaning, to add and enrich compact expression. Call this “pragmatic” enrichment of meaning.

The theory of pragmatic enrichment has developed a good deal in the post-Gricean era.³² Even those who focus more on traditional grammar and semantics have come to recognize that the concept of pragmatic enrichment exists. So, for example, take the statement, “Some of my students did well on the exam.” The apparent implication—technically an “implicature”—is that most of the students did *not* do well on the exam. Notice that the statement “some of the students did well on the exam” does not say that “most of the students did not do well.” It is implied, not stated, and without spelling it out as I have, it would be silent. Notice also that the pragmatic enrichment, the meaning that comes from context, could be *cancelled* if I added information that “some of my students did well on the exam, but most did very well.”

Cancellation is a key feature of pragmatic enrichment more generally.³³ It reflects a default reasoning system that is defeasible.³⁴ As linguist and philosopher of language Stephen Levinson has described it, generalized implicatures “are inferences that appear to go through in the absence of information to the contrary; but additional information to the contrary may be quite sufficient to cause them to evaporate.”³⁵ Levinson goes on to argue that many generalized implicatures result from a stereotypical contrast set.³⁶ So, for example, in our most recent example “some of my students did well on the exam,” the background contrast set is “some” versus “all.” The contrasting set (some, all) leads to the implicature that “only some” (not all) of the students did well.

32. On generalized versus particularized implicatures, and Grice’s embrace of the generalized as well as the particularized, see LEVINSON, *supra* note 17, at 18 (quoting Grice’s William James Lectures (Grice 1989)). Even those philosophers of language who disagree with Grice’s maxims believe in the concept of enriching meaning by inference. *See, e.g.*, DAN SPERBER & DEIDRE WILSON, MEANING AND RELEVANCE 309–14 (2012) (“We are not denying that a statement of the form ‘ . . . some . . . ’ may in some cases carry an implicature of the form ‘ . . . not all . . . ’”).

33. LEVINSON, *supra* note 27, at 114 (“[Grice] isolates five characteristic properties of which the first, and perhaps the most important, is that they are *cancellable*, or more exactly *defeasible*.”).

34. *Id.*

35. LEVINSON, *supra* note 17, at 42.

36. *Id.*

Pragmatic enrichment may be linguistic boilerplate,³⁷ but Grice's work has been controversial. He is well-known for positing four types of conversational maxims: manner, quantity, relevance, and quality.³⁸ His followers have not necessarily accepted any or all of these principles. His detractors have rejected the maxims altogether.³⁹ In statutory interpretation, the maxims have been applied but with limited success.⁴⁰ One need not engage in the great maxim debate, however, to accept the principle that inferences can enrich the meaning of text, whether the inferences are called implicatures, implicatures, or derivations from explicatures.⁴¹ Textbooks on semantics (roughly the study of grammar and syntax) and pragmatics (roughly the study of language in context) teach Grice's notion of an implicature as pragmatic enrichment. Pragmatic enrichment is featured in texts in the overlapping fields of semantics,⁴² pragmatics,⁴³ and the philosophy of language.⁴⁴ Because this

37. See, e.g., John A. Hawkins, *On (In)definite Articles: Implicatures and (Un)grammaticality Prediction*, 27 J. LINGUISTICS 405, 405 (1991); Liza Verhoeven & Leon Horsten, *On the Exclusivity Implicature of 'Or' or on the Meaning of Eating Strawberries*, 81 STUDIA LOGICA 19, 19 (2005).

38. H. Paul Grice, *Logic and Conversation*, in 3 SYNTAX & SEMANTICS 47 (Peter Cole & Jerry L. Morgans eds., 1975).

39. See, e.g., LEVINSON, *supra* note 17, at 35–39 (retheorizing Gricean maxims in terms of three heuristics). Compare SPERBER & WILSON, *supra* note 32 (arguing that the maxims can be reduced to a single concept of relevance), with LEVINSON, *supra* note 17, at 55–59 (rejecting the Sperber/Wilson theory).

40. Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179, 1194–95. Geoffrey Miller's analysis of canons shows brilliant historical connections between the canons of construction and ancient religious interpretive principles, but his attempt to explain canons of construction as a reflection of Gricean maxims has been criticized because the maxims themselves are so unwieldy and unclear.

41. "Implicature" is the term used by Kent Bach. Kent Bach, *The Top 10 Misconceptions About Implicature*, in DRAWING THE BOUNDARIES OF MEANING: NEO-GRICEAN STUDIES IN PRAGMATICS AND SEMANTICS IN HONOR OF LAURENCE R. HORN 21 (Betty J. Birner & Gregory Ward eds., 2006). "Explicature" is associated with Sperber and Wilson's relevance theory. See SPERBER & WILSON, *supra* note 32, at 160. Neither of these theorists deny that contextual enrichment occurs by inference due to economy of expression.

42. See, e.g., JAMES R. HURFORD, ET AL., SEMANTICS: A COURSEBOOK, 21–26 (2d ed. 2007); NICK RIEMER, INTRODUCING SEMANTICS 118–20 (2010); JOHN I. SAEED, SEMANTICS, 7.7 (4th ed. 2016).

43. See, e.g., YAN HUANG, PRAGMATICS 25–83 (2d ed. 2014); Laurence R. Horn, *Implicature*, in THE HANDBOOK OF PRAGMATICS 3 (Laurence Horn & Gregory Ward eds., 2004). See the list of pragmatics texts in MIRA ARIEL, DEFINING PRAGMATICS 95 (2010) (listing implicature as a basic topic in most contemporary pragmatics texts).

44. WILLIAM G. LYCAN, *Implicative Relations*, in PHILOSOPHY OF LANGUAGE: A CONTEMPORARY INTRODUCTION 156 (2d ed. 2000); CONCISE ENCYCLOPEDIA OF PHILOSOPHY OF LANGUAGE AND LINGUISTICS 308–21 (Keith Brown et al. eds., 2010); KEY IDEAS IN LINGUISTICS AND THE PHILOSOPHY OF LANGUAGE (Siobhan Chapman et al. eds., 2009).

idea transcends Grice, or even neo-Gricean philosophy, this Article uses the term “pragmatic enrichment theory.”⁴⁵

There are good reasons to believe that the pragmatic enrichment principle should play an important role in interpreting statutory text. The basic idea is that speech is *economical*⁴⁶: It communicates more than the words themselves do. If all English speakers assume that “some” does not mean “all,” then we obtain more information than the sentence uttered encodes. So, “some of the students did well,” says in six words what a pragmatically enriched meaning, once spelled out, says in twelve words: “Some of the students did well and most did not do well.” Pragmatic enrichment is essential to communication because communication depends upon an information economy in which meaning is conveyed by fewer words than would be required without enrichment.

