LANGUAGE'S EMPIRE

A Counter-Telling of Administrative Law in Canada

by

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Abstract

This thesis renders the unstated assumptions that animate statutory interpretation in the administrative state. It argues that the current approach is a disingenuous rhetorical overlay that masks the politics of definitional meaning. After rejecting the possibility of structuring principles in our (post)modern oversaturation of signs, the thesis concludes with an aspirational account of interpretive pragmatism in the face of uncertainty.

I. Introduction

In a system of written laws, interpretation necessarily precedes governance. Legal texts do not exist outside the act of reading them. Language and the subject are inseparable. While these propositions are largely uncontroversial—merely denoting a preliminary step of reading the text prior to further action—they create a significant, unresolved problem for legal interpretation: How does the isolated act of construing a text give way to a democratic community ruled by predefined laws? The answers provided in our jurisprudence exist in tension with the theory they ignore. As contemporary understandings of language continue to demonstrate the inherently personal—and, indeed, arguably incommunicable—nature of textual interpretation, the law has recommitted itself to images of objectivity and universality. This is both unfortunate and understandable. State power must justify itself and, on most accounts, should aspire to something more than the ascension of the sociolegal elite at the expense of all others. These aspirations, however compelling, quickly run up against the limits of texts, broadly construed. If we begin with the uncontestable notion that language is constructed and words defy any inherent content, it becomes difficult to dispute the impossibility of a verifiable truth embodied in laws. There is at least some play in the structure of legal interpretation—an idea fundamentally at odds with the discoverability of textual meaning.

However abstracted the foregoing paragraph may appear, this core tension of legal interpretation is rehearsed everyday. In its most familiar form, a dispute about statutory language reaches a legal decision-maker for resolution. If the language that constitutes the relevant provision has no embedded meaning, then how are the competing

interpretations collapsed into an authoritative definition? This implicates the relationship between the decision-maker and the textual stimulus, begging the question of how much constraint is imposed by the provision at issue. Words have no inherent meaning, but there appears to be an intuitive range prompted by familiar signs. A "book" probably denotes a bound collection of pages, and might also suggest an electronic device, but surprise and criticism would result if, say, a motor vehicle was included in the legal definition. There is no necessary content in language, but conventional usage facilitates routine interactions and even the appearance of communicative congress. Perhaps, then, when a meaningless, constructed term is defined by an unaccountable judge, she is simply standing as a proxy for the common understanding of it. The law in this area is, after all, deeply committed to the "ordinary and grammatical sense" of a provision.[1]

This comforting image begins to break down when one considers the source material with which we work. When meaning is in dispute, a legal decision-maker defines a provision in a textual decision. She uses words to define language. There is infinite regress; we are without a reference point, as every subsequent definition begs another. While the problems of communication in a world of contingent sign associations are multifaceted and situational, the practice of legal interpretation provides a uniquely clear means of tracing the interrelations between language and authority. Here, state actors impose meaning on that which cannot be verified. Definitional sense arises, as I will argue, from individualized experiences and psycholinguistic biases; it is therefore important to engage with the question of who gives meaning to the arbitrary signs that constitute our language. In other words, when a written law must be defined—and then

[1] The current approach to statutory interpretation in Canada is set-out in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para 21. As will be discussed, it has been followed with remarkable and uncritical consistency ever since.

backed, in that form, by the threat of legal violence—an association is forged without reference to an external reality. These associations animate the organization of governmental force. Interpretation is inherently political and necessarily unconstrained by the words at issue.

The processes of expression and interpretation are highly complex in our current iteration of governance. As alternative sites of adjudication continue to arise and flourish, the state monopoly on definitional sense grows ever more diffusive. In place of any engagement with the politics of meaning, the official approach to interpretation is based on amorphous principles that mask the play(s) of power in the administrative state. When legal decision-makers impose their worldview on linguistic disagreements, they invariably perpetuate the current logic of hierarchical authority. If words are given meaning within the interpreting subject, and are always already refracted through one's largely unconscious biases, then legal definitions reflect the dominant perspective of the sociocultural elite. This is a problem that is exacerbated by the doctrinal approach to linguistic ordering, which presents a barrage of structuring concepts as an over-determined thesis of legitimation. These principles naturalize the current distribution of power by presenting political decisions as the 'ordinary grammar' of law. Otherness is rendered nonsensical under the "modern principle" of interpretation.

My first chapter unpacks this rhetorical landscape, emphasizing both the impossibility of its terms and the insidious consequences of its distortive effect. I reject the idea that language can be predictably ordered through conservative ideals that are, themselves, more language in need of interpretation. The prevailing approach presumes to answer the challenges of signification with a foundation built entirely upon the same

unverifiable language, ignoring the uncomfortable conclusion that it is language all the way down. In my second chapter, this problem is explored in the context of administrative law and its dominant discourse. There is no greater challenge to those wishing to confront the current empire of language than the administrative state. Organizing principles like expertise and deferential respect provide further layers of ideological naturalization, suggesting that there is something *out there*, accessible to the legal elites, that resolves linguistic conflict through impartial universality. Amidst the constant misdirection of a regime that both enjoys and obscures the play of its structure, I ask a simple question: Who gets to speak when meaning is in dispute? Since every interpretation is simply the ascension of a single, dominant perspective over all others, the answer depends exclusively on whoever enjoys the last (authoritative) definitional word.

The implications of this conclusion are considered at length in my third chapter, which explicates the Supreme Court of Canada's approach to construing language in administrative law in the aftermath of its most recent doctrinal shift. In the decade since the famous *Dunsmuir v. New Brunswick* decision, our highest court has reviewed questions of language as though transcendent meaning is available through the distillation of privileged legal reasoning.[2] This evocation of neutrality allows the judiciary to forge their preferred textual associations while denying any active interpretive agency. They appear to be constrained and so divest themselves of responsibility through a series of ideological tropes. Finally, my fourth chapter is an aspirational account of statutory interpretation that remains mindful of its limits. When meaning is in dispute, resolution depends on the ascension of a single perspective—and, in the absence of a metalanguage,

[2] 2008 SCC 9 [*Dunsmuir*].

it always will. The possibility of progress, then, depends on transparent engagement with the epistemological limits of interpretation. By presenting the constellation of signs that surround each definitional choice, we create sites of disagreement that require the explicit consideration of divergent perspectives.

II. A Principled Landscape and Its Discontents

The administrative state is a highly contingent outcome of institutional practices and traditions. While it is hardly novel to assert that state power is historically constructed, there is a growing sense, both in the literature and relevant jurisprudence, that a "deep structure"[3]—founded on principles of constitutionalism and democracy—moves this form of governance into the realm of impersonal objectivity.[4] This transcendence assuages our collective discomfort with bureaucratic discretion; the considerable authority vested in individual decision-makers comes predetermined by ideas like 'non-arbitrariness' and 'consistency.'[5] Our long entrenched constitutional values foreground the personalized nature of discretion while protecting us from its tyrannical corollary: the simple paradox that it always imports a range of legitimate decisions. On this orthodox (and deeply romantic) reading, administrative law is an arbitrary organization of institutional power only in a narrow, logistical sense. Its underlying principles animate and inform our constitutional democracy and provide an enclosed justificatory space. Where aberrations arise, judicial review safeguards "the rule of law as a fundamental postulate of our constitutional structure."[6]

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[3] David Dyzenhaus, "The Deep Structure of *Roncarelli v. Duplessis*" (2008) 53 UNBLJ 111. While he refers specifically to this foundational judgment, his discussion on the separation of powers and the 'rule of law' resonate more broadly within the relevant jurisprudential field.

[4] The clearest (or at least most sustained) valorization of objectivity in the corpus of administrative law is *Doré v Barreau du Québec*, 2012 SCC 12, where (*inter alia*) an alleged lack of objectivity by a legal professional horrified the Court. While this obviously demonstrates a belief in the concept of objectivity—indeed, the Court locates such a quality as a worthy "public mandate" for professional self-governance (para 8)—I am referring to something more specific. For instance, in *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47, the Court conceptualized a portion of relevant statutory language through a guiding principle of "fairness," which was immediately followed by a claim to objectivity (para 115). Essentially, courts divest or eschew their interpretive subjecthood in favour of universal structuring principles—or so the story goes.

[5] See, e.g., *Domtar Inc v Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 SCR 756.

[6] *Roncarelli v Duplessis*, [1959] SCR 121 at 142.

These apparent structuring concepts will be discussed at length below, but it is important at the outset to contextualize the interrelation between governing principles and administrative authority. Although the phrasing is highly variable, the dominant view of bureaucratic governance posits coherence through the presence of neutral limits. It rejects "the instrumentalist conception of law" and thereby locates constitutionalized administration within an apolitical space.[7] This is an area bounded by its commitments to competence, fairness, and specified authority;[8] there is an articulable sphere of justification that constrains the decision-maker even while it gives content to her reasoning. Just as the outer limits are policed for "expertise, deliberation, and reason giving," we can also "look inside the agency for administrative legitimacy."[9] We are, in other words, beneficiaries of an enclosed system of regulation. Macrocosmic principles promote consistency that finds expression in the varied microcosms of bureaucratic adjudication.

It is important, then, to pull at the thread of this dominant image and consider the possibility of interpretive guidance via structuring principles. These claims to objectivity are not simply popular academic arguments; rather, the development of administrative law is largely predicated on the practical utility of these ethereal concepts.[10] The play of power in the administrative state is either obscured behind this rhetoric of constitutionalism and communal predictability or it is largely nonexistent. Certainly, on

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[7] Murray Hunt, "Constitutionalism and the Contractualisation of Government in the United Kingdom" in Michael Taggart, ed, *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) 21 at 22.
[8] Halsbury's Laws of Canada, *Administrative Law*, "Overview of Administrative Law" (I.1) at HAD-1 [Halsbury's, *Administrative Law*].
[9] Sidney Shapiro, Elizabeth Fisher & Wendy Wagner, "The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy" (2012) 47 Wake Forest L Rev 465 at 467.
[10] In *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, the Court explicitly leans on structuring principles in the application and operation of judicial review.

the prevailing view, courts and adjudicators hold tremendous coercive authority, but there is no play in that structure.[11] Instead, governmental force is dispersed toward greater efficiency while concentrated in preternaturally available principles.

There is perhaps no other area of the law so replete with references to metanarratives like 'the rule of law' or 'legislative intent.' While this paper is hardly the forum for an exhaustive analysis of either concept, the ability of any such device to structure state power is a matter of considerable interest. The discourse surrounding the administrative state bleeds into doctrinal development—our collective comfort with interpretive principles renders further reform ostensibly redundant. Although the current reliance on these rhetorical devices could be assessed in relation to varied iterations of governmental power, there is perhaps no greater test than that posed by statutory interpretation. The problem of linguistic indeterminacy forces the state to impose its dominant perspective as some form of objective truth—a matter that is further complicated by the range of legitimacy mandated by our ideas of administrative governance.[12]

(a.) At Play in the Field of Language

Decades ago, a prominent postmodern theorist declared us all inmates in the prison-house of language.[13] This idea, that we are constituted and constrained within psycho-linguistic patterns, is best understood in light of its philosophical development. The starting point is largely uncontroversial: Language is an arbitrary system imposed on

[11] In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, where the coercive power of the administrative state was on full display, the Court offers a comforting narrative where "discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the Charter" (p 820).
[12] See, e.g., *Mellor v Saskatchewan (Workers' Compensation Board)*, 2012 SKCA 10 at para 26.
[13] Fredric Jameson, *The Prison-House of Language: A Critical Account of Structuralism and Russian Formalism* (Princeton: Princeton University Press, 1972).

the observable or articulable world. Few would argue that, to use Ferdinand de Saussure's famous example, our word for 'tree' has any inherent connection to the perennial plant to which we thereby refer.[14] The study of semiotics is a helpful conceptual device here, as it separates linguistic signs from what they signify—they can and should be considered as distinct parts of a socially manufactured relationship.[15] Claims to definitional meaning seek to privilege a specific sign/signified association; for instance, when the Supreme Court defines "termination by an employer" to include "bankruptcy," they give legal force to the association between these textual signifiers. Obviously, the result is more than semantics given the authority of judicial interpretation.[16]

Moving from this background theory, numerous thinkers began to question the authorship of constructed language. If the sounds and symbols that constitute our thoughts and communications are contingent on accepted customs, how and why were these customs created? The scholarship on this point is rich, but a concise account is provided in Jean Baudrillard's *Simulacra and Simulation*: Language mediates our perceptions of the world in a manner that perpetuates the current distribution of power.[17] Put another way, if there is no natural connection between words and what they signify,

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[14] Ferdinand de Saussure, *Course in General Linguistics*, translated by Wade Baskin (New York: Columbia University Press, 2011) at X.

[15] Writing in a more overtly critical context, Max Horkheimer and Theodor Adorno describe the implications of this analytical distinction: "[W]ord and content were at once different from each other and indissolubly linked. … The trenchant distinction which declares the word itself fortuitous and its allocation to its object arbitrary does away with the superstitious commingling of word and thing" (*Dialectic of Enlightenment*, translated by Edmond Jephcott (Stanford: Stanford University Press, 2002) at chapter VI).

[16] One is reminded here of the striking opening sentences in Robert Cover's "Violence and the Word" (1986) 95 Yale LJ 1601: "Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life."

[17] Jean Baudrillard, *Simulacra and Simulation*, translated by Sheila Faria Glaser (Ann Arbor: University of Michigan Press, 1994) at 27. In this particularly lucid passage, he goes on to say that "[i]t is always the goal of the ideological analysis to restore the objective process, it is always a false problem to wish to restore the truth beneath the simulacrum."

language itself becomes deeply personal.[18] The sign/signified interrelationship can never be empirically assessed; there is no control group and there never will be. We assume communicative clarity when our grammatical understandings appear to align, but I will never know how my 'tree' signifies in relation to yours.[19] Further explanations are vulnerable to the same linguistic difficulties. Of course, we can both point at the same object, pronouncing it a 'tree,' but the linguistic signifier remains one of more general application. This is stretched to extremes in the relevant legal context, as we cannot collectively point at, say, 'fairness' or 'expertise' except in discrete and contentious manifestations.[20]

The critical project here involves a consideration of which definitions prevail and become markers of elite discourse. No one can claim access to the linguistic equivalent of Platonic ideal forms, so the interpretive project involves privileging the dominant perspective and superimposing those linguistic associations onto the texts that animate our legal system.[21] This, of course, is a highly diffuse phenomenon; there are

[18] This raises the complex question of how group-based power functions in the absence of straightforward communication. The indeterminacy of language is the same at the top of the hierarchy. For the purposes of this discussion, it suffices to observe that "[t]ruth is produced by large social apparatuses and is thus implicated in the distribution of power relations. It is never 'outside power,' but is always 'a thing of this world.'" In other words, the dominant perspective is the source of mainstream textual associations; powerful groups relate linguistically based on a shared perspective of the real. See: Linda Alcoff, *Real Knowing: New Versions of the Coherence Theory* (Ithaca: Cornell University Press, 1996) at 134.

[19] The idea that linguistic interactions are *largely* unproblematic is evocative of HLA Hart's penumbral distinction, but perhaps the most sustained apologia for "practical certainty" is found in (the aptly named) Kent Greenawalt, *Law and Objectively* (Oxford: Oxford University Press, 1992) esp at 72 [*Law and Objectivity*].

[20] Perhaps the clearest jurisprudential example arises in *Canada (Attorney General) v Mavi*, 2011 SCC 30, where the Supreme Court disagreed with the appellate judgment on the content of procedural fairness. This is, of course, only one (albeit the most common) form of the 'fairness' signifier, but it is worth noting how many ill-defined concepts constitute the Court's understanding of this requirement. For instance, "while the content of procedural fairness varies with circumstances and the legislative and administrative context, it is certainly not to be presumed that Parliament intended that administrative officials be free to deal unfairly with people subject to their decisions" (para 39). In other words, fairness is not unfairness.

[21] It is important to note the movement from individualized linguistic subjecthood to the consolidation of group power through dominant interpretations. If there is no inherent content in interpretive prompts, one might expect greater randomness and more discrete pockets of authority. However, as will be discussed

innumerable long histories of authoritative exegesis as a means of social control, and the suggestion that Canadian statutory interpretation has a unique claim to our postmodern incredulity is tenuous at best. Directing this theoretical lens at agency interpretation and its judicial limits does, however, facilitate a sustained examination of the play(s) of power in the administrative state. Our legal institutions, backed by a scholarly tradition of trust in principles, posit an enclosed system whereby administrators act within neutral bounds and courts police the conceptual borderlands.[22] This narrative is proffered as a thesis of legitimation, but its foundation of principles depends heavily on linguistic determinacy. Administrative authority can only be governed by ideas like 'the rule of law' if they hold meaning that signifies beyond individual actors.[23] More specifically, the normative framework of interpretation avoids careful scrutiny through its multitude of governing precepts: One does not easily untangle, for instance, the idea that "[j]udicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers."[24] Presumptions that inform the play(s) of power in the administrative state are either unarticulated or presented within a complex matrix of rarely defined principles.[25]

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below, language signifies based largely on personal biases and histories—which are, of course, widely shared amongst the sociocultural elite.

[22] This is perhaps most concisely stated in the decision penned by Binnie J in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61.

[23] As Joseph Singer observes, "[d]eterminacy is necessary to the ideology of the rule of law, for both theorists and judges. It is the only way judges can appear to apply the law rather than make it" ("The Player and the Cards: Nihilism and Legal Theory" (1984) 94:1 Yale LJ 1 at 12).

[24] *Dunsmuir*, *supra* note 2.

[25] I.e., administrative law takes a number of (contested) positions on the conditions of legality. These become "the central ideology of social order" and resist sustained scrutiny by virtue of their interlocking and ill-defined character. See: JC Smith, "Psychoanalytic Jurisprudence and the Limits of Traditional Legal Theory" in Richard Devlin, ed, *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery Publications, 1991) 223 at 225.

While this justificatory space could be evaluated in various contexts, the process and review of administrative hermeneutics is particularly instructive. Amidst claims to unverifiable and deeply personal sign/signifier associations, the expression of institutional theories of governance (whether express or implied) is inevitable. Put another way, interpreting language at the intersection of Parliament and the judiciary requires some explicit engagement with state power. If the ability to give content to contentious legal language is assigned to boards and tribunals, then this relatively new governmental iteration must be justified—at least to the extent of developing a working scope of decision-making authority.[26] The interplay between agencies and courts in the process of interpretation tells us something important about the source(s) of the dominant perspective. There is compelling reason to understand definitional work as the imposition of a privileged viewpoint at the expense of all others, and so delineating an interpretive claim space requires an institutional show of power; that is, when performing legal hermeneutics, it is helpful to begin by asking who gets to speak when meaning is in dispute. This question is most comprehensively answered through a preliminary examination of how linguistic authority is constructed.

1. Form is Content: A Preliminary Discussion

The form/content (inter)relationship is well known in literary fields, but state actors rarely discuss how their surroundings shape the construction of statutory meaning.[27] There is, however, a latent understanding in our institutional literature that

[26] On this point, Sara Blake's synthesis of the case law is helpful. She notes that administrators are seen as "fill[ing] in the details" of general statutes, and she notes that tribunals both implement and are bound by legislative language (*Administrative Law in Canada*, 5th ed (Markham: LexisNexis Canada Inc, 2011) at 3).

[27] For a formative work on the subject, see: Walter Benjamin, "The Work of Art in the Age of Mechanical Reproduction" in *Illuminations: Essays and Reflections*, translated by Harry Zohn (New York: Schoken Books, 2007) 217.

each locus of authority brings something unique to the act (or, more precisely, the outcome) of governing. In administrative hermeneutics, the language most overtly at issue is often legislative; words embodied in statutory instruments are sources of authority and the material from which interpretations arise. There are numerous theoretical stances on how the act of legislating does and should impact how we understand the result, but uncovering linguistic power in the administrative state requires a broader conceptualization of texts. This insight is perhaps most succinctly put in Jacques Derrida's famous critique of Saussure: "*There is nothing outside of the text*."[28] The distinction is, however, nuanced to the extent that no locus of embedded textual meaning exists; instead, texts are constituted by individuals' acts of working through them.[29] This evokes the intuitive notion that formal characteristics affect the content of language, but this does not produce a meta-language—my engagement with institutional inflections is itself a textual process, broadly construed.

How, then, are the texts of agency statutory interpretation shaped by the space from which they issue?[30] In a recent discussion of appropriate interpretive contours, the Supreme Court held that "[w]here the ordinary tools of statutory interpretation lead to a single reasonable interpretation and the administrative decision maker adopts a different interpretation, its interpretation will necessarily be unreasonable — no degree of

[28] Jacques Derria, *Of Grammatology*, 40th anniversary ed, translated by Gayatri Chakravorty Spivak (Baltimore: John Hopkins University Press, 2016) at X [*Of Grammatology*]. Emphasis in original.
[29] In the translator's preface to this edition of Derrida's text, he writes that "[t]he book is not repeatable in its 'identity': each reading of the book produces a simulacrum of an 'original' that is itself the mark of the shifting and unstable subject … the book's repetitions are always other than the book" (*ibid* at xxx).
[30] The idea that there is a "correct version" of a statutory instrument is based, at least in part, on the function of hierarchical interpretation: The authoritative decision-maker forecloses alternate possibilities toward the ascendancy of a single, elite perspective. See: Daniel Del Gobbo, "Unreliable Narration in Law and Fiction" (2017) 30:2 Can JL & Jur 311 at 330.

deference can justify its acceptance."[31] Although Moldaver J, writing for the majority here, indicates that 'ambiguity' will afford an agency with greater discretion, this distinction rests on the presumed content of "ordinary tools." This mechanism nominally vests discretion in boards and tribunals while retaining authority in a familiar way. By evoking the discoverable content of interpretive tools, this holding suggests the presence of a neutral threshold for agency decision-making. Of course, it remains a judicial determination whether a single reasonable interpretation exists and, given the impossibility of a universally "ordinary" set of hermeneutical methods, this approach can always justify either outcome. In other words, as Ruth Sullivan bluntly puts it, "administrators can neither make law (that is the job of the legislature) nor determine its true meaning (that is the job of the courts)."[32] Agency interpretation takes place under judicial supervision that is self-policing. The resultant texts of exegesis must resolve linguistic ambiguity within an institutional structure that considers them "more or less persuasive" opinions.[33] While this apparent supremacy is at odds with the deferential bent that characterizes judicial self-perceptions, the foregoing theoretical lens provides an important insight into the exceptionalization of statutory interpretation in the administrative state.

Given the fundamental conceit of postmodern linguistics—i.e., that "by an awareness of the arbitrariness of the sign … the entire question of meaning can be

[31] *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at para 38 [*McLean*].
[32] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis Canada Inc, 2014) at 710. On its face, Moldaver J's sentiment seems to allow for some agencies to 'make' law, but the judicial ability to find just one reasonable definition undermines that idea. *McLean* is always available for judges to impose a preferred perspective by collapsing the "range" of possible meanings. When agencies make law, it is because judges have allowed it.
[33] *Ibid*.

bracketed"[34]—the claim that textual signifiers can produce a "single reasonable interpretation" appears markedly unsophisticated. This point requires some familiarity with administrative law standards of review, which depart from the treatment of reasonableness and correctness set out in *Housen v. Nikolaisen*.[35] While these two standards remain, the relevant question has been described as "resolving the basic tension between legislative intent and safeguarding the rule of law."[36] On the orthodox view, courts recognize that Parliament took active steps to divest them of authority, yet limits must be enforced where a tribunal exceeds its delegated mandate. The result is a reasonableness standard where the "standard of review analysis" finds that deference is warranted.[37] This invokes a "margin of appreciation" where the impugned decision must fall "within a range of possible, acceptable outcomes which are defensible."[38] Conversely, a finding that the correctness standard is appropriate justifies unilateral reversal where judges disagree.

This doctrinal foundation is difficult to reconcile with the problems of linguistic meaning. If language is both arbitrary and deeply personal, there is little to suggest that a "range of acceptable" definitions will ever exist.[39] It should be noted, however, that judicial review of administrative hermeneutics also produces an occasional progressive remark. After all, gestures toward deference are not usually dispensed with even in the

[34] Paul de Man, "Semiology and Rhetoric" in Vincent Leitch et al, eds, *The Norton Anthology of Theory and Criticism*, 2nd ed (New York: WW Norton & Co, 2010) 1365 at 1367.
[35] 2002 SCC 33.
[36] Halsbury's, *Administrative Law*, *supra* note 8 at HAD-106.
[37] *Dunsmuir*, *supra* note 2 at para 29. This is determined with reference to four questions: "(1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal" (para 64).
[38] *Ibid* at para 47.
[39] *Ibid*.

interpretive forum,[40] and definitional ranges have been described as legitimate.[41] This produces a "paradox of deference" where permissible analytical difference leads to divergent interpretations.[42] If supervising courts are sincere about granting "a measure of deference" to administrative decision-makers,[43] then alternative interpretations—which logically arise from divergent hermeneutical processes—are owed some measure of respect. The difficulty here, even if clumsily or evasively put by the bench, is reconciling the idea of deference with that of adjudicative merit.

Contemporary understandings of language resolve any apparent paradox regarding incongruous definitions, but only the staunchest postmodern skeptic would suggest that legal interpretations cannot be better or worse in how they affect subjects. It is therefore understandable that judges, working in good faith, might wish to subordinate difference in favour of a "single reasonable interpretation." Certainly, the general jurisprudence on statutory interpretation is replete with claims to transcendent epistemic capacity; there is, after all, only "one principle or approach" for divining true legislative meaning.[44] Elsewhere, I have discussed the vacuous rhetoric of the prevailing approach to legal hermeneutics, arguing further that the suggestive notion of interpretive correctness constitutes an effort to privilege a dominant worldview and immunize it from critical

[40] For a recent valorization of this precept, see: *Teal Cedar Products Ltd v British Columbia*, 2017 SCC 32, [2017] SCJ No 32 [*Teal*].
[41] Most famously, the *Dunsmuir* decision endorses a "range of reasonable outcomes." This is endorsed in *Saskatoon Regional Health Authority v Ready*, 2017 SKCA 20 at para 221, where the decision-maker's "misapprehension and misinterpretation of the administrative law, the law of contract and its failure to engage in any appropriate statutory interpretation resulted in its decision being unjustifiable on the basis of a reasonableness standard of review."
[42] Jerry Mashaw, "Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation" (2005) 57:2 Admin L Rev 501 at 504.
[43] *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 25.
[44] For the most famous articulation of this stance, see: *Rizzo*, *supra* note 1 at para 21.

scrutiny.[45] My interest here is more specific, but in service of a broader inquiry: What does the interplay between institutional actors making claims to linguistic certainty tell us about the play(s) of power in the administrative state? Accepting that language can never signify beyond the individual, we can productively examine governmental efforts to obscure this subjectivity. Questions of interpretation are inflected by the authoritative scope of each state branch, but, at a high level of generality, this is simply the procession of linguistic simulacra. As institutional actors impose their dominant perspective upon textual signifiers, they rely on a series of unstated presumptions that can be productively unpacked toward a "logic of bureaucracy" and coherent critique of interpretive authority.[46]

2. In/determinacy and Applied Linguistic Meaning

Returning, then, to my opening claim—that the administrative state is a historically contingent organization of governance—there is a significant interrelation between linguistic instability and the critical project of unsettling regulatory convention. Definitional power issuing from varied sources obscures the arbitrariness of the sign. Official interpretations are given the endorsement of 'legal reasoning' and proffered as apolitical assertions of fact. In the administrative context, there is almost constant recourse to decisional 'expertise,' which is seen as a justification for hermeneutical deference from the bench. Of course, understanding language as an inherently unknowable construct effectively dismantles the idea that someone could be an expert of interpretation; if there is no "transcendental signifier," to use Derrida's phrase, then there

[45] Nicholas Hooper, "Notes Toward a Postmodern Principle" (2018) 31:1 Can JL & Jur 33.
[46] This phrasing is borrowed from an eponymous rendering of conservative, hierarchical administrative governance. See: Albert Breton & Ronald Wintrobe, *The Logic of Bureaucratic Conduct* (Cambridge: Cambridge University Press, 1982).

is no education or experience that produces exegetical proximity to it.[47] Doctrinal misdirection of this sort will be discussed at greater length below, but it is important at the outset to frame this critique within its larger theoretical ambitions. An attack on the stability of language destabilizes the jurisprudential foundations of administrative law. This is perhaps why a long tradition of respected scholarship stands for the dominant proposition that, semiotics aside, we can have faith in legal coherence founded upon meta-principles. To suggest otherwise is to succumb to the nihilism of indeterminacy: The suggestion that we can never move language beyond the self would "undermine any attempt to articulate a vision of a more humane society, even one without laws."[48] Discomfort of this sort is not, however, a compelling reason for uncritical acceptance.

This is not to suggest that critics of the poststructuralist legal vision hinge their arguments on practicalities of implication. There is no singular apologia for a determinate system of laws, but some instructive generalizations can be made. My central argument here is that the rhetoric of interpretive certainty obscures the imposition of dominant values as hermeneutical 'truth.' A more moderate position can be traced back to HLA Hart's argument that "[c]anons of 'interpretation' cannot eliminate, though they can diminish, these uncertainties; for these canons are themselves general rules for the use of language, and make use of general terms which themselves require interpretation."[49] He famously locates a "core of certainty,"[50] thus acknowledging the epistemic problem

[47] While it will be discussed at length in the next chapter, it is worth noting an obvious alternative argument for interpretive expertise: Someone must have the last hermeneutical word, and numerous scholarly and even institutional efforts focus on democratic bases for this power. Further, institutional positioning can also support an argument for expertise, though not one based on linguistic meaning. Instead, one might privilege an agency's proximity to those most affected. See: *infra* chapter 2, section B.
[48] Lawrence Solum, "On the Indeterminacy Crisis: Critiquing Critical Dogma" (1987) 54:2 U Chicago L Rev 462 at 502.
[49] HLA Hart, *The Concept of Law*, 3rd ed (Oxford: Oxford University Press, 2012) at 126 [Hart].
[50] *Ibid* at X.

without the invocation of radical critique. In response to this infinite regress of interpreting interpretations, numerous scholars have adopted an analogous approach: Few argue that legal interpretation is always stable or predetermined by official rules,[51] but the mainstream view posits the routine, apolitical character of our daily recourse to the law.[52] This view has been most thoroughly attacked by the "indeterminacy thesis" arising from the Critical Legal Studies movement. Although variations on its themes proliferate, it remains helpful to trace the general contours of this argument to position this analysis of legal interpretation within the broader claim that law is indeterminate.

The foundation of this claim is eponymous—i.e., that our laws fail to anticipate the situations upon which they are imposed—but the critical treatment of this idea is more complex. Even those sympathetic to the play of language tend to retain some sense of discernment regarding legal arguments. Arguably, we are told very little by the bare signifiers that make up "procedural fairness" but significantly more by the rule that "[a] person is deemed not to have attained a specified number of years of age until the commencement of the anniversary, of the same number, of the day of that person's birth."[53] This is not to disregard the divergent institutional purposes of these texts, but rather to foreground the apparent determinacy of the latter quotation. It is straightforward to imagine a hierarchy of arguments regarding the age of a person in relation to this legislation; of course, one could argue that its enforcement in a given case would defeat

[51] Mark Tushnet, "Defending the Indeterminacy Thesis" (1996) 16 Quinnipiac L Rev 339 at 341 [Tushnet]. He writes, in summary, that "[n]early everyone agrees that some legal propositions are indeterminate."
[52] *Ibid* at 342. For instance, "[u]nder the present United States Constitution no person may become president who is under 35 years of age" is likely viewed as determinate by most legal professionals and scholars. The value judgments that come into play are discussed below in relation to Dworkin's internal skepticism.
[53] *Interpretation Act*, RSC 1985, c I-21, s 30.

the purpose of the enactment or some other inventive argument, but, generally speaking, one expects to determine age by reference to the statutory formula.

We rely on some form of universal signification to structure our daily experiences. Until an alternative argument gains credibility, interested parties will, for instance, employ the above statutory directive to determine age in routine matters. The implications of this ostensible "core of certainty" for the indeterminacy thesis are succinctly described by Mark Tushnet:

> Lawyers find it easy to resolve controversies when one side offers an argument that merely satisfies the "straight face" test and the other offers a stronger one. The general idea would be to say that indeterminacy truly exists only when "reasonably powerful" arguments are available on either side of a legal proposition. This response does not take the implications of the sociological perspective fully into account. [An argument becomes] professionally respectable when a socially significant set of legal actors [begin] to make it. In this sense professional respectability derives from a certain type of social or political power. Again to generalize, as those legal actors gain even more power (or lose it), the … argument[s] they make will become "reasonably powerful" (or will revert to being frivolous).[54]

In other words, the threshold of indeterminacy is often presented as situational: Many will agree that a constitutional interpretation with strong arguments on both sides is logically indeterminate; few will agree that the application of the foregoing anniversary formula presents the same challenges. We are reminded, however, that the persuasiveness of a legal argument is always the product of sociological forces. An idea that is currently obscure—e.g., that such a method of calculating age is discriminatory on the basis of irrelevant physical criteria—can become powerful given the right combination of resources and publicity.

The radical character of the indeterminacy thesis can be productively considered using the same example. This is, after all, an academic movement based on destabilizing

[54] Tushnet, *supra* note 51 at 344-45.

foundational presumptions.[55] Chronological age is as close to an objective fact as we are likely to find. Presuming an uncontroversial date of birth, the ensuing calculation is nominally determinate. Proponents of the relevant thesis would diverge on this issue. While some distortion necessarily attends this form of generalization, John Hasnas productively delineates two approaches to the implications of indeterminacy. On one side, the paradoxically named "mainstream Crits" are mindful of law's various internal inconsistencies but "cannot advocate abandoning the legal regulation of human activity since this would simply allow the underlying hierarchies to flourish."[56] Rules such as the age example form the constituent parts of a system that perpetuates the current distribution of power. Since the invocation of legal texts depends on the necessarily political movement from 'facts' to 'law,' even apparently clear enactments are fundamentally indeterminate: The operation of law is instrumental and malleable, but always issuing from a locus of authority. Predictability, in other words, is compatible with indeterminacy; one can be unsurprised that legal texts operate to privilege dominant interests while still holding to the belief that law is indeterminate. As Joseph Singer convincingly demonstrates, our system fails to be "comprehensive, consistent, directive and self-revising," which are preconditions for logical determinacy.[57] For the so-called

[55] See, e.g., Allan Hutchinson & Patrick Monahan, "Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought" (1984) 36 Stanford L Rev 199 at 200: "[I]t is not merely the truth of nature that is at stake, but the nature of truth itself."

[56] John Hasnas, "Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not to Miss the Point of the Indeterminacy Argument" (1995) 45:1 Duke LJ 84 at 101 [Hasnas].

[57] Singer, *supra* note 23 at 14. More specifically, Singer shows that legal comprehensiveness is a myth since that would require full coverage for all imaginable fact scenarios. Proponents of thoroughness ignore both the gaps in existing rules and the infinite number of possible holdings in response to routine litigation (e.g., strict liability v traditional negligence in a car accident could also devolve into "universal car repair insurance or the abolition of cars altogether and reliance on mass transport" (15)). Consistency, too, fails since the line between a rule and its exception is in constant flux, often governed by meaninglessly vague "metatheories" such as "freedom" or "privacy" (16). On his third point, he concisely points out that "[p]rinciples or theories are non-directive if they do not help us choose among alternative possible rules"

"mainstream Crits," this does not mean we can dispense with legality; rather, to the extent that, say, the indeterminate age rule keeps children out of exploitative work conditions, it must be supported in spite of its amorphous character.[58]

Conversely, the "irrationalists" distrust the narrative of progress advanced by their mainstream counterparts.[59] If an inherently malleable set of rules is being simultaneously applied and abused by the institutional elite, then law reform is an empty promise that obscures the need for more radical change. This stance has been derided as a form of useless nihilism, but such criticisms depend on the scope of one's transformative ambitions. Given their explicit disdain for improving an indeterminate legal order, moderate commentators find little utility in the irrationalist call for profound (and, to be fair, seemingly unlikely) change. On its own terms, this perspective is one of extreme optimism: Decisional action can, of course, take place outside of the legal system.[60] This claim is arguably progressive in a way that most advocacy for choice ignores—that is, as feminist scholars point out, the illusion of choice does significant damage by presuming an equal footing upon which everyone decides under the barely disguised operation of formal equality—because it has the potential to drastically reframe the relations that are constituted by legal structures. This radical side of the indeterminacy thesis is well

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(18). Finally, we have no determinate system for the revision of legal rules. If we cannot fully predict when a law will stop governing, we can never truly refer to this iteration of governance as determinate (19).

