

Minimalist Textualism

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Textualism is now the dominant theory of statutory interpretation in the Supreme Court. This paper explores a series of conditions that all theories of statutory interpretation, including textualism, ought to satisfy. The conditions are Nonequivalence; Limited Domain; Legality; Specificity; Normativity; and Restricted Relevance. These conditions deny and qualify claims sometimes made by textualists—such as “the text is the law” or “the ordinary meaning of the statute governs”—and arguments they offer to justify their position. Textualist theories should satisfy these conditions because they are warranted requirements for statutory interpretation. Compliance with these conditions leaves space for a textualist approach that preserves the commitment to statutory text and the rejection of appeals to purpose and legislative intent, while avoiding some common pitfalls in textualist theory, rhetoric, and practice. This minimalist textualism is thus a better version of textualism.

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INTRODUCTION

Textualism is, ostensibly, the dominant theory of statutory interpretation in the Supreme Court.¹ At the most general level, textualists about statutory interpretation claim that judges should not aim to identify legislators’ intentions or statutes’ implicit purposes but, rather, should stick to the enacted statutory text.² Judges ought to be faithful to “valid statutes . . . rather than seeking to improve upon them in the course of giving them effect.”³ The statutory text is *the*

¹ As Justice Kagan once put it, “we are all textualists now.” Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE, at 8:28 (Nov. 25, 2015), <https://www.youtube.com/watch?v=dpEtszFT0Tg>; see also William Baude, *The 2023 Scalia Lecture: Beyond Textualism?*, 46 HARV. J.L. & PUB. POL’Y 1331, 1338 (2023); Jesse M. Cross, *Where Is Statutory Law?*, 108 CORNELL L. REV. 1041, 1042–43 (2023); William N. Eskridge Jr., Brian G. Slocum & Kevin Tobia, *Textualism’s Defining Moment*, 123 COLUM. L. REV. 1611, 1614 (2023), <https://doi.org/10.2139/ssrn.4305017>.

² Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 15–18 (Amy Gutmann ed., 1997), <https://doi.org/10.1515/9781400882953-004>; ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 16 (2012).

³ Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 HARV. L. REV. 515, 523 (2023), <https://doi.org/10.2139/ssrn.4330403>.

authoritative text that has been duly promulgated under the constitutional scheme.⁴

This Article takes textualism's dominance as a given⁵ and articulates six conditions that all theories of statutory interpretation, including textualism, ought to satisfy.⁶ The aim is, thus, twofold: to set out a series of necessary conditions that (at least in our context) all theories of statutory interpretation ought to satisfy, and to use these conditions to suggest what a better textualist position—that I call *minimalist textualism*—might look like.

The conditions are necessary but not sufficient or exhaustive. There might be other, additional conditions that theories of statutory interpretation should satisfy. But the conditions set out here, while just necessary, have important implications for statutory interpretation. The conditions are (the labels are merely stipulative):

⁴ *Id.* at 522–23; see also Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 273 (2020).

⁵ This dominance has led some scholars to question the relevance of debates about the merits of textualism and its alternatives. Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 4 (2006). For others, textualism's dominance suggests that the differences between theories of statutory interpretation are not as important as once thought. Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 353 (2005). And this is partly driven by the fact that even contemporary anti-textualists accept textualism's contributions to statutory interpretation. Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819, 1852 (2016). To be clear, textualism's dominance is a contingent fact about contemporary American law—or more precisely, about a particular aspect of American law (namely, statutory interpretation in the Supreme Court). It is independent from the merits of intentionalist or purposivist approaches or their significance in other times or in other jurisdictions. For a systematic exploration of intentionalism and the underlying notion of legislative intent, see generally RICHARD EKINS, *THE NATURE OF LEGISLATIVE INTENT* (Timothy Endicott et al. eds., 2012). For a more recent exploration of the relevance of intent for determining when a text is a statute, see Brian Flanagan, *Intentional Legislation: What Makes a Text a Statute?*, in *CONVERSATIONS IN PHILOSOPHY, LAW, AND POLITICS* 515, 515–36 (Ruth Chang & Amia Srinivasan eds., 2024), <https://doi.org/10.1093/oso/9780198864523.003.0027>.

⁶ I will assume that statutory interpretation aims to identify the legal content—the legal duties, rights, privileges, and so on—generated by a statute. See generally Mark Greenberg, *Legal Interpretation*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (July 7, 2021), <https://plato.stanford.edu/archives/fall2021/entries/legal-interpretation>. I will also assume, like classical textualist accounts, that the theory is first and foremost a theory of *judicial* statutory interpretation. This raises an important question about the relationship between judicial interpretation and statutory interpretation by other agents, including legislatures, agencies, citizens, and judges. But I leave that question aside in this Article.

Nonequivalence (one cannot equate the statute and the law); *Limited Domain* (theories of statutory interpretation are only a part of legal reasoning); *Legality* (the meaning of statutes is a legal question); *Specificity* (statutory texts are a specific kind of text, different from ordinary communication); *Normativity* (theories of statutory interpretation are normative views about how judges ought to act, grounded in legal reasons or reasons of political morality); and *Restricted Relevance* (theories of statutory interpretation cannot ensure, by themselves, the achievement of valuable goals like fair notice and judicial restraint).

Some of these conditions, like Nonequivalence, Specificity, and Restricted Relevance, derive from what I take to be the nature of things.⁷ Others, like Limited Domain and Legality, derive from what I take to be fairly central features of legal practice. Still others, like Normativity, are grounded in a combination of both. This raises a possible concern. At least some theories of interpretation, including textualism, can be seen as normative theories about what the approach to interpretation should be. If that is right, these theories could very well have revisionary implications regarding stable features of our legal practices. My response here is quite limited: we can come up with normative theories with radical revisionary implications if we like. But I do not think most textualist theorists today—or most theorists of statutory interpretation—want to make *radically* revisionary arguments. The best way to read their normative theories is to read them as prescribing within certain constraints (including, at least, some of the more stable aspects of legal practice). Of course, I might be wrong. Perhaps some theorists do want to make radically revisionary arguments. But, in that case, we are owed an argument as to why we should do without so many central aspects of our legal practices—such as the fact that statutes are not the only source of law even in cases primarily governed by statutory provisions. More importantly, for textualist judges, the structure and the content of the law in force—which vindicates conditions like Limited Domain—is not only an *is* but also an *ought*.

Several strands of textualism already comply with some of the conditions set out here—in fact, in making the case for them, I will sometimes rely on textualists' arguments. At the same time, though,

⁷ Thus, I do not think questions about statutory interpretation turn *exclusively* on normative considerations. *Contra* Francisco J. Urbina, *Reasons for Interpretation* (Feb. 9, 2024) (manuscript at 1, 5), <https://doi.org/10.2139/ssrn.4722069>.

these conditions deny or significantly qualify claims that textualists sometimes make, such as the notion that “the text is the law” or the assertion that the ordinary meaning of the statute governs.⁸ These conditions also lead to a reformulation of justifications textualists sometimes offer, such as arguments based on notions of fair notice and judicial restraint.⁹ Again, textualist theories should satisfy these conditions because they are sound requirements for statutory interpretation. Textualism’s central commitments to the authority of enacted statutory texts and judicial restraint can be preserved in a thinner, humbler version of textualism—*minimalist textualism*—that satisfies these conditions. By complying with these conditions, minimalist textualism avoids common pitfalls, including equations of text and law;¹⁰ a misunderstanding, and unnecessary exaggeration of the significance of, ordinary meaning;¹¹ a view of statutory interpretation as a task aimed exclusively at uncovering facts about communicative content;¹² and an atomistic conception that overfocuses on statutes to the detriment of judges’ duty to apply the law as a whole.¹³ Minimalist textualism would also avoid unnecessary tensions with substantive canons like the rule of lenity.¹⁴ It would avoid seeing statutory interpretation as an impoverished empirical inquiry.¹⁵ It would embrace the fact that there is a lot of interpretive flexibility within the legal system.¹⁶ And it would accept, like all theories of statutory interpretation should, that many of the values we care about when it comes to the behavior of judges—including judicial restraint and legal certainty—rest on much more than statutory interpretation.

This Article thus joins recent attempts to reframe or refine textualism, such as Jonathan Molot’s claim that textualists should turn criticism “inward” in order to defuse its most extreme versions;¹⁷ Anita

⁸ See *infra* Parts I, II, and III.

⁹ See *infra* Part VI.

¹⁰ See *infra* Part I.

¹¹ See *infra* Part III.

¹² See *infra* Parts I, II, and III.

¹³ See *infra* Part II.

¹⁴ Eidelson & Stephenson, *supra* note 3, at 517; Jeesoo Nam, *Lenity and the Meaning of Statutes*, 96 S. CAL. L. REV. 397, 403–04 (2022).

¹⁵ Anya Bernstein, *Legal Corpus Linguistics and the Half-Empirical Attitude*, 106 CORNELL L. REV. 1397 (2021).

¹⁶ Richard M. Re, *Permissive Interpretation*, 171 U. PA. L. REV. 1651, 1652 (2023).

¹⁷ Molot, *supra* note 5, at 5.

Krishnakumar's account of the divergences between the theory of textualism and its practice;¹⁸ Professors Eskridge, Slocum, and Tobia's account of the inherent complexities in textualism and their suggestion of best practices;¹⁹ and Tara Leigh Grove's discussion of textualism's internal divisions.²⁰ Like all of these contributions, this Article is an attempt to take textualism's dominance seriously, and to move statutory interpretation forward in a constructive manner.

The approach of this Article is, nevertheless, distinct. Its aim is to articulate, through philosophical argument, a set of general conditions that constrain the content of plausible theories of statutory interpretation as a way of reconstructing a thinner, yet theoretically stronger, version of textualism. The end product is—at least a tentative beginning towards—what I call *minimalist textualism*. Although my concern here is substance and not labels, I should note that the concept of *minimalism* is appropriate because this type of textualism jettisons unnecessary (and unnecessarily maximalist) claims sometimes made by textualists—and particularly textualist judges. And the label *textualism* is appropriate because, despite jettisoning or modifying some claims found in textualist rhetoric and theory, it is still—as I argue in Part VII—consistent with some of textualism's central commitments.

To ground the rest of this Article, consider a recent and familiar example of a textualist opinion: *Bostock v. Clayton County*.²¹ In *Bostock*, the majority of the Court held that Title VII of the Civil Rights Act forbids employment discrimination on the basis of sexual orientation and gender identity.²² The majority argued that courts ought to interpret statutes “in accord with the ordinary public meaning” of their terms, because “only the words on the page constitute the law.”²³ Anything beyond the ascertainment of ordinary meaning would risk a form of judicial overreach.²⁴ While disagreeing with the outcome, the

¹⁸ Anita S. Krishnakumar, *Textualism in Practice*, 74 DUKE L.J. (forthcoming 2024) (manuscript at 2–6, 15, 36, 51) (on file with author), <http://doi.org/10.2139/ssrn.4441426>.

¹⁹ Eskridge, Slocum & Tobia, *supra* note 1, at 1625.

²⁰ Grove, *supra* note 4, at 267–68.

²¹ *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

²² *Id.* at 1737.

²³ *Id.* at 1738.

²⁴ As Tobia and Mikhail write: “For Gorsuch, the text of Title VII and its ordinary meaning at the time of its adoption are sufficient to decide *Bostock*.” Kevin Tobia &

dissents shared similar starting points. Justice Kavanaugh, for instance, emphasized that a focus on ordinary meaning gives ordinary citizens fair notice.²⁵ And in this respect, both the majority and the dissenting opinions are representative of larger trends within textualism.²⁶ It is common for textualists to claim that the purpose of statutory interpretation is to determine the ordinary meaning of legislative enactments, and that this ordinary meaning is—at least *prima facie*—determinative of those enactments’ legal implications.²⁷ The conditions that this Article sets out problematize, or at least qualify, these ideas.

Here is a brief roadmap. Part I discusses Nonequivalence. Nonequivalence denies the claim that the enacted statutory text is the law. Part II moves on to Limited Domain. Limited Domain states that the theory of statutory interpretation is only a part of the general theory of legal reasoning. Thus, the judge’s role is to apply the law rather than the *laws* (understood as single statutes). Limited Domain vindicates interpretive flexibility and the presence of legal standards, including substantive canons, that legitimately govern statutory interpretation. Part III discusses Legality. Legality stands for the claim that, within law, the meaning of statutes is a legal question. Part IV focuses on Specificity—namely, the specific textual and autonomous features of enacted statutes and their differences with ordinary communication. Part V focuses on Normativity. Normativity argues that theories of statutory interpretation are views about how judges ought to act, and that they are grounded in legal norms or—in cases where the law is silent or indeterminate—considerations of political morality. Part VI describes Restricted Relevance. Restricted Relevance is the notion that theories of statutory interpretation cannot by themselves guarantee or achieve valuable goals and principles like fair notice and judicial restraint. Part VII offers a skeletal and tentative account of minimalist textualism and suggests why this theory would

John Mikhail, *Two Types of Empirical Textualism*, 86 BROOK. L. REV. 461, 468 (2021), <https://doi.org/10.2139/ssrn.3729629>. For insightful criticism, see Mitchell N. Berman & Guha Krishnamurthi, *Bostock Was Bogus: Textualism, Pluralism, and Title VII*, 97 NOTRE DAME L. REV. 67, 72 (2021); Erik Encarnacion, *Text Is Not Law*, 107 IOWA L. REV. 2027, 2030–31 (2022).

²⁵ *Bostock*, 140 S. Ct. at 1828 (Kavanaugh, J., dissenting).

²⁶ See, e.g., *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019).

²⁷ See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 548 (1992) (Scalia, J., concurring in part and dissenting in part). In the academic literature, see Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2209 (2017).

still be faithful to textualism's central commitments. But, as the Conclusion notes, textualism (even minimalist) is not the only game in town. There are many plausible theories of statutory interpretation and many aspects of legal reasoning that go beyond them.

I. NONEQUIVALENCE

The first condition is:

Nonequivalence: the text of the statute is not the law.

The object to be interpreted is a statute—an authoritative text that purports to have normative implications.²⁸ But what is the relationship between the text and the law that the judge must apply? One possibility, some textualists sometimes suggest, is that the statute's text just is the law.²⁹ This slogan is these textualists' "prime directive."³⁰ In Justice Kavanaugh's words, "the statute's text as passed by Congress and signed by the President (or passed by two-thirds of both Houses over the President's veto) is the law."³¹ As Erik Encarnacion has shown, for textualist judges—including Kavanaugh, Scalia, Easterbrook, and others at the federal and state levels—this view is almost "an unremarkable platitude."³²

The platitude is at least misleading. Statutes are authoritative legal enactments, and as such, they are a source of law that generates legal norms or impacts the content of the law. But that is a very different claim from the blunt slogan that the text is the law (at least without several important qualifications).³³ Every theory of statutory interpretation should accept this fact and therefore comply with Nonequivalence. Statutes are the law in a more limited and qualified sense: they constitute an authoritative source of law.

²⁸ RICCARDO GUASTINI, *INTERPRETAR Y ARGUMENTAR* 26 (2021).

²⁹ See, e.g., Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2118 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)); Scalia, *supra* note 2, at 22. The "some" is important. Professor Tara Leigh Grove's view, for instance, can be interpreted as rejecting a direct equation of (the meaning of) text and law. Tara Leigh Grove, *Is Textualism at War with Statutory Precedent?*, 102 TEX. L. REV. 639, 690 n.278 (2024).

³⁰ Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117, 131 (2009).

³¹ Kavanaugh, *supra* note 29, at 2123.

³² Encarnacion, *supra* note 24, at 2033.

³³ For a comprehensive and thoughtful critique, see generally Encarnacion, *supra* note 24.

Textualism is certainly committed to the centrality of statutory texts—and I will explain why this commitment is defensible below.³⁴ But that commitment should not be based on the claim that the statutory text is itself the law. A text is a set of inscriptions. The communicative content of a text is a set of propositions it conveys. Its legal content is the set of doctrines, rules, rights, and obligations derived from that text.³⁵ In other words, we must distinguish between the statutory provision (the statement contained in an authoritative source of law) and the norm that results from that provision (the legal content it generates).³⁶ The provision is what we interpret, and legal norms are the result of the interpretive process.³⁷

Thus, statutes contribute to the content of law—but the law that judges derive from a particular statute is not necessarily determined by its communicative content.³⁸ The content of the law in any jurisdiction—the legal rights, duties, prohibitions, permissions, and privileges that obtain in that jurisdiction³⁹—is an upshot of multiple things, including legislative enactments. And in contemporary legal systems, like ours, statutes are a particularly significant source of law. There is no plausible case, however, for a perfect identity between the communicative content of a particular statute and the legal content the judge will apply—it is simply not true that the text *is* the law. More charitably, though, perhaps the thought behind the slogan is that the meaning or the communicative content of the text is the law. There is a plausible version of this idea that I will explore below (in Part I.B), but even this idea is not the same as “the text is the law.”

Since I am discussing charity, I should address a potential objection at the outset. Charitably, “the text of the statute is the law” should be understood as only shorthand. Read in its best light, that slogan is only a summarized statement for a larger, more defensible view (arguably, that more defensible view is that “the meaning of the

³⁴ See *infra* Part III.

³⁵ See generally Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479 (2013).

³⁶ GUASTINI, *supra* note 28, at 77.

³⁷ *Id.* at 78.

³⁸ William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1085 (2017).

³⁹ Mark Greenberg, *Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication*, in PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 217, 219 (Andrei Marmor & Scott Soames eds., 2011), <https://doi.org/10.1093/acprof:oso/9780199572380.001.0001>.

text is the law”). Just like some slogans in everyday political life—“my body, my choice” or “the personal is political”—might compress plausible and more complex normative views, “the text is the law” should be examined as imperfect shorthand for a more articulated and complex claim or set of claims. If that is the case, the objection would go, an extensive evaluation of “the text is the law” as a claim about the relationship between the text of the statute and legal norms would be too uncharitable. We ought to evaluate the more defensible view that the slogan imperfectly articulates.

