

# ON *MEANING*

## THE MEANING OF *MEANING* IN THE LAW

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### I. THE MULTIPLE MEANINGS OF *MEANING*

In his dissent in *Gregg v. Georgia*,<sup>1</sup> Justice Brennan asserted that the Supreme Court is “the ultimate arbiter of the meaning of our Constitution.”<sup>2</sup> The question arises, however, as to what the Justice meant by his claim, for the noun *meaning* and its verbal counterpart *mean* are multiply ambiguous. Four of their meanings are illustrated by the examples of (1),<sup>3</sup> each of which is drawn from the Court’s decision in *Furman v. Georgia*.<sup>4</sup> Justice Brennan authored the first, while Justice Marshall’s opinion gives us the second, third and fourth examples.

- (1) a. If the word *unusual* is to have any meaning apart from the word *cruel*, however, the meaning should be the ordinary one, signifying something different from that which is generally done.<sup>5</sup>
- b. The fact that the State may seek retribution against those who have broken its laws does not mean that retribution may then become the State’s sole end in punishing.<sup>6</sup>
- c. There is some recognition of the fact that a prohibition against cruel and unusual punishments is a flexible prohibition that may change in meaning as the mores of a society change, and that may eventually bar certain punishments not barred when the Constitution was adopted.<sup>7</sup>
- d. Justices White and Holmes dissented and argued that the cruel and

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1. 428 U.S. 153 (1976).

2. *Id.* at 229.

3. For a more complete list of examples illustrating the various senses of *meaning*, see 1 JOHN LYONS, *SEMANTICS* (1977).

4. 408 U.S. 238 (1972) (per curiam).

5. *Trop v. Dulles*, 356 U.S. 86, 100-101 n.32 (1958), cited in 408 U.S. at 276 (Brennan, J., concurring). Italics is used for quotations when linguistic forms are being cited so that they will be consistent with the text.

6. 408 U.S. at 343 (Marshall, J., concurring).

7. *Id.* at 321 n.19 (citing 1 *Annals of Cong.* 782-83 (1789)).

unusual prohibition was meant to prohibit only those things that were objectionable at the time the Constitution was adopted.<sup>8</sup>

In (1a), Justice Brennan seems to have in mind a sense of the term *meaning* according to which the meaning in question is conventional (*i.e.*, is widely accepted and attached to the linguistic form in question). In (1b) *mean* would seem to be equivalent in conventional meaning to the word *entail*. In (1c), we have a use of *mean* largely equivalent to *significance* or *import*.<sup>9</sup> Finally, in (1d), we have a use of *mean* that is equivalent to *intend*.

That the justices might have employed the words *mean* and *meaning* in these four quite distinct ways should not be surprising, for each plays a critical role in language understanding. Suppose, for instance, that A and B are dining together and A says, *Can you reach the salt?*, to B, an utterance that has the *conventional meaning* of an inquiry of B by A as to whether or not B is physically able to reach the salt. In this case, B would likely assume that A's saying this meant that she wanted the salt (the *contextual significance* of the utterance), that is, that A's goal was to obtain the salt (the speaker's *intention*). However, suppose that A is arranging the apartment of B, who is physically handicapped, so that B can be self-sufficient and A says, *Can you reach the salt?* to B. In this case, B would likely assume that A's saying this meant that A wanted to know whether or not B was physically able to reach the salt (the *contextual significance* of the utterance), that is, that A's goal was to come to know whether or not B was physically able to reach the salt (the speaker's *intention*).

The importance of beliefs about people's goals to understanding the contextual significance of their utterances is made particularly clear by another example.

- (2) a. I'll give you \$5 if you mow the lawn.

8. 408 U.S. at 325 (citing *Weems v. United States*, 217 U.S. 349, 389-413 (1910)).

9. The Justices use two other locutions *within the meaning of X* and *give meaning to X*, where "X" is a word, phrase, or sentence.

(i) "[The petitioners] are here on petitions for certiorari which we granted limited to the question whether the imposition and execution of the death penalty constitute "cruel and unusual punishment" within the meaning of the Eighth Amendment as applied to the States by the Fourteenth."

408 U.S. at 240 (Douglas, J., concurring).

(ii) "Thus, the history of the clause clearly establishes that it was intended to prohibit cruel punishments. We must now turn to the case law to discover the manner in which courts have given meaning to the term *cruel*."

*Id.* at 322 (Marshall, J., concurring). Arguably, these uses of *meaning* have essentially the same meaning as does the occurrence of *meaning* in (1c).

b. I won't give you \$5 if you don't mow the lawn.

Geis and Zwicky<sup>10</sup> observed that sentences of the form *P if Q* (2a) are commonly taken to imply propositions of the form *not P if not Q* (2b). However, it is clear that this sometimes quite compelling inference does not always go through and is therefore clearly not an entailment.<sup>11</sup> A critical factor is the perceived goal of the person who initiates the interaction. Note that while (2a) seems to imply (2b) in conversation (3), it does not in conversation (4).

- (3) A, an adult, phones B, a young neighbor of A.  
 A: Are you mowing lawns this summer?  
 B: Yes.  
 A: I'll give you \$5 if you mow my lawn.  
 B: I would like to, but my lawn mower is being repaired.
- (4) B, the child of A, approaches A.  
 B: Say, Mom, I need \$5.  
 A: I'll give you \$5 if you mow the lawn.  
 B: The mower is being repaired.  
 A: Well, I'll give you \$5 if you clean out the garage.

