

Juxtaposition and Intent: Analyzing Legal Interpretation Through the Lens of Literary Criticism

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JUXTAPOSITION AND INTENT: ANALYZING LEGAL INTERPRETATION THROUGH THE LENS OF LITERARY CRITICISM

Disagreement exists within both the literary and legal communities about authorial intent's proper role in interpretation. In an effort to balance textualism's strict limits with intentionalism's risk of constructed meaning, this Comment approaches the debate from a literary perspective focused on the text but open to limited evidence of the author's intended meaning. Some literary critics suggest that evidence of an author's understanding of and associations with particular words can provide a useful tool for objective interpretation. A judge drawing on such evidence could analyze statutory text by juxtaposing a statute's language with limited evidence of the enacting legislature's understanding of the language's meaning. The resulting interpretation would remain grounded in the nature of the words used, but it would avoid imposing meaning upon the language because it would situate the disputed language within a larger statutory context. Structural juxtaposition therefore might assuage the fears of text-focused judges who express concern that reliance on legislative intent creates opportunities for abuse. To illustrate structural juxtaposition's impact on interpretation, this Comment concludes with an evaluation of the opinions that constitute a circuit split over interpretation of the Computer Fraud and Abuse Act. Examination of the opinions demonstrates that a statutory analysis that begins with a text's language and then expands to include contextual information properly balances the legal need for determinacy against the temptation to impose meaning on statutory text.

I. INTRODUCTION	1842
II. INTENT IN LEGAL AND LITERARY ANALYSES.....	1845
A. <i>Authorial Intent in Literary Criticism</i>	1845
1. Authorial Intent as a Source of Meaning.....	1846
2. The Intentional Fallacy, New Criticism, and Objective Interpretation	1847
3. Deconstruction, the Failure of Language, and the Collapse of Meaning	1850
4. Literary Lessons for Legal Analysis	1851

B. <i>Legislative Intent in Legal Analysis</i>	1852
1. Textualism Versus Legislative Intent	1853
2. Structural Analysis.....	1856
C. <i>Law and Literature Scholarship</i>	1857
III. INTENT IN A CONTEMPORARY CIRCUIT SPLIT:	
INTERPRETING THE COMPUTER FRAUD AND ABUSE ACT.....	1864
A. <i>Narrow Interpretation of the CFAA</i>	1867
B. <i>Broad Interpretation of the CFAA</i>	1870
C. <i>Assessing the Courts' Analytical Approaches</i>	1873
IV. CONCLUSION.....	1879

I. INTRODUCTION

Questions of intent arise in a broad variety of contexts, ranging from sports¹ and criminal punishment² to legal interpretation and literary criticism. In the latter two contexts, literary critics and judges seek to ascertain the meaning of a written text. Just as literary scholars must grapple with fluid and ambiguous language in literary texts, judges working with language must assign concrete meaning to the words included in statutes and constitutions.³ As a part of these efforts at interpretation, judges and literary critics alike periodically include language's intended meaning as a factor for consideration: some judges seek to determine the legislature's intent in enacting the statute,⁴ and some literary critics look for the author's intended meaning for the work of literature.⁵ However, disagreement exists within both the literary and

1. *E.g.*, NAT'L COLLEGIATE ATHLETIC ASS'N, 2013 AND 2014 NCAA FOOTBALL RULES AND INTERPRETATIONS §§ 9-1-3 to -4 note 1, at FR-87 (Ty Halpin ed., 2013) (“‘Targeting’ means that a player takes aim at an opponent for purposes of attacking with an apparent intent that goes beyond making a legal tackle . . .”).

2. *E.g.*, WIS. STAT. § 939.23(4) (2013–2014) (“‘With intent to’ or ‘with intent that’ means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result.”).

3. *See* Ona Russell, *The Literary Case for Legal Ambiguity*, ORANGE COUNTY LAW., Aug. 2006, at 22, 24 (“Language may always be in flux, but it is all lawyers and judges have.”).

4. *See, e.g.*, *United States v. Nosal*, 676 F.3d 854, 858 (9th Cir. 2012) (en banc).

5. *See, e.g.*, W.K. Wimsatt, Jr. & M.C. Beardsley, *The Intentional Fallacy*, 54 SEWANEE REV. 468, 468–69 (1946) (situating the article within scholarly debate regarding intent); *see also* TERRY EAGLETON, *LITERARY THEORY: AN INTRODUCTION* 45 (anniversary ed. 2008) (describing one critic as “an unabashed ‘intentionalist’, reckoning into account what the author probably meant and interpreting this in the most generous, decent, English sort of way”).

legal communities as to whether the intended meaning of a text should serve as a foundation for interpretation.⁶

When deciding whether to use legislative intent as an interpretive factor, a legal interpreter could use an approach that synthesizes literary and legal interpretive techniques. By drawing upon analytical tools favored by literary critics who oppose the use of authorial intent, a judge could engage in a structural analysis of statutory texts⁷ by juxtaposing a statute's language with internal and intermediate evidence of the enacting legislature's intended meaning.⁸

Juxtaposition in that manner allows a legal interpreter to implement a statutory purpose grounded in the nature of the words used and in the legislature's understanding of the meaning of those words. But at the same time, it avoids imposing meaning upon statutory language. Thus, structural juxtaposition can assuage the fears of text-focused judges concerned with the potential for abuse inherent in appeals to legislative intent.⁹ A judge who interprets a statutory provision in isolation runs the same risk of imposing meaning on the text as a judge who bases his or her reasoning on inferred legislative intent. Only an interpretation that situates disputed language within a larger statutory context avoids imposed meaning.

6. See EAGLETON, *supra* note 5, at 41 ("The New Critics broke boldly with the Great Man theory of literature, insisting that the author's intentions in writing, even if they could be recovered, were of no relevance to the interpretation of his or her text."); Teresa Godwin Phelps & Jenny Ann Pitts, *Questioning the Text: The Significance of Phenomenological Hermeneutics for Legal Interpretation*, 29 ST. LOUIS U. L.J. 353, 370–71 (1985) (describing the textualist versus intentionalist debate in legal interpretation); Wimsatt & Beardsley, *supra* note 5, at 468 (discussing the interpretive consequences of a literary critic's opinion regarding the role of authorial intent). Compare Antonin Scalia, *Common Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 22 (Amy Gutman ed., 1997) ("The text is the law, and it is the text that must be observed."), with Larry Alexander & Saikrishna Prakash, "Is That English You're Speaking?" *Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967, 969 (2004) ("[O]ne cannot interpret texts without reference to the intentions of some author.").

7. Maxwell O. Chibundu, *Structure and Structuralism in the Interpretation of Statutes*, 62 U. CIN. L. REV. 1439, 1445–46 (1994) ("It would be unfortunate . . . if the . . . impulse to eschew the unfamiliar confines the use of structural analysis to the demonstrably fallacious search for 'legislative intent.'").

8. Wimsatt & Beardsley, *supra* note 5, at 477–78.

9. Scalia, *supra* note 6, at 17–18 ("[U]nder the guise or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field.").

A circuit split between the United States Courts of Appeals regarding the Computer Fraud and Abuse Act¹⁰ provides a series of opinions that can serve as an example for evaluating different interpretive approaches.¹¹ Comparing opinions in which different courts interpret the same statutory language demonstrates that juxtaposition of statutory provisions effectuates statutory purpose while also generating an interpretation focused on the statutory text's enacted language.¹² This juxtaposition-based analytical approach draws on literary criticism,¹³ legal scholarship,¹⁴ and interdisciplinary law and literature scholarship¹⁵ to examine the debates within the legal community and within literary criticism, respectively, regarding authorial intent's proper role in interpretation. Ultimately, a comparison of the opinions in the circuit split regarding the Computer Fraud and Abuse Act¹⁶ illustrates that interpretation accounting for context properly balances the legal need for determinacy against the temptation to impose meaning on statutory text.¹⁷

10. The split involves conflicting interpretations of the Act's unauthorized access provisions in the employment context. Note, *The Vagaries of Vagueness: Rethinking the CFAA as a Problem of Private Nondelegation*, 127 HARV. L. REV. 751, 752 (2013) (“[A] circuit split has developed regarding whether, or under what circumstances, an employee violates the CFAA by misappropriating an employer's trade secrets.” (citing Audra A. Dial & John M. Moye, *The Computer Fraud and Abuse Act and Disloyal Employees: How Far Should the Statute Go to Protect Employers from Trade Secret Theft?*, 64 HASTINGS L.J. 1447, 1453–62 (2013))).

11. See *WEC Carolina Energy Solutions LLC v. Miller*, 687 F.3d 199 (4th Cir. 2012); *United States v. Nosal*, 676 F.3d 854 (9th Cir. 2012) (en banc); *United States v. Rodriguez*, 628 F.3d 1258 (11th Cir. 2010); *United States v. John*, 597 F.3d 263 (5th Cir. 2010); *Int'l Airport Ctrs., L.L.C. v. Citrin*, 440 F.3d 418 (7th Cir. 2006); see also Michelle L. Evans, *Establishing Access “Without Authorization” Under Computer Fraud and Abuse Act*, 132 AM. JUR. PROOF OF FACTS 3D 105, § 3, at 116 (2013); Dial & Moye, *supra* note 10, at 1453–62; Daren M. Orzechowski, Bijal V. Vakil & Carmen Lo, *A Widening Circuit Split in the Interpretation of the Computer Fraud and Abuse Act*, WHITE & CASE (Sep. 13, 2012), <http://www.whitecase.com/articles-09132012/>, archived at <http://perma.cc/S5QW-RDHA> (introducing the disagreement among the federal courts of appeals regarding the proper interpretation of language in the statute providing penalties for accessing a computer system without authorization).

12. See *infra* Part III.C.

13. See *infra* Part II.A.

14. See *infra* Part II.B.

15. See *infra* Part II.C.

16. See *infra* Parts III.A–B.

17. See *infra* Part III.C.

II. INTENT IN LEGAL AND LITERARY ANALYSES

Disputes over the role of intent in literary analysis and in statutory interpretation arise out of each discipline's core goal of discerning meaning from written language. Literary critics disagree as to whether the author's intention should govern the meaning of a work of literature.¹⁸ In the context of legal interpretation, the legislature takes the place of the author as the potential source of controlling intent.¹⁹ As a result of law's shared medium with literature—language—and their consequent similar interpretive conflicts, an interdisciplinary field of law and literature scholarship developed in an attempt to apply insights from literary analysis to the interpretation of legal texts.²⁰

A. Authorial Intent in Literary Criticism

Readers who endeavor to interpret a literary work use the relationships among the words on the page to attempt to find meaning conveyed by the text.²¹ Meaning derives from the “compound of ideas and judgment[s]” that the text communicates or, at least, seems to communicate.²² Literary critics, though, disagree regarding the appropriate elements that an interpreter may identify as infusing the literary communication with meaning.²³ Some critics view a text's author as a natural source for the meaning of a literary text. But others

18. Wimsatt & Beardsley, *supra* note 5, at 468–69 (“There is hardly a problem of literary criticism in which the critic's approach will not be qualified by his view of ‘intention.’”); see also RICHARD A. POSNER, *LAW & LITERATURE* 307 (3d ed. 2009) (“Possible attitudes toward fidelity to an author's conscious intentions thus range from a narrow intentionalism at one end, through formalism in the middle, to deconstruction (and postmodernism more generally) at the other end.”).

19. Scalia, *supra* note 6, at 16 (“You will find it frequently said in judicial opinions . . . that the judge's objective in interpreting a statute is to give effect to ‘the intent of the legislature.’”).

20. GUYORA BINDER & ROBERT WEISBERG, *LITERARY CRITICISMS OF LAW* 3 (2000) (“This scholarship employs the techniques and principles of literary criticism, theory, and interpretation to better understand the writing, thought, and social practice that constitute legal systems . . .”). Applied correctly, literary analysis may benefit legal interpretation by “illuminating the meanings of a particular legal dispute, fashioning a normative argument adapted to a particular cultural context, or grasping and transcending the limits of a point of view.” *Id.* at 18.

