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LAW AND LANGUAGE: THE ROLE OF PRAGMATICS IN STATUTORY INTERPRETATION†

M.B.W. Sinclair*

In everyday conversation social conventions constrain our speech and aid understanding of the speech of others. These social conventions have been analyzed by the philosopher H.P. Grice and others. Professor Sinclair explores the applicability of such conventions to statutes and thereby derives a set of pragmatic rules of statutory construction. These rules explain some of the intuitions underlying "canons of construction" and their limitations and provide a basis for understanding and for criticizing some important judicial decisions.

TABLE OF CONTENTS

I. Speech Act Theory and Statutory Interpretation ........ 374
II. Pragmatics ............................................. 377
   A. A Brief Outline of Grice’s Theory .................. 377
      1. The Maxims of Quantity .......................... 377
      2. The Maxims of Quality ............................ 378
      3. The Maxim of Relation ............................ 379
      4. The Maxims of Manner ............................. 379
   B. Pragmatics, Syntax, and Semantics .................. 382
III. Legislative Speech Compared With Conversation ........ 385
IV. Applying Conversational Maxims to Legislative Speech .. 390
   A. The Maxims of Manner ................................ 391
   B. The Maxims of Quantity ............................. 393
      1. Make Each Provision Cover All the Persons and
         Actions You Intend It To .......................... 393
      2. Make Each Provision Cover Only the Persons
         and Actions You Intend It To and No More .... 396
   C. The Maxims of Quality ............................. 397
      1. Do Not Enact a Provision That Can Be Shown
         Not To Further the Legislative Purpose .......... 397
      2. Do Not Enact a Provision When There Is No

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Adequate Evidence That It Furthers the Legislative Purpose ........................................ 398

D. The Maxim of Relevance ........................................ 399

V. Examples of the Application of Grice’s Theory .......... 401
   A. Applications in Statutory Construction .......... 401
      1. An Example From the Uniform Commercial Code ............................................. 401
      2. Two Cases From the Washington Supreme Court .............................................. 405
   B. Applications to Canons of Construction ........ 408
      1. Ejusdem Generis ........................................... 410
      2. Expressio Unius Est Exclusio Alterius .......... 414

VI. Conclusion .......................................................... 420

I. SPEECH ACT THEORY AND STATUTORY INTERPRETATION

Legal theorists have successfully maintained a superb oblivion to the historical and social features of legal language . . . rather than studying the actual development of legal linguistic practice . . .**

This Article is an attempt to treat one aspect of “legal linguistic practice” in its historical and social context. By using some basic and well-established linguistic theory—speech act theory—it examines the implications of the social facts of enactment of a statute as communication. The result is a set of principles which clarify many of the processes of statutory interpretation with which we all must struggle. Putting together a part of speech act theory and some commonly accepted intuitions regarding statutory interpretation produces a fairly cohesive and easily applicable set of principles. The mystery and uncertainty of some aspects of statutory law is commensurately reduced.

Legislatures, when they enact statutes, are initiating communications with the persons subject to their jurisdiction. The enactment of a statute is communicative behavior; insofar as a legislature can speak, it is legislative speech, and each provision of a statute enacted is a legislative utterance. We should therefore be able to gain in insight and understanding by applying speech act theory to statutes.

Of course, even though we might use the locution,¹ a legislature

does not speak in the literal sense. The modern American legislature has no oral voice but is confined to the printed word in its communicative performance. Legislatures speak through their statutes. If legislatures so speak, to what extent should they be held to the conventions that control the production and interpretation of speech in everyday social intercourse? Can we apply the same interpretive rules to Congress that we require to make everyday conversation possible? Does the difference in kind between oral and written speech make a critical difference and, if so, what?

Theoretical linguistics has traditionally been divided into three parts: syntax, semantics, and pragmatics. The theory discussed in this Article is in that part called pragmatics, "the study of linguistic acts and the contexts in which they are performed." The theory of pragmatics offered here is based on the assumption that legislatures act in a context, for a purpose, and within the requirements imposed by communication.

In particular, I shall use the seminal work of the English philosopher H. P. Grice on the social constraints on conversation. Originally the William James Lectures at Harvard University in 1967, the text was widely circulated in manuscript form and quickly became a landmark in the literature of pragmatics. The strategy of this Article is to examine the extent to which Grice's "conversational constraints" apply to legislative speech. Accordingly, Part II is an outline of


2. Of course, members of a legislature speak, and their speeches are recorded in legislative histories. However, a member is not a legislature. Throughout this Article, I shall by "legislative speech" and various synonyms be referring to legislative enactments, not to the utterances of members.


4. I do not wish to intimate any prejudice one way or the other as to the primacy of the oral or the written form of language. So long as we can understand what we are doing such disputes can best be left to Messrs. Derrida et al. See, e.g., J. Derrida, Of Grammatology (English trans. 1977).


7. It has since been published in edited form. All cites herein are to the version published in 3 P. COLE & J. MORGAN, SYNTAX AND SEMANTICS, SPEECH ACTS 41 (1975) under the title Logic and Conversation. This text is readily available. In the following it will be referred to as Grice. Although since extended and refined by Grice and others, the solidity of Grice's basic ideas has never been shaken.
Grice's theory and a comparison of pragmatic rules with the rules of syntax and semantics. The points made are essential to the following legal applications.

Grice's theory is of an idealized, cooperative conversation. Legislative speech (that is statutes) has many similarities to such conversation, but of course there are also many differences. These similarities and differences will determine the applicability of Grice's maxims to legislative speech and thus to statutory interpretation. Part III discusses those similarities and differences in relation to Grice's theory. Although the particular principles developed by Grice do not apply directly to legislative speech, most of the insights underlying them do.

Part IV develops and illustrates modifications of Grice's maxims so that they may apply to statutes. There should be nothing substantively new at any particular point in this section. My aim is to make explicit what is already implicit in the juristic process. Thus each point made should not only be intuitively viable but should also be represented in judicial opinion. The result, if successful, will be a clarification of the reasons for some common intuitions about the meaning of statutes, that is, an aid to the understanding of reasoning processes we already, for the most part, accept. Collectively, the pragmatic principles developed can be seen as an analysis of what it is for a legislature to act rationally, reasonably, and purposefully.

Although these pragmatic principles are formulated as rules for how a legislature should proceed in enacting laws, their ultimate value is as interpretive devices. One of Grice's most important products was a firmer and more systematic basis for our understanding of the information conveyed in social conversation. A major goal of this Article is, similarly, to generate principles of interpretation justifying the extraction of a fuller range of information from a statute.

Accordingly, Part V illustrates the application of the theory developed in Part IV. The first section comprises two examples of questions of statutory interpretation. The second section comprises a discussion of well-known interpretive devices: I hope to demonstrate

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8. "Philosophy begins with the concepts of ordinary, every-day knowledge; and it consists in an extended, detailed and complete exposition of those concepts . . . ." Oakeshott, The Concept of a Philosophical Jurisprudence (pt. 3), 1938 POLITICA 345, 346. See also W. HEGEL, THE PHILOSOPHY OF RIGHT 225 (1821).

that at least some of the old and much maligned canons of construction can be pragmatically justified.

II. PRAGMATICS

A. A Brief Outline of Grice's Theory

Grice's argument is based on the simple, general proposition that human conversation is, for the most part, a cooperative and purposive process:

Our talk exchanges do not normally consist of a succession of disconnected remarks, and would not be rational if they did. They are characteristically, to some degree at least, cooperative efforts; and each participant recognizes in them, to some extent, a common purpose or set of purposes, or at least a mutually accepted direction.10

This could scarcely be disputed. Its importance lies in what follows from it. For example, "at each stage [of a conversation], some possible conversational moves would be excluded as conversationally unsuitable."11 Thus, Grice formulates his most general conversational maxim, the COOPERATIVE PRINCIPLE: "Make your conversational contribution such as is required, at the stage at which it occurs, by the accepted purpose or direction of the talk exchange in which you are engaged."12 More specific maxims follow from this general principle. Grice collects them in four categories—quantity, quality, relation, and manner.13

1. The Maxims of Quantity

The category of QUANTITY relates to the quantity of information to be provided, and under it fall the following maxims:

1. Make your contributions as informative as is required (for the current purposes of the exchange).
2. Do not make your contributions more informative than is required.14

In brief, a conversational participant should say as much as, but not more than, he or she can. An example from an ordinary conversation15 might be as follows. Suppose A arrives at the office and says to

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10. Grice, supra note 7, at 45.
11. Id.
12. Id.
13. Id.
14. Id.
15. The clearest illustrations given by Grice are of transactional analogs. (As such, they are
B: “I just saw a big crash on 3rd and Jordan with three cars in it!” A few minutes later C arrives and joins the discussion saying: “I just saw a big crash on 3rd and Jordan with three cars, a truck, and a motorcycle in it!” B, wondering about the extra truck and motorcycle, then asks A if that was the same crash he had seen, and A replies that it was but that what he had said was not false because, after all, it was true that there were three cars in the crash, and he just hadn’t bothered to mention the other vehicles. Was there not something very strange, indeed infelicitous, about A’s opening statement? A violated the maxim of quantity. However, in normal conversation or speech making we often rely on and use conversational conventions for dramatic effect. For example, one way in which we exploit the first maxim of quantity is by “utterances of patent tautologies like . . . War is war.”

The second maxim under the category of quantity (“Don’t say too much”) is not so easy to explain. Indeed, as Grice notes, violation of it may not be so much “a transgression of the [Cooperative Principle] . . . [as] merely a waste of time.” Nevertheless, “hearers may be misled as a result of thinking that there is some particular POINT in the provision of the excess of information.” Such a misconception could be especially pertinent to legislative utterances.

2. The Maxims of Quality

Under the category of QUALITY falls a supermaxim—“Try to make your contribution one that is true”—and two more specific maxims:

1. Do not say what you believe to be false.
2. Do not say that for which you lack adequate evidence.

perhaps more accurately illustrative of legislation than of normal conversation.) His illustration of the maxim of quantity is: “If you are assisting me to mend a car, I expect your contribution to be no more nor less than is required; if, for example, at a particular stage I need four screws, I expect you to hand me four, rather than two or six.” Grice, supra note 7, at 47.

16. “Felicity” has become a term of art; Grice’s conversational maxims are sometimes called “felicity conditions.” If a person is complying with all relevant conversational maxims, then that person is speaking felicitously. The word carries an appropriate connotation of good faith as well as, in this context, requiring compliance with general social conventions. This use of “felicity” was originated, I believe, by J. L. Austin in his William James Lectures at Harvard in 1955. See J. L. Austin, How To Do Things With Words 14 (2d ed. 1975).

17. Grice, supra note 7, at 52.
18. Id. at 46.
19. Id.
20. See infra text accompanying notes 99-103.
21. Grice, supra note 7, at 46. Grice’s transactional illustration is:

I expect your contributions to be genuine and not spurious. If I need sugar as an ingredient...
That the maxims of quality apply to ordinary social conversation is obvious. Many literary and conversational devices depend on the flouting of the first maxim of quality; for example, irony, metaphor, meiosis, and hyperbole. Both of the maxims of quality involve the concepts of truth and falsity. As these concepts have little relevance to statutes, the applicability of the maxims of quality to legislative discourse, in the form in which Grice has stated them, is problematic.

3. The Maxim of Relation

There is a single maxim under the category of RELATION: "Be relevant." Grice notes that this is a very difficult maxim to elaborate for ordinary conversation, the focus of which can shift in a variety of subtle ways. At the most obvious level, however, it is clear that one ought not to change the subject without flagging the fact that one is doing so. Some conversational moves are also quite blatantly irrelevant. For example: "If O'Leary asks, 'Are you going to the party?' it would be inappropriate for you to answer, 'Yes, snow is white.'"

