WHAT ARE WE DEBATING WHEN WE DEBATE LEGAL INTERPRETATION?

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Debates over legal interpretation, such as those between textualists and purposivists or between originalists and living constitutionalists, are familiar to every judge, lawyer, and law student. And yet there remains disagreement over what these debates are really about—over what interpretive theories aim to achieve. For instance, do interpretive theories aim to grasp what legal texts communicate? Do they aim to explain how legal texts make law? Or are they instructions for how to proceed when a legal text's effect on the law is underdetermined? This "meta-interpretive debate" over what we are debating when we debate legal interpretation receives less attention than it should.

This Article explores how a widely held view in general jurisprudence—Hartian Positivism—can help answer the meta-interpretive debate. Hartian Positivism, roughly put, holds that what counts as law in any jurisdiction depends on what most officials in that jurisdiction accept and treat as law. While Hartian Positivism cannot resolve debates over legal interpretation, it can clarify what these debates are about. If Hartian Positivism is right, then these debates are primarily about legal interpretation in a specific remedial sense: they concern how to go on when a legal text's effect on the law is underdetermined. In short, they concern how to fill in the law's gaps.

This remedial answer to the meta-interpretive debate sheds fresh light on how judges and theorists should—and should not—defend their preferred interpretive theories. The remedial answer implies that interpretive theories require a moral-political defense and that we should be wary of monolithic theories that purport to apply across the board. It also highlights a fallacy in prominent arguments for textualism or originalism. Although these issues may seem abstract, their political stakes are significant: many judges profess to adhere to interpretive theories, and it is important that we understand what these theories are about and what could justify judges in adopting them.

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INTRODUCTION

Debates over legal interpretation—over how to interpret constitutions, statutes, and the like—show little sign of nearing resolution.[1] Different camps in the debates have achieved more or less prominence over time,[2] but none commands a clear consensus among judges or theorists today.[3] Faced with

[1] *See* Richard H. Fallon Jr., *The Statutory Interpretation Muddle*, 114 NW. UNIV. L. REV. 269, 271 (2019) ("[N]o agreement on interpretive methodology has yet emerged."); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS xxvii (2014) (there is no "generally agreed-on approach to the interpretation of legal texts"); HENRY M. HART JR. & ALBERT M. SACKS, THE LEGAL PROCESS 1169 (William N. Eskridge Jr. & Phillip P. Frickey eds., 1994) ("American Courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation.").

[2] For instance, some have noted the recent ascendancy of textualism. *E.g.*, William Eskridge Jr., Brian Slocum & Kevin Tobia, *Textualism's Defining Moment*, 123 COLUM. L. REV. 1611, 1616 (2023) ("Textualism is now clearly ascendant."). Others have observed a rise in judges' use of tradition. *E.g.*, CASS R. SUNSTEIN, HOW TO INTERPRET THE CONSTITUTION (2023) ("[R]espect for tradition is on the ascendancy").

[3] Empirical work suggests that many judges and theorists are pluralists, i.e., that they do not favor any one interpretive theory. *See* Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1302 (2018) (suggesting that judges embrace "intentional eclecticism" in statutory interpretation); Eric Martínez & Kevin Tobia, *What Do Law*

this seeming stalemate, some scholars have turned to general jurisprudence—to the branch of legal philosophy that studies the nature of law—for help resolving these debates.[4] One recent example of this turn to general jurisprudence is William Baude and Stephen Sachs's claim that a prominent view of the nature of law, Hartian Positivism, favors originalism in constitutional interpretation because Hartian Positivism implies that originalism is "our law."[5]

This Article takes a more modest approach. My thesis is that, while general jurisprudence cannot resolve our debates over legal interpretation, it can still meaningfully advance those debates by clarifying their subject matter—by clarifying what they are really about. Like Baude and Sachs, I will focus on Hartian Positivism because it is likely the dominant view of the nature of a law among American legal theorists today, making it common ground for many participants in debates over legal interpretation.[6] Roughly put, Hartian Positivism claims that legal officials' convergent practice determines what counts as law in their jurisdiction.[7] In other words, what most legal officials do and believe around here determines what the law is around here.

If Hartian Positivism can clarify what debates over legal interpretation

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Professors Believe about Law and the Legal Academy?, 112 GEO. L.J. 111, 116 (2023) (presenting evidence that law professors endorse plural theories of statutory interpretation).

[4] Emad Atiq & Jud Mathews, *The Uncertain Foundations of Public Law Theory*, 31 CORNELL J. L. & PUB. POL'Y 389, 391 (2022) (observing a "jurisprudential turn" in public law scholarship that "involves arguing from assumptions about the nature of law . . . to controversial public law conclusions"); *see also* Mitchell N. Berman, *How Practices Make Principles, and How Principles Make Rules* (U. Penn. L. Sch. Pub. L. Rsch. Paper No. 22-03, 2022) (manuscript at 52), https://ssrn.com/abstract=4003631 (suggesting that a theory of law has implications for legal interpretation); Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L.J. 1288, 1291 (2014) (same); SCOTT J. SHAPIRO, LEGALITY 359 (2011) (same).

[5] William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1477 (2019) ("[L]egal practice shows originalism to be our law"); William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 L. & HIST. REV. 809, 809 (2019) ("[O]ur law happens to be the founders' law."); William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2351–52 (2015) ("[A] version of originalism is indeed our law."); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J. L. & PUB. POL'Y 817, 838 (2015) (suggesting that originalism may be "our law").

[6] *See* Mark Greenberg, *Legal Interpretation*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta et al. eds., 2021), https://plato.stanford.edu/entries/legal-interpretation ("[M]any theorists of legal interpretation profess to accept Hartian positivism."); Baude & Sachs, *Grounding Originalism*, *supra* note 5, at 1463 ("[A] generally Hartian version of positivism . . . strikes us as the focal point among American law professors."); *see also* Martínez & Tobia, *supra* note 3, at 162 (presenting evidence that a supermajority of law professors accept a "positivist" rather than a "natural law" view of the nature of law).

[7] *See* H.L.A. HART, THE CONCEPT OF LAW 100–10 (3d ed. 2012); *see also* Bill Watson, *Explaining Legal Agreement*, 14 JURIS. 221, 237–44 (2023) (developing a version of Hartian Positivism); Richard H. Fallon Jr., *Constitutional Precedent Viewed through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1126–28 (2008) (summarizing the core tenets of Hartian Positivism).

are about, then that could spur real progress in these long-running and practically significant disputes.[8] Perhaps surprisingly given the amount of ink spilled on legal interpretation, there remains disagreement over what legal interpretation, in the relevant sense, even is—over what it aims to achieve.[9] For instance, does it aim to grasp what a legal text communicates (the text's communicative content)? Does it aim to explain the text's effect on the law (the text's contribution to the law)? Or is legal interpretation instead about how to proceed when a legal text's effect on the law is underdetermined—when there is no single right answer to what the text contributes to the law?

This "meta-interpretive debate" over what we are debating when we debate legal interpretation receives less attention than it should.[10] To be clear, the meta-interpretive debate is not about language; it is not about what the word "interpretation" means. Judges and theorists use that word to pick out a variety of related activities.[11] The meta-interpretive debate concerns which of those activities is principally at issue in our debates over legal interpretation; it concerns what theories like textualism, purposivism, originalism, or living constitutionalism are disagreeing *about*. Our failure to clearly identify that subject matter is, no doubt, partly to blame for abiding confusion over how

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[8] Others have argued before that Hartian Positivism is a poor vehicle for defending controversial interpretive theories like originalism. *See, e.g.*, Charles L. Barzun, *The Positive U-Turn*, 69 STAN. L. REV. 1323, 1357 (2017) ("[N]o defender of *any* controversial theory of legal interpretation can appeal to Hartian positivism for support."); Mark Greenberg, *What Makes a Method of Legal Interpretation Correct?: Legal Standards vs. Fundamental Determinants*, 130 HARV. L. REV. F. 105, 115 (2017) ("[N]othing that is uncertain or controversial can be part of the rule of recognition."). By contrast, my goal here is different and more constructive; my goal is to explain not merely what Hartian Positivism cannot teach us about legal interpretation but also what it affirmatively can teach us.

[9] *See* Greenberg, *supra* note 6 ("[T]here is no consensus with respect to . . . what legal interpretation is."); *see also infra* Part I.B (surveying different ideas that theorists sometimes put under the label "legal interpretation").

[10] I am using the term "meta-interpretive" in a different sense than some scholars do. *See, e.g.*, SHAPIRO, *supra* note 4 (stipulating that "meta-interpretation" concerns how to choose an interpretive methodology); Nina Varsava, *How to Realize the Value of Stare Decisis: Options for following Precedent*, 30 YALE J. L. & HUMANS. 62, 67 (2018) (same); Piotr Bystranowski & Kevin Tobia, *Measuring Meta-Interpretation*, J. INST. & THEORETICAL ECON. (forthcoming) (manuscript at 2), https://ssrn.com/abstract=4556665 (same). As I use the term, the "meta-interpretive" debate is not about how to choose an interpretive theory; rather, it concerns what we are disagreeing *about* when we debate legal interpretation.

[11] *See* SUNSTEIN, *supra* note 2, at 61 ("[T]here is nothing that interpretation 'just is.'"); Jeffrey Goldsworthy, *The Meaning and Interpretation of Statutes in Anglo-American Legal Systems*, INTERPRETIVISM AND THE LIMITS OF LAW 43, 44–45 (Tomasz Gizbert-Studnicki, Francesca Poggi & Izabela Skoczeń eds., 2022) ("[T]he 'interpretation' of statutes . . . includes several different processes that judges rarely distinguish."); Richard A. Posner, *Legislation and Its Interpretation: A Primer*, 68 NEB. L. REV. 431, 448 (1989) ("[I]nterpretation is a portmanteau word so capacious that virtually nothing that a court might 'do' to or with a statute could not be thought interpretation in a semantically permissible . . . sense.").

to define and adjudicate among these kinds of theories.

Hartian Positivism suggests an answer to the meta-interpretive debate.[12] On the Hartian picture of law, it is practically inevitable that there will be no single right answer to some legal questions. The convergent practice that determines what counts as law will be too imprecise to resolve every question arising in litigation, leading to "hard cases" in which there is no single right answer to what the law requires. Debates over legal interpretation are primarily about how judges or other legal actors should proceed in exactly these hard cases—about how they should go on when a legal text's contribution to the law is underdetermined. The debates are thus primarily about a *remedial* sense of legal interpretation: they are about how to fill in the law's gaps.

Notice that how we talk about interpretation tends to obscure the role that remedial interpretation plays in our practice. We frequently use the word "interpret" to refer to any effort to understand or apply a text's contribution to the law.[13] Enforcing a legal text always requires interpreting it in this very broad sense. By contrast, remedial interpretation involves evaluating and selecting from a range of norms that a text could plausibly have contributed to the law. Legal texts do not always need interpreting in that narrow sense.[14] When the Constitution says that each State gets "two Senators," we normally do not need to remedially interpret it before applying it.[15] And yet, on some occasions, enforcing legal texts does require remedially interpreting them.

Take *Taniguchi v. Kan Pacific Saipan*,[16] which addressed whether a statute allowing prevailing parties to recoup certain costs of litigation, including "compensation for interpreters," applied to costs incurred to translate written documents from Japanese to English.[17] The Supreme Court held that the statute did not apply because "interpreters" was most naturally read to refer to just oral translators.[18] But a dissent replied that the statute was "not so clear as to leave *no room for interpretation*" and proposed interpreting it, based on its purpose, to permit recovery of the costs at issue.[19] Hartian Positivism

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[12] *See infra* Part III.

[13] *See, e.g.*, SCALIA AND GARNER, *supra* note 1, at 53 ("Every application of a text to particular circumstances entails interpretation"); SHAPIRO, *supra* note 4, at 304 (suggesting that an "interpretive methodology" is simply "a method for reading legal texts").

[14] *See* ANDREI MARMOR, PHILOSOPHY OF LAW 138 (2011) ("[I]t is not our experience that every utterance by a speaker is somehow followed by a pause, when the hearer thinks about ways to interpret what has been said. . . . [W]e just hear the utterances and thereby understand what has been said."); Timothy A. O. Endicott, *Linguistic Indeterminacy*, 16 OXFORD J. LEGAL STUDS. 667, 673 (1996) ("[W]e interpret when we can reformulate a rule in a way that clarifies its meaning. We do not interpret stop signs.").

[15] U.S. CONST. art. I, § 3, cl. 1.

[16] 566 U.S. 560 (2012).

[17] *Id.* at 562.

[18] *Id.* at 569.

[19] *Id.* at 577–79 (Ginsburg, J., dissenting) (emphasis added).

suggests that the (textualist) majority and the (purposivist) dissent in this case were disagreeing over when or how to remedially interpret the statute.

Much follows from this answer to the meta-interpretive debate that scholars have overlooked or underappreciated. In future work, I hope to draw out implications for how to think about and define certain interpretive theories.[20] But at present, I will focus on implications for how to defend and adjudicate among those theories. Hartian Positivism implies that interpretive theories require a moral-political defense.[21] The basic challenge is to show why legal actors should follow a theory rather than doing what they think is best in each case. Meeting that challenge generally requires showing that an actor's role or epistemic limitations makes them more likely to act rightly when they adhere to one theory than when they adhere to any other theory or no theory.

Significantly, it follows that interpretive theories must be sensitive to differences among interpreters, areas of law, types of texts, etc.—making it less likely that any one such theory is best across the board.[22] Different interpreters have different roles and abilities; different areas of law implicate different values or purposes; and different types of legal texts have predictably different features (e.g., statutes are generally much more detailed than constitutions and far easier to amend). Political context matters too (e.g., if Congress was less gridlocked in prior decades, maybe that bears on how judges should have remedially interpreted statutes then as opposed to now). In short, Hartian Positivism gives us reason to be skeptical of monolithic interpretive theories.

Equally important is how *not* to defend interpretive theories. Hartian Positivism brings to light a common error in defenses of textualism or originalism. The error, which I call "the plain-meaning fallacy," is to conflate how we grasp what the law is with how we remedially interpret the law.[23] In other words, the mistake is to assume that what is true of a text's "plain meaning" is also true when a text's meaning is less than plain. I show how a variety of textualist and originalist arguments commit this same fallacy, including textualists' common refrain that "only the text is the law,"[24] Baude and Sachs's

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[20] *See infra* note 196.

[21] *See infra* Part IV.A.

[22] *See infra* Part IV.B.

[23] *See infra* Part IV.C.

[24] *See, e.g.*, NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 132 (2019) ("The text of the statute and only the text becomes law."); Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1924 (2017) ("[T]he original meaning of the text controls because 'it and it alone is law.'" (quoting Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 552 (1994))); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2118 (2016) ("The text of the law is the law."); 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 22 (Amy Gutman ed., 1997) ("The text is the law, and it is the text that must be observed.").

proposal that originalism is "our law,"[25] and John McGinnis and Michael Rappaport's argument for originalism based on a "good constitution."[26]

Arguing over the import of Hartian Positivism for interpretive theories may seem abstract, but the political stakes are real and significant. Textualism and originalism are ascendent interpretive theories among judges and, at present, are closely tied to conservative legal discourse.[27] It matters whether those theories are, or can credibly be, claims about what the law requires judges to do, as opposed to claims about how judges should proceed once the law runs out.[28] Hartian jurisprudence cannot answer whether textualism, originalism, or anything else is the "correct" or "best" interpretive theory, but it can help us better understand what these theories are about and what could justify legal interpreters in adhering to one such theory over any other.

The rest of the Article proceeds in four parts. Part I introduces the key debates, including first-order debates over statutory and constitutional interpretation, the meta-interpretive debate over what these first-order debates are about, and general jurisprudence's positivism-antipositivism debate. Part II addresses Hartian Positivism and its application to our legal system in greater detail. Part III contends that, if Hartian Positivism is right, then the first-order debates are primarily about remedial interpretation. And Part IV explores implications for how judges and theorists should (and should not) defend their preferred interpretive theories. Lastly, a short conclusion summarizes the Article's main argument and points toward future directions for research.

I. LEGAL INTERPRETATION AND GENERAL JURISPRUDENCE

This part briefly surveys debates over legal interpretation and the nature

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[25] *See* sources cited *supra* note 5.

[26] *See* John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693, 1701 (2010) ("[O]ur argument claims that the supermajoritarian process is the best means of producing a substantively good constitution."); *see also* John O. McGinnis & Michael B. Rappaport, *The Abstract Meaning Fallacy*, 2012 U. ILL. L. REV. 737, 779 (2012) (summarizing the same argument); John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case against Construction*, 103 NW. U. L. REV. 751, 782 (2009) (same).

[27] *See* Ryan Doerfler, *Late-Stage Textualism*, 2021 SUP. CT. REV. 267, 275–77 (2021) (connecting textualism to the conservative legal movement); Neil H. Buchanan & Michael C. Dorf, *A Tale of Two Formalisms: How Law and Economics Mirrors Originalism and Textualism*, 106 CORNELL L. REV. 591, 592 (2021) (tying textualism and originalism to conservative ideology). *But see* Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Progressive Textualism*, 110 GEO. L.J. 1437, 1444 (2022) (noting "increasing interest in a politically 'progressive textualism,'" and proposing a "methodologically progressive textualism").

[28] *Cf.* Atiq & Matthews, *supra* note 4, at 3 (observing that, when writers claim that an interpretive theory is the law, they raise the stakes of public-law debates by portraying their opponents "as not following the law").

of law for the limited purpose of teeing up the rest of the Article. I first identify some defining features of contemporary debates over statutory and constitutional interpretation. I then turn to the, perhaps surprising, disagreement that persists over what these debates are really about. Lastly, I overview one prominent debate in general jurisprudence—the debate between legal positivists and antipositivists over the relationship between law and morality.

A. First-Order Interpretive Debates

Debates over legal interpretation are familiar to every American judge, lawyer, and law student. Most prominently, these debates include disagreements over how to interpret statutes and constitutions. The major camps in the debates are well known. With respect to statutory interpretation, we argue over textualism,[29] intentionalism,[30] purposivism,[31] pragmatism,[32] and the like. And with respect to constitutional interpretation, we contest the merits of originalism,[33] common-law constitutionalism,[34] moral readings,[35] Thayerism,[36] etc. At least in the United States, debates over legal interpretation are hotly contested and long running, with no end in sight.[37]

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[29] *E.g.*, SCALIA & GARNER, *supra* note 1, at 323; John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 430 (2005).

