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ARTICLE

THE LAW OF INTERPRETATION

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## THE LAW OF INTERPRETATION

*William Baude & Stephen E. Sachs\**

*How should we interpret legal instruments? How do we identify the law they create? Current approaches largely fall into two broad camps. The standard picture of interpretation is focused on language, using various linguistic conventions to discover a document's meaning or a drafter's intent. Those who see language as less determinate take a more skeptical view, urging judges to make interpretive choices on policy grounds. Yet both approaches neglect the most important resource available: the already applicable rules of law.*

*Legal interpretation is neither a subfield of linguistics nor an exercise in policymaking. Rather, it is deeply shaped by preexisting legal rules. These rules tell us what legal materials to read and how to read them. Like other parts of the law, what we call "the law of interpretation" has a claim to guide the actions of judges, officials, and private interpreters — even if it isn't ideal. We argue that legal interpretive rules are conceptually possible, normatively sensible, and actually part of our legal system.*

*This Article thus reframes the theory of statutory and constitutional interpretation, distinguishing purely linguistic questions from legal questions to which language offers no unique answer. It also has two concrete implications of note. It provides a framework for analyzing the canons of interpretation, determining whether they are legally valid and how much authority they bear. And it helps resolve debates over constitutional "interpretation" and "construction," explaining how construction can go beyond the text but not beyond the law.*

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## INTRODUCTION

“(I) Read the statute; (2) read the statute; (3) read the statute!” Great judges tell us these are the fundamental rules of statutory interpretation.<sup>1</sup> Their admonition reflects a standard picture of the interpretive process. People often assume, usually without realizing it, that a judge’s job is to “read the [text] and do what it says.”<sup>2</sup> They may disagree violently about *how* the text should be read; but if only we could accurately read the authors’ minds,<sup>3</sup> or discern their purposes,<sup>4</sup> or compile the ideal legal dictionary for their time and place,<sup>5</sup> or whatnot, then we’d know what to do. The law the text enacts *just is* whatever the text says it is.

Not everyone agrees. A more skeptical view of interpretation, embodied in recent papers by Professors Cass Sunstein and Richard Fallon, holds that there’s nothing that legal interpretation “just is.”<sup>6</sup> Instead, there are many ways to read a legal text, each with its own claim to authority. And if an instrument can mean many things, then judges are and should be largely unbound when choosing among them — engaging instead in case-by-case normative balancing,<sup>7</sup> or selecting from the “capacious . . . range of approaches” whatever they think “makes the relevant constitutional order better rather than worse.”<sup>8</sup>

Both the standard picture and the skeptical view are missing something: law. Interpretation isn’t just a matter of language; it’s also governed by law. This “law of interpretation” determines what a particular instrument “means” in our legal system. Whether the written text actually has that meaning in any natural language, whether English,

<sup>1</sup> See HENRY J. FRIENDLY, *Mr. Justice Frankfurter and the Reading of Statutes*, in BENCHMARKS 196, 202 (1967) (quoting Justice Frankfurter).

<sup>2</sup> DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 88 (1991); see also Mark Greenberg, *The Standard Picture and Its Discontents*, in 1 OXFORD STUDIES IN PHILOSOPHY OF LAW 39, 48 (Leslie Green & Brian Leiter eds., 2011) (describing, and critiquing, this “Standard Picture”). We don’t mean to accuse Justice Frankfurter or Judge Friendly of holding the “Standard Picture” exactly, though the quote may especially resonate with those who do. See Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 528–35 (1947).

<sup>3</sup> See, e.g., Larry Alexander, *Telepathic Law*, 27 CONST. COMMENT. 139 (2010).

<sup>4</sup> See, e.g., Stephen Breyer, Madison Lecture, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 266 (2002).

<sup>5</sup> See, e.g., 1 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 3–4 (1953); Thomas W. Merrill, Essay, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 372 (1994); cf. John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 177–78.

<sup>6</sup> Cass R. Sunstein, *There Is Nothing that Interpretation Just Is*, 30 CONST. COMMENT. 193, 193 (2015); accord Richard H. Fallon, Jr., *The Meaning of Legal “Meaning” and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1238–39 (2015).

<sup>7</sup> See Fallon, *supra* note 6, at 1303–05.

<sup>8</sup> Sunstein, *supra* note 6, at 212.

Latin, or legalese, is largely beside the point. The law says it does, and that's what matters.

As an example, think of the famous case of the two ships *Peerless*.<sup>9</sup> Two parties agreed to send cotton on the *Peerless*, unaware that there were two such ships sailing months apart (and that each party had a different ship in mind). As Professor Arthur Corbin recognized, it's useless to ask what the jointly authored contract *really means*. The parties sought to convey different ideas, they invoked different public meanings, they had different purposes, and so on. Even if a judge "knew all the circumstances that were known to both the speaker and the hearer, he could still give it no 'correct' meaning of his own."<sup>10</sup> There's just no one meaning that's the fact of the matter.

Yet we still have to decide the case. We don't keep fruitlessly hunting for a hidden meaning; but neither do we tell judges to fill the gap with whatever they think best. Instead, we use law to displace our ordinary inquiries about meaning. The Second Restatement of Contracts handles a *Peerless* case based on the parties' relative degrees of fault; if one had reason to know the other's meaning, we hold that extra knowledge against them.<sup>11</sup> Other contract theories might handle it differently. Either way, we don't need to convince ourselves that the contract *really means* one ship or the other; the law can just treat the parties as if it did.

The crucial question for legal interpreters isn't "what do these words mean," but something broader: What law did this instrument make? How does it fit into the rest of the *corpus juris*? What do "the legal sources and authorities, taken all together, *establish*"?<sup>12</sup> Questions like these presuppose some particular system of law, and their answers depend on the other legal rules in place. Language will of course be an input to the process, but law begins and ends the inquiry.

So, contrary to the standard picture, an instrument's legal effect doesn't just follow from the meaning of its language, according to your favorite set of linguistic conventions. What to read, and what linguistic conventions to use, is itself a question of law.

Meanwhile, contrary to the skeptics, extracting legal content from a written instrument needn't involve much direct normative judgment. In fact, it usually doesn't. Many of the normative choices at issue have already been made, as reflected in preexisting legal rules.

<sup>9</sup> *Raffles v. Wichelhaus* (1864) 159 Eng. Rep. 375; 2 Hurl. & C. 906.

<sup>10</sup> 3 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 535, at 16 (1960).

<sup>11</sup> RESTATEMENT (SECOND) OF CONTRACTS §§ 20, 201 (AM. LAW INST. 1981); *see also* Allstate Ins. Co. v. Tarrant, 363 S.W.3d 508, 529 (Tenn. 2012) (applying section 20(2)(b)).

<sup>12</sup> 4 JOHN FINNIS, *Introduction to PHILOSOPHY OF LAW: COLLECTED ESSAYS* 1, 18 (2011).

This paper focuses attention on these preexisting rules — rules of law, and not of language — that determine the legal effect of written instruments. By “rules,” of course, we don’t mean that legal interpretation is mechanical or simplistic; we could call them “standards,” “principles,” or whatever you like. What *is* important is that these instructions are conceptually possible, normatively sensible, and legally part of the American system. More controversially, they govern the interpretation not only of private instruments, but also of new statutes and of the U.S. Constitution.

We aren’t the first to recognize these rules as rules of law.<sup>13</sup> For a long time, though, they’ve lain hidden in plain sight. Because people have assumed that an interpretive rule ought to outrank whatever it interprets, they’ve searched for these rules in statutes, quasi-constitutional doctrines, or the Constitution’s text. Yet as Blackstone noted long ago, and as Professor Abbe Gluck has reminded us much more recently,<sup>14</sup> our interpretive rules are primarily rules of *unwritten* law, even as they govern the interpretation of written law.<sup>15</sup> Recognizing their nature and status could help clarify or resolve many existing disputes.

More concretely, these insights let us clarify two of the hoariest and hottest debates in interpretation. One is the role of the canons of interpretation. We provide a framework for answering endless questions about why the canons have authority and which putative canons are valid or not. In particular, we differentiate between linguistic canons, which stand or fall by their accuracy in reflecting relevant linguistic practices, and legal canons, which stand or fall by their status in the legal system.

The other is the much-ballyhooed activity of “construction.” Recent constitutional scholarship, following older scholarship in contract law and elsewhere, has differentiated between the “interpretation” and

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<sup>13</sup> See, e.g., Helen Silving, *A Plea for a Law of Interpretation*, 98 U. PA. L. REV. 499, 501 (1950); Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as “Law” and the Erie Doctrine*, 120 YALE L.J. 1898, 1907–24 (2011); see also FINNIS, *supra* note 12, at 18 (“These rules [of a legal system] must be understood not as the statements found in the texts of constitutions, statutes, and judgments or judicial orders, but as the *propositions* which are true, as a matter of law, by reason (a) of the authoritative utterance of those statements taken with (b) the bearing on those utterances and statements (and on the propositions those utterances were intended to make valid law) of the legal system’s other, already valid propositions.”).

<sup>14</sup> See Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 WM. & MARY L. REV. 753 (2013). As we explain *infra* section V.A.2.a, pp. 1137–38, we view the law of interpretation somewhat differently from Gluck, but we owe much to her emphasis on unwritten law.

<sup>15</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*68 (including within the common law “the rules of expounding wills, deeds, and acts of parliament”). We follow the convention of describing the common law as “unwritten,” though it’s of course reflected in materials (such as case reports or treatises) that are themselves written down. See *id.* at \*63–64.

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“construction” of legal instruments. The latter has been attacked as both overly wide-ranging and lacking in authority. The law of interpretation can help on both counts: it can identify the proper scope of an activity like construction, grounding it firmly in valid legal rules, while at the same time preventing it from turning into a blank check for policymaking. In other words, it can make construction safe for law.

Our argument proceeds as follows. Parts I and II discuss the law of interpretation as a matter of theory. Part I identifies the flaws in the standard picture and in the skeptics’ response, and Part II explains how legal rules of interpretation might cure them. Part III then shows how these interpretive rules, both written and unwritten, are widely found in our legal system — and for good reason: they make the system better than it otherwise would be. Part IV discusses the implications of our theory both for the interpretive canons and for construction. Part V answers potential objections that the law of interpretation is too mutable or uncertain.

Coming to a right understanding of interpretation means carefully distinguishing language from law. Throughout modern debates and cases, we see judges and lawyers missing this distinction. Hopefully this paper will help them stop.

## I. WHAT’S MISSING FROM THE STANDARD PICTURE

Most recent interpretive debate, no matter how deep its disagreements, has actually rested on a shared picture of the world: that legal interpretation is just regular interpretation, applied to legal texts.<sup>16</sup> This Part identifies some problems with the standard picture, both in practice and in theory. It then turns to the skeptics, who recognize the flaws in the standard picture and conclude that judges must fill the gaps. But these flaws can also be addressed by conventional legal rules, which routinely make contested normative judgments affecting society as a whole. Understanding why we might prefer social judgments to individual ones is the first step toward understanding the law of interpretation.

### A. *The Standard Picture*

Lawyers and judges often use “interpretation” to mean two different things at once. We “interpret” a written text, seen as a set of marks on paper, to find out the meaning of its language. And we also “inter-

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<sup>16</sup> In drawing upon Professor Mark Greenberg’s characterization and label of the standard picture, *see* Greenberg, *supra* note 2, we do not mean to wade into the question of whether he has correctly identified which philosophers actually hold the picture in its entirety. Our interest is in the frequency with which the idea pops up in lawyers’ instincts and legal doctrine.

pret” the same text, now seen as a legal object (a “contract” or a “statute”), to find out its legal content — the changes it works in the law by its adoption or enactment.<sup>17</sup> An ordinary deed to land might be expressed in perfectly ordinary language (“I grant Blackacre to A”) with a perfectly ordinary meaning. At the same time, it represents a complex set of normative propositions, reassigning a vast array of Hohfeldian incidents.<sup>18</sup> Sometimes this second step, of identifying an instrument’s legal content and significance, goes by the name of “construction.”<sup>19</sup> We agree that the distinction between the two is real and useful; but in practice, “interpretation” often serves for both.<sup>20</sup>

Sharing the “interpretive” label usually doesn’t cause problems, because the inferential step from ascribed meaning to legal effect is usually uncontroversial. In many cases, the legal effect of a text is mostly what the text says it is. (*O grants Blackacre to A; what more do you need to know?*) This ease of translation gives rise to a standard picture of interpretation, which Professor Mark Greenberg helpfully names the “Standard Picture”: the view that we can explain our legal norms by pointing to the ordinary communicative content of our legal texts.<sup>21</sup> On the standard picture, the point of legal interpretation is to discover an instrument’s meaning as a matter of language. Once we have that in hand, legal effect should follow in due course.<sup>22</sup>

The standard picture is both simple and attractive as a matter of theory. The philosophy of language is capacious enough to handle key elements of legal practice. It accepts, for example, that legal texts might be written in a technical language of “legalese,” with specialized

<sup>17</sup> Cf. Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 480 (2013) (differentiating the “communicative content” of a text from its “legal content,” or “the legal norms the text produces”).

<sup>18</sup> See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30 (1913).

<sup>19</sup> See, e.g., Solum, *supra* note 17, at 483.

<sup>20</sup> See Kent Greenawalt, *Constitutional and Statutory Interpretation*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 268, 274 (Jules L. Coleman, Kenneth Einar Himma & Scott J. Shapiro eds., 2004) (noting that lawyers often “speak of the meaning of a statute as conforming with how a statute should be applied”); cf. Solum, *supra* note 17, at 483 (“Nothing hangs on the terminology . . .”).

<sup>21</sup> See Greenberg, *supra* note 2, at 48; see also Mark Greenberg, *Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication*, in PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 217, 223 (Andrei Marmor & Scott Soames eds., 2011) [hereinafter PHILOSOPHICAL FOUNDATIONS]. By relying on Greenberg’s account of the standard picture, we don’t mean to suggest agreement with the rest of his account of legal obligation, or — again, *supra* note 16 — to wed ourselves to his view of who precisely holds the picture.

<sup>22</sup> Cf. Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 415 (1989) (describing the view that “courts should say what the statute means” as “the most prominent conception of the role of courts in statutory construction”); Barbara Baum Levenbook, *Soames, Legislative Intent, and the Meaning of a Statute*, in PRAGMATISM, LAW, AND LANGUAGE 40, 40 (Graham Hubbs & Douglas Lind eds., 2014) (“A familiar jurisprudential view is that statutes have the content and apply the way the legislature intended.”).



vocabulary and linguistic conventions that legally trained people use to talk to one another.<sup>23</sup> To the standard picture, legalese is one more natural language like English (or “law French”<sup>24</sup>): it’s a way of transmitting meaning within a given community, a description of how actual people actually speak. Their linguistic practices don’t carry the force of law, but they help us interpret texts that do.

The standard picture also has no problem with the “pragmatic” aspects of communication that supply what bare words lack.<sup>25</sup> Legal communication has pragmatics too; our shared expectations and understandings help us avoid uncertainties and make rich inferences about meaning.<sup>26</sup> Fancy-named canons like *noscitur a sociis* and *ejusdem generis*<sup>27</sup> aren’t so different from maxims that guide ordinary speech; neither is the presumption that legislatures don’t “hide elephants in mouseholes.”<sup>28</sup>

Most importantly, the standard picture makes intuitive sense as a matter of legal authority. Only some people, and not others, get to write legal texts. (Only legislators can enact legislation; only a testator can make a will; and so on.) Presumably there are good reasons why we look to those people and not others, and why those people wrote what they did and not something else. So to the extent we can discover what their language *really means* — say, by consulting an ideal dictionary, or by reading their minds telepathically (as in Professor Larry Alexander’s celebrated hypothetical)<sup>29</sup> — we should do it, and then give effect to whatever rule it prescribes. Otherwise we’d be discarding the meaning of the text they did write in favor of some other meaning of some other text they didn’t write. Giving effect to anything other than our best guess at linguistic meaning rides roughshod over all the reasons our legal system has for paying attention to that text in the first place.<sup>30</sup>

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<sup>23</sup> See Frederick Schauer, *Is Law a Technical Language?*, 52 SAN DIEGO L. REV. 501 (2015).

<sup>24</sup> See generally J.H. BAKER, *MANUAL OF LAW FRENCH* (2d ed. 1990) (describing the unique Anglo-French dialect spoken in medieval English courts).

<sup>25</sup> See generally Andrei Marmor, *Can the Law Imply More Than It Says? On Some Pragmatic Aspects of Strategic Speech*, in *PHILOSOPHICAL FOUNDATIONS*, *supra* note 21, at 83; Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 U. ILL. L. REV. 1935, 1955–56.

<sup>26</sup> See Timothy Endicott, *Interpretation and Indeterminacy: Comments on Andrei Marmor’s Philosophy of Law*, 10 JERUSALEM REV. LEGAL STUD. 46, 52–56 (2014).

<sup>27</sup> See, e.g., *Wash. State Dep’t of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003).

<sup>28</sup> *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001).

<sup>29</sup> See Alexander, *supra* note 3.

<sup>30</sup> See *id.* at 143.

*B. Problems with the Picture*

So framed, the standard picture seems irresistible. But there are serious cracks in the theory, and they've been growing wider over time. As a matter of practice, our legal system *does* seem to misread texts quite deliberately — to apply rules and conventions on a regular basis that don't track any coherent theory of linguistic meaning. The more empirical research that's done, the more our conventional legal rules seem to depart from the actual intentions and understandings of actual people. More disturbingly, as a matter of theory, there just may not *be* a single right way to read a legal text. Different legal systems might read their texts in very different ways, without any one of them being wrong. And if there's no one right way to read a given text, then we can't treat the meaning of its language as the only source of its legal effect.

1. *The Limits of Linguistic Guesses.* — When the American legal system interprets a text, the process often looks nothing like a straightforward search for linguistic meaning. Lawyers and judges bandy about a large number of so-called canons of interpretation. These range from common-sense maxims like “[w]ords are to be given the meaning that proper grammar and usage would assign them” to obscure and technical rules on the repeal of repealers.<sup>31</sup> A recent book on interpretation by the late Justice Scalia and Professor Bryan Garner contains no fewer than fifty-seven canons<sup>32</sup> — and there may be many more not included by the authors.<sup>33</sup>

One way to understand the canons is as “linguistic habits of mind,” guesses about the way actual people actually speak.<sup>34</sup> But if that's all they are, many accepted rules and canons seem like *bad* guesses. Think, for example, of the rules that statutes in derogation of the common law are narrowly construed,<sup>35</sup> that grants of public land favor the sovereign,<sup>36</sup> that all federal laws and regulations “shall be so inter-

<sup>31</sup> ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 140, 334 (2012); *see also* 1 U.S.C. § 108 (2012).

<sup>32</sup> *See* SCALIA & GARNER, *supra* note 31, at xvi.

<sup>33</sup> *See* Jess Bravin, *Writers Bloc: Justice Scalia's Literary Collaborator Tells All*, WALL STREET J.: L. BLOG (July 23, 2012, 2:26 PM), <http://blogs.wsj.com/law/2012/07/23/writers-bloc-justice-scalia%E2%80%99s-literary-collaborator-tells-all> [<https://perma.cc/ZNZ5-4A33>].

<sup>34</sup> Manning, *supra* note 5, at 180; *accord* SCALIA & GARNER, *supra* note 31, at 31 (describing these practices as “so deeply ingrained” in legal speech that they’re “known to both drafter and reader alike,” and so “can be considered inseparable from the meaning of the text”); Larry Alexander & Saikrishna Prakash, *Mother May I? Imposing Mandatory Prospective Rules of Statutory Interpretation*, 20 CONST. COMMENT. 97, 102 n.12 (2003) (suggesting that interpretive rules may be “evidentiary rules of thumb” for discerning the author’s intent).

<sup>35</sup> *See, e.g.*, *Pasquantino v. United States*, 544 U.S. 349, 359 (2005).

<sup>36</sup> *See, e.g.*, *United States v. Union Pac. R.R. Co.*, 353 U.S. 112, 116 (1957).

preted” as “to stimulate a high rate of productivity growth,”<sup>37</sup> or that the phrase “products of American fisheries” when used by Congress or administrative agencies doesn’t apply to U.S.-caught fish that were later filleted and frozen by non-U.S. residents in foreign territorial waters.<sup>38</sup>

Even within the specialized communities of lawyers and legislators, real people don’t express themselves this way. Someone who actually wanted to know the authors’ intended meaning, or the public’s understanding, or the purposes that were to be achieved, and so on, would never arrive at *these* rules in particular. This isn’t just an armchair judgment; according to a recent wave of empirical scholarship, many of those who draft our statutes and regulations don’t know of some canons and openly reject others.<sup>39</sup>

This is real trouble for the standard picture, at least if it claims to be a picture of American law. Professors Abbe Gluck and Lisa Bressman have asked “why interpreters treat rules that they believe to be fictions as benign ones,”<sup>40</sup> expressing “surprise” that courts fail to cite “important political science literature about congressional drafting.”<sup>41</sup> We are less surprised. But if the standard picture is right, these fictions do seem indefensible. And yet the fictions live on, regularly applied by courts without any sense of legal impropriety. This suggests that something else is going on.

2. *Multiple Theories of Meaning.* — Even if we decided to reform the canons, the better to conform to a pure vision of linguistic meaning, we’d still have to decide what that vision is. As decades of interpretive debates have established, there’s more than one plausible way to read a text. To put the standard picture into practice, we have to decide *which* meaning, produced by which *theory* of meaning, we

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<sup>37</sup> 15 U.S.C. § 2403 (2012); see also Tobias A. Dorsey, *Some Reflections on Yates and the Statutes We Threw Away*, 18 GREEN BAG 2D 377, 378 (2015).

<sup>38</sup> 1 U.S.C. § 6 (2012).

<sup>39</sup> See Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside — An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 936 (2013) [hereinafter Gluck & Bressman, *Part I*] (showing that only a small minority of drafters try to use terms consistently across statutes unrelated by subject matter); see also 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, 755 (2014) [hereinafter Bressman & Gluck, *Part II*] (showing that many drafters of criminal statutes failed to recognize the “rule of lenity”); Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1019 fig.1 (2015) (showing that six percent of agency rule drafters were unfamiliar with *Chevron* deference by name); cf. Aaron Nielson, *What Kind of Agency Rule Drafter Doesn’t Know About Chevron?*, YALE J. ON REG.: NOTICE & COMMENT (Aug. 11, 2015), <http://www.yalejreg.com/blog/what-kind-of-agency-rule-drafter-doesnt-know-about-chevron-by-aaron-nielson> [<https://perma.cc/S3UF-5ZBB>] (wondering where they find these people).

