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Songs of Innocence and Experience:
Dominance Feminism in the University

The Morning After: Sex, Fear and Feminism on Campus. By Katie Roiphe*

Kathryn Abrams†

Feminists have had notorious difficulty handling challenges from within our ranks. The "sex wars" struggle, in which opponents of pornography and advocates of sexual expression tarred each other with claims of false consciousness, produced lingering hostilities. Mainstream feminists first decried the race critique as freighting their efforts with "extra baggage," and only slowly recognized that it exposed a dynamic of erasure within feminism itself. In the wake of the antagonism and wasted effort produced by these failures, some feminists have voiced an unsteady resolve: to give ear to the unorthodox in feminism, to attempt to reconceive feminist efforts along pluralist lines.

This resolve has been challenged by the emerging controversy over "date rape" on university campuses. Camille Paglia fired the first shot, charging that

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1. The term "sex wars" is frequently used to describe the ongoing controversy between (self-described) anti-pornography and pro-sex feminists, which began with the 1982 Barnard sexuality conference and continued through several campaigns around the MacKinnon-Dworkin anti-pornography ordinance. See Carole Vance, More Pleasure, More Danger: A Decade After the Barnard Sexuality Conference, in Pleasure and Danger: Exploring Female Sexuality at xxii (Carole Vance ed., 2d ed. 1992).
campus rape policies resurrect parental protection, creating a generation of women unable to enjoy the "sizzle" of sex or protect themselves against its inevitable excesses. Paglia's scattershot cultural indictment and adulation of a dark, immutable male sexuality ("Guess what, it's hot.") confounded her message and made it difficult to gauge her target. Yet Paglia's challenge has been seconded in ways that are more difficult to ignore. Writing in the New York Times Magazine, Katie Roiphe warned that exaggerated claims of date rape "betray[] feminism" by portraying women as fragile, vulnerable, and unable to negotiate the "libidinous jostle" of contemporary life without paternalistic rules and restrictions. With the publication of her book, The Morning After: Sex, Fear, and Feminism on Campus, Roiphe adds to the date rape critique the voice of an author explicitly concerned about the future of feminism.

Roiphe's book is ultimately unsatisfying, for both stylistic and substantive reasons. Its narrative is bathed in second-hand nostalgia for a golden age of sexual revelry that Roiphe never witnessed. Its subtext—that sexualized oppression is mainly a problem inside women's heads—is absurd outside the rarified atmosphere Roiphe describes, and makes little sense within it. Its relentless portraits of shrill campus leaders and their sulking, maladjusted followers will try the patience of all but the most generous feminist readers. Yet the book's larger message is one that feminists cannot afford to ignore. As a student drawing on recent experience, Roiphe speaks from the vortex of the controversy. While her rhetoric reflects the current taste for mocking "political correctness," her concern with women's fear-filled abdication of the sexual realm has a more established pedigree.

Roiphe's book voices the concerns of a subset of feminists, women old enough to have participated in the "sex wars" and young enough to dominate "Generation X." These women worry about whether depictions of pervasive male aggression and coercion imply female passivity; and whether advocacy of expanded legal protection signals a return to paternalism, or undermines a woman's assertion of individual responsibility for her own direction and security. They want to fight against the oppression of women without surrendering their belief in the present possibility of women's agency. The publication of Roiphe's book provides an occasion for feminists who do not share her views to think seriously about how to respond.

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3. Id. at 57.
I. DATE RAPE'S OTHER VICTIM

Roiphe argues that a campus movement that depicts women as victims of pervasive male sexual aggression has transformed feminists into thought police, and women into fragile vessels. Feminism has joined hands, she contends, with both authoritarianism\(^6\) and the recovery movement.\(^7\) The result is a growing wall of legal and social restrictions, and behind it, a generation of women who obsess about trauma and violation, yet lack the will or the savvy to direct their own sexual lives.\(^8\)

As stern as Roiphe's conclusions might seem, her argument is not structured as a polemic. It emerges from impressionistic portraits of college life, the apparently ludicrous extremes of which frame Roiphe's indictment. In form, her stories are oddly reminiscent of the narratives of Patricia Williams, an author who shares few of Roiphe's substantive perspectives.\(^9\) Like Williams, Roiphe is a perplexed observer, a foreign correspondent in a world gone awry; she is confident in her own perceptions, yet vertiginously aware that they challenge the sanity of all those around her.

The main thrust of Roiphe's argument is delivered in the first four chapters. The first chapter, "The Blue Light System," describes the cloud of sexual fear that has settled over many American campuses. Prodded on the one hand by campus education on date rape and, on the other, by growing concerns about the spread of AIDS,\(^10\) students' lives are pervaded by a sense of vulnerability, a new and discomforting awareness that sexuality connotes

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6. Id. at 60-69.
7. Id. at 30-39, 79-81. When Roiphe refers to "recovery," she describes a process of self-examination and reinterpretation through which a person comes to understand that she has been crucially shaped by an experience or injury, whose impact—whether because of submersion or denial—has not been consciously confronted. This process is often undertaken collectively, through groups constituted of individuals with a particular kind of injury or exposure, such as Alcoholics Anonymous, Gamblers Anonymous, or Adult Children of Alcoholics. The initial goal of such efforts is the recognition of the injury or dependence. The ensuing "recovery" process is one through which a person begins to reshape her life in relation to that recognition, to live despite it but with an awareness of the influence it exerts. In her discussions of what she calls the "recovery movement," Roiphe generally focuses her denigration on its emphasis on public acknowledgement and revelation of injury, collective encouragement and support, and individual self-celebration. However, I understand her larger point to be that the effort of excavating submerged injuries and learning to accommodate their pervasive effect on one's life through a sustained, temporarily extended process can encourage one toward an identification with, or investment in one's injuries that can make it difficult to get on with the other projects that constitute one's life. I have sympathy with this point, although recovery programs may vary in the extent to which they characterize the individual as capable of asserting herself against the effects of the injury, rather than relying on some external force or power, and the extent to which they describe recovery as a finite process rather than an on-going and ultimately uncompletable journey. I am less concerned with this problem, however, than with the way that recovery can encourage an inward focus on individual injury, rather than a collective effort to address the conditions that helped give rise to it. See infra note 65 and accompanying text.
8. Id. at 30-43, 97-99.
10. THE MORNING AFTER, supra note 5, at 21-27.
risk.\textsuperscript{11} At first, Roiphe handles this theme with poignant balance; as the chapter proceeds, however, that balance gradually tips in a single direction. According to Roiphe, college women's obsessive focus on weight and fitness reflects an effort to "elud[e] the pressures of the outside world,"\textsuperscript{12} and the bathroom graffiti writers "aren't worried about enough freedom anymore—they are worried about too much danger."\textsuperscript{13} She argues that in the date rape and safe-sex workshops students don't simply learn how to make refusal or condom use less embarrassing, they also learn how to acquiesce in politically prescribed views of the world.\textsuperscript{14} "I look for signs of frustration, rebellion, dissent," Roiphe writes, "but there are only heads nodding in consensus."\textsuperscript{15} The result is that the "hard, bright, hedonistic light"\textsuperscript{16} of sexual freedom and experimentation—which Roiphe views as the birthright of the post-adolescent—has been replaced by the "blue light" of campus safety.\textsuperscript{17}

The "date rape crisis," the primary protagonist in this struggle to instill fear, is the focus of the following two chapters. In "Taking Back the Night," Roiphe offers a montage of images from the yearly marches that have become a cultural ritual in American campus life. To Roiphe, these marches represent the apogee of feminism as recovery: emotion-drenched spectacles of mutual affirmation in which young women discover the revelation of sexual violation as a route to power. Roiphe is frankly contemptuous of these events, dissecting the dress and bearing of the participants, parodying their utterances of support and the homogeneity of their discourse, pointing out instances in which the emotion of the moment has led women to embroider or fabricate rape charges.\textsuperscript{18} Her frustration with these public displays contrasts sharply with her sympathetic rendition of a more personal revelation:

Once, over a cup of coffee, a friend told me that she had been raped by a stranger with a knife. I was startled. Small, neat, self-contained, she was not someone prone to bursts of self-revelation. She described it, the flash of the knife, the scramble, the exhaustion, the decision to keep her mind blank, the bruises and the police. After she had finished, she quickly resumed her competent, business-as-usual attitude, her toughness, but I could tell how hard it had been for her to tell me. I felt terrible for her. I felt like there was nothing I could say.\textsuperscript{19}

\textsuperscript{11} Id. at 12-15.
\textsuperscript{12} Id. at 21.
\textsuperscript{13} Id. at 19.
\textsuperscript{14} Id. at 22-23.
\textsuperscript{15} Id. at 23.
\textsuperscript{16} Id. at 27.
\textsuperscript{17} Id. at 27-28.
\textsuperscript{18} Id. at 39. In support of this generalization, Roiphe offers only two accounts of women who fabricated rape stories. Id. at 39-42.
\textsuperscript{19} Id. at 43.
This abbreviated, furtive revelation, made almost without breaking stride to a listener who remains trapped behind the silence of her own discomfort is, to Roiphe's mind, a normative point of reference. It is a model that neither blunts women's individuality nor "celebrate[s] their vulnerability . . . [their] victim status." The distance between this conversation, and the spectacles in which vulnerability and broken silence are parlayed into power, prompts Roiphe to investigate "not . . . what the marchers are saying, but . . . why."

Roiphe's ensuing scrutiny of the date rape crisis takes up the following chapter of the book. In "The Rape Crisis, or 'Is Dating Dangerous?'", she argues that the "one-in-four statistic," the "epidemic" of date rape on campuses, reflects not a change in behavior but a new way of interpreting sexual encounters. Primed by freshman orientation programs that tout the pervasive hazards of non-public encounters, of mixing alcohol and sex, and of emotional as well as physical coercion, young women have begun to feel pressure and see danger in all heterosexual interaction. Not only does Roiphe see in such warnings restrictive codes of ladylike conduct worthy of her grandmother's time, she also sees familiar images of fragility and asexuality in the portraits of guileless, bamboozled women. "The assumption embedded in the movement against date rape is . . . [that] men want sex, women don't," Roiphe argues. "In emphasizing the struggle—he pushing, she resisting—the rape-crisis movement recycles and promotes an old model of sexuality."

To Roiphe's mind, the conviction that sex is "our Tower of Babel," a zone of confusion and mutual misunderstanding, and the resultant longing for a simpler time of sexual innocence and social predictability, are baggage that feminists can do without:

Imagine men sitting around in a circle talking about how she called him impotent and how she manipulated him into sex, how violated and dirty he felt afterward, how coercive she was, how she got him drunk first, how he hated his body and couldn't eat for three weeks afterward. Imagine him calling this rape. Everyone feels the weight of emotional pressure at one time or another. The question is not whether people pressure each other, but how that pressure is transformed in our mind and culture into full-blown assault. There would never be a rule or a law, or even a pamphlet or peer-counseling group, for men who claimed to have been emotionally raped or verbally pressured into sex. And for the same reasons—assumptions

20. Id. at 44.
21. Id. at 50.
22. Id. at 53.
23. Id. at 57-60.
24. Id. at 66-69.
25. Id. at 63.
26. Id. at 76.
of basic competence, free will, and strength of character—there should be no such rules or groups or pamphlets for women.  

Into this prospective vacuum, Roiphe moves a generalized prescription for individual action: take responsibility for your own situation, resist a man when you want to resist, and take up that “hard, bright, hedonistic light” of sexual expression when you prefer. This approach contains no grandmotherly warnings, no Victoriana; yet it is hard to miss the conflicting currents of Nancy Reagan and Erica Jong.

Feminist campaigns against sexual harassment, the subject of the chapter Roiphe titles “Reckless Eyeballing: Sexual Harassment on Campus,” represent the ultimate elevation of the trivial to the status of an injury. Shifting their attack from quid pro quo proposals by professors to jokes, leers, and epithets from classmates, campus feminists “propose the right to be comfortable as a feminist principle.” The problem with this approach, opines Roiphe, sounding almost Paglian, is that:

[T]hough it may infringe on the right to comfort, unwanted sexual attention is part of nature. To find wanted sexual attention, you have to give and receive a certain amount of unwanted sexual attention. Clearly, the truth is that if no one was ever allowed to risk offering unsolicited sexual attention, we would all be solitary creatures.

Roiphe argues that sexual harassment education, now a staple on most campuses, deepens the harm perpetuated by date rape orientations. By suggesting that women are vulnerable to jokes or looks, and by implying that female professors can be harassed by male students, such programs teach women that they are “hothouse flowers,” unable to sustain the pressures of a frankly sexual world. These programs also exacerbate the damaging effects of the “cult of recovery,” in which women are more likely to nurse their violations than to take action to prevent them.

According to Roiphe, the politicization of apparently harmless acts produces codes of “etiquette,” at best absurdly straitening for all concerned, at

27. Id. at 68-69.
28. Id. at 68-69, 101-02.
29. Id. at 87.
30. Id. at 87.
31. Id. at 108-09.
32. Roiphe offers as evidence the story of a classmate:
   She was at a crowded party, leaning against a wall, and a big jock came up to her, placed his hands at either side of her head, and pretended to lean against her, saying, So, baby, when are we going out? All right, he didn’t touch me, she says, but he invaded my space. He had no right to do that.
   She has carried this first instance of sexual harassment around in her head for six years.
   It is the beginning of a long list.
   Id. at 98.
worse reminiscent of the cultural prohibitions that made “reckless eyeballing” of white women an offense punishable by lynching for black men. A better answer is to depoliticize, or at least to decollectivize, the response to sexualizing acts. “Interpreting leers and leer-type behavior as a violation is a choice,”33 Roiphe insists, sounding perilously like that earlier avatar of racial insight, the Supreme Court in *Plessy v. Ferguson*.34 For more serious offenses, she finds that an imaginative response is required:

> Someone I knew in college had an admirable flair for putting offenders in their place. Once, when she was playing pinball in a college coffee shop... a teenage boy came up to her and grabbed her breast. She calmly went to the counter and ordered a glass of milk and then walked over and poured it over his head.

After the pugnacious brio of these opening chapters, Roiphe’s narrative rapidly runs out of steam. “The Mad Hatter’s Tea Party,” which might more accurately be entitled “Lifestyles of the Rich and Feminist,” is a series of portraits of campus women and men; they highlight, with a breathtaking lack of generosity, the personal absurdities and contradictions produced by experimentation with feminist politics and academic forms of feminist discourse.36 “Catharine MacKinnon, the Antiporn Star,” is a sometimes perceptive reflection on the theorist whose work informs the rape-crisis analysis. This chapter may be more interesting to a lay audience than to legal scholars who have analyzed MacKinnon at length, and who have become accustomed to her galvanizing presence on the academic scene.37 “Still Looking for Mr. Goodbar” is an attempt at synthesis, a wandering, graduation-day rumination on the kinds of fantasies and nightmares created by four years of campus fear. With a brief afterword on the intermittent need to fight one’s friends, the book closes.

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33. *Id.* at 102.
34. 163 U.S. 537 (1896). There the majority opinion stated:
   > We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.
   > *Id.* at 551 (emphasis added).
36. *Id.* at 113-37.
37. There is something disturbingly incomplete about describing MacKinnon as a superstar, with no mention of the decade MacKinnon spent moving from institution to institution, her theories reviled by colleagues and contested among feminists. While it is true that one is under no ethical obligation to document the humble beginnings of current superstars (e.g. you don’t have to talk about Madonna’s beginnings in Bay City, Michigan), Roiphe’s omission here is part of a larger pattern that is more troubling. Her reluctance to report the ways in which feminism has been embattled as well as triumphant, its leading figures pariahs more often than superstars, makes it easier for her to present “rape crisis” feminism as an ascendant, if not hegemonic, force on university campuses.
II. CRISIS? WHAT CRISIS?

Roiphe is, in some respects, a peculiar subject of attention for feminist legal theorists. An intemperate attack on feminism by a student writing in a popular vein is not the stuff of which feminist scholarship is generally made. Yet there is more reason for engaging the provocative message of this flawed book than might first appear.

The popular focus of the book may place it beyond the scope of some feminist theoretical projects, but squarely within the domain of others. The recent renaissance of popular feminist writing may be the first to take place against the backdrop of a substantial and largely institutionalized body of feminist scholarship. If these movements are not to work at cross-purposes, feminists in both genres ought to give thought to their inter-relations: writers like Roiphe, Paglia, and Naomi Wolf might have had more difficulty making a target out of victim feminism, for example, if academic feminists had been more attentive to the way that dominance principles were being presented in popular settings.

There is likewise no reason to conclude that Roiphe's antagonistic tone places her beyond the purview of feminist response. Roiphe is, on the weight of the evidence presented, a complicated person, with a complicated relationship to the events detailed in her book. She may seek to redirect

38. A range of popular books by young feminist authors have recently attracted wide attention. Many of them could be understood to address the paradox that many young women today favor a range of opportunities for women yet decline to identify themselves as "feminists." See, e.g., NAOMI WOLF, FIRE WITH FIRE: THE NEW FEMALE POWER AND HOW IT CAN CHANGE THE 21ST CENTURY (1993); and SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR ON AMERICAN WOMEN (1991). While Susan Faludi blames mainstream cultural forces for the negative connotations of "feminism," Roiphe and Naomi Wolf finger the feminist tendency to depict women as victims. There are pointed differences between Wolf and Roiphe's delivery of this message: Wolf is more precise in her target, differentiating "victim feminism" from more promising varieties, while Roiphe's comparatively indiscriminate attack threatens to throw the baby out with the bathwater. Perhaps more importantly, Wolf advances an affirmative program under the rubric of "power feminism," with which one may or may not agree, but which avoids the individualistic and solipsistic aspects of Roiphe's isolated suggestions. See infra pp. 1546-47. However, both might be included under the rubric of what columnist Anna Quindlen has trenchantly labelled "babe feminism," which tries to expand the reach of the movement and reassure discomfited men by modifying the feminist message to make it more (hetero)sexy and less threatening. See Anna Quindlen, And Now, Babe Feminism, N.Y. TIMES, Jan. 19, 1994, at A21. Viewed less critically, these feminist efforts may be understood as part of a broader literature that attempts to rescue multiculturalism from victimization rhetoric. See ROBERT HUGHES, THE CULTURE OF COMPLAINT (1992).

39. The need for some integration of popular and scholarly efforts may be particularly great for feminist legal theorists, as the hard work of litigated feminist change often depends on the understandings of "lay" women and men. The cultural developments Roiphe describes have been shaped by a particular regime of legal and regulatory enforcement: they reflect attitudes borne of legal imagery, and expectations about regulatory intervention and response. Understanding of these social and cultural currents—and how they are likely to affect activists and clients—is crucial to the performance of our professional task.

40. Tucked away in a section of "The Mad Hatter's Tea Party" is the revelation that Roiphe's views, as expressed in an early editorial in the New York Times, were harshly protested by some of her feminist classmates in graduate school. THE MORNING AFTER, supra note 5, at 128. These students circulated a petition against her among graduate students and some faculty; they posted it in the English department and placed copies in mailboxes. They then determined that to look at or speak to Roiphe "would be to betray the cause." Id. This level of ostracism is severe, and might be expected to have had a strong effect
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campus politics—and to punish those feminists who treated her harshly, and
to exploit a literary market that embraced the likes of Dinesh D'Souza. While
such calculated positioning may not be what most of us look for in a feminist
spokesperson, neither is it cause for excommunication. Moreover, the
resonance of Roiphe's argument with earlier, less solipsistic defenses of female
sexual agency makes the questions that she raises genuinely important. To my
mind, the question is not whether The Morning After is actually a challenge
from within feminism—a question we can probably never answer—but
whether discussing this book, whatever its motivation and positioning,
contributes to feminist thinking. I will examine this question, first by asking
how the book succeeds on its own terms, and second by exploring the inquiries
to which it points.

Roiphe's signal contribution may be descriptive. Her book is a dispatch,
not simply from an Alice-in-Wonderland world gone awry, but from a new
frontier of feminism. Roiphe's classmates are among the first to come of age
at a time when feminist theory and practice have permeated many aspects of
university life. College is a time for trying on roles and experimenting with
personal styles—a point Roiphe seems to grasp in the realm of the sexual and
miss everywhere else. It is fascinating to see young women do with Hélène
Cixous or Catharine MacKinnon what my classmates and I did with Jurgen
Habermas or Michel Foucault: think about the implications of their work for
one's personal posture, and toy with the elements of an intellectual style. The
same—though this is an older project—goes for the effort to reconcile one's
personal style with one's feminist convictions, particularly in the murky waters
of heterosexual engagement. The personal accommodations Roiphe indicted as
being contradictory or shallow strike me as interesting and poignant: they
reflect the awkwardness and transitional imbalance that social change demands
of all of us, writ large on the canvas of college life.

Of course, Roiphe's main point is not to expose heterogeneity and
experimentation, but to decry its opposite: the pressure for conformity, around
a flawed and counterproductive image of women, that has become the hallmark
of campus feminism. Here, too, Roiphe makes some important points. It is
useful, although hardly novel, to be reminded of the danger that resistance and
rebellion can imperceptibly be transformed into orthodoxy. It is instructive to
see how feminism, a movement which originally joined personal to political,
has been privatized or even depoliticized through its link to recovery rhetoric
and practice. It is important to see in practice what “sex wars” partisans have
long warned in theory: that exposing the pervasiveness of male sexual
domination may project images of women as passive, fragile, and repelled by

on a 23- or 24-year old. Although Roiphe notes in the Introduction that “[t]his book comes out of
frustration, out of anger, out of the names I’ve been called,” id. at 7, she does not specifically address the
impact of this episode on her view of campus feminism, supporting my impression that Roiphe is
ambivalent about being a protagonist in her own drama. See infra pp. 1542-43.
sexuality. But whether we take Roiphe’s book as she does, as an indictment of a burgeoning feminist authoritarianism, or as a warning about a tension in some strains of feminist thinking, depends upon the persuasiveness with which she makes her case.

Roiphe’s narrative methodology makes her argument hard to assess. An author who offers her analysis through impressionistic images is unlikely to “prove” to readers, in the objectivist sense, that there is a campus crisis of sexual interpretation. Roiphe does not render the full texts of university “date rape” pamphlets; she doesn’t tell us, on a case-by-case basis, whether this education was compulsory, whether students had access to alternative sources of information, whether there were counter-reactions, or whether all students responded with the docility Roiphe recalls among her classmates. A narrative approach cannot offer readers “hard” data of this sort. This may mean, of course, that narrative is not the optimal vehicle for supporting an indictment as broad as Roiphe’s seems to be. But even if we take Roiphe’s argument as a more limited critique of the few environments she has directly experienced, the success of her argument depends on whether she is a reliable narrator. On this ground, her argument leaves serious room for doubt.

Roiphe is in some respects a keen observer. She has a good eye for the telling detail, for glimpsing the numerous complicated relationships between personal style and political substance. Her dissection, for example, of the way that Catharine MacKinnon uses the word “fuck” in her speeches about pornography, is witty and revealing. She also has a well-tuned cynic’s ear for the passive-aggressive tendencies in contemporary victimization politics: her discussion of the way in which the claim of having been silenced has metamorphosed into a claim to power should chasten feminists who reach too often for this rhetoric.

Yet, in other respects, Roiphe’s narrative voice is troubling. In those passages where she appears as a character in her own narration, Roiphe functions more as a symbol than as a living, breathing protagonist. This oddly limited self-revelation extends from the classroom to Roiphe’s own life in the realm of the senses:

People have asked me if I have ever been date-raped. And thinking back on complicated nights, on too many glasses of wine, on strange

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41. THE MORNING AFTER, supra note 5, at 150-51.
42. Id. at 34-36.
43. Roiphe sometimes describes being at the receiving end of feminist hostilities without telling readers precisely what she has said:

In a conversation about how terrible it is that a professor made a dirty joke in class, I offer my opinion. Someone tells me that I don’t understand the humiliation, the violence of these comments. We look at each other, nothing more to say, our argument backed against a wall.
Id. at 114. Roiphe obviously did not find the joke to be “terrible,” but whether her classmate’s response was temperate or totalizing, depends in large part on the substance and tone of Roiphe’s comment. This we are never told.
and familiar beds, I would have to say yes. With such a sweeping definition of rape, I wonder how many people there are, male or female, who haven’t been date-raped at one point or another.  

There are many ways in which an experiential narrator can establish her credibility: she can say something so unconventional and potentially stigmatizing in its revelation that she could have little motive for offering it other than its truth; she can offer an account so concrete and particularized in its understanding that she thereby demonstrates her own credibility and knowledge; she can tell a story sufficiently universalizable that it resonates with readers’ factually distinct experiences; or she can show herself to be vulnerable to the same failings she finds in others. The foregoing narrative, however, manifests none of these qualities, and Roiphe never offers enough information to permit us to judge the credibility of her claim. For example, "complicated nights, on too many glasses of wine, on strange and familiar beds" is not an experiential account; it is a gesture toward the kind of dramatic, attractively abandoned college sex life many of us would like to think we had. Narrative may be a fine tool for placing others under the microscope, but Roiphe is noticeably squeamish about using it on herself.  

This suggestion of unreliability is underscored by Roiphe’s handling of some of the educational materials she critiques. Her discussion of a pamphlet produced by Princeton’s SHARE (Sexual Harassment/Assault Advising, Resources & Education), for example, is disturbingly selective. Focusing on the pamphlet’s examples, Roiphe states that describing women subject to non-physical coercion as becoming “nervous, depressed and angry” creates “hothouse flowers [that] are going to wilt in the light of postcollege day.” She completely fails to note the pamphlet’s first instruction on dealing with sexual harassment: “[s]peak up at the time and say ‘no’ to the harasser. Be direct and firmly tell the harasser to stop harassing you. . . . If you say ‘no,’ do so firmly and unequivocally. Don’t apologize and don’t smile.” The

44. Id. at 79.  
45. This framework for evaluation is articulated in Kathryn Abrams, Hearing the Call of Stories, 79 CAL. L. REV. 971 (1991).  
46. In “Taking Back the Night,” however, Roiphe makes the useful point that when such revelation is not shocking but pro forma, the risk implicit in revelation itself no longer functions to guarantee the truth of the narrative. THE MORNING AFTER, supra note 5, at 36.  
47. Even if we were to take this narrative as a credible account of Roiphe’s sex life, her use of it to suggest that the definition of “rape” has become so expansive as to be dangerous has an additional problem. There is nothing in her account that is evocative of rape—forcible stranger rape, emotionally exploitative acquaintance rape, or otherwise. “Complicated nights, on too many glasses of wine, on strange and familiar beds” contains no suggestion of coercion, the theme that unites traditional claims of stranger rape with more inclusive versions focusing on emotional pressure. To attack the shift of focus from physical coercion to emotional coercion by invoking an account that involves no coercion makes no sense, except as a reductio ad absurdum that draws little support even from the rest of her argument.  
48. Id. at 108-09.  
49. SHARE, WHAT YOU SHOULD KNOW ABOUT SEXUAL HARASSMENT (on file with author). The pamphlet notes that if contemporaneous verbal communication is “uncomfortable or unsuccessful,” women
image conveyed by this instruction contrasts sharply with Roiphe’s vision of cowering victims; it suggests many women will be able to communicate their disapproval of harassing behavior with energy and resolve. This kind of selectivity, as Katha Politt has observed, also afflicts Roiphe’s treatment of the social science data on rape, and her single brief excursion into the law.50

These difficulties indicate a lack of self-awareness that afflicts Roiphe’s narration throughout. So bent is she on exposure and critique, so eager to see herself as the lone voice howling in the wilderness, that she misses the way in which her rhetoric and posture begin to converge with those of her opponents. Her claim to have been silenced by campus feminists ("[t]his book comes out of . . . all the times I didn’t say something I was thinking because it might offend the current feminist sensibility")51 sits oddly next to her indictment of the political tyranny of the “silenced.” Her lament for bygone days of uninhibited sexual experimentation reflects the same trope of “paradise lost” that informs the campus feminists’ lament for a time of lost innocence. Even her plaintive shifting under the shackles of campus sexual fear is caught up in contradiction. She says of the “Take Back the Night” marchers:

These students say again and again, “It’s not fair that I should feel afraid.” This is an idea that springs from privilege. . . . Considering how many things there are to be afraid of and how many things are not fair, being afraid to walk around Princeton, New Jersey late at night does not seem like one of God’s great injustices.52

One wonders why she does not heed her own advice. It is difficult to place one’s trust in a narrator so unself-conscious as to miss these contradictions, or so puerile as to resent AIDS primarily for cramping her sexual style.53

But Roiphe’s convergence with the posture of her opponents also extends to matters of substance. The analysis that emerges from her stories displays a totalizing bent, conflating the threatening and the innocuous in ways that make illumination difficult. She sees paternalistic control and female fragility in many places where they do in fact exist: injunctions restricting dating to public places and depictions of college women as virginal innocents are surely a problem. But she also sees these failings in places where the links between

should attempt the same communication in the form of a letter.

50. See Katha Politt, Not Just Bad Sex, NEW YORKER, Oct. 4, 1993, at 220. In a searing critique, Politt argues that Roiphe’s case for date rape as a “problem of interpretation” relies on a single study, neglecting a range of studies that problematize that conclusion. Id. at 222-23. She also explains that Roiphe’s discussion of a New Jersey rape case, which ostensibly demonstrated how feminist definitions have infiltrated the law, mischaracterizes certain facts: the relationship between the parties, the age of the victim, and the extent to which the victim offered resistance to the attack. Id. at 221-22. Politt concludes that Roiphe may be “that rare grad student who has actually read ‘Clarissa,’ but when it comes to rape and harassment she has not done her homework.” Id. at 221.

51. THE MORNING AFTER, supra note 5, at 7.

52. Id. at 45.

53. Id. at 24-26.
concern about male aggression, on the one hand, and female infantilization and authoritarian enforcement, on the other, are far more tenuous.

Roiphe argues, for example, that campus feminists’ claim that female faculty members can be sexually harassed by male students is “insulting” to women:

The mere fact of being a man doesn’t give the male student so much power that he can plow through social hierarchies, grabbing what he wants, intimidating all the cowering female faculty in his path. The assumption that female students or faculty must be protected from the sexual harassment of male peers or inferiors promotes the regrettable idea that men are natively more powerful than women.54

The notion that male students can “sexually harass” female faculty members might, in fact, mean many things. It might mean, for example, that male students experience “sex-role spillover,” as a result of which they treat women faculty members according to the roles to which they most frequently assign women—wife, sister, date—rather than according to the role their position in the academic hierarchy suggests. It does not necessarily mean that the women recipients of such treatment “cower”; this is Roiphe’s own negative image of the sexual harassment victim, not the response of the average sexual harassment victim, nor a response the legal term implies or requires. And it does not mean that the conduct necessarily requires an enforcement response: one might imagine an educational effort or an individualized response alerting male students to the possibility that they may be categorizing female faculty members in inappropriate ways. Yet Roiphe yokes the three inexorably together, thereby suggesting that the use of the term in this context has authoritarian and infantilizing implications that need not, and often do not, follow from it.

Another troubling example is her indictment of the American College Health Association’s advice that “if someone starts to offend you, tell them firmly and early.”55 In an amusing but dubious leap, Roiphe compares this advice to the counsel of the 1857 pamphlet, The Young Lady’s Friend.57 One could view the ACHA advice as fostering brittle and prudish attitudes among college women—the word “offend” is perhaps ill-chosen in this regard. But one could also view it as authorizing women to speak their minds and set their own rules for social interaction. Roiphe’s classmate, who showered milk on her harasser, did little more than “tell [him] firmly and early” that his behavior

54. Id. at 89.
55. This term comes from BARBARA GUTEK, SEX AND THE WORKPLACE 134 (1985).
56. Id. at 66 (quoting AMERICAN COLLEGE HEALTH ASS’N, ACQUAINTANCE RAPE: IS DATING DANGEROUS? (1991)).
57. THE MORNING AFTER, supra note 5, at 66.
was unwelcome.\textsuperscript{58} Roiphe’s leap from ACHA advice to Victoriana places educational efforts inevitably on the side of authoritarian protection, and neglects the extent to which they can assist women’s own efforts at self-assertion.