[30] *E.g.*, Stanley Fish, *There Is No Textualist Position*, 42 SAN DIEGO L. REV. 629, 644 (2005); Larry Alexander & Saikrishna Prakash, *"Is That English You're Speaking?" Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967, 968 (2004).

[31] *E.g.*, STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 92 (2010); HART & SACKS, *supra* note 1, at 1378.

[32] *E.g.*, RICHARD A. POSNER, HOW JUDGES THINK 238 (2008).

[33] *E.g.*, Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 862 (1989). For helpful discussion of the many varieties of originalism, see Lawrence B. Solum, *Originalism versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1295–96 (2019).

[34] *E.g.*, David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 888 (1996).

[35] *E.g.*, James E. Fleming, FIDELITY TO OUR IMPERFECT CONSTITUTION: FOR MORAL READINGS AND AGAINST ORIGINALISMS 28 (2015); RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 2 (1996).

[36] *E.g.*, James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 135 (1893); Cass R. Sunstein, *Thayerism* (Sept. 10, 2022) (unpublished manuscript), https://ssrn.com/abstract=4215816.

[37] *See* sources cited *supra* note 1. These same issues may not be so contested in some states or foreign countries. *See* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1754 (2010) (observing that several state have implemented interpretive frameworks governing statutory questions); Leonid Sirota, *Purposivism, Textualism, and Originalism in Recent Cases on Charter Interpretation*, 47 QUEEN'S L.J. 78, 79–80 (2021) (noting that the "lack of debate about competing approaches to interpretation is sometimes taken to be a defining . . . characteristic of the Canadian legal culture" but questioning that assumption).

I will refer to these familiar debates as "first-order interpretive debates," and I will call the camps within them "interpretive theories." I do not want to say too much about first-order interpretive debates up front because I do not want to beg the question of what they are about—I do not want to just assume what their subject matter is. Yet we must know something about them before moving forward. It should be fairly uncontroversial that these debates have something to do with how judges or other legal actors should use legal texts to answer disputed legal questions. In this respect, the debates are (1) practically oriented and (2) focused on "hard cases." Let me explain what I mean.

To start, first-order interpretive debates are practically oriented, in the sense that they concern what judges or other legal actors should do. Participants in the debates routinely talk this way: they discuss how judges "should" interpret constitutions, statutes, etc.[38] Now, these writers could be interested in what judges "should" do according to the law, according to political morality, or according to something else. My point is just that the debates somehow relate to appropriate judicial behavior. An answer to them that had no upshot for what judges should do would not be a satisfying answer—indeed, it would be not so much an answer as a change in the topic of conversation.

Moreover, first-order interpretive debates are primarily about what judges should do specifically in hard cases. Scholars use the terms "easy cases" and "hard cases" in different ways.[39] For now, I will use these terms in their sociological sense to refer to the extent of experts' agreement on the law. A case is *easy* insofar as nearly any lawyer would agree on what the law directs the parties in that case to do; and a case is *hard* insofar as many lawyers would disagree over what the law directs the parties in that case to do. First-order interpretive debates are primarily about what legal actors should do in cases where many lawyers would disagree over what the law requires, permits, etc.

The main evidence for this claim is that participants in the debates rarely discuss easy cases but do often discuss hard ones. Easy cases abound in daily life.[40] No one would dispute, for instance, that the law requires me to stop at red lights as I drive to my office or that it permits me to type this Article right now on my computer. Likewise, no one would dispute that the law forbids anyone from being elected to the office of President more than twice or that that it allows the State of Massachusetts to send no more than two senators to

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[38] *E.g.*, Solum, *supra* note 33, at 1265–66 (stating that originalists maintain that "constitutional practice should be constrained by [the constitutional text's] fixed original meaning"); BREYER, *supra* note 31, at 72–73 ("[T]he Court should interpret written words, whether in the Constitution or in a statute, using tools that help make the law effective in practice.").

[39] *See* Joshua B. Fischman, *How Many Cases Are Easy?*, 13 OXFORD J. LEGAL ANALYSIS 595, 600–02 (2021) (distinguishing different senses in which cases are "easy" or "hard").

[40] *See, e.g.*, Watson, *supra* note 7, at 227–30 (arguing that experts pervasively agree on the law in many cases); Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 407 (1985) (proposing that easy cases represent "an enormous portion of constitutional law").

the U.S. Congress.[41] Notwithstanding the ubiquity of such easy cases, first-order interpretive debates devote little, if any, attention to them.

Rather, first-order interpretive debates focus on cases like *Dobbs v. Jackson Women's Health Organization*,[42] *New York State Rifle & Pistol Association v. Bruen*,[43] *Bostock v. Clayton County*,[44] *King v. Burwell*,[45] *Smith v. United States*,[46] and *Tennessee Valley Authority v. Hill*[47]—i.e., cases in which experts could (and in fact did) disagree over what the law required.[48] A successful interpretive theory must offer some guidance on how to proceed in hard cases like these. An interpretive theory that had no upshot for legal actors' behavior in hard cases would not be a satisfying answer to our first-order interpretive debates—again, it would not really be an answer at all.

B. The Meta-Interpretive Debate

Judges and theorists disagree not just over which interpretive theory is best but also at a more fundamental level over what these theories aim to achieve—over what they are theories of.[49] A naïve response would be that they are all theories of interpretation. But that response will not do. We will see shortly that "interpretation" is a capacious word that can refer to a variety of activities.[50] The question is which of these activities is primarily at issue in disputes between textualists, purposivists, originalists, living constitutionalists, and the like. This disagreement over what we are debating when we debate legal interpretation is what I call the "meta-interpretive debate."

Consider four possible answers to the meta-interpretive debate. The first

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[41] U.S. CONST. art. I, § 3, cl. 1.; *id.* amend. XXII.

[42] 597 U.S. 215 (2022).

[43] 597 U.S. 1 (2022).

[44] 140 S. Ct. 1731 (2020).

[45] 576 U.S. 473 (2015).

[46] 508 U.S. 223 (1993).

[47] 437 U.S. 153 (1978).

[48] *See, e.g.*, Lawrence B. Solum & Randy E. Barnett, *Originalism after* Dobbs*,* Bruen*, and* Kennedy*: The Role of History and Tradition*, 118 NW. UNIV. L. REV. 433, 435 (2023) (discussing *Dobbs* and *Bruen*); Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 266 (2020) (discussing *Bostock*); Fallon, *supra* note 1, at 323–25 (discussing *King*); Scalia, *supra* note 24, at 18–23 (discussing *Smith*); William N. Eskridge Jr., *The New Textualism*, 37 UCLA L. REV. 621, 627–30 (1990) (discussing *Tennessee Valley Authority*).

[49] *See* Greenberg, *supra* note 6 ("[T]here is no consensus with respect to . . . what legal interpretation is.").

[50] The word "interpretation" is so capacious that it can refer to diametrically opposed activities. On the one hand, it can refer to grasping the meaning of something rather than reasoning creatively about it. *See, e.g.*, Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1, 56 (2009) (contrasting "interpretation" with creative "authorship"). On the other hand, it can refer to reasoning creatively about something rather than grasping its meaning. *See, e.g.*, Endicott, *supra* note 14, at 673 (contrasting "interpretation" with "understanding").

answer (call it the *linguistic answer*) is that interpretive theories aim to grasp a legal text's communicative content. I will say more about communicative content below.[51] For now, it suffices to note that a legal text's communicative content is the text's linguistically expressed meaning at the time of enactment; it is a function of not just the text's words and syntax but also its context.[52] Think back to *Taniguchi* and the statute concerning "compensation for interpreters."[53] On the linguistic answer, when a textualist and a purposivist disagree about *Taniguchi*, they are disagreeing over how to discern what the statute's use of the phrase "compensation for interpreters" communicated.[54]

A second answer (call it the *legal answer*) is that interpretive theories aim to tell us how a legal text contributes to the law.[55] A legal text's contribution to the law is the text's effect on the law; it is that which the text adds to, subtracts from, or otherwise modifies about the set of all legal norms in its jurisdiction. According to the legal answer, interpretive theories concern which sorts of facts determine a legal text's contribution to the law.[56] Sticking with *Taniguchi* as an example, the legal answer implies that a textualist and a purposivist who disagree about that case are disagreeing over which kinds of facts determined what the relevant statute added to our law.

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[51] *See infra* Part II.C.

[52] *See* Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 488 (2013) ("The full communicative content of a legal writing is a product of the semantic content . . . and the additional content provided by the available context.").

[53] *See supra* text accompanying notes 16–19.

[54] Some intentionalists are careful to use the word "interpretation" to refer to grasping a text's communicative content, as are some originalists who distinguish between "interpretation" and "construction." *See, e.g.*, Fish, *supra* note 30, at 647 ("[T]he act of interpreting is always and necessarily the act of determining [communicative] intention."); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 474–75 (2013) (defining interpretation as aiming "at the recovery of . . . communicative content").

[55] So stated, the legal answer assumes that interpretive theories are *atomistic* in the sense of searching for a legal text's individual contribution to the law rather than *holistic* in the sense of searching for the law as a whole after accounting for and amalgamating the contributions of all relevant sources. *Cf.* HRAFN ASGEIRSSON, THE NATURE AND VALUE OF VAGUENESS IN THE LAW 13 (2020) (contrasting atomistic and holistic accounts of legal content); Mark Greenberg, *The Standard Picture and Its Discontents*, *in* 1 OXFORD STUDIES IN PHILOSOPHY OF LAW 39, 50 (Leslie Green & Brian Leiter eds., 2011) (same).

[56] Some originalists may presuppose this legal answer when they argue that only the Constitution's original meaning is "the law." *See* Mitchell N. Berman & Kevin Toh, *On What Distinguishes New Originalism from Old: A Jurisprudential Take*, 82 FORDHAM L. REV. 545, 558–59 (2013) (collecting statements to this effect from different originalists). Other theorists more explicitly favor this answer or at least something close to it. *See, e.g.*, Mark Greenberg, *Legal Interpretation and Natural Law*, 89 FORDHAM L. REV. 109, 129 (2020) ("[L]egal interpretation is best understood as seeking the content of the law."); SHAPIRO, *supra* note 4, at 354 ("[T]he debate between textualism and purposivism . . . concerns . . . *how* to follow the law."); RONALD DWORKIN, LAW'S EMPIRE 15–30 (1986) (proposing that judicial disagreements in various hard cases were about "what the law actually was").

A third answer (call it the *epistemic answer*) is that interpretive theories aim to tell legal actors how they epistemically should grasp a legal text's contribution to the law. While how one epistemically should grasp a text's contribution to the law mostly depends on how the text does contribute to the law, these inquiries can come apart. Given cognitive bias or other problems, the best way to grasp a text's contribution to the law may be through a heuristic. The epistemic answer implies that a textualist and a purposivist who disagree about *Taniguchi* are disagreeing over how the justices could have best arrived at the truth about what the relevant statute added to our law.[57]

A fourth answer (call it the *remedial* answer) is that interpretive theories aim to tell legal actors how they morally or politically should proceed when a legal text's contribution to the law is underdetermined. A text's contribution is underdetermined insofar as there is no single right answer to what the text contributed to the law (there may be many wrong answers, but there are multiple minimally plausible candidates for the right answer).[58] On this remedial view, a textualist and a purposivist who disagree about *Taniguchi* are disputing how the justices should have evaluated and selected from a range of minimally plausible answers to what the relevant statute added to our law.[59]

In sum, there are at least four possible answers to the meta-interpretive debate—at least four questions that we might be debating when we debate legal interpretation:

1. LINGUISTIC: How do legal texts communicate?
2. LEGAL: How do legal texts contribute to the law?
3. EPISTEMIC: How can legal actors most reliably grasp a legal text's contribution to the law?
4. REMEDIAL: How should legal actors proceed when a legal text's contribution to the law is underdetermined?

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[57] Some of what Greenberg, Berman, and Toh say is suggestive of the epistemic answer. *See* Greenberg, *supra* note 56, at 136 ("[T]he theory of legal interpretation may come apart from the theory of law because legal interpreters may more accurately identify the content of the law by . . . following simpler methods."); Berman & Toh, *supra* note 56, at 552 (stating that "*theories of constitutional interpretation* proper" concern "how some class of persons . . . should try to determine or discover the Constitution's legal content").

[58] *See* Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 473 (1987) (discussing underdeterminacy in the law).

[59] *Cf.* Fallon, *supra* note 1, at 296 ("[D]ebates about statutory meaning in reasonably disputed cases . . . . are debates about how judges should decide cases when a statute's linguistic meaning is underdeterminate."); ANDREI MARMOR, THE LANGUAGE OF LAW 108 (2014) ("[I]nterpretation is called for when there is some plausible doubt about what the law says or about how what it does say would settle the case at hand."); Dennis Patterson, *Interpretation in Law*, 42 SAN DIEGO L. REV. 685, 696–97 (2005) ("It is in the act of interpretation that the fabric of law is repaired, thereby enabling practitioners to go on.").

This list may not be exhaustive: there might be other possible answers to the meta-interpretive debate.[60] Nor are the items on this list mutually exclusive: our first-order interpretive debates may, and probably do, touch on all of these inquiries. Indeed, it is likely that the word "interpret" lacks a univocal meaning in these debates and that participants are sometimes talking past one another.[61] Even so, we can still strive to identify which of these inquiries is *most central* to our first-order interpretive debates, so that we can be clear about when we are arguing over that central inquiry and when we are arguing over something else. That, in essence, is the project of the rest of this Article.

C. The Nature of Law

General jurisprudence studies the nature of law, wherever and whenever law exists.[62] One debate in this area is that between positivists and antipositivists over the relationship between law and morality. How to define the

[60] Another answer (call it the *amending answer*) may be that interpretive theories aim to tell legal actors when and how to revise a legal text's contribution to the law—i.e., when and how they should enforce the text in a way that is inconsistent with any minimally plausible answer to what the text contributed to the law. While judges would never characterize themselves as "revising" the law, it is clear that they sometimes do so. *See* Martin David Kelly, *The 'Always Speaking' Principle: Cracking an Enigma* (Aug. 3, 2023) (manuscript at 16), https://ssrn.com/abstract=4529392 ("[T]here are undoubtedly clear cases of 'revising.'"). Moreover, judges may sometimes be legally permitted to do so. *See infra* notes 189–191.

A different answer (call it the *adjudicative answer*) might combine all of the foregoing answers and more. It would claim that interpretive theories aim to tell legal actors how they legally, morally, or politically should adjudicate legal disputes. *Cf.* Thomas W. Merrill, *Legitimate Interpretation—Or Legitimate Adjudication?*, 105 CORNELL L. REV. 1395, 1396 (2020) ("The question to be considered is this: When adjudicators resolve a dispute between adverse parties, what types of decisional norms can the adjudicator invoke that will be regarded as legitimate?"). The adjudicative answer, however, is not so much an answer to the meta-interpretive debate as a refusal to engage in the meta-interpretive debate; it does nothing to render more precise what the subject matter of first-order interpretive debates is.

[61] *See sources* cited *supra* note 11. It is also possible that participants in first-order interpretive debates are sometimes engaged in "metalinguistic negotiations" over the word "interpret"—that they are using that word to implicitly advocate for how it should be used in a certain context (e.g., that it should be used to refer to grasping legal texts' communicative content, or to grasping legal texts' contributions to the law, or to something else). *See* David Plunkett & Timothy Sundell, *Dworkin's Interpretivism and the Pragmatics of Legal Disputes*, 19 LEGAL THEORY 242, 248 (2013) (defining "metalinguistic negotiation").

[62] Andrei Marmor & Alexander Sarch, *The Nature of Law*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta et al. eds., 2019), https://plato.stanford.edu/archives/fall2019/entries/lawphil-nature/. Behind substantive debates in general jurisprudence lies a methodological debate over what views on the nature of law are about. Very roughly, there are three positions: such views aim to (1) describe our concept of law, (2) describe law itself, or (3) tell us what our concept of law should be. Bill Watson, *The Decline of Natural Law and the Rise of Exclusive Positivism*, 75 SMU L. REV. F. 174, 181–82 (2022). I am assuming that Hartian Positivism is a descriptive analysis of either our concept of law or law itself.

major players in this debate is itself controversial.[63] The classic formulation of positivists' key claim comes from John Austin: "The existence of law is one thing; its merit or demerit is another."[64] Put a little more precisely, *positivism* holds that, in any legal system, whether a norm is a legal norm ultimately depends on descriptive facts about what people say, think, do, etc.—and not on the norm's merit (not on whether it is good, right, or rational).[65]

By contrast, *antipositivism* holds that, in any legal system, the legality of some norms does depend on their merit. An answer to the question "What makes that the law?" may turn, for instance, on whether the norm in question is a rational standard of conduct[66] or whether it follows from principles that fit and morally justify a community's past institutional decisions.[67] These definitions of positivism and antipositivism are still not perfect, but they will suffice for our purposes here.[68] (There is also an intramural dispute between "inclusive" and "exclusive" positivists, but that dispute need not detain us because it has no practical upshot for first-order interpretive debates.[69])

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[63] For various formulations of the debate, see, e.g., Emad H. Atiq, *There Are No Easy Counterexamples to Legal Anti-Positivism*, 17 J. ETHICS & SOC. PHIL. 1, 1–2 (2020); John Gardner, *Legal Positivism: 5½ Myths*, 46 AM. J. JURIS. 199, 201 (2001); Jules L. Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139, 143 (1982).

[64] JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 157 (Wilfrid E. Rumble ed., Cambridge 1995) (1832).

[65] Positivism has been described as being committed to various theses. *See* Torben Spaak & Patricia Mindus, *Introduction to* THE CAMBRIDGE COMPANION TO LEGAL POSITIVISM 7 (Torben Spaak & Patricia Mindus eds., 2021) (discussing the "social thesis," the "separation thesis," the "thesis of social efficacy," and the "semantic thesis"). The definition offered above centers on a claim that is sometimes called the "social thesis." *See id.*

[66] *See* JONATHAN CROWE, NATURAL LAW AND THE NATURE OF LAW 143 (2019) (offering various formulations of the "natural law thesis").

[67] *See* DWORKIN, *supra* note 56, at 255 (proposing that judges search for "the best constructive interpretation of the political structure and legal doctrine of their community").