[58] Hasnas, *supra* note 56 at 103. On this point, Hasnas writes, "many of the Crits argue for the legal empowerment of the subordinated or oppressed groups currently victimized … This line of argument has included arguments for the empowerment of union members … of women, by altering state laws concerning working conditions and child care … and of oppressed people generally, by using the law to build 'an authentic or unalienated political consciousness.'"

[59] *Ibid* at 105.

[60] This claim is vulnerable to definitional misunderstanding. On first reading, one considers the varied decisions that take place informally in daily experience, but these are structured by the extant legal system. We can resolve disputes outside of the (manifest) discourse of law, but our relative bargaining position will always be shaped by what Duncan Kennedy refers to as "background conditions." For the so-called "irrationalists," locating agency beyond legal structures is a more radical proposal, as will be discussed below.

described by one of its detractors as working to "unfreeze [the] false sense of necessity" in governmental structures.[61] Rejecting the more easily applied critiques of legal inequity, this stance on indeterminacy usefully foregrounds the incoherence of law's metaprinciples.

Much has been written on the subject of legal indeterminacy and a full-scale discussion of those debates would require more pages than necessary for the salient point here. The administrative state has a unique relationship with textual determinacy, which is stretched to extremes in the context of statutory interpretation. It is profoundly destabilizing to confront the malleability of all legal rules, but learning from this applied exercise in poststructural skepticism does not require the resolution of unsolvable problems. Both mainstream and irrationalist notions of indeterminacy (or, more specifically, the implications thereof) foreground the plight of the embodied legal subject. Of course, meaning has been imposed at least to the extent that the law can work injustice while advancing its dominant interests—on that, there is little disagreement from the critical movement. Internal disagreement instead concerns the action necessitated by this recognition. The pertinent question, then, is the role of the subject in relation to legal texts. This is, in many ways, a heavily abstract point, but one that is brilliantly described by the judge character in Cormac McCarthy's *Blood Meridian*:

> The truth about the world, he said, is that anything is possible. Had you not seen it all from birth and thereby bled it of its strangeness it would appear to you for what it is, a hat trick in a medicine show, a fevered dream, a trance bepopulate with chimeras having neither analogue nor precedent, an itinerant carnival, a migratory tentshow whose ultimate destination after many a pitch in many a mudded field is unspeakable and calamitous beyond reckoning.
> …

[61] Ken Kress, "Legal Indeterminacy" (1989) 77:2 California L Rev 283 at 284.

> Even in this world more things exist without our knowledge than with it and the order in creation which you see is that which you have put there, like a string in a maze, so that you shall not lose your way.[62]

The maze of agency interpretation is guided by a rhetorical string that provides the illusion of order. Working through texts remains a constitutive process and, as the indeterminacy thesis demonstrates, it exists in a fundamentally contingent relationship with each legal actor.

On almost any reading, our legal texts require interpretation. Even the most radical indeterminacy arguments suggests a reformative process whereby individual meaning is construed through both intuitive and conversational means—*viz*., a holistic version of personal hermeneutics. The foregoing discussion of legal epistemology adds a further layer to our inquiry: If even qualified versions of linguistic stability (e.g., the generally accepted operation of a statutory enactment) are vulnerable to shifting meaning, how can statutory interpretation (i.e., the literal imposition of meaning onto unknowably personal textual signifiers) ever make claims to objectivity via structuring principles? In the administrative state, power is conferred through legislative text while the bounds of that authority is policed by the judiciary.[63] More broadly, as we have seen, the process of textual signification extends well beyond words of enactment; our interpretive techniques themselves, along with those who apply them, are constituted by the same ambiguities of language. There is no meta-language for the neutral displacement of linguistic subjectivity. Much like the proponents of the indeterminacy thesis, we arrive at the endpoint of textual skepticism and must reconcile an opposition: the problems of language with our system of legal signs.

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[62] Cormac McCarthy, *Blood Meridian; Or, The Evening Redness in the West* (New York: Vintage International, 1992) at 256 [emphasis added].
[63] See, e.g., *Mission Institution v Khela*, 2014 SCC 24 at para 37.

In this way, the process and review of agency interpretation facilitates both a deconstructive and progressive project. There is perhaps no greater test of conceptual authority than the officially sanctioned ability to impose sign associations as legal truths. By demonstrating the failure of language to signify beyond the subject, the poststructuralist account of interpretation reminds us that every definition is an affirmation of the self. While the current judicial mandate posits "one principle or approach," the discrete analytical moves from legislative text to definitional meaning do not hold in a world of arbitrary signs reflecting only themselves. In the absence of a metalanguage, there is some hope for a progressive response rather than nihilistic silence;[64] presumably, one does not acknowledge the meaninglessness of language only to stop speaking.[65] There is no single reasonable interpretation but this recognition does not require linguistic tyranny. Instead, when we appreciate interpretation as an ascension of a single perspective, we can reorient the debate about how legislation should signify. The question is one of accountability and is necessarily normative: Who should speak when meaning is in dispute? This complex question is best approached by turning to the intellectual development of the administrative state—not because there is an externally available past full of enlightened guidance, but rather because it foregrounds the contingent nature of our interpretive presumptions. Whatever the jurisprudence suggests, there is nothing inevitable about the institutional spaces from which legal definitions arise. It remains nonetheless essential to account for the status quo in terms of its justificatory trajectory, not least for the gaps and elisions which thereby become manifest.

[64] Drucilla Cornell, *The Philosophy of the Limit* (New York: Routledge, 1992) at 70-71: "To run into an aporia, to reach the *limit* of philosophy, is not necessarily to be paralyzed. … The limit challenges us to reopen the question—to think again."
[65] This is perhaps best captured in Samuel Beckett's famous "I can't go on. I'll go on."

(b.) Toward an Interpretive Claim-Space

Legal interpretations render a single perspective with the force of law. Behind this truism lies an uncomfortable relationship between the necessity of construing textual laws and the violence of supplanting alternative perspectives in favour of one dominant semiotic association. In the absence of an easy explanation, the state turns to the tropes of ideological misdirection. The prevailing image of legal hermeneutics evokes a bounded democratic process of governmental harmony. Parliament writes, agencies read, and judges supervise. Even the doctrine recognizes that complexities arise, but this broad generalization is presented as the hard-won product of historical forces—of *progress* and *development*.[66] In other words, the administrative state produces efficient, specialized regulation and the threat of "untrammeled discretion," as recognized by Rand J, is suppressed through law's internal commitments. Pulling at the thread of this narrative and asking legal actors to account for the politics of interpretation requires an understanding of how these power relations are obscured in the mainstream discourse. One critic, writing in the tradition of Guattari, succinctly notes that "[e]conomic and political power is inconceivable without the production of subjections and significations that determine for each person the position one is to occupy."[67] Through subtle appeals to a natural order and doctrinal evolution, judges distract us from the unilateral force that underwrites every legal definition.

In Marxian thought, the basic moves of ideological rhetoric are simple but profoundly effective. The state historicizes, naturalizes, and eternalizes in an effort to

[66] A particularly strong summary, detailing the challenges but also their progressive resolutions, is found in *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 at para 33.
[67] Maurizio Lazzarato, *Signs and Machines: Capitalism and the Production of Subjectivity*, translated by Joshua Jordan (South Pasadena: Semiotext(e), 2014) at 122.

"'disappear' that which tends to contradict [dominant ideology] or expose its repressions."[68] In a simplified sense, all of this is to say that those in power are motivated to render the status quo as the culmination of linear work toward the enlightened present that reflects the natural order of things, and which will abide indefinitely, barring regression.[69] The result preempts critical reflection; it is ahistorical while ostensibly looking backwards. Perhaps unsurprisingly given its internal tensions, the law of interpretation relies heavily on these ideological devices. In almost textbook fashion, the modern principle announces that "[t]oday there is only one principle or approach." Judgments that write these words never engage with the seemingly obvious questions of 'why?' and 'how did we get here?' In a much broader sense, the sites of interpretation in administrative law manifest as neutral and evolved spaces for democratic adjudication. Ideas like deference, the rule of law, consistency, and constitutionalism pervade the relevant judgments as though they mean something fixed and discoverable.[70] Unhelpfulness aside, this is an important way in which "jurisprudence excludes reflection on its own constructedness through academic norms, and thus like many other academic discourses shrouds itself in a veil of naturalness."[71] Although it is seemingly beyond controversy that the administrative state is a deeply contingent iteration of governance, this observation is hidden by a barrage of principles declaring inevitability.

The act of contextualizing administrative claim-spaces embodies significant critical potential. We can "de-naturalize" the ideological presentation of a self-enclosed

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[68] John Lye, "Ideology: A Brief Guide" online: <https://brocku.ca/english/jlye/ideology.php>.
[69] *Ibid*.
[70] There is arguably no stronger example than *Dunsmuir*: "In essence, the rule of law is maintained because the courts have the last word on jurisdiction, and legislative supremacy is assured because determining the applicable standard of review is accomplished by establishing legislative intent" (para 30).
[71] Margaret Davies, *Delimiting the Law: 'Postmodernism' and the Politics of Law* (London: Pluto Press, 1996) at 24 [*Delimiting the Law*].

interpretive system by focusing on the very questions it obscures.[72] The law of interpretation rests on a series of premises that are presented as axiomatic. In an effort to step outside the deemed legitimacy of our current interpretive regime, it is helpful to begin by working through the process and review of agency interpretation, which is both an institutional and individualized legal event. Someone interprets by forging an associative bond, and this perspective compels through the operation of institutional power and positioning. As will be discussed in the following chapters, the *circumstances* of interpretation play an important conceptual role here, but the inherent play of language is invulnerable to analytical mandates and institutional specialization. Indeed, even Hart would have observed that meta-rules such as reading "the entire context" in its "ordinary meaning" are themselves linguistically constructed and would need definitions for consistent application—which, of course, continues *ad infinitum*.[73] The bleakness of this outlook is perhaps mitigated by a degree of critical self-awareness; although our legal landscape is made up of words piled upon words, this paper can be read and we can invoke 'statutory interpretation' without a great deal of linguistic discomfort.

An understanding of this irony, whereby language is deemed uselessly personal in a written argument that at least tries for external signification, exists in opposition to the aforementioned ideological tropes. Legal interpretation depends on the stability of language; otherwise, it is the arbitrary ascendancy of one elite perspective over all others. More than this, though, the current regime implies the progressive enlightenment of the spaces from which interpretations issue—again, through ideology that historicizes,

[72] For a discussion on the unique ability of postmodern thought to de-naturalize the observable world and extant power relations, see: Linda Hutcheon, *The Politics of PostModernism* (New York: Routledge, 2001).
[73] Hart, *supra* note 49 at 126: "Canons of 'interpretation' cannot eliminate … these uncertainties; for these canons are themselves general rules for the use of language, and make use of general terms which themselves require interpretation."

naturalizes, and eternalizes. A close reading of that which is excluded from statutory interpretation—i.e., the content before the "today" of the modern principle—is important for unpacking the power relations that inhere to the construction of legal language. Before we can insist upon transparent engagement with the foregoing linguistic irony (that is, admitting that we cannot know language outside ourselves, even as we use it to demand this form of accountability), we must dismantle the idea that institutions speak beyond the voices of their constituent actors. Our brand of democratic constitutionalism can be read in a manner that facilitates the administrative state, but this is by no means natural or inevitable—and the ensuing interpretations gain no greater universality by virtue of our governmental arrangements.

1. Agency Hermeneutics: A Speculative History

There is no single history of administrative law in Canada, and what follows will not be an exhaustive account of its development. I cannot advance both a critique of linguistic stability and a unified historical narrative. Texts are invariably acted upon by those who interpret them, and piecing together an account of the past is no different. Laurent Binet, engaging with the limits of historical fiction, puts it concisely: "I don't want to write a historical handbook. This story is personal. That's why my visions sometimes get mixed up with the known facts. It's just how it is. … Actually, no: that's not how it is. That would be too simple."[74] These significant global problems notwithstanding, the law provides some advantages as an area of inquiry. It is deeply textual insofar as we have little difficulty sourcing the formative jurisprudence—though,

[74] Laurent Binet, *HHhH*, translated by Sam Taylor (New York: Picador, 2009) at 105.

of course, such records can never be taken at face value.[75] Forging a story of legal history is largely about imposing an ideational arc onto discrete texts that brought about specific results. These are the raw materials from which we claim legal trends.[76] Literature abounds on the possibility of historical facts and this project lacks the space to recount that debate in significant detail.[77] Problems of textual signification are, if anything, magnified in relation to the inaccessible past, and connections between these texts are constructed with an eye toward a coherent narrative. Despite these epistemic challenges, it is useful to contextualize administrative interpretation to foreground its historical and intellectual contingency.[78]

There is an unfortunate trend in scholarship to "take for granted (or worse, ignore) the importance of history (construed broadly here) in identifying the key conditions of legality that characterize a particular legal system."[79] In administrative law, this has obscured the significant and ideologically uncomfortable point that our background "conditions of legality" could justify radically different outcomes. While agency decision-makers complicate the classical view of our governmental branches, their empowering principles are eminently familiar. Individual statutory instruments enable

[75] Again, the irony of discussing main tenets of CLS thought and then positioning case law as a reliable source of intellectual development would be substantial.

[76] This is perhaps best expressed by SFC Milsom: "Legal history is not unlike that children's game in which you draw lines between numbered dots, and suddenly from the jumble a picture emerges; but our dots are not numbered" (*Historical Foundations of the Common Law* (London: Butterworths, 1969) at xiv cited in David Ibbetson, "Milsom's Legal History" (2017) 76:2 Cambridge LJ 360 at 361).

[77] Broadly speaking, I agree with the idea that "[i]n our contemporary or postmodern world, history conceived of as an empirical research method based upon the belief in some reasonably accurate correspondence between the past, its interpretation and its narrative representative is no longer a tenable conception of the task of the historian" See: Alun Munslow, *Deconstructing History* (New York: Routledge, 1997) at X.

[78] The goal is perhaps best stated by Michel Foucault: "Why? Simply because I am interested in the past? No, if one means by that writing a history of the past in terms of the present. Yes, if one means writing the history of the present" (*Discipline and Punish: The Birth of the Prison*, translated by Alan Sheridan (New York: Vintage Books, 1995) at 31.

[79] Anver Emon, "On Statutory Interpretation and the (Canadian) Rule of Law: Interpretive Presumptions as Boundary Setting" (2015) 3:1 Theory & Practice of Legislation 45 at 47 [Emon].

administrative agencies to perform discrete functions within the workings of our legal system. Parliament enjoys virtually unlimited powers of delegation[80] and must simply provide a valid basis for official action.[81] Despite this official story—which, through naturalization, coalesces neatly into our present epoch of regulation—one can imagine a markedly different approach forged from the same constituent parts. We have, in short, constitutionalized courts and delegable powers—the regulatory permutations are virtually endless. It is therefore important to reconsider the inner workings of the doctrinal foundations that are said to animate our present forms of bureaucratic regulation.

Nearly a century ago, Walter Benjamin provided a helpful caveat for those who wish to employ the past toward social critique: "To articulate the past historically does not mean to recognize it 'the way it really was' (Ranke). It means to seize hold of a memory as it flashes up at a moment of danger."[82] This is a welcome qualification given my foregoing exposition on the unavailability of stable meaning. It also underscores a recurring point: If the difficulties of historical evocation produce critical silence, the past will simply be harnessed and manipulated by those in power.[83] The point of this exercise is well stated in a relatively recent valorization of historical method: "[L]egal history … allows us to make our own decisions by seeing that there is nothing inevitable or preordained in what we currently have."[84] For my purposes, this observation leads directly into the question of why permissive concepts in our legal order—that Parliament *can* delegate and judges are constitutionally *empowered* to supervise the ensuing

[80] David Jones & Anne DeVillars, *Principles of Administrative Law*, 6th ed (Toronto: Carswell, 2014) at 5.
[81] This is described as the "principle of validity." See: Peter Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (loose-leaf 2007-Rel. 1), ch 34 at 34-4.
[82] Walter Benjamin, "Theses on the Philosophy of History" in *Illuminations: Essays and Reflections*, translated by Harry Zohn (New York: Schoken Books, 2007) 253 at 255.
[83] *Ibid*.
[84] Jim Phillips, "Why Legal History Matters" (2010) 41 Victoria U Wellington L Rev 293 at 295.

decisions—have been organized into a set of laws and rules that few would call especially elegant or coherent. By most accounts, the answer lies in ideas of necessity: Changes in social and economic conditions brought about utilitarian responses for reasons we often seem to forget.

Writing about the period around Confederation, Colleen Flood and Jennifer Dolling suggest that familiar "calls to establish an independent, apolitical regulatory tribunal" impelled the earliest moves in this direction.[85] At a high level of abstraction, the desire for independent, alternative regulation was symptomatic of new forms of state power. If this was the case in the mid- to late 19th century, then it certainly embodied a renewed urgency as the state responded to the First World War and its economic/regulatory impacts, which created a "massive expansion of government."[86] The growth of administrative law is often associated with the rise of the "welfare state," which is hardly a stable locus of meaning. The salient point for our purposes, however, is the idea of efficiency: Board and tribunals were seen as the "good and pragmatic" solution to increasingly diverse governmental services.[87] While it is difficult to argue with the broad premise that more sites of adjudication facilitate more expeditious dispute resolution, this form of governance also raised new questions. Increasingly, critics began to ask

> To what extent can these [private] areas of power be subject to traditional notions of law with its emphasis on fixed and continuing principles with general application, and upon a particular method of reasoning on the part of legal institutions? The risk is that courts with their characteristic methods of control … are either pushed to the margin of public affairs and

[85] Colleen Flood & Jennifer Dolling, "An Introduction to Administrative Law: Some History and a Few Signposts for a Twisted Path" in Colleen Flood & Lorne Sossin, eds, *Administrative Law in Context*, 2nd ed (Toronto: Emond, 2013) 1 at 5.
[86] *Ibid* at 8.
[87] *Ibid* at 11.

> become ineffectual, or that the exercise of legal control itself becomes discretionary, sectional and subjective in the same way as the institutions that it seeks to control.[88]

Both the foundational calls for an apolitical form of administrative governance and the attendant discomfort with discretion and intervention continue today—an issue that is further complicated by the overtly political character of some sites of administrative interpretation (e.g., the decisions of civil servants). The result is a unique relationship between administrative law and theory.[89]

Accordingly, the efforts of both Michael Taggart and Matthew Lewans to sketch an intellectual history of the administrative state are invaluable. The anxiety of administrative law development has remained more or less unchanged since the 19th century: Formative actors confronted the persistent tension between Diceyan views of the common law—i.e., that administrative law was antithetical to the proper English modes of constitutional democracy[90]—and the burgeoning sense that bureaucratic regulation "was one of the greatest legal developments of the century."[91] The stakes are particularly high given the protracted contours of state/subject interaction in bureaucratic governance. Simply put, administrative law requires (and has always required) an explicit theory of

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[88] DJ Galligan, "Judicial Review and the Textbook Writers", Book review of *Judicial Review of Administrative Action* by SA de Smith & JM Evans and *Administrative Law* by HWR Wade (1982) 2:2 Oxford J Leg Stud 257 at 257 cited in Michael Taggart, "Prolegomenon to an Intellectual History of Administrative Law in the Twentieth Century: The Case of John Willis and Canadian Administrative Law" (2005) 43 Osgoode Hall LJ 223 at 229.

[89] This is evocative of Terry Eagleton's claim that "when you get a really virulent outbreak of theory, on an epidemic scale, … then you can be sure that something is amiss" (*The Significance of Theory* (Cambridge: Blackwell, 1990) at 25-26.

[90] The views of AV Dicey expressed in his famous *Introduction to the Study of the Law of the Constitution* are well known and subject to much scholarly interest. My own reading will be presented below; for the purposes of intellectual history in the mainstream legal discourse, this caricature of his distrust of bureaucracy is sufficient.

[91] Michael Taggart, "Prolegomenon to an Intellectual History of Administrative Law in the Twentieth Century: The Case of John Willis and Canadian Administrative Law" (2005) 43 Osgoode Hall LJ 223 at 225 [Taggart].

organization because of the state's diverse delegated manifestations.[92] Doctrinal and theoretical development in this area is often characterized by a familiar preoccupation with il/legitimate decision-making. Threshold conditions must emerge to distinguish those who interpret with the force of law from everyone else. Lewans, writing both in the present tense and in reference to historical forces, notes that "administrative law is perceived primarily in terms of its outer limits."[93] As far back as the first-wave legal realists, there is significant concern about the malleability of institutional roles which allow judges to exercise their supervisory powers and perpetuate the current (conservative) distribution of authority.[94]

The familiarity of these historical concerns is instructive. We do not naturally fear non-judicial actors or locate our feelings about legislative delegation on a Diceyan spectrum; rather, ideas about administrative law persist despite their origins in different socioeconomic circumstances. There is no necessary relationship between these preoccupations and the relevant subject matter, so there must be some ideological convenience in their persistence. On this point, we must consider how the official story presents a final epoch, which is currently in force. We have, on this reading, eschewed the idea that "there [is] one uniquely correct meaning of an agency's constitutive legislation" and so have moved beyond our Diceyan past.[95] As concepts like respectful deference and agency specialization proliferate, administrative discourse is at pains to divest itself of the unilateral exercise of judicial power. The same signifiers that animated the historical search for impartial sites of regulation—e.g., efficiency, discretion, and

[92] *Ibid* at 233.
[93] Matthew Lewans, *Administrative Law and Judicial Deference* (Oxford: Hart Publishing, 2016) at 4 [Lewans, *Judicial Deference*].
[94] Taggart, *supra* note 91 at 257.
[95] *Ibid* at 264.

supervision—continue to provoke significant disagreement. The history of ideas in administrative law fosters a continual distrust of non-judicial actors, buried almost euphemistically under discussions about appropriate limits for judicial review. Contextualizing the intellectual development of this regulatory area is not an exercise in drawing lines from historical ingenuity to present day sophistication but rather in noting the sameness of conceptual language that was always contingent on its social and institutional surroundings.

2. Law & Interpretation: Reading Against the Development of Bureaucracy

None of the foregoing ideas exist in a disembodied, observable state. We are fortunate, then, that the records from which critics and officials draw their trajectories are uniquely accessible. It is relatively straightforward for judges and other interested parties to construct a narrative of progress from the textual materials of legality. The conventional focus on landmark decisions and constitutional theories does, however, privilege a decidedly elite, judge-centric worldview. In his groundbreaking work on the origins of the administrative state, H.W. Arthurs suggests that even early work toward bureaucratic organization was marked by a "convergence of economic interest, ideology, and intellectual perspective."[96] Those within the legal system have an obvious incentive to perpetuate some version of the status quo—at least enough to retain their professional or authoritative monopoly. The result has been a shift in judicial language—"from a pragmatic to a principled style."[97] By moving stories about jurisprudential development into the register of external principles, officials have masked the contingency of their preferred forms of governance. As we have seen, when deemed progress is reduced to

[96] HW Arthurs, *'Without the Law': Administrative Justice and Legal Pluralism in Nineteenth-Century England* (Toronto: University of Toronto Press, 1985) at 40.
[97] *Ibid*.

amorphous concepts, it has profound staying power despite fluctuations in background conditions.

It is telling, for instance, that the Canadian approach to judicial deference "has no textual basis in the Constitution, the idea was borrowed from American jurisprudence and transplanted into the Canadian common law."[98] While this is obvious insofar as no one in 1867 would have predicted our current mechanisms of judicial review, there is rarely much jurisprudential discussion of its undemocratic construction and adoption. It is instead presented as an axiomatic foundation of this legal area. Similarly, when we look back on the trilogy of *Nicholson v. Haldimand-Norfolk Police Commissioners*, *C.U.P.E. v. New Brunswick Liquor Corp.*, and *Crevier v. Attorney General (Québec)*, the often unstated development involves a move to the language of principles. As Lewans puts it, "instead of conceiving judicial review as a means for ensuring that the legislature, judiciary, and executive perform distinct constitutional functions, the purpose of judicial review construed as a means of sustaining fundamental values like procedural fairness."[99] Even where we move to the so-called "pragmatic and functional era" or into modernity with the *Dunsmuir* insistence on understated terminology, we remain within an amorphous linguistic empire.[100]

This is deeply beneficial to those in power because the relevant structuring principles are largely atemporal. Certainly, there have been fluctuations in the emphases placed on, say, deference and reasonableness, but few would ever have explicitly rejected the lofty promise of "procedural fairness." In result, sites of interpretation exist largely without historical grounding despite an implicit promise that they have come forth from a

[98] Lewans, *Judicial Deference*, *supra* note 93 at 138.
[99] *Ibid* at 140.
[100] *Ibid* at 156.

long tradition of jurisprudential wisdom.[101] When we read legal texts about subjects interacting with the administrative state, we are presented with records of experience—the application of principles in everyday life. This requires careful attention because

> the evidence of experience, whether conceived through a metaphor of visibility or in any other way that takes meaning as transparent, reproduces rather than contests given ideological systems … the project of making experience visible precludes critical examination of the workings of the ideological system itself, its categories of representation … its premises about what these categories mean and how they operate, and of its notions of subjects, origin, and cause.[102]

Recounting a history of interpretation is impossible given the individualized and perhaps incommunicable forces at play, but we can still account for, or at least pay attention to, institutional inflections and relationships. The critical value in such an undertaking relies heavily on an ability to discuss historically contingent features of legality without securing the content called into question. Suggesting that the treatment of concepts like deference has changed over time runs the risk of implying stability within the signifier and the institutions that advance it as an organizing ideal.

Those who have traced the intellectual development of Canadian administrative law note "mixed messages" throughout our case law, but interpretation remains, to my mind, largely static.[103] The turn to principles noted by Arthurs in the 19th century continues more or less apace; interpretive work is structured around concepts that hold no inherent meaning. Often, the language remains the same—we may never stop talking in terms of limits to deference, as though tribunals wait to transgress their statutory mandates at every turn—but the core process is consistent though hidden. Interpretation

[101] There are more valorizations of structuring principles than could be realistically cited, but see: *Reference re Secession of Quebec*, [1998] 2 SCR 217 at paras 48-82 for the enumeration of "four principles" that encapsulate our benevolent epoch of constitutional evolution.
[102] Joan Scott, "The Evidence of Experience" (1991) 17:4 Critical Inquiry 773 at 778.
[103] Lewans, *Judicial Deference*, *supra* note 93 at 168.

must necessarily constitute the ascendancy of one textual association over all others. This does not, however, mean that progress is impossible. A reformative effort must start, as I have tried to do above, by foregrounding the contingency of sites for interpretation and the mechanisms for its review. On this newly leveled ground, there is significant promise in unpacking the theoretical lineage of administrative interpretation. The language of principles is meant to disappear controversy, but this is ultimately an interpretive approach borne of significant and self-conscious conflict—one of staking moral claims and pushing alternative frames of meaning to the margins.

(c.) The External Skeptic, Internalized

The "entire context" of the modern principle is an easy point of criticism. It is a directive that refers to everything and nothing—and, in practice, to whatever the decision-maker prefers.[104] This selective application is understandable (even if the rhetoric behind it is not) since every interpretation must draw a line somewhere. Given the play of language, one can look endlessly for definitional supplements; almost anything can impact our (embodied) understandings of signification.[105] In administrative law, this work is delimited through the presence of structuring principles: a tendency that owes an often unstated debt to the work of Ronald Dworkin.[106] While his most famous text, *Law's Empire*, engages deeply with the proper scope of hermeneutical concern, there are answers to persistent questions of legal meaning throughout his anti-positivist

[104] I have made this claim at length elsewhere. Essentially, given the linguistic treatment of the phrase in the jurisprudence, it *does* seem that courts view the "entire context" to refer to everything potentially relevant to their preferred reading. Of course, the full context of any enactment is far more complex and voluminous than anyone could hope to process, including things like etymology and unconscious features of syntax and usage. See: Hooper, *supra* note 45 at 40.

[105] For a recent example of this breadth, see: Kamal Rahmani, Juergen Gnoth & Damien Mather, "A Psycholinguistic View of Tourists' Emotional Experiences" (2018) J Travel Research 1.

[106] Only three Supreme Court decisions cite his work, all from the 1980s, and none of these deal with administrative law.

corpus. This body of work evinces little concern with administrative law, but instead seems to speak directly to the core anxieties of its subject matter. For Dworkin, there are (or, at least, can be) principles that meaningfully constrain discretion and decision-making wherever it appears. One critic, building on this interpretive vision, finds "[a]dministrative law values [which] are immanent in the law."[107] In this way, legal hermeneutics do not depend on tyrannical discretion but rather upon the operation of internal commitments that coalesce into the best possible version of legality in any given dispute. This is, of course, largely a question of ethics, as no one can make a claim to best practices without a normative end in mind.

The contributions made by Dworkin on this question are highly influential and, to his credit, rarely shy away from their overtly normative character.[108] Beyond his well-known arguments for interpretation as a matter of "principle" and "integrity," a more general turn to principles—the idea that there is something *out there* that conduces to a legally sound answer—has been adopted by several contemporary scholars, perhaps most notably by David Dyzenhaus.[109] This approach is not without benefits. There is critical promise in his insistence that value judgments inhere to every interpretive act, but it also presumes linguistic stability in a manner that eschews alternative perspectives. Guidance

[107] Paul Daly, "Administrative Law: A Values-Based Approach" in John Bell et al, eds, *Public Law Adjudication in Common Law Systems: Process and Substance* (Oxford: Hart Publishing, 2016).

[108] Adopting a moral stance and insisting upon its validity is important throughout his work. For a recent example, see: Ronald Dworkin, *Justice for Hedgehogs* (Cambridge: Belknap Press, 2011) at 126: "An academic lawyer might say, for example, that though a particular interpretation … seems the best to him, he knows that others disagree, and he cannot say that there is only one correct interpretation or that those who disagree with him are simply mistaken. That bizarre form of words makes no sense at all: if in his opinion one interpretation is best, then, also in his opinion, contrary interpretations are inferior and he contradicts himself when he asserts that some of them are not."

[109] This is not to suggest conceptual sameness between their respective ideas of principled interpretation. Indeed, Dyzenhaus strives to differentiate between the faux-neutrality of Dworkin's "legal liberalism" and his own approach, which endorses a more proceduralist idea of legality—and one that is alive to the contingency of underlying interpretive principles. See, e.g., David Dyzenhaus, "Emergency, Liberalism, and the State" (2011) 9:1 Perspectives on Politics 69.

is available through principles only when there is agreement on what they mean. To suggest that a definitional question can be answered through the operation of, say, "integrity" is simply to defer (and probably complicate) the first-order interpretation. It is not this simple for Dworkin (although it often is for judges); he recognizes that principles allow for different readings and operational disagreements.[110] In an effort to contextualize sites of interpretation within the administrative state, however, it is useful to reorient the question, asking instead about the limits and authorship of these apparently structuring principles. This issue is taken up in earnest throughout Dworkin's work on productive skepticism. His inquiry, like mine in the foregoing section, is about what questions are properly asked when legal language is construed.

Our jurisprudence is rife with claims to interpretive truth—and, unlike Dworkin, these judges stop short of the Herculean thought experiment to justify themselves.[111] Indeed, the current approach to statutory interpretation is based on the idea that a definitional answer exists and can be found, concurrently, within and outside the text.[112] In his *A Matter of Principle*, Dworkin suggests that we must be wary of a "rule-book" conception of law—one where judges "decide hard cases by trying to discover what is 'really' in the rule book."[113] This sounds circular, but his point is that "background moral

[110] In his last book, he takes this argument on in arguably the grandest possible fashion: He argues that value is objective, but there are different experiences of it—one of which is through belief in god. See: Ronald Dworkin, *Religion Without God* (Cambridge: Harvard University Press, 2013).
[111] The most egregious instance in administrative law is found in *McLean v British Columbia (Securities Commission)*, 2013 SCC 67. Here, the Court had significant opportunity to embrace the more theoretically sophisticated idea that more than one interpretation can be valid: The dispute involved the interpretation of the home statute and, clearly, the standard of review was reasonableness. Even with this flexibility, the majority held that there only "a single reasonable interpretation" (para 38).
[112] I have written about this elsewhere; see: "Statutory Interpretation in the Administrative State" [unpublished]. My core argument is that statutory interpretation embodies a distinct tension, where decision-makers submit that a text means something in particular—that there is meaning embodied in the enactment—but it can only be found by looking outside the text, to things like legislative history and interpretive maxims.
[113] Ronald Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1985) at 13 [*Principle*].

rights" should inform a reading of the text over the abstraction of "what the legislation would have done" had it imagined the relevant situation.[114] Legal interpretation of this sort relies on the "language of objectivity": In a world replete with subjective tastes, there is still a space for "genuine" moral claims that search for the "right answer."[115] Again, this is more nuanced than a simple claim about one true meaning. We can search for an objective version of truth, but this remains distinct from aesthetic arguments. Dworkin does not presume that he (or, indeed, anyone) holds the only valid answer to any given dispute; rather, we "discover" truth when we argue in a productive way.[116] In other words, to become an internal skeptic is to "assume some general and abstract moral position," which informs a bounded interpretation of law.[117] Internal skepticism is "skepticism *within* the enterprise of interpretation, as a substantive position about the best interpretation."[118] It involves disagreement about meaning, but never about the possibility of meaning.

Conversely, the external skeptic is uneasy about truth statements—but, for Dworkin, pointlessly so. This person is incredulous toward metanarratives; she rejects "the view that interpretive meanings are 'out there' in the universe or that correct legal decisions are located in some 'transcendental reality.'"[119] While this seems like an eminently reasonable position, it becomes a matter of logical consistency. The insidious external skeptic tries to "have it both ways," attacking claims to moral truth and

[114] *Ibid* at 16.
[115] Ronald Dworkin, *Law's Empire* (Cambridge: Belknap Press, 1986) at 80-81 [*Empire*].
[116] *Ibid* at 86. It should be noted, too, that Dworkin does advance several truth statements and has, in fact, written at length about the "correct" views on e.g. the legal treatment of "life." See: Ronald Dworkin, *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom* (New York: Vintage, 1994).
[117] *Ibid* at 84.
[118] *Ibid* at 78. Emphasis is original.
[119] *Ibid* at 84.

suggesting that her global skepticism is, itself, true.[120] Perhaps most egregiously of all, this person "attacks our ordinary beliefs because he attributes to us absurd claims we do not make. *We* do not say … that interpretation is like physics … We only say, with different emphases, that *Hamlet* is about delay and slavery is wrong."[121] Crucially, these statements are the products of an internal skeptic's methodology: "The practices of interpretation and morality give these claims all the meaning they need or could have."[122] In other words, internal skepticism rejects a "positive moral claim" only when justified by the self-conscious adoption of an incompatible one.[123] This is an interpretive approach deeply amenable to the idea that texts, broadly construed, are all we have—but one that refuses to see this as a conceptual problem or a rationale for departing from the "language of objectivity."[124]

While Dworkin's language is unapologetically normative, it should not be read as blindly monistic.[125] His terms, broadly speaking, are 'ought' rather than 'is.' Indeed, the interpretive approach advanced in much of his oeuvre, which closely mirrors that found in our jurisprudence, is inspired at least partially by an awareness of more global uncertainty. The proliferation of structuring principles in legal hermeneutics can be read as a response to passive relativism. For Dworkin, external skeptics are useless in their

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[120] *Ibid.*
[121] *Ibid*. Emphasis in original.
[122] *Ibid*.
[123] Ronald Dworkin, "Objectivity and Truth: You'd Better Believe it" (1996) 25:2 Philosophy & Public Affairs 87 at 90 ["Objectivity"].
[124] The process of working on the legal chain novel, as Dworkin famously describes it, fits with the notion of 'nothing outside the text.' An interpreting judge can only write her own chapter in light of how she understands what precedes it; there is a sense of interiority despite the normative work of trying to make the individual chapter "the best it can be." The difference, though, is Dworkin's insistence that the chain novel provides a shared field of meaning that transcends the problems of embodied meaning—he imagines that 'wrong' interpretations will be felt as such if incompatible with the principles that inform the process of legal authorship. See: *Empire*, *supra* note 115 at 228-32.
[125] See, e.g., Jack Winter, "*Justice for Hedgehogs*, Conceptual Authenticity for Foxes: Ronald Dworkin on Value Conflicts" (2015) 22:4 Res Publica 463 at 477.

lines of inquiry: "They say, of any thesis about the best account of legal practice in some department of the law, 'That's your opinion,' which is true but to no point."[126] Instead, since he views "global internal skepticism" as worthless (e.g., the argument that morality can only ever be drawn from the mores of a given community) and only rhetorically distinct from external skepticism, Dworkin insists that we make moral claims and argue for their objective validity.[127] On this view, an attack on the stability of language is worthless since it distracts from the important work of "discovering" the best possible meaning for every legal text.[128]

It is hardly difficult to critique this position from a deconstructivist perspective. The threshold question of who gets to decide what something like 'best' means is likely to render an elite group, with minimal diversity, performing privileged legal heuristics.[129] Although there are presumptions of universality throughout Dworkin's work—his is a violent brand of hermeneutics, reducing otherness to a single best answer or approach—there is something undeniably instructive in his demanding interpretive theory. The insistence that everyone must take a position, that no amount of theoretical abstraction saves one from the fray of personal bias, remains important for interpretation in a world of contingent sign associations. My argument here is that Dworkin underestimates the value of "not-knowing" in relation to external skepticism, but that this does not merit a wholesale rejection of his analytical rigour. His voice remains important for understanding the practice of administrative interpretation and review, but it also has the

[126] *Empire*, *supra* note 115 at 85.
[127] *Ibid* at 84.
[128] *Ibid* at 86.
[129] His claims rest on presumed linguistic stability. If 'best' or 'integrity' cannot transcend the embodied difficulties of communication, then the interpretive enterprise owes much to force—i.e., the question of who defines 'integrity' becomes far more important than the abstraction of whether a given interpretation fits this term.

potential to mediate between the "language of objectivity" and efforts toward critical destabilization. Reading Dworkin against his claims to universality raises important questions about the predictive value of structuring principles, but also facilitates a grounded self-awareness in poststructuralist legal interpretation. The maligned external skeptic has important insights to contribute, so long as she lives up to Dworkin's challenge of articulating her necessarily politic moral judgments.

