

PLANE* MEANING AND THOUGHT: REAL-WORLD SEMANTICS AND FICTIONS OF ORIGINALISM

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* I use “plane” in the sense of “[a] level of development, existence, or achievement.” THE AMERICAN HERITAGE COLLEGE DICTIONARY 1064 (4th ed. 2002). As will be evident from Sections II, III, and IV *infra*, any purported “plain” meaning of a term or phrase cannot ignore the planes of meaning and their frames involved in any such term or phrase.

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I. INTRODUCTION

*We live in a constellation
Of patches and of pitches
Wallace Stevens¹*

A. WHAT IS A CASE?

Imagine three middle school students sipping sodas in a café. They overhear the following phrase from an adult conversation nearby: “It was indeed a strange, weak case.” One student imagines a valise with a broken hinge and an embroidered dragon on the cover. Another imagines a minor rash caused by a rare mosquito. A third imagines a poorly built crate with the nails popping out. Twenty years later, as practicing lawyers, the same three persons hear the phrase again. This time they all wonder who the parties were, whether the case was civil or criminal, and whether it was the merits or the procedural posture (or both) that caused the case to be strange and weak.

B. FRAMING AND ITS FLEXIBILITY

The above example illustrates the fundamental role framing and its flexibility play in how we think and how we make meaning of the world. We cannot grasp something until we put it in graspable form. In other words, we cannot grasp something until we frame it.

As the different frames demonstrate, each person is limited by his own imagination and experience when choosing frames. A child unaware of legal terminology, for example, cannot use such terminology in framing. However, after the child becomes familiar with such terminology, the new terminology becomes available for use in framing. Hand in hand, imagination and meaning expand with learning and experience.

Additionally, as these different frames point out, multiple frames can work equally well in light of given data. Under the very limited facts given

1. WALLACE STEVENS, COLLECTED POETRY & PROSE 476 (Library of America 1997). The brilliance of this line includes not only recognizing the role of “patches” discussed below in Part IV.B.3, but also the different senses of “pitches,” which include notions of voice, of print, and of rhetoric. See THE AMERICAN HERITAGE COLLEGE DICTIONARY 1061 (4th ed. 2002) (stating various formal and informal definitions include “[a] line of talk designed to persuade,” “[t]he quality of highness or lowness of a sound,” and “[t]he density of characters in a printed line”). Stevens was not only a poetic tour de force, he was also a practicing lawyer. See Harold Bloom, *Biography of Wallace Stevens*, in COMPREHENSIVE RESEARCH AND STUDY GUIDE: WALLACE STEVENS 14, 14–15 (Harold Bloom ed. 2003).

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above, none of the students' radically different understandings are demonstrably wrong. While we can rule out frames with additional data, this does not alter the fact that the same data can still support (or at least not contradict) radically different frames and thought.

For example, if we learn that the speakers in the example above referred to a mysterious rash on a girl's arm, the crate and the valise frames no longer work. However, no matter how much additional data we add, we cannot escape the wiggle room framing still permits at multiple levels of thought and meaning. First, who are we talking about and which part of her arm? Should we be concerned about her whole arm or just the affected portion? Second, what are the issues presented by the rash? Should we be concerned about only dark redness, all redness, swelling, all of the above, or something else? Third, which categories and rules² should we use to address these issues? Should we follow Dr. Smith's book on allergic reactions or Dr. Watson's on contagious skin conditions? Should we even follow Western medical treatises at all? Fourth, assuming we agree on the applicable rules and categories and *even if* we agree on a reasonable cause, how should we frame our conclusion? Possibly a mild poison ivy rash? Likely a mild poison ivy rash? Certainly a mild poison ivy rash? No doubt experts could disagree at this level as well. Though additional data can rule out frames, frames thus remain involved at multiple levels of meaning: how we frame the boundaries of the subject of discussion, how we frame our issues, how we frame our analysis, and how we frame our conclusion.

C. PLANE VS. ORIGINAL MEANING

Concerned with all of these issues, this Article therefore explores how we frame at multiple planes or levels of meaning and thought,³ how we have flexibility in such framing,⁴ how we use metaphors and concepts in such framing,⁵ and how we test our frames.⁶ It also examines useful, basic forms of thought based upon such explorations.⁷ For further insight into

2. For purposes of this example, I use "rule" in the broad sense of "a method or procedure for solving problems." See, e.g., THE AMERICAN HERITAGE COLLEGE DICTIONARY 1214 (4th ed. 2002) (providing a mathematical definition of "rule" as "[a] standard method or procedure for solving a class of problems"). Further analysis of the characteristics of rules in general is beyond the scope of this Article. Except to the extent addressed in Part II.D below, further analysis of the characteristics of legal rules in particular is also beyond the scope of this Article.

3. See *infra* Sections II.B.1–2, III.A.1, III.B.1.

4. See *infra* Section I.B.

5. See *infra* Sections III.B.1–3.

6. See *infra* Section IV.B.

7. See *infra* Sections II.C–G.

real-world meaning and thought, this Article also explores original meaning as a negative example of how such meaning and thought do *not* work.⁸ Through such a discourse, this Article seeks to provide both a theoretical analysis of how thorough judges, lawyers, professors, and students think, and to equip them with a brief practical primer.

II. OVERVIEW OF REAL-WORLD MEANING AND THOUGHT

A. MEANING AND EXPERIENCE

What difference would it practically make to anyone if this notion rather than that notion were true? If no practical difference whatever can be traced, then the alternatives mean practically the same thing, and all dispute is idle.

William James⁹

Before exploring “meaning” in any detail, we need an initial definition of the term. As I have maintained elsewhere,¹⁰ if one uses “experience” broadly to include *both* external experience (that is, public or objective experience) *and* internal experience (that is, thoughts, memories, and other private¹¹ experience), the following revised version of Charles Saunders Peirce’s pragmatic notion of meaning works well, “Consider what actual or possible¹² experiential effects we conceive the object of our conception to have. Then, our conception of these effects is the whole of our conception of the object.”¹³

8. See *infra* Sections II.H.1–2, III.A.2, III.B.4, III.D.2, IV.B.4.b.

9. WILLIAM JAMES, PRAGMATISM: A NEW WAY FOR OLD WAYS OF THINKING (1907), reprinted in WILLIAM JAMES: PRAGMATISM AND THE MEANING OF TRUTH 28 (1996).

10. Harold Anthony Lloyd, *Exercising Best Practices, Exorcising Langdell: The Inseparability of Legal Theory, Practice, and the Humanities*, 49 WAKE FOREST L. REV. 5, 6–8 (2013).

11. By private experience I mean an experience (such as a thought or pleasant or painful sensation) directly experienced by only the individual having the experience.

12. For purposes of this Article, I consider this to include private as well as possible experience.

13. Peirce’s version reads as follows: “Consider what effects, which might conceivably have practical bearings, we conceive the conception to have. Then, our conception of these effects is the whole of our conception of the object.” CHARLES SANDERS PEIRCE, COLLECTED PAPERS OF CHARLES SANDERS PEIRCE 5.402 (Charles Hartshorne & Paul Weiss eds., 1963). As I have noted before, to the extent Peirce’s formula is limited to objective experience and therefore results in beliefs being synonymous if they cause the same habits, I would disagree. See Lloyd, *supra* note 10 at 7. See also JOHN P. MURPHY, PRAGMATISM: FROM PEIRCE TO DAVIDSON 25, 26–29 (1990). For example, I could have a habit of driving from my home to the grocery store in just the same manner both when I believe that I will be able to buy chocolates on sale and when I believe the opposite.

This definition of meaning works well in law school, in law practice, in the courthouse, and in everyday life. If one asks a thorough lawyer or law professor, for example, what a statute or a contract provision means, such a lawyer or law professor will generally “flesh them out,” or generally describe how the statute or contract provision would play out in practice. If asked to explain a specific warranty provision, for example, a thorough lawyer or law professor would describe the various scenarios that could play out under the terms as written. Thus, if the provision contained an absolute, unconditional two-year limitation on liability, the explanation would include a statement that in no scenario would the warrantor be liable after two years. It would also “flesh out” when the two years would begin and end. As for vague or ambiguous terms, the thorough lawyer or law professor would also “flesh out” how various persons might read the terms and what this might mean in practice.¹⁴

B. BASIC PLANES OF MEANING

“This,” whatever this may be, always implies a system of meanings focussed at a point of stress, uncertainty, and need of regulation.

John Dewey¹⁵

As discussed in more detail in the remainder of this section, the following drawing can help demonstrate four¹⁶ initial fundamental levels of meaning understood in this broad experiential way:

14. For more on the “embodiment” of legal meaning, see Lloyd, *supra* note 10, at 6–12.

15. JOHN DEWEY, EXPERIENCE AND NATURE 352 (1926).

16. I have previously written about three levels of meaning: reference, frame, and disposition. Harold Anthony Lloyd, *Crushing Animals and Crashing Funerals: The Semiotics of Free Expression*, 12 FIRST AMEND. L. REV. 237 (2012). In this Article, I have changed some terminology and further refined the levels of meaning for two reasons. First, as Section III shows, reference also involves framing. It therefore now seems to me that “framing” should not be used for naming one level of meaning. Second, my original third level of disposition includes both analysis and conclusion. See *id.* at 242–243. This Article refines this joinder by expressly dividing disposition into analysis and conclusion.



The drawing can also help to map basic forms of thought discussed in the remainder of this section and to ground the deeper discussion of the levels of thought contained in Section III below.

1. The Reference

There are no limits in things. . . .
Pascal¹⁷

In studying the meaning of the drawing above, we first need to agree that we are referring to all and only all of the lines and other marks of that drawing. Such clarity at this first level of meaning is clarity of the reference or referent (that is, that to which we refer).¹⁸ Clarity here is, of course, of great importance. If we are not referring to the same thing or things, we cannot have any mutual discussion about them. If I am talking about all and only all of the lines and other marks in the drawing above while you are either talking about (1) only some of them; (2) all of them as well as something else, such as their context within the page; or (3) something else entirely, such as the portion of the page that contains them or the chemical content of the ink, then we are, from the outset, talking at cross purposes and cannot have any truly meaningful dialogue. If opposing lawyers are not talking about the same thing, how can they possibly hope to make their respective clients' cases to the other? Though this point may seem obvious in the abstract, as we shall see in Section III(A) below, reference problems

17. BLAISE PASCAL, PASCAL'S PENSÉES 103 (E.P. Dutton & Co., Inc. 1958) (1670), available at <http://www.gutenberg.org/files/18269/18269-h/18269.htm>.

18. The central question of reference theory is: "In virtue of what does a linguistic expression designate one or more things in the world?" THE CAMBRIDGE DICTIONARY OF PHILOSOPHY 674 (Robert Audi ed., 2d ed. 1999). I discuss this question further in Section III.A below.

can easily work their way into legal matters and jurists must therefore be vigilant.

Additionally, by grasping the importance of clarity of reference, the importance of framing in meaning and in thought is revealed. To refer to a specific part of experience or the world, we have to carve that piece of experience away from the rest of experience or the world. In other words, we have to put a “fence” or “frame” around that part of experience and make sure that our frames contain the same part of experience or the world. In the example just given, to be clear that we are talking about the drawing above, we must be clear that we are “fencing out” all and only all of the lines and other marks in the drawing above. Though such reference framing is framing at the most basic level, it can present difficult problems as, again, Section III(A) below will discuss in more detail.

2. *The Issue(s)*

*Description is revelation. It is not
The thing described, nor false facsimile.*

Wallace Stevens¹⁹

After we have agreed upon our reference, we need to agree upon the various ways we might handle the reference, if we wish to have a meaningful discussion. That, again, involves drawing a “fence” or frame around the accepted possible ways of speaking about or analyzing the reference and thereby excluding the unacceptable ways. In a murder trial, for example, one way to further frame the drawing above would be: “This is a picture of (1) a sleeping man, (2) a meditating man, (3) a man in blissful prayer, (4) a mannequin, or (5) a corpse in an open casket.” If we agree upon this set of possibilities, we have thus agreed upon and limited the issues²⁰ presented by the reference. The only questions presented under this formulation are whether this is a drawing of a sleeping man, a man in meditation, a man in blissful prayer, a mannequin, or a corpse in an open casket. However we answer this question, it cannot be a drawing of anything else, such as a drawing of a zombie or of a woman sleeping in

19. STEVENS, *supra* note 1, at 301.

20. The definition of “issue” includes “[a] point or matter of discussion, debate, or dispute.” THE AMERICAN HERITAGE COLLEGE DICTIONARY 736 (4th ed. 2002). By moving from the level of pure reference to explore the reference further, we are setting up the reference for further discussion. Issue is distinct from reference: we can agree on the reference but disagree on the issue or issues. For example, we can both agree that we are referring to the same lines and marks while one of us sees the issue as framed above or as “whether we have a sleeping male or dead male” or as “whether we have a sleeping male or a mannequin.”

men's clothes. Such a framing allows the prosecutor both to argue that it is a picture of a corpse and to exclude arguments about conclusions outside the five possibilities. In other words, such a framing makes it possible for the prosecutor to produce evidence of a corpse while limiting the universe of counterarguments.

Other possible frames are not so favorable to the prosecutor and one cannot stress enough the importance of this second level of framing, that is, issue framing. Arguments can be won, lost, or at least impaired at this level because accepted issue frames rule out countless otherwise-possible solutions. For example, if a less-savvy prosecutor in the same murder trial instead agrees that these lines are either a picture of a man sleeping or of a mannequin, that prosecutor has given up any claim that the picture is of a corpse and thus evidence of a dead body. This is of course all well and good if done knowingly. However, it can be malpractice if done unwittingly and can lose a case before any further analysis can be done. If the picture were the only evidence of a body, the prosecutor would have thus ended his case almost *ab initio*.

In addition to unwittingly making a case impossible to win, careless issue framing can also reduce one's chances of winning. If, for example, a surgeon is seeking approval of a new surgical procedure at her hospital, she would present a facially weaker case if she concedes an opponent's frame that “[t]here is [a] 10% mortality [rate] in the first month” than she would if she claimed instead that “[t]he one-month survival rate is 90%.²¹ To continue with statistics examples, it is much more powerful to note, for example, that adding chemical X to the environment doubles the risk of cancer than to note that adding the chemical results in a cancer rate of two per million persons instead of a rate of one per million.

Every lawyer should therefore understand and every law school course should therefore emphasize this critical function of issue framing. As a part of grasping this point, good thinkers also grasp how easily one can make a framing mistake by unconsciously accepting as the issue frame a challengeable common metaphorical or other conceptual paradigm. This danger is discussed in more detail in Section III(B) below.

21. See DANIEL KAHNEMAN, THINKING, FAST AND SLOW 367 (Farrar et al. eds., 2011) (providing these frame examples).

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3. The Analysis and Conclusion

He imposes orders as he thinks of them.
Wallace Stevens²²

*[The grownups] answered me: “Why should a hat be scary?”
My drawing was not of a hat. It was of a boa eating an
elephant.*

Antoine de Saint-Exupéry²³

After having framed the issues, if one presently has no further interest in them beyond what they might represent, one can of course end matters there with an agreed-upon framing of the reference and an agreed-upon framing of the issue(s). However, if one wishes to study or act upon the reference further, one must address the issue(s) framed (that is, analyze them), and if one wishes to resolve the analysis, one must reach some conclusion level of meaning. Returning to the drawing in Section II(B) above, one might also consider it possible evidence in a missing mannequin case. If the party seeking recovery of the mannequin has successfully framed the issue as whether the picture is of a mannequin or of a sleeping man, one plausible conclusion could of course be that we have a drawing of a mannequin. One underlying analysis to that effect could be: “The features are too symmetrical for a real man. This must therefore be a picture of a mannequin.” However, another plausible conclusion could be that we have a sleeping man. One analysis underlying such a conclusion could be: “Mannequins are used to model clothes in an appealing fashion. What store in its right mind would model a shirt and tie on a sleeping or zombie-like mannequin? Therefore it’s a picture of a sleeping man.” Since both analyses are plausible, the final choice between them will require further persuasion through either rhetoric or force.²⁴

22. STEVENS, *supra* note 1, at 348 (1943).

23. My translation of “Elles m’ont répondu: “Pourquoi un chapeau ferait-il peur?” Mon dessin ne représentait pas un chapeau. Il représentait un serpent boa qui digérait un éléphant.” ANTOINE DE SAINT-EXUPÉRY, LE PETIT PRINCE 6 (1943). Though the child’s drawing can be seen as a hat, it can also be seen as the exterior of a boa stretched around a swallowed elephant. The child intended the latter.

24. GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 157 (2003) (“whether in national politics or in everyday interaction, people in power get to impose their metaphors”). *See also* ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW, 24–25 (2000) (on “communal power”). *See also id.* at 48, 165–93 (on the use of rhetoric). To the extent disagreement exists at either the reference or issue level of framing, rhetoric or force must resolve any such disagreement as well.

C. BASIC PLANES OF THOUGHT

Thus, in their most basic form, complete thoughts will thus include references, issues, analyses, and conclusions. In other words, basic forms of complete thoughts will include a RIAC (reference, issue, analysis, conclusion) form,²⁵ which can itself be further refined.²⁶

To give a concrete legal example of this RIAC structure, an attorney may have as her reference a particular real estate document that her client wishes to be reviewed and addressed in a brief memorandum. After confirming that she is reviewing an accurate and complete copy of the document actually referenced (the “R”), she must next turn to framing the possible ways of addressing the reference (the “I”). For example, in her memo she might frame the issue as, “Whether this document is a lease or a license agreement.” Again, how she frames the issue is of critical importance since it limits the possible answers to a lease or a license agreement. She could have quite different results if, for example, she framed the question as, “Whether the document at hand is a lease or a sublease agreement.” She might then end up with a sublease agreement instead of a lease or license agreement. After setting out the issues, a complete memo will then include an analysis (the “A”) of the issues as framed and her resulting conclusion (the “C”). Thus, if she frames the issue presented as, “Whether the document is an assignment or a sublease,” a complete memo will, after the analysis, reach a conclusion constrained by the “assignment or sublease” frame. Based on the framing choices made, the memo can find the document is an assignment or a sublease, but there is no room for finding that it is a license.

An incomplete thought, on the other hand, lacks one or more of these four levels or some part of such a level. Such incompleteness can be either objectionable or not objectionable depending upon the circumstances.

25. In fact, this same four-part thought structure can be seen in the form of the Shakespearean Sonnet: abab cdcd efef gg. See e.g., WILLIAM SHAKESPEARE, SONNET 2, THE COMPLETE PELICAN SHAKESPEARE 67 (Stephen Orgel & A.R. Braunmuller eds., Pelican 2002) (the first four lines refer to the matter of aging, the next four lines address issues that arise for the childless person that ages, the next four lines analyze the issues, and the final couplet concludes that youth can be regained through one’s children). Thus, if the poet so chooses, this form lends itself to precise and thoughtful exploration by identifying a reference (abab), exploring issues related to the reference (cdcd), performing analysis (efef), and reaching a conclusion (gg). See *id.* A poet who writes such a good sonnet is hardly “shackled” but has powerfully made his point. A poet could also of course vary the number of lines used in the sonnet for each of the four levels of meaning. Sonnet 2 is an example where the meaning levels and rhyme scheme match.

26. See *infra* Part II.E–G.

Continuing with the above example, simply concluding that the document is a sublease without the requisite supporting analysis would beg the question where the client has asked for a definitive answer. However, where the client merely asks what the document might be, adequate reference and issue framing suffices. Under these circumstances, framing the issue as, “This could be either a lease or a sublease” would be perfectly acceptable. In other words, the truncated “RI” form would suffice.

D. RIRAC AS A BASIC FORM OF THOUGHT

The search for fundamental forms of meaning and thought, however, does not end with RIAC. As the following example shows, legal analysis (the “A” in RIAC) involves rules, application of rules, and a symbiotic relationship between the reference(s), rule(s), and issue(s) involved.²⁷ The single “A” thus involves multiplicity requiring further refinement.

For example, a prosecutor might frame a case as a “murder case” where the “defendant purposefully and without justification or excuse caused the death of another person.”²⁸ In this case, the reference would be these “facts” of the case and the issue would be, “Is the defendant guilty of murder?”²⁹ To answer this question, the prosecutor must find some applicable rule addressing murder. If the applicable rule provides that “[a]ny person who, without justification or excuse, purposefully causes the death of another person, is guilty of murder,”³⁰ a murder conclusion seems pretty straightforward as a matter of simple deduction.

In addition to demonstrating the role of rules in legal analysis, this example also shows something else of critical importance. In framing this case, references, issues, and rules have a symbiotic relationship. One must

27. As noted from the outset in Section I, it is beyond the scope of this Article to enter into a philosophical debate as to the nature of legal rules. For purposes of this article, I find it sufficient to agree with others that such rules should satisfy at least three criteria: (1) “be simply-stated—concise enough for the reader to grasp easily,” (2) be readily applicable without circular or ambiguous terms, and (3) be “consistent with the cases and law in the jurisdiction.” See Paul Figley, *Teaching Rule Synthesis with Real Cases*, 61 J. LEGAL EDUC. 245, 247 (2011). I have delved deeper into the nature of legal rules elsewhere. See Harold Anthony Lloyd, *Let’s Skill all the Lawyers: Shakespearean Lessons on the Nature of Law*, 11 VERA LEX 33, 64–74 (2010) (discussing the semiotic dialogue). Also for purposes of this article, I consider the term “rule” to include standards as well. See WILSON HUHN, THE FIVE TYPES OF LEGAL ARGUMENT 51 (3d. ed. 2014) (“The application of a rule depends solely on the existence of specific facts.... The application of a standard involves the consideration of one or more facts in light of one or more underlying values....”).

28. HUHN, *supra* note 27, at 194.

29. *Id.*

30. *Id.*

frame them all with the others in mind or risk failure. If, again, the rule requires lack of justification or excuse for a murder conviction, the “facts” referred to must include these “facts.” The potential symbiotic relationship can play out further because “justification” may be a legal term of art. If so, one would need to choose a more “neutral” term to avoid simply begging the question in the analysis.³¹ Understanding the difference between a reference and a rule assists in this regard. Additionally, this case demonstrates the symbiotic relationship of issues with references and rules. When framing the issue as a murder case, the prosecutor must understand the applicable rule as well as the facts that will support such a conclusion.

To give another example, when considering whether police have violated the Constitutional rights of same-sex couples arrested for engaging in private consensual sex, one of course needs legal rules to resolve the matter. However, one cannot fully separate the framing of the issues from the framing of these rules. Is the issue here whether one has “a fundamental right to engage in homosexual sodomy”³² and all the baggage that historically loaded term entails³³ or is the issue whether adults have a basic constitutional right to be free of governmental intrusions into their private, consensual expressions of affection?³⁴ As we see, either frame of the issue must involve the framing of a corresponding rule and these in turn require framing the necessary facts.

Since issue analysis involves a symbiotic framing of references, issues, and rules and the application of such rules to such issues, RIAC can be more precisely stated as RIRAC. In this restatement, the second “R” stands for “Rule”³⁵ and “A” now stands for “Application.” In other words, RIRAC would mean Reference, Issue(s), Rule(s), Application, and Conclusion.³⁶

31. See, e.g., RICHARD K. NEUMANN, JR. & KRISTEN KONRAD TISCIONE, *LEGAL REASONING AND LEGAL WRITING* 183–86 (2013) (discussing and giving examples of what is and is not a fact).

32. *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986), overruled by *Lawrence v. Texas*, 539 U.S. 558 (2003).

33. *Bowers*, 478 U.S. at 191.

34. *Lawrence*, 539 U.S. at 564.

35. Although a more detailed analysis of legal rules is beyond the scope of this article, this level of analysis can itself involve multiple and potentially-competing rules as well as the corresponding rhetoric involved in framing how these rules apply in a given case. See generally HUHN, *supra* note 27 (discussing reasoning turning on text, intent, precedent, tradition, and policy; the ways each approach can be used against reasoning of its type; and the ways each approach can be used against other types). Pages 94–95 of the text contain a particularly helpful summary table. *Id.*

36. This basic form can also apply to non-legal thought if one takes “rule” in the broad sense of “a method or procedure for solving problems” as discussed in note 2 *supra*. If, for example, we are

E. FROM RIRAC TO IRAC

As long as we are clear on our references, we can further shorten RIRAC to IRAC. We can often do this in law school settings where our hypotheticals have clear references. However, again, we need to be vigilant in not forgetting that reference requires framing, too, and is a critical part of legal meaning and thought.³⁷

While RIRAC specifically reminds us to be clear on reference, RIRAC and IRAC both remind us to address and communicate issue, rule, application, and conclusion levels, of meaning and thought.

Additionally, both forms ease comprehension for the reader or audience because they structure meaning and thought in the logical progression discussed above from reference to conclusion.³⁸ To make the same point, one can see IRAC as “an adaptation of deductive syllogism[s] to legal reasoning.”³⁹ Identifying the major premise of a syllogism with the “R,” the minor premise with the “A,” and the conclusion with the “C”⁴⁰ puts the logical flow of IRAC in line with long-held views and expectations of the progression of deductive thought.⁴¹ Good form also helps convince and persuade not only through such logos of “a logical exposition of the argument” but also through the ethos of “revealing the competence of the author to handle the exposition itself.”⁴²

Additionally, usage of RIRAC and IRAC (and variations suggested below⁴³) by professors can help us do a better job as teachers. We need to

debating whether a certain bird is a finch or a sparrow, we have agreed on the reference (R) and the issue (I). If we agree that the method of resolving the debate is by use of the descriptions provided in a certain birding manual, we have agreed on the rules of resolving the case (R). We could then need to apply the agreed method (A) and hopefully reach our conclusion (C).

37. See *supra* Section II.B.1.

38. See *supra* Section II.D.

39. See Tracy Turner, *Finding Consensus in Legal Writing Discourse Regarding Organizational Structure: A Review and Analysis of the Use of IRAC and Its Progenies*, 9 *LEGAL COMM. & RHETORIC*: JALWD 351, 356 (2012). See also RICHARD A. LANHAM, *A HANDBLIST OF RHETORICAL TERMS* 31, 166 (2nd ed. 1991) (providing the definition for a canonical syllogism and deduction).

40. See Turner, *supra* note 39, at 356.

41. See LANHAM, *supra* note 39, on syllogism and deduction. See also Christina L. Kunz and Deborah A. Schmedemann, *Our Perspective on IRAC*, *LEGAL STUD. RES. PAPER SERIES* 11 (William Mitchell Coll. L., St. Paul, Minn., Nov. 1995) (“IRAC is a translation of a classic writing principle to the legal context. That principle is topic/elaboration/conclusion. The I in IRAC corresponds to topic, R and A to elaboration, and C to conclusion.”).

42. Michael D. Murray, *Classical Rhetoric, Explanatory Synthesis, and the TREAT Paradigm* (Univ. of Ill. Coll. of Law, Law & Econ. Working Papers, Working Paper No. 75, 2007) (discussing the TREAT paradigm where “T” stands for “thesis”).

43. See *infra* Section II.F regarding IRAC variations for professors’ usage.

be clear when we talk in class about our references, issues, and rules (including not only the rules themselves but how the rules were derived). We also need to be clear in how we apply the rules to reach our conclusions. The study of legal reasoning and analysis applies in every class and teachers' thoughts also need to be well structured. RIRAC and IRAC usage (and further variations for teachers suggested below⁴⁴) can help assure this.

Of course, RIRAC and IRAC forms (and their variations) themselves do not assure quality of results. Good results also require knowledge, skill, and good framing, throughout the various levels of meaning and thought. Thus, those who question IRAC, for example, on the grounds that it purports to be "a yellow brick road" that one only need follow "from start to finish"⁴⁵ are thus attacking a straw man. The form in itself claims no such powers.⁴⁶ As we have seen, significant framing and other choices are required in using RIRAC and IRAC. Additionally, a good RIRAC or IRAC must have good rhetorical style including rhythm, tone, and flow, if it is to keep the reader's attention and persuade or convince.⁴⁷

Nor need RIRAC and IRAC forms (and their variations) improperly stifle creativity as students may sometimes feel.⁴⁸ First, good creativity is necessarily involved in the framing and in the selection and formation of metaphors and categories discussed in more detail in Sections III(B) and III(D)(1) below. Second, once one has mastered basic forms of thought, one can then move to variations that might serve particular situations better, so long as such variations still address all necessary levels of thought.⁴⁹ However, one cannot successfully improve or embellish a core of good

44. See *infra* Section II.F regarding IRAC variations for professors' usage.

45. See Bret Rappaport, *Using Elements of Rhythm, Flow, and Tone To Create a More Effective and Persuasive Acoustic Experience in Legal Writing*, 16 J. LEGAL WRITING INST. 67 (2010) (citing Rebecca Adams, "Writing Non-Fiction" in Instead of Full Stops: A Guide to Writing and Publishing Non-Fiction 1996).

46. See, e.g., Kunz & Schmedemann, *supra* note 41, at 12 ("IRAC can be taught so that students understand not only why it is useful as a thinking and writing tool, but also that proper use of it requires judgment and creativity.").

47. See generally Rappaport, *supra* note 45.

48. See Gerald Lebovits, *Cracking the Code to Writing Legal Arguments: From IRAC to CRARC to Combinations in Between*, 82 N.Y. ST. B.A. 64 (2010) (noting student complaints of stifled creativity).

49. In addition to CREAC, ICREAC, and IREAC discussed below, RIRAC and IRAC can generate countless other forms. See, e.g., Turner, *supra* note 39, at 357–58 (setting forth a table of 20 forms); Lebovits, *supra* note 48, at 50 (setting forth a table of 17 forms).

thought that does not exist.⁵⁰ Third, when using basic forms of thought, one should also use all available helpful linguistic and liberal arts skills, which also necessarily involves creativity.⁵¹

F. EXPANDING IRAC INTO CREAC

I want a man to begin with the conclusion.
Montaigne.⁵²

Continuing with our formal analysis, IRAC itself can be further elaborated to address concerns and expectations of judges, practicing attorneys, and clients.

Judges, lawyers, and clients want to begin with conclusions.⁵³ Unlike readers of mystery novels, judges, lawyers, and clients do not consider matters spoiled if they get the ending first; they want to know “who dunnit” up front and then turn to the reasoning that lies behind.⁵⁴ Judges and lawyers want the answers first because they are pressed for time; clients want the answer first because that is of course what they really care about rather than the reasoning that lies behind it.⁵⁵ These audience demands therefore require that IRAC be modified to begin with a conclusion. Since conclusions turn on issues already resolved, the “I” in “IRAC” can be replaced with “C” thus transforming it to “CRAC.”

Unless clear on their face, rules need good explanations of what they mean so that the practicing attorney can justify to the judge, other attorneys, or their client the analysis and conclusion the lawyer puts forth.

50. Bret Rappaport, *Tapping the Human Adaptive Origins of Storytelling by Requiring Legal Writing Students to Read a Novel in Order to Appreciate How Character, Setting, Plot, Theme, and Tone (CSPTT) Are as Important as IRAC*, 25 T. M. COOLEY L. REV. 299 (2008) (Students need IRAC from the outset of law school “to learn how lawyers view the world, deconstruct disputes, and from that deconstructed base, spot issues and construct arguments that help their client prevail Without the fundamental understanding of the logic and reason of the law, students would flounder, for the real world of law is made up of such things.”).

