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Articles

THE STATUTORY INTERPRETATION MUDDLE

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ABSTRACT—Debates about statutory interpretation typically proceed on the assumption that statutes have linguistic meanings that we can identify in the same way that we identify the meaning of utterances in ordinary conversation. But that premise is false. We identify the meaning of conversational utterances largely based on inferences about what the speaker intended to communicate. With legislatures, as now is widely recognized, there is no unitary speaker with the sort of communicative intentions that speakers in ordinary conversation possess. One might expect this recognition to trigger abandonment of the model of conversational interpretation as a framework for interpreting statutes. Instead, interpreters invent legislative intentions—purportedly "objective" ones for textualists—or purposes. With those inventions in place, judges and theorists then carry on talking about what statutes mean, or would mean to a reasonable person, as if there were a linguistic fact of the matter even in intelligibly disputed cases. But this is a deep and systematic error.

Mainstream thinking about statutory interpretation needs a major reorientation. Contrary to widespread impressions, debates about statutory interpretation are not about what statutes mean as a matter of linguistic fact, but about which grounds for the attribution of an invented meaning would best promote judicial and governmental legitimacy. Having recognized that the model of conversational interpretation cannot ground claims about statutes' meanings in disputed cases, we also need to rethink the role of legislatures and courts in a political democracy. There are limits to what legislatures can reasonably be expected to accomplish. Courts need to play the role of helpmates to the legislature, not just faithful agents. In the interpretation of statutes, linguistic intuitions should matter, but primarily for normative reasons, involving justice and fairness in the coercive application of law, and not because they reveal the legislature's linguistically clear dictates.

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Introduction

Justice Scalia said in his Tanner Lectures that it was disheartening to think we have no agreed theory of statutory interpretation.[1] Though Justice

[1] *See* 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, 14 (Amy Gutmann ed., 1997) (endorsing the assertion of HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) that "[t]he hard truth of the matter is that

Kagan has subsequently asserted that "we're all textualists now,"[2] Justice Scalia remains fundamentally correct: no agreement on interpretive methodology has yet emerged. The explanation resides in a premise that undergirds nearly all claims about statutes' meanings and similarly underlies nearly all interpretive theories. This is the premise that statutes have linguistic meanings that we can reliably ascertain in roughly the same way we determine the meaning of utterances in ordinary conversation.[3] That premise is almost always false in contested cases. My central ambitions in this paper are to establish both the pervasiveness of that premise and its falsity, and to trace the resulting implications.

My analytical starting point lies in the concept of legislative intent. If we ask why anyone might think that legislative intent matters to statutory interpretation, the answer involves a commitment to the techniques we employ to identify the meaning of utterances in ordinary conversation.[4]

I use the term "utterances" advisedly. Philosophers of language distinguish between "sentence meaning" and "utterance meaning."[5] Within

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American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation" and adding that "this is a sad commentary").

[2] Harvard Law School, *The Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes* at 8:29 (Nov. 17, 2015), http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation [https://perma.cc/3BCF-FEFR].

[3] This premise is shared not only by judges, lawyers, and ordinary citizens, but also by nearly all legal theorists and many philosophers of language. *See, e.g.*, Mark Greenberg, *Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication*, *in* PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 217, 218–19 (Andrei Marmor & Scott Soames eds., 2011) (citing examples); 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, 403 (2009) [hereinafter SOAMES, *Interpreting Legal Texts*] (arguing that "[p]rogress can . . . be made . . . by seeing [legal and statutory interpretation] as an instance of the more general question of what determines the contents of ordinary linguistic texts").

[4] *See, e.g.*, ANDREI MARMOR, THE LANGUAGE OF LAW 12 (2014) ("The . . . 'standard' view that I strive to defend . . . can be stated as follows: the collective action of the legislators enacting a law is a collective speech act, whereby some content is communicated that is, essentially, the content of the law voted on."); Scott Soames, *Deferentialism, Living Originalism, and the Constitution*, *in* THE NATURE OF LEGAL INTERPRETATION: WHAT JURISTS CAN LEARN ABOUT LEGAL INTERPRETATION FROM LINGUISTICS AND PHILOSOPHY 218, 218 (Brian G. Slocum ed., 2017) [hereinafter Soames, *Living Originalism*] ("The legal content of a statute . . . *can* be identified with what was said, asserted, or stipulated by lawmakers or ratifiers in passing or approving it."); Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L.J. 979, 984 (2017) (endorsing "the 'conversation' model of interpretation").

[5] *See, e.g.*, STEPHEN C. LEVINSON, PRAGMATICS 18 (1983) ("The distinction between sentence and utterance is of fundamental importance to both semantics and pragmatics."); Scott Soames, *Toward a Theory of Legal Interpretation*, 6 N.Y.U. J.L. & LIBERTY 231, 236 (2011) [hereinafter Soames, *Toward a Theory*] ("Contemporary philosophy of language and theoretical linguistics distinguish *the meaning of a sentence S* from its *semantic content relative to a context*, both of which are distinguished from (the content of) *what is said, asserted, or stipulated by an utterance of S*."); *see also* MARMOR, *supra* note 4,

the terms of that distinction, the meanings of sentences do not vary from one context to another. Sentence meaning is "semantic meaning," defined largely by the definitions of words and the rules of syntax and grammar. By contrast, the communicative contents of different utterances of a sentence can vary greatly. "Alex was a big help" may refer to different people named Alex and, in context, may implicitly signal where, how, and with what Alex was helpful. To use just a bit more philosophical jargon, the movement from sentence meaning to utterance meaning occurs via a process of "pragmatic enrichment" in which both speakers and listeners rely on contextual factors to supplement semantic meanings.[6] There is much dispute about how to draw the line between semantic meaning and pragmatic enrichment.[7] But there is little dispute that pragmatic enrichment matters crucially to utterance meaning and that it depends, in one way or another, on the communicative intentions of speakers against the background of intersubjectively shared, but typically unarticulated, assumptions of speakers and listeners.[8]

In the example of "Alex was a big help," unstated assumptions and a speaker's communicative intentions can mean everything. On some occasions, the utterance of that sentence might be, and might properly be understood as being, ironic. If so, its communicative content—or, as I shall say, its meaning—would be that Alex was no help at all. In referring to "meaning" here, I need to be precise about terminology. Throughout this Article, unless I expressly indicate otherwise, I use the term "meaning" to refer to what philosophers of language more commonly call the "communicative content" of an utterance, or what an utterance asserts or stipulates.[9] The term "meaning" can properly be used differently and more

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at 23 (positing that "semantic properties are properties of words and sentences, not of utterances or speech acts").

[6] *See, e.g.*, PATRICK GRIFFITHS, AN INTRODUCTION TO ENGLISH SEMANTICS AND PRAGMATICS 21 (2006) (contrasting "[s]emantics," which "is the study of context-independent knowledge that users of a language have of word and sentence meaning," with pragmatics, which is concerned with the meaning of words and sentences in context); MARMOR, *supra* note 4, at 22–27; SOAMES, *Interpreting Legal Texts*, *supra* note 3, at 404 ("Typically, an agent produces a sentence in a context with a communicative goal and topic, a record of what has been supposed or established up to then, and assumptions about the beliefs and intentions of the participants. This *pragmatic* information interacts with the *semantic* content of the sentence to add content to the discourse."). For a well-known but controversial account of the unselfconscious, psychological processes through which pragmatic enrichment occurs, see DAN SPERBER & DEIRDRE WILSON, RELEVANCE: COMMUNICATION AND COGNITION 118–71 (2d ed. 1995).

[7] *See, e.g.*, LEVINSON, *supra* note 5, at 22–25.

[8] *See* SOAMES, *Interpreting Legal Texts*, *supra* note 3, at 403; Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 488 (2013) ("In the philosophy of language and theoretical linguistics, the phrase 'pragmatic enrichment' is sometimes used to refer to the contribution that context makes to meaning.").

[9] *See* Scott Soames, *Deferentialism: A Post-Originalist Theory of Legal Interpretation*, 82 FORDHAM L. REV. 597, 598 (2013) [hereinafter Soames, *A Post-Originalist Theory*] ("[W]hat is

capaciously, both in ordinary language and in law, to include, for example, sentence meaning or the proper application of an instruction or a statute in light of nonlinguistic considerations.[10] Putting other possible usages to one side, I am concerned, for now, solely with the content that specific utterances convey at the time of their utterance.

One more example may further illuminate the way in which conversational utterances can convey less, as well as more, than the literal meanings of the sentences that are spoken. Imagine two parents discussing appropriate discipline for a child who has misbehaved:[11]

> A: So we agree that we will tell Carol, "You are grounded for two weeks because of what you did."
>
> B: Yes, after school, she has to be in the house unless she is participating in a school activity.
>
> A: Or unless she is going to church or music lessons or is with one of us.
>
> B: Of course.

Now imagine that the above conversation had stopped after the initial utterances by A and B, with no reference to whether the agreement to ground Carol bars her from going to church or a music lesson. And further imagine that when either A or B recites the agreement to Carol, Carol asks whether her punishment precludes her participation in those activities. What ought A or B to say if the other is not there? In light of B's "Of course," I would conclude that assumptions about church, music lessons, and activities with a parent are part of the interpretive common ground—the background of unstated assumptions—existing between A and B and, thus, contribute to the communicative content of their utterances to one another.

Although lawyers rarely follow philosophers in using the terms "sentence meaning" and "utterance meaning," they routinely draw a closely analogous distinction when they differentiate between a statutory provision's literal meaning and its meaning "in context."[12] At one time, statutory

asserted or stipulated can usually be identified with what the speaker means and what hearers take the speaker to mean by the words used on [a particular] occasion."); Solum, *supra* note 8, at 480 ("The phrase 'communicative content' is simply a precise way of labeling what we usually call the 'meaning' or 'linguistic meaning' of the text.").

[10] *See* Richard H. Fallon, Jr., *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1243–52 (2015) (distinguishing multiple senses of legal meaning, including semantic or literal meaning, contextual meaning, intended real conceptual meaning, reasonable meaning, and interpreted meaning).

[11] I am indebted to Mark Richard for suggesting this example.

[12] *See, e.g.*, Solum, *supra* note 8, at 487–94 (discussing literal meaning in law).

interpretation debates included adherents to a "plain meaning" school.[13] To a reasonable approximation, the plain meaning school equated statutory meaning with sentence meaning.[14] Today, however, nearly all participants in statutory interpretation debates accept that meaning depends on context.[15] And if we apply what I shall call the model of conversational interpretation to interpret statutes, then contextual meaning would appear to be the equivalent of utterance meaning—what a reasonable person would take a statutory provision to mean as uttered by a particular person on a particular occasion. If so, the analogy of the exchange between Carol's parents would suggest that statutes might mean more, less, or something different from what they literally say. The analogy might also help to illuminate nonliteral interpretations of statutes in some cases, including those in which courts sometimes read statutes as having unstated exceptions[16] or as "preempting"

[13] For a discussion of the plain-meaning approach to statutory interpretation, see generally Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231 (1991).

[14] *See* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2456 (2003) [hereinafter Manning, *Absurdity*] ("In contrast with their literalist predecessors in the 'plain meaning' school, modern textualists reject the idea that interpretation can occur 'within the four corners' of a statute." (quoting White v. United States, 191 U.S. 545, 551 (1903))); John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 79 & n.28 (2006) [hereinafter Manning, *What Divides*] (stating the same).

[15] *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 16 (2012) ("In their full context, words mean what they conveyed to reasonable people at the time they were written."); Manning, *Absurdity*, *supra* note 14, at 2392–93; Manning, *What Divides*, *supra* note 14, at 91 (noting that textualists and purposivists both stress the importance of contexts but maintaining that "[t]extualists give primacy to the *semantic* context—evidence about the way a reasonable person conversant with relevant social and linguistic practices would have used the words," while "[p]urposivists give precedence to *policy* context—evidence that goes to the way a reasonable person conversant with the circumstances underlying enactment would suppress the mischief and advance the remedy").

[16] For example, the Supreme Court has recognized a myriad of nontextual exceptions to 42 U.S.C. § 1983, which provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ." *See* Richard H. Fallon, Jr., *Three Symmetries Between Textualist and Purposivist Theories of Statutory Interpretation—and the Irreducible Roles of Values and Judgment Within Both*, 99 CORNELL L. REV. 685, 719–24 (2014). In doing so Justices who characterize themselves as textualists have frequently, but not invariably, relied on the common law background against which § 1983 was enacted. *See id.* Lacking a common law background on which to rely, in *National Private Truck Council, Inc. v. Oklahoma Tax Commission*, the textualist Justice Clarence Thomas, in a majority opinion joined by Justice Scalia, reasoned that historical practice supported a "presumption that federal law generally will not interfere with administration of state taxes" and held on that basis that "Congress did not authorize injunctive or declaratory relief under § 1983 in state tax cases . . . ." Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n, 515 U.S. 582, 588 (1995).

other laws that previously regulated the same subject.[17]

But when we move from conversational to statutory interpretation, a disparity stands out. Utterances in ordinary conversation have speakers or authors whose communicative intentions and assumptions matter crucially in determining what those utterances mean. Indeed, among philosophers of language, the central debate is not so much about whether speakers' intentions matter to utterance meaning as about how they matter.[18] With regard to statutes, by contrast, leading participants in debates about interpretation agree that the legislature typically has no shared, collective, or institutional intent to communicate a particular "meaning" in the way, for example, that one friend might if she said to another, "Alex was a big help," or if one of a child's parents said, "So we agree that we will tell Carol, 'You are grounded for two weeks because of what you did.'"

As is now widely recognized by textualists and purposivists alike, American legislatures are not the kinds of entities capable of having *collective* communicative intentions in the same rich, psychological sense as individuals.[19] Moreover, although members of an enacting majority may individually have communicative intentions in that rich, psychological sense, it is improbable that their individual intentions would converge exactly with regard to disputed provisions. At least in cases involving complex legislation, different legislators may aim to cause readers or listeners to come to different beliefs about the communicative content of contestable provisions. And some legislators may not even have read the disputed provisions themselves. If not, they may have no specific communicative intentions of their own.

With both textualists and purposivists agreeing that the legislature typically lacks collective communicative intent in the same rich, psychological sense as an individual speaker or author, one might also expect both to concur in rejecting the model of conversational interpretation.[20] Remarkably, however, neither textualists nor purposivists have done so. Instead, in response to the absence of an actual intent of the legislature to

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[17] *See, e.g.*, Sprietsma v. Mercury Marine, 537 U.S. 51, 64 (2002) (articulating a standard under which federal law will be held impliedly to preempt state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941))).

[18] *See infra* notes 38–42 and accompanying text.

[19] *See, e.g.*, John F. Manning, *Without the Pretense of Legislative Intent*, 130 HARV. L. REV. 2397, 2405–12 (2017) [hereinafter Manning, *Without the Pretense*] (endorsing this position and cataloguing myriad luminaries in the theory of statutory interpretation who have concurred).

[20] For a powerful argument that it should, see RONALD DWORKIN, LAW'S EMPIRE 51–55, 313–37 (1986). For discussion of how Dworkin's theory of law and interpretation relate to my argument in this Article, see *infra* Section III.D.

communicate particular meanings, the most familiar response has been to invent a substitute that enables continued reliance on the model of conversational interpretation, as duly amended. For the psychological intent of the legislature, textualists propose to substitute an "objective" intent.[21] Purposivists advocate reliance on legislative "purposes" as ascribed by courts rather than on actual, subjective speakers' intentions.[22]

But efforts to invent a substitute for legislative intent, understood as a psychological intent to communicate a particular meaning, are muddled. This is my first, central, anchoring claim in this Article, introduced here and further supported in Part I. If we accept that speakers' intentions need to be invented, it follows that a statute's meaning—if it is to be a function of an invented substitute for speakers' intent—will be an invention, too. We cannot both invent a determinant of statutes' meanings and claim to have discovered what statutes "really" mean as a matter of linguistic fact, at least in reasonably contestable cases—a qualification I shall explain shortly.

Textualists, in particular, are prone to overlook the implications of their own arguments that legislatures lack communicative intentions in the sense in which ordinary speakers have them. Falling into a muddle on this point, textualists are partly the victims of their own ingenuity in seeking to give content to the idea of "objective" legislative intent. Textualists characteristically equate the objective intent of the legislature with an intent to communicate whatever a reasonable listener would understand a statutory provision to mean. For reasons I shall explain, this strategy succeeds insofar, but only insofar, as it involves the positing of what I shall call the "minimal" communicative intentions that would be necessary to make a statute

[21] *See, e.g.*, Scalia, *supra* note 1, at 17 ("We look for a sort of 'objectified' intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*."); John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 423 (2005) [hereinafter Manning, *Textualism and Legislative Intent*] ("[T]extualists have sought to devise a constructive intent that satisfies the minimum conditions for meaningfully tracing statutory meaning to the legislative process."); Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 353–57 (2005). In a more recent article, Dean Manning proposes to abandon even the idea of an "objective" legislative intent, *see* Manning, *Without the Pretense*, *supra* note 19, at 2421–27, but continues to rely on the model of conversational interpretation to determine what a "reasonable person" would understand legislative language to mean—even though a reasonable listener's capacity to grasp the meaning of utterances in ordinary conversation depends on assumptions about or ascriptions of speakers' intentions. *See infra* notes 37–42 and accompanying text.

[22] *See, e.g.*, HART & SACKS, *supra* note 1, at 1374 (urging interpreters to "[d]ecide what purpose ought to be attributed to the statute and to any subordinate provision of it which may be involved" on the assumption that the legislature consisted of "reasonable persons pursuing reasonable purposes reasonably" and to "[i]nterpret the words of the statute immediately in question so as to carry out the purpose" as well as possible). There is an important conceptual difference between statutory purposes in this sense and the specific communicative intentions of the enacting legislature. *See, e.g.*, Archibald Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 HARV. L. REV. 370, 370–71 (1947); Manning, *Without the Pretense*, *supra* note 19.

intelligible in its linguistic, historical, and institutional context.[23] These would include such intentions as to legislate, in English, and to convey whatever a reasonable listener would *necessarily* understand the words of a statute to require, provide, or stipulate.

But an objective legislative intent, in this minimal sense, is not much richer than an intent to utter a meaningful sentence with legal consequences of some kind. Knowing the speaker had this kind of minimal intention—necessarily held by anyone who uttered words in a linguistic, historical, and institutional context—would not have told us whether Carol's grounding by her parents barred her from attending church or music lessons. Nor would a minimal intention, in the sense defined, help with reasonably disputable cases such as those that currently perplex the courts. It would not tell us, for example, whether a federal statute includes implicit exceptions, analogous to those in Carol's case, or preempts state statutes regulating the same activities.

Smith v. United States,[24] which divided the Justices of the Supreme Court and has subsequently divided theorists,[25] illustrates the same point. *Smith* posed the question whether a provision that enhanced the criminal penalty for anyone who "uses" a firearm in connection with drug trafficking applied to a defendant who had traded a gun for drugs. Writing for the majority, Justice O'Connor held that the statute applied. A person who trades a gun for drugs "uses" a gun in the literal sense, she emphasized.[26] Moreover, it is surely intelligible that a legislator establishing the penalty enhancement might have intended the statute to apply. Justice Scalia dissented. He thought that a speaker using the relevant words and a listener hearing them would much more probably understand the phrase "use a firearm" as meaning "use a firearm as a weapon."[27]

[23] This usage echoes JOSEPH RAZ, BETWEEN AUTHORITY AND INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASON 284–85 (2009) (positing that legislators should be assumed to vote for legislation with the "minimal intention" to make law that will be "understood" in accordance with the norms of "their legal culture"). For discussion of the limits of Raz's notion of minimal intent, see *infra* note 83.