My response here is quite simple. When judges offer reasons for their decisions, we should treat those articulations as purporting to express the serious, considered justifications that judges deem legally appropriate. This is particularly true when those reasons are not just articulated in adjudication, but also reaffirmed in academic writing.⁴⁰ From that point of view, we should examine claims like “only the text is the law” as what they purport to be: genuine justificatory reasons for legal decisions, reaffirmed by textualist judges in their academic writing. And, so judged, that particular claim—as I will argue—fails. This is certainly compatible with the possibility of views that are somewhat close to the infelicitously expressed reasons that would be defensible. My only claim in this regard is that if judges could articulate the view in a defensible way that avoids leading to further mistakes, they should do so—and the task of legal scholars is to provide tools with which they can. Unlike political activists, judges and legal scholars have plenty of opportunities to avoid simplistic slogans and the further mistakes these slogans might generate. In this particular case, the slogan “only the text is the law” can lead to an overvaluation of statutory interpretation at the expense of other forms of legal reasoning (as I argue below when discussing Limited Domain) and a resultant destabilization of otherwise legitimate sources of legal decision-making—such as substantive canons.⁴¹ We should jettison the slogan, and textualist judges should avoid it.

The point of the critique this Article offers is not to fault individual textualist judges but, rather, to offer arguments as to why they should do without an unnecessary, unhelpful, and—as expressed—incorrect statement about the relationship between statutory texts and the norms judges ought to apply. Judges could express their view in a more thoughtful and careful way that avoids

⁴⁰ See Kavanaugh, *supra* note 29, at 2118; Scalia, *supra* note 2, at 15–18.

⁴¹ See *infra* Part II.

unnecessary inconsistencies with other stable aspects of legal practice and that complies with Nonequivalence (for example, by adopting something like the *pro tanto* view I will discuss below). The point of this Part is to provide tools for that more careful articulation.

There are two ways in which one could justify Nonequivalence. The first strategy is to claim that there is a basic categorical or metaphysical distinction between communicative and legal content. The second is more concessive (and could be read as a friendly refinement of the slogan “the text is the law”): even if there is no categorical distinction, and the legal content that any given statute contributes to the law is its communicative content, what legal norms a statute generates turns on the combination of a multiplicity of legal texts and norms beyond the statute. These two alternative paths to justify Nonequivalence rely on very different philosophical views about the relationship between law and language. What I aim to show is that no matter what metaphysical picture one starts from, Nonequivalence is inescapable.

A. *The First Strategy: Text Is Not Law*

The first strategy for justifying Nonequivalence sees the conflation of communicative and legal content as a category mistake. This is the type of view articulated by scholars like Mitchell Berman, Erik Encarnacion, and Mark Greenberg.⁴² According to this view, there is a basic metaphysical distinction between facts about the meaning of a legal text and the set of legal norms that the text produces.⁴³

Under this view, one cannot automatically move from the communicative content of a text to its legal implications. Although the communicative content of legal texts matters, what role it plays in explaining the resultant legal norms is an ulterior question that cannot be settled by purely linguistic considerations.⁴⁴ As Greenberg would put it: there are many candidates for statutes’ contribution to legal

⁴² See Mitchell N. Berman, *Our Principled Constitution*, 166 U. PA. L. REV. 1325, 1330, 1333 (2018), <https://doi.org/10.2139/ssrn.2935085>; Encarnacion, *supra* note 24, at 2030–31; Greenberg, *supra* note 39, at 219; Mark Greenberg, *The Standard Picture and Its Discontents*, in OXFORD STUDIES IN PHILOSOPHY OF LAW: VOLUME 1 39, 39–40 (Leslie Green & Brian Leiter eds., 2011), <https://doi.org/10.1093/acprof:oso/9780199606443.003.0002>.

⁴³ Berman, *supra* note 42, at 1384–85.

⁴⁴ Greenberg, *supra* note 39, at 219, 249–50.

content, including different linguistic and mental contents.⁴⁵ Which of these candidates we should pick turns on legal (and jurisprudential) considerations.⁴⁶ It is a mistake to assume, as some theorists and lawyers do, that the communicative content of a statutory text determines its legal implications without any explanatory intermediaries—i.e., without an argument that can bridge the gap between communicative and legal content.⁴⁷

Greenberg's argument is part of a larger jurisprudential project, according to which legal norms are the moral norms that obtain as a consequence of the actions and practices of legal institutions.⁴⁸ But Greenberg's observations about the metaphysical distinction are compatible with other jurisprudential views. For example, on a positivist view, the activities and practices of legal officials—most conspicuously, judges—will play an important role in determining the legal impact of statutes.⁴⁹ The relationship between legal texts and the legal norms they generate, on such view, would depend on the conventions of legal officials, including judges.⁵⁰ The practices of legal officials would, on this positivist picture, determine which facts about communicative content are relevant (and how) as a legal matter.

This idea is sometimes expressed by relying on the distinction between two processes: interpretation (ascertaining communicative content) and construction (ascertaining legal content).⁵¹ While analytically severable, in practice both processes are part of what judges do when interpreting statutes in the context of adjudication.⁵² But

⁴⁵ *Id.* at 220.

⁴⁶ *Id.* at 232.

⁴⁷ *Id.* at 228–229.

⁴⁸ See Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L.J. 1288, 1290 (2014).

⁴⁹ Solum, *supra* note 35, at 480.

⁵⁰ In the civil law context, see generally GIOVANNI TARELLO, DIRITTO, ENUNCIATI, USI: STUDI DI TEORIA E METATEORIA DEL DIRITTO (1974).

⁵¹ Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 103 (2010) [hereinafter *Interpretation-Construction Distinction*]. On the distinction, see also Riccardo Guastini, *Interpretación y Construcción Jurídica*, ISONOMÍA 11 (2015), <https://doi.org/10.5347/43.2015.71>; Edwin W. Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 833 (1964), <https://doi.org/10.2307/1120825>; Peter M. Tiersma, *The Ambiguity of Interpretation: Distinguishing Interpretation from Construction*, 73 WASH. U. L. REV. 1095, 1095 (1995).

⁵² See Felipe Jiménez, *A Formalist Theory of Contract Law Adjudication*, 2020 UTAH L. REV. 1121, 1128 (2020).

what matters here is that, on the view that we are exploring, whether the communicative content of a statutory provision generates an identical legal norm within this complex interpretive process turns on non-linguistic considerations. Judges, for instance, might derive legal norms from statutes by considering the purposes of the legal system—and these purposes might lead them to avoid seeing the law produced by the statute as merely replicating its communicative content.⁵³

Certainly, in many cases, the legal norms generated by the statute replicate or closely resemble the statute's communicative content.⁵⁴ And, as a general matter, in order to derive legal content from a statutory enactment, the communicative content of the enactment will be very relevant.⁵⁵ But when this is the case, it is an upshot of law, legal practices, and judges' own engagement with legal texts. It is not, as the claim "the text of the statute is the law" suggests, a fixed feature of our legal practices, or—much less—a fundamental fact that legal practices must accommodate. On the contrary, our legal practices routinely depart from the slogan.⁵⁶ This is illustrated, in our context, by the existence of judicially created legal presumptions and interpretive standards.⁵⁷ Many of these standards are inconsistent with the standards that would be appropriate for understanding the meaning of speech and language in ordinary contexts.⁵⁸ In this aspect, American law is not an exception.⁵⁹ Communicative content does not necessarily determine legal content.⁶⁰ That is why legal practices legitimately make the latter diverge from the former, at least sometimes.

Legal changes brought about by judicial decision-making provide an intuitive illustration of the metaphysical distinction. When courts interpret legal texts, they precisify and elaborate the legal content of

⁵³ Greenberg, *supra* note 39, at 221.

⁵⁴ Solum, *supra* note 35, at 486.

⁵⁵ Greenberg, *supra* note 39, at 219; BRIAN G. SLOCUM, ORDINARY MEANING: A THEORY OF THE MOST FUNDAMENTAL PRINCIPLE OF LEGAL INTERPRETATION 8 (2015) [hereinafter ORDINARY MEANING], <https://doi.org/10.7208/chicago/9780226304991.001.0001>.

⁵⁶ See *infra* Part II.C.

⁵⁷ Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 755 (2013).

⁵⁸ See Eidelson & Stephenson, *supra* note 3, at 543–44.

⁵⁹ Consider, for instance, Savigny's interpretive canons. FRIEDRICH KARL VON SAVIGNY, SYSTEM OF THE MODERN ROMAN LAW (1867).

⁶⁰ Greenberg, *supra* note 39, at 236–37.

those texts. Given routine practices like *stare decisis* and the very process of socialization into current legal practice, changes in interpretation in fact change what the law requires.⁶¹ When the judicial interpretation of a statutory provision changes over time, there is at least a clear sense in which legal rights and obligations change without changes in facts about the communicative content of the statute.⁶² Ascertaining communicative content, in other words, is not always sufficient to ascertain the content of the law.⁶³ And the explanation, on this view, would be provided by the basic fact that legal texts are linguistic objects, while law is a system of norms.⁶⁴ These are two different types of entities.⁶⁵ The question for a legal interpreter is not “what do these words mean,” but “what law does this enactment create.”⁶⁶

To put the claim in a slogan: “texts are not norms.”⁶⁷ What a theory of statutory interpretation requires, on this view, is an account of how a specific linguistic content leads to (or ought to lead to) legal content.⁶⁸ That means that questions of statutory interpretation are legal questions.⁶⁹ Textualism, on this view, ought to be articulated as a theory about how statutory texts lead to law—not as a theory that equates the two of them. This view offers one path to explain, then, why textualists should discard the claim that “the text is the law” and comply with Nonequivalence.

B. *The Alternative: Pro Tanto Legal Content*

Still, many scholars would disagree with the claim that there is a basic distinction between legal and communicative content. Some theorists, for example, think that legal content is in fact reducible to

⁶¹ Encarnacion, *supra* note 24, at 2064–65; John Gardner, *Can There Be a Written Constitution?*, in 1 OXFORD STUDIES IN PHILOSOPHY OF LAW 162, 189 (Leslie Green & Brian Leiter eds., 2011), <https://doi.org/10.1093/acprof:oso/9780199606443.003.0005>.

⁶² See Samuel Beswick, *Retroactive Adjudication*, 130 YALE L.J. 276, 281 (2020).

⁶³ Solum, *supra* note 35, at 481.

⁶⁴ Greenberg, *supra* note 48, at 1309; see also Greenberg, *supra* note 42, at 47–48.

⁶⁵ Baude & Sachs, *supra* note 38, at 1082–83.

⁶⁶ *Id.* at 1083.

⁶⁷ Encarnacion, *supra* note 24, at 2066–67.

⁶⁸ *Id.* at 2075.

⁶⁹ Tara Leigh Grove, *Testing Textualism’s “Ordinary Meaning,”* 90 GEO. WASH. L. REV. 1053, 1057 (2022).

communicative content and that the former should be ascertained in basically the same way as the linguistic content of ordinary texts.⁷⁰ Discovering the content of law would require us to discover what propositions legislative enactments express.⁷¹ The law, on this view, is constituted by a series of assertions, orders, and prohibitions that are communicated by legal texts.⁷² The norms are simply constituted by the communicative content of legal texts.⁷³ There is no metaphysical distinction, on this view, between communicative and legal content: legal norms just are the propositions expressed by statutory texts.

Nonequivalence does not require a resolution of this metaphysical dispute. Put differently, even someone who rejects the metaphysical distinction between communicative and legal content should be able to endorse Nonequivalence. Even if the legal impact of a statute is determined by its communicative content, the specific legal content that the judge applies to resolve a case and the communicative content of legal texts are not necessarily *identical*. The reason for this is quite simple: even on this view, the law is not constituted by the communicative content of just one single statute (much less of a single statutory provision, and much less of a single word). It is the upshot of the combination of multiple legal texts, including the constitutional text, other statutes, judicial precedents, and so on. The binding legal norms that obtain as a consequence of the enactment of one particular statute are not always or necessarily identical to the communicative content of that statute. There is, in other words, always a possible gap between the content of the law and the communicative content of the statute—even if that gap is not metaphysical but merely a consequence of contingent facts about the multiple sources of law and legal texts in force in contemporary legal systems.

⁷⁰ See, e.g., Scott Soames, *Deferentialism: A Post-Originalist Theory of Legal Interpretation*, 82 FORDHAM L. REV. 597, 604 (2013), <https://doi.org/10.23943/princeton/9780691160726.003.0015>.

⁷¹ *Id.* at 597–98.

⁷² *Id.* at 597; see also Andrei Marmor, *Can the Law Imply More Than It Says? On Some Pragmatic Aspects of Strategic Speech*, in PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 83, 90 (Andrei Marmor & Scott Soames eds., 2011), <https://doi.org/10.1093/acprof:oso/9780199572380.003.0005>.

⁷³ See Anya Bernstein, *Democratizing Interpretation*, 60 WM. & MARY L. REV. 435, 462–65 (2018); see also Greenberg, *supra* note 39, at 217–18.

Consider Hrafn Asgeirsson's theory, which rejects the metaphysical distinction between text and law.⁷⁴ On Asgeirsson's view, authoritative legal texts directly provide legal reasons that correspond to the communicative content of those texts. These legal reasons, though, are defeasible and *pro tanto*: they interact with the law produced by other sources to determine the "all things considered" legal norms of the relevant legal system.⁷⁵ On this view, then, enacted legal texts generate legal reasons that can be reduced to communicative content. But the relevant "all things considered" effect of particular enactments is an upshot of the interaction between their communicative content and the communicative content of all the other relevant legal materials in the jurisdiction.⁷⁶ Perhaps a simplified example will illustrate this: one cannot know that the proposition *p* expressed by text Y issued by institution X is a legal norm that the judge must apply unless, at least: (i) one combines this content with other legal norms in virtue of which X's enactments, following a certain procedure, generate binding legal content; and (ii) one examines other authoritative legal materials to identify qualifications, disambiguations, and contradictions with *p* (as well as their resolution) generated by the existence of such materials.

As Watson argues, then, even on this picture, legal norms are constituted by the interaction between the communicative content of multiple legal texts.⁷⁷ We should not conflate a single statute's contribution to legal content with the legal norms that obtain after that contribution is taken into account. If this view is right, statutes' contribution to the law in force is in fact reducible to their communicative content—there is no metaphysical distinction between law and the meaning of the text after all. But legal norms arise out of the interaction of multiple legal texts.⁷⁸ At the very least, we will have to combine the communicative content of the statute with the communicative content of other statutes and other authoritative sources of law in order to know what law the judge must apply.

⁷⁴ See HRAFN ASGEIRSSON, *THE NATURE AND VALUE OF VAGUENESS IN THE LAW* 7–8 (2020), <https://doi.org/10.5040/9781474202756>.

⁷⁵ *Id.* at 13–14.

⁷⁶ *Id.* at 16.

⁷⁷ Bill Watson, *In Defense of the Standard Picture: What the Standard Picture Explains that the Moral Impact Theory Cannot*, 28 *LEGAL THEORY* 59, 81–82 (2022), <https://doi.org/10.1017/S1352325221000276>.

⁷⁸ *Id.* at 82.

Thus, even on a plausible communicative view of legal content, Nonequivalence can be justified. On that view, enacted legal texts make a contribution to the content of the law that is reducible to their communicative content.⁷⁹ But the legal norm that a judge must apply is still not reducible to the *prima facie* or *pro tanto* legal content generated by particular enacted texts. Even if the legal content produced by each particular enactment is grounded in its communicative content, the communicative content of a particular statute is not “the law.”⁸⁰ The mere enactment of the statute does not immediately produce a single, determinate legal norm that the judge must apply. This does not mean that, as it were, all bets are off: there is a set of plausible norms in any legal system, and that set is constrained—on this view—by the meaning of the authoritative legal texts within the system. But this is just a metaphysically more modest way of saying that the meaning of the text does not settle which specific operative legal norm(s) a judge ought to apply as a consequence of its enactment. Even if there is no categorical difference between communicative content and *pro tanto* legal content, there is a gap between the communicative content of a statute and the particular norm that adjudicative institutions will apply in any specific case.⁸¹

C. *Textualism and Nonequivalence*

What does Nonequivalence imply for textualism? It implies, most obviously, that textualists should abandon the rhetorical conflation of text and law, or at least suitably clarify and refine the thought that they are trying to articulate when conflating them.⁸² Textualists should accept that the meaning of a single statute is not, in and of itself, equivalent to the legal norm that judges must apply in any given case as a consequence of the statute’s enactment.⁸³ That difference might be an upshot of a fundamental, metaphysical distinction between text and law. Or it might be an upshot of the less ambitious observation that there are more legal texts out there, beyond the particular statute at hand, and therefore, the law that the judge must apply is not reducible to *this particular provision*.

⁷⁹ ASGEIRSSON, *supra* note 74, at 19.

⁸⁰ *Id.* at 33.

⁸¹ *Contra* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2266 (2024) (arguing that courts must ascertain the single “best” meaning of statutes).

⁸² *But see* Encarnacion, *supra* note 24, at 2069.

⁸³ *Id.* at 2075.

What the textualist could argue, however, is that there are good reasons for sticking close to the text of the statute and avoiding radical divergences between legal norms and the statute's meaning. These reasons have to be articulated, not taken for granted,⁸⁴ and I will say more about them below.⁸⁵ Moreover, an honest textualist must also accept that, often, the meaning of the statutory provision does not settle what legal norms obtain as a consequence of its enactment.⁸⁶ And even the question of what particular candidate for the meaning of the statutory provision should matter in the process of statutory interpretation will not be answered by purely linguistic considerations.⁸⁷ Indeed, as I will argue below, what counts as the meaning of a statute is itself a legal question.