51. See Lloyd, *supra* note 10, at 28–33. See also, e.g., Rappaport, *supra* note 50, at 299 (“Literature and its elements, character, setting, plot, theme and tone, have a rightful and valued place in a student’s second or third year.”). I would say literature and other liberal arts also have a place in the first year. *See id.*

52. MICHEL DE MONTAIGNE, THE COMPLETE ESSAYS OF MONTAIGNE 301 (Donald Frame trans., Stanford University Press 1976).

53. CHRIS COUGHLIN ET AL., A LAWYER WRITES: A PRACTICAL GUIDE TO LEGAL ANALYSIS 165–66 (2008).

54. *Id.*

55. *See id.*

Although, as noted above,⁵⁶ clients are generally mostly concerned with conclusions, some clients will want to follow the analysis carefully. Even for those who may not care, it is important to provide the client with at least the opportunity to read clear explanations. Additionally, if things go wrong, a good lawyer needs to be able to explain his reasoning and point out that he had initially provided this information to the client. In the classroom setting, a professor can better understand how a student reached a wrong conclusion, and thus understand what knowledge the student lacks if the student explains his thinking. It is therefore helpful to modify CRAC further to add a rule explanation provision; thus, CRAC becomes CREAC.⁵⁷

G. REFINING IRAC AND CREAC INTO THE PROFESSORIAL ICREAC AND IREAC

[Y]ou [that is, the law student in 1930] will notice that any wide synthesis of the subject-matter of a case class is left to you. Piece-wise, we help. As to any whole, our wiser members still leave you largely to yourselves.

Karl Llewellyn⁵⁸

Although learning legal analysis requires students to solve problems for themselves, it does not follow that law professors have no duty to provide detailed and structured overviews of law and its practice. Students are also paying clients and can reasonably expect law schools to present them with a meaningful amount of material in a logical and digestible form. “Piece-wise” instruction that “largely leaves students to themselves”⁵⁹ is unacceptable in any institution that would call itself a school.

In providing instruction that is not “piece-wise,” the CREAC format can provide student “clients” with the same benefits that the form provides legal clients.⁶⁰ However, while legal clients focus on conclusions, student “clients” must learn to spot issues as well. For this reason, adding “I” to

56. See *supra* Section II.F regarding clients and explanations.

57. Again, in addition to ICREAC and IREAC discussed below, RIRAC and IRAC can generate countless other forms. See, e.g., Turner, *supra* note 39, at 357–58 (setting forth a table of 20 forms); Lebovits, *supra* note 48, at 50 (setting forth a table of 17 forms).

58. KARL LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 109 (Oceana Publications 1960) (1930).

59. *Id.*

60. See *supra* Section II.E.

reach ICREAC creates a working model that can be a better general model for instruction.

For example, in discussing the doctrine of consideration in a restrictive covenant context, an employment-law professor might begin by asking a series of “issue” questions such as: “Is one dollar promised but never delivered sufficient consideration for a covenant not to compete?”; “Is a promise of continued employment sufficient consideration for such a covenant?”; “Is a change of title without more sufficient consideration for such a covenant?”; “Is an increase in an employee’s existing duties sufficient consideration?”; or “What about a decrease?”

These issue questions serve a couple of educational purposes. First, they identify issues students may confront in the practice area. Second, they hopefully will pique the students’ interest in the topic. The uncomfortable thought of increasing employee duties, for example, as possible consideration would hopefully draw at least some eyes away from their laptops. At this point, the professor can either give the answer before further exploration (thus using ICREAC) or she can move straight to further exploration (thus using IREAC). In either case, engaged students can then follow the formal progression from “R” to “E” and then to the various applications that result in “C.”

Whether a professor uses ICREAC or IREAC in a given discussion is always a situational judgment call. In my experience, one approach is a good choice in some cases and not in others. I never liked the game of “hiding the ball” as a student and ICREAC avoids this. Additionally, students may disagree with, be puzzled by, or perhaps even be fascinated with a professor’s initial conclusion. Any such reaction may thereby provoke more interest than an IREAC would have done. However, in other cases IREAC may pique more interest and generate a livelier discussion.

None of this is to say, though, that the ICREAC or IREAC burden falls entirely upon the professor in class. Students can be required to play roles in ICREACs and IREACs at every level. To continue with the example of a restrictive covenant for an employee, instructors might begin by asking students what sorts of consideration issues might arise with restrictive covenants. After either the students or the professor has raised the issues, the students can be asked what they think the conclusions should be. Students can have similar involvement with any of the remaining parts of the ICREAC or IREAC.

Students must of course do their own IRACs and CREACs and other assigned analyses as well in order to learn how to think and reason like a lawyer. For example, I find it useful in my commercial leasing class to assign, among other things, a series of problems for which I require answers in IRAC form. Some students complain about this initially but by the end of the class generally tell me that this was one of the most useful aspects of the class. In retrospect, they should see this as no surprise since, again, good thinking needs to be in the form of good thought.⁶¹ Though these homework IRACs are useful, they are no substitute for the professor's ICRAEs and IREACs. The professor's ICRAEs and IREACs provide a coherent (rather than "piece-wise") environment in which maximum learning can occur.

H. FRAMING AND FORMALISM

The law is not the same at morning and night.

*George Herbert's Proverbs*⁶²

1. Framing and the Crank Fallacy

Having seen the importance of framing and choice at multiple levels in legal meaning and thought, it is also useful to explore legal formalism as a negative example of how we do not mean and think.

Legal formalists believe (or at least claim to believe) that law is "a self-contained system of legal reasoning" involving deduction of "neutral," apolitical results from "general principles and analogies among cases and doctrines."⁶³ In other words, the law is like a deductive machine that takes in new facts and cranks⁶⁴ out "neutral" applications of existing law to these facts.⁶⁵

61. See *infra* Section II.D regarding RIRAC as a basic form of thought.

62. GEORGE HERBERT, THE COMPLETE ENGLISH WORKS 283 (Everyman's Library 1995).

63. See MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 16–17 (1992).

64. As far as I know, these terms are my own.

65. Though naïve formalists might believe that the law can "crank" out one "right" answer, Justice Scalia acknowledges that his formalist notions discussed below will not "produce an absolute sameness of results" though he claims they will "narrow the range" of what is acceptable. ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS xxviii (2012). Judge Frank Easterbrook makes similar assertions in his forward to Justice Scalia and Mr. Garner's book. *Id.* at xxiii. All that said, however, Justice Scalia still seeks "*the* meaning that [a text] has borne from its inception . . ." *Id.* at xxvii (emphasis added). As discussed further in Appendix B, Justice Scalia's "narrow the range" claim also does not withstand scrutiny.

In using this model of the law, legal formalists purport to embrace “clear, distinct, bright-line classifications of legal phenomena” and shun notions of “balancing conflicting policies and ‘drawing lines’ somewhere between them.”⁶⁶ They believe this provides them with a “screen of legitimacy from attack from left and right” since the law on its own determines results.⁶⁷ In other words, they would claim that judges are not “builders of law” but are instead its “mere protectors.”⁶⁸ (Ironically, such protection can also run the other way. Some have claimed that legal formalism has protected lesser intellects on the bench who have clung to “dry legal logic” and “rules” as “their one excuse for power.”⁶⁹)

Not only does the flexibility of framing at multiple levels⁷⁰ belie such a model of the law; the fact that we have a large legal profession does so as well. If we could simply crank out right answers from the law like cranking widgets from a machine, there would be no need for the bar as we know it. That bar exists precisely because the law is not such a machine.

2. *Justice Scalia and Queen Anne*

In exploring the contrast between formalism and real-world legal meaning and thought, this Article will focus on one particular formalist doctrine: the doctrine of original meaning. This doctrine holds that legal interpretation generally involves taking words in the context in which they were written, giving them the meanings that they had at the time at the time they were written, and then reaching a purportedly impartial holding.

For purposes of this Article, I shall follow one of Justice Scalia’s multiple formulations of original meaning. Under this formulation, original meaning holds that “in their full context, words mean what they conveyed to reasonable people at the time they were written—with the understanding that general terms may embrace later technological innovations.”⁷¹ Though Justice Scalia does not use the term original meaning expressly with this

66. See HORWITZ, *supra* note 63, at 17 (explaining what they do but not referencing these fallacies).

67. See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 625 (2d ed. 1985).

68. *Id.* at 623. In addition to the other problems with legal formalism noted at various points in this paper, Friedman notes that this claim can be used as a “disguise or mask” by the judge who would hide “the power of the bench in a briar patch of legalism” and who would conceal “their thought processes in jargon.” *Id.*

69. See *id.* at 400.

70. See *supra* Sections I.B, II.H, III.A.1, and III.B.1.

71. SCALIA & GARNER, *supra* note 65, at 16.

particular formulation, this is the approach he endorses at the beginning of his most-recent book.⁷²

Disciples of original meaning consider originalism “the normal, natural approach to understanding anything that has been said or written in the past.”⁷³ For example, Justice Scalia notes that Queen Anne may once have told Sir Christopher Wren that St. Paul’s Cathedral was “awful, artful, and amusing” which under common usage at the time meant “awe-inspiring, highly artistic, and thought-provoking.”⁷⁴ Because the meanings of these terms have shifted, and because we should therefore take them in their original senses to preserve their original meaning, Justice Scalia believes that this possible statement alone “is reason enough for using originalism to interpret private documents” and a fortiori public ones.⁷⁵

Of course Justice Scalia is correct that failure to understand the contemporaneous meanings of these terms would lead a modern reader to misinterpret what Queen Anne allegedly said.⁷⁶ However, on its face this example does not apply to the interpretation and application of an ongoing legal rule. Instead, it involves understanding the words used to make a statement about a past state of affairs. No honest person would want to claim that Queen Anne made a statement that she did not mean to make at the time.

However, nothing here suggests that statutory meanings and their applications are frozen in time. If instead Queen Anne had signed a statute permitting only “awful, artful, and amusing buildings” which we now diligently read to mean “awe-inspiring, highly artistic, and thought-provoking,” that hardly means that the inspiring, the highly artistic, and the thought-provoking, cannot evolve over time and thus require an ever-evolving application of the statute.

When applied to an ongoing actual rule, Justice Scalia’s Queen Anne example thus actually highlights the importance and flexibility of framing in legal decisionmaking. We not only have to understand that Queen Anne’s words meant “awe-inspiring, highly artistic, and thought-provoking,” but we also have to grapple with what those words mean when applied through

72. *Id.* at 15–16. I single this formulation out not only because of its prominence at the beginning of his book but also because it lacks problems with other ones given by Justice Scalia in the book. *See infra* Appendix B and Section III.A.2.

73. *Id.* at 82.

74. *Id.* at 78.

75. *Id.* at 82.

76. *Id.* at 78.

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time. Of course, no reasonable person who has studied the humanities would contend that artistic standards and thought, for example, do not evolve over time. Nor would such a reasonable person deny that reasonable people might have different frames for high art or provoking thought in any given post-Queen Anne era. This battle of frames takes us well beyond any period dictionary Queen Anne might have been holding when using her original words.

In exploring levels of meaning in more detail below, we shall return to original meaning for such additional light that its negative example sheds on reference, issue, analysis, and conclusion levels of meaning and thought.⁷⁷ Such additional light not only elucidates how real-world meaning and thought actually work, it also exposes the gamesmanship involved in trying to deny the general role and flexibility of framing over time.

III. REAL-WORLD MEANING AND THOUGHT IN MORE DEPTH

A rabbit scurries by, the native says “Gavagai,” and the linguist notes down the sentence “Rabbit” (or “Lo, a rabbit”) as tentative translation

W. V. O. Quine⁷⁸

Having sketched out the basic levels of meaning, their interrelation, and how they translate into basic forms of thought, we can now look at more specific examples of how grasping the basic RIAC and RIRAC thought forms can cull good thought from bad. In this portion of the article, I shall explore examples both from law practice and from the negative example of original meaning.

A. REFERENCE IN MORE DEPTH

1. Framing Reference

The Object absolute is naught

77. See *infra* Sections III.A.2, III.B.4, III.C.2, and III.D.2. In using original meaning as a negative example, we should always keep in mind its status as a doctrine of judicial choice. As William Popkin describes it, “A statute is written for the future, unless it has a sunset date, and there is no *a priori* reason to exclude the contemporary audience’s understanding of a statutory text from judicial consideration.” WILLIAM D. POPKIN, A DICTIONARY OF STATUTORY INTERPRETATION 109 (Carolina Academic Press 2007).

78. WILLARD VAN ORMAN QUINE, WORD AND OBJECT 29 (M.I.T. 1983).

*Emily Dickinson*⁷⁹

If Blackacre and Greenacre are adjacent properties and we wish to discuss only Blackacre, we need to make sure that we have carved out only Blackacre as our reference and that all parties to the conversation have done the same. At first blush, this may seem a simple and even trivial point to make. However, even in the simplest examples, one should dispel overconfidence at the reference level.

Imagine, for example, that a flustered-looking senior partner has a sheet of typed paper with two black smudges. His worried assistant asks him if there is anything that they need to discuss. The senior partner puts his finger on one of the smudges and they begin to talk. He grumbles about how unprofessional and unattractive “it” is. The partner eventually looks at his watch and leaves. As he quits the room, both have no doubt whatsoever that they have been discussing the same thing. But have they? The assistant might well think that the complaint was about smudges and might in a panic set about determining what caused them. The senior partner, however, might have been referring to something else entirely. Perhaps he disliked the quality of the paper, the font used, the size of the margins, or the method of indentation. Perhaps he disliked where he found the page in the office. Perhaps he disliked the rhetorical style of the page. Perhaps he disliked the reasoning set forth on the page.

All this demonstrates the following: reference can be tricky. We certainly cannot precisely identify reference merely by pointing.⁸⁰ We instead must make good use of words, such as “let’s discuss this inkblot under my finger” or “let’s talk about the awful quality of this cheap paper stock.”

The following law practice example also underscores this point. Cousin Jane and Cousin Sally both want Grandmother’s ring. Cousin Jane and Cousin Sally both obtain counsel. Their counsel asks them what they want. Both women say the same thing: “I want Grandmother’s ring shown in this old photograph and I will accept nothing short of obtaining that

79. EMILY DICKINSON, THE POEMS OF EMILY DICKINSON 446 (R.W. Franklin ed., Harvard University Press 1999).

80. As Wittgenstein notes for example, when one wishes to name a person by pointing at the person, the viewer might take that definition as one of “a color, of a race, or even of a point of the compass. That is to say: an ostensive definition can be variously interpreted in *every case*.⁷⁹ LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 13–14 (G.E.M. Anscombe trans., Basil Blackwell 1958).

ring.” Unfortunately, counsel for both women consider these instructions quite precise (they have not only clear words but a photograph as well) and have no doubt whatsoever as to the reference of the disputed matter. They therefore litigate the matter for several years at considerable expense until Cousin Jane at last wins possession of the ring. Immediately upon victory, Cousin Jane astonishes her counsel by plucking out the diamond and tossing the finely engraved band into the garbage can. A week later, Cousin Jane proudly displays the stone to Cousin Sally who inquires about the location of the band. When told about its disposal, Cousin Sally exclaims, “But all I ever wanted was that beautiful band! I would have always given you that flawed and ugly diamond!” Both women then realize too late how apparently precise language (and even a photograph!) failed both them and their counsel.

But just how did both attorneys fail in this case? They did not sufficiently define the reference of their client’s wishes. In so doing, they managed not only to miss what their clients’ each desired (different parts of the ring), but also created an illusory dispute by assuming a common desired reference (the entire ring) that was never really in dispute. Building on this erroneous reference, the lawyers then framed their issues, did their analyses, and reached, with the aid of the court, a conclusion that did not apply to the real case at hand.

Apart from simple carelessness, how do attorneys typically err in such a way at the reference level of meaning? First, attorneys do not always adequately explore the interests of their clients. In the dispute above, each client’s stated desire for the ring should have been followed by her counsel’s simple question: “Why?” That should have led shortly to the true reference of each client’s desire and then to an easy settlement.