[68] Among other potential problems, these definitions do not specify the sort of metaphysical dependence relationship at issue. It is fashionable now to flesh out this relationship in terms of "grounding." *See, e.g.*, Samuele Chilovi, *Grounding-Based Formulations of Legal Positivism*, 177 PHIL. STUDS. 3283, 3286 (2020); David Plunkett, *A Positivist Route for Explaining How Facts Make Law*, 18 LEGAL THEORY 139,153 (2012). But some have questioned this grounding turn. *See generally* Brian Leiter, *Critical Remarks on Shapiro's Legality and the "Grounding Turn" in Recent Jurisprudence* (Sept. 16, 2020), https://ssrn.com/abstract=3700513; Dennis Patterson & Bosko Tripkovic, *The Promise and Limits of Grounding in Law*, 29 LEGAL THEORY 202 (2023). For our purposes, nothing turns on this dispute.

[69] Roughly put, inclusive positivism allows that the legality of a norm may contingently depend on its merit if descriptive facts make it so. *See, e.g.*, Wil Waluchow, *Four Concepts of Validity: Reflections on Inclusive and Exclusive Positivism*, *in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION 123, 123 (Matthew D. Adler & Kenneth Einar Himma eds., 2009). For instance, an inclusive positivist might say that, insofar as the Equal Protection Clause points to certain evaluative facts, those evaluative facts determine the validity of downstream legal norms. *See* JULES COLEMAN, THE PRACTICE OF PRINCIPLE 126 (2001). By contrast, exclusive positivism claims that legality never depends on merit. *See, e.g.*, SHAPIRO,

There are different positivist theories of law on offer,[70] but I will focus on just one such theory: Hartian Positivism. As noted above, Hartian Positivism is likely the dominant view of the nature of law among American legal theorists today.[71] By "Hartian Positivism," I mean a theory of law roughly like that which H.L.A. Hart advanced in his seminal *The Concept of Law*[72]—i.e., a theory on which what counts as law in any jurisdiction ultimately depends on customary practice. Or in more Hartian terms, what counts as law in any jurisdiction ultimately depends on social rules—called "rules of recognition"[73]—that identify and validate all of the jurisdiction's legal norms.[74]

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supra note 4, at 271. An exclusive positivist would say that the Equal Protection Clause at most gives judges a "directed power": it directs them to take certain evaluative facts into account when applying the Clause to make *new* law. *See* JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 242 (1996).

So, where inclusive positivists take judges to be applying existing law grounded partly in evaluative facts, exclusive positivists take judges to be making new law based in part on those same evaluative facts. This difference between applying and making law is orthogonal to first-order interpretive debates. It has no bearing on how judges should behave in hard cases; it only impacts how we characterize what they are doing—whether we talk of them as applying existing law or instead as making law new. In what follows, I will adopt exclusive positivism to avoid having to hedge at each point where exclusive and inclusive positivists would speak differently. But that is just choosing a manner of speaking and does not alter what is actually at stake in our first-order interpretive debates. *Cf.* Frederick Schauer, *On the Relationship between Law and Legal Reasoning*, *in* NEW ESSAYS ON THE NATURE OF LEGAL REASONING 5, 20–21 (Mark McBride & James Penner eds., 2023) (concluding that there are virtues and vices to thinking in either the inclusive- or the exclusive-positivist mode).

Combining Hartian Positivism with an exclusive-positivist manner of speaking might sound strange, given that Hart himself endorsed inclusive (or "soft") positivism. *See* HART, *supra* note 7, at 250. But that endorsement of inclusive positivism is not essential to Hartian Positivism, as defined here. An *inclusive* Hartian Positivist would have to give the following unwieldy answer to the meta-interpretive debate: interpretive theories aim to tell legal actors how they should proceed when a legal text's contribution to the law is either underdetermined or discoverable only by exercising moral-political judgment. We will see that an exclusive-positivist manner of speaking allows for a cleaner answer to the meta-interpretive debate—an answer that better isolates what we really care about, namely when and how legal actors should exercise their own moral-political judgment. *See infra* Part III.B.

[70] *See, e.g.*, Berman, *supra* note 4, at 1–2 (discussing Principled Positivism); SHAPIRO, *supra* note 4, at 213 (discussing the Planning Theory of Law).

[71] *See supra* text accompanying note 6.

[72] HART, *supra* note 7. I say "Hartian Positivism" rather than "Hart's Positivism" because I am interested in positivist theories associated with Hart, not exegesis of Hart's work.

[73] It is immaterial whether we speak of a single rule of recognition per jurisdiction (with potentially many clauses that can come into conflict) or of several rules of recognition per jurisdiction. Hart himself sometimes spoke of a single rule of recognition and at other times spoke of plural such rules. *See* HART, *supra* note 7, at 101–02.

[74] There is much debate over rules of recognition, including over whose attitudes and behaviors ground rules of recognition, *see infra* note 77 and accompanying text; over whether rules of recognition identify only sources of law or also explain how such sources contribute to the law, *see infra* note 110 and accompanying text; and over whether or in what

More specifically, rules of recognition specify which types of facts determine or constitute legal norms in their jurisdiction; they tell us which types of facts make law around here.[75] To illustrate, imagine a very simple legal system. Suppose that the only rule of recognition in the state of Rexland is: "Any directive that the monarch, Rex, speaks with the intention of making law is a legal norm." It follows that, to identify what the law is, we must look to what Rex says. If Rex says "All income earned in Rexland shall be taxed at a rate of 20%" with the intention of making law, his speech creates a legal norm that all income earned in Rexland shall be taxed at a rate of 20%.

What makes this rule a rule of recognition? Since rules of recognition are *social* rules, their existence depends on some group's behaviors and attitudes. The details here are controversial, but very roughly, a rule of recognition exists when nearly all of the right people in a jurisdiction regularly identify legal norms in accordance with the rule, take themselves as having a reason do so, and are disposed to criticize those who do not.[76] So, for the rule stated above to be a rule of recognition, enough of the right people in Rexland must regularly treat the directives that Rex speaks as legal norms, view themselves as having a reason to do so, and be disposed to criticize those who do not.

This account naturally raises a question: Who are these people whose behaviors and attitudes determine their jurisdiction's rules of recognition? Is it judges? The public at large? There is no clearcut answer to that question, and there may be room for variation in this regard between jurisdictions and even between different rules of recognition within the same jurisdiction.[77] For now, I will assume that the people whose attitudes and behaviors matter are a jurisdiction's officials—its judges, legislators, executive, etc.[78] Thus, if we

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sense rules of recognition are conventional, see generally Marcin Matczak, *Ruth G. Millikan's Conventionalism and Law*, 28 LEGAL THEORY 146 (2022); Julie Dickson, *Is the Rule of Recognition Really a Conventional Rule?*, 27 OXFORD J. LEGAL STUD. 373 (2007).

[75] *See* Watson, *supra* note 7, at 239; Bill Watson, *How to Answer Dworkin's Argument from Theoretical Disagreement Without Attributing Confusion or Disingenuity to Legal Officials*, 36 CAN. J. L. & JURIS. 215, 220 (2023).

[76] Here I am roughly following Hart's well-known practice theory of social rules. *See* HART, *supra* note 7, at 108. The practice theory is not without its problems. *See, e.g.*, ANDREI MARMOR, FOUNDATIONS OF INSTITUTIONAL REALITY 40–61 (2023) (surveying problems with the practice theory and offering refinements to it). But we do not need a very sophisticated understanding of the metaphysics of social rules for present purposes.

[77] *See* Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719, 726 (2006) (addressing whose attitudes and behaviors ground rules of recognition); Grant Lamond, *The Rule of Recognition and the Foundations of a Legal System*, *in* READING H.L.A. HART'S THE CONCEPT OF LAW 97, 109–12 (Luis Duarte d'Almeida, James Edwards & Andrea Dolcetti eds., 2013) (same).

[78] *See* HART, *supra* note 7, at 105 (focusing on a jurisdiction's officials). On the role of officials in Hartian jurisprudence, see generally Jorge Luis Fabra-Zamora, *A Hartian Account of Legal Officials*, *in* LEGAL POWER AND LEGAL COMPETENCE: MEANING, NORMATIVITY, OFFICIALS AND THEORIES 207 (Gonzalo Villa-Rosas & Torben Spaak eds., 2023).

were to reduce Hartian Positivism to a slogan, it might be: what most legal officials do and believe around here determines what the law is around here.

Notice that Hartian Positivism makes it practically inevitable that some legal questions will have no single right answer.[79] If the only criteria of legal validity are those that nearly all legal officials treat and accept as such, then the criteria of legal validity are bound to run out before legal questions do. Suppose once more that Rex says "All income earned in Rexland shall be taxed at a rate of 20%" with the intention of making law. Does the resulting legal norm require taxing income that Rexland residents earn by working remotely from home for employers in other countries? There is no uniquely right answer to that question because Rex, it seems, said nothing about it.[80]

To be clear, I do not mean that the law is bound to run out very often.[81] Nor do I mean that "anything goes" when the law does run out. We will see that, even when the criteria of legal validity underdetermine the answer to a legal question, they continue to bound legal actors' discretion by taking some answers off the table and may also guide actors' discretion by directing them to take certain factors into account.[82] To say that the law has run out is thus not to say that the law has become irrelevant. It is only to say that one cannot look to *just* the law to decide how to proceed; one must exercise some discretion—some moral-political judgment—to choose from a range of options.

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[79] *See* Brian Leiter, *Legal Positivism as a Realist Theory of Law*, *in* THE CAMBRIDGE COMPANION TO LEGAL POSITIVISM, *supra* note 65, at 79, 80–81 (observing that Hart's theory implies that the "adjudication of some legal disputes inevitably involves judgements that are not constrained by law"); RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 68 (2018) ("[P]urely linguistic and historical facts could not, even in principle, establish a sufficiently determinate original meaning to resolve most of the kinds of constitutional cases that come to the Supreme Court.").

[80] The point generalizes to more sophisticated legal systems. While these systems have more rules of recognition and legal norms, there will almost certainly remain cases in which their rules of recognition and legal norms are silent or inconclusive. Indeed, there is a tradeoff here: the more rules of recognition and legal norms a jurisdiction has, the less likely that the law will be silent on a legal question, but the more likely that the law will be inconclusive because different rules of recognition or legal norms point in different directions. *See* Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. PA. L. REV. 549, 552 (1993) ("Enriching the class of legal reasons will reduce indeterminacy owing to gaps, but . . . . [t]here may, then, [fail to be] . . . only one uniquely warranted outcome.").

[81] *See* Brian Leiter, *Explaining Theoretical Disagreement*, 76 U. CHI. L. REV. 1215, 1226–28 (2009) ("It is precisely because just about everyone agrees about the law that lawyers can tell most prospective clients who wander through the doors that they have no claim and should go home."); FALLON, *supra* note 79, at 94 ("In most actual and hypothetical cases . . . there will be no question concerning what the applicable constitutional rules, standards, or practices of recognition require.").

[82] *See infra* Part III.B.

II. HARTIAN POSITIVISM AND THE U.S. LEGAL SYSTEM

To see how Hartian Positivism answers the meta-interpretive debate, we first need to fill in the details of the Hartian picture and its application to our legal system a bit more. In this part, I first discuss how rules of recognition identify legal texts, then examine how those texts communicate specific content, and finally suggest how that communicative content relates to the law. I should stress that it is not my goal here to defend Hartian Positivism or win over its critics.[83] My goal instead is to lay out the Hartian picture for the sake of analyzing what it can—and cannot—teach us about legal interpretation.

A. Identifying Legal Texts

We said above that rules of recognition specify which types of facts make law.[84] Part of that task involves identifying their jurisdiction's *sources* of law—i.e., the customs, enactments, or precedents that serve to make law in that jurisdiction. Because first-order interpretive debates are not principally concerned with customary law, I will have little to say about customs here. I will focus instead on how rules of recognition identify certain texts, like constitutions, statutes, regulations, executive orders, and so forth. These texts are, to borrow a term from the philosophy of language, speech acts:[85] they are speech that not only communicates something but does something.[86]

More specifically, let us stipulate that *legal texts* are speech by which (1) one or more institutions with authority to make law (2) intend to exercise that authority. In practically every jurisdiction, there are certain institutions (electorates, legislatures, agencies, etc.) that have authority to make law. The only way for them to exercise that authority is by speaking—by expressing, either orally or in writing, their intent to give a norm the force of law. That speech is a legal text. (To be clear, it is the institution's *intent* to exercise its authority to make law that produces a legal text, regardless of whether the institution oversteps its authority or ultimately succeeds in making law.[87])

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[83] I have defended Hartian Positivism and addressed objections to it in prior work. *See generally* Watson, *supra* note 7 (arguing that Hartian Positivism offers a better explanation than rival theories of the fact that lawyers pervasively agree on the law in many cases); Watson, *supra* note 75 (responding to Dworkin's argument from theoretical disagreement).

[84] *See supra* text accompanying note 75.

[85] For an overview of contemporary speech-act theory, see generally Daniel W. Harris, Daniel Fogal & Matt Moss, *Speech Acts: The Contemporary Theoretical Landscape*, *in* NEW WORK ON SPEECH ACTS (Daniel W. Harris, Daniel Fogal & Matt Moss eds., 2018).

[86] MARMOR, *supra* note 59, at 12 ("[T]he collective action of the legislators enacting a law is a collective speech act."); Goldsworthy, *supra* note 11, at 49 ("[S]tatutes are . . . communicative acts to be understood in much the same way as other such acts in everyday life.").

[87] What if an institution speaks with the intention of exercising its lawmaking authority

From this definition of legal texts, it follows that the rules of recognition in any jurisdiction must, either directly or indirectly, identify (1) which institutions generally have lawmaking authority and (2) what must procedurally happen for those institutions to speak with the intent of exercising their authority. Put simply, rules of recognition must tell us *who* gets to make law and *how*. There are some jurisdictions where rules of recognition directly identify certain institutions as having lawmaking authority. For instance, I take it, following Hart, that one rule of recognition in Britain is something to the effect of: "Whatever the King in Parliament enacts is a legal text."[88]

Our legal system works differently because it has a written constitution. I will not try to detail every rule of recognition in the United States.[89] But one very important such rule is this: "The U.S. Constitution is a legal text" (where "the U.S. Constitution" refers to the document on display at the National Archives that we presume was ratified in 1788).[90] This rule identifies the U.S. Constitution as a sort of foundational legal text that creates institutions, vests them with authority to make law, and partially specifies what must happen for those institutions to exercise their authority (e.g., a bill must pass both houses of Congress and be signed by the President to become a statute[91]).

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but oversteps its authority (such as when Congress enacts an unconstitutional statute)? In that event, the institution's speech is still a legal text. But the speech act is infelicitous, in the sense that its contribution to the law is (or more precisely, could be held to be) unenforceable. *See, e.g.*, Close v. Sotheby's, Inc., 909 F.3d 1204, 1209–10 (9th Cir. 2018) (explaining that a federally preempted state statute remains on the books but is unenforceable).

[88] *See* HART, *supra* note 7, at 107. Hart puts the rule in terms of "law" rather than "legal texts." *Id.* He likely means that whatever the King in Parliament enacts is a legal text and therefore a source of legal norms. *See* Lamond, *supra* note 77, at 117 ("[T]he rule of recognition in England would identify . . . enactments of Parliament . . . as (sources of) law.").

[89] Doing so would require its own article. *Cf.* Kent Greenawalt, *The Rule of Recognition and the Constitution*, *in* THE RULE OF RECOGNITION, *supra* note 69, at 1, 36–37 (offering one view of the rules of recognition in the United States); Kenneth Einar Himma, *Understanding the Relationship Between the U.S. Constitution and the Conventional Rule of Recognition*, *in* THE RULE OF RECOGNITION, *supra* note 69, at 95, 120 (offering a different view).

[90] This makes the U.S. Constitution a special kind of legal text. It was spoken by institutions (state ratifying conventions) that had authority to make law (based on a rule of recognition with content roughly equivalent to Article VII). Yet the U.S. Constitution owes its status as a legal text today not to those historical facts but instead to a present-day consensus that *directly* identifies the U.S. Constitution as our federal constitution. Of course, one could argue that the relevant rule of recognition today is still a rule with content roughly equivalent to Article VII. But that seems unlikely. A thought experiment shows why: Suppose that we were to discover tomorrow that the U.S. Constitution had never satisfied the ratification process detailed in Article VII. Would officials still treat the U.S. Constitution as a legal text? I have little doubt that they would. *Cf.* David E. Pozen & Thomas P. Schmidt, *The Puzzles and Possibilities of Article V*, 121 COLUM. L. REV. 2317, 2339–70 (2021) (discussing arguable deficiencies in the ratification of most federal constitutional amendments).

[91] U.S. CONST., art. I, § 7. We can tell a similar story about how rules of recognition identify state constitutions, which then create institutions with authority to make state law.

A striking feature of our legal system is that we virtually never disagree over what counts as a legal text.[92] Of course, we sometimes disagree over the constitutionality of a text—i.e., over whether an institution *exceeded* its authority to make law.[93] But we virtually never disagree over whether an institution generally has authority to make law or intended to exercise that authority on some occasion.[94] We do not hear lawyers making arguments like "Your Honor, the text that opposing counsel said was a statute is not really a statute." So, while it may be hard to articulate every rule for identifying legal texts, there is almost zero disagreement over what they are or how to apply them.

B. Legal Texts' Communicative Content

Although legal texts are speech acts, they differ in some respects from most speech acts in everyday conversations among friends, coworkers, etc.[95] Perhaps most importantly, legal texts are often spoken by collectives composed of many people, like electorates or legislatures. This fact complicates how we discern those texts' communicative content.[96] On one picture of how communication works, a speaker's *intention* to convey certain content determines their speech's communicative content.[97] Collectives, however, do not have minds and so cannot literally form intentions or other mental states.[98]

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[92] Watson, *supra* note 75, at 234–35; *see also* Tim Dare, *Disagreeing about Disagreement in Law: The Argument from Theoretical Disagreement*, 38 PHIL. TOPICS 1, 8 (2010) (noting how rare it is for judges and lawyers to disagree over whether a statute exists).

[93] Take *Shelby County v. Holder*, 570 U.S. 529 (2013), where the Supreme Court divided over the constitutionality of the coverage formula in § 4(b) of the Voting Rights Act. The majority held that the formula was unconstitutional. *See id.* at 557. The dissent disagreed. *See id.* at 560 (Ginsburg, J., dissenting). But all of the justices agreed that § 4(b) was *part of a statute*—that Congress had spoken § 4(b) with the intention of making law.