Roiphe also offers totalizing explanations for the strength of “rape crisis” feminism on campus, explanations that are not only unitary but wrong. A recurring theme in her narrative is that campus sexual fear reflects a displacement of inevitable anxieties about entry into the world of sex. Consequently, the appeal of “rape crisis” feminism lies in the certitudes it offers to the sexually ambivalent, guilt-ridden, or unsure:

The idea of date rape comes at us fast and coherent. It comes at us when we’ve just left home and haven’t yet figured out where to put our new futon or how to organize our new social life. The rhetoric about date rape defines the terms, gives names to nameless confusions, and sorts through mixed feelings with a sort of insistent consistency. In the first rush of sexual experience, the fear of date rape offers a tangible framework in which to locate fears that are essentially abstract.\textsuperscript{59}

Some forms of feminism may offer reassurance to women whose sexual experience has left them uncomfortable or ambivalent. But at a time when women are organizing to protest practices ranging from stalking to abuse in intimate relationships, reducing campus concern about male aggression to sexual confusion reflects a post-adolescent view of the world. It makes sense for Roiphe to focus on feminism within the university; but to read that effort in isolation from women’s struggles throughout society is a solipsistic mistake.

Finally, Roiphe’s effort founders in articulating a new direction for feminists on campus. Having wielded her analytic wrecking ball on the current campus movement, Roiphe has little to put in its place. In no sense does she offer programmatic suggestions; her view of a more heterogeneous and dignifying feminism must be drawn from between the lines. The two suggestions that can be glimpsed in this manner offer scant reason for optimism. The first is exemplified by Roiphe’s own professed conduct: a kind of sexual “carpe diem” that harkens back to the golden age of the sexual revolution. Even setting aside the threat of AIDS—which only the foolish would actually do—the problems with this re-creation are precisely those of the original. For the most part, the sexual revolution was concerned with removing attitudinal barriers to the kinds of sex that people already had—not with changing what men expected or women wanted from sexual encounters. Unlike her “sex wars” counterparts, who draw on feminist insights to depict

\textsuperscript{58} Id. at 101.
\textsuperscript{59} Id. at 82-83.
a desiring female subject, Roiphe has little critical distance on conventional sexual practices. In one faint attempt at re-imagining female sexuality, Roiphe describes a campus fad of dancing without shirts at parties:

I remember the parties, dark rooms, beer, cigarettes, dancing shadows dressed in mostly black. . . . Girls were dancing with girls, some because they were interested in each other, others because they were trying to catch the attention of the boy across the room. That spring girls had started taking their shirts off at parties. I remember the bras, black lace, white lace, pink lace. There was a drama in dancing in bras, in crushing taboos beneath our feet. For most people, boys were in the background those nights. They were not the point. Dancing without shirts was intended as a bold statement about the triumph of the female body, an eye-catching, spirit-lifting display of sexual availability.60

It takes a peculiar angle of vision to see stripping down to lace brassieres in front of a room filled with men as “crushing taboos beneath our feet.” Perhaps these women show more enthusiasm about the prospect of sex than some who rally to take back the night; but if displaying one’s availability is the closest women can come to sexual self-assertion, I can only hope this revolution will not be televised.

Roiphe’s other answer is a strange kind of equality feminism: one that asserts not that women are just like men, but that all might be well if they could be. The problem with women’s response to male sexual aggression is that it is, for lack of a better term, too feminine.61 Women faced with coercive sexual behavior become anxious; they cry, they withdraw, they express their lack of control by starving or distancing themselves from their own bodies.62 The heroines of Roiphe’s narrative are women who eschew this kind of “cowering” for the casual sense of self-possession one associates with social privilege, and for the easy physical self-assertion one most frequently sees in men.63 They don’t demand restrictive legislation or sit around in self-help groups. They simply and firmly say no, and if the guy doesn’t like it, they pour a glass of milk on his head.

There is an appeal to this imagery: scores of women cheered it in “Thelma and Louise.” I liked “Thelma and Louise,” too: it is satisfying to watch the tables turned, to see what happens when women behave like Clint Eastwood. But “Thelma and Louise” was fantasy; things are likely to be a good deal more complicated in the real world. To begin with, there is the problem of socialization: women who have come of age in this culture will have to be

60. Id. at 15-16.
61. Id. at 68-69.
62. Id.
63. See, e.g., id. at 101, 120.
exposed to a lot more than Katie Roiphe before all of them will feel comfortable meeting a sexual advance with verbal or physical force. Beyond that, Roiphe’s analysis distorts the character of sexual threats in a way that makes the more prevalent female responses less plausible than they should be. In Roiphe’s view, the problem of male coercion means that he wants it and she doesn’t, or has been brainwashed into thinking she doesn’t. In the world outside of Roiphe’s imagination, coercion means that he controls your job, your scholarship, your letters of reference. He may be blocking the door, holding your car keys, or grabbing your shoulder too tightly on a deserted street. Recognizing these inequalities of power—inequalities that make unwanted sexual conduct truly anguishing—is a step Roiphe declines to take, stating that “rules and laws that are based [on this premise] . . . only reinforce the image of women as powerless.”64 Perhaps, but laws can communicate inequalities in ways that encourage transformation, as well as ways that perpetuate complacency and stasis. To ignore such inequalities, however, is simply to blink reality.

Finally, even if an Eastwood-style response were socially plausible and contextually prudent, it would only address the coercive behavior in the individual case; it would do little to mitigate the broader social problem. The recovery emphasis Roiphe decries in “rape crisis” feminism is problematic not simply for its self-indulgence but for its self-referentiality. As women nurse their grudges or heal their wounds, they fail to turn their efforts out towards the institutional structures and social norms that helped to produce their injury in the first place.65 The same is true of Roiphe’s primary reliance on the individualized response. The glass of milk may prevent a man from putting his hands, or his penis, where you don’t want them. But it will do little to keep him from putting them where another woman doesn’t want them, still less to affect the cultural images, the social expectations, attitudes and sanctions, or the interlocking economic inequalities that make it acceptable for him to impose and costly for women to interject their preferences.

This last failure underscores the way in which, for Roiphe, the problem of male sexual aggression truly is a problem of interpretation. It is because she sees sexual coercion as a problem in women’s heads—a leer we are free to interpret as we please, a bad night reflecting one of the many ways in which gender-neutral individuals put emotional pressure on each other—that she can propose privatization and de-politicization as solutions. For those of us who see “rape crisis” feminism as a response to a social and political problem, more collective and outward-looking forms of action are required. It is to the questions raised by these forms of action that I now turn.

64. Id. at 89-90.
65. A similar point is made in Martha Minow, Surviving Victim Talk, 40 UCLA L. REV. 1411, 1441-45 (1993).
III. VICTIMIZATION, AUTONOMY, AND LAW

In the past decade, "dominance" feminism has become an influential framework for understanding gender inequality. The sexual harassment analysis that Catharine MacKinnon built on the experience of victims has become federal law. The dominance-based anti-pornography ordinance remains mired in First Amendment challenges. Yet its central insight—that our popular culture reflects and fuels an eroticization of sexualized dominance that is implicated in such widespread practices as rape and spousal abuse—increasingly informs the way feminists and others think about sexual and social interaction. Even if Roiphe's indictment of an emerging feminist authoritarianism falls wide of the mark, we may still read her work as reanimating longstanding questions about whether addressing a pervasive male sexual dominance by resort to law reinforces images of women as vulnerable or sexually passive.

A decade ago, Ellen Willis warned that regulating pornography would reinforce images of "sex as an aggressive, unladylike activity . . . an exercise of erotic power . . . taboo for women." Joan Nestle assailed Andrea Dworkin's "litany of the penis" as a threat to the legacy of determined, sometimes costly, sexual agency exemplified by her mother. More recently, Sharon Marcus has argued that women's vulnerability to rape is neither biologically nor socially inevitable, but a socially constructed, legally endorsed cultural "script" that women should "disrupt" by aggressive resistance. Roiphe's account lacks the theoretical sophistication of these earlier critiques.

66. I use the term "dominance" feminism to describe that strand of feminist (legal) theory that locates gender oppression in the sexualized domination of women and the eroticization of that dominance through pornography and other elements of popular culture. Dominance feminism proposes to address this issue through legal regulation or prohibition of particular oppressive practices. Dominance theorizing provides at least part of the academic underpinning for the political movement that Roiphe refers to, pejoratively, as "rape crisis" feminism. While Catharine MacKinnon would probably be described as the primary—and most visible—exponent of this theory, the following discussion applies not merely to MacKinnon, but to the entire range of feminists who have worked theoretically, and often through political practice, to raise consciousness about male sexualization of and aggression against women. I consider myself loosely within this group, although I find dominance theory more persuasive in explaining some practices, such as rape or sexual harassment, than in explaining others, such as work-family conflict or the regulation of fertile women.

68. See American Book Sellers v. Hudnut, 771 F.2d 323 (7th Cir. 1985).
70. Joan Nestle, My Mother Liked To Fuck, in Powers of Desire, supra note 69, at 468.
71. See Sharon Marcus, Fighting Bodies, Fighting Words: A Theory and Practice of Rape Prevention, in Judith Butler & Joan Scott, Feminists Theorize the Political (1992). In fact, in its critique of culturally ascendant notions of women's vulnerability to rape and its advocacy of individualized, often physical resistance, Marcus' argument bears some similarity to Roiphe's. However, Marcus reflects none of the solipsism or self-importance that mar Roiphe's presentation. Marcus is temperate in her criticism of those who have highlighted women's vulnerability, and is careful to identify feminists on both sides of the debate. Moreover, for Marcus the individual aspects of disruptive resistance are tied to a larger, collective project of contesting and pluralizing dominant understandings of women.
It does not begin to disentangle the complicated assumptions that underlie the connection between dominance-based regulation and perpetuation of female sexual passivity. Yet it is framed in a way that has garnered considerable attention. Thus it is important that feminists who value the contributions of dominance theory explore the assumptions of Roiphe's challenge, and think about their implications for feminist activism and education.

A. "Down by Law"?

Feminists might begin by disaggregating the parts of the negative imagery Roiphe invokes. One reason that women within the dominance framework are viewed by critics as passive or dependent is that they rely on mechanisms provided by the state, the university, or other institutions to challenge sexualized injury. We might ask, first, why the resort to state or other quasi-legal protections should connote dependence, vulnerability, or passivity. In fact, recent memory offers potent counter-examples of groups whose resort to law was not associated with images of vulnerability or dependence. Black litigants in 1960's school desegregation suits were not viewed by observers as "cowering" behind a wall of legal rights. They were depicted as asserting themselves, claiming their rights, and pressing strongly for the rectification of injustices. Why are 1960's blacks (a group that included women) and 1990's women (a group that includes blacks) depicted in such different ways? One explanation may be that civil rights activists were prepared to rally, march, engage in non-violent resistance, and expose themselves to considerable

72. The parallels between Roiphe's work and that of theorists such as Willis, Nestle, and Marcus raise the question of why Roiphe's deeply flawed critique has been able to call wider attention to these issues than earlier, more cogent critiques. One answer lies in the increasing prevalence of dominance-based imagery. At the time that Willis and Nestle wrote, this imagery was comparatively new in feminist circles; it had not become the subject of more widespread discussion, nor had it yet been embodied in legal or regulatory regimes. With the advent of sexual harassment regulation and rape crisis activism, this vision of women's oppression has become more familiar to the general public; this greater familiarity—and the resistance it has wrought—have made Roiphe's critique a subject of more widespread interest.

A second factor has to do with Roiphe's accessibility and appeal to a broader public. Sharon Marcus' powerful critique, for example, is contained in a collection of essays in postmodern feminist theory, known mainly to academics; even were it more widely available, its reliance on academic forms of discourse ("rape is a language" is only one particularly stark example) would make it inaccessible to many readers. Katie Roiphe, on the other hand, uses a story-telling mode that is accessible to a range of readers; her clearly drawn thematic bottom lines create no ambiguity or confusion for a nonprofessional audience.

Perhaps more to the point, however, Roiphe is a highly mediagenic "sex warrior." Unlike her earlier counterparts, many of whom were frank sexual subversives—sex workers, users and makers of pornography, practitioners of sado-masochism, radical gay and lesbian activists—Katie Roiphe is a sexual adventurer you can take home to mother. Her carefully cultivated "bad girl" image is saucy enough to legitimate her critique of rape crisis feminists as latter-day Victorians, but sufficiently privileged, heterosexual and bland ("complicated nights, on too many glasses of wine") to pose little challenge to mainstream sexual sensibilities. It is unlikely that this quality has been lost on the editors of such publications as the New York Times. The Times has spotlighted Roiphe's book on the front page of its Book Review section, run her editorials on its op-ed page, and featured a lengthy interview of Roiphe and her mother, feminist essayist and novelist Anne Roiphe, in its Style section—a red-carpet treatment not usually extended to first-time authors, which has no doubt contributed to the book's visibility.
physical danger, in addition to litigating their cause. Yet feminist activists also rely on methods other than litigation; critiques of feminist rallies and educational initiatives occupy much of Roiphe's book. Other factors seem to be at work in shaping contrasting images of these two overlapping groups.

One factor may be the mediating stereotypes through which the actions of each group are interpreted. Most people interpret the actions of those around them in light of stereotypes, which include not only stigmatizing caricatures, but also shorthand explanations that help people to assimilate complex aggregations of facts. One factor that encourages the disparate imagery remarked above is that the actions of the groups “blacks” and “women” tend to be interpreted according to different stereotypes. Women invoking legal protections may be characterized as dependent or vulnerable because women, as a group, have often been characterized as vulnerable and dependent. Moreover, such characteristics have explicitly been invoked, sometimes by women, in seeking state intervention on their behalf. An additional piece of the puzzle—that explains why black litigants have not been characterized in this way, although some of them are women, and female litigants have, although some of them are black—is provided by the analysis of Kimberle Crenshaw. Crenshaw argues that cultural imagery relating to blacks reflects popular perceptions of black men, whereas cultural imagery relating to women reflects popular perceptions of white women, thereby dichotomizing the relevant imagery in ways that would not be possible were these images to address the experiences of black women.

Changing social views of government intervention may be a second factor shaping these divergent perceptions of the resort to law. Black civil rights litigants may have escaped characterization as vulnerable or dependent because the government protection invoked by litigation was not, at that time, understood to imply dependence. A Reagan-era mobilization of public sentiment against Great Society programs has resulted in a reconceptualization of government intervention, which may have contributed to the perceptions of black litigants as independent.

73. One reason for this characterization has been the continuing power of the ideology of “domesticity” in shaping images of women, particularly women of racial and socioeconomic privilege. According to the imagery of domesticity, women are appropriately sequestered in the home because of the nurturing qualities that make them good familial caregivers, and the delicate sensibilities that make them vulnerable in a turbulent public world. Women's relegation to the home, of course, makes them economically dependent on men, who support and represent their families in the public world. For a thoughtful recent discussion of the ideology of domesticity, see Joan Williams, Deconstructing Gender, 87 Mich. L. Rev. 797 (1989). As black feminists since Sojourner Truth have observed, however, the ideology of domesticity is neither appropriate nor frequently applied to black women, who have historically worked in large numbers outside the home and have not generally been depicted as delicate or vulnerable. See, e.g., Bell Hooks, Ain't I a Woman: Black Women and Feminism 160 (1981).


76. Crenshaw's analysis may explain why initial accounts of civil rights activism neglected the contributions of women, and why recent black victims of sexualized injury have been evaluated—sometimes to their detriment—according to norms reflecting popular perceptions of white women. See id. at 407-16 (making latter point with respect to Senate testimony of Anita Hill).
of governmental protection: it is now more likely to be construed as conferring
an unearned advantage, or as connoting the dependent character of the
beneficiary. As the increasingly acrimonious debates over affirmative action
and welfare reform have demonstrated, these images now impede African-
American men and women, as well as women of a variety of races.

A third reason for the divergence in these images may be the unexamined
assumption of a public-private distinction. Exclusion from a school system is,
according to this framework, a public wrong, which makes (public) legal
redress entirely appropriate. However, sexualized injuries—particularly those
such as date rape and sexual harassment that occur between acquaintances—are
thought to be private wrongs. Despite the fact that they have been rendered
public by the creation of a legal claim, some critics persist in seeing their
prevention or rectification a private matter, a matter of individual
responsibility. Thus, the resort to legal means in such cases represents the
failure of individual responsibility—the woman’s responsibility—to prevent or
resolve the problem. Feminist theory attempts to explain why reliance on this
distinction is inappropriate. It is shortsighted to call a sexualized injury private
when the creation of a legal claim acknowledges its social consequences.
Interactions in the “private” realm are so critically shaped by influences that
have their origins in the “public”—from economic inequalities to institutional
sanctions that reinforce gender role expectations—as to make a rigid boundary
between the two incoherent. This analysis explains why private responses may
be unavailing, and why the resort to law itself represents no failure. Yet it also
highlights a different aspect of the negative imagery in question: a female
victim so multiply compromised that she is unable to avert or address such
injuries herself—an image that is inconsistent with some women’s experience
of or aspiration for autonomy.

B. Women’s Victimization and Women’s Autonomy

But why is a given woman’s experience of, or aspiration for, autonomy
inconsistent with the recognition of socially created obstacles that prevent
many women from addressing sexualized injury on an individual basis? When
feminist theorists say that we should permit women recourse to law without
requiring them to address offenders on their own, they are not necessarily
saying that women are intrinsically unable to resist acquaintance rape or speak
straightforwardly to sexual harassers. It is important, in light of critiques such

77. It might be argued that this emergent stigma applies mainly to government assistance programs,
as opposed to the kind of constitutional protections invoked during the civil rights period. Yet I think this
distinction is too simplistic: affirmative action programs, which represent a remedial response to the kinds
of constitutional challenges to restricted institutional access that began in the civil rights period, have been
subject to some of the same negative imagery as public assistance programs.
as Roiphe's, to ask how these positions have become confused, to the
detriment of feminist efforts at reform.

How the revelation of constraints on a group comes to be understood as
a statement implicating any given individual is the first question that requires
attention. This confusion reflects, in part, a misapprehension by feminism's
critics. The decision to authorize legal intervention in response to particular
acts may imply no statement whatsoever about the acts’ victims. Laws that
make theft or assault a crime make no statement about the capacity of victims,
and require nothing more than that victims give evidence.\footnote{Some forms of legal recourse informed by dominance feminism impose similarly weak
requirements of individualized action. The claim for sexual harassment, for example, requires the victim
1604.11(a) (1985)), which is frequently, though need not always be, demonstrated by reference to a
response by the victim to the harasser at the time.}

Even laws that
premise intervention in part on the difficulties faced by victims in effecting
private resolution do not claim to describe all members of the victim class.
They may be based upon the probability of barriers to individualized response,
or the probability of barriers in the most serious cases. But they are not
inconsistent with the possibility of an assertive response by an individual
victim, nor does the existence of such a response cast doubt upon a legislative
scheme.

However, the connection between group-based statements and individual
inferences is not based wholly on a misunderstanding. The emerging link
between dominance theory and the rhetoric of recovery may also contribute to
this confusion. A recovery approach supplements the social-victim message of
feminist theory with an emphasis on individual victimization. Its focus on
individualized response to injury, as Roiphe notes, can make the experience of
the victim central to participants’ self-conceptions. Its suggestion that the world
is full of “walking wounded” who have not yet discovered their injuries creates
a personal parallel to dominance feminism’s political claim that practices such
as rape and spousal abuse are more pervasive than most people suspect. Yet,
contrary to Roiphe’s suggestion, this conjunction is neither the intentional
product of dominance theorists nor the inevitable result of their arguments.
One can read reams of dominance theory without encountering the rhetoric of
recovery; even in Roiphe’s critical exposition, MacKinnon prods students
toward concerted political action rather than self-absorption. If this merger has
become a problem, it is more indicative of a reversible mistake in feminist
strategy than a substantive flaw in the theory of women’s sexual victimization.

How the notion of constraints on women’s ability to respond comes to be
understood as an “insult” is a more important question. Here, a crucial factor
is the widespread assimilation of liberal precepts. According to liberal theory,
the qualities that are most distinctive and valuable in human beings are those
that inhere by virtue of their universal human nature. Prime among these is
autonomy, the ability to direct one's life through the exercise of unencumbered choice. For those who have been socialized to an incompletely reflective acceptance of such precepts, there is something doubly insulting about being identified by apparently contingent, non-universal, group-based qualities, and being described as unable to transcend the psychological or economic constraints that these qualities impose on autonomous self-direction. To be a woman constrained by the incidents of a sexist society, in this view, is to suffer a kind of compromised personhood. Addressing this argument has proved a difficult task, as dominance feminists have been obliged to respond both to its underlying premises, and to the complicating contexts in which they have been applied.

This response has enjoyed the greatest success in the realm of political theory, where liberal precepts are subject to the clearest articulation and response. Dominance feminists and others have challenged the notion of autonomy as the incident and measure of personhood from a range of different starting points. Theorists more sympathetic to liberal premises have sought to integrate descriptions of partially compromised autonomy into liberal theory, depicting unencumbered choice as a human potential that is only incompletely and differentially realized under present circumstances. Other theorists have rejected the notion of a universal, pre-social human nature, in favor of a view emphasizing social construction. In this view, the most salient characteristics of persons are forged in the limitless domain of the social, by singular or multiple structures of oppression. Group-based characteristics and constraints are neither exceptional nor demeaning; they are, rather, predictable incidents of social construction. Such theorists, in general, seek to displace liberal precepts, but may also endeavor to accommodate them. Seeking partly to explain the possibility of resistance under assumptions of social

79. My emphasis here is on the popular assimilation of liberal precepts. This assimilation inevitably obscures important lines of analysis that inhere in some liberal theorizing. For example, although liberal theory generally stresses the human potential for autonomous self-direction, and this element is incorporated in popular conceptions of human capacity, some liberal theorists describe with considerable nuance the factors that limit or compromise the capacity for autonomous self-direction. Theorists such as John Rawls and Thomas Nagel have argued, for example, that notwithstanding this human potential, many people are constrained in their ability to execute their chosen projects by factors that are beyond their immediate control, such as discrimination and class-based inequalities of resources. See John Rawls, A Theory of Justice 71-75 (1971); and Thomas Nagel, Equality and Partiality 102-05 (1991). Moreover, even when one considers the popular assimilation of liberal precepts, one sees occasional departures from the insistence on autonomous self-direction. Many people, including most of those who would describe themselves as "liberal," favor consideration of the backgrounds of those who commit crimes in sentencing and/or adjudication of guilt or innocence. However, it is possible that such arguments may simply reflect a pathologization of those who commit crimes, and that a person's resort to such argumentation might be consistent with a desire not to be viewed herself as a product of constraining circumstance.


81. For a theorist who embraces a post-structuralist view, group-based characteristics or affinities are, in fact, shifting and contingent, rendered unstable by intersecting social influences.
construction, some theorists have described in this context a limited human agency—the capacity to maneuver within institutional or cultural constraints.  

These efforts at revision, modestly successful at the level of theory, have encountered greater barriers in the areas of law and popular discourse. Lay critics of a dominance-based vision do not always understand the extent to which dichotomous assumptions about autonomy and incapacity affect their thinking, or the fact that alternative assumptions are possible. Those who understand their assumptions in a more self-conscious way may cling to the notion of unencumbered choice, if not as a present description, then as a statement of aspiration or an expression of potential. They may find notions of partially compromised autonomy discouraging, or see notions of a complex, divided self as inaccessible and offputting.

In the legal context there are other problems. Feminist legal advocates do not simply, or even primarily, advance arguments about autonomy, social construction, or the decentered self. They seek instead to win discrete legal battles. This latter goal may initially be furthered by accepting rather than challenging the liberal assumptions of legal decisionmakers. Feminists working in the area of spousal abuse, for example, chose to counter decisionmakers’ assumption that battered women exercise unencumbered choice by interposing images of unusual passivity or incapacity (i.e., “learned helplessness”). This strong account of compromised capacity did not challenge judges’ assumption of autonomous choice, but highlighted the possibility of exceptions created by extreme circumstances. While this strategy was initially successful, it set in motion a series of damaging dynamics. Battered women recoiled in confusion and denial from the images of

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83. For some observers, particularly those with a legal focus, the entire concern about the “insult” of dominance theory may be less about the incapacity it describes than about the incapacity it encourages. Law is sometimes viewed as more than a means of obtaining compensation (or retribution) for injurious acts: it is also viewed as a system of incentives for encouraging socially optimal behavior. The objection to a theory that authorizes legal recovery without requiring strong individualized response on the part of women may be that it encourages passive or powerless behavior by failing to attach negative sanctions to it when it occurs. This analysis opens up an interesting line of inquiry, but it has important drawbacks. First, in its suggestion that legal incentives should be directed at the behavior of plaintiffs as well as defendants, it reflects the assumption that women's conduct is at least implicated in sexualized injury. Second, it neglects the problems inherent in using law to punish victim behavior, without comprehensively addressing the conditions that produce victimization. Lenore Weitzman highlighted this problem when she studied a California alimony regime that provided displaced homemakers with financial “incentives” to return to the workforce. See Lenore Weitzman, The Divorce Revolution (1984). Because not simply attitudinal diffidence, but also discrimination, lack of training, and other tangible barriers made it difficult for longtime homemakers to enter the workforce, legal insistence on financially independent behavior that might be the goal of the future was severely punitive in the present. What is true of divorcing homemakers may also be true of victims of date rape or sexual harassment.

84. In a recent article, I refer to this as the “law reform” vision of feminist legal advocacy. See Kathryn Abrams, Unity, Narrative and Law, 13 Stud. L., Pol. & Soc. 3, 27 (1993).

exceptional passivity; judges who used such images in an exculpatory fashion in the context of battered women's self-defense began to use them punitively in related custody proceedings. 86 When battered women's advocates offered more complex, less fully compromised images of their clients, judges heard unqualified images of incapacity. 87 Their commitment to a dichotomous world of autonomous individuals and pathological exception, reinforced in some cases by the early arguments of battered women's advocates, made it hard to understand that advocates were interposing an unfamiliar image of human possibility.

A related dynamic may play a role in the acquaintance rape debate. To counter the widespread belief that women exercise free choice in the context of sex with acquaintances, dominance feminists have stressed a pattern of cultural and institutional practices, culminating in the actual sexual encounter, through which women's autonomy has been largely negated by male sexual coercion. 88 Women's constraint, in this account, is no longer a narrow exception; it is, rather, part of a dichotomous depiction in which autonomy remains the norm, but women, as a class, are prevented from achieving it. The topsy-turvy social world of The Morning After attests, in exaggerated form, to the responses that may be generated by this depiction. Although some women feel vindicated by the revelations of male domination, others have begun to recoil from the wholly compromised image of women they believe it suggests. 89 In addition, many participants, habituated by their own dichotomous premises and by this strong account of the domination of women, have become unable to discern the more qualified accounts of both male and female agency that have sometimes been offered by feminist advocates.

Feminists must consider how to integrate the more complex accounts of human nature and agency that have informed recent theoretical discussions into popular and legal debates. Although this task is only now in its inception, it is possible to sketch its general outlines. It will require, first, mobilizing the appropriate imagery in describing the lives of women. Contradiction and complexity, shifting combinations of choice and restriction, will need to be depicted in concrete terms that a range of audiences can understand. 90 This

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87. Id.
88. For an interesting discussion of this strategic strain in Catharine MacKinnon's work, see Frances Olsen, Feminist Theory in Grand Style, 89 Colum. L. Rev. 1147 (1989) (reviewing Catharine MacKinnon, Feminism Unmodified (1987)).
90. For a discussion of the role of narratives in introducing these feminist understandings, see Abrams, supra note 84, at 3. For particularly good examples of narratives depicting partially compromised autonomy or decentered, divided selves, see Mahoney, supra note 86; and Vicki Schultz, Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument, 103 Harv. L. Rev. 1749 (1990).
task will also require an interpretive framework that emphasizes that such complex, constrained images are not exceptional or pathological: though the particular constraints may be specific to the circumstances of a group, the distance from a condition of unencumbered autonomy is more widely shared. Finally, feminists will need to address the features of the legal world that make accounts of partially compromised autonomy, or complex, divided identities difficult to accommodate or comprehend. As this larger task of conceptual transformation proceeds, however, feminists must also respond to the need for a more practical education, particularly in the university setting.

C. The Challenge of Feminist Education

Dominance feminists’ educational efforts have aimed primarily to produce the social understanding that justifies the resort to law; and to demonstrate that the problem is pervasive enough to require, or conceptualizable in terms that permit, state intervention. This has meant that only intermittent attention has been given to the ways in which women should negotiate the terrain of their daily lives—a terrain marked less frequently by dramatic attacks than by banal offenses and on-going coercive pressures. The vacuum created by this strategic choice can be filled too readily by recovery counseling, or by student leaders experimenting with the extremes of a political stance. If Roiphe’s book tells us anything, it is that dominance feminists should be more concerned with the way that their message applies to the practical challenges of women’s lives.

An appropriate education familiarizes women with legal or administrative norms, so that they can identify and curtail violative practices. Yet such technical knowledge can only be viewed as a beginning. Legal standards in areas such as sexual harassment and acquaintance rape are still emerging. Even where greater clarity exists, many acts lie in the grey areas created by the law; others annoy or intimidate without approaching the standards required for enforcement. Helping women to think about and respond to acts that may not rise to the level of a violation is a crucial component of any educational program. Yet, in this area, the consciousness-raising portion of the dominance program has created tension with the need for more practical guidance.

Exposing the dynamic of domination within a variety of acts that may not, technically speaking, reach the level of illegality is an important tool for

91. A growing body of legal scholarship has attempted to attend, in one way or another, to this task. One portion of this literature has sought to address those legal standards that assume unencumbered choice, so as to permit accommodation of partially constrained subjects. See Schultz, supra note 90; Joan Williams, Gender Wars: Selfless Women in the Republic of Choice, 66 N.Y.U. L. REV. 1559 (1991). Another group of articles has attempted to challenge the inflexibility of legal categories that prevent accommodation of a subject with complex or contradictory characteristics. See Kathryn Abrams, Title VII and the Complex Legal Subject, Mich. L. Rev. (forthcoming 1994); James Boyle, Is Subjectivity Possible? The Postmodern Subject in Legal Theory, 62 U. Colo. L. REV. 489 (1991); Steven Winter, Indeterminacy and Incommensurability in Constitutional Law, 78 CAL. L. REV. 1441 (1990).
increasing awareness. It illustrates the pervasiveness of sexualized oppression, highlights the strength and variety of influences that impede autonomous response, and demonstrates the appropriateness of (some) legal regulation. But this strategy, which feminists have designed to convince audiences who are wed to liberal precepts, or are only beginning to perceive the dynamic of dominance, may not be the most appropriate for young women who are at least partially aware of this dynamic. Educational programs designed for this group require a different emphasis: one that makes clear that the pervasiveness of this oppressive dynamic does not make all acts touched by it equally problematic. Not all coercive or sexualizing acts create legal violations, and not all of them require the same kind of response. Having a teenager grab your breast in a diner is not the same as having your academic mentor grab your breast in his office. Young women need an education that empowers them to make these kinds of distinctions and to act on them.

This is a difficult task, whose flexibility and contextuality makes it continually vulnerable to the force of conventional understandings: if you won’t state unequivocally that a particular act was date rape or sexual harassment, it becomes easier for others to insist that what happened was simply a courtship ritual or harmless horseplay. Yet, in contexts where dominance theory has begun to problematize a range of sexualized behaviors, encouraging contextualized judgments about the presence and extent of coercion can be appropriate and beneficial. Not only is it illuminating for participants and observers, but it can also be authorizing for the target of sexualized behavior, who learns to see a spectrum of coercive pressures, not all of them incapacitating, and to explore a range of possible responses.

92. As I note above, this approach may backfire for those committed to liberal precepts as well. See supra note 79 and accompanying text.

93. My own experience watching MacKinnon in public lectures is that she encourages just these kinds of discriminating, and empowering, judgments when she answers questions from the audience; I have no doubt that this is true of other dominance feminists as well. The problem is not what they have done on an ad hoc basis, but what they have done to institutionalize these understandings in university programs.