[24] 508 U.S. 223 (1993).

[25] *See*, *e.g.*, CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 88 (2d ed. 2018) (praising the majority's analytical approach); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 110–11 (2001) [hereinafter Manning, *Equity of the Statute*] (arguing that "the *Smith* dissent arrived at a more plausible conclusion" than would a literal reading of the statute and commending that "more contextual approach" to textualists); Soames, *Toward a Theory*, *supra* note 5, at 237–41 (critiquing the conflation of the meaning of a sentence with what the sentence was used to assert in Justice Scalia's "otherwise brilliant dissent").

[26] *Smith*, 508 U.S. at 228–29.

[27] *See id.* at 241–43.

Suppose we agree that Justice Scalia was correct about most typical usages, perhaps as revealed by corpus linguistic analysis.[28] Even if so, it would not follow that a speaker using the statutory language would *necessarily* have intended to communicate the more restricted message. As corpus linguistic research recurrently teaches, the most common uses of words or phrases are typically not the only, or the only linguistically eligible, ones.[29] More examples would amplify, not limit, the central conclusion to be drawn: to generate determinate answers in cases such as *Smith*, textualists must posit more than necessarily inferable or minimal speakers' intentions. To resolve disputed cases, textualists must fill up the underdeterminate vessel of "objective" legislative intent—as Justice Scalia sought to do in *Smith*—with contestable content (or take similar steps to specify the assumptions of the "reasonable" reader in whose judgments they seek to ground the idea of an objective legislative intent). It is not an adequate answer to maintain, as some theorists do, that the law renders determinate what linguistic meaning leaves unresolved.[30] Although I shall say a good deal more about this point below, it should suffice for now to recall the complaint by Justice Scalia with which I began: to date, the law has failed to develop agreed, determinate methods of statutory interpretation.

Building on this argument, this Article advances a second strong claim: the real fight in statutory interpretation debates is less about linguistics than about which normative criteria should guide the construction of the fictitious objective intent or legislative purpose that will help determine interpretive outcomes. More specifically, the deep dispute between textualists and purposivists involves questions of moral and political legitimacy. Purposivists emphasize the importance of justice and good government—as measured from the perspective of reasonable people concerned to achieve reasonable aims through reasonable means—as a source of interpretive legitimacy.[31] By contrast, textualists protest that purposivist interpretation risks the substitution of judicial for legislative judgment in contravention of democratic norms.[32] In taking this stance, textualists prioritize democracy

[28] Corpus linguistic analysis relies on large databases made up of naturally occurring usages in newspapers, books, websites, and the like to identify the most common uses of words or phrases. *See, e.g.*, Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 833–51, 859–64 (2018).

[29] *See id.*

[30] *See infra* Section II.A.

[31] *See, e.g.*, Daniel J. Meltzer, *Preemption and Textualism*, 112 MICH. L. REV. 1, 7 (2013) (defending purposivism as necessary to "the task of fashioning a workable legal system").

[32] *See, e.g.*, Scalia, *supra* note 1, at 17–18 ("The *practical* threat is that, under the guise or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires . . . .").

over substantive justice and reasonableness as a source of interpretive legitimacy.

Against the background of legal disagreement and confusion, my third central claim addresses an aspect of the debate between textualists and purposivists that neither, understandably, like to dwell on. Until substantive content is ascribed to the ideas of "objective intent"—in the case of textualism—and more is said about how courts should ascribe "reasonable" purposes to the legislature—in the case of purposivism—one cannot meaningfully compare the merits of interpretive textualism, trumpeted as a theory to advance democracy and democratic legitimacy, with those of purposivism, touted as a promoter of good government. To run this comparison, one would need to know the outcomes that the theories would generate. At the very least, one would need to know what purportedly "objective" intentions textualists would ascribe and, absent linguistic necessity, on what basis they would make their ascriptions. At the present time, textualists tend to be disproportionately conservative and purposivists more characteristically liberal.[33] If we assume these pairings to be stable (even if they are contingent rather than necessary), then conservative textualists—whose conservatism will inexorably shine through in the way they invent the intent that textualism then purports to reveal—need to defend their conservatism as much their textualism. By the same token, liberal purposivists have to defend their liberalism in imputing purposes to the legislature.

Following my critique of the model of conversational interpretation as a muddled foundation for claims about statutory meaning in disputed cases, this Article turns from debunking to prescription. Focus on the necessarily normative dimension of statutory interpretation in cases in which linguistic meaning is underdeterminate casts the connection between legal interpretation and linguistic interpretation in a new light, but, it does not imply that no such connection exists, even in reasonably disputable cases such as *Smith*. Although it is error to believe statutes' meanings can be grounded in the model of conversational interpretation, it would be an equally deep mistake to conclude that the role of judges in interpreting statutes could be untethered from the ways in which ordinary people use and understand language. I would conjecture that ordinary people, unschooled in

[33] *See, e.g.*, Margaret H. Lemos, Book Review, *The Politics of Statutory Interpretation*, 89 NOTRE DAME L. REV. 849, 906–07 (2013) (noting that "[i]nterpretive theories like textualism and purposivism have become political brands, marking judges as conservatives or liberals," and explaining that although textualism is not "hard-wired to produce conservative results," "[t]o deny the political nature of contemporary textualism is to blink reality"); Caleb Nelson, *supra* note 21, at 373 (noting that "today's textualists tend to be politically conservative").

either law or linguistic theory, are as prone as judges and lawyers to think that they can generally understand statutes in roughly the same way that they interpret utterances in daily conversation. Encountering a statute that makes it an offense to drive an unregistered motor vehicle, a person of ordinary intelligence concludes unhesitatingly that it is a punishable offense to drive an unregistered motor vehicle, without anxiety about how to assign linguistic meaning to a speaker-less utterance. Nor does that confidence dissolve in debated cases, such as *Smith*, in which even as sophisticated a user of language as Justice Scalia insisted that the statute's meaning and application could be resolved as a matter of linguistic fact.

Having advanced this conjecture about ordinary citizens' confident apprehension of statutes' meanings, this Article links linguistic analysis to normative political theory. Within the domain of linguistic theory, I develop a distinction between linguistic *intuitions* about statutes' meanings and well-grounded linguistic *judgments*. In my usage, intuitions are immediate, untheorized, provisional beliefs. By contrast, judgments are rooted in and claim validation by articulable frameworks or theories. As theorized within the model of conversational interpretation, well-grounded linguistic judgments depend on speakers' communicative intentions and speakers' and listeners' assumptions about interpretive common ground. It is vital to recognize, however, that the absence of individual speakers with rich, psychological communicative intentions in statutory interpretation cases frequently does not undercut our linguistic intuitions about statutes' meanings, even in the recognized absence of a theoretically satisfactory foundation for those intuitions.

For normative rather than linguistic reasons, I argue, the law should accord significant weight to linguistic intuitions, with the significance increasing as those intuitions become more widely shared. As a normative matter, it would deliver a heavy blow to the legal system's legitimacy—roughly speaking its entitlement to respect if not obedience[34]—if ordinary people could not relatively reliably determine their legal rights and obligations based on their untutored linguistic instincts or if judges' ascription of meaning to statutes impressed ordinary people as arbitrary or Humpty Dumpty-like.[35] But neither should judges decide hard statutory interpretation cases based on an opinion poll, the results of which might be unreliable anyway. Whenever there is no linguistic fact of the matter about statutes' meanings—identifiable in the way that we identify utterances'

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[34] *See* RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 23–24 (2018).

[35] *See* LEWIS CARROLL, THROUGH THE LOOKING GLASS, *in* THE COMPLETE WORKS OF LEWIS CARROLL 214 (Modern Library ed. 1936) ("'When *I* use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.'").

communicative content in ordinary conversation, partly in recognition of speakers' communicative intentions—the grounds for determinate choice need to be normative.

In maintaining that we can have linguistic intuitions about what statutes mean, but that we cannot reach well-grounded linguistic judgments adequate to resolve contestable cases in the absence of speakers with more than minimal communicative intentions, I propose an "error theory," which is meant to challenge philosophers of language as well as judges and lawyers. That theory answers the question, "How should we account for widespread agreement that even contested statutes frequently have clear meanings—with the debate being solely about what the clear meaning is—in the absence of speakers whose communicative intentions would help to ground those meanings?" In reading statutes, it is hard not to assume that they have linguistic meanings, somehow traceable to the intentions of a legislature that has set out to tell us what to do or what the consequences of certain conduct will be, even in cases outside the legislature's minimal, collective intent to communicate, in English, whatever its words, in context, would necessarily mean. And judges, in explaining their linguistic intuitions, may have good reason to refer to the intentions and purposes that they—like ordinary people—may almost reflexively *impute* to the legislature. Nevertheless, judges and legal theorists should be aware that imputing anything beyond minimal intentions or purposes to the legislature typically involves a fiction if not an epistemological error. Legislative intent and legislative purposes, as invoked to ground statutory interpretations, are both constructs, devised more to justify intuitions or outcomes than to discover what statutes mean as a matter of linguistic fact.[36] Part III talks at length about the complexity of judges' and Justices' necessary choices and the legal framework in which those choices ought to be made.

Part III also emphasizes the implications of my error theory for what we can realistically expect legislatures to accomplish. If complex statutes are to be reasonably functional in the absence of determinate legislative intentions as anchors for interpretation, courts must assume the role of helpmates to the legislature. In order to do so, courts must ascribe sometimes contestable purposes to statutes—much in the way that purposivists advocate, but with sensitive attention to the desideratum of achieving consistency with widely shared linguistic intuitions. In casting themselves as junior partners to the legislature, courts need to understand and respect the limited capacity of the legislature to "speak" clearly and determinately while

[36] *See* Doerfler, *supra* note 4, at 982 (describing legislative intent as a benign and valuable "fiction").

seeking to realize an ideal of governmental legitimacy that has important, but not exclusive, democratic wellsprings.

The Article's final contribution is to frame new questions for lawyers, philosophers of language, and political theorists by showing how statutory interpretation in contestable cases necessarily occurs at the blurry intersections of their respective disciplines. At the moment of ultimate interpretive decision, law typically matters, as do linguistic intuitions arising from law's reliance on natural language, as do normative considerations involving the legitimacy of judicial decisions and the legal system as a whole. But precisely how these various factors matter, and how they interact with each other to support well-justified conclusions, is a question that has drawn too little specific attention.

My argument unfolds in four Parts. Part I argues that the model of conversational interpretation cannot ground judgments about statutes' linguistic meanings in the kinds of reasonably contestable cases that perplex courts. Part I further traces the parallel efforts of textualists and purposivists to invent substitutes for legislative intent to guide judicial decision-making and exposes the defects in their strategies. Part II advances the thesis that the construction of fictitious legislative intentions or purposes both is and ought to be driven by normative values. Judges' guiding aspiration should be to resolve cases in the most morally and politically legitimate way—which will ordinarily require them to follow the law when the law is determinate and to reach the results that will best maintain or enhance the moral legitimacy of the legal system in cases in which they must exercise substantive moral judgment. Part II maintains that debates between textualists and purposivists are largely normative in character, but it also argues that much of the debate misapprehends the most fundamental normative challenge, which is that of giving substantive content to the abstract fiction of "objective" legislative intent or legislative purposes. Part III argues that although ordinary linguistic intuitions about statutes' meanings rest on ultimately untenable assumptions, the moral legitimacy of the legal system depends on ordinary citizens' capacity to rely on their linguistic intuitions to determine their rights and obligations in most contexts. Having done so, it elaborates the implications of that recognition, including for how we should understand both the legislative and the judicial roles in a political democracy. Part IV concludes the Article with reflections on the relationship between law and language. I argue that lawyers, judges, and legal theorists need a better understanding of how language works than most have achieved so far, but that statutory interpretation also poses challenges that philosophers of language have not plumbed adequately.

I. THE ILL FIT BETWEEN STATUTORY INTERPRETATION AND THE MODEL OF CONVERSATIONAL INTERPRETATION

Nearly all debate about statutory interpretation assumes that we do and should interpret statutes in roughly the same way that we discern the meaning of utterances in ordinary conversation.[37] Typically, in conversation, a known speaker says something to a particular listener or listeners in a specific context. In ordinary conversation, moreover, nearly all agree that speakers' intentions play a crucial role in determining the meaning of their utterances. Insofar as dispute exists, it mostly involves the precise mechanism through which speakers' intentions achieve their significance. According to the influential theories of H.P. Grice, the meaning of an utterance simply is the speaker's intended meaning.[38] According to other theorists, the meaning of an utterance is a function of multiple factors, of which a speaker's intentions are only one.[39] Philosopher of language Scott Soames equates utterance meaning with "what a reasonable hearer or reader who knows the linguistic meaning of [the sentence that is uttered] *S*, and is aware of all relevant intersubjectively available features of the context of the utterance, would rationally take the speaker's use of *S* to be intended to convey and commit the speaker to."[40] Either way, utterance meaning depends on the communicative intentions of a particular speaker addressing a particular audience in a particular context.[41] Inferences will also reflect actual or

[37] *See supra* note 4 and accompanying text. For discussion of works by scholars who have rejected the mainstream assumption on this point, see *infra* Section III.D.

[38] *See* ANDREI MARMOR, *supra* note 4, at 19 ("According to a Gricean view, . . . [w]hatever the speaker actually intended to say is the content asserted."); Solum, *supra* note 8, at 491 ("The speaker's meaning (or utterer's meaning) of an utterance is the illocutionary uptake that the speaker intended to produce in the audience on the basis of the audience's recognition of the speaker's intention."). *See generally* PAUL GRICE, STUDIES IN THE WAY OF WORDS 117 (1989) (characterizing utterer's meaning as "basic" and other notions of meaning as "(I hope) derivative").

[39] *See, e.g.*, Andrei Marmor & Scott Soames, *Introduction*, *in* PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW, *supra* note 3, at 1, 8 (asserting that the communicative content of utterances "is determined by a variety of factors, including the semantic content of the sentence uttered, the communicative intentions of the speaker, the shared presuppositions of the speaker-hearers, and obvious features of the context of utterance").

[40] Soames, *A Post-Originalist Theory*, *supra* note 9, at 598. The reference to what a listener would "rationally take" a speaker to commit to is potentially ambiguous: it might refer either to what rationality would dictate (and only to what rationality would dictate) or to what one person might rationally (or not irrationally) take to be the case even if another did not. If used in the former sense, Soames's formulation would result in a limited conception of utterance meaning, restricted to what a speaker's use of an utterance would commit him or her to as a matter of rational necessity. The restricted conception of utterance meaning would closely approximate that which would emerge as an inference from what I referred to above as the "minimal intent" that must be imputed to a speaker in order to make a sentence intelligible in the context of its utterance. *See supra* note 23 and accompanying text.

[41] Accordingly, Soames acknowledges contexts in which the appropriate specification of the content of an utterance would depend on "what the rule-makers understand themselves to be prohibiting."

presupposed common knowledge—what the listener takes the speaker to know about her and about the context and imagines that the speaker will take for granted that she, the listener, knows.[42]

This Part begins by arguing that the analogy of statutory interpretation to conversational interpretation fails, at least as extended to cases in which linguistic intuitions can reasonably diverge. It then traces efforts by both textualists and purposivists to salvage the model of conversational interpretation as applicable to statutory interpretation by devising substitutes for the psychological intentions of an actual legislative speaker—"objective intentions" in the case of textualists, legislative "purposes" for purposivists. Finally, this Part documents the fallacy of this strategy: insofar as statutes' purported linguistic meanings depend on invented substitutes for the psychological assumptions and intentions of an actual speaker, then the meanings of disputed statutes will themselves be inventions, too. The result is a muddle: textualists and purposivists purport to disagree about statutes' linguistic meanings, but their real dispute is about what intentions or purposes to impute to legislatures in cases involving disputed statutes.

A. The Nonexistence of Collective Legislative Intentions

Although debates about statutory interpretation abound with talk about legislative intent,[43] the idea that the legislature has or could have a single communicative intention in the same rich, psychological sense as an individual speaker is a fiction in all disputable cases. In claiming that legislatures lack discernible communicative intentions in the psychological sense, I break no new ground.[44] Arguments to this effect are well-known and widely accepted.

SOAMES, *Interpreting Legal Texts*, *supra* note 3, at 417 n.7; *see also* Soames, *Toward a Theory*, *supra* note 5, at 241 ("Since what language users *intend* to say, assert, or stipulate is a crucial factor, along with the linguistic meanings of the words they use, in constituting what they *do* say, assert, or stipulate, the intentions of lawmakers are directly relevant to the contents of the laws they enact.").

[42] *See* Robert Stalnaker, *Common Ground*, 25 LINGUISTICS & PHIL. 701, 701 (2002). Philosophers of language emphasize the importance of "presuppositions" to successful communication. *See, e.g.*, SCOTT SOAMES, *Presupposition*, *in* 1 PHILOSOPHICAL ESSAYS: NATURAL LANGUAGE: WHAT IT MEANS AND HOW WE USE IT, *supra* note 3, at 75–76 (distinguishing among logical, expressive, and pragmatic presuppositions); Robyn Carston, *Legal Texts and Canons of Construction: A View from Current Pragmatic Theory*, *in* 15 LAW AND LANGUAGE: CURRENT LEGAL ISSUES 2011, at 8, 9 (Michael Freeman & Fiona Smith eds., 2013) (distinguishing pragmatic presupposition from semantic presupposition).

[43] For a catalogue of examples, some recent and some stretching into the early nineteenth century, see Manning, *Without the Pretense*, *supra* note 19.

[44] *See, e.g.*, *id.*

1. The Shared View of Textualists and Purposivists

In the case of a speaker in ordinary conversation, communicative intentions exist as a matter of psychological fact. In the case of a large, multimember legislature, by contrast, there is no analogous psychological entity. Legal texts do not have unitary authors.[45] Sometimes, no member of the legislature that enacts a statute may actually have read every word of it.[46]

For these reasons among others, textualists—who have been the main drivers of modern debates about statutory interpretation—expressly emphasize that the legislature could not have a collective communicative intent. As they like to put it, the legislature is a "they," not an "it."[47]

Against this textualist commonplace, Professor Andrei Marmor maintains that shared intentions of a majority of the legislature should suffice to establish an intention that could be attributed to the legislature as a whole.[48] It is improbable, however, that a majority of the legislature would share overlapping communicative intentions that bear usefully on the kinds of questions that divide judges in interpreting complex statutes—which can include hundreds of pages, written by multiple drafters, and which most members are unlikely even to have read.[49]

Moreover, even if individual legislators' communicative intentions did overlap to a greater or lesser extent, there would be a conceptual problem, highlighted by Professor Ryan Doerfler. Even though legislatures comprise

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[45] For pathbreaking empirical work on how statutes are actually drafted, see Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725 (2014); Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575 (2002). Among their central findings are that a variety of congressional staff—including committee staff with policy-based goals and expertise, nonpartisan drafting experts in the Office of Legislative Counsel, and personal staff—often have a role in the drafting of legislation, *see* Bressman & Gluck, *supra*, at 783–84; Nourse & Schacter, *supra*, at 583–90; that inconsistencies of purpose and usage frequently emerge as a result, *see* Bressman & Gluck, *supra*, at 783–84; and that members of Congress rarely draft legislative language themselves, *see* Nourse & Schacter, *supra*, at 585–86.

