

SUBSTANTIAL CONFUSION: The Use and Misuse of the Word "Substantial" in the Legal Profession

By Michael J. Malaguti¹

I. INTRODUCTION

A search on Westlaw for “substan!” turns up 2,793,047 documents.² This reflects a fact most lawyers know intuitively but upon which few probably reflect: the use of the word “substantial” pervades the legal lexicon.³ Lawyers, judges and legislators use the word “substantial” like sailors use the word — well, you get the idea. This is problematic because there are at least three viable (and very different) definitions of the word, and because legal writers rarely specify which of these definitions they are using. Inevitably, this carelessness infects the law with uncertainty and doubt.

At its best, the word “substantial” gives the law flexibility so that it can embrace and resolve the facts of divergent cases.⁴ At its worst, it is “thrown around” negligently by courts and advocates eager to attach the imprimatur of fact and authority to their positions.

“Substantial” is among the most widely used words in the law.⁵ During the 1930s and coinciding with the emergence of the administrative state, it began to appear in print with increasing frequency.⁶ Part of my aim in this article is simply to underscore the word’s prevalence in legal writing. This goal is animated by my belief that there exists among legal writers an ignorance regarding how heavily “substantial” is relied upon. There is the substantial factor test of causation, substantial certainty for intentional torts, substantial justice for minimum contacts, substantial performance for contracts, the substantial evidence standard of review in administrative law, the substantial compliance doctrine for wills formalities, and the substantial capacity test for criminal law. In intellectual property, there is the concept of substantial equivalents. These examples only begin to scratch the surface. Not only does “substantial” appear frequently; when it does appear, it tends to carry operative importance. No article or case of which I am aware has devoted more than a paragraph or two to examining directly this all-important word, leaving a troublesome gap in the scholarly literature.⁷

This article is intended to highlight this problem and to begin a

discussion that I hope others will join. I argue that the word “substantial” has never had a single, stable definition. Instead, it signifies a rancorous philosophical debate that has raged since ancient Greece. However, I also suggest that most current uses of “substantial” are simply incorrect. Finally, I link the problems with “substantial” with the controversy over judicial activism, and argue that because our legal system values judicial restraint, we should feel uneasy when judges use the word.

Because I believe the present discussion can only begin after understanding the etymological and philosophical roots of the word “substantial,” I begin with a brief overview of those topics and a look at current definitions of the word. Then, I turn in Part III to a discussion of the word’s prevalence and confused use in legal writing.⁸ In Part IV, I examine two death penalty cases in which the Supreme Court considered the import of the word “substantial” in jury charges. In Part V, I respond to the contextualists’ argument that all words are indeterminate, signifying little outside of a particular context. Finally, in Part VI, I contend that while good legislation may make use of the word “substantial,” good jurisprudence should not.

II. CLASSICAL ROOTS

Unlike the law, philosophy has given extensive treatment to the question, “what is substance?” Countless volumes have been dedicated to this endeavor. To recount the history of this philosophical debate is, in large measure, to recount the history of Western philosophy itself. For present purposes, chronicling some of the highlights will be sufficient.

First, though, a word of caution. It is important to recognize that the word “substance” is likely to connote to a philosopher certain concepts that are not necessarily congruent with everyday uses of the word.⁹ However, in this area philosophy preceded etymology,¹⁰ making study of the philosophical antecedents indispensable to our study of etymology.

Plato

The philosophical concept of “substance” is central to how philosophers define and categorize reality and address how we perceive, know, and describe.¹¹ The most logical point of departure for our discussion

is Plato, whose famous “allegory of the cave” hews with remarkable clarity the parameters of the debate over “substance” that has raged for millenniums in philosophical circles.¹² The dialogue is between Socrates and Glaucon, a young boy under Socrates’s tutelage. While the prose is archaic and inaccessible, the patient reader is rewarded with Plato’s insights into “matters ethical, political, metaphysical, epistemological,”¹³ and, for our purposes, legal. “[L]et me show in a figure,” Socrates begins, “how far our nature is enlightened or unenlightened:”

Behold! Human beings living in an underground den, which has a mouth open toward the light and reaching all along the den; here they have been from their childhood, and have their legs and necks chained so that they cannot move, and can only see before them, being prevented by the chains from turning round their heads. Above and behind them a fire is blazing at a distance, and between the fire and the prisoners there is a raised way; and you will see, if you look, a low wall built along the way, like the screen which marionette-players have in front of them, over which they show the puppets.¹⁴

On the “raised way” above and behind the prisoners, walk men carrying things.¹⁵ Because the prisoners’ heads are locked to look straight ahead, they see only shadows of themselves and of the men on the raised way.¹⁶ Because they have been locked since childhood in this condition, the shadows on the wall in front of them are their only reality.¹⁷ They are “like ourselves,” Socrates says.¹⁸ He queries Glaucon further: “[I]f they were able to converse with one another, would they not suppose that they were naming what was actually before them? . . . To them . . . , the truth would be literally nothing but the shadows of the images.”¹⁹

Socrates then instructs Glaucon to imagine that the prisoners “are released and disabused of their error.”²⁰ Further, he says,

when any of them is liberated and compelled suddenly to stand up and turn his neck round and walk and look toward the light, he will suffer sharp pains; the glare will distress him, and he will be unable to see the realities of which in his former state he had seen the shadows; and then conceive of someone saying to him, that what he saw before was an illusion, but that now, when is approaching nearer to being and his eye is turned toward more real existence, he has a clearer vision

Once their eyes become accustomed to the light, the liberated prisoners “will be able to see the sun, and not mere reflections of him²¹ in the water; but [they] will see him in his own proper place, and not in another; and he will contemplate him as he is.” A strange effect of the personification of “sun” is that the sun is given a mystical, divine connotation. This only amplifies Socrates’s point that the sun is more essentially real than the shadows. In the parlance of philosophers’ interpretations of the “allegory of the cave,” the sun is a “Form.” Forms are the “driving principles which give structure and purpose to everything else.”²² To Plato, then, the objects of our perception are not accurate transpositions of the Forms; they are adulterated copies. What has this to do with “substance?” The “[F]orms are Plato’s substances, for everything derives its existence from Forms.”²³ In this regard, Plato’s Forms are characterized by “ontological basicness”; that is, they are “the

foundational or fundamental entities of reality.”²⁴

The objects of our daily perception are “real” only insofar as they partake of the Forms. Notably, Plato’s conception of substance, unlike the vast majority of today’s legal uses of the word, has nothing to do with size. Plato’s focus is instead on essence. The inquiry is into the true nature and character of a given thing. Furthermore, the Platonic conception of “substance” is decidedly relational; something is substantial or is said to be substantially such-and-such to the extent that it resembles its Form.