The difference in the two cases concerns whose goal is being negotiated.<sup>12</sup> In the case of Scenario (3), it is A's goal of getting her lawn mowed that is being negotiated. In this case, we could reasonably say that *I'll give you \$5 if you mow my lawn* means that (contextual significance) the speaker will not give the addressee \$5 if he does not mow her lawn. In the case of Scenario (4), it is B's goal of obtaining \$5 that is being negotiated. In this case, *I'll give you \$5 if you mow the lawn* does not mean that the speaker will not give addressee \$5 if he does not mow her lawn.

These examples illustrate two incontestable facts:

- The goal of utterance interpretation is not simply to recover the conventional meaning of the sentence uttered, but rather, to recognize its contextual significance or import in the context in which it occurs.
- The contextual significance or import of an utterance does not enjoy a transparent relationship to the conventional meaning of the sentence uttered, for a sentence with a single conventional meaning can have a different significance or import in different contexts.

10. Michael L. Geis & Arnold M. Zwicky, *On Invited Inferences*, 2 LINGUISTIC INQUIRY 561 (1971).

11. For a definition of the notion "entailment," see example (6), *infra*.

12. Conversation with Dr. Kate Welker (Summer 1994).

These facts have an important bearing on the work of the Court for the goal of the interpretation of legal texts is to determine what they require<sup>13</sup> or how they are to be applied<sup>14</sup> rather than simply what the language that comprises them conventionally means. No less than in the case of ordinary conversation, the import of a legal text will typically not enjoy a transparent relationship to the conventional meaning of the text. Given the importance of the distinction between the conventional meaning of a text and its import, some attention must be paid to how it is drawn. We shall try to draw this distinction quite sharply and then employ the distinction in an examination of a case in which linguistic analysis played a decisive role.

#### *A. Conventional Meaning and Entailment*

At the heart of the interpretation of any sign, whether the sign is linguistic or drawn from some other system of communication, is the conventional meaning that is attached to it. This is true of the use of semaphore flags in ship-to-ship communication and the hand signals used by combat soldiers in circumstances in which silence must be maintained. The same is true of the words, phrases, and sentences that comprise a language. In each of these cases, the conventional meaning of the sign is arbitrary in that there is no necessary connection between the look or sound of the sign and its meaning, is widely shared (among the set of persons who use the communication system), and is attached to the sign itself. In contrast, the contextual significance or import of any sentence occurring in a given context will usually not be arbitrary. Rather, it will be rationally related to the context,<sup>15</sup> the conventional meaning of the sentence produced, and the assumptions made regarding the possible goal(s) of the author of the sentence. Therefore, the contextual significance of a sentence

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13. Justice White noted in *Furman* that "Judicial review, by definition, often involves a conflict between judicial and legislative judgment as to what the Constitution means or requires." 408 U.S. 238, 313. This statement strongly suggests that the Justice saw determination of the significance or import of the Constitution as being the goal of interpretation.

14. As Chief Justice Burger noted in *Furman*, "Our constitutional inquiry, however, must be divorced from personal feelings as to the morality and efficacy of the death penalty, and be confined to the meaning and applicability of the uncertain language of the Eighth Amendment." 408 U.S. at 375. Justice Burger is clearly distinguishing what we are calling "conventional meaning" and "contextual significance."

15. Contexts are best viewed as sets of propositions which the parties to an interaction believe to be true, for context cannot affect utterance interpretation except insofar as it affects participant beliefs. When these beliefs are shared by the parties, communication will normally proceed successfully. When they are not, difficulties in understanding will sometimes arise.

cannot be assumed to be attached to the sentence *per se*.

Within the fields of linguistics and the philosophy of language, the most widely accepted theory of conventional linguistic meaning is the truth-conditional theory. According to this theory, to understand a sentence is to understand in what circumstances it would be true and in what circumstances it would be false. Therefore, an account of the meaning of any sentence should consist of a statement of its truth-conditions, *i.e.*, a statement of the conditions in which it would be true and the conditions in which it would be false.<sup>16</sup> In (5), we find an example of an informally stated truth-condition:

- (5) *John died* is true if and only if John was alive at time  $t_1$  and was not alive at time  $t_2$ , and  $t_1$  occurred before  $t_2$ , and  $t_2$  was earlier than now.

The classical approach to truth-conditional semantics took the position that sentences can be given determinate truth-conditions. More recently, it has been argued that truth-conditions are so dependent on context that it makes more sense to speak of the truth-conditional potential of sentences, rather than of its truth-conditions. Two classes of data force this view. First are deictic forms, forms that refer to elements of the immediate speech context. This class includes the pronouns *I* and *you* and the adverbs *here* and *now*, among others. The second class includes forms which are discourse dependent such as anaphoric uses of definite pronouns such as *she*, *her*, *he*, *him*, and *they* and *them*<sup>17</sup> and some uses of the definite article *the*.<sup>18</sup>

The truth-conditional approach to meaning gives rise to a straightforward definition of the notion "entailment," thereby facilitating distinctions between those inferences of a text that are logically valid, from those

16. Obviously because imperatives, *e.g.*, *Leave the room*, and interrogative sentences, *e.g.*, *Did he leave the room?*, can be neither true nor false, some modification of this canon must be made for these cases. We might say that an imperative counts as a directive (command, request, suggestion, etc.) to the addressee to act in such a way as to make the sentence, *You do A*, true where "A" is the directive (*e.g.*, leaving the room). And, we might say that a "Yes-No"-Question, with propositional content, "P" counts as a directive to the addressee to tell the speaker whether "P" is true or false.

17. Anaphoric pronouns are those that refer to entities that have already been referred to in the discourse, either in the same sentence or a prior sentence, as is true of *him* in the following conversation.

A: Did you see John?

B: No, I didn't see him.