21. See TERRY EAGLETON, *HOW TO READ LITERATURE* 119 (2013) (“[T]he work does not come to us with much of a setting at all. Instead, it creates its own setting as it goes along. We have to figure out from what it says a background against which what it says will make some sense.”).

22. H. PORTER ABBOT, *THE CAMBRIDGE INTRODUCTION TO NARRATIVE* 76 (2002).

23. See Wimsatt & Beardsley, *supra* note 5, at 468.

argue that the nature of texts as constructs of language requires that interpreters rely only upon the texts themselves, without reference to any external sources of meaning.²⁴ Taken to an extreme, focus on language can even lead to the conclusion that language cannot convey meaning at all, that language is inherently indeterminate.²⁵ Across this spectrum of interpretive outcomes—ranging from meaning derived from authorial intent to entirely indeterminate language—an intermediate approach that relies upon limited evidence of authorial intent as the source of determinate meaning for a text’s language provides a literary perspective that a legal scholar could employ.

1. Authorial Intent as a Source of Meaning

An intent-based interpretation of a literary work relies upon the assumption that “a single creative sensibility” underlies and gives meaning to the text.²⁶ As described by literary theorist Terry Eagleton, this assumption implies that “the meaning of a literary work . . . is identical with whatever ‘mental object’ the author had in mind, or ‘intended’, at the time of writing.”²⁷ Interpreters who rely upon this assumption that an authorial intention both exists and gives meaning to the text presume that a reader’s inferences regarding meaning occur because the author intended to communicate certain ideas to the reader.²⁸

24. Compare ABBOT, *supra* note 22, at 95–97 (“[T]he ideas and judgments that we infer from the narrative are understood to be in keeping with a sensibility that intended these effects. Some would say that this is the only valid way to read a narrative.”), with Wimsatt & Beardsley, *supra* note 5, at 468–70 (“[T]he design or intention of the author is neither available nor desirable as a standard for judging the success of a work of literary art . . .”).

25. See EAGLETON, *supra* note 5, at 126 (“[L]iterature for the deconstructionists testifies to the impossibility of language’s ever doing more than talk about its own failure . . .”).

26. ABBOT, *supra* note 22, at 95.

27. EAGLETON, *supra* note 5, at 58.

28. See ABBOT, *supra* note 22, at 95 (“[T]he ideas and judgments that we infer from the narrative are understood to be in keeping with a sensibility that intended these effects.”); see also S.H. BURTON, *THE CRITICISM OF PROSE 2* (1973) (describing intent as “the purpose underlying . . . writing”). Explaining the method for analyzing the author’s intent, Burton suggests that

In a variation on intent-based interpretation, some critics suggest that readers analyzing authorial intentions should refer to an implied author, rather than the real author, when seeking to “anchor the narrative” in a source that serves as the origin of the text’s underlying communication.²⁹ This hypothetical author serves as a repository for the “implied authorial views” that a reader infers from the text; eventually, this implied author becomes a construct that is consistent with “all the elements of the narrative discourse” of which the reader is aware.³⁰ Although an implied author may grow out of the beliefs and perspectives held by the text’s real author, the nature of an implied author can also depart from the identity of the real author by adopting a viewpoint different—and even divergent—from that of the real author.³¹ However, reference to an implied author as a construct separate from the real author begins to undermine the focus on authorial intent because it suggests that “the best evidence for the author’s intention is usually to be found in the text,” from which readers infer the nature of the anchoring implied author.³²

2. The Intentional Fallacy, New Criticism, and Objective Interpretation

In contrast to the intentional approach, *The Intentional Fallacy* by W.K. Wimsatt Jr. and M.C. Beardsley, a key text for proponents of New

the writer may be trying to communicate information, to arouse feeling, to form opinions. He may be trying to do all or some of these things at once. The critic must become aware of what is being attempted and, in relation to . . . each passage that he reads, he must refine his description of intention from a broad category into an accurate particularisation. Grasp of meaning and sensitiveness to tone are, of course, crucial to success in discerning intention.

Id. at 2–3.

29. ABBOT, *supra* note 22, at 77. For a discussion of the critical debate surrounding use of the implied author, see generally TOM KINDT & HANS-HARALD MÜLLER, *THE IMPLIED AUTHOR: CONCEPT AND CONTROVERSY* 69–104 (Alstair Matthews trans., 2006).

30. ABBOT, *supra* note 22, at 77 (emphasis omitted).

31. *See id.* at 77–78 (“After all, the real author is a complex, continually changing individual of whom we may never have any secure knowledge. . . . [¶] The real author may be open to many views that are actually condemned in the narrative. The real author may even, within a space of time, find her own work repugnant and repudiate it.”).

32. MATTHEW CLARK, *NARRATIVE STRUCTURES AND THE LANGUAGE OF THE SELF* 10 (2010); *see also* POSNER, *supra* note 18, at 292 (“One element of authorial intention is the intention that the reader consider the author a particular kind of person. The reader forms this belief by inference from the book itself. So the implied author—who might better be called the inferred author—stands between the real author and the reader.”).

Criticism,³³ presents an argument for objective interpretation of literary texts without reference to an author's subjective intent.³⁴ According to Wimsatt and Beardsley, a literary work becomes "detached from the author at birth and goes about the world beyond his power to intend about it or control it."³⁵ As a result, the text "belongs to the public. It is embodied in language, the peculiar possession of the public, and it is about the human being, an object of public knowledge."³⁶ Consequently, an interpretation of a literary work can be valid regardless of the interpretation's adherence to the meaning that the author originally, subjectively sought to communicate through the text.

Assessing the role of authorial intent in literary scholarship, Wimsatt and Beardsley describe the "difference between internal and external evidence for the meaning of a [literary work]" and argue against the use of external evidence for literary interpretation.³⁷ Internal evidence refers to the public information conveyed by a piece of literature, which an interpreter "discover[s] through the semantics and syntax of a [literary work], through . . . habitual knowledge of the language, through grammars, dictionaries, and all the literature which is the source of dictionaries."³⁸ External evidence, on the other hand, includes information that is "not a part of the work as a linguistic fact: it consists of revelations . . . about how or why the poet wrote the poem."³⁹ Often consisting of a text itself—perhaps in the form of the author's notes, outlines, or journals—external evidence cannot provide insights about a

33. See EAGLETON, *supra* note 5, at 42 & 210 n.26; see also Richard A. Posner, *Law and Literature: A Relation Rearguard*, 72 VA. L. REV. 1351, 1362 n.44 (1986) (referring to Wimsatt and Beardsley as an important text for New Critics). Eagleton discusses the history of New Criticism, introducing its combination of a "stress on the text's internal unity with an insistence that, through such unity, the work 'corresponded' in some sense to reality itself." EAGLETON, *supra* note 5, at 41. For New Critics, a text could "be plucked free of the wreckage of history and hoisted into a sublime space above it." *Id.* at 42. See generally *id.* at 38–46 for Eagleton's full introduction to New Criticism.

34. Wimsatt & Beardsley, *supra* note 5, at 468.

35. *Id.* at 470.

36. *Id.*

37. *Id.* at 477.

38. *Id.* New Critics treated meaning as something "public and objective, inscribed in the very language of the literary text, not a question of some putative ghostly impulse in a long-dead author's head, or the arbitrary private significances a reader might attach to his words." EAGLETON, *supra* note 5, at 42.

39. Wimsatt & Beardsley, *supra* note 5, at 477–78.

text because it, too, is subject to questions about the intentions that undergird its creation.⁴⁰

Wimsatt and Beardsley then introduce a concept that they call “intermediate” evidence.⁴¹ Describing a continuum between internal and external evidence, Wimsatt and Beardsley characterize intermediate evidence as a

kind of evidence about the character of the author or about private or semi-private meanings attached to words or topics by an author The meaning of words is the history of words, . . . and the associations which the word had for *him*, are part of the word’s history and meaning.⁴²

After defining these three kinds of evidence of meaning, Wimsatt and Beardsley suggest that criticism relying upon both internal and intermediate evidence does not necessarily entail inquiry into the author’s intention because, “while [the intermediate evidence] may be evidence of what the author intended, it may also be evidence of the meaning of his words and the dramatic character of his utterance.”⁴³ Any reader interpreting a text can recognize internal evidence of meaning conveyed by the language. And an interpreter might seek out additional, intermediate evidence that provides insights *regarding the language itself*, rather than insights regarding the author’s beliefs about the text. Therefore, an interpretive approach that uses internal and intermediate evidence of intended meaning allows an interpreter to account for the context surrounding a work’s creation without

40. See *id.* at 477–78, 484 (“[N]otes tend to seem to justify themselves as external indexes to the author’s *intention*, yet they ought to be judged like any other parts of a composition (verbal arrangement special to a particular context), and when so judged their reality as parts of the poem . . . may come into question.”).

41. *Id.* at 478.

42. *Id.* To distinguish intermediate evidence of meaning from external evidence of meaning, Wimsatt and Beardsley discuss one critic’s interpretation of the poem *Kubla Khan* by Samuel Taylor Coleridge. *Id.* at 478–79; see also Samuel Taylor Coleridge, *Kubla Khan*, in THE NORTON ANTHOLOGY OF ENGLISH LITERATURE 1554 (M.H. Abrams ed., 5th ed. 1987). Although they concede that “by looking up the vocabulary of ‘Kubla Khan’ in the *Oxford English Dictionary*, or by reading some of the other books there quoted, a person may know the poem better” (a kind of intermediate evidence of the poem’s meaning), they emphasize their opposition to external evidence of the author’s intent: “There is a gross body of life, of sensory and mental experience, which lies behind and in some sense causes every poem, but can never be and need not be known in the verbal and hence intellectual composition which is the poem.” Wimsatt & Beardsley, *supra* note 5, at 479–80.

43. Wimsatt & Beardsley, *supra* note 5, at 478.

necessarily conducting an inquiry into the author's methods or internal, subjective purposes for creating the text.⁴⁴

3. Deconstruction, the Failure of Language, and the Collapse of Meaning

Departing further still from the use of authorial intent, deconstructive interpretation of literature suggests that literary texts are, essentially, "ambiguous and indeterminate."⁴⁵ Derived from the writings of philosopher Jacques Derrida, deconstructionism posits that, although traditional conceptions of language treat the meaning of words as based upon an "unassailable foundation, a first principle or unimpeachable ground upon which . . . meanings may be constructed," the foundational principles themselves exist as "products of a particular system of meaning."⁴⁶ As a result, language cannot convey exact information, only metaphors *suggesting* a particular meaning.⁴⁷ A person engaging in a deconstructionist reading of a literary text therefore runs the risk of becoming "suspended between a 'literal' and a figurative meaning, unable to choose between the two, and thus cast dizzily into a bottomless linguistic abyss by a text which has become 'unreadable.'"⁴⁸ At its core, then, "literary language constantly undermines its own meaning."⁴⁹

44. *Id.*; see also EAGLETON, *supra* note 21, at 135 ("Authors may have long forgotten what they intended a poem or story to mean. In any case, works of literature do not mean just one thing. They are capable of generating whole repertoires of meaning, some of which alter as history itself changes, and not all of which may be consciously intended."); POSNER, *supra* note 18, at 291–92 ("Because we do not have unmediated access to another person's mind, intent is always something inferred or constructed. . . . [T]he New Critics thought authorship a construct but insisted that the author be constructed from his work rather than from his biography and his extraliterary opinions.").

45. EAGLETON, *supra* note 5, at 126.

46. See *id.* at 114; see also ABBOT, *supra* note 22, at 98 ("Derrida grounded this idea in a view of meaning as infinitely deferred and therefore infinitely unreliable as a foundation for any clear certainty of reference to the world that lies beyond it."); BINDER & WEISBERG, *supra* note 20, at 390–91 ("[Derrida] challenges the integrity of all those cultural traditions that define themselves by their fidelity to a canon or a sacred text.").

47. See EAGLETON, *supra* note 5, at 126; see also POSNER, *supra* note 18, at 278 ("It is just as logical, just as natural—deconstruction claims—to subordinate the communicative function of discourse to the communication-impeding effects of the signifiers that the speaker or writer uses and thus to attend to the relation between them and concepts other than the one intended to be signified.").

