Bill Watson

(612) 408-9745 | fwatson@law.harvard.edu | billwatson.net
109 Griswold Hall, 1525 Massachusetts Avenue, Cambridge, MA 02138

Research Agenda

My research draws on philosophical tools and my experience as a litigator to analyze questions at the intersection of public law, precedent, and interpretation. As a doctoral student in philosophy, I wrote my dissertation on legal agreement and disagreement—on why we agree on the law as often as we do, why we sometimes disagree, and what that can teach us about the nature of law. Going forward, I plan to build on that prior work by examining its practical applications for (1) precedential reasoning and (2) statutory and constitutional interpretation.

Two themes run throughout these lines of inquiry. The first is the relevance of legal philosophy to debates over legal interpretation—and particularly to clarifying how those debates can most productively move forward. And the second is that there are distinct normative stakes involved in interpreting different kinds of legal texts under different circumstances, suggesting that a complete theory of legal interpretation must be complex and multifaceted. Below, I first briefly summarize my doctoral research, before turning to my current and near-term projects.

I. Doctoral Research on Legal Agreement and Disagreement

Legal philosophers aim, among other things, to describe the nature of law—to describe the sort of thing that law is, wherever and whenever it is found. A prominent debate in this area concerns the relationship between law and morality. Stated very roughly, legal positivists claim that the law always depends, at bottom, on just social facts about what people believe and do, while legal antipositivists claim that the law always depends on moral facts as well. As a doctoral student, I refined and defended a positivist theory of law associated with H.L.A. Hart ("Hartian Positivism"), according to which the law foundationally depends on legal officials' convergent attitudes and behavior—on what most legal officials accept and treat as law.

Despite the salience of disagreement over the law to legal scholarship and public debate, lawyers and judges *agree* on what the law directs in most situations. This is a mundane but important fact, and one that goes underappreciated by many theories of law. In *Explaining Legal Agreement*, 14 JURIS. 221 (2023), I contend that Hartian Positivism explains this fact better than rival theories, like Ronald Dworkin's Law as Integrity or Scott Shapiro's Planning Theory. And in *How to Answer Dworkin's Argument from Theoretical Disagreement Without Attributing Confusion or Disingenuity to Legal Officials*, 36 CAN. J. L. & JURIS. 215 (2023), I argue that Hartian Positivism also adequately accounts for our disagreements over the law.

A separate article, *Metalinguistic Negotiation in Legal Speech*, 42 L. & PHIL. 487 (2023), asks a related question: What are legal practitioners disagreeing *about* when they disagree over matters of legal interpretation? I propose that they are sometimes engaged in "metalinguistic negotiations"—that they are using certain words to implicitly advance competing views about what those words should mean or how those words should be used. Judges seem to occasionally

employ words like "plain" or "meaning" in just this way. They might use "plain" to implicitly express a view about what the threshold for plainness in statutory meaning should be, or they might use "meaning" to implicitly advocate for a particular conception of statutory meaning.

Consider *TVA v. Hill*, where the question was whether the Endangered Species Act prohibited a federal agency from operating a nearly completed dam that threatened a species of small fish. The Supreme Court, with Chief Justice Burger writing, held that the Act prohibited operating the dam, reasoning that "one would be hard pressed to find a statutory provision whose terms were any plainer." Justice Powell dissented, arguing that the Act's meaning was "far from 'plain.'" We might understand the justices' dispute in *TVA* as a metalinguistic negotiation: each justice used the word "plain" not only to assert that the Act's meaning was or was not plain but also to implicitly advocate that the standard for plainness should be more or less exacting.

II. New Work on Precedential Reasoning

My job talk paper, *Obstructing Precedent*, NW. UNIV. L. REV. (forthcoming), leverages philosophical work on precedent to analyze a common criticism of the Supreme Court. Recent years have seen repeated charges that the Court is "disrespecting," "gutting," or "nullifying" precedent—that the Court is undermining certain precedents without formally overruling them. Think of *Egbert v. Boule*'s retrenchment of *Bivens* actions against federal officials who violate constitutional rights; of *Shinn v. Ramirez*'s undercutting of *Martinez v. Ryan*'s avenue to habeas relief; of *Kennedy v. Bremerton School District*'s abandonment of *Lemon v. Kurtzman*'s Establishment Clause test; or of *West Virginia v. EPA*'s failure to apply the *Chevron* doctrine.

These charges of "disrespecting," "gutting," and the like seem on their face to be process-oriented and ideologically neutral critiques; the underlying assumption is that we can all agree that the Court should not treat precedent this way. My paper takes seriously these criticisms' face value: it fleshes out this objection to the Court's treatment of precedent and considers whether the objection has legs to stand on. To that end, I offer a novel account of what the Court is doing in cases like *Egbert*, *Shinn*, *Kennedy*, and *West Virginia*. I propose that the Court is *obstructing precedent*—that it is disposing of a case one way, even though the weighting of values or purposes justifying the precedent's holding favors disposing of the case otherwise.

I use this account of obstructing precedent to elucidate the Supreme Court's recent treatment of precedent and, more broadly, to examine whether or when the Court should refrain from treating precedent this way. Perhaps contrary to one's initial intuition, I argue that obstructing precedent is often legally permissible. If there is something troubling about obstructing precedent *as such*, it is not a matter of legal error but of the Court exercising discretion in a morally suspect way. I further contend that the justices' recent and aggressive pattern of obstructing precedent is morally problematic due to its negative effect on the impersonality of their decisionmaking and hence on public trust in the Court as a neutral arbiter.