If it complies with Nonequivalence, then textualism can avoid the axiomatic and mistaken assumption that “the text *is* the law,” as well as its implausible implications.⁸⁸ Textualism can, in fact, be articulated and defended without that assumption,⁸⁹ as an account of the way in which the meaning of statutes ought to be the starting point for—and a constraint on—statutory interpretation.⁹⁰

II. LIMITED DOMAIN

The second condition is closely related to Nonequivalence. It is:

Limited Domain: theories of statutory interpretation are only part of the theory of legal reasoning.

When they enact a statute, legislators intend to create new law and to produce specific legal effects.⁹¹ This intention to legislate is a very minimal intention,⁹² and it is—more importantly—the intention to enact a particular legal text that will join a multiplicity of other already valid legal texts to co-constitute legal norms. While minimal, this

⁸⁴ Greenberg, *supra* note 39, at 239.

⁸⁵ See *infra* Part IV.

⁸⁶ Frederick Schauer, *Constructing Interpretation*, 101 B.U. L. REV. 103, 117–18, 132 (2021).

⁸⁷ Greenberg, *supra* note 39, at 220, 249–50.

⁸⁸ Siegel, *supra* note 30, at 121.

⁸⁹ Encarnacion, *supra* note 24, at 2046.

⁹⁰ *Id.* at 2044.

⁹¹ As noted by Greenberg, *supra* note 39, at 242.

⁹² Joseph Raz, *Intention in Interpretation*, in BETWEEN AUTHORITY AND INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASON 265, 284 (2009), <https://doi.org/10.1093/acprof:oso/9780199562688.003.0011>.

intention merits respect in democratic legal systems committed to the idea of legislative authority.⁹³ This intention matters—judges cannot simply decide to treat a duly enacted statute as not legally authoritative (absent reasons to deny its validity).⁹⁴ The formal enactment of a statute makes an intentional contribution to the content of the law, which counts as such a contribution because legislators have the legal authority to make it.⁹⁵

Consistently with this, textualists have historically argued that judges, in a democratic system, are bound to apply the norms that arise out of democratic legislation.⁹⁶ While this is correct, it is important to bear in mind that judges are supposed to apply the law as a whole, rather than each particular statutory text on its own.⁹⁷ An atomistic understanding of the judicial application of law—which sees the task of judge as applying the statute, or worse, the statutory provision or word—threatens to transform it into an impoverished, isolated exercise in ascertaining the meaning of particular texts, phrases, or words. Limited Domain, instead, reflects that what judges must apply is the law as a whole, and that much of legal reasoning goes *beyond* the interpretation of statutes.

⁹³ The intention to legislate is what we can call, building on speech act theory, an *illocutionary* intention. See Marcin Matczak, *Three Kinds of Intention in Lawmaking*, 36 L. PHIL. 651, 654–55 (2017), <https://doi.org/10.1007/s10982-017-9302-8>. Speech act theory and the discussion of the illocutionary effects of speech build on the work of philosophers like J.L. Austin and John Searle. See generally J.L. AUSTIN, HOW TO DO THINGS WITH WORDS: SECOND EDITION (1975), <https://doi.org/10.1093/acprof:oso/9780198245537.001.0001>; JOHN R. SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE (1969), <https://doi.org/10.1017/CBO9781139173438>.

⁹⁴ Matczak, *supra* note 93, at 664.

⁹⁵ See Marcin Matczak, *Why Legal Rules Are Not Speech Acts and What Follows from That?*, in PROBLEMS OF NORMATIVITY, RULES AND RULE-FOLLOWING 331, 338 (Michał Araszkiewicz et al. eds., 2015), https://doi.org/10.1007/978-3-319-09375-8_24; Joseph Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, in BETWEEN AUTHORITY AND INTERPRETATION 323, 329 (2009), <https://doi.org/10.1093/acprof:oso/9780199562688.003.0013>.

⁹⁶ See, e.g., Scalia, *supra* note 2, at 9–14.

⁹⁷ This explains why a case that might look hard when looking at the meaning of the statute in isolation might not truly be a hard case. See Scott Soames, *Interpreting Legal Texts: What Is, and What Is Not, Special about the Law*, in 1 PHILOSOPHICAL ESSAYS, NATURAL LANGUAGE: WHAT IT MEANS AND HOW WE USE IT 403, 415 (2008), <https://doi.org/10.1515/9781400837847.403>.

A. *The Law, Not “Laws”*

Sometimes, textualists equivocate between judges’ duty to apply *the law* and judges’ duty to apply *laws*. Consider the following statement by Justice Scalia:

Government by unexpressed intent is . . . tyrannical. It is the *law* that governs, not the intent of the lawgiver. That seems to me the essence of the famous American ideal set forth in the Massachusetts constitution: A government of laws, not of men. Men may intend what they will; but it is only the *laws* that they enact which bind us.⁹⁸

In this paragraph, Scalia conflates the idea that *law* governs with the idea that *laws* govern. This conflation is understandable for linguistic reasons. In English, the same basic word is used for the two concepts. While understandable, the conflation is incorrect. The distinction between *law* and *laws*—as well as an awareness of English speakers’ tendency to ignore it—is not novel in the common law tradition. Sir Frederick Pollock, for example, wrote:

[T]he ambiguity of the English word *law* seems peculiar to English Law in the abstract, the sum of rules of justice administered in a State and by its authority, is *ius* in Latin, *droit* in French, *diritto* in Italian, *Recht* in German. For the express rule laid down by an originating authority these languages have respectively the quite distinct words, *lex*, *loi*, *legge*. . . . *Gesetz*. Thus an Englishman tends, consciously or not, to regard enacted law as the typical form; it is hard for him not to identify laws (as the plural of ‘a law’) with Law. Frenchmen and Germans, on the other hand, are more likely to regard *loi* or *Gesetz* as merely a particular form of *droit* or *Recht*, and not necessarily the most important form.⁹⁹

We should thus distinguish between *the law* and *laws*. We should also distinguish between the view that judges should only apply the law and the view that judges should only apply laws (i.e., particular statutes). These two views are quite distinct, and textualists should be committed to the first rather than the second. It would be absurd to

⁹⁸ Scalia, *supra* note 2, at 17.

⁹⁹ FREDERICK POLLOCK, FIRST BOOK OF JURISPRUDENCE FOR STUDENTS OF THE COMMON LAW 17–18 (1929). Pollock later seems to take this in the direction of natural law theory, equating law (or “ius”) with natural law. *Id.* at 18. In a similar vein, see Roscoe Pound, *Law and Laws*, 19 OHIO ST. L.J. 441, 442–43 (1958). For a philosophical exploration of the ambiguities of the term “law” (and acknowledging the distinction between law and laws), see Jules L. Coleman & Ori Simchen, “Law,” 9 LEGAL THEORY 1, 12–13 (2003), <https://doi.org/10.1017/S1352325203000016>.

restrict the law that applies to a particular case exclusively to a specific text or a specific statutory provision.¹⁰⁰ It would be absurd to even restrict it to all legislation. Legal norms are not isolated commands, but the linkage of multiple authoritative legal texts.¹⁰¹

This explains why, despite their regular invocation of ordinary people and their reliance on conversational examples,¹⁰² textualist judges regularly employ juristic tools and resources (common law precedents, legal concepts, and canons of construction) in order to ascertain the content of a particular statute.¹⁰³ The regular invocation of ordinary people is in tension with textualist judges' reliance on juristic tools.¹⁰⁴ That tension should be resolved by adopting the view that judges are bound to apply the law as a whole, not just particular statutory provisions. Adjudication requires integrating the particular contribution that one statute makes to the law with the rest of the body of legal materials—including judicial precedent.¹⁰⁵ This explains why courts rely on precedent in ascertaining the legal implications of statutes.¹⁰⁶ Theories about statutory interpretation are only a part of legal reasoning.

This obviously means that a full account of what judges should do goes beyond statutory interpretation theories. It requires theories of adjudication and, at least arguably, theories about the limits of law, the legal domain, and the *canon* of legal argument. But this is as it should be. Expecting a theory of statutory interpretation to exhaustively answer how judges ought to decide or what types of facts, considerations, and reasons are legitimate sources for their decision-making is a mistake.

¹⁰⁰ Melvin Aron Eisenberg, *Strict Textualism*, 29 *LOY. L.A. L. REV.* 13, 23 (1995).

¹⁰¹ Matczak, *supra* note 95, at 336.

¹⁰² See *infra* Parts III, IV.

¹⁰³ Krishnakumar, *supra* note 18, at 4, 39. For an insightful general exploration of the relationship between statutory interpretation and common law, see generally Jeffrey A. Pojanowski, *Statutes in Common Law Courts*, 91 *TEX. L. REV.* 479 (2013), <https://doi.org/10.2139/ssrn.2023527>.

¹⁰⁴ Krishnakumar, *supra* note 18, at 40; see also William N. Eskridge, Jr. & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 *N.Y.U. L. REV.* 1718, 1728, 1778 (2021).

¹⁰⁵ Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 *U. CHI. L. REV.* 825, 887 (2017), <https://doi.org/10.2139/ssrn.2724054>.

¹⁰⁶ *Id.* at 887–88.

B. *Integrating Statutes into the Fabric of the Law*

Every new statutory enactment takes its place in a large body of already existing law.¹⁰⁷ How multiple legal texts ought to be connected to each other to produce legal norms is a complicated question.¹⁰⁸ Textualism has focused on the interpretation of statutes. But it has paid less attention to the question of how statutes ought to be integrated with the rest of the legal materials to generate legal content beyond relatively thin references to the “corpus juris” and similar notions.¹⁰⁹

The integration of statutory norms into the rest of the law is not automatic. It requires legal judgment about how the different pieces of the puzzle fit together, and therefore, inevitably generates interpretive flexibility or, to use Sandro’s term, *systemic discretion*.¹¹⁰ This flexibility is palpable in textualists’ own internal disagreements between more formalistic and more flexible approaches.¹¹¹

From this perspective, textualism’s promise of increased certainty and predictability¹¹² sometimes sits uneasily with the reality of textualism as practiced.¹¹³ That reality is in fact consistent with Limited Domain: there is legal reasoning outside of statutory interpretation. Whether adjudication is predictable and certain will thus depend on much more than the adoption of a theory like textualism. More specifically, it will depend on larger questions about legal reasoning and on how the rest of positive law and legal culture fare in terms of predictability. Just to mention a few factors that might be relevant beyond the limited domain of statutory interpretation: judges’ approaches to precedent; their view of the judicial role; the general legal culture’s valuation (or lack thereof) of the autonomy of legal

¹⁰⁷ Baude & Sachs, *supra* note 38, at 1100–01.

¹⁰⁸ Mark Greenberg, *How Facts Make Law*, 10 LEGAL THEORY 157, 177 (2004), <https://doi.org/10.1017/S1352325204040212>.

¹⁰⁹ See, e.g., Scalia, *supra* note 2, at 17.

¹¹⁰ PAOLO SANDRO, THE MAKING OF CONSTITUTIONAL DEMOCRACY: FROM CREATION TO APPLICATION OF LAW 166–67 (2022), <https://doi.org/10.5040/9781509905249>.

¹¹¹ Grove, *supra* note 4, at 266–67, 279; see also Eskridge, Slocum & Tobia, *supra* note 1, at 1693–94.

¹¹² See, e.g., SCALIA & GARNER, *supra* note 2, at xxix.

¹¹³ Eskridge, Slocum & Tobia, *supra* note 1, at 1622–23. For further discussion and explanation of this tension, see Ryan D. Doerfler, *Late-Stage Textualism*, 2021 THE SUPREME COURT REVIEW 267, 269 (2022), <https://doi.org/10.1086/719651>.

reasoning; and the rules and culture around judicial nomination, selection, and training.

According to scholars like Jonathan Molot, textualism's key difference with the older plain-meaning school is that the former acknowledges interpretive freedom.¹¹⁴ Judges, as Pierluigi Chiassoni argues, partly make "the rules of the game."¹¹⁵ And rhetoric aside, judicial practice reflects that statutory interpretation is, as Richard Re puts it, "flexible and multifaceted."¹¹⁶

The explanation for this widely recognized flexibility is, at least in part, the fact that the application of law requires much more than statutory interpretation. It requires integrating the statute within the larger fabric of all the legal materials in a particular legal system. Textualism should not ignore that there is law beyond the statute.¹¹⁷ A textualist theory about statutory interpretation needs to be integrated within a larger theory that makes space for precedent, for systematic relationships between statutes, for constitutional and other legal values, and for the aspects of legal argument that are not determined by legal texts (this is compatible, of course, with textualism's aim to avoid judicial discretionary powers or the avoidance of statutory norms on the basis of policy concerns). Like all theories of statutory interpretation, textualism ought to recognize its limited domain.

C. *Rethinking Substantive Canons*

To see what a textualist view that complies with Limited Domain would achieve, consider the ostensible tension—or even contradiction—between textualism and substantive canons of statutory construction.¹¹⁸

¹¹⁴ Molot, *supra* note 5, at 49. *But see* Tara Leigh Grove, *The Misunderstood History of Textualism*, 117 NW. U. L. REV. 1033, 1038–39 (2023).

¹¹⁵ PIERLUIGI CHIASSONI, INTERPRETATION WITHOUT TRUTH: A REALISTIC ENQUIRY 71 (2019), <https://doi.org/10.1007/978-3-030-15590-2>.

¹¹⁶ Re, *supra* note 16, at 1652.

¹¹⁷ Will Baude has emphasized this fact too, although he takes his correct observation in what, to my mind, is a misguided direction: unwritten law, (what seems to be) a resurrection of the declaratory theory of the common law, and natural law. *See generally* Baude, *supra* note 1. In a way, one can interpret my remarks in this section as an agreement with Baude's observation along with a rejection of the implications he draws from it—and an invitation to textualists to take the observation seriously even if they might worry about the implications that Baude wants to derive from it.

¹¹⁸ *See, e.g.*, Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 123–24 (2010); Eidelson & Stephenson, *supra* note 3, at 519.

The standard view is that canons of construction can be either *semantic* or *substantive*. Semantic canons are generalizations about communication, whereas substantive canons are legal, non-communicative considerations that favor a particular construction of a statutory text.¹¹⁹ A canon is substantive when it is not—and does not aim to be—based on facts about communication but, rather, is premised on legal concerns that determine the statute’s legal effect.¹²⁰ One good example of a substantive canon is the rule of lenity, according to which linguistically indeterminate criminal statutes should be interpreted in favor of the criminal defendant.¹²¹

Semantic canons are, in principle, compatible with all forms of textualism: it all turns on whether the semantic canon is warranted as a matter of language. In the case of substantive canons, whether there is such compatibility is at least contested. The problem these substantive canons are thought to pose for textualism is that, as Justice Barrett once wrote, “their application can require a judge to adopt something other than the most textually plausible meaning of a statute.”¹²² Textualist judges applying substantive canons would seemingly strain the statutory language to achieve goals that are not expressed in the statute itself.¹²³ Indeed, the best interpretation of what substantive canons do is precisely that they determine how statutes generate legal norms in ways that might diverge from the ordinary meaning of the relevant text.¹²⁴

If textualism were modified to satisfy the conditions of Nonequivalence (rejecting the slogan that “the text is the law”) and Limited Domain (seeing the duty of the judge as applying the law as whole rather than a particular statute), it would avoid this tension. It would accept that substantive canons are part of the law that judges ought to, or at least can permissibly, apply as a matter of law.¹²⁵

The adoption of Limited Domain does not mean that anything goes. Some substantive canons—such as the rule of lenity—have a long tradition and an unquestionable status as central aspects of our

¹¹⁹ *Id.* at 516–17.

¹²⁰ *Id.* at 533–34.

¹²¹ Nam, *supra* note 14, at 406.

¹²² Barrett, *supra* note 1188, at 123–24.

¹²³ *Id.* at 124.

¹²⁴ Greenberg, *supra* note 39, at 254.

¹²⁵ See Baude, *supra* note 1, at 1339; see also Baude & Sachs, *supra* note 38, at 1122.

legal regime. Others—like the recent major questions doctrine—have a much shakier legal standing.¹²⁶

If textualists do not adopt a view like Limited Domain, they make themselves liable to objections like Justice Kagan’s claim that they use substantive canons, such as the major questions doctrine, as “get-out-of-text-free cards.”¹²⁷ Faced with this critique, the defender of the major questions doctrine can either defend it as a substantive canon on legal grounds, or as a linguistic canon on linguistic grounds.¹²⁸ The latter defense’s success depends on empirical facts, and the limited work on this question suggests the facts do not support the “linguistic” interpretation of the major questions doctrine.¹²⁹ If instead we see it as a substantive canon, the real question about the major questions doctrine is not whether it fits empirical facts about communication but, rather, whether the doctrine is grounded in law—a separate question that is not itself prejudged by theories of statutory interpretation that comply with Limited Domain.

As a more general matter, the critique of substantive canons cannot be *merely* that they are at odds with dominant understandings of textualism. In this sense, Justice Kagan’s suggestion that we should perhaps “toss them all out”¹³⁰ is not warranted. Justice Kagan is right to note the tension.¹³¹ But the tension is based on a misunderstanding of how statutes interact with legal content and of statutory interpretation’s limited domain. Instead of abandoning all substantive canons, we should fix our views of statutory interpretation. Those views should make space for the fact that legal normative considerations can

¹²⁶ See Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 262 (2022).

¹²⁷ *West Virginia v. EPA*, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting); see Sohoni, *supra* note 1266, at 282.