18. Clearly, the truth of *If the statute is passed, it will be declared unconstitutional almost immediately* cannot be determined without knowing what *the statute* refers to, from which it follows that the truth-condition(s) for *the* cannot be stated independent of context.

that are not including, in particular, Grice's conversational implicatures,<sup>19</sup> a distinction that is obviously critical to the work of the Court.

- (6) A proposition *P* entails a proposition *Q* if and only if *Q* is true in every possible circumstance in which *P* is true.

The thesis that some proposition *P* entails another proposition *Q* can be falsified by showing that *Q* is false in a circumstance in which *P* is true. Thus, one can falsify any claim to the effect that (2a) entails (2b) by pointing out that (2a) is true, but (2b) false, in conversation (4) (i.e., there is at least one circumstance in which *P* (= (2a)) of definition (6) is true and *Q* (= (2b)) is false.)

### B. Meaning as 'contextual significance'

Making a sharp distinction between conventional sentence meaning and the significance the sentence has when produced in a particular context is clearly important to the work of the Court. Indeed, it is important that we all understand when a particular interpretation of a legal provision follows directly from the language involved (i.e., is an entailment of that language) or is based on assumptions about the context in which the legal text was authored (e.g., what counted as a cruel and unusual punishment at the time the Constitution was adopted?), assumptions about the intentions (goals) of the authors of the text, and canons of interpretation. Unfortunately, the Court seems too little to appreciate how rarely the language comprising disputed legal texts (which are the sorts of texts they tend to be asked to interpret) have a "plain meaning" or a "plain import" or "clear import," all terms the Court uses. One consequence of this is that the Court sometimes attributes to the language of a legal text meanings that are at least in part dependent on contextual information.

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19. This term is due to Paul Grice, *Logic and Conversation*, 3 SYNTAX AND SEMANTICS: SPEECH ACTS 41 (Peter Cole & Jerry Morgan, eds., 1975). A conversational implicature is a nonvalid but nevertheless contextually compelling inference, normally one that the speaker intends for the addressee to draw. It is "calculated" from the conventional meaning of the sentence uttered, the context of utterance, general background knowledge, and the assumption that the speaker is acting in good faith, i.e., is obeying the Cooperative Principle ("Make your conversational contribution such as is required, at the stage at which it occurs, by the accepted purpose or direction of the talk exchange in which you are engaged") and a set of maxims that, should they be followed, ensure cooperativeness. These maxims, some of which are simplified here, consist of maxims of quantity (Don't say less or more than is required), quality (Speak the truth and have evidence for what you say), relation ("Be relevant"), and manner ("Be orderly," "Avoid ambiguity," "Avoid unnecessary prolixity," among others.) *Id.* at 45-46. Conversational implicatures play a critical role in language understanding in virtually all contexts of language use.

Reconsider the *Can you reach the salt?* and *I'll give you \$5 if you mow the lawn* examples. There was a clear relationship between the conventional meaning of what was said,<sup>20</sup> the context of what was said, the perceived goal of the speaker, and the contextual significance of what was said. We might formalize the relationship between these elements as in (7), where " $L_u$ " is the conventional meaning of the language " $L$ " comprising an utterance " $u$ ," " $C_u$ " is the context in which " $u$ " is uttered, " $S_u$ " is the contextual significance of " $u$ ," and " $G_s$ " is the goal of the speaker " $s$ ." Formula (7a) represents a case in which the addressee has a reasonably good idea as to the possible goals of the speaker and is trying to determine the contextual significance of what is said. Formula (7b) represents a case in which the addressee is attempting to identify the goal of the speaker based on assumptions as to the possible contextual significance of the utterance.

- (7) a.  $S_u = f(L_u, C_u, G_s)$   
 b.  $G_s = g(L_u, C_u, S_u)$

Formula (7a) represents the state of affairs in the two "reach the salt" and the two "lawn mowing" scenarios just discussed, where the goals of the initiators of the interactions were relatively clear. Formula (7b) represents the state of affairs that arises when someone says something "out of the blue" to an addressee. Thus, should A phone his friend, B, early in the morning on a working day, and say, *My car just stalled and I'm up in the Glen.*<sup>21</sup> B may hear this as identifying a possible precondition on B's needing/wanting a ride. As a result, the utterance may implicate that (*i.e.*, mean that) A wants B to give him a ride from the Glen to some place, perhaps his place of work. From that B would reasonably infer that A's goal is to come to be at this place.

Functions " $f$ " and " $g$ " in (7) represent different modes of informal reasoning, neither of which is deductive. In the case of " $f$ " we have the phenomenon of implicature-calculation, the informal mode of reasoning put forth by Grice based on the Cooperative Principle.<sup>22</sup> This is the sort of reasoning the Court routinely engages in. The canons of interpretation (*e.g.*,

20. The conventional meaning of a text constrains how it may be interpreted. Had the speaker in our "reach the salt" examples said, *Do you ever use salt?*, neither interpretation would likely have arisen.

21. For discussion of a very interesting ride request that was initiated in just this way, see MICHAEL L. GEIS, *SPEECH ACTS AND CONVERSATIONAL INTERACTION* 74-84, 109-112 (forthcoming 1995).

22. See GRICE, *supra* note 19, at 45-46.

the scienter rule, the rule of lenity, etc.) would be elements of the function "f." In the case of "g" we have an instance of what the philosopher Charles Peirce called "abductive reasoning,"<sup>23</sup> reasoning from a set of facts (what we are calling the context) and a novel fact (the speaker's saying something) to an hypothesis (as to the speaker's goal) that explains the occurrence of the novel fact.

