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Bill Watson

Introduction

- What role, if any, does metalinguistic negotiation play in legal practitioners' speech about the law?
  1. Lawyers and judges do not engage in metalinguistic negotiation in the ways that Plunkett & Sundell have proposed.
  2. Lawyers and judges may engage in metalinguistic negotiation in a different way involving key terms in legal interpretation.

Metalinguistic Negotiation

Metalinguistic Negotiation

- Dispute: a linguistic exchange that appears to express a genuine disagreement.
- Metalinguistic dispute: a dispute in which at least one party uses a term to express a view about the meaning or correct usage of that term relative to context.
- Normative metalinguistic dispute / metalinguistic negotiation: a dispute in which at least one party uses a term to express a view about what that term should mean or how it should be used relative to context.
  1. Distinctive communicative mechanism: metalinguistic usage
  2. Distinctive normative topic: conceptual ethics

Examples of Metalinguistic Negotiation

Office Temperature

Oscar and Jill are officemates. Oscar often feels chilly; Jill often feels warm. The thermostat in their office—which both believe to be accurate—currently reads 68° F. While both are looking at the thermostat, Oscar says, “It’s cold in here.” Jill replies, “No, it’s not cold in here.”

Examples of Metalinguistic Negotiation

Secretariat

Callers to a sports-radio show are debating whether Secretariat belongs on a list of the one-hundred greatest athletes of the twentieth century. Caller 1 says, “Secretariat is an athlete.” Caller 2 replies, “No, Secretariat is not an athlete.” Both know (and know that the other knows) all about Secretariat’s racing career.

Plunkett & Sundell's Proposals

Plunkett & Sundell's First Proposal

- Practitioners might use "law" to not just explicitly assert a proposition about what the law requires but also to express that a legal actor should adopt a concept of law that makes that proposition is true.
- *TVA v. Hill:* Does the ESA prohibit operating the Tellico Dam?
  - Chief Justice Burger looked to the ESA's "ordinary meaning" to hold that ESA prohibited operating the Tellico dam.
  - Justice Powell argued that the Court should have adopted "a permissible construction that accords with some modicum of common sense and the public weal."

Plunkett & Sundell's First Proposal

- Paraphrase:

  Chief Justice Burger: The law prohibits operating the dam.

  Justice Powell: No, the law does not prohibit operating the dam.

- Chief Justice Burger used "law" to refer to a concept (LAW_1), on which a statute's "ordinary meaning" grounds the content of the law.
- Justice Powell used "law" to refer to a different concept (LAW_2), on which common sense and the public weal also ground the content of the law.
- The crux of their disagreement was over which concept—LAW_1 or LAW_2—courts should employ when deciding questions of statutory interpretation.

Plunkett & Sundell's First Proposal

- Judges do not take themselves to be disagreeing over what the word "law" should mean in cases like *TVA*. An argument about which concept of law to employ is not an intelligible move to make in legal practice.
- The problem is not just that it would be inconvenient or politically obtuse to make this sort of argument; the problem is that no judge would, even on reflection, take herself to be making such an argument.
- It makes little sense to posit that judges are globally wrong about the communicative content of their speech.

Plunkett & Sundell's Second Proposal

- Practitioners might use terms in statutes, regulations, and the like to advocate for how legal actors should interpret those terms.
- *Smith v. United States:* Is someone who trades a gun for drugs subject to a sentencing enhancement for anyone who "uses a firearm" during a drug-trafficking crime?
  - Justice O'Connor held that "uses a firearm" meant *uses a firearm in any way*.
  - Justice Scalia argued "uses a firearm" meant *uses a firearm for its usual purpose as a weapon*.

Plunkett & Sundell's Second Proposal

- Paraphrase:

  Justice O'Connor: Smith used a firearm.

  Justice Scalia: No, Smith did not use a firearm.

- Justice O'Connor used "uses" to advocate that "uses" in this context should mean *uses in any way.*
- Justice Scalia used "uses" to advocate that "uses" in this context should mean *uses an object for its usual purpose*.
- The problem is that the paraphrase is misleading; judicial opinions never look like that.
- There is rarely anything metalinguistic about lawyers' and judges' disputes over the meanings of terms like "uses."