The brand of interpretive anti-positivism that has now pervaded judicial discourse and even mainstream scholarship is concisely summarized as "the requirement that any relevant legal materials be displayed in their best moral light."[130] One does not search long for this sentiment in statutory interpretation jurisprudence; in *Dunsmuir*, for instance, reviewing agency interpretation is a matter of construing language toward the simultaneous valorization of the 'rule of law' and legislative supremacy.[131]An external skeptic would, of course, question the possibility of this enterprise. The 'rule of law,' for instance, is hardly a standalone justification or analytical tool. What, though, is the benefit to rejecting this rhetorical device and positioning the claim as peremptory and structural? Dworkin would start by rendering it within his matrix of positive morality—something like, 'interpretation should be justified as much as possible through the articulation of individualized associations and preferences rather than amorphous principles'—but is still unlikely to find my argument persuasive. The usefulness of this global uncertainty is not, however, simply in the arguments it produces but rather in the openness it facilitates. More specifically, unsettling presumptions of linguistic stability is important if we are to ask, as clearly as possible, 'who speaks when meaning is in

[130] David Dyzenhaus, "The Very Idea of a Judge" (2010) 60:1 UTLJ 61 at 77.
[131] *Dunsmuir*, *supra* note 2 at para 27.

dispute?' When courts impose their definitional will, but act as though they are "discovering" something out there on the basis of, say, the 'rule of law,' they engage in active misdirection about where the authoritative subject is located.[132] If judges are to pen legally binding chapters in the Dworkinian chain novel of interpretations, then they should (a normative 'ought' statement that would have been familiar to Dworkin) sign their own names instead of evoking settled law through ethereal principles.

The benefit of external skepticism lies primarily in the questions it asks, rather than the answers it secures. Acknowledging that problems of communication preclude a singular "language of objectivity" is not analytically useless, though it does not facilitate easy interpretive answers.[133] When placed in conversation with the idea that one "can't be skeptical all the way down," since skepticism is built "on some positive moral position," it becomes even more important to remain distrustful of that which we hold as self-evident.[134] I agree with Dworkin that every version of interpretive skepticism is built on a variety of moral convictions—skepticism is inseparable from the person manifesting it—but submit that these, too, deserve a healthy measure of doubt. We construe language without the availability of a metalanguage and therefore cannot verify that our textual associations align. The complexities of language that give rise to disputes about a statutory provision remain fully in force when we devise an approach that is built on words—whether "integrity," "best practices," or anything else. Dworkin's disdain for

[132] This is important because, as research in another field has shown, the "hidden author" legitimizes their vested interests by lending their writing an air of impartial authority. See: Warren Parker, "Plagiarism, Public Relations and Press Releases: The Case of the Hidden Author" (2006) 20:1 Critical Arts 132.
[133] Returning to the example provided in *Law's Empire*, the external skeptic's challenge that truth claims are "just your opinion" can be useful without necessarily providing us with fodder for the next chapter of the chain novel. It is, to my mind, worth something to engage with epistemic problems rather than advancing our moral judgments as though universal by virtue of our sincere beliefs and internally directed processes.
[134] "Objectivity and Truth," *supra* note 123 at 94.

external skepticism is admirable to the extent it keeps him from the nihilism of total indeterminacy, but our interpretations better reflect the diversity appropriate to a democratic legal task when we engage with the conditions of "not-knowing."

Rather than acknowledging the play within the structure of internal skepticism, legal actors continue to advance "[p]rinciples concerning administrative decision-makers and the interpretation of legislation."[135] The result is what Dyzenhaus calls a "practice-oriented common law tradition."[136] Interpretation is shaped, on this reading, by a matrix of internal commitments that gives meaning and structure to our debates about law. Even the routine claim, whether on first instance or review, that the "express" or "ordinary" meaning renders something definite depends on "skepticism of the internal kind [that] must be earned by arguments of the same contested character as the arguments it opposes."[137] This provides a shared language of interpretive work, but lacks the external skeptic's disquiet about the meta-structure of the enterprise. On review, courts assess the reasonableness of a given definition, usually provided by a tribunal empowered by the same instrument. They use the same terminology—indeed, our "one principle or approach" of statutory interpretation demands it[138]—despite the absence of any clear definition of what 'context,' 'purpose,' or 'intent' might mean depending on one's perspective. Both administrative and judicial decision-makers practice internal skepticism by advancing a definition that best accords with their sense of the dispositive principles. External skepticism is unlikely to produce short answers to questions about language, but

[135] *Schmidt v Canada (Attorney General)*, 2018 FCA 55 at para 24.
[136] David Dyzenhaus, "The Legitimacy of Law: A Response to Critics" (1994) 7:1 Ratio Juris 80.
[137] *Empire*, *supra* note 115 at 86.
[138] *Rizzo*, *supra* note 2.

it does reorient the frames through which we view the practice and review of interpretation.

(d.) Interpretation as Power

Structuring principles provoke far less controversy than claims to an authoritative perspective. If legal actors engage transparently with the play of language, they must also become explicit about the power they hold. Someone must have the last definitional word in a system of textual laws, but this basic implication of linguistic play is obscured behind the rhetoric of legal interpretation. As a result, when we talk about statutory interpretation, we often ask the wrong questions. Inquiring into the 'correct' or even 'reasonable' definition of a given provision misses the larger point because "[t]he answers will depend on who asks, why they ask, where they ask, and even when they ask."[139] The impulse to constrain or impose order upon the interpretive task is an understandable one, but nothing stable underlies our legal texts. Rules and presumptions about interpretation simply defer the first-order question; if we cannot define the legislative provision, then what hope do we have of defining open-ended directives, that we should read, say, the "entire context" or in the "ordinary and grammatical sense." The process of construing legislation must always reduce down to the ascendancy of a single perspective. This is not fatal to aspirations of democratic decision-making, but reformative efforts cannot begin before we clarify the problem.

It is rhetorically uncomfortable to admit that a legal definition rests on nothing more than a subjective sign association. This is exacerbated by the radical implications of deconstruction in the courtroom: Language that reflects only itself does not facilitate a

[139] Allan Hutchinson, *Toward an Informal Account of Legal Interpretation* (Cambridge: Cambridge University Press, 2016) at 150.

doctrinal solution. While the necessity of legal interpretation and the means of moving forward will be discussed at length in the final chapter, it is important to remain mindful of the significant challenges that inhere to this critical project. If the words that constitute structuring principles and legislative provisions cannot signify beyond their speakers, then what makes *these* words any different? The short answer is nothing. Difficulties of communication cannot, however, result in nihilistic silence when linguistic meaning is imposed by legal actors everyday. A preliminary step toward understanding the current regime and advocating for progressive changes involves transparent engagement with the inherent meaninglessness of language. This fundamentally shifts the dispositive question from what words should mean to the sites of interpretation themselves. In the absence of a metalanguage and in a landscape of written texts, we must ask who gets to speak when meaning is in dispute.

III. Stories of Interpretation

In his *Philosophical Investigations*, Ludwig Wittgenstein suggests that every "picture of reality" is constructed with observable fragments.[140] When we reach conceptual bedrock, the whole is transformed but the elemental features are irreducible. He begins to see his chair as legs, a back, etc., but these constituent pieces remain static.[141] Although administrative law is, as a claimed doctrinal area, invisible in its broadest sense, its operation manifests in a similar way. Like the furniture in Wittgenstein's study, this form of regulation presents as the sum of its identifiable parts. The function of the administrative state—*viz*., mediating "relationships between the government and the governed"[142]—splinters into innumerable contact points that are said to cohere around foundational precepts like a "deep structure" in our constitution.[143] Both the case law and literature surrounding administrative governance would be virtually unrecognizable without familiar thematic anchors like deference and expertise. Indeed, as the foregoing chapter points out, this legal area is uniquely replete with structuring principles that claim to order the discretion that proliferates.[144] Dialogue about the bureaucratization of state power can productively begin with a simple question: What do we talk about when we talk about administrative law?

In one sense, this is an easy question to answer. While an academic database returns about ten thousand books and articles dealing with this subject in Canada alone

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[140] Ludwig Wittgenstein, *Philosophical Investigations*, translated by GEM Anscombe, PMS Hacker & Joachim Schulte (Oxford: Wiley-Blackwell, 2009) at 33.
[141] More precisely, he might begin to classify the back of his chair as, say, a series of wooden supports before moving on. The central idea is to identify the smallest observable segments.
[142] Halsbury's Laws of Canada, *Administrative Law*, *supra* note 8 at HAD-1.
[143] David Dyzenhaus, "The Deep Structure of Roncarelli v Duplessis" (2004) 53 UNBLJ 111.
[144] Mere "toleration" of discretion, as rendered in some of the early criticism, has been replaced with varied celebrations of its legitimacy and expediency. For the former perspective, see: J Grey, "Discretion in Administrative Law" (1979) 17:1 Osgoode Hall LJ 107.

(to say nothing of the primary sources: the tens of thousands of agency decisions and judicial reviews),[145] some generalizations can (and must) be made.[146] This is where a critical reading of the "picture of reality" becomes illuminating. The work performed on administrative law as a whole by discrete elements—whether they be institutional structures, like branches of government, or ideational ones, such as the ubiquitous notion of decisional respect—is easily discernible (though still highly complex). A more useful question concerns the act of naming constituent parts. Wittgenstein stops theorizing about his chair once he sees it as, e.g., legs and a backrest; this does not mean that nothing underlies those visible components. My interest here is not in subatomic particles but in the questions of where foundational concepts are claimed (and marked off) and, more importantly, what if anything exists beneath these surfaces. It is analytically useful to see administrative law as the product of its animating discourse(s), but the next step inquires into the irreducible nature of its central preoccupations. Deference to agencies, for instance, does not exist in an *a priori* relationship with bureaucracy. Instead, there is a dominant discourse that shapes our law and, necessarily, a series of omissions and elisions that justify the current workings of administrative power.[147]

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[145] My search terms on Novanet include "administrative law" and "Canada." There are currently 9,838 results, though with various journals dedicated to this particular area, the number will constantly increase. I am aware that a mere mention of Canadian administrative law is a low threshold—and, indeed, my sample includes titles like "Societal Benefits and Costs of International Investment Agreements"—but the salient point remains unchanged: Much more has been said than can be comprehensively read or synthesized.

[146] This is not a neutral exercise. Just as translators still grapple with "big questions" in even the oldest works, I will consciously or not impose my own value judgments on the texts that follow (see, e.g., Wyatt Mason, "The First Woman to Translate the 'Odyssey' Into English" (2 November 2017) New York Times online:
<www.nytimes.com/2017/11/02/magazine/the-first-woman-to-translate-the-odyssey-into-english.html>).
Given my foregoing thoughts on the impossibility of reflecting language through impersonal recognition—that transmission is always vexed—I do not think this raises an inherent problem. I do not presume to articulate a universal understanding of the administrative state; instead, I endeavour to justify my choices of focalization and omission.

[147] For a recent discussion on this broad issue, see: Arie Rosen, "Law as an Interactive Kind: On the Concept and the Nature of Law" (2018) 31:1 Can JL & Juris 125.

Since every limit must imply something beyond it, there is compelling reason to suspect latent content is left unremarked by the language of administrative law. When searching for a point of entry into the variegated realm of legal bureaucracy, there is an understandable impulse to reach for something distinct from the manifest work of boards, tribunals, and reviewing courts. Those who answer similarly ambitious queries—such as, 'what is language?'—typically claim "something other than" that which must be defined.[148] In much the same way, judges and critics define administrative law as, *inter alia*, a matrix of institutional relationships and contact points between citizens and government.[149] Throughout the case law and literature, there is an impulse to render the relevant legal area as "something other than" its mechanistic workings. The result is a discursive field that presents power within a nominally enclosed structure. It advances a set of signifiers that remain consistent even while their content is fiercely debated. As a rhetorical overlay in a world of unverifiable signs, it is not just unhelpful—the prevailing discourse of administrative law obscures the play(s) of power inherent to interpretive work. Controversy and difference are disappeared behind the privileged vernacular of legal reasoning.[150]

The relevant discourse presumes both linguistic stability and the universality of meaning. This allows empty signifiers like deference and reasonableness to arise without explanation or supplemental definitions. Structuring principles carry significant

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[148] See, e.g., William Rogers, *Interpreting Interpretation: Textual Hermeneutics as an Ascetic Discipline* (University Park: Pennsylvania State University Press, 1994) at 5. He discusses famous examples, such as where Heidegger works through the idea of language with an aphorism: "Language speaks."

[149] This often takes the shape of "delegation" in the orthodox literature; for instance, the idea that "it would be almost inconceivable to expect Parliament by itself to deal with all aspects of the laws it makes." See: David Jones & Anne de Villars, *Principles of Administrative Law*, 6th ed (Toronto: Carswell, 2014) at 91.

[150] Broadly speaking, administration is intimately related to violence, as it renders a set of normative options that constrain while categorizing lived events. See, e.g., Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, & the Limits of Law* (London: Duke University Press, 2015) at 73-74.

theoretical baggage while remaining malleable enough to justify any outcome. A word like deference, for instance, implies its own limits; without more, it means and predicts very little. Still, these ethereal concepts predominate, owing in no small part to the fact that "[a]dministrative law, as a discrete area of practice, scholarship, and legal education, was born in the throes of a legitimacy crisis."[151] Lofty ideals are advanced to explain away the problems of novel discretion and alternative sites of regulation. In result, the violence of interpretation—of imposing definitional sense with the threat of force—is obscured behind the rhetoric of dispassionate legal reasoning. Pulling at the thread of this linguistic empire reveals a set of malleable discursive conventions that, taken together, aim to justify the expressions of power in the administrative state. This chapter considers some of the loudest critical voices in the relevant scholarship to demonstrate the instability of our governing principles. I begin with the ubiquitous notion of deference as a stand-in for theses of legitimacy before unpacking the role of specialization and institutional difference in popular theories of agency interpretation. Finally, I provide a broadly deconstructive reading of the most pervasive concepts that are said to structure agency interpretation and review.

(a.) Deferring to Respect: On the Contested Legitimacy of Administrative Governance

In at least one sense, the question of what we talk about when we talk about administrative law has an obvious answer. We talk, sometimes almost exclusively, about judicial review.[152] Students and critics in this area can readily name the cases that give content to its doctrinal foundations—conversations and articles abound on, say, *CUPE*

[151] Richard Thomas, "Deprofessionalization and the Postmodern State of Administrative Law Pedagogy" (1992) 42 J Legal Educ 75 at 75 [Thomas].
[152] This is, and has been, the 'traditional understanding' of administrative law. See: DJ Galligan, "Judicial Review and the Textbook Writers" (1982) 2:2 Oxford J Leg Stud 257 at 258.

and *Wilson*—but generally fall silent about ground-level application.[153] This runs contrary to the official self-image of the administrative state; boards and tribunals form the core of this mode of governance while the judiciary waits at the margins for the transgression of some outer limit.[154] It appears strange, then, that arguments about the appropriate ordering of administration depends on the idea of deference from the bench without often giving sustained attention to the first-order question—to what, exactly, do we defer? The idea is perhaps best put in a recent text by Matthew Lewans: "This preoccupation generates a hollow conception of administrative law, because it is portrayed merely as a species of political power that emerges when the law runs out."[155] By visualizing administrative law as that which polices the borders and keeps us safe from bureaucrats and their paralegal discretion, we construct a discursive field centred on one half of the classic dichotomy between delegated parliamentary supremacy and the entrenched supervisory role of the judiciary. When we discuss administrative law, we are more often than not already declaring a crisis—the limits of agency power have been invoked and the judiciary prepares to step in.[156]

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[153] *CUPE v NB Liquor Corp*, [1979] 2 SCR 227; *Wilson v Atomic Energy of Canada Ltd*, 2016 SCC 29. I do not mean to suggest that nothing is written about the ways in which boards and tribunals operate in our modern epoch of bureaucracy. Subjects like labour, immigration, and human rights often deal explicitly with administrative decision-making. I simply suggest that a cursory glance at the "administrative law" section of a law library finds more titles concerned with judicial review than not.

[154] See, e.g., Peter Cane, "Judicial Review in the Age of Tribunals" in Christopher Forsyth et al, *Effective Judicial Review: A Cornerstone of Good Governance* (Oxford: Oxford University Pree, 2010) 120 at 136.

[155] Matthew Lewans, *Administrative Law and Judicial Deference* (Oxford: Hart Publishing, 2016) at 1.

[156] At a high level of generality, we have long found value in this over-determined brand of rhetoric, because readers, "like poets, rush 'into the middest,' *in medias res*, when they are born; they also die *in mediis rebus*, and to make sense of their span they need fictive concords with origins and ends" (Frank Kermode, *The Sense of an Ending: Studies in the Theory of Fiction with a New Epilogue* (Oxford: Oxford University Press, 2000) at 7). We are vulnerable to the 'crisis' frame because it locates us at an end, thus providing the appearance of order.

Accordingly, the relevant discourse begins with institutions already in conflict.[157] This is an unavoidable implication of self-enclosed governance: It requires both an administrative core and judicial supervision—and, more significantly, it leaves the question of scope unanswered.[158] As a result, the contours of bureaucratic decision-making (and its review) remain hotly contested in the relevant scholarship. While few critics suggest that either side of the institutional dichotomy should collapse entirely, barrels of ink have been spilt trying to locate the point at which the judiciary can validly begin speaking. This is hardly a new phenomenon (the cliché of citing AV Dicey's centuries-old incredulity is well-worn on this point), but it continues to take up considerable critical space.[159] It is, in short, a story about deference. Parliament can, of course, delegate, and it is assumed that the ensuing administrative decisions will survive *some* degree of judicial scrutiny or even disagreement; the question, though, is how much.[160] This technical sounding question carries the weight of significant theoretical and

[157] As Paul Daly concisely puts it, "No judicial review applicant has ever gone before a court, brandishing an administrative decision and smiling cheerfully as she says: 'This is an exemplar of fine administrative decision-making, please uphold the decision.'" See: "Good Decision-Makers, Bad Decision-Makers, and the Courts" (2015) Double Aspect online: <http://www.administrativelawmatters.com/blog/2015/04/23/good-decision-makers-bad-decision-makers-and-the-courts-perez-v-mortgage-bankers-association-575-u-s-_____-2015/>.

[158] This owes largely to the nature of the doctrinal foundations: "Judicial review is the tool that was devised to enable the superior courts to supervise administrative decision-makers, and intervene to ensure that they do not exceed their statutory powers" (see: Halsbury's, *supra* note 8 at HAD-5). As numerous critics have observed, there is significant malleability in the interpretation of statutory powers and their limits. See, e.g., Justice Joseph Robertson, "Judicial Deference to Administrative Tribunals: A Guide to 60 Years of Supreme Court Jurisprudence" (2014) 66:2 SCLR 1.

[159] It is worthwhile to consider, without becoming diverted, the political implications of prolific writing, whether individually or as a group. If "excessively long books are a form of undemocratic dominance that impoverishes the public discourse by reducing the airtime shared among others," then surely the same can be said for an academic sub-discipline with a far scarcer audience. It appears that we lose space for other issues when we prioritize the loudest voices articulating their ideas of legitimacy. See: Amy Hungerford, "On Not Reading" (11 September 2016) The Chronicle Review online: <www.chronicle.com/article/On-Refusing-to-Read/237717>.

[160] See, e.g., Robert Danay, "Quantifying *Dunsmuir*: An Empirical Analysis of the Supreme Court of Canada's Jurisprudence on Standard of Review" (2016) 66:4 U Toronto LJ 555, where a substantial discussion is provided on the amount of deference being afforded to agencies without any conceptual discussion of why or how.

normative baggage. Deference has become a shorthand for the more abstract issues surrounding the legitimacy of any adjudicator imposing their interpretation as the final word; it facilitates an image of cleanly delineated institutional authority without requiring the speaker to articulate, say, a theory of legitimacy or democratic constitutionalism from the ground up.[161] Simply put, deference functions as a malleable placeholder for the desired conceptual justification in any given case; it signifies in relation to lofty ideals about governmental organization without meaning anything in particular. Once again, it is instructive to consider what lies beneath the surface of this constituent element of administrative discourse.

Judicial review, whether nominally deferential or not, is inextricably linked to the practice of statutory interpretation.[162] Within the uniquely grammatical landscape of administrative law, the contours of discretion and powers of reversal depend (at least in theory) on the words of enactment.[163] Deference is therefore an innocuous sounding frame for debates about legitimate spheres of authority. This is, after all, a story about linguistic superiority despite unverifiable meaning. Behind the "variability project" of interpreting under the threat of review lies an inescapable approach/avoidance proposition—the paradoxical search for enforcement and restraint.[164] The act of judicial forbearance attracts the most sustained critical and judicial attention despite its acute lack of signifying power; indeed, this is an area with a direct nexus between the academy and

[161] This is perhaps most clearly demonstrated in the jurisprudence discussed in the following chapter, but see also: Ronald Cass, "Staying Agency Rules: Constitutional Structure and Rule of Law in the Administrative State" (2017) 69:2 Admin L Rev 225.
[162] See, e.g., Mark Mancini, "The Dark Art of Deference" (6 March 2018) Double Aspect online: <https://doubleaspect.blog/2018/03/06/the-dark-art-of-deference/>.
[163] This, at least, is how Derrida would understand the written nature of the empowering texts. See, e.g., Simon Wortham, *Derrida: Writing Events* (New York: Continuum, 2008) at 41.
[164] Dean Knight, "Locating Dunsmuir's Meta-structure Within Anglo-Commonwealth Traditions" (5 March 2018) Administrative Law Matters online: <www.administrativelawmatters.com/blog/2018/03/05/locating-dunsmuirs-meta-structure-within-anglo-commonwealth-traditions-dean-r-knight/>.

doctrinal development.[165] Although the term itself is an empty demarcation point between institutions claiming definitional content, deference is a convenient rhetorical device for advancing any given iteration of legitimate authority. It suggests liminality by invoking a protected core and an active supervisor who either defers or does not—but, in either case, acts on the basis of awareness and, on most accounts, privileged legal enlightenment.[166] As a result, the discourse surrounding the legitimacy of speaking to contested meaning masks the operation of institutional authority behind the play of 'deference' as a foundational structure.

1. Delimiting the "Culture of Justification"

Despite its relatively advanced age, an oft-cited article from David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy," has been proffered repeatedly by the Supreme Court as an ideal image of judicial review.[167] While the invocation of scholarly authority is not, in itself, especially uncommon, Dyzenhaus receives more than passing reference for legitimizing purposes: His phrase, "deference as respect," has entered the legal vernacular and is now cited routinely in trial and appellate courts alike.[168] In essence, its jurisprudential impact has been the nominal adoption of "a respectful attention to the reasons offered or which could be offered in support of a

[165] See, e.g., *Dunsmuir*, *supra* note 2 at para 48; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 65.
[166] For a critique of this reading of deference, see: Leonid Sirota, "The Paradox of Simplicity" (7 March 2018) Double Aspect online: <https://doubleaspect.blog/2018/03/07/the-paradox-of-simplicity/>.
[167] The earliest decision citing this piece is *Canada Safeway Ltd v Retail, Wholesale and Department Store Union, Local 454*, [1998] SCJ No 47, though a more sustained discussion was provided a year later in *Baker*, *supra* note 11. In total, there are 18 Supreme Court judgments that rely on Dyzenhaus's image of deference.
[168] LexisNexis returns 186 such citations.

decision."[169] His thesis of legitimacy—a "theory of democratic legal order"—relies on the well-known mandate that courts pay respectful attention to administrative reasoning.[170] Throughout this argument, and the numerous comments it inspires, is an abiding faith in the stability of language. Institutions can exist as "strands in a web of public justification" because that structure is communicable;[171] even if we disagree on the geographical validity of a given strand, there is a field of debate—an anti-positivist space for declaring best practices—where interpretations (and their review) can be openly advanced and defended. This is a pervasive aphorism in administrative discourse, and one that is intimately connected to both the process and rhetoric of construing language in this area of the law.

On this prevailing view of institutional legitimacy, whereby courts defer via respectful attention to agencies and their reasoning, Dyzenhaus makes an important distinction between respect and submission. The latter, he suggests, is the dictionary meaning of deference, but one that is incompatible with the "legal culture of justification" he imagines.[172] Courts enjoy considerable power and should, on the mainstream view, exercise restraint in their oversight of agency decision-making. This leads to a proposed threshold consideration: Legitimate deference is actualized where judges construe legislation "in terms of the reasons that best justify having [it] … More precisely, they have to take the tribunal's reasoning seriously because what they are primarily concerned to do is to find the reasons that best justify any decision, whether legislative,

[169] David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart, ed, *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) 279 at 286 cited in *Dunsmuir*, *supra* note 2 at para 48.
[170] *Ibid*.
[171] *Ibid* at 305.
[172] *Ibid* at 303.

administrative or judicial."[173] We have, then, a unifying theory of institutional claim spaces. When meaning is in dispute, courts will consider the best reasons for a given definition before contemplating reversal. For administrative decision-makers, their reasoning is taken "seriously" to the extent it corresponds with the best available justification. This is positioned as a move beyond the shadow of Dicey; respectful deference accepts that judges can never free themselves from the necessity of interpretation, whether framed as deference, substantive evaluation, or something else.[174] The idea here is to open space for alternative answers to how texts signify.

This approach produces the aforementioned "paradox of deference." [175] Incongruous answers to the definitional question can be simultaneously correct—an observation that flows inevitably from a recognition that "judges and administrators interpret … within divergent normative contexts," but one that remains difficult to reconcile with the orthodoxy of legal interpretation: *viz*., even where Parliament leaves ambiguities unresolved, there is a 'best' answer to the definitional question through the operation of heuristics like purposive reading and structuring principles. Arguments about the legitimate operation of the administrative state constantly return to this idea of singularity. Consider, for instance, the language used by Dyzenhaus (and subsequently the courts)—what is the "best" justification for a given definition? This is not an admission that language can mean wildly different things to different people based on their psycholinguistic constitution; rather, "deference as respect" carves out a space for a

[173] *Ibid*.
[174] *Ibid* at 280, 294.
[175] Mashaw, *supra* note 42.

decision-maker to speak unilaterally about how texts signify.[176] The pertinent question, then, is not whether a given interpretation is legitimate—that is virtually impossible to answer in the absence of a metalanguage—but rather one of authoritative positioning. Since the "best" justification for a statute or a decision depends entirely on one's perspective,[177] the "paradox of deference" is resolved when we reorient the debate by asking who gets to speak when meaning is in dispute.

This question has a familiar doctrinal basis. When we talk about legitimacy in terms of judicial review, the focus is generally on whether "power is justified as law."[178] Judges who adopt the prevailing "deference as respect" model "must examine the reasons that justify decisions to ensure that they can be law."[179] While there is an ongoing preoccupation with who appropriately speaks to statutory meaning—whether framed in terms of jurisdiction or the limits of respectful deference—there is a point at which the discourse falls silent. It is uncontroversial that legal interpretation is an exercise in justifying a particular reading, but there is a pervasive assumption that a stable perspective exists for the purposes of evaluation.[180] The very idea of finding the "best" justification depends on some "intrinsic qualities that give law its authority"—otherwise

[176] When judges uphold an administrator's interpretation based on a conventional rationale for deference (e.g., expertise), there is not generally much engagement with what the text could have meant. In *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47, for instance, the Court indicates that expertise hews to the task to interpreting the home statute and that "the presumption of reasonableness had not been rebutted." This is about the board being able to unilaterally impose their definitional sense—which seems only tangentially related to the idea that language can signify throughout a "range" of possible meanings [*Capilano*].

[177] There is no universal meaning of 'best' and, even if there was, it would be results-oriented, which would also produce considerable variance.

[178] Mark Walters, "Respecting Deference as Respect: Rights, Reasonableness and Proportionality in Canadian Administrative Law" (2015) Queen's University Faculty of Law Research Paper Series No 2015-002 at 20 ["Respecting Deference"].

[179] *Ibid*.

[180] See, e.g., Paul Daly, "The Struggle for Deference in Canada" in Hanna Wilberg & Mark Elliott, eds, *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Oxford: Hart Publishing, 2015).

the assessment depends on the goals and perspective of the final decision-maker.[181] Reference points proliferate; one critic argues, borrowing language from Supreme Court jurisprudence, that, so long as the tribunal's reasoning is "transparent, intelligible, and justifiable as well as demonstrably 'alert, alive, and sensitive" to the interests of the claimants," then the decision would seem to be on solid footing."[182] Unsettling the presumed stability of language therefore has profound implications for the law and discourse surrounding administrative interpretation.

When reduced to the bare signifiers that make up the argument, it appears relatively obvious that something like 'intelligible' is as value laden as simply trying to find the 'best' rationale. Although there is a growing awareness that administrative law is uniquely replete with the rhetoric of principled development,[183] this is not a new phenomenon. Deference became a matter of respect when Dyzenhaus sought to elaborate on a signifier that, on its own, means nothing. When respect, in turn, becomes a matter of listening to the best justification that might be offered, which must subsequently be elaborated into a culture that is later viewed as "a set of values,"[184] it becomes easy to see the exponential dispersion of language's empire. The question of who gets to decide what constitutes the best justification for a given textual association refocuses the discourse about legitimate decisional authority, but it also brings out the subjective nature of the conversation.[185] By looking at the oldest cliché in administrative scholarship in a new

[181] David Dyzenhaus, "Constitutionalism in an Old Key: Legality and Constituent Power" (2012) 1:2 Global Constitutionalism 229 at 233.
[182] Matthew Lewans, "Administrative Law, Judicial Deference, and the *Charter*" (2014) 23:2 Constitutional Forum constitutionnel 19 at 29.
[183] See, e.g., Paul Daly, "The Language of Administrative Law" (2016) 94 Can Bar Rev 519 [Daly, "Language"].
[184] "Respecting Deference," *supra* note 178 at 14.
[185] See, e.g., Duncan Kennedy, "Freedom and Constraint in Adjudication: A Critical Phenomenology" (1986) 36:4 JL & Educ 518.

light, the ways in which we use the same words to talk past each other become clear, leaving a single question: Who will impose their embodied perception of how language signifies?

2. The Freudian Dream of Interiority; Or, Dicey's Mom

Albert Venn Dicey might have benefited from some form of therapy. Certainly, his feelings about women[186] and, to a lesser degree, unions[187] are worthy candidates for psychological exploration. Administrative law scholarship has, however, largely ignored his troubling views. This is probably due largely to the lack of incentive for orthodox theorists to redeem or contextualize the figure of Dicey, who has figured mostly as a caricature in the discourse surrounding administrative legitimacy. Indeed, such conservative views fit nicely with the general treatment of his famous *Introduction to the Study of the Law of the Constitution*.[188] For the purposes of passing reference in an administrative law textbook, it is enough to observe that, for him, "'courts' closely associated with the executive … did not provide citizens with adequate protection against the executive, for which a truly 'independent' judiciary was necessary."[189] This provides an instructive contrast and advances a story of progress: We were previously hostile toward administrative governance, but now we exist in an epoch more tolerant of institutional difference. His views are those of an unenlightened past, serving as a historical warning about undue rigidity regarding the conceptual status of the executive and adjudicative impartiality.

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[186] See, e.g., AV Dicey, "Letters to a Friend on Votes for Women" (19 June 1909) online: <http://archive.spectator.co.uk/article/19th-june-1909/23/professor-diceys-letters-on-woman-suffrage>.
[187] Mark Walters, "Dicey on Writing the *Law of the Constitution*" (2012) 32:1 Oxford J Leg Stud 21 at 25.
[188] AV Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (London: MacMillan & Co, 1960) [Dicey].
[189] Peter Cane, *Administrative Law*, 5th ed (Oxford: Oxford University Press, 2011) at 44.

Notably, the language in Dicey is essentially the same as that of his detractors. While increasingly sympathetic readings of his work have appeared in the past several years,[190] both sides of the argument share a presumption that their words signify interpersonally—that Parliamentary supremacy, for instance, can be discussed without prior definition. By positioning the constituent elements of administrative law as though they have universal content, proponents of a given theory of legitimacy can interrupt critical scrutiny. It remains important to take an atomistic look at what we talk about when we talk about administrative law—or, more precisely, where we stop talking and presume the stability of our concepts. Turning back to the idea of psychoanalytic benefits, a subversion of the Diceyan trope, whereby his famous *Law of the Constitution* is the subject of a Freudian reading, brings out the persistent interiority that characterizes the relevant literature.[191] The goal here is to move from an isolated assessment of his constituent terms to uncover "the internal relations between the thoughts which linked them together."[192] This exemplifies the relational character of our reasoning about administrative law and legitimacy. The popular assumption that we mean the same things when we use the same signifiers can be shown to be false if consistent terms can justify inconsistent conclusions. Reviving the caricature of Dicey by placing him on Freud's couch is a useful case study in how the elements of administrative discourse signify only in relation to each other. First, however, it is important to more carefully define my understanding of interiority as it relates to the interpreting subject.

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[190] Many of which will be discussed below, but see generally: Rivka Weill, "Dicey was not Diceyan" (2003) 62:2 Cambridge LJ 474.

[191] For the purposes of preliminary discussion, this refers specifically to "a conception of reality interior to the subject." See: David Rodick, "The Problem of Interiority in Freud and Lacan" (2012) 3:1 J Arts & Humanities 151 at 151.

[192] Sigmund Freud, *Jokes and Their Relation to the Unconscious* in Ivan Smith, ed, *The Complete Works of Sigmund Freud* online: <www.valas.fr/IMG/pdf/Freud_Complete_Works.pdf> 1613 at 1748.

(i.) Mirrors & Reflections: Embodied Discourse on the Administrative State

There is an internal logic in theories of administrative legitimacy. In part, this is because concepts are defined by their limits and, so, there can be no proper scope of judicial review without an image of illegitimate supremacy.[193] Much like other forms of reasoning, engaging with statutory interpretation requires us to a build a theoretical foundation.[194] Ideas of authorship and textuality work together, consciously or not, to produce a method for understanding legislation. Administrative law is a unique space for this process, since it embodies (at least nominally) a range of theoretical commitments. This is an area of the law with a series of structuring principles relevant to interpretation and its review: Parliamentary intent, judicial deference, and statutory familiarity, among many others, are the materials we use to understand bureaucratic governance. While these concepts are not stable or exempt from the problems of communication, they do function in relation to each other within individual arguments—they "take [their] colour from context."[195] Consider, for instance, the ubiquitous fiction of Parliamentary intent. This can signify in relation to deference and expertise in a variety of ways: It might justify a hands-off approach from the bench on matters that have been delegated, or it could facilitate a move away from the words of delegation if a contrary motive can be asserted.[196] In the course of arguing about administrative interpretation, we often presume

[193] See, e.g., Bart Verheij, "Dialectical Argumentation with Argumentation Schemes: An Approach to Legal Logic" (2003) 11 Artificial Intelligence & L 167.
[194] See, e.g., Elke Weber & Eric Johnson, "Query Theory: Knowing What We Want by Arguing with Ourselves" (2011) 34:2 Behavioral and Brain Sciences 91.
[195] *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59 [*Khosa*].
[196] This is particularly well-stated in the American context in Thomas Waldron & Neil Berman, "Principled Principles of Statutory Interpretation: A Judicial Perspective After Two Years of BAPCPA" (2007) 81:3 Am Bankruptcy LJ 195 at 203: "Perhaps ironically, when one considers the assumptions built into the precepts of our current methods of statutory interpretation, such a methodology was not considered 'legislating from the bench' or 'judicial activism,' but instead represented the same goal that exists today: appropriately interpreting congressional intent."

that we mean the same thing when we use the same words, but the most popular structuring principles can mean profoundly different things depending on one's perspective.