### C. Meaning as 'intention' or 'goal'

In example (1d), we find Justice Marshall citing references by Justices White and Holmes to the intent of the framers of the Eighth Amendment.<sup>24</sup> Unfortunately, the notion of "speaker intention" is itself vague even if not actually ambiguous. It ranges from what we might call a person's "motives" in saying or doing something, to the person's "goals," where we understand a motive to be a private, possibly inaccessible intention and a goal to be a publicly accessible intention.

Consider, for instance, a case in which the Senate passes a bill that prohibits the public display of magazines and newspapers containing figures of naked persons on their covers. The ostensible goal in this case might be quite transparent—to keep such items out of the sight of minors. However, different senators might have different motives for voting for the bill. In the case of some senators, the motive might be that they wish to reduce the temptation to minors to purchase such things. In these cases, their motive closely corresponds to the goal. On the other hand, there might be one or more senators who vote for the bill in the belief that it is unconstitutional and that the President will see that this is true and will therefore veto it, thereby making himself an easy political target, as being "soft on pornography." In this case, the motives of the voters would be very different from the ostensible goal of the statute and may not be accessible to others. Clearly, in the interpretation of the Constitution or of other legal texts, as well as the interpretation of the language of conversation, the concern must be with the ostensible, publicly accessible goals of the text, not the possibly private motives of the author of the text.

## II. A CASE STUDY

Let us apply model (7a) in attempting to understand and evaluate the

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23. CHARLES S. PEIRCE, *PHILOSOPHICAL WRITINGS OF PEIRCE: SELECTED AND EDITED WITH AN INTRODUCTION BY JUSTUS BUCHLER* 151-56 (Justus Buchler ed., 1955).

24. *Furman*, 408 U.S. 238, 325 (1972).



linguistic reasoning in *Smith v. United States*,<sup>25</sup> a case in which Justices O'Connor and Scalia engaged in substantial linguistic argumentation. The central fact in this case is that the petitioner, Mr. John Angus Smith, made an offer to an undercover officer, who represented himself as a pawnshop dealer, to exchange his automatic MAC-10 and silencer for two ounces of cocaine.<sup>26</sup> This was alleged to be a violation of the following provision of 18 U.S.C. § 924(c)(1):

Whoever, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years . . . .<sup>27</sup>

Specifically, the prosecution claimed that Mr. Smith's bartering his firearm for drugs constituted using the firearm in a drug trafficking crime.<sup>28</sup> He was convicted but appealed, arguing that bartering a firearm for drugs does not constitute use of a firearm within the meaning of the statute.<sup>29</sup> Furthermore, nothing in the trial record indicated that he used the firearm as a weapon by firing it, threatening anyone with it, or employing it for self-protection.<sup>30</sup> The conviction was upheld on appeal by the Eleventh Circuit Court of Appeals,<sup>31</sup> and the Supreme Court affirmed.<sup>32</sup>

Justice O'Connor, writing for the majority, argued:

When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning. . . . Surely petitioner's treatment of his MAC-10 can be described as "use" within the every day meaning of that term. Petitioner "used" his MAC-10 in an attempt to obtain drugs by offering to trade it for cocaine. Webster's defines "to use" as "[t]o convert to one's service" or "to employ." Black's Law Dictionary contains a similar definition: "[t]o make use of; to convert to one's service; to employ; to avail oneself of; to utilize; to carry out a purpose or action by means of." Indeed, over 100 years ago we gave the word "use" the same gloss, indicating that it means "to employ" or "to derive service from." Petitioner's handling of the MAC-10 in this case falls squarely within those definitions. By attempting to trade his MAC-10 for the drugs, he "used" or "employed" it as an item of barter to

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25. 113 S. Ct. 2050 (1993).

26. *Id.* at 2052.

27. 18 U.S.C. § 924(c)(1) (1988).

28. 113 S. Ct. at 2051. The defendant was not charged with carrying a concealed weapon.

29. *Id.* at 2053.

30. *Id.* at 2054.

31. *Smith v. United States*, 957 F.2d 835 (11th Cir. 1992).

32. 113 S. Ct. 2050.

obtain cocaine; he “derived service” from it because it was going to bring him the very drugs he sought.<sup>33</sup>

It is reasonably clear from Justice O’Connor’s use of “ordinary or natural meaning” and “every day meaning” that she has in mind what we are calling “conventional meaning,” as opposed to “contextual significance.”

Justice Scalia, in dissent, argued that most people would understand *use a firearm* in section 924(c)(1) as meaning ‘use a firearm as a weapon.’<sup>34</sup> Justice Scalia articulated the principle lying behind this conjecture:

To use an instrumentality ordinarily means to use it for its intended purpose. When someone asks “Do you use a cane?” he is not inquiring whether you have your grandfather’s silver-handled walking-stick on display in the hall; he wants to know whether you *walk* with a cane. Similarly, to speak of “using a firearm” is to speak of using it for its distinctive purpose, i.e., as a weapon. . . . To be sure, “one can use a firearm in a number of ways,” *ante*, at 2055, including as an article of exchange, just as one can “use” a cane as a hall decoration—but that is not the ordinary meaning of “using” the one or the other.<sup>35</sup>

Interestingly, though Justice O’Connor and Justice Scalia differ strikingly in their analysis of *use a firearm*, they each claim that they are proffering the “ordinary meaning” of the phrase. However, in order to make sense of their analyses, we must conclude that Justice O’Connor means ‘conventional meaning’ by her term “ordinary meaning” and Justice Scalia means ‘contextual significance.’

Justice O’Connor’s argument that the meaning of the phrase<sup>36</sup> *use a firearm during and in relation to a drug trafficking crime* is consistent with using the firearm as an item of barter is based in part on an examination of what dictionaries have to say about the meaning of *use*. One difficulty with this approach to the determination of conventional meaning is that dictionary definitions are not definitions at all, but guides to usage, and quite vague guides at that.<sup>37</sup> Secondly, were they construed as definitions in the sense that this term is used in mathematics and the sciences, they

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33. *Id.* at 2054 (citations omitted).

