

LEGAL INTERPRETATION: THE WINDOW OF THE TEXT AS TRANSPARENT, OPAQUE, OR TRANSLUCENT

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[T]he reader is brought to the edge of the language that is being used, to the edge of language itself perhaps, where he can begin to see it as made, as chosen, as the material with which the mind can work. Language loses the transparency it normally has and becomes opaque, or perhaps better, translucent.

—James Boyd White¹

INTRODUCTION

It is a common metaphor that the text is a window onto the world that it depicts. I want to explore this metaphor and the insights it may offer us for better understanding legal interpretation. As in the opening epigraph from James Boyd White, I shall develop the metaphor of the text as window in three ways: the text may be transparent, opaque, or translucent.² My goal will be to argue that the best way to understand legal interpretation is to conceive of the legal text as translucent, but along the way I will compare the merits also of considering the legal text as either transparent or opaque.

I. TRANSPARENT

Let me begin by situating development of these three alternatives within the law by contextualizing the debate at the larger level of literary and philosophical interpretation. The metaphor of a text as *transparent* suggests that the text is a medium that provides a direct opening onto the world, an opening

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¹ JAMES BOYD WHITE, *THE EDGE OF MEANING* 3 (2001).

² As I shall discuss, see *infra* text accompanying note 26, my attention to this tripartite division pre-existed my reading of White, who does not return to this specific division in his text. In my research on the topic over time, it has been of interest to see the tripartite division arise in other scholarly contexts. See, e.g., DAVID GAUTHIER, *MORALS BY AGREEMENT* 173-74 (1986) (distinguishing the disposition of individuals to others as potentially transparent, translucent, or opaque); Anthony D'Amato, *The Relation of the Individual to the State in the Era of Human Rights*, 24 *TEX. INT'L L.J.* 1, 7 (1989) (distinguishing the characterization of the state as transparent, translucent, or opaque in the context of international human rights); William Powers, Jr., *Structural Aspects of the Impact of Law on Moral Duty Within Utilitarianism and Social Contract Theory*, 26 *UCLA L. REV.* 1263, 1263-65 (1979) (considering the law's relation to moral considerations as transparent, translucent, or opaque); William C. Powers, Jr., *Formalism and Nonformalism in Choice of Law Methodology*, 52 *WASH. L. REV.* 27, 28-29 & n.11 (1976) (same).

where the medium does not obtrude. In Henry David Thoreau's *Walden*,³ for example, he frequently refers to the transparency of Walden Pond;⁴ it is the "earth's eye"⁵ and provides access to nature's depths.⁶ The pond's transparency becomes the symbol for Thoreau's own writerly task. We must, says Thoreau, "work and wedge our feet downward through the mud and slush of opinion, and prejudice, and tradition, and delusion and appearance . . . till we come to a hard bottom and rocks in place, which we can call *reality*, and say, This is, and no mistake . . ." ⁷ Thoreau urges us not to forget "the language which all things and events speak without metaphor . . ." ⁸ This transparent language of nature is the language Thoreau's work itself seeks,⁹ even if metaphors such as the pond remain for him a vehicle to that end.¹⁰

We find a similar emphasis in George Orwell's work on the desired transparency of language, if not to the same transcendentalist end as Thoreau's work. Orwell too wants language not to get in the way of depiction. Language should not itself be the object of consideration but should direct attention clearly to the reality written about. In Orwell's famous phrase, "[g]ood prose is like a window pane."¹¹

II. OPAQUE

In philosophy, Richard Rorty writes critically that the modern period since Descartes has viewed knowledge to have the task of providing an accurate "Mirror of Nature."¹² Our assumed challenge has been "to mirror accurately, in our own Glassy Essence, the universe around us. . . ." ¹³ Knowledge is the "assemblage of accurate representations."¹⁴ The notions of the mind as a "Mirror" and of humanity's "Glassy Essence" are metaphors of transparency. There is no obstruction between humanity and external reality, between mind and nature.

³ HENRY DAVID THOREAU, *WALDEN* (Sherman Paul ed., Riverside Editions 1960) (1854).

⁴ *Id.* at 123, 131, 138.

⁵ *Id.* at 128.

⁶ *Id.* at 123.

⁷ *Id.* at 67.

⁸ *Id.* at 77. James Boyd White refers to this passage, too, although his focus is not that of transparency. See WHITE, *supra* note 1, at 17-18.

⁹ Thoreau's emphases here have become a model for environmental writing. See, e.g., SCOTT SLOVIC, *SEEKING AWARENESS IN AMERICAN NATURE WRITING: HENRY THOREAU, ANNIE DILLARD, EDWARD ABBEY, WENDELL BERRY, BARRY LOPEZ* (1992). Thoreau's attempt to move to transparency beyond the "mud and slush" of language evokes as well provocative comparisons with the goals of some Asian religions. See, e.g., ARTHUR VER-SLUIS, *AMERICAN TRANSCENDENTALISM & ASIAN RELIGIONS* (1993).

¹⁰ WHITE, *supra* note 1, at 18.

¹¹ GEORGE ORWELL, *Why I Write*, in *A COLLECTION OF ESSAYS* 313, 320 (Doubleday & Co., Inc. 1954) (1946). For application of Orwell to legal writing, see Pamela Samuelson, *Good Legal Writing: Of Orwell and Window Panes*, 46 U. PITT. L. REV. 149 (1984) (emphasizing the needed clarity of argument).

¹² RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 163 (1979). For additional discussion of the mind and science as a "Mirror of Nature," see *id.* at 97, 211-12, 298.

¹³ *Id.* at 357. See also *id.* at 86 (returning to the theme of humanity's "Glassy Essence").

¹⁴ *Id.* at 163. See also *id.* at 170 (same).

In contrast, Rorty argues against the availability of transparency and claims that truth is a matter of social justification.¹⁵ For him, the view of the mind as a mirror of nature should be discarded.¹⁶ The supposed window between the mind and any external reality or truth is *opaque*. Rorty argues for truth without mirrors.¹⁷ Humans successfully represent not according to nature's conventions but to our own.¹⁸ Rorty draws upon philosophers John Dewey, Ludwig Wittgenstein, and Martin Heidegger as exemplars of a contemporary approach whereby "words take their meanings from other words rather than by virtue of their representative character" and vocabularies gain their merit by virtue of those who use them "rather than from their transparency to the real."¹⁹

The commonality in perspective that Rorty finds can be extended across diverse terrains of contemporary continental and Anglo-American approaches. In work typified by Wittgenstein, Anglo-American philosophy has turned from questions of metaphysics to the philosophy of language. For Wittgenstein, as is well known, meaning is not a matter of mirroring nature but of its use in human language games.²⁰ Continental thought is exemplified in Ferdinand de Saussure's claim that meaning depicts not some claimed external reality but is explicated by the differentiation of signs through their relation to other signs in the linguistic system. "[I]n language[,]" says Saussure, "there are only differences without positive terms. . . . [L]anguage has neither ideas nor sounds that existed before the linguistic system, but only conceptual and phonic differences that have issued from the system."²¹ Jacques Derrida's theory of deconstruction is an extension of Saussure's insight that we are caught within the world of signs. In Derrida's well-known phrase, "[t]here is nothing outside of the text."²² Maurice Merleau-Ponty captures these perspectives in writing precisely of the "opaqueness of language. Nowhere does it stop and leave a place for pure meaning; it is always limited only by more language, and meaning appears within it only set in a context of words."²³ Merleau-Ponty notes language's "opaqueness, its obstinate reference to itself, and its turning and folding back upon itself . . ."²⁴ According to these vantage points, the window of the text is

¹⁵ *Id.* at 170.