While this undoubtedly complicates any theorizing about administrative interpretation and review, it also clarifies the extent to which we reside within a field of language when we advance a preferred iteration of institutional authority. Given the lack of universality embodied in linguistic signs, it is perhaps unsurprising that statutory interpretation must eventually lead to a consideration of individual decision-makers. However good their intentions may be (and however one might define that word), there is very little in a legislative instrument to constrain its interpretation. This also reflects the status of macrocosmic structuring principles. We can supplement a provision with additional concepts, but those signifiers will be no less vulnerable to the indeterminacy of language. The question of who gets to speak when meaning is in dispute becomes virtually dispositive on this reading, but it is also complicated by the layers of potential forbearance or review in administrative interpretation, along with the potential impacts of the legislative instruments themselves.

Even if interpretive work is wholly individualized, the words and formation of the statute still form the stimuli that give rise to the analysis. Readers of Canadian law will also note a degree of sameness in the relevant decisions. Reference points like "ordinary meaning" and citations of administrative expertise recur throughout the literature and jurisprudence; whether or not this is empty rhetoric, there are clearly institutional factors at play in interpretive work. My interest in who gets to decide as a central question in statutory interpretation includes the extent to which the answer is informed by how the

speaking subject is positioned within the administrative state. It is therefore helpful to begin by clearing the conceptual space of the rhetoric that serves only to mask the play(s) of power in agency interpretation and review. Freudian theory is helpful here as it insists on internal relations that are shaped by social forces while remaining individualized/unconscious.[197] Legal interpretation is presented as the outcome of governmental ordering—sites of interpretation are carved out by the state and resonate beyond the decision-maker. These communal forces cannot, however, provide stability to the language which must be interpreted. When we account for the interpreting subject within the law of interpretation—here, by way of oneiric detour—the extent to which language hides the operation of power becomes manifest.

(ii.) Dream-Work

In his speculative account of Freud's law career, Charles Yablon notes an enduring preoccupation with "the relationship between individuals and societal institutions."[198] The governed subject experiences a mediated reality, one that represses her desires while presenting a neutral slate of decisional authority.[199] This is particularly apposite in discussions about the administrative state, given its manifest concern with citizen/government interactions.[200] While there is significant critical potential in the recognition "that society has an unconscious and formative effect on individual experience and perception of oneself and others," it provides a uniquely instructive lens

[197] For a useful gloss on his prolific writing, see: Robin Lydenberg, "Freud' Uncanny Narratives" (1997) 112:5 PMLA 1072.
[198] Charles Yablon, "Freud as Law Professor: An Alternative History" (1995) 16:4 Cardozo L Rev 1439 at 1440.
[199] For perhaps his most sustained discussion on this point, see: Sigmund Freud, *Civilization & Its Discontents*, translated by David McLintock (New York: Penguin Books, 2004).
[200] See, e.g., Jerry Mashaw, "Explaining Administrative Process: Normative, Positive, and Critical Stories of Legal Development" in Peter Schuck, ed, *Foundations of Administrative Law*, 2nd ed (New York: Foundation Press 2004) 84.

for considering the discourse of interpretive legitimacy.[201] There is nothing preordained about the concepts advanced as foundational in this mode of regulation; rather, ideas like deference and statutory familiarity obscure the domination inherent in every authoritative claim to definitional truth. The signifiers that make up the field of legal interpretation work in relation to each other but without a fixed point of departure. Within the interpreting subject, material is "largely divested of its logical relations ... while at the same time displacements of intensity among its elements necessarily bring about a psychical transvaluation of this material. ... [I]t is a matter of displacement along a chain of associations."[202] This is brought into relief when we consider the relational chain in the *Law of the Constitution*.

While Dicey's faith in the judiciary has not aged well, his distrust of the administrative state is still understandable when one considers his terms. Indeed, few would argue that his description of *droit administratif* sounds like a promising approach for governmental organization. Early in his famous discussion on the subject, Dicey grounds his opposition in the special treatment of state officials, "or, as we say in England, of the Crown, who, whilst acting in pursuance of official orders … are guilty of acts which are wrongful or unlawful."[203] The obvious counterargument is that this rendering of bureaucracy betrays a conservatism of thought. Dicey is, after all, fairly rigid in his denunciation of "this protection" despite its nonessential character.[204] There is, however, a sense of linguistic care throughout the *Law of the Constitution*, and one that

[201] David Caudill, "Freud and Critical Legal Studies: Contours of a Radical Socio-Legal Psychoanalysis" (1991) 66 Indiana LJ 651 at 662.
[202] Sigmund Freud, *The Interpretation of Dreams*, translated by Joyce Crick (Oxford: Oxford World Classics, 2008) at 255 [*Interpretation of Dreams*].
[203] Dicey, *supra* note 188 at 329.
[204] *Ibid*. It is easy to imagine a situation where the efficiency of tribunal regulation is lauded so long as those officials receive no special license to transgress the law.

gestures toward a conceptual overview: "This absence from our language of any satisfactory equivalent for the expression *droit administratif* is significant; the want of a name arises at bottom from our non-recognition of the thing itself."[205] Throughout his argument, there are claims to democratic expectations (that "Englishmen" reject administrative governance) and warnings about populist calls to abrogate judicial checks on state power.[206] Both arguments would likely receive general assent today so long as the relevant terms remained consistent. At a high level of generality, we see Dicey rally against the administrative state, but his discrete moves are defensible for non-Napoleonic theorists. Once again, our assumed differences reduce down to questions about how we define our constituent terms—or, ultimately, to questions of language.

Dicey's argument is strong because his positions are obvious. He rejects special treatment for state actors, blatant transgressions of the popular will, and authoritarian limits on the availability of judicial review. In the process, of course, he rejects what he understands as *droit administratif*, which tells us something important about the malleability of constituent elements. Here, it becomes useful to render what Freud called the "[i]nternal, organic somatic stimulus" of administrative aversion in the *Law of the Constitution*.[207] The fundamental concern is one of unchecked discretion whereby "judges are the *enemies* of the servants of the State."[208] There is an underlying theory of legitimacy here: One can disagree with Dicey's understanding of the judicial function, but if we take his argument on its own terms, it largely makes sense. If, as he suggests, "[t]he administrative law of to-day has been built up on the foundations laid by

[205] *Ibid* at 330.
[206] *Ibid* at 332, 340.
[207] *Interpretation of Dreams*, *supra* note 202 at 30.
[208] Dicey, *supra* note 188 at 342. Emphasis in original.

Napoleon"—and, further, there is a locus of proved restraint and impartiality on the bench—then of course the addition of bureaucratic regulation is undesirable.[209] This is not to suggest a passive form of relativism that accepts any argument based on counterfactual content (like the transcendent wisdom of the judiciary posited in Dicey's work) but rather a means of understanding the play in the constituent structures of administrative law.

I have no particular interest in presenting a sympathetic reading of the *Law of the Constitution*. Instead, as Jacques Lacan describes the Freudian project, I hope to bring out "the analytic situation, which, within the four walls that limit its field, can do very well without people knowing which way is north."[210] In other words, signs are interpreted according to the inner logic of the interpreting subject. Dicey presents a matrix of familiar structuring principles that presents as outdated but signifies persuasively according to its internal logic. There is nothing stable within the signifiers he advances, but each concept takes meaning from its surroundings.[211] When he draws on, say, Parliamentary supremacy, it stands as a marker of democratic representation; otherwise, "they would cease to be a House of Commons."[212] This, in turn, informs his understanding of the separation of powers. Since the legislature is the institutional placeholder for English subjects, "[t]here is no law which Parliament cannot change."[213] Understandably, if these

[209] *Ibid* at 350.
[210] Jacques Lacan, "The Freudian Thing, or the Meaning of the Return to Freud in Psychoanalysis" in *Écrits: The First Complete Edition in English*, translated by Bruce Fink (New York: Norton, 2006) 334 at 339.
[211] This is a familiar sentiment for readers of administrative law. See: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59.
[212] Dicey, *supra* note 188 at 85 citing Edmund Burke, *The Works of Edmund Burke*, vol ii (1808) at 287-88. Again, the emphasis on terminology should be noted.
[213] *Ibid* at 88.

laws are to be written, we must cede interpretive authority to someone, and his suggestion is the judiciary.[214]

The mutually informing nature of his signifiers reaches an apex where he concludes on the administrative state and the 'rule of law,' suggesting that the "executive needs therefore the right to exercise discretionary powers, but the Court must prevent, and will prevent where personal liberty is concerned, the exercise by the government of any sort of discretionary power."[215] While this reads as more of the judicial supremacy typically attributed to him, Dicey is rehearsing the same push/pull of self-enclosed governance that continues to provoke discussion and debate. For him, the fulcrum is "ordinary law" and anything beyond its contours should be disallowed.[216] This, of course, is an empty signifier, but no more so than "deference as respect." The point is that administrative law discourse often relies heavily on interlocking metanarratives. In the *Law of the Constitution*, we find judges who have access to privileged heuristics and governmental actors whose only role is to reflect that which is "common"—the democratic will of the people.[217] The result is an argument for a conservative distribution of interpretive authority. Conversely, arguments that find value in tribunal specialization draw the lines of permissible discretion to favour (what they understand as) deference. When structuring principles are advanced for a theory of interpretive legitimacy, they rely on the words around them in a manner roughly analogous to Freudian dream logic.

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[214] *Ibid* at 144.
[215] *Ibid* at 412.
[216] *Ibid* at 401: "Yet to an Englishman imbued with an unshakable faith in the importance of maintaining the supremacy of the ordinary law of the land enforced by the ordinary law courts, the *droit administratif* of modern France is open to some grave criticism."
[217] For Dicey, so long as each institutional actor performs her job according to its own role and criteria, there is no conflict between different branches of government.

Interiority is both a difficult and important concept for parsing the relevant literature. While we do not have privileged access to anyone's cognitive processes, it remains instructive to consider the metanarratives surrounding interpretation within their internal matrices. On this point, it is useful to recall Theodor Adorno's use of Hegelian limits, so "that whenever we identify a limit to our knowledge, we already place ourselves beyond that limit just by identifying the limiting factor and so bringing it within our compass."[218] As a result, our signifiers are in constant internal flux and "whenever I grasp an object as non-identical with the concept(s) under which I have approached it, I become compelled to revise my concept(s) so as to try again to know, to classify, the elusive object."[219] This approach is one of "constellations" between that which we understand and that which is unfamiliar—a process in a constant state of revision. As we begin to engage with the linguistic foundations of administrative governance, this form of discovery is essential for identifying the presumed areas of stability and reading against them.[220] Interpretive authority is presented as a structured exercise that transcends individual actors and, as a result, the power of imposing definitional sense is never held to account. When we talk about administrative law, we too often talk as though its constituent parts signify sensibly in isolation. While presenting the internal logic of a given argument does not transcend the problems of communication, it provides a preliminary step for engaging with the epistemic limits of the interpretive project. By

[218] Alison Stone, "Adorno, Hegel, and Dialectic" (2014) 22 British J History Phil 1118 at 1135.
[219] *Ibid*.
[220] The idea of reading *against* texts and conventions is a hallmark of postmodern incredulity, involving considerations of what is presumed as natural and what is thereby disappeared. See, e.g., Alastair West, "Reading Against the Text – Developing Critical Literacy" (1994) 1 Changing English: Studies in Culture & Education 82.

emphasizing the interiority of the relevant discourse, we foreground the central place of the speaking subject when meaning is in dispute.

(b.) Beyond the Courtroom: Readers, Texts, & Institutional Difference

Stories about agency interpretation insist on institutional difference. The administrative state is not simply about providing a more efficient courtroom experience; rather, the diverse contexts of specialized regulation promise something more. Both judges and theorists rationalize deference, at least in part, on the basis of things like statutory familiarity and greater proximity to those affected by governmental action.[221] It is said, then, that these decision-makers stand in a better position to construe the language that enables them. When we talk about administrative law, it often generates an intuitively persuasive argument in favour of agency interpretation. Unlike generalist judges, agency decision-makers spend their entire professional lives focusing on a single legislative scheme. They deal with the words themselves in great depth, but also with the people who seek access to the benefits conferred.[222] While agencies have, on average, less formal legal training than traditional adjudicators, they have a far smaller scope of concern. The relative weight that should be afforded to these institutional factors is, however, a matter of some disagreement.[223] As critics argue over the bases for agency

[221] As the *Dunsmuir* majority puts it, "deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system" (para 49).

[222] See, e.g., Andrew Green, "Can There Be Too Much Context in Administrative Law: Setting the Standard of Review in Canadian Administrative Law" (2014) 47 UBC L Rev 443 at 456: "Part of the answer to reducing error costs is to provide the power to make the decision to the party with the better information."

[223] In Banks Miller & Brett Curry, "Experts Judging Experts: The Role of Expertise in Reviewing Agency Decision Making" (2013) 38:1 L & Soc Inquiry 55, for instance, the authors note that greater familiarity with a complex legal area potentially produces more ideologically motivated decision-making. Generalist judges are, on this reading, less likely to manipulate underlying rules for a personally preferred outcome.

interpretation and its limits, they begin to articulate an understanding of language—one that tells us how provisions should be construed in the administrative state.

There is broad assent in both law and scholarship that tribunals will often be owed respect when they interpret their home statute, but different people draw the lines of institutional competence in different ways. Two broad considerations predominate. On one hand, when meaning is in dispute, it is defensible to let agencies speak based on their statutory familiarity; on the other, if we give content to the law of statutory interpretation (and, unfortunately, most critics still do), judges are better positioned to distil, say, 'legislative intent' or 'ordinary grammar.'[224] I have argued elsewhere that our legal tools for construing language are vacuous rhetoric, incapable of structuring the interpretive process, and that tribunals are, if anything, more inclined to turn to legal maxims in an effort to define a provision.[225] While the disconnect between rhetoric and action is instructive, my interest here is in the theoretical bases for interpretive authority. Whenever someone argues about the appropriate institutional locus of linguistic meaning, they articulate a theory of interpretation. If things like specialization and proximity militate in favour of agency hermeneutics, then we accept a connection between repetitious exposure to words and validly defining them. In other words, asking what underlies our claims to expertise reframes the question: When meaning is in dispute, *why* should one institution speak over another—and, more precisely, what does this say about our theories of linguistic meaning?

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[224] These justifications are not self-contained or mutually exclusive. While indicia of interpretive competence will be discussed at length below, it is sufficient here to draw the simple line usually advanced in the scholarship: Agencies are deeply familiar with both the words and impacts of their enabling regimes, and this allows them to be more broadly purposive in construing language. Judges are, however, better equipped to employ so-called legal reasoning to give legal content to statutory instruments. For an interesting discussion of these ideas, albeit in the American context, see: Christopher Walker, "Legislating in the Shadows" (2017) 165:6 U Penn L Rev 1377.

[225] *Supra* note 40.

The administrative state disperses the ability to define legislation, but does so based on under-examined premises about adjudicative positioning. Institutional difference is, at once, a promising and incoherent answer to who should interpret with the force of law. While the "range" of legitimate answers hints toward progress—an epoch willing to engage with the individualized aspects of construing language—the persistent rhetoric of definitional accuracy is largely incompatible with contemporary understandings of language.[226] The idea that sustained exposure to a statutory instrument leads to better interpretations seems compelling, but we rarely pause to ask what lies beneath these arguments. Administrative discourse presumes the possibility of interpretive expertise, but rarely make the connection between specialization and linguistic meaning explicit.[227] My argument, that this ideal of the learned tribunal obscures the singularity of interpretation, is divided into three parts. First, I consider the possibility of hermeneutical expertise in relation to the stated goals of statutory interpretation. Secondly, I place my conclusion—that no one can become an expert in how language signifies—in conversation with the prevailing images of institutional difference. This subset of the literature is broadly deferential to agency hermeneutics; however, accepting the official image of contingent, specialized authority makes it far easier for judicial review to impose a preferred definition. The limits of interpretive expertise are easily manipulated. Finally, I demonstrate how the presumed stability of

[226] The language used is not always as direct as my summation, but the idea remains the same. See, e.g., Noga Morag-Levine, "Agency Statutory Interpretation and the Rule of Common Law" (2009) Mich St L Rev 51, where the author notes historical divergences that explain different takes on legitimate interpretive authority. When critics are concerned about interpretation that deviates from purely legal/textual subject matter, they claim that results-oriented hermeneutics are illegitimate. A necessary implication is that meaning can be found objectively in the statute by way of legal reasoning.

[227] The more explicitly normative claims to specialization and institutional competence will be discussed below, but for an empirical assessment of its impact in one Canadian field, see: Sean Rehaag, "Troubling Patterns in Canadian Refugee Adjudication" (2007) 39:2 Ottawa L Rev 335.

language masks the ideological components of construing language in the administrative state.

1. Hermeneutical Expertise: The Theory & Practice of Defensible Interpretation

An understanding of institutional competence as a rationale for authority requires at least a provisional theory of interpretive legitimacy. The possibility of hermeneutical expertise depends on whether one is concerned with words or outcomes. This is a tenuous (and hardly watertight) distinction, but one that provides some preliminary scaffolding for the point at issue.[228] Consider, for instance, the claims made in an amicus brief by a group of American linguists:

> We are a group of scientific experts authorized by our professional discipline. We do not take a position on the effect of the Court's decision on the parties before it. … However, we care deeply about adverbial syntax, and about what other courts have said and what this Court may say about syntax in the course of reaching and explaining its decision here. As experts, we seek to address the theory of interpreting statutory language that the Court will employ and articulate in this case. On arguments concerning what knowingly means here, insofar as they are about ordinary language and syntax, we can speak better than anyone else.[229]

While the absence of legal linguists in our courts reflects the success this argument enjoyed, their overarching claim is instructively transparent. It is, in short, one of privileged knowledge at the level of language. Despite my conviction that linguists would improve the law of statutory interpretation (insofar as the "modern principle" would be mercifully put to rest),[230] I disagree with the possibility of "speak[ing] better" on

[228] It is, moreover, an officially recognized distinction. See, e.g., *R v ADH*, 2013 SCC 28 at paras 23-29, where purposive interpretation is described as a series of legal presumptions. There is analytical work to be done mediating between the presumptively anticipated consequences of the enactment and the so-called plain meaning of the words.

[229] Marc Poirier, "On Whose Authority?: Linguists' Claim of Expertise to Interpret Statutes" (1995) 73:5 Washington UL Rev 1025 at 1026.

[230] The amorphous recourse to "context" would be one casualty. In a burgeoning recognition of the interpretive function in language, theorists are becoming alive to a more conceptually rigorous idea of relevant context—one that looks to language acquisition in terms of usage, which leads back into roles and

"ordinary language and syntax." Whether or not one is conversant with, say, the adverbial compatibility with clitic dislocation, the speaking subject does not, by virtue of her linguistic expertise, enter into a metadiscursive sphere of universality.[231] A systematized study of common grammar does not provide hierarchical knowledge about how textual associations are forged for individual readers.

All of this begs for a definition of interpretation's goal. According to Ruth Sullivan, "[t]o determine the legally correct meaning of a legislative text, the courts begin by trying to establish its ordinary meaning."[232] Thereafter, judges consider legislative intent and ensure the meaning is "plausible."[233] The vacuity of these directives necessitates a further inquiry: What is ordinary meaning and how does it relate to what Parliament meant? In practice, it involves constant recourse to the will of the legislature, as evidenced by the seemingly determinative impact of the context of the enactment, broadly defined.[234] This reading has the further advantage of reflecting a traditional image of the separation of powers—something judges seem to prefer, given their explicit distinction between finding and constructing meaning.[235] What, then, is the advantage of linguistic expertise? The answer depends, at least initially, on how one conceptualizes the authorship of legislation.

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stereotypes that are culturally inscribed. Similarly, academic scrutiny would collapse the as-yet unexplained distinction between the "ordinary and grammatical sense." See, e.g., Nikolay Boldyrev & Olga Dubrovskaya, "Sociocultural Commitment of Cognitive Linguistics via Dimensions of Context" (2016) 69:1 Ilha do Desterro 173.

[231] Liliane Haegeman, "The Internal Syntax of Adverbial Clauses" (2010) 120:3 Lingua 628 at 642.

[232] Halsbury's Laws of Canada, *Legislation* at HLG-57. It is worth noting that Sullivan writes descriptively here—not, in other words, in favour of the current regime. Her terms are 'is' rather than 'ought.'

[233] *Ibid* at HLG-75.

[234] This has particular resonance in administrative law because "the rule of law is maintained because the courts have the last word on jurisdiction, and legislative supremacy is assured because determining the applicable standard of review is accomplished by establishing legislative intent" (*Dunsmuir*, *supra* note 2 at para 30).

[235] See, e.g., *Canada Trustco Mortgage Co v Canada*, 2005 SCC 54 at para 47.

For most theorists and even judges, legislative intent is a self-conscious fiction. It is an easy target for critical incredulity, not least because of the outdated nature of interpreting in light of an author's beliefs or experiences.[236] Still, statutes are distinct from belletristic literature, however lofty their preambular clauses become; as such, an abiding interest in legislative authorship is potentially defensible. If, as legal actors often claim, statutory interpretation is about giving effect to the wishes of Parliament, consonant with the "ordinary" sense of the words used, there must be some implicit notion of the authorial subject who intends something. That locus of intentionality might ultimately be the provision itself; after all, the text is the subject of democratic debate and eventual assent, which is necessarily communal. It is almost trite to observe that different Members will have different motives for—and even understandings of—the legislation for which they vote.[237] Other possibilities include a search for what the drafters intended or an explicit delegation to adjudicators to impose their sense of an 'ordinary' meaning.

These disparate alternatives are united by their incompatibility with linguistic expertise. If the aim of interpretation is to distil *something* from language—whether the 'ordinary' meaning, what somebody intended, or virtually anything else residing within the text—then these experts must explain their ability to impose a uniquely valid association between texts and competing definitions. More starkly, what does linguistic expertise add to the search for interpretive accuracy, as defined by the goals of construing provisions in a democratic legal order? The answer, I think, is not much. If we imagine

[236] In some ways, this status is reflected in the dwindling articles and monographs that seriously try to link authorial experience with a uniquely correct way of reading a text. Many have, however, pointed out the insidious ideological aspects of "exceptionalism" in the literary canon. See, e.g., Dascăl Reghina, "'Dancing through the Minefield': Canon Reinstatement Strategies for Women Authors" (2015) 14:1 Gender Studies 48.

[237] This is reflected in a variety of ways in Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999), particularly at 40-41 in his deliberation/enactment distinction.

the counterfactual presence of linguists in the courtroom, using their privileged knowledge about general usage and syntax to answer questions of interpretation, we run into serious problems concerning the nature of legislation.[238] At the highest level of abstraction, it is important to recall the deconstructivist critique here: We cannot know how texts signify to other people, so even if we understand common sign patterns, this tells us nothing about the internal associations forged by each subject. We can, in short, use the same words to talk past each other. Closer to the ground, those who advance institutional positioning as a means of better defining the home statute must articulate an endgame. A linguistic expert might have better insights into the function of grammar—how certain words and phrases might indicate intent—but decoding the drafters' rhetorical goals does not provide a means of construing something as communal as legislation. If it takes special knowledge about grammar to determine the intent of the author, then that cannot be presumed as the content for which individual Members of Parliament voted. Linguistic expertise has a variety of uses, but providing a privileged means of reading legislation is not one of them.

Administrators are not trained as linguists. The foregoing critique applies even more forcefully to their deemed expertise, which consists of reading the same statute repeatedly. There is, however, a second subset of specialization—one of consequences rather than bare words. State actors who administer a service have a unique perspective on how it impacts citizens. There is some jurisprudential ambivalence on this point; something akin to policy expertise is implicit in much of the case law, but judges cannot

[238] It should be noted that there is no single definition of linguistics, applied or otherwise. For a summary of the debate and disagreement, see: Alan Davies, *An Introduction to Applied Linguistics: From Practice to Theory*, 2nd ed (Edinburgh: Edinburgh University Press, 2007) at 1-3.

openly admit to the lack of constraint imposed by statutory language.[239] In the *Georgia Strait Alliance v. Canada (Minister of Fisheries and Oceans)* decision, for instance, the Federal Court of Appeal held that "[e]xpertise in fisheries does not necessarily confer special legal expertise to interpret the statutory provisions of the *SARA* or of the *Fisheries Act*."[240] Holding otherwise would be something of a Diceyan nightmare, as it would allow tribunals to transgress textual directives in favour of "particular expertise and experiences" that arise from institutional positioning.[241] Tribunal policy-making is inevitable given the vacuity of our interpretive laws, but there is a decided approach/avoidance attitude to this form of expertise as an explicit postulate of the administrative state. It is, after all, fundamentally incompatible with the idea of found meaning in a legislative instrument.[242]

Institutional difference is inseparable from most aspirational accounts of agency interpretation. Clearly, texts are being construed outside of courtrooms, and this is presumed to impact the results in a variety of ways. The oft-cited indicia of this difference—some combination of schematic familiarity, proximity to those affected, and technical knowledge on points of particular complexity—undoubtedly influence the definitions that arise from the administrative state. My claim here is simply that no one can be an expert in how language signifies. We are constituted by a matrix of signs that cannot be straightforwardly communicated in a verifiable way; textual associations are

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[239] See, e.g., *Dunsmuir*, *supra* note 2 at para 49, endorsing David Mullan's idea of "field sensitivity."
[240] 2012 FCA 40 at para 104.
[241] *Dunsmuir*, *supra* note 2 at para 49.
[242] Admittedly, one could consider both the words at issue and their perceived impacts—something that happens often in courts and agencies and which might be called "candour" by Allan Hutchinson. The official stance, however, seems to be one of consequences as a check on legal meaning. If a legally compelling definition will produce an absurd result, we have a rule that will negate it. There is, then, a sense in the jurisprudence that is well summarized by the foregoing *Georgia Strait Alliance* passage: Statutory interpretation is about the words of the enactment and our tools of legal hermeneutics.

largely unknowable absent a metalanguage. Linguistic competence is ultimately unhelpful in the task of interpreting statutes because there is no grammatical insight that provides a privileged reading of a text.[243] When we talk about administrative law in terms of institutional difference, we presume some specialized ability to determine democratic meaning, but we rarely ask *how* the features of bureaucracy impact the interpretive process. It is therefore important to turn to the literature to parse the supposed benefits of administrative bodies speaking when meaning is in dispute.

2. Opening Space with Abnegation

While most administrative law scholars advocate for some form of deference, Adrian Vermeule has authored a body of work that celebrates institutional difference using quasi-enlightenment language. As judges retreat to the margins, ready to step in where agencies transgress broad delegated limits, the law is "working itself pure" by following its "own criteria."[244] Writing in the American context, Vermeule argues that "the Constitution superseded itself from within," that delegation of authority is an essential component of modern regulation.[245] This argument has significant ramifications for adjudicative legitimacy in a broad sense, but accepting it raises a specific question about interpretation: How should we conceptualize the space left by judges, and ceded to administrators, on points of linguistic meaning? In *Law's Abnegation*, he follows a critical trend such that agencies should be seen as choosing between competing

[243] It should be noted, however, that usage might tell us something meaningful about the goals or context of a written provision. There is a growing interest in "interactional linguistics," which connects the presence or use of a word with the speaker's position. This lens has limited utility in the context of statutory interpretation because of the variegated nature of authorship and reading in the legislative sphere. See generally: Arne Zeschel & Nadine Proske, "Usage-Based Linguistics and Conversational Interaction" (2015) 3:1 Yearbook of the German Cognitive Linguistics Association 123.
[244] Adrian Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Cambridge: Harvard University Press, 2016) at 13, 22 [Vermeule].
[245] *Ibid* at 43, 50.

definitions within a "policy space," essentially picking one in a "range of … reasonable interpretations."[246] Sometimes, he suggests, only one answer will be reasonable. Otherwise, choice persists and language can be defined explicitly in relation to policy outcomes.[247] At a certain point, tribunals need to decide on a singular definition and rendering further explanations simply becomes "pathological."[248] The core interpretive idea here seems to point directly back to results-oriented expertise—an issue taken up in earnest by the first-wave legal realists.

Although he was far from alone, Karl Llewellyn was explicit about his disdain for the law of statutory interpretation. By his reading, the presumptions that underwrite legal definitions are simply "thrusts" and "parries."[249] They are used selectively based on a preferred result and, taken together, simply cancel each other out. Judges are not constrained by these rules, and nor could agencies be. Interpretive questions, then, are always already in the policy sphere. This sentiment is largely echoed in John Willis's influential "Three Approaches to Administrative Law." He argues that "there is no reason to distinguish in administrative law between questions of policy and questions of law."[250] We should focus instead on effecting a vision of the public good.[251] This broad concern, which has been instrumental in the development of administrative regulation, has distinct implications for how we understand interpretive roles. As the relevant law and discourse began to take shape, "left-leaning scholars were deeply resentful of what they saw as conservative judges twisting the pliable rules of statutory interpretation to favour the

[246] *Ibid* at 201.
[247] *Ibid* at 124.
[248] *Ibid* at 129.
[249] Karl Llewellyn, "Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed" (1950) 3 Vand L Rev 395.
[250] John Willis, "Three Approaches to Administrative Law: The Judicial, The Conceptual, and the Functional" (1935) 1 UTLJ 53 at 80.
[251] *Ibid*.

existing order, privileging the rich … and defeating the purposes of statutes intended to further the interests of the workers, the homeless, and the least well-off in society."[252] The distinct positioning of administrative bodies arguably embodies progressive potential based on overt concerns with legislative outcomes. We return to that which is prohibited by the law of statutory interpretation—prioritizing outcomes over empty gestures to language.

The relevant discourse has, at least by implication, advanced a meaningful role for institutional difference. By interacting directly with those affected by a governmental scheme, agencies can interpret with the end in mind—and potentially effect positive outcomes. A major difficulty, however, lies in trying to define these terms. Many of the early proponents of administrative regulation rallied against judicial bias, but there is no assurance that administrative decision-makers will be less conservative in their distributive choices.[253] Even an agency working in earnest to improve its services is still made-up of embodied subjects who have no uniquely transcendent information about how a given definition will impact the lived experiences of someone else. Returning to the central question here—how features of institutional difference impact the construction of language—the functional answer depends on how closely one holds to the comforting idea of legislated constraint. If the argument is that agency specialization produces skill at the level of communal signification, then there is nothing useful being advanced. There is

[252] Taggart, *supra* note 91 at 257.

[253] This is a complex point, and one that will be expanded upon in my final chapter. There is some distributive impact in every regulatory act or omission. Administrative law has often been associated with progressive approaches to resource distribution in the forms of, e.g., labour and social assistance, but leftist politics do not inhere to the foundations of bureaucracy. There are reasons for optimism—that administrators are perhaps *less* predominantly white, male, and wealthy and therefore inclined to perpetuate the status quo that has served them well—but certainly no political guarantees. See generally: Patrick Shaunessy, "A Matter of Choice: Rethinking Legal Formalism's Account of Private Law Rights" (2017) 37:1 Oxford J Leg Stud 163.

no 'correct' sign association at the level of language and, so, becoming an expert on this point is nonsensical. If, however, non-traditional sites of interpretation invite greater transparency at the level of political decision-making, then the "bureaucratization of everyday life" is a potentially promising development in the law of interpretation.[254]

3. Amorphous Expertise

There is a significant, yet eminently understandable problem in the discourse surrounding institutional difference. Whether one uses the language of expertise, proximity, or something else to refer to the unique relationship between agencies and their subject matter, there is rarely much discussion of analytical content. In *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd*, for instance, the Court endorses the expertise of a "specialized tribunal," but says little of substance about *how* this perspective operates on statutory meaning. The closest that Karakatsanis J, writing for the majority, gets is to hold that "[e]xpertise arises from the specialization of functions of administrative tribunals like the Board which have a habitual familiarity with the legislative scheme they administer."[255] This problem—that surely we mean something more ambitious than 'habit' when institutional difference is invoked—makes a degree of sense when one considers the source. As one critic puts it, despite the discourse of administrative expansion, "in the common law system, judges at base still consider themselves to be the bulwarks against Leviathan."[256] There is no incentive for judges to vest a form of conceptual authority in agencies that they themselves cannot hold, particularly since the mere evocation of expertise amply serves their rhetorical needs. The

[254] David Graeber, *The Utopia of Rules: On Technology, Stupidity, and the Secret Joys of Bureaucracy* (New York: Melville House, 2015) at 142.
[255] *Capilano*, *supra* note 176 at para 33.
[256] Ian Holloway, "A Bona Fide Attempt: Chief Justice Sir Owen Dixon and the Policy of Deference to Administrative Expertise in the High Court of Australia" (2002) 54 Admin L Rev 687 at 698.

relevant jurisprudence provides a malleable image of institutional difference based on self-interest, which opens space for critical voices to give content to the allowance that tribunals construe legislation in a distinct way.

In most discussions, administrative expertise reads as a legal euphemism. There are several possible reasons for recognizing specialized interpretations, but they all lead to an uncomfortable resolution. Tribunals exist in greater proximity to those affected by a legislative scheme. They also enjoy routine exposure to their empowering legislation and presumably have a strong grasp on complex delegated subject matter. What is left unsaid is that none of these rationales have much to do with the words of the enactment. The prevailing image of self-enclosed governance is jeopardized by this suggestive departure from textual guidance. As is often the case, the American literature on this point is more explicit, but makes the point concisely: There is a burgeoning theme in the development of judicial review that reflects "the Court majority's increasing worries about the politicization of administrative expertise."[257] Legal actors appear unwilling to depart from the impossible ideal of transcendent adjudicative impartiality, so a response is found in "the attempt by courts to ensure that agencies exercise expert judgment free from outside political pressures."[258] The problem is that expertise divorced from political value judgments (even if such a thing were possible) leaves a hollow shell, useful only for rhetorical justifications. If something like proximity to legislative consequences changes the way a provision is read, then any pretense that those words embody fixed content must be dropped. Contrary to how that might sound, this is a decidedly optimistic point for the status of institutional difference.

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[257] Jody Freeman & Adrian Vermeule, "*Massachusetts v EPA*: From Politics to Expertise" (2007) SCR 51 at 52.
[258] *Ibid*.

The political nature of the administrative state can be traced back to its earliest iterations—or even to its fundamental interrelation with the executive branch of government.[259] Although communicative expertise is impossible at the level of sign associations, specialized tribunals hold a unique position in relation to governmental policy. Oft-cited proximity to those affected is not a full answer to the justificatory question of specialization, but it does point toward a more compelling basis for interpretive authority. In his discussion of politicized pedagogy in administrative law classrooms, Richard Thomas makes an important and transferable observation:

> [T]here is no current consensus … on the organization and substance of the new politically sensitive administrative law course that is to replace the traditional "legalistic" course. Instead, we have a smorgasbord of "unitary organizing principles," each drawing heavily on different aspects of the social sciences and/or political theory. … If the left wants a meaningful battle in administrative law, it will find it not in the struggle to deconstruct a pervasive false consciousness called "formalism" but rather in the struggle to expand the acknowledged "politics" of administrative law to include the political goals of the oppressed and dispossessed.[260]

Institutional difference embodies progressive potential to the extent it is explicitly named and engaged with. It also depends on the discontinuation of text-based theories of expertise. While interpretation is unavoidably political, masking this feature behind the rhetoric of legislative guidance allows hierarchical bureaucracy to flourish.[261] The final step in conceptualizing policy expertise involves placing it in conversation with the foregoing point—that no one, by virtue of their office, stands in a privileged place of universality.

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[259] On the latter point, see: Gillian Metzger & Kevin Stack, "Internal Administrative Law" (2017) 115:8 Michigan L Rev 1239.
[260] Thomas, *supra* note 151 at 90, 95.
[261] This danger is discussed at length in Gerald Frug, "The Ideology of Bureaucracy in American Law" (1984) 97:6 Harvard L Rev 1276 [Frug].

