FACES OF FORMALISM

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Formalist approaches to legal interpretation, such as textualism and originalism, are ascendant in federal statutory and constitutional law. Yet with success have come uncertainty and dissatisfaction. Formalists and their critics observe that textualism and originalism can seem as open-ended as the purposive and dynamic methods they were supposed to replace. This Article tries to diagnose the source of this discontent. It does so by identifying two different faces of formalist interpretation: the formalism of authority*—adherence to original sources of law—and the* formalism of method*—constraint through predictable, rule-bound interpretation. Defenses of formalism often assume these two paths to constraint run together, but they can come apart. The careful search for an authoritative source is not readily amenable to rules. At the same time, seeking certainty and impersonality through mechanical methods risks interpretive drift from original, authoritative norms.*

Once we notice this tension, we see it everywhere in arguments about interpretive formalism: intentionalism versus public meaning, what kind of intentionalism, what kind of public meaning, the force of original expected applications, whether to treat interpretive method as law, and the centrality of rules over standards. Answers to these questions turn on how we reconcile or prioritize these two faces of formalism. It turns out that the standard contrasts between "form and substance," or "form and function," or "letter and spirit," miss important parts of the picture. Different substantive visions about law

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and interpretation compete within the confines of form. Method formalism's goals are more functional, while the spirit of authoritative formalism is less likely to confine itself to the letter. Although no synthesis should obscure either face of formalism entirely, the most plausible approach places the search for authority at the center of the practice.

INTRODUCTION

Formalist approaches to legal interpretation, such as textualism and originalism, are ascendant in federal statutory and constitutional law. At the same time, jurists and scholars today cannot seem to agree about what it means for an approach to be "formal." There is basic agreement on a core principle that formalist interpretation should direct decision-making and constrain normative judgment about what the law ought to be. But beyond that, things get messy. In fact, recent works by formalists and their

critics observe that textualism and originalism can seem as open-ended as the purposive and dynamic methods they were supposed to replace.[1]

For a less abstract setup of the problem, consider *Bostock v. Clayton County*.[2] Title VII of the Civil Rights Act of 1964 makes it "unlawful" for employers to discriminate against a person "because of such individual's race, color, religion, sex, or national origin."[3] Writing for the majority, Justice Gorsuch held that the "ordinary public meaning of its terms at the time of its enactment" compelled the judgment that Title VII prohibits employment discrimination against gay and transgender persons.[4] Justice Gorsuch rejected the objection that "few in 1964 would have expected Title VII to apply to" such discrimination.[5] He replied that such arguments "impermissibly seek[] to displace the plain meaning of the law in favor of something lying beyond it."[6] That something, whether it be unwritten intention, purpose, or lurking policy preferences, is not the law.

Justice Alito, joined by Justice Thomas, dissented, claiming that the majority was engaging in "legislation" under the guise of interpretation.[7] He likened the majority opinion to a pirate ship, smuggling in statutory updates under the false flag of textualism.[8] No reader in 1964, he objected, "would have thought" the statute bore the "exotic meaning" that Justice Gorsuch elicited through the implications of the language "because of 'sex.'"[9] Justice Kavanaugh's dissent objected that good textualism looks for the "ordinary meaning of phrases," not the "literal meaning" of the

[1] See generally, e.g., Tara Leigh Grove, Which Textualism?, 134 Harv. L. Rev. 265, 292–95 (2020) (noting that one of the goals of "early textualists" was to "constrain judicial discretion," while highlighting that the textualism employed by some members of the Court today "carries an analogous risk of interpretive leeway"); Anita S. Krishnakumar, Backdoor Purposivism, 69 Duke L.J. 1275, 1276 (2020) (arguing that "the Court's textualist Justices have been quietly engaging in a form of purposive analysis"); James A. Macleod, Standard Textualism, 124 Mich. L. Rev. 661, 680–81 (2026) ("[M]odern pluralism's recourse to extratextual factors may make it the more rule-like, discretion-constraining method."); Andrew S. Oldham, On Inkblots and Truffles, 135 Harv. L. Rev. F. 154, 170 (2022) ("[W]e need more and more work that shows particular constitutional provisions have objectively determinate meanings based on rigorous analysis and academic debate over relevant sources of original meaning.").

[2] 140 S. Ct. 1731, 1738–39 (2020).

[3] 42 U.S.C. § 2000e-2(a)(1).

[4] *Bostock*, 140 S. Ct. at 1738, 1741.

[5] Id. at 1749.

[6] Id. at 1750.

[7] Id. at 1754 (Alito, J., dissenting, joined by Thomas, J.).

[8] Id. at 1755–56.

[9] Id. at 1771–72.

words in a phrase taken separately.[10] Ordinary meaning draws on "relevant social and linguistic conventions" to "read the text in context."[11] He argued that the context of the 1964 enactment and a range of subsequent discrimination legislation show that "common parlance and common legal usage" foreclose the majority's opinion.[12]

All three opinions claimed adherence to the Supreme Court's governing mode of statutory interpretation: original public meaning textualism. Each opinion also claimed that those on the other side of the judgment were doing it wrong. We can multiply such examples beyond *Bostock*: Is tobacco a "drug" subject to FDA regulation? The literal terms of the Federal Food, Drug, and Cosmetic Act's ("FDCA") definitions indicate it is.[13] Yet an opinion joined by textualist Justices Scalia and Thomas held that inferences from the broader structure of the statutory regime and other tobacco-specific legislation compelled the opposite conclusion.[14] Do the Eleventh Amendment's protections extend only to suits against a state brought by the citizens of other states and nations? There are strong arguments, grounded in original public meaning of the constitutional text, that it is so limited.[15] At the same time, the Court has held repeatedly that the original meaning of the text, in light of its legal backdrops, means more.[16] The arguments here concern competing inferences not merely about the same textual evidence, but about what text and context count as good evidence for finding the law.

[10] See id. at 1828 (Kavanaugh, J., dissenting).

[11] Id. at 1825 (quoting John F. Manning, The Absurdity Doctrine, 116 Harv. L. Rev. 2387, 2392–93 (2003) [hereinafter Manning, Absurdity Doctrine]).

[12] Id. at 1828–30, 1832–33.

[13] See Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 164 (2000) (Breyer, J., dissenting).

[14] See id. at 126 (majority opinion) (holding that "[s]uch authority is inconsistent with the intent that Congress has expressed in the FDCA's overall regulatory scheme and in the tobacco-specific legislation that it has enacted subsequent to the FDCA").

[15] See, e.g., John F. Manning, The Eleventh Amendment and the Reading of Precise Constitutional Texts, 113 Yale L.J. 1663, 1740–49 (2004) [hereinafter Manning, Eleventh Amendment] (making that argument). For a collection of citations to such arguments, see Anthony J. Bellia Jr. & Bradford R. Clark, State Sovereign Immunity and the New Purposivism, 65 Wm. & Mary L. Rev. 485, 527 n.182 (2024).

[16] See, e.g., Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996) (explaining "we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms" (alteration in original) (quoting Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779 (1991) (Scalia, J.))); Bellia & Clark, supra note 15, at 531 ("Although *Seminole Tribe* did not provide a comprehensive account of state sovereign immunity, the Court suggested that the constitutional basis of such immunity was independent of—and predated—the Eleventh Amendment.").

Recent scholarship on interpretive formalism follows suit. Professor Lawrence Solum contends that public meaning textualism cannot stop at bare semantic meaning, but must also account for the text's richer pragmatic context.[17] Professor Stephen Sachs has noted "originalists' serene acceptance—or smug disregard, as their critics might say—of the difficulties of doing legal history or the frequent mistakes of prominent judges."[18] Sachs replies that if such a search leads to an answer that "is right about the law, then it's right about the law, though it may be hard to carry out well."[19] There is no reason why "the *correct* approach" must "also be a *practical* one."[20] Others are less sanguine. Professor Tara Leigh Grove objects that sweeping in wide contextual evidence to define public meaning permits just the kind of judicial discretion that textualism was supposed to avoid.[21] Judge Andrew Oldham worries that an originalism that hardly ever leads to ready answers may not be one worth defending.[22] Professor James Macleod offers the ironic observation that the purportedly formalist textualism at today's Supreme Court looks much more like a law of standards, not a law of rules.[23]

What are we to make of these disagreements? This Article tries to sort out the problem by taking a closer look at what interpretive formalism is for. Interpretive formalists share a common goal of constraint through conformity to an external rule or standard.[24] But there are different ways of being constrained. One way—the *formalism of authority*—focuses on conforming to original sources of law.[25] Another way—the *formalism of method*—conforms to a predictable, rule-bound approach to

[17] See generally Lawrence B. Solum, Pragmatics and Textualism, 33 J.L. & Pol'y 2, 7–9 (2025) [hereinafter Solum, Pragmatics and Textualism]. See also Saikrishna Bangalore Prakash, Spirit, 173 U. Pa. L. Rev. 937, 945 (2025) (arguing that "every sort of originalist should come to grips with spirit's pervasive role" in Founding-era interpretation).

[18] Stephen E. Sachs, Originalism: Standard and Procedure, 135 Harv. L. Rev. 777, 779–80 (2022) [hereinafter Sachs, Standard and Procedure].

[19] Id. at 780.

[20] Id. at 792.

[21] See Grove, supra note 1, at 292–95.

[22] See Oldham, supra note 1, at 156 ("The best (dare I say only?) way to define and defend originalism against its critics is to show that some (dare I hope all?) provisions of the Constitution have determinate or 'thick' original meanings—that is, that we can find the true, genuine, and objectively correct meaning of a constitutional provision with greater ease than a hound blindly searching for a truffle.").

[23] Macleod, supra note 1, at 668 (arguing that "[t]he more strictly text-based the interpretation" in today's Supreme Court, "the more standard-like the resulting legal content").

[24] See infra Part I.

[25] See infra Section I.A.

interpretation.[26] Formalists often assume these two paths to constraint run together: normative arguments for methods like originalism and textualism both respect the authoritative choices of the people *and* are more manageable and predictable than freewheeling purposive or moral inquiries. Yet these two paths to constraint often, in fact, diverge. The basic reason is this: a careful search for an original, authoritative source is not amenable to mechanical methods, and interpretive simplicity risks interpretive drift from original, authoritative norms.[27]

If we can no longer believe that authority and method support a unified approach to formalist constraint, we have to make sense of a fragmented world east of methodological Eden. Part of that is appreciating how so many neuralgic questions for formalists trace back to disagreements over whether to prioritize original authority or methodological clarity. In *Bostock*, for example, Justice Gorsuch's adherence to the formalism of method led him to rule for the petitioner and accuse his context-friendly dissenters of backdoor purposivism, so to speak.[28] The dissenters' allegiance to the formalism of authority led *them* to return the favor by characterizing Justice Gorsuch's more algorithmic method as statutory updating on the sly.[29] More generally, understanding this tension within formalism illuminates a number of vexed topics in formalist circles, such as original intention versus original public meaning; if intentionalism, what kind; if public meaning, what kind; the role of original expected applications; whether interpretive method should be treated as law; and the role of rules and standards in formalist interpretation.

In the name of constraint, then, some formalist interpretation prioritizes authoritative sources and other practices emphasize method. In doing so, however, these contrasting approaches point to very different accounts of the meaning and goals of interpretive constraint. Each one also draws on different accounts of what law is and what it is for, even if these accounts are implicit. An understanding of constraint that focuses on authority is open to methodological complexity that would surprise the first wave of formalists. An account of constraint that prioritizes method points toward

[26] See infra Section I.B.

[27] See infra Part II.

[28] See Bostock v. Clayton County, 140 S. Ct. 1731, 1753 (2020); Krishnakumar, supra note 1, at 1278 (contending that textualist jurists "at times engage in a form of backdoor purposivism, or at least speculation about legislative intent, that looks surprisingly similar to the intent speculation inherent to traditional purposivism").

[29] See *Bostock*, 140 S. Ct. at 1755–56 (Alito, J., dissenting).

an understanding of authoritative sources very different from the theory from which it originated. It turns out, then, that the standard contrasts between "form and substance," or "form and function," or "letter and spirit," miss important parts of the picture. Different substantive visions about the nature and purposes of law and interpretation compete within the confines of form. Method formalism's goals are more functional, while the spirit of authoritative formalism is less likely to confine itself to the letter. Formalists, in the end, need to choose which understanding of constraint to prioritize in their interpretive methods. This Article contends that, while no new synthesis should obscure either face of formalism entirely, the most plausible reconstruction of interpretive formalism should place the search for authority at the center of the practice.

Two quick notes before starting. First, on scope: an article addressing statutory and constitutional interpretation assumes that both practices call for similar methods. I am inclined to think they do, but that could be wrong. Nevertheless, I treat them similarly for purposes of argument, particularly since many scholars and jurists discussed here do too. This focus might also be too narrow for ignoring contracts, wills, and trusts. I do not discuss them because I have less considered views about interpreting private-law instruments and, for better or worse, most of the work engaged here does not address them, either. In short, I am smoothing over complexities in an Article that is already long enough.

The second note is on relevance. What if you think formalism is bunk?[30] Just as there is little point in attending to a missive that seeks to unravel the mysteries of phlogiston, an anti-formalist reader might not want to bother here, either. That would be too quick. Even non-formalist theories give legal formality their due. Professors Henry Hart and Albert Sacks's purposivism relies heavily on the *original* enactment and its context.[31] For Professor William Eskridge, good, old-fashioned statutory text is a crucial segment of his interpretive "funnel of abstraction," alongside other less formal dimensions.[32] To the extent that legal formality plays a role in *any* approach to interpretation, interpreters face

[30] Cf. Mitchell N. Berman, Originalism Is Bunk, 84 N.Y.U. L. Rev. 1, 8 (2009) ("[O]riginalism . . . is not merely false but pernicious as well.").

[31] See Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1377–80 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

[32] See William N. Eskridge, Jr., Dynamic Statutory Interpretation 55–56 (1994).

cognate problems confronting the more full-blooded formalist, albeit as a subdivision of a larger, more dynamic approach to reading law.

The Article proceeds as follows. Part I defines interpretive formalism in general and then sketches the two faces of formality in particular through examples and arguments from leading legal formalists. It then shows how formalist jurists often assume these competing approaches are compatible. Part II complicates that picture by explaining how these two paths to interpretive constraint do not always run in parallel. It then traces these complexities through a number of inter-formalist arguments about original intention, public meaning, expected applications, the law of interpretation, and the role of rules and standards. Part III takes stock, first by situating this dilemma in the recent history and conceptual apparatus of interpretive formalism. It then explains how these disagreements at the level of interpretive method are rooted in deeper tensions in moral arguments for legal formality more generally. It identifies the competing visions that prioritize authority or method, respectively, and offers a brief argument for why authority should anchor interpretive practice. A brief conclusion follows.

I. SKETCHING THE FACES OF FORMALISM

Formalist methods like textualism and originalism are ascendent in the courts, but what does it mean for an interpretive approach to be "formalist"? The term "formalism" in law comes with many connotations.[33] Legal realists critiqued the "formalism" of thinkers like Joseph Beale and Christopher Columbus Langdell for allegedly believing that judging was a mechanical, deductive process autonomous from other domains of practical reason.[34] Then there is the standard characterization of formalism as an approach that privileges legal formalities over substance or function.[35] More generally, it is a multipurpose and perennial

[33] See Paul B. Miller, The New Formalism in Private Law, 66 Am. J. Juris. 175, 180–81 (2021) (identifying fifteen propositions attributed to legal formalism); Richard H. Pildes, Forms of Formalism, 66 U. Chi. L. Rev. 607, 607 (1999) (identifying three varieties of formalism discussed in one symposium alone).

[34] See generally Brian Z. Tamanaha, Beyond the Formalist-Realist Divide: The Role of Politics in Judging 1–3, 14–17, 51–53 (2010) (summarizing this critique).

[35] See Felix S. Cohen, Transcendental Nonsense and the Functional Approach, 35 Colum. L. Rev. 809, 821–23 (1935) (contrasting legal formalism with pragmatic functionalism); Miller, supra note 33, at 180–81 (describing this attribute).

term of abuse.[36] More positively, private-law theorists like Professor Ernest Weinrib embrace formalism's "postulate[] that law is intelligible as an internally coherent phenomenon."[37] Professor Paul Miller, in turn, has offered a complex theory of private-law formalism that emphasizes law's guidance-giving function, the importance of the rule of law, and the objective intelligibility of legal reasons and outcomes.[38]

I do not give a complete definition or defense of legal formalism here, but rather emphasize what unites a number of formalist approaches to statutory and constitutional interpretation. These formalist theories emphasize *limitation of choice* by conformation to an external rule or other kind of constraint.[39] "Formalism in this sense is not the denial of choice *by* the judge" (the alleged sins of Langdell and the *Lochner* Court), "but the denial of choice *to* the judge."[40] In other words, legal formalism in *this* sense of the term recognizes and respects the fact that legal norms can be opaque with respect to their motivating background moral purpose. When the two come apart, formalism privileges the content of legal norm. Non-formalism, by contrast, is more willing to subordinate the content of the norm or, put another way, is more likely to include the animating moral purpose as part of the norm. (One could also invoke the classic distinction between the letter of the law and the spirit, and that is true as far as it goes, but as we will see, that phrasing can overemphasize the role text plays for some formalists.[41])

In legal interpretation, this kind of formalism seeks to limit the interpreter's choice in giving legal meaning to an enacted text. Most commonly, interpretive formalists will privilege the public meaning of the text or the drafters' intentions over the overarching purpose of the

[36] See Frederick Schauer, Formalism, 97 Yale L.J. 509, 510, 513 (1988) [hereinafter Schauer, Formalism]; Martin Stone, Formalism, *in* The Oxford Handbook of Jurisprudence and Philosophy of Law 166, 166 (Jules L. Coleman & Scott Shapiro eds., 2004) ("Like the treatment of neurosis or the death of God, the critique of formalism seems somehow interminable.").

[37] See Ernest J. Weinrib, Legal Formalism: On the Immanent Rationality of Law, 97 Yale L.J. 949, 951 (1988).

[38] See Miller, supra note 33, at 196–97.

[39] See Schauer, Formalism, supra note 36, at 521; accord Larry Alexander, "With Me, It's All er Nuthin'": Formalism in Law and Morality, 66 U. Chi. L. Rev. 530, 531 (1999) ("A formalist looks to the form of a prescription—that it is contained in an authoritative rule—rather than to the substantive end or ends that it was meant to achieve.").

[40] Schauer, Formalism, supra note 36, at 521.

[41] See infra Part II.

enactment, contemporary values, or pragmatic consequences.[42] With the rise of textualism in statutory interpretation and public meaning originalism in constitutional interpretation, such interpretive formalism has enjoyed a renaissance in recent decades on the federal bench—if not in the legal academy. We can find some complexity, however, even within this stipulated, shorn-down understanding of formalism. Even if methods share the goal of constraining the interpreter, it turns out that there are different ways of being constrained—and different underlying understandings of the aims of legal interpretation.