94. What I am proposing here is not so much a "yes/no" judgment about the influence of dominance theorizing as a "sliding scale" approach. The stronger the awareness of the pervasiveness of sexual coercion in a particular setting, or within a particular population, the greater the need to emphasize the distinctions among particular acts and the different possibilities of response. For example, this emphasis would be more appropriate in a university setting which already featured well-established date rape and sexual harassment counseling programs. Moreover, even in such settings, the message described above might be more suitable to programs aimed primarily at women than to those directed toward men. The latter might require a more systematic introduction to the insights of dominance feminism, and a discussion of context-specific judgments that reflected a different emphasis (the ease, for example, of "stepping over the line" into coercive pressure). Because this essay is concerned primarily with the attitudes of women toward sex and sexual victimization, I focus in this section on educational efforts directed at women. I do not mean to suggest, however, that educating women is the only, or even the primary means of reducing sexual coercion. Because men are usually the perpetrators of such coercion, addressing and changing their understandings of sexuality and masculinity is crucial as well. A number of programs aimed specifically at college males have begun this important work. See MEN AND RAPE: THEORY, RESEARCH AND PREVENTION PROGRAMS IN HIGHER EDUCATION (Alan Berkowitz ed., forthcoming 1994).
The initial step in fostering such judgment is to discuss criteria that might assist in differentiation. Factors such as a hierarchical relationship between the perpetrator and the target; threat to physical safety or bodily integrity; pervasiveness and targeting of non-physical coercion; and opportunities for and costs of avoidance or exit should all be considered in assessing the seriousness of a sexualized act. Considering the possibility of individual resistance in cases where the behavior is not physically threatening and the physical context is not isolating may be one way of building confidence or encouraging feelings of agency in the target of offensive behavior. But thinking creatively about responses to more serious acts is also important. Roiphe's oppositional juxtaposition of regulatory intervention and individualized response is a fictional creation that serves her rhetorical ends. The invocation of legal remedies can be combined with individual objection or political protest in ways that preserve the agency and voice of the person aggrieved. Conversely, the fact that an act may not be sufficiently coercive or severe to trigger regulatory intervention does not relegate the target of the behavior to an individual objection or a glass of milk. Individual letters, joint statements, political protests, and advocacy of regulatory change are all transformative and self-affirming options that should be given greater visibility in campus discussions.\textsuperscript{95}

Another important task facing dominance feminists is to rethink the images of women and sexuality that educational programs project. Such images may be crucial to the sense of self-possession that helps women navigate situations of coercive pressure. They may also shape women's ability to enjoy the non-coercive aspects of sexual experience. This task must begin with decisions about how to present women in rape education pamphlets and simulations. Any program that fails to portray women's varying degrees of sexual assertiveness, sexual experience, and self-possession in the face of aggressive or coercive behavior, is simply off the mark. It risks misinforming less knowledgeable women, and alienating those, like Roiphe, who are savvy enough to know better. But this task must also include more far-reaching reflection on appropriate stances for women toward a sometimes dangerous, sometimes exhilarating sexual world. MacKinnon's refusal to engage in affirmative imagery, however reasonably justified, has been a palpable drawback in this area.\textsuperscript{96} Roiphe's Manichaean contrast between timorous fixation on risk and heedless embrace of experience simply recycles a dichotomous stereotype. At

\textsuperscript{95} Such efforts may already be more widespread than Roiphe is willing to admit. My own perception, based on evidence no more anecdotal than Roiphe's own, is that "dissenters" such as Gillian Greensite and Marjorie Metsch, see THE MORNING AFTER, supra note 5, at 81, who encourage critical reflection on coercive behavior and decline to put words in students mouths, are in fact in the mainstream of campus educational efforts. My point, however, is that building these kinds of programs should be a central part of dominance feminists' task.

\textsuperscript{96} For a succinct iteration of this position, see CATHARINE MACKINNON, FEMINISM UNMODIFIED 219 (1987).
this transitional juncture, women may need to reject this dichotomizing
tendency for images that combine alert attention to risk with exhilaration or
enjoyment. Many people who become adept at risky, but gratifying activities
develop such a posture: keen, well-schooled awareness operating in the
background of thoroughgoing interest or enjoyment. It may be precisely the
sexual discomfort Roiphe describes that prevents us from experimenting with
this and other transitional metaphors for sexual experience. Abandoning that
discomfort for a more unencumbered exploration of what sex for women might
mean—in an age of AIDS, coercion and still-unabated pleasure—remains a
crucial object of educational efforts.

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It would be wrong to view Roiphe as the primary instigator of the kinds
of inquiries outlined above. At best, her narrative reiterates, in less nuanced
form, critiques that were offered a decade ago by Ellen Willis, Joan Nestle,
and others; at worst, it reduces the vexed territory of contemporary women’s
lives to a problem of their own making. Yet seizing the attention of a
politically complacent public, as we learned in the aftermath of Anita Hill’s
testimony, is a large part of the battle. If Roiphe’s book is vivid and
tendentious enough to bring these issues before a wider public, even so flawed
a work can make an important contribution.

97. AIDS activist Robin Gorna has argued that thoroughgoing enjoyment of and comfort with
sexuality, and judicious response to risk go hand in hand. Citing the work of another activist, Sven-Erik
Ekeid, she notes that “only an individual who has the strength to say yes to sexuality, has the strength to
say no to risky sexual behavior.” See Robin Gorna, Delightful Visions: From Anti-Porn to Eroticizing Safer
Sex, in Sex Exposed: Sexuality and the Pornography Debate 175 (Lynne Segal & Mary McIntosh
eds., 1992). In one sense, this may sound similar to Roiphe’s advocacy of sexual abandon, yet closer
scrutiny reveals important differences. For Gorna, “saying yes” to sexuality means understanding it in all
of its variety, distinguishing those forms which have been stigmatized for their coercive qualities from those
which have been stigmatized for failure to conform to mainstream heterosexist norms. It is from the
position of knowledge, born of critical investigation, rather than from heedless experience, that one
develops the comfort necessary to say “yes” to sexuality and “no” to risk.
Plain Meaning and Hard Cases


Clark D. Cunningham,† Judith N. Levi,‡ Georgia M. Green,†† and Jeffrey P. Kaplan†††

If the language of a statute is plain, how can interpreting that statute create a hard case? And if a case is hard, how can recourse to the statutory language help resolve the case? This essay will explore the apparent paradoxes raised by these questions. In his recent book, The Language of Judges, Lawrence Solan, a lawyer first trained as a linguist, uses linguistics to critique a variety of opinions in which he believes the Supreme Court has erroneously claimed that its decision was based on the plain meaning of a statute. After examining Solan's conclusions, this essay will use his book to show how linguists can provide very useful information as to whether a text is ambiguous. In doing so, we hope to go beyond Solan's intentionally narrow undertaking—using linguistics to critique judicial decisions after the fact for treating ambiguous texts as if they were plain—to experiment with ways that analysis of ambiguous texts by linguists could actually assist judges in identifying and choosing among possible interpretations in a principled and objective way that remains grounded in the textual language.

It is probably safe to assume that most statutory interpretation cases before the Supreme Court present hard problems of textual analysis, especially where there has been a split among the circuit courts of appeal. When this essay was commissioned in July 1993, Cunningham¹ reviewed all of the cases in which

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1. Unlike the other authors, Cunningham is not a professionally trained linguist. He has, however, written about various applications of linguistics to law. See The Lawyer as Translator, Representation as

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the Supreme Court had granted certiorari in the ten weeks immediately preceding its summer recess, with the thought that these cases would be deferred long enough for one or more linguists to analyze the disputed texts prior to the oral arguments. He selected three cases in which the outcome might turn on the meaning of a statutory provision in ordinary language. Cunningham then contacted Levi to help him identify and recruit academic linguists willing to analyze the statutory provisions at issue in these cases using the methods of modern linguistics. He prepared one-page summaries of each of the cases and sent them to the linguists identified by Levi. Two, Kaplan and Green, agreed to take on major responsibility for the project, along with Levi.

In each case, our analysis demonstrates that the disputed text is ambiguous and reveals that the lower courts' efforts to resolve the ambiguity are seriously flawed as a matter of ordinary language interpretation. The linguists' analysis

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2. Out of the 26 cases for which certiorari had been granted between April 26, 1993 and July 1, 1993, three cases were selected: United States v. Staples, 971 F.2d 608 (10th Cir. 1992), cert. granted, 113 S. Ct. 2412 (1993), discussed infra pp. 1573-77; United States v. Granderson, 969 F.2d 980 (11th Cir. 1992), cert. granted, 113 S. Ct. 3033 (1993), discussed infra pp. 1577-81, 1582; and National Organization for Women, Inc. v. Scheidler, 968 F.2d 612 (7th Cir. 1992), cert. granted, 113 S. Ct. 798 (1994), discussed infra pp. 1588-1613. We also selected a fourth case, United States v. Knox, 977 F.2d 815 (3d Cir. 1992), cert. granted, 113 S. Ct. 2926, vacated and remanded, 114 S. Ct. 375 (1993), and conducted considerable empirical research before the Court remanded the case in November in response to a change in position by the government regarding the “plain meaning” of the statutory provision at issue (prohibiting possession of videotapes containing “lascivious exhibition of the genitals or pubic area” of a minor, 18 U.S.C. § 2256(2)(E) (1988)). In light of this development, we decided not to include our analysis of Knox in this essay but may discuss the case in a later article. The Justices received galley proofs of this essay on November 22, 1993, one week before the Court heard oral argument in the Staples case. (The NOW case was argued on December 8, 1993 and Granderson on January 10, 1994.) Copies were also sent to counsel of record for the parties in Staples, NOW, and Granderson and to the United States as amicus curiae in the NOW case. A brief discussion of the Court's decision in the NOW case, which was issued on January 24, 1994 as this essay was going to press, appears at the end of Part VII, supra note 197.

3. Levi, a theoretical linguist and former chair of the Northwestern University Linguistics Department, has been writing for more than a decade about social science research on language and law, as well as about applications of linguistics to legal cases. She has participated as a consultant or expert witness in more than 20 legal cases since 1978. During that period, she has also served as a sort of clearinghouse for information relating to both these domains. Her publications include LANGUAGE AND LAW: A BIBLIOGRAPHIC GUIDE TO SOCIAL SCIENCE RESEARCH IN THE U.S.A. (American Bar Ass'n 1994) and LANGUAGE IN THE JUDICIAL PROCESS (Judith N. Levi & Anne G. Walker eds., 1990).

4. These methods are briefly described infra pp. 1568-69.


6. Green has published widely on matters of syntactic theory and on semantic and pragmatic interpretation in natural language understanding. She is the author of PRAGMATICS AND NATURAL LANGUAGE UNDERSTANDING (1989) [hereinafter GREEN, PRAGMATICS], and the coeditor of LINGUISTIC COMPLEXITY AND TEXT COMPREHENSION (Georgia Green & Alice Davison eds., 1988), and LINGUISTICS AND COMPUTATION (Georgia Green et al. eds., forthcoming 1994).

7. Throughout this essay we use the terms ambiguous and ambiguity in the broad sense found frequently in legal usage, where the terms describe language about whose interpretation reasonable people
of the textual ambiguity, however, provides significant guidance toward identifying the sources of the ambiguity. This analysis narrows the field of possible interpretations in ways that are both linguistically and intuitively sensible, making the court's decision more coherent and understandable to the various audiences the court must address. Although the discussion draws upon theoretical concepts that may be unfamiliar to lawyers and judges, and in one case employs empirical research, we believe that our conclusions would make sense to judges because the analysis articulates linguistic distinctions that all members of the relevant speech community can recognize once they are brought to conscious attention. Indeed, judges are already accustomed to the use of dictionaries to serve exactly such purposes: to remind them of what they already know, to inform them of what they may not know (such as the meaning of words not encountered before or technical meanings of certain words in specialized fields such as medicine or science), and to help them make distinctions. Unfortunately, compared to analysis of a particular textual problem by a trained linguist, dictionaries are a crude and frequently unreliable aid to word meaning and usage. In fact, for one of the three cases, the leading dictionaries have definitions that differ exactly as the parties differ over the meaning of the statutory term, and thus provide no objective way of resolving that dispute over ordinary language meaning.

In the lively debate about statutory interpretation currently occurring among both legal scholars and judges, the phrase "plain meaning" itself presents interpretive difficulties. "Plain meaning" is sometimes invoked to
indicate that the meaning of a provision is "clear" and "unambiguous." The following statement from a recent Supreme Court decision is typical:

In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished... The controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written.13

When the "plain meaning" rule is given this interpretation, one would not expect the rule to be invoked very often in Supreme Court opinions, unless the issue were whether an extraordinary circumstance required inquiry beyond the plain meaning. For if the statutory provision was clear and unambiguous, one would not expect to find the kind of disagreement among lower courts that warrants Supreme Court review. But as Frederick Schauer has persuasively shown, the "plain meaning" cases that have occupied much of the Supreme Court's attention in recent years did not necessarily become hard because of the "exceptional situation" caveat to the plain meaning rule:

[In many of the statutory construction cases of the 1989 term] where the plain meaning is subject to dispute, there still seems to be agreement that it remains the appropriate focus of legal argument... [T]he grounds for the debate, even when there was a debate, were not whether plain meaning would dominate, but just what the plain meaning was.14

One of Solan's most powerful critical moves is to analyze the seemingly embarrassing paradox in Supreme Court cases where all nine Justices agreed that the meaning of a provision was "plain," but split five to four over what that provision meant.15

At other times, "plain meaning" seems to take on a different sense, one that perhaps explains how hard cases can focus on plain meaning. In the following recent dissent, Justice Scalia points to the rule of "plain meaning" as being about ordinary rather than unambiguous meaning.
I thought we had adopted a regular method for interpreting the meaning of language in a statute: first, find the ordinary meaning of the language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies. If not—and especially if a good reason for the ordinary meaning appears plain—we apply that ordinary meaning.16

For Justice Scalia, and quite possibly for a number of his fellow Justices, invocation of “plain meaning” represents a decision to give greater weight to the text as compared to legislative history and policy considerations. William Eskridge has termed this approach the “new textualism”17 and has identified several policy justifications advanced for this greater attention to text: (1) the ordinary meaning of the text is a more reliable guide than legislative history to the intent of all the actors in the federal legislative process (including the President who refrains from exercising veto power); (2) the ordinary meaning is more accessible and comprehensible to officials and citizenry affected by the legislation; and (3) ordinary meaning can constrain judicial discretion more effectively than can recourse to legislative history.18

Much of the scholarly attention devoted to new textualism has attacked the soundness of one or more of these policy justifications. This essay does not address these difficult jurisprudential issues. Rather, it explores what assistance linguistics can give to a judge to the extent she chooses for whatever reason to use the ordinary language meaning of a text to guide her decisionmaking. Linguistics has something to offer for both versions of the “plain meaning rule.” For the “plain means unambiguous” side, linguists can determine empirically whether a phrase is ambiguous as a matter of ordinary language. Even more importantly, for Justice Scalia’s “plain means ordinary meaning” strand, linguists can help a judge explore and articulate the judge’s intuitive but usually unconscious understanding of ordinary meaning. “Ordinary” meaning can be ambiguous at times. Where an ordinary language reading of a text can produce two or more plausible interpretations, judges face a dilemma. How can two judges discuss, much less resolve, differing views about what a provision “plainly” means? According to Eskridge, the “new

16. Chisom v. Roemer, 111 S. Ct. 2354, 2369 (1991). Chief Justice Rehnquist and Justice Kennedy joined in Justice Scalia’s dissenting opinion. Id.; see also Smith v. United States, 113 S. Ct. 2050, 2054 (1993) (O’Connor, J.) (“When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning.”); Russello v. United States, 464 U.S. 16, 21 (1983) (Blackmun, J.) (stating that when a term is not specifically defined in statute, court starts “with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used”) (quoting Richards v. United States, 369 U.S. 1, 9 (1962)).
17. Eskridge, supra note 12, at 623.
18. Id.; see also Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring). A fourth argument for reliance on ordinary meaning is that it may produce more internally coherent case law than decisionmaking that assigns new technical meaning to key terms that have well established, albeit complex, meanings in ordinary usage. See Cunningham, A Linguistic Analysis, supra note 1.
textualism" would replace reference to legislative history with "dictionaries and grammar books . . . and the common sense God gave us." As this essay hopes to show, judges rely on dictionaries at their peril to resolve questions of meaning, but the methods of linguistic science can significantly inform their innate "common sense" about their own language, thus providing some objective and principled ways to deliberate over hard cases of interpretation.

In Part I we summarize Solan's overview of the discipline of linguistics as it might relate to the study of law and add some observations of our own. Parts II through V illustrate how linguistics can explicate hard cases arising from uncertain relations among words in a sentence or between words and their larger context. All the examples are drawn from Supreme Court cases: Parts II and V are based on Solan's analysis of past Supreme Court decisions, while in Parts III and IV we propose analyses of two cases pending before the Supreme Court in the 1993-94 term. Parts VI and VII address the problem of interpreting words referring to conceptual categories whose boundaries seem to be uncertain or "fuzzy." All the examples relate to statutory terms in the Racketeer Influenced and Corrupt Organizations Act (RICO): Part VI to Solan's analysis of past Supreme Court decisions interpreting RICO, and Part VII to our extended analysis of another RICO case pending before the Supreme Court. Part VII is, significantly, the longest section of this essay because, unlike the analyses in Solan's book, it illustrates the use of empirical research methods which expand the database for analysis beyond the linguist's introspection and intuitive understanding of his own language.

I. LINGUISTICS AND THE LAW

One of many refreshing things about The Language of Judges is that, although the book is published by a leading university press, its author is not an academic but a practicing lawyer. Lawrence Solan received a Ph.D. in linguistics from the University of Massachusetts, but decided to go to Harvard Law School rather than become a college professor. Following a clerkship with a New Jersey Supreme Court justice, he joined a New York City law firm, where he is now a partner.

Given Solan's background as a professionally trained linguist, one might expect his book to focus on ways that linguistics could contribute to the work of judges, especially to help them decide hard cases. His project, however, has a different focus: "The issue that [Ronald] Dworkin raises is how judges

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19. Eskridge, supra note 12, at 669.
20. This essay does not contend, though, that linguistics will make hard cases easy or produce the "right answer" to cases.
21. Additional information about the empirical methods and results discussed in Part VII is found in the appendices to this essay and is on file with the authors.
decide hard cases. The issue that I raise is a different one: how judges attempt
to mask the fact that a case is hard in the first place.”

Solan uses linguistics to demonstrate how judges avoid acknowledging
demonstrable ambiguity. He urges judges faced with hard cases to
acknowledge both the indeterminacy of the text and their reliance on
nontextual sources for their decision. Solan’s book does more, however, than
enlist linguistics in the service of a familiar realist critique of judging. First,
it explains the discipline of linguistics with clarity, both in an excellent
overview that appears in the first chapter and throughout the remainder of the
book. Second, it progressively educates the reader as to the wide variety of
ways linguistics can illuminate legal texts, as Solan carefully walks through
each example of how the judges got it wrong. Third, the book goes beyond its
professed narrow goal of critiquing existing judicial practices to show how the
explication of the shared competence of all speakers can provide a basis for
improving the quality of judicial discourse.

Solan begins the first chapter of his book by summarizing Justice
Cardozo’s famous discussions of the paradox of law:

[The law must] be both sufficiently flexible to accommodate new
cases as they arise and sufficiently rigid to maintain its predictive
power. If the law is not flexible enough, then it is doomed to
irrelevance and to becoming the source of injustice. If the law is too
flexible, then it becomes so unstable that it fails to define with any
reliability people’s rights and obligations . . . .

He then quotes Cardozo directly:

No doubt the ideal system, if it were attainable, would be a code at
once so flexible and so minute, as to supply in advance for every
conceivable situation the just and fitting rule. But life is too complex
to bring the attainment of this ideal within the compass of human
powers.

Solan asserts that Cardozo’s wistful fantasy of the “ideal code” describes the
reality of language. This is true in the sense that our language is flexible
enough to enable us to use it in describing—or imagining—circumstances that
are quite novel to us. Moreover, just as we encounter new experiences all the
time and use our existing language to talk about them, so we routinely hear
sentences we have never heard before and yet interpret them without pause and
usually without conscious effort. That we accomplish these cognitive tasks

23. Id. at 12.
24. Id. at 13 (quoting BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 143 (1921)).
with relative ease and swiftness does not mean, however, that our interpretations of what we hear and read are invariably correct.

Although we are reluctant to take literally Solan's description of language as an "ideal code," it is true that linguistics has made considerable progress in finding and analyzing predictable order in the seemingly infinite variety of speech. The same exploratory methods that have enabled linguists to make significant scientific progress in recent decades can also assist judges in finding and analyzing predictable order in the complex textual issues which so frequently make cases hard.

What is the nature of this discipline, which is at the same time so appropriate for use by judges and yet still so unfamiliar to most? Simply stated, linguistics is the scientific study of human language. Linguistics addresses such questions as: What do you know when you know a language? What do you learn when you learn a language? What do all languages have in common? How do languages differ? The analyses in this essay draw primarily upon three areas in the field of linguistics: syntax—the principles governing the structure of sentences; semantics—the principles governing representational connections between language and the world, and governing meaning connections among words and sentences; and pragmatics—principles governing how interpretation can be affected by context.25

Linguists test their hypotheses according to the familiar principles of the scientific method: they deduce contrasting predictions of opposed hypotheses and measure those predictions against observable aspects of reality. Because the hypotheses and their predictions do not typically involve observable reality, and because the reality that linguists try to describe is the set of abstract and complex rules underlying language use, linguists have to make inferences from people's linguistic behavior under both natural and controlled conditions. They analyze the contexts in which people naturally use words and constructions, in order to infer the senses of those words or the discourse function of those constructions. Linguists also investigate the judgments made by native speakers about whether a given sentence could mean something particular or whether it would be natural to use it to mean anything at all. While intuition guides the critical first steps of linguists, their hypotheses are always subject to empirical testing.26 Several types of empirical tests will be demonstrated later in this essay in the discussion of one of the pending Supreme Court cases.

25. Other areas of linguistics are phonetics—the study of the mechanics of speech sound production and the classification of speech sounds; phonology—the rules governing the sound system of a language; morphology—the rules governing the internal structure of words; and discourse analysis—various approaches to the structure of discourses (stretches of speech or writing longer than a sentence). Each of these areas of linguistics can be applied to one or more languages, or to language generally as in the study of linguistic universals.

26. The commitment to test conclusions empirically is an important feature that identifies linguistics as a science and distinguishes it from philosophical inquiry, which is not similarly constrained.
The routine work of linguists is to articulate the conventions that distinguish one language from another. Ordinary speakers of our language are generally unaware of these conventions, and are unprepared to articulate them. English speakers, for example, might have difficulty explaining why they say *the tall one* and *someone tall*, but not *the one tall* or *tall someone*, despite the fact that it would never occur to them to speak any differently. Somewhat similarly, ordinary speakers are not aware of how many different kinds of linguistic conventions they are unconsciously relying on for every sentence they utter or interpret, from rules of pronunciation to rules of syntax, and from rules of contextual inference of facts to rules for recognizing and reflecting social parameters of a particular interaction. Just as we are largely unaware of the breadth of this system of unconscious linguistic competence, so we are largely unaware of the depth of specificity that can be incorporated into a single convention.\(^7\)

In his book, Solan most frequently applies the linguist’s ability to articulate linguistic conventions to the analysis of contested legal texts through the following steps. First, he identifies the portion or feature of the text that appears to be at issue in a reported case. He then provides one or more examples of non-legal discourse that seem to be ambiguous in the same way as the legal text. He shows that the ambiguity of these ordinary language examples can be explained through one or more well recognized linguistic principles, and often shows how the ambiguity disappears if the expression is reformulated. In these examples, Solan is able to use the reader’s own competence as a speaker of English to validate the application of the linguistic principle. Finally, Solan extends the linguistic principle back to the legal text to explain how, as a matter of ordinary language, the text is ambiguous in non-obvious ways. Solan’s approach operates most clearly and successfully in cases where the contested text is structurally ambiguous, and so we begin our discussion with such cases.

II. STRUCTURAL AMBIGUITY

Solan suggests that the first problem with the conventional version of the plain meaning rule, the version that equates plain with unambiguous, is that “it is not always easy to tell when a statute is ambiguous.”\(^28\) He then sets himself the task of discussing “from a linguistic point of view, what it means for language to be clear, and what causes language not to be clear.”\(^29\) The

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27. Trying to explain these conventions to non-native speakers of English is one situation that forces us to recognize such complexities. For example, imagine trying to explain which objects in the world can be called *tall* as opposed to *high*, or trying to tease out the subtle differences between: *I lived there, I was living there, I have lived there, I did live there*, and *I have been living there.*

28. SOLAN, supra note 22, at 93.

29. Id. at 94.
two major causes of statutory ambiguity, according to his analysis, are "structural ambiguity" and problems of categorization. The latter topic, which Solan refers to as "concepts with fuzzy boundaries," will be discussed in Parts VI and VII of this essay.

In cases of structural ambiguity, interpretive difficulties arise not from indeterminacy as to the meaning of individual words but from ambiguity as to the relationship of the words in a sentence structure. A famous example in linguistics is this phrase:

(1) old men and women

This can refer to (a) men who are old and women who are old, or to (b) men who are old and women of any age. The difference depends on whether old forms a constituent with just men, or whether it forms a constituent with the coordinate phrase men and women.

Solan illustrates how structural ambiguity can create hard cases with two Supreme Court cases that were "hard" because of ambiguity as to the relationship between the adverb knowingly and the rest of a sentence in a statute.

In United States v. Yermian, the interpretive challenge arose under the federal False Statement Act, which provides in relevant part: "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully... makes any false... statements... shall be fined... or imprisoned..." Yermian admitted to making a false statement on a security clearance form he submitted to his employer, a government defense contractor. His sole defense was that he did not know that the false statement was within the jurisdiction of a federal agency; he thought he was lying only to his private employer. The trial court rejected Yermian's interpretation that knowingly applied to within the jurisdiction as well as to makes any false statements. The court of appeals agreed with

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30. Id. at 95-98.
31. Id. at 96-99, 104-08.
32. We will follow the convention in linguistics of numbering all our examples sequentially, with closely related examples assigned the same number with differing letters, such as 4(a) and 4(b).
34. The provision reads in full:
   Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.
35. 468 U.S. at 66.
36. Throughout this essay, we follow the convention in linguistics of italicizing examples of words or phrases.
Yermian, reversing his conviction. The Supreme Court split five to four, with the majority reinstating the conviction. The question of whether the statute was ambiguous had particular significance in this case because of the "rule of lenity," a canon of statutory construction stating that ambiguity in a criminal statute should be resolved in favor of the defendant. The majority's insistence that the statute was unambiguous is striking in that the four dissenting Justices and the three judges of the court of appeals had a different view of the scope of knowingly. Writing for the dissenters, then-Associate Justice Rehnquist stated:

[T]he Court's reasoning here amounts to little more than simply pointing to the ambiguous phrases and proclaiming them clear. In my view, it is quite impossible to tell which phrases the terms "knowingly and willfully" modify, and the magic wand of ipse dixit does nothing to resolve that ambiguity.

By bringing to bear the linguistic significance of adverb positioning, Solan persuasively shows how even the threshold question of whether the statute was ambiguous presented a hard case. He reports that "[l]inguists have for many years recognized that the position of a prepositional phrase" affects interpretation of a sentence. Solan demonstrates that sentences with a prepositional phrase at the end, like sentence (2)(a) below, are more readily recognized as ambiguous than are sentences that are otherwise identical but have the prepositional phrase at the beginning, as in (2)(b):

(2)(a) Fred knowingly sold securities without a permit.
(2)(b) Without a permit, Fred knowingly sold securities.

As Justice Rehnquist pointed out in his Yermian dissent, prior to its amendment in 1948, the statute did not prepose within the jurisdiction but instead read as follows: "[W]hoever shall knowingly and willfully ... make ... any false ... statements ... in any matter within the jurisdiction of any department or agency of the United States ... shall be fined ... or imprisoned." According to Solan's analysis, as a matter of ordinary

37. See Dowling v. United States, 473 U.S. 207, 213-16 (1985) ("Due respect for the prerogatives of Congress in defining federal crimes prompts restraint in this area, where we typically find a 'narrow interpretation' appropriate."). Two policy arguments for this rule are that those accused of crimes are entitled to clear notice of what is illegal, and that strict construction of criminal statutes preserves the role of the legislature in defining crimes. SOLAN, supra note 22, at 66-67. Solan uses Yermian and Liparota to claim that the Supreme Court has avoided application of the rule of lenity through linguistically unjustified denials that ambiguity exists. Id. at 67-76.
38. 468 U.S. at 77-78, quoted in SOLAN, supra note 22, at 70.
39. SOLAN, supra note 22, at 71.
40. Id. at 70-71.
language, the earlier statute was more ambiguous than the version under which Yermian was charged. Yet all nine Justices apparently agreed that Congress did not intend to make any substantive changes in the state of mind requirement when it rewrote the statute in 1948. The majority maintained that the statute was unambiguous both before and after the amendment, while the dissenters found it just as ambiguous in either form.

The Court’s decision a year after Yermian in Liparota v. United States supports Solan’s analysis. A majority of six out of eight Justices, including two from the majority who had found the Yermian statute unambiguous, agreed that the following provision of the federal food stamp statute was ambiguous as to the scope of knowingly: “[W]hoever knowingly uses . . . or possesses coupons or authorization cards in any manner not authorized by this chapter or the regulations issued pursuant to this chapter shall . . . be fined . . . or imprisoned . . . .” Liparota argued that he had not knowingly used food stamps in a manner not authorized by law or regulation, but the trial court rejected that defense and instructed the jury that it need only find that Liparota knowingly possessed the food stamps.

The majority of the Court in Liparota, finding the scope of knowingly to be ambiguous, applied the rule of lenity to interpret the statute in the defendant’s favor and reverse the conviction. However, the majority did not respond to the dissenters’ argument that the Court was bound by the Yermian precedent to find the statute unambiguous, since the grammatical position of knowingly in the pre-1948 version of the statute involved in Yermian was the same as in the food stamp provision.

42. 468 U.S. at 72-74, 78-79; SOLAN, supra note 22, at 70.
44. Justice Powell did not participate in the decision. Id. at 434.
45. 7 U.S.C. § 2024(b) (1988), quoted in SOLAN, supra note 22, at 72. The full provision reads:

Subject to the provisions of paragraph (2) of this subsection, whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by this chapter or the regulations issued pursuant to this chapter shall, if such coupons or authorization cards are of a value of $100 or more, be guilty of a felony and shall, upon the first conviction thereof, be fined not more than $10,000 or imprisoned for not more than five years, or both, and, upon the second and any subsequent conviction thereof, shall be imprisoned for not less than six months nor more than five years and may also be fined not more than $10,000 or, if such coupons or authorization cards are of a value of less than $100, be guilty of a misdemeanor, and, upon the first conviction thereof, shall be fined not more than $1,000 or imprisoned for not more than one year, or both, and upon the second and any subsequent conviction thereof, shall be imprisoned for not more than one year and may also be fined not more than $1,000. In addition to such penalties, any person convicted of a felony or a misdemeanor violation under this subsection may be suspended by the court from participation in the food stamp program for an additional period of up to eighteen months consecutive to that period of suspension mandated by section 2015(b)(1) of this title.

46. 471 U.S. at 422.
47. Id. at 424-25.
48. Id. at 427-29.
49. The Liparota majority distinguished Yermian on the grounds that the provision in that case was unambiguous and that either interpretation of it would include a mens rea requirement, but did not explain
III. The Scope of *Knowing*: The Staples Case

The case of *United States v. Staples*, now pending before the Supreme Court, demonstrates how structural ambiguity and ambiguity as to specific word meaning can interact to create a hard case. The dispute once again turns on the scope of *knowingly* in a criminal statute.