Transparent policy work is essential because there is nothing outside the text, nothing that does not require interpretation.[262] Assessing legislative impacts, even at the level of interaction with those accessing the service, is not divorced from unconscious biases or normative value judgments.[263] This is where the proliferation of lofty rhetoric does significant damage by facilitating unstated interpretive work; there can be neither expertise nor accountability when one simply reads a legislative scheme with unusual repetition. In the literature, many scholars *do* politicize their structuring principles, but fail to ask how and by whom they will be actualized. If respectful deference or dialogue is crucially important to one's image of legitimate judicial review, it is deeply significant to ask who construes that dialogue and gives content to 'respect.' When we stop before these questions, we advance meaningless signifiers in place of the "political goals" evoked above. Interpretation necessitates a single textual association to be drawn from virtually endless possibilities, but this can be done from a place of (more) defensible institutional difference. If agencies articulate the lessons they take from their proximity to those affected, they provide material for debate rather than preempting critical engagement by relying on what a word 'correctly' or 'reasonably' means.

The structuring principles of administrative law obscure the violence of interpretation in a manner that precludes direct engagement with the consequences of legislation. It is undeniably comforting to imagine constraint in both democratically enacted laws and our means of reading them, but this pretense comes at a considerable cost. While the literature has long demonstrated a "functional … rather than formal" bent

[262] *Of Grammatology*, *supra* note 28.
[263] The literature on this seemingly intuitive proposition is sparse, but see: Darren Hutchinson, "Preventing Balkanization or Facilitating Racial Domination: A Critique of the New Equal Protection" (2015) 22:1 Virginia J Soc Pol'y & L 1.

in administrative decision-making, the clear expression of political value judgments remains elusive.[264] We are presented instead with ethereal concepts, like amorphous expertise in terms of legislative instruments, that do not require "candour" regarding policy preferences.[265] It is helpful, then, to look back to the legal realists, taking their core insight that adjudication is always results-oriented as a starting point, and reorienting the interpretive question toward perceived impacts.[266] However learned we imagine our decision-makers, they remain embodied subjects without transcendent knowledge of external realities. Giving imprecise content to the idea of expertise serves an ideological function by changing the critical conversation. Instead of asking where power is vested when meaning is in dispute—and, perhaps more importantly, *why* it has been so vested—institutional difference is presented as a means of arriving at a predefined outcome that will be assessed in relation to judicially defined (and, crucially, *definable*) limits. When we talk about administrative law, we often fall silent at precisely the point of demanding a justification for interpretive power that engages with the indeterminacy of meaning. The relevant discourse reroutes interested readers into a matrix of structuring principles that must therefore be assessed in terms of their hermeneutical utility.

(c.) Naming Constituent Elements

The law of interpretation appears determined to live up to its status as something more than the imposition of a unitary perspective. Maxims and principles flourish without requiring any consistency of application; after all, who can say whether something like "common law constitutionalism" supports one definition over another?

[264] Avishai Benish & Asa Maron, "Infusing Public Law into Privatized Welfare: Lawyers, Economists, and the Competing Logics of Administrative Reform" (2016) 50:4 Law & Soc Rev 953.
[265] Hutchinson, *supra* note 139.
[266] See generally: Thomas Reed & Morton Horwitz, *American Legal Realism* (New York: Oxford University Press, 1993).

The legitimizing myths of statutory interpretation are insidious in two broad ways. First, as discussed above, they distract from the salient question of who speaks when meaning is in dispute. They answer with a disingenuous 'no one,' because meaning is always already discoverable through the relevant legal steps, or perhaps more precisely with 'everyone,' since these principles ostensibly arise from democratic commitments within law itself.[267] Secondly, the nominal rules of interpretation are rhetorically difficult to challenge. There is enough play in the relevant discursive field that the dominant terminology persists without much opposition. If someone disagrees with the ideal content of, say, the separation of powers, they advance their argument while retaining the same signifier. These terms are placeholders for interpretive work that is either preempted or deferred through the empire of language. Administrative law has a uniquely meta-discursive character, presuming to order the violence of interpretation through structuring principles that are simply words about words. It is therefore important to level the conceptual ground by inquiring into the connections between second-order language (i.e., interpretive principles that advance language to help us understand language) and the work of legal hermeneutics.

There is no shortage of aspirational writing on the fundamental content of administrative law. Although more structuring concepts have been advanced than could be reproduced here, there are two broad areas that impact directly on the discourse of interpretation: the language of values and the roles of governmental branches. The former posits underlying limits in the exercise of interpretive authority while the latter suggests that writing and reading legislation are exceptional tasks with clearly defined and

[267] The ways in which this plays out are discussed at length below, but see generally: John Swaigen & Jasteena Dhillon, *Administrative Law: Principles and Advocacy*, 3rd ed (Toronto: Emond Montgomery Publications, 2016).

delimited spheres of power. These popular ideals are presented as the raw materials from which administrative power operates. In contrast, a critical reading presses the issue, asking where these concepts fall silent and presume the stability of their signifying potential.

1. The Language of Values

Legal interpretation begins with the unenviable task of reconciling our need for justifications with the radical problems of linguistic communication. It is far from certain that we would vest interpretive power in state actors if the process was transparently one of imposing a single perspective. This problem is exacerbated in the administrative context where the history, both domestically and abroad, "constitutes a series of ongoing attempts to legitimize unelected public administration in a constitutional liberal democracy."[268] The language of values is an understandable response, but one that ultimately subsumes difference and masks the politics of interpretation. Indeed, the authors of the foregoing quotation follow it up with "a commitment to reason."[269] This phrase, while unremarkable, is characteristic of the critical response: There is a crisis of legitimacy or a point of unchecked discretion and, so, it must be closed. Much like this reliance on 'reason,' the ensuing discourse generally adopts a lofty ideal that is explicitly normative. We have a long history of abusing 'reason' as an analytical tool. While the relevant organizing principles come in a variety of forms, there is enough consistency to discuss their internal logic and foreground their rhetorical function.

The most insidious form of this discourse positions guiding principles within the law itself. It should be recalled that, in *Law's Abnegation*, Vermeule hinges his argument

[268] Sidney Shapiro, Elizabeth Fisher & Wendy Wagner, "The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy" (2012) 47 Wake Forest L Rev 463 at 463.
[269] *Ibid* at 502.

on the idea of internal commitments—that the administrative state arises and expands as the law "works itself pure."[270] Similarly, though more explicitly, a Canadian critic suggests that "legal principles such as fairness and equality reside within the common law, are constitutive of legality, and inform (or should inform) statutory interpretation on judicial review."[271] Again, this sentiment is not especially worthy of condemnation but is adduced to demonstrate the character of the relevant discourse. The salient point is that these claims implicitly answer my core question of who gets to speak when meaning is in dispute: It is the law itself, "as a repository of principles that constitute the rule of law and control the interpretation of statutes."[272] The result is clearly set-out in a recent discussion about the conceptual status of legislation:

> Dworkinian interpretivism, advocating interpretation of statutes in light of moral principles, or modes of purposive interpretation that emphasise the import of objective purpose and the consideration of values on statutory interpretation, can be seen as correctness-oriented in this sense. They call upon interpreters to put statutes to good use and read them as fulfilling basic values and moral principles."[273]

On the orthodox view, we do not learn *who* reads the relevant words with reference to their necessarily embodied experiences of moral principles. The relationship between principles and decisional agency is relegated to the margins because it is irrelevant on this reading. Legal actors are presented as conduits for the 'values' that law infuses into statutory instruments.

Beyond the work this rhetoric does to disguise the speaking subject—the unilateral voice who must impose a subjective perspective on the definitional problem—

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[270] Vermeule, *supra* note 244.
[271] Evan Fox-Decent, "Democratizing Common Law Constitutionalism" (2010) 55 McGill LJ 511 at 513.
[272] *Ibid* at 517.
[273] Arie Rosen, "Statutory Interpretation and the Many Virtues of Legislation" (2017) 37:1 Oxford J Leg Stud 134 at 138.

the language of values renders dissent nonsensical. Consider, for instance, Paul Daly's assertion that "judicial review of administrative action is a values-based enterprise."[274] He continues on to the effect that "[i]ts practice—and probably also its development—depends on the ongoing interaction between administrative law values—the rule of law, good administration, democracy and separation of powers—in the common law tradition."[275] Few are likely to argue that administrative law should avoid developing in a way that is 'good' or 'democratic.' These terms do not simply preclude wholesale opposition; rather, they issue from sites of pre-existing power and therefore embody considerable rhetorical potential. The "values-based" approach to administrative interpretation simultaneously masks authority and suggests that conceptual or formalistic correctness exists within the enterprise. This is further exacerbated by the image of clearly defined roles in relation to legal texts.

2. Reading Legislation

The modern principle appears in both tribunal and courtroom interpretations and suggests a distinct relationship between Parliament and decision-makers. Much of the discussion is, after all, dedicated to discerning their purposes and schematic choices. It is easy to criticize the idea of legislative intent as a clear fiction, but doing so at length is disingenuous. While much of the case law gestures toward some externalized locus of will and purpose, there is an overwhelming sense that this is a self-conscious construct, existing only for analytical and rhetorical ends.[276] The idea, though, "still figures as a trope in the general rhetoric of judges when they justify review, and is thought by some public law theorists to be a necessary reference point for judicial review, as only it can

[274] Daly, *supra* note 183 at 21.
[275] *Ibid*.
[276] Its continued use at the Supreme Court of Canada is discussed in the following chapter.

support the claim that officials have acted ... outside the scope of their delegated authority."[277] There can be no disembodied intent, but its central place in the law of interpretation raises larger questions about the status of institutions in relation to the construction of meaning. If a legislative text can retain intentionality from its authors, then the interpretive process is aimed at discoverable correctness. This is because "sovereignty is both legally constituted and yet legally unlimited."[278] Democratic laws reign, absent an alleged constitutional violation, and interpretation must be about manifesting the embedded purpose of the relevant provision.

None of these ideals about statutory interpretation—and the lawmaking/governing interrelation more generally—explain the presence of *legal* interpretation. Discourse about interpretive work in the administrative state presupposes an institutional impact on the 'discovery' of meaning. Otherwise, the idea of constraint is meaningless. If classical authority "stands for the proposition that discretion is limited … by legal principles," there must be some play in the structure of interpretation.[279] Broadly speaking, the orthodox views suggests that legal reasoning or else administrative "field sensitivity" (to use the language of *Dunsmuir*) will affect the analytical steps, but rules of general application police the outer limits.[280] This is, however, an inherently vexed point because legal actors and many theorists are uncomfortable with the central place of subjective

[277] David Dyzenhaus, "Process and Substance as Aspects of the Public Law Form" (2015) 74:2 Cambridge LJ 284 at 286.
[278] David Dyzenhaus, "Austin, Hobbes, and Dicey" (2011) 24:2 Can JL & Juris 411 at 417.
[279] Geneviève Cartier, "Administrative Discretion: Between Exercising Power and Conducting Dialogue" in Colleen Flood & Lorne Sossin, eds, *Administrative Law in Context*, 2nd ed (Toronto: Emond, 2013) 381 at 390.
[280] This has been the official line for several years. See, e.g., Robert Yalden, "Deference and Coherence in Administrative Law: Rethinking Statutory Interpretation" (1988) 46:1 UT Fac L Rev 136 at 153: "Perhaps one should at least be grateful that, despite this apparent resurrection of Maxwell and Dicey, some breathing space was left for the proposition that statutes are sometimes unclear and that, in such instances, judicial deference—exercised through the reasonableness test—is appropriate."

perspectives in legal interpretation. It is a relatively common refrain in administrative law to hear that "[a]gencies are not entitled to base their statutory interpretations and constructions on policy concerns and political considerations that are unrelated to their statute's semantic meaning and the legal norms that comprise their purposive mandate."[281] Essentially, there is something *within* the statutory language, but it paradoxically comes out through recourse to privileged external heuristics.[282]

The metanarratives surrounding agency interpretation are roughly organized around the idea of self-enclosed governance. Each institution has a specified place in the construction and distillation of legal meaning. As a result, engagement with the violence of interpretation is indefinitely deferred. Courts are not overturning specialized agencies with better proximity to interested subjects; instead, when judges speak, it is an expression of the democratic will. The constituent parts of administrative discourse provide cover for the unilateral imposition of linguistic meaning. This, of course, requires a presumption in the stability of structuring concepts.. When we talk about administrative law, there is a conceptual bedrock that arises before the politics of constructed legal meaning. Put another way, the proliferation of institutional ideals and amorphous limits creates a discursive field that stands in place of wholesale critique regarding the (necessary) ascendancy of a single interpretive perspective.[283] The literature that forges our theories of bureaucratic regulation provides the backdrop for the judicial exercise of power and disappearance of controversy in the administrative state.

[281] Evan Criddle, "The Constitution of Agency Statutory Interpretation" (2016) 69 Vand L Rev 325 at 348.
[282] For a particularly clear statement to this effect, see: Jonathan Adler, "*King v. Burwell*: Desperately Seeking Ambiguity in Clear Statutory Text" (2015) 40:3 Health Politics, Pol'y & L 577.
[283] See chapter 4, below.

IV. The Metaphysics of Administrative Law

The case of *Dunsmuir v. New Brunswick* provides a useful demarcation point in the study of administrative interpretation for two main reasons.[284] First, this is a self-conscious moment of rupture and invention. The majority confronts the "troubling question" of appropriate institutional roles and demands "real guidance" for all involved.[285] In an almost divine register, the co-authors pronounce an end to our collective waiting: "The time has arrived for a reassessment of the question."[286] As a result, the "underlying tension" of administrative law finds a new (rhetorical) resolution through legal reformulation and criticism of prior approaches.[287] It is, in short, almost impossible to talk about the current law in this area without some mention of the shift embodied in *Dunsmuir*.[288] Secondly, and more uniquely, this decision introduces a new means of obscuring the nature and function of interpretation.[289] While the majority deals in age-old tropes—citing the 'rule of law,' for instance, 15 times in their analysis—the judgment suggests a benevolent epoch of respectful deference and practical guidance.[290] *Dunsmuir* looks actively beyond itself, creating a fresh approach to judicial review that will signify guidance for the lower courts. In result, the play(s) of power in the administrative state are buried under fresh layers of institutional posturing and faith in the universality of legal definitions.

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[284] *Dunsmuir*, *supra* note 2.
[285] *Ibid* at para 1.
[286] *Ibid*.
[287] *Ibid* at para 27.
[288] As the governing authority on standards of judicial review, *Dunsmuir* is cited reflexively at all levels of court. LexisNexis suggests that it has been invoked 10,754 times since its release—or, at a rate of about 2.9 endorsements per day, including weekends and holidays, in the decade-plus it has been available (accessed 16 May 2018).
[289] This is hardly a novel subject for discussion. Novanet returns 172 articles that refer to the style of cause, which is to say nothing of its sustained presence in every major treatise on Canadian administrative law. Some attention is also paid in, for instance, Sullivan's aforementioned text on statutory interpretation and various recent texts on public and constitutional law generally.
[290] *Dunsmuir*, *supra* note 2 at para 48.

Dunsmuir is a frame that organizes interpretive discourse from the bench. It provides a shared set of signifiers and presumes their stability. By virtue of the majority opinion, courts now discuss ideas of deference and the relative reasonableness of a definition without much meta-engagement or analytical discomfort. Moreover, as authors that actively sought to recast the field of judicial review, Bastarache and LeBel JJ realized their goals—empirical research shows an almost automatic acceptance of *Dunsmuir* in all the subsequent jurisprudence.[291] This decision will not, however, live forever. A shift in the law is imminent, but this is all the more reason to take stock of administrative interpretation in its current form.[292] With all its language of dialogue, deference, and the reluctant threat of reversal, *Dunsmuir* stands as a classical distillation of the irresolvable tensions within administrative law. This case, in other words, is symptomatic of a larger problem—that language does not conduce to a verifiable "range of possible, acceptable outcomes"—but endeavours to hide it in a distinct way.

This is an interesting time for legal interpretation in the administrative state. As another restatement looms—or, perhaps, dissipates in a jurisprudential recommitment to *Dunsmuir*—it is important to understand how the politics of linguistic meaning work in the background of our case law. In the absence of a metalanguage, it is judges who speak when meaning is in dispute. This is the inevitable result of unverifiable signs and a

[291] Indeed, while the extent to which it *can* be followed will be discussed below, this case is cited virtually without exception as the ruling authority for determining the standard of judicial review. See, e.g., William Lahey, Diana Ginn, David Constantine & Nicholas Hooper, "How Has Dunsmuir Worked? A Legal-Empirical Analysis of Substantive Review of Administrative Decisions after *Dunsmuir v. New Brunswick*: Findings from the Courts of Nova Scotia, Quebec, Ontario and Alberta" (2017) 30:3 Can J Admin L & Prac 317 at 346: "Courts across Canada are universally following the methodology for substantive review prescribed by *Dunsmuir*."

[292] In granting leave to appeal in *Minister of Citizenship and Immigration v Alexander Vavilov*, 2018 CanLII 40807 (SCC), the Court held that this case, along with others that will be heard concurrently, "provide an opportunity to consider the nature and scope of judicial review of administrative action, as addressed in *Dunsmuir v. New Brunswick*."

system of written laws: *someone* must have the final definitional word. Unfortunately, this is not an especially attractive means of presenting bureaucratic regulation. As such, considerable work is done on the bench to hide the nature of interpretation from interested parties. The case law since *Dunsmuir* does this in distinct ways, but the work itself is highly transferable—particularly since the rhetoric of legal interpretation suffers from relatively consistent points of weakness. In an effort to prove my answer to the ideological question of who speaks to contested meaning, this chapter identifies three main ways that the post-*Dunsmuir* Supreme Court case law masks the violence of interpretation.[293] First, meaning is presented externally, suggesting that judges merely *find* the relevant textual association. This necessarily obscures the violence of interpretation, wordlessly replacing the ascendancy of a single perspective with the performance of impartial 'legal reasoning.' Secondly, the speaking subject is disguised behind a barrage of voices. The administrative state features a panoply of legal actors and source material, and this allows judges to locate their preferences in the words of others. Finally, the relevant jurisprudence manipulates the idea of reasonableness to enforce unilateral power that presents as diverse and deferential.

(a.) Finding Objective Meaning

If language defies universal meaning, then there is something decidedly unsettling about the practice of statutory interpretation. There can never be a uniquely 'correct' definition, but legal decision-makers impose their perspective everyday, providing a

[293] Since March 7th, 2008, there are 32 decisions from the Supreme Court that deal with administrative law and use the phrase "statutory interpretation" at least once (with a handful of exclusions that will be explained below). A full list of my sample, along with a more precise methodology and a list of cases that were flagged and then excluded, is provided in the appendix.

textual association with the threat of state force.[294] Administrative law is both uniquely well-positioned to handle the contingency of linguistic work and profoundly uneasy about the play in this structure.[295] On the former, judicial review embodies a distinct commitment to recognizing a "range" of answers to interpretive questions, at least so long as the speaker can justify herself. The latter point, however, is equally characteristic: Bureaucratic governance exists in a long history of anxiety about illegitimate decision-making and inappropriate review. Engaging with inherently meaningless signs and signifiers pushes this discomfort to its limits; as the need for non-judicial discretion grows with the complexities of the administrative state, so too does the spectre of tyrannical freedom and gaps in decisional restraint.[296] We expect state power to rely on something more than the unilateral preferences of a privileged decision-maker, but when unverifiable textual associations must be forged, external reference points are limited. We are, as Margaret Atwood observes of Canadian literature, in search of a communal story or unifying myth.[297]

The jurisprudence since *Dunsmuir* has answered this challenge, though not in so many words. It is taken as axiomatic that something *out there* constrains interpretive work and its review. The language of "values" and "principles" is ubiquitous in Supreme Court jurisprudence, but a more fundamental presumption about the stability of language underwrites these grand claims. Much like Stanley Fish's argument that "[i]nterpretation

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[294] Robert Cover, "Violence and the Word" (1986) 95 Yale LJ 1601.
[295] Structural play is most famously described in Jacques Derrida, "Structure, Sign, and Play in the Discourse of the Human Sciences" (1970) online: <www5.csudh.edu/ccauthen/576f13/DrrdaSSP.pdf>: "The center is not the center. … The concept of centered structure is in fact the concept of a freeplay based on a fundamental ground, a freeplay which is constituted upon a fundamental immobility and a reassuring certitude, which is itself beyond the reach of the freeplay."
[296] See, e.g., Louis Howe, "Administrative Law and Governmentality: Politics and Discretion in a Changing State of Sovereignty" (2002) 24:1 Administrative Theory & Praxis 55 at 64.
[297] Margaret Atwood, *Survival: A Thematic Guide to Canadian Literature* (Toronto: Anansi, 1972).

is not a theoretical issue, but an empirical one," the prevailing discourse from the bench suggests the discoverability of objective meaning.[298] When the first move is, as it was for Cromwell J in *Figliola*, recourse to "the grammatical and ordinary sense of the words," there is clearly an underlying faith in the statutory instrument's ability to retain content.[299] Crucially, if the text signifies something definite—that is, if legislation is imbued with meaning that can be distilled through the laws of interpretation—then there is no danger of self-serving or capricious discretion. This comforting idea is unfortunately incompatible with contemporary theories of language; there is, to paraphrase Derrida, nothing inside the statute apart from what the reader places there.[300] By denying the problem, however, legal actors can present their preferred definitions as dispassionate truth. While claims to meaning are necessarily political and contingent, the relevant jurisprudence obscures value judgments behind the Dworkinian "language of objectivity."

This is not to suggest that adjudicators are especially vocal about their unique ability to impose a definitional perspective as law. Indeed, part of the rhetorical force of external meaning depends on recognition rather than construction. Supreme Court jurisprudence in particular gestures beyond itself to *find* things like values and principles that cast light on the best reading of a statute.[301] The impact is essentially twofold: Gesturing toward an external locus of meaning obscures the nature of interpretation as the unilateral ascendancy of one textual association and it nominally complies with the

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[298] Stanley Fish, "There Is No Textualist Position" (2005) 42 San Diego L Rev 629 at 650.
[299] *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52 at para 81 [*Figliola*].
[300] *Of Grammatology*, *supra* note 28.
[301] See, e.g., *Wilson v British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 47 at para 27 [*Wilson v BC*]: "[T]his Court has cautioned against judicial rewriting of legislation under the guise of interpreting it."

administrative law commitment to the "range" of legitimate answers.[302] If meaning can be assessed in relation to something stable, then judicial review on such questions is unremarkable; the bench can find the meaning of the provision and hold it up to the proffered administrative definition. In practice, this is complicated by the recognition that, as the 1979 *CUPE* decision puts it, an interpretation can "lie logically at the heart of the specialized jurisdiction confided to the Board."[303] In other words, the aforementioned expertise assigned to agencies—that which is ill-defined and easily manipulable—necessitates some recognition of analytical difference.[304] Judges leverage this form of deferential rhetoric to suggest that, while they found external meaning, it can differ for those outside their ranks. This sounds progressive, but it quickly reduces down to an elitist insistence on legal reasoning.

Recourse to law as a privileged repository of inferential wisdom is a judicial trope, but one that is rarely considered in discussions of administrative interpretation.[305] At base, legal reasoning is a hierarchical, imperialistic force that signifies very little, substantively speaking.[306] In an early effort to distil its precepts, an American scholar mused that "[t]he effort to find complete agreement before the institution goes to work is

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[302] In *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at para 34 [*Williams Lake*], the Court exemplifies both points: "The range of reasonable outcomes available to the Tribunal is therefore constrained by … principles as they are understood and applied by the courts."

[303] *Canadian Union of Public Employees Local 963 v New Brunswick Liquor Corp*, [1979] 2 SCR 227 at 236.

[304] This is ubiquitous in the jurisprudence, but is concisely put in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 25: Administrative actors have a "special role, function and expertise."

[305] There is little scholarship that expressly links critiques of 'legal reasoning' with the workings of administrative law, but see: Nicholas Zeppos, "The Legal Profession and the Development of Administrative Law" (1997) 72:4 Chicago-Kent L Rev 1119 at 1121, where he notes the "expertise, power, and prestige necessary to understand any theory of lawyer resistance to the administrative state."

[306] The most famous, though somewhat generalized, account is found in Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System*, critical ed (New York: New York University Press, 2007). Unfortunately, the idea that legal professionals and especially decision-makers hold privileged means of reasoning—of rendering 'sense' from their surroundings—persists, even in nominally critical volumes. For an example heavy on 'truth' claims, see: Jeffrey Lipshaw, *Beyond Legal Reasoning: A Critique of Pure Lawyering* (New York: Routledge, 2017).

meaningless. It is to forget the very purpose for which the institution of legal reasoning has been fashioned. This should be remembered as a world community suffers in the absence of law." [307] Our disagreements about words (among other things) are benevolently resolved by elite legal actors—but they do not decide, *per se*. Rather, the rhetorical strength of legal reasoning (an umbrella term that includes invocations of normative content, along with varied 'rules' of interpretation) lies in its suggestive impartiality.[308] When judges find meaning in legislative instruments or amorphous structuring principles, they deny decisional agency. They speak beyond themselves. Indeed, in a relatively recent decision, the Court unanimously held that an interpretation can simply reflect the words at issue—that *they* stand in a position to discern whether an administrative interpretation meets the 'true' definition embodied in the legislation.[309] This has profound implications for understanding the process and review of agency interpretation.

An administrator interprets her home (or a related) statute and is owed presumptive deference.[310] Where this is not rebutted, the ubiquitous "range" comes into play; as Moldaver J puts it, "because legislatures do not always speak clearly and because the tools of statutory interpretation do not always guarantee a single clear answer, legislative provisions will on occasion be susceptible to multiple *reasonable* interpretations."[311] When there are multiple justifiable answers, "the resolution of unclear language in an administrative decision maker's home statute is

[307] Edward Levi, "An Introduction to Legal Reasoning" (1948) 15:3 U Chicago L Rev 501 at 574.
[308] This is an official jurisprudential stance. See, e.g., *Carbone v McMahon*, 2017 ABCA 384 at paras 56-57: "The public must perceive that judges are impartial. It is not enough that they actually are. … The best way to ascertain the public's perception of judicial impartiality is to adopt an objective measure."
[309] *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 65 [*Agraira*].
[310] *Alberta Teachers' Association*, *supra* note 22 at para 34.
[311] *McLean*, *supra* note 111 at para 32.

usually best left to the decision maker."[312] These relatively uncontroversial doctrinal points rely on the idea of externalized meaning. There are "tools" of interpretation that produce results, which are only "on occasion" subject to linguistic subjectivity. Once legal heuristics distil meaning, a judge can determine whether legitimate processes could produce alternatives; the "range" is rarely discussed in detail, but it must contain at least implicit content if judges can assess whether an administrative definitions fits within its bounds.[313] Again, the idea is one of dispassionate observation, as though the act of creating additional 'reasonable' textual associations is more impersonal than the first-order interpretation. The jurisprudence relies on the performance of dispassionate analysis to obscure the singularity of interpretation.

For the Supreme Court, meaning is deferred—that is, presented externally—in two distinct, though interrelated, ways. First, the nature of interpretation is presented as the actualization of internal legal commitments. There is a pervasive sense that structuring principles constrain the process of construing legislation in a manner that is democratically impersonal.[314] The second stage is a move to the particular. Given the lack of content embodied in the ostensible values of interpretation, the law of interpretation must quickly shroud itself in statutory surroundings. At the moment where one expects to learn how, say, the 'rule of law' assists in definitional work, these lofty ideals reduce

[312] *Ibid* at para 33.
[313] See, e.g., *Canada (Attorney General) v Igloo Vikski Inc*, 2016 SCC 38 at para 53 (Côté J dissenting): "I apply the same standard of review as my colleague Brown J., i.e. reasonableness, however, I disagree with his conclusion that the Canadian International Trade Tribunal's interpretation is reasonable. Indeed, I find that the Tribunal's decision falls well outside the range of reasonable interpretations."
[314] The result is a universal register that "spiritualizes" contingent sociolegal preferences. See: Jennifer Denbow, "The Problem with *Hobby Lobby*: Neoliberal Jurisprudence and Neoconservative Values" (2017) 25:2 Fem Leg Stud 165 at 167.

down to a purpose that is found and never justified.[315] Interpretation is rhetorically framed around "fundamental values and … fundamental goals" without explaining how *any* value, however "fundamental," can inform an unverifiable textual association that has already provoked protracted disagreement.[316] The results justify a preferred definition in grandiose language without any indication of how amorphous structuring principles can give content to language.

1. Overarching Values: Reading Together

In the oft-cited case of *Doré v. Barreau du Québec*, the Court glossed much of the formative jurisprudence to distil a new rule about constitutional rights in the administrative state.[317] Where a *Charter* breach is alleged, agencies are owed deference that transcends the usual *Oakes* test.[318] Abella J, writing for a unanimous bench, cites "expertise and specialization" to suggest a "particular familiarity with the competing considerations at play in weighing *Charter* values."[319] At issue was the interpretation of the relevant professional *Code of Ethics*, which imposes a "series of broad standards … open to a wide range of interpretations."[320] The result reflects this, as the Disciplinary Council decision was upheld through three levels of review. At this level of headnote-

[315] See, e.g., *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 at para 66, where the Court relies heavily on interpretive purpose without discussing their means of finding it.
[316] *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 at para 33. The *Agraira* decision, *supra* note 309, provides a representative example. Much of the reasoning concerned the proper interpretation of s 34 of the *Immigration and Refugee Protection Act*. This provision allows for inadmissibility on "national security" grounds. The Court holds that words alone cannot constrain this legislative expression; rather, "the Parliament of Canada also intended that it be interpreted in the context of the values of a democratic state" (para 78). Thereafter, we find the familiar metanarratives surrounding *Charter* values, all of which serve as a diversion from the interpretive work that remains unseen. When the decision returns from a seemingly collateral valorization of democracy, meaning has apparently been delivered—though its process has been masked by the language of values.
[317] 2012 SCC 12 [*Doré*].
[318] *Ibid* at paras 56-57. See also: *R v Oakes*, [1986] 1 SCR 103, where the Court established the proportionality test for justifying breaches under s 1 of the *Charter*.
[319] *Ibid* at para 47.
[320] *Ibid* at para 60 citing *Code of ethics of advocates*, c B-1, r 3.

esque summation, one finds a deferential slant in both the overarching treatment of administrative *Charter* breaches and the extended range of definitions available in this case. Here, a tribunal is allowed to speak to linguistic meaning and, more broadly, agency decision-makers will be allowed to assess the impacts of their interpretations, again, "by virtue of expertise and specialization."[321] At this first level, guidance is found outside the statutory instrument, but mediated by the laws of interpretation.

Early in the judgment, Abella J submits that "[i]t goes without saying that administrative decision-makers must act consistently with the values underlying the grant of discretion, including *Charter* values."[322] Her decision to express what she considers obvious is important because it sets up a series of presumptions. It is taken as axiomatic that the language of values should constrain the exercise of discretion; the question, then, becomes one of operationalizing this content in terms of a framework for review. Even as detail is added via recourse to *Baker*, the Court faces the unenviable task of rendering "fundamental Canadian values" and then holding administrative discretion to those terms.[323] For at least some readers, the language of distinctly national values evokes prejudice—one is reminded of the recent calls for "anti-Canadian values" screening—but these words have a distinct function in our jurisprudence.[324] This is not to suggest that the term is unproblematic, particularly given the lack of explanation regarding the unique validity of *our* national values, but the most important issue for this discussion concerns

[321] *Ibid* at para 47.
[322] *Ibid* at para 24.
[323] *Ibid* at 28 citing *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817. In the latter decision, the majority holds that, though discretionary decisions will generally be given considerable respect, that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*" (para 56).
[324] See, e.g., Anne Kingston, "How Kellie Leitch Accidentally Revealed Canadian Values" (26 May 2017) Maclean's online: <www.macleans.ca/politics/how-kellie-leitch-accidentally-revealed-canadian-values/>.

the sources from which judges derive governing principles. They arise, we are told, largely from the values in the *Charter*, which are, according to that text's preamble, both "the supremacy of God and the rule of law."[325] In practice, they tend to mirror protected rights like equality and the grandiose "principles of fundamental justice."[326] Even on this sympathetic (or, at least, searching) reading, it is unclear how any of the foregoing values resolves the definitional problem at issue.

I am far from alone in making this claim. The *Doré* framework has been derided as indeterminate and unduly complex for ground-level application.[327] While these are important concerns, they leave the more persistent issue unremarked. Ethereal concepts of this kind mask the play(s) of power in the administrative state through a persistent belief in the stability of language. Applying something like 'fundamental justice' to a hermeneutical question is complex because it is meaningless, at least outside the interpreting individual.[328] This case serves as a sustained example, but the problem is a longstanding one that goes beyond *Doré* and its subsequent impact at the lower levels. Recently, in *Quebec (Commission des normes, de l'équité, de la santé et de la sécurité du travail) v. Caron*, the Court held that all Quebec legislation must be interpreted "in accordance with the Quebec *Charter*."[329] As mentioned in the foregoing chapter, it can be challenging to criticize the operation of principles; here, it was the "duty to

[325] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[326] Halsbury's Laws of Canada, *Constitutional Law (Charter of Rights)*, "*Charter* Values" (I.4.(2)) at HCHR-7.
[327] See, e.g., Hoi Kong, "*Doré*, Proportionality and the Virtues of Judicial Craft" (2013) 63:2 SCLR 501.
[328] This is pronounced in *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53 at para 29 [*University of Calgary*], where the Court deems "legislative respect for fundamental values," then changes the subject.
[329] 2018 SCC 3 at para 32.

accommodate."[330] Few would argue that workplace legislation cannot benefit from a duty to accommodate lens, but the permissive mandate is much broader. Recourse to *Charter* principles is based on the deemed purpose of the relevant enactment.[331] While a duty to accommodate stipulation is perhaps less vulnerable to abuse, as it would take significant rhetorical work for it to justify, say, an anti-labour stance, the process of constructing the intent of a provision defies the possibility of constraint. It is also worth noting that, should one dislike the rhetorical impact of a given principle, there is no reason to invoke it.[332]

When the administrative decision in *Doré* was upheld, the Court presented as self-effacing. Principles, like those in *Caron*, are meant to defer the site of authority, to move the act of judgment beyond the courtroom and into the sphere of impartiality. In much the same way, a finding of specialization suggests judicial forbearance.[333] When, for instance, the executive wishes to be represented by a non-lawyer, and the "interpretation … respecting administrative justice falls squarely within the ATQ's expertise," then the Supreme Court appears to be doing nothing at all when they uphold the decision.[334] Yet one reads this case, and those like it, with a sense of latent agency. Prior to this particular grant of deference on the basis of expertise, the Court discussed the indicia of reasonableness, finding, *inter alia*, that there was no issue of central importance here, and that this narrow question *did* fall within the specialization of the

[330] *Ibid* at para 35.
[331] *Ibid* at para 22: "The duty to reasonably accommodate disabled employees is a fundamental tenet of Canadian and, more particularly, Quebec labour law."
[332] See, e.g., Kennedy, *supra* note 306.
[333] For a particularly strong example, see: *Quebec (Attorney General) v Guérin*, 2017 SCC 42 at para 31, discussing the "core … mandate and expertise" at issue.
[334] *Barreau du Québec v Quebec (Attorney General)*, 2017 SCC 56 at para 18.

relevant decision-maker.[335] These claims rarely find sustained justification in the jurisprudence, but the indeterminacy thesis, along with the practice of reading the flexible results in administrative case law, suggests that an argument can always be made that, say, this *was* a centrally important issue. The treatment of structuring principles at the Supreme Court relies on the stability of language if interpretation is to be anything more than the unilateral imposition of a single perspective. It is a challenge the Court has addressed by grounding their concepts in the faux-neutrality of interpretive rules.