[94] Of course, there are notable exceptions. *See, e.g.*, Luther v. Borden, 48 U.S. 1, 47 (1849) (holding, in a dispute involving an attempt to overthrow the government of Rhode Island, that identifying a state's operative constitution is a political question, not a legal one).

[95] For instance, legal texts are normally written, not spoken, and there may be a long lag time, measured in decades or even centuries, between when they are spoken and when they are applied. In addition, the conversation goes in only one direction: there is no opportunity for law-appliers to ask the enacting institution to clarify what it meant. On these and other differences between legal texts and most speech acts in everyday conversations, see Felipe Jiménez, Minimalist Textualism (Oct. 18, 2023) (unpublished manuscript at 39–42) (on file with author); PAOLO SANDRO, THE MAKING OF CONSTITUTIONAL DEMOCRACY: FROM CREATION TO APPLICATION OF LAW 201–02 (2022).

[96] *See* Mark Greenberg, *Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication*, *in* LANGUAGE IN THE LAW 217, 239–41 (Andrei Marmor & Scott Soames eds., 2013) (raising this worry with respect to statutes).

[97] PAUL GRICE, STUDIES IN THE WAY OF WORDS 122–23 (1991).

[98] We can put to the side instances where a collective, like a corporation or a club, speaks through a designated spokesperson. Electorates and legislatures do not operate that way.

So, it is worth pausing to consider how they can communicate anything at all.

While collectives cannot literally form intentions, we do routinely attribute intentions to them, as when we say that a baseball team "intended" to win a game or that a hiring committee "intended" to invite someone to an interview.[99] Attributing intentions to collectives may involve a degree of metaphor or fictionalization,[100] but it need not be mysterious. Legal institutions have well-established voting procedures, the very purpose of which is to enable us to attribute intentions to them.[101] In essence, those procedures aggregate the votes of many members into a single institutional speech act—a single institutional "intention" to speak a text and thereby make law.

At the same time, collectives like electorates and legislatures clearly do not have as robust of communicative intentions as individuals in everyday conversations.[102] Individuals can intend to convey a different message than their audience would reasonably take them to convey. If I tell a friend "I'll be in my office" with the intent of expressing that I will be in my home office, my friend might, quite reasonably, take me to be expressing that I will be in my office on campus. That sort of divergence between subjectively intended meaning and reasonably understood meaning is generally not possible for legal institutions that speak by aggregating the votes of many members.

When an electorate or a legislature enacts a legal text, all that it "intends" to communicate by the text, and all that its members assent by their votes to it communicating, is what the text's audience would reasonably understand it to communicate in context.[103] The only communicative intention that we can attribute to the *institution itself* is an intention to convey whatever reasonable readers in the intended audience would take the text to convey. It follows that, if reasonable readers in the intended audience would disagree

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[99] MARMOR, *supra* note 59, at 16–22.

[100] *See* Ryan D. Doerfler, *Who Cares How Congress Really Works*, 66 DUKE L.J. 979, 983 (2017) (defending fictionalism with regard to Congressional intent); Jiménez, *supra* note 96 (manuscript at 44) ("Even those who believe collective agents exist, and that a legislature might be one of them, accept that the concept of legislative intent is metaphorical.").

[101] *See* MARMOR, *supra* note 59, at 18 ("Voting procedures are meant to generate an institutional decision.").

[102] *See* Fallon, *supra* note 1, at 275 ("American legislatures are not the kinds of entities capable of having *collective* communicative intentions in the same rich, psychological sense as individuals."); Doerfler, *supra* note 100, at 998 ("Congress as structured is reliably incapable of forming collective intentions other than the bare intention to enact text into law.").

[103] *See* Richard H. Fallon Jr., *The Chimerical Concept of Original Public Meaning*, 107 VA. L. REV. 1421, 1430–32 (2021) (arguing that constitutions embody only minimal communicative intentions "to create binding law and to convey, in English, whatever a reasonable listener would *necessarily or noncontroversially* understand the words of the provision . . . to require, provide, or stipulate"); MARMOR, *supra* note 59, at 18–22 (suggesting that we view asserted content "as the kind of content that a reasonable hearer, sharing the relevant contextual knowledge, would infer that the utterance says in the context of its expression").

over whether the text conveys *X* or *Y*, there is no answer to whether the text conveys *X* or *Y*. The text's communicative content is underdetermined.

Who are these reasonable readers? Are they lawyers? Legislators? Laypeople? What do they know about our law and traditions? There are no easy answers to these questions, and the answers may vary from one legal text to the next. One of the key themes of this Article is that we should not look for specificity where there is none to be found. We will see that this uncertainty over a legal text's intended audience creates a matching uncertainty over its context.[104] *Context* is information that is mutually salient to the speaker and the audience—information that the speaker can expect the audience to be aware of.[105] When the audience's identity is uncertain, context may be too.

Of course, none of this prevents us from grasping what legal texts communicate and how they apply in most cases.[106] If a statute says "Drivers must not exceed 65 mph on highways," we usually have no trouble understanding what it is asking us to do. But our discussion so far does suggest that a legal text's *clear* communicative content will often be a function of just the conventional meanings of its words, the rules of syntax, and minimal context that almost anyone can be expected to know about their legal system or the world.[107] (In philosophical jargon, its clear communicative content will often be its semantic content, with only minimal pragmatic enrichment.[108])

C. Legal Texts' Contribution to the Law

Identifying what counts as a legal text gets us partway toward identifying legal norms, but it cannot get us all of the way there because these texts are not themselves norms.[109] We still need to know *how* legal texts create legal norms, i.e., *how* they contribute to the law. I will assume, though not all Hartian Positivists agree on this score,[110] that rules of recognition play a role here

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[104] *See infra* text accompanying notes 131–132.

[105] *See* Kent Bach, *Context* ex Machina, *in* SEMANTICS VERSUS PRAGMATICS 15, 19 (Zoltán Gendler Szabó ed., 2005) (communicative success involves making the speaker's communicative intention evident and enabling the audience to recognize it in light of "mutually salient information that comprises the extralinguistic cognitive context of utterance").

[106] Watson, *supra* note 7, at 236; *see also* David A. Strauss, *Why Plain Meaning?*, 72 NOTRE DAME L. REV. 1565, 1566 (1997) ("In countless settings, . . . [t]he notion that [people] should do something other than read the words, and assign them the intuitively obvious meaning, is so alien that it is difficult even to describe what the alternative would be.").

[107] The account that I offer here of legal texts' communicative content and their relationship to the law bears some similarity to Sandro's treatment of the subject. *See* SANDRO, *supra* note 95, at 169–210 (applying "semantic minimalism" to legal texts).

[108] On semantics and pragmatic enrichment, see MARMOR, *supra* note 59, at 33–34.

[109] *See* Erik Encarnacion, *Text Is Not Law*, 107 IOWA L. REV. 2027, 2031 (2022) ("[C]onflating text and law is a potentially harmful mistake.").

[110] *Compare* Grant Lamond, *Legal Sources, the Rule of Recognition, and Customary*

as well. In other words, I will assume that rules of recognition determine not just what counts as a source of law but also how any such source contributes to the law. Accordingly, to understand how legal texts contribute to the law we must look once more to legal officials' convergent practice.[111]

Let us put aside how precedents contribute to the law and focus just on legal texts that are ratified or enacted, like constitutions or statutes. I propose that officials in the United States converge on the criterion that these texts' clear communicative content—or in lawyerly terms, their "plain meaning"—is their contribution to the law.[112] I will address objections to this proposal below,[113] but for now, I simply want to get the proposal on the table. The idea

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Law, 59 AM. J. JURIS. 25, 29 (2014) ("[T]he rule of recognition constitute[es] the different *sources* of law."), *and* ANDREI MARMOR, SOCIAL CONVENTIONS: FROM LANGUAGE TO LAW 155 (2009) ("[Rules of recognition] determine . . . the *sources of law*."), *with* Mark Greenberg, *Hartian Positivism and Normative Facts: How Facts Make Law II*, *in* EXPLORING LAW'S EMPIRE: THE JURISPRUDENCE OF RONALD DWORKIN 265, 271 (Scott Hershovitz ed., 2008) (the rule of recognition determines "the content of the law"), *and* Brian Leiter, *Back to Hart*, 69 ANNALS BELGRADE L. REV. 749, 756 (2021) ("[T]he rule of recognition is supposed to . . . identify which norms are legally valid norms. And so it seems we have to know a little bit more than just what the sources of law are."). For further discussion, see Felipe Jiménez, *Legal Principles, Law, and Tradition*, 33 YALE J. L. & HUMANS. 59, 81–84 (2022).

[111] This is where Hartian Positivism may seem to run into trouble: a perennial objection to Hartian Positivism is that legal officials do not converge on how legal texts contribute to the law. *See* DWORKIN, *supra* note 56, at 3–5; Scott J. Shapiro, *The "Hart–Dworkin" Debate: A Short Guide for the Perplexed*, *in* RONALD DWORKIN 22, 35–40 (Arthur Ripstein ed., 2007). The mistake that this objection makes, as I have argued elsewhere, is to demand more fine-grained convergence on which facts determine legal norms than is needed to support a rule of recognition. *See* Watson, *supra* note 75, at 233–36. Legal officials do converge on how legal texts contribute to the law but at a fairly high level of generality. *See id.*

[112] This rule for how legal texts contribute to the law is sometimes called the "standard picture." *See, e.g.*, Greenberg, *supra* note 55, at 43. The standard picture is so called because it offers a popular and intuitive picture of how legal texts contribute to the law. Some have argued that the standard picture does not accurately describe our practice. *See, e.g.*, *id.* at 72–81; William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1085–1093 (2017). But these critics generally attack only a caricature of the standard picture. *See* Bill Watson, *In Defense of the Standard Picture: What the Standard Picture Explains that the Moral Impact Theory Cannot*, 28 LEGAL THEORY 59, 76–87 (2022); Aaron Graham, *The Standard Picture and Statutory Interpretation*, 36 CAN. J. L. JURIS. 341, 348–57 (2023).

My presentation of the standard picture here differs a bit from how I have presented it before. I previously proposed that a legal text's communicative content is its contribution to the law, and insofar as its communicative content is underdetermined, its contribution to the law is underdetermined too. Watson, *supra*, at 76–87. By contrast, I emphasize here that only a legal text's *clear* communicative content is its contribution to the law. I include this clarity condition because officials do *not* agree on where to look for a text's contribution to the law when the text's communicative content falls below some loose threshold of clarity. *See infra* Part III.C.2. Anything below that threshold cannot be the law, though the text's communicative content continues to limit how one may remedially interpret it. I see this clarity condition as more a change in emphasis or presentation than a change in the substance of my view.

[113] *See infra* Par III.C.

is that, if a statute clearly conveys that drivers shall not exceed 65 mph on highways, its contribution to the law is exactly a norm that drivers shall not exceed 65 mph on highways. Nothing more and nothing less.[114]

Insofar as the statute's communicative content provides clear direction in the case at hand, there is legally correct answer to what the statute requires in that case. For instance, the speeding statute imagined above clearly forbids me from driving 75 mph on a highway just to get home a little faster. But insofar as the statute's communicative content fails to provide clear direction in the case at hand, its contribution to the law is underdetermined, and judges or other legal actors may then employ different means of choosing from a range of legally permissible answers. Some may look to what the statute *most likely* communicates; some may look to its legislative history or purpose; etc.

I should stress that a legal text's plain meaning is identical only to its individual contribution to the law, which might differ from what *the law as a whole* requires. To see what the law as a whole requires we normally must look to multiple sources.[115] Omissions or ambiguities in one source's contribution to the law may be mitigated by another source's contribution. Perhaps we must look to not just a statute but also a regulation implementing the statute (or a court's prior interpretation of the statute). For instance, while the speeding statute imagined above does not itself exempt emergency vehicles from the speed limit, presumably another source's contribution would do so.

What is the evidence for this plain-meaning criterion of legal validity? To start, the criterion may just follow from the idea that an institution has *authority* to make law. If an institution clearly expresses that the law is *X*, and it is within the institution's authority to make the law *X*, then the law is *X*. To deny that conclusion would, it seems, be to deny that the institution has authority to make the law that it intends to make. In any event, the label "plain meaning" also functions as a sort of conversation-stopper in our legal system. To say that a text's meaning is plain—that what it communicates is clear—is to announce that we need look no further for its contribution to the law.[116]

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[114] A couple clarifications about the rule of recognition proposed here are in order. First, a better statement of the rule is that a legal text's clear *imperatival* communicative content (i.e., the directives that the text clearly communicates) is its contribution to the law. A text's nonimperatival communicative content (e.g., legislative findings) is not normative and so cannot be part of what the text contributes to the law, though it can be *evidence* of what the text contributes to the law. For ease of presentation, however, I will speak in terms of just "clear communicative content" or "plain meaning" in the main text. Second, this rule only states how non-precedential texts contribute to the law. It does not state how precedential texts, like some judicial or agency opinions, contribute to the law because what those texts communicate is not dispositive of the law that they make. *Cf.* Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 955 (2005) (noting that an precedential opinion's statement of its holding may not resolve what its holding is).

[115] Watson, *supra* note 112, at 81–82.

[116] *See, e.g.*, Bostock v. Clayton County, 140 S. Ct. 1731, 1749 (2020) ("[W]hen the

We can put the same point in more doctrinal terms. A common formulation of the plain-meaning rule is: "Where the language is plain and admits of no more than one meaning, *the duty of interpretation does not arise*, and the rules which are to aid doubtful meanings need no discussion."[117] That is, where a legal text's communicative content is clear, the text's contribution to the law is clear too, and courts need only apply it to the case at hand. The need to remedially interpret the text arises only when the text's communicative content is not clear. My proposal, in effect, is that the plain-meaning rule is a rough articulation of one rule of recognition in our legal system.[118]

To be sure, the foregoing evidence suggests only that legal texts' plain meaning has lexical priority in determining their contributions to the law—that plain meaning is where we look first to ascertain their contributions to the law. Might there be something else about legal texts that determines their contributions to the law when their meaning is not plain? That seems conceptually possible.[119] It could be a rule of recognition that, when a legal text's meaning is not plain, its contribution to the law is what it *most likely* communicates. Or it could be a rule of recognition that, when a legal text's meaning is not plain, its contribution to the law is what best fulfills its apparent purpose (or what best comports with how officials have applied it so far).

But I see little evidence of officials converging on such a rule today. What to do when a legal text's clear communicative content runs out, and no other legal norm fills the gap, seems to be precisely where officials' convergence breaks down. Once a legal text's clear communicative content has been exhausted, some officials may continue parsing the text, but others may turn to

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meaning of the statute's terms is plain, our job is at an end."); Conn. Nat. Bank v. Germain, 503 U.S. 249, 254 (1992) ("When the words of a statute are unambiguous, then . . . 'judicial inquiry is complete.'" (quoting Rubin v. United States, 449 U.S. 424, 430 (1981))). Is it a problem that courts have articulated this rule of recognition in precedent and hence arguably encoded it into law? I do not think so. We might think that there is both a plain-meaning rule of recognition grounded in officials' convergent practice *and* a plain-meaning legal rule grounded in precedent. It would not be surprising for the rule of recognition and the legal rule to have similar or identical content, since the legal rule provides a salient standard around which officials can organize their conduct. Alternatively, we might deny that rules governing how legal texts relate to the law, like the plain-meaning rule, are legal rules.

[117] Caminetti v. United States, 242 U.S. 470, 485 (1917) (emphasis added); *accord* Campbell v. Allied Van Lines Inc., 410 F.3d 618, 621 (9th Cir. 2005); United States v. Dickson, 816 F.2d 751, 752 (D.C. Cir. 1987).

[118] I hasten to add that immense confusion surrounds the plain-meaning rule. *See, e.g.*, William Baude & Ryan D. Doerfler, *The (Not So) Plain Meaning Rule*, 84 U. CHI. L. REV. 539, 545–46 (2017) (noting some difficulties in understanding the plain-meaning rule). My proposal here is an attempt to not just describe but also make sense of a, concededly, messy part of our practice. For helpful analysis of the plain-meaning rule, see generally Marco Basile, *Ordinary Meaning and Plain Meaning*, VA. L. REV. (forthcoming).

[119] As noted above, how to interpret legal texts whose communicative content is unclear may not be as contested in some states or foreign countries. *See supra* note 37.

its legislative history, its apparent purpose, past practice, or something else.[120] And even if officials did agree on the appropriate universe of such items to consider, they would certainly disagree over how to weight or adjudicate among those items insofar as they pointed in different directions.

III. HARTIAN POSITIVISM'S ANSWER TO THE META-INTERPRETIVE DEBATE

Here is my key claim: if Hartian Positivism is right, then sociologically hard cases (where many lawyers disagree over what the law directs) are nearly all metaphysically hard cases (where there is no single right answer to what the law directs). That being so, the remedial answer to the meta-interpretive debate is the only one that makes sense, rather than nonsense, of first-order interpretive debates. Interpretive theories are primarily about how to go on when a legal text's contribution to the law is underdetermined. That conclusion, we will see, matters to how we understand and defend such theories.

A. Metaphysically Hard Cases

On the Hartian picture outlined above, common causes of disagreement over the law are likewise causes of underdeterminacy: the very things that lead us to disagree over what the law is also suggest that there is no single right answer to what the law is. We can divide these causes of disagreement over the law into three rough categories: (1) semantic, (2) pragmatic, and (3) legal. Philosophers of language distinguish semantics, which concerns the information that a text conveys just in virtue of its words and syntax, from pragmatics, which concerns the information that a text conveys in virtue of its context.[121] Some semantic causes of disagreement over the law include:

- POLYSEMY: A word in a legal text may have multiple related meanings.[122] Insofar as context fails to clearly identify which of the word's meanings is operative, the text's contribution to the law is underdetermined. For instance, it could be unclear whether the word "vegetable" in a tariff statute refers to vegetables in a

[120] *See* sources cited *supra* note 3.

[121] This is a rough formulation of the distinction; the dividing line between semantics and pragmatics is controversial but need not detain us here. *Compare* Bach, *supra* note 105, at 22–29 (offering a more minimal view of semantic content), *with* Jeffrey C. King & Jason Stanley, *Semantics, Pragmatics, and the Role of Semantic Content*, *in* SEMANTICS VERSUS PRAGMATICS, *supra* note 105, at 113 (offering a more capacious view of semantic content).