Staples was convicted of violating the National Firearms Act because he failed to register a rifle that he owned. He was sentenced to five years probation and a $5000 fine. The rifle in question was an AR-15 assault rifle that had been modified so that it could fire more than one shot with a single trigger pull, making it an automatic weapon, or in other words, a machinegun. Ordinary one-shot rifles do not have to be registered; machineguns do.

The indictment against Staples charged that he "'knowingly received and possessed firearms,' described as follows: a. Inland Model M1 .30 caliber carbine, serial number 522984; b. SGW Model XM1, .223 caliber rifle, serial number X2606 both of which had been modified so as to be machineguns, and neither of which were registered to" him. The case nicely presents three different ways of interpreting *knowingly possessed*: (1) simple knowledge that the object was in his possession, (2) additional knowledge that the object was a dangerous weapon, or (3) further knowledge that the object was a specific type of weapon, namely a machinegun. As to the first weapon, the M1 carbine found in his bathroom closet during a search of his house by government agents, Staples denied even knowing that he possessed the object. The prosecution did not contest that the M1 was registered to the defendant's father, and the father testified that he was going to be away for a few days and left it in the closet without his son's knowledge. Thus the defendant did not knowingly possess the M1 even under the most limited of the three types of knowledge listed above. The jury acquitted Staples on the charge relating to the M1.

In contrast, Staples admitted knowing that he possessed the SGW Model XM1 rifle (the AR-15), which the agents found in his home office during the same search. However, he denied knowing that the rifle "'had been modified so as to be [a] machinegun." This denial made critical the choice between the second and third possible interpretations of *knowingly possessed a firearm* because *firearm* is a term of art under the National Firearms Act. In addition to machineguns, the term includes shotguns with barrel lengths under eighteen.

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50. 971 F.2d 608 (10th Cir. 1992), cert. granted, 113 S. Ct. 2412 (1993).
51. See supra note 7 for a discussion of the distinction between these two types of ambiguity.
52. The AR-15 is "the civilian version of the military's M-16 rifle," which is an automatic weapon.
53. Id. at 3 n.1.
55. Id.
inches, rifles with barrel lengths under sixteen inches, and hand grenades, but not an unmodified AR-15 rifle. As a jury instruction, Staples proposed the third interpretation of *knowingly possessed a firearm*: “[A]n essential element of the offense of possessing a machinegun, is that the possessor knew that the gun would fire fully automatically . . . .” The trial judge rejected this interpretation and instead instructed the jury using the second interpretation:

The Government need not prove that a defendant knows he is dealing with a weapon possessing every last characteristic which subjects it to regulation. It is enough to prove he knows that he is dealing with a dangerous device of such type as would alert one to the likelihood of regulation. If he has such knowledge, and if the particular item is in fact regulated, he acts at his peril . . . . It is not necessary for the Government to prove that the defendant knew that the weapon in his possession was a firearm within the meaning of the statute, only that he knowingly possessed it.

However, unlike the situation in *Yermian* and *Liparota*, the adverb *knowingly* does not appear in the statute, which provides simply that it shall be unlawful for any person “to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record . . . .” The government first inserted the word *knowingly* in the indictment; the trial court then did the same in the jury instructions. Nonetheless, the indictment and the jury instruction were “the law” as far as the jury in the trial was concerned, so, for the purposes of the study done in connection with this essay, the linguists analyzed the phrase *knowingly possessed a firearm* as if the statute so read.

56. 26 U.S.C. § 5845(a), (e), (f) (1988).
57. 971 F.2d at 612 n.6.
58. *Id.* at 612 (emphasis omitted). The jury also received this instruction:

A person is knowingly in possession if his possession occurs voluntarily and intentionally and not because of mistake or accident or other innocent reason. The purpose of adding the word knowingly was to insure that no one would be convicted of possession of a firearm if he did not intend to possess it.

60. It is not entirely clear whether prosecutors and judges routinely add *knowingly* to the statutory language in stating the elements of this crime on the grounds that Congress intended some intent requirement for the crime and simply neglected to state it, or because constitutional due process requires at least this level of intent. This question is also addressed by the appeals court in Staples. See infra note 67.
61. Because the addition of a knowledge requirement to § 5861(d) is in effect an act of judicial legislation, albeit perhaps one performed in order to effect legislative intent, the linguists’ analysis is addressed to the courts as it would be to a legislature. In other words, it is up to the Court in the *Staples* case, like a legislature, to decide the appropriate state of mind requirement. That requirement then should be enacted with minimal ambiguity and maximal comprehensibility for those affected by the enactment. Indeed, the ambiguity of the phrase *knowingly possessed a firearm* has obscured the state of mind requirement imposed by the various lower courts that have interpreted this provision. See *Staples*, 971 F.2d at 618-19 (Ebel, J. concurring) (collecting and discussing the various circuit court statements on state of mind required for conviction under § 5861(d)). One might almost suspect that, like legislators on some
The threshold question of interpretation is whether firearm is to be understood as defined in the National Firearms Act or according to its ordinary meaning. Because possession is an indictable offense only if the item possessed is a firearm within the meaning of the Act, it seems reasonable to begin by assuming that firearm is to be interpreted according to its statutory definition. That definition states that "[t]he term ‘firearm’ means [among other things] . . . a machinegun." Thus the phrase knowingly possessed a machinegun should be legally equivalent to the language of the indictment in this case.

The Staples case presents one instance of a well-studied class of expressions using verbs that describe attitudes. In ordinary English usage, when we assert that an individual holds an attitude (such as knowing, believing, wanting, or expecting) toward a proposition, we accurately ascribe that attitude to the person only insofar as he himself would recognize that he holds the attitude toward that proposition. For example, suppose Smith knows that Harold Baker is her neighbor. Even if we know that Harold Baker is a judge, we cannot assume Smith knows that her neighbor is a judge. Thus the truth of both (3)(a) and (3)(b) does not entail the truth of (3)(c).

(3)(a) Smith knows that her neighbor is Harold Baker.
(3)(b) Harold Baker is a judge.
(3)(c) Smith knows her neighbor is a judge.

Similarly, if Smith knows that Harold Baker is a judge, but does not know that Judge Baker lives next door to her (for example, she mistakenly thinks her neighbor is a trial lawyer named Arnold), then it still might be correct to assert 3(d).

(3)(d) Smith doesn’t know her neighbor is a judge.

Logicians express this idea by the maxim “substitutability of identicals does not preserve truth in opaque contexts.” An “opaque context” is a context
within which different descriptions of the same object cannot be substituted without altering the proposition expressed by the statement. In our example, "Harold Baker" and "her neighbor" are the equivalent terms which cannot be substituted freely in a sentence about what Smith knows.

Restated in terms applicable to the Staples case, the question is whether a person knows that he possesses an object meeting a particular description (a machinegun) if he knows that he possesses the object, but does not know that it satisfies that description. In the phrase knowingly possessed a __________, the clause following knowingly is in an opaque context. Presumably the phrase knowingly possessed is equivalent to possessed and knew that he possessed. According to the principles discussed above, the statement Staples knew that he possessed a machinegun is true only if both of the following are true statements at the relevant time:

(4)(a) Staples knows that Staples possesses X and
(4)(b) Staples knows that X is a machinegun.

The only way to make the indictment consistent with the trial judge’s explanation of it to the jury is to make the implausible claim that the indictment used the single word firearm with two different meanings in the same sentence. This would amount to treating firearm as meaning simply gun when speaking of what Staples knew, but as meaning machinegun as to what he possessed.

Whether simply knowing that the object in one’s possession is a gun is a sufficiently culpable state of mind, either in terms of the intent behind the Act or in terms of due process, is a question beyond the scope of this essay. The Supreme Court has at least three different options for defining the state of mind required for this crime: (1) conviction if Staples knew he possessed the object, even if he knew nothing about its characteristics; (2) conviction if Staples knew he possessed the object and knew that it was a gun, even if he thought it was the kind of gun that does not need to be registered; or (3)

64. See, e.g., WILLARD V. QUINE, WORD AND OBJECT 141-56 (1960).
65. The jury instructions themselves indicate that the reason they contain the word knowingly is to distinguish possession that is voluntary and intentional from possession “because of mistake or accident or other innocent reason.” See supra note 58. If so, this rationale is inconsistent with an interpretation providing that the possessor need not know the identity of what is possessed to be guilty of illegally and knowingly possessing it. The theory in the jury instructions appears to be that if the object is of a sort that the possessor suspects might be regulated, it is incumbent on her to determine exactly what it is. However, this rationale is insufficient to distinguish intentional and voluntary possession from accidental or mistaken possession. If Smith orders a case of wine, and a wooden crate labelled “Cabernet Sauvignon” is delivered to her house, she has no reason to open it immediately and examine the contents just because wine is a regulated substance. Yet it might contain something else instead of, or in addition to, the wine; it could happen that she was an unwitting conduit for a conspiracy, involving say, her cook and the wine merchant, to import arms and drugs. Surely we would not say she knowingly possessed the contraband, even though she intentionally and voluntarily possessed the box that contained it.

66. Presumably this broadest standard would still result in the acquittal for possession of the M1 carbine. See supra notes 54-55 and accompanying text.
conviction only if Staples knew he possessed the object and knew that it was a machinegun.\(^{67}\)

Linguistics contributes to legal understanding by establishing that if the Court opts for either the first or second of these, no subsequent indictment or jury instruction should use the phrase *knowingly possessed a firearm* because an ordinary language interpretation of the phrase implies a higher level of knowledge. Certainly every effort should be made to draft jury instructions so that they do not contravene ordinary language principles of meaning. Rather, the knowledge requirement should be expressed in a nonambiguous way, as illustrated by Solan’s discussion of *Yermian* and *Liparota*.\(^{68}\)

IV. THE CASE OF THE MISSING REFERENT: *UNITED STATES V. GRANDERSON*

In the second pending Supreme Court case to be discussed in this essay, *United States v. Granderson*,\(^{69}\) we found an interesting parallel to the implausible way the trial court in *Staples* apparently tried to assign different meanings to the same word in the same sentence. However, in *Granderson* the problem of interpretation that led to such an implausible reading arose more from the relation between the text and its larger context (the “missing referent” of this Part’s heading), than from the words of the text alone.

The defendant in *Granderson* was charged with destruction of mail, a crime that carries a term of up to six months imprisonment. He pled guilty and the court sentenced him to a term of five years probation, but he violated that probation three months later when his urine sample tested positive for cocaine. The court revoked his probation and sentenced him to a twenty month sentence of imprisonment, based on the following statutory provision:

> If the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may, after a hearing pursuant to Rule 32.1 of the Federal Rules of Criminal Procedure, and after considering the factors set forth in section 3553(a) to the extent that they are applicable—
> (1) continue him on probation, with or without extending the term of [sic] modifying or enlarging the conditions; or
> (2) revoke the sentence of probation and impose any other sentence that was available under subchapter A at the time of the initial sentencing.

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67. There is a fourth option: conviction only if Staples also knew that machineguns must be registered. However, this last condition relates to a mistake of law, not fact, and the Supreme Court has already decided that conviction under the National Firearm Act does not require proof that the defendant knew that the law required registration of the object. See *United States v. Freed*, 401 U.S. 601 (1971).

68. For example, if the Court chooses the second option, the indictment could state: “Defendant knowingly possessed an AR-15 assault rifle, knowing that this rifle was a dangerous weapon, although not necessarily knowing that it was a machinegun. Defendant failed to register this rifle.”

Notwithstanding any other provision of this section, if a defendant is found by the court to be in possession of a controlled substance, thereby violating the condition imposed by section 3563(a)(3), the court shall revoke the sentence of probation and sentence the defendant to not less than one-third of the original sentence.  

The trial court interpreted original sentence as referring to the five-year sentence of probation and ordered imprisonment for twenty months (one-third of sixty months). The Court of Appeals for the Eleventh Circuit reversed and ordered Granderson released from custody, apparently interpreting original sentence to refer to the maximum potential sentence of imprisonment for the original crime (six months). By the time of the appellate decision, Granderson had already been imprisoned for more than eleven months.

In deciding the Granderson case, the Eleventh Circuit joined the Third, Sixth, and Tenth Circuits in limiting the maximum term of imprisonment for a probation violation under the last sentence of § 3565(a) to one-third of the maximum potential term of imprisonment for the underlying crime. However, the Eighth and Ninth Circuits had interpreted original sentence, as did the trial court, as referring to the term of the probation. The United States successfully petitioned the Supreme Court to grant certiorari to resolve the circuit split. In urging reinstatement of the twenty-month term of imprisonment, the government asserted in its brief to the Court that the rule of lenity is inapplicable because “the language of the statute unambiguously provides that a defendant’s sentence of imprisonment . . . must be at least one-third as long as the original sentence of probation.”

When the linguists began to review this statutory provision, it was assumed that the interpretive problem was identifying the referent for original sentence. This initial review produced the observation that there were only two possible interpretations of original sentence, and neither one of them was consistent with that applied by the trial court. All other things being equal, one would assume original sentence means the sentence that was originally imposed. Since Granderson’s original sentence in that sense was sixty months

71. 969 F.2d at 985. The Court of Appeals noted that if Granderson had been separately charged for possession of cocaine, 21 U.S.C. § 841(a) (1988), he would have faced a statutory maximum of one year imprisonment. 969 F.2d at 983 n.2. Thus, the maximum combined imprisonment that could have been imposed for convictions of both mail destruction and cocaine possession was 18 months; the sanction for violating probation under the mail destruction conviction was 20 months.
74. United States v. Diaz, 989 F.2d 391 (10th Cir. 1993).
76. United States v. Corpuz, 953 F.2d 526 (9th Cir. 1992).
77. Brief for the United States at 10, Granderson (No. 92-1662).
78. Green performed the initial review of the Granderson case.
on probation, revoking the sentence of probation and sentencing the defendant
to not less than one-third of the original sentence would amount to revoking
the sixty months of probation and sentencing the defendant to not less than
twenty months of probation. Alternatively, the drafters of the statute might
have intended original sentence to refer to the maximum allowable sentence
of six months incarceration for the original crime under the sentencing
guidelines. The phrase “any other sentence that was available under subchapter
A” in the second general condition of § 3563 apparently refers to this sort of
original sentence. According to this interpretation, “not less than one-third
of the original sentence” would be not less than two months incarceration.
Those who analyzed the provision felt certain though that there was no
linguistic justification based on the text for the trial court’s decision, since that
interpretation selected one interpretation of sentence for the type of punishment
(incarceration) and a different interpretation for the term of that punishment
(one-third of the probation period).

Upon further reflection, we conclude that the interpretive problem with
original sentence is not ambiguity as to which prior referent is meant; rather,
original sentence has no contextually identifiable referent. So whatever the
contested provision means, its meaning is not plain as a matter of ordinary
language and it requires extratextual sources for interpretation.

Our analysis then shifted to the lexical ambiguity of sentence as a
technical term in this statute. When Congress passed the Sentencing Reform
Act of 1984, it altered the conventional meanings of sentence and probation.
The provision at issue was not part of the 1984 Act but was added to
§ 3565(a) by the Anti-Drug Abuse Act of 1988. Prior to the 1984 Act, sentence
in the context of criminal conviction referred to the imposition of
imprisonment, fine, or both. Probation was understood to be an alternative to
sentencing. Thus, the Federal Probation Act of 1925 referred to the court’s
power to “suspend the imposition or execution of sentence and to place the
defendant upon probation.” The 1984 Act, however, made probation a type
of sentence. The Committee Report accompanying the Act explained that under
the new law “unlike current law . . . probation is a type of sentence rather than
a suspension of the imposition or execution of a sentence.” The first section
of the Chapter on Sentencing in Title 18 of the U.S. Code states in relevant
part: “An individual found guilty of an offense shall be sentenced . . . to: (1)
a term of probation . . . (2) a fine . . . or (3) a term of imprisonment . . . .

These three different types of sentence will be referred to as sentence\textsuperscript{p} (probation), sentence\textsuperscript{f} (fine), and sentence\textsuperscript{i} (imprisonment).

The first occurrence of sentence in the relevant provision\textsuperscript{65} is sentence\textsuperscript{f}: \textit{sentence of probation}. The other two occurrences of sentence in the provision, the verb phrase “sentence the defendant” and the last phrase “one-third of the original sentence” lack a modifier explicitly indicating whether sentence refers to probation, imprisonment or fine. Without regard to the context, the most obvious interpretation would be that sentence in the balance of the provision also refers to sentence\textsuperscript{f}. However, the provision would then be interpreted as follows: “the court shall revoke the sentence of probation and sentence the defendant to a term of probation not less than one-third of the original sentence of probation.” This meaning is improbable in context because it represents no increased sanction for the possession of a controlled substance. The Eleventh Circuit appeared to interpret the latter two occurrences of sentence as sentence\textsuperscript{i}, so that it would read this way: “and sentence the defendant to a term of imprisonment not less than one-third of the original sentence of imprisonment.”\textsuperscript{67} Unfortunately for this interpretation, there was no “original sentence of imprisonment.” This forced the Eleventh Circuit to interpret original sentence as if the provision read: “one-third of the maximum sentence of imprisonment that was available at the time of sentencing.”

The trial court and the Ninth and Tenth Circuit courts have produced an even stranger interpretation. They interpret the provision as if it read “the court shall revoke the sentence of probation and sentence the defendant to a term of imprisonment not less than one-third of the term of the original sentence of probation,” shifting the meaning of sentence from sentence\textsuperscript{f} to sentence\textsuperscript{i} and then back to sentence\textsuperscript{p}.\textsuperscript{88} This shift in meaning is as linguistically peculiar as the way in which the Staples trial court seemed to switch from gun to machinegun in interpreting firearm in one sentence. We felt confident that there was a linguistically more plausible way to resolve the case of the missing referent for original sentence, and so turned to a review of the way sentence is used throughout the chapter on sentencing in the U.S. Code.

\textsuperscript{86} By “relevant provision” we mean the last sentence of 18 U.S.C. § 3565(a) (1988). To avoid confusion, we will use the word provision rather than sentence to refer to this sentence.
\textsuperscript{87} This interpretation assumes that sentence has a default meaning of sentence\textsuperscript{i} when unmodified. However, with the exception of this provision, the chapter on sentencing, Chapter 227, assiduously avoids unmodified use of sentence, thus suggesting strongly that no default meaning should be assumed. See infra notes 90-91 and accompanying text.
\textsuperscript{88} Similar terminology appears in the preceding subsection, 18 U.S.C. § 3565(a)(2), thus making the Eleventh Circuit’s ruling even less plausible as a matter of textual interpretation. Congress showed that it knew how to distinguish between the sentence actually imposed and the potential range of imprisonment available at the time of sentencing.
Review of the entire text of the chapter on sentencing produces the following observation. The provision at issue in *Granderson* is the only place in the entire chapter where *sentence* appears as the verb in a clause without a modifier to indicate which of the three meanings is intended. Everywhere else Congress was scrupulously careful not to use *sentence* without modification. Indeed the Chapter seems to reflect a strong preference for using the verb phrase “imposed a sentence of ____” rather than simply *sentenced*. This provision is also the only place in the entire chapter where the phrase *original sentence* appears. It is as if a speaker of another dialect—the pre-1984 language of sentencing—had interrupted Chapter 227 to utter the statutory language at issue. The provision only seems to make sense under the pre-1984 meanings of *probation* and *sentence*, in which an *original sentence* would always be a sentence of imprisonment that was suspended if the defendant was “placed on” probation. Thus, analysis of the textual language by a linguist in this case seems to point toward an examination of legislative history, particularly a search for evidence that this provision, added in 1988, might have been drafted with the pre-1984 meanings in mind. A review of the legislative history reveals that the provision was literally a last-minute amendment that did not go through the normal committee process and thus might have been framed without an awareness of the new meaning of *probation* as a type of sentence in the federal scheme.

89. We reviewed Chapter 227 of Title 18 by downloading its text from the LEXIS database, converting it to the WordPerfect word processing software, and then using the “Search and Replace” function to bold and capitalize every word containing the string “sentenc.” This process took only a few hours and review of every occurrence in this text of some version of *sentence* was quite easy. This modified version of the text of Chapter 227 is on file with the authors.

90. The standard verb phrase is “sentenced to a term of (probation or imprisonment).” See, e.g., 18 U.S.C. §§ 3561(a), 3581(a), 3583(a) (1988).

91. Cunningham examined this legislative history with the assistance of reference librarian Peggy McDermott. This provision apparently first appeared in a floor amendment in the Senate, after the bill had passed the House, and only one day before the bill passed the Senate. 134 CONG. REC. S15,781 (Oct. 13, 1988) (Byrd Amendment No. 3677 to H.R. 5210). The Anti-Drug Abuse Act of 1988 was a massive and complex piece of legislation, which takes up 364 pages in Statutes at Large, Pub. L. No. 100-690, 102 Stat. 4181-4545 (1988). The provision may have originated in the following amendment, proposed ten days earlier, which was not enacted into law:

Section 3565(a) of title 18, United States Code, is amended by adding at the end thereof the following: Notwithstanding any other provision of this section, if the defendant tests positive for illegal use of controlled substances, thereby violating the condition imposed by section 3563(a), on two separate tests taken at least 3 weeks apart, the court shall, in addition to any other action which may be taken pursuant to this section (A) revoke the sentence of probation and *sentence the defendant to a period of imprisonment*, (B) require the defendant to reside and participate in a residential community treatment center program, or participate in an out-patient drug treatment program if residential treatment is unavailable or impractical, or (C) require the defendant to remain at his place of residence pursuant to section 3563(b)(20). Notwithstanding any other provision of this section, if the defendant tests positive for the illegal use of controlled substances, thereby violating the condition set forth in section 3563 (a) or (e), on three separate tests taken at least 3 weeks apart, the court shall revoke the sentence of probation and *sentence the defendant to not less than one third of the original sentence.* 134 CONG. REC. S14,337 (Oct. 3, 1988) (Byrd Amendments Nos. 3369 and 3370) (emphasis added). The same set of amendments also contained, in a section having to do not with drug abuse but with use of an explosive in the commission of a felony, the following pre-1984 use of *probation*: “Notwithstanding any
It is striking that neither the briefs of the parties before the Supreme Court nor any of the five circuit court opinions interpreting this provision reflect awareness of this particular aspect of the provision’s legislative history. The fact that analysis by a linguist in this case, limited as it is to the four corners of the text, generates a useful clue for searching legislative history is a reminder that close attention to text is not necessarily at odds with the use of legislative history in statutory interpretation.

V. DECEPTIVE APPEARANCES OF PLAINNESS: AMBIGUOUS NOUN PHRASES

The potential value of linguistic explication is even clearer in Solan’s ingenious explanation of Sedima, S.P.R.L. v. Imrex Co.,92 in which the nine Justices of the Supreme Court agreed that a statutory provision was unambiguous and yet split five to four as to its plain meaning. Sedima called for interpretation of the federal Racketeer Influenced and Corrupt Organizations Act (RICO).93 RICO is Solan’s favorite source of examples, as he “can think of no better source of disagreement over the meaning of words in a statute than . . . RICO.”94 Although RICO is primarily a criminal statute, § 1964 provides a civil remedy of treble damages to “[a]ny person injured in his business or property by reason of a violation of section 1962.”95 Section 1962, in turn, prohibits “any person employed by or associated with any enterprise . . . [from conducting] such enterprise’s affairs through a pattern of racketeering activity.”96 Sedima alleged in a civil suit that Imrex had violated § 1962 by submitting inflated bills under a sales contract; its use of the mails and the telephone to submit the inflated bills constituted federal mail and wire fraud. Mail and wire fraud are both found within RICO’s definition of “racketeering activity.”97 The issue before the Supreme Court was the decision of the lower courts, in favor of Imrex, holding that injury “by reason of a violation of section 1962” must be more than ordinary business loss due to the inflated billing. Rather, Sedima had to show a “racketeering injury,” an injury “different in kind from that occurring as a result of the predicate acts themselves, or not simply caused by the predicate acts, but also caused by an activity which RICO was designed to deter.”98

Writing for the majority of five, Justice White said:

94. SOLAN, supra note 22, at 77.
95. 18 U.S.C. § 1964(c).
96. Id. § 1962(c).
97. Id. § 1961(1)(B).
98. 473 U.S. at 485 (quoting Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 496 (2d Cir. 1984)).
If the defendant engages in a pattern of racketeering activity in a manner forbidden by [§ 1962(a)-(c)], and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c). There is no room in the statutory language for an additional, amorphous "racketeering injury" requirement.99

On behalf of himself and three other dissenters, Justice Marshall wrote:

[T]he statute clearly contemplates recovery for injury resulting from the confluence of events described in § 1962 and not merely from the commission of a predicate act. The Court's contrary interpretation distorts the statutory language under the guise of adopting a plain-meaning definition, and it does so without offering any indication of congressional intent that justifies a deviation from what I have shown to be the plain meaning of the statute.100

Solan suggests that subtle ambiguity in the phrase pattern of racketeering activity may explain how the majority and dissenters could come to opposite interpretations of a provision that all thought had a plain meaning.101 Solan begins with some ordinary language examples of this type of ambiguity:

(5) A series of rainstorms damaged the house.
(6) A gang of teenagers intimidated the neighbors.102

Does the first sentence mean that there were a number of rainstorms, each of which damaged the house, or that the damage only resulted from the cumulative effect of the storms? Does the second mean that various gang members acting individually committed acts of intimidation, or that the teenagers appeared in a group and intimidated the family by their numbers?103

Solan explains this ambiguity in terms of a semantic regularity that linguists have observed in certain complex noun phrases of the form "a noun 1 of noun 2," such as a series of rainstorms or a gang of teenagers, where noun 1 can be understood as one type of quantifying expression. In these noun phrases, the expression is ambiguous as to which one of the two nouns is the semantic "head" of the phrase, and which one is the modifier.104 If noun 1 is the head, then noun 2 modifies it: it is the series that damages the house and

99. 473 U.S. at 495.
100. Id. at 509-10 (Marshall, J., dissenting).
101. SOLAN, supra note 22, at 102-03.
102. Id. at 102.
103. Id.
104. Solan cites Elisabeth Selkirk, Some Remarks on Noun Phrase Structure, in FORMAL SYNTAX 285 (Peter W. Culicover et al. eds., 1977), on this point. SOLAN, supra note 22, at 102 n.29. Normally, the modifier would follow the head, as in these unambiguous examples: a child of royalty, an error of logic, or a mirror of the soul.
rainstorms explains what kind of series it is, or it is the gang that intimidates, and teenagers tells what kind of gang. If noun 2 is the head, then noun 1 is the modifier: it is rainstorms that damage the house, and series adds the information that the storms came one after another; it is teenagers themselves who intimidate, and gang adds information about the connections among the teenagers. Solan terms the interpretation of noun 1 as head the "nondistributive reading," and noun 2 as head, the "distributive reading." For the latter, the action, the damaging or the intimidating, is "distributed" among all the members of the set rather than attributed to them acting collectively.

Solan then applies this analysis to Sedima. Let § 1964 be paraphrased as follows: "If an enterprise's pattern of racketeering activity injures a person's business, the injured person may sue for treble damages." The majority used a distributive reading, interpreting activity as the head of the phrase "pattern of racketeering activity." Thus, to state a civil RICO claim, Sedima needed only to show that Imrex's activity of mailing inflated bills inflicted the injury. The dissenters resolved the ambiguity in the other direction: pattern was the head of the phrase for them. They would have required Sedima to show how a pattern of racketeering inflicted injury.

The ambiguity is apparent once explicated by Solan. Absent this linguistic explication, one could easily assign a single interpretation to this subtle ambiguity either way without recognizing what one had done. Once a reader interprets one of the nouns as head of the phrase, the sentence seems "plain" in that it appears to have only one possible interpretation. Without one's own interpretive process being brought to conscious awareness, one could understandably conclude that those offering the other interpretation either do not know how to read or are being intellectually dishonest. Solan does not indicate his view as to which resolution of the ambiguity conforms better with ordinary language expectations. He stops at the point of showing that, contrary to the rhetoric of both sides in Sedima, the language is not clear. Nonetheless, his analysis might have improved the discourse of the Court in Sedima had it been available to the Justices. Perhaps they could have agreed that plain meaning did provide guidance, to the extent that analysis of the ordinary language meaning of the phrase revealed a two-way ambiguity typical of certain noun phrases. They might then have relied more explicitly upon

105. Id. at 102.
106. A potential criticism of Solan's analysis of Sedima is that he constructs the ambiguity by importing the noun phrase "pattern of racketeering activity" from § 1962 into the sentence being interpreted, § 1964. Strictly speaking, § 1964 as written does not present a noun phrase ambiguity problem. But the paraphrase is a fair rewriting of § 1964, which incorporates § 1962 by reference. 18 U.S.C. §§ 1962, 1964(c).
107. Solan does suggest that the "more natural" reading of the gang example is the nondistributive one, that it was the whole group that was intimidating, but he provides no clear explanation for that choice. He suggests that "the contextual relationship between the group term and the predicate" is a decisive factor. He does not offer a view as to the better reading of the rainstorm example. SOLAN, supra note 22, at 102.
interpretative strategies other than appeal to ordinary language to resolve that choice. At the very least, Solan's analysis shows how seemingly plain language can create a hard case even at the level of ordinary language comprehension. Indeed, the apparent inability of linguistic principles alone to resolve the ambiguity helps explain why Sedima presented the kind of case worthy of Supreme Court attention.

VI. CONCEPTS WITH FUZZY BOUNDARIES

Solan distinguishes the types of interpretative problems represented by the cases discussed above in Parts II through V from what he terms "categorical indeterminacy" or "fuzziness." Categorical indeterminacy, he claims, accounts "for most of the problems that arise in the legal context" over the meaning of textual language: "The problem arises... when a statute or other legal document makes reference to a category of things or events, and a dispute arises over whether a particular thing or event in question fits into the category."108 Solan identifies familiar word challenges from philosophy of language (such as defining the categories of game and mountain) and from jurisprudence (such as defining the vehicles prohibited from a park) as being attributable to this problem.109 He seems to conclude that linguistics is capable merely of flagging the indeterminacy of such words but not of assisting judges in resolving that indeterminacy. He illustrates this argument with further discussion of RICO cases.

Solan effectively distinguishes ambiguity that presents a clear choice between meanings from the problem of fuzzy conceptual boundaries by returning to the same phrase, pattern of racketeering activity, discussed in Part V in relation to the Sedima case. Four years after deciding Sedima, the Supreme Court returned to this phrase to determine the meaning of pattern. In H.J. Inc. v. Northwestern Bell Telephone Co.,110 the issue was whether a single scheme to bribe state officials could constitute a pattern of racketeering activity where the alleged bribery involved multiple acts over a period of time. Both the trial court and the court of appeals had agreed that a pattern required proof of at least two different racketeering schemes.111 Once again, the Court split five to four, although all of the Justices voted for reversal. Writing for the majority, Justice Brennan set out the following definition based on "a commonsense, everyday understanding of RICO's language:"112

108. Id. at 96.
109. Id. (game example drawn from LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 31-32 (1953); mountain from QUINE, supra note 64, at 126; and vehicle from H.L.A. HART, THE CONCEPT OF LAW 125-26 (1961)).
111. Id. at 233-35.
112. Id. at 241.
[T]o prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates [e.g. acts of bribery] are related, and that they amount to or pose a threat of continued criminal activity. . . . Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement.\textsuperscript{113}

He concluded that the plaintiff’s allegations met this less stringent definition of \textit{pattern} and reinstated its RICO complaint. Concurring, Justice Scalia agreed that RICO does not require proof of multiple racketeering schemes, but suggested that RICO’s language might be so indeterminate as to be unconstitutional under the “void for vagueness” doctrine, a problem that in his view the majority’s definition did not cure.\textsuperscript{114}

Solan offers two linguistic criticisms of the majority’s definition of \textit{pattern}. First, he questions whether the requirement that acts take place over a long period of time is soundly based on a “commonsense, everyday understanding” of \textit{pattern}, as the majority claimed. He argues that “there is nothing in the word ‘pattern’ that requires continuity, except for a period long enough to permit formation of the pattern itself.”\textsuperscript{115} He gives the following two uses of \textit{pattern} which seem perfectly acceptable even though the events took place over a much shorter time period than the majority opinion would allow:

During the three weeks that he was on drugs, John exhibited a pattern of violent behavior that we had not seen before and have not seen since.