Statutes and constitutions are forms of communication. “[L]inguists . . . agree that a statute is an instrument of communication.”⁴⁷ New textualists insist that drafters use language in many of the ways that ordinary citizens do or at least as ordinary lawyers might.⁴⁸ If ordinary citizens typically enrich meaning with apparent context, it follows that statutes will follow the same rule.⁴⁹ Legislators aim to solve general problems—end discrimination, stop hunger, freeze the debt. Constitutional drafters must be even briefer if they are to create a workable framework for the ages. However lengthy, every statute and every constitution is economical in the sense that it might have been longer if one sought, for example, to negate all possible implications.⁵⁰

One might argue that constitutional or statutory drafters are not engaged in a cooperative enterprise and therefore Grice’s principles of cooperation should not apply to statutes or constitutions. As indicated above, however, one need not accept Grice’s maxims or his theory of cooperation to believe that pragmatic enrichment exists and needs to be spelled out. Even those linguists who reject Grice’s maxims or reject the

45. Having said this, it is also important to note that there are different kinds of pragmatic inference, and implicature is a particular kind of pragmatic inference. If I am using the term “state” in the diplomat’s office, the context suggests that the meaning of “state” is a country in the world. Philosophers of language might dispute whether state-as-country is an implicature or not, but they would not dispute that there is a pragmatic enrichment—the background context has been used to precisify meaning.

46. SPERBER & WILSON, *supra* note 32, at 60, 177.

47. *Law and Linguistics Conference*, 73 WASH. U. L.Q. 800, 817 (1995) (statement of Judith Levi).

48. John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 434 (2005).

49. Nicholas Allott & Benjamin Shaer, *Inference and Intention in Legal Interpretation*, in *THE PRAGMATIC TURN IN LAW: INFERENCE AND INTERPRETATION* 104–07 (Janet Giltrow et al. eds., 2017).

50. See generally TIMOTHY ANDREW ORVILLE ENDICOTT, *VAGUENESS IN LAW* (2000) (arguing for the necessity of vagueness in law).

term “implicature” believe that meaning can be enriched by adding apparent context.⁵¹ Accepting the existence of “implicature” does not require that one embrace a full or even partial theory of overt cooperation. There is every reason to believe that statutory or constitutional drafters have an overarching individual incentive to communicate: Why else would each reduce their thoughts to text?⁵² Finally, for those who believe statutes are contracts (an assumption I do not share since all parties bound did not consent), contract theorists are no strangers to pragmatic enrichment. As Professor Adam Kramer has argued, contractual “communication” is only possible because of a “sophisticated process of pragmatic inference.”⁵³

To summarize: The philosophy of language suggests four principles of value in determining meaning. First, pragmatic enrichments from context are often silent. The word “fifth” is precisified to mean the “Fifth Amendment” without the author saying, “I am now bringing legal context to bear.” The letter writer does not say, “I am following conventions of letter writing and providing you with all relevant information about the candidate.” Second, pragmatic enrichment is not limited to institutional contexts, cultural practices, or idiosyncratic one-off interactions; it is linguistically generalizable. The statement, “Some of my students did well on the exam,” implicates that “most did not do well” because of background stereotypical contrast sets (some versus all) independent of any particular grading practice or educational institution. Third, and perhaps most importantly, apparent enriched meaning can be negated or cancelled by conflicting enrichments. When the letter writer adds, “and she is the best student I have ever taught,” or the professor says, “most did very well,” the original apparent meaning (she is a bad student, most students did not do well) is cancelled, defeated. Finally, because of cancellation, apparent pragmatic enrichments *may be entirely false*. In the letter writer’s example, it turns out to be false that the student is unqualified, and in the grading example, it turns out to be false that most students did poorly.

51. See Miller, *supra* note 40, at 1185–86.

52. To be sure, statutes and constitutions have multiple audiences. See generally NOURSE, *supra* note 13 (explaining the far-reaching nature of statutes and constitutions). But as John Ferejohn and Bill Eskridge argued long ago, members of Congress want to see their projects yield results, and this gives them a basic incentive to draft statutes in ways that judges and administrators will understand. William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 535 (1992).

53. “[B]y harnessing, and then processing, more information than merely the text, more meaning can be extracted at the other end of the interpretative process. The other information is the ‘context.’” Adam Kramer, *Common Sense Principles of Contract Interpretation (And How We’ve Been Using Them All Along)*, 23 OXFORD J. LEGAL STUD. 173, 177 (2003).

B. *Isolationist Method and Pragmatic Enrichment*

What then does the philosophy of language show us about interpretation: It suggests that *the very choice of text can lead to false or contestable implications*. Let us reverse our grading example. We have the final statement, “Some of my students did well on the exam, but most did very well.” Now assume that we take from this statement only the first part of it: “Some of my students did well.” If we take only this statement, isolating it from the rest of the text, we have created an illusory implication that most of the students have not done well.⁵⁴ We know, however, from the full statement, that this apparent implication or enrichment is not what the speaker meant. The full statement says that most students did very well. We now see the dangers of isolationist readings of statutory or constitutional text: They are not part of the speakers’ meaning; they cherry pick the text to create the interpreters’ meaning.

Let us turn to an actual case, the Supreme Court’s recent health care statutory case, *King v. Burwell*.⁵⁵ The political opponents of the health care law based their argument, one the Chief Justice found to be “strong,” on taking 4 words from a 900-plus-page statute, isolating the phrase “established by the State,” in a sub-sub-sub (the Chief Justice’s words) provision of the statute on tax credits.⁵⁶ The argument was quite simple: Since the tax statute gave credits for exchanges “established by the State,” this meant that exchanges created by the federal government were not covered.⁵⁷ Under the exchange provisions of the statute, the states were to create exchanges for citizens to buy health insurance but, if they did not, then the federal government was to act in their place, to establish an exchange “within the state.”⁵⁸ To be sure, once the case reached the Supreme Court, other arguments were added, but this was the core textual argument.⁵⁹ In theory, “state” has many meanings: It might mean “state of injury” to a doctor, or “a country in the world” to a diplomat (the “state of Israel”). In the context of an American law, however, the Chief Justice

54. The implication is apparent or illusory because the text has been taken out of context by the act of isolation.

55. 135 S. Ct. 2480 (2015).

56. I.R.C. § 36B(b)(2)(A) (2012) (“[E]nrolled in through an Exchange established by the State”); see *King*, 135 S. Ct. at 2495 (explaining that the tax statute was an “ancillary provision: a sub-sub-sub section of the Tax Code”); *id.* (“Petitioners’ arguments about the plain meaning of Section 36B are strong.”).

57. *King*, 135 S. Ct. at 2492.

58. 42 U.S.C. § 18041(c)(1) (2012); see *King*, 135 S. Ct. at 2487 (“[I]f a State nonetheless chooses not to establish its own Exchange, the Act provides that the Secretary of Health and Human Services ‘shall . . . establish and operate such Exchange within the State.’” (citing 42 U.S.C. § 18041(c)(1) (alteration in original))).