2. Localized Values: Reading with Purpose

One major point of troubling vacuity in the modern principle is the optional and ill-defined use of the "entire context." Interpretations are often advanced without learning much from the circumstances of enactment or the debates surrounding a provision, yet these are often adduced when they seem to favour a particular result. Much of the work in this area focuses, at least nominally, on what the provision hopes to achieve.[336] Ruth Sullivan puts it simply: "In statutory interpretation there are two categories of presumptions—presumptions about how legislative texts are drafted and presumptions about what policies and values the legislature wishes to promote when it enacts legislation."[337] These presumptions are no more theoretically compelling than those directed at the first-order question of interpretation. Even where a purpose is expressed through a preambular 'whereas,' it continues to rely on the reader to impose meaning. Purposive interpretation is one more point of misdirection that locates authority outside the courtroom. In judicial review since *Dunsmuir*, recourse to intent particularizes the

[335] *Ibid* at para 17.
[336] This is particularly evident in *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44, where context is taken from various legislative schemes and, along with recourse to an amorphous "regulatory context" (para 30).
[337] Halsbury's Laws of Canada, *Legislation*, "Determining Legislative Intent" (VIII.4.(1)) at HLG-93.

lofty ideals of interpretation.[338] When purpose is claimed, Parliament is speaking. This has particular resonance in administrative law, where judges navigate the bounded expertise that hews to tribunal interpretations.[339]

This is a relatively nuanced point, but its operation is easily discernible in the *Alberta (Information and Privacy Commissioner) v. University of Calgary* decision.[340] Here, the Court considered the purpose of the solicitor-client privilege exceptions, as set out in the relevant *Freedom of Information and Protection of Privacy Act*.[341] On the (found) facts, the legislature spoke through their silences: The relevant provision required something more for the renunciation of privilege.[342] Côté J, writing for the majority, glossed the modern principle to add that "it recognizes legislative respect for fundamental values."[343] Again, we find ill-defined externality—but, this time, it is put in play through a contextual application of the modern principle. It is both telling and alarming that, in the concurring judgments, there are significant disagreements about what the law of interpretation actually *does*. For the majority, "[t]he modern approach to statutory interpretation requires legislative texts to be read in their entire context. And resort to other texts from different jurisdictions may be helpful in determining what that entire context is."[344] Cromwell J, concurring in result, finds an "anchor" in the text, and that is emphatically all the context he needs.[345]

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[338] While this is, as will be discussed, a common practice, a good introduction is found in *Quebec (Attorney General) v Lacombe*, 2010 SCC 38 at para 20, where presumed intent and found purpose frame the ensuing analysis.
[339] The definitive statement on this point is found in *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 at para 33.
[340] *University of Calgary*, *supra* note 328.
[341] RSA 2000, c F25.
[342] *University of Calgary*, *supra* note 328 at para 29.
[343] *Ibid*.
[344] *Ibid* at para 63.
[345] *Ibid* at para 73.

Context and purpose exist in close interrelation since the overwhelming majority of relevant decisions use the former as a means of discovering the latter. When courts make their turn to the modern principle, they are 'finding' meaning in a way that collapses the general into the particular.[346] This is an active "moment of rupture," characterized by ephemerality, where judges transform the jurisprudential space. They briefly disrupt the language of values to render a contextualized result.[347] It is therefore a moment of particular importance for understanding how power is vested and disguised in legal interpretation. Consider, for instance, the unstated presumptions that inform the idea that "the intended scope of judicial review legislation is to be interpreted in accordance with the usual rule that the terms of a statute are to be read purposefully in light of its text, context and objectives."[348] We find the norm clearly marked: There is a usual rule that sets out the routine concerns of statutory interpretation. The relevant term is read for purpose in light of words, words about those words, and purpose. Reliance is placed on the stability of language in a manner that strains even orthodox theories of legal interpretation. The jurisprudence must distract from its own inconsistency—that it presumes to resolve disagreements about language with recourse to more of the same. In some ways, this is an unfair criticism given that nothing is outside of the text; however, if people can diverge on what a statute means, it is difficult to imagine how the status of context and purpose signify beyond this form of subjectivity. This challenge is masked behind amorphous moves to the legislative surroundings.

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[346] This turn is explicit in *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52 at para 81: "I turn first to the grammatical and ordinary sense of the words."
[347] For a concise summary of much of this literature, see: Sam Halvorsen, "Taking Space: Moments of Rupture and Everyday Life in Occupy London" (2015) 47:2 Antipode 401.
[348] *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para 18 [*Khosa*].

Contextualizing interpretation adds the illusion of content where legal maxims run out. The decision in *Canada (Citizenship and Immigration) v. Khosa* is instructive here, as the Court frames its methodology around classical authority: "As Rand J. commented in *Roncarelli v. Duplessis*, … 'there is always *a perspective* within which a statute is intended to operate.'"[349] At the moment where guiding principles appear ready for explication, they disappear. In their place, we find ground-level application that operates in isolation through a single perspective, discerned through the law of interpretation. When judges speak about, say, the distinct purpose of regulatory legislation, which "differs from criminal legislation in the way it balances individual liberties against the protection of the public," they locate definitions in that which is concurrently transcendent and mundane.[350] The focus remains on the legislative text, along with its "entire context," but the bench is implying the communal availability of this content—they gesture well beyond themselves to find uncontroversial meaning in the routine work of legal interpretation.

It is important to note that this *can* involve recourse to principles, but opens up the possibilities far wider than the threshold discussion of guiding principles. Immediately after Cromwell J cites the modern principle in *British Columbia (Workers' Compensation Board) v. Figliola*, he frames the interpretive question around "the principles of the finality doctrines rather than … their technical tenets."[351] In a case that explicitly addresses which institutional actor can validly speak to meaning, this contextual use of principles allows for continued rhetorical misdirection. On this official reading, it is not the court of last word that decides the question of interpretive authority; rather, the

[349] *Ibid* at para 20. Emphasis mine.
[350] *Wilson v BC*, *supra* note 301 at para 33.
[351] *Figliola*, *supra* note 346 at para 81.

"general principles of administrative law" conduce to situational maxims that disappear alternative voices.[352] The modern principle embodies a commitment to purposive interpretation for good reason—it is both malleable and always already justified. As the majority in *Canadian Broadcasting Corp v. SODRAC 2003 Inc* puts it, "purposive construction is a tool of statutory interpretation *to assist* in understanding *the meaning* of the text. It is not a stand-alone basis for the Court to develop its own theory of what it considers appropriate policy."[353] When meaning is in dispute, the Court uses the idea of purpose to evoke impersonal values, thereby disguising and deferring the speech-act.[354]

Judges use this communicative faith to mask the violence of their work. There can be no unilateral power if the Court simply *finds* meaning, but the impossibility of such a task is disguised behind principles just far enough out of focus to retain their credibility. By insisting that meaning exists externally, judges occupy a privileged space of recognition and discovery.[355] Although parties are in clear and expensive disagreement about textual signification, interpretive difference is rendered nonsensical through truth

[352] *Khosa*, *supra* note 348 at para 48. In *Figliola*, the Court loosened the doctrines of issue estoppel, collateral attack, and abuse of process, focusing again on ethereal, malleable concepts at the expense of the parties. Their technical contours are subordinate to underlying principles of "fairness" and "finality." The complainants in the underlying litigation suffered from chronic pain, but were subject to "capped" compensation on that basis under the relevant workers' compensation statute. After an unfavourable ruling by the Workers' Compensation Board, but before their appeal to the Workers' Compensation Appeal Tribunal, the legislation was amended to remove human rights jurisdiction from that tribunal. As such, the complainants brought a fresh complaint to the Human Rights Tribunal. The majority foreclosed this avenue, presenting judicial review as the only proper brand of subsequent litigation. In doing so, LeBel J et al denied the complainants' ability to present their claim before the now-appropriate decision-maker. Their experiences were, then, confined to the language and presentation of the WCB forum and were presumptively invalid, pending successful reversal on judicial review.

[353] 2015 SCC 57 at para 55 [*SODRAC*]. Emphasis mine.

[354] In other words, the Court uses suggestive 'legal reasoning' to deny embodied "cognitive states" as expressed through pragmatic discursive structures. See: Stephen Barker, *Renewing Meaning: A Speech-Act Theoretic Approach* (Oxford: Oxford University Press, 2004).

[355] The result is perhaps best summarized in *Williams Lake*, *supra* note 302 at para 195: "statutory text remains both the starting point of the exercise of statutory interpretation and the focal point of the analysis."

claims about external legislative meaning.[356] This holds a particular resonance upon judicial review because the sites of potential meaning are even more diverse. Courts can locate textual associations in things like presumed expertise or purposive maxims, but interpretation always remains a matter of discovery rather than construction.[357] This goes a significant distance in perpetuating the legalistic, uncontroversial character of statutory interpretation, but it leaves judicial speech too far in the open. The next step, then, is one of divesting legal actors of any active recognition at all. Misdirection about who speaks when meaning is in dispute immunizes the judiciary from charges of illegitimate agency or error. In the decade since *Dunsmuir*, the Supreme Court has masked the unilateral force of imposing definitional sense behind the rhetoric of principles and purpose. The vacuity of this approach is, however, further disguised by an insistence that someone else is speaking.

(b.) Throwing Voices

The administrative state depends on a panoply of voices, speaking in concert, about what legislation means. It is an unwieldy system that begins *in medias res*. Deliberation has occurred and ink has been spilt long before a definitional disagreement is brought forth for adjudication. At the risk of providing a high school civics refresher, interpretation happens only after democracy is reduced to representatives and their decisions are sent to be drafted, subject to further refinement.[358] The ensuing words are disparate in their aims, but increasingly interested in what a literary critic might call

[356] In *Atomic Energy*, *supra* note 153 at para 51, for instance, truth claims are adduced to situate a provision in terms of familiar legal usage.
[357] See, e.g., *Capilano*, *supra* note 339 at para 33.
[358] Halsbury's Laws of Canada, *Legislatures*, "Parts of Parliament and Legislative Assemblies" at HLE-1.

"reader-response."[359] Amidst the diversification of decision-making that characterizes administrative law, there is a unified, top-down concern with how and by whom our laws will be read.[360] To this end, innumerable areas of regulation have been carved out for tribunals to read, at least initially, in the place of judges. The nuances continue unabated and while some are obvious (like the distinct standards of judicial review), the aforementioned language of principles creates a cacophony of governmental expression. When the Supreme Court finally decides what a provision means, they can assign that authoritative definition to any number of interested actors. The unitary interpretive work is disappeared behind the appearance of institutional collegiality.

A recent criminal law decision from our highest court provides an unexpected gloss on the problem. In *R. v. Clarke*, it was held that administrative law has a unique relationship with "ambiguity."[361] This is because a lack of statutory clarity does not necessarily act as a "divining rod" for *Charter* values; instead, "[t]he issue in the administrative context … is whether the exercise of discretion by the administrative decision-maker unreasonably limits the *Charter* protections in light of the legislative objective of the statutory scheme."[362] There is much to untangle here. Beneath layers of constitutional protections and deemed Parliamentary goals lies a core of discretionary activity that must remain 'reasonable.' In other words, judicial review can locate meaning in legislative expression, administrative discretion, or legal principles that transcend individual actors. It is further assumed that, as the Court put it in *Doré*, "[b]y recognizing

[359] See, e.g., Elizabeth Freund, ed, *The Return of the Reader: Reader-Response Criticism*, 2nd ed (London: Routledge, 2003).
[360] The first line of *Alberta Teachers' Association*, *supra* note 22, puts it succinctly: "Through the creation of administrative tribunals, legislatures confer decision-making authority on certain matters to decision makers who are assumed to have specialized expertise with the assigned subject matter."
[361] 2014 SCC 28 at para 16.
[362] *Ibid*.

that administrative decision-makers are both bound by fundamental values and empowered to adjudicate them, *Baker* ceded interpretive authority on those issues to those decision-makers."[363] This creates a system in which the *Charter* is said to "nurture" administrative law, thus 'infusing' values in the act of interpretation.[364] We are confronted with expressive content *prior* to the act of interpretation. Dialogue between institutions, for all its promise, can also jeopardize the ability to locate points of decisional agency.[365]

This misdirection often traces the classical dichotomies of administrative law. A distinction has been drawn, for instance, between policy and law, which necessarily implicates Parliament, the administrative decision-maker, and the judiciary.[366] The tenuous dualism at play here is particularly problematic for those seeking interpretive candour; given the aforementioned malleability of principles and purpose, policy preferences can always be shrouded in the "entire context" of the statute. Similarly, the presentation of the discretion/deference opposition creates a surplus of (ostensibly) relevant signification. As Binnie J in *Khosa* puts it, "[w]hether or not the court should exercise its discretion in favour of the application will depend on the court's appreciation of the respective roles of the courts and the administration as well as the 'circumstances of each case.'"[367] In this way, content is said to arise from the factual matrix, the

[363] *Doré*, *supra* note 317 at para 29.
[364] *Ibid* citing David Dyzenhaus & Evan Fox-Decent, "Rethinking the Process/Substance Distinction: *Baker v. Canada*" (2001) 51 UTLJ 193 at 240.
[365] The interactions between courts and agencies are oft-remarked and characterized as a "delicate balance of power." I am interested in how additional layers of nuance are imposed rhetorically through the insistence on amorphous speech, as discussed below. See: Emily Meazell, "Deference and Dialogue in Administrative Law" (2011) 111:8 Columbia L Rev 1722 at 1787.
[366] This is most clearly demonstrated in *Khosa*, *supra* note 348 at para 17.
[367] *Ibid* at para 36 citing *Harelkin v University of Regina*, [1979] 2 SCR 561 at 575.

provision, and institutional difference—but, since these are assessed (or 'appreciated') by the Court, they can be relevant or not depending on the preferred outcome.

The distinct position of administrative decision-makers relative to their delegated subject matter serves as an important point of rhetorical misdirection in the relevant jurisprudence. Given the malleability of specialization, courts can buttress a definition they find compelling while denying the operation of expertise wherever convenient. Since the opening line of *Alberta Teachers' Association*, and again in that of *Capilano*, it has been legally assumed that "specialized expertise with the assigned subject matter" is a core feature of administrative law, but its operation is—and must be—unconstrained.[368] While the ill-defined contours of privileged knowledge are discussed above, there is a distinct function of expertise in the relevant jurisprudence: It evokes a concordance between legislative meaning and the speaking subject. In *Canadian National Railway Co. v. Canada (Attorney General)*, for instance, the Court found that "[e]conomic regulation is an area with which the Governor in Council has particular familiarity."[369] As a result, the presumption of deference, cited to *Dunsmuir*, was upheld.[370] If there is a core of information surrounding "economic regulation" (which is unlikely), it is not something courts have been reticent to pronounce upon.[371] By ascribing knowledge to this decision-maker, however, the Court buries the authorial voice beneath additional layers of democratic meaning. Here, Parliament enacts a statute and infuses it with their distributive goals. At the same time, they vest interpretive authority in a non-judicial

[368] *Capilano*, *supra* note 339 at para 1; *Alberta Teachers' Association*, *supra* note 22 at para 1.
[369] 2014 SCC 40 at para 56.
[370] *Ibid* at para 59.
[371] The regulation of our economy is a profoundly complex, integrated, and pervasive process in any state. It is probably impossible to render a legal decision with no economic impact. For a good introductory discussion on the breadth and diversity of economic regulation, see: Junji Nakagawa, *International Harmonization of Economic Regulation* (Oxford: Oxford University Press, 2011) at 1-19.

decision-maker who uses a combination of *their* knowledge and legislative guidance to forge definitional sense. When this is reviewed, the Court is speaking, to be sure, but only to narrate the dispositive reasoning somewhere beyond the bench.

In the foregoing example, and those like it, courts are not compelled to find expertise at the level of definitional meaning. The doctrine is sufficiently malleable to support a holding against the very possibility of non-judicial specialization on "economic regulation." Implicit in all of these decisions is a theory of institutional competence. Where convenient, courts can vest tribunals with expertise that they will recognize and correspondingly divest themselves of any positive action. The operation of 'legal reasoning,' however, is closely guarded by the judiciary and helpful for effecting "disguised correctness review."[372] Consider, for instance, the classical—but persistent—dichotomy cited in *Khosa*: "the issues to be resolved had to do with immigration policy, not law."[373] Carving out this space for administrative decision-makers has the unstated impact of securing a distinctly legal space for the bench. Tribunals are assigned a "core of … mandate and expertise" and the courts enjoy authority over legalistic interpretation, which can include "principles" along with "legislative context and purpose."[374] The ensuing compartmentalization is both vacuous and rhetorically effective where courts wish to speak in concert with other voices.

This is pushed to its inevitable limits of misdirection in the recent decision of *Green v. Law Society of Manitoba*.[375] It begins with the language of extreme deference.

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[372] Sheila Wildeman, "Making Sense of Reasonableness" in Colleen Flood & Lorne Sossin, eds, *Administrative Law in Context*, 3rd ed (Toronto: Emond Montgomery Publications, 2018) 437 at 465.
[373] *Khosa*, *supra* note 348 at para 17.
[374] *Guérin*, *supra* note 333 at para 31; *Celgene Corp v Canada (Attorney General)*, 2011 SCC 1 at para 1 [*Celgene*].
[375] 2017 SCC 20.

The impugned rule from the Law Society must not only be unreasonable, it must be one that "no reasonable body informed by [the relevant] factors could have [enacted]."[376] Despite this gesture toward abdication, the ensuing analysis finds the Court performing a "two-step" review.[377] First, there is a threshold move to the modern principle, which sets the provision in legal terms; secondly, we learn whether or not this reading could have been enacted by a "reasonable body."[378] In result, the Court valorizes their access to 'legal reasoning,' which serves as a reference point against which to construe an administrative definition. There is no critical engagement with the "expansive purpose" they use as an interpretive tool, nor with the idea that the text itself is never exhaustive.[379] Instead, we find the decision attributed to the Law Society while the background construction of reasonableness takes place within the courtroom. There can be no meaningful distinction between the law of interpretation and the policy concerns that animate it.[380] Driedger's mandate is not sealed with doctrinal purity. By presenting these institutional delineations, however, courts are able to assign active decision-making to non-judicial actors while maintaining overarching control over the contours of these categories. Judges are always speaking to legal meaning, but have ample opportunity to deny that speech.

When interpretation is understood as the unilateral imposition of a textual association, the obvious question concerns the person(s) empowered to forge that

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[376] *Ibid* at para 20 citing *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at para 24.
[377] *Ibid* at para 26.
[378] *Ibid* at paras 26-27.
[379] *Ibid* at paras 29, 37.
[380] See, e.g., Anestis Papadopoulos, *The International Dimension of EU Competition Law and Policy* (Cambridge: Cambridge University Press, 2010) at 58-59. The distinction is sometimes presented in terms of normative "soft law" versus that which has been enacted with the threat of state force. Whatever merit this might have in other areas of the law (though it does seem like a tenuous distinction at its foundation), statutory interpretation is *always* normative and permissive rather than mandatory. Judges can, for instance, look to "expansive purpose," but need not. Context is whatever they like.

meaning. We rarely receive an express answer, particularly in the administrative state where interpretive work is presented through a cacophony of speaking subjects. A legal core is reserved for judges—perhaps most clearly in *Dunsmuir* itself with the four rebuttals to reasonableness—but it is often deferred where legislative meaning is refracted through an administrative decision-maker.[381] The violence of giving legal force to a subjective definition is effectively disguised when three levels of government speak in harmony. On my reading, Parliament provides source material from which to impose interpretive sense; an agency does exactly that; and, on review, a court does the same before deciding whether or not to uphold the original embodied definition. Even where deference reads as pseudo-abdication, there is work being done within this privileged legal sphere that produces a definitional result and, where necessary, a "range of acceptable outcomes." Interpretation is always subject to judicial approval, but disguising this fact behind both the idea of external meaning and the presentation of varied institutional roles further legitimizes the preferred result. The relevant doctrine is malleable enough to enforce a single answer while masking the play(s) of power in the administrative state through the language of reasonableness.

(c.) The Only Reasonable Answer

For all their rhetoric about meaning embedded within statutory instruments, the Supreme Court was forced to admit to an open-endedness in *McLean v. British Columbia (Securities Commission)*.[382] The decision turned in large part on the definition of "the events" in relation to a limitation period. While Moldaver J, writing for the majority, held that such a vague provision essentially delegated authority on a case-by-case basis to the

[381] *Dunsmuir*, *supra* note 2 at para 55, particularly where "a question of law … is of 'central importance to the legal system,'" which defies stable meaning and stands as a thesis of legitimacy.
[382] 2013 SCC 67.

relevant Commission, he provides an additional gloss on the interrelation between reasonableness and interpretation.[383] His comments, which were unnecessary for the disposition of this case, are worth reproducing in full:

> It will not always be the case that a particular provision permits multiple reasonable interpretations. Where the ordinary tools of statutory interpretation lead to a single reasonable interpretation and the administrative decision maker adopts a different interpretation, its interpretation will necessarily be unreasonable—no degree of deference can justify its acceptance … In those cases, the "range of reasonable outcomes" … will necessarily be limited to a single reasonable interpretation—and the administrative decision maker must adopt it.[384]

The impact of this holding is twofold. First, and obviously, it facilitates a version of judicial supremacy that operates through the language of deference. A clearer use of binary correctness is difficult to imagine—if the decision-maker fails to adopt the single definition preferred by the reviewing court, she is acting unreasonably. This decision stands for the proposition that, where a judicially generated "range" is limited to one answer, it will be overturned despite a governing standard of reasonableness. Secondly, and relatedly, *McLean* evokes the aforementioned sphere of legality through recourse to "ordinary tools of statutory interpretation." This allows for significant manipulation in a regime that "takes its colour from the context."[385]

The rhetorical value of reasonableness is perhaps most clearly demonstrated through the concurring judgments in *Wilson v. Atomic Energy of Canada Ltd*.[386] In a relatively famous proposal to adopt reasonableness as the single standard of judicial review, Abella J reads *Dunsmuir* as an affirmation of her task. It does not, she suggests,

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[383] *Ibid* at para 49: "Thus, it stands to reason that 'the events' is a deliberately open-ended phrase because it must be capable of applying to a variety of different contexts."
[384] *Ibid* at para 38. References omitted.
[385] *Khosa*, *supra* note 348 at para 59. See also: *Capilano*, *supra* note 339 at para 32: ""The presumption of reasonableness may be rebutted if the context indicates the legislature intended the standard of review to be correctness." Context is never given any precise content.
[386] 2016 SCC 29.

mandate a fixed number of standards but rather ensures that there will always be *some* measure of judicial oversight available in administrative law.[387] Her critique of the faux-simplicity brought about post-*Dunsmuir* is alive to difficulties that characterize this area of the law until, very suddenly, it is not. She hints at the amorphous character of our "potentially indeterminate number of varying degrees of deference" and finds that deference must imply "no uniquely correct answer to the question."[388] She points to the obvious flaw in cases like *McLean*—that unitary reasonableness is just correctness—before suggesting that both approaches "can live comfortably under a more broadly conceived understanding of reasonableness."[389] In other words, Abella J identifies the profound fluctuations in judges' applications of deference and then suggests that the problem can be solved by calling everything by the same name.

There are two perfunctory concurring reasons alongside hers that, taken together, constitute a majority and ensure the persistence of correctness review. It took Cromwell J only three paragraphs to conclude that "developing new and apparently unlimited numbers of gradations of reasonableness review … is not an appropriate development of the standard of review jurisprudence."[390] His concerns are warranted and unavoidable. In a recent comment on how a single reasonableness standard might be operationalized, one critic suggests that,

> by demonstrating that the range of reasonable outcomes is constrained by statutory language, pre-existing jurisprudence and so on, the Court can provide a significant degree of structure to areas of substantive law. Without necessarily substituting judgment as it would by applying

[387] *Ibid* at para 31: "Nothing *Dunsmuir* says about the rule of law suggests that constitutional compliance dictates how many standards of review are required. The only requirement, in fact, is that there *be* judicial review in order to ensure, in particular, that decision-makers do not exercise authority they do not have."
[388] *Ibid* at paras 18, 22.
[389] *Ibid* at para 24.
[390] *Ibid* at para 73.

> correctness (or "disguised correctness") review, it can indicate that administrative decision-makers have, relatively speaking, a narrower margin of interpretation in some areas than in others. … the analytical structure of reasonableness review provides some safeguards against judicial intrusion on administrative decision-makers' autonomy."[391]

This idea of constraint via (*inter alia*) statutory language is, as mentioned above, deeply tempting but ultimately impossible. The foregoing passage is instructive because it traces the contours of aspirational reasonableness before demonstrating its rhetorical strength. It has become shorthand for judicial inactivity and progressive deference, which helps explain the majority's terse conservatism in *Wilson*. While the vast majority of decisions fall into reasonableness review, the threat of correctness flatters the former dialogic standard—even where it avails of only a single 'reasonable' answer.

Interpretive reasonableness exemplifies the malleability of this almost circular standard, where, "to be unreasonable, … the decision must be said to fall outside 'a range of possible, acceptable outcomes which are defensible in respect of the facts and law.'"[392] In other words, judges are constrained by a conceptual range governed by the ideas of possibility, acceptability, and defensibility—or, given the emptiness of these signifiers, by nothing at all. Although it is well-settled that statutory interpretation defaults to a reasonableness review, there is little consistency in the contours of the analysis.[393] In one decision, it was found that "Driedger's modern rule of statutory interpretation provides helpful guidance" when assessing the reasonableness of a given interpretation.[394] Another case finds interpretive reasonableness in a definition that "accords ... with the plain words

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[391] Paul Daly, "The Signal and the Noise in Administrative Law" (2017) 68 UNBLJ 68 at 84-85.
[392] *Celgene*, *supra* note 374 at para 34.
[393] See, e.g., *Canadian National Railway Co*, 2014 SCC 40 at para 62: "This issue of statutory interpretation does not fall within any of the categories of questions to which a correctness review applies. As such, the applicable standard of review is reasonableness."
[394] *Wilson v BC*, *supra* note 301 at para 18.

of the provision, its legislative history, its evident purpose, and its statutory context."[395] None of these rhetorical gestures to 'ordinary grammar' or amorphous context provide meaningful space for engagement. They are conclusory statements that mask the value judgments that inform the un/reasonableness assessment. Statutory interpretation requires the ascension of a single perspective; the current approach allows it to be that of the judiciary, disguised behind the language of respectful deference.

When meaning is in dispute, the last authoritative speaker imposes a textual association that becomes legally binding. Judicial review unambiguously vests that power in the courts, but there are significant ideological advantages to be gained from denying the violence of interpretation. Masking the play(s) of power in the administrative state recasts contingent, political sign associations as natural, inevitable, and externally available. It is normative adjudication at the level of linguistic sense, and it never reveals the profound play within its ill-defined structures. Infinitely malleable—and occasionally binary—reasonableness is one method of 'finding' statutory meaning, but it works in concert with the aforementioned moves to externality and institutional misdirection. The result is a body of case law that asserts a unilateral image of how language means while refusing to present that work for critical engagement. This is particularly insidious in light of both contemporary linguistics and our textual legal system. No one holds divine or even 'correct' knowledge about signification, but someone must be vested with the final word for legal resolution. The violence of interpretation is a necessary feature of language and our embodied experiences of reading it—an insight that both complicates and refocuses the possibility of progress.

[395] *Agraira*, *supra* note 309 at para 64 citing *Smith v Alliance Pipeline Ltd*, 2011 SCC 7.

V. On the Continued Necessity of Statutory Interpretation

There is no law outside the practice of interpretation. One cannot write without an experience of that text, and cannot respond to a rule, permissive grant, or anything else without first perceiving and thereby interpreting it. Since we are embodied individuals without access to a metalanguage, these premises underwrite a sustained critique of statutory interpretation. If language reflects nothing but itself, a definition with legal force necessarily privileges those in power.[396] Any claim to interpretive 'reasonableness' runs afoul of the basic tenet of the linguistic turn, that "[b]etween consciousness, perception (internal or external) and the 'world,' rupture is perhaps not possible, even in the subtle form of the reduction."[397] The current law of interpretation is, then, profoundly capricious. It is legalistic sound and fury that distracts from the violence of its task. Perhaps surprisingly, these insights leave the core of statutory interpretation untouched. 'Nothing beyond texts' as a theoretical mantra leaves no possibility of communal interpretation. Even where we discuss and agree upon a textual association, that discourse is itself a text that we interpret without verifiable congress.[398] In law, as in decision-making more generally, someone must have the last definitional word. This is not a matter of principled governance but rather a necessary feature of language's empire in the administrative state.

Legal texts proliferate and mean nothing outside the act of reading them. This is often unproblematic. People do, for instance, have satisfactory interactions with the

[396] The people who are positioned to assert their interpretive will are generally those with considerable other indicia of privilege. See, e.g., Sabrina Lyon & Lorne Sossin, "Data and Diversity in the Canadian Justice Community" (2014) 10:5 Osgoode Legal Studies Research Paper No 12/2014.
[397] *Of Grammatology*, *supra* note 28 at 73.
[398] Ultimately, much of this argument is about the unconscious points where we *impose* something upon a text. This is eloquently described in Herman Melville, *Moby-Dick; or, The Whale* (New York: Penguin Books, 2002) at 213: "every stately or lovely emblazoning—the sweet tinges of sunset skies and woods … all these are but subtle deceits, not actually inherent in substances, but only laid on from without."

administrative state—we are just far less likely to read about them. When interpretations clash, however, any legal system will dictate a final site of adjudication. The result can be a slow climb up the courtroom hierarchy, the operation of undisguised force, or virtually anything in between.[399] In any case, it is this final word that sets legal linguistic meaning rather than something inherent and universal within the (broadly construed) text. This is perhaps the most frustrating aspect of the modern principle and its constituent rhetoric: Legal interpretation is always already a matter of imposing a single authoritative perspective; it hardly seems unreasonable to ask those who hold this power to be honest about it.[400] While judges are acting exactly as the nature of interpretation requires—that is, they subordinate alternative perspectives by forging a single legal definition, backed by state force—they prefer to soften this governmental necessity in the aforementioned ways. At the Supreme Court, interpretation is derived from transcendent principles, spoken in a variety of voices, and is, ultimately, 'correct.' None of these ideas are possible in light of contemporary understandings of language, but they certainly sound better than my suggested alternatives.[401]

Since some comfort might be derived from an interpretive regime that masks its violence, it is important to be precise about my criticisms. If the current approach stands

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[399] I hasten to add that the former example is different in presentation, but the potential for violence remains—and is, indeed, probably on a larger scale when one considers the coercive arm of the state. For the definitive statement, see: Cover, *supra* note 294.

[400] The same has been said about the administrative state more generally. As this form of regulation developed, state actors "faced a problem of legitimation, namely, that a new institution of power had to be given political meaning within the inherent liberal tradition." It is therefore arguably unsurprising that statutory interpretation is shrouded in the language of the 'rule of law' and other such ideals. See: Eliza Wing-yee Lee, "Political Science, Public Administration, and the Rise of the American Administrative State" (1995) 55:6 Pub Admin Rev 538 at 539.

[401] This preference for comforting, persuasive rhetoric is evident throughout our current iteration of legality (see, e.g., Scott Fraley, "A Primer on Essential Classical Rhetoric for Practicing Attorneys" (2017) 14 Legal Communication & Rhetoric 99). Names and symbols, though, come at a cost. This will be discussed at length below, but see: Vaughan Black, "Rights Gone Wild" (2005) 54:3 UNBLJ 1 at 7: "it is worth pausing to note which symbols the government elects to … rejoice in and which it does not."

as the inevitable outcome of unverifiable sign associations, then what is harmed by judges doing just that? The answer lies in the cost of this misdirection. Our current regime is, as an early author of propaganda puts it, "the dramatization of important issues."[402] When judges hide their interpretive perspective behind a quotation from Elmer Driedger, interested parties are left with no sense of how the definitional work was performed. This is an unnecessary and damaging point of unrestrained discretion.[403] Statutory interpretation requires the decision-maker to reach for a variety of external reference points, including the relevant provision and the parties' readings of the same. This process is radically subjective. Whoever defines the text will internalize the relevant stimuli and impose a textual association that has no inherent connection to the original signifiers.[404] While the work being done to forge a definition cannot be structured or communally verified—and the ensuing meaning cannot be right or wrong—the materials from which we work *can* be apprehended, at least in a qualified sense. The current approach has an unchangeable result (the imposition of a single, subjective perspective) but a flawed process. I do not mean to invoke some tenuous distinction between process and result but rather to ask two simple questions: What can be learned from an interpretive judgment, and why does it matter? This quickly becomes a question of knowledge and its limits.

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[402] Edward Bernays, *Propaganda* (New York: Ig Publishing, 2005) at 128.

[403] In some senses, *this* is exactly the type of discretion that judicial review has always sought to eradicate. In *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, 2001 SCC 41 at para 16, Binnie J summarizes a long line of jurisprudence to support the claim that discretion is confined by its intended purpose. The current approach to construing statutes fails even on this (self-consciously) low standard—discretion is exercised to forge a legal definition, but not to obscure the work of doing so.

[404] For a description at the level of cognitive processing, see: Jerome Feldman, *From Molecule to Metaphor: A Neural Theory of Language* (Cambridge: MIT Press, 2006) at 38: "[A]ny input of language or perception is understood against a background of ongoing activity and is always contextual."

(a.) Belief in Doubt

The possibility of better interpretive practices depends on the potential utility of transparent reasoning. An obvious problem in most calls for reform is at the root of my critique: Nothing is outside the text, so hermeneutical "candour," to use Hutchinson's term, simply creates more texts.[405] We find signs reflecting signs, awash in embodied contingency. As even Hart notes, there is nothing stable about the rules we use to construe language, and this holds, too, for the explanations we offer.[406] Statutory interpretation is the practice of talking about words, and it is uncertain whether there is a meaningful difference between reading hermeneutical decisions or just reading the definitional result. Deconstruction points out the violence of interpretive truth claims, but leaves the conceptual field bare.[407] Fortunately, there is a sense that this act of clearing space points forward to some possibility of improvement. Confronting the pervasive textual uncertainty that characterizes this discipline, along with experience itself, is "not simply part of a 'linguistic turn' but instead serves as a *material force* to undo the stagnation of institutions that hold us prisoners in the name of sophisticated forms of pessimism."[408] In other words, this critical lens embodies significant reformative potential in its incredulity toward received institutional wisdom, but stops short of nihilistic pessimism through an engagement with epistemological limits that always imply something beyond themselves.[409]

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[405] Hutchinson, *supra* note 139.
[406] Hart, *supra* note 49.
[407] This theoretical lens does actively seeks to repudiate hierarchies, particularly as they relate to knowledge and elitism, so no interpretation has greater *a priori* priority over those of others. In the applied legal sphere, see: Juliano Zaiden Benvindo, *On the Limits of Constitutional Adjudication: Deconstructing Balancing and Judicial Activism* (London: Springer, 2010) at 333.
[408] Drucilla Cornell, "Derrida's Negotiations as a Technique of Liberation" (2017) 39:2 Discourse 195 at 203. Emphasis in original.
[409] Cornell, *supra* note 64.

Interpretation is solitary work, but can there be a communal appreciation of how that work is done? On this point, Wittgenstein's posthumous notes provide important insight. He advances a qualified epistemology, one where "doubts form a system," and within this system we find argumentation and judgment.[410] Doubt and belief are not mutually exclusive oppositions, but rather imply each other in a liminal relationship. In practice, this becomes an awareness that

> [a]ll testing, all confirmation and disconfirmation of a hypothesis takes place already within a system. And this system is not a more or less arbitrary and doubtful point of departure for all our arguments: no, it belongs to the essence of what we call an argument. The system is not so much the point of departure, as the element in which arguments have their life.[411]

This is evocative of his better known work on our collective "language game," but retains an important distinction. Our embodied experiences are all we have—and this is not a design flaw. Instead, he submits, "[i]f you tried to doubt everything you would not get as far as doubting anything. The game of doubting itself presupposes certainty."[412] Even the most profound skepticism requires some kind of provisional anchor, reminiscent of the Cartesian approach.[413] For interpretive purposes, this requires a consideration of how readers experience the system, or the "language game," of construing meaning in administrative law.

Conceptualizing space for readers in relation to legal interpretation is important for assessing the impact of analytical transparency. It also returns us to Dworkinian skepticism through the invocation of structure. Indeed, the idea that doubt presupposes

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[410] Ludwig Wittgenstein, *On Certainty*, translated by Denis Paul & GEM Anscombe (Oxford: Blackwell, 1975) at para 126.
[411] *Ibid* at para 105.
[412] *Ibid* at para 115.
[413] For an accessible summary, see: Janet Broughton, *Descartes's Method of Doubt* (Princeton: Princeton University Press, 2002).

some foundational belief is broadly congruous with a "global internal skepticism."[414] Recall, for instance, that much of the relevant discussion in *Law's Empire* is about recasting the external skeptic's arguments to force the articulation of a positive stance.[415] Administrative law presents a significant challenge this way because experiences of state/subject interaction are profoundly (and increasingly) diverse. There is no single experience of bureaucratic regulation.[416] What, then, is the foundation from which we express doubt about the interpretive enterprise? A provisional answer lies in the collapsed, mutually informing version of internalized external skepticism discussed above.[417] I can identify a doctrinal structure in place for interpretation while remaining mindful that it is contingent both in my perception of it and in its own existence as the culmination of more or less arbitrary forces.[418] There is general agreement, at least at the level of terminology, that textual laws are interpreted by agencies and judges, and that these institutions embody some aspirational content in terms of their interactions.