¹⁶ *Id.*

¹⁷ *Id.* at 295.

¹⁸ *Id.* at 298.

¹⁹ *Id.* at 368.

²⁰ See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* ¶ 43 (G.E.M. Anscombe, trans., 2d ed., 1958).

²¹ FERDINAND DE SAUSSURE, *COURSE IN GENERAL LINGUISTICS* 120 (Charles Bally & Albert Sechehaye eds., Wade Baskin trans., 1959) (1916) (emphasis omitted).

²² JACQUES DERRIDA, *OF GRAMMATOLOGY* 158 (Gayatri Chakravorty Spivak trans., 1976) (1967) (emphasis omitted).

²³ MAURICE MERLEAU-PONTY, *SIGNS* 42 (Richard C. McCleary trans., 1964) (1960). Earlier in this passage Merleau-Ponty seems to allude to the traditional metaphor of the linguistic sign as a window. He states that the usual view is that meaning is "immanent" to signs "in the sense that each one of them, having *its* meaning once and for all, could not conceivably slip any opacity between itself and us" *Id.*

²⁴ *Id.* at 43.

opaque because it provides no view to anything outside; its world is internal and self-referential.²⁵

III. TRANSLUCENT

Translucency in turn mediates between transparency and opacity. Like opacity, translucency acknowledges the materiality of the medium of communication; like transparency, some light does come through the medium, even if colored by the medium's thickness and hues. My first encounter with the term translucency came in the work of theologian Paul Tillich. Tillich found the term useful to describe that

which does not allow that things are clearly seen through it (e.g., stained window). The light shines through the stained window, but the window contributes something, the manifoldness, diverse intensity, and interrelation of colors. . . . The color and forms are the contributions of the medium which make a seeing of the invisible possible.²⁶

The imagery of stained glass is useful. What I retain about the notion of translucency is that the light—the message, the meaning—appears only by virtue of its transmission through the stained glass. We do not have independent, direct, unmediated access to it in some way. We need the window in order to see. At

²⁵ I would claim that, for at least Derrida, the text is in fact translucent rather than opaque, despite the perhaps more stereotypical view that he would emphasize the latter. Hints that for Derrida the text is translucent appear in *Of Grammatology*. DERRIDA, *supra* note 22. When Derrida claims that reading cannot “transgress” the text toward some external reality “whose content could take place, could have taken place outside of language,” *id.* at 158, it may be that while “external reality” cannot appear *outside of* language, it can *through* language. The insight of Derrida—and also of Paul Ricoeur, to whom I shortly turn—is that so much can appear *in* language. Nevertheless, the statement that there is nothing outside the text remains indicative of a perspective insisting that the text is opaque and not translucent.

Let me offer just one additional gloss on Derrida's perspective on the translucent. Although without reference to Rorty, Derrida agrees with Rorty that the usual understanding of reflection is that it is a process of transparent mirroring. Derrida wants to problematize the nature of this reflection. He writes of “the specular nature of philosophical reflection, philosophy being incapable of inscribing (comprehending) what is outside it otherwise than through the appropriating assimilation of a negative image of it, and dissemination is written on the back—the *tain*—of that mirror.” JACQUES DERRIDA, *DISSEMINATION* 33 (Barbara Johnson trans., 1981) (1972). In an extremely accomplished analysis, Rodolphe Gasché builds a work that orients its understanding of Derrida through this imagery. RODOLPHE GASCHÉ, *THE TAIN OF THE MIRROR: DERRIDA AND THE PHILOSOPHY OF REFLECTION* (1986). To attend the tain of the mirror is to attend the structure that generates the mirror's reflection. We think of the mirror's reflection as transparent, yet since the tain “is made of disseminated structural instances, the mirror's tinfoil necessarily becomes semitransparent and, as a correlate, only semireflective. Reflection, then, appears to be affected by the infrastructures that make it possible; it appears broached and breached as an inevitably imperfect and limited *Scheinen* [shining].” *Id.* at 238. Gasché goes on to describe the tain as “opaque.” *Id.* I would describe the “semitransparent” and “semireflective” activity as translucent.

²⁶ Paul Tillich, *Rejoinder*, 46 *J. RELIGION* 184, 187 (1966). Tillich claims in this section that it is the idea of translucency that he has always had in mind on this matter, mistaking the implications in English of the word “transparency” in some of his earlier work. For the significance of such usage in Tillich's work, see 1 PAUL TILlich, *SYSTEMATIC THEOLOGY* 121, 124, 133 (1967) (transparency), 2 PAUL TILlich, *SYSTEMATIC THEOLOGY* 122, 151 (1967), and 3 PAUL TILlich, *SYSTEMATIC THEOLOGY* 99 (1967) (translucency).

the same time, the virtue of the stained glass lies not in itself but in what it conveys, which is a product of both the light as well as the colors and thickness of the glass. The stained glass is not complete in itself. Further, it is also essential to recognize that the stained glass filters; it contributes its color to the message transmitted. Translucency discloses but also distorts.²⁷ I shall later explore how a legal text is similarly translucent—it too discloses and distorts—and shall consider the implications of this characterization for legal interpretation.

Because my discussion of legal interpretation will be framed by the hermeneutics of Paul Ricoeur, I want to complete my discussion of the larger themes of transparency, translucency, and opacity by indicating the affinity of Ricoeur's hermeneutics to notions of translucency, even though, to my knowledge, he does not directly attend that term.²⁸ Ricoeur, a French philosopher, shared an intellectual environment similar to Merleau-Ponty and Derrida²⁹ and was also influenced by the work of Saussure³⁰ and reflective philosophy.³¹ Ricoeur's hermeneutics is predicated upon the claim that we understand the self, others, actions, or history not by intuition but through the signs they display.³² These signs are objectifications—exterior marks—of meaning. They are not transparent and so unmediated; their quality as signs or marks brings some dimension, some opacity to them. But the light they transmit comes from elsewhere, from the “creative energies” of human life.³³

Several aspects of Ricoeur's portrayal are worth noting. First, the externalization and objectification of human meaning, human energies, is inevitable,³⁴ whether this occurs in discourse, written texts, action, craft, art, or institutions. Human meaning must take on some kind of expression, some kind of form. Second, objectification can be positive, as the arts may most readily illustrate. This view contrasts with those such as legal scholar Margaret Jane Radin who argues that objectification necessarily entails commodification, the alienation of human meaning from the product.³⁵ For Radin, objectification is

²⁷ See PAUL RICOEUR, *THE CONFLICT OF INTERPRETATIONS: ESSAYS IN HERMENEUTICS* 233 (Don Ihde ed., 1974) (“In forming a name, we have both disclosure of Being and enclosure in the finitude of language By preserving, man contains, does violence, and also begins to conceal.”).