[122] *See* MARMOR, *supra* note 59, at 120–22. I am purposefully leaving lexical ambiguity (when a term has multiple unrelated meanings) off this list. Lexical ambiguity almost never causes legal underdeterminacy; by contrast, polysemy much more often does. *See id.* at 121.

scientific sense that does not include tomatoes or rather to vegetables in a colloquial sense that does include tomatoes.[123]

- VAGUENESS: A word in a legal text may have borderline cases in which there is no fact as to whether the word applies to a particular object or not.[124] Insofar as context fails to render the word's extension (i.e., the set of objects to which it refers) more precise, the text's contribution to the law is underdetermined. For example, it might be unclear whether the word "vehicle" applies to airplanes in a statute that prohibits the transportation of stolen vehicles.[125]
- SYNTACTIC AMBIGUITY: A legal text's syntax may be such that the text could express either of two directives.[126] It may be unclear, for instance, whether the adverb "knowingly" modifies a subsequent clause in a criminal statute or not.[127] Insofar as context fails to clearly identify which directive the text does communicate, the text's contribution to the law is underdetermined.

Other causes of disagreement over the law are pragmatic, in the sense that they are more a function of a text's context. Recall that context is information that is mutually salient to the speaker and the audience—information that the speaker could expect the audience to be aware of.[128] Context often renders communicative content more determinate.[129] But crucially, context can also

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[123] *See* Nix v. Hedden, 149 U.S. 304 (1893). For more examples of polysemy in statutes, see Bill Watson, *Textualism, Dynamism, and the Meaning of "Sex*,*"* 2022 CARDOZO L. REV. DE NOVO 41, 45–46; Bill Watson, *Literalism in Statutory Interpretation: What Is It and What Is Wrong with It?*, 2021 U. ILL. L. REV. ONLINE 218, 222–23.

[124] *See* MARMOR, *supra* note 59, at 85–86. There is also an epistemic view of vagueness, on which there is a fact about whether a vague term applies in borderline cases but the fact is unknowable. *See* TIMOTHY WILLIAMSON, VAGUENESS 185 (1994). This epistemic view of vagueness would make no difference for our purposes; whether the application of a legal text is indeterminate or unknowable, legal actors cannot tell what it is asking them to do.

[125] *See* McBoyle v. United States, 283 U.S. 25 (1931). Many instances of vagueness in the law could be redescribed as polysemy; in practice, the distinction is quite blurry. *See* John O. McGinnis & Michael B. Rappaport, *The Power of Interpretation: Minimizing the Construction Zone*, 96 NOTRE DAME L. REV. 919, 945 (2021) (arguing that many questions thought to involve vagueness might involve "related-meaning ambiguity," i.e., polysemy).

[126] *See* Sanford Schane, *Ambiguity and Misunderstanding in the Law*, 25 T. JEFFERSON L. REV. 167, 171–72 (2002).

[127] United States v. X-Citement Video, 513 U.S. 64 (1994) (addressing syntactic ambiguity arising from uncertainty over whether "knowingly" modified "use of a minor"); *see also* Young v. Cmty. Nutrition Inst., 476 U.S. 974 (1986) (addressing syntactic ambiguity resulting from unclarity over whether a clause in a statute modified one word or another).

[128] *See supra* text accompanying note 105.

[129] *See* SCOTT SOAMES, *Interpreting Legal Texts: What Is, and What Is Not, Special about the Law*, *in* PHILOSOPHICAL ESSAYS: NATURAL LANGUAGE—WHAT IT MEANS AND HOW WE USE IT 403, 404 (2008) ("Semantic content is often merely a vehicle for getting to

have the opposite effect: it can sometimes throw otherwise clear communicative content into doubt.[130] This sort of context-induced unclarity is a frequent cause of disagreement over the law and can work in tandem with the semantic mechanisms identified above. Some examples are:

- AUDIENCE IDENTITY: It is usually unclear exactly who is in a legal text's audience or what information that audience would find salient.[131] Insofar as information that may or may not count as context would license inferring that a legal text communicates different content, the text's contribution to the law is underdetermined. For instance, it may be unclear whether a text's audience would take a certain word to have a technical legal meaning or not.[132]
- IMPLICATURE: We often infer that a speaker implicates something different from what they literally said because what they literally said is false, irrelevant, or contrary to our expectations.[133] Yet it is sometimes unclear how one would expect a lawmaker to speak (e.g., would one expect Congress to require mens rea for every element of a crime?[134]). Insofar as uncertainty over the applicable conversational norms renders what a legal text implicates unclear,[135] the text's contribution to the law is underdetermined.
- SCRIVENER'S ERROR: It is sometimes obvious that a speaker misspoke, such that any reasonable hearer would take the speaker to express something different from what the speaker literally said.[136] But at other times, matters are not so obvious. Insofar as it

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pragmatically enriched content.").

[130] *See* Andrei Marmor, *Defeasibility and Pragmatic Indeterminacy in Law*, *in* PRAGMATICS AND LAW: PRACTICAL AND THEORETICAL PERSPECTIVES 15, 27–31 (Francesca Poggi & Alessandro Capone eds., 2017) (offering examples of how "pragmatic forms of defeasibility may render legal content indeterminate").

[131] *See supra* text accompanying notes 104–105.

[132] Rimini St., Inc. v. Oracle USA, Inc., 139 S. Ct. 873, 881 (2019) (holding that the term "costs" in a provision of the Copyright Act bore a technical meaning); *see also* Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 591–97 (2004) (stating that the meaning of the term "age" was "a matter of context," and looking to "social history" as context).

[133] *See* GRICE, *supra* note 97, at 26.

[134] *See* Staples v. United States, 511 U.S. 600 (1994) (considering whether mens rea was required for an element of a crime); *see also* Abitron Austria GmbH v. Hetronic Int'l, Inc., 600 U.S. 412 (2023) (addressing whether statutory provisions applied extraterritorially).

[135] *See* MARMOR, *supra* note 61, at 56 (observing that there is "uncertainty about the relevant maxims of conversation" governing legislative speech, which "is generated by the courts' selective and not-quite-predictable application of the relevant maxims").

[136] *See* Ryan D. Doerfler, *The Scrivener's Error*, 110 NW. U. L. REV. 811, 817 (2016) ("[A] 'scrivener's error' is a case in which the words of a legislative text diverge from what Congress *meant* to say."). For examples of obvious scrivener's errors that did not lead to legal underdeterminacy, see United States v. Scheer, 729 F.2d 164, 169 (2d Cir. 1984) (a

> is plausible, but not certain, that an institution misspoke, a legal text's contribution to the law is underdetermined. For instance, it may be unclear whether a filing deadline of "not less than 7 days" was supposed to say "not more than 7 days."[137]

Lastly, there are legal causes of disagreement over the law. Even if every relevant source's contribution to the law is crystal clear, the law as a whole may still be underdetermined because two coordinate legal norms conflict. Insofar as officials have no convergent practice for resolving such a conflict, the law as a whole is underdetermined. This may occur, for instance, when two statutes communicate contradictory norms,[138] when two canons of interpretation point in different directions,[139] or when a statute's communicative content suggests answering a question one way but a court's prior (mis)interpretation of the statute suggests answering the question differently.[140]

The point is that there are numerous mechanisms that can occasion disagreement over the law and those same mechanisms tend to render a text's contribution to the law or the law as a whole underdetermined. On the Hartian picture presented above, it appears that disagreement over the law and underdeterminacy in the law will generally coincide. Needless to say, we have not definitively proven that hypothesis, and empirically testing it is probably not feasible. But the foregoing discussion provides at least strong intuitive and anecdotal support for the conclusion that, if Hartian Positivism is right, then sociologically hard cases are overwhelmingly metaphysically hard ones.[141]

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statute stating "upon *request* of the . . . request" plainly meant "upon *receipt* of the . . . request"); Cernauskas v. Fletcher, 211 Ark. 678, 680 (1947) (a statute stating "[a]ll laws . . . are hereby repealed" plainly did not repeal the entire state legislative code).

[137] *See* Amalgamated Transit Union Loc. 1309 v. Laidlaw Transit Serv., 435 F.3d 1140 (9th Cir. 2006) (concerning whether "not less than 7 days" was an error for "not more than 7 days"); *see also* United States v. Locke, 471 U.S. 84 (1985) (addressing whether "prior to December 31" was an error for "on or before December 31").

[138] *See, e.g.*, Morton v. Mancari, 417 U.S. 535 (1974) (concerning an apparent conflict between the Indian Reorganization Act and the Equal Employment Opportunity Act).

[139] *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950) (famously arguing that canons of interpretation frequently conflict with each other).

[140] An arguable example might be *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). Suppose for the sake of argument that, contrary to the majority's reasoning, the only plausible reading of Title VII was that it did not prohibit discrimination on the basis of sexual orientation or gender identity. *See* Mitchell N. Berman & Guha Krishnamurthi, Bostock *Was Bogus: Textualism, Pluralism, and Title VII*, 97 NOTRE DAME L. REV. 67, 72 (2021). Nevertheless, the Court's sex-stereotyping precedents strongly suggested that the common-law built up around Title VII did prohibit such discrimination. *See* Zarda v. Altitude Express, Inc., 883 F. 3d 100, 121 (2018) (en banc). The tension between Title VII's contribution to the law and this common-law would then result in the law as a whole being underdetermined.

[141] For the most part, the only instances where sociologically hard cases will not be

B. Remedial Interpretation

The question now is: What can Hartian Positivism teach us about legal interpretation? Recall the four answers to the meta-interpretive debate surveyed above. The linguistic answer—that interpretive theories aim to grasp a legal text's communicative content—has little going for it, regardless of the truth or falsity of Hartian Positivism. Many interpretive theories, like pragmatism or Thayerism, have nothing to do with grasping communicative content. Moreover, the normative arguments that theorists routinely make in support of their preferred interpretive theories (about democracy, the rule of law, etc.[142]) have no obvious connection to grasping communicative content.

The legal answer—that interpretive theories aim to tell us how a legal text contributes to the law—is more interesting because some theorists do claim that this is what first-order interpretive debates are centrally about.[143] But Hartian Positivism shows why that answer makes little sense. First-order interpretive debates focus on what judges or other legal actors should do in sociologically hard cases where many lawyers disagree over what the law directs.[144] And we just saw that, if Hartian Positivism is right, then these sociologically hard cases will overwhelmingly be metaphysically hard cases where there is no single right answer to what the law directs.[145]

So, if Hartian Positivism is right, then the legal answer to the meta-interpretive debate implies that our first-order interpretive debates are deeply confused—that we are strangely fixated on arguing over what the law directs in cases where there is no single right answer to what the law directs. For the same reason, Hartian Positivism makes the epistemic answer (that interpretive theories concern how legal actors epistemically should grasp a legal text's contribution to the law) unappealing. Again, if Hartian Positivism is

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metaphysically hard are when lawyers are widely mistaken about the facts that, in light of prevailing rules of recognition, determine what the law is. For instance, lawyers may be widely mistaken about the plain meaning of an old text because something about its semantics or context is no longer widely known or has been lost to history. Such widespread errors, however, are likely to be rare and of marginal significance. That is partly because legal texts' contributions to the law usually lose importance over time, as the bodies of common law built up around them take on a larger role (assuming the texts are frequently litigated).

[142] *See, e.g.*, Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 172 (2008) ("[T]he normal way of defending a given method of constitutional reasoning is to argue that it respects, or better yet promotes, values like democracy or the rule of law."); Lawrence B. Solum, *Originalist Theory and Precedent: A Public Meaning Approach*, 33 CONST. COMMENT. 451, 461 (2018) (noting two primary strands of justification for originalism based on "the rule of law" and "democratic legitimacy").

[143] *See* sources cited *supra* note 56.

[144] *See supra* Part I.A.

[145] *See supra* Part III.A.

right, then there is nothing to grasp in the cases primarily under discussion: there is no uniquely right answer to what the law directs in these cases.

That leaves the remedial view of legal interpretation—that interpretive theories concern how legal actors should proceed when a legal text's contribution to the law is underdetermined. In other words, interpretive theories tell legal actors how they should go on when the law runs out and they must exercise their own moral-political judgment to decide what to do. Notably, this conclusion coheres with the fact that most arguments justifying interpretive theories are moral-political arguments about democracy, the rule of law, etc.[146] While some facets of our first-order interpretive debates may touch on other topics, the core of the debates concerns remedial interpretation.

Before proceeding, let me say a bit more about what remedial interpretation is and is not. A legal text requires remedial interpretation when its meaning is less than plain. Or more precisely, a legal text requires remedial interpretation when there are multiple minimally plausible answers to what the text communicates or how it applies to a given situation. Remedial interpretation thus involves evaluating and selecting from a range of legally permissible answers. That is quite different from legislating on a blank slate: the interpreter cannot decide that the law directs just anything but rather remains constrained by what the text could, at least colorably, communicate.

Sometimes, the law itself answers how to proceed when a legal text's contribution to the law is underdetermined. Most obviously, this occurs when a precedential interpretation of the text clearly instructs legal actors to enforce the text one way. But it may also occur if the "law of interpretation"[147]—such as the rule of the lenity,[148] presumption against extraterritoriality,[149] *Chevron* doctrine,[150] and so on—clearly instructs legal actors how to proceed.[151] In

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[146] *See* sources cited *supra* note 142.

[147] *See* Baude & Sachs, *supra* note 112, at 1082 ("Interpretation isn't just a matter of language; it's also governed by law."); *see also* Chaim Saiman, *The Law Wants to Be Formal*, 96 NOTRE DAME L. REV. 1067, 1091 n.131 (2021) ("Scholars have recently taken to conceptualizing statutory interpretation as hard doctrinal rules of law.").

[148] *E.g.*, United States v. Davis, 139 S. Ct. 2319, 2333 (2019) ("[A]mbiguities about the breadth of a criminal statute should be resolved in the defendant's favor.").

[149] *E.g.*, RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325, 335 (2016) ("Absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application."). Some canons of interpretation that have often been construed as substantive canons, like the presumption against extraterritoriality, may be better understood as linguistic canons that concern communicative content. *See* Brian G. Slocum & Kevin Tobia, *The Linguistic and Substantive Canons*, 137 HARV. L. REV. F. 70, 87–91 (2023) (presenting evidence that people generally infer that rules come with implied territorial limits).

[150] *E.g.*, Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

[151] The law of interpretation may, in the end, almost never give clear direction that

that event, legal actors have no discretion to remedially interpret the text and so have no need for an interpretive theory. Where the law leaves no room for discretion, there is no place for interpretive theories.

Even when the law as a whole does run out, legal actors are not totally at sea. There are a range of tools that legal actors traditionally employ to guide their interpretation of legal texts. These include principles like federalism or international comity, persuasive authorities like treatises or restatements, analogical arguments, legislative history, historical practice, and much else besides.[152] Yet trying to adjudicate among all these sources can quickly become overwhelming. Interpretive theories are, in essence, attempts to impose greater order on remedial interpretation by instructing legal actors to limit or prioritize what they take into account as they work to fill in the law's gaps.[153]

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preempts the need for legal actors to exercise discretion. *See* Doerfler, *supra* note 27, at 12 ("[M]odern textualists . . . [have] conced[ed] that interpretive canons are less conducive to legal determinacy."); Frank H. Easterbrook, *The Absence of Method in Statutory Interpretation*, 84 U. CHI. L. REV. 81, 83 (2017) ("*[E]very* canon implicitly begins or ends with the statement 'unless the context indicates otherwise,' which potentially leaves so much room for maneuver that the canon isn't doing much work."). But nothing about my argument turns on whether the law of interpretation frequently provides determinate direction or not.

[152] As explained above, there is no convergent practice among officials on exactly which of these sources to employ or how to adjudicate among them if they point in different directions. *See supra* Part II.C. Whenever legal actors employ these tools, they must exercise some discretion—some moral-political judgment—to choose which ones to employ and how to weight or aggregate them. Thus, legal actors who employ these tools, by definition, cannot be searching for what the law is. *See supra* note 71. That said, these tools are "legal" in the sense that legal actors often employ them, and those who are trained in the law have a characteristic way of engaging in moral-political reasoning. *Cf.* SCOTT HERSHOVITZ, LAW IS A MORAL PRACTICE 156–59 (2023) (discussing lawyers' distinctive moral expertise); Felipe Jiménez, Tradition in Constitutional Adjudication (Nov. 22, 2023) (manuscript at 63–64), https://ssrn.com/abstract=4641821 ("When the facially applicable legal materials run out, decision-making can still be guided by legal categories, legal concepts, and doctrinal tools.").

[153] Remedial interpretation has some affinity with originalists' idea of "construction." Solum distinguishes "interpretation," which "aims at the recovery of communicative content," from "construction," which aims at applying legal texts to specific cases and developing bodies of rules for doing so. Solum, *supra* note 54, at 457, 474–75. So defined, every legal text requires both interpretation and construction in every case—which is simply to say that enforcing a legal text always requires both grasping what it communicates and applying that communicative content to concrete facts in two, in principle, distinct steps. This distinction between grasping communicative content and applying it is helpful, and I certainly do not wish to dispute it here (indeed, I employ it throughout this Article).

But I do worry about using the word "interpretation" to mark the distinction. Interpretive theories are not about how to grasp what a legal text communicates; rather, on the assumption that Hartian Positivism is right, they are about how legal actors should proceed when a legal text's contribution to the law is underdetermined. If we were to use the word "interpretation" as Solum proposes, then we would have to say that interpretive theories have nothing to do with interpretation—a bewildering result. Solum does employ another a term, "the construction zone," which appears to be synonymous with what I call "remedial interpretation." *See*

C. Answering Objections

We have covered a lot of ground very quickly. I just argued that Hartian Positivism implies that first-order interpretive debates primarily concern remedial interpretation and that interpretive theories are therefore best understood as telling legal actors how they should proceed in the absence of determinate legal direction. I will pause here to address four worries that may have come up for various readers, namely (1) that legal texts always require remedial interpretation; (2) that legal texts virtually never require remedial interpretation; (3) that a plain-meaning criterion of legal validity is too mysterious; and (4) that officials sometimes disregard legal texts' plain meaning.