¹²⁸ See, e.g., Ilan Wurman, *Importance and Interpretive Questions*, 110 VA. L. REV. 909, 949 (2024), <https://doi.org/10.2139/ssrn.4381708>. For a judicial articulation, see *Biden v. Nebraska*, 143 S. Ct. 2355, 2376 (2023) (Barrett, J., concurring).

¹²⁹ Kevin Tobia, Daniel Walters & Brian G. Slocum, *Major Questions, Common Sense?*, 97 S. CAL. L. REV. (forthcoming 2024) (manuscript at 5, 62) (on file with author), <https://doi.org/10.2139/ssrn.4520697>.

¹³⁰ Transcript of Oral Argument at 60, *Pueblo v. Texas*, 142 S. Ct. 1929 (2022) (No. 20-493). The same applies to other legal doctrines at odds with some versions of textualism, such as the absurdity doctrine. See John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2419–20 (2003), <https://doi.org/10.2307/1342768>; see also Brian G. Slocum, *Ordinary Meaning and Empiricism*, 40 STATUTE L. REV. 13, 16 (2019), <https://doi.org/10.1093/slr/hmy028>.

¹³¹ Eidelson & Stephenson, *supra* note 3, at 518.

play a crucial role in fixing, modulating, and determining the legal impact of statutory enactments.¹³² On this view, some purported substantive canons might still need to be jettisoned. But not merely because they are inconsistent with unwarranted views about statutory interpretation. The question about substantive canons is legal, not linguistic.¹³³

Consider the case of the rule of lenity. The purpose of the rule is to ensure fair notice by avoiding punishing a defendant for an action the status of which was unclear.¹³⁴ If the aim of statutory interpretation were to ascertain the communicative content of the particular statute because that content is the law, it is not obvious why concerns about fairness in punishment should be relevant for that task.¹³⁵ Like other substantive canons, the rule of lenity aims to implement a legal principle in the process of ascertaining a particular statute's legal implications.¹³⁶ This discrepancy leads Jeesoo Nam to argue that lenity should be reformed and applied as an excuse rather than as a substantive canon.¹³⁷ While perhaps this would be a welcome innovation from other perspectives (including some highlighted by Nam), I do not think it's necessary merely because of the alleged discrepancy. The fact that Scalia himself did not see a contradiction—despite his mistaken equation of *law* and *laws*—should be a reminder of the possibility.¹³⁸

* * *

Statutes are *legal* texts. This means that their legal impact is ultimately a legal question.¹³⁹ Because it is a legal question, its answer depends on legal considerations beyond the statute. The theory of

¹³² Schauer, *supra* note 86, at 116.

¹³³ Baude & Sachs, *supra* note 38, at 1084, 1127.

¹³⁴ John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 WM. & MARY L. REV. 1321, 1327 (2018).

¹³⁵ Nam, *supra* note 14, at 401–02.

¹³⁶ *Id.* at 402.

¹³⁷ *Id.* at 402–03.

¹³⁸ See David S. Romantz, *Reconstructing the Rule of Lenity*, 40 CARDOZO L. REV. 523, 561–65 (2018).

¹³⁹ See Richard H. Fallon, *The Meaning of Legal “Meaning” and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1241 (2015). In fact, given their recurrent reliance on technical legal terms or definitions, even the communicative content of many statutes is partly a legal question. As Fred Schauer puts it, the meaning of technical legal terms is not clearly distinguishable from legal considerations. Schauer, *supra* note 86, at 126–27.

statutory interpretation is only part of the larger theory of legal reasoning.

As mentioned above, some textualists might feel inclined to reject conditions like Limited Domain. I think this position would be wrong on the merits. But it would also be unwise because it makes textualism a more extreme and implausible position than necessary.¹⁴⁰ Textualists should instead adapt their views, retain their central commitments to the enacted text and to limiting judicial inquiry into intentions and purposes, but toss out some of the more implausible (and unnecessary) views that are currently part of the theory. There is very little evidence that contemporary text-is-law judicial textualism is compatible with substantive canons.¹⁴¹ In light of this fact, textualists should modify their theory rather than misguidedly question a central—and, until very recently, unquestioned—aspect of our legal practices. They should replace a commitment to *laws* with a commitment to *law*.

Of course, this does not mean that textualism can accommodate all conceptually possible substantive canons. Some imaginable canons—such as “interpret all statutes in light of their purpose” or “interpret all statutes in a way that maximizes social welfare”—would be flatly inconsistent with textualism. And perhaps the major questions doctrine is one of the canons that lacks any legal grounding. My point is simply that there is no necessary tension between textualism and *all* substantive canons merely because they are substantive canons. The reason for this is that theories of statutory interpretation apply within a limited domain.

III. LEGALITY

The third condition is:

Legality: within law, the meaning of statutes is a legal question.

The idea that statutes should be interpreted according to their *ordinary meaning* has a long history in American law.¹⁴² But it has become exceptionally significant for contemporary textualists.¹⁴³ The

¹⁴⁰ Siegel, *supra* note 30, at 145.

¹⁴¹ Eidelson & Stephenson, *supra* note 3, at 520–21.

¹⁴² Professor Slocum characterizes it as “perhaps the most widely cited axiom of legal interpretation.” ORDINARY MEANING, *supra* note 55, at 4.

¹⁴³ See Krishnakumar, *supra* note 18, at 9; see also Marco Basile, *Ordinary Meaning and Plain Meaning*, 110 VA. L. REV. 135, 137 (2024); Jesse M. Cross, *The Fair Notice Fiction*,

Court itself has expressed that, when in charge of interpreting a statute, the interpreter must generally seek to discern the ordinary meaning of its text.¹⁴⁴ The language contained in statutes should be given its ordinary meaning.¹⁴⁵

There is little clarity about exactly what *ordinary meaning* means.¹⁴⁶ But the underlying intuition is that the application of statutes should turn, at least presumptively, on how an ordinary person would understand the text.¹⁴⁷ As a general rule, the first question a judge must ask is how ordinary people would understand the statutory text.¹⁴⁸ Of course, the statutory text might be such that its most obvious audience is not the public at large but rather a narrower group, such as a subset of legal officials. But this would be an exception to the general rule. Moreover, those committed to ordinary meaning could answer the very question of whether technical meaning should prevail by reference to what an ordinary person would understand in terms of the audience of the relevant statute.

Legality suggests that—contrary to what the rhetoric surrounding ordinary meaning might seem to imply—within law and legal practices, the meaning of a statute is not simply an empirical fact about linguistic usage. It is, instead, a legal construct. This is true even when the focus is on ordinary meaning. This does not entail entirely jettisoning all talk about ordinary meaning. Rather, and as I will argue in Part III.E below, Legality merely asks one to give the idea of ordinary meaning less significance than textualist judges sometimes do and to avoid an unwarranted emphasis on its connection to ordinary people.

Legality does not turn on an idiosyncratic equation or conflation of meaning (or communicative content) with legal content. I accept (as Nonequivalence suggests) that these are two different types of entities. The claim is more limited: when judges are responsible for

75 ALA. L. REV. 487, 491–92 (2023); Stefan Th. Gries & Brian G. Slocum, *Ordinary Meaning and Corpus Linguistics*, 2017 BYU L. REV. 1417, 1424 (2017).

¹⁴⁴ *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1480–81 (2021); *BP P.L.C. v. Mayor & City Council of Balt.*, 141 S. Ct. 1532, 1537 (2021).

¹⁴⁵ *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 548 (1992) (Scalia, J., concurring in part and dissenting in part).

¹⁴⁶ Anita S. Krishnakumar, *Metarules for Ordinary Meaning*, 134 HARV. L. REV. F. 167, 167 (2021).

¹⁴⁷ Kevin P. Tobia, *Testing Ordinary Meaning*, 134 HARV. L. REV. 726, 736 (2020).

¹⁴⁸ *See, e.g., Yates v. United States*, 574 U.S. 528, 566 n.6 (2015) (Kagan J., dissenting); *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1015 (2020).

ascertaining it, the meaning—i.e., the communicative content—of statutes is legally constructed.

A. *Meaning as a Legal Construct*

Consider first how, on at least some influential accounts, ordinary meaning requires idealization. Brian Slocum, for example, argues that we should understand ordinary meaning as the meaning that an idealized (or *reasonable*) ordinary interpreter would give to the relevant text in light of the relevant context.¹⁴⁹

This does not deny the connection between ordinary meaning and empirical facts about ordinary people.¹⁵⁰ But this connection is limited: the question about ordinary meaning is not, on this view, *purely* empirical.¹⁵¹ As Scalia and Gardner—who also emphasize the significance of ordinary meaning—write, the question is not how the statistically average person would understand the text, but rather how a *reasonable* reader, “fully competent in the language,” would understand it.¹⁵² The actual understanding of actual ordinary people is not the core of the question.¹⁵³ The question, instead, is how an idealized ordinary interpreter would understand the statutory language—in other words, the meaning that the particular text would convey to this reasonable reader, in light of publicly available facts about the relevant context.¹⁵⁴

There is a short path from this conception of ordinary meaning to Legality. Indeed, if one understands ordinary meaning in this way, then it is at least possible—if the idealization will be operationalized by judges deciding legal disputes—for what will count as ordinary meaning to be, as Tara Leigh Grove puts it, an “inherently legal” question.¹⁵⁵ This is something that at least some textualists have

¹⁴⁹ ORDINARY MEANING, *supra* note 55, at 108.

¹⁵⁰ *Id.* at 103. For a critique of this view, see Bernstein, *supra* note 15, at 1452.

¹⁵¹ Carissa Byrne Hessick, *Corpus Linguistics and the Criminal Law*, 2017 BYU L. REV. 1503, 1503 (2017). For further discussion, see ORDINARY MEANING, *supra* note 55, at 14, 16–17, 102.

¹⁵² SCALIA & GARDNER, *supra* note 2, at 31.

¹⁵³ ORDINARY MEANING, *supra* note 55, at 106.

¹⁵⁴ Grove, *supra* note 69, at 1064–65; *see also* Berman & Krishnamurthi, *supra* note 24, at 80.

¹⁵⁵ Gries & Slocum, *supra* note 1433, at 1426.

already emphasized,¹⁵⁶ and that may justify why judges sometimes attribute to language an “ordinary meaning” that is at odds with how ordinary people would understand it.¹⁵⁷

Of course, even on this view, empirical facts matter. The idealization and potential legal construction involved in ordinary meaning are, after all, about the understanding of ordinary readers. But which types of facts matter, which evidence about them is relevant, and how they lead to a determination of meaning, are—on this view—all questions settled by legal practices.¹⁵⁸ Talk about ordinary meaning, then, is compatible with the relevant questions depending on law and legal practices.¹⁵⁹ Such questions include which evidence to take into account and how to construe a statute’s meaning on the basis of that evidence.¹⁶⁰ The empirical facts might be relevant, but their *legal* relevance, relative weight, and priority would be determined by legal considerations.¹⁶¹ Ordinary meaning, for those who recognize space for idealization and legal construction, would thus rely on empirical facts while being, ultimately, a legal question.

Consider the idea of the reasonable reader that Slocum, Scalia and Garner, and others allude to in their articulations of ordinary meaning. As a general legal matter, the reasonable person is not merely the statistically average person. Most of our legal culture has rejected a merely statistical view of what counts as a reasonable person, for good reasons.¹⁶² Instead, most scholars see the reasonable person as a partially idealized person, and questions about what a reasonable person would do as partly normative and not merely about the “empirical average.”¹⁶³ As a general legal matter, reasonableness

¹⁵⁶ John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 75 (2006), <https://doi.org/10.2139/ssrn.2849247>.

¹⁵⁷ See, e.g., James A. Macleod, *Ordinary Causation: A Study in Experimental Statutory Interpretation*, 94 IND. L.J. 957, 961–62 (2019), <https://doi.org/10.31234/osf.io/pdjb7>.

¹⁵⁸ Grove, *supra* note 69, at 1065–66.

¹⁵⁹ *Id.* at 1058.

¹⁶⁰ *Id.* at 1057.

¹⁶¹ For critical analysis of corpus linguistics along related lines, see generally Bernstein, *supra* note 15.

¹⁶² See Kevin P. Tobia, *How People Judge What Is Reasonable*, 70 AIA. L. REV. 293, 300–02 (2018).

¹⁶³ GREGORY C. KEATING, REASONABLENESS AND RISK: RIGHT AND RESPONSIBILITY IN THE LAW OF TORTS 141 (2022), <https://doi.org/10.1093/oso/9780190867942.001.0001>; see also JOHN GARDNER, *The Many Faces of the Reasonable Person*, in TORTS AND OTHER WRONGS 271, 273–74 (2019), <https://doi.org/10.1093/oso/9780198852940.001.0001>.

“involves a kind of judgment that is both normative and descriptive.”¹⁶⁴ And what is true in law in general is true about ordinary meaning. The reasonable reader is not the statistically average reader—for starters, the reasonable reader is a highly competent user of the English language. The reasonable reader is an idealized construct, even if the idealization is based on the human beings that are meant to interpret and be guided by legal standards.¹⁶⁵

My point here is not to endorse this understanding of ordinary meaning or the associated idealization. Rather, the point is that at least some judges and theorists who want to emphasize the relevance of ordinary meaning accept idealization and therefore accept the role of legal considerations. What matters to these theorists and judges is how the *reasonable reader* would understand the text in the relevant context, in light of social and linguistic conventions.¹⁶⁶ Within legal practices in which the notion of a “reasonable reader” plays a role, meaning is thus not a purely empirical fact even though it is sensitive to them.¹⁶⁷

Of course, one might deny that, in our actual legal practices, judges understand ordinary meaning in a way that requires idealization. Perhaps at least some—or many—judges understand ordinary meaning as a purely empirical fact. And to the extent judges understand ordinary meaning as a construct that requires idealization, we should reform our legal practices.

Both arguments are at least plausible. But they are consistent with Legality. The first argument makes a claim about what our legal practices are. The second makes a claim about what these practices should be. But ultimately, both arguments recognize that whether idealization is part of our legal practices—and, therefore, whether ordinary meaning requires legal judgment or is a purely empirical fact—ultimately depends on the substance and structure of those practices. Legality is inescapable because while, at a first-order level, one might want to reject the view that questions of meaning ought to

¹⁶⁴ Benjamin C. Zipursky, *Reasonableness in and out of Negligence Law*, 163 U. PA. L. REV. 2131, 2150 (2015). For general discussion (and empirical support), see generally Tobia, *supra* note 1622.

¹⁶⁵ See ORDINARY MEANING, *supra* note 55, at 3; see also Paolo Sandro, *To Whom Does the Law Speak? Canvassing a Neglected Picture of Law’s Interpretive Field*, in PROBLEMS OF NORMATIVITY, RULES AND RULE-FOLLOWING 265, 273 (Michał Araszkiwicz et al. eds., 2015), https://doi.org/10.1007/978-3-319-09375-8_20.

¹⁶⁶ Manning, *supra* note 130, at 2392–93; see also Lawrence M. Solan, *The New Textualists’ New Text*, 38 LOY. L.A. L. REV. 2027, 2030 (2005).

¹⁶⁷ Grove, *supra* note 69, at 1063, 1066.

be sensitive to legal considerations, whether that view prevails or not within the legal domain will depend on our legal practices. What will count as meaning or ordinary meaning will depend on legal practices. Our legal practices might be (or might ought to be) such that, at a first-order level, what counts as meaning or ordinary meaning is a purely empirical question that involves neither idealization nor consideration of legal concerns. But the ultimate explanation again will turn on what judges and legal officials around here happen to do. At the most basic level, within the legal domain, questions of meaning are settled by legal practices.

B. “*Meaning*”

Even though questions of meaning ultimately depend, in the legal domain, on legal standards, they are sensitive—more or less, contingent on what the legal standards and practices are—to empirical facts. Again, the facts might be such that they warrant interpreting statutory terms or phrases in terms of their technical rather than ordinary meaning.¹⁶⁸ Our practices are characterized by the presence of technical legal language in many statutory texts, as well as by the widely accepted practice to interpret them as such¹⁶⁹ and to rely on juristic tools in ascertaining meaning.¹⁷⁰ Whether ordinary or technical, meaning—as ascertained by judges—will be subject to the impact of law and legal norms.¹⁷¹

¹⁶⁸ See Barrett, *supra* note 27, at 2202. Relying on Hilary Putnam, Tobia, Slocum, and Nourse suggest that a familiar explanation for this fact might be provided by the “division of linguistic labor”: ordinary people’s reliance on experts’ understanding of technical terms or the technical content of ordinary terms. See Hilary Putnam, *The Meaning of ‘Meaning’*, in 2 MIND, LANGUAGE AND REALITY: PHILOSOPHICAL PAPERS 145–46 (1975), <https://doi.org/10.1017/CBO9780511625251>; Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Ordinary Meaning and Ordinary People*, 171 U. PA. L. REV. 365, 388–93 (2023), <https://doi.org/10.2139/ssrn.4034992>.

¹⁶⁹ See generally Frederick Schauer, *Is Law a Technical Language?*, 52 SAN DIEGO L. REV. 501 (2015); Frederick Shauer, *Unoriginal Textualism*, 90 GEO. WASH. L. REV. 825 (2022); Kevin Tobia, *Legal Concepts and Legal Expertise*, 203 SYNTHESE 107 (2024), <https://doi.org/10.1007/s11229-024-04512-3>.

¹⁷⁰ Anita S. Krishnakumar, *The Common Law as Statutory Backdrop*, 136 HARV. L. REV. 608, 663–64 (2022); see also Benjamin Minhao Chen, *Textualism as Fair Notice?*, 97 WASH. L. REV. 339, 359 (2022); Grove, *supra* note 29, at 651–75; McGinnis & Rappaport, *supra* note 1344, at 1340–41. Importantly, ordinary people seem to understand that legislation will contain many technical legal terms and meanings. See Tobia, Slocum & Nourse, *supra* note 1688, at 389.