48. EAGLETON, *supra* note 5, at 126 ("[D]econstruction sees social reality less as oppressively determinate than as yet more shimmering webs of undecidability stretching to the horizon."). For an exploration of language and meaning in a legal context, see Dennis W.

4. Literary Lessons for Legal Analysis

Among these three perspectives—intentionalism, objective interpretation, and deconstructionism—Wimsatt and Beardsley’s argument for interpretation based on internal and intermediate evidence is the approach most likely to prove useful for legal interpretation. This perspective begins with the crucial supposition that literary texts exist as a result of an intentional act of creation; “[a] poem does not come into existence by accident.”⁵⁰ Consequently, Wimsatt and Beardsley’s approach remains valid for evaluation of statutory language, which necessarily has the force of law because of intentional conduct on the part of the enacting body. By advocating for using both internal and intermediate evidence when evaluating intentionally created works, Wimsatt and Beardsley offer an interpretive approach that bridges intentionalism and deconstructionism. Through intermediate evidence that accounts for the meaning an author associated with words used in a public text,⁵¹ Wimsatt and Beardsley accept a limited form of authorial intended meaning. And they also avoid deconstructionism’s pitfalls by affirming that words can have a particular, determinate meaning.⁵² Attributing determinate meaning to

Arrow, *Pomobabble: Postmodern Newspeak and Constitutional “Meaning” for the Uninitiated*, 96 MICH. L. REV. 461 (1997).

49. EAGLETON, *supra* note 5, at 125. Strict application of the principle that texts are indeterminate also leads to the unnerving conclusion that text-based disciplines like “[p]hilosophy, law, [and] political theory work by metaphor just as poems do, and so are just as fictional.” *Id.* at 126 (emphasis added). Within the context of law-and-literature scholarship, application of deconstructive principles to legal texts leads to “critical scholarship that treats law as language and views all language use as a figurative or literary practice of signification.” BINDER & WEISBERG, *supra* note 20, at 378. Judge Posner notes that, in practice, “one should not be surprised that deconstruction in law, except when the word is used merely as a synonym for text skepticism, bears little resemblance to deconstruction in philosophy or literary theory.” POSNER, *supra* note 18, at 280 (footnote omitted). Rather, “[d]econstruction in law has come to mean identifying latent contradictions in legal reasoning or legal doctrine.” *Id.*

50. Wimsatt & Beardsley, *supra* note 5, at 469. A work of literature, like statutory language enacted into law, “belongs to the public” and “is embodied in language, the peculiar possession of the public.” *Id.* at 470.

51. *Id.* at 478.

52. *Id.* (“The meaning of words is the history of words, and the biography of an author, his use of a word, and the associations which the word had for *him*, are part of the word’s history and meaning.”). In an endnote, they also add that the “history of words *after* a poem is written may contribute meanings which if relevant to the original pattern should not be ruled out by a scruple about intention.” *Id.* at 488 n.12. Such a comment further highlights the applicability of intermediate evidence to legal interpretation by evoking an evolution of meaning consistent with common law judicial interpretation, through which the meaning of

language therefore results in an interpretation that emphasizes the language of the text at issue while simultaneously accounting for context in the form of a limited type of meaning as intended by the author.

B. Legislative Intent in Legal Analysis

Judges and legal scholars, like literary critics, spent much of the twentieth century engaged in a debate regarding the necessity and efficacy of relying on authorial intent when determining the meaning of legal texts.⁵³ Advocates for the use of legislative intent treat statutory texts as the product of authors seeking to communicate a particular idea; proper interpretation, they argue, therefore necessarily requires reference to the original purpose that gave rise to the communication.⁵⁴ From this perspective, appropriate judicial respect for the separate power of the legislature requires deference to the legislature's intention when enacting the statute.⁵⁵ In contrast, textualists argue against the subjective nature of such analysis, preferring interpretation based upon objective information—specifically, an enacted statute's language.⁵⁶ Outside of the ongoing debates between textualists and intentionalists, an alternative perspective—structuralism—draws upon both approaches to advocate for interpreting individual statutory provisions in a manner that obtains meaning by juxtaposing individual provisions with the structure created by their statutory context.⁵⁷

statutory language changes—if only incrementally—across successive interpretations with the passing of time.

53. See generally Phelps & Pitts, *supra* note 6, at 370–75 (discussing the academic debate between textualists and intentionalists, and noting their common assumption that “the valid meaning of a text was created in the past” and remains binding in the present); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930) (introducing the argument against use of legislative intent); Michael Robertson, *The Impossibility of Textualism and the Pervasiveness of Rewriting in Law*, 22 CAN. J.L. & JURIS. 381, 390 (2009) (arguing that legal interpretation necessarily requires reference to legislative intent); Scalia, *supra* note 6 (advocating for textualism).

54. See, e.g., M.B.W. Sinclair, *Statutory Reasoning*, 46 DRAKE L. REV. 299, 323 (1997).

55. See *id.* at 325–26.

56. See, e.g., Scalia, *supra* note 6, at 17; cf. Alex Kozinski, *Should Reading Legislative History Be an Impeachable Offense?*, 31 SUFFOLK U. L. REV. 807, 813 (1998) (“The two Houses and the President agree on the text of statutes, not on committee reports or floor statements. To give substantive effect to this flotsam and jetsam of the legislative process is to short-circuit the constitutional scheme for making law.”).

57. See Chibundu, *supra* note 7, at 1440–48 (“[T]he use of structure in interpretive theory permits the functional alignment of ‘fluctuating humanistic values’ to ‘rules of law.’ As such, structural analysis presents an effective bridge of the theoretical concerns that are the driving impulses behind the literary-based approaches of the deconstructive movement and

1. Textualism Versus Legislative Intent

Like literary critics who use authorial intent when interpreting literary texts, some judges and legal scholars believe that “discerning intent must be the goal of every legal interpreter.”⁵⁸ The search for the legislative intent behind a statute becomes a search for “the role the legislature intended the statute to play in society”⁵⁹ because “a text only exists if it was deliberately produced by an author in order to express a meaning intended by that author.”⁶⁰ Understanding the meaning of the language that forms legal texts thus requires evaluating a variety of factors; the interpreter must consider a broad “context that includes much more than just syntax and semantics and even assumptions about authorial intention.”⁶¹ As a result of this dependence on context and intended meaning, intentionalists argue that proper interpretation of a legal text requires the interpreter to engage in “the activity of ascertaining accurately what the author of that text intended it to mean.”⁶²

Emphasizing the primacy of statutory text in judicial interpretation, the textualist approach to legal interpretation focuses on statutory language in a manner similar to New Criticism’s preference for internal evidence.⁶³ A textualist approach holds that “[t]he text is the law, and it is the text that must be observed.”⁶⁴ Therefore, “[i]t is the *law* that governs, not the intent of the lawgiver. . . . Men may intend what they

the law as a humanities school, and the ambivalent empiricism of the conventional schools of legal interpretation.” (footnotes omitted)).

58. Alexander & Prakash, *supra* note 6, at 991.

59. Sinclair, *supra* note 54, at 323.

60. Robertson, *supra* note 53, at 387 (“Words alone, without an animating intention, do not have power, do not have semantic shape, are not yet language . . .” (quoting Stanley Fish, *There Is No Textualist Position*, 42 SAN DIEGO L. REV. 629, 632–33 (2005)); see also Phelps & Pitts, *supra* note 6, at 371 (“[I]ntentions may be ascertained from the text itself, as in textualism. Unlike textualism, however, an interpreter also may seek out evidence of intent in extrinsic sources, such as legislative proceedings and minutes.”)).

61. Robertson, *supra* note 53, at 396.

62. *Id.* at 400.

63. See Scalia, *supra* note 6, at 22.

64. *Id.*; see also Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL’Y 59, 66 (1988) (characterizing the search for legislative intent as a process of “creation” rather than “interpretation”). Judge Easterbrook goes on to criticize judges who attempt to “justify” judicial creation by “show[ing] that they have been authorized to proceed in the fashion of the common law. To claim to find missing answers by ‘interpretation’ is to seize power while blaming Congress.” *Id.* Instead, Judge Easterbrook suggests, “An appropriately modest judicial role would depend less on imputed intent — ‘intent’ that ultimately can be found only in the mind of the judge.” *Id.*

will; but it is only the laws that they enact which bind us.”⁶⁵ Justice Scalia has quoted Justice Oliver Wendell Holmes Jr. for a consequence of this approach: “We do not inquire what the legislature meant; we ask only what the statute means.”⁶⁶ This reflects the argument made by Max Radin, an early advocate for intention-free interpretation, in 1930: “A legislature certainly has no intention whatever in connection with words which some two or three men drafted, which a considerable number rejected, and in regard to which many of the approving majority might have had, and often demonstrably did have, different ideas and beliefs.”⁶⁷ Proponents of the textualist approach argue that, “under the guise . . . of pursuing unexpressed legislative intents, common-law judges will . . . pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field.”⁶⁸

In response, intentionalist critics argue that textualist judges who rely exclusively on statutory language do not account for the meaning that the legislature seeks to convey with statutory text and, accordingly, fail to give sufficient deference to the legislature.⁶⁹ From the perspective

65. Scalia, *supra* note 6, at 17. In contrast, Professor Phelps and Chief Judge Manier (formerly Jenny Ann Pitts, now serving on the St. Joseph County Superior Court in Indiana) describe textualists as focused on the statutory language but nevertheless motivated by a desire to effectuate legislative intent: “Textualism takes the language of a legal provision as the ‘primary or exclusive source of law’ because the text alone is seen as the best guide to determining its author’s intentions.” Phelps & Pitts, *supra* note 6, at 370–71 (footnote omitted) (quoting Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 205 (1980)).

66. Scalia, *supra* note 6, at 23 (quoting OLIVER WENDELL HOLMES, *Legal Interpretation*, in COLLECTED LEGAL PAPERS 203, 207 (1920)) (internal quotation marks omitted).

67. Radin, *supra* note 53, at 870; *see also* Kozinski, *supra* note 56, at 813 (“Collective intent is an oxymoron. Congress is not a thinking entity; it is a group of individuals, each of whom may or may not have an ‘intent’ as to any particular provision of the statute. But to look for congressional intent is to engage in anthroporphism—to search for something that cannot be found because it does not exist.”).

68. Scalia, *supra* note 6, at 17–18; *see* Radin, *supra* note 53, at 881 (“It is hard to see how subjectivism can be avoided or how the personality of the judge can be made to count for nothing in his decision on statutory interpretation as on everything else.”). Some cynically describe the use of legislative history to infer legislative intent as “akin to ‘looking over a crowd and picking out your friends.’” Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (referring to comments by Harold Leventhal), *quoted in* Daniel R. Suhr, *Interpreting the Wisconsin Constitution*, 97 MARQ. L. REV. 93, 106 & n.74 (2013) (quoting *Mortier v. Town of Casey*, 154 Wis. 2d 18, 39, 452 N.W.2d 555, 564 (1990) (Abrahamson, J., dissenting)).

69. *See* Alexander & Prakash, *supra* note 6, at 990–91; Sinclair, *supra* note 54, at 323–26.

of those critics, “[t]he principle of legislative supremacy requires that intensional meaning, ‘the original meaning of the statute or the original intent of the legislature’ provide the relevant constraint on judicial decisions under it.”⁷⁰ The intentionalist critique asserts that a textualist, by claiming that he or she can discern a clear meaning conveyed by the language of a statutory text, necessarily relies upon unacknowledged assumptions about the author’s intent to employ conventional rules to communicate meaning through the text.⁷¹ Ultimately, for an intentionalist, statutory “text is just a means of conveying meaning,” and various “extratextual factors,” including legislative intent, can “help illuminate a statute’s meaning.”⁷²

These critics of textualism seem to argue that legal interpreters should include information similar to the intermediate evidence described by New Criticism.⁷³ Inquiries into the meaning of statutory text

must involve extralinguistic entities, for otherwise we could have no basis of mutual intelligibility; but meanings also involve understandings, relationships with other symbols Words, then[,] depend for their meanings on the words for distinguished or contracted meanings—intensions—just as they also depend on things in the world—extensions. . . . The skeptics’ elementary error in this argument is to ignore the reality of linguistic meaning and how intent is expressed in language.⁷⁴

70. Sinclair, *supra* note 54, at 325–26 (“If [by enacting a statute] the legislature intends to change society—to put moves on the prevailing norms and their implementation—then its presuppositions should control subsequent applications of the statute.”).