1. Legal texts always require remedial interpretation. Judges or theorists sometimes say that enforcing a legal text always requires interpreting it.[154] I assume that they are usually using the word "interpret" in a linguistic or legal sense to refer to any attempt to grasp what a legal text communicates or contributes to the law. On this way of speaking, the claim that enforcing a legal text always requires interpreting it is true but mundane (of course, one must try to understand what a legal text communicates or contributes to the law before enforcing it!). But there is a more controversial version of the claim, i.e., that enforcing a legal text always requires *remedially* interpreting it.[155]

If that more controversial claim is right, then our first-order interpretive debates could still primarily be about remedial interpretation but remedial interpretation would not occupy the limited domain that I have given it so far. The idea would be that legal texts never have a plain meaning because grasping what they communicate always requires exercising moral-political judgment to choose from a range of competing possibilities of what they could communicate. If that is right, then there are no uniquely right answers to what the law directs even in the easiest of easy cases; officials can never just apply the law but instead must always make it up to some extent.

The claim that enforcing a legal text always requires remedially interpreting it raises complex issues that I cannot fully address here, and in any event, I do not want to simply reiterate what others have said before.[156] I will only

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id. at 458. But I find it easier and more intuitive to talk in terms of remedial interpretation.

[154] *See, e.g.*, SCALIA & GARNER, *supra* note 1, at 53 ("Every application of a text to particular circumstances entails interpretation."); SUNSTEIN, *supra* note 2, at 21 ("[T]o understand what the Constitution means . . . . [we] need a theory of . . . interpretation."); *see also* Endicott, *supra* note 14, at 673 (noting that some talk of interpretation "seems to stretch the notion of interpretation over instances of understanding that are not interpretive at all" because they do not involve "reformulat[ing] a rule in a way that clarifies its meaning").

[155] *See* DWORKIN, *supra* note 56, at 266 (claiming that there are no easy cases because "easy cases are . . . only special cases of hard ones").

[156] *See, e.g.*, ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY 95 (2d ed. 2005)

add that, as a matter of common sense, it seems that legal texts do frequently convey clear content that we can grasp and apply without resort to moral-political judgment. To give one familiar example, the Presidential Qualifications Clause, which states that the President must "attain[] to the Age of thirty five Years," clearly forbids an eighteen-year-old from being President.[157] There is only one colorable answer to how the Clause applies to those facts.[158]

Although lawmakers sometimes intentionally draft legal texts that are unclear, my sense is that they do so only rarely. One of the main reasons to make law, after all, is to guide conduct. As I have written before, "legal texts are usually carefully drafted to provide clear direction in an anticipated range of cases, and it is those anticipated cases that tend to arise most often."[159] The result is that legal texts' frequently have a plain meaning, in the sense that nearly any lawyer would find one reading of the text straightforwardly plausible and find no other reading that would require a different outcome in the case at hand plausible enough to seriously contend with the first one.[160]

2. Legal texts virtually never require remedial interpretation. It may be tempting to think that there is nearly always one right answer to what a legal text contributes to the law. If one reading of what the text communicates is at least 51% likely, is not that the right answer?[161] Even when there is room to disagree over what the text communicates, it is only in the rarest of cases

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(explaining that positivism is committed to there being "easy cases" in which we can understand and apply the law without having to evaluate competing interpretations).

[157] U.S. CONSTITUTION, art II, § 1, cl 5; *see also* Anthony D'Amato, *Aspects of Deconstruction: The Easy Case of the Under-Aged President*, 84 NW. U. L. REV. 250, 254 (1990) (discussing the Presidential Qualifications Clause); Stanley Fish, *Still Wrong after All These Years*, 6 L. & PHIL. 401, 404–05 (1987) (same).

[158] Of course, I am not suggesting that a legal text's contribution to the law is necessary or immutable. If the Presidential Qualifications Clause had been enacted in a different context, or if our rules of recognition were different, then it is possible that the Clause would—while employing the same string of words—colorably permit an eighteen-year-old President. Perhaps the argument would be that the Clause requires only that one have the *maturity* of most thirty-five-year-olds and that a precocious eighteen-year-old could meet that standard. But that is just to say that context matters and that our practices are contingent and could change. It is *not* to say that legal texts never have a "plain meaning" (in the sense that I am using that term). In short, my argument here is not necessarily in tension with the views of scholars like Anthony D'Amato or Stanley Fish. *See* sources cited *supra* note 157.

[159] Watson, *supra* note 7, at 236.

[160] *Id.*

[161] *Cf.* McGinnis & Rappaport, *supra* note 125, at 923 (proposing such a "51-49 rule"). McGinnis and Rappaport argue that a 51-49 rule determines the Constitution's communicative content, but that cannot be right. To say that the Constitution's communicative content is identical to the most likely reading of its communicative content makes no sense (it amounts to saying that the Constitution's communicative content is both fully determined and underdetermined at the same time). Rather, a 51-49 rule can at most be a social or legal rule regarding how to proceed when a text's communicative content is underdetermined.

when two readings are *exactly* equally plausible that the text's contribution to the law is underdetermined. It follows that many cases might be sociologically hard but metaphysically easy, and Hartian Positivists need not conclude that first-order interpretive debates concern remedial interpretation.

The problem with this objection is that it is not officials' convergent practice to search without stop for the most plausible understanding of what a legal text communicates all the way down to the 51% level. Officials do *not* nearly all act as if what the text most likely communicated resolves what the text contributed to the law. Think again of *Taniguchi*, which addressed whether paying someone to translate written documents from Japanese to English was "compensation for interpreters" that could be taxed against a losing party.[162] A majority of the Supreme Court answered no, reasoning that "interpreters" is usually understood to refer to just oral translators.[163]

More noteworthy for our purposes is Justice Ruth Bader Ginsburg's dissent. She agreed that referring to translators of written documents was not "the most common usage" of the word "interpreters" but stressed that it was an "acceptable" usage."[164] The statute was "not so clear as to leave *no room for interpretation*."[165] She would have interpreted it to permit taxing the costs at issue because doing so accorded with the statute's purpose and trial courts' longstanding practice.[166] That move—enforcing a minimally plausible reading of a statute's communicative content that, while not the most plausible, has other benefits—is a move that officials commonly make.[167]

As argued above, the relevant rule of recognition is that a legal text contributes just its clear communicative content, or "plain meaning," to the law.[168] Of course, this rule raises a line-drawing problem: How clear is clear enough? How plain must a text's meaning be to count as law? There is no precise answer. Different judges set the threshold for plainness at different levels, and even the same judge might set the threshold higher in some cases than in others.[169] Sometimes, judges set the threshold high (demanding that a

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[162] Taniguchi v. Kan Pac. Saipan, 566 U.S. 560, 562–63 (2012).

[163] *Id.* at 569.

[164] *Id.* at 576 (Ginsburg, J., dissenting).

[165] *Id.* at 579 (emphasis added).

[166] *Id.* at 577–79.

[167] *See, e.g.*, United States v. X-Citement Video, 513 U.S. 64, 68–69 (1994) (rejecting the "most natural" reading of a statute, given the "anomalies" that would follow); Tenn. Valley Auth. v. Hill, 437 U.S. 153, 196 (1978) (Powell, J., dissenting) ("[W]here the statutory language . . . need not be construed to reach . . . [an absurd] result, I view it as the duty of this Court to adopt a permissible construction that accords with some modicum of common sense and the public weal.").

[168] *See supra* Part II.C.

[169] For instance, Justice Elena Kagan claims that a difference between her and Justice Scalia was the "quickness" with which each was willing to find "ambiguity" in statutes. Elena Kagan, *The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes*,

text's communicative content be extremely obvious to close the door to remedial interpretation). But at other times, they set the threshold lower.[170]

For Hartian Positivists, since officials' convergent practice does not resolve exactly where remedial interpretation begins, determining its precise starting point is a moral-political question. Officials' convergent practice puts rough outer limits on when a text's meaning counts as plain and hence on when remedial interpretation is legally permissible. But there remains a contested middle ground where there is no fact of the matter—where all we can do is argue over whether the text's meaning *should* count as a plain. For this reason, first-order interpretive debates likely concern not just how to remedially interpret legal texts but also, to some extent, *when* to do so.[171]

3. Plain meaning is too mysterious. Some readers may still worry that this division between searching for a legal text's plain meaning and remedially interpreting it is too neat. To assess whether a text's meaning is plain we first must know where to look, and that requires making choices about whether to look, for instance, to legislative history,[172] past practice,[173] policy aims,[174]

HARVARD L. TODAY, at 56:54 (Nov. 17, 2015), http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation; *see also* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521 (1989) (stating that he was more likely than other judges to find that "the meaning of a statute is apparent"). Justice Brett Kavanaugh says that he applies a "65-35 rule": if one reading of a statute is at least 65% plausible, then he calls that reading "clear." Kavanaugh, *supra* note 24, at 2137–38. He suspects that other judges apply more of a 90-10 rule. *Id.* Some judges may even apply a 51-49 rule; for instance, Judge Raymond Kethledge claims that he has "never yet had occasion to find a statute ambiguous." Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections after (Almost) Ten Years on the Bench*, 70 VAND. L. REV. EN BANC 315, 320 (2017).

[170] I have previously proposed that legal practitioners sometimes engage in metalinguistic negotiations using the term "plain meaning." Bill Watson, *Metalinguistic Negotiation in Legal Speech*, 42 L. & PHIL. 487, 504–12 (2023). That is, practitioners sometimes use the term "plain meaning" to implicitly advocate that the threshold for plainness should be set higher (or lower). In doing so, they are engaging in a linguistic dispute over how to use the term "plain meaning" but doing so as a proxy for a more substantive dispute about how quick legal actors should be to jump to the creative task of remedial interpretation.

[171] *See infra* note 196.

[172] *See* ROBERT A. KATZMANN, JUDGING STATUTES 4 (2014) (advocating for the use of legislative history in statutory interpretation).

[173] *See* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 3 (2019) ("Constitutional law is also rife with claims of authority by historical practice.").

[174] *See* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 76 (2006) ("Purposivists give priority to policy context—evidence that suggests the way a reasonable person would address the mischief being remedied.").

precedent,[175] principles,[176] tradition,[177] etc. The worry is that, once we decide which of these considerations are relevant to assessing plain meaning, there is no work left for remedial interpretation to do. Whether a text's meaning is plain and how to remedially interpret it are not so easily separated.

There is something to this worry but not as much as one might think.[178] As we saw above, since legal texts are often spoken by collectives, and since there is uncertainty over who their audience is, their clear communicative content will usually be a function of just the conventional meanings of their words, the rules of syntax, and minimal context that almost anyone would know about our legal system or the world.[179] Those are the first places to look to assess whether a legal text's meaning is plain. But sometimes, we also need to consider other facts that at least arguably form part of the text's context, especially if they give us reason to doubt what the text communicates.[180]

Regardless, even if searching for a legal text's plain meaning and remedially interpreting it are sometimes hard to disentangle,[181] they remain conceptually distinct because they have different success conditions. When assessing plain meaning, the goal is to ascertain whether a reasonable reader would find just one reading of the text plausible; roughly put, this involves asking whether there is any alternative reading that would require a different result in the case at hand and that could be offered in court with a straight face. By contrast, when remedially interpreting a text, the goal is to choose which minimally plausible reading of the text ought to be enforced.

All that said, I recognize that there are hard questions in this vicinity and that I cannot fully answer them here. There remains more work for theorists to do in this regard. But the absence of a fully worked out explanation of which facts determine a legal text's plain meaning or how legal actors judge plainness should not cause us to doubt that officials do rely on plain meaning

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[175] *See* Tara Leigh Grove, *Is Textualism at War With Statutory Precedent?*, 102 TEX. L. REV. (forthcoming) (identifying different ways in which precedent can intersect with statutory meaning or statutory interpretation).

[176] *See* Mitchell N. Berman, *Our Principled Constitution*, 166 U. PA. L. REV. 1325, 1386–1390 (2018) (proposing various principles of our constitutional system).

[177] *See* Solum & Barnett, *supra* note 51, at 445–55 (explaining different roles that tradition can play in constitutional law and adjudication).

[178] *Cf.* Watson, *supra* note 170, at 516 & n.95 (explaining that "plain meaning" raises issues of both the relevant "threshold" and the "scale" on which that threshold lies).

[179] *See supra* Part II.B.

[180] *See supra* text accompanying notes 130–137.

[181] Part of the problem here is that it is often hard to tell what purpose we are using certain information for. For instance, are we looking to legislative history or apparent purposes as evidence of how someone could have reasonably understood a text's communicative content (which is relevant to assessing whether that content is clear), or are we looking to legislative history or apparent purposes as a guide for how to resolve underdeterminacy in the text's communicative content (which is relevant to remedial interpretation)?

to identify what the law is. Officials regularly talk of legal texts' "plain meaning," and for their most part, their doing so is intuitively comprehensible and successfully organizes their conduct.[182] There is something that officials are latching onto, even if we do not completely understand it.

4. Officials sometimes disregard plain meaning. Some readers may worry that officials disregard legal texts' plain meaning so often that plain meaning cannot serve the role that I say it does—that it cannot be a rule of recognition that legal texts' plain meaning is their contribution to the law. Think of cases like *Riggs v. Palmer*, where New York's statutes on wills seemed to plainly permit a murderer to inherit under his victim's will but the court held that a murderer could not so inherit. Or think of the First Amendment, which states that "*Congress* shall make no law . . . abridging the freedom of speech"[183] but has been held to limit the power of all branches of government.[184]

There are complex issues here too, but these examples do not show that something other than a legal text's plain meaning determines its contribution to the law. To start, we must not conflate semantic content with communicative content. Recall that a text's semantic content is what the text conveys in virtue of its words and syntax, whereas a text's communicative content also includes what the text conveys in virtue of its context.[185] Disregarding clear semantic content does not equate to disregarding clear communicative content: a text's semantic content may be clear, and yet its communicative content may be unclear because context introduces an element of uncertainty.[186]

This distinction between semantic and communicative content may help explain *Riggs* and similar cases. In *Riggs*, the relevant New York statutes did not explicitly say that a murderer may inherit from his victim; rather, they were silent on the matter. Since we expect legislatures to legislate reasonably, one might wonder whether the relevant statutes implicated something more than what they literally said. Perhaps they implicated an exception to their seemingly categorical rules for enforcing wills—an exception that applied in this case.[187] And maybe that mere possibility sufficed to render the statutes' meaning less than plain and to open the door to remedial interpretation.[188]

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[182] *See* sources cited *supra* note 117.

[183] U.S. CONST. amend. I.

[184] *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 264 (1964) (applying the First Amendment, as incorporated against the states via the Fourteenth Amendment, to state court action); *see also* David A. Strauss, *Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 2, 30 (2015) ("The First Amendment is uncontroversially understood to protect freedom of speech . . . against all three branches of the federal government.").

[185] *See supra* text accompanying notes 51, 121.

[186] *See supra* text accompanying notes 130–137.

[187] Watson, *supra* note 75, at 236.

[188] Judges sometimes formulate the plain-meaning rule to suggest that courts can ignore a statute's plain meaning when necessary to avoid absurd results. *See, e.g.*, United States v.

Alternatively, there is likely a customary or common-law norm in the United States that grants judges the power to modestly *revise* a legal text's contribution to the law to avoid morally bad and unforeseen results. We call this norm the "absurdity doctrine."[189] When judges apply the doctrine, they may say that they are finding the law, and that is true in a sense because they are exercising a power that the law gives them.[190] But it is more accurate to say that they are lawfully amending a text's contribution to the law.[191] Perhaps that is what the court in *Riggs* did. If so, then *Riggs* does not show that legal texts contribute something other than their plain meaning to the law.

These two ideas—that context can throw otherwise clear communicative content into doubt and that judges have a power to modestly revise legal texts' contributions to the law to avoid morally bad and unforeseen results—explain cases like *Riggs*. But they do not work for the First Amendment. It is too much of a stretch to argue that the First Amendment implicated restraints on institutions other than Congress or that its use of the word "Congress" led to unforeseen results. Here, we must conclude that a court, at some point in the past, violated the law. The first time that a court applied the First Amendment to a branch of government besides Congress, that court acted unlawfully.

After this initial law violation, it became the law going forward that the First Amendment applies against other branches of government, since officials in our legal system treat courts' precedential pronouncements of what the Constitution requires as higher authority than the Constitution itself.[192] That courts sometimes disregard legal texts' plain meaning and violate the

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Lopez, 998 F.3d 431, 438 (9th Cir. 2021) ("We may avoid giving a statutory term its plain meaning if doing so would produce absurd results."). This formulation of the plain-meaning rule may conflate semantic content with communicative content and should be avoided. A statute's meaning (its full communicative content) might *not* be plain when enforcing it would produce absurd results (insofar as the statute arguably implicates an exception).

[189] For some of the extensive literature on the absurdity doctrine, see generally Andrew S. Gold, *Absurd Results, Scrivener's Errors, and Statutory Interpretation*, 75 U. CIN. L. REV. 25 (2006); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2005); Jonathan R. Siegel, *What Statutory Drafting Errors Teach Us About Statutory Interpretation*, 69 GEO. WASH. L. REV. 309 (2001).

[190] Philosophers would call this a "directed power." *See* RAZ, *supra* note 69, at 242. The scope of this power is hotly contested, and because officials' convergent practice does not give a precise answer to when exercising the power is lawful, there is no precise answer.

[191] The absurdity doctrine likely requires judges to use their own moral-political judgment to decide whether a consequence is absurd and, if so, how to best avoid it. So, according to the positivist picture presented here, the absurdity doctrine likely cannot be a means of discerning what a text contributed to the law or what the law is. *See supra* note 69. Put another way, applying the doctrine is generally a matter of making, not finding, law.

[192] *See* Fallon, *supra* note 7, at 1142 ("[N]onoriginalist precedent sometimes prevails *as a matter of law* over what would otherwise be the best interpretation of the written Constitution."). *But see* Stephen E. Sachs, *Finding Law*, 107 CAL. L. REV. 527, 561 (2019) (proposing that a judicial decision that is contrary to the U.S. Constitution is merely "as-if" law).

law is unsurprising, particularly when the stakes are high (as they often are in the constitutional sphere). If courts did this more than once in a blue moon, then that would render a plain-meaning criterion of legal validity doubtful. But in fact, courts disregard legal texts' plain meaning extremely rarely.