Aristotle

Aristotle’s defines substance as “that which is neither predicable of a subject nor present in a subject.”²⁵ By this, Aristotle is referring to what he calls “primary substance” – “the truest and most definite sense of the word.”²⁶ Aristotle tells us that the individual man and the individual horse are both primary substances.²⁷ Individual instances of things are not predicable of a subject because an individual instance cannot be said of a subject. Put another way, it would be impossible for me to assert “Eric” of “John.”²⁸ This follows from the proposition that “John” and “Eric” are individual instances. Additionally, “Eric” is not present in “John.” That is, “John” is not characterized by “Eric-ness” but rather “John-ness.”

But primary substances are not the only substances. “Eric” and “John” themselves fall into broader categories of things. “Eric” and “John” are both “humans.”²⁹ Pause for a moment to note why “human” is not a primary substance by applying Aristotle’s definition. First, “human” is predicable of a subject.³⁰ It is possible to say that “Eric” or “John” is characterized by “human-ness.”³¹ It is also true that “human-ness” is present in “Eric” or “John.” Secondary substances, then, are “the species and genera of the primary substances – the kinds into which the primary substances fall.”³²

One author’s explanation helps concretize these concepts:

Each individual entity has a primary “substance” (Greek: *ousia*). One sense of this term is that “[o]usia is what something is; the answer to the question ‘What is F’ tells us the *ousia* of F. In these cases it is rendered by ‘essence’” This primary and individual substance (the particular individual, “Eric”) underlies everything else, including and especially the “secondary” substances to which the individual belongs, in this case “man” and “animal.” We see then that the particular entity “Eric” consists of an essential substance that makes him what he is.³³

It is from Aristotle’s definition that we have received the word “substance” into the English language: “A [secondary] substance . . . is the essence (the ‘what it is to be’), the form (*morphê* or *eidos*), of a [primary substance]”³⁴ Thus, the word substance “corresponds to the Greek *ousia*, which means ‘being,’ transmitted via the Latin *substantia*, which means ‘something that stands under or grounds things.’”³⁵

Lastly, and most significant, is Aristotle’s distinction between “substance” and “accident:”

With respect to any substance, we can typically distinguish between properties that are essential for the thing to be the kind of thing it is and properties that are inessential (the accidents) An individual

diamond must consist of carbon in appropriate crystalline structure, and must have a scratch hardness of 10 on the Mohs scale — these are essential properties. But it may be large or small; white, blue, red, green or black; be set in a crown or other setting — these are accidental properties.³⁶

This illustrates what is meant when it is said that substance is “that which lies beneath.” The accidental properties may come and go, but the substance, standing as it does beneath the accidental properties, remains.

It is clear then that substance, as it was originally used, had nothing to do with size — a descriptive category that is embodied today in the most prevalent use of “substance.”³⁷ The substance-accident dichotomy illustrates this perfectly. Something is “substantial” if it lies beneath — that is, if it is essential to making something what it is. Significantly, size was, to Aristotle, an accidental property. As Aristotle observed in *Categories*:

Expressions which are in no way composite signify substance, quantity, quality, relation, place, time, position, state, action, or affection. To sketch my meaning roughly, examples of substance are “man” or “the horse”, of quantity, such terms as “two cubits long” or “three cubits long”, of quality, such attributes as “white”, “grammatical”. “Double”, “half”, “greater”, fall under the category of relation; “in the market place”, “in the Lyceum”, under that of place; “yesterday”, “last year”, under that of time. “Lying”, “sitting”, are terms indicating position.; “shod”, “armed”, state; “to lance”, “to cauterize”, action; “to be lanced”, “to be cauterized”, affection.³⁸

It therefore would not have made sense to Aristotle to say, for instance, a “substantial amount,” or a “substantial number,” because such a statement rests on a conflation of substance and accident. To use the diamond example, the size of the diamond may change without affecting its “diamond-ness.”

Notice how Plato and Aristotle differ on the question of substance. Plato begins conceptually with the Forms and assesses the objects of our perception against those paragons. Aristotle, instead, begins with the sensible world in front of him and categorizes based on observed similarities and differences. The differing orientations of Plato and Aristotle lead to a theoretical debate concerning “substance” that is reflected today in alternate definitions of the word.³⁹

The Greek Neoplatonist Porphyry, who lived from 232—303 c.e., crystallized the formulation of this debate, writing:

Next, concerning genera and species, the question indeed whether they have a substantial existence, or whether they consist in bare intellectual concepts only, or whether if they have a substantial existence they are corporeal or incorporeal, and whether they are separable from the sensible properties of things (or particulars of sense), or are only in those properties and subsisting about them, I shall forbear to determine. For a question of this kind is a very deep one and one that requires a long investigation.⁴⁰

It was this phrasing of the question that would occupy philosophers into the twelfth century and beyond.⁴¹

Medieval Phrasing: The Problem of Universals

Medieval philosophers dubbed Porphyry’s question the “problem of universals.”⁴² The problem of universals is simply an iteration of the dispute between Plato and Aristotle.⁴³ Philosophers have posited several possible positions. One position, very clearly Platonic, holds that “universals (genera) have a real existence independent of any individual examples (species) of them.”⁴⁴ The allegory of the cave provides obvious support for this position, which is called “extreme realism.”⁴⁵ The opposite position, called “nominalism,” posits that “universals have no real existence but are only names we use to categorize individuals.”⁴⁶ The compromise position is Aristotelian. Called “conceptualism,” it holds that “universals are real but not independent of individual examples.”⁴⁷ Thus, “humanity” is real, referring to those qualities shared by all individual persons and discovered through the observation of individuals.⁴⁸

As noted above, it is clear that Aristotle’s substance-accident distinction was encapsulated by the Romans in the word *substantia*,⁴⁹ which in turn worked its way into the English language. Equally clear, however, is that multiple uses of the word that derive from alternative philosophical strands have also worked their way into the English language. This is one reason why confusion abounds. Some use the word “substantial” in the Platonic sense while others use it in the Aristotelian sense. And some use it in a different sense that is anchored to neither of these traditions. It is this — we’ll call it “modern” — sense, which is most prevalent in modern legal writing.