A. The Formalism of Authority

One face of interpretive formalism is what we can call the formalism of *authority*. Here, interpreters seek to identify a choice that has been fixed into law by an authoritative decision-maker in the past, rather than making a substantive decision themselves about what the law should be. The substance of that preexisting, discovered choice could be good, bad, or indifferent.[43] Still, the interpreter's primary—or at least initial—quarry is the content of that choice.[44] The formalism of authority is very often also a formalism of *origins*.[45] To search for authoritative norms is to discover constraining choices made in the past. A literary critic who thinks an author's communicative intention grounds valid literary interpretation will pursue the most plausible inferences about what a man

[42] See Miller, supra note 33, at 193–95 (discussing this kind of "[c]onstitutional and [l]egislative" formalism).

[43] See, e.g., Schauer, Formalism, supra note 36, at 510 (arguing that a method is formalist to the extent it "screen[s] off from a decisionmaker factors that a sensitive decisionmaker would otherwise take into account").

[44] I have hedged with the phrases "presumptively" and "at the very least initial" with respect to the goal of interpretation to leave open the possibility that, at least as a matter of adjudication, interpreters may not ultimately adhere to what they find at the source. Formalism comes in shades, whether it is Frederick Schauer's "presumptive positivism" that puts a strong thumb on the scale in favor of rules, see Frederick Schauer, Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life 203–05 (1991) [hereinafter Schauer, Playing by the Rules], or the natural lawyer who sees adhering to promulgated law as a strong, presumptive moral duty that is nevertheless defeasible if the human law radically undermines the common good and human rights.

[45] See Amy Coney Barrett, Substantive Canons and Faithful Agency, 90 B.U. L. Rev. 109, 114 (2010) [hereinafter Barrett, Canons and Faithful Agency] ("Textualists in statutory interpretation tend to be originalists in constitutional interpretation.").

named Shakespeare meant when he wrote *Hamlet* circa 1600.[46] In the same fashion, the authoritative formalist asking what "established by a state" means in the Affordable Care Act will seek to understand what the 111th Congress did in 2010.[47] A formalism of authority sees the law of the past not as a dead hand, but rather as a living pointer toward our current obligations.

Authoritative formalism runs through a host of apparently disparate theories of legal interpretation. Consider Professor Larry Alexander's intentionalism. He contends that interpreting a text is "necessarily seeking its author's or authors' intended meaning"[48] and that "[i]f we want to know what the law is, we must ascertain what the authorities have determined ought to be done."[49] To do otherwise "is to construct a federal law that lacks constitutional authorization."[50] He acknowledges it will not always be easy or possible to find that original intention.[51] There may not even be an underlying intention to find: if no legislative majority shared an intended meaning about an enacted text, despite appearances, "the law has no authorially intended meaning."[52] This "failed law" would in fact be "gibberish."[53] Other doctrines or defaults could guide officials on what to do about failed law, but such implementation would not be legal *interpretation* of authoritative sources, but rather the generation of new legal norms arising out of necessity.[54]

Professor Richard Ekins's approach to intentionalism is another example of authoritative formalism. Ekins treats the "intentions of

[46] See E.D. Hirsch, Jr., Validity in Interpretation 5 (1967) ("To banish the original author as the determiner of meaning was to reject the only compelling normative principle that could lend validity to an interpretation.").

[47] See King v. Burwell, 576 U.S. 473, 483 (2015) (grappling with whether Congress included federally established health exchanges in the category of "an Exchange *established by the State* under section 1311 of the Patient Protection and Affordable Care Act" (quoting 26 U.S.C. § 36B(b)–(c))).

[48] Larry Alexander, Telepathic Law, 27 Const. Comment. 139, 139 (2010) [hereinafter Alexander, Telepathic Law].

[49] Larry Alexander, All or Nothing at All? The Intentions of Authorities and the Authority of Intentions, *in* Law and Interpretation: Essays in Legal Philosophy 357, 363 (Andrei Marmor ed., 1995) [hereinafter Alexander, All or Nothing at All].

[50] Alexander, Telepathic Law, supra note 48, at 141.

[51] Larry Alexander, Originalism, the Why and the What, 82 Fordham L. Rev. 539, 542 (2013) [hereinafter Alexander, Why and the What].

[52] Id.

[53] Alexander, All or Nothing at All, supra note 49, at 386 (failed law); Alexander, Why and the What, supra note 51, at 542 (gibberish).

[54] Alexander, All or Nothing at All, supra note 49, at 388.

individual legislators in respect of particular legislative acts" as "irrelevant to the content of the joint act."[55] What matters is that the legislators jointly intend that an open proposal before the body becomes law if it clears enactment procedures.[56] Despite this ontologically richer account of intention, Ekins's approach also seeks authoritative, original sources of law by focusing on the open proposal before the legislature. The object of interpretation is to "infer the legislature's intended meaning in uttering the relevant statutory text," a process that "is informed by, and in turn informs, reflection on the reasoned choice the legislature likely acted to make and is grounded in the rich context of enactment."[57] As with statutes, so with constitutions. A constitution is "a deliberate lawmaking act" by authority, "the intended meaning of which is to be upheld."[58] Respect for this promulgating authority, Ekins concludes, entails that a written constitution "is not rightly open to all of the many established interpretive approaches."[59] Proper interpretation searches for the reasoned choices constitutional authorities made when they adopted the promulgated text.[60]

A similar story holds for much original public meaning textualism in statutory and constitutional interpretation. This approach denies that it is worthwhile, or even possible, to pursue the lawmaking intention of groups like multimember legislatures or ratifying conventions.[61] For statutes, some interpreters instead ask how an ordinary legislator would have

[55] Richard Ekins, The Nature of Legislative Intent 231 (2012) [hereinafter Ekins, The Nature of Legislative Intent].

[56] Id. at 232–33.

[57] Id. at 244.

[58] Richard Ekins, Objects of Interpretation, 32 Const. Comment. 1, 22 (2017) [hereinafter Ekins, Objects of Interpretation].

[59] Id. at 23.

[60] See also Donald L. Drakeman, The Hollow Core of Constitutional Theory: Why We Need the Framers 45 (2020) (arguing that constitutional interpretation requires looking beyond "the four corners of the text" because "[t]he Constitution was the result of a combination of reasoned arguments and the negotiated compromises needed to address difficult sectional rivalries"); Richard S. Kay, Original Intention and Public Meaning in Constitutional Interpretation, 103 Nw. U. L. Rev. 703, 718 (2009) ("In the context of constitutional interpretation, the puzzle is why anyone would find a constitution imbued with . . . denatured meaning—one worked out without considering the real historical circumstances of the text's creation—to have normative force.").

[61] See, e.g., Frank H. Easterbrook, Statutes' Domains, 50 U. Chi. L. Rev. 533, 547 (1983); Manning, Absurdity Doctrine, supra note 11, at 2408–19; Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 16–18, 32 (Amy Gutmann ed., 1997) [hereinafter Scalia, Matter of Interpretation].

understood the text's meaning.[62] Others deemphasize the hypothetical legislator in favor of "congressional outsiders": courts are agents of *the people*, not Congress, and should therefore read a statute "as its recipients would."[63] In doing so, interpreters "look for a sort of 'objectified' intent"[64] that tracks how "a reasonable person, conversant with the relevant social and linguistic conventions, would read the text in context."[65] In addition to the semantics and pragmatics of ordinary language, this context can also include legal-interpretive conventions and common law backdrops.[66]

In reading constitutional text, these interpreters also eschew the intentions of the Framers or ratifiers in favor of an objective, original public meaning.[67] Gleaning the meaning of *constitutional* text may be more difficult due to the lapse of time and more open-ended phrasing, but the basic goals and techniques are the same.[68] The interpreter pursues the

[62] See Chisom v. Roemer, 501 U.S. 380, 405 (1991) (Scalia, J., dissenting) ("We are to read the words of that text as any ordinary Member of Congress would have read them . . . .").

[63] Amy Coney Barrett, Congressional Insiders and Outsiders, 84 U. Chi. L. Rev. 2193, 2209 (2017) [hereinafter Barrett, Insiders and Outsiders].

[64] Scalia, Matter of Interpretation, supra note 61, at 17.

[65] Manning, Absurdity Doctrine, supra note 11, at 2392–93; see also Frank H. Easterbrook, The Role of Original Intent in Statutory Construction, 11 Harv. J.L. & Pub. Pol'y 59, 65 (1988) [hereinafter Easterbrook, Original Intent] (stating that an interpreter should ask how "a skilled, objectively reasonable user of words" would read the text).

[66] See Manning, Absurdity Doctrine, supra note 11, at 2467 (citing McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 496 (1991)) (interpretive conventions); id. at 2466–67 (citing Young v. United States, 535 U.S. 43, 49–50 (2002)) (common law backdrops); Frank H. Easterbrook, The Case of the Speluncean Explorers: Revisited, 112 Harv. L. Rev. 1913, 1913–14 (1999) [hereinafter Easterbrook, Speluncean Explorers] (explaining how textualists can imply unstated common law defenses to criminal statutes).

[67] The string cite could be endless, but for a taste, see generally Vasan Kesavan & Michael Stokes Paulsen, The Interpretive Force of the Constitution's Secret Drafting History, 91 Geo. L.J. 1113, 1118 (2003) ("[T]he project of constitutional interpretation is to determine the *original meaning* of the Constitution . . . and not to determine either the Framers' or Ratifiers' *subjective intention* . . . ."); John F. Manning, The Role of the Philadelphia Convention in Constitutional Adjudication, 80 Geo. Wash. L. Rev. 1753, 1760–64 (2012) (explaining the shift from original intentionalism in interpretation to original public meaning); Scalia, Matter of Interpretation, supra note 61, at 38 ("What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended."); Keith E. Whittington, The New Originalism, 2 Geo. J.L. & Pub. Pol'y 599, 609–10 (2004) ("What is at issue in interpreting the Constitution is the textual meaning of the document, not the private subjective intentions, motivations or expectations of its authors.").

[68] See generally Manning, Eleventh Amendment, supra note 15 (rejecting the argument that judges should read a precisely worded provision of the Constitution differently than a precisely worded statute); Scalia, Matter of Interpretation, supra note 61, at 37 ("The problem is

same kind of objectified meaning of the text, with "careful attention to the nuances and specialized connotations" of speakers at the time, historical context, and awareness of the technical-legal character of the text and its surrounding conventions.[69] For some leading constitutional originalists, ratification-era background law can also contribute to interpretive context to the extent it is incorporated by the original Constitution or otherwise informs the original meaning.[70] Such norms or practices can include the background law or conventions of interpretation.[71] (This summary smooths over subtle and hard questions about the relationship between the meaning of enacted text and background law, but is precise enough for current purposes.[72])

Most who treat public meaning as the primary source for interpretation also seek its *original* understanding. When Justice Scalia and Professor Bryan Garner list canons applicable to all legal texts,[73] their second item (preceded only by the "ordinary-meaning rule" as the "most fundamental semantic rule of interpretation"[74]) is the "[f]ixed-[m]eaning [c]anon," which holds that "[w]ords must be given the meaning they had when the text was adopted."[75] They offer a full-blown defense of original meaning

distinctive, not because special principles of interpretation apply, but because the usual principles are being applied to an unusual text.").

[69] Manning, Eleventh Amendment, supra note 15, at 1704.

[70] See, e.g., Stephen E. Sachs, Originalism as a Theory of Legal Change, 38 Harv. J.L. & Pub. Pol'y 817, 849 (2015) [hereinafter Sachs, Originalism as Legal Change].

[71] Stephen E. Sachs, Constitutional Backdrops, 80 Geo. Wash. L. Rev. 1813, 1816 (2012) [hereinafter Sachs, Constitutional Backdrops] (identifying "constitutional 'backdrops': rules of law that aren't derivable from the Constitution's text, but instead are left unaltered by the text, and in fact are protected by the text from various kinds of legal change"); 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, 751–52 (2009) [hereinafter McGinnis & Rappaport, Original Methods Originalism] (contending that interpretation should be governed by "the content of the interpretive rules in place when the Constitution was enacted").

[72] See generally Caleb Nelson, State and Federal Models of the Interaction Between Statutes and Unwritten Law, 80 U. Chi. L. Rev. 657 (2013) (arguing that federal statutes are interpreted to answer more legal questions than similarly worded state statutes because courts can turn to state common law if the state statute is silent, but federal principles of unwritten law are not often regarded as an available alternative when interpreting federal statutes). For some originalists who focus on the original law—written or unwritten—text is not even necessary. See Stephen E. Sachs, Originalism Without Text, 127 Yale L.J. 156, 157 (2017) [hereinafter Sachs, Originalism Without Text].

[73] Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 69–239 (2012).

[74] Id. at 69.

[75] Id. at 78.

and a fusillade against more dynamic approaches. They acknowledge that most linguistic canons are defeasible presumptions or rules of thumb,[76] but they offer no such qualifications about the fixity of original meaning.[77] In the same vein, Professor Lawrence Solum, one of the most sophisticated public meaning theorists, defends the thesis that "[t]he meaning of the constitutional text is fixed when each provision is framed and ratified."[78] Judge Easterbrook holds that statutory meaning "comes from the ring the words would have had to a skilled user of words *at the time*, thinking about the same problem."[79] Professor Michael McConnell also identifies the judicial task as enforcing "commitments made by the people in the past, and embodied in text, history, tradition, and precedent."[80] We could multiply examples, but in mainstream interpretive doctrine, adding "original" to "public meaning textualism" seems almost superfluous.

B. The Formalism of Method

This second face of formalism is less concerned with finding original, authoritative sources than with methods to identify the meaning of texts. The goal here is to limit discretion and judgment in the interpretive act itself by adopting rule-like approaches to reading law. An interpretative method is rule-like to the extent it has a limited menu of interpretive moves and those options themselves reduce judgment calls. Whereas the formalism of authority seeks to limit discretion by tying interpretation to another legal actor's binding choice, method-formalism emphasizes the rule-of-law values of notice, predictability, stability, decision-making economy, and the judicial impersonality that come from reducing the number and kinds of discretionary judgments.[81]

[76] Id. at 51 ("Properly regarded, [canons] are not 'rules' of interpretation in any strict sense but presumptions about what an intelligently produced text conveys.").

[77] At most they recognize that a historical fixed meaning can apply to new circumstances, id. at 85–86, or that some (fixed) "statutory terms refer to defined legal qualifications whose definitions are, and are understood to be, subject to change," id. at 89.

[78] Lawrence B. Solum, The Fixation Thesis: The Role of Historical Fact in Original Meaning, 91 Notre Dame L. Rev. 1, 1 (2015).

[79] Easterbrook, Original Intent, supra note 65, at 61 (emphasis added).

[80] Michael W. McConnell, The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution, 65 Fordham L. Rev. 1269, 1273 (1997).

[81] See, e.g., Frank H. Easterbrook, Text, History, and Structure in Statutory Interpretation, 17 Harv. J.L. & Pub. Pol'y 61, 63 (1994) [hereinafter Easterbrook, Text, History, and Structure] ("Another thing political society wishes to do is to confine judges. We are supposed

For perhaps the starkest example of this methodological formalism, consider the argument Professor Adrian Vermeule advanced in *Judging Under Uncertainty*. There, he argued that judges should "limit[] themselves to a small set of interpretive sources and a restricted range of relatively wooden decision-rules."[82] Courts should "stick close to the surface-level or literal meaning" of the statutory provision at issue.[83] They should not use "legislative history, many of the canons of construction, [or] holistic textual comparison."[84] Rather, they should only rely on "directly dispositive clauses or provisions at hand."[85] He contrasts this with "dubious" "holistic" textualist approaches that seek to understand a particular provision in light of other provisions in the statute and other "collateral legal texts."[86] Vermeule grounds this "rule-consequentialist"[87] approach in institutional-competence and decision-theoretical analysis. Generalist judges have limited competence and time. There is also genuine uncertainty about whether further contextual searches beyond particular clauses will improve interpretive accuracy. Given the uncertain benefits of such further work, and given that work's certain costs, a rational judge would choose this limiting, second-best approach to interpretation.[88]

On the other hand, when statutes are unclear and are administered by agencies, Vermeule would have courts defer to agency interpretations.[89] In his view, the differences in administrative agencies' capacities and decision-making environments place them in a better position to resolve interpretative uncertainties.[90] For that reason, agencies should have

to be faithful agents, not independent principals. Having a wide field to play—not only the statute but also the debates, not only the rules but also the values they advance, and so on—liberates judges. This is objectionable on grounds of democratic theory as well as on grounds of predictability."); Scalia & Garner, supra note 73, at 34 (stating that "certainty, predictability, objectivity, reasonableness, rationality, and regularity . . . are the objects of the skilled interpreter's quest").

[82] Adrian Vermeule, Judging Under Uncertainty: An Institutional Theory of Legal Interpretation 4 (2006).

[83] Id.

[84] Id. at 183.

[85] Id. at 204.

[86] Id. at 203–04 (criticizing Justice Scalia's opinion in *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991)).

[87] Id. at 5.

[88] Id.

[89] Id. at 205–11.

[90] Id. at 213–15.

greater license than courts to engage in nonformal interpretation.[91] For similar reasons, he recommended that courts adopt a stance of Thayerian deference in judicial review when provisions of the Constitution are unclear.[92] One could argue that legal flexibility in the executive and legislative branches undermines the method-formalist's aspirations to limit discretion and encourage notice, predictability, and decision-making efficiency. Nevertheless, a formalist of this stripe would reply that in hard cases, the line between interpretation and policymaking is blurry at best, and one cannot seek legal predictability when there is no obvious law on point.[93] And, as a formalist like Larry Alexander would argue, when there are no rules on point to follow, all that remains is ordinary moral and policy reasoning.[94] Thus, for the interpreter in this situation, the only preexisting authoritative choice to find is that of the executive or legislative actor within those gaps.

Professor Frederick Schauer has also offered a second-best defense of formalist interpretation. Schauer's more qualified argument[95] is that the benefits of coordination *can* justify courts' adherence to the plain meaning of statutes, even though doing so can "generate an absurd result, or at least a result at odds" with the statute's background policies or purposes.[96] Understanding the policy context of a statute and the implications of varied interpretations takes time and expertise that generalist judges lack. "Context," Schauer cautions, "is not for dabblers."[97] Judges are also likely to disagree about the upshots of contextualist inquiries. This creates a coordination problem for judges and for those trying to anticipate how judges will interpret statutes. Plain meaning, when available, can play the role of a salient coordinator.

[91] Id.

[92] Id. at 233.

[93] Cf. Adrian Vermeule, Neo-?, 133 Harv. L. Rev. F. 103, 111 (2020) ("Once the apple of realism has been tasted, everything changes, and the way back to the garden of naive classicism is forever barred.").