<sup>40</sup> Gluck & Bressman, *Part I*, *supra* note 39, at 915.

<sup>41</sup> *Id.* at 917.

ought to pick. Yet the standard picture doesn't tell us that — nor can it.

Consider just two popular theories of meaning: author's intent and reader's understanding. There's always the possibility of a gap between the two. An author might have wanted to convey one thing, while a given reader, with a given amount of context, might *think* the author wanted to convey something else.<sup>42</sup> Which of these two, if either, is what the text really “means”?

Many scholars have argued for one or the other.<sup>43</sup> But neither has to win every time. That's because the right way to read a text, in a given circumstance, depends on our reasons for reading it in the first place. To use Alexander's example, one spouse following the other's shopping list might care only about author's intent — knowing, say, that “cherries” really means “cherry tomatoes.”<sup>44</sup> But an FDA bureaucrat reviewing a nutrition label (“Ingredients: Cherries”) would put aside any special knowledge of the author's past intentions, caring only about what the likely future reader would understand.<sup>45</sup> Maybe those understandings don't reflect what the label “means,” just what everyone who reads it *thinks* it means.<sup>46</sup> But that seems to rule out perfectly standard usages of the term “means” — and in any case to be largely beside the point. We need to know which aspects of the text *the law* cares about, whether or not they truly qualify as “meaning.” Those aspects might be different for the spouse and for the FDA bureaucrat, and they might be different for us too.

In most cases, of course, the dictionary meanings, general purposes, and relevant contexts are all common knowledge. As Professor Scott Soames argues, “what the speaker means and what the hearers take the speaker to mean” are usually the same thing; competent users of

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<sup>42</sup> See Greenberg, *supra* note 21, at 230–31.

<sup>43</sup> Compare, e.g., Larry Alexander, *Originalism, the Why and the What*, 82 *FORDHAM L. REV.* 539, 540 (2013) (arguing that “our job [as interpreters] is to determine the uptake the legislator(s) intended us to have”), with Jeffrey Goldsworthy, *The Case for Originalism*, in *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION* 42, 48 (Grant Huscroft & Bradley W. Miller eds., 2011) (describing the meaning of an utterance as “what the speaker's meaning appears to be, given evidence that is readily available to his or her intended audience”).

<sup>44</sup> Larry Alexander, *The Objectivity of Morality, Rules, and Law: A Conceptual Map*, 65 *ALA. L. REV.* 501, 506 (2013).

<sup>45</sup> Accord Larry Alexander, *Free Speech and Speaker's Intent: A Reply to Kendrick*, 115 *COLUM. L. REV. SIDEBAR* 1, 2 n.3 (2015) (arguing that the audience's interpretation is relevant when government is regulating potentially harmful speech, while “the speaker's intended meaning” is relevant “when it comes to statutory and constitutional interpretation . . . because in those contexts, one is trying to ascertain the norms promulgated by those with the authority to choose the norms that govern us”).

<sup>46</sup> Cf. Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 *NOTRE DAME L. REV.* 1, 22 (2015) (arguing that “[c]ommunicative content is fixed” at the time of writing, while “beliefs about communicative content can change” over time).

language rarely make severe mistakes about what their audience will understand.<sup>47</sup>

But the legal system can't limit itself to successful communications. It has to be able to handle unsuccessful ones too.<sup>48</sup> For example, Supreme Court Justices have repeatedly disagreed about using legislative history to resolve ambiguities adversely to criminal defendants.<sup>49</sup> At its core, this debate is about whether the authors' or readers' perspective controls; legislators who wrote a provision may have wanted to communicate something that a member of the public won't or can't reasonably know from reading the code.<sup>50</sup> When these misfires happen, we need to know which reading wins.

There may be good reasons for a legal system to prefer one set of meanings to another. The authors are supposed to lay down rules and tell us what they are — so maybe their communicative intentions are what matter.<sup>51</sup> Or maybe enforcing those hard-to-find intentions would make the law unpredictable or arbitrary, holding the audience responsible for things they shouldn't be expected to know.<sup>52</sup> As we've each argued in prior work, different societies might make those choices differently, whether or not they agree with your favorite theory of meaning.<sup>53</sup> But no matter how sensible or silly a society's choices, they're choices made as a matter of *law*, and not as a matter of *lan-*

<sup>47</sup> Scott Soames, *Deferentialism: A Post-Originalist Theory of Legal Interpretation*, 82 *FORDHAM L. REV.* 597, 598 (2013).

<sup>48</sup> See, e.g., Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 *CONST. COMMENT.* 47, 57 (2006) (noting that different theories may “overlap” in “a large range of cases,” but that “there may be times when different approaches will yield different answers”); cf. John Danaher, *The Normativity of Linguistic Originalism: A Speech Act Analysis*, 34 *LAW & PHIL.* 397, 398–99 (2015) (arguing that invoking “success conditions” for communication can reintroduce hidden normative concerns).

<sup>49</sup> Compare *United States v. R.L.C.*, 503 U.S. 291, 298–306 (1992) (plurality opinion) (assuming that it may), and *Dixon v. United States*, 465 U.S. 482, 500 n.19 (1984), with *R.L.C.*, 503 U.S. at 307–11 (Scalia, J., concurring in part and concurring in the judgment) (arguing not), and *United States v. Hayes*, 555 U.S. 415, 437 (2009) (Roberts, C.J., dissenting) (at least not if the legislative history is “obscure”). See also *United States v. Granderson*, 511 U.S. 39, 67 (1994) (Kennedy, J., concurring in the judgment) (noting disagreement); *Crandon v. United States*, 494 U.S. 152, 160 (1990) (suggesting that such uses of legislative history should be rare).

<sup>50</sup> See, e.g., Hillel Y. Levin, *Contemporary Meaning and Expectations in Statutory Interpretation*, 2012 *U. ILL. L. REV.* 1103, 1128 (“The rule of lenity is justified by the principle that a law can only have force if the regulated community can reasonably understand the law . . .”).

<sup>51</sup> See, e.g., Alexander, *supra* note 43, at 540.

<sup>52</sup> See, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 17 (Amy Gutmann ed., 1997) (analogizing author's intent to Emperor Nero's practice of “posting edicts high up on the pillars, so that they could not easily be read”); Goldsworthy, *supra* note 43, at 47 (arguing that the audience's meaning, and not the speaker's, should control “when your utterance fails to communicate your meaning to your intended audience (through your fault, not theirs)”).

<sup>53</sup> See William Baude, *Is Originalism Our Law?*, 115 *COLUM. L. REV.* 2349, 2363–65 (2015); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 *HARV. J.L. & PUB. POL'Y* 817, 829–33 (2015).

guage. As Greenberg points out, the “[p]hilosophy of language and Gricean theory have nothing to say about what we should *deem* to be the content of the legislature’s intentions.”<sup>54</sup> Unless supplemented by something else, the standard picture leaves us at sea.

### C. *The Skeptical Response*

These flaws can provoke an extreme reaction. Like Professor H.L.A. Hart’s “disappointed absolutist,” who rejects legal rules if they “are not all they would be in a formalist’s heaven,”<sup>55</sup> the disappointed follower of the standard picture may end up rejecting meaning itself as a meaningful constraint.

Fallon, for example, claims in a recent paper that there is “an astonishing diversity” of ways of cashing out the meaning of a legal instrument.<sup>56</sup> This diversity leads him to conclude that “[i]n hard cases, the meaning of statutory and constitutional provisions does not exist as a matter of prelegal linguistic fact.”<sup>57</sup> Fallon accepts that “distinctively legal norms” might in theory help determine legal meaning.<sup>58</sup> But “[w]hen those standards are indeterminate” — as he claims “they typically are in disputed cases”<sup>59</sup> — interpreters’ best option is to follow an “interpretive eclecticism” that makes interpretive decisions on “a case-by-case basis.”<sup>60</sup> Of the many possible targets of interpretation, legal interpreters “should choose the best interpretive outcome as measured against the normative desiderata of substantive desirability, consistency with rule of law principles, and promotion of political democracy, all things considered.”<sup>61</sup>

Similarly, Sunstein argues that “there is nothing that interpretation ‘just is.’”<sup>62</sup> He identifies a long list of potential interpretive methods for legal documents (such as authorial intention, public meaning, Dworkinian moral reading, and so on),<sup>63</sup> all of which he considers to be adequately “faithful to the text itself.”<sup>64</sup> If none of these approaches is “mandatory” — that is, required by the philosophy of language, as “part of what interpretation requires by its nature” — then “[a]ny ap-

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<sup>54</sup> Greenberg, *supra* note 21, at 233.

<sup>55</sup> H.L.A. HART, *THE CONCEPT OF LAW* 139 (Penelope A. Bulloch & Joseph Raz eds., 3d ed. 2012).

<sup>56</sup> Fallon, *supra* note 6, at 1239.

<sup>57</sup> *Id.* at 1307.

<sup>58</sup> *Id.* at 1241.

<sup>59</sup> *Id.* at 1307.

<sup>60</sup> *Id.* at 1308.

<sup>61</sup> *Id.* at 1305.

<sup>62</sup> Sunstein, *supra* note 6, at 193.

<sup>63</sup> *Id.* at 194, 197, 202.

<sup>64</sup> *Id.* at 200.

proach must be defended on normative grounds.”<sup>65</sup> He concludes that “[a]mong the reasonable alternatives,” the right choice is whichever one “makes our constitutional system better rather than worse.”<sup>66</sup> And in deciding this question, “judges and lawyers must rely on normative judgments of their own.”<sup>67</sup>

Traditional rules and canons of interpretation might help fix an instrument’s meaning or constrain these normative choices. But the canons’ uncertain status on the standard picture actually helps the skeptics. If drafters in Congress don’t follow the whole-code rule, for example,<sup>68</sup> but the courts do anyway, it looks like the courts are inventing meaning rather than enforcing it. This may be why Fallon, for example, treats “reasonable meaning” (roughly, the output of the legal process school) and “interpreted meaning” (roughly, the output of *stare decisis*) as two more possible methods of interpretation, from which the interpreter may freely choose.<sup>69</sup>

And why stop there? If the courts are allowed to produce new meanings for normative reasons by using the traditional rules, then why can’t they produce other, normatively better meanings using other, normatively better rules? If the canons are descriptively false as accounts of legislative practice, then the courts’ continued use of them seems to license other descriptively false approaches, too — with only normative preferences to guide which falsehoods the courts tell.

## II. A TASK FOR LAW

We share the criticisms of the standard picture, but we think this skepticism is a bridge too far. Even in disputed cases, lawyers and judges needn’t — and usually don’t — make first-best decisions about political democracy, the rule of law, or even cost-benefit analysis. Instead, they can and do put a great deal of effort into discerning the legal standards already imposed by existing materials. In the mine run of cases, they seem pretty successful at finding them. If language alone can’t finish the job, as we agree it often can’t, then something else must. We suggest that this something else is law.

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<sup>65</sup> *Id.* at 193. Sunstein does not specify whether those “normative grounds” are necessarily individual judgments or can be established at the level of legal rules. *Compare id.* (“[B]oth judges and lawyers must rely on normative judgments of their own.”), *with id.* at 193 n.3 (“This is so even if those implicit judgments direct them to defer to, or to accept, the normative judgments of other people.”).

<sup>66</sup> *Id.* at 193–94.

<sup>67</sup> *Id.* at 193.

<sup>68</sup> *See* Gluck & Bressman, *Part I*, *supra* note 39, at 936.

<sup>69</sup> Fallon, *supra* note 6, at 1250–51. It may also be why others strive to reconcile even our substantive canons and interpretive defaults with the faithful-agent model of statutory interpretation. *See* EINER ELHAUGE, *STATUTORY DEFAULT RULES* 4–5 (2008).

Our model here is private law, which is chock full of rules for handling private instruments such as contracts, deeds, or wills.<sup>70</sup> In some cases, these rules simply advance the parties' private aims. They might, for example, read a sales contract without a price term as calling for "a reasonable price,"<sup>71</sup> or imply warranties that match conversational maxims and common experience,<sup>72</sup> "fill[ing] in the blanks and oversights with the terms that people would have bargained for had they anticipated the problems and been able to transact costlessly in advance."<sup>73</sup> But in other cases, the interpretive rules are designed to advance *society's* goals, whether or not they reproduce the parties' ideal bargain. If a sales contract lacks a quantity term, the Uniform Commercial Code may mark it zero and hold that no sale occurs.<sup>74</sup> Even though zero is the only quantity we know the parties *didn't* want, the rule sometimes makes sense: it's easy for judges to apply, it elicits clarity on an important point, and it may "prevent people from defrauding victims with whom they do not necessarily have a contractual relationship."<sup>75</sup> Scholars have catalogued a range of other such rules serving a range of other purposes — to give parties an incentive to be clear,<sup>76</sup> to "enforce whatever term would be efficient in the particular case,"<sup>77</sup> to make it difficult to disinherit one's children,<sup>78</sup> and so

<sup>70</sup> Cf. Gluck, *supra* note 13, at 1970 ("Statutory interpretation, like the interpretation of contracts, wills, and trusts, entails the judicial interpretation of a text previously negotiated by others. Many of the same overarching questions arise in each of these contexts . . .").

<sup>71</sup> U.C.C. § 2-305(1) (AM. LAW INST. & UNIF. LAW COMM'N 2014); *see also id.* § 2-305(4) (providing a different result where the parties "intend not to be bound unless the price be fixed or agreed"); cf. RESTATEMENT (SECOND) OF CONTRACTS § 204 (AM. LAW INST. 1981) (instructing courts to supply "a term which is reasonable in the circumstances").

<sup>72</sup> *See, e.g.*, U.C.C. § 2-314(2)(b)–(c) (including, as conditions for merchantability, that goods "are of fair average quality within the description" and "are fit for the ordinary purposes for which such goods are used").

<sup>73</sup> FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 34 (1991); *see also* Omri Ben-Shahar, Essay, *A Bargaining Power Theory of Default Rules*, 109 COLUM. L. REV. 396, 396 (2009) ("The most broadly accepted principle of gap filling is that courts should 'mimic the parties' will.'" (citing Richard Craswell, *Contract Law: General Theories*, in 3 ENCYCLOPEDIA OF LAW AND ECONOMICS 1, 3–4 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000))).

<sup>74</sup> U.C.C. § 2-201(1) (providing that a contract for sale of goods for \$500 or more "is not enforceable . . . beyond the quantity of goods shown in such writing").

<sup>75</sup> Eric A. Posner, *Norms, Formalities, and the Statute of Frauds: A Comment*, 144 U. PA. L. REV. 1971, 1986 (1996). Professor Eric Posner argues that the zero-quantity rule is a contractual formality, rather than a default. *See id.* at 1980–86; *see also* Eric A. Posner, *There Are No Penalty Default Rules in Contract Law*, 33 FLA. ST. U. L. REV. 563, 576 (2006). *But see* Ian Ayres, *Ya-Huh: There Are and Should Be Penalty Defaults*, 33 FLA. ST. U. L. REV. 589, 593–94 (2006) (arguing that this distinction needn't matter). We won't dwell on this distinction, as the legal effect of the text is altered either way.

<sup>76</sup> Eric A. Posner, Essay, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829, 839–40 (2003).

<sup>77</sup> *Id.* at 840.

<sup>78</sup> Adam J. Hirsch, *Incomplete Wills*, 111 MICH. L. REV. 1423, 1438 (2013).



on. Like the traditional rules and canons of interpretation, these rules don't necessarily track actual linguistic usage; they're binding on the parties simply because they're the law.

Private law can also choose among multiple theories of meaning. The Second Restatement generally looks to the parties' shared understanding;<sup>79</sup> but "[u]nless a different intention is manifested"<sup>80</sup> (that is, "shown"<sup>81</sup>), the Restatement also gives contractual language its "generally prevailing meaning," including a "technical meaning" for "technical terms and words of art."<sup>82</sup> That privileges public meaning over the parties' actual intent, on the theory that the gains from standardization outweigh the costs to "parties who use[] a standardized term in an unusual sense" and who "run the risk that their agreement will be misinterpreted."<sup>83</sup>

The appropriate theory of meaning can change with the context. As Professor Caleb Nelson reports, courts at the Founding made their own lives easier by requiring grantors to "use the terms of art that the law associated with certain sorts of conveyances," presuming that the language of a deed "reflected technical advice or knowledge."<sup>84</sup> Hence "a Man may have Advice & Assistance in drawing of Deeds [a]nd it is his own Folly if he has not."<sup>85</sup> As to wills, though, the "courts took a much more forgiving approach," recognizing "the extremity in which [wills] are often made, not admitting of counsel being called in."<sup>86</sup> These rules didn't result from precise assessments of particular cases; they were general rules designed to advance general purposes. But the legal system frequently chooses artificial rules of interpretation, and once chosen they're the law, whether or not they reflect what a given text *really meant*.

We argue that the same thing happens in public law. Our law of interpretation helps determine the legal content of our written instruments. Using legal rules instead of (or in addition to) language may seem like a highly artificial way to read a text. But it's "artificial" in

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<sup>79</sup> RESTATEMENT (SECOND) OF CONTRACTS § 201(1) & cmt. c (AM. LAW INST. 1981) (describing a search "for a common meaning of the parties, not a meaning imposed on them by the law").

<sup>80</sup> *Id.* § 202(3).

<sup>81</sup> *Id.* § 201 cmt. a.

<sup>82</sup> *Id.* § 202(3)(a)–(b).

<sup>83</sup> *Id.* § 201 cmt. c; *see also id.* § 204 cmt. d (providing that, when facing "an omitted term," the court should sometimes look beyond the parties' intentions, "supply[ing] a term which comports with community standards of fairness and policy rather than analyz[ing] a hypothetical model of the bargaining process").

<sup>84</sup> Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 565 (2003).

<sup>85</sup> *Id.* (alteration in original) (quoting *Hawkins v. Thornton*, 2 Va. Colonial Dec. B243, B244 (Gen. Ct. 1737) (argument of counsel)).

<sup>86</sup> *Id.* (alteration in original) (quoting *Kennon v. M'Roberts*, 1 Va. (1 Wash.) 96, 102 (1792)).

the old sense of “well-crafted,” of having been “skilfully made”<sup>87</sup> to achieve certain goals. The “artificial reason” of the law, as Coke famously put it,<sup>88</sup> offers artificial solutions to many questions in life. That’s as true in interpretation as it is elsewhere.<sup>89</sup>

To the skeptics, any legal interpretive rules that we apply to public instruments are contingent, and so require normative justification. In this they’re surely right. Interpretive rules aren’t natural kinds; they depend on what law happens to be in force, and they’re as subject to moral assessment as any other legal rules. But there are good reasons for these rules to be established at the level of law, whether written or unwritten — and not simply left to the normative predilections of individual judges or officials.

After all, there are normative arguments underlying every topic in the law. What should the punishment be for murder, burglary, or drug possession? Should drug possession even be a crime at all? As a society, we have contingent legal settlements of these normative debates. When judges are asked to accept a plea bargain for drug possession, they aren’t asked to wade into the normative debate about whether drug possession *should* be a crime. They’re asked instead to look at the factual basis for the charge and see whether there’s a legal settlement criminalizing that conduct.

We see this as one of the most important functions of a legal system: to replace real answers with fake ones. There may be real answers out there to lots of important normative and policy questions, such as how fast we should drive on the highway, what tax policy is best, and so on. But people persistently disagree on the real answers, and the legal system helpfully offers fake answers instead — answers that hopefully are somewhat close to the real ones, but on which society (mostly) agrees and which allow us (mostly) to get along.

So it’s a non sequitur to leap from the lack of an inherent “just is”<sup>90</sup> form of interpretation to direct normative judgments. We don’t have

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<sup>87</sup> *Artificial* (9.a), OXFORD ENGLISH DICTIONARY (3d ed. 2008), <http://www.oed.com/view/Entry/111211> [<https://perma.cc/3ULQ-L9DU>]; cf. CHRISTOPHER WREN, PARENTALIA: OR, MEMOIRS OF THE FAMILY OF THE WRENS 281 (Gregg Press Ltd. 1965) (1750) (recounting Charles II’s praise of St. Paul’s Cathedral as “very artificial, proper, and useful”).

<sup>88</sup> Prohibitions del Roy (1607) 77 Eng. Rep. 1342, 1343; 12 Co. Rep. 63, 65; see also EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWE OF ENGLAND: OR, A COMMENTARY UPON LITTLETON, NOT THE NAME OF THE AUTHOR ONLY, BUT OF THE LAW IT SELFE (1608), reprinted in 2 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE 577, 701 (Steve Sheppard ed., 2003) (describing the common law as “understood of an artificial perfection of reason, gotten by long study, observation, and experience, and not of every mans naturall reason, for, *Nemo nascitur artifex* [no one is born an artisan]”).

<sup>89</sup> Cf. Jeffrey A. Pojanowski, *Reading Statutes in the Common Law Tradition*, 101 VA. L. REV. 1357, 1361 (2015) (portraying formalist approaches to interpretation as compatible with the “artificial reason” of the common law).

<sup>90</sup> Sunstein, *supra* note 6.

an inherent “just is” law of narcotics, either, but judges don’t handle drug cases by making their own first-order normative decisions. They start by looking at what judgments have already been made in the law, and if those judgments are conclusive, they usually stop there too.

The same reasons why we have law in general are reasons to have a law of interpretation in particular. Law fills gaps that would otherwise be filled by the interpreter’s normative priors. It allows us to agree on what our rules are precisely so that we can debate whether to change them. And even if we should reform some of our law of interpretation — or if we should reform some of our drug laws — that doesn’t mean that judges can and should initiate those reforms according to their own normative lights.

### III. OUR LAW OF INTERPRETATION

If the law of interpretation is really so important, how has anybody missed it? We think many scholars have been looking in the wrong place — looking up, to rules of ever-higher legal authority, when they should have been looking down, to ordinary and unremarkable rules of unwritten law.