Secondly, attorneys do not always question apparently obvious reference frames, especially when they believe they understand their clients’ interests very well. For example, Cousin Bill and Cousin Bob have inherited adjacent tracts of land from their grandfather. They believe that they are entitled to no more or less than individual inheritances whatever they may have been. However, Cousin Bob would like an access easement over a corner of Cousin Bill’s land. He takes a copy of their grandfather’s original survey to Cousin Bill and indicates the desired location of the easement and offers a good price. Cousin Bill refuses to grant the easement. As a result, Cousin Bob is no longer speaking to Cousin Bill and hires counsel to help him obtain an access easement elsewhere. Such counsel efficiently procures another workable easement at a reasonable price, and

the cousins never again speak to one another. Though Cousin Bob is thus impressed with his counsel's seemingly good work, he should in fact be angered over his counsel's malpractice. Cousin Bob's counsel did not obtain a new and better survey (or at least an updated one) that would have shown Cousin Bob actually owned the corner in question. Had the reference frame been corrected by the new survey, the additional easement would not have been needed and the cousins (who wanted no more than their inheritances, whatever they might have been) might well be on good terms again.

Third, attorneys can incorrectly assume that references have natural or given forms apart from the values and desires that people bring to experience. To take the ring example again, any purported natural reference of the ring (that is, the whole ring) was only in play in the lawyers' heads. As we saw, the references of their clients differed and were never in dispute. It is thus important that attorneys not only understand original interests but also continue to understand interests as matters proceed.

The easement dispute above is a further example of this point. There are different survey techniques and standards that are acceptable in practice.⁸¹ A good attorney knows that he can explore such various possible practices to see if some accepted approaches might benefit his client more than others. A good attorney also knows that surveying standards evolve⁸² and can thus be challenged and supplemented if one can make a good case for doing so. Perfect, natural survey standards therefore do not exist, and good real estate attorneys know this.

Fourth, the good attorney also knows the need for good descriptions when referring to a particular issue. As the example of pointing and the inkblot discussed above (as well as the ineffectiveness of merely looking at the picture of the ring disputed by Cousin Jane and Cousin Sally) demonstrates, we cannot identify a reference point by simply pointing to it. First, the question always remains as to the extent of the reference to which one is pointing. Second, since pointing out a reference requires framing that extent of the reference, one must use concepts, such as lines of demarcation, as well as any other descriptions needed to describe the extent of the frame of the reference. Framing must therefore involve description,⁸³

81. See generally *Land Survey Techniques*, <http://www.surveyors.com/land-surveyors/land-survey-techniques/> (last visited Feb. 18, 2014).

82. See *id.*

83. See HILLARY PUTNAM, PRAGMATISM: AN OPEN QUESTION 40 (Basil Blackwell 1995) ("We can learn and change and invent languages, and in them we can state truths; that *is* describing reality.").

though the framing description need not thereafter define the referent. For example, what we initially refer to as an ancient maple tree in a land survey may turn out to be a sycamore.⁸⁴

All these examples show the critical importance of questioning and investigation at the reference level. The good attorney investigates and understands his client's interests well. The good attorney performs adequate inquiry as to the referential frame itself. The good attorney knows that there are no natural or given frames for carving out a particular reference.⁸⁵ The good attorney also knows the importance of careful description when framing reference.

2. Real-World Reference Refutes Original Meaning

[T]he knower is not simply a mirror floating with no foothold anywhere, and passively reflecting an order that he comes upon and finds simply existing.

William James⁸⁶

Again, for purposes of this Article, I take original meaning to be the doctrine that: “in their full context, words mean what they conveyed to reasonable people at the time they were written—with the understanding that general terms may embrace later technological innovations.”⁸⁷ If we take this doctrine to freeze the meanings of non-general, non-technological words,⁸⁸ original meaning rejects itself at the very first level of reference to the real world. In doing so, it also exposes the artifice involved in trying to deny flexibility of reference framing over time.

The first part of the exception applies to “general terms.” Without getting too much into the weeds of the old nominalist-universalist-conceptualist debate,⁸⁹ all real-world terms can be considered general in the sense that their referents can change over time and can thus include more than just the reference as initially framed.⁹⁰ For the extreme realist, terms

84. See SAUL A. Kripke, NAMING AND NECESSITY 106–07 (Harvard University Press 1980).

85. As Putnam puts it, “to ask how things are ‘in themselves’ is in effect, to ask how the world is to be described in the world’s own language, and there is no such thing as the world’s own language, there are only languages that we language users invent for our various purposes.” PUTNAM, *supra* note 83, at 29.

86. PUTNAM, *supra* note 83, at 17.

87. SCALIA & GARNER, *supra* note 65, at 16.

88. See *infra* Section IV.B.4.

89. WINFRIED NÖTH, HANDBOOK OF SEMIOTICS 84 (Indiana University Press, 1995).

90. *Id.*

refer to “nonmental entities.”⁹¹ However, no sensible realist claims that entities in this world are immutable.⁹² As such, terms referring to “nonmental entities” must be general in the sense that their referents can change over time. For conceptualists, meanings “exist in the mind.”⁹³ Since minds are also mutable, all terms must also be general in the sense that their referents can also change over time. Nominalists accept “only the existence of singular objects and deny the reality of universals,” with extreme nominalists believing that “objects having the same quality have nothing in common but their name.”⁹⁴ Despite such denial of universals, however, a sensible nominalist’s terms must also be general in the mutability sense just discussed. Furthermore, the sensible nominalist no doubt acknowledges that real-world objects can and do change. Thus, it would seem that all three understandings of universals would concede that all words referring to the real world are general in the sense that their referents can change over time and can thus include more than just the reference as initially framed.

Since all words referring to the real world in this sense are thus, at the very least, general, Justice Scalia’s exception must turn on whether words involve technology. A primary definition of “technology” is “[t]he application of science, esp. to industrial or commercial objectives.”⁹⁵ Since Justice Scalia would presumably be impartial and not favor industrial or commercial parties over non-industrial or non-commercial ones when it comes to the flexibility of the law, one can reasonably assume that he means “the application of science” when he speaks of technology. A primary definition of “science” is “[t]he observation, identification, description, experimental investigation, and theoretical investigation of phenomena.”⁹⁶ “Phenomena” is the plural of “phenomenon,” the primary definition of which is “[a]n occurrence, a circumstance or a fact that is perceptible by the senses.”⁹⁷ In other words, this includes anything perceptible to the senses. On its face, this excludes no perceptible changes and developments including perceptible changes and developments in both language, thought, and morality. The exception thus swallows up the rule.

91. *Id.*

92. Plato is no exception here. He did not believe that his unchangeable Forms exist in the everyday world of perception. *See id.* at 98.

93. *Id.* at 84.

94. *Id.*

95. THE AMERICAN HERITAGE COLLEGE DICTIONARY 1415 (4th ed. 2002).

96. *Id.* at 1243.

97. *Id.* at 1044.

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Assuming otherwise, for the sake of argument, original meaning still fails at this first level of reference. Again, reasonable people understand that everything changes in this ephemeral world. For example, unless I expressly state that I only mean to refer to Justice Scalia as he existed at noon on January 1, 2014, reasonable people will take my references to him in this article as to the man known as Scalia who changes over time.

The same applies to legal entities as well. The term “The United States” refers both to the original thirteen colonies and to the current fifty states.⁹⁸ When the term “United States” is used without more, we therefore have no frozen reference. If we mean to limit the reference to July 4, 1863, for example, we have to make that plain.

Because ordinary people use language, the default reference of a term is thus the reference over time unless otherwise expressly qualified, and original meaning therefore has things backwards. The reference of anything (including therefore the reference of words in a constitution or statute) is only limited to a specific slice of time when the limitation is expressly made by the author or speaker. Our Constitution, for example, has no such limiting language. Nor does the Dictionary Act, which addresses “determining the meaning of any Act of Congress”; instead it provides that its definitions apply “unless the context indicates otherwise.”⁹⁹

Additionally, even when we freeze the reference to a specific moment in time, we still must agree on the extent of the frozen reference, that is, we still must frame it. As reasonable people can disagree on framing at the reference level, there cannot be one original meaning even at frozen levels. For example, we might choose to refer to North America as a specific moment in time. Even in that case, appealing to the understanding of reasonableness does not generate any original reference. First, do we appeal to the understanding of people today or to the understanding of people at the time? When we are simply speaking of a vast piece of ground, how does one group have precedence over the other? Second, what do we mean when we freeze the time? Are we looking at a minute, a second, a nanosecond, an un-extended point in time? Finally, where are the physical boundaries of the frozen reference? Do they include Central America? The Aleutian Islands? North Carolina’s Outer Banks? There is no common reasonable answer to any of these questions and original meaning thus fails

98. See, e.g., WILLIAM R. SHEPHERD, SHEPHERD’S HISTORICAL ATLAS 196, 198–99 (Barnes & Noble 1973) (showing “The United States” from 1783–1803 and the expansion of “the United States” thereafter).

99. 1 U.S.C. §1 (2012).

even where we expressly freeze meaning in time. Original meaning, therefore, falters at the very first level of meaning and cannot be taken seriously. As we shall see in Sections III(B)(4), III(C)(2), and III(D)(2) below, it falters at other levels as well.

B. ISSUES IN MORE DEPTH

1. *Framing Issues and Their Metaphors*¹⁰⁰

The drive toward the formation of metaphors is the fundamental human drive, which one cannot for a single instant dispense with in thought, for one would thereby dispense with man himself.

Nietzsche¹⁰¹

Every concept arises from the equation of unequal things.

Nietzsche¹⁰²

As the preceding discussion shows, if we wish to think further about any given reference, we must, at the very least, frame issues or questions with regards to that reference.¹⁰³ For example, in exploring a legal dispute about the lines and markings in the example in Section II(B) above, we might ask whether we have a portrait of a mannequin or a portrait of a sleeping man. However, because lines and other marks are not literally portraits, such an analysis necessarily involves metaphor, that is, “understanding and experiencing one kind of thing in terms of another.”¹⁰⁴

We often speak of categories when doing such metaphorical issue framing. Categories are “sets of things” “treated as if they were, for the purposes at hand, similar or equivalent or somehow substitutable for each other.”¹⁰⁵ When we equate categories with other things, we thus have

100. Portions of this section are also discussed in Lloyd, *supra* note 10 and accompanying text. See *infra* Section IV.B.1.

101. FRIEDRICH NIETZSCHE, THE NIETZSCHE READER 121 (Keith Ansell Pearson & Duncan Large eds., Blackwell 2006).

102. *Id.* at 177.

103. See *infra* Section III.A.1..

104. METAPHORS WE LIVE BY, *supra* note 24, at 5. Lanham includes a similar definition of “metaphor”: “[A]ssertion of identity rather than, as with Simile, likeness.” LANHAM, *supra* note 39, at 100. So understood, metaphor equates something with something else. Competing examples would thus include for example “argument is war” and “argument is a dance.” METAPHORS WE LIVE BY, *supra* note 24, at 4–5. On the difference between metaphor and metonymy (i.e., the use “of one entity to refer to another that is related to it” such as when a waiter refers to a customer as “the ham sandwich” because of what he ordered). See *id.* at 35–40.

105. METAPHORS WE LIVE BY, *supra* note 24, at 20.

metaphors. When using such categories, whether something falls inside any such category will of course depend upon “the criteria chosen to measure likeness or unlikeness.”¹⁰⁶

Thus, to the extent we speak of any X as Y (that is, not-X) we must always use metaphor. A “cup,” for example, is a set of experiences that we have used metaphor to characterize as a “cup.”¹⁰⁷ Others might debate, however, whether we should categorize the same experiences as a glass, goblet, mug, or beaker. As all these possibilities allow different and thus contradictory meanings, the categories used cannot be literally true. Nothing can be literally itself and not itself at the same time.¹⁰⁸ Thus, since a concept such as “cup” metaphorically characterizes something else in terms of that concept, our “ordinary conceptual system, in terms of which we both think and act, is fundamentally metaphorical in nature.”¹⁰⁹

Meaning in law and legal education, as in all other cognitive areas, is therefore by necessity largely driven by metaphors.¹¹⁰ For example, if we say that Greenacre is a square, we have used metaphor by equating Greenacre to a geometric space involving perfect points, angles, and lines that do not exist in the real world.¹¹¹ We even speak metaphorically if we just say Greenacre, since our notions of surveyed land and fee simple do not actually exist in nature itself.¹¹²

In understanding such metaphorical categories, it is useful to note that such categories are often conceived in spatial terms because we often perceive them as “containers” of things “with an interior, an exterior, and a boundary.”¹¹³ For example, “When we understand a bee as being *in* the garden, we are imposing an imaginative container structure on the garden,

106. *Id.* at 49.

107. I do not agree with Lakoff and Johnson on this point. See, e.g., GEORGE LAKOFF & MARK JOHNSON, PHILOSOPHY IN THE FLESH 58 (1999) (“Cup (the object you drink from) is literal.”).

108. See LANHAM, *supra* note 39, at 41 (“two mutually exclusive Propositions . . . cannot both be true”). Again, I do not agree with Lakoff and Johnson on the literal nature of cups. See LAKOFF & JOHNSON *supra* note 107 and accompanying text.

109. METAPHORS WE LIVE BY, *supra* note 24, at 3.

110. See, e.g., *id.* (“Our ordinary conceptual system, in terms of which we both think and act, is fundamentally metaphorical in nature.”).

111. Robert J. Rovetto, *The Shape of Shapes: An Ontological Exploration*, <http://ceur-ws.org/Vol-812/paper9.pdf> (last visited July 30, 2013) (explaining the difference between geometric and physical shapes).

112. See *supra* note 81 and accompanying text (addressing various acceptable surveying techniques which belie any one natural notion of a survey). See WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY 1–3 (West 3rd ed. 2000) (discussing competing notions of “property.”).

113. PHILOSOPHY IN THE FLESH, *supra* note 107, at 20.

with the bee *inside* the container. The cognitive structure imposed on the garden is called *the container image schema*.¹¹⁴ Such spatial image schemas have “bounded regions, paths, centers and peripheries, objects with fronts and backs, regions above, below, and beside things.”¹¹⁵ We will return to this specific point in Section III(D) discussing conclusions in more detail.

2. Conflation That Highlights and Hides

We obtain the concept, as we do the form, by overlooking what is individual and actual; whereas nature is acquainted with no forms and no concepts.

*Nietzsche*¹¹⁶

In evaluating metaphors, lawyers and law students should always take care to recognize and remember metaphor’s two primary functions: “highlighting certain properties” and “downplaying . . . [or] hiding still others.”¹¹⁷ For example, the following statements refer to the same woman and act, yet highlight, downplay, and hide various different properties:

“My husband talked to another woman on the phone last night.”

“My husband talked to a famous artist on the phone last night.”

“My husband talked to a crooked politician on the phone last night.”

“My husband talked to a neighbor on the phone last night.”¹¹⁸

Though all of the above statements can be true, they are incomplete and thus biased in terms of what they highlight, downplay, and hide. Good lawyers therefore never accept statements as true without considering what such statements highlight, downplay, and hide and whether that which is highlighted, downplayed, and hidden is consistent with their clients’ interests. For example, good lawyers understand that a wife planning a divorce might find “another woman” a useful label while a wife wishing to impress others might prefer “a famous artist.” In neither case, however,

114. *Id.* at 117.

115. *Id.* at 508.

116. NIETZSCHE, *supra* note 101, at 117.

117. METAPHORS WE LIVE BY, *supra* note 24, at 163. See also *id.* at 152. Concepts by their very nature require this. Since concepts are not literally the things conceptualized, there cannot be a perfect one to one match. See, e.g., *id.* at 13.