The two-week outburst of burnings formed a pattern: only buildings that had not been occupied for two months were torched.\textsuperscript{116}

Second, he characterizes the majority definition of \textit{pattern} as requiring “relatedness plus continuity” among the predicates.\textsuperscript{117} But, he argues, “relatedness is at least as indeterminate a concept as is \textit{patternhood} . . . . Try, as an experiment, to define relatedness meaningfully so that your definition has predictive force. You will fail.”\textsuperscript{118} He draws the following conclusion:

Justice Brennan’s effort to divine a ‘common-sense, everyday understanding’ of the statute from its language is actually an effort to decompose the word ‘pattern’ into what he apparently believes are its

\begin{footnotes}
\item \textsuperscript{113} Id. at 239, 242 (emphasis added).
\item \textsuperscript{114} Id. at 255-56 (Scalia, J., concurring in the judgment).
\item \textsuperscript{115} SOLAN, supra note 22, at 105.
\item \textsuperscript{116} Id.
\item \textsuperscript{117} Id.; see Northwestern Bell, 492 U.S. at 239 (emphasis added). The Court may have derived this formula from the legislative history. See id. (citing 116 CONG. REC. 18,940 (1970) (statement of Sen. McClellan, the bill’s sponsor)); Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n.14 (1985).
\item \textsuperscript{118} SOLAN, supra note 22, at 105.
\end{footnotes}
component concepts. The effort fails, as do most efforts at lexical decomposition. . . . Nor would it do to substitute other concepts for relatedness and continuity. Exactly the same types of problems would arise. We will always be able to find examples of patterns and non-patterns that challenge the proposed components.

The problems that the Court faced in construing the word "pattern" in RICO are, in fact, unavoidable. They result from the imperfect match between concepts conveyed by the words in a statute and the virtually infinite variety of events that can occur in the world. As hard as we may try to avoid the indeterminacy of concepts at the margins, we will not succeed. . . . Our knowledge of language . . . simply does not answer all of these questions.\(^{119}\)

Solan continues this approach to category indeterminacy with a discussion of yet another RICO case, United States v. Turkette,\(^{120}\) in which the meaning of enterprise was at issue. Relying heavily on statements in the legislative history indicating that the purpose of RICO was to prevent organized crime from infiltrating legitimate business enterprises, the court of appeals had held that enterprise could not apply to organizations that are exclusively criminal. In reversing, the Supreme Court emphasized the importance of plain meaning:

In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of "a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive. . . .

The Court of Appeals, however, clearly departed from and limited the statutory language. . . .

If Congress had intended the more circumscribed approach espoused by the Court of Appeals, there would have been some positive sign that the law was not to reach organized criminal activities . . . . The language of the statute, however—the most reliable evidence of its intent—reveals that Congress opted for a far broader definition of the word "enterprise," and we are unconvinced by anything in the legislative history that this definition should be given less than its full effect.\(^{121}\)

Solan's critique of this statement by the Court is equally strong:

[It] is wrong to say that "enterprise" could not be understood to include only legitimate businesses. Generally speaking, that is how the

\(^{119}\) Id. at 105-06.
\(^{120}\) 452 U.S. 576 (1981).
\(^{121}\) Id. at 580-81, 593 (citation omitted).
word is used, and the statute's definition is not really very helpful. . . .

. . . . [T]here is nothing the least bit clear about what the word “enterprise” means in RICO. While we do have a sense of a typical enterprise, I would be extremely hard pressed to state the necessary and sufficient conditions for membership in the class of enterprises.

. . . . [Enterprise] becomes a fuzzy concept at the margins.122

Given that Solan characterizes the problem of “fuzzy boundaries” as the most common source of hard cases arising from textual interpretation, we were naturally intrigued by his position that the inadequacies of the decisions in Northwestern Bell and Turkette were “unavoidable,” presumably even with the assistance of linguistics. Thus we were delighted when one of the pending Supreme Court cases identified in our review of cases to be argued in December 1993 and January 1994 not only involved a problem of categorization, but also concerned the very word enterprise in RICO. We did indeed find that the puzzle of enterprise presented different kinds of interpretive challenges than the texts in Staples and Granderson, as evidenced by our decision to undertake several empirical research projects as part of our analysis of that puzzle. By the end of Part VI, however, we reach a more optimistic conclusion than Solan about the potential contribution linguistics can make to solving the apparent problem of the “fuzzy boundaries” of categories referenced by words in legal texts.

VII. THE PUZZLE OF ENTERPRISE

A. The NOW Case123

In 1986 the National Organization for Women (NOW), together with two women’s health centers, filed a civil suit against the Pro-Life Action Network (PLAN) and a number of other anti-abortion organizations and individual activists, claiming in part that PLAN had violated RICO through its nationwide campaign to close medical clinics that provide abortion services. The specific provision of RICO invoked by NOW provides:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly,

122. SOLAN, supra note 22, at 79, 107.
in the conduct of such enterprise's affairs through a pattern of racketeering activity or through collection of an unlawful debt.\textsuperscript{124}

NOW sought monetary damages and an injunction\textsuperscript{125} to prevent PLAN and the other defendants from engaging in such criminal activities as trespass, vandalism, and extortion.\textsuperscript{126} The trial court dismissed the complaint for failure to state a claim,\textsuperscript{127} and the Court of Appeals for the Seventh Circuit "reluctantly" affirmed the dismissal.\textsuperscript{128} The Supreme Court granted NOW's petition for certiorari only as to one of the grounds for dismissal: that PLAN was not an enterprise within the meaning of § 1962(c) and (d) of RICO.\textsuperscript{129}

The Seventh Circuit applied the following definition of enterprise: "an association having an ascertainable structure which exists for the purpose of maintaining operations directed toward an economic goal that has an existence that can be defined apart from the commission of the predicate acts constituting the pattern of racketeering activity."\textsuperscript{130} Because this widely cited definition of enterprise apparently entered RICO case law through the Eighth Circuit's opinion in \textit{United States v. Anderson}, we will refer to it as the "Anderson definition."

NOW, the United States as amicus supporting NOW's position, and the RICO defendants each argue in their briefs to the Supreme Court that the plain meaning of the statute is unambiguous and directs a decision in their favor. Both NOW and the government start their briefs by asserting that because enterprise is defined in the statute, no further inquiry (into the legislative history or otherwise) is necessary.\textsuperscript{131} However, it is apparent upon reading the definitional section of RICO, § 1961, that the subsection on enterprise does not state what conditions must be satisfied for something to count as an enterprise: "[E]nterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals

\begin{itemize}
\item \textsuperscript{125}NOW filed the suit seeking to represent a nationwide class of women seeking abortion services, and the two health centers acting as name plaintiffs sought to represent a class of all health centers seeking to perform abortions; the motions for class certification were not decided prior to dismissal.
\item \textsuperscript{126}The plaintiffs alleged that PLAN members committed the predicate acts of "racketeering" required for RICO by violating the Hobbs Act, 18 U.S.C. § 1951 (1988).
\item \textsuperscript{127}765 F. Supp. 937 (N.D. Ill. 1991).
\item \textsuperscript{128}968 F.2d at 614.
\item \textsuperscript{129}The Court granted certiorari on the question of whether "[i]n addition to [the] statutory 'interstate commerce' and injury to one's 'business or property' requirements of RICO, should [the] statute be further limited to cases in which either [the] enterprise or predicate acts has an overriding economic motive?" 62 U.S.L.W. 3027 (U.S. July 20, 1993) (No. 92-780).
\item \textsuperscript{130}NOW, 968 F.2d at 627 (emphasis added) (quoting United States v. Anderson, 626 F.2d 1358, 1372 (8th Cir. 1980), cert. denied, 450 U.S. 912 (1981)).
\item \textsuperscript{131}Presumably, if enterprise were in fact given a comprehensive technical meaning by statutory definition, ordinary language usage would be of less relevance. \textit{See supra} text accompanying note 56 (definition of firearm).
associated in fact although not a legal entity."\textsuperscript{132} Despite occurring in a section entitled "Definitions," this statement does not define \textit{enterprise}, precisely because it does not state necessary and sufficient conditions for something to be an enterprise. NOW and the government argue as if the passage began "Enterprise means" rather than "Enterprise includes." Section 1961 does define other terms using "means."\textsuperscript{133} If Congress intended for \textit{includes} to be interpreted as \textit{means}, then anything that fits within one of the categories listed after \textit{includes} would count as an \textit{enterprise}. Most obviously, such an interpretation would entail that every individual is an \textit{enterprise}. Inasmuch as § 1961 does use different verbs in defining other words, it is reasonable to assume that \textit{includes} has a different import than \textit{means} in that section, just as it does in ordinary language. Subsection 1961(4) on \textit{enterprise} seems to assume that the reader already has an understanding of what an \textit{enterprise} is, and to instruct the reader that nothing should preclude considering the listed types of entities as possible \textit{enterprises} pursuant to that understanding. In particular, § 1961(4) seems intended as a corrective against the possibility that the reader's preexisting understanding of \textit{enterprise} might cause her to limit the word to legally constituted entities like corporations and partnerships.\textsuperscript{134} A plain meaning interpretation of \textit{enterprise} thus cannot begin and end with the definition section of the statute. Because RICO's so-called definition of \textit{enterprise} contains so little information, there seems to be little evidence to rebut the normal presumption in statutory interpretation, often applied in RICO cases, that Congress intended the ordinary meaning of the words used.\textsuperscript{135} Thus, attempting to buttress its statutory definition argument, NOW next turns in its brief to \textit{Webster's Third New International Dictionary} for this definition: "'Enterprise' encompasses any 'venture, undertaking, project' or 'any systematic purposeful activity or type of activity.' Based on this definition, NOW argues that in "its normal usage, 'enterprise' includes virtually any type of organized venture."\textsuperscript{136} One group of RICO defendants rejoins by quoting the same dictionary:

\begin{quote}
But RICO clearly does not incorporate \textit{this} meaning of 'enterprise'; the statutory definition includes \textit{entities}, not mere 'activities' or 'designs.' The first \textit{concrete} definition given for an enterprise is as
\end{quote}

\begin{enumerate}
\item\textsuperscript{133} \textit{E.g.}, id. § 1961(1) ("'[R]acketeering activity' means . . ."); id. § 1961(6) ("'[U]nlawful debt' means . . .").
\item\textsuperscript{134} Subsection 1961(4) was used by the Court this way in United States v. Turkette, 452 U.S. 576, 580-82 (1981), to hold that \textit{enterprise} can apply to an illegal association, in particular, an arson \textit{ring}.
\item\textsuperscript{135} See \textit{Russello}, 464 U.S. at 21 (construing ordinary meaning of the term \textit{interest} in RICO).
\item\textsuperscript{136} Brief of Petitioners at 21-22, NOW, 114 S. Ct. 798 (1994) (No. 92-780) (quoting \textit{Webster's Third New International Dictionary} 757 (unabr. 1971)).
\end{enumerate}
follows: 'a unit of economic organization or activity (as a factory, a farm, a mine); esp: a business organization: FIRM, COMPANY.'  

However, the dictionary widely regarded as most extensive and authoritative, the Oxford English Dictionary (Second Edition) does not list “unit of economic activity,” “business organization,” “firm,” “company,” or any similar term in its definition of enterprise. This difference does not seem to be attributable to variation in dialect between British and American English; several American dictionaries, including Webster's Second Edition, do not list “business” or an equivalent for enterprise. Also problematic for the RICO defendants’ reliance on dictionary definition would be this definition from yet another dictionary: “any undertaking; project: a business enterprise.” This definition treats “business” as an example of a much more expansive category that by its terms—“any undertaking”—could well include PLAN.

Recourse to dictionaries is a notable feature of the “new textualism” and the Court has relied upon them before in interpreting RICO. However, as this variance among well-known dictionaries illustrates, such reliance must be very guarded. It is tempting to expect to resolve disputes about the “plain meaning” of a word by invoking a dictionary definition that purportedly reveals what the word “properly” means. It is commonly supposed that dictionaries represent facts of the language that are independent of the users of the language, and that if a usage does not conform with the description in the dictionary, the usage is incorrect. This is a misconception, as discussed in further detail in the conclusion of this essay.

Unlike the briefs before the Supreme Court, the reasoning of the Seventh Circuit opinion in NOW relies neither on statutory nor dictionary definitions in concluding that enterprise means an association “directed toward an economic goal.” Rather, the court relies on RICO case law. The court cites

137. Brief of Respondents Randall A. Terry, Project Life, and Operation Rescue at 20, NOW, 114 S. Ct. 798 (1994) (No. 92-780) (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 757 (unab. 1986) (emphasis and capitalization in the dictionary quotation)). For a more complete quotation of this definition, see infra Appendix A. This brief makes the same point about the significance of the use of the word includes rather than means in the statutory definition as presented above, see supra text accompanying note 132. This brief is the only place we have seen this seemingly obvious distinction recognized.

138. See infra Appendix A for this and eight other dictionary definitions of enterprise.


140. See infra Appendix A (definition from The World Book Dictionary).


143. See infra text accompanying notes 197-204.

144. NOW, 968 F.2d at 627 (quoting United States v. Anderson, 626 F.2d 1358, 1372 (8th Cir. 1980)).
Northwestern Bell\textsuperscript{145} as authority for the interchangeability of \textit{business} and \textit{enterprise} for RICO purposes. However, interchangeability of two words in a particular context does not mean that they are synonymous. For example, one word (business) may refer to a subcategory or example from a larger category encompassed by the other word (enterprise). The Seventh Circuit also relies heavily on the \textit{Anderson} decision and subsequent cases applying it. Unfortunately the \textit{Anderson} definition is muddled both in origin and in application. The \textit{Anderson} opinion, although thorough and scholarly in many respects, provides very little explanation\textsuperscript{146} for the "economic goal" part of its definition, which is not surprising since that requirement is entirely dicta in the \textit{Anderson} case itself. The alleged enterprise in \textit{Anderson} was a group of three people—two county administrators and a salesman—operating a kickback scheme for county purchases of various highway supplies. The "economic goal" requirement was dicta because the defendants never argued that the alleged enterprise lacked an economic goal; the three participants obviously intended to make money through their scheme.\textsuperscript{147} Since the \textit{Anderson} decision in 1980, its definition of \textit{enterprise} has been widely cited but rarely with any discussion or effect on case outcome. Indeed, in a number of cases that appear to adopt the \textit{Anderson} definition, the alleged RICO enterprise is a government agency, most frequently a police department, a unit of local government, or a court. Yet not one of these cases acknowledges that it is peculiar to define a government agency, particularly a court or police department, as an association that directs its operations toward an "economic goal."

\textsuperscript{145} Id. at 629 (citing 492 U.S. at 229). See \textit{supra} notes 110-19 and accompanying text for discussion of Northwestern Bell.

\textsuperscript{146} The \textit{Anderson} court does quote a law review article by Senator McClellan, a cosponsor of the Act, and a law review note to the effect that "the purpose" of RICO is "economic." 626 F.2d at 1365 (quoting John L. McClellan, \textit{Organized Crime Control Act (S. 30) or Its Critics: Which Threaten Civil Liberties?}, 46 \textit{NOTRE DAME L. REV.} 55, 161-62 (1970), and Note, \textit{Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity"}, 124 \textit{PA. L. REV.} 192, 222 (1975)).

\textsuperscript{147} The \textit{Anderson} court emphasized the narrow scope of its decision: "Defendants ... argue that the term 'enterprise' does not encompass an illegal association that is proved only by facts which also establish the predicate acts constituting the 'pattern of racketeering activity.' This is the narrow issue we address." 626 F.2d at 1365; see also id. at 1365 n.10. The Eighth Circuit held that this association of three people was not an enterprise because it had no existence independent of the kickback scheme itself. It is noteworthy that in so holding, the Eighth Circuit explicitly rejected a "plain meaning" approach to interpreting the meaning of "enterprise" (an approach the court seemed to assume would result in finding the association to be an enterprise) and invoked legislative history in support of its holding. 626 F.2d 1370-72.

\textsuperscript{148} Perhaps the most striking example is the Seventh Circuit's decision in United States v. Neapolitan, 791 F.2d 489 (7th Cir. 1986), cited by the \textit{NOW} court as its immediate precedent. Neapolitan was a police officer who allegedly collected protection money from car thieves. Thus the alleged enterprise within which he conducted his racketeering activities was his place of employment, the county sheriff's department. Id. at 492. The defendant apparently never argued that lack of economic goal on the part of the claimed enterprise defeated the RICO claim. For other cases in which the RICO enterprise was a governmental unit, see United States v. Hocking, 860 F.2d 769, 778 (7th Cir. 1988); United States v. Yonan, 800 F.2d 164, 167-68 (7th Cir. 1986), \textit{cert. denied}, 479 U.S. 1055 (1987); United States v. De Peri, 778 F.2d 963, 975 (3d Cir. 1985), \textit{cert. denied}, 475 U.S. 1110, \textit{cert. denied}, 476 U.S. 1159 (1986); United
Indeed, apart from the NOW decision itself, there appears to be only one reported appellate decision applying the Anderson definition to find that an entity was not a RICO enterprise because it lacked an economic goal. In United States v. Ivic, in an opinion by Judge Friendly, the Second Circuit held that a group of Croatians organized for the purpose of carrying out terrorist activities was not an enterprise because its goals were political, not economic: “Defendants joined together not to make money but . . . to advance the goal of Croatian independence.” Judge Friendly primarily relied upon one textual argument for the Anderson definition. He looked to the use of enterprise in the two preceding subsections of § 1962 that prohibit investing proceeds from racketeering activity in “any enterprise” and prohibit the use of a pattern of racketeering activity to acquire “an interest in . . . any enterprise.” He concluded that, “[a]lthough perhaps somewhat wider in its reach than ‘business,’ an ‘enterprise,’ as used in these subsections, is evidently an organized profit-seeking venture.” There is, of course, a strong presumption that a word has the same meaning in different sections of the same statute. Thus he concluded that an enterprise under § 1962(c) must also be the kind of entity in which one could invest proceeds or acquire an interest, neither being a possibility for the terrorist organization.

Only four months after the decision in Ivic, a different panel of the Second Circuit drastically limited it, explaining that Judge Friendly did not really mean that a RICO enterprise need be “an organized profit-seeking venture.” Ironically this second decision, United States v. Bagaric, also involved Croatian terrorists. The significant factual distinction was that the Bagaric organization raised funds for its terrorist objectives by extorting money from wealthy Croatians in the United States. In language seemingly designed to skirt the issue of whether the organization was an enterprise for RICO purposes, the Bagaric court provided the following strained reading of the Ivic precedent:

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149. 700 F.2d 51, 60-61 (2d Cir. 1983).
151. Id. § 1962(b).
152. 700 F.2d at 60. The court also referred to the title of RICO, and observed that it would strain ordinary meaning to describe the Croatian terrorist group as “corrupt” or “racketeer influenced.” Id. at 61.
153. Id. at 60. Cunningham’s colleague, Kathleen Brickey (an expert on white-collar crime), has pointed out to us that Judge Friendly’s textual argument ignores the full text of § 1962(a) and (b). Section 1962(a) also prohibits using income received from racketeering activity for “the establishment or operation of, any enterprise.” Section 1962(b) also prohibits using a pattern of racketeering activity to “maintain . . . control of any enterprise.” These broader prohibitions would seem applicable to noncommercial entities.
155. See 706 F.2d at 48-50.
The *Ivic* court nowhere stated, however, that economic gain must be the sole motive of every RICO enterprise. . . . The literal terms of the narrow *Ivic* holding require no more than an objective appraisal that some economic purpose was to be accomplished by the crime charged . . . . We recognize that, read in isolation, language in *Ivic* can be taken to support a requirement that, quite apart from the nature of the predicate acts, the enterprise itself must be “the sort of entity one joins to make money.” . . . [T]his language is dictum, and differs from the holding of the case, which stated only that because neither the acts charged nor the purpose of the enterprise was economic, the indictment was outside the scope of § 1962(c). More significantly, the context in which it was employed persuades us the panel had no intention of insisting the necessary showing of economic purpose be confined to the enterprise. . . . The *Ivic* panel’s consideration of the meaning of “enterprise” in subsections (a) and (b) therefore amounted to no more than support for its ultimate conclusion that economic purpose must be shown in *either* the proof of enterprise *or* the proof of predicate acts.\(^{156}\)

The court thus concluded that the RICO indictment was proper because *this* Croatian organization had a financial purpose for its racketeering activity, specifically, to raise money by extortion. A third case from the Second Circuit, *United States v. Ferguson*,\(^ {157}\) followed the lead of *Bagaric* to uphold a RICO conviction where the alleged enterprise was a black nationalist organization. In *Ferguson*, the fact that the racketeering activities were bank robberies to support the organization’s political activities supplied the “economic element.”

Neither *Bagaric* nor *Ferguson* came to terms with the impact of their facts on the underlying textual rationale for *Ivic*. Neither the *Bagaric* nor *Ferguson* organizations were entities in which one could invest proceeds or acquire an interest; they certainly were not “organized profit-seeking ventures.” Yet if these organizations were not deemed to be enterprises, then the RICO claims fail, regardless of how economically motivated the racketeering activities were.

There exists in the RICO case law another definition of *enterprise* which can be traced to the Supreme Court’s decision in *Turkette*:

> The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. . . . The “enterprise” is not the “pattern of racketeering activity”; it is an entity separate and apart from the pattern of activity in which it engages.\(^ {158}\)

Under the *Turkette* definition, PLAN would be an enterprise. Indeed, a women’s health center successfully alleged that a more loosely knit pro-life

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\(^{156}\) Id. at 53, 55, 56-57.


organization was a RICO enterprise in a Third Circuit case, *Northeast Women's Center, Inc. v. McMonagle*. McMonagle and NOW do not technically represent a split in authority because the RICO defendants in *McMonagle* did not object to the broader *Turkette* definition. Indeed, the *Turkette* definition can be found in many of the same opinions that quote *Anderson*, as if the two were interchangeable, although *Anderson* is obviously narrower.

The fact that the *Anderson* definition is so widely and uncritically accepted, even though the subsequent Second Circuit decisions have shorn away *Ivic*’s textual justification, and even in contexts in which it does not seem applicable to the facts, suggests that the definition reflects some kind of ordinary language intuition.

The linguists designed two empirical projects to explore the ordinary language meaning of *enterprise* as it might be relevant to the *NOW* case. Their focus was particularly on the extent to which the *Anderson* definition of *enterprise* conformed to ordinary language usage. One project, using surveys data, particularly addressed the “hard cases” for interpreting *enterprise*: non-business organizations such as labor unions, government agencies, and politically motivated organizations that resemble PLAN or the Bagaric terrorist group. This research, described below, produced the conclusion that, in contrast to the Seventh Circuit’s view, *enterprise* cannot be taken as synonymous with *business*. To the contrary, while *enterprise* stereotypically refers to businesses, businesses are actually a subcategory of a larger set of entities that can be described as *enterprises* in ordinary usage. Moreover, deciding whether PLAN is an enterprise is made unexpectedly difficult because, as indicated by our survey data, English speakers divide into two groups as to how they understand the word *enterprise* and thus in how they apply the word to a given entity. One way focuses on whether the activity of the enterprise is organized for the achievement of a goal to which the constituent members are jointly committed; the other focuses on whether the entity is like a business. These two ways correspond closely to the “competing” *Turkette* and *Anderson* definitions of *enterprise*.

159. 868 F.2d 1342, 1348 n.5 (3d Cir.), cert. denied, 493 U.S. 901 (1989), cert. denied, 494 U.S. 1050 (1990) (The jury was given the following definition of *enterprise*: “an ongoing organization, either formal or informal in nature in which the various associates functioned as a continuing unit. The enterprise must have an existence separate and apart from the pattern of activity in which it engages.”). This definition actually requires less of a “common purpose” than the definition set forth in *Turkette*.

160. The *Anderson* definition may have been given particular credence by its adoption in a set of guidelines promulgated by the U.S. Department of Justice in 1981 to guide prosecutorial discretion in bringing RICO charges. See *Ivic*, 700 F.2d at 64. The Justice Department has since disavowed this interpretation. Brief for the United States as Amicus Curiae Supporting Petitioners at 17, *NOW*, 114 S. Ct. 798 (1994) (No. 92-780).
1. Searching the Range of Uses: The NEXIS Database

In their research on the ordinary meaning of enterprise, the linguists first performed a search of the NEXIS database produced by Mead Data Central for actual documented uses of the word in natural language. The purpose of the NEXIS search was to enlarge the linguists' database beyond whatever examples might have been available by simple introspection. An initial and a second search yielded 192 examples of the word enterprise, from both spoken and written language samples.\(^1\)

When professionally trained linguists review large sets of data in order to study the meaning of a single word, they bring to bear no automatic screening devices or linguistic equivalents of Geiger counters. Rather, they utilize their awareness of grammatical categories, semantic complexities, and other linguistic subtleties. This includes understanding the different ways that a single part of speech, such as a noun or verb, can be used in the grammar of a specific language, the multidimensional nature of word meaning, the role of context in linguistic communication, and the fact that linguistic performance varies among individuals. All of these played a part in the analysis of the NEXIS search product. As explained earlier,\(^2\) the linguist's skills do not make her more authoritative than any other native speaker, such as a judge, as to whether any particular use of a word is appropriate. The linguist can, however, use the NEXIS search to augment the judge's thinking about possible uses of the word, to suggest distinctions among uses that might escape the judge's notice due to the unconscious nature of language comprehension, and to inform the judge of uses entirely acceptable and current in the relevant speech community, of which the judge might not be aware.

The initial review of the data revealed first that enterprise is used in two grammatically distinct ways: first, as a mass noun, one that normally cannot be pluralized, such as mud or clarity, and second, as a count noun, one denoting an entity we can count, which thus can be pluralized, as in pebbles or qualities. The mass noun category includes the familiar expression, free enterprise. Another mass noun use denotes a personal quality that combines ambition with creativity, as in "[H]ard work and enterprise are also part of the [Vietnamese] culture."\(^3\)

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161. The spoken language samples were from program transcripts of the MacNeil/Lehrer NewsHour and various National Public Radio news broadcasts in 1993. The written language samples were from January 1977 editions of the Washington Post, and October 1989 samples from the New York Times, the Sacramento Bee, the St. Petersburg Times, Time Magazine, and U.S. News and World Report. The actual searching, retrieval, and word processing of these samples to highlight uses of enterprise required only a few hours of time. Levi did most of the following analysis of these examples.

162. See supra text accompanying note 25.

163. Two other examples of the mass noun use from the NEXIS data are: "[President Ford] said of Latin America only that 'our relations have taken on a new maturity and sense of common enterprise,'" and "[T]he small mom-and-pop stores that are the foundation of American enterprise."
The count noun uses of *enterprise* are the ones that are relevant to interpreting RICO. In these uses, the noun can appropriately and readily be pluralized, as in these NEXIS citations: “Disney, Universal Studios, and the other tourist enterprises throughout the state” and “What evolved is a mix of academic, scientific, and business enterprises.” However, we noted that count noun uses of *enterprise* can be divided into at least two distinct senses: one which denotes an activity, and one which denotes an entity carrying out such an activity. The first “activity” sense (*enterprise*\(^a\)) is exemplified by these NEXIS citations:

[M]aking and launching that many satellites will be a very expensive enterprise.

[L]iterary history has itself become a far more complex and delicate enterprise than it ever was before.

The second count noun sense, which denotes an entity (*enterprise*\(^e\)) carrying out one or more activities, is exemplified by these NEXIS citations:

[The National Football League] is a curious enterprise: an intercity alliance of 28 monopolies, blessed by Congress and invariably ruled by fabulously rich capitalists, bound up in its own form of Socialism.

[T]he kinship [foster care] program has mushroomed beyond all expectations into a $200 million enterprise . . . .

We concluded that only the *enterprise*\(^e\) sense could be the one intended in RICO.\(^{164}\) It is this distinction between *enterprise*\(^a\) and *enterprise*\(^e\) that the RICO defendants were making in arguing that NOW quoted the wrong part, the activity part, of *Webster's* definition of *enterprise*.\(^{165}\)

The data from NEXIS demonstrate conclusively that the count noun *enterprise* cannot be taken a priori as synonymous with *economic enterprise* where *economic* is taken to mean “profit-seeking.” There are too many counterexamples in the data to support any such equivalence.\(^{166}\) Moreover,
there are eleven occurrences of the expressions business enterprise, commercial enterprise, and economic enterprise. These occurrences, which do not appear to be redundant, also provide evidence for the nonsynonymous relationship of enterprise and economic enterprise, as opposed to the apparent redundancy of commercial business or economic business.

Another conclusion we reached from reviewing the NEXIS data is that "organized profit-seeking entities," entities which may be roughly characterized as equivalent to what is meant by the term businesses, represent the largest share of the entities referred to as enterprises. We further observed that a small number of citations, not counting those that used enterprise in the context of a RICO prosecution, showed enterprise as denoting criminal organizations or criminal activities, thus demonstrating that use of the word is not restricted to entities and organizations that conform to the law.167

Our final conclusion concerning the NEXIS data was that, as far as we could tell from the contexts provided in the fifty-word quotations, for all examples of enterprise, the enterprise could be characterized as having a goal of some sort, although not necessarily the goal of seeking profits. This common feature turned out to be very significant in the responses of the subjects to a survey designed to expand the database on the ordinary use of enterprise one step further.

2. Looking to the Speech Community: Investigating Native Speaker Judgments via Questionnaires

Based on the NEXIS data and previous work on descriptive lexical semantics,168 we then designed a survey questionnaire. We designed the survey in part to test the Anderson definition of enterprise used by the Seventh Circuit in NOW: "an association (1) having an ascertainable structure (2) which exists for the purpose of maintaining operations (3) directed toward an economic goal (4) that has an existence that can be defined apart from the
commission of the predicate acts constituting the pattern of racketeering activity. The survey asked subjects whether certain real or hypothetical groups were enterprises, and contained examples written to test whether entities similar to PLAN and the Croatian terrorist group in Bagaric would be considered enterprises. It also asked if a well-known labor union, the United Auto Workers, and a well-known government agency engaged in economic activity, the Internal Revenue Service, were enterprises.

a. Methodology

The following survey question illustrates the format used for each question:

The IBM (International Business Machines) Corporation.
(a) Does it seem right, to you, to call the International Business Machines (IBM) an "enterprise?"

YES I CAN'T TELL NO

(b) I am

VERY SURE FAIRLY SURE NOT TOO SURE

that most others would agree with the choice I circled in response to question (a).

We scored their combined answers on a scale from 1 to 7 as follows:

<table>
<thead>
<tr>
<th></th>
<th>VERY SURE</th>
<th>FAIRLY SURE</th>
<th>NOT TOO SURE</th>
</tr>
</thead>
<tbody>
<tr>
<td>NO</td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>CAN'T TELL</td>
<td>4</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>YES</td>
<td>7</td>
<td>6</td>
<td>5</td>
</tr>
</tbody>
</table>

After several pre-tests by Kaplan at San Diego State University and by Cunningham at Washington University, we developed a final set of twelve questions. To keep the time for survey completion short, the twelve questions were split between two different questionnaire forms so that, in any given survey session, half the group was answering the six questions on Survey A and the other half the six questions on Survey B. The survey was administered three times, to students at Northwestern University, Washington


170. The authors received considerable assistance during the pre-test period from Lee Robins, University Professor of Social Science at Washington University, who has very extensive experience in survey research.

171. The items which appeared on the surveys are presented in full in Appendix C. In addition to six questions regarding enterprise, each survey also contained three questions relating to the word exhibit as part of our research on the Knox case. See supra note 2.
University, and San Diego State University. In total, there were fifty-four respondents to Survey A and sixty-two to Survey B. The surveys given to respondents in two of the sample groups also asked them to explain briefly “Why or Why Not” after circling “Yes,” “No,” or “Can’t Tell,” and before choosing among the “Very Sure,” “Fairly Sure,” and “Not Too Sure” options. We subsequently mailed to 127 U.S. District Court judges a survey that contained six examples from Surveys A and B, including those most relevant to RICO; judges responded. As will be shown in more detail below, their responses corresponded with those of the college students, in particular as to the most important examples, and thus provide convergent evidence supporting the model of the speech community’s range of uses of enterprise derived from the original survey’s responses.