The law of interpretation is easier to justify when it’s imposed from above. As to private instruments, it’s relatively uncontroversial, because private parties writing contracts or wills have to take the law as they find it. If that law requires clear statements or “magic words,” or if it otherwise restrains the parties’ freedom to act, that’s because legislatures are often paternalistic to private parties.

That model breaks down when it comes to public law. After all, who has the right to be paternalistic to a legislature? A law of interpretation for statutes might seem to invade the legislature’s authority, denying it the power to express its will as it pleases. So to govern how we read statutes, we might need rules of quasi-constitutional status<sup>91</sup> — and only some strange superlaw could tell us how to read the Constitution.

We disagree. A legal rule of interpretation doesn’t need to *outrank* what it interprets in order to be useful, or even to be law. To be sure, it’s possible to arrange things that way: a legislature might impose interpretive rules on administrative agencies, as New Mexico’s has done,<sup>92</sup> or the federal government might require local communications

<sup>91</sup> See Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 163–64 (2010).

<sup>92</sup> N.M. STAT. ANN. §§ 12-2A-1 to -20 (2016); see also UNIF. STATUTE & RULE CONSTR. ACT prefatory note (UNIF. LAW COMM’N 1995), <http://goo.gl/gEZgHf> [<https://perma.cc/C2QC-B6ZF>]. But cf. Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1845 n.359 (2010) (noting that the Uniform Act is “not widely known” and of “limited utility”); Adrienne L. Mickells,

policies to be expressed in particular ways.<sup>93</sup> But this outranking isn't necessary. In a common law system like ours, the rules of interpretation can also bubble up from below.

Rather than override the lawmakers' authority, the law of interpretation creates a legal structure that enables that authority's exercise. Legislatures don't change the law in a vacuum. Like contracting parties, they act in a world already stuffed full of legal rules — some of which happen to be rules of interpretation. Even omnipotent legislatures, with the power to override any rule on the books, never use their power all at once. In our system, at least, new enactments are designed to take their place in an existing corpus juris, as new threads in a seamless web. As Jeremy Bentham once complained:

At present such is the entanglement, that when a new statute is applied it is next to impossible to follow it through and discern the limits of its influence. As the laws amidst which it falls are not to be distinguished from one another, there is no saying which of them it repeals or qualifies, nor which of them it leaves untouched: it is like water poured into the sea.<sup>94</sup>

We are less worried by this than Bentham. Integrating new law with old, even in a haphazard way, helps the legislature focus on particular issues and solve problems one at a time. Default rules of interpretation serve the same goals as default rules of substance: they address recurrent issues to which the authors haven't adverted or which they didn't think necessary to address.

Like any other rules already on the books, interpretive rules don't supersede new legislation, but coexist with it. When the legislature is silent, the old rules remain in effect; when it appears to override or abrogate those rules, we treat its action the same way we'd treat any other express or implied repeal. And because interpretive rules function just like other legal rules, they can be unwritten as well as written, and can be applied (and often are) to the Constitution just as easily as to statutes.

To explain our view, we first take a brief step back, exploring how new legislation usually interacts with existing rules of substantive law. (We focus on the federal system, as states may have their own ways of interpreting their law.<sup>95</sup>) Our system understands that new legal rules

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Comment, *The Uniform Statute and Rule Construction Act: Help, Hindrance, or Irrelevancy?*, 44 U. KAN. L. REV. 423 (1996).

<sup>93</sup> See 47 U.S.C. § 332(c)(7)(B)(iii) (2012) (requiring that certain state or local decisions regarding wireless service “be in writing and supported by substantial evidence contained in a written record”); *T-Mobile South, LLC v. City of Roswell*, 135 S. Ct. 808, 811–12 (2015) (requiring this record to be contemporaneous with the decision).

<sup>94</sup> JEREMY BENTHAM, *OF LAWS IN GENERAL* 236 (H.L.A. Hart ed., Univ. of London Athlone Press 1970) (1782).

<sup>95</sup> Cf. Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341 (2010) (describing the many interpretive rules that states have adopted).

have to coexist with other ones already on the books. When a problem tends to recur, Congress can adopt a default rule, which supplies a general answer until more specific provision is made.

We then turn to interpretive rules. Congress can establish statutory defaults on interpretation no less than on substance — and these continue to operate, of their own force, until expressly or impliedly repealed. These defaults help answer recurrent interpretive questions whenever new statutes fail to speak to the matter. When they do, of course, we listen to the new statutes: interpretive rules and substantive ones are both subject to repeal. But until that repeal occurs, the old rules continue to govern.

This analysis applies equally to unwritten law. Statutes of course trump unwritten rules, just as new statutes trump old ones. But an unwritten legal rule, like an old statute, governs of its own force until something else abrogates it. A common law duress defense might interrupt the operation of a criminal statute, even though the statute outranks the defense. A common law rule of interpretation can do the same. In fact, many canons are best understood as unwritten interpretive rules — setting interpretive defaults, establishing the priority of different sources, and instructing judges in cases of uncertainty. Unwritten law even provides the fundamental structure of legal interpretation, identifying what counts as a legal text, what role that text plays in our law, and how we should go about interpreting it.

Finally, we turn to the Constitution. Our approach provides a way of thinking about various theories of constitutional interpretation, and particularly about the role that Founding-era interpretive rules might play. On some views, those rules matter only to the extent that they were actually contemplated by the Founders, or to the extent that they reflected actual linguistic usage. They can't matter *as rules*, because they can't outrank the authority of the Constitution's text. But on our view, interpretive rules don't need to be superlaw; they only need to be law. The Constitution was a legal document, adopted in a world with legal rules of interpretation already in place, and those unwritten rules may well have shaped its legal content.

#### A. *Written Law*

1. *Substantive Defaults.* — Suppose that Congress enacts a new criminal statute:

Any person who sends live geese through the mails shall be fined under this title or imprisoned not more than two years, or both.

The plain text of this statute says nothing about conspiracies, or solicitation, or aiding and abetting. Yet we know that these are illegal

too — because we have separate statutes, written in general terms, that punish accessories and co-conspirators to federal crimes.<sup>96</sup> Similarly, the phrase “[a]ny person” makes no exceptions for insanity or for the passage of time; but *we* make such exceptions, under statutes that codify the insanity defense or the limitations period.<sup>97</sup>

All this ought to seem obvious, but it presents a puzzle for devotees of the standard picture. Maybe today’s Congress thinks the auxiliary offenses too broad or the statutory defenses too generous; maybe it would have provided different ones, or none at all, had the issues been freshly debated. The statute says “[a]ny person who sends”; how do we know that Congress wants to exclude some people or include others? And if Congress doesn’t mention any of this, how can we let old statutes effectively trump our new one?

One way to explain away the problem would be to shoehorn every relevant rule of law into a statute’s “meaning.” We could claim, in essence, that our new statute has invisible-ink extensions to conspiracies and accessories, invisible-ink exceptions for insanity and the limitations period, and so on. We wouldn’t need to worry about old statutes limiting the new, because the language of our new statute already “encompasses those questions,” given that “Congress enacted [it] against the backdrop supplied by” existing law.<sup>98</sup>

That explanation doesn’t hold water. We don’t usually take the insanity defense or the conspiracy statute as empirical guides to what legislators actually had in mind when enacting a new statute — or what an observing member of the public would have actually thought they intended by it, or what its overall purposes might have been, or whatever. Maybe the possibility of goose-mailing conspiracies wouldn’t have occurred to *anyone*, in Congress or out; the conspiracy statute applies regardless.

So the law takes a different approach. Instead of attributing superhuman foresight to Congress — that is, instead of looking for *actual* intentions, beliefs, or understandings — it simply adds each new enactment to the pile, enforcing all valid statutes according to their terms. In our system, legal propositions don’t have to follow the “logical model of necessary and sufficient conditions,”<sup>99</sup> in which each new rule somehow addresses every situation it might someday encounter. We understand that new enactments will take their place in a body of

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<sup>96</sup> See, e.g., 18 U.S.C. § 2(a) (2012) (aiding and abetting, solicitation); *id.* § 3 (accessories after the fact); *id.* § 371 (conspiracy).

<sup>97</sup> See *id.* § 17 (insanity); *id.* § 3282(a) (five-year statute of limitations for noncapital offenses).

<sup>98</sup> Caleb Nelson, *State and Federal Models of the Interaction Between Statutes and Unwritten Law*, 80 U. CHI. L. REV. 657, 662 (2013) (describing this claim without endorsing it); accord Manning, *supra* note 5, at 155–56, 156 n.213.

<sup>99</sup> Richard A. Epstein, *Pleadings and Presumptions*, 40 U. CHI. L. REV. 556, 560 (1973).

existing law, and that some questions about a rule's application might have to be answered by other parts of the law. Individual statutes might have gaps, or might even conflict with one another, but *the law* remains a seamless web.

In particular, we accept that external legal rules might not only extend new statutes (as by punishing conspiracies), but might also restrict them (as by providing defenses). Our legal materials are what logicians call "defeasible,"<sup>100</sup> establishing prima facie rules that are subject to defeat in particular cases — and often leaving unspecified exactly which cases those are.<sup>101</sup> (Ordinary speech can be defeasible too; we truthfully say things like "birds fly" without having to mention emus.) That's why phrases like "[a]ny person" coexist peacefully with unnamed defenses: the most we get from the new statute's language is that it takes subjects like mental disabilities or stale prosecutions as it finds them. These other statutes keep on doing their thing, whether anyone adverts to them or not.

These older statutes play the same role in our criminal law that intestate succession plays in the law of wills and estates: they're general defaults that operate in the absence of more specific instructions. So we don't usually think of these statutes as tying Congress's hands, any more than intestacy rules tie the hands of testators. The whole point of a default rule is to provide an off-the-shelf solution for a recurrent problem until we affirmatively choose otherwise — whether "expressly or by fair implication."<sup>102</sup> If a new criminal statute needs to do something special vis-à-vis conspiracy, it can say so. If the new statute is silent, existing law continues in effect. Indeed, from the drafter's perspective, the entire corpus juris looks like one big default rule — something that continues to apply in the absence of new instructions to the contrary.

Far from tying the legislature's hands, looking to the entire corpus juris actually frees them. A sensible Congress can enact a conspiracy statute ahead of time, to avoid having to consider the problem anew for each separate criminal prohibition — just as it avoids having to reconsider, say, the rules on witness tampering,<sup>103</sup> speedy trials,<sup>104</sup> or the

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<sup>100</sup> Carlos Iván Chesñevar et al., *Logical Models of Argument*, 32 ACM COMPUTING SURVEYS 337, 338 (2000).

<sup>101</sup> See H.L.A. Hart, *The Ascription of Responsibility and Rights*, in *ESSAYS ON LOGIC AND LANGUAGE* 145, 147–48 (Antony Flew ed., 1951); Neil MacCormick, *Defeasibility in Law and Logic*, in *INFORMATICS AND THE FOUNDATIONS OF LEGAL REASONING* 99, 103 (Zenon Bankowski et al. eds., 1995); Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1838–40 (2012).

<sup>102</sup> *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 749 (2012).

<sup>103</sup> See 18 U.S.C. § 1512 (2012) (prohibiting witness tampering).

<sup>104</sup> See *id.* § 3161(c)(1) (limiting pretrial delays).

criminal jurisdiction of the district courts.<sup>105</sup> Default rules let legislatures focus on the problem at hand (apparently, something involving geese and mailboxes) and not any of the other myriad problems that past legislatures have already tried to address.<sup>106</sup> By passing a general statute on conspiracies, Congress balanced two risks: that it might forget something important when the next prohibition comes along, and that it might forget to suspend its default rule when the circumstances call for it. Congress decided to put a general statute on the books, and it was probably right. Denying past legislatures that power means denying the possibility of general legislation, or indeed of any legislation at all.

2. *Interpretive Defaults.* — Just as a legislature can establish substantive defaults on topics like conspiracies or witness tampering, it can also establish interpretive defaults. These rules identify how a newly enacted text produces its legal effect. As above, the rules don't just make predictions about a new statute's meaning — but neither do they tie the new legislature's hands. Instead, they're default rules like any other, and they operate until the legislature says they shouldn't.

As a (relatively) simple example, consider the repeal-revival rule of 1 U.S.C. § 108. This rule addresses a problem familiar to the common law. Suppose that statute *A* has been repealed by *B*, which in turn is repealed by *C*. What happens to *A*? Does it stay repealed, having once been taken off the books and not having been reenacted? Or does it spring into force again, now that we've eliminated the only thing holding it back?

Both views are plausible, and both seem consistent with ordinary and even technical understandings of the word “repeal.” At common law, though, the matter was settled. Repeal didn't actually erase anything from the statute books; *A* was still a law, but one in suspended animation, deprived of future legal effect so long as *B* stayed in force. Once *B* was similarly put on ice, *A* would naturally revive.<sup>107</sup> In 1871, Congress opted for a different rule,<sup>108</sup> abrogating the common law and declaring that new repeals would no longer revive old statutes “unless it shall be expressly so provided.”<sup>109</sup>

That's a stark example of the law of interpretation. Devotees of the standard picture might want to reduce this provision to linguistics — to an “interpretive guideline[]” that “Congress might take into

<sup>105</sup> See *id.* § 3231 (providing jurisdiction).

<sup>106</sup> See David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 942 (1992) (noting that “change is news but continuity is not”).

<sup>107</sup> See 1 WILLIAM BLACKSTONE, COMMENTARIES \*90.

<sup>108</sup> Act of Feb. 25, 1871, ch. 71, § 3, 16 Stat. 431, 431–32 (codified as amended at 1 U.S.C. § 108 (2012)).

<sup>109</sup> *Id.* at 432; see also 1 U.S.C. § 108.



account” in the future, “just as a Congress might very well take into account dictionary definitions.”<sup>110</sup> But § 108 is a duly enacted law, like the general conspiracy statute — and unlike most dictionaries. It lays down a legal rule, not about what the word “repeal” *means*, but about what statutes repealing things actually *do*. Though § 108 concerns interpretation and not substantive policy, it acts like any other general default, solving a recurrent problem that legislators don’t always think about in advance.

Enacting § 108 into law also has real advantages over merely adopting it as a standard linguistic practice — say, by including it in a House drafting manual. As enacted law, § 108 operates of its own force until another rule of law intervenes. We can apply the rule even if we suspect that everyone was unaware of its existence; indeed, even if some people, including some legislators, might have predicted the opposite result. That’s why “we *presume* that Congress is aware of existing law when it passes legislation”;<sup>111</sup> we call this a presumption because we suspect that, in many cases, it might turn out to be false.

This presumption is rebuttable, of course. If a new statute’s text and context are clear enough to work an implied repeal, § 108’s “express[]” exception requirement is unenforceable.<sup>112</sup> To cite an example offered by Professors Alexander and Saikrishna Prakash, if *B* did *nothing but* repeal *A*, the only reason to pass *C* and to repeal *B* would be to bring *A* back into force.<sup>113</sup> In that case, the “fair implication”<sup>114</sup> of the statute — based on all the *other* tools in our legal toolbox — would be that *A* had been revived, whatever § 108 might say. But that kind of implied repeal can happen to any rule of law, not just rules of interpretation. If a new criminal prohibition were sufficiently suggestive about conspiracies to override the general conspiracy statute, we’d follow its suggestion;<sup>115</sup> that’s the point of implied repeals. But otherwise we keep following the rules we have.

Section 108 is far from our only federal statutory rule of interpretation. Consider the McCarran-Ferguson Act,<sup>116</sup> a fundamental component of federal insurance law that primarily acts through interpretive

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<sup>110</sup> Alexander & Prakash, *supra* note 34, at 99.

<sup>111</sup> Mississippi *ex rel.* Hood v. AU Optronics Corp., 134 S. Ct. 736, 742 (2014) (emphasis added) (internal quotation marks omitted).

<sup>112</sup> See *Marcello v. Bonds*, 349 U.S. 302, 310 (1955) (refusing to require “magical passwords” for Congress to supersede a similar requirement); see also *Lockhart v. United States*, 546 U.S. 142, 149 (2005) (Scalia, J., concurring) (“When the plain import of a later statute directly conflicts with an earlier statute, the later enactment governs, *regardless* of its compliance with any earlier-enacted requirement of an express reference . . .”).

<sup>113</sup> Alexander & Prakash, *supra* note 34, at 99.

<sup>114</sup> *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 749 (2012).

<sup>115</sup> *Cf. Marcello*, 349 U.S. at 310.

<sup>116</sup> McCarran-Ferguson Act, Pub. L. No. 79-15, 59 Stat. 33 (1945) (codified as amended at 15 U.S.C. §§ 1011–1015 (2012)).

rules. Under that Act, “silence on the part of the Congress” in future statutes is construed not to interfere with state insurance regulations,<sup>117</sup> nor to preempt those regulations “unless such Act[s] specifically relate[] to the business of insurance.”<sup>118</sup> This is only one of an enormous variety of interpretive provisions that Congress has enacted, addressing subjects from fisheries to productivity growth to the evidentiary force of chapter titles in the criminal code.<sup>119</sup>

Or consider the Dictionary Act,<sup>120</sup> a list of global definitions for acts of Congress, which tells us that “oath” includes affirmation, “person” includes corporations and partnerships, and so on.<sup>121</sup> Unlike the medieval English Parliament, which had to revise a statute on the theft of “horses” to apply to the theft of a single horse,<sup>122</sup> the Dictionary Act lets us rest easy that the singular will include the plural, and vice versa.<sup>123</sup> These definitions might *look* like rules of language, but having been duly enacted, they have the *status* of rules of law. The Dictionary Act may only apply “unless the context indicates otherwise”;<sup>124</sup> but so do our other default rules, any of which might be overturned in the future through implied repeal. In other words, the Dictionary Act is more than just a good dictionary; it’s the law.

### B. Unwritten Law

In a common law system like ours, rules of interpretation can also be found in unwritten law. In private law, as above, this seems relatively uncontroversial. Not much turns on whether, say, the rule against perpetuities is codified by statute or is just good law in the courts; grantors have to draft around it all the same. That’s also true of interpretive rules: the Second Restatement’s term-of-art provisions, discussed above,<sup>125</sup> have the same impact on private contracts whether they’ve been adopted by legislatures or just accurately summarize the common law in force. Written and unwritten rules might have different sources or might change in different ways, but while they’re in effect, they’re just as binding.

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<sup>117</sup> 15 U.S.C. § 1011.

<sup>118</sup> *Id.* § 1012(b).

<sup>119</sup> See 1 U.S.C. § 6 (2012); Dorsey, *supra* note 37, at 378–81 (citing 15 U.S.C. § 2403; Act of June 25, 1948, Pub. L. No. 80-772, § 19, 62 Stat. 683, 862); see also Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002).

<sup>120</sup> 1 U.S.C. §§ 1–8.

<sup>121</sup> *Id.* § 1.

<sup>122</sup> See S.E. Thorne, *The Equity of a Statute and Heydon’s Case*, 31 ILL. L. REV. 202, 213 (1936).

<sup>123</sup> 1 U.S.C. § 1.

<sup>124</sup> *Id.*

<sup>125</sup> See *supra* notes 79–83 and accompanying text.

Unwritten rules do similar work in public law. In fact, some of our most important interpretive rules are best understood as unwritten law. These include not only some traditional canons of construction, but also the more foundational rules structuring our interpretive process. To see how this works, we again start with a comparison to substantive rules, before returning to rules of interpretation.

1. *Substantive Rules.* — Just as old statutes coexist with new ones, unwritten rules coexist with written ones. On the civil side, statutory causes of action lose every day to unwritten defenses such as laches, waiver, or *res judicata*, just as they lose to written defenses like the statute of limitations or the statute of frauds.<sup>126</sup> On the criminal side, traditional defenses such as duress, necessity, or self-defense are routinely applied by federal courts, even though they're uncodified in the federal system.<sup>127</sup> The fact that a statute's language makes no exception for unwritten law doesn't mean it will escape unscathed.

The standard picture has had trouble explaining this practice, too. As with older statutes, some scholars have portrayed unwritten rules as hidden features of the statutory language. These unwritten defenses, the argument goes, might be part of the "shared background conventions of the relevant linguistic community" on which "the meaning of a text depends,"<sup>128</sup> and "against which the legislature presumably enacted" the text in question.<sup>129</sup> The Supreme Court has spoken this way in several cases,<sup>130</sup> though it hasn't quite agreed on how to fit unwritten rules into a linguistic model: the recent duress case of *Dixon v. United States*, construing the Safe Streets Act of 1968, produced four badly splintered opinions and no majority for any one approach.<sup>131</sup>

We think the linguistic model is a poor fit for how these rules are actually understood and applied. Presumptions about empirical facts such as the legislature's use of language, the general understanding of the legal community, and so on, are more or less plausible in particular cases. But our courts don't use unwritten defaults as empirical heuristics for interpreting new texts, any more than they use statutory de-

<sup>126</sup> Cf. FED. R. CIV. P. 8(c)(1) (listing all five as affirmative defenses).

<sup>127</sup> See, e.g., *Dixon v. United States*, 548 U.S. 1, 6 (2006) (duress); *United States v. Bailey*, 444 U.S. 394, 409–10 (1980) (necessity); *Smith v. United States*, 133 S. Ct. 714, 720 (2013) (self-defense); see also *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 490 (2001) (questioning the status of common law defenses, but recognizing that they had been entertained in the past).

<sup>128</sup> John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2467 (2003).

<sup>129</sup> *Id.* at 2469; see also Nelson, *supra* note 98, at 662 (describing this as a common view).

<sup>130</sup> See, e.g., *Oakland Cannabis Buyers' Coop.*, 532 U.S. at 490; *Bailey*, 444 U.S. at 415 n.11; see also Nelson, *supra* note 98, at 753–55.

<sup>131</sup> 548 U.S. 1 (applying Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (codified as amended in scattered sections of 5, 18, and 42 U.S.C.)).

faults that way. When a criminal statute is silent on the topic of insanity, we don't really know what the enacting Congress thought about the issue (assuming that it's coherent to ask the question), or what most actual lawyers and judges would actually think after reading the text. All we know is that the insanity defense is good law, and that the statute apparently does nothing to alter that fact.