118. This example is based on a similar scenario given by Lakoff. See *id.* at 163.

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does a good lawyer simply accept the biased and incomplete statement as complete and unbiased.¹¹⁹

In fact, forgetting that metaphors can downplay and conceal can be catastrophic. For example, an unfortunate factory worker apparently once caused an explosion by tossing a still-lit cigarette into an “empty barrel” that had recently held explosive chemicals.¹²⁰ The word “empty” presumably downplayed any explosive residue in the barrel that led to the disaster. Who should be liable in this case? The employer for “mislabeling” the barrel? The employee for negligently disposing of his cigarette? Or should the injured even have recourse against either party? Reasonable minds could disagree on the answers here, but they should not miss the metaphors and frames that may have contributed to the disaster.

Forgetting the incomplete and biased nature of metaphors can also lead us to miss opportunities provided by “the alternative categories we did *not* use.”¹²¹ For example, a lawyer who always approaches negotiation in a combative manner is forgetting that negotiations can (and often ought to) have cooperative properties.¹²² The lawyer may thus unwittingly harm his client by negotiating a worse deal than he might otherwise have done. Similarly, legal scholars who believe that labor is merely a fungible commodity like gold or silver might miss any dangerous, “dehumanizing,” or otherwise immoral aspects of labor or labor laws.¹²³

3. Metaphor in Narrative

In appreciating this fundamental importance of metaphor, one must also appreciate how metaphors are often embedded in a narrative and how competing narratives can account for the same facts.¹²⁴ Failure to realize “that there is more than one ‘true’ story” can lead one to be “unconsciously captive to a set of unexamined assumptions based on narratives.”¹²⁵ Linda H. Edwards gives an excellent overview of how competing narratives of “hard-won freedoms secured by the American Revolution and the founding

119. One might in similar fashion dispute categories and other metaphors with much broader social implications: for example, is welfare a “safety net” or a “handout?” See AMSTERDAM & BRUNER, *supra* note 24, at 51.

120. AMSTERDAM & BRUNER, *supra* note 24, at 142.

121. *Id.* at 49.

122. METAPHORS WE LIVE BY, *supra* note 24, at 10.

123. *Id.* at 236–37.

124. See generally AMSTERDAM & BRUNER, *supra* note 24, at 111 (“stories construct the facts that comprise them.”).

125. See Linda H. Edwards, *Where Do the Prophets Stand? Hamdi, Myth, and the Master’s Tools*, 13 CONN. PUB. INT. L.J. 43 (2013).

of the Nation”¹²⁶ versus “the myth of redemptive violence” and its narrative of “the world as an overwhelmingly dangerous place, under attack by powerful evil forces”¹²⁷ played out in the case of Yasir Esam Hamdi, an American citizen detained as an “enemy combatant.”¹²⁸

President Bush and the Fourth Circuit viewed the arrest and detention of Hamdi through a dangerous-world narrative in which our “only hope is a strong leader, who will save vulnerable mortals by defeating the powers that threaten them, thus imposing order and safety.”¹²⁹ In this narrative, the strong leader was the President, and the executive should be given a virtually free hand “[t]o defend us.”¹³⁰ Not surprisingly, the Fourth Circuit affirmed the President’s broad powers here.¹³¹ The Supreme Court, however, viewed the case through a different narrative frame. The Court focused on Hamdi’s status as an American citizen and the importance of “the hard-won freedoms” obtained through the American Revolution. Viewed this way, the Supreme Court found the President’s actions to be unconstitutional.¹³²

Judges, lawyers, law professors, and law students, who miss such competing narratives in *Hamdi* miss much of the case and how it was actually won and lost at the various appellate levels. Similarly, judges, lawyers, law professors, and law students, who miss the actual or possible narrative levels of the matters before them similarly miss much of what might be done with rhetoric and strategy. Worse, they might unwittingly disserve their clients by unnecessarily conceding the narratives that lead to poor results for their clients.

Because at least ninety-five percent of thought may be “below the surface of conscious awareness,”¹³³ avoiding the “hidden” effects of metaphor and narrative is a constant struggle.¹³⁴ For the reader’s convenience, I have included in Appendix C a number of common conceptual metaphors that may come into play above or below our level of

126. *Id.* at 64.

127. *Id.* at 61.

128. *Id.* at 59–66.

129. *Id.* at 54, 59–66.

130. *Id.* at 63.

131. See *id.* See generally *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002), *aff’d*, 542 U.S. 507 (2004).

132. See *Edwards*, *supra* note 125, at 64–66. See generally *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

133. PHILOSOPHY IN THE FLESH, *supra* note 107, at 13.

134. See *infra* Appendices C & D.

awareness to highlight the distinction. I have also included in Appendix D some further brief reflections on metaphors and issue framing.

4. Real-World Issue Framing and Its Use of Metaphor Refute Original Meaning

It is never the thing but the version of the thing . . .
Wallace Stevens¹³⁵

Of course, flexibility of issue framing creates problems for original meaning similar to problems raised by the flexibility of reference framing.¹³⁶ As discussed in Sections III(A)(1) and III(B)(1) above, framing occurs at the issue level as well as the reference level. Because reasonable people can disagree on framing at the issue level, terms simply cannot have a finite original meaning defined by the average, reasonable person.

For example, even where two people agree on the reference of North Carolina (as when they agree that North Carolina includes only land within its present boundaries), the same two persons could reasonably disagree about the issues properly included in a discussion of North Carolina. Since, for example, the Lost Colony of Roanoke Island was considered part of Virginia in colonial times,¹³⁷ should it be told as a part of Virginia, and not North Carolina, history? As a North Carolinian, I naturally prefer a North Carolina narrative while a native Virginian may not. Furthermore, even if our two persons agree that the Lost Colony is part of North Carolina history, they could still reasonably use radically different metaphors in framing issues raised by the Lost Colony. For example, one of our persons could frame the issues with metaphors of failed progress in the development of North America, but the other could use metaphors of failed continuing immoral exploitation of Native Americans at the time.

Similarly, as shown in Section III(B)(2) above, if the same two people agreed to discuss “the issue of the woman on the telephone last night,” they could have radically different issue frames depending upon the characterization of the woman they choose. No appeals to dictionaries, contexts, or reasonable person standards can resolve any of these

135. STEVENS, *supra* note 1, at 292.

136. See *supra* Section II.C.1.

137. HAMILTON MCMILLAN, SIR WALTER RALEIGH’S LOST COLONY: AN HISTORICAL SKETCH OF THE ATTEMPTS OF SIR WALTER RALEIGH TO ESTABLISH A COLONY IN VIRGINIA, 11 (1888) available at <https://digital.lib.ecu.edu/13413#details>.

differences because, quite simply, reasonable people do differ on the appropriate issue frames.

Similarly, in legal texts, issue framing delivers multiple blows to original meaning. First, reasonable people from the time of the text could have differed as to the issues raised by the text. As we have seen,¹³⁸ nature simply does not give us neutral issue frames any more than it gives us neutral reference frames. Second, again, even if contemporaneous reasonable people agreed on the issues raised by the text, they might have viewed these issues through radically different metaphorical or narrative lenses. *Hamdi* is a good example of such competing metaphors and narratives.¹³⁹ Thus, it is simply not true that reasonable people would in any given case necessarily agree on one original set of issues raised by a text.

Were these not problems enough for original meaning at the issue level, the specific formulation of the doctrine itself creates further issue-framing problems. Again, original meaning, as discussed here, holds that: “in their full context, words mean what they conveyed to reasonable people at the time they were written—with the understanding that general terms may embrace later technological innovations.”¹⁴⁰ Of course, the opening phrase “in their full context” removes any doubt of finite interpretive choice when reading law or documents since “reasonable people” of any era could always disagree about the meaning of “full context.” (The problems with the arbitrary exclusion of “technological innovations,” are discussed in Section IV(B)(4)).

For example, Abraham Lincoln read the Declaration of Independence’s provision that “all men are created equal” to include blacks. He believed the signers included “the right, so that the *enforcement* of it [with respect to blacks] might follow as fast as circumstances should permit.”¹⁴¹ Senator Douglas disagreed, reading “men” to mean only white men.¹⁴² To a reasonable person at the time the Declaration was written, whose reading of the words “in their full context” was more accurate? Lincoln saw a broader evolutionary context while Douglas did not. Since Lincoln and Douglas (both presumably reasonable people) could not agree

138. See *supra* Sections II.B & III.B.

139. See Edwards, *supra* note 125.

140. SCALIA & GARNER, *supra* note 65, at 16.

141. ABRAHAM LINCOLN, SPEECHES AND WRITINGS 1832–58, 398 (Library of America 1989).

142. *Id.* at 399.

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on what the context meant at the time, how can we expect to do better than these icons of history?

C. ANALYSIS IN MORE DEPTH

Reason is available but it is pliable in any direction.
Pascal¹⁴³

1. Common Analysis Errors

Errors in legal analysis can of course involve both failing to perform the required parts of an analysis and performing all required parts of an analysis but making a mistake in doing so.¹⁴⁴ Both types of error underscore the need to understand the basic forms of meaning and thought and the roles of metaphor and narrative explored in this article. Understanding the levels of thought, for example, increases the chance that one will not forget the importance of both reference and issue examination in legal analysis, as well as the importance of performing the actual analysis.

To give an example of an incomplete analysis easily avoidable by a grasp of basic forms of thought, imagine a law student assigned to write a memorandum about whether a particular person is an independent contractor or an employee. The student carefully reads the subject agreement, researches and finds a case with a similar agreement, carefully reads the case (including the entire operative agreement which happens to be set out in the case), notices that both operative agreements are identical in form, and therefore concludes that this person is likely an independent contractor because the case found the same.

Of course, this is not sufficient legal analysis. To perform such an analysis, the student must remember that thought begins at the reference level. This should signal to her that she should try to identify all the relevant things in play. Such things include not just evaluating the forms of the agreements but also evaluating actual treatment of the worker in the judicial opinion and the worker she is evaluating. If she does this, she might note, for example, that both agreements do not provide for health insurance, that no such coverage was provided for the worker in the judicial opinion, but that such coverage is in fact provided for the worker she is

143. PASCAL, *supra* note 17, at 112.

144. Analysis also of course requires the metaphorical skills and knowledge addressed in Section III.B and Appendices C and D.

evaluating. This should then cause her to question whether this presents an issue in her problem. As she examines the applicable rules, her rule examination will also likely be more thorough. She might therefore be more likely to discover, for example, that provision of health insurance benefits is a factor that could indicate employee status and thus distinguish her result from that of the judicial opinion.¹⁴⁵

Another common failure to perform is failure to communicate performance. Students may perform the above analysis perfectly and still err in their assignment by not adequately communicating their performance steps. Unfortunately, it is too easy to assume that others can follow one's train of thought if one just sets out the applicable law, one's facts, the facts of the case (which the reader on his own should see are similar or dissimilar), the holding of the case, and the seemingly obvious result that the student believes should therefore follow.

Fortunately, understanding the need to set out all basic levels of thought can help a student avoid this common communication error. In other words, it can help the student to remember to communicate all the relevant facts of both the judicial opinion and her own problem (not just the form of the agreements), the applicable governing law, how this law was applied to the facts in the case, and all other relevant aspects of how the case is otherwise like and unlike the student's problem.¹⁴⁶

In addition to nonperformance possibilities, one can perform all of the requisite steps of analysis but err in the process. Such performance errors can include: committing fallacies of induction and deduction; chasing red herrings; and simply misunderstanding the relevant facts, issues, and law when performing the analysis.¹⁴⁷

In any event, understanding basic forms of thought helps one speak more precisely. For example, such an understanding helps one distinguish between equivocation of reference or equivocation of rule (that is, using the same term for different things at issue or using the same term for different

145. See, e.g., *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 (1989) (setting forth a non-exhaustive list of factors to weigh in determining such status; “provision of employee benefits” is one such factor).

146. See e.g. COUGHLIN ET AL., *supra* note 53, at 129–49.

147. See e.g. LANHAM, *supra* note 39, at 77–78 (listing formal and informal fallacies); NEUMANN & CONRAD, *supra* note 31, at 30–33 (addressing the “[i]nterdependence [a]mong [f]acts, [i]ssues, and [r]ules.”).

points of law).¹⁴⁸ It also helps one remember the roles of framing, metaphor, categorization, and narrative, when attacking “complete” analyses of others.¹⁴⁹

2. Real-World Analysis Refutes Original Meaning

The knower is an actor . . . [who] registers the truth which he helps to create.

*William James*¹⁵⁰

Reckon right, and February hath one and thirty days.

*George Herbert's Proverbs*¹⁵¹

The flexibility of reference and issue framing¹⁵² results in a flexibility of analysis that cannot be resolved simply by appealing to dictionaries or to a reasonable person standard. If there are no pre-framed references to pre-framed issues, there is no pre-determined way to assure that we should perform any given form of analysis as opposed to another. If, for example, Lincoln and Douglas differed on the meaning of “full context” for their slavery debate,¹⁵³ then they could not even perform the same slavery analysis, much less agree that there is an impartial analysis based on dictionaries or on what reasonable people of the relevant era might believe. Neither approach can crank out an impartial answer.

In fact, the real world can belie original meaning in another way. Not only can reasonable people dispute frames and even make errors, sometimes they simply cannot avoid making errors. A fascinating example of this is the Müller-Lyer illusion where one cannot avoid seeing one of two equal lines as larger than the other.¹⁵⁴ Reasonable people of any era will analyze the lines and conclude they are unequal, but they will be wrong. When presented with a measuring stick, reasonable people will accept its correction and the notion that they cannot help but make errors here. Therefore, reasonable people will concede that apparent original meaning can be wrong and may require reference to other measures of meaning. This also of course applies to reasonable people who draw two

148. Equivocation is the “deliberate confusion of two or more meanings of a word.” LANHAM, *supra* note 39, at 77.

149. See *supra* Sections III.A–B.

150. PUTNAM, *supra* note 83, at 17 (quoting James).

151. HERBERT, *supra* note 62, at 264.

152. See *supra* Sections III.A–B.

153. See *supra* Section III.B.4.

154. KAHNEMAN, *supra* note 21, at 26–27.

such lines with the express belief that they are of unequal length (though, as a ruler will show, they are not). Is the original meaning here two equal or two unequal lines? I would enjoy hearing Justice Scalia's answer to this question.¹⁵⁵

D. CONCLUSION IN MORE DEPTH

1. Conclusions, Categories, and Hedging

Provost: But what likelihood is in that?

Duke: Not a resemblance, but a certainty. . . .

Shakespeare¹⁵⁶

Since conclusions are conceptual (such as the conclusion that a certain trace of ink is a line, a geometrical concept), and since as discussed in Section III(B)(1) above we picture concepts as containers of things, we also treat conclusions as containers of things. As containers, conclusions therefore raise issues of fit and strength. How well does an examined part of experience fit within our proposed conclusion? How likely is the conclusion to hold up when carrying that examined experience? Just as we need to know whether the content of a box is likely to spill out or if the box is likely to break under the weight of its contents, we need to know the same about our conclusions. Is the fit good? Is the container sturdy?

For predictive purposes we thus need to grade the fit and strength of conclusions. In non-persuasive situations outside the law, we often use such linguistic "hedges" as "very, pretty, kind of, barely," likely, unlikely, and so on.¹⁵⁷ Similarly, in non-persuasive legal analysis such as objective classroom discussions or objective memos, conclusions must thus always be probable ones with the degree of probability clearly indicated; no one can predict how a court will rule on any issue and a competent attorney

155. Justice Scalia might object that lines are not words and line examples are thus red herrings. Such an objection, however, would miss the point. A word and a drawn line are both signs pointing to something beyond themselves. For example, Peirce's standard definition of a sign is "something which stands to somebody for something in some respect or capacity." PEIRCE, *supra* note 13, at § 2.228. For a concise table of various conceptions of the basic structure of signs, see NÖTH *supra*, note 89, at 88. Words can serve as symbols that arbitrarily signify (such as "red" for the color red) while drawn lines can be iconic signs signifying the linear geometric notion that they imitate. See PEIRCE, *supra* note 13, at §§ 1-369, 1-372 (discussing the distinction between basic types of signs).