[46] *See* Nourse & Schacter, *supra* note 45, at 608.

[47] Kenneth A. Shepsle, *Congress Is a 'They,' Not an 'It': Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 244 (1992). Echoing this formulation, textualists emphasize that legislatures are multimember bodies lacking shared psychological intentions. *See, e.g.*, Manning, *Textualism and Legislative Intent*, *supra* note 21, at 430–31; *see also* Scott Soames, *Justice Scalia's Philosophy of Interpretation: From Textualism to Deferentialism*, *in* JUSTICE SCALIA: RHETORIC AND THE RULE OF LAW 21, 26 (Brian G. Slocum & Francis J. Mootz III eds., 2019) ("In an age in which major pieces of legislation routinely contain thousands of pages of text written by small armies of staffers, . . . [t]o imagine that one could ask each member what he or she intended in adopting the text, and, by aggregating, converge on a meaningful result is, as Scalia rightly suggests, absurd.").

[48] MARMOR, *supra* note 4, at 162–65.

[49] *See, e.g.*, Abbe R. Gluck, Comment, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 69–70, 83 (2015); Nourse & Schacter, *supra* note 45, at 585–86.

multiple members, there is an important sense in which Congress, in its constitutional capacity as a collective lawmaking institution, is "an 'it,' not a 'they.'"[50] As Doerfler puts it, "If the legislative power belongs to Congress as a single body, . . . either Congress forms intentions *qua* 'it' or there is no legislative intent."[51] In other words, if we want to know the intent of the lawmaker in order to interpret a statute, we seem to need an institutional intent, not an aggregation of the communicative intentions of individual members.

Purposivists also recognize that the legislature is not capable of having a shared or unitary psychological intent that is sufficiently rich or determinate to resolve disputed cases. Purposivists thus talk not about legislative intent, but about legislative purposes. Moreover, they conceptualize legislative purpose as something that needs to be imagined or constructed and then imputed. As a perceptive commentator once summarized, the paradigmatically purposivist Legal Process theory of Henry Hart and Albert Sacks calls for judges to "conjure up plausible organizing purposes for" statutes, rather than discover them, and then to interpret statutes in light of the ascribed purposes.[52]

2. *The Insights and Limitations of Modern Intentionalist Theories*

In agreeing with textualists and purposivists that legislatures do not have shared or collective psychological intentions *of the kind that would be necessary to resolve most disputed cases*, or those in which linguistic intuitions diverge, I have endeavored to maintain the highlighted qualification. That qualification is important in light of the insight—first developed in philosophical work on group agency—that people often intend to do things together.[53] For example, two or more people can intend to take a walk together or to cook dinner together. In these cases, the relevant intentions are "we-intentions," not "I-intentions." If two people intend to take a walk or cook dinner together, their intentions are joint or interlocked, not just the psychologically separate intentions of two people each of whom independently intends to take a walk or to cook dinner.

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[50] *See* Doerfler, *supra* note 4, at 999–1000.

[51] *Id.* at 1000; *see also id.* at 1002–03.

[52] Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 249 (1992); *see also* Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 600–01 (1995) (similarly characterizing the Hart & Sacks approach).

[53] Leading works in developing accounts of group agency and group intention include MICHAEL E. BRATMAN, FACES OF INTENTION: SELECTED ESSAYS ON INTENTION AND AGENCY (1999), and CHRISTIAN LIST & PHILIP PETTIT, GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS (2011).

Extending this insight about the possibility of group agency to the legislature, we might say—as I acknowledged in the Introduction—that legislators intend to legislate together by participating in a process that will yield a group-endorsed result. We might further say, as Professor Richard Ekins has maintained, that the members of a legislature have a joint or interlocking intent to legislate pursuant to the standing rules of legislative procedure.[54] It may be equally accurate to say that they intend to legislate in English[55] and to compel, forbid, or stipulate whatever the words of a statute would necessarily commit an author of the words of a statute, as read in context, to compelling, forbidding, or stipulating.

If so, Ekins has explained how the model of conversational interpretation could apply, or could easily be adapted to apply, to cases that can be decided in reliance on what I have called "minimal" communicative intentions.[56] But minimal intentions that are necessarily inferable from a speaker's use of particular words in a particular linguistic context typically will not resolve disputable cases. Tellingly, at a key juncture in his argument, Ekins appears to acknowledge that he has failed to bridge this gap. After explaining that legislators can have interlocking intentions to legislate together, Ekins's argument takes a teleological and normative turn, relying on the premise that legislation must be viewed as a "reasoned scheme" for the common good.[57] Consistent with this premise, Ekins then asserts that the intentions that most specifically matter to the interpretation of legislation are those of what he calls "well-formed" legislatures, posited to satisfy the demands of legitimacy in the exercise of political power, not actual ones.[58]

Other theorists have emphasized that collectives other than legislatures can sometimes be said to have more than minimal communicative intentions.[59] But their characteristic examples differ materially from the case of legislatures. The attribution of communicative intentions to corporations, for example, typically involves an actual or imagined delegation of authority to an identified person. For instance, a corporation might empower its chief executive officer or a spokesperson to speak on behalf of the corporation. In seeking to determine the meaning of a corporate statement, we then might

[54] RICHARD EKINS, THE NATURE OF LEGISLATIVE INTENT 219–22 (2012).

[55] *See* Larry Alexander & Saikrishna Prakash, *"Is That English You're Speaking?" Why Intention Free Interpretation is an Impossibility*, 41 SAN DIEGO L. REV. 967 (2004).

[56] *See supra* note 23 and accompanying text.

[57] EKINS, *supra* note 54, at 247–49.

[58] *Id.* at 143, 178–79.

[59] *See, e.g.*, STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 99 (2010); RAZ, *supra* note 23, at 280.

look to the communicative intent of the authorized spokesperson or decision-maker.

No similar delegation occurs in the case of legislatures. Professor Lawrence Solan has argued that members of Congress share a "general recognition that those who ushered [a] bill through the process did so with particular [intentions] that deserve to be honored."[60] Although Solan does not specify whom exactly he has in mind, he offers the committees that draft legislation and issue accompanying reports as central examples. But Congress has never adopted an interpretive norm assigning authoritative status to committee reports, much less to the individual intentions of members of drafting committees, even though it imaginably could.

We could also imagine a similar argument that Congress should be viewed as adopting the communicative intentions of whoever drafted a statute or any of its relevant, disputed parts, even if language was pasted in without committee deliberation. But it strikes me as implausible that most members of Congress actually share any such we-intention, and I know of no empirical studies that would support the suggestion that they do. Absent such evidence, it would take a normative argument, not a linguistic one, to establish that an enacting legislature should be viewed as having a "we-intention" to adopt the communicative intentions of whoever happened to write a disputed provision. If we look at who actually drafts legislation, the drafters are frequently a diverse variety of committee and personal staffers[61] and, in some cases, may include lobbyists.[62] From a normative perspective, it would be bizarre to think that the meaning of legislation should depend on the communicative intentions of a lobbyist.

B. Invention

With legislatures lacking shared or collective communicative intent of a kind to which readers or listeners could appeal in seeking to resolve uncertainties about statutes' meanings, one might expect participants in and theorists of statutory interpretation to abandon the model of conversational interpretation as a framework for their efforts. Instead, most try to adjust or patch up that model by inventing an analogue to actual speakers' communicative intentions. But their strategies of invention fail—for reasons

[60] Lawrence M. Solan, *Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation*, 93 GEO. L.J. 427, 447 (2005).

[61] *See supra* note 45.

[62] *See* Ganesh Sitaraman, *The Origins of Legislation*, 91 NOTRE DAME L. REV. 79, 106 (2015) ("Legislative drafts can also emerge from private authors—interest groups, industry, academics, individual policy experts, or bodies of experts like the Administrative Conference or the American Law Institute.").

that vary slightly depending on the particular invention that a theorist advances.

1. Textualism and Objective Intent

For textualists, the invented substitute for legislative intent in the psychological sense is "objective" or "objectified" intent,[63] which Justice Scalia defined as "the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*."[64] The textualists' terminology in effecting this substitution reveals both the considerable ingenuity and the large ambition of their strategy: to devise a conception of legislative intent that is admittedly invented or fictional[65] but that can nevertheless make claims to "objective" status. In implementing this strategy, textualists proceed in two steps. First, they shift the focus in their search for the communicative content of legislation from the speaker, and what the speaker intended, to the listener, and to what a reasonable listener would take statutory language to mean, in context.[66] By itself, this step does not take textualists all the way to where they want to go. Because reasonable listeners figure out what utterances mean partly by reference to what they take the speaker's communicative intentions to be, a gap remains to be filled. The second textualist step, involving the positing of an objective intent, aims not only to fill this gap, but to do so in a way that restricts judges to reliance on known, publicly accessible facts.

On the surface, the claim that legislative intentions could be simultaneously invented or fictional[67] and also "objective" risks self-contradiction. If I understand correctly, textualists believe that the intentions they posit can be aptly characterized as objective because of the way in which they are identified. According to leading textualists, reasonable readers or listeners ascertain the meaning of statutory provisions, like other utterances, by relying on "conventions" of language use that exist as a matter of

[63] *See supra* note 21 and accompanying text.

[64] Scalia, *supra* note 1, at 17.

[65] *See* Doerfler, *supra* note 4, at 982–83 (characterizing legislative intent as fictional).

[66] *See* SCALIA & GARNER, *supra* note 15, at 16 ("In their full context, words mean what they conveyed to reasonable people at the time they were written . . . ."); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988) ("The meaning of statutes is to be found not in the subjective, multiple mind of Congress but in the understanding of the objectively reasonable person."); Manning, *Absurdity*, *supra* note 14, at 2392–93 ("[Textualists] ask how a reasonable person, conversant with the relevant social and linguistic conventions, would read the text in context.").

[67] *See*, *e.g.*, Manning, *Textualism and Legislative Intent*, *supra* note 21, at 423–24; Manning, *Without the Pretense*, *supra* note 19, 2400–01; *id.* at 2421–22 & n.151 (attributing a fictionalist view to Justice Scalia).

objective, social fact.[68] With conventions of language use grounding claims of objectivity, textualists purport to work backward from the interpretive conclusions that conventions dictate to a conception of the speakers' intent that applicable conventions presuppose. Dean John Manning—the textualist who has written most prolifically on the topic of reasonable listeners and objective legislative intentions—thus asserts repeatedly that objective intent is the "minimal" communicative intent that must be postulated in order to trigger the "shared conventions [of a community] for decoding language in context."[69]

If Manning were right that we have "shared conventions for decoding language in context" that can operate without reliance on speakers' subjective communicative intentions or suppositions about interpretive common ground, then textualists could claim that the "objective" intentions of the legislature are whatever communicative intentions a reasonable listener or reader needs to impute to the legislature in order for its utterances to mean what linguistic conventions establish that they mean.[70] But the premise—that we have conventions for "decoding" language without reference to speakers' subjective communicative intentions or to what speakers subjectively know or assume—is false in most, if not all, disputable cases. A reasonable listener, in context, would seek to ascertain an utterance's meaning by reference to a speaker's likely communicative intentions, among other considerations.[71] And if meaning in context depends on speakers' communicative intentions, there is an obvious, fallacious circularity in beginning with what a reasonable listener would take a statute

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[68] *See* Manning, *Equity of the Statute*, *supra* note 25, at 16 (describing textualists' premise "that a faithful agent's job is to decode legislative instructions according to the common social and linguistic conventions shared by the relevant community"); John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 176 [hereinafter Manning, *New Purposivism*] (maintaining that "unless interpreters give priority to the shared semantic conventions that make it possible for legislators to communicate their policies to the law's implementers, a legislature cannot predictably use language as a tool to define the scope and limits of the background legislative policies that the statutory text carries into effect"); Manning, *Textualism and Legislative Intent*, *supra* note 21, at 434 (explaining textualism's reliance on "conventions" as a source of meaning in the absence of subjective legislative intent).

[69] Manning, *Textualism and Legislative Intent*, *supra* note 21, at 434; *see also* Manning, *Equity of the Statute*, *supra* note 25, at 16.

[70] Manning, *Textualism and Legislative Intent*, *supra* note 21, at 434.

[71] In rejecting a "plain meaning" approach to statutory interpretation, Dean Manning thus writes—quoting another prominent textualist, Judge Easterbrook—that "[b]ecause textualists want to know the way a reasonable user of language would understand a statutory phrase in the circumstances in which it is used, they must always ascertain the unstated 'assumptions shared by the speakers and the intended audience.'" Manning, *What Divides*, *supra* note 14, at 81 (quoting Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441, 443 (1990)). I do not fully know what Manning means by this sentence in light of his more characteristic insistence that legislatures are not the kind of entity capable of holding assumptions.

to mean, in context, and using that meaning as a basis for imputing an "objective" legislative intent. Until content is given to speakers' intentions, the textualist project spins in a vacuous circle.

Professor Doerfler has suggested that textualists might surmount this difficulty by relying on the "fiction" of a "generic" speaker with the similarly generic assumptions and communicative intentions that the utterer of a statutory directive should be assumed to have "just on the basis of her having written the statute as enacted."[72] This idea of a fictional, generic speaker promises to solve the circularity problem: we now start with a speaker as well as a listener.

The remaining problem is that the idea of a generic speaker will almost inevitably prove either too thin or too thick to solve the problems that lead textualists to conjure the idea of an objective legislative intent in the first place. For reasons that I have emphasized, if the only imputed communicative intentions are the "minimal intentions" necessary to render a statutory provision intelligible in its linguistic and historical context, then the idea of a generic speaker will not resolve any reasonably disputable question of statutory interpretation. Consider the following examples, drawn almost randomly from fields in which I teach. When legislators confer rights or obligations on "any person" or use such generic terms as "employer," do they intend to treat state and local governments as persons or employers?[73] When federal statutes confer jurisdiction on federal or state courts, do they mandate its exercise in absolutely all cases?[74] When Congress enacts a federal regulatory statute, does it intend to impliedly repeal or displace prior federal legislation dealing with the same or similar issues[75] or preempt state legislation regulating the same or similar activities?[76] In all of these cases, it seems nearly self-evident that different speakers uttering the words of the

[72] *See* Doerfler, *supra* note 4, at 1043.

[73] *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452 (1991) (ruling that judges are not covered "employees" under the Age Discrimination in Employment Act); Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978) (reversing an earlier decision and holding that local governments are among the "persons" to which a statute authorizing suits to redress constitutional violations applies).

[74] *Compare* Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 74–75 (1984) (answering in the affirmative), *with* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 545 (1985) (answering in the negative).

[75] *See, e.g.*, Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018) (concluding that a provision of .the National Labor Relations Act that authorizes workers to litigate collectively did not displace a provision of the Federal Arbitration Act that makes arbitration agreements that waive litigation rights judicially enforceable); City of Rancho Palos Verdes v. Abrams, 544 U.S. 113 (2005) (holding that Congress's provision of express remedies for violation of a federal statute impliedly withdrew remedies that otherwise would have existed under an earlier, more general statute).

[76] *See generally* Meltzer, *supra* note 31, at 7 (criticizing textualist theories that would preclude courts from finding implied preemption and defending purposivism as necessary to "the task of fashioning a workable legal system").

relevant statutes might have had different communicative intentions that might have helped to clarify the meaning of their utterances, in context. The minimal intentions that all legislators necessarily would have shared—such as intentions to legislate intelligibly, in English, and to stipulate or prescribe convey what any non-ironic utterer would inescapably commit herself to stipulating or prescribing—resolve nothing.

Nor does it help to equate generic or minimal intent with an intent to rely exclusively on settled linguistic "conventions." If we wanted generic linguistic conventions for determining the meaning of utterances in context, there might seem to be no better candidates than Grice's well-known maxims for successful communication through natural language—including injunctions to "[m]ake your contribution as informative as is required," "[t]ry to make your contribution one that is true," "[b]e relevant," and "[a]void obscurity of expression."[77] For textualists, however, reliance on Gricean assumptions as sources of interpretive common ground for legislatures and the audiences of legislation would pose at least three problems. First, as Grice made explicit, his maxims reflect a pervasive assumption that the speaker and the listener are engaged in a cooperative activity.[78] Yet many, if not most, textualists reject this assumption in the legislative context,[79] where legislative compromises may seek to obfuscate differences, not cooperate with imagined listeners or readers in achieving clarity of understanding.[80] Second, Grice's maxims are both defeasible and underdeterminate in many cases.[81] Third, the Gricean maxims assume the existence of intersubjective common ground between speaker and audience—which is missing in the absence of a speaker with actual knowledge, assumptions, and beliefs—in light of which it can be gauged how a particular utterance might be "relevant," "informative," or "obscur[e]."[82]

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[77] GRICE, *supra* note 38, at 26–28. According to Grice, we normally trust others to observe these maxims and feel entitled to draw inferences about the meaning of their utterances in reliance on them. *See id.*

[78] *Id.*

[79] *See, e.g.*, Manning, *Without the Pretense*, *supra* note 19, at 2422–23.

[80] *See* 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, *supra* note 3, at 83.

[81] *See* Carston, *Legal Texts and Canons of Construction*, *in* 15 LAW AND LANGUAGE: CURRENT LEGAL ISSUES 2011, *supra* note 42, at 13–15 (describing the use of Grice's maxims as "highly context-sensitive" and noting that there must be some "constraints[,] conditions . . . and/or ordering in their application" to avoid ambiguous or contradictory results); Andrei Marmor, *The Pragmatics of Legal Language*, 21 RATIO JURIS. 423, 430–38 (2008) (identifying problems with the application of Gricean maxims to a legislative context, which in some ways "does not abide by the Gricean maxims of cooperative interaction").

[82] *See* Marmor, *supra* note 81, at 431, 434–38.

Textualists' claims that other, less fundamental, conventions will decisively resolve hard cases are correspondingly unpersuasive. Bluff protestations of confidence notwithstanding,[83] we have no linguistic conventions to take us beyond what speakers with otherwise unknown communicative intentions would necessarily commit themselves to. Beyond the literal meaning of sentences, we enter the domain of pragmatics, where textualists can identify no purely linguistic conventions for determining which elements of context matter to statutory interpretation. And insofar as the relevant, purported conventions are legal, the canons of statutory construction are contested and frequently underdeterminate, as past and continuing debates about statutory interpretation notoriously attest.[84]

It would, of course, be possible for textualists to respond to the problem of semantic underdeterminacy by furnishing a thicker conception of generic legislative intent. If the idea of a "generic" intent is a fiction, then one can write fictions as one will. But, because there are innumerable ways in which

[83] In suggesting that linguistic conventions, and objective intentions derived from them, could resolve disputed questions, Dean Manning—often purporting to characterize the position of Justice Scalia and other textualists—relies recurrently on selected passages by legal and political philosophers who have emphasized legislatures' justified reliance on conventions of interpretation and, more generally, on the conventional nature of language. One is Professor Joseph Raz, who asserts that legislators should be assumed to vote for legislation with the "minimal intention" to make law that will be "understood" in accordance with the norms of "their legal culture." RAZ, *supra* note 23, at 284. As the surrounding passage makes plain, however, Raz advances no substantive claims about how any provision will or should be interpreted within a particular legal culture. His immediate concern is not with interpretation, but with the "minimal intention" necessary for legislative action "to count as a lawmaking act" by a legitimate lawmaking authority. *Id.* at 285. Manning has also quoted on multiple occasions from a cryptic passage by the political theorist Jeremy Waldron:

> A legislator who votes for (or against) a provision . . . does so on the assumption that—to put it crudely—what the words mean to him is identical to what they will mean to those to whom they are addressed (in the event that the provision is passed). . . . That such assumptions pervade the legislative process shows how much law depends on language, on the shared conventions that constitute a language, and on the reciprocity of intentions that conventions comprise.