One final point. My claim is that, *if* Hartian Positivism is right, then first-order interpretive debates are primarily about remedial interpretation.[193] If, notwithstanding everything that I said above, you remain convinced that first-order interpretive debates are *not* primarily about remedial interpretation, then you may think that my argument shows that Hartian Positivism is wrong. (As philosophers say, one person's *modus ponens* is another's *modus tollens*.[194]) Once again, my goal is not to win over Hartian Positivism's critics but instead to draw out Hartian Positivism's implications for legal interpretation—which is important to do, in light of Hartian Positivism's prominence among theorists and the uses to which some theorists have tried to put it.[195]

IV. HOW TO DEFEND INTERPRETIVE THEORIES

Our discussion so far has been fairly abstract, but I now want to turn to some more concrete takeaways. The rest of the Article focuses on the implications that the remedial answer to the meta-interpretive debate has for how judges and theorists should (and how they should not) defend their preferred interpretive theories.[196] My overarching goal is to illustrate how the remedial

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[193] Some readers will have noticed that my argument here flips Dworkin's argument from theoretical disagreement on its head. Simplifying a little, Dworkin holds fixed the intuition that our first-order interpretive debates concern how legal texts contribute to the law and uses that intuition to argue that Hartian Positivism is false. *See* DWORKIN, *supra* note 56, at 15–30. By contrast, I hold fixed the intuition that Hartian Positivism correctly describes our concept of law and use that intuition to argue that our first-order interpretive debates concern how legal actors morally-politically should proceed when a legal text's contribution to the law is underdetermined. Although I do not attempt to defend Hartian Positivism here, I have done so in prior work. *See generally* Watson, *supra* note 7; Watson, *supra* note 75.

[194] *E.g.*, HILARY PUTNAM, WORDS AND LIFE 280 (1995). The point of this saying is that, whereas one person may take an argument to lead to a true conclusion, another person may take the same argument to be a *reductio ad absurdum*—i.e., to lead to such an absurd conclusion that at least one of the argument's premises must be false.

[195] *See supra* notes 5–6 and accompanying text.

[196] In future work, I hope to explore the remedial answer's implications for how we should think about and define interpretive theories, especially textualism and originalism. Hartian Positivism helps us tease apart two questions that judges and theorists normally conflate. The first is a *threshold* question: When should remedial interpretation begin? At what point should judges shift from trying to understand a legal text's contribution to the law to evaluating what the text's contribution should be? The second and likely more familiar question is a *how-to* question: When judges do engage in remedial interpretation, how should they do so? Textualism and originalism might be best understood as answers to the threshold question that allow for significant intramural variation on the how-to question. We can view

answer can stimulate progress in our first-order interpretive debates by reframing key issues and revealing unexplored lines of argument.

A. A Moral-Political Defense

Hartian Positivism implies that interpretive theories require a certain kind of defense. If these theories are about remedial interpretation, then it is not an option to argue that *the law* requires employing a particular interpretive theory because such theories are about what to do *after* the law runs out—they are about how to proceed when a legal text's contribution to the law fails to give determinate direction and no other legal norm clearly fills that gap. In other words, interpretive theories concern how legal actors should exercise moral-political judgment when underdeterminacy in the law requires them to do so. Interpretive theories thus require a moral-political defense.

What kind of moral-political argument could justify legal actors in adopting an interpretive theory? Well, consider the alternative to such a theory. The alternative would be to take *each* case one at a time—to decide in each case where the law fails to give determinate direction what the best course of action is. An interpretive theory, in essence, replaces such case-by-case decisionmaking with a rule or rule of thumb for how to respond to legal underdeterminacy. Legal actors are justified in adopting such a theory only if following the theory makes them more likely to do what is best in the relevant range of cases than following any other theory or no theory at all.[197]

Making such a showing is a heavy lift. After all, it seems like the easiest and surest way to have legal actors do what is best is to tell them to do exactly that. Why not ask them to weigh all relevant reasons in every case? (And by "all relevant reasons," I do mean *all* relevant reasons, including not just reasons relating to the dispute at hand but also reasons stemming from their decision's effect on future parties' incentives, the clarity and administrability of the law, and so forth.) The challenge, in short, is to explain why legal actors should follow a theory that directs them to take into account only a limited set of reasons bearing on their decisions instead of all such reasons.

There are two main types of arguments that proponents of interpretive

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textualism as claiming that the threshold for remedially interpreting statutes should be very high but as lacking a unified answer regarding how to proceed once that threshold is crossed; and we can view originalism as making a parallel claim with respect to constitutions.

[197] The ideas about defending interpretive theories that I develop in this subpart are broadly consistent with Solum's masterful treatment of the subject in an important draft paper. *See* Lawrence B. Solum, *The Constraint Principle: Original Meaning and Constitutional Practice* (Apr. 6, 2019) (manuscript at 25–54), https://ssrn.com/abstract=2940215. Similarly, my ideas here are broadly consistent with Cass Sunstein's recent work on defending interpretive theories. *See* SUNSTEIN , *supra* note 2, at 8. My argument offers a jurisprudential backing, based on Hartian Positivism, for much of what Solum and Sunstein propose.

theories can make in this regard—one based on a legal actor's role and another based on the actor's epistemic position. First, proponents of interpretive theories can argue that, given a legal actor's role in our system of government, that actor should consider only certain reasons or should systematically privilege certain reasons over others.[198] This kind of argument might have a more deontic, or duty-based, flavor: the claim might be that someone in the actor's position has a duty to reason this way because it is not their place to act on the basis of what they think is all-things-considered best.

"Faithful agent" arguments fall into this category.[199] The gist of such arguments is that judges have a duty to serve as faithful agents of the legislature when enforcing statutes.[200] The faithful-agent argument for textualism goes roughly like this: "Judges must act as faithful agents of the legislature. The only way for the legislature to make its will known to judges is via statutes' communicative content. Judges should therefore enforce whatever a statute most likely communicates; they should fully exhaust, or come close to fully exhausting, a statute's communicative content before turning to any other source for guidance."[201] That is an example of a role-based argument.

Second, proponents of interpretive theories can argue that a legal actor's epistemic position is such that the actor is more likely to act rightly by following a theory:[202] something about the actor's epistemic situation makes them more likely to reach better decisions by following a rule than by taking each case one at a time. Perhaps the actor suffers from cognitive biases, lacks relevant expertise, or has insufficient time for deliberation. This second type

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[198] *Cf.* Richard H. Fallon, *Selective Originalism and Judicial Role Morality* (Feb. 3, 2023) (manuscript at 50–58), https://ssrn.com/abstract=4347334 ("[W]e should evaluate Justices pursuant to role-based moral norms."); MARMOR, *supra* note 59, at 109 ("[S]tatutory interpretation must be guided by some views about the role of the judiciary vis-à-vis the legislature in their respective authorities to shape the law and to modify it.").

[199] *See, e.g.*, Fallon, *supra* note 1, at 296 ("[P]urposivists, no less than textualists, seek to cast courts as the faithful agents of the legislature."); Barrett, *supra* note 24, at 112 ("Throughout most of the twentieth century, participants in debates about statutory interpretation largely subscribed to [the view that federal courts are faithful agents of Congress].").

[200] Of course, scholars disagree over what exactly it means to be a faithful agent and over how any alleged duty to be a faithful agent bears on judging. *See, e.g.*, Alexander & Prakash, *supra* note 30, at 992 ("Contrary to the claims of textualists, textualists are not faithful agents of Congress."); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 469 (1989) ("[C]ourts are not mere agents of the enacting legislature but have an obligation to the citizenry and the legal system as a whole.").

[201] *See* Manning, *supra* note 189, at 2390 ("Textualists . . . believe that the only safe course for a faithful agent is to enforce the clear terms of the statutes . . . .").

[202] *Cf.* ADRIAN VERMEULE JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 149 ("[T]he crucial predicates for the choice of interpretive approaches are facts about institutional capacities . . . ."); Cass R. Sunstein, *There Is Nothing That Interpretation Just Is*, 30 CONST. COMMENT. 193, 209 (2015) ("The argument for any particular approach must depend, in large part, on . . . institutional capacities.").

of argument may have a more consequentialist flavor: the claim may be that, by routinely privileging some reasons over others, the actor is more likely to maximize the good consequences of their decisions.

Which consequences are good? Proponents of interpretive theories usually do not start from comprehensive views of the good; rather, they take certain widely-shared values for granted and then argue that their interpretive theory maximizes those widely-shared values.[203] For instance, one common argument for textualism is that it promotes democratic values (by better enforcing the compromises found in legislation[204]) and rule-of-law values (by promoting predictable and consistent results[205]). The idea is that judges would likely undervalue these consequences if they were to reason in each case on their own and so are better off following textualism as a rule instead.

B. Against Monolithic Theories

The foregoing brief and programmatic remarks on how to defend first-order interpretive theories probably raise as many questions as they answer; they are meant to be the first, not the final, word on an exceedingly complex subject. For now, however, I want to turn to one important implication for the *scope* of interpretive theories, i.e., for the range of cases in which such theories instruct legal actors how to proceed. The remedial answer to the meta-interpretive debate suggests that we ought to be skeptical of monolithic interpretive theories that purport to tell legal actors how they should behave in every case that calls for remedial interpretation.

If interpretive theories are about how legal actors should proceed when a legal text's contribution to the law is underdetermined and no other legal norm clearly fills the gap, then these theories must be sensitive to the distinct normative stakes at play in different interpretive contexts. More specifically, they must be sensitive to who is doing the interpreting, what kind of text is being interpreted, which area of law the text contributes to, the broader political context, and so on. We cannot just brush these matters aside as we perhaps could if interpretive theories were instead about how to grasp legal texts' communicative content or their contribution to the law.

Consider the distinct normative stakes at issue in interpreting statutes versus constitutions. In general (and putting "common-law statutes" aside[206]),

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[203] *See* Solum, *The Constraint Principle*, *supra* note 197, at 28 (distinguishing between "deep" and "shallow" justifications for interpretive theories).

[204] *See* Manning, *supra* note 174, at 99 ("[T]he affirmative justification for textualism lies in the idea that semantic meaning is the currency of legislative compromise.").

[205] *See* Note, *Textualism as Fair Notice*, 123 HARV. L. REV. 542, 542 (2009) (observing that one "argument for textualism is that it promotes fair notice of the law.").

[206] *See, e.g.*, Randy J. Kozel, *Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis*, 97 TEX. L. REV. 112, 1143–44 (2019) (pointing to the Sherman Act as

statutes give more detailed direction, have less far-reaching of an impact, are easier to amend, and have greater democratic legitimacy.[207] Given those differences, one might conclude that judges should pay much more attention to statutes' communicative content than to constitutions' communicative content—that judges should, as a rule, enforce what statutes most likely communicate but not what constitutions most likely communicate. (I happen to think this, and it is why I consider myself a textualist but not an originalist.[208])

Or consider the distinct epistemic positions in which judges find themselves when interpreting constitutional provisions relating to criminal procedure as opposed to, say, Congressional powers or equal protection. Judges may be better situated than the political branches to decide what procedural protections criminal defendants should have because judges have a much closer view of how criminal processes play out. That being so, one might think that judges should rely more on their own moral-political judgment in criminal-procedure cases (take *Gideon v. Wainright*[209] as a focal example), while deferring to the political branches in other constitutional cases.[210]

The broader political context in which legal actors find themselves matters too. If Congress was less gridlocked and more capable of enacting needed legal change in prior decades than now,[211] then that might bear on how judges

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an example of a common-law statute).

[207] *See* Kent Greenawalt, *Constitutional and Statutory Interpretation*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 268, 271 (Jules L. Coleman, Kenneth Einar Himma & Scott J. Shapiro eds., 2004) (noting differences between "the authority of constitutional and statutory provisions, the political legitimacy of the bodies enacting them, the generality of the textual language, the age of the provisions, and the ease with which political bodies can override what the courts decide").

[208] I use the term "textualism" to refer to a theory about statutory interpretation and the term "originalism" to refer to a substantially similar theory about constitutional interpretation. *See, e.g.*, NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 106–07 (2019) ("[W]hat textualism seeks to accomplish for statutes, originalism seeks to accomplish for the Constitution."). Some scholars use these terms differently. *See, e.g.*, Katie Eyer, *Disentangling Textualism and Originalism*, 13 CONLAWNOW 115, 115 (2022) ("Textualism commands adherence to the text. Originalism, in contrast, commands adherence to history.").

[209] 372 U.S. 335, 339–40 (1963) (holding that an indigent criminal defendant in state court has a constitutional right to state-appointed counsel).

[210] These thoughts could offer a response to a common critique of Thayerism in constitutional interpretation (i.e., deference to the political branches' decisions except when those decisions transgress clear constitutional meaning). *See* sources cited *supra* note 36. The critique is that virtually no one is an across-the-board Thayerian; very few Thayerians believe that their approach is appropriate in every case. *See* SUNSTEIN, *supra* note 2, at 51 ("[I]n the long history of American law, it is exceedingly difficult to find consistent or across-the-board Thayerians."). A response could be that one does not have to be an across-the-board Thayerian; there are principled reasons to be a Thayerian with regard to some cases but not others.

[211] *See* Steven Kull and James Fishkin, *Congress Is Polarized and Broken. But Americans Are More United than You Might Think.*, USA TODAY (Apr. 19, 2022, 11:42 AM), https://www.usatoday.com/story/opinion/2022/04/19/polarization-congress-common-

should have remedially interpreted statutes before as opposed to now. Perhaps judges were once justified in adopting a rule of enforcing statutes' most likely communicative content but are no longer so justified. Textualists have not done nearly enough to address this worry (and, again, I include myself in their camp). The main point is that there is space for contextual arguments like this, and proponents of interpretive theories ought to make more of them.

In short, Hartian Positivism gives us reason to be wary of monolithic theories that claim to apply across the board. A complete theory of legal interpretation may be more complex and multifaceted than many have previously thought. How Article III judges should interpret statutes may be different from how administrative-law judges should do so; how judges should interpret constitutions may be different from how they should interpret statutes;[212] how judges should interpret criminal statutes may be different from how they should interpret civil ones;[213] etc. How to proceed once the law runs out is likely much too complicated for a one-size-fits-all approach.

C. The Plain-Meaning Fallacy

The remedial answer to the meta-interpretive debate brings to light a frequent error in defenses of textualism or originalism, which I call "the plain-meaning fallacy."[214] The fallacy, in brief, is to conflate determinate applications of the law with underdetermined ones—to assume that whatever is true of a legal text's "plain meaning" is also true of a legal text whose meaning is not plain. Below, I propose that this fallacy arises in a range of textualist and originalist arguments, including (1) the argument that only the text is the law, (2) Baude and Sachs's argument that originalism is our law, and (3) McGinnis and Rappaport's argument for originalism based on a good constitution.

1. Only the text is the law. One commonly heard argument for textualism goes something like this: "Judges should be textualists because they should

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ground/7366237001/ ("[P]artisan polarization has created persistent gridlock.").

[212] *See* Kevin M. Stack, *The Divergence of Constitutional and Statutory Interpretation*, 75 U. COLO. L. REV. 1, 42 (2004) ("While majoritarian and rights-based conceptions of democracy can provide a basis for originalism in statutory interpretation, neither provides a stable justification for originalism in constitutional interpretation.").

[213] *See* Joshua Kleinfeld, *Textual Rules in Criminal Statutes*, 88 U. CHI. L. REV. 1791, 1825 (2021) (arguing that "approaches to statutory interpretation should be sensitive to the distinctiveness of other areas of law").

[214] My label for this fallacy plays on McGinnis and Rappaport's "abstract meaning fallacy," which "occurs when interpreters conclude that possibly abstract language [in a legal text] has an abstract meaning without sufficiently considering and weighing the alternative possibilities." McGinnis & Rappaport, *The Abstract Meaning Fallacy*, *supra* note 26, at 739. That said, the fallacy that I propose has a different structure than theirs: it is not about mistakenly overlooking plain meaning but about conflating plain with not plain meaning.

follow the law and only the text is the law."[215] It is normally not obvious what this argument means. But here is one way of understanding it:

1. When judges apply a statute, they should look only to the law.
2. Only the text of the statute is the law.

C. Thus, when judges apply a statute, they should look only to the text of the statute.

So understood, the argument equivocates between two senses of the word "law"—law in the sense of legal norms and law in the sense of legal texts. Premise 1 is helpful only if it refers to law in the sense of legal *norms*. If Premise 1 referred instead to law in the sense of legal texts, then it would beg the question; it would presuppose the conclusion that judges should look only to the text of a statute. Yet Premise 2 is true only if it refers to law in the sense of legal *texts*. If Premise 2 referred instead to law in the sense of legal norms, then it would be false because legal texts are not identical to legal norms (they are different kinds of things).[216] As presented, the argument is invalid.

Still, there is a more charitable construction of the argument. Maybe the idea is that judges should adhere to the legal norm that a statute creates and the statute's plain meaning fully determines the content of that norm. That is:

1. When judges apply a statute, they should look only to its contribution to the law.
2. Only a statute's plain meaning is its contribution to the law.

C. Thus, when judges apply a statute, they should look only to its plain meaning.

This argument might seem promising at first glance, but it is here that the plain-meaning fallacy arises. Premise 1 must be restricted to legally *determinate* applications of a statute. After all, when it comes to legally underdetermined applications, judges cannot possibly look to just the statute's contribution to the law because the statute's contribution to the law has run out.

Yet for the argument to be a defense of an interpretive theory—for it to be a defense of textualism—its conclusion must extend to legally *underdetermined* applications of a statute. Its conclusion must tell us something about how judges should remedially interpret a statute whose meaning is not plain. Needless to say, the conclusion stated above fails to do that. Yet some textualists seem tempted to take this conclusion about what to do when the law offers determinate direction (what to do when a statute's meaning is plain) as

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[215] *See* sources cited *supra* note 24.

[216] *See* Encarnacion, *supra* note 109, at 2031 ("[C]onflating text and law is a potentially harmful mistake.").

somehow resolving what to do when the law runs out (what to do when a statute's meaning is not plain). That is the plain-meaning fallacy.

To be sure, there is another version of the argument. When textualists say that only the text is the law, they could be claiming that a rule of recognition in the United States is that a statute only contributes its *most likely* communicative content to the law. In other words, the argument could be:

1. When judges apply a statute, they should look only to the statute's contribution to the law.
2. Only a statute's most likely communicative content is its contribution to the law.

C. Thus, when judges apply a statute, they should look only to a statute's most likely communicative content.

This version of the argument is valid (its premises entail its conclusion). Furthermore, the conclusion suggests that we need not worry much about remedial interpretation because statutes will require remedial interpretation only when two understandings of a statute's communicative content are exactly equally plausible (which may be a vanishingly rare phenomenon).