This description is also a text, but with an important caveat—there is more of it. While that might seem like a strange distinction, and certainly there can be damaging uses of volume where layers of misdirection must be peeled away, it helps explain a problem with the most extreme skepticism. When we talk about statutory interpretation,

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[414] *Law's Empire*, *supra* note 115 at 84. Global internal skepticism "assume[s] some general and abstract moral position … as the basis for rejecting the more concrete moral claims at hand … They may not strike you as good arguments, once [the external skepticism] disguise is abandoned, but that is, I suggest, because you find global internal skepticism about morality implausible."

[415] *Ibid*.

[416] For an example of the varied institutional inflections one might experience in a legal situation, see: Robert Gorman, "The Development of International Employment Law: My Experience on International Administrative Tribunals at the World Bank and the Asian Development Bank" (2004) 25:3 Comparative Labor L & Pol'y J 423.

[417] See: chapter 1, section C and, more generally, Hillary Nye, "Staying Busy While Doing Nothing? Dworkin's Complicated Relationship with Pragmatism" (2016) 29:1 Can JL & Jur 71.

[418] Again, this necessitates reference backwards to my opening claim in chapter 1—the administrative state is highly contingent. The ability to delegate via legislation, read in concert with our constitutionally buttressed courts of review, could have justified radically different outcomes. More broadly, all of those outcomes depend for meaning on the act of interpreting them.

there *appears* to be a rough consensus on the legal actors involved, the rhetorical steps they take, and even on the most common normative goals of such an approach.[419] My legal area of focus is, on some readings, nothing more than an empty signifier, and, in the absence of a metalanguage, I have no idea whether we mean the same thing when we talk about 'statutory interpretation.' That uncertainty is useful to a point—it is the external part of my preferred skepticism—but it does not explain the consistency of focus in the relevant scholarship.[420] The difference is that 'statutory interpretation' implicates a variety of other accessible texts. One can see or else read about lawmaking processes and the legislative and constitutional sources for interpretive authority. None of these constituent parts of construing statutory meaning transcend the need for embodied interpretation, but when a common set of signifiers is articulated, there is an ever-widening field of discourse, analogous to Adorno's idea of the constellation.[421] There is some (intuitive) benefit to a decision that explains its bases for imposing a single definitional perspective, but it is important to understand why.

If the law of interpretation is vacuous rhetoric that masks the play(s) of power in the administrative state, the first step of reform seems simple: Replace misdirection with transparent engagement into what can and cannot be known. This argument is concisely set out in Hutchinson's recent text—judges are decidedly "not godly figures" and, so, "[t]hey have no especial, let alone divine insight into the meaning of legal texts or the

[419] Canadian scholarship on legal interpretation is relatively sparse, but there is consistency from John Willis, "Statute Interpretation in a Nutshell" (1938) 16:1 Can Bar Rev 1 to Daniella Murynka, "Some Problems with Killing the Legislator" (2015) 73:1 UT Fac L Rev 11 about the actors and value judgments involved.

[420] Even looking to the far more voluminous American literature, these people are talking with remarkable consistency about the same issues—whether they be so-called 'originalism' or divined Parliamentary intent. Of course, they often talk past each other using common signifiers, but each writer at least appears confident in the arguments and institutions that form the backdrop for their own ideas.

[421] For a helpful summary, see: Rainer Nägele, "The Scene of the Other: Theodor W Adorno's Negative Dialectic in the Context of Poststructuralism" (1983) 11:2 Boundary 2 59.

nature of social justice."[422] As a result, "[t]he only real choice is one of candour or subterfuge."[423] Yet this candour, however appealing, runs into the same problems at one degree of separation. Generously reading *Rizzo Shoes*, for instance, one might note the identification of an interpretive problem—at the beginning of the case, we do not know what "bankruptcy" means.[424] It should be helpful, then, to learn that the Court relies on, say, the *Interpretation Act* to ground the analysis in remedial objectives.[425] When the purpose is subsequently located in workers' interests upon the dissolution of employment, it appears sensible for "bankruptcy" to be construed broadly through the lens of labour rights.[426] Still, even on this streamlined reading that omits the misdirection of the modern principle, one wonders how these moves are more stable than the first-order question of meaning. Remedial purposes must be interpreted in the same prison-house of language as bankruptcy, or "large and liberal construction," or anything else. Since definitions must always be imposed, and our laws will always require definitions, is there any value to transparent reasoning, or do additional sites of interpretive work simply create *more* opportunities for masking the unilateral assignation of meaning?

Returning, then, to the idea of constellations, it is useful to reconsider the status of context in relation to the object of inquiry. If everything that surrounds the interpretive question is a sign reflecting only other signs, interpretive candour has limited utility. The distinction between first-order definitional questions and the work that surrounds them is

[422] Hutchinson, *supra* note 139 at 154.
[423] *Ibid* at 156.
[424] *Rizzo*, *supra* note 1 at para 20: "At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete."
[425] *Ibid* at para 22 citing *Interpretation Act*, RSO 1980, c 219, s 10.
[426] *Ibid* at para 24 citing *Machtinger v HOJ Industries Ltd*, [1992] 1 SCR 986 at 1002.

a subtle one, but one that inheres to the nature of interpretation. When the reading subject forges meaning,

> the thing's own "identity against its identifications" can never be grasped in its immediacy … [so] we can only approach the object through a constellation of concepts which attempts to bring into the light the specific aspects of the object left out of the classifying process. The constellation does not pretend to totality in the sense of fully expressing the sedimented potential of the object. What it does is unleash the fullest possible perspective on what the object has come to be in its particular context. … "Context" here is understood not merely as external relation but also as the internalized characteristics which make an object what it is. The "substance" of the object is relational at the core.[427]

Totalizing claims are rejected in favour of a relational emphasis. This is definition by absence, an effort to triangulate meaning based on a necessarily embodied perspective. While that likely sounds opaque, these are familiar steps in many hermeneutical processes.[428] Readers of poetry, for instance, will recognize the liminal character of interpreting though constellations.[429] This is a process of "creating a place for possibility and *present* absences."[430] A foundation for doubt (which implies something that can be known) lies in this appreciation of signifying potential. It requires careful engagement with the connections that inform our embodied experiences of a text and an openness to the contingency of the same.

It would be deeply hypocritical to assert that some amorphous ideal of connectedness can inform interpretive methodology after my critique of so-called structuring principles. This arbitrary signifier is meant instead to introduce a multitude of

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[427] Cornell, *Philosophy of the Limit*, *supra* note 64 at 23.
[428] Of course, there is no single brand of hermeneutics, but its core focus on interpretive knowledge creates a consistency of interests that are directed at profoundly diverse subject matter. See, e.g., Irena Martínková & Jim Parry, "Heideggerian Hermeneutics and Its Application to Sport" (2016) 10:4 Sport, Ethics and Philosophy 364.
[429] There is perhaps no better call to this method than that in "Ode on a Grecian Urn" by John Keats: "Heard melodies are sweet, but those unheard / Are sweeter."
[430] Ben Lerner, *The Hatred of Poetry* (New York: McClelland & Stewart, 2016) at 86. Emphasis mine.

others. A fundamental problem with legal interpretation is its faith in language's ability to answer its own challenges. We can advance words *ad infinitum*, but none have any greater claim to communicability than the first-order term or provision at issue. Embracing the relational context of Adorno's constellations is not about linguistic transcendence but rather closing in on the core of what cannot be known. In response, interpreters can avail themselves of a pragmatism that refrains "from thinking that there is a special set of terms in which all contributions to the conversation should be put."[431] There is nothing special about the language game of statutory interpretation, and that provides a helpful means of looking beyond entrenched signifiers that exclude alternative perspectives, even at the level of analytical work. Instead, one becomes "willing to pick up the jargon of the interlocutor rather than translating it into one's own."[432] The goal of such an epistemology is "to find the maximum amount of common ground with others" toward a version of hermeneutics "where we do not understand what is happening but are honest enough to admit it."[433] This provides a new lens through which to consider the value of interpretive candour.

None of the foregoing terms mean anything definite, and that is exactly the point they try to signify. There is no "constellation" *out there* as distilled method; rather, its meaning (at least to me) is that it means a variety of things, as a non-sedimented signifier, depending on the site of interpretation and the position of the reading subject. When we open space for non-traditional interpretive voices and considerations, the ensuing regime of hermeneutics is one of doubt based on a simple belief in the contingency and

[431] Richard Rorty, *Philosophy and the Mirror of Nature* (Princeton: Princeton University Press, 2009) at 318.
[432] *Ibid*. See also: Richard Rorty, *Consequences of Pragmatism: Essays, 1972-1980* (Minneapolis: University of Minnesota Press, 1982).
[433] *Ibid* at 316, 321.

subjectivity of language.[434] In practice, this becomes candour about the violence of interpretation—not the simple transparency of saying, as the *Rizzo Shoes* case does, we "rely upon s. 10 of the *Interpretation Act*."[435] The rhetoric of the modern principle distracts from a necessary feature of democratic legal interpretations, that "one cannot take seriously the existence of a plurality of legitimate values without recognizing that they will conflict. And this conflict cannot be visualized merely in terms of competing interests that could be adjudicated or accommodated without any form of violence."[436] An inevitable, uncomfortable result of vesting someone with the last interpretive word is this ascendancy of one perspective over all others. Pragmatism insists that this work can be carried out alongside an acknowledgement that "our democratic and liberal principles define only one possible language game among others."[437] This returns us to the profound contingency of the administrative state and hints toward a central place for hermeneutical reasoning.

Transparent engagement with the violence of interpretation is useful in spite of its empty signifiers. The language game itself is unimportant, except insofar as it provides a shared set of raw materials through which subjects approach definitional work. A pragmatic approach to hermeneutics infuses doubt into lofty epistemic claims, and this doubt (which is built on the structure of belief identified by Wittgenstein) becomes a significant analytical device.[438] This becomes a question of focalization; interpretive

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[434] Language, particularly in a given critical context, provides the stimuli that "open[s] space for interpretation." See: Ludger Hagedorn, "René Girard's Theory of Sacrifice, or: What is the Gift of Death?" (2015) 15:1 J Cultural & Religious Theory 105.
[435] *Rizzo*, *supra* note 1 at para 22.
[436] Chantal Mouffe, "Deconstruction, Pragmatism and the Politics of Democracy" in Simon Critchley et al, eds, *Deconstruction and Pragmatism* (New York: Routledge, 1996) 1 at 8.
[437] *Ibid* at 4.
[438] For a discussion of how my preferred brand of pragmatism fits into the larger philosophical tradition, see: Cheryl Misak, "Rorty, Pragmatism, and Analytic Philosophy" (2013) 2 Humanities 369; Cheryl Misak,

candour is most useful when it identifies a range of epistemic problems. While nothing preempts the text or the necessity of reading it, legal interpretation is ultimately a matter of forging a single definition with the threat of state force. If the interpreter is honest about the "*present* absences" that characterize this process, she expresses both belief and doubt within a range of "not-knowing."[439] In other words, despite the radical subjectivity of language, there are more and less incommunicable signs. We appear to reach functional communication more quickly when we say "chair" as opposed to "the principles of fundamental justice." Within an unknowable, contingent field of language, some things remain more stable than others.

This returns us to the idea of context and volume. Interpretation mandates a certain number of presumptions, but these need not be arbitrary. Drawing, once more, on *Rizzo Shoes* as a familiar example, readers find a range of epistemic challenges. There is nothing stable about the invocation of statutory interpretation as a doctrinal lens—just as there is nothing determinate about relying on the "large and liberal" stipulation in the *Interpretation Act*—but the former provides a host of signifiers that become an accessible constellation.[440] While no inherent content hews to the accepted terms of this practice, a language of engagement and critique exists within the tradition of statutory interpretation. Armed with treatises and readable institutional practices, one can argue that, for instance, a given definition seems to transgress its commitment to purposive interpretation as rendered in a lengthy Parliamentary debate. This will not be right or wrong in any

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"Language *and* Experience for Pragmatism" (2014) 6:2 European J Pragmatism & American Philosophy 28.

[439] Donald Barthelme, *Not-Knowing: The Essays and Interviews* (Berkeley: Counterpoint, 1997).

[440] For an excellent critique of the malleability and historical contingency of doctrinal categories, see: Theodore Ruger, "Health Law's Coherence Anxiety" (2008) 96:2 Georgetown LJ 625.

transcendent sense, but provides an instructive contrast to something like the "ordinary and grammatical sense."

If we talk about interpretation in terms of applying legislative instruments, there is a considerable field of signification that is potentially open to alternative perspectives. Conversely, the current approach preempts these structures for doubt in a common language game. We can argue about, say, what purpose is embodied in a Hansard debate; we cannot argue about the 'ordinary grammar.' This is because the former respects difference—the notion that our individual understanding of the text will be informed by psycholinguistic experiences—while providing a set of signifiers for the expression of alternative perspectives.[441] This is significantly different from my assertion that an interpretation is or is not "ordinary." The extent to which interpretive candour avails itself of a democratic language game is important. There is nothing productive about judicial transparency regarding the use of a "large and liberal" lens, or considering the "entire context." Instead, to use the former as an example, a pragmatic approach would insist on bringing that idea into the accepted discursive field. A decision-maker relying on that provision in the *Interpretation Act* would accordingly articulate a commitment to purposive reading that tries to get beyond narrow technicalities. Again, none of *these* words signify beyond individuals, but they present as sites for conflict. When I express a definition in terms of, say, an expansive purpose that endeavours to give as much space for governmental objectives as possible, there is an implicit limit that implies the other. We cannot know any universal 'purpose,' but candour is useful when it advances such a concept in a manner that invites disagreement. One cannot speak openly about (*inter alia*)

[441] This approach "suspends the finality of an idiosyncratic reading by resisting the terminating values of signification within a text." See: Peter Trifonas, "Postmodernism, Poststructuralism, and Difference" (2004) 20:1 J of Curriculum Theorizing 151 at 155.

purpose and usage without creating space for alternative perspectives within the shared language game of legal interpretation.

(b.) Candid Bureaucracy

The language game of administrative law is uniquely positioned to accommodate difference in the interpretive process. While its constituent terms like deference and dialogue are often vacuous rhetorical devices meant to disguise the imposition of judicial force, this is still an area where "legitimate techniques for agency statutory interpretation diverge sharply from the legitimate techniques and standards for judicial statutory interpretation."[442] Indeed, the presence of an irresolvable "paradox of deference" evokes a latent compatibility with the play of language and problems of signification. If the administrative state takes its own (stated) commitments seriously, then the ubiquitous "range" of possible definitions embodies significant promise. As bureaucratic governance continues to forge new, diverse spaces for interpretive work, it becomes necessary to refocus the status of institutional difference. There can be no hierarchy of reasonable answers to interpretive questions when "[s]ubjectivity is limited by the vision of the subject, and the task … is to do the best with what you have."[443] Of course, the "best" answer faces the same internal limits—that of embodied subjecthood—but its search remains "a vocation no less essential for being impossible."[444] An interpretive candour that embraces the failure of finding the best answers is deeply compatible with an administrative state that disperses authority to diverse actors in hopes of learning from alternative perspectives via specialization and deference.

[442] Mashaw, *supra* note 42 at 504.
[443] Zadie Smith, "Philip Roth, A Writer All the Way Down" (23 May 2018) The New Yorker, online: <www.newyorker.com/books/page-turner/philip-roth-a-writer-all-the-way-down>.
[444] Lerner, *supra* note 430 at 85.

Candid bureaucracy is, in other words, uniquely imaginable within this legal matrix of respect for institutional difference and the "paradox of deference." It is important, however, to note the dangers that inhere to calls for progress. First, the very idea of progress is a metanarrative closely related to naturalization.[445] Reformative efforts should therefore retain a degree of external skepticism: Advocates are in no better position to speak beyond themselves, and the language game from which we speak is historically contingent, reflecting innumerable presumptions and biases that have generally favoured those with conventional indicia of privilege.[446] Secondly, the temptation to valorize lofty ideals must be resisted at every turn. Demanding an interpretive regime that, say, 'reads for difference' is, without more, a deferral of the first-order question. This is especially important in administrative law because many of the loftiest terms in the jurisprudence signify, at least to me, as promising areas of reformative potential. The stated commitments in this area embody a distinct compatibility with my critique of language, but only where they exist within a larger constellation that includes enough context for critique within our shared language game.

To this end, it is worthwhile to consider the foundational point that "agencies are not inferior courts. They are part of the Executive branch."[447] These are ever-diversifying sites of regulation; the power to construe language is delegated to tribunals in an effort to

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[445] See, e.g., See generally: Jean-Francois Lyotard, *The Postmodern Condition: A Report on Knowledge* (Minneapolis: University of Minnesota Press, 1984).

[446] See, e.g., Steven Syrek, "'Why am I talking?' Reflecting on Language and Privilege at Occupy Wall Street" (2012) 54:2 Critical Quarterly 72 at 72: "language itself can tacitly reinforce both the privilege of the linguistically confident and the marginalisation of those who do not feel empowered to speak for themselves."

[447] Mashaw, *supra* note 42 at 514. Again, this is a series of meaningless signifiers that exist within a language game. Unlike something like 'respect,' however, there is a constellation of materials surrounding these words; the "Executive branch" might signify differently to you, but there are a host of accessible signifiers we can use to situate it within a broader language game, thus increasing the chances of pragmatic clarity.

gain something from institutional difference and alternative positioning. Interpretation is always already inflected in bureaucracy because, as Gilles Deleuze puts it in his reading of the *Recherche*, "[v]ocation is always predestination with regard to signs. Everything that teaches us something emits signs; every act of learning is an interpretation."[448] Placing this in conversation with the non-hierarchical image of agencies as executive expressions of power, we begin to find space for definitional work that approaches the language game from a different perspective.[449] Without the rhetorical misdirection of principled restraint, administrative law becomes a regime where "discretion is piled on top of discretion—judicial discretion on top of official discretion."[450] Given the violence of imposing linguistic sense, whoever has the last interpretive word enjoys unilateral power. The structure of discretion is decidedly top-heavy. While there is little chance of transcending the problems of language, the relevant jurisprudence is unequivocal about its commitment to the "paradox of deference"—or, more specifically, the possibility of multiple legitimate answers. The question is how to review for that "range" of permissible difference without descending into judicial supremacy.[451]

Statutory interpretation pushes these commitments to an extreme because it can never be reliably constrained. It is undeniably frightening to vest state actors with the ability to impose their definitional will, which is perhaps why even a critic as judicially

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[448] Gilles Deleuze, *Proust and Signs*, translated by Richard Howard (Minneapolis: University of Minnesota Press, 2000) at 4.
[449] Mark Walters, "Jurisdiction, Functionalism, and Constitutionalism in Canadian Administrative Law" in Christopher Forsyth et al, *Effective Judicial Review: A Cornerstone of Good Governance* (Oxford: Oxford University Pree, 2010) 300 at 315: "We are not really in an extra-legal penumbra at all."
[450] David Dyzenhaus, "Form and Substance in the Rule of Law?" in Christopher Forsyth, ed, *Judicial Review and the Constitution* (Oxford: Hart Publishing, 2000) 140 at 150.
[451] *Ibid* at 158: "to pile pile judicial discretion on top of official discretion not only compounds the problem but invites interference by judges who are at best ignorant of and at worst hostile to the programs of redistributive welfarism."

effacing as Vermeule supports *some* measure of available review.[452] The official position is that judges police the outer limits of administrative authority, but few acknowledge the radical implications brought about by the valorization of deference.[453] Self-enclosed governance posits a "totality" where the reasonableness of an unverifiable sign association will be assessed from the bench. As a result, it is "always seeking to incorporate the Other within itself under the category of the same."[454] Institutional difference provides an answer here, but not one that is compatible with the jurisprudential treatment of (convenient) expertise.[455] Although administrative law is uniquely positioned to legitimize non-judicial definitions while expressly disagreeing with them, this is functionally useless if specialization is presented as a means of discovering a correct definition.[456] Indeed, interpretive accuracy is a vexed concept in our (post)modernity, but one that be accommodated within the language game of the administrative state.

Agency specialization is often lauded without a precise definition, especially as it relates to the interpretive project. This owes in large part to orthodox efforts "to define a stable and uniquely legal subject matter."[457] Concerns with the distributive impacts of a given regulatory regime are implicitly viewed as paralegal; agencies gesture toward

[452] Vermeule, *supra* note 244 at 219. Passing references to this position are, however, ubiquitous.
[453] Admittedly, in his way, Vermeule does exactly this. His form of deference is, at a high level of simplification, abnegation.
[454] George Ciccariello-Maher, *Decolonizing Dialectics* (London: Duke University Press, 2017) at 109.
[455] See: chapter 2, section B.
[456] On the former point, it is useful to recall the breadth of reasonableness review articulated in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 14: "It is a more organic exercise -- the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at 'the qualities that make a decision reasonable.'"
[457] Thomas, *supra* note 151 at 86.

found meaning in statutes as opposed to "straightforward political disputation."[458] While there are compelling arguments for candour at the level of policy—essentially that these always already inform a statutory reading—this does not allow us to escape the prison-house of language. How can anyone speak beyond themselves about the impacts of a legislative scheme, particularly where these are often inextricably bound up in alternative experiences and the absence of the most vulnerable?[459] That is, of course, an impossible task, but one that is uniquely consonant with an aspirational view of administrative governance. We are ultimately faced again with the question of context within the language game of bureaucracy. The current approach is problematic because its "[d]escriptive language is often either useless—because it adds nothing but a conclusory label to a conclusion reached on other grounds—or downright dangerous—because it hides the norms guiding judges—or both."[460] Greater transparency at the level of policy expertise—which is uniquely legitimate in administrative doctrine—is promising to the extent that this knowledge is placed within constellations that function as sites of disagreement in our shared language game.

With its self-conscious "range" of definitions and ability to legitimize incongruous answers from various institutions, administrative law is well-positioned for this type of candour. Its actualization, though, depends on legal actors' willingness to

[458] *Ibid* at 95.
[459] There is a significant volume of literature on the ambitiously named "access to justice" crisis. At its most cutting, it points to the fact that available services are not generally accessed by those most in need. This is probably for a lot of reasons—distrust, systemic discrimination, and our failure to provide marginalized people with the tools they need to find the tools they need. In other words, there is a seemingly infinite regress when a regulatory scheme is put in place. Access often depends on things like internet access or literacy, thus securing an exclusionary border around the most vulnerable legal subjects. This makes it almost impossible to assess the impacts of legislative scheme—and, indeed, it is arguably offensive to allow someone privileged enough to read statutes with the force of law to construe the ways in which they affect lived experiences of those who need them most. For a deeply uncritical example (as most of them are), see: CBA Access to Justice Committee, *Reaching Equal Justice: Balancing the Scales* (2013) online: <www.cba.org/CBAMediaLibrary/>.
[460] Daly, "Language," *supra* note 183 at 544.

reject "a peculiarly deceptive kind of rhetoric [that] attempts to combine-yet-separate subjectivity and objectivity."[461] The objective register is familiar to readers of law, and it roughly traces the contours of Dworkin's anti-positivism. This is useful to a point: As we are reminded throughout his corpus, everyone must take a position on the best answer to an interpretive question. What is typically missing, though, is that which is explicitly denounced in *Law's Empire*: external doubt. There is nothing natural about the process of statutory interpretation; from the delegated power to our concern with purposive reading, innumerable presumptions and historical contingencies are presented without much meta-engagement.[462] This is not to say that reading for what a democratically elected legislature intended is necessarily flawed, but rather to insist that these moves are positioned as areas of contention within a shared language game. A ubiquitous signifier like 'purpose' can then be understood in relation to, *inter alia*, institutional roles, processes of lawmaking, and theories of signification.[463] Administrative law in particular can render these interpretive methods as points in their unique institutional constellation, thus giving way to a positive expression of meaning that presents its premises as contingent and rebuttable.

When interpretation is conceptualized as the unilateral ascendancy of an elite perspective, claims to democratic participation are necessarily qualified. Someone must have the final word, and that person generally benefits from a substantial amount of privilege. This is where bureaucratic regulation embodies the most significant potential;

[461] Frug, *supra* note 261 at 1293.
[462] There is, after all, "only one principle or approach." We are rarely told what happened before Driedger's "today."
[463] All of this takes place within a language game that does not conduce to right answers, but this should not preempt our efforts to advance definitions in light of normative goals that are placed as accessibly as possible within the available structures for doubt and disagreement. See: David Kasdan, "One More Look at (Neo-)Pragmatism in Public Administration: Seeing the Forest and the Trees" (2015) 47:9 Administration & Society 1110.

the judiciary remains atop the interpretive hierarchy, but the administrative state depends on diverse sites of interpretation that impose additional considerations in the relevant language game. Processes of administration are inherently normative, though, and the current regime reinforces pre-existing distributions of power through "forms of pervasive social inequality that are ultimately backed up by the threat of physical harm."[464] In other words, despite the promise of interpretive decentralization, bureaucracy often reflects the prevailing order.[465] This is symptomatic of an interpretive violence that denies itself. When dominant metanarratives like 'rationality' or 'efficiency' are proffered outside their (inherently political) constellation, they underwrite definitions that valorize the status quo. Fortunately, just as there is nothing inevitable about how these words signify, there is nothing preordained about this approach that relegates difference to the margins.

(c.) Interpretive Poetics

When we talk about interpretation, we talk about language. These words, in turn, require interpretation and, in the non-legal, everyday sphere, that interpretation is largely unconscious. I hear you speak and process that text in accordance with how I understand language and that to which it refers. Often, this seems unproblematic. While conversations rarely involve the sort of rhetorical misdirection that characterizes the modern principle, they also tend to presume communicative clarity, or at least its possibility.[466] Is it possible, then, that by theorizing at length about statutory interpretation, we miss its intuitive character? The signifier for 'ordinary' embodies no

[464] Graeber, *supra* note 254 at 57.
[465] See, e.g., *ibid* at 80: "The police truncheon is precisely the point where the state's bureaucratic imperative for imposing simple administrative schema and its monopoly on coercive force come together. It only makes sense then that bureaucratic violence should consist first and foremost of attacks on those who insist on alternative schemas or interpretations."
[466] There is a massive body of literature on conversational communication and clarity that presumes the accessibility and stability of interpersonal meaning. See, e.g., Neal Norrick, "Interactional Remembering in Conversational Narrative" (2005) 37:11 J of Pragmatics 1819.

inherent content, but we all seem to bring a default (albeit personalized) ordinariness into routine interpretive work. In my experience, one rarely breaks out Saussure's *Course in General Linguistics* to lament the hermeneutical drift of a conversational reference to foliage.[467] The question of how to square the sense of shared meaning that typically accompanies routine interpretation with the profound contingency of our signs (coupled with the lack of a metalanguage) does not produce an immediate answer. There is compelling reason to understand our (post)modernity in terms of a manufactured certainty—one that disguises the ways in which meaning is constructed and then naturalized by those in power—and yet this fails to account for my faith in the comprehensibility of this sentence. Meaning is forever "bracketed" by that which cannot be known; still, we continue to write as though understood.[468]

In a recent defence of his craft, Ben Lerner makes a pertinent observation about poetry and how it "becomes a word for an outside that poems cannot bring about, but can make felt, albeit as an absence."[469] Is it any wonder, he asks, that so many dislike it? Poets are artists of failure, writing toward a core that cannot be written—approaching something like the Romantic sublime, and perhaps getting ever-closer, but never arriving.[470] Amidst this general disfavour, there is cause for celebration because, if poetry is about the inexpressible, then it stands as a qualified success each time someone writes *around* that which cannot be spoken and brings it forward through a keenly felt absence. When we (appear to) reach communicative congress, it is worth considering the

[467] Saussure, *supra* note 14. As mentioned above, he provides a classical example of semiotics by asking about the connection between "*arbre*" and a perennial plant, pictured alongside its signifier.
[468] Paul de Man, "Semiology and Rhetoric" in Vincent Leitch et al, eds, *The Norton Anthology of Theory & Criticism* (New York: Norton, 2010) 1365 at 1367.
[469] Lerner, *supra* note 430 at 54.
[470] See generally: Thomas Weiskel, *The Romantic Sublime: Studies in the Structure and Psychology of Transcendence* (Baltimore: John Hopkins University Press, 1976).

respective roles of both speech and silence. Conceptual gaps are often as important as spoken ideas; in law, for instance, we (appear to) understand statutory interpretation through both its stated aims and that which is centred on but unspoken. The absence of, say, strictly utilitarian considerations (e.g., what a given definition of bankruptcy would have meant for the now-defunct Rizzo & Rizzo Shoes) informs our dialogue about this practice. It is taken, at a high level of generality, as an exercise that inquires closely into a written provision. This is not to suggest that is any more natural than any other signifier, but rather to signal the ways in which we unconsciously listen for spaces when we communicate.

Of course, much of the process of construing routine communications relies on the source of speech. This has become a major preoccupation is the deconstructive literature that inquires into manufactured power relations. It has been argued, for instance, that "[t]he context affects the understanding of a message in such a way that communication itself becomes jeopardized, since the form of interaction (the medium) changes the content, or perverts the understanding of the content."[471] We understand language largely through relational context.[472] The perceived source of a text affects our interpretive expectations and provides the stimulus for our constructions of meaning.[473] As such, legal interpretation imports—and even begins with—a familiar web of signifiers. None of these have inherent value, but it is hardly difficult to isolate common themes in the relevant jurisprudence. Parliament speaks, decision-makers interpret, and

[471] Franco "Bifo" Berardi, *And: Phenomenology of the End* (South Pasadena: Semiotext(e), 2015) at 262.
[472] See, e.g., Kathleen Galvin & Pamela Cooper, *Making Connections: Readings in Relational Communication* (Los Angeles: Roxbury Publishing Company, 1996).
[473] This has been identified as a means of perpetuating the current distribution of authority. See, e.g., Marjorie Hass, "The Style of the Speaking Subject: Irigaray's Empirical Studies of Language Production" (2000) 15:1 Hypatia 64.

interested readers engage with the aforementioned metanarratives (legislative intent, ordinary meaning, etc.). Much of my argument to this point has been about this disingenuous process of talking *around* the definitional question, but signification by absence (or, perhaps more precisely, by triangulation) is arguably our sole means of communication in a world of unverifiable sign associations. The possibility of progress therefore depends on greater attention to the language game of interpretation. In the absence of a metalanguage, we cannot talk sensibly about what a word means, but must look instead at the language we use to surround meaning.

Opening spaces for otherness in statutory interpretation requires careful attention to sites of conflict. If privileged legal actors hinge their reasoning on individualized understandings of what a word means or what Parliament intends, then interpretation is a proxy for power. In the absence of a metalanguage, those heuristics reflect entrenched bias; 'ordinariness' quickly gives way to domination when decision-makers are those already in positions of authority. In contrast, the pragmatic approach views something like 'ordinary meaning' as conceptually identical to the first-order definitional question. Both require a constellation of signs to provide potential sources of content. Put another way, when we talk about, say, the ordinary meaning of a word, we evoke innumerable unstated presumptions. We are talking about ourselves, drawing on experiential baggage, and are invariably influenced by our biases—both consciously and otherwise. Although speaking outside of our own ideology is impossible—and no one rises above the fray into disembodied neutrality—the interpretive process *can* better reflect the areas of difference that militate one way or another based on psycholinguistics.

An example of this is found in the relatively recent decision of *British Columbia Human Rights Tribunal v. Schrenk*.[474] The issue was simple: Does human rights protection "regarding employment" extend to discrimination by a colleague? While the analysis relies on familiar counterproductive tropes, the steady expansion of signifiers is instructive. One central legislative directive here was "person." It was held that,

> [i]n its ordinary meaning, the term "person" generally refers to a human being. In the context of the Code, it also defines the class of actors against whom the prohibition in s. 13(1)(b) applies. The ordinary meaning of "person" is broad; certainly, it encompasses a broader range of actors than merely any person with economic authority over the complainant. It is significant that the Legislature chose to prohibit employment discrimination by any "person". Had it intended only to prohibit employment discrimination by employers – or some other narrow class of individuals – it could easily have done so by using a narrower term than "person".[475]

Within this barrage of legalistic language, a pragmatic bent begins to emerge. We find the classic repetitions of 'ordinariness' and suggestive legislative intent, but not without a sense of contextualization. Although it is, to be sure, an underdeveloped and hardly exemplary passage, the majority's interest in what a "person" might include begins to set-up sites of potential conflict. Questions about breadth, consequences, and omissions provide points of engagement that are capable of accommodating different perspectives.

On the idea that "person" means something more general than "employer," for instance, the Court is introducing a preliminary step in the construction of meaning.[476] One's conclusion might differ from the majority here, and arguments can be made for a contextual readings of "person" that include only employers, or everybody in the world,

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[474] 2017 SCC 62.
[475] *Ibid* at para 34.
[476] For a relatively technical discussion, see: Vyvyan Evans, "Design Features for Linguistically-Mediated Meaning Construction: The Relative Roles of the Linguistic and Conceptual Systems in Subserving the Ideational Function of Language" (2016) 7 Frontiers in Psychology.

or some middle ground between the two. At the level of linguistic work, the important point is not the conclusion but rather the opportunities for disagreement. Scope is one point at which difference will manifest. Interpretive communication is advanced, rather than obscured, when the necessarily contentious processes of construction are presented *around* the word at issue. Again, those words mean exactly as much as any other symbol in isolation, but advance the goals of democratic decision-making when presented within a constellation that is mindful of not-knowing. The central question has no uniquely reasonable answer, but a pragmatic approach insists on identifying that which surrounds the first-order definition. Reading texts through the constellation that surrounds them re-emphasizes the absence of transcendental signifiers, and this, in turn, changes the terms of the interpretive inquiry. "Person," without more, means nothing at all, but instead stands as the sum of choices made at each site of definitional conflict.

None of this removes the reality of a last definitional word vested in the legal elite. Their definitions will not become more universal. An important distinction, though, concerns the impact of legal interpretation on those affected. As Robert Cover demonstrated so eloquently more than thirty years ago, giving meaning to laws is not an exclusively theoretical exercise.[477] Citizens demand—and should demand—*better* interpretations despite the impossibility measuring that standard against an accessible reality. As I have discussed at length above, the current regime imposes a dominant worldview as definitional sense. We might, then, aspire to interpretive work that considers marginalized voices and alternative perspectives. Of course, the persons considering these voices would remain wealthy embodiments of sociolegal privilege—an important problem that underscores the exclusionary classism of the whole enterprise—

[477] Cover, *supra* note 294.

but, to the extent we work within a flawed system, it remains worthwhile to name the flaws and their potential (albeit qualified) solutions.

The language that surrounds definitional questions can either facilitate or foreclose engagement with otherness. Continuing with the *Schrenk* example, when one considers the scope of "person" or "regarding employment," there is a clear entry point for disagreement. Even as the interpretation fixes a particular meaning—here, protection is afforded against all workplace discrimination—there is potential for the expression of difference. Something like "employment" is deeply contingent on one's psycholinguistic biases; it is as personally and culturally shaped as the 'ordinary meaning,' but refocuses the inquiry. The status of these points in the constellation of not-knowing is the same as their criteria: They do not assume the rationality or superiority of a single perspective. As such, considering the alternatives to how "employment" means invites a far more meaningful inquiry than the same question concerning 'ordinary' grammar. This does not mean the words that form constellations will be more stable than any others; rather, their utility arises out of the ensuing moves within the language game of pragmatic interpretation. I do not know what "employment" signifies to anyone else, but associated texts immediately suggest themselves on the interpretive question of scope. It becomes far easier to be mindful of how my experiences (and privilege) influence my understanding of the workplace when the question is "how far does 'employment' extend?" rather than "what is its ordinary meaning?" The ensuing definition still reflects individualized choices about, for instance, how far the workplace extends, but presents an analytical step that is transparently contingent on subjective value judgments.

There are no easy answers in this area of the law. Meaningless signs must be resolved with recourse to a final interpretive word. The foregoing pragmatic approach simply provides one means of infusing doubt into the process. By articulating the processes that inform a definition—without presenting those conclusions as *a priori*—the veneer of inevitability is cast aside in favour of respect for difference. We can talk around a word, making its meaning(s) felt by absence, when we inquire into the interpretive steps that have previously taken place in the margins. The result is to ask what makes a definition appear 'ordinary' to us; or, more specifically, how our experiences and biases make us answer certain definitional questions without articulating them. As a result, no interpretation is ordinary, and the expression of discrete steps eschews uncritical reliance on one's perspective as axiomatically correct or even reasonable. Such an approach would stop asking Driedger's questions; it would instead ask how and where we impose meaning when language is in dispute.