In the same way, we don't really know what Congress thought about duress in 1968 when it enacted the Safe Streets Act. But we do know that it failed to address the common law rule — and so, as five Justices separately suggested in *Dixon*, we enforce that rule as we believe it stands.<sup>132</sup> That's why most states,<sup>133</sup> as well as some lower federal courts,<sup>134</sup> describe these defaults for what they are: distinct rules of unwritten law, which act of their own force in future cases unless abrogated or impliedly repealed.

Unwritten rules can affect the application of written ones without controlling or outranking the written text. Though the common law *can be* abrogated, that doesn't mean that it usually *is*. When Congress enacts a new criminal statute, even one phrased in general terms (“[a]ny person”), we don't understand it as addressing these defenses in particular. Nor, as Judge Frank Easterbrook has pointed out, would we read its blunt language on punishment (“shall be fined under this title”) to “override[] the rules of evidence, the elevated burden of persuasion, [or] the jury.”<sup>135</sup> The statute just identifies a new subject for prohibition, and then it takes other legal rules as it finds them — including rules of unwritten law.

Separating the roles of law and language helps avoid some of the confusions of the standard picture — and, indeed, of the skeptical approach. Consider the famous example of “no vehicles in the park.” As Fallon notes, that instruction, even given in a nonlegal context (say, by a private park owner to a gatekeeper), would never be relied on to exclude ambulances. Fallon explains this by suggesting that the phrase has a separate “reasonable meaning” — distinct from its semantic, intended, or contextual meanings — under which ambulances are ex-

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<sup>132</sup> See *id.* at 18 (Kennedy, J., concurring) (doubting “that Congress would have wanted the burden of proof for duress to vary from statute to statute depending upon the date of enactment,” and instead finding “no reason to suppose that Congress wanted to depart from the traditional principles for allocating the burden of proof”); *id.* at 19 (Alito, J., joined by Scalia, J., concurring) (noting that Congress has “create[d] new federal crimes without addressing the issue of duress,” and concluding that “the burdens remain where they were” at common law); *id.* at 22 (Breyer, J., joined by Souter, J., dissenting) (calling for the application of the common law rule as it had “evolve[d] through judicial practice”); see also Nelson, *supra* note 98, at 755 n.438 (describing the opinions in *Dixon*).

<sup>133</sup> See Nelson, *supra* note 98, at 759–61.

<sup>134</sup> See *id.* at 756 & n.439 (citing cases from the Second, Third, and Sixth Circuits).

<sup>135</sup> Frank H. Easterbrook, *The Case of the Speluncean Explorers: Revisited*, 112 HARV. L. REV. 1913, 1913 (1999).

empt.<sup>136</sup> But the reasons to let in the ambulance have little to do with the phrase's *meaning*. (If the owner stopped by and asked, "any vehicles in the park today?" the gatekeeper would be lying if she answered "no, boss, see you tomorrow," instead of "yes, boss, but I thought an ambulance would be okay.")

Letting ambulances into the park might be inconsistent with what the owner *said*, but it's consistent with the rule those words *established*.<sup>137</sup> The ambulance exception isn't part of the linguistic practices of American English, but of our social practices of giving and receiving instructions. That's why a similar emergency would be just as good an excuse to violate some other instruction with entirely different wording — such as "fetch some soupmeat."<sup>138</sup> The exception reflects a recognized social norm (of adjusting to emergencies) that can coexist with other, equally defeasible rules.

To return to the legal context, a statute forbidding "vehicles in the park" is similarly subject to defeat by recognized common law defenses. For example, the public authority defense excuses officials for certain acts done pursuant to their duties,<sup>139</sup> without incorporating those defenses as a matter of language. (That's why ambulances can drive through red lights, fire trucks can blare sirens at night, police can seize contraband without "possessing drugs," and so on.<sup>140</sup>) Fallon's example rests heavily on our shared intuition about the right outcome. But we don't need separate categories of meaning to explain that intuition. All we need is defeasibility, and the recognition that statutes don't lightly override the common law.

2. *Interpretive Rules*. — Unwritten law governs interpretation no less than substance. A prime example is the traditional canons of construction. These rules are partially codified in many states,<sup>141</sup> but not all of the rules, and not everywhere.<sup>142</sup> Without attempting a comprehensive survey, we identify three families of canons that seem highly unlikely to be rules of language. *Interpretive defaults* assign legal content to particular phrases or types of statutes. *Priority rules* rank the force of different legal sources. And *closure rules* determine outcomes

<sup>136</sup> Fallon, *supra* note 6, at 1260–62.

<sup>137</sup> See FINNIS, *supra* note 12, at 18; accord David A. Strauss, *Does Meaning Matter?*, 129 HARV. L. REV. F. 94, 95 (2015) (distinguishing the instruction's "meaning" from "what [the gatekeeper] is required to do, considering not just the [instruction] but also all the other relevant facts").

<sup>138</sup> See generally William N. Eskridge, Jr., "Fetch Some Soupmeat," 16 CARDOZO L. REV. 2209 (1995).

<sup>139</sup> See *United States v. Pitt*, 193 F.3d 751, 756 (3d Cir. 1999).

<sup>140</sup> Some jurisdictions have also codified some of these privileges. See, e.g., IOWA CODE § 321.231 (2016) (describing the "privileges" of a "driver of an authorized emergency vehicle").

<sup>141</sup> See generally Scott, *supra* note 95.

<sup>142</sup> See generally Gluck, *supra* note 92, at 1775–82, 1798–811.

in cases of uncertainty. These canons wouldn't make much sense as rules of language, but they make plenty of sense as rules of law.

(a) *Interpretive Defaults*. — Just as unwritten law can establish substantive defaults, it can also establish default rules of interpretation. Because these rules are unwritten, they depend to some extent on general practice. That means they're often easy to confuse with mere linguistic conventions, standard features of a language of legalese that help us make good guesses about intended or shared meanings. For example, as above, the rule of the last antecedent is primarily a rule of legal grammar.<sup>143</sup> The rule against “elephants in mouseholes”<sup>144</sup> just applies our ordinary pragmatic maxims of conversation.<sup>145</sup> The “linguistic canons”<sup>146</sup> of *expressio unius*<sup>147</sup> or *noscitur a sociis*<sup>148</sup> may have the sanction of long tradition, but we apply them only to the extent that we think they're accurate depictions of Congress's actual linguistic practices. Rules like these really do “describe (rather than prescribe) linguistic habits of mind,” offering “a shorthand way for the judge to describe the mental calculation that explains his or her conclusion.”<sup>149</sup>

By contrast, a legal default rule is more than a good heuristic; it applies of its own force. Consider the interpretive default rule under which courts “read a state-of-mind component into an offense even when the statutory definition d[oes] not in terms so provide.”<sup>150</sup> This rule applies even if we're convinced that the enacting legislature failed to advert to the question (or was irreconcilably divided on it), and even if the text says nothing about it. Because this “*Mens Rea* Canon”<sup>151</sup> is already recognized as part of the law, to displace it we need “some indication of congressional intent,” whether that indication is “express or implied.”<sup>152</sup>

We think “unwritten law” also best describes several of the traditional canons that have been abrogated by statute. The old repeal-revival rule was a rule of common law before it was abolished by § 108. So was the rule that the repeal of a criminal statute abates

<sup>143</sup> *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003).

<sup>144</sup> *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

<sup>145</sup> See Endicott, *supra* note 26, at 52 (“The [conversational] maxims that [H.P.] Grice identified have obvious parallels with maxims or ‘canons’ of statutory interpretation and of other forms of legal interpretation.”).

<sup>146</sup> See Barrett, *supra* note 91, at 117.

<sup>147</sup> See SCALIA & GARNER, *supra* note 31, at 107.

<sup>148</sup> *Id.* at 195.

<sup>149</sup> Manning, *supra* note 5, at 180.

<sup>150</sup> See, e.g., *Dean v. United States*, 556 U.S. 568, 574–75 (2009) (quoting *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437 (1978)).

<sup>151</sup> SCALIA & GARNER, *supra* note 31, at 303.

<sup>152</sup> *Staples v. United States*, 511 U.S. 600, 606 (1994).

pending prosecutions,<sup>153</sup> which was abrogated by the general saving statute.<sup>154</sup> And so was the rule forbidding reliance on section titles in interpretation,<sup>155</sup> which was replaced by a rule allowing recourse to section titles,<sup>156</sup> and which in turn has been overridden by statute for specific portions of the Revised Statutes and of the U.S. Code.<sup>157</sup> We've already argued (and hope it's easy to see by now) that the *statutes* involved here are legal rules, and not merely guesses as to meaning. But if that's true, then the rules that those statutes abrogate also seem like legal rules. Indeed, the fact that Congress thought it necessary to override these rules by statute, rather than informally announcing a contrary linguistic convention (such as by rewriting an internal drafting manual), suggests that it viewed them as rules of law, and not merely rules of language.

Similarly, we think plenty of modern canons are also intended as interpretive defaults, not just descriptive shorthand. And if they're established by unwritten law, they remain binding even if they aren't ideal. For instance, the prevailing doctrine on scrivener's error requires that errors be "absolutely clear";<sup>158</sup> some say a better theory would recognize error whenever it's more likely than not.<sup>159</sup> But whether that theory is a good idea is a different question than whether it's good law.

(b) *Priority Rules.* — Complex legal systems offer plenty of opportunities for different rules to conflict. How we settle these conflicts is a legal question, not a linguistic one: we already know what the rules *mean*, we just want to know which one *wins*. Sometimes we use written law to settle these conflicts: the Supremacy Clause, say, ranks federal law over state law.<sup>160</sup> But most of our solutions are unwritten.

Consider the last-in-time rule, which holds that no Congress can bind a future Congress and that new statutes therefore trump old ones.<sup>161</sup> As a matter of language, the legal system could work either way: both the new text and the old have a linguistic meaning, and the law could choose to give effect to either one. Indeed, the problem only

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<sup>153</sup> See *United States v. Chambers*, 291 U.S. 217 (1934).

<sup>154</sup> 1 U.S.C. § 109 (2012).

<sup>155</sup> See *Hadden v. Collector*, 72 U.S. (5 Wall.) 107, 110 (1866).

<sup>156</sup> See *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998).

<sup>157</sup> See, e.g., Act of June 25, 1948, Pub. L. No. 80-772, § 19, 62 Stat. 683, 862 (addressing Title 18); REV. STAT. § 5600, 18 Stat. 1091 (addressing the Revised Statutes generally); cf. *United States v. Holcomb*, 657 F.3d 445, 447 (7th Cir. 2011) (Easterbrook, C.J.) (rejecting relevance of "language [that] precedes the enacting clause," such as a statutory caption). See generally Dorsey, *supra* note 37, at 379–80.

<sup>158</sup> See Ryan D. Doerfler, *The Scrivener's Error*, 110 NW. U. L. REV. 811, 834 (2016).

<sup>159</sup> See *id.* at 834–43.

<sup>160</sup> U.S. CONST. art. VI, cl. 2.

<sup>161</sup> See, e.g., *United States v. Winstar Corp.*, 518 U.S. 839, 872–73 (1996) (opinion of Souter, J.).

arises when *both* statutes apply by their terms. Our legal system has to go beyond language to hold that the new statute wins.

Other priority rules create special exceptions to last-in-time. Think of the canon that the specific trumps the general,<sup>162</sup> or the related canon against implied repeal,<sup>163</sup> both of which preserve preexisting law as against new enactments. These, too, are invoked only when both provisions' language could cover the case.

Yet other priority rules regulate how statutes interact with external sources of law. These canons are designed, as Professor David Shapiro notes, to favor "continuity over change,"<sup>164</sup> fitting new statutes into an existing legal order. Classic examples include the presumption that Congress is aware of the whole corpus juris<sup>165</sup> and the canon against derogation of the common law.<sup>166</sup> The *Charming Betsy* canon and the rule against extraterritoriality put a thumb on the scale against displacing international or foreign law;<sup>167</sup> the presumption against retroactivity tries to avoid changing the law applicable to past transactions;<sup>168</sup> the presumption against preemption tries to preserve state law intact;<sup>169</sup> the doctrine of constitutional avoidance<sup>170</sup> disfavors interpretations that might be unconstitutional (or, nowadays, maybe-kind-sorta unconstitutional);<sup>171</sup> and so on. These canons don't really look like empirical claims about language and purpose, or even about community usage. Legislators today seem positively eager to violate international law, and the legal community knows it.<sup>172</sup> But the rules continue to apply nonetheless — requiring, in the manner of rules against implied repeal, some affirmative indication that a prior rule is to be set aside. They act more like the Dictionary Act than like a dictionary, governing until abrogated by something new.

(c) *Closure Rules.* — Interpretive defaults aren't a panacea. Even after we bring all our rules and canons to bear, legal language

<sup>162</sup> See, e.g., *Morton v. Mancari*, 417 U.S. 535, 550–51 (1973).

<sup>163</sup> See, e.g., *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662 (2007).

<sup>164</sup> Shapiro, *supra* note 106, at 927.

<sup>165</sup> See *Branch v. Smith*, 538 U.S. 254, 281 (2003) (opinion of Scalia, J.).

<sup>166</sup> See *United States v. Texas*, 507 U.S. 529, 534 (1993).

<sup>167</sup> See *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010) (extraterritoriality); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) (international law).

<sup>168</sup> See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265–69 (1994).

<sup>169</sup> See *Egelhoff v. Egelhoff*, 532 U.S. 141, 151 (2001).

<sup>170</sup> See *Clark v. Martinez*, 543 U.S. 371, 380–82 (2005).

<sup>171</sup> See Caleb Nelson, *Avoiding Constitutional Questions Versus Avoiding Unconstitutionality*, 128 HARV. L. REV. F. 331 (2015); Richard M. Re, *The Doctrine of One Last Chance*, 17 GREEN BAG 2D 173 (2014).

<sup>172</sup> Cf. Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 518 (1998) (noting "empirical evidence suggesting that compliance with international law is often not the political branches' paramount concern").



can still be unclear. When our tools of legal interpretation run out, then of course we make decisions only by drawing on other resources. Yet those resources might still be supplied by the law. What we term “closure rules” are rules of interpretation that don’t regulate the content of any enacted text in particular, but instead tell us how to proceed in cases of uncertainty.<sup>173</sup>

These rules are familiar in private law (consider the *contra proferentem* rule for contracts),<sup>174</sup> and they’re found in statutory interpretation too. Public land grants are resolved favorably to the sovereign;<sup>175</sup> statutes concerning Native American tribes are construed in the tribes’ favor;<sup>176</sup> criminal prohibitions give way at the edges to the rule of lenity;<sup>177</sup> and so on. These rules don’t guess at meaning *ab initio*, so much as instruct interpreters on how to handle any remaining doubts.<sup>178</sup>

Many of these closure rules resemble burdens of proof, which have a role to play in legal questions as well as questions of fact.<sup>179</sup> For example, the burden of establishing a federal court’s subject matter jurisdiction falls on the party invoking it.<sup>180</sup> If, at the end of the day, the judge is unsure about jurisdiction — whether because the facts are uncertain or because the relevant statute is unclear — then the case should be dismissed or remanded. Likewise, it’s the plaintiff’s job to establish the elements of the claim,<sup>181</sup> the defendant’s job to show that an affirmative defense applies,<sup>182</sup> and so on. In general, our system

<sup>173</sup> These rules include, but may not be strictly limited to, what Professor Adam Samaha formally defines as “law’s tiebreakers.” Adam M. Samaha, *On Law’s Tiebreakers*, 77 U. CHI. L. REV. 1661, 1665–71 (2010).

<sup>174</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 206 (AM. LAW INST. 1981) (“In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.”).

<sup>175</sup> See *United States v. Union Pac. R.R. Co.*, 353 U.S. 112, 116 (1957).

<sup>176</sup> See *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

<sup>177</sup> See *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion); see also Samaha, *supra* note 173, at 1714 (discussing the rule of lenity as “a powerful tiebreaker”).

<sup>178</sup> See Greenberg, *supra* note 2, at 76 (noting that the Standard Picture is hard to reconcile with lenity as it “provides no reason that the determination of which aspect of linguistic content constitutes the law should be different in the case of criminal statutes”).

<sup>179</sup> See Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859 (1992); Gary Lawson, *Stipulating the Law*, 109 MICH. L. REV. 1191 (2011); see also GARY LAWSON, *EVIDENCE OF THE LAW: PROVING LEGAL CLAIMS* (forthcoming 2017).

<sup>180</sup> 13 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3522, at 103–05 (3d ed. 2008).

<sup>181</sup> *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56–57 (2005).

<sup>182</sup> *Taylor v. Sturgell*, 553 U.S. 880, 907 (2008).

holds that “he who asserts must prove,”<sup>183</sup> so that burdens of persuasion largely track the assigned burdens of pleading.<sup>184</sup>

These burdens are sometimes assigned by substantive rules, but they have clear consequences for interpretation. When one side invokes a statute, it’s usually with the hope of showing that the statute supports an argument that is that side’s burden. As Judge Easterbrook has noted, in cases of fatal uncertainty, “[w]hoever relies on the statute loses.”<sup>185</sup> That kind of closure rule gives us a legally proper method of resolving the dispute — even when we don’t know what the statute really means, in some Platonic sense. And when all else fails, we send the plaintiff home empty-handed, because the plaintiff bears the burden to show an entitlement to relief.<sup>186</sup>

3. *The Structure of Interpretation.* — Unwritten law does more than supply canons and burden-shifting rules. It also serves as a foundation for our legal system’s interpretive process. It defines the materials we interpret, identifies their role in our legal system, and selects the interpretive approaches we bring to bear.

(a) *Defining the Object of Interpretation.* — What materials count as part of the written law? The answer may seem obvious: statutes, treaties, agency regulations, and so on. Yet the issue is more complicated than that. One of the most urgent debates over legislative history, as Professor Jeremy Waldron perceptively frames it, is whether committee reports or managers’ floor statements count as part of the material to be interpreted — whether they count as “acts of the legislators in their collective capacity,” things that *Congress* did or said or believed.<sup>187</sup> Written law sometimes specifies these materials’ legal effect.<sup>188</sup> But usually it doesn’t, leaving the question up to unwritten law.

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<sup>183</sup> Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19 HARV. J.L. & PUB. POL’Y 411, 425 (1996).

<sup>184</sup> See Epstein, *supra* note 99.

<sup>185</sup> Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 534 (1983).

<sup>186</sup> *Schaffer*, 546 U.S. at 56 (citing “the ordinary default rule that plaintiffs bear the risk of failing to prove their claims”). *But see* Samaha, *supra* note 173, at 1715 (“Civil statutory interpretation lacks a universal tiebreaker that can assure decisive outcomes.”).

<sup>187</sup> JEREMY WALDRON, *Legislators’ Intentions and Unintentional Legislation*, in LAW AND DISAGREEMENT 119, 146 (1999) (emphasis omitted); *cf.* *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 73 (2004) (Scalia, J., dissenting) (criticizing certain uses of legislative history as “a kind of ventriloquism,” whereby “[t]he Congressional Record or committee reports are used to make words appear to come from Congress’s mouth which were spoken or written by others”).

<sup>188</sup> See, e.g., Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1075 (codified at 42 U.S.C. § 1981 note (2012)) (“No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S 15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to Wards Cove — Business necessity/cumulation/alternative business practice.” (citation omitted)); see also John F. Manning, *Why Does Congress Vote on*

Consider the following private law example. The parol evidence rule holds that an integrated written agreement sweeps away the parties' earlier agreements and understandings.<sup>189</sup> As the Second Restatement of Contracts puts it, this isn't merely "a rule of interpretation," but a rule "defin[ing] the subject matter of interpretation" — that is, the particular aspects of the parties' interactions that actually carry legal force.<sup>190</sup> If two CEOs work out a deal on a napkin, they could always just sign the napkin and make that their contract. For very good reasons, they don't: they hire lawyers to rewrite the deal in legal language, working out details and subsidiary questions with the understanding that the formal document controls.

The same thing can happen in public law. As Gluck and Bressman note, members of Congress and expert committee staff typically work with policy ideas and "bullet points"; the draft bills are written by generalists at the Offices of Legislative Counsel.<sup>191</sup> Some committees never even *look* at draft text, debating and approving plain language summaries instead.<sup>192</sup> At some point before the floor vote, these summaries get translated into statutory language, which almost no one in Congress will read; everyone relies on the committee summaries instead.<sup>193</sup> As Chief Judge Robert Katzmann suggests, members of Congress and their staff sometimes use this legislative history as "a vehicle for details that drafters think are inappropriate for statutory text."<sup>194</sup>

The question is what to make of all this. Gluck and Bressman suggest that this process "undermines the emphasis that formalists place on the ultimate vote on the text of the statute."<sup>195</sup> That conclusion doesn't follow. Our system *might* give legal force to the committee proceedings, but it also might make a different choice. For instance, it might treat the committee's summary as a type of parol evidence — the legislative version of the CEOs' napkin, displaced by the integrated final bill.<sup>196</sup>

Different choices have different costs and benefits, which have been contested elsewhere and which we won't rehearse here. But which

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*Some Texts but Not Others?*, 51 TULSA L. REV. 559, 566 & n.52 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)) (providing other examples).

<sup>189</sup> See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 213 (AM. LAW INST. 1981).

<sup>190</sup> *Id.* § 213 cmt. a.

<sup>191</sup> Gluck & Bressman, *Part I*, *supra* note 39, at 968.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> KATZMANN, *supra* note 188, at 38.

<sup>195</sup> Gluck & Bressman, *Part I*, *supra* note 39, at 969.

<sup>196</sup> In certain cases, the "parol evidence" analogy might still treat the summary as *evidence* for claims about the text, see, e.g., Manning, *supra* note 5, at 171; John David Ohlendorf, *Textualism and the Problem of Scrivener's Error*, 64 ME. L. REV. 119, 157 (2011), but it makes the formalist emphasis on the text itself easier to understand.

choice our system has in fact *made* is a question of law. As Professor John Manning has argued, that can't be resolved by pointing to committee practice, because the question is what force the law gives to that practice.<sup>197</sup> (Similarly, even if napkin negotiations were widespread, that wouldn't resolve the force of the parol evidence rule.) Those are questions for our law of interpretation, perhaps informed by the specification of the legislative process in Article I, Section 7.