Jeremy Waldron, *Legislators' Intentions and Unintentional Legislation*, *in* LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY 329, 339 (Andrei Marmor ed., 1995); *see* Manning, *Equity of the Statute*, *supra* note 25, at 16 nn.64–65; Manning, *Textualism and Legislative Intent*, *supra* note 21, at 433; Manning, *Without the Pretense*, *supra* note 19, at 2427 n.179. But that just-quoted passage, though it undoubtedly insists that conventions of language use exist, says nothing about what the relevant conventions are, nor about whether they speak to the kinds of questions that textualists invoke them to resolve, nor about their relative determinacy or underdeterminacy.

[84] *See*, *e.g.*, William N. Eskridge, Jr., Book Review, *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 545, 561 (2013) (reviewing SCALIA & GARNER, *supra* note 15) (observing that in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 690 (1995)—in which the Supreme Court divided 6-3 over the application of a provision that made it an offense to "take" an endangered species to actions by private landowners that destroy endangered species' habitats—"[t]here were more than a dozen [applicable] canons [of interpretation] available for the Justices, and they deployed them like battlefield weapons").

a fiction could be filled out, any substantive elaboration would put claims to identify an "objective" intent deeply at risk.

To meet this difficulty, a defender of the view that linguistic conventions generate determinate and objective conclusions in disputed cases might imaginably adopt a functionalist approach to the identification of relevant conventions. On this view, we infer the existence of conventions from their efficacy in producing agreed "conventional meanings" in many if not most cases. And if agreement is the measure of what conventions dictate, then textualists might insist that even disputed statutes have "conventional meanings," as determined by the outcome of opinion polls, even if the results are not anchored in any account of what makes a judgment by any of the respondents correct. But the law has always treated the idea that statutory language bears its ordinary or conventional meaning as defeasible, based on relevant features of context.[85] If this premise is correct, there would be endless disputes about which purported features of "context" the subjects of a poll should be exposed to. Indeed, Dean Manning has described disputes about which features of context should be treated as relevant as the central bone of contention between textualists and purposivists: textualists emphasize semantic context, while purposivists emphasize policy context.[86]

Abandoning pretensions that linguistic conventions can alone produce determinate outcomes in disputed cases, a textualist might maintain that law, in the form of legal conventions, renders determinate what a statute's linguistic meaning might otherwise have left unsettled. I shall discuss that possibility in Part II. In this Section, I have focused wholly on textualists' suggestion that conventions of language use frequently reveal an objective intent that is capable of yielding correct answers to disputed questions that any ordinary, reasonable language user ought to be able to discern in contested cases.[87] As we have seen, that suggestion collapses upon close examination.

[85] *See*, *e.g.*, King v. Burwell, 135 S. Ct. 2480, 2489 (2015) (recognizing that "the 'meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.'"); Brown v. Gardner, 513 U.S. 115, 118 (1994) ("Ambiguity is a creature not of definitional possibilities but of statutory context . . . ." (citing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132, (2000))).

[86] *See* Manning, *What Divides*, *supra* note 14, at 91.

[87] Manning often takes this view, perhaps most typically in defense of Justice Scalia's claims to have identified what ordinary or conventional usage indicates about how controverted language must be interpreted or "decoded" in context. *See*, *e.g.*, Manning, *Equity of the Statute*, *supra* note 25, at 111 (endorsing Justice Scalia's conclusion that a provision enhancing penalties for "using a firearm" in the context of committing a crime did not include bartering the gun); Manning, *Textualism and Legislative Intent*, *supra* note 21, at 441–42 (explicating and defending Justice Scalia's reliance on "semantic context" to find a clear result in *West Virginia University Hospitals v. Casey*, 499 U.S. 83, 88–92 (1991) (holding that a statutory reference to "a reasonable attorney's fee" does not include fees paid to experts assisting attorneys)); Manning, *What Divides*, *supra* note 14, at 93–94 (same).

2. *Purposivism and Legislative Purposes*

Like textualists, purposivists seek a substitute for the communicative intent of the legislature as a whole, which, for them, is legislative purpose. In relying on purpose, not intent, purposivists' stance toward the model of conversational interpretation may be more equivocal than that of textualists. Purposivists acknowledge the need for judges to ascribe normative values to the legislature in order to give content to the idea of legislative purposes. In the famous phrase of Professors Henry Hart and Albert Sacks, purposivists postulate that the legislature consists of reasonable people seeking to promote reasonable goals in reasonable ways.[88] In this formulation, the notion of reasonableness has a substantial normative component: it is not mere means-ends rationality. A reasonable legislator is a legislator with values that must first be identified and then adjudged as reasonable.[89] This, we should recall, is textualists' leading objection to purposivism.[90]

At the same time, purposivists—or at least a growing cadre of "new purposivists"[91]—hew as closely as they can to the model of conversational interpretation and can be viewed as proposing its adaptation, not displacement. As explicated by Dean Manning, new purposivism acknowledges, and indeed emphasizes, that "the law's 'purpose,' properly understood, embodies not merely a statute's substantive ends . . . , but also Congress's specific choices about the means to carry those ends into effect," as reflected in statutory language.[92] The aim of purposivists who embrace this constraint on judicial imputation of explanatory purposes seems to be to provide enough information about an imagined legislative speaker to license claims about what statutes determinately mean—if not strictly based on

[88] *See* HART & SACKS, *supra* note 1, at 1374, 1378.

[89] The distinction that moral philosophers frequently draw between the "rational," which can be understood in purely instrumental, self-interested terms, and the "reasonable," which imports a disposition to behave in ways that give due consideration to the interests of others, highlights the normative element. *See, e.g.*, JOHN RAWLS, POLITICAL LIBERALISM 49 n.1 (1993) ("[K]nowing that people are rational we do not know the ends they will pursue, only that they will pursue them intelligently. Knowing that people are reasonable where others are concerned, we know that they are willing to govern their conduct by a principle from which they and others can reason in common; and reasonable people take into account the consequences of their actions on others' well-being." (citing W.M. Sibley, *The Rational Versus the Reasonable*, 62 PHIL. REV. 554–60 (1953))); T.M. SCANLON, WHAT WE OWE TO EACH OTHER 191–92 (1998).

[90] *See supra* note 32 and accompanying text.

[91] *See* Manning, *New Purposivism*, *supra* note 68. Dean Manning's leading exemplar of a "new" purposivism is Justice Elena Kagan, *see id.* at 116, 133-41, but he also cites opinions by Justices Ginsburg and Sotomayor, *see id.* at 129, as embodying a more textually focused and constrained form of purposivism than that exhibited, for example, in the traditional purposivist chestnut of *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892).

[92] Manning, *New Purposivism*, *supra* note 68, at 115.

Congress's communicative intent, then tied similarly closely to the legislature's choice of specific language.

As this focus indicates, purposivists, no less than textualists, seek to cast courts as the faithful agents of the legislature.[93] Agents of course require direction from principals. And the model of conversational interpretation provides the most familiar paradigm of language-based direction. Going forward, I shall emphasize the strand of purposivist thought that seeks to approximate the model of conversational interpretation by viewing purposes as closely analogous substitutes for, rather than a sharp alternative to, legislative intent as a basis for statutory interpretation.[94]

C. The Statutory Interpretation Muddle

The strategies of textualism and purposivism, or at least the dominant strand of modern purposivism, lead to similar if not identical muddles. Nearly all textualists and nearly all purposivists begin by acknowledging that "legislative intent" and "legislative purpose" are fictions or inventions. Yet, as if oblivious to the implications of their own insight, textualists and many purposivists then rely on these inventions to identify statutory meanings for which they claim a more-than-fictional existence.

If presented as methodologies for identifying linguistic meanings that depend on legislatures' psychological states, the approaches of inventing objective intentions and constructing legislative purposes both look absurd. If the strategy of basing statutory interpretation on invented objective intentions or judicially constructed purposes is not absurd, the reasons would have to lie in normative, not linguistic, theory. The justification would need to be that it is necessary or appropriate to rely on an invention and that it would be legally or morally preferable to interpret statutes on the basis of one invention rather than the other.[95] There would also need to be an accompanying confession or acknowledgment: debates about statutory meaning in reasonably disputed cases are not about linguistic meaning after all. They are debates about how judges should decide cases when a statute's linguistic meaning is underdeterminate.

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[93] *See, e.g.*, Stephen Breyer, Madison Lecture, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 266 (2002) (arguing that "purposive" interpretation "reminds the judge . . . that it is in Congress, not the courts, where the Constitution places the authority to enact a statute"); Peter L. Strauss, *The Courts and the Congress: Should Judges Disdain Political History?*, 98 COLUM. L. REV. 242, 252–53 (1998) (arguing that purposivism makes courts the most effective agents of the legislature).

[94] According to Manning, *New Purposivism*, *supra* note 68, at 156, "both the traditional and new versions of purposivism find some support in the great book'" of the purposivist canon, HART & SACKS, *supra* note 1.

[95] *See* Manning, *Without the Pretense*, *supra* note 19, 2425–28.

It is not difficult to reconceptualize the debate between textualists and purposivists in these terms—as about appropriately ascribed legal meanings in linguistically disputable cases, rather than about linguistic meanings. But for an explicitly normative argument for one or the other approach to succeed, the proponents could not stop with an abstract choice between textualism and purposivism. To evaluate an argument that proceeded on these grounds, we would need to know more about the specific "objective" intentions or reasonable purposes that textualist or purposivist judges would ascribe to a legislature, or at least about the criteria to be used in imputing fictional intentions or motivating purposes.

Despite the arguments that I have offered in this Part, my claim about the necessity of normative judgment—extending to specific determinations about which intentions or purposes to ascribe to the legislature—might appear too strong. We can and frequently do ascribe normative values to speakers without endorsing those values. And even if the legislature is not exactly like ordinary human speakers, with communicative intentions or purposes in the psychological sense, there might be ways in which a reasonable listener could ascribe intentions or moral values to a legislature or an invented hypothetical legislator without endorsing them.[96] For example, if judges thought legislation bigoted or mean-spirited, they might ascribe bigoted or mean-spirited intentions as a way of resolving otherwise doubtful cases. But insofar as judges must impute either "objective" intentions or "reasonable" purposes to a legislature in order to interpret a statute in a case in which legal norms do not determine their judgment, then judges, as agents of the legal system, cannot escape normative responsibility for the decisions that they render—as the next Part will seek to establish.

II. LAW, LEGITIMACY, AND THE JUDICIAL ROLE IN STATUTORY INTERPRETATION

In debating about statutory interpretation, we debate, among other things, what judges ought to do. But "ought" in what sense? Judges' interpretive decisions can send people to jail, impose huge financial penalties, upset settled expectations, or leave the poor without remedies for harms that they have suffered. Judges—and those of us who offer theories of interpretation that purport to tell judges how to interpret statutes—should therefore pause to ask how their acting as coercive instruments of the state could be justified morally.

[96] *See* Seana Valentine Shiffrin, *Speech, Death, and Double Effect*, 78 N.Y.U. L. REV. 1135, 1155 (2003) (employing an "objective notion of intention as it is made manifest through the performance of actions of a certain type, actions that, because of what they involve, are typically motivated by a certain rationale and are reasonably interpreted as being so motivated").

This Part confronts that question in several steps. I first consider—and reject—the possibility that American judges can rely on autonomous legal norms to provide determinate resolutions to reasonably disputable questions about statutes' meanings or applications.[97] With moral questions thus being unavoidable, I argue that the concept of moral or political legitimacy provides the best framework for thinking about how judges should resolve statutory disputes. Within minimally legitimate legal regimes—a term I shall explain shortly—judges should strongly presumptively apply the law. But where the law either requires judges to exercise normative judgment or leaves them no choice but to do so, judges should adopt the conclusion that is most morally legitimate under the circumstance.

In the argument's next step, I show that debates between textualists and purposivists are, in an important sense, debates about the most important sources of moral and political legitimacy. Textualists appeal to ideals of democracy. By contrast, purposivists rely on good government as a source of moral legitimacy: they seek to enlist the courts as "junior partners"[98] of the legislature in interpreting statutes as pursuing reasonable goals by reasonable means.

In a final step, my argument then shows that debates between textualists and purposivists, even as thus recast, still fail to come to grips with ultimately crucial issues. Abstract appeals to democratic accountability and substantively just outcomes as sources of judicial legitimacy leave too many questions unresolved. It is impossible to determine whether a textualist or a purposivist approach would produce more legitimate outcomes without considering how judges should give substantive content to the otherwise underdetermined notions of "objective" legislative intent and reasonable legislative purpose.

A. Law?

If judges require moral justifications for their decisions to deploy the coercive apparatus of the state in favor of one party to a dispute, the resulting challenge is a daunting one, which I may seem to have framed too bluntly or to have arrived at too quickly. Judges operate within legal systems. And it is possible, I shall assume, that legal norms can direct the process of statutory

[97] I continue to assume that statutes' linguistic meanings are reasonably disputable insofar as minimal, necessarily inferable communicative intentions and their contributions to listeners' understandings fail to resolve questions arising under them.

[98] Richard H. Fallon, Jr., *On Viewing the Courts as Junior Partners of Congress in Statutory Interpretation Cases: An Essay Celebrating the Scholarship of Daniel J. Meltzer*, 91 NOTRE DAME L. REV. 1743 (2016); Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2041 (2007).

interpretation with considerable determinacy. If so, and if the legal system is a morally decent or legitimate one, then judges who have promised to obey the law presumptively ought to do so.[99] In a recent article, Professors William Baude and Stephen Sachs assert that our legal system reasonably approximates the state of affairs that I have just described: the law of interpretation almost invariably either renders determinate what language otherwise would have left underdeterminate or supplants linguistic meaning with a more specific legal meaning.[100]

There should be no doubt that law contributes importantly to the interpretive context in which judges must ascribe meaning to statutes—by which, on this occasion, I mean to refer legal meaning. And we might say that a statute's legal meaning differs from its linguistic meaning, with which Part I was concerned, if legal norms either clarify or alter linguistic meaning. I put this point equivocally, in terms of what we might say, because the relationship between linguistic meaning and legal meaning is deeply complex—a matter to which I shall return in Part IV. If an utterance's linguistic meaning is its meaning in context, and if an utterance occurs in a legal context, then perhaps any relevant legal norms are elements of the context that generate linguistic meaning.[101]

Although I am unsure how leading textualists such as Dean Manning and Justice Scalia conceptualize the relationship between linguistic and legal meaning, they unquestionably assume that legal norms interact with ordinary conventions of language use in determining how courts should interpret statutes. Manning thus writes:

> Because textualists want to know the way a reasonable user of language would understand a statutory phrase in the circumstances in which it is used, they must always ascertain the unstated "assumptions shared by the speakers and the intended audience." In particular, when operating within the realm of legal parlance (a relevant linguistic subcommunity), textualism's premise requires that interpreters consider specialized conventions and linguistic practices peculiar to the law.[102]

Other textualists adopt similar stances. Judge Easterbrook maintains that statutes defining criminal offenses and prescribing penalties

[99] *See* DAVID LYONS, ETHICS AND THE RULE OF LAW 202 (1984); Richard M. Re, *Promising the Constitution*, 110 NW. U. L. REV. 299, 302–03 (2016).

[100] *See* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079 (2017).

[101] *Cf.* P.F. Strawson, *Intention and Convention in Speech Acts*, 73 PHIL. REV. 439, 456–57 (1964) (distinguishing between purely linguistic and other kinds of conventions that may bear on the meaning of speech acts).

[102] Manning, *What Divides*, *supra* note 14, at 81 (footnotes and citations omitted).

traditionally have been, and should continue to be, read as presupposing the availability of defenses such as "necessity."[103] Justice Scalia insisted that "Congress must be presumed to draft . . . in light of . . . background principle[s]."[104] He strongly defended judicial reliance on a variety of canons of statutory interpretation,[105] including such substantive canons as those that call for criminal statutes to retain the common law requirement of mens rea,[106] for statutes not to apply extraterritorially to noncitizens,[107] and for statutes of limitations to be "subject to 'equitable tolling.'"[108]

Adding legal norms, canons, and conventions to the interpretive matrix from which statutes' linguistic and legal meanings emerge, we should take seriously the claim by Professors Baude and Sachs that the law typically is sufficiently determinate to absolve judges from needing to make normative choices in interpreting statutes apart from the choice of whether to follow the law.[109] At the end of the day, however, the Baude-Sachs proposal proves untenable. For purposes of making their argument, Baude and Sachs assume—as I shall—a positivist jurisprudential theory[110] of the kind most famously developed in H.L.A. Hart's *The Concept of Law*.[111] According to Hart, the foundations of law lie in social facts and, in particular, in officials' practices in identifying law and in treating it as authoritative. The Hartian system has enormous explanatory power. It elucidates, for example, why the Constitution is law within the United States instead of, for example, the dictates of the British Parliament, which once were law here. But it takes both close analytical work and critical imagination to explain the intricacies of the U.S. legal system in Hartian terms.[112]

When one delves into details, widespread disagreement or uncertainty about statutory interpretation methodology, including among judges, deeply embarrasses claims for the determinacy of "the law of interpretation" as applied to disputes in which protagonists invoke theories such as textualism

[103] Frank H. Easterbrook, *The Case of the Speluncean Explorers: Revisited*, 112 HARV. L. REV. 1876, 1913–14 (1997).

[104] Young v. United States, 535 U.S. 43, 49–50 (2002).

[105] *See* SCALIA & GARNER, *supra* note 15, at 69–339 (discussing interpretive canons and their proper application).

[106] *See* Brogan v. United States, 522 U.S. 398, 406 (1998); SCALIA & GARNER, *supra* note 15, at 303.

[107] *See Brogan*, 522 U.S. at 406; SCALIA & GARNER, *supra* note 15, at 268–72.

[108] *Young*, 535 U.S. at 49–50 (quoting Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990)).

[109] See Baude & Sachs, *supra* note 100, at 1083 ("[C]ontrary to the skeptics, extracting legal content from a written instrument needn't involve much direct normative judgment. In fact, it usually doesn't.").

[110] *See id.* at 1116.

[111] H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1994).