4. The Maxims of Manner

The category of MANNER relates "not (like the previous categories) to what is said but, rather, to HOW what is said is to be said." Under it Grice includes:

- the supermaxim—'Be perspicuous'—and various maxims such as:
  1. Avoid obscurity of expression.
  2. Avoid ambiguity.
  3. Be brief (avoid unnecessary prolixity).

in the cake you are assisting me to make, I do not expect you to hand me salt; if I need a spoon, I do not expect a trick spoon made of rubber.

\textit{Id.} at 47.

22. \textit{Id.} at 53.
23. See infra text accompanying notes 56-58.
24. See infra text accompanying notes 104-08.
25. Grice, supra note 7, at 46. Grice's transactional illustration is:
I expect a partner's contribution to be appropriate to immediate needs at each stage of the transaction; if I am mixing ingredients for a cake, I do not expect to be handed a good book, or even an oven cloth (though this might be an appropriate contribution at a later stage).

\textit{Id.} at 47.

26. \textit{Id.} at 46.
27. The example is Stalnaker's; see Stalnaker, supra note 6, at 278.
4. Be orderly.\textsuperscript{29}

The maxim of manner is more of an ideal than are the preceding three maxims. Conversation in violation of it may be tedious, but it would not fail the Cooperative Principle.

There is a great amount of intuitive plausibility to these maxims; they describe the conditions under which conversation most usefully proceeds. Casual empiricism tells us that they do in fact apply but also that they are frequently violated. That they are violated purposefully, accidentally, or ignorantly does not detract from their empirical validity. Oral conversation commonly involves ungrammatical sentences, but we do not for that reason reject descriptive grammar. Similarly, violations of conversational felicity conditions do not necessarily require their rejection. The point of such counter-examples is that we see them as violations, not as normal. As such, they tend to reinforce rather than detract from the validity of the analysis.

Nevertheless, if we are to be able to use these maxims as conversational constraints to generate rules (analytic techniques), we should require that they be founded in something more solid than mere empirical regularity. As Grice puts it, "I would like to be able to think of the standard type of conversational practice not merely as something that all or most do \textit{in fact} follow but as something that it is \textit{reasonable} for us to follow, that we \textit{should not} abandon."\textsuperscript{30} Although he does not claim to have proved that the maxims must hold, Grice does argue persuasively that it is "reasonable (rational)"\textsuperscript{31} that they should:

\begin{quote}
[A]nyone who cares about the goals that are central to conversation/communication (e.g., giving and receiving information, influencing and being influenced by others) must be expected to have an interest, given suitable circumstances, in participation in talk exchanges that will be profitable only on the assumption that they are conducted in general accordance with the [Cooperative Principle] and the maxims.\textsuperscript{32}
\end{quote}

One could add further that it is very difficult to imagine conversation continuing in anything like the form in which we know it if these maxims were generally abandoned.

If one assumes that a speaker is speaking felicitously (i.e., that he

\textsuperscript{29} Id. The transactional illustration is: "I expect a partner to make it clear what contribution he is making, and to execute his performance with reasonable dispatch." Id. at 47.

\textsuperscript{30} Id. at 48 (emphasis in original).

\textsuperscript{31} Id.

\textsuperscript{32} Id. at 49.
or she is acting in accord with the Cooperative Principle and maxims), then one can infer a great deal more than the semantic content of the words themselves. Such inferred information flows not just from the words chosen but from the fact that this particular speaker chose them and used them at this juncture of this discourse. In other words, such inferences require the utterance to be evaluated in its total context.

Grice coined the term “implicate” (and “implicature,” “implicatum”) for this kind of inference to distinguish it from “imply” (and variations thereon). The words have gained wide acceptance, usually in the form “pragmatic implicature” or “conversational implicature.” Grice illustrates implicature with the following example:

Suppose that A and B are talking about a mutual friend, C, who is now working in a bank. A asks B how C is getting on in his job, and B replies, “Oh quite well, I think; he likes his colleagues, and he hasn’t been to prison yet.”

A might be well aware of what peculiar quality of C prompted the tag, “he hasn’t been to prison yet,” but if he is not, he certainly is entitled to ask of B what he was implicating. At the very least, it is “that C is potentially dishonest.” If C were known by B to be a normally honest person without a record, then B would have violated at least the maxim of relevance. Yet his assertion would not for that reason be false; it would, rather, be infelicitous, a violation of a conversational constraint. The implicature depends on the assumption of the observation of the conversational maxims.

This example rests entirely on the words the speaker chose to use. In a similar fashion, the timing or the ordering of a speaker’s utterances can vary their overall force. For example, the two sentences “Nixon made a speech” and “Nixon cleaned his teeth,” when uttered consecutively in that order, make a point that would be missed if the order were reversed or if they were not used consecutively.

There are many situations in which we depend upon information about the context of an utterance that is not included in the actual words used or their arrangement for the full understanding of the utterance. The most obvious examples include the use of indexicals:

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33. Grice, supra note 7, at 43-44.
34. Id.
35. Even clearer is “She was poor but she was honest;” the use of “but” makes sense only against a background implicature of dishonesty among the poor.
"This one is green!" Other examples are not quite as obvious. Grice uses an example\textsuperscript{36} of two persons, $A$ and $B$, planning a holiday in France, during which $A$ wants to visit $C$. $A$ says "Where does $C$ live?" $B$ replies, "Somewhere in the south of France." From this reply, $A$ can deduce that $B$ does not know exactly where (for example, in what city) $C$ lives. This is not an adequate answer for planning purposes. Had $B$ known more, he would have been required, by the first maxim of quantity, to say so. But had he hazarded a more accurate specification of $C$'s whereabouts without evidence to support it, he would have been violating the maxims of quality. Hence, the conversational implicature: $B$ does not know in what town $C$ lives. To reach this conclusion required knowledge not only of the words used but also of the nature and purpose of the conversation and of the normal requirements for locating persons and that "the south of France" does not satisfy them.\textsuperscript{37}

It is important to distinguish between implicature and assumption. For example, one might assume, for the purposes of argument, that all persons are to be treated equally in all respects. A claim that amounted to unequal treatment would then be simply inconsistent with the assumption and, for that reason, rejected. Such a procedure does not depend on conversational constraints;\textsuperscript{38} the person who asserted the claim need not have violated any conversational maxim. One can get something wrong without being infelicitous, just as one can be infelicitous without being wrong.

\textbf{B. Pragmatics, Syntax, and Semantics}

Principles of pragmatics, such as Grice's maxims, are not rules that bind their subjects as do, say, rules of chemistry or mathematics. They are not invalidated by individual counter-examples, and they can even conflict with one another.\textsuperscript{39} Communication, however, could not survive their general abandonment. In this subpart, I shall

\textsuperscript{36} Grice, \emph{supra} note 7, at 51-52.

\textsuperscript{37} No doubt there is more required, contextual knowledge that is much too obvious for us to notice. Wittgenstein: "What we have to mention in order to explain the significance, I mean the importance, of a concept, are often extremely general facts of nature: such facts as are hardly ever mentioned because of their great generality." L. \textsc{Wittgenstein}, \textsc{Philosophical Investigations} 56 (1953).

\textsuperscript{38} This example is from B. \textsc{Ackerman}, \textsc{Social Justice in the Liberal State} 7 (1980). Ackerman did not make this distinction.

\textsuperscript{39} Pragmatic principles are in this respect quite similar to the jurisprudential \textit{principles} that Ronald Dworkin distinguishes from rules and policies in that they have "the dimension of weight." \textit{See} R. \textsc{Dworkin}, \textsc{Taking Rights Seriously} 26 (1977).
draw out these qualities of pragmatic principles by comparing and contrasting them with the rules of syntax and semantics.

There are some very important differences between the conversational maxims and the rules of syntax and semantics. A speaker who violates the rules of English syntax is, in a sense, not speaking English. Even more clearly, a speaker who attempts to use English words with different meanings will fail to communicate with a conventional English-speaking hearer. The rules of English (or of any other language) syntax and semantics are constitutive of English. The rules of felicitous conversation are, by contrast, regulative rules. They tell how conversation can get somewhere, achieve its ends; violating them does not mean one is not speaking the language.

Whereas the rules of syntax and semantics apply quite precisely—an utterance complies or it does not—the conversational maxims apply "more or less." We can and do violate them, deliberately or otherwise, and it is a matter of judgment how well they are being observed in any given conversation.

The rules of syntax and semantics are conventional in the very strong sense that they are arbitrary, depending on no external criteria for their selection. Different meaning assignments to sound or sign sequences would work as well, provided they were the convention. Grice's conversational maxims are not conventional in this sense. They are deductible from extralinguistic phenomena, in particular, from the social goals of conversation. We wish to use our conventional language to some end and require social conventions, such as Grice's maxims, to make that possible.

Whereas the rules of syntax and semantics remain much the same over widely variant kinds of language use, the maxims of pragmatics do not. The social conventions of different kinds of discourse can be quite diverse. Consider, for example, the courtroom

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40. The first three of the following distinctions and many more are summarized clearly in G. Leech, Principles of Pragmatics 19-45 (1983).

41. This distinction between constitutive and regulative rules originates, so far as I know, in J. Searle, Speech Acts 33 (1969).

42. Of course, if there were to be a general abandonment of the maxim of quality, it is difficult to imagine language surviving.

43. For all that, we tolerate large violations in ordinary conversation.

44. See F. de Saussure, Course in General Linguistics 67 (1959).

45. There are, of course, well-known exceptions. Familiar examples from the language of lawyers are the common omission of articles (syntax) and the use of "language" where other disciplines use "words" or "passage" (semantics).
dialogue in a famous case:46

"Q. Do you have any bank accounts in Swiss banks, Mr. Bronston?
   A. No, sir.
   Q. Have you ever?
   A. The company had an account there for about six months, in Zurich."

In reality, Bronston had maintained a personal bank account for almost five years in Geneva, Switzerland. His response was not false, but it did violate the maxim of quantity. He was convicted of perjury, and his conviction was affirmed by the court of appeals.47 The Supreme Court was unanimous in reversing. Chief Justice Burger wrote:

"Beyond question, petitioner's answer to the crucial question was not responsive if we assume, as we do, that the first question was directed at personal bank accounts. There is indeed, an implication in the answer to the second question that there was never a personal bank account; in casual conversation this interpretation might reasonably be drawn. But we are not dealing with casual conversation and the statute does not make it a criminal act for a witness to willfully state any material matter that implies any material matter that he does not believe to be true."

It is the responsibility of the lawyer to probe; testimonial interrogation, and cross-examination in particular, is a probing, prying, pressing form of inquiry. If a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination.48

The Cooperative Principle applied to courtroom cross-examination does not generate the maxim of quantity.49 Normal syntax and semantics nevertheless are still required.

The theory presented so far is intended primarily to apply to ordinary social discourse. Such discourse is normally about some topic known to the participants and about which they share some general knowledge. Ideally, conversation adds to and refines that shared knowledge: the topical ball should be advanced.50 It would thus be

48. 409 U.S. at 357-59.
49. Another clear example is verse. Consider "Little Bo-Peep": "[she] has lost her sheep, and doesn't know where to find them;" the italicized portion says no more than is contained in the previous line. But worse, the poem continues with the dramatic imperative "leave them alone!"; having lost them AND not knowing where to find them, what else could she do?
50. "We do not, except in social desparation, direct isolated and unconnected pieces of infor-
inappropriate to make an utterance which does nothing to further this goal or which too greatly outstrips the knowledge shared by the other participants (maxims of quantity). It is also necessary that new assertions in the conversation not be deliberate falsehoods and that the speaker believe them supportable by adequate evidence; falsehoods and insupportable statements do not add to or refine the shared knowledge (maxims of quality). Nor do irrelevancies—utterances about topics outside the universe of conversational discourse—advance the topical ball (maxim of relation).