71. Robertson, *supra* note 53, at 390 (“Words, wholly conventional as they are, can bear any meaning at all, although in this or that real world context—drafting legislation, giving directions, ordering pizza—you might be well advised . . . to mean by your words what most people would assume . . . you to mean.” (quoting Stanley Fish, *Intention Is All There Is: A Critical Analysis of Aharon Barak’s Purposive Interpretation in Law*, 29 *CARDOZO L. REV.* 1109, 1124 (2008))). This type of critique challenges the textualist position from the perspective of deconstruction, questioning the textualist’s underlying assumptions about the meaning of words. See EAGLETON, *supra* note 5, at 114 (discussing deconstructionists questioning the existence of an “unimpeachable ground upon which a whole hierarchy of meanings may be constructed”).

72. Alexander & Prakash, *supra* note 6, at 990.

73. Compare Sinclair, *supra* note 54, at 323 (“[M]eanings . . . involve understandings, relationships with other symbols”), with Wimsatt & Beardsley, *supra* note 5, at 478 (“The use of biographical evidence need not involve intentionalism, because while it may be evidence of what the author intended, it may also be evidence of the meaning of his words and the dramatic character of his utterance.”).

74. Sinclair, *supra* note 54, at 323.

By focusing on the relational meaning that results from juxtaposition of words, this approach seems to invoke New Criticism's intermediate evidence and its contemplation of "meanings attached to words" by the author of a text.⁷⁵ Indeed, even a less-than-strict version of textualism provides that "[a] text should not be construed strictly . . . ; it should be construed reasonably, to contain all that it fairly means";⁷⁶ therefore, a textualist approach may also allow an interpreter to consider limited evidence of an author's intended meaning in the form of the author's understanding of particular words. Relying upon contextual evidence thus allows for a thoughtful analysis of the meaning of a text's words in a manner that does not necessarily involve reconstructing an overarching intent for the authoring legislature.

2. Structural Analysis

In contrast to purely textualist or purely intentionalist interpretation of statutory text, a structural analysis allows a legal interpreter to derive meaning "from an examination of relationships" between elements in a statute.⁷⁷ Structural analysis encompasses "the juxtaposition of sections of a statute, the comparison of the uncontested provisions of those sections, and the procedural hurdles embedded in the enforcement of the agreed-upon rights conferred by such provisions,"⁷⁸ and—without

75. See Wimsatt & Beardsley, *supra* note 5, at 478.

76. Scalia, *supra* note 6, at 23.

77. Chibundu, *supra* note 7, at 1463. Professor Chibundu specifically defines structure as "the process of relying on the placement or juxtaposition of items of a statute one to another, or of a statute to other statutes." *Id.* at 1463–64. Ultimately, Professor Chibundu claims that this approach results in interpretations that are "more transparently the product of the interpreter's extrapolation of meaning than . . . of the foisted-on intent of the writer." *Id.* at 1537–38.

78. *Id.* at 1531. Earlier in the article, Professor Chibundu includes a thorough description of the comparative nature of structural analysis:

Such relationships may vary from the placement of words within a section, the placement of sections within a statute, or the placement of statutes within a code. Invocation of concepts of structural interpretivism may range from application of more or less established linguistic rules of punctuation, syntax, and grammar—in which case structure may be viewed as "textualism" by another name—to the incorporation of certain of the common-law canons. The structural relevance of other statutes to the interpretive process may be derived either from the similarity or dissimilarity of language—whether in terms of the words chosen or the internal organization of the provisions—or from a desire to create an intellectually coherent corpus in the sense of filling in most of the gaps while eliminating as many redundancies as possible. In the latter case, structure is hardly textualist, but is rather "purposive."

limiting principles—it would treat passage of legislation as “an invitation for further review and deconstruction by the parties, the courts, and . . . administrative agencies.”⁷⁹ By focusing on relationships between words and between related statutory provisions, structural analysis “provides an intelligible mechanism for assisting and guiding the ongoing process[] of interpretation.”⁸⁰

Just as Wimsatt and Beardsley’s intermediate evidence balances literary criticism’s extremes of intentionalism and deconstructionism, structural analysis of legal texts can incorporate the strengths of textualist and of intentionalist interpretation. Focusing on the language of a statutory text, a legal interpreter performing a structural analysis examines the relationships between words and then engages with the consequences of those relationships to determine the meaning of disputed language. While the interpreter does discern a statutory purpose through this process, the resulting interpretation nevertheless adheres to the text itself, rather than to external evidence of an individual legislator’s understanding at the time of enactment.

C. Law and Literature Scholarship

During the 1970s, scholars from these two language-based disciplines began attempting to find points of convergence between legal and literary interpretation.⁸¹ These attempts often resulted in comparisons

Id. at 1464 (footnotes omitted). Thus, an interpreter who articulates a coherent, minimally-redundant statutory purpose can effectuate that purpose and ascribe to disputed statutory language meaning consistent with that purpose. See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAN. L. REV. 395, 400 (1950), reprinted in 5 GREEN BAG 2D 297, 301 (2002) (“If a statute is to make sense, it must be read in the light of some assumed purpose.”).

79. Chibundu, *supra* note 7, at 1554–55.

80. *Id.* Similar to structural analysis, Professor Akhil Reed Amar has argued for intratextual analysis in the Constitutional context. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999). Professor Amar notes that, while textualists “focus[] intently on the words of a given constitutional provision in splendid isolation . . . , intratextualism always focuses on at least two clauses and highlights the link between them.” *Id.* at 788. At the same time, he also distinguishes his intratextual approach from structural analysis, which he perceives as “focus[ed] not on the *words* of the Constitution, but rather on the *institutional* arrangements implied or summoned into existence by the document.” *Id.* at 790. Nevertheless, an analysis of statutory text that uses structural juxtaposition informed by literary theory benefits from Professor Amar’s focus on relational meaning between words and clauses. See *id.* (“Just as intratextualism, as a variant of textual argument, often focuses on what is merely implicit in the text, so too intratextualism, as a variant of historical argument, may highlight what is only *presumed* to be the specific intent.” (emphasis added)).

81. See BINDER & WEISBERG, *supra* note 20, at 3.

focused on identifying similarities between law and literature that ultimately fell short of providing illuminating commentary,⁸² and the movement faced a critique positing that literary theory cannot possibly provide insights relevant to legal interpretation.⁸³ However, when conducting a structural analysis of statutory language, a legal interpreter can use the middle ground created by literary criticism's internal and intermediate evidence to strike a balance between textualism and intentionalism, engaging with a statute by conducting a juxtaposition-based examination that concentrates on the statutory language while simultaneously accounting for a narrow conception of legislative intent.⁸⁴

In a seminal essay, Professor Robert Weisberg collected and described early law and literature scholarship that applied literary analysis to legal interpretation, initially distinguishing scholarly writing about law-*in*-literature from writing about law-*as*-literature.⁸⁵ According to Professor Weisberg, law-*in*-literature scholars tend to focus on "the appearance of legal themes or the depiction of legal actors or processes in fiction or drama."⁸⁶ On the other hand, law-*as*-literature scholars parse legal texts such as "statutes, constitutions, judicial opinions, and certain classic scholarly treatises as if they were literary works."⁸⁷ Notably, law-*as*-literature scholars therefore "may assume that there has been conscious authorial control of the semantic and structural complexities of a legal text," allowing the scholars to "subject the intrinsic text to the conventional techniques of 'meaning' interpretation normally applied to poems, plays, or novels."⁸⁸ Accordingly, Professor Weisberg suggested that using these literary techniques allows law-*as*-literature scholars to "'situate' legal texts within a culture in a manner parallel to the way literary works are

82. See Robert Weisberg, *The Law-Literature Enterprise*, 1 YALE J.L. & HUMAN. 1, 43 (1988).

83. See Posner, *supra* note 33, at 1351.

84. See Chibundu, *supra* note 7, at 1445-46, 1531.

85. See Weisberg, *supra* note 82, at 1-2.

86. *Id.* at 1.

87. *Id.*

88. *Id.* at 2. By acknowledging that legal writers intentionally create legal texts, Weisberg parallels Wimsatt and Beardsley, who accepted the existence of some "designing intellect as a *cause* of a poem." Wimsatt & Beardsley, *supra* note 5, at 469 (declining "to grant the design or intention as a *standard*").

considered parts of a culture's mythologies or moral or spiritual principles."⁸⁹

As a part of the same paper, Professor Weisberg also criticized the state of early law and literature scholarship, arguing that critics had failed to effectively compare the disciplines.⁹⁰ "Chiefly, we get a sort of syllogism that law and literature are related, that meaning in literature is highly contestable, and that therefore meaning in law may be indeterminate."⁹¹ Arguing that, by this type of comparison, most law-as-literature scholarship had simply "sought to exploit the analogy between legal and literary texts by treating legal texts as consciously crafted works" open to criticism "in terms of explicit or implicit intended meaning," Professor Weisberg observed that "lawmaking is an intellectual act conditioned by formal political constraints that do not apply to literary expression."⁹² Rather than merely drawing a comparison between law and literature, Weisberg suggested that law-as-literature scholarship actually proves "illuminating only when discomfiting, or, better yet, subversive . . . of the *apparent* structure of a culture."⁹³ Literary readings of legal texts should "see through deceptive unity or community, toward the less visible stories, poems, and dramas that entangle law as they do the rest of culture."⁹⁴ From this perspective, using literary techniques to interpret legal texts can highlight implicit meaning in the legal language.

In contrast to Professor Weisberg's argument that literary criticism may prove useful as a tool for legal analysis, Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit has argued that "literature has little to contribute to the interpretation of statutes and constitutions."⁹⁵ He has offered various justifications for opposing application of literary techniques to legal analysis. From Judge Posner's perspective, "the functions of legislation and literature are so different, and the objectives of the readers of these two different sorts of mental

89. Weisberg, *supra* note 82, at 2.

90. *Id.* at 3.

91. *Id.* at 43. Claims of indeterminacy in law and literature scholarship flow out of the deconstructionist approach in literary criticism. See BINDER & WEISBERG, *supra* note 20, at 461 (discussing the ways in which "[d]econstructive criticism of law views law as a language" and, as a result, treats law as "literary language that subverts or deconstructs the structure that gives it meaning").

92. Weisberg, *supra* note 82, at 3.

93. *Id.*

94. *Id.* at 66–67.

95. Posner, *supra* note 33, at 1351.

product so divergent, that the principles and approaches developed for the one have no useful application to the other.”⁹⁶ Emphasizing predictability and limits on judicial power, Judge Posner has rightly observed that, although “[i]t is a fairly harmless enterprise for New Critics to propose startling new readings of old works of literature, . . . if every lawyer and judge were free to imprint his own reading on any statute, . . . incredible chaos would ensue.”⁹⁷ Furthermore, in an environment where judges “are not privileged to ignore those provisions that are hackneyed or unclear,” the literary technique of “attributing significance to every detail” creates “absurdities” in legal analysis because “[s]tatutes . . . are written in haste by busy people, not always of great ability or diligence.”⁹⁸

Ultimately, Judge Posner suggests that by “emphasizing the variety of possible interpretations of texts, literary critics may perhaps help judges to see that some seemingly obvious interpretations are in fact debatable,” but he questions “if they can teach judges any constructive lessons.”⁹⁹ While literary analysis may help judges to see the possibility

96. *Id.* at 1374. Elsewhere, Judge Posner has noted that a legislature enacting laws “is trying to give commands” both to judges and to the people who the laws will regulate. POSNER, *supra* note 18, at 308 (“A command is a communication, to be decoded in accordance with the sender’s intentions. If a message is garbled in transmission you ask the sender to repeat it; that is intentionalism in practice. If you cannot reach the sender, you try to glean from everything you know about him and the circumstances of the failed message what he would have done had he been on the spot. . . . [T]he correct analysis is an intentionalist one.” (footnote omitted)).