59. *King*, 135 S. Ct. at 2492.

found that the term had a “strong” plain meaning, and was forced to find an “ambiguity” in the statute, leading him to look to the statutory plan.⁶⁰

Now, apply pragmatic enrichment analysis. The isolation of “established by the State” in the tax statute leads to the following apparent enriched meaning: “*established only by the state.*” Note that this is not what the statute says. The statute says “established by the State.”⁶¹ The pragmatic enrichment adds exclusivity—*only* by the state.⁶² From this implication, it appears to follow that the statute excludes exchanges created by the federal government. This implication is not what the statute does in fact “say.” The law’s opponents’ argument is a pragmatic enrichment gleaned from isolating the text, which intensifies and adds (1) exclusivity (“only”) and (2) the stereotypical American legal contrast set of *state* versus the *federal* government.

Implications that arise from isolating text can be cancelled by adding more information. And, in fact, this is precisely what the rest of the statute does when we look at the context of the whole statute. The statute does not allow for the creation of exchanges “only” by the states; it provides that the federal government may establish exchanges “within the State” where the state itself does not create an exchange.⁶³ Isolating “state” from the tax provision led to the implication that, to receive benefits, exchanges must be “*established only by the states.*” The state and federal exchange provisions *cancel* the exclusivity implication: Since *exchanges may be established by the federal government*, it follows that *exchanges are not established only by the states.*

The original pragmatic enrichment is cancelled by textual provisions spelling out the relationship between the federal and state exchanges—that the federal government may *stand in for the state.*⁶⁴ Let us call this the “substitute” relationship: The federal government may act as state substitute in setting up exchanges.⁶⁵ When the state fails to create the exchange, the federal exchange will operate “within a State,” and “such exchange[s]” are covered by the Act.⁶⁶ Again, this cancels the apparent pragmatic enrichment that *only states may create state exchanges.* If this analysis is correct, the purported textual argument made by the statute’s opponents was not a textual argument, it was an argument made by *pragmatic enrichment*, by adding meaning to the text that the rest of the statute cancelled or at least negated. It is tempting to use the pejorative

60. *Id.* at 2495.

61. I.R.C. § 36B(b)(2)(A).

62. *See* LEVINSON, *supra* note 27, at 107 (suggesting this exclusivity implicature as a common gloss).

63. 42 U.S.C. § 18041(c)(1).

64. *See id.*

65. *Id.*

66. *See id.*

“petty textualism”⁶⁷ to describe this case, but insults are not argument or analysis. Pragmatic enrichment analysis helps us see why the opponents’ (and Supreme Court dissenters’) textual argument is not the kind of “strong” argument the majority opinion dubbed it.⁶⁸

Lest the health care law’s political intensity obscure the point, consider a similar move made by the Obama administration in *Yates v. United States*.⁶⁹ This 2015 Supreme Court case involved the much more pedestrian question whether concealing undersize fish (yes, fish) could constitute an offense under a provision of the Sarbanes-Oxley financial reform law (SOX).⁷⁰ There, the full statute read, “Whoever knowingly alters, destroys, mutilates, . . . falsifies, or makes a false entry in any record, document, or tangible object [with intent to impede a federal investigation] . . . shall be fined under this title, imprisoned not more than 20 years, or both.”⁷¹ The government’s argument, adopted by Justice Kagan’s dissent, isolated the two words “tangible object,”⁷² leading to the implication that *the statute covers all tangible objects*.⁷³ Again, the statute does not say “all tangible objects.” The background contrast set here is *all* versus *some*.

The question is whether the whole statute negates or cancels the pragmatic enrichment that *all* tangible objects are contemplated under the statute. The defendant, and Justice Ruth Bader Ginsburg writing for the plurality, argued for opening the textual frame, first by looking at the rest of the words in the phrase, “any record [or] document,” coupled with the title of the statute, “Destruction, alteration, or falsification of records in Federal investigations and bankruptcy.”⁷⁴ The plurality’s pragmatic enrichment was that “*tangible object*” *had to mean some objects like documents and records*. The *coup de grace* was the full phrase providing that the defendant must “alter[], destroy[], mutilate[], conceal[], cover[]

67. NOURSE, *supra* note 13, at 106–07.

68. *King v. Burwell*, 135 S. Ct. 2480, 2495 (2015).

69. 135 S. Ct. 1074 (2015).

70. *Id.* at 1079.

71. 18 U.S.C. § 1519 (2004).

72. *Yates*, 135 S. Ct. at 1081 (discussing government reading). Note that the pragmatic enrichments I am suggesting are announced in the Courts’ various opinions; I am not creating them. See *id.* at 1090–91 (Kagan, J., dissenting) (“This case raises the question whether the term ‘tangible object’ means the same thing in § 1519 as it means in everyday language—any object capable of being touched.”) (emphasis added). It is worth noting that the term “any,” which appears before the term “report” in the statute, does not necessarily mean “all” or “every.” See *Any*, DICTIONARY.COM, <http://www.dictionary.com/browse/any?s=t> (last visited Oct. 29, 2017) (defining “any” as referring to “a single one or ones; an unspecified thing or things; a quantity or number”).

73. To be more precise, pulling the term “tangible object” out of the statute (isolationist method), suggests an extension of the term (all tangible objects) not necessarily suggested by the full statute.

74. *Yates*, 135 S. Ct. at 1083, 1085 (citing 18 U.S.C. § 1519) (alteration in original).

up, falsif[y], or make[] a false entry in any record, document or tangible object.”⁷⁵ The full phrase thus yields a further implication based on the stereotypical meaning of the act of “false entry,” suggesting that “*tangible object*” means some objects in which false entries can be made.⁷⁶

It should be clear by now that “isolationist” method creates the risk of yielding apparent meanings that the whole statute may disavow—or at least that isolationist method tends to negate statutory ambiguity by fiat. This Part has aimed to show that: (1) isolationist arguments are made in prominent Supreme Court cases; (2) such arguments tend to invite pragmatic enrichments because narrowing the textual economy (sometimes to a word or two) invites the reader to enrich the literal text; and (3) the interpreters’ enrichments may be cancelled or negated if we open the textual economy to include the whole text.

II. ISOLATIONIST METHOD: PICKING AND CHOOSING TEXTS

There is power in taking silent enrichments out of the shadows and making them explicit. This Part argues that pragmatic enrichment theory shows why isolationist textualism can lead to “picking and choosing” texts. Finally, it explains why judges with widely differing theories of interpretation pragmatically enrich textual meanings. As a matter of linguistic philosophy, linguistic enrichment can be performed both by liberals and conservatives, in statutory as well as constitutional law.

It turns out that both sides to an interpretive controversy typically enrich meanings, suggesting that the enrichment, rather than the text, is doing most of the interpretive work. In some cases, there are better interpretations based on the whole text of the statute because the statute cancels one side’s pragmatic enrichment or provides a far more plausible competing enrichment. In other cases, there is only one proper interpretation, leading to the conclusion that the opposing “enrichment” is no enrichment, but the injection of policy preferences into the text.