III. LEGISLATIVE SPEECH COMPARED WITH CONVERSATION

This section describes the similarities and differences between legislative speech and social conversation that are most relevant to the applicability of Grice’s maxims. The most obvious similarity between conversation and legislation is that they both use language. When one opens a conversation, one does so assuming that the other participant(s) understand the language one is using. The language may change—participants who start in English might also use some French or Yiddish or change entirely into a different language—but it ought never to do so in such a way as to preclude the advance of shared knowledge. Legislatures are usually more restricted in this respect; typically they are required to use only their official languages(s).

Legislatures are also more restricted in this respect because they have at their disposal only the written form of the language in a conventionally restricted form. Gestures, facial expressions, expletives, special emphasis, and even pictorial or diagrammatic illustrations are typically unavailable.

A second similarity between legislation and conversation is that both are confined to a particular topic or universe of discourse. In this respect, too, legislative discourse more closely approaches the idealized conversation than does ordinary social discourse. In the latter, the topic may be changed in various ways; in any particular piece of legislation, it may not. The parliamentary device of tacking an unpopular or controversial bill onto a very popular one reinforces rather

51. See, e.g., In re Lockett, 179 Cal. 581, 178 P. 134 (1919) (statute prohibiting fellatio was found unconstitutional because “fellatio” is not an English word).
than refutes this point. The practice is, and is seen by all to be, a
devious and controversial ploy; it is an infelicitous maneuver.

The concept of topic in conversation is not without its difficul-
ties. In legislation, it is somewhat easier to capture. Legislatures
typically address subject areas, later (after enactment) referred to as
the scope of the statute. For example, a state legislature enacting Ar-
ticle 2 of the Uniform Commercial Code would have as its topic (as
article 2 has as its scope) transactions in goods; thus it would not be
appropriate for it to include a section governing, say, the licensing of
physicians. Whereas the topic of conversation may change at the
whim of the participants, the topic of a piece of legislation may not.
Thus, conversational conventions depending on stability of topic
(maxim of relation) will be more readily applicable to legislative dis-
course than to normal social discourse.

The most obvious difference between legislation and normal con-
versation is that legislative speech is one-sided. The addressees of any
legislative utterance are not present to constrain the conversation;
there is nobody there to say "What an inappropriate thing to say" or
"How does that bear upon the subject at hand?" Of course, the need
for such responses is minimized by preliminary hearings, committee
sessions, and floor debates. But these are preliminary to and not part
of the actual legislative utterance.

It is tempting to say that the actual conversation partners to leg-
islative speech are the courts. Inconcinities in statutes so often sur-
face and become publicized through the courts. However, very few
legislative utterances are addressed to courts. Any particular legisla-
tion is addressed to the persons who act within its domain of dis-
course. In the most typical examples, these will be persons governed
by the legislature. The courts act as one of the media through which
members of this audience can make their responses known.

A second striking feature of legislative discourse is the general

52. See Reinhart, Pragmatics and Linguistics: An Analysis of Sentence Topics (Indiana Uni-
iversity Linguistics Club (1982)) and works included in the excellent bibliography.
54. As, for example, Calabresi tends to. See G. CALABRESI, A COMMON LAW FOR THE AGE
OF STATUTES (1982).
55. Nevertheless, legislatures do recognize that the critical part of their audience will be profes-
sionally trained. A clear example is the tax code which, though governing all, is clearly addressed to
(and only intelligible to) specialists. Similarly, when a statute includes a word like "intent" or "neg-
ligent" nobody could doubt that it is the legally developed and not the everyday English meaning
that is intended.
irrelevance of truth. Unless conversation, it is neither important nor even relevant to expect of a legislature that its utterances be true. This is because the underlying purpose of legislative discourse is not the advancement and refinement of the knowledge shared by the legislature and its audience. Rather, it is the creation of laws within the bounds of which the addressees are to be required to act.

It is not necessary to resort to the model of law as orders backed by threats to make this point explicit. Legislative utterances are not often affirmative commands or orders. Yet they do share with commands and orders the feature of being inappropriate subjects for evaluation as true or false.

We do, however, require of a legislature that it be consistent, at least within a given piece of legislation. Consistency is usually explained in terms of truth: two propositions are inconsistent if they cannot both be true. Although this does not apply to legislative utterances, it is not difficult to find the correct analogy. Two utterances within a legislative discourse, that is, two provisions of a statute, will be inconsistent if complying with one requires violating the other. Thus, as the enactment of a statute proceeds, there will develop a body of legislative utterances that will ever more closely constrain the possible subsequent provisions. Such provisions cannot require inconsistent actions. This is quite closely analogous to the shared information that participants in a conversation have, develop, and refine.

Although legislative enactments are not truth functional, they are strongly purposive. The role of legislative purpose is analogous

56. "But the norm enacted by the legal authority . . . cannot be true or false, because it is not an assertion about a fact—not a description of an object but a prescription." H. Kelsen, Pure Theory of Law 73 (1967) (emphasis in original).

57. See J. Austin, Lectures On Jurisprudence (1885).

58. This is easily confirmed by checking the grammatical form of legislatively enacted sentences. (For example, a command always has a deleted second person subject.)

59. Since legal norms, being prescriptions (that is, commands, permissions, authorizations), can neither be true nor false, the question arises: How can logical principles, especially the Principle of the Exclusion of Contradiction and the Rules of Inference be applied to the relation between legal norms, if, according to traditional views these principles are applicable only to assertions that can be true or false.

H. Kelsen, supra note 56, at 74.

60. Kelsen's answer is: "Two legal norms are contradictory and can therefore not both be valid at the same time, if the two rules of law that describe them are contradictory; and one legal norm may be deduced from another if the rules of law that described them can form a logical syllogism." Id. The distinction between norms and statutes necessary to make sense of this answer is unnecessary to the present discussion.

61. Kelsen explicitly excludes legislative purpose from the subject matter of the "pure theory"
to that of truth in conversation in that any utterance, any specific clause that is contrary or irrelevant to that purpose would be, to that extent, infelicitous. This point is more controversial because some have argued that there is nothing determinable that can count as the purpose of a legislature in enacting a statute.62

What sort of thing is the purpose of a piece of legislation? As Dickerson63 points out, there is a whole hierarchy of “ever widening purposes, beginning at the inner extreme with the specific purpose of taking that action and ending at the outer extreme with the very general purpose of helping to advance the total public good.”64 A similar hierarchy can be replicated according as one looks to the entire statute or to ever smaller subparts of it down to the specific clause.

For present purposes I shall use the word “purpose” as applying only to whole statutes, to whole legislative enactments. These parallel whole conversations on given topics. For specific sections of a statute, that is, for specific utterances within the total legislative speech, I shall use the term “intent.” This stipulation corresponds roughly to that in current usage. Of course, no claim is made that intent and purpose are distinct or that they are distinct from “meaning.”65

The purpose of the statutory enactment as a whole is still statable in a variety of ways. Radin uses the example of a gambling statute: Its immediate purpose is to declare gambling contracts void (or to create a defense); a broader purpose is to discourage gambling; and the most general purpose is to promote public welfare.66 The choice


62. Compare Radin, Statutory Interpretation, 43 Harv. L. Rev. 863, 869 (1930) and Easterbrook, Statutes' Domains, 50 U. Chi. L. Rev. 533, 540-41, 547-49 (1983) (both deny the existence of a determinable legislative purpose) with Fuller, Positivism and Fidelity to Law—A Reply to Professor Hart, 71 Harv. L. Rev. 630, 664 (1958) (“[I]t is really ever possible to interpret a word in a statute without knowing the aim of the statute?”); see also Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed, 3 Vand. L. Rev. 395, 400 (1950).

63. R. Dickerson, supra note 3, at 87-89.

64. Id. at 88.

65. There is no suggestion that legislative meaning and legislative purpose can be considered wholly in isolation from each other. Obviously, the meaning of a statute is the primary evidence of the purpose underlying its passage, and light may be thrown on the understood meaning of statutory language if the purpose of the act is clearly comprehended.


of level of generality is not one of which is correct but, rather, of which is more useful.

Common sense tells us that the maximal purpose of promoting public welfare, while surely applicable, is too general to be of any use; it applies to all statutes, not specifically to the particular one at hand. This suggests that we should look to the most general purpose that can properly be found peculiarly applicable to the statute in question. Following Dickerson, we might call this the immediate purpose of the statute. Narrower refinements might then be thought of as the legislature's intended method of achieving that purpose.

Despite the difficulties that may arise in settling on the appropriate formulation of the purpose of a particular statute, it is clear that there is always a purpose to be found. "We require our legislatures to live up to a certain standard of rationality." Thus, we would not accept pointless or spurious statutes or enactments out of "legislative caprice."

This lengthy digression into the notion of legislative purpose has been necessary to make the following point. Legislation differs from conversational speech in that it does not build up and refine factual information; it is, however, strongly purposive. The legislative purpose serves a function in constraining the utterances of participants similar to that of truth in the idealized social conversation (maxim of quality). It will thus play an important role in pragmatic constraints on legislative speech.

Legislative discourse differs from normal social conversation also in the confidence we may reasonably place in the good faith and literal intentions of speakers. In social discourse, all manner of undercurrents, misdirections, and deceptions are possible, indeed, common. We all are aware of this and mentally process the utterances of others accordingly. With legislative utterances, the converse is true:

[A court interpreting a statute] should assume, unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably.

It should presume conclusively that these persons, whether or not entertaining concepts of reasonableness shared by the court, were trying responsibly and in good faith to discharge their constitutional powers and

67. R. DICKERSON, supra at note 3, at 145.
69. Id. at 226. Bickel properly emphasizes the distinction between legislative purpose and motive. Id. at 210.
We can put much more faith in the felicity of a legislative utterance than we can in that of the typical participant in social conversation. In a similar way, a legislature is limited in its ability to use literary devices exploiting pragmatic principles; it must wear its discursive heart on its sleeve, so to speak. In conversation, we exploit the conversational maxims not only by assuming that they hold and by drawing implicatures, but also by deliberately flouting them, as, for example, in sarcasm. This latter conversational ploy is not available to a legislature; ironic or metaphoric legislation would not do. Legislative discourse is forced to be much more pedestrian in its choice of literary devices. “Because legal documents are for the most part unemotive, it is presumed that the author’s language has been used, not for its artistic or emotional effect, but for its ability to convey ideas.”71 That, however, is as it should be: the communicative function of legislation is much too important to permit any but the most straightforward language.

In summary, legislative speech is similar to normal conversation in that it uses language and is confined by topic or subject matter. It is strikingly different in that it is one-sided: there is nobody who can immediately answer back. Although legislative utterances are not truth functional, as are ordinary conversational utterances, they are constrained in an analogous way by the purpose of the legislative endeavor. How, if at all, do Grice’s conversational maxims apply to these one-sided, written conversations our legislatures have with us?

IV. APPLYING CONVERSATIONAL MAXIMS TO LEGISLATIVE SPEECH

This section is devoted to adapting Grice’s conversational maxims to legislative speech and to justifying the adaptation to show them as rules about how legislatures do talk and about how they always should talk. The “more or less,”72 noncategorical nature of pragmatic

70. H. Hart & A. Sacks, The Legal Process 1415 (tent. ed. 1958). Note, however, that this assumption is not always accepted. For example, Sir Frederick Pollock pointed out that accepted canons of construction “cannot well be accounted for except on the theory that Parliament generally changes the law for the worse, and that the business of the judges is to keep the mischief of its interference within the narrowest possible bounds.” F. Pollock, Essays in Jurisprudence and Ethics 85 (1882). More recently, a similarly mistrustful attitude toward legislatures seems to pervade G. Calabresi, supra note 54.

71. R. Dickerson, supra note 3, at 224.

72. See supra text accompanying note 43.
rules should make us expect exceptions. Accordingly, those exceptions should be seen as exceptions, not necessarily as counter-examples. The general maxims should be supportable as requirements for the rational continuation of the legislative enterprise.\textsuperscript{73}

\textbf{A. The Maxims of Manner}

The easiest of the four conversational maxims to apply to legislation is the fourth,\textit{ manner}: “Be perspicuous.”\textsuperscript{74} This is fundamentally different from the other maxims, because it is concerned with \textit{how} a conversational contribution is made rather than with \textit{what} is said. As such, it and its submaxims apply directly to legislative speech; of course, a legislature should avoid obscurity and ambiguity—its utterances (statutory provisions) should be orderly and not unnecessarily prolix.