[112] *See, e.g.*, Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1131–42 (2008); Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621, 621–23 (1987).

and purposivism.[113] To put the point slightly differently, Hartian theory needs to explain how judges can disagree as well as agree. In offering an explanation, Hartian theorists come to a fork in the analytical road. For those who adopt a "hard" version of Hartian positivism that relies on convergent official practice to fix the content of fundamental "rules of recognition," the conclusion follows inescapably that the law of interpretation is underdeterminate in relevant respects.[114] There is too much disagreement for it to be plausible that all or nearly all judges practice the same, determinate rule. Where the law runs out, hard positivists generally accept that judges must assume a quasi-legislative role, guided by what it would be morally best to do.[115] Rejecting the "hard positivist" option, Baude and Sachs maintain that questions about the content of the law of interpretation should be resolved as a matter of law, depending on who has "the better of the argument, based on the higher-order legal rules of the era."[116] Because the implications of any such higher-order rules are demonstrably disputed, this suggestion would appear to embrace the "inclusive" positivist position Hart adopted in the Postscript to the second edition of *The Concept of Law*.[117] Inclusive positivists contemplate that the foundational, practice-based rule of recognition in a legal system such as ours might incorporate moral criteria to resolve otherwise unsettled questions.

For the moment, we need not choose between the hard and inclusive versions of Hartian positivism to see that "the law of interpretation" cannot deliver the social-fact-based determinacy that Baude and Sachs seem to promise. On either version, a judge confronted with a situation in which there is no consensus concerning the content of applicable substantive and interpretive norms must make a morally inflected, even if not a purely moral, judgment. If the law is simply underdeterminate, a judge morally ought to do what is morally best in the absence of controlling law.[118] And if the law incorporates moral criteria to guide the resolution of indeterminacies that would exist otherwise, moral considerations again come into the picture. We thus find ourselves confronting the blunt question of how judges might be morally justified in calling on the coercive apparatus of the state to enforce

[113] *See* Mark Greenberg, *What Makes a Method of Legal Interpretation Correct? Legal Standards vs. Fundamental Determinants*, 130 HARV. L. REV. F. 105, 114–19 (2017) (explaining that the absence of consensus either about interpretive methodologies or the criteria for their validation falsifies claims for the determinacy of the law of interpretation under Hartian premises).

[114] *See id.* at 115 ("Hartian positivism makes little room for a law of interpretation that goes beyond what is already widely accepted.").

[115] *See, e.g.*, Joseph Raz, *Incorporation by Law*, 10 LEGAL THEORY 1 (2004).

[116] Baude & Sachs, *supra* note 100, at 1141 (emphasis omitted).

[117] *See* HART, *supra* note 111, at 250–54.

[118] *See*, *e.g.*, Raz, *supra* note 115.

their interpretive judgments, conjoined with the related question of whether, or under what circumstances, coercive state enforcement is morally justified.

B. Law and Legitimacy

In thinking about these questions, the most helpful frame comes from the concept of moral legitimacy.[119] Moral legitimacy in law and adjudication is a hugely complex topic.[120] In veering into it for present purposes, I must be brief. In order to do so, I begin with a stipulated definition: a legal regime is legitimate insofar as its dictates have a moral claim to obedience,[121] or at least respect by its citizens, and insofar as its officials are morally justified in enforcing its dictates.[122] As should be obvious, this definition answers no substantive questions about the conditions for moral legitimacy. It does, however, identify the laws of a legitimate legal system as sources of moral obligation, especially for judges who have promised to obey them.[123] In legitimate regimes, judges are bound by their promises except in extraordinary circumstances. A further moral question then arises involving how judges would need to rule, in cases in which the law is otherwise underdeterminate, in order for their decisions on behalf of the legal system to possess moral legitimacy.

If we ask how a legal regime might have a moral entitlement to exercise coercive force and demand obedience, we enter a timeless debate that I shall not attempt to resolve here. There are well-known, alternative views about the relative significance of alternative possible sources of moral legitimacy. One proposed source is democracy: a regime may be legitimate insofar as it reflects the decisions of political majorities as arrived at through fair democratic processes.[124] Another possible source of legitimacy may lie in substantive ideals of justice or in effectiveness in meeting social needs.[125] There may be further potential sources of legitimacy as well, including procedural fairness and conformity to rule of law ideals.[126]

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[119] *See* FALLON, *supra* note 34, at 21 (distinguishing among sociological, legal, and moral concepts of legitimacy).

[120] *See id.* at 20–46.

[121] By a "moral claim," I mean one about what we owe to others that is supported by reasons other than self-interest. *See*, *e.g.*, RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 13–15 (2011) (distinguishing morality from ethics).

[122] *See* FALLON, *supra* note 34, at 23–25.

[123] *See supra* note 99 and accompanying text.

[124] *See, e.g.*, Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1375–89 (2006).

[125] *See, e.g.*, NICOLE ROUGHAN, AUTHORITIES: CONFLICTS, COOPERATION, AND TRANSNATIONAL LEGAL THEORY 29–31 (2013).

[126] See FALLON, *supra* note 34, at 29.

In order to make sense of debates about the legitimacy of legal regimes, we need one more distinction. This is a distinction between ideal legitimacy and minimal legitimacy.[127] Ideal legitimacy would require satisfying moral standards that no actual legal regime may ever have met fully. By contrast, minimal legitimacy connotes only a sufficient approximation of ideal standards to render a legal system respectworthy and to justify officials in enforcing its laws.[128]

With the distinction between ideal and minimal legitimacy in place, I now want to stipulate, or at least assume for sake of argument, that the prevailing legal regime in the United States is minimally, but not ideally, legitimate. It is reasonably, though far from completely, just.[129] The legal system is also sufficiently, though not perfectly, democratic. It mostly adheres to rule of law norms, including those that require reasonable stability of legal rights and fair, advance notice of the consequences of one's actions. Its procedural mechanisms for reaching decisions, including through the judicial branch, are reasonably fair as well. Having offered arguments to support these conclusions elsewhere,[130] I shall forgo repetition here. Suffice it to say that the standard for adjudging a legal regime minimally legitimate should not be too high when the only realistic alternative to the prevailing structure of government might be worse.[131]

Having briefly canvased the bases on which a legal regime might be adjudged morally legitimate, we can now return to the role of the judiciary, including in statutory interpretation. What must judges do in order for their decisions to be morally justified against the background of the American legal system? It is inadequate to say that they should enforce statutes according to their linguistic meanings as determined in the same way that we determine the meanings of conversational utterances. As Part I argued at length, in reasonably disputable cases, statutes will lack linguistically determinate meanings. To repeat, if the identification of statutory meanings

[127] *See id.* at 24–35.

[128] *See id.* at 27–30.

[129] The U.S. legal system historically has not treated some groups, and may not treat some groups today, with the same evenhanded justice more normally available to others. For discussion of the possibility that legitimacy may be partly group-relative, see *id.* at 30–31.

[130] *See id.* at 24–35.

[131] *See* David Copp, *The Idea of a Legitimate State*, 28 PHIL. & PUB. AFF. 3, 43–44 (1999) ("Matters would have to be very bad for a state not to be legitimate . . . . It is as if we were at sea in a leaky boat. Unless there is another boat available to which we could easily move, there are strong considerations in favor of following the orders of the captain."); Joseph Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, *in* 2 CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 152, 173 (Larry Alexander ed., 1998) (asserting that "[a]s long as they remain within the boundaries set by moral principles, constitutions are self-validating in that their validity derives from nothing more than the fact that they are there") (emphasis omitted).

requires reliance on an invented analogue to communicative intentions, then an invention will determine statutes' meanings.

Accordingly, as we confront questions about the proper judicial role, it should be clear that debates about statutory interpretation are not disputes about linguistic facts or questions of "hard" law in the positivist sense.[132] At bottom, they are debates about how judges should interpret statutes as a matter of judicial role morality. They turn on opposing views about what judges ought to do within a minimally, but not ideally, legitimate legal system, the substantive and interpretive norms of which are less than fully determinate.

The ideal of adjudicative legitimacy within a minimally just legal system requires judges, in exerting the coercive power of the state, to decide cases in the most morally legitimate or best justified way in light of the legal obligations and role constraints to which they are subject. But by what criteria should we gauge judicial legitimacy or the moral justifiability of judicial decision-making in cases not determinately controlled by hard law?

C. Legitimacy and Interpretive Theories

Not surprisingly, we can easily account for debates between textualists and purposivists as involving how judges should resolve disputes about statutory interpretation in light of the most important sources of the moral legitimacy of law and adjudication. Textualists often begin with a critical rather than an affirmative claim: judges should avoid interpretive methods that invite them to substitute their policy preferences for those of the legislature—as they insist that purposivist theories invite judges to do.[133] Strongly implicit in this critique is an embrace of political democracy as the paramount source of morally legitimate government, which textualists believe has direct implications for morally legitimate judicial interpretation of statutes.[134] Roughly speaking, textualists insist that judges should adhere as rigidly as reasonably possible to texts' linguistic meanings in order to facilitate the operation of political democracy, including legislative

[132] *See supra* text accompanying notes 113–118.

[133] *See, e.g.*, Manning, *New Purposivism*, *supra* note 68, at 176 ("[U]nless interpreters give priority to the shared semantic conventions that make it possible for legislators to communicate their policies to the law's implementers, a legislature cannot predictably use language as a tool to define the scope and limits of the background legislative policies that the statutory text carries into effect.").

[134] *See* Manning, *Textualism and Legislative Intent*, *supra* note 21, at 432–33 ("[T]he demands of legislative supremacy require only that legislators intend to enact a law that will be decoded according to prevailing interpretive conventions. If so, then society can at least attribute to each legislator the intention 'to say what one would ordinarily be understood as saying, given the circumstances in which one said it.'" (quoting Joseph Raz, *Intention in Interpretation*, *in* THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM 249, 268 (Robert P. George ed., 1996)).

compromise, without judges substituting their own view of good policy for the legislature's decisions.[135]

I have argued that the textualist project, as thus described, could not succeed fully because linguistic meanings will not resolve reasonably disputed cases. For the moment, however, that critique is beside the point. In defending textualism, textualists recurrently appeal to the importance of preserving legislative preeminence and associated ideals of democratic accountability in lawmaking.

In partial contrast with textualists' focus on democracy, purposivists emphasize substantive fairness and well-crafted policy as sources of political legitimacy.[136] Accordingly, they adopt an approach to statutory interpretation that they believe will promote those legitimacy-enhancing values.[137] In taking this approach, purposivists do not discount political democracy as a source of moral legitimacy.[138] But they embrace a theory of political democracy that allows legislatures to enlist the assistance of the courts in translating statutory policy into workable rules.[139]

A further indication of the significance of moral legitimacy in debates about interpretive methods comes from the way that otherwise diverse theories either embrace, or signal the need to consider embracing, judicial precedent or agencies' interpretations of statutes as considerations relevant to statutory interpretation.[140] On first encounter, precedent seems an

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[135] *See* Schacter, *supra* note 52, at 636–46 (characterizing narrowly text-based approaches as aspiring to respect or improve political democracy); *see also* Soames, *Living Originalism*, *supra* note 4, at 222 (asserting that "the normative" claim for a theory of "deferentialism" that approximates but modifies originalist textualism "is that more expansive conceptions of the judiciary put too much legislative authority beyond the reach of democratically elected representatives").

[136] *See, e.g.*, Meltzer, *supra* note 31, at 7 (defending purposivism as necessary to "the task of fashioning a workable legal system").

[137] *See* Fallon, *supra* note 98, at 1780–81. Even intentionalists fit into a framework that explains debates about interpretive theory largely as normative debates about the most important sources of moral legitimacy. For example, the neo-intentionalist Professor Richard Ekins constructs legislative intent in the way that he does—as an intent "to change the law in [a] complex, reasoned way"—in order to promote an ideal of normatively legitimate government. EKINS, *supra* note 54, at 243. Others may believe that their approach is necessary to respect the legitimate authority of legislators and constitution-writers, the meaning of whose directives depends on their intentions in issuing those directives. Professor Joseph Raz similarly insists on the primacy of a conception of "minimal" legislative intention in interpretation in order to connect statutes' legal authority with the normative authority of the lawgiver. *See* RAZ**,** *supra* note 23, at 285.

[138] AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW 256–59 (Sari Bashi trans., 2005) (emphasizing purposivists' commitment to political democracy and criticizing textualism as frequently thwarting legislative purposes); Schacter, *supra* note 52, at 630–31 (sketching a "metademocratic" theory that asks judges to complement legislative action).

[139] *See* Schacter, *supra* note 52, at 630–31.

[140] For a recent discussion of textualists' willingness to overrule statutory interpretation precedents, see Anita S. Krishnakumar, *Textualism and Statutory Precedents*, 104 VA. L. REV. 157 (2018).

embarrassment to any principled theory of interpretation.[141] Under even modestly robust theories of the authority of precedent, precedent-based reasoning sometimes may require deviation from what an interpreter otherwise might take to be a statute's "real" meaning or the best interpretation statutory language will bear.[142] But the acceptance of a precedent-dictated outcome loses its mystery if the goal of judicial interpretation is to generate legitimate results, not necessarily to discover purely linguistic or originally intended statutory meanings. Past judicial interpreters may be legitimate authorities whose decisions have a legal or moral claim to adherence.[143] If so, acceptance of the authority of precedent cannot be an "exception" to the best or correct theory of statutory interpretation.[144] To the contrary, a theory of precedent's legitimate authority—if it possesses legitimate authority—is a necessary component of any defensible theory of legally and morally legitimate judicial decision-making.

Debates about judicial deference to agencies' interpretations of statutes possess a similar structure. In cases involving uncertainty in or divisions among linguistic intuitions, courts—centrally including the Supreme Court—will often face a choice about whether to resolve the disputed issue based directly on their independent judgment (which might reflect an invented legislative intent or constructed legislative purpose) or to accord deference to the interpretation advanced by another decision-maker, such as an administrative agency. In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[145] decided in 1984, the Court articulated a two-level interpretive framework for judicial decision. First, the Court asks whether "the intent of Congress is clear."[146] If it is, Congress's clearly intended meaning controls. Second, "if the statute is silent or ambiguous with respect to the specific issue," the Court will adopt the agency's interpretation as long as it reflects a "permissible construction of the statute."[147] More recently, the

[141] *See* Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 289 (2005) ("Whatever one's theory of constitutional interpretation, a theory of *stare decisis*, poured on top and mixed in with it, *always corrupts the original theory*.").

[142] *See* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 571 (1987) (observing that precedent-based decision-making poses the question, "Why should the best decision for now be distorted or thwarted by obeisance to a dead past, or by obligation to an uncertain and dimly perceived future?").

[143] *See* FALLON, *supra* note 34, at 79–82.

[144] *Cf.* Antonin Scalia, *Response*, *in* A MATTER OF INTERPRETATION, *supra* note 1, at 129, 140 (characterizing *stare decisis* as an "exception" to a theory of constitutional and statutory interpretation, not an aspect of it).

[145] 467 U.S. 837 (1984).

[146] *Id.* at 842.

[147] *Id.* at 843.

Court has partially qualified its commitment to *Chevron*.[148] Justice Kennedy has described the "reflexive deference" that the Court exhibits as "troubling," especially when an agency has pronounced on "the scope of its own authority."[149] Accordingly, he called upon the Court to "reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision."[150]

The debate about whether and, if so, how much courts should defer to the decisions of administrative agencies involves, and should ultimately turn on, views about alternative sources of governmental legitimacy. In cases in which linguistic intuitions diverge, the best argument for *Chevron* is not that Congress intended for agencies to make a policy choice among competing interpretive options. It is, rather, that agency interpretations—over which presidents have strong influence—can derive moral legitimacy from the President's democratic mandate and accountability in a way that judicial interpretations cannot.[151] By contrast, de novo judicial judgment is presumably less tainted by partisan considerations than agency decision-making. Proponents of that approach thus point to rule of law values as a source of legitimacy for independent judicial decisions.[152]

To summarize, the debate about whether courts should adopt a textualist or a purposivist approach to statutory interpretation is less about which will better reveal statutes' linguistic or intended meanings than about how best to interpret statutes, via the imputation of either objective intentions or reasonable purposes to the legislature, in order to promote morally legitimate government. And this, at one level, is as it should be. Judges should be centrally concerned with the moral legitimacy or justifiability of their decisions within the role constraints to which the laws of a minimally legitimate legal regime subject them.

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[148] Among other things, the Supreme Court has held that *Chevron* deference applies only to agency decisions that have "the force of law." *See* United States v. Mead Corp., 533 U.S. 218, 226–27 (2001); Christensen v. Harris Cty., 529 U.S. 576, 587 (2000). It has also suggested that an exception may be appropriate for regulatory decisions of "deep economic and political significance." King v. Burwell, 135 S. Ct. 2480, 2489 (2015) (quotation omitted).

[149] Pereira v. Sessions, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring).

[150] *Id.* at 2121.

[151] *See* Schacter, *supra* note 52, at 615–18.

[152] *See*, *e.g.*, Perez v. Mortgage Bankers Assn., 135 S. Ct. 1199, 1217 (2015) (Thomas, J., concurring) ("[T]he judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws."); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (championing independent judicial interpretation of law as a crucial safeguard of liberty under the separation of powers).

1. *The Too-Often Missing Issue in Debates About Legitimate Interpretation*

Unfortunately, however, the thrust-and-parry between textualists and purposivists often skips past issues that are logically necessary antecedents to those that the participants prefer to discuss. It is artificial to think that we could resolve in principle whether it would be better to interpret statutes based on the legislature's imagined objective intentions or in light of its imputed purposes without knowing how courts would give substance to those abstractions. Just as purposivists need to determine which purposes to ascribe to the legislature, textualists need to pour content into the otherwise empty vessel of the legislature's objective intent. Without such content, we could not resolve good-faith interpretive disagreements,[153] nor could we gauge the likely consequences of embracing textualist or purposivist interpretive premises for the ultimate moral legitimacy of judicial decisions. Even those who prioritize democracy over substantive justice as a source of moral legitimacy are likely to attach some significance to the moral acceptability of substantive outcomes, and vice versa for those who prioritize substantive justice over democratic accountability.

With the moral legitimacy of judicial decisions thus depending partly on the substantive content of the purportedly "objective" intentions, or the purposes that judges impute to the legislature, it becomes readily explicable why conservative judges so frequently reach conservative results and why liberal judges so frequently reach liberal results, regardless of whether they profess to be textualists or purposivists.[154] To give content to the notion of "objective intent," conservative judges—with the goal of performing their role morally legitimately—tend to rely on premises or assumptions that support conservative conclusions. In "conjuring up" the purposes that would best explain statutory language, liberal judges—also aiming at moral legitimacy in their decision-making—tend to prefer liberal animating explanations. Methodology matters, but it does not eliminate the need for judges to make substantive judgments about which possible interpretations of statutes, as mediated by construction of objective intentions or legislative purposes, would be most morally legitimate or best justified.

Textualists frequently and perhaps typically resist this conclusion. Seeking to minimize the need for judges to make judgments of substantive desirability, even if such judgments cannot be avoided entirely, textualists insist that their methodology—in purported contrast with purposivism—forbids reliance on extralinguistic considerations to justify a deviation from

[153] *See* Fallon, *supra* note 16, at 703–24.

[154] *See id.* at 724–26 (citing and summarizing empirical studies).

statutes' clear linguistic meanings.[155] As should now be plain, however, this assertion is either mistaken or empty. As even the most ardent textualists acknowledge in moments of cool reflection, the "plainness or ambiguity of statutory language" depends on "the specific context in which that language is used, and the broader context of the statute as a whole."[156] Any appeal to a statute's "clear [linguistic] meaning"[157] to disqualify an effort to identify what it actually means in context is therefore fallacious under textualists' own premises.