Current Definitions

Surprisingly, the current edition of Black’s Law Dictionary does not contain a definition of the word “substantial.”⁵⁰ However, it appears as a modifier 25 times.⁵¹ The New Oxford American Dictionary defines “substantial” as “1 of considerable importance, size, or worth . . . 2 concerning the essentials of something . . . 3 real and tangible rather than imaginary.”⁵² It therefore captures each of the three primary senses in which “substantial” is used. The first definition, “1 of considerable importance, size, or worth,” is the modern sense that should be familiar to any legal writer.⁵³ The second, “2 concerning the essentials of something,” is the Aristotelian sense.⁵⁴ The third, “3 real and tangible rather than imaginary,” is the Platonic sense.⁵⁵

Even within the Oxford definition, the potential for wildly differing uses is apparent. For example, there is a significant difference between something “of considerable importance, size, or worth” and something “real and tangible rather than imaginary.” An atom, for instance, is real and tangible and not imaginary, but few would say that an atom is of considerable size. Remarkably, the inconsistency is not only between alternate definitions; it is often within them.

III. PROBLEMS WITH THE MODERN DEFINITION

This section explores the inconsistency within the “modern” (and most prevalent) definition — the definition that focuses on size. A comparison of three cases yields an illustrative example of this inconsistency. In the first case, the Maryland Supreme Court considered whether a business displaying adult material was permitted under local zoning laws. The Carroll County (Maryland) Code “permits an ‘adult entertainment

business' in an IG General Industrial Zone, but in no other zone. The term 'adult entertainment business' is defined in the code . . . as an . . . 'adult store.'⁵⁶ An adult store, in turn, is defined as "a business establishment that offers for sale or rental 'any printed, recorded, photographed, filmed or otherwise viewable material, or any sexually oriented paraphernalia, if a substantial portion of the stock or trade is characterized by an emphasis on matters depicting, describing or relating to sexual activities.'"⁵⁷ Under the county code, a "substantial portion" is present where "[a]t least 20% of the stock in the establishment or on display consists of matters or houses devices depicting, describing or relating to sexual activities; or [a]t least 20% of the usable floor area is used for the display or storage of matters or devices depicting, describing or relating to sexual activities."⁵⁸ The district court found that the store was being operated as an illegal adult store under the statute.⁵⁹ The Maryland Supreme Court dismissed its grant of certiorari as improvidently granted, thereby upholding the intermediate appeals court's reversal of the district court's ruling that the defendant in the case was operating an illegal adult store. Neither appellate court reached the question of substantiality.

The second case was authored by the Kansas Court of Appeals. Kansas Statute 75-4305 provides:

(a) Any local governmental officer or employee who has not filed a disclosure of substantial interests shall, before acting upon any matter which will affect any business in which the officer or employee has a substantial interest, file a written report of the nature of the interest with the county election officer of the county in which is located all or the largest geographical part of the officer's or employee's governmental subdivision.⁶⁰

Kansas law defines a "substantial interest" as being present:

(1) If an individual or an individual's spouse, either individually or collectively, has owned within the preceding 12 months a legal or equitable interest exceeding \$5,000 or 5% of any business, whichever is less

(2) If an individual or an individual's spouse, either individually or collectively, has received during the preceding calendar year compensation which is or will be required to be included as taxable income on federal income tax returns of the individual and spouse in an aggregate amount of \$2,000 from any business or combination of businesses

(3) If an individual or an individual's spouse, either individually or collectively, has received in the preceding 12 months, without reasonable and valuable consideration, goods or services having an aggregate value of \$500 or more from a business or combination of businesses

(4) If an individual or an individual's spouse holds the position of officer, director, associate, partner or proprietor of any business, other than an organization exempt from federal taxation of corporations under section 501(c)(3), (4), (6), (7), (8), (10) or (19) of chapter

26 of the United States code

(5) If an individual or an individual's spouse receives compensation which is a portion or percentage of each separate fee or commission paid to a business or combination of businesses

Interpreting these statutes, the Kansas Court of Appeals held that a 55 percent equity interest in an entity qualifies as a "substantial interest."⁶¹

In the last case, the Mississippi Supreme Court went a step further than most courts in acknowledging that "[s]ubstantial evidence [is] not easily defined."⁶² Notwithstanding the difficulty, however, the Court boldly went on to state that "[s]ubstantial evidence . . . means something more than a 'mere scintilla' of evidence [but] that it does not rise to the level of 'a preponderance of the evidence.'"⁶³ Nevertheless, the court's definition places "substantial" somewhere between 0.1% and 50 percent.⁶⁴

These cases are a clear example of legislatures and courts using the modern, most prevalent, definition of "substantial" — the definition that focuses on size. They are particularly illustrative because they happen to involve actual percentages. While it is admittedly a slight oversimplification to say that courts and legislatures have defined "substantial" to mean 0.1 percent, 20 percent, and 55 percent, these examples do highlight with remarkable clarity the ambiguity inherent even within the modern sense of the term.⁶⁵

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IV. THE SUPREME COURT'S USE OF "SUBSTANTIAL" IN DEATH PENALTY CASES

Defining "substantial" is not only difficult; it can also be critically important. In *Cage v. Louisiana*, the Supreme Court considered a ruling of the Louisiana Supreme Court that the defendant, who had been convicted of first degree murder and sentenced to death, had not been constitutionally prejudiced by the jury charge given in the guilt phase of his trial.⁶⁶ The instruction provided in pertinent part:

If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. It must be such doubt as would give rise to a grave uncertainty, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. It is an actual substantial doubt. It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a moral certainty.⁶⁷

The Supreme Court reversed, noting that the trial court "equated a reasonable doubt with a 'grave uncertainty' and an 'actual substantial doubt,' and stated that what was required was a 'moral certainty' that the defendant was guilty."⁶⁸ "It is plain to us," the Court continued,

that the words 'substantial' and 'grave,' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable-doubt standard. When those statements are then considered with the reference to 'moral certainty,' rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.⁶⁹

Similarly, in *Victor v. Nebraska*, the defendant was also convicted of first-degree murder and sentenced to death.⁷⁰ The jury charge in his trial stated in pertinent part:

'Reasonable doubt' is such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon. It is such a doubt as will permit you, after full, fair, and impartial consideration of all the evidence, to have an abiding conviction, to a moral certainty, of the guilt of the accused. At the same time, absolute or mathematical certainty is not required. You may be convinced of the truth of a fact beyond a reasonable doubt and yet be fully aware that possibly you may be mistaken. You may find an accused guilty upon the strong probabilities of the case, provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable.