Compared with normal multilateral conversation, one-sided, legislative discourse requires perspicuity and clarity more intensively. If it is to communicate with its audience, the legislature will be limited in its choice of language. As Justice Holmes wrote, “it is reasonable that a fair warning should be given to the world \textit{in language that the common world will understand}, of what the law intends to do if a certain line is passed.”\textsuperscript{75} On the other hand, the audience also has some burden in this communicative process; it should not be spared all effort and ought to expect and tolerate the speech mannerisms a legislature might characteristically develop. Justice Holmes again: “If Congress has been accustomed to use a certain phrase with a more limited meaning than might be attributed to it by common practice, it would be arbitrary to refuse to consider that fact when we come to interpret a statute.”\textsuperscript{76} Thus, unless special circumstances show otherwise, a legislature acting felicitously will use words in the manner that would be most ordinary to the intended audience. Easterbrook’s suggestion that “[w]hen Congress enacts a $10,000 jurisdictional amount, we cannot be certain whether it means $10,000 in nominal dollars or real (inflation-adjusted) ones”\textsuperscript{77} is simply wrong. We can indeed be certain.

\textsuperscript{73} See supra text accompanying note 30.
\textsuperscript{74} See supra text accompanying notes 28-29.
\textsuperscript{75} McBoyle v. United States, 283 U.S. 25, 27 (1931) (emphasis added). Notice that this should only hold for statutes that are addressed to “the common world;” statutes addressed to specialist audiences might appropriately be in specialist language.
\textsuperscript{76} Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 48 (1928).
\textsuperscript{77} Easterbrook, supra note 62, at 536.
Legislative speech is, as mentioned above, also limited by the medium it must use to reach its audience—the printed word. It is thus deprived of many of the expressive devices common in social, oral discourse. Obvious examples are emphasis, pauses, facial expression, and gestures.

Thus Grice’s maxims of manner apply more strictly to legislative speech than they do to everyday discourse. The differences spring mostly from the one-sidedness of legislative speech; the hearer (reader) cannot say “Would you rephrase that, please, I can’t understand it as it is.”

But with legislative speech we might go even further than merely applying the usual constraints of manner with special strictness. Allwood suggests an additional maxim, a “Postulate of Adequacy,” “Utilize language maximally.” This he explains as follows: “Use words the literal meaning of which gets closest at what you mean. Not using a certain word which is available is often just as indicative as to what you mean, as the actual word you have used.” We do not hold this very firmly of ordinary conversation; we usually do not have time, and many of us simply lack the ability to select the perfect word or mode of expression to achieve our ends. Legislatures, by comparison, do have the resources of critical expertise available in framing their utterances and thus reasonably can be held to this standard.

Thus Allwood’s Postulate of Adequacy is essential to the possibility of reasonable, legislative communication. If we could not, absent clear contrary indicia, rely on the legislature to have intended exactly the choice of words it made, we could have no basis for understanding its enactments.

78. See supra text accompanying note 51.
79. The hearer (reader) can however have it repeated as many times as he/she chooses!
81. Id. at 4.
82. It is, however, unrealistic to suppose that legislatures always have the time or the inclination to make adequate use of these resources. Nevertheless, even when a legislature has acted without care or consideration, we have little choice in taking it at its exact word rather than on some speculation of what it might have said. See infra text accompanying note 84.
83. “But . . . the usage of Congress simply shows that it has spoken with careful precision, that its words mark the exact spot at which it stops . . . .” Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 48 (1928).
84. This justification is a variation on Grice’s argument; see supra text accompanying notes 30-32.
B. The Maxims of Quantity

The maxims of quantity (say as much as you can, but not more than required) do not, as formulated by Grice, apply directly to legislative speech. The ideal conversation envisioned by Grice involves increasing and refining the information shared by the participants; hence Grice’s maxims of quantity are appropriate. But legislative speech does not carry information in the same way; it does not tell us how things are but tells us how to behave. As the enactment of a statute progresses what increases is not, as in conversation, the total shared information, but the total control of behavior being exerted by the legislature. The restrictions on legislative speech that parallel the maxims of quantity will thus have to be formulated in terms of behavioral rather than informational limits.

I suggest the appropriate reformulation of the first maxim of quantity (referred to in the following as “first maxim of quantity (statutes)” to be:

1. Make Each Provision Cover All the Persons and Actions You Intend It To

Just as Grice’s first maxim of quantity is sometimes paraphrased (“say as much as you can”) so too can this be paraphrased: “Cover as much as you intend.” Note that we have to substitute “intend” for “can”: we are dealing here not with information exchanges but behavioral limitations, and nobody would wish to maximize legislative control wherever possible. Note, too, that “provision” and “cover all the persons and actions” have been substituted for Grice’s terms “contribution” and “as informative.” Each legislative utterance is a provision of a statute just as each conversational utterance is a contribution to the conversation, but the latter is an addition of information whereas the former is not.

Again, the justification is by considering and rejecting the contrary rule. Could a legislature bind its subjects to more than is announced in its statutes or bind more persons than it specifies? Could a statute banning consumption of liquor by persons under a certain age be used against a person over that age? If we are to be able to make sense of statutes and if they are to succeed in guiding behavior, we

85. “1. Make your contributions as informative as is required (for the current purposes of the exchange). 2. Do not make your contributions more informative than is required.” Grice, supra note 7, at 45. See supra text accompanying note 14.
must be able to rely on the legislature's compliance with the first maxim of quantity.

Assuming that a legislature does follow this maxim, we can generate some fairly stable implicatures. First, following the corollary of Grice's first maxim of quantity (i.e., "Say something"), we can likewise presume that each enacted provision of a statute says something. Accordingly, if a provision\textsuperscript{86} appears merely to repeat a previous provision, then we should treat that appearance as deceptive and try to find some additional content in the later one.\textsuperscript{87} If a later provision appears to cover the entire domain of a previous provision in a different way, that too should be treated as deceptive; the legislature did not, in its first provision, make an arbitrary and gratuitous utterance, but said something.\textsuperscript{88}

The application of this implicature can be illustrated with a simple problem of construing Section 9-506 of the Uniform Commercial Code:

9-506. Debtor's Right to Redeem Collateral
At any time before the secured party has disposed of collateral . . . the debtor or any other secured party may unless otherwise agreed in writing after default redeem the collateral by . . .

Does "after default" modify "redeem the collateral" or "otherwise agreed in writing"? Suppose the former. In the great majority of cases,\textsuperscript{89} the creditor will only have the collateral by repossession after default. As redeeming by the debtor only makes sense if the creditor is in possession of the collateral, with rare exceptions, it applies only after default. Thus on this hypothesis the legislature would have said little or nothing by adding the modifier "after default." Consider the alternative hypothesis: "after default" modifies "otherwise agreed in writing." This would mean that a predefault agreement depriving the debtor of the right of redemption would be ineffective, a very significant and purposeful provision. Thus the choice is easy: The first

\textsuperscript{86} Or even an additional word or phrase; Justice Holmes referred to "[t]he presumption that the second word is not added without some meaning." O. W. HOLMES, THE COMMON LAW 63 (1881).

\textsuperscript{87} Why the later one? The standard presumption, not necessarily based in actual fact, is that statutes are enacted in linear order from first provision to last. This presumption is supported by the fact that Congress speaks only through statutes and thus speaks in the linear order of the statute and by the fact that no other presumption is at all plausible.

\textsuperscript{88} This is illustrated in Part V with U.C.C. § 2-714(1) & (2) (1983).

\textsuperscript{89} The exception is the possessory security interest—the pledge; although important, it is now numerically unusual.
maxim of quantity (statutes) dictates that in this context "after default" modifies "otherwise agreed in writing;" the alternative renders the language virtually meaningless.

A second general pragmatic implicature flows from the first maxim of quantity (statutes): A statutory provision does not apply to entities or behavior not in its specific domain and does not place controls on such entities or behavior beyond those specified. A clear illustration occurred in *Iselin v. United States*. Ms. Iselin was contesting a tax assessed on her receipts from the rental of her box at the Metropolitan Opera House. The statute was very detailed in its coverage and apparently was intended to cover all second sales of opera tickets but, as the government conceded, did not provide "in terms for taxing a privilege like that enjoyed by the plaintiff."

The government argued that "Congress clearly intended to tax all sales of tickets; . . . that this general purpose of Congress should be given effect, so as to reach any case within the aim of the legislation; and that the Act should, therefore, be extended by construction to cover this case." In other words, the government argued that Congress had violated the first maxim of quantity (statutes) but should not lose thereby. The Supreme Court held Congress to the felicity condition: "What the Government asks is not the construction of a statute, but, in effect, an enlargement of it by the Court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function." Holding the legislature to have followed the first maxim of quantity (statutes) (that is, to have acted felicitously in legislating thusly) precludes the interpretation of a statutory provision to cover more persons or actions than are set forth therein.

90. Nevertheless, the first maxim of quantity should not be expected to hold absolutely for either all legislative or all conversational speech. Sometimes, especially when substantial discursive space has intervened since the previous utterance of it, it may be useful to all to reiterate an important point. Even when they are close together repetitions are sometimes to be forgiven rather than interpreted; for example U.C.C. § 9-306(3) includes "the security interest . . . ceases to be . . . perfected . . . and becomes unperfected." I cannot even pretend to offer a criterion for distinguishing such cases. As with many such conveniences, the propriety of such a reiteration is a matter of judgment.

91. Were this not the case, persons could be subject to legislative control through a statutory provision giving them no notice of that fact.

92. 270 U.S. 245 (1926).

93. Id. at 249-51.

94. Id. at 249-50.

95. Id. at 250.

96. Id. at 251.
When a legislature has said something about a subject, it can be presumed to have said all that it intended to. In other words, when a statute is silent, it does not control; silences must be construed as deliberate. Professor Tribe has provided many splendid examples illustrating this point. The present argument shows that Professor Tribe's thesis can be founded in quite general phenomena.

The second maximum of quantity (say no more than is required) also requires reformulation to be applicable to legislative speech. I suggest as its appropriate reformulation (referred to in the following as “the second maxim of quantity (statutes)”):

2. Make Each Provision Cover Only the Persons and Actions You Intend It To and No More

This has a greater similarity to Grice's second maxim of quantity than did the reformulation of the first maxim of quantity because here both constraints are social. How much one may be required to say in conversation is limited by social rather than empirical and evidentiary facts. So too is the entire legislative process.

The second maxim of quantity (statutes) can be applied to legislative speech strictly and with confidence to generate rules of implicature. A general pragmatic implicature flowing from the second maxim of quantity (statutes) is that a legislature intends the control specified to apply to all the behavior (i.e., the persons plus actions) specified in a statutory provision. Were its intended coverage narrower, it would not have said as much as it did. A dramatic example of the application of this rule was in the famous case, Caminetti v. United States. Congress had stated in the Mann Act that it applied to “any person who shall knowingly transport . . . in interstate commerce . . . any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose.” However, Congressman Mann’s own committee report stated that the Act was in-

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99. Thus, the first and second maxims of quantity (statutes) could easily be combined into a single maxim of quantity for statutory enactments: Make each provision cover all and only the persons and actions you intend it to.
100. 242 U.S. 470 (1917).
102. Id. § 2.
tended to cover commercial vice only and not to reach "immorality in general." In other words, the committee said that the statute covered more than Congress intended, that the legislature had violated the second maxim of quantity (statutes), but that the intent rather than the statute should control. The Supreme Court, keeping to the presumption that Congress always speaks felicitously (in this case, according to the second maxim of quantity (statutes)), applied the statute according to its terms and upheld the conviction of young men who had traveled, together with willing young women, from Sacramento to Reno for a weekend's diversion. Had Congress not intended the statute to cover such persons and actions, it should have used more restricted language.

