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STATUTORY INTERPRETATION — TEXTUALISM — SIXTH CIRCUIT  
HOLDS THAT PRIVATE COMMERCIAL ARBITRATION IS A FOREIGN  
OR INTERNATIONAL TRIBUNAL. — *In re: Application to Obtain  
Discovery for Use in Foreign Proceedings*, 939 F.3d 710 (6th Cir. 2019).

Since 1964, 28 U.S.C. § 1782 has empowered federal courts to assist parties in “foreign or international tribunal” proceedings with obtaining discovery from their opponents.<sup>1</sup> At the time the law was revised, international commercial arbitration and international investment arbitration were virtually unknown in the United States,<sup>2</sup> but their importance has grown dramatically in the decades since. Although the statute applies most clearly to traditional judicial proceedings, parties have invoked the broad language of “tribunal” to request assistance with discovery in private commercial arbitration.<sup>3</sup> The Second and Fifth Circuits have previously determined that § 1782 does not apply in that context.<sup>4</sup> Recently, in *In re: Application to Obtain Discovery for Use in Foreign Proceedings*,<sup>5</sup> the Sixth Circuit broke from its sister circuits in holding that “tribunal” in § 1782(a) does include “privately contracted-for commercial arbitration.”<sup>6</sup> The court relied on a textual analysis, investigating the usage of “tribunal” in legal writing to uncover its meaning in the statute.<sup>7</sup> However, the adjectives modifying “tribunal” compel a reading of the term that excludes private commercial arbitration given the usage of the compound terms “foreign tribunal” and “international tribunal” in legal writing, even if those expressions are not, technically, legal terms of art.

In 2014, FedEx International, a subsidiary of FedEx Corporation, entered into a contract for delivery services with Abdul Latif Jameel Transportation Company Limited (ALJ), a Saudi corporation.<sup>8</sup> The parties selected arbitration in Dubai as their method of resolving disputes.<sup>9</sup> In 2016, they entered into a separate contract, which specified that

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<sup>1</sup> S.I. Strong, *Discovery Under 28 U.S.C. § 1782: Distinguishing International Commercial Arbitration and International Investment Arbitration*, 1 STAN. J. COMPLEX LITIG. 295, 298 (2013) (quoting 28 U.S.C. § 1782 (2018)); *see id.* at 304.

<sup>2</sup> *Id.* at 304–05.

<sup>3</sup> *See id.* at 303–04.

<sup>4</sup> *Republic of Kazakhstan v. Biedermann Int’l*, 168 F.3d 880, 883 (5th Cir. 1999) (holding that the statute does not cover “private international arbitrations”); *NBC v. Bear Stearns & Co.*, 165 F.3d 184, 185 (2d Cir. 1999) (holding that a tribunal for the purposes of § 1782 does not encompass “commercial arbitration . . . under the auspices of . . . a private organization”).

<sup>5</sup> 939 F.3d 710 (6th Cir. 2019).

<sup>6</sup> *Id.* at 717; *see id.* at 723.

<sup>7</sup> *Id.* at 720–22.

<sup>8</sup> *Id.* at 713–14.

<sup>9</sup> *Id.* at 714.

arbitration would be in Saudi Arabia.<sup>10</sup> In early 2018, after the relationship between the parties had deteriorated, ALJ filed for arbitration in Saudi Arabia under the 2016 agreement; subsequently, FedEx International began proceedings in Dubai, as stipulated in the 2014 contract.<sup>11</sup> A few months later, ALJ filed an application under § 1782(a) to obtain discovery against FedEx Corporation, its opponent's parent company, so as to gather evidence for both arbitrations.<sup>12</sup>

The District Court for the Western District of Tennessee rejected ALJ's request for assistance in the arbitration proceedings.<sup>13</sup> The statutory provision at issue states that courts can entertain motions for discovery only in the context of "a proceeding in a foreign or international tribunal."<sup>14</sup> The parties differed on whether the private arbitration proceedings they were engaged in counted as "tribunals."<sup>15</sup> Finding that there was no controlling precedent and that the scope of the term was unclear, the court proceeded to a four-part functional analysis.<sup>16</sup> The parties agreed on three elements of the test, but disagreed as to whether the proceedings were "subject to judicial review."<sup>17</sup> The court held that the Dubai and Saudi arbitrations did not qualify as tribunals because there was no basis for substantive judicial review of them in either jurisdiction.<sup>18</sup>