A. General Dynamics Land Systems, Inc. v. Cline⁷⁷

The Age Discrimination in Employment Act (ADEA) bars discrimination based on age.⁷⁸ A union and a company agreed to protect the health care benefits of persons over fifty, but eliminated such benefits

75. 18 U.S.C. § 1519.

76. Justice Samuel Alito’s concurring opinion relies heavily on the verbs in the statute. *See, e.g., Yates*, 135 S. Ct. at 1090 (Alito, J., concurring) (“[T]he last phrase in the list—‘makes a false entry in’—makes no sense outside of filekeeping.”).

77. 540 U.S. 581 (2004).

78. 29 U.S.C. § 623(a)(1) (2012) (barring “discriminat[ion] . . . because of [an] individual’s age”).

to persons who retired at forty to fifty.⁷⁹ Members of the younger class sued for age discrimination.⁸⁰ The majority, invoking purpose and legislative history, came to the conclusion that the act did not cover younger workers; the purpose of the act was to attack the stereotypical notion that older persons were incapable of working at the same levels as younger persons.⁸¹ The plaintiffs, and Justices Antonin Scalia and Clarence Thomas in dissent, took the isolationist path, focusing on the term “age.”⁸² The statute deems it unlawful for an employer “to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual . . . because of such individual’s age.”⁸³ From this, the plaintiffs drew a circle around the term “age,” and compared this now-excised and decontextualized “ageless age” with other parts of the statute in which “age” did not always mean “older age.”⁸⁴ For example, younger “age” might be a bona fide occupational qualification in a different context (e.g., younger age might be a real reason to hire an undercover investigator infiltrating a boarding school).⁸⁵

The plaintiffs’ interpretation enriched the statute’s meaning by suggesting a more encompassing rule: “any age discrimination, younger or older, may be covered.”⁸⁶ Now, of course, the law does not say this; it says “discrimination . . . because of age.”⁸⁷ However “textualist” the Scalia and Thomas opinion may appear, it rests upon adding meaning to the text. The majority rejected the dissenters’ result but did precisely the same thing: They relied upon their own pragmatic enrichment, reading the statute to say, “discrimination because of relatively *older* age.”⁸⁸ The dissenters, who themselves had enriched the statute (“any” age) were quick to charge that the majority was inserting the term “older” before age.⁸⁹ The statute does not say “all” ages, nor does it say “older” age.⁹⁰ Both sides of the argument have added meaning to the text.

79. *General Dynamics*, 540 U.S. at 584.

80. *Id.* at 585.

81. *Id.* at 600.

82. 29 U.S.C. § 623(a)(1).

83. *Id.*

84. *General Dynamics*, 540 U.S. at 594–95.

85. *See id.*

86. *Id.* at 603 (Thomas, J., dissenting) (“The phrase ‘discriminate . . . because of such individual’s age,’ 29 U.S.C. § 623(a)(1), is not restricted to discrimination because of relatively *older* age.”).

87. 29 U.S.C. § 623(a)(1).

88. *General Dynamics*, 540 U.S. at 603.

89. *Id.* at 604.

90. The real problem in this and other discrimination cases has to do with the differing meanings of the term “discrimination.” The “thin” meaning suggests that any distinction yielding harm is covered. The “thick” meaning suggests that there is a causal connection because the reasons for the discrimination and the class affected (i.e., discriminating against women because

The critic is likely to say we have reached stalemate. In fact, we have refuted the notion that the “text” is doing the real work here. We know from this analytic exercise that the case cannot be decided by isolating the term “age” without adding meaning by pragmatic enrichment. Both sides of the argument adopted conflicting meanings, so that the term “age” cannot resolve the case. Pragmatic enrichment theory thus refutes the conventional assumption that isolating text can decide cases by objective means or by “plain meaning.” Pragmatic enrichments must “be worked out” or articulated. This process of “working it out” illuminates how an interpreter adds, rather than finds, meaning.

As a general rule, a judge does not believe she is *adding meaning* when she focuses on a particular word or phrase in a statute. Pragmatic enrichment theory forces the interpreter first to (1) articulate the implicated assumptions (acknowledging addition and/or subtraction); and (2) consider whether the whole text could negate or cancel an enriched meaning (opening the inquiry to the whole text). The typical judge, however, believes that she is simply finding linguistic equivalents to the statute’s words. Once legislators have chosen the word, whether the word is “state” or “age,” the judge looks to dictionaries or canons or perhaps the common law as sources of meaning. The point is that *adding meaning starts before recourse to these sources, in the very choice of text and its pragmatic enrichments.*

B. West Virginia v. Casey⁹¹

Now that we are comfortable with the idea that isolation can lead to apparent but enriched meanings, let us see how some choices of text can be better than others based on the whole text. Consider the majority argument in *West Virginia v. Casey*, a case about attorneys’ fees under a civil rights statute, 42 U.S.C. § 1988.⁹² The majority opinion is a well-known example of Justice Scalia’s application of “new textualism.”⁹³ The statute allowed a “reasonable attorney’s fee as part of the costs” of suit.⁹⁴ The state of Pennsylvania argued that it did not have to pay witness fees, only an “attorney’s fee.”⁹⁵ The Supreme Court agreed.⁹⁶

Let us focus on Pennsylvania Governor Robert Casey’s textual argument against paying witness fees. The claim was that an “attorney’s

they are incapable of full participation in the workplace). See Philip P. Frickey, *Wisdom on Weber*, 74 TUL. L. REV. 1169, 1180 (2000).

91. 499 U.S. 83 (1991).

92. *Id.* at 84.

93. John F. Manning, *Foreward: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 22–23 (2013).

94. 42 U.S.C. § 1988 (2012).

95. *Casey*, 499 U.S. at 87.

96. *Id.*

fee” meant fees for lawyers, not witnesses. This claim, however, trades upon isolating the term “attorney” from the rest of the statutory phrase “attorney’s fee” which is part of a larger phrase, “attorney’s fee as part of the costs.”⁹⁷ As we have seen above, the isolationist technique leads to the pragmatic enrichment of meaning that *only attorneys are covered by the statute*. Since *attorneys are not witnesses*, it appears to follow that *witness fees are excluded* from compensation.

Isolating the words “attorney’s fee” enriches meaning to suggest that *only attorneys* are covered.⁹⁸ Now perform a different isolating move: Isolate the word “costs.” By isolating that statutory term, we enrich its meaning to suggest that *only costs* are covered by the statute. Witness fees are costs of suit, so witness fees are *not* covered. The choice of text—“attorney’s fee” or “costs”—leads to diametrically opposed enrichments, and from those enrichments, diametrically opposed results. If the interpreter picks the term “attorney’s fee,” then witness fees are out; if the interpreter picks the term “costs,” then witness fees are in.