Chief Judge Katzmann writes that “[w]hen Congress passes a law, it can be said to incorporate the materials that it, or at least the law’s principal sponsors (and others who worked to secure enactment), deem useful in interpreting the law.”<sup>198</sup> Whether or not that’s true, it can’t be proven merely by observing staffers’ behavior. What statutes “incorporate” — and who has power to “deem” things “useful” — is a legal question, and it has to be answered by reference to our law of interpretation.<sup>199</sup>

(b) *Identifying Written Law’s Role.* — Once we know which written materials count, we still need to know what they count *for*. As noted above, different societies can use written law differently.<sup>200</sup> In a mostly illiterate society, a parliament might make law by oral agreement, with a written record produced only afterward. In that world, the oral agreement might be the law, and the reported text merely evidence thereof. Or a society could have its judges draft new laws, as in medieval England, so that for them the words “are little more than a faint and distant echo of a very real and well understood intention.”<sup>201</sup> (And if some unfortunate lawyer were to read the text too closely, he might well be told, per Lord Chief Justice Hengham, “Do not gloss the Statute; we understand it better [than] you do, for we made it.”<sup>202</sup>) Or it might treat its statutes as setting forth presumptive or *prima facie*

<sup>197</sup> See John F. Manning, *Inside Congress’s Mind*, 115 COLUM. L. REV. 1911, 1916 (2015).

<sup>198</sup> KATZMANN, *supra* note 188, at 48.

<sup>199</sup> Compare Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2124 n.18 (2016) (reviewing KATZMANN, *supra* note 188) (“Congress has not said [that statutes incorporate external materials], even though it easily could.”), and Manning, *supra* note 188, at 565–66 (asking why Congress rarely votes on external materials), with Robert A. Katzmann, *Response to Judge Kavanaugh’s Review of Judging Statutes*, 129 HARV. L. REV. F. 388, 389 (2016) (arguing that the Constitution “vests Congress with the authority to determine its own procedures,” and that “it is not for the courts to impose rules on the legislative branch as to how to do its business”). Note, however, that neither House (as far as we know) has tried to establish the authority of legislative history by rule.

<sup>200</sup> See *supra* note 53 and accompanying text.

<sup>201</sup> Thorne, *supra* note 122, at 203; see also H.G. Richardson & George Sayles, *The Early Statutes*, 50 L.Q. REV. 201, 203 (1934) (noting that in early thirteenth-century England, “[t]here had been much miscellaneous law-making,” but that “no one had collected these enactments systematically, and when they were remembered, they were remembered indistinctly and imperfectly”).

<sup>202</sup> *Aumeye v. Abbat*, YB 33 Edw. 1, Mich. (1305) (Eng.), reprinted in 5 YEAR BOOKS OF THE REIGN OF KING EDWARD THE FIRST 78, 82 (Alfred J. Horwood ed. & trans., 1879).

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norms, with judges expected to depart from them in appropriate cases — much the way we now treat the Sentencing Guidelines.

What sets our society apart from these others isn't our written statutes (or written committee reports, if you prefer those). The presence of a writing doesn't tell us what the writing's *role* is — whether it's there to preserve the legislative bargain, to record an oral agreement, to refresh the judge's recollection, to guide the exercise of discretion, or to do something else. Pretty much everybody agrees that in our system, it's the first of these. But that's a consequence of an unwritten legal commitment, namely that written law is more than a guide or a mnemonic device.

(c) *Choosing an Interpretive Approach.* — Once we know what written law counts for, we still need to know what it says. Here, too, unwritten law plays a role. Private law sometimes commits to particular interpretive theories for particular kinds of written instruments. As noted above, the Second Restatement of Contracts counsels a more textualist approach to recognized terms of art; older doctrines prescribed more formal interpretation of deeds than of wills; and so on.<sup>203</sup> These commitments might be codified in particular statutes, but they don't have to be, so long as they're recognized as law.

Our system also takes certain positions on the interpretation of public law. When any two authors disagree on what they wish to convey, a strict intentionalist, for example, would treat the language they produce as “gibberish.”<sup>204</sup> But in the United States, this never happens. Lawyers don't actually cast aside any statutes after learning that some (or even many) legislators disagreed about their meanings. We don't mean to argue that pure intentionalism is conceptually false, just that it's not our conventional method of interpretation. Neither is pure textualism; lawyers don't toss aside statutes simply because there's more than one linguistically acceptable public meaning of the text. Nor do lawyers conclude, when a number of legislative purposes were at work, that any resulting statute is therefore incoherent — or, equivalently, that one purpose must have been the *real* purpose to which all others must yield.<sup>205</sup> They proceed instead to the artificial intent, meaning, and purpose to which the law points.

Each of these approaches has something, in theory, to be said for it. Textualism gives legislators an incentive to express formally what's important to them. This makes life easier for judges, who have fewer

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<sup>203</sup> See *supra* notes 79–86 and accompanying text.

<sup>204</sup> Alexander, *supra* note 43, at 542.

<sup>205</sup> See *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (per curiam) (noting that “no legislation pursues its purposes at all costs,” *id.*, and that “it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law,” *id.* at 526).

places to look when trying to find the legislature's choice. And it makes life easier for the public, which can place more trust in what's written down in the statute books. On the other hand, intentionalists will sacrifice this formality and stability to advance the legislators' more specific reasons for choosing a particular rule to communicate. Purposivists cast aside those specific reasons to advance the more general goals that the legislators thought their choices were serving. And there will always be future circumstances that legislators can't foresee, or that pose controversies they can't agree about; an "equity of the statute" approach trusts judges or other interpreters to deal with those circumstances appropriately, even if it means deviating from the text.<sup>206</sup>

We have our own views on which of these approaches is best. But this is something on which reasonable people can disagree, and so can reasonable societies. Whether our system is textualist, intentionalist, purposivist, or something else is a legal question, to be answered by our sources of law — and, in the end, by the appropriate theory of jurisprudence. (We assume in this Article something like Hartian positivism,<sup>207</sup> partly for ease of exposition, though much of our framework should hold true on any mainstream theory.) Legal convention might *happen* to endorse one of these "pure" theories of interpretation, but it also might not. Arguments about the approaches used in our legal system should be conducted as legal arguments, based on legal materials and not (or not primarily) on pure interpretive theory.

As it happens, our legal system uses a decidedly impure approach to interpretation. Consider the Court's statement that we "presume that a legislature says in a statute what it means and means in a statute what it says there."<sup>208</sup> This claim presupposes that there is a "legislature" that "says" and "means" things, that uses language in something like the way natural persons do. We read a statute *as if* it had been written by a sole legislator, *as if* that legislator were aware of the whole code, *as if* that legislator speaks the way we speak and chooses words for reasons we can comprehend,<sup>209</sup> and so on. The legislative

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<sup>206</sup> Compare John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001) (arguing that the equity of the statute doctrine was rejected in the early republic), and John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648 (2001) (contending that the Constitution requires faithful agency), with William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990 (2001) (arguing that the equity of the statute doctrine was not rejected in the early republic).

<sup>207</sup> See Baude, *supra* note 53, at 2365 n.80; Sachs, *supra* note 53, at 825–26.

<sup>208</sup> *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992).

<sup>209</sup> Cf. Manning, *supra* note 5, at 171 (accepting, with other textualists, that "a statute's ulterior purpose may indicate the sense in which Congress used the relevant term").

intent we impute might be “apparent,”<sup>210</sup> “fictional,”<sup>211</sup> “objectified,”<sup>212</sup> or “constructed,”<sup>213</sup> but it’s still proper according to law.

Some scholarly approaches to interpretation already make room for legal rules. Certain public meaning theories, for example, focus not on actual understandings formed by actual members of the public, but on the hypothetical understanding of a “reasonable reader”<sup>214</sup> familiar with all applicable legal conventions — or, more precisely, on the hypothetical intentions of a “reasonable drafter”<sup>215</sup> who was aware of those conventions while drafting.

These moves can be controversial, especially as to texts from the distant past. Historians such as Professors Saul Cornell and Jack Rakove have objected strongly to lawyers’ replacing actual figures from the past with constructed ones.<sup>216</sup> But as Professors Gary Lawson and Guy Seidman point out, the reasonableness here is of a kind with other garden-variety legal constructs, such as the “reasonable man” of tort law.<sup>217</sup> While historical facts are of course central to understanding documents produced in the past, “the ultimate inquiry is legal”<sup>218</sup>: what impact did this particular instrument make on the law when it was enacted? For that purpose, the “touchstone” of legal interpretation “is not the specific thoughts in the heads of any particular historical people” — whether at Philadelphia, in Congress, or in society at large — “but rather the hypothetical understandings of a reasonable person who is artificially constructed by lawyers.”<sup>219</sup> The fiction is useful because it’s a legal fiction, built by our legal rules.<sup>220</sup>

<sup>210</sup> Andrew S. Gold, *Absurd Results, Scrivener’s Errors, and Statutory Interpretation*, 75 U. CIN. L. REV. 25, 33 (2006).

<sup>211</sup> Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L.J. (forthcoming 2017) (manuscript at 1), <http://ssrn.com/id=2823751> [<https://perma.cc/CN45-WMW3>].

<sup>212</sup> SCALIA, *supra* note 52, at 17 (urging a search for “the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*”).

<sup>213</sup> Lawson & Seidman, *supra* note 48, at 61–67; *see also* Gary Lawson, Commentary, *No History, No Certainty, No Legitimacy . . . No Problem: Originalism and the Limits of Legal Theory*, 64 FLA. L. REV. 1551, 1558–59 (2012) (reiterating this position).

<sup>214</sup> SCALIA & GARNER, *supra* note 31, at 33.

<sup>215</sup> *See* Cory R. Liu, Note, *Textualism and the Presumption of Reasonable Drafting*, 38 HARV. J.L. & PUB. POL’Y 711, 722 (2015).

<sup>216</sup> *See, e.g.*, Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 FORDHAM L. REV. 721, 735 (2013) (arguing that many scholars have “unconsciously poured their own ideological prejudices into the ideal readers they constructed”); Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, The Poverty of Public Meaning Originalism*, 48 SAN DIEGO L. REV. 575, 586 (2011) (describing the “imaginary disinterested original reader of the Constitution” as “nothing more nor less than a creature of the modern originalist jurist’s imagination”).

<sup>217</sup> Lawson & Seidman, *supra* note 48, at 47 & n.3.

<sup>218</sup> *Id.* at 48.

<sup>219</sup> *Id.*

<sup>220</sup> Professor Richard Ekins argues that legislatures really do have intentions, products of joint standing intentions “to legislate like a reasonable sole legislator,” RICHARD EKINS, THE NA-

### C. Interpretive Rules and the Constitution

Thus far, our discussion of public law has focused on statutes. But interpretive rules can apply to constitutional text as well. The Constitution is a written instrument, and to determine its legal effect, we have to call on the law of interpretation.

As regards the Constitution, only a very small part of our interpretive law is written. We can find a few explicit rules of construction in the Territories Clause of Article IV,<sup>221</sup> as well as in the Ninth,<sup>222</sup> Eleventh,<sup>223</sup> and Seventeenth Amendments.<sup>224</sup> But that's about it.<sup>225</sup> Congress hasn't tried to legislate rules of constitutional interpretation, and as discussed below, its power to do so is far from clear. This leaves a great deal of constitutional interpretation up to unwritten law.

Consider *United States v. Chambers*, the case of an indicted bootlegger whose guilty plea hadn't reached final judgment when Prohibition ended.<sup>226</sup> At common law, repealing a criminal statute would abate a pending prosecution.<sup>227</sup> With the underlying statute gone, the

TURE OF LEGISLATIVE INTENT 236 (2012), and “to change the [law] when there is good reason to do so,” *id.* at 219. What legislators share when they legislate is simply the intention to adopt, if it gets enough votes, a particular proposal to change the law. See Richard Ekins & Jeffrey Goldsworthy, *The Reality and Indispensability of Legislative Intentions*, 36 SYDNEY L. REV. 39, 67 (2014). If this account is right, then in this situation there isn't much difference between the legal fiction and the reality.

<sup>221</sup> U.S. CONST. art. IV, § 3, cl. 2 (“[N]othing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.”).

<sup>222</sup> *Id.* amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”); see William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1742, 1796–98 (2013) (discussing the Ninth Amendment); see also Kurt T. Lash, *A Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 895 (2008); Ryan C. Williams, *The Ninth Amendment as a Rule of Construction*, 111 COLUM. L. REV. 498 (2011).

<sup>223</sup> U.S. CONST. amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”); see Kurt T. Lash, *Leaving the Chisholm Trail: The Eleventh Amendment and the Background Principle of Strict Construction*, 50 WM. & MARY L. REV. 1577, 1695 (2009); Steven Menashi, *Article III as a Constitutional Compromise: Modern Textualism and State Sovereign Immunity*, 84 NOTRE DAME L. REV. 1135, 1184 (2009).

<sup>224</sup> U.S. CONST. amend. XVII, cl. 3 (“This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.”).

<sup>225</sup> But see Christopher R. Green, *“This Constitution”: Constitutional Indexicals as a Basis for Textualist Semi-Originalism*, 84 NOTRE DAME L. REV. 1607 (2009) (seeking to distill other interpretive rules from the text); Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857 (2009) (same).

<sup>226</sup> 291 U.S. 217, 221–22 (1934). Chambers's co-conspirator was set to go to trial and demurred once Prohibition ended. *Id.* We are indebted for this example to Professor John Harrison.

<sup>227</sup> See *id.* at 223; *Yeaton v. United States*, 9 U.S. (5 Cranch) 281, 283 (1809) (“[I]f no sentence had been pronounced, it has been long settled, on general principles, that after the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some special provision be made . . .”).



court lost its power to punish the offense, even though the defendant's actions were wholly illegal when performed. In 1871, Congress abrogated this rule by passing the general savings statute.<sup>228</sup> But as the Supreme Court noted in *Chambers*, that statutory rule of interpretation “applies, and could only apply, to the repeal of statutes by the Congress.”<sup>229</sup> When the Twenty-First Amendment repealed the Eighteenth and pulled the constitutional rug out from under Prohibition, there was no constitutional savings provision to keep the prosecutions going. And because Congress couldn't extend its own power to punish violators, the common law abatement rule applied in its stead.

What's most interesting for our purposes is how the Court described its ruling in *Chambers*. The Court didn't try to offer a judicial gloss on the text itself; it didn't say, for example, that the limited enumeration of Article I simply requires a certain approach to repeals. That would be an uphill argument: Congress had enjoyed full power to forbid Chambers's conduct when it occurred, and as a matter of ordinary English, the language of the Twenty-First Amendment took no sides. There was no evidence that Congress and the States had any particular intentions about abating prosecutions. If anything, the public meaning pointed the other way: as the government argued, most states had joined Congress in abrogating the common law rule.<sup>230</sup>

Instead, the Court addressed head-on the government's argument “that the rule which is invoked is a common law rule and is opposed to present public policy.”<sup>231</sup> As the Court saw it, an issue of constitutional power to punish was not an issue “of public policy which the courts may be considered free to declare.”<sup>232</sup> Nor was it one on which the common law had “develop[ed]” over time; “the reason for the rule [had] not ceased,” and the underlying principle of limiting punishments was “not archaic but rather is continuing and vital.”<sup>233</sup> Though most states had abolished the rule by statute, those statutes didn't reflect an evolution in the common law over time, but “themselves recognize[d] the principle which would obtain in their absence.”<sup>234</sup> In other words, the Court in *Chambers* was indeed enforcing a common law rule, one that the Constitution nonetheless made immune from certain kinds of statutory abrogation.

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<sup>228</sup> Act of Feb. 25, 1871, ch. 71, § 4, 16 Stat. 431, 432 (codified as amended at 1 U.S.C. § 109 (2012)) (“[T]he repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide . . .”).

<sup>229</sup> *Chambers*, 291 U.S. at 224.

<sup>230</sup> *Id.* at 226.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

Our view is that the Court in *Chambers* generally got it right, and for the right reasons. Whether or not the Twenty-First Amendment automatically abated prosecutions was something to be answered on its ratification, not something that Congress could decide later. *Maybe* Congress can set new defaults for interpreting new amendments, if that's necessary and proper to carry into execution some other power (say, the power to propose amendments). But the general savings statute hadn't done so, leaving the common law abatement rule in effect.

While the example of common law abatement may seem picayune, there are lots of other places where constitutional interpretation relies on law to fill the gaps. Just for starters, think of the presumption of constitutionality (or your preferred burden of proof for constitutional questions);<sup>235</sup> the authority of constitutional precedents; the unenumerated power of congressional contempt; or the rules against legislative entrenchment.<sup>236</sup> Applying our law of interpretation to the Constitution can be both trickier and more consequential than usual, due to Congress's limited power to fix errors or to lay down new rules.<sup>237</sup> But that simply pushes unwritten law to the fore.

What's more, just as for statutes, we look to unwritten law to identify the Constitution's legal force and the object of constitutional interpretation. As we've both argued elsewhere, just as the constitutional document can't tell us whether it's really our law or merely a pretender like the Articles of Confederation, it also can't settle how its own text should be understood<sup>238</sup> — or whether its drafting materials count as part of the material to be interpreted,<sup>239</sup> or whether it offers rules or guidelines,<sup>240</sup> and so on. The Constitution's legal status and legal content may both be settled instead by unwritten law.

#### IV. IMPLICATIONS

We've argued that legal systems can and should have a law of interpretation, and that our system does indeed have one. Now we turn to the question of implications. Recognizing our law of interpretation can resolve two important confusions in public law: the existence and

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<sup>235</sup> See generally Christopher R. Green, *Constitutional Theory and the Activismometer: How to Think About Indeterminacy, Restraint, Vagueness, Executive Review, and Precedent*, 54 SANTA CLARA L. REV. 403 (2014); Lawson, *Proving the Law*, *supra* note 179.

<sup>236</sup> See generally Stephen E. Sachs, *The "Unwritten Constitution" and Unwritten Law*, 2013 U. ILL. L. REV. 1797.

<sup>237</sup> Cf. Richard Primus, *The Cost of the Text*, 102 CORNELL L. REV. (forthcoming 2017) (manuscript at 11–12), <http://ssrn.com/id=2812872> [<https://perma.cc/A3NR-VEPP>].

<sup>238</sup> Baude, *supra* note 53, at 2363–65; Sachs, *supra* note 53, at 829–32.

<sup>239</sup> See *supra* p. 1112.

<sup>240</sup> See *supra* pp. 1114–15.

authority of the canons and the use of construction as a supplement to interpretation.

*A. Assessing the Canons*

Once we see that interpretation is governed by legal rules, we can think more clearly about what kind of rules these are. As mentioned above, there are a great many canons, and indeed no single authoritative list of them all.<sup>241</sup>

At the same time, scholarly attempts to enumerate the canons have created endless disagreement and confusion.<sup>242</sup> What authority do these canons have, if any? How would one know whether a proposed canon is real or false? The competing accounts seem to make these questions harder, and also raise the possibility that they're ultimately indeterminate. Our framework lets us see the logic of the canons and helps point the way to some answers.

1. *Their Authority.* — Consider authority first. As one might expect by this point, we distinguish linguistic rules, which are features of how some group of actual people actually speak, from the legal rules that regulate how a given legal system handles texts. This roughly tracks two existing categories in statutory interpretation: “linguistic” (or “textual”) canons, which seek “to decipher the legislature’s intent,” and “substantive” canons that “promote policies external to a statute.”<sup>243</sup>

This division immediately raises a question of authority. Linguistic canons piggyback on the authority of whoever adopted the instrument in the first place. These canons are just attempts to read whatever the authors wrote, according to the appropriate theory of reading — authorial intention, public meaning, and so on. By definition, nonlinguistic canons attempt to do something else. So why should we apply them?

To some scholars, the answer is that “we shouldn’t.” Professor Amy Barrett, for example, notes that seemingly substantive canons like the rule of lenity or *Charming Betsy* have been with us since preconstitutional or early American practice.<sup>244</sup> So while these canons are hard to square with a simple faithful-agency account, it seems like-

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<sup>241</sup> See *supra* p. 1088.

<sup>242</sup> See, e.g., William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531 (2013) (reviewing SCALIA & GARNER, *supra* note 31, and criticizing Scalia and Garner’s turn to the canons); Andrew Koppelman, *Passive Aggressive: Scalia and Garner on Interpretation*, 41 BOUNDARY 2: INT’L J. LITERATURE & CULTURE 227, 229–31 (2014) (same).

<sup>243</sup> Barrett, *supra* note 91, at 117 & n.27; see also Gluck & Bressman, *Part I*, *supra* note 39, at 924; *id.* at 924–25 (identifying a third category of “extrinsic” canons, which refer to extratextual materials such as legislative history).

<sup>244</sup> Barrett, *supra* note 91, at 125–54.

ly that they're at least consistent with Article III's judicial power.<sup>245</sup> But Barrett argues that such canons have no more legal authority to affect interpretation than would "a more general concern for equity";<sup>246</sup> those who give only modest scope to the latter must do the same for the former. Perhaps some rules can be derived from the Constitution itself,<sup>247</sup> but most can't be — leading Barrett to doubt the validity even of common law defenses to criminal statutes.<sup>248</sup> Others, like Professor William Eskridge, take the persistence of these canons to "negate the claims of both textualist and purposivist judges that they are nothing more than the faithful agents of legislatures or umpires calling balls and strikes."<sup>249</sup>

Our view resolves this puzzle in a different way. Legal canons don't need to be recast as a form of quasi-constitutional doctrine, because they don't need to outrank the statutes to which they apply. Instead, the canons stand on their own authority as a form of common law. This authority distinguishes them from "a more general concern for equity"<sup>250</sup> — unless, of course, a general concern for equity turns out to be an established rule of unwritten law.<sup>251</sup>

2. *Their Validity.* — The division between language and law also tells us how to assess each purported canon as valid or not. Much recent research focuses on "how Congress actually functions,"<sup>252</sup> exploring its internal dynamics and approaches to drafting.<sup>253</sup> But as Gluck and Bressman helpfully acknowledge, the implications of this research for any given canon depend on that canon's role.<sup>254</sup> Some canons might be effective guides to legislative intent,<sup>255</sup> while others might

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<sup>245</sup> *Id.* at 155–58; see also SCALIA, *supra* note 52, at 29.