A reasonable doubt is an actual and substantial doubt reasonably arising from the evidence, from the facts or circumstances shown by the evidence, or from the lack of evidence on the part of the State, as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture.⁷¹

Victor, recycling the argument that had prevailed in *Cage*, argued that the "actual and substantial doubt" language of the jury charge "overstated the degree of doubt necessary for acquittal."⁷² The Court agreed with *Victor* that this language added an element of ambiguity to the jury charge, stating:

We agree that this construction is somewhat problematic. On the one hand, 'substantial' means 'not seeming or imaginary'; on the other, it means 'that specified to a large degree.' Webster's Third New International Dictionary, at 2280. The former is unexceptionable, as it informs the jury only that a reasonable doubt is something more than a speculative one; but the latter could imply a doubt greater than required for acquittal under [the Due Process Clause of the Fourteenth Amendment].⁷³

However, the Court continued, "Any ambiguity . . . is removed by reading the phrase in the context of the sentence in which it appears: 'A reasonable doubt is an actual and substantial doubt . . . as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture.'"⁷⁴ The Court then affirmed *Victor's* conviction.

These cases are remarkable for several reasons. Firstly, they demonstrate how important the word "substantial" can be. In *Cage*, for instance, the addition of the word to a jury charge resulted in the reversal of one man's death sentence. The legal profession is a profession of words. Lawyers, however, too rarely recognize the profound meanings their words often have. If these cases tell us anything, it is that we should take care to reflect carefully on the words in which we vest operative meaning. Secondly, these cases reveal the Supreme Court struggling with defining the word "substantial." The Supreme Court is virtually alone in resorting to a dictionary in its consideration of the word.

Unlike the vast majority of those 2,793,047 legal writers who have used the word, the Supreme Court in these cases actually engaged in a meaningful analysis of the word and some of the different senses in which it is used. Though the Court's analysis is not particularly extensive, it is a step ahead of most in recognizing the need for an analysis at all. Finally, in interpreting the import of the word, the Supreme Court rightly consulted the context in which the word appears. Faced with divining meaning from the word "substantial" that a legal writer has already used, context is a legitimate and valuable tool.

V. A RESPONSE TO A POSSIBLE COUNTERARGUMENT

Context, however, is not everything. While it is certainly legitimate to use words that depend on context for meaning, this should not serve as license to throw achievable precision to the wind. Today, the word "substantial" is inherently ambiguous and vague,⁷⁵ characteristics that context can do little to resolve. One of the problems is that the differ-

ences between the three possible definitions are differences of kind, not degree. And while the Aristotelian and Platonic definitions have a better claim to historical legitimacy than does the modern definition, history cannot resolve this controversy. Equally problematic is that “substantial” is so vague that, even laying the ambiguity problem aside, its meaning is still uncertain.⁷⁶ As I explored in Part III, the modern definition of “substantial” has so little of its own meaning that it is defined almost entirely by context,⁷⁷ with at least 600,00 words in the English language,⁷⁸ I believe we can do better.

Some would disagree with me, however. For instance, scholars have decried the oft-raised complaint that “a word which appears in two or more legal rules, and so in connection with more than one purpose . . . , should have precisely the same scope in all of them.” Impressing this argument to an extreme, some argue that language is “meaningless outside of context,”⁷⁹ or perhaps even that it is just meaningless. One plank in the critical legal movement’s platform is the principle of indeterminacy,⁸⁰ which holds that reliance on legal doctrine (cases, statutes, etc.) is illusory; what actually animates “the Law” is not doctrine but shadowy societal value judgments (which, critical legal theorists hold, tend to favor those in power). Legal doctrine without this shadowy apparatus results in “incorrigible indeterminacy.”⁸¹ The principle of indeterminacy is undergirded by the assumption that words tell us much less than we are accustomed to believing they tell us.⁸²

Thus, a critical legal theorist would respond to this article by arguing that because all words are meaningless outside of context, I am merely stating the obvious. My response is this: it is conceivable that in interpreting “the Law,” we may arrive at the conclusion that the text tells us very little by itself — but we should not start there. As First Circuit Judge Guido Calabresi observed, “[l]anguage is important. To say that language does not mean anything . . . is baloney.”⁸³ I believe there are “correct” and “incorrect” ways of using a word. So does Bryan Garner, the leading expert on legal language. He has written that although

[w]ords change over time . . . , [t]hat doesn’t mean we should abandon the idea of correctness in word usage. What is “correct” (some prefer to say “appropriate”) is a word choice that, in a given age has two characteristics: (1) it is consistent with historical usage, especially of the immediate past, and (2) it preserves valuable distinctions that careful writers have cultivated over time.⁸⁴

The “modern” definition fails on both counts. First, it is a marked departure from a venerable (and millenniums-old) historical usage. Not until the last century did the word appear in its “modern” sense. Second, the Aristotelian usage captures “valuable distinctions that careful writers have cultivated over time.”⁸⁵ This sense of the word permits lawyers to do something more than measure or count (which is all the “modern” usage permits): it allows them to categorize. Categorizing is what the law is all about. The Aristotelian definition allows lawyers to articulate whether a contract has been essentially performed, whether an action or inaction is, at its core, a tort. The “modern” definition is not packed with this much meaning. It can convey meaning, but it is a diluted imitation of the Aristotelian definition.

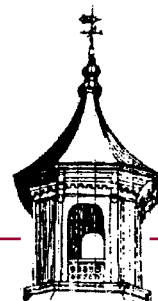
If we are forced to accept that the “modern” usage is here to stay, we should be more careful in using it. Even those who use only the “modern” usage often do so incorrectly. Remember, the modern usage means “of considerable importance, size, or worth.”⁸⁶ Half-a-percent would seem (in most cases) to fall well outside the scope of this definition yet, as we saw above, the Mississippi Supreme Court appears to believe that half a percent qualifies as “substantial” because it is more than a scintilla.⁸⁷

Those who use “substantial” to characterize things of de minimis quantity are unwittingly substituting the Platonic definition for the modern one. In the half-a-percent example, “substantial” is much closer to “real and tangible rather than imaginary” than it is to “of considerable importance, size, or worth.”⁸⁸

“Substantial,” then, lacks “definiteness of content.”⁸⁹ Contrast “substantial” with another legal gap-filler: “reasonable.” To be sure, the actions or inactions which are said to be “reasonable” vary dramatically, but “reasonable” (the universal) has roughly the same conceptual meaning irrespective of the action or inaction (the particular).⁹⁰ The same simply cannot be said for “substantial.” There are at least three viable definitions of “substantial,” some of which are almost opposite in meaning to others. Additionally, even within the modern definition, the word is so vacuous that it can be used to mean almost anything. The primary effect of all this confusion is that the law’s “demand for reasonable certainty”⁹¹ is left woefully unsatisfied.