Metalinguistic Negotiation
and Legal Interpretation

Metalinguistic Negotiation and Legal Interpretation

- Maybe lawyers and judges engage in metalinguistic negotiation by using key terms in legal interpretation to advocate for what those terms should mean or how courts should use them in a given context.
  1. Vague, context-sensitive terms like “plain” or “clear”
  2. Other terms like “meaning” or “holding”

Background on Plain Meaning

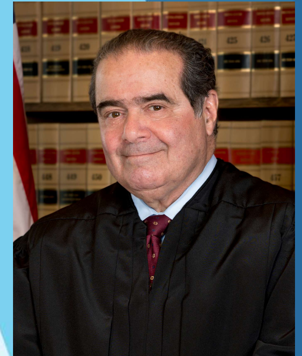
- Many canons of statutory interpretation turn on an initial finding of whether a statute's meaning is "plain," "clear," or "unambiguous":
  - Chevron Deference: "[W]hen an agency … promulgates a regulation interpreting a statute it enforces, the interpretation receives deference if the statute is ambiguous and if the agency's interpretation is reasonable."
  - The Rule of Lenity: "[A]mbiguities about the breadth of a criminal statute should be resolved in the defendant's favor."
  - The Canon of Constitutional Avoidance: If there are two "competing plausible interpretations of a statutory text" and one of them "raises serious constitutional doubts," then courts should adopt the other interpretation.
  - Legislative History: Courts may rely on legislative history to clarify a statute's meaning only if its meaning is "ambiguous."
  - Policy Considerations: Policy considerations come into play only "[t]o the extent that the [statute] is ambiguous."

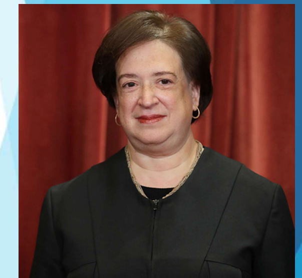
Background on Plain Meaning

- The plain-meaning rule: "Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion."
- What does "meaning" mean here? Bare semantic content? Speaker meaning? Something more objective?
- When is statutory meaning "plain," "clear," or "unambiguous"?
  - A statute's meaning is plain as to a given legal question just in case there is no need to interpret the statute to resolve that question, i.e., there is no need to choose between multiple plausible interpretations of the statute to resolve the question.

When Should Courts Call Statutory Meaning "Plain"?

- How plausible must an alternate interpretation be to preclude finding a statute's meaning plain? Judges vary widely in this regard.
- Justice Scalia: "One who finds *more* often (as I do) that the meaning of a statute is apparent … thereby finds *less* often that the triggering requirement for Chevron deference exists."
- Justice Kagan: says that one of the main differences between her and Justice Scalia is the "quickness" with which finds "ambiguity" in statutes.
- Justice Kavanaugh: "I tend to be a judge who finds clarity more readily than some of my colleagues but perhaps a little less readily than others…. [I]f the interpretation is at least 65-35 clear, then I will call it clear …. I think a few of my colleagues apply more of a 90-10 rule …. By contrast, I have other colleagues who appear to apply a 55-45 rule."





When Should Courts Call Statutory Meaning “Plain”?

- Judges do disagree over what the threshold for plainness in statutory meaning should be.
- But they hardly ever make explicit arguments in this regard in their opinions.
- When judges dispute the plainness of statutory meaning, perhaps their disagreement concerns what the threshold for plainness should be, and they are each using “plain” to advocate for a different threshold.
- That is, perhaps they are engaged in a metalinguistic negotiation over how courts should use words like “plain” with respect to statutory meaning (comparable to Office Thermostat).

When Should Courts Call Statutory Meaning "Plain"?

- *United States v. X-Citement Video*: Does the following statute require knowledge that a visual depiction is of a minor?

  (a) Any person who—

  (1) knowingly transports or ships in interstate or foreign commerce … any visual depiction, if—

  (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

  (B) such visual depiction is of such conduct; …

  shall be punished as provided in subsection (b) of this section.

- Justice Rehnquist: such knowledge is required, given (i) mens rea canon; (ii) absurdity doctrine; and (iii) canon of constitutional avoidance.
- Justice Scalia: "it could not be clearer that ['knowingly'] applies only to the transportation or shipment of [a] visual depiction …. There is no doubt. There is no ambiguity. There is no possible 'less natural' but nonetheless permissible reading."

When Should Courts Call Statutory Meaning "Plain"?

- Justice Scalia knew that his colleagues had held that the statute was ambiguous but nevertheless insisted that the statute was "clear."
- We can understand him as using "clear" to advocate that courts should adopt a lower threshold for plainness than the majority assumed.
- The legal consequence of adopting that lower threshold for plainness would (at least arguably) be to foreclose arguments based on the mens rea canon, absurdity doctrine, and canon of constitutional avoidance.

What Should "Meaning" Mean?

- Practitioners might also engage in metalinguistic negotiation over what "meaning" should mean as applied to statutes.
- Practitioners agree at an abstract level that "meaning" in this context refers to the directive(s) that a statute communicates (the imperatival content that it communicates).
- They also agree on which more basic facts can at least arguably ground statutory meaning.
  - Legislature's communicative intention
  - Conventional meanings of the statute's words
  - Rules of syntax
  - Contextual beliefs regarding social or political context, legislature's purpose in legislating, applicable conversational norms, etc.

What Should “Meaning” Mean?