[94] See Larry Alexander, The Banality of Legal Reasoning, 73 Notre Dame L. Rev. 517, 518–19 (1998).

[95] Frederick Schauer, Statutory Construction and the Coordinating Function of Plain Meaning, 1990 Sup. Ct. Rev. 231, 232 [hereinafter Schauer, Statutory Construction] ("Still, there turns out to be a plausible normative argument supporting the Court's approach. This is not to say that there could not be equally plausible normative arguments supporting other approaches."); id. at 255 ("The normative contingency of [plain meaning's desirability] ought to be obvious.").

[96] Id. at 252.

[97] Id. at 253.

Adhering to it can "provide some minimal mutual understanding that guards something that is shared in the face of widely disparate political views and social experiences."[98]

Because of its modesty and presumptive character, Schauer's coordination-based defense of plain meaning could resonate with a wide range of formalist interpreters, including many originalist-textualists in the federal judiciary. His more recent inquiries on the implications of notice and coordination take him places where many practicing formalists fear to tread. Schauer offers an approach that "treats the text as genuinely authoritative" but also "treats the meaning of the text as the meaning at the time of interpretation—now—as against the original-meaning-originalists."[99] This non-originalist, contemporary public meaning textualism would apply to both statutory and constitutional interpretation, though, he adds, this approach would be *most* jarring to formalists in the constitutional domain.[100] He grounds this approach along similar lines of his defense of plain meaning. If the Constitution is going to be effective, it must speak not just to judges after litigation, but to *everyone* "whose behavior the Constitution purports to control and constrain."[101] If so, it is important that those actors "be able to understand the Constitution directly."[102] Understanding "the Constitution to mean now what its language means *now* to its addressees" accomplishes that far better than abstruse legal-historical inquiries.[103]

Schauer emphasizes the simplicity of his method, which is easier to apply for judges who are not blessed with the resources that allow Supreme Court Justices to work like "amateur historians."[104] He contends that non-originalist textualism is especially apt for nonjudicial officials

[98] Id. at 254–55.

[99] Frederick Schauer, Unoriginal Textualism, 90 Geo. Wash. L. Rev. 825, 838 (2022) [hereinafter Schauer, Unoriginal Textualism].

[100] See id. at 828–29. Schauer notes cases in which the Supreme Court, without much controversy, has deployed contemporary plain meaning to older statutes. Id. at 828 n.8; see also Hillel Y. Levin, Contemporary Meaning and Expectations in Statutory Interpretation, 2012 U. Ill. L. Rev. 1103, 1105–06 (articulating and defending contemporary meaning in statutory interpretation); T. Alexander Aleinikoff, Updating Statutory Interpretation, 87 Mich. L. Rev. 20, 61 (1988) (defending "present-minded interpretation[]" on notice grounds). That said, when textualists consider the choice between the original and contemporary public meaning of a statute, they increasingly tend to prefer the original. See Schauer, Unoriginal Textualism, supra note 99, at 828 n.8 (listing examples).

[101] Schauer, Unoriginal Textualism, supra note 99, at 857.

[102] Id. at 858.

[103] Id.

[104] Id. at 863–64.

who must act without waiting for guidance from courts.[105] He further argues that it is more likely to constrain such actors. Officials who "understand themselves as being constrained only by what those words meant generations or literally centuries ago" are more likely to wave off the mists of history and impose their own policy preferences.[106] This simplicity is an overall virtue because guidance and constraint by law are important constitutional goods which our interpretive methods should pursue.[107] Schauer notes that these are not the *only* goals, and he disclaims any judgment that they should trump other values.[108] His argument that we should take contemporary public meaning more seriously nevertheless suggests that formalists need to more closely consider whether their methods are simple enough to provide sufficient guidance.

At the risk of some decisional simplicity, moreover, courts pursuing coordination and guidance could follow the lead (or the research results) of scholars who use experiments to learn how people today are likely to understand language. For example, Kevin Tobia, Jesse Egbert, and Thomas Lee recently designed a 500-person survey experiment to identify whether the ordinary meaning of "and" in a mandatory-minimum sentencing provision of 18 U.S.C. § 3353(f) is disjunctive or conjunctive with respect to a series of conditions—a question then before the Supreme Court in *Pulsifer v. United States*.[109] The authors contended that rather than relying (merely) on dictionaries, canons, or their own impressions of language use, jurists could look to studies of ordinary language use.[110] Their particular survey indicated that the distributive use of "and," although less frequent than its conjunctive use, is common enough to introduce possible ambiguity.[111] (Justice Gorsuch, in fact, cited their study in his *Pulsifer* dissent against the majority's conclusion that the "and" was conjunctive.[112])

[105] Id. at 864.
[106] Id.
[107] See id. at 865.
[108] Id. ("Tradeoffs are inevitable, and Panglossian efforts to deny that serving some goals may impede others will result in avoiding the difficult problems that inhere in all aspects of governance . . . .").
[109] Kevin Tobia, Jesse Egbert & Thomas R. Lee, Triangulating Ordinary Meaning, 112 Geo. L.J. Online 23, 27–28, 44–45 (2023); Pulsifer v. United States, 144 S. Ct. 718 (2024).
[110] Tobia et al., supra note 109, at 24–25.
[111] Id. at 27, 50.
[112] *Pulsifer*, 144 S. Ct. at 743 (Gorsuch, J., dissenting).

These authors do not contend that experiments studying usage should be the sole metric for determining ordinary, contemporary public meaning. Rather, they advocate an approach that "triangulates" ordinary meaning through use of traditional tools, historical and contemporary linguistic corpora, *and* survey data.[113] Nevertheless, such empirical work could be fruitful for finding interpretations that provide notice and coordination today. Their utility, of course, depends upon the relevant community the interpreter is trying to coordinate. If the goal is coordinating among judges and lawyers, traditional canons and stray, lay impressions of language use might be more appropriate. If the target of notice and coordination is the governed, linguistic corpora or contemporary usage studies are better tools.

Another prominent, recent defense of method-formalism is what Professor Grove calls "formalistic textualism."[114] This focuses on text and "semantic context, zeroing in on the words approved by Congress and the President, rather than the social or policy context surrounding the enactment."[115] Grove contrasts formalist textualism with what she calls "flexible textualism," which, while focusing on text and eschewing legislative history, *also* looks at "social and policy context, normative values, and the practical consequences of a decision" to identify the text's legal meaning.[116] For her, *Bostock* exemplifies this distinction. Justice Gorsuch's majority opinion "carefully parsed the words of Title VII, focusing closely on semantic context," and, as Grove notes, "the opinion has an almost algorithmic feel to it."[117] By contrast, the dissenters criticized the majority for "an impoverished vision of the relevant context for textualism," namely the "social context in which Title VII was enacted."[118] Original public meaning, in the dissents' eyes, anchors to how ordinary people at the time would have understood the statute—a sociocultural understanding that is not limited to the *semantic* context of the enacted text.[119]

[113] See Tobia et al., supra note 109, at 24–25.
[114] Grove, supra note 1, at 267.
[115] Id. at 281.
[116] Id. at 286.
[117] Id. at 281.
[118] Id. at 283 (quoting Bostock v. Clayton County, 140 S. Ct. 1731, 1773 (2020) (Alito, J., dissenting)) (citing *Bostock*, 140 S. Ct. at 1828 (Kavanaugh, J., dissenting)).
[119] See id. at 283–84 (first quoting *Bostock*, 140 S. Ct. at 1766–67 (Alito, J., dissenting); and then quoting *Bostock*, 140 S. Ct. at 1828 (Kavanaugh, J., dissenting)).

Grove argues for formalistic textualism because it advances the goal of "cabining judicial discretion."[120] The more an interpreter uses substantive canons, treats unenacted background conventions as part of the law, or looks to social and policy context for identifying original meaning, the more "interpretive leeway" judges have to consciously or unconsciously read political preferences into the text's original meaning.[121] Consequently, she explains, courts should eschew non-semantic context, "apply only a 'closed set' of normative canons[,] and, relatedly, . . . rule out canons, such as the absurdity doctrine, that flexible textualism permits and that invite considerable judicial discretion."[122] If judges tie themselves to the mast of formalistic textualism, this "relatively rule-bound method" will constrain discretion and reduce their "proclivity to rule in favor of the political forces" that led to their nomination.[123] Such precommitment will improve the Court's "sociological legitimacy" and help Justices "navigate the tension between" Article II's politics and Article III's judicial duty.[124]

Grove's formalistic textualism differs from Schauer's method, as it anchors the law in the *original* public meaning of the statutory words at the time of enactment.[125] While she concedes that compared to flexible textualism, her preferred method may seem "wooden" in application,[126] this formalistic textualism seems marginally less rigid than Vermeule's, as she appears willing to allow linguistic canons and broader text and statutory structure to play a role in identifying legal meaning. Nevertheless, it aspires to advance methodological predictability, uniformity, and impersonality in interpretation.[127]

Finally, if ease of method, coordination, and notice were the ultimate goals of legal interpretation, our methodological ideal with respect to any legislative text (intentionally crafted or otherwise) would be algorithmic,

[120] Id. at 291.

[121] Id. at 292–95.

[122] Id. at 269 (footnote omitted) (quoting Manning, Absurdity Doctrine, supra note 11, at 2474).

[123] Id. at 298–99.

[124] Id. at 298, 300.

[125] Id. at 282–83.

[126] Id. at 270 (quoting Bostock v. Clayton County, 140 S. Ct. 1731, 1745 (2020)).

[127] Grove, in other writings, has also offered skepticism of empirical approaches to understanding ordinary meaning. See generally Tara Leigh Grove, Foreword: Testing Textualism's "Ordinary Meaning," 90 Geo. Wash. L. Rev. 1053, 1057 (2022) (arguing that "textualists treat 'ordinary meaning' as primarily a legal concept, not simply as an empirical fact").

and the outputs' connections to original authority would be contingent at best.[128] One could imagine a regime in which a government-approved artificial intelligence app generates authorized interpretations of texts, with the law providing that any time-stamped interpretation would be conclusive evidence of compliance with the statute. The inexcusability of ignorance of the law would no longer be a fiction, judges would not have to exercise discretion, notice would be possible for everyone, and coordination could be cheap and more freely available.[129] This seems fanciful, but it is only different in degree from a method that chooses easily applied rules over the uncertain work of finding authoritative choices in the past. In fact, a scholar recently contended that a large language model-based "[o]rdinary [m]eaning [b]ot" is a "practical, accurate alternative to dictionaries, intuition, or complex corpus analysis."[130] Though the impartiality of AI interpretation may incline some formalists to use it as *a* tool in interpretation, none (yet) have welcomed our machine-learning overlords with open arms.[131]

As a concluding aside, not all methodological formalism needs to press toward simplicity, ease of use, and notice. Recall the accusation that Justice Gorsuch's approach in *Bostock* was "algorithmic" in a way that risked departing from the original source, however understood. Not all impersonal algorithms need to be simple and transparent. Indeed, many real-life algorithms today operate in a black box, giving impersonal

[128] See Grove, supra note 1, at 281 (describing Justice Gorsuch's opinion in *Bostock* as "algorithmic"). But see Frank H. Easterbrook, The Absence of Method in Statutory Interpretation, 84 U. Chi. L. Rev. 81, 82 (2017) [hereinafter Easterbrook, Absence of Method] ("No algorithm [is] there [for textualism]—nothing a well-designed expert system could use to replace judges with computer code and a big database.").

[129] See Jack Kieffaber, Predictability, AI, and Judicial Futurism: Why Robots Will Run the Law and Textualists Will Like It, 48 Harv. J.L. & Pub. Pol'y (forthcoming 2026) (manuscript at 1), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4966334; cf. Yonathan Arbel & David A. Hoffman, Generative Interpretation, 99 N.Y.U. L. Rev. 451, 455 (2024) ("Giving courts a convenient way to commit to a cheap and predictable contract interpretation methodology would be a major advance in contract law, and parties may start to include them in their choice-of-law repertoire.").

[130] Johannes Kruse, The Ordinary Meaning Bot: Simulating Human Surveys with LLMs 1 (Max Planck Inst. for Rsch. on Collective Goods, Discussion Paper No. 2025/12, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5378203 [https://perma.cc/R58S-2GQD].

[131] The closest we have so far is Judge Kevin Newsom, who explained in a concurrence that he used AI to identify the ordinary meaning of the term "physically restrained." United States v. Deleon, 116 F.4th 1260, 1272 (11th Cir. 2024) (Newsom, J., concurring). Even at this judicial frontier, however, Judge Newsom was "at pains to emphasize" that he was "not advocating that we give up on traditional interpretive tools" and stated that AI large language models might only "serve a valuable auxiliary role" in public meaning textualism. Id. at 1277.

outputs in opaque fashion. It could be that the very complexity, difficulty, and artificiality of the reasoning is what renders the method impersonal and separated from first-order moral judgments.[132] This could limit notice and coordination between interpreters and the rest of the world. And it is possible that the complex methods could depart from—or even be independent of—a search for authoritative sources. But on the other hand, if the bench and bar have a shared, complex craft tradition of reason, there could be coordination within the system and impersonality with respect to results. At times, one senses a kind of professional pride in the interpreter who, at the end of a rigorous and complex train of legal reasoning, reaches a counterintuitive outcome against political type.

C. Dual Loyalties

The previous discussion identified two different goals and underlying rationales. Notwithstanding the sharp dichotomy sketched above for analytical purposes, many well-known formalists view adherence to authoritative sources *and* constraint in method as complementary features of interpretive formalism.

Justice Scalia is notable in this respect. First, he explains how originalism respects the authority of the people. Writing with Garner, his defense of the "fixed-meaning canon" claims that originalism "is the *only* approach to text that is compatible with democracy," and if we were to depart from it, "the very nature of the judicial branch and the qualifications for those who serve in it [would be] radically altered."[133] He goes as far as to contend that originalism "is the only objective standard of interpretation even competing for acceptance" because non-originalism is, in fact, *not* interpretation proper.[134] At the same time, he *also* touts the methodological benefits of his original public meaning approach to interpretation. He claims that it provides "greater certainty in the law, and hence greater predictability and greater respect for the rule of law."[135] Original public meaning's virtues of "certainty, predictability, objectivity, reasonableness, rationality, and regularity," in his view,

[132] I am grateful to Angelo Ryu for this point.

[133] Scalia & Garner, supra note 73, at 82–83; accord Scalia, Matter of Interpretation, supra note 61, at 17 (linking a focus on the objective intent of a statute and rule of law).

[134] Scalia & Garner, supra note 73, at 89.

[135] Id. at xxix.

render his method superior to the search for original intention.[136] Using legislative history, by contrast, undermines those goals.[137]

We can say the same for other preeminent formalist jurists. Justice Barrett has written extensively on how interpretive formalism is grounded in faithful agency to the law, whose content is defined as "the most natural meaning of the words at issue because that is the way [the courts'] principal—the people—would understand them."[138] This meaning, moreover, is fixed at the time of enactment.[139] At the same time, she defends textualist methods on the grounds that they provide fairness and notice to the governed.[140] Justice Gorsuch suggests that adherence to original meaning is inherent in the interpretation of written law and "anticipated and fairly commanded by [the Constitution's] terms."[141] But adhering to original public meaning does more than honor "*whom* the Constitution entrusts with its adoption and amendment."[142] It also advances the "rule-of-law value[] of notice," for original public meaning "ensures that citizens know with some predictability the content of their constitutional rights."[143] The same goes for textualism in statutory interpretation.[144]

Judge Easterbrook, one of the foremost formalist scholar-jurists, defends the faithful agency of original public meaning textualism from both angles. He contends that non-formalist interpretation "is

[136] Id. at 34.

[137] Id. at 388–89. Even this defense contains an admixture of authoritative formalism. In response to the claim that rejecting the long-standing practice of using legislative history would "undermine the values of certainty and predictability that we elsewhere uphold," Justice Scalia appeals to originalist arguments against the practice's constitutionality. Id. at 388.

[138] Barrett, Insiders and Outsiders, supra note 63, at 2195.

[139] See Barrett, Canons and Faithful Agency, supra note 45, at 116; Amy Coney Barrett, Originalism and Stare Decisis, 92 Notre Dame L. Rev. 1921, 1924 (2017).

[140] Barrett, Insiders and Outsiders, supra note 63, at 2209; see also Barrett, Canons and Faithful Agency, supra note 45, at 168–69 (arguing that constitutionally inspired substantive canons may be more justified than "open-ended doctrines like absurdity and equitable interpretation" because their roots in the Constitution render their application "more predictable and more democratically legitimate").

[141] Neil M. Gorsuch with Jane Nitze & David Feder, A Republic, If You Can Keep It 116 (2019); see id. at 113 (contending the "dead hand" objection to originalism amounts to an attack on "written law" (emphasis omitted)).

[142] Id. at 120.

[143] Id. at 125.

[144] Id. at 131 (*ordinary* public meaning); see also id. at 132 (arguing that "textualism offers a known and knowable methodology for judges to determine impartially and fix what the law is" and that linguistic canons are "preexisting, neutral, and objective interpretive tools . . . that the people can [use to] discern with some certainty what the law demands of them").

objectionable on grounds of democratic theory as well as on grounds of predictability."[145] The "foundation for textualist interpretation" is faithful agency, which means that legal interpreters must "be faithful to *yesterday's* rules (whether in the Constitution or in the United States Code)."[146] At the same time, a method should "confine judges" rather than give them "a wide field [of] play."[147] In arguing that the legislature-judge relationship of faithful agency is different from the standard principal-agent relationship, he emphasizes how law is "designed to control the conduct of strangers to the transactions, not just of the judges. Rules must be publicized to be effective (to be 'rules of *law*' at all). Addressees need predictability so they may plan—for compliance, for the rearrangement of the rest of their lives."[148] For this reason, among others, non-formalist imaginative reconstruction of legislation is also inappropriate.[149]

All told, one gets the impression that the formalism of authority and the formalism of method are two great tastes that taste great together.[150] The relationship between these forms of formalism, however, is more complex—even fraught.[151]

II. FORMALIST FACE-OFFS

Briefly stated, the challenge for formalists is this: authoritative formalism can press toward methodological informality in interpretation, whereas methodological formality can lead to departure from

[145] Easterbrook, Text, History, and Structure, supra note 81, at 63.

[146] Frank H. Easterbrook, Judicial Discretion in Statutory Interpretation, 57 Okla. L. Rev. 1, 4 (2004); Frank H. Easterbrook, Judges as Honest Agents, 33 Harv. J.L. & Pub. Pol'y 915, 915 (2010) [hereinafter Easterbrook, Judges as Honest Agents] (emphasis added).

[147] Easterbrook, Text, History, and Structure, supra note 81, at 63.

[148] Easterbrook, Judges as Honest Agents, supra note 146, at 922.