<sup>246</sup> Barrett, *supra* note 91, at 163.

<sup>247</sup> *Id.* at 163–64.

<sup>248</sup> *Id.* at 165.

<sup>249</sup> WILLIAM N. ESKRIDGE, JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 12–13 (2016).

<sup>250</sup> Barrett, *supra* note 91, at 163.

<sup>251</sup> See, e.g., Eskridge, *supra* note 206 (arguing that the "equity of the statute" was part of the Founders' law of interpretation — a historical claim on which we take no view).

<sup>252</sup> KATZMANN, *supra* note 188, at 8.

<sup>253</sup> See, e.g., Cheryl Boudreau et al., *What Statutes Mean: Interpretive Lessons from Positive Theories of Communication and Legislation*, 44 SAN DIEGO L. REV. 957 (2007); James J. Brudney, *Intentionalism's Revival*, 44 SAN DIEGO L. REV. 1001 (2007); Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317 (2014); Gluck & Bressman, *Part I*, *supra* note 39; Bressman & Gluck, *Part II*, *supra* note 39; Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807 (2014); Ganesh Sitaraman, *The Origins of Legislation*, 91 NOTRE DAME L. REV. 79 (2015); Walker, *supra* note 39; see also Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575 (2002).

<sup>254</sup> Gluck & Bressman, *Part I*, *supra* note 39, at 949.

<sup>255</sup> *Id.* at 906–07; *id.* at 949 (describing "feedback" and "approximation" canons).

not;<sup>256</sup> they portray the latter as potentially advancing “rule of law norms,” making the legal system work better.<sup>257</sup> We propose a slightly different dichotomy: canons of language and canons of law.

Because language depends on practice, a linguistic rule stands or falls by its use. Noah Webster’s 1828 dictionary is a poor tool for understanding the last omnibus spending bill if it doesn’t describe how people in and around Congress now speak. Similarly, a linguistic canon founded on the way people used to speak in 1828 might be a poor tool for understanding what Congress produces today. As heuristics about actual linguistic practices, these canons should be directly falsifiable by empirical studies of the relevant community.<sup>258</sup>

By contrast, legal canons operate even if — indeed, especially if — the drafters are unaware of them. At least on our view of jurisprudence,<sup>259</sup> law also depends on practice, but not in quite the same way that language does. Unlike the primary rules of a language, most legal rules derive their validity from other, higher-order rules and practices — and they remain valid even after they’ve fallen out of common use, so long as those higher-order rules have not.<sup>260</sup> If nearly everyone forgot about the semicolon, it’d quickly disappear from standard English; but we can all forget some details of the U.S. Code (say, that it’s illegal to have switchblades on guano islands), so long as we remember how to look them up later.<sup>261</sup> Many legal canons are common law default rules, so they keep chugging along until they’re affirmatively displaced. If anything, the lack of knowledge about a canon *reinforces* the strength of that canon: what legislators were unaware of, they’re unlikely to have displaced.

To be sure, legal canons can eventually be falsified by practice, too. Unwritten law can usually be displaced by statute (unless it’s somehow been constitutionally protected from abrogation).<sup>262</sup> Or it might evolve on its own terms, depending on one’s theory of the common law. And unwritten rules, like all legal rules, could all be thrown over if we move to a different legal regime. But unless those things happen, un-

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<sup>256</sup> *Id.* at 907; *id.* at 949 (describing “disconnected” and “rejected” canons).

<sup>257</sup> *Id.* at 961; accord BRIAN G. SLOCUM, ORDINARY MEANING 180 (2015) (“[S]ubstantive canons, rather than contributing to ordinary linguistic meaning, . . . offer reasons for deviating from it in order to protect other interests deemed to be more important in the particular case.”).

<sup>258</sup> See SLOCUM, *supra* note 257, at 186 (“If a textual canon does not capture general language use, there is no justification for [its] existence . . .”).

<sup>259</sup> See *supra* p. 1116.

<sup>260</sup> See HART, *supra* note 55, at 103.

<sup>261</sup> See 15 U.S.C. § 1243 (2012); 18 U.S.C. § 7(4) (2012); see also KEVIN UNDERHILL, THE EMERGENCY SASQUATCH ORDINANCE (2013); Note, *Desuetude*, 119 HARV. L. REV. 2209, 2209 (2006) (recognizing that the United States has no recognized doctrine of desuetude outside of West Virginia).

<sup>262</sup> See generally Sachs, *supra* note 101.

written legal rules remain in force even when we lack complete agreement about them.

We think these presumptions are implicit in our shared understanding of language and law, but the discussion is also confounded by loose talk. For instance, one often hears that Congress is “presumed” to write statutes “in light of [a] background principle” like equitable tolling.<sup>263</sup> That’s fine, but it seems to invite the possibility that the presumption could be rebutted if a sufficient number of legislators were unaware of the principle. As Manning has aptly observed, though, this kind of presumption operates “[w]hether or not an actual legislator is subjectively aware of the law’s background principles”; it’s better seen as an “assumption that a ‘reasonable legislator’” — that is, a constructed one, not a real one — “knows *or should know* the social and linguistic practices of the . . . legal community.”<sup>264</sup>

We think it’s more helpful to recognize that different canons are the products of different practices in different communities. Linguistic canons are designed to handle *communications*, so their validity turns directly on the linguistic practices of those who write and read legislation. But individual legal rules are derived from broader legal conventions, so their validity turns on the recognized legal practices of those who constitute the legal system (perhaps including judges, officials, lawyers, or the legally educated public),<sup>265</sup> and on inferences from these practices that the participants themselves might not have drawn. We can say that an enacting Congress “understood” or “knew” or “accepted” all these rules, but that’s true only of Congress-the-legal-entity, the artificial construct of our legal rules. The natural persons we call “members of Congress” didn’t have to know these rules at all, and it seriously confuses matters to pretend that they did.

This distinction also provides a first cut at how to understand the implications of the empirical studies. Gluck and Bressman discovered that many established canons of interpretation either are unknown to congressional staffers or don’t reflect the staffers’ claims about the drafting process.<sup>266</sup> The authors correctly note that these facts, if true, could potentially undermine claims that methods of statutory interpretation can be wholly traced back to the legislative authority.<sup>267</sup>

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<sup>263</sup> See *Young v. United States*, 535 U.S. 43, 49–50 (2002).

<sup>264</sup> John F. Manning, *Chevron and the Reasonable Legislator*, 128 HARV L. REV. 457, 468 (2014) (emphasis added); cf. Greenberg, *supra* note 21, at 254 (“[T]he canons specify how legislation properly contributes to the law, rather than what the legislature is likely to have intended as a matter of actual psychological fact.”).

<sup>265</sup> Cf. Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719 (2006) (noting jurisprudential disagreement over this community’s scope).

<sup>266</sup> Gluck & Bressman, *Part I*, *supra* note 39, at 933–34, 942–46.

<sup>267</sup> *Id.* at 909, 917; Bressman & Gluck, *Part II*, *supra* note 39, at 788–90.

We would add that the distinction between linguistic and legal canons tells us what should come next. Because linguistic canons live or die by their usage, Gluck and Bressman's empirical claims might be highly relevant to them.<sup>268</sup> By contrast, congressional ignorance of *legal* canons is largely unmomentous.<sup>269</sup> As we've said, legal canons operate on a different track, so our representatives' lack of knowledge about them is as irrelevant as their ignorance of accomplice liability or general federal question jurisdiction.

3. *Some Examples.* — The law of interpretation lets us take stock of proposed canons by seeing whether they satisfy either of the two paths to validity: linguistic or legal. To satisfy the linguistic path is to show that the canon accurately gauges how lawmakers and law-readers communicate.<sup>270</sup> To satisfy the legal path is to show that the canon meets the general standards for the validity of legal rules, as supplied by the appropriate theory of jurisprudence. (In our view, this involves being the product of secondary rules yielded by our rule of recognition; applications of your own preferred theory are left as an exercise for the reader.) Often a canon is plausible only on one path or the other; but either is sufficient to validate its use.

An example might help. Scalia and Garner list among their fifty-seven canons the "Series-Qualifier": "When there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series."<sup>271</sup> The canon's application to a 1998 child pornography law was extensively discussed in *Lockhart v. United States*, recently decided by the Supreme Court.<sup>272</sup> But, as one observer noted, nobody proposed this maxim *as a canon* until Justice Scalia "pioneered" it in his book a few years ago.<sup>273</sup> What sense does it make for a Justice to propose a

<sup>268</sup> One would also need to supplement studies like Gluck and Bressman's with other inquiries. For example, who in the legislature is part of the relevant linguistic community — lawmakers or their staff? See Gluck & Bressman, *Part I*, *supra* note 39, at 906, 923–24 (suggesting that it should be staff). And if the latter, which staff? Compare Bressman & Gluck, *Part II*, *supra* note 39, at 737–48 (favoring policy staff over legislative counsel), with Shobe, *supra* note 253, at 863–65 (favoring legislative counsel over policy staff). What about people outside the legislature who actually draft the proposals, such as agency counsel or interest-group lobbyists? See Sitaraman, *supra* note 253, at 103–06. And so on.

<sup>269</sup> *But cf.* Gluck & Bressman, *Part I*, *supra* note 39, at 956 ("[S]ome substantive canons have goals that seem less dependent on drafter awareness or use than others.").

<sup>270</sup> We bracket the question of *what text or document* should be understood as the authoritative communication. See *supra* section III.B.3.a, pp. 1112–14.

<sup>271</sup> SCALIA & GARNER, *supra* note 31, at 147.

<sup>272</sup> 136 S. Ct. 958, 965–66 (2016); *id.* at 969–73 (Kagan, J., dissenting); see also *id.* at 967–68 (majority opinion) (describing the history of the provision at issue).

<sup>273</sup> Asher Steinberg, *The Government Jumps off a Cliff in Lockhart v. U.S., and Why All Textualism Is (Constructive) Intentionalism*, NARROWEST GROUNDS (Oct. 22, 2015, 5:21 PM), <http://narrowestgrounds.blogspot.com/2015/10/the-government-jumps-off-cliff-in.html> [<https://perma.cc/2VM4-NRFD>].

previously nonexistent canon in a book in 2012, and then for the Court to discuss it in 2016, in the course of interpreting a statute from 1998?

The key to making sense of this new canon is to understand its status. The series-qualifier canon purports to be “a matter of common English” that’s “highly sensitive to context”<sup>274</sup> — hence, a linguistic rule. That means it stands or falls on its use. If it accurately describes how certain people speak, then it’s a valid canon of usage.<sup>275</sup> The fact that it hadn’t been previously known by that name is no more defeating than the fact that a usage dictionary has a new entry in it.

Similarly, even if a linguistic canon *is* oft-recognized, that doesn’t make it right. Just as formal recognition isn’t necessary for a linguistic canon to be valid, it isn’t sufficient either. What matters is usage. Consider the more famous canon against superfluity or surplusage, which also purports to be linguistic.<sup>276</sup> It might well turn out that “some overlap is common in laws of [a certain] kind,” and that “lawmakers, like Shakespeare characters, sometimes employ overlap or redundancy so as to remove any doubt and make doubly sure.”<sup>277</sup> Lawmakers might use repetitive “doublet” phrases such as “metes and bounds” or “cease and desist” — another “form of redundancy in which lawyers delight.”<sup>278</sup> And readers of statutes may well expect and comprehend such redundancy. If redundancy were actually far more common than we realized among the relevant readers and speakers, then the canon against superfluity might need to be modified or abandoned.

It’s no answer to say, as some defenders of the surplusage canon do, that “[s]tatutes *should* be carefully drafted, and encouraging courts to ignore sloppily inserted words results in legislative free-riding” — or that legislators “ought to hire eagle-eyed editors” to conform draft bills to the canon.<sup>279</sup> The linguistic canons were made for man, not man for the linguistic canons. Absent binding law to apply, declaring that Congress “*should*” adhere to some particular rule of usage (such as avoiding surplusage, or spelling “colour” with a “u”) would be like declaring that Congress “*should*” write all distances in furlongs and all numbers in binary — and should hire extra staffers to make it so.

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<sup>274</sup> SCALIA & GARNER, *supra* note 31, at 147, 150.

<sup>275</sup> See *Lockhart*, 136 S. Ct. at 970 (Kagan, J., dissenting) (“That interpretive practice of applying the modifier to the whole list boasts a fancy name[,] . . . but, as my opening examples show, it reflects the completely ordinary way that people speak and listen, write and read.”).

<sup>276</sup> SCALIA & GARNER, *supra* note 31, at 174–79.

<sup>277</sup> *Loving v. IRS*, 742 F.3d 1013, 1019 (D.C. Cir. 2014) (Kavanaugh, J.) (citing Gluck & Bressman, *Part I*, *supra* note 39, at 934–35).

<sup>278</sup> *In re Ocwen Loan Servicing, LLC Mortg. Servicing Litig.*, 491 F.3d 638, 646 (7th Cir. 2007) (Posner, J.) (quoting BRYAN A. GARNER, *THE REDBOOK: A MANUAL ON LEGAL STYLE* § 11.2(f) (2d ed. 2006)).

<sup>279</sup> SCALIA & GARNER, *supra* note 31, at 179.



So that's linguistic canons. When we turn to canons that seem implausible as accounts of linguistic practice, it's a different story. The rule of lenity, for instance, isn't an empirical claim that a particular Congress meant to express solicitude for criminal defendants. (If it were, no one would believe it.) Nor are these canons founded on an ability to make the legal system work better; just like any other legal rules, canons might sometimes make the legal system worse.<sup>280</sup> Instead, these canons have to be tested according to the appropriate theory of determining unwritten law. We, following our previously expressed views on positive features of the American legal system, would ask whether the canons were rules of law at the Founding or have validly become law since, pursuant to rules of legal change that were themselves valid in this way.<sup>281</sup> But other people might propose other tests instead.

The rule of lenity probably passes our test, as it appears to date back to the Founding.<sup>282</sup> But other legal canons might not. It's far from clear, as a matter of language, that an ambiguous grant of regulatory authority *really means* a *Chevron*-style delegation to the agency to fill any relevant gaps (to be exercised subject to procedural safeguards, such as notice-and-comment rulemaking, and so on).<sup>283</sup> It's more plausible to see *Chevron* as a certain kind of closure rule: if the agency was generally granted power to regulate a field through certain means, then it's the challenger's burden to show that some particular subfield was excluded from this grant, and this burden can be met only with clear text. But there are other possible closure rules in which the tie might go to the challenger — for instance, that “agencies have no power beyond that granted by Congress,” or simply that “everything not forbidden is permitted.” The correctness of *Chevron* might come down to which of these closure rules, if any, meets our criteria for law.<sup>284</sup>

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<sup>280</sup> See Kavanaugh, *supra* note 199, at 2154–56 (calling for the revision of various traditional canons that involve difficult judgments of ambiguity).

<sup>281</sup> Baude, *supra* note 53, at 2355 n.16; Sachs, *supra* note 53, at 819.

<sup>282</sup> Barrett, *supra* note 91, at 129 (“Schooled in the English tradition, American judges applied the principle of lenity from the start.”); see also John F. Stinneford, *Dividing Crime, Multiplying Punishments*, 48 UC DAVIS L. REV. 1955, 1994–2001 (2015) (arguing that “the rule of strict construction of penal statutes,” *id.* at 1995, stood in place of the modern rule of lenity from the Founding until the 1950s); cf. SCALIA, *supra* note 52, at 29 (“The rule of lenity is almost as old as the common law itself, so I suppose that is validated by sheer antiquity. The others I am more doubtful about.” (footnote omitted)).

<sup>283</sup> *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984); see also *United States v. Mead Corp.*, 533 U.S. 218 (2001).

<sup>284</sup> See generally Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. (forthcoming 2017), <http://ssrn.com/id=2649445> [<https://perma.cc/MPN8-9Z3K>] (exploring and criticizing legal rationales for *Chevron* deference).

### B. Assessing Construction

The law of interpretation can also shed some light on the relationship between interpretation and construction. As we understand it, “interpretation” here refers to a search for linguistic meanings, for information that a particular text might communicate. “Construction,” by contrast, is a search for legal content, for legal propositions that a particular instrument establishes or makes true. As we noted above, this distinction seems to us both real and useful. But we also understand why it’s generated substantial controversy, which we think the law of interpretation might help resolve.

1. *Concerns About Construction.* — The problem is this. As Professor Lawrence Solum argues, the meaning of “the constitutional text does not provide determinate answers to constitutional questions.”<sup>285</sup> When that happens, what’s left is a “construction zone[,]” in which officials must act — by assumption — “on the basis of normative considerations that are not fully determined by the communicative content of the constitutional text.”<sup>286</sup>

But what these normative considerations are, and hence what’s supposed to happen in these construction zones, can seem awfully indeterminate. That’s perhaps why other scholars, especially contemporary originalists, have objected to this portrayal.<sup>287</sup> Some have searched far and wide for textual rules to settle these disputes.<sup>288</sup> Others have suggested that construction is a political act.<sup>289</sup> Still others have denied the distinction entirely, as “born[] out of false linguistic association” and having “done harm in the work of constitutional theorists who wish to liberate judges from the texts they construe.”<sup>290</sup>

One can’t blame folks for worrying that “construction zones” are catastrophic gaps in the law where anything might happen. If construction is the product of “normative considerations” (because the text, by assumption, is silent on these questions), there might be liber-

<sup>285</sup> Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *FORDHAM L. REV.* 453, 458 (2013).

<sup>286</sup> Solum, *supra* note 46, at 5; see also Randy E. Barnett, *Interpretation and Construction*, 34 *HARV. J.L. & PUB. POL’Y* 65, 70 (2011) (requiring “a theory of construction to employ when original meaning runs out”); Keith E. Whittington, *Constructing a New American Constitution*, 27 *CONST. COMMENT.* 119, 120–21 (2010) (“Construction picks up where interpretation leaves off.” *Id.* at 120.).

<sup>287</sup> See, e.g., John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 *NW. U. L. REV.* 751, 783 (2009) (criticizing the concept of construction as indeterminate).

<sup>288</sup> See, e.g., Gary Lawson, *Dead Document Walking*, 92 *B.U. L. REV.* 1225 (2012); Paulsen, *supra* note 225.

<sup>289</sup> KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* 1–17 (1999).

<sup>290</sup> SCALIA & GARNER, *supra* note 31, at 14.

tarian constructions, Dworkinian constructions, Thayerian constructions, and so on.<sup>291</sup> Professor Jack Balkin, for example, would restrict interpretation only to “areas of likely and *overwhelming* agreement” on the original meaning.<sup>292</sup> Whenever there’s any real dispute, our interpretive shackles fall off, and we’re free to invoke “all available modalities of argument”<sup>293</sup> — including “precedent, inter-branch convention, structure, and consequences”<sup>294</sup> — to serve “as sources of wisdom or insight” in the construction process.<sup>295</sup> With friends like these, no wonder construction has enemies. We don’t think most of construction’s proponents intend it to be a free-for-all. But if it isn’t, we need something more to settle it.

2. *Construction and Law.* — As you might expect, we think there is “something more” — the law of interpretation. Legal interpretive rules do represent a form of construction, as they determine legal effect rather than linguistic meaning. But they’re the product of “normative considerations” only in a thin and limited sense. The individual judges doing the constructing aren’t left wholly to their *own* normative views, but rather take their cues from an existing legal system, of which the interpretive rules form a part. These rules themselves may not be “found in the semantic content of the written Constitution,” as Professor Randy Barnett notes.<sup>296</sup> But as explained above, that needn’t be a problem, so long as they’re found in *the law*. So while Barnett is right that interpreters “need a normative theory for how to construe a constitution when its meaning runs out,”<sup>297</sup> that’s true in the nonunique sense that the problem of political obligation is not yet solved, and that an individual moral actor *always* needs a normative theory to justify following (or violating, or ignoring) a legal rule.<sup>298</sup>

Once again, our model matches interpretation in private law. Solum notes that decades of contracts scholars have distinguished between interpretation and construction.<sup>299</sup> As Corbin put it, “interpre-

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<sup>291</sup> See Solum, *supra* note 285, at 473.

<sup>292</sup> Jack M. Balkin, *The Construction of Original Public Meaning*, 31 CONST. COMMENT. 71, 80 (2016) (emphasis added).

<sup>293</sup> *Id.* at 92.

<sup>294</sup> *Id.* at 74.

<sup>295</sup> *Id.* at 92.

<sup>296</sup> Barnett, *supra* note 286, at 69.

<sup>297</sup> *Id.* at 70.

<sup>298</sup> See Baude, *supra* note 53, at 2392, 2394–95; see also H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

<sup>299</sup> See Solum, *supra* note 46, at 10. Solum also traces the concept as far back as Franz Lieber’s work in 1839. *Id.* But cf. Richard S. Kay, *Construction, Originalist Interpretation and the Complete Constitution*, 19 U. PA. J. CONST. L. ONLINE (forthcoming) (manuscript at 3–6), <http://ssrn.com/abstract=2778744> [<https://perma.cc/T3FB-DXW7>] (questioning either the clarity or the relevance of Lieber’s work).

tation” pertains “with respect to *language* itself,”<sup>300</sup> while construction “determine[s] its legal effect” — meaning that construction decides both “whose meaning and understanding” controls,<sup>301</sup> and also which rules are used to “fill[] in gaps in the terms of an agreement.”<sup>302</sup>

In contract law, we also take it to be relatively uncontroversial that construction is largely *a matter of law*. In Corbin’s words, the question of whose interpretation controls is “determined . . . as required by some substantive rule of law.”<sup>303</sup> Similarly, he describes nonlinguistic rules of construction as rules of law, “legal requirement[s]” imposed by “a statute or other legal rule.”<sup>304</sup>

We submit that the same holds for construction in public law.<sup>305</sup> The functions of construction are very close to what we’ve described as functions of the law of interpretation: to identify which features, of which communications, will carry legal effect, and to identify legal rules that supplement and refine the raw language. So at a first approximation, we’d say that the appropriate theory of construction is simply to apply the law of interpretation. Indeed, it’s been suggested — with some justice — that the legal rules we describe might just as well be called “the law of construction.”<sup>306</sup>

3. *Resolving the Disputes*. — This analogy to private law puts us in broad agreement with some of those who endorse construction. As Solum notes, the private-law distinctions largely mirror the ones that he emphasizes today for public law.<sup>307</sup> Public-law construction both determines “the legal effect of the constitutional text” and “determines the content of constitutional doctrine.”<sup>308</sup> We think Solum is right that something other than language is doing an awful lot of the work in generating legal content. What we would emphasize is that this process can be and usually is controlled by law. While *in principle* there

<sup>300</sup> 3 CORBIN, *supra* note 10, § 534, at 8.