²⁸ We do find in Ricoeur language about the transparent and the opaque. He claims, for instance, that the symbol is opaque and not transparent because it is “endowed with concrete roots and a certain material density and opacity.” *Id.* at 317.

²⁹ See, e.g., FRANÇOIS DOSSE, *PAUL RICOEUR: LES SENS D'UNE VIE* (1913–2005) 135–38, 359–63 (rev. ed. 2008).

³⁰ See, e.g., RICOEUR, *supra* note 27, at 27–61.

³¹ Reflective philosophy asserts that the self is known not in immediacy but as “‘mediated’ by representations, actions, works, institutions, and monuments which objectify it.” *Id.* at 327.

³² Paul Ricoeur, *Objectivation et Aliénation dans l'Expérience Historique*, 45 *ARCHIVIO DI FILOSOFIA* 27, 34–35 (1975) (citing Dilthey).

³³ PAUL RICOEUR, *FROM TEXT TO ACTION: ESSAYS IN HERMENEUTICS*, II 112 (Kathleen Blamey & John B. Thompson trans., 1991).

³⁴ Ricoeur, *supra* note 32, at 27.

³⁵ See, e.g., MARGARET JANE RADIN, *CONTESTED COMMODITIES* 16–29 (1996) (chapter on “Market-Inalienability” arguing that certain qualities of personhood should be inalienable in the economic market and therefore not commodified).

the negation of the human subject; it is the “failure to respect in theory and to make space in practice for the human subject.”³⁶ Ricoeur’s assessment that objectification may be positive also marks a signal departure of his hermeneutics from the work of hermeneutic scholar Hans-Georg Gadamer and social theorist Charles Taylor.

Gadamer views objectification as necessarily alienating, and he critiques the method of the human sciences as alienating because it is objectifying.³⁷ As for Taylor, his assessment is that not only is the Western trend to treat the external world as devoid of inherent meaning and as simply composed of objects—an “‘objectification’ of the world”—but that this objectification has extended “to englobe human life and society.”³⁸ Social relations and practices have themselves become objectified,³⁹ and the result is a utilitarian, mechanistic science of human being.⁴⁰ In contrast, for Ricoeur we must distinguish between the positive exteriorization of meaning into signs, texts, objects, or goods—forms of objectification—and the negative exteriorization which leads to the separation of human meaning from the object—forms of alienation or reification.⁴¹

As already lightly anticipated, the third implication of Ricoeur’s depiction of objectification is that objectification occurs not only in written texts but in many other forms of human activity, such as labor, craft, the arts, and history. Further, these objectifications make these activities texts. Human action is textual in its objectification or exteriorization, similar to the fixation that occurs in writing.⁴² The meaning of these activities is derived on the basis of interpretation of their objectification in exterior marks.⁴³

Fourth, we must be careful to address the full capacities for meaning that may inhere in texts. Two subpoints are pertinent here. First, the quality of meaning may be robust and creative. Textual meaning may manifest something new, innovative, inspired. In Ricoeur’s corpus the full extensions of this insight come particularly to light in his work on metaphor. For Ricoeur, creative metaphor can shatter not only the existing structures of language but also the previous structures of reality.⁴⁴ He writes of the potential for the “eruption

³⁶ *Id.* at 155. For a more extended response to Radin, see George H. Taylor & Michael J. Madison, *Metaphor, Objects, and Commodities*, 54 CLEV. ST. L. REV. 141 (2006).

³⁷ See, e.g., PAUL RICOEUR, *The Task of Hermeneutics*, in HERMENEUTICS & THE HUMAN SCIENCES 43, 60 (John B. Thompson ed. & trans., 1981) (exploring this distinction).

³⁸ CHARLES TAYLOR, *HEGEL* 539 (1975).

³⁹ *Id.* at 540.

⁴⁰ *Id.* at 539.

⁴¹ See Ricoeur, *supra* note 32 (elaborating this distinction). In this essay, Ricoeur equates alienation with reification. See *id.* at 32.

⁴² RICOEUR, *supra* note 33, at 150 (action as objectification); *id.* at 138 (action as exteriorization).

⁴³ The concept of culture of anthropologist Clifford Geertz is similarly semiotic. See CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 5 (1973). Geertz explicitly analogizes the “thick description” of cultural meaning, see, e.g., *id.* at 7, to interpreting a literary text, *id.* at 448. “[C]ultural forms can be treated as texts, as imaginative works built out of social materials . . .” *Id.* at 449. Geertz makes plain that he borrows the idea of the inscription of action from Ricoeur. *Id.* at 19.

⁴⁴ PAUL RICOEUR, *Creativity in Language*, in *THE PHILOSOPHY OF PAUL RICOEUR* 120, 132 (Charles E. Reagan & David Stewart eds., 1978). For Ricoeur’s more complete treatment of

of the unheard in our discourse.”⁴⁵ The example of poetry may be the readiest example of the possibility of the new occurring in language.⁴⁶ Contrary to the views of Saussure⁴⁷ or of Rorty,⁴⁸ we may not be caught within the existing world of signs. As already discussed, Ricoeur believes not that we can escape the world of texts—of exteriorization and objectification of meaning—but that more may be available within language, within texts, than we may have contemplated.⁴⁹

A corollary subpoint is that interpretation of any of these texts requires us to be open to the potential world of meaning that a text expresses. If the examination of a text undertakes interpretation of *meaning*—in contrast to other reductive methodologies in psychology, sociology, or other social or life sciences—the task is one of recognizing the text’s signs as objectifications of meaning (if they are) rather than as reductive reifications. Ricoeur writes of the needed effort of appropriation of the world that the text may convey.⁵⁰ In particular, Ricoeur emphasizes, interpretation must allow the text the manifestation of new truths rather than reduce its message to or judge its message according to its adequation to existing norms.⁵¹

The fifth and final point about Ricoeur’s theory of the text as the objectification of meaning returns more directly to the theme of translucency. Because meaning is expressed in texts, in objectified signs, it is not transparent but conveyed by and mediated by these texts and signs. The text as window is not clear glass but translucent due to the color and thickness of its signs. The textual signs convey meaning, but they also color meaning. If I may analogize from elsewhere in Ricoeur’s writing, texts capture meaning but the coloring and thickness of their signs may also, perhaps inevitably, translate meaning,

metaphor, see PAUL RICOEUR, *THE RULE OF METAPHOR: MULTI-DISCIPLINARY STUDIES OF THE CREATION OF MEANING IN LANGUAGE* (Robert Czerny trans., 1977).

⁴⁵ Paul Ricoeur, *Biblical Hermeneutics*, 4 *SEMEIA* 27, 127 (1975).

⁴⁶ As in the immediately prior quotation, the potential theological – or, more generally, ontological – implications of this insight also need to be acknowledged.

⁴⁷ See *supra* text accompanying note 21.