156. SHAKESPEARE, MEASURE FOR MEASURE, in THE COMPLETE PELICAN SHAKESPEARE, *supra* note 25, act 4, sc. 2, lines 183-84.

157. See METAPHORS WE LIVE BY, *supra* note 24, at 123-24 (on "hedging" of metaphors).

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should never attempt to do so.¹⁵⁸ (However, in persuasive analyses such as persuasive arguments and briefs, outright conclusions can be, and generally are, appropriate since the parties are acting in advocate roles.¹⁵⁹).

2. Real-World Conclusions Refute Original Meaning

*Both read the Bible day & night,
But thou read'st black where I read white.*

William Blake¹⁶⁰

Since framing of both reference and issues are not fixed or objectively given, and since analysis involves application of an infinite number of possible consistent and inconsistent metaphors and concepts,¹⁶¹ purely deductive, self-generated, merely cranked legal conclusions simply do not exist. The flexibility involved in framing references, issues, and the possibility of applying an infinite number of consistent and inconsistent metaphors and concepts in legal analysis belies any notion that conclusions of original meaning (or other formalist conclusions) can flow simply from consideration of the original meaning of words in context (whatever the term context means).

IV. EVALUATING THE VARIOUS PLANES OF MEANING

A. PRAGMATISM AND MEANING

I had rather ride on an ass that carries me than a horse that throws me.

George Herbert's Proverbs¹⁶²

158. In legal writing, such probability statements can include such words or phrases as: “will very likely,” “will very likely not,” “will likely,” “will likely not,” and “might” among others. See COUGHLIN ET AL., *supra* note 53, at 226. As a concrete example, I once personally witnessed a case where the defendants were being sued for breach of a restrictive covenant contained in a franchise agreement. Under the law of the state provided by the contract’s choice of law provision, the covenant was unenforceable on its face. Additionally, the franchisor had litigated the same issues at least once before in another state and had lost for this very reason. Notwithstanding all this, a very good judge ruled against the defendants for reasons I still cannot understand. Despite the apparently-clear law as further demonstrated by at least one prior case, defendants’ counsel would have been in a difficult position had she initially told her clients that the court would find the restrictive covenant unenforceable (though she should have and did tell the court that the covenant was unenforceable).

159. I would avoid, however, telling a court that it “must” do anything since it is the role of judges and not the parties to issue orders.

160. WILLIAM BLAKE, POEMS AND PROPHECIES 356 (Everyman’s Library 1991).

161. *See supra* Sections III.A–B.

162. HERBERT, *supra* note 62, at 264.

Once we have constructed reference, issue, analysis, and conclusion, levels of meaning and thought in a given situation, how then do we evaluate what we have done? How do we know whether our efforts are good or bad, right or wrong, or true or false? As we have seen, mere appeals to logic or reasonable persons cannot suffice because of the flexibility involved in framing such appeals from the potentially endless metaphorical and categorical choices we can make.¹⁶³ To seriously answer these questions, we must understand how usage of categories and metaphors works and how it fails.

Lawyers (and all other thinkers) use categories and other metaphors to organize experiences in ways that hopefully make such experiences, among other things, easier and more predictable to handle.¹⁶⁴ By categorizing experiences together, lawyers do not have to reanalyze every experience in a void but can handle somewhat similar experiences in ways they have seen already work. For example, if a lawyer has decided that a particular associate is competent to prepare a will, he can act accordingly without further analysis when he needs a will prepared in the future. Of course, the lawyer's categorization of such associate (as well as the lawyer's resulting judgment to use such associate accordingly) must actually work in practice if the categorization is to be a good one. In other words, at a minimum good, categories must work "sufficiently well enough for [the user] to function."¹⁶⁵ What, however do we mean when we say that categories work?

B. FOUR CONSIDERATIONS OF WORKABILITY

1. *Predictability*

He that looks not before finds himself behind.

*George Herbert's Proverbs*¹⁶⁶

Good conclusions must not only be logically sound; they must also work in practice. Logic itself acknowledges this in the distinction between valid arguments (the conclusions logically follow from the premises) and

163. See *supra* Sections III.B.4.

164. See AMSTERDAM & BRUNER, *supra* note 24, at 21–23, 25–26.

165. PHILOSOPHY IN THE FLESH, *supra* note 107, at 21.

166. HERBERT, *supra* note 62, at 263.

sound arguments (the premises and conclusions are all true).¹⁶⁷ For example, the following argument is valid but not sound: If a day has twenty-four hours, then there is no difference between a lease and a fee simple interest in land. A day has twenty-four hours. Therefore, there is no difference between a lease and a fee simple interest in land.

As the difference between valid and sound arguments demonstrates, concepts and thoughts fail when they predict an experience that does not then occur. Again, for example, if a lawyer considers his associate to be competent in drafting wills and she fails when given such an assignment, his initial concept of her was wrong because the predicted outcome did not occur. That the lawyer's concept of the associate was wrong is apparent on its face and admits little if any controversy. What would be controversial, however, would be to equate workability with mere predictability. As discussed below, workability in law and other disciplines involves more than mere prediction.¹⁶⁸

2. *Respecting Precedent and the Past*

The command of custom is great.

*George Herbert's Proverbs*¹⁶⁹

Following precedent and respecting the past can promote fairness (treating similar cases equally), economy (not expending effort to solve problems already solved), and predictability (permitting reliance on past decisions, practices, and views when contemplating future action).¹⁷⁰

Precedent and respect for the past thus play a critical role in legal analysis¹⁷¹ though these same considerations apply to other analyses as well. For example, if a parent limits advances on one twin child's allowances to a certain dollar amount based upon affordability calculations, why should that parent duplicate the same affordability calculations when the other twin asks for an allowance advance? To promote family harmony, why would the parent not want predictable answers to future requests for

167. LANHAM, *supra* note 39, at 168–69.

168. See PUTNAM, *supra* note 83, at 9–10 (on the “different types of ‘expediency’”).

169. HERBERT, *supra* note 62, at 274.

170. See DAVID M. WALKER, THE OXFORD COMPANION TO LAW 1174 (1980) (“The main justifications for [stare decisis] are that it enables a judge to utilize the wisdom of his predecessors, that it makes for uniformity of application of law to similar cases, and that it makes the law predictable.”) Following precedent can also promote simplicity and coherence in the senses discussed in Section IV.B.3–4, below. I reserve those considerations for those sections.

171. See HUHN, *supra* note 27, at 41–50 (discussing the importance of precedent and tradition).

advances from either twin? To promote family harmony and a sense of fairness, why would the parent not want to treat the twins in the same manner when such requests are made? Why would the parent not wish for his or her past decisions to be respected? It is thus easy to see why a rational and fair parent would naturally default to precedent in these situations as well. Good precedent is thus compelling.

However, following precedent in some cases can thwart all of these goals. It can: (1) generate unfair analyses by perpetuating mistakes, (2) thwart judicial or mental economy by constantly requiring reconsideration or patches where the precedent simply does not work well in practice, and (3) thwart predictability by the cloud of doubt that necessarily hangs over questionable decisions. When this happens, reasons that support following precedent in general require us to reconsider the value of specific precedent that, for example, perpetuates mistakes, requires constant patching, and affects predictability by the very question of how long such questionable precedent may survive.¹⁷² The issue of patching reappears in the discussion of simplicity in Section IV(B)(3) below.

3. Simplicity

*Fear not my truth. The moral of my wit
Is “plain and true;” there’s all the reach of it.
Shakespeare¹⁷³*

*I cannot bring a world quite round,
Although I patch it as I can.
Wallace Stevens¹⁷⁴*

From a practical point of view, the simplest of otherwise-equally effective solutions is always preferable.¹⁷⁵ First, a simpler solution by definition should generally be easier to use. Second, adding layers of complexity also increases the chance that things may go wrong in the future.¹⁷⁶ To take a concrete example, adding more moving parts to a

172. Again, following precedent can also promote simplicity and coherence in the senses discussed in Sections IV.B.3–4. Reconsideration of precedent should involve these additional considerations.

173. SHAKESPEARE, TROILUS AND CRESSIDA, in THE COMPLETE PELICAN SHAKESPEARE, *supra* note 25, act 4, sc. 4, lines 106–07.

174. STEVENS, *supra* note 1, at 135.

175. See generally RONDO KEELE, OCKHAM EXPLAINED: FROM RAZOR TO REBELLION (2010).

176. *Id.*

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machine adds more ways for the machine to break. Thus, if a machine with one part works just as well as a machine with three parts, the practical choice is the machine with one part. Analysis of workability must therefore always involve simplicity analysis.

Interesting subsets of simplicity analysis are patching and rigging. When a machine that we already have breaks, should we patch the break? Or if a machine that we already have proves ineffective, should we add patches or rigging to make it work? In either case, it might truly be simpler to patch or rig the machine than to throw the machine out and start over with a new machine, especially if the new machine requires new design. The revolutions that we have seen in science from Aristotle to Copernicus to Newton to Einstein give us non-legal examples of how long it has seemed sensible to patch and rig failing models.¹⁷⁷

In the legal sphere, we also struggle with how long various notions can be rigged or patched before they must be abandoned. For example, if prohibiting same-sex marriage is a violation of equal protection, is it sufficient to patch or rig the prohibition problem by recognizing equivalent civil unions and continuing to prohibit same-sex unions? This is not really a difficult question to answer from a simplicity analysis standpoint. This is not like the case of the broken automobile where we are faced with making expensive patches or incurring the costs of losing and replacing the car with a new one. Instead, here we are faced with either opening a working car up to others or requiring them to ride in a separate but equal new vehicle that we must now acquire. To ask which approach is simpler really answers itself. The mere fact of adding a new car alongside another already working car is on its face more complex. Furthermore, we now have to worry about maintaining two cars instead of one and we also have yet to know what hidden defects or problems the new car may contain. The one-car solution on these facts is simpler and supports extending the concept of marriage to include same-sex parties.

4. Coherence in the Broadest Sense

*Do not embrace me till each circumstance
Of place, time, fortune do cohere
Shakespeare¹⁷⁸*

177. See generally THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (3d ed. 1996) (discussing patching and replacing various scientific models over time).

178. SHAKESPEARE, TWELFTH NIGHT, in THE COMPLETE PELICAN SHAKESPEARE, *supra* note 25, act 5, sc. 1, lines 246–47.

a. General Points

If good, workable concepts effectively manage experience, such concepts must work or cohere with every aspect of experience. William James succinctly defines such coherence as “what fits every part of life best and combines with the collectivity of experience’s demands, *nothing being omitted.*”¹⁷⁹

Taking experience in the broadest sense noted above,¹⁸⁰ experience includes not only objective experience (such as which direction a weathervane is pointing). It also includes, without limitation, values, intentions, purposes, and community standards (including evolving community standards). Thus, though stealing a car may at first seem the fastest way to solve a transportation problem, it is upon analysis an unworkable solution because it does not cohere with morality, law, and community standards.

b. Incoherence of Original Meaning

Again, I take original meaning to be the doctrine that: “in their full context, words mean what they conveyed to reasonable people at the time they were written—with the understanding that general terms may embrace later technological innovations.”¹⁸¹

Even a person who knows absolutely nothing about the law has all the tools needed to reject the coherence of this doctrine—if analysis can even proceed that far. The latter caveat that “general terms may embrace later technological innovations” either guts original meaning or underscores its incoherence. As we saw in Section III(A)(2) above, unless we give preferential treatment to the merchant or industrialist, the technology exception swallows the rule by applying to all phenomena including written and spoken words.

If we, however, for some reason attempt to give preferential treatment to the merchant and industrialist and use “technology” only to provide merchants and industrialists with legal flexibility, principles of coherence would still restrain our hand. Coherence demands addressing all aspects of experience, not merely an arbitrarily plucked subset such as merchant or

179. JAMES, *supra* note 9, at 44 (emphasis added).

180. See *supra* Section II.A.

181. SCALIA & GARNER, *supra* note 65, at 16.

industrial innovations. By expressly rejecting such full coherence, the doctrine of original meaning would, on its face, be incoherent with the world in which we live.

A perhaps subtler incoherence would also exist. Each time we apply a law, we further fill out its meaning. If, for example, a court resolves a dispute about whether electric current is a good in a certain context for purposes of the Uniform Commercial Code,¹⁸² the definition of goods itself has changed in that jurisdiction through the clarification. Since water is also a utility, in that jurisdiction it may now be more likely that provision of water services will also be seen as a provision of goods. Of course, piping water is hardly a new technological notion; yet, original meaning could now allow something no one had ever considered to be a good to become a good. This evolution is driven by the very nature of precedent as “essentially reasoning by analogy,”¹⁸³ thereby making the deep freeze of original meaning an impossibility in our system of justice. Looking for analogies for any X by definition looks beyond any purported original meaning of X.¹⁸⁴

In fact, the appeal to reasonable people of the past is, to put it mildly, a strange standard for a doctrine of frozen meanings. What reasonable person of any era has not observed that meanings and values change over time as moral sentiments become more refined? For example, reasonable people from the eighteenth and nineteenth centuries undoubtedly noticed the general exclusion of drawing and quartering and burning at the stake from practiced forms of capital punishment.¹⁸⁵ “Cruelty” was thus a term whose meaning they undoubtedly understood could change. Why should any other terms be different? Why cannot water, for example, come to be seen as a good if people see parallels between its provision and the provision of widgets? How can a reasonable person refuse to acknowledge that the usage of our terms can and should change as we learn more about the world

182. Section 2-105 (1) defines “goods” to include “all things . . . which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities . . . and things in action.” U.C.C. §2-105(1) (2014). Is electricity, for example, a “good” under this definition? See *Helvey v. Wabash Cnty. REMC*, 278 N.E.2d 608, 610 (Ind. Ct. App. 1972) (answering in the affirmative).

183. HUHN, *supra* note 27, at 42.

184. This follows from the notion that an analogy is a “[s]imilarity in some respects between things that are otherwise dissimilar” and includes “[a] comparison based on such similarity.” AMERICAN HERITAGE COLLEGE DICTIONARY 50 (3rd ed.).

185. For an overview of barbarous prior punishments from a nineteenth century perspective, *see generally* WILLIAM ANDREWS, OLD TIME PUNISHMENTS (1890) available at <https://archive.org/details/oldtimepunishmen00andruoft>.

and about ourselves? Unless by a reasonable person, original meaning actually means unreasonable person, how can imputing frozen meanings to past generations avoid insulting the basic intelligence of those who came before us?

V. CONCLUSION

As we have seen, meaning and thought have at least five basic planes or levels: references, issues, rules, application of rules, and conclusions. A good understanding of each of these basic levels of meaning and thought (and resulting basic forms of thought) greatly refines one's reasoning, communication, and persuasion.

A good understanding of reference focuses one on the real objects of discourse, can increase the likelihood of ascertaining all the relevant facts, and can avoid parties merely talking past one another. A good understanding of issues focuses discourse by setting its permissible parameters and lessens the chances of losing a debate from the outset by avoiding unfavorable issue parameters. A firm understanding of how rule framing and application drive meaning focuses one on the requisite analytical steps and the awareness to communicate them well. A good understanding of the conclusion level of meaning focuses on reasonable probability assessments and their clear communication where hedging an analysis both prevents undue surprise and tempers hubris.

Additionally, a good understanding of how framing, metaphors, categories, and narratives are all inextricably woven into these levels of real-world meaning greatly refines one's reasoning, communication, and persuasion. A good understanding of framing avoids the error of simply accepting others' frames, recognizes the need to frame in ways that benefit one's case, and highlights the need to assure that all frames are sufficiently communicated to all the parties to permit true joint discussion. Similarly, a good understanding of how metaphors, categories, and narratives work, both separately and together, avoids the error of simply accepting others' metaphors, categories, and narratives, helps one construct metaphors, categories, and narratives that benefit a case, and generates awareness of what operative metaphors, categories, and narratives highlight and conceal so that one can proceed accordingly and avoid surprise. In addressing such framing, metaphors, categories, and narratives, a good understanding of the pragmatics of real-world meaning and thought also greatly refines one's reasoning, communication, and persuasion. A good understanding of the roles of predictability, precedent, simplicity, and coherence, in the broadest

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sense not only helps one evaluate the real-world sustainability of one's own positions. It also helps one evaluate the sustainability of others' positions.