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VI. THE LEGISLATIVE PREROGATIVE AND JUDICIAL LEGITIMACY

Let us redirect our focus slightly to the institutional implications of the widespread use of the word “substantial.” Two of the cases presented in Section III involve legislative uses of the word, which are quite common, probably for the practical reason that many legislators and drafters of legislation tend to be lawyers. Legislation has one primary goal: to lay down rules of law to regulate conduct.⁹² The drafters of legislation select and arrange the words in a manner that best embodies the legislature’s aim.⁹³

Scholars have advanced several reasons for the primacy of statutes in our polity and have, as yet, failed to arrive at a consensus.⁹⁴ Some, including Easterbrook, Posner, and Landes, cast the reason in economic terms, suggesting that “statutes should be viewed as contracts between legislators and the interest groups supporting them and advocating the legislation” and that “courts

... are an economically efficient mechanism for enforcing these contracts.”⁹⁵ Others make a majoritarian argument grounded in democratic theory.⁹⁶ Finally others, including Maltz, have posited that statutes matter so much because that view has deep roots that cannot be pulled out.⁹⁷ Whatever the reason, we can say without fear of contradiction that judges owe fealty to a legislature’s unambiguous, constitutional statute.

Soon after we accept this proposition, one begins to wonder how far it can be pushed. To use an illustrative example, can a legislature define “light” to mean “dark?” Generally, courts have held that they can.⁹⁸ For example, in *Fox v. Standard Oil Co. of New Jersey*, the Supreme Court rejected the argument that legislatures cannot in defining terms depart from their common meaning, holding:

There might be force in this suggestion if the statute had left the meaning of its terms to the test of popular understanding. Instead, [the legislature] has attempted to secure precision and certainty by rejecting a test so fluid and indeterminate and supplying its own glossary. The goods offered for sale are to be understood as having reference to goods ‘of any kind,’ and the place at which the sale is made shall include, not only places that in the common speech of men would be designated as stores, but, broadly speaking, any mercantile establishment, whether a store or something else. In such circumstances definition by the average man or even by the ordinary dictionary with its studied enumeration of subtle shades of meaning is not a substitute for the definition set before us by the lawmakers with instructions to apply it to the exclusion of all others. There would be little use in such a glossary if we were free in despite of it to choose a meaning for ourselves.⁹⁹

This is because “[l]egislative actions are performed by means of words and the words of the law are the law,”¹⁰⁰ even if the words produce an “uncommonly silly” result.¹⁰¹ In order to respect the institutional roles of the players, we must credit the words the legislature selects, suspending in the service of the legal fiction¹⁰² any semantic objection we might otherwise voice.

Usually, curious definitions do not result from legislative inadvertence but are selected by the drafters to achieve a desired purpose. For

example, in *Carroll Craft Retail*¹⁰³ and *Dowling Realty*,¹⁰⁴ the legislatures defined “substantial” with an eye toward applying the statutes to a particular object of legislative concern. The different definitions of “substantial” in each case allow the legislature to calibrate precisely the reach of the statute. Sometimes (as in both of these cases), legislative drafters use a universal such as “substantial” in the operative part of the statute and define the contours of the universal (the particulars) elsewhere. This allows the statute to embrace alternative particulars, and is also more readable than if all the particulars were embedded in the operative phrase.

The practice of legislatures defining operative terms — even if those terms depart from commonplace definitions — has much to recommend it. It “secures precision and certainty” by allowing citizens to rely on statutes.¹⁰⁵ The practice also results in more readable statutes and may serve as a tool by which legislatures may eschew over and under-inclusive laws. Finally, legislators may use definitions to implement a negotiated compromise.¹⁰⁶

Not so for judges. Quibble though we may over whether judges “make law,”¹⁰⁷ there is little point in arguing over the semantically similar yet distinct question whether judges make policy. Justice Stevens has written, “It is a proper part of the judicial function to make law as a necessary by-product of the process of deciding actual cases and controversies. But to reach out . . . blatantly and unnecessarily to make new law in a case . . . is unabashed judicial activism.”¹⁰⁸ Even Justice Douglas, New Dealer, author of *Griswold*, and reliable liberal vote on the Supreme Court for more than 30 years, wrote in 1974, “The Court today makes an extraordinary excursion into the legislative field [which] may or may not be desirable public policy. But it is a legislative decision that not even a rampant judicial activism should entertain.”¹⁰⁹ The judicial authority rests precariously on the perceived legitimacy of its decisions. To use an example I mentioned above, judges, unlike legislators, cannot define “light” to mean “dark” without being perceived as illegitimate usurpers of the legislative prerogative.

Typically, the outcry over “activist judges” is directed at judges who are accused of basing their opinions on personal predilections or where they insinuate themselves into cases best left for legislative action. Yet there is subtler aspect of “judicial activism” that is no less deleterious, an aspect that is particularly applicable to this article. Some perceptive scholars have linked semantic imprecision (whether inadvertent or intentional, the result is the same) with the judicial arrogation of the legislative prerogative. For example, Fourth Circuit Judge J. Harvey Wilkinson III has written:

Whether it is the Commerce Clause cases, the Section Five [of the Fourteenth Amendment] cases, or the commandeering cases [interpreting the Tenth Amendment], the tests in these areas are all quite flexible. They rely on semantic distinctions that each side in the federalism debate can shape to its own ends. The heavily semantic nature of the debate will make judicial outcomes unpredictable and encourage further litigation. The result of a case, and indeed of federalism jurisprudence generally, lies in the interpretation of words that cannot have a meaning on which all reasonable people can agree.