¹⁷¹ For reflection along similar lines, see Krishnakumar, *supra* note 18, at 57–58.

Does this mean judges should stop talking about “ordinary meaning” (or perhaps meaning in general!) because, in law, meaning is ultimately dependent on legal practices? Not necessarily. Even though it is partly legally constructed, “ordinary meaning” is not an arbitrary label. When judges talk about ordinary meaning, they have in mind ordinary people and empirical evidence about them. Moreover, many judges—and particularly textualist judges—want to exclude *extraordinary* meanings that could only be ascertained on the basis of evidence about the drafters’ or enacting legislators’ subjectively intended meaning.¹⁷²

This also explains why judges who express a commitment to ordinary meaning need not adopt a blanket exclusion of technical meanings. In this sense, perhaps a better label to capture the general textualist approach would be to frame it as a commitment to *public* or *plain* meaning.¹⁷³ The point of the textualist approach is to exclude the relevance of factors that are not ascertainable on the basis of objective facts widely available to the general public.¹⁷⁴ It is perfectly consistent with such an approach to accept that meaning is, in law, not necessarily an exclusively empirical fact, or that sometimes the meaning of a statutory text is its technical meaning.¹⁷⁵

Regarding this latter point, a textualist view that complied with Legality could very well state a general presumption of, or preference for, ordinary meaning. Legal standards in complex and large societies are supposed to guide the behavior of many citizens, and natural languages are the obvious starting point for crafting the materials from which those standards will be derived.¹⁷⁶ This type of concern will be very prevalent in statutory regimes that aim to clearly convey normative standards to the population at large that wouldn’t otherwise be obvious to them, such as *mala prohibita* criminal statutes. At the same time, such a textualist approach would also recognize law can always diverge from the standard meaning that ordinary reasonable readers would derive

¹⁷² Tobia, *supra* note 1477, at 738.

¹⁷³ For the suggestion of “public,” see Eskridge, Slocum & Tobia, *supra* note 1, at 1696; Tobia, Slocum & Nourse, *supra* note 168, at 374. For the suggestion of “plain,” see Lawrence B. Solum, *Pragmatics and Textualism* (July 10, 2024) (unpublished manuscript) (on file with author) [hereinafter *Pragmatics*].

¹⁷⁴ For similar reflections, see Schauer, *Unoriginal Textualism*, *supra* note 169, at 841.

¹⁷⁵ ORDINARY MEANING, *supra* note 55, at 101.

¹⁷⁶ SANDRO, *supra* note 110, at 186–87.

from legal texts and aim to direct the behavior of a narrower group.¹⁷⁷ But, even in these cases, the interpretation should build upon empirical facts about communicative content. Although Legality argues that questions of meaning depend on law, it does not affirm that they are independent from facts about how actual people would understand language.¹⁷⁸

C. *Legal Aims and Legal Methods*

While dependent on issues of empirical fact, the questions judges ask about the meaning of statutes are not entirely reducible to them.

Consider the distinction between meaning as the object judges are aiming to ascertain and the mechanisms and procedures judges use to do so. From the perspective of this distinction, meaning is what philosophers sometimes call a *standard of correctness*. It is not a decision procedure but rather a criterion for the legally correct starting point or baseline for statutory interpretation.¹⁷⁹

Two observations are relevant here—one about the procedures and methods judges use to ascertain meaning and another about meaning as the standard of correctness. Regarding the first point, presumably there is an objective truth about the meaning or range of meanings that a certain sentence would have in ordinary English or in technical legal English for a competent interpreter (again, Legality is not a skeptical claim). Judges, though, are not experts in empirical linguistics, and there is no single reliable mechanism that can correctly ascertain these facts in the context of litigation—as the multiple debates over the role of dictionary definitions, experimental evidence, corpus linguistics, and their possible combination attest.¹⁸⁰ At the level of procedures, then, judges have to use a specific method or combination of methods that is administrable and workable in the particular context of legal decision-making. As a consequence, any method used by judges will only imperfectly track objective linguistic

¹⁷⁷ See *id.* at 187; see also Gries & Slocum, *supra* note 143, at 1431.

¹⁷⁸ SANDRO, *supra* note 110, at 90.

¹⁷⁹ On the distinction, see R. Eugene Bales, *Act-Utilitarianism: Account of Right-Making Characteristics or Decision-Making Procedure?*, 8 AM. PHIL. Q. 257, 259 (1971). For an application in the legal domain, see Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 779 (2022).

¹⁸⁰ See, e.g., Kevin Tobia, Jesse Egbert & Thomas R. Lee, *Triangulating Ordinary Meaning*, 112 GEO. L.J. ONLINE 23, 24 (2023), <https://doi.org/10.2139/ssrn.4441512>.

facts. Whatever judges can ascertain using that method will be an imperfect proxy for the standard of correctness (meaning).¹⁸¹

Sometimes, judges use bad proxies. For instance, they rely on dictionary definitions, which commonly generate interpretations that diverge from the actual meaning of terms.¹⁸² Or they might fixate on the wrong thing—say, extension rather than intension, or extensional meaning rather than prototypical meaning, or reference rather than sense, and so on.¹⁸³ In other situations, judges do a better job. They rely on a richer array of evidence or rely on relatively reliable methods that produce better results.

But here, we come to the second observation. If, within the legal domain, the meaning of a text was a purely empirical notion, the procedures judges ought to use would be whatever mechanisms are more likely to correctly grasp the relevant facts. And, if we had the appropriate mechanisms, the empirical evidence produced by them would be decisive.¹⁸⁴ Instead, what we observe is that which procedures to use and how much weight they have are issues that turn on the practices of judges and on legally relevant considerations. Even when meaning as a standard of correctness is understood as a purely empirical fact, *this will be an upshot of legal practices*. Thus, judges could try to track the objective facts that constitute the communicative content of a statute. And they could succeed at doing so. But whether any of these things are the case in a particular situation and whether they are warranted as a legal matter will depend on law. This is sufficient to vindicate Legality.

Because of Legality, then, both the standard of correctness *and* the mechanisms and procedures we use to ascertain it are upshots of law and legal norms. Within legal practices, the meaning—and even the ordinary meaning—of a statute is not *just* an empirical notion. It

¹⁸¹ See Solan, *supra* note 166, at 2031.

¹⁸² ORDINARY MEANING, *supra* note 55, at 23, 215.

¹⁸³ These are all legal applications of distinctions drawn from theoretical linguistics and the philosophy of language. I list the oppositions merely as examples rather than to take any substantive position on them. For discussion in recent American legal scholarship, see Victoria F. Nourse, *Two Kinds of Plain Meaning*, 76 BROOK. L. REV. 997, 1000 (2011); Solan, *supra* note 166, at 2039–44.

¹⁸⁴ See Macleod, *supra* note 157, at 961; see also Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Progressive Textualism*, 110 GEO. L.J. 1437 (2021), <https://doi.org/10.2139/ssrn.4441512>; Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 795 (2018).

is instead a legal construct that depends—both in terms of what it is and how we ascertain it—on legal and judicial practice.

Because meaning is sensitive to empirical facts, judges should rely on the array of tools—including surveys, experiments, corpus linguistics studies, and so on—that might help them ascertain said facts.¹⁸⁵ But just as we worry about *law-office history*, we should worry about *law-office empiricism*.¹⁸⁶ Judges are experts in legal interpretation, not in the empirical study of language or in the use of any particular empirical methodology.¹⁸⁷ Thus, the significance of empirical facts does not entail that judges ought to be in the business of directly engaging in empirical work.

On the contrary, judges should acknowledge that they are in the business of making legal decisions.¹⁸⁸ Even when empirical facts are correctly ascertained by relying on dependable empirical methods, they are not necessarily determinative of meaning (even ordinary meaning). This is partly an upshot of the fact that what counts as the meaning we are striving to identify is a legal question. It is also an upshot of the inevitable imperfection of the legal procedures used to ascertain it. Judges should act as such and avoid the temptation to become amateur linguists or, worse, to treat their imperfect findings about communicative content as the objective truth about meaning.

D. *Putting Ordinary Meaning in its Place*

All of this suggests that, while an important element in our contemporary practices, ordinary meaning is not quite what many textualist judges sometimes seem to suggest. Indeed, it is common for contemporary textualist judges to repeatedly insist on the significance of the “ordinary reader” of statutory language,¹⁸⁹ and to see themselves as beholden to such readers because they must act as faithful agents of ordinary people.¹⁹⁰ In fact, contemporary textualists rely on talk about ordinary meaning as a justification for decisions significantly more than previous Supreme Court justices.¹⁹¹

¹⁸⁵ See Tobia, Egbert & Lee, *supra* note 180, at 24–25.

¹⁸⁶ Grove, *supra* note 29, at 695.

¹⁸⁷ See Gries & Slocum, *supra* note 143, at 1417.

¹⁸⁸ Bernstein, *supra* note 15, at 1452.

¹⁸⁹ Krishnakumar, *supra* note 170, at 660–61.

¹⁹⁰ See Barrett, *supra* note 27, at 2205.

¹⁹¹ As Anita Krishnakumar writes, “[a] Westlaw search for ‘ordinary meaning’ conducted in the SCT database reveals 279 references to ‘ordinary meaning’ in the 35

This rhetoric, however, leads to an overestimation of the actual significance of both ordinary meaning and ordinary people. First, meaning is not necessarily the meaning that the text has in ordinary English; it is ultimately a legal construct, sensitive to technical meaning, and merely built from—rather than determined by—empirical facts. Second, ordinary meaning is just the starting point of statutory interpretation (broadly understood).¹⁹² It can be successfully overcome by legal considerations.¹⁹³ A gap between ordinary meaning and legal implications is always possible.¹⁹⁴ Third, whatever role ordinary meaning plays in statutory interpretation—in fact, whatever role *meaning* plays in statutory interpretation—itsself depends on the collective practices of judges.

We should thus be circumspect about the commonly asserted idea that the ordinary meaning of statutory texts “controls.”¹⁹⁵ At least in our legal system, ordinary meaning is not mandated by any particular legal norm, including constitutional ones.¹⁹⁶ Enacted legal texts do not settle their own application, and grasping their communicative content is only part of what it takes to apply them.¹⁹⁷ Ordinary meaning might be a default presumption—the criterion that dictates how the process of deciding a case falling under a statutory norm begins. But its content as a standard and its ascertainment are a matter of legal practice.

This is not to say that meaning is irrelevant. First, statutory interpretation must start somewhere—and the meaning of the text in natural language is a quite reasonable place to start.¹⁹⁸ Second, there are reasons why notions like plain, public, and ordinary meaning can work as a useful coordination device for multiple interpreters with

years between 1987 and 2022, compared to 240 references to ‘ordinary meaning’ in the 179 years between 1986 and 1817.” Krishnakumar, *supra* note 18, at 10.

¹⁹² Basile, *supra* note 143, at 4150.

¹⁹³ ORDINARY MEANING, *supra* note 55, at 98–99; *see supra* Part II.

¹⁹⁴ ORDINARY MEANING, *supra* note 55, at 179.

¹⁹⁵ *See, e.g.*, Durand v. U.S. Dep’t of Labor, 662 F.3d 1106, 1109 (9th Cir. 2011); Fed. Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 476 (1994). For discussion, *see* Basile, *supra* note 143, at 147–48; *see also* William Baude & Ryan D. Doerfler, *The (Not So) Plain Meaning Rule*, 84 U. CHI. L. REV. 539, 545 (2017).

¹⁹⁶ *See* Basile, *supra* note 143, at 155.

¹⁹⁷ FERNANDO ATRIA, ON LAW AND LEGAL REASONING 141 (2002); *see also* Solum, *supra* note 35, at 481.

¹⁹⁸ David A. Strauss, *Why Plain Meaning?*, 72 NOTRE DAME L. REV. 1565, 1565 (1997).

different perspectives and normative views.¹⁹⁹ Third, law aims to guide behavior, and doing so effectively turns at least in part on some connection between legal norms and facts about non-legal communication.²⁰⁰

A version of textualism that satisfied Legality would thus be able to recognize these reasonable intuitions and the significance of empirical facts about the communicative content of statutory texts. But, by making itself consistent with Legality, textualism would avoid overemphasizing the significance of meaning (or ordinary meaning), the suggestion that questions of statutory interpretation are purely empirical questions about the meaning of language, and the claim that the communicative content of statutes immediately and necessarily constrains them. Moreover, perhaps acknowledging the collective power of judges to determine what the meaning of a text is and how it is ascertained would lead—somewhat paradoxically—to a humbler appraisal of the significance of their own determinations of meaning.

* * *

A potential worry about my argument in this section is that it collapses the distinction—to which I alluded in Part I—between communicative and legal content.²⁰¹ Under this distinction, legal texts have a meaning (communicative content) and also produce legal norms (legal content).²⁰² But Legality argues that the meaning (i.e., the communicative content) of legal texts is itself ultimately determined, in the legal domain, by legal norms. This would suggest that I am making a fundamental conceptual mistake or at least collapsing an important distinction.

I believe the distinction between communicative and legal content is analytically useful and that it does capture a fundamental difference between two types of things. The point of Legality is not that there is no such thing as the communicative content of legal texts like statutes. Legality is not, however, a claim about the relationship

¹⁹⁹ Here, I echo Frederick Schauer, Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 232 (1990), <https://doi.org/10.1086/scr.1990.3109661>. For empirical support, see Ivar R. Hannikainen et al., *Coordination and Expertise Foster Legal Textualism*, 119 PROC. NAT'L ACAD. SCI. (2022), <https://doi.org/10.1073/pnas.2206531119>.

²⁰⁰ Sandro, *supra* note 165, at 276–78; see also MATTHEW KRAMER, OBJECTIVITY AND THE RULE OF LAW 139–40 (2007), <https://doi.org/10.1017/CBO9780511619014>.

²⁰¹ See *supra* note 51.

²⁰² See Solum, *supra* note 35, at 480.

between communicative and legal content in the abstract or about the distinction between different types of entities within the structure of the universe. It is an observation about how law operates. As a legal matter and within the process of adjudication, the meaning of statutory texts never appears *in propria persona* just because it is the meaning of statutory texts. It always appears either as a functional, legal construct that is connected to the real thing or—if the legal system both attempts to track the thing itself *and* it succeeds at doing so—as a contingent upshot of legal practices. One way in which we could take this observation would be to treat it as a reason for skepticism about the distinction between communicative and legal content.²⁰³ But one can also take the observation in the more limited direction I am suggesting here. While the distinction is defensible, once we are in the legal domain, we never have access to communicative content directly and just because it is communicative content. Legal practices play an ineliminable explanatory role when it comes to the judicial ascertainment of the meaning of statutory texts.

IV. SPECIFICITY

The fourth condition is what I will call:

Specificity: statutory texts are a specific kind of text, different from ordinary communication.

The object of statutory interpretation is a statute, and statutes are texts. This section focuses on the specificity of statutes as well as the implications of this fact for statutory interpretation. I focus on two implications. First, Specificity undermines a familiar trend to see statutory interpretation as modeled on the interpretation of ordinary conversation. Second, Specificity suggests that textualists might be right to be skeptical about references to legislative intent. Overall, this section suggests that, as Paolo Sandro—on whose work I build upon—argues, statutory interpretation is significantly different from ordinary communication.²⁰⁴

²⁰³ For discussion along these lines, see Schauer, *supra* note 86, at 103.

²⁰⁴ SANDRO, *supra* note 110, at 171 (arguing that legal communication cannot be modeled on a simple equivalence to ordinary communication).

A. *Statutes as Texts*

Statutory interpretation is a kind of textual interpretation.²⁰⁵ It is a common feature of our legal culture that we treat legislation as a text with a canonical, definitive formulation, which claims legal authority *as a text*.²⁰⁶

A commitment to the centrality of the text of the statute is one of the central features of textualism.²⁰⁷ Indeed, even though there are different versions of textualism and some internal divisions both within the judiciary and the academy, for all textualists, the text is “the focal point of analysis.”²⁰⁸

Why should the text be the focal point? Sometimes, textualists make the argument in constitutional terms: the text is what has been properly enacted by the legislature after following the relevant constitutional procedures.²⁰⁹ There is, nevertheless, a more basic argument for the centrality of text—one that does not even appeal to constitutional considerations. Law, among other things, aims to guide the conduct of people through rules. The public should be able to follow those rules.²¹⁰ The rules should be knowable, and therefore, the publicly available texts enacted by legislators ought to play a crucial role in the determination of those rules. This does not deny that judges will rely on legal standards beyond the text for that determination. But it does suggest that the text enacted by the legislature—while, contrary to some textualists’ claims, not itself “the law”—should be the starting and focal point.²¹¹ There are thus powerful reasons to treat statutory texts as what Peter Tiersma calls *autonomous texts* and what Paolo Sandro—building on Tiersma—calls *autonomous text-acts*: as texts that convey, on their own, as much information as needed for a reader to understand them.²¹²

²⁰⁵ See GUASTINI, *supra* note 28, at 25.

²⁰⁶ JEREMY WALDRON, LAW AND DISAGREEMENT 77–79 (1999), <https://doi.org/10.1093/acprof:oso/9780198262138.001.0001>; see also Richard H. Fallon, Jr., *The Statutory Interpretation Muddle*, 114 NW. U. L. REV. 269, 313 (2019).

²⁰⁷ WALDRON, *supra* note 206, at 86–87.

²⁰⁸ Grove, *supra* note 114, at 1077.

²⁰⁹ Manning, *supra* note 156, at 73.