These two maxims of quantity, as adapted for application to legislative speech, are the most important in practice. The adaptions (first and second maxims of quantity (statutes)) do not prevent the application of Grice's more general forms within the natural limitations required. Thus, for example, where Congress intends to prohibit a certain type of behavior, we can reasonably expect it to specify that behavior as fully as it possibly can. That is, within these boundaries, the legislature should still say as much as it can.

C. The Maxims of Quality

Grice's two maxims of quality will also have to be reformulated if they are to be applicable to legislative speech. The main difficulty with them in Grice's formulation is that they are in terms of truth and evidence. As has been shown above, the concept of truth is not applicable to legislative enactments. However, the legislative purpose can fulfill much the same role, and, accordingly, the required reformulations are in terms of furtherance of that purpose.

Grice's first maxim of quality can be applied to legislative speech in the following reformulation (referred to in the following as "the first maxim of quality (statutes)"):

1. Do Not Enact a Provision That Can Be Shown Not To Further the Legislative Purpose

There are difficult choices to be made in reaching this particular
reformulation. The first is how to parallel the ordinary speaker's knowledge of the falsity of his utterance: Should one say "has been shown" capturing the actual awareness; or should one say "can be shown," a more useful and powerful form? I chose the latter because it is fair to assume that a legislature will have adequately researched a proposed provision to determine whether it furthers the desired ends. For the practical purpose of statutory interpretation, this seems a fair assumption regardless of whether such research was in fact done or the legislative history contains a record of it.

The second difficulty is whether to use the form "not to further" or the alternative form "detrimental to." The latter is the more accurate parallel to falsity in Grice's formulation. The choice of the former is essentially political: We believe that everything ought to be free unless it is essential to some important purpose that it be constrained. Thus, the burden should still be on the proponent of a statutory provision to show that it furthers, and not merely that it is not contrary to, that purpose.105

These same considerations lead naturally to the reformulation of Grice's second maxim of quality:

2. **Do Not Enact a Provision When There Is No Adequate Evidence That It Furthers the Legislative Purpose**106

This is a heavily political and controversial recommendation. Essentially, it recommends that a burden of proof be met before a further constraint can be placed on the governed. As such, it parallels Grice's social constraint requiring a participant in a conversation to be prepared to support an assertion. We are then entitled to presume that a connection between a statutory provision and the legislative purpose was established prior to the provision's enactment. This second maxim of quality is of little use in aiding us to understand the full import of a statutory enactment and thus will not be used again in this discussion.

In dealing with an actual problem of statutory interpretation we will, as always, assume that the legislature did comply with the maxim, here the first maxim of quality (statutes). If two interpreta-

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105. In a political system in which everything was forbidden except that which was expressly permitted, the contrary view would hold.

106. Note that this is roughly equivalent to "Do not enact a provision that cannot be shown to further the legislative purpose" which is very close in words but critically different in meaning from the first maxim of quality (statutes).
tions of a provision seem plausible in the abstract, the one that fur-
thers the legislative purpose is the correct choice. A fine example of
this occurs in Judge Learned Hand's opinion in *Lehigh Valley Coal
Co. v. Yensavage.*107

Yensavage had been injured while working in Lehigh Valley
Coal Company's mine. A state statute provided compensation to em-
ployees injured in unsafe workplaces, but Yensavage was working
under a contract carefully designed by Lehigh Valley Coal Company
to make mine workers independent contractors. The question thus
was as to the meaning of the word "employee" in the statute. The
company argument, although having conservative authority behind it,
would have required a result contrary to the purpose of the statute.
Accordingly Judge Hand argued:

[The company argument] misses the whole purpose of such statutes,
which are meant to protect those at an economic disadvantage.
It is true that the statute uses the word "employed," but it must be un-
derstood with reference to the purpose of the act, and where all the con-
ditions of the relation require protection, protection ought to be given

. . . .

Such statutes . . . should be construed, not as theorems of Euclid, but
with some imagination of the purposes which lie behind them.108

In terms of the first maxim of quality (statutes), to interpret the stat-
ute according to the coal company's argument would be to attribute
to the legislature the enacting of a statute lending itself to the opposite
of the intended purpose.

D. The Maxim of Relevance

Grice's single cryptic maxim of relevance, "Be relevant," can be
applied equally to legislative speech. The question we must answer
though is, "relevant to what?" In (idealized) normal conversation,
there is a topic of the conversation and individual subtopics of each
utterance. We tend to understand intuitively what these are when we
are participants, but formulating a rule for picking them in a given
text has proved very difficult.109 With legislative speech the problem
is less difficult. Legislatures cannot change their subjects at whim,
and, in their actual speech (statutory enactments), they are following

107. 218 F. 547 (2d Cir. 1914), cert. denied, 235 U.S. 705 (1914). See also Cox, Judge Learned
Hand and the Interpretation of Statutes, 60 Harv. L. Rev. 370, 377 (1947).
108. Id. at 552-53.
109. See Reinhart, supra note 52.
a predetermined public plan. Thus, the maxim of relevance is applied more intensively to legislative than to conversational discourse.

There are two senses in which the topic of a legislative conversation—of a statute, an act—must be explicated. First, there is the scope of the statute, its domain of discourse. A statute regulating the sale of goods (say, Article 2 of the U.C.C.) is, in this sense, on the topic of goods and sales. It would\textsuperscript{110} be inappropriate to include in it a provision regulating the licensing of physicians. The maxim of relevance (henceforth "the maxim of relevance (statutes)") requires that each provision be about things within the scope of the statute.

Legislative speech also can be said to have a topic in the sense of a goal or objective. What is the legislature trying to achieve? With the idealized conversation we assume that the goal is the increase and refinement of the knowledge shared by the participants. With legislation we must substitute legislative purpose. Thus, a specific provision of a statute could violate the maxim of relevance (statutes) in a second way by being irrelevant to the furtherance or detriment of the legislative purpose. In this, it is distinct from the first maxim of quality (statutes) which treats of provisions that may enhance, inhibit, or be neutral to the furtherance of the legislative purpose, but only if they have some relevance to it. The maxim of relevance (statutes) treats of the question whether the provision is assessable on that scale at all.

The maxim of relevance (statutes) primarily refers to the relation between the intent of a particular provision and the purpose of the whole statute of which it is a part. Within any particular provision the same requirement holds between the meaning assigned to any constituent words or phrases and the intent of the whole provision. Particular words must be construed in accordance with the legislative intent; to do otherwise would be to hold the legislature guilty of violating the maxim of relevance (statutes).

The assumption that this maxim is met by legislatures is not only eminently reasonable but empirically seems always to hold. An example is Judge Learned Hand's opinion in \textit{Lehigh Valley Coal Co. v. Yensavage} discussed above.\textsuperscript{111} The company position followed the legal dictionary definition of "employee" as contrasted with "independent contractor." But that distinction had its roots in the law of agency and liability in tort to injured third parties (\textit{respondeat superior}); it was utterly irrelevant to the use being made of "employee" in

\textsuperscript{110} These are the same examples used above; see \textit{supra} text accompanying note 53.

\textsuperscript{111} See \textit{supra} text accompanying notes 107-08.
the statute in question. Thus, the company argument required a legislative violation of the maxim of relevance (statutes). Judge Hand presumed the contrary, namely, felicitous legislative speech in accord with the maxim of relevance (statutes).

All the pragmatic maxims for statutes are justified in the same way. It is reasonable that a legislature should act in accordance with them; they are among the characteristics of rationality in legislation. From the point of view of the "hearer"—the reader of a statute—the propriety of the maxims is a precondition to the possibility of sensibly understanding, making use of, and guiding behavior by legislative speech. Being pragmatic constraints, they in fact may be violated on occasion, but the entire enterprise of legislation would fail if they were to be generally disregarded.¹¹²

In summary, then, Grice's maxims of conversation do apply to legislative speech. However, legislative speech is different in important ways from normal conversation, and, accordingly, the maxims require reformulation. The reformulated versions have a great amount of intuitive plausibility and seem empirically valid. Perhaps more importantly, it is reasonable to hold legislatures to them.

V. EXAMPLES OF THE APPLICATION OF GRICE'S THEORY

This section illustrates the use of Grice's maxims, as modified for legislative speech. The form of the argument is straightforward. The assumption is that the pragmatic maxims (statutes) developed in Part IV have been followed and used within the context of enactment to discriminate between otherwise possible interpretations of a statute. Requirements generated by pragmatic implicature also limit the range of possible constructions.

A. Applications in Statutory Construction

1. An Example From the Uniform Commercial Code

Consider the general question whether every breach of contract for the sale of goods is a breach of warranty under Article 2 of the U.C.C. In particular, is late delivery a breach of warranty? Our precode and extra-legal intuitions tell us it is not; but the U.C.C. has substantially expanded the scope of the primitive concept of warranty

¹¹² The reader will have noticed my determined resistance to saying pragmatic maxims are "normative" or "empirical."
in its definitions.\textsuperscript{113}

The force of the suggestion that late delivery is a breach of warranty for article 2 purposes comes from section 2-313(1)(a):

2-313. Express Warranties by Affirmation, Promise, Description, Sample
(1) Express warranties by the seller are created as follows: (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

Assuming it is part of the basis of the bargain, is not a firm delivery date a “promise made by the seller to the buyer which relates to the goods”? One is tempted to reply that such a promise does not relate to the goods but to delivery, nor is it something to which the goods can conform. But the buyer’s reply, “I contracted for these goods at this place and time,” especially if delivery time was in fact a critical term, keeps the question open. We would appear to be forced to look to the intent of the legislature and to what \textit{ought} to be the correct solution, both notoriously judgmental methods in such confined spaces. There should be a better way.

The question is not merely academic: it gets its practical teeth from the damages available. Suppose the jurisdiction to be Texas, the plaintiff-buyer to be a medium-sized corporation, the goods to be a highly technical piece of equipment under development at the time of contracting, and the defendant seller to have failed by six months to meet the delivery date. The damages under the U.C.C. are, let us say, substantial but not life threatening to either buyer or seller.

But this is Texas, and we must address the Deceptive Trade Practices—Consumer Protection Act (DTPA).\textsuperscript{114} Plaintiff is a consumer for its purposes and thus within the ambit of its very laudable purpose “to protect consumers against false, misleading, and deceptive practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection.”\textsuperscript{115} The link between this statute and the U.C.C.\textsuperscript{116} is provided in section 17.43 of the DTPA:

An act or practice that is a violation of law other than this subchapter may be made the basis of an action under this subchapter if the act or

\begin{footnotes}
\item[113] U.C.C. §§ 2-312 to 2-315. An example of this expansion is that a core description is now an express warranty under § 2-313(1)(b).
\item[114] TEX. BUS. & COMM. CODE §§ 17.41-17.63 (Vernon 1973).
\item[115] Id. § 17.44.
\item[116] Texas enacted the U.C.C. in 1965 as TEX. BUS. & COMM. CODE (Vernon 1978).
\end{footnotes}
practice is proscribed by a provision of this subchapter or is declared by such other law to be actionable under this subchapter.

Breach of warranty (but not other breach of contract) is not only mentioned in the statement of purpose, \(^\text{117}\) but also in the provision for "relief for consumers," section 17.50:

(a) A consumer may maintain an action where any of the following constitute a producing cause of actual damages:

(2) breach of an express or implied warranty;

The key to the importance of this link between the U.C.C. and the Texas DPTA is the latter’s damage provision: \(^\text{118}\)

(b) In a suit filed under this section, each consumer who prevails may obtain:

(1) the amount of actual damages found by the trier of fact. In addition the court shall award two times that portion of actual damages that does not exceed $1,000. If the trier of fact finds that the conduct of the defendant was committed knowingly, the trier of fact may award not more than three times the amount of actual damages in excess of $1,000;

(d) Each consumer who prevails shall be awarded court costs and reasonable and necessary attorneys’ fees.