In a limited concession to the need for judges to make substantive judgments in order to interpret statutes, textualists sometimes affirm that their methodological project has a forward-looking dimension. If the courts lay down clear rules governing how they will ascribe meaning to statutes, then, textualists say, actual legislators will be able to bargain, compromise, and horse-trade with relative confidence about what statutory language will accomplish.[158]

If honestly and consistently carried out, this approach would call for courts to establish the baseline presumptions about how statutes should be interpreted that would best ensure the moral legitimacy of the legal regime. In *Statutory Default Rules*, Professor Einer Elhauge proposes such a strategy.[159] He advocates adoption of interpretive rules that he thinks would best promote the realization of majority preferences at the moment when a court resolves a case. Significantly, however, Elhauge's argument is normative, not linguistic, and he does not cast himself as a textualist. Rather, he acknowledges the limits of any form of purely linguistic, text-based analysis to resolve disputed cases.

Some textualists acknowledge the importance of normative judgments in laying down clear, democracy-enabling interpretive presumptions for the future when they invoke or defend "substantive canons" of statutory interpretation.[160] Other textualists express wariness of the entire idea of

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[155] *See* SCALIA & GARNER, *supra* note 15, at 56–57 (discussing the "Supremacy-of-Text Principle": "except in the rare case of an obvious scrivener's error, purpose—even purpose as most narrowly defined—cannot be used to contradict text or to supplement it"); Manning, *Absurdity*, *supra* note 14, at 2434 n.179.

[156] Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997); *see supra* notes 15–17 and accompanying text.

[157] Manning, *Absurdity*, *supra* note 14, at 2434 n.179.

[158] *See*, *e.g.*, Manning, *Without the Pretense*, *supra* note 19, at 2426 (defending a textualist methodology as a means to "enable[] Congress" (emphasis omitted)).

[159] *See* EINER ELHAUGE, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION 1–38 (2008).

[160] For example, Scalia and Garner defend a number of substantive canons. SCALIA & GARNER, *supra* note 15, at 47–340. *But see* Scalia, *supra* note 1, at 28 (asserting that the substantive canons present "[t]o the honest textualist . . . a lot of trouble").

substantive canons.[161] But this wariness reflects a refusal to face the fact—which textualist theory actually emphasizes in other contexts—that objective intent is not only an invention, but also a necessary invention, if their approach to interpretation is to be workable.[162] At bottom, substantive canons are mechanisms for the construction of an "objective" legislative intent that could not be invented without reliance on normative judgments anyway.

In my view, the purposivist approach to statutory interpretation displays greater candor or self-awareness than does textualism about the need for judges to make normative choices in ascribing assumptions, intentions, or purposes to the legislature. The interpretive touchstone is reasonableness: courts should first "[d]ecide what purpose ought to be attributed to the statute and to any subordinate provision of it which may be involved" on the assumption that the legislature consisted of "reasonable persons pursuing reasonable purposes reasonably."[163] Then, having done so, judges should "[i]nterpret the words of the statute immediately in question so as to carry out the purpose" as well as possible.[164] The difficulty, of course, is that the idea of reasonableness—in order to do the work that purposivists rely on it to do—requires normative content. And the normative content will sometimes, inevitably, prove controversial. Nothing seems more familiar in moral and political debate than reasonable disagreement.

In sum, there is no alternative to judges making normative judgments in cases that are linguistically and legally disputable. The impulse to want to restrict the range of such judgments is laudable, not discreditable. But no progress can be made toward defining appropriate bounds without a candid recognition of the limits of language and the resulting challenges to law and judges. Interpretive debates are incomplete and misleading, if not disingenuous, if they do not include honest recognition of the need to give substantive content to the idea of objective intent and acknowledgment that the imputation of either an objective legislative intent or a statutory purpose requires normative judgment.

It is easy to see why participants in debates about statutory interpretation resist pushing those debates onto disputed substantive terrain. Judges and Justices have good reason to want to distance their disagreements from partisan political controversies. Moreover, as I shall explain further,

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[161] *See, e.g.*, Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 163–64 (2010) (arguing that judicial reliance on substantive canons is defensible only insofar as particular canons are derivable from the Constitution's structure and reliance does not involve "a departure from a statute's plain language").

[162] *See supra* notes 19–21, 63–69 and accompanying text.

[163] HART & SACKS, *supra* note 1, at 1374.

[164] *Id.*

and indeed emphasize, in the next Part, judges and Justices are subject to significant legal constraints. They are not, or should not be, politicians in robes. They cannot, or should not, vote directly on their first-order moral preferences in every case. Especially under these circumstances, debate in the legal literature about abstract approaches to moral and political theory—John Rawls vs. Robert Nozick, in Professor John Hart Ely's stylized example[165]—can seem pointlessly academic and practically misleading. Nevertheless, judges cannot interpret statutes without making normative judgments, as they would need to do in order to ascribe assumptions, intentions, and purposes to a legislature that does not collectively possess such assumptions, intentions, and purposes as a matter of psychological fact.

III. From Diagnosis of a Muddle to Prescriptions for Muddling Through

At this point, what I have called the statutory interpretation muddle lies fully exposed. Most of our arguments and much of our thinking about statutory interpretation rely on false premises about statutes' linguistic meanings. Neither our interpretive practice nor our debates about interpretive theory have faced the full implications of acknowledging that the legislature ordinarily lacks the rich kind of shared communicative intentions that could help to determine the linguistic meaning of disputed provisions. Law certainly has a role to play in resolving contestable issues. Nonetheless, strong claims for the determinacy of relevant legal norms prove unsustainable, at least on a hard positivist view of the nature of law. Leading disputes, such as those between textualists and purposivists, are more about the requisites of morally legitimate judging than about linguistic meaning as gauged by the model of conversational interpretation. Yet, even when the nature of central disputes is clarified, crucial judgments about morally and practically desirable outcomes are more often smuggled in than openly articulated. Judges and Justices need to make moral judgments, yet straightforward argumentation about first principles of moral and political theory would offend widely shared understandings concerning the nature of the judicial role.

These circumstances require a rethinking of the paired roles of legislatures and courts within a political democracy. If legislatures lack the kind of communicative intentions that would be necessary for linguistic determinacy in disputable cases, we should acknowledge realistic limits to what legislatures can accomplish. Complete linguistic determinacy is frequently not an attainable ideal. Correspondingly, we should look at courts

[165] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 58 (1980).

more nearly as junior partners of the legislature than as agents subject to advance control by their principals in linguistically doubtful cases. At the same time, we should not want to cede too much to the courts, perhaps especially in an era of hyper-partisan decision-making in the appointment and confirmation of federal judges. More must be said than that judges sometimes need to make moral judgments.

This Part begins the rethinking that this situation requires. At the first step, it propounds an "error theory" that defines much of the challenge for judges, lawyers, philosophers of language, and political theorists who care about statutory interpretation. Nearly all participants in legal practice, from the most sophisticated theorists to ordinary citizens, share in the assumption that statutes have linguistic meanings determinable under the model of conversational interpretation in the same way as the meanings of conversational utterances. To make progress, we must acknowledge the fallacy of this belief. But even though the fallacy is demonstrable, it would be unrealistic to imagine that it could be eradicated from ordinary people's confident conclusions about statutes' meanings in light of deeply entrenched, interlocked assumptions about law, language, and the role of legislatures within political democracy. If it is unrealistic to imagine that ordinary people could be persuaded to abandon the model of conversational interpretation as a framework for gauging statutes' meanings, we should proceed cautiously and incrementally in formulating an action agenda. In particular, this Part argues, we should hesitate to advance prescriptions that would imperil the pillars of democracy and the moral legitimacy of democratic governments as most people understand them. Democracy works well enough, and can continue to work well enough, even in the absence of richly determinate legislative intentions to guide statutory interpretation in disputed cases.

Accordingly, although this Part advocates reimagining courts as junior partners to the legislature in cases requiring the interpretation of linguistically disputable statutes, it also emphasizes the importance of widely shared linguistic *intuitions*[166]—insofar as they exist—to the proper interpretation of statutes, including those with reasonably disputed meanings. For reasons involving the moral legitimacy of law, courts should hesitate to deviate too far from broadly shared perceptions of statutes' meanings, even when no linguistic necessity dictates the embrace of widely shared—but not necessary or unanimous—interpretive understandings. At the same time, courts should interpret disputable statutes with due appreciation of other contributors to the moral legitimacy of fundamentally

[166] Here and throughout, I adhere to the stipulated definition of linguistic intuitions provided *supra* p. 280.

democratic governments, including substantive justice, procedural fairness, and such rule of law values as predictability and respect for settled expectations. Overall, courts need to engage a complex, legitimacy-focused reasoning process that this Part seeks to illustrate through the consideration of some familiar, challenging examples.

A. An Error Theory—and Its Limits

Section I.B debunked the idea that courts could use the model of conversational interpretation to decide disputed statutory interpretation cases simply by positing a legislative intention to communicate whatever a reasonable listener would take the conventional meaning of a contested provision to be. But I did not suggest that the language of statutes is gibberish, that judges or the rest of us should ignore statutory language, or that interpreters can responsibly assign it any meaning that they might choose.

The reasons for caution lie partly in language, partly in law, and partly in considerations of moral legitimacy. Analysis can usefully begin with the law. The law—which we can understand sufficiently well for most practical purposes—constitutes legislatures as entities that are capable of possessing at least minimal communicative intentions. The law also identifies legislatures as legitimate authorities. Authorities, in the relevant sense, are entities that can change legal and sometimes moral obligations.[167]

Acting in an authoritative capacity, the legislature "is an 'it,' not a 'they.'"[168] The language of statutes matters because the legislature has enacted it. Under these circumstances, it should be no surprise that when ordinary people encounter the law—in the form of stop signs, directives to pay taxes by April 15, and the like—they almost invariably take it, without pausing for conscious reflection, to embody the directives of a decision-maker whose communicative intentions either directly or indirectly determine statutes' meanings. Ordinarily there is no self-conscious invention of legislative intentions, no felt need to impute a legislative purpose. Nonetheless, I think that ordinary people, and perhaps all of us, tacitly assume that we can grasp the meaning of stop signs and statutes in the same way that we grasp the meaning of conversational utterances. If I have to pay my taxes by April 15 on pain of specified penalties, the first explanation to

[167] On the obligation-altering implications of legitimate authority, see H.L.A. HART, *Commands and Authoritative Legal Reasons*, *in* ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY 243, 243–47 (1982); Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1939 (2008).

[168] *See* Doerfler, *supra* note 4, at 999.

spring to mind is likely to be that an authoritative decision-maker has told me and everyone else that we must do so.

Cognizant of this reality, I was careful, in Part II, not to deny that the model of conversational interpretation might work, or at least could be adapted to work, insofar as the minimal intentions that are necessarily attributable to the legislature leave no doubtful questions. This adaptation seems imperative because it is foundational to explaining how democracy can work: democracy depends on recognition of the authority of the legislature, as a collective entity, to enact authoritative stipulations binding on the citizenry.[169] And often, perhaps typically, there will be no reasonable dispute about what statutes mean.[170]

Reasonably disputed cases present much harder problems. It is important to recognize, however, that those problems typically emerge almost imperceptibly along a spectrum from clear to doubtful cases. Most people, it seems evident, do not distinguish between cases in which minimal legislative intentions suffice to anchor statutory interpretation and those in which minimal intentions would be too spare. *Smith v. United States*, involving a dispute about the significance of the phrase "use[] . . . a firearm," furnishes a good example.[171] As illustrated in debates in the Supreme Court, reasonable people's intuitions about the statute's linguistic meaning diverged. Accordingly, my analysis would suggest that insofar as linguistic meaning was concerned, there was little more to be said than that the case was a doubtful one. It seems plain, however, that my linguistic thesis cuts strongly against the grain of most people's pre-theoretical, common-sense beliefs. In *Smith*, reasonable Justices who disagreed about how the statute should be interpreted nonetheless concurred in their background assumption that the disputed provision had a determinate linguistic meaning.

To begin to get an analytical handle on the resulting situation, it will help to distinguish, as I did in the Introduction, between linguistic intuitions and well-grounded linguistic judgments. The model of conversational meaning embodies premises about how people can arrive at well-grounded judgments about what utterances mean, with the foundations for those judgments depending heavily on speakers' communicative intentions. But

[169] *See*, *e.g.*, RAZ, *supra* note 23, at 284.

[170] *See* MARMOR, *supra* note 4, at 32–33 (maintaining that pragmatic enrichment is "much more limited and infrequent" in law than in "ordinary conversations"). But even if the need for pragmatic enrichment is "not so prevalent in the legislative context" as in ordinary interpretation, *id.* at 33, it is not infrequent, as Professor Marmor sometimes acknowledges. *Id.* at 105 ("Given the complex contextual background of legal regulations, I suspect that conversational vagueness in law is much more common than one might have thought."); *see also id.* at 108 (noting that the "assertive content [of legal directives] is often pragmatically enriched content, going beyond the semantic content of the relevant expression").

[171] 508 U.S. 223, 227 (1993); *see infra* notes 186–189 and accompanying text.

even in cases in which there is no speaker with relevant communicative intentions, people can and do have linguistic intuitions, defined as untheorized convictions about meaning that are supported by no more than their confidence as competent speakers of a natural language that their linguistic knowledge and instincts—in conjunction with what they unreflectively assume about an imagined speaker (which might be Congress)—will lead them to correct judgments. In the absence of an actual speaker with relevant intentions and assumptions, those intuitions are not well-grounded. That is, they lack supporting foundations in a theory of how statutory provisions, viewed as utterances, could have richly determinate communicative content in the absence of a speaker with richly determinate communicative intentions. What matters for present purposes, however, is that linguistic intuitions about statutes' meanings or communicative content can exist, and sometimes persist unshakably, even if they are not well-grounded in the kind of account of linguistic meaning in ordinary conversation that leading philosophers of language have offered.

In positing a gap between linguistic intuitions and well-grounded linguistic judgments, I offer an "error theory" about the pre-legal, linguistic meanings or communicative content of statutes.[172] According to that theory, our ordinary discourse, as engaged in by citizens as well as judges and lawyers, frequently if not routinely rests on a false premise. That false, assumed premise holds that statutes possess communicative content or linguistic meaning, ascertainable pursuant to the model of conversational interpretation, that can be based on ascriptions of speakers' intentions (or an analogue thereto) beyond the "minimal" intentions that need to be imputed to Congress to make a statute intelligible in its historical context.

We may, or may not, make similar errors with regard to other instruments that purport to speak on behalf of collective entities or groups—committee reports and statements by multiple signatories, for example. Without going into detail, I would insist only that it would be a mistake to

[172] In moral philosophy, the most celebrated error theory is that of John Mackie, which holds that ordinary moral claims rest on a false assumption that objective right- and wrong-making properties exist. *See generally* J. L. MACKIE, ETHICS: INVENTING RIGHT AND WRONG (1977); *see also* Brian Leiter, *Explaining Theoretical Disagreement*, 76 U. CHI. L. REV. 1215, 1224 (2009) (advancing an error theory to explain, consistent with the tenets of legal positivism, judges' claims that there are right answers to questions of appropriate interpretive methodology in cases of manifest disagreement, under which "parties to theoretical disagreements are simply in *error*: they honestly think there is a fact of the matter about what the grounds of law are, and thus what the law is, in the context of their disagreement, but they are mistaken, because in truth there is no fact of the matter about the grounds of law in this instance precisely because there is no convergent practice of behavior among officials constituting a Rule of Recognition on this point"). *Cf.* Doerfler, *supra* note 4, at 982 (describing the ascription of intentions to Congress as a valuable exercise in "fictionalism," undertaken to resolve the tension that arises because "Congress must have intentions for legislation to be meaningful but reliably fails to form them").

speak too categorically. As noted above, sometimes an organization may designate a spokesperson, authorized to speak on its behalf, whose communicative intentions determine the content of what she says or writes. (Other members of the organization might later disavow what she said, but that would be a different matter, not involving the communicative content of her initial utterance.) Co-authors who work in close collaboration may have, and may be presumed to have, joint or overlapping communicative intentions. In the case of judicial opinions, a judge who delivers an "opinion of the Court" may act as an authorized spokesperson. On closely collegial courts, the various judges might have joint or overlapping communicative intentions. In such cases and possibly in others, the extent to which linguistic intuitions are well-grounded might be a matter of degree.[173] If so, what to do with the uncertainty would seem to me to be a practical, legal, or moral question, not a strictly linguistic one.

Putting all of those matters to one side, I believe that the erroneous belief that there is a linguistic fact of the matter about whether and how statutes apply to intelligibly disputable cases runs deep and would be difficult if not impossible to eradicate. Ordinary people are as prone as lawyers and judges to think that they, as competent speakers of English, understand statutory language, can assign it determinate meaning, and are

[173] In some contexts, what Professor Doerfler calls generic assumptions about authorial intentions, based solely on the content of an utterance, may suffice for conclusions about its content to count as well-grounded, so long as the otherwise generic assumptions are assigned probabilistically and would be defeasible in light of further information, were it forthcoming. *See* Doerfler, *supra* note 4, at 1043. This clearly seems true when we ascribe communicative content with little or no knowledge of the speaker. In those cases, our unselfconscious ascriptions of communicative intentions may be both generic and mistaken—the speaker may have spoken ironically or may have employed idioms or code that are unknown to us—but they will be defeasible. There may also be contexts in which specific information about the actual authors of written instruments, in particular, might strike us as irrelevant. When I read assembly or operating instructions for newly purchased items, I rely overwhelmingly on "generic" assumptions about a generic instruction-writer. Students taking reading comprehension tests similarly rely on generic assumptions about what is known to and assumed by the authors of the passages about which they must answer questions. In these cases, judgments of meaning based on assumptions and intentions ascribed to the unknown or possibly nonexistent author—if the text were produced by a committee, for example—might not be wholly ungrounded if there were some rational basis on which to make assumptions about interpretive common ground and if further information might change our judgments. But there is a difference between asking, "What should I assume to be interpretive common ground between the unknown but presumably literate and well-socialized speaker and me?" and asking, "What should I assume that whoever, or possibly whatever group, produced this test would have expected me to assume to be common ground between me and a possibly fictional but literate and well-socialized author of a passage such as that which I am reading?" Even if a linguistic judgment could be relatively well-grounded in the latter case, the grounding would become progressively less well supported by the model of conversational interpretation as one moved beyond judgments concerning the minimum that any imagined speaker fitting the relevant description would necessarily commit herself to. Although I take no stand on whether any particular standardized test is culturally biased, the conceptual possibility that such tests might be biased seems very real.

entitled to protest when they think that courts have erred. If so, the question is how the law, or judges acting in the name of the law, ought to respond. More particularly, it is how judges should respond as a matter of law, with worries about the moral legitimacy of their decisions, and ultimately about the legitimacy of the legal system as a whole, in mind.[174]

B. Legislatures and Courts

The linguistic thesis that undergirds my error theory carries a potent message about what we can realistically expect legislatures to do. Legislatures sometimes legislate with sufficient linguistic clarity, in context, to leave no reasonable doubt about what statutes mean or whether and how they apply to particular cases. For example, I assume that most provisions of the tax code and traffic laws are amply clear, even if a few occasion controversy in some applications. Better drafting might achieve more determinacy more often. Nonetheless, there are important limits to the precision with which a multi-member legislature can legislate, especially when enacting complex legislation. As Professor Abbe Gluck has noted, modern statutes frequently have multiple drafters, run for hundreds of pages, and comprise a myriad of complexly interacting sections and provisions.[175] Infelicities, oversights, ambiguities, and mistakes are only to be expected. Even under the best of circumstances, the meaning of some provisions will invite dispute. Given linguistic underdeterminacy, and with applicable legal norms frequently proving disputable as well, judges must somehow pick up the pieces.