In using surveys to explore further the meanings of enterprise, the authors are not suggesting that judges should delegate to others the task of ascertaining just how statutory terms should be applied to particular cases. Nor do we suggest that legal meaning is something that can be determined by an opinion poll. Rather, as with the NEXIS data, the surveys are a device for expanding an individual’s ability to bring to conscious awareness her intuitive understanding of word meaning, and for informing an individual of perfectly

172. At San Diego, the subjects were students in a linguistics class taught by Kaplan; at Northwestern the subjects were students in a linguistics class taught by Levi. The Washington University subjects were students in an undergraduate course in social methods taught by Lee Robins, see supra note 170; Cunningham was present when the survey was administered. None of the subjects were given any information or instructions beyond what appeared on the survey questionnaire itself. Washington University students received Survey A and B in four different forms with question sequencing randomized on Robins’ advice; the randomizing did not seem to affect responses.

173. The survey was mailed to all active and senior status federal district court judges in Alabama, Idaho, Illinois, Michigan, Missouri, New Hampshire, and New Mexico. The selection of states represented a rough balance among regions of the country and between urban versus rural districts. Because the survey was mailed from Washington University and the cover letter identified linguistics professors at Northwestern University and the University of Illinois as part of the team designing the survey, it was hoped that judges in Missouri and Illinois would be particularly likely to respond. Although the cover letter to the judges did state that “the Supreme Court will hear argument on cases that require interpretation of these words [enterprise and exhibit] in two federal statutes,” no explicit reference to RICO or the NOW case was made. Further, the judges were asked “not to answer any question based on your belief of what the word should mean in any particular federal statute or how it should be interpreted in any pending case.” Letter to Federal Judges Re: Statutory Interpretation Project (Oct. 27, 1993) (on file with Prof. Clark Cunningham).

174. These judges were surveyed for two reasons. First, they are representative of one group that must interpret RICO on a case by case basis, and must apply whatever definition the Court develops in deciding the NOW case. Second, even though this project was not aimed at determining legislative intent, the authors anticipated possible criticism that the college student respondents, although literate and thoughtful, might be too divergent in age and life experience from the people who enacted RICO to be relevant. The district court judges seemed to be a group that would be motivated to respond to the survey and who would more closely approximate the age and life experience of the legislators who voted on RICO, assuming that is a relevant factor. The authors also sent the same survey received by the judges to 146 current members of Congress, targeting the members with the longest terms of service. Only five returned completed surveys; six wrote letters explaining they have a policy of not answering surveys.

175. Judges should, however, take survey data very seriously in regard to whether a word or phrase is ambiguous as a matter of ordinary language. It is very hard to maintain that a particular utterance is capable of only one interpretation if large numbers of native speakers can be shown to disagree about its interpretation.
acceptable and normal uses, or subtleties thereof, that a word may have in the speech community—uses of which the individual might not previously have been aware.

b. Results and Discussion

Tables A and B contain the average score and the standard deviation for each response across the three groups of student subjects, along with a measure (a two-tailed t-test) of whether the average score for each item is significantly lower than the score of the item listed just above it. Table C displays the results from the judges.

Of particular interest for present purposes is the fact that the example designed to track closely the features of the Pro-Life Action Network (PLAN) as described in the NOW case\textsuperscript{176} was the example that scored most like an enterprise after IBM and the Small Company. This example was in a statistical tie for first place with three other entries in the judges’ survey.\textsuperscript{177} The survey described the PLAN-type example as follows:

The Coalition for Fair Adoption Laws (CFAL) is a highly organized national network of non-profit organizations representing adoptive parents and persons seeking to adopt. The executive directors of the member organizations comprise the steering committee of CFAL. CFAL’s activities include lobbying, rallies, and planning demonstrations at courts and adoption agencies.

\textsuperscript{176} PLAN is a highly organized nationwide network of anti-abortion activists; its “steering committee” is comprised of the executive directors of several member organizations. PLAN is responsible for the overall national strategy of national conferences and training sessions, promotion of national agendas, and direct action against abortion clinics. Brief of Petitioners at 7, NOW, 114 S. Ct. 798 (1994) (No. 92-780). PLAN raises funds which support staff salaries, office expenses, and other operational costs. Id. at 47.

\textsuperscript{177} The judges’ survey did not include either the IBM or Small Company questions. See infra Appendix C.
TABLE A. Survey A (54 University Students)

<table>
<thead>
<tr>
<th>Question (1:No/Very Sure to 7:Yes/Very Sure)</th>
<th>Average Score</th>
<th>Standard Deviation</th>
<th>Difference Statistically Significant at .01 Level? (By 2-tailed t-test)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Small Company</td>
<td>6.42</td>
<td>1.05</td>
<td>{ } Yes (P=.0000)</td>
</tr>
<tr>
<td>Coalition for Fair Adoption Laws (CFAL)</td>
<td>4.7</td>
<td>1.89</td>
<td>{ } Yes (P=.0007)</td>
</tr>
<tr>
<td>Independent Quebec Organization (IQO)</td>
<td>3.96</td>
<td>1.93</td>
<td>{ } Yes (P=.0020)</td>
</tr>
<tr>
<td>Internal Revenue Service (IRS)</td>
<td>3.44</td>
<td>1.86</td>
<td>{ } Barely Not (P=.0143)*</td>
</tr>
<tr>
<td>Civil War Enthusiasts</td>
<td>2.94</td>
<td>1.68</td>
<td>{ } Yes (P=.0000)</td>
</tr>
<tr>
<td>Bible Study Group</td>
<td>2.24</td>
<td>1.27</td>
<td></td>
</tr>
</tbody>
</table>

* Difference Significant at .05 Level
<table>
<thead>
<tr>
<th>Question (1: No/Very Sure to 7: Yes/Very Sure)</th>
<th>Average Score</th>
<th>Standard Deviation</th>
<th>Difference Statistically Significant at .01 Level? (By 2-tailed t-test)</th>
</tr>
</thead>
<tbody>
<tr>
<td>IBM</td>
<td>6.35</td>
<td>1.89</td>
<td>Yes (P=.0000)</td>
</tr>
<tr>
<td>Lemonade Stand</td>
<td>4.69</td>
<td>2.1</td>
<td>No (P=.4576)</td>
</tr>
<tr>
<td>Movement for Fair Adoption Laws (MFAL)</td>
<td>4.52</td>
<td>1.91</td>
<td>No (P=.2140)</td>
</tr>
<tr>
<td>United Auto Workers (UAW)</td>
<td>4.24</td>
<td>1.75</td>
<td>Yes (P=.0013)</td>
</tr>
<tr>
<td>Amateur Football Team</td>
<td>3.58</td>
<td>1.95</td>
<td>Yes (P=.0000)</td>
</tr>
<tr>
<td>Poker Players</td>
<td>1.97</td>
<td>1.14</td>
<td></td>
</tr>
<tr>
<td>Question</td>
<td>Average Score</td>
<td>Standard Deviation</td>
<td>Difference Statistically Significant at .01 Level? (By 2-tailed t-test)</td>
</tr>
<tr>
<td>--------------------------------------</td>
<td>---------------</td>
<td>--------------------</td>
<td>-----------------------------------------------------------------------</td>
</tr>
<tr>
<td>Independent Quebec Organization (IQO)</td>
<td>5.32</td>
<td>2.01</td>
<td>No (P=.2980)</td>
</tr>
<tr>
<td>Coalition for Fair Adoption Laws (CFAL)</td>
<td>4.8</td>
<td>1.81</td>
<td>No (P=.7260)</td>
</tr>
<tr>
<td>Lemonade Stand</td>
<td>4.66</td>
<td>2.1</td>
<td>No (P=.7810)</td>
</tr>
<tr>
<td>United Auto Workers (UAW)</td>
<td>4.46</td>
<td>2.01</td>
<td>Yes (P=.0000)</td>
</tr>
<tr>
<td>Internal Revenue Service (IRS)</td>
<td>2.4</td>
<td>1.46</td>
<td>No (P=.1050)</td>
</tr>
<tr>
<td>Bible Study Group</td>
<td>1.97</td>
<td>1.04</td>
<td></td>
</tr>
</tbody>
</table>
The CFAL results were notable not only for the high scores but also for the distribution of answers. Specifically, 70% of the student respondents and 66% of the judges were either very sure or fairly sure that others would agree with their judgment about whether CFAL was or was not an enterprise. The average scores of 4.7 for students and 4.8 for judges are thus primarily the result of offsetting high and low scores, rather than a high number of "I Can't Tell" responses. Graphs 1 and 2 most accurately display this distribution.

Also of particular interest for RICO purposes was the scoring of the Independent Quebec Organization (IQO), an entity designed to track the features of the Croatian terrorist group that the Second Circuit found to be an enterprise in Bagaric: "The Independent Quebec Organization is a terrorist group that robs banks and extorts money from wealthy, French-speaking Canadians to finance its bombing, arson, and assassination activities." The students rated IQO significantly lower than CFAL, but the judges rated IQO relatively high. Graphs 3 and 4 show the distribution of scores for this item.

178. From this point forward, we will refer to respondents "being sure" about a particular judgment rather than fully stating that they were sure that others would agree. We adopted the seven point scale from the Coleman and Kay experiment mentioned above. Coleman & Kay, supra note 168. Coleman and Kay actually sought to discover the respondent's strength of conviction in her own judgment but found in a pretest that subjects seemed to circle "I am very sure" despite other indicators, such as long hesitation and facial gestures during testing, that seemed to indicate uncertainty. Id. at 30. Thus they reformulated the "sure" question to ask about whether others would agree in order to investigate indirectly the subject's own certainty. For our purposes, certainty that others would agree with the subject's own judgment is if anything a more significant indicator of speech community usage than the speaker's personal conviction of certainty.

179. Among the students, 50% were either very sure or fairly sure that CFAL was an enterprise, while 20% were either very sure or fairly sure it was not. Among the judges, 54% were either very sure or fairly sure that it was an enterprise, 11.5% were very sure or fairly sure it was not.

180. For the judges' survey, the differences between the average score for IQO and the average scores for CFAL, UAW, and Lemonade Stand were not statistically significant according to the two-tailed t-test, as indicated by the "p value" column in Table C. Nonetheless, the authors are intrigued by the difference in distribution of scores for IQO between the students and the judges as displayed in graphs 3 and 4. Eight subjects in the San Diego State and Washington University surveys (the two groups asked to explain "Why or Why Not" they answered as they did) provided explanations for answering "No" as to IQO. Six out of these eight explained that IQO is "not legal" or engages in "negative activities." We speculate that the judges (who were not asked in their survey to provide explanations) were accustomed to the concept of a "criminal enterprise," and thus were not dissuaded to the same degree by the illegal nature of IQO's activities. In the same vein, it is possible that some of the judges were familiar with the Bagaric precedent, and thus readily identified IQO as a RICO enterprise, despite the instructions not to interpret *enterprise* for purposes of any particular statute.
GRAPH 1. Coalition for Fair Adoption Laws (Student Respondents)

GRAPH 2. Coalition for Fair Adoption Laws (Judge Respondents)
GRAPH 3. Independent Quebec Organization (Student Respondents)

GRAPH 4. Independent Quebec Organization (Judge Respondents)
A highly structured legal organization devoted to raising money, the Internal Revenue Service, rated low for both students and judges. Twice as many student respondents said "No" with at least fair certainty than said "Yes." Even more strikingly, 70% of the judges said "No" with at least fair certainty as contrasted with only 6% saying "Yes" with such certainty.

On the basis of these results, it can be concluded that the Anderson definition used by the Seventh Circuit to dismiss NOW's RICO claim does not correspond well with the way most speakers understand enterprise, since an overwhelming majority of both the students and judges responding thought that at least one entity was an enterprise that lacked at least one of the elements of that definition: economic goal, ascertainable structure, and independent existence. CFAL received an average rating of 4.7 from the students and 4.8 from the judges, despite having no economic goal, about the same as Lemonade Stand which rated 4.69 from the students and 4.66 from the judges. Lemonade Stand does have an economic goal but has minimal structure and no existence independent of the momentary activity. Moreover, the implicit fund-raising activities of the IRS were not sufficient to earn it an average rating close to that of CFAL. Indeed, nothing in the Anderson definition of enterprise can explain why such a highly structured and independently existing entity as the IRS was rated so much lower than CFAL.

Respondents' answers to the Why/Why Not questions helped to explain the striking results. The subjects divided into two distinct, albeit related, groups in regard to the primary criterion for categorizing an entity as an enterprise. The first group centered on the entity's having a clear goal, while the second group focused on one very specific goal, seeking a profit.

The subjects' explanations of why they rated CFAL as they did demonstrate this bifurcated pattern. Of the twelve respondents who provided Why/Why Not answers and felt that CFAL was an enterprise, all but two mentioned the organization having a goal. In sharp contrast, all five of the respondents who did not mention goal said: "Maybe not because is non-profit group" and "They are all working together." The former comment was apparently an explanation of why the subject was "Not Too Sure" others would agree with his answer rather than of why the subject thought CFAL was an enterprise. The latter explanation could arguably be understood as implying a goal.

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181. The Lemonade Stand was described simply as "Three children selling lemonade on a street corner." See infra Appendix C.
182. The IRS received an average rating of 3.96 from the students and only 2.4 from the judges.
183. The split between these two approaches can be seen in several ways in the Why/Why Not responses. A tally of all the properties of enterprise that subjects mentioned shows that 65% mentioned "seeking a profit" and 54% mentioned "having a goal." In this count, the number mentioning the latter does not include subjects mentioning the former, although seeking a profit is a kind of goal. Other properties were mentioned by far fewer subjects. For example, 25.5% mentioned "having group unity," 22% mentioned "having official status," and only 16% mentioned "having structure." Moreover, only 4% of the subjects who provided Why/Why Not responses failed to mention either "seeking a profit" or "having a goal"; 41% mentioned profit but not goal, 31% mentioned goal but not profit, and 24% mentioned both. For further discussion of these responses, see infra Appendix E.
184. The two who did not mention goal said: "Maybe not because is non-profit group" and "They are all working together." The former comment was apparently an explanation of why the subject was "Not Too Sure" others would agree with his answer rather than of why the subject thought CFAL was an enterprise. The latter explanation could arguably be understood as implying a goal.
“No” respondents who disagreed and explained why CFAL was not an enterprise mentioned CFAL’s lack of an economic goal.

As one might have expected, respondents’ explanations for their ratings of the Movement for Fair Adoption Laws (MFAL), an entity designed to be similar to CFAL but less structured, show the same pattern as seen in the CFAL responses, namely the contrast between “having a goal” and “seeking a profit” as the primary criterion. One “Can’t Tell” respondent explicitly stated the clear tension between “goal” and “profit-seeking”: “It’s very possible that having a large group of people working together for a common purpose is an enterprise, but I tend to think that enterprises make money.”

An examination of the explanations for the UAW, the IRS, and the IQO shows that the “goal” versus “profit-seeking” dichotomy drives those responses as well, but with a difference that strongly suggests why CFAL and MFAL produced fewer “Can’t Tell” and more “sure” responses in both directions. CFAL and MFAL had very clearly identified goals that defined the organizations, and they were also clearly not motivated by making money. As a result, respondents who weighed the “goal” feature heavily felt sure that they were enterprises, and those who thought an enterprise needed to be profit-seeking were sure that they were not. The relative few who marked “Can’t Tell” seemed to feel an equal pull from both features and were thus immobilized by the sharp choice that CFAL and MFAL offered between them. In contrast, the relatively strong showing for UAW shows about half the affirmative votes coming from those who weigh goal-orientation heavily and thought the UAW has a clear goal, and the rest from people who thought the UAW makes money or is otherwise like a business. The “Yes” responses to IQO show the same pattern. The IRS, in contrast, rated much lower because very few of the “goal” weighing respondents thought it had a clear goal; the relatively few “Yes” explanations emphasized its money-raising function.

In brief, among those respondents who expressed a reason for answering any of the questions, there was almost total correlation between whether the respondent preferred a “goal” or “profit-seeking” explanation and how the respondent decided the “hard” cases.

It is possible to contrast the “profit-seeking” and “goal” ways of understanding enterprise by considering two different ways that people might

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185. MFAL was described as “an unstructured network of political activists, who favor freer adoption. With much intercommunication among ‘members,’ MFAL’s activities consist of, among other things, planning demonstrations at courts and adoption agencies." See infra Appendix C.

186. Of the fourteen respondents who indicated that MFAL was an enterprise and explained their answer, eleven referred to MFAL’s having a goal. Of the six respondents who said MFAL was not an enterprise and explained why, two mentioned that it lacked a profit-making focus, two mentioned that it lacked structure, and two gave essentially “empty” explanations. Those two explanations were: (1) “Think of enterprise as something else” and (2) “I have only heard the word ‘enterprise’ to describe inanimate things.”

187. Almost no one was “very sure” that the IRS was an enterprise.
decide whether to apply the familiar word *enterprise* to an unfamiliar entity such as the (hypothetical) Coalition for Fair Adoption Laws. One way is to think about enterprise-as-entity, and then compare CFAL to the stereotypical enterprise-as-entity, namely a business. This way could produce the kind of rankings given by the “seeking a profit” group. The “have a goal” group could have proceeded differently, by focusing on enterprise-as-activity, even though the examples were all entities.

The two conceptions of an enterprise as a goal-directed activity and as a goal-directed entity correspond to a more general relation between an activity and concrete manifestations of that activity, as Green has discussed in detail elsewhere.\(^8\) Thus English speakers use and understand *constitution* as either a process of constituting or a written charter that constitutes a nation or organization, and *shelter* as the state of being sheltered, as in “Shelter is a basic human need,” or as a structure that enables that state, as in “Shelter is expensive.”\(^9\) This process may be at work for those who used the “goal” way of understanding *enterprise*: the respondent relates the novel entity to the activity in which it apparently engages, and then compares that activity to familiar enterprise activities, which generally have clear goals, though not necessarily profit-seeking goals.

The survey work generates several conclusions. First, disagreement among members of the same speech community, for both the students and the judges, over whether a given entity is an *enterprise* is not entirely attributable to what Solan terms “categorical indeterminacy” or “fuzzy words.” Rather for some examples, most notably CFAL, most speakers who disagree about whether the example is an enterprise agree that the issue is not “fuzzy.” They feel sure that most others would agree with their own conclusion about membership in the category. The relatively few “Can’t Tell” responses for such examples further suggest that the interpretive challenge is not a problem of marginal membership in a category.\(^10\)

Second, this disagreement is not a result of speakers choosing between two meanings which all speakers use, as is the case of homonym pairs like *bank* as the land edge next to a river and *bank* as a financial institution. Rather, speakers differ in how they apply *enterprise* to entities. One group looks at whether an entity has a clear goal; the other asks whether the entity is like a business.

Third, for the many who use “having a goal” as their primary criterion, the word *enterprise* may denote both “economic,” profit-seeking enterprises and

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188. See, e.g., GREEN, PRAGMATICS, supra note 6, at 47-61.
189. Another example of a relation between a state of affairs and the entities whose properties constitute it is seen in the following two sentences: “Snow is forecast for tomorrow,” and “Snow is cold.” The word *snow* is used quite unremarkably to refer to either a process or the concrete manifestation of that process.
190. See supra text accompanying note 108.
noneconomic enterprises. For this substantial part of the speech community, whether a nonbusiness entity is an enterprise does not turn on the degree to which the goal is economic. Rather, for such persons, the clarity of its goal and the extent to which the entity is identified with that goal is more salient.

Fourth, it is only for that part of the speech community which uses "profit-seeking" as the primary criterion that the economic character of the entity's goal is salient. However, even for this group, the other features of the Anderson definition—ascertainable structure and independent existence—do not state necessary conditions for being an enterprise, as demonstrated by the number who are sure that Lemonade Stand is an enterprise.

Fifth, because of these conclusions, reasonable members of the speech community can and do differ as to whether they consider a goal-oriented but non-profit-seeking entity such as PLAN to be an enterprise.

Sixth, businesses are the stereotypical enterprises for both groups. However, this does not mean that business and enterprise are synonymous, any more than the fact that Americans consider a robin to be a stereotypical bird means they believe that the word robin is a synonym of bird.

These results, along with those from the NEXIS search, give rise to the following implications for the NOW case. Many if not most speakers would consider describing PLAN as an enterprise to be an appropriate use of the word, although some speakers would disagree with certainty. People who identify an enterprise primarily by its clear goals would classify PLAN as an enterprise, because it has a clear and specific goal; the activities it generates to accomplish that goal readily meet their understanding of enterprising activities; and it is an organizational embodiment of its goal-directed activity. For these persons, PLAN's clear commitment to a specific goal is likely to make it seem as much or more like an enterprise as entities like terrorist groups, labor unions, and government agencies.

On the other hand, for people who apply an economic criterion in deciding whether an entity is an enterprise, PLAN will probably not qualify because its economic activities are so incidental to its organizational goals that it does not significantly resemble a profit-seeking business. However, such people may also conclude that terrorist groups, labor unions, and government agencies are not enterprises because they too do not seem enough like businesses.

Both groups appear to treat "having a goal" as essential, though they differ in whether that goal must be an economic one. In fact, the two ways of interpreting enterprise that have emerged from our empirical research correspond closely to the "competing" Turkette and Anderson definitions of enterprise. Thus the circuit splits appear to reflect actual features of ordinary language usage, which may do much to explain the origin and persistence of both definitions, including the unreflective way courts use each in the case law.

191. See supra p. 1597.
The larger statutory context in which enterpris... as recognized in Vic, the “business-like” or “economic goal” criterion seems relevant to the first two of RICO’s three prohibitions: § 1962(a) prohibits investment in an enterprise and § 1962(b) prohibits acquiring an interest in an enterprise. On the other hand, a fair interpretation of the statute’s definitional subsection on enterpris... In particular there is little doubt that Congress intended to protect labor unions from racketeering influence and corruption; textual evidence to that effect in both the mention of unions in the definition of enterpris... Yet, at least according to our survey data, the “business-like” criterion does not readily lead to the conclusion that unions such as the UAW are enterprises.

The lessons from the linguists’ analysis and the tangled case law seem to merge. Some speakers, thinking of a business as the stereotypical enterpris... Inclusion of this wider range of entities entails replacing the narrow “business-like” criterion with a broader criterion that focuses on whether the entity is dedicated to a clear, specific goal. Courts attempting to retain the narrow focus on economic goal while at the same time including nonbusiness organizations such as PL... run counter to the ordinary language patterns of usage and are likely to generate incoherent discourse.

The linguistic analysis we have presented of course is not offered as a “right answer” to how the NOW case should be decided. The role of linguists has been to analyze the language, not to make judicial decisions about the legal implications of such analysis. Rather the analysis has shown that both the Anderson and Turkette definitions have roots in ordinary language. Further, there can be a host of sound legal reasons why enterpris... Nevertheless, the analysis by linguists could help judges articulate their own intuitions about how the word enterpris... In the above explanatory accounts respondents who said the UAW is not an enterprise: “they’re workers, not a business,” “this group does not seek financial gain,” “not making money primarily,” and “they don’t work together or cooperate to make money for themselves.”

192. See supra notes 149-52 and accompanying text. However, as discussed in note 153, Vic may be reading § 1962(a) and (b) too narrowly as applying only to business-like entities. 193. See supra notes 131-34 and accompanying text. 194. 18 U.S.C. § 1961(4) (1988). 195. Pub. L. No. 91-452, 84 Stat. 922 (1970). 196. Consider the following Why/Why Not explanations from respondents who said the UAW is not an enterprise: “they’re workers, not a business,” “this group does not seek financial gain,” “not making money primarily,” and “they don’t work together or cooperate to make money for themselves.”
Both of these contributions could help a judge understand how other judges might come to different conclusions about what this word “plainly means.” The discourse between those disagreeing judges could then rise above mere unarticulated assertion of personal understanding or invocation of a strategically chosen dictionary edition. Instead it could become informed by such objectively derived distinctions as those between activities and entities and between the “goal” and “profit-seeking” criteria for deciding whether a nonbusiness organization is an enterprise.

To the extent that a court’s opinion explicitly selected one of these two criteria, subsequent applications of that opinion to new cases might be more coherent and predictable because the actual rationale would be seen clearly, and the unjustified claims that “ordinary language” simply dictates a single result would not be present. However, even if the language of RICO is not so plain as to dictate a single result, its language can still guide judicial decisionmaking: for even in a case that apparently presented what Solan views as an intractable problem of fuzzy category boundaries, analysis of ordinary language meaning does provide a degree of determinacy through identifying and articulating these two distinct criteria. In this way, an empirical study by trained language analysts can help untangle the linguistic knots that led to NOW becoming a “hard” case.197

197. On January 24, 1994, less than seven weeks after oral argument, the Court issued a unanimous decision in favor of NOW; Chief Justice Rehnquist authored the brief opinion. 114 S. Ct. 798, 798-806 (1994). Justice Souter wrote a one page concurrence, joined by Justice Kennedy, emphasizing that the decision did not address whether the abortion protesters might have some First Amendment defense to a RICO suit. Id. at 806-07.

The Court’s quick unanimous decision and its terse opinion refuted expectations that the highly politicized nature of the underlying abortion protest issue, an element which made the case one of the most publicized of the term to date, would produce a lengthy and splintered set of opinions. The NOW case makes a striking contrast with last term’s decision in Bray v. Alexandria Women’s Health Clinic, 113 S. Ct. 753 (1993) (the “Operation Rescue” case), also brought by NOW and abortion clinics against anti-abortion protesters, but under the anticonspiracy provision of the Civil Rights Act of 1871, 42 U.S.C. § 1985(3). Justice Scalia’s majority opinion in Bray, holding that NOW did not have a cause of action, was one of five opinions produced by the fractured Court—all totalling 49 pages in the Supreme Court Reporter.

The content of the NOW opinion itself, along with the swiftness, unanimity, and brevity of the decision, indicate that the Justices’ reliance on their own linguistic intuitions about the “plain meaning” of enterprise may have been a most significant factor. The key to Rehnquist’s opinion appears to be the presupposition that enterprise as used in ordinary language is appropriately applied to PLAN. This presupposition is apparent in statements that begin and end the substantive discussion in the opinion: “We turn to the question of whether the racketeering enterprise or the racketeering predicate acts must be accompanied by an underlying economic motive,” 114 S. Ct. at 803 (emphasis added), and “the question presented for review asked simply whether the Court should create an unwritten requirement limiting RICO to cases where either the enterprise or racketeering activity has an overriding economic motive.” Id. at 806 n.6 (emphasis added). Rehnquist is able to agree with NOW’s characterization of the economic motive requirement as “unwritten” because he takes as self-evident that the meaning of enterprise does not contain such a requirement. His opinion focuses instead on whether the text of RICO contains other evidence of an economic motive requirement. Rehnquist finds only two provisions deserving of attention. The first is the requirement in § 1962(c), the provision that NOW accused the abortion protesters of violating, that the enterprise “affect commerce.” See supra note 124 and accompanying text. Rehnquist rejects this as a possible textual basis for an economic motive requirement by citing a dictionary definition of “affect” for the conclusion that an enterprise could affect commerce without being profit-seeking. 114 S. Ct. at 804 (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 35 (1969)). The second possibility rejected
VIII. CONCLUSION

A. Meaning Cannot Be Found in “The” Dictionary

As we received comments on prior drafts of this essay, we were struck by how often law-trained reviewers asked some version of the following question: “So how is this analysis really any better than just looking in the dictionary?” A superficial answer would be to point to the variance in the definition of enterprise among leading dictionaries discussed above in connection with the NOW case. Moreover, there is no single reference book which is The Dictionary, but rather a number of competing publications which themselves may differ significantly from edition to edition. Law currently has no rule for identifying only one publisher’s edition as The Dictionary, nor is there likely to be a principled basis for such a rule. But the value of linguistics goes well beyond the fact that it could address the problem of inconsistency among dictionaries as to a particular word definition. Linguistics is not properly seen as a means of supplementing the information provided by dictionaries about word meaning. In fact, linguists do not view dictionaries of their own language as significant primary sources and are unlikely to consult them for guidance in doing their research on word meaning.

We would offer the following additional points as reasons why empirical research is likely to be more informative and reliable than simple recourse to a dictionary:

(1) Dictionaries do not represent facts of a language that are independent of the users of that language. Dictionaries do not legislate usage; if a particular actual usage does not conform with a dictionary’s description, it does not follow that the usage is therefore incorrect.

Contrary to our assertion in the sentence preceding this note in the text, the Court’s opinion conveys the general impression that NOW was in fact not a hard case at all. All nine Justices thus appear to fall within the group of speakers, represented by the majority of both student and district judge survey respondents, who consider entities with a clear goal to be enterprises, regardless of economic motive, and believe that others share that understanding.

198. The situation would be different, though still problematic, if a convention existed that all lawmakers—legislators, regulation promulgators, and judges alike—would routinely and exclusively refer only to a specified dictionary edition, so that for example the Court in deciding the NOW case could assume with confidence that the 1970 judiciary committees of both Houses had consulted the second edition of Webster’s New Twentieth Century Dictionary before deciding to use enterprise as a key term in drafting RICO.

199. The authors expect that readers of this essay have shared their experience of looking up a word in a dictionary to find that none of the definitions match the particular use they have in mind. That
(2) The fact that a meaning is listed in a dictionary is just evidence that the dictionary makers (lexicographers) observed the word being used in a way consistent with it having that meaning intended.\(^{200}\) Nothing can validly be inferred from the fact that a particular meaning is not recorded for a particular word. Dictionary-making is an inexact art, and it often happens that usages are common for some time before lexicographers happen to collect enough of them and realize that they represent a distinct usage, and decide to revise an entry to include that usage.\(^{201}\) In contrast, empirical means for enlarging one’s database such as the NEXIS search or surveys used for analyzing *enterprise* are far more reliable means of observing and testing contemporary usage.\(^{202}\)

(3) Even when a dictionary does record a usage that corresponds to what appears to be a legally relevant meaning, it is dangerous to rely on the way that usage is characterized, categorized, and ordered. Dictionary entries are severely limited by time and space constraints; lexicographers must prepare thousands of dictionary entries, each one of which must fit into a very small space and predetermined format. Whether a particular usage is listed first or last in an entry has no bearing on whether it is the “plainest” meaning for the word in the context in question.\(^{203}\) Thus even if a dictionary accurately records and distinguishes among relevant usages, analysis by a linguist would provide much needed guidance for choosing among the different dictionary entries by discovering the use conditions pertinent to each entry.\(^{204}\)

(4) Dictionaries must provide definitions that are appropriate to thousands of contexts; a linguist can conduct a study in a case-specific context, thereby drawing upon whatever aspects of the context that are likely to be pertinent to readers of that language in that context.

Of course, the different kinds of language issues that arise in hard cases often require other kinds of linguistic expertise than that needed for interpretation of individual word meaning; such cases thus lie entirely beyond

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experience does not mean, though, that the particular use is inappropriate. Green found that in 17 randomly selected passages of English narrative prose, an average of 14% of the uses of nouns, verbs, and adjectives were not listed in a selection of desktop dictionaries. For an earlier survey of narrative prose, see GREEN, PRAGMATICS, supra note 6, at 56 n.17.


\(^{201}\) Not only are dictionaries unreliable as evidence of new but accepted usage, but they are also likely to preserve usages that have become archaic without necessarily so indicating.

\(^{202}\) For example, none of the dictionaries we reviewed clearly listed a definition that would cover noneconomic *enterprise* entities (as distinct from noneconomic *enterprise* activities) even though both the NEXIS and survey data show clearly that such usages of *enterprise* are acceptable in contemporary American English.

\(^{203}\) The principles of arranging the glosses (“definitions”) varies from dictionary to dictionary; sometimes it is historical or chronological order. It might be by inferred frequency, or it might be by some logical schema. Generally the front matter of the dictionary will explain how entries are structured.