The Court has acknowledged as much. It should acknowledge also that the vague labels and imprecise terminology that dominate the federalism debates may open the Court to charges of judicial activism and subjectivity when popular enactments are invalidated. Thus, the loose and the elastic nature of the judicial standards mandate their own cautious application.¹¹⁰

Even without imputing nefarious motivation to judges who use “substantial,” it is easy to see why so many do use it. It allows judges to replace analysis with a single word. The word also carries the imprimatur of fact and authority. That is, it bolsters the appeal of a position by linking that position with objectivity. Additionally, and most concerning, it secures for judges a considerably more powerful role in the polity:

The subjective nature of the word “substantial” is clear after reading the . . . definition. Yet, the [United States Supreme] Court has attached this subjective element not only to the Commerce Clause test but to tests in many other areas of the law. These subjective tests allow Justices to legislate from the bench.¹¹¹

Judicial recognition of the nexus between words like “substantial” and judicial activism appears to be quite modest. However, at least one court has stated that the word “substantial” is inherently ambiguous.¹¹² And at least four dissenting Supreme Court justices have intimated as much and suggested that courts are institutionally ill-equipped to pass on the meaning of vacuous words and concepts such as “substantial.” Those justices, in an opinion by Justice Souter, pilloried the majority’s holding that Congress exceeded its power under the Commerce Clause:

Our cases, which remain at least nominally undisturbed, stand for the following propositions. Congress has the power to legislate with regard to activity that, in the aggregate, has a substantial effect on interstate commerce. The fact of such a substantial effect is not an issue for the courts in the first instance but for the Congress, whose institutional capacity for gathering evidence and taking testimony far exceeds ours. By passing legislation, Congress indicates its conclusion, whether explicitly or not, that facts support its exercise of the commerce power. The business of the courts is to review the congressional assessment, not for soundness but simply for the rationality of concluding that a jurisdictional basis exists in fact. Any explicit findings that Congress chooses to make, though not dispositive of the question of rationality, may advance judicial review by identifying factual authority on which Congress relied. . . .

Thus the elusive heart of the majority’s analysis in these cases is its statement that Congress’s findings of fact are “weakened” by the presence of a disfavored “method of reasoning.” This seems to suggest that the “substantial effects” analysis is not a factual inquiry, for Congress in the first instance with subsequent judicial review looking only to the rationality of the congressional conclusion, but one of a rather different sort, dependent upon a uniquely judicial competence.¹¹³

Souter’s dissent rests on an unstated assumption that the word “substantial” lacks “definiteness of content.”¹¹⁴ Leaving it to judges to pick and apply one of three viable definitions¹¹⁵— one of which requires a value judgment¹¹⁶— is a clear arrogation of legislative authority and a concrete example of “judicial activism.”¹¹⁷

VII. CONCLUSION

It seems that today’s law journals are full of pieces hawking high theory and obscure aspects of the law.¹¹⁸ Yet it is far from clear whether all this scholarship has improved the quality of advocacy and jurisprudence. Little could be simpler than the words we choose, yet little could improve advocacy and jurisprudence more than being precise, deliberate, and reflective in selecting those words. Not only is this endeavor directly related to the quality of advocacy and jurisprudence, but, as I explored above in Part VI, it leads quickly to profound questions such as the appropriate separation between legislatures and courts. These practical issues— grounded in the everyday practice of the law yet neglected by the professoriate— offer the opportunity for scholars, lawyers, and judges to make a substantial contribution to the quality of advocacy and jurisprudence.

ENDNOTES

1. Ransmeier & Spellman, P.C., Concord. I thank Professor Dana Remus for her invaluable assistance.
2. Westlaw search [“substan!”] in “All State and Federal” database, performed by author on November 30, 2010. Westlaw displays a maximum of 10,000 documents. However, it is possible to see the actual number of hits by looking at one’s research trail.
3. See generally E. Blythe Stason, “Substantial Evidence” in *Administrative Law*, 89 UNIV. PA. L. REV. 1026 (June 1941).
4. See, e.g., Yon Maley, *The Language of Legislation*, 16 LANGUAGE IN SOC’y No. 1, 38 (Mar. 1987) (noting that a goal of legislation is flexibility).
5. See Stason, *supra* note 3, at nn.2-20.
6. Google Ngram Viewer, <http://ngrams.googlelabs.com/> (search for “substantial”) (last visited March 16, 2011).
7. *But cf.* David Jakobowitz, “Help I’ve Fallen and Can’t Get Up!” *New York’s Application of the Substantial Factor Test*, 18 ST. JOHN’S J. LEGAL COMMENT. 593 (2005). To be sure, many have stated in passing that “substantial” is unclear or ambiguous, but few, if any, have systematically examined the word.
8. I shall use the term “legal writing” broadly to refer to legislation, judicial opinions, legal arguments, commentary, etc.
9. *Cf.* RESTATEMENT (SECOND) OF TORTS § 431 cmt. a (1965) (“The word “substantial” is used to denote the fact that the defendant’s conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called “philosophic sense,” which includes every one of the great number of events without which any happening would not have occurred. Each of these events is a cause in the so-called “philosophic sense,” yet the effect of many of them is so insignificant that no ordinary mind would think of them as causes.”).
10. See STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *Substance* (hereinafter “SEP-Substance”), § 2.1, <http://plato.stanford.edu/entries/substance> (last visited December 12, 2010) (“[T]he concept of substance is essentially a philosophical term of art. Its uses in ordinary language tend to derive, often in a rather distorted way, from the philosophical senses. (Such expressions as ‘a person of substance’ or ‘a substantial reason’ would be cases of this. ‘Illegal substances’ is nearer to one of the philosophical uses, but not the main one.) There is an ordinary concept in play when philosophers discuss ‘substance’, and this, as we shall see, is the concept of *object*, or *thing* when this is contrasted with properties or events. But such ‘individual substances’ are never termed ‘substances’ outside philosophy.”).
11. PLATO, REPUBLIC xv (Benjamin Jowett transl., Elizabeth Watson Scharfenberger Introduction and Notes, Barnes & Noble Books 2004) (“the Republic “presents influential arguments

concerning the very nature of reality and the means by which we human beings might apprehend what is real and distinguish it from what we see and experience in the world around us.”).

12. See SEP-Substance, *supra* note 10, at § 2, (calling this strand of philosophical argument a “debate,” and noting that “[a]lmost all major philosophers have discussed the concept of substance”).

13. REPUBLIC, *supra* note 11, at li.

14. *Id.* at (7.514a–b).

15. *Id.* at (7.514b—515a).

16. *Id.* at (7.515a).

17. See *id.*; see also *id.* at (7.515c) (“To them . . . , the truth would be literally nothing but the shadows of the images.”).

18. *Id.* at (7.515a).

19. *Id.* at (7.515c).