As courts assume that responsibility, the guiding star, as Part II insisted, should be the ideal of morally legitimate government under law. More specifically, three principles should control. Complicating the challenge for courts, those principles reflect the diverse wellsprings of morally legitimate law and adjudication.

First, for reasons involving the democratic foundations of political legitimacy, courts should cast themselves in the role of helpmates to the legislature. For democracy to work, courts need to take up where Congress left off in assigning clear and determinate meaning to linguistically

[174] The same conclusion would hold, I should emphasize, if we were to assume or conclude that statutory interpretation cases differ from efforts to discern the meaning of conversational utterances only as a matter of degree. We would still come up short in attempting to give an account of what, exactly, would make it the case that a claim about a statute's communicative content, determinative enough to control a disputed case, either was or was not correct. We could not supply the truth conditions for a claim that "uses a gun" in connection with drug trafficking either does or does not encompass the trading of a gun for drugs. And, given the uncertainty, a judge's role-based moral duty would be to determine which conclusion would be morally best unless an applicable legal rule determined the choice.

[175] *See* Gluck, *supra* note 49, at 96–107.

disputable provisions. In doing so, courts should imagine themselves as the junior partners of Congress, not claim the mantle of coequal legislators.[176] Nonetheless, familiar talk about courts as "faithful agents"[177] should not obscure the reality that legislatures are not speakers in the sense that the model of conversational interpretation posits. The achievement of coherence and determinacy in statutory law requires a significant, and partially creative, judicial role.

In this context, it would be fallacious to view judicial exercises of normative judgment in interpreting statutes as regrettable or constitutionally suspect, much less as incompatible with the constitutional grant of legislative power to Congress. To the contrary, without a judicial role of this kind, Congress could not realistically enact workable legislation—genuinely traceable to legislative decision-making—in the modern world. In any reasonably disputable case, arguments that acceptance of a proffered interpretation would violate Article I because "that is not what Congress said" should be dismissed as a species of question-begging confusion.[178]

Second, in determining how to interpret provisions that are linguistically disputable, courts, nevertheless, should attach great and often controlling significance to broadly shared linguistic intuitions, which may themselves reflect intuitive assumptions about what an imagined legislature would have intended—provided, of course, that such broadly shared intuitions exist. The reasons reside not in purported facts about linguistic meaning, but instead in considerations involving the moral legitimacy of law and the judicial role. When linguistic intuitions are widely shared, interpretive methodologies or conclusions that too far undermine ordinary citizens' capacity to identify their rights and obligations would damage the moral legitimacy of our legal regime. Rule of law considerations involving the law's transparency and predictability are crucially at stake.

On this point, I should note, my prescription largely aligns with current practice. Judges rarely if ever reach decisions that reject proffered interpretations on which nearly everyone's linguistic intuitions converge. Reasoning from Hartian premises under which the rule if recognition is fixed

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[176] On the idea of junior judicial partnership in lawmaking, see Fallon, *supra* note 98; Fallon & Meltzer, *supra* note 98.

[177] *See supra* note 93 and accompanying text.

[178] *See, e.g.*, King v. Burwell, 135 S. Ct. 2480, 2503 (2015) (Scalia, J., dissenting) (objecting that arguments from unworkability "would show only that the statutory scheme contains a flaw; they would not show that the statute means the opposite of what it says"); Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610, 1612–13 (2012) ("And if they said 'up' when they meant 'down' and you could prove by the testimony of 100 bishops that that's what they meant, I would still say, too bad. Again, we are governed by laws, and what the laws say is what the laws mean.").

by the convergent practices of judges and other officials,[179] I would conclude that nearly unanimously shared linguistic intuitions (when they exist) authoritatively establish statutes' legal meanings, at least in the absence of very powerful countervailing considerations, such as precedential authority to the contrary. As linguistic intuitions progressively diverge, however, my error theory about disputed statutes' linguistic meanings becomes correspondingly more important in pointing to the necessity of normatively guided, rather than linguistically mandated, judicial judgment.

Third, in disputed cases, judges should interpret statutes holistically, as presumptively embodying reasonably coherent policy prescriptions, rather than by riveting on bits of language in relative isolation.[180] Considerations of democratic legitimacy and ideals of substantively good government both support this interpretive principle. If statutory interpretation is to proceed based on an invented substitute for a speaker's communicative intentions—as textualists and many purposivists agree that it should—then the invented substitute should make it reasonably possible for legislatures to enact complex statutes that function coherently in the service of recognizable conceptions of the public interest. In holding legislators accountable for statutes, voters should be able to express approval or disapproval of intelligible policies, not dysfunctional jumbles of statutory provisions.

Admittedly, this third interpretive principle, which accords better with purposivist than with textualist theories, does not come without hazard. Beyond any shadow of doubt, it requires the ascription of goals, values, or purposes to a legislature that is incapable of possessing such goals, values, or purposes as a matter of psychological fact. And, in discharging the interpretive responsibility that this third principle imposes, courts could claim troublingly large discretionary authority or even—as textualists like to emphasize—override deliberate legislative compromises.[181] But otherwise sound principles should not be disqualified based on the mere possibility that they might be abused. Insofar as compromises are concerned, a principle favoring holistic interpretation provides no license for overriding compromises where compromises can be discerned. Legislators bent on compromise, including unprincipled compromise, could always employ language that made their bargains unmistakable.

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[179] *See* HART, *supra* note 111, at 94–95.

[180] *Cf.* EKINS, *supra* note 54, at 245 ("The central axiom of a well-formed interpretive practice is that the legislature is an institution that aims to act responsibly for the common good.").

[181] *See, e.g.*, E. Associated Coal Corp. v. United Mine Workers, 531 U.S. 57, 68–69 (2000) (Scalia, J., concurring) (stressing that statutory text "is often the result of compromise among various interest groups, resulting in a decision to go so far and no farther"); Manning, *Without the Pretense*, *supra* note 19, at 2422–24 (discussing Justice Scalia's view).

What bears greater emphasis, however, is that no interpretive theory could establish failsafe guarantees against the risk of judicial overreach. In attacking purposivism, textualists preach the mantra that courts must never deviate from the meanings of clear statutory texts. But this claim, as I have emphasized, is either vacuous or misleading in disputable cases that are not controlled by the minimal intentions that must be imputed to Congress to render a provision intelligible in its context.

Accordingly, to echo a phrase that I used earlier, the responsibility falls to the courts to find a way forward that respects and builds on what Congress has done, but that is not and could not be precisely determined by past congressional action. Under these circumstances, holistic interpretation based on imputed purposes entails an embrace of judicial responsibility to the appropriate degree in a political democracy. As the notion of *junior* judicial partnership seeks to bring out, imputed policies must fit the language that Congress actually enacted[182]—even though there will, inevitably, be disagreement in marginal cases about what counts as fitting once a holistic framework is adopted. Determinate legislative language (as gauged either by the minimal intentions necessary to make statutory language intelligible in relevant contexts or by overwhelmingly convergent linguistic intuitions) controls. Last, but by no means least, Congress can always have the final, controlling word by amending a statute to override any judicial interpretation.

C. Legal Meaning

In endorsing a principle of holistic statutory interpretation that bends toward interpretive purposivism, I have appealed repeatedly to normative considerations. In earlier Parts of this Article, my references to statutes' "meaning" adhered relatively scrupulously—with one brief, noted exception—to the definition that I stipulated in the Introduction, which reserved that term for what philosophers of language call an utterance's "communicative content."[183] In this Part, by contrast, I have abandoned that restriction on the ground that a statute's minimal "communicative content" far too frequently fails to answer the law's needs for determinacy. Instead, I have suggested that courts should resolve disputed questions of statutory interpretation based on a mix of linguistic, legal, and moral considerations.

In previous writing, I have identified a multiplicity of senses of "meaning" that the law sometimes makes eligible for adoption by judges as

[182] *See* Gluck, *supra* note 49, at 79 ("[W]hat has escaped attention [in textualist critiques of interpretive purposivism] is that the kind of objectified, text-derived purpose [that the modern] Court utilizes has textualist foundations, along with Legal Process ones.").

[183] *See supra* note 9 and accompanying text.

the legally relevant meaning of a statute: (1) literal or semantic meaning, (2) moral or conceptual meaning, (3) reasonable meaning, (4) intended meaning, and (5) interpreted or precedential meaning.[184] In my view, judges acting as helpmates to or junior partners of the legislature should sometimes employ the entire menu of interpretive options that the law provides in order to reach the most morally legitimate outcomes. Although I have no sharply defined formula for combining relevant considerations,[185] or for identifying the most legally and morally salient sense of "meaning" in a particular case, a few examples may illustrate the kind of multi-factored analytical process that judges should pursue in seeking to maximize the moral legitimacy of their decisions in reasonably contestable cases.

Smith v. United States. I believe that Justice Scalia, writing in dissent, reached the correct result: the Court should have ruled that a statute that enhanced the penalty for drug offenses for any person who "uses . . . a firearm" in the course of drug trafficking did not apply to a criminal defendant who had attempted to trade a gun for drugs.[186] Although the majority opinion reasoned correctly that the statutory language literally applied, there is force to Justice Scalia's protest that "[t]he ordinary meaning of 'uses a firearm'"—by which I take him to refer to most people's linguistic intuitions—"does not include using it as an article of commerce."[187] Crediting Justice Scalia's guess about most people's linguistic intuitions, which may themselves reflect unselfconscious assumptions about the likely communicative intentions of an inchoately imagined Congress, I see no adequate reason for the Court to have adopted a contrary interpretation. To the contrary, the longstanding canon of statutory interpretation known as the rule of lenity, which essentially prescribes that criminal defendants should get the benefit of reasonable interpretive doubts, supports Scalia's conclusion.[188] Considerations of justice and fairness undergird the rule of lenity.

In differentiating my preferred analysis from that of others who agree with Justice Scalia about how the statute should have been interpreted, I would emphasize only that the decision should have rested on legal and moral foundations, not on claims about linguistic meaning. According to

[184] *See* FALLON, *supra* note 34, at 51–57, 142–53; Fallon, *supra* note 10, at 1244–45.

[185] *See generally* Richard H. Fallon, Jr., *Arguing in Good Faith About the Constitution: Ideology, Methodology, and Reflective Equilibrium*, 84 U. CHI. L. REV. 123, 144 (2017) (proposing that participants in constitutional debates should engage in "a back and forth search for reflective equilibrium").

[186] Smith v. United States, 508 U.S. 223, 241, 246 (1993) (Scalia, J., dissenting) (citations omitted).

[187] *Id.* at 242 n.1.

[188] *See* SCALIA & GARNER, *supra* note 15, at 296 (explicating the rule of lenity as prescribing that "[a]mbiguity in a statute defining a crime or imposing a penalty should be resolved in the defendant's favor").

philosopher of language Scott Soames, "the real issue" in *Smith* should have been "what the lawmakers *asserted* in adopting the text"[189] or the linguistic meaning of the disputed provision. I disagree. Absent more richly determinate communicative intentions than the enacting legislature (as an artificial, collective entity) reasonably could have had, the Court should have put aside the model of conversational interpretation and focused on other factors relevant to the legitimacy of its decision, centrally including widespread linguistic intuitions and the rule of lenity.

United Steelworkers of America v. Weber.[190] In *Weber*, the Supreme Court confronted the question whether a provision of the 1964 Civil Rights Act that made it unlawful for employers to "discriminate . . . because of . . . race" forbade affirmative action preferences for racial minorities.[191] Dividing five to two, the Court held that it did not. The dissenting Justices protested vehemently that race-based affirmative action programs came within the literal language of the statutory prohibition.[192] I would stipulate, moreover, that many and perhaps most people's linguistic intuitions would have supported the dissenters' conclusions about the statute's linguistic meaning. Even so, the minimal intention necessarily ascribed to Congress to make the statutory language intelligible did not require the dissenting Justices' interpretation. In *Weber*, it was entirely intelligible to understand the regulatory prohibition as aimed centrally at, and as applicable only to, traditional, hostility-based discrimination that reflected an ideology of white supremacy.[193]

Nor, under the circumstances, should common but not unanimous linguistic intuitions necessarily have proved decisive in light of other legitimacy-based considerations. Among the legal senses of "meaning" eligible for judicial adoption is "real conceptual meaning."[194] And if we focus on the real conceptual meaning of the prohibition against discrimination in the 1964 Civil Rights Act, the *English Oxford Living Dictionaries* indicate that "discriminate" can mean either "differentiate" or "make an unjust or prejudicial distinction."[195] In my view, the Court in *Weber* had good, legitimacy-based reasons to accentuate the latter of these two senses. In 1964, and still in 1979, many of the blacks who stood to benefit from

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[189] Soames, *A Post-Originalist Theory*, *supra* note 9, at 598–99 (2013).

[190] 443 U.S. 193 (1979).

[191] *Id.* at 197, 201; 42 U.S.C. §§ 2000e–2000e-17 (2012).

[192] *See id.* at 221 (Rehnquist, J., dissenting).

[193] For an ordinary-conversational analogy, recall the example of Carol's "grounding" by her parents not encompassing church or music lessons, *supra* note 11 and accompanying text.

[194] *See supra* note 10 and accompanying text.

[195] *Discriminate*, LEXICO, https://lexico.com/en/definition/discriminate [https://perma.cc/XN6Q-MD8N].

programs challenged in *Weber* were likely victims of past invidious discrimination. Backward-looking arguments suggested that it would be unwise if not unfair to bar efforts to compensate for past injustices.[196] Forward-looking arguments highlighted the potential and possibly the necessity of affirmative action to establish substantive equality of opportunity for historically disadvantaged racial minorities.[197] Absent a richly determinate speakers' intent, I agree with the majority Justices in *Weber* that the disputed statutory language was best interpreted as forbidding racially exclusionary discrimination but not all affirmative action.[198]

Others will disagree with the normative judgments on which my conclusion rests. But my aim, here, is not to persuade them to revise their views. Without pausing to confront competing arguments, I am primarily concerned to highlight that the Supreme Court, absent a well-grounded conclusion about the statute's linguistic meaning, had to weigh considerations bearing on the moral legitimacy of its judgment. As textualists should be the first to recognize, to talk about what Congress "intended" would reflect confusion. With congressional intent in the psychological sense removed from the picture, the relevant normative considerations encompassed social justice and sound policy fully as much as the presumptive rule of law benefit of aligning judicial rulings with what I have assumed to be many, but by no means all, people's linguistic intuitions.

The Affordable Care Act (ACA).[199] The Patient Protection and Affordable Care Act provides that each state shall establish an exchange for the purchase of health insurance, but adds that the Secretary of Health and Human Services (HHS) "shall . . . establish and operate such Exchange" in states that fail to do so.[200] Another provision gives tax credits to those who

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[196] *See Weber*, 443 U.S. at 204 ("It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had 'been excluded from the American dream for so long,' 110 CONG. REC. 6552 (1964) (remarks of Sen. Humphrey), constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.").

[197] *See id.* at 202–03 ("Congress feared that the goals of the Civil Rights Act—the integration of blacks into the mainstream of American society—could not be achieved . . . unless blacks were able to secure jobs 'which have a future.'").

[198] Much of the Court's opinion sought to justify its conclusion by reference to legislative history that it apparently viewed as probative of legislative intent. *See Weber*, 443 U.S. at 201–07. If the decision had to rest on that foundation, the dissenting opinion mustered an array of quotations that was at least as impressive as that of the majority, and perhaps more so. As argued in Part I, however, it is fallacious to think that Congress had a communicative intent of the kind that both the majority and dissenting opinion in *Weber* set out to prove that it had.

[199] I have offered this example in similar terms in a prior Article. *See* Fallon, *supra* note 98, at 1770–72.

[200] 42 U.S.C. § 18041(c)(1) (2012).

buy insurance through "an Exchange established by the State."[201] In *King v. Burwell*,[202] the Supreme Court held six to three that the latter provision authorizes credits for purchasers of insurance on federally as well as state-operated Exchanges.[203] The three dissenting Justices thought it linguistically "quite absurd" to conclude that "when the [ACA] says 'Exchange established by the State' it means 'Exchange established by the State or the Federal Government.'"[204] But the majority concluded otherwise and in my view was justified in doing so.

As Chief Justice Roberts noted, "the 'meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.'"[205] Against the background of that premise, he observed that "[i]f we give the phrase 'the State that established the Exchange' its most natural meaning,"[206] other features of the Act would cease to function in any sensible way. Under these circumstances, he reasoned, the meaning of the statute's provision of tax credits for purchases on "an Exchange established by the State" was not plain, as it might have been in other contexts,[207] but required interpretation in light of the ACA as a whole. And based on a holistic view, the Chief Justice concluded, the disputed provision was best construed to embrace purchases on an Exchange established and operated by the federal government when a State had failed to establish an exchange of its own.[208] "Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them," Roberts wrote.[209] "If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter."[210]

With that crucial ascription of purposes to Congress, Chief Justice Roberts's opinion epitomizes the role of the judiciary as helpmate to the legislative branch in interpreting legislation to make it coherent and functional, not self-defeating or dysfunctional. The ACA encompasses nearly 1,000 pages. As the majority emphasized, it "contains more than a few examples of inartful drafting" and "does not reflect the type of care and deliberation that one might expect of such significant legislation."[211]

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[201] 26 U.S.C. §§ 36B(b)–(c) (2012).
[202] 135 S. Ct. 2480 (2015).
[203] *Id.* at 2496.
[204] *Id.* (Scalia, J., dissenting).
[205] *Id.* at 2489 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000)).
[206] *King*, 135 S. Ct. at 2490.
[207] *Id.*
[208] *See id.* at 2493–96.
[209] *Id.* at 2496.
[210] *Id.*
[211] *Id.* at 2492.

Legislation of its length and complexity would be made impossible, or at least slowed to a crawl, without an active role for the courts.[212]

Dissenting in *King*, Justice Scalia protested that "[i]t is entirely plausible that tax credits were restricted to state Exchanges deliberately—for example, in order to encourage States to establish their own Exchanges."[213] More fundamentally, though, he registered consternation that the majority had sought to "assist" Congress through its strained interpretation of a badly drafted statute[214] when he thought the Court should have thrust the burden onto Congress to fix the ACA (after adopting an interpretation that would disable it).[215] In view of the limits of language and the difficulties of the legislative process, Scalia's approach, if adopted on a consistent basis, would, as a practical matter, leave us with disempowered legislatures and dysfunctional legislation.[216]

Against this argument, it is not adequate to reply, as Justice Scalia and other textualists often do, that courts must take statutory language seriously or risk upsetting legislative bargains.[217] Once again, textualist arguments to this effect tend to be question-begging: they assert that language is clear in response to arguments that it is not—and do so without justification insofar as their claims outrun the "minimal" intentions that must be imputed to make statutory language intelligible in context. The overreach emerges even more clearly when one recognizes that Congress could always accomplish its preferences through more careful drafting—for example, to make clear that what otherwise might have looked like a slip in the choice of language was a deliberate choice. The real issue involves the proper location of the burden of inertia in procuring further legislative action. That burden should lie with those whose preferences would be to frustrate the purposes that otherwise would best explain Congress's adoption of a statute, read holistically.