Contrast these “isolated” readings with a reading that seeks to give the entire phrase a coherent meaning. “Attorney’s fee” is connected to cost by an important relational term: “as part of.” This conveys a part/whole relationship. “Attorney’s fees” is, by statute, a smaller subset of the larger category, “costs.” Notice that the isolating method invites the enrichment of text: By adding meaning (e.g., *only* states, *only* attorneys), it is also capable of ignoring, and thus striking, text. Here, isolationist technique effectively strikes “as part of.” Isolating “attorney’s fee” or “costs” eliminates the relationship of fees to costs, namely that attorney’s fees are a subset of a larger category termed “costs.”

If we give meaning to this relationship (“as a part of”), it cancels or at least undercuts the enriched isolated meaning that *only attorney’s fees* are covered. If *costs include fees for attorneys* and *costs is a larger category than attorney’s fees*, it follows that *costs may include other items than fees to attorneys*. If this analysis is correct, then isolating either the text “attorney” or “cost” *adds meaning* to the text, and *subtracts* the whole text’s internal relations.

Giving meaning to the whole text, including its relational language, suggests Justice John Paul Stevens’s reading is the better textual analysis. Because attorney’s fees are “part of the costs,” costs must be a larger category and *the statute cannot be limited to attorney’s fees alone*. This cancels the majority’s enriched meaning. We are still left to define “costs.” Resolving that question is not within the scope of the text, but requires additional information, pitting evidence from other statutes, as Justice Scalia’s majority opinion argues,⁹⁹ against legislative evidence on

97. 42 U.S.C. § 1988.

98. *Id.*

99. *Casey*, 499 U.S. at 88–89 (listing fee-shifting statutes).

the statute at issue, Section 1988, as Justice Stevens’s dissent argues.¹⁰⁰ The point, however, should not be lost: The case cannot be decided based on the literal text of the statute. Any interpretation that rests upon the purported definition of “attorney’s fees” is one that both adds and subtracts from the actual text.

C. *Babbitt v. Sweet Home*¹⁰¹

Finally, let us see how it is possible that a textual argument, via a pragmatic enrichment, can inject purpose into text, turning textualist theory on its head in textualist practice. Presumably, formalists do not believe that this is what they are doing. When the pragmatic enrichment deviates rather dramatically from the whole text, however, it can become quite apparent that the interpreter has injected their own policy preferences into the pragmatic enrichment, a move that textualism as a theory should disavow. I believe that Justice Kagan’s dissenting opinion in the fish case, *United States v. Yates*,¹⁰² reflects this purposivism-undercover-of-textualism. There are, however, clearer examples, as in the canonical textualist case, *TVA v. Hill*.¹⁰³

The 1973 Endangered Species Act (ESA) barred the “taking” of any endangered species and statutorily defined “take” to include a variety of actions including “harm” to a species.¹⁰⁴ In 1975, the Secretary of the Interior issued a regulation governing significant habitat modification as a form of statutory “harm.”¹⁰⁵ In 1978, the Supreme Court decided *TVA v. Hill*—a highly controversial case that stopped the building of a large dam to save the habitat of a tiny fish, the snaildarter.¹⁰⁶ In 1982, after “heated debates” between environmental interest groups and industry, Congress finally came to a bipartisan compromise, to simplify and streamline the operation of the 1973 Act. The 1982 statute provided a safety valve: It authorized permits for private actors who incidentally “take” species.¹⁰⁷ The question in *Babbitt v. Sweet Home*, then, was whether the agency’s regulation was consistent with the statute.

Section 9(a)(1) of the ESA provided that it was “unlawful for any person” to take any such species within the United States, and Section 14 specifically defined “take” as follows: “The term ‘take’ means to harass,

100. *Id.* at 108–11 (Stevens, J., dissenting) (discussing legislative history). It is worth noting that Justice Stevens’s reading and the statute’s own language refute the notion that the term “costs” is being used in its “technical” sense as meaning “court costs” such as filing fees, etc.

101. 515 U.S. 687 (1995).

102. 135 S. Ct. 1074 (2015).

103. 437 U.S. 153 (1978).

104. *Id.* at 184.

105. *Id.* at 185.

106. *Id.* at 194.

107. 16 U.S.C. § 1539(a)(1)(B) (2012).

harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”¹⁰⁸ “The Secretary ha[d] promulgated a regulation that define[d] the statute’s prohibition on takings to include ‘significant habitat modification or degradation where it actually kills or injures wildlife.’”¹⁰⁹ Justice Scalia’s dissent analyzed the statute by isolating the word “take,” to exclude habitat regulation.¹¹⁰ Analogizing “take” to the common law and constitutional meaning of “takings,” the dissent argued that “taking” meant only intentional actions, like shooting or hunting.¹¹¹ This definition excluded “habitat modification” presumably because cutting down a forest was not intended to kill animals, even if that was the result.

Let us consider the isolating method, focusing on “take” and severing it from the statutory definition. Isolating the term “take” leads to the enriched meaning that *only* takings are covered. Based on this pragmatic inference, further inferences are added from the common law, the constitutional idea of “takings,” and dictionaries. Of course, the statute does not say any of these things. It does not say that “*only* actions like take” are covered, and it does not say only “*intentional* takings” are covered. In fact, it lists at least ten versions of what Congress meant by “take,” including: “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”¹¹² It is possible of course that all these ten could be “intentional” but the first two “harass” and “harm” do not obviously qualify as takings.

Now let us consider an entirely different isolationist focus on the statutory term “harm.” Section 19 of the ESA includes “harm[ing]” endangered species. If we pull the term “harm” out of the statute, by the sheer fact of isolation, we come up with precisely the opposite conclusion, without pragmatic enrichment: (1) harm is literally covered under the statute; (2) habitat modification harms endangered species; and (3) habitat modification is covered under the statute. As we have seen before, “isolating” the term “harm” yields precisely the opposite result than if we pulled “take” out of the statute. More importantly, unlike the dissent’s view, it provides this meaning without pragmatic enrichment. And, if this were not enough, the 1982 amendments¹¹³ exempted “incidental” takings, a concept highly incompatible with a common law or constitutional reading of “taking.”

108. *Id.* § 1538(a)(1); *id.* § 1532(19).

109. *Babbitt v. Sweet Home*, 515 U.S. 687, 690 (1995) (quoting 50 C.F.R. § 17.3 (1994)).

110. *Id.* at 717 (Scalia, J., dissenting).

111. *Id.*

112. 16 U.S.C. § 1532(19).

113. The 1982 amendments provided for an exception to the permitting requirement “if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.” 16 U.S.C. § 1539(a)(1)(B) (1982). This defines taking to include purposeful and non-purposeful actions.