97. Posner, *supra* note 33, at 1370; *see also* Teresa Godwin Phelps, “*Reading as If for Life*”: *Law and Literature Is More Important than Ever*, 43 *STUD. L. POL. & SOC’Y* 133, 134 (2008) (“Seen as abstract philosophical discourse divorced from the realities of life, the law and its interpretation can be manipulated at will. It can justify exterminations, disappearances, and torture.”).

98. Posner, *supra* note 33, at 1372.

99. *Id.* at 1374–75. Applying literary criticism to legal analysis may, for example, show that “legal and literary texts, and the words that compose them, may mean different things to different people or groups.” Michael L. Boyer, *Contract as Text: Interpretive Overlap in Law and Literature*, 12 *S. CAL. INTERDISC. L.J.* 167, 170 (2003). For example, “literary theory might inform legal interpretation” regarding the parol evidence rule, offering insight as to “exactly when a judge in a contract dispute should look to evidence outside the written contract to discern the parties’ intentions.” *Id.* at 171. A judge who treats language as indeterminate may be more likely to find that the language of a contract is ambiguous on its face, instead choosing to “give effect to the parties’ intent.” *Id.* at 173. *But see* POSNER, *supra* note 18, at 318 (arguing that there is no “contradiction between being an intentionalist judge with regard to statutes and constitutional provisions and a formalist judge when dealing with contracts, reluctant to allow extrinsic evidence, including testimony about the contracting parties’ conscious intentions, to change the meaning suggested by the contractual text”).

of multiplicity of meaning, Judge Posner seems to see it as stopping short of giving legal interpreters new tools to identify a preferred meaning among reasonable alternatives.

Despite this critique, law and literature scholarship has continued to evolve, as exemplified by the publication of *Literary Criticisms of Law*, in which Professor Guyora Binder joins Professor Weisberg to trace the history of law and literature scholarship and to argue that literary analysis of law allows for “interpret[ing] law as a cultural datum and analyz[ing] legal processes as arenas for generating cultural meaning.”¹⁰⁰ This perspective “recognize[s] that the literary is intrinsic to law insofar as law fashions the characters, personas, sensibilities, identities, myths, and traditions that compose our social world.”¹⁰¹ Because, like literary analysis, “law is an arena for contesting, negotiating, and fashioning meaning,”¹⁰² Professors Binder and Weisberg argue that legal interpretation is “a practice that constantly appropriates, reproduces, and reshapes a culture.”¹⁰³

Over the past decade, other scholars have observed that law and literature scholarship seems to have reached an impasse, remaining a topic of legal discourse but no longer offering new insights that can improve legal analysis.¹⁰⁴ Where law and literature scholarship began as an effort to use literary techniques to illuminate new perspectives for legal analysis,¹⁰⁵ more recent scholars have argued that “interdisciplinarity . . . tended to exaggerate disciplinarity, caricaturing

100. BINDER & WEISBERG, *supra* note 20, at 18.

101. *Id.*

102. *Id.* at 26.

103. *Id.* at 27.

104. See Julie Stone Peters, *Law, Literature, and the Vanishing Real: On the Future of an Interdisciplinary Illusion*, 120 PMLA 442, 449 (2005) (“[T]he interdisciplinarity of law and literature enacted a double movement that ran counter to its own project. It sought to break down disciplinary boundaries, but, through the imaginary projection by each discipline of the other’s difference, it exaggerated the very disciplinary boundaries it sought to dissolve. . . . In the disciplinary hall of mirrors, they met in the shared space of mutual projection, in work that acted out both sets of anxieties while repressing some of the most important insights of each discipline.”); Kenji Yoshino, *The City and the Poet*, 114 YALE L.J. 1835, 1836–39 (2005) (“Law’s simultaneous need and inability to banish literature makes law and literature a distinctively fraught enterprise.”).

105. Greta Olson & Martin A. Kayman, *Introduction: From ‘Law-and-Literature’ to ‘Law, Literature, and Language’: A Comparative Approach*, 11 EUR. J. ENG. STUD. 1, 3 (2007) (“The relationship between law and literature rests then on a notion of literature that has been apotheosised into a privileged repository of the ethical, one which would serve as an antidote to the legal formalism and theoretical relativism that beset lawyers and judges at their worst.”).

disciplinary difference through each discipline's longing for something it imagined the other to possess."¹⁰⁶ While literary analysis of law has often highlighted qualities otherwise "stigmatized within the law, such as falsity, irrationality, and seductiveness," these challenging perspectives on legal interpretation have allowed for only "anemic" growth of the joint law and literature enterprise.¹⁰⁷

Despite these challenges to comparative analysis, law and literature nevertheless continues to provide a useful approach to analyzing legal texts because the two fields share a medium: language.¹⁰⁸ At its core, "[l]aw is a machine made of words," and those words, like the words of a literary text, are subject to interpretation.¹⁰⁹ As a result, any difference in the process and consequences of interpretation between legal texts and literary texts stems from their divergent contexts, rather than from their respective natures as texts.¹¹⁰

Recognizing this primacy of context allows for the use of literary theories regarding authorial intent to bridge the gap in the legal debate

106. Peters, *supra* note 104, at 449. *But see* Phelps, *supra* note 97, at 149 ("The law and literature movement, because it integrates law and literature, does not undercut the foundations of the law; it broadens them to include the life of the imagination. . . . [W]e who do the law—judges, lawyers, and human rights activists—may better live lives in the law because the law and literature movement has furnished us with new ways of understanding what we do."). In his argument against the utility of literary techniques for legal interpreters, Judge Posner captures the impasse between the disciplines: "The literary intentionalist is a lawyer manqué; the legal New Critic is a literary critic manqué. The former demands a type of constraint on interpretation that law rather than literature requires; the latter seeks a freedom of interpretation that literature but not law allows." POSNER, *supra* note 18, at 309–10 (footnote omitted).

107. Yoshino, *supra* note 104, at 1838; *see also* Mark Kingwell, *Let's Ask Again: Is Law Like Literature?*, 6 YALE J.L. & HUMAN. 317, 336 (1994) ("Nobody's life would be lost if the practice of literary criticism were suddenly to collapse; but a collapse of the system of legal interpretation . . . could easily wreak social havoc. . . . So it is crucial that a theory of legal interpretation take account of these practice-specific demands of law: its needs for a final adjudicator, a final answer, stability and commonality, and so on.").

108. Yoshino, *supra* note 104, at 1838.

109. *Id.*

110. *See* Kingwell, *supra* note 107, at 351 ("Law is utterly like literature because it consists of written texts that are subject to interpretation. . . . But law is utterly unlike literature in that the practices governed by its texts have quite different goals. This difference may mean that the texts themselves have a different character. . . ."); Phelps, *supra* note 97, at 139 ("In the law, interpretation serves a practical purpose: there is a given case that gives rise to the necessity of the interpretation. Naturally, a fundamental and critical difference exists in an act of interpreting a literary text, in which there is no specific application in mind, and an act of interpreting a law.").

between intentionalists and textualists¹¹¹ through a structural analysis of statutory text that accounts both for the language enacted into law by the legislature and for the meaning that the statute derives from its context.¹¹² As discussed above, Wimsatt and Beardsley, in addition to accepting evidence of authorial intent internal to a literary text's language, acknowledged that evidence of an author's understanding of and associations with particular words can provide a useful tool for objective interpretation.¹¹³ If a legal interpreter begins a statutory analysis with the language of the text and then expands the analysis to include contextual information—essentially considering the intermediate evidence of authorial intent as described by Wimsatt and Beardsley—he or she can remain grounded in the statutory language while also accounting for some legislative intent.¹¹⁴ Expanding the

111. Kingwell, *supra* note 107, at 345–46 (“The truth of an interpretation concerns *both* its ‘plain message’ *and* its embeddedness within practices and institutions with determinate features . . . , for neither makes sense alone, and we cannot recover one without the other.”). For a discussion of the divergence between a New Critical and an intentionalist interpretation of the Eighth Amendment, see POSNER, *supra* note 18, at 294–95.

112. Chibundu, *supra* note 7, at 1446 (“[S]tructuralism . . . can and does function to bridge the purported chasm between academic theorizing on interpretive methodologies and the mundane practice of law by judges and lawyers.”); Kingwell, *supra* note 107, at 341 (accounting for “authorial intention without sacrificing the authority of the text as object”). For a more expansive interpretive model relying on not only structural context but also social context, see William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1554 (1987) (“[S]tatutes are dynamic things: they have different meanings to different people, at different times, and in different legal and societal contexts. . . . [F]ederal courts should interpret statutes in light of their current as well as historical context.”).

113. Wimsatt & Beardsley, *supra* note 5, at 478; *see supra* notes 37–44 and accompanying text.

114. *See* Sinclair, *supra* note 54, at 323 (emphasizing the intended role for the statute in society). Critiquing legal interpretation's dichotomy between textualists and deconstructionists, Professor Teresa Phelps also argues for a balanced approach to interpretation. Phelps, *supra* note 97, at 136–38. Similar to a structural approach that finds meaning through juxtaposition of statutory language, Professor Phelps finds meaning at the point where the legal text intersects with the interpreter. *Id.* at 138–40. Drawing on the interpretive methodologies of Hans-Georg Gadamer, Professor Phelps argues that legal interpreters must engage with the text that they seek to interpret:

What occurs in an act of interpretation that yields the truth, then, is that the interpreter enters into a dialectic with the text, going openly to the text with unfettered questions. The interpreter immerses himself in a paradoxical union of timelessness and history, using the language and horizons of the text itself as the medium through which understanding can occur. The interpreter does not seek some objective meaning, but instead attempts to mediate the text into the present. She asks, “What do these words mean for us today, on this occasion, with these facts in front of us, in this act of being a judge?”

. . . .

analysis further, an interpreter may then begin to juxtapose the disputed statutory provision with the intermediate evidence of intent as well as with other portions of the statute, performing a structural analysis that derives meaning from the relationships between all of the elements under consideration.¹¹⁵ By approaching the intentionalist versus textualist divide with a literary sensibility focused on the text but open to limited evidence of the author's intended meaning, a legal interpreter can strike an appropriate balance between textualism's strict limits and intentionalism's risk of constructed meaning derived from an indeterminate legislative intent.

III. INTENT IN A CONTEMPORARY CIRCUIT SPLIT: INTERPRETING THE COMPUTER FRAUD AND ABUSE ACT

By its nature, a split within the United States Courts of Appeals involves a series of opinions in which judges reach their conclusions after applying differing interpretive approaches. The manner in which a judge interprets statutory language necessarily places constraints on the conclusions that he or she can reach.¹¹⁶ A circuit split thus provides a useful vehicle for examining the outcomes that result from the use of particular interpretive techniques. In particular, an analysis of the opinions in a circuit split regarding interpretation of the Computer Fraud and Abuse Act (CFAA) not only illustrates the consequences of limiting interpretation to statutory text (versus relying on legislative intent) but also highlights the advantages of using a structural approach to evaluate language in context.

... At the same time, the text itself is not endlessly fungible. It has its own horizons, including the original meaning, the intent of the drafters, the plain meaning of the words, the historical moment in which it was written, the reason it was written and so on. The merging of the richness of the text and the richness of the interpreter reveals true meaning.

Id. at 138–40. See generally HANS-GEORG GADAMER, TRUTH AND METHOD (Joel Weinsheimer & Donald G. Marshall trans., Crossroad Publ'g Co., 2d rev. ed. 1989) (1975).

115. See Chibundu, *supra* note 7, at 1531.

116. *Cf.* Amar, *supra* note 80, at 748 (“Interpreters squeeze meaning from the Constitution through a variety of techniques—by parsing the text of a given clause, by mining the Constitution’s history, by deducing entailments of the institutional structure it outlines, by weighing the practicalities of proposed readings of it, by appealing to judicial cases decided under it, and by invoking the American ideals it embraces. Each of these classic techniques extracts meaning from some significant feature of the Constitution . . .”).