34. *Id.* at 2061 (Scalia, J., dissenting).

35. *Id.*

36. The syntax of this sentence has been rearranged, of course, but not in any way that presents a problem with the arguments of the text.

37. For an extensive study of how the Court has used and misused linguistic evidence in doing its work, including, in particular, how it has misused dictionaries, see LAWRENCE M. SOLAN, *THE LANGUAGE OF JUDGES* (1993).

would have to be regarded as circular, for if one recursively looks up the meanings of the words employed in any dictionary "definition" one will inevitably encounter the word being "defined." The *Black's Law Dictionary* definition, for instance, defines *to use* as '[t]o make use of,'<sup>38</sup> which is quite hopelessly circular. Equating *to use* with 'to employ' is no better. If one looks up *use* in the *American Heritage Dictionary of the English Language*, one finds that one of the definitions of *to use* is 'to employ for some purpose.'<sup>39</sup> But if one looks up the word *employ* in this dictionary, one finds that it is defined as 'to use in some process or effort.'<sup>40</sup> Thus, this definition is also circular. The definition '[t]o convert to one's service' is little better.<sup>41</sup> The *American Heritage Dictionary* provides no definition of the noun *service* directly applicable to this case. The closest relevant "definition" is 'employment in duties or work for another,'<sup>42</sup> where we find a noun form of *employ*, which, of course, means 'use,' and we are back where we began.

We must therefore conclude that Justice O'Connor's claim that the petitioner "derived service" from the firearm is equivalent to saying that he "derived use" from it. What we learn from this exercise is that *to use* means 'to use' or 'to derive use from,' which provides us little help in understanding the conventional meaning of *use*.

Justice O'Connor's analysis would have been better served had she simply argued that *use a firearm as an item of barter during and in relation to a drug trafficking crime* entails *use a firearm during and in relation to a drug trafficking crime*, which is the language found in section 924(c)(1), for this claim is true and makes the point she wished to make.<sup>43</sup> Moreover, against Justice Scalia, she might have responded by noting that sentence (8a) clearly does not entail (8b).

- (8) a. John used the pistol to hammer in the nail.  
 b. John used the pistol as a weapon in hammering in the nail.

38. BLACK'S LAW DICTIONARY 1541 (6th ed. 1990).

39. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1410 (1981).

40. *Id.* at 428.

41. WEBSTER'S NEW INTERNATIONAL DICTIONARY OF ENGLISH LANGUAGE 2806 (2d ed., 1949), cited in *Smith v. United States*, 113 S. Ct. 2050, 2054 (1993).

42. *Id.* at 1184.

43. This claim depends on the author's semantic intuition. Fortunately, entailment judgments are among the most reliable intuitions speakers have and serve as the primary source of data for semantic analysis, that is, for the analysis of conventional meaning. To back this intuition up, note that *Although John used his firearm to buy drugs, he didn't use his firearm*, is self-contradictory. This would not be true unless "*use a firearm to buy drugs*" entailed *use a firearm*.

This falsifies Justice Scalia's claim that "to speak of *using a firearm* is to speak of using it for its distinctive purpose, *i.e.*, as a weapon,"<sup>44</sup> if he means 'necessarily to speak of' by *to speak of*.<sup>45</sup>

The fact that *use a firearm as an item of barter during and in relation to a drug trafficking crime* entails *use a firearm during and in relation to a drug trafficking crime* does not completely settle the matter of the conventional meaning of *use a firearm during and in relation to a drug trafficking crime*. Observe that the verb *use* makes room for a parameter spelling out the nature or purpose of the use.

- (9) a. Harry used the pistol to shoot the intruder.  
b. Harry used the pistol as a weapon.
- (10) a. Harry used his pistol to drive in the nails.  
b. Harry used his pistol as a hammer.
- (11) a. Harry used his shotgun to prop the door closed.  
b. Harry used his shotgun as a door prop.

Not just any verb can occur with such parameters. Note that none of the following sentences is fully sensible English:

- (12) a. \*Harry found a rifle as a weapon.  
b. \*Harry kissed his firearm as a weapon.  
c. \*Harry threw his firearm away as a weapon.

It is clearly a fact about the conventional meaning of *use* that it occurs with a purpose parameter and a fact about the conventional meanings of *find*, *kiss*, and *throw away*, among many other verbs, that they do not. Thus, we may conclude that the conventional meaning of *use x* must be very much like that of *use x as y*, where *as y* may be thought of as a "purpose" parameter.<sup>46</sup>

As the examples of (9)-(11) demonstrate, *use* can occur with an explicit purpose parameter. The question arises as to how we interpret an utterance in which this parameter is not specified directly. In some cases, the linguistic or nonlinguistic context will directly determine what this parameter is. In conversation (13), it would be clear that *use your shotgun* would be interpreted as 'use your shotgun as a door prop/to prop closed the door.'

44. 113 S. Ct. at 2061.

45. If he does not mean this, his claim is empty.

46. This is an oversimplification, for we not only get the phrase *use x as y*, but also *use x to do a*, where "a" is some action. This simplification does not impact on the argument being made, however.

- (13) a. Harry: I can't find anything to prop the door closed.  
 b. Sam: Use your shotgun.

How, though do we interpret *use x* when no purpose parameter is supplied and none is directly determined by the context?