A separate project—*Debating Common-Law Interpretation*—concerns the role of precedent in adjudication more broadly. How should courts interpret a precedent whose holding is unclear or applies indeterminately to the instant case? It is striking that, despite the voluminous literature on precedent, there are no widely debated schools of thought on how to interpret

precedent comparable to, say, textualist or purposivist schools of statutory interpretation or originalist or Thayerian schools of constitutional interpretation. My goal in this paper is not to argue for any one interpretive approach but rather to frame the relevant question and lay out possible responses in such a way as to encourage a more robust conversation on the subject.

The paper lays out several approaches to interpreting precedent that parallel familiar approaches to statutory interpretation. For instance, one could be a textualist who looks primarily to what a precedential opinion communicated. One could be an intentionalist who searches for the rule that the precedent court intended to create. One could be a purposivist who focuses on the purposes reasonably gleaned from the precedential opinion. Or one could be—as most judges are—a pluralist who engages in some combination of the foregoing. I propose that different approaches are better suited to different contexts (e.g., horizontal vs. vertical precedent, narrow holdings vs. broad doctrinal frameworks, a single precedent vs. an established line of precedent).

III. New Work on Statutory and Constitutional Interpretation

As noted above, my dissertation defended a version of legal positivism associated with H.L.A. Hart. In a new project titled *What Are We Debating When We Debate Legal Interpretation?*, BOSTON UNIV. L. REV. (forthcoming), I examine the import of Hartian Positivism for debates over constitutional and statutory interpretation. Contrary to William Baude and Stephen Sachs, I argue that the Hartian picture of law does not favor any one position in these debates over any other. Nevertheless, Hartian Positivism can still advance these debates by elucidating what they are about—by explaining what interpretive theories, like textualism, purposivism, originalism, or living constitutionalism, aim to achieve.

Perhaps surprisingly given the amount of ink spilled on debates over legal interpretation, there remains disagreement over what interpretive theories aim achieve. Hartian Positivism suggests an answer. On the Hartian picture, the social facts that determine what the law is will inevitably be too imprecise to resolve every question arising in litigation, leading to "hard cases" in which there is no right answer to what the law requires. Debates over legal interpretation are principally concerned with how legal actors should behave in these hard cases—how they ought, morally or politically, to proceed absent determinate legal direction. Interpretive theories are thus best understood as serving a remedial function. They are about how to fill in the law's gaps.

From this account, I draw several upshots for our interpretive debates. Most importantly, it follows that a theory of legal interpretation—such as textualism, purposivism, pragmatism, or the like—requires a moral-political defense. Generally speaking, the proponent of such a theory must show that, given a particular interpreter's role in our system of government or epistemic limitations, that interpreter is more likely to do what is, all things considered, best by following the theory than by following any other theory or no theory at all. Relatedly, a theory of legal interpretation must be sensitive to differences among interpreters, types of legal texts, and areas of law. We should be wary of monolithic theories that claim to apply across the board.

This project on Hartian Positivism and legal interpretation is the theoretical backdrop for two further projects, one of which is titled *How to Be a Textualist in Statutory Interpretation Without Being an Originalist in Constitutional Interpretation.* Many proponents of textualism in

statutory interpretation also advocate for originalism in constitutional interpretation. Yet there is no reason why these two theories must travel together. The values usually used to justify the one do not require adopting the other; indeed, the democratic and rule-of-law values undergirding textualism seem to counsel *against* adopting originalism. My paper advocates for textualism without originalism: it contends that textualists need not, and should not, be originalists.

A careful explanation of why these two interpretive theories can and should come apart is important for at least three reasons. First, it highlights an underappreciated and undertheorized position in debates over legal interpretation: textualism without originalism is a viable and attractive view deserving of further study. Second, it shows why textualism's critics cannot use originalism's flaws to object to textualism, as some have tried to do. And third, it foregrounds key differences in how one must go about justifying theories of statutory versus constitutional interpretation. Ultimately, I suggest that the values that best justify textualism in statutory interpretation support something closer to Thayerian deference in constitutional interpretation.

Another project in this vein—*The Sources of Legal Indeterminacy*—argues that a theory of legal interpretation must be sensitive to the reasons *why* a statute or constitutional provision is indeterminate as to a given case. Although there have been prior efforts to taxonomize sources of legal indeterminacy, there has been no attempt to systematically address how different sources of legal indeterminacy bear on how courts should resolve the cases pending before them. My paper identifies these sources and shows why courts should respond differently to some than to others—looking to both familiar sources of legal indeterminacy like ambiguity or vagueness and less-known ones like polysemy or pragmatic indeterminacy (i.e., indeterminacy due to context).

Take pragmatic indeterminacy. Just as there are conversational norms that govern our everyday speech, there are similar norms that govern legislatures' speech in statutes. These norms can form the basis for implicatures—for inferring content beyond what the legislature literally said. The trouble is that it is frequently unclear which norms govern legislative speech; indeed, controversies over the major-questions doctrine or absurdity doctrine may, to some extent, be rooted in disagreement over which conversational norms apply. Such indeterminacy raises several issues for a theory of legal interpretation, such as whether courts should enforce merely implicated content at all and, if so, how clear they should require the implicature to be.

Looking further ahead, I hope to extend many of the ideas discussed above with respect to statutory and constitutional interpretation to regulatory interpretation. Just as it would be a mistake to assume that the same interpretive approach should apply to statutes and constitutions alike, it would be a mistake to assume that the same approach should apply to statutes and regulations or to all regulations regardless of their subject matter. A theory of interpretation must be sensitive to the distinct normative stakes involved in different administrative contexts. I look forward to considering how these ideas bear on how courts should interpret regulations and on when they should defer, under *Auer*, to agencies' interpretations of their own regulations.