<sup>301</sup> *Id.* § 535, at 22.

<sup>302</sup> *Id.* § 534, at 11. Professor Greg Klass argues that other scholars (such as Williston) defined construction slightly differently, but that Corbin was right. Greg Klass, *Interpretation and Construction 3: Arthur Linton Corbin*, NEW PRIVATE LAW (Nov. 25, 2015), <http://blogs.law.harvard.edu/nplblog/2015/11/25/interpretation-and-construction-3-arthur-linton-corbin-greg-klass> [https://perma.cc/P3SE-A9P3].

<sup>303</sup> 3 CORBIN, *supra* note 10, § 532, at 4; *see also id.* at 5 (“[T]he court must determine, in accordance with the applicable law, whose meaning is to prevail.”); *id.* § 535, at 22.

<sup>304</sup> *Id.* § 550, at 196–97; *see also id.* § 551, at 200–01 (discussing statutory requirements); 4 WALTER H.E. JAEGER, WILLISTON ON CONTRACTS § 602, at 320 (3d ed. 1961) (“Construction . . . is rightly used wherever the import of the writing is made to depend upon a special sense *imposed by law*.” (emphasis added)).

<sup>305</sup> *But see* Mitchell N. Berman & Kevin Toh, *On What Distinguishes New Originalism from Old: A Jurisprudential Take*, 82 FORDHAM L. REV. 545, 553 (2013) (debating whether “construction” is part of “a theory of law” or instead “a theory of adjudication”).

<sup>306</sup> We are indebted for this point to Lawrence Solum.

<sup>307</sup> Solum, *supra* note 285, at 468.

<sup>308</sup> *Id.* at 457.

could be constructions following any of dozens of normative paths, in practice the law will often have picked one.<sup>309</sup>

Thus we *also* find ourselves in agreement with much of what's written by two of construction's biggest critics. Professors John McGinnis and Michael Rappaport say that "original meaning need not run out when constitutional language is ambiguous or vague, as constructionists often assert," because one can often use "the original interpretive rules"<sup>310</sup> or "original legal methods"<sup>311</sup> to resolve the indeterminacy. We basically agree, but we would reframe some of that resolution as the law of interpretation. The "original legal methods" are, in our view, the law of interpretation as it stood at the Founding. When there's a question about the law that the Constitution made, the right place to turn isn't to just *any* construction, but to the particular construction prescribed by law. Call it original methods, call it a form of construction; our point is that linguistic content must be processed through law.

The fit between construction and legal interpretive rules may not be perfect. For example, Solum sees construction as particularly necessary when the text is "vague or irreducibly ambiguous."<sup>312</sup> But those cases may be beyond the power of interpretive rules to cure. If the proposition of law established by the text, after we've brought all our linguistic and legal tools to bear, is that an award of attorney fees must be reasonable,<sup>313</sup> or that a case may be transferred to another venue in the interest of justice,<sup>314</sup> the law of interpretation won't tell us what reason and justice require.<sup>315</sup> (Some scholars have used "construction" to encompass the creation of judicial doctrine in such cases, such as the tiers of scrutiny or the *n*-part test for obscenity.<sup>316</sup> We doubt that the law of interpretation reaches that far — creating doctrine often seems to be a task that comes after the law is already in place — though we see some ambiguity on the point.<sup>317</sup>)

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<sup>309</sup> We are not certain whether Solum excludes from construction the question of *whose* or *which* linguistic meaning counts. As explained *supra* sections I.B.2, pp. 1089–92, & III.B.3, pp. 1112–14, we follow Corbin in thinking that this is a question for law to answer.

<sup>310</sup> JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, *ORIGINALISM AND THE GOOD CONSTITUTION* 140 (2013).

<sup>311</sup> *Id.* at 150.

<sup>312</sup> Solum, *supra* note 285, at 458.

<sup>313</sup> *E.g.*, 5 U.S.C. § 504(b)(1)(A) (2012).

<sup>314</sup> 28 U.S.C. § 1404(a) (2012).

<sup>315</sup> *Accord* Timothy Endicott, *Legal Interpretation*, in *THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW* 109, 109 (Andrei Marmor ed., 2012).

<sup>316</sup> Kermit Roosevelt III, *Interpretation and Construction: Originalism and Its Discontents*, 34 *HARV. J.L. & PUB. POL'Y* 99, 103–08 (2011); Solum, *supra* note 285, at 468–69.

<sup>317</sup> For instance, some doctrinal rules, such as rules of judicial deference, Roosevelt, *supra* note 316, at 106–08, might derive directly from interpretive rules governing conduct under uncertainty. See *infra* p. 1133. For more on the generation of doctrine, whatever one calls it, see Mitchell N.

Ultimately, though, our goal isn't to quibble about the exact domains of construction and interpretation, or for that matter about the terminology of construction itself.<sup>318</sup> Our basic point is that attention to and development of our law of interpretation ought to make debates about construction significantly less open-ended — and significantly more, shall we say, constructive.

## V. OBJECTIONS

### A. Mutability

To some, our approach might seem at odds with the very notion of written law. Indeed, it might invite legal chaos. If every legal text were constantly being run through unwritten rules of interpretation, couldn't those rules change wildly over time? Couldn't that lead to mindless legal systems evolving in ways no one wanted? Or to judges seizing the power to rewrite the interpretive rules, and so to rewrite our Constitution and legal code?

We're sensitive to these concerns, but we think them ill-founded. Properly understood, the law of interpretation won't have this effect, and indeed will clear up a lot of confusion about legal change over time — at least on our own views about law. Up until now we've been writing from a relatively catholic perspective, assuming that we should look to what law says about interpretation without adjudicating some of the more disputed questions about what law is and how it changes. If we make some (we think) modest additional claims or assumptions about law, we can also understand a lot about how law changes over time. (If your own preferred view of law rejects these assumptions, it might lead to a more amorphous, changeable law. But that's on you.)

We first explain what happens when the rules of interpretation change; we then discuss who has power to change them.

#### 1. *What Happens When Interpretive Rules Change?*

(a) *Adoption Rules and Application Rules.* — Our basic view is that legal instruments, from deeds to statutes to constitutions, do their legal work when adopted. This follows from two claims.

First, our legal rules persist over time, until something legally significant happens to alter them. The way to understand the content of a legal instrument, whether private or public, is to ask what the legal

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Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004); Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649 (2005).

<sup>318</sup> Compare, e.g., SCALIA & GARNER, *supra* note 31, at 14–15, with Solum, *supra* note 285, at 484–85, 493–95.

system looked like beforehand, and then to see what the new instrument did or didn't change.<sup>319</sup>

Second, when new instruments are adopted, they operate on the facts at particular points in time, as determined by "the relevant activity that the rule regulates."<sup>320</sup> The substance of the law typically changes prospectively, affecting relevant activities from and after the date of the change.<sup>321</sup> For example, even without an effective date provision or an Ex Post Facto Clause, a new statute punishing the mailing of geese would usually apply only to geese mailed after the date of enactment. A new rule raising the bar for qualifying expert witnesses would likewise apply only to experts qualified after the statute took effect, and so on.<sup>322</sup>

Combining these two claims, we can hazard a guess about how to handle changes in the law of interpretation. Many legal rules of interpretation are what we call *adoption rules*: they determine the legal content of a written instrument upon its adoption. As a result, the version of the rule relevant to a particular text is the one that governed at the time the text was adopted and made its impact on the law — when its legal content, to use Bentham's phrase, was "poured into the sea."<sup>323</sup> For instance, if Congress simply abolished § 108 and returned to the common law repeal-revival rule, we wouldn't expect a century's worth of unrevived statutes suddenly to spring back to life; they didn't get revived when they had the chance, and their old repealing statutes won't do more work now.

By contrast, *application rules* are framed as instructions to future decisionmakers, including judges, on what to do at the point of application.<sup>324</sup> For instance, modern courts might defer to the State Department's present views on treaty interpretation — not because the Department can rewrite treaties, but just because it knows more about foreign relations.<sup>325</sup> And some of these rules might vary for different

<sup>319</sup> Accord 4 JOHN FINNIS, *Just Votes for Unjust Laws*, in PHILOSOPHY OF LAW, *supra* note 12, at 436, 443.

<sup>320</sup> *Republic of Austria v. Altmann*, 541 U.S. 677, 697 n.17 (2004) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 291 (1994) (Scalia, J., concurring in the judgments)).

<sup>321</sup> See *id.* ("Absent clear statement otherwise, only such relevant activity which occurs *after* the effective date of the statute is covered.")

<sup>322</sup> *Landgraf*, 511 U.S. at 291 (Scalia, J., concurring in the judgments).

<sup>323</sup> BENTHAM, *supra* note 94, at 236.

<sup>324</sup> This distinction resembles Professor Mitchell Berman's distinction between "constitutional operative propositions" ("doctrines that represent the judiciary's understanding of the proper meaning of a constitutional . . . provision") and "constitutional decision rules" ("doctrines that direct courts how to decide whether a constitutional operative proposition is satisfied"). Berman, *supra* note 317, at 9.

<sup>325</sup> See *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184–85 & 184 n.10 (1982); see also David Sloss, *Judicial Deference to Executive Branch Treaty Interpretations: A Historical Perspective*, 62 N.Y.U. ANN. SURV. AM. L. 497 (2007).

interpreters: the Patent and Trademark Office reads patent claims more broadly in reexamination proceedings than courts do in infringement suits, to let applicants “adjust the scope of claim protection as needed” and to avoid giving “finally allowed” claims “broader scope than is justified.”<sup>326</sup> Because rules like these regulate present decisions, and not the instrument’s original content, they take effect at the time of decision. So unless some other rule prevents it, a change to an application rule can have full effect in all future cases to which the rule applies, even if they involve texts that were adopted long ago.

As with the canons, to figure out *when* a rule works we have to figure out *what kind* of rule it is. Suppose, for example, that Congress repealed *Chevron* and replaced it with a Diceyan presumption against the legality of agency action. What would happen to uncertain provisions in existing statutes? If *Chevron* is a rule about delegated powers,<sup>327</sup> then it’s probably an adoption rule: the agency got a bundle of powers upon enactment and will keep them until they’re affirmatively taken away. If, though, *Chevron* is a rule of judicial deference,<sup>328</sup> then it’s probably an application rule: it tells courts not to set aside agency action too quickly, and so it applies to tomorrow’s cases under yesterday’s statutes.

(b) *Implications for Interpretation.* — These rules for changing law also determine the effect of changing language. One can read the language of a legal text according to any number of linguistic conventions: those of the authors, the readers, the lawyer class, the lay public, and so on. What matters for determining legal content is the particular type of meaning that the law of interpretation chooses. And whatever linguistic answer the legal system chooses, it makes this choice as of the date of adoption: that’s when the text makes its impact on the law, pouring its contribution into the sea. If all this is right, then we’ve got another reason to look to original linguistic conventions when construing an old text: the law of interpretation, at the time, likely cross-referenced the linguistic practices of the time, and not any unknown practices to be developed in the future. (A society *could* require phrases like “domestic Violence”<sup>329</sup> to be read according to their evolving meanings over time; for obvious reasons, very few do.<sup>330</sup>)

<sup>326</sup> *In re Yamamoto*, 740 F.2d 1569, 1571–72 (Fed. Cir. 1984); *accord* *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131 (2016) (applying this standard to *inter partes* review).

<sup>327</sup> *See, e.g.*, *Christensen v. Harris County*, 529 U.S. 576, 597 (2000) (Breyer, J., dissenting) (suggesting that *Chevron* deference turns on whether “Congress actually intended to delegate interpretive authority to the agency”).

<sup>328</sup> *See, e.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 242–43 (2001) (Scalia, J., dissenting) (analogizing *Chevron* to limits on mandamus relief).

<sup>329</sup> U.S. CONST. art. IV, § 4.

<sup>330</sup> This accords with Solum’s “Fixation Thesis,” that “[t]he meaning of the constitutional text is fixed when each provision is framed and ratified.” Solum, *supra* note 46, at 1. But we take this



This way of looking at interpretation is particularly compatible with certain forms of originalism. As we've argued above, the law of interpretation applies to the Constitution no less than to a statute or contract. A constitutional provision generally has whatever legal content it was assigned when it was ratified — meaning the content determined by the original adoption rules, including their potential incorporation of then-current linguistic practice.<sup>331</sup>

This approach also explains how to think about original interpretive conventions, such as James Madison's vision that constitutional indeterminacies would be "liquidated" through practice.<sup>332</sup> The first question is whether liquidation was understood as a rule of law, or as a mere custom or prediction about what future judges might do. If it was law, the next question is whether it was an adoption rule, incorporating in the Constitution's legal content an implicit delegation to future generations to iron out ambiguities. If so, it would ordinarily be preserved over time. By contrast, if liquidation is instead best understood as an application rule — an instruction to resolve future uncertainties with an eye to settled practice, perhaps analogous to precedent<sup>333</sup> — then there's a further question: whether this original law of liquidation has been amended or altered in the intervening years.

Our views thus resemble and overlap with the "original methods" proposal put forth by McGinnis and Rappaport, with one crucial elaboration. McGinnis and Rappaport, focusing on the text of the Constitution, argue that its interpretation should be "based on the content of the interpretive rules in place when the Constitution was enacted."<sup>334</sup> We mostly agree, but we would distinguish sharply between linguistic and legal rules. McGinnis and Rappaport, by contrast, do not think that distinction important. They describe their "single core idea" as being "that the meaning of language requires reference to the [original] interpretive rules and methods."<sup>335</sup> They understand that idea to include, without distinction, not only linguistic interpretive rules but also

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thesis to be a contingent matter, and not a necessary truth about any legal system that uses texts (or about the nature of texts themselves).

<sup>331</sup> As a reminder, we don't claim to have proved that this way of looking at interpretation is either conceptually required or normatively superior to its alternatives. We have, though, each suggested that it's required by our current positive law. See generally Baude, *supra* note 53; Sachs, *supra* note 53.

<sup>332</sup> See Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 10–21 (2001); William Baude, *Constitutional Liquidation* (Oct. 10, 2016) (unpublished manuscript) (on file with the Harvard Law School Library).

<sup>333</sup> See Baude, *supra* note 332, at 25–31.

<sup>334</sup> McGinnis & Rappaport, *supra* note 287, at 752.

<sup>335</sup> *Id.* at 754.

what we see as nonlinguistic legal ones.<sup>336</sup> For them the key distinction is between interpretive rules and other rules, regardless of source.

Similarly, our views largely overlap with Nelson's discussion of original interpretive conventions. We share his view that the enforceable legal content of the Constitution "emerges from the application to the Constitution's words of various legal and linguistic principles that reasonable members of the founding generation would have used to understand those words . . . *even though the Constitution does not itself codify them.*"<sup>337</sup> We'd add only that, while Nelson's discussion to some extent leaves open "[e]xactly which aspects of the founding generation's ideas about interpretation retain their importance for present-day interpreters,"<sup>338</sup> we see that question as generally determined by Founding-era law.

In our view, an interpretive rule's force turns on whether or not it was good law, and if so, of what kind. Adherence to the Constitution requires adherence to the original adoption rules (which happened to fix both the original linguistic rules and *some* of the nonlinguistic rules), as well as to original application rules that haven't yet been altered or amended. But we'd leave out both interpretive customs that weren't incorporated by law and any application rules that might have changed since adoption. We've each advanced versions of originalism in which the law imposed by the document is consistent with Founding-era interpretive principles that might meet this test (such as liquidation).<sup>339</sup> Our conclusions may or may not be right, but framing these issues in terms of the law of interpretation may make some disagreements and fault lines clearer.

2. *Who Can Change the Interpretive Rules?* — Interpretive rules can change over time. But how, and who can change them? On our view, many interpretive rules — both in the states and in the federal system — take the form of unwritten law. That view, however, raises two families of questions. First, whose unwritten law is this? Is it federal law, state law, or something else? Is it proclaimed by judges, or is it the product of broader custom? Second, who can override this law? Can judges rewrite the rules that determine our reading of statutes, or even of the Constitution? Can Congress? If it can't, doesn't

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<sup>336</sup> See *id.* at 762 n.32; see also MCGINNIS & RAPPAPORT, *supra* note 310, at 142 (incorporating both linguistic and legal rules when confronted with purportedly vague terms).

<sup>337</sup> Nelson, *supra* note 84, at 548–49.

<sup>338</sup> *Id.* at 549; see, e.g., *id.* at 550, 552.

<sup>339</sup> See Baude, *supra* note 53, at 2357–58; Sachs, *supra* note 53, at 855–56. Note that this distinguishes us from those described by Berman's claim that "[c]ontemporary originalists by and large believe that what the law is — what our legal powers, duties, and rights are — is fully determined by semantic qualities of promulgated texts." Mitchell N. Berman, *Judge Posner's Simple Law*, 113 MICH. L. REV. 777, 779 (2015) (reviewing RICHARD A. POSNER, REFLECTIONS ON JUDGING (2013)).

that make statutes subservient to common law? And if it can, couldn't Congress entrench its own statutes by "interpreting" away any future attempts to repeal them?

(a) *The Nature of Interpretive Rules.* — We see the unwritten law of interpretation as a form of "general law."<sup>340</sup> In this we differ from Gluck, who has written extensively on the legal status of interpretive rules, describing them as a form of "federal common law" and abjuring the "general law" label.<sup>341</sup> We see two minor distinctions and one major one.

One minor issue is that the label of "federal common law" suggests that there's something uniquely federal about the *source* of the unwritten law of interpretation. When federal courts and state courts refer to, say, the rule of lenity, they're referring to a common legal object that's part of a common legal tradition (hence what Gluck calls the "universal, even ancient, feel" of the canons<sup>342</sup>), rather than fifty-one different defenses which happen to share the same name. (Of course, these fifty-one jurisdictions don't all have to treat lenity in the same way; even *Swift v. Tyson* recognized that general law could be supplemented by local usages that varied across jurisdictions.<sup>343</sup>)

Another minor issue is that treating interpretive rules as general law allows for a broader range of possibilities regarding stare decisis. Gluck argues that federal courts don't currently treat interpretive rules as law, in large part because they fail to give adequate stare decisis effect to past holdings on interpretation.<sup>344</sup> But stare decisis and common law are separate categories. One can have stare decisis for decisions based on written law, and one can have common law without the modern version of stare decisis. On one historically recognized view, the common law depends upon a "regular *course* of decisions."<sup>345</sup> In other words, a new rule might be slowly absorbed or rejected as general law, rather than imposed through the fiat of a single majority.

But finally and most importantly, "federal common law" suggests that the law of interpretation is up to federal courts and judges to revise as they see fit. Gluck adopts what we might call a very modern view of unwritten law — that it is "judge-made"<sup>346</sup> or a "judicial creation[]"<sup>347</sup> — and so she ultimately endorses a judicial "power to create

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<sup>340</sup> See generally Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 503 (2006) (describing legal rules not dictated by any particular jurisdiction, but whose content "emerges from patterns followed in many different jurisdictions").

<sup>341</sup> Gluck, *supra* note 14, at 771–73; Gluck, *supra* note 13, at 1974.

<sup>342</sup> Gluck, *supra* note 13, at 1987.

<sup>343</sup> 41 U.S. (16 Pet.) 1, 18 (1842).

<sup>344</sup> See Gluck, *supra* note 14, at 770, 777–79.

<sup>345</sup> Nelson, *supra* note 332, at 15 (emphasis added).

<sup>346</sup> Gluck, *supra* note 14, at 757.

<sup>347</sup> *Id.* at 755 n.4.

and apply interpretive rules designed to shape and improve legislation.”<sup>348</sup> We are not so sure that judges have the power to make interpretive law in that sense. In using the older label of “general law,” we mean to evoke Nelson’s observation that when judges “articulate and apply . . . legal doctrines that have not been codified,” they aren’t necessarily “inventing rules of decision out of whole cloth.”<sup>349</sup> Instead, they might be recognizing elements of an existing general-law tradition — a tradition that makes its appearance in judicial decisions, but isn’t merely their creature.

(b) *Deliberate Change.*

(i) *By Judges.* — Viewing interpretive rules as features of an existing legal tradition, as opposed to deliberate acts of lawmaking, helps answer many potential critiques of common law interpretation. For instance, it wouldn’t matter that, as Alexander and Prakash write, “the federal judiciary has no authority to *create* binding rules of interpretation.”<sup>350</sup> So long as judges are taking existing rules off the shelf, so to speak, no issue of creative authority arises. This view also explains why we have a canon of narrowly reading statutes in derogation of the common law. Rather than a “judicial power-grab”<sup>351</sup> or a “fossil remnant”<sup>352</sup> of the medieval dark, it’s a simple corollary of the canon against implied repeal. When a rule of law is already on the books (or, if you prefer, brooding omnipresently in the sky), we need some affirmative indication that a new rule has displaced it.<sup>353</sup>

Of course, these rules must have originally come from *somewhere*. Barrett rejects the view that common law canons stand on their own bottom, because we can see back to (and before) the time of their creation.<sup>354</sup> Without adjudicating the legality of each canon, we don’t think their nature as human artifacts is fatal. The first court decision recognizing a given principle wasn’t necessarily making it up. Courts might have a judicial obligation to *find* common law rules in other sources (including customary sources), not merely to *make* them to fit one’s will.<sup>355</sup> As those sources evolve by slow accretion, or as understandings of the same materials change over time, eventually some

<sup>348</sup> *Id.* at 779. A similar theme appears in ELHAUGE, *supra* note 69. *Id.* at 325 (“What we consider acceptable judicial practice has clearly changed over time. In the formalist age, it may have seemed unthinkable that courts would ever admit that formal legal materials were ambiguous and openly explain their policy grounds for resolving such ambiguity. But now that happens all the time.”).

<sup>349</sup> Caleb Nelson, *The Legitimacy of (Some) Federal Common Law*, 101 VA. L. REV. 1, 7 (2015).