\(^{204}\) For example, the use of *enterprise* that Webster’s Third International Dictionary defines as “readiness to attempt” can be readily distinguished by a linguist from *enterprise* as “venture, undertaking” by the fact that the former appears in actual use as a mass noun while the latter is used a count noun. See supra text accompanying note 163.
the competence of either dictionaries or dictionary makers. Within the scope of this essay alone, we have seen that hard cases can arise from the ways words interact with each other in a particular context, such as the opaque context problem discussed in the \textit{Staples} case, or from the relation of an utterance to the context of its uttering, such as the nonexistent referent of the original sentence in the \textit{Granderson} case. In such cases that go well beyond individual word meaning, the specific interpretive problems can be carefully matched to individual subfields of linguistics in ways that are simply unavailable to users of dictionaries. Linguists with expertise in those areas could then provide focused and informed analyses of the language issues in question.\footnote{Further, the value of linguistics for the judicial process cannot be judged fully from the three Supreme Court cases analyzed by us and the handful of other cases we discuss from Solan’s book, not only because linguistics encompasses a wider range of areas of language study than that upon which we have drawn here, but also because the range of hard cases centering on language issues is of course vastly underrepresented by the cases discussed in this essay. For a report on how a fuller array of linguistic subfields has been applied at the trial level through expert testimony, see Judith N. Levi, \textit{Language as Evidence: The Linguist as Expert Witness in North American Courts}, \textit{Forensic Linguistics} (forthcoming Spring 1994).}

\section*{B. Navigating Uncertainty}

It will probably be difficult to dislodge the grip the lawyer or judge has upon the dictionary of his or her choice, both because legal discourse requires constant invocation of authority and because a number of procedural problems arise once the fiction is dissolved that meaning can be “judicially noticed” by pulling a dictionary off the shelf. The very flexibility of language that Solan rightly celebrates is possible precisely because the range of meaning of a word or sentence cannot be limited in advance by prescription but rather is realized in the creativity of actual use. Interpretation of actual usage is thus very complex but also achievable. Perhaps the greatest virtue of Justice Scalia’s reformulation of the plain meaning rule is the implicit recognition that “plain meaning” does not necessarily mean “simple” or “determinate” meaning. Indeterminacy does not equate with vacuity of meaning; indeed, as the analyses in this essay show, meaning is frequently indeterminate because a word or phrase can mean so many different things. The challenge in such circumstances is not to attempt to create new meaning in a vacuum but to select among objectively identifiable options in a principled way that produces a coherent discourse.

In a felicitous metaphor, James Boyd White offers this advice to those unsettled by the indeterminacy of legal language: When what seemed to be solid ground becomes water under your feet shifting with every breeze, don’t
sink or drift aimlessly: learn to sail.²⁰⁶ For those willing to sail, linguistics—like a telescope—may reveal a few more stars by which to steer.

²⁰⁶ See JAMES B. WHITE, WHEN WORDS LOSE THEIR MEANING 278 (1984).
APPENDIX A. DICTIONARY DEFINITIONS OF ENTERPRISE

THE AMERICAN HERITAGE ILLUSTRATED ENCYCLOPEDIC DICTIONARY 563 (Houghton Mifflin Co. 1987):

1. An undertaking, especially of some scope, complication, and risk.
2. a. Commercial or economic activity; business; *private enterprise.*
b. A business or company. 3. Industrious effort, especially when directed toward making money. 4. Readiness to venture; boldness; initiative.

FUNK & WAGNALLS NEW “STANDARD” DICTIONARY OF THE ENGLISH LANGUAGE 828 (Funk & Wagnalls Co. 1959):

1. That which one attempts to perform; any projected task or work upon which one sets out; an undertaking; scheme, especially, a bold or difficult undertaking; 2. The act of engaging, or the disposition to engage, in difficult undertakings; boldness, energy, and invention exhibited in practical affairs, especially in business.


1. A design of which the execution is attempted; a piece of work taken in hand, an undertaking; *chiefly,* and now exclusively, a bold, arduous, or momentous undertaking. b. *abstr.* Engagement in such undertakings. 2. Disposition or readiness to engage in undertakings of difficulty, risk, or danger; daring spirit. 3. *Obs.* The action of taking in hand; management, superintendence.


1. an undertaking, esp. a bold or difficult one. 2 (as a personal attribute) readiness to engage in such undertakings. 3 a business firm.

THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 476 (Random House 1966):

1. a project undertaken or to be undertaken, esp. one that is of some importance or that requires boldness or energy. 2. a plan for such a

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207. Etymology and examples of usage omitted.
project. 3. participation or engagement in such projects. 4. boldness or readiness in undertaking; adventurous spirit; energy. 5. a company organized for commercial purposes; business firm. Syn 1. plan, undertaking, venture.


1. an undertaking; a project.
2. a bold, hard, dangerous, or important undertaking.
3. willingness to venture on such undertakings; readiness to take risks or try something untried; energy and initiative.
4. the carrying on of projects; participation in undertakings.
Syn.—adventure, undertaking, venture.

WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 484 (World Publishing Co. 1968):

1. an undertaking; project; hence, 2. a bold, hard, dangerous, or important undertaking. 3. willingness to venture on such undertakings; readiness to take risks or try something untried; energy and initiative.
4. the carrying on of projects; participation in undertakings.

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE—UNABRIDGED 757 (Merriam-Webster Inc. 1986):

1 a: a plan or design for a venture or undertaking. b: VENTURE, UNDERTAKING, PROJECT; esp: an undertaking that is difficult, complicated, or has a strong element of risk. c: a unit of economic organization or activity (as a factory, a farm, a mine); esp: a business organization: FIRM, COMPANY. d: any systematic purposeful activity or type of activity. 2: readiness to attempt or engage in what requires daring or energy: a bold energetic questing spirit: independence of thought: INITIATIVE, ENERGY.

THE WORLD BOOK DICTIONARY 705 (World Book, Inc. 1988):

1. an important, difficult, or dangerous plan to be tried; great or bold undertaking. 2. any undertaking; project: a business enterprise. 3. readiness to start projects; willingness to undertake great or bold projects: 4. The carrying on of enterprises; a taking part in enterprises.
APPENDIX B. CITATIONS OF “NON-ECONOMIC” ENTERPRISES

The following is a small but representative sample of the citations from our NEXIS search which denote non-economic enterprises in several categories. The key word enterprise has been italicized for ease of reference.

Academic/scholarly: “Local history enterprises are at their best when they bring together professional historians and local citizens.”

Artistic/musical/creative: “The United States has made possible all manner of extraordinary artistic enterprises—for example, the distinctly American triumphs in ballet of George Balanchine and Lincoln Kirstein.”

Educational: “It’s become very clear that all of the dimensions of our lives are very intimately linked to the improvement of our educational enterprise.”

Government: “The party advocates making government enterprises and schools private, cutting taxes, ending rent control . . . and phasing out Social Security.”

Journalistic: “Mr. Vecchione said of the [NBC series featuring Dr. Koop]: ‘I don’t consider it a journalistic enterprise. I consider it in the realm of information programming and public affairs.’”

Scientific/research: “This allegation of fraud is both without basis and irrelevant to Dr. Baltimore’s qualifications for leading a world-class scientific enterprise.”
APPENDIX C. SURVEY ITEMS

Survey A asked whether the following six examples were enterprises:

A weekly Bible study group directed by a Lutheran minister conducts discussion of various New Testament verses. The group’s only activity is the Bible discussions.

The Coalition for Fair Adoption Laws (CFAL) is a highly organized national network of non-profit organizations representing adoptive parents and persons seeking to adopt. The executive directors of the member organizations comprise the steering committee of CFAL. CFAL’s activities include lobbying, rallies, and planning demonstrations at courts and adoption agencies.

Fifty Civil War enthusiasts meet once a year to re-enact part of the Battle of Gettysburg. Each person covers his own expenses and contributes $100 towards the costs of the re-enactment; there is a loose steering committee of five who do the pre-event organizing.

The Independent Quebec Organization is a terrorist group that robs banks and extorts money from wealthy, French-speaking Canadians to finance its bombing, arson, and assassination activities.

A small company (10 stockholders, 30 employees) manufactures and sells vending machines.

The Internal Revenue Service.

Survey B asked about the following six examples:

Five people, who had never met before, play poker one night at a casino table in Las Vegas.

The Movement for Fair Adoption Laws (MFAL) is an unstructured network of political activists, who favor freer adoption. With much intercommunication among “members,” MFAL’s activities consist of, among other things, planning demonstrations at courts and adoption agencies.

Eleven middle-aged men play touch football games every weekend against seven other such teams. The team members do not know each other outside the context of the team. The teams contribute $500 each toward a $4000 pot to be won by the champion team at the end of the summer.

The IBM (International Business Machines) Corporation.

Three children selling lemonade on a street-corner.
The United Auto Workers.

Survey C contained four items from Survey A: the weekly bible study group, the Coalition for Fair Adoption Laws, the Independent Quebec Organization, and the Internal Revenue Service. It also contained two items identical to those of Survey B: the three children selling lemonade and the United Auto Workers.
APPENDIX D. EXAMPLES OF THE “WHY/WHY NOT” RESPONSES

The following data illustrate the strength of the relationship between the two ways of identifying an enterprise, the “having a goal” and the “seeking a profit” approaches, and the scores given for a particular question. The information below combines the answers from San Diego State University students and Washington University students to the “Why/Why Not” question in regard to whether the Coalition for Fair Adoption Laws (CFAL) is an enterprise. The first column contains the subject numbers (with an asterisk denoting Washington University subjects), the second column indicates the scores of the subjects’ answers, and the third column contains the subjects’ “Why/Why Not” responses.

<table>
<thead>
<tr>
<th>Subject</th>
<th>Score</th>
<th>Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>A3</td>
<td>7</td>
<td>This group is specifically organized to do something.</td>
</tr>
<tr>
<td>A9</td>
<td>7</td>
<td>Undertaking a specific goal</td>
</tr>
<tr>
<td>*A2</td>
<td>7</td>
<td>Because it is an organization that raises $ and seeks members to carry out its intentions</td>
</tr>
<tr>
<td>*A4</td>
<td>7</td>
<td>It has leadership and a goal</td>
</tr>
<tr>
<td>A1</td>
<td>6</td>
<td>They’re gathering in order to achieve something in society.</td>
</tr>
<tr>
<td>A2</td>
<td>6</td>
<td>Clear goals with measurable outcome re laws, procedures, successes.</td>
</tr>
<tr>
<td>A5</td>
<td>6</td>
<td>[no response]</td>
</tr>
<tr>
<td>A10</td>
<td>6</td>
<td>Tight focus or purpose; goal</td>
</tr>
<tr>
<td>*A5</td>
<td>6</td>
<td>Maybe not bec. is non-profit groups</td>
</tr>
<tr>
<td>*A6</td>
<td>6</td>
<td>Spreading idea enterprise of “selling” idea</td>
</tr>
<tr>
<td>*A9</td>
<td>6</td>
<td>[no response]</td>
</tr>
<tr>
<td>A7</td>
<td>5</td>
<td>They are organized in an effort to do something</td>
</tr>
<tr>
<td>*A1</td>
<td>5</td>
<td>They are all working together</td>
</tr>
<tr>
<td>*A10</td>
<td>5</td>
<td>Have an established goal</td>
</tr>
<tr>
<td>A4</td>
<td>4</td>
<td>In one sense yes because it is a sort of business, but no because I also have an idea that it should make money.</td>
</tr>
<tr>
<td>A11</td>
<td>4</td>
<td>[no answer]</td>
</tr>
<tr>
<td>A13</td>
<td>4</td>
<td>[no answer]</td>
</tr>
<tr>
<td>*A3</td>
<td>4</td>
<td>I have no clue</td>
</tr>
<tr>
<td>A6</td>
<td>2</td>
<td>This group is non-profit</td>
</tr>
<tr>
<td>A12</td>
<td>2</td>
<td>I’m sticking with business</td>
</tr>
<tr>
<td>*A7</td>
<td>2</td>
<td>[no response]</td>
</tr>
<tr>
<td>*A8</td>
<td>2</td>
<td>Non-profit</td>
</tr>
<tr>
<td>A8</td>
<td>1</td>
<td>This would imply commercial undertones</td>
</tr>
</tbody>
</table>

Overall average: 4.7
APPENDIX E. GENERALIZATIONS FROM THE "WHY/WHY NOT" RESPONSES

All 23 respondents to Survey A, and 28 of the 33 respondents to Survey B, responded meaningfully to at least some of the "Why/Why Not" questions. (Irrelevant responses such as "Maybe" were excluded.) The properties of the potential "enterprises" that subjects mentioned in their responses are listed in Table A.

**Table A.**

<table>
<thead>
<tr>
<th>Property</th>
<th>Number of subjects who mentioned the property</th>
<th>Total number of times mentioned</th>
</tr>
</thead>
<tbody>
<tr>
<td>Profit orientation</td>
<td>33 (64.7%)</td>
<td>111</td>
</tr>
<tr>
<td>Goal orientation</td>
<td>28 (53.9%)</td>
<td>72</td>
</tr>
<tr>
<td>Having group unity; cohesion</td>
<td>13 (25.5%)</td>
<td>40</td>
</tr>
<tr>
<td>Being formal, serious, or &quot;official&quot;</td>
<td>11 (21.6%)</td>
<td>6</td>
</tr>
<tr>
<td>Having structure</td>
<td>8 (15.7%)</td>
<td>11</td>
</tr>
<tr>
<td>Having a certain size</td>
<td>8 (15.7%)</td>
<td>5</td>
</tr>
<tr>
<td>Unlawfulness or &quot;Negativity&quot;</td>
<td>7 (13.7%)</td>
<td>6</td>
</tr>
<tr>
<td>Being private vs. governmental</td>
<td>6 (11.8%)</td>
<td>8</td>
</tr>
</tbody>
</table>

In Table A, the percentages add up to more than 100% because some subjects mentioned more than one property. The group of 28 subjects who mentioned goal orientation does not include subjects who mentioned profit orientation without identifying this as a goal, even though profit-seeking is a kind of goal.

The "Why/Why Not" data can also be used to classify subjects with respect to the two leading criteria, profit orientation and goal orientation. Table B gives the numbers of respondents to Surveys A and B who mentioned either, both, or neither of these criteria.

**Table B.**

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Number of subjects mentioning those criteria</th>
</tr>
</thead>
<tbody>
<tr>
<td>Profit, but not Goal</td>
<td>21 (10 Survey A, 11 Survey B)</td>
</tr>
<tr>
<td>Goal, but not Profit</td>
<td>16 (6 Survey A, 10 Survey B)</td>
</tr>
<tr>
<td>Goal and Profit</td>
<td>12 (6 Survey A, 6 Survey B)</td>
</tr>
<tr>
<td>Neither Goal nor Profit</td>
<td>2 (0 Survey A, 2 Survey B)</td>
</tr>
</tbody>
</table>

Table B shows that of the 23 Survey A respondents who provided "Why/Why Not" rationales, 12 mentioned goal orientation in their rationale for at least one of their judgments, and 16 mentioned profit orientation. It also shows that of the 29 Survey B respondents who provided "Why/Why Not" rationales, 16 mentioned goal orientation and 17 mentioned profit orientation. Among all
respondents who provided "Why/Why Not" rationales, 31% mentioned "goal" alone, 41% mentioned "profit" alone, 41% mentioned both "goal" and "profit," and 4% mentioned neither.
Yet Still Partial to It


Gregory E. Maggs†

The Supreme Court has wrapped itself in a great deal of controversy during the latter half of this century by forcing change on people who have not wanted it. Its decisions have altered police practices, eliminated prayer from public institutions, curtailed the death penalty, ordered busing of children to new schools, and struck down longstanding laws on a variety of subjects ranging from flag burning, to loitering, to abortion. This history would suggest to many observers that the Court has no particular fondness for the status quo and, indeed, that the Court is quite willing to use its docket to rework society.

Professor Cass Sunstein does not share this view. In his new book, The Partial Constitution, Sunstein faults the Court not for imposing change on an unreceptive nation, but instead for making the status quo a "baseline" for judging the constitutionality of action or inaction by the government. In Sunstein's view, the Supreme Court tends to uphold laws that leave existing distributions of wealth and opportunity alone, while treating laws that alter them as constitutionally suspect.

Sunstein believes that the Court favors the status quo because it thinks that the status quo is neutral. According to Sunstein, however, this view is wrong. In The Partial Constitution, Sunstein strives to explain that the status quo usually is not neutral because it is rarely determined solely by natural forces.

Sunstein asserts that a myriad of background laws, such as the common law


2. THE PARTIAL CONSTITUTION, supra note 1, at 3.
3. Id.
of property and contracts, have helped to shape the distribution of resources in America over the centuries. As a result, the status quo may lack fairness and legitimacy if the background laws that have shaped it lack legitimacy.

What troubles Sunstein most is the possibility that, by interpreting the Constitution to prefer the status quo over change, the Court's opinions favor those who currently enjoy benefits under the law, and disfavor those who do not. Favoring existing distributions, in other words, may make the Constitution "partial" to some and not to others. Sunstein asserts that the Court should cease preferring the status quo over change when it interprets the Constitution. He maintains that, properly interpreted, the Constitution generally empowers the government to alter legal interests so long as it acts in a manner consistent with what he calls "deliberative democracy." 

Sunstein clearly has thought long about his arguments, and he presents them in a logically organized and impressively detailed manner. Yet, the claim that the Supreme Court has taken an excessively conservative approach to change does not accord with a casual observation of the Court's cases, which appear to be constantly reshaping various facets of American life. The Partial Constitution's thesis suggests, moreover, that the Constitution mandates even greater departures from the status quo than those which the Court already has ordered. Sunstein contends that Congress has a constitutional duty to undertake various redistributive projects, such as funding abortion in certain cases. He also argues that current anti-obscenity laws may violate the First Amendment, except to the extent that they prohibit depiction of violence against women.

Although Sunstein says much that is convincing, the central argument in The Partial Constitution has several problems. Sunstein does not prove that it is possible to generalize about whether the Constitution requires, permits, or forbids using the status quo as a baseline for decisionmaking. He does not show and probably cannot show that the Constitution embraces deliberative democracy or any other abstract principles in a consistent manner. Finally, he does not demonstrate that the Court actually has given the status quo the sanctity that Sunstein alleges.

4. Id. at 6.
5. Id.
6. Id.
8. See THE PARTIAL CONSTITUTION, supra note 1, at 315-17.
9. See id. at 269-70.
These problems, though significant, do not undermine the aim of his book, which is to relax inhibitions against political actions altering the status quo. Ironically, Sunstein’s project is more likely to be undermined by his argument backfiring than by any holes in that argument. In other words, insistence that governmental action accord with Sunstein’s vision of deliberative democracy might inhibit more change than it would foster.

I. SUMMARY

Although any short summary of The Partial Constitution has to leave out a great deal of detail, Sunstein’s argument does not defy a brief outline. The Partial Constitution is split into two parts. The first examines a variety of questions that arise when the government attempts to change the status quo. The second applies the ideas developed in the first part to a host of currently controversial constitutional issues.

A. Status Quo Neutrality and Constitutional Interpretation

In discussing the government’s obligations with respect to the status quo, Sunstein addresses three topics: (1) the “impartiality principle” in constitutional law, (2) the “status quo neutrality” conception of impartiality, and (3) the proper manner of interpreting the Constitution. Although these ideas may sound rather abstract, Sunstein lays them out in straightforward terms.

1. The Impartiality Principle

Sunstein claims that the Constitution generally requires the government to treat citizens impartially, meaning that it may not distribute “resources to one person or group rather than to another on the sole ground that those benefited [by the distribution] have exercised political power in order to obtain government assistance.” In other words, no group—men, women, Christians, or others—should have special benefits merely because its members have managed to elect sympathetic representatives into office.

Where does this “impartiality principle” come from? Sunstein finds support for it in the history and text of the Constitution. He reports that a common idea “echoed” throughout the founding period that the United States should be a “republic of reasons” and a “deliberative democracy,” rather than a nation

10. Sunstein has packed the book with discussions of many interesting issues. Moreover, where other authors might give one or two examples to support their points, Sunstein rarely settles for less than a half dozen, as he takes the reader through lists of constitutional provisions, Supreme Court cases, and hypothetical questions. To appreciate the book fully, one really must read it in its entirety.


12. Id. at 20.
governed by "the self-interest of private groups." The framers, Sunstein asserts, wanted participants in government to persuade their opponents through logical reasoning, rather than merely to outvote them. He notes, for example, that James Madison said that he wanted to create a government that would consist of men "whose wisdom [will] discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations." Sunstein has found similar quotations from Thomas Jefferson, Roger Sherman, and Alexander Hamilton.

The Constitution, according to Sunstein, embodies the impartiality principle, in greater and lesser degrees, in a variety of places. For example, the Privileges and Immunities Clause of Article IV and the so-called dormant Commerce Clause prohibit protectionism or, as Sunstein puts it, "measures that citizens of one state enact in order to benefit themselves at the expense of out-of-staters." Sunstein sees the Equal Protection and Due Process Clauses as general expressions of the same idea, in that they forbid the government from benefiting or discriminating against any group without providing justifications.

The Eminent Domain Clause, he observes, likewise allows the government to take property only for public use, and not for the private use of others. The Contract Clause, Sunstein notes, affords further protection against government partiality by preventing those in power from undoing agreements if they later become disadvantageous to one side.

2. Status Quo Neutrality—A Misconception of Impartiality

Sunstein argues that although the Court has recognized the requirement of impartiality, it often misconceives the meaning of impartiality. According to Sunstein, the Court has taken the position that the government acts neutrally or impartially when it does not interfere with existing distributions of rights and opportunities. Sunstein labels this conception of impartiality, which he considers misguided, "status quo neutrality." Sunstein does not believe that status quo neutrality necessarily satisfies the impartiality requirement. Distributions of resources rarely stem from wholly

13. Id.
15. See THE PARTIAL CONSTITUTION, supra note 1, at 22 (condemning decision to conduct the Constitutional Convention in secret).
16. See id. (opposing proposal giving citizens a right to "instruct" their representative on how to vote because it would impede deliberation).
17. See id. at 24 (arguing that differences of opinion would help, rather than hinder, the functioning of a republic).
18. Id. at 32.
19. See id. at 33-34.
20. See id. at 37.
21. See id. at 35.
22. Id. at 3-6.
natural forces; instead, some background law—such as the common law—usually determines who has what in our society. In Sunstein's words, "[r]espect for existing distributions is neutral only if existing distributions are themselves neutral." He asserts that, when the status quo favors one group over another, and thus lacks impartiality, a court should not use the status quo as a baseline for assessing whether governmental action or inaction has violated the impartiality principle.

Sunstein illustrates this idea with a host of Supreme Court decisions. One of his examples is *Lochner v. New York*, in which the Court struck down a state law limiting the number of hours bakers could work each week. Reading between the lines of the opinion, Sunstein interprets the case to say that the law violated the impartiality principle because it "transfer[red] resources from employers to employees" and thus favored one group over another. He faults this reasoning because it takes "existing distributions as the starting point for analysis." Sunstein feels that the Court should have recognized that there were background rules—in particular, the common law—under which the bakers and their employers operated before the legislature enacted the maximum-hour legislation, and thus realized that the status quo was not necessarily neutral.

A more recent example is *Rust v. Sullivan*, in which Sunstein says the Court "upheld a regulation forbidding clinics [receiving certain federal funds] from giving advice about abortion." Sunstein criticizes the decision for its failure to recognize that conditions on federal funding may violate the First Amendment. He explains:

23. *Id.* at 6.
24. 198 U.S. 45 (1905).
25. *The Partial Constitution*, supra note 1, at 47. See infra pp. 1643-45 for a differing view of the *Lochner* Court's rationale.
27. *See id.*
28. Sunstein discusses *Plessy v. Ferguson*, 163 U.S. 537 (1896), and *Muller v. Oregon*, 208 U.S. 412 (1908), at length. In *Plessy*, the Court upheld racial segregation, rejecting the argument that segregation favored one race over the other by stamping "the colored race with a badge of inferiority." 163 U.S. at 551. The Court said that if the "colored race" experienced feelings of inferiority, "it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." *Id*. Sunstein faults this analysis for failing to recognize that the "colored race" would not have chosen to interpret segregation as implying a "badge of inferiority" in the absence of the segregation laws. *The Partial Constitution*, supra note 1, at 44. Blacks felt inferior precisely because of those background legal rules. *See id.*
29. *Rust* case upheld a maximum-hour law that applied only to women. According to Sunstein, the Court ruled that the state action at issue was neutral because "the difference between the sexes" justified the legislation. *Id.* at 62 (citing 208 U.S. at 419). Again, Sunstein contends, the Court failed to recognize that the status quo was not natural, but was in part the creation of law: "The Court treated the differences between men and women as 'inherent' when in fact some of these differences were a creation of social customs, and indeed of the legal system itself." *The Partial Constitution*, supra note 1, at 62.
30. *The Partial Constitution*, supra note 1, at 86. For the author's differing view of the facts of the *Rust* case, see infra pp. 1645-46.
On the Court’s approach, the recipient [of the funds] is the person in the preregulatory status quo. Even if that person is pressured by a selective funding decision, she has no basis for complaint unless she is worse off than she was before the program was enacted. This is a conspicuous use of the status quo as the basis for assessing whether government has violated its obligation of neutrality.31

Sunstein claims that the Court recently has made similar mistakes in others areas of the law.32

Despite these examples, Sunstein does not believe that the Court always gets it wrong. The New Deal, in his view, changed America’s way of thinking about the status quo, causing many to realize that we live in a constructed world that the government can change. Sunstein cites Shelley v. Kraemer33 as the best example of this view. In that case, the Supreme Court held that state courts could not enforce covenants that restricted the use of real property on the basis of race.34 The Court found it insufficient that the common law long had allowed such covenants. In the Court’s opinion, as Sunstein interprets it, “common law principles no longer seemed merely to facilitate private desires or to be natural, but instead emerged as a conscious social choice.”35 The Court, in other words, rejected status quo neutrality and inquired into the justness of existing distributions. Sunstein describes other cases which he believes embody similar conclusions.36

3. *How To Interpret the Constitution*

After this introduction to the ideas of impartiality and status quo neutrality, Sunstein devotes the next three chapters of his book to the question of how to

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31. *The Partial Constitution*, supra note 1, at 87; see also id. at 229-30, 310.
32. Sunstein characteristically does not limit himself to a few examples, but instead discusses status quo neutrality in the context of state action, affirmative action, de jure/de facto distinctions, sex discrimination, definitions of liberty and property, campaign finance regulation, unconstitutional conditions, review of agency inaction, standing, and takings. See id. at 68-92.
33. 334 U.S. 1 (1948).
34. See id. at 4, 23.
36. Sunstein cites three sex discrimination cases as examples: Califano v. Goldfarb, 430 U.S. 199 (1977), Craig v. Boren, 429 U.S. 190 (1976), and Mississippi University for Women v. Hogan, 458 U.S. 718 (1982). In each of these cases, states had enacted laws that reflected—at least roughly—typical differences between men and women in our society. The statute in Goldfarb assumed that husbands financially supported their wives, but wives did not financially support their husbands. The statute in Craig rested on the idea that young men who drank posed more of threat to themselves and society than young women who did so. The statute in Hogan presumed that women, but not men, wanted to become nurses. The Court invalidated the laws in all of these cases, even though they may to some extent have accorded with actual differences between men and women. Sunstein favors this result because “the differences, even if ‘real,’ are at least to some degree creations of society: products of cultural forces, including the legal system, that have given effect to and perpetuated differences between the sexes, or turned these differences into social disadvantages.” *The Partial Constitution*, supra note 1, at 80 (footnote omitted). The Court, in Sunstein’s view, thus properly concluded that, when the status quo fails the impartiality test, laws perpetuating the status quo also do not satisfy it.
interpret the Constitution. Sunstein directs his argument not just to the courts, but also to the other branches of the government and "the citizenry at large." He first sets out to refute originalism, the theory that the Constitution means what the framers and ratifiers originally understood it to mean. In making his argument against originalism, he concentrates almost exclusively on Judge Robert H. Bork's exposition of the theory in his best selling book, *The Tempting of America.* Sunstein explains that he focuses on Bork's book "not because it is eccentric, but . . . because it states a certain widely held view of constitutional neutrality.

Sunstein agrees with Judge Bork that judges have not followed the original understanding of the Constitution. Yet, he believes that Bork has failed to supply adequate reasons for the conclusion that the Court has a duty to do so. As Sunstein puts it, "the position set out in *The Tempting of America* is not so much defended as proclaimed." He asserts that Bork did not want to defend originalism because any defense of the theory "would have to be rooted in moral and political judgments" and would undermine Bork's claim that judges must avoid such judgments by using originalism to interpret the Constitution. Sunstein explains that "no text has meaning apart from the principles held by those who interpret it, and those principles cannot be found in the text itself." According to Sunstein, many possible interpretive principles exist, including originalism, but "their selection must be justified in moral and political terms; we cannot defend a system of interpretation in law without mounting a substantive defense."

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37. *The Partial Constitution*, supra note 1, at 10. Sunstein explains that courts have limitations that other institutions do not, and he thus considers it a mistake to focus exclusively on courts when discussing the Constitution. See *id.* at 145-53.


40. Sunstein states, "It is surprising but true that many of the principles of constitutional liberty most prized by Americans were created, not by the founders, but by the Supreme Court during this century." *Id.* at 97.

41. *Id.* at 103. As Sunstein portrays it, Judge Bork makes only three half-hearted attempts to defend originalism, each of which is unconvincing. First, Bork asserts that the choice to follow the original understanding "was made long ago by those who designed and enacted the Constitution." *Id.* at 99 (quoting BORK, supra note 38, at 177). Sunstein finds this statement circular and unpersuasive. He responds that Bork is saying merely "that the original understanding is binding because the original understanding was that the original understanding is binding." *The Partial Constitution*, supra note 1, at 100. Second, Bork argues that the Court must follow the original understanding because the people never authorized it to do otherwise. *Id.* at 99-100 (citing BORK, supra note 38, at 201). Sunstein responds that "a tight connection with a specific previous decision of the polity is neither a necessary nor a sufficient condition for legitimacy." *The Partial Constitution*, supra note 1, at 100. According to Sunstein, whether the Supreme Court's decisions deserve respect depends on whether "some amalgam of substantive political reasons" justify obedience to them. *Id.* Third, Bork believes that abandoning the original understanding would require judges to make "moral choices" not subject to a rational defense. *Id.* at 100-01 (citing BORK, supra note 38, at 258-59). Sunstein finds this argument unpersuasive because "Bork's own approach . . . relies on [a] political and moral decision[...]"—the very decision to follow the original understanding. *The Partial Constitution*, supra note 1, at 101.

42. *The Partial Constitution*, supra note 1, at 103.

43. *Id.* at 101.

44. *Id.* at 102.
On similar, although not identical grounds, Sunstein rejects several other constitutional theories, including those of Professors Laurence Tribe, John Hart Ely, and Ronald Dworkin.45 He then turns to the affirmative task of identifying what he thinks should control the meaning of the Constitution. Sunstein says, in particular, that “[w]e should develop interpretive principles” for understanding the Constitution “from the goal of assuring the successful operation of a deliberative democracy.”46 Sunstein does not attempt to “offer a full elaboration and defense”47 of this theory in The Partial Constitution, but he does outline the form that the defense might take:

This goal [of deliberative democracy] can be traced to the earliest days of the American republic. It has been broadened and deepened by important developments since the founding. The governing ideal of deliberative democracy has a close connection with constitutional aspirations as they have been understood at the important periods in our history. An effort to build interpretive principles from this ideal therefore has the advantage of continuity with the Constitution’s structure and history. The ideal also has considerable independent appeal.48

Sunstein breaks down the principles of deliberative democracy into various ingredients, which include commitments to “deliberation, citizenship, agreement as a regulative ideal, and political equality.”49 According to Sunstein, courts should decide whether governmental action violates the Constitution in light of these factors, rather than by reference to the status quo.50

It is somewhat difficult to summarize what the principles of deliberative democracy mandate in practical terms. Sunstein appears to present two competing visions, one more restrictive than the other. At times, he seems to say that the principles require the government to have an articulable public-minded explanation that consistently and comprehensively justifies its acts. Sunstein asserts, for example, that “the principle of impartiality,” properly understood, “requires government to provide reasons [for its acts] that can be

45. See id. at 104-13.
46. Id. at 133.
47. Id. at 134.
48. Id. at 133-34.
49. Id. at 141.
50. Id. at 123, 141. Before arguing for principles of interpretation based on deliberative democracy, Sunstein very briefly discusses substantive reasons for preserving the status quo, including arguments (1) that change in the status quo usually will produce unexpected consequences, making matters worse than before; (2) that frequent reexaminations of existing distributions of property undermine stability and settled expectations; and (3) that we should have respect for the status quo and existing practices because they often reflect centuries of experience and the common thought of millions of people. Id. at 127-31. Sunstein recognizes that all of these arguments have some force, but finds none of them strong enough to form general interpretive principles.
intelligible to different people operating from different premises." In other places, however, he appears to relax this higher standard and suggest that the principles of deliberative democracy merely require the government to engage in "deliberation that has some autonomy from private pressures." In other words, the government only needs to avoid the influence of "naked preferences" of private groups.