Although Justice Scalia's claim that "to use an instrumentality ordinarily means to use it for its intended purpose"<sup>47</sup> cannot be accepted, it is true that if someone were to utter a sentence like *Harry used his firearm yesterday* completely "out of the blue," the addressee would likely interpret it as meaning that he fired it. Similarly, virtually anyone told, *Harry used a firearm to rob the bank*, would hear that as meaning that Harry brandished a firearm in robbing the bank or even that he fired a firearm in robbing the bank. However, in this case, the interpretation of *used a firearm* as being equivalent to 'used a firearm as a weapon' is due to the linguistic context. Specifically, the complement phrase *to rob a bank* is an activity in which, if firearms are used, it can be expected that they will be used as weapons. This analysis is supported by the fact that few, if any, persons hearing, *Harry used a firearm to break into his kid's piggy bank*, would be likely to hear this as meaning 'Harry used a firearm as a weapon to break into his kid's piggy bank.' In this case, she would be more likely to hear it as meaning 'Harry used a firearm as a hammer to break into his kid's piggy bank.' This difference in interpretation is due to the different effects of the two complements, *to rob a bank* and *to break into his kid's piggy bank*, on how the purpose parameter *as y* is instantiated.

The linguistic context provided in section 924(c)(1) provides strong support for the view that *use a firearm* has the contextual meaning 'use a firearm as a weapon.'<sup>48</sup> Consider first the fact that *use a firearm* occurs in the larger construction *uses or carries a firearm* in section 924(c)(1). The fact that *use* occurs contrasted with *carry* suggests the possibility that *uses or carries a firearm* is to be interpreted in something like the way locutions like *killed or injured* (*Ten people were killed or injured*), or *own or lease a car*, etc., are interpreted, where the two predicates refer to actions or states of the same general type, but the first predicate is the

47. 113 S. Ct. at 2061.

48. We are speaking quite informally here. One is not giving a representation of the conventional meaning of an expression simply in equating it with another expression, as we saw in our analysis of Justice O'Connor's use of dictionaries. See *supra* note 36-45 and accompanying text. All we mean to be doing here is asserting that whatever the correct representation of the conventional meaning of *use x* is, it must contain a purpose parameter of the sort found in *use x as y*.

stronger predicate.<sup>49</sup> Were this interpretation to be correct, it would support the petitioner's and Justice Scalia's position that *use a firearm* contextually means 'use a firearm as a weapon,' where firing or brandishing a weapon is a stronger (*i.e.*, more threatening) action than simply carrying it.

Second, the language of section 924(c)(1) provides that the sentence to be imposed on the defendant must vary with the nature of the firearm. Following the passage cited earlier, section 924(c)(1) goes on to say:

[A]nd if the firearm is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device,<sup>50</sup> or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years.<sup>51</sup>

The nature of the sentence to be imposed seems to be a function of the deadliness of the firearm ("semiautomatic assault weapon" versus "machine gun") and its efficacy in criminal activities (use of silencers can reduce the chance of being observed engaging in the crime). This strongly supports the thesis that, in the statute, *use a firearm* contextually means 'use a firearm as a weapon.'<sup>52</sup>

Justice O'Connor supported her position with two counter-arguments. Her first counter-argument was:

It is one thing to say that the ordinary meaning of "uses a firearm" includes using a firearm as a weapon, since that is the intended purpose of a firearm and the example of "use" that most immediately comes to mind. But it is quite another to conclude that, as a result, the phrase also *excludes* any other use. Certainly that conclusion does not follow from the phrase "uses . . . a firearm" itself. As the dictionary definitions and experience make clear, one can use a firearm in a number of ways. That one example of "use" is the first to come to mind when the phrase "uses . . . a firearm" is uttered does not preclude us from recognizing that there are other "uses" that qualify as well. In this case, it is both reasonable and normal to say that petitioner "used" his

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49. The suggestion that *killed* and *own* are stronger predicates than *injured* and *lease* is based on the present author's intuition that to be killed or injured is bad and that to be killed is worse than being injured and that owning and leasing a car are good and owning a car is better in some sense than leasing one. Just how general this phenomenon is is unclear.

50. This reference to a "destructive device" is clearly linguistically infelicitous if what is meant is a bomb or hand grenade, for such things are not firearms at all.

51. 18 U.S.C. § 924(c)(1) (1988).

52. The reader is reminded that we are speaking quite informally here. In saying "*use x* contextually means 'use *x* as *y*'" all we mean to be saying is that the correct representation of the conventional meaning of *use x* must contain a purpose parameter of the sort found in *use x as y*.

MAC-10 in his drug trafficking offense by trading it for cocaine; the dissent does not contend otherwise.<sup>53</sup>

A difficulty with Justice O'Connor's counterargument is that she does not give proper weight to the linguistic context in which *use a firearm* occurs.<sup>54</sup> Moreover, she provides no principle which could be used to exclude arguably spurious applications of her theory. Given the Justice's line of argument, each of the following actions would be violations of section 924(c)(1).<sup>55</sup>

- (14) a. Fearing that someone might barge into his apartment while he was purchasing drugs from his brother, John, Harry went into his closet, got out his civil-war era rifle, and propped his door closed.
- b. While purchasing drugs from his brother, John, Harry found that he couldn't remember the combination of the lock he used to secure his money box, so he went to his desk, got out his target pistol, and hammered the lock open.

In these cases, use of the firearm advances the drug deal forward (i.e., Harry employs and derives service from the rifle and pistol). However, in neither is it used as a weapon (i.e., to shoot or threaten anyone). Nor would it likely be so used, since the two parties are brothers. Arguably there is no "ordinary" or "natural" or "every day" or "normal"<sup>56</sup> meaning of "*use a firearm during and in relation to a drug trafficking crime*" according to which Harry's actions in (14) constitute violations of section 924(c)(1).