VI. Conclusion

Legal texts are inseparable from the subjects reading them and, so, the structuring principles of statutory interpretation fail to constrain definitional agency. Under a system of written laws, disputes must eventually be 'settled' with recourse to a single authoritative perspective. A meaningless set of signs and signifiers cannot accommodate a communal interpretation—though, if it could, that, too, would be unverifiable in the absence of a metalanguage. We can only talk about language with more of the same, continuing on *ad infinitum*. This prison-house of language encompasses both the first-order questions we ask about linguistic meaning and the subsequent moves we make toward a crystallized definition. There is nothing outside the text, and that includes our means of reading it. State actors cannot acknowledge this (post)structural play without conceding their suggestive notions of objectivity. As such, the administrative state—which is, itself, a deeply contingent outcome of institutional practices—presents as neutral and inevitable. The result is an increasingly complex matrix of interpretive voices, all centred on the same dominant logic. This is not to say that governmental power can manifest and communicate across institutions using the same vexed means of linguistic expression; rather, those who speak definitional sense are always already in power. The legal image of reality is that which perpetuates the current distribution of power.

The possibility of progress, then, is not a mere shift in doctrinal method. Even that proposed shift would be unverifiable within our oversaturation of meaningless signs. It might be some form of revolution—a wholesale repudiation of this epoch of governance, with privileged decision-makers forging linguistic meaning with the force of law—but such an approach risks clear impracticality. Working on the assumption that our

constitutional structure will not be overthrown in the near future, the question is whether meaningless signs can be interpreted in a way that is less violent in its disingenuous marginalization. The first step, as I have attempted to show in my first chapter, is an elucidation of the problem. Language does not facilitate the dominant approach to legal interpretation. This is obscured behind empty rhetoric because it allows the dominant picture of reality to appear as though impartial and natural—progressive, even. My second and third chapters look to both the scholarship and case law to reorient the discourse around that which has been disappeared: *viz.*, who gets to speak when meaning is in dispute? It is, at a high level of generality, those already within the privileged sphere of the legal elite. Finally, I suggest that the problem can be part of the solution. The epistemological problems of definitional sense can be positioned as sites of conflict and otherness. When decision-makers engage with that which cannot be known, their assertions become 'I' statements, necessarily implying a beyond to which they aspire.

Bibliography

Legislation

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
Freedom of Information and Protection of Privacy Act, RSA 2000, c F25.
Interpretation Act, RSC 1985, c I-21.
Interpretation Act, RSO 1980, c 219.

Jurisprudence

Agraira v Canada (Public Safety and Emergency Preparedness), 2013 SCC 36.
Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association, 2011 SCC 61.
Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817.
Barreau du Québec v Quebec (Attorney General), 2017 SCC 56.
British Columbia (Workers' Compensation Board) v Figliola, 2011 SCC 52.
Canada (Attorney General) v Igloo Vikski Inc, 2016 SCC 38.
Canada (Attorney General) v Mavi, 2011 SCC 30.
Canada (Citizenship and Immigration) v Khosa, 2009 SCC 12.
Canada (Privacy Commissioner) v Blood Tribe Department of Health, 2008 SCC 44.
Canada Trustco Mortgage Co v Canada, 2005 SCC 54.
Canada Safeway Ltd v Retail, Wholesale and Department Store Union, Local 454, [1998] SCJ No 47.
Canadian Union of Public Employees Local 963 v New Brunswick Liquor Corp, [1979] 2 SCR 227.
Carbone v McMahon, 2017 ABCA 384.
Celgene Corp v Canada (Attorney General), 2011 SCC 1.
Century Services Inc v Canada (Attorney General), 2010 SCC 60.
CUPE v NB Liquor Corp, [1979] 2 SCR 227.
Domtar Inc v Quebec (Commission d'appel en matière de lésions professionnelles), [1993] 2 SCR 756.
Doré v Barreau du Québec, 2012 SCC 12.
Dunsmuir v New Brunswick, 2008 SCC 9.
Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd, 2016 SCC 47.
Harelkin v University of Regina, [1979] 2 SCR 561.
Housen v Nikolaisen, 2002 SCC 33.
Machtinger v HOJ Industries Ltd, [1992] 1 SCR 986.
McLean v British Columbia (Securities Commission), 2013 SCC 67.
Mellor v Saskatchewan (Workers' Compensation Board), 2012 SKCA 10.
Minister of Citizenship and Immigration v Alexander Vavilov, 2018 CanLII 40807 (SCC).
Mission Institution v Khela, 2014 SCC 24.
Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services), 2001 SCC 41.
Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board), 2011 SCC 62.

Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch), 2001 SCC 52.
Quebec (Attorney General) v Guérin, 2017 SCC 42.
Quebec (Attorney General) v Lacombe, 2010 SCC 38.
R v ADH, 2013 SCC 28.
Reference re Secession of Quebec, [1998] 2 SCR 217.
Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 SCR 27.
Roncarelli v Duplessis, [1959] SCR 121.
Saskatoon Regional Health Authority v Ready, 2017 SKCA 20.
Schmidt v Canada (Attorney General), 2018 FCA 55.
Smith v Alliance Pipeline Ltd, 2011 SCC 7.
Teal Cedar Products Ltd v British Columbia, 2017 SCC 32.
Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development), 2018 SCC 4.
Wilson v Atomic Energy of Canada Ltd, 2016 SCC 29.
Wilson v British Columbia (Superintendent of Motor Vehicles), 2015 SCC 47.

Secondary Sources: Monographs

Alcoff, Linda, *Real Knowing: New Versions of the Coherence Theory* (Ithaca: Cornell University Press, 1996).
Arthurs, HW, *'Without the Law': Administrative Justice and Legal Pluralism in Nineteenth-Century England* (Toronto: University of Toronto Press, 1985).
Atwood, Margaret, *Survival: A Thematic Guide to Canadian Literature* (Toronto: Anansi, 1972).
Barker, Stephen, *Renewing Meaning: A Speech-Act Theoretic Approach* (Oxford: Oxford University Press, 2004).
Barthelme, Donald, *Not-Knowing: The Essays and Interviews* (Berkeley: Counterpoint, 1997).
Baudrillard, Jean, *Simulacra and Simulation*, translated by Sheila Faria Glaser (Ann Arbor: University of Michigan Press, 1994).
Benvindo, Juliano, *On the Limits of Constitutional Adjudication: Deconstructing Balancing and Judicial Activism* (London: Springer, 2010).
Berardi, Franco, *And: Phenomenology of the End* (South Pasadena: Semiotext(e), 2015).
Bernays, Edward, *Propaganda* (New York: Ig Publishing, 2005).
Binet, Laurent, *HHhH*, translated by Sam Taylor (New York: Picador, 2009).
Blake, Sara, *Administrative Law in Canada*, 5th ed (Markham: LexisNexis Canada Inc, 2011).
Breton, Albert & Ronald Wintrobe, *The Logic of Bureaucratic Conduct* (Cambridge: Cambridge University Press, 1982).
Broughton, Janet, *Descartes's Method of Doubt* (Princeton: Princeton University Press, 2002).
Cane, Peter, *Administrative Law*, 5th ed (Oxford: Oxford University Press, 2011).
Cass, Ronald, "Staying Agency Rules: Constitutional Structure and Rule of Law in the Administrative State" (2017) 69:2 Admin L Rev 225.
Ciccariello-Maher, George, *Decolonizing Dialectics* (London: Duke University Press, 2017).

Cornell, Drucilla, *The Philosophy of the Limit* (New York: Routledge, 1992).
Davies, Alan, *An Introduction to Applied Linguistics: From Practice to Theory*, 2nd ed (Edinburgh: Edinburgh University Press, 2007).
Deleuze, Gilles, *Proust and Signs*, translated by Richard Howard (Minneapolis: University of Minnesota Press, 2000).
Derria, Jacques, *Of Grammatology*, 40th anniversary ed, translated by Gayatri Chakravorty Spivak (Baltimore: John Hopkins University Press, 2016).
Dicey, AV, *Introduction to the Study of the Law of the Constitution*, 10th ed (London: MacMillan & Co, 1960).
Dworkin, Ronald, *Justice for Hedgehogs* (Cambridge: Belknap Press, 2011).
———. *Law's Empire* (Cambridge: Belknap Press, 1986).
———. *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom* (New York: Vintage, 1994).
———. *A Matter of Principle* (Cambridge: Harvard University Press, 1985).
———. *Religion Without God* (Cambridge: Harvard University Press, 2013).
Eagleton, Terry, *The Significance of Theory* (Cambridge: Blackwell, 1990).
Feldman, Jerome, *From Molecule to Metaphor: A Neural Theory of Language* (Cambridge: MIT Press, 2006).
Foucault, Michel, *Discipline and Punish: The Birth of the Prison*, translated by Alan Sheridan (New York: Vintage Books, 1995).
Freud, Sigmund, *Civilization & Its Discontents*, translated by David McLintock (New York: Penguin Books, 2004).
———. *The Interpretation of Dreams*, translated by Joyce Crick (Oxford: Oxford World Classics, 2008).
———. *Jokes and Their Relation to the Unconscious* in Ivan Smith, ed, *The Complete Works of Sigmund Freud.*
Freund, Elizabeth, ed, *The Return of the Reader: Reader-Response Criticism*, 2nd ed (London: Routledge, 2003).
Graeber, David, *The Utopia of Rules: On Technology, Stupidity, and the Secret Joys of Bureaucracy* (New York: Melville House, 2015),
Greenawalt, Kent, *Law and Objectively* (Oxford: Oxford University Press, 1992).
Halsbury's Laws of Canada, *Administrative Law*.
Halsbury's Laws of Canada, *Legislation*.
Hart, HLA, *The Concept of Law*, 3rd ed (Oxford: Oxford University Press, 2012).
Hogg, Peter, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (loose-leaf 2007-Rel. 1).
Horkheimer, Max & Theodor Adorno, *Dialectic of Enlightenment*, translated by Edmond Jephcott (Stanford: Stanford University Press, 2002).
Hutcheon, Linda, *The Politics of PostModernism* (New York: Routledge, 2001).
Hutchinson, Allan, *Toward an Informal Account of Legal Interpretation* (Cambridge: Cambridge University Press, 2016).
Jameson, Fredric, *The Prison-House of Language: A Critical Account of Structuralism and Russian Formalism* (Princeton: Princeton University Press, 1972).
Jones, David & Anne DeVillars, *Principles of Administrative Law*, 6th ed (Toronto: Carswell, 2014).

Kennedy, Duncan, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System*, critical ed (New York: New York University Press, 2007).
Kermode, Frank, *The Sense of an Ending: Studies in the Theory of Fiction with a New Epilogue* (Oxford: Oxford University Press, 2000).
Lazzarato, Maurizio, *Signs and Machines: Capitalism and the Production of Subjectivity*, translated by Joshua Jordan (South Pasadena: Semiotext(e), 2014).
Lerner, Ben, *The Hatred of Poetry* (New York: McClelland & Stewart, 2016).
Lewans, Matthew, *Administrative Law and Judicial Deference* (Oxford: Hart Publishing, 2016).
Lipshaw, Jeffrety, *Beyond Legal Reasoning: A Critique of Pure Lawyering* (New York: Routledge, 2017).
Lyotard, Jean-Francois, *The Postmodern Condition: A Report on Knowledge* (Minneapolis: University of Minnesota Press, 1984).
Mason, Wyatt, "The First Woman to Translate the 'Odyssey' Into English" (2 November 2017) New York Times.
McCarthy, Cormac, *Blood Meridian; Or, The Evening Redness in the West* (New York: Vintage International, 1992).
Melville, Herman, *Moby-Dick; or, The Whale* (New York: Penguin Books, 2002).
Milsom, SFC, *Historical Foundations of the Common Law* (London: Butterworths, 1969.
Munslow, Alun, *Deconstructing History* (New York: Routledge, 1997).
Nakagawa, Junji, *International Harmonization of Economic Regulation* (Oxford: Oxford University Press, 2011).
Papadopoulos, Anestis, *The International Dimension of EU Competition Law and Policy* (Cambridge: Cambridge University Press, 2010).
Reed, Thomas & Morton Horwitz, *American Legal Realism* (New York: Oxford University Press, 1993).
Rogers, William, *Interpreting Interpretation: Textual Hermeneutics as an Ascetic Discipline* (University Park: Pennsylvania State University Press, 1994).
Rorty, Richard, *Consequences of Pragmatism: Essays, 1972-1980* (Minneapolis: University of Minnesota Press, 1982).
———. *Philosophy and the Mirror of Nature* (Princeton: Princeton University Press, 2009).
de Saussure, Ferdinand, *Course in General Linguistics*, translated by Wade Baskin (New York: Columbia University Press, 2011).
Swaigen, John & Jasteena Dhillon, *Administrative Law: Principles and Advocacy*, 3rd ed (Toronto: Emond Montgomery Publications, 2016).
Vermeule, Adrian, *Law's Abnegation: From Law's Empire to the Administrative State* (Cambridge: Harvard University Press, 2016).
Waldron, Jeremy, *Law and Disagreement* (Oxford: Oxford University Press, 1999).
Weiskel, Thomas, *The Romantic Sublime: Studies in the Structure and Psychology of Transcendence* (Baltimore: John Hopkins University Press, 1976).
Wittgenstein, Ludwig, *On Certainty*, translated by Denis Paul & GEM Anscombe (Oxford: Blackwell, 1975).
———. *Philosophical Investigations*, translated by GEM Anscombe, PMS Hacker & Joachim Schulte (Oxford: Wiley-Blackwell, 2009).

Secondary Sources: Journal Articles & Book Chapters

Adler, Jonathan, "*King v. Burwell*: Desperately Seeking Ambiguity in Clear Statutory Text" (2015) 40:3 Health Politics, Pol'y & L 577.

Benish, Avishai & Asa Maron, "Infusing Public Law into Privatized Welfare: Lawyers, Economists, and the Competing Logics of Administrative Reform" (2016) 50:4 Law & Soc Rev 953.

Benjamin, Walter, "Theses on the Philosophy of History" in *Illuminations: Essays and Reflections*, translated by Harry Zohn (New York: Schoken Books, 2007).

———. "The Work of Art in the Age of Mechanical Reproduction" in *Illuminations: Essays and Reflections*, translated by Harry Zohn (New York: Schoken Books, 2007) 217.

Black, Vaughan, "Rights Gone Wild" (2005) 54:3 UNBLJ 1.

Boldyrev, Nikolay & Olga Dubrovskaya, "Sociocultural Commitment of Cognitive Linguistics via Dimensions of Context" (2016) 69:1 Ilha do Desterro 173.

Cartier, Geneviève, "Administrative Discretion: Between Exercising Power and Conducting Dialogue" in Colleen Flood & Lorne Sossin, eds, *Administrative Law in Context*, 2nd ed (Toronto: Emond, 2013) 381.

Caudill, David, "Freud and Critical Legal Studies: Contours of a Radical Socio-Legal Psychoanalysis" (1991) 66 Indiana LJ 651.

Cornell, Drucilla, "Derrida's Negotiations as a Technique of Liberation" (2017) 39:2 Discourse 195.

Cover, Robert, "Violence and the Word" (1986) 95 Yale LJ 1601.

Criddle, Evan, "The Constitution of Agency Statutory Interpretation" (2016) 69 Vand L Rev 325.

Daly, Paul, "Administrative Law: A Values-Based Approach" in John Bell et al, eds, *Public Law Adjudication in Common Law Systems: Process and Substance* (Oxford: Hart Publishing, 2016).

———. "Good Decision-Makers, Bad Decision-Makers, and the Courts" (2015) Double Aspect.

———. "The Language of Administrative Law" (2016) 94 Can Bar Rev 519.

———. "The Signal and the Noise in Administrative Law" (2017) 68 UNBLJ 68.

———. "The Struggle for Deference in Canada" in Hanna Wilberg & Mark Elliott, eds, *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Oxford: Hart Publishing, 2015).

Danay, Robert, "Quantifying *Dunsmuir*: An Empirical Analysis of the Supreme Court of Canada's Jurisprudence on Standard of Review" (2016) 66:4 U Toronto LJ 555.

Davies, Margaret, *Delimiting the Law: 'Postmodernism' and the Politics of Law* (London: Pluto Press, 1996).

Del Gobbo, Daniel, "Unreliable Narration in Law and Fiction" (2017) 30:2 Can JL & Jur 311

Denbow, Jennifer, "The Problem with *Hobby Lobby*: Neoliberal Jurisprudence and Neoconservative Values" (2017) 25:2 Fem Leg Stud 165.

Dworkin, Ronald, "Objectivity and Truth: You'd Better Believe it" (1996) 25:2 Philosophy & Public Affairs 87.

Dyzenhaus, David, "Austin, Hobbes, and Dicey" (2011) 24:2 Can JL & Juris 411.

———. “Constitutionalism in an Old Key: Legality and Constituent Power” (2012) 1:2 Global Constitutionalism 229.
———. “The Deep Structure of *Roncarelli v. Duplessis*” (2008) 53 UNBLJ 111.
———. “Emergency, Liberalism, and the State” (2011) 9:1 Perspectives on Politics 69.
———. “Form and Substance in the Rule of Law?” in Christopher Forsyth, ed, *Judicial Review and the Constitution* (Oxford: Hart Publishing, 2000) 140.
———. “The Legitimacy of Law: A Response to Critics” (1994) 7:1 Ratio Juris 80.
———. “The Politics of Deference: Judicial Review and Democracy” in Michael Taggart, ed, *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) 279.
———. “Process and Substance as Aspects of the Public Law Form” (2015) 74:2 Cambridge LJ 284.
———. “The Very Idea of a Judge” (2010) 60:1 UTLJ 61.
Dyzenhaus, David & Evan Fox-Decent, “Rethinking the Process/Substance Distinction: *Baker v. Canada*” (2001) 51 UTLJ 193.
Emon, Anver, “On Statutory Interpretation and the (Canadian) Rule of Law: Interpretive Presumptions as Boundary Setting” (2015) 3:1 Theory & Practice of Legislation 45.
Evans, Vyvyan, “Design Features for Linguistically-Mediated Meaning Construction: The Relative Roles of the Linguistic and Conceptual Systems in Subserving the Ideational Function of Language” (2016) 7 Frontiers in Psychology.
Fish, Stanley, “There Is No Textualist Position” (2005) 42 San Diego L Rev 629.
Flood, Colleen & Jennifer Dolling, “An Introduction to Administrative Law: Some History and a Few Signposts for a Twisted Path” in Colleen Flood & Lorne Sossin, eds, *Administrative Law in Context*, 2nd ed (Toronto: Emond, 2013) 1.
Fox-Decent, Evan, “Democratizing Common Law Constitutionalism” (2010) 55 McGill LJ 511.
Fraley, Scott, “A Primer on Essential Classical Rhetoric for Practicing Attorneys” (2017) 14 Legal Communication & Rhetoric 99.
Frug, Gerald, “The Ideology of Bureaucracy in American Law” (1984) 97:6 Harvard L Rev 1276.
Galligan, DJ, “Judicial Review and the Textbook Writers”, Book review of *Judicial Review of Administrative Action* by SA de Smith & JM Evans and *Administrative Law* by HWR Wade (1982) 2:2 Oxford J Leg Stud 257.
Galvin, Kathleen & Pamela Cooper, *Making Connections: Readings in Relational Communication* (Los Angeles: Roxbury Publishing Company, 1996).
Gorman, Robert, “The Development of International Employment Law: My Experience on International Administrative Tribunals at the World Bank and the Asian Development Bank” (2004) 25:3 Comparative Labor L & Pol’y J 423.
Green, Andrew, “Can There Be Too Much Context in Administrative Law: Setting the Standard of Review in Canadian Administrative Law” (2014) 47 UBC L Rev 443.
Grey, J, “Discretion in Administrative Law” (1979) 17:1 Osgoode Hall LJ 107.
Haegeman, Liliane, “The Internal Syntax of Adverbial Clauses” (2010) 120:3 Lingua 628.
Hagedorn, Ludger, “René Girard’s Theory of Sacrifice, or: What is the Gift of Death?” (2015) 15:1 J Cultural & Religious Theory 105.

Hasnas, John, "Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not to Miss the Point of the Indeterminacy Argument" (1995) 45:1 Duke LJ 84.

Hass, Marjorie, "The Style of the Speaking Subject: Irigaray's Empirical Studies of Language Production" (2000) 15:1 Hypatia 64.

Holloway, Ian, "A Bona Fide Attempt: Chief Justice Sir Owen Dixon and the Policy of Deference to Administrative Expertise in the High Court of Australia" (2002) 54 Admin L Rev 687.

Hooper, Nicholas, "Notes Toward a Postmodern Principle" (2018) 31:1 Can JL & Jur 33.

Howe, Louis, "Administrative Law and Governmentality: Politics and Discretion in a Changing State of Sovereignty" (2002) 24:1 Administrative Theory & Praxis 55.

Hungerford, Amy, "On Not Reading" (11 September 2016) The Chronicle Review.

Hunt, Murray, "Constitutionalism and the Contractualisation of Government in the United Kingdom" in Michael Taggart, ed, *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) 21.

Hutchinson, Allan & Patrick Monahan, "Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought" (1984) 36 Stanford L Rev 199.

Hutchinson, Darren, "Preventing Balkanization or Facilitating Racial Domination: A Critique of the New Equal Protection" (2015) 22:1 Virginia J Soc Pol'y & L 1.

Ibbetson, David, "Milsom's Legal History" (2017) 76:2 Cambridge LJ 360 at 361

Kasdan, David, "One More Look at (Neo-)Pragmatism in Public Administration: Seeing the Forest and the Trees" (2015) 47:9 Administration & Society 1110.

Kennedy, Duncan, "Freedom and Constraint in Adjudication: A Critical Phenomenology" (1986) 36:4 JL & Educ 518.

Kingston, Anne, "How Kellie Leitch Accidentally Revealed Canadian Values" (26 May 2017) Maclean's.

Knight, Dean, "Locating Dunsmuir's Meta-structure Within Anglo-Commonwealth Traditions" (5 March 2018) Administrative Law Matters.

Kong, Hoi, "*Doré*, Proportionality and the Virtues of Judicial Craft" (2013) 63:2 SCLR 501.

Kress, Ken, "Legal Indeterminacy" (1989) 77:2 California L Rev 283.

Lacan, Jacques, "The Freudian Thing, or the Meaning of the Return to Freud in Psychoanalysis" in *Écrits: The First Complete Edition in English*, translated by Bruce Fink (New York: Norton, 2006) 334.

Lahey, William et al, "How Has Dunsmuir Worked? A Legal-Empirical Analysis of Substantive Review of Administrative Decisions after *Dunsmuir v. New Brunswick*: Findings from the Courts of Nova Scotia, Quebec, Ontario and Alberta" (2017) 30:3 Can J Admin L & Prac 317.

Levi, Edward, "An Introduction to Legal Reasoning" (1948) 15:3 U Chicago L Rev 501.

Lewans, Matthew, "Administrative Law, Judicial Deference, and the *Charter*" (2014) 23:2 Constitutional Forum constitutionnel 19.

Llewellyn, Karl, "Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed" (1950) 3 Vand L Rev 395.

Lydenberg, Robin, "Freud' Uncanny Narratives" (1997) 112:5 PMLA 1072.

Lye, John, "Ideology: A Brief Guide" online: <https://brocku.ca/english/jlye/ideology.php>.
Lyon, Sabrina & Lorne Sossin, "Data and Diversity in the Canadian Justice Community" (2014) 10:5 Osgoode Legal Studies Research Paper No 12/2014.
de Man, Paul, "Semiology and Rhetoric" in Vincent Leitch et al, eds, *The Norton Anthology of Theory and Criticism*, 2nd ed (New York: WW Norton & Co, 2010) 1365.
Mancini, Mark, "The Dark Art of Deference" (6 March 2018) Double Aspect.
Martínková, Irena & Jim Parry, "Heideggerian Hermeneutics and Its Application to Sport" (2016) 10:4 Sport, Ethics and Philosophy 364.
Mashaw, Jerry, "Explaining Administrative Process: Normative, Positive, and Critical Stories of Legal Development" in Peter Schuck, ed, *Foundations of Administrative Law*, 2nd ed (New York: Foundation Press 2004) 84.
———. "Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation" (2005) 57:2 Admin L Rev 501.
Meazell, Emily, "Deference and Dialogue in Administrative Law" (2011) 111:8 Columbia L Rev 1722.
Metzger, Gillian & Kevin Stack, "Internal Administrative Law" (2017) 115:8 Michigan L Rev 1239.
Miller, Banks & Brett Curry, "Experts Judging Experts: The Role of Expertise in Reviewing Agency Decision Making" (2013) 38:1 L & Soc Inquiry 55.
Misak, Cheryl, "Language *and* Experience for Pragmatism" (2014) 6:2 European J Pragmatism & American Philosophy 28.
———. "Rorty, Pragmatism, and Analytic Philosophy" (2013) 2 Humanities 369.
Morag-Levine, Noga, "Agency Statutory Interpretation and the Rule of Common Law" (2009) Mich St L Rev 51.
Mouffe, Chantal, "Deconstruction, Pragmatism and the Politics of Democracy" in Simon Critchley et al, eds, *Deconstruction and Pragmatism* (New York: Routledge, 1996) 1.
Murynka, Daniella, "Some Problems with Killing the Legislator" (2015) 73:1 UT Fac L Rev 11.
Nägele, Rainer, "The Scene of the Other: Theodor W Adorno's Negative Dialectic in the Context of Poststructuralism" (1983) 11:2 Boundary 2 59.
Norrick, Neal, "Interactional Remembering in Conversational Narrative" (2005) 37:11 J of Pragmatics 1819.
Nye, Hillary, "Staying Busy While Doing Nothing? Dworkin's Complicated Relationship with Pragmatism" (2016) 29:1 Can JL & Jur 71.
Parker, Warren, "Plagiarism, Public Relations and Press Releases: The Case of the Hidden Author" (2006) 20:1 Critical Arts 132.
Phillips, Jim. "Why Legal History Matters" (2010) 41 Victoria U Wellington L Rev 293.
Poirier, Marc, "On Whose Authority?: Linguists' Claim of Expertise to Interpret Statutes" (1995) 73:5 Washington UL Rev 1025.
Rosen, Arie, "Law as an Interactive Kind: On the Concept and the Nature of Law" (2018) 31:1 Can JL & Juris 125.
Rahmani, Kamal, Juergen Gnoth & Damien Mather, "A Psycholinguistic View of Tourists' Emotional Experiences" (2018) J Travel Research 1.

Reghina, Dascăl, "'Dancing through the Minefield': Canon Reinstatement Strategies for Women Authors" (2015) 14:1 Gender Studies 48.
Rehaag, Sean, "Troubling Patterns in Canadian Refugee Adjudication" (2007) 39:2 Ottawa L Rev 335.
Robertson, Joseph, "Judicial Deference to Administrative Tribunals: A Guide to 60 Years of Supreme Court Jurisprudence" (2014) 66:2 SCLR 1.
Rodick, David, "The Problem of Interiority in Freud and Lacan" (2012) 3:1 J Arts & Humanities 151.
Ruger, Theodore, "Health Law's Coherence Anxiety" (2008) 96:2 Georgetown LJ 625.
Scott, Joan, "The Evidence of Experience" (1991) 17:4 Critical Inquiry 773.
Shapiro, Sidney, Elizabeth Fisher & Wendy Wagner, "The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy" (2012) 47 Wake Forest L Rev 465.
Shaunessy, Patrick, "A Matter of Choice: Rethinking Legal Formalism's Account of Private Law Rights" (2017) 37:1 Oxford J Leg Stud 163.
Singer, Joseph, "The Player and the Cards: Nihilism and Legal Theory" (1984) 94:1 Yale LJ 1.
Sirota, Leonid, "The Paradox of Simplicity" (7 March 2018) Double Aspect
Smith, JC, "Psychoanalytic Jurisprudence and the Limits of Traditional Legal Theory" in Richard Devlin, ed, *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery Publications, 1991) 223.
Smith, Zadie, "Philip Roth, A Writer All the Way Down" (23 May 2018) The New Yorker.
Solum, Lawrence, "On the Indeterminacy Crisis: Critiquing Critical Dogma" (1987) 54:2 U Chicago L Rev 462.
Spade, Dean, *Normal Life: Administrative Violence, Critical Trans Politics, & the Limits of Law* (London: Duke University Press, 2015).
Stone, Alison, "Adorno, Hegel, and Dialectic" (2014) 22 British J History Phil 1118.
Sullivan, Ruth, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis Canada Inc, 2014).
Syrek, Steven, "'Why am I talking?' Reflecting on Language and Privilege at Occupy Wall Street" (2012) 54:2 Critical Quarterly 72.
Taggart, Michael, "Prolegomenon to an Intellectual History of Administrative Law in the Twentieth Century: The Case of John Willis and Canadian Administrative Law" (2005) 43 Osgoode Hall LJ 223.
Thomas, Richard, "Deprofessionalization and the Postmodern State of Administrative Law Pedagogy" (1992) 42 J Legal Educ 75.
Trifonas, Peter, "Postmodernism, Poststructuralism, and Difference" (2004) 20:1 J of Curriculum Theorizing 151.
Tushnet, Mark, "Defending the Indeterminacy Thesis" (1996) 16 Quinnipiac L Rev 339.
Verheij, Bart, "Dialectical Argumentation with Argumentation Schemes: An Approach to Legal Logic" (2003) 11 Artificial Intelligence & L 167.
Waldron, Thomas & Neil Berman, "Principled Principles of Statutory Interpretation: A Judicial Perspective After Two Years of BAPCPA" (2007) 81:3 Am Bankruptcy LJ 195.
Walker, Christopher, "Legislating in the Shadows" (2017) 165:6 U Penn L Rev 1377.

Walters, Mark, "Dicey on Writing the *Law of the Constitution*" (2012) 32:1 Oxford J Leg Stud 21.

———. "Jurisdiction, Functionalism, and Constitutionalism in Canadian Administrative Law" in Christopher Forsyth et al, *Effective Judicial Review: A Cornerstone of Good Governance* (Oxford: Oxford University Pree, 2010) 300.

———. "Respecting Deference as Respect: Rights, Reasonableness and Proportionality in Canadian Administrative Law" (2015) Queen's University Faculty of Law Research Paper Series No 2015-002.

Weber, Elke & Eric Johnson, "Query Theory: Knowing What We Want by Arguing with Ourselves" (2011) 34:2 Behavioral and Brain Sciences 91.

Weill, Rivka, "Dicey was not Diceyan" (2003) 62:2 Cambridge LJ 474.

West, Alastair, "Reading Against the Text – Developing Critical Literacy" (1994) 1 Changing English: Studies in Culture & Education 82.

Wildeman, Sheila, "Making Sense of Reasonableness" in Colleen Flood & Lorne Sossin, eds, *Administrative Law in Context*, 3rd ed (Toronto: Emond Montgomery Publications, 2018) 437.

Willis, John, "Statute Interpretation in a Nutshell" (1938) 16:1 Can Bar Rev 1.

———. "Three Approaches to Administrative Law: The Judicial, The Conceptual, and the Functional" (1935) 1 UTLJ 53.

Wing-yee Lee, Eliza, "Political Science, Public Administration, and the Rise of the American Administrative State" (1995) 55:6 Pub Admin Rev 538.

Winter, Jack, "*Justice for Hedgehogs*, Conceptual Authenticity for Foxes: Ronald Dworkin on Value Conflicts" (2015) 22:4 Res Publica 463.

Wortham, Simon, *Derrida: Writing Events* (New York: Continuum, 2008).

Yablon, Charles, "Freud as Law Professor: An Alternative History" (1995) 16:4 Cardozo L Rev 1439.

Yalden, Robert, "Deference and Coherence in Administrative Law: Rethinking Statutory Interpretation" (1988) 46:1 UT Fac L Rev 136.

Zeppos, Nicholas, "The Legal Profession and the Development of Administrative Law" (1997) 72:4 Chicago-Kent L Rev 1119.

Zeschel, Arne & Nadine Proske, "Usage-Based Linguistics and Conversational Interaction" (2015) 3:1 Yearbook of the German Cognitive Linguistics Association 123.

Appendix A: Case Sample Methodology & List

My third chapter canvases Supreme Court of Canada jurisprudence after *Dunsmuir v. New Brunswick* for the treatment of statutory interpretation on judicial review. This sample is the product of a search in LexisNexis Quicklaw for decisions at the Supreme Court level after March 7th, 2008. The terms are "administrative law" and "statutory interpretation," which returns the following cases. Irrelevant decisions that appear in this search are included with a reason for omission in the line below. This list is current to August 3rd, 2018.

Agraira v Canada (Public Safety and Emergency Preparedness), 2013 SCC 36.

Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association, 2011 SCC 61.

Alberta (Information and Privacy Commissioner) v University of Calgary, 2016 SCC 53.

Allstate Insurance Company of Canada v Klimitz, [2015] SCCA No 510.
Omitted as a leave application without substantive content.

Association des courtiers et agents immobiliers du Québec v Proprio Direct inc, 2008 SCC 32.

Barreau du Québec v Quebec (Attorney General), 2017 SCC 56.

British Columbia v Western Forest Products Ltd, [2009] SCCA No 413.
Omitted as a leave application without substantive content.

British Columbia (Workers' Compensation Board) v British Columbia Hydro and Power Authority, [2014] SCCA No 499.
Omitted as a leave application without substantive content.

British Columbia (Workers' Compensation Board) v Figliola, 2011 SCC 52.

Canada (Citizenship and Immigration) v Khosa, 2009 SCC 12.

Canada (Canadian Human Rights Commission) v. Canada (Attorney General), 2011 SCC 53.

Canada (Privacy Commissioner) v Blood Tribe Department of Health, 2008 SCC 44.

Canadian Broadcasting Corp v SODRAC 2003 Inc, 2015 SCC 57.

Canadian National Railway Co v Canada (Attorney General), 2014 SCC 40.

CB Powell Ltd v Canada (Border Services Agency), [2011] SCCA No 267.
Omitted as a leave application without substantive content.

Celgene Corp v Canada (Attorney General), 2011 SCC 1.

Century Services Inc v Canada (Attorney General), 2010 SCC 60.

Chopra v Canada (Attorney General), [2014] SCCA No 410.
Omitted as a leave application without substantive content.

Doré v Barreau du Québec, 2012 SCC 12.

Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd, 2016 SCC 47.

El-Helou v Canada (Courts Administration Service), [2017] SCCA No 4.
Omitted as a leave application without substantive content.

Enmax Power Corp v Alberta Utilities Commission, [2015] SCCA No 474.
Omitted as a leave application without substantive content.

Gilmor v Nottawasaga Valley Conservation Authority, [2017] SCCA No 311.
Omitted as a leave application without substantive content.

Green v Law Society of Manitoba, 2017 SCC 20.

Kanthasamy v Canada (Citizenship and Immigration), 2015 SCC 61.

Katz Group Canada Inc v Ontario (Health and Long-Term Care), 2013 SCC 64.

La Souveraine, Compagnie d'assurance générale v Autorité des marchés financiers, 2013 SCC 63.
Omitted as a criminal law case without substantive administrative content.

Maxim Power Corp v Alberta (Utilities Commission), [2010] SCCA No 376.
Omitted as a leave application without substantive administrative content.

Merck Frosst Canada Ltd v Canada (Health), 2012 SCC 3.

MiningWatch Canada v Canada (Fisheries and Oceans), 2010 SCC 2.

McLean v British Columbia (Securities Commission), 2013 SCC 67.

Northrop Grumman Overseas Services Corp v Canada (Attorney General), 2009 SCC 50.

Quebec (Attorney General) v Guérin, 2017 SCC 42.

Quebec (Attorney General) v Lacombe, 2010 SCC 38.

Quebec (Commission des normes, de l'équité, de la santé et de la sécurité du travail) v Caron, 2018 SCC 3.

R v Appulonappa, 2015 SCC 59.
Omitted as a criminal law case without substantive administrative content.

R v Clarke, 2014 SCC 28.
While this is a criminal law decision, it features a discussion of administrative law case law and is discussed in that qualified sense in chapter three.

R v Nur, 2015 SCC 15.
Omitted as a criminal law case without substantive administrative content.

Rakuten Kobo Inc v Canada (Commissioner of Competition), [2015] SCCA No 310.
Omitted as a leave application without substantive content.

Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada, 2012 SCC 35.

Saulnier v Royal Bank of Canada, 2008 SCC 58.

Smith v Alliance Pipeline Ltd, [2009] SCCA No 239.
Omitted as a leave application without substantive content.

Smith v Alliance Pipeline Ltd, 2011 SCC 7.

Sun Indalex Finance, LLC v United Steelworkers, 2013 SCC 6.
Omitted as a case about bankruptcy with no administrative law content.

Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development), 2018 SCC 4.

Wilson v Atomic Energy of Canada Ltd, [2015] SCCA No 114.
Omitted as a leave application without substantive content.

Wilson v Atomic Energy of Canada Ltd, 2016 SCC 29.

Wilson v British Columbia (Superintendent of Motor Vehicles), 2015 SCC 47.