Given this, one can only describe the dissent as injecting policy views into the text of the statute. The statute does not say “only takings,” the statute does not say “common law” taking, and the statute does not say something like a “Fifth Amendment” taking. These are pragmatic enrichments upon pragmatic enrichments that seem best explained by the interpreter’s “policy preferences” for the common law meaning of taking, the constitutional meaning of taking, or resistance to the regulation altogether. As detailed elsewhere, if one doubts that “harm” cannot be cut out of the statute, all one has to do is look at the best evidence of context—a few pages of a committee report—to see that the authors of the statute believed habitat modification covered.¹¹⁴ Any other interpretation in the face of such clear interpretive evidence is purposivism masquerading as textualism.

D. *Theoretical Conclusions*

What this Article has tried to show by this highly technical analysis is something quite basic about textualism in practice as opposed to textualism in theory. Textualism, as it is currently practiced, risks picking and choosing text, without recognizing that this choice itself has meaning. The result may well be arbitrary or contrary to the whole statute; it may even assume that which it seeks to prove. For those who believe that they can find “fixed” meaning in the text of the constitution and statutes, they may not, in practice, be finding it in the text; they may be adding or subtracting it based on their own pragmatic additions or subtractions.

Unacknowledged Additions or Subtractions. New textualists are typically open about the fact that they will add information to the search for textual meaning based on dictionaries, settled legal meanings, or even the common law.¹¹⁵ Relative to adding these kind of sources, enriched pragmatic meanings are far more powerful because they are *silent*. In reaching out to dictionaries, or to the whole code, the interpreters’ method is on display. For the true-hearted textualist, who rejects in principle the notion of adding meaning to the text, the question remains whether the *very choice of text* is in fact enriching meaning, and does so at the very beginning of the analysis, before dictionaries, before canons of construction, or any other acknowledged addition of information. If that is true, it is not enough to claim, as have some, that the search is for “ordinary meaning” or “plain meaning” or that the question is one of “text versus purpose.” The choice of text is likely to have an extraordinarily powerful effect upon the ensuing argument. Not only may it add or subtract text, once the pragmatic enrichment is set (e.g., *only attorneys’*

114. Victoria F. Nourse, *Decision Theory and Babbitt v. Sweet Home: Skepticism About Norms, Discretion, and the Virtues of Purposivism*, 57 ST. LOUIS U. L.J. 909, 920–23 (2013).

115. John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 81–83 (2006).

fees), then the interpreter will tend to seek confirming information, colored by the original choice of text, amplifying the original judge-made enrichment with other judge-made interpretive preferences.

Cancellation or Negation by the Whole Text. The point of this critique is not to invite radical skepticism. The point is to argue that any interpreter who looks at the text must acknowledge how enriched meanings are created and how they may be cancelled by the whole text. No modern textualist, nor any modern purposivist, rejects the whole text. Enriched pragmatic theory offers a far more transparent, and rigorous way to force analysis of the whole text, as opposed to little bits of it (“isolationist textualism”). Illuminating unacknowledged enriched readings can yield better interpretations, if *better* is measured by the whole, rather than parts, of a text. It will not, in my opinion, answer hard cases; more information will be required. Of course, this reinforces the idea that text itself may be the beginning, but is unlikely to be the end, of the analysis.

Assuming What One Is Trying to Prove. The worst part of isolationist textualism is not that it fails to be candid (by failing to articulate added or subtracted meanings) or fails to consider the whole text (by failing to consider the possibility of cancellation or conflicting enrichments). The worst problem is that it teaches the naïve interpreter that picking and choosing words is all there is to statutory or constitutional interpretation. Those choices, as we have seen, are often result-oriented: pick the word “state” in the health care case, and the government loses; pick the words “attorney’s fee” in *Casey* and the quest for witness fees fails. In both cases, however, these are spurious textualist decisions once one looks at the whole text. In both cases, one is left with the distinct impression that the textual choice is a means for imposing a greater policy agenda—what amounts to purposivism-under-cover-of-text.

III. THE INFORMATION ECONOMY IN STATUTORY INTERPRETATION

For the past thirty years, statutory interpretation theory has moved toward an increasingly information-poor economy of interpretation. New textualists have insisted that interpreters reject legislative resources as aids to statutory construction,¹¹⁶ and although not completely successful, their arguments have intensified focus on small bits of text, thus reducing the information available to statutory interpreters.¹¹⁷ To be sure, some

116. SCALIA & GARNER, *supra* note 23, at 369, 388–89.

117. For an example of pluralist analysis in another era, see the real vehicles in the park case, *McBoyle v. United States*, 283 U.S. 25, 26 (1931) which relies upon text, legislative history, and canons. Pluralism actually traces to Blackstone.

new textualists have also embraced canons of construction,¹¹⁸ but this is a controversial position among textualists because it in fact adds to the meaning of the text as passed by Congress.¹¹⁹ At the very least, the insistent call to look to the text, whether the original public meaning of text in constitutional interpretation or the plain meaning of text in statutory interpretation, has the tendency to increase the likelihood that the interpretive method used is “isolationist.”

Pragmatic enrichment analysis tells all interpreters, whether textualist or purposivist, that they should avoid silent additions to the text or, at the very least, they should acknowledge that these enrichments exist: “work them out,” and then consider whether the full statute negates them. Less obviously, this analysis suggests something interesting about the conventional methods deployed by most judges—what will be called “pluralism.” Pluralism refers to the conventional mode of analysis that looks to multiples sources for meaning,¹²⁰ including the whole text, purpose, canons, and legislative history (or what should be called “legislative evidence.”)¹²¹ Pluralism, and its analog in constitutional interpretation, has been attacked as providing arguments that can trump text and for failing to provide an answer to which kinds of arguments trump others (canons or legislative evidence?).

Pragmatic enrichment theory suggests that pluralism may provide an unnoticed advantage: It enriches the information economy. By contrast, isolationist textualism impoverishes that economy, and creates the need for silently enriched meanings. Enrichments exist *because* statements are economical; their terseness invites interpreters to add information as any ordinary reader trying to understand a communication. Isolationist technique tends to exacerbate this economy by decreasing the amount of interpretive information. Pluralism, on the other hand, adds information to the interpretive economy, whether from the whole text, canons of interpretation, legislative, or historical evidence. For this reason, based on the sheer amount of information, plural methods—relative to isolationist ones—may be more likely to reveal improperly enriched meanings.

Today, pluralism is seen as a means of discovering a convergent statutory meaning. My argument *reverses* the current approach toward pluralism. It argues that pluralism has a function, even if inadvertent, as

118. Margaret H. Lemos, *The Politics of Statutory Interpretation*, 89 NOTRE DAME L. REV. 849, 853 (2013) (reviewing ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012)).

119. Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 109 (2010).

120. See generally ROBERT A. KATZMANN, *JUDGING STATUTES* (2014) (explaining why judges must examine the legislative record of a law to determine its meaning).