A second argument Justice O'Connor advanced against the petitioner and Justice Scalia is:

In petitioner's view, § 924(c)(1) should require proof not only that the defendant used the firearm but also that he used it *as a weapon*. But the words "as a weapon" appear nowhere in the statute. Rather, § 924(c)(1)'s language sweeps broadly, punishing any "us[e]" of a firearm, so long as the

53. 113 S. Ct. at 2055.

54. This despite the fact that she clearly recognizes the importance of context, saying at one point, "The meaning of a word that appears ambiguous if viewed in isolation may become clear when the word is analyzed in light of the terms that surround it." 113 S. Ct. at 2054.

55. In arguing that the majority's construction of the phrase *uses . . . a firearm* will not produce anomalous applications, Justice O'Connor cites a case of someone who scratches his head during a drug deal, noting that a use of a firearm would be punishable only if it "facilitates or furthers the drug crime" and the defendant's scratching his head neither facilitates nor furthers the drug crime. *Id.* at 2058-2059. However, the examples cited in the present text involve uses of a firearm for an "innocuous purpose" but do further the drug crime.

56. These are all predicates that Justice O'Connor employs in her argument at one point or another.

use is “during and in relation to” a drug trafficking offense.<sup>57</sup>

This argument suffers from the difficulty that we normally do not make explicit what we reasonably believe our addressees will assume, including references to the normal uses of the things words refer to. The normal use of a firearm, as Justice Scalia noted and Justice O’Connor conceded, is as a weapon. The authors of section 924(c)(1) can be expected not to have made explicit that they meant to make illegal the use of a gun as a weapon in a drug deal because that interpretation would clearly be recognized by anyone reading the statute (who is a speaker of English and is of sound mind). Moreover, it would have been very difficult, simply as a stylistic matter, to have added the phrase “as a weapon” to section 924(c)(1).<sup>58</sup>

The Justice’s argument can lead to unwanted results. Suppose that the Ohio legislature decided to make it illegal “to use a computer in the commission of a crime,” and someone was found to have beaten someone else over the head with his laptop computer. To claim not only that our lawbreaker had committed assault, but had broken the law against using a computer in the commission of a crime would be absurd. Using Justice O’Connor’s reasoning, however, we would be entitled to say that since the law did not say that the computer had to be used in computing something as a part of the criminal act the language of the law “sweeps broadly” and therefore includes its use as a weapon.

In fact, the failure of Congress to include a purpose parameter in section 924(c)(1) provides a powerful argument that they envisioned a “normal use” interpretation. Suppose, in this light, that Harry tells his employee Sam to use a new claw hammer Harry has just purchased to put in a floor, and that Sam not only uses the hammer to drive in nails, but also to pry up a board that he had nailed in incorrectly. Suppose, finally, that the head of the hammer breaks in the course of prying up the board. Harry is unlikely to accept Sam’s defense that he was entitled to use the claw hammer to pry up a board because when Harry said, *Use this hammer to put in the floor*, he didn’t say, *Use this hammer (only) to drive in nails in putting in the*

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57. *Id.* at 2054.

58. Neither *whoever, during and in relation to any crime of violence or drug trafficking crime . . . uses as a weapon or carries a firearm, . . .*, nor *Whoever, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm as a weapon, . . .* is stylistically felicitous. The first is stylistically barbarous; the second suggests that *carry* might be a verb, like *use*, that takes a purpose parameter, which is doubtful. Had Congress intended for its language to “sweep broadly” it could have said, *whoever, during and in relation to any crime of violence or drug trafficking crime . . . , uses or carries a firearm in any way . . .*. The fact that it did not further weakens Justice O’Connor’s argument.



*floor*. The point is that we—and this includes Congress—depend on others to interpret what we write and say in standard ways unless there is a compelling reason not to do so. Because of this, we feel free not to spell out precisely what we mean in cases in which a standard interpretation is intended.

We have here two starkly opposed positions: that the phrase *use a firearm during and in relation to a drug trafficking crime* applies to a use of a firearm as an item of barter and that it does not. Both positions claim to reflect the “ordinary meaning” of this phrase. Arguably, this conflict has arisen because Justice O’Connor is concerned with the *conventional meaning* of the phrase and Justice Scalia with its *contextual meaning*. Certainly Justice O’Connor gives a highly decontextualized treatment of *use a firearm*.

The difficulty with Justice O’Connor’s analysis of the conventional meaning of *use a firearm during and in relation to a drug trafficking crime* is that it is functionally equivalent to *bring a firearm to the scene of a drug trafficking crime* or *handle a firearm at the scene of a drug trafficking crime*. However, had Congress intended so broad an interpretation it could have said, “whoever, during and in relation to any crime of violence or drug trafficking crime . . . , uses a firearm *in any way*, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years. . . .” However, it must be recognized that the fact that Congress did not adopt such language is consistent either with the thesis that it simply did not occur to Congress that it should do so in order to achieve its goals or that it did not intend its language to “sweep broadly.”

The problem with Justice O’Connor’s position is not that her analysis of the conventional meaning of “to use a firearm during and in relation to a drug trafficking crime,” is wrong, but that it is incomplete. Recall our formula (7a), which is repeated below as (15).

$$(15) \quad S_u = f(L_u, C_u, G_s)$$

We may see Justice O’Connor’s claim as a claim about “ $L_u$ ” (a largely decontextualized interpretation) and Justice Scalia’s claim as a claim about the significance “ $S_u$ ” of *use a firearm* in the context in which it occurs, *i.e.*, as equivalent to “ $f(L_u, C_u)$ .” According to this analysis, the Justices are talking about two very different senses of *meaning*.