The Sixth Circuit reversed the district court's order and remanded the case.<sup>19</sup> In a unanimous opinion by Judge Bush,<sup>20</sup> the panel held that "foreign or international tribunal" encompassed the private arbitration in question.<sup>21</sup> The court noted initially that it could find no evidence that "foreign tribunal" and "international tribunal" were terms of art, in part because there were no dictionary definitions of those phrases.<sup>22</sup> As the meanings of "foreign" and "international" were clear and not in dispute, the court proceeded to interpret "tribunal."<sup>23</sup> The appellee argued that "the word is limited to government-sponsored entities and excludes private arbitration," while the appellant relied on a broader reading.<sup>24</sup> Resorting to a number of legal and nonlegal dictionaries, the court found

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 715.

<sup>12</sup> *Id.* at 715–16.

<sup>13</sup> *In re: Application of Abdul Latif Jameel Transp. Co. Ltd. to Obtain Discovery from Fed. Express Corp. for Use in Foreign Proceedings*, No. 18-mc-00021, slip op. at 4 (W.D. Tenn. Mar. 13, 2019).

<sup>14</sup> 28 U.S.C. § 1782(a) (2018).

<sup>15</sup> *Application of ALJ*, slip op. at 4.

<sup>16</sup> *Id.* at 5–6.

<sup>17</sup> *Id.* at 7.

<sup>18</sup> *Id.* at 8–10.

<sup>19</sup> *Application to Obtain Discovery*, 939 F.3d at 732.

<sup>20</sup> Chief Judge Cole and Judge Griffin joined Judge Bush's opinion.

<sup>21</sup> *Application to Obtain Discovery*, 939 F.3d at 714.

<sup>22</sup> *Id.* at 718–19.

<sup>23</sup> *Id.* at 719.

<sup>24</sup> *Id.* at 719 n.5.

that some definitions could reach as far as private arbitrations, while others stopped short.<sup>25</sup> Because the dictionaries could not settle the question, the court proceeded to investigate the use of the word in legal writing, finding support for a more expansive reading.<sup>26</sup> The court cited a nineteenth-century treatise by Justice Story, decisions from state high courts and the U.S. Supreme Court, and a Sixth Circuit case as evidence that “American jurists and lawyers have long used the word ‘tribunal’ . . . [to] include[] private, contracted-for, commercial arbitral panels.”<sup>27</sup> The court turned next to the statutory “context and structure,” finding that a narrower reading of “tribunal” was not compelled by other instances of the word in the statute.<sup>28</sup> Concluding that “the text, context, and structure” of the statute all supported a broad reading of “foreign and international tribunal,” the court found that the arbitration at issue was within the statute’s reach.<sup>29</sup>

Although the Sixth Circuit considered its textual analysis dispositive, it proceeded to address arguments based on legislative history.<sup>30</sup> The court looked to *Intel Corp. v. Advanced Micro Devices, Inc.*,<sup>31</sup> in which the Supreme Court noted that Congress had amended the statute’s scope in 1964 from “any judicial proceeding . . . in a foreign country” to “a proceeding in a foreign or international tribunal.”<sup>32</sup> According to the legislative history, the intent was to ensure that assistance would not be limited to traditional court proceedings, but would extend to “administrative and quasi-judicial proceedings.”<sup>33</sup> The Sixth Circuit reasoned that the amendment indicated that “tribunal” was meant to generally encompass “non-judicial proceedings,” such as private arbitration.<sup>34</sup>

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<sup>25</sup> *Id.* at 719–20.

<sup>26</sup> *Id.* at 720.

<sup>27</sup> *Id.* at 720–22.

<sup>28</sup> *Id.* at 722–23.

<sup>29</sup> *Id.* at 723. The Saudi arbitration had been dismissed, which mooted the question in regard to it. *Id.* at 716–17. The court assured the appellant that the district court’s order, having been reversed, would not have preclusive effect in case the arbitrator’s dismissal was overturned. *Id.* at 717.