⁴⁸ See *supra* text accompanying notes 15-19.

⁴⁹ For prior discussion of this point, see *supra* note 25. For Rorty the proper philosophical task is edification. See RORTY, *supra* note 12, at 357-72. The situation is admittedly more complex in Rorty, as edification allows “for the sense of wonder which poets can sometimes cause—wonder that there is something new under the sun, something which is *not* an accurate representation of what was already there” *Id.* at 370. What this openness to wonder means in Rorty’s world remains, indeed, opaque.

⁵⁰ RICOEUR, *Appropriation*, in *HERMENEUTICS & THE HUMAN SCIENCES*, *supra* note 37, at 182, 182.

⁵¹ See PAUL RICOEUR, *FIGURING THE SACRED: RELIGION, NARRATIVE, AND IMAGINATION* 36 (Mark I. Wallace ed., David Pellauer trans., 1995). For elaboration of the distinction between manifestation and adequation in the context of analysis of Derrick Bell’s work, see George H. Taylor, *Derrick Bell’s Narratives as Parables*, 31 *N.Y.U. REV. L. & SOC. CHANGE* 225, 238-39 (2007).

giving it different hues and form than were sought.⁵² The objectification of meaning in texts discloses but also distorts.⁵³

IV. THE LEGAL TEXT AS TRANSPARENT, OPAQUE, OR TRANSLUCENT

I now turn from depiction of the larger themes of the transparency, opacity, and translucency of texts and examine their application within the more specific context of legal interpretation. I want to argue for the propriety of interpreting legal texts as translucent but will present arguments in the legal literature for the other motifs. We shall also discover that application of these themes to legal interpretation requires their further refinement to fit this domain. While in the present Article I seek to comprehend how we may retain legal texts as (positive) objectifications of legal meaning and not their (negative) reifications, the horizon of this inquiry asks how the same may be said of the larger legal institutions that these texts represent.

A. *The Legal Text as Transparent*

If less in the ascendancy currently, the claim that the legal text is *transparent* has been associated with more liberal methodological approaches. In the 1970s, Thomas Grey wrote of liberals who endorsed results of equal treatment even though the constitutional text did not provide “the source of the values or principles that rule the cases;” instead, these liberals maintained that the text’s broad provisions provided legitimacy “for *judicial* development and explication of basic *shared national values*.”⁵⁴ In the early 1980s, Henry Monaghan accused liberal constitutional scholars of believing that the Constitution’s meaning was coextensive with their own personal social and political preferences.⁵⁵ In the 1990s, Robin West argued, adopting reader-response theory,⁵⁶ that the constitutional text does not itself operate as a significant interpretive constraint,⁵⁷ but constraint lies in the “purposes, needs, or interests of the relevant interpreting community.”⁵⁸ For these approaches, the legal text is transparent; it does not markedly delimit meaning. Delimitation comes from the interpreters.

A small group of legal scholars agrees with the methodological liberals that the legal text does not supply constraint, but this group argues that interpretive determinacy can be located in the intentions of its authors rather than in the

⁵² Ricoeur argues that understanding is translation. PAUL RICOEUR, *ON TRANSLATION* 24, 27-28 (Eileen Brennan trans., 2006). His particular focus is on the lack of a common, identical language even between speakers of the ostensibly same language such as English. *Id.* at 25. I extend the point to argue that the translation occurs not only between speaker and speaker (or writer and interpreter) but between speaker and utterance.

⁵³ See *supra* note 27.

⁵⁴ Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 *STAN. L. REV.* 703, 709 (1975) (emphases added). For Grey’s subsequent revision of his approach, see *infra* text accompanying notes 97-98.

⁵⁵ Henry P. Monaghan, *Our Perfect Constitution*, 56 *N.Y.U. L. REV.* 353 (1981).

⁵⁶ ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT* 307 (1994).

⁵⁷ *Id.* at 74.

⁵⁸ *Id.* at 307.

text's interpretive communities (its readers).⁵⁹ Oddly, Stanley Fish now locates himself within this camp.⁶⁰ Still, for these scholars too the text is transparent; it does not impose constraint.

A modified form of textual transparency arises in the work of other commentators on the Constitution, both liberal and conservative. These writers insist that certain grounding principles are contained *in* the Constitution and, in that sense, are not imposed upon it.⁶¹ These principles provide the text some interpretive density and hence lack of transparency that must be respected. And these writers typically state regard for the delimitations on interpretation imposed by the Constitution's structure.⁶² But the more general impression these writers leave is that once generally articulated, these principles leave considerable transparency to the constitutional text. Interpretive boundaries are located more by reference to the principle than to the structure of the text itself. The text's transparency is in part suggested by the divergence in principles (or their understanding) emphasized as available in the text by these commentators. Ronald Dworkin famously emphasizes the principle of substantive equality in the Constitution⁶³ and then goes on to argue that a "moral reading" of the text is required to interpret that principle's contours.⁶⁴ Justice Thomas also lays stress on the principle of equality "that underlies and infuses our Constitution,"⁶⁵ but in contrast to Dworkin, he emphasizes a principle of formal equality that disallows a government's racial classifications.⁶⁶ Richard Epstein in turn argues that a Lockean theory of private property was incorporated into the Constitution.⁶⁷ Within the Constitution's original framework, he maintains, "the rich array of procedural and jurisdictional protections was expected to serve some substantive end. And that end was, of course, the protection of private property"⁶⁸

⁵⁹ See, e.g., Larry Alexander & Saikrishna Prakash, "Is That English You're Speaking?" *Why Intention Free Interpretation is an Impossibility*, 41 SAN DIEGO L. REV. 967 (2004). For an earlier endorsement of a similar position, see Paul Campos, *That Obscure Object of Desire: Hermeneutics and the Autonomous Legal Text*, 77 MINN. L. REV. 1065, 1091 (1993). For classic legal emphasis on the author's intentions, see RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977) and Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

⁶⁰ See Stanley Fish, *Intention Is All There Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law*, 29 CARDOZO L. REV. 1109, 1111 (2008). Previously, Fish had been well known for advocating that meaning lies with the text's readers. See, e.g., STANLEY FISH, *IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES* 2-3 (1980).

⁶¹ See, e.g., RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 2 (1996).

⁶² See, e.g., *id.* at 10-11.

⁶³ See *id.* at 270.

⁶⁴ See *id.* at 2.

⁶⁵ See, e.g., *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in the judgment) (citing the Declaration of Independence as the source for this constitutional principle).

⁶⁶ *Id.*

⁶⁷ RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 16 (1985).

⁶⁸ *Id.* at 17.