Were we forced to choose between the positions of Justices O’Connor and Scalia on purely linguistic grounds, we would have to side with Justice Scalia. However, the interpretation of section 924(c)(1) is arguably incom-

plete, for the issue cannot be what the *phrase use a firearm during and in relation to a drug trafficking crime* means, but what the *statute* means. To determine this we must consider the intent of Congress (“G<sub>s</sub>” in formula (15)) as well as the application of canons of reasoning or other interpretive principles. This could possibly include those advanced by Grice.<sup>59</sup>

In presenting the majority decision in *Smith*, Justice O’Connor quoted the District of Columbia Circuit Court’s observation that

It may well be that Congress, when it drafted the language of [§] 924(c), had in mind a more obvious use of guns in connection with a drug crime, but the language [of the statute] is not so limited[;] nor can we imagine any reason why Congress would not have wished its language to cover this situation. Whether guns are used as the medium of exchange for drugs sold illegally or as a means to protect the transaction or dealers, their introduction into the scene of drug transactions dramatically heightens the danger to society.<sup>60</sup>

If the intent of Congress was, in fact, to minimize “the danger to society” that the firing of weapons during drug transactions poses, then one could argue that it is the presence of firearms at the scene of drug crimes *which could be used as weapons* that Congress was trying to discourage in framing section 924(c)(1).<sup>61</sup> Because a loaded MAC-10 which is brought to the scene of a drug deal as an item of barter could be used as a weapon should the drug crime go sour, such a use of the MAC-10 would count as a violation of section 924(c)(1). The question arises as to whether this is an interpretation of section 924(c)(1) that its language will bear.

The reasoning of the Court comes down to the claim that Congress meant (16b) by (16a), that is, that (16b) follows rationally from the conventional meaning of (16a), the linguistic context, and the assumption that Congress was attempting to discourage the presence of firearms in violent crimes and drug trafficking crimes in passing 924(c)(1).

- (16) a. Whoever, during and in relation to any crime of violence or drug trafficking crime . . . , uses or carries a firearm, . . . .  
 b. Whoever introduces a firearm into the scene of a drug transaction,  
 . . . .

The problem here is that the significance of (16a), in the linguistic context

59. See *supra* note 19 and accompanying text.

60. 113 S. Ct. at 2059 (quoting *United States v. Harris*, 959 F.2d 246, 261 (per curiam), cert. denied, 113 S. Ct. 362 (1992)).

61. Ironically, this theory of the ultimate significance or import of section 924(c)(1) depends on an assumption that *use a firearm* means ‘use a firearm as a weapon.’

in which it occurs, is something on the order of (17).

- (17) Whoever, during and in relation to any crime of violence or drug trafficking crime . . . , carries a firearm, . . . .

The difficulty is that (18), which is the provision of 924(c)(1) that the petitioner was charged with violating, is vastly stronger than (16b), when interpreted in the linguistic context in which it occurs.

- (18) Whoever, during and in relation to any crime of violence or drug trafficking crime . . . , uses a firearm, . . . .

To argue that (18) implicates (16b) comes down to claiming that consideration of the intent of a speaker in interpreting language can have the effect of substantially weakening the force of that language, and this is not the effect that consideration of speaker intent normally has. Thus, while the petitioner may have violated 924(c)(1), he appears not to have violated the part of the law that he was charged with violating.

The problem with the Court's reasoning is that, in arguing that (18) implicates (16b), the Court does serious violence to the most credible interpretation of the meaning *use a firearm* has in the *linguistic* context in which it occurs, which is 'use a firearm as a weapon.' The point is that the language of any statute must limit the interpretation the Court gives to the statute. This means not that the conventional meaning of this language must restrict the Court's interpretation, but that the contextual significance of this language must do so *for the meaning the language has in the context in which it occurs is the only meaning it has*. Thus, in the canon of interpretation according to which the Court should not give a legal text a meaning it cannot bear, the operative sense of "meaning" must be contextual meaning (contextual significance), not conventional meaning. Adoption of this thesis will tend to encourage overbroad construals of statutes which violate the rule of lenity.<sup>62</sup>

### III. CONCLUSION

We began with the observation that the Court uses the words *mean* and

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62. Justice Scalia took the position in *Smith* that *use a firearm* was ambiguous and that the rule of lenity should lead the Court to take the interpretation—the 'use a firearm as a weapon' interpretation—that favors the petitioner. 113 S. Ct. at 2063. In fact, *use a firearm* is not ambiguous insofar as either its conventional meaning or contextual meaning is concerned. One may revise the Justice's application of the rule of lenity by saying that the Court should give the instantiation to the purpose parameter that favors the petitioner when alternate instantiations are theoretically possible.

*meaning* in a number of ways. The difficulty with this is that there are two senses of these words that can, and often are confused, and these are what we have been calling “conventional meaning” and “contextual significance.” Locutions containing *mean that* are particularly problematic, for *mean that* is sometimes equivalent to ‘entail’ and sometimes to ‘implicate.’ Clearly it is in the interest of the Court to be more explicit about what it means by *mean* and *meaning*. Unfortunately, its practice of adding modifiers like *common, ordinary, natural, every day,* and *plain* not only does not make its meaning clearer, it further exacerbates the problem.

The Supreme Court would be well-advised to adopt the analytic techniques of linguists, specifically semanticists and pragmatists. Rather than the question-begging usage of dictionaries, the Court could employ entailment tests of the sort used here to determine the conventional meaning of the language of disputed texts. Arguably, it would come up with results that not only are more empirically sound, but provide a stronger basis for its real task—to determine the applicability or import, *i.e.*, the contextual significance, of the legal texts that the Court interprets.