<sup>30</sup> *See id.* at 723–24.

<sup>31</sup> 542 U.S. 241 (2004).

<sup>32</sup> *Id.* at 248–49.

<sup>33</sup> *Id.* at 249 (quoting S. REP. NO. 88-1580, at 7 (1964)).

<sup>34</sup> *See Application to Obtain Discovery*, 939 F.3d at 724. The Sixth Circuit also assessed the argument that the *Intel* Court had considered, as one of the factors in deciding whether to grant discovery, “the receptivity of the foreign government . . . or agency abroad to U.S. federal-court judicial assistance,” which may support an interpretation of “tribunal” that excludes private arbitration. *Id.* at 725 (quoting *Intel*, 542 U.S. at 264). The court reasoned that this factor did not relate to the definition of “tribunal,” but, rather, to the discretionary inquiry of whether to grant discovery once the statutory requirements had been met. *Id.* at 725–26.

The court concluded by questioning the value of legislative history in general, due to reliability concerns.<sup>35</sup>

The Sixth Circuit was similarly not “inclined to countenance” FedEx’s policy arguments, noting that policymaking is up to the legislature, but it still addressed them.<sup>36</sup> Responding to the notion that its interpretation would lead to more expansive discovery in foreign arbitration proceedings than is available domestically, the Sixth Circuit determined that these “proportionality arguments” should not carry weight based on its reading of *Intel*.<sup>37</sup> The court also rejected the argument that its reading might make arbitration inefficient and thus disserve the statute’s goals because district courts would still have discretion to deny or shape discovery.<sup>38</sup> Having dispensed with these counterarguments, the Sixth Circuit remanded the case to the district court to consider whether to grant the discovery motion in the Dubai arbitration based on the discretionary factors in *Intel*.<sup>39</sup>

In concluding from instances where “tribunal” is used synonymously with “arbitration” that the “best reading” of the former includes the latter, the Sixth Circuit avoided the interpretive question of the intended scope of the word within the specific context of 28 U.S.C. § 1782(a). The court searched beyond dictionaries, the quintessential textualist tools, and looked to the term’s usage in legal writing. But the court should have limited its search to instances where “tribunal” is used in a similar context as in the statute, rather than looking for any and all instances of the term. The relevant context includes the adjectives “foreign” and “international,” which, in addition to carrying semantic import of their own, compel a particular reading of the noun they modify. Although “foreign tribunal” and “international tribunal” are not necessarily terms of art, those expressions have been used consistently in legal writing in a sense that would exclude private commercial arbitration. This constitutes textual evidence that “tribunal” carries a traditional rather than an expansive meaning in the statute, contrary to the Sixth Circuit’s conclusion.

Linguists speak of polysemy when a word like “tribunal” can have multiple and often related meanings, one of which asserts itself only in context through the term’s relationship to the words surrounding it.<sup>40</sup> Before proceeding to its analysis of “tribunal,” the Sixth Circuit noted

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<sup>35</sup> See *id.* at 727. The Sixth Circuit submitted that the Second and Fifth Circuits, which had reached the opposite conclusion after finding textual ambiguity and consulting congressional reports, had “turned to legislative history too early.” *Id.* at 726.

<sup>36</sup> *Id.* at 728.

<sup>37</sup> *Id.* at 728–29.

<sup>38</sup> *Id.* at 730.

<sup>39</sup> *Id.* at 731–32.

<sup>40</sup> See Brigitte Nerlich & David D. Clarke, *Polysemy and Flexibility: Introduction and Overview*, in POLYSEMY 3, 8–9 (Brigitte Nerlich et al. eds., 2003).