B. The Legal Text as Opaque

Stress on the *opacity* of the legal text comes from those who give priority to the text rather than any separable purpose lying behind the text. Perhaps the most helpful account here comes from Frederick Schauer in his discussion of what it entails to follow a rule. Rule-following asks decision makers to “treat the generalization of a rule as entrenched,” and hence “as supplying reasons for decision independent of those supplied by the generalization’s underlying justification.”⁶⁹ We follow the rule, not its supposed undergirding rationale. An alternative form of decision making, says Schauer, does the reverse: it emphasizes attention to the underlying justification rather than to the rule. “The existing generalization operates merely as the defeasible marker of a deeper reality. It is *transparent rather than opaque*, and a decision-maker operating in this mode is expected to look through that transparent generalization to something deeper”⁷⁰ I was, of course, intrigued to see Schauer characterize rule-following as a method that regards the text as “opaque.”⁷¹ It was also intriguing to ascertain that Schauer analyzes the interpretive division to be two-fold rather than threefold. Part of the present Article’s inspiration is to argue against Schauer for the availability of a third interpretive approach, where the text is properly regarded as translucent rather than either opaque or transparent.

The most prominent examples of legal interpreters insisting on the opacity of the text are textualists such as Justice Scalia and Judge Frank Easterbrook. As is well known, Justice Scalia affirms that “[t]he text is the law, and it is the text that must be observed.”⁷² He gives attention to the meaning of statutory or constitutional words, not the separable intention of legislators or framers who drafted and passed the words.⁷³ For Judge Easterbrook, “Statutes are law, not evidence of law.”⁷⁴ The text of the law is the rule rather than evidence of the “real” rule lying behind the text.⁷⁵

Yet what I find particularly instructive about the stances of Justice Scalia and, even more so, Judge Easterbrook is that each recognizes the role of context in determining the meaning of words in a legal text. I shall contend that

⁶⁹ FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION MAKING IN LAW AND IN LIFE* 51 (1991). Schauer later draws an explicit comparison between positivism and rule-following. *Id.* at 199 (“[A] positivist system is in many respects the systemic analogue of a rule.”).

⁷⁰ *Id.* at 51 (emphasis added). This quotation concludes with the point that the decision maker looks to something deeper “when recalcitrant experiences present themselves.” *Id.* Otherwise, the rule and the underlying rationale coexist. In the text, I have deleted that conclusion to emphasize the difference between opacity and transparency.

⁷¹ In other writings, Schauer asserts that the task of rule-following is to look at the text rather than behind or through it. Frederick Schauer, *The Constitution as Text and Rule*, 29 WM. & MARY L. REV. 41, 46 (1987). At first glance, the differentiation between looking at, behind, or through the text might suggest a tripartite division, such as I have been describing, between the text as opaque, transparent, or translucent. However, it is evident from the prior quotation, which reiterates the language of looking through, see *supra* text accompanying note 70, that looking behind or through the text are both modes where the text is transparent.

⁷² ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 22 (1997).

⁷³ *Id.* at 22-23.

⁷⁴ *Matter of Sinclair*, 870 F.2d 1340, 1343 (7th Cir. 1989).

⁷⁵ *Id.* at 1342.

this attention to context opens the way to my endorsement of a legal text's translucency. I am less concerned here about the textualist attention to *linguistic* context⁷⁶ than to *external* context that informs linguistic meaning. Again, as is well known, Justice Scalia is willing to look to the writings of the Constitution's framers to reveal how that text was originally understood.⁷⁷ Elsewhere Justice Scalia writes of an "unwritten Constitution" that "encompasses a whole history of meaning in the words contained in the Constitution, without which the Constitution itself is meaningless."⁷⁸ Judge Easterbrook is willing to look to legislative history (as Justice Scalia is not)⁷⁹ to help ascertain the meaning of statutory language:

An unadorned "plain meaning" approach to interpretation supposes that words have meanings divorced from their contexts – linguistic, structural, functional, social, historical. Language is a process of communication that works only when authors and readers share a set of rules and meanings. . . . To decode words one must frequently reconstruct the legal and political culture of the drafters. Legislative history may be invaluable in revealing the setting of the enactment and the assumptions its authors entertained about how their words would be understood.⁸⁰

Schauer too acknowledges the role of context in ascertaining meaning:

[C]ontextual factors are presupposed in attributing even the barest amount of meaning to an utterance. I understand what someone else says not simply because I understand the literal meaning of the words she uses, but also because I interpret those words in light of numerous contextual understandings not contained in the definitions of those words.⁸¹

If Justice Scalia and Judge Easterbrook argue that interpreters of legal text must resurrect the original context of enacted language to establish the original meaning, Schauer's recognition of context has a different implication. He claims that "a large number of contextual understandings will be assumed by all speakers of a language."⁸² When contextual understandings are shared, frequently the result is "easy cases."⁸³ As in Wittgenstein, shared contextual understandings do not require interpretation of a rule, for we already compre-

⁷⁶ For elaboration of textualism's attention to linguistic context, see George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321, 341-42 (1995).

⁷⁷ SCALIA, *supra* note 72, at 38.

⁷⁸ Antonin Scalia, *Is There an Unwritten Constitution?*, 12 HARV. J.L. & PUB. POL'Y 1, 1 (1989).

⁷⁹ SCALIA, *supra* note 72, at 29-37.

⁸⁰ *Sinclair*, 870 F.2d at 1342.

⁸¹ SCHAUER, *supra* note 69, at 56-57. As Schauer acknowledges, *see id.* at 57 n.6, this insight has gained significant credibility in analytic philosophy. John Searle argues that traditional semantic theory, which contends that literal meaning is "context free," is wrong. John R. Searle, *The Background of Meaning*, in *SPEECH ACT THEORY AND PRAGMATICS* 221, 223 (John R. Searle et al. eds., 1980). "[F]or a large number of cases the notion of the literal meaning of a sentence only has application relative to a set of background assumptions, and . . . these background assumptions are not all and could not all be realized in the semantic structure of the sentence" JOHN R. SEARLE, *Literal Meaning*, in *EXPRESSION AND MEANING: STUDIES IN THE THEORY OF SPEECH ACTS* 117, 120 (1979).

⁸² SCHAUER, *supra* note 69, at 57.

⁸³ Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985).

hend its meaning.⁸⁴ One of the functions of legal education may be to promote shared contextual understandings among those legally trained.⁸⁵ Schauer concludes that these common understandings allow the “semantic autonomy of language,” its ability to be comprehended independent of the particular situation of use.⁸⁶ For those, then, who interpret the legal text as opaque—as requiring attention to the text, not what may lie behind it—recognition is granted to the role of external context in determining textual meaning. However, this external context generally leads to interpretive determinacy on the basis of either the text’s original meaning—its original context—or its shared context with all informed readers.

C. *The Legal Text as Translucent*

As we turn to explore contemporary support and my own endorsement of the legal text as *translucent* rather than as opaque or transparent, I want to retain the significance of external context in interpretation and also, in a revised sense, the semantic autonomy of the text. Although I do not argue the point here, it seems to me that communication is less marked by agreement or common understandings than by understandings that are at least somewhat off-center from one another or reach greater commonality only over a process of communication. I follow Ricoeur in viewing understanding, even among speakers of the same language, as prototypically translation.⁸⁷ Whatever the merits of that larger contention, translation is also at issue in contested cases; there contexts are not shared between text and interpreters or between interpreters. So a critical issue for legal interpretation is how to adjudge the external context of contested legal language.