20. *Id.*

21. “[T]he word for sun in Greek (*helios*) is masculine—hence the masculine pronouns in Jowett’s translation.” REPUBLIC, *supra* note 11, at n. 0.

22. SEP-Substance, *supra* note 10.

23. *Id.*, at Introduction (emphasis in original).

24. *Id.*, at §§ 2.1 & Introduction.

25. ARISTOTLE, CATEGORIES (2a11-13).

26. *Id.* at (2a11-12).

27. *Id.* at (2a13).

28. See James M. Donovan, *Rock-Salting the Slippery Slope: Why Same-Sex Marriage is not a Commitment to Polygamous Marriage*, 29 N. KY. L. REV. 521, n.48 (2002) (citation omitted); see also THE NEW OXFORD AMERICAN DICTIONARY 1335 (2d ed. 2005) (“Predicate: something that is affirmed or denied concerning an argument of a proposition”).

29. See Donovan, *supra* note 28.

30. See *id.*; see also SEP-Substance, *supra* note 10, at § 1 (“Thus Fido the dog is a primary substance – and individual – but *dog* or *doghood* is the secondary substance or substantial *kind*”). *Id.* “Aristotle was mainly, if not exclusively, concerned with questions” regarding secondary substances. *Id.*

31. See Donovan, *supra* note 28.

32. S. Marc Cohen, *Aristotle’s “Substance,”* in Themes in Ancient and Modern Philosophy (Kendall-Hunt 2009).

33. Donovan, *supra* note 28 (citation omitted)

34. Cohen, *supra* note 32.

35. SEP-Substance, *supra* note 10, at Introduction. *Ousia* is a form of the verb “to be.” Cohen, *supra* note 32.

36. Justin Broackes and Peter Hacker, 78 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY, SUPPLEMENTARY VOLUMES 41, 44 (2004).

37. *Infra* Part III.

38. CATEG., *supra* note 25 at (1b25-2a4).

39. On this, more *infra* at Part II.D.

40. WILLIAM R. COOK & RONALD B. HERZMAN, THE MEDIEVAL WORLD VIEW 213 (Oxford Press 2004) (citation omitted).

41. *Id.*

42. *Id.* One author’s description of the problem of universals is worth glancing at because it was intended for a popular audience. He describes the problem of universals as follows:

In medieval philosophy, [t]he dispute between Plato and Aristotle was called “the problem of universals.” A universal signifies a united with reference to some plurality—i.e., “mankind” versus individual men. Any intellectual concept—beauty, goodness, justice, etc.—is a universal, for it stands as a unity against individual beauties, individual persons of goodness, individual acts of justice, etc. The basic philosophical question is what reality these universals possess. Plato believed they had a reality separate from earthly things and existed in the World of the Forms, which was far superior to the shadowy realities of our world because earthly realities were real only insofar as they partook of the existence of their ultimate models in the World of the Forms (the “really real”). This philosophical position is called—paradoxically from a modern standpoint—extreme realism; Augustine of Hippo was its most outstanding later proponent. Aristotle, the father

of moderate realism, believed that universals do exist, but only in the real objects of sense experience and that human beings perceive the universal dimension only intellectually (i.e., I know my neighbor Sam is an individual; I also know him to be human and therefore partaking of the universal, humanity). Thomas Aquinas would in the thirteenth century become the most important proponent of the Aristotelian position. “Everything,” said Thomas, “that is in the intellect has been in the senses.” . . . Other positions are possible, such as nominalism, which contends that universals are but words.

THOMAS CAHILL, MYSTERIES OF THE MIDDLE AGES 197-98, n.f (Anchor Books 2006):

43. See CAHILL, *supra* note 42. (linking the problem of universals to the Plato-Aristotle dispute).

44. *Id.*

45. COOK & HERZMAN, *supra* note 40, at 214.

46. *Id.*

47. *Id.*

48. *Id.* The problem of universals is particularly relevant to the law. Every case begins with particulars. A client comes into the office with a problem. She relates to the lawyer the facts surrounding that problem. The lawyer then taps his expertise by applying his knowledge of the Law to the facts of this case. “The Law” is conceptual. The particulars are abstracted away. What remains are concepts. Negligence is not Mrs. Smith’s failure to restrain her dog; it is failing to exercise due care. Consideration is not the money Mr. Jones paid for his house; it is the inducement to a contract. At bottom, the practice of law is an interplay of universalism and particularism.

49. See *supra* notes 34 – 35 and accompanying text.

50. Thomas W. Henning, *Partnership Exit Strategies and the Failure of the Substantiality Test*, 916 PLI/Tax 123-1 (available on Westlaw).

51. *Id.*

52. NEW OXFORD DICTIONARY, *supra* note 28, at 1687.

53. Jakubowitz, *supra* note 7, at n.44; see also *Culver v. Bennett*, 58 A.2d 1094, 1099 (Del. 1991) (“the term “substantial factor” has a quantitative connotation.”).

54. *Supra* Part II.B.

55. *Supra* Part II.A.

56. *County Comm’r of Carroll Cnty v. Carroll Craft Retail, Inc.*, 862 A.2d 404, 407-08 (Md. 2004) (quotation omitted).

57. *Id.* (emphasis omitted).

58. *Id.*

59. This narrative is taken from the Maryland Court of Appeals’s opinion, see *id.*, because there is no record of the district court’s order available, and because for extremely complicated and confusing procedural reasons neither the intermediate nor the highest court reached the issues of substantiality.

60. *Dowling Realty v. City of Shawnee*, 85 P.3d 716, 720 (Kan. Ct. App. 2004) (emphases added).

61. *Id.* at 720.

62. *Delta CMI v. Speck*, 586 So.2d 768, 773 (Miss. 1991).

63. *Id.* (citations omitted).

64. NEW OXFORD DICTIONARY, *supra* note 28, at 1339, 1518. (“Scintilla: a tiny trace or spark of a specified quality or feeling;] Preponderance: the quality or fact of being greater in number, quantity, or importance.”).

65. See Jakubowitz, *supra* note 7, at n.44.

66. *Cage v. Louisiana*, 489 U.S. 39, 40. (1990) (per curiam).

67. *Id.* (emphasis added).

68. *Id.* at 41.

69. *Id.*

70. *Victor v. Nebraska*, 511 U.S. 1, 17 (1994).

71. *Id.* at 18 (emphasis added).