[149] Id. at 921. Judge Easterbrook also emphasizes that legislation is drafted by multimember bodies with conflicting objectives. Id. at 921–22.

[150] Scalia & Garner, supra note 73, at 402 ("In ease of lawyerly application (never mind legitimacy and predictability), originalism surpasses competing approaches."). In the 1980s, Hershey would advertise that its Reese's Peanut Butter Cup's mixture of chocolate and peanut butter was "two great tastes that taste great together." vcrcooking, Reese's Peanut Butter Cup Commercial 1982, at 00:17 (YouTube, May 21, 2022), https://www.youtube.com/watch?v=rTTixlelryY [https://perma.cc/4YMZ-DFQR]. That this advertisement accompanied the rise of original public meaning textualism is likely a coincidence.

[151] One could contend that these two faces of formalism are a product of the intellectual history of interpretive formalism (from original intentionalism and judicial restraint to original public meaning and judicial constraint) or roughly track the interpretation/construction or theory of law / theory of adjudication distinctions that originalists make today. There is something to that, but, as Section III.A, *infra*, demonstrates, it is not the complete story.

authoritative origins. Understanding this basic tension will illuminate a number of debates in statutory interpretation and clarify their normative stakes. But first a brief, abstract sketch of the dilemma before more concrete examples in interpretive debates.

First, consider how authoritative formalism is often not very rule-like in practice. Sometimes identifying the original, authoritative source of law is straightforward. The legal norm that the text creates can be easy to discover and hard to dispute. If it matches most readers' understanding of the text, it will provide notice and facilitate coordination. But that is not always the case. The original intention or public meaning could differ from contemporary understanding. The authoritative norm may also be a product of interaction with other features of the statutory structure or related law. If that is the case, we cannot know the content of the norm without investigating beyond the provision's surface meaning and immediate context. Identifying authoritative legal sources behind or beyond enacted text, especially originating sources, can be subject to method, but such method by its nature is not guaranteed to limit discretion, reduce search costs, provide notice, or promote coordination. It is possible that the search for authoritative norms can, by itself, be particularly *resistant* to advancing such goals.[152] "Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived . . . ."[153] Even if the legal craft of authoritative formalism can "find" the law independent of the interpreter's moral priors, such judgment is not a rule-bound endeavor.

This brings us to the second horn of the dilemma. If the quest for original, authoritative sources can confound clarity and ease of method, the reverse is also true. The more one seeks to increase formality in method, the more one risks departing from the original content of an authoritative norm. In interpretation, using first impressions, rough cuts, and limited sources can make it simpler to fix a legal norm. Methods that

[152] Cf. Gary Lawson, No History, No Certainty, No Legitimacy . . . No Problem: Originalism and the Limits of Legal Theory, 64 Fla. L. Rev. 1551, 1554 (2012) [hereinafter Lawson, No History] ("If constraint and certainty are the goals, originalism is a relatively poor way to achieve it compared to numerous other methodologies."); id. at 1560 ("Anyone who tries to structure an interpretive inquiry to generate only answers that are *constraining* or *rule-like* fundamentally misunderstands the enterprise of interpretation. The goal of interpretation is to find *correct* answers, however freeing or un-rule-like they may turn out to be.").

[153] United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805). Chief Justice Marshall qualified this with the proviso that "[w]here the intent is plain, nothing is left to construction." Id. What it means for intention to be plain is disputable.

are stable, easy, transparent, and replicable can provide notice, save judicial resources, and reduce disagreement about inferences to draw from the legal evidence. Such simplifying approaches, however, might trade reduced decision costs for accuracy relative to the original legal source. Nevertheless, the formalism of method inclines to make that bargain, even if such settlement does not get the authoritative norm right.[154]

As we will see, there is little, if any, pure formalism of either variety out in the wild. And, as noted, leading formalist jurists appeal to both dimensions when they offer justifications for their approach. Understanding how these two dimensions operate and interact can help us better understand the various interpretive approaches that fly under the formalist banner, as well as the disagreements among them. The rest of this Part does just that. Its purpose is analytical rather than normative, tracing the tension and complex relationships between the two different dimensions without yet weighing in on how interpreters should address these problems.

A. Intentionalism Versus Original Public Meaning

One obvious area where the faces of formalism square off concerns the choice between intentionalist and original public meaning interpretation.[155] If one believes that actual, historical legislative intent is in fact impossible for groups like legislatures, there is no authoritative source to find. Objections to legislative history and intentions here are conceptual, rather than methodological.[156] (The original intentionalist returns the favor on source, arguing that original public meaning is itself

[154] This is akin to a rationale for strong stare decisis, where adjudicators are willing to accept prior legal errors in the name of judicial impersonality, legal stability, and ease of decision-making. See generally Randy J. Kozel, Settled Versus Right: A Theory of Precedent (2017) (arguing that adherence to precedent advances legal continuity and the rule of law in the face of serious, principled disagreements among judges).

[155] I want to emphasize that there is at least a plausible difference between intentionalism and purposivism. One can distinguish between the intentional content of a legal norm or plan and the background reasons a legislature chose that particular norm or plan. The content of that plan can diverge from the animating purpose. Intentionalists would adhere to the intended plan, whereas purposivists would modify the plan to achieve the animating policy goal.

[156] Ekins's argument that the shared intention of the legislature—rather than intentions of individual legislators—is the target of interpretation is another kind of conceptual objection to looking at certain kinds of legislative intention. See supra notes 55–57 and accompanying text. It is not, however, skeptical that social groups like legislatures can have intentions.

an incoherent fiction.[157]) Nevertheless, we can understand this debate in terms of the authority/method dichotomy. Hard intentionalism prioritizes the formalism of authority over formalism in method. Consider, for example, Alexander's intentionalism discussed in Section I.A.[158] The enacted text or its public meaning (original or otherwise) is not the law. Rather, the law is the legal proposition that the lawmaker intended to enact by codifying the text.[159] Ordinary meaning may be a decent working presumption about those intended propositions. Speakers usually speak in a manner that will communicate propositions effectively, and nonstandard usage frustrates that goal. Nevertheless, such surface meanings are at most presumptive and, without more, are ever-corrigible to evidence of contravening, underlying intent.

The sources and methods for identifying such formalized intentions are not themselves formal. Those who believe that the actual, subjective intentions of legislators form the basis of legislative intent have to identify and combine those mental states. In the absence of a unanimous mental state about meaning, the task is even more complicated.[160] As Professor Reed Dickerson described the task, "[J]ust as 'a set of vectors' can be combined into a single resultant, so too one can conceive of 'corporate legislative intent' as 'the composite thrust of many individual intents, no one of which need wholly coincide with the composite.'"[161] Of course, "putting that idea into practical operation will require some contestable judgments."[162] Then there is the "agency model of legislative intent," in which particular members or committees of the legislature are understood to have authority to fix meaning.[163] Under that approach, the interpreter has to identify the agency relationship, the relevant agents, and their intention. If an interpreter thinks legislative history is a good source for

[157] See Alexander, Why and the What, supra note 51, at 541 ("[Original public meaning] either reduces to authorially intended meaning or, if at odds with it, undermines the legal enterprise.").

[158] See supra notes 48–54 and accompanying text.

[159] See supra notes 48–54 and accompanying text.

[160] See Caleb Nelson, Statutory Interpretation 445 (2d ed. 2024) [hereinafter Nelson, Statutory Interpretation].

[161] Id. (quoting Reed Dickerson, The Interpretation and Application of Statutes 73 (1975)).

[162] Id.

[163] Gerald C. MacCallum, Jr., Legislative Intent, 75 Yale L.J. 754, 780–81 (1966); Lawrence M. Solan, Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation, 93 Geo. L.J. 427, 444–47 (2005); see Nelson, Statutory Interpretation, supra note 160, at 446–48 (first citing Solan, supra; and then citing MacCallum, supra) (discussing the agency model).

these inferences, one has to find it, rank it according to pedigree and relevance, and sort out any possible conflicts in the evidence.[164] Alternatively, one could try to find statements and actions that are "costly actions," on the grounds that they are more reliable legislative history.[165] All of this takes time, effort, and is not transparent to the reader of the statute.[166]

Intentionalism can complicate the interpretive enterprise beyond these well-known problems of search costs and uncertainty. Even if identifying intent is possible and judges are good at it, the quest itself can destabilize the interpretive process overall. At the extreme, it is possible that the search for legislative intent could reveal that what appears to be a law is, in fact, nothing at all. As Alexander argues, if no legislative majority coalesces around a shared intention for a proposition, what appears to be formal law is in fact "gibberish" or "failed law" with no legal propositional content.[167] In that case, law-appliers have to fall back on norms that direct them to "breathe meaning into laws that are actually meaningless"—a perhaps necessary process that Alexander argues is not interpretation, but re-authoring.[168] If the law-appliers re-author based on their determinations "of what ought to be done," that method seems much less formal than, say, a plain meaning approach.[169] (An individual law-applier could choose to re-author according to plain meaning, or a preexisting norm could impose plain meaning across the board for failed

[164] Defenders of legislative history have argued that the received "standard hierarchy" of legislative history is itself an overbroad rule of thumb and should yield to contextual judgments about where in the legislative process the source arose. See Victoria Nourse, Misreading Law, Misreading Democracy 88–91 (2016).

[165] See generally McNollgast, Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation, 57 Law & Contemp. Probs. 3, 8 (1994) ("We use the general principles of signaling behavior to identify the actions and statements in a legislative history that can provide an outside observer with information about the interests and expectations of the parties to an agreement and, thereby, about the intent of a statute.").

[166] See, e.g., Daniel B. Rodriguez & Barry R. Weingast, The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation, 151 U. Pa. L. Rev. 1417, 1422–30 (2003) (applying McNollgast's method to Title VII of the Civil Rights Act); Easterbrook, Absence of Method, supra note 128, at 95 ("I admire [Rodriguez and Weingast's] work. One might even call it a compelling demonstration that legislative history can be used reliably . . . [but] the article is 125 pages long . . . [and] was published twenty-four years after [*United Steelworkers v.*] *Weber*.").

[167] Alexander, Why and the What, supra note 51, at 542; Alexander, All or Nothing at All, supra note 49, at 386–88.

[168] Alexander, All or Nothing at All, supra note 49, at 388.

[169] Id.

law, but one would have to then make that contestable, non-interpretive choice and do so only after the search for law that comes up a failure.)

Intentionalism would also have a lower trigger for equitable extension or contraction of a statute's domain. Equitable interpretation is a chimeric term, and here I am not referring to an expansive version of the doctrine in which courts extend statutes liberally by analogy or shape their scope "based on the law of reason and the law of God."[170] Rather, the intentionalist would tailor the law's application to the lawmaker's underlying judgment, rather than its linguistic reach.[171] The same holds for the absurdity doctrine, which is but a species of this form of equitable interpretation, though intentionalists anchor application of the doctrine in the substantive views of the lawmakers, rather than their own views of absurdity.

The methodological complications which legislative intent introduces are starkest when an interpreter chooses an original intention that conflicts with the text. Yet the search for historical intent also introduces complexity when text is unclear. Professor Caleb Nelson provides an instructive example.[172] Imagine a statute with a superficial ambiguity or a tillable patch of vagueness. An interpreter who looks to dictionaries, linguistic canons, surrounding structure, and background law settles upon the conclusion that it is more likely than not (say, 60/40) that the statute means *X*. And imagine that most interpreters using those tools would settle on *X* as well. But imagine further that the legislative history or other subjective indicia of intention point strongly toward *Y*. In this respect, the search for historical intention could make interpretation "less predictable than it would otherwise be."[173] Of course, if actual legislative intent is the lodestar of interpretation, and if those other ordinary tools are at best presumptive pointers toward such intent, too bad for those tools. They are mere means, and their predictable use is not an end in itself.

On the flip side, original public meaning interpretation can reflect a willingness to sacrifice adherence to original authoritative norms in the

[170] Jim Evans, A Brief History of Equitable Interpretation in the Common Law System, *in* Legal Interpretation in Democratic States 67, 67–68 (Jeffrey Goldsworthy & Tom Campbell eds., 2002) (citing Christopher St. German, Doctor and Student 97 (T.F.T. Plucknett & J.L. Barton eds., Selden Soc'y 1974) (1528)).

[171] See id. at 68–70 (distinguishing "corrective exceptions" and "corrective extensions" from "extensions by analogy" because the former two "apply a judgment that was actually made" by the legislature).

[172] See Nelson, Statutory Interpretation, supra note 160, at 464.

[173] Id.

name of methodological ease, notice, and predictability. On this line of thinking, asking how a reasonable reader of legal English at the time would understand the words consumes fewer judicial resources, improves coordination among judges, and gives better notice to the public. Even if legislative intention is real and discoverable, the argument goes, the systemic costs of searching for underlying intention swamp the occasional error costs of choosing an original public meaning when there is a gap between the two. In fact, it may not be much of a trade-off at all if we think that (1) original public meaning is usually a good proxy for original intention, and (2) judges may not be very good at identifying the instances of original intention when it departs from public meaning.[174]

But what if it is not a good proxy for authoritative norms, or what if interpreters wanted the ability to go with the real thing instead of a generally suitable stand-in? As Professor Steven Smith has argued, original public meaning interpretation avoids the challenge of aggregating lawmaking intentions, but only by creating worries about authority.[175] Referring to the Constitution, he asks, "[H]ow can an impersonal sociological phenomenon (linguistic conventions, or 'the rules of language') or an imaginary and concocted character (the purely hypothetical reader) possibly claim authority to speak for 'We the People'?"[176] It is possible that "no actual member of the American public in 1787 fully and perfectly fit the description of the hypothetical reader whose idealized understanding is the criterion of the text's meaning."[177] If so, who is in charge here?

In this light, the choice between original intentionalism and public meaning turns on a normative assessment about how much one is willing to risk departing from original authoritative norms in the name of methodological certainty. For intent skeptics, the choice is easy because you cannot betray something that does not exist. Those who think legislative intention is possible or a necessary presupposition for interpretation of any text face a real choice. Where they fall on the original public meaning / intentionalist divide reflects, at least in part, a judgment about what good formalist interpretation ought to do.

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[174] Cf. Caleb Nelson, What Is Textualism?, 91 Va. L. Rev. 347, 374 (2005) [hereinafter Nelson, What Is Textualism?] (arguing that textualism is best understood as rule-restricted intentionalism).

[175] Steven D. Smith, Fictions, Lies, and the Authority of Law 59 (2021).

[176] Id.

[177] Id. at 58 (emphasis omitted).

B. Varieties of Original Intentionalism

The interplay between the formalism of authority and the formalism of method can illuminate the varying shades of intentionalism in constitutional and statutory interpretation. Even though intentionalists might be methodologically less formal than public meaning readers, rare is the interpreter who looks under every rock for stray scraps of intention. (Though California courts for a time flirted with post-enactment testimony.[178]) This fact alone seems a concession to methodological concerns of cost and coordination.[179] The accepted hierarchy of legislative history may also reflect methodological concerns. Conference-report explanatory statements, committee reports, and floor statements by sponsors and bill managers (in that order) may have the highest pedigree because they are a good estimation of the legislative body's understanding of the promulgated text, even if it is possible that a more detailed search could lead to a more accurate result in a given case. An intentionalist might also treat those sources (in that order) as superior to other types of floor statements and committee testimony because they are easier to use and find. Reports are a click away, and finding a bill sponsor or manager is easier than combing the Congressional Record to sum intentions or identify statements of "costly action."[180]

Others seek to give intentionalism further methodological rigor. Richard Ekins, for example, counsels against using legislative history to find intended meaning. Even though it is "in principle relevant to understanding what legislators intended," an "exclusionary rule" is justified because using legislative history undermines "the structure of legislative action, with its central focus on what is transparent to the community."[181] In this respect he departs from other intentionalists, as well as purposivists or dynamic interpreters. Unlike many textualists, however, his objections do not arise out of skepticism about legislative intent per se. His position is grounded in respect for authoritative sources: using legislative history will affect the legislative process in a way that

[178] See Nelson, Statutory Interpretation, supra note 160, at 346 & n.1 (discussing this practice); Rose v. County of San Benito, 292 Cal. Rptr. 3d 678, 702 (Ct. App. 2022) (rejecting this practice).

[179] Nelson, supra note 160, at 347–48.

[180] McNollgast, supra note 165, at 23; cf. Rodriguez & Weingast, supra note 166, at 1449 ("[J]udges should focus on statements by pivotal legislators and on statements by ardent supporters that are costly signals . . . .").

[181] Ekins, The Nature of Legislative Intent, supra note 55, at 274.

makes it harder for interpreters to identify the original intention, which is the reasoned choice available to the legislature. Similarly, a non-intent skeptic could ignore legislative history because the perils of using it make the interpreter less likely to identify intention than a rule-restricted approach that sticks to publicly available sources.[182] One decides *not* to look at particular sources of authority because a rule-restricted method will be *more* likely to adhere to original authoritative intention of law at a reasonable cost.

All told, although Ekins rejects intent skepticism, in practice his intentionalism can resemble original public meaning interpretation. Ekins holds that to infer the intended meaning—the content of the legislature's reasoned choice or plan—interpreters should understand the enacted text in light of the publicly available policy context (including the animating mischief), as well as background law (including other legislation, general law, and legal principles that form part of the constitutional order) and interpretive doctrine.[183] He leaves room for an absurdity doctrine[184] and equitable interpretation limited to "exceptional, *unforeseen* cases" when the "reasoned choice" embodied in the legislative text "comes apart from the legislature's intended meaning."[185] In this respect, his intentionalism is methodologically less formal than original public meaning interpretation. Nevertheless, its restrictions on the sources of evidence an interpreter can consider renders it more methodologically formal than other forms of intentionalism.[186]

More rule-like approaches that exclude some (or all) legislative history, create a hierarchy of legislative history materials, or exclude some complex vector-calculation of intentions can over- and undershoot the target of authoritative judgment. Yet even with those conceded errors, at a systemic level, the interpreter may be more likely to get intention correct than by canvassing all available evidence. (For example, ordinary

[182] See Nelson, What Is Textualism?, supra note 174, at 349 ("[M]uch of what separates textualism from intentionalism may be less about the *desirability* of the search for legislative intent than about the *mechanics* of that search and about whether a relatively rule-like approach will advance or hinder it.").

[183] Ekins, The Nature of Legislative Intent, supra note 55, at 246–61.

[184] Id. at 258.

[185] Id. at 275.

[186] There are other explanations for these differences in approaches to intentionalism, which do not track the authority/method dichotomy neatly. For example, the choice to ignore the intentions of individual legislators could flow from a theory of authority and legislative action: only the legislature acting as a group, not individual legislators, can change the law.

meaning alone may be imperfect, but it could be more accurate across the run of cases than methods that require interpreters to sum the intentions of individuals or subgroups.) And it does so, moreover, at a reasonable adjudicative cost while improving notice and coordination. As we have seen, even more rule-like intentionalism can be *less* methodologically formal than original public meaning interpretation or more clause-bound approaches; after all, it leaves some theoretical and practical room for equitable correction. But just as the authority/method dichotomy runs through the choice between intentionalist and textualist approaches, so too it runs through methodological choices within intentionalism itself.