If late delivery is a breach of warranty, our defendant supplier will face liability not only for plaintiff’s actual damages but for at least $2,000 plus plaintiff’s costs and attorney fees and (because it knew it was late) the possibility of treble damages. \(^\text{119}\) Whether late delivery is a breach of warranty is thus a critical question; an affirmative answer could indeed be life threatening to defendant.

Article 2 of the U.C.C., together with the theory developed in the first part of this Article, provides a very clear answer to this question. The source of the answer is not in the definitions of warranties but again in the relevant damages provision of article 2—section 2-714:

2-714. Buyer’s Damages for Breach in Regard to Accepted Goods

(1) Where the buyer has accepted goods and given notification . . . he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller’s breach as determined in any manner which is reasonable.

\(^{117}\) Id. § 17.44.

\(^{118}\) Id. § 17.50(b).

\(^{119}\) It works in straight breach of warranty cases; see, e.g., Indust-Ri-Chem Laboratory, Inc. v. Par-Pak Co., 602 S.W.2d 282 (Tex. Civ. App. 1980); Ralston Oil & Gas Co. v. Genesco, Inc., 706 F.2d 685 (5th Cir. 1983).
(2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

Suppose all breaches of contracts for the sale of goods were breaches of warranty. Then, section 2-714(2) would provide the basic remedy formula and its own exception tag. What then would section 2-714(1) tell us? Nothing? But that would be a clear violation of Grice's first maxim of quantity and first maxim of quantity (statutes). We are justified in assuming that legislatures, when they speak, intend to say something. Accordingly, section 2-714(1) must apply to something; there must be some breach of contract under article 2 that is not a breach of warranty.

The same implicature can be reached by focusing on the language used in section 2-714(1). With respect to remedies provisions throughout the U.C.C., there is a special statement of the legislative purpose of section 1-106(1):

1-106. Remedies to be Liberally Administered
(1) The remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed . . . .

Where the breach is of warranty, the legislature, saying as much as it can in accordance with the maxims of quantity, provided a formula for computing damages in accordance with this purpose. In section 2-714(1), still saying as much as it can, it could not provide a formula similarly furthering the given purpose for cases of breach in general. Why not? Whatever the actual reason, it must pertain to breaches by sellers other than of warranty, for otherwise section 2-714(1) would have been enacted in violation of first maxim of quality (statutes). Thus again, there must be some breaches by sellers which are not breaches of warranty. What are they?

The language of section 2-714(1) achieves its general coverage by using the phrase "non-conformity of tender." In article 2, "tender" refers not only to the manner and time of delivery of the goods but also to conformity of the goods themselves:

(1) Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification necessary to enable him to take delivery.

120. U.C.C. § 2-714(2).
121. Note that this generates an infelicity in U.C.C. § 2-601, Buyer's Rights on Improper De-
Thus, in accord with Allwood's Postulate of Adequacy and the maxims of manner, section 2-714(1) is designed to cover all breaches by a seller where a buyer has kept the goods, be they breaches of warranty or of time and manner of delivery. Breaches of warranty are then covered particularly in section 2-714(2); breaches of delivery requirements remain the exclusive province of section 2-714(1).

In this way the language of the U.C.C., in the light of the maxims of quantity, quality, and manner, requires the conclusion that a seller's breach by late delivery not be a breach of warranty. Treble damages and attorney fees under the DTPA will not be available to our hypothetical Texas plaintiff.

Of course, one could reach this conclusion on other grounds. For example, one could look to the policy of the Texas legislature in enacting the DTPA and the kind of problems it intended to cover. One could argue on the basis of common sense and reasonableness that this is the only sensible conclusion. But the point to note for present purposes is that all these arguments require some judgment to be made at some point. At least one move is discretionary and, to that extent, unpredictable and uncertain. The argument based on conversational constraints does not require judgment or discretion. It rests firmly in the requirements of rational and reasonable communicative behavior and the minimal presumption that the legislature was, in enacting the U.C.C., behaving felicitously.

2. Two Cases From the Washington Supreme Court

In 1974, in Helling v. Carey, the Supreme Court of Washington decided that an ophthalmologist had, as a matter of law, been negligent notwithstanding the fact that he had followed the procedures and standards accepted in his profession. According to the court, "reasonable prudence required the timely giving of the pressure test . . . irrespective of its disregard by the standards of the ophthalmology profession." Not surprisingly, this caused some consternation in the medical profession—so much in fact that in 1975 the

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livery, which includes the language "if the goods or any tender of delivery fail in any respect to conform to the contract." As tender of delivery includes the requirement of conformity of the goods to the contract the first disjunct—"the goods"—is apparently redundant; that is, the legislature has used some words but said nothing, violating the maxims of quantity.

123. Id. at 519, 519 P.2d at 983.
124. Id. at 516-18, 519 P.2d at 982-83.
125. Id. at 519, 519 P.2d at 983.
Washington legislature passed a statute designed to reverse the law created by the decision. The report of the house committee stated so directly: "The bill as introduced would reestablish the pre-Helling standards of negligence that have been developed through case law in Washington."126 The statute passed, RCW 4.24.290, provides, in relevant part:

In any civil action for damages based on professional negligence against . . . a member of the healing arts, the plaintiff in order to prevail shall be required to prove by a preponderance of the evidence that the defendant or defendants failed to exercise that degree of skill, care and learning possessed by other persons in the same profession . . . .

In 1979, the same court again faced the question of reasonable prudence in medical practice in Gates v. Jensen.127 Defendants again were ophthalmologists who had followed procedures accepted as standard in the profession.128 Among other defenses, the ophthalmologists argued that "the Helling rule . . . was abrogated by RCW 4.24.290."129 The court did not agree.

The statute as passed was an amended version of that originally introduced which had referred to the "skill and care practiced by others in the same profession."130 As enacted, it referred to the "skill, care and learning possessed by other persons in the same profession." While noting that the original version "would have established the standard of care as that skill and care practiced by others in the same profession,"131 the majority read the enacted version as setting a "much broader" standard allowing "ample scope for the application of the limited Helling rule."132 Thus:

The statute as passed requires physicians to exercise the skill, care and learning possessed by others in the same profession . . . . It is not argued that respondent and other ophthalmologists did not possess the skill, care and learning required to choose and administer the two alternative, simple and risk-free tests.133

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128. The disease was even the same—glaucoma; the medical procedures in question and other factual aspects were, however, different.
129. 92 Wash. 2d at 252, 595 P.2d at 923.
130. Id. at 256, 595 P.2d at 926 (emphasis in original).
131. Id. at 253-4, 595 P.2d at 924.
132. Id. at 254, 595 P.2d at 924.
133. Id. (emphasis in original).
Semantically, this majority argument seems unimpeachable: there is a great deal of difference between skill \textit{possessed} and skill \textit{exercised}. The dissenting opinion\textsuperscript{134} challenged the majority on these grounds:

I do not believe that the change of the word "practiced" to "possessed" frustrated the legislature's purpose in enacting RCW 4.24-290. The issue is not whether members of the profession possessed, practiced, followed or exercised a certain degree of skill. Rather, it is whether the standard of the profession should be used to measure the defendant's conduct instead of the \textit{Helling} standard of "reasonably prudent under the circumstances."\textsuperscript{135}

Maybe so, but that question has already been answered by the court in \textit{Helling} and need not be readdressed unless the legislature had since changed it. The majority's argument is that, on the meaning of the words of RCW 4.24.290, there had been no change. Why then are so many uncomfortable with the majority's argument and decision?

The qualms stem from reactions not only to the semantic content of the legislature's utterance but also the pragmatic content. RCW 4.24.290 was a purposive legislative speech act to be taken as such in its full context. The majority of \textit{Gates v. Jensen} ignored this entirely, focusing only on the string of words as purely a semantic phenomenon.\textsuperscript{136}

The majority opinion requires the legislature to have violated both the maxim of quantity and the maxim of quality (statutes). If the rule of \textit{Helling} is still the law in Washington, then the legislature, despite is deliberate effort to do so, has said nothing. The utterance it has produced (RCW 4.24.290) also demonstrably does not further the avowed purpose of the legislature.\textsuperscript{137} Thus, the majority requires the legislature to have acted utterly infelicitously in respect to both quantity and quality.

If we assume that the legislature complied with the maxims of quantity and quality, the majority argument in \textit{Gates v. Jensen} cannot be accepted. However, the dissenting position of ignoring the difference between "possessed by" and "practiced by" is not obviously cor-

\textsuperscript{134} The decision was en banc (7-2). Six justices joined Horowitz, J. in his majority opinion; only one joined Dolliver, J. in dissent.

\textsuperscript{135} 92 Wash. 2d at 257, 595 P.2d at 926 (citations omitted).

\textsuperscript{136} Such myopia might be justified on the belief that legislatures always and only make mischief. \textit{See supra} note 70. But this belief is scarcely a plausible basis for modern statutory interpretation.

\textsuperscript{137} \textit{See supra} text accompanying note 126. The purpose was to change the rule of \textit{Helling}. 
rect either. Under the maxim of manner, and in particular Allwood's Postulate of Adequacy, we are entitled to presume that the legislature meant what it said. This is especially pointed here when there was a change in text during preparation for the legislative act. Simply to interpret "possessed by" as "practiced by" is also to charge the legislature with infelicity under the maxim of manner.

Clearly, the legislature did not do as well as it ought to have done in formulating the statute. Which is the worse set of infelicities for decision purposes? Unless the judiciary is determinedly hostile to the legislature, the answer is fairly clear. It can be presented more dramatically by a simple argument of the kind at which lawyers are most adept. On the majority view, RCW 4.24.290 requires a medical practitioner always to exercise all the skills possessed by other practitioners. Failure "to exercise that degree of skill . . . possessed by other persons in the same profession" is imprudent, negligent medical practice. On the facts of Helling and Gates, a prudent ophthalmologist must give every patient a pressure test for glaucoma on every visit. But this is not only nonsense, it requires an even greater violation of the maxim of quality, being precisely the contrary of the legislative purpose. The answer is clear: Minimizing infelicities requires the court to follow the legislative purpose. Accordingly, the decision of the Washington Supreme Court in Gates is pragmatically unacceptable.

B. Applications to Canons of Construction

The second set of examples of the use of pragmatic maxims is more theoretical. Many famous canons of construction, while having intuitive plausibility, suffer not only from being applicable only to limited classes of cases, but also from the fact that there are no rules for discriminating those classes. This malady is not peculiar to canons of construction. The trouble with many good arguments is that they work only when they work. We then have to show how to determine when that is and why the question at hand is one of those cases. Typically, however, we skip these last steps.

Consider, for example, generalization arguments. Should A do X? What would happen if everyone did that? The form is very common: It is the basis of "rule" as opposed to "act" utilitarianism; it is

138. See supra notes 70 & 136.
lurking in Kant's categorical imperative;\textsuperscript{140} it pervades judicial opinions.\textsuperscript{141} The most common illustration substitutes "vote" for "X" in the above schema: Should \(A\) vote? It is raining, and \(A\) has work to do, and \(A\)'s vote would be insignificant anyway. But generalize, and the obligation to vote becomes apparent: it would be terrible if nobody voted. But suppose the question is whether \(A\)'s wife and \(A\) should go to the movie "Diva" this evening. What would happen if everyone did that? Catastrophe! Pursuing the argument form can lead to universal inaction, unless we rephrase the question. What would happen if every couple in town who is presently debating whether to go to "Diva" this evening were to decide affirmatively? Not much; at worst the theater might host an overflow crowd. The key is what one chooses to generalize over. But how does one make that choice, if not by the outcome it produces?