that there was no evidence that “international tribunal” or “foreign tribunal” were terms of art; in particular, the court identified no dictionary definitions of those phrases.<sup>41</sup> But evidence that a phrase is so well established and determinate as to warrant inclusion in a legal dictionary is too high a bar. The court set up a false dichotomy: either “international” or “foreign tribunal” was a term of art like “double jeopardy,” or “tribunal” must be read in isolation, without reference to the adjectives modifying it. In fact, as linguists recognize, “a word of a given semantic type may force a specific reading of a word with which it combines.”<sup>42</sup> Rather than being limited to terms of art, this phenomenon is intrinsic to communication: “almost every word is more or less polysemous,”<sup>43</sup> and interpretation relies on a word’s relation to other words.<sup>44</sup> An adjective, in addition to carrying semantic import of its own, can compel a narrower reading of the polysemous noun that it modifies. For example, the sentence “Man seeks solace” probably denotes the broader, outdated sense of “man” (humankind), whereas “Sad man seeks solace” probably refers to the core sense (adult male human). Even though it is not a term of art, “sad man” must be interpreted as a unit, like “international tribunal,” in order for “man” to be properly understood. It is not enough to assume that the meaning of “sad” is clear, like “international” was to the Sixth Circuit, and that “man” can reach as broadly as humankind. The adjective compels a narrower sense.<sup>45</sup>

Like “man,” “tribunal” is polysemous, and the terms “foreign tribunal” and “international tribunal” must similarly be interpreted as combined units. The Sixth Circuit implicitly employed a form of corpus linguistics, as it tried to discern the meaning of “tribunal” by investigating its usage in legal texts.<sup>46</sup> The court presented instances where commercial arbitration had been referred to as a “tribunal,” which shows that, in one of its senses, the word can be so comprehensive as to embrace that form of adjudication. But because “words are often interpreted according to the semantic environment in which they are found,”<sup>47</sup> the court should have looked for instances of the combined expressions in order to see if a consistent sense emerged — which it does. This consistent usage suggests a best textual reading, even if the relevant expressions have not yet become

<sup>41</sup> *Application to Obtain Discovery*, 939 F.3d at 718–19, 719 n.3.

<sup>42</sup> John R. Taylor, *Cognitive Models of Polysemy*, in POLYSEMY, *supra* note 40, at 31, 38.

<sup>43</sup> Nerlich & Clarke, *supra* note 40, at 8.

<sup>44</sup> See JAMES PUSTEJOVSKY, THE GENERATIVE LEXICON 59 (1995).

<sup>45</sup> If no single, best reading emerges in context, “tribunal” is ambiguous, such that the court should “consult [the] statute’s apparent purpose or policy,” John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 439 (2005), as the Second and Fifth Circuits did, *see Application to Obtain Discovery*, 939 F.3d at 726.

<sup>46</sup> See Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 795 (2018).

<sup>47</sup> *Id.* at 832.

memorialized as legal terms of art or if their connotations<sup>48</sup> are too permeable to ever warrant exposition in a legal dictionary.

The expression “international tribunal” had been used extensively before the statute’s amendment to refer to adjudicatory bodies set up by treaty to resolve interstate disputes or try violations of international criminal law. The same year that Congress introduced the relevant language to § 1782(a), the Supreme Court employed “international tribunal” multiple times in *Banco Nacional de Cuba v. Sabbatino*<sup>49</sup> to refer to interstate adjudicatory bodies established by treaty and applying international law. The Court noted that because of the “peculiar nation-to-nation character” of international law, “the usual method for an individual to seek relief,” after “exhaust[ing] local remedies,” was to “persuade [the executive authorities of his own state] to champion his claim . . . before an international tribunal.”<sup>50</sup> The dissent distinguished “international tribunals” from “arbitral commissions” and “arbitration.”<sup>51</sup> In the late 1940s, Justice Douglas’s concurrence in the Court’s per curiam opinion in *Hirota v. MacArthur*<sup>52</sup> showed the same understanding of the phrase, which referred in context to an international criminal court: “May [an American citizen plotting a war against the United States] be tried and convicted by an international tribunal . . . ?”<sup>53</sup> More recently, investor-state arbitration, made possible by investment treaties, was consistently referred to by Chief Justice Roberts as an “international tribunal” in *BG Group PLC v. Republic of Argentina*<sup>54</sup>: “Indeed, ‘[g]ranting a private party the right to bring an action against a sovereign state in an international tribunal regarding an investment dispute is a revolutionary innovation’ . . . .”<sup>55</sup> The understanding of international tribunals as established by treaty and applying international law continues to this day in Supreme Court opinions,<sup>56</sup> statutes,<sup>57</sup> and scholarly articles.<sup>58</sup>

<sup>48</sup> See John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 81 (2006) (“A given statutory phrase may reflect the . . . connotations of a technical term of art.”).