72. *Id.*

73. *Id.*

74. *Id.*

75. In everyday speech, and even in the law, we tend to conflate the concepts of “ambiguous” and “vague.” In fact, there is an important distinction between these words that

is relevant to our discussion. "Ambiguous" means "open to more than one interpretation; having a double meaning." *Supra* note 28, at 38. On the other hand, "vague" means "of uncertain, indefinite, or unclear character or meaning." *Id.* at 1857. See also Harry Surden, *The Variable Determinacy Thesis*, 12 COLUM. SCI. & TECH. L. REV. 1, n.219 (2011).

76. Jakubowitz, *supra* note 7, at n.44.

77. It is somewhat easier to identify insubstantial and "hyper-substantial" things. See Jakubowitz, *supra* note 7, at n.40 and accompanying text.

78. Russell W. Jacobs, *Recapturing Rareness: The Significance of Surname Rareness in Trademark Registration Determinations*, 50 IDEA 395, n.127 (2010).

79. E.g., LUDWIG WITTGENSTEIN, *TRACTUS LOGICO-PHILOSOPHICUS* 51 (C.K. Ogen trans., Routledge&Kegan Paul Ltd. 1981).

80. David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STANF. L. REV. 575, 577-78 (1984).

81. Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 578-79 (1983).

82. See Guido Calabresi, *Being Honest About Being Honest Agents*, 33 HARVARD J. L. & PUB. POL'Y 907, 910-11 (2010).

83. *Id.*

84. BRYAN A. GARNER, *THE REDBOOK: A MANUAL ON LEGAL STYLE* § 12.2(a) (2d ed. West 2006).

85. *Id.*

86. NEW OXFORD DICTIONARY, *supra* note 28, at 1687.

87. See *supra* notes 62-64 and accompanying text.

88. NEW OXFORD DICTIONARY, *supra* note 28, at 1687.

89. Stason, *supra* note 3, at 1035.

90. Kenneth A. Adams, "Substantial" and "Substantiality", THE KONCISE DRAFTER BLOG (Jan. 25, 2011), <http://www.koncision.com/substantial-and-substantially/>

91. *Id.*

92. See Maley, *supra* note 4, at 33.

93. See generally *id.*

94. See generally Earl M. Maltz, *Statutory Interpretation and Legislative Power: The Case for a Modified Intentionalist Approach*, 63 TUL. L. REV. 1 (1988).

95. *Id.* at 7; see also Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984); Landes & Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975).

96. Matz, *supra*, note 94 at 7-8; see also J. ELY, *DEMOCRACY AND DISTRUST* (1980).

97. Matz, *supra*, note 94 at 9 ("The best explanation for the doctrine of legislative supremacy is simply that it reflects a deeply-embedded premise of the American political system."). Of course, resolving this controversy is outside the scope of this article, but I think Waltz's explanation begs the question.

98. E.g., 82 C.J.S. *Statutes* § 372 (2011) (collecting cases and stating, "[T]he statutory definition will be applied even though otherwise the language would have been construed to mean something other than the meaning indicated by the statute; a legislature may be its own lexicographer."); see also SUTHERLAND *STATUTES AND STATUTORY CONSTRUCTION, Definition Sections*, § 20.8 (7th ed. 2010). *Butsee Iowa Beef Processors, Inc. v. Miller*, 312 N.W.2d 530 (Iowa 1981).

99. 294 U.S. 87, 95-96 (1935); see also, e.g., *Stenberg v. Carhart*, 530 U.S. 914 (2000) ("When a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning. That is to say, the statute, read 'as a whole . . . leads the reader to a definition.');" *Meese v. Keene*, 481 U.S. 465, 484-485 (1987) ("It is axiomatic that the statutory definition of the term excludes unstated meanings of that term"); *Colautti v. Franklin*, 439 U.S. 379, 392-93, n.10 (1979); ("As a rule, 'a definition which declares what a term "means" . . . excludes any meaning that is not stated"'); *Western Union Telegraph Co. v. Lenroot*, 323 U.S. 490, 502 (1945).

100. Maley, *supra*, note 4, at 27. Another way of saying this is that the words of a statute "are simultaneously linguistic and legal." *Id.*

101. *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting).

102. I use the term "legal fiction" here quite deliberately, for convincing ourselves that "light" means "dark" requires the temporary suspension of disbelief. See BLACK'S LAW DICTIONARY (9th ed. 2009) ("legal fiction: a device by which a legal rule or institution is diverted from its original purpose to accomplish indirectly some other object.").

103. *Supra* Part III.

104. *Id.*

105. See *supra*, note 99 and accompanying text.

106. See John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, n.118 (2006) ("As I have previously suggested, '[t]he reality is that a statutory turn of phrase, however awkward its results, may well reflect an unrecorded compromise or the need to craft language broadly or narrowly to clear the varied veto gates encountered along the way to enactment.'").

107. E.g., Bush: No Moderate Judges, *newsday*, Mar. 29, 2002, at A16, available at 2002 WL 2735564 ("We want people to interpret the law, not try to make law and write law"); see also generally Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism"*, 92 Cal. L. Rev. 1441 (2004).

108. *Florida v. Wells*, 495 U.S. 1, 13 (1990) (Stevens, J., dissenting); see also Kmiec, *supra* note 107, at 1471.

109. *Teleprompter Corp. v. Columbia Broad.Sys.*, 415 U.S. 394, 416, 419 (1974) (Douglas, J., dissenting); see also Kmiec, *supra* note 107, at 1471.

110. J. Harvie Wilkinson III, *Federalism for the Future*, 74 S. Cal. L. Rev. 523, 533 (2001)

111. See Note, Devon M. Jacob, *United States v. Morrison: The "Substantial Effects" Test of the Commerce Clause: A "Substantial" Way for the United States Supreme Court to Legislate?*, 11 WIDENER J. PUB. L. 125, 145-46 (2002) (emphasis added).

112. *Idaho v. Freeman*, 507 F.Supp. 706, 717 (D. Idaho 1981).

113. *U.S. v. Morrison*, 529 U.S. 598, 628, 638 (2000) (Souter, J., dissenting).

114. Stason, *supra* note 3, at 1035.

115. See *supra* Part V.

116. *Supra* note 53 and accompanying text. The "modern" definition requires the user to determine how big, important, or worthy something is. *Id.*

117. Cf. *City of Knoxville v. Entm't Res., LLC*, 166 S.W.3d 650, 657 (Tenn. 2005) (citation omitted).

118. See, e.g., Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. Rev. 1, 4 (1998) (noting the "increased academification" of the professoriate, and suggesting that little of their scholarship reaches judges and practitioners).



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