1. *The Argument*

Textualists such as Justice Scalia and Judge Easterbrook typically want to delimit external context by resorting to the legal text’s original meaning. But that is not a necessary entailment of legal language. Judge Easterbrook allows, for instance, that some statutes are common law statutes that permit evolution of meaning as applied over time.⁸⁸ And, of course, the Supreme Court has itself allowed for “evolving standards” in areas such as the jurisprudence of

⁸⁴ WITTGENSTEIN, *supra* note 20, at ¶ 201 (“[T]here is a way of grasping a rule which is *not* an *interpretation*, but which is exhibited in what we call ‘obeying the rule’ and ‘going against it’ in actual cases.”).

⁸⁵ See, e.g., Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 746 (1982) (“In law the interpretive community is a reality. . . . There can be many schools of literary interpretation, but . . . in legal interpretation there is only one school and attendance is mandatory.”).

⁸⁶ SCHAUER, *supra* note 69, at 55 (emphasis omitted).

⁸⁷ RICOEUR, ON TRANSLATION, *supra* note 52, at 24-25, 27-28. For development of this argument, see George H. Taylor, *The Possibility of Dialogue in Today’s Diverse World: Understanding as Metaphoric, Not a Fusion of Horizons*, in GADAMER AND RICOEUR: CRITICAL HORIZONS FOR CONTEMPORARY HERMENEUTICS (Francis J. Mootz, III & George H. Taylor eds., forthcoming 2010).

⁸⁸ Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 544 (1983) (“The statute books are full of laws, of which the Sherman Act is a good example, that effectively authorize courts to create new lines of common law.”).

capital punishment.⁸⁹ The possibility of evolving meaning anticipates Ricoeur's own conception of the semantic autonomy of language. No longer does this semantic autonomy presuppose, as in Schauer, a common understanding of context between text and interpreter.⁹⁰ Rather, Ricoeur describes the text's autonomy in three respects: (1) from the author's intention; (2) from the cultural and sociological conditions of the text's production; and (3) from its original audience.⁹¹ Due to its semantic autonomy, the text may open up possible meaning that escapes from its authors' "finite intentional horizon."⁹² Ricoeur has explicitly extended this analysis to law: "[T]he meaning of a law, if it has one, is to be sought in the text and its intertextual connections, and not in the will of a legislator . . ."⁹³ For present purposes, the possibility of a legal text's evolutionary meaning is a subordinate one, although it is an issue to which I return.⁹⁴ I more want to pursue that this semantic autonomy is a consequence of the text's density and structure. The text's linguistic signs retain their vitality independent of any authorial plan that inspired them. The text's signs are not transparent but have thickness. The issue now is to discern that this thickness is not opaque but translucent.

The claim is that more may be at work in a legal text than an emphasis on its opacity would allow. I find helpful here a trajectory of liberal interpretive methodology. We have seen that one side of that methodology has maintained that the legal text is transparent and subject to constraint not due to its structure but to the community of its interpreters.⁹⁵ A second strand has moved to greater recognition of the text's weight. Thomas Grey, for example, changed his characterization of the liberal interpretive approach over time from an assertion that the constitutional text did not provide the source of principles that determined cases⁹⁶ to a claim that liberals "accept supplementary sources of constitutional law,"⁹⁷ implying that the text had some interpretive heft after all. The written text was supplemented "with an unwritten constitution that is implicit in precedent, practice, and conventional morality."⁹⁸ The unwritten constitution lay outside the text.

More recently the move is from the unwritten constitution to the "invisible Constitution," in Laurence Tribe's text of that name.⁹⁹ Tribe wants to insist "on the way the Constitution *at every moment* depends on extratextual sources

⁸⁹ See, e.g., *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2649 (2008). The appropriate test, the Court held, was not "the standards that prevailed when the Eighth Amendment was adopted in 1791 but . . . the norms that 'currently prevail.'" *Id.*

⁹⁰ See SCHAUER, *supra* note 69, at 55-57.

⁹¹ RICOEUR, *supra* note 33, at 298.

⁹² *Id.* at 83. I am aware that one may be an advocate of original meaning and also allow that meaning may evolve. It may be, for instance, that an enacting legislature intentionally passed broad language to permit its evolution over time, as in a common law statute. The evolutionary meaning is then consistent with the original meaning.

⁹³ PAUL RICOEUR, *THE JUST* 112 (David Pellauer trans., 2000).

⁹⁴ See *infra* text accompanying notes 151-54.

⁹⁵ See *supra* text accompanying notes 54-58.

⁹⁶ Grey, *supra* note 54, at 709.

⁹⁷ Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 1 (1984).

⁹⁸ *Id.*

⁹⁹ LAURENCE TRIBE, *THE INVISIBLE CONSTITUTION* (2008).

of meaning.”¹⁰⁰ Significantly, for Tribe, the invisible Constitution entails meaning that goes “beyond mere personal preference”¹⁰¹ and is instead “bounded”¹⁰² and subject to “constraints.”¹⁰³ While the term “invisible” Constitution might suggest transparency, Tribe analogizes to “dark matter” that exerts gravitational pull on the meaning of the constitutional text despite being unseen.¹⁰⁴ In my vocabulary, the dark matter informs the meaning of the constitutional text and so renders it translucent rather than transparent or opaque.¹⁰⁵ Tribe writes of the Constitution’s unwritten extensions and implications,¹⁰⁶ its “‘invisible’ structure and principles,”¹⁰⁷ the unstated doctrines necessary to protect its explicit guarantees,¹⁰⁸ its “underlying presuppositions and premises.”¹⁰⁹ As Tribe recounts, these invisible principles have been invoked by both liberals and conservative courts. In *New York Times v. Sullivan*,¹¹⁰ the Warren Court protected certain less essential speech—public interest advertising—in order not to chill political speech at the core of the First Amendment.¹¹¹ In *Seminole Tribe of Florida v. Florida*,¹¹² the Rehnquist Court protected Eleventh Amendment state sovereignty not on the basis of the Amendment’s explicit language but on the basis of its unwritten presuppositions.¹¹³ Moving outside Tribe’s references, the Supreme Court has found a similar logic persuasive in statutory cases where it looks “not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.”¹¹⁴

It remains debated in particular cases the range and extension to which external context can appropriately be appealed, but for my purposes the point is to place emphasis on the interrelation of text and context. Tribe writes:

[M]ost of the modes of reasoning to the contents of the invisible Constitution involve arguing in one form or another from its visible text (but not in a way that could be considered “mere logical inference”). At the same time, the Constitution’s “dark matter” may be seen to animate and undergird significant portions of its visible text.”¹¹⁵

¹⁰⁰ *Id.* at 6.

¹⁰¹ *Id.* at 36.

¹⁰² *Id.* at 35.

¹⁰³ *Id.* at 36.

¹⁰⁴ *See id.* at 38, 149.

¹⁰⁵ Given my attention to this vocabulary, it was of interest that Tribe describes a “self-contained constitutional text,” which he rejects, as “transparent” because it is “wholly visible” and “fully accessible,” absent of “arcane or hidden meanings.” *Id.* at 149. In my terms, a self-contained text would be opaque because it is non-referential.