The CFAA is a federal statute regulating unauthorized access to computer systems.¹¹⁷ Originally enacted as a criminal provision in 1986,¹¹⁸ subsequent amendments have also created a civil cause of action under the statute.¹¹⁹ A person may incur criminal liability under the statute if he or she accesses a “protected computer” either “without authorization” or in a manner that “exceeds authorized access” and, as a result, engages in conduct such as (1) “obtain[ing] . . . information from any protected computer,”¹²⁰ (2) advancing a fraudulent purpose,¹²¹ or (3) damaging the accessed computer.¹²² “Any person who suffers damage or loss by reason of a violation of [the CFAA] . . . may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief.”¹²³

Although the CFAA provides definitions for the key terms “protected computer” and “exceeds authorized access,” it does not include a definition for “without authorization.”¹²⁴ A “protected computer” includes computers “exclusively for the use of a financial institution or the United States Government,” as well as computers used “by or for” those entities and any computer “which is used in or affecting interstate or foreign commerce or communication.”¹²⁵ “[T]he term ‘exceeds authorized access’ means to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter.”¹²⁶

117. See 18 U.S.C. § 1030(a) (2012).

118. Computer Fraud and Abuse Act of 1986, Pub. L. No. 99-474, 100 Stat. 1213 (codified as amended at 18 U.S.C. § 1030).

119. Computer Abuse Amendments Act of 1994, Pub. L. No. 103-322, sec. 290001(d), 108 Stat. 1796, 2097–99 (codified as amended at 18 U.S.C. § 1030(g)); see also Evans, *supra* note 11, § 2, at 114–16.

120. 18 U.S.C. § 1030(a)(2)(C).

121. *Id.* § 1030(a)(4).

122. *Id.* § 1030(a)(5).

123. *Id.* § 1030(g).

124. See *id.* § 1030(e); Orin S. Kerr, *Vagueness Challenges to the Computer Fraud and Abuse Act*, 94 MINN. L. REV. 1561, 1576 (2010) (“[T]he courts have not yet settled on the broader question of what exactly makes access without authorization or in excess of authorization. The statute simply does not define what makes access ‘without authorization.’ As a result, there are a surprising number of instances in which citizens cannot know whether their conduct amounts to an unauthorized access. The statutes simply do not say what the terms mean, and no precedents have provided clear answers.” (footnotes omitted)).

125. 18 U.S.C. § 1030(e)(2); see also *United States v. Nosal*, 676 F.3d 854, 859 (9th Cir. 2012) (en banc) (noting that the interstate commerce language means that the Act applies to “effectively all computers with Internet access”).

126. 18 U.S.C. § 1030(e)(6).

Notably, because this definition turns upon the phrase “with authorization,” any interpretation of the phrase “exceeds authorized access” must occur in conjunction with an interpretation of the phrase “without authorization.”

In the absence of a clear definition for the phrase “without authorization,” the courts of appeals have taken responsibility for interpreting the term,¹²⁷ and the resultant circuit split provides a useful context for using the lens of literary criticism to examine conflicting approaches to statutory interpretation. Recent court of appeals decisions—interpreting the phrase in the context of employee use of employer computer systems—have read the phrase narrowly, limiting the definition of “without authorization” to “the unauthorized procurement or alteration of information, not its misuse or misappropriation.”¹²⁸ Earlier interpretations by other circuits read the language more broadly, finding that a person may use a computer “without authorization,” and as a result incur criminal or civil liability under the CFAA, by violating “limits placed on *the use* of information obtained by permitted access to a computer system.”¹²⁹

Inconsistent opinions in this circuit split provide fertile grounds for the application of the law and literature analytical techniques discussed above. Examination of the five court of appeals decisions at the center of this interpretive debate will first illustrate the consequences of including legislative intent as a factor for analysis and then demonstrate that interpreting statutory texts by juxtaposing disputed passages with other statutory provisions and with limited evidence of intended authorial meaning ultimately leads to an interpretation that appropriately effectuates the purpose animating disputed statutory language.

127. See Evans, *supra* note 11, § 3, at 116; Orzechowski et al., *supra* note 11.

128. *Nosal*, 676 F.3d at 863 (quoting *Shamrock Foods Co. v. Gast*, 535 F. Supp. 2d 962, 965 (D. Ariz. 2008)) (internal quotation mark omitted); accord *WEC Carolina Energy Solutions LLC v. Miller*, 687 F.3d 199, 206 (4th Cir. 2012) (“[T]he terms ‘without authorization’ and ‘exceeds authorized access’ . . . apply only when an individual accesses a computer without permission or obtains or alters information on a computer beyond that which he is authorized to access.”).

129. *United States v. John*, 597 F.3d 263, 271 (5th Cir. 2010); accord *United States v. Rodriguez*, 628 F.3d 1258, 1260–61, 1263 (11th Cir. 2010) (finding a violation where a Social Security Administration worker used his access to Administration databases and “obtained personal information” about his romantic interests “for nonbusiness reasons”); *Int’l Airport Ctrs., L.L.C. v. Citrin*, 440 F.3d 418, 420–21 (7th Cir. 2006) (holding that, under agency principles, termination of employment meant that former employee no longer had authorization to access the employer’s computer).

A. Narrow Interpretation of the CFAA

By interpreting the CFAA in a manner that focused on the statutory language but included limited references to legislative intent, the Fourth and Ninth Circuits both adopted narrow interpretations of the statute. The Ninth Circuit's holding in *United States v. Nosal*¹³⁰ exemplifies the narrow interpretation of the CFAA: “[E]xceeds authorized access’ . . . is limited to violations of restrictions on *access* to information, and not restrictions on its *use*.”¹³¹ After leaving his job at an executive search firm to start a business competing with his former employer, Nosal convinced some former colleagues to use their authorization to access his former employer’s confidential database to retrieve potential clients’ contact information, despite the firm’s “policy that forbade disclosing confidential information.”¹³² Holding that a person “exceeds authorized access” when he or she has authorization “to access only certain data or files but accesses unauthorized data or files,” the Ninth Circuit rejected the government’s argument that the statute should apply “to someone who has unrestricted physical access to a computer, but is limited in the use to which he can put the information.”¹³³

To reach this conclusion, the Ninth Circuit focused on the relationship between the phrase “exceeds authorized access” and other provisions of the CFAA while also briefly referring to Congress’s intent in selecting particular words for the statute.¹³⁴ Beginning its analysis of the language by noting that it must “consider how the interpretation . . . will operate wherever in that section the phrase appears,” the court noted that, under a provision of the CFAA that “makes it a crime to exceed authorized access of a computer . . . *without* any culpable intent,” a broad reading of the phrase would criminalize “activities . . . routinely prohibited by many computer-use policies,” such as using an office computer for personal purposes.¹³⁵ Based on the outcome revealed by this juxtaposition of suggested interpretation with actual statutory text,

130. 676 F.3d 854 (9th Cir. 2012) (en banc).

131. *Id.* at 864; *see also* Note, *supra* note 10, at 772 (“[G]iven the number of courts that have found the ‘without authorization or exceed[ing] authorized access’ standard to be ambiguous, courts might adopt one of the narrow interpretations that would criminalize hacking but not violations of use agreements or breach of agency-related duties.” (alteration in original)).

132. *Nosal*, 676 F.3d at 856.

133. *Id.* at 856–57.

134. *See id.* at 858–61.

135. *Id.* at 859–60.

the court concluded that the language selected by Congress did not require imposing criminal liability on such a wide variety of conduct.¹³⁶ Further buttressing its conclusion, the court added as an aside that, “[w]ere there any need to rely on legislative history” as a type of intermediate evidence of the meaning that Congress attached to the statutory language, evidence exists to indicate that Congress rejected a broader definition for the term “exceeds authorized access” than appears in the enacted legislation.¹³⁷

With an opinion that places greater weight on Congress’s intended meaning for the CFAA, the Fourth Circuit also adopted a narrow reading of the statute’s unauthorized access provisions in *WEC Carolina Energy Solutions LLC v. Miller*.¹³⁸ Miller allegedly downloaded confidential information from a laptop provided by WEC (his employer), resigned from his job to begin working for a competitor, and used the downloaded information to secure a business deal with a potential WEC client.¹³⁹ Affirming the district court’s dismissal of WEC’s civil claim against Miller, the Fourth Circuit held that the two unauthorized access provisions “apply only when an individual accesses a computer without permission or obtains or alters information on a computer beyond that which he is authorized to access.”¹⁴⁰

136. *Id.* at 857 (“If Congress meant to expand the scope of criminal liability to everyone who uses a computer in violation of computer use restrictions—which may well include everyone who uses a computer—we would expect it to use language better suited to that purpose.”).

137. *Id.* at 858 n.5 (“[T]he government claims that the legislative history supports its interpretation. It points to an earlier version of the statute, which defined ‘exceeds authorized access’ as ‘having accessed a computer with authorization, uses the opportunity such access provides for purposes to which such authorization does not extend.’ Pub. L. No. 99-474, § 2(c), 100 Stat. 1213 (1986). But *that* language was removed and replaced by the current phrase and definition. And Senators Mathias and Leahy—members of the Senate Judiciary Committee—explained that the purpose of replacing the original broader language was to ‘remove[] from the sweep of the statute one of the murkier grounds of liability, under which a[n] . . . employee’s access to computerized data might be legitimate in some circumstances, but criminal in other (not clearly distinguishable) circumstances.’ S. Rep. No. 99-432, at 21, 1986 U.S.C.C.A.N. 2479 at 2494.” (alterations in original)). Reference to but not reliance on legislative history comes as no surprise in an opinion authored by Chief Judge Alex Kozinski. See Kozinski, *supra* note 56, at 812 (“Led by Justice Scalia, a number of federal judges—I among them—have foresworn the use of legislative history as an interpretive tool.”); *cf.* *Yates v. United States*, 135 S. Ct. 1074, 1093 (2015) (Kagan, J., dissenting) (discussion legislative history only for the benefit of “those who care about it” in an opinion joined by Justices Scalia, Kennedy, and Thomas).

138. 687 F.3d 199, 206 (4th Cir. 2012).

139. *Id.* at 201–02.

140. *Id.* at 206–07.

Describing its approach to the decision, the Fourth Circuit indicated that it would begin with a “focus on the plain language of the statute, seeking ‘first and foremost . . . to implement congressional intent,’” an interpretive approach that focuses on the statutory language but that considers more evidence of intent than *Wimsatt* and *Beardsley*’s intermediate evidence might allow.¹⁴¹ Beginning by considering a variety of dictionary definitions related to “authorization,” the Fourth Circuit concluded that “an employee is authorized to access a computer when his employer approves or sanctions his admission to that computer. Thus, he accesses a computer ‘without authorization’ when he gains admission to a computer without approval.”¹⁴² Going on to reason that a broad reading of the statute would make liable even an employee who “disregards his employer’s policy against downloading information to a personal computer so that he can work at home,” the court concluded that “Congress did not clearly intend to criminalize such behavior.”¹⁴³ In the end, the court treated the CFAA as “a statute meant to target hackers” on its way to indicating that it would not “contravene Congress’s intent by transforming” the meaning of the statute.¹⁴⁴

Applying literary theory to an examination of the opinions by these two courts, the narrow interpretations of the unauthorized access provisions of the CFAA illustrate an approach to statutory text that bridges legal interpretation’s divide between textualism and intentionalism. Both decisions begin with a focus on the statutory language. The Ninth Circuit juxtaposes a proposed interpretation with other statutory provisions,¹⁴⁵ and the Fourth Circuit parses the dictionary definitions of the disputed terms.¹⁴⁶ Each decision supplements initial analysis of the language with limited evidence of intent. But there the interpretive approaches diverge. While the Ninth Circuit uses evidence of Congress’s understanding of the language used

141. *Id.* at 203 (alteration in original) (quoting *United States v. Abdelshafi*, 592 F.3d 602, 607 (4th Cir. 2010)). Although grounded in the statutory language, this statement seemingly appeals to subjective congressional intent, rather than the mere understanding of meaning associated with words. See *Wimsatt & Beardsley*, *supra* note 5, at 478.

142. *Miller*, 687 F.3d at 204.

143. *Id.* at 206.

144. *Id.* at 207.

145. *United States v. Nosal*, 676 F.3d 854, 859–60 (9th Cir. 2012) (en banc).