²¹⁰ SANDRO, *supra* note 110, at 177.

²¹¹ *Id.*

²¹² *Id.* at 195–200; Peter M. Tiersma, *A Message in a Bottle: Text, Autonomy, and Statutory Interpretation*, 76 TUL. L. REV. 431, 445 (2001).

The centrality of texts explains why some textualists have wanted to limit pragmatic enrichment—the extent to which context can illuminate what a word or phrase conveys, beyond its bare semantic content.²¹³ For example, textualists like John Manning believe that statutory interpretation should focus on *semantic context*. By this notion, he means “evidence about the way a reasonable person conversant with relevant social and linguistic practices would have used the words.”²¹⁴ Other textualists are willing to go beyond and to consider a wider set of facts.²¹⁵ But, for all textualists, the communicative content of statutes should not turn on opaque facts that could contribute to determining it but are not straightforwardly conveyed by the text.²¹⁶ What is publicly available is the text,²¹⁷ and thus, textualists aspire to avoid a pursuit of facts about the true subjective intent of legislators or the legislature as a whole.²¹⁸

The centrality of texts generates complex problems. Some of these issues have been highlighted, in our context, by scholars like Anya Bernstein and William Eskridge and Victoria Nourse.²¹⁹ As Bernstein argues, most theories of statutory interpretation assume the object of interpretation as a given. But legal interpreters do not have full, unmediated access to the thing itself: their own collective activities contribute to determining what counts as the text to interpret.²²⁰ Legal interpreters have choices to make about what text to interpret—which text to focus on, what part of that text to focus on, which parts to emphasize, etc.²²¹ And, as Eskridge and Nourse correctly explain, legal

²¹³ For discussion about pragmatic enrichment and its role in relation to semantic content, see Scott Soames, *Drawing the Line Between Meaning and Implicature—and Relating Both to Assertion*, in 1 PHILOSOPHICAL ESSAYS, NATURAL LANGUAGE: WHAT IT MEANS AND HOW WE USE IT 257–77 (2008), <https://doi.org/10.1515/9781400837847>.

²¹⁴ Manning, *supra* note 156, at 91. Not everyone agrees. See *Pragmatics*, *supra* note 173, at 38.

²¹⁵ SCALIA & GARNER, *supra* note 2, at 33.

²¹⁶ SANDRO, *supra* note 110, at 201.

²¹⁷ See *id.* at 204.

²¹⁸ See John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 421 (2005), <https://doi.org/10.2139/ssrn.2853690>.

²¹⁹ Anya Bernstein, *Before Interpretation*, 84 U. CHI. L. REV. 567 (2017); Eskridge & Nourse, *supra* note 104.

²²⁰ See Bernstein, *supra* note 219, at 568; see also Cross, *supra* note 1, at 1044.

²²¹ Bernstein, *supra* note 219, at 573.

interpreters not only choose what text and part to focus on, but also what contextual factors might contribute to its content.²²²

For the “text is law” version of textualism sometimes expressed by textualist judges, these problems are fatal. Not so much for a reconstructed textualist position consistent with Nonequivalence and Specificity, and cognizant of the always possible gap between legal materials and legal norms. That gap is filled, in part, through choices that are not dictated by the statutory text. Again, this does not mean that anything goes as a legal matter. But it does suggest that textualism must accept that there are many more legal judgments and arguments beyond statutory interpretation proper that both precede and follow it.

Even against this backdrop, textualists can still legitimately treat the legally determined text as fully or relatively autonomous—and, in fact, their decision to do so will itself make the text more successful as an autonomous one. In other words, the less judges treat statutes’ content as dependent on non-public facts that the statute does not carry “on its sleeve,” the more these statutes will be a reliable basis from which ordinary people can infer legal norms.²²³ Specificity is thus a condition that textualist theories can easily satisfy, and that vindicates some of their underlying motivations.

Now, not all textualists would agree that we should draw a radical distinction between models of ordinary communication and statutory interpretation. The difference would be of degree, not kind. Lawrence Solum, for instance, has formulated models that incorporate some of the distinctive features of statutory enactment and interpretation within models of ordinary communication, such as Paul Grice’s, without adopting the idea of statutes as autonomous texts.²²⁴ Specificity is compatible with this type of project, since all it requires is the acceptance of the claim that statutory interpretation is different from ordinary communication in multiple and important ways—even if that difference is not categorical.

²²² Eskridge & Nourse, *supra* note 104, at 1721.

²²³ Tiersma, *supra* note 212, at 448. To my mind, this is compatible with some forms of pragmatic enrichment.

²²⁴ See Lawrence B. Solum, *Contractual Communication*, 133 HARV. L. REV. F. 23, 34–45 (2019); Lawrence B. Solum, *Disaggregating Chevron*, 82 OHIO ST. L.J. 249, 276–83 (2021) [hereinafter *Disaggregating Chevron*]; see also *Pragmatics*, *supra* note 173, at 4.

B. *Against the Conversational Model*

One important implication of Specificity is that statutes should not be interpreted in the same way as ordinary speech.²²⁵

Federal courts sometimes rely on language found in non-legal sources to interpret statutes. One particular form of this approach, sometimes employed by textualist judges, alludes to examples drawn from—real or, more commonly, hypothetical—“conversations between friends.”²²⁶ Evan Zoldan calls this approach the *conversation canon*.²²⁷ This approach favors interpretations that conform to the meaning of language in ordinary communicative contexts.²²⁸ Other scholars believe this is not really a canon of interpretation, but simply a rhetorical tool that judges use for emphatic purposes.²²⁹

Be that as it may, the analogy between statutory interpretation and ordinary communication has a long history. For example, the entire argument in Alexander and Prakash’s article against intention-free interpretation is based on analogies between legislation and ordinary communication.²³⁰ Something similar applies to Stanley Fish’s arguments against textualism,²³¹ and to Scott Soames’s views about legal interpretation.²³² Other scholars, like Lawrence Solum and Bill Watson, acknowledge important differences, but still believe the starting point should be to treat legislative enactments as roughly similar to everyday speech.²³³

Nevertheless, while an analogy with ordinary *communication* might be defensible, as these scholars suggest, an analogy with ordinary *conversation*—as the conversation canon would have it—is not. If we think about ordinary conversation and statutory communication

²²⁵ Tiersma, *supra* note 212 at 449; *see also* RONALD DWORKIN, *LAW’S EMPIRE* 64, 315 (1986).

²²⁶ Evan C. Zoldan, *The Conversation Canon*, 110 KY. L.J. 1, 3–4 (2022). For the idea of a conversation between friends, *see* *Bostock v. Clayton County*, 140 S. Ct. 1731, 1828 (2020) (Kavanaugh, J., dissenting).

²²⁷ Zoldan, *supra* note 226, at 8; *see also* Krishnakumar, *supra* note 170, at 661.

²²⁸ *See* Zoldan, *supra* note 226, at 12.

²²⁹ *See* Krishnakumar, *supra* note 18, at 59–60.

²³⁰ Larry Alexander & Saikrishna Prakash, *Is That English You’re Speaking? Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967, 974 (2004).

²³¹ Stanley Fish, *There Is No Textualist Position*, 42 SAN DIEGO L. REV. 629, 638 (2005).

²³² Soames, *supra* note 97, at 403.

²³³ *Pragmatics*, *supra* note 173, at 37; Bill Watson, *Literalism in Statutory Interpretation: What Is It and What Is Wrong with It?*, 2021 U. ILL. L. REV. ONLINE 218, 221–22 (2021).

carefully, we can see that the analogy between them is at least dubious. In ordinary conversation, and following Paul Grice's influential model,²³⁴ we find at least: (i) a complex, reflective intention of the speaker to assert something; (ii) the meaning of the utterance said; (iii) the shared context; (iv) cooperative assumptions shared by speaker and listener; and (v) things that are not said but implicated.²³⁵ Because all of these things can be present in an ordinary conversation, it is perfectly possible for what the speaker has said to differ from the content they have asserted.²³⁶ It is also possible that what they have asserted does not exhaust the full communicative content of the particular utterance—since an utterance might also recognizably imply additional content.²³⁷

All theories of statutory interpretation, including textualism, should reject a too quick analogy between this type of situation and statutory interpretation.²³⁸ If anything, a comparison between statutory interpretation and ordinary conversation illuminates the multiple disanalogies between them.²³⁹ This is something at least some textualists have already emphasized.²⁴⁰ It is also an implication of Specificity that all textualists should accept. The point is not that there are no analogies between ordinary communication and the enactment and interpretation of a statute. It is rather that theories of statutory interpretation should be particularly attentive to all the ways in which the analogy fails—and particularly so when the instance of ordinary communication that judges have in mind is a conversation.

²³⁴ See generally PAUL GRICE, *STUDIES IN THE WAY OF WORDS* (1991).

²³⁵ Francesca Poggi, *Against the Conversational Model of Legal Interpretation: On the Difference Between Legislative Intent and Speaker's Intention*, 40 *REVUS: J. CONST. THEORY & PHIL.* L. 9, 12 (2020), <https://doi.org/10.4000/revus.5694>. For a similar taxonomy, see Andrei Marmor, *The Pragmatics of Legal Language*, 21 *RATIO JURIS* 423, 424–25 (2008), <https://doi.org/10.1111/j.1467-9337.2008.00400.x>.

²³⁶ Marmor, *supra* note 235, at 426.

²³⁷ *Id.* at 430.

²³⁸ See Tiersma, *supra* note 212, at 448.

²³⁹ See Marmor, *supra* note 235, at 434. Richard Fallon makes an argument for a similar conclusion, both on the basis of the differences between ordinary communication and statutory interpretation and on different grounds—namely, that the meaning of “meaning” is as ambiguous in statutory interpretation as in ordinary communication. See Fallon, *supra* note 139, at 1252–77.

²⁴⁰ See, e.g., Justice Gorsuch's argument in *Bostock*. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1745 (2020).

First, the enactment of the statute and its interpretation occur at different points in time.²⁴¹ In contrast, ordinary conversation is typically characterized by a shared context and by utterance and interpretation happening at the same time. In statutory cases, there is a context of enactment and an infinite number of contexts of interpretation (one context for every interpreter).²⁴² The enactment of a statute is a closed, unilateral speech act.²⁴³

Second, the aim of legislation is quite distinct from the aims of ordinary conversation.²⁴⁴ Thus, strategies of interpretation that would not be warranted in ordinary contexts might be warranted in the statutory context, and vice versa.²⁴⁵ A statute is, also, a legal document enacted in a legal setting. It is much more likely to contain technical terms and technical definitions of ordinary terms that are not present in ordinary communication—although, of course, to what extent this is true will vary across areas of legal regulation. Thus, even if all we want to do is to ascertain the communicative content of the statute, that communicative content will be heavily infused with law.²⁴⁶

Third, ordinary conversation is typically a cooperative endeavor, where the assumption that both parties mean to make a significant contribution to communicate and move the conversation forward makes sense. The same is not true of legislation, which is a complex form of strategic behavior, in which it would be bizarre and self-defeating to aim at communicating something different from what the statute says.²⁴⁷

Fourth, in ordinary conversation, hearers can respond to speakers. But statutory texts do not require, or even make possible, a communicative response from their addressees.²⁴⁸ This entails that whatever the legislator wants to convey must be conveyed—as much as possible—explicitly rather than implicitly, and semantically rather

²⁴¹ See David Duarte, *Linguistic Objectivity in Norm Sentences: Alternatives in Literal Meaning*, 24 *RATIO JURIS* 112, 120 (2011), <https://doi.org/10.1111/j.1467-9337.2011.00479.x>; SLOCUM, *supra* note 35, at 45.

²⁴² Duarte, *supra* note 241, at 118.

²⁴³ ORDINARY MEANING, *supra* note 55, at 46.

²⁴⁴ See *id.* at 45–46, 52.

²⁴⁵ See Greenberg, *supra* note 39, at 221.

²⁴⁶ Grove, *supra* note 29, at 689–90.

²⁴⁷ See Marmor, *supra* note 235, at 429.

²⁴⁸ See Duarte, *supra* note 241, at 116.

than pragmatically.²⁴⁹ An ordinary conversation that looked like statutory communication would be cumbersome and inefficient. A statute that relied on the model of ordinary conversation would be opaque and ineffective as a means to guide conduct.

All of this suggests that textualists ought to reject the model of ordinary conversation.²⁵⁰ This does not deny that there might be some similarities between statutory interpretation and other instances of communication. In statutory interpretation, like in ordinary communication, some degree of pragmatic inference will be necessary.²⁵¹ But the institutionalization and complexity of the legislature's work does suggest that this pragmatic inference, in the case of statutory interpretation, might be quite different from the same inference in ordinary communication. And the same observation can be extended to other aspects of ordinary communication that are either absent or ought to be avoided as a matter of instrumental rationality in the case of statutes. And all of this is particularly pressing when the model of ordinary communication is a "conversation between friends." Theories of statutory interpretation should be consistent with Specificity, and therefore reject the conversational model for statutory interpretation.

C. *Legislative Intent?*

In ordinary communication, speakers' intentions play a crucial role. In the statutory context, whether we can have access to anything that looks like a speaker's intention is at least not obvious.²⁵² These types of doubts have led some textualists to argue that statutory interpretation should avoid a search for evidence of the legislature's intent.²⁵³ But a close analogy with ordinary communication inexorably pushes us towards the notion of legislative intent.²⁵⁴ Precisely, once we see the disanalogies between ordinary communication and statutory enactment and interpretation, the pressure towards thinking and

²⁴⁹ See SANDRO, *supra* note 110, at 169–209.

²⁵⁰ See Encarnacion, *supra* note 24, at 2071.

²⁵¹ Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L.J. 979, 981 (2017).

²⁵² See Poggi, *supra* note 235, at 16; see also Greenberg, *supra* note 39, at 239.

²⁵³ John F. Manning, *Inside Congress's Mind*, 115 COLUM. L. REV. 1911, 1912 (2015), <https://doi.org/10.2139/ssrn.2849256>; see also Kessler & Pozen, *supra* note 5, at 1849; Siegel, *supra* note 30, at 134.

²⁵⁴ See DWORKIN, *supra* note 225, at 317.

talking about legislative intent tends to dissipate. We can thus talk about statutory interpretation without what is at best a misnomer, a useful fiction, or a functional analogue and at worst, a fundamental mistake.

If statutory interpretation is understood as ordinary communication, then the former must be thought of as the ascertainment of “what the lawmakers asserted or stipulated in adopting an authoritative text.”²⁵⁵ On this view, interpreting statutes depends on figuring out someone’s (the lawmakers’, whether as a collective body or as an aggregation of individual agents) intention. After all, figuring out in ordinary contexts what an individual means seems to turn, obviously, on what that individual intends to communicate.

A first potential problem with this approach is one of feasibility.²⁵⁶ How are we supposed to find out about the intention underlying a statute?²⁵⁷ Statutes emerge typically as compromises between contending partial interests,²⁵⁸ not as the consequence of a single intention.²⁵⁹ And those actually involved in the drafting of legislation are not typically formal members of the legislature.²⁶⁰ If one is to be faithful to the authority of a statute, then, the best approach might be to stick as closely as possible to the text that emerged as a compromise between these contending interests.²⁶¹

A second potential problem is conceptual. Can we make sense of the idea of legislative intent without assuming a collective entity (the lawmaker, the legislature, etc.), and does this assumption make sense? How can we operationalize this assumption without transforming it into the intention of a few single individuals? As Max Radin wrote almost a century ago, it is not obvious whether “the lawmaker” as an

²⁵⁵ Soames, *supra* note 70, at 597–98.

²⁵⁶ For an overview of these issues, see DWORKIN, *supra* note 225, at 318–27.

²⁵⁷ See Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870–71 (1930), <https://doi.org/10.2307/1330769>.

²⁵⁸ Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239, 244–48 (1992), [https://doi.org/10.1016/0144-8188\(92\)90043-Q](https://doi.org/10.1016/0144-8188(92)90043-Q).

²⁵⁹ See Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123, 134 (1989); see also Fallon, *supra* note 139, at 1273; Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress’s Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 62 (2015).

²⁶⁰ Fallon, *supra* note 206, at 288.

²⁶¹ See Mashaw, *supra* note 259, at 135.

entity with communicative intentions of its own actually exists.²⁶² Perhaps it does—although whether that's the case is a complex question about the metaphysics of intention and collective agency.

But a third potential problem here is normative. The authority of legislation is the authority of the end product, of the statute that was approved in some institutionally appropriate way and observing certain procedures. It is not the authority of each individual lawmaker.²⁶³ Because of this, Stanley Fish is mistaken when he argues that a textualist approach towards legal texts is impossible—and that, conversely, intentionalism is the only plausible approach—because without intention there is no meaning.²⁶⁴ Fish might be right about his premise. Maybe we do need to know or assume some intention to make sense of any set of symbols as meaningful language in ordinary communication. Fish's mistake, however, is that from this it does not follow that interpreting legal texts necessarily requires an inquiry into legislators' intentions. In fact, the authority of legislation as the end product of legislative debate might require limiting such inquiry.

These issues might not be insurmountable. That is why I have talked about *potential* problems. But the analogy between statutory interpretation and ordinary communication pushes us to resolve these complicated questions. The more we see legal materials as utterances and expressions of a speaker who intends to communicate something, the more we need to see legislation as the result of a collective intention. Specificity provides an alternative path that is quite consistent with many standard textualist arguments.²⁶⁵ That path allows us to engage in statutory interpretation without resolving the complex questions—practical, metaphysical, and normative—raised by the notion of legislative intent.

Admittedly, judges sometimes refer to legislative intent. But this reference should be understood as, at best, a metaphor to underscore that judges are not supposed to legislate anew. Instead, they should

²⁶² Radin, *supra* note 257, at 870. For a discussion of legislative intent from a textualist perspective, see *Disaggregating Chevron*, *supra* note 224, at 268, 274–75.