This is the besetting problem of the various rules and canons of construction, too. Karl Llewellyn\textsuperscript{142} produced a list of twenty-eight rules each matched with its counter, with solid sources for all. He wrote: "[I]n the field of statutory construction also, there are 'correct,' unchallengeable rules of 'how to read' which lead in happily variant directions."\textsuperscript{143} Seldom, however, does one see a justification for the application of the rule or canon (rather than its contrary) in the particular situation at issue. Yet, that is exactly what is required if the use of such a rule is to count as argument. Again Llewellyn puts it aptly: "Plainly, to make any canon take hold in a particular instance, the construction contended for must be sold, essentially, by means other than the use of canon . . . ."\textsuperscript{144}

The theory developed in this Article can help in determining whether a rule or canon is appropriately applicable in a given case. Of course, one ought not to expect an automatic answer to the question of applicability in all cases; courts unavoidably have to make some

\begin{itemize}
\item \textsuperscript{140} Any form of the categorical imperative will do; for example: "Act only on that maxim which will enable you at the same time to will that it be a universal law." I. KANT, THE FUNDAMENTAL PRINCIPLES OF THE METAPHYSIC OF ETHICS 38 (1938).
\item \textsuperscript{141} For example, regarding police searches of trash cans, the California Supreme Court said: "We should hesitate to encourage a practice whereby our citizens' trash cans could be made the subject of police inspection without the protection of applying for and securing a search warrant." People v. Krivda, 5 Cal. 3d 357, 367, 486 P.2d 1262, 1269, 96 Cal. Rptr. 62, 68 (1971). The word "practice" is the key to the generalization here.
\item \textsuperscript{142} Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed, 3 VAND. L. REV. 395, 401 (1950).
\item \textsuperscript{143} Id. at 399.
\item \textsuperscript{144} Id. at 401.
\end{itemize}
decisions. But the level of justification can be pushed back one step further, and the point upon which the court must actually decide more clearly demarcated by the use of Grice's maxims. More importantly, in those cases in which this theory of pragmatics can determine the applicability of a rule or canon of construction, the determination will be on grounds independent of the choice of outcome. It is thus more likely to produce a result in accord with the legislature's design than with the predilections of the judge, should those two not coincide.

In the following, I shall discuss two canons of construction—ejusdem generis (with its colleague, noscitur a sociis) and expressio unius est exclusio alterius.

1. Ejusdem Generis

"Under the rule of ejusdem generis, where general words follow an enumeration of specific items, the general words are read as applying only to other items akin to those specifically enumerated."\(^{145}\) When in a statute the legislature gives a list of examples beginning with "such as" or ending with "and the like," items not on the list itself are within the scope of the provision only if they have an appropriate similarity to items that are on the list. The rule, like all canons,\(^{146}\) is "no more than an aid to construction and comes into play only where there is some uncertainty as to the meaning of a particular clause."\(^{147}\)

The problem with this nice-sounding rule is that it always begs the question. What is it for "other items" to be "akin to those specifically enumerated?" What are the determinants of kinship? For any list of words, there are indefinitely many ways in which to describe what they have in common; there are indefinitely many kinship rules that will capture some shared property of the items on the list.\(^{148}\) For example, consider the "fair use" provision of the Copyright Revision Act of 1976, in pertinent part:


\[^{146}\) You don't need interpretive aids when the answer is plain on the face of the statute.

\[^{147}\) United States v. Turkette, 452 U.S. at 581; Harrison v. PPG Indus., 446 U.S. at 588.

\[^{148}\) "Philosophers of science often claim that for any given body of data there are an infinite number of possible explanations; for the explanatory relation E and any body of data d, an infinite number of alternative potential explanations stand in the relation E to d." R. Nozick, Anarchy, State, and Utopia 278 (1974). See also L. Wittgenstein, Philosophical Investigations §§ 28-30 (1933).
Sec. 107. Limitations on Exclusive Rights: Fair Use

[T]he fair use of a copyright work, . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.¹⁴⁹

The use in question ("second use") is, at this stage of the argument, a proven or admitted copy of the original copyrighted work. Given that the second use is not of a kind listed, what must its purpose be like in order to satisfy this statutory requirement? Could it be that the listed purposes usually have the original work as their subject; or that they are usually not as long as the original and thus reach the audience more quickly; or that these purposes are usually different from that of the first work? If the list alone is to generate its own kinship determinants under the rule of ejusdem generis, all we really have is a challenge to the imaginations of opposing counsel. It thus appears, prima facie, that the rule is useful only to bolster a conclusion reached on independent grounds.

There is something wrong with the argument so far. We seem to be seeking a rule, expressed in an English sentence, to substitute for the list of examples provided by the legislature. But surely if such a rule were available the legislature, acting felicitously in accord with the maxims of manner (including Allwood's Postulate of Adequacy) and quantity, would have used that instead of the list of examples.¹⁵⁰ Saying as much as it could¹⁵¹ as clearly and concisely as it could,¹⁵² the legislature could not find a rule. Accordingly it resorted to the next best form, "w, x, y, . . . , and such like." To assume there is a rule, nevertheless, is to assume infelicitous legislation.

This merely shifts the problem without changing it. Now the question becomes not "what is the kinship rule?" but "is this particular thing before the court like those listed in the statute?" This merely raises the question of the appropriate criterion of similarity, and the argument begins again. Some progress has been made, however. It must be clear that the criterion of similarity is determined by what the


¹⁵⁰. It could, of course, be that the legislature tried but failed to find the rule which some later work revealed. Such a rare event should prompt an amendment.

¹⁵¹. First maxim of quantity (statutes), supra text accompanying note 85, and Grice's first maxim of quantity, supra text accompanying note 14.

¹⁵². Grice's maxims of manner, supra text accompanying note 29; Allwood's Postulate of Adequacy, supra text accompanying note 80.
legislature was trying to do in the provision in which it included the list. What the purpose of the whole statute and the legislative intent for the provision in question are will determine whether the item in question in the circumstance in question is akin to the listed items. Inescapably we are drawn into the first maxim of quality (statutes): only if it can be shown to further the legislative purpose (as the legislature found the listed examples to do), should the candidate be granted kinship.

Karl Llewellyn, in his description of the rule opposing *ejusdem generis*, makes much the same point: “General words must operate on something. Further, *ejusdem generis* is only an aid in getting the meaning and does not warrant confining the operations of a statute within narrower limits than were intended.” One of the authorities Llewellyn cites for this counter, *Texas v. United States*, makes the point even more directly: “The rule of *'ejusdem generis' is applied as an aid in ascertaining the intention of the legislature, not to subvert it when ascertained. The scope of the immunity must be measured by the purpose which Congress had in view and had constitutional power to accomplish.” The first maxim of quality (statutes) thus prescribes the method of application of the rule of *ejusdem generis*: Only if the item in question can be shown to further the legislative purpose in the same way as do the items listed should it be held to come under the statutory provision.

Applying this argument to the fair-use provision of the Copyright Revision Act of 1976 clarifies the problem used in the illustration above. The purpose Congress must further is given in the Constitution: Promoting the progress of science and useful arts. Congress also had a more precise objective in this particular statute: “to restate the present judicial doctrine of fair use, not to change, narrow or enlarge it in any way.” The doctrine had developed in a common law fashion that had proved notoriously difficult of definition. Accordingly, Congress enacted a list of categories of second

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153. Llewellyn, supra note 142, at 405.
155. Id. at 534 (citation omitted).
158. “Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible . . . .” H.R. REP. No. 94-1476, 94th Cong., 2d Sess. 65 (1976).
uses in which fair uses had previously been found. All the uses on the list are such as we would expect to serve the constitutional purpose and in a manner different from that of the work copied. Any item not on the list at least would have to do likewise to satisfy the ejusdem generis kinship condition of this statute. Noscitur a sociis, first cousin to ejusdem generis, is the principle according to which one interprets a word by looking at the meanings of words adjacent to and associated with it. It thus comes into play, not as with ejusdem generis, when the court is looking at an item not in a statutory list, but when it is looking at a word occurring in such a list but uncertain of meaning. It suffers from similar problems. The cure is to look to the context of the utterance (enactment) and, in particular, the purpose as prescribed by the felicity conditions. The argument was illustrated beautifully in a recent opinion by Lord Diplock in Customs and Excise Commissioners v. Viva Gas Appliances Ltd. At issue was the meaning of the word “alteration” in a statute providing an exemption from tax (a “zero-rating”) for “[t]he supply, in the course of the construction, alteration or demolition of any building . . . of any services.” Viva Gas claimed the exemption for the installation of gas fires in place of coal ones. The local tribunal and the high court agreed; the court of appeals reversed, denying the exemption, stating, inter alia:

The conjunction of the words “construction” of a building, “demolition” of a building and “alteration” of a building indicates that the kind of alteration must not only be structural but not unlike construction or demolition and therefore should be substantial . . . . It must be sufficiently substantial in relation to the relevant building as a whole that it can properly be described as “alteration of the building.”

159. For example, parody or burlesque. These were included in an expansion of the section 107 list in the reports of both House and Senate committees; See H.R. REP. No. 94-1476, 94th Cong., 2d Sess. 65 (1976); S. Rep. No. 94-473, 94th Cong., 1st Sess., 61-62 (1975).
160. This would not mean that it was ipso facto a noninfringing fair use. The Constitution also prescribes the method Congress must use to promote the copyright purpose: “by securing for limited times to authors . . . the exclusive right to their . . . writings.” U.S. CONST. art. I, § 8. Section 107 of the Copyright Revision Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976), continues with a list of examples of ways in which a candidate fair use might too greatly impinge on this monopoly.
161. [1983] 1 W.L.R. 1445. Remember that English judges are not permitted the aid of legislative history in determining legislative purpose.
162. Finance Act, 1972, sch. 41, § 12, sched. 4, group 8, item 2; see Viva Gas, W.L.R. at 1447.
164. Id.
The House of Lords reversed again agreeing with Viva Gas. After distinguishing cases interpreting similar language from another statute\textsuperscript{165} which was "passed for a wholly different purpose;"\textsuperscript{166} Lord Diplock elegantly disposed of the above-quoted argument:

My Lords, I cannot with great respect follow the logic of the reasoning contained in the passages from the Court of Appeal's judgment that I have cited. The maxim nosciture a sociis may be a useful aid to statutory interpretation, but the contexts in which it is applicable are limited. In the case of a word which is capable of bearing various shades of meaning, the fact that it is included in a list of words of greater precision in which some common characteristic can be discerned may enable one to say that the chameleon takes its colour from those other words and of its possible meanings bears that which shares the characteristic that is common to the other. But here the socii relied on by the Court of Appeal, "construction" and "demolition," have no common colour for "alteration," which is sandwiched between them, to take. "Demolition" far from sharing a common characteristic with "construction" is its antithesis. Once what constitutes the relevant "building" has been identified, "Construction," . . . , in the absence of any reference to "part of a building," means erecting the building as a whole and "demolition" means destroying it as a whole, so "alteration" is left to cover all works to the fabric of the building which fall short of complete erection or complete demolition.\textsuperscript{167}

Thus the obvious purpose of the legislature was saved. Acting felicitously, saying as much as it could (first and second maxims of quantity (statutes)) and with maximal use of language (Allwood's Postulate of Adequacy) the legislature seems inescapably to be aiming at all improvements to a building that are not de minimis.\textsuperscript{168}

\textit{2. Expressio Unius Est Exclusio Alterius}

What is \textit{expressio unius est exclusio alterius}? As Dickerson\textsuperscript{169} accurately states, it "is a rather elaborate, mysterious sounding and anachronistic way of describing the negative implication." Roughly, to state one thing is to exclude the other. It is one of the most useful but difficult of all canons of construction. Dickerson again:\textsuperscript{170} "Perhaps the most difficult problem in the interpretation of statutes is that of determining whether a negative implication exists and, if so, how far it extends."

\begin{itemize}
  \item \textsuperscript{165} Leasehold Reform Act, ch. 88 (1967).
  \item \textsuperscript{166} \textit{Viva Gas}, I W.L.R. at 1449.
  \item \textsuperscript{167} \textit{Id.} at 1450-51.
  \item \textsuperscript{168} \textit{Id.} at 1451.
  \item \textsuperscript{169} R. Dickerson, \textit{supra} note 3, at 234.
  \item \textsuperscript{170} \textit{Id.} at 235 n.58.
\end{itemize}
Perhaps, because of this difficulty, *expressio unius* lends itself uncommonly well to misuse and, consequently, has generated the most hostile antipathy among some commentators. For example:

The rule that the expression of one thing is the exclusion of another is in direct contradiction to the habits of speech of most persons. To say that all men are mortal does not mean that all women are not, or that all other animals are not. There is no such implication, either in usage or in logic, unless there is a very particular emphasis on the word *men*. It is neither customary nor convenient to indicate such emphasis in statutes, and without this indication, the first comment on the rule is that it is not true.  