121. NOURSE, *supra* note 13, at 153–59.

an antidote to isolationism. Adding information provides the possibility of cancelling false, but apparent, enrichments. Today, pluralists tend to start with text and then seek confirming evidence.¹²² In fact, that approach may simply exacerbate the problems of falsely enriched meanings. As the cognitive bias literature shows, our initial frames may be subject to cognitive bias, which is only exacerbated by “confirmation bias.”¹²³ If this is correct, then pluralism, which increases the amount of information in the interpretative economy, may be defended if it is used to search for *disconfirming evidence*—evidence that may crudely or inadvertently, but effectively, negate unacknowledged enriched meanings.

A. Whole Act and Linguistic Canons

Let us focus on the use of canons of construction as a means to cancel isolationist implicatures. In *Yates v. United States*,¹²⁴ the dissent isolated the term “tangible object,” leading it to the conclusion that all tangible objects were covered by the statute, and the dumping of undersize fish was within the purview of a financial fraud statute.¹²⁵ The silent implicature was that the statute covered “all” tangible objects.¹²⁶ Without articulating it in these terms, Justice Ginsburg’s plurality opinion rejected that conclusion, finding that the whole statute effectively “cancelled” the dissent’s implicature by invoking the linguistic canons of construction known as *ejusdem generis* and *noscitur a sociis*.¹²⁷ *Ejusdem generis* holds that general words should be read to be consistent with the more specific terms that precede them,¹²⁸ in this case “records” and “documents.” *Noscitur a sociis* tells readers to read lists of words consistently.¹²⁹ Relying on these canons, Justice Ginsburg concluded that the Act as a whole could not be explained by isolationist enrichment (all tangible objects) because otherwise Congress would not have included words like “record” or “document.”¹³⁰ Instead, Congress would have written a statute that said simply “any tangible object,” without any reference to records or documents.¹³¹ Because *ejusdem generis* operates to limit the reach of generalized terms, and *noscitur a sociis* limits the reach of a list

122. James J. Brudney, *Confirmatory Legislative History*, 76 BROOK. L. REV. 901, 901 (2011).

123. NOURSE, *supra* note 13, at 199–200.

124. 135 S. Ct. 1074, 1091 (2015) (Kagan, J., dissenting).

125. *Id.*

126. *Id.*

127. *Id.* at 1085–87.

128. See Kaushalya Kumari, *Principles of “Ejusdem Generis”-“Noscitur a Sociis” in Taxation Laws*, TOPCA FIRMS (Sept. 5, 2013), <https://www.topcafirms.com/index.php/white-paper/5716-principles-of-ejusdem-generis-noscitur-a-sociis-in-taxation-laws>.

129. *Id.*

130. *Yates*, 135 S. Ct. at 1087.

131. *Id.*

of terms to something they all share, each will tend to resist expansive pragmatic enrichments like “all” tangible objects.

From this, one should not conclude that pragmatic enrichment theory justifies all canons, but something quite a bit more modest: To the extent that linguistic canons urge the interpreter to look at the “whole act,” they will tend to resist isolationist method. Canons are now so various and voluminous, not to mention terribly substantive, that canon-generalizations are hazardous.¹³² The linguistic canons are a small subset of the entire range of canons. Nevertheless, one of the most interesting things about the linguistic canons is that they have come to prominence in our current isolationist age. For decades, canons like *ejusdem generis* never soiled the pages of Supreme Court opinions to confound law students, such canons seemingly felled by Professor Karl Lewellyn’s wisdom that for every canon there exists a counter-canon.¹³³ As we have seen, however, the canons add information to the textual inquiry carrying the potential to cancel the isolationist enrichment: In *Yates*, *ejusdem generis* focuses attention on the terms “record” and “document” which helps to cancel the original isolationist focus on “tangible objects.”¹³⁴ To the extent the canons require the interpreter to read the whole text, by their nature they will tend to cancel unstated pragmatic enrichments (all objects, only takings, all uses).

In this sense, the canons should be seen as a defensive, rather than offensive tool, resisting isolationism, and reasserting the power of the whole text. By “defensive use,” I mean use as a prophylactic against isolationist readings. Today, the canons are conventionally seen as ways to *find, rather than make*, the meaning of a statute. Judges aim to find “plain meaning,” and if none is to be found, then they use canons or, in the alternative, they use canons to *confirm* plain meaning. I have argued that canons can be justified as resisting silent isolationist implicatures or other enriched meanings. *The reverse does not hold true, however.* Using canons to confirm a falsely enriched meaning simply amplifies the original and potentially false enrichment. Consider Justice Kagan’s dissenting opinion in *Yates*. She explains the *ejusdem generis* canon well: It requires that the interpreter find a generalization.¹³⁵ But the generalization she finds is precisely the one she has created—the statute is an obstruction of justice statute. If one does not recognize that the canons are a means to disconfirm false but apparent enriched meanings,

132. WILLIAM N. ESKRIDGE, JR. ET AL., *STATUTES, REGULATION, AND INTERPRETATION: LEGISLATION AND ADMINISTRATION IN THE REPUBLIC OF STATUTES* 447–49 (2014) (describing the various genres of canons of statutory interpretation).

133. Karl N. Lewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950).

134. *Yates*, 135 S. Ct. at 1087.

135. *Id.* at 1097 (Kagan, J., dissenting).

then their use will simply aggravate the original isolationist move, adding illusory inference upon false implications.

B. *Legislative Evidence*

A similar asymmetrical analysis applies to legislative evidence. The Supreme Court and appellate courts continue to look to legislative history in difficult cases.¹³⁶ Even if one rejects that position, it is possible to see legislative evidence in a more modest role, not in confirming textual meaning, as the current Supreme Court employs it, but in rejecting silent enrichments of meaning caused by isolationist technique.

Let us return to *Sweet Home v. Babbitt*.¹³⁷ The isolationist move here led to the enriched meaning “only takings.”¹³⁸ In my view, the better reading rejects the “only takings” enrichment because that eliminates the term “harm” from the statute. If that were not enough, the legislative evidence makes clear that Congress did not adopt the common law meaning of “take,” much less an exclusive common law meaning. The 1982 amendments were specifically aimed at providing an exception for those private projects threatening habitat modification. In the conference committee report supporting the amendments, the very examples used included habitat modification: A California development plan sought to maintain the home of an endangered butterfly. There is no way to read this conference report or its legislative history (the joint explanation) without recognizing that Congress did not accept Justice Scalia’s enrichment (only intentional “takings.”)¹³⁹ The legislative evidence openly and specifically addressed habitat modification, contrary to the dissent’s “only intentional takings” construction of the statute.¹⁴⁰

Similar results occur when we consider the legislative history in *Yates v. United States*.¹⁴¹ There, an amicus brief handed the Supreme Court legislative evidence disconfirming the dissent’s enriched meaning—“all tangible objects.”¹⁴² Congressman Michael Oxley’s brief revealed a cornucopia of evidence rejecting the “general obstruction of justice”

136. See Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 *YALE L.J.* 70, 72 (2012).

137. 515 U.S. 687 (1995).