¹⁰⁶ *See id.* at 157.

¹⁰⁷ *Id.* at 171.

¹⁰⁸ *See id.* at 172.

¹⁰⁹ *Id.* at 189.

¹¹⁰ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

¹¹¹ *See* TRIBE, *supra* note 99, at 172-73.

¹¹² *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

¹¹³ *Id.* at 54. *See* TRIBE, *supra* note 99, at 55-56.

¹¹⁴ *Negusie v. Holder*, 129 S. Ct. 1159, 1165 (2009) (quoting *Dada v. Mukasey*, 128 S. Ct. 2307, 2317 (2008) (quoting *Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991))).

¹¹⁵ TRIBE, *supra* note 99, at 38.

Interpretation does not impose itself on a legal text that is transparent and has no weight and thickness of its own. Nor does interpretation supplement the text from outside. Rather, the text manifests weight and thickness due to its language and the contextual presuppositions intertwined with this language.¹¹⁶ At the same time the text is not opaque and self-contained, because the context “animate[s]” the text. I find the most eloquent statement of the relation in law between text and context in the work of Charles Black, a source of inspiration for Tribe’s own volume.¹¹⁷ Writing on the Constitution, Black claims that there is “a close and perpetual interworking between the textual and the relational and structural modes of reasoning, for the structure and relations concerned are themselves created by the text, and inference drawn from them must surely be controlled by the text.”¹¹⁸ As a matter of language in general and of legal language in particular, text and context are interrelated. The text is translucent to its context. A more comprehensive understanding of what it means to have a text recognizes that the context is not outside the text but part of it. The context informs the text.

Before turning to interpretation of a statutory text to illustrate my argument about translucency, I offer one final extension of its logic. As witnessed in Justice Breyer’s recent book, *Active Liberty*,¹¹⁹ much of the recent debate in legal interpretation divides between those, such as Justice Breyer himself, who give special prominence to the legal text’s purpose and those, such as Justice Scalia, who rest emphasis on the text’s language.¹²⁰ What I found especially intriguing about Justice Breyer’s analysis, however, is the way he relates purpose back to the text. Before judges divide as to points of emphasis, he writes, they employ similar tools. Note in his description the ties of these tools, including purpose, to the text’s language:

[Judges] read the text’s language along with related language in other parts of the document. They take account of its history, including history that shows what the language likely meant to those who wrote it. They look to tradition indicating how the relevant language was, and is, used in the law. They examine precedents interpreting the phrase, holding or suggesting what the phrase means and how it has been applied. They try to understand the phrase’s purposes or (in respect to many constitutional phrases) the values that it embodies, and they consider the likely consequences of the interpretive alternatives, valued in terms of the phrase’s purposes.¹²¹

¹¹⁶ It is uncertain to me that Tribe completely endorses this inextricable interconnection between text and context. In the sentence immediately prior to the language just quoted, Tribe indicates: “[t]o say that the invisible Constitution contains or implies rules that cannot be inferred from the visible text alone is emphatically not to say that the invisible Constitution bears no relation to the visible text.” *Id.* This statement seems to allow for more separation of text and context than I would, although I appreciate the emphasis is on the contextual, “invisible” elements that inform the written text. *Id.*

¹¹⁷ *Id.* at 147.

¹¹⁸ CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 31 (1969).

¹¹⁹ STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005).

¹²⁰ *See, e.g., id.* at 86-88 (exploring this difference in the context of statutory interpretation, although not mentioning Justice Scalia by name).

¹²¹ *Id.* at 7-8.

Purpose is not isolable from the text but explicative of it. Justice Breyer writes of how the approach he favors “sees texts as driven by purposes.”¹²² He does not look through a transparent text in order to focus on a purpose lying behind and independent of or supplementary to the text. Instead, the purpose is part of the context that informs the meaning of the text itself. While questions should appropriately be raised about what in the legislative history forms legitimate sources of interpretation,¹²³ where it is legitimate the legislative history may rightly inform our understanding of the text’s purpose and central meaning.

2. *The Argument Applied*

I conclude with examination of an exemplary case where the Supreme Court divided over statutory meaning and argue that understanding this meaning as translucent best comprehends what is at work in this text. I find more pertinent a dispute over statutory rather than constitutional meaning, because the structure of the text is more overtly at work in the statutory context. Except for figures such as Charles Black who emphasize analysis of constitutional structures,¹²⁴ constitutional interpretation has more prototypically rested on engagement with constitutional phrases such as “equal protection,” and this, as we have seen, has allowed much interpretation in this arena to assume the constitutional text is transparent. The structure of the statutory text more prototypically exhibits the density and weight of the legal text.

The case I have chosen to explore is *Circuit City Stores, Inc. v. Adams*,¹²⁵ a Supreme Court decision from 2001. The case is a favorite of mine in a course I teach on Legislation—whose subject matter includes statutory interpretation along with the legislative process—and it is of interest that Justice Breyer also finds the case worthy of discussion in his book.¹²⁶ In *Circuit City*, the Court had to assess the application of the Federal Arbitration Act¹²⁷ (FAA) to an employment contract. The contract provided that all disputes had to be resolved exclusively by binding arbitration, and when employee Adams brought an employment discrimination suit against Circuit City two years into the contract, Circuit City sought to enjoin the action and to compel arbitration under the FAA.¹²⁸ The FAA was passed in 1925 to overcome judicial resis-

¹²² *Id.* at 17 (emphasis omitted).

¹²³ See SCALIA, *supra* note 72, at 29-37 (arguing that legislative history is not legitimate). Justice Scalia will, however, look to the writings of the framers as legitimate portrayals of the original meaning of constitutional text. *Id.* at 38. Recall, by contrast, that Judge Easterbrook will look to legitimate legislative history to understand the meaning of statutory texts. See *supra* text accompanying note 80. It should be emphasized that Judge Easterbrook references legislative history to comprehend textual meaning, not purpose. See *supra* text accompanying note 80.

¹²⁴ See BLACK, *supra* note 118, at 31.

¹²⁵ *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

¹²⁶ See BREYER, *supra* note 119, at 91-95, 147 nn.7-9. Part of the significance of Justice Breyer’s attention to this case lies in his ascribing it sufficient importance even though he was not the author of any opinion in the case. He joined the dissents of Justice Stevens, *Circuit City*, 532 U.S. at 124 (Stevens, J., dissenting), and of Justice Souter, *id.* at 133 (Souter, J., dissenting).

¹²⁷ 9 U.S.C. §§ 1-14 (2006).