In the face of this sort of hostility, some justification for the appeal of the canon and the faith so many of us are tempted to place in it is called for.

We all learned in introductory logic that from “Some swans are white” one cannot deduce “Some swans are not white,” although most of us wanted to say one could. The reason was that if all swans are white (and there are swans) then some swans are white. So where “all swans are white” is true (and there are swans), “some swans are white” is also true, but “some swans are not white” is false.

Why the temptation to make this invalid inference? Consider these sentences in an actual conversation. The speaker knows of no swans other than white ones; all his information points to there being no such swans; why would he say, “some swans are white”? Surely that would be infelicitous, a violation of Grice’s maxims of quantity. In those circumstances, he should have said as much as he could, namely, “all swans are white.” But since we assume felicity we can thus deduce from the speaker’s assertion, not the truth of “some swans are not white,” but that the speaker at least would hold that some swans are not white. The pragmatic implicature comes not just from the truth conditions of the words used but from the context of their use and the social conventions governing conversation.  

Radin’s mistake with “all men are mortal” in the passage quoted above is in divorcing it utterly from any context of actual use. Of course, *expressio unius* will not apply *in vacuo*. Create a context, any context, and some pragmatic implicature will appear.

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171. Radin, *Statutory Interpretation*, 43 Harv. L. Rev. 863, 874-75 (1930). See also R. Dickerson, supra note 3, at 234 (“Far from being a rule, it is not even lexicographically accurate . . .

172. The example in Part IIA, 1, supra, of reporting an automobile accident is similar.

173. The obvious example is a domain of discourse of gods and man (generic) and doing things
With legislative speech, the problems, though still plentiful, are fewer than they are with ordinary conversation.\textsuperscript{174} We can reasonably expect a legislature always to speak felicitously and never to use literary devices for dramatic impact or social manipulation. Accordingly, we can rely on its using words maximally (following Allwood’s Postulate of Adequacy), always covering all but only the persons and actions it intends to (first and second maxims of quantity (statutes)) and, within that limitation, always saying as much as, but not more than it can (maxims of quantity), as clearly and concisely as it can (maxims of manner); and all this only in demonstrable furtherance of its legislative purpose (first maxim of quality (statutes)). Thus, we do not have to handle the difficulties of trying to cope with a statement out of context or with determining whether the speaker is being ironic, over cautious, or just too cute. Legislative utterances are confined to their topics (the maxim of relevance (statutes)) in respect to both domain and purpose.

Given the requirements of felicitous legislative speech, the canon \textit{expressio unius} really amounts to little more than a restatement of Grice’s maxim of quantity, “say as much as you can,” and the pragmatic implicatures that flow from it. It will, however, always require full use of the context, the intent of the provision, and the purpose of the legislation.

Consider one of the U.C.C.’s rules creating warranties on the transfer of a negotiable instrument (for example, a check):

3-417. Warranties on Presentment and Transfer.
(2) Any person who transfers an instrument and receives consideration warrants to his transferee . . . that . . .
(b) all signatures are genuine or authorized; and
(c) the instrument has not been materially altered . . .

Does this mean that if I sell a blunt instrument (hammer) to my neighbor, I warrant the genuineness of the manufacturer’s signature on the handle and that I have not altered it?\textsuperscript{175} Of course not; the provision is confined in scope to its domain of discourse, commercial

\textsuperscript{174} For this reason, critics, like Radin and Dickerson, who base their attack on the canon on examples of its inapplicability to everyday speech are to that extent mistaken. \textit{See supra} note 171.

\textsuperscript{175} This example seems trivial; but it is not very different in that respect from Radin’s example. \textit{See supra} text accompanying note 171.
paper\(^\text{176}\) (the maxim of relevance (statutes) (scope)). Does it mean that a woman who transfers a check for consideration does not make such a warranty (*expressio unius* on the masculine pronoun)? Of course not; the purpose of the statute is clearly to determine the rules for use of negotiable instruments, and the intent of this section is transfer warranties. Such an interpretation would be in defiance of the maxim of relevance (statutes) (purpose). But it does mean that one who transfers a check for no consideration, as, for example, in a gift, does not make these warranties. The legislature, saying as much as it could, placed the burden of these warranties on all and only the persons it intended to (first and second maxims of quantity (statutes)). *Expressio unius est exclusio alterius.*

It should be noted that this does not follow as a matter of logic or pure semantics. The quoted provision is equivalent in form to an "If . . . , then . . . " statement, and we all learned, again in elementary logic, that from the denial of the antecedent one cannot deduce the denial of the consequent. "If I jump from the top of the Empire State Building then I’ll die" may be true, but not making such a jump is not a guarantee of immortality.\(^\text{177}\) On a simple,\(^\text{178}\) truth-functional analysis the consequent is undetermined when the antecedent is false. Accordingly, if the check is transferred by gift, the judge is free to decide warranty burdens as he chooses. Only by using pragmatic constraints can the necessary (and proper) implicature be generated.\(^\text{179}\)

*Expressio unius est exclusio alterius* thus appears as a derivative of the conditions of felicitous legislative speech and, in particular, those pertaining to quantity. Its application will always be sui generis: its use requires treating the provision in question in its full context and within the confines of legislative domain and purpose. The above example is a very simple one; others are not so easy, and, in

\(^{176}\) Article 3 of the U.C.C. bears the caption "Commercial Paper," and captions are relevant. U.C.C. § 1-109.

\(^{177}\) Nor even, to be more fair, of surviving any longer than I would if I went to New York and jumped.


\(^{179}\) An interesting by-product of legislative speech’s being nontruth functional in the ordinary way is that the usual pragmatic ambiguities do not always apply. Consider the proposition: "If Cambridge were in Georgia, Harvard would be a southern college." This could be true or false according as one shifted Cambridge or redrew the boundaries of Georgia to make the antecedent true. Not so if it were a legislative utterance: even if you redrew Georgia, by legislative fiat Harvard would still be a southern college.
many cases, no clear answer will fall into place. That is scarcely surprising. I shall try briefly to illustrate some of the difficulties with another example from the U.C.C.

Suppose a state has adopted section 2-318 Alternative A, to govern the reach of article 2 warranties in nonprivity situations.180

2-318. Third Party Beneficiaries of Warranties Express or Implied

A seller’s warranty . . . extends to any natural person who is in the family of his buyer or who is a guest in his home if it is reasonable to expect that such a person may use, consume or be affected by the goods and who is injured by breach of warranty.

This is very precisely stated; if the legislature is saying as much as it can, then persons outside the specified class do not get the benefit of the seller’s warranties. For example, the seller’s (manufacturer’s) warranty would not run to the person (consumer) who buys from his buyer (retailer). But was the legislature saying as much as it could? That it chose alternative A and not one of the more open alternatives, B or C, suggests it was. But, on the other hand, the drafters added comment 3:

The first alternative expressly includes as beneficiaries within its provisions the family, household and guests of the purchaser. Beyond this, the section in this form is neutral and is not intended to enlarge or restrict the developing case law on whether the seller’s warranties, given to the buyer who resells, extend to other persons in the distributive chain.

The comment suggests that, for all that the legislature may have said as much as it wanted to for the moment, it did not want to intimate that this is all that can or should be said. The courts are free to develop a less restricted class of beneficiaries as they see fit. But the comment is not a part of the statute or of its legislative history. Unless the status of the comment is determined, we simply cannot tell whether expressio unius confines the class of beneficiaries or does not. Different courts have decided the question in opposite ways.181 This is an unusually clear example of the general question whether the legislature in its statutory enactment is occupying the field to the preclusion of common law development or not. That question can only be

180. The problem was suggested by Professor Dickerson. He lists five possible interpretations, all plausible. R. DICKERSON, supra note 3, at 235.

181. Indiana, for example, does not allow the warranty to run to the second purchaser. See Lane v. Barringer, 407 N.E.2d 1173 (Ind. App. 1980). Pennsylvania is quite the opposite. See Kassab v. Central Soya, 432 Pa. 217, 246 A.2d 848 (1968).
answered on independent grounds peculiar to each provision of each statute.

From the foregoing, I hope it is clear that appropriate use of at least some of the hoary old canons of construction can be justified on speech act theory. The justification does not establish the canons as immutable universal rules; had it done so it would have been, ipso facto, wrong. Rather, just as the theory's maxims of conversation apply more or less according to the actual contextual conditions that obtain, so too do the canons of construction.

In modern times, there has never been much doubt as to the goal of statutory construction: "In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress." Legislatures act in a context, for a purpose, and within the constraints imposed by the requirements of communication. The theory of pragmatics offered here takes explicit account of these facts as justification for canons which captured, but only implicitly, many of the same consequences:

The so-called rules of interpretation are not rules that automatically reach results, but ways of attuning the mind to a vision comparable to that possessed by the legislature. The vision of itself rarely actually grasps the particular determinate, but the eye once aligned in the same direction will more probably place a particular determinate in its appropriate spot.

The same point was addressed centuries ago by Plowden and recently in most elegant psychological terms by Professor Lehman. Canons of construction thus are pragmatic tools useful only when the grounds on which they rest also hold. As Landis says: "Like most 'rules of law,' they solve only the obvious case, and give direction for profitable thinking about the difficult ones. And it is true of them, as of most 'rules of law,' that occasions will arise when they must be broken." Making explicit the justification for these canons should

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182. I hope further that the basic approach to justifying other canons has also become clear.
183. See supra text accompanying note 43.
185. Landis, A Note on Statutory Interpretation, 43 Harv. L. Rev. 886, 892 (1930).
186. Eyston v. Studd, 2 Plowden 459, 75 Eng. Rep. 688 (1574). Plowden, the reporter, included lengthy commentaries on some cases anticipating the use of his work as a law text. Id. at 465, 75 Eng. Rep. at 695.
187. Lehman, How to Interpret a Difficult Statute, 1979 Wis. L. Rev. 489.
188. Landis, supra note 185, at 892-93.
help discriminate the obvious from the difficult case and make clear what sort of occasion requires their breach.

VI. CONCLUSION

Grice's work upon which this Article is based may be seen as part of an ongoing program of determining the conditions required for an utterance to be meaningful. In most conversations, being meaningful has a great deal to do with truth and falsity, concepts which do not apply to legislation. This Article is an attempt to apply the same style of thinking to legislation, notwithstanding this important difference.

The result is a small set of pragmatic maxims that together spell out part of what it is for a legislature to act felicitously. Each maxim is justified as a reasonable requirement and as a condition for rationally purposeful legislative action. All can be found in judicial opinions in less explicit form.

The maxims are useful in statutory interpretation and in making clear the content and justification of some concepts with which we are already familiar. To use them we must assume legislative compliance, that is, that the legislature did act felicitously, saying as much as it could, as clearly as it could, to further its purposes as best it could. Even if in a particular instance some maxim was not historically satisfied, this assumption is still warranted.

Pragmatics, as an approach to the use of language, focuses on the actual use of words in the full context of their use. This discussion has attempted to treat statutory enactments in the same way; that is, as legislative speech acts occurring purposefully in fully developed contexts. Meaning attaches to such performances, not to the abstract linguistic tokens found in dictionaries.

189. See also Strawson, supra note 50; Strawson, On Referring, 59 Mind 320 (1950).