138. *Id.* at 708.

139. See the analysis of the legislative evidence in Nourse, *supra* note 114, at 920–23 (describing the conference report that includes reference to habitat change as well as the debate on the conference report—all of five pages—which also refers to habitat change).

140. The conference report’s joint explanation explains that private habitat modification was covered by the 1982 Act: The term “habitat” was used over fifty times in a thirty-five-page report. *See id.* at 920–23.

141. 135 S. Ct. 1074 (2015).

142. Brief for the Honorable Michael Oxley as Amicus Curiae in Support of Petitioner at 20, *Yates v. United States*, 135 S. Ct. 1074 (2015) (No. 13-7451).

reading that results from the dissent's enrichment (*all* tangible objects).¹⁴³ Over a series of years, Congress had deliberately avoided enacting a general obstruction statute (despite complaints by the Justice Department), writing statute after statute keyed to specific kinds of fraud—health care fraud, social security fraud—precisely because a general statute could be a source of prosecutorial abuse. As the government argued, the Judiciary Committee knew of problems applying the ancient witness tampering statute, 18 U.S.C. § 1512, to standard obstruction claims, problems that SOX fixed in a specific amendment added on the Senate floor.¹⁴⁴ The *Yates* prosecution, however, did not proceed under the witness tampering statute; it proceeded under a new records provision, 18 U.S.C. § 1519.¹⁴⁵ In other words, the legislative evidence disconfirms the dissent's enrichment that “all tangible objects” were covered.

Under this conception, legislative evidence is being used not to find meaning or resolve ambiguity, but to negate apparent, but false, enrichments of meaning. Reversing this procedure to find confirmatory meanings may aggravate textual isolationism. The *Yates* dissent cited legislative evidence to “confirm” its reading of the statute as including every tangible object, including fish. Confirmatory readings are by definition incapable of cancelling an enriched meaning. If legislative evidence is to perform a cancellation function, the interpreter must look *to negate the enriched meaning, to find contrary evidence*. Had the dissent looked for evidence against its “all objects including a fish” argument, it would simply have had to look at the relatively short debate on this part of the bill—in which there is no mention of a general obstruction statute and a great amount of talk about a new financial records destruction statute.¹⁴⁶ Instead, the dissent quoted legislative evidence dealing with a different statute, 18 U.S.C. § 1512, namely the old witness tampering statute confirming its own pragmatic addition to the only relevant statute, 18 U.S.C. § 1519.

IV. RESPONSE TO OBJECTIONS

Some critics will object that it is impossible to read a text without isolating words. Yes, that is what makes this Article important—it applies to all interpretive activity. Isolation is necessary but insufficient to honor the whole text. The best readings of text, according to textualists themselves, consider the whole text. My own view is that textualists and purposivists have undertheorized their actual approach to text by failing to take account of pragmatic enrichment. The best interpreters will

143. *Id.* at 21–23.

144. *Yates*, 135 S. Ct. at 1084.

145. *Id.* at 1079.

146. 148 CONG. REC. 14,449–50, 14,453, 14,497 (2002).

oscillate back and forth between specific and general texts to determine whether the pragmatic enrichment is consistent with the whole text, based on the idea of the “hermeneutic circle.”¹⁴⁷ The best interpreters will realize that they are adding and subtracting meaning by pragmatic enrichment, and will consult the best evidence of context—legislative evidence—to falsify their interpretations.

Even in the simplest of statutes, one can see how interpreters pragmatically enrich the text by choosing only a part of it. Consider a statute that commands: “No vehicles in the park.” If the interpreter isolates the term “vehicles,” one is left with all sorts of strange law professor hypotheticals about baby carriages, wheelbarrows, and statues (that is not a typo for statute, I mean statues). The implicit, but unstated, pragmatic implication is that “no” vehicles means “all” vehicles. If one opens the textual window to include the idea of “no vehicles in the park,” one can posit a different enriched meaning, which is to say “park-appropriate” vehicles like baby carriages, wheelbarrows, and statues of vehicles are obviously fine in the park. To be sure, this does not answer all applications of the statute, but it does show that isolation of terms leads to enriched meanings that may be entirely implausible to judges and lawyers. Isolating the term “vehicle” and subtracting the term “park” causes interpreters to assert what only law professors would assert—baby carriages and wheelbarrows should be banned from parks. Even if one disagrees with my interpretation, at the very least, this shows how pragmatic enrichment theory applies to the most elementary cases.

Second, other critics will claim that this Article has engaged in a picayune method, committing the very sins decried. To be sure, this Article engaged in precise linguistic analysis. Formal arguments cannot be defeated without formal responses. Elsewhere, I have made arguments that petty textualism is likely to yield unfortunate results because of the “focusing illusion” noted by behavioral economists; by limiting the information economy to a few words, the very focus of the analysis can occlude information needed for a rational decision.¹⁴⁸ Formalists however are unlikely to find this particularly persuasive because it suggests a behavioral tendency the interpreter might overcome. My admittedly formal analysis raises a different kind of challenge—whether it is ever possible to overcome, on a formal basis, the pragmatic implications that arise from choosing text. This applies not only to textualists, but all interpreters; even purposivists start with text, and they

147. William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1482, 1509–10 (1987); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 350–52 (1990).

148. See generally NOURSE, *supra* note 13 (discussing the negative effects petty textualism can have on rational decision making).

too are quite willing to enrich texts in ways that favor their policy positions.

Third, critics will claim that this Article has not skewered textualism, simply urged textualists and purposivists to be more candid about their enrichments, or to be more willing to look at the whole text. My point is not to skewer textualism; everyone is a textualist these days. Both purposivists and textualists should have a better theory of textual choice. This appears more of a problem for textualists because they claim to be finding “plain” meaning or “ordinary” meaning. If I am right about these examples, however, textualist and purposivist judges of all stripes, are adding or subtracting meaning by pragmatic enrichment. One can quote it from judicial opinions themselves. It is not enough for a judicial interpreter to simply say they are looking at text; they must ask themselves whether they are creating, rather than finding, text.

CONCLUSION

Methods of statutory interpretation have come to increasingly focus on text, a development very few reject, including myself. Little attention, however, has been paid to a tendency to focus on small bits of text and how this picking and choosing of text can in fact invite inferences that add, subtract, or change the meaning of the statute. Since this form of “isolationism” is practiced by all kinds of interpreters—from textualists to purposivists to originalists—it is time to shine a spotlight on the ways in which the choice of text encourages the enrichment of meaning, and may assume precisely that which it tries to prove. Pragmatic enrichment analysis is not simply a critique of isolationist method, its analytics require the interpreter to articulate the pragmatic enrichments attendant upon the choice of text. It may also suggest why courts, despite a shrinking information economy, still maintain pluralist methods. If properly deployed, increasing the information economy can reject apparent but false pragmatic enrichments by disconfirming them.