B. Application of Sunstein's Theory to Current Issues

In the second part of The Partial Constitution, Sunstein applies his theory to a great variety of contemporary issues. He reaches the following principal conclusions:

- [T]he Constitution neither forbids nor requires affirmative action; . . .
- [G]overnment restrictions on pornography and campaign expenditures do not offend the First Amendment; . . .
- [T]he] government has very substantial discretion to fund, or not fund, artistic projects; . . .
- [T]he equal protection clause (if not the right to privacy) protects women's right to have an abortion, and indeed compels governmental funding of that right in cases of rape and incest; . . .
- [O]ur present educational system violates the Constitution, and . . . the President and Congress are under a constitutional duty to remedy the situation; . . .
- [T]here is no constitutional problem if government creates a right of private access to the media or otherwise imposes obligations of diversity and public affairs programming on broadcasters; and . . .
- [T]he Constitution does not create a judicially enforceable right to welfare or other forms of subsistence.

Sunstein's arguments on these points, made over the course of several hundred pages, also defy concise summary. A few examples, though, illustrate his ideas.

For instance, Sunstein discusses at length whether the government has the power to regulate sexually explicit materials. He explains that court decisions presently do not allow the government to ban materials that depict violence against women unless those materials are obscene. Sunstein notes that courts have rejected the antiviolence form of restriction, which has been the

51. Id. at 24.
52. Id. at 38.
53. Id. at 25, 38.
54. Id. at 8 (format altered).
55. See id. at 261-70.
basis for several recent local ordinances, because it establishes an “approved”
view of “how the sexes may relate to each other” in violation of the neutrality
principle as embodied in the First Amendment.\textsuperscript{56}

Sunstein rejects the law’s distinction between obscenity and violent
pornography because he believes that the distinction impermissibly rests upon
status quo neutrality:

Obscenity law, insofar as it is tied to community standards, is . . .
deemed neutral, but only because the class of prohibited speech is
defined by reference to existing social values. Antipornography
legislation [specifically aimed at the depiction of violence against
women] is deemed impermissibly partisan because the prohibited class
of speech is defined by less widely accepted ideas . . . [such as the
idea] that sexual violence by men against women is a greater problem
than sexual violence by women against men . . . \textsuperscript{57}

Sunstein thinks that the principles of deliberative democracy dictate that courts
stay out of this sort of debate, notwithstanding the First Amendment. In his
view, “[s]o long as any emerging [antipornography] law has the requisite
clarity and narrow scope, the appropriate forum for deliberation is the
democratic process, not the judiciary.”\textsuperscript{58}

The question of whether Congress must fund abortions for indigent women
in cases of rape or incest provides another good example of the application of
Sunstein’s theory. He asserts that, under present law, Congress does not have
a duty to pay for abortion because the Supreme Court views a failure to fund
as inaction by the government, rather than action, and thus considers it
presumptively neutral and constitutional.

Sunstein criticizes the Court’s understanding of the issue as being “based
on the indefensible conception of neutrality that we have encountered
throughout this book.”\textsuperscript{59} He explains that neither “biology” nor “poverty”
justify the result that poor women cannot have abortions when they become
pregnant.\textsuperscript{60} Instead, the decision not to fund abortions “is a legal and a social
one.”\textsuperscript{61} Congress, after all, could fund abortions if it wished. Sunstein
explains more fully that “the failure to fund is not inaction at all. It represents
a conscious social choice, one that conscripts women in the cause of
incubation. It does not simply let ‘nature’ take its course.”\textsuperscript{62}

\textsuperscript{56} Id. at 268 (quoting American Booksellers Ass’n v. Hudnut, 771 F.2d 323, 328 (7th Cir. 1985),
aff’d mem., 475 U.S. 1001 (1986)).

\textsuperscript{57} THE PARTIAL CONSTITUTION, supra note 1, at 269. Sunstein does not discuss the apparent
similarity between his argument here and the reasoning that he condemns in Muller v. Oregon. See supra
note 28.

\textsuperscript{58} THE PARTIAL CONSTITUTION, supra note 1, at 270.

\textsuperscript{59} Id. at 317.

\textsuperscript{60} Id.

\textsuperscript{61} Id.

\textsuperscript{62} Id.
concludes that, at least in certain instances, the Constitution may require Congress to fund abortion.\textsuperscript{63}

After completing his discussion of these and numerous comparable issues, Sunstein concludes \textit{The Partial Constitution} with a thoughtful essay about the roles of the various branches of government in interpreting the Constitution.\textsuperscript{64} He recognizes that courts have institutional limitations that prevent them from forcing the rest of government to act in all instances in which the Constitution might require action.\textsuperscript{65} Sunstein, therefore, makes clear that he is addressing his argument as much to the legislative and executive branches of government as to the courts.\textsuperscript{66}

\section{II. \textsc{Originalism}}

Sunstein deserves praise for devoting a significant portion of his book to originalism. Far from lying "outside the mainstream,"\textsuperscript{67} the theory in fact represents a view shared by a great many lawyers and judges in this country. Even if the Supreme Court does not always decide constitutional cases on the basis of what the framers and ratifiers thought, their views play a consistently prominent role in constitutional litigation.\textsuperscript{68} As a result, no work in constitutional law that seeks to persuade a broad audience can afford to ignore originalism. Although Sunstein disagrees with the theory, his generally respectful analysis of Judge Bork's exposition of the theory accrues to his credit.

Sunstein's argument nevertheless has three principal weaknesses. First, Sunstein fails to explain fully the position that originalists would take on the issue of status quo neutrality and thus leaves unclear why originalism poses a problem for the thesis of his book. Second, Sunstein offers a somewhat incomplete assessment of the justifications for originalism because he focuses nearly exclusively on the argument presented in Robert Bork's \textit{The Tempting of America}. Third, Sunstein does not make clear exactly what sort of defense of originalism would satisfy him.

\begin{footnotesize}
\begin{enumerate}
\setcounter{enumi}{63}
\item See infra note 112.
\item See id. at 319-46.
\item See id. at 320.
\item See id. at 346.
\item Several members of the Senate Judiciary Committee declared that they voted against confirming Judge Bork's nomination to the Supreme Court because his views were "outside the mainstream." See, e.g., Steven V. Roberts, \textit{9-5 Panel Vote Against Bork Sends Nomination to Senate Amid Predictions of Defeat}, \textsc{N.Y. Times}, Oct. 7, 1987, at A1 (quoting Senator DeConcini); John Hanrahan, \textit{Washington News}, UPI, Oct. 6, 1987, \textit{available in LEXIS}, Nexis Library, Archive File (quoting Senator Kennedy); cf. \textit{Reagan Rebukes Bork Foes}, \textsc{Chi. Trib.}, Sept. 26, 1987, at I (quoting President Reagan as saying that Bork's opponents were outside the mainstream).
\item References to the framers of the Constitution, for example, have appeared in dozens of Supreme Court opinions and hundreds of briefs filed in the Court during the past decade.
\end{enumerate}
\end{footnotesize}
A. *The Threat of Originalism*

Why does Sunstein need to refute originalism? He does not spell out a reason explicitly in *The Partial Constitution*, and the answer may differ from what one first expects. Originalism does not threaten Sunstein's thesis by validating the status quo neutrality conception of impartiality. Instead, originalism makes Sunstein's arguments against status quo neutrality irrelevant.

An originalist makes decisions of constitutionality according to the original understanding of the Constitution. Sunstein's argument that the status quo neutrality principle overlooks background law and fails to comport with the "commitment to deliberative democracy," even if correct, cannot influence an originalist's interpretation of the Constitution. These considerations might play a role in devising future constitutions, but they cannot change the original understanding of the Constitution we already have.

Discovering exactly what the framers and ratifiers thought about the relevance of the status quo to particular subjects would require exhaustive research. There was certainly a mixture of views. The framers probably would not have objected to respecting the status quo in certain contexts. For example, as Sunstein himself recognizes, certain constitutional provisions, such as the Takings and Contracts Clauses, appear to rest on the premise that the government should not disrupt existing distributions of resources, even if those distributions depend on background rules of property and contract law.69

The framers and ratifiers, however, may not have understood other provisions of the Constitution to require status quo neutrality. The Equal Protection Clause is a good example. All legislation creates categories and affects some people differently from others.70 Moreover, all new legislation changes the status quo. An act that increases property tax rates, for example, will not leave everyone as well off as they were before and may fall harder on homeowners than renters, or vice versa. Although the new law might radically alter the status quo, it surely would not violate the Equal Protection Clause, as originally understood, for that reason alone. An originalist must accept status quo neutrality as a valid constitutional argument to the extent that the framers and ratifiers of the Constitution and its amendments understood it to be a valid argument, but no further.

B. *Incompleteness*

Sunstein, as noted, attempts to counter the threat of originalism by taking on *The Tempting of America*. Sunstein makes many valid observations about

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69. *See* THE PARTIAL CONSTITUTION, *supra* note 1, at 153 ("[T]he takings and contracts clauses cannot easily be read to create a constitutional baseline other than that of the status quo.").

the book. Bork does not address at any length the need for interpretive principles and he eschews discussion of the kinds of moral and political issues that Sunstein finds relevant. Bork thus has little to say about the kinds of questions that Sunstein considers crucial to determining what the Constitution means. Sunstein's criticism of The Tempting of America, nevertheless, has two significant shortcomings.

First, Sunstein largely repeats charges already leveled against Bork's book, but he does not respond to arguments made in Bork's defense. Immediately after Judge Bork wrote The Tempting of America, a number of reviewers criticized it on precisely the grounds that Sunstein sets forth in The Partial Constitution. Judge Richard Posner and Professors Ronald Dworkin and Bruce Ackerman, for example, each faulted Bork for failing to recognize that a reader may interpret any text in a variety of ways and for failing to justify the originalist method.71

Since the publications of these and other reviews, however, several authors have written powerful responses in support of The Tempting of America. Professor Lino Graglia, for example, questioned whether it makes sense to require justificatory reasons for originalism of the kind that Sunstein demands.72 Raoul Berger, moreover, has supplied a variety of historical arguments in favor of Bork's position.73 If Sunstein has replies to these responses, he should have included them in his book rather than simply reiterating criticism that by now has become familiar.

Second, even if Sunstein could show that Bork had not supplied a complete defense of originalism in The Tempting of America, that would not prove that the theory has no defense. Although Sunstein briefly responds to an essay by Judge Frank Easterbrook,74 he does not touch upon the arguments of many others who have written in defense of originalism.75 Practical considerations surely limited how much Sunstein could say about the topic, but this omission is troubling nonetheless.

71. See, e.g., Bruce Ackerman, Robert Bork's Grand Inquisition, 99 YALE L.J. 1419, 1421 (1990); Ronald Dworkin, Bork's Jurisprudence, 57 U. CHI. L. REV. 657, 668 (1990); Richard A. Posner, Bork and Beethoven, 42 STAN. L. REV. 1365, 1368 (1990). Even Sunstein has made the same arguments in a previous review. See Sunstein, What Judge Bork Should Have Said, supra note 7, at 205 ("Because [The Tempting of America] relies on [originalist] principles without defending or even recognizing them, it provides no basis for its own approach.").

74. See THE PARTIAL CONSTITUTION, supra note 1, at 99-100 (citing Frank Easterbrook, Abstraction and Authority, 59 U. CHI. L. REV. 349 (1992)).
C. Interpretation or Legitimacy

Perhaps Sunstein did not say more about the arguments for originalism because he felt that originalists bore the burden of proof on the issue and had not yet made a convincing case. That possibility, though, raises the question of what Sunstein thinks that originalists must show. A careful reading of The Partial Constitution suggests that he has an unusual standard.

Sunstein apparently would ask that originalists not only justify their method of interpreting the Constitution, but also that they prove that the Constitution, enacted into law in 1789, has continuing legitimacy. Sunstein, indeed, criticizes Bork and Easterbrook for failing to recognize that the Constitution and judicial decisions made in its name cannot be “justified simply because [they] follow from a judgment made by the people—especially when the relevant people died long ago, and indeed excluded large segments of the polity (including all blacks and all women).” 76 Sunstein explains that “[a] prior agreement of that sort does not provide a moral justification for obedience. Ultimately obedience is justified, if it is, for some amalgam of substantive political reasons . . . . By itself, however, the fact that there was agreement on the document many generations ago is insufficient for legitimacy.” 77 In this passage, Sunstein seems to be calling for Bork and other originalists to demonstrate that the Constitution—as opposed to something else—empowers and restrains the government.

If Sunstein truly holds this position, he is going too far. In writing about how judges should interpret the Constitution, Judge Bork and others certainly do not have to explain what makes the Constitution law. That may be an interesting and important question, but it is not a question of interpretive principles or a question that judges who already have sworn to uphold the Constitution must decide.

III. Deliberative Democracy and a Republic of Reasons

Sunstein decided not to supply a complete defense of his theory that the nation's commitment to deliberative democracy—government in which reason rather than naked power prevails—should provide principles for interpreting the Constitution. 78 He certainly deserves no criticism for this decision. The Partial Constitution undertakes enough ambitious tasks for a single volume.

76. The Partial Constitution, supra note 1, at 100.
77. Id. Sunstein ultimately suggests that a variety of factors may justify obedience to the Constitution, including its largely democratic pedigree and the possibly chaotic consequences of abandoning it. Id. Given Sunstein's open-ended conception of constitutional interpretation, however, what he means by obedience certainly differs from what an originalist would mean.
78. Id. at 134 (“I will not be attempting to offer a full elaboration and defense of deliberative democracy or to measure it against the many alternative sources of interpretive principles. To undertake such tasks, it would be necessary to set out a complete theory of what government should do.”).
Yet if Sunstein chooses to present a more complete defense in a later work, he will have his hands full, and not just with the arguments of the originalists. Antisthenes the Cynic, a defender of the philosophy of nominalism, once had an argument with Plato about whether it was possible to discern the nature of a horse. He complained to Plato, who he thought was looking at the matter too abstractly, that "A horse I can see, but horseness I cannot see." Sunstein will encounter the same kind of objection in trying to prove that our republic has the abstract feature of "deliberative democracy."

Our Constitution, despite its virtues, lacks consistency. Some provisions of the document no doubt serve to promote deliberation and curtail majority power. The Speech or Debate Clause is one excellent example. The provisions that break up factions by staggering terms of office and dividing representatives geographically provide other illustrations.

The Constitution, however, includes many other provisions that do not require decisions based on the rational debate one might expect in a "republic of reasons." For example, the President has the power to veto bills for good reason, bad reason, or no reason at all. Congress, in turn, has the power to override the President's veto not when it can devise better arguments than the President, but whenever it can muster a two-thirds majority to override the veto.

Indeed, the Constitution contains striking examples of decisions not made by reasoning. The three-fifths compromise is one. Logic certainly did not dictate that slaves should count as only sixty percent of a person for census purposes. The rule makes no sense by itself; it came about only as a compromise between factions lacking the power to obtain exactly what they each wanted. The provision preventing Congress from regulating the

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79. 8 SIMPLICIUS, COMMENTARIA IN ARISTOTELEM 208 (Charles L. Kalbfleisch ed., 1907).
80. See supra notes 46-53 and accompanying text.
81. U.S. Const. art. I, § 6, cl. 1 ("[F]or any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place.").
82. See id. art. I, § 3, cl. 2 (staggered terms for Senators); id. art. I, § 2, cl. 3 (geographical distribution of House seats).
83. See id. art. I, § 7, cl. 3.
84. See id. To some extent, these powers promote deliberative democracy structurally by creating some checks on power.
85. See id. art 1, § 2, cl. 3.
86. Representatives from the Southern states wanted to count slaves as whole persons so that their states would have more Representatives in Congress. They argued, without a trace of irony, that slaves were equivalent to workers in the North. Representatives from the Northern states did not want to count slaves at all, arguing that they were property and that other property, such as cattle, did not count for census purposes. Neither argument carried the day. Instead, the competing factions compromised on counting slaves as three-fifths of a person. Madison and at least one other participant in the Constitutional Convention describe these debates and the compromise in their notes. See H.R. Doc. No. 398, 69th Cong., 1st Sess. 354-55, 764 (1927) (reprinting Madison's journal from July 11, 1787, and notes taken by Hon. Robert Yates on June 11, 1787). For a rather weak rationalization of the three-fifths compromise, see THE FEDERALIST No. 54 (Alexander Hamilton or James Madison).
importation of slaves until 1808 (rather than, say, 1798 or 1818) provides another example of an unreasoned compromise. As these counterexamples demonstrate, any attempt to say that the Constitution creates a "republic of reasons" based on "principles of deliberative democracy" is an overgeneralization. They also suggest that searching for abstract principles to govern all constitutional issues involves great risks. Sunstein might see "deliberative democracy" in various places in the Constitution. Others, however, may look at the three-fifths compromise and 1808 slave trade provision and see arbitrariness and tolerance of evil. Surely the latter ideas, although clearly embodied in the Constitution, should not influence all constitutional debate.

This criticism should not come as a surprise to Sunstein, because he clearly understands the problem of overgeneralization. For example, even though he insists that the Constitution generally does not require status quo neutrality, he admits that some provisions—like the Takings Clause—do embody that principle. In other words, in some instances, Sunstein is willing to accept the fact that the Constitution is a rather mixed bag. It is thus odd that Sunstein did not recognize that deliberative democracy probably does not supply the only principles for interpreting the Constitution.

What is an alternative? Originalism supplies one answer. The idea is not to look for "horseness" in the Constitution—that is, abstract general principles about the nature of our republic. They may or may not exist. Originalists would say, simply, that the Constitution promotes deliberative democracy through the provisions that were originally understood to do so, but not elsewhere.

IV. STATUS QUO NEUTRALITY IN THE COURTS

Regardless of whether the Constitution embodies a general and consistent commitment to deliberative democracy, Sunstein makes a valid and important point in his discussion of the "status quo neutrality" conception of impartiality. When considering the constitutionality of a statute that changes existing distributions, courts should not forget that natural forces alone did not create the status quo. Instead, courts should recognize the contribution of background law, especially the common law, and judge the new law not by itself, but in the context of the existing law.

If Sunstein were limiting his book to this point, he would be on solid ground. He goes further though, contending that the Supreme Court regularly has used status quo neutrality reasoning to reach its decisions. This view should strike most casual observers of the Court as odd, given all of the

87. See U.S. CONST. art. 1, § 9, cl. 1.
88. See THE PARTIAL CONSTITUTION, supra note 1, at 153-55.
sweeping changes the Court has wrought in society. A significant weakness of *The Partial Constitution* is that some of the most prominent cases that Sunstein cites as examples do not support his conclusion. Sunstein may be condemning a practice that does not occur as often as he suggests.

A. Bakers

Sunstein makes *Lochner v. New York* a centerpiece of his argument. He asserts that the Court in *Lochner* struck down a state law limiting the number of hours that bakers could work because it thought that the statute served a redistributive purpose, and thus violated status quo neutrality. This analysis seems rather strained. As Sunstein himself admits, the Court never said that the statute served a redistributive purpose and never said anything about the status quo neutrality conception of impartiality. Sunstein merely reads that rationale into the Court's decision. It is more helpful to look at what the case actually said.

Justice Peckham wrote the opinion of the Court in *Lochner*. He sought to demonstrate the unconstitutionality of the statute in three steps. First, Peckham asserted that as a general rule, a state cannot regulate contracts. To support this proposition, he noted the Court's previous holding in *Allgeyer v. Louisiana* that "[t]he general right to make a contract in relation to [one's] business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution." Second, Peckham asserted that as an exception to the general rule, a state could restrict the right to make a contract in the exercise of its police powers. Various precedents established that these powers included protecting the health and safety of workers and wards of the state. Third, Peckham asserted that the statute at issue did not fit into this police power exception. He reasoned that restricting the working hours of bakers did not really protect their health or safety. Peckham thus concluded that the *Allgeyer* decision controlled the case and that the statute was unconstitutional.

Of these three steps, the first—in which Peckham asserted that the Fourteenth Amendment generally prohibits states from regulating contracts—was the most important. Peckham's citation of *Allgeyer* for that proposition was undoubtedly correct, for he happened to have written the opinion of the Court in *Allgeyer* as well as in *Lochner*. The key issue then is where the Court in *Allgeyer* found the rule that the freedom to make a contract

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89. 198 U.S. 45 (1905).
90. See *THE PARTIAL CONSTITUTION*, supra note 1, at 47.
91. 165 U.S. 578 (1897).
92. 198 U.S. at 53.
93. See id. at 53-55.
94. See id. at 55-64.
is a “liberty” protected from regulation by the Fourteenth Amendment. Here is what Justice Peckham said in *Allgeyer*:

The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.95

Where did this definition of “liberty” come from? Unfortunately, Justice Peckham did not say. Following this long declaration, he provided no citation. Apparently, Peckham just made it up.

Justice Holmes, in his famous dissent in *Lochner*, rejected the understanding of liberty expressed in *Allgeyer*. He maintained that citizens traditionally have not had a freedom to make unregulated contracts. Holmes cited longstanding restrictions, such as “Sunday laws and usury laws,” as examples.96 Emphasizing the need to look at existing practices, Holmes wrote:

I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.97

Holmes—if anyone—was arguing for a decision based on the status quo. He thought that the New York statute was constitutional simply because it was a “traditional” kind of law.

*Lochner* strongly cuts against Sunstein’s thesis in two ways. First, it shows that the Court does not always base its decisions on status quo neutrality. Justice Peckham and the other members of the majority did not rely on the status quo as a reason to invalidate the statute; to them the status quo was irrelevant. Moreover, they rejected the position that Holmes took in dissent, even though he did rely on the status quo.

95. 165 U.S. at 589.
96. 198 U.S. at 75.
97. *Id.* at 76. After reciting this quotation in his book, Judge Bork commented: “So Holmes . . . merely disagreed with Peckham and the majority about which principles were fundamental. Nor did he explain why a free people could not decide to change or abandon principles supported by tradition but not by the Constitution.” BORK, supra note 38, at 45-46.
Second, and perhaps more seriously, the case shows how easy it is to read the status quo rationale into a case that does not explicitly contain that rationale. The legal status quo often has several dimensions. For example, while the statute in *Lochner* altered the status quo by placing new restrictions on bakeries, it respected the status quo in the sense that it was not a novel type of regulation. As a result, no matter how *Lochner* had been decided, Sunstein could have characterized it as a decision biased in favor of the status quo.

Despite these problems, Sunstein stands on solid ground when he says that the Court erred in *Lochner*. The case should have come out the way Holmes said that it should, but for a different reason. The Court decided *Allgeyer* and *Lochner* incorrectly because it invented the freedom of contract out of thin air, not because it cared too much or too little about the status quo.

B. Pregnancy Counselors

Another of Sunstein’s prominent examples, *Rust v. Sullivan*, also does not support his thesis that the Court regularly decides cases on grounds of status quo neutrality. That case involved what Sunstein and the popular media commonly, though inappropriately, refer to as the “gag rule.” As noted above, Sunstein says that the Court “upheld a regulation forbidding clinics [that received federal funds] from giving advice about abortion” on grounds that the restriction did not leave anyone “worse off than she was before the program was enacted.” Sunstein inaccurately characterizes the facts and holding of the case: *Rust v. Sullivan* did not in fact involve a regulation categorically forbidding clinics from giving abortion advice; and the Court made clear that such a restriction would not be upheld merely because it left the persons whom it affected no worse off.

The actual facts of the case are revealing. In 1970, Congress enacted Title X, a law providing federal funding for family planning services. The statute stated that “[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning.” In 1988, the Secretary of Health and Human Services promulgated a regulation under the statute providing that “[a] title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning.” Several Title X grantees—recipients of the federal money—challenged the regulation on the ground that it “condition[ed] the receipt of a benefit, Title X funding, on the

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100. Id. at 86.
101. Id.
relinquishment of a constitutional right, the right to engage in abortion advocacy and counseling.”

In an opinion written by Chief Justice Rehnquist, the Court rejected this argument, not because the government had the power to condition the receipt of Title X benefits on the relinquishment of free speech rights, but because the government had not done so. The Court’s opinion says so in unmistakably clear terms:

The Secretary’s regulations do not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities. Title X expressly distinguishes between a Title X grantee and a Title X project. . . . The regulations govern the scope of the Title X project’s activities, and leave the grantee unfettered in its other activities. The Title X grantee can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds.

In other words, contrary to what Sunstein suggests, the grantees could advocate abortion even if they accepted the federal money.

Immediately following this passage, the Court reaffirmed the validity of what it called its “unconstitutional conditions” cases. The Court explained that it previously had found First Amendment violations in “situations in which the government had placed a condition on the recipient of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program.”

Rust v. Sullivan, however, simply did not present that issue. In sum, Rust v. Sullivan does not show that the Court relies on the status quo conception of neutrality. The Court did not use the status quo as an argument for its holding and, in dicta, suggested that it would not accept status quo reasoning if the facts were what Sunstein asserts.

104. 111 S. Ct. at 1763.
105. Id. at 1774.
106. Sunstein appears to have understood the actual facts of Rust because he quotes the Chief Justice as saying that Rust is not a case “in which the government has placed a condition on the recipient of the subsidy rather than on a particular program or service, thus prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program.” The Partial Constitution, supra note 1, at 86-87.

Yet, despite his inclusion of this quotation, Sunstein misdescribes the statute in each of the three portions of his book discussing the case. See id. at 86 (“a regulation forbidding clinics from giving advice about abortion”); id. at 229 (“regulations banning federally funded family planning services from engaging in counseling concerning, referrals for, and activities advocating abortion”); id. at 310 (“the so-called abortion gag rule, forbidding clinics receiving federal funds to provide abortion-related counseling”).
107. 111 S. Ct. at 1774.
C. Other Cases

Even if *Lochner* and *Rust* do not provide good examples for Sunstein, that does not mean that the Court never decides cases on the basis of status quo neutrality. The Court may do so; it decides more than a hundred cases a year and certainly does not give the best of reasons for all of them. Some of the many other cases that Sunstein cites in *The Partial Constitution* in fact may provide examples that can withstand close scrutiny. *Lochner* and *Rust*, however, suggest that he has overstated the extent to which the Supreme Court relies on the status quo neutrality conception of impartiality.

V. STATUS QUO NEUTRALITY OUTSIDE THE COURTS

The question now arises whether the problems suggested above really matter to Sunstein's argument. Would the Supreme Court's refusal to endorse the principles of deliberative democracy undermine what Sunstein seeks to accomplish? Does the actual number of times that the Supreme Court has relied on the status quo neutrality argument make a difference? Probably not. The foregoing criticisms, even if valid, should not trouble Sunstein very much.

Sunstein surely is not writing disinterestedly about the ability of the government to change the status quo. He wants actual change, perhaps even very extensive change, in existing legal arrangements. For this reason, he stresses throughout *The Partial Constitution* that he is addressing the book more to politicians than to members of the judiciary.108 As Professor Sanford Levinson, an early and enthusiastic reviewer of the book, has put it: "*The Partial Constitution* is now, among other things, a memorandum to the White House about the way that 'new liberals' (in whose camp Sunstein would count himself) should respond to the unexpected opportunity [presented by President Clinton's election] to reshape American constitutional doctrine."109

To achieve sweeping legal change, Sunstein needs to persuade participants in the executive and legislative branches of government that the Constitution does not prohibit redistribution as a general matter. He thus emphasizes that, at a minimum, the government usually may enact new laws that alter existing allocations. If members of Congress or the Administration go so far as to accept Sunstein's further thesis that they have a constitutional duty to pursue

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108. See, e.g., *THE PARTIAL CONSTITUTION*, supra note 1, at 10 ("[M]any of the constitutional proposals set out here are intended not for the judges at all, but for others thinking about constitutional liberties in the modern state."). Sunstein does not say much explicitly about the practical political impact that he wants or expects his views to have. In several places in the book, however, he speaks very favorably of the general reorientation of government that took place during the New Deal. *See id.* at 6-7, 57-61. Perhaps he would favor a similarly broad reorientation of our present legal framework.

109. Levinson, supra note 1, at 40.
the principles of deliberative democracy to their logical conclusions, all the better.

The criticisms of Sunstein’s book presented earlier in this Review do not stand in the way of these objectives. Arguing that the Supreme Court has acted too conservatively in the past, even if not wholly accurate, still serves a purpose. It strengthens the argument for more change now. In any event, a little deliberation here and there would not hurt the country, even if the Constitution does not require as much of it as Sunstein suggests.

Whether Sunstein’s theories of deliberative democracy truly would facilitate the reworking of society that Sunstein wants, however, remains unclear. Sunstein does not think that the Constitution prohibits the government from altering the status quo, but he does set a high standard for new legislation. He insists, as noted, that “the principle of impartiality requires government to provide reasons [for its acts] that can be intelligible to different people operating from different premises.”

To the extent that he is serious about that standard, Sunstein may be making it more difficult for government to act, for a simple reason: Factions often have to compromise, and compromises tend to produce somewhat arbitrary results. Consider, for example, the issue of abortion counseling. When Congress was considering the legislation involved in Rust v. Sullivan, it probably had to make a choice. Some members of Congress surely wanted to fund clinics that would provide information about all lawful forms of birth control, including abortion. Others surely did not want to fund clinics at all. Each side could present reasons to the other that presumably would satisfy the test of impartiality. Neither side, after all, was singling out abortion counseling for special treatment. Ultimately, however, Congress took a middle course—funding family planning, but denying money to abortion advocacy. Sunstein says that the compromise violates the impartiality principle. That conclusion, however, may prevent the government from doing anything. As the current administration has discovered as it tackles controversial topics like gays in the military, the budget, and health care reform, not much happens without compromise.

Perhaps the founders of this nation wanted the “republic of reasons” that Sunstein describes. Perhaps the framers even wanted to hold the government to Sunstein’s impartiality test—even if that test often would prevent government action when disputing sides could compromise but not convince

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110. THE PARTIAL CONSTITUTION, supra note 1, at 24.
111. See supra text accompanying notes 51-53.
112. Sunstein objects primarily to “selective funding” decisions, not policies of paying for everything or nothing. THE PARTIAL CONSTITUTION, supra note 1, at 317. By way of comparison, as noted, Sunstein argues that the government “must fund abortion in cases of rape or incest, at least if it is funding childbirth in such cases.” Id. at 13.
each other. But is this what Sunstein wants from his envisioned "republic of reasons?" Ironically, by replacing "status quo neutrality" with his conception of impartiality, Sunstein might make it harder rather than easier to change existing law.

113. Many of the Founders had quite conservative views when it came to the status quo. Even the Declaration of Independence—the most revolutionary of all official documents—prudently and incongruously cautions: "[A]ll experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed." The Declaration of Independence para. 2 (U.S. 1776).

114. Sunstein seems to recognize this possibility early in the book. See The Partial Constitution, supra note 1, at 25 ("If interest-group pluralism does describe contemporary politics, a requirement of impartiality, understood as a call for public-regarding justifications for government outcomes, is inconsistent with the very nature of government. It imposes on politics a requirement that simply cannot be met."). Oddly, however, he says little more about it.