²⁶³ See JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* 121, 128 (1999), <https://doi.org/10.1017/CBO9780511621987>.

²⁶⁴ Fish, *supra* note 231, at 632–33.

²⁶⁵ And not *just* textualist arguments. See Fallon, *supra* note 139, at 1274–76.

decide on the basis of normative standards that are derived from the statute enacted by the legislature.²⁶⁶

Even those who believe collective agents exist, and that a legislature might be one of them, accept that the concept of legislative intent in actual judicial practice is, at best, metaphorical.²⁶⁷ Perhaps, as Ryan Doerfler suggests,²⁶⁸ we should treat the notion as a fiction that aims at something like objectified intent: “the import that a reasonable person conversant with applicable social and linguistic conventions would attach to the enacted words.”²⁶⁹

Doerfler, however, would want to go further. In his view, treating legislative intent as a fiction is not just an accommodation of judicial language but rather a demand imposed by the nature of communication. Metaphorical or fictionalized claims about legislative intent would be unavoidable under this view because “recognizing a speaker’s intention is integral to efficient and effective communication.”²⁷⁰ Again, though, it is not obvious why claims about legislative intent are unavoidable. By assuming that the question of statutory interpretation is what Congress means when it speaks, we are already assuming the model of ordinary conversation is appropriate. Specificity offers a way out: to stop insisting on attributions of legislative intent to Congress that are reliably false.²⁷¹

In response, Doerfler might suggest that we should stick to this fiction in order to make statutory interpretation feasible.²⁷² Courts must appeal to context to resolve ambiguities,²⁷³ and must appeal to the legislature’s practical ends in order to fully grasp the propositions Congress enacted.²⁷⁴ This would suggest that the fiction of legislative intent is necessary to make statutory interpretation possible.

Whether this fiction is necessary, however, depends on how much we think the text of a statute can communicate on its own. Importantly, what judges must interpret and apply is not just a word,

²⁶⁶ Manning, *supra* note 253, at 1924; Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 76 (2012).

²⁶⁷ Nourse, *supra* note 266, at 81–82.

²⁶⁸ Doerfler, *supra* note 251, at 983.

²⁶⁹ Manning, *supra* note 218, at 424.

²⁷⁰ Doerfler, *supra* note 251, at 986–87.

²⁷¹ *Id.* at 998.

²⁷² *Id.* at 1022.

²⁷³ *Id.* at 990.

²⁷⁴ *Id.* at 991–92.

not just a phrase, and not just a statute. References to legislative intent and practical purposes, as well as reliance on wide context to precisify the asserted content of particular words or phrases, become less necessary once we take into account that judges are not in charge of applying a particular word or a particular sentence but rather the entirety of the law.

Something similar can be said about Victoria Nourse's claim that Congress has the "functional equivalent" of intent: sequential procedures that lead to enactment.²⁷⁵ On Nourse's view, the enactment of a statute happens against a background context of rules and procedures that are constitutionally sanctioned: a legislative context that we sometimes call—not entirely felicitously—*legislative history*.²⁷⁶ Understanding this procedural context, she argues, is essential to understanding a statute.²⁷⁷ Questions about legislative intent, then, are not questions about the mental state of the legislature but questions about its enactments within a certain procedural context.²⁷⁸ As a group, the legislature acts according to certain formal procedures in a coordinated way, and this is all it takes to vindicate at least a version of the idea of legislative intent.²⁷⁹ Legislative intent can be inferred from collective action that relies on sequential procedures.²⁸⁰

All of this strikes me as plausible. But arguments like Nourse's—and Doerfler's—do not deny, but rather accept, that what we call *legislative intent* in the statutory interpretation context is very different from what we would understand as intent in ordinary communication. Specificity directly acknowledges this fact and suggests we can perfectly jettison the fiction.

* * *

Specificity is a condition that is particularly consistent with textualist views. Like those views, Specificity highlights the centrality of the text and the irrelevance of legislative intent.

²⁷⁵ Victoria F. Nourse, *Elementary Statutory Interpretation: Rethinking Legislative Intent and History*, 55 B.C. L. REV. 1613, 1615 (2014). For a recent view that exploits procedures to elucidate the idea of legislative intent, see Flanagan, *supra* note 5, at 520.

²⁷⁶ Nourse, *supra* note 275, at 1615–16.

²⁷⁷ *Id.* at 1618.

²⁷⁸ *Id.* at 1625.

²⁷⁹ *Id.* at 1639.

²⁸⁰ *Id.* at 1640.

A concern here might be that Specificity is inconsistent with legislative authority. According to Andrei Marmor, for instance, the fact that the legislature possesses authority should lead us to think, too, that the intentions underlying its decisions should also bind judges.²⁸¹ If interpreters are committed to the authority of the legislature, they should attempt to discover those intentions.

As Jeremy Waldron argues, though, Marmor's argument might be appealing when we imagine the legislator to be a single individual issuing a simple command.²⁸² But it is not appealing in the context of a group that has authority as a collective body that combines the interests, judgments, and preferences of its members, and where there is little ground for making any inferences from the authority of the legislature to the significance of what any particular legislator intended.²⁸³ The authority of the legislature should, in fact, lead us to discount the significance of these particular intentions,²⁸⁴ and to focus on the only thing we know the legislature decided—and has authority—to enact: the text of the statute.²⁸⁵

But then another worry surfaces. In some situations, because of linguistic indeterminacy (ambiguity or vagueness), the text will be, *by definition*, unable to help judges in deciding cases. In such situations, trying to focus on the statute to get an answer “is like hoping to get richer by gazing at your wallet.”²⁸⁶ By jettisoning reference to legislative intent, minimalist textualism actually cannot—in fact, it refuses to be able to—answer questions of statutory interpretation in these hard cases.²⁸⁷

If textualism is understood as a theory that equates text with law, sees legal content as reducible to communicative content, sees the ordinary meaning of statutes as a purely linguistic fact, and understands each statute as the law to be applied in isolation, then Marmor is perhaps right. But, if textualism satisfied the conditions set out so far, it would only see itself as one more tool in legal reasoning—with many other tools that might come in handy in resolving hard cases

²⁸¹ See generally ANDREI MARMOR, *INTERPRETATION AND LEGAL THEORY* (1992).

²⁸² WALDRON, *supra* note 206, at 120.

²⁸³ *Id.* at 121.

²⁸⁴ *Id.* at 138.

²⁸⁵ *Id.* at 142.

²⁸⁶ ANDREI MARMOR, *THE LANGUAGE OF LAW* 118 (2014), <https://doi.org/10.1093/acprof:oso/9780198714538.001.0001>.

²⁸⁷ *Id.* at 129.

involving linguistic indeterminacy. Indeed, such a version of textualism would reject, like other textualist views, judicial inquiry into legislative intent. But it would also accept that many other legal texts, concepts, doctrines, standards, and considerations might play a legitimate role in determining the legally correct answer even when purely linguistic facts would underdetermine it. All of this would make reference to legislative intent significantly less appealing.

Textualism's focus on the authoritative text is consistent with Specificity. This focus conveys both that statutory interpretation should not be concerned with subjective facts about legislative intent *and* that the statute is owed deference and is the basis of the judge's decision because it is the text enacted by a legislature with authority. Sometimes, this idea is expressed through the concept of "objectified intent."²⁸⁸ Objectified intent conveys, at the same time, both that what legislators intended to enact matters in interpreting statutes, and that their private intentions beyond enactment do not. These positions go well with Specificity, which requires—and in this aspect, textualists tend to be less consistent—seeing statutes as specific texts that are quite different from ordinary communication. But, again, Specificity must go hand in hand with the other conditions we have already explored.

V. NORMATIVITY

The fifth condition is what we can call:

Normativity: questions of statutory interpretation (broadly understood) are normative questions—about how judges ought to act—that can be resolved by law or, in the absence of legal settlement, by reference to considerations of political morality.

A. *Statutory Interpretation as a Question of Political Morality*

Many textualists recognize the fact that theories of statutory interpretation (broadly understood to encompass both interpretation and construction) like textualism need to be defended on normative grounds.²⁸⁹ Whenever someone makes a claim about the way in which statutes ought to be interpreted, they owe us an argument as to why. Although considerations about the nature of communication or legislation might play a role in setting the outer limits of what might

²⁸⁸ Manning, *supra* note 218, at 433; *see also* Scalia, *supra* note 2, at 17.

²⁸⁹ *See, e.g.*, Manning, *supra* note 253, at 1923.

be a plausible theory, the choice between plausible theories must rely on normative premises. In the case of judges, the question within this zone of plausibility is straightforwardly a debate about judicial role morality. The real debate, as Richard Fallon argues, is normative.²⁹⁰

Of course, non-normative theories of statutory interpretation—such as theories that are purely conceptual or that develop explanatory models—play an important role. Normativity just suggests that these theories leave space open for multiple plausible views about how judges ought to derive legal norms from statutes. The choice between these theories must rely on additional normative premises.

This idea builds upon the distinction between text and law. Questions about statutory interpretation are not fully determined by facts about communication and meaning but are, instead, normative questions about how legal experts, and judges in particular, ought to exercise their interpretive power. In fact, the mere existence of disputes over how judges should interpret legal texts and decide cases shows that we are perfectly aware of the reality that legal experts in general, and judges in particular, have the power to make these determinations.²⁹¹ Otherwise, the debate would be pointless. The main reason for having textualist over intentionalist judges is that we know that these choices must be made and will be made in different ways by different legal officials.²⁹² Thus, controversies about statutory interpretation are straightforward normative debates about what judges should do in order to ascertain the legal content of legal enactments.²⁹³ They are not debates about the best way to ascertain communicative content but, rather, about how judges, lawyers, and other legal participants should derive legal content from legal texts.²⁹⁴

This normative debate is particularly relevant and salient in cases where the legally correct solution is either underdetermined or normatively contested.²⁹⁵ And this debate should be pursued directly. The question, however, is not whether the particular outcome that

²⁹⁰ Fallon, *supra* note 206, at 278.

²⁹¹ For discussion of the idea of interpretive choice and its implications, see generally Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74 (2000).

²⁹² Gardner, *supra* note 61, at 190.

²⁹³ *Id.* at 194.

²⁹⁴ For a similar argument in the context of literary interpretation, see STANLEY FISH, *IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES* 338–39 (1982).

²⁹⁵ Watson, *supra* note 233, at 224.

results from applying an interpretive approach in a particular case is normatively attractive or not.²⁹⁶ The question about a general approach to statutory interpretation is necessarily wholesale, not retail. And that question, again, is about normative considerations, not linguistic ones.²⁹⁷

B. *Statutory Interpretation as a Question of Law*

The fact that questions about statutory interpretation (broadly understood) are normative questions suggests that, like in the case of other normative questions, law can help us in settling and answering them, even in the face of uncertainty and disagreement. Thus, questions about statutory interpretation, while normative and subject to contestation, need not be indeterminate. They might be answered by legal norms and doctrines.²⁹⁸ Like in other domains of normative disagreement, the law can step in and authoritatively settle our disagreements, producing a determinate legal answer where we lacked one before. A theory of statutory interpretation could thus be legally correct even though we disagree about it at the level of first principles. For instance, a constitutional provision, a binding precedent, or some other authoritative legal material might make it the case that a certain approach to statutory interpretation is mandatory. In such cases, the relevant lawmaker will have settled the normative question about interpretation.²⁹⁹

Mark Greenberg has objected to this view by arguing that what makes a method of legal interpretation correct is whether it adequately identifies the law. Questions about legal interpretation cannot be answered by law itself. They depend on what constitutes the law at the more fundamental level.³⁰⁰ The argument does not deny that there might be legal norms and doctrines that deal with questions of

²⁹⁶ In fact, there is reason to suspect that the normative and political valence of the outcomes produced by any approach might not be fully predictable. See Grove, *supra* note 4, at 274.

²⁹⁷ Brian H. Bix, *Legal Interpretation and the Philosophy of Language*, in THE OXFORD HANDBOOK OF LANGUAGE AND LAW 146, 155 (Lawrence M. Solan & Peter M. Tiersma eds., 2012), <https://doi.org/10.1093/oxfordhb/9780199572120.013.0011>.

²⁹⁸ For a general statement of this view, see Baude & Sachs, *supra* note 38; see also Fallon, *supra* note 139, at 1277.

²⁹⁹ In a similar vein (from a different theoretical perspective), Urbina, *supra* note 7, at 34–35.

³⁰⁰ Mark Greenberg, *What Makes a Method of Legal Interpretation Correct? Legal Standards vs. Fundamental Determinants*, 130 HARV. L. REV. F. 105, 106 (2017).

interpretation. The issue is that the content of this “law of interpretation” itself depends on how the content of law is determined at the most basic level—i.e., on the nature of law. We can’t resolve interpretive questions without ultimately relying on jurisprudence—and, particularly, on a theory about what provides the constitutive explanation for the content of law in any legal system.³⁰¹

Perhaps Greenberg is right as a matter of metaphysics. But, as a matter of epistemology, there is jurisprudential disagreement about the nature of law just like there is moral disagreement about the status of abortion.³⁰² Law can authoritatively resolve these disagreements for those operating within the legal system in the absence of determinacy or agreement about the true answer to them.³⁰³ Positive law can settle the question about how to answer what constitutes the law in our legal system, for our judges, deciding cases here and now. And this is precisely why questions of statutory interpretation are themselves treated as *legal* questions. A judge needs a view or set of views about how to resolve disputes by applying legal materials. But it is not necessary for those views to rely on a theory about the grounds of law.³⁰⁴ The need is significantly less pressing the more judges can rely on legal doctrines and standards that guide their interpretive tasks.

This provides a direct explanation for the role of canons of construction, common law precedents, legal doctrines, and technical legal concepts in fixing the legal implications of statutes. They are part of the legal standards determining the implications of legal enactments—part of the “law of interpretation.”³⁰⁵ From this point of view, the question for legal interpreters such as judges is a question about how to use their interpretive authority—again, a normative question that might be partly or fully settled by law.³⁰⁶ Textualists should embrace this aspect of the Normativity condition: like other questions of political morality, the question about statutory interpretation can be partly resolved by legal rules and standards.

This illuminates why the fact that meaning is a legal construct—as I acknowledged above and as textualist scholars like Tara Leigh

³⁰¹ *Id.*

³⁰² LIAM MURPHY, WHAT MAKES LAW: AN INTRODUCTION TO THE PHILOSOPHY OF LAW 77, 183 (2014), <https://doi.org/10.1017/CBO9780511808425>.

³⁰³ See Baude & Sachs, *supra* note 38, at 1096.

³⁰⁴ MURPHY, *supra* note 302, at 8, 11–12.

³⁰⁵ Baude & Sachs, *supra* note 38, at 1082.

³⁰⁶ *Id.* at 1083.

Grove argue³⁰⁷—is a problem for textualists who are inclined to overemphasize and rely too much on rhetoric about ordinary meaning and ordinary people. Indeed, precisely because questions of interpretation are, as Grove argues, legal questions, once we get to the stage where lawyers and judges interpret the law, what we will find is *always* legally constructed meaning.³⁰⁸ There is no way to fully “outsource” legal interpretation—even to imagined reasonable readers.³⁰⁹

The legal implications of legal texts are never settled merely because of linguistic facts. The interpretation of legal texts is always an upshot of legal practice³¹⁰—and textualists should recognize this fact openly and explicitly. Of course, the practices and usages of legal experts might be such that they converge on treating facts about communicative content as highly relevant or even determinative of legal content in many cases.³¹¹ And there might be, as textualists have long argued, powerful reasons for starting statutory interpretation with that approach as a default rule. But what drives legal interpretation are not facts about the asserted content of legal enactments or about the understanding of real or hypothetical ordinary readers but, rather, facts about what interpreters—in our context, predominantly legal experts—make of those enactments. Even those who attempt to argue that linguistic considerations drive legal interpretations recognize this. Scott Soames, for instance, while arguing that statutes are basically identified with “what was said” in enacting them, also claims that judges have the authority to make “minor adjustments” in their content to avoid undesirable results.³¹² But, as Greenberg correctly notes, this seems like an *ad hoc* exception lacking any principled explanation.³¹³ It is preferable to simply acknowledge that, as a general matter, law and legal experts can determine the relevance of communicative considerations, on the basis of normative—including legal—considerations. This is what Normativity affirms.

³⁰⁷ Grove, *supra* note 69, at 1053.

³⁰⁸ On law as a specialized language, Schauer, *supra* note 169, at 503.

³⁰⁹ See Bernstein, *supra* note 73, at 435.

³¹⁰ Jeffrey Goldsworthy, *The Real Standard Picture, and How Facts Make It Law: A Response to Mark Greenberg*, 64 AM. J. JURIS. 163, 175 (2019), <https://doi.org/10.1093/ajj/auz011>.

³¹¹ *Interpretation-Construction Distinction*, *supra* note 51, at 107–08.

³¹² Soames, *supra* note 97, at 417.

³¹³ Greenberg, *supra* note 39, at 246.

Interpretive questions are thus partly legal questions. Practical necessity also drives this phenomenon, even at the level of interpretation strictly construed (rather than construction). Like any other area of knowledge, theoretical linguistics and the philosophy of language evolve, change, and are characterized by persistent theoretical disagreement between epistemic peers about issues as foundational as meaning, the relationship between semantics and pragmatics, etc.³¹⁴ That is just how human knowledge works. On top of that, we have normative disagreements about what judges should do when interpreting statutes. And we also have disagreements about the nature of law. In the meantime, law cannot wait for us to obtain an accurate picture of language and communication, to resolve our moral disagreements, or to settle questions about the nature of law. In fact, law has had to resolve questions about legal interpretation well before contemporary discussions in theoretical linguistics, the philosophy of language, moral and political philosophy, and general jurisprudence emerged—and well before we had any sustained theoretical literature on the virtues and costs of different interpretive approaches. There might well be correct answers out there for questions about these issues, but while we figure them out, law must provide a working (even potentially false) answer.³¹⁵ As a sheer fact of necessity, law must authoritatively settle questions on which deep and reasonable disagreement has existed and sometimes persists.