- But practitioners’ shared understanding of statutory meaning is underspecified: they clearly do not agree on what fixes a statute’s meaning when the minimum meaning facts point in different directions or otherwise *underdetermine* which directive a statute communicates.
- When there are multiple plausible answers to which directive a statute communicates, one way of moving forward is to argue that we should cash out “meaning” more precisely.
- We can construe the traditional contenders in the statutory-interpretation debate as trying to do just that, i.e., as advocating for different ways of precisifying what “meaning” should mean when applied to statutes.

What Should “Meaning” Mean?

- Some judges profess to adhere to one of these normative proposals for precisifying practitioners’ shared understanding of statutory meaning.
- But they rarely explicitly argue for one such proposal over another in their opinions. Instead, they seem to use “meaning” to refer to their preferred precisified concept of meaning, without explaining that they are doing so.
- Perhaps they are using “meaning” to pragmatically advocate for their preferred precisified concept of meaning—to express that courts should adopt such a concept of meaning for purposes of deciding what a statute’s meaning is and whether it counts as plain.
- Could tell a similar story about “meaning” in the context of constitutional interpretation or “holding” in the context of common-law interpretation.

What Should “Meaning” Mean?

- *General Dynamics Land Systems v. Cline*: Does the ADEA prohibit not just discrimination favoring the young but also discrimination favoring the old?
- Justice Souter looked to the ADEA’s “social history” and purpose to hold that the ADEA “clearly” prohibited just discrimination favoring the young.
- Justice Scalia dissented, arguing that the statute’s meaning was not clear, such that the Court should defer to the EEOC under *Chevron*.
- Justice Thomas dissented, arguing that the statute clearly prohibited both forms of discrimination and that “social history”/purpose was irrelevant.
- Perhaps Justice Souter used “meaning” to advocate for a more purposive concept of meaning, while Justice Thomas used it to advocate for a more textualist one.

Questions?

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Extra Slides

Conversational Implicature?

- In the Secretariat case, perhaps Caller 2's utterance conversationally implicates that "athlete" should refer only to certain humans.
- Caller 1 might reason:
  1. Caller 2 has asserted a proposition that is obviously false, given what I take 'athlete' to mean.
  2. Since Caller 2 presumably intends to assert something true, he must take 'athlete' to mean something else.
  3. Since Caller 2 presumably intends to cooperate and not merely talk past me, he must intend to communicate that 'athlete' should be used as he is using it, at least in this context.
- Other examples: "planet," "Midwest," "war"

What Should "Holding" Mean?

- No reason to think that metalinguistic negotiation in legal practice is limited to cases involving statutory interpretation—it may also arise in cases involving constitutional or common-law interpretation.
- Consider courts' use of the term "holding." Assume that a holding is the rule or principle explaining a court's disposition of a case.
- Where should courts draw the line between reasoning that gets included in the rule or principle explaining the disposition of a case and that which does not? Perhaps some judges use "holding" to advocate for a higher or lower threshold?
- How should courts weight different facts that can ground an opinion's holding? Perhaps some judges use "holding" to advocate for a certain concept of holdings.

A Possible Objection to Hartian Positivism

- On Hartian positivism, there is a social rule—a rule of recognition—at the foundation of any legal system that identifies each legal norm in that system.
- Rules of recognition perform this function by specifying which facts ground legal norms in their legal system ("the grounds of law").
- It seems that practitioners must, by and large, agree on the content of any rule of recognition and hence on the grounds of law.
- Legal texts are certainly among the grounds of law; but merely identifying legal texts cannot identify legal norms; we must know *what about* those texts grounds legal norms.
- For any legal system with written law, a rule of recognition must specify what about legal texts grounds legal norms. It follows that practitioners must, by and large, agree on how legal texts relate to legal norms.

A Possible Objection to Hartian Positivism

- Practitioners do agree on how legal texts relate to legal norms! They agree on the following rule of recognition:
  - What a legal text either means or holds *just is* the difference that it makes to the set of all legal norms for its legal system.
  - E.g., if a statute means that a will must be signed by two witnesses, it adds a norm that a will must be signed by two witnesses to the set of all legal norms for its legal system.
- Metalinguistic negotiation over what "meaning" or "holding" should mean shows that agreement on the foregoing rule is illusory because practitioners are employing different concepts of meanings and holdings.
- Put another way, this sort of metalinguistic negotiation suggests that practitioners are, at bottom, looking to different facts, and so relying on different rules, to identify legal norms.

A Possible Objection to Hartian Positivism

- What does it mean to agree on a social rule? Does disagreement over concepts that figure in a rule amount to disagreement over the rule itself?
- It would make little sense to posit that we can agree on the content of a social rule only if we agree on the concepts by which we explain that rule, and the concepts by which we explain those concepts, and so on, perhaps all the way down to our most basic concepts.
- If disagreement concerns which of a pair of homonyms (comparable to "bank" as in a riverbank versus "bank" as in a financial institution) determines legality, then parties do not agree on the same rule.
- But if the disagreement instead concerns subtle shades of meaning, then I see no obstacle to concluding that the parties agree on the same rule. This is the case for the rule of recognition described above.