The problem with this version of the argument is that Premise 2 is false, and any effort to prop it up would probably itself involve the plain-meaning fallacy. As I argued at length above, officials do *not* nearly all treat what a statute most likely communicated as the statute's contribution to the law.[217] If textualists wanted to make this version of the argument, they would have to offer convincing support for Premise 2, and merely saying "only the text is the law" would not cut it. In offering such support, they would have to be careful not to conflate officials' convergence on a plain-meaning criterion of legal validity with convergence on a most-likely-communicates criterion.

2. Originalism is our law. Over the course of several articles, Baude and Sachs have put forward a nuanced argument that originalism is "our law."[218] I cannot offer anything close to a full response to their argument here, nor do I wish to merely repeat what others have said before.[219] I will only object to one key move in their argument, which seems to commit the plain-meaning

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[217] *See supra* Part III.C.2.

[218] *See* sources cited *supra* note 5.

[219] For criticism of Baude and Sachs's argument that originalism is our law, see, e.g., Andrew Jordan, *The (Ir)relevance of Positivist Arguments for Originalism*, 56 LOY. L.A. L. REV. 937 (2023); Mitchell N. Berman, *Keeping Our Distinctions Straight: A Response to Originalism: Standard and Procedure*, 135 HARV. L. REV. F. 133 (2022); Guha Krishnamurthi, *False Positivism: The Failure of the Newest Originalism*, 46 BYU L. REV. 401 (2021); Charles L. Barzun, *Constructing Originalism or: Why Professors Baude and Sachs Should Learn to Stop Worrying and Love Ronald Dworkin*, 105 VA. L. REV. ONLINE 128 (2019); Barzun, *supra* note 8; Greenberg, *supra* note 8.

fallacy. To start, we have to get their argument on the table. When Baude and Sachs say that originalism is our law, they could mean either (1) that originalism is a rule of recognition in the United States today or (2) that originalism is a legal norm validated by a rule of recognition in the United States today.[220]

Baude and Sachs are not always clear in this regard, but they seem to have the first idea in mind: that originalism is a rule of recognition.[221] Significantly, it is not possible for officials to widely and substantially disagree over the *content* of any rule of recognition.[222] Such a disagreement would just show that the rule in question is not a rule of recognition, since the convergent practice needed to ground it as such would not obtain. Judges may (occasionally) be widely and substantially mistaken as to how a rule of recognition *applies* to certain facts,[223] but they cannot be widely and substantially mistaken as to the rule's content. Baude and Sachs seem to acknowledge this.[224]

So, Baude and Sachs owe us an account of the content of a rule of recognition that makes originalism our law and that officials today nearly all agree upon. What could that be? As I understand them, Baude and Sachs advance a form of original-methods originalism: they claim that the only lawful interpretive methods are the Founders' methods.[225] If nearly any lawyer at the time of the Founding would have interpreted legal texts (including the Constitution) in light of liquidation through practice, or precedent, or purposes, or common-law principles, or anything else, then that is how judges today must interpret legal texts to ascertain those texts' contribution to the law.[226]

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[220] A terminological point: if originalism is a rule of recognition, then originalism is not technically "our law" because a rule of recognition is not law. A rule of recognition is a social rule that validates legal norms, but it is not itself a legal norm. *See* HART, *supra* note 7, at 109. *But see* Lamond, *supra* note 110, at 42 ("[T]here is no compelling reason for conceptualizing the rule of recognition as something other than part of the law."). We can ignore this terminological point, as it does not go to the substance of Baude and Sachs's argument.

[221] *See* Baude & Sachs, *Grounding Originalism*, *supra* note 5, at 1478.

[222] *See* MARMOR, *supra* note 76, at 57–61 ("[I]f the content of a social rule is constituted by the collective attitudes of the population that follows it, then it is simply not possible for the relevant population to be mistaken about what the *content* of the rule is.").

[223] *See* COLEMAN, *supra* note 69, at 116 ("Judges may agree about what the rule *is* but disagree with one another over what the rule *requires*.").

[224] *See* Baude & Sachs, *Grounding Originalism*, *supra* note 5, at 1464–65.

[225] *See id.* at 1482 (originalism requires "tracing the title of every relevant interpretive method" to the founding); William Baude & Stephen E. Sachs, *Originalism's Bite*, 20 GREEN BAG 2D 103, 104 (2016) ("[O]riginalism permits arguments from precedent, changed circumstances, or whatever you like, to the extent that they lawfully derive from the law of the founding."). On original-methods originalism, see generally McGinnis & Rappaport, *Original Methods Originalism*, *supra* note 26.

[226] Baude and Sachs often state that our law is "the Founders' law, as it's been lawfully changed." *E.g.*, Baude & Sachs, *Originalism's Bite*, *supra* note 225, at 104. Could that be the content of a rule of recognition? It would be a very strange rule of recognition because it does not directly specify which types of facts ground legal norms; instead, it refers back to

That is, Baude and Sachs's claim is that a rule of recognition today is roughly: "Legal texts contribute their communicative content *as interpreted using the Founders' interpretive methods* to the law."[227] It is in offering evidence for such a rule that Baude and Sachs seem to fall into the plain-meaning fallacy.[228] Their evidence mostly concerns a present-day consensus that the Constitution contributes its clear communicative content to the law. They stress that even cases like *Lawrence v. Texas*[229] or *Obergefell v. Hodges*[230] did look to the Constitution's communicative content but found that content unclear.[231] And they observe that judges sometimes find the Constitution's communicative content dispositive and never admit to overriding it.[232]

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one or more historical rules of recognition that are no longer rules of recognition. Baude and Sachs's proposal would have to be that officials today nearly all agree that the facts that ground legal norms now are whichever facts the Founders' rules of recognition identified as grounding legal norms at the Founding. But of course, it could not have been a rule of recognition at the Founding that "The law is what our law is, until it's lawfully changed." That sort of self-referential rule would go nowhere. Instead, the rules of recognition at the Founding must have specified which types of facts grounded legal norms at that time. Yet Baude and Sachs do not say when or why those original rules supposedly morphed into the bizarrely ossified rule that the law is "the Founders' law, as it's been lawfully changed."

[227] Even if Baude and Sachs are right that this is a rule of recognition today, I doubt that it could yield as much determinacy as they expect because the Founders' interpretive methods would likely conflict or apply unclearly in many cases. *See supra* note 80. For that matter, on one account, the Founders understood the Bill of Rights as merely declaring rights with severely underdetermined content whose contours were for the political branches, not the judiciary, to flesh out. *See generally* Jud Campbell, Determining Rights (Mar. 2, 2023) (unpublished manuscript) (on file with author). Perhaps Baude and Sachs would embrace that view of the Bill of Rights, but the result would be so far removed from how most of us think of originalism as to make Baude and Sachs's adoption of the term "originalism" misleading.

[228] Some of the evidence that Baude and Sachs offer in support of their position is questionable for reasons that have nothing to do with the plain-meaning fallacy. First, they note that officials "treat the Constitution as a legal text." Baude & Sachs, *Grounding Originalism*, *supra* note 5, at 1477. But the fact that the Constitution is a legal text does not, by itself, answer how the Constitution relates to the law or how to interpret it. *See* text accompanying *supra* note 109. Second, they claim that "[a]ctors in our legal system don't acknowledge, and indeed reject, any official legal breaks or discontinuities from the Founding." *Id.* at 1477. What they seem to have in mind here is that the U.S. Constitution has never been replaced in the way that, say, the Articles of Confederation were replaced. But the absence of such a change in our founding document does not tell us anything about whether there has been a change in how officials do remedially interpret legal texts or how they should do so now.

[229] 539 U.S. 558 (2003).

[230] 576 U.S. 644 (2015).

[231] Baude & Sachs, *Grounding Originalism*, *supra* note 5, at 1478; *see also* Baude, supra note 5, at 2380 ("*Lawrence* can be read as being content to find historical ambiguity."); *id.* at 2382 (stressing the Court's statement in *Obergefell* that "[t]he generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions" (quoting *Obergefell*, 135 S. Ct. at 2598)).

[232] *Id.* at 1477 ("Original meaning sometimes explicitly prevails over policy arguments in constitutional adjudication, but the reverse doesn't seem to be true."); *id.* at 1478 ("[T]here

The problem is that Baude and Sachs take this to also be evidence of a consensus that identifying the law requires employing the Founder's interpretive methods. They treat evidence that the Constitution's clear communicative content is our law as evidence that the Constitution's communicative content *as interpreted using the Founders' interpretive methods* is our law. But these are very different ideas: what the Constitution clearly communicated at the time of ratification is one thing; how the Founders generally chose to proceed when a legal text's communicative content was unclear is something else. To conflate these ideas is to commit the plain-meaning fallacy.

Importantly, the Founding-era interpretive methods that Baude and Sachs have in mind are not linguistic canons that encode implicatures or could plausibly bear on legal texts' communicative content. Rather, they have in mind interpretive methods that look to subsequent practice, common-law principles, precedent, and so forth—methods that have little, if anything, to do with legal texts' communicative content but instead concern how to remedially interpret underdetermined communicative content. Baude and Sachs provide little to no evidence that officials today nearly all accept and treat the Founders' interpretive methods, whatever they were, as determining our law.[233]

3. A good constitution. Let us turn next to a different kind of argument. McGinnis and Rappaport offer, as I believe proponents of interpretive theories should, a moral-political defense of original-methods originalism. They claim that the supermajoritarian process involved in ratifying the Constitution was very likely to produce a "good constitution"—one that would advance the general welfare not just back then but also today.[234] Moreover, they argue that judges should enforce the Constitution's meaning, as lawyers at the time would most likely have interpreted it, because doing so is more likely to advance the general welfare than if judges were to proceed otherwise.[235]

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are no clear repudiations of originalism as our law in the current canon of Supreme Court cases, even in situations where the Justices must have been sorely tempted.").

[233] *See* sources cited *supra* note 1. Baude and Sachs's most recent contribution argues that, while judges do not all behave like originalists, they all claim to do so; and this "official story" is what makes originalism a rule of recognition. *See* William Baude & Stephen E. Sachs, *The Official Story of the Law*, 43 OXFORD J. LEGAL STUD. 178, 179–80 (2023). Thus, we should not get hung up on how judges actually adjudicate constitutional cases; rather, we should focus on what they claim to be doing. My question for Baude and Sachs is: What is the evidence that judges nearly all claim to be following not just the Constitution's clear communicative content as law but the Constitution's communicative content interpreted as the Founders would have interpreted it as law? I see little evidence of judges making the latter claim. The Founders' interpretive methods are not part of our official story (or if they are, it is not *because* they were the Founders' methods but because we happen to use them).

[234] McGinnis & Rappaport, *Originalism and the Good Constitution*, *supra* note 26, at 1701 ("[O]ur argument claims that the supermajoritarian process is the best means of producing a substantively good constitution.").

[235] *Id.* at 1696 ("[W]e must interpret [constitutional provisions] in accord with the

There are many problems with arguing that the process involved in ratifying the Constitution was genuinely supermajoritarian or that it produced a "good constitution" for most of the American people, either back then or today.[236] But I want to put those problems aside and accept for the sake of argument that the process involved in ratifying the Constitution (and its amendments) was supermajoritarian and did produce a good constitution. At present, I am more interested in the connection between a supermajoritarian consensus on adopting a text as law and enforcing that text's meaning. We might formalize McGinnis and Rappaport's argument roughly as follows:

1. If a text was enacted by a supermajoritarian process, then judges should first fully enforce that text's meaning.
2. The Constitution was enacted by a supermajoritarian process.

C. Thus, judges should first fully enforce the Constitution's meaning.

The problem is that this argument equivocates on the word "meaning." Premise 1 is, at most, true of a constitution's plain meaning. The only thing that we can safely conclude was the subject of a supermajoritian consensus was the text's clear communicative content; insofar as there was room to reasonably disagree over what the text communicated, we cannot assume that a supermajority of ratifiers assented to it being understood just one way. But McGinnis and Rappaport intend for their conclusion to extend to the Constitution's less than plain meaning; they claim that judges today should interpret the Constitution as lawyers at the time would *most likely have interpreted it.*

That, too, is the plain meaning fallacy. McGinnis and Rappaport might reply that the ratifiers all knew what the relevant interpretive methods were.[237] But it is unlikely that the ratifiers would have all agreed on exactly

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meaning that the provisions had when they went through that [supermajoritarian] process . . . . It was by virtue of that meaning that these provisions received the widespread support that remains the touchstone of their beneficence.").

[236] Most obviously, large swaths of the American people, including all women and enslaved persons, did not participate in the ratification process; and not surprisingly the resulting Constitution did not adequately protect their rights. In addition, it would be surprising if those who did participate in the ratification process could better foresee how best to distribute rights and powers in the twenty-first century than judges alive today. To be fair, McGinnis and Rappaport anticipate these and other problems and attempt to give answers them. *See* McGinnis & Rappaport, *Originalism and the Good Constitution*, *supra* note 26, at 1752–67.

[237] McGinnis and Rappaport claim that the relevant interpretive methods looked to "evidence of history, structure, purpose, and intent." McGinnis & Rappaport, *Original Methods Originalism*, *supra* note 26, at 752. Moreover, they argue that lawyers at the time recognized a closure rule directing officials to enforce the most likely, or 51% plausible, result of applying the foregoing methods. McGinnis & Rappaport, *supra* note 125, at 923 ("[A]t the time of the Constitution's enactment a legal interpretive rule—what we call the 51-49 rule—required interpreters to choose the better supported interpretation.").

the same methods or on how to proceed if those methods conflicted. Regardless, knowledge of the relevant methods does not show that the ratifiers had the result of applying those methods (let alone the *most likely* result) in mind when they voted for the Constitution. We cannot assume that the "meaning" derived from applying those methods was ever the subject of a supermajoritarian consensus or that it shares in the benefits such a consensus entails.

Now, my objection comes with a caveat. If originalists were mostly in the business of unearthing the Constitution's plain meaning, then I would agree that their work tells us what the law is (or was insofar as courts have changed it). But my sense is that most originalist scholarship would not satisfy many officials' standard for plain meaning because the historical record or its implications are contested.[238] Originalists are usually offering one view of what the Constitution most likely communicated or how lawyers at the time would most likely have remedially interpreted it.[239] That may or may not be relevant to how judges should behave, but it cannot tell us what the law is.

I suspect that once we start looking for the plain-meaning fallacy, we will find it in other defenses of textualism or originalism. For instance, when textualists say that looking to statutes' communicative content promotes the predictability and consistency of judicial decisions, they may be conflating looking to clear communicative content with looking to communicative content that is perhaps only 70% or 60% plausible (and so less likely to yield predictable and consistent results). None of this is to say that there are no good arguments for textualism or originalism (again, I call myself a textualist). It is just to say that justifying these positions is harder than some have thought.

CONCLUSION

Hartian Positivism's import for first-order interpretive debates is at once modest and significant. It is modest in that Hartian Positivism cannot resolve these debates; it cannot tell us whether any mainstream interpretive theory is

[238] I take the originalist literature on the President's removal power to be a representative example. *Compare* Aditya Bamzai & Saikrishna Bangalore Prakash, *The Executive Power Of Removal*, 136 HARV. L. REV. 1756, 1761–62 (2023) (arguing that the Constitution's original meaning granted the President the power to remove executive officials at will and that Congress could not limit that power), *with* Andrea Scoseria Katz & Noah A. Rosenblum, *Removal Rehashed*, 136 HARV. L. REV. F. 404, 404 (2023) (contending that there is little historical evidence for Bamzai and Prakash's claims).

[239] The same is true of originalist judges. There is no shortage of scholarship arguing that originalist judges' portrayal of the Constitution's original meaning is simplistic or overlooks disagreements among lawyers at the time of ratification. *See, e.g.*, Bethany R. Berger, *Eliding Original Understanding in* Cedar Point Nursery v. Hassid, 33 YALE J.L. & HUMANS. 307, 314–15 (2022) (arguing that the majority opinion in *Cedar Point Nursery*, which all of the justices who call themselves originalists signed onto, misrepresented the founding generation's understanding of the right to enter property in the public interest).

right or wrong. Yet Hartian Positivism's import for these debates is also significant in that it clarifies what the debates are about. First-order interpretive debates focus on sociologically hard cases where many lawyers disagree over what the law directs parties to do. If Hartian Positivism is right, then sociologically hard cases are overwhelmingly metaphysically hard cases where there is no single right answer to what the law directs parties to do.

That being so, first-order interpretive debates must be primarily about interpretation in a remedial sense. The main question in the debates is how legal actors should proceed when a legal text's contribution to the law is underdetermined and no other legal norm clearly fills that gap. In other words, the question is: How should legal actors exercise their own moral-political judgment when called upon to do so because the law cannot give them wholly determinate direction? This probably is not the only question at issue in first-order interpretive debates, but it is the main one. If participants in the debates want to argue about something else, they should be clear about what that is.

From this framing of first-order interpretive debates, much follows. The remedial answer to the meta-interpretive debate clarifies how to go about defending any interpretive theory. Since these theories concern how to exercise moral-political judgment, they require a moral-political defense. Interpretive theories offer a rule or rule of thumb that purports to do better than simply taking each case as it comes. Generally speaking, proponents of interpretive theories must show that an interpreter's role in our system of government or epistemic situation makes that interpreter more likely to act rightly by following one theory than by following any other theory or no theory at all.

The remedial answer to the meta-interpretive debate also suggests that we should be wary of monolithic interpretive theories that claim to apply across the board. Interpretive theories must be sensitive to the distinct normative stakes involved in interpreting different kinds of texts, in different areas of the law, in different political contexts, and so forth. Moreover, it is important that proponents of interpretive theories not fall prey to the plain-meaning fallacy, as some textualists and originalists do. They must avoid conflating legal texts' plain meaning (or determinate contribution to the law) with those texts' less than plain meaning (or underdetermined contribution to the law).

Paying closer attention to Hartian Positivism and its answer to the meta-interpretive debate may yield further dividends as well. Doing so may clarify how to think about and define some interpretive theories, like textualism and originalism, which are notoriously hard to define. Hartian Positivism may also shed light on vexed doctrinal issues surrounding the plain-meaning rule and its interaction with linguistic and nonlinguistic canons. And we have seen that there is a need for more limited and context-sensitive defenses of interpretive theories. In the end, although Hartian Positivism cannot answer what legal actors should do, it can clarify which questions we should be asking.