C. Varieties of Public Meaning

Choices between authoritative sources and methodological clarity extend beyond legislative intention. Considerations of authority and method also shape how one constructs the reasonable reader who defines original public meaning. They do so in two ways: (1) how many sources interpreters should consult in grasping public meaning, and (2) whether to use original or contemporary public meaning.

To take the first matter, many adherents to the formalism of authority nevertheless embrace methods that are neither rule-governed nor simple. Original public meaning textualism asks how a reasonable reader at the time of enactment would understand the text. This may require challenging historical inquiries and lead to outputs that are contestable and not apparent on the face of the text—especially if the text is quite old.[187] This acceptance of complexity also marks modern textualists' flight from "literalism" in statutory interpretation. To construct the reasonable, non-literalist reader, courts view particular words and phrases through the lens of (many) canons, which are understood as rule-of-thumb generalizations about how legal language is used, rather than firm rules dictating legal meaning.[188] The interpreters also move beyond the particular statutory term or phrase to account for the "statute's subject matter, its internal coherence, or surrounding legislation."[189] These

[187] See, e.g., Frank H. Easterbrook, Foreword *to* Scalia & Garner, supra note 73, at xxi, xxv ("The older the text, the more distant that interpretive community from our own. At some point the difference becomes *so* great that the meaning is no longer recoverable reliably.").

[188] See Easterbrook, Absence of Method, supra note 128, at 83; Abbe R. Gluck, Justice Scalia's Unfinished Business in Statutory Interpretation: Where Textualism's Formalism Gave Up, 92 Notre Dame L. Rev. 2053, 2061, 2072 (2017).

[189] Ryan D. Doerfler, Late-Stage Textualism, 2021 Sup. Ct. Rev. 267, 280 (2022).

interpreters put particular texts in broader legal context not to find historical intent (Justice Scalia asks, "[H]ow could an earlier Congress know what a later Congress would enact?"), but rather because it is their "role to make sense rather than nonsense out of the *corpus juris*."[190] Such authoritative formalists also emphasize how language is a social phenomenon: "Words don't have intrinsic meanings; the significance of an expression depends on how the interpretive community alive at the time of the text's adoption understood those words."[191] For this reason, formalists might look to the broader social or policy context at the time, or even the mischief,[192] to understand a particular term.

The search for authoritative sources grows even more complex when one includes unwritten background law. Textualists will recognize that background norms separate from particular enacted text can implicitly qualify or shape a provision's content. Ready examples would be inferring implied defenses to generally worded criminal offenses[193] or deploying canons like the rule of lenity or presumptions against extraterritoriality.[194] This turn has accelerated as formalist scholars increasingly emphasize the importance of legal backdrops and the need to move "beyond" mere textualism to "find" the true authoritative, if unwritten, legal sources that govern interpretations.[195] To some, discovering the content of the Fourteenth Amendment requires understanding the conceptions and implications of unwritten general law.[196] It is possible that finding original, governing legal sources need not involve texts at all.[197]

Both formalists—and their critics—have noted that the demands of history and contextualism could come at the cost of predictability,

[190] W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 100–01 (1991) (Scalia, J.).

[191] Easterbrook, supra note 187, at xxv.

[192] Cf. Samuel L. Bray, The Mischief Rule, 109 Geo. L.J. 967, 1013 (2021) (noting that the mischief rule "can be used with a good conscience even by a textualist").

[193] See, e.g., Easterbrook, Speluncean Explorers, supra note 66, at 1913–14.

[194] Abramski v. United States, 573 U.S. 169, 203 (2014) (Scalia, J., dissenting); Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010) (Scalia, J.).

[195] William Baude, The 2023 Scalia Lecture: Beyond Textualism?, 46 Harv. J.L. & Pub. Pol'y 1331, 1336 (2023); Sachs, Constitutional Backdrops, supra note 71, at 1816; Stephen E. Sachs, Finding Law, 107 Calif. L. Rev. 527, 530 (2019).

[196] William Baude, Jud Campbell & Stephen E. Sachs, General Law and the Fourteenth Amendment, 76 Stan. L. Rev. 1185, 1190–91 (2024).

[197] Sachs, Originalism Without Text, supra note 72, at 157.

transparency, and ease of use.[198] This has given a number of formalists pause on methodological grounds.[199] For example, then-Professor Stephanos Bibas contrasted Justice Scalia's *formalism* in criminal law with his *originalism*.[200] He noted how the two could run apart when, among other reasons, the historical record is not clear.[201] Others complain more harshly about the Supreme Court's originalism, which gives legal effect to the results of contestable inferences about legal history.[202] These commentators are right to spot the tension, but their framing can obscure how the quest for original authoritative sources *and* the goal of methodological ease are *both* products of the formalist's search for constraint. If the Court's goal is to find out original public meaning, and if identifying that can be a complex task unsusceptible to rules, it misses the point to say that the Court is not adopting a method geared toward ease and predictability.[203] In this light, the non-rule-like search for original public meaning is not a betrayal of formalism through use of standards.[204] Rather, it reflects the emphasis of one face of formality—authority—to the neglect of the other.

[198] See, e.g., Doerfler, supra note 189, at 288–89; William N. Eskridge, Jr., Brian G. Slocum & Kevin Tobia, Textualism's Defining Moment, 123 Colum. L. Rev. 1611, 1622–23 (2023); Gluck, supra note 188, at 2061–64; Grove, supra note 1, at 291–96; Macleod, supra note 1, at 666–67.

[199] See generally Grove, supra note 1, at 295 ("Once a judge emphasizes social and policy context, the door is opened for considerable interpretive leeway."); Easterbrook, Absence of Method, supra note 128, at 96 ("Rules of interpretation must reflect the resources available to the task. I argued over twenty years ago that this implies a relatively simple and mechanical approach to interpretation, and nothing I have seen since has changed my mind." (footnote omitted)); id. at 97 (first citing Schauer, Statutory Construction, supra note 95, at 231–32; and then citing Vermeule, supra note 82, at 289–90).

[200] Stephanos Bibas, Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?, 94 Geo. L.J. 183, 184–85 (2005).

[201] Id. at 185.

[202] See, e.g., Martin H. Redish & Matthew B. Arnould, Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a "Controlled Activism" Alternative, 64 Fla. L. Rev. 1485, 1489, 1522 (2012) (arguing that originalism's "often contrived and opaque veil of historical inquiry" gives courts a "smokescreen" for imposing their own values).

[203] See Lawson, No History, supra note 152, at 1560 ("Anyone who tries to structure an interpretative inquiry to generate only answers that are *constraining* or *rule-like* fundamentally misunderstands the enterprise of interpretation. The goal of interpretation is to find *correct* answers, however freeing or un-rule-like they may turn out to be.").

[204] Cf. Macleod, supra note 1, at 666–67 (noting this "deep irony at the heart of modern textualism").

This choice may be inevitable for any formalist approach that wants to find enduring original sources and avoid the errors of literalism.[205] No "algorithm" can pick out meaning in a complex legal system, and "canons are inevitable, because all language depends on them."[206] And it could be true that even "flexible textualism," as Grove calls it, "is relatively constrained compared to pragmatism or purposivism."[207] Nevertheless, for those who prefer method to authority, this comparative constraint will not be enough. As noted, Grove has contended that courts should eschew social and policy context and restrict the canons they use in their pragmatic quest to understand original public meaning.[208] She argues that courts should stick to semantic context, limiting themselves as much as possible to the artificial linguistic universe of enacted language.[209] Vermeule, at least in the older writings discussed above, would further shrink the semantic universe. There, he counsels courts to stick to particular clauses rather than ranging out to consider the broader text and structure of the statute and its relation to other legislation.[210] Schauer's defense of plain meaning challenges not only purposivists and original intentionalists, but also textualists who seek a richer understanding of original public meaning.[211] Excavating the original, historical understanding or trying to understand a phrase in light of the entire *corpus juris* takes time, requires judgment calls, and could undermine notice and coordination.

A preference for formality in method can also explain some textualists' indifference to actual legislative practice when constructing public meaning. Professors Abbe Gluck and Lisa Schultz Bressman have criticized textualists along these lines, contending that courts should be sure legislative drafters are cognizant of the interpretive canons they use to parse statutory language. Otherwise, there is a gap between the law as authored and law as applied.[212] Textualist responses to that critique can,

[205] See Easterbrook, Absence of Method, supra note 128, at 84–85.
[206] Id. at 82, 84.
[207] Id. at 82.
[208] Grove, supra note 1, at 303–04.
[209] Id. at 303.
[210] Vermeule, supra note 82, at 205.
[211] See Schauer, Statutory Construction, supra note 95, at 231–32.
[212] See, e.g., 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, 909 (2013) (arguing that textualists' use of canons does not attend to congressional practice and thus departs from legislative expectations).

at least in part, be methodological.[213] Looking to original public meaning as understood by lawyers or the general public and using a relatively stable set of interpretive canons could be easier than tracking the (potentially shifting) drafting conventions as conveyed by congressional staffers. Limiting the toolkit in this fashion provides greater notice and coordination among the governed.[214] Doing so also promotes "fair notice" and minimizes "epistemic burden[s]" on interpretation.[215] Even a set of canons that does not track how Congress actually thinks (if such thinking were possible) can give the legislature "a cheap and predictable way" to "draw effective lines" if courts use them consistently.[216]

And then there is the temporal question about public meaning. The differences between Schauer's non-original textualism and the formalism of original authoritative sources are instructive. Contemporary public meaning gives rise to linguistic drift, where the legal content of the norms shifts with the vagaries of language use. This is anathema for formalists who seek to honor the authoritative choice embedded in the law at a given point in time. For other formalists, some departure from original sources could be the price of pursuing guidance and coordination. Tellingly, Schauer emphasizes how the philosophical foundations of contemporary public meaning textualism depart from the formalism of original authoritative sources. He notes that the strongest objection to his theory—the claim that any theory of interpretation requires a search for original intentions—is simply unavailing.[217]

Going back to the example opening this Article, the dueling textualist opinions about constructing public meaning in *Bostock* exemplify these competing rationales for formalism. What Justice Gorsuch called

[213] Justice Barrett has argued that Gluck misses the mark because the true legislative authority is the people, rather than the legislators, and so faithful agency pursues the understanding of the former over the latter. Barrett, Insiders and Outsiders, supra note 63, at 2194–95, 2208–09.

[214] See Ryan D. Doerfler, Who Cares How Congress Really Works?, 66 Duke L.J. 979, 986, 1043 (2017) (arguing that if we care about "facilitat[ing] easy and effective communication between Congress, citizens, courts, and agencies," we should consider "just formally adopted materials—salient to all in virtue of their formal bindingness"—and other more publicly available materials).

[215] Id. at 1040. Doerfler argues that such an approach can also promote democratic accountability by ensuring legislators understand bills when they vote on them. Id. at 1039–40.

[216] John F. Manning, Inside Congress's Mind, 115 Colum. L. Rev. 1911, 1942 (2015).

[217] Schauer, Unoriginal Textualism, supra note 99, at 846; see also id. at 839–41 (defending the cogency of intention-independent public meaning).

purposivism in the dissents could be best understood as a more probing search for the original meaning or law the statute created. What Justice Alito called statutory updating on the sly could be the result of linguistic drift from original norms that methodological formalism is willing to risk by sticking to a sparer, original semantic meaning. *Bostock* is an arresting case not—or not only—because of the heated political and cultural context. It stands out as a vivid demonstration of when the formalism of authority and the formalism of method work at cross-purposes rather than run together.

D. Original Meaning Versus Original Expected Applications

The authority/method dichotomy can illuminate a related dispute about whether interpreters should look for the original meaning or the original expected application of unclear legal texts.[218] The original public meaning, to use one prominent definition, is the "communicative content that is accessible to ordinary citizens who are competent speakers" that is fixed at the time of enactment or ratification.[219] Original expected applications, by contrast, refers to "how people living at the time the text was adopted would have expected it would be applied using language in its ordinary sense (along with any legal terms of art)."[220] Some originalists argue that the two can come apart and that we should not conflate them. Professor Jack Balkin, for example, criticizes Justice Scalia's Eighth Amendment jurisprudence along these lines. He contends that the original public *meaning* of that Amendment (prohibition of punishments that are "cruel and unusual"[221]) is different from the set of punishments that the people who ratified that provision *expected* to be banned as cruel and unusual (Justice Scalia's metric for the original public meaning of the Amendment).[222] It is possible that the original meaning of "cruel" permits fewer kinds of punishments than people living at the time thought the Amendment prohibited.[223]

[218] I am grateful to Joel Alicea for raising this point.

[219] Lawrence B. Solum, Original Public Meaning, 2023 Mich. St. L. Rev. 807, 846 [hereinafter Solum, Original Public Meaning].

[220] Jack M. Balkin, Abortion and Original Meaning, 24 Const. Comment. 291, 296 (2007).

[221] U.S. Const. amend. VIII.

[222] Balkin, supra note 220, at 296.

[223] In principle, the Amendment could allow *more* kinds of punishment than people thought it permitted as well, if the original public meaning were less forgiving than the expected punitive regime.

A formalism of method might favor original public meaning over expected applications. For the reasons discussed, finding the original public meaning of a statutory or constitutional provision can be complicated enough. Adding a further inquiry about how the enactors expected a norm or concept to apply in particular, perhaps unforeseen, circumstances adds yet another layer of complexity and discretion. This preference for original meaning over expected applications is another way of understanding Justice Gorsuch's differences from the *Bostock* dissenters.

By contrast, a formalism of authority would be friendlier to original expected applications. What an authority wants to accomplish is deeply intertwined with the legal norm it puts in place. An interpreter who hews only to the words while ignoring the music, so to speak, is as much a coauthor or re-interpreter as an agent of authority. In this light, attending to expected applications makes it more likely that interpreters will hew to the contours of the norm that the lawmaker embedded in the law, thus reducing the risk that they will substitute their judgment for that of authority.[224] This is so even for provisions that appear to encode a general principle. This is because "verbal formulations often do not tell us which particular variation of a principle was intended."[225] It is possible that the Framers intended to embed a particular conception of "cruelty" in the Constitution, rather than an abstract idea or a morally correct account of the concept. When a provision's meaning "is unmoored from expected applications, it will be filled by other kinds of content," thus shifting "enormous power from the enactors" to today's interpreters.[226] If authority conferred such delegation, so be it, but a formalism of authority would be keener on investigating whether an indeterminate phrase encodes a more concrete norm.

The defender of expected applications can also draw on methodological arguments. An expected-applications inquiry focuses on competing inferences from historical materials. Such conclusions, to be

[224] See John O. McGinnis & Michael Rappaport, Original Interpretive Principles as the Core of Originalism, 24 Const. Comment. 371, 379 (2007) [hereinafter McGinnis & Rappaport, Original Interpretive Principles]. Original public meaning advocates also recognize that expected applications can "provide strong evidence of original public meaning." Solum, Original Public Meaning, supra note 219, at 844. They just do not think original public meaning can "be reduced to [such] prototypical meanings of the key operative words and phrases of constitutional provisions at the time" of ratification. Id. at 844–45.

[225] McGinnis & Rappaport, Original Interpretive Principles, supra note 224, at 379.

[226] Id. at 380.

sure, are contested and not obvious on the face of the legal materials. Nevertheless, that inquiry may be more determinate as a legal matter than abstract arguments about whether the death penalty is truly "cruel" or whether the proper understanding of "liberty" or "equality" entails a right to abortion. There may be good reasons for resolving those constitutional questions by reference to true moral reality, but they certainly are not methodologically formalist.

E. The "Law" of Interpretation

The authority/method dichotomy can also illuminate long-standing debates about whether courts should treat interpretive method as a kind of binding law. Here the situation is more complex, with authority and method offering cross-cutting considerations for formalists.

Candidates for a binding law of interpretation abound. First, a formal legal instrument could embed these norms. Professor Nicholas Rosenkranz, for example, has called for Congress to codify a Federal Rules of Statutory Interpretation.[227] Although this sounds exotic, states have codified interpretative rules, at least in piecemeal fashion and with mixed success.[228] Professors John McGinnis and Michael Rappaport's "original methods" originalism posits a law of constitutional interpretation that accompanies our written Constitution.[229] Professors A.J. Bellia and Brad Clark have taken this claim a step further to argue that as an instrument designed to transfer sovereign rights, the Constitution was subject to well-established rules that governed the interpretation of such instruments.[230] These rules, they argue, were an inextricable part of the legal content conveyed by the text of the Constitution.[231] Here, the "methods that the constitutional enactors would have deemed applicable to" the Constitution are part of the original intent or public meaning of the document.[232] Alternatively, precedent or the customary practices of legal actors could create a law of interpretation.

[227] Nicholas Quinn Rosenkranz, Federal Rules of Statutory Interpretation, 115 Harv. L. Rev. 2085, 2086 (2002).

[228] See id. at 2089 & n.10 (itemizing the interpretive provisions codified by the fifty states plus the District of Columbia).

[229] McGinnis & Rappaport, Original Methods Originalism, supra note 71, at 751–52.

[230] Anthony J. Bellia Jr. & Bradford R. Clark, The Constitutional Law of Interpretation, 98 Notre Dame L. Rev. 519, 521 (2022).

[231] Id. at 522.

[232] McGinnis & Rappaport, Original Methods Originalism, supra note 71, at 751–52.

This is what Professor Aaron-Andrew Bruhl has called "methodological precedent"—the practice of courts giving stare decisis effect to their methods of statutory interpretation.[233] Again, at least one state supreme court—Oregon's—gave precedential treatment to its method of textualist statutory interpretation.[234] (The Oregon legislature subsequently intervened to require that the courts give legislative history greater weight in the interpretive process.[235]) Similarly, Professors Will Baude and Stephen Sachs have argued that it is "conceptually possible, normatively sensible, and legally part of the American system" to have a positive (albeit unwritten) law of interpretation for both the federal Constitution and legislation.[236] Indeed, they contend our unwritten law of constitutional interpretation happens to be originalist.[237]

A law of interpretation could be quite appealing from the perspective of methodological formalism. Bruhl has linked methodological precedent and the rise of interpretive formalism. As he put it, "Attraction to canons and formalism is not the same thing as adherence to [methodological precedent], but they are compatible and reinforcing impulses."[238] Quite so. Professor Gluck has argued that today's textualism fails the test of formalism because it lacks "a defined set of predictable rules" and does not treat interpretive doctrine "as law."[239] Methodological precedent, perhaps, could bring the "rules, objectivity, and a disciplined approach to statutory cases" that she claims formalists like Justice Scalia preached but

[233] Aaron-Andrew P. Bruhl, Eager to Follow: Methodological Precedent in Statutory Interpretation, 99 N.C. L. Rev. 101, 104 (2020).