Finally, understanding flaws in such formalisms as original meaning provides us with cautionary negative examples of how meaning and thought do not, and cannot, work together. If we find ourselves believing that we can crank out impartial legal results by simply recognizing that "in their full context, words mean what they conveyed to reasonable people at the time they were written—with the understanding that general terms may embrace later technological innovations,"¹⁸⁶ we should now be able to correct our course. Reaching for the illusory, impartial crank should remind us of the complexities of choice, levels, frames, metaphors, and categories that make up real-world meaning and thought.

186. SCALIA & GARNER, *supra* note 65, at 16.

VI. APPENDIX A: A BRIEF OVERVIEW OF SOME BASIC FORMS OF THOUGHT

Aside from the obvious corrective advantages, [form] frees one from the fetters of one's ego.

Auden¹⁸⁷

The theme looks for the right [form]; the [form] looks for the right theme.

Auden¹⁸⁸

1. A Basic Form of Thought

RIRAC (Reference, Issue, Analysis, Conclusion)

2. Some Variations on RIRAC

IRAC (Issue, Rule, Application, Conclusion)

CREAC (Conclusion, Rule, Explanation, Application, Conclusion)

Professorial ICRAEC (Issue, Conclusion, Rule, Explanation, Application, Conclusion)

Professorial IREAC (Issue, Rule, Explanation, Application, Conclusion)

187. R. VICTORIA ARANA, W.H. AUDEN'S POETRY: MYTHOS, THEORY, AND PRACTICE 156 (Cambria Press 2009). I have substituted "form" here for "formal verse" in the original.

188. WRITERS AT WORK: THE PARIS REVIEW INTERVIEWS, FOURTH SERIES 254 (George Plimpton, ed., Viking Press 1976).

VII. APPENDIX B: SOME OF JUSTICE SCALIA'S VARYING DEFINITIONS OF ORIGINAL MEANING

Ironically faced with competing, inconsistent notions of original meaning in a book that seeks “to narrow the range of acceptable judicial decision-making and acceptable argumentation,”¹⁸⁹ I selected the definition set out in the main body of this article for the reasons previously indicated.¹⁹⁰ Again, under that definition, “original meaning” is the doctrine that: “in their full context, words mean what they conveyed to reasonable people at the time they were written—with the understanding that general terms may embrace later technological innovations.”¹⁹¹

In his most recent book, Justice Scalia also defines his approach thusly:

[T]he doctrine that words are to be given the meaning they had when they were adopted; specif., the canon that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect.¹⁹²

This formulation has peculiar problems over and beyond those I explored with the chosen definition of original meaning. First, there is no express mention of context as in the other definition though the element of context is presumably implied in light of the other definition (this omission is a good example itself of the importance of context in interpretation). Second, what does “fully informed” mean? There is no objective, impartial definition of this qualifier for each situation in which it might apply. Third, “at the time when the text first took effect” contradicts the adoption language at the beginning of the definition. Which is it? This is not just an academic question since statutes, for example, can have delayed effective dates.¹⁹³

Consider the following hypothetical: (1) a legislature is concerned about the spread of an invasive foreign plant species called “Scalia grass;” (2) it therefore passes a statute called the “Scalia Grass Control Act”

189. SCALIA & GARNER, *supra* note 65, at xxviii.

190. See *supra* Section II.H.2.

191. SCALIA & GARNER, *supra* note 65, at 16.

192. *Id.* at 435.

193. See NORMAN SINGER & J.D. SHAMBIE SINGER, 2 SUTHERLAND STATUTORY CONSTRUCTION § 33:7 (7th ed. 2009) (“The power to enact laws includes the power to fix a future effective date,” explaining circumstances in which statutes may have delayed effective dates.)

prohibiting “the planting of non-native grasses” (using the broader phrase to pick up other invasive species in addition to the species of primary concern); (3) to give fair notice of the new restriction, it makes the statute effective one year later; (4) during that one year period scientists determine that “Scalia grass” is not a grass but a fern and this receives wide public notice; and (5) ordinary, reasonable people immediately thereafter cease to consider “Scalia grass” a grass. Under Justice Scalia’s alternative definition, “Scalia grass” might both be prohibited by the statute since it was considered a grass when the statute was passed yet not be prohibited by the statute since the understood meaning of the term had changed by the statute’s effective date. Alternatively, “Scalia grass” might never have been prohibited by the statute at all if one considers it reasonable to look at how the term was used for some seemingly reasonable period both before and after the statute was passed.¹⁹⁴ Of course, no such scenario makes sense. We either have a contradiction or a statute entitled the “Scalia Grass Control Act,” passed for the clear purpose of controlling Scalia grass, yet not applying to Scalia grass.

In yet another definition of original meaning in his most recent book, Justice Scalia no longer speaks of a “fully informed observer” but of an understanding “reflecting what an informed, reasonable member of the community would have understood at the time of adoption according to then-prevailing linguistic meanings and interpretive principles.”¹⁹⁵ This clarifies the adoption versus effective date ambiguity but introduces other problems. “Informed,” “reasonable,” “member,” and “community” have no given or natural definitions. Were, for example, literate slaves who secretly read newspapers informed members of the pre-Civil war “community?” “Then-prevailing” also of course invites debate and begs the very question that there ever were such principles. Since good thinkers have never agreed on how language works, how could there be any such “then-prevailing” “interpretive principles?”¹⁹⁶ This question remains even if we restrict ourselves to British empiricism since Hobbes, Locke, and Berkeley, for example, had differing views about how language works.¹⁹⁷

Finally, Justice Scalia claims that original meaning “will narrow the range of acceptable judicial decision-making and acceptable argumentation.

194. SCALIA & GARNER, *supra* note 65, at 33.

195. SCALIA & GARNER, *supra* note 65, at 435.

196. See, e.g., NÖTH, *supra* note 89, at 14–38 (Indiana University Press, 1995) (discussing the competing notions of how language works from ancient to modern times).

197. SCALIA & GARNER, *supra* note 65, at 23–25.

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It will curb—even reverse—the tendency of judges to imbue authoritative texts with their own policy preferences.”¹⁹⁸ This is simply not true. To the extent original meaning disregards other relevant facts and materials beyond the text itself, original meaning gives the judge a freer interpretive hand. This is not a difficult point to grasp. Consider again the drawing from earlier:



If we are restricted to the drawing itself when we make our interpretation, we might conclude that it is a drawing of anything from a male mannequin to a bald woman laid out in men’s clothes. However, if we must also consider the artist’s statement that she drew a picture of her sleeping uncle, our reasonable interpretive discretion is greatly reduced.

Similarly, an ordinance might provide that “no wheeled devices are allowed on the sidewalks.” If we are not permitted to look at the floor debates, for example, for the ordinance we have much more flexibility in interpretation. We can pull out our dictionaries and come up with countless interpretations. We might, for example, say that baby carriages are allowed if they do not have axles since the dictionary we happen to use defines “wheel” as “[a] solid disk or rigid circular frame designed to turn around a central axle.”¹⁹⁹ Or, using that same definition, we might say that baby carriages are allowed so long as they do not have solid or rigid wheels. However, since the same dictionary also defines wheel as something resembling the foregoing definition “in appearance or movement,”²⁰⁰ we might conclude that baby carriages are not allowed regardless of the type of wheels; having the shape or function of a wheel would be enough to ban baby carriages.

198. *Id.* at xxviii.

199. THE AMERICAN HERITAGE COLLEGE DICTIONARY 1559 (4th ed. 2002).

200. *Id.*

We have, in other words, vast interpretive latitude here. However, if we must also consider the ordinance debates where every councilperson made it clear that the purpose of the ordinance was primarily to keep bicycles off the sidewalks so that people could safely use them for baby carriages, our interpretive latitude is greatly diminished. Not only is our interpretive latitude diminished, we avoid making a mistake in our interpretation of the ordinance. As Justice Aharon Barak of the Supreme Court of Israel has deftly stated:

[The] “minimalist” judge “who holds that the purpose of the statute may be learned only from its language” has more discretion than the judge “who will seek guidance from every reliable source.” . . . A method of statutory interpretation that is deliberately uninformed, and hence unconstrained, may produce a result that is consistent with a court’s own views of how things should be, but it may also defeat the very purpose for which a provision was enacted.²⁰¹

201. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 133 (2001); POPKIN, *supra* note 77, at 212.

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VIII. APPENDIX C: A BRIEF OVERVIEW OF SOME COMMON CONCEPTUAL METAPHORS

A. METAPHORS BASED UPON THE FIVE SENSES²⁰²

Metaphor: “Thinking Is Perceiving”²⁰³

1. Vision

Metaphor: “Knowing Is Seeing”²⁰⁴

Example: “I see what you mean.”²⁰⁵

Metaphor: “Being Ignorant Is Being Unable To See”²⁰⁶

Example: Being “in the dark.”²⁰⁷

Metaphor: “Paying Attention Is Looking At”²⁰⁸

Example: “Pointing something out.”²⁰⁹ Keep your eye on the ball.

Metaphor: “Deception Is Purposefully Impeding Vision”²¹⁰

Examples: “cover-up,” “pull the wool over their eyes”²¹¹

Metaphor: “Thinking Is Linguistic Activity”²¹²

Example: “I can read her mind.”²¹³

2. Hearing

Metaphor: “Being Receptive Is Hearing”²¹⁴

202. The headings and arrangement here are mine and I do not mean to suggest that Lakoff and Johnson would necessarily agree with the form of the presentation. For example, they tie primary metaphors into a specific “sensorimotor domain.” *See, e.g.*, PHILOSOPHY IN THE FLESH, *supra* note 108, at 50–54.

203. PHILOSOPHY IN THE FLESH, *supra* note 108, at 238.

204. *Id.* at 53.

205. *Id.* at 54.

206. *Id.* at 55.

207. *Id.* at 239.

208. *Id.* at 238.

209. *Id.* at 239.

210. *Id.* at 238.

211. *Id.* at 238–39.

212. *Id.* at 244.

213. *Id.*

Example: I'm all ears.

Metaphor: "Taking Seriously Is Listening"²¹⁵

Example: "I always listen to what my father tells me."²¹⁶

Metaphor: "Thinking Is Linguistic Activity."²¹⁷

Example: I hear what you say.

3. Touch

Metaphor: "Emotional Reaction Is Feeling"²¹⁸

Example: I feel bad for him.

Metaphor: "Affection Is Warmth"²¹⁹

Example: "They greeted me warmly"²²⁰

Metaphor: "Emotional Effect Is Physical Contact"²²¹

Example: "I was struck by his sincerity"²²²

Metaphor: "Seeing Is Touching"²²³

Example: "She picked my face out of the crowd"²²⁴

4. Taste

Metaphor: "Ideas Are Food"²²⁵

Examples: "an appetite for learning," "fresh ideas," "spoon-feed"²²⁶

Metaphor: "Considering Is Chewing"²²⁷

214. *Id.* at 238.

215. *Id.*

216. *Id.* at 239.

217. *Id.* at 244.

218. *Id.* at 238.

219. *Id.* at 50.

220. *Id.*

221. METAPHORS WE LIVE BY, *supra* note 24, at 50.

222. *Id.*

223. PHILOSOPHY IN THE FLESH, *supra* note 108, at 54.

224. *Id.*

225. *Id.* at 241.

226. *Id.* at 242.

227. *Id.* at 241.

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Example: Chewing on an idea²²⁸

Metaphor: Accepting Is Swallowing²²⁹

Example: A gullible person “swallows ideas whole”²³⁰

Metaphor: “Personal Preference Is Taste”²³¹

Example: “A sweet thought”²³²

Metaphor: Good Is Tasty

Example: A delicious idea

Metaphor: Bad Is Unpalatable

Example: “Rotten ideas”²³³

5. Smell

Metaphor: Bad Is Malodorous²³⁴

Example: “This movie stinks”²³⁵

Metaphor: Good Is Fragrant

Example: This movie is sweet

Metaphor: “Sensing Is Smelling”²³⁶

Example: “Something doesn’t smell quite right here”²³⁷

B. METAPHORS BASED UPON SPATIAL, MATERIAL, KINETIC AND OTHER EXPERIENCE

1. Spatial Experience

Metaphor: “Good Is Up”²³⁸

228. *Id.* at 242.

229. *Id.* at 241.

230. *Id.* at 243.

231. *Id.* at 238.

232. *Id.* at 240.

233. *Id.* at 242.

234. *Id.* at 50.

235. *Id.*

236. *Id.* at 238.

237. *Id.* at 240.

Example: "Things are looking up"²³⁹

Metaphor: "Virtue Is Up"²⁴⁰

Example: "She has high standards"²⁴¹

Metaphor: "Health And Life Are Up"²⁴²

Example: "He's at the peak of health," "Lazarus rose from the dead"²⁴³

Metaphor: "Conscious Is Up"²⁴⁴

Example: "He rises early in the morning"²⁴⁵

Metaphor: "Rational Is Up"²⁴⁶

Example: "high-level intellectual discussion"²⁴⁷

Metaphor: "Unknown Is Up"²⁴⁸

Example: "That's still up in the air"²⁴⁹

Metaphor: "Happy Is Up"²⁵⁰

Example: "I'm feeling up today"²⁵¹

Metaphor: "More Is Up"²⁵²

Example: "Prices are high"²⁵³

Metaphor: "Control Is Up"²⁵⁴

Example: "I'm on top of the situation"²⁵⁵

238. METAPHORS WE LIVE BY, *supra* note 24, at 16.

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.* at 15.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.* at 17.

247. *Id.*

248. *Id.* at 137.

249. *Id.*

250. PHILOSOPHY IN THE FLESH, *supra* note 108, at 50.

251. *Id.*

252. *Id.* at 51.

253. *Id.* at 50.

254. *Id.* at 53.

255. *Id.*

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Metaphor: "Self Control Is Being In One's Normal Location"²⁵⁶

Example: "I was beside myself," "He's out to lunch"²⁵⁷

Metaphor: "Self Control Is Having The Self Together"²⁵⁸

Example: "Pull yourself together."²⁵⁹

Metaphor: Self Control As Being On The Ground²⁶⁰

Example²⁶¹: "The ground fell out from under me," "head in the clouds"

Metaphor: "Important Is Big"²⁶²

Example: "Tomorrow is a big day"²⁶³

Metaphor: "Intimacy Is Closeness"²⁶⁴

Example²⁶⁵: "We've been close . . . but we're beginning to drift apart."

Metaphor: "Similarity Is Closeness"²⁶⁶

Example: "These colors . . . [are] close"²⁶⁷

Metaphor: "Closeness Is Strength Of Effect"²⁶⁸

Example: "Who are the men closest to Khomeini?"²⁶⁹

Metaphor: "Purposes are destinations"²⁷⁰

Example: "He'll ultimately be successful, but he isn't there yet."²⁷¹

Metaphor: "Means Are Paths"²⁷²

256. *Id.* at 274.

257. *Id.* at 274–75.

258. *Id.* at 276.

259. *Id.*

260. *Id.* at 275.

261. *Id.*

262. *Id.* at 50.

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.* at 51.

267. *Id.*

268. METAPHORS WE LIVE BY, *supra* note 24, at 128.

269. *Id.* at 129.

270. PHILOSOPHY IN THE FLESH, *supra* note 108, at 52.

271. *Id.* at 53.

272. *Id.* at 179.

Example: “However you want to go about it is fine with me”²⁷³

Metaphor: States Are Locations²⁷⁴

Example: “I’m close to being in a depression. . . ”²⁷⁵

Metaphor: “Argument Is A Journey”²⁷⁶

Example: “We have arrived at a disturbing conclusion.”²⁷⁷

2. Material Experience

Metaphor: The Mind Is A Container²⁷⁸

Example: “He has an empty head”

Metaphor: The Mind Is A Theatre²⁷⁹

Example: “I watched our ideas play out.”