In some jurisdictions, the law of interpretation—and the practices and standards of legal experts on which it is based—might be at times indeterminate. I believe this is partly what has happened in American law for a long time, and explains why—as Richard Re notes—the Court does not treat its own statutory interpretation standards as binding, justices disagree with each other about interpretation, and even judges who express commitments to certain approaches sometimes deviate from them.³¹⁶ It is important to note, though, that this is a contingent fact about the law of interpretation of the United States—driven, for instance, by how little guidance the constitutional text provides about

³¹⁴ Baude & Sachs, *supra* note 38, at 1089–90; Francesca Poggi, *Meaning in Law. Two Theories of Ordinary Meaning for Statutory Interpretation and Why They Do Not Work*, 21 ANALISI E DIRITTO 57, 58 (2021).

³¹⁵ Baude & Sachs, *supra* note 38, at 1096.

³¹⁶ Re, *supra* note 16, at 1652. Commentators have long recognized this fact about statutory interpretation in American law. See, e.g., Greenberg, *supra* note 300, at 116; Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549, 556 (2005).

the interpretation of statutes.³¹⁷ As such, it could change. What approach to statutory interpretation is legally correct, whether any particular approach is legally correct, or whether instead the law is indeterminate on this point, are questions that turn on facts about the content of the law and, more fundamentally, on the practices and actions of legal officials and other legal experts.³¹⁸

VI. RESTRICTED RELEVANCE

The sixth and last condition is:

Restricted Relevance. theories of statutory interpretation cannot themselves guarantee or achieve valuable goals like fair notice and judicial restraint, even in the context of statutory interpretation.

Restricted Relevance is a deflationary condition. Theories that comply with this condition are modest theories that moderate their claims and promises. This does not mean that such theories reject the task of normatively justifying themselves. The point is rather that the normative argument must be commensurate with the goods that theories of statutory interpretation can actually deliver, even within their limited domain.

This approach would also have the following beneficial effect: the less we exclusively focus on statutory interpretation, and the more we accept there are multiple other factors in the theory of legal reasoning and beyond that might interact with the former, the better we will be able to discipline and think about these other factors. Recognizing Restricted Relevance can also open the door for emphasizing the significance of other aspects of legal reasoning that our current focus obscures.

In order to show what Restricted Relevance entails, here I will explore how two familiar alleged virtues of textualism would figure in a textualist theory that complied with it. Restricted Relevance does not ask textualists (or any other theorists of statutory interpretation) to give up on their normative arguments, but simply to be more circumspect about the support they can provide for any theory of statutory interpretation.

³¹⁷ Strauss, *supra* note 198, at 1573.

³¹⁸ Baude & Sachs, *supra* note 38, at 1116, 1140.

A. *Fair Notice*

The virtue of the rule of law is realized through compliance with certain formal virtues: publicity, nonretroactivity, consistency, congruence, and stability.³¹⁹ The value of the rule of law is not about what we do through law but about the way in which we do it.³²⁰ It allows political communities to regulate their own affairs in a way that is effective given the existence of practical disagreements and uncertainty.³²¹ It also allows individuals the space to plan their affairs and to know what standards of behavior will be applied by public officials.³²² In this way, compliance with the rule of law allows for a minimal degree of respect for human agency.³²³

The connection between agency and the rule of law lies in the fact that the rule of law demands that clear, prospective, and knowable rules govern the behavior of the state and its officials. The rule of law makes law *predictable*, and in this way makes it hospitable for the development of people's own life projects.³²⁴ Ordinary people should be able to rely with some degree of certainty on what state officials will do.

What is true of state officials in general is also true of judges. What individuals decide to do depends on what the law demands of them, and what law demands of individuals depends on how legal officials like judges interpret and apply it.³²⁵ The idea of predictability *in legal interpretation* is the idea that individuals should be bound, not by any particular judge's will, but by impersonal standards that are knowable *ex ante*.³²⁶

³¹⁹ See LON FULLER, *THE MORALITY OF LAW* (1964); Joseph Raz, *The Rule of Law and Its Virtue*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* (1979); Jeremy Waldron, *Does Law Promise Justice?*, 17 GA. ST. U.L. REV. 759 (2001); Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 6 (2008).

³²⁰ See John Gardner, *The Supposed Formality of the Rule of Law*, in *LAW AS A LEAP OF FAITH: ESSAYS ON LAW IN GENERAL* 195, 211 (2012), <https://doi.org/10.1093/acprof:oso/9780199695553.003.0008>.

³²¹ See generally WALDRON, *supra* note 206.

³²² See Raz, *supra* note 319.

³²³ *Id.* at 221; see also JOHN RAWLS, *A THEORY OF JUSTICE* 241 (1971), <https://doi.org/10.4159/9780674042605>.

³²⁴ Jeremy Waldron, *The Rule of Law in Contemporary Liberal Theory*, 2 *RATIO JURIS* 79, 84 (1989), <https://doi.org/10.1111/j.1467-9337.1989.tb00028.x>.

³²⁵ Gerald J. Postema, *Coordination and Convention at the Foundations of Law*, 11 J. LEGAL STUD. 165, 189 (1982), <https://doi.org/10.1086/467697>.

³²⁶ F. A. HAYEK, *THE CONSTITUTION OF LIBERTY* 153 (1978).

In line with this tradition, it is quite common for textualists to argue for their approach on the basis of the notion of fair notice: the idea that citizens ought to be able to know their legal rights and duties *ex ante*.³²⁷ And textualists who rely on the ideas of ordinary meaning and ordinary readers tend to defend this emphasis on the basis of the idea of fair notice.³²⁸

This simplified fair notice argument faces an important empirical problem. Most laypeople do not read statutes.³²⁹ And, when they do, it is not clear that they believe their content is determined by how ordinary readers would interpret them.³³⁰ In fact, scholars have long noted that judicial discourse about fair notice seems implausible as a matter of empirical reality.³³¹

But one can reframe fair notice, without abandoning it, as a commitment to making the normative status of behavior knowable by ordinary people. It is a commitment to the idea that people should not be sanctioned by normative standards that are completely opaque. The issue is whether people have the opportunity to ascertain what their legal rights and obligations are—not whether they, as a matter of fact, consult statute books or can easily do so and immediately conclude, without any further effort, what the law is.

This means that if we are really serious about fair notice—about making sure that everyone has the opportunity to inform themselves about their legal rights and obligations—then what we need is the combination of accessible law with sufficient access to legal advice.³³² Indeed, under Nonequivalence, the mere communicative content of statutes is not itself the law. This means, on the one hand, that the empirical reality that ordinary people do not read statute books is not

³²⁷ William N. Jr. Eskridge & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 340 (1990), <https://doi.org/10.2307/1228963>.

³²⁸ Chen, *supra* note 170, at 349; Krishnakumar, *supra* note 18, at 8.

³²⁹ Chen, *supra* note 170, at 351; Dan M. Kahan, *Some Realism about Retroactive Criminal Lawmaking*, 3 ROGER WILLIAMS U. L. REV. 95, 99–100 (1997). I should note that I find Kahan's argument against the prohibition on retroactive lawmaking unpersuasive.

³³⁰ Chen, *supra* note 170, at 354. More generally, see Tobia, Slocum & Nourse, *supra* note 168.

³³¹ Cross, *supra* note 143, at 92–93; Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 660 (1984), <https://doi.org/10.2307/1340892>.

³³² See FREDERICK WILMOT-SMITH, EQUAL JUSTICE: FAIR LEGAL SYSTEMS IN AN UNFAIR WORLD 80–82 (2019), <https://doi.org/10.4159/9780674243729>.

per se a problem for fair notice. But, on the other, it means that consistency between legal norms and lay views and access to professional legal advice—advice that can reasonably anticipate *how* legal standards are construed from statutes—will be important, *along with* an adequate approach to statutory interpretation.

From this perspective, the argument for any theory of statutory interpretation is an argument that cannot operate in isolation. To the extent it is based on fair notice, correctly understood, it is an argument about citizens' ability to find out the legal status of their behavior. This is more consistent with the empirical reality of how ordinary people interact with law and with the actual practice of statutory interpretation. But such an argument is only part of what a complete legal regime committed to the idea of fair notice should require. Predictability is the upshot of an entire institutional regime, and statutory interpretation is only a small part of it. Any theory that promises the achievement of fair notice, *by itself*, is doomed to breach its promise.³³³ Textualist arguments should thus comply with Restricted Relevance.

B. *Judicial Restraint*

Another common argument for textualism alludes to the notion of judicial restraint. Early textualists like Justice Scalia worried about how purposive or intentionalist approaches might allow judges to achieve their ends with very little restraint.³³⁴ The aim of textualism was, in part, to limit and cabin interpretive flexibility.³³⁵

But if the conditions set out above are true, then we must accept that this common view has things backwards. Judicial restraint is not an upshot of textualism. Instead, textualism—or any other theory of statutory interpretation that is grounded in considerations of judicial restraint—is an upshot that might grow out of a commitment to judicial restraint. No interpretive method can avoid the space for legal judgment and interpretive flexibility. Judicial restraint is not the result of a method, but a virtue. *If* a judge is committed to restraint, and textualists are right that textualism can be valuable for that purpose, judges could use textualism as a tool that can help them secure the goal of restraint.

³³³ See Bernstein, *supra* note 219, at 596; see also Eskridge & Nourse, *supra* note 104, at 1737.

³³⁴ Grove, *supra* note 4, at 293.

³³⁵ Molot, *supra* note 5, at 26.

As a consequence, the judicial rhetoric that tends to offer clear and obviously correct answers to complex legal questions should be jettisoned.³³⁶ No theory of statutory interpretation is a bulletproof method for automatically generating clear answers that judges can ascertain. This is true, too, of textualism, which cannot make its case as a guarantee of legal restraint but should instead see itself as a method that can aid judges when their purpose is to exercise self-restraint. This means that textualist interpretations will, in many cases, not be obvious. There will be space for legitimate disagreement in good faith, and for different resolutions of contested cases even when judges agree in method—an attitude that is frankly at odds with the rhetoric of some current textualist judges.³³⁷ A humbler textualism that complied with Restricted Relevance would abandon this rhetoric and its portrayal of legal reasoning as a simple, deductive, and straightforward exercise that merely applies the text of the statute.³³⁸

Restricted Relevance also helps us in thinking about intramural disputes between textualists. Tara Leigh Grove, for example, has argued in favor of a *formalistic* brand of textualism, a rule-bound method that emphasizes semantic context and downplays the significance of the outcome in the particular case, in the hope that this method will constrain judicial discretion.³³⁹ But again, this is a hope bound to fail. Interpretive methods interact with—and are therefore partly an upshot of—judicial attitudes, virtues, and commitments. A method cannot generate constraint by itself. Instead, the attitudes, commitments, and virtues of judges can ground the choice of method—whether a method like Grove’s formalistic textualism or a different one. The very fact that, in the last ten years, the conservative legal movement and conservative judges went from endorsing non-interventionism in public law to an interventionist approach without ceasing to adopt a textualist theory of statutory interpretation proves as much.³⁴⁰

To be clear, this is not a point about good or bad faith. The claim is not that theories of statutory interpretation cannot guarantee a value because judges who claim to adopt the theory might act in bad faith.

³³⁶ Anya Bernstein & Glen Staszewski, *Judicial Populism*, 106 MINN. L. REV. 283, 284–85 (2021).

³³⁷ *Id.*

³³⁸ *Id.* at 311–12; *see also* Molot, *supra* note 5, at 63.

³³⁹ Grove, *supra* note 4, at 269.

³⁴⁰ Doerfler, *supra* note 113, at 270.

The claim is that theories of statutory interpretation are partial tools that operate within a larger set of virtues, commitments, and values, which themselves determine exactly what any given theory will produce.

Textualism can aid a judge in exercising self-restraint. But if what we want is restraint we should focus as much, if not more, on the virtues and ethical standards of judges—and the institutions and mechanisms that foster them—than on questions about interpretive methods. Arguments in favor of said methods should comply with Restricted Relevance.

VII. MINIMALIST TEXTUALISM

The conditions so far leave us with the following claims:

- (i) Statutes are authoritative legal texts that make a contribution to the content of the law.
- (ii) The content of the law that applies to a case is not reducible to the communicative content of a single enacted statutory text.
- (iii) The starting point for ascertaining the contribution that a particular statute makes to the law is its meaning (understood as a legal construct rather than as a purely empirical fact).
- (iv) Statutory interpretation is significantly different from ordinary communication.
- (v) The role of judges is to apply the law as a whole rather than isolated statutory texts.
- (vi) Any approach to statutory interpretation must be defended and evaluated normatively, although it can also be grounded in legal determinations of this morally contested issue.
- (vii) Theories of statutory interpretation play a limited role in securing valuable ends and values like fair notice and judicial restraint.

A textualist theory consistent with these claims would be what I have called *minimalist textualism*. But, so far, I have mostly set out the view through the denial, modification, or reinterpretation of arguments found in textualist theory and practice. I have not really offered a positive articulation of the content of minimalist textualism. I have just stated conditions with which textualism should comply, and that set the broad outline or the outer limits of what minimalist

textualism would be. The full articulation of an affirmative view of statutory interpretation would require a separate article (and more). For now, all I can offer is a first pass—a tentative formulation for discussion, critique, and evaluation that sets out the central commitments of the view. Under this very tentative view, minimalist textualism could be characterized (tentatively) as a view under which judges should:

- (i) Treat statutes as authoritative legal enactments;
- (ii) derive legal norms from said statutes starting from their meaning, without attempting to implement policy goals (whether framed as legislative intentions, implicit purposes, or some such);
- (iii) rely on legal norms and standards in order to ascertain statutes' communicative and legal content;
- (iv) take into consideration the specificities of statutes as compared with ordinary communication; and
- (v) integrate statutes thus interpreted into the complex system of legal norms that includes other legal sources.

Is this still textualism? In important respects, the conditions I have articulated are at odds with claims that are usually made by textualists. For instance, and as I have argued, textualists sometimes claim that:

- (i) The enacted statutory text is the law.
- (ii) Statutes' legal implications are determined by their ordinary meaning (understood as a purely empirical linguistic fact).
- (iii) The duty of judges is to apply the *laws* enacted by Congress.

Thus, if the conditions are warranted, textualists ought to modify their views. But textualists would still be able to remain faithful to the central commitments of the theory: the idea of the authority of the enacted statutory text; the notion that judges should not depart from the enacted statute in pursuit of underlying intentions or purposes; and the more general idea that judges are bound by law.³⁴¹ In this sense, at least, minimalist textualism would be squarely within the

³⁴¹ These ideas were encapsulated in textualism's concerns about unfettered judicial inquiry into legislative history. See William N. Eskridge Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1512 (1998), <https://doi.org/10.2307/1290094>.

textualist tradition. It would also be a better, albeit more minimalistic and humbler, version of textualism.

CONCLUSION

This Article has offered a series of conditions that theories of statutory interpretation ought to comply with. These conditions are particularly relevant for evaluating and reconstructing textualism, given its current dominance. The conditions make distinctions that some textualists sometimes obscure or directly deny.

These distinctions lead to what I have characterized (or rather, begun to characterize) as minimalist textualism. Minimalist textualism only takes us so far. It is not a guarantee of judicial restraint. It does not ensure that there will be predictability and fair notice. In this sense, the Article is partly deflationary, not just regarding textualism but in general regarding theories of statutory interpretation. There is only so much these theories can do. No interpretive theory can ultimately protect us from the authority of legal officials who have formal powers for interpreting the law. Textualism rightly seeks predictability and to limit judicial power. But this search will not succeed if we cling on to inaccurate slogans and fictions.

Now, there is still an underlying question. Granted that this might be a better version of textualism, is it the best available theory of statutory interpretation? The question about the optimal theory of statutory interpretation is complex. It turns partly on empirical facts, including the institutional context, the legal culture, officials' and individuals' behavior in response to legal rules, and a large set of factors. Because of this, it is not surprising that, from a comparative perspective, this is not a "one size fits all" situation. Different legal systems adopt different approaches.³⁴² From this perspective, working out different views and making them as strong as they can be makes sense, particularly when we are dealing with views that—like textualism today in the United States—are particularly salient in judicial practice.

Sometimes (though not always), theorists of statutory interpretation argue for their own views as if they are the only acceptable or reasonable position.³⁴³ In lawyerly fashion, the arguments are supposed to knock down their opponents, force them

³⁴² See generally NEIL MACCORMICK & ROBERT SUMMERS, INTERPRETING STATUTES: A COMPARATIVE STUDY (1st ed. 2016), <https://doi.org/10.4324/9781315251905-1>.

³⁴³ Bernstein & Staszewski, *supra* note 336, at 316.

to accept the conclusion that the defended view is the only acceptable view whether they like it or not, and so on.³⁴⁴ This Article has adopted a much less belligerent position: working out certain conditions grounded in the nature of law, legislation, and judicial practice, and that can be brought to bear on a dominant view to improve upon it. This strategy accepts that even the improved version of textualism might not be the optimal, all-things-considered ideal view. It simply takes it for granted and attempts to make the theory better and more plausible even if, against the slogan, we are not all textualists now.

³⁴⁴ This is not just a form of lawyerly argument, but also of (some forms of) philosophical argument. See ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 4 (1983).