[234] See Portland Gen. Elec. Co. v. Bureau of Lab. & Indus., 859 P.2d 1143, 1146 (Or. 1993). Gluck has written extensively on Oregon's approach. See Abbe R. Gluck, The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism, 119 Yale L.J. 1750, 1775–85 (2010).

[235] See Or. Rev. Stat. § 174.020 (2023); State v. Gaines, 206 P.3d 1042, 1050 (Or. 2009) (en banc) (following Or. Rev. Stat. § 174.020 and holding that "contrary to this court's pronouncement in [*Portland General Electric Co.*], we no longer will require an ambiguity in the text of a statute as a necessary predicate to the second step—consideration of pertinent legislative history that a party may proffer").

[236] William Baude & Stephen E. Sachs, The Law of Interpretation, 130 Harv. L. Rev. 1079, 1084 (2017).

[237] See William Baude, Is Originalism Our Law?, 115 Colum. L. Rev. 2349, 2352 (2015); Sachs, Originalism as Legal Change, supra note 70, at 819–20.

[238] Bruhl, supra note 233, at 160.

[239] Gluck, supra note 188, at 2054; see also Rosenkranz, supra note 227, at 2088 ("Each theory [of statutory interpretation] may have its own merits, and some may be better than others, but these differences ultimately may matter less than a central imperative of statutory interpretation: a single, predictable, coherent set of rules.").

did not practice.[240] Similarly, Rosenkranz has argued that a codified regime could be "clear, predictable, and internally coherent, and that both promulgator and interpreter of text [could] agree on the regime beforehand."[241] Thus, the argument goes, a fixed, posited law of interpretation reduces discretion, increases judicial impersonality, and improves coordination and notice within the legal system. Such a hierarchy of tools and rules, for example, could discipline an interpretive formalism that seeks original authoritative intention or public meaning. This is the gist of Gluck's praise of the Oregon Supreme Court's approach to textualism.[242] And, if method matters more than authoritative pedigree, there should be little concern over whether the rules of interpretation came from judges or enacted law; what matters most is settlement, not who settles. In fact, one kind of formalist nirvana would be an authoritative law of interpretation that is methodologically clear and easy to use.

Nevertheless, a positive law of interpretation is an ambiguous type of method-formalism. A law of interpretation could itself prescribe non-formalistic methods. The Oregon legislature wants its courts to *always* consider legislative history presented to them.[243] The Australian Acts Interpretation Act of 1901 states that "the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation."[244] A court could also, through self-conscious precedential signposting or unwritten practice, formally declare its interpretive informality. Baude and Sachs, after all, defend constitutional originalism because it *happens to be* our law of interpretation.[245] It is a contingent fact that could have legitimately been otherwise.[246] A positive law has the

[240] Gluck, supra note 188, at 2056.

[241] Rosenkranz, supra note 227, at 2157.

[242] Gluck, supra note 234, at 1785.

[243] See Or. Rev. Stat. § 174.020 (2023).

[244] Acts Interpretation Act 1901 (Cth) s 15AA.

[245] See Baude, supra note 237, at 2352; Sachs, Originalism as Legal Change, supra note 70, at 819–20.

[246] See Baude, supra note 237, at 2402–03 ("As with state constitutions, grounding originalism in positive law allows originalists to acknowledge some foreign practices as nonoriginalist without having to argue that they are conceptually incoherent or lead to the supposedly bad consequences of nonoriginalism. Indeed, a positivist originalist might say that when in Rome one ought to do as Romans do."); see also McGinnis & Rappaport, Original Methods Originalism, supra note 71, at 752 ("While the original methods approach requires that the Constitution be interpreted in accordance with the original interpretative rules, nothing guarantees that those rules were originalist.").

potential for formalism of method—perhaps, in the eyes of its proponents, the *greatest* potential for formalism of method. But that potential depends on the law of interpretation itself decreeing a coherent, formalist method. Otherwise, formalism of method presides as a head of state without a portfolio.

The relationship between a law of interpretation and authority-formalism is also conflicted. A law of interpretation that instructs officials to seek something besides original intention, meaning, or law would unmoor interpretive practice from its anchoring justification of finding original authority.[247] It is little surprise, then, that two of the most notable critics of such laws of interpretation are original intentionalists Larry Alexander and Saikrishna Prakash.[248] In their view, such a law of interpretation is not merely misguided. Rather, the logic of authority can render such laws inert. Assume, as Alexander and Prakash believe, that original intention is the authoritative lodestar.[249] If a law is passed in 2025 with an intention to do *X*, the interpreter ought to apply the norm *X*. But imagine there is also an interpretive statute passed in 2005 that, at the time, indicated courts should apply a method of interpretation that would lead an answer of not-*X* as applied to the 2025 statute. Alexander and Prakash contend that an intentionalist would still interpret the statute to mean *X* because that is the latest, most particular intention we have from the legislature.[250] A similar argument can follow for original public meaning. Justice Scalia insisted that past legislatures cannot require future legislatures to say magic words to change the law.[251] If the most reasonable interpretation of a later statute points toward an original public meaning of *X*, requiring not-*X* based on an earlier interpretive statute

[247] A formalist who sees original intention as the locus of authority yet is told to apply original meaning would have similar misgivings, and vice versa.

[248] See Larry Alexander & Saikrishna Prakash, Mother May I? Imposing Mandatory Prospective Rules of Statutory Interpretation, 20 Const. Comment. 97, 98 (2003).

[249] Id. at 100 ("[W]e are intentionalists and believe that the meanings of words are those meanings intended by the author(s) or speaker(s).").

[250] Id. at 98 ("In our view, statutes . . . have meanings independent of (and sometimes contrary to) any mandatory rules of interpretation that Congress or the judiciary might have laid down in the past. Artificial rules of interpretation laid down in advance that do not reflect subsequent usages or intentions should not be allowed to trump the actual meaning of statutes." (footnote omitted)).

[251] See, e.g., Lockhart v. United States, 546 U.S. 142, 148 (2005) (Scalia, J., concurring) ("Among the powers of a legislature that a prior legislature cannot abridge is, of course, the power to make its will known in whatever fashion it deems appropriate—including the repeal of pre-existing provisions by simply and clearly contradicting them.").

would in effect make the later legislature invoke magic words to evade the interpretive framework its predecessor laid down.

Viewed from another angle, though, the formalism of authority could be congenial to a law of interpretation, at least with respect to rules enacted in statutes or constitutions.[252] If the goal of interpretation is following authoritative norms, and if a constituent lawmaker or legislature gives the interpreter authoritative guidance on how to approach the task, following those guidelines honors that authority.[253] Of course, those guidelines could tell courts to not seek out authority when reading other enacted legal texts. If so, we might think lawmakers are not doing a good job, but a court's relying on its preference for authority to resist the legislature's authoritative judgment is not what the game is about. There remains the objection that more recent, more particular exercises of authority trump earlier, more general authoritative judgments about interpretive methodology. This can remain true, while earlier interpretive statutes still have gravitational pull. This is especially so for those who, rejecting the advice of method-formalists, look beyond the text of a particular provision to understand its meaning in light of other statutes and background law. There is a difference between requiring magic words[254] and having a presumption against implied repeals, with the latter helping to make sense out of the authoritative tapestry a series of legislatures has woven over time.[255]

In sum, the very idea of a law of interpretation offers mixed bags to formalists of both tendencies. A law of interpretation can in principle provide methodological stability, but there is no guarantee that its rules will promote those aims. A law of interpretation can also be a source of authoritative guidance, but one that raises the quandaries of earlier, high-level authoritative instructions to ignore later, low-level authoritative choices. Formalist jurists have generally been less enthusiastic than

[252] Precedential interpretive rules that cut against seeking original authority would be much more suspect for such a formalist who accepted legislative or constitutive supremacy.

[253] See generally McGinnis & Rappaport, Original Methods Originalism, supra note 71 (regarding original interpretive methods as authoritative); Prakash, supra note 17 (contending that fidelity to the Framers' interpretative methods requires departures from modern textualism).

[254] Bad. See *Lockhart*, 546 U.S. at 148 (Scalia, J., concurring).

[255] Fine. See Scalia & Garner, supra note 73, at 327 ("Repeals by implication are disfavored . . . ."); id. at 330–31 ("[J]ust as later-enacted laws can change the meaning of earlier ones, earlier laws can change the interpretation that would otherwise be given to later-enacted laws."); W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 101 (1991) (Scalia, J.) ("[O]ur role [is] to make sense rather than nonsense out of the *corpus juris*.").

scholars about finding and following a law of interpretation. Professor Gluck in particular claims that textualists like Justice Scalia have failed, hypocritically so, in their formalism because they do not have a structured interpretive method that they are willing to treat as law.[256] There can be many reasons for that hesitation, including uncertainties about whether and in what sense interpretive method can be binding "law." The way that a law of interpretation presents conflicting considerations to formalists of either stripe (or both) offers another reason for its marginalization in formalist judicial practice.[257]

F. Of Rules and Standards

Finally, there are cognate complications with formalists' approaches to rules and standards.[258] Adherence to rules, and to rule-like approaches to interpretation, is a hallmark of modern formalism. Justice Scalia, after all, championed the "Rule of Law as a [l]aw of [r]ules,"[259] and leading philosophical defenders of formalist interpretation emphasize the merits of rule-like decision-making.[260] Legal norms that come in the form of standards, and interpretive methods that confer substantial discretion, are generally understood to be formalist anathemas. The picture, however, is more complicated once we consider it in view of the two dimensions of formalism.

Now, if a legal norm is both rule-like in form *and* easy to discover, we have a formalist nirvana that satisfies both the authoritative and

[256] See Gluck, supra note 188, at 2065–66.

[257] The Court's precedential practice may suggest a further, authority-based reason for rejecting a law of interpretation. To the extent Justices are more willing to overrule erroneous precedent, they demonstrate a commitment to the authority of the Constitution over the Court's past interpretations. See, e.g., Gamble v. United States, 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring) ("[T]he Court's typical formulation of the *stare decisis* standard does not comport with our judicial duty under Article III because it elevates demonstrably erroneous decisions . . . over the text of the Constitution and other duly enacted federal law."). If they are hesitant to let prior, individual decisions stand in the way of honoring the law of the Constitution, they would be even more loathe to let a precedential method of interpretation stand between them and that authoritative law in a systemic fashion. I am grateful to Randy Kozel for this point.

[258] I am grateful to Larry Solum for emphasizing this.

[259] Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1175 (1989).

[260] See, e.g., Larry Alexander & Emily Sherwin, The Rule of Rules: Morality, Rules, and the Dilemmas of Law 2–3 (2001); Schauer, Playing by the Rules, supra note 44, at 135–66; see also Macleod, supra note 1, at 665–66 (explaining the common linkage between textualism and rule-following).

methodological dimensions. This may overstate the simplicity, however. Good authoritative formalism may not take clear text at face value: context, background law, or history may reveal an original meaning or intention that is different from the text. If that requires a search, or at least a peek, behind bare semantic meaning, formalist utopia may be smaller than we think. That said, there can be instances where interpreters can be confident that first impressions do not lie.

Matters are trickier when the given legal norm is rule-like in form, but whose content is more challenging to discover. Here the dimensions of formalism begin to come apart. The target norm itself does not require interpreters to exercise discretion in applying it, but the search for the original norm can be costly and uncertain. (Think here of the original meaning of the Eleventh Amendment or whether tobacco is a drug.[261]) Method formality could suggest accepting an interpretation that departs from original authority to avoid the costs and uncertainty of detailed searches. A search for authoritative judgment, by contrast, spurs the formalist to dig into the background context of the norm itself.

An even sharper contrast occurs when the original authoritative norm requires interpreters to exercise judgment in application: in other words, authority chose a standard. Sharper still, what at first glance appears to be a simple rule is in fact a more complicated rule or a standard. The formalist of authority would reply that the rule of law is not the law of rules, but rather the "law of law," and if what authoritative law requires is hard to find and hard to apply, so be it.[262] Just as interpreters should not turn rules into standards in light of background purposes, they should not substitute rules for enacted standards because of an aversion to discretion in interpretive method or norm application. For this reason, faithful formalism of the authoritative variety can be quite standard-like on the ground. At the same time, one can point to the formalist aspiration for ease of method and claim such an interpreter seeking authority is no true formalist, or at least a fair-weather one. What could appear as hypocrisy, however, is complexity at the heart of the formalist project itself.

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[261] See supra notes 13–16 and accompanying text.

[262] See Steven G. Calabresi & Gary Lawson, The Rule of Law as a Law of Law, 90 Notre Dame L. Rev. 483, 503–04 (2014).

Formalists often understand their approach as having the virtues of honoring original authoritative norms *and* constraining interpreters' discretion. Yet as we have seen, it can be hard to practice both virtues at the same time; sometimes there may even be an inverse relationship between adherence to original authority and methodological ease. Authoritative formalist inquiries may even be as complex and discretion laden as nonformal methods like dynamic and moral readings, particularly if we are including unwritten legal backdrops as part of the original law. Of course, the formalist could contend that, compared to strongly purposive or dynamic interpretation, the character of discretion in the formalism of authority looks less to first-order substantive judgments. (Compare the challenge to figuring out what the living, breathing Shakespeare actually meant in *Measure for Measure* to determining what it would be most beautiful for him to mean.) Still, if the moral case for formalism rests heavily on limiting interpretive discretion, at a certain point the quest for authority could saw the branch off the tree. A mirror image of that challenge confronts those who claim adherence to law's enactors while choosing formally constrained methods that can cause drift from those authors' norms. (Think of how facile proof-texting isolated provisions of the Bible makes for poor hermeneutics and theology.) How should we understand, and possibly manage, these tensions at the heart of interpretive formalism?

III. FACING UP TO FORMALITY'S COMPLEXITY

This final Part takes stock of the complex character of interpretive formalism. First, it contextualizes the two faces of formalism in light of the practice's recent intellectual history and conceptual apparatus. It then shows how this complexity in interpretive practice is a recapitulation of a basic tension in foundational justifications for formalism more generally. After tracing this line running through the heart of formalism, it identifies the moral vision behind each component. It concludes that, while no credible formalist approach can abandon authority or method entirely, the moral case for formalism should put the search for authority at its core.

A. Originalist and Textualist History and Theory

We can understand the methodological tensions traced above, in part, as a result of the recent intellectual history of interpretive formalism in American jurisprudence. If, as is often contended by originalists and their

critics, the so-called "old" originalism was animated by an attempt to rein in judicial overreach by the Warren and Burger Courts, formalism sought *methodological* restraint in the name of an *authoritative*, original Constitution whose content was presumed to limit courts.[263] Similarly, textualism arose at the high-water mark of purposivism, when critics complained about courts sifting through reams of legislative history to subvert plain text and make easy cases hard.[264] There, again, methodological ease seemed congruent with respect for the original, authoritative source.

If, however, the Constitution's original law was hard to find, or if, when found, it turned out to empower courts, this adjudicative theory of restraint could come apart from its appeal to origins. Similarly, as textualism beat back the most egregious instances of extratextual interpretation—while at the same time seeking the law of the statute through complex analysis involving lexicography, canons, structural inferences, and background presumptions—its comparative simplicity at the level of method to non-textualist alternatives became less obvious.[265] In other words, it became clear that *constraint* by law is not necessarily the same thing as *restraint* of judicial judgment. Thus, for those who are primarily driven by goals of restraint, simplicity, or coordination, anchorage to original intentionalist or rich originalist-textualist theories of law is an uncertain proposition. Such jurists would recoil from originalism about a constitution that, say, made a certain conception of natural rights judicially enforceable. So too would they reject a baroque textualism that subjected many complex questions of statutory interpretation to the artificial reason of canon- or corpus-wielding judges laboring to make sense rather than nonsense out of the codebook.

In part as an outgrowth of this history, formalist interpretive theorists have developed sophisticated conceptual tools, such as the distinction between theories of law and theories of adjudication, or the distinction between interpretation and construction. At first glance, it might appear that the formalism of authority / formalism of method dichotomy tracks, or is reducible to, those distinctions.[266] If so, do we need a third set of distinctions? As I explain briefly below, the choice between authority and

[263] See Mitchell N. Berman & Kevin Toh, On What Distinguishes New Originalism from Old: A Jurisprudential Take, 82 Fordham L. Rev. 545, 545–46 (2013).

[264] Scalia & Garner, supra note 73, at 388–90.

[265] I thank James Stern for this point.

[266] I am grateful to Nate Oman for raising this issue.

method is not reducible to these distinctions and is, in an important way, prior to them. (Those who lack interest in these intra-originalist debates—or who reject the interpretation/construct or the law/adjudication distinctions—can skip ahead to the next Section. This Article takes no stance on either of these two latter distinctions, and its thesis stands independent of them.)

Originalist Professor Gary Lawson, for example, contends that theories of "interpretation concern the meaning of the Constitution," whereas theories of adjudication "concern the manner in which decisionmakers . . . resolve disputes."[267] To understand the *meaning* of the text ("the law") is one thing; whether and how to apply that meaning in adjudication is quite another.[268] Non-originalist Professor Mitchell Berman makes a similar distinction between theories about how to identify the law created by a given legal text and theories about how to adjudicate disputes that invoke such texts.[269] One way of understanding the conflicting models of formalism is to say that authoritative approaches offer theories of law, whereas methodological formalism emphasizes a theory of adjudication. It could be difficult and costly to identify the original authoritative norm, but if that is the right way of doing interpretation (or, in a descriptive vein, if that is our law of interpretation), so be it. Interpretation never promised you a bowl of cherries. These scholars are quick to note that a theory of adjudication need not track a theory of law.[270] Lawson doubts that legal scholars have offered an "objectively correct moral theory" that adjudication should go in "lockstep adherence" with the Constitution.[271]

We can also try to understand the authority/method dichotomy through the lens of the interpretation/construction distinction. This distinction identifies two "moments" (or aspects) of the single act of applying a legal

[267] Gary Lawson, On Reading Recipes . . . and Constitutions, 85 Geo. L.J. 1823, 1823 (1997).

[268] See Lawson, No History, supra note 152, at 1563 ("The key is to recognize that interpretative indeterminacy and adjudicative indeterminacy are very different concepts. They are connected *only if* one has a theory of adjudication that requires a correct interpretative answer to every problem; however, there is nothing in the enterprise of adjudication that entails any such requirement.").

[269] Mitchell N. Berman, Keeping Our Distinctions Straight: A Response to *Originalism: Standard and Procedure*, 135 Harv. L. Rev. F. 133, 139 (2022).

[270] See, e.g., Lawson, No History, supra note 152, at 1563.