146. *Miller*, 687 F.3d at 204.

in the statute as a secondary support for its decision,¹⁴⁷ the Fourth Circuit explicitly seeks to effectuate Congress's subjective intent.¹⁴⁸ Although both opinions first consider the statutory text and then supplement that analysis with references to legislative intent, compared to the Fourth Circuit's opinion, the Ninth Circuit's juxtaposition of statutory provisions combined with a secondary reference to congressional intent more closely resembles an appropriate structural analysis using juxtaposition and intermediate evidence of legislative intent.

B. Broad Interpretation of the CFAA

By more explicitly limiting their analyses to the statutory language at issue, the Fifth, Seventh, and Eleventh Circuits place no restrictions on the scope of their own interpretations and—inconsistent with limited approach to interpretation for which textualists advocate¹⁴⁹—have adopted broad readings of the CFAA as a result.

In *United States v. John*,¹⁵⁰ the Fifth Circuit settled on a more expansive interpretation of the CFAA, treating unauthorized “use of information obtained by permitted access to a computer system” as sufficient to incur liability under the CFAA's unauthorized access provisions.¹⁵¹ John, an employee at a bank, used her authority to access the company's customer database despite bank policies prohibiting such misuse of its computer system; she retrieved confidential customer information, which she provided to her half brother as part of a scheme to incur fraudulent charges.¹⁵² Affirming John's conviction under the statute, the Fifth Circuit chose not to adopt her contention that the “statute only prohibits using authorized access to obtain information that [a person] . . . is not entitled to obtain.”¹⁵³ Unlike the *Nosal* and *Miller* cases that adopted a narrow interpretation of the unauthorized access language, the Fifth Circuit in *John* limited the context within

147. See *Nosal*, 676 F.3d at 858 n.5.

148. *Miller*, 687 F.3d at 203.

149. See Scalia, *supra* note 6, at 24 (“Words do have a limited range of meaning, and no interpretation that goes beyond that range is permissible.”).

150. 597 F.3d 263 (5th Cir. 2010).

151. *Id.* at 271 (emphasis omitted).

152. *Id.* at 269, 272.

153. *Id.* at 269, 271.

which it situated its analysis when adopting this broad interpretation, juxtaposing its proffered meaning only with decisions by other courts.¹⁵⁴

Although the Eleventh Circuit joined the Fifth Circuit in adopting a broad interpretation of the unauthorized access provisions of the CFAA in *United States v. Rodriguez*,¹⁵⁵ the Eleventh Circuit conducted a more complete analysis by juxtaposing its interpretation with other statutory provisions in addition to focusing on the statutory language in question.¹⁵⁶ Employed by the Social Security Administration, Rodriguez used his access to the Administration database to retrieve confidential personal information about his romantic interests, contravening an Administration policy prohibiting accessing the database for non-business reasons.¹⁵⁷ The court held that “the plain language of the Act” required a finding that Rodriguez exceeded his authorized access because the Administration allowed access to the database “only . . . for business reasons” and Rodriguez admitted “that his access . . . was not in furtherance of his duties.”¹⁵⁸ In addition to comparing its decision to cases from other circuits, the Eleventh Circuit situated its reading of the statutory provision within the context of the CFAA as a whole, countering Rodriguez’s claim that the CFAA required proof of a fraudulent purpose for a conviction by observing that only the felony provisions, rather than the misdemeanor provision under which Rodriguez faced liability, required such proof.¹⁵⁹

Approaching the issue from yet another angle, the Seventh Circuit — in an opinion written by Judge Posner — adopted a particularly broad interpretation of the unauthorized access language in *International Airport Centers, L.L.C. v. Citrin*.¹⁶⁰ After quitting his job but before beginning a new job competing with his former employer, Citrin deleted

154. Compare *United States v. Nosal*, 676 F.3d 854, 859–60 (9th Cir. 2012) (en banc) (considering other statutory language), and *Miller*, 687 F.3d at 203 (implementing congressional intent by focusing on statutory language), with *John*, 597 F.3d at 271–73 (comparing the facts of the case to existing case law).

155. 628 F.3d 1258 (11th Cir. 2010).

156. *Id.* at 1263–64.

157. *Id.* at 1260–62.

158. *Id.* at 1263.

159. *Id.* at 1263–64 (“The misdemeanor penalty provision of the Act under which Rodriguez was convicted does not contain any language regarding purposes for committing the offense. See § 1030(c)(2)(A). Rodriguez’s argument would eviscerate the distinction between these misdemeanor and felony provisions. That Rodriguez did not use the information to defraud anyone or gain financially is irrelevant.”).

160. 440 F.3d 418, 418, 420–21 (7th Cir. 2006).

data collected for the company, as well as data revealing his improper competitive conduct, from a laptop provided by his former employer.¹⁶¹ He used a secure-erasure program that permanently prevented the employer from retrieving the information.¹⁶² Referring to agency principles, the court found that, by leaving his employment to compete with the employer, Citrin breached a duty of loyalty to the employer, terminating his agency relationship and therefore also terminating “his authority to access the laptop.”¹⁶³

While the Seventh Circuit’s opinion closely parses the statutory language, it also engages in an analysis of congressional intent that seems to exceed the limits for intermediate evidence suggested by *Wimsatt and Beardsley*.¹⁶⁴ Observing that “[t]he difference between ‘without authorization’ and ‘exceeding authorized access’ is paper thin,” the court used the aforementioned agency approach to find a complete absence of authorization.¹⁶⁵ In transitioning to this discussion of the unauthorized access language, though, the court observed that Congress intended the CFAA “to reach the disgruntled programmer,” the type of individual who seeks to “trash the employer’s data system on the way out” of the company.¹⁶⁶ Although the opinion does not cite a particular authority for this assumed congressional intent, the court does seem to invoke a basis for “how or why” Congress enacted the statute, a type of external evidence of the statute’s meaning.¹⁶⁷ As a result, the analysis that Judge Posner articulates for the court rests upon a key assumption external to the statutory text, despite an otherwise strong foundation in the statutory language.

Collectively, these three opinions adopting broad interpretations of the unauthorized access language in the CFAA consistently ground their analyses in the statutory text, but they fall short of using limited evidence of congressional understanding of the statutory language to place that analysis of statutory provisions into context with the larger

161. *Id.* at 419.

162. *Id.*

163. *Id.* at 420–21.

164. *See id.* at 420.

165. *Id.* at 420–21.

166. *Id.* at 420.

167. *See id.* at 420–21; *see also* *Wimsatt & Beardsley*, *supra* note 5, at 477–78 (describing external evidence as consisting of “revelations (in journals, for example, or letters or reported conversations) about how or why the poet wrote the poem”).

statutory structure.¹⁶⁸ Among the three cases, only the Eleventh Circuit's decision in *Rodriguez* clearly moves beyond its analysis of the plain language of the statutory text to compare the court's interpretation of the unauthorized access language with other provisions of the CFAA and to consider the consequences of applying the chosen broad interpretation.¹⁶⁹ Even *Rodriguez*, though, engages in only an oblique juxtaposition—briefly countering *Rodriguez*'s suggested interpretation—rather than using the juxtaposition to affirmatively support the propriety of adopting a broad reading of the statute.¹⁷⁰ Taken together, then, these cases begin to imply a relationship between a limited, language-focused reading of the statutory text and an eventual broad interpretation of the statute's language.

C. Assessing the Courts' Analytical Approaches

Undertaking a literary analysis of the opinions in these CFAA cases suggests that the opinions that situate a legal interpretation of the unauthorized access provisions within the context of the larger statutory structure more accurately implement the entire CFAA as a unified legislative enactment. The type of evidence that an interpreter considers when approaching a text—whether internal evidence based on the words used in the text, external evidence of the author's purpose for writing the text, or intermediate evidence of meaning that the author attached to the words in the text—will ultimately influence that interpreter's final reading of it.¹⁷¹ By expanding the analysis beyond the language immediately at issue, a legal interpreter who performs a structural juxtaposition accounts for the consequences of the decision in a manner that strives to achieve a consistent statutory purpose—without assuming a hypothetical legislative intent underlying the statutory language.¹⁷²

168. See *supra* notes 111–115 and accompanying text.

169. See *United States v. Rodriguez*, 628 F.3d 1258, 1264 (11th Cir. 2010).

170. See *id.*

171. Wimsatt & Beardsley, *supra* note 5, at 478 (“[A] critic who is concerned with [internal evidence] . . . and moderately with [external evidence] . . . will in the long run produce a different sort of comment from that of the critic who is concerned with [external evidence] . . . and with [intermediate evidence] . . . where it shades into [external evidence].”).

172. Compare *United States v. Nosal*, 676 F.3d 854, 859–60 (9th Cir. 2012) (en banc) (considering the court's interpretation in the context of other statutory provisions), with *Rodriguez*, 628 F.3d at 1263 (reasoning based on plain meaning of language).

In juxtaposing its narrow interpretation of the unauthorized access language with other similar language throughout the CFAA, the Ninth Circuit in *Nosal* bolstered the propriety of its interpretation by concluding that only a narrow reading allowed the CFAA to function in a manner consistent with existing law.¹⁷³ Considering a provision that imposes criminal liability for unauthorized access to “a computer connected to the Internet *without* any culpable intent,”¹⁷⁴ the court recognized that if it applied a broad interpretation even “minor dalliances would become federal crimes” because the statute would then ensnare personal use of work computers, a use “routinely prohibited by many computer-use policies.”¹⁷⁵ Building on this reasoning, the court then noted that a broad interpretation would expand the relationship between employer and employee beyond the realm of tort and contract law and into the sphere of criminal law,¹⁷⁶ raising significant notice concerns in the process as a result of potential criminal sanctions arising from breach of contract situations between the employee and the employer.¹⁷⁷

Expanding the analysis still further, the Ninth Circuit went on to observe that the same concerns apply to public use of computers more generally; a broad reading could ensnare average computer users who breach a website’s terms of service, making criminals out of individuals who fail to comply with terms of use that, in some cases, change without notice to the users.¹⁷⁸ Therefore, by juxtaposing its narrow

173. See *Nosal*, 676 F.3d at 859–62.

174. *Id.* at 859; see 18 U.S.C. § 1030(a)(2)(C).

175. *Nosal*, 676 F.3d at 860.

176. *Id.* (“Employer–employee and company–consumer relationships are traditionally governed by tort and contract law; the government’s proposed interpretation of the CFAA allows private parties to manipulate their computer-use and personnel policies so as to turn these relationships into ones policed by the criminal law.”).

177. *Id.* (“[I]f minor personal uses are tolerated, how can an employee be on notice of what constitutes a violation sufficient to trigger criminal liability?”); see also Note, *supra* note 10, at 753 (“[T]he truly concerning aspect of the CFAA’s operation is its delegation of power to private actors effectively to define, with hardly any constraint, what conduct will incur criminal liability under the statute.”).

178. *Nosal*, 676 F.3d at 861–62. The court explained,

Our access to . . . remote computers is governed by a series of private agreements and policies that most people are only dimly aware of and virtually no one reads or understands.

. . . .

Not only are the terms of service vague and generally unknown— unless you look real hard at the small print at the bottom of a webpage— but website owners retain

interpretation of the CFAA within this expansive statutory context, the court concluded that its interpretation appropriately enforced the provisions of the text by limiting the potential for criminal penalties resulting from breaches of contract.¹⁷⁹

By limiting themselves to the language of the disputed provisions, other opinions ultimately fail to take advantage of text-focused insights offered by using juxtaposition as a tool for statutory interpretation.¹⁸⁰ In adopting a broad reading in *Rodriguez*, the Eleventh Circuit read the plain language of the CFAA as “foreclose[ing]” any argument for a narrow interpretation.¹⁸¹ Similarly, the Seventh Circuit’s opinion in *Citrin* assumes a particular congressional intent and then discusses the agency-based justification for adopting a plain reading of the statute’s language.¹⁸² The Fifth Circuit’s opinion in *John* engages with the statutory definition of “exceeds authorized access” and proceeds to reason through that definition to define “without authorization” without reference to other statutory language.¹⁸³ Although these opinions certainly benefit from the thoughtful reasoning of the authoring judges, those judges nevertheless strictly limit the information available for their own consideration and, therefore, deprive their analyses of insights available in the form of implicit meaning derived from relationships between the words in the text. As a result, the decisions conclude with a broad interpretation of the statutory language without any regard for

the right to change the terms at any time and without notice. . . . Accordingly, behavior that wasn’t criminal yesterday can become criminal today without an act of Congress, and without any notice whatsoever.