<sup>49</sup> 376 U.S. 398 (1964).

<sup>50</sup> *Id.* at 422–23; see also *id.* at 433 n.37 (“[I]nternational law provides other remedies for breaches of international standards . . . than suits for damages before international tribunals.”).

<sup>51</sup> *Id.* at 458, 468 (White, J., dissenting).

<sup>52</sup> 338 U.S. 197 (1948) (per curiam).

<sup>53</sup> *Id.* at 205 (Douglas, J., concurring); see also *id.* at 204 (“I assume that we have no authority to review the judgment of an international tribunal.”).

<sup>54</sup> 134 S. Ct. 1198 (2014).

<sup>55</sup> *Id.* at 1220 (Roberts, C.J., dissenting) (alteration in original) (quoting JESWALD W. SALACUSE, *THE LAW OF INVESTMENT TREATIES* 137 (2010)).

<sup>56</sup> Although the Sixth Circuit made much of the Court’s use of “international arbitral tribunal” in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 636 (1985) (emphasis added), see *Application to Obtain Discovery*, 939 F.3d at 722, a Westlaw search did not unveil any instance of “international tribunal” that deviated from this understanding.

<sup>57</sup> See, e.g., 5 U.S.C. § 552b(c)(10) (2018) (addressing an “action in a foreign court or international tribunal, or an arbitration”).

<sup>58</sup> See, e.g., Grant Hanessian, “*General Principles of Law*” in the *Iran-U.S. Claims Tribunal*, 27 COLUM. J. TRANSNAT’L L. 309, 349 (1989) (“[A] private party . . . ha[s] no ‘standing’ before

The expression “foreign tribunal,” in its turn, has referred consistently to adjudicatory bodies established by sovereigns, either a U.S. state’s courts<sup>59</sup> or other countries’ tribunals. The famous case *United States v. Libellants of the Schooner Amistad*<sup>60</sup> employed the latter usage: “[A] decree, or judgment, or declaration of a foreign tribunal . . . is evidence, beyond which the Courts of *another country* will not look.”<sup>61</sup> The Sixth Circuit quoted a treatise by Justice Story, in which he referred to arbitrators as “these domestic tribunals,” as evidence of the common legal usage of the word,<sup>62</sup> but in a different treatise, he used “foreign tribunal” in a way that would certainly exclude arbitration. Examining the effect of foreign judgments, Justice Story wrote about cases in which “the judgment is set up by way of defence to a *suit* in a foreign tribunal,” compared to those in which “the *judgment is sought to be enforced* in a foreign tribunal.”<sup>63</sup> “Suit” refers to litigation, not arbitration,<sup>64</sup> and arbitrators can only issue awards, not enforce judgments.<sup>65</sup> Justice Story’s usage of the whole expression “foreign tribunal” to exclude arbitration seems at least as significant as his usage of “tribunals” as a synonym for arbitration in the different context of “these domestic tribunals.”<sup>66</sup> Indeed, examples where “tribunal” is modified by the same adjectives as the ones in the statute are more probative as to which of its senses is intended than occurrences of “tribunal”

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an international tribunal; rather, the state . . . must make claims under international law on its behalf.”).

<sup>59</sup> In *Hanson v. Denckla*, 357 U.S. 235 (1958), a personal jurisdiction case predating the statutory language in § 1782 by a few years, the Court mentioned technological advances that facilitated “the defense of a suit in a foreign tribunal,” meaning a Florida state court. *Id.* at 251.

<sup>60</sup> 40 U.S. (15 Pet.) 518 (1841).

<sup>61</sup> *Id.* at 583–84 (emphasis added). Note the use of “decree,” “judgment,” or “declaration” — none of which relate to arbitration, which issues awards instead. See *Arbitration*, A.B.A., [https://www.americanbar.org/groups/dispute\\_resolution/resources/DisputeResolutionProcesses/arbitration](https://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses/arbitration) [<https://perma.cc/3G2T-K2UP>].