[271] Gary Lawson, Originalism Without Obligation, 93 B.U. L. Rev. 1309, 1309–10 (2013).

text to a question.[272] The first is "the process (or activity) that recognizes or discovers the linguistic meaning or semantic content of the legal text."[273] The output of legal interpretation is a combination of bare semantic facts plus any contextual enrichment.[274] Here, the interpreter is simply seeking (linguistic) facts about the world, a task that "is 'value neutral,' or only 'thinly normative.'"[275] The second aspect of construction is "the process that gives a text legal effect" either by "translating the linguistic meaning into legal doctrine or by applying or implementing the text."[276] In some circumstances, construction is more or less invisible, as when a court "simply translates the semantic content of the text into corresponding legal content, and then applies that content to a particular case."[277] At other times, construction steps in more obviously to supply a legal rule of decision when interpretation comes upon vagueness, irreducible ambiguity, a legal gap, or the need for implementing doctrines.[278]

Construction, defenders of the distinction maintain, is more thickly normative than interpretation. One cannot work in the construction zone without making normative choices about what legal content to supply and how.[279] Importantly for our purposes, some theorists do not limit "construction" to filling semantic potholes that "interpretation" discovers. Professor Gregory Klass contends that construction is conceptually *prior* to interpretation. A person approaching a legal text has to decide *whose* meaning governs (historical author, morally idealized author, reasonable reader at the time of enactment, current reader), what *type* of meaning governs (popular convention versus local meaning, semantic or pragmatic meaning), and what types of *evidence* or *facts* determine those meanings (for example, legislative history versus only publicly available materials).[280] Indeed, the apparently invisible character of construction

[272] See Lawrence B. Solum, Originalism and Constitutional Construction, 82 Fordham L. Rev. 453, 481–82 (2013) [hereinafter Solum, Originalism and Construction] (offering the two-moments model of the distinction).

[273] Lawrence B. Solum, The Interpretation-Construction Distinction, 27 Const. Comment. 95, 96 (2010) [hereinafter Solum, Interpretation-Construction Distinction].

[274] See Solum, Originalism and Construction, supra note 272, at 481.

[275] Solum, Interpretation-Construction Distinction, supra note 273, at 104.

[276] Id. at 96.

[277] Id. at 103.

[278] Id. at 106–07.

[279] See, e.g., id. at 104–05.

[280] See Gregory Klass, Contracts, Constitutions, and Getting the Interpretation-Construction Distinction Right, 18 Geo. J.L. & Pub. Pol'y 13, 22–30 (2020).

when one simply applies the outputs of interpretation is the product of an antecedent judgment that interpretation *should* dictate the legal content of the texts at issue.[281] In this light, we might conclude that the formalism of authority thinks the outputs of interpretation should predominate, whereas the formalism of method emphasizes the practical considerations of construction.

These cursory historical and conceptual accounts can help us understand the origins and contours of the competing dimensions of authority and method. Yet they do not tell formalists whether and how to negotiate the tensions between those dimensions. Is this resulting complexity a matter of formalism working itself pure, a sign of decadence, or evidence of formalism's theoretical incoherence? Jurists who embrace the formalism of authoritative origins have more than an antiquarian or intellectual interest in understanding the Constitution or the Armed Career Criminal Act. Unlike a legal historian trying to understand the law of evidence in Ottoman Bulgaria,[282] they seek guidance and constraint from the law of the past. They must justify why doing so matters and grapple with the practical costs of their quests' methodological informality.[283] By contrast, the formalist of method must present and justify an alternative understanding of legal truth that deemphasizes the authority of past lawmakers in the name of interpretive ease and economy. The intellectual evolution of formalist interpretation brings that choice to the fore. Distinctions between interpretation and construction, and between theories of law and theories of adjudication, clarify the differences between these two visions of legal formality. But without more, they cannot resolve them. We need to dig deeper into the moral justifications for interpretive formality.

[281] See Lawrence B. Solum, The Constraint Principle: Original Meaning and Constitutional Practice 3 (Apr. 3, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940215 [https://perma.cc/4P43-3TFM] (explaining the originalist "claim that the content of constitutional doctrine and the decision of constitutional cases should be consistent with the original meaning of the constitutional text").

[282] See Orin S. Kerr, The Influence of Immanuel Kant on Evidentiary Approaches in 18th-Century Bulgaria, 18 Green Bag 2d 251 (2015).

[283] Sachs, Standard and Procedure, supra note 18, at 802 ("In short: the more historical uncertainty there is, the less reason we have to trust that the Constitution we *think* we know truly reflects the choices of its enactors. And the Constitution we think we know is the only one we can really use. This poses serious difficulties to any theory that justifies originalism by its faithfulness to those enactors' choices, or to the substance of the choices themselves.").

B. The Normative Jurisprudence of Form

I offer two sketches of moral arguments for legal formality that point to the source of the competing tendencies within interpretive formalism. First, take Professors Larry Alexander and Emily Sherwin's defense of formality in law. They contend that law's primary justification is authoritative settlement amid reasonable disagreement and limited knowledge.[284] Even if a community agrees about moral principles at a general level, they will disagree about how to apply them in particular circumstances, may lack expertise on the best way to accomplish even shared ends, and may lack knowledge about how others will apply those principles.[285] This leads to chaos and moral combat.[286] Delegating decision-making authority to an expert can help solve those problems, and the best way for the decision-maker to act is through issuing legal rules of general applicability.[287] (Telling people to do the right thing gets us back to square one.) By the same token, the best way to accomplish that task is to adhere to those rules even when doing so does not advance their background purpose.[288] If we made exceptions to authoritative rules every time it appears one misfired, we would lose the moral benefits of law.[289]

Alexander and Sherwin identify three benefits of adhering to rules: (1) coordination among judges and the governed, (2) efficiency in decision-making, and (3) harnessing the rule-maker's expertise.[290] They do not contend exceptionless rule-formalism is an unmitigated good. A system could have bad rules—or bad rulers—and the logic of formalism leads to the entrenchment of these bad results.[291] In fact, Alexander and Sherwin have raised doubts about whether exceptionless formalism can ever be morally rational from the perspective of the *rule applier*.[292] Nevertheless, from the perspective of the *system* (or, more concretely, morally motivated rule-making authorities), exceptionless rule-application is the optimal solution *if* one thinks the overall benefits of rule formalism come out ahead of a regime of case-by-case decision-making after we net out

[284] Alexander & Sherwin, supra note 260, at 2.
[285] Id. at 12.
[286] Id.
[287] See id. at 12–13, 28.
[288] Id. at 53–54.
[289] See id. at 54.
[290] Id. at 14.
[291] See id. at 55–61.
[292] See id. at 94–95.

the admitted cost of serious rules.[293] This philosophical account resembles more popular justifications for interpretive formalism. This approach, articulated in the book *The Rule of Rules*,[294] will be congenial to a jurist like Justice Scalia who saw the rule of law as the law of rules.[295]

There are worries about this consequentialist case for formalism—including ones that other formalists could share. But what matters here is understanding how the competing choice between authority and method confronts a formalist who accepts the framework as a whole. In fact, the dilemma is at the heart of the model. Recall the three benefits of authoritative settlement by rules: (1) coordination among judges and the governed, (2) efficiency in decision-making, and (3) harnessing the rule-maker's comparative expertise. Methodological formalism sounds in the goods of coordination and efficiency (1, 2). The formalism of authority seeks the wisdom of the original rule-maker (3). Even if one were committed to exceptionless rule-following, one *still* has to figure out how to identify the rule, and that may not always be easy. If we are focusing on the benefit of the expertise of the authority, we might find ourselves sacrificing coordination and decision-making efficiency. In short, we are back to the tension between authoritative source and interpretive method. Alexander and Sherwin's key term "authoritative settlement" itself captures this antinomy: the quest for the authoritative can frustrate settlement, and vice versa.

Consider another rough sketch of a moral case for formalism. Scholars like Joel Alicea, Richard Ekins, Lee Strang, Kevin Walsh, and me have offered arguments that ground formalist interpretation in the classical natural law tradition, which views law as an ordinance of reason for the common good promulgated by an authority with responsibility for the community.[296] The common ground of these arguments is that, because

[293] See id. This justification of rule formalism roughly tracks Joseph Raz's normal justification thesis, which holds that it can be morally rational to suspend one's judgment and submit to authority if one "is likely better to comply with reasons which apply to him . . . than if he tries to follow the reasons which apply to him directly." Joseph Raz, Authority, Law, and Morality, *in* Ethics in the Public Domain: Essays in the Morality of Law and Politics 210, 214 (1994).

[294] Alexander & Sherwin, supra note 260.

[295] See Scalia, supra note 259, at 1175.

[296] See generally J. Joel Alicea, The Moral Authority of Original Meaning, 98 Notre Dame L. Rev. 1 (2022) (offering a Thomistic defense of an originalist approach to legal interpretation); Ekins, The Nature of Legislative Intent, supra note 55 (same); Lee J. Strang, Originalism's Promise: A Natural Law Account of the American Constitution (2019) (same); Jeffrey A. Pojanowski & Kevin C. Walsh, Enduring Originalism, 105 Geo. L.J. 97 (2016)

law in its ideal type or "central case"[297] is the reasoned choice of an authority, the proper object of interpretation is the choice that was, in fact, made by an authority responsible for the community's good. To do otherwise undermines the moral goods that positive law—and only positive law—can bring to a community of any size and complexity.

One way law can depart from the central case is when it conflicts with what reason tells us about how to advance the common good. A natural-law formalist will nevertheless argue that, in many cases, the interpreter should apply the rule as promulgated. They will contend that interpretation and adjudication should focus on identifying authority's promulgated ordinance because legislators have the primary role in reasoning about the common good.[298] They will emphasize that there should be a strong, but not indefeasible,[299] presumption in favor of adhering to the reasoned choice authority actually made. This emphasis is a rough and ready way of dividing formalists and non-formalists among natural lawyers: formalists give greater emphasis to the authoritative, promulgated choice of the person with the care of the community, whereas a non-formalist attends more to the demands of reason.[300]

This argument among natural lawyers is interesting and important, but not our subject today. Our topic is a *different* way in which positive law can depart from its central case. Ideally, for enacted law, the (1) reasoned choice of authority (2) is promulgated in a manner accessible to the reader. But there can be departures from this ideal. A carefully reasoned choice may be promulgated in a way that fails to communicate to the polity (or not promulgated at all—imagine a legislative group that reaches consensus and walks out without a vote). On the flip side, there could be

[hereinafter Pojanowski & Walsh, Enduring Originalism] (same); 2 Thomas Aquinas, Summa Theologica I-II, Q. 90, art. 4 (Fathers of the Eng. Dominican Province trans., Christian Classics Complete Eng. ed. 1981) (c. 1274) (defining law as "an ordinance of reason for the common good" promulgated by authority).

[297] On central case methodology, see generally John Finnis, Natural Law and Natural Rights 9–16 (2d ed. 2011) ("I prefer to call the states of affairs referred to by a theoretical concept in its focal meaning the *central case(s)*.").

[298] See Russell Hittinger, The First Grace: Rediscovering the Natural Law in a Post-Christian World 75–76 (2003).

[299] In cases of serious injustice, citizens are not morally obliged to adhere to the law and may be obliged to disobey. Similarly, *in extremis* public officials may refuse, or even be obliged to refuse, to apply an unjust positive law, though an official lacks jurisdictional authority to say the law is other than what it is and then give legal force to that transformed norm. See Hittinger, supra note 298, at 107–10.

[300] See Alicea, supra note 296, at 15–16.

a clearly promulgated legal text that does not reflect the reasoned choice of any author. (*In extremis*, imagine a legislature votes on a sealed text with the minimal intention that the words, whatever they are, should be understood pursuant to the system's usual interpretive methods.) In these nonideal instances of law, accessible signs and authoritative choice drift apart. And departures from the ideal will be scalar: reasoned choices may be more or less discoverable and more or less well-formed. If formalists share an emphasis on the reasoned choice of authority *and* its promulgation, they could nevertheless disagree about what to do when enacted law (often) departs from those ideals. We can therefore understand the formalism of authoritative origins as emphasizing the search for the reasoned choice, while the formalism of method, with its focus on accessibility, notice, and predictability, emphasizes promulgation.

C. Reconciling Authority and Method

Ideally in law, a well-reasoned, authoritative choice is accessible to its readers. In that case, the formalist faces no dilemma: a rule-consequentialist formalist gets the benefits of coordination, efficient decision-making, and authoritative expertise. The natural-law formalist can identify and respect the authoritative, reasoned choice that advances the common good. The dilemma for formalists—and, more generally, the dilemma for legal interpreters to the extent they respect formality at all, which is most any legal interpreter—is what to do when the reasoned choice is not readily identifiable, as is often the case.

Perhaps an interpreter could confront these competing values without an overarching theory, accommodating them one case at a time through a kind of craft situation-sense. There is something to that instinct, especially for those who think that practical reasoning is the nondeductive art of applying general principles to particular situations. Yet there is an irony about an interpretive formalism that is irreducibly particular at the meta-level. A formalist that flits in mysterious ways across the docket between the quests for original authority and methodological ease may be giving the whole game away. A more promising and more disciplining approach would account for the competing values in a principled fashion—whether through lexical ordering or at least a methodological tilt that inclines the inquiry toward one kind of value or another. That priority or tilt would incline the formalist toward or away from certain kinds of interpretive formalism discussed in Part II above. The rest of this Section sketches out

two of such possible ordering regimes, identifies their underlying vision of law, and evaluates that picture.

1. The Priority of Authority

It is not hard to see how a formalism can account for both values while prioritizing authority. Let us frame it in the terms of a classical natural law formalist. The main quest of such formalism is to identify the reasoned choice that the person or persons with responsibility for the community made.[301] The quest may be difficult for an individual enactment. It can become even more difficult as the interpreter tries to fit that into the broader fabric of enacted law; other legislation and other provisions of a constitution are, after all, *also* reasoned choices of an authority that is exercised over time. This is not to say that ease of method plays no role. Interpreters who privilege the formalism of authoritative origins can make concessions to method, even if it can lead to a gap between promulgated meaning and interpretative outputs. Just as non-utilitarians make pragmatic judgments about the best way to pursue objective goods without becoming utilitarians, the formalist of authoritative origins can find a place for methodological clarity without making it the master principle.

This, after all, explains their requirement that there actually *be* a promulgation, not just a choice. Perhaps such a formalist will have a strong, if rebuttable, presumption in favor of original public meaning and exclude legislative history. Similarly, the rule of lenity could persist in an originalist-textualist age not just because of its ancient pedigree, but also as a kind of notice offset. Interpreters who generally prefer to plumb the depths of the law to find the true sources may still be slow to jail someone for what they discovered down there. More generally, methodological concerns operate as a kind of pragmatic, prudential side constraint: at a certain point, it may not be worth searching for original intention, meaning, or coherence with other enacted law. The point is that the formalist of origins will reach that point much later because methodological ease is secondary to the primary quest for authority.

The underlying vision of such a formalism sees law's task as not merely settlement, but *guidance*. To interpret is to search for an authoritative voice from the past that continues to bind us today. This could be because that voice's authority is legitimate: perhaps it captures

[301] See supra notes 296–97.

the genius of its framers, the choices of a self-governing people, a deliberative or supermajoritarian process that tends toward practical wisdom, or the like. Or perhaps it is good by virtue of simply being linked to inherited practices or promises our polity made in the past that define *us* and shape our identity as a people today. There is also a kind of conservativism here that values enduring, authoritative norms even at the expense of ordering convenience. Such a vision is contestable. Philosophers may puzzle over or doubt authority,[302] and authority is not the be-all and end-all for law, including for natural lawyers who are formalists.[303] But the search for authority hardly pursues an obscure quarry. Whether it is the person on the street who simply understands legal interpretation as "just figuring out what Congress said," or the philosopher who mystically views the practice of lawyering as the "search for voices,"[304] orienting interpretation around authority is cogent. Furthermore, the idea of binding law without authoritative choice is itself jarring. As Smith asked, if a legal text "is understood not as the expression of a collective decision by the established political authority but rather as a kind of thing-in-itself, a free-floating text, then why is its right to command any greater than that of, say, the political treatise or the science fiction novel?"[305]

The prioritization of authority comes with its own implications and challenges. For those who seek original intention, the theoretical criticisms of the existence or knowability of legislative intention are all the more pressing. One has to be confident that there is a "there" there—that the authoritative voice does not come from a judicial sock puppet, but another agent capable of making and communicating reasoned choices. The criticisms of intentionalist models that require the summation of every member of the enacting body are powerful. At the same time, acting as if a single, readable mind wafts off a legislature seems metaphysically florid. If strongly atomistic and organic theories of legislative intention are troublesome, some *tertium quid* theories of institutional agency would need to fill that ontological gap. Sophisticated intentionalists have started mining work in social ontology and the philosophy of group agency, but the continued development, grasping, and application of theories of

[302] See generally Smith, supra note 175 (raising worries that contemporary understandings of legal authority rest on fictions).

[303] See Alicea, supra note 296, at 15–16.

[304] Joseph Vining, From Newton's Sleep 117 (1995).

[305] Steven D. Smith, Law Without Mind, 88 Mich. L. Rev. 104, 112 (1989).

institutional reasoning and action seem crucial for this strain of formalism to remain more than an appeal to an as-if authority.[306]

Matters are also tricky for intent-skeptics who seek original authority. Take the textualist who thinks legislative intent can be no thicker than the minimum intention to enact law to be understood under existing interpretive conventions.[307] This interpreter must be content with the prospect that there is no basic difference between interpreting an act picked out of a hat while blindfolded and one chosen and crafted with care. There are also worries about whether a free-floating text can bear the weight of authority, or about how an antecedently constructed reasonable reader consulting linguistic corpora, the whole code, the canons, and the general law should have any more power to bind or loose than Dworkin's fictive Hercules. If authority, rather than ease of method, is to be the primary driver of interpretation, we might fear that the authoritative foundations are vacant.

Or, instead of being absent, perhaps they are mysterious. It is possible here to glimpse in public meaning textualism a model of authority that resembles traditional visions of the common law, which was understood to be created or developed without anyone intending to do so. Case law is "made" (to the extent it can be understood as made) incidentally in the process of deciding cases.[308] Legislation, on this parallel understanding, is *also* created in the process of doing other things—voting on authoritative texts—and can only be discovered after the fact through an investigation of text, structure, canons, and context. Contemporary formalists' attraction to the brooding omnipresence of the general law; the artificial reasoning worked upon a complex statute and sprawling code; the belief that the law today can mean something nobody at the time of enactment could have expected; the assertion that the true author of legislation is "the people" rather than legislators—all these notes chime as echoes of the classical common law transposed into a legislative key, even if those playing that music do not appreciate it. The common law

[306] See, e.g., Ekins, The Nature of Legislative Intent, supra note 55, at 53–57 (drawing on the work of Michael Bratman); Stephanie Collins & David Tan, Legislative Intent and Agency: A Rational Unity Account, 44 Oxford J. Legal Stud. 231, 232 (2024) (using social ontology to offer a version of intent that treats "the legislature [as] an agent with a distinctive 'rational point of view' ").

[307] See, e.g., Manning, Absurdity Doctrine, supra note 11, at 2457–58, 2457 n.258 (invoking that minimum intention).

[308] See John Gardner, Some Types of Law, *in* Law as a Leap of Faith: Essays on Law in General 73, 75 (2012).

claimed authority as a kind of shared reason, discerned through the craft knowledge of those adept at working over the myriad wilderness of single instances of the jurisprudence.[309] Even if the technical norms and doctrines flowing from this process were not the direct design of any one mind, they were at least congruent and fitting for the people whose decentralized legal activities generated the originating data.[310] The authoritative mind is a kind of emergent entity linked to, but not reducible to, the choices of legal officials and the people they represent.

The non-intentionalist formalism of authority, then, might have even more exotic grounds than its intentionalist counterparts. Although the standard story understands legislation as law that was intentionally made (in contrast to case law or customary law),[311] contemporary intent skepticism blocks that more prosaic option, hence a flight to a kind of declaratory theory of legislation by textualists who seek authoritative origins. And, although I cannot pursue or fully substantiate the thought here, one wonders if the intentionalist search for a *via media* between atomistic and organic, hive-mind theories of legislative intention would turn up a partially constructed institutional agent similar to the kind of emergent authority arising from richer textualist inquiries. If so, scholars noting the convergence between sophisticated theories of intentionalism and originalist textualism might be understating matters. Not only would the methods often converge as a practical matter (as when an intentional legislative actor speaks in a way that conforms with public understandings), but also at the level of justification and ontology.

2. The Priority of Method

It is harder to imagine an approach that prioritizes methodological ease *and also* gives a substantial fallback accommodation to authoritative origins. We are familiar with the idea of pragmatic checks on the pursuit of principled, substantive ends. The reverse is trickier to conceive: How

[309] Cf. Alfred Lord Tennyson, Aylmer's Field (1793), *reprinted in* The Poetic and Dramatic Works of Alfred Lord Tennyson 240, 246 (Cambridge ed. Boston & New York, Houghton, Mifflin Co. 1898) (describing the study of the common lawyer as "Mastering the lawless science of our law / That codeless myriad of precedent / That wilderness of single instances").

[310] See generally Gerald J. Postema, Philosophy of the Common Law, *in* The Oxford Handbook of Jurisprudence and Philosophy of Law, supra note 36 (describing classical common law theory); Jeffrey A. Pojanowski, Reading Statutes in the Common Law Tradition, 101 Va. L. Rev. 1357, 1420–21 (2015) (noting parallels between classical common law theory and contemporary textualist interpretation).

[311] See Gardner, supra note 308, at 59–61.

does one give ancillary effect to substantive ends in a pursuit ordered to practical ease? Indeed, pragmatic philosophy is notably hesitant about recognizing or imposing overarching or anchoring ends.[312] To be sure, one could account for authority *in terms* of methodological goals: perhaps in the context of newer enacted norms, it will be easier to identify original intentions or public meanings, and adhering to them will provide better guidance and coordination than semantically sparer approaches to interpretation. But method's concession to origins would have a rapidly depleting half-life, and the very decision to use a different approach to more recently enacted texts introduces complexity and line-drawing problems that a methodological formalist would like to avoid.

The underlying vision of law here is also quite different from the formalism of authority—and ordered in a way that resists overarching, substantive ends. Formalism of method emphasizes the benefits of a smooth ordering of legal relations, whatever the goals happen to be or the content of the original norm—and even if the legal output of enacted norms drifts unmoored from the reasoned choice of an enacting authority. On the positive side, this transparency of the law respects our dignity as agents and empowers us: ease of interpretive method allows us to know our obligations, helping us to plan, coordinate, and strike a ready, spontaneous social equilibrium. Put negatively, this vision could also reflect skepticism about lawmaking authorities' ability to pursue the good through reasoned choice, at least compared to the negotiations of private actors who can pursue the good through the well-known rules of a decentralized game.

Such implicit visions of law and its role in the pursuit of the common good chime well with the strain of textualism that draws on public choice theory for its vision of the legislature and its acts. Under this methodological nominalism, Congress is a "they" not an "it," and Arrovian cycling and agenda control make it impossible to hypothesize any norms behind the text, which is itself the mysterious aggregated equilibrium of contingent interest group preferences.[313] It is also telling

[312] See Justin Desautels-Stein, At War with the Eclectics: Mapping Pragmatism in Contemporary Legal Analysis, 2007 Mich. St. L. Rev. 565, 572–73 (observing that for philosophical pragmatists, "the domain of 'means' should be lauded and loved while the realm of 'ends' should largely be discarded").

[313] See John F. Manning, Second-Generation Textualism, 98 Calif. L. Rev. 1287, 1293–98 (2010) [hereinafter Manning, Second-Generation Textualism] (summarizing this strain of textualism).

that textualists who are willing to accommodate thicker contextual evidence in the pursuit of original authority step back from the most bloodless renditions of this story. Provost John Manning, who emphasizes the original pragmatic context and background law alongside semantic meaning, has distanced himself from the starkest versions of public choice skepticism about a legislature's ability to reason about policy goals; rather, he defends the primacy of text over purpose on the grounds that apparent textual misfires could represent an invisible compromise that is important to respect given our constitutional structure.[314] (Compromise, of course, can be a reasoned choice by a deliberative body seeking to pursue the good amid disagreement about means and ends[315]—and therefore the proper quarry for one seeking to discover and respect original authority rather than a textually salient simulacrum.) At some point contextualism, while suitable for identifying authority, becomes troublesome for method formalists.[316]

If methodological ease and its corresponding features of notice, coordination, and impersonality were the primary target, one also would be more inclined to use survey data or artificial intelligence to give legal meaning to terms. A well-executed study of lay understandings could diverge from the original intention or meaning. Nevertheless, if the result matches the expectations of the governed, it leads to coordination and reduces the risk of judicial overreach.[317] The primary methodological drawback is the complexity of designing (or, in the case of judges, identifying) reliable case studies. AI interpretation would be less complex. A government-certified program that applies something like the standard canons of interpretation and gives you a time-stamped

[314] See, e.g., Manning, Absurdity Doctrine, supra note 11, at 2456–76 (arguing that textualism, by accounting for social and linguistic context and background conventions, avoids the errors of literalism); Manning, Second-Generation Textualism, supra note 313, at 1290, 1304. There is some hedging here, as evidenced by his description of compromises being "unknowable" as opposed to merely unknown. See id. at 1304.

[315] Manning, Second-Generation Textualism, supra note 313, at 1290 ("Perhaps in part because this newer emphasis does not depend on assumptions about interest group manipulation or legislative chaos, it has gained far more traction with the Court as a whole than did first-generation textualism.").

[316] Grove, supra note 1, at 286 (noting how "flexible textualism" uses social and policy context and background principles); id. at 270–71 (contending that "flexible textualism" can undermine judicial legitimacy).

[317] For an example of careful scholarly work in which survey experiments inform ordinary meaning, see generally Tobia et al., supra note 109.

interpretation could provide maximum coordination.[318] This is so even if programming an interpretive chatbot requires contested choices: so long as it is reasonably consistent, people will have a good sense of their obligations and act accordingly. For an interpreter who thinks the primary point of interpretation is understanding what authority chose, automated shortcuts are perverse. It could be *easier* to extract a meaning in this way, just as it is easier for me to draw an uptake from any old text without any historical context. That ease seems to grow in direct proportion to the risks of misunderstanding.

For the formalist of method, those departures from authority may be worth it, especially if original authority is hard to identify. A more radical jurisprudential response challenges the very necessity of authority. Following the lead of theorists like Laurence Claus, one could contend that the desire to locate authority in law is a lingering, creationist vestige of days when we built human law in the image of a divine lawgiver with a right to rule.[319] In the twilight of such idols, the argument continues, we should turn to an evolutionary understanding that sees law as a complex, customary system of signaling that allows people to predict how others, including legal officials, will respond to their actions.[320] It is little surprise, then, that Claus's writing on interpretation emphasizes public meaning on coordination grounds. We read not to seek the guidance of authority, but to maintain a morally worthwhile, decentralized system of cooperation that the legal text facilitates.[321] Evidence of actual authoritative choice is only relevant to understanding a legal text if it contingently enables coordination.[322] But authority has no role beyond these subsidiary tasks.

[318] If there were conflicting interpretations that led to litigated disagreement, presumably an adjudicative chatbot could also resolve *those* disputes.

[319] Laurence Claus, Law's Evolution and Human Understanding 28–29 (2012).

[320] See Laurence Claus, The Empty Idea of Authority, 2009 U. Ill. L. Rev. 1301, 1302 ("Law is just a signaling system of and for human action. Law is a self-generating, self-recognizing network of human communications that signals likely action within a human community.").

[321] Laurence Claus, Authority and Meaning, 52 Conn. L. Rev. 1497, 1508–09 (2021) ("If the lawgiver was mentally checked out, with no actual understanding of what he was signing up to, we would still try to treat his words as the product of a rational mind. Understanding the actual workings of his mind is not the primary reason we read his words—we read them not for what they tell us about him, but for what they tell us about our practices, about how our life together is going to be.").

[322] See id. at 1509.

This vision has no room for authority as traditionally conceived, and it undergirds the formalism of method at its purest.[323] It seeks to reorient our understanding of enacted law just as much as Coase's theory of reciprocal causation in tort sought to alter our notions of responsibility in private law, and to similar ends of understanding law as a system of negotiated ordering.[324] Just as few formalists of authoritative origins would accept legislation without promulgation, few formalists of method seem ready to dispose of authority entirely. The remaining role for authority is spare, however. It identifies which texts count as positive law in the system and could, if sufficiently expert or predictive of popular norms, be a good signal for facilitating coordination. Anything more amounts to a pinch of incense to old legal gods best forgotten.

3. Authority, in the End.

What are we to make of these competing visions? What follows is a too-brief sketch of an argument for why, in the end, identifying authority should be the lodestar of formalist interpretation. The values that method pursues are not to be gainsaid. Notice, clarity, ease of application, and facilitating coordination are crucial for the rule of law. Their complete absence renders the moral goods of legal authority nugatory. But they are not enough.

In part, this is because if taken too far, the pursuit of method can be self-undermining. It is possible that interpretation that relies on semantic, thin-context meaning can in fact lead to *more* ambiguity and offer *less* guidance in the face of vague terms.[325] Seeking additional context and pragmatic enrichment, while costlier than sparer interpretive methods, can actually cabin judicial discretion. If interpreters have no guidance in the face of statutory ambiguity or vagueness, it will ultimately be *their*

[323] One alternative underlying vision for a formalism of method does not reject authority so much as relocate it. If finding the original law is too hard, the courts can in effect create new law through simplified approaches to interpretation. The people can then treat those norms as authoritative law. This essentially recasts the interpreter or law-applier as the authority. This is less radical at the level of theory—it does not dispose of the idea of authority in law—but it raises serious questions about legitimacy. And it is not clear it could accomplish its task: determining the scope of precedent and interpreting judicial opinions—the new locus of authority—is no simple matter, either.

[324] See R.H. Coase, The Problem of Social Cost, 3 J.L. & Econ. 1, 19 (1960).

[325] See Solum, Pragmatics and Textualism, supra note 17, at 95 ("Because the literal meaning of statutes is radically ambiguous, sparse, and incomplete, literalism creates underdeterminacies in the legal content of statutory doctrine.").

choice about how to complete the norm. That delegation itself can lead to unpredictability and unmoored judicial choice.[326] The same dynamic occurs with interpretive methods that ignore expected applications in the name of simplicity. To avoid the thickets of discerning historical expectations, one might wander into the bramble bush of arguing about the abstract essence of "liberty" or "cruelty."

But there is the more basic worry that *legal* interpretation without authority is incoherent. Even maximally methodological formalism points to an authority of *some kind*. Spare, wooden, clause-bound interpretation treats *this text* rather than others as the object of concern. The same goes for updated readings based on contemporary public meaning, whether understood through survey data or ordinary judicial intuition. An AI "ordinary meaning bot,"[327] too, treats a particular text as focal, and those who defer to its outputs are treating the bot itself as a practical authority. Any kind of coordination requires salient markers for people to note and follow. Coordination that is distinctively legal empowers particular persons or institutions to make those decisive marks and author their content.[328] Interpretation that fixes on particular signs of legal validity while detaching them from authority is a kind of theoretical platypus, an odd hybrid of traditional understandings of authority and purer, decentralized forms of spontaneous ordering.

This resting point *as a formalist position* will face objections from competing sides. From one side, it is simply too thin—too formal and procedural. If what we want from law is reasonable guidance, the argument goes, why fixate on whatever authority happens to say, rather than focus on what authority ought to have said? (If one can even discover what an authority meant amid the mists of history and the thicketed layers of generality that occlude our view.) From the other side, it is too thick.

[326] It is telling that Professor Vermeule's formal judicial textualism is paired with robust deference doctrines to resolve statutory and constitutional indeterminacies. See Vermeule, supra note 82, at 183–288; see also Jeffrey A. Pojanowski & Kevin C. Walsh, Recovering Classical Legal Constitutionalism: A Critique of Professor Vermeule's New Theory, 98 Notre Dame L. Rev. 403, 427 (2022) [hereinafter Pojanowski & Walsh, Classical Legal Constitutionalism] (reviewing Adrian Vermeule, Common Good Constitutionalism: Recovering the Classical Legal Tradition (2022)) ("The surface-hugging, clause-bound character of [Vermeule's] presumptive textualism is crucial for realizing [robust deference to agencies], however, since a more detailed search to *find* the Framers' reasoned choice may correspondingly limit the remit of agencies (or, if you prefer, legislators) to *give* some content ordering law to the common good.").

[327] See Kruse, supra note 130, at 5.

[328] See Maris Köpcke, Legal Validity: The Fabric of Justice 96 (2019).

Perhaps, as Claus argued, authority in law is a theological hangover from the divine right of kings to rule, a creationist theory of law in a post-Darwinian world.[329] Authority, simply put, seems regressive and oppressive, indicating the right of certain people to boss around others by their say-so, even if they are no more wise or adept than those they rule.

Classical natural law thinking about law and authority, I think, can respond to both sets of concerns. Noted briefly here, but argued at length elsewhere,[330] the classical tradition emphasizes the important moral role that positive law plays in choosing among the panoply of reasonable options and plans that natural law requires, but does not determine, for human communities to flourish. A reasonable legal system can provide that the primary domain for making those choices is through legislation, rather than adjudication. Thus, interpretation, properly understood, is the search for the authoritative, reasoned choices of the enactors.[331] In short, there are good substantive reasons for legal interpreters to identify and respect the authoritative choices of lawmakers.

Against the authority skeptic, the classical natural lawyer has two responses. First, for the reasons discussed above, authoritative choice is necessary for a polity of any complexity to flourish and protect basic rights. This is so even if oftentimes officials are less than wise, and even if we (rightly) reject the notion that legal authority flows from the right to rule over others by mere say-so.[332] Second, as the natural law tradition teaches, legal authority is only presumptively binding as a moral matter. Legal authority exists not for its own sake, but to advance the common good of the polity. The presumption in favor of obedience can be strong, particularly given how many moral choices are subject to reasonable disagreement, but it is not irrebuttable. As countercultural as it sounds, legal authority is good and necessary. But there is a crucial difference

[329] See Claus, supra note 319, at 28–29.

[330] See generally Hittinger, supra note 298, at 74–75 (discussing Aquinas's preference for implementing the natural law through written legislation); Pojanowski & Walsh, Enduring Originalism, supra note 296 (drawing on the classical tradition's understanding of positive law's nature and purpose to argue that the best way to understand the Constitution is to identify the original propositions of law that became valid by virtue of the addition of the Constitution to the rest of the law then in effect); Pojanowski & Walsh, Classical Legal Constitutionalism, supra note 326 (same).

[331] See Ekins, The Nature of Legislative Intent, supra note 55, at 244–45 (statutes); Ekins, Objects of Interpretation, supra note 58, at 1 (constitutions).

[332] John Finnis, Freedom, Benefit and Understanding: Reflections on Laurence Claus's Critique of Authority, 51 S.D. L. Rev. 893, 894–98 (2014).

between the authoritative and the authoritarian.[333] A wise formalist seeks the former and eschews the latter.

CONCLUSION

We end where we began. Interpretive formalism seeks constraint through two means: the discovery of authoritative choice and manageable, predictable methods. Often, those two vectors point in the same direction; at other times, they will conflict. How a formalist chooses to manage those conflicts and prioritize among these formalist values will have important implications for interpretive choice. This choice runs through debates between intentionalist and public meaning interpreters; between different types of intentionalists; and between different types of public meaning theorists. These competing dimensions cut both ways in arguments about the law of interpretation and complicate the standard discussions about legal formalism and rules and standards. Thus, interpretive choice here is not limited to formal versus nonformal interpretation, but *what kind* of formality and in *what* degree.

These insights revise accepted scripts about legal formality, the letter and the spirit, and form and substance. There are different substantive visions about law and legal ordering competing under the heading of form. The formalism of authority, moreover, is less likely to rest upon the letter alone. This Article argues, however briefly, that the search for authority should be the primary orienting force in interpretive formalism, and anchors that claim in a particular understanding about the nature and purposes of law. This particular resolution is controversial, both in its conclusion and its justifying framework, and requires greater elaboration than a subsection of an article. Yet any competing position will also require a similar type of argument about whether and why (or whether and why not) authority should be primary at the level of theory construction.

Provost John Manning has often argued in his defense of formalism that "all statutory interpretation involves an 'interbranch encounter of sorts.'"[334] This entails that "interpretive method necessarily implicate[s]

[333] Cf. Joseph Vining, The Authoritative and the Authoritarian 5–6 (1986) ("[T]he problem of legal authority . . . may be described in a phrase as the problem of perceiving the difference between the authoritative and the authoritarian.").

[334] See, e.g., John F. Manning, Statutory Pragmatism and Constitutional Structure, 120 Harv. L. Rev. 1161, 1173 (2007) (quoting Jane S. Schacter, Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation, 108 Harv. L. Rev. 593, 593 (1995)).

the institutional allocation of power among the branches," and thus depends on inferences about constitutional arrangements.[335] We can take this further and suggest that, in terms of legal formality, interpretation implicates an allocation of power among dimensions of authority and method, and thus basic inferences about the nature and moral purposes of enacted law. Seeing the different upshots formalists take from these methodological interbranch encounters can make sense of the apparent contradictions and disagreements among these interpreters.

[335] Id.