Preemption. Preemption cases present the question whether statutes that create express federal obligations also impliedly preclude the states from imposing further, judicially enforceable duties on the regulated parties.

[212] Justice Scalia's dissenting opinion in *King* came close to acknowledging as much at one point. *See id.* at 2500 (Scalia, J., dissenting) ("The Affordable Care Act spans 900 pages; it would be amazing if its provisions all lined up perfectly with each other. This Court 'does not revise legislation . . . just because the text as written creates an apparent anomaly.'" (quoting Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2033 (2014))).

[213] *Id.* at 2505 (Scalia, J., dissenting).

[214] *Id.* at 2507.

[215] *See id.* at 2506.

[216] *See* Gluck, *supra* note 49, at 103–04 (emphasizing the phenomenon of congressional gridlock as a reality that "increases the costs" of a judicial invalidation).

[217] *See* Scalia & Manning, *supra* note 178, at 1613 (noting that if courts do not assume that "Congress picks its words with care, then Congress won't be able to rely on words to specify what policies it wishes to adopt or, as important, to specify how far it wishes to take those policies").

There are sometimes reasons to believe that federal regulatory statutes may, or should, do so. For example, state safety requirements more stringent than those that Congress has legislated might drive federally licensed drugs from the market. Where the state poses this kind of obstacle to Congress's goals, federal courts have traditionally found that federal statutes impliedly preempt state laws.[218]

Some textualists now reject the traditional approach. According to them, if Congress has failed to include an express preemption clause in a statute, then the Supreme Court has no justification for deviating from clear statutory language that imposes a federal duty but leaves state regulation untouched.[219] But that response is as question-begging here as elsewhere, insofar as it assumes that a statute's literal or semantic meaning is also its clear, actual meaning. Analogously to the way in which utterances in ordinary conversation can say more or less than they literally assert, statutes' legal meanings can vary from their literal meanings—as textualists themselves insist in some cases.

As Professor Daniel Meltzer argued with characteristic incisiveness, an approach to statutory interpretation in which courts ask whether state regulations would substantially obstruct the purposes most sensibly attributed to federal statutes is vital to "the task of fashioning a workable legal system," especially but not exclusively in preemption disputes.[220] Given the myriad of state regulatory statutes that may overlap with congressional enactments, Congress—or, more realistically, congressional drafters—could not reasonably be expected to know of every state enactment that might impinge on federal interests. Perhaps especially, it would burden Congress unduly to expect or require it to respond to every subsequently enacted piece of state legislation. Overall, the effect of a narrow textualism, consistently pursued, would not be to enable Congress to legislate more effectively if only "it" could be induced or instructed to legislate more carefully.[221] The result, instead, would be to render sensible federal legislation vastly more costly, if not impossible, to achieve. In sum, the Supreme Court's traditional approach

[218] *See, e.g.*, Sprietsma v. Mercury Marine, 537 U.S. 51, 64 (2002) (articulating a standard under which federal law will be held impliedly to preempt state law that "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" (quoting Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995))).

[219] *See, e.g.*, Wyeth v. Levine, 555 U.S. 555, 583 (2009) (Thomas, J., concurring) (arguing that "implied pre-emption doctrines . . . wander far from the statutory text"); Note, *Preemption as Purposivism's Last Refuge*, 126 HARV. L. REV. 1056, 1056 (2013) (arguing that "preemption doctrine has been left behind from th[e] Textualist Revolution").

[220] Meltzer, *supra* note 31, at 7.

[221] *Cf.* SCALIA & GARNER, *supra* note 15, at 51 (affirming that a goal of judicial textualism is to "promote clearer drafting").

to implied preemption finds justification not only in good-government considerations, but also in a conception of political democracy that recognizes Congress's sometime need for the assistance of a judicial junior partner.

D. A More Radical Alternative Considered

My argument that statutory interpretation cannot rely on the model of conversational interpretation at least in disputed cases constitutes a partial rejection of what Professor Mark Greenberg has called "the Standard Picture" of law.[222] As conceptualized by Greenberg, the Standard Picture assumes that statutes constitute the directives or stipulations of an authoritative lawgiver that can be understood in roughly the same way as conversational utterances.[223] Although I have presented what I believe to be original arguments in exposing a specific muddle at the core of leading theories of statutory interpretation, I am hardly the first to reject the Standard Picture's assumptions about statutes' status as ordinary utterances eligible for interpretation through the model of conversational interpretation. Greenberg has done so.[224] Before him, Professor Ronald Dworkin also propounded devastating criticisms of the model of conversational interpretation as a framework for statutory interpretation.[225]

Although my arguments in this Article reflect both Greenberg's and Dworkin's influence, my ultimate conclusions do not sweep so far as theirs. Dworkin's voluminous writings include many strands, perhaps the most iconoclastic of which characterizes the mistaken belief that statutes can have linguistic meanings in the same way as conversational utterances as part of an interlocking tangle of confusions about the nature of law. Dworkin sometimes maintained that the best jurisprudential account would define the prevailing law in the United States as the set of principles that provide the best constructive interpretation of such first-level sources of law as statutes and the Constitution.[226] On this radical view, statutes are not so much law in themselves as sources in light of which interpreters seek to identify legal principles that ultimately constitute the law.[227]

[222] *See* Mark Greenberg, *The Standard Picture and Its Discontents*, *in* 1 OXFORD STUDIES IN PHILOSOPHY OF LAW 39 (Leslie Green & Brian Leiter eds., 2011).

[223] *See* Greenberg, *Legislation as Communication?*, *supra* note 3, at 223–24, 256.

[224] *See, e.g.*, Greenberg, *supra* note 3, at 233–41.

[225] *See* DWORKIN, *supra* note 20, at 51–55, 313–37.

[226] *See id.* at 227–28, 243, 255–58.

[227] *See* Greenberg, *supra* note 3, at 227 ("Consider Ronald Dworkin's (1986) position: the content of the law is the set of principles that best justify the past legal and political decisions or practices. . . . [O]n the Dworkinian picture, a statute is not best thought of as carrying a particular meaning . . . . Rather, a

Greenberg advances a partly similar jurisprudential theory, according to which "the law is the moral impact of the relevant actions of legal institutions."[228] On this account, our concern with statutes should not be with what they say or mean—an inquiry that Greenberg regards as irredeemably fallacy-ridden—but with what moral impact they have in altering rights, powers, and duties.[229] Whatever other conclusions one might draw, this characterization—like Dworkin's jurisprudential theory—marks a fundamental departure from the more conventional, and also more intuitively plausible, Hartian conception of law as a system of rules.[230] Among its virtues, Hart's theory builds from the ground up, by accounting for how statutes could be regarded as authoritative and why they need interpretation in the first place, without assuming that we already know well enough which institutions count as "legal" and which of their outputs might plausibly have moral impacts.

Although agreeing with Dworkin and Greenberg that it is a mistake to view statutes as utterances in the same sense as remarks and writings by individuals, my claims in this Article neither presuppose nor require a radically revisionary theory of the concept of law. In adopting a basically Hartian jurisprudential frame for purposes of arguing about statutory interpretation, I need not deny the possibility that Dworkin or Greenberg might provide the most perspicuous philosophical analysis both of the concept of law and of the nature of law within legal systems such as ours. But even if one of them succeeded in that ambition, Dworkin's and Greenberg's analyses would be accessible, and mostly be of interest, only to philosophical and jurisprudential specialists. Their accounts operate at a long remove from the understanding of ordinary people and even from the operating assumptions of judges and lawyers who view their role as one of determining what statutes mean, not assessing their moral impacts in light of preexisting sources of law.

Law and legal practice depend for their existence on the attitudes of many participants, including not only judges and officials, but also ordinary citizens.[231] Accordingly, our concept of law should be viewed, at least for some purposes, as a "folk concept," rooted in and sensitive to ordinary

statute's enactment changes the law by changing the set of past legal and political decisions—the data—thereby changing which set of principles best justifies the data.").

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

[229] *Id.* at 1291–93.

[230] *See* HART, *supra* note 111, at 98–99 (identifying "the combination of primary rules of obligation with secondary rules of recognition, change and adjudication" as forming "the heart of a legal system").

[231] *See, e.g.*, FALLON, *supra* note 34, at 92.

people's understandings.[232] In adopting this stance, I do not rule out the possibility that we could have both a "folk concept" of law and a more technical, philosophical concept. But insofar as jurisprudential theories are analyses of law and related folk concepts, the Hartian picture of law as a system of duty-conferring and power-conferring rules better explains the practice of judges, lawyers, and ordinary people in identifying law and ascertaining its meaning. As I have said, I strongly suspect that appeals to legislative intentions and purposes and to the meaning of statutes—as distinguished from the moral impacts of legislative enactments or their contributions to the set of unwritten principles that constitute the law—are ineradicable from the thinking not only of ordinary citizens, but also of judges. For that reason, I hesitate to reject a basically Hartian account of the nature of law, even though I agree with Dworkin and Greenberg that statutes are not utterances in the way that the Standard Picture assumes them to be.

Unlike Dworkin's and Greenberg's jurisprudential theories, my error theory does not imperil the basic Hartian idea that law is a system of rules. To know how to follow a rule in the relevant sense is to know how to "go on" in ways that other participants in a practice recognize as correct and to act with a corresponding motivation.[233] Rule-following in this sense does not depend on the applicability of the model of conversational interpretation. It suffices if legislators have interlocking intentions to legislate pursuant to standing procedural rules and if legal rules in the Hartian sense govern statutes' interpretation (and attach high importance to broadly shared linguistic intuitions).

My normative prescriptions about how judges should interpret statutes, as presented in Sections B and C of this Part, reflect these assumptions. Without delving very far into whether Dworkin's and Greenberg's reformist

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[232] The notion of a "concept" presents a number of complications in its own right that I shall not attempt to pursue here. *See generally* Eric Margolis & Stephen Laurence, *Concepts*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (rev. 2011). Following a definition used by Frank Jackson, I shall assume that the term "concept" refers to "the possible situations covered by the *words* we use to ask our questions." FRANK JACKSON, FROM METAPHYSICS TO ETHICS: A DEFENCE OF CONCEPTUAL ANALYSIS 33 (1998). A folk concept, roughly speaking, is one rooted in the understandings and usages of ordinary people. This assumption makes linguistic intuitions relevant because "[i]nasmuch as my intuitions are shared by the folk, they reveal the folk theory" that presumptively defines a folk concept's extension. *Id.* at 37.

[233] *See* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS para. 151–53, 179–83 (G.E.M. Anscombe et al. trans., 1953); *see also* JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY 80–81 (2001) (invoking the Wittgensteinian notion to explicate jurisprudential issues). In a formulation that Hart cited as stating a position "similar" to his, *see* HART, *supra* note 111, at 289, "the test of whether a man's actions are the application of a rule is . . . whether it makes sense to distinguish between a right and a wrong way of doing things in connection with what he does." PETER WINCH, THE IDEA OF A SOCIAL SCIENCE AND ITS RELATION TO PHILOSOPHY 58 (2d ed. 1990).

analyses succeed in their theoretical ambitions to transcend ordinary understandings of what law is, I think we do better—when considering what judges ought to do—to rest content with more minimal qualifications and repairs of the Standard Picture.

IV. From Error Theory to Better Understandings of How Law Works

Although emphasizing the central role in statutory interpretation of normative ideals of judicial and governmental legitimacy, I have not addressed in any comprehensive way a deeper question, which my analysis helps to frame, involving the nature of the relationship between law and natural language. My arguments throughout have rejected the familiar view that statutes are utterances with meanings discernible in the same way as conversational remarks and writings by identifiable individuals. But if that view fails, what should take its place? Although I have no adequate answer to that question, neither can I ignore it. I hope it will be one of this Article's contributions to demonstrate the importance of further inquiry by law professors, philosophers of language, and possibly political theorists regarding a point of complex intersection and partial overlap of their disciplines.

Among the theorists who have most explicitly addressed questions about the relationship between law and language, Professors William Baude and Steven Sachs insist on the primacy of law over linguistic meaning in statutory interpretation: The "'law of interpretation' determines what a particular instrument 'means' in our legal system. . . . Language will of course be an input to the process, but law begins and ends the inquiry."[234] Although I may misunderstand, I worry that this formulation begs the question that it purports to answer. Debates about the content of the law of interpretation—which Baude and Sachs depict as the ultimate determinant of claims of statutory meaning—are themselves conducted in ordinary, natural language. Moreover, for a system of law to be publicly accessible and thus morally legitimate, all true propositions of law need to be expressible and comprehensible in ordinary language. In light of these deep interconnections, a claim that the law "begins and ends" inquiries about the meaning of statutory language raises as many questions about the relationship between law and language as it answers.

[234] Baude & Sachs, *supra* note 100, at 1082–83.

Another view, which Professors John McGinnis and Michael Rappaport have endorsed,[235] would characterize law as a "technical" language unto itself. As they point out, law has not only a partially distinctive vocabulary, but also its own interpretive rules.[236] Maintaining that legal meanings exist only within and relative to the language of the law, they imply that statutes' meanings depend exclusively on what legal experts—who are fluent in the language of the law—take them to mean.[237]

Characterization of the law of the U.S. as a technical language in this sense threatens to prove unnerving. The exclusion of ordinary people from the "recognition community"[238] whose practices determine the criteria of legal validity and legal meaning suggests that the language and meaning of the law could, in principle, float free of ordinary language in Kafkaesque ways.[239] Even if this result were a conceptual possibility, law that was too far divorced from ordinary understanding would not be legitimate.

Before confronting that worry head-on, however, we should consider what a language or a technical language is. If a language is "a system for generating expressions with a specific meaning,"[240] it seems clear that "the language of the law," if it were a language, would be different in kind from natural languages such as English. Among other things, if there is a language of the law, it is parasitic on natural language. Moreover, it is hard to imagine how law, which could not exist without natural language, could take on enough attributes of a natural language to be usefully conceptualized as occupying the same or even a similar status. Consider the suggestion by

[235] *See* John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 WM. & MARY L. REV. 1321, 1330 (2018). Professor Frederick Schauer has sympathetically sketched, but not expressly embraced, a similar position. Frederick Schauer, *Is Law a Technical Language?*, 52 SAN DIEGO L. REV. 501 (2015).

[236] *See* McGinnis & Rappaport, *supra* note 235, at 1340–46.

[237] The authors recognize that legal experts will sometimes need to determine, as a matter of law, whether an otherwise ambiguous term "should be given its ordinary or technical meaning" in a particular context. *Id.* at 1344.

[238] *See* Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719, 725–26 (2006).

[239] The same Kafkaesque possibility might appear to exist within Hartian jurisprudential theory, arising from Hart's view that the content of the rule of recognition is fixed by the practice of officials, especially judges. *See* HART, *supra* note 111, at 256 ("[T]he rule of recognition . . . is in effect a form of judicial customary rule existing only if it is accepted and practised in the law-identifying and law-applying operations of the courts . . . ."); *see also id.* at 116 ("[R]ules of recognition specifying the criteria of legal validity and [the legal system's] rules of change . . . must be effectively accepted as common public standards of official behaviour by its officials."). By contrast, Hart said, "[t]he ordinary citizen manifests his acceptance largely by acquiescence." *Id.* at 61. Although embracing a basically Hartian framework, I would insist that judges' and other officials' recognition practices are nested among those of a wider public, who both shape and constrain judicial practice. *See* FALLON, *supra* note 34, at 92.

[240] Francis Heylighen, *Advantages and Limitations of Formal Expression*, 4 FOUNDS. SCI. 25, 37 (1999).

McGinnis and Rappaport that the rule of lenity—to which I referred above in discussing *Smith v. United States*—is part of the language of the law.[241] This claim seems clearly overstated if it assumes that law is a language in the same sense as natural languages such as English. The rule of lenity could be abolished by legislation in a way that maxims guiding the interpretation of utterances in natural language—such as the Gricean maxim that the contributors to a conversation should "[m]ake [their] contribution[s] as informative as is required (for the current purposes of the exchange)"[242]—could not.

References to law as a language might of course mean something less. For example, we might refer to "the language of the law" in a way analogous to that in which we might refer to the language of literary theory or baseball or bridge.[243] But I take these locutions mostly to recognize that people participating in a professional field or recreational or other practice sometimes develop a partly specialized vocabulary or conventions of usage that then fit relatively seamlessly into discourse occurring within ordinary language. No one doubts that some legal language is specialized in a sense that is at least analogous to the partly constitutive terminology of bridge or baseball. Just as natural language permits bridge players to rely on distinctive conventions as contributors to and sometimes determinants of the meaning of their utterances, speakers of natural languages can rely on their shared knowledge of and assumptions about law as helping to determine the meaning of their utterances in many contexts. Where legal rules apply, I assume that they can also fix the linguistic meaning of statutory terms in their legal context. For example, if a statutory provision defines an otherwise vague term, I assume that it establishes the term's linguistic meaning in its statutory context.

Nevertheless, granting all these similarities and parallels, we can still ask whether the relationship between law and natural language is interestingly different from and more distinctively complex than the relationship between "other technical languages"[244] and natural language. I believe that the answer is yes, but along a dimension that once again pulls us away from the domain of linguistic theory and into that of political morality. We hold law answerable to standards of moral legitimacy that we do not apply to the language of literary theory, baseball, or bridge, in part because of the law's claim to coercive authority even over those who would prefer

[241] *See* McGinnis & Rappaport, *supra* note 235, at 1353–54.

[242] GRICE, *supra* note 38, at 26.

[243] *Cf.* McGinnis & Rappaport, *supra* note 235, at 1330 (analogizing "the language of the law" to "the language of medicine or psychology").

[244] *Id.*

not to participate. If we were to conceptualize law as a language, our concerns about moral legitimacy would not diminish in any way. Moreover, we might have potent moral reasons to object to some actual or proposed usages within "the language of the law." As I have emphasized, it would often be deeply objectionable for judges to develop conventions that made it too difficult for ordinary citizens to read and understand the law for themselves, without need to absorb distinctively legal training.

For now, my provisional conclusion would be that there is no single relationship between law and natural language. There could be no law as we know it without natural language. Moreover, at the barest minimum, linguistic intuitions are crucial to intuitions about legal meaning. But linguistic intuitions can often be unreliable guides to statutory meaning, sometimes for reasons rooted in law and sometimes for reasons involving the absence of a speaker with the rich set of assumptions and communicative intentions that individual speakers normally have. Recognition of the limits of the model of conversational interpretation serves as a reminder that there often is no simple fact of the matter about statutes' linguistic meanings. But this reminder, which invites the unsustainable thought that law must both begin and end the inquiry in statutory cases, merely continues the spiral of interconnection among language, law, and—in the face of underdeterminacy—norms of political morality in the search for legal meaning. For the moment, I am confident of only two conclusions. First, lawyers cannot understand what law is and how it works without understanding how language works. Second, even though some philosophers of language appear to believe otherwise, the model of conversational interpretation does not adequately capture how language works in the law.