¹²⁸ *Circuit City*, 532 U.S. at 110.

tance to enforcement of arbitration agreements.¹²⁹ Adams in turn contended that his suit could go forward because his employment was subject to § 1 of the Act, which exempted from coverage “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”¹³⁰ Because, he claimed, his work for Circuit City was a matter of interstate commerce, his employment contract was not covered by the FAA, and his suit could therefore proceed.¹³¹

The Court split 5-4, with the majority holding that Adams’s contract was governed by the FAA and therefore subject to arbitration.¹³² I want to discuss two aspects of the case that divided the Court. First, the majority held that § 1 of the FAA could not be understood literally to exclude “any . . . class of workers engaged in . . . interstate commerce,”¹³³ because that broad exclusion in a residual phrase would swallow the more limited exclusions of “seamen” and “railroad employees” in the main part of the section, making those specific exclusions redundant.¹³⁴ Instead, the Court held, the section should be read according to the statutory canon of *ejusdem generis*, where general words following an enumeration of more specific words are understood to be confined within the categories exemplified by the specific terms.¹³⁵ Under this construction, § 1 exempts from coverage of the Act only those employees who work in the transportation industry.¹³⁶ As students analyzing the case come to perceive, the analysis is salutary, because it forces attention to the linguistic context of the words and shows that more may be at work in the structure of the text than first perceived. The majority’s analysis is also beneficial here because it acknowledges that invocation of statutory canons is not conclusive on its own and needs to be encompassed within attention to “other sound considerations” relevant to interpretation of the disputed language.¹³⁷ In the vocabulary we have been using, the canon cannot be invoked to claim that the text is simply “opaque”—that is, determinable independent of other context.

The majority’s second major point addressed the language of § 1 exempting coverage for those workers “engaged in . . . interstate commerce[,]”¹³⁸ assessing this language on its own, independent of the rest of the clause.¹³⁹ In question here is whether, as Adams asserts, the language “in commerce” should be read as broadly as the language “involving commerce” in § 2,¹⁴⁰ which the Court had ruled in an earlier case to extend to the full reach of Congress’s commerce power.¹⁴¹ The Court majority rejected this analogy, holding that the

¹²⁹ *Id.* at 111.

¹³⁰ 9 U.S.C. § 1. *Circuit City*, 532 U.S. at 112.

¹³¹ *Circuit City*, 532 U.S. at 114.

¹³² *Id.* at 119.

¹³³ 9 U.S.C. § 1.

¹³⁴ *Circuit City*, 532 U.S. at 114.

¹³⁵ *Id.* at 114-15.

¹³⁶ *Id.* at 115.

¹³⁷ *Id.*

¹³⁸ 9 U.S.C. § 1.

¹³⁹ *Circuit City*, 532 U.S. at 115.

¹⁴⁰ 9 U.S.C. § 2 (2006).

¹⁴¹ See *Circuit City*, 532 U.S. at 115-16 (citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277 (1995)).

language “in commerce” was a term of art having a more circumscribed reach.¹⁴² The Court also rejected Adams’s argument that when the FAA was passed in 1925 the term “in commerce” was not yet a term of art and was meant to include the full range of Congress’s power under the Commerce Clause.¹⁴³

Under Adams’s theory, the application of the term “in commerce” should expand as the range of the Commerce power has also expanded. Because the Commerce power was understood to be narrow in 1925 and applied basically to workers in transportation, the interpretation should not be so restricted in current application when § 1 exempted workers “engaged in . . . interstate commerce.” The Court declined this argument, insisting that a “variable standard for interpreting common, jurisdictional phrases” would not only contradict earlier cases but “bring instability to statutory interpretation.”¹⁴⁴ The Court insisted that its approach afforded “objective and consistent significance” to the meaning of the terms used by Congress and that it would be unwieldy for the Court to “deconstruct” statutory phrases involving the Commerce Clause depending upon the year of statutory enactment.¹⁴⁵ The words “engaged in commerce” had a “plain meaning.”¹⁴⁶ Consistent with Schauer, the Court treated the plain meaning as entrenched and refused to look separately to the meaning’s underlying justification.¹⁴⁷ The plain meaning is opaque, requiring no regard for external context.

By contrast, the two dissents, by Justices Stevens and Souter, countered that the meaning of § 1 is, in my vocabulary, translucent and not opaque. Justice Stevens argues that the history of the FAA makes evident that its concern was to overcome judicial refusal to enforce *commercial* arbitration agreements—agreements between businesses—not employment contracts—between management and labor.¹⁴⁸ The concluding phrase of § 1, exempting “any . . . class of workers engaged in . . . interstate commerce,”¹⁴⁹ was added to overcome the objections of organized labor, which wanted to ensure that no employees would be governed by the Act.¹⁵⁰ According to this argument, then, the apparent linguistic logic of § 1, which would endorse reading it according to the *ejusdem generis* canon, is undermined by the actual logic by which the clause was in fact written. The clause is not opaque but translucent; it does not stand on its own but requires context.

Justice Souter’s dissent emphasizes particularly interpretation of the “engaged in . . . commerce” language of § 1. Justice Souter rejects the majority’s interpretation of this phrase which, in his view, leaves the language “in a statutory ambit frozen in time” and instead argues that the language has an

¹⁴² *Id.*

¹⁴³ *Id.* at 116.

¹⁴⁴ *Id.* at 117.

¹⁴⁵ *Id.* at 117-18.

¹⁴⁶ *Id.* at 118. While my emphasis is on the Court’s interpretation of the meaning as plain and therefore opaque, it also bears mentioning that its criteria focus on consistency in its own methods, which are a matter of its own rules of interpretation, rather than on the logic that led Congress to write the text it did.

¹⁴⁷ See SCHAUER, *supra* note 69, at 51.

¹⁴⁸ *Circuit City*, 532 U.S. at 125 (Stevens, J., dissenting).

¹⁴⁹ 9 U.S.C. § 1 (2006).

¹⁵⁰ *Circuit City*, 532 U.S. at 126-27 (Stevens, J., dissenting).

“elastic reach” that allows it to have a meaning “evolutionary” over time in contexts of new application and new understandings of the Commerce Clause power.¹⁵¹ I would go further and contend not simply that this evolutionary reading is a permitted interpretation of the statutory text, but that the broad language of the clause may indicate a congressional purpose intending, like a common law statute,¹⁵² the meaning of the statute to change in new situations of application. The “semantic autonomy”¹⁵³ of the text allows its recontextualization in new circumstances.¹⁵⁴ Again meaning is translucent because it depends on context, here the context of application over time.

V. CONCLUSION

Evaluation of a case such as *Circuit City* is insightful, for it portrays how much may be at work in the text beyond an initial reading. More meaning may be disclosed in the text than may first appear. Concomitantly, attention to the text without regard for its external context may distort its meaning. To comprehend a legal text by reference to its context is to appreciate the light that the context brings to the text and renders the thickness and color of the text no longer opaque but translucent.

¹⁵¹ *Id.* at 134 (Souter, J., dissenting). *See also id.* at 137 (arguing that the exemption language should not be “read as petrified”).

¹⁵² *See supra* text accompanying note 88.

¹⁵³ *See supra* text accompanying note 91.

¹⁵⁴ Endorsement of the semantic autonomy of the phrase “engaged in commerce” is not contradictory to the prior endorsement of attention to the originating context of the language of § 1 as a whole. It is useful to understand the origins of legal language in order to consider the ways these origins may inform legal meaning. It is a separate point whether interpretation should remain restricted to these origins in situations of new application. It also bears mentioning, *see supra* text accompanying note 92, that the point of origin may itself allow for an evolutionary reading.