<sup>350</sup> Alexander & Prakash, *supra* note 34, at 102 (emphasis added).

<sup>351</sup> SCALIA, *supra* note 52, at 29; *accord* Gluck, *supra* note 14, at 769.

<sup>352</sup> Liu v. Mund, 686 F.3d 418, 421 (7th Cir. 2012) (Posner, J.).

<sup>353</sup> *Cf.* Shapiro, *supra* note 106, at 937.

<sup>354</sup> See Barrett, *supra* note 91, at 111.

<sup>355</sup> See Stephen E. Sachs, *Finding Law* (Oct. 26, 2016) (unpublished manuscript) (on file with the Harvard Law School Library).

court will be the first to say so.<sup>356</sup> But as Professor Brian Simpson points out, it's simply a mistake to treat this first court decision as the actual source of the underlying rule.<sup>357</sup> Even under quite formalist premises — and, indeed, even after *Erie Railroad Co. v. Tompkins*<sup>358</sup> — judges may well have some authority to find common law rules.<sup>359</sup>

(ii) *By Legislatures.* — Assuming that judges can't deliberately rewrite the law of interpretation, how about Congress? Legislatures can trump common law when they choose. If interpretation is governed by law, and not just language, could Congress redefine the Constitution by changing the interpretive rules? Or could it force us to read future statutes in a way that insulates its work from repeal — invalidating, say, any statutes that fail to begin with “Mother May I” or “Simon Says”?<sup>360</sup>

In most cases, no. As described above, constitutional provisions took on their legal content at the time of ratification, under the interpretive rules that governed at the time. If Congress can't change that content directly, it also can't change it by retroactively altering the original adoption rules.<sup>361</sup>

Nor can Congress force us to read future statutes in ways that limit a future Congress's ability to legislate. Unless it's a “backdrop” constitutionally insulated from change,<sup>362</sup> a statutory rule of interpretation is at most a default rule that can be changed by Congress at any time.<sup>363</sup> A future Congress can also evade these rules by notoriously violating them, thereby working an implied repeal. The rule against legislative

<sup>356</sup> Cf. *United States v. Stevens*, 559 U.S. 460, 472 (2010) (“Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law.”).

<sup>357</sup> See A.W.B. SIMPSON, *The Common Law and Legal Theory*, in LEGAL THEORY AND LEGAL HISTORY: ESSAYS ON THE COMMON LAW 359, 367 (1987).

<sup>358</sup> 304 U.S. 64 (1938).

<sup>359</sup> See Caleb Nelson, *A Critical Guide to Erie Railroad Co. v. Tompkins*, 54 WM. & MARY L. REV. 921 (2013). Without licensing similar behavior, we can also treat as law today some past changes that *were* deliberately made by judges, so long as they've since become part of the common law. By way of analogy, maybe the first person to spell “color” without a “u” was making a mistake, even a deliberate one. Yet that spelling has since become standard in the United States, and an English teacher (or a judge) who insisted on others' rejecting it would be acting *ultra vires*.

<sup>360</sup> See Alexander & Prakash, *supra* note 34, at 97 (offering the “Mother May I” example).

<sup>361</sup> Congress's ability to change application rules is more plausible, at least within some limits established by Articles I and III. See John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503 (2000); see also Sachs, *supra* note 101, at 1866 (citing *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995); *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872)); cf. *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1326 (2016) (holding that Congress may impose new law in pending cases, but may not direct “findings or results under old law” (quoting *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 438 (1992))).

<sup>362</sup> See Sachs, *supra* note 101, at 1828–38.

<sup>363</sup> See Rosenkranz, *supra* note 119, at 2087.

entrenchment — including its associated doctrine of implied repeal — may itself have been constitutionally insulated from change, as a common law limitation of the grant of powers to Congress.<sup>364</sup> In that case, Congress can't get rid of implied repeals, and it can't prevent a future Congress from using them — even when what's being repealed is a rule of interpretation.

### B. Indeterminacy

In addition to the theoretical problem of change over time, the law of interpretation also has to confront a practical problem of disagreement. People seem to disagree over what the law of interpretation actually is — and disagree again over how to apply it, once we find out.

To be clear, we see this only as a practical problem, and not as a theoretical one. On our view, the law doesn't *have* to be any more determinate than it is. Law's determinacy, like its content, depends on contingent social facts. If a given legal system has more gray areas or includes more discretion for judges or other officials, then that's just how this legal system works.<sup>365</sup> All else being equal, indeterminacy might be something to avoid; but all else is rarely equal, and legal systems often privilege other goals. The point of the law of interpretation isn't to determine which interpretive approaches get the most determinate results, but which approaches are most legally correct.

As a practical problem for our current legal system, we think indeterminacy is serious, but not fatal. We think there are good reasons to think that the law of interpretation can be found and applied much of the time. And even if it can't be found and applied in every single case, that doesn't diminish its importance in the cases where it can be.

1. *Finding the Law of Interpretation.* — One good reason to have a law of interpretation is that people disagree on the correct interpretive rules. Yet this disagreement also makes it harder to see what the law is.

This objection may be most acute when it comes to the Constitution, so that's where we'll focus. On our view, to determine the Constitution's legal content, we need to know what the legal adoption rules *were* two hundred years ago. But, as Cornell notes, people back then disagreed.<sup>366</sup> Cornell describes a Founding-era “conflict between elite and popular approaches to constitutional interpretation,” in which “[p]roponents of a lawyer's constitution clashed with champions of a

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<sup>364</sup> See Sachs, *supra* note 101, at 1848–54.

<sup>365</sup> See generally Steven G. Calabresi & Gary Lawson, *The Rule of Law as a Law of Law*, 90 NOTRE DAME L. REV. 483 (2014).

<sup>366</sup> See Saul Cornell, *The People's Constitution vs. the Lawyer's Constitution: Popular Constitutionalism and the Original Debate over Originalism*, 23 YALE J.L. & HUMAN. 295, 296 (2011).

people's constitution."<sup>367</sup> More specifically, Professor Kurt Lash cautions against excessive reliance on the common law, as "the same generation that adopted the Constitution also challenged the uncritical acceptance of English common law."<sup>368</sup>

These historical critiques are important, but we think the focus on law may help us see past them. Purely linguistic questions are questions of usage, determined by on-the-ground practice. But the way to resolve a Founding-era legal disagreement isn't merely to total up the votes and see who had more; we want to know who had *the better of the argument*, based on the higher-order legal rules of the era.

And on that basis, Cornell's and Lash's historical evidence points in favor of something like the picture we've described. Cornell describes the lawyerly class at the Founding as believing "that constitutions ought to be interpreted according to the rules laid down by Anglo-American jurists such as Blackstone,"<sup>369</sup> whose *Commentaries* were "a standard reference work for both the meaning of the common law and the methods of legal analysis."<sup>370</sup> That was precisely what the common folk allegedly disliked about legal interpretation: that it was full of fancy-sounding rules from England and so inaccessible to those without legal training. Antifederalists like Brutus recognized — in order to criticize on policy grounds — the prevailing Blackstonian concept of legislative intent as "a complex legal construct . . . deduced from the application of a clear set of legal rules of construction."<sup>371</sup>

Similarly, Lash references as an example of the Founders' divided opinion a post-Revolutionary popular movement against the common law.<sup>372</sup> That movement was predicated on the idea that the English common law, full of "jargon-ridden formalisms . . . that only professional aristocrats could understand," was already dominant in the legal profession — and indeed that "[t]he legal profession's continuing existence in American society depended on the common law," having established "a monopoly on [that] law and the means of knowing it."<sup>373</sup>

Whether that elite tradition trumped any contrary popular objections isn't just a historical question: it's a legal one. Different theories

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<sup>367</sup> *Id.* at 303–04.

<sup>368</sup> Kurt T. Lash, *Originalism All the Way Down?*, 30 CONST. COMMENT. 149, 156 (2015) (reviewing MCGINNIS & RAPPAPORT, *supra* note 310).

<sup>369</sup> Cornell, *supra* note 366, at 304.

<sup>370</sup> *Id.* at 309.

<sup>371</sup> *Id.* at 315.

<sup>372</sup> Lash, *supra* note 368, at 156, 157 n.30.

<sup>373</sup> Aaron T. Knapp, *Law's Revolutionary: James Wilson and the Birth of American Jurisprudence*, 29 J.L. & POL. 189, 235 (2014). While elite views of the English common law did change over time, our reading of the evidence (much of it put forth by Professor Stewart Jay) suggests that the major changes occurred a decade after the Founding. See Stewart Jay, *Origins of Federal Common Law: Part One*, 133 U. PA. L. REV. 1003, 1011 (1985); Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231, 1234 (1985).

of jurisprudence look to different facts to identify a society's law. If the practices of lawyers who participate in the legal system have a heightened claim to determining the law, at least as compared to the policy preferences of the general public, then it's the elite practice that matters. Indeed, Cornell's evidence doesn't suggest that popular-elite disagreement centered on the *content* of the law, so much as on the *merits* of the system that the lawyers had made for themselves. If so, looking past the popular view wouldn't be the "methodological obfuscation[]" that Cornell describes,<sup>374</sup> but a jurisprudential obligation.

We also note Lash's argument that at the time of the Founding, "there *were no* preexisting methods of interpretation applicable to a 'federal' Constitution," as "no such constitution had ever existed."<sup>375</sup> If true, this might make it impossible for originalists to rely on Founding-era unwritten law. The status of the common law at the Founding is an enormous topic, and it can't be done justice here,<sup>376</sup> but we are more optimistic than Lash. While there was debate over which set of common law rules to use — in particular, whether the Constitution should be interpreted as a statute or as a treaty — Professor Jefferson Powell's work suggests that the statutory model dominated for the first decade after ratification, and in any case that there was consensus on which legal consequences each of those interpretive models would have.<sup>377</sup> The novelty of the Constitution made certain interpretive moves more difficult, but it didn't bar the use of an unwritten law of interpretation.

2. *Applying the Law of Interpretation.* — Once we know what our law of interpretation is, it still has to be applied. We can know what laws we have without being certain of how much work they do. Indeed, some skeptics might claim that the law of interpretation is just as indeterminate as natural language, and therefore will have its own gaps to fill. Consider Professor Karl Llewellyn's famous article on dueling canons of interpretation, designed to portray the rules of interpretation as hopelessly indeterminate.<sup>378</sup> If that's true, as Fallon argues, then looking to legal canons "only postpones the problem."<sup>379</sup>

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<sup>374</sup> Cornell, *supra* note 366, at 299.

<sup>375</sup> Lash, *supra* note 368, at 161.

<sup>376</sup> For an alternative view to ours, see, for example, Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551 (2006).

<sup>377</sup> See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 923–24 (1985); see also Sachs, *supra* note 53, at 884–85.

<sup>378</sup> See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950). But see SCALIA & GARNER, *supra* note 31, at 59–60 (criticizing Llewellyn's argument).

<sup>379</sup> Fallon, *supra* note 6, at 1292; see also Carlos E. González, *Turning Unambiguous Statutory Materials into Ambiguous Statutes: Ordering Principles, Avoidance, and Transparent Justification in Cases of Interpretive Choice*, 61 DUKE L.J. 583, 585 (2011); Lash, *supra* note 368, at 165.



(a) *The Volume of Indeterminacy.* — If you look at hard cases of statutory interpretation, it might seem like disagreement about the law of interpretation is rampant and deep. Fallon observes that in hard cases, “theories such as textualism and purposivism, originalism and living constitutionalism”<sup>380</sup> are “almost stunningly inadequate to perform the most basic function that one might expect them to fill”<sup>381</sup> — namely supplying a “consistently and uniquely correct” choice among interpretive approaches “without an additional exercise of explicitly normative judgment.”<sup>382</sup>

But there’s another way of looking at it. After all, the disputed cases are disputed only because the applicable standards are unclear — at which point the relative indeterminacy that Fallon emphasizes may be tautological. If, as Professor Frederick Schauer puts it, “we focus only . . . on the cases that a screening process selects [for] their very closeness,” we’ll never see *any* standard factor — law, language, whatever — making a substantial difference.<sup>383</sup> If it did, the cases would no longer be close.

Fallon recognizes that “we ordinarily grasp . . . the meaning of statutory and constitutional provisions without needing to employ such theories at all.”<sup>384</sup> But rather than make an argument against theory, we think the easy cases actually do the opposite. Often these cases seem easy because a particular theory has become second nature to us, so that we no longer see it as a “theory” at all. It’s an easy case, and not a hard one, that a new criminal statute takes the laws of duress or accessory liability as it finds them. It’s easy to say that courts aren’t literalists that blindly follow dictionaries, that they don’t plumb the private diaries of senators to discover their actual intent, and so on. The question is *why* those cases are so easy — a question we think our theory helps resolve.<sup>385</sup>

Understanding the canons *as law* also helps us to see how seemingly contradictory canons can fit together. When the canons are understood as maxims, proverbs, or pieces of advice,<sup>386</sup> it’s easy to see them as vaguely conflicting,<sup>387</sup> like the sayings that “haste makes waste” and

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<sup>380</sup> Fallon, *supra* note 6, at 1277.

<sup>381</sup> *Id.* at 1278.

<sup>382</sup> *Id.* at 1278–79.

<sup>383</sup> Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 423 (1985).

<sup>384</sup> Fallon, *supra* note 6, at 1299.

<sup>385</sup> For example, we understand our law to employ a combination of what Fallon calls “contextual meaning” and “real conceptual meaning,” *id.* at 1246–48; the context identifies the relevant concept, which then receives its full extension, *see* Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555 (2006). We might be wrong, but the important question is where to look.

<sup>386</sup> *Cf.* Manning, *supra* note 5, at 179–80 (“habits of mind,” *id.* at 180).

<sup>387</sup> *See* Llewellyn, *supra* note 378.

that “he who hesitates is lost.” But how different legal rules interact with one another is itself a question to be settled by law. When courts encounter two potentially conflicting federal statutes, they don’t simply throw up their hands and say, “Dueling statutes!” So too it should be with conflicting canons.

(b) *Resolving Hard Cases*. — Of course we do agree that hard cases exist. Statutory interpretation, under our theory or any other, won’t eliminate all “need for choice.”<sup>388</sup> Some instruments are intentionally vague: say, a statute forbidding “neglect” of a child.<sup>389</sup> But others that seem crystal clear will still have blurry edges.<sup>390</sup> Hart invoked his celebrated example about “vehicles” in the park<sup>391</sup> to show that a rule *could* be straightforward as to many applications (and nonapplications, such as pedestrians and flowerbeds),<sup>392</sup> even as it contains a menagerie of edge cases (bicycles, motorized wheelchairs, a working truck incorporated in a war memorial, and so on).<sup>393</sup>

These hard cases don’t arise in a vacuum. Sensitive and accurate interpretation of legal language often takes place in a normatively charged context, and different interpreters may well reach different conclusions based on their different views of the world. To apply the presumption that Congress doesn’t “hide elephants in mouseholes,”<sup>394</sup> you need to know what’s an elephant and what’s a mousehole. So interpreters routinely rely, as they must, on broader presuppositions about how the world works.

To paraphrase an example from Professor Terry Winograd, consider the following two statements:

- (1) The committee denied the group a parade permit because they advocated violence.
- (2) The committee denied the group a parade permit because they feared violence.<sup>395</sup>

From a linguistic perspective, these sentences are obviously ambiguous: “they” could just as easily refer to “the committee” as to “the group,” and does. But to any ordinary person, it’s just as obvious

<sup>388</sup> Fallon, *supra* note 6, at 1277.

<sup>389</sup> See Timothy Endicott, *The Value of Vagueness*, in PHILOSOPHICAL FOUNDATIONS, *supra* note 21, at 14, 16–17.

<sup>390</sup> See HART, *supra* note 55, at 126; Scott Soames, *What Vagueness and Inconsistency Tell Us About Interpretation*, in PHILOSOPHICAL FOUNDATIONS, *supra* note 21, at 31, 32.

<sup>391</sup> Hart, *supra* note 298, at 607–11; see also HART, *supra* note 55, at 126–28.

<sup>392</sup> See Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. REV. 1109, 1122, 1124–26 (2008).

<sup>393</sup> See HART, *supra* note 55, at 126; see also, e.g., Fallon, *supra* note 6, at 1256; Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARV. L. REV. 630, 663 (1958).

<sup>394</sup> *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001).

<sup>395</sup> See Terry Winograd, *Understanding Natural Language*, 3 COGNITIVE PSYCHOL. 1, 33 (1972); see also Fredrik deBoer, *Winograd’s Dilemma*, INTERFACES OF THE WORD (Jan. 15, 2015), <http://fredrikdeboer.com/2015/01/15/winograds-dilemma> [<https://perma.cc/8KGA-MDJ3>].

whom “they” refers to in each case — because, as one linguist puts it, “of what we know about committees and parades and permitting in the real world.”<sup>396</sup> To understand language correctly, an interpreter needs “a theory of the world,” one that includes not only “committees and permits and parades, but apples and honor and schadenfreude and love and ambiguity and paradox . . . .”<sup>397</sup>

In this sense, Eskridge may well be right that many interpretive canons “demand normative analysis” or “normative judicial judgments about statutory purpose.”<sup>398</sup> And to the extent that normative commitments form part of our theories of the world, judges who make different normative judgments may well interpret the same texts differently. But these are “normative” judgments in the sense that they’re *judgments about norms* — particularly those held by other people — not in the sense that they involve first-order normative reasoning about what is to be done. As a result, these judgments are very different from the kind of ad hoc normative reasoning that Fallon thinks is inevitable, such as choosing “the best interpretive outcome as measured against the normative desiderata of substantive desirability, consistency with rule of law principles, and promotion of political democracy, all things considered.”<sup>399</sup> A judge who values these things can’t help but be affected thereby, but he or she can also take marching orders primarily from external sources.

(c) *The Work of Closure Rules.* — Even if we’re overly optimistic about the volume of indeterminacy, the law of interpretation still has useful work to do. Our interpretive rules include not only individual canons, but also the application and closure rules mentioned above. For instance, *contra proferentem* tells uncertain judges which side to rule against in a contract dispute; the land-grant canon does the same thing in property cases. And closure rules can be procedural as well as substantive. If one side needs a statute to be clear on a particular issue, they’ll lose if it’s uncertain<sup>400</sup> — and if there’s no better answer, the plaintiff loses every time. The very point of these closure rules is to tell interpreters what to do when other legal rules don’t.

It’s true that closure rules might seem arbitrary or harsh in any individual case. (That’s rules for you!) And that’s a good reason to try to better understand our law of interpretation. It’s great if interpretation can be fair and nonarbitrary, or meet whatever hopes we have for it. But, again, legal interpreters need to know what to do, even if only

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<sup>396</sup> deBoer, *supra* note 395.

<sup>397</sup> *Id.*

<sup>398</sup> Eskridge, *supra* note 242, at 537.

<sup>399</sup> Fallon, *supra* note 6, at 1305.

<sup>400</sup> See Easterbrook, *supra* note 185, at 535, 544–45.

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to know to do nothing. Closure rules tell them. They therefore provide an important bulwark against charges of indeterminacy.

Of course, there can be uncertainty or disagreement about closure rules too. Once again, though, we think a focus on the law makes it easier to close the gap. For one thing, we don't need a true consensus on individual legal disputes; within a given legal system, there can be correct and incorrect views of the law. That's why the Supreme Court (and Founding-era legislators, for that matter) was able to resolve legal disputes as they arose, rather than throwing up their hands and concluding there was no law to apply.

And disputes about the closure rules can ultimately be resolved by particular rules about authority. The law often layers rules on top of rules on top of rules. As we've discussed, when the ordinary legal rules run out, we have closure rules to tell us which side wins close cases. And when even the closure rules run out, we have authority rules to tell us how to resolve individual disputes — such as a rule that five Justices beat four.

3. *Residual Indeterminacy.* — We don't mean to claim that there are *no* unprovided-for cases in the law of interpretation. No rule crafted by human hands, to handle human affairs, can provide instructions for avoiding *all* cases of uncertainty — including uncertainty over whether a text is uncertain *enough* to trigger these instructions, and uncertainty over *that*, and so on. And there may be some circumstances when the whole legal system runs out — for instance, when there's irreconcilable disagreement on the grounds of our legal order.<sup>401</sup> The law of interpretation doesn't rule out any of these possibilities in principle, and we certainly don't claim to have shown that it does so in practice.

What to do when law is off the table — when one is unbound by law, or just unable to determine what the law requires — is beyond the scope of this project. As moral actors, we always in some sense have to make the “all things considered” normative judgments that Fallon discusses.<sup>402</sup> It's just that usually one big thing to consider, especially for legal officials, is the law.

Our disagreement with the skeptics may thus be one of degree. But we think it *stems* from a conceptual disagreement. A legal instrument's legal effect isn't entirely a question of *language* or *meaning*. So it's a mistake to leap from the indeterminacy of language to the conclusion that judges are unbound by law and must do what seems best. Law's artificial reasons are designed to handle cases for which

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<sup>401</sup> We don't believe this is the case with the American legal system, but we're willing to discuss the possibility. See, e.g., Baude, *supra* note 53, at 2403–08; Sachs, *supra* note 53, at 883–85.

<sup>402</sup> Fallon, *supra* note 6, at 1305.

natural reasons fail to produce agreement. Indeed, this design is reason for more attention to our law of interpretation — perhaps its settling power can be improved by careful attention to what canons of interpretation are actually established, what closure rules actually mark our legal system, and what priority our rules have over one another. The law may not supply all the answers, but lawyers ought to be looking for them.

#### CONCLUSION

Everybody knows that in legal interpretation we start with written words and somehow end up with law. The question is what happens in between. Interpretation, we think, has been too obsessed with the first and last stages of this process — figuring out the possible linguistic meanings of words, and figuring out what judges should do. Not enough effort has been focused on an important stage in the middle: processing written texts through law.

Once we recognize the importance and ubiquity of the law of interpretation, we can be clearer with ourselves and with each other about what we're doing in any given case — linguistic interpretation, legal reasoning, or judicial invention. And we'll have many more (and hopefully more tractable) resources for distilling law out of the many meanings, purposes, and intentions that any one legal instrument can have. We don't claim to have produced all of the answers here, but we hope that we can lead others to ask the right questions.