<sup>62</sup> *Application to Obtain Discovery*, 939 F.3d at 720 (quoting 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 1457, at 955 (Boston, Little, Brown & Co., 6th ed. 1853)).

<sup>63</sup> JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 584, at 847 (London, A. Maxwell, 2d ed. 1841) (emphases added).

<sup>64</sup> *Suit*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining “suit” as a “proceeding . . . in a court of law,” synonymous with lawsuit).

<sup>65</sup> *Arbitration*, *supra* note 61 (explaining how “the arbitrator issues an award” that “can be enforced by a court”).

<sup>66</sup> Another passage in the statute favors the contextual interpretation of “foreign tribunal” as established by a sovereign state. Just after the expression “foreign or international tribunal,” the statute specifies that the court’s order “may prescribe . . . the practice and procedure of the foreign *country* or the international tribunal.” 28 U.S.C. § 1782(a) (2018) (emphasis added). The parallelism between the two passages suggests that Congress had in mind adjudicative bodies established by “count[ri]es” and applying their states’ rules of procedure, and not arbitral tribunals created by contract.

in different contexts, evidence on which the Sixth Circuit relied and which it seemed to consider dispositive.<sup>67</sup>

It may be argued that, although private commercial arbitration had not yet developed at the time the statute was enacted, the text may be broad enough to encompass it.<sup>68</sup> Although meanings evolve and multiply as speakers come to apply words in different contexts,<sup>69</sup> the relevant interpretive question is whether the word “tribunal,” with the sense in which it was used in the statute, would have encompassed private commercial arbitration at the time of promulgation. Extensive and consistent usage of the expressions “international tribunal” and “foreign tribunal” suggests that the statute employed “tribunal” in the sense of an adjudicatory body established by one or multiple sovereigns. Thus, regardless of the existence of a broader sense of “tribunal” that would encompass private commercial arbitration, the word seems to carry a narrower meaning in the statute that would probably not embrace private commercial arbitration, even if that type of dispute resolution were as important at the time of enactment as it is now.<sup>70</sup>

The Sixth Circuit concluded, based on the usage of “tribunal” in a broad sense in some legal writing, that such a meaning was the best reading of § 1782. But the polysemic nature of “tribunal” — the fact that it has a range of possible meanings, from the narrowest to the broadest, depending on the context — means that only those instances of usage that parallel the context of the term in the statute will be relevant. That context includes, at least, the adjectives modifying the term, which makes it significant that the expressions “foreign tribunal” and “international tribunal” have consistently been used in a way that would exclude private commercial arbitration. The fact that something is not technically a “term of art” (a rare bird<sup>71</sup>) should not give courts license to read words in isolation, without reference to their context. In this case, the Sixth Circuit’s lack of attention to the linguistic context will have significant policy implications. Its interpretation of a statute motivated by considerations of comity<sup>72</sup> will, ironically, create friction with other countries, by miring the wheels of international commercial arbitration in a swamp of U.S. litigation.

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<sup>67</sup> See *Application to Obtain Discovery*, 939 F.3d at 726–27 (holding that “courts’ longstanding usage of [tribunal],” as gleaned from examples of the term in different contexts, “shows . . . the best reading of the word in this context”).

<sup>68</sup> Cf. Lon L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429, 445–46 (1934) (“Suppose a legislator enacts that it shall be a crime for anyone ‘to carry concealed on his person any dangerous weapon.’ After the statute is passed someone invents a machine, no larger than a fountain pen, capable of throwing a ‘death ray.’ Is such a machine included? Obviously, yes.”).

<sup>69</sup> See PUSTEJOVSKY, *supra* note 44, at 42.

<sup>70</sup> Note how unlike this is to Professor Lon Fuller’s example, where “dangerous weapon,” as a matter of text, would clearly have encompassed the deadly machine if it were around at the time of the enactment. See Fuller, *supra* note 68, at 446.

<sup>71</sup> In context, something unusual, rather than a bird that is rare.

<sup>72</sup> See *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 247–49 (2004).