Id.

179. *Id.* at 863–64 (“This narrower interpretation is . . . a more sensible reading of the text and legislative history of a statute whose general purpose is to punish hacking—the circumvention of technological access barriers—not misappropriation of trade secrets—a subject Congress has dealt with elsewhere.”). The dissent objected to the majority’s juxtaposition of the disputed passage with other subsections of the CFAA. *Id.* at 866 (Silverman, J., dissenting) (“[I]t does not advance the ball to consider, as the majority does, the parade of horrors that might occur under *different* subsections of the CFAA, such as subsection (a)(2)(C), which does not have the scienter or specific intent to defraud requirements that subsection (a)(4) has. . . . I express no opinion on the validity or application of other subsections of 18 U.S.C. § 1030, other than § 1030(a)(4), and with all due respect, neither should the majority.”).

180. Compare *United States v. Rodriguez*, 628 F.3d 1258, 1263 (11th Cir. 2010) (limiting analysis to the language of the statutory text), with *Nosal*, 676 F.3d at 859–60 (comparing disputed statutory provision with other aspects of the statutory text).

181. *Rodriguez*, 628 F.3d at 1263.

182. *Int’l Airport Ctrs., L.L.C. v. Citrin*, 440 F.3d 418, 420–21 (7th Cir. 2006).

183. *United States v. John*, 597 F.3d 263, 270–72 (5th Cir. 2010).

internal limits imposed by the language's relationship to the larger statutory text.¹⁸⁴

This difference in outcome between the courts performing a structural analysis that juxtaposes the disputed language with other statutory provisions and the courts that limit themselves to an analysis only of the language at issue highlights the significant consequences of the perspective adopted by the interpreting court.¹⁸⁵ A judge

184. Although a textualist may argue that intratextual limits are illusory and prone to relativism, Professor Phelps and Chief Judge Manier anticipated this critique in their argument for interpretation at the point where the text intersects with the author. Phelps & Pitts, *supra* note 6, at 365. They quoted Gadamer to argue that a “new objectivity” results when an interpreter is “aware of one’s own bias, so that the text may present itself in all its newness and thus be able to assert its own truth against one’s own fore-meanings.” *Id.* (emphasis omitted) (quoting HANS-GEORG GADAMER, *TRUTH AND METHOD* 238 (1975)). An interpreter aware of his or her own biases can achieve understanding when interpreting a text by recognizing the conflict between the language in the text and the biases that he or she brings to the interpretation. *See id.* Such restrictions imposed by the intersection of the interpreter and the text constrain the interpretation similar to the limits present when an interpreter conducts a structural juxtaposition to analyze disputed language.

185. Like the opinions in the CFAA circuit split, the Justices’ opinions in *Yates v. United States*, 135 S. Ct. 1074 (2015), a case from the Supreme Court’s October 2014 Term, also illustrate the impact that a broad or narrow perspective can have on an interpretation. *Yates* involved a fisherman charged with violating 18 U.S.C. § 1519 for throwing undersized fish overboard from his vessel after receiving a citation for violating federal fishing regulations. 135 S. Ct. at 1078–79. Enacted as part of the Sarbanes–Oxley Act of 2002, § 1519 makes it a felony to “knowingly alter[], destroy[], mutilate[], conceal[], cover[] up, falsif[y], or make[] a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States.” Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, sec. 802, § 1519, 116 Stat. 745, 800 (codified at 18 U.S.C. § 1519 (2012)). *Yates* challenged the government’s contention that a fish was a “tangible object” under the statute on the grounds that “it would cut § 1519 loose from its financial-fraud mooring to hold that it encompasses any and all objects . . . destroyed with obstructive intent.” *Yates*, 135 S. Ct. at 1079 (plurality opinion); *see also* Paul J. Larkin, *Oversized Frauds, Undersized Fish, and Deconstruction of the Sarbanes–Oxley Act*, 103 GEO. L.J. ONLINE 17 (2013) (discussing the consequences of interpreting the phrase “tangible object” apart from its context).

In a plurality opinion joined by the Chief Justice and Justices Breyer and Sotomayor, Justice Ginsburg announced the judgment of the Court and used § 1519’s statutory context to ultimately reach a narrow interpretation of the phrase. *Yates*, 135 S. Ct. at 1079 (plurality opinion) (“Mindful that in Sarbanes–Oxley, Congress trained its attention on corporate and accounting deception and cover-ups, we conclude that a matching construction of § 1519 is in order: A tangible object captured by § 1519, we hold, must be one used to record or preserve information.”). Although Justice Ginsburg began her analysis for the plurality by considering dictionary definitions and by noting that Sarbanes–Oxley focused on white collar crime, *id.* at 1081, she placed a greater emphasis on the structure and organization of Sarbanes–Oxley, as well as § 1519’s relationship with other sections in the United States Code, *id.* at 1083–86. Noting as well the canons of statutory interpretation and rule of lenity concerns raised by

approaching a case from a point of view focused on the specific statutory language at hand does not face the same restraints on meaning as a judge who chooses to consider the same language in the broad context created by other statutory provisions.¹⁸⁶ If a judge evaluates language in isolation, then he or she risks losing the foundations for constructing meaning and thus falling prey to deconstructionism's trap of undefined meaning.¹⁸⁷

Common sense therefore suggests that additional limits on interpretation will naturally lead to a narrow yet grounded reading of statutory language. By placing constraints on the interpretation of language, legal analysis of statutory text that employs the literary technique of juxtaposition to derive meaning for disputed language from the structure of the statute necessarily leads to an interpretation firmly

Yates, the opinion uses all of this information provided by § 1519's context to "resist reading § 1519 expansively to create a coverall spoliation of evidence statute." *Id.* at 1086–09. Just as the circuits that considered contextual information arrived at a narrow interpretations of the CFAA, the plurality's juxtaposition of § 1519 with the structure and language that comprise both Sarbanes–Oxley and the United States Code allowed the plurality to identify an underlying purpose for § 1519 that naturally narrows the meaning of the phrase "tangible object."

Advocating in dissent for a broad interpretation of § 1519, Justice Kagan—joined by Justices Scalia, Kennedy, and Thomas—strongly objected to the manner in which the plurality conducted its contextual analysis. *Id.* at 1090–91 (Kagan, J., dissenting). Justice Kagan made clear that she saw little room for ambiguity in the meaning of the phrase "tangible object." *Id.* at 1091 ("A fish is, of course, a discrete thing that possess physical form."); *see also id.* at 1092 (agreeing with the plurality that context should influence interpretation, but arguing that "[s]tepping back from the words 'tangible object' provides only further evidence that Congress said what it meant and meant what it said"). In particular, Justice Kagan criticized the plurality's reliance on the statutory structure as a tool for narrowing the meaning of "tangible object." *Id.* at 1094 ("I know of no other case in which we have *begun* our interpretation of a statute with the title, or relied on a title to override the law's clear terms."). By rejecting the plurality's structural juxtaposition, the dissent thus suggested a broad interpretation of "tangible object" inconsistent with an animating purpose implicit in the statutory language.

186. *Nosal*, 676 F.3d at 862 (observing that the circuits adopting a broad interpretation "looked only at the culpable behavior of the defendants before them, and failed to consider the effect on millions of ordinary citizens"). Returning to his example of literary interpretations of the Eighth Amendment, Judge Posner notes that "[w]hen a court reads the Constitution it is looking, if not for guidance, at least for some limits on judicial discretion. It would find none if it felt free to give 'cruel and unusual punishments' any meaning that the words permit as a matter of semantics." POSNER, *supra* note 18, at 301. The overall structure of a statutory scheme can create the limiting context that Judge Posner desires.

187. *See* EAGLETON, *supra* note 5, at 114.

rooted in the language of the text while simultaneously cognizant of the context in which the interpretation must apply.¹⁸⁸

Furthermore, an interpretive approach that draws upon insights derived from relationships between words while also accepting the need for determinacy in language defeats the critique that literary analysis cannot provide useful insights for legal interpretation.¹⁸⁹ In questioning the utility of literary analysis for legal interpretation, Judge Posner has argued that “[i]n our society the exercise of power by appointed officials with life tenure (true of all federal and, practically speaking, many state judges) is tolerated only in the belief that the power is somehow constrained.”¹⁹⁰ However, far from adopting a particular literary approach like deconstruction—in which “[p]hilosophy, law, [and] political theory work by metaphor just as poems do”¹⁹¹—limited use of literary theory in legal interpretation actually provides the type of judicial restraint that Judge Posner seeks.¹⁹² By considering only certain evidence of legislative intent and by accounting for the relationships between words in statutory texts, a court that “interprets an ambiguous provision . . . [and] impos[es] its view on the rest of society, often with far-reaching practical consequences,”¹⁹³ can ensure that the

188. Referring to the argument that the minimum age requirement for presidents set forth in Article II of the Constitution is actually indeterminate, Judge Posner has criticized the deconstructionist approach to legal interpretation for its failure to account for context. Compare Gary Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151, 1174 (1985) (“[E]ven a seemingly determinate clause such as the minimum age for presidents remains indeterminate. It is possible the age thirty-five signified to the Framers a certain level of maturity rather than some intrinsically significant number of years.”), with POSNER, *supra* note 18, at 288 (“[T]o read the provision [in that manner] . . . would be to take the words of the Constitution . . . out of a context that includes recognition of the importance of having orderly means of succession of officials, a practice of recording birth dates (and computing age, as not all societies do, from birth) . . . in order to minimize uncertainty, albeit at some cost in substantive justice. This context enables us to see that the Constitution lays down a flat rule for age of eligibility so that everyone will know with certainly well in advance of an election whether all the candidates are eligible.”).

189. See Posner, *supra* note 33, at 1370 (“A judge who proclaimed himself a deconstructionist or even a New Critic would properly be excoriated for having cut himself loose from moorings that are part of the fundamental design of American government.”).

190. *Id.*

191. EAGLETON, *supra* note 5, at 126.

192. See, e.g., *United States v. Nosal*, 676 F.3d 854, 857, 862–63 (9th Cir. 2012) (en banc) (focusing on the statutory text to adopt a narrow interpretation of the CFAA because the court found the language used by Congress “better suited to that purpose”).

193. Posner, *supra* note 33, at 1373.

interpretation it produces functions as a coherent addition to the context of existing law.¹⁹⁴

IV. CONCLUSION

In the face of the well-documented dispute between intentionalism and textualism, a literary approach to legal interpretation offers an additional avenue for discerning meaning in a statutory text.¹⁹⁵ By juxtaposing a proposed interpretation for a disputed statutory provision with other portions of that statute and with limited evidence of the legislature's understanding of the language used, a legal interpreter can situate his or her interpretation of statutory language within a broad statutory context. Doing so can help a legal interpreter ensure that his or her interpretation remains internally consistent while simultaneously unified with the complex meaning attached to various provisions of the statutory text. Rather than simply calling the meaning of all language into question, careful literary analysis of statutory text therefore serves as one useful tool for legal interpreters focused on the goal of attaching a definitive and consistent meaning to statutory language.

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194. Conceding that “[t]here is no such thing as a collective mind” but observing that a legislature’s “collective intent can signify . . . agreement,” Judge Posner advocates for some use of legislative intent on the grounds that “legislators who vote to pass a bill may agree on what they expect it to accomplish, and their expectation if known by a court asked to interpret the law may be a valuable aid to interpretation.” POSNER, *supra* note 18, at 315–16. This precedes his conclusion that “[t]here is thus no inconsistency in being an intentionalist judge but a formalist literary critic.” *Id.* at 318.

195. See Chibundu, *supra* note 7, at 1445 (offering structural analysis as an “elaboration and an alternative to the . . . use of text and history as tools of statutory interpretation”).

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