Metaphor: “The Mind Is A Machine”²⁸⁰

Examples: “turning out ideas,” “mental breakdown”²⁸¹

Metaphor: “The Mind Is A Brittle Object”²⁸²

Example: “Her ego is very fragile,” “He cracked up”²⁸³

Metaphor: Ideas Are Inanimate Objects²⁸⁴

Example: Putting “the idea under a microscope”²⁸⁵

Metaphor: Ideas Are Animate Objects²⁸⁶

Examples: “a budding theory,” a theory still in its infancy²⁸⁷

273. *Id.* at 191.

274. *Id.* at 52.

275. *Id.*

276. METAPHORS WE LIVE BY, *supra* note 24, at 90.

277. *Id.*

278. PHILOSOPHY IN THE FLESH, *supra* note 108, at 338.

279. *Id.* at 339.

280. *Id.* at 247, 547.

281. *Id.* at 247.

282. METAPHORS WE LIVE BY, *supra* note 24, at 28.

283. *Id.*

284. PHILOSOPHY IN THE FLESH, *supra* note 108, at 240.

285. *Id.* at 241.

286. METAPHORS WE LIVE BY, *supra* note 24, at 47.

287. *Id.*

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Metaphor: Thought Is “Object Manipulation”²⁸⁸

Example: “Complex ideas can be crafted, fashioned, shaped . . .”²⁸⁹

Metaphor: “Life Is A Container”²⁹⁰

Example: “Life is empty for him”²⁹¹

Metaphor: The Self Is A “Container”²⁹²

Examples: “I was₂₉₃ beside myself,” Being “out of your mind/head/skull”

Metaphor: “Visual Fields Are Containers”²⁹⁴

Example: “That’s in the center of my field of vision”²⁹⁵

Metaphor: “Categories Are Containers”²⁹⁶

Example: “Are tomatoes in the fruit or vegetable category?”²⁹⁷

Metaphor: “Linguistic Expressions Are Containers”²⁹⁸

Example: “His words carry little meaning”²⁹⁹

Metaphor: “Argument Is A Container”³⁰⁰

Example: “That argument has holes in it.”³⁰¹

Metaphor: “Argument Is A Building”³⁰²

Example: “We’ve got the framework for a solid argument”³⁰³

Metaphor: “Memory Is A Storehouse”³⁰⁴

Example: “Teaching is putting ideas into the minds of students”³⁰⁵

288. PHILOSOPHY IN THE FLESH, *supra* note 108, at 546.

289. *Id.* at 240.

290. METAPHORS WE LIVE BY, *supra* note 24, at 51.

291. *Id.*

292. PHILOSOPHY IN THE FLESH, *supra* note 108, at 275.

293. *Id.*

294. METAPHORS WE LIVE BY, *supra* note 24, at 30.

295. *Id.*

296. PHILOSOPHY IN THE FLESH, *supra* note 108, at 51.

297. *Id.*

298. METAPHORS WE LIVE BY, *supra* note 24, at 10.

299. *Id.* at 11.

300. *Id.* at 92.

301. *Id.*

302. *Id.* at 98.

303. *Id.*

304. PHILOSOPHY IN THE FLESH, *supra* note 108, at 240.

Metaphor: “Remembering Is Retrieval (Or Recall)”³⁰⁶

Example: I can recall every detail of the event

Metaphor: “Organization Is Physical Structure”³⁰⁷

Example: “How do the pieces of this theory fit together?”³⁰⁸

Metaphor: “Understanding Is Grasping”³⁰⁹

Example: ability “to grasp transfinite numbers”³¹⁰

Metaphor: “Purposes Are Desired Objects”³¹¹

Example: “I saw an opportunity . . . and grabbed it”³¹²

Metaphor: “Difficulties Are Burdens”³¹³

Example: “She’s weighed down by responsibilities”³¹⁴

Metaphor: “More Of Form Is More Of Content”³¹⁵

Example: “He is very very very tall.”³¹⁶

Metaphor: “Vitality Is A Substance”³¹⁷

Example: “I’m drained,” “That took a lot out of me”³¹⁸

Metaphor: “Love Is A Patient”³¹⁹

Example: “This is a sick relationship”³²⁰

3. Kinetic Experience

Metaphor: “Thinking Is Moving”³²¹

305. *Id.*

306. *Id.*

307. *Id.* at 51.

308. *Id.*

309. *Id.* at 54.

310. *Id.*

311. *Id.* at 53.

312. *Id.*

313. *Id.* at 50.

314. *Id.*

315. METAPHORS WE LIVE BY, *supra* note 24, at 127.

316. *Id.*

317. *Id.* at 51.

318. *Id.*

319. *Id.* at 49.

320. *Id.*

321. PHILOSOPHY IN THE FLESH, *supra* note 108, at 236.

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Examples: “My mind wandered,”³²² “line of reasoning,” “flights of fancy”³²³

Metaphor: “Time Is Motion”³²⁴

Example: “Time flies”³²⁵

Metaphor: “Time Is Stationary And We Move Through It”³²⁶

Example: “As we go through the years , . . . ”³²⁷

Metaphor: “Change Is Motion”³²⁸

Example: “My car has gone from bad to worse lately”³²⁹

Metaphor: “Actions Are Self-propelled Movements”³³⁰

Example: “I’m moving right along on the project”³³¹

Metaphor: “Difficulties Are Impediments To Movement”³³²

Example: “We ran into a brick wall”³³³

Metaphor: Freedom To Act Is “Lack Of Impediment To Movement”³³⁴

Examples: “Break out of your daily routine”³³⁵

Metaphor: “Communication Is Sending”³³⁶

Examples: “Your reasons came through to us”³³⁷

4. Other Experience

Metaphor: “Thought Is Mathematical Calculation”³³⁸

322. *Id.*

323. *Id.* at 52.

324. *Id.*

325. METAPHORS WE LIVE BY, *supra* note 24, at 43.

326. *Id.*

327. PHILOSOPHY IN THE FLESH, *supra* note 108, at 52.

328. *Id.*

329. *Id.* at 187.

330. *Id.* at 52.

331. *Id.* at 202.

332. *Id.* at 189.

333. *Id.* at 188.

334. *Id.*

335. METAPHORS WE LIVE BY, *supra* note 24, at 10.

336. *Id.*

337. PHILOSOPHY IN THE FLESH, *supra* note 108, at 405.

Examples: "That figures," "That just doesn't add up"³³⁸

Metaphor: "Explanation Is An Accounting"³³⁹

Example: "Give me an account of why that happened," "bottom line?"³⁴⁰

Metaphor: "Causes Are Physical Forces"³⁴¹

Example: "They pushed the bill through Congress."³⁴²

Metaphor: "Argument Is War"³⁴³

Example: "He shot down all of my arguments"³⁴⁴

Metaphor: "Love Is A Physical Force"³⁴⁵

Example: "There were sparks," "His whole life revolves around her"³⁴⁶

Metaphor: "Love Is Madness"³⁴⁷

Example: "I'm crazy about her."³⁴⁸

Metaphor: "Love Is Magic"³⁴⁹

Example: "I'm charmed by her."³⁵⁰

Metaphor: "Love Is War"³⁵¹

Example: "He won her hand in marriage," "He has to fend them off"³⁵²

Metaphor: "Life Is A Gambling Game"³⁵³

Example: "I'll take my chances," "It's a toss-up"³⁵⁴

338. *Id.* at 406

339. *Id.* at 246.

340. *Id.*

341. *Id.* at 53.

342. *Id.*

343. METAPHORS WE LIVE BY, *supra* note 24, at 4.

344. *Id.*

345. *Id.* at 49.

346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.*

350. *Id.*

351. *Id.*

352. *Id.*

353. *Id.* at 51.

354. *Id.*

IX. APPENDIX D: SOME ADDITIONAL METAPHORICAL ISSUES IN LEGAL ANALYSIS

A. IDENTIFYING THE METAPHORS IN PLAY

*Arcturus is his other name,
I'd rather call him star!
Emily Dickinson³⁵⁵*

Effective jurists properly identify the conscious and subconscious metaphors and frames involved in a given situation. For example, a lawyer representing a client seeking to lease Blackacre does not represent her client thoroughly if she simply takes the frame her client has given her without further analysis. Although one's automatic reaction might well be to limit oneself to the realm of the lease, a good lawyer would of course consider other possible means of controlling the land (such as a license or a purchase) to determine which approach is best for her client.

Similarly, effective family law attorneys understand that marriage metaphors and frames can include such diverse notions as “a partnership, a journey through life together, a haven from the outside world, a means for growth, or a union of two people into a third entity.”³⁵⁶ Each of these metaphors and frames of course carries along a different “world that contains them.”³⁵⁷ For example, a divorcing spouse who sees marriage as “a journey” may reject the other spouse’s proposed property division based upon their differing notion of marriage as a “partnership”³⁵⁸ in which each spouse “shares the profits and the liabilities” (to use legal partnership terms).³⁵⁹ The chances of a more amicable resolution likely increase if the parties and their counsel understand the competing frames and metaphors and seek to leverage areas in which they may overlap. (For example, journeys also have their own costs and allocations of cost and perhaps the partnership spouse can reframe her proposal accordingly.)

355. DICKINSON, *supra* note 79, at 117.

356. METAPHORS WE LIVE BY, *supra* note 24, at 243.

357. AMSTERDAM & BRUNER, *supra* note 24, at 29–32.

358. If the two spouses have framed marriage differently, they are not operating on the same playing field at the most fundamental of levels. In such a case, marital problems may arise that could have been avoided by an upfront agreement on the frame.

359. See, e.g., UNIF. PARTNERSHIP ACT §§ 306, 401 (1997) (addressing a partner’s liabilities, rights and duties).

These same points also hold for lawyers working at the government level. For example, lawyers drafting bills for liberal and conservative legislators might make more progress if they better understood the metaphors and frames in play. Lakoff suggests that liberal and conservative political views are based upon “two opposing models of the family, the nurturing parent and the strict father families.”³⁶⁰ If this is true, understanding one’s own and one’s opponent’s metaphors and frames could help avoid gridlock in at least two ways. First, liberals and conservatives could explore areas where these metaphors overlap and attempt to accomplish goals in such areas where they agree. For example, both “nurturing” parents and strict fathers would presumably want excellent educational opportunities for their children as well as access to quality health care. A strict father, for example, cannot reasonably demand good behavior without the child having the health and training necessary for such behavior. Second, understanding the opposing metaphors allows each party to explore whether, and to what degree, the metaphors actually fit or ignore important elements of a specific situation. Assuming good faith on both sides, this might also permit avoidance of at least some gridlock. Another example could be the political debate over privatization of public schools.³⁶¹ Lakoff and Johnson suggest that the conservative metaphorical frame is often based on a notion of evolution as survival of the fittest, where competition in the free marketplace will best assure the survival of such schools.³⁶² However, liberals can just as easily frame evolution as survival of the best nurtured and this could very likely have vastly different implications for public schools.³⁶³

B. GRASPING METAPHORICAL INCONSISTENCIES

Effective jurists also understand that, as shown in Appendix C, our “metaphors used to reason about concepts may be inconsistent.”³⁶⁴ To the extent such inconsistency actually impacts decision-making, one needs to be aware of the relevant inconsistencies. For example, Lakoff and Johnson believe that two potentially inconsistent metaphors underlie Cartesian philosophy: “Knowing Is Seeing” and “Thinking Is Mathematical Calculation.”³⁶⁵ Lakoff and Johnson also identify potentially inconsistent

360. METAPHORS WE LIVE BY, *supra* note 24, at 250.

361. PHILOSOPHY IN THE FLESH, *supra* note 107, at 560–61.

362. *See id.*

363. *Id.*

364. *See also* METAPHORS WE LIVE BY, *supra* note 24, at 273.

365. *See* PHILOSOPHY IN THE FLESH, *supra* note 108, at 393–94, 406–07.

metaphors in Anglo-American philosophy's metaphors for mind: "The Mind As Body," "Thought As Motion," "Thought As Object Manipulation," Thought As Language," "Thought As Mathematical Calculation," and "The Mind As Machine."³⁶⁶ A lawyer relying upon Anglo-American notions of mind when arguing a case will need to understand how these various notions play against each other.³⁶⁷ However, at the same time, effective judges, lawyers, teachers, and students understand that if we only use consistent metaphors, we ignore many aspects of experience that other inconsistent metaphors would address. To succeed we must therefore constantly shift metaphors and use inconsistent metaphors if we are to make sense of our daily experience.³⁶⁸

C. APPRECIATING THE MUTABILITY OF METAPHORS

Effective jurists also appreciate the potentially changeable status of metaphors. As Amsterdam and Bruner argued, we often "*experience the world as categorized* and simply take this experience for granted, as given."³⁶⁹ In fact, Lakoff and Johnson maintain that we cannot "'get beyond' our categories and have a purely uncategorized and unconceptualized experience."³⁷⁰

Thus, the more lawyers grasp the mutability of metaphors, the more they can understand that seemingly entrenched categories do not come from nature itself and are never really final, and that they can thus be corrected.³⁷¹ For example, the long history of denying suffrage to women could seem entrenched to the point that removing it might upset nature itself.³⁷² Of course, nature survived this change and lawyers versed in such history can see that fixing other long-standing discriminatory laws can also leave nature unscathed.

366. See *id* at 248–49.

367. Lakoff and Johnson note that modern Anglo-American philosophy turns on such basic conceptual metaphors as "Thought Is Language, Thinking Is Mathematical Calculation, [and] The Mind Is A Machine." PHILOSOPHY IN THE FLESH, *supra* note 108, at 541–42. I agree with Lakoff and Johnson about the marvelous "creative and synthetic" process involved in building philosophical theory upon such inconsistent metaphors *Id.* at 542. I also agree with them that philosophers are "the poets of systemic thought." *Id.*

368. See METAPHORS WE LIVE BY, *supra* note 24, at 221.

369. AMSTERDAM & BRUNER, *supra* note 24, at 26 (emphasis added).

370. PHILOSOPHY IN THE FLESH, *supra* note 108, at 19.

371. See AMSTERDAM & BRUNER, *supra* note 24, at 36–37. See also Lloyd, *supra* note 27, at 42–45 (2010), available at <http://ssrn.com/abstract=2219496>.

372. See AMSTERDAM & BRUNER, *supra* note 24, at 44.

D. REMEMBERING THAT METAPHORS IMPLY THEIR WORLD

Finally, effective jurists remember that metaphors and categories “imply a world that contains them.”³⁷³ To continue the suffrage example, if one denies women the fundamental right to vote, this implies an inferiority that extends beyond the ballot box.³⁷⁴ Those untrained to look for such further implications may therefore unwittingly treat women as inferior in other realms as well.³⁷⁵

In fact, forgetting the incomplete and biased nature of metaphor can lead us to miss opportunities provided by “the alternative categories we did *not* use.”³⁷⁶ For example, the lawyer who always approaches negotiation in a combative manner may forget that negotiation can be cooperative as well,³⁷⁷ and may thus unwittingly harm his client by negotiating a worse deal than might have been obtained via a collaborative approach. Similarly, unrestrained, free market politicians believing that “labor is a resource” can unwittingly harm workers with legislation; the belief that labor is a fungible commodity like gold or silver can ignore the dangerous, “dehumanizing” or otherwise immoral aspects of labor or labor laws.³⁷⁸

373. *Id.* at 29–32.

374. SUZANNE M. MARILLEY, WOMAN SUFFRAGE AND THE ORIGINS OF LIBERAL FEMINISM IN THE UNITED STATES 1820–1920, 90–91 (1996).

375. *Id.*

376. *Id.* at 49.

377. METAPHORS WE LIVE BY, *supra* note 24, at 10